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# COMMENTS

## WAKE-UP CALL: ELIMINATING THE MAJOR ROADBLOCK THAT CELL PHONE DRIVING CREATES FOR EMPLOYER LIABILITY\*

*“Using one’s car as a mobile office from which one places and receives work-related calls . . . is a relatively recent, and growing, business practice. As that practice spreads, the doctrine of respondeat superior must necessarily evolve if it is to continue to fulfill its purpose of ensuring businesses bear the costs of risks that may fairly be regarded as typical of or broadly incidental to their activities.”*<sup>1</sup>

### I. INTRODUCTION

In 2010, cell phone related car accidents caused over 3,000 deaths in the United States.<sup>2</sup> That means one of every eleven traffic fatalities that year was caused by a person using their cell phone while driving.<sup>3</sup> Among many of these “cell phone drivers”<sup>4</sup> are employees using their cell phones to conduct business while on the road.<sup>5</sup> Cell phones enable employees to conduct business far beyond the confines of their workplace, and well past their normal working hours. Beyond talking to clients or coworkers, an employee can also send work-related documents, emails, and text messages from his cell phone while driving—making him *twenty-three times* more likely to cause an accident.<sup>6</sup> This dangerous practice has recently led to an explosion of cases alleging employer responsibility for injuries caused by employees who conduct

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1. *Miller v. Am. Greetings Corp.*, 74 Cal. Rptr. 3d 776, 785 (Ct. App. 2008) (internal quotation marks omitted).

2. James R. Healey, *Feds: Phoning, Texting Killed 3,092 in Car Crashes Last Year*, USA TODAY, [http://content.usatoday.com/communities/driveon/post/2011/12/nhtsa-cell-phones-killed-3092-car-crashes-1#.T3d\\_4XEzKpI](http://content.usatoday.com/communities/driveon/post/2011/12/nhtsa-cell-phones-killed-3092-car-crashes-1#.T3d_4XEzKpI) (last updated Dec. 8, 2011).

3. *Id.*

4. Throughout this Comment, the term “cell phone drivers” refers to individuals who use their cell phones while driving.

5. Jordan Michael, *Liability for Accidents from Use and Abuse of Cell Phones: When Are Employers and Cell Phone Manufacturers Liable?*, 79 N.D. L. REV. 299, 299 (2003).

6. *Cell Phone Ban While Driving Gets Big Push*, CBSNEWS.COM (Jan. 12, 2010, 11:50 AM), <http://www.cbsnews.com/stories/2010/01/12/earlyshow/main6086546.shtml>.

business on their cell phones while driving.<sup>7</sup> If an employee causes an accident while talking on his cell phone, two different theories possibly exist to hold the employer liable for the damages: (1) respondeat superior, and (2) direct liability.<sup>8</sup>

Despite the modern challenges that cell phone driving presents to these theories, courts continue to apply traditional principles of employer liability to cell phone related cases—attempting to force a square peg into a round hole. To help courts adapt traditional doctrines of employer liability to cases involving the modern practice of cell phone driving, this Comment proposes three guidelines that courts should follow when deciding such cases. First, every jurisdiction should adopt the minority rule in cell phone related cases involving respondeat superior, which holds that, under particular circumstances, the employee is presumed to be acting within the scope of his employment, and the employer bears the burden to rebut that presumption. Second, every jurisdiction should follow California’s enterprise theory of liability when adjudicating cell phone related cases asserting respondeat superior, and use the Roszkowski test to apply the theory.<sup>9</sup> Finally, this Comment suggests five factors that a court should balance to determine whether an employer may be held *directly* liable for the injuries caused by an employee using a cell phone at the time of the accident.<sup>10</sup>

Part II.A of this Comment discusses recent cell phone statistics in the United States and the reasons why cell phones are so distracting and dangerous to use while driving. Part II.B lays out the steps a court currently follows to determine whether the party using a cell phone while driving negligently caused the car accident. Part II.B also provides various defense theories a party may adopt to defeat a negligence claim in a cell phone related case. Part II.C discusses the doctrine of vicarious liability as applied to the employer, and how *Restatement (Second) of Agency* principles of vicarious liability differ from California’s enterprise theory of liability. Part II.D analyzes the most recent employer liability lawsuits involving cell phone driving. Part II.E briefly discusses the two predominant policies underlying respondeat superior: enterprise liability and deterrence. Finally, Part II.F discusses the doctrine of direct employer liability.

Part III.A discusses the first proposed rule regarding the rebuttable presumption. This Comment rejects the majority rule, which places the burden of proof on the plaintiff to prove that an employee acted within the scope of his employment at the time of the accident.<sup>11</sup> Instead, courts should adopt the minority rule, which holds that, under certain circumstances, the employee is presumed to have been acting within the scope of employment, and the employer must prove otherwise. Part III.B proposes that,

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7. See Ira H. Leesfield & Mark A. Sylvester, *Bad Call*, TRIAL, Aug. 2010, at 16, 17 (“Several cases from around the country indicate an emerging trend in the law regarding employer responsibility for injuries caused by employees who use their cell phones to conduct business while driving.”). See also *infra* Part II.D for a discussion of several cases involving cell phone driving and employer liability that have emerged over the past ten years.

8. Michael, *supra* note 5, at 304–06.

9. See *infra* Part III.B for a discussion of why courts should follow California’s enterprise theory of liability instead of the Restatement when facing cell phone related cases.

10. See *infra* Part III.C for a discussion of the suggested factors courts should balance to determine whether an employer is directly liable.

11. See *infra* Part III.A for a discussion of first proposed rule regarding the rebuttable presumption.

in cases involving cell phone driving and employer liability, courts adopt California's enterprise theory of liability and apply the Roszkowski test to determine scope of employment. The Roszkowski test enables courts to achieve efficiency, enterprise liability, and deterrence under respondeat superior.<sup>12</sup> Finally, Part III.C suggests five factors that courts should consider to determine whether an employer should be held *directly* liable in cell phone related cases.

## II. OVERVIEW

### A. *The Danger of Cell Phone Driving*

When individuals use their cell phones while driving it becomes more likely that they will kill themselves, or someone else, on the road.<sup>13</sup> Cell phone driving has had an enormous effect on the increasing number of car accidents in the United States and the number of resulting injuries and deaths.<sup>14</sup> Recent studies pertaining to distracted driving reveal the reason why there is such a strong causal connection between cell phone driving and car accidents.<sup>15</sup>

#### 1. Statistics of Cell Phone Related Car Accidents

In 2001, approximately 128.4 million Americans subscribed to a wireless-calling plan.<sup>16</sup> By 2011, America had more than 331 million wireless subscribers,<sup>17</sup> a number greater than the country's total population.<sup>18</sup> From June 2007 to June 2008, the number of individuals who reported using text messaging increased more than 150 percent.<sup>19</sup> These statistics are relevant to driving safety because individuals who speak on cell phones while driving are four times as likely to get into a serious car accident than those who do not talk on a cell phone while driving.<sup>20</sup> Drivers who text, dial, or email in the car are *twenty-three* times more likely to crash than those who do not.<sup>21</sup>

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12. See *infra* Part III.B for a discussion of the Roszkowski test.

13. See *Cell Phone Ban While Driving Gets Big Push*, *supra* note 6 (stating that talking on a cell phone while driving makes the driver four times more likely to cause an accident).

14. See *infra* Part II.A.1 for a discussion of the effect cell phone driving has had on the number of car accidents in the United States, and the number of injuries and deaths resulting therefrom.

15. See *infra* Part II.A.2 for a discussion of recent studies pertaining to distracted driving, which help explain why there is such a strong connection between cell phone driving and car accidents.

16. *Wireless Quick Facts*, CTIA: THE WIRELESS ASS'N, [http://www.ctia.org/media/industry\\_info/index.cfm/AID/10323](http://www.ctia.org/media/industry_info/index.cfm/AID/10323) (last visited May 28, 2012).

17. *Id.*

18. See Anton Troianovski, *At Wireless Trade Show, Rose-Colored Glasses*, WALL ST. J. DIGITS BLOG (Oct. 11, 2011, 4:34 PM), <http://blogs.wsj.com/digits/2011/10/11/at-wireless-trade-show-rose-colored-glasses>.

19. Shannon L. Noder, Comment, *Talking and Texting While Driving: A Look at Regulating Cell Phone Use Behind the Wheel*, 44 VAL. U. L. REV. 237, 239-40 (2009) (citing Daniel B. Wood, *L.A. Metrolink Crash Puts Focus on Dangers of Texting*, CHRISTIAN SCI. MONITOR, Sept. 17, 2008, at 25).

20. *Teenage Drivers Continue to Use Cellphones Despite a North Carolina Ban*, STATUS UPDATE (Ins. Inst. for Highway Safety, Arlington, VA), June 9, 2009, at 1, 3, available at <http://www.iihs.org/externaldata/srdata/docs/sr4304.pdf>.

21. *Cell Phone Ban While Driving Gets Big Push*, *supra* note 6.

Consequently, car accidents caused by cell phone driving nearly tripled from 636,000 in 2003 to 1.6 million in 2008.<sup>22</sup>

In 2010, over 3,000 deaths in the United States resulted from cell phone related car accidents.<sup>23</sup> However, these statistics may be an underestimate for at least three reasons: (1) it can be difficult to detect cell phone use at the time of the accident; (2) individuals likely avoid reporting using their cell phones in fear of facing civil liability; and (3) many states only recently began recording data for cell phone related accidents.<sup>24</sup> Conversely, however, there are times when “police [will] inaccurately record crashes as cell phone related simply because officers observed that a cell phone was present or in use at an accident scene.”<sup>25</sup>

The drastic increase in cell phone driving is due in part to commuters attempting to maximize their travel time while driving to or from work.<sup>26</sup> Even when employees are not commuting to or from work, their employers may expect them to be accessible at all times when out of the office.<sup>27</sup> To accommodate such needs, employees often keep their cell phones nearby whenever and wherever they are driving.<sup>28</sup> As a result, employee drivers spend a significant amount of time talking on their cell phones, which leads to a significant amount of car accidents.<sup>29</sup> The idea of an employee’s car being his “mobile office” is being only reinforced by carmakers, which are now adding technologies to their newer models that enable drivers to access the internet *in the car itself*, without even requiring a cell phone.<sup>30</sup>

## 2. Explanation for Why Cell Phone Driving is Dangerous

So why exactly do cell phones cause such a problem for drivers on the road? Various research reports point to different reasons; but one reason seems to prevail: using a cell phone while driving is very distracting.<sup>31</sup> There are generally four different kinds of driving distractions: (1) visual; (2) biochemical; (3) auditory; and (4)

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22. *Id.*

23. Healey, *supra* note 2.

24. See Annie Barret Wallin, Note, *Cell Phones Pose a Distraction to Drivers but Legislative Ban Is Not the Answer*, 98 KY. L.J. 177, 190 (2009) (gathering data on traffic accidents from Michigan, Oklahoma, and Florida).

25. Dusty Horwitt, Note, *Driving While Distracted: How Should Legislators Regulate Cell Phone Use Behind the Wheel?*, 28 J. LEGIS. 185, 190 (2002).

26. Noder, *supra* note 19, at 241 (citing Jordan Michael, *Automobile Accidents Associated with Cell Phone Use: Can Cell Phone Service Providers and Manufacturers Be Held Liable Under a Theory of Negligence?*, 11 RICH. J.L. & TECH., Winter 2005, at 1, 3).

27. *Id.* (citing Matthew C. Kalin, *The 411 on Cellular Phone Use: An Analysis of the Legislative Attempts to Regulate Cellular Phone Use by Drivers*, 39 SUFFOLK U. L. REV. 233, 233–34 (2005)).

28. See *id.* at 240 (“As a result of our culture’s dependence on cell phones and the desire for individuals to always be accessible, many Americans now use their cell phones while driving.”).

29. See *id.* at 241 (“[T]he use of a cell phone while driving is dangerous because it distracts the driver, which causes accidents.”).

30. Ray LaHood, U.S. Transp. Sec’y, Remarks for the Second National Distracted Driving Summit (Sept. 21, 2010), available at <http://www.distraction.gov/download/press-kit/distracted-driving-summit-press-kit.pdf>.

31. Noder, *supra* note 19, at 241.

cognitive.<sup>32</sup> Unlike most activities that distract drivers,<sup>33</sup> however, with cell phone driving, all four types of driving distractions apply.<sup>34</sup> In fact, a study at Carnegie Mellon University revealed that talking on a cell phone reduces the amount of brain activity associated with driving by thirty-seven percent.<sup>35</sup> To put that in perspective, using a cell phone delays a driver's reaction time as much as someone driving with a blood alcohol concentration at the legal limit of 0.08%.<sup>36</sup>

Moreover, recent studies show that "hands-free" cell phones are no safer to use while driving than hand-held cell phones.<sup>37</sup> Rather, it is the cognitive distraction of cell phone use that is problematic, and this is not solved by hands-free technology.<sup>38</sup> Even if the driver is looking at stop signs and traffic signals while talking on his cell phone, the distraction is not from holding the cell phone. It is the cell phone *conversation* that impairs the driver's detection of and reaction to these signals.<sup>39</sup> No state, however, currently prohibits drivers from talking on a hands-free cell phone while driving.<sup>40</sup> Moreover, many employers encourage their employees to use hands-free devices as a safe alternative to conducting business on a hand-held cell phone while driving.<sup>41</sup>

#### B. Cell Phone Drivers Are Negligent Drivers

If a plaintiff seeks damages for injuries sustained in a car accident caused by a cell phone driver, he will most likely bring a negligence action.<sup>42</sup> To prove a prima facie case for a cell phone related negligence claim, the plaintiff must prove four elements: (1) that the driver had a duty to operate the motor vehicle with reasonable care, (2) that the driver breached that duty by using a cell phone while driving, (3) that the driver's use of a cell phone while driving caused the accident, and (4) that damages were

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32. *Id.* at 244.

33. Typical distracting driving activities may include applying makeup, eating food, changing the radio station, driving while tired, or talking to another passenger in the car.

34. Noder, *supra* note 19, at 244 (citing Horwitz, *supra* note 25, at 202).

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

36. See David L. Strayer et al., *A Comparison of the Cell Phone Driver and the Drunk Driver*, 48 HUMAN FACTORS 381, 390 (2006).

37. Kalin, *supra* note 27, at 252; see also Press Release, Carnegie Mellon Univ., Carnegie Mellon Study Shows Just Listening to Cell Phones Significantly Impairs Drivers (Mar. 5, 2008), available at [http://www.cmu.edu/news/archive/2008/March/march5\\_drivingwhilelistening.shtml](http://www.cmu.edu/news/archive/2008/March/march5_drivingwhilelistening.shtml) ("[M]aking cell phones hands-free or voice-activated is not sufficient in eliminating distractions to drivers.").

38. See Kalin, *supra* note 27, at 253.

39. David L. Strayer et al., *Cell Phone-Induced Failures of Visual Attention During Simulated Driving*, 9 J. EXPERIMENTAL PSYCHOL.: APPLIED 23, 26 (2003).

