

COMMENT The Next Best Defendant: Examining a Remote Text Sender's Liability Under Kubert v. Best, 50 Akron L. Rev. 353

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I. Introduction

With the rise in cell phone usage in the United States, texting while driving has grown to become a pervasive form of distracted driving, which has created a major public safety issue with much of the focus only on the conduct of the driver. **1** Texting, because of its inherently distracting and mobile nature, **2** poses a serious and potentially deadly risk of harm to others when coupled with the operation of a motor vehicle. **3** To illustrate, in 2013, cell phone related accidents constituted 27 percent of all automobile accidents. **4** Further, it is estimated that 341,000 of those accidents were related to texting and driving, **5** where 411 of those crashes resulted in fatalities. **6** These figures demonstrate how a driver substantially increases the likelihood of causing an accident when he uses a cell phone to view or send texts, which exposes the driver to liability while the text sender generally bears no responsibility. **7**

[*355] Because texting requires the participation of at least two individuals, the driver should not be held solely liable while the sender of the text shares no liability. **8** While a driver owes a duty of reasonable care not to become distracted by an incoming text, if the sender of the text is aware that the driver is likely to become distracted by it, she should have a limited duty not to send that text. **9** For example, in June of 2015, James Davenport, a school bus driver, "was driving while distracted due to sending and receiving text messages," veered into oncoming traffic and collided with another school bus, killing two students and a teacher's aide. **10** If the text sender was aware that the bus driver, who may have owed a heightened duty of care to his passengers, was driving a school bus during the exchange of texts, the victims of such a needless tragedy should be able to seek redress from both parties who engaged in the texting activity. **11**

Recently in *Kubert v. Best*, the Superior Court of New Jersey properly extended potential liability not merely to the driver who causes an accident due to texting and driving, but also to the sender of the text. **12** *Kubert's* holding represents a departure from traditional notions of third-party tort liability and imposes a new duty on remote senders of text messages. **13** While the Superior Court concluded that the evidence presented by the *Kuberts* was insufficient to hold the remote text sender liable, it held that "the sender of a text message can potentially be liable if an accident is caused by texting, but only if the sender knew or had special reason to know that the recipient would view the text while driving and thus become distracted." **14**

This Article: argues that states should extend liability to text senders **[*356]** to provide victims of accidents caused by texting and driving with an alternative mechanism of redress. Part II discusses empirical evidence that demonstrates the societal harm caused by texting and driving and provides the legislative background concerning the steps that states have already taken to reduce texting while driving. Part III discusses the holding, facts, and the "full duty analysis" that the New Jersey Superior Court employed in *Kubert v. Best* to impose a new duty on remote text senders. **15** Part IV argues that state legislatures and courts should establish rules that impose a duty on remote persons to avoid sending text messages to drivers if they know that the driver will view the text and become distracted. Finally, Part IV also examines how a plaintiff might prove a remote text sender's negligence under *Kubert*.

II. Background

A. Texting and Driving Has Produced Negative Effects in Society

Empirical evidence of the negative consequences caused by distracted driving - and specifically texting and driving - should serve as incentive for society to address the issue and take steps to curtail the unsafe activity. In the United States, approximately 899,000 automobile accidents were related to distracted driving in 2010, and at least 47,000 police-reported crashes involved a driver who was distracted by an

electronic device. **16** Since then, various studies have concluded that the activity of texting while driving is one of the most risky forms of distracted driving. **17** Furthermore, the economic costs imposed on society by accidents caused by distracted driving should further incentivize society to proactively reduce distracted driving. Specifically, a study by the National Highway Traffic Safety Administration reported that the economic cost of distracted driving equated to a total cost of at least \$ 40 billion. **18** This figure includes "losses [of] productivity, medical **[*357]** costs, legal and court costs, emergency service costs, insurance administration costs, congestion costs, property damage, and workplace losses." **19** The societal movement to decrease incidences of drinking and driving offers guidance on how society should approach the problem of texting and driving. **20** Analogously, drinking and driving has resulted in harmful societal consequences and has been fiercely combated. **21** Particularly, over the last several decades, media campaigns, legal prohibitions, and heightened public awareness of the issue led to a decrease in accidents related to drinking and driving and, in turn, decreased the number of deaths caused by drinking and driving. **22** To illustrate, alcohol related accidents that resulted in a fatality declined by 23 percent from 13,099 in 2004 to 10,076 in 2013. **23** Thus, by adopting similar techniques, particularly by increasing civil liability, incidences of accidents related to texting and driving can also be reduced.

