

# DRIVING

*While on the*

# CELL PHONE

## *Punitive Damage Awards Should Come Through Loud and Clear*

**By Ira H. Leesfield and Richard I. Segal**

**S**ocrates, as reported by Plato, noted that “[t]he unexamined life is not worth living.”<sup>1</sup> He said this to a jury of Athenians in the year 399 B.C., after having been found guilty of heresy and sedition. Socrates was pleading with his fellow Athenians to further examine and understand the complex meaning and worth of a single life.

Today, perhaps, we are a bit less sophisticated. The “good life” that we usually seek to attain would be somewhat removed from the values Socrates espoused and sought. Nonetheless, we all could agree that to attain “good” can only be achieved if one is alive. If life is what we live for, and good is what we seek to attain, then why do many of us drive while we hold

conversations on our cell phones, diverting our attention from the road—and tempting fate?

As lawyers and as a legal community, we need to reconceptualize the meaning and worth of the gift of life. We have all faltered. Most of us take life for granted by following our daily routines and trying to pack as much work as possible into the hours of the day. We check our e-mail on our BlackBerrys, we discuss client matters on the phone, and we even send and receive faxes—all while driving through dangerous traffic or in residential neighborhoods where children play in the streets. Today we need to reexamine the life in which we consciously or unconsciously participate. As lawyers, we should plead to the courts to bang the proverbial gavel of consciousness,

waking up a society dormant to the risk of driving while on the cell phone. And perhaps the only means by which courts will be able to accomplish this is the imposition of punitive damages.

### **Examining the Evidence of Danger**

To begin, we need to remember that an automobile is an extremely dangerous object that can easily cause grievous injury. Even when driven carefully and defensively, cars kill. When our driving skills and focus are compromised, the stakes are raised and other people’s lives, along with our own, can be placed in danger. Thus, lawmakers are scrambling to find a solution to a problem that has become endemic to our society: driving while distracted. According to the National Highway and

Traffic Safety Administration, distracted driving contributes to one in four traffic accidents.<sup>2</sup>

Astonishingly, between 4,000 and 8,000 crashes per day are associated with distracted driving.<sup>3</sup>

Driving while talking on a cell phone is just one manifestation of distracted driving. People sometimes watch movies while driving, listen to loud music under headphones, eat, play video games, groom themselves, and perform a host of other dubious actions. However, the ubiquity of cell phone use is now an unfortunate but established part of our driving environment. In fact, at the end of 2004, estimates suggest there were 182 million cellular subscribers in the United States.<sup>4</sup> At any given moment throughout the day, 8 percent of drivers on the road are using their cellular phones.<sup>5</sup> Moreover, two separate field studies have corroborated the fact that over 40 percent of Americans admit to conversing on the cell phone while driving.<sup>6</sup>

Further, technological innovations regularly lead to new products, and cell phone companies have proven adept at providing new gadgets to further distract drivers. They are inundating the market and creating a cornucopia of distracting behaviors that appears to have no end in sight.<sup>7</sup>

Concerns about such proliferation are merely anecdotal and ungrounded—or so the cell phone companies argue. New research, however, is providing scientific support for such commonly held fears. One study concludes that cell phone drivers' reaction times are reduced by approximately 20 percent and that such drivers are significantly more likely to be involved in rear end collisions than drivers not

using cell phones, even though the driver's eyes are fixed on the road ahead.<sup>8</sup> The study's authors conclude that this can be attributed to an "inattention blindness," which suggests that the cognitive distraction caused by cell phone usage decreases a driver's awareness of important information in a driving scenario.<sup>9</sup> Even more startling is the finding that hand-held and hands-free phones are equally faulty in creating distracted drivers.<sup>10</sup> Thus, the impetus behind the distraction is directly attributable to cognitive preoccupation, as opposed to the difficulties of manually holding or manipulating a cellular phone.

Most shocking of all is the conclusion that the performance of drivers who are conversing on cell phones is *more impaired* than drivers who are intoxicated.<sup>11</sup> According to one study, drivers on cell phones have more accidents and slower reaction times than drivers who are legally drunk. The new scientific evidence makes one message abundantly clear: drivers should not use *any* type of cell phone behind the wheel.<sup>12</sup>

### Employer Liability

With new science pointing out the dangers of driving while on the cell phone, law firms and many other types of employers are left with the dilemma of balancing productivity and safety. Ideally, employers want to be in constant contact with their employees. For example, many law firms provide their attorneys with BlackBerrys, and some firms even go so far as to pay their attorneys' cell phone bills. However, astute managing partners must question whether this practice of providing attorneys with cell phones might end up in the long run exposing the firm to

costly liability.