40. *Cell Phone and Texting Laws*, GOVERNORS HIGHWAY SAFETY ASS'N, [http://www.ghsa.org/html/statinfo/laws/cellphone\\_laws.html](http://www.ghsa.org/html/statinfo/laws/cellphone_laws.html) (last updated May 2012). Many states, however, prohibit all types of cell phone use for novice drivers and/or school bus drivers. See *id.*

41. See, e.g., *Employers Guide to Cell Phone Liability*, BRAUN CONSULTING NEWS (Braun Consulting Grp., Seattle, WA), Summer 2002, <http://www.braunconsulting.com/bcg/newsletters/summer2002/summer2002.html#one> (noting that an "extremely cautious" company may require the use of a hands-free phone).

42. Meghan K. Loftus, *Causes of Action Arising Out of Cell Phone Use While Operating A Motor Vehicle*, in 35 CAUSES OF ACTION 2D 151, § 5 (2007).

sustained as a result of the motor vehicle accident.<sup>43</sup> This Section discusses how a plaintiff meets each of these elements.

### 1. Duty and Breach

Drivers have a duty to operate their vehicles with reasonable care.<sup>44</sup> To operate his vehicle reasonably, the driver must remain attentive to his surroundings while driving.<sup>45</sup> Operating a cell phone distracts drivers in several ways including “talking, dialing, hanging up, answering, or reaching for their phones.”<sup>46</sup> Thus, an individual breaches his duty to remain attentive to his surroundings when he uses his cell phone while operating a vehicle.<sup>47</sup>

Violation of a statute may also be evidence of negligence.<sup>48</sup> Nine states currently prohibit drivers from talking on a hand-held cell phone while driving.<sup>49</sup> A majority of states, however, prohibit text messaging while driving and also prohibit any type of cell phone use for novice drivers.<sup>50</sup> Violation of a statute is evidence of negligence if the statute’s purpose is “(1) to protect a class of persons that includes the person whose interest is invaded; (2) to protect the particular interest invaded; (3) to protect that interest against the kind of harm that resulted; and (4) to protect that interest against the particular hazard from which the harm resulted.”<sup>51</sup>

A cell phone statute generally meets these four elements. First, it protects both pedestrians and other drivers on the road.<sup>52</sup> Second, it protects a person’s interest in life

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43. *E.g.*, *Williams v. Cingular Wireless*, 809 N.E.2d 473, 476 (Ind. Ct. App. 2004).

44. Loftus, *supra* note 42, at § 6.

45. *See Covey v. Simonton*, 481 F. Supp. 2d 224, 232 (E.D.N.Y. 2007) (holding that a reasonable driver must keep a proper lookout and consider all possible dangers existing from “weather, road, traffic and other conditions” (internal quotation mark omitted) (quoting *Goldstein v. United States*, 9 F. Supp. 2d 175, 186 (E.D.N.Y. 1998)); *Peirce v. United States*, No. C05-440-JCC, 2007 WL 1577762, at \*4 (W.D. Wash. May 30, 2007) (citing *Presleigh v. Lewis*, 534 P.2d 606, 607 (Wash. Ct. App. 1975)) (finding that a driver has a duty to “exercise reasonable care in the operation of the vehicle, which includes keeping the vehicle under control to avoid collisions with other cars and pedestrians”); *Bencriscutto v. Simmons*, No. M2000-01816-COA-R3-CV, 2001 WL 585094, at \*3 (Tenn. Ct. App. June 1, 2001) (explaining that a reasonable driver is one who keeps a proper lookout for both vehicle and pedestrian traffic).

46. Horwitt, *supra* note 25, at 190.

47. *See, e.g.*, *McCormick v. Allstate Ins. Co.*, 870 So. 2d 547, 551–52 (La. Ct. App. 2002) (holding that a driver breached her duty of care because she was talking on her cell phone and not paying attention to her surroundings when she collided with another vehicle in the parking lot); *Perkins v. Allstate Indem. Ins. Co.*, 821 So. 2d 647, 650–51 (La. Ct. App. 2002) (finding that dialing a telephone number on a cell phone while waiting to make a left turn into oncoming traffic constitutes a breach of duty).

48. *E.g.*, *Low v. Stephens*, No. 53878-1-I, 2005 WL 1345514, at \*2 (Wash. Ct. App. June 6, 2005).

49. These nine states are California, Connecticut, Delaware, Maryland, Nevada, New Jersey, New York, Oregon, and Washington. *Cell Phone and Texting Laws*, *supra* note 40.

50. *See id.* (indicating that thirty states and the District of Columbia prohibit use of cell phones by novice drivers, and thirty-five states and the District of Columbia ban text messaging while driving).

51. *Low*, 2005 WL 1345514, at \*2 (quoting *Mathis v. Ammons*, 928 P.2d 431, 434 (Wash. Ct. App. 1996)).

52. *See, e.g.*, Use of Mobile Telephones, N.Y. VEH. & TRAF. LAW § 1225-c(2)(a) (McKinney 2010) (“[N]o person shall operate a motor vehicle upon a public highway while using a mobile telephone to engage in a call while such vehicle is in motion.”).

and safety.<sup>53</sup> Third, car accidents caused by cell phones will generally result in loss of life or injury.<sup>54</sup> Fourth, cell phone statutes generally prohibit using a cell phone while driving,<sup>55</sup> which is the particular hazard from which these injuries and deaths have resulted.

## 2. Causation and Damages

Even if a person breaches his duty to drive with reasonable care he is not liable unless his negligent conduct *proximately caused* the accident.<sup>56</sup> At a minimum, the plaintiff must prove that but for the driver's cell phone use, the accident would not have occurred.<sup>57</sup> Studies and statistics revealing the dangerous link between car accidents and cell phone use may make it easier for plaintiffs to prove that the cell phone caused the accident.<sup>58</sup>

To meet the final element of negligence, the plaintiff must prove that the accident caused damages.<sup>59</sup> Damages may include physical injury, death, or property damage.<sup>60</sup> If injured, the plaintiff may recover for past and future medical bills, lost wages, pain and suffering, and other non-economic damages.<sup>61</sup> In cases where the defendant's negligent conduct is considered particularly egregious, punitive damages are likely available as well.<sup>62</sup> Punitive damages, however, are not reserved solely for instances of egregious conduct.<sup>63</sup> Courts may also issue punitive damages if the driver was aware, or should have been aware, of the dangers of cell phone driving and used his cell phone while driving in spite of that known danger.<sup>64</sup>

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53. See Wallin, *supra* note 24, at 178 ("Lawmakers have identified what they perceive to be a safety issue, and many either have enacted or proposed new legislation to ban the use of cell phones by motorists.")

54. See NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., TRAFFIC SAFETY FACTS: DISTRACTED DRIVING 2009, at 1 (2010), available at <http://www-nrd.nhtsa.dot.gov/Pubs/811379.pdf> (noting that in 2009, cell phone related car accidents caused nearly 1,000 deaths and 24,000 injuries).

55. *E.g.*, N.Y. VEH. & TRAF. LAW § 1225-c(2)(a).

56. Loftus, *supra* note 42, § 8.

57. See *id.* (citing *Malolepszy v. Nebraska*, 729 N.W.2d 669, 675 (Neb. 2007)) (to establish proximate cause, a plaintiff must show that "but for the negligence, the injury would not have occurred").

58. See *supra* Part II.A for a discussion of the statistics and studies that reveal a link between car accidents and cell phone driving.

59. Loftus, *supra* note 42, § 9.

60. *Id.*

61. *Id.*

62. *Id.*

63. See Michael, *supra* note 5, at 307 (citing *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536 (1999) (finding that an employer may be liable for punitive damages if the employer discriminates "in the face of a perceived risk that [the employer's] actions will violate federal law"))

64. See *id.* (noting that courts may "extend punitive damages to those instances where an employer was aware of the mandates of the law and simply did not provide adequate training or education to employees").

### 3. Defenses

Cell phone cases often involve an injured plaintiff suing a defendant because the defendant used his cell phone while driving.<sup>65</sup> Other cases involve defendants who raise comparative negligence as an affirmative defense by producing evidence that the plaintiff was using a cell phone while driving.<sup>66</sup> Proof of comparative negligence may lessen or negate the defendant's own liability for the accident.<sup>67</sup>

For instance, in *Wilkerson v. Kansas City Southern Railway*,<sup>68</sup> the court reduced the defendants' liability from forty percent to zero percent after determining that the accident only occurred because the plaintiff's cell phone conversation provided a fatal distraction.<sup>69</sup> In *Wilkerson*, a train struck the plaintiff while she slowly passed over the railroad crossing in her car.<sup>70</sup> She approached the crossing on her cell phone, allegedly smiling and carrying on a conversation.<sup>71</sup> She failed to notice the oncoming locomotive, which was sounding its warning horn, until the collision.<sup>72</sup> At trial, the jury attributed forty percent of the fault to the railroad company.<sup>73</sup> The appellate court made clear that it disagreed with this determination when it said:

Although [the driver] was proceeding slowly, she was distracted by her cell phone conversation and did not approach the crossing with heightened caution. Tragically for herself and her loved ones, she did not see what she could have seen, nor heard what she should have heard, had she looked and listened. [Her] sad and untimely death was caused by her own inattention and not by any actions or inactions on the part of the railroad, or the engineer.<sup>74</sup>

#### C. Vicarious Liability of the Employer

Tort law is predominantly based upon fault.<sup>75</sup> It generally holds individuals responsible for their own wrongful conduct.<sup>76</sup> There are times, however, where a person or entity, other than the actor who actually caused the injury, is nonetheless

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65. See *infra* Part II.D.2 for a discussion of several cases that involve injured plaintiffs suing defendants because the defendant used his cell phone while driving.

66. See *Prego v. Falcioni*, No. CV020280472S, 2006 WL 463189, at \*1 (Conn. Super. Ct. Feb. 8, 2006) (finding plaintiff comparatively negligent because she was on her cell phone seconds before the collision). *But see* *Morgenstern v. Knight*, 134 P.3d 897, 898 (Okla. Civ. App. 2006) (refusing to instruct the jury "that the use of a cell phone while driving an automobile which is involved in an accident, without more, creates an issue of fact as to whether the cell phone user is guilty of contributory negligence").

67. *Prego*, 2006 WL 463189, at \*2; *Morgenstern*, 134 P.3d at 898.

68. 772 So. 2d 268 (La. Ct. App. 2000).

69. *Wilkerson*, 772 So. 2d at 280.

70. *Id.* at 269.

71. *Id.* at 270.

72. *Id.*

73. *Id.* at 269.

74. *Id.* at 280.

75. John Dwight Ingram, *Vicarious Liability for Negligence of a Vehicle's Driver*, 43 TORT TRIAL & INS. PRAC. L.J. 71, 72 (2007).

76. *Id.*

liable for another actor's wrongful conduct.<sup>77</sup> These cases normally involve lawsuits against employers for third-party injuries caused by their employees.<sup>78</sup> Plaintiffs generally sue employers because of third-party injuries under two theories: vicarious liability and direct liability.<sup>79</sup>

The modern theory of vicarious liability stems from the common law doctrine known as respondeat superior.<sup>80</sup> In Latin, respondeat superior literally means "let the superior make answer."<sup>81</sup> For respondeat superior to apply, the plaintiff must prove that at the time of the accident, the person who negligently caused his injury was (1) an employee of the defendant, and (2) acting within the scope of his employment.<sup>82</sup> In most jurisdictions, the plaintiff bears the burden to prove both of these elements.<sup>83</sup> In a minority of jurisdictions, however, proof that the employee was operating his employer's vehicle at the time of the accident creates a presumption that the employee was acting within the scope of his employment.<sup>84</sup> Once this presumption arises, the burden of rebuttal shifts to the employer.<sup>85</sup>

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77. *Id.*

78. Mark E. Roszkowski & Christie L. Roszkowski, *Making Sense of Respondeat Superior: An Integrated Approach for Both Negligent and Intentional Conduct*, 14 S. CAL. REV. L. & WOMEN'S STUD. 235, 235 (2005).

79. *Id.* at 235–36.

80. Christina M. Mann, Note, *Torts: Respondeat Superior and the CDA: Letting the Superior Off the Hook—Urban v. American Legion Department of Minnesota*, 34 WM. MITCHELL L. REV. 1489, 1503 (2008).

81. BLACK'S LAW DICTIONARY 619 (Bryan A. Garner ed., 3d pocket ed., Thomson/West 2006). Today, "vicarious liability" and "respondeat superior" are commonly used interchangeably, and will be used interchangeably throughout this Comment.

82. See RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958) (stating that "[a] master is subject to liability for the torts of his servants committed while acting within the scope of their employment"); *Hoskins v. King*, 676 F. Supp. 2d 441, 445 (D.S.C. 2009) (same). When discussing respondeat superior, this Comment presupposes an employer-employee relationship exists and will focus primarily on whether that employee was acting within the scope of his employment at the time of the accident.

83. See, e.g., *Hartline v. Kaiser Found. Hosps.*, 33 Cal. Rptr. 3d 713, 718 (Ct. App. 2005) (plaintiff has the burden to demonstrate that the employee committed a negligent act while in the scope of employment); *Nulle v. Krewer*, 872 N.E.2d 567, 569 (Ill. App. Ct. 2007) (same); *Wolfe v. Town of Homer*, 11 So. 3d 39, 42–43 (La. Ct. App. 2009) (same); *Johnson v. Evers*, 238 N.W.2d 474, 476–77 (Neb. 1976) (same); *Pekarsky v. City of New York*, 659 N.Y.S.2d 496, 497 (App. Div. 1997) (same); *Vencill v. Cornwell*, 145 N.E.2d 136, 138 (Ohio Ct. App. 1956) (same).

84. See, e.g., *Gordy Constr. Co. v. Stewart*, 456 S.E.2d 245, 246 (Ga. Ct. App. 1995) ("[W]hen an employee is involved in a collision, while operating his employer's vehicle, a presumption arises that he is acting within the scope of his employment."); *Whittington v. W. Union Tel. Co.*, 1 So. 2d 327, 329 (La. Ct. App. 1941) (finding a rebuttable presumption was created that a messenger boy was acting within the scope of his employment when, at the time the accident occurred, he was riding his bicycle and dressed in his work uniform); *West v. Aetna Ins. Co.*, 45 So. 2d 585, 586 (Miss. 1950) (an employee is presumed to be acting within the scope of employment when driving an employer-owned truck at time of collision); cf. *Berkeley-Dorchester Cntys. Econ. Dev. Corp. v. U.S. Dep't of Health & Human Servs.*, 395 F. Supp. 2d 317, 323 (D.S.C. 2005) (citing *S.C. Budget & Control Bd. v. Prince*, 403 S.E.2d 643, 646–47 (S.C. 1991)) (when there is doubt as to whether an employee was acting within the scope of employment, that doubt is resolved against the employer).

