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2003

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### Recommended Citation

Michael, Jordan (2003) "Liability for Accidents from Use and Abuse of Cell Phones: When Are Employers and Cell Phone Manufacturers Liable," *North Dakota Law Review*: Vol. 79 : No. 2 , Article 2.

Available at: <https://commons.und.edu/ndlr/vol79/iss2/2>

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# LIABILITY FOR ACCIDENTS FROM USE AND ABUSE OF CELL PHONES: WHEN ARE EMPLOYERS AND CELL PHONE MANUFACTURERS LIABLE?

JORDAN MICHAEL\*

## I. INTRODUCTION

Between 1992 and 2002, the number of cell phone users grew from 10 million to 129 million people, and cell phone usage increased more than thirty percent in the last two years.<sup>1</sup> Although many calls are personal in nature, many are for business purposes. Individuals that use cell phones for business purposes include doctors, lawyers, accountants, stock brokers, trades people—anyone away from the office or work site who needs to reach a coworker, patient, or client. Many people make cell phone calls for business purposes in their automobiles while driving.

Studies indicate that fifty-four percent of all drivers have access to a cell phone.<sup>2</sup> Studies also indicate that eighty-five percent of subscribers use their cell phone while driving,<sup>3</sup> and seventy percent of all cell phone calls are made from vehicles.<sup>4</sup> Cell phone use in automobiles has grown because of the sheer increase in the presence of cell phones. Information on the percentage of cell phone calls used for personal versus business purpose is not available, yet with the increasing presence of cell phones there is no reason to believe that cell phone use for business purposes is not increasing as

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1. Kelli Ovies, *Hold That Call: Talking on the Phone While Driving Could Spell Trouble for Agents and Their Firms*, TAR HEEL REALTOR (North Carolina Association of Realtors, Chapel Hill, N.C.), August 2002, at <http://nc.living.net/public/THR/2002/thr-0802/phone.htm> (last visited June 27, 2003).

2. *Id.*

3. Joel S. Aziere, *Employer Liability for Cell-Phone Related Accidents*, LABOR & EMPLOYMENT SOLUTIONS (Davis & Kuelthau, s.c., Milwaukee, Wis.), Nov. 2001, at 3, at <http://www.dkattorneys.com/newsletters/laborempsol.htm> (last visited June 27, 2003).

4. Ovies, *supra* note 1.

well. When companies have been providing reimbursement for the cost of a cell phone or for the cost of a business-related call, it is intuitive that cell phone use for business purposes has been increasing.

While cell phone use continues to increase, the distraction of having a conversation on a cell phone while driving in a car has been the basis of several accidents.<sup>5</sup> Drivers are four times more likely to have an accident when using cell phones.<sup>6</sup> In particular, a University of Florida study reported that “people using mobile phones while driving were anywhere from [thirty-four] percent to 300 percent more likely to have an accident.”<sup>7</sup>

Distraction is the real issue, not just the act of holding the cell phone.<sup>8</sup> In fact, ninety-one percent of Americans believe that driving while talking on a cell phone creates a distraction and increases the likelihood of an accident.<sup>9</sup> Assuming distraction is the central issue, other activities, including navigational systems, Internet/e-mail access, and specialty services (such as General Motor’s OnStar “concierge” services for movie times and restaurant suggestions) are also a source of concern.<sup>10</sup> The dangers associated are two fold: one, a driver may take his or her eyes off the road while dialing; and two, a driver may become so involved in a conversation that concentration is impaired, jeopardizing the safety of other drivers, occupants, and pedestrians.<sup>11</sup>

When thinking of distraction, one may be tempted to assume that it occurs only at the moment of the distracting event. According to the New England Journal of Medicine, collision rates are four times higher even when a call ends fifteen minutes before an accident.<sup>12</sup> The risk of an accident dissipates only fifteen minutes after a cell phone call is made.<sup>13</sup>

According to another study, the risk of an accident caused by cell phone use is equivalent to the risk caused by legal intoxication.<sup>14</sup> “Scien-

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5. Aziere, *supra* note 3, at 3.

