

DON'T TEXT, TALK, AND WALK: THE EMERGING SMARTPHONE DEFENSE IN PERSONAL INJURY LITIGATION

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Like it or not, many of us are both happily and hopelessly addicted to texting, tweeting, emailing, and speaking on handheld devices.

On the professional side, this permits lawyers, waiting in court to quietly but effectively communicate with colleagues, clients, and opposing counsel in other cases, without disturbing judges, court officers, and other lawyers also patiently waiting for their cases to be called. On the personal side, this allows everyone to communicate at any time with everyone about anything; whether announcing we will be a few minutes late for lunch, rescheduling an appointment, providing a picture of the tuna fish sandwich someone had for lunch and posted on Facebook for others to admire, or tweeting about the new episodes of “Arrested Development” or “Veronica Mars.”

Just look around the next time you are stopped at a cross-walk waiting for the traffic signal to change: people, like you and I, with smartphones in our hands, staring at them intently, rapidly moving our thumbs, and texting. Those listening to music on iTunes or Spotify are easily distinguished, as their heads may bob in time to the music. Not so with those who text: a steady head and quick thumbs are the key to rapid texting. Just try having a serious conversation with someone who is walking and texting.

Whatever happened to the advice from our parents, “look both ways before crossing?” Today, people are looking down, not up or around. Many of us now reflexively, if not instinctively, repeatedly examine our handheld devices to make certain that nothing (critical or otherwise) has taken place in the five minutes since we last looked at our smartphones.

Consider Bobby Valentine who, in the final days of managing the

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Boston Red Sox, fell off a bicycle while riding near the Central Park Reservoir in Manhattan.¹ It was not a good year for Bobby V., who was reading a text on his phone from Red Sox All-Star second baseman Dustin Pedroia while riding a bike.² Valentine claimed that he looked up and, when he “swerve[d] to avoid the umbrellas of two French tourists walking in front of him,” his bike skidded, causing him to lose his balance and careen to the bottom of a ditch.³ It is unknown whether the unidentified French tourists were related to the marshmallow salesman who New York Yankees Manager Billy Martin famously alleged he punched out in a lobby,⁴ but we do know that Bobby Valentine admitted to his error, stating “I shouldn’t have been reading a text while I was riding That’s the wrong thing to do. But at least I was wearing my helmet.”⁵ Leave it to Bobby V. to give new meaning to “spin.”

Nearly half of all adults in the United States now own smartphones.⁶ A wealth of scientific studies show that the human brain has difficulty focusing on more than one thing at a time,⁷ but we stubbornly continue to multi-task and even believe that this shows that we are superior individuals, fully capable of handling several matters at once, because we all are so important and indispensable.

With the proliferation of texting technology, the number of people who regularly send and receive texts has exploded. “In December 2001, the monthly number of text messages sent in the United States was 252.8 million.”⁸ One decade later, by December 2011, “that monthly number nationwide had jumped to 193.1 billion according to CTIA—The Wireless Association, a Washington-based organization that represents the wireless industry.”⁹ A June 2013

¹ David Waldstein, *Valentine Is Hurt Falling Off Bike*, N.Y. TIMES, Oct. 3, 2012, at B13.

² *Id.*

³ *Id.*

⁴ *Marshmallow Salesman Tells of Martin Fight*, LODI NEWS-SENTINEL, Oct. 31, 1979 at 21.

⁵ Waldstein, *supra* note 1, at B13 (internal quotation marks omitted); see Robert D. Lang, *The New Defense of Texting and Tweeting in Personal Injury Lawsuit*, FOR DEFENSE, Mar. 2013, at 34, 35.

⁶ Lee Rainie, *Two-Thirds of Young Adults and Those with Higher Income Are Smartphone Owners*, PEW INTERNET 2 (Sept. 11, 2012), http://www.pewinternet.org/~media/Files/Reports/2012/PIP_Smartphones_Sept12%209%2010%2012.pdf.

⁷ See Marcel Adam Just et al., *A Decrease in Brain Activation Associated with Driving When Listening to Someone Speak*, 1205 BRAIN RES. 70, 71 (2008) (collecting studies).

⁸ Editorial, *Get Tough on Texting While Driving*, HOME NEWS TRIB. (July 6, 2012, 4:33 PM) <http://www.mycentraljersey.com/article/20120706/NJOPINION0101/307060069/Get-tough-texting-while-driving>.

⁹ *Id.*

study by Liberty Mutual Insurance found that 26% of pedestrians walk while texting or emailing, despite the 55% considering those behaviors to be dangerous.¹⁰ Since drivers and pedestrians engage in dangerous activities, despite recognizing the risks involved, the logical conclusion is that many people are doing so because of a “it won’t happen to me” attitude.¹¹

Nor is it only teenage drivers who engage in texting while driving. A survey of teen drivers commissioned by AT&T conducted in April 2012, found that 41% of them had observed their parents texting while driving and 53% of them said they had seen their parents text while stopped at traffic lights.¹² Moreover, since some adults are newer to texting than their children, the new texters may be more engrossed in their new activity while walking, and therefore even less likely to notice their surroundings.

