



## Are You Liable?

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### **Facts:**

You are driving down a residential street, you hear a buzz from your smartphone. You look down for a second, then look up. At that very moment a 10 year old kid walks from behind a parked car and in front of your car. It is too late. You have hit the child. You weren't speeding. You had the right of way. Are you liable? Tell us what you think...our answer will be posted Friday!

### **Our Simple Answer:**

You (the driver) will be found at least partially liable for the child's injuries.

### **Our Detailed Legal Answer:**

***Every driver must use reasonable care in driving a vehicle. Drivers must keep a lookout for pedestrians. Drivers must control the speed and movement of their vehicle. Failure to do so is negligence.<sup>1</sup>***

In our fact pattern, the driver must keep a lookout for pedestrians in a residential neighborhood in particular. Children regularly play on and cross residential streets from in between cars. Failing to keep a constant lookout when parked cars may be blocking the view of children may result in a finding of negligence against the driver.

***A person shall not drive a motor vehicle while using a wireless telephone unless that telephone is specifically designed and configured to allow hands-free listening and talking, and is used in that manner while driving.<sup>2</sup> A person shall not drive a motor vehicle while using an electronic wireless communications device to write, send, or read a text-based communication, unless the electronic wireless communications device is specifically designed and configured to allow voice-operated and hands-free operation to dictate, send, or listen to a text-based communication, and it is used in that manner while driving.<sup>3</sup>***

***If a jury decides that you violated the statute and that your violation was a substantial factor in causing the harm, then you must be found negligent.<sup>4</sup>***

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<sup>1</sup> CACI 700 - Basic Standard of Care (Judicial Council of California Civil Injury Instructions)

<sup>2</sup> California Vehicle Code Section 23123

<sup>3</sup> California Vehicle Code Section 23123.5

<sup>4</sup> CACI 418 - Presumption of Negligence per se

This was the trick part of the fact pattern. The fact pattern says that the driver looked down after hearing the smartphone buzz. There is no mention of listening or talking. There is no mention of hands being used to operate the phone.

This driver was driving a motor vehicle while using the phone in manner that violates the statute...looking down at the phone is a use that is not protected by the statute. If the jury says that your use of the phone was a substantial factor in causing the child's injury, then you must be found negligent. Wireless phones must be used in a hands free and distraction free manner or else their use violates the statute. Many new cars are coming out with features that read your text messages to you...this is so you don't have to take your eyes off the road. **You must keep your eyes on the road!**

The defense attorney for the driver (you) would argue that you only looked down for a second, and that when you looked up the child was too close and that nothing could have been done to prevent the accident. Accident reconstruction experts would testify that the stopping distance that was lost during that one second was approximately 36 feet (vehicles travel approximately 36 feet per second at 25 mph). This assumes that the jury believes that you only looked down for a second. It is likely that a jury will believe that every second counts in a situation like this and find you negligent for being distracted by your phone.

***The law also requires both drivers and pedestrians to yield the right of way. Even if someone has the right of way they must use reasonable care to avoid an accident.***<sup>5</sup>

In our fact pattern, the driver's right of way does not absolve the driver of liability to keep a lookout for pedestrians.

***The duty to use reasonable care does not require the same amount of caution from drivers and pedestrians. Both drivers and pedestrians must be aware that motor vehicles can cause serious injuries, drivers must use more care than pedestrians.***<sup>6</sup>

The law places a higher duty on drivers than pedestrians. This does not however mean that a pedestrian may not be found to be the sole cause of an accident. The law does not say "pedestrians always have the right of way". The law applies different standards of care for children than for adults as stated herein.

***Children are not held to the same standards and behaviors of adults. A child is required to use the amount of care that a reasonably careful child of the same age, intelligence, knowledge, and experience would use in that situation.***<sup>7</sup> ***A child under the age of 5 is unable to be found contributorily negligent.***<sup>8</sup>

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<sup>5</sup> CACI 701 - Definition of Right of Way

<sup>6</sup> CACI 710 - Duties of Care for Pedestrians and Drivers

<sup>7</sup> CACI 402 - Standard of Care for Minors

<sup>8</sup> Christian v. Goodwin (1961) 188 Cal. App. 2d 650, 655

In our fact pattern, a jury would be asked to determine whether or not this 10 year old used the degree of care expected of other 10 year olds with similar experience and intelligence. Does this 10 year old have experience crossing streets? Did he or she know that it was dangerous to just cross the street without looking? How does this 10 year old compare with other 10 year olds?

Our fact pattern does not indicate whether or not the child looked both ways, but it is reasonable to assume that the child did not. A 10 year old child was chosen for a purpose. 10 year olds vary significantly as to their experience crossing streets. If a child knows, prior to the accident, that it is unsafe to cross the street without looking then a reduced damages award could result. That being said, as you can see, the law has a bias in favor of protecting children.

***A defendant driver may claim that others are at fault or negligent for the child's injury thereby seeking equitable indemnity or apportionment of responsibility.<sup>9</sup>***

In our fact pattern, there is no mention of where the parents of the 10 year old are at the time of the injury accident. The parents could have been 10 feet away or at work. Either way, if the child was not supervised, the jury will be instructed on the issues of apportionment of responsibility to the persons responsible for watching the child. This may have the effect of reducing the damages to be paid, but it will not absolve the driver of at least partial liability.

### **CONCLUSION:**

Our civil jury system provides specific instructions to the jury about what the law is for a given set of facts. The jury listens to the facts and comes to a conclusion, after deliberations, as to whether someone is negligent or liable for a given set of facts.

**A jury will find the driver at least partially liable for this accident because the driver failed to keep a lookout, took his or her eyes off the road while traveling down a residential street, and because every second counts when driving down a residential street.**

This fact pattern should be distinguished from a fact pattern where the person was not distracted. If a child just runs out from a parked car and the driver can not stop in time, as a matter of physics/science, then the jury may conclude that a driver was not at fault.

Legal opinions regarding the outcome of a given fact pattern can and do vary. The legal opinions expressed herein are just one lawyer's opinion of the likely results of this fact pattern. They are based on California law only.

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<sup>9</sup> CACI 406 - Apportionment of Responsibility

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