6. *Id.*

7. Bonnie Rogers, *Driving While Phoning*, IRMI INSIGHTS (International Risk Management Institute, Inc., Dallas, Tex.), Dec. 2001, at <http://www.irmi.com/insights/articles/rogers001.asp> (last visited June 27, 2003).

8. Ovies, *supra* note 1.

9. *Cell Phones and Driving*, HOT TOPICS & INSURANCE ISSUES (Insurance Information Institute, New York, N.Y.), Feb. 2003, at <http://www.iii.org/media/hottopics/insurance/cellphones> (last visited June 27, 2003).

10. *Id.*

11. *Id.*

12. Donald A. Redelmeier & Robert J. Tribshirani, *Association Between Cellular-Telephone Calls and Motor Vehicle Collisions*, 336 NEW ENG. J. MED. 453, 455 (1997); see also *Cell Phone Safety While Driving*, THE ST. PAUL (St. Paul Fire and Marine Insurance Co., St. Paul, Minn.), Summer 2002, at 2-3 (discussing the New England Journal of Medicine study).

13. *Cell Phone Safety While Driving*, *supra* note 12, at 3.

14. Redelmeier & Tribshirani, *supra* note 12, at 456.

tific research has found that a driver's reaction time is slowed by an average of [thirty percent] while talking on a cell phone, similar to that of a drunk driver."<sup>15</sup> Vehicle crashes already account for twenty-four percent of workplace deaths, the highest single factor of on-the-job fatalities.<sup>16</sup>

Using one hand to talk on a cell phone while only having one other hand free to drive also contributes to the danger of using a cell phone while operating a car. However, the risk of accident remains the same regardless of whether the cell phone is "hands-free" (mounted in a car) or "hand-held."<sup>17</sup> Talking on a cell phone with the "hands-free" type of phone while driving still quadruples the chance of getting into a motor vehicle accident.<sup>18</sup> A recent National Safety Council study found that "regardless of whether hands-free devices were used, conversing on cell phones led to significant decrements in simulated driving performance."<sup>19</sup> The State of New York has banned the use of "hand-held" cell phones while driving but has allowed the use of "hands-free" phones; the effectiveness of this public policy has yet to be seen.<sup>20</sup>

However, there does appear to be a strong enough nexus between cell phone use in automobiles and automobile accidents to justify a change in a company's employee cell phone use policy. For example, "Praxair, a \$5 billion industrial gas maker, banned cell phone use in 1999."<sup>21</sup> Johnson & Johnson, Du Pont, and the New York City Taxi and Limousine Commission

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15. Michael Thiel & Finley Maxson, *The Cell Phone and Distracted Driving, A Potential Danger for the Real Estate Broker*, THE REAL ESTATE RESOURCE (Minnesota Association of Realtors, Edina, Minn.), July, 2002, at 2, available at [www.mnrealtor.com](http://www.mnrealtor.com) (last visited June 27, 2003).

16. *Cell Phones and Driving*, *supra* note 9.

17. Aziere, *supra* note 3, at 3.

18. *Employers Guide to Cell Phone Liability*, 7 BRAUN CONSULTING NEWS 1 (Braun Consulting Group, Seattle, Wash.), Summer 2002 [hereinafter *Employers Guide*], at <http://www.braunconsulting.com/bcg/newsletters/summer2002/summer2002.html> (last visited June 27, 2003); see also Redelmeier & Tribshirani, *supra* note 12, at 453-58. A New England Journal of Medicine study concluded that "using a cellular telephone was associated with a risk of having a motor vehicle collision that was about four times as high as that among the same drivers when they were not using their cellular telephones." *Id.* at 456. Also, "[t]elephones that allowed the hands to be free did not appear to be safer than hand-held telephones." *Id.* at 455.

19. Rogers, *supra* note 7.

20. See N.Y. VEH. & TRAF. LAW, § 1225-c (McKinney Supp. 2003) (banning the use of hand-held mobile phones). Section 2(a) indicates that "no person shall operate a motor vehicle upon a public highway while using a mobile telephone to engage in a call while such vehicle is in motion." *Id.* § 1225-c(2)(a). Section four provides for a fine of up to \$100 for violation. *Id.* § 1225-c(4).

