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as you make a decision to hire a lawyer.**

Now, here is Bill Simpson and Nigel Gilby

Preventing Injury: A Focus on Distracted Driving

Bill: Welcome to this episode of the Lerners injury law podcast series. Nigel and I are glad you are here. We have a really interesting program in this episode. We have a feature interview with Sergeant David Rektor who is the Community Relations Specialist for West Region of the Ontario Provincial Police ("OPP"). Sergeant Rektor has a lot of experience under his belt and he's here today to talk about an emerging concern which is distracted driving on Ontario's highways.

We've got two questions for our episode today from Petrolia and Ridgetown. They're related questions. They're asking about things that concern having a trial and how the costs work so we'll look forward to giving those answers as part of our regular segment.

Nigel: Yes, thanks for tuning in. This episode continues one of the themes that we are trying to emphasize and that is safe driving. Unfortunately, we see the effects of unsafe driving every day and we are continuing to try to encourage our listeners to think about safety and driving so that, quite frankly, you don't end up having to be one of our clients.

Bill: Well said. This is going to be a good a show. We'll be right back.

(Music) Once again, here's Bill and Nigel.

Bill: We're really pleased today to have Sergeant David Rektor from the OPP join us as a guest. Sergeant Rektor is a Community Relations Specialist with the West Region of the Ontario Provincial Police and Sergeant, thank you for joining us.

Sergeant Rektor: It's my pleasure.

Bill: We wanted to talk with you today, generally, about the dangers associated with texting and driving and certainly Nigel and I are seeing, in our new case load, more and more instances where there is one driver at least who is thought to have been texting or distracted and an accident has resulted and somebody has been hurt. I wonder if we can start with just reviewing the basics. Texting and driving is illegal in Ontario.

Sergeant Rektor: Yes it is.

Bill: And that is its own offence under the Highway Traffic Act?

Sergeant Rektor: Yes, it's an offence under the Highway Traffic Act, prohibiting you from texting and driving, talking on a cell phone or using any other electronic forms of communication while you're driving.

Nigel: Let me maybe pop in there for a second. I don't necessarily want to equate the two together but, with impaired driving, if you get caught you're going to lose your licence for a year and you can face a substantial fine and the possibility of going to jail. The information that we're getting is that there are now actually more accidents that are being caused by distracted driving; texting, iTune changing; than actually impaired driving, yet the penalties appear to be pretty mild and I don't know what your thoughts or opinions are about the fact. Are we imposing sufficient fines to really stop drivers from texting and driving?

Sergeant Rektor: The Ontario Provincial Police has identified distracted driving as the number one leading cause of motor vehicle crashes in Ontario this year. It has now surpassed impaired driving. The fines have recently jumped, there's a set fine for texting and driving now. They range between \$300.00 and \$500.00 depending on the jurisdiction that you're in, but it's a significant jump from the \$150.00 that it was, so we've seen that. The OPP supports any legislation that will prevent people from harming them self and clearly the statistics are telling us, they're screaming at us, that distracted driving is a huge issue, and it's preventable, and I foresee down the future the fines will probably be increased again and the legislation will be tightened up on this even stronger I believe.

Nigel: And what about the demerit points because there's a lot of people, including Bill and myself, that can pay those fines, and yeah we don't want to, but it's not really going to impact us that much, but we don't like the demerit points because insurance rates go up and things like that. Are there demerit points also with distracted driving charges now?

Sergeant Rektor: Right now there's no demerit points, and you're quite correct, for a lot of people it's the cost of doing business. That's how they look at the fine right now. When it really hits home is when demerit points are added to the offence then it becomes something they recognize more because it has an effect on their insurance.

Nigel: And that's hopefully something that the government may look at and bring in.

Sergeant Rektor: There's legislation being looked at right now that may add demerit points to the fine structure.

Bill: Sergeant Rektor, I think it's important for people to distinguish that when we use the word texting and driving that encompasses more than simply texting a message. So, for example, if somebody is stopped at a red light waiting for traffic and they pick up their smart phone to check their Facebook page or to check their Twitter account, that, for the purposes of the Highway Traffic Act, is all one and the same.

Sergeant Rektor: Absolutely. If you're in a motor vehicle and you have a cell phone in your hand, that constitutes the offence. The onus is upon the driver to prove to the court that in fact they weren't doing anything, but the fact that they had it in their hand is part of the offence and they can be fined for that.

