

Controlling Fleet Liability Risks that Could Drive You Out of Business

**Timothy J. Batz, CSP, ARM, CRIS
IMA, Inc.
Denver, CO**

Introduction

According to the National Highway Traffic Administration, in 2011 there were 32,367 motor vehicle fatalities in the United States. The Center for Disease Control, in 2011, calculated that the cost of fatal crashes topped \$41 Billion. In the 1970's, according to the National Institute of Health, alcohol was a factor in 60% of traffic deaths. In recent years, that percentage has dropped to 32%, according to the Center for Disease Control.

Drivers who use hand-held devices are four times more likely to get into crashes serious enough to injure themselves, according to study by Monash University in Australia. According to the Virginia Tech Transportation Institute (VTTI), text messaging while driving creates a crash risk 23 times worse than driving while not distracted. You may also be surprised to know that a hands-free cell phone use is **not** substantially safer than hand-held use, also according to the VTTI. Many states have enacted laws requiring that drivers must use a hands-free device (Bluetooth) if they choose to talk on the phone while driving. Does that make sense? Finally, a study by Carnegie Mellon University showed that engaging in a secondary task, such as talking on a cell phone, reduces the amount of brain activity associated with driving by 37%. These studies are instructive and we, as safety professionals, need to be aware of the hazards of distracted driving and what we can do to manage them.

What's the Big Deal? We Have Insurance

To answer that question, one needs to understand some basics about our legal system. It's been said of our legal system that it's the worst there is...except for all the rest. One characteristic of our legal system is that it offers access for those who feel that they have been wronged. If a person has no resources to hire a lawyer, there are plaintiffs' lawyers who will take the case on a contingency basis; that is, the attorney's compensation is contingent upon an award or settlement in favor of the plaintiff.

In our system of justice, a person (plaintiff) can bring a legal action against another if they feel the person (defendant) was negligent and that negligence caused them harm.

According to www.legal-dictionary.com, In order to establish negligence as a cause of

action under the law of torts, a plaintiff must prove that the defendant had a duty to the plaintiff, the defendant breached that duty by failing to conform to the required standard of conduct, the defendant's negligent conduct was the cause of the harm to the plaintiff, and the plaintiff was, in fact, harmed or damaged.

Is your organization doing what is reasonable? What is "reasonable?" According to www.legal-dictionary.com, the term "reasonable" is a generic and relative one and applies to that which is appropriate for a particular situation. Look again at the definition of negligence.

The standard your company will be held to is what a "reasonable person do in similar circumstances."

Ask yourself if these statements sound reasonable:

- My employee has a driver's license, that's good enough.
- Checking employee driving records is too cumbersome.
- That person makes me a lot of money; I can't put restrictions on him/her.
- I took away the company car and now she drives her own car for business.
- I checked the employee's driving record when he was hired many years ago.
- It's only one DUI, everybody makes mistakes.

These are excuses I commonly hear from businesses. How defensible are your company's acts or omissions? Are your acts/omissions reasonable? Do you have a written fleet safety program? Does your company check employee driving records periodically? If not, why not? You might find that your company is not acting reasonably.

For that matter, who defines "reasonable?" It can be a long and winding road, but juries often are the ones who determine if the defendant acted reasonably. Relying on "common sense" isn't a good idea: Go back to "what a reasonable person who do in similar circumstances."

From a liability standpoint, the good news is that business auto liability insurance is designed to respond to claims of negligence (including gross negligence). For example, if an employee is driving a vehicle for business and negligently injures another, the insurance policy is designed to respond to claims of bodily injury and property damage. That doesn't mean the claimant will be sent a check. It simply means that the policy will respond with your legal defense and pay damages that you're a legally obligated to pay for harm to another person or property.

Of course, with the insurance in place, insurance carriers would like to see some control exercised over which employees drive company vehicles or who drive their own vehicles on company business. An insurance carrier is in a contractual relationship with the policyholder to provide financial responsibility in the event the insured is legally liable. It is understandable that they would want some controls in place to minimize exposure to loss.

The criteria that most insurance carriers like to see include driver selection, such as a periodically checking an employee's driving record against a written criteria, driver safety training and written plan to implement safety procedures. You will also find that carriers are interested in those who drive their personal vehicles for business and expect the same criteria to be applied.

Why do carriers pay attention to employees who drive personal vehicles on company business? Because it's a source of loss.