B. Texting-and-Driving Laws Have Been Enacted by State Legislatures to Combat the Negative Effects of Texting and Driving

In response to the increase in accidents caused by texting and driving, a majority of states have enacted measures to curb the phenomenon in various forms. **24** Currently, forty-six states have enacted a texting-and-driving ban for all drivers. **25**

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C. Several Courts Have Extended Liability to Passengers of Motor Vehicles

Courts in New Jersey have recognized that passengers of automobiles may be held liable to third-party victims for accidents caused by the driver of an automobile. **34** Generally, while passengers cannot be held liable for injuries to third parties based on the negligent conduct of the driver, New Jersey courts have imposed a duty on passengers not to interfere with the driver's operation and control of a motor vehicle. **35**

Courts in other jurisdictions have similarly held that a passenger may be held liable to an injured third party if she interferes with the driver's control of the automobile through her own affirmative negligence. **36** Specifically, conduct such as grabbing and turning the steering wheel, distracting the driver's attention from the road, obstructing the driver's view, and urging the driver to violate traffic laws, such as driving under the influence of drugs, may constitute conduct sufficient to demonstrate that the passenger interfered with the driver's operation of the motor vehicle. **37** <<<EDIT>>>

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III. A Closer Look at Kubert v. Best

A. Kubert's Holding Places a New Duty on Remote Text Senders

Kubert's holding imposes a new duty on remote text senders in relation to the public who use the roadways. **43** This holding is articulated in several different ways throughout the court's opinion. **44** Essentially, the court held that "the sender of a text message can potentially be liable if an accident is caused by texting, but only if the sender knew or had special reason to know that the recipient would view the text while driving and thus be distracted." **45** The court explained that a sender has "special reason to know" based on a "personal relationship or prior experience that put a defendant 'in a position' to 'discover the risk of harm.'" **46** Thus, a sender will have breached a duty to the public who use the roadways by distracting the driver if the sender either knew or had **[*361]** "special reason to know" that the driver would view the message while driving. **47**

B. Factual and Procedural Background of Kubert

In Kubert, the plaintiffs, Linda and David Kubert, were riding a motorcycle when Kyle Best, who was driving a pick-up truck, veered into the opposite lane and collided with the Kuberts. **48** Best stopped his vehicle and immediately dialed 911. **49** As a result of the collision, both Linda and David Kubert lost their left legs. **50**

The Kuberts filed suit against Best in the Morris County Superior Court in New Jersey. In preparing for the lawsuit, the Kuberts' attorney investigated Best's actions on the day of the accident and discovered

that Best had been in continuous communication with Shannon Colonna via text message and telephone throughout the day. ⁵¹ While the cell-phone record revealed that Best and Colonna had texted each other sixty-two times on the day of the accident, the two defendants were not in a romantic relationship at the time, but were merely friends. ⁵² Further, because the cell-phone record indicated that Best sent a text to Colonna immediately before the accident, the court reasoned that it could be inferred that Best replied to Colonna's text received only thirty-five seconds earlier. ⁵³ Seventeen seconds after responding to Colonna's text, Best called 911. ⁵⁴ Thus, the evidence suggested that Best must have collided with the Kuberts at some point during those seventeen seconds. ⁵⁵

The Kuberts added Colonna as a defendant to the lawsuit and their attorney attempted to obtain the content of the text messages that were [*362] exchanged between Best and Colonna. ⁵⁶ However, the Kuberts' attorney did not have access to that information and neither Best's nor Colonna's depositions contained what the contents of those text messages were. ⁵⁷ Eventually, Best settled and Colonna moved for summary judgment. ⁵⁸ The trial court concluded that remote persons do not have a legal duty to avoid sending text messages to drivers, even if the remote person knows that the recipient is driving. ⁵⁹ The Kuberts appealed the trial court's dismissal of their claims against Colonna to the Appellate Division of the New Jersey Superior Court. ⁶⁰

C. The Rationale of the Kubert Decision

To reach its conclusion that the sender of a text has a limited legal duty not to send a text in certain circumstances, the Kubert court engaged in the common law process of formulating a new duty under a "full duty analysis." ⁶¹ First, the court noted that a "duty is an obligation imposed by law requiring one party to conform to a particular standard toward another," that defining a duty is an issue of law, and that "determinations of the scope of duty in negligence cases has traditionally been a function of the judiciary." ⁶² Next, the court briefly stated that imposing a legal duty requires balancing several factors, such as "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution."

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[T]he [Second Restatement of Torts § 303](#), states that "an act is negligent if the actor intends it to affect, or realizes or should realize that it is likely to affect, the conduct of another, third person, or an animal in such a manner as to create an unreasonable risk of harm to the other." ⁷⁹ Further, the court offers an illustration of this concept, which states: "A is driving through heavy traffic. B, a passenger in the back seat, suddenly and unnecessarily calls out to A, diverting his attention, thus causing him to run into the car of C. B is negligent toward C." ⁸⁰ Based on this illustration, the court expanded the scope of passenger liability by imposing a duty to avoid unreasonably risky conduct that the passenger knows or has special reason to know will distract the driver, such as urging the driver to [*365] remove his gaze from the road to view a cell phone screen. ⁸¹