A 23% rise in traffic fatalities in New York City from July 2011 through June 2012, after years of decline, was found by then New York City Commissioner of Transportation, Janette Sadik-Khan, to have been caused in part by an increase in both distracted walking and distracted driving.¹³ As stated by former Commissioner Sadik-Khan: “I don’t think that the iPhone has invented an app yet that will ping you when you hit a crosswalk.”¹⁴

Help may be on the way. A new app—CrashAlert—now in prototype, uses a distance-sensing camera to scan the path ahead and alert users when approaching obstacles.¹⁵ The camera looks forward while the user looks down.¹⁶ Another new app, Sidewalk Buddy, creates a video pop-up window, which appears on top of any other app that people are using to show a heads-up, real-time feed of what is in front of you, from the phones rear-facing camera.¹⁷

¹⁰ *Liberty Mutual Insurance-New Study Shows Three out of Five Pedestrians Prioritize Smartphones over Safety When Crossing Streets*, ENP NEWSWIRE (June 11, 2013) (accessed by searching LEXIS ADVANCE News index).

¹¹ *See Survey: Distracted Walking Just as Dangerous as Distracted Driving*, UNITED PRESS INT’L (June 11, 2013, 5:40 PM), http://www.upi.com/Science_News/2013/06/11/Survey-Distracted-walking-just-as-dangerous-as-distracted-driving/UPI-40821370986834/.

¹² *AT&T Teen Driver Survey: Executive Summary*, AT&T 4 (May 2012), http://www.att.com/Common/about_us/txtng_driving/att_teen_survey_executive.pdf.

¹³ Matt Flegenheimer, *Deaths Rise for Drivers, Bikers and Walkers on City Streets*, N.Y. TIMES, Sept. 27, 2012, at A22.

¹⁴ *Id.* (internal quotation marks omitted).

¹⁵ Anna Lacy, *Avoiding the Pitfalls of Texting and Walking*, BBC NEWS (May 24, 2013 7:44 PM), <http://www.bbc.co.uk/news/health-22631731>.

¹⁶ *Id.*

¹⁷ *New Android Smartphone App Solves More than Texting and Walking Problems*, PR NEWSWIRE (Mar. 12, 2013), <http://www.prnewswire.com/news-releases/new-android-smartphone-app-solves-more-than-texting-and-walking-problems-197694831.html>.

Former Commissioner Sadik-Khan added, “That breakup text can wait.”¹⁸ However, it is not only the dreaded breakup text which can cause such problems. Earlier last year, a British radio personality fell into an icy canal while walking and texting her boyfriend.¹⁹ Her incident was caught on CCTV cameras in the shopping district and was publicized on the internet and in print.²⁰ The woman who fell, Laura Safe, tweeted after the incident, “I should really be called Laura UNSafe after the day I’ve had! LOL.”²¹

One way New York City is dealing with the pedestrians texting while crossing streets is to paint, “LOOK!” signs inside the stripes of busy crosswalks, reducing the hazards, whether self-inflicted or otherwise, to pedestrians.²² Of course, one has to be looking up from texting in order to see those warnings. The town of Fort Lee in New Jersey has approached the problem in a different way, “outlaw[ing] texting while jaywalking, [and] issuing . . . tickets to pedestrians who send or read messages while drifting out of crosswalks.”²³ The potential hazards from texting while crossing streets has given rise to recent suggestions that New York City ban the activity altogether.²⁴

Satirizing the problems of walking and texting, earlier last year in New York City, the prank collectives, Improv Everywhere and BuzzFeed, joined forces by having sixty participants walk the streets of Manhattan, divided into two groups.²⁵ Half of the group posed as “Seeing Eye People,” wearing orange vests stating, “I Can Help You Walk and Text,” and the other half were individuals texting and walking, physically connected to the Seeing Eye People on leashes.²⁶ “The Seeing Eye People claimed to be part of a

¹⁸ Flegenheimer, *supra* note 13, at A22 (internal quotation marks omitted).

¹⁹ Christina Lopez, *UK Woman Falls into Icy Canal While Texting Boyfriend*, ABC NEWS (Jan. 25, 2013, 11:37 AM), <http://abcnews.go.com/blogs/headlines/2013/01/uk-woman-falls-into-icy-canal-while-texting-boyfriend/>.

²⁰ *E.g., id.*; *Woman Busy Texting Walks Straight into Freezing Cold Canal in Birmingham*, TELEGRAPH (Jan. 24, 2013, 10:34 PM), www.telegraph.co.uk/news/newstopics/howaboutthat/9825625/woman-busy-texting-walks-straight-into-freezing-cold-canal-in-Birmingham.html.

²¹ Lopez, *supra* note 19 (internal quotation marks omitted).

²² See Flegenheimer, *supra* note 13, at A22.

²³ Renée Loth, *Put that Phone Down and Just Walk*, BOS. GLOBE, July 13, 2013, at A9.

²⁴ See Andrew Ramos, *Nationwide Epidemic: Should NYC put a Ban on Texting While Walking?*, PIX 11 (July 3, 2013), <http://pix11.com/2013/07/03/should-nyc-ban-texting-while-walking/#axzz2gzlsKv9Q>.

²⁵ *Seeing Eye People*, IMPROV EVERYWHERE (Apr. 30, 2013), <http://improveverywhere.com/2013/04/30/seeing-eye-people/>.

