Distracted Driving Accident Claims Involving Smart Phones: Pursuing or Defending Litigation
Conducting Pre-Suit Investigations and Discovery,
Leveraging Expert Witnesses, Vicarious Liability Considerations

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Today’s faculty features:


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DISTRACTED DRIVING ACCIDENT CLAIMS INVOLVING SMART PHONES: PURSUING OR DEFENDING LITIGATION

Conducting Pre-Suit Investigations and Discovery, Leveraging Expert Witnesses, Vicarious Liability Considerations

Stafford | August 1st, 2017

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Farmington Hills, Michigan

Mr. Gursten focuses his practice on serious auto and truck accident injury and wrongful death cases. He frequently lectures at legal seminars throughout the country on trial advocacy, trucking litigation, and traumatic brain injury cases. He has recovered the top-reported jury verdict for a car or truck accident in Michigan for multiple years, according to published reports. He serves as President of the Motor Vehicle Trial Lawyers Association and a Past Chair of the American Association (AAJ) for Justice Truck Accident Litigation Group.

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Mr. Liro focuses his defense litigation practice in the areas of construction, transportation, professional malpractice, employment and catastrophic injury. He is a member of the firm's Transportation Practice Group and is on their Transportation Rapid Response Team. He is frequent author and presenter on automobile negligence, among other topics.
Why pursue evidence of distracted driving in your auto or truck wreck case?

Texting is the new drunk driving
What does the research show?
* The Headlines

✓ Texting while driving was more dangerous than drunk driving.
   ~Car and Driver Magazine.

✓ Texting while driving “[i]s 6x more dangerous than driving while intoxicated,”
   ~Forbes.

✓ [I]mpairments to driving” due to distraction from “voice-based interaction” with a “speech-to-text system” may rise to the level associated with drunk driving,
   ~AAA-Foundation for Traffic Safety.

✓ [T]he impairments associated with using a cell phone while driving can be as profound as those associated with driving while drunk.
   ~University of Utah study

✓ “[P]eople are as impaired when they drive and talk on a cell phone as they are when they drive intoxicated at the legal blood-alcohol limit’ of 0.08 percent, which is the minimum level that defines illegal drunk driving in most U.S. states,”
   ~University of Utah study

More Fatal than Drunk Driving

- Driver distractions leading factor in fatal and serious injury crashes.

- Motor vehicle accidents are the number one cause of death, resulting in an estimated 39,000 to 46,000 deaths annually.

- More than 1.6 million crashes are caused by cell phone use and texting while driving each year.

- According to the National Highway Traffic Safety Administration, 3,477 people were killed and 391,000 people were injured in motor vehicle crashes involving distracted drivers in 2015 alone.
Handheld v. Hands Free Devices

Texting
- 18% of drivers admit to texting while driving.
- Drivers’ texting are 23 times more likely to have an accident or near miss, or 8 times more likely than a drunk driver.

Handheld Devices
- Drivers conversing handheld cell phones have delayed braking reactions and are involved in more traffic accidents than when they are not conversing on a cell phone.
- People recognize the risk of talking on handheld and texting more than the risk of hands-free.

Hands-Free Devices
- Hands-free devices are seen as a solution and mistakenly believed to be safer than handheld.

Most legislation focuses on only handheld devices or texting. All state laws and some employer policies allow hands-free devices.
Texting while driving – 23 times more likely to crash

✓ “Text messaging made the risk of crash or near-crash event 23.2 times as high as non-distracted driving,” according to a 2009 study from the Virginia Tech Transportation Institute.

* 12 times more likely to crash if dialing a cell phone while driving

✓ The Virginia Tech Transportation Institute found that “dialing a handheld cell phone” while driving made the driver “12 times more likely to crash.”.

Source: http://www.pnas.org/content/113/10/2636.full.pdf (Pages 4 and 5 of the PDF)
* Cell phone use causes 26% of U.S. car crashes

✓ “The use of cell phones causes 26% of the nation’s car accidents,” according to USA Today.

Source: https://www.usatoday.com/story/money/cars/2014/03/28/cellphone-use-1-in-4-car-crashes/7018505/
Is the distracted driving crisis getting worse?
Distracted Driving Accident Claims Involving Smart Phones
Presented by:

* Sadly, yes.

