

**2018
THE CAR CRASH SEMINAR**

August 9 - August 10, 2018
Norris Conference Center ▪ Austin, Texas

**Shifting into First:
Early Development of the
Commercial Truck Crash Case**

Mike Davis

©2018 Mike Davis
SLACK DAVIS SANGER, LLP
2705 Bee Cave Road, Suite 220
Austin, Texas 78746
(512) 795-8686
(512) 795-8787 (fax)
mdavis@slackdavis.com

TABLE OF CONTENTS

Table of Contents

TABLE OF AUTHORITIES	III
SHIFTING INTO FIRST: EARLY DEVELOPMENT OF THE COMMERCIAL TRUCK CRASH CASE	1
TRUCK CRASHES DIFFER FROM CAR CRASHES	2
THE REGULATORY FRAMEWORK	3
Federal Motor Carrier Safety Regulations	7
Part 40 – Procedures for Transportation Work-Place Drug and Alcohol Testing Programs	8
Part 380 – Special Training Requirements	8
Part 382– Controlled Substances and Alcohol Use and Testing	9
Part 383 – Commercial Driver’s License	11
Part 385 – Safety Fitness Procedures	13
Part 387 – Financial Responsibility For Motor Carriers.....	14
Part 390 – General.....	15
Part 391 – Qualifications of Drivers.....	17
Part 392 – Driving Of Commercial Motor Vehicles.....	23
Part 393 – Parts and Accessories Necessary for Safe Operation.....	24
Part 395 – Hours of Service of Drivers	25
Part 396 – Inspection, Repair and Maintenance.....	28
Part 397 – Transportation of Hazardous Materials	29
INVESTIGATION.....	29
Preservation Letter	30
Initial Investigation	31
Inspection of Defendant’s Truck and Trailer	33
DISCOVERY	34
Informal Discovery	34
OTHER SOURCES OF INFORMATION.....	36
Discovery From Defendant Driver	39
Discovery From Defendant Trucking Company	40
Discovery from Third Parties	42
THEORIES OF LIABILITY	43

INSURANCE COVERAGE.....	54
MCS-90 Endorsement.....	55
Texas Forms E and F	57
Foreign Motor Carriers	58
Bobtail Policies	58
APPENDIX A	59
APPENDIX B	60
APPENDIX C	66
APPENDIX D	70
APPENDIX E.....	73
APPENDIX F.....	74
APPENDIX G	75
APPENDIX H	76

TABLE OF AUTHORITIES

CASES

<i>Adams v. Royal Indemn. Co.</i> , 99 F.3d 964 (10th Cir. 1996).....	56-57
<i>Bays v. Summitt Trucking, Inc.</i> , 691 F. Supp. 2d 725, 730 (W.D. Ky. 2010)	49
<i>Berry v. Golden Light Coffee Co.</i> , 327 S.W.2d 436 (Tex. 1959)	7-8
<i>Bituminous Cas. Corp. v. Maxey</i> , 110 S.W.3d 203 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).....	53
<i>Blue Bird Body Co. v. Ryder Truck Rental, Inc.</i> , 583 F.2d 717 (5th Cir. 1978)	54
<i>Brown v. Truck Connections Int’l, Inc.</i> , 526 F. Supp. 920 (E.D. Ark. 2007).....	46
<i>Builders Transport, Inc. v. Grice-Smith</i> , 167 S.W.3d 1 (Tex. App.—Waco 2005, pet. denied)	52-53
<i>Campbell v. Bartlett</i> , 975 F.2d 1569 (10th Cir. 1992)	56
<i>Canal Ins. Co. v. Coleman</i> , 625 F.3d 244, 253-54 (5th Cir. 2010)	55
<i>Canal Ins. Co. v. First Gen. Ins. Co.</i> , 889 F.2d 604 (5th Cir. 1989)	55-56
<i>Coastal Corp. v. Torres</i> , 133 S.W.3d 776 (Tex. App.—Corpus Christi 2004, pet. filed).....	53
<i>Commercial Standard Ins. Co. v. McKissack</i> , 153 S.W.2d 997, (Tex. Civ. App.—Fort Worth 1941, writ ref’d)	57
<i>Consumers County Mut. Ins. Co. v. P.W. & Sons Trucking, Co.</i> , 307 F.3d 362 (5th Cir. 2002).....	46
<i>Drennan v. Cmty. Health Inv. Corp.</i> , 905 S.W.2d 811 (Tex. App.—Amarillo 1995, writ denied)	44-45
<i>Fifth Club Inc. v Ramirez</i> , 196 S.W.3d 788, 795 (Tex. 2006).....	50
<i>Gonzalez v. Ramirez</i> , 463 S.W.3d 499, 503-06 (Tex. 2015)	49
<i>Goodyear Tire & Rubber Co. v. Mayes</i> , 236 S.W.3d 754 (Tex. 2007)	51
<i>Grinnell Mut. Reinsurance Co. v. Empire Fire & Marine Ins. Co.</i> , 722 F.2d 1400 (8th Cir. 1983).....	48
<i>Hartford Ins. Co. v. Occidental Fire & Cas. Co.</i> , 908 F.2d 235 (7th Cir. 1990).....	48
<i>Hawkins v. Gorea Motor Express, Inc.</i> , 360 F.2d 933, (2d Cir. 1966).....	32
<i>Ill. Bulk Carrier, Inc. v. Jackson</i> , 908 N.E.2d 248 (Ind. Ct. App. 2009)	46
<i>Integral Ins. Co. v. Lawrence Fulbright Trucking, Inc.</i> , 930 F.2d 258, (2d Cir. 1991).....	57
<i>John B. Barbour Trucking Co. v. State</i> , 758 S.W.2d 684 (Tex. App.—Austin 1988, writ denied)	47-48
<i>John Deere Ins. Co. v. Nueva</i> , 229 F.3d 853 (9th Cir. 2000)	56