21. Associated Press, *Firms Craft Cell Phone Policies*, (August 26, 2001), at <http://www.wired.com/news/business/0,1367,46326,00.html> (last visited June 27, 2003).

have also banned cell phone use.<sup>22</sup> Other companies refuse to reimburse drivers for cell phone-related expenses.<sup>23</sup>

Company liability for employee-driving accidents is not a new concept. Cell phone accidents have resulted in both criminal and civil claims.<sup>24</sup> Often, employers have paid monetary damages for civil claims or settled out of court to avoid protracted publicity and the damning results of jury sympathy.<sup>25</sup> Many cases involving employee's use of cell phones have settled out of court for substantial monetary damages.<sup>26</sup> Other cases have resulted in jury awards worth several million dollars.<sup>27</sup>

This article will explore the liability of an employer for accidents caused by employee cell phone use while driving and discuss the significance of employee training and warnings. This article will also provide a cautionary tale to manufacturers to protect their "deep pockets" by providing warnings to cell phone users of the dangers of talking while driving.

## II. THE LAW AND PUBLIC POLICY RELATIVE TO CELL PHONE USE

The concern over "dialing while driving" has created a great enough issue for various states, counties, and cities to legislate in the area of operating a cell phone while driving.<sup>28</sup> For instance, New York State imposes a \$100, \$200, or \$500 fine depending on the number of violations of its ban on hand-held cell phone use.<sup>29</sup> The city of North Bend, Washington, imposes \$300 fines for motorists who commit a moving violation while engaged in a number of distracting activities, including cell phone usage.<sup>30</sup> Some states, cities, and counties are enacting their own "negligent driving laws" relating to cell phone use.<sup>31</sup> Limits on the use of hand-held cell phones have been pending in forty-two states, yet only five states have con-

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22. Aziere, *supra* note 3, at 3.

23. Rogers, *supra* note 7.

24. Laura Parker, *Cell Phone Suits Targeting Firms*, USA TODAY, Dec. 26, 2002, at Tech.

25. Ovies, *supra* note 1.

26. Aziere, *supra* note 3, at 3.

27. *Employers Guide*, *supra* note 18. In the 1990's, Domino's Pizza changed its delivery policy after sustaining massive liability for accidents caused by employees attempting to meet their thirty-minute deadline. Aziere, *supra* note 3, at 3.

28. See *Cell Phones and Driving*, *supra* note 9 (listing states regulating cell phone usage).

29. N.Y. VEH. & TRAF. LAW, § 1225-c (McKinney Supp. 2003).

30. Mark S. Filipini, *Reducing Employer Liability From Employee Cell Phone Use*, UPDATE, (Preston Gates Ellis LLP, Seattle, Wash.) Winter 2002, at 1, at <http://www.prestongates.com/publications/newsletter.asp?pubID=240> (last visited June 27, 2003).

31. *Employers Guide*, *supra* note 18. Nebraska has proposed a rebuttable presumption of negligence if a driver was using a cell phone at the time of an accident. MATT SUNDEEN, CELL PHONES AND HIGHWAY SAFETY, 2002 Legislative Update 8 (National Conference of State Legislatures 2002).

sidered an outright prohibition of all cell phones and other communication devices while driving.<sup>32</sup> There is proposed legislation that would force states to adopt mobile phone restrictions by October 1, 2003 or lose up to \$30 billion in federal highway funding.<sup>33</sup> Japan, Italy, Ireland, and Germany are among other countries with restrictions on cell phone use.<sup>34</sup> Singapore gives a jail sentence and a hefty fine for using a “handphone” while driving.<sup>35</sup>

Although the following sections will discuss cases regarding employer liability for accidents caused by employees that were driving while using a cell phone, it is important to address the legal issues underlying employer liability.

