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TRANSPORTATION LAW UPDATE



TIMOTHY J. ABEEL | CHAIR
tabeel@rawle.com

Rawle & Henderson LLP
Commercial Motor

Vehicle Section:

PARTNERS

Timothy J. Abeel

Delia A. Clark

Robert A. Fitch

Nigel A. Greene

Anthony D. Luis

Gary N. Stewart

OF COUNSEL

Diane B. Carvell

David R. Chludzinski

Sonia Di Valerio

PHILADELPHIA

(215) 575-4200

NEW YORK CITY

(212) 323-7070

LONG ISLAND

(516) 294-2001

NEW JERSEY

(856) 596-4800

HARRISBURG

(717) 234-7700

PITTSBURGH

(412) 261-5700

DELAWARE

(302) 778-1200

www.rawle.com

“He Said/She Said”: How to Prove Your Client’s Case with an Event Data Recorder



Gary N. Stewart

In trucking litigation, we frequently hear and use the terms “ECM,” “download,” and “black box” when referring to the electronic control module data available for download from a tractor involved in a collision. This data is very helpful in establishing the speed and braking of a vehicle immediately prior to impact and can help determine the veracity of a litigant’s statements concerning the

accident. However, the ECM data is not always available after a collision due to 1) an electrical short, 2) moving of the tractor after an accident, and/or 3) vehicle damage. In addition, as many of us know, the specific make, model, and—probably most importantly—the year can affect the data that is present.

During litigation, not preserving or inadvertently overriding this data could result in spoliation claims or adverse inferences against clients.

Always remember to determine if an involved passenger car or “four-wheeler” has an Event Data Recorder (“EDR”) available for download immediately following the collision or when a lawsuit is received.

An EDR is a tiny microcomputer that is part of the airbag control module and does more than simply monitor your airbags. EDR records motor vehicle crash information from one’s vehicle. Specifically, information from these devices can show what your vehicle was doing before, during, and after a crash or event. In most vehicles, there is not even a need for the airbag to deploy to capture the data, as the EDR can activate from sudden braking, swerving, or impact.



Jolee Bovender

Most EDRs are programmed to record data in a continuous loop, writing over information again and again until a vehicle is in a collision. When an accident occurs, the device automatically saves data from immediately before, during, and after an incident. Some EDRs are equipped to save a number of collisions, providing data on the past three or four collisions or events that a vehicle was involved in.

For litigation purposes, EDR provides an objective and accurate way of determining the truth of an accident, especially when there are conflicting stories from the individuals involved. Information from it may also be a useful tool in mitigating damages from a biomechanical standpoint, especially in low-impact accidents routinely seen in metropolitan areas that involve tractor-trailers making deliveries.

A biomechanical engineer can review the speed, directional movement, and other data of a vehicle to determine what effect Δv forces had on an occupant's body during a collision. If these forces are minimal, there is a valid argument that a plaintiff's alleged injuries were pre-existing or unrelated to the motor vehicle accident.

Lastly, this data can show whether the plaintiff was involved in multiple collisions and/or subsequent collisions, even if it is stated that he or she was not involved in any other motor vehicle accidents.

We all have seen cases where the plaintiff and the defendant have completely different versions of events on how the motor vehicle accident occurred. For example, a plaintiff could claim that a commercial motor vehicle driver ("CMV driver") backed into his vehicle, while the defendant CMV driver could claim that the plaintiff ran into the back of his truck or that the plaintiff was in the CMV driver's blind spot. This presents a classic "he said, she said" motor vehicle

accident and more often than not, the plaintiff's version will be believed.

Recently, we were faced with a "he said, she said" situation where the plaintiff's vehicle had an EDR. As such, we retrieved the EDR data from the plaintiff's vehicle to determine what occurred. The EDR data showed that the plaintiff's car was involved in four collisions, with the most recent frontal collision documenting that the vehicle accelerated forward immediately prior to the collisions occurrence. This data provided valid electronic evidence that supported the CMV driver's version of events that he was rear-ended by the plaintiff.

Not only was this EDR data able to show what happened during the accident, it showed what speed the plaintiff's vehicle was traveling when the accident occurred. By retaining a biomechanical engineer, we were able to determine that the impact of the accident was no more than what would be exerted on the plaintiffs' body from the plaintiff's daily recreational activities or chiropractic sessions. This objective information was valuable to our defense.

Although EDR data is a valuable litigation tool, there are potential downsides, including expense, availability, and accuracy. Retrieval and interpretation of the EDR data is expensive, as it requires hiring someone with specialized training and tools to extract and interpret the data. You will also want an expert report on this data to produce to opposing counsel. Additionally, if taken further, you may want to have a doctor and/or biomechanical expert review this data to determine what "g" forces were applied to the plaintiff's body and if the forces applied are consistent with the plaintiff's alleged injuries.

Unfortunately, not all cars are equipped with EDR data, especially older, foreign vehicles. For example, it was not

until 2014 that Volkswagen began utilizing EDR data in its EOS model. A quick review of the vehicle year, make, and model with your attorney will confirm whether a claimant's vehicle has an EDR.