²⁶ *Id.*

Department of Transportation Pilot Program.”²⁷ Later that same day, a second version of the project was staged where the Seeing Eye People approached “real people” texting and walking on the street, offering their services to guide them safely through Manhattan.²⁸

On April Fool’s Day in 2012, Philadelphia taped off “e-lanes” on sidewalks, to be used by pedestrians using mobile devices in response.²⁹ Many people used the “e-lanes” even to the extent of separating themselves from friends and family to stay between the lines.³⁰

Nor are the problems of texting and walking restricted to urban settings. As reported last July by the Chief of Emergency Medicine for Broward Health in Florida, in discussing injuries due to texting while walking: “People live outdoors in South Florida and that is a little bit more dangerous . . . They almost always want to stay in touch with their Twitter and the Internet. They are almost addicted to it.”³¹

In fact, the problems of texting and walking are worldwide. In June of last year, Japan Rail East began a seven-week campaign asking commuters to put away their smartphones while on train platforms.³² The rail line launched a program, complete with 1,000 posters stating, “No mobile phones and games while walking,” due to an increase in people falling off train platforms and bumping into each other at train stations while staring down at their smartphones.³³ The Japanese National Transportation Ministry reported at least eighteen people fell from train station platforms in 2011 while using cell phones and a recent study by Tsukuba University in Japan, found that over 60% of 650 students surveyed in 2013 had either run into someone or almost had bumped into another person while using a cell phone, with 4% of the students suffering injuries as a result.³⁴

Although there are bans on handheld phones or texting while

²⁷ *Id.*

²⁸ *Id.*

²⁹ Tom Breckenridge, *Cleveland’s Cellphone-Wielding Walkers Headed for Injury, Research Shows*, CLEVELAND.COM (June 30, 2013, 6:00 PM), http://www.cleveland.com/metro/index.ssf/2013/06/clevelands_cellphone-wielding.html.

³⁰ *Id.*

³¹ Johnny Diaz, *Curbing Texting and Walking*, SUN-SENTINEL (Ft. Lauderdale), July 14, 2013, at 12G (internal quotation marks omitted).

³² Erik Slavin, *Tokyo Commuters Asked Not to Walk and Text*, STARS & STRIPES (June 11, 2013), <http://www.stripes.com/news/tokyo-commuters-asked-not-to-walk-and-text-1.225420>.

³³ *Id.*

³⁴ *Id.*

driving in nearly every state,³⁵ the scientific evidence points to the conclusion that it is the act of being engaged in a conversation on a mobile device, rather than holding that device in one's hand, which is the primary source of distraction, and therefore of potential injury.³⁶ Studies show that people recognize the risks of talking on handheld phones and texting, more than they perceive the risks of hands-free phones, due to distractions.³⁷ A recent study by Ohio State University compared the number of injuries suffered by walking and texting pedestrians in emergency rooms nationwide from 2004 to 2010 and showed an increase each year with an overall increase of almost 140% over that six year period, with two-thirds of those injured younger than twenty-five years old.³⁸ Dr. Jack Naser, Professor of City and Regional Planning at Ohio State University, concluded that he "wouldn't be surprised if the number of injuries to pedestrians caused by cell phones doubles again between 2010 and 2015."³⁹

The demands upon the attention of drivers are increasing, not decreasing, as automobile makers have increasingly introduced voice-activated systems that allow drivers to keep their hands on the wheels and their eyes on the road which have the unfortunate consequence of taking a drivers mind off the road.⁴⁰ In today's world, automobile makers aren't designing and selling cars, they are building the next generation of mobile devices.⁴¹ The latest in-car technology allows drivers to use voice commands to dictate a

³⁵ *Cellular Phone Use and Texting While Driving Laws*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/transport/cellular-phone-use-and-texting-while-driving-laws.aspx> (last updated Nov. 1, 2013). South Carolina and Arizona are the only states without a texting ban applicable to any category of driver. *Id.*

³⁶ See Robert W. Hahn & Patrick M. Dudley, *The Disconnect Between Law and Policy Analysis: A Case Study of Drivers and Cell Phones*, 55 ADMIN. L. REV. 127, 156–57 (2003).

³⁷ *E.g.*, NAT'L SAFETY COUNCIL, UNDERSTANDING THE DISTRACTED BRAIN: WHY DRIVING WHILE USING HANDS-FREE CELL PHONES IS RISKY BEHAVIOR 4 (2012), http://www.nsc.org/safety_road/Distracted_Driving/Documents/Cognitive%20Distraction%20White%20Paper.pdf.

³⁸ Nicholas Bakalar, *Dangers of Distracted Walking*, N.Y. TIMES WELL BLOG (June 28, 2013, 9:43 AM), http://well.blogs.nytimes.com/2013/06/28/dangers-of-distracted-walking/?_r=0.

³⁹ Jeff Grabmeier, *Distracted Walking: Injuries Soar for Pedestrians on Phones*, OHIO ST. UNIV. (June 19, 2013), <http://researchnews.osu.edu/archive/distractwalk.htm> (internal quotation marks omitted).

⁴⁰ Matt Richtel & Bill Vlasic, *Hands-Free Technology Is Still Risky, Study Says*, N.Y. TIMES, June 13, 2013, at B1.

⁴¹ See Clifford Atiyeh, *Connectivity Features in New Cars*, BOSTON.COM, http://www.boston.com/cars/gallery/new_car_connectivity_features/ (last visited Nov. 22, 2013) (slideshow demonstrating features on several vehicles).

text, update a Facebook page, or send an email.⁴² Some high-end luxury cars, such as the BMW 7-Series, allow to drivers to dictate emails or text messages but it is not only the \$100,000 sedans which invite such driver distractions.⁴³

Nor is it only cars designed and manufactured in the deepest reaches of the Black Forest that offer such options. “The Chevrolet Sonic compact car . . . has a system [which] allows drivers to compose texts verbally on an iPhone connected in the vehicle.”⁴⁴ The 2012 Chevrolet Cruze’s “myLink service can read and update Facebook statuses” and the Hyundai Sonata and Veloster’s “Blue Link service can update your Facebook profile with” the location of your car.⁴⁵ Put differently, in response to our perceived needs and desires, car makers are producing large, fast moving, two-ton rolling smartphones.

