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Possible distracted walking charges raise debate

BY JUDY VAN RHIJN
For Law Times

Are the days coming when we all have to stand still when we are using our mobile devices? Will the regulatory response to the carnage caused by distracted driving extend to the footpaths? The ever more innovative uses for cellphones are making pedestrians a danger to themselves and others, and raising questions for lawmakers.

"Various incidents have been well reported and I have seen pedestrian injuries in my practice related to cellphone use," says Michael Giordano, founding partner at Avanesy Giordano LLP of Toronto. He refers to a particular case where a witness alleged one of his teenage clients was using a gaming device.

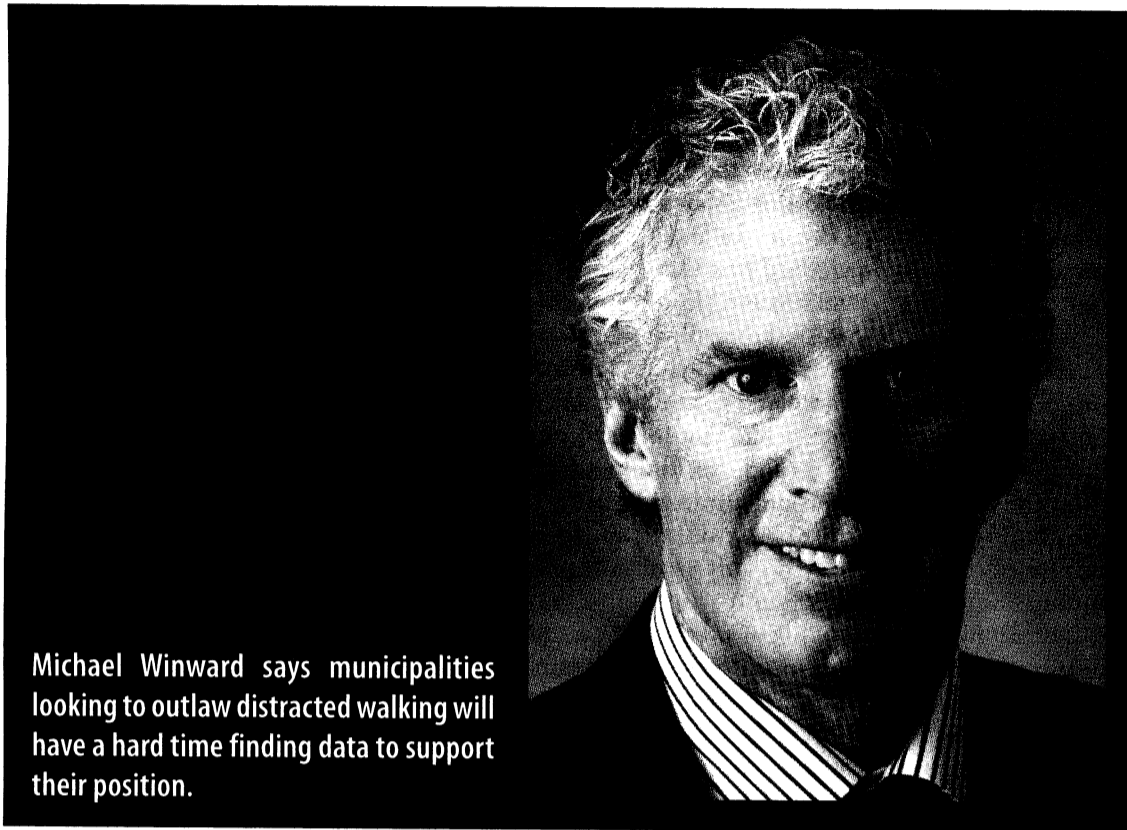
"The defence is trying to reduce the amount of damages for contributory negligence. We're just at the preliminary stage, but there may be some requests for phone records, or they might want to see records for gaming sites to determine whether a person was active or logged in at the time," he says.