A key issue is the way in which employer liability attaches. Does liability attach when the employee uses the cell phone for work-related activities? How are work-related activities defined? Do the employee’s activities fall within the scope of employment? Can an “employer” be held liable for the actions of an independent contractor, such as a sales distributor or real estate agent? Could liability attach to an employer on the basis of an agency relationship?

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32. SUNDEEN, *supra* note 31, at 3. Many of these bills have died in committee; others are still under consideration. *Id.* at 5-12. A New Jersey bill would prohibit the use of hand-held cellular telephones while operating a motor vehicle. *Id.* at 8. Fines for the first offense range from \$100 to \$200 and for any subsequent offense range from \$250 to \$1000. *Id.* (citing S. 1283, 2002 Leg., 210 Sess. (N.J. 2002)). A New York statute provides a ban on the use of hand-held phones and provides civil penalties for violation. *Id.* at 4 (citing N.Y. VEH. & TRAF. LAW, § 1225-c(2)). A version is under consideration that creates a criminal offense for causing an accident that results in serious injury or death while talking on a cell phone. *Id.* at 9. A New Jersey statute prohibits drivers less than twenty-one years of age who have only a learner’s permit from using a cell phone while driving. *Id.* at 3. The statute imposes a \$100 fine or a ninety-day permit suspension for violation. *Id.* at 4 (citing N.J. REV. STAT., § 39:3-13 (2003)). An Arizona statute prohibits school bus drivers from using a mobile phone while operating a school bus, but it specifies no penalty. *Id.* (citing ARIZ. ADMIN. CODE, R17-9-104 (2002)). A Rhode Island statute also prohibits such use, unless in the case of an emergency. *Id.* (citing R.I. GEN. LAWS, § 31-22-11.8 (2002)). A Massachusetts statute also prohibits any person from operating a moving school bus while using a mobile telephone. *Id.* (citing MASS. GEN. LAWS, ch. 90, § 13 (2003)). However, the Massachusetts statute permits cellular phone use by the public as long as one hand remains on the steering wheel at all times. SUNDEEN, *supra* at 3. The penalty is \$35 for the first violation, \$35 to \$75 for the second violation, and \$75 to \$150 for the third and subsequent violations committed within a year. *Id.* at 4 (citing MASS. GEN. LAWS, ch. 90, § 13). A Florida statute requires drivers to use a headset that provides sound through one ear and allows surrounding sound to be heard with the other ear. *Id.* (citing FLA. STAT. ch. 316.304 (2003)). The penalty is \$30 for each violation. *Id.*

33. Rogers, *supra* note 7.

34. John Goepel, Your Care: Driving, accidents, and your cell phone, VIA (the Magazine for the Western Traveler May 2003, at [http://www.viamagazine.com/top\\_stories/auto/cell\\_phones03.asp](http://www.viamagazine.com/top_stories/auto/cell_phones03.asp) (last visited June 27, 2003).

35. Rogers, *supra* note 7.

## A. RESPONDEAT SUPERIOR

Under the theory of *respondeat superior*, an employer is liable for the actions of an employee if the employee was acting “within the scope of his or her employment at the time of the accident.”<sup>36</sup> Courts have held conducting employer business via a cell phone at the time of an automobile accident to be within the scope of employment.<sup>37</sup> For example, the State of Hawaii paid 1.5 million dollars “to the family of a New Jersey man who was walking across a highway when he was struck by a car driven by a public school teacher who was talking on a cell phone.”<sup>38</sup>

In another example, Dyke Industries, an Arkansas lumber wholesaler, paid 16.2 million dollars to a seventy-nine-year-old woman following a car accident involving one of Dyke’s salesmen.<sup>39</sup> The jury awarded 21 million dollars to the woman, but the case was settled for 16.2 million, the limits of Dyke Industries’ and the driver’s insurance policies.<sup>40</sup> The Dyke Industries employee was allegedly talking on a cell phone seconds before the accident occurred.<sup>41</sup> Law firms are also at risk under the theory of *respondeat superior*.

