INVESTIGATION OF CATASTROPHIC ACCIDENTS

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I. INTRODUCTION

II. COORDINATION OF THE INITIAL INVESTIGATION

III. THE INITIAL INVESTIGATION

A. The First Call

B. Immediately Notify Insured’s Management or Employer

C. Gather Data and Evidence at the Accident Site
   1. Time and Location
   2. Accident Scene
   3. Parties Involved
   4. Witnesses, Law Enforcement, and Emergency Responders
   5. Vehicles Involved and Property Damage
   6. Injuries and Fatalities

D. Respond to the Injured

E. Secure the Accident Scene

F. Accident Reconstructionist and Other Experts

G. Alcohol and Drug Testing

H. Care and Support for the Insured Employee(s)

I. Obtain Witness Statements

J. Secure Documents

K. Secure Vehicle Computer Devices

L. Obtain Reports and Evidence from the Authorities

M. Internet Resources

IV. CONCLUSION

The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
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I. INTRODUCTION

When a catastrophic accident occurs, prompt and efficient collection of evidence is critical to minimizing liability exposure. Within 24 hours of the incident, if the fieldwork has not begun, the evidence begins to fade away. Weather conditions, emergency personnel, law enforcement, and other factors can quickly change the accident scene and may remove critical pieces of evidence. Witnesses’ memories of specific details begin to fade as the accident is no longer fresh. As time elapses following the accident, the who, what, when, where, why, and how of a catastrophic accident become unattainable.

With proper planning and coordination, accident investigators can maximize the collection and preservation of critical pieces of evidence. At the same time, prompt action can minimize the potential for making common investigation errors. The key is to develop a thorough method for collecting reliable, clear, and comprehensive information about an accident which will allow for an early evaluation of liability and damages.

II. COORDINATION OF THE INITIAL INVESTIGATION

It may be advisable to designate an “investigation coordinator” to oversee the initial investigation in order to eliminate confusion and redundancy. It is often prudent to promptly retain the services of an attorney and a law firm with experience in handling the initial investigation, as well as the defense of catastrophic accidents. The benefits of involving an attorney from the very beginning of the investigation include:

- Coordination of investigative efforts to reduce duplicate and unnecessary investigation during the critical initial stages;
- Assistance with the assignment and hiring of claims adjusters, accident reconstructionists, and other specialized investigators or experts;
- Undertake necessary action to ensure the preservation of helpful evidence at the accident scene and to avoid spoliation of evidence;
- Protection of all communications concerning the investigation via the attorney-client and attorney-work product privileges; and
- Formulate an initial evaluation of the potential liability issues and gear the investigation toward the defense of impending litigation.
It is helpful to have a list of attorneys and law firms prepared in advance by state and locality, along with contact information. Retain a law firm that has the resources which are required to promptly coordinate the investigation and the experience to ensure that the necessary components are in place to successfully complete the initial investigation, including retention of highly qualified experts.

III. THE INITIAL INVESTIGATION

A. The First Call

The first call usually comes from the insured driver, employee, company, or law enforcement officials.

Obtain preliminary facts from these individuals and entities, such as:

- Whether the accident involved any injuries or fatalities.
- Extent of property damage – to vehicles, equipment, buildings, and products.
- Location, type, and configuration of accident scene.
- Accident conditions, i.e., weather, time of day, lighting, etc.
- Details of the accident, i.e., location of vehicles, equipment, buildings, or products involved, identification of witnesses, nature and extent of physical evidence, etc.
- Existence of photographs or videotapes.

B. Immediately Notify Insured’s Management or Employer

- Compile a list of home, office, fax, e-mail, pager, and cell phone contacts for the insured company officials who will serve as contacts and assist throughout the investigation.

C. Gather Data and Evidence at the Accident Site

Depending on the severity of the accident, promptly retaining an accident reconstructionist, engineer, or other experts/investigators can aid tremendously in determining exposure, event chronology, and necessary additional investigation. After obtaining the preliminary facts, the investigation moves to the scene of the accident where there are crucial pieces of evidence that must be secured and preserved as soon as possible.

