

[Committee Perspectives]

Drivers with Telematic Equipment: The Risks

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Motor vehicles today are equipped with electronic devices that yesterday were the stuff of science fiction. Coined “telematics,” these devices range from the ubiquitous cell phone to Global Positioning Systems and tracking systems that use satellite signals to pinpoint a vehicle’s location. This technology has changed the manner by which the trucking industry monitors its fleets, enabling dispatchers and drivers to communicate almost instantly with each other.

At the same time that the industry is embracing the new technologies, motor vehicle accident litigation involving cell phone usage is becoming more prevalent, sometimes resulting in attention-grabbing headlines. In 2002, a \$10 million settlement was reported in a case in which cellular phone use by a driver contributed to an accident that left the plaintiff with catastrophic brain injuries. *Carroll, by his guardian Ward v. Gebreyal*, 2002 National Jury Review and Analysis. On December 14, 2001, in two different Florida courtrooms, juries rendered multi-million dollar verdicts where defendant drivers were talking on cell phones at the time of the accident. Plaintiff’s counsel in one of those cases (which resulted in a \$20.9 million verdict), believes that it is becoming standard procedure for personal injury lawyers to subpoena cell phone records, “saying a plaintiff’s lawyer who does not investigate the possible use of a cell phone by a defendant should be sued for malpractice.” “Cell Phone Use Creates New Standard for Auto Accident Investigations,” *The Legal Intelligencer*, January 4, 2002.

In this climate, employers who provide telematic equipment to their drivers, and the attorneys who represent them, must be aware of the legal issues that arise from their use. When can the employer be held vicariously liable for accidents that occur while their employees are using these devices? Should employers be deemed “on notice” of actual risks associated with the use of such devices? Moving beyond liability based solely on *respondeat superior*, when could a corporate defendant be found liable independently or for punitive damages based on the allegation that it has allowed its drivers to operate telematic systems while operating a vehicle in the face of known risks? Should the employer have taken steps to prevent the use of telematics while their employees are driving? Underlying all of these scenarios, what special evidentiary issues arise when the use of telematic systems are at the core of a lawsuit?

Telematics: What Are They and What Are Their Risks?

Commentators have grouped telematic devices into three categories. It is useful to understand the differences among the three in order to address the legal issues that arise from their use. In Hentzen, “The Trouble With Telematics: The Uneasy Marriage of Wireless Technology and Automobiles,” 69 UMKC L.Rev. 845, 847 (2001), telematic devices are described as: (1) hand-held devices, which include the common cell phone; (2) integrated devices, which include the Global Positioning Systems (GPS) and vehicle tracking systems that are gaining widespread use in the trucking industry; and (3) safety enhancing technology such as

the Automatic Crash Notification (ACN) system which notifies emergency personnel automatically upon deployment of an airbag and requires little, if any, driver input.

Each device presents varying degrees of driver distraction. While the presence of radios, ham radio equipment, and even other passengers have always created potentially distracting situations, “evidence is growing that cell phones and other in-vehicle electronic devices are becoming a major source of fatal distraction.” Some researchers equate the risk of driving while talking on a cell phone to the risk of driving while intoxicated. “The Trouble With Telematics,” *supra*, at 846.

The use of integrated devices has not escaped scrutiny. Studies “show that ‘hands-free’ operation is not a panacea for the problem of cognitive distraction and that other telematic devices such as GPS systems produce similar levels of cognitive distraction.” *Id.* at 847. Moreover, manufacturers of such systems are well aware of the safety issues presented by the distraction caused by their devices, and are taking steps to minimize risks, such as designing products that “minimize ‘eyes-off-road and hands-off-wheel time’: . . . designs that ‘reduce the number of steps and complexity to operate any feature’; . . . common design architecture across the board so ‘improvements are driven into all vehicle lines’; and . . . built-in safeguards that limit or disable certain functions while the car is moving.” *Id.* at 852-53. Older designs still in use, however, may not incorporate these newer features believed to maximize safe use of the systems.

The National Highway Traffic Safety Administration has conducted several studies on driver distraction. In the past, NHTSA has focused its attention on the heavy trucking industry because of the use, within that industry, of telematic devices for tracking, navigation, and driver communication.