Nigel: I was out walking my dogs the other day in my neighbourhood and what I'll call an older woman, a woman that would be in her forty's or perhaps older, (Bill interjects: you just alienated half the audience with that), driving a new Cadillac which would clearly have a hands free system in it, turning around the corner with the cell phone pressed up against her ear. Are there any statistics that show that this is something that is particular to an age group, is it across the board, or what are the statistics showing in terms of distracted driving?

Sergeant Rektor: Well statistically, the younger generation, 18 to 35 years of age, are the people that are using cell phone technology more frequently than senior drivers just based on

the fact that the seniors weren't exposed to this. A lot of them still don't have that technology or are intimidated by it and don't use it. But those that have grown up in the technology savvy world we live in, which is the younger generation, they're the ones that are using the cell phones and other technology in their vehicles quite frequently.

Bill: We've been familiar with the offence of careless driving for some time. It's been around a while. How is careless driving different from distracted driving as far as the police and the Highway Traffic Act is concerned?

Sergeant Rektor: The Highway Traffic Act clearly defines what distracted driving is and it pertains to telecommunication devices such as a cell phone or other piece of technology that you're using. Careless driving is more encompassing and it can be another offence that you're charged with as well as distracted driving. Cell phone technology for instance, there's a section under the HTA, that's the Highway Traffic Act, that specifically speaks to having a cell phone in your hand while you're driving. The evidence that the officer sees, where somebody is all over the road, their driving is somewhat just below dangerous, but it's inattentive, they can certainly be charged with careless driving as well as distracted driving offence.

Bill: When the police are called to an accident where the damage is done, so to speak, when the officer becomes aware or concerned that it may be a distracted driving case, do the police have the ability to access a person's phone records or phone use in order to investigate that accident and then to decide what role that played in causing the accident?

Sergeant Rektor: Yes, our technical collision investigators have the ability to execute search warrants to assist with their investigation so they can, and often do, especially in a serious incident where somebody is seriously injured or killed, they'll do a background check and part of that will be what were they doing prior to the crash. Often times we see cell phones on the floor of vehicles still on and somebody on the other end going, hello, hello. That's really disturbing but really good evidence in terms of what may have caused that crash.

Nigel: So, for example, because we follow this ourselves, with technology today you can tell when somebody is using their cell phone first of all, where they are, and you can get the phone records. So if the accident happened, let's say at 7:49 on a Friday evening, you can get the records and determine that at 7:49 that cell phone was in use and, in fact, who they were calling or speaking to at the time of the accident. Has that been done or do the police look at that?

Sergeant Rektor: It has been done. We have had incidents where we've investigated crashes, they look at the cell phone records and it is the time and date, and the location of where the collision happened, it's time stamped on the phone so it's a really good investigative tool for our officers.

Bill: I think that's something young people in particular may not think about. If you're in an accident and you think you are going to outsmart the police by deleting a message from your phone, you're really doing nothing positive and, in any event, the police have the resources to make their own enquiries and can confirm a phone's use regardless of what shows up on the actual screen.

Sergeant Rektor: Absolutely, and tragically, often times the case is the person that's doing the texting or talking while they're driving are seriously injured or dead and the ramifications and the impact on the society they leave behind is just so tragic.

Nigel: I was watching television the other day and it was an American channel and there was a very affective safety ad with young people in a car and all of a sudden out of nowhere just a

huge impact and the vehicle is pushed off a ramp of a highway and the next thing you see is the car destroyed and a police officer standing there and says if I had seen the driver using a cell phone I would have charged her and it may have saved these people's lives. What are we doing in this Province in terms of trying to get that message out?

Sergeant Rektor: From a police perspective, we're really working with our media partners quite exclusively to promote the message on distracted driving. The media have been a very useful tool to us in terms of getting the message out. We also educate in the schools - colleges, universities - even in the younger grade levels talking to young people. Our message isn't only for the people that are texting and driving, the drivers, but it's more so for the passengers. We want to empower them the same way we do a passenger in a vehicle driven by an impaired driver saying, hey, you don't have to be in that vehicle, and you should do everything in your power to prevent that driver from committing that offence because it's so dangerous.