1. Time and Location

- Date and time of the accident
• Precise location: state/county/city; route or street, street address; building identification or name; intersection or junction of routes; distance from nearest community; distance from mile markers, utility poles, highway bridges, etc.

2. Accident Scene

(a) Time is of the Essence

• Get to the scene as soon as possible to determine the physical factors and/or traffic conditions that may have played a role in causing the accident.

(b) Construct a Chronology

• Obtain statements from witnesses to determine the sequence of events. If the incident was a car or truck accident, obtain information on the directions of travel of each vehicle to the point of impact and from the point of impact to its final resting place.

(c) Measurements

• Width of the traffic lanes or highway, clearance between parked vehicles, buildings, traffic islands, or other obstructions.

• Distance of the site of the accident or point of impact from identifiable stationary objects, such as telephone poles, fire hydrants, mile posts, etc.

• Length of skid marks and direction the vehicles traveled after the point of impact.

• Distance from the point of impact to detached parts of vehicles.

(d) Photographs/Videotapes

• Scene from various angles.

• Resting position of vehicles, equipment, products or other physical evidence involved.

• Damage to all vehicles, property, buildings, equipment, products or other physical evidence involved.

• Pre-accident paths of the vehicles, i.e., tire tracks, skid marks, fluid trails, etc.

• Area where debris landed.

• Avoid gory photographs of injured parties.
• Determine existence of security video.

• Potential Police/Fire Department Computer Evidence and vehicle generated video.

• Cell phone photographs/video.

  (e) Record Road, Traffic, Weather, and Lighting Conditions

  (f) Electronic Data

• Potential Computer Forensic Expert

• Preserve Cell Phones, Blackberrys, etc.

• Preserve Computers

3. Parties Involved

• Names and addresses of:
  – Injured party(ies), co-workers, supervisors, other potential witnesses.
  – Owners, drivers, and passengers of all vehicles involved.
  – Owners of all other property involved.

• Determine the location of each party before and after the accident.

• Determine which parties sustained injuries.

• Identify fatalities and try to determine whether they survived the accident for any period of time.

4. Witnesses, Law Enforcement, and Emergency Responders

Witness Statements: The most important information about an accident usually comes from witnesses. Therefore, witness statements are vital to the investigation.

• Allow the witness to tell his/her own story and then ask clarifying questions.

• Interview witnesses separately.

• Do not reveal the name or testimony of one witness to another.

• Determine the source of the witness’ information, whether it is from first-hand observation or hearing from another witness.
• Obtain a signed or recorded statement from each witness, if appropriate.

Information to obtain:

• Names and addresses of individuals first on the scene.

• Interview investigating police officers and any state or federal agency officials (i.e., OSHA, DOT, State Fire Marshal EPA, etc.) to determine their initial opinions, if they photographed the scene, their level of expertise in accident reconstruction, and if they surveyed the area. Also, obtain the name, badge numbers, and address of each law enforcement or agency official.

• Identify the ambulance service and emergency technicians.

• Identify fire and rescue personnel on the scene.

• Identify wrecker or towing service and their employees to determine the condition of the vehicles/cargo/equipment/debris transported and whether further damage was sustained during transport.

• Describe witnesses who refuse to identify themselves, i.e., license plate info, physical characteristics, etc.

5. Vehicles Involved and Property Damage

• Insured vehicle:
  – Make, model, year of manufacture, serial number, body type, type of cargo, and gross weight.
  – Identify each vehicle in a combination unit, i.e., tractor, trailer, etc.

• For any vehicles operated by a motor carrier, obtain the certificate or permit number issued by the U.S. Department of Transportation or state agency.

• For any leased vehicles, record the names and addresses of both the lessor and lessee.

• If a vehicle is a bus, obtain the information listed above, as well as the number of passengers on board, a list of the passengers, and a diagram showing where each passenger was sitting or standing. It is important to obtain an immediate count of passengers.