Finally, the court states that foreseeability, a "foundational element" in determining whether a duty exists, is "based on the defendant's knowledge of the risk of injury." ⁸² Next, the court reasoned that the sender of a text takes a foreseeable risk if the sender is aware that the recipient is driving and will view the text immediately." ⁸³ Therefore, the court concluded that if a person sends a text to a recipient when the sender has either actual knowledge or special reason to know that the recipient is driving and will read the text, then the sender has, like a passenger, "knowingly engaged in distracting conduct" and has breached the duty of care owed to the public who use the roadways. ⁸⁴

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Consequently, a lack of legislative action regarding a text sender's liability should not dissuade a court from imposing a duty on remote text senders because, even if a legislature's policy differs from that of the court, legislatures are empowered to overturn a court's decision if it be the will of the people. ¹⁰⁹

IV. States Should Permit Victims of Accidents Caused by Texting and Driving to Recover Against Remote Text Senders

A. States Should Adopt Rules That Impose a Duty on Remote Text Senders

State courts and legislatures should, in a manner similar to that of Kubert, hold that remote persons have a duty to avoid sending text messages to drivers if they know or have special reason to know that the driver will view the text and become distracted. <<<EDIT>>>

B. Remote Text Sender's Duty Aligns with the Parameters Set Forth in **Palsgraf**

The relational aspects of breach and duty set forth in Kubert properly align in a manner consistent with **Palsgraf** so that a remote text sender may indeed breach a duty of care to the public who use the roadways. In **Palsgraf**, Judge [Cardozo](#) introduced the notion that the elements of breach and duty must align for a plaintiff to recover even if the defendant's conduct actually causes the plaintiff's injury. **113** The events in **Palsgraf** take place at a train station where the guard of a railroad car pushed a gentleman carrying a package. **114** The contents of the package, unbeknownst to all because of its modest appearance, in fact contained fireworks, which exploded upon impact with the ground. **115** The plaintiff, a young woman who stood "many feet away" at the other end of the platform, was injured from the explosion. **116** The plaintiff sued the railroad company for the negligence of the guard, and the court held that, while the guard owed a duty to the gentleman carrying the package, it was not foreseeable that the apparently harmless package "had in it the potency of peril to persons thus removed." **117** Therefore, even though the plaintiff indeed suffered an injury because of the guard's negligence, it was not foreseeable that his actions would cause harm to anyone other than the possessor of the package, and therefore he could not have breached a duty that he did not owe to the plaintiff. **118**

While a potential victim of an automobile accident would be far removed from the source of the careless conduct similar to the plaintiff in **Palsgraf**, it is "the risk reasonably to be perceived [that] defines the duty to be obeyed." **119** In **Palsgraf**, the guard did not owe a duty to the plaintiff because it was not foreseeable ex ante that he would, by **[*371]** shoving the owner of the package, carelessly set in motion the series of events which caused a hidden but dangerous instrumentality to explode and injure the plaintiff. **120** However, unlike the guard in **Palsgraf**, the sender of a text will be held liable only if he is aware that the recipient is driving an automobile that, when operated carelessly, can foreseeably cause substantial harm to others in the immediate proximity. **121** Further, even though the instrumentalities in both cases are potentially dangerous, in the case of texting a driver it is foreseeable that an automobile, because of its known and dangerous potentialities, will give notice to the actor ex ante of the "risk reasonably to be perceived." **122** Thus, because the sender of a text can perceive the risk to others when she sends a text knowing that the recipient is operating a dangerous instrumentality, it is not unfair to impose a duty upon the sender to refrain from engaging in an activity that has the potential to harm the public who use the roadways. **123**<<<EDIT>>>

V. Conclusion

Texting and driving is a dangerous activity that is responsible for many of the avoidable accidents that occur due to distracted driving. **179** While many state legislatures have responded by enacting formal prohibitions on texting and driving, the penalties are far less severe than other forms of distracted driving, namely driving while intoxicated. **180** **[*382]** Because the penalties for many states and localities usually consist of a small monetary fine, the deterrent effect on the conduct of drivers is minimal. **181** Thus, this approach to reducing texting while driving only addresses one-half of the prohibited conduct. While prohibiting texting and driving on the part of the recipient-driver is the more obvious approach to addressing the issue, the very nature of texting requires the participation of two individuals, which suggests that the text sender's conduct should also be addressed. The framework that Kubert has formulated appropriately addresses the issue of texting and driving by imposing a duty on the remote sender to refrain from texting in inappropriate circumstances. **182** Because the threshold of proving that a remote text sender has breached his duty is higher than ordinary standards of conduct, Kubert's holding offers a realistic approach to reducing incidences of texting while driving. **183** It also forces society to re-examine how drivers should use electronic devices when operating an automobile. Accordingly, state courts and legislatures should impose a duty on remote text senders, consistent with the holding in Kubert, to not send a text to a recipient whom they know is driving and is likely to become distracted by the incoming