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Roger W. Reinsch

Geoffrey G. Bell

Alan C. Roline

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Exploring the Case for Expanded Remote Texter Liability for Employers

*Roger W. Reinsch, Geoffrey G. Bell & Alan C. Roline**

ABSTRACT

In 2013, the New Jersey Appellate Court decided the potentially landmark case of *Kubert v. Best*, recognizing for the first time that a sender of a text may be held liable to an innocent third party injured in an automobile accident caused by a driver who was distracted by receiving the text. Other subsequent cases have both confirmed and limited the *Kubert* ruling. In this article, we explore possible further extensions of the *Kubert* ruling, anticipating that because of expanding employer liability for acts undertaken by their employees, the next step in the evolution of texting and driving law may likely hold employers liable for accidents caused by their employees whose employment-related texts to others result in accident and harm.

* Roger W. Reinsch, J.D., Professor of Business Law, University of Minnesota Duluth Department of Accounting and Finance, Labovitz School of Business and Economics 360L LSBE, 1318 Kirby Drive, Duluth, MN 55812, rreinsch@d.umn.edu.

Geoffrey G. Bell, Ph.D., Horse T. Morse Distinguished Associate Professor of Strategic Management, University of Minnesota Duluth, Department of Management Studies, Labovitz School of Business and Economics 365Q LSBE, 1318 Kirby Drive, Duluth, MN 55812, ggbell@d.umn.edu, 218-726-7640.

Alan C. Roline, J.D., Associate Professor of Business Law, University of Minnesota Duluth, Department of Accounting and Finance, Labovitz School of Business and Economics, 219B LSBE, 1318 Kirby Drive, Duluth, MN 55812, aroline@d.umn.edu.

I. INTRODUCTION

In 2013, the New Jersey Appellate Court decided the potentially landmark case of *Kubert v. Best*.¹ *Kubert* addressed whether the sender of a text (a “remote texter”) may be liable to an injured passenger when the accident occurred because the driver was distracted by the text.²

In *Kubert*, Kyle Best was driving a pickup truck in the southbound lane when he crossed the double center line and ran into the Kuberts, who were riding a motorcycle in the northbound lane.³ Best’s girlfriend, Shannon Colonna, was texting him.⁴ While looking at her text, Best sideswiped the Kuberts’ motorcycle.⁵ The Kuberts sued Best and Colonna for negligence.⁶ The New Jersey court decided that Colonna, as a remote texter, could be held liable to the Kuberts for the resulting accident if she “knew or had special reason to know that the driver would read the message while driving and would thus be distracted from attending to the road and the operation of the vehicle.”⁷ However, because Colonna did not know that Kyle was driving, she was found not liable in this particular instance.⁸ Even though she was not held liable, the court expanded the concept of negligence in regard to a remote texter’s potential liability to encompass situations where the remote texter knows, or has special reason to know, the recipient is driving.⁹ Because the *Kubert* case creates a situation where a remote texter could be held liable in certain circumstances, we examine the possible next step of liability. Namely, we explore the risk to employers that they could be held liable when a remote texter acting as an agent is texting within the scope of their employment.

This article proceeds as follows. Part II explores the dangers of texting and driving. Then, Part III examines the expansion of liability for texting and driving along with current legislation and cases that address texting and driving. Next, Part IV considers the similar expansion of liability in drunk driving law and the policy reasons behind that expansion. This part establishes legal and policy parallels between drinking and driving compared to texting and driving to help answer the question, “Under what conditions is the remote texter liable alongside the recipient driver?” Additionally, “When may an employer be held liable for an accident when an employee texts someone the employee knew or had special reason to know was driving?”

Part V of the article argues that as matter of public policy, courts and legislatures should make employers liable for texting by their employees. In situations where an employee is texting someone they know is driving, and the text subject is work-related, we believe employers should be held liable for any resulting accident and injury. Creating legal policies will stimulate employers—who have the power to create comprehensive employment policies—to (1) take a more expansive view of texting risks and (2) broaden their existing texting policies. This will thereby

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

2. *Id.*

3. *Id.* at 1219.

4. *Id.*

5. *Id.* at 1220.

6. *Id.* at 1222.

7. *Id.* at 1221.

8. *Id.* at 1229.

9. *Id.*

hopefully reduce the incidence of accidents caused by texting and driving. Even though courts have yet to consider potential employer liability, employers would be well served if they prepared for that now. Finally, we make recommendations regarding the content and enforcement of such a texting policy to reduce the risk of employer liability.