<i>Logan v. Grady</i> , 482 S.W.2d 313 (Tex. Civ. App.—Ft. Worth 1972, no writ)	32
<i>Lowry v. Anderson-Barney Bldg. Co.</i> , 161 S.W.2d 459 (Tex. 1942)	44
<i>Mata v. Andrews Transport, Inc.</i> , 900 S.W. 363 (Tex. App.—Houston [14th Dist.] 1995, no writ)	47-48
<i>MBank El Paso, N.A. v. Sanchez</i> , 836 S.W.2d 151 (Tex. 1992)	7, 50
<i>McComb v. National Cas. Co.</i> , 994 F. Supp.2d 918, 923-24 (N.D. Ill. 2013)	57
<i>Minyard Food Stores, Inc. v. Goodman</i> , 80 S.W.3d 573 (Tex. 2002).....	45
<i>Morris v. JTM Materials, Inc.</i> , 78 S.W.3d 28 (Tex App.—Fort Worth 2002, no pet.).....	49, 52
<i>N. Am. Van Lines, Inc. v. Emmons</i> , 50 S.W.3d 103 (Tex. App—Beaumont 2001, pet. denied)	53-54
<i>N. Houston Pole Line Corp. v. McAllister</i> , 667 S.W.2d 829 (Tex. App.—Houston [14th Dist.] 1983, no writ)	52
<i>Nat’l Cas. Co. v. Lane Express, Inc.</i> , 998 S.W.2d 256 (Tex. App.—Dallas 1999, pet. denied).....	57-58
<i>Newspapers, Inc. v. Love</i> , 380 S.W.2d 582 (Tex. 1964).....	44
<i>Omega Contracting, Inc. v. Torres</i> , 191 S.W.3d 828 (Tex. App.—Fort Worth 2006, no pet.)	53
<i>Ooida Risk Retention Group, Inc. v. Williams</i> , 579 F.3d 469 (5th Cir. 2009)	46, 56
<i>Perry v. Harco Nat’l Ins. Co.</i> , 129 F.3d 1072 (9th Cir. 1997).....	46
<i>Perry v. S.N.</i> , 973 S.W.2d 301 (Tex. 1998).....	53
<i>Pierre v. Providence Washington Ins. Co.</i> , 784 N.E.2d 52 (N.Y. 2002).....	57
<i>Planet Ins. Co. v. Transport Indem. Co.</i> , 823 F.2d 285 (9th Cir. 1987).....	48
<i>Price v. Westmoreland</i> , 727 F.2d 494 (5th Cir. 1984)	46-48
<i>Proctor v. Colonial Refrigerated Transp., Inc.</i> , 494 F.2d 89 (4th Cir. 1974)	48
<i>Progressive County Mut. Ins. Co v. Carway</i> , 951 S.W.2d 108 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).....	56
<i>Rodgers v. McFarland</i> , 402 S.W.2d 208 (Tex. Civ. App.—El Paso 1966, writ ref’d n.r.e)	51
<i>Rodriguez v. Ager</i> , 705 F.2d 1229 (10th Cir. 1983).....	48
<i>Schneider v. Esperanza Transmission Co.</i> , 744 S.W.2d 595 (Tex. 1987)	51
<i>Sharpless v. Sim</i> , 209 S.W.3d 825. (Tex. App.—Dallas 2006, pet. denied)	45, 47, 49
<i>Simmons v. King</i> , 478 F.2d 857 (5th Cir. 1973).....	47-48
<i>State of Texas v. United States</i> , 866 F.2d 1546 (5th Cir. 1989).....	4
<i>T.H.E. Ins. Co. v. Larsen Intermodal Servs.</i> , 242 F.3d 667 (5th Cir. 2001).....	55-56