✓ Distracted driving-related fatalities and injuries increased approximately 200% and 112%, respectively, from 2014 to 2016

✓ Fatalities and injuries from distracted driving-related car crashes in Michigan increased approximately 50% and 47%, respectively, from 2015 to 2016

   ~Michigan State Police Criminal Justice Information Center data

✓ Distracted driving car accidents in Michigan increased approximately 70% from 2015 to 2016 – approximately 138% from 2014 to 2016

   ~Michigan State Police Criminal Justice Information Center data

STATE AND FEDERAL DISTRACTED DRIVING LAWS, RULES AND REGULATIONS
* State laws on texting and cell phone use while driving

Source: http://www.iihs.org/iihs/topics/laws/cellphonelaws/maptextingbans
Text Messaging State Laws

- Forty seven (47) states along with D.C., Puerto Rico, Guam and the U.S. Virgin Islands ban text messaging for all drivers. Those texting ban laws have primary enforcement in all but 4 states.

- The states with secondary enforcement (meaning that police can ticket for texting while driving only after having stopped the vehicle for another offense, like speeding, etc.) are Florida, Nebraska, Ohio and South Dakota.

- The 3 states that don’t ban texting for all drivers are Arizona, Missouri and Montana.

- California drivers who are 18 and older may dictate, send or listen to text-based messages if they're using voice-activated, hands-free devices.

Hand-held Cell Phone Use State Laws

- 14 states (California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, New Hampshire, New Jersey, New York, Oregon, Vermont, Washington, West Virginia) as well as D.C., Puerto Rico, Guam and the U.S. Virgin Islands have laws prohibiting drivers from using hand-held cell phones while driving.

- All of these laws have “primary” enforcement, meaning that a police officer has the authority to make a traffic based solely on violation of a state’s ban on hand-held cell phone use while driving.

- A bill proposing to ban hand-held cell phone use in Michigan is currently pending in the Michigan House of Representatives, House Bill 4466.

- In Washington, drivers may not hold a personal electronic device in either hand or both hands while operating a motor vehicle on a public highway, including while temporarily stationary because of traffic, a traffic control device, or other momentary delays, effective July 23, 2017.

Source:
http://www.iihs.org/iihs/topics/laws/cellphonelaws/maptextingbans
All Cell Phone Use State Laws

- No state bans drivers all from all cell phone use (both hand-held and hands-free) while driving
- However, 38 states (including Michigan) and D.C. ban cell phone use by teen, beginning drivers and 20 states and D.C. prohibit school bus drivers from using a cell phone while driving

Bans on Cell Phone Usage

• Executive Order 13513, signed in 2009, mandates:
  – No texting & driving in Federal Government vehicles.
  – No texting & driving by Federal Government employees, or contractors, with a mobile device provided by the Federal Government, even if in a POV.

• Certain drivers have additional regulation:
  – Novice Drivers: 31 states & DC ban all cell phone use.
  – School Bus Drivers: 19 states & DC ban cell phone use.

• Chapel Hill, NC bans all cell phone use while driving.
* Fla. Stat. §316.305 – Cell Phone Usage

- “Florida Ban on Texting While Driving Law”
- Allows law enforcement to issue a citation as a secondary offense.
- A person may still use a cell phone for navigation, weather, or radio broadcast purposes.
• “Michigan’s Anti-Texting Law”

• Only prohibits drivers from texting while driving.

• A “primary” law that allows law enforcement to pull a driver over and issue a citation without witnessing some other violation.

• Michigan does not prohibit other cell phone usage. Localities determines their own cell-phone driving laws.
FMCSA Regulations §392.82

- Comprehensive ban against cell phone use by drivers of commercial motor vehicles (CMV) except when stationary or in the event of an emergency.

- Prohibits employers from requiring drivers of CMV’s to use cell phones while driving.
Trucking Injury and Death Cases - Federal rules on texting and cell phone use when driving

New Rules For CMV Drivers About Hand-Held Mobile Devices

Source: https://www.fmcsa.dot.gov/driver-safety/distracted-driving
Michigan’s Kelsey’s Law - banning cell phone use by teen drivers

Kelsey’s Law prohibits teen drivers (those who have been issued a level 1 or level graduated driver licenses) from using “a cellular telephone while operating a motor vehicle upon a highway or street ...,” which means they can’t “initiate a call,” “answer a call” or “listen to or engage in verbal communication through the cellular telephone.” (MCL 257.602c(1))

Source: http://www.michiganautolaw.com/blog/2017/05/03/teen-drivers-voice-operated-phones/
DISTRACTED DRIVING CIVIL LIABILITY CASES
Initial Considerations: Case Intake
Multitasking is a Myth

- The human brain processes sequentially, not simultaneously.
- Brain engages in a constant process to:
  1. Select information brain will attend to,
  2. Process information,
  3. Encode to create memory, and
  4. Store information
- The brain must also:
  5. Retrieve, and
  6. Execute or act on information
- When brain is overloaded these steps are affected
Multitasking is a Myth

During the **Encoding** stage:
- Brain filters information due to overload
- Drivers not aware of information filtered out
- Information does not get into memory
- Drivers miss critical information on potential hazards
Not all Distractions are Created Equal

• We can walk and chew gum safely because it is not a cognitively-demanding task.