85. E.g., *West*, 45 So. 2d at 586.

Where the issue of scope of employment is clear and free from doubt, the court determines if the act was within the scope of employment.<sup>86</sup> Where it is unclear, however, the employee's scope of employment becomes a determination for the jury or fact finder.<sup>87</sup> If the fact finder determines that the employee acted within the scope of his employment at the time of the accident, the employer is strictly liable for all damages resulting from his employee's negligence.<sup>88</sup> Whether the employer was negligent is irrelevant for purposes of respondeat superior, but may determine the employer's *direct* liability.<sup>89</sup>

### 1. Determining Scope of Employment Under the Restatement

In an effort to define the scope of employment, most states<sup>90</sup> generally rely on section 228(1) of the *Restatement (Second) of Agency*. Section 228 provides that an employee's conduct falls within the scope of his employment if, but only if "(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master."<sup>91</sup> Section 229 then provides a list of factors which courts often consider to determine whether an act, although not authorized by the employer, should nevertheless be considered within the scope of employment. These factors are:

- (a) whether or not the act is one commonly done by such servants;
- (b) the time, place and purpose of the act;
- (c) the previous relations between the master and servant;
- (d) the extent to which the business of the master is apportioned between different servants;
- (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
- (f) whether or not the master has reason to expect that such an act will be done;
- (g) the similarity in quality of the act done to the act authorized;
- (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;

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86. See, e.g., *Hartline*, 33 Cal. Rptr. 3d at 718 (stating that "[w]hether an act is within the scope of employment is a question of fact, unless the facts are undisputed and no conflicting inferences are possible, in which case the question is one of law").

87. *Id.*

88. Mann, *supra* note 80, at 1504.

89. See FRANK J. VANDALL ET AL., TORTS: CASES AND PROBLEMS 1041 (2d ed. 2003) (noting that vicarious liability is a form of strict liability, and liability will be imposed no matter what standard of care the liable entity met; but if an employer was itself negligent, it may be sued directly for its failure to meet the applicable standard of care).

90. See Roszkowski & Roszkowski, *supra* note 78, at 236 (noting that "most states" derive the test for respondeat superior liability from the *Restatement (Second) of Agency*).

91. RESTATEMENT (SECOND) OF AGENCY § 228(1) (1958). The Restatement includes a fourth prong regarding intentional force, which was excluded because it is not material to this Comment: "(d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master." *Id.*

- (i) the extent of departure from the normal method of accomplishing an authorized result; and
- (j) whether or not the act is seriously criminal.<sup>92</sup>

When applying the Restatement principles, most courts do not consider ordinary travel commute within the scope of employment.<sup>93</sup> Under what is commonly known as the “going and coming” rule, employees are not considered within the scope of employment when driving to or from work because the employee renders no service to the employer by traveling to or from work.<sup>94</sup> Thus, his employment is suspended from the time he leaves his workplace to the time he returns.<sup>95</sup>

Like most rules, several exceptions exist for the “going and coming” rule. The three exceptions that are most relevant to cases involving cell phone driving are: (1) if the purpose of the trip is intended to benefit the employer as well as the employee, (2) if the employee is performing a special errand or mission for the employer, or (3) if the employee is compensated for his traveling expenses or his car is furnished by his employer.<sup>96</sup> Each of these exceptions is briefly explained in turn.

Under the first exception—commonly referred to as the “dual-purpose” exception—an employer remains liable if his employee’s trip to or from work provides a benefit to both the employer and employee.<sup>97</sup> Employees are considered within the scope of their employment even if the trip primarily benefits themselves or a third person.<sup>98</sup> An employer is only relieved from liability if he completely deviates from his scope of employment in an attempt to accomplish an entirely personal task.<sup>99</sup> To determine whether the employer received a benefit, courts often consider the amount of control the employer exerted over the employee throughout his trip and whether the employee forwent any personal time to embark on the journey.<sup>100</sup>

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92. *Id.* § 229.

93. *See Mannes v. Healey*, 703 A.2d 944, 946 (N.J. Super. Ct. App. Div. 1997) (describing the commonly endorsed “rule that an employee driving his or her own vehicle to and from the employee’s workplace is not within the scope of employment for the purpose of imposing vicarious liability upon the employer for the negligence of the employee-driver”).

94. Christopher Vaeth, Annotation, *Employer’s Liability for Negligence of Employee in Driving His or Her Own Automobile*, 27 A.L.R. 5TH 174 § 3 (1995).

95. *See Mannes*, 703 A.2d at 946 (explaining how the going and coming “rule is sometimes ascribed to the theory that employment is suspended from the time the employee leaves the workplace until he or she returns”).

96. Ingram, *supra* note 75, at 77.

97. *See, e.g., Faul v. Jelco, Inc.*, 595 P.2d 1035, 1037 (Ariz. Ct. App. 1979) (describing the dual-purpose exception, which “applies when in addition to merely commuting, the employee performs a concurrent service for his employer that would have necessitated a trip by another employee if the commuting employee had not been able to perform it while commuting”).

98. Ingram, *supra* note 75, at 79.

99. *Id.*; *see also Mannes*, 703 A.2d at 945–46 (holding that an employee commuting to work during off hours solely for personal convenience is acting outside the scope of employment).

100. *Compare Mannes*, 703 A.2d at 945–46 (stressing that varying hours and unrestricted access to the office illustrated a lack of control by the employer, and thus the employee’s actions were outside the scope of employment), *with Chevron, U.S.A., Inc. v. Lee*, 847 S.W.2d 354, 356 (Tex. Ct. App. 1993) (finding an employee’s actions were within the scope of employment because the employer exerted control over the employee during a trip, and the employee was required to forego personal time in order to complete the trip).

In *McClelland v. Simon-Williamson Clinic, P.C.*,<sup>101</sup> the court refused to adopt the dual-purpose exception to impose liability on a hospital clinic, even though the physician spoke to a patient on his cell phone while driving to the hospital moments before the accident occurred.<sup>102</sup> The concurrence in *McClelland* warned that applying the dual-purpose exception “merely because sometime during that trip the employee receives a [work-related] cellular telephone call . . . would expand the . . . exception in a manner that would make it qualitatively different than was originally intended.”<sup>103</sup>

Conversely, the dissent argued that the majority’s interpretation of the dual-purpose exception was too “cramped” and “formulaic.”<sup>104</sup> The dissent pointed out that the exception had been applied to other, previously unheard of advances in communication devices, including walkie-talkies, radio-dispatched police vehicles, and pagers.<sup>105</sup> It stressed that the determinative focus of when to apply the exception should be on the *purpose* of the trip, not the *route* of the trip.<sup>106</sup> Thus, even a personal journey may turn into a trip with a dual purpose if a work-related event occurs en route.<sup>107</sup> For instance, in *McClelland*, the physician made “a routine drive to work *and* a drive in response to a specific patient’s call.”<sup>108</sup> Even if the doctor decided to cancel the routine drive to work, he still would have had to drive to the hospital in response to his patient’s call.<sup>109</sup>

Under the second exception, liability is generally imposed upon an employer if his employee performs a “special errand” or “special mission” for the employer while going to or coming from work.<sup>110</sup> A “special errand” or “special mission” refers to a specific task that an employee undertakes upon the request of his employer.<sup>111</sup> The employee is considered within the scope of his employment from the time he

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101. 933 So. 2d 367 (Ala. Civ. App. 2005).

102. *McClelland*, 933 So. 2d at 368–69, 371. Note that although this case is a workers’ compensation case, the “going and coming” rule generally applies to both doctrines, and the analysis is essentially the same. See *Lobo v. Tamco*, 105 Cal. Rptr. 3d 718, 721 n.3 (Ct. App. 2010) (stating that “under both the tort rule of respondeat superior and workers’ compensation law, the application of the going and coming rule is similar for both purposes”). But see *Beard v. Brown*, 616 P.2d 726, 735 (Wyo. 1980) (refusing to apply workers’ compensation rules in a negligence case because negligence is based on fault).

103. *McClelland*, 933 So. 2d at 372 (Murdock, J., concurring).

104. *Id.* at 373 (Crawley, J., dissenting).

105. *Id.* at 374 (citing *Montgomery Cnty. v. Wade*, 690 A.2d 990, 992 (Md. 1997) (finding that police officer was within the scope of employment when officer was not on duty but was monitoring police radio)).

106. *Id.* at 374–75.

107. See *id.* at 374 (“The dual-purpose nature of the trip need not have existed from the moment the trip was first started. . . . If in the course of that trip a business purpose arises . . . the trip from that point on will be a business trip . . . .” (quoting 1 ARTHUR LARSON & LEX K. LARSON, *LARSON’S WORKERS’ COMPENSATION LAW* § 16.05, at 16–19 (2005))).

108. *Id.* at 375.

109. *Id.*

110. Vaeth, *supra* note 94, § 4[a].

111. *Wilie v. Signature Geophysical Servs., Inc.*, 65 S.W.3d 355, 359 (Tex. App. 2001); see also *Smith v. Universal Elec. Constr. Co.*, 30 S.W.3d 435, 440 (Tex. App. 2000) (explaining that an employee is not furthering an employer’s business if the employer did not require any particular route for the employee’s journey to or from work).

commences the errand until its termination.<sup>112</sup> Courts may recognize a special errand exception even when the employer is not traveling to or from his actual workplace.<sup>113</sup>

Finally, under the third exception, some courts find that compensating an employee for his travel expenses, or furnishing him with a company car, indicates that the employer somehow benefits from that employee's travel.<sup>114</sup> Therefore, when the employee is compensated for his traveling, this travel time should be considered part of the working day and within the scope of his employment.<sup>115</sup>

Many state courts, however, give little weight to compensation as an indicator for scope of employment.<sup>116</sup> For example, in *Beard v. Brown*,<sup>117</sup> the court held that an employee was not within the scope of her employment when involved in a car accident on her way to work, even though the employee received two hours of additional pay as compensation because of the long drive to and from work.<sup>118</sup> The court reasoned that mere payment of travel expenses, without more, does not bring an employee within the scope of employment.<sup>119</sup> The court mentioned that for an employee to be considered within the scope of her employment, her conduct must be at least partially motivated by a purpose to serve the employer and conducted with the intention to further the interests of her employer to some extent.<sup>120</sup> Because the employee's longer-than-average commute did not serve an employment purpose nor provide a direct benefit to the employer, the court refused to recognize an exception to the general "going and coming" rule.<sup>121</sup>

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112. *Soto v. Seven Seventeen HBE Corp.*, 52 S.W.3d 201, 206 (Tex. App. 2000); *see also* *Kephart v. Genuity, Inc.*, 38 Cal. Rptr. 3d 845, 853 (App. 2006) (finding an employee is considered in the course of employment from the time he starts on errand until returning); *Young v. Mooney*, 815 So. 2d 1107, 1111–12 (La. Ct. App. 2002) (noting the scope of employment is established when the employer had reason to expect the employee undertook the mission and when the employee reasonably expected to be compensated for that mission).

113. *See Chevron, U.S.A., Inc. v. Lee*, 847 S.W.2d 354, 356 (Tex. App. 1993) (recognizing a "special mission" exception for an employee involved in a car accident on the way to a mandatory seminar away from the normal workplace because his journey was furthering a "special errand either as part of his regular duties or at the specific order or request of his employer").

114. *See, e.g., Hinman v. Westinghouse Elec. Co.*, 471 P.2d 988, 992 (Cal. 1970) ("[T]he employer, having found it desirable in the interests of his enterprise to pay for travel time and for travel expenses . . . should be required to pay for the risks inherent in his decision.").

115. *See O'Brien v. Traders & Gen. Ins. Co.*, 136 So. 2d 852, 864 (La. Ct. App. 1961) (finding there is no better evidence to prove that an employee is within the scope of employment than the fact that the employer is compensating him for services).

116. *See, e.g., Easterling v. Man-O-War Auto., Inc.*, 223 S.W.3d 852, 856 (Ky. Ct. App. 2007); *Heide v. T.C.I. Inc.*, 506 P.2d 486, 487, 491 (Or. 1973); *Wilson v. H.E. Butt Grocery Co.*, 758 S.W.2d 904, 907 (Tex. App. 1988).

117. 616 P.2d 726 (Wyo. 1980).

118. *Beard*, 616 P.2d at 735–37.

119. *Id.* at 736.

120. *Id.* at 735.

121. *Id.*

## 2. Determining Scope of Employment Under California's Enterprise Theory of Liability

Declining to follow the Restatement principles, California utilizes an alternative test to determine whether an employee's conduct falls within the scope of her employment.<sup>122</sup> Under a doctrine generally referred to as the "enterprise theory of liability" ("enterprise theory"), California courts hold that the employee falls within the scope of his employment so long as his journey "involves an incidental benefit to the employer, not common to commute trips by ordinary members of the work force."<sup>123</sup> In California, an employee must meet a lower threshold to be considered within the scope of employment during his commute than under the Restatement principles.<sup>124</sup> When applying the enterprise theory, California courts consider hindsight foreseeability and ask whether "in the context of the particular enterprise the employee's conduct was so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business."<sup>125</sup> Unlike the Restatement, the enterprise theory does not focus on elements of control. Rather, it considers whether "the employer's enterprise creates inevitable risks as a part of doing business."<sup>126</sup>

Recently, the court in *Lobo v. Tamco*<sup>127</sup> applied the enterprise theory and reversed summary judgment for an employer whose employee caused a fatal accident when he failed to notice oncoming traffic as he pulled out of the driveway of the employer's premises.<sup>128</sup> Although the employee intended to go home when he pulled out of the driveway, one of his responsibilities as an employee included visiting customers' facilities.<sup>129</sup> The court found that vicarious liability may be appropriate because the employer derived an incidental benefit by relying upon the availability of the employee's car.<sup>130</sup>

Similarly, in *Potter v. Shaw*,<sup>131</sup> the court imposed vicarious liability upon an employer whose employee negligently caused a car accident while sightseeing on a "day off" during a business trip.<sup>132</sup> Applying the enterprise theory, the court held that sightseeing is not "so unusual or startling that it would seem unfair to include the [accident] among the other costs of the employer's business."<sup>133</sup> Thus, the court concluded that the employer should have anticipated or foreseen that its employees

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122. See generally *Hinman v. Westinghouse Elec. Co.*, 471 P.2d 988 (Cal. 1970). "Fundamentally, the California enterprise liability eschews the scope of employment test set forth in the *Restatement (Second) of Agency* §§ 218, 228, 229 (1957)." *O'Toole v. Carr*, 786 A.2d 121, 125 (N.J. Super. Ct. App. Div. 2001).

123. *Hinman*, 471 P.2d at 991.

124. See *O'Toole*, 786 A.2d at 124 (referring to California's enterprise theory as "[b]y far, the most liberal" test used by any jurisdiction).

125. *Henderson v. Adia Servs., Inc.*, 227 Cal. Rptr. 745, 749-50 (Ct. App. 1986) (internal quotation marks omitted).

126. *Bailey v. Filco, Inc.*, 56 Cal. Rptr. 2d 333, 335 (Ct. App. 1996).

127. 105 Cal. Rptr. 3d 718 (Ct. App. 2010).

128. *Lobo*, 105 Cal. Rptr. 3d at 719, 722-23.

129. *Id.* at 721.

130. *Id.* at 722.

131. No. 991255, 2001 WL 914203 (Mass. Super. Ct. May 29, 2001) (applying California law).

132. *Potter*, 2001 WL 914203, at \*4.

