

# YOUR WORST DAY

Leadership and Preparation for Catastrophic Claims



---

By Stephen E. Winborn, Colleen F. Shepherd,  
Bradford G. Hughes and Lee Stephen MacPhee

---

NO ONE WANTS to receive the call that their driver has been involved in a serious accident and that people have been injured or killed. Catastrophic accidents rarely happen at a convenient time or location, so being prepared to quickly respond on your worst day is of critical importance. You get only one chance at an initial response to a catastrophic accident, and mistakes made early on can have dire consequences.

## THE INITIAL RESPONSE

Many times, motor carriers decline to immediately investigate a claim because initial information suggests that the accident was not their fault. However, fault is nearly impossible to determine based upon the limited information available immediately after a serious accident. Rarely is the

severity of the accident overstated. Instead, the severity is typically significantly understated. Lawsuits filed following an accident are driven primarily by the potential for the recovery of monetary damages, not fault. Even a small percentage of fault in a catastrophic case can equate to a significant amount of monetary damages.

Regardless of fault, your response to a serious accident should always be the same—fully investigate and preserve evidence. It is far easier to scale back a response than to accelerate one, as critical information, including witnesses and evidence, become much more difficult to locate with the passage of time. Critical tasks must be completed within a very limited time frame, including those mandated by the Department of Transportation

(DOT) and the Federal Motor Carrier Safety Administration (FMCSA). Finally, failure to preserve physical evidence at the scene can result in the inability to put forth an otherwise viable defense.

## CONTACT YOUR INSURER

If you are not self-insured, your first phone call should be to your insurance carrier. The best carriers have established teams that are ready to respond to catastrophic claims at any hour. These insurers have unique knowledge, resources and experience in handling these claims. Transportation-focused insurers also have attorneys, field adjusters, investigators and experts, who are extensions of the early response team, located in every jurisdiction. These professionals are of the utmost

importance when managing any catastrophic response.

If you are self-insured, be sure to have your own nationwide network of external resources prepared to rapidly respond when the time comes.

### **ASSIGN A RELIABLE SUPERVISOR**

If possible, you should dispatch a reliable supervisor to the accident scene immediately. If the accident is far from your home operation, assign a reliable supervisor to direct operations remotely. This person will be actively involved with your insurance carrier, and serves as your company representative at the accident scene.

Avoid sending someone who is critical to your daily operations; the reliable supervisor needs to be focused on responsibilities at the scene. The reliable supervisor will work with law enforcement and needs to get your driver to a DOT-approved drug and alcohol testing facility immediately. He or she also should be able to calmly communicate with both your driver and law enforcement in extremely stressful situations, and be well-versed in how to respond to an accident and approach the situation with a level head, without emotion.

### **RETAIN COUNSEL**

As noted earlier, a transportation-focused insurance carrier will have a team of attorneys, field adjusters, investigators and experts at the ready to respond to a catastrophic claim. If you are self-insured, retain a local attorney to respond to the scene and begin a privileged investigation. The attorney will work with you to hire and direct the field adjuster, accident reconstruction expert and any other appropriate experts. An attorney is a critical part of the accident investigation because of the attorney-client privilege and/or the attorney work-product privilege that attaches to an attorney's investigation.



### **RETAIN A FIELD ADJUSTER**

If you have an insurer, it will dispatch a local field adjuster. If you are self-insured, a local field adjuster should be assigned, preferably by your attorney to maintain privilege. In both instances, the field adjuster will interview and identify all witnesses, locate possible claimants, take accident scene photographs, and determine the severity of any injuries. If the reliable supervisor is working remotely, then the field adjuster should be tasked with taking the driver to receive DOT-approved drug and alcohol testing. The field adjuster will also assist in the identification of any on-scene accident participants,

including police officers, emergency medical technicians, firefighters, tow truck drivers and all others present.

### **RECONSTRUCT THE ACCIDENT**

Depending on the circumstances, an accident reconstruction expert may need to be added to the rapid response team. The "accident recon" is responsible for a number of tasks at the scene, including preserving all electronics for download, documenting all physical evidence, and engaging in strategic surveys and photography. A failure to collect and preserve this information in an accident where you may have a viable liability defense could result in your



inability to assert that defense if a claim is made at a later date.