Jane Wagner, an attorney, struck and killed a 15-year-old girl, Naeun Yoon, with her Mercedes while talking on a cell phone late at night.<sup>42</sup> Yoon’s parents brought suit against Wagner and her former employer, Cooley Godward, a San Francisco based firm, claiming Wagner was on a business call at the time of the accident.<sup>43</sup> The firm and Wagner deny that she was on a business call noting that the call occurred after business hours.<sup>44</sup>

Although an employer is not generally liable for accidents occurring before or after business hours, if the employee is conducting business via a cell phone at the time of the accident, the employer might still be indirectly

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36. Filipini, *supra* note 30, at 1.

37. *Employers Guide*, *supra* note 18.

38. Parker, *supra* note 24.

39. *Id.* The woman was severely disabled, required a ventilator to breathe, and has since died. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* Wagner did not stop after hitting the girl, claiming she thought it was a deer. *Id.* Wagner served one year of a five-year sentence and lost her job and law license after she pled guilty to leaving the scene of an accident. *Id.*

liable.<sup>45</sup> The employer might still be liable because conducting business via a cell phone provides a benefit to the employer.<sup>46</sup>

Under *respondeat superior*, another factor to consider is whether the act in question, at least in part, provides a benefit to the employer.<sup>47</sup> The employer should absorb the cost of harm caused by the tortious conduct of an employee who was acting to benefit the employer.<sup>48</sup>

Conduct may also be within the scope of employment when the employee acts within the authorized time and space limits prescribed by the employer.<sup>49</sup> The limits authorized become expanded when the employer encourages employees to fulfill the employer's profit expectations outside normal work hours.<sup>50</sup> An employer may be liable to an accident victim if an employee is conducting business that furthers the employer's aims.

## B. NEGLIGENCE

Plaintiffs have also sued under a second theory of liability, negligence.<sup>51</sup> "Plaintiffs claim that the employer is directly negligent" in permitting employees "to use cell phones for business without adequate training or consideration of safety issues".<sup>52</sup> Liability could also attach if a court decides that an employer has enough control over an independent contractor's actions "to be responsible for that agent or broker's negligence."<sup>53</sup>

For example, a stockbroker (Robert Tarone) in Pennsylvania killed a twenty-four-year-old motorcyclist.<sup>54</sup> Tarone was driving and talking on his cell phone while en route to a nonbusiness event.<sup>55</sup> The company did not provide employees with cell phones.<sup>56</sup> Tarone stated he was making "cold

45. Filipini, *supra* note 30, at 1.

46. RESTATEMENT (SECOND) OF AGENCY § 229, cmt. d (1958).

47. W. PAGE KEETON, ET AL, PROSSER & KEETON ON TORTS, §69, 500-01 (5th ed. 1984).

48. *Id.* § 69, at 500. The reason for placing damages on employers is as follows:

They are placed upon the employer because, having engaged in an enterprise, which will on the basis of all past experience involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.

*Id.* at 500-01.

49. RESTATEMENT (SECOND), *supra* note 46, § 229(2)(b).

50. *See id.* § 229 (listing factors to consider when conduct, although not authorized, is within the scope of employment).

51. Filipini, *supra* note 30, at 1.

52. *Id.*

53. Ovies, *supra* note 1.

54. Aziere, *supra* note 3, at 3.

55. *Id.*

56. *Id.*



calls” when the accident occurred.<sup>57</sup> Other employees testified that making “cold calls” on personal time was needed in order to contact hard-to-reach individuals.<sup>58</sup> Although the plaintiff claimed that Tarone was acting within the scope of employment at the time of the accident, the plaintiff also claimed that the company was negligent in encouraging employees to use cell phones without any warning or training on potential hazards.<sup>59</sup> The company decided to settle the case for \$500,000, which avoided the possibility of a much larger jury award.<sup>60</sup> These types of monetary damages should cause employers to implement policies that mitigate their liability.

