

Protecting Your Interests Following a Crash: Record Retention and Spoliation of Evidence

by Paul Farrell

Editor's Note: This article is reprinted with permission from SafetyFirst Systems, LLC. Copyright 2006 SafetyFirst Systems, LLC. All rights reserved.

Summary

Why is record retention an important or relevant issue to safety professionals and risk managers? A growing trend in lawsuit tactics focuses on “missing or lost evidence.”

If your firm is sued for negligence in a vehicle collision and you can not produce the requested documents, physical evidence, or data files, some attorneys may raise the question “**why was the evidence not preserved to be presented?**”

This question, if not adequately addressed, could cast doubt on whether the evidence was purposely destroyed or “lost” to avoid placing a negative spin on your defense—even if there was no intention to hide or destroy evidence as part of a cover up.

Various fleet safety records (i.e. driver qualification files, maintenance records, log books, toll receipts, crash investigation reports) maintenance records, and physical evidence (i.e. broken brake lights, turn signals, headlamps, and brake system components) are typically cataloged, filed, and set aside when there is notice that a lawsuit is pending or likely some items may have already been discarded during routine document purging.

Many companies have determined that record retention policies are an important mechanism to protect the organization's rights in the event of a lawsuit related to a crash event, but are these policies up to date on “electronic data” sources and non-regulated documents such as toll receipts (often used to corroborate driver's log books, etc.)?

One of the factors, we believe, in the increased scrutiny of evidence is the ongoing introduction of onboard

recorders and GPS units—rich sources of performance data that might prove or exonerate a case of negligence. Another possible factor is the widely published reports of various scandals related to destroying potentially damaging evidence.

This article, while not providing a complete review of many complex safety, risk management, legal, and human resource issues, is intended to raise your awareness of the need to periodically review your evidence preservation actions, record, and data retention policies. Of course, you should seek the advice of your organization's attorneys who can properly and more completely address specific recommendations that would benefit your company's processes and preparations for potential litigation. (*In plain English—“hey, we're not attorneys—we just thought you might want to get an introduction to these concepts.”*)

Litigation Overview

What are the odds of your company becoming involved in a lawsuit over a crash? It's impossible to accurately predict the likelihood of your firm's potential involvement in litigation over a crash event, but there are some curious trends being reported that indicate that all motor transport firms may see more litigation in the coming years.

First of all, despite crash “rates” per million miles traveled being reported widely as coming down, the total number of fatalities and serious injury-related crashes remains very high. So long as there are tragic crashes, there is an ongoing supply of potential plaintiffs.

According to the most recent National Safety Council data, during 2003, motor vehicle collisions resulted in:

- 44,800 deaths
- 2.4 million nonfatal injuries

Interestingly, a report from the Bureau of Justice Statistics' suggests that at least some of these motor vehicle collisions are being translated into litigation events:

- The annual number of “tort cases” (tort cases involve plaintiffs claiming injury, loss, or damage resulting from a defendant's negligent or intentional acts) handled by U.S. district courts has averaged about 44,770 per year.
- Of these cases, roughly 20 percent have been related to motor vehicle collisions.
- Although plaintiffs prevailed in nearly half (48 percent) of the tort cases completed by trial in 2002–2003, as many as 98 percent of all tort cases were settled out of court.

A trend in litigation has been seen in data compiled by the Public Policy Institute of New York State:²

- The number of motor vehicle tort filings in state Supreme Court increased from 22,108 in 1988 to 41,668 in 1996—an **88 percent** jump. Motor vehicle cases rose every year and accounted for nearly two-thirds of the increase in all tort filings in New York during that period.
- These increases would be understandable if matched by some equivalent increase in car crashes—or, at the very least, in car accidents involving personal injuries. Instead, motor vehicle accident and tort filing rates have moved in precisely opposite directions, with fewer accidents but *more* lawsuits.

Based on this type of trend toward more litigation, the odds are increasing that your firm may eventually become involved in litigation in the future.

