



Trends In Distracted Driving – Get Off The Phone!

Distracted Driving -The Problem Continues to Grow Worse

Over the last few years, our society has seen an explosion of electronic devices and gadgets that both simplify and complicate our lives. While the convenience of almost unlimited communication and information at our fingertips wherever we go has proved useful in many aspects of our lives, it has also created the tension to stay constantly connected – even while driving.

Along with this convenience, there has come the inevitable increase in accidents due to distracted driving. In fact, distracted driving is now one of the leading causes of automobile accidents in our country.

In order to deal with the problem of drivers being distracted by the array of electronic information, various laws and regulations have been adopted to discourage behavior that hinders one's ability to operate a motor vehicle. Courts and juries have responded with sizeable verdicts to punish such behavior, and in this era of the reptile theory, send a message to protect the community from these safety risks.

This presentation will discuss the ever growing problem of distracted driving, reactions by various agencies to confront it, and practical steps that can be taken to help minimize or avoid the risk during a claim.

Risks of Distracted Driving Are Significant

In addition to the readily acknowledged problem of people being distracted while looking away from the road, such as texting while driving, the less acknowledged, but equally hazardous problem of cognitive distraction (such as talking on the phone) is also a growing problem. Additionally, today's modern vehicles contain an array of sophisticated technology that allows a driver to make their phone into a car stereo system, and to use the car's navigation system to search for the nearest restaurant. While the technology is impressive, it does take familiarity to know how to work it. Once a driver acquires a certain level of familiarity with the technology, they feel comfortable that they can use it quickly, even while driving.

People will admit to the problem of having to figure out the sophisticated technology by randomly pressing the various buttons to figure out how it works, but once one achieves a degree of understanding, they feel that they can quickly read texts or make telephone calls. Of course, many people cannot get the technology to work as advertised, which leads to the problem of frustrated and very distracted drivers. This incorporation of the technology into every aspect of our daily lives makes people almost too comfortable and emboldens them to think that they can still utilize the technology while driving. Therefore, even though people will acknowledge the risks, they will not fully appreciate its application to them.

Unfortunately, despite drivers being aware of the risks, the National Highway Traffic Safety Administration (NHTSA) statistics show that distracted driving now accounts for over 3,100 driving deaths and over 420,000 injuries per year. Despite the risks, it appears that drivers have not made the connection of the necessary steps to drive more safely. Therefore, the correlation between being aware of the risks and taking steps to drive more safely has not occurred. Interestingly, although more than half of teens admit to texting and driving, the number of deaths of teen drivers has decreased. This appears to be due to the number of miles

driven by teens has been decreasing. Teens no longer immediately rush to get their licenses at 16. The number of teens (ages 17-19) with a driver's license, dropped from 80% 30 years ago to 60% today. Many factors may contribute to this decline, but a leading theory is that teens are so interconnected via electronic devices, that the need for transportation to visit with friends is greatly diminished.

Multi-Tasking

NHTSA has identified three types of distractions:

Visual – looking away from the road

Manual – taking your hands off the wheel

Cognitive – performing more than one mental task at a time

Many people assume that they can perform more than one task efficiently and safely at a time. The evidence does not support that assumption. NHTSA conducted extensive research on this issue and found when people switch between tasks their productivity is reduced.

Surprisingly, even talking on a hands-free phone caused an individual's cognitive abilities to be impaired. This mental distraction can lead a driver not being able to fully appreciate a sudden emergency or danger in a timely fashion.

Not surprisingly, cell phone use is highest among teens; however, in all age groups the Insurance Institute for Highway Safety and the Highway Loss Data found that the numbers were high among all age groups until the drivers were over 70 years of age.

Technology

In response to the growing problem of distracted driving, states are toughening their laws. Moreover, juries and judges are imposing large punitive damages to discourage this type of behavior. However, it appears that crash avoidance technology is the most effective way to reduce traffic accidents caused by distracted drivers (Insurance Institute). According to the

Insurance Institute, crash avoidance warnings have been shown to redirect a driver's attention back to the road when a danger is detected, and allows the driver time to appreciate the danger and react. Also, hands free technology has shown to vastly improve a driver's attentiveness to the road and their driving. However, the tests did vary by the type of technology. Therefore, while it appears that crash avoidance technology may have an overall positive effect of ameliorating the detrimental effects of distracted driving, it is not known whether the ability to navigate, call, text or work the entertainment system through voice commands will resolve the problem.