### III. MITIGATION OF LIABILITY

How can an employer mitigate liability or even avoid liability altogether? A policy that restricts cell phone use, because the car becomes arguably an extension of the workplace, may be appropriate.<sup>61</sup>

A written policy along with instructions outlining safe operation of the cell phone may help mitigate an employer’s liability.<sup>62</sup> The policy should be documented, disseminated, and strictly enforced. Some companies require that employees sign an acknowledgment form that phones are not to be used while operating automobiles or other equipment.<sup>63</sup> Some company-owned cell phones carry a warning sticker that use of phones while driving is dangerous and should be done only in an emergency.<sup>64</sup> Several other measures can also be created to reinforce company policy.<sup>65</sup> Some employers have chosen to ban employees from using cell phones while employees are operating a company-owned vehicle, while employees are operating a personal vehicle at the same time as conducting business, and while employees are using a phone furnished or required by the firm at the same time as operating any vehicle.<sup>66</sup>

A good policy often includes a training program to communicate that policy.<sup>67</sup> Adequate training is multifaceted and may include the imple-

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57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Filipini, *supra* note 30, at 3.

62. *Id.*

63. *Id.*

64. *Employer’s Guide*, *supra* note 18.

65. *E.g.*, Filipini, *supra* note 30, at 3; Rogers, *supra* note 7.

66. Rogers, *supra* note 7.

67. *Id.* For example, in the area of harassment and gender discrimination, adequate employee training creates an absolute bar to any plaintiff’s claim against an employer for the conduct of employees. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998) (holding that an

mentation of written policies and instructions, videos, feedback surveys, properly communicated disciplinary measures, and periodic refresher training.<sup>68</sup> Employees may also be required to sign a statement indicating acknowledgment of the company policy.<sup>69</sup> Employers can mitigate liability they might have for employee cell phone use by implementing a policy of accident prevention.

Furthermore, adequate training is needed because it is a logical extension of case law to sue employers for punitive damages, under the theory that with developing case law the employer “knew or should have known” that employee accidents during cell phone usage are likely to occur and that lack of employer training amounts to “reckless disregard for the law.” The United States Supreme Court has held that punitive damages need not be limited to only those instances where egregious conduct has occurred.<sup>70</sup> This ruling may allow courts to extend punitive damages to those instances where an employer was aware of the mandates of the law and simply did not provide adequate training or education to employees.

#### IV. MANUFACTURER LIABILITY

To date, no claim has been brought against a cell phone manufacturer for failure to warn a cell phone user of the hazards of talking on a cell phone while driving. Yet, such a claim may be successful under theories of negligence or strict product liability. Indeed, no article has addressed a manufacturer’s liability for failure to warn cell phone users of the danger of “dialing while driving.” Does this mean that the concept is so far-fetched that it may have no validity? Doesn’t it already seem a stretch of the law that a company could be held liable when its employee operated a cell phone in the employee’s own automobile, on the employee’s own time, using a cell phone not issued by the employer? Yet legal concepts show a growing trend of employer liability serving as the basis of either settlements or jury awards.<sup>71</sup>

The Restatement (Third) of Torts provides three categories of product defect: (1) manufacturing defect, (2) design defect, and (3) inadequate

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employer may establish an affirmative defense depending on the reasonableness of the employer’s and plaintiff’s conduct).

68. *Employers Guide*, *supra* note 18.

69. Rogers, *supra* note 7.

70. See *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 536 (1999) (stating that “in the context of § 1981a, an employer must at least discriminate in the face of a perceived risk that the employer’s actions violate federal law to be liable in punitive damages”).

71. See *supra* text accompanying notes 38-44, 54-60.

warnings.<sup>72</sup> The Restatement (Third) maintains strict liability standards for manufacturing defects but maintains a negligence standard for design and warning defects.<sup>73</sup>

This author's concern lies in a manufacturer's liability for failure to give adequate warning of increased risk of accidents caused by cell phone use while driving.<sup>74</sup> With an ever-increasing number of cases on cell phone related automobile accidents, no manufacturer can claim lack of foreseeability of such accidents. Section 2(c) of the Restatement (Third) indicates that a product is defective:

[B]ecause of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.<sup>75</sup>

One issue to review under manufacturer liability involves the cell phone itself. Does usage of the cell phone arise as a product in a "defective condition unreasonably dangerous?" Comment *i* of section 402 A suggests liability when a product is in a defective condition unreasonably dangerous "to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."<sup>76</sup> The ordinary consumer does not

72. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c) (1997).

