

# Cell Phones & Driving: Part 1, How to Make the Legal Case for Banning Employee Cell Phone Use



It's a no-brainer, right?

Traffic accidents are the leading cause of workplace deaths.

Motorists who use cell phones when they drive are at greater risk of traffic accidents—up to four times greater, according to the prestigious *New England Journal of Medicine*—than drivers who stay focused on the road.

So if a company wanted to protect its employees against fatal traffic accidents, it would ban them from using their cell phone when driving—at least when driving on company business.

If only things were that simple! In the real world, HR directors often have a hard time persuading their company to ban cell phone use. The good news is that it's getting easier all the time to prove that cell phones are dangerous. The body of scientific evidence showing that cell phones create distractions that can easily lead to traffic accidents. (we've listed some of these sources on page x).

The bad news is that proving the dangers of cell phones may not be enough to get them banned. Management may *want* workers to use cell phones to promote "multi-tasking." "The increased risk of traffic accidents is a price some companies are willing to pay to boost productivity," according to an Ontario HR director who understandably asked not to be named. And, adding insult to injury, resistance to cell phone bans may come not just from management but from employees and their labour unions.

So if you're having a hard time selling your company on a cell phone ban, consider taking a different tack. In addition to stressing the risk of traffic

accidents, explain how cell phone use by employees can expose your company to increased risks of liability. "Phrasing it in terms of legal risks gets management's attention and is often decisive," according to the Ontario HR director.

But building a legal case can be tricky. This article will show you how to do it. Next month, in Part 2, we will help you overcome an equally important but no less difficult challenge: Creating the right kind of ban once you've persuaded your company to adopt one.

## **What the Law Says about Cell Phones & Driving**

It's a venerable tradition as old as the HR profession itself. If you want to get management to undertake an employee safety initiative, point out that it's required by law. Playing the liability card can be an effective strategy for advocating a cell phone ban. But you need to be careful. You're not going to be able to point to a specific statute or regulation to bolster your case:

- The OHS laws of no province recognize use of cell phones by employees operating motor vehicles (and other equipment) as a workplace hazard. That means employers aren't required to adopt a ban on employee cell phone use as part of their health and safety policies.
- A number of U.S. states have traffic safety laws that ban motorists from using cell phones when they drive. A few provinces, including Manitoba and Ontario, are contemplating similar laws. And there have been polls to suggest that most Canadians would support such a ban. But so far, only one province has actually taken the plunge. In 2003, Newfoundland/Labrador made it illegal to use a handheld cellular phone while driving.

**Insider Says:** In theory, a driver who causes an accident because of using a cell phone could be charged for other traffic offences such as reckless driving and even for criminal negligence if the result is death or serious injury. This is something you should point out to break down employee or union resistance to a ban.

## **Why Cell Phone Bans Are Required By Law**

How in the world are you going to argue that the law requires your company to implement a ban on employee use of cell phones when driving when there's no law or regulation that directly says this? *Answer:* Because there is in fact strong grounds to believe that such a legal obligation *does* exist.

Confused? Don't be. It's pretty simple when you remember that not all legal obligations stem from statutes and regulations. Something can still be illegal even if a statute or regulation doesn't say it is. That's because people and companies have duties under what's called common law—that is, law made up by judges on the basis of cases.

Negligence is one of those judge-made laws. A person, including a company may face liability for negligence when it fails to take reasonable steps to protect persons against foreseeable risks and somebody gets hurt as a result. Failing to take reasonable steps is a broad concept that can cover just about anything—from leaving a banana peel on a train platform to letting employees do their jobs in a way that endangers the public.

# Using Negligence to Justify a Ban on Cell Phones

Liability for negligence is a serious risk for companies. And letting employees talk on cell phones is arguably an act of negligence.

Suppose one of your employees is driving a company vehicle delivering materials to a construction site and getting drop-off instructions from his supervisor on the cell phone. The employee is so distracted that he drives through a STOP sign and runs over a pedestrian crossing the street. The victim could, of course, sue the employee for her injuries. But the employee might not have a lot of money. So the victim and her lawyer would probably look for a deep pocket to sue—like your company. Unfortunately for the company, the victim would have a strong chance of winning such a lawsuit. There are two arguments the victim could use:

**The Company Was Negligent:** First, the victim could argue that the accident was caused by the company's negligence. A reasonable person would have recognized that letting employees talk on cell phones when they drive on company business creates a risk of traffic accidents and injuries. Thus, the victim could claim that the company's failure to implement a ban on cell phone use was negligent.

**The Employee Was Negligent and the Company Was Responsible:** The victim could also try to hold the company responsible for the employee's negligence by using a theory called vicarious liability. Under this theory, a company can be liable for injuries caused by their agents or representatives if they were negligent in performing their job duties (or, as lawyers describe it, "acting within the scope of their employment"). Vicarious liability would probably apply in the example above because:

- The employee was employed by the company and was thus its agent;
- The accident was the result of the employee's negligence in running the stop sign; and
- The negligence occurred while the employee was performing company business and thus was within the scope of his employment.