133. *Id.*

would use their day off to engage in various recreational activities, including sightseeing.<sup>134</sup>

Two legal scholars, Mark E. Roszkowski and Christie L. Roszkowski, propose that to more effectively determine whether an employee's conduct was actually "unusual or startling" to the employer, courts applying the enterprise theory should simply ask one question: In hindsight, "[w]ould the employee, *in fact*, have been reprimanded or discharged for the conduct if the employer had learned of it and no tort had occurred?"<sup>135</sup> Under the Roszkowski test, the first issue courts must resolve is whether the employee would *in fact* have been reprimanded, discharged, or otherwise disciplined for his conduct.<sup>136</sup>

[E]vidence of a general employer policy against the conduct is of little value in the absence of additional evidence that employees had in fact been disciplined for violations of that policy. Evidence that the employer had tolerated employee deviations of a similar type in the past is strong evidence that the deviation resulting in the tort was not "unusual or startling" and that the employer had already judged such deviations as one of the normal risks to be borne by business.<sup>137</sup>

Thus, the Roszkowski test focuses on the employee's—or generally, all employees'—past deviation from the company policy at issue, as well as how the employer responded to that deviation.<sup>138</sup>

Although the Roszkowski test differs from the Restatement's approach, "most of the factors articulated in Restatement sections 228 and 229 remain relevant."<sup>139</sup> For example, the fact that the tort was accomplished by an instrumentality not furnished by the employer<sup>140</sup> supplements other available evidence, such as the company's policy and past deviations therefrom.<sup>141</sup> More importantly, however, the presence or absence of the factors provides circumstantial evidence to help determine the ultimate issue of whether the employee's conduct, in hindsight, was "unusual or startling" to the employer.<sup>142</sup>

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134. *Id.*

135. Roszkowski & Roszkowski, *supra* note 78, at 255.

136. *Id.* at 255.

137. *Id.* (internal quotation mark omitted).

138. *Id.*

139. *Id.* See *supra* Part II.C.1 for a discussion of the factors articulated in sections 228 and 229 of the Restatement.

140. See RESTATEMENT (SECOND) OF AGENCY § 229(h) (1958) (identifying as a factor to be considered, "whether or not the instrumentality by which the harm is done has been furnished by the master to the servant"). See also *supra* Part II.C.1 for a more general discussion of the factors listed under section 229.

141. Roszkowski & Roszkowski, *supra* note 78, at 255.

142. *Id.* at 256.

*D. Lawsuits Involving Vicarious Liability for Injuries Caused by Employees Using Their Cell Phones While Driving*

The increase in cell phone driving over the past ten years consequently increased cell phone related litigation.<sup>143</sup> This litigation produced both high-priced settlements as well as tried lawsuits. The settlements and case law that have emerged over the past ten years illustrate the critical role that cell phones play in determining employer liability.

1. Settlements

As the use of cell phones continues to grow, so does the scope of employer liability.<sup>144</sup> Employees of major law firms and corporations cause accidents because they are distracted by work-related conversations on their cell phones.<sup>145</sup> The doctrine of vicarious liability, however, leaves employees untouched financially. Instead, the plaintiff goes after the “deep pockets” of the employers, who can be held completely liable for those accidents involving an employee’s use of a cell phone while driving.<sup>146</sup> The employer’s insurance company typically covers any negligence claim, relieving the employer from being personally responsible for the settlement payment if the employer has enough insurance to cover that amount.<sup>147</sup> As a result, defendants’ insurance carriers normally decide to settle rather than risk an uncertain—and potentially bankrupting—outcome at trial.<sup>148</sup>

For instance, in 1999, a Smith Barney associate struck and killed a twenty-four-year-old man with his car, and claimed that, moments before the accident, he had dropped his cell phone and driven through a red light while trying to reach for it.<sup>149</sup> Because the associate was not discussing work-related matters on his cell phone, Smith

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143. See *supra* Part II.A.1 for a discussion of the increase in cell phone users over the first decade of the twenty-first century. See also *infra* Part II.D.1 for a discussion of the emergence of cell phone related litigation since 1999.

144. See *Miller v. Am. Greetings Corp.*, 74 Cal. Rptr. 3d 776, 785 (Ct. App. 2008) (noting that the doctrine of respondeat superior will have to evolve as more employees continue to use their cell phones while driving).

145. For example, an Arkansas lumber wholesaler, Dyke Industries, settled for \$16.2 million with a plaintiff who was severely injured by one of their salesmen who was driving to a sales appointment. Laura Parker, *Cellphone Suits Targeting Firms*, USA TODAY, Dec. 26, 2002, at A3. The salesman was allegedly talking on his cell phone seconds before the collision. *Id.* At an intersection, he collided with another vehicle being driven by a seventy-eight-year-old woman who died not long after the accident. *Id.* See also Leesfield & Sylvester, *supra* note 7, at 18 (discussing several other instances of collisions caused by employees while distracted by cell phones).

146. For example, in 2007, International Paper Company agreed to pay \$5.2 million to a woman whose arm was amputated as a result of being rear-ended by one of the company’s employees. Leesfield & Sylvester, *supra* note 7, at 18. The employee was reportedly using her company-provided cell phone at the time of the accident. *Id.* Additionally, the state of Hawaii agreed to pay \$1.5 million to a man who was struck while crossing the street by one of the state’s employees; the employee was talking on her cell phone while driving her car. Mark S. Filipini, *Reducing Employer Liability from Employee Cell Phone Use*, EMP. & LAB. DEP’T UPDATE (Preston Gates Ellis LLP, Seattle, WA), Winter 2002, at 1, 3.

147. Kalin, *supra* note 27, at 243.

148. See *id.*

149. Terry Carter, *Crash Course for Business: Companies Can Be Liable for Accidents from Job-Related Cell Phone Use*, 85 A.B.A. J. 40, 40 (1999).

Barney believed it could easily defeat the scope-of-employment claims at trial.<sup>150</sup> Nevertheless, it settled the case for \$500,000.<sup>151</sup>

Similarly, in 2004, an associate from a major law firm hit and killed a fifteen-year-old girl with her car.<sup>152</sup> The associate, who made as many as forty calls per day, was on her cell phone at the time of the accident.<sup>153</sup> Central to the plaintiff's argument was that the law firm not only expected and acquiesced to its employees' use of cell phones while driving, but directly benefited from the billable hours amassed during those calls.<sup>154</sup> The law firm argued that it should not be held liable for this particular accident because it occurred after business hours and the attorney was not discussing firm-related business on her cell phone at the time of the accident.<sup>155</sup> The firm ultimately settled the thirty million dollar lawsuit for an undisclosed amount.<sup>156</sup>

## 2. Case Law

While many cell phone cases settle, there are a significant number that have gone to trial. In one of the earliest cell phone related lawsuits, the court in *Johnson v. Rivera*<sup>157</sup> refused to impose liability upon a hospital for an accident caused by a nurse on her way home from work.<sup>158</sup> Moments before the accident, the nurse reached to the floor of her car to retrieve her employer-provided cell phone so she could call her daughter.<sup>159</sup> The court reasoned that the nurse was outside the scope of her employment because she did not respond to her cell phone *while working*, but rather while driving home from work.<sup>160</sup> Further, the court noted that unlike eating lunch, which is often considered within the scope of employment, "[r]eaching under the seat of a car for a phone to make a personal call . . . is not 'necessary to the life, comfort, or convenience of the employee while at work.'"<sup>161</sup>

In *Clo White Co. v. Lattimore*,<sup>162</sup> the court held that because the employee may have been on his cell phone and calling his employer's office at the time of the accident, a jury question remained as to the employer's potential liability for its

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150. *Id.*

151. *Id.* For the details of the settlement order, see *Roberts v. Smith Barney, Inc.*, No. CIV. A. 97-2727, 1999 WL 33236939 (E.D. Pa. Jan. 29, 1999).

152. Parker, *supra* note 145; *see also* Leesfield & Sylvester, *supra* note 7, at 18 (describing details of the accident).

153. Parker, *supra* note 145.

154. *See id.* ("The suit alleges that the firm is partly liable for the accident because [the associate's] job involved doing business—in lawyers' parlance, amassing 'billable hours'—by cellphone. Such calls, the suit says, were done 'with the expectation and acquiescence of [the law firm] and served as a direct benefit to . . . the law firm.'" (alterations in the original)).

155. *Id.*

156. *See id.*; Leesfield & Sylvester, *supra* note 7, at 18.

157. No. C1-98-1922, 1999 WL 343860 (Minn. Ct. App. June 1, 1999).

158. *Johnson*, 1999 WL 343860, at \*2.

159. *Id.*

160. *Id.*

161. *Id.* (quoting *Mensing v. Rochester Cheese Express, Inc.*, 423 N.W.2d 92, 95 (Minn. Ct. App. 1988)).

162. 590 S.E.2d 381 (Ga. Ct. App. 2003).

employee's conduct.<sup>163</sup> In *Clo White*, the employee lost control of his car on his way to work and struck the plaintiff's vehicle.<sup>164</sup> The accident occurred at approximately 7:00 a.m., and cell phone records indicated that the employee called his employer at the following three times that morning: 7:01 a.m., 7:02 a.m., and 7:03 a.m.<sup>165</sup> The employee could not remember whether he was on the phone at the time of the accident, but admitted to making at least one call to his office before the accident and one immediately after the accident.<sup>166</sup> The employee also admitted that he used his cell phone on prior instances to get in touch with his employer for work-related reasons while on his way to work.<sup>167</sup> The employer had the employee's cell phone number and could access him twenty-four hours a day on his company-provided pager.<sup>168</sup>

The court recognized that under normal circumstances it could not hold the employer liable for an accident that occurred while the employee was going to or coming from work.<sup>169</sup> Because the employee may have been on the phone conducting work-related business *at the time of the accident*, however, the court held that this "special circumstance" creates a jury issue as to whether the employee acted within the scope of his employment at the time of the accident.<sup>170</sup>

In *Ellender v. Neff Rental, Inc.*,<sup>171</sup> the court imposed vicarious liability upon an employer whose employee caused a severe automobile accident while talking on his cell phone.<sup>172</sup> Moments before the accident, the employee's coworkers called seeking pricing information.<sup>173</sup> The employee reached down to search for the document containing the information, causing him to divert his attention away from the road and collide with another automobile causing severe injuries to the driver.<sup>174</sup>

As a regional sales manager, the employee in *Ellender* received \$600 per month for the use of his personal vehicle in performing his job duties.<sup>175</sup> The employer also provided the employee with a cell phone, which the employee "regularly" used while driving in order to conduct business on behalf of the employer.<sup>176</sup> The employer never prohibited the employee from talking on his cell phone while driving and did not have any policies or procedures that forbade or discouraged employees from doing so.<sup>177</sup>

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163. *Clo White*, 590 S.E.2d at 382–83. *See also* O'Toole v. Carr, 815 A.2d 471, 473 (N.J. 2003) (per curiam) (refusing to impose vicarious liability, but reasoning that had there been some basis for concluding that the accident occurred while the attorney was engaged in a firm-related cell phone call he claimed to have made prior to the accident, then summary judgment may not have been appropriate).

164. *Clo White*, 590 S.E.2d at 382.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 383.

170. *Id.*

171. 965 So.2d 898 (La. Ct. App. 2007).

172. *Ellender*, 965 So.2d at 902.

173. *Id.* at 900.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

The court in *Ellender* reasoned that an employer's scope of employment increases with the amount of authority and freedom of action granted to the employee performing his assigned tasks.<sup>178</sup> The court noted that while the employer may not have expected or intended for its employees to talk on their cell phones while driving, it provided no factual information that such expectations or intentions were conveyed to its employees or enforced at all.<sup>179</sup> "Thus, although [the employer] may not have expressly authorized conducting business on a cell phone while driving, it certainly did not prohibit it."<sup>180</sup>

In *Miller v. American Greetings Corp.*,<sup>181</sup> the court affirmed summary judgment for the employer because no reasonable juror could conclude that the accident happened while the employee was talking on his cell phone with his employer.<sup>182</sup> Plaintiffs relied on a cell phone record to allege that the employee was on the phone with his employer during the accident.<sup>183</sup> The phone records, however, established the employee spoke to his employer more than eight minutes before the accident.<sup>184</sup> Thus, the court found the employee was not within scope of his employment.<sup>185</sup>

Although the court in *Miller* found the employer not liable, it provided insightful dictum regarding the link between respondeat superior and work-related cell phone calls while driving:

Sometimes the link between the job and the accident will be clear, as when an employee is on the phone for work at the moment of the accident. Oftentimes, the link will fall into a gray zone, as when an employee devotes some portion of his time and attention to work calls during the car trip so that the journey cannot be fairly called entirely personal. But sometimes, as here, the link is de minimis . . . .

. . . .

. . . Using one's car as a mobile office from which one places and receives work-related calls and conducts an employer's business is a relatively recent, and growing, business practice. As that practice spreads, the doctrine of respondeat superior must necessarily evolve if it is to continue to fulfill its purpose of ensuring businesses bear the costs of risks that may fairly be regarded as typical of or broadly incidental to their activities.<sup>186</sup>

Recently, in *Hoskins v. King*,<sup>187</sup> the court held the employee was not acting within the scope of her employment when she struck and killed a cyclist with her employer-provided car while talking on her employer-provided cell phone.<sup>188</sup> The employee was

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178. *Id.* at 902 (citing *Richard v. Hall*, 874 So.2d 131, 138 (La. 2004)).

179. *Id.*

180. *Id.*

181. 74 Cal. Rptr. 3d 776 (Ct. App. 2008).

182. *Miller*, 74 Cal. Rptr. 3d at 782–83.

183. *Id.* at 780.

184. *Id.*

185. *Id.* at 782.

186. *Id.* at 783, 785 (internal quotation marks omitted).

187. 676 F. Supp. 2d 441 (D.S.C. 2009).

188. *Hoskins*, 676 F. Supp. 2d at 444–46.

reportedly talking on her cell phone with her close friend right before the accident.<sup>189</sup> It was a Sunday, and the employee was driving home to North Carolina after leaving her parent's house in South Carolina, where she attended her own wedding reception.<sup>190</sup> Taking these facts in the light most favorable to the plaintiff, the court determined that none supported an inference that she acted within the scope of her employment that day.<sup>191</sup>

E. *Policy for Respondeat Superior*

Negligence is primarily premised upon the concept of fault.<sup>192</sup> Vicarious liability cannot be justified upon fault because the theory underlying *vicarious* liability is that the employer is not at fault; he is merely taking responsibility for his employee's conduct.<sup>193</sup> Instead, most courts justify imposing vicarious liability because it furthers certain policy goals.<sup>194</sup> Of these possible policy goals, there are two that appear to be most influential to courts' reasoning: (1) enterprise liability, and (2) deterrence.<sup>195</sup>

1. Enterprise Liability

Supporters of enterprise liability suggest that the employer's liability for his employees' conduct "extends to the risks inherent in or created by the enterprise."<sup>196</sup> Thus, even though neither party is at fault, it is more equitable to impose those costs fairly regarded as risks of conducting that business upon the employer, rather than a plaintiff who has no financial connection to the enterprise.<sup>197</sup> Put simply, a "business

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189. *Id.* at 444–45 (there was speculation that she may also have been attending to her dogs in the front seat or adjusting the radio).