• If a vehicle is a passenger car or other small vehicle, record the make, year of manufacture, VIN number, body type, and current license number.
• Describe the damage:
  – sustained by each vehicle involved;
  – to any cargo in any vehicle; and
  – to any real property.

• Estimate the dollar value of damage to each vehicle, its cargo, and other property damage.

• Determine the cause of damage to each vehicle and related property.

6. Injuries and Fatalities

• Obtain name, address, sex, age, marital status, number of dependent children, and employment status of each injured person.

• Describe the nature and extent of injuries.

• Obtain the name of the doctor and hospital involved in the initial treatment. Describe the nature of the treatment administered. If possible, identify the treating physician(s).

• For fatalities, obtain the clinical cause of death and events that established the cause of death.

• Obtain the date and place of death for each person killed, including persons dying at a later date from injuries sustained in the accident. Possible sources of information include obituaries, newspaper articles, and autopsy or medical examiner’s reports.

D. Respond to the Injured

Respond to the injured by determining the extent of the injuries and obtaining appropriate medical care.

E. Secure the Accident Scene

Secure the accident scene in coordination with local law enforcement to prevent further accidents, injuries, damage, and to preserve the evidence.

F. Accident Reconstructionist and Other Experts

The retention of an accident reconstructionist, engineer, or other appropriate expert should be made by or with the attorney so that any potential privileges will be preserved.
G. Alcohol and Drug Testing

In trucking accidents, Federal Motor Carrier Regulations require that employers must conduct alcohol testing within eight hours of the accident and drug testing must occur within 32 hours of the accident. If the tests are not completed within the time requirements, the trucking company must maintain a file with documentation of the reasons why the tests were not administered.

Testing must be completed for the truck driver if:

- The accident involved the loss of human life or
- The driver received a citation within eight hours of the accident under state or local law for a moving violation, if the accident involved:
  - bodily injury to any person who immediately receives medical treatment away from the scene of the accident; or
  - one or more of the vehicles involved in the accident incurred disabling damage such that the vehicle had to be towed or transported away from the accident scene.

Federal law sets forth the requirements for drug testing in the Code of Federal Regulations, 49 C.F.R. § 382.303. Proper procedures should be in place that go to great lengths to complete these tests in order to avoid later accusations and allegations by potential plaintiffs.

Alcohol and drug testing should also be considered in other catastrophic accidents. Frequently, law enforcement or other governmental officials may request that the plaintiff or the insured’s employees undergo testing. Even if such tests are not always required, it may be helpful to show that your insured’s employee or driver was not under the influence.

H. Care and Support for the Insured Employee(s)

By the time the attorney or the claims adjuster comes into contact with the insured, the employee(s) involved frequently has already given a statement to the police or other governmental agency. Unfortunately, employees involved in accidents are often in a high level of mental and emotional distress. As a result, their statements or representations are often incoherent, full of remorse, or distorted by their state of mind. For better or worse, statements made by such employees often become the most significant version of events due to their proximity in time with the accident. Other than the information required by law enforcement, it is imperative that the insured employee(s) should not give any written or recorded statements.

An experienced claims handler and/or attorney can work to protect the employee(s) from making spontaneous, emotional and discoverable admissions and speculations. Also, in the
event of possible criminal charges, the attorney can retain criminal defense counsel to protect the employee(s) rights.

Consider the following in dealing with the insured’s employee(s):

- Contact the employee immediately and assure them that you are on their side.
- Determine whether the employee needs medical attention.
- Arrange for the employee to submit to alcohol and drug testing.
- Determine if the employee needs counseling, refer him to his employer’s Employer Assistance Program.
- Evaluate the content of any statement given by the employee to the investigating law enforcement authorities and to any other parties.
- Obtain the employee’s own account of the accident, including the chronological events leading up to the accident, and facts leading to the cause of the accident.
- Determine the location of documents related to the vehicle, equipment or product involved.
- Obtain authorization from the employee for release of their medical records, determine if he suffers from any medical conditions or wears glasses or contacts.
- Obtain employee’s personal contact information.
- Advise employee on how to deal with the media.
- Explain to the employee what to expect if a civil suit is filed or if criminal charges are made against him.
- Determine if the employee received a citation or ticket and if so, make arrangements to respond to the citation or ticket.
- Determine if criminal charges have been filed and make arrangements for a defense, if appropriate.
- Determine if there were any maintenance, mechanical, or operational problems experienced before the accident with the vehicle, equipment, or product involved.
I. Obtain Witness Statements

