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# Comments: Judicial Messaging: Remote Texter Liability as Public Education

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## JUDICIAL MESSAGING: REMOTE TEXTER LIABILITY AS PUBLIC EDUCATION

### I. INTRODUCTION

In an August 2013 case of national first impression, the New Jersey Superior Court held that “one who is texting from a location remote from the driver of a motor vehicle can be liable to [third parties] injured because the driver was distracted by the text.”<sup>1</sup> The remote texter<sup>2</sup> will be liable if the accident was caused by texting and if that remote texter “knows, or has special reason to know, [that] the recipient will view the text while driving” and thus be distracted.<sup>3</sup> Perhaps unsurprisingly, *Kubert* fast became the object of ridicule among legal commentators and in news coverage.

Distracted driving is an epidemic that plagues the nation. Polls suggest that the current traffic safety culture is one of indifference, founded upon drivers’ “do as I say, not as I do” attitude.<sup>4</sup> At any given moment, 660,000 drivers are using cell phones and electronic devices while driving.<sup>5</sup> Studies show that distracted driving, which enhances the risk of a car accident by three times,<sup>6</sup> is more dangerous than drinking and driving.<sup>7</sup>

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1. *Kubert v. Best*, 75 A.3d 1214, 1218–19 (N.J. Super. Ct. App. Div. 2013). New Jersey motor vehicle and criminal statutes provide penalties for those who use their cell phone while driving, but neither statutory nor case law directly address penalties for the remote sender of the text. *Id.* at 1218.
  2. Texter has been recognized in the Collins English Dictionary, defined as “a person who communicates by text messaging.” *Definition of “Texter,”* COLLINS ENGLISH DICTIONARY, <http://www.collinsdictionary.com/dictionary/English/texter> (last visited Apr. 10, 2015).
  3. *Kubert*, 75 A.3d at 1221.
  4. Bruce C. Hamilton et al., *Distracted and Risk-Prone Drivers*, AAA FOUND. FOR TRAFFIC SAFETY 2 (Jan. 2013), <https://www.aaafoundation.org/sites/default/files/Distracted%20and%20Risk%20Prone%20Drivers%20FINAL.pdf>.
  5. See Timothy M. Pickrell & Tony Jianqiang Ye, *Driver Electronic Device Use in 2011*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN. 1 (Apr. 2013), <http://www-nrd.nhtsa.dot.gov/Pubs/811719.pdf>.
  6. *New VTTI Study Results Continue to Highlight the Dangers of Distracted Driving*, VA. TECH TRANS. INST. (May 29, 2013), <http://www.vtti.vt.edu/featured/052913-cellphone.html>.
  7. See Philip LeBeau, *Texting and Driving Worse than Drinking and Driving*, CNBC (June 25, 2009, 11:54 AM), <http://www.cnbc.com/id/31545004>. CNBC and Car and

Handling a cell phone while driving is a temptation for people of all ages and demographics. As attorneys, we check our email, discuss client matters on the phone, and even send and receive faxes—all while driving on congested highways or through neighborhoods where children play in the streets. We must take a step back and reexamine the life in which we consciously and unconsciously participate. Today's society is apathetic to the risks involved with distracted driving. Public service announcements, peer discussion, and even the prospect of a traffic ticket have failed to stem this serious hazard. Could the threat of civil liability accomplish what all of these conventional approaches to public education have not?

Liability rules do more than compensate the victims of harm for their injuries. "When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm."<sup>8</sup> By educating people about both the hazards of their conduct and its potential liability consequences, tort law admonishes would-be wrongdoers, and thus induces at least some of them to take greater care. In this way, liability rules serve a prophylactic, as well as a compensatory, purpose.

This Comment defends *Kubert v. Best*, and remote texter liability more generally, as a valuable instrument of public education about a novel and serious public safety problem, and as an appropriate example of judicial innovation.<sup>9</sup> Part II provides a factual and legal overview of *Kubert v. Best*.<sup>10</sup> Part III then analyzes the legal concepts at issue: evolving the common law, aligning moral culpability with legal responsibility, and preventing foreseeable harm.<sup>11</sup>

The Comment further seeks to show that *Kubert* exemplifies appropriate judicial innovation.<sup>12</sup> Part IV promotes *Kubert*-style liability as a desirable means of raising public consciousness and suggests that many jurisdictions will adopt this extension of

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Driver Magazine partnered to test brake time reaction for drivers in various conditions. Driving 70 mph, an unimpaired driver takes .54 seconds to brake, a legally drunk (.08 BAC) driver takes an additional 4 feet, a driver reading an email takes an additional 36 feet, and a driver sending a text takes an additional 70 feet. *Id.*

8. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 25 (5th ed. 1984).
9. See discussion *infra* Parts II–V.
10. See discussion *infra* Part II.
11. See discussion *infra* Part III.
12. See discussion *infra* Parts IV–V.

liability.<sup>13</sup> Part V addresses objections, and then argues that the enormous benefit of societal education outweighs the minute added liability.<sup>14</sup>

## II. UNDERSTANDING THE UNDERPINNINGS OF *KUBERT V. BEST*

### A. *Factual Background*

On the afternoon of September 21, 2009, David and Linda Kubert were riding their motorcycle in Mine Hill Township, New Jersey.<sup>15</sup> As the Kuberts were rounding a bend, “a pick-up truck . . . driven . . . by eighteen-year-old Kyle Best crossed the double center line” into the Kubert’s lane of travel.<sup>16</sup> After an unsuccessful attempt to evade the collision, the truck and motorcycled collided.<sup>17</sup> David’s left leg was nearly severed and Linda’s left leg was shattered, “leaving her fractured thighbone protruding [from her] skin” as the Kuberts laid injured in the road.<sup>18</sup> Best, a volunteer fireman, did his best to aid the Kuberts until medical responders arrived, but both victims lost their left leg as a result of the accident.<sup>19</sup>

The Kuberts’ attorney gathered evidence of Best’s cell phone activity on the day of the accident, which showed 62 texts between Best and his 17-year-old friend, Shannon Colonna, on the day of the accident.<sup>20</sup> Colonna texted Best at 5:48:14 p.m., Best responded at 5:48:23 p.m. and 5:48:58 p.m., then Colonna texted back at 5:49:07 p.m., just before Best placed the 911 call at 5:49:15 p.m.<sup>21</sup> Seventeen seconds passed between Best texting Colonna and the 911 call; those seventeen seconds had to include Best stopping his truck, getting out, seeing the gravity of the injuries, and calling 911.<sup>22</sup> The judge inferred that the teenagers’ texting distracted Best, causing him to collide with the Kuberts’ motorcycle.<sup>23</sup>

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13. See discussion *infra* Part IV.