A law firm could be held liable for its employees under respondeat superior or negligence. The doctrine of respondeat superior is based on the assumption that the master controls the acts of the servant and is therefore liable for the consequences of those acts.<sup>13</sup> Thus, it is foreseeable that a law firm could be held liable for an employee who causes an accident while being on the cell phone with his employer or a client.<sup>14</sup>

Interestingly, a recent study by the National Highway and Traffic Safety Administration estimated that each on-the-job employee automobile accident costs an employer an average of nearly \$16,500, and with each injury that number increases by \$76,000 or more.<sup>15</sup>

Managing partners should also recognize that in 1999 Smith Barney was sued when one of its employees caused an accident, killing a man while conducting Smith Barney business on his cell phone. Faced with a jury trial, Smith Barney settled the lawsuit for \$500,000.<sup>16</sup> In 2001, a law firm in California was sued when one of its attorneys hit and killed a child while using her cell phone and driving.<sup>17</sup> Allegedly, the attorney was talking on her cell phone and doing work for the firm at the time her vehicle swerved and hit the child.<sup>18</sup> Before the trial, in 2004, the employer law firm settled with the child's family for an undisclosed amount.<sup>19</sup>

Thus, it is vital that employers consider the ramifications of allowing or passively agreeing to allow employees to do business on their cell phones while driving. In essence, to mitigate the possibility of future liability law firms should have a clear policy stating specifically where they stand on the cell

phone issue and what they expect from their employees.

### **Legislative Failures**

With a myriad of behaviors contributing to driving while distracted and the ostensible difficulties of enforcing the pertinent statutes, many states and local governments have sought to confront the most visible and obvious culprit: driving while talking on the cell phone. Interestingly, by 2005 lawmakers in 26 states had proposed 62 bills limiting cell phone use while driving.<sup>20</sup> Despite these efforts, with cellular phone lobbies playing the role of formidable adversary with seemingly unlimited resources, legislative attempts have been met with fierce resistance. As a result, attempts to restrict cell phone use have enjoyed only limited success. In fact, only two states, New York and Connecticut, and the District of Columbia currently have cell phone bans enforced on a primary level.<sup>21</sup>

Despite the documented dangers stemming from driving while on a cell phone, some states have completely and effectively precluded any local legislation from confronting the issue. Ten states—including such populous states as Florida, New York, and Pennsylvania—have passed legislation preempting all local governments from passing any legislation addressing cell phone use while driving.<sup>22</sup> Clearly, a legislative impasse exists, providing little hope that states will be able to cure this ill in the near future.

### **Another Option: Punitive Damages**

With legislative attempts falling far short of any solvency, and accident costs and injuries escalating at troubling rates, is there any hope of effectively addressing the problem?

Can the dangers of driving while on the cell phone be mitigated or removed altogether? Without a viable solution in sight, perhaps the logical place to turn is the courts.

Few doubt that cell phone use while driving will increase if left unchecked. It may never go away. Hence, if it is indeed impossible to eliminate this habitual and pervasive practice, at the very least the law should possess the proper means to compensate its victims adequately and to punish culpable tortfeasors. Our belief is that this can best be effected through the application of punitive damages. Just as punitive damages are available in driving while intoxicated (DWI) collisions, they should also be applied to collisions that occur because drivers were using their cell phones.

The U.S. Supreme Court has held that punitive damages are aimed at deterrence and retribution, and may be imposed to further a state's legitimate interests.<sup>23</sup> Though the dearth of legislation would suggest otherwise, the protection of our own and other's lives should indeed be such a legitimate interest.

States control the discretion over the imposition of punitive damages.<sup>24</sup> A majority of states permit juries to assess punitive damage awards against defendants who cause auto accidents while intoxicated. The authority is derived from statutes and common law. Some states adopt a per se approach, where evidence of a drunk driver is sufficient on its own to support a finding of punitive damages.<sup>25</sup> Other states determine whether punitive damages are warranted in DWI cases by conducting an individualized inquiry into the driver's conduct and any other aggravating circumstances.<sup>26</sup> In general, punitive

damages may be assessed when the act in question was committed with malice, moral turpitude, wantonness, willfulness, outrageous aggravation, or in reckless indifference to another person's legal rights.<sup>27</sup>

All of the justifications for punitive damages in DWI cases can be effectively transplanted to cases of driving while on the cell phone. The similarities between the two are undeniable. Like DWI, driving while on the cell phone is an intentional, voluntary behavior that unnecessarily endangers drivers, passengers, and pedestrians. The volitional decision to drive while distracted places other people's lives in danger. In fact, proving that the driver was on a cell phone would be fairly simple, as cell phone records can almost conclusively prove whether a driver was using his or her cell phone at a certain time.

