

## New statute - unlawful use of a cell phone while driving can be proof of recklessness in death by auto and assault by auto cases

08/14/12

A new law in New Jersey will make it easier for prosecutors to prove guilt in death by auto and assault by auto cases where the driver's use of a cell phone was involved. Under existing law, a person who operates a motor vehicle "recklessly" and causes the death of another person, or injury to another person, is subject to prosecution for death by auto, or assault by auto. The key element in any such prosecution is whether the accused was driving "recklessly." Under New Jersey's criminal code:

A person acts recklessly when he consciously disregards a substantial and unjustifiable risk. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

Recklessness is different than negligence. Recklessness requires a conscious disregard of a known risk, while negligence is based upon a failure to perceive a risk. For example, someone who unwittingly drives through a patch of ice on the roadway and loses control, thereby causing an accident may be considered negligent if a reasonable person would have noticed the ice and slowed down. By contrast, a driver who actually sees the patch of ice ahead in the roadway, and decides to speed up through the ice in order to accelerate and pass another car up ahead, might be considered reckless because he has consciously disregarded the substantial and unjustifiable risk that his conduct would cause an accident and injury or death to another person.

In most cases, prosecutors rely on proof of intoxication by drugs or alcohol to establish recklessness. Under the newly enacted amendments to the death by auto and assault by auto statutes, "proof that the defendant was operating a hand-held wireless telephone while driving a motor vehicle in violation of NJSA 39:4-97.3 may give rise to an inference that the defendant was driving recklessly." The following points should be noted:

FIRST - These amendments apply only in cases in which use of the mobile phone is in violation of an existing statute - NJSA 39:4-97.3. That statute permits driving during use of a cell phone with a hands-free listening device (i.e., Bluetooth), and also permits the use of either hand to activate, deactivate, or initiate a function of the telephone.

SECOND - Even in cases in which a driver violates NJSA 39:4-97.3, such a violation "may give rise to an inference" of recklessness. Under existing law, inferences created by statute is not binding on a jury - the inference may be accepted or rejected by a jury. Juries are told by the court that:

An inference is a deduction of fact that may be drawn logically and reasonably from another fact or group of facts established by the evidence. Whether or not an inference should be drawn is for you to decide using your own common sense, knowledge and everyday experience. Ask yourselves is it probable, logical and reasonable. However, you are never required or compelled to draw an inference. You alone decide whether the facts and circumstances shown by the evidence support an inference and you are always free to draw or

not to draw an inference. If you draw an inference, you should weigh it in connection with all the other evidence in the case, keeping in mind that the burden of proof is upon the State to prove all the elements of the crime beyond a reasonable doubt.

Penalties for driving recklessly and causing death or injury to another are substantial, and convictions invariably result in state prison sentences, even for first-time offenders. Additionally, whatever sentence is imposed is subject to a statute known as the No Early Release Act (NERA), which requires 85% of the sentence be served in custody before an offender is eligible for parole. These cases are always tragic. Victims' lives are lost, and their families suffer immeasurably. On the other end of the spectrum, someone who may be a first-time offender who had no intention of hurting anyone can end up losing his or her freedom and career. These terrible consequences can be magnified even more when the life lost is a passenger in the same car as the driver - a friend, a spouse or a child.

The newly enacted amendments to the death by auto and assault by auto statutes specifically allow the prosecution to rely on the impermissible use of a cell phone while driving as evidence of recklessness.

**Attorney**

- Darren M. Gelber

**Practice**

- Criminal Defense