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News Story

Black box data plays role in settlement

By *GUY LORANGER, Staff Writer*

Event data recorders were designed to provide auto manufacturers with information that could be used to make cars safer.

As Raleigh attorney Jay Trehy discovered during a recently resolved personal injury case, these "black boxes" can also have a major use in accident litigation.

Trehy's client had been severely injured last January after his sport utility vehicle collided with a tractor-trailer that was attempting a U-turn on a four-lane highway in Vance County.

The trucking company's insurer settled the property damage claim, assumed title to the client's totaled SUV and downloaded data from a black box. The data had been tapped from the SUV's powertrain control module.

Typically, black box data can provide information about a car's braking, speed, rpm, throttle and air-bag deployment for the moments immediately before, during and after an accident.

In this case, the data showed that Trehy's client was driving at 6 mph above the speed limit before impact. The insurer used it to bolster a contributory negligence argument.

"I've had situations before where they were interested in seeing the data, but it had never played a role like this before," said Trehy, whose client settled his personal injury claim for \$650,000. "More and more, I think, we're going to see litigation outcomes dependent on these."

Sean Dennis, a mechanical engineer with Cary-based Accident Research Specialists, agreed. He said the use of black box data in civil and criminal cases has increased during the past decade, especially in cases involving commercial vehicles.

And Dennis said the data's use could kick into higher gear in September 2012 when National Highway Traffic Safety Administration regulations take effect.

Those regulations, codified at 49 CFR Sect. 563, would require auto manufacturers to provide commercially available systems that can be used to retrieve event data recorder information and would require that the information be standardized.

"What they are mandating to be recorded will go above and beyond what we're seeing now. It won't be only standardized data, but it will be more data," Dennis said.

"The clients like seeing the numbers and seeing the report, and I'm sure juries like seeing the numbers because they come from an impartial witness. The computer is just doing the recording. It doesn't care who is driving or what the situation is."

More than safety purposes

According to *AutoWeek* magazine, event data recorders were first used in race cars in the 1970s, but they did not become a common feature in passenger vehicles until General Motors began using them in their 2000 model-year products.

By 2006, according to the magazine, more than 64 percent of manufacturers were equipping cars with EDRs, which provide data that can be downloaded from an airbag control module or a powertrain control module that Dennis called the "computer brain" of the car.

"It's real-world crash data," Dennis said. "For [manufacturers] it's for doing analysis of their own systems and vehicles to make sure everything is working OK. The secondary effect is for me and the police to get the data."

Gary E. Kilpatrick, a Jamestown-based mechanical engineer and accident reconstruction expert, said that black box data currently can be retrieved from GM, Ford and Chrysler cars and their affiliated makes and models.

"The information that the newer cars collect, especially those made in the last three or four years, is very accurate," Kilpatrick said. "They continuously collect this information from the PCM and provide a snap shot of when the crash took place."

Currently, there is only one commercially available system of hardware and software that can be used to download the black box data the Bosch Vetronix retrieval system Dennis said.

But the system cannot be used on all models. Black box data from Toyota cars, for instance, can only be retrieved with the manufacturer's system.

"Right now, it's a situation where they have to be involved in some kind of product liability litigation before they'll [download the data] for you," Dennis said. "You hear tales of criminal cases, where a judge will put out an order requiring them to do it, but even then, it's usually under seal."

Of course, once the 2012 NHTSA regulations kick in, the data from those cars will become accessible. However, even as black box data becomes more of a standard presence in litigation, Dennis didn't see the nature of his job changing.

"The general rule of thumb with data from black boxes is that you never substitute the data for a thorough reconstruction of the accident," he said. "It is there as a tool to back up what the reconstruction shows, but it is not designed to be a standalone answer."

Making a case

Black box data also can't entirely knock out all other evidence and arguments in a case.

For instance, in Trehy's client's case, the black box data bolstered the defendant's contributory negligence argument and "made it more viable than it otherwise would have been," Trehy said.

"But we still felt that we would have been able to meet that challenge at trial."

In the lawsuit, which was removed from state to federal court last July, Trehy's client alleged that the defendant's tractor-trailer had been traveling in the opposite direction when it began to make a slow U-turn in a median turning break.