### **OBTAINING (AND RETAINING) ELECTRONIC EVIDENCE**

The accident recon will coordinate downloading all electronic control modules (ECMs) and retrieving any data from dashboard cameras, sometimes known as automated event recorders (AERs). Do not assume that your local truck dealer can perform a download of the ECM or AER. Often, it is much more complicated and may require factory-trained personnel.

On certain units, the existing data is wiped out when the engine is restarted. Even if a vehicle is drivable after a severe accident, you should “tow until you know” that a download of the ECM is not necessary. If ECM or AER information is destroyed, serious problems are sure to follow. In certain jurisdictions, plaintiff attorneys can argue that the data was destroyed intentionally to hide evidence of fault. Spoliation of evidence can allow a judge to instruct the jury that they may draw an adverse inference that the evidence was destroyed because it was harmful.

### **MANAGING THE DRIVER**

Your driver is the most critical piece of the post-accident puzzle. In a perfect world, the driver should not be permitted to make a formal statement to anyone outside the presence of your attorney. Frequently, however, the driver may have already spoken to the authorities immediately after an accident. It is important to learn to whom the driver has spoken and what was said.

Your driver must be prepared and understand his or her responsibilities at the accident scene, as the driver is effectively the first company representative at any catastrophic accident. He or she must be able to accurately convey information without fear, be trained to remain calm and professional, secure the scene, take appropriate photographs, deploy reflectors, and seek immediate help from the authorities.

### **PERFORM DRUG AND ALCOHOL TESTING**

You *must* test your driver after a catastrophic accident. As mandated by FMCSA regulations, the driver must submit to drug and alcohol tests “as soon as practicable” following an accident when:

- a fatality has occurred,
- a citation has been given and injury occurred to anyone, or
- one of the vehicles involved was towed from the scene.

Remember, many municipalities can issue citations days, even weeks, after an accident. Be aware of your company drug and alcohol testing requirements. If they are more stringent than the FMCSA regulations, then you must follow the former.

### **HANDLING CRIMINAL CITATIONS**

It is possible that your driver will receive a criminal citation, which will trigger different responses, processes and obligations for everyone involved in the accident. Advise your insurance carrier immediately of any citations of any kind received by the driver or by the company.

### THE PAPER CHASE

Truck litigation is often won or lost “on the paper,” i.e., the Driver Vehicle Inspection Reports, the maintenance and service records, the registration file, the logs, the driver’s cellphone records and the driver qualification file. Before the accident scene is even clear, you must begin to assemble all records that may possibly be needed to defend the claim. It is always far easier to assemble the data immediately after the accident than months—or years—later when a suit is filed. A failure to preserve this information can lead to separate spoliation claims.

### (SOCIAL) MEDIA MANAGEMENT

In a YouTube world, you can expect media coverage almost immediately. If the media calls, you should contact your insurer immediately. Never try to handle the media on your own. Your driver and all of your employees

“Regardless of fault, your response to a serious accident should always be the same—fully investigate and preserve evidence.”

should be reminded that it is inappropriate to comment on, or discuss, the accident on social media.

### OUTREACH

If a fatality or critical injury occurred, special care should be taken in claimant communications. Your insurance carrier should be consulted before any outreach is made. Take advantage of the collective experience of your insurer before inadvertently making a bad situation worse.

### PRACTICE, PRACTICE

You should prepare for and practice what to do in the event of a serious accident. Like a fire drill, make it

a routine for your operation. Your response drills must involve your drivers and reliable supervisors.

Practice these drills several times a year. Being prepared and knowing how to respond to a catastrophic accident can save your company from potentially dire consequences. ■

*Stephen E. Winborn is vice president of operations for Vanliner Insurance Company. Colleen F. Shepherd is director of claims for Vanliner Insurance. Bradford G. Hughes is a partner at Selman Breitman LLP in Los Angeles. Lee Stephen MacPhee is of counsel at Morrison Mahoney LLP in Boston.*

# WE MOVE YOU **IN SO MANY WAYS!**



member of:  
RIM M PAMA AMSA WORLDWIDE IIRC lacma IAM

Telephone: 340-774-5872 - Telefax: 340-774-7740

Email: [ralynch@vipowernet.net](mailto:ralynch@vipowernet.net) - Website: [www.boblynchmovers.com](http://www.boblynchmovers.com)  
#4 Cargo Center, C.E. King Airport, St. Thomas, Virgin Islands 00801