



Texters Beware - Cyber Messaging Liability Risk

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On August 27, 2013, the New Jersey Appellate Court held in *Kubert v. Best, et al.*, No. A-1128-12T4 (N.J. App. Ct.) that under certain circumstances the sender of a text message would be liable for damages if the sender had “special reason” to know the recipient was driving and would read the message. The Court affirmed dismissal of claims against the text sender on the facts of this case, but nonetheless declined to adopt the trial court’s reasoning that a remote texter never has a legal duty to avoid sending text messages to one who is driving. The decision may have broad implications not only for individuals, but also businesses and employers who use text, email and other electronic communications to communicate with employees, customers and others using handheld or portable devices.

The accident occurred in September 2009, when plaintiffs were riding their motorcycle in Morris County, New Jersey. The defendant, Kyle Best, was driving in the opposite direction and crossed the center line. The plaintiffs each suffered severe injuries and lost one of their legs as a result of the accident. Discovery showed that on the day of the accident, Best sent or received 180 text messages, including 62 with one friend, Shannon Colonna. The evidence indicated that the collision took place immediately after Best sent a text to Colonna, and several other texts between the two were exchanged minutes before. The content of the messages was not available from the service provider.

Colonna was added as a defendant to plaintiffs’ suit after discovery of the texts. She moved for summary judgment on grounds that she was not at the scene of the accident, had no legal duty to avoid sending a text to Best when he was driving, and did not know he was driving. The trial court granted summary judgment on grounds that Colonna had no legal duty to avoid sending a message to Best.

The appellate court affirmed summary judgment, but noted that there is a legal duty on the part of the sender of a text under limited circumstances. Examining the “foreseeability of risk” in the context of a remote texter, the Court stated that where “[t]he sender has knowingly engaged in distracting conduct ... it is not unfair also to hold the sender responsible for the distraction.” The Court further stated:

When the sender texts a person who is then driving, knowing that the [recipient is driving at the time and] will immediately view the text, the sender has disregarded the attendant and foreseeable risk of harm to the public. The risk is substantial, as evidenced by the dire consequences in this and similar cases where texting drivers have caused severe injuries or death.



Commentary

The case has potentially far-reaching implications for employers and insurers as well as individuals who communicate electronically on portable devices. Efforts will undoubtedly be made to give the ruling a wider potential reach than just social messages, and to have it apply to forms of communication other than texts. Plaintiffs' counsel will certainly assert and attempt to expand the scope of the ruling in New Jersey to other jurisdictions and seek expanded discovery on messaging history. Others will contend that the Court's holding was merely dicta that should not be overly persuasive. Insurers will need to be aware of the possibility that some of their insureds may face such liability and consider policy terms and conditions accordingly. Also unresolved is the issue of which jurisdiction's law will apply when the sender and recipient of the texts are in different venues.

Given that dismissal was affirmed in this case, an appeal to the New Jersey Supreme Court may not be likely. Also, in light of the high evidentiary standard set by the appellate court, the number of cases that fall within its scope may be few. But it is increasingly clear that as rapid communications technology becomes more advanced and inseparable from everyday activities, and access to stored data about those activities becomes more accessible, potential liability issues will continue to expand in complexity.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors:

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