In recognition of the fact that the technology in the car makes it a “mobile computer” that distracts drivers, the automobile industry is trying to find the correct balance between the new media options and the importance of staying focused on the road. “Ford Motor [Company] . . . repeatedly revise[d] its popular Sync system [in an effort] to mitigate distractions and make it easier for drivers to use.”⁴⁶ In the most recent revamping, Ford is introducing buttons, “reversing the focus on touch screens.”⁴⁷ The new Honda MDX model is also streamlining the instrument panel, eliminating thirty buttons.⁴⁸

The problem with these latest technology advances, addressed in a June 2013 study by the AAA Foundation for Traffic Safety, is that using voice-activated technology to check your e-mail or text while driving may be even more dangerous than talking on a cell phone, and more distracting than a traditional cell phone, whether hands-free or hand-held.⁴⁹ If anything, speech-to-text systems that allow drivers to send, delete, or scroll through text and email messages, require greater concentration by drivers than other potentially

⁴² Richtel & Vlasic, *supra* note 40, at B1.

⁴³ *See id.*

⁴⁴ *Id.*

⁴⁵ Atiyeh, *supra* note 41 (click “Next” until page 4).

⁴⁶ Bill Vlasic, *Designing Dashboards with Fewer Distractions*, N.Y. TIMES, July 6, 2013, at B1.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Think You Know All About Distracted Driving? Think Again, Says AAA*, AAA NEWSROOM (June 12, 2013), <http://newsroom.aaa.com/2013/06/think-you-know-all-about-distracted-driving-think-again-says-aaa/>.

distracting activities such as talking on the phone, conversing with a passenger, watching and/or listening to GPS directions, listening to a book on tape, or to the radio. “The greater the concentration required to perform a task, the more likely a driver is to develop . . . ‘tunnel vision’ or ‘inattention blindness.’”⁵⁰ This results in drivers no longer scanning the road or looking at side and rearview mirrors, instead looking straight ahead, seeing, but failing to see what is in front of them, such as pedestrians and red lights.⁵¹ Who among us can resist touching a screen or gently tapping a button to try the latest toys in our new car, amusing ourselves and impressing others?

Car makers are trying to keep consumers connected without having to use their hand-held phones while driving, recognizing that people want to be connected in their car just as they are in their home or office. The resulting “arms race” among automobile manufacturers, offering emails, texting, tweeting, or updating Facebook and cell phone conversation, all while driving, results in greater distractions for drivers. When one considers that drivers are doing this in their cars, while pedestrians are doing much the same while walking, a “perfect storm” is being created, the net effect of which will be increased accidents and litigation which tests and measures the attention of both drivers and pedestrians. With so much attention on the distractions caused by driving and texting or driving and talking, recognition should also be given to the fact that distraction caused by walking and texting can be just as dangerous and risky.⁵² No pun intended: the new technology is setting a collision course between drivers and pedestrians, each distracted by data.

These handheld devices are now part of our lives while waiting for friends, for dinner, or waiting for an elevator in an office or apartment building. But with the advance of smartphones in the hands of adults and children, the real and significant problem is divided attention by the users. If one is texting brilliant comments to be included in an appellate brief, that person is unlikely paying full, or perhaps any, attention to the crack in the sidewalk, the break in the curb, the bicyclist, the car, or other pedestrians who

⁵⁰ Joan Lowy, AAA: *Hands-Free Technology Not Safer for Drivers*, NEWSDAY (June 12, 2013, 9:48 PM), <http://www.newsday.com/news/nation/aaa-hands-free-technology-not-safer-for-drivers-1.5471169>.

⁵¹ *Id.*

⁵² Susan Spencer, *Just Watch Where You're Going—or Else*, WORCESTER TELEGRAM & GAZETTE, June 24, 2013, at A1.

similarly are walking with a steady pace, looking, but not really seeing—not unlike zombies but without the contorted faces and outstretched arms we see in movies.

Given that the problems of talking on a cell phone while driving, and texting and driving, have already been recognized, it is only natural, and predictable, that the same issues of inattention/divided attention we see in automobile cases will now present in increasing numbers and frequency in personal injury cases involving pedestrians and shoppers. Attorneys for both the plaintiff and defendant should therefore be mindful of the need to address smartphone activities of plaintiffs and defendants and request records showing location of those devices at the time of accident to be presented in discovery and at trial, where the smartphone and Blackberry records support that interpretation of the facts giving rise to the accident.