An early study of driver distraction within the heavy trucking industry, performed by NHTSA between 1992 and 1995, tested the ability of professional drivers to read from a computer screen, manually dial a phone, and respond to questions asked during a phone conversation. The driver distraction was measured by “glance duration, number of glances, and total glance time away from the road scene” and “lane exceedance frequency.” Ranney, *et al.*, *NHTSA Driver Distraction Research: Past, Present and Future*. See NHTSA International Internet Forum (July 5-August 11, 2000), at <http://www.nhtsa.dot.gov/hot/>, citing Tiherina, *et al.*, *Workload Assessment of In-cab Text Messaging System and Cellular Phone Use by Heavy Vehicle Drivers on the Road*, NHTSA Report No. DOT HS 808 467 (7A) (1995).

One of the authors’ observations was that the sheer multiplicity of possible combinations of tasks while driving made it impossible to develop a reliable quantitative model. The authors of the NHTSA study did conclude, however, that dialing a phone caused a driver to wander out of his lane twenty percent of the time and that being engrossed in a phone conversation reduced visual scanning by fifty percent. *Id.*

In November 1997, NHTSA published a study by Michael Goodman *et al.*, entitled *An Investigation of the Safety Implications of Wireless Communications in Vehicles*. See Report No. DOT HS 808-635), at <http://www.nhtsa.dot.gov/people/injury/research/wireless>. The purpose of the report was to “assess the current state of knowledge regarding the safety implications of using wireless communication while driving a motor vehicle and to explore the broader safety issues associated with such use.” *Id.* The study concluded that cell phone use while driving increases the risk of an accident “at least in isolated cases.” *Id.*, at §6.4. While the report stressed the need for additional data, the underlying message is clear.

According to a recent analysis, 43 states, the District of Columbia, and Puerto Rico considered legislation in 2001 that would regulate cell phone use on the road, “with most states contemplating at least some bills to restrict such use.” “Driving While Distracted: How Should Legislators Regulate Cell Phone Use Behind The Wheel,” 28 *J.Legis.* 185 (2002). A look at legislative action highlights the lack of comprehensive, reliable data on the involvement of cell phones in accidents. “There is some uncertainty involved in the debate over whether to regulate the use of cell phones on the road because it is unclear how many accidents are cell phone-related. The cellular phone industry strongly suggests that very few accidents involve cell phone use.” *Id.* at 187.

Even though collection of data on the use of telematic devices remains problematical, crash data does at least indicate that cell phones can distract drivers in several different ways. “A survey of 28 crashes involving cell phones showed that at the time of the crash, drivers were talking, dialing, hanging up, answering or reaching for their phones.” *Id.* at 190. The hazards associated with such distractions are evident: “(w)hile doing any of these things, a driver may take his eyes off the highway. Even a momentary distraction can be significant in a moving car. At 35 miles per hour, for example, a car travels 51.3 feet per second. At 65 miles per hour, it covers 95.3 feet per second. Thus, the driver who takes his eyes off the road for just one second to answer a phone is essentially blind for close to 100 feet of roadway. Under ideal circumstances, a car moving at 65 miles per hour will travel an average of 344 feet after its driver realizes that he must apply the brakes and bring the car to a halt. In sum, the driver who looks away for a single second to operate a phone and then looks up to find that he must immediately slam on his brakes, may travel well over the length of a football field before successfully bringing his vehicle to a stop.” *Id.* at 191, citing data from the 1997 NHTSA study, *An Investigation of the Safety Implications of Wireless Communications in Vehicles, supra.*

Although studies frequently point to the need for better data collection, the conclusions reached certainly provide fodder for plaintiff’s expert witnesses to opine on the safety hazards associated with the use of telematics. Given the well-documented distractions of using this equipment and the growing body of research linking such distractions to motor vehicle accidents, what are the liability issues facing employers who provide these devices to their drivers?

Employer’s Liability per *Respondeat Superior*

The *Restatement (Second) of Agency*, section 219, provides that an employer may be held liable for the actions of its employees when the employee is acting within the scope of his or her employment. Liability can be imposed upon an employer even when the employee is acting outside the scope of his employment if:

- (a) the master intended the consequences, or
- (b) the master was negligent or reckless, or
- (c) the conduct violated a non-delegable duty of the master.

