

## **AUTOMOBILE ACCIDENTS ASSOCIATED WITH CELL PHONE USE: CAN CELL PHONE SERVICE PROVIDERS AND MANUFACTURERS BE HELD LIABLE UNDER A THEORY OF NEGLIGENCE?**

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### I. INTRODUCTION

[1] Cell phone related car accidents have received a lot of attention in the press and academic journals over the past few years.<sup>1</sup> Articles have discussed the impact of driving while using a hand-held or hands-free cell phone, and in some instances have identified liability on the part of employers. A number of cases have gone to the jury on employer liability based on *respondeat superior*, where the employer is held responsible for the actions of an employee acting within the scope of employment.<sup>2</sup> In

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<sup>2</sup> *E.g.*, Stephen A. Fuchs, *Do You Know Where Your Employees Are?*, 166 N.J.L.J. 908 (2001) (discussing *Yoon v. Wagner* (Va. Cir. Ct. June 14, 2001) (No. CL 24892); Patricia T. Stambelos, *Employer Liability in a Wireless World*, 71 CAL. CPA 33 (2003)

simple terms, the employer has been held liable when the employee uses a cell phone for business purposes and the employee causes a car accident, leading to personal injury or property damage.<sup>3</sup> Causes of action may also arise under negligence, strict liability, and breach of the implied warranty of merchantability based on a failure to warn the ordinary consumer of the hazards of cell phone use while driving. This article establishes a road map for the litigation of such actions by refuting a recent ruling of the Court of Appeals of Indiana (“Indiana Court”).<sup>4</sup>

[2] The extent to which cell phone use really causes car accidents has been debated. If cell phone use is just one of many possible distractions, then why single out cell phone use to impose liability?<sup>5</sup> We have not seen any public policy initiatives to impose fines or prison terms when tuning a car radio or changing a CD has created a distraction leading to an accident, so what is so different about cell phone use that requires special attention?<sup>6</sup> Research published over the past few years has indicated that cell phone use creates not just a momentary distraction, but a period of “cognitive inattention” that acts as a perceptual disability.<sup>7</sup> Such periods

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(discussing several cell phone-related lawsuits brought on theories of employer liability); Stephanie Armour, *Firms Crack Down: Don't Dial And Drive*, USA TODAY, Sept. 26, 2000, at A1 (discussing Salomon Smith Barney, the brokerage that paid \$500,000 to settle a case brought by the family of a motorcyclist killed when he was struck by a stock broker using a cell phone while driving).

<sup>3</sup> See Laura Parker, *Cell Phone Suits Targeting Firms*, USA TODAY, Dec. 26, 2002, at A3.

<sup>4</sup> *Williams v. Cingular Wireless*, 809 N.E.2d 473 (Ind. Ct. App. 2004).

<sup>5</sup> Lauren Weinstein, *Cell-Phone Ban Not a Good Call*, Wired News, at <http://www.wired.com/news/print/0,1294,56733,00.html> (Dec. 9, 2002).

<sup>6</sup> See, e.g., Bryan Knowles, *Should Using a Cell Phone While Driving Be Illegal?*, SpeakOut.com, at [http://speakout.com/activism/issue\\_briefs/1334b-1.html](http://speakout.com/activism/issue_briefs/1334b-1.html) (June 15, 2000); Iain Murray, *Hard Cell*, Tech Central Station, at <http://www.techcentralstation.com/033103B.html> (Mar. 31, 2003); Lynne Shallcross, *Cell Phone Ban Drives No Benefits*, MSNBC News, at <http://www.statehighwaysafety.org/html/media/mediacoverage/062603.htm> (June 26, 2003); *1 in 20 Crashes Linked to Cell Phones*, CBSNews.com, at <http://www.cbsnews.com/stories/2002/12/02/tech/main531320.shtml?CMP=ILC-SearchStories> (Dec. 2, 2002).

<sup>7</sup> See MICHAEL GOODMAN ET AL., AN INVESTIGATION OF THE SAFETY IMPLICATIONS OF WIRELESS COMMUNICATIONS IN VEHICLES, Report Summary (1997), <http://www.nhtsa.dot.gov/people/injury/research/wireless/> (last visited Oct. 20, 2004); James McKnight & A. Scott McKnight, *The Effect of Cellular Phone Use Upon Driver Attention*, AAA, at <http://www.aaafoundation.org/resources/index.cfm?button=cellphone> (last visited Oct. 20, 2004); David L. Strayer & William A. Johnston, *Driven to Distraction: Dual-Task Studies of Simulated Driving and Conversing on a Cellular*

of inattention may occur more frequently and last longer<sup>8</sup> as cell phone service providers make more phones available to the general public at little or no charge and encourage increasing minutes of use as a competitive marketing tool. The fact that cell phone use in automobiles has increased is correlated with an ever-growing commuter population attempting to make the best use of “down time” while driving. As stated in a 1997 National Highway Transportation Safety Administration (“NHTSA”) study, “American motorists in particular spend substantial amounts of their day in automobiles, vans, trucks, and buses. It is not surprising that people will attempt to optimize their time in the vehicle by doing other things.”<sup>9</sup>

[3] The purpose of this article is to demonstrate a plausible theory of negligence whereby cell phone service providers and manufacturers can be held liable for cell phone related automobile accidents involving business and personal calls.<sup>10</sup> This opens the field of liability which may be addressed through effective consumer education campaigns to curtail the use of cell phones.<sup>11</sup> This viewpoint runs counter to a recent Indiana Court ruling, which will be addressed in some detail in this article.

## II. CELLULAR PHONES IN USE

*Telephone*, 12 PSYCHOL. SCI. 462, 464-66 (2001); Karolina Rous, *Wireless Phones and Cognitive Distraction: What the Studies Have to Say*, *New Media Journalism*, at [http://www.fims.uwo.ca/newmedia/cell/Cell\\_Rous/cell\\_rous\\_mainpage\\_d01\\_e.htm](http://www.fims.uwo.ca/newmedia/cell/Cell_Rous/cell_rous_mainpage_d01_e.htm) (Dec. 2003); Frank A. Drews et al., *Passenger and Cell-Phone Conversations in Simulated Driving*, in PROCEEDINGS OF THE HUMAN FACTORS AND ERGONOMICS SOCIETY 48TH ANNUAL MEETING 2210, 2212 (2004), available at <http://www.psych.utah.edu/AppliedCognitionLab/HFES2004-000597-1.pdf>.

<sup>8</sup> J.T. Cohen & J.D. Graham, *A Revised Economic Analysis of Restriction on the Use of Cell Phones While Driving*, 23 RISK ANALYSIS 5, 15 (2003) (“The second influential factor is our assumed increase in time spent on the phone while driving (central estimate of 77 billion minutes annually vs. 26 billion minutes annually)” since 1997.).

