

PRIVACY

WHILE YOUR HOME IS YOUR CASTLE WHERE PRIVACY IS CONCERNED, NOT SO MUCH FOR YOUR CAR: OR WHAT DOES AUTOMOTIVE TECHNOLOGY, PRIVACY AND DRUNK DRIVING HAVE TO DO WITH EACH OTHER?

by Wendy G. Hulton

For a number of years, auto manufacturers have been quietly installing something akin to black boxes in passenger cars. Originally, these devices were solely for airbag deployment, but today, these boxes or SDM's (Sensing Diagnostic Modules) provide much more data. While the SDM data provides manufacturers with real world crash information, this data can also be put to other uses.

This takes us to the early morning hours of March 20, 2010 in Kamloops, British Columbia, when after a lengthy drinking bout, Wayne Fedan lost control of his 2004 GMC Sierra 2500 pick-up truck. Neither 61 year old Fedan, nor his two drinking companions were wearing seatbelts. Twenty year old Brittany Plotnikoff was ejected from the vehicle and died at the scene. Her thirty-eight year old boyfriend, Kenneth Craigdallie, died shortly thereafter at the hospital. The court did not permit the Crown to use the results of the blood sample taken from Fedan at the hospital because the police had failed to read him his legal rights beforehand, which allowed Fedan to avoid being convicted for impaired driving, but following the accident, the police were able to obtain a search warrant that authorized a forensic search and seizure of blood, DNA, fingerprints, personal effects, and any documents in what was left of Fedan's truck. The warrant, however, did not specifically specify the seizure of the manufacturer-installed "SDM" embedded underneath the floor of the driver's seat or a search of its data.

The collision analyst and accident reconstruction expert relying on prior legal advice, downloaded the SDM's data, which revealed that: (i) the speed of the vehicle one second before the collision was 106 km/hour; (ii) the throttle was at 82% in the four seconds before the brakes were engaged; and (iii) the brakes were applied only in the last second before the collision.

A voir dire was held on the admissibility of the SDM data. Fedan did not testify at the voir dire and the court held that the search of the SDM did not violate Fedan's section 8 Charter right and admitted the SDM data into evidence.

On Fedan's appeal of his conviction on two counts of dangerous driving causing death, he submitted that: (i) the presumed reasonable expectation of privacy in his vehicle provided the basis for a presumed reasonable expectation of privacy in the device which was a component of his vehicle; (ii) although destroyed in the accident, he asserted that he had not abandoned his privacy interest in the vehicle;

(iii) his informational privacy interest in the SDM data is analogous to an "onboard computer" or a "black box"; (iv) the informational content of the SDM was not visible to the public eye in that a witness would not have been able to observe the precise speed of the vehicle, the extent of its acceleration and when it braked; and (v) the seizure of the SDM was intrusive, as admittedly, it was not an easy task to remove the device.

In considering whether Fedan's presumed expectation of privacy in the SDM translated to an objectively reasonable expectation of privacy in its data, the British Columbia Court of Appeal noted that context is everything. The court pointed out that the data recovered by the SDM provided no personal information about Fedan. The captured information pertained only to the use of the vehicle in a five-second window of time before the deployment or near-deployment event. Nor did the court buy the analogy between the SDM and a personal computer. After undertaking a normative assessment of the reasonableness of Fedan's privacy claim, the court said it was difficult to see how an operator of a vehicle might be found to have reasonably intended the last five seconds of information pertaining to his or her driving before a collision to be private. The Supreme Court of Canada denied Fedan's application for leave to appeal.

R. v. Fedan, 2016 BCCA 26 (36970)

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