

Company Liability for Distracted Driving Traffic Accidents & 5 Ways to Avoid It



A lumber company salesman driving his Ford Explorer to a sales meeting collides with a Buick driven by a 78-year-old woman. The victim suffers severe injuries and is put on a ventilator. The salesman had been talking on his cellphone and was so distracted that he never saw the Buick coming. After the victim dies, her family sues both the salesman and the company. The company denies responsibility for the accident. But the jury disagrees and socks the company with a \$21 million verdict. The company eventually settles the case for \$16.2 million—the limit of its liability coverage [*Dyke Industries*].

The Cellphone Liability Challenge

The link between cellphones and traffic accidents has been well documented. According to the New England Journal of Medicine, motorists who use cellphones while driving are 4 times more likely to get into accidents. And, as the *Dyke* case illustrates, companies—and possibly their officers and directors—may be liable for such traffic accidents that happen because a worker on a cellphone got distracted while driving on company business.

The *Dyke* case is no aberration. There's been an increasing number of negligence and wrongful death lawsuits against companies by victims of traffic accidents caused by workers on cellphones:

- Smith Barney paid \$500,000 to settle a lawsuit because one of its brokers who was allegedly doing business on his cellphone ran a red light and hit and killed a motorcyclist.
- The State of Hawaii settled a lawsuit for \$1.5 million after a state worker talking on a cellphone ran over a tourist crossing the highway.
- The law firm Cooley Godward paid an undisclosed amount to settle a \$30 million wrongful death lawsuit by the family of a 15-year-old girl who was run over by an associate lawyer who was allegedly distracted because she was talking on her cellphone while driving her Mercedes.

Vicarious Liability for Distracted Driving

[Accountability for traffic accidents caused by workers who drive distracted](#) stems from a law called vicarious liability. Under this theory, a company is responsible for injuries caused by the negligence of their employees, agents or representatives while performing their job duties (or, as lawyers describe it, "acting within the scope of their employment"). For example, in *Dyke*:

- The salesman was a lumber company employee and thus its agent.
- He was negligent because his cellphone conversation distracted him from paying attention to his driving.

- The negligence occurred while the salesman was on his way to a sales meeting and was thus within the scope of his employment.

Although *Dyke* is a U.S. case, vicarious liability is also the law in Canada. For example, an Ontario company was held 25% liable for injuries caused by a worker who got into an accident after drinking alcohol at a holiday party held at the company's offices. It could have been worse for the company if the worker hadn't stopped at a bar for a nightcap after leaving the party and before getting into the accident. Still, the court ruled that the company should have seen the accident coming and taken steps to keep the worker from driving home [[*Hunt \(Guardian of\) v. Sutton Group Incentive Realty Inc.*](#), 2002 CanLII 45019 (ON CA)].

There hasn't been a case in Canada accusing a company of vicariously liability for a traffic accident caused by a worker on a cellphone—so far. But it's only a matter of time before that changes, lawyers say. The liability risk is even greater now that the provinces and territories have adopted traffic safety laws banning cellphone use by drivers.

5 Ways to Minimize Cell Phone Driving Liability Risks

There are 5 things OHS coordinators can do to protect their company against the risk of liability for distracted driving by workers on cellphones.

1. Ban Hand-Held Cellphone Use While Driving

Adopt a [written policy](#) that bans workers from texting, talking, or otherwise using a hand-held cellphone or other electronic device while driving a company vehicle or driving

for employment-related purposes. Ensure that all workers who drive are aware of the policy and have them sign a written form acknowledging that they understand and will follow the policy or risk discipline up to and including termination.

2. Consider Banning Hands-Free Cellphone Use While Driving

Although traffic safety law bans are typically limited to hand-held devices, there's a [strong case](#) to be made for banning hands-free devices as well. The argument: Cellphone distractions are caused by the actual conversation rather than the mere handling of the device. So, a total ban is the best way to minimize distractions. By the same token, there may be compelling business reasons for letting drivers communicate via cellphone, provided that they use a hands-free device.

Bottom Line: Talk to your lawyer and make an informed decision based on your particular circumstances about whether to ban all cellphone use or just use of hand-held devices.

3. Monitor Drivers' Cellphone Use

Regardless of their scope, it's essential to actively monitor and enforce your cell phone rules. That may involve deploying surveillance cameras, [artificial intelligence systems](#), or scanning internal usage data from workers' actual devices.

Caveat: Be aware of the [privacy risks](#) involved. Ensure that your monitoring solutions don't gather more data than necessary to accomplish the safety objective. You should also have a [written policy](#) that discloses the monitoring systems you use, the data they collect, your use of that data, and the measures in place to keep the data private and secure. Such policies are [expressly required in Ontario](#) and highly advisable everywhere else.

4. Enforce Cellphone Use Rules

You must actively enforce your cellphone use and distracted driving policies. Workers who violate the ban should be subject to a combination of [education](#) and [discipline](#), up to and including termination. “From a liability standpoint, having a policy that you don’t enforce is worse than not having a policy at all,” cautions an Ontario HR lawyer. “The existence of the policy is evidence that you were aware of the risk; failure to enforce is evidence that you acted negligently in not preventing a known risk.”

5. Check Your Liability Insurance

Last but not least, make sure your company’s general liability policy covers the risk of cellphone accidents. For example, several insurance underwriters won’t issue general liability policies unless companies ban cellphone use by their workers.