190. *Id.* at 445–46.

191. *Id.* at 446.

192. Ingram, *supra* note 75, at 72.

193. See VANDALL ET AL., *supra* note 89, at 1041 (explaining the general concept of vicarious liability).

194. See *Hinman v. Westinghouse Elec. Co.*, 471 P.2d 988, 990 (Cal. 1970) (explaining that "the modern justification for vicarious liability is a rule of policy" (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 471 (3d ed. 1964))).

195. See Roszkowski & Roszkowski, *supra* note 78, at 240 (noting that the "two important policies [that] support respondeat superior liability" are enterprise liability and "providing employers with a strong incentive to exercise reasonable care" in order to prevent injuries caused by employees).

196. *Hinman*, 471 P.2d at 990.

197. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 499, 500–01 (5th. ed. 1984). Keeton explains the policy behind cost allocation as follows:

[The enterprise theory] is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise, which will on the basis of all past experience involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.

*Id.*

enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.”<sup>198</sup>

Critics of the enterprise liability rationale suggest that an activity is not really “characteristic” of a business unless it is the major cause of the injury in a significant number of cases.<sup>199</sup> For instance, property damage may be deemed a risk inherent to the activity of blasting.<sup>200</sup> “Yet this strong form of ‘characteristic’ does not really fit the facts of most vicarious liability cases. In many cases the harm caused by the defendant’s employee seems ad hoc or idiosyncratic rather than ‘characteristic.’”<sup>201</sup>

Beyond fairness, however, supporters of enterprise liability argue that from a strictly economic perspective, enterprises are more capable than individuals to spread their liability costs.<sup>202</sup> In fact, certain courts have found that “[t]he principal justification . . . of respondeat superior in any case is the fact that the employer may spread the risk through insurance and carry the cost thereof as part of his costs of doing business.”<sup>203</sup> Large enterprises may obtain liability insurance, reduce profits, increase prices, or reduce wages, enabling them to efficiently distribute costs among employees, consumers, enterprise competitors, and the public at large.<sup>204</sup> Even if the enterprise is not able to employ such methods of cost spreading, “[i]ncreased costs may be distributed among the shareholders, staff, and employees of the enterprise. This is accomplished through smaller dividend payments to shareholders and smaller wage increases for employees.”<sup>205</sup>

However, supporters of enterprise liability recognize that it is not always an appropriate justification for imposing vicarious liability. Enterprise liability typically would not be applicable “in situations in which the injury victim is better-positioned [than the enterprise] to either avoid the risk or decide that the risk is worth taking.”<sup>206</sup> The quintessential example of such an instance is a person who is suffering cancer as a result of smoking cigarettes.<sup>207</sup> While tobacco companies are “the superior risk-spreader of the injury costs associated with smoking,” the cancer victim is generally

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198. *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968).

199. Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1749–50 (1996).

200. *Id.* at 1750.

201. *Id.*

202. See KEETON ET AL., *supra* note 197, § 69, at 500–01 (noting that modern supporters of enterprise liability justify the deliberate allocation of risk to enterprises based on their position to absorb liability costs and distribute costs “through prices, rates or liability insurance, to the public . . . to society, [and] to the community at large”).

203. *Johnston v. Long*, 181 P.2d 645, 651 (Cal. 1947).

204. Mann, *supra* note 80, at 1501.

205. *Id.* (footnote omitted).

206. Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 MD. L. REV. 1190, 1206 (1996).

207. *Id.* at 1206–07 (discussing why enterprise liability does not apply to tobacco users in most situations). Other examples of when imposition of respondeat superior has been deemed inappropriate include courts not holding “knife manufacturers responsible for typical kitchen mishaps, bicycle manufacturers responsible for ordinary (but serious) riding injuries, or ladder manufacturers for routine accidental falls.” *Id.* at 1207–08.

held responsible for causing his illness.<sup>208</sup> In that scenario, “the superior risk-spreading capacity of the manufacturer is often trumped by the countervailing consideration that . . . product users have to take individual responsibility for risks that they can readily avoid.”<sup>209</sup>

## 2. Deterrence

Deterrence is the second theory often used to justify vicarious liability.<sup>210</sup> The deterrence theory operates under the assumption that employers are in the best position to prevent their employees from engaging in negligent behavior.<sup>211</sup> Therefore, as long as the cost of their employees’ negligent behavior outweighs the benefit that behavior generates, then vicarious liability provides employers with an incentive to take whatever precautions are necessary to prevent that behavior.<sup>212</sup>

For instance, suppose a large law firm would lose \$100,000 per month in billable hours if it prohibited its associates from continuing to use cell phones for work-related purposes while driving. A cell phone related lawsuit or settlement that imposes vicarious liability upon the employer is a foreseeable event, and can cost the employer millions of dollars.<sup>213</sup> In this scenario, the cost of a potential lawsuit clearly outweighs the benefit of having associates conduct work-related matters on their cell phones while driving. Theoretically, the law firm will adopt reasonable precautions to deter its associates from using a cell phone while driving for work-related purposes.<sup>214</sup> This hypothetical illustrates that imposing vicarious liability (which follows a strict liability standard) may sometimes be more effective than imposing direct liability (which follows a negligence standard) because it encourages employers to take precautions that will *actually* prevent accidents, as opposed to meeting whatever bare minimum guidelines are required to meet the applicable standard of care.

Some legal scholars, however, are more skeptical as to whether the risk of vicarious liability will actually deter employees from using cell phones while driving.<sup>215</sup> First, such critics argue that while “businesses consider the risk of [vicarious liability] lawsuits as a normal part of their budgeting process,” individuals do not.<sup>216</sup> In other words, because the employee is not held personally responsible for the financial

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208. *Id.* at 1206–07.

209. *Id.* at 1208.

210. Mann, *supra* note 80, at 1501.

211. *Id.* at 1501–02.

212. See, e.g., Horwitt, *supra* note 25, at 197 (discussing how the risk of expensive lawsuits may cause businesses to prohibit employee use of cell phones while driving).

213. See, e.g., Leesfield & Sylvester, *supra* note 7, at 18 (describing incident where an employer agreed to pay \$5.2 million in settlement to a plaintiff whose arm was amputated as a result of being rear-ended by one of the company’s employees reportedly using her company-provided cell phone at the time of accident).

214. See Roszkowski & Roszkowski, *supra* note 78, at 240 (noting that respondeat superior liability provides a strong incentive for employers to exercise reasonable care concerning their “selection, training[,] and supervision of employees” in order to prevent accidents).

215. See Horwitt, *supra* note 25, at 198 (arguing that “whether the threat of liability will persuade individual drivers to put down their phones is, at best, uncertain”).

216. *Id.* at 197.

consequences of his actions, he has no reason to change his behavior.<sup>217</sup> Thus, critics argue that while it is possible that “litigation will influence *corporate* behavior” the assumption that “the threat of liability will persuade *individual* drivers to put down their phones is, at best, uncertain.”<sup>218</sup>

The second reason why litigation may not deter individual drivers from using cell phones is the prevalence of automobile insurance.<sup>219</sup> When a plaintiff wins or settles a negligence lawsuit involving an auto accident, the defendant’s insurer is typically responsible for paying the damages—not the defendant himself.<sup>220</sup> Even if cell phone driving is considered “reckless” behavior, plaintiffs will normally agree to settle within the limits of the defendant’s insurance policy.<sup>221</sup> Thus, beyond the possible increase in their insurance rates, individual drivers are unlikely to bear the financial burden of a cell phone related lawsuit. “Moreover, there is no guarantee that drivers would associate the increase in rates with talking on a cell phone while driving, as opposed to the accident itself. For these reasons, it appears that the tort system may provide an inadequate deterrent effect on cell phone use behind the wheel.”<sup>222</sup>

#### F. Direct Liability of the Employer

Direct liability occurs when an employer is liable for his employee’s conduct not necessarily because the employee was negligent, but because of the employer’s *own* negligence.<sup>223</sup> Employers have “a duty to exercise reasonable care for the safety of the public whenever its employees are acting within the course and scope of their employment.”<sup>224</sup> If employers breach that duty, they may be held directly liable in addition to being held vicariously liable.<sup>225</sup>

For instance, a plaintiff may sue an employer directly under the theory of “negligent supervision” if the employer negligently or recklessly supervises the employee’s conduct that ultimately results in the plaintiff’s harm.<sup>226</sup> Under a similar

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217. *Id.*

218. *Id.* at 198 (emphasis added).

219. *Id.*

220. *Id.* at 199.

221. *Id.* Horwitt explains this situation as follows:

Even when defendants have committed reckless acts that are not covered by insurance, such as driving while intoxicated, plaintiffs’ attorneys will sue for both negligence and recklessness. Then, the plaintiff’s lawyer will make a demand to settle within the limits set by the insurance policy. Most defendants settle for the negligence portion of the suit (paid by the insurer) rather than risk an adverse verdict at trial on the grounds of recklessness (which would require the defendant to pay out-of-pocket).

*Id.* (footnotes omitted).

222. *Id.*

223. *See, e.g.,* James v. Kelly Trucking Co., 661 S.E.2d 329, 330 (S.C. 2008) (finding that “where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring, supervising, or training the employee”).

224. Leesfield & Sylvester, *supra* note 7, at 18.

225. VANDALL ET AL., *supra* note 89, at 1041.

226. 27 AM. JUR. 2D *Employment Relationship* § 397 (2011).

rationale, an employer may be sued directly for “negligent training” of its employees.<sup>227</sup> Employers may also be held liable under the theory of negligent entrustment if “the employer supplies an employee with a chattel knowing the employee to be likely, because of . . . inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to self and others.”<sup>228</sup>

In *Hoskins*, the court refused to recognize a claim of direct liability against an employer, even though the employer hired an employee who had two speeding tickets on her record, and also caused a car accident by using her cell phone while driving less than one year prior to applying for that job.<sup>229</sup> Shortly after being hired, the employee struck and killed a cyclist while driving and talking on the employer-provided cell phone.<sup>230</sup> The court acknowledged that an employer can be held liable under negligent supervision if the employer “knew or should have known facts about [the employee] that would suggest that entrusting [the employee] with a cell phone and automobile would pose an unreasonable risk of harm to the public.”<sup>231</sup> Nonetheless, the court held that the record did not “demonstrate a sufficient nexus between conduct that would put [the employer] on notice of a need to control [the employee] and the conduct that caused the harm suffered in [that] case.”<sup>232</sup>

In a case analogous to the employer-employee context, plaintiffs asserted in *Pertinen v. Swick*<sup>233</sup> that the parents negligently entrusted their daughter with both a cell phone and a car, which implicitly indicated their approval for her to use the cell phone while driving.<sup>234</sup> The plaintiffs alleged that the parents knew from a prior incident that their daughter was an inexperienced and reckless driver.<sup>235</sup> The parents denied that they knew their daughter was a reckless or incompetent driver, and claimed that they instructed her to use the cell phone only for emergencies, but never while driving.<sup>236</sup> The phone bill, however, indicated that the daughter used her cell phone for more than just emergencies, and that she used the phone several times in the minutes prior to the accident.<sup>237</sup> Regardless, the court held that without other evidence showing incompetence or recklessness, telephone records alone “do not . . . provide a basis from which a reasonable jury could conclude that the [parents] knowingly entrusted their car to an incompetent or unfit driver.”<sup>238</sup>

Recently, the court in *Buchanan ex rel. Buchanan v. Vowell*<sup>239</sup> found that a person may be liable for talking to the driver on the other end of the cell phone conversation

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227. *Id.* (“Negligent training of employees may trigger liability under a negligent-supervision theory, but the employer’s omission to train must be the proximate cause of the employee’s injuries.”).

228. *Id.*

229. *Hoskins v. King*, 676 F. Supp. 2d 441, 446–47 (D.S.C. 2009).

230. *Id.* at 444–45.

231. *Id.* at 446.

232. *Id.* at 447.

233. No. 00-C-2791, 2002 WL 1008462 (N.D. Ill. May 15, 2002).

234. *Pertinen*, 2002 WL 1008462, at \*1.

235. *Id.*

236. *Id.*

237. *Id.* at \*2.

238. *Id.* (emphasis added).

239. 926 N.E.2d 515 (Ind. Ct. App. 2010).

when the accident occurred, regardless of the absent person's actual involvement in the car accident.<sup>240</sup> In *Buchanan*, the defendant's friend knew that the defendant had consumed alcoholic beverages before driving home.<sup>241</sup> Rather than call a cab, the friend told the defendant that she would follow her home.<sup>242</sup> The friend then called the defendant once they were in their cars and talked to her throughout the trip home.<sup>243</sup> On the way home, however, the defendant struck the plaintiff, who was walking on the street, and severely injured him.<sup>244</sup>

The trial court dismissed the plaintiff's amended complaint for failure to state a claim.<sup>245</sup> In his complaint, the plaintiff alleged that the friend—in addition to the defendant—was negligent for making an “affirmative, conscious effort to call [the defendant], distracting her from maintaining a proper lookout.”<sup>246</sup> The appellate court found that as a driver on the road, the friend owed a duty of reasonable care to both pedestrians and other motorists.<sup>247</sup> The court therefore determined that she may have breached this duty when she called and distracted the defendant.<sup>248</sup> Because the friend may have been held liable for the plaintiff's injuries even though she was not involved in the actual accident, the court held that the trial court abused its discretion in dismissing the plaintiff's amended complaint for failure to state a claim.<sup>249</sup>

### III. DISCUSSION

Before cell phones, applying the doctrine of respondeat superior to determine the scope of employment was fairly straightforward: employees typically were considered outside the scope of employment whenever they drove to or from work, to or from lunch, or for any purpose not related to traditional business activities. Thus, courts could not impose vicarious liability upon employers for injuries caused by their employees during those time periods.<sup>250</sup> Cell phone driving lawsuits, however, are testing and rapidly widening the traditional scope of employment for respondeat superior. Recent case law reveals that an employer may now be liable even if the employee is using his cell phone while driving outside his workplace or beyond his regular business hours.<sup>251</sup>

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240. *Buchanan*, 926 N.E.2d at 521–22. See also Jon Vegosen & Damon E. Dunn, *Employer Liability for Texting While Driving*, 4 BLOOMBERG L. REP.—LAB. & EMP., no. 13 (2010), available at [http://www.fvldlaw.com/C014EC/assets/files/News/2010\\_Emp\\_liab\\_for\\_text\\_driving.pdf](http://www.fvldlaw.com/C014EC/assets/files/News/2010_Emp_liab_for_text_driving.pdf) (recognizing possible employer liability resulting from a situation where one employee texts another employee knowing the other employee is likely driving).

241. *Buchanan*, 926 N.E.2d at 517.

242. *Id.*

243. *Id.* at 517–18.

244. *Id.* at 517.

245. *Id.* at 518.

246. *Id.*

247. *Id.* at 522.

248. *Id.*

249. *Id.*

250. See *Leesfield & Sylvester*, *supra* note 7, at 18.

251. See *supra* Part II.D.2 for a detailed discussion of recent cell phone related law suits involving respondeat superior.