• However, driving involves a more complex set of tasks than walking, comprised of visual, manual, cognitive, and auditory components.

• How does a cell phone affect these functions?
  – Visual: takes your eyes off the road
  – Manual: takes your hands off the wheel
  – Cognitive: takes your mind off driving
  – Auditory: takes your hearing off of the road
Not all Distractions are Created Equal

By comparison:

- Adult passengers share awareness of driving situation, a safety benefit.

- Front seat passengers reduce risk of crashing by 38% compared to cell phone conversations.

- Adults with passengers have lower crash rates than adults without passengers (not true for novice teen drivers).
Distracted Driving Accident Claims Involving Smart Phones
Presented by:
* Interview with the client or witnesses

I knew she was going to hit me. I saw her looking down before she rear-ended me. It looked like she wasn’t even looking.
Who’s Your Defendant?
Type of collision can suggest distracted driving played a role

- Failure to obey traffic signal or sign
- Failure to maintain lane
- Rear-end
- A collision with no warning or evasive action taken before impact
- A collision with no braking or braking just before impact
Investigation/Evidence Preservation

Pre-litigation investigation

1. Police officers and reports

- Request the FOIA complete police report (shown on left)

1. Must obtain the 911 dispatch to get actual time of collision

- Speak with police officer
- Gather evidence at the scene - evidence of braking or lack of
- Defendant’s phone number on report is typically their cellular

Distracted Driving Accident Claims Involving Smart Phones

Presented by:

Michigan Auto Law

Attorneys

Investigation/Evidence Preservation
Investigation/Evidence Preservation

Pre-litigation investigation

1. Lexis / People Search

- Often reveals a cell phone carrier
Investigation/Evidence Preservation

Pre-litigation investigation

1. Social Media

- Rants, kissy face selfies, vlogging, etc. while driving popular pastimes.
- Before an attorney gets to the Defendant and scrubs their social media, or suggests they change settings to private, you need to download their social media profiles as a pdf.
- Facebook, Twitter, Instagram, etc.
For the Defense: Investigation and Evidence Preservation

- Identify the plaintiff’s phone number and carrier.
  - Subpoena phone records from time of the incident.
- Identify plaintiff’s social media accounts.
  - Download content.
- Inspect the scene and the vehicles.
  - Take pictures and record tire marks, debris, visibility, etc.
  - Identify possible “black boxes” in all vehicles.
- Look up weather condition at the time of the incident.
Initial Considerations: Expert Witnesses

✓ Expert witnesses’ area of expertise in distracted driving cases may include:
  – Distracted Driving
  – Human Factors
  – Accident Reconstruction
  – Safety Accident Analysis & Transportation
  – Civil Engineering
  – Medical
Distracted Driving Accident Claims Involving Smart Phones
Presented by:
Distracted Driving Legal Discovery

After filing and before service

- Subpoena cell carrier for all data and record of use
- Telephone number from police report with carrier from Lexis

In the Name of the People of the State of Michigan. TO:

Cellco Partnership dba Verizon Wireless - 180 Washington Valley Rd., Bedminster, NJ 07921

3. Produce/permit inspection or copying of the following items: A complete copy of all cellular phone records for the date of 3/26/15, including, but not limited to, the time and duration of any incoming and outgoing calls, text messages, content of text messages, internet access of data use including time accessed; location service usage including time accessed; for cellular number ($10)
Distracted Driving Legal Discovery

Request for Admissions

☐ Please admit you were using your cellular telephone at the time of the collision on [date].

☐ Please admit you were driving while distracted at the time of the collision on [date].
Distracted Driving Legal Discovery

Interrogatories

- Please provide your cellular telephone information on the date of the collision. (If you have more than one cellular telephone, please provide information regarding all numbers).
  - Carrier
  - Cellular telephone number

- Request for Production of Documents
  - Please sign the attached authorizations allowing disclosure of your cellular data from the date of the collision.
  - Please provide copies of any videos related to the subject collision (including but not limited to any dashcams)
Distracted Driving Legal Discovery

Depositions

1. Defendant
   1. Typically our 1st deposition

1. People in the Car with Defendant
   1. Depose all passengers
   2. Ask about other incidents of distracted driving

1. Witnesses
   1. At minimum, obtain statements from all witnesses; however, depositions are best in the event those witnesses are not available for trial in the future.
Did the police officer look for evidence of distracted driving?
Is law enforcement slowly catching up to the dangers of distracted driving?
Expert Witnesses

The scope of evidence you can now recover from cell phones is extraordinary. But experts can be very expensive – pick your cases carefully.
Extraction Reports

Obtain possession of defendant’s cell phone for extraction of data.
Things to Come...