14. See discussion *infra* Part V.

15. *Kubert v. Best*, 75 A.3d 1214, 1219 (N.J. Super. Ct. App. Div. 2013).

16. *Id.*

17. *Id.* at 504.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 1220 (admitting into evidence a chart indicating the exact times of each text).

22. *Id.*

23. See *id.* at 1220–21. Cell phone records show that Best resumed texting with Colonna at 5:55:30 p.m., and that Best texted Colonna after he began driving home. *Id.* at 1221.

### B. *Procedural Posture and Holdings*

The Kuberts brought claims for compensation against both Best and Colonna, alleging the accident was caused by distractions created by the texters; Best settled and the trial court granted summary judgment in favor of Colonna, on the ground that she had no legal duty to avoid texting Best, even if she knew he was driving.<sup>24</sup> On appeal, the Kuberts challenged the dismissal of claims against Colonna, urging that if a jury found her texting to be a proximate cause of the accident, then she should be liable for aiding and abetting Best's unlawful texting while driving.<sup>25</sup> The Kuberts further asserted that Colonna "had an independent duty to avoid texting to a person who [she knew] was driving" and that, based on the timestamps of the texts, a jury could infer that Colonna knew Best was driving home from work when she texted him less than a minute before the accident.<sup>26</sup>

The appellate court agreed that Colonna *did* have a legal duty to not distract Best while he was driving, declaring that "a person sending text messages has a duty not to text someone who is driving if the texter knows, or has special reason to know, the recipient will view the text while driving."<sup>27</sup> Nonetheless, the Kuberts were unable to produce sufficient evidence to prove that Colonna knew or had special reason to know that Best was driving during their text conversation; therefore, the appellate court affirmed summary judgment in favor of Colonna.<sup>28</sup>

### C. *The Kubert Court's Journey To Defining The Duty Owed By A Remote Texter*

To recover for negligence, a plaintiff must prove that a defendant breached a duty of care owed to the plaintiff, and that the breach caused actual compensatory injuries to the plaintiff.<sup>29</sup>

In analyzing whether a remote texter owes a duty of care to those who may be harmed when the text recipient-driver is distracted, the New Jersey Superior Court examined case law, including analogous precedent from various jurisdictions, and the Restatement (Second) of Torts.<sup>30</sup> There is a long-standing duty to not interfere with a

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24. *Id.* at 1218, 1221.

25. *Id.* at 1221.

26. *Id.*

27. *Id.*

28. *Id.*

29. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 6 cmt. b (2010).

30. *Kubert*, 75 A.3d at 1222–27.

driver's operation of the motor vehicle.<sup>31</sup> Passengers who actively encourage unsafe actions by a driver may be jointly liable for resulting harm,<sup>32</sup> while mere presence in a negligent driver's vehicle or failure to prevent unsafe conduct is, in most jurisdictions, insufficient to establish that a passenger aided and abetted the driver's negligence.<sup>33</sup> Generally, to establish a duty upon passengers, they must satisfy either of two conditions. First, the plaintiff could establish that the passenger had a special relationship with the driver or the passenger actively encouraged the driver's negligent conduct.<sup>34</sup> A special relationship involves an element of control, such as parent-child, common carrier-passenger, employer-employee, or landowner-invitee.<sup>35</sup> Second, the plaintiff can prove that the passenger actively encouraged the driver's negligent conduct. Active encouragement entails affirmative acts on the part of the passenger, thus creating a situation where a passenger could aid and abet the driver's negligent actions.<sup>36</sup>

The *Kubert* holding endorsed these conditions as separate avenues for imposing liability on the remote texter and acknowledged that Colonna satisfied neither: Colonna did not have a special relationship with Best nor did she actively encourage Best to text while driving.<sup>37</sup> With the contents of the text messages unknown to the court, it could not be shown that Colonna knew Best was driving, therefore a jury could not find that Colonna aided and abetted.<sup>38</sup> The court provided

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31. 8 AM. JUR. 2d *Automobiles* § 703 (2014). See generally RESTATEMENT (SECOND) OF TORTS § 876 cmt. a(2) (1979) (stating that two speeding drivers are both liable to an injured party).
  32. E.g., *Sloan v. Fauque*, 784 P.2d 895, 895 (Mont. 1989) (encouraging driver to continue chase of another vehicle); *Aebischer v. Reidt*, 704 P.2d 531, 532 (Or. 1985) (refilling marijuana pipe for driver warranted imposing liability on that passenger); *Hood v. Evans*, 126 S.E.2d 898, 899–90 (Ga. 1962) (holding liable the passenger who signaled the start of a drag race).
  33. E.g., *Edwardson v. Am. Family Mut. Ins. Co.*, 589 N.W.2d 436, 439–40 (Wisc. Ct. App. 1998).
  34. *Kubert*, 75 A.3d at 1224 (citing *Champion ex rel. Ezzo v. Dunfee*, 939 A.2d 825, 829–30 (N.J. Super. Ct. App. Div. 2008)). But see *Adams v. Morris*, 584 S.W.2d 712, 716–17 (Tex. Civ. App. 1979) (finding that passengers may owe a common law duty of reasonable care to all others on the roadway).
  35. *Webb v. Univ. of Utah*, 125 P.3d 906, 909 (Utah 2005).
  36. See Beth Holliday, *Cause of Action Against Motor Vehicle Passenger to Recover for Injury Sustained in Accident*, 61 CAUSES OF ACTION 2d 1, § 3 *Alternative Actions* (2014).
  37. *Kubert*, 75 A.3d at 1224. In this case, it was not argued that Colonna had a special relationship with Best—the only condition at issue was active encouragement. *Id.*
  38. *Id.* at 1229.