<sup>9</sup> GOODMAN ET AL., *supra* note 7, at Report Summary (“[I]t logically follows from the above that if more cellular telephones are in use, then there will be more opportunity for distraction and, hence, there will likely be an increase in related crashes – unless, of course, changes take place in the technology or its use that mitigates such a trend.”); *see id.* § 1.1 (indicating that as of 1990, cell phone business use comprised 60% and personal use 40%; as of 1994 business use comprised 44% and personal use 56%).

<sup>10</sup> This article will also address related causes of action to include strict liability claims under the theories of failure to warn and breach of the product’s implied warranty of merchantability.

<sup>11</sup> GOODMAN ET AL., *supra* note 7, at Report Summary; Mory Katz, *National Driving Habits Survey*, 14580 Magazine Online, at <http://magazine.14850.com/0107/driven.html> (July 2001).

[4] The number of cell phone subscribers has increased dramatically since 1990 when there were roughly 4.3 million subscribers.<sup>12</sup> According to the Cellular Telecommunications Industry Association (“CTIA”), there are 171,005,219 wireless subscribers in the United States.<sup>13</sup> A report issued by the National Conference of State Legislatures (“NCSL”) in December 2003 indicated that 85% of the 140 million service subscribers used cell phones in cars.<sup>14</sup> The NHTSA has estimated that “at any given moment of the day, 500,000 drivers of passenger vehicles are talking on handheld cell phones.”<sup>15</sup> Accordingly, the Texas Department of Public Safety has noted that the number of cell phone related accidents is up 44% from 2000.<sup>16</sup>

[5] A Harvard Center for Risk Analysis (“HCRA”) study estimated that the average motorist uses a cell phone 300 to 1200 minutes per year.<sup>17</sup> That estimate, however, may be conservative given increasing minutes of use under current cell phone service plans. Other studies indicate that cell phone users spend 60% of cell phone minutes while driving, affirming the notion that cell phone use in automobiles is a deliberate attempt by drivers to create value with underutilized time in automobiles.<sup>18</sup> A combination of marketing initiatives and circumstances—increased hand sets, more frequent and longer cell phone conversations due to increased plan minutes, and a high percentage of use concentrated in automobiles—may be increasing the risk of cell phone related auto accidents.

### III. RISK ASSOCIATED WITH USE

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<sup>12</sup> Pat Curry, *Cell Phone Chatter Can Cause Accidents*, Bankrate.com, at <http://www.bankrate.com/brm/news/insurance/cell-phones1.asp> (last visited Oct. 20, 2004).

<sup>13</sup> *Cellular Telecommunications Industry Association Website*, CTIA, at <http://www.ctia.org> (last visited Nov. 1, 2004) [hereinafter *Cellular Telecommunications Industry Association Website*, CTIA].

<sup>14</sup> Gary Gately, *Cell Phones: Hands-Free Not Risk-Free*, Health on the Net Foundation, at <http://www.hon.ch/News/HSN/511476.html> (Jan. 28, 2003) (quoting Matt Sundeen of the National Conference of State Legislatures).

<sup>15</sup> John Goepel, *Your Car: Driving, Accidents, and Your Cell Phone*, VIA MAG., available at [http://www.viamagazine.com/top\\_stories/auto/cell\\_phone03.asp](http://www.viamagazine.com/top_stories/auto/cell_phone03.asp) (May 2003).

<sup>16</sup> James Lozada, *DPS Releases Cell Phone Accident Rates* (News 9 San Antonio television broadcast, Feb. 3, 2004) (transcript on file with the Richmond Journal of Law & Technology).

<sup>17</sup> Cohen & Graham, *supra* note 8, at 10.

<sup>18</sup> Robert W. Hahn et al., *Should You Be Allowed to Use Your Cellular Phone While Driving?*, 23 REGULATION 46, 48 (2000).

[6] The “NHTSA reported in 2001 that distractions from cell phone use could be a factor in 20 to 30 percent” of car accidents,<sup>19</sup> and 82% of survey respondents in an *Insurance Research Council Public Attitude Monitor* agreed that cell phone use “distracts drivers and increases the likelihood of accidents.”<sup>20</sup>

[7] Some may argue that cell phone related accidents are but a small percentage of all accidents. A study conducted by Virginia state troopers indicated that of the 2,700 accidents related to distracted drivers between June and November 2002, only 5% were linked to cell phone use; other associated causes involved rubbernecking (16%), driving while looking at scenery (10%), passenger or child distraction (9%), and adjusting the CD player (7%).<sup>21</sup> The list of possible distractions is endless, including drinking coffee, reading the newspaper, eating a hamburger, and screaming children.<sup>22</sup>

[8] Nonetheless, the Response Insurance National Driving Habit Surveys indicate that drivers’ concerns regarding “aggressive driving and drunk driving are now taking second and third place to the fear that the other driver is simply not paying sufficient attention to the road” inasmuch as they emphasize a “higher priority on making better use of their time than on getting to their destination safely.”<sup>23</sup> The survey explains, “[a]s the car becomes the extension of the home and office . . . drivers are increasingly engaging in activities that take their hands, and more importantly their focus of attention, off the road.”<sup>24</sup>

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<sup>19</sup> *Special Report: Driving While Talking*, InsWeb, at <http://www.insweb.com/learningcenter/special-reports/cellphones/solutions.htm> (last visited Oct. 22, 2004).

<sup>20</sup> *Partnership for Safe Driving and Cell Phone Safety*, MorganLee.Org, at <http://www.morganlee.org> (last visited Oct. 22, 2004) [hereinafter *Partnership for Safe Driving and Cell Phone Safety*, MorganLee.Org]; see Gary Frankenfield, *Cell Phone Use While Driving Increases Crash Risk*, WebMD Medical News Archive, at [http://my.webmd.com/content/article/21/1728\\_55265?src=Inktomi&condition=Home%200&%20Top%20Stories](http://my.webmd.com/content/article/21/1728_55265?src=Inktomi&condition=Home%200&%20Top%20Stories) (Feb. 24, 2000) (referring to Patricia Pena, whose two-year-old daughter Morgan Lee “was killed in her car seat when the car in which she was riding was struck by a motorist using a cell phone”).

<sup>21</sup> Jennifer Warner, *Rubbernecking Distracts More Than Phones*, WebMD, at <http://content.health.msn.com/content/article/62/71477.htm> (Mar. 7, 2003).

<sup>22</sup> See, e.g., Katz, *supra* note 11 (describing common distractions).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

[9] Many in-car entertainment systems like CD's, radios, or tape players may cause distractions, yet there has been no legislative attempt to ban these as there has been to ban cell phone use. These entertainment systems "certainly provide benefits, but it is clear that they cause more accidents than cell phone use. In this case society has taken a collective decision that the deaths caused by in-car entertainment systems are outweighed by the collective utility, or general happiness, the public derives from them."<sup>25</sup>

[10] Thus under the theory of risk/utility, the authors of the HCRA study argue that we derive a net benefit or utility from the use of cell phones that justifies the risk of accident, or that at least justifies not placing a complete ban on the use of these devices. The HCRA study states, however, that "as a society we are underinvesting in motor vehicle safety."<sup>26</sup>

[11] In the area of cell phone use, compromise legislation has been proposed that would ban hand-held phones, which create distractions through dialing and phone manipulation, but permit hands-free phones. Yet in large measure even that compromise has failed.<sup>27</sup>

#### IV. LEGISLATION

[12] Many foreign countries, including Australia, Austria, Germany, Greece, Ireland, Japan, Russia, and Switzerland, have restricted cell phone use by drivers.<sup>28</sup> In Britain, it became a criminal offense as of December 1, 2003 to use a hand-held mobile phone at any time while driving.<sup>29</sup> The regulations "simply make it an offence to hold a phone whilst driving and cover all activities associated with making or receiving a call, including dialing."<sup>30</sup>

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<sup>25</sup> Murray, *supra* note 6.

