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## Seeking punitive damages against drivers distracted by hand-held electronic devices

Distracted drivers' cases can adopt the legal principles providing for punitive damages against drunk drivers

The images are ones familiar to our television screens – a public-service announcement showing a tragic accident, a wrecked vehicle, an impaired driver lamenting the one mistake that forever changed their life and hurt or killed others. Ten or fifteen years ago, the subject of that advertisement would have been obvious – drunk driving and its tragic, all-too-frequently fatal consequences. Today, however, such a message is equally likely to be directed at a more recent, still-growing epidemic on America's roads – driving while distracted by electronic devices. Like drunk driving, distracted driving results in severe physical and mental impairment in drivers and results in thousands of preventable crashes, deaths, and injuries.

Just as advocacy groups have successfully adopted the language, symbolism, and media message of prominent anti-drunk-driving campaigns to address the rapid rise in fatal and injury-producing crashes from calling, texting, and other electronics-related distractions, attorneys representing clients who have been injured or killed as a result of these distracted drivers can adopt the legal principles providing for punitive damages against drunk drivers to apply to those who are knowingly distracted by electronic devices and cause injury.

### Rise of electronic device use

As the use of smartphones and other electronic devices has come to dominate more of our social and professional lives

with family, friends, and employers expecting to be in contact 24/7, the use of this technology while driving has dramatically increased. In January 2012 the number of smartphone users eclipsed 100 million for the first time, according to the market research group, ComScore, Inc. Studies conducted by the Center for Disease Control show that more than two-thirds of adult drivers in the U.S. report talking on their cell phone while driving, and nearly one-third of U.S. adult drivers sent or read a text or email while driving in a 30-day period. (Naumann, Rebecca B. et al. *Mobile Device Use While Driving – United States and Seven European Countries, 2011*. Morbidity and Mortality Weekly Report See Gunning, Next Page

(March 15, 2013) Center for Disease Control and Prevention.) The number of smartphone users had increased by more than 50 percent to approximately 152 million. (ComScore Report – November 2013 Smartphone Subscriber Market Share (January 6, 2014) <[http://www.comscore.com/Insights/Press\\_Releases/2014/1/comScore\\_Reports\\_November\\_2013\\_US\\_Smartphone\\_Subscriber\\_Market\\_Share](http://www.comscore.com/Insights/Press_Releases/2014/1/comScore_Reports_November_2013_US_Smartphone_Subscriber_Market_Share)>.) These increasing trends in cellular phone use and in particular text messaging, email, and Internet use, show no signs of slowing for the foreseeable future.

### Dangers of electronics use while driving

Empirical studies by the National Highway Traffic and Safety Agency (“NHTSA”) and other agencies have demonstrated that distraction by electronic devices presents severe mental and physical impairment. According to the Federal Motor Carrier Safety Administration, a texting driver is 23.4 times more likely to be involved in a “safety critical event.” (Olson, Rebecca, et al. Federal Motor Carrier Safety Administration, “*Driver Distraction in Commercial Vehicle Operations*.” p. 146, <<http://www.distraction.gov/download/research-pdf/Driver-Distraction-Commercial-Vehicle-Operations.pdf>>.) A driver dialing a cell phone is 5.93 times more likely to be involved in a “safety critical event.” (*Id.* at 148.) A driver using or reaching for any other electronic device is 6.72 times more likely to be involved in a “safety critical event.” (*Ibid.*) The FMCSA study found that these distractions take a driver’s eyes off the road for substantial, hazardous periods of time including, for example, an average of 4.6 seconds while texting. (*Id.* at p. 150.) This is enough time for a driver to travel the length of a football field at 55 mph without looking at the road The hazards of this conduct are borne out by inevitably tragic results – more than 995 people were killed and 24,000 people were injured in accidents involving cell-phone distraction in 2009 in the United States. (National Highway and Traffic Safety Agency. *Traffic Safety Facts*. “Research Note – Driver

Electronic Device Use in 2009.” p. 1 <<http://www.distraction.gov/download/research-pdf/Driver-Electronic-Device-Use-2009.pdf>>.)

### Punitive damages for drunk driving

For 34 years, California has recognized that the conduct of knowingly driving while intoxicated is conduct that can rise to a level of culpability so severe that punitive damages – to make an example of those driving under the influence – can be awarded. In this context, drunk driving amounts to “malice” – “despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.” (Civ. Code, § 3294.) Conscious disregard occurs when a defendant “display[s] a conscious and callous indifference to, or disregard of, probable harm.” (*Seimon v. Southern Pac. Trans. Co.* (1977) 67 Cal.App.3d 600, 607.)

