

# BACE LAW REPORT

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LEGAL NEWSLETTER

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## “Texting,” Driving, and the Negligent Operation of a Motor Vehicle

Sending text messages via cell phone has become a mainstream form of communication. Along with email, texting allows the instant transfer of short messages, and a convenient method to stay in touch while in a meeting or otherwise unable to answer a live call. However, incidents of “texting,” while driving resulting in car accidents is on the rise, and lawmakers in the Commonwealth are pushing for new laws to address the issue.

### Negligent Driving is a Crime

The Commonwealth’s Negligent Operation of a Motor Vehicle statute, arguable already provides for a mechanism by which texters could be held criminally liable for sending messages while driving. The crime is a misdemeanor, and if convicted, can impose a

sentence of up to two years in jail.

To establish guilt for Negligent Operation of a Motor Vehicle, the Commonwealth must prove, beyond a reasonable doubt, the following:

- ▶ The defendant operated a motor vehicle,
- ▶ The defendant operated a motor vehicle upon a public way,
- ▶ The defendant operated that vehicle negligently, so as to endanger the lives or safety of the public. *Commonwealth v. Ferreira*, 70 Mass. App. Ct. 32 (2007).

Defining the third element of the crime is troublesome, and the Courts have attempted to distinguish what activity gives rise to criminal liability for driving negligently.

To operate a vehicle negligently for purposes of the criminal statute, the same standard in civil tort cases is applied. That is, a defendant must drive in such a way that a reasonably prudent person would not *and* the public *might* have been endangered. *Commonwealth v. Duffy*, 62 Mass. App. Ct. 921 (2004).

In *Ferreira*, the defendant was witnessed spinning the wheels of his BMW after pulling out of a parking lot. The back of the vehicle “fishtailed,” and the defendant was charged and convicted of the crime. There was no accident. There was no injury. There existed no duration beyond a few moments and no instances of prolonged speed or erratic behavior. The defendant simply accelerated too quickly, and spun the wheels aggressively upon exiting a parking space. The Court reasoned that because the parking lot was in a busy shopping center with heavy pedestrian traffic, the defendant’s behavior *might* have endangered the lives of the public. The statute requires only that the Commonwealth show the public *might* have been endangered; whether or not the public was *actually* endangered is not the relevant inquiry. The defendant was convicted of the crime. *Id.* at 34.

While speeding alone, without any other evidence, is insufficient to prove guilt of negligent operation, it certainly will be considered when making that determination. *Commonwealth v. Duffy*, 62 Mass. App. Ct. 921

(2004). In *Duffy*, the defendant was witnessed driving his motorcycle between 60-70mph in a 30mph posted zone. When combined with the fact that the neighborhood was thickly settled, and the incident occurred during a holiday weekend, the Court reasoned there was sufficient evidence for a guilty finding.

In a similar case, and adding to the difficulty distinguishing what behavior yields criminal liability, an officer witnessed a defendant driving, and estimated the speed to be between 50-55mpg (without the assistance of a radar). *Commonwealth v. Twombly*, 435 Mass. 440 (2001). There was moderate traffic in the area, the defendant illegally passed another car, and also drove erratically for one mile. Although not charged with Negligent Operation, the Court stated that the behavior witnessed by the officer “did not yet reach the level of operating negligently so as to endanger.” *Id.* Driving erratically, and almost striking a traffic island, coupled with evidence of intoxication will likely satisfy the statute. *Commonwealth v. Siciliano*, 420 Mass. 303, 307 (1995).

## Is Texting Is Criminally Negligent?

Based on the current caselaw, and the murky definition of what constitutes negligent operation, one could argue that the Negligent Operation of a Motor Vehicle misdemeanor already provides the Commonwealth a mechanism by which to charge “texters” with a crime.

The critical inquiries are the following: (1) would a reasonably prudent driver send text messages while operating their motor vehicle, and (2) does texting while driving endanger the public? Arguably, sending a text message is not behavior a reasonably prudent person would undertake while cruising at highway speeds. Unlike changing a radio station, or drinking a cup of coffee, texting takes one’s attention and eyes off the road for longer than a brief second, thus increases the risk of an accident.

Such an event would also arguably

endanger the public, especially if it occurred on a busy highway, or during periods of heavy commuter traffic. The recent news stories citing an increase in accidents associated with texting appear to support this conclusion. Even without the added complication of excessive speed, or erratic behavior, texting while driving at any speed is theoretically sufficient to attach criminal liability under the statute. Then why propose new legislation?

Former prosecutor-turned-defense-attorney, Jason Chan ([www.attorneychan.com](http://www.attorneychan.com)) states, “The new statute is being proposed to directly address the problem of texting related accidents. The new statute essentially would give the district attorney’s office another weapon to use in these cases.” If you have been accused of a crime, contact an attorney without delay.

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