Focus PERSONAL INJURY

The rising cost of driving digitally impaired

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Did you know that driving while talking on a cellphone is as dangerous as driving with a blood alcohol count of .08; that drivers using cellphones in any manner fail to see up to 50 per cent of the information in their driving environment; or that a person is 23 times more likely to be involved in a serious motor vehicle collision while text messaging?

Such startling statistics propelled the Ontario legislature to introduce Bill 31, *The Transportation Statute Law Amendment Act (Making Ontario Roads Safer), 2014*, which contains, in part, an increase in the fines for texting and driving imposed under sections 78 and 78.1 of the *Highway Traffic Act* to between $300 and $1,000.

In personal injury actions, whether or not a person was holding or using his/her cellphone at the time of the collision is often a key factor in determining liability. This is highlighted in *Cucullo v. Basso* [2014] O.J. No. 4437, a recent decision in the Superior Court of Justice. In *Cucullo*, the defendant Usselman brought a motion for summary judgment to determine the issue of liability as between himself and the co-defendant Basso.

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According to Basso, he observed Usselman in his vehicle talking on a cellphone and looking at papers before suddenly swerving in front of Basso, cutting him off and causing him to collide with the rear end of Usselman's vehicle, which in turn struck the vehicle ahead of him. The court relied on Usselman's cellphone records and the time of the collision taken from the motor vehicle accident report to determine that Usselman received two phone calls prior to impact and therefore there was a genuine issue requiring a trial as between the defendants.

The issue of whether the simple act of holding a cellphone is sufficient to contravene section 78.1(1) of the *Highway Traffic Act* was addressed by the Court of Appeal for Ontario in *R. v. Kazemi* [2013] O.J. No. 4300, in which Kazemi stopped at a stoplight and a police officer observed a cellphone in her hand. She explained that the cellphone had dropped to the floor and she picked it up when she got to the red light. She did not contest that when observed by the officer she was driving, but argued that her cellphone was not in use.

Kazemi was convicted. The Ontario Superior Court of Justice overturned her conviction on the basis that there must be some sustained physical holding of the device in order to meet the "holding" requirement under section 78.1(1), and that the momentary handling here was insufficient to establish that requirement. The prosecutor appealed. The central issue on appeal was whether Kazemi was "holding" the cell. Justice Stephen Goudge overturned the lower court ruling and concluding that the ordinary interpretation of the word "holding" — that is, to have in one's hand — best served the legislative intent underlying this section of the HTA. The courts have made it very clear that a driver holding or using a cellphone or other hand-held device while behind the wheel will face serious penalties. Will the courts extend a similar level of culpability to the employer of a negligent driver who is talking on a cellphone at the time of a collision and is required to or actively encouraged to use a phone for work purposes while driving?

Canadian courts have broadly interpreted the issue of whether an employer can be held vicariously liable for its employee's negligent acts. In *Bazley v. Curry* [1999] 2 S.C.R. 534, the Supreme Court of Canada established the principle that employers are vicariously liable for employee acts that were authorized by the employer and unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing authorized acts.

An analysis under this principle is three-fold. Firstly, should liability lie against the employer? Second, is the wrongful act sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability? If there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires, the employer may still be found vicariously liable. Thirdly, in determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors should be considered including: (a) the opportunity that the enterprise afforded the employee to abuse his or her power; (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee); (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise; (d) the extent of power conferred on the employee in relation to the victim; and (e) the vulnerability of potential victims to the wrongful exercise of the employee's power.

Distracted driving has become the leading cause of fatal motor vehicle collisions on our highways. At any given time, one in 20 Canadian drivers is using a cellphone while driving. Young drivers between the age of 16 and 20 are at highest risk for distracted driving-related collisions. As these statistics continue to grow, it is likely the legislature and courts will maintain its eyes-on-the-road, hands-on-the-wheel approach and we will see the continued development of this issue in many areas of law.

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