

Driving While Distracted: The New DUI

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As of December 2008, there were 271 million cell phones in use in the United States, representing 84% of the country's population. That's a lot of talking. One might argue that more people are linked together, in a way that years before would be unimaginable. The world is closer in communication and, one might think, a better place for it.

But what happens when all those people chatting together, texting it up, and emailing communications...are doing that while they are driving. Maybe that's a problem.

In fact, it has become an enormous problem which the states are just now beginning to address legislatively. Because cell phones – and in particular mobile text and email messaging – are relatively new technologies, society has not yet had a chance to assess the collateral damage from all this communication. But it is well recognized that these distractions while driving are perhaps the greatest current contributors to car crashes at the present time.

Drivers today can not only speak on the phone, they can surf the internet, and watch DVDs, movies, TV and videos. They can retrieve email and send text and email message. They can take pictures on their cell phones from a moving vehicle and send it to someone clear across the world while negotiating a turn. The range of distractions is endless. Plus, with the addition of new in-car technology, in-dash monitors provide a wide array of distractions such as GPS navigation and complex computer-controlled onboard entertainment systems.

The National Highway Traffic Safety Administration estimates that driving while distracted contributes to one in every four car crashes. By some estimates, in as many as half of all crashes (there were 6 million last year), cell phone use was involved.

What is “driver distraction”?

“Driver distraction” can be defined any number of ways. Some have characterized it as “misallocated attention,” any activity that takes a drivers attention away from the road, or an event or object that draws ones attention from the task of driving.

There is a difference between distraction and inattention. Distraction can be inside the vehicle or something external.

There is a phenomenon known as inattention blindness: a cognitive preoccupation with a conversation that occurs even without the need to hold the phone – hands free users do it too. It results in a slower reaction time and limits the driver’s ability to detect changes in conditions. Researchers at the University of Utah published some of t he results from a recent study in the February/March 2003 issue of the National Safety Council’s *Injury Insights*. The research demonstrated that speaking on cell phones disrupts the driver’s attention to the visual environment, leading to inattention blindness.

There is another aspect of the distraction of cell phones while driving: a recordable decrease in brain activation. A 2008 study clearly establishes the striking result that the addition of a sentence listening task such as a cell phone conversation decreases the brain activation associated with performing a driving task, despite the fact that the two tasks draw on largely non-overlapping cortical areas. Just, et al., “A Decrease in Brain Activation Associated With Driving When Listening to Someone Speak,” *Brain Research 1205* (2008), pp. 70-80.

In 2008, Americans sent 600 billion text messages. Ever wonder how many were from the driver of a moving vehicle?

According to one study, 26% of American teens admit to texting while driving; 48% of teens aged 12-17 say they have been a passenger in a car while the driver has texted behind the wheel. (Pew Research Center’s Internet & American Life Project, *Texting, Talking and Other Uses of the Cell Phone Behind the Wheel*, November 16, 2009.)

The New York Times recently reported on a Virginia Tech study showing that text messaging increased a driver's risk of collision by *23 times*. Matt Richtel, *In Study, Texting Lifts Crash Risk by Large Margin*, N.Y. Times, July 27, 2009. Moreover, a

study of young drivers in England found that reaction times of young drivers were reduced by text messaging *three times* more than by drinking alcohol to the legal limit. Helen Nugent, *Texting While Driving Is More Dangerous than Drink-Driving*, London Times, September 18, 2008.

A recent study of young drivers is frightening. The study by Monash University researchers found that texting drivers spent 400 percent more time with their eyes off the road than when not texting. Despite some compensatory behavior, these 18 to 21 year old drivers did not reduce their speed. The study provided compelling evidence that receiving and, particularly, sending text messages was detrimental to driver safety. Hosking, et al., Monash University Accident Research Centre, "The Effects of Text Messaging on Young Novice Driver Performance," February 2006; "the Effects of Text Message on Young Drivers," *Human Factors: The Journal of the Human Factors and Ergonomics Society*, August 1, 2009, p. 582.