<i>Texas Dept. of Public Safety v. Nesmith</i> , 959 S.W.2d 443 (Tex. Civ. App.—Corpus Christi 1977, no writ)	32
<i>Thomas v. Johnson Agri-Trucking</i> , 802 F. Supp. 2d 1242, 1249 (D. Kan. 2011).....	49
<i>UPS Ground Freight, Inc. v. Farran</i> , 990 F. Supp. 2d 848, 857-860 (S.D. Ohio 2014).....	49
<i>Wardlow v. Newberry</i> , 319 S.W.2d 437 (Tex. Civ. App.—Eastland 1958, no writ).....	7-8
<i>White v. Excalibur Ins. Co.</i> , 599 F.2d 50 (5th Cir. 1979)	47

STATUTES

37 TEX. ADMIN. CODE § 4.11(a).....	4, 11-12
37 TEX. ADMIN. CODE § 4.11(b)(3)	4
37 TEX. ADMIN. CODE § 4.11(c)(1)	5-6
37 TEX. ADMIN. CODE § 4.12(a)(1)	6
37 TEX. ADMIN. CODE § 4.12(a)(2).....	26
37 TEX. ADMIN. CODE § 4.12(a)(4).	27-28
37 TEX. ADMIN. CODE § 4.12(b)(2)	26
37 TEX. ADMIN. CODE § 4.12(b)(10)	8
37 TEX. ADMIN. CODE § 4.15	14
37 TEX. ADMIN. CODE § 4.21	11
37 TEX. ADMIN. CODE § 16.9(c)(4).....	22
TEX. TRANSP. CODE § 522.004.....	12
TEX. TRANSP. CODE § 522.0235.....	18
TEX. TRANSP. CODE § 522.027.....	18
TEX. TRANSP. CODE § 642.002.....	16
TEX. TRANSP. CODE § 643.051	14
TEX. TRANSP. CODE § 644.002(a)	4
TEX. TRANSP. CODE § 644.051(a)(2)	4
TEX. TRANSP. CODE § 644.252.....	11

RULES

TEX. R. EVID. 803(6)	32
TEX. R. EVID. 803(8)	32

REGULATIONS

49 C.F.R. § 177.823	29
---------------------------	----

49 C.F.R. § 365.106	6
49 C.F.R. § 376.12(c)(1)	46
49 C.F.R. § 380.503	8
49 C.F.R. § 380.505	8-9
49 C.F.R. § 380.507	8
49 C.F.R. § 380.509	8
49 C.F.R. § 380.509(b)	9
49 C.F.R. § 380.511	9
49 C.F.R. § 382.103	9
49 C.F.R. § 382.201	9
49 C.F.R. § 382.207	9
49 C.F.R. § 382.209	10
49 C.F.R. § 382.213	9
49 C.F.R. § 382.215	9
49 C.F.R. § 382.301	9
49 C.F.R. § 382.303	9
49 C.F.R. § 382.305	10
49 C.F.R. § 382.307	10
49 C.F.R. § 382.309	10
49 C.F.R. § 382.401(b)(1).....	10
49 C.F.R. § 382.401(b)(2).....	10
49 C.F.R. § 382.401(b)(3).....	10-11
49 C.F.R. § 382.401(b)(4).....	11
49 C.F.R. § 382.413	11
49 C.F.R. § 383.111	12
49 C.F.R. § 383.113	12
49 C.F.R. § 383.21	13
49 C.F.R. § 383.23	12
49 C.F.R. § 383.31	13
49 C.F.R. § 383.33	13
49 C.F.R. § 383.5	12
49 C.F.R. § 383.51	13
49 C.F.R. § 383.71	12