that, even under the assumption that Colonna's texts were phrased to require responses, the act of sending text messages does not, by itself, constitute active encouragement of texting while driving.<sup>39</sup> Colonna could not actively encourage Best to text while driving if she did not know Best was driving.<sup>40</sup>

The *Kubert* court consciously defined the duty owed by a remote texter as a narrow one. It recognized that "courts must be careful not to 'create a broadly worded duty and . . . run the risk of unintentionally imposing liability in situations far beyond the parameters we now face.'"<sup>41</sup> It therefore limited a text sender's duty to circumstances in which the sender knows or has special reason to know that the recipient: (1) is driving; and (2) will read and respond to the message.<sup>42</sup>

### III. DOCTRINAL FOUNDINGS OF THE *KUBERT* HOLDING

The *Kubert* court expressed dire concern about the lack of public consciousness regarding the deadly epidemic of texting while driving.<sup>43</sup> In an effort to promote public awareness of the gravity of potential harm, the court appropriately exercised its authority to create civil liability where statutes had proven ineffective. The *Kubert* court interpreted the negligence elements of duty and proximate cause to support a legal responsibility for risks that people know or should know they are creating.<sup>44</sup> Because duty and proximate cause operate in all common law states as the primary doctrinal impediments to third-party liability for negligent driving, the *Kubert* analysis has nationwide implications.<sup>45</sup>

#### A. *Statutory Influence, Or Lack Thereof*

Courts have traditionally had authority to decide issues of first impression in the absence of a controlling statute.<sup>46</sup> Such judge-made law creates a binding rule or standard that is then incorporated into

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39. *Id.*

40. *Id.* at 1224.

41. *Id.* at 1227 (quoting *Estate of Desir ex rel. Estiverne v. Vertus*, 69 A.3d 1247, 1258 (2013)).

42. *Id.* at 1218–19.

43. *Id.* at 1229.

44. *Id.* at 1226–28.

45. Peggy Wright, *Text Sender Could Be Civilly Liable for N.J. Wreck*, USA TODAY (Aug. 29, 2013, 1:31 PM), <http://www.usatoday.com/story/news/nation/2013/08/29/texting-driving-crash-ruling-nj/2727549/htm>.

46. *See, e.g., Merrill Lynch, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 376 (1982).

the governing body of law.<sup>47</sup> “If civil liability is appropriate to effectuate the purposes of a statute, courts are not denied this traditional remedy because it is not specifically authorized [by statute].”<sup>48</sup>

Prior to this case, New Jersey had one statute in place, N.J. STAT. ANN. 39:4-97.3, prohibiting texting while driving. This law makes it illegal to use a cell phone that is not hands-free while operating a motor vehicle, except in a few specifically described emergency instances.<sup>49</sup> Interestingly, effective July 1, 2014, 50 percent of the fines imposed on those who violate this statute are allocated to the State, and shall be used for public education, including “informing motorists of the dangers of texting while driving.”<sup>50</sup> Furthermore, in response to *Kubert*, New Jersey amended its criminal assault statute in 2012 to add N.J. STAT. ANN. 2C:12-1(c)(1), dubbed the “Kulesh, Kubert, and Bolis Law.”<sup>51</sup> This new law provides criminal penalties for those who use a cell phone while driving and injure others.<sup>52</sup>

47. *See id.*

48. *Id.*

49. N.J. STAT. ANN. 39:4-97.3 (West Supp. 2014) (amended July 1, 2014) states in pertinent part:

a. The use of a wireless telephone or electronic communication device by an operator of a moving motor vehicle on a public road or highway shall be unlawful except when the telephone is a hands-free wireless telephone or the electronic communication device is used hands-free . . .

b. The operator of a motor vehicle may use a hand-held wireless telephone while driving with one hand on the steering wheel only if:

(1) The operator has reason to fear for his life or safety, or believes that a criminal act may be perpetrated against himself or another person; or

(2) The operator is using the telephone to report to appropriate authorities a fire, a traffic accident, a serious road hazard or medical or hazardous materials emergency, or to report the operator of another motor vehicle who is driving in a reckless, careless or otherwise unsafe manner or who appears to be driving under the influence of alcohol or drugs.

50. N.J. STAT. ANN. 39:4-97.3(f) (West Supp. 2014). Prior to July 1, 2014, the statute provided only that the State “shall develop and undertake a program to notify and inform the public as to the provisions of this act.” The amended statute allocates the other 50 percent of fines to the municipality in which the offense occurred. *Id.*

51. N.J. STAT. ANN. § 2C:12-1(c)(1) (West Supp. 2014); *see also* *Kubert v. Best*, 75 A.3d 1214, 1218 (N.J. Super. Ct. App. Div. 2013).

52. N.J. STAT. ANN. 2C:12-1(c)(1) states in pertinent part:

### B. *Creating A Common Law Duty*

The duty element serves as a gatekeeper and must be established to succeed on a negligence claim.<sup>53</sup> By defining the obligation that one person owes another, duty “constrains and channels behavior in a socially responsible way before the fact, and it provides a basis for judging the propriety of behavior thereafter.”<sup>54</sup> Determining the scope of duty in negligence claims has long been a judiciary function.<sup>55</sup>

The court considers whether a plaintiff’s interests deserve legal protection from a defendant’s conduct.<sup>56</sup> In doing so, courts use duty to balance competing interests: the security of the class of potential victims versus the freedom of action of the class of actors.<sup>57</sup> When the actor’s chosen conduct creates a risk of harm to others, the court may determine the appropriateness of the conduct by weighing the importance of the actor’s goal against the risk of harm such an act imposes on others.<sup>58</sup> Under *Kubert*, a person who texts a driver knowing that the driver will be distracted by the text effectively chose to create risk to the recipient and others on the road.<sup>59</sup> The remote texter’s decision to text the driver is deemed inappropriate because the texter’s interest in communicating a message to the driver will almost always be outweighed by the increased likelihood of an auto accident.<sup>60</sup> For example, the texter’s desire to ask the

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A person is guilty of assault by auto or vessel when the person drives a vehicle or vessel recklessly and causes either serious bodily injury or bodily injury to another. Assault by auto or vessel is a crime of the fourth degree if serious bodily injury results and is a disorderly persons offense if bodily injury results. Proof that the defendant was operating a hand-held wireless telephone while driving a motor vehicle in violation of section 1 of P.L. 2003, c. 310 (C. 39:4-97.3) may give rise to an inference that the defendant was driving recklessly.