Often, the most important source of information comes from persons who were involved in investigating or responding to the scene. Preliminary facts that may not be ascertainable at a later date, such as condition of injured parties, initial statements, physical evidence, roadway and weather conditions, status of the vehicles, equipment or product, etc. are essential.

Statements should be obtained from the following persons:

- Insured employees
- Company employees on the scene
- Law enforcement
- Emergency responders: fire and EMT
- Eyewitnesses

J. Secure Documents

Documents often serve as key pieces of evidence in litigation. They contain information that may reveal confidential information or information that may lead to liability. Some documents may be protected by a privilege, which would prevent disclosure to plaintiffs. However, many documents are not privileged, and may later be subject to a spoliation claim if the documents are not secured from the very beginning of the investigation and then preserved.

Even if litigation is uncertain, it is still worthwhile to secure the following documents:

- Driver’s logs for 30 days prior to the accident.
- Equipment inspection reports for 30 days prior to the accident.
- Dispatch records relating to the driver for a week prior to the accident.
- Bills of lading and shipping documents for the trip involving the accident.
- Fuel receipts for 30 days prior to the accident.
- Weight tickets for at least one week prior to the accident.
- Toll receipts for at least one week prior to the accident.
- All maintenance files for the vehicle, equipment, or product involved.
- Employer’s investigation file, including photographs and statements, secured by its own employees.
• Employer’s policies, procedures, and training materials in force at the time of the accident.

• Information relating to the insured’s employees:
  – qualifications and credentials.
  – drug and alcohol testing results.
  – payroll records for 30 days prior to the accident.
  – cell phone records for the month of the accident.
  – any disciplinary record in personnel file.

K. Secure Vehicle Computer Devices

Heavy trucks manufactured after the mid-1990s are likely to be equipped with on board electronic control modules ("ECM"), which record the truck’s movements prior to the accident. Similarly, some trucks may be equipped with global position systems ("GPS"), which can calculate the exact positioning of a truck. Passenger cars also have technology that can provide useful accident information. Some newer cars contain a car data retrieval ("CDR") system that downloads information from the air bag control system. All these computer devices can provide critical information such as the speed of the vehicle, the driver’s actions leading up to, during, and after an accident.

Likewise, many other types of products and equipment (i.e., tractors, combines, large machinery) contain similar types of computer generated information stored in devices on the equipment.

In order to preserve this type of evidence, consider the following steps:

• After the vehicle, equipment or product is released by the authorities, secure it until a technician can download the ECM data.

• During the retrieval of the information, have a court reporter present to swear in the technician to establish on the record his qualifications and procedures in downloading the data.

• After downloading, secure a digital and hard copy of the data.

• Contact the insured company to determine if they have any GPS or other digital data.

• Contact the owner of any cars or other passenger vehicles involved in the accident and try to reach an agreement to preserve and obtain the CDR information.
L. Obtain Reports and Evidence from the Authorities

Another source of critical evidence and data is the investigating law enforcement agencies. Beyond the police report, documents from state agencies and other authorities may provide important information. Obtain the following documents from the appropriate authorities:

- Any commercial motor vehicle inspection reports regarding the working condition of the equipment.
- Any citations issued by IDOT, other state agencies, or other local law enforcement officials.
- Preliminary, final, and supplemental accident reports.
- Any photographs or diagrams of the scene and the objects involved in the accident.
- Any accident reconstruction files generated by authorities with such expertise.
- Official weather reports.

M. Internet Resources

Investigate parties and witnesses through Facebook, MySpace, and other online resource sites.