Nigel: That's very interesting because in the legal world when we deal with people, for example somebody gets badly injured in an accident and they come and hire us, but if the driver was obviously impaired, the person who got injured as a passenger can actually be found to be partially at fault and their damages reduced because they got into a vehicle when they knew, or ought to have known, that the driver was impaired. In other words, you're assuming some of the risk by getting into a vehicle with a person like that and although I haven't seen it myself personally yet, I wouldn't be surprised that we're going to start see defences raised for people that are passengers and injured where there was texting going on that they may have assumed some of the risk if there are no efforts made by them to stop the driver from texting or iTunes changing while they're driving. People that are out there and are passengers should be aware, obviously first and foremost, that it's dangerous and it may end up causing your death or a significant injury to you, but secondly, that you may actually find yourself to be partly at fault if this is something that is going on and you don't do anything to stop the driver, or at least attempt to stop the driver from doing it.

Sergeant Rektor: Absolutely. Nobody in their right mind would get into the vehicle with a driver that is impaired. Yet they get in a car with somebody who is talking on a cell phone. That driver is usually, and hopefully, sober, first off, but usually a nice person. Somebody who is a business professional or they have their own business, they're on the phone for a valid reason in their own mind. The passenger in the car is thinking well, this person is sober, and nobody has dialed into the danger factor yet of this device, this cell phone nightmare that we have out on our highways right now. You can tell when somebody is on the phone because it's worse than an impaired driver. When you're following behind them the evidence is so dramatic. You think you're pulling over an impaired driver and it's somebody who was talking on a cell phone. We need to empower the passengers to believe to buy in that that is every bit and more dangerous to some degree than an impaired driver because your attention isn't on what you need to be doing.

Bill: That's very interesting. The OPP for many years, particularly at holiday weekends, have had blitzes, safety blitzes, on the major highways and historically a lot of those have been focussed on impaired driving. Do the OPP plan blitzes specifically targeted to distracted driving in 2014?

Sergeant Rektor: Yes. Our previous Commissioner, Commissioner Lewis, and now Commissioner Hawkes, are both committed to dealing with the issue of distracted driving. We do have enforcement changes that are coming down the pipes, if you will, to aid our front line officers in being able to be a bit more discreet in finding the people that are using cell phones but sadly, the reality is that you can be in a fully marked cruiser, and I see this every day, in a

fully marked OPP SUV, I can pull along people and if they're on the phone, they're too distracted to notice that I'm even behind them or beside them. That's how oblivious you become when you're distracted by technology in a vehicle.

Nigel: I saw the Police Chief's do put out some statistical information and something that I was reading said that the chances of getting into an accident when you are distracted are 23 times greater.

Sergeant Rektor: Yes, absolutely, the statistics show that. Just to give you an example, if you are travelling at 100 kilometers per hour, highway speed, and you look down for 2 or 3 seconds, you've covered half a football field. So if a young child is running out in front of you, or the car is stopped in front of you and you're looking down for that length of time - you've covered half a football field - is it any wonder you plow into the back of them? You are 23 times more likely to be involved in a serious crash if you are distracted.

Nigel: And, unfortunately, like you, Bill and I have seen the effects of that. I've got a young woman that was crossing on a green light, she was on roller blades, and she got hit by a young man driving and on my cross-examination of him he admitted that he was trying to change the music on his iPhone and acknowledged that his eyes would have been off the road for 5 to 10 seconds. That young woman ended up with a significant brain injury that has and will affect the rest of her life. People really need to understand how they're not just potentially putting themselves at risk but they're putting other completely innocent people at risk as well.

Sergeant Rektor: Absolutely. It's not just the distraction of the cell phone, it's everything else in the car that you alluded to; it's the iPod, the radio, buttons on the console, the cruise control, all these devices that car companies have made to make vehicles comfortable and easy to manipulate and fun to drive can certainly be distractions for other drivers that might not be that good of a driver in the first place.

Bill: Sergeant, let me ask you this. I had a recent experience where I rode in a taxi, I hadn't been in one in some time, and I was surprised at the level of technology up on the taxi drivers' dash board. There appeared to be, the fare box of course, and then there appeared to be almost a small laptop computer and I wasn't able to see from the back seat all the information, but it appeared that the taxi dispatcher was sending out information about potential fares or pickups and the taxi driver was, I thought, spending quite a bit of time dealing with all that equipment. That's no different is it?

Sergeant Rektor: I'm not familiar with the equipment inside a taxi cab myself but any distraction that causes you to take your eyes away from the road in front of you is lethal, or could be lethal. We need to change the way we think as drivers and we need to get back to the basics of driving which is always looking in front of your vehicle and being alert to everything around you all the time; checking your mirrors every 7 seconds to see what's beside you, behind you, or in front of you. People have lost sight of that and have traded it in for the conveniences of always being on their cell phone or texting or punching in maps on different GPS (Global Positioning System) devices, so we need to get away from those distractions.