73. *Id.*

74. See CAL. VEH. CODE § 28090 (2000) (requiring that rental cars with embedded cell phone equipment contain written instructions on the safe use of the phone while driving).

75. LYNDA J. OSWALD, THE LAW OF MARKETING, 351 (2002). A manufacturer is such a "predecessor in the commercial chain." *Id.* In May 1997, the American Law Institute (ALI) adopted the Restatement (Third) of Torts. *Id.* Many jurisdictions have yet to adopt the Restatement (Third); section 402 A of the Restatement (Second) remains the prevailing legal rule on strict products liability in these jurisdictions. *Id.* at 349.

76. RESTATEMENT (SECOND) OF TORTS § 402 A. cmt. i (1965). Section 402 A applies to all commercial sellers of products, whether manufacturers, wholesalers, or retailers. *Id.* Section 402 A states:

Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

contemplate cell phone use as hazardous, unless the sudden increase of cases, as well as the recent trend in legislation and public policy limiting cell phone use in automobiles, has created such awareness in the community.

The test in many jurisdictions to establish whether a product poses an “unreasonable risk” of injury has been the “consumer expectation test.”<sup>77</sup> More recently, courts have been imposing the risk-utility test.<sup>78</sup> Under this test a product is “unreasonably dangerous” if a reasonable person would conclude that the danger, whether foreseeable or not, outweighs the utility of the product.<sup>79</sup> If a product is “unavoidably unsafe” and its benefits outweigh the danger, the seller is not held strictly liable for any injuries that occur.<sup>80</sup> “Such a product, properly prepared and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous.”<sup>81</sup>

Although a cell phone is not inherently dangerous, it may become “unavoidably unsafe” while used in various driving situations. Without efforts on the part of manufacturers to educate the consuming public, the product may be considered “unreasonably dangerous” and pose liability to the manufacturer. If a manufacturer provides proper warnings, then cell phone use may not be unreasonably dangerous or “defective.”<sup>82</sup> The consuming public extends far beyond employees and independent contractors and includes any consumer making personal phone calls.

Liability may not only extend to the manufacturer of a hand-held cell phone, for it may also extend to the manufacturer of an automobile who includes a hands-free cell phone in a car as well as the “embedded” component provider of cellular phones in automobiles. A manufacturer’s liability could be enormous.

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(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

*Id.*

77. OSWALD, *supra* note 75, at 350.

78. *Id.*

79. *Id.*

80. *Id.*

81. RESTATEMENT (SECOND), *supra* note 46, at § 402 A. cmt. k.

82. Also, under the theory of negligence, a manufacturer who knew or should have known that the use of a cell phone increases the likelihood of accidents while driving should provide adequate warnings informing the user of dangers.

## V. CONCLUSION

Cell phone use has increased over the past ten years.<sup>83</sup> Cell phone related automobile accidents have also increased dramatically.<sup>84</sup> More and more accidents are foreseeable given the commonplace use of cell phones and their likely use for business purposes while driving. Courts have held employers liable for cell phone related accidents under various legal theories (*respondeat superior*, negligence, and enterprise liability), and there appears to be little case law contrary to this result.<sup>85</sup> Employers can protect themselves from such liability through employee training, clearly enunciated policy guidelines, or restrictions on employee cell phone use.<sup>86</sup>

Similarly, manufacturers may also be held liable in similar circumstances for not providing the public with warnings. The remedy of proper warnings and education may be cost-effective. The result without such warnings may have a devastating impact on manufacturers of both handheld and embedded cell phone technology, as well as the actual manufacturer of automobiles that include cell phone devices and similarly distracting services.

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83. Oviess, *supra* note 1.

84. *Safety Alert. New Studies Define Cell-phone Hazards*, 68 CONSUMER REP. 8 (May, 2003).

85. *See supra* accompanying text notes 38-44, 54-60.

86. *See supra* notes 63-65 and accompanying text.