



Truck Crash Litigation

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Trucking Cases Are Different



- ◆ **Complicated Business**
- ◆ **Complex Laws and Regulations**



FEDERAL MOTOR CARRIER SAFETY REGULATIONS HANDBOOK

J.J. Keller & Associates, Inc.
3003 W. Breezewood Lane
P.O. Box 368
Neenah, WI 54956
1-800-558-5011
Website: <http://www.jjkeller.com>

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Ten Rules for Investigation and Discovery



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Rule 1: Understand the Hazards

- ◆ 4,897 people were killed in crashes involving large trucks in 2002
- ◆ Annual death toll from truck-related crashes is the equivalent of twenty-six major airplane crashes every year
- ◆ Yearly cost >\$19 billion

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Rule 2: Learn the Business

- ◆ Complex commercial enterprise
- ◆ Computer monitored—GPS and tracking info
- ◆ Federal requirements
- ◆ Get consultant

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Take Advantage of the Existing Resources

U.S. DEPARTMENT OF TRANSPORTATION
(USDOT)

FEDERAL VEHICLE MOTOR SAFETY ADMINISTRATION
(FMCSA)

- Facts and Figures
- Safety Programs
- Rules and Regulations
- Licensing and Insurance
- Obtaining USDOT Numbers

<http://www.fmcsa.dot.gov/factsfigs/dashome.htm>

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Take Advantage of the Existing Resources

U.S. DEPARTMENT OF TRANSPORTATION
(USDOT)

FEDERAL VEHICLE MOTOR SAFETY ADMINISTRATION
(FMCSA)

- Regulatory Guidance of Regulations: 49 CFR Chapter III (135 pages)
- Summary of Completed Work Projects and Studies
- Rule Making and Notices

<http://www.fmcsa.dot.gov/factsfigs/dashome.htm>

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Take Advantage of the Existing Resources

FEDERAL VEHICLE MOTOR CARRIER SAFETY ADMINISTRATION (formerly a part of the National Highway Traffic Administration, now a separate entity within the U.S. Department of Transportation)

(FMCSA)

MOTOR CARRIER MANAGEMENT INFORMATION SYSTEM

(MCMIS)

A computerized system whereby the FMCSA maintains a comprehensive record of the safety performance of approximately 470,000 interstate motor carriers

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MANAGEMENT INFORMATION SYSTEM DATABASES:

- Federal Form MCS-150 (identifying data)
- Federal Form MCS-151 Part A (compliance records with the Federal Motor Vehicle Safety Regulations (FMCRS))
- Licensing and Insurance Information (former ICC, replaced in 1995 by Surface Transportation Board of the Department of Transportation)
- SafetyNet (State inspection and accident reports)
- Federal Form MCS-63 (driver/vehicle inspection reports)

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Take Advantage of the Existing Resources

TRUCKING SAFETY PROFILE SUMMARIES

- Safety Profile (safety fitness, inspections, crashes, compliance reviews)
- Safety Ratings (carrier only has a score if rating is deficient, based upon driver's safety, vehicle safety, road safety)
- Enforcement Information
- Individual Crashes
- Inspections

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Take Advantage of the Existing Resources

To order the MCMIS Census file or a Motor Carrier Safety Profile Summary:

Computing Technologies, Inc.

MCMIS Data Dissemination Program

P.O. Box 3248

Merrifield, Va 22116-3248

1-703-280-4001

website: www.safersys.org

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Take Advantage of the Existing Resources

AMERICAN TRIAL LAWYERS ASSOCIATION:

ATLA EXCHANGE

1-800-344-3023

facsimile: 1-202-337-0977

Website: www.exchange.atla.org

email: exchange@atlahq.org

(ATLA'S FAX ON DEMAND SERVICE, 24/7, 1-800-976-2190 OR 888-267-0770)

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AMERICAN TRIAL LAWYERS ASSOCIATION:

TRUCKING UNDERRIDE LITIGATION GROUP

1-800-424-2725, EXT 312

1-202-965-3500, EXT 312

Facsimile: 1-202-337-0977

email: sections@atlahq.org

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Rule 3: Learn the Law

- ◆ Ordinary Rules of Respondeat-Superior Do Not Apply
- ◆ Wyckoff Rule

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Liability of Interstate Carrier Lessees

◆ *Wyckoff Trucking v. Marsh Bros* (1991), 58 Ohio St. 3d 261

- Wyckoff owns the truck.
- Wyckoff employs Bell to drive the truck.
- Wyckoff leases the truck and driver (Bell) to Rogers.
- Wyckoff trip -leases the truck and driver to Marsh.
- Bell causes a crash while traveling to pick-up a load for Marsh.

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Liability of Interstate Carrier Lessees

◆ Holding of Wyckoff

In tort causes of action involving leased vehicles of interstate motor carriers, primary liability shall be determined with regard to Interstate Commerce Commission regulations rather than the common-law doctrines of *respondeat superior*, master-servant, independent contractor and the like.