IV. CONCLUSION

A catastrophic accident can occur at any time. Conducting a thorough initial investigation is critical to preserve the evidence which will serve as the foundation of the ongoing investigation and potential litigation.

In order to conduct the initial investigation, claims handlers should prepare and plan the procedures for conducting the investigation in advance. It is advisable that claims adjusters compile emergency contact information for their insureds. A roster of attorneys and independent adjusters by state and locality should be kept to allow for immediate access to investigation coordinators and investigators after a major accident.

A prompt and thorough investigation will allow you to gain an advantage in avoiding mistakes – which could otherwise result in unfavorable factual surprises later on, during litigation. Investigating and preserving the evidence will enable you mitigate the damages by settling the case early; laying the foundation for a defense to avoid prolonged litigation; and the opportunity to reduce the risk of a negative outcome in the event the case goes to trial.
Joseph G. Feehan  
- Partner

Joe has spent his entire legal career with Heyl Royster, beginning in 1988 in the Peoria office. He is the co-chair of the firm’s Truck/Motor Carrier Litigation Practice Group. Joe concentrates his expertise in all areas of civil litigation including product liability, sexual torts, trucking/transportation, premises liability, auto, and commercial litigation.

In recent years, Joe has developed a special focus on defending sexual tort claims, particularly those brought against corporations and religious entities. Many of his cases are against leading Chicago and national counsel where damages sought against these target defendants typically reach several million dollars.

Although always prepared to try cases when necessary, Joe is a skilled negotiator and has had great success resolving cases through mediation. Over the last five years, Joe has resolved over 40 lawsuits through mediation.

Joe is a frequent speaker at programs and seminars on civil litigation, including such topics as effective trial techniques, expert witnesses, and evidentiary issues. Joe has published many articles on various trial practice and evidence issues. He served as Editor-in-Chief of the Illinois Defense Counsel Quarterly, the official journal of the Illinois Association of Defense Trial Counsel, and as a contributor to the IDC Quarterly’s Evidence and Practice Tips column for several years. Joe co-authored the chapter on UCC Warranties in the Contract Law Handbook published in 2008 and 2005 by the Illinois Institute of Continuing Legal Education. Currently, Joe serves as Chair of the Peoria County Bar Association’s Continuing Legal Education Committee and is President of the Abraham Lincoln Chapter of the Inns of Court. Joe was recently elected to the Board of Directors of the Illinois Association of Defense Trial Counsel.

Joe enjoys an "AV" rating by Martindale-Hubbell. He has been designated an Illinois “Super Lawyer” (top five percent) as a result of a survey of Illinois attorneys and judges conducted by Chicago magazine, as were 13 of his partners. Joe has also been selected as a Leading Lawyer in Illinois.

Publications
- Life After “Same Part of the Body:” An Update on Admissibility of Prior Injuries, Illinois Bar Journal

Professional Recognition
- Martindale-Hubbell AV Rated
- Named to the Illinois Super Lawyers list (2005-2011). The Super Lawyers selection process is based on peer recognition and professional achievement. Only five percent of the lawyers in each state earn this designation.
- Selected as a Leading Lawyer in Illinois. Only five percent of lawyers in the state are named as Leading Lawyers
- Illinois Association of Defense Trial Counsel Distinguished Service Award, 2007

Professional Associations
- National Diocesan Attorneys Association
- Trucking Industry Defense Association
- Defense Research Institute
- Illinois Association of Defense Trial Counsel (IDC Quarterly regular columnist, past Editor-in-Chief, and current Board member)
- Abraham Lincoln Inn American Inn of Court (presently President)
- American Bar Association
- Illinois State Bar Association
- Peoria County Bar Association (Chair of Continuing Legal Education Committee)

Court Admissions
- State Courts of Illinois
- United States District Court, Central and Northern Districts of Illinois

Education
- Juris Doctor (Cum Laude), Northern Illinois University College of Law, 1988
- Bachelor of Arts-Business Administration, Illinois State University (1983)