The client claimed that he hit the brakes on his Mercury SUV but not in time to avoid hitting the trailer, which had allegedly encroached across both lanes.

The client crashed under the side of the trailer and was trapped in his car for nearly two hours before being extracted by rescuers.

He suffered a torn tendon; brain and head injuries; and a broken arm, sternum, ribs and nose.

The complaint alleged that the driver of the tractor-trailer was negligent because he had failed to yield, keep a proper lookout or have certain operable lights, including the right side rear hazard light, low-beam headlight and rear turn signal.

The defendant countered by arguing that Trehy's client had negligently failed to see and avoid

the slow-moving rig as it turned.

During mediation, the defendant presented the black box data.

The company had used the moment when Trehy's client had applied his brakes, added time and distance for human perception reaction time and calculated the approximate distance from the point of impact when the client would have noticed the trailer.

The data also showed that the client had set his cruise control at 61 mph, or 6 mph above the posted speed limit. The trucking company argued that this speed amounted to negligence per se.

Trehy said his client contended that the excess speed had not been the proximate cause of the nature or extent of his injuries.

"If we were at trial, we could have almost guaranteed that every juror and probably the judge had driven to that courthouse at more than 5 mph above the speed limit," Trehy said.

"The idea that you could be driving to work, having vehicles pass you as you traveled in the slower right-hand lane, and then be called contributorily negligent because you were a few miles per hour above the posted speed limit just shows the arbitrariness of contributory negligence."

A frustrating aspect of the litigation, according to Trehy: The trucking company did not have a policy or procedure for retrieving data from the black boxes in its own vehicles.

In this case, the tractor-trailer had continued on its trip after the accident, which meant that the cyclically stored data from the crash was destroyed.

That data would have helped in reconstructing the accident Trehy said.

But, according to the defendant's attorney, Joseph E. Wall of Raleigh, the tractor-trailer's black box data "wouldn't have made any difference." The defendant's speed, Wall said, was not at issue.

"It was a question of whether it had failed to yield the right of way to oncoming traffic, and whether the oncoming vehicle should have seen it," he said.

Wall recalled a 2005 case in which he had represented a tractor-trailer driver who had collided with another tractor-trailer.

An eyewitness in that case had said that the plaintiff was traveling at 70 mph, while an electronic control module in the plaintiff's truck kept the rig from going faster than 65 mph.

The jury apparently rejected the black box evidence and entered a "no negligence" verdict in favor of Wall's client, the defendant.

"I've never tried a case where the downloaded data was central to the case," Wall said, "but I think a jury could be swayed."

Ultimately, this case illustrated that black box data can serve as a "double-edged sword," Wall said.

"Here, it gave us an argument that the plaintiff was going faster than he should have gone," he said. "On the other hand, if I'd been representing a trucker, and he'd gone too fast, it could have hurt us. It can cut either way."

Questions or comments may be directed to guy.loranger@nc.lawyersweekly.com

Type of action: Trucking accident

Injuries alleged: Borderline to mild traumatic brain injury; subdural hematoma with mass effect in temporal lobe; fractures (left proximal ulnar fracture, left first to eighth ribs; right first rib; manubrium; left maxillary sinus); avulsion of triceps tendon

Case name: *Joyner v. Windy City Trucking*

Case number: 5:08-CV-285-F

Court: U.S. District Court for the Eastern District of North Carolina

Name of judge: Hon. James C. Fox

Verdict or settlement: Settlement (mediated)

Name of mediator: Alan Pittman

Amount: \$650,000 with FEHBA lien reduced to \$35,000

Special damages: \$70,700 (medical bills) and \$25,000 (lost wages)

Plaintiff's experts: Dr. Patrick Logue, neuropsychology (Durham); Mike Sutton and Aaron Kiefer, accident reconstruction (Cary)

Insurance carrier: Carolina Casualty Insurance Company

Plaintiff's attorney: Jerome P. "Jay" Trehy Jr. of Twiggs, Beskind, Strickland & Rabenau (Raleigh)

Editor's note: The information in Lawyers Weekly's verdicts and settlements reports was submitted by the counsel for the prevailing party and represents the attorney's characterization of the case.

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