In some cell phone actions alleging respondeat superior, the issue of scope of employment will be clear and undisputed. For instance, where clear and convincing evidence shows that the employee-driver discussed a work-related matter on his cell phone at the moment of the accident, the employee-driver will almost certainly be considered within the scope of his employment.<sup>252</sup> Oftentimes, however, the link between work and the accident will fall into a “gray zone.”<sup>253</sup>

This gray zone may appear for two separate reasons. The first reason is evidentiary, and occurs when the scope of employment is unclear—as when parties dispute certain evidentiary matters such as who the employee was talking to on the phone, what content they were discussing, and how close in time that discussion was to the time of the accident.<sup>254</sup> The second reason is substantive, and occurs if—even when no factual dispute exists—the issue of whether the employee was within the scope of his employment when talking on his cell phone is unclear. This may occur when the “employee devotes some portion of his time and attention to work calls during the car trip so that the journey cannot be fairly called entirely personal.”<sup>255</sup>

The geographical and temporal flexibility of cell phone driving presents courts with the novel challenge of determining when that link between work and the accident becomes strong enough to fairly find the employer liable for his employees’ conduct. Despite the modern challenges that cell phones present, courts continue to apply traditional principles of employer liability to cell phone related cases, thus forcing a square peg into a round hole. To resolve this dilemma, this Comment proposes three modern guidelines that courts should follow when deciding cell phone driving cases involving employer liability. These guidelines alleviate many of the evidentiary and substantive obstacles that cell phone related cases currently present, allowing courts to decide these cases in a more efficient and equitable fashion than under traditional principles of employer liability. These three modern guidelines are:

1. Under particular circumstances, a rebuttable presumption arises that the employee was acting within the scope of his employment at the time of the accident.
2. States should reject the *Restatement (Second) of Agency* principles, and instead adopt California’s enterprise theory of liability. To apply the enterprise theory, courts should use the Roszkowski test, which requires answering only one question to determine scope of liability: In hindsight, would the employee, *in fact*, have been reprimanded or discharged for conducting work-related matter on his cell phone while driving if the employer had learned of it and no tort had occurred?

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252. See, e.g., *Ellender v. Neff Rental, Inc.*, 965 So. 2d 898, 902 (La. Ct. App. 2007) (affirming partial summary judgment against an employer who did not convey to its employees or enforce an expectation that employees are not to talk on cell phones while driving).

253. See *Miller v. Am. Greetings Corp.*, 74 Cal. Rptr. 3d 776, 783 (Ct. App. 2008) (discussing the concept of the “gray zone” as applied to employees using cell phones while driving).

254. See *supra* Part II.D.2 for an explanation of the numerous lawsuits that have emerged involving cell phone driving and employer liability over the past ten years.

255. *Miller*, 74 Cal. Rptr. 3d at 783.

3. Courts should balance the five factors<sup>256</sup> suggested by this Comment to determine whether an employer has breached a duty to exercise reasonable care for the safety of the public, and may thus be held directly liable for the injuries resulting from an employee who used his cell phone while driving.

A. *Creating a Rebuttable Presumption that the Employee Acted Within Scope of Employment*

The majority of jurisdictions place the burden of proof on the plaintiff to prove that the employee acted within the scope of his employment at the time of an accident. In some jurisdictions, however, evidence that the employee was operating his employer's vehicle during the accident creates a rebuttable presumption that the employee was acting within the scope of his employment.<sup>257</sup> This Section first explains why placing the burden to prove the scope of employment on the plaintiff is inadequate in cell phone related cases, and then discusses why the minority rule is appropriate in such cases.

1. *Placing the Burden to Prove Scope of Employment on Plaintiff is Inadequate in Cell Phone Related Cases*

Before the advent of cell phones, placing the burden of proving scope of employment upon the plaintiff seldom presented major problems.<sup>258</sup> Proving that the driver was traveling outside normal working hours, or running a personal errand, typically does not require access to difficult-to-obtain employer documents. In a cell phone related case, however, the plaintiff will likely prevail only if he proves that the employee used the cell phone for work-related purposes at or near the time of the accident.<sup>259</sup> To prove this by a preponderance of the evidence, plaintiffs must access numerous employer documents, including:

- Cell phone numbers and provider names for every cell phone in the possession, custody, or control of the driver on the date of the accident.
- Phone records from the cell phone provider, including records of all incoming and outgoing calls, texts, and e-mails. . . .
- The employer's billing records for the employee's cell phone use.
- The identity of the person who paid for the cell phone and the cell phone plan. . . .
- Names of the recipients of all calls, e-mails, and text messages that were transmitted around the time of the incident. [Plaintiffs will

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256. See *infra* Part III.C for an explanation of the five factors proposed by this Comment.

257. See *supra* notes 82–85 and accompanying text for a discussion of the burden of proof in respondeat superior cases.

258. See *Leesfield & Sylvester*, *supra* note 7, at 18 (noting that before cell phones, it was typically clear when the court would hold an employer liable under respondeat superior).

259. See *id.* (“A claim against an employer will succeed only if you can prove that the driver was on the cell phone when the accident occurred, that the driver was using the cell phone for work-related purposes, and that the use of the cell phone caused or contributed to the accident.”).

have to c]ontact those people to ask if the calls were business-related.

- Information from company employees about whether their coworkers typically conduct business on their cell phones while driving.
- Any policies related to employee use of cell phones, in particular while driving. Discovery should include finding out when and how employees are instructed or trained on the policy.
- The identity of any witnesses, passengers, bystanders, or coworkers whose testimony might be helpful.<sup>260</sup>

Many of the documents listed above are necessary to solve factual disputes to determine whether the employee was or was not within the scope of his employment at the time of the accident.<sup>261</sup> These documents, however, may be difficult for plaintiffs to acquire through traditional discovery channels, such as interrogatories or depositions, because the documents will generally be in the form of electronic evidence, such as emails, monthly cell phone bills, and text messages.<sup>262</sup> Although the responding party generally bears the burden for discovery costs,<sup>263</sup> many courts remove this burden when electronic evidence is involved.<sup>264</sup> Consequently, innocent plaintiffs—typically who cannot match large corporations in available discovery funds<sup>265</sup>—are not able to acquire information essential to proving their case, even though employers have unhindered, immediate access to such documents.<sup>266</sup>

## 2. Placing the Burden to Prove Scope of Employment on the Employer is Appropriate in Certain Cell Phone Related Cases

As illustrated above, if plaintiffs retain the burden of persuasion, employers will nearly always prevail, leaving companies with little financial incentive to deter employees from using cell phones while driving. To help resolve the evidentiary imbalance between plaintiffs and employers, courts should apply the minority rule,

260. *Id.* at 18–19.

261. *See id.* (noting that plaintiffs will need to obtain many of these aforementioned documents in order to prevail against an employer).

262. *See id.* at 18 (noting cell phone providers hold the electronic documents required to prove that an employee was within the scope of employment while cell phone driving for a short time, and lawyers should issue subpoenas immediately to retrieve this evidence).

263. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (stating that “the presumption is that the responding party must bear the expense of complying with discovery requests, but he may invoke the . . . court’s discretion . . . to grant orders protecting him from ‘undue burden or expense’”).

264. *See, e.g., Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, No. Civ. A. 99-3564, 2002 WL 246439, at \*3 (E.D. La. Feb. 19, 2002) (suggesting that removing the burden of discovery cost may be appropriate whenever “a party . . . contends that the burden or expense of the discovery outweighs the benefit of the discovery”).

265. *See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 317 (S.D.N.Y. 2003) (“Courts must remember that cost-shifting may effectively end discovery, especially when private parties are engaged in litigation with large corporations.”).

266. *See Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 423 (S.D.N.Y. 2002) (“Too often, discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter. . . . [D]iscovery expenses frequently escalate when information is stored in electronic form.”).

which holds that proof that the employee was operating his employer's vehicle during the accident creates a rebuttable presumption that the employee was acting within the scope of his employment.<sup>267</sup> This Comment argues that in cell phone related cases, courts should recognize circumstances analogous to vehicle ownership that would similarly raise a rebuttable presumption that the employee was within the scope of his employment. Examples of such circumstances include: proof that the employee was using an employer-provided cell phone at the time of the accident;<sup>268</sup> proof that the employer compensated the employee for his cell phone plan;<sup>269</sup> or proof that the accident occurred during a time when the employer generally expects his employees to be available by cell phone or email.<sup>270</sup>

Supporters of the majority rule may argue that applying the minority rule creates an unfair advantage for plaintiffs, and would open the floodgates to "deep pockets" litigation. Plaintiffs, however, still bear the initial burden to present a threshold of circumstantial evidence to create a rebuttable presumption. Even after that presumption is established, employers may rebut the presumption by providing direct and uncontradicted evidence that shows the employee was not within the scope of his employment at the time of the accident.<sup>271</sup> Where doubt remains as to whether the employee was within the scope of his employment, however, that doubt should be resolved against the employer.<sup>272</sup>

For instance, in *Johnson v. Rivera*,<sup>273</sup> the nurse was talking on a cell phone provided by her employer at the time of the accident.<sup>274</sup> If the courts had followed the minority rule, the nurse would presumptively have been within the scope of her employment at the time of the accident on account of her use of an employer-provided cell phone at the time of the accident. Nonetheless, the hospital could rebut this presumption merely by showing that the phone records reflected that she was talking to her daughter at the time of the accident, and thus not acting within the scope of her employment. If doubt remained as to whether talking to her daughter on an employer-

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267. See *supra* notes 84–85 and accompanying text for a discussion of the minority rule concerning rebuttable presumptions in respondeat superior cases.

268. *Cf. Gordy Const. Co. v. Stewart*, 456 S.E.2d 245, 246 (Ga. Ct. App. 1995) (finding that when an employee is operating his employer's vehicle, a presumption arises that he is acting within the scope of employment).

269. *Cf. O'Brien v. Traders & Gen. Ins. Co.*, 136 So. 2d 852, 864–65 (La. Ct. App. 1961) (finding that there is no better evidence to prove that an employee is within the scope of employment than the fact that an employer is compensating him for his driving costs).

270. *Cf. Ellender v. Neff Rental, Inc.*, 965 So. 2d 898, 902 (La. Ct. App. 2007) (holding employer liable for an employee's cell phone related automobile accident because the employer provided the employee's cell phone and the employee regularly conducted business for the employer on the cell phone while driving).

271. *E.g., Gordy Const. Co.*, 456 S.E.2d at 246.

272. *E.g., Berkeley-Dorchester Cntys. Econ. Dev. Corp. v. U.S. Dep't of Health & Human Servs.*, 395 F. Supp. 2d 317, 323 (D.S.C. 2005).

273. No. C1-98-1922, 1999 WL 343860 (Minn. Ct. App. June 1, 1999). See *supra* notes 157–61 and accompanying text for a detailed discussion of *Johnson*.

274. *Johnson*, 1999 WL 343860, at \*1.

provided cell phone was within the scope of her employment, that doubt would have been resolved against her employer.<sup>275</sup>

Moreover, the employee is only presumed to be within the scope of his employment; he is not presumed negligent. The plaintiff still bears the ultimate burden of proving that the employee negligently caused the car accident by using his cell phone while driving. Studies and statistics revealing the dangerous link between car accidents and cell phone driving may support proof of causation. Despite the danger, many states still do not prohibit cell phone driving,<sup>276</sup> making it more difficult for plaintiffs to prove breach of duty.<sup>277</sup> Moreover, many courts remain skeptical of the causal link between cell phone driving and car accidents.<sup>278</sup> Judicial skepticism only grows when plaintiffs are unable to offer critical documents—such as cell phone bills and call logs—to help prove the causal link between the driver’s cell phone use and the car accident.

*B. Applying California’s Enterprise Theory Instead of the Restatement Principles is Appropriate in Cell Phone Related Cases*

As stated earlier, most jurisdictions rely on section 228(1) of the *Restatement (Second) of Agency* to define scope of employment.<sup>279</sup> Under the Restatement, an employee’s conduct of talking on his cell phone while driving falls within the scope of his employment if, but only if: “(a) it is [the type of conduct] he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the [employer].”<sup>280</sup>

In contrast, California applies the enterprise theory of liability to define scope of employment. Under the enterprise theory, an employee’s conduct of talking on his cell phone while driving would be considered within the scope of employment as long as doing so is not “so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer’s business.”<sup>281</sup>

To help determine whether the employer would actually find cell phone driving “unusual or startling,” the Roszkowski test suggests that courts simply ask one question: In hindsight, would the employee, *in fact*, have been reprimanded or

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275. See *Berkeley-Dorchester*, 395 F. Supp. 2d at 323 (noting that where there is doubt as to whether an employee was within the scope of employment, that doubt is resolved against the employer).

276. Only nine states—California, Connecticut, Delaware, Maryland, New Jersey, New York, Nevada, Oregon, and Washington—prohibit all drivers from using hand-held cell phones while driving; no state prohibits hands-free cell phone driving. *Cell Phone and Texting Laws*, *supra* note 40.

277. See *supra* notes 48–55 and accompanying text for a discussion of how a driver’s violation of a cell phone statute helps prove negligence in cell phone driving cases.

278. See, e.g., *McClelland v. Simon-Williamson Clinic, P.C.*, 933 So. 2d 367, 372 (Ala. Civ. App. 2005) (Murdock, J., concurring) (mentioning that a driver should not be found negligent “merely because sometime during that trip the [driver] receives a cellular telephone call”).

279. See *Roszkowski & Roszkowski*, *supra* note 78, at 236 (noting that “most states” derive the test for respondeat superior liability from the *Restatement (Second) of Agency*).

280. RESTATEMENT (SECOND) OF AGENCY § 228(1) (1958).

281. *Henderson v. Adia Servs., Inc.*, 227 Cal. Rptr. 745, 749–50 (Ct. App. 1986).

discharged for cell phone driving if the employer had learned of it and no accident had occurred?<sup>282</sup>

The advent of cell phones challenges the application of traditional principles of respondeat superior. Cell phones allow employees to conduct business-related activity while driving in their own cars, outside regular business hours, and far beyond the location of their workplace. As such, many of the traditional standards and exceptions under the Restatement are difficult to apply to cell phone related cases. However, using the Roszkowski test to apply the enterprise theory in cell phone related cases enables courts to achieve three important policies of general tort law and respondeat superior more effectively than the Restatement: efficiency, enterprise liability, and deterrence.<sup>283</sup> Each of these policies is addressed in turn.

### 1. Efficiency

As high-profile cell phone driving verdicts and settlements over the past decade gain attention, it is logical to predict that most companies will adopt—if they have not already adopted—a policy prohibiting employees from cell phone use while driving for work-related purposes. Defense lawyers for employers will then argue that liability should not attach to their clients because the activity was “unauthorized” conduct. Section 229 of the Restatement provides a non-exhaustive list of ten different factors for courts to consider whether certain conduct, although unauthorized, should nonetheless be considered within the scope of employment.<sup>284</sup> No single factor, however, is determinative.<sup>285</sup> Its application often turns on “each court’s ad hoc judgment regarding the weight assigned [to] each factor.”<sup>286</sup> Given the already difficult “gray zone” issue that cell phones present to respondeat superior, treading through the muddy waters of an ad hoc analysis is inefficient and unnecessary.

