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Case can be made for punitive damages against texting motorists

Just about every single driver at some time (or multiple times daily, unfortunately) has read or responded to a text message or email that we think just cannot wait. Drivers know the obvious dangers of texting and distracted driving but continue to consciously disregard the known dangers it presents to all.

Perhaps a tad histrionic for this subject, inscribed within the Jefferson Memorial, Thomas Jefferson reminded us that "laws and institutions must go hand in hand with the progress of the human mind" and "changes in laws and Constitutions" must occur when "manners and opinions change, with the change of circumstances." Although there certainly was no texting at Monticello, even Jefferson would agree that times are very different today.

According to the National Safety Council, one out of every four car accidents in the United States is attributed to texting and driving, while texting and driving is six times more likely to cause an accident compared to driving intoxicated. Illinois law has long held that willful and wanton conduct is conduct that shows an utter indifference to or conscious disregard for the safety of others. As known, Illinois law prohibits texting (and emailing) while driving.

A vehicle traveling 55 mph will cover more than 320 feet in four seconds, or the average amount of time a distracted driver takes to access their cellphone and read the average text message that is no more than seven words. Reading or responding to that text message is enough time to eliminate the National Safety Council's recommended three-second following distance.

There likely are few and far attorneys reading this who have not read or glanced at a lengthy email from opposing counsel as they "multitask" behind the wheel. Just because texting and driving has become common practice does not eliminate the grave dangers it presents to the innocent pedestrian walking through a crosswalk or the vehicle ahead coming to a stop at a light.

A defendant admitting to texting is certainly an inflammatory fact. But, seeking the admission that he or she made the "conscious choice to text knowing it places others in danger" could be a sound basis to seek punitive damages.

When a motorist decides to read an email while traveling down a crowded interstate, that is as much a failure to exercise reasonable care as it is a conscious and intentional decision to blindly operate an instrument that accounts for close to 35,000 deaths per annum in the United States.

There are few district or appellate court decisions that have assessed a trial court's decision to permit leave to plead punitive damages based on texting and driving. It can be presumed that there are so few because most of these cases lead to settlement. In *Pennington v. King*, the U.S. District Court for the Eastern District of Pennsylvania found that use of a cellphone at the time of an accident could be used by a plaintiff to support an award for punitive damages. *Pennington v. King,* 2009 WL 415718 (E.D. Pa. 2009) [however, most decisions have included additional aggravating factors such as erratic driving and excessive speed].

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To be granted leave to plead punitive damages, an Illinois court must find that a plaintiff established a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. A critical element to willful, punitive conduct is to assess whether the defendant had "actual knowledge" that their conduct caused a danger but made a conscious decision to disregard that knowledge. *Hadley v. Witt Unit School District 66*, 123 Ill.App.3d 19, 78 Ill.Dec. 758, 462 N.E.2d 877 (1984).

Simply arguing to a court that a truck driver, for example, was texting at the time of the accident is one thing. Citing to testimony that the truck driver also agreed that he had "actual knowledge" of the dangers of texting, and admitted that he made the "voluntarily, personal choice" to "consciously disregard" that knowledge provides the stronger factual foundation. Plaintiffs' attorneys too often view texting as just an aggravating factor versus a basis to prove to a court that a defendant-driver made a conscious decision to disregard the safety of others.

How often texting and driving occurs should be irrelevant to a court's decision. States throughout the nation have spent millions (if not billions) of dollars on campaigns to "crack down" on texting and driving. These campaigns, often at the cost of taxpayer dollars, are meant to deter this conduct, with deterrence also being the overriding purpose of punitive damages.

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