The California Supreme Court found that such “malice” could include driving while intoxicated in *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 896-97. The *Taylor* Court was faced with allegations that a driver, knowing they would later have to drive, became intoxicated and drove drunk, causing an accident and serious injuries. The Court held that such conduct could give rise to punitive damages, stating “[o]ne who wilfully consumes alcoholic beverages to the point of intoxication, knowing that he thereafter must operate a motor vehicle, thereby combining sharply impaired physical and mental faculties with a vehicle capable of great force and speed, reasonably may be held to exhibit a conscious disregard of the safety of others.” The Court found that no specific facts, such as prior drunk driving crashes, were necessary to show knowledge of the probable dangerous consequences of this conduct, noting “[t]here is a very commonly understood risk which attends every motor vehicle driver who is intoxicated.” While the *Taylor* Court was careful to note that “ordinarily, routine negligent or even reckless disobedience of traffic laws would not justify an award of punitive damages,” it left open the door for “the

circumstances in a particular case [to] disclose similar wilful or wanton behavior in other forms.”

In determining that driving while intoxicated warranted punitive damages as a matter of public policy, the *Taylor* Court relied on two other key factors. First, the California Legislature’s acknowledgement of the societal harm caused by, and the hazards involved in, the conduct. Second, government studies of the empirically dangerous nature of the conduct and the resulting deaths and injuries to significant numbers of motorists were taken into account to show the need for deterrence.

After *Taylor* was decided, punitive damages law in California was altered to include an additional requirement of “despicable” conduct in addition to “conscious disregard” to establish malice. (Civ. Code, § 3294, subd. (a).) Conduct is “despicable” when it is so vile, base, or contemptible that it would be looked down on and despised by reasonable people. (*Ibid.*) “Such conduct has been described as “[having] the character of outrage frequently associated with crime.” (*Scott v. Phoenix Sch., Inc.* (2009) 175 Cal.App.4th 702, 715.) While no California appellate court has re-examined the issue of whether drunk driving, as a matter of law, meets the definition of “despicable” required to establish malice, the horrific consequences of drunk driving, as well as the fact that as a criminal act it naturally carries the outrage associated with crime, suggest that such conduct is despicable.

### Applying *Taylor* to electronic device use

Just as the framework for education and advertising campaigns to deter distracted driving involving electronic devices mirrors those used to combat drunk driving, so too can the legal framework for using punitive damages to deter this type of distracted driving mirror the punitive damages rationale of *Taylor* for drunk driving.

Distilled to its essence, *Taylor*’s analysis of the factors causing drunk driving rises to the level of conscious disregard and includes three factors that can be

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applicable to other types of conduct: (1) “a vehicle capable of great force and speed,” (2) “sharply impaired physical and mental faculties,” (3) “a very commonly understood risk” of the injurious consequences of the conduct.

First, since both types of conduct involve automobiles, the force and speed element in *Taylor* is likewise present in distracted driving cases.

Second, as set forth above, NHTSA and other government agencies have established through substantial scientific research that distracted driving involving electronics is extremely unsafe. Other organizations examining the impairment caused by distracted driving involving electronic devices have found that this impairment equals or exceeds that of a person with a blood alcohol content (“BAC”) of 0.08 percent. In one such study, when intoxicated drivers and drivers using cell phones were compared, researchers found that “impairments associated with using a cell phone while driving can be as profound as those associated with driving while drunk.” (Strayer, D. L., Drews, F. A., and Crouch, D. L. *A comparison of the cell phone driver and the drunk driver*. Human Factors: The Journal of the Human Factors and Ergonomics Society, 2006 (Summer), 381-391; University of Utah.)

In another study performed by Car and Driver magazine, both younger and older drivers were evaluated for reaction times and stopping distances in actual vehicles both when texting while driving and while having a BAC of 0.08 percent. This study found that texting drivers, both young and old, exhibited slowed reaction times and increased stopping distances equal to or worse than the intoxicated drivers. (Austin, Michael. *Car and Driver Magazine, Texting While Driving: How Dangerous Is It?* p. 2 <<http://www.caranddriver.com/features/texting-while-driving-how-dangerous-is-it-the-results-page-2>>.)

Third, as in the drunk-driving context, legislative prohibitions on driving while using electronic devices make clear that the risks of such distracted driving are commonly understood by society like

the risks of drunk driving present in *Taylor*. The State of California has banned the operation of a non-hands-free cellular phone while driving (Veh. Code, § 23123a), the use of laptop computers and other devices with electronic displays while driving (Veh. Code § 27602), as well as the reading of any emails or other electronic messages, including text messages, while driving (Veh. Code, § 23123.5). In enacting these bans, and criminalizing this conduct, the Legislature found “[t]here is growing public concern regarding the safety implications of the widespread practice of using hand-held wireless telephones while operating motor vehicles.” (2006 Cal. Legis. Serv. Ch. 290 (S.B. 1613).) The Legislature has further recognized that “[i]t is difficult to imagine, however, an argument in favor of allowing the driver of a high-speed, multi-ton, steel-and-glass vehicle to engage in an activity as strongly distracting as text-messaging” and “[t]he danger inherent in such activity is manifest.” (Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 28 (2007-2008 Reg. Sess.) as amended August 4, 2008, p. 2, par. 6.)