To reiterate the findings noted in the study previously mentioned: a driver talking on his or her cell phone suffers a greater impairment to driving ability than a drunk driver.<sup>28</sup> With this conclusion, the logical bridge for punitive damages is clear.

Perhaps the most compelling argument for punitive damages is that all of the dangers and risks created by driving while on the cell phone are avoidable. It is a choice. The driver chooses whether to risk his or her life—and the lives of others—in driving while on the cell phone. Requiring a driver to devote his or her full attention to the operation of a 2,000-pound vehicle is not unreasonable.

Since no legislative remedy seems possible in the near future, the last bastion of hope for victims and society is the court system. Punitive damages assessed against drunk drivers will serve as the

model by which courts can assess punitive damages against those recklessly driving while conversing on their cell phones. The only difference between the two—and it may be ephemeral—is the *illegality* of driving while intoxicated. Even without the legislation, driving while on the cell phone rises to the punitive damage level of aggravated misconduct, qualifying as wanton and willful behavior that consciously endangers our safety and that of others. Punitive damages for driving while on the cell phone provide the most immediate and efficient means to address the epidemic. They will punish the culpable persons and serve as a much needed deterrent to others. If we, as a society, do not have the willpower and strength to control our own actions, then we must resort to the court system to enforce our own safety.

### Conclusion

Let us not forget: life is here today, and it is our responsibility to maintain it. Various tasks and decisions lie within our control to make sure life will be here tomorrow. So, the next time you are in your car, before picking up your cell phone, examine if your life is worth living. As lawyers, we can lead by example, and with punitive damages as a deterrent, others are sure to follow. ■

### Notes

1. See Plato, *Apology*, in GREAT DIALOGUES OF PLATO 423, 443 (Eric H. Warmington & Philip G. Rouse eds., W.H.D. Rouse trans., Mentor Books 1956).

2. Business Wire, *Insurance Institute for Highway Safety Finds Cell Phone Users Four Times More Likely to Crash—21st Century Insurance Urges Motorists to “Just Drive,”* <http://find>

[articles.com/p/articles/mi\\_m0EIN/is\\_2005\\_July\\_12/ai\\_n14737740](http://articles.com/p/articles/mi_m0EIN/is_2005_July_12/ai_n14737740) (last visited June 18, 2007).

3. Karen Lurie, *Driving While Distracted*, [www.sciencentral.com/articles/view.php3?language=english&type=&article\\_id=218392289](http://www.sciencentral.com/articles/view.php3?language=english&type=&article_id=218392289) (last visited June 18, 2007).

4. Cellular Telecommunications and Internet Association, CTIA's Semi-Annual Wireless Industry Survey Results, <http://files.ctia.org/pdf/CTIAYearend2004Survey.pdf> (last visited June 18, 2007).

5. Donna Glassbrenner, *Driver Cell Phone Use in 2004—Overall Results*, [www.nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/RNotes/2005/809847.pdf](http://www.nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/RNotes/2005/809847.pdf) (last visited June 18, 2007).

6. Mason-Dixon Polling & Research, Inc., *Drive for Life Annual National Driver Survey*, [www.safedrivingtest.com/driversadmit.html](http://www.safedrivingtest.com/driversadmit.html) (last visited Nov. 1, 2006); see also JANE STUTTS ET AL., *DISTRACTIONS IN EVERYDAY DRIVING* (AAA Foundation for Traffic Safety, June 2003), [www.aaafoundation.org/pdf/DistractionsInEverydayDriving.pdf](http://www.aaafoundation.org/pdf/DistractionsInEverydayDriving.pdf) (last visited June 18, 2007).

7. Melania Zaharopoulos, *Driving under the Influence of PSP*, [www.gilroydispatch.com/lifestyles/content.view.asp?c=165830](http://www.gilroydispatch.com/lifestyles/content.view.asp?c=165830) (last visited June 18, 2007).

8. David L. Strayer & Frank A. Drews, *Multi-Tasking in the Automobile*, [www.psych.utah.edu/AppliedCognitionLab/WickensChapterFinal.pdf](http://www.psych.utah.edu/AppliedCognitionLab/WickensChapterFinal.pdf) (last visited June 18, 2007). Strayer & Drews have posited that a driver talking on cell phone enters a sort of virtual reality with the person on the other end of the conversation, instead of dealing with the physical environment that they are actually in. “What happens is, even though the driver is looking out the windshield, [and] they’re looking at signs and other information in the driving scene, they’re not actually pro-

cessing it,” suggest Strayer and Drews. “They’re not seeing that information because their mind is concentrating on the cell phone conversation, and not on driving.” See Lurie, *supra* note 3.