The old adage, “an ounce of prevention is worth a pound of cure,” remains valid—taking steps to reduce the risk of collisions occurring is critical, but preparing to deal with the aftermath of such a collision is also worthwhile.

Retention of Documents versus “Spoliation”

How long does your firm retain basic documents that might have a potential bearing on a court case related to a collision?

If your fleet is subject to Federal Motor Carrier Safety Regulations (FMCSRs), there are specific retention periods for some common documents.

For example, “Hours of Service” records need to be retained for six months, and then may be destroyed or discarded based on the regulations. While this helps keep the amount of documents manageable for the purposes of audits and management oversight of driver activities, it also balances the need for “housekeeping” by allowing the records to be purged.

Many firms have formal practices and policies dealing with document retention and purging. This housekeeping process can really help to keep file size manageable, especially for larger firms.

However, there are two concerns that many firms need to address:

1. Does the formal retention program extend to all types of documents or only certain types (ie documents required by regulation).
2. Does the program have a built-in exception process to “set aside” records as soon as the potential of litigation (related to a specific driver and his or her vehicle) is recognized by the management team? That is to say, are the documents dealing with the crash isolated into a “do not purge” file once it is clear that a lawsuit is being pursued?

Some firms may immediately “freeze” all documents related to an affected driver and his or her vehicle following a crash if it:

- was judged to be a DOT reportable crash
- involved a fatality or serious bodily injury

- had other special circumstances (as defined by each company)

Some firms may wait to “freeze” information only when notice of a legal action has been received. Perhaps there are management teams that take an aggressive stance—“let’s get rid of this in case it might hurt us”—as soon as a crash has been reported to their insurer.

According to Merriam-Webster’s Dictionary of Law, “**spoliation**” [’spo-le-’a-shen] is:

1. the destruction, alteration, or mutilation of evidence especially by a party for whom the evidence is damaging
2. alteration or mutilation of an instrument (as a will) by one who is not a party to the instrument

We can’t tell you what your company should do to avoid allegations of spoliation (remember we’re not attorneys), but we are interested in motivating you to look at your current practices and consider talking with your counselor proactively.

Also, we are interested in examining what could possibly be included as “evidence.”

Physical Evidence

Besides paper records, what happens to damaged parts after they’ve been replaced? Are they retained or discarded? Are photos kept of the vehicle’s appearance prior to repairs being started?

We’re not sure what the “right” answer is for your firm, but are you asking these questions of your management team, and considering how you’d answer a plaintiff’s attorney if he or she asks you why you can’t produce these items for examination by reconstruction experts, etc.?

In-Vehicle Technology

Many forms of in-vehicle technology are being widely adopted to address safety, dispatch, or efficiency issues. Examples include: GPS tracking systems; computers in engines to monitor performance; onboard data recorders that track speed,

sudden brake applications, etc., and even “camera-in-cab” systems that are specifically designed to capture video footage of crash events and “poor driving habits.”

The introduction of new technologies is really just beginning.

Consider fatigued or drowsy driving—a highly dangerous situation that some researchers are trying to detect through onboard systems (to alert the driver to wake up and pull over to get some needed rest, etc.).

According to a recent report,³ at least one research center is working on a drowsy-driver detection system that promises to “detect the differences between drowsy driver behaviors versus non-drowsy with 90 percent accuracy.” That could be great news for tired drivers, but what happens when the data recorder says “yup, your driver dozed off right before he or she ran into the tour bus loaded with kids and senior citizens?”

Technology is great when it saves lives, and that cannot be overstated, but it may also paint a tough scenario to defend in court.

There are many compelling reasons to embrace these technologies, but the data records produced by these systems could be considered evidence.

It is possible that some of these systems automatically purge data when older files are “overwritten” or dumped to make room for new data files.

Again, the question of when to “freeze” data records (permanently save them to a special location to avoid purging) is one that requires special advice and a lot of thought.