An employee’s use of a cell phone or electronic device supplied by his employer may implicate the employer under this doctrine, although it appears that courts are willing to look closely at the circumstances of the accident. The issue of whether the employer provided the electronic device in use at the time of the accident may not be dispositive. In *Johnson v. Rivera*, 1999 Westlaw 343860, 1999 Minn.App.LEXIS 617, an employee was found not to be acting in the scope of her employment at the time of the accident, when she was reaching for a cell phone provided by her employer intending to make a personal call on her way home from work. By contrast, Smith Barney decided it was better off avoiding “deep pocket liability” and paying

\$500,000 to settle a case where one of its stockbrokers killed a 24-year-old father of two when he was driving while making a cold call sales pitch on his own cell phone at 9 p.m. on a Saturday. Smith Barney neither provided the cell phone nor required them for its stockbrokers, but the plaintiff's attorney claimed that the brokerage firm had a policy for its brokers to make calls outside of normal business hours to reach some potential customers. See "Crash Course for Business," 85 Am.Bar Assn.J. 40 (August 1999).

The San Francisco-based law firm of Cooley Godward was named a defendant in a matter involving the death of a pedestrian killed by an associate of the law firm who was driving home from a client meeting and was allegedly speaking on her cell phone to a firm client at the time of the accident. Plaintiffs alleged that the law firm is liable under the doctrine of *respondeat superior* because it failed to take public safety into account when it "encouraged and profited from its associate's use of her cell phone." *New York Law Journal*, November 20, 2001. The case is pending in a county court in Virginia.

In order to defend against these allegations, employers who provide telematics to their employees are advised to take certain steps to guard against liability for employees' careless use of such devices. In "Driving While Dialing: Crashes Put Employers at Risk," *The Legal Intelligencer*, February 27, 2002, companies are advised to include a safety policy for wireless devices in their employee handbooks. The policy should address all types of electronic devices, not just cell phones, and employers are advised to have "their employees sign acknowledgments attesting to the fact that they have read, understood and will abide by the company's policy." *Id.* Stated another way, "Wise employers are moving to establish cell phone use policies before becoming targets of a personal injury suit. The best policies will include clear guidelines and be crafted to cover use of other telematic devices as well." "The Trouble With Telematics," *supra*, 69 UMKC L.Rev. at 871.

Companies that employ professional drivers who are provided with sophisticated GPS equipment probably need to go further. Drivers will obviously be trained on the use of the equipment, and the training program should explicitly cover all relevant safety considerations. The instruction should be documented for each driver and the driver should sign an acknowledgement that he or she received the training. Updates concerning revised or enhanced safety procedures must be communicated to all drivers, and ideally each driver should have some means of acknowledging receipt of all on-going directives. In the event of an accident where it is alleged that a driver was distracted by telematic equipment, the employer will want to be able to affirmatively establish that its driver was properly instructed on the safe use of the equipment. If an accident occurs while the driver is in the course of his employment, the company may not be able to avoid vicarious liability, but a case based on the momentary lapse of the driver is far different than a case alleging corporate negligence in failing to properly train its operators.

Another issue employers must face is whether the telematic equipment should be disabled while the truck is moving. Many manufacturers provide this option. If an employer decides not to incorporate this option into its telematic equipment, its deliberations and reasoning for not exercising the option should be well documented. If the manufacturer of the equipment does not provide that option or its sales force fails to notify the employer of that option, it also may be a potential defendant. [Any claims against manufacturers is a topic beyond the scope of this article.]

The Risk of Punitive Damages

Companies whose drivers are involved in fatal or catastrophic accidents are frequently threatened with punitive damage exposure. Traditionally, trucking companies have been a convenient target for plaintiffs. Nearly every member of a jury has heard of the alleged horror of the “urban cowboys” who recklessly drive the highways.

Cases involving the use of telematic equipment play right into that theme of the reckless trucking corporation adding another weapon to their driver’s arsenal to further endanger the public. Legislative movements towards the possible outright ban of the use of cell phones and other telematic devices while operating motor vehicles and the media exposure of traffic accidents involving the use of telematic equipment by inattentive drivers have increased everyone’s awareness of this problem. Given this potentially inflamed climate, the trucking company can find that the scope of the trial is no longer limited to which driver caused the accident but is expanded to include whether the company’s safety procedure should be blamed. A creative plaintiff’s attorney can play to the driving public’s fear to further a jury’s antipathy towards the trucking industry. Thus, keeping the issue of punitive damages against an employer out of the courtroom is critical to any defense of a telematic device case.

The *Restatement (Second) of Torts*, section 909 addresses punitive damages against a principal as follows:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

- (a) the principal or a managerial agent authorized the doing and the manner of the act;
or
- (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him; or
- (c) the agent was employed in a managerial capacity and was acting in the scope of the employment; or
- (d) the principal or a managerial agent of the principal ratified or approved the act.