II. DANGERS OF TEXTING AND DRIVING

Texting and driving is a major issue in the United States because of the number of accidents resulting from the distraction it creates.¹⁰ To reduce instances of texting and driving, laws were created to penalize those who use cell phones while driving.¹¹ Numerous articles have examined the risk of using cell phones while driving.¹² Some writers argue the distraction caused by using a cell phone while driving can be as serious as drinking and driving.¹³ Professors David Strayer, Frank Drews, and Dennis Crouch found that “[w]hen driving conditions and time on task were controlled for, the impairments associated with using a cell phone while driving can be as profound as those associated with driving while drunk.”¹⁴ The June 2009 issue of *Car and Driver* reported the following results of an experiment they conducted to compare the dangers of texting and driving with drunk driving:¹⁵

During the experiment, cars were rigged with a red light to alert drivers when to brake. The magazine tested how long it would take to hit the brakes when sober, when legally impaired at a [blood alcohol content] level of .08, when reading an e-mail and when sending a text. Sober, focused drivers took an average of 0.54 seconds to brake. For legally drunk drivers four feet needed to be added. An additional 36 feet was necessary

10. *Texting and Driving Statistics*, EDGAR SNYDER & ASSOCIATES, <https://www.edgarsnyder.com/car-accident/cause-of-accident/cell-phone/cell-phone-statistics.html> (last visited Feb. 26, 2019) (“The National Safety Council reports that cell phone use while driving leads to 1.6 million crashes each year. . . . Nearly 390,000 injuries occur each year from accidents caused by texting while driving.”).

11. *Distractions Driving*, GOVERNORS HIGHWAY SAFETY ASSOC., <https://www.ghsa.org/state-laws/issues/Distracted-Driving> (last visited Feb. 26, 2018) (fifteen states, the District of Columbia (“D.C.”), and three U.S. territories prohibit all drivers from using hand-held cell phones while driving. Thirty-eight states and the D.C. ban cell phone use by novice drivers, while 20 states and D.C. prohibit it for school bus drivers. Forty-seven states, D.C., Puerto Rico, Guam, and the U.S. Virgin Islands ban text messaging for all drivers).

12. See, e.g., Victoria K. Lee, *Fatal Distraction: Cell Phone Use While Driving*, 59(7) CAN. FAM. PHYSICIAN 723 (2013); CDC: *10 Most Important Public Health Problems and Concerns*, BECKER’S HOSP. REV., (Mar. 1, 2016), <https://www.beckershospitalreview.com/population-health/cdc-10-most-important-public-health-problems-and-concerns.html>.

13. See, e.g., Phil LeBeau, *Texting and Driving Worse than Drinking and Driving*, CNBC, <http://www.cnbc.com/id/31545004> (last updated Aug. 3, 2010, 11:45 AM); David L. Strayer, Frank A. Drews & Dennis J. Crouch, *Fatal Distraction? A Comparison of the Cell-Phone Driver and the Drunk Driver*, U. IOWA RES. ONLINE 25, 29 (2003), <https://ir.uiowa.edu/cgi/viewcontent.cgi?article=1085&context=drivingassessment>.

14. David L. Strayer, Frank A. Drews & Dennis J. Crouch, *A Comparison of the Cell Phone Driver and the Drunk Driver*, 48 HUM. FACTORS: J. HUM. FACTORS & ERGONOMICS SOC’Y 381, 390 (2006).

15. Michael Austin, *Texting While Driving: How Dangerous is it?*, CAR & DRIVER (June 24, 2009), <https://www.caranddriver.com/features/texting-while-driving-how-dangerous-is-it>.

for reading an e-mail, and a whopping added 70 feet was needed for sending a text.¹⁶

The National Highway Traffic Safety Administration (“NHTSA”) has said that they believe that mobile phone use and driving should be on par with the use of alcohol and driving because it has the same effect by impacting the driver’s ability to focus on driving safely.¹⁷ In fact, many insurance companies are starting to treat cell phone tickets similarly to DWI offenses, raising insurance rates when drivers receive such a ticket.¹⁸

Distracted driving caused by texting may be one of the more dangerous activities that one can engage in. For example,

The statistics show that individuals who drive while sending or reading text messages are 23 times more likely to be involved in a car crash than other drivers. A crash typically happens within an average of three seconds after a driver is distracted. . . . Every year, about 421,000 people are injured in crashes that have involved a driver who was distracted in some way. Each year, over 330,000 accidents caused by texting while driving lead to severe injuries. This means that over 78% of all distracted drivers are distracted because they have been texting while driving. . . . Each day in the United States, approximately 9 people are killed and more than 1,000 injured in crashes that are reported to involve a distracted driver. Distracted driving is driving while doing another activity that takes your attention away from driving.¹⁹

Because of the increasing evidence of the public health and economic concerns of texting while driving, there are increasing calls for stronger action to eliminate the behavior. For example, Christopher Edwards, J.D. candidate from the University of Akron School of Law, stated the following:

16. Kiernan Hopkins, *Is Texting While Driving More Dangerous Than Drunk Driving?*, DISTRACTED DRIVER ACCIDENTS.COM (Apr. 2, 2013), <http://distracteddriveraccidents.com/texting-driving-dangerous-drunk-driving>; see also Austin, *supra* note 15; Strayer, Drews & Crouch, *supra* note 14 (concluding In fact, when controlling for driving difficulty and time on task, cell phone drivers may actually exhibit greater impairments (i.e., more accidents and less responsive driving behavior) than legally intoxicated drivers. These data also call into question driving regulations that prohibit hand-held cell phones and permit hands-free cell phones, because no significant differences were found in the impairments to driving caused by these two modes of cellular communication.).