<sup>26</sup> Cohen & Graham, *supra* note 8, at 16.

<sup>27</sup> See generally MATT SUNDEEN, CELL PHONES AND HIGHWAY SAFETY: 2003 STATE LEGISLATIVE UPDATE 4-13 (2003), <http://www.ncsl.org/print/transportation/cellphoneupdate12-03.pdf> (collecting federal, state, and local legislative efforts).

<sup>28</sup> *Id.* at 16; Goepel, *supra* note 15.

<sup>29</sup> *Cell Phones are Banned for British Drivers – It's the Law!*, Drive and Stay Alive, at [http://www.driveandstayalive.com/info%20section/news/individual%20news%20articles/x\\_031027\\_hand-held-cellphones-outlawed-in-Britain.htm](http://www.driveandstayalive.com/info%20section/news/individual%20news%20articles/x_031027_hand-held-cellphones-outlawed-in-Britain.htm) (Oct. 2003).

<sup>30</sup> *Id.*

[13] Canada has also taken initiatives in this direction. As of April 1, 2003, Newfoundland banned the use of hand-held phones while driving; now drivers can only “talk on handheld cell phones while their cars are parked.”<sup>31</sup> Fines for violating the ban range from \$45 to \$180 and may also include demerit points.<sup>32</sup> British Columbia, Alberta, Nova Scotia, and Ontario are among other provinces that have considered restrictions or bans.<sup>33</sup> Many of the countries and provinces legislating against cell phone use while driving hope to have results similar to Japan, where “in the month after the law went into effect, the number of accidents caused by drivers using cell phones fell by about 75 percent.”<sup>34</sup>

[14] In the United States, many state legislatures have proposed various restrictions on the use of hand-held cell phones, yet only seventeen states have such laws enacted.<sup>35</sup> In the first three months of 2004, twenty-six states proposed legislation to curb the use of cell phones while driving.<sup>36</sup> During that three month period, fifty bills were introduced; five are active, and forty-two are inactive.<sup>37</sup> Most notably, only three of the bills introduced during that three-month period have been enacted: bills in California, New Jersey and the District of Columbia.<sup>38</sup>

[15] Many states propose restrictions on cell phone use, but the measures often die in committee. This is due in part to “the political clout of 76 million cell phone users. Also, just about every politician owns and uses a cell phone.”<sup>39</sup> Even cell phone bans on hand-held devices—thought to create the greatest distraction while driving—have seldom been

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<sup>31</sup> *Driving and Dialing*, CBC News Online, at [www.cbc.ca/news/background/cellphones/driving.html](http://www.cbc.ca/news/background/cellphones/driving.html) (June 3, 2004) [hereinafter *Driving and Dialing*, CBC News Online].

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Partnership for Safe Driving and Cell Phone Safety*, MorganLee.Org, *supra* note 20.

<sup>35</sup> SUNDEEN, *supra* note 27, at 4.

<sup>36</sup> National Conference of State Legislatures (NCSL) Online Tracking Database, *Legislative Tracking Database: Distracted Driving*, at <http://www.nhtsa.dot.gov/ncsl/Index.cfm> (2004) [hereinafter NCSL, *Legislative Tracking Database*].

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* The bills enacted by the District of Columbia, B15-0035, and New Jersey, SB 338, ban hand-held cell phones while driving in these two states. California, AB 2785, prohibits school or transit bus drivers from using cell phones while driving. *Id.*

<sup>39</sup> Frankenfield, *supra* note 20 (quoting Matt Sundeen, an analyst with the National Conference of State Legislatures).

legislatively enacted. In 2000, an estimated 44% of motorists in the United States had a cell phone in their car.<sup>40</sup>

[16] Nebraska has been debating legislation that would consider “presumed negligence” in accidents that involved driving while using a cell phone.<sup>41</sup> The Nebraska legislation proposes a rebuttable presumption of negligence, allowing the plaintiff to offer evidence that the use of the cell phone was not a causal or contributing factor in an automobile accident.<sup>42</sup> Kansas and Tennessee have also presented similar legislation.<sup>43</sup>

[17] Many counties, cities, towns, and local municipalities have taken their own initiatives on restricting cell phone use.<sup>44</sup> In response, states have proposed legislation to preempt local municipalities from enacting such laws.<sup>45</sup> However, state legislatures, as public policy decision makers, have consistently failed to provide legislation to deter or prohibit hand-held cell phone use while driving.<sup>46</sup> State legislatures have not shown themselves to be an effective catalyst for public policymaking in this area and therefore should not prove a barrier to other public bodies that choose to legislate in order to deter cell phone related automobile accidents.

[18] The passage of legislation banning hand-held cell phones and allowing hands-free cell phones would not address the underlying problem. Evidence exists that hands-free devices and hand-held devices in vehicles produce

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<sup>40</sup> Knowles, *supra* note 6.

<sup>41</sup> *Safety First! Avoid Traffic Tickets and Accidents*, Cellular Phone News, at [www.cellularphonenews.com/ebook/safety.html](http://www.cellularphonenews.com/ebook/safety.html) (1999).

<sup>42</sup> *See id.*

<sup>43</sup> SUNDEEN, *supra* note 27, at 5, 10 (stating that in 2003, Kansas proposed a law of “negligence per se” (HB 2230) for auto accidents involving the use of a cellular or mobile phone; Tennessee enacted SB208 in 2003 which creates a rebuttable presumption of negligence for auto accidents involving a hand-held phone).

<sup>44</sup> *See id.* at 15-16; Frankenfield, *supra* note 20.

<sup>45</sup> *E.g.*, SUNDEEN, *supra* note 27, at 16 (stating that New York and Florida laws supersede local regulations).