9. Strayer & Drews, *supra* note 8, at 126.

10. Suzanne McEvoy et al., *Role of Mobile Phones in Motor Vehicle Crashes Resulting in Hospital Attendance: A Case-Crossover Study*, 331 BRIT. MED. J. 428 (Aug. 2005), [www.bmj.com](http://www.bmj.com) (last visited June 18, 2007).

11. Strayer & Drews, *supra* note 8.

12. Press Release, Governor's Highway Safety Association, *New Research Reinforces Safety Hazards of Cell Phone Use While Driving* (July 12, 2005), [www.ghsa.org/html/media/pressreleases/2005/071205.html](http://www.ghsa.org/html/media/pressreleases/2005/071205.html) (last visited June 18, 2007).

13. See *Vigilant Ins. Co. v. Keiser*, 391 So. 2d 706, 714 (Fla. Dist. Ct. App. 1980).

14. See *King v. Pagliaro Bros. Stone Co.*, 703 A.2d 1232, 1233 (D.C. 1997) (employer sued for negligence when employee truck driver caused accident while talking on his cell phone).

15. See NAT'L HIGHWAY & TRAFFIC SAFETY ADMIN., *THE ECONOMIC BURDEN OF TRAFFIC CRASHES ON EMPLOYERS 6–7* (2003), [www.nhtsa.dot.gov/people/injury/alcohol/EconomicBurden/pages/WhatDOTCCost.html](http://www.nhtsa.dot.gov/people/injury/alcohol/EconomicBurden/pages/WhatDOTCCost.html).

16. See Terry Carter, *Crash Course for Business: Companies Can Be Liable for Accidents Resulting from Job-Related Cell Phone Use*, 85 A.B.A. J. 40 (Aug. 1999).

17. See Teri Zucker, *Around the Firms*, 7 L. FIRM PARTNERSHIP & BENEFITS REP. 1 (July 2001).

18. *Id.*

19. *Id.*

20. Matt Sundeen, *Highway Safety Cell Phones and Highway Safety: 2005 Legislative Update* (National Conference of State Legislatures July 2005), [www.ncsl.org/programs/transportation/](http://www.ncsl.org/programs/transportation/)

cellphoneupdate05.htm (last visited June 18, 2007).

21. Governor's Highway Safety Association, State Info & Laws, Cell Phone Laws, [www.ghsa.org/html/stateinfo/laws/cellphone\\_laws.html](http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html) (last visited July 27, 2007). Although observed hand-held phone use in New York dropped 50 percent in the months immediately following the enactment of the law, a year after the ban usage rates had climbed nearly to the same rates that existed before the ban. *See Hand-Held Cell Phone Use Goes Back Up in New York, Despite Year-Long Ban*, 38 STATUS REP. at 6 (Insurance Institute for Highway Safety Aug. 26, 2003),

[www.iihs.org/sr/pdfs/sr3808.pdf](http://www.iihs.org/sr/pdfs/sr3808.pdf).

22. Governor's Highway Safety Association, *supra* note 21. The 10 states are Florida, Kentucky, Louisiana, Mississippi, Nevada, New Jersey, New York, Oklahoma, Oregon, and Pennsylvania.

23. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1995).

24. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1519 (2003).

25. *See, e.g., Honeycutt v. Walden*, 294 Ark. 440, 743 S.W.2d 809, 810 (1988); *Taylor v. Superior Court of Los Angeles County*, 24 Cal. 3d 890, 157 Cal. Rptr. 693, 598 P.2d 854, 857 (1979); *Ingram v. Pettit*, 340 So. 2d

922, 924 (Fla.1976); *Calloway v. Rossman*, 150 Ga. App. 381, 257 S.E.2d 913, 917 (1979).

26. *See, e.g., Smith v. Chapman*, 115 Ariz. 211, 564 P.2d 900, 903-04 (1977); *Infeld v. Sullivan*, 151 Conn. 506, 199 A.2d 693, 694-95 (1964); *McMahon v. Chryssikos*, 218 N.J. Super. 571, 528 A.2d 104, 109 (Law Div.1986); *Cabe v. Lunich*, 70 Ohio St. 3d 598, 640 N.E.2d 159, 162-63 (1994).

27. *Fla. E. Coast Ry. Co. v. McRoberts*, 111 Fla. 278, 149 So. 631 (1933).

28. *Strayer & Drews, supra* note 8, at 131.