While it’s relatively easy to gauge how much space a set of paper files takes up in a drawer, defining how much space a series of GPS recordings occupy on your hard drive may be a bit more tricky. In fact, some of the video files from “camera-in-cab” systems can be measured in multiple

Continued on page 8

Protecting Your Interests Following a Crash: Record Retention and Spoliation of Evidence

Continued from page 7

megabytes per individual event recording. (They could fill up your typical desktop computer quickly depending on what files you choose to retain, or you may need IT resources to share space on a network server, etc.)

Other technical questions can arise too. Can you retrieve all the data? Does your maintenance team have the tools to obtain the needed data and store it in a way so that it can be displayed on a standard computer? Is the computer where you store the data protected from viruses, and if the data is stored on media (ie CD-ROM, diskette, etc.) is it safely secured so that it is not lost or damaged?

What Now?—Form a Plan to Take Action

As we stated at the beginning, we can't possibly tell you what's best for your company, but we wanted to help you get thinking about these issues before you are in the middle of litigation and feeling overwhelmed.

There is a lot of information available (see below, with the usual disclaimers!) and remember that your best bet is to talk to your attorney that would likely handle your case (should one arise).

There are specialists who handle the defense of companies whose drivers were involved in collisions, and they can help you devise a strategy that is both up to date and appropriate for your company. ■

Endnotes

1. <http://www.ojp.usdoj.gov/bjs/pub/press/fttv03pr.htm>.
2. <http://www.bcnys.org/ppi/accid3.htm>.
3. http://fleetowner.com/news/topstory/driver_fatigue_detection_george_washington_university_cisr_041306/.

Other References

(Hey, we're not responsible for the information contained at these reference sources, so don't count on their recommendations or information being correct for your situation.)

- CCJ, November 2003, "Shred of Evidence"; Avery Vise <http://www.etrucker.com/apps/news/article.asp?id=42172>.
- *NY Times*, July 11, 2004, "In Deaths at Rail Crossings, Missing Evidence and Silence"; WALT BOGDANICH <http://www.nytimes.com/2004/07/11/national/11RAILS.html?ex=1247198400&en=25adfadac9955a6c&ei=5090&partner=rssuserland>.
- WAFF 48 News, December 15, 2005, "You May Not Be Alone in Your Car" <http://www.waff.com/Global/story.asp?S=1565003>.
- *The Salt Lake Tribune*, April 13, 2006, "Gateway Inc. sanctioned for destroying evidence"; Bob Mims http://www.sltrib.com/ci_3657798?source=rss.
- American Bar Association, "Sample Document Retention Policy" <http://www.abanet.org/lpm/lpt/articles/sampledocretentionpolicy.pdf>.

Loss Control Quarterly

is published four times a year by and for the members of the Loss Control Section of the CPCU Society. <http://losscontrol.cpcusociety.org>

Loss Control Quarterly Editor

Charles H. Morgan, J.D., CPCU, CLU, CSP, ARM
AIG Consultants
e-Mail: charles.morgan@aig.com
Phone: (908) 679-3995

Loss Control Quarterly Assistant Editor

Donald J. Jackson, CPCU
Zurich North America
e-Mail: don.jackson@zurichna.com

Loss Control Section Chairman

Jane M. Wahl, CPCU, CLU
State Farm Group
e-Mail: jane.wahl.brez@statefarm.com

Sections Manager

John Kelly, CPCU
CPCU Society

Managing Editor

Michele A. Ianetti, AIT
CPCU Society

Production Editor

Joan Satchell
CPCU Society

Design

Susan Leps
CPCU Society

CPCU Society
720 Providence Road
Malvern, PA 19355
(800) 932-CPCU
www.cpcusociety.org

Statements of fact and opinion are the responsibility of the authors alone and do not imply an opinion on the part of officers, individual members, or staff of the CPCU Society.

© 2006 CPCU Society



Loss Control Quarterly

Volume 17

Number 3

LCQ

August 2006

CPCU Society
720 Providence Road
Malvern, PA 19355
www.cpcusociety.org

PRSR STD
U.S. POSTAGE
PAID
BARTON & COONEY