Texting a Lawsuit?

Contributed by John Browning
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No one will argue that texting while driving can be a major source of driver distraction, leading to an increasing number of accidents every year. In fact, at least 38 states have adopted some form of “texting while driving” ban. And motorists who get into accidents because that text simply couldn’t wait should probably expect their digital distraction to land them in court. But what about the person on the other end of that text? Can he or she be held at fault?

That was the novel issue being debated in a first-of-its-kind case unfolding recently in a New Jersey courtroom. David and Linda Kubert were injured in a September 21, 2009 auto accident with 19 year-old Kyle Best. Best had clocked out of his job at a local YMCA at 5:41 p.m.; his pickup truck crossed the yellow line and struck the motorcycle on which the Kuberts were riding at 5:49 p.m. Both husband and wife were severely injured in the crash and each would lose a leg as a result. Best was charged with careless driving, improper use of a cellphone, and failure to stay in his lane. He pleaded guilty to the counts and was fined, given a probated sentence, and ordered to speak at 14 local high schools about the dangers of texting while driving. In the resulting civil lawsuit, Best testified in a deposition that he didn’t know exactly where his truck was on the road because he was distracted by a text he had just received. Best’s cellphone records were subpoenaed. They revealed that on that day, Best had exchanged a total of 62 text messages with his 17 year-old girlfriend, Shannon Colonna (30 from Best to Colonna, and 32 from Colonna to Best). Right before the accident, the records showed that Best texted his girlfriend at 5:47:56 p.m., she replied at 5:48:23 p.m., and he responded at 5:49:07 p.m.

The lawyer for the Kuberts, Stephen “Skippy” Weinstein, decided to add Ms. Colonna as a defendant to the lawsuit on the novel theory that she was “electronically present” in Best’s vehicle, that she knew or should have known that he would be driving, and that she owed third parties a “duty of care” to prevent Best from getting into an accident. The attorney analogized this to the criminal justice system’s use of “aiding and abetting” charges against third parties. The Kuberts also made the argument that as a matter of public policy, senders of texts that distract drivers should share in the blame for any resulting accident. They pointed to a bill introduced earlier this year in the New Jersey legislature that would create an inference that illegal use of a cellphone amounts to reckless driving. The proposed legislation would also increase the penalties for texting or talking on a cellphone while driving.

But should a person who texts someone be held legally responsible for that person’s distraction and any resulting accident? Can the legal system assume clairvoyance on the part of a message sender—that the sender is somehow aware that the message recipient is doing something else at the exact moment he reads the text, such as driving, operating heavy machinery, or even performing surgery? Colonna testified in her deposition that she didn’t know whether her boyfriend was driving at the time. Her lawyer, Joseph McGlone, also pointed out that when the crash occurred, Best was typing a text, not reading one from Colonna. McGlone argued that it would be both impractical and unfair to impose a duty on the texter, since she has no control over when, where, or how a recipient would read and respond to a text. “Quite simply,” he says, “once the message sender transmits an electronic message, it is the message receiver’s responsibility to read it at the appropriate and safe time.”

That makes perfect sense. Whether it is an incoming phone call, text message, Facebook update, or whatever form of communication, the sender should have every right to expect the recipient to exercise common sense in reading, listening to, or reacting to that message. If I was careless enough to open and read my “snail mail” while going 65 mph down the freeway, how can I or anyone else blame the person who sent me that mail for an accident that I later get into?

Fortunately, N.J. State Superior Court Judge David Rand agrees. He dismissed the claims against Ms. Colonna, saying it is reasonable for text message senders to assume that recipients will behave responsibly. He also observed that drivers today are bombarded with all sorts of distractions, including GPS devices and signs along the road, and that “were I to extend this duty to this case, in my judgment, any form of distraction could potentially serve as the basis for a liability case.” Hopefully, any other judges encountering similar attempts to broaden the scope of liability will follow Judge Rand’s example and keep this Pandora’s box that is our wired world shut.