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Liability of Interstate Carrier Lessees

◆ Holding of Wyckoff

Federal regulations create an irrebuttable presumption of an employment relationship between a carrier-lessee and the driver of a vehicle displaying the ICC identification of the carrier.

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Liability of Interstate Carrier Lessees

◆ Rationale of Wyckoff

49 CFR 376.12(c)(1) – [replacing 49 CFR 1057.12]:
The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

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PRINCIPLE ONE:

A TRUCKING CASE IS A DOCUMENTS CASE.

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PRINCIPLE TWO:

**MAXIMIZING DAMAGES BY
MAXIMIZING LIABILITY:**

**The worse the defendant is, the
more generous the jury tends to
be.**

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PRINCIPLE THREE:

**THE PRIMARY WRONGDOER
IS THE TRUCKING COMPANY.
THE DRIVER'S NEGLIGENCE
ARISES FROM THE CARRIER'S
INTENTIONAL OR RECKLESS
DISREGARD OF THE FEDERAL
REGULATIONS AND ITS OWN
SAFETY POLICIES (OR LACK
THEREOF)**

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Q: HOW DO YOU PROVE THIS?

**A: WITH THE DOCUMENTS AND A
THOROUGH UNDERSTANDING OF THE
FMCSRs
(Federal Motor Carrier Safety Regulations)**

**NEVER TAKE A DEPOSITION UNTIL YOU
HAVE ALL OF THE DOCUMENTS.**

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RULE OF PUNITIVE DAMAGES

Preston v. Murty (1987), 32 Ohio St. 3d 334: Actual malice, necessary for an award of punitive damages, is (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other person that has a great probability of causing substantial harm.

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RULE OF PUNITIVE DAMAGES

The amount of punitive damages is limited by the Due Process Clause of the United States Constitution. In this regard, the jury is entitled to consider the following factors:

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RULE OF PUNITIVE DAMAGES

- **harm caused by the defendant**
- **reprehensibility of the defendant's conduct**
- **duration of the conduct**
- **defendant's awareness**
- **any concealment of the defendant**
- **existence and frequency of similar past conduct**

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RULE OF PUNITIVE DAMAGES

- profitability of the conduct
- desirability of removing that profit
- financial position of the defendant
- costs of litigation
- any criminal sanctions against the defendant
- other civil awards against the defendant

Pacific Mutual Life Insurance Co. v. Haslit (1991), 111 S. Ct. 1032

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RESPONDEAT SUPERIOR NOT APPLICABLE WITH PUNITIVE DAMAGES: EMPLOYER MUST BE PERSONALLY (NOT VICARIOUSLY) LIABLE

Tracy v. Coal & Land Co., 115 O.S. 298 (1926), an employer cannot be punished for the malicious conduct of his servant or agent, unless the employer authorized, ratified, or participated in the wrongdoing that has a great probability of causing substantial harm.

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The FMCSR impose almost virtual strict liability on the carrier to ensure that its drivers observe all of the regulations and prohibitions of the motor carrier safety regulations

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Part 390: Federal Motor Carrier Safety Regulations: A tremendous source of proving violations of negligent hiring, retention, supervision, and maintenance by the trucking carrier

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**Part 390.11: It shall be the duty of the MVC to require "observance" by its drivers of all duties or prohibitions imposed by the regulations.
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Part 391: Qualifications of Drivers

(Qualifications, background, character checks)

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**Part 391.11: Qualifications
of driver, including his
providing his employer every
12 months with a list of all
driving violations for that
period of time.**

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**Driver must pass the driving
test and know the necessary
safety regulations as set out in
49 CFR 391.31 and 392.1**

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**Part 391.15: Driver must not
operate a motor vehicle with
a BAC equal to or in excess
of .04.**

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Part 392: Driving of Commercial Motor Vehicles

(appropriate use of truck and other equipment, including flares or emergency signals)

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Part 392.22: Driver must place warning devices when his vehicle is stopped on the shoulder ...

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Part 390.13: No person shall aid, abet, encourage, or require a MVC or its employees to violate the rules of this Chapter.

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(Failure to discover the falsity of driver logs when MVC has documentary proof of such violations through trip envelopes containing dates of dispatch, expenditures, telephone calls, etc.)

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Part 393: Parts and Accessories Necessary for Safe Driving

(fuel systems, braking systems, lights)

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Parts 392.9 and 393.100-393.136: (Effective 1-04-2004)

**THE NEW RULES REQUIRE MOTOR VEHICLE CARRIERS TO CHANGE THE WAY THEY USE CARGO SECUREMENT DEVICES TO PREVENT ARTICLES FROM SHIFTING ON OR WITHIN, OR FALLING FROM, CMVs .
(See Federal Register, handout)**

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Part 395: Hours of Service of Drivers

(hours of services for drivers and limitation driving hours within a certain number of days)

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Part 392.3: The MVC shall not permit a fatigued or impaired driver from operating a motor vehicle.