Research on distracted driving reveals some surprising facts:

Using a cell phone use while driving, whether it's hand-held or hands-free, delays a driver's reactions as much as having a blood alcohol concentration at the legal limit of .08 percent. (Source: University of Utah)

Driving while using a cell phone reduces the amount of brain activity associated with driving by 37 percent. (Source: Carnegie Mellon)

Nearly 6,000 people died in 2008 in crashes involving a distracted driver, and more than half a million were injured. (NHTSA)

The younger, inexperienced drivers under 20 years old have the highest proportion of distraction-related fatal crashes.

Drivers who use hand-held devices are four times as likely to get into crashes serious enough to injure themselves. (Source: Insurance Institute for Highway Safety)

In 2008, 5,870 people lost their lives and an estimated 515,000 people were injured in police-reported crashes in which at least one form of driver distraction was reported on the police crash report. Distracted driving comes in various forms, such as cell phone use, texting while driving, eating, drinking, talking with passengers, as well as using in-vehicle technologies and portable electronic devices. The actual statistics for distracted-driving deaths and injuries are likely, since few people admit to having been distracted prior to a crash. There is no blood test to prove that someone was texting, and some phone records are ambiguous and inconsistent. At fault drivers are no more likely to admit they were sending a text than they are to admit being drunk.

While these numbers are significant, they likely understate the real size of the problem, since identifying distracted drivers and a distraction's role in a crash can be very difficult to determine using only police-reported data. New data sources are available to provide more details on the type and presence of driver distraction. But what more do we need to know? These distractions are known to contribute to traffic crashes in great numbers and their use is, by and large, completely discretionary.

So what means do we have to limit or eliminate these distractions?

Legislation:

Some states and municipalities have acted to ban texting while driving and/or driving with a handheld device.

States which have acted to legislate

A ban on hand-held devices has been enacted in:

- California
- Connecticut
- District of Columbia
- New Jersey
- New York
- Oregon
- Washington
- Virgin Islands

A texting ban has been enacted in:

- Alaska
- Arkansas
- California
- Colorado
- Connecticut
- District of Columbia
- Illinois
- Louisiana
- Maryland
- Minnesota
- New Hampshire
- New Jersey
- New York
- North Carolina
- Oregon
- Rhode Island

Tennessee
Utah
Virginia
Washington
Guam

Six states have laws that prohibit local jurisdictions from enacting restrictions (Florida, Kentucky, Louisiana, Mississippi, Nevada, and Oklahoma). In other states, localities are allowed to ban cell phone use or texting while driving.

In October 2009, President Obama issued an order banning texting by any of the 4.5 million federal employees from texting while driving.

OTHER MEANS OF DETERRING DISTRACTED DRIVING: LITIGATION

The frequency and severity of distraction related crashes, or DWD, necessitates prompt and aggressive litigation and discovery. In order to preserve records and evidence to demonstrate that the driver of a vehicle was distracted, immediate discovery must take place.

In numerous cases, parties have destroyed evidence or allowed time to fade recollections. In one recent, case, however, the attempt to impede discovery was recognized by the courts and discovery was ordered. In *Detraglia v. Grant*, 2009 NY Slip Op 09120 [68 AD3d 1307], Dec. 10, 2009, the New York Supreme Court Appellate Division held that cell phone and air card records were discoverable.

In *Detraglia*, the Grant was driving a company car owned by his employer, Hawkeye. His vehicle collided with Detraglia's car. Demand was made that defendants Grant and Hawkeye produce billing records for all three of Grant's cellular telephones and the Verizon wireless air card for his company-issued laptop computer. Defendants refused to comply. A motion to compel discovery followed.