53. David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1674 (2007).

54. *Id.* at 1674–75 (citing David G. Owen, *Duty Rules*, 54 VAND. L. REV. 767, 767–79 (2001)).

55. *Kelly v. Gwinnell*, 476 A.2d 1219, 1226 (N.J. 1984).

56. *Kubert v. Best*, 75 A.3d 1214, 1227–28 (N.J. Super. Ct. App. Div. 2013) (citing *J.S. v. R.T.H.*, 714 A.2d 924, 928 (N.J. 1998)).

57. Owen, *supra* note 53, at 1675.

58. *See id.* at 1678.

59. *Kubert*, 75 A.3d at 1227–29.

60. *See id.* at 1222–23.

driver what s/he wants for dinner does not warrant tripling the risk of a car accident.<sup>61</sup>

Courts have authority to establish a common law duty of care,<sup>62</sup> and typically define that duty with reference to notions of basic fairness and consideration of public policy.<sup>63</sup> Courts weigh the relationship of the parties, the associated risk, the opportunity and ability to use care, and the public interest in the outcome, with the goal of developing a “generally applicable rules to govern societal behaviors.”<sup>64</sup> This is a judicial undertaking that looks well beyond the particular facts and parties before the court that day.<sup>65</sup>

### C. Proximate Cause As A Judicial Tool, Not A Bright-Line Rule

The element of proximate cause is similarly informed by public policy.<sup>66</sup> “[P]roximate cause is an ‘elusive butterfly’ that e’er evades a net of rules.”<sup>67</sup> Cause-in-fact addresses the factual connection between the breach of duty and the injury, whereas proximate cause speaks to “whether in logic, fairness, policy, and practicality, the defendant ought to be held legally accountable for the plaintiff’s harm that in some manner is ‘remote’ from the defendant’s breach.”<sup>68</sup> This element of negligence, though essential for liability,<sup>69</sup> cannot be boiled down to hard set of rules, let alone a single name;<sup>70</sup> rather,

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61. See generally *New VTTI Study Results Continue to Highlight the Dangers of Distracted Driving*, *supra* note 6 (examining statistical data on the risks associated with cell phone use while driving).
62. See, e.g., *Wilson v. Copen*, 244 F.3d 178, 181 n.1 (1st Cir. 2001).
63. *Kubert*, 75 A.3d at 1223 (citing *Estate of Desir ex. rel. Estiverne v. Vertus*, 69 A.3d 1247, 1258 (N.J. 2013)).
64. See *id.* (quoting *Vertus*, 69 A.3d at 1258).
65. See *id.* (quoting *Vertus*, 69 A.3d at 1258).
66. *Ashley Cnty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 671 (8th Cir. 2009) (“Proximate cause is bottomed on public policy as a limitation on how far society is willing to extend liability for a defendant’s actions.”).
67. KEETON, ET AL., *supra* note 8, § 41, at 264 (explaining that proximate cause reflects “ideas of what justice demands, or of what is administratively possible and convenient”); *Owen*, *supra* note 53, at 1682.
68. *Owen*, *supra* note 53, at 1681.
69. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 6 cmt. b at 79–80 (2010).
70. At times, courts refer to proximate cause as “legal cause,” yet also reference proximate cause as encompassing both factual and legal causation, thereby creating mounds of confusion. *Owen*, *supra* note 53, at 1682. To assuage this confusion and to better exemplify its meaning, the *Restatement (Third) of Torts* replaces “proximate cause” with “scope of liability.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM ch. 6 at 492, Special Note on Proximate Cause.

proximate cause is a judicial tool used to define the scope of potential liability.<sup>71</sup> Founded in the concept of foreseeability, proximate cause analysis allows a court to examine specific factual and legal issues from comprehensive policy and common-sense perspective.<sup>72</sup> The relevant inquiry is whether, at the time the choice of action was made, the actor should have contemplated the class of resulting injury as a plausible result of their action.<sup>73</sup> “[P]rior incidents or other facts evidencing risks may make certain risks foreseeable that otherwise were not, thereby changing the scope-of-liability analysis.”<sup>74</sup>

#### D. *Proximate Cause Satisfied Through Public Policy And Common Sense*

As the *Kubert* court explained, the sender of a text may reasonably “assume that the recipient will read a text message only when it is safe and legal to do so, that is, when not operating a vehicle.”<sup>75</sup> “However, if the sender knows that the recipient is both driving and will read the text immediately, then the sender has taken a foreseeable risk in sending a text at that time.”<sup>76</sup> Fairness to the public requires that the sender be held responsible for such scienter.

In its proactive expansion of liability, the *Kubert* court appropriately honored the duty and proximate cause doctrines in order to develop the common law in response to social and technological change.

### IV. REMOTE TEXTER LIABILITY TO RAISE PUBLIC CONSCIOUSNESS

*Kubert*-style liability may serve as public education when other means fail to adequately address a pressing issue. The legal landscape is perpetually adjusting to the speed of technological innovation and the omnipresence of technology in our daily lives.<sup>77</sup> From the industrial era to the modern digital age, courts have

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71. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992).

72. *See Kubert v. Best*, 75 A.3d 1214, 1223 (N.J. Super. Ct. App. Div. 2013) (quoting *Estate of Desir ex. rel. Estiverne v. Vertus*, 69 A.3d 1247, 1258 (N.J. 2013)).

73. Owen, *supra* note 53, at 1683.

74. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. d.

75. *Kubert*, 75 A.3d at 1227.