Nigel: I was in a taxi in Toronto recently and, sure enough, the taxi driver, when he picked me up, the phone rang and he picks up his phone and he's talking to, I don't know if it's a family member or who or what it was, and I said to him please don't talk on the phone while I'm in your cab, and I think people need to assert themselves and say that and I think that people tend to be very timid or afraid to say to somebody, put your phone down and we just need to encourage people to do that. You're in that cab and the guy's talking; put your phone down or let me out and, by the way, I'm not paying for the fare either.

Sergeant Rektor: Absolutely. I did that. A similar experience; I was in Florida with my wife and family and we were in a limo coming from the airport to our hotel and the taxi driver, it was a mini-van, he was on the phone, and it was ringing, and I was very bold and just said to him, you need to stop talking on the phone and concentrate on the road. He looked at me like I had three heads and, once again, I had to threaten I'm not going to pay for my fare because you're endangering my life and my family's life and he said, well if that's your attitude, well he got kind of snarky with me, but he put down the phone. The point being that you need to take that step, you need to be aggressive. It's your own safety you're dealing with. You need to be vocal about it.

Nigel: The one thing that I was looking at, I didn't know anything about this at all myself, but there is something that's apparently called an X-Blocker. That may be the manufacturer's name, I'm not sure; but it apparently is something that gets installed in the vehicle and it works automatically at any speeds over 50 miles per hour and it's like your personal secretary. It says it responds to calls and texts automatically and it basically stops people from using their cell phones in their cars except in emergency situations where they're always allowed to call 911 and another list of safety type numbers. I'm not sure whether you've heard about this or not but it seems that, interestingly enough, there is technology out there that you can use and, in fact, I've also read that there are applications that you can actually download on your phone as well that basically prevents you from using them when you're in your car and the car is moving.

Sergeant Rektor: I really like the latter of the two of those choices. The X-Blocker is something that is new to me and anything that would help prevent people from using the phone in the car is great, but even at 15 kilometers per hour, I've been hit by a car at 10 kilometers per hour, and it hurts, and the damage is great, so if you're backing out your car and there is a little kid behind your car, at 5 kilometers per hour you would probably kill that child or seriously injure them, and if you're on the phone, what excuse do you have, so the best technology is the latter one, that as soon as you get in your car it shuts it down. I'm all in favour of that one.

Nigel: Coming back to impaired driving, I know that there are people that get convicted of impaired driving and even after their suspension is up they're sometimes required to install in their vehicle essentially a breathalyser that they have to blow in before their car will start. I foresee the government moving forward and perhaps requiring people that have been charged with texting and driving or messaging and driving with having these types of devices put in their vehicles so that they can't do it.

Sergeant Rektor: I see law enforcement sharing your vision that that will likely be coming down the pipes. It only makes sense that if you have something that is more serious or is taking the lead on impaired driving, that the counter measures to that have to reflect that as well. From a police perspective we certainly welcome anything that will help make the roads safer for everybody using them.

Bill: Sergeant, Nigel and I certainly hope that people listening to this are going to be more aware about distracted driving generally after hearing the interview and I'm wondering, if somebody is driving down the 401 as an example, and they see an obvious instance where another driver is distracted by a smart phone or some other device, are they welcome to call the OPP right there from the road? What advice do you give people on that?

Sergeant Rektor: If you see somebody, if you can safely record a licence number or commit it to memory and pull over to the shoulder of the road, call 911. That's an emergency call for us. If you see a drunk driver we tell people to call 911 because it's very important to us. This is as well. If you see somebody texting, talking on their phone or doing something else that is

distracting in their vehicle, that's a 911 call to the police and we will take it very seriously. If we don't find that person we still have the licence plate to follow up on and it usually means one of our officers will go to the door and have a heart to heart chat with that person. Even though we can't prove the identity of the driver at that point and you might get off the legal perspective of it, we can still have the heart to heart and that's just as important sometimes.

Bill: The message will be delivered.

Sergeant Rektor: The message is delivered.

Nigel: I guess it's discretionary on a police officer whether or not to charge somebody if they pull them over for distracted driving or texting, but what are the police doing? Is it to the point now where they're basically just going to charge people and not say this is your warning, don't do it again?

Sergeant Rektor: No. A couple of years back when this really came into the radar of the police if you will, we had an education campaign where we would pull people over and warn them. Those days are gone. If you are on cell phone talking, texting, you're distracted, you will be charged. There is some discretion but when it comes to this, predictable is preventable, that's our logic and our mindset right now with regards to this. It's such a serious topic. We want to save lives, that's what we are paid to do, and prevent the injury from happening. If we can get people off the cell phones, that's great, but voluntary compliance is what we're hoping through active enforcement.