The enterprise theory provides a clear and straightforward test for courts to apply by determining whether, in hindsight, an employee’s conduct of using his cell phone for work-related purposes while driving was “unusual or startling” to his employer. To efficiently determine whether the conduct was “unusual or startling” to the employer, the Roszkowski test enables courts to focus on one question: Would the employee, *in fact*, have been reprimanded or discharged for cell phone driving if the employer had learned of it and no accident had occurred? Applying this test pinpoints the inquiry on the company’s anti-cell phone policies, deviation from that policy by the employee or other employees, and the employer’s response to such deviation.<sup>287</sup>

Under the Roszkowski test, the Restatement factors remain relevant; however, they serve a limited and direct purpose. The factors provide “circumstantial evidence on the determinative issue: Was the employee’s conduct, in hindsight, ‘unusual or

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282. See Roszkowski & Roszkowski, *supra* note 78, at 255.

283. See *supra* Part II.E for a discussion of the relevant policies of respondeat superior.

284. See *supra* note 92 and accompanying text for the several factors of section 229.

285. Roszkowski & Roszkowski, *supra* note 78, at 246–47.

286. *Id.* at 254.

287. See Roszkowski & Roszkowski, *supra* note 78, at 255 (noting how the test is easily applied in the context of litigation through company personnel testimony).

startling?”<sup>288</sup> For instance, evidence that employees commonly used cell phones while driving to conduct work-related activity,<sup>289</sup> that the employer furnished the employee’s cell phone,<sup>290</sup> that the accident occurred substantially within the location of the workplace or its hours of operation,<sup>291</sup> or that cell phone driving was not a substantial departure from the normal method of conducting work-related activity<sup>292</sup> lends support to the fact that, in hindsight, the employee’s conduct was not “unusual or startling” to the employer.

The efficiency of the Roszkowski test is best illustrated by examining *Clo White Co. v. Lattimore*.<sup>293</sup> In *Clo White*, the employee often used his cell phone while driving to contact his employer for work-related purposes.<sup>294</sup> Reciprocally, the employer had the employee’s cell phone number and could access him twenty-four hours a day.<sup>295</sup> Because a factual dispute existed as to whether the employee was conducting work-related business at the time of the accident, the court held that it was for the jury to determine whether the employee was within the scope of his employment.<sup>296</sup>

Under the Roszkowski test, however, such a dispute would not impede the judicial process, as it would be irrelevant whether the employee discussed work-related matter *at the time* of the accident. Rather, the court need only determine whether the employee would have *in fact* been reprimanded or discharged for talking on his cell phone while driving if the employer had learned of it and no accident had occurred.<sup>297</sup> In *Clo White*, the employer knew his employee talked on his cell phone while driving because the employer himself frequently talked to him on it.<sup>298</sup> Thus, not only was the employee not reprimanded, the employer implicitly encouraged him to use his cell phone while driving. Had the court simply applied the Roszkowski test, no issue would have remained as to whether the employee acted within the scope of his employment at the time of the accident.

## 2. Enterprise Liability

Under the Restatement, an employee typically is not within the scope of his employment if he is not within authorized time and space limits of his workplace when the accident occurs.<sup>299</sup> Courts generally interpret this to mean that employees are

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288. *Id.* at 256.

289. *Cf.* RESTATEMENT (SECOND) OF AGENCY § 229(2)(a) (1958) (considering “whether or not the act is one commonly done by such servants”).

290. *Cf. id.* § 229(2)(h) (considering “whether or not the instrumentality by which the harm is done has been furnished by the master to the servant”).

291. *Cf. id.* § 229(2)(b) (considering “the time, place and purpose of the act”).

292. *Cf. id.* § 229(2)(i) (considering “the extent of departure from the normal method of accomplishing an authorized result”).

293. 590 S.E.2d 381 (Ga. Ct. App. 2003).

294. *Clo White*, 590 S.E.2d at 382.

295. *Id.*

296. *Id.* at 383.

297. Roszkowski & Roszkowski, *supra* note 78, at 255.

298. *Clo White*, 590 S.E.2d at 382.

299. RESTATEMENT (SECOND) OF AGENCY § 228(1)(b) (1958).

outside the scope of employment when traveling to or from the workplace.<sup>300</sup> The premise is that the employee renders no service to the employer by traveling to or from the workplace. The use of cell phones, however, makes this bright line application much more difficult because employees can easily conduct work-related phone calls while driving to or from work and outside of normal business hours.

Restatement supporters may argue that current exceptions under the Restatement—such as the dual-purpose exception or special errand exception—already provide remedies to this problem. As seen in *McClelland v. Simon-Williamson Clinic, P.C.*,<sup>301</sup> however, courts are hesitant to extend these exceptions “merely because sometime during that trip the employee receives a [work-related] cellular telephone call.”<sup>302</sup> The problem with such a stringent bar is that it relieves employers from liability even though they receive a benefit by allowing—or at least not prohibiting—their employees to make and receive work-related phone calls while driving.

Application of the enterprise theory in cell phone cases, however, ensures that the employer’s liability for an employee’s conduct on the road “extends to the risks inherent in or created by the [employer’s] enterprise.”<sup>303</sup> An employer that values productivity over safety may regard employee use of cell phones while driving as a benefit that outweighs the risk. An employer can best assess that risk because it can spread liability costs through insurance and increased revenue. It is therefore fair to impose liability costs on that employer as the one ultimately benefitting from the conduct. The innocent plaintiff, however, has no connection to the employer’s enterprise and receives no benefit from an employee using his cell phone while driving. Therefore, it is more equitable to impose liability on the employer as a cost of doing business in exchange for the benefit the employer received by tolerating employee use of cell phones while driving for work-related purposes.

For example, in *Hoskins v. King*,<sup>304</sup> an employee struck and killed a cyclist while talking on her employer-provided cell phone and driving her employer-provided vehicle.<sup>305</sup> The court refused to impose vicarious liability because, at the time of the accident, the employee was not acting within the scope of her employment,<sup>306</sup> which would imply that the employer received no benefit from her dangerous activities. Under the enterprise theory, however, one can argue that the employer in *Hoskins* received an incidental benefit merely by providing the employee with a cell phone. If an employer pays for an employee’s cell phone and cell phone bill, then that employee

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300. See *Mannes v. Healey*, 703 A.2d 944, 946 (N.J. Super. Ct. App. Div. 1997) (“Most courts endorse the general rule that an employee driving his or her own vehicle to and from the employee’s workplace is not within the scope of employment for the purpose of imposing vicarious liability upon the employer for the negligence of the employee-driver.”).

301. 933 So. 2d 367 (Ala. Civ. App. 2005).

302. *McClelland*, 933 So. 2d at 372 (Murdock, J., concurring).

303. *Hinman v. Westinghouse Elec. Co.*, 471 P.2d 998, 990 (Cal. 1970).

304. 676 F. Supp. 2d 441 (D. S.C. 2009).

305. *Hoskins*, 676 F. Supp. 2d at 444–45. See also *supra* notes 187–91 and accompanying text for a discussion of the facts in *Hoskins*.

306. *Id.* at 446.

presumably will feel obligated to answer cell phone calls whenever his employer calls him.<sup>307</sup>

Moreover, if an employer allows for personal calls on the cell phone, it has given that employee implicit permission to use employer assets for personal reasons, and it should be responsible for that use. Applying this rationale to *Hoskins*, it would have been fair to impose liability costs on the employer because it received an incidental benefit from the employee's ability to use her cell phone for work-related purposes, even though she was engaged in a personal conversation at the time of the accident.<sup>308</sup>

### 3. Deterrence

Effective deterrence from employee use of cell phones while driving must be coupled with an incentive for the employer to actually enforce its cell phone policies. A rational employer will not enforce a policy if mere presence of the policy, without more, satisfies the applicable standard of care and exempts the employer from liability. For the same reasons, however, an employer may be just as likely *not* to enforce a policy if it is held liable regardless of its enforcement policy. Fortunately, the Roszkowski test solves this dilemma.

To solve the dilemma, courts must focus on the words "in fact" when applying the Roszkowski test.<sup>309</sup> For instance, evidence that the employer, *in fact*, disciplined its employees for violating the cell phone policy proves that an employee's use of a cell phone while driving to conduct work-related activities would be "unusual or startling" behavior within that enterprise. In that circumstance, liability should not be extended to the employer because it would be "unfair to include the loss resulting from it among other costs of the employer's business."<sup>310</sup>

Conversely, a cell phone policy is of little value if employees were not actually reprimanded or discharged for violating the policy.<sup>311</sup> If the employer tolerated its employees' use of their phones while driving, the employer cannot then argue that such conduct was "unusual or startling" merely because an accident resulted from that conduct.<sup>312</sup> Employees using their cell phones while driving would not be surprising to that employer; it would be expected—and thus, implicitly encouraged—behavior.

As illustrated, the Roszkowski test encourages employers to *actually* enforce their policies because it provides employers with an opportunity to avoid potential liability. Once employees realize that their coworkers are being disciplined for violating their company's anti-cell phone policy, they will presumably cease to use cell phones while

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307. See Noder, *supra* note 19, at 241 (discussing the importance employers place on the availability of their employees when they are outside the office).

308. *Hoskins*, 676 F. Supp. 2d at 445–46.

309. See Roszkowski & Roszkowski, *supra* note 78, at 255 (encouraging courts to focus on whether the employee would have "in fact" been disciplined for the conduct).

310. *Henderson v. Adia Servs., Inc.*, 227 Cal. Rptr. 745, 749–50 (Ct. App. 1986).

311. See Roszkowski & Roszkowski, *supra* note 78, at 255 (reasoning that "evidence of a general employer policy against the conduct is of little value in the absence of additional evidence that employees had in fact been disciplined for violations of that policy").

312. See *id.* (quoting *Farmers Ins. Grp. v. Cnty. of Santa Clara*, 906 P. 2d 440, 448 (Cal. 1995)) (noting that evidence the employer tolerated similar employee deviations is evidence that deviation resulting in plaintiff's injury was not "unusual or startling").

driving for work-related purposes. The costs of losing their jobs or being reprimanded will outweigh the minimal benefits of their on-the-road productivity. They also will not feel that coworkers are receiving an unfair advantage since *none* are allowed to conduct business on their cell phones while driving.

Too many employers have been lax about instituting or enforcing bans on their employees' use of cell phones while driving, choosing productivity over safety—with results that have been deadly. Litigation can exert pressure on . . . companies to insist on stricter cell phone policies and make the roadways safer for everyone.<sup>313</sup>

For instance, if lawsuits involving employee cell phone liability had been a more serious threat to the employer in *Hoskins*, it would have likely taken further steps to deter its employees from using their employer-provided cell phones when driving for any purpose—work-related or non-work-related. By adopting the Roszkowski test to apply the enterprise theory, courts can effectively deter employees from using cell phones while driving and make our roads a safer place for the entire public.

### C. Suggested Factors to Determine Direct Liability

Employers have a duty to “exercise reasonable care for the safety of the public whenever its employees are acting within the course and scope of their employment.”<sup>314</sup> This duty includes ensuring the safe use of cell phones for work-related purposes.<sup>315</sup> If an employer breaches this duty, it may be held directly liable for any damages resulting from that breach.<sup>316</sup>

Because cell phone driving is a relatively new concern for employer liability, courts have yet to present any clear factors for how employers may avoid direct liability. Courts may be tempted simply to look at whether the employer has an existing cell phone policy as a defense to direct liability. While such a policy is one factor, it should not be controlling. This Comment suggests five factors for courts to balance in order to determine whether the employer breached its duty to ensure cell phone safety: (1) whether the employer encouraged or required employees to use cell phones for work-related purposes while driving,<sup>317</sup> (2) whether the employer implemented an adequate policy prohibiting or discouraging cell phone use while driving,<sup>318</sup> (3) whether the employer knew, or should have reasonably expected, that employees use their cell phones for work-related purposes while driving and did not attempt to stop

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313. Leesfield & Sylvester, *supra* note 7, at 20.

314. Leesfield & Sylvester, *supra* note 7, at 18.

315. See *Employers Guide to Cell Phone Liability*, *supra* note 41 (noting that in most states, employers have a duty to take appropriate steps to promote worker safety, which “includes [the] safe use of cell phones”).

316. See *VANDALL ET AL.*, *supra* note 89, at 1041 (stating that “if the employer was itself negligent, it may be sued directly for its failure to meet the applicable standard of care”).

317. See Leesfield & Sylvester, *supra* note 7, at 18 (noting that a direct negligence claim against the employer would be appropriate where “[t]he employer encouraged or expected the employee to use a cell phone for work-related purposes while driving”).

318. See *id.* (noting that a direct negligence claim against an employer would be appropriate where “[t]he employer failed to adopt and implement policies banning the use of cell phones and mobile devices for work-related purposes while driving”).

the conduct,<sup>319</sup> (4) whether the employer failed to adequately inform or warn employees about the risks of using cell phones while driving,<sup>320</sup> and (5) whether the employer hired or entrusted an employee whose driving records should have indicated a likelihood of negligence.<sup>321</sup> This Section discusses the import of each factor in turn.

1. Whether the Employer Encouraged or Required Employees to Use Cell Phones for Work-Related Purposes While Driving

The court should first consider whether the employer encouraged or required employees to use cell phones for work-related purposes while driving. The dangers of using a cell phone while driving are severe, and proof of those dangers is widely available to the public at this point. In fact, recent studies show that cell phone driving is as dangerous as drunk driving.<sup>322</sup> Imagine a court's reaction if faced with a case involving an employer—perhaps an alcoholic beverage company that employs traveling salesmen—that openly encouraged or required its employees to drive over the legal limit while working. Given the empirical data that a cell phone driver is as impaired as a drunk driver, proof that an employer encouraged employees to use cell phones while driving should be looked upon by courts no differently than proof that an employer encouraged its employees to drive over the legal alcohol limit.

Evidence that an employer encourages or requires its employees to put themselves and others in such danger undoubtedly breaches that employer's duty to the public to ensure the safe use of cell phones for work-related purposes. Consequently, proof of this factor alone should be considered dispositive evidence of breach of duty. Consideration of other factors would be unnecessary.

2. Whether the Employer Implemented an Adequate Policy Prohibiting or Discouraging Cell Phone Use While Driving

Given the high price tag of recent settlements involving cell phone driving and employer liability, it is unlikely that employers outwardly encourage or require employees to use cell phones while driving. To the contrary, most employers probably have implemented—and if not, should implement—a policy prohibiting employees

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319. See *id.* (noting that a direct negligence claim against an employer would be appropriate where the “employer knew, or should have known, that employees were using their cell phones while driving for work-related purposes and failed to act affirmatively to stop the conduct”).