Both the plaintiff and defense bars recognize the need to obtain these smartphone records in cases where it is alleged that plaintiffs and/or defendants were distracted at the time of the accident.⁵³

One example is the YouTube sensation of a woman who fell into a fountain at the Berkshire Mall while texting and walking.⁵⁴ After the video went viral with close to 1.2 million views, the woman (who became known as “Fountain Lady”), hired an attorney who threatened a lawsuit based on the failure of the mall to come to her aide following the accident and for allowing the CCTV film to be aired on YouTube.⁵⁵ The YouTube posting of Fountain Lady and her lawyer itself had almost seven hundred thousand views.⁵⁶

You could also view on YouTube the Philadelphian who, in July 2012, can be seen meandering on an empty subway platform, falling over the edge of the platform and onto the tracks, while blithely speaking on a cell phone.⁵⁷ Fortunately, no trains were

⁵³ See generally, e.g., *Brignac v. Celadon Trucking Servs.*, No. 2:10 CV 373, 2012 U.S. Dist. LEXIS 6810, at *2 (W.D. La. Jan. 19, 2012) (“In this motion, [defendant] seeks to prevent the plaintiffs from introducing . . . cell phone records at trial.”); *Powell v. United Parcel Serv., Inc.*, No. 1:08-cv-1621-TWP-TAB, 2011 U.S. Dist. LEXIS 3627, at *2 (S.D. Ind. Jan. 13, 2011) (“Plaintiffs’ second motion seeks to prevent [defendant] UPS from obtaining their Verizon Wireless cell phone records, which UPS subpoenaed to evaluate whether cell phone use contributed to the accident . . .”).

⁵⁴ *ExtremesDotCom, Woman Falls into Fountain at Mall While Texting and Walking*, YOUTUBE (Jan. 17, 2011), <http://www.youtube.com/watch?v=jPW8xmI4w6U>.

⁵⁵ See *id.*; ABC News, *Fountain Lady Cathy Cruz Marrero Fights Back; Lawsuit?*, YOUTUBE (Jan. 20, 2011), <http://www.youtube.com/watch?v=AOBZmNVgOz0>.

⁵⁶ ABC News, *supra* note 55.

⁵⁷ *Newsdontsee, Man Talking on His Cell Phone Walks off Train Platform and onto Subway Tracks in Philadelphia*, YOUTUBE (July 30, 2012), <http://www.youtube.com/watch?v=2JuGdVPrBmY>.

approaching. Again, the incident was caught on CCTV film.⁵⁸

In July 2009, a New York teenager was walking with a friend and texting when she fell into an uncovered sewer manhole in Staten Island, New York.⁵⁹ Despite the fact that the hole was open and obvious, which, under New York law, is a defense in a personal injury suit,⁶⁰ the family of the high school sophomore announced that they were considering a lawsuit to recover damages for her personal injuries, claiming that the Department of Environmental Protection should not have left the manhole unattended or should have at least marked it as dangerous before removing the lid.⁶¹

Because there are relatively few reported decisions concerning cell phone and smartphone records, attorneys and New York courts will look to cases from other jurisdictions in deciding these emerging issues. Earlier last year, in *Miller v. Lewis*,⁶² Justice Ruchelsman in Supreme Court, Kings County, ruled on a motion by plaintiff's counsel to preclude the introduction into evidence of plaintiff's cell phone records.⁶³ Plaintiff was struck by a truck in Manhattan at the busy intersection of Ninth Avenue and West 48th Street.⁶⁴ The precise time of the accident was not determined; however, there was a 911 call placed by a bystander at 11:08 a.m.⁶⁵ Plaintiff's cell phone records established that she received a call at 11:01:10, which continued until 11:06:33.⁶⁶ There was a potential gap of twenty-seven seconds between the time plaintiff finished that call and the accident.⁶⁷

Plaintiff's counsel argued that "there is only speculation that the

⁵⁸ *Id.*

⁵⁹ Christina Boyle, *She's Texting, but Then She Just Drops in*, N.Y. DAILY NEWS, July 11, 2009, at 3.

⁶⁰ *Gagliardi v. Walmart Stores, Inc.*, 860 N.Y.S.2d 207, 208 (App. Div. 2d Dep't 2008); *Shulman v. Old Navy/Gap, Inc.*, 845 N.Y.S.2d 341, 342 (App. Div. 1st Dep't 2007) (quoting *Cupo v. Karfunkel*, 767 N.Y.S.2d 40, 43 (App. Div. 2d Dep't 2003)); *Espinoza v. Hemar Supermarket, Inc.*, 841 N.Y.S.2d 680, 681 (App. Div. 2d Dep't 2007) (citing *Bernth v. King Kullen Grocery Co.*, 830 N.Y.S.2d 222, 222 (App. Div. 2d Dep't 2007); *Morgan v. TJX Cos.*, 831 N.Y.S.2d 482, 483 (App. Div. 2d Dep't 2007); *Swan v. Eastman Kodak Co.*, 790 N.Y.S.2d 897, 897 (App. Div. 4th Dep't 2005) (citing *Tedesco v. Nowak*, 742 N.Y.S.2d 461, 462 (App. Div. 4th Dep't 2002)); *Zimkind v. Costco Wholesale Corp.*, 785 N.Y.S.2d 108, 109 (App. Div. 2d Dep't 2004); *Cupo*, 767 N.Y.S.2d at 42; *Rosa v. Food Dynasty*, 763 N.Y.S.2d 756, 757 (App. Div. 2d Dep't 2003)).

⁶¹ Natalie James, *NY Girl Falls in Manhole While Texting, Family Plans Lawsuit*, MONEY TIMES (Dec. 7, 2009, 12:31 PM), <http://www.themoneytimes.com/node/76161>.

⁶² *Miller ex rel. Miller v. Lewis*, 963 N.Y.S.2d 837 (Sup. Ct. Kings County 2013).

⁶³ *Id.* at 837–38.