76. *Id.*

77. *See John G. Browning, Emerging Technology and Its Impact on Automotive Litigation*, 81 DEF. COUNS. J. 83, 83–84 (2014).

wrestled to adapt time-honored doctrines to our ever-developing world.<sup>78</sup>

A. *Pervasive Disjunction Between Awareness And Conduct*

Automotive litigation demonstrates the misaligned relationship between new technology and established legal concepts.<sup>79</sup> The ability to instantly communicate with others has bred an electronic tethering to one's friends, family, and work; 14,100,000,000 texts are sent per day in the United States<sup>80</sup> and at any given moment, 660,000 drivers are using cell phones and electronic devices while driving.<sup>81</sup> Studies show that distracted driving, which enhances the risk of a car accident by three times,<sup>82</sup> is more dangerous than drinking and driving.<sup>83</sup>

The U.S. Department of Transportation analyzes three main types of distraction: manual, visual, and cognitive.<sup>84</sup> Texting while driving engages all three types simultaneously, making it the most dangerous of distractions.<sup>85</sup> In 2012, about 421,000 people were injured in motor vehicle crashes involving a distracted driver.<sup>86</sup>

There is a troubling disjuncture between the perceived threat to public safety and the actual actions taken toward curbing the threat. Accidents are the fifth leading cause of death in the United States.<sup>87</sup> The majority of Americans believe that distracted driving is a bigger problem today than three years ago; the same sample group did not

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78. See, e.g., *Great N. Ry. Co. v. Cahill*, 253 U.S. 71, 76–77 (1920) (evaluating cases of first impression regarding duties in the railroad context); *Bridge Proprietors v. Hoboken Co.*, 68 U.S. 116, 147 (1863) (describing the invention of the steam engine as a massive difficulty for the legal system); *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100–01 (N.Y. 1928) (discussing the development of the concept of foreseeability and its impact on negligence law).

79. Browning, *supra* note 77, at 83.

80. See *Text Message Statistics*, STATISTIC BRAIN (June 18, 2013), <http://statisticbrain.com/text-message-statistics/> (showing that from June 2011 to June 2012, the average number of texts sent per month in the United States was 423,000,000,000).

81. *What is Distracted Driving?*, DISTRACTION.GOV, <http://www.distraction.gov/stats-research-laws/facts-and-statistics.html> (last visited Apr. 10, 2015).

82. *Id.*

83. See LeBeau, *supra* note 7.

84. *What is Distracted Driving?*, *supra* note 81.

85. *Id.*

86. *Id.*

87. The Editors of Publ'n's Int'l, *15 Most Common Causes of Death in the United States*, HOWSTUFFWORKS, <http://health.howstuffworks.com/diseases-conditions/death-dying/15-most-common-causes-of-death-in-the-united-states.htm> (last visited Mar. 6, 2015).

feel that impaired driving, traffic congestion, and aggressive driving posed a similarly growing threat.<sup>88</sup>

On the other hand, polls suggest that the current traffic safety culture is one of indifference, founded upon drivers' "do as I say, not as I do" attitude.<sup>89</sup> Nearly all drivers view texting while driving as completely unacceptable, and seven out of eight drivers do perceive social disapproval for texting while driving.<sup>90</sup> Yet two out of three people report using their cell phone "while driving within the past month,"<sup>91</sup> one in four people admit to sending a text while driving in the past month; and one in three admit to reading a text while driving in the past month.<sup>92</sup> Further, about "1 in 3 Americans have had a friend or relative seriously injured or killed in a [car] crash."<sup>93</sup> In spite of the public's evident awareness of the problem, however, "less than half (44.6%) [of drivers] support an outright ban on using any type of cell phone (including hands-free) while driving."<sup>94</sup> These statistics are not reserved for the teen population, as many may suspect. Rather, adult drivers reported using their phones or texting while driving substantially more often than high school-aged teens.<sup>95</sup>

Statistics confirm the indifference that is readily apparent in our daily lives: people shamelessly admit to using their cell phones while driving, despite awareness of the rampant danger. As a mechanism for moving the public consciousness, the New Jersey Superior Court proactively expanded the existing statutory liability to include remote senders of text messages, i.e., those who aid and abet texting while driving.<sup>96</sup>

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88. See *2013 Traffic Safety Culture Index*, AAA FOUND. FOR TRAFFIC SAFETY 14 (Jan. 2014), <https://www.aaafoundation.org/sites/default/files/TSCI%202013%20Final%20FTS%20Format.pdf>.

89. Hamilton et al., *supra* note 4, at 4.

90. *2013 Traffic Safety Culture Index*, *supra* note 88, at 3. ("Nearly all drivers view texting or emailing while driving as a very serious threat to their own personal safety . . .").

91. *Teens Report Texting or Using Phone While Driving Significantly Less Often Than Adults*, AAA NEWSROOM (Dec 11, 2013), <http://newsroom.aaa.com/2013/12/teens-report-texting-or-using-phone-while-driving-significantly-less-often-than-adults/>.

92. Hamilton et al., *supra* note 4, at 3.

93. *2013 Traffic Safety Culture Index*, *supra* note 88, at 3.

94. *Id.*

95. *Teens Report Texting*, *supra* note 91 (finding that "[f]orty-three percent of adults ages 25–39" reported using their phone "fairly often or regularly while driving, compared to only 20 percent of teens").

96. See *Kubert v. Best*, 75 A.3d 1214, 1229 (N.J. Super. Ct. App. Div. 2013).

### B. Courts Can Play A Pivotal Role In Raising Awareness

While legislatures throughout the nation have been enacting civil and criminal statutes to address specific modes of distracted driving, such lawmaking tends to lag behind the technology it seeks to regulate.<sup>97</sup> Most communication takes place through digital messaging, be it text or email, rather than actual conversation. Therefore, while effective in their narrow scope, the laws already in place are not sufficient to combat the epidemic of distracted driving, especially texting while driving.

The *Kubert* holding reflects the actual dangers of texting while driving. Derived from criminal statutes imposing liability on texters who cause injury, the *Kubert* court echoed the legislature's view that texting while driving is more than just negligent; rather, it is reckless—a higher degree of subjective culpability.<sup>98</sup>

### C. *Kubert-Style Liability: Coming Soon To A Jurisdiction Near You*

Courts are well positioned to extend or reinterpret existing rules or craft new law in response to new and emerging issues. Ideally, they will adopt common law liability rules in dialogue with the legislature.