Nigel: I was in Provincial Court and somebody was up for driving and using their cell phone and the provincial prosecutor had made a deal with the individual to reduce the fine and interestingly, when they presented it to the judge, the judge said no, I'm not taking that and you're paying the full fine because it's so serious that I'm not prepared to do it. It was interesting to see that the judge in that particular circumstance wasn't going to go along with plea bargain and said no, you're paying the full fine because it's so dangerous.

Sergeant Rektor: That's great.

Nigel: Sergeant, we really appreciate you coming in and taking your time so that you can hopefully educate drivers out there about the dangers of distracted driving and using those devices. Thank you very much.

Sergeant Rektor: It's our pleasure to be here. We really appreciate you helping us with this cause and partnering with us to promote safety.

Bill: Thanks very much.

(Music) Once again here's Bill and Nigel

Bill: Nigel, we've reached that point in the show where we have questions from our listeners. We have two of them today and they're both sort of related on a theme.

The first one is from Byron in Petrolia who says, how likely is it that my case will actually go to trial. We hear that a lot. Many people are very apprehensive about going to trial and one of the first things we usually say to them is it is unlikely.

Nigel: If I'm a betting man, all my money is on the fact that your case is not going to go to trial. Statistically, I would say certainly less than 5% of cases ever make it to the court room door and

even if they make it to the court room door, that doesn't mean that you're going to go through to trial. They often settle at the court room door. The vast majority of cases settle long before you get to the trial.

Bill: One of the things we explain to people is that our litigation system has a built in opportunity to try and settle a case. We call that a pre-trial conference. That's an opportunity where the parties and the lawyers sit with the judge and it's the judge's job at that pre-trial conference to see if a settlement can be brokered but there are other opportunities too.

Nigel. Yes. We've become a system really now that deals with something called mediations and most cases will proceed to mediation long before they would even get to a pre-trial. A mediation is a voluntary process where the lawyers and their respective clients, in other words the insurance company and the injured party, come together. There is an independent third party who then works between the insurance company and the individual who is injured through their lawyers and tries to get the case settled. The injured person is physically present, the insurance company, or cheque writer as we like to refer to them, is physically present and the mediator's job is to go back and forth and try and get the case resolved. I use the example, if you think of a situation where the company and the union are at loggerheads and they don't or can't resolve their differences then often times they will bring in a mediator to try and work with the company and the union to resolve their issues and it's very, very similar.

Bill: Byron, that was a good question and we thank you for sending it to us. Remember that all of our listeners can email questions to this address; podcast@lerner.ca.

We do have a second question today from Janet in Ridgetown, that's the friendliest town in Ontario, who says this; if I have a trial and I win my case, does the other side have to pay my legal bill in full. That's also a question we get asked quite a bit and the answer here is a little trickier because only lawyers can come up with a system like we have when it comes to costs and fees.

Nigel: Yes, and not only if your case goes to trial, but even if you settle your case before it goes to trial, similar to what we were talking to a moment ago, the answer to the question is that they are required to pay some of your costs. We have a system, as Bill has indicated is complicated, and to leave it as uncomplicated as possible, let me put it this way. When you settle your case, or if you go to trial and are successful, then the other side is responsible to pay a large part of your costs but not all of your costs. What they pick up is most of the disbursements, and that's the expenses for medical reports and other experts that you may be hiring to help build your case and they are also required to pay for some of the lawyer's time that has been spent working on your file. Usually you will have an arrangement with the lawyer that you hire as to what other fees you will be charged by that lawyer. In our firm we work on basically what's called a contingency fee which means that you have the choice when you hire a lawyer from our firm to say, I will give you a percentage of my winnings and in exchange for that, if, in case I lose, I pay nothing to you. Basically, we tell clients you don't pay any money unless we get money for you and that way they're pretty safe.

Bill: That's right. To emphasize it, it's not possible to have a trial and come out of the process without having some legal fees to be paid out of the proceeds from the judgment that the court gives. We don't have a system where you can receive your legal fees paid in full by the other side when you win at trial.

Nigel. No.

Bill: Janet, it was a good question. Thank you for sending it. We will look forward to answering more questions in our next episode. Send them all to [us; podcast@lerner.ca](mailto:us;podcast@lerner.ca).

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