<sup>46</sup> *Cf. id.* at 13 (“A common misperception is that many states have banned cell phone use while driving or are considering such legislation. In fact, no state completely bans the use of cell phones while driving.”).



approximately the same level of distraction in drivers.<sup>47</sup> Characterizing the issue as one of distraction, however, ignores a key element of driver inattention. Cell phone conversations promote “cognitive impairment,” which prevents or delays drivers from responding to dangerous situations.<sup>48</sup>

## V. DISTRACTION VERSUS COGNITIVE IMPAIRMENT

[19] A 1991 study sponsored by the AAA Foundation for Traffic Safety concluded that “all forms of cellular phone usage lead to significant increases in the establishment of non-response to highway-traffic situations and increases in time to respond” and that “[c]omplex, intense [phone] conversations lead to the greatest increases in likelihood of overlooking significant highway traffic conditions.”<sup>49</sup> A University of Montreal study of 36,000 people indicated that using a cell phone while driving created a 38% greater likelihood of getting into an accident.<sup>50</sup> In a study conducted in Ottawa, testers observed twenty drivers as they drove through fourteen signalized intersections on busy four-lane city streets.<sup>51</sup> The study showed that drivers failed to look at a traffic light 21.9% of the time when conversing on a cell phone, as compared to 7.8% of the time when not conversing on a cell phone.<sup>52</sup>

[20] An often-cited study by Redelmeier and Tibshirani in the February 1997 edition of the *New England Journal of Medicine* found that “talking on a cell phone while driving quadrupled a person’s risk of accident.”<sup>53</sup> Maclure and Mittleman’s analysis of the data indicated that cell phone

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<sup>47</sup> See David L. Strayer et al., *Why Do Cell Phone Conversations Interfere with Driving?* 3 (Proceedings of the 81st Annual Meeting of the Transportation Research Board 2002) (unpublished document on file with the Richmond Journal of Law and Technology).

<sup>48</sup> *Id.* at 4.

<sup>49</sup> McKnight & McKnight, *supra* note 7.

<sup>50</sup> *Driving and Dialing*, CBC News Online, *supra* note 31.

<sup>51</sup> Patricia Trbovich & Joanne Harbluk, *Cell Phone Communication and Driver Visual Behavior: The Impact of Cognitive Distraction*, CHI 2003, at [http://www.carleton.ca/hotlab/hottopics/PDF/trbovich\\_harbluk.pdf](http://www.carleton.ca/hotlab/hottopics/PDF/trbovich_harbluk.pdf) (April 2003).

<sup>52</sup> *Id.*

<sup>53</sup> *Driving and Dialing*, CBC News Online, *supra* note 31; Donald A. Redelmeier & Robert J. Tibshirani, *Association Between Cellular-Telephone Calls and Motor Vehicle Collisions*, 336 *NEW ENG. J. MED.* 453, 453 (1997); see also GOODMAN ET AL, *supra* note 7, § 5.6 (reporting that “the risk of a collision was estimated to be between 3.0 and 6.5 times as high within 10 minutes after a cellular-phone call began as when the telephone was not used”).

units that allowed hands-free operation offered no safety advantage and confirmed that the risk of collision more than doubled within five minutes after the start of the call.<sup>54</sup> A 1996 study by Violanti and Marshall concluded that talking more than fifty minutes per month on a cell phone in a car increased the risk of a traffic accident by 5.59 times over other factors.<sup>55</sup>

[21] Although both the Redelmeier and Violanti studies have been subject to criticism, they have raised significant questions regarding how cell phone use impacts driver inattention and elevates the risk of accidents. The questions have led to research focused on distinguishing the effects of hands-free versus hand-held cell phone use, and the observable effects of cell phone use on driving behavior. While studies focused on these issues have found that either a hand-held cell phone or a hands-free cell phone carry risk of accident when used by an automobile driver, the real issue focuses on the effect of conversation while using a cell phone.<sup>56</sup>

[22] Complex cell phone conversations significantly increase driver inattention and cognitive impairment, which substantially increases the risk of failing to see a road sign or avoid a hazard.<sup>57</sup> Empirical studies comparing the effect of a simple but involved cell phone conversation to that of a casual conversation with a passenger also demonstrate a significant degradation in “cognitive impairment.”<sup>58</sup> These conclusions indicate that the character of the cell phone conversation impacts how distracted a driver will become, rather than whether a cell phone unit is hands-free or hand-held.<sup>59</sup> The conversation does not need to involve complex matters. A simple, “naturalistic” conversation may also pose a significant risk of automobile accidents.<sup>60</sup>

[23] Studies by Strayer revealed that the level of impairment while using a cell phone and driving compares to a blood alcohol level of 0.08.<sup>61</sup> In simulated driving conditions, driving performance was not disrupted by

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See Strayer et al., *supra* note 47, at 3.

<sup>57</sup> See *id.*; Strayer & Johnston, *supra* note 7, at 465.

<sup>58</sup> Drews et al., *supra* note 7, at 2211.

<sup>59</sup> See, e.g., *id.* at 2212.

<sup>60</sup> *Id.* at 2210.

<sup>61</sup> Strayer & Johnston, *supra* note 7, at 462.

listening to the radio or a book on tape.<sup>62</sup> Subjects engaged in cell phone use (either hand-held or hands-free), however, “were more than twice as likely to miss simulated traffic signals.”<sup>63</sup> Strayer’s study noted that talking on a hands-free cell phone reduced the amount of visual information drivers processed by 50%.<sup>64</sup> Strayer calls this “inattention blindness,” a concept that occurs when “even though your eyes may be looking directly at something, you may fail to see it or not see it in time.”<sup>65</sup>

[24] A study conducted by Wheatley in 2000 noted that the more complex and emotionally charged the conversation, the greater the impairment of performance.<sup>66</sup> This has been supported by other studies which test for the effect of involved cell phone conversations by having drivers respond to questions requiring mathematical computations.<sup>67</sup> However, Strayer and others have identified the effect of “naturalistic conversations” on driving performance, for both in-vehicle conversations with passengers and conversations on a cell phone.<sup>68</sup> The cell phone conversation was not designed to elicit high emotional response or require complex problem solving skills, but to provide an indication of the effect a conversation would have on a driver in more natural situations. The number of driving errors was higher for those having a cell phone conversation than it was for those driving with a passenger conversation.<sup>69</sup> With in-vehicle passenger conversation, traffic became a topic of conversation, returning the focus of attention to the driving experience.<sup>70</sup> In fact, there was no change in performance in the in-vehicle conversation compared to the control condition of driving only; however, drivers on cell phones paid less

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<sup>62</sup> Strayer et al., *supra* note 47, at 3, 4.

<sup>63</sup> *Id.* at 1.

<sup>64</sup> See Strayer & Johnston, *supra* note 7, at 463.

<sup>65</sup> Sam Graceffo, *Curtain Calls*, Syracuse New Times Net, at <http://newtimes.rway.com/2003/021903/bodymind.shtml> (last visited Oct. 27, 2004) (quoting researcher David Strayer).

<sup>66</sup> Shelley Roberts, *Computer Use in Automobiles: Safety and Usability Issues*, Carleton University, at [http://www.carleton.ca/hotlab/hottopics/Articles/roberts\\_article\\_on\\_safety.html](http://www.carleton.ca/hotlab/hottopics/Articles/roberts_article_on_safety.html) (2003).

<sup>67</sup> GOODMAN ET AL., *supra* note 7, at Chapter 5.3; Strayer et al., *supra* note 47, at 1.