#### 1. Legislative Support For Judicial Extension

The *Kubert* court relied on existing state statutes and the Restatement (Second) of Torts to justify their extension of liability.<sup>99</sup> Presently, 44 states and the District of Columbia have bans on texting while driving.<sup>100</sup> Most of these are primary laws—i.e., police may stop a motorist for that offense alone.<sup>101</sup> Notwithstanding the national trend toward enacting such prohibitions, there is a parallel trend of not enforcing them.<sup>102</sup> States issue, on average, one ticket per day for

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97. See generally *id.* at 1218–19 (explaining that the distracted driving laws enacted thus far by the legislature do not answer the issue presented in this case “whether one who is texting from a location remote from the driver of a motor vehicle can be liable to persons injured because the driver was distracted by the text”).

98. See *id.* at 1229.

99. *Id.* at 1222–27.

100. *Distracted Driving: Cellphones and Texting*, INS. INST. FOR HIGHWAY SAFETY (Mar. 2015), <http://www.iihs.org/iihs/topics/laws/cellphonelaws?topicName=distracted-driving> (providing a table of state-by-state laws restricting cellphone use and texting, including enforcement mechanisms).

101. Larry Copeland, *FWIW, Few Drivers Nabbed by Texting Bans*, USA TODAY (May 5, 2013, 3:39 PM), <http://www.usatoday.com/story/news/nation/2013/05/05/texting-driving-bans-enforcement-tickets/2133815/html>.

102. *Id.*

violating cell phone laws.<sup>103</sup> Justin McNaull, director of state relations for AAA and former Virginia police officer, defended such under-enforcement on the ground that it takes time for police to establish and propagate effective enforcement tactics.<sup>104</sup> McNaull further explained that it is easier to issue citations for speeding or failing to buckle a seatbelt, as those violations are readily apparent, whereas a driver using a small cell phone is hard to spot.<sup>105</sup> McNaull concluded: “Ultimately, the goal of traffic laws and traffic enforcement isn’t to write a certain number of tickets. It’s to change behavior. It’s to discourage people from engaging in dangerous behavior.”<sup>106</sup>

## 2. Elastic Common Law Doctrines Facilitate Change

Duty exists where a court declares it does; as our ideas of responsibility change with the times, so do the duties imposed by courts.<sup>107</sup> Recently, courts have imposed new duties in response to pervasive dangers that are foreseeable.<sup>108</sup> Virtually all jurisdictions presently employ a foreseeability (or risk) standard for judging proximate cause.<sup>109</sup> This standard has been the basis for imposing civil liability for other serious but preventable threats to public safety.<sup>110</sup>

Although the specific duty announced in *Kubert* is novel, the *Kubert* court in fact joined the broad trend in recent decades of using the common law to incentivize or induce safer, more responsible behavior.<sup>111</sup> For example, most jurisdictions now impose dram shop liability, which recognizes a duty of care for a restaurant or bar that continues to serve an obviously drunk patron who will later drive.<sup>112</sup> Today, dram shop laws are mostly codified, but the initial impetus for recognizing such a duty came from the courts.<sup>113</sup> Dram shop liability

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103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *See* *Ontiveros v. Borak*, 667 P.2d 200, 204 (Ariz. 1983) (en banc).

108. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. e (2010); Owen, *supra* note 53, at 1685.

109. *Id.*

110. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. e.

111. *See* *Kubert v. Best*, 75 A.3d 1214, 1224–25 (N.J. Super. Ct. App. Div. 2013).

112. Ross Sharkey, Note, *Rohlfs v. Klemenhausen, LLC: Is It Time To Revise Montana’s Dram Shop Act?*, 72 MONT. L. REV. 127, 129–30 (2011).

113. *Ontiveros v. Bank*, 667 P.2d 200, 209 (Ariz. 1983) (en banc) (“These holdings have been translated into a finding of duty in common law . . .”).

extends a tavern owners' duty to protect patrons from other violent patrons to a duty to protect the general public by ceasing to furnish alcohol to an intoxicated patron.<sup>114</sup> Courts have compared reckless over-serving of alcohol with a "put[ting] into the hands of an obviously demented individual a firearm with which he shot an innocent third person."<sup>115</sup> Just as providing an insane person with a firearm, or continuing to serve alcohol to a patron who is likely to drive, irresponsibility enhances the risk of harm, so, too, does willfully inducing a driver to text while driving.<sup>116</sup>

Building on these established duties, scholars are proposing new ways in which judicial initiative may serve to mitigate (or solve) novel and seemingly incurable problems. For instance, *Kubert*-style liability may be the next step in attacking the hot-button issue of cyberbullying. Law Professor Elizabeth Jaffe, a national expert on the legal response to bullying,<sup>117</sup> advocates for expanding duty to include web servers and web hosts—e.g., Facebook or Twitter—who are in a position to proactively monitor their websites and cut off sources of cyberbullying.<sup>118</sup> Like the *Kubert* court, Jaffe purports to turn a moral duty into a legal duty, thereby imposing liability on those in control of reasonably foreseeable harm.<sup>119</sup> Embracing the message in *Kubert*, Jaffe believes that the threat of civil liability will incentivize web hosts to take affirmative steps to prevent harm from occurring.<sup>120</sup>

Using the law to effect social change is unique neither to legislatures, nor to courts. Situations of aiding and abetting dangerous behavior are appropriately combatted through judicially-imposed law, just as was the case in *Kubert*.

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114. *Id.* at 211.

115. *Id.* at 209 (citing *Jardine v. Upper Darby Lodge No. 1973, Inc.*, 198 A.2d 550, 553 (Pa. 1964)).

116. *Kubert*, 75 A.3d at 1229; LeBeau, *supra* note 7; see also *Colo. Dog Fanciers, Inc. v. City & Cnty. of Denver*, 820 P.2d 644 (Colo. 1991) (en banc) (holding as constitutional an ordinance banning pit bulls); *Tracey v. Solesky*, 50 A.3d 1075 (Md. 2012) (imposing strict liability on landlords of pit bull-owning tenants based on inherent danger involved in a pit bull attack, thereby implying a moral duty not to aid and abet the existence of pit bulls in domestic environments), *superseded by statute*, Md. Code Ann., Cts. & Jud. Proc. § 3-1901 (2014).