320. See *Employers Guide to Cell Phone Liability*, *supra* note 41 (“Plaintiffs often claim that an employer is directly negligent for its own conduct in encouraging or permitting employees to use cell phones for business without adequate training or consideration of safety issues.”); *cf.* *Giant Food, Inc. v. Mitchell*, 640 A.2d 1134, 1142 (Md. 1994) (noting that inadequate training of employees may cause an employer to be directly negligent because of negligent supervision).

321. See *Hoskins v. King*, 676 F. Supp. 2d 441, 446 (D.S.C. 2009) (acknowledging that an employer can be held directly liable if the employer “knew or should have known facts about [the employee] that would suggest that entrusting [the employee] with a cell phone and automobile would pose an unreasonable risk of harm to the public”).

322. See *supra* notes 35–36 and accompanying text for a discussion of how using a cell phone delays a driver's reaction time as much as driving with a blood alcohol concentration at the legal limit of 0.08%.

from using cell phones while driving for work-related purposes.<sup>323</sup> Nonetheless, many employers do not strictly enforce these bans; they turn a blind eye to cell phone driving within their enterprise, sacrificing public safety for private productivity.<sup>324</sup>

To determine whether an employer's policy is adequate, courts should consider both its dissemination and effectiveness.<sup>325</sup> Courts should first focus on whether the employer disseminated the policy to its employees. Proof that the employer created a policy, but failed to disseminate it throughout the company, is evidence that the employer did not exercise reasonable care to prevent employees from using their cell phones while driving for work-related purposes.<sup>326</sup> Evidence of such behavior should weigh heavily against the employer meeting its duty to ensure the safe use of cell phones for work-related purposes.

However, the mere fact that the employer adequately disseminated its policy to its employees is not sufficient to exempt the employer from negligence; the disseminated policy must also be *effective*.<sup>327</sup> To be deemed effective, courts should consider whether the policy contains some, if not all, of the following provisions within it.<sup>328</sup> First, and most importantly, the policy should prohibit all employees from using cell phones for work-related purposes while operating any motor vehicle.<sup>329</sup> Using a "hands-free" cell phone while driving should also be prohibited, or at least discouraged as a safe alternative.<sup>330</sup> Every employee should sign a written acknowledgement of the cell phone policy.<sup>331</sup> Moreover, any employee whose vehicle, cell phone, or cell phone bill is paid for by the employer should certify that they will not use the phone in any

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323. See Press Release, Nat'l Safety Council, Number of Companies Implementing Cell Phone Bans Grows (Oct. 23, 2009), <http://www.nsc.org/Pages/NumberofCompaniesImplementingCellPhoneBansGrows.aspx> (survey revealing that fifty-eight percent of participating companies had a cell phone policy of some kind).

324. See Leesfield & Sylvester, *supra* note 7 ("Too many employers have been lax about instituting and enforcing bans on their employees' use of cell phones while driving, choosing productivity over safety—with results that have been deadly. Litigation can exert pressure on these companies to insist on stricter cell phone policies and make the roadways safer for everyone.").

325. *Cf. Faragher v. City of Boca Raton*, 524 U.S. 775, 807–09 (1998) (finding that, in addition to merely adopting an anti-sexual harassment policy, employers must also disseminate that policy).

326. *Cf. id.* (noting that, by failing to disseminate its anti-sexual harassment policy, an employer had not exercised reasonable care to prevent harassing conduct as a matter of law).

327. *Cf. Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1260 (11th Cir. 2003) (holding that mere dissemination of a sexual harassment policy does not preclude employer liability where that policy is ineffective).

328. See *Employers Guide to Cell Phone Liability*, *supra* note 41 (providing similar considerations and examples of elements of existing phone policies).

329. See *id.* (noting that "extremely cautious" companies strictly prohibit all cell phone driving for work-related purposes). Some policies may require employees to pull off to the side of the road before making or receiving a call. *Id.* However, this requirement may have liability implications of its own. *Id.* For instance, an employer requiring an employee to pull off to the side of the road before using a cell phone may be liable because of how or where the employee pulled off. *Id.* A plaintiff may thus assert that the employer should not have required its employee to pull off to the side of the road. *Id.*

330. See *supra* notes 37–41 and accompanying text for a discussion of recent studies revealing that "hands-free" cell phone use is no less dangerous than using a regular cell phone while driving.

331. See Michael, *supra* note 5, at 307 (suggesting that employers require employees to sign a statement indicating their acknowledgment of the policy).

way that violates the company's cell phone policy.<sup>332</sup> To ensure compliance, employers should notify their employees that any violation of the policy will result in strict disciplinary action, including possible discharge.<sup>333</sup> While this list of suggested provisions is not exhaustive, it provides a fundamental checklist for courts to consider when determining the effectiveness of a company's cell phone policy.

Obviously, if no cell phone policy even exists, this factor should weigh very heavily in favor of finding that the employer breached its duty of care. For instance, in *Ellender v. Neff Rental*,<sup>334</sup> the employer provided the employee with a cell phone, which the employee "regularly" used while driving in order to conduct business on behalf of the employer.<sup>335</sup> The employer never prohibited the employee from talking on his cell phone while driving and did not have any policies or procedures which forbade or discouraged employees from doing so.<sup>336</sup> The court noted that while the employer may not have expected or intended for its employees to use their cell phones while driving, it failed to provide any evidence that those expectations or intentions were communicated to employees or enforced at all.<sup>337</sup> "Thus, although [the employer] may not have expressly authorized conducting business on a cell phone while driving, it certainly did not prohibit it."<sup>338</sup>

3. Whether the Employer Knew, or Should Have Reasonably Expected, that Employees Were Using Their Cell Phones While Driving and Did Not Attempt to Stop the Conduct

No matter how well drafted, the effectiveness of an employer's cell phone policy should be discredited if the employer knew, or should have reasonably expected, that its employees were using cell phones while driving, and the employer did nothing to stop it. To determine whether an employer should have reasonably expected that its employees conducted business on their cell phones while driving, the court should inquire into the culture of cell phone use at the workplace.<sup>339</sup> For instance, do employees commonly use their cell phones while driving, despite the policy?<sup>340</sup> Are employees reprimanded or punished for not answering their cell phones when called by their employer? Do employers expect employees to be available by cell phone at all

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332. See *Employers Guide to Cell Phone Liability*, *supra* note 41 (noting that "employers should maintain documentation, including written acknowledgments of their company policy, from employees when they are issued cell phones or related equipment").

333. See *id.* (noting that the policy should be strictly enforced).

334. 965 So. 2d 898 (La. App. Ct. 2007).

335. *Ellender*, 965 So. 2d at 900.

336. *Id.*

337. *Id.* at 902.

338. *Id.*

339. See *Leesfield & Sylvester*, *supra* note 7, at 19 (discussing that even if an employer has a cell phone policy, plaintiffs should "dig a little deeper to find out more" about employees' cell phone use within the company).

340. See *id.* (noting that if employees routinely engage in a policy-prohibited practice, the policy itself is not very effective).

times?<sup>341</sup> Affirmative answers to these questions indicate that the employer should have at least expected its employees to be using cell phones while driving, despite the existence of a policy prohibiting such behavior.<sup>342</sup>

Because this factor does not require subjective knowledge, it is irrelevant whether or not the employer actually knew its employees were using cell phones while driving. Thus, the “ostrich with its head in the sand” approach is not an adequate defense to this factor.<sup>343</sup> Depending on the company’s cell phone culture, a fact finder can infer whether the employer should have reasonably expected that its employees were using their cell phones while driving for work-related purposes. Evidence that the employer did nothing to stop cell phone use—which it should have reasonably expected was occurring—should not be dispositive of breach of duty, but should weigh heavily in that direction.

#### 4. Whether the Employer Failed to Adequately Inform or Warn Employees About the Risks of Using Cell Phones While Driving

Statistics reflecting the dangers of using a cell phone while driving are relatively recent.<sup>344</sup> Many employees may not yet be informed about these dangers. Logically, therefore, employers cannot meet their duty owed to the safety of the public if they do not warn and educate employees about the potential risks associated with cell phone driving.<sup>345</sup>

To educate employees on the danger of cell phone driving, the employer should require every employee to attend an extensive information session on the subject.<sup>346</sup> To be effective, the information session should be multifaceted, and include “the implementation of written policies and instructions, videos, feedback surveys, properly communicated disciplinary measures, and periodic refresher training.”<sup>347</sup> In addition to information sessions, every cell phone furnished by the employer to an employee for work-related purposes should contain a warning sticker that alerts the employee to the dangers of using a cell phone while driving.<sup>348</sup>

The amount of effort that employers implement to adequately inform and warn employees about the dangers of cell phone driving should directly impact the amount

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341. See, e.g., *Clo White Co. v. Lattimore*, 590 S.E.2d 381, 382 (Ga. Ct. App. 2003) (noting that employer had employee’s cell phone number and could access him twenty-four hours a day).

342. See *Leesfield & Sylvester*, *supra* note 7, at 19 (arguing that “[i]f the employer knew that its employees were engaging in [cell phone driving,] . . . and if the employer did nothing further to deter it, the defense should not stand”).

343. *Id.*

344. See *supra* Part II.A for a discussion of recent statistics that reveal an increase in cell phone related car accidents.

345. See *Leesfield & Sylvester*, *supra* note 7, at 18 (noting that “[a]n employer has a duty to exercise reasonable care for the safety of the public whenever its employees are acting within the course and scope of their employment”).

346. See *Employers Guide to Cell Phone Liability*, *supra* note 41 (noting that a training session on cell phone safety may help inform employees about the risks of cell phone driving).

347. Michael, *supra* note 5, at 306–07.

348. See *id.* at 306 (noting that “[s]ome company-owned cell phones carry a warning sticker that use of phones while driving is dangerous”).

of weight this factor has on determining breach of duty. For instance, a brief information session or a simple booklet supplying employees with information about the risks of cell phone driving is obviously better than nothing, but should not be dispositive for finding that the employer met his duty of care.<sup>349</sup> In addition to affecting the balancing scale, the employer's effort to inform and warn employees about cell phone driving should play a role when courts consider punitive damages.<sup>350</sup> Punitive damages typically are not limited to instances of egregious conduct.<sup>351</sup> Thus, courts may issue punitive damages if the employer was aware, or should have been aware, of the dangers of cell phone driving and failed to adequately educate or warn employees about that danger.<sup>352</sup>

5. Whether the Employer Negligently Hired or Entrusted an Employee Whose Driving Record Should Have Indicated a Likelihood of Negligence

Several states now prohibit cell phone driving at least on some level. Therefore, it will become easier for employers to determine if applicants were issued citations for using a cell phone while driving.<sup>353</sup> Obviously, record of such a violation for using a cell phone while driving should not alone cause an employer to refrain from hiring that applicant. The court should, however, consider whether the employer provided that employee with a cell phone or automobile for work-related purposes after they were hired.<sup>354</sup> If that employee causes an accident because he was using the employer-provided cell phone, the employer may be held directly liable under a theory of negligent entrustment because the employer "knew or should have known facts about [the employee] that would suggest that entrusting [the employee] with a cell phone . . . would pose an unreasonable risk of harm to the public."<sup>355</sup>

For instance, in *Hoskins*, the employer provided a cell phone to an employee even though she had two speeding tickets on her record when she applied for the job and was involved in a car accident less than a year before she applied for the job.<sup>356</sup> Soon after beginning her job with the employer, the employee struck and killed a cyclist while driving and talking on the employer-provided cell phone.<sup>357</sup> A rational-minded person

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349. See *Employers Guide to Cell Phone Liability*, *supra* note 41 (noting that a "brief training session or a simple booklet may be a good way to answer any questions asked by employees").

350. See Michael, *supra* note 5, at 307 (noting that "adequate training is needed because it is a logical extension of case law to sue employers for punitive damages").

351. See *id.* (citing *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536 (1999) (finding that an employer may be liable for punitive damages if the employer discriminates "in the face of a perceived risk that its actions will violate federal law").

352. See *id.* (noting that the *Kolstad* ruling "may allow courts to extend punitive damages to those instances where an employer was aware of the mandates of the law and simply did not provide adequate training or education to employees").

353. *Cell Phone and Texting Laws*, *supra* note 40 (listing which states issue primary and secondary violations for violating cell phone driving statute).

354. See, e.g., *Hoskins v. King*, 676 F. Supp. 2d 441, 446-47 (D.S.C. 2009) (noting that the employer provided the employee with a cell phone for work-related purposes, even though she was involved in a recent accident while talking on her cell phone).

355. *Id.* at 446.

356. *Id.*

357. *Id.* at 444-45.

may reasonably conclude that there could not be a clearer set of facts indicating that an employer should have known that entrusting an employee with a cell phone would create “an unreasonable risk of harm to the public.”<sup>358</sup> However, the *Hoskins* court refused to recognize a claim of liability because there was no “sufficient nexus between conduct that would put [the employer] on notice of a need to control [the employee] and the conduct that caused the harm suffered in this case.”<sup>359</sup> Unlike the majority in *Hoskins*, this Comment urges enlightened courts to find a “sufficient nexus” linking the employer to direct liability if faced with similar or analogous facts.

#### IV. CONCLUSION

Notwithstanding the danger, employees continue to conduct business on their cell phones while driving. As that practice increases, so does the potential for employer liability. The emergence of cell phone related cases involving respondeat superior has revealed the evidentiary problems plaintiffs now face in defining the scope of employment. Plaintiffs are forced to rely on documents that may be unreasonably burdensome or prohibitively expensive to acquire.<sup>360</sup> To alleviate this evidentiary inequity, this Comment encourages courts to reject the majority rule that places the burden of proof on the plaintiff. Instead, states should adopt the minority rule, which under particular circumstances presumes the employee was acting within the scope of his employment, and forces the employer to prove otherwise.

Moreover, cell phone related cases challenge the assumptions underlying the traditional doctrine of respondeat superior. Traditional principles of the Restatement—for example, inquiring into the “time” and “place” of the conduct—are inadequate tools when applied to cell phone related cases. They result in reasoning that is inefficient, unfair, and ineffective. Instead, courts should follow California’s enterprise theory of liability, and apply the Roszkowski test, which simply asks whether the employee, in fact, would have been reprimanded or discharged for cell phone driving if the employer learned of it and no tort had occurred. With the aid of hindsight reasoning, courts can define the scope of employment with more efficiency and equity, and promote deterrence.

Cell phones have also increased the likelihood that an employer will be held directly liable.<sup>361</sup> Because cell phone driving is a relatively new occurrence, courts have not presented any clear factors for how employers may avoid direct liability. To bridge this gap, this Comment urges the use of five separate factors, which will help employers meet their duty of care owed to the public.<sup>362</sup>

Judicial decisions have evolved in recognizing the dangers of drunk driving. So must the courts now become enlightened on their role in providing redress for cell

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358. *Id.* at 446.

359. *Id.* at 447.

360. See *supra* Part III.A for a discussion of the evidentiary problems plaintiffs now face in defining the scope of employment.

361. See *supra* Part III.C for a discussion of how cell phones have increased the likelihood that an employer will be held directly negligent.

362. See *supra* Part III.C for a discussion of the suggested guidelines employers should adopt to avoid direct liability.

phone driving negligence. In so doing, the judiciary will become an agent in deterring employees' use of cell phones while driving, and save countless numbers of lives in the process.