<sup>68</sup> Drews et al., *supra* note 7, at 2210. Participants were in a high fidelity driving simulator and drove in irregular flow conditions “where vehicles changed lanes and speeds frequently, making it difficult for the participant to proceed smoothly and requiring varying attention demands.” *Id.* at 2211.

<sup>69</sup> *Id.* at 2210.

<sup>70</sup> *Id.*

attention to surrounding traffic and missed exits they did not notice.<sup>71</sup> “Drivers in the cell phone condition were four times more likely to fail in finishing the [driving] task than drivers in the passenger condition,” and were more likely to miss more traffic signals and react more slowly to events in the driving environment.<sup>72</sup> The study concluded that “legislative initiatives that restrict hand-held devices but permit hands-free devices are not likely to reduce interference from the phone conversation, because the interference is, in this case, due to central attention processes.”<sup>73</sup>

## VI. CELL PHONE RISK/REWARD

[25] A 1997 study published by the NHTSA indicated that more than 85% of cellular telephone owners use their phones at least more than once while driving and over 27% use their phones during at least half their travels.<sup>74</sup> “The results suggest that the number of cellular telephone related crashes is increasing with the growing number of cellular telephones in use.”<sup>75</sup> Due to the fact that drivers forget they are behind the wheel once they become engrossed in a conversation, the study commented, “the outcome of legislation specifying hands free only usage, may be an increase in cellular telephone related crashes to the extent that conversation itself is a causal factor in crashes.”<sup>76</sup> No state has banned hands-free use by adult, non-commercial drivers; in fact, states which ban hand-held use of cell phones by drivers would appear to encourage hands-free cell phone use as an alternative.<sup>77</sup>

[26] Is the solution a ban on cell phone use in automobiles? The HCRA concluded that a ban would not make sense economically. The 2003 study, an update of a prior 2000 study, estimated that the value of cell phone calls equals almost \$43 billion.<sup>78</sup> The cost components used to calculate net benefits included “medical, funeral, emergency medical services, vocational rehabilitation, insurance administration, and legal

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<sup>71</sup> *Id.* at 2211.

<sup>72</sup> *Id.*

<sup>73</sup> Strayer & Johnston, *supra* note 7, at 466.

<sup>74</sup> GOODMAN ET AL., *supra* note 7, at Report Summary.

<sup>75</sup> *Id.* § 4.5. With free give aways of cell phones or rebates reducing the cost to consumers and increasing minutes of use plans, increasing cell phone use per subscriber with increasing risk of accidents would not be surprising.

<sup>76</sup> *Id.* § 6.5.

<sup>77</sup> SUNDEEN, *supra* note 27, at 4-11.

<sup>78</sup> Cohen & Graham, *supra* note 8, at 12.

costs.”<sup>79</sup> Missing from the list of costs indicated in the HCRA are multi-million dollar awards to plaintiffs who have been injured by employees driving while conducting business on cell phones, as well as the awards to plaintiffs injured by ordinary drivers conducting personal conversations.<sup>80</sup>

[27] An assumption behind this HCRA report is that:

[i]ncremental crash risk is proportional to time spent on the phone. This assumption is consistent with the hypothesis that mental distraction associated with phone conversation is the main contributor to crash risk, rather than other factors, such as physical interference with the driving task resulting from dialing. The results of Redelmeier and Tibshirani, which did not show hands-free cell phones to be safer than hand-held devices, and experiments conducted by Strayer *et al.* to see how conversation influences performance on simulated driving tasks, support this hypothesis.<sup>81</sup>

[28] The HCRA report estimated that typical cell phone use while driving was around 300 minutes per year.<sup>82</sup> That number may be subject to

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<sup>79</sup> *Id.* at 11.

<sup>80</sup> *Id.* In a similar fashion, the Ford Motor Co. did not take into account multimillion dollar jury awards in its cost/benefit analysis of the production of the Ford Pinto, a vehicle known to cause severe injury and death upon rear-end impact. As Lee Iacocca, who was in charge of the development of the Ford Pinto has stated, “safety doesn’t sell.” From various Pinto crash reports it had been clear that “but for” the ruptured gas tanks, the injured would have survived the accident. On rear-end impact, Pinto gas tanks ruptured, causing leaking fuel, explosion, and the incineration of occupants. The cost to prevent such accidents would have been \$5.08 per car for a rubber bladder to line the inside of the gas tank. *Design Defects of the Ford Pinto Gas Tank*, at <http://www.fordpinto.com/blowup.htm> (last visited Oct. 31, 2004). “A confidential company policy memo issued in late 1971, directed that no additional safety features be adopted for the 1973 and later cars until required by law.” Ford estimated that based on an \$11 design change, “the cost was calculated to be \$137 million, much greater than [sic] the \$49.5 million benefit.” *The Case of the Ford Pinto*, at <http://www.es.rice.edu/~vardi/comp601/case2.html> (last visited Oct. 31, 2004).

<sup>81</sup> Cohen & Graham, *supra* note 8, at 6.

<sup>82</sup> *Id.* at 10.

increase based on market competition in the past two years alone, with free phone giveaways and expanded minutes of use plans including free weekend and evening calling plans.

[29] The authors of the HCRA study point out that the benefit to society does not support a ban on all cell phone use in the automobile. They conclude that “the fact that the net benefits of the ban are close to zero and yet there are other more efficient motor vehicle safety measures that are not yet implemented indicates that as a society we are underinvesting in motor vehicle safety.”<sup>83</sup>

## VII. THE LEGAL ENVIRONMENT

[30] As publications have pointed out, lawsuits have been brought against employers for cell phone related accidents involving employees under a theory of *respondent superior*, where the negligent act of the employee is attributed to the employer.<sup>84</sup> These claims may be supported by the evidence that business conversations, by their complex nature, promote “cognitive inattention,” leading to a high risk of accident.<sup>85</sup> The Strayer studies demonstrate, however, that “cognitive inattention” is also evident in non-business conversations.<sup>86</sup>

[31] Recently the Indiana Court upheld a lower court ruling denying a claim against Cingular Wireless, a cellular phone service provider, by a driver of an automobile who was injured by another driver using a cell phone for personal purposes. In *Williams v. Cingular Wireless*, Williams was involved in an accident with Meagher, who purchased a cell phone from Cingular Wireless (“Cingular”).<sup>87</sup> Williams argued that “Cingular Wireless was negligent in furnishing a cellular phone to Meagher when it knew, or should have known, that [the phone] would be used while the user operated a motor vehicle.”<sup>88</sup> The lower court dismissed Williams’ case due to a failure to state a claim upon which relief could be granted.<sup>89</sup> In other words, the claim was not legally sufficient because Williams could not prove that negligence applied in this matter.

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<sup>83</sup> *Id.* at 15-16.

<sup>84</sup> Stambelos, *supra* note 2, at 33.

<sup>85</sup> Strayer & Johnston, *supra* note 7, at 462; Trbovich & Harbluk, *supra* note 51.

<sup>86</sup> Strayer & Johnston, *supra* note 7, at 464-66.

<sup>87</sup> *Williams v. Cingular Wireless*, 809 N.E. 2d 473 (Ind. Ct. App. 2004).

