

New York Law Journal

TUESDAY, JANUARY 25, 2005

LITIGATION REVIEW



New Decision Paves Way to Greater Use of "Black Box" Evidence

BY KEVIN SCHLOSSER

Based upon what is likely to become a leading decision by the Supreme Court in Nassau County, the brave new world of litigation is about to welcome a new technological creature that could very well rival e-mail as a compelling force in the adjudication of civil claims. On January 5, 2005, Justice Alan L. Honorof issued his decision in *People v. Slade*, a criminal manslaughter case arising from an automobile collision, ruling that information from a car's "black box" can be admitted into evidence at trial. Although the decision arises from a criminal case, the opinion obviously has broad implications for any civil litigation involving automobile accidents.

Since 1990, certain manufacturers have been installing a device known as a sensing diagnostic module ("SDM") in passenger cars. Because they record data similar to the devices installed on airplanes and trains, the SDM has been informally referred to as the automobile's "black box." Although the primary purpose of the SDM has been to manage airbag deployment, the boxes have become increasingly more "intelligent" over the years. The SDM can now reveal critical information concerning the circumstances of a collision just seconds before impact, including the speed of the vehicle, engine RPMs, how far the accelerator pedal was pressed, if the brakes were applied,

whether the driver's seatbelt was buckled, changes in velocity and what warning lights were on. Moreover, a company known as Vetronix Corporation has produced a mechanical device known as a "crash data retrieval system" ("CDR"), which allows for downloading this information into a laptop computer with the relative ease of connecting a wire to a plug located under the car's dashboard, which will then generate reports for use in accident reconstruction. According to data compiled by Vetronix, the CDR can retrieve SDM data in Ford, Lincoln and Mercury models and a number of General Motors models, including Buick, Cadillac, Chevrolet, GMC, Hummer, Isuzu, Oldsmobile, Pontiac and Saturn. It is anticipated that many other cars will include black boxes of some type in the near future. Indeed, at least one bill has been introduced in the New York State Assembly requiring every new motor vehicle registered in the State of New York to be equipped with a black box device.

Legal Issues

It does not require much imagination to anticipate how the data from a car's black box might be used in civil litigation. As a result of this emerging technology, courts are likely to face various legal issues. First, is the data obtained from the black box admissible evidence? If it is admissible, what weight should be given to the data in resolving the relevant issues? That is, can the results be relied upon as conclusive evidence supporting a motion for summary judgment or should

the data be used simply as corroborative evidence, along with other factual findings and testimony of eyewitnesses? Finally, what are the consequences if data from the black box is not preserved or made available in discovery?

In *People v. Slade*, Justice Honorof was confronted with a number of issues arising from the Nassau County Police Department's removal of the black box from the Corvette driven by one of the defendants, who was accused of traveling 100 miles per hour along side the other defendant's car, resulting in a fatal collision with a third vehicle and the death of its two occupants. Once the black box was removed, the police downloaded the information into their computer. After refusing to grant the defendants' motion to suppress the black box and information obtained from it, finding that a subsequent search warrant validated the police's seizure of the black box, Justice Honorof addressed the admissibility of such evidence.

Applying the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), known as the "general acceptance test," the court noted that such "scientific evidence is only admissible at trial if the methodology or scientific principle upon which the opinion is based is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'" (Quoting *Frye*, 293 F. at 1014.) After conducting a full *Frye* hearing, in which the People presented an expert from California to testify regarding the scientific reliability and general acceptance of the black box, the court found that the "information provided by the technology

Kevin Schlosser is a partner and co-chair of the Litigation Department at Meyer, Suozzi, English & Klein in Mineola.

underpinning event data recorders has been relied upon for years by the government that regulates air bag safety, vehicle manufacturers in making safer air bag systems and crash researchers and reconstructionists." The court continued: "This court credits the testimony of [the People's expert] and finds the SDM, including the event data recorder, to be generally accepted as reliable in the scientific community, and therefore the *Frye* admissibility standard has been satisfied."

At least three other New York criminal trial-level decisions are consistent with Justice Honorof's opinion in *Slade*. In *People v. Christmann*, 3 Misc.3d 309, 776 N.Y.S.2d 437 (Wayne Co. 2004), the defendant was charged with speeding and failure to exercise due care resulting in a fatal automobile pedestrian accident. The State Trooper used computer equipment in his police car to download information from the SDM located in the defendant's vehicle. In a rather short analysis, the court followed a civil decision by an appellate court in Illinois in which it was held that the data recorded from an SDM was "generally accepted as reliable and accurate by the automobile industry and the National Highway and Traffic Safety Administration" and therefore satisfied the *Frye* standard.

