



## **Texting Liability isn't Just for Drivers Anymore**

At this point everyone knows that someone texting and driving can be held liable for damages (along with the company they are working for if in the course of employment). However a NJ appellate court just paved the way for the person who texts a person they had knowledge was driving can be held liable for damages. You read that right! The person texting a driver can be held liable for damages the driver causes as a result of texting or reading a text. In a bizarre decision by the NJ appellate court the sender of a text can be held liable if the sender knows that the person receiving the text is driving and is likely to read the text while driving.

### **Kubert vs. Colonna**

Colonna was texting with driver Kyle Best. Best, who was texting with Colonna while driving, struck a motorcycle and severely injured Mr. & Mrs. Kubert to the point that both of them each lost a leg in the accident. After a settlement with the Best's insurance company of \$500,000 (presumably the policy limits) the Kubert's filed suit against Shannon Colonna charging that she had a duty not to text Kyle Best because he was driving and she aided and abetted in his breaking of the law. The lower court denied the suit and ruled in favor of the defendant. The Kuberts appealed. The appellate court also found in favor of the defendant "because the plaintiff was unable to prove that Colonna knew that Best was driving". While this particular case is a win for the defendant, the courts paved the way for the flood gates of litigation in regards to those that send text messages. *In its opinion, the court stated there would be liability on the part of the person who sent the text if they knew that person was driving.*

This ruling casts a wide net for potential liability. The case was limited to texting. No other form of electronic communication was mentioned in the case. What about other forms of electronic communication? If one was on the phone with someone they knew was driving? Most people also receive emails on their smartphones. If a company emails their outside sales people while they are driving, can they be held liable if the employee reads the email while driving?

### **Protecting oneself personally and corporately**

The case law is too new to really determine what protections one should take to truly insulate themselves from liability regarding this decision. However there are prudent steps one can take to minimize the risk. On a personal level, do not text someone you know or have reason to believe may be driving. For example, if your spouse leaves work at 5PM don't text them to pick up a gallon of milk on the way home at 5:10 pm. It may be prudent to add a line on your text signature to state that any person receiving the text while driving should not respond until they are legally parked. Have a



conversation with driving age children on a different level. They all have been told the dangers of texting while driving (teenage minds do not process dangerous consequences the same as adults). Have a conversation with them about the possible financial impact to your family for simply sending a text to someone that is or might be driving.

Regarding businesses, I have been advising businesses to change their corporate policies regarding the use of cell phones while driving a company car or a personal car on company time. The few that have polices are outdated and simply refer to the requirement of hand free devices. It is time to change the corporate policy to ban the use of any electronic communication while driving. Many companies text employees in various situations. Some will do it on an individual basis, and some will do it on a mass scale. In my opinion this has never been good risk management simply because the written documentation for such communication is often not stored and archived on company servers and may compromise a legal defense for certain legal situations. With this added burden, it would be wise to ban texting all together as a corporate policy. Consider adding a disclaimer on all emails advising the recipient not to read or respond to emails while driving. It sounds ridiculous, but there is a reason a package of peanuts says, "warning contains nuts".

The case is new and I have absolute confidence that its boundaries regarding phone conversations and emails will be tested. Don't be a test dummy!! Consider changing your personal risk profile and your corporate risk profile and take action to discourage the sending of electronic communications to anyone who is driving.

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