17. Steve Bowen, *Using Cell Phones While Driving is as Bad as Drunk Driving*, QUOTEWIZARD, <https://quotewizard.com/auto-insurance/cell-phones-like-driving-drunk-for-motorists> (last updated Feb. 12, 2018).

18. Nelson, Fromer, Crocco & Jordan - New Jersey Lawyers, FACEBOOK (June 1, 2017), <https://www.facebook.com/pg/Nelson-Fromer-Crocco-and-Jordan-New-Jersey-Lawyers-301478609873127/posts>

(Put the cell phone down! I was advised recently, by a prior client, that although her cell phone ticket from an Ocean County Municipal Court cost a little less than \$250, the insurance company hit her with a \$1000 surcharge! . . . The insurance industry took its cue from the NHTSA and is now looking at cell phone tickets as being the same as a DWI when it comes to raising your rates.).

19. *Distracted Driving Facts*, END DISTRACTED DRIVING, <https://www.enddd.org/the-facts-about-distracted-driving> (last visited Feb. 17, 2019).

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. Since then, various studies have concluded that the activity of texting while driving is one of the most risky forms of distracted driving. 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. This figure includes ‘losses [of] productivity, medical costs, legal and court costs, emergency service costs, insurance administration costs, congestion costs, property damage, and workplace losses.’²⁰

The problem of texting and driving seems to be getting worse, especially among millennials.

A new report from the AAA Foundation for Traffic Safety found that 88[%] of young millennials engaged in at least one risky behavior behind the wheel in the past 30 days, earning the top spot of worst behaved U.S. drivers. These dangerous behaviors—which increase crash risk—included texting while driving, red-light running and speeding. These findings come as U.S. traffic deaths rose to 35,092 in 2015, an increase of more than 7[%], the largest single-year increase in five decades. . . . ‘Alarming, some of the drivers ages 19-24 believe that their dangerous driving behavior is acceptable,’ said Dr. David Yang, AAA Foundation for Traffic Safety executive director. ‘It’s critical that these drivers understand the potentially deadly consequences of engaging in these types of behaviors and that they change their behavior and attitudes in order to reverse the growing number of fatalities on U.S. roads.’²¹

Thus, it appears that texting while driving is at least as dangerous as drunk driving, and possibly more so. Because of the dangers involved in texting and driving, we assert that the law needs to respond to the effects of this technology. Professor David Friedman agrees with our assertion by stating the following:

Technological change affects the law in at least three ways: (1) by altering the cost of violating and enforcing existing legal rules; (2) by altering the underlying facts that justify legal rules; and (3) by changing the underlying facts implicitly assumed by the law, making existing legal concepts and

20. Christopher P. Edwards, *The Next Best Defendant: Examining A Remote Text Sender’s Liability Under Kubert v. Best*, 50 AKRON L. REV. 353, 356–57 (2016) (internal citations omitted).

21. Jessica Souto, *Young Millennials Top List of Worst Behaved Drivers*, AM. AUTO. ASSOC. NEWSROOM (Feb. 15, 2017), <http://newsroom.aaa.com/tag/texting-while-driving>; *see also* Daniel Bean, *Drivers Know Cellphone Use Dangerous, but Drive and Phone Anyway*, ABC NEWS (Apr. 6, 2013), <http://abcnews.go.com/Technology/drivers-cell-dangerous-drive/story?id=18890675>.

categories obsolete, even meaningless. The legal system can choose to ignore such changes. Alternatively, it may selectively alter its rules legislatively or via judicial interpretation.²²

Clearly, text messaging has adversely affected driving safety. As Professor Friedman says, the needed change to the law could come through legislation and/or judicial interpretation. We argue that such change is necessary to address new dangers created by emerging technology. Our call echoes the following words of Judge Cardozo:

The law does not lead us to so inconsequent a conclusion. Precedents drawn from the days of travel by stage coach do not fit the conditions of travel [today]. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.²³

III. EXPANSION OF LIABILITY FOR TEXTING

Jurisprudence is guided by legal principles, including the principle of negligence, that help determine how cases will be decided. The purpose underlying the principle of negligence is simple: make everyone responsible to look out for the well-being of others.²⁴ A person has a duty to use reasonable care when interacting with others, and everyone with whom that person interacts has a right to expect that reasonable care will be used; if not, that they will be compensated for any resulting harm.²⁵ Therefore, if a person does not behave in a reasonable manner, and their actions could reasonably be anticipated to injure another, then that person could be liable for injury resulting from those actions.²⁶

The elements necessary to set forth a cognizable claim for negligence are [(1)] duty, [(2)] general standard of care, [(3)] specific standard of care, [(4)] cause in fact, [(5)] legal or proximate cause, and [(6)] damage. The element with which we are concerned here, that of 'duty,' has been defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct towards another. Whether the law will impose such an obligation depends upon the relationship between the actor and the injured person.

Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law. The duty may arise specifically by mandate of statute, or it may arise generally by operation of law under application of the basic rule of the common law, which imposes on every

22. David D. Friedman, *Does Technology Require New Law?*, 25 HARV. J. L. & PUB. POL'Y 71 (2001).

23. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 391 (N.Y. Ct. App. 1916).

24. *See A Brief Overview of Tort Law*, TORT.LAWS.COM, <https://tort.laws.com/tort-law> (last visited Feb. 26, 2019).

25. *See generally* David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1671 (2007).

26. *Id.* at 1678.

person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others. This rule of the common law arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another. Further, the duty of care at issue may be specific, owed by the defendant to a particular plaintiff, or it may be of a general nature owed by the defendant to the public as a whole.²⁷

Prior case law has already established a duty for a passenger not to distract a driver, and when a passenger does distract a driver to the point of causing an accident, that passenger may also be liable for resulting damages.²⁸ Therefore, negligence law already assesses liability for someone who distracts a driver when that distraction results in an accident.²⁹

Because of cell phone technology and text messaging, someone can now distract a driver even though they are not physically present in the car. In *Kubert*, the trial court ruled that a driver could be distracted by someone not in the presence of the driver.³⁰ The *Kubert* case stands for the proposition that if a remote texter messages someone they know or have special reason to know is driving, and they know that the driver will likely be distracted by the message, then the texter should reasonably foresee that texting may cause that driver to look at the text which could cause an accident.³¹ Whether a duty exists to refrain from texting a person you know is driving requires, like any other claim of negligence,

an examination of the reasonableness of the risk created by the defendant's conduct. This in turn depends upon a panorama of considerations such as the magnitude of the harm, the likelihood and foreseeability of its occurrence, weighed against the utility of the defendant's conduct.³²

The magnitude of the harm caused by texting and driving is substantial, the foreseeability of an accident is high, and the necessity of texting at that moment is generally low. Texting can normally wait until it is safe to do so.³³

27. *Hetterle v. Chido*, 400 N.W.2d 324, 326–27 (Mich. Ct. App. 1986).

28. 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. *See, e.g., Olson v. Ische*, 343 N.W.2d 284, 288 (Minn. 1984) (“A passenger who interferes with his driver's operation of the motor vehicle, for instance by grabbing the steering wheel, may be liable to others.”); For examples of conduct by a passenger being found liable for damages for distracting a driver, *see Edwards, supra* note 20, at 359–60. *See also Collins v. McGinley*, 558 N.Y.S.2d 979 (N.Y. App. Div. 1990); *Good v. MacDonell*, 564 N.Y.S.2d 949, 953 (N.Y. Motion Term 1990).

29. *Kubert v. Best*, 75 A.3d 1214, 1226 (N.J. Super. Ct. App. Div. 2013) (“We have recognized that a passenger who distracts a driver can be held liable for the passenger's own negligence in causing an accident. In other words, a passenger in a motor vehicle has a duty not to interfere with the driver's operations.”) (internal quotations omitted).

30. *Id.* at 1229. Shekida A. Smith, *Texting While Driving Liability Now Extends to Remote Texters, According To New Jersey Appellate Court*, U. MIAMI L. REV. (Sept. 28, 2013), <https://lawreview.law.miami.edu/texting-driving/> (“In theory, the New Jersey opinion demonstrates that legal ramifications for being a knowing and active nuisance to a driver who might possibly end up in a serious or fatal crash are not obsolete when the nuisance is ‘electronically present,’ rather than physically present, in the driver's car.”).

31. *See, e.g., Kubert*, 75 A.3d at 1227.

32. *Hetterle*, 400 N.W.2d at 326–27.

33. *See Bowen, supra* note 17.

Kubert has spawned several articles and blogs by practicing attorneys and others that address remote texter liability, which conclude that the probability of making remote texters liable for a resulting accident is likely to increase. For example, in a short summary of the *Kubert* decision, a posting from the Atkins Law Office noted the following:

While the court (in *Kubert*) ruled that holding remote texters liable for auto accidents in Chicago and throughout Illinois may be possible, they've also set a high evidentiary bar to protect remote texters from being sued. . . . Given the increasing use and integration of cellular technology in our nation, it's an issue that is most certainly going to come up with increasing frequency in the future. As such, it's important for drivers to adhere to the existing prohibitions and abstain from using their cell phones and tablets while driving. Doing so is the only way to ensure that they, and anyone texting them, won't be held liable for the injury or death of other motorists.³⁴

IV. EXAMINING THE LEGISLATION AND CASES

At present, there is no uniform federal law prohibiting texting and driving. However, as of March 2018, texting while driving has been banned in 47 states and the District of Columbia.³⁵ Such legislation may be the basis for civil liability in the event of an accident caused by the person who is sending the text to the driver.³⁶ Similarly, the majority of case law regarding liability in instances of texting while driving focuses on the conduct of the driver and the distraction caused by texting.³⁷ However, recent court decisions have begun to expand liability in two directions.