49 C.F.R. § 383.71(a).....	12-13
49 C.F.R. § 383.72	13
49 C.F.R. § 385.13	14
49 C.F.R. § 385.19	14
49 C.F.R. § 385.301	13
49 C.F.R. § 385.301(a).....	6
49 C.F.R. § 385.305	6
49 C.F.R. § 385.307	13
49 C.F.R. § 385.319(c).....	13-14
49 C.F.R. § 385.5	14
49 C.F.R. § 387.15	15, 55-56
49 C.F.R. § 387.31	14
49 C.F.R. § 387.33	14
49 C.F.R. § 387.39	15
49 C.F.R. § 387.7	14
49 C.F.R. § 387.7(b)(3).....	58
49 C.F.R. § 387.9	14
49 C.F.R. § 390.11	7, 15
49 C.F.R. § 390.15(b)	16
49 C.F.R. § 390.15(b)(1).....	16
49 C.F.R. § 390.15(b)(2).....	16
49 C.F.R. § 390.17	16-17, 17
49 C.F.R. § 390.19(a).....	16
49 C.F.R. § 390.200	6
49 C.F.R. § 390.21	16
49 C.F.R. § 390.29	16
49 C.F.R. § 390.3(a).....	7, 15
49 C.F.R. § 390.3(e).....	15
49 C.F.R. § 390.3(e)-(f)	7
49 C.F.R. § 390.5	4-5, 46, 50
49 C.F.R. § 391.11	17-18
49 C.F.R. § 391.15	18

49 C.F.R. § 391.21(a).....	19
49 C.F.R. § 391.21(b)	19
49 C.F.R. § 391.21(b) (10).....	20
49 C.F.R. § 391.21(b) (11).....	19-20
49 C.F.R. § 391.23	20
49 C.F.R. § 391.23(a)(2).....	20
49 C.F.R. § 391.23(b)	20
49 C.F.R. § 391.23(c)(1).....	20
49 C.F.R. § 391.23(d)-(e).....	23
49 C.F.R. § 391.25	20
49 C.F.R. § 391.25(c).....	20
49 C.F.R. § 391.27	20
49 C.F.R. § 391.27(d)	20
49 C.F.R. § 391.31	21
49 C.F.R. § 391.31(d)	21
49 C.F.R. § 391.31(e).....	21
49 C.F.R. § 391.31(g)	21
49 C.F.R. § 391.41	22
49 C.F.R. § 391.41 (a)(1)(i).....	21, 22
49 C.F.R. § 391.41 (b)	21-22
49 C.F.R. § 391.49	21
49 C.F.R. § 391.51(b)	23
49 C.F.R. § 391.51(c).....	23
49 C.F.R. § 391.53(a).....	23
49 C.F.R. § 392.3	23
49 C.F.R. § 392.4	23-24
49 C.F.R. § 392.5(a).....	24
49 C.F.R. § 392.5(c).....	24
49 C.F.R. § 392.5(d)	24
49 C.F.R. § 392.6	24
49 C.F.R. § 392.60	24
49 C.F.R. § 392.71	24
49 C.F.R. § 392.9a(a).....	7

49 C.F.R. § 395.1	25
49 C.F.R. § 395.1(e)(1)(i)	27
49 C.F.R. § 395.15	26
49 C.F.R. § 395.15(j)	26-27
49 C.F.R. § 395.3	25
49 C.F.R. § 395.5	25
49 C.F.R. § 395.8(a)(1)	26
49 C.F.R. § 395.8(a)(1)(i)	27
49 C.F.R. § 395.8(a)(1)(ii)	27
49 C.F.R. § 395.8(a)(1)(iii)	27
49 C.F.R. § 395.8(a)(1)(iv)(A)	26
49 C.F.R. § 395.8(a)(1)(iv)(B).....	26
49 C.F.R. § 395.8(a)(1)(iv)(C).....	26
49 C.F.R. § 395.8(f)(1)	27
49 C.F.R. § 395.8(f)(2)	27
49 C.F.R. § 395.8(f)(7)	27
49 C.F.R. § 395.8(i)	27
49 C.F.R. § 395.8(k)(1).....	27
49 C.F.R. § 395.8(k)(2).....	27
49 C.F.R. § 396.11(a)(1)	28
49 C.F.R. § 396.11(c).....	28, 50-51
49 C.F.R. § 396.11(c)(2).....	28-29
49 C.F.R. § 396.13	29
49 C.F.R. § 396.17	29
49 C.F.R. § 396.17(e).....	50
49 C.F.R. § 396.19	29
49 C.F.R. § 396.21	29
49 C.F.R. § 396.3(c).....	28
49 C.F.R. § 396.5	28
49 C.F.R. § 396.7(a).....	28
49 C.F.R. § 396.9	28
49 C.F.R. § 396.9(b)	28
49 C.F.R. § 396.9(c).....	28

