

**New Hampshire Supreme Court**

**October 17, 2012**

**Oral Argument Case Summary**

**CASE # 2**

**State of New Hampshire v. Lynn Dion (2011-0786)**

Attorney Allison M. Ambrose for the appellant, Lynn Dion

Senior Assistant Attorney General Susan P. McGinnis for the appellee, State of New Hampshire

**QUESTIONS PRESENTED ON APPEAL**

1. Does talking or dialing on a cell phone while driving amount to criminally negligent behavior that would support Ms. Dion's conviction for negligent homicide?
2. Since cell phone use when driving is not prohibited in New Hampshire, should a driver who is in an accident while legally talking on a cell phone be subject to criminal penalties if talking on the phone was the only allegedly wrongful conduct?
3. Should the court have allowed into evidence records of several cell phone calls that Ms. Dion engaged in during the 30 minutes prior to the accident? Were those records relevant to the trial or were they unfairly prejudicial to Ms. Dion?
4. Was there sufficient evidence for the jury to find, beyond a reasonable doubt, that the defendant, Ms. Dion, had engaged in some blameworthy conduct that was a gross deviation from what a reasonable person would do and thus justify a conviction for negligent homicide?

**SUMMARY OF LAWS TO CONSIDER**

**NEW HAMPSHIRE CRIMINAL CODE:**

**630:3, I (2007) Negligent Homicide. –**

I. A person is guilty of a class B felony when he causes the death of another negligently.

**626:2, II (d) (1973) General Requirements of Culpability**

(d) "Negligently." A person acts negligently with respect to a material element of an offense when he fails to become aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that his failure to become aware of it constitutes a gross deviation from the conduct that a reasonable person would observe in the situation.

**NH Rules of Evidence Rule 404b**

**(b) *Other Crimes, Wrongs, or Acts.* - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.**

**From the trial judge's instructions to the jury prior to deliberations:**

Criminal negligence requires not only the failure to perceive more than an ordinary risk but some serious blameworthiness in the conduct that caused the accident. Unless the defendant engaged in some serious blameworthy conduct that created or contributed to a substantial and unjustifiable risk of death or serious injury, then the defendant is not engaged in criminal negligent conduct.

**FACTS OF THE CASE**

On June 28, 2009, shortly before 9 p.m. Lynn Dion of Franklin was driving a Toyota Corolla on Central Street in Franklin on her way home from a friend's house in Sutton. Genny Bassett and her friend Elsa Gonnella, also of Franklin, were in the crosswalk across Central Street at the east end of the Ward One Bridge. According to the evidence at a trial in Merrimack County Superior Court, Ms. Bassett was struck by the right front bumper of the defendant's car. She was thrown onto the hood of the car and her head struck the windshield, causing a fatal brain injury. Ms. Gonnella was knocked unconscious. The defendant was driving about 30 miles per hour, within the speed limit; her car was in good repair and its headlights were on at the time of the accident.

According to the evidence at trial, at impact, the defendant heard a loud "pop" and glass flew into her car; she immediately slowed down, stopped and saw a person in the street. She got out of her car and called the Franklin Police Department, which she had on automatic dial on her cell phone. When a

police officer arrived on the scene, the defendant said she had never seen the two women in the crosswalk. She told police she was not on her cell phone at the time of the accident.

A jury convicted the defendant of negligent homicide, a felony. She was sentenced to serve one and a half to three years in the state prison pending the outcome of this appeal. If her conviction is upheld by the Supreme Court her driver's license will also be revoked for 7 years after her incarceration.

## **LEGAL ISSUES**

The state contends that Ms. Dion's failure to maintain a proper lookout and avoid the victim because she was distracted by her cell phone usage is a gross deviation from reasonable conduct and therefore supports a conviction of negligent homicide. The state in its brief filed with the Supreme Court contends that "if the defendant had been paying attention it would have taken her no more than a second and a half to stop her car...however she was so distracted and inattentive she never saw (the women) walking right in front of her car." The state contends that based on her rate of speed (30 mph) the defendant had over 13 seconds from the time she turned onto the Ward One Bridge to the point of impact when she should have seen the two women in the crosswalk.