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Fatigue as a Safety Hazard



◆ Contributing Factor in 30-40% of Heavy Truck Crashes

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Fatigue as a Safety Hazard

◆ 30% of truck crash fatalities on rural roads are due to sleep deprivation.

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Fatigue as a Safety Hazard

- ◆ Risk of a crash effectively doubles from the eighth to the tenth hour of driving, and doubles again from the tenth to the eleventh hour of driving alone

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Federal Regulations New Rules Effective 1/4/04

Property Carrying CMV drivers may not drive:

- ◆ More than 11 hours, following 10 hours off-duty.
- ◆ Beyond the 14th hour after coming on-duty, following 10 hours off-duty
- ◆ After 60/70 hours on-duty in 7/8 consecutive days.
- ◆ A driver may restart a 7/8 consecutive day period after taking 34 or more consecutive hours off duty.

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16 Hour Exception

Drivers may extend the 14 hour on duty period by 2 hours if they:

- ◆ Are released from duty at the normal work reporting location for the previous 5 duty tours; and
- ◆ Return to the normal work reporting location and are released from work within 16 hours; and
- ◆ Have not used this exception within the last 6 days, except following a 34 - hour restart of 7/8 day period.

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Sleeper Berth Exception

Drivers may accumulate the equivalent of 10 consecutive hours off-duty by taking periods of rest in the sleeper berth, under certain circumstances.

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Part 395.3:(Effective 1-04-2004)

All property carrying MVC drivers may not drive:

- More than 11 hours, following 10 hours off duty
- Beyond the 14th hour after coming on-duty, following 10 hours off-duty
- After 60 hours on-duty if MVC operates less than 7 days a week
- After 70 hours on-duty if MVC operates seven days a week

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See U.S. ODOT Pamphlet, handout

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Part 396: Inspection, Repair and Maintenance

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Part 392.7 and 392.8: Driver insures that truck parts, accessories, and emergency equipment are in good working order.

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Part 392.7, 393.75, 393.80, and 393.81:

Driver insures that truck parts, accessories, tires, mirrors, horn and emergency equipment are in good working order prior to starting a trip.

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Part 396.11: Driver Vehicle Inspection reports at the end of every day, reporting all of the items listed in 396.11(a)

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Financial Responsibility Requirements

- ◆ MCS 90 endorsement
- ◆ \$750 K minimum

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Rule 4: Retain Consultants

- ◆ Trucking Expert
- ◆ Reconstructionist

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Rule 5: Preserve the Wreckage

- ◆ Informal agreement?
- ◆ TRO?
- ◆ Watch spoliation issues



Sample complaint, interrogatories, request for production of documents, motion for TRO, proposed order

Bate Stamp No. 00292-00327

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Rule 6: Get the Reports

- ◆ All of the Reports available through the Safety Profile of the Carrier
- ◆ Accident Reports

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Rule 7: Get the Logbooks



- ◆ Each page covers 24 hours
- ◆ Must account for time and provide details of breaks, location, *et al.*
- ◆ Carrier must keep books for at least 6 months
(Bate Stamp 00279)

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Log Book Must Contain

- ◆ Duty status for the 24 hour period recorded on a grid
- ◆ Driver's signature
- ◆ Date
- ◆ Total miles driven that day
- ◆ Total hours in each duty status that day
- ◆ Name of the carrier
- ◆ Main office
- ◆ Co-driver
- ◆ ID truck or tractor and trailer
- ◆ Shipping document number
- ◆ Location of change of duty status

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Rule 8: Get Supporting Documents

- ◆ Bills of Lading
- ◆ Dispatch Records
- ◆ Inspection Reports
- ◆ Receipts
- ◆ Safety Manuals
- ◆ GPS Logs
- ◆ Email Logs

(Bate Stamp No's: 000313-000318)

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Technology

- ◆ On-board communications system (Qualcomm)
- ◆ GPS Systems



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Omnitracs

- ◆ Monitors and logs communications between driver and dispatcher



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Positives and Negatives

- ◆ Logbook accountability
- ◆ Admission?
- ◆ Use while driving=danger

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Rule 9: Find the Violations

- Inspection records OK?
- Route and time of day reasonable, reflected in logs?
- GPS logs? —Potential gold mine
- Email logs?
- Fuel Card Records?
- Cell phone records?
- GOAL: Put the puzzle together

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Rule 9: Find the Violations

EXPERT AUDIT REPORT

(BATE STAMP No's: 000333-000433)

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Rule 10: Prepare for Depos

General topics in materials

Safety Director:

--Focus on requirements of regulations;
organizational structure, training, safety
training, how they monitor compliance

(Bate No.'s: 000267-000277)

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Rule 10: Prepare for Depos

**Have you obtained and
mastered the documents?**

**IT IS USUALLY A GOOD IDEA TO VIDEO
ALL DEPOSITIONS SO YOU CAN COLLECT
VIDEO CLIPS OF CRITICAL PIECES OF THE
TESTIMONY**

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