This example isn't just speculation by lawyers. There have been a number of actual negligence lawsuits against companies for accidents caused by employees on cell phones. (See "Liability Scorecard" on page x for details of some of the leading cases.)

So far, all of the cases have come from the U.S. But negligence and vicarious liability are also the law in Canada. And lawyers tell the *Insider* that it's only a matter of time before the trend catches on in Canada.

## Conclusion

Keeping your employees from using cell phones while they drive is an important safety measure. But if you're an HR director, you already know that. But what you might not know is that you also have *the law* on your side. True, no statute or regulation in Canada requires a company to ban cell phone use by its employees. One day that may change. But you don't have to wait for that to happen. Because of negligence law, you can make the case right now that if your company doesn't ban cell phone use by employees it runs the risk of being found negligent if those employees become distracted and get into traffic accidents.

But persuading the company to adopt a ban is only half the battle. The next step is to ensure that you craft an appropriate and effective ban. Next month, in Part 2, we'll show you how to do that.

### **Studies to Cite as Ammunition for Banning Cell Phones**

Lesch, "Driving Performance During Concurrent Cell Phone Use," *Accident Analysis & Prevention*, Vol. 36, No. 3, May '04.

Thulin & Gustafsson, "Mobile Phone Use & Driving: Conclusions from 4 Investigations," Swedish National Road & Transp. Inst., 2004.

Strayer, Drews & Crouch: "Fatal Distraction? A Comparison Between Cell Phone Drivers and Drunk Drivers," Proceedings of the 2<sup>nd</sup> International Driving Symposium on Human Factors in Driving Assessment," July 21-24, 2003, Park City, UT. <http://www.psych.utah.edu/AppliedCognitionLab/DrivingAssessment2003.pdf>

Consiglio, Driscoll & Witte, "Effect of Cell Phone Conversation & Other Potential Interference on Reaction Time in Braking Response," *Accident Analysis & Prevention*, Vol. 35, No. 4, July 2003.

Wilson, Fang & Wiggins, "Collision & Violation Involvement of Drivers who Use Cell Phones," *Traffic Injury Prevention*, Vol. 4, No. 1, March 2003.

"The Risk of Using a Mobile Phone While Driving," Royal Society for the Prevention of Accidents (Birmingham, UK), 2002, <http://www.rospa.org.uk/pdfs/road/mobiles/report.pdf>.

Lissy, Cohen & Park, "Cell Phone Use While Driving: Risks & Benefits," Harvard Center for Risk Analysis, 2000.

Hahn & Tetlock, "The Economics of Regulating Cell Phone Use in Vehicles," AEI-Brookings Joint Center for Regulatory Studies, Oct. 1999. [http://www.aei.brookings.org/publications/working/working\\_99\\_09.pdf](http://www.aei.brookings.org/publications/working/working_99_09.pdf)

Redelmaier & Tibshirani, "Association Between Cellular Telephone Calls & Motor Vehicle Collisions," *New England Journal of Medicine*, Vol. 336, No. 7, Feb. 13, 1997.

### **Employers Sued For Accidents Caused By Employees On Cell Phones**

In the U.S., there have been a rush of lawsuits against companies by victims of traffic accidents allegedly caused by employees talking on cell phones. The cell phone lawsuit still hasn't reached Canada. But lawyers say that it's just a matter of time before that changes.

#### **1. Lumber Company**

A lumber company salesman driving his Ford Explorer to a sales meeting is talking on his cell phone and drives through an intersection without checking for oncoming traffic. He smashes into a Buick driven by a 78-year-old lady. The

victim is put on a ventilator and eventually dies of her injuries. The victim's family sues the salesman and the lumber company for negligence. The jury finds the driver guilty of negligence and holds the company vicariously liable. It orders the company to pay \$21 million. The company ultimately settles the case \$16.2 million, the limits of its liability coverage [*Bustos v. Dyke Industries*, Miami, Dade County Civ. Ct. No. 01-13770 CA30].

## **2. Brokerage Firm**

A stock broker is trying to make a sales call on his cell phone while driving to a restaurant. He is so distracted that he runs a red light and drives over a 24-year-old motorcyclist with fatal results. The victim sues the broker's employer, Smith Barney, for negligence. Smith Barney settles the lawsuit for \$500,000.

## **3. State Government**

A special education teacher who works for the State of Hawaii is discussing business on her cell phone while driving. She runs over a tourist from New Jersey while he's crossing the highway. The victim suffers permanent brain damage. The company is found 20 percent liable for the injuries and has to pay \$1.5 million.

## **4. Law Firm**

A lawyer talking on her cell phone while driving her Mercedes Benz runs over a 15-year-old girl. The girl dies. The lawyer keeps right on driving, later claiming that she thought she had hit a deer. The girl's family is suing the law firm, Cooley Godward, for more than \$30 million [*Youn v. Wagner et al.*, Loudon City Court, CL 24892].