In her brief to the Supreme Court, Ms. Dion through her lawyer, states that she "does not minimize the fact that Genny Bassett tragically died in this accident..." But, Ms. Dion contends that she did not engage in the "wrongful or blameworthy conduct" that New Hampshire law requires for a conviction for negligent homicide. Cell phone use alone is "not enough to convict someone of criminally negligent homicide," she contends in her appeal.

Ms. Dion says she was not on her cell phone at the time of impact. While the state argues the bridge was "well-lit," Ms. Dion argues it was nighttime, visibility was seriously impaired and it had rained earlier. The result, Ms. Dion's lawyer argues "is a dark night, a spotty windshield and an *accident*."

Ms. Dion also contends that the state's failure to pinpoint the time of the accident and her testimony that she did not have her phone in her hand at the time of the accident support her contention that no "rational trier of fact" could find she was on the phone at the time of the accident.

In the New Hampshire courts, failure to use "due care" is ordinary civil negligence; the more serious charge of criminal negligence requires a finding of "blameworthiness." According to the defendant, Ms. Dion, the only evidence that the state presented about what caused the accident was that she was inattentive and distracted because of her cell phone. In appealing her conviction, the defendant contends that evidence does not rise to the level of wrongful or blameworthy conduct needed for a finding of negligent homicide. Through her attorney, Ms. Dion points out that it is not illegal to talk on a cell phone when driving in New Hampshire and it is a common and accepted practice that New Hampshire drivers engage in on a daily basis.

The state, in its brief to the Supreme Court, counters that while talking on a cell phone while driving is not illegal, or necessarily blameworthy,

“becoming so focused on one’s cell phone use and conversations that one is totally unaware of pedestrians in a well-lit clearly marked crosswalk clearly visible to the driver for over 13 seconds” is a gross deviation from conduct of a reasonable person.

On appeal, Ms. Dion also argues that it is up to the legislative branch of government, not the judicial branch, to make the policy decision about whether talking on a cell phone while driving should be illegal. So far the legislature had banned texting while driving, but there is no law that prohibits dialing or using a cell phone while driving.

Ms. Dion’s lawyer also contends that the trial judge should not have allowed the records of prior cell phone calls to be admitted at trial. Generally speaking, the rules of evidence say that evidence of “prior bad acts” cannot be admitted into evidence just to try to prove the “character” of a person. The state argues in this case it used the prior cell phone call records to establish the defendants “state of mind” at the time of the accident. Ms. Dion in her appeal contends however that the state wanted to use that evidence “to prejudice the jury into believing that the defendant should be found guilty of negligent homicide because she frequently talks on the phone when she drives.”

The judge in the case agreed that the record of prior cell phone calls was relevant to the defendant’s state of mind “leading up to the time of the accident.” The state argues on appeal that the accident occurred because the defendant “was distracted and not paying attention to the road in front of her, not exercising due care because of her cell phone.” The state contended that the degree of inattention itself was enough to support a conclusion that the defendant’s conduct was blameworthy.

### **QUESTIONS FOR STUDENTS TO CONSIDER**

1. Should New Hampshire make it a crime to talk on the phone while driving a car? Is this a policy issue that should be decided in the state legislature and not through a court case?
2. If the NH legislature intended for people like Ms. Dion to serve time in jail for talking on her cell phone while driving a car, wouldn’t they have said so by passing a law banning such conduct?
3. For the jury to decide that the defendant was guilty of criminal negligence, does it matter whether the state could or could not prove that she was actually on the phone at the time of the accident?

**This summary was prepared by the Judicial Branch Communications Office based on legal briefs filed by the parties to the appeal.**

**September 26, 2011.**