Managing Liability for Videoconferencing While Driving

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The COVID-19 pandemic brought many changes to the manner in which businesses conduct their operations. While many of these changes were temporary, some appear likely to remain an ongoing part of the business world. One such area is the reliance on videoconferencing. But while this has become an essential business communication tool, it has also introduced the potential for additional company liability for employees utilizing videoconferencing while driving.

Recent statistics underscore this potential risk. In 2021, despite fewer vehicles on the road, traffic fatalities reached their highest levels since 2005. Cell phone usage undoubtedly played a major role in this problem, with one study indicating phone usage while driving rose by 38% during the pandemic. During this same time, the use of videoconferencing skyrocketed and continues to be utilized by businesses at increased rates. This increased smart phone reliance, in conjunction with an increase in virtual meetings, has created another source of potential recovery for personal injury plaintiffs against employers who are not adequately prepared.

Liability for employers related to employee videoconferencing accidents can come about in two forms—vicarious and direct liability. Claims of vicarious liability for an employee involved in an accident are commonplace. In these instances, the negligence of the employee-driver is imputed to the company, assuming they were acting within the course and scope of their employment.

What is less commonly seen however, are claims of direct liability against a company based upon an employer's independent negligence. Courts have held that a corporation may owe duties of care directly to a plaintiff, separate from those of its individual agents, such as duties to maintain safe operating procedures that affect the public. Additionally, the Pennsylvania Superior Court has recognized that "an employer [has] the duty to exercise reasonable care in… controlling employees." According to legal theory published by the American Legal Institute in the Restatement (Second) of Agency § 213 (1958):

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
...
(b) in the employment of improper person or instrumentality in work involving risk of harm to others; (c) in the supervision of the activity; (d) or in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, ... with instrumentalities under his control.

Applying the above analysis in the videoconferencing while driving context, an em-

ployer could be held directly liable for such conduct. This type of direct negligence theory would require a showing that an employer breached a duty of care owed to a plaintiff to protect them from a foreseeable risk. The analysis would center on whether the employer knew or should have known that the conduct of participating in a videoconference call created an unreasonable risk. It could hardly be argued that the risk of an accident is not foreseeable for an employee participating in a videoconference call, as the dangers of distracted driving are well known. Simply put, if an employer allows—or even worse, encourages—videoconference participation while they know an employee is driving, the employer can be held directly liable for negligence, in addition to damages related to the vicarious liability claim of a plaintiff. Further, depending on the nature of the videoconference and the company's policies, such activity could potentially open the door for claims of punitive damages against the company for reckless behavior.

While engagement in a videoconference while driving could unquestionably lead to direct company liability, it is unclear whether the same can be said for an employee simply participating in an audio-only call. In Pennsylvania, for example, the use of a cell phone alone is not sufficient to demonstrate negligence. However, this would depend on the nature of the conference call itself, as well as the level of employee involvement in the call. Videoconference calls routinely involve the use of documents, images and other potentially distracting features. If an employee is actively engaged in the videoconference call beyond simply listening, this could create the potential for direct liability.

Nonetheless, even assuming a company would ultimately be found not liable based upon an employee using the audio-only option on a call, this victory would come at the expense of significant legal fees related to its defense. If the claim is not dismissed at an early stage, as is often the case in such suits, any mitigating factors based upon the employee not actively being on video at the time of the accident would likely not occur until the summary judgment or trial stage. By this point, the company would have paid years of litigation costs for an avoidable issue.

While uncertainty exists related to the tenability of a direct claim against an employer, potential liability can be avoided or mitigated by companies having clear and unambiguous policies in place. These policies should clearly set forth in writing the company's expectations and prohibitions, and should plainly outline that employees are prohibited from videoconferencing while driving. The policies should further advise management to remove any videoconference participant who is participating while driving. These requirements should be routinely emphasized and communicated to employees. Doing so will serve to not only limit company liability, but more importantly, help promote community safety.

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