117. See *Elizabeth M. Jaffe Faculty Biography*, JOHN MARSHALL LAW SCHOOL, <http://www.johnmarshall.edu/facultystaff/elizabeth-m-jaffe/> (last visited Jan. 17, 2015).

118. Elizabeth M. Jaffe, *Imposing a Duty in an Online World: Holding the Webhost Liable for Cyberbullying*, 35 HASTINGS COMM. & ENT. L.J. 277, 297 (2013).

119. *Id.* at 300–02.

120. *Id.* at 299.

## V. OBJECTIONS TO REMOTE TEXTER LIABILITY ARE UNWARRANTED, AS IT PROVIDES EDUCATIONAL BENEFIT IN EXCHANGE FOR LITTLE ADDED LIABILITY

On its face, *Kubert* may appear to threaten an exponential expansion of liability for the simple act of sending a text message, an action that occurs 14,100,000,000 times per day in the United States.<sup>121</sup> However, such a fear is unwarranted. *Kubert* will not and was not intended to result in significantly more liability. With very few exceptions, the rule of *Kubert* does not apply to the wife who texts her husband a grocery list to be viewed at the store later, or the teenage boy who texts his girlfriend saying “Good luck on your test today.” Rather, *Kubert* aims to send a message (no pun intended) to the general public: Texting is dangerous and kills people at a rate comparable to drunk driving,<sup>122</sup> so stop texting and driving!

### A. *This Analysis Is Not Subject To The Superseding Cause Doctrine*

A common objection to *Kubert*'s expansion of liability is that the recipient of the text, as the ultimate decision maker, should retain sole liability for diverting their focus from the road to their phone.<sup>123</sup> Critics of *Kubert* argue that, even if texting a driver sometimes is irresponsible, in the sense that the texter understands that s/he is creating a risk of harm, the driver's decision to read and respond to the text is the superseding cause of any accident, thus cutting off the remote texter's chain of foreseeability.<sup>124</sup> This argument, though, is incompatible with the purpose of the proximate cause element and is also accounted for in the *Kubert* test.

First, the United States Supreme Court has expressly carved out instances in which the closest temporal action to the harm is the sole proximate cause.<sup>125</sup> A superseding cause exempts prior negligent actions from liability because the “injury was actually brought about by a later cause of independent origin that was not foreseeable.”<sup>126</sup> These intervening events sever the chain of causation, thus rendering the prior cause remote.<sup>127</sup> “An intervening act may not be deemed a

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121. See *Text Message Statistics*, *supra* note 80.

122. *Wheeler v. Hruza*, No. CIV 08-4087, 2010 WL 2231959, at \*3 (D.S.D. June 2, 2010) (“[R]ecent studies have shown that the probability of a vehicular collision is as great for intoxicated drivers as for texting and cell phone use drivers.”).

123. See Eugene Volokh, *Liability for Texting Driver*, THE VOLOKH CONSPIRACY (Aug. 30, 2013, 12:38 PM), <http://www.volokh.com/2013/08/30/liability-texting-driver/>.

124. *Id.*

125. See *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1192 (2011).

126. *Exxon Co. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996).

127. *Archer v. Warner*, 538 U.S. 314, 326–27 (2003) (Thomas, J., dissenting).

superseding cause, however, if the intervening act was set in motion by the initial act of negligence.”<sup>128</sup> Key to the analysis is the independence of the final actor.<sup>129</sup> In the circumstance of texting, the actions are concerted, not independent.<sup>130</sup> Therefore, the superseding cause doctrine does not serve as legal insulation for the remote texter.

### *B. Slippery Slope Is Not So Slippery*

*Kubert* should not be read to suggest that one cannot distribute any form of message to someone who is traveling without being negligent. Most smartphones<sup>131</sup> notify receipt not only of text messages, but also Facebook messages, Twitter replies, Snapchat images, email, and voicemail messages.<sup>132</sup> Often, all message notifications appear in the same or similar format, thereby creating the same or similar level of distraction and foreseeable risk of harm to others. The fact that a text message may be indistinguishable from many other equally distracting message notifications naturally raises the question of whether the *Kubert* rule can be limited to text messaging.

Although the *Kubert* court intended to expose only a narrow class of texters to potential liability, this initial intention is no guarantee that the scope will remain so confined. One might worry that future courts, in their enthusiasm to effect social change through extension of traditional tort law, could extend the logic of *Kubert* to a broader category of remote texters, thus opening the floodgates for litigation.<sup>133</sup>

However, limits on liability for people who distract drivers are already well established. Drivers are exposed to a miscellany of distractions as they travel: stadium events, billboards, road signs,

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128. *Fletcher v. Pizza Hut of Am., Inc.*, 406 F. App'x 785, 790 (4th Cir. 2011).

129. *Id.* at 790–91 (finding the sole proximate cause, despite the Pizza Hut employee's negligent parking of car in traffic lane, to be another driver's decision to move around the delivery car and run a red light); *Hubbard v. Murray*, 3 S.E.2d 397, 401–02 (Va. 1939) (finding independence of actions where, despite the bus driver's negligent parking of the bus on the highway, the truck driver could have stopped his vehicle to avoid the collision).

130. *Kubert v. Best*, 75 A.3d 1214, 1224 (N.J. Super. Ct. App. Div. 2013).

131. “Smartphone” also includes tablets, PDAs, Blackberrys, and other text-enabled communication devices.

132. See Dennis O'Reilly, *How to Silence Notifications on Smartphones and Tablets*, CNET (Nov. 19, 2012, 4:47 PM), [http://howto.cnet.com/8301-11310\\_39-57551600-285/how-to-silence-notifications-on-smartphones-and-tablets/](http://howto.cnet.com/8301-11310_39-57551600-285/how-to-silence-notifications-on-smartphones-and-tablets/).

