



Straight From the Bench - May 5, 2025

Criminal Law Primer:

R. v. Attard, 2024 ONCA 616: Lower your Expectations

Overview

In *R. v. Attard*, 2024 ONCA 616, the Ontario Court of Appeal addressed pivotal issues concerning the admissibility of data from a vehicle's Event Data Recorder (EDR) in criminal proceedings. The case arose from a serious motor vehicle collision in Brampton, Ontario, where the accused, Wendel Attard, was charged with dangerous operation of a motor vehicle causing bodily harm. At the scene, police seized Attard's vehicle and extracted its EDR data without obtaining a warrant or his consent. The trial judge ruled that this warrantless seizure and data extraction violated section 8 of the Canadian Charter of Rights and Freedoms, which protects against unreasonable search and seizure, leading to the exclusion of the EDR evidence and Attard's acquittal.

Upon appeal, the Ontario Court of Appeal overturned the trial decision, holding that the seizure of the vehicle was lawful under section 489(2) of the Criminal Code. The Court further determined that, following the lawful seizure, there was no reasonable expectation of privacy in the EDR data, as the EDR was considered an integral component of the vehicle, akin to its engine or brakes. Consequently, the Court found no Charter breach and ordered a new trial.

This decision has significant implications for the interpretation of privacy rights concerning digital data stored in vehicles and the scope of lawful search and seizure in the context of criminal investigations.

Background Facts & Relevant Jurisprudence

An Event Data Recorder "EDR" is an airbag deployment device that records up to five seconds of vehicle data before a crash. Its main purpose is airbag activation on a "deployment event" – that is, on a collision. It captures limited data with respect to the speed, throttle, and braking of the vehicle in the five seconds before an event or near-deployment event. Data cannot be manually inputted into the EDR or changed.

This particular accident occurred in Brampton on Highway 50 near the Queen Street East intersection. Highway 50 is a six-lane highway which has dedicated left-hand turn lanes. One of the vehicles involved in the crash was waiting to turn left and as the driver was completing that left turn, Wendal Attard's vehicle sped through the intersection at a high speed and struck the turning vehicle. Three of the wheels of the turning vehicle came off the ground, it spun 540 degrees and Mr. Attard's vehicle slid across the road, over a median, across a sidewalk and flipped on its roof as it rolled into a ditch. Both drivers were injured and taken to hospital.

When police attended, Officer Jeff Ball, the OIC who had 14 years of experience as a police officer, suspected the crash was due to excessive speed. During the investigation, police spoke to



witnesses including a witness with a dashcam that showed Mr. Attard's vehicle travelling faster than other vehicles in the same direction.

The investigating officer testified that at the time the vehicles were seized, he was investigating the offence of dangerous driving and believed the cars contained evidence of the offence, and as well relied on a decision of the British Columbia Court of Appeal ([R. v. Fedan, 2016 BCCA 26](#)) which held that there was no reasonable expectation of privacy (REP). At the time there was also a Saskatchewan Court of Appeal case with the same finding ([R. v. Major, 2022 SKCA 80](#)). In Ontario though, the caselaw was divided on whether there was a REP in the data contained in the EDR, with some jurisprudence suggesting there was REP and police were required to obtain a warrant to search and seize the data.

At the scene of the accident, the police seized the respondent's car and the car that it hit. Both were inoperable. The police extracted the EDRs from both cars and downloaded the data they contained. The police did not obtain the respondent's consent or judicial authorization to seize his car or to extract the EDR and its data.

s. 489(2) of the [Criminal Code](#) deals with the lawfulness of a seizure and provides that every officer who is lawfully present in a place may, without a warrant, seize any thing that the officer believes on reasonable grounds

- (a) has been obtained by the commission of an offence ...;
- (b) has been used in the commission of an offence...; or
- (c) will afford evidence in respect of an offence...

In this case, the police believed the vehicle itself, including the data contained within the EDR would afford evidence in respect of an offence.

That data showed, for the five seconds prior to the collision, the vehicles' speed, engine RPM, motor RPM, brake pattern, brake oil pressure, steering input, shift position, drive mode, cruise control, and longitudinal/latitudinal acceleration. The data from the EDR revealed Mr. Attard's car was going 120 km/h 4.75 seconds before the crash, accelerated to 130 km/h 0.75 seconds before the crash, and was going 113 km/h at the time of impact. The posted speed limit was 80 km/h.



The potential offences could be either careless driving under s. 136 of the [Highway Traffic Act](#)¹ or dangerous driving under the *Criminal Code*.²

In terms of the elements of the offence of dangerous driving causing bodily harm or death, the consequences themselves are not taken as a consideration when assessing the manner of driving.

For both offences, it is the manner of driving which is at issue. The question is whether there was a departure from the standard of care of a reasonably prudent driver.

Mr. Attard was charged with dangerous operation of a motor vehicle causing bodily harm.

At trial, the issue was whether Mr. Attard's driving was a marked departure from what a reasonable and prudent driver would have done in the same circumstances.