<sup>88</sup> *Id.* at 475.

<sup>89</sup> *Id.*

[32] Upon review, the Indiana Court looked at three elements to determine a claim of negligence: (1) a duty owed to the defendant by Cingular, (2) breach of that duty and (3) compensable injury proximately caused by the breach of duty.<sup>90</sup> The following is an analysis of the court's review with comment and critique.

[33] Relative to the duty of care owed to the plaintiff, the court determined that a duty "arises out of a relationship between the parties."<sup>91</sup> The court held that there was no direct relationship between Williams and Cingular and therefore no duty was owed. Williams was neither a customer nor a party to the sales transaction between Cingular and Meagher, so the court ruled that there was simply no contractual relationship.<sup>92</sup> Additionally, "the accident did not involve a Cingular employee or vehicle and did not occur on Cingular property."<sup>93</sup> The court also noted that Williams' injury was not a result of cell phone malfunction. The court concluded that there was "no relationship between Cingular and Williams that would create a duty on the part of Cingular."<sup>94</sup>

[34] The court saw no direct contractual relationship between Williams and Cingular. Yet, privity of contract has been rejected as a requirement for the imposition of a duty.<sup>95</sup> The duty of reasonable care is owed to anyone who may use, consume or be affected by a product or service.<sup>96</sup> A duty in these circumstances may arise from a duty to warn when a manufacturer or supplier places a product in the stream of commerce.<sup>97</sup> Given the numerous research findings and federal government reports, Cingular knew or should have known of the risk of conducting

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<sup>90</sup> *Id.* at 476.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 477.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> LYNDIA J. OSWALD, *THE LAW OF MARKETING* 347 (West 2002) (discussing the decision of *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), in which the majority discarded the privity concept); *see also* RESTATEMENT (SECOND) OF TORTS § 402A cmt. 1 (1965).

<sup>96</sup> RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965). Section 402A applies to all commercial sellers of products, whether manufacturers, wholesalers, or retailers. *Id.* § 402A cmt. f.

<sup>97</sup> *Id.* § 402A cmt. j.

conversations over a cell phone while driving.<sup>98</sup> Furthermore, Cingular knew or should have known that in developing cell phone plans that encourage use, and offering special deals to place phones in the stream of commerce at little or no charge to consumers, there would be increased use and therefore the associated increased risk of accidents.<sup>99</sup>

[35] The Indiana Court also held that it was not reasonably foreseeable that Williams would be harmed. In discussing the concept of reasonable foreseeability, the court stated, “a negligent act or omission is the proximate cause of an injury if the injury is a natural and probable consequence which, in light of the circumstances, should reasonably have been foreseen or anticipated.”<sup>100</sup>

[36] Williams argued that it was reasonably foreseeable that the sale of a cell phone would lead to a car accident because several states had proposed legislation limiting drivers’ use of cell phones. The court responded:

[a]lthough we agree that it may be foreseeable that a person who is using a cellular phone while driving might be in an accident, we do not agree with the leap in logic Williams urges us to make that it is likewise foreseeable to a legally significant extent that the sale of the phone would result in an accident.<sup>101</sup>

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<sup>98</sup> There are a number of web sites dedicated to victims of automobile related cell phone deaths. See, e.g., *Partnership for Safe Driving and Cell Phone Safety*, MorganLee.Org, *supra* note 20 (describing a situation where “a driver failed to stop for a stop sign while using his cellular phone” and killed Morgan Lee Bent) (last visited Oct. 31, 2004); *Drive Now Talk Later*, at <http://www.drivenowchatlater.com> (telling the story of twins killed as a result of a cell-phone related accident) (last updated Oct. 13, 2004); *Stop Cell Phone Use While Driving*, Care2.com, at [http://www.thepetitionsite.com/takeaction/365964115?ts=1099257592&sign\[partnerID\]=1&sign\[memberID\]=646600021&sign\[partner\\_userID\]=646600021](http://www.thepetitionsite.com/takeaction/365964115?ts=1099257592&sign[partnerID]=1&sign[memberID]=646600021&sign[partner_userID]=646600021) (displaying an on-line petition indicating 377 signatures as of October 31, 2004 to stop cell phone use while driving) (last visited Oct. 31, 2004).

<sup>99</sup> See GOODMAN ET AL., *supra* note 7. “The consequent increase in use among the driving public can therefore increase overall crash hazard exposure.” *Id.* § 6.3.

<sup>100</sup> Williams v. Cingular Wireless, 809 N.E.2d 473, 477 (Ind. Ct. App. 2004) (quoting City of Portage v. Lindbloom, 655 N.E.2d 84, 86 (Ind. Ct. App. 1995)).

<sup>101</sup> *Id.* at 478.



The court claimed that instead of the cell phone, “it is the driver’s inattention while using the phone that may cause an accident.”<sup>102</sup> The court hinged its reasoning on the fact that “[d]rivers frequently use cellular phones without causing accidents, and, of course, cellular phones are used in all sorts of places other than in vehicles.”<sup>103</sup> Thus, the court could not find “that there was a high degree of foreseeability that the sale of the phone would result in an accident.”<sup>104</sup>

[37] It is not the sale of the phone that causes the accident; it is the supplier’s and service provider’s failure to properly warn of the hazard of cell phone use while driving that creates a reasonably foreseeable risk of an accident.<sup>105</sup> A cause of action based in a failure to warn has been enunciated in product liability cases, including those cases which consider failure to warn to be a breach of the implied warranty of merchantability.<sup>106</sup> Without adequate warning, some products cannot be fit for their ordinary purpose.

[38] Furthermore, as cell phone related car accidents may occur during daylight hours, with adequate road conditions and properly maintained automobiles, such accident disqualifying conditions may allow a plaintiff to argue that “but for” the cognitive impairment that arises with cell phone use there would have been no driver inattention leading to a collision.

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Cf.* RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2(c) (1998) (indicating a product is defective as a result of inadequate instructions or warnings).

<sup>106</sup> See, for example, *Vassallo v. Baxter Healthcare Corp.*, 696 N.E.2d 909, 922 (Mass. 1998), which is a product liability action involving silicone breast implants. The court stated that:

[o]ur current law, regarding the duty to warn under the implied warranty of merchantability, presumes that a manufacturer was fully informed of all risks associated with the product at issue, regardless of the state of the art at the time of sale, and amounts to strict liability for failure to warn of these risks.