133. *Send a Text, Be Liable for a Car Crash*, AMERICA'S FUTURE, <http://www.americasfuture.net/courtmonitor/2013/2013-11-10.html> (last visited Feb. 3, 2015).

low-flying aircraft, cars stopped in the shoulder, accidents, holiday decorations, and conspicuous pedestrians present habitual diversions to driving. As discussed by the California Court of Appeals in 1993, “[t]ravelers who, in the manner of Homer’s ancient Argonauts, must sail past Sirens, are obliged to exercise reasonable care in the navigation of their craft and resist being seduced by sights and sounds.”<sup>134</sup> Drivers have a duty to use reasonable care while operating the vehicle, which includes being aware of potential dangers and not allowing attractive sights to interfere with their careful operation of the vehicle.<sup>135</sup>

Although society accepts many distractions along the road, text messaging is unique in both the ways it is used and the nature of the distraction it presents. Stadium events, decorations, pedestrians, and aircrafts are conducting business-as-usual, which is wholly unrelated to the fact that people are simultaneously driving cars in the vicinity. Billboards target drivers and passengers in cars, but do so generally, as opposed to soliciting the attention of a specific driver. Accidents on the road and cars in the shoulders are inevitable. Road signs deliver pertinent messages that may require attention. In each of these instances of general distraction, the blanket duty of reasonable care that the law imposes on drivers is generally sufficient to induce them to maintain their focus primarily on the road. In addition, these kinds of general distractions tend to be very brief—typically a fraction of a second; in contrast, reading and responding to a text message requires much more sustained focus.<sup>136</sup>

Texting a driver is different. A principal reason to text, as opposed to call, is to deliver an ordinary message that can be viewed later at one’s convenience and when it is safe and appropriate to do so. Further, text messaging has a personal aspect that is absent in the above-mentioned distractions: a texter chooses the recipient of the text message and directly communicates with that individual. The risk-generating conduct involves specific action by two parties. Moreover, there is a level of conscious awareness of the danger before the action is made. The sender of the text message will sometimes be aware of the hazard they are creating for a particular driver. The joint culpability is now reflected in *Kubert*, which makes such awareness an essential condition for liability. Lastly, the

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134. *Lompoc Unified Sch. Dist. v. Superior Court*, 26 Cal. Rptr. 2d 122, 128 (Ct. App. 1993).

135. *Id.* at 125.

136. *See LeBeau, supra* note 7.

blanket duty on drivers to avoid temptations to divert their attention has proven insufficient when applied to texting while driving.

Embracing *Kubert* does not threaten unbounded significant expansion of liability; therefore, the societal value of *Kubert*'s third-party liability is not undermined by a slippery slope argument.

### C. *Kubert Is Compatible With Traditional Tort Liability*

Traditionally, tort liability principally seeks to compensate a specific injured party.<sup>137</sup> Tort liability has increasingly been used as a catalyst for the evolution of public consciousness—a purpose long associated with criminal law.<sup>138</sup>

If I were sitting in the passenger seat of your car, acting in a way that I knew would likely distract you as the driver, and you consequently got into an accident, both you and I would be liable.<sup>139</sup> The remote physical location of a sender of a text message who nevertheless knowingly distracts a driver should not change the analysis. This concept is also embodied in dram shop liability laws.<sup>140</sup>

This holding is consistent with traditional negligence liability: persons have a duty to act (or not act, as in this case) reasonably when their conduct foreseeably creates a risk of harm to others.<sup>141</sup> This duty does not cease just because the risk is produced through the joint conduct of two separate actors. With foundations in traditional tort principles, *Kubert*-style liability is narrowly crafted to outwit superseding cause doctrines and slippery slope problems. In the absence of any serious objections, remote texter liability brings the enormous benefit of societal education for relatively little added liability.

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137. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 169 (2d Cir. 2010).

138. *See Raymond v. Riegel Textile Corp.*, 484 F.2d 1025, 1028 (1st Cir. 1973) (“Criminal cases may be useful as guides to the type of conduct which the law will condemn or excuse . . .”).

139. *Adams v. Morris*, 584 S.W.2d 712, 715–16 (Tex. Civ. App. 1979) (finding that a passenger who distracted the driver was liable for breaching a standard of ordinary care).

140. Larry Copeland, *Horrific N.C. Crash Puts Spotlight on Dram Shop Laws*, USA TODAY (Nov. 28, 2012, 5:41 PM), <http://www.usatoday.com/story/news/2012/11/24/dram-shop-laws/1660707/>.

141. *Montgomery v. Nat'l Convoy & Trucking Co.*, 195 S.E. 247, 250–51 (S.C. 1938).

## VI. CONCLUSION

Delivery of the *Kubert* message was attempted prior to *Kubert*,<sup>142</sup> yet efforts have been in vain.<sup>143</sup> Therefore, in a plea to the general public to cease an activity that causes rampant and unnecessary deaths, the New Jersey Superior Court crafted a narrow test for placing liability on the remote text sender who sends a text message to a person who they know is driving, will view the text, and will respond.<sup>144</sup> By design, the elements of the *Kubert* test will rarely be met,<sup>145</sup> as liability is only imposed on those remote texters with knowledge that the recipient is driving and will view the text while doing so.<sup>146</sup> Such a narrow test suggests that this holding strives to discourage dangerous conduct, rather than rack up case after case of tort liability and damages.

By grounding this prophylactic rule in traditional tort law, *Kubert*-style liability may soon become law in many jurisdictions. As the *Kubert* court explained:

Just as the public has learned the dangers of drinking and driving through a sustained campaign and enhanced criminal penalties and civil liability, the hazards of texting when on the road, or to someone who is on the road, may become part of the public consciousness when the liability of those involved matches the seriousness of the harm.<sup>147</sup>

Judicial innovation, as exemplified by the *Kubert* court, should be embraced as a valuable tool for curing the disjuncture between public awareness and conduct, with little added liability. Such proactive expansions of liability can serve as catalysts for raising public consciousness of serious societal problems, while evolving the common law to align with social and technological changes.

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142. See *supra* Part V.

143. See *Wheeler v. Hruza*, No. CIV 08-4087, 2010 WL 2231959, at \*3 (D.S.D. June 2, 2010) (explaining that a lack of public concern for the dangers of drivers using cell phones, as compared to concern for intoxicated drivers, impacted its actionability).

144. *Kubert v. Best*, 75 A.3d 1214, 1219 (N.J. Super. App. Div. 2013).

145. The defendant in *Kubert* was found not liable due to a lack of evidence to satisfy the test. *Id.* at 1224–25.

146. *Id.* at 1219.

147. *Id.* at 1229.

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