THE TEXTALYZER would determine if the driver had used the phone to do anything considered illegal under New York’s hands-free driving laws.
Cuomo orders study on whether ‘textalyzer’ technology can prevent texting and driving accidents in New York

~NEW YORK DAILY NEWS | July 26, 2017
* Pleading the Case: Elements and Amendments

- Cell phone usage while driving may constitute negligence and give rise to liability.
Distracted Driving Discovery: Written Discovery

Interrogatories

• Do you wear glasses, contact lenses, or hearing aids?
• Did you consume any alcoholic beverages or take any drugs or medication within 12 hours before the time of the incident?
• Describe in detail how the incident happened, including all actions taken by you to prevent the incident.
• Where you charged with any violation of law arising out of the incident?
• Has anything been paid or is anything payable from any third party for the damages listed?

Request for Admission

• Admit that you are entitled to receive benefits from a collateral source for medical bills/loss of wages or income.
• Admit that at the time and place of the incident, you were not using the available functional and operable seatbelt/shoulder harness restraint system.
• Admit that there are third parties responsible for causing the subject accident.
Distracted Driving Discovery: Depositions

**Plaintiff**
- Get plaintiff’s account of the events.
- Identify possible discrepancies.
- Was plaintiff distracted?
- Did plaintiff wear seatbelt?

**Passengers**
- Get any passengers’ accounts of the events.
- Did the passenger(s) see or hear anything prior to the impact?

**Witnesses**
- Did any witness observe the defendant distracted on his/her phone?
- Did any witness hear the defendant break, or see the defendant trying to avoid the impact?
- What are plaintiff’s injuries?
- Are the injuries permanent?
- Are the injuries casually related to the incident?
- Will plaintiff need future treatment?
Settlements and Verdicts

- **Torres v. Cruz-Govin (2011)**
  Teenage defendant was texting and speeding when he crashed into plaintiff’s car, injuring the driver and killing the passenger. The plaintiff’s texting and distracted driving expert testified that the defendant was most likely affected by a phenomenon known as inattention blindness as a result of the texting. The plaintiffs were awarded $8,820,000 in damages and a second trial was set to apportion negligence between the defendant driver, the owner of the car defendant was driving, and plaintiffs.

- **Kathy Haynes v. Andrei Franciuc (2013)**
  20-year-old defendant crashed into plaintiff’s vehicle after he failed to stop at a red light due to inattention caused by texting. Jury deliberated for two hours before returning a $1,140,000 verdict for the plaintiff.
Vicarious Liability of Employers or Parents
When is a Company Liable for Its Driver’s Conduct?
* Respondeat Superior

- The legal theory of *respondeat superior*, or vicarious responsibility, means an employer may be held legally accountable for the negligent acts of his employee or agent if the employee or agent was acting within the scope of his or her employment at the time of a crash, regardless of the employer’s fault. This including government employees.
How to Prove Your Driver Was Asleep at the Wheel
Distracted Driving Accident Claims Involving Smart Phones

Presented by: Tristan Teddyp Shelton ▶ CDL 4 LIFE

AS DRIVERS WE KNO WHEN ITS NOT SAFE TO KEEP DRIVING FOR SAFETY AND HEALTH REASONS....i told the dispatch im feelin light headed and fatigue im comin in......these motherfuckin dispatchers don't give a damn about us.

[Image of text messages]

5:30 pm →

bringin it in after these pickups...feeling light headed and fatigue.

5:45 pm →

WE STILL HAVE WORK TO DO.
§ 392.6 Schedules to conform with speed limits.

No motor carrier shall schedule a run nor permit nor require the operation of any commercial motor vehicle between points in such period of time as would necessitate the commercial motor vehicle being operated at speeds greater than those prescribed by the jurisdictions in or through which the commercial motor vehicle is being operated.

[33 FR 19732, Dec. 25, 1968, as amended at 60 FR 38746, July 28, 1995]
Initial Considerations – Policies, Procedures, Protocol

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Distracted Driving Accident Claims Involving Smart Phones
Presented by: Michigan Auto Law
Wicker Smith
Auto Accident Attorneys
Policies

• “It is the employer’s responsibility and legal obligation to have a clear, unequivocal, and enforced policy against texting and driving.” OSHA, 10/2/2010.