⁶⁴ *Id.* at 838.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 838–39.

plaintiff was on her cell phone at the time of the accident.”⁶⁸ Counsel for defendant countered that

there is no question the plaintiff was on her cell phone some time before the accident and thus evidence, both direct and circumstantial, should be introduced to establish that the plaintiff was still on her phone when struck. The use of a cell phone can be introduced to argue inattentiveness or the failure to observe the traffic conditions on the part of the plaintiff.⁶⁹

Justice Ruchelsman acknowledged that “[t]here are no New York cases which directly address the admissibility of cell phone records to circumstantially prove cell phone use and hence inattentiveness and possible negligence. However, the matter has been addressed in other jurisdictions concerning the cell phone use of drivers.”⁷⁰ Citing decisions from New Jersey,⁷¹ Illinois,⁷² Michigan,⁷³ and California⁷⁴ the court ruled that the driver who struck the pedestrian could introduce the pedestrian’s cell phone records into evidence in order to argue that the pedestrian contributed to the cause of the accident by talking on the cell phone.⁷⁵

Justice Ruchelsman also determined that the defendants would not be permitted to question potential jurors during *voir dire* or comment regarding texting or emailing while walking and talking on a cell phone.⁷⁶ Significantly, the court found that there would be no distinction between phone evidence of a pedestrian rather than a driver as that would go to the weight, and not the admissibility, of such evidence.⁷⁷

Earlier cases from New York support the conclusion that jurors recognize that the use of mobile devices raise serious questions of inattentiveness in comparative fault giving rise to accidents. In *Glen v. Murphy*,⁷⁸ a case involving a motor vehicle personal injury,

⁶⁸ *Id.* at 839.

⁶⁹ *Id.*

⁷⁰ *Id.* at 840.

⁷¹ *Scianni v. Soriano*, No. A-4415-O5T5, 2007 N.J. Super. Unpub. LEXIS 1070, at *7–8 (N.J. Super. Ct. App. Div. Feb. 20, 2007).

⁷² *Hiscott v. Peters*, 754 N.E.2d 839, 849 (Ill. App. Ct. 2001), *overruled in part by Thornton v. Garcini*, 928 N.E.2d 804 (Ill. 2009).

⁷³ *McCuish v. Jaffe*, No. 286807, 2009 Mich. App. LEXIS 1952, at *6–7 (Mich. Ct. App. Sept. 24, 2009).

⁷⁴ *Miller v. Am. Greetings Corp.*, 74 Cal. Rptr. 3d 776, 781–82 (Cal. Ct. App. 2008).

⁷⁵ *Lewis*, 963 N.Y.S.2d at 840–42.

⁷⁶ *See id.* at 843.

⁷⁷ *Id.* at 841.

⁷⁸ *Glen v. Murphy*, 781 N.Y.S.2d 230 (Sup. Ct. Nassau County 2004).

defendant argued that plaintiff failed to see the car that hit her because she was talking on her cell phone.⁷⁹ In addition, plaintiff was not driving hands-free, as plaintiff allegedly held the phone to her ear with her left hand while driving with her right hand on the steering wheel.⁸⁰ Justice Palmieri of Supreme Court, Nassau County, ruled that plaintiff could be held comparatively negligent and therefore denied plaintiff's motion for summary judgment.⁸¹

For events occurring in an urban setting, consider *Goppel v. Chiarella*,⁸² where a plaintiff was injured in Manhattan while walking within the crosswalk.⁸³ Defendant opposed plaintiff's motion for summary judgment, arguing that there were triable issues of material fact, notably that plaintiff was using her cell phone while crossing the street, and therefore was not paying sufficient attention to traffic conditions, including the traffic control signal that was flashing "do not cross" at the time of the accident.⁸⁴ Although plaintiff conceded that she used her cell phone to call a friend shortly after the accident, plaintiff denied that she was on her cell at the time of the incident.⁸⁵ In the absence of proof, rather than speculation, by the defense that plaintiff was using her cell phone at the time of the incident, Justice Wooten of Supreme Court, New York County, denied the motion for summary judgment.⁸⁶

In *Matthew v. A.J. Richard & Sons*,⁸⁷ plaintiff was injured when the lid of a barbecue grill—which was displayed on the showroom floor of defendants' retail establishment—closed and struck her on the back while she leaned against the grill to make a phone call on her cell.⁸⁸ Defendant moved for summary judgment on liability, which was denied by Justice Martin of Supreme Court, Kings County.⁸⁹ On appeal, the Second Department unanimously held that the open lid of the barbecue was an open and obvious condition and not entirely dangerous.⁹⁰ The fact that the plaintiff was making a phone call on her cell at the time of the incident, and

⁷⁹ *Id.* at 230–31.

⁸⁰ *Id.* at 231.

⁸¹ *Id.* at 232.

⁸² *Goppel v. Chiarella*, No. 100058/07, 2009 N.Y. Misc. LEXIS 6212 (Sup. Ct. New York County Oct. 15, 2009).

⁸³ *Id.* at *1.

⁸⁴ *See id.* at *5–6.

⁸⁵ *Id.* at *6.

⁸⁶ *See id.* at *8–9.

⁸⁷ *Matthew v. A.J. Richard & Sons*, 923 N.Y.S.2d 218 (App. Div. 2d Dep't 2011).

⁸⁸ *Id.* at 218–19.

⁸⁹ *Id.* at 218.