Finally, like drunk driving, a jury could conclude that driving while distracted by electronic devices, depending upon the facts of the case, constitutes “despicable” conduct. Like drunk driving, it carries with it “the character of outrage frequently associated with crime” as it is also an illegal act that places the lives of other motorists and the public at great risk.

The same factors that led the *Taylor* Court to conclude that punitive damages were warranted for drunk driving, including the empirical and legislative recognition of the tragic, fatal consequences of that conduct, offer a strong basis for California courts to apply the principles of *Taylor* to cases involving distracted driving and electronic device use.

### Liability of employers

In addition to pursuing punitive damages against a driver distracted by electronic devices while causing an accident, a simple extension of existing

California law allows such claims to be pursued against a driver’s employer.

As with any case for punitive damages against a corporate employer, a plaintiff must prove that an employer, through its officers, directors, or “managing agents”: (1) had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others, (2) authorized or ratified the wrongful conduct for which the damages are awarded, or (3) was personally guilty of oppression, fraud, or malice. (Civ. Code § 3294, subd.(b).)

Employers are intimately involved in the proliferation of smartphones, laptop computers, tablets, and other electronic devices among employees, as well as establishing when, where and how those devices are to be used in an employee’s performance of their duties. In an age where employees are increasingly under pressure by employers to be available by phone, email, and other electronic means throughout the work day and beyond, and under pressure to perform more work on electronic devices, an employer’s actions in encouraging, incentivizing, or requiring employees to use their electronic devices during the work day while driving potentially give rise to authorization, ratification, or independent malice.

An employer’s own actions in promoting electronic device use while driving, whether explicitly or (more likely) implicitly, could very well constitute independent malice on the part of an employer. Under well-established principles of California punitive damages law, an employer’s actions in creating an environment that encourages or tolerates wrongful conduct, can support a finding of independent malice. (See, e.g., *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1159 [employer conduct creating environment which enabled sexual harassment was independent malice].) An employer could also potentially “ratify” an employee causing a collision while engaging in distracted driving using electronic device use where an employer (1) has actual

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knowledge of the employee's wrongful conduct, (2) fails to investigate or discipline the employee once the misconduct becomes known, or (3) fails to intercede in a known pattern of workplace misconduct. (See *College Hosp., Inc. v. Super. Ct. (Crowell)* (1994) 8 Cal.4th 704, 725-726; *Cruz v. HomeBase* (2000) 83 Cal.App.4th 160, 168.)

### Real-world application

This remains an emerging area of law and one that will doubtlessly increase in importance as the use of electronic devices such as smartphones, tablets, laptops, and other emerging innovations such as Google Glass proliferate even more throughout our day-to-day life and work. To date, no California appellate case has addressed whether using electronic devices while driving is a basis for punitive damages. Nonetheless, applying the existing case law, statutes, and arguments set forth in this article, plaintiffs have found success at the trial court level in pursuing punitive damages against distracted drivers and their employers.

In 2013, our firm resolved a case involving punitive damages liability for

distracted driving while using electronic devices by a California sales representative and his employer, a Fortune 50 company. In that case, the defendant driver was allegedly distracted by a company-issued electronic device during a collision where the defendant driver inexplicably veered off a roadway, striking and killing a pedestrian in broad daylight without ever seeing them. The plaintiffs explored the employer defendant's liability for its independent acts in requiring and incentivizing full-time electronic device use by its employees, and its acts in ratifying the employee's distracted driving conduct by failing to adequately investigate once electronic device use was implicated. Based on the analogy to drunk-driving precedent set forth in this article, the corporate defendant's motion to strike punitive damages was denied, a motion for summary adjudication of punitive damages was denied, and the case was settled for a confidential amount before trial.

### Conclusion

When representing a client who is the victim of a collision that involves a defendant driving while distracted by

an electronic device, the potential for punitive damages against both the driver and, if applicable, the driver's employer, should be fully explored. Employers profit from cultivating an "always on" culture among employees and requiring constant access to electronic devices, including while driving. When dangerous, distracted driving, equivalent to drunk driving in the level of impairment it creates, is promoted for profit at the expense of the safety of others on our roadways, attorneys seeking justice for their clients can and should push to apply the law of punitive damages to deter such conduct and fully compensate those injured as a result.

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