34. *Distracted Driving and the Liability of Remote Texters*, ATKINS L. OFF., <https://ankinlaw.com/distracted-driving-and-the-liability-of-remote-texters> (last visited Mar. 3, 2019). See also Steven M. Gursten, *How Can You Avoid Remote Texter Liability?*, MICH. AUTO L. (Nov. 27, 2017), <https://www.michiganautolaw.com/blog/2017/11/27/remote-texter-liability>; Maureen May, *Can Remote Texters Be Held Liable for Accidents?*, LEGAL EXAMINER (Oct. 8, 2015, 4:23 PM), <https://web.archive.org/web/20170908132804/http://baltimore.legalexaminer.com/automobile-accidents/can-remote-texters-be-held-liable-for-accidents/> (“The only sure way to prevent distracted driving accidents caused by cell phones: put the phone away when you get behind the wheel.”); *New Jersey Court Finds Texter Can Have Responsibility for Remote Accident*, CLEMENTS, TAYLOR, BUTKOVICH & COHEN, LPA, CO. (Feb. 6, 2014), <https://ctbclawyers.com/2014/02/06/new-jersey-court-finds-texter-can-have-responsibility-for-remote-accident/> (“While this is a New Jersey case, it provides potent precedence of concern for the devastating consequences of distracted driving in Ohio and elsewhere in the U.S.”); *Texting Liability for Remote Senders: Will This Be a Trend?*, COLLINS & COLLINS, P.C., <https://www.collinsattorneys.com/injuryblawg/auto-accidents/texting-liability-for-remote-s/> (last visited Mar. 2, 2019) (“Texting and driving has catastrophic consequences. Distracted driving in fact leads to over 1000 deaths each year according to the CDC’s Distracted Driving Fact Sheet.”). See also Emily K. Strider, *Don’t Text a Driver: Civil Liability of Remote Third-Party Texters After Kubert v. Best*, 56 WM. & MARY L. REV. 1003 (2015).

35. *Cellphones and Texting*, IIHS & HLDI (Mar. 2019), <https://www.iihs.org/iihs/topics/laws/cell-phonelaws/maphandheldcellbans> (“In addition, novice drivers are banned from texting in two States[.] Arizona and Missouri.”) (internal parenthesis omitted).

36. See, e.g., Billy Johnson, *Laws & Liability for Texting and Driving Accidents*, HG.ORG, <https://www.hg.org/legal-articles/laws-and-liability-for-texting-and-driving-accidents-44235> (last visited Mar. 2, 2019) (“In the case of texting and driving, the liability in an accident is weighted against a driver who was illegally texting.”).

37. See, e.g., Catherine Chase, *U.S. State and Federal Laws Targeting Distracted Driving*, 58 ASS’N ADVANCEMENT AUTOMOTIVE MED. 84 (Mar. 31, 2014).

First, there has been a move to make employers liable when their employees' text and drive in the course of their employment.³⁸ Second, liability has been extended to remote texters when they know their intended recipient is driving and their texts result in accident and injury.³⁹

The first element expanding employer liability involves employees who text while driving, and courts now interpret such action as falling within the employee's "scope of employment."⁴⁰ This is based on a basic concept behind the doctrine of *respondeat superior*: the principal has control over who is hired, and also controls the terms and conditions of employment that employees must follow.⁴¹ Thus, the employer can choose whether or not to create work-related policies that promote safety for employees and others.⁴²

The other concept undergirding the doctrine of *respondeat superior* is "the principal must bear the consequences of hiring an agent to the extent it is foreseeable that harm might result from the agent's unauthorized acts."⁴³ This does not imply that the employer is not liable for all wrongful acts by employees, because the doctrine of *respondeat superior* applies only to negligent acts by employees that are

38. See, e.g., EMPLOYER LIABILITY AND THE CASE FOR COMPREHENSIVE CELL PHONE POLICIES, NAT'L SAFETY COUNCIL 8 (May 2015), [https://www.nsc.org/Portals/0/Documents/DistractedDriving-Documents/NSC-CorpLiability-WP-Ir-\(1\).pdf](https://www.nsc.org/Portals/0/Documents/DistractedDriving-Documents/NSC-CorpLiability-WP-Ir-(1).pdf) [hereinafter NAT'L SAFETY COUNCIL]

(The legal theory of *respondeat superior*, or vicarious responsibility, means that an employer may be held legally accountable for negligent employee actions if the employee was acting within the scope of his or her employment at the time of a crash. The key phrase "acting within the scope of his or her employment" can and has been defined broadly in cases of crashes involving cell phones.)

See also Rhonda Smith, *Employer Liability Varies When Workers Using Cell Phones Cause Vehicle Crashes*, BLOOMBERG BNA (June 18, 2012), <https://www.bna.com/employer-liability-varies-n12884910098> ("Really, the only time an employer cannot be held liable is if the employee has a crash and it's not on company business and does not involve a company phone, David Teater, NSC's senior director of transportation initiatives, told BNA.") (internal quotations omitted).

39. See Kubert v. Best, 75 A.3d 1214, 1221 (N.J. Super. Ct. App. Div. 2013); Gallatin v. Gargiulo, No. 10401 of 2015, C.A., 2016 WL 8715650, at *4 (Pa. Ct. C.P. Mar. 10, 2016); Smith, *supra* note 30.