Lastly, some limitations to the data are present. Many EDRs do not show the date that the collision(s) occurred, which could leave one guessing, years after the subject accident, which event recorded was the actual collision or if the subject collision was recorded over. Although the EDR download does not have to be done immediately following the accident like with some ECMs, EDR data of a collision typically will be erased after approximately 250 key cycles. This is something that the expert that is retained

can clarify after the initial determination is made that there is an EDR. Because of the potential for inaccuracy in the EDR data, it is recommended the information be obtained for review by your attorney and expert to determine if the EDR data is consistent with the facts and circumstances from your accident.

In conclusion, immediately after an accident occurs involving a passenger car, we recommend identifying year, make, and model to learn whether it has an EDR, then requesting to download it and/or requesting that the claimant preserve this information. Please note that some states require written permission of the vehicle owner to download the EDR.

Gary N. Stewart is a partner in the Commercial Motor Vehicle Section in our Harrisburg office. Gary is admitted to practice in Pennsylvania, New Jersey, Massachusetts, Connecticut, Vermont and Rhode Island, as well as before the U.S. District Courts for the Eastern, Middle and Western Districts of Pennsylvania, the District of New Jersey, the District of Massachusetts, the District of Rhode Island, the District of Connecticut and the U.S. Court of Appeals for the First and Third Circuits. He graduated *magna cum laude* from the Harrisburg campus of Widener University School of Law. Gary was the recipient of the James C. Crumlish Jr. Award for Excellence in Scholarship and Administrative Law. He received his undergraduate degree from the U.S. Merchant Marine Academy at Kings Point, New York, and holds U.S. Coast Guard professional licenses as Master of Oceans, Steam or Motor Vessels up to 1600 gross tons as well as Chief Officer, unlimited tonnage, all oceans. Gary served as the law clerk for the Honorable Rochelle Friedman, Commonwealth Court of Pennsylvania in Harrisburg. He has been selected by his peers as a Transportation/Maritime Pennsylvania Super Lawyer in 2016, 2012, 2011, 2010, 2009 and 2007. He is a member of Rawle & Henderson LLP's Executive Committee.

Gary can be reached at (717) 234-7730 • gstewart@rawle.com

Jolee Bovender is an associate in our Harrisburg office. She concentrates her practice on the defense of commercial motor vehicles and their insurers and is experienced in all aspects of general litigation. Jolee earned her J.D., *cum laude*, from Widener University School of Law. While in law school, she clerked for the Honorable J. Michael Eakin of the Supreme Court of Pennsylvania as well as the Honorable John F. Cherry of the Dauphin County Court of Common Pleas. She served as a certified intern at the Dauphin County District Attorney's office and also with a private law firm in Dillsburg, Pennsylvania. In addition, Jolee was on the Dean's List at Widener and was a student member of the James S. Bowman Inn of Court. She served as a senior staff member of the *Widener Law Journal*. Her academic survey on the Pennsylvania Right-to-Know law was published in the *Widener Law Journal* in 2013. In 2011 she studied abroad in Lausanne, Switzerland. She earned her B.A., *magna cum laude*, from East Stroudsburg University. She has volunteered with the Disability Rights Network of Pennsylvania, and with Wills for Heroes. Jolee is admitted to practice in Pennsylvania and New Jersey, as well as the U.S. District Court for the Middle District of Pennsylvania.

Jolee can be reached at (717) 234-1006 • jbovender@rawle.com

NEW YORK METRO SUPER LAWYER



Robert A. Fitch

CMV Partner **Robert A. Fitch** has been named a **2016 New York Metro Super Lawyer** by the publishers of *Law & Politics*. Super Lawyers selects attorneys each year for recognition through a rigorous nomination process that includes peer review by practice area and independent research on candidates. Only the top 5% of the lawyers in the New York metro area are chosen annually for this honor. Bob was also selected as a Super Lawyer in 2013, 2014 and 2015. He is the resident partner in the Rawle & Henderson LLP New York City office. Bob concentrates his practice in the defense of architects and engineers, construction, medical and oral surgery malpractice claims, and commercial motor vehicle litigation. He received his undergraduate degree from Syracuse University and his J.D. from Syracuse University College of Law. He is admitted to practice in New York since 1974, as well as in federal courts in Southern, Eastern and Northern Districts of New York and the Second Circuit Court of Appeals. He has tried over 100 cases to verdict and is a member of the Defense Research Institute, Federal Bar Council, PIAA and Trucking Industry Defense Association. He has a peer review rating by Martindale-Hubbell of AV (the highest).

Bob can be reached directly at: (212) 323-7060 • rfitch@rawle.com

ABA TIPS



Nigel A. Greene

Nigel A. Greene, a partner in our Philadelphia office, has been appointed Vice-Chair of the **ABA Tort Trial and Insurance Practice Section (TIPS) Commercial Transportation Litigation General Committee** for the 2016-2017 fiscal year. His appointment is in recognition of his professional abilities and reputation among 24,000 TIPS members. This will be the third one-year term that Nigel has served in this position.

Nigel focuses his practice on the defense of commercial motor vehicles, municipalities, commercial general liability, and premises liability matters. In addition, he serves as an arbitrator in Philadelphia County. He is admitted to practice in the state courts of Pennsylvania, the U.S. District Courts for the Eastern and Middle Districts of Pennsylvania and the U.S. Courts of Appeals for the Third Circuit. He received his J.D. from Georgetown University Law Center in 1994 and his B.A. from the Virginia Polytechnic and State University in 1989.

Nigel can be reached directly at: (215) 575-4278 • ngreene@rawle.com

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