In accidents involving the use of telematic equipment provided by an employer, plaintiffs contend that the employer’s decision to provide the devices to its employees is a grossly negligent, outrageous, or recklessly indifferent act to the safety of others, to warrant a claim for punitive damages. Other claims by plaintiffs assert that the employer improperly trained its employees in the use of the devices, which the employer knew or should have known constituted a dangerous act, for which punitive damages should be awarded.

The court, in *Tolle v. Interstate Systems Truck Lines, Inc.*, 42 Ill.App.3d 771, 356 N.E.2d 625 (1976), involving a trucking accident, analyzed the rationale behind the imposition of punitive damages against a corporate employer based on the acts of an employee. Noting that the justification for imposition of punitive damages is similar to justification for criminal penalties—“to punish and deter undesirable conduct”—the court looked at the vicarious liability rule (imposing liability for punitive damages whenever the employee could be liable) and the complicity rule (the corporate master is liable for punitive damages only when the superior officer orders, participates in or ratifies outrageous conduct.) 356 N.E.2d at 626-27. The court reasoned that imposition of vicarious liability would not serve society’s interests, since the “ability to better control the actions of the employee through greater supervision is often illusory. . . . [E]mployees may perform their duties where direct supervision is impossible. . . . [I]ncreased supervision may well be ineffective to prevent the occurrence of certain torts for which punitive damages may be assessed.” *Id.* at 627.

The court found that the complicity rule was more consistent with the rationale behind the concept of punitive damages because it requires some deliberate corporate participation before the sanction is imposed. “The complicity analysis will allow punitive damages where the institutional conscience of the corporate master should be aroused while protecting the corporate master from liability for punitive damages when a properly supervised employee acts with requisite circumstances of aggravation.” *Id.*, citing Morris, “Punitive Damages in Personal Injury Cases,” 21 Ohio St. L. J. 216, 222 (1960). The court noted that the *Restatement (Second) of Agency*, section 217C, which is identical to the section cited above, adopts the “complicity rule” for imposing punitive damages.

It is particularly enlightening to view this analysis in the context of the telematic systems used by trucking companies and other entities today. In 1976, the year of the *Tolle* decision, it was deemed beyond question that a corporate trucking company could not “supervise” an employee driver who was involved in a serious collision. Today, the very GPS devices that allow trucking companies to send and receive electronic messages also permit the company to track an employee’s rest times, unit position and even speed. If desired, the company can monitor the unit’s location at the time electronic messages are sent and received, and a company has the capability, if desired, of tracking messages sent from its vehicles to determine whether a driver is sending messages while the vehicle is in motion. Will courts ultimately find that such enhanced capabilities impose enhanced corporate obligations to monitor its driver’s usage of electronic messaging systems and other telematic devices? Will it also result in judges charging juries that employees now have or should have greater knowledge of the driver’s poor driving habits, creating another avenue to establish corporate culpability?

In the context of punitive damages analysis, if the company equips its fleet with telematic devices that are known to distract drivers who utilize them when their vehicle is moving, should a jury be able to consider whether the company should be liable for punitive damages? The analysis in *Wauchop v. Domino’s Pizza, Inc.*, 832 F.Supp. 1577 (N.D.Ind. 1993), may be instructive.

Wauchop involved the policy of Domino’s Pizza to guarantee delivery of its pizzas within 30 minutes, despite evidence that such a policy could lead to hazardous driving by its deliverers. Domino’s moved for summary judgment, asking the court to dismiss the punitive damages claim alleged against it. The court noted that an award of punitive damages against Domino’s turned on the company’s state of mind: “whether Domino’s knew of, but consciously disregarded, the danger of the 30-minute guarantee.” *Id.* at 1579. The court noted: “Knowledge on the part of [a] company can be proved only by showing the state of mind of its employees. The court should be cautious in granting a motion for summary judgment when resolution of the dispositive issue requires a determination of state of mind.” *Id.* at 1580.

In analyzing the “Domino scenario,” the court considered the testimony that Domino’s never gathered any information to determine the number of accidents or claims involving Domino’s drivers. It noted that Domino’s maintained a toll-free telephone number to register complaints about late service and the quality of the product, but did not register complaints about reckless driving. The court also considered that Domino’s never statistically analyzed accidents in response to the negative publicity it received, because the 30-minute guarantee was primarily a marketing program and the magnitude of such a tabulation was outside the scope of Domino’s budget and manpower. *Id.* at 1581.