40. Lisa Nagele-Piazza, *Employers Can Be Liable for Distracted Driving*, SHRM (Oct. 29, 2018), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/employers-can-be-liable-for-distracted-driving.aspx> ("Employers can generally be held responsible for damages when a distracted driver is acting in the course and scope of employment. Since technology is expanding and the remote workforce is growing, workers are conducting more business away from the worksite and on the road, which increases the chances for employer liability."). See, e.g., Ellender v. Neff Rental, Inc., 965 So. 2d 898, 902 (La. Ct. App. 2007) (holding a call on an employer provider phone while driving to lunch was within the scope of employment); Jeewarat v. Warner Bros. Ent., 98 Cal. Rptr. 3d 837 (Cal. Ct. App. 2009); Rosell v. Cent. W. Motor Stages, Inc., 89 S.W.3d 643 (Tex. Ct. App. 2002); Hunter v. Modern Cont'l Constr. Co., 652 S.E.2d 583, 584 (Ga. Ct. App. 2007); David Needle, *Could Texting in Car Be an Employer Liability?*, ENTERPRISE MOBILE TODAY (Jan. 26, 2010), <http://www.enterprisemobiletoday.com/article.php/3860556/Could-Texting-in-Car-Be-an-Employer-Liability.htm>.

41. *Respondeat Superior*, FREE DICTIONARY, <https://legal-dictionary.thefreedictionary.com/respondeat+superior> (last visited Mar. 3, 2019) ("An employee is an agent for her employer to the extent that the employee is authorized to act for the employer and is partially entrusted with the employer's business. The employer controls, or has a right to control, the time, place, and method of doing work.")

42. See, e.g., RESTATEMENT (SECOND) OF AGENCY § 228 (AM. LAW INST. 1958). See also RESTATEMENT (SECOND) OF AGENCY § 229 (AM. LAW INST. 1958) (stating that "[t]o be within the scope of employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized," and it includes a list of factors to be used in determining whether conduct is sufficiently similar to authorized conduct to be within the scope of employment).

43. Paula J. Dalley, *A Theory of Agency Law*, 72 U. PITT. L. REV. 495, 498 (2011).

done within the scope of their employment.⁴⁴ What is unique about this legal doctrine is that it places liability on the employer, even though that employer may not have been directly at fault.⁴⁵ With this doctrine, “The important underlying societal policies are satisfied most of the time: the master cannot be permitted to evade liability by employing another, and the master cannot be permitted to shift the costs of her business to relatively innocent bystanders.”⁴⁶ However, the principle of scope of employment

is intended to ensure that employers internalize the losses that arise from their businesses. Once a loss is too far removed from the business, then it is no longer appropriate that the employer internalize the loss. The scope of employment doctrine is the legal link between the tort and the employer’s business. If the doctrine is too narrow, employers are able to externalize some of their costs of doing business to innocent third parties. If the doctrine is too broad, a third party’s losses are fortuitously charged to an innocent business. If the doctrine is indeterminate, however, judges are free to decide the cases as they please. . . .⁴⁷

Because the principle limits employer liability to employee actions occurring within the scope of employment, it is critical to understand how “the scope of employment” is changing as a result of the use of new technology. Briefly, what fell within the scope of employment was formerly limited to action taken at the employer’s location, and/or during business hours.⁴⁸ However, because of advancements in technology, the line between “work” and “not work” has blurred.⁴⁹ For that reason, we will examine recent expansions to what conduct of what it means to be within the scope of employment.

In our case, the key question of whether employer liability attaches to employee cell phone use is whether that use falls within the scope of employment. To answer this question, we examine how the courts have recently defined work-related

44. FREE DICTIONARY, *supra* note 41 (“When an employee substantially departs from the work routine by engaging in a frolic—an activity solely for the employee’s benefit—the employee is not acting within the scope of her employment.”).

45. Paula Dalley, *Destroying the Scope of Employment*, 55 WASHBURN L. J. 637, 640 (2016) (*respondeat superior* “imposes liability on a person (the employer) in the absence of the person’s fault and often in cases where the person could not possibly have prevented the tort.”); *Vicarious Liability/Respondeat Superior*, JUSTIA, <https://www.justia.com/injury/negligence-theory/vicarious-liability-respondeat-superior/> (last visited Mar. 3, 2019) (“What distinguishes vicarious liability (*respondeat superior*) from other theories of liability is that it can be imposed irrespective of participation in the wrongful act.”).

46. Dalley, *supra* note 45, at 642.

47. *Id.* at 637–38.

48. Jordan Michael, *Liability for Accidents from Use and Abuse of Cell Phones: When Are Employers and Cell Phone Manufacturers Liable?*, 79 N.D. L. REV. 299, 304–05 (2003)

(Although an employer is not generally liable for accidents occurring before or after business hours, if the employee is conducting business via a cell phone at the time of the accident, the employer might still be indirectly liable. The employer might still be liable because conducting business via a cell phone provides a benefit to the employer).

RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. LAW INST. 2006) (defining the scope of employment “when performing work assigned by the employer or engaging in a course of conduct subject to the employer’s control.” Therefore, with technology allowing one to “perform work assigned by the employer” from virtually anywhere and anytime, the scope of employment is not limited to the workplace of the employer, but to anywhere the employee is engaging in work related to his/her job).

49. Michael, *supra* note 48.

activities.⁵⁰ The National Safety Council report stated that, “The key phrase ‘acting within the scope of his or her employment’ can and has been defined broadly in cases of crashes involving cell phones.”⁵¹

Numerous courts have already decided that an employer is liable in cases where an employee who is driving and using their cell phone for their employer’s business has an accident.⁵²

For example, the State of Hawaii paid \$1.5 million to the family of a man who was struck crossing a highway by a car driven by a state employee who was talking on a cell phone. In another example, Dyke Industries, an Arkansas lumber wholesaler, paid \$16.2 million to a 79-year-old woman following a car accident involving one of Dyke’s salesmen who was allegedly talking on a cell phone seconds before the accident occurred. In another case, Jane Wagner, an attorney, struck and killed a 15-year-old girl with her Mercedes while talking on a cell phone late at night. The girl’s parents brought suit against Wagner and won a \$2 million judgment against Wagner and her former employer, Cooley Godward, claiming Wagner was on a business call at the time of the accident.⁵³

The Wagner suit alleged that the firm was partly liable for the accident because Wagner’s job involved amassing billable hours by cell phone.⁵⁴ Such calls, the suit said, were done with the expectation and acquiescence of Cooley Godward and served as a direct benefit to the law firm.⁵⁵ “The firm and Wagner den[ied] that she was on a business call noting that the call occurred after business hours.”⁵⁶ However, the law firm settled the claim with the parents.⁵⁷ Such suits have spurred some companies to prohibit employees from using cell phones while driving.⁵⁸

Each of the above cases involve the employee using a cell phone for work-related situations. However, even the definition of “workplace” is no longer clear and may extend beyond situations where an employee is texting and driving.⁵⁹ It certainly no longer encompasses just the employer’s physical place of business.⁶⁰ A 2008 case stated the following:

50. *Id.*; *Miller v. Am. Greetings Corp.*, 74 Cal. Rptr. 3d 776, 785 (Cal. Ct. App. 2008) (Using one’s car as a mobile office from which one places and receives work-related calls and conducts an employer’s business is a relatively recent, and growing, business practice. As that practice spreads, the doctrine of *respondeat superior* must necessarily evolve if it is to continue to fulfill its purpose of ensuring businesses bear the costs of risks that may fairly be regarded as typical of or broadly incidental to their activities.)

(internal quotations omitted).

51. NAT’L SAFETY COUNCIL, *supra* note 38, at 2.

52. Michael, *supra* note 48, at 304.

53. *Id.*

54. Karin Brulliard, *Family Wins \$2 Million in Hit-Run*, WASH. POST (Oct. 8, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A16109-2004Oct7.html>.

55. Michael, *supra* note 48, at 304.

56. *Id.*

57. Brulliard, *supra* note 54.

58. Fredrick Kunkle, *Cargill goes Cold Turkey on Using Mobile Phones While Driving*, WASH. POST (Jan. 10, 2017), <https://www.washingtonpost.com/news/tripping/wp/2017/01/10/cargill-goes-cold-turkey-on-using-mobile-phones-while-driving>.

59. NAT’L SAFETY COUNCIL, *supra* note 38, at 2; Smith, *supra* note 30.

60. NAT’L SAFETY COUNCIL, *supra* note 38, at 2.

[t]he law of *respondeat superior* is not so cut and dried. . . . Using one's car as a mobile office from which one places and receives work-related calls and conducts an employer's business is a relatively recent, and growing, business practice. As that practice spreads, the doctrine of *respondeat superior* must necessarily evolve if it is to continue to fulfill its purpose of ensuring businesses bear the costs of risks that 'may fairly be regarded as typical of or broadly incidental' to their activities . . . the law involving 'mobile' offices inside an employee's car is unsettled, appellants could have reasonably entertained a good faith (albeit ultimately mistaken) belief that they could prevail here under *respondeat superior*.⁶¹

Not only has the law of *respondeat superior* not caught up with this emerging business practice, but some employers and their employees are still confused about the role of a mobile office in the workplace.