Legal Proceedings

Before trial, the respondent challenged the admissibility of the EDR evidence. He argued that his car had not been lawfully seized pursuant to s. 489(2) of the *Criminal Code* and, even if it had been, the warrantless seizure of the EDR and search of its data violated his s. 8 Charter right to be secure against unreasonable search and seizure.³

The trial judge excluded the EDR evidence pursuant to s. 24(2) of the Charter because it was obtained without a warrant and the remaining evidence was the dashcam footage and an expert interpretation of that footage. Without the evidence of Mr. Attard's speed relative to the other vehicles and a determination of whether he was accelerating into the intersection, there was a reasonable doubt and Mr. Attard was acquitted on the charge of dangerous driving.⁴

The Crown appealed the exclusion of the EDR data.

¹ The offence of careless driving under s. 136 of the *Highway Traffic Act* requires proof that the defendant was driving a vehicle on a highway *without due care and attention or reasonable consideration* for other persons using the highway. This is a strict liability offence, meaning the prosecution only needs to prove that the accused committed the prohibited act, and does not need to establish intent or *mens rea*. However, the defendant can avoid conviction by proving that they took all reasonable care or exercised due diligence.

² The elements of the offence of dangerous driving typically include a *marked departure* from the standard of care that a reasonable person would exercise, and the driver's actions must have placed others in danger. The offence at the time s. 249(1) of the *Criminal Code* (now s. 320.13) legislated that everyone commits an offence who operates a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place.

³ [R v Attard, 2024 ONCA 616 \[Attard\]](#) at para 7.

⁴ *Ibid* at para 29.



The Ontario Court of Appeal agreed with the Crown and found there was a lawful seizure under section 489(2) which lawfully permitted the seizure of the vehicles and furthermore, that there was no reasonable expectation of privacy in EDR data.⁵

The ONCA confirmed that a lawful seizure of a vehicle extinguishes privacy interests in the vehicle and its component parts.⁶ The EDR is a component of a car just as much as the engine, steering wheel and brakes.

The trial judge had characterized the vehicle as a “place” with a reduced expectation of privacy, which took it outside of the ambit of s. 489(2)(c) which permits the warrantless seizure of “any thing”. The ONCA further held that within the meaning of s. 489(2)(c) the vehicle was a “thing” so there was legal authority for seizing the vehicle, including the EDR component.⁷

When considering the lawfulness of the EDR data extraction, the question was whether that act by the police violated Mr. Attard’s s. 8 *Charter*-protected interests. To answer that question, the trial judge had to determine whether there was a reasonable expectation of privacy in the EDR data.

The applicant bears the onus of establishing the breach. There are three broad categories of privacy interests: territorial, personal and informational.⁸ Whatever form of privacy is at issue the legal framework begins with an inquiry into whether someone has a reasonable expectation of privacy. That determination necessitates both a factual and a normative inquiry. The factual inquiry involves the circumstances of the case, the normative inquiry is broader, seeking protection for that which we ought to expect protection from a privacy perspective in a free and democratic society.⁹

At issue in this case was Mr. Attard’s informational privacy.

The test for determining whether someone has a REP asks the following:

1. What is the subject matter of the search? In this case the EDR
2. Does the accused have a direct interest in the subject matter? He did, as the driver.
3. Does the accused have a subjective expectation of privacy in the subject matter? The crown conceded Mr. Attard had a subjective expectation of privacy; and
4. Would an expectation of privacy be *objectively reasonable* in the circumstances of the case?¹⁰ This was the issue the ONCA had to grapple with.

The trial judge analogized the EDR data with a computer. The Court of Appeal found this characterization ill-fitting, as the EDR “contains no information going to the driver’s biological

⁵ *Ibid* at para 56.

⁶ *Ibid* at para 57.

⁷ *Ibid* at para 45.

⁸ *Ibid* at para 60.

See *R. v. El-Azrak*, [2023 ONCA 440](#), at para 30; *R. v. Spencer*, [2014 SCC 43](#), at para 38.

⁹ *Ibid* at para 61.

¹⁰ *Ibid*.



core, lifestyle, or personal choices, nor information that could be said to directly compromise his “dignity, integrity and autonomy”.¹¹ There is no data on driving patterns, driving history, or average driving speed. There is no data on location or GPS coordinates. EDRs are not reprogrammable and cannot be reinstalled once removed. The EDR data is limited to five seconds of information regarding the operations of the car. It has no link to any location or person. It does not identify the driver. It does not broadcast or receive data. The data provides no independent insight into the behaviours of anyone in the car.

Since the EDR data provides no personal identifiers that could link the driver to its captured data, the respondent had no reasonable expectation of informational privacy in the data after the vehicle had been lawfully seized.¹²

The court found this decision was reinforced by the fact that this data relates to the manner of driving, a public, highly regulated activity.¹³

The trial judge’s errors in law on these issues had a material bearing on Mr. Attard’s acquittal because the evidentiary gap would have been filled by the EDR data. Although the ONCA did not have to conduct a review of the trial judge’s 24(2) analysis, they found legal errors in that too.¹⁴

Consequently, the EDR evidence was determined to be admissible, and a new trial was ordered with a direction that the EDR data was admissible.¹⁵

TLDR

There is not a reasonable expectation of privacy in your vehicle’s EDR. Police can seize and extract the data from a vehicle’s EDR without a warrant if an officer believes on reasonable grounds it will afford evidence of an offence.

¹¹ *Ibid* at para 65.

¹² *Ibid* at para 67.

¹³ *Ibid* at para 68.

¹⁴ *Ibid* at para 70.

¹⁵ *Ibid* at para 85.