Finally, the court noted: “Notwithstanding concern generated about the hazards of the 30-minute guarantee, there is evidence that no discussion regarding the safety of the 30-minute

guarantee ever occurred in an ‘official corporate format.’...No person on Domino’s board of directors or executive team expressed any concern about the 30-minute guarantee policy being a safety hazard...Although Domino’s ‘management people in the field’ debated the safety of the 30-minute guarantee, no person higher up in the corporate hierarchy did so.

“[P]laintiffs have presented evidence from which a jury could find that Domino’s had knowledge of the danger of the 30-minute guarantee, but consciously disregarded such danger.”
Id.

This analysis, when applied to publicity concerning safety hazards created when drivers are distracted by telematic equipment supplied by their employers, could provide the basis for a punitive damages award if trucking companies and others do not actively consider the risks presented and take appropriate steps to minimize or avoid the danger. Documenting the company’s decision regarding the use of telematic devices may be critical to any successful defense of a punitive damage claim.

Evidentiary Issues

Accidents involving telematic devices present certain evidentiary issues which counsel should consider. First and foremost, the issue of causation cannot be overlooked. Under traditional negligence analysis, plaintiffs have to establish that defendant breached a duty to plaintiff, and that the breach of the duty was the proximate cause of the injury. The mere fact that a telematic device, such as a cell phone or other unit, was operating does not necessarily establish that the use of the equipment was the proximate cause of the accident.

As one commentator has noted, “Under (tort) analysis, it makes no difference whether a driver fails to exercise reasonable care because she was using a cell phone, eating a hamburger, downloading e-mail, or entering coordinates on a route navigation system. Drivers have a duty to exercise reasonable care when operating their vehicle.” “The Trouble With Telematics,” *supra*, 69 UMKC L.Rev. at 868. The traditional tort analysis may be altered, however, if legislation is enacted which would create a rebuttable presumption of negligence when the operator of a motor vehicle is involved in an accident while using a mobile telephone, as would be the case if a recent bill introduced in the Nebraska legislature were adopted. *Id.* at 869. Counsel involved in the defense of these actions must be aware of any relevant legislative actions which would affect the liability issues in the case under consideration.

The admissibility of circumstantial evidence that a cell phone or other device was, in fact, being used at the time of the accident is sometimes at issue. In *Hiscott v. Peters*, 324 Ill. App.3d 114, 754 N.E.2d 839 (2001), the court considered whether the trial court erred in excluding circumstantial evidence that one of the defendant drivers was using his cellular telephone immediately before the accident. Defendant Peters denied that he used his cell phone and the jury was instructed to disregard the testimony. Counsel for the co-defendant made an offer of proof of Cellular One billing records to show that Peters used his cell phone for one minute between 1:14 p.m. and 1:15 p.m., and that he made a two-minute call to the same number at 1:29 p.m. The record indicated that the accident was reported to police at 1:20 p.m. The trial court excluded the evidence on the ground that there was no direct evidence Peters was using his cell phone at the time of the accident. This ruling was reversed on appeal.

The appellate court in *Hiscott* reasoned: “We are mindful that all clocks are not synchronized, and that it may have taken five minutes for the accident to be reported. Additionally, (a witness) testified that it appeared Peters had only one hand on the steering wheel. On the basis of the record, the evidence of Peters’s use of his cellular telephone was not

so remote as to require its exclusion.” 754 N.E.2d at 849. The court held that the weight and value of the evidence should have been left to the jury. However, by the same token, where evidence of the use of telematic equipment is truly remote, counsel should argue that its prejudicial effect would outweigh its probative value and should seek to have the evidence excluded.

Conclusion

The ever-growing use of telematic equipment all but guarantees that counsel who represent companies regularly involved in motor vehicle transportation are going to be faced with issues arising out of its use. As in most areas of litigation, an ounce of prevention is worth pounds of paper expended in discovery battles involving driver use of telematic equipment. Ideally, your clients will be aware of the risks associated with use of telematic equipment when operating a motor vehicle, and will have taken appropriate measures to instruct their drivers on the safe use of the equipment. By becoming aware of the pitfalls these cases can present, you can avoid surprise during litigation and also take appropriate steps to limit the impact of this evidence at trial.

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