



THE UNHOLY TRINITY: TALKING, TEXTING AND TRUCKING — THE EPIDEMIC, THE LAW AND HOW TO WIN YOUR CASE

By Dan Ramsdell

THE EPIDEMIC

On September 19, 2012, Former FCC Chairman Julius Genachowski was quoted as stating:

“You’ve heard the numbers. People who drive while texting are 23 times more likely to have an accident than a non-distracted driver.

An estimated 160,000 accidents were caused by texting and driving in 2010, and 11 percent of drivers aged 18–20 who were involved in an automobile accident and survived

admitted they were sending or receiving texts when they crashed.

More than 3,092 people lost their lives in 2010 as a result of distracted driving. More than 3,000 people. That’s more than 51 city buses full of people.”

Texting while driving is in fact a very dangerous, life taking national epidemic. Deaths occur every day because of it. Everyone who now does it knows that it is a reckless disregard for safety to do so. Yet it continues, day after day, mile after mile, unnecessary death after

unnecessary death. We need society, and juries, to recognize the change in what is considered to be acceptable conduct in this area. Texting while driving a semi should be just as unacceptable to a jury as are drunk driving and fatigued driving.

According to the National Highway Traffic Safety Administration, texting while driving is reportedly roughly six times more likely to cause an accident than driving while intoxicated. It is also the same as driving after having consumed four beers. Reportedly, one in five drivers “surf the web” while driving.

In 2011, approximately 23% of all crashes involved cell phone usage, which resulted in approximately 1.3 million crashes.

This national epidemic causes untold physical and mental pain, suffering and loss of lives. Economic damages of billions of dollars have been caused by crashes that involved texting while driving. Most everyone today who talks or texts while driving a commercial motor vehicle knows that it substantially increases the odds of being involved in a catastrophic and life threatening crash. Certainly, professional motor vehicle operators who drive semi tractors and trailers know that. And yet... the epidemic still continues. They still do it over and over and over again. To text while driving is illegal in most states. It is a conscious choice to needlessly place the lives of others at a substantially increased danger and at a substantially increased risk of serious bodily injury or death. The use of a cell phone to talk, or to text, while driving is a very selfish, unsafe and highly reckless act. All professional truck drivers know the dangers. They have all been taught this. All trucking companies also know this. They also know that they cannot allow, or require, its drivers to text while driving. It is against the law. It is unsafe. It is life threatening. It is totally and completely unjustifiable. According to the USDOT, distracted driving caused by texting comes can be identified in three main areas:

1. Manual Distraction — the trucker takes his hands off of the steering wheel while driving;
2. Cognitive Distraction — the trucker takes his mind off of the driving activity while driving;
3. Visual Distraction — the trucker takes his eyes off of the road while driving;

Texting while driving is especially dangerous because it also involves all three of the main distractions... simultaneously! This of course contributes to a truck driver's inability to perceive dangers in a timely fashion and to react to them in a timely and appropriate manner. The trucker's delayed observations of, and reactions

to, a hazard on the road ahead, and the panic that can then occur due to that, will almost certainly also cause an impairment in judgment. It will also cause impairment in the quality of the trucker's response to the hazard. Oftentimes, an otherwise preventable crash will then occur.

PREVENTABLE ACCIDENT

According to the Federal Motor Carrier Safety Administration, a "preventable accident" is one which occurs because the driver fails to act in a reasonably expected manner to prevent it. In judging whether the driver's actions were reasonable, one seeks to determine whether the driver drove defensively and demonstrated an acceptable level of skill and knowledge. The judgment of what is reasonable can be based on a company-adopted definition, thus establishing a goal for its safety management programs.

Note that the above definition of preventable accident is focused on the actions of the driver. It is the commonly used definition in evaluating driver performance. A broader definition, which can be used to evaluate the driver's and the motor carrier's actions, is given by the Federal Motor Carrier Safety Regulations as follows:

A preventable accident on the part of a motor carrier means an accident that:

- (1) involved a commercial motor vehicle, and
- (2) could have been averted but for an act, or failure to act, by the motor carrier, or the driver.

The concept of a "preventable accident" is a fleet safety management tool which achieves the following goals:

- a. It helps establish a safe driving standard for the driver;
- b. It provides a criterion for evaluating individual drivers;
- c. It provides an objective for accident investigations and evaluations;
- d. It provides a means for evaluating the safety performance of individual drivers and the fleet as a whole;
- e. It provides a means for

- monitoring the effectiveness of fleet safety programs;
- f. Assists in dealing with driver safety infractions;
- g. It assists in the implementation of safe driving recognition programs.

EYES OFF THE ROAD AHEAD

Research from the Federal Motor Carrier Safety Administration demonstrates that drivers who text while driving take their eyes off of the road for an average of five out of every six seconds. Some are distracted for even longer periods of time. Crashes involving texting while driving a commercial motor vehicle are therefore *preventable*, according to the above definition.

It is important to note what a speed of 70 miles per hour with an average of six consecutive seconds of distraction caused by texting means for the members of the motoring public sharing the highway with these gigantic death machines. The 80,000 pound truck will rocket very dangerously on an unknown path, hopefully, (but not always), on the road, while essentially being unguided the whole way. This 80,000 pound missile of death will continue for at least six consecutive seconds, and for roughly 630 feet, totally unguided. This distance is a length that is greater than the length of two football fields!