When employees drive their own vehicles on company business, it is indeed an auto liability exposure for the business. Commonly, if the employee is involved in a crash while driving their own vehicle for a work, their personal automobile insurance will respond if they are legally liable.

But what happens if the employee doesn't have insurance or has very low limits of liability? The business auto liability carrier will likely respond to this legal liability, and that's why business auto liability carriers are interested in the control of this exposure.

Motor Vehicle Records (MVRs)

The value of checking a drivers motor vehicle record (MVR):

- Do you check motor vehicle records (MVRs) for drivers in your organization? If you run MVRs, at what point do you restrict n employee to drive on company business?
- Many organizations have realized the liability exposure of having employees driving vehicles and have chosen to implement a procedure that includes checking MVRs.
- If you do indeed check MVRs, what is a reasonable criterion?

Below are the minimum criteria that businesses should consider:

1. There have been no major violations within the past five years: Major violations are generally defined as convictions for:
 - DUI
 - reckless driving
 - commission of a felony while driving a motor vehicle
 - refusal to take an alcohol test
 - leaving scene of an accident
 - drag race or speed contest
 - eluding a police officer
 - speeding in excess of 25 mph over the posted limit
2. No more than three minor violations within the past three years. Minor violations are defined as convictions for:
 - speeding below 25 mph
 - failure to yield
 - failure to stop
 - any moving violation not considered major

So, what should a business do if drivers don't meet the criteria? The short answer is to not allow the employee to drive on company business, in a company car or in his/her own vehicle. Before you criticize the criteria as unrealistic, realize that legal liability is real and has consequences.

- Here's an actual case: Alicia Bustos was a passenger in the back seat of a Buick when her car was hit by a F150, whose driver was using a cell phone at the time of the crash, which left her severely injured and ventilator-dependent. Following the accident, she sued the driver of the Ford and the driver's employer. A Miami jury awarded Bustos and her husband \$20.98 million; the lawsuit was later settled for \$16.1 million. *Bustos v. Leive*, No. 01-13370 CA 30 (Miami-Dade Co., Fla., Cir.Ct.) Central to the case was the use of the cell phone while driving.
- The insured *was* a well servicing contractor. I use *was* in the past tense because the company is not in business any longer as a result of this incident. It had been raining heavily all day so the owner took the crew to a bar for some "team building." After several hours and multiple pitchers of beer, the crew departs in company vehicles. Two employees race side by side on a two-lane road and collide with a vehicle carrying four teenage girls. The crash resulted in three fatalities and one severe brain injury. The auto liability insurance carrier paid policy limits and the court granted a very large punitive damage award.

These types of huge awards are unusual, but it makes the point that these types of losses can drive a company out of business. Insurance can pay for actual damages up to policy limits, but punitive damages are generally not insurable as a matter of public policy.

A Word about Technology

With technology moving at lightning speed, there a new products and services coming onto the market to help employers manage these exposures. Some products can be plugged into the diagnostic port under the vehicle's dashboard and give you very telling data about your drivers' habits, how many hard stops and starts he/she has in a given time period, and even the how much time is spent idling.

Other technologies will allow an employer to see an employees' motor vehicle record in real time, simply with the click of a button. Moreover, vehicles can be equipped with GPS tracking devices that will send a notification to the employer if it leaves a predetermined geographical area.

There is even a product recently available that will disable a phone while located in a moving vehicle. Technology solutions are readily available and at a relatively low cost.

What Businesses Can Do

How can you as a safety professional help minimize this exposure? Knowing that a one size fits all approach isn't likely to work, you should focus on making incremental progress over time.

The safety professional should also know that what is reasonable will change over time. A generation or two ago, if you were pulled over by the police for driving drunk, law enforcement might tell you to go straight home and sleep it off. Society's view of drunk driving has changed since then. Due to the efforts of organizations such as Mothers Against Drunk Driving (MADD), public health campaigns and state lawmaking, society now takes a much dimmer view of drunk driving. If you are stopped for drunk driving in today's world, you will likely be arrested, spend

several hours in the company of law enforcement and lose your driver's license for a period of time.

How can we as safety professionals help?

- Have a written driver safety policy that includes motor vehicle record (MVR) criteria
- Evaluate all employees who will drive company or their own vehicles on company business and review their driving records periodically thereafter
- Formalize driver training
- Enforce disciplinary standards
- Have a distracted driving policy and address cell phone usage
- Require the use of seat belts.
- Know that there is an ANSI standard on the topic. (Z15.1), *Safe Practices for Motor Vehicle Operations*