• Employers can and should design cell phone policies to follow best safety practice, reduce significant risks and minimize liability. Employers should implement cell phone policies which include:
  – Handheld and hands-free devices
  – All employees
  – All company vehicles
  – All company cell phone devices
  – All work-related communications – even in a personal vehicle or on a personal cell phone
Education and Enforcement

- Companies must be proactive in requiring training
- Companies must be proactive and not merely show their teeth when a violation occurs.
Commercial Vehicles – Evidence Preservation

• The process of preserving evidence should begin as fast as possible.
  – Send preservation letters to non-parties.
  – Inspect the vehicles and the scene as soon as possible.
    • Record tire marks, debris, etc. Take pictures!
  – Find the “black box” (if there is one) of both vehicles and preserve stored data.
  – Download information from GPS tracker.
Pleading the Case

- Two considerations:

1. Is the driver an **employee** or an **owner-operator** (i.e., an independent contractor)?
   - An “owner-operator” in the trucking industry refers to a self-employed commercial truck driver or small business that operates trucks for transporting goods over highways for its customers.

2. Was the driver acting within the **scope of his employment** when the alleged negligence occurred?
Defining “Employee”

- The driver must be an employee or agent of the company, rather than an independent contractor/owner-operator.
- Agency status is not defined solely by the terms of the contract between the driver and the company, but depends on the course of dealings between the company and the driver.
- Whether a driver is an employee or an agent of a company is typically a question of fact for the jury.
The Restatement Agency Factors

- The extent of control which, by the parties’ agreement, the employer exercises over the details of the work;
- Whether the employee is engage in a distinct occupation or business;
- Whether the work is usually done under the direction of the employer or by a specialist without supervision;
- The skills required in the particular occupation;
- Whether the employer or the workman supplies the instrumentalities, tolls, and place of work;
- The length of time for which the person is employed
- Use of company logo, uniforms, advertisements, marketing, etc. (rebuttable presumption of agency where company’s name appears on commercial vehicle. See Crowell v. Clay Tricking Lines, Inc., 700 So.2d 120 (Fla. 2d DCA 1997));
- Requirement that the driver maintain specific licenses, permits, certifications, etc.;
- Requirements that the driver attend training courses;
- Parties’ belief as to status of employment relationship; and
- Wording in the contract between the driver and the company.
Scope of Employment

- After employment/agency is established, plaintiff must prove that the driver’s negligent act fell within the scope of his employment.

- In order for an employee’s conduct to fall within the scope of employment for purposes of establishing vicarious liability, it must:
  - Have been the kind of conduct the employee or agent was employed to perform;
  - Have occurred within the time and space limits of the employment; and
  - Have been activated at least in party by a purpose to serve the employee or principal.

- Additional considerations include:
  - Whether the employee stepped aside from his employment to perform an act which the employer did not authorize or expect him to perform.
  - Whether there was a clear cut deviation or departure from the employer’s business to perform a nonessential, purely personal errand.
  - Whether the employer could have foreseen the employee’s conduct.

- Typically, tortious or criminal acts are not considered to be within the scope of employment, but there is no bright line rule.
Discovery: Corporate Depositions

• The party defending the deposition carries the burden to adequately prepare the designated corporate representative.

• Preparation
  – Make sure the notice of deposition adequately states the designated topic with “reasonable particularity.”
  – Educate the witness to speak on the designated topic and the overall issue.
  – The witness is a “corporate spokesperson” and his or her own personal beliefs are irrelevant and should not be part of the testimony.
  – Ensure the witness is familiar with any necessary documents, including documents not authored by the witness.
Settlements and Verdicts – Maximizing Your Case

  Employee of International Paper rear-ended another car while distracted by use of a cell phone. The plaintiff, whose arm had to be amputated as a result of the crash, sued International Paper under a theory of vicarious responsibility. Even though International Paper had previously adopted a policy banning employees from using a cell phone while driving, it nevertheless agreed to settle the case for $5.2 million.
Punitive Damages

In order for an employer to be held vicariously liable for payment of punitive damages due to the actions of its employee drivers, there must be a showing that:

- The employer actively and knowingly participated in the conduct;
- The managers of the employers knowingly condoned, ratified, or consented to such conduct;
- The employer engaged in conduct that constituted gross negligence that contributed to the loss, damages, or injury suffered by the claimant.

Punitive damages cannot be assessed for mere negligent conduct, but must be based on behavior which indicates a wanton disregard for the rights of others.