Shockingly, if texting while driving, all of that time and all of that distance would be traveled without the trucker ever once looking ahead on the road. In essence, that means that the trucker would be driving "blind" for this extended and very dangerous distance and time. The texting truck driver would also be "blind" to whatever changing traffic conditions or hazards may occur anywhere within that time or distance ahead of him. According to the National Highway Transportation Safety Administration:

"The primary responsibility of the driver is to operate a motor vehicle safely. The task of driving requires full attention and focus. Drivers should resist engaging in any activity that takes their eyes and attention off the road for more than a couple of seconds. In some circumstances

even a second or two can make all the difference in a driver being able to avoid a crash.”

THE LAW — WHAT IS IT AND WHO MUST ABIDE BY IT?

For a commercial motor vehicle operator to text and drive is a very clear violation of Section 392.80 of the F.M.C.S.R. However, before we take a look at that particular F.M.C.S.R., and since it is a part of Part 392, let's first see who has a duty to comply with the rules set forth in Part 392 of the F.M.C.S.R.

See: § 392.1

Scope of the rules in this part.

Every motor carrier, its officers, agents, representatives, and employees responsible for the management, maintenance, operation, or driving of commercial motor vehicles, or the hiring, supervising, training, assigning, or dispatching of drivers, shall be instructed in and comply with the rules in this part.

See also: § 392.2

Applicable operating rules.

Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. However, if a regulation of the Federal Motor Carrier Safety Administration imposes a higher standard of care than that law, ordinance or regulation, the Federal Motor Carrier Safety Administration regulation must be complied with.

Now, let's look at F.M.C.S.R. § 392.80

Prohibition against texting.

For a commercial motor vehicle operator to text and drive is a very clear violation of the above regulation, which is set forth immediately below for your convenience.

Subpart H — Limiting the Use of Electronic Devices

§ 392.80 Prohibition against texting.

- (a) *Prohibition.* No driver shall engage in texting while driving.
- (b) *Motor carriers.* No motor carrier shall *allow* or *require* its drivers to engage in texting while driving. (*emphasis added*)

(d) *Emergency exception.* Texting while driving is permissible by drivers of a commercial motor vehicle when necessary to communicate with law enforcement officials or other emergency services

It is important to carefully review the exact language of F.M.C.S.R. 392.80 above. Please note that “no motor carrier” shall “allow” or “require” its drivers to engage in texting while driving. This may in fact constitute a strict liability provision for the motor carrier when a trucker uses a cell phone to text.

The existence of an unsafe or nonexistent safety environment within the trucking company itself towards cell phone texting and usage while driving could also constitute “allowing” a trucker to text while driving, in violation of the law. This unsafe environment within the defendant trucking company which constitutes “allowing” the violation can occur by either failing to have in place an effective cell phone safety program, or by failing to enforce it, or both. Trucking companies cannot sit back passively and turn a blind eye to this problem. If they do, it is up to you to hold them accountable.

Please also note that the use of a cell phone to text while driving may result in a commercial motor vehicle operator being disqualified from driving for fixed periods of time, as noted below in F.M.C.S.R. Section § 391.15 Subpart B Qualification and Disqualification of drivers.

(a) *General.*

A driver who is disqualified shall not drive a commercial motor vehicle.

A motor carrier shall not require or allow a driver who is disqualified to drive a commercial motor vehicle.

(e) Disqualification for violation of prohibition of texting while driving a commercial motor vehicle —

- (1) General rule. A driver who is convicted of violating the prohibition of texting in §392.80(a) of this chapter is disqualified for the period of time specified in paragraph (e)(2) of this section.
- (2) Duration. Disqualification for violation of

prohibition of texting while driving a commercial motor vehicle —

(i) Second violation. A driver is disqualified for 60 days if the driver is convicted of two violations of §392.80(a) of this chapter in separate incidents during any 3-year period.

(ii) Third or subsequent violation. A driver is disqualified for 120 days if the driver is convicted of three or more violations of §392.80(a) of this chapter in separate incidents during any 3-year period.

(f) Disqualification for violation of a restriction on using a hand-held mobile telephone while driving a commercial motor vehicle —

(1) General rule. A driver who is convicted of violating the restriction on using a hand-held mobile telephone in §392.82(a) of this chapter is disqualified from driving a commercial motor vehicle for the period of time specified in paragraph (f)(2) of this section.

(2) Duration. Disqualification for violation of a restriction on using a hand-held mobile telephone while driving a commercial motor vehicle

(i) Second violation. A driver is disqualified for 60 days if the driver is convicted of two violations of §392.82(a) of this chapter in separate incidents committed during any 3-year period.

(ii) Third or subsequent violation. A driver is disqualified for 120 days if the driver is convicted of three or more violations of §392.82(a) of this chapter in separate incidents committed during any 3-year period.

If a commercial motor vehicle operator is driving and is involved in a crash during a period of time in which he was also disqualified from driving because of texting while driving, that raises many liability issues. Of course, the prudent lawyer would explore these issues against both the driver and also against the motor carrier who was employing him at the time of that crash. The motor carrier could likely have both vicarious liability and direct liability for this crash under these circumstances.