49 C.F.R. § 396.9(d)	28
49 C.F.R. § 396.9(d)(2)–(d)(3)	28
49 C.F.R. § 396.9(d)(3)(ii)	28
49 C.F.R. § 397.1	29
49 C.F.R. § 397.2	29
49 C.F.R. § 397.5	29
49 C.F.R. § 397.7	29
49 C.F.R. § 40.25	11
49 C.F.R. §§ 392.10–392.16	24
49 C.F.R. §§ 392.22–392.25	24
49 C.F.R. §§ 392.7-392.9	24
49 C.F.R. §§ 40.281-40.313	10
49 C.F.R. Ch. III	17
49 C.F.R. Pt. 387	57
62 Fed. Reg. 16370	50
62 Fed. Reg. 16427	50
70 Fed. Reg. 58065	57
75 Fed. Reg. 4305	17
82 Fed. Reg. 5292	6
<u>OFFICIAL DOCUMENTS</u>	
Fed. Motor Carrier Safety Admin., Report to Congress on the Large Truck Crash Causation Study (2005)	1-2
Fed. Motor Carrier Safety Admin., Report to Congress on the Large Truck and Bus Crash Facts (2015)	2

**SHIFTING INTO FIRST:
EARLY DEVELOPMENT OF THE
COMMERCIAL TRUCK CRASH CASE**

By Mike Davis

Large commercial trucks account for a disproportionate percentage of the injuries and deaths occurring on American roadways. When a large truck collides with a passenger vehicle, the passenger vehicle loses. In fatal crashes involving a large truck and a passenger vehicle, the persons killed or injured are usually the occupants of the passenger vehicle.

The Federal Motor Carrier Safety Administration (FMCSA) conducted a study in which it gathered data from crashes involving large trucks between 2001 and 2003 to report to Congress. The FMCSA reported that, during the 33-month study period, there were approximately 141,000 fatal or injury causing crashes involving large trucks.¹ FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, REPORT TO CONGRESS ON THE LARGE TRUCK CRASH CAUSATION STUDY (2005), <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/ltccs-2006.pdf>. According to the FMCSA's report, two-thirds of the crashes caused by large trucks were attributable to either the truck driver's failure to recognize a potential crash risk as a result of inattention, distraction, or failure to observe, or the driver's poor decision-making, such as driving too fast for conditions, following too closely, misjudging the speed of other vehicles, or making incorrect assumptions about the other driver's actions. *Id.* at 12. More than 60% of the crashes caused by large trucks resulted from one of two types of

¹ Large truck was defined as a truck with a gross vehicle weight rating greater than 10,000 pounds.

driving failures—driving outside the truck’s proper lane of travel or loss of control. *Id.* at 13.

Nearly a decade later, the statistics are still sobering. In 2015, 4,067 people were killed and 116,000 injured in crashes involving large trucks and passenger vehicles. FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, LARGE TRUCK AND BUS CRASH FACTS 2015, at 17 & 23 (2017). <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/LTCF2015%20Early%20Release.pdf>. Between 2005 and 2009, fatal crashes involving large trucks and buses increased 34%, and injury crashes increased 62%. *Id.* at 3.

Texas has the dubious distinction of leading the nation in trucking injuries and deaths. In 2015, there were 474 fatal crashes in Texas, resulting in 561 deaths. *Id.* at 40-41. Texas’s 561 deaths in truck wrecks accounted for over 13% of the fatalities suffered in truck wrecks in the entire country in 2015, and are over 52% higher than the number of deaths from truck wrecks reported by the state that had the next highest fatality rate from truck crashes—California. *Id.* at 40.

TRUCK CRASHES DIFFER FROM CAR CRASHES

In addition to the increased severity of injury when a vehicle weighing tens of thousands of pounds collides with a vehicle weighing only a few thousand pounds, truck wrecks differ from car wrecks in several other significant respects. Trucking companies and truckers are controlled by an extensive framework of federal and state regulation and, as a general rule, most trucking companies and truckers are in violation of these regulations every day. Truck wreck cases also require much more investigation into the pre-wreck conduct of both the truck driver and the trucking company, the driver’s training, and the condition of the vehicle than would ordinarily be involved in a routine

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Shifting Into First: Early Development of the Commercial Truck Crash Case

Also available as part of the eCourse

[2018 The Car Crash eConference](#)

First appeared as part of the conference materials for the
2018 The Car Crash Seminar session

"Shifting Into First: Early Development of the Commercial Truck Crash Case"