Despite tougher laws, more education and massive jury awards and settlements, people remain complacent about the risks distracted driving presents.

What is Being Done – Latest Laws, Cases and Technology

Several states have adopted laws to ban texting while driving, or the use of any technology while operating a motor vehicle. Interestingly, most states make exceptions for the use of hands-free devices. However, Arizona and Montana have no (NO or a ban?) ban on texting and driving and Missouri only bans drivers 21 and younger from texting and driving. Therefore, in most states, a driver can use a speaker or Bluetooth device, in order to continue their telephone conversations.

It is anticipated that more states and cities will continue to adopt more stringent bans on any use of electronic devices. In fact, some municipalities are even taking the issue of distraction to pedestrians. The City of Chicago is considering a proposal to make "Distracted Walking" an offense punishable by a \$500 fine. It is also clear that although people may engage in the behavior they know is wrong and will be more likely to punish it, rather than be sympathetic, they have engaged in similar behavior.

The use of these devices in light of these bans will impose strict liability and allow a plaintiff's attorney to utilize the reptile arguments. It will be imperative that a company has some type of policy in place either prohibiting their use or describing when it is allowable. It will be equally important that any company having such a policy actually enforce it. Having a policy in place that is not enforced will open any business to further exposure.

The negative impact this type of behavior is having on jury verdicts and judgments is demonstrated in numerous sizeable settlements and verdicts. In 2012, Coca-Cola was hit with a \$21 million judgment in Texas when their driver was talking on a cell phone. In 2017, in North Carolina, plaintiff's attorneys were able to obtain a settlement of \$1.25 million when a distracted driver hit and injured a homeless man. Even if a punitive damage is not specifically pled, the damaging impact on the valuation of a case cannot be ignored.

What to Do

When you get a case in which the plaintiff is alleging distracted driving as a contributing cause of the accident, you need to determine the reason for the distraction. If the driver is on the phone to check on their sick child, the jury will be more sympathetic to that situation rather than to one who is merely playing a game. With the advent of reptile tactics in the courtroom, judges and juries will have a strong inclination to punish. However, from the statistics and studies, it is very likely that the jurors have engaged in the very behavior that the plaintiff's attorney is attempting to demonize. You will need to make the behavior relatable and understandable in order to keep any potential impact on the jury's verdict to a minimum.

Obtain Your Driver's Phone and Billing Records

The best course of action is to preserve your driver's phone. If it is a commercial driver with a company phone, the owner of the phone should require the driver to turn it over. A good

practice is to have a company representative and the driver go to the cellular company that provided the phone and obtain a new one for the driver, which will let him keep his existing phone number, and the company can preserve the phone in its current status. Ideally, the phone should be placed in airplane mode and sent to a forensic engineer. The determination as to whether or not to download the data, and the extent of the time period of data to produce can be determined later, as long as the data is preserved and potential spoliation issues have been removed.

Additionally, many commercial drivers will have a second personal phone in their vehicle with them. It is important to ask them how many phones they had with them. You do not want this fact to be discovered during their deposition. When investigating an accident, it is highly advisable that you have a checklist of information you want to obtain so that you do not forget to ask the pertinent questions when you are at the accident scene dealing with your driver, the police and potential media.

Do Not Forget to Obtain Plaintiff's Electronic Data

While we are focused on defending claims, and responding to plaintiff's notices to preserve data, the same tactics can be used against an adverse driver. Consideration should be given to sending notice to preserve letters to the adverse driver for their cellular information. In addition to the cell phone records, the notice to preserve should include the vehicle's black box data and infotainment system data. Today's passenger vehicles contain a vast amount of information and this information can be used to help defeat a potential claim. Additionally, the car's stereo, navigation and Bluetooth data that the modern passenger vehicles have in them also contain a wide variety of useful information that may show that the plaintiff driver was distracted. This information could be used to help mitigate any potential claim. Of course, if the

adverse driver is not represented by counsel, consideration will need to be made as to whether sending the letter will cause that driver to seek out representation; however, in today's environment we all know that a claim is more likely to happen than not and we should be prepared to effectively defend our clients.