*Id.*

[39] The *Williams* court refused to consider liability based on public policy considerations that impose a duty on cell phone service providers to take measures to prevent these accidents. As the court explained:

[i]t is foreseeable to some extent that there will be drivers who eat, apply makeup, or look at a map while driving and that some of those drivers will be involved in car accidents because of the resulting distraction. However, it would be unreasonable to find it sound public policy to impose a duty on the restaurant or cosmetic manufacturer or map designer to prevent such accidents. It is the driver's responsibility to drive with due care.<sup>107</sup>

[40] The court made a fundamental mistake in grouping the “cognitive impairment” associated with cell phone use in the same category with other distractions. Such impairment has a strong association with and enhances the risk of accidents, which may increase with cell phone service provider inducements that continually increase the use of such cell phone services. This is especially so when consumers view the car as an extension of the home or office and an opportunity to conduct conversations that they would be unable to conduct otherwise.<sup>108</sup>

[41] The court went on to explain that “[t]o place a duty on Cingular to stop selling cellular phones because they might be involved in a car accident would be akin to making a car manufacturer stop selling otherwise safe cars because the car might be negligently used in such a way that it causes an accident.”<sup>109</sup>

[42] Again the court incorrectly focused on the sale, avoiding the discussion of the use of the cell phone. The sale of automobiles has not been banned as a result of severity of accidents, but the government has required manufacturers to install seatbelts and provide public service announcements on the use of such belts in cars.<sup>110</sup> As a matter of public

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<sup>107</sup> *Williams*, 809 N.E.2d at 478.

<sup>108</sup> GOODMAN ET AL., *supra* note 7, at Executive Summary.

<sup>109</sup> *Williams*, 809 N.E.2d at 478.

<sup>110</sup> CHARLES J. KAHANE, FATALITY REDUCTION BY SAFETY BELTS FOR FRONT SEAT OCCUPANTS OF CARS AND LIGHT TRUCKS (2000) (“reconfirm[ing] the agency’s earlier

policy, the federal government has imposed a duty to warn, because a car, like a cell phone, used for its ordinary purpose may pose hazards that need to be addressed.<sup>111</sup>

[43] The court justified its inaction by shifting the responsibility to the state legislature:

Legislation has already been drafted to address the issue of cellular phone use while driving and to place the responsibility on the driver to refrain from doing so. We are confident that the legislature is taking appropriate measures to protect public safety, and that is both its right and duty.<sup>112</sup>

[44] Again, the Court has missed the mark. As of December 2003, Indiana had proposed four pieces of legislation in this area, all of which are currently inactive.<sup>113</sup> Indiana's most recent piece of proposed

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estimates of fatality reduction by manual 3-point belts: 45 percent in passenger cars and 60 percent in light trucks"), <http://www.nhtsa.dot.gov/cars/rules/regrev/evaluate/pdf/809199.pdf> (last visited Oct. 31, 2004).

<sup>111</sup> *Vassallo*, 696 N.E.2d at 922.

The majority of States, either by case law or by statute, follow the principle expressed in Restatement (Second) of Torts § 402A comment j (1965), which states that "the seller is required to give warning against [a danger], if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the . . . danger."

*Id.*

<sup>112</sup> *Williams*, 809 N.E.2d at 479.

<sup>113</sup> SUNDEEN, *supra* note 27, at 5.

SB 347 – Prohibits use of hand-held phones while driving, exemptions for emergency situations.... SB 110 – Makes it a Class B infraction punishable by fines up to \$1,000 to use a mobile telephone while operating a motor vehicle. Provides exceptions for emergency situations. HB 1945 – Prohibits the use of mobile telephones while driving. Enforced as a secondary offense. Provides exceptions for emergency situations. HB 1586 – Prohibits the use

legislation, SB 131, which imposes a fine of \$1,000 for operating a motor vehicle while simultaneously using a mobile telephone, except in an emergency situation, has also stalled in session adjournment.<sup>114</sup> The Indiana legislative history falls in line with that of most other state legislatures which cannot seem to get these numerous bills passed.<sup>115</sup> It is inappropriate, then, for the Court to rely solely upon the state legislature to address this issue. In fact, all of the enacted state legislative proposals target individual drivers, not manufacturers or service providers.<sup>116</sup> The Court's attempt to place the burden of responsibility solely on the consumer of cell phone service is inappropriate given the extensive nature of the empirical studies on "cognitive inattention."<sup>117</sup>

[45] The Court concludes its discussion in attempting to balance the duty factors by stating:

[a]lthough it is foreseeable that cellular phone use while driving may contribute to a car accident, it is not foreseeable that the sale of a phone to a customer will necessarily result in a car accident. Public policy weighs in favor of not imposing a duty on cellular phone companies for car accidents, even if cellular phones have the potential to distract drivers if misused.<sup>118</sup>

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of hand-held mobile telephones while driving.  
Provides exceptions for emergency situations.

*Id.*

<sup>114</sup> NCSL, *Legislative Tracking Database*, *supra* note 36.

<sup>115</sup> SUNDEEN, *supra* note 27, at 4-13.

<sup>116</sup> *See e.g., id.* at 6, 10 (detailing Maine SP 477/LD1439 which concerns drivers under the age of 21 and Tennessee SB208 which requires both hands on the steering wheel); MASS. GEN. LAWS ch. 90, § 13 (1994) ("[A] person may operate a motor vehicle while using a . . . mobile telephone as long as one hand remains on the steering wheel at all times."); N.Y. VEH. & TRAF. LAW § 1225-c (Consol. Cum. Supp. 2004) (prohibits hand-held cell phone use while driving on public highways); NCSL, *Legislative Tracking Database*, *supra* note 36 ("District of Columbia B15-0035 – Prohibits the use of hand-held phones while driving. . . New Jersey SB 338 – Prohibits use of hand-held cell phones while driving.").

<sup>117</sup> *See e.g., Cohen & Graham, supra* note 8 and accompanying text.

<sup>118</sup> *Williams v. Cingular Wireless*, 809 N.E.2d 473, 479 (Ind. Ct. App. 2004).

[46] It is not the sale of the cell phone that results in a car accident, it is its use—the proper use for the ordinary purposes for which it is intended—that leads to an elevated risk of an accident. Without imposing a duty to adequately warn and educate ordinary consumers, those in the chain of distribution may be held accountable.<sup>119</sup> As early as 1997, the NHTSA advocated improved consumer education with specific recommendations, saying that “[e]ducational materials should be developed and disseminated to educate the driving public” on the various ways that distraction in general, and cellular telephones in particular, can increase the risk of crashes.<sup>120</sup> The intention would be to make these materials available in driver education, licensing and cellular telephone sales facilities or through companies that provide service and products to cellular telephone users. “These materials would inform drivers of the subtle influences of cellular telephone use while driving (e.g., loss of situational awareness even though lanekeeping is good).”<sup>121</sup>

[47] Although CTIA has published its tips on the safer use of cell phones, little has been done by cell phone service providers or manufacturers to properly warn the public.<sup>122</sup> This is in stark contrast to employers who have gone to great lengths to educate and warn employees of cell phone use while driving and to insulate themselves from multimillion dollar

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<sup>119</sup> RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2(c) (1997).

<sup>120</sup> GOODMAN ET AL., *supra* note 7, at Report Summary.

Table 6-1: Cellular Phone Safe Driving Tips. [1.] Safe driving is your first priority. [2.] Make sure that your phone is positioned where it is easy to see and easy to reach. [3.] Use a hands-free microphone while driving. [4.] Use the speed dialing feature to program in frequently called numbers. [5.] When dialing manually without the speed dialing feature, dial only when stopped. [6.] Never take notes while driving. [7.] Let your wireless network’s voice mail pick up your calls when it’s inconvenient or unsafe to answer the car phone. [8.] Be a cellular Samaritan.