In Pennsylvania, a stockbroker named Robert Tarone killed a twenty-four-year-old motorcyclist. Tarone was driving and talking on his cell phone while en route to a nonbusiness event. The company did not provide employees with cell phones. Tarone stated he was making 'cold calls' when the accident occurred. Other employees testified that making 'cold calls' on personal time was needed in order to contact hard-to-reach individuals. Although the plaintiff claimed that Tarone was acting within the scope of employment at the time of the accident, the plaintiff also claimed that the company was negligent in encouraging employees to use cell phones without any warning or training on potential hazards. The company decided to settle the case for \$500,000, which avoided the possibility of a much larger jury award.⁶²

Another relevant case, *Tiburzi v. Holmes*, involved Jeffrey Knight, who was a driver for Holmes Transport & Logistics, and Mark Tiburzi, who was driving his personal vehicle at the time.⁶³ Knight caused an accident that injured 15 people and killed three in St. Louis, Missouri.⁶⁴ One of those injured was Tiburzi, who suffered a severe traumatic brain injury.⁶⁵ The accident was attributed to excessive speed, driving over the allotted on-duty hours, and distraction resulting from Knight looking at his cell phone rather than the roadway.⁶⁶ The jury awarded Tiburzi \$18 million, ultimately paid by Knight's employer.⁶⁷

Just as the court in *Miller* expanded applicability where an employee does one's work within scope of employment to the "mobile office," these courts have recently extended this reasoning to include cases where the employee's use of a cell phone for business purposes, from whatever location, falls within the scope of

61. *Miller v. Am. Greetings Corp.*, 74 Cal. Rptr. 3d 776, 785 (Cal. Ct. App. 2008); Isaac A. Hof, *Wake-Up Call: Eliminating the Major Roadblock That Cell Phone Driving Creates for Employer Liability*, 84 TEMPLE L. REV. 701, 719 (2012).

62. Michael, *supra* note 48, at 305-06.

63. *Tiburzi v. Holmes Transport, Inc.*, No. 4:08 CV 1151 DDN, 2009 WL 2592732, at *1 (Mo. Ct. App. Aug. 20, 2009).

64. *Id.* at *2.

65. *Id.* at *3.

66. *Id.* at *2.

67. *Id.* at *5 n.6.

employment. These cases show that in order for the doctrine of *respondeat superior* to fulfill its function, it must necessarily evolve to expand along with modern definitions and implementations of the workplace.

A. Liability of Remote Texters

Considering several recent cases, we now examine the propensity of courts to increase the liability of remote texters. Our analysis begins with *Kubert v. Best*.⁶⁸ On September 21, 2009, David and Linda Kubert were riding their motorcycle in Mine Hill Township, New Jersey.⁶⁹ As the Kuberts were rounding a bend, the pickup truck driven by Kyle Best crossed the double center line.⁷⁰ As a result, the truck and motorcycle collided.⁷¹ David's left leg was nearly severed and Linda's left leg was shattered.⁷² Best, a volunteer fireman, tried to aid the Kuberts until medical responders arrived, but both Kuberts lost their left legs as a result of the accident.⁷³

The evidence of Best's cell phone activity on the day of the accident showed 62 texts between him and his 17-year-old friend, Shannon Colonna.⁷⁴ 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.⁷⁵ Seventeen seconds passed between Best texting Colonna and the 911 call.⁷⁶ In that brief period, Best must have stopped and exited his truck, realized the gravity of the Kuberts' injuries, and called 911. The judge inferred that Colonna's texting distracted Best, causing him to collide with the Kuberts' motorcycle.⁷⁷

The Kuberts sued both Best and Colonna for compensation, alleging the accident was caused by distractions created by their texting.⁷⁸ 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.⁷⁹

On appeal, the Kuberts challenged the summary judgment in favor of 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.⁸⁰ The Kuberts also claimed 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.⁸¹

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

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

69. *Id.* at 1219.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 1220.

76. *Id.*

77. *Id.* at 1220–21.

78. *Id.* at 1218.

79. *Id.* at 1221–22.

80. *Id.* at 1221; *see also* N.J. STAT. ANN. § 39:4-97.3 (West 2014) (making texting and driving illegal).

81. *Kubert*, 75 A.3d at 1221.

know, the recipient will view the text while driving.”⁸² However, 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.⁸³ Thus, even though the summary judgment in favor of Colonna was upheld, the case created an expansion of duty under the tort of negligence.

A subsequent 2016 Pennsylvania case, *Gallatin v. Gargiulo*, cited *Kubert* and adopted that same expansion of what is included as a duty in a negligence case, namely that a remote texter who is texting someone they know is driving could also be liable for a resulting accident.⁸⁴ In *Gallatin*, Laura Gargiulo was operating a vehicle owned by Joseph Gargiulo.⁸⁵ Laura was driving behind Daniel Gallatin, who was riding a motorcycle.⁸⁶ Laura was responding to a text message from Joseph, who knew she was driving.⁸⁷ Laura was distracted while receiving Joseph’s text, and caused the accident that killed Daniel Gallatin.⁸⁸ The estate of Gallatin sued both Laura and Joseph: Laura for negligence and Joseph, as the remote texter, for negligently distracting her.⁸⁹ In addition, the estate sued Timothy Fend, who was also texting Laura when she was driving, claiming that he should also be held liable as a remote texter.⁹⁰ Both Laura and Fend filed a preliminary objection claiming that there was no legal basis in Pennsylvania for the claim that they were negligent.⁹¹ In deciding whether the court should dismiss the case against Fend, the court said the following:

The Court is unaware of Pennsylvania precedent specifically regarding the duties or liability of the sender of a text message to a person who is simultaneously operating a motor vehicle. However, the Superior Court of New Jersey, in the case of *Kubert