Similarly, in *People v. Hopkins*, 2004 WL 3093274 (Monroe Co. Aug. 30, 2004), the court found "based upon its review of the cases and other supporting documentation submitted by the People, and in the absence of any contrary or contradictory evidence, that the SDM module technology has been generally accepted as reliable in the relevant scientific community." The court, therefore, accepted the data into evidence and denied a *Frye* hearing as unnecessary.

Finally, in *People v. Reynolds*, 193 Misc.2d 697, 749 N.Y.S.2d 687 (Essex Co. 2002), a vehicular manslaughter case, the court denied the defendant's motion for a *Frye* hearing, permitting the People to offer the testimony of an accident reconstruction expert, which included information from the SDM of the victim's vehicle.

Civil Implications

Although there are no known New York civil cases in which the admissibility of a black box has been determined, the reasoning followed by these criminal decisions obviously

applies equally in the civil context. As cited by the courts in *Slade* and *Christmann*, *Bachman v. General Motors Corporation*, 776 N.E.2d 262 (App. Ct., Illinois, 4th Dist. 2002) is a leading case in the civil arena. In *Bachman*, the driver and her mother brought an action against an automobile manufacturer and others for injuries the daughter suffered in an automobile accident, claiming that the automobile's airbag inadvertently deployed prior to the collision, thus causing the collision. The appellate court held that the process of recording and downloading data from the airbag sensor system was not a novel technique or method and thus both the data and related opinion testimony were admissible under the *Frye* standard.

In one of the only other relevant appellate decisions, the United States Court of Appeals for the Sixth Circuit addressed the weight to be given to certain black box data on a motion for summary judgment in *Harris v. General Motors Corporation*, 201 F.3d 800 (6th Cir. 2000). *Harris* involved a products liability claim by a driver against an automobile manufacturer, alleging that her car's airbag had been defective in deploying after an accident, causing her injuries. The District Court granted the defendant summary judgment, finding that information obtained from the black box conclusively contradicted and therefore defeated plaintiff's claim of defect. On appeal, the Sixth Circuit reversed, holding that General Motors' expert affidavit, relying upon the black box data, was insufficient in itself to justify rejecting the plaintiff's evidence as to how the accident occurred and the events thereafter. Moreover, the Court of Appeals directed the District Court to perform a "gatekeeping" analysis under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) with respect to the expert and the data received from the black box.

In addition to questions on the admissibility and weight of the black box evidence, courts are likely to confront issues of spoliation of evidence concerning the black box. In the *Christmann* decision discussed above, the court noted that it was "uncontradicted that the data in the SDM after a deployment or near deployment can or will be erased after the car ignition is turned on 250 times or if another

deployment or near deployment event occurs." The court further explained: "The events that could trigger the loss of this information include bumping the vehicle into a curb, hitting a pothole, or suddenly engaging the brakes causing a faster deceleration than that which occurred during the accident." This not only highlights the importance of obtaining information from a car's black box soon after an accident so that it can be retrieved before it is erased, but it also opens up a Pandora's box of inevitable questions as to whether and what extent a party has a duty to preserve the data where injuries have been sustained as a result of the accident in question. At the very least, counsel should ascertain if the cars involved are equipped with such a black box so that an appropriate decision can be made as to whether to preserve the data in the likely event of criminal and/or civil proceedings.

Conclusion

The Nassau County Supreme Court's decision in *People v. Slade*, accepting into evidence data and testimony arising from an automobile's black box, is likely to pave the way to greater use of such evidence in a broad array of civil cases. Those who do not address this new form of compelling evidence may be severely disadvantaged. Certainly, the Bar is now on notice of this emerging technological litigation tool.

Endnotes

1. *People v. Slade*, Supreme Court of the State of New York, County of Nassau, Index No. 0666-03, January 5, 2005, reprinted in N.Y.L.J., Jan. 18, 2005, p. 20, col. 1.
2. Information concerning the "black box" can be found on a number of useful websites. See, e.g., www.collisionsafety.net.
3. Arthur Croft, "Sensing Diagnostic Module (SDM): the Modern Motor Vehicle's 'Black Box'," *Dynamic Chiropractic*, October 22, 2001, Volume 19, Issue 22.
4. *People v. Christmann*, 3 Misc.3d 309, 776 N.Y.S.2d 437 (Justice Ct., Village of Newark, Wayne Co. 2004).
5. See www.vetronix.com/diagnostics/cdr/vehicle_list.html; www.vetronix.com/diagnostics/cdr/.
6. Assembly Bill 5971, introduced by Assembly Member Ivan Lafayette during the 2003-04 session. According to Assembly Member Lafayette's office, the bill is expected to be reintroduced during the current session.