⁹⁰ *Id.* at 219.

leaning against the grill while so doing, formed part of the conclusion that plaintiff had failed to observe that open and obvious condition because she was engrossed in her phone call on her cell.⁹¹

Notably, in *Rhoney v. United States*,⁹² an automobile case, plaintiff moved for summary judgment on liability.⁹³ The defense argued that plaintiff had been observed talking on her cell while driving and had actually waited some 10–15 seconds to finish her telephone call after the accident before approaching the vehicle after the collision.⁹⁴ Magistrate Judge Schroeder recommended that plaintiffs' motion for summary judgment be denied, finding that the allegation that plaintiff may have been talking on a cell phone at the time of the accident raised a triable issue of material fact as to whether the inattentiveness of plaintiff caused or contributed to the incident.⁹⁵

In *Matthews v. Vlad Restoration Ltd.*,⁹⁶ plaintiff was hurrying to catch a bus when she tripped and fell on a horizontal brace of a scaffold.⁹⁷ Plaintiff was also speaking on her cell at the time she fell.⁹⁸ Justice Diamond of Supreme Court, New York County, granted the motion for summary judgment filed by defendant.⁹⁹ On appeal, a unanimous First Department affirmed; although the fact that plaintiff was on her cell at the time of the incident was not dispositive, it did support the contention that defendant's scaffold, an open and obvious condition, was not recognized by plaintiff because she was on her cell and that plaintiff should have recognized the condition and exercised due care and caution.¹⁰⁰

In *Dessasore v. New York City Housing Authority*,¹⁰¹ plaintiff recovered \$5 million in personal injuries after he fell down a stairway in defendant's building, tripping on a hand rail that was partially loosened from the wall at the top of the steps.¹⁰² At trial, evidence was introduced that plaintiff may have been talking on his

⁹¹ See *id.* at 218–19.

⁹² *Rhoney v. United States*, No. 08-CV-0097A(Sr), 2010 U.S. Dist. LEXIS 14303 (W.D.N.Y. Jan. 27, 2010).

⁹³ See *id.* at *1–2.

⁹⁴ See *id.* at *3.

⁹⁵ *Id.* at *6–7.

⁹⁶ *Matthews v. Vlad Restoration Ltd.*, 904 N.Y.S.2d 391 (App. Div. 1st Dep't 2010).

⁹⁷ *Id.* at 391.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See *id.*

¹⁰¹ *Dessasore v. N.Y.C. Hous. Auth.*, 895 N.Y.S.2d 44 (App. Div. 1st Dep't 2010).

¹⁰² *Id.* at 45.

cell phone at the time of the incident.¹⁰³ “The jury found both plaintiff and defendant were negligent but that plaintiff’s negligence was not a substantial factor in causing his injuries.”¹⁰⁴ Justice Barone in Supreme Court, Bronx County, “denied defendant’s post-trial motion to set aside the jury’s verdict on liability, [and] granted both parties’ motions to set aside the damages award and directed a new trial on damages.”¹⁰⁵

On appeal, the First Department found that the verdict on liability was “irreconcilably inconsistent” as the evidence pointed to the conclusion “that plaintiff [did] not look[] down before he proceeded to descend the stairs . . . [and] was talking on [his] cell phone just before he fell.”¹⁰⁶ The court therefore found that “the issues of negligence and proximate cause are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause.”¹⁰⁷ Justices Saxe and Sweeney dissented, finding that the jury had sufficient evidence to conclude rationally “that although plaintiff was negligent in talking on his cell phone and not looking down as he approached the stairs, that negligence was not a proximate cause of his accident, and that the sole proximate cause was the hand rail on the floor.”¹⁰⁸

Deljanin v. St. Nicholas Cathedral of Russian Orthodox Church in North America,¹⁰⁹ involved a plaintiff who was injured when she was struck in the forehead by the arm of a large cherry picker.¹¹⁰ At the time of the incident, plaintiff was walking on a sidewalk in Manhattan.¹¹¹ It was established “that at the time of the [incident] plaintiff was searching for her cell phone.”¹¹² Following the completion of discovery, defendant moved for summary judgment.¹¹³ Justice Judith Gische denied the motion finding that it would be for a jury to decide whether plaintiff had been inattentive while walking down the street due to her cell phone, and therefore it was

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 45–46.

¹⁰⁷ *Id.* at 46 (quoting *McCollin v. N.Y.C. Hous. Auth.*, 764 N.Y.S.2d 40, 41 (App. Div. 1st Dep’t 2003)) (internal quotation marks omitted).

¹⁰⁸ *Dessasore*, 895 N.Y.S.2d at 46 (Saxe, J., dissenting).

¹⁰⁹ *Deljanin v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, No. 105998/04, 2006 N.Y. Misc. Lexis 1241 (Sup. Ct. New York County May 22, 2006).

¹¹⁰ *Id.* at *1.

¹¹¹ *Id.*

¹¹² *Id.* at *2.