Although Grant testified at deposition that he wasn't using his cell phone or laptop at the time of the accident and that the laptop was secure in a bag, there was evidence from the tow truck driver that he saw the laptop on the vehicle's computer desk, with the screen flipped up and turned on. The Appellate court found that conflicting evidence raised questions as to whether Grant used any technological devices while driving, rendering the records relevant to the question of his negligence."

A recent settlement involved a distracted driver who the plaintiff claimed traveled 19 inches out of her designated lane of travel on a four-lane road on a clear day and hit and killed two bicyclists. In *Hoskins v. King*, et al., C/A No. 3:08-CV-02442 (U.S. District Ct., D. SC), a settlement was reached for approximately \$5 million where

there was evidence that the driver was on a cell phone call, had her dogs up front, and was turning up the radio. Just before the accident she had bought gas with a company card. The driver's employer was also sued but obtained summary judgment.

Punitive Damages

It took many years and a great deal of common law development before driving while intoxicated was allowed to give rise to a claim for punitive damages. But over time. Legislatures and courts recognized that the voluntary intoxication combined with driving a deadly instrumentality like a car or truck was tantamount to an intentional act. The conduct has been universally recognized as being so grossly negligent such that the imposition of punitive damages are appropriate both as a means to punish the wrongdoer and deter others from committing such acts.

If a driver texting or using a cell phone is as impaired as a drunk driver, as some studies have concluded, then why wouldn't the knowing and voluntary act of texting while driving (TWD) give rise to punitive damages. In many jurisdictions punitive damages are available to victims of drunk driving. The victims of distracted drivers, where provable, should be similarly afforded the same remedy.

The dual purpose of deterrence and punishment are effectuated by allowing for punitive damages. By this time the substantial dangers of voluntary distraction while driving are recognized. Yet the behavior continues. In some studies, texting while driving has actually increased in the past few years. In particular, younger drivers are most affected by the inattention blindness created by the multitasking effect of text/cell phone use while driving. This is happening despite awareness in the media – and common sense – that sending text messages while driving is a very dangerous activity.

Holding Employers Liable

One means of creating a deterrence to the use of hand held devices/texting while driving is to hold employers liable for the use when done in the course and scope of employment. Many businesses provide cell phones and smart phones/PDAs to their employees, or reimburse the employee for use. Even where they do not, many employers expect employees to use their phones as part of their job.

Under respondeat superior, the employer may be held liable for the negligent act of its employee while the employee is furthering the employer's business. Moreover, there might be direct negligence for entrusting or encouraging employees to utilize hand held devices while operating vehicles.

One important discovery angle in all motor vehicle crash cases should include obtaining the cell phone records of all hand held devices in the control and possession

of the driver of the vehicle involved. This may well demonstrate that the driver was texting, emailing, talking or even surfing the web at the time of the crash. If the driver was engaged in any business on behalf of the employer, that might well trigger employer liability.

SOCIAL DISFAVOR

Finally, when all other means of modifying dangerous or socially irresponsible behavior fail, society must make it socially unacceptable to engage as such. Examples such as seat belt use, smoking and drunk driving are the most obvious. Until it became socially unacceptable to smoke in public places, laws were either nonexistent or ignored. Americans, especially teens, need to be aware that the use of cell phones and texting in particular represents such an extraordinary risk of serious injury and death that it is socially unacceptable to engage in this behavior. Until peers pressure their peers to stop texting, it will be difficult to truly reduce the incidence of this activity.

For many high risk activities, it is only through the civil justice system that true change will occur. DWD may be one of those activities. Because it is too easy, too accessible and our world has become too multi-tasking oriented, social change may require litigation and economic disincentives. Even with legislation that may (or may not) succeed, actual change in behaviors may lag considerably.

That is where the civil justice system comes in. The ability to obtain punitive damages, and hold responsible those who benefit, condone or encourage DWD - tacitly or otherwise - is the lynchpin of making this change. Punitive damages are just one tool that the practitioner needs to use to obtain fair justice and reduce the frequency of risky behavior by vehicle operators.