Despite frequent media reports of outdoor gamers trespassing, finding dead bodies and falling into holes, the incidence of actual reportable injuries appears to be low.

"I have not seen an increase in pedestrian accidents in my practice," says Sharon Bauer, a personal injury lawyer at Fireman Steinmetz Daya LLP, "but that's not to say there won't be with Pokémon GO and people completely attached to their smartphone."

Michael Winward, partner of Mackesy Smye LLP of Hamilton, Ont., says in terms of his practice he hasn't noticed an increase.

"I assume the theory is that because of the increase in electronic



Michael Winward says municipalities looking to outlaw distracted walking will have a hard time finding data to support their position.

devices, the younger generation is more prone to get hit, but the steps of reporting, going to the hospital and calling a lawyer don't seem to be happening," he says.

Winward refers to the Ontario Road Traffic Safety Report released in April, which shows a 37-per-cent decrease in serious pedestrian accidents since 1994 and a 21-per-cent decrease in fatalities. Preliminary figures for the 2014 report continue this trend.

"It's interesting the way rates are trending down. Just think of all the distracting electronic devices with the iPod era and the mobile phone era," he says.

He also refers to the age demographic of people killed.

"Over half are 55 and older so it's not so much the smartphone generation," he says.

Fiona Chapman, manager of Pedestrian Projects, Transportation Services with the City of Toronto, has been studying police collision reports and hospital admission.

"A lot of data shows trends over five years or so. Devices are more recent so we might need more time," she says.

In the meantime, people are using anecdotal reports to found calls for laws and bylaws to address the phenomenon. Toronto City Council had already canvassed the question of distracted walking laws or bylaws even before the Pokémon GO craze hit the streets.

On July 14, it passed a motion calling for the province of Ontario to amend the Highway Traffic Act to make it illegal to use a mobile device "while on any travelled portion of a roadway."

The province declined to do so but said the municipalities could address the matter if they wished to.

Opinions are divided on whether it should be attempted.

"If you want to deter any type of dangerous behaviour you need to implement some type of conse-

quence," says Giordano. "Despite the fact that the injury is a consequence, a monetary deterrent or penalty may be required as well. I don't think many people in the general public appreciate the concept of contributory negligence.

If they knew there was a monetary loss when they are found to have a liability, that would be an additional deterrent."

Winward thinks the statistics just aren't there to prove the practice is dangerous yet.

"You'd have a hard time suggesting iPods and smartphones have made things worse. The data doesn't seem to report that yet. It remains to be seen whether virtual reality will make a difference to that," he says.

He notes that the Ontario Road Traffic Safety Report 2013 puts the percentage of collisions attributable to inattention at 12 per cent.

"If you want to make regulatory changes, you can't do it on intuition. Municipalities will

have a hard time finding data to support them," he says.

Chapman confirms that there are, in fact, no bylaws on the table in Toronto.

"I am cautious of people who focus all their political capital on that issue when the data suggests that there's not really a problem. We must ensure that we follow data-driven approaches," she says.

"Anecdotal evidence is nice, but we need a more substantive measure to determine that there's a real problem."

Bauer says it would be very hard to create any regulations around "distracted walking."

"You would find yourself trying to deal with people quickly glancing as opposed to texting or playing Pokémon GO," she says.

"You'd also be looking into what kind of roads it would apply on – sidewalks or two lane streets or one lane streets. It would be very complicated."

Chapman says enforcement is almost impossible.

"It's a momentary thing. Signage makes more clutter and is completely ineffective.

Creating bylaws about behaviour makes you feel good, but they are relatively unenforceable and there is no root problem," she says.

Bauer sees this as a problem that will quickly pass in any case.

"One day we will not have to text. There will be some crazy new invention where we talk aloud and it will do it for us," she says.

"It will stick around for some time now because it's new, and we probably will see more accidents involving handheld devices, unfortunately, but in 10 years' time, the problem won't be around.

We'll have high-tech goggles instead." **LT**

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