¹¹³ *Id.* at *1.

for the jury to decide liability.¹¹⁴

In addition to the liability of those using cell phones, juries may now also be required to consider the potential liability of those who *send* texts to pedestrians and drivers who are involved in accidents. In August 2013, a New Jersey court considered the liability of a person who sent texts to a driver involved in an accident.¹¹⁵ In that case, the injured plaintiffs, who had been riding a motorcycle when hit by the driver of a pick-up truck, sued both the teenage driver and his girlfriend who had allegedly been sending him distracting texts.¹¹⁶ The plaintiffs sought to establish joint and several liability on the basis that the girlfriend had “violated a duty of care because she aided and abetted [the driver’s] violation of the law when he knowingly used his cell phone while driving.”¹¹⁷ The court, holding that a special relationship of active encouragement was required in order to hold the girlfriend liable, concluded that the sending of messages alone was insufficient evidence to establish such a relationship.¹¹⁸ Though the message sender was not found liable in this case,¹¹⁹ this novel theory of liability can be imported into other jurisdictions. Thus, it is not too far-fetched to say that New York courts may soon consider the liability of people who send texts in personal injury suits brought by those injured by the receiver of the message, as well as the receiver herself!

From the standpoint of the practicing attorney it is therefore critical to obtain the records from both plaintiff and defendant, of their handheld devices, showing their use at the time of the incident, or moments before. It is now predictable that opposing counsel will ask for those records from their adversary. Therefore, at the inception of the case attorneys for plaintiff, in addition to asking their client whether a smartphone was being used, should obtain authorization from the client to obtain the records so that the careful attorney can resolve any dispute regarding the recollection of the incident. It is critical to obtain the mobile device records from the attorneys own client in any event since opposing counsel is unlikely to rely upon the testimony, standing alone, without supporting documentary evidence on the extent and timing of

¹¹⁴ *Id.* at *3, *4.

¹¹⁵ Robert D. Lang, Expanded Tort Liability Targets Those Who Send Texts to Drivers, N.Y.L.J., Nov. 14, 2013, at 4, col. 1.

¹¹⁶ *Kubert v. Best*, 75 A.3d 1214, 1218–19 (N.J. Super. Ct. App. Div. 2013).

¹¹⁷ Lang, *supra* note 115.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

texting cell phone use.

Where an attorney obtains evidence that one or more of the parties were texting and tweeting, rather than paying full attention at the time of the incident, that attorney can then seek to resolve the case before, and not after, opposing counsel obtains those records. Stated otherwise, obtaining the records from the smartphones of your own client, before your adversary becomes aware of their content, allows a careful practitioner to time settlement discussions so that they take place before, and not after, the adversary becomes aware of their existence and import.

Should a party deny using a smartphone at the time of an incident, where there is evidence to point to the other person with whom the party was communicating, that non-party can be interviewed and the records from their smartphone subpoenaed. This process takes longer, and is more expensive, but the net result can be devastating against that party which “misremembered” that he or she was texting moments before the accident occurred. Similarly, testimony from passengers in a car where the driver was texting establishing the activities of the driver at the time of the accident can be introduced to establish the actual state of events at the time of accident. Especially where an accident takes place in a store or on the sidewalk outside a business, counsel for both plaintiff and defendant now look for CCTV film which may show one or both of the parties texting (think: Fountain Lady and Laura “Unsafe”) or talking on a cell at the time of the accident. There are a variety of ways to accomplish the same objective which is to obtain admissible evidence whether plaintiff and/or defendant were engrossed in the use of their handheld device, rather than paying attention to the surroundings about them, at the time of the accident.

CONCLUSION

We are, and will continue to be, an impatient, instant-gratification society, stressed for time and requiring major multi-tasking so we can achieve our goals within the time allotted. It is wishful thinking to expect people to willingly power down their devices while in transit. Our use of smartphones, Blackberries, cell phones and other handheld devices will continue to increase and people will use them in circumstances where they should not, despite the growing evidence of the risk they create and the growing concern that they know better. Given the opportunities presented

by new technology, “single-tasking seems downright boring and even unproductive.”¹²⁰

Our attention is increasingly divided and our brains increasingly tasked with all that new technology presents, so that we are connected at all times wherever we go and however we are traveling. The net result is an increasing risk of accidents due to the increasing flow of information to be assessed, evaluated, and our increasing need to respond in the moment. These present both enhancements and impairments at the same time.

For some time, drivers have known the safest way to speak on a cell phone is to drive out of traffic and stop the car so they can talk. It may take considerably longer for the same message to be understood by pedestrians—when texting “in a busy area, stop and complete your texting in a safe place, then resume walking.”¹²¹

When we text, we are focused on that task, rather than our surroundings. People are not taking responsibility for the potential harm they may be causing, due to the new distractions in which they choose to indulge and engage. These are forms of impairments of our own selection. From a human behavioral standpoint, it appears that many of us will risk falling, spraining an ankle, or bumping into another person, just so we can text “LOL” or read “WRUD.”¹²² Until we can refrain from doing so, both plaintiffs’ and defendants’ lawyers will be looking for CCTV of people texting and walking and subpoenaing smartphone records for evidence of texting, talking, and tweeting as an accident is taking place. We need to be smarter with our smartphones, as we adjust our new Google Glasses, insert our earbuds, start texting, and step into the crosswalk.

¹²⁰ Matt Richtel, *Forget Gum. Walking and Using Phone is Risky.*, N.Y. TIMES, Jan. 16, 2010, at A1.

¹²¹ Art Powell, *Texting Fail—Perils of Distracted Walking*, U.S. ARMY (Feb. 6, 2013), <http://www.army.mil/article/95640/>.

¹²² Beth Teitell, *Caution: Texting on Foot a Hazard; Distracted Pedestrians are racking up all Kinds of Injuries. The message? Pay Attention or Pay the Price.*, BOS. GLOBE, May 17, 2011, at G12.