*Id.* § 6.3. In addition, ten safety tips are posted on CTIA’s website. *See Driving Safety Tips*, CTIA, at <http://www.ctia.org/content/index.cfm/AID/91> (last updated Nov. 1, 2004).

<sup>121</sup> GOODMAN ET AL., *supra* note 7, at Report Summary.

<sup>122</sup> *Id.* § 6.3. Cingular has posted the “Pledge to Be Sensible” in concert with Avis on its website. *Be Sensible & Safety: Avis & Be Sensible*, Cingular, at [http://www.cingular.com/sensible\\_programs/safety](http://www.cingular.com/sensible_programs/safety) (last visited Nov. 1, 2004).

damage claims that juries have awarded to plaintiffs under the theory of *respondeat superior*.<sup>123</sup>

#### VIII. SERVICE PROVIDER AND MANUFACTURER LIABILITY

[48] The Restatement (Third) of Torts provides three categories of product defects: (1) manufacturing defect; (2) design defect; and (3) inadequate warnings. The Restatement (Third) asserts a strict liability standard for manufacturing defects, but it maintains a negligence standard for design and warning defects.<sup>124</sup> The legal foundation for a service provider or manufacturer's negligence in cell phone-related automobile accidents resides in the failure to give adequate warning of the risks of use.<sup>125</sup> With the increasing number of lawsuits against employers, and

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<sup>123</sup> Stambelos, *supra* note 2.

Employers are well-advised to implement a policy prohibiting the use of attention-distracting devices, such as cell phones, while driving. In the event of a lawsuit, such a policy will enable an employer to argue that employees, even if they were conducting company business at the time of the accident, were acting outside the scope of their authority. Employers that implement such a policy, however, must enforce it by disciplining employees for violations.

*Id.*

<sup>124</sup> RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c) (1997).

<sup>125</sup> *Id.*; see also *Vassallo v. Baxter Healthcare Corp.*, 696 N.E. 2d 909, 923 (Mass. 1998).

[A] product “is defective because 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 . . . and the omission of the instructions or warnings renders the product not reasonably safe.” The rationale behind the principle is explained by stating that “unforeseeable risks arising from foreseeable product use . . . by definition cannot specifically be warned against.” However, comment m also clarifies the manufacturer’s duty “to perform reasonable testing prior to marketing a product and to discover risks and risk-avoidance measures such testing would reveal. A seller is charged with knowledge of what reasonable testing would reveal.”

scientific studies demonstrating the associated risks of “cognitive impairment” and cell phone related accidents, no service provider or manufacturer can claim a lack of foreseeability. Section 2(c) of the Restatement (Third) indicates that a product is defective:

because 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>126</sup>

Liability, in that event, extends to any cell phone service provider, manufacturer or retail distributor, including Cingular Wireless.

[49] Liability stems not just from the sale, but from the use of the cell phone. Comment i of section 402A of the Restatement (Second) of Torts suggests liability when a product is in a defective condition and 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>127</sup> The ordinary consumer does not contemplate a cell phone as normally hazardous in making and receiving cell phone calls to and from family, friends, and business associates. If one were to assert that the increase in lawsuits, as well as the recent trend in legislation, has

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*Id.* (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. m (1997)).

<sup>126</sup> RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c) (1997). A manufacturer or service is such a “predecessor in the commercial chain.” In May 1997, the American Law Institute (ALI) adopted the Restatement (Third) of Torts. OSWALD, *supra* note 95, at 351. Many jurisdictions have yet to adopt the Restatement (Third); section 402A of the Restatement (Second) remains the predominant legal rule on strict products liability in these jurisdictions. *Id.* at 349.

<sup>127</sup> RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965). Section 402A applies to all commercial sellers of products, whether manufacturers, wholesalers, or retailers, and does not require privity of contract. The injured party need only be someone who may use, consume or be affected by the use of a product, and includes both occupants and non-occupants of a vehicular accident. *Id.* at cmt. l; OSWALD, *supra* note 95, at 349.

created such awareness in the community as related to automobile accidents, that argument would alternatively support a claim of negligence.

[50] Although a cell phone may not be inherently dangerous, it may become unavoidably unsafe while used in driving situations because of induced “cognitive impairment.” Without effort on the part of service providers and manufacturers to educate the consuming public, the product may be considered to be in a “defective condition unreasonably dangerous.”<sup>128</sup> The public to whom a duty of warning is owed extends to anyone who may use, consume, or be affected by a product, according to the landmark case of *MacPherson v. Buick Motor Co.*<sup>129</sup> *MacPherson*, accepted in all jurisdictions, swept aside the requirement of privity of contract that the court adheres to in its decision regarding the sale of a cell phone.<sup>130</sup> In simple terms, an injured party may have a legal claim against a cell phone service provider if that service provider cannot demonstrate that it has provided adequate warning and customer education to deter auto accidents involving cell phone use.

#### IX. CONCLUSION

[51] In 1997, a causal connection was identified between automobile accidents and cell phone use. The NHTSA study discussed distraction and driver inattention in terms of what Strayer and others have labeled as “cognitive impairment” connected with cell phone use while driving.<sup>131</sup> Studies over the past several years have supported the risk of accidents, and recent studies have demonstrated that the risk is associated not only with business calls involving complex conversations, but also ordinary, everyday calls by the average person.<sup>132</sup>

[52] Although the legislatures of many states have attempted to limit or ban hand-held cell phone use, few states have actually passed laws, and there is little hope that they will be, based on the legislative track record. In no event should legislative initiatives on the ban of cell phone use deter any court from addressing legally valid claims based on negligence, strict liability, or breach of the implied warranty of merchantability.

<sup>128</sup> OSWALD, *supra* note 95, at 349.

<sup>129</sup> *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

<sup>130</sup> *See* OSWALD, *supra* note 95, at 347.

<sup>131</sup> GOODMAN ET AL., *supra* note 7.

<sup>132</sup> *See* Strayer & Johnston, *supra* note 7 and accompanying text.



[53] Cell phone service providers and manufacturers have a duty to warn the public of the risks of a product used in its ordinary course, and any risks which the consumer may not be ordinarily aware of, when such risk is clearly foreseeable to those manufacturers and service providers. No parties in the chain of distribution, service providers and manufacturers alike, can possibly claim a lack of foreseeable risk unless they themselves claim “selective inattention” to the evidence.

The risk of accidents only escalates when parties in the commercial chain of distribution induce consumers to increase use through a steady stream of competitive promotions that offer free giveaway products and flat rate plans with free weekend and evening use, in order to capture market share in an expanding cellular industry. Some of the families of those who have died in cell phone related auto accidents have developed websites and posted their stories on the Internet for the world to read. It remains only for sympathetic juries hearing claims of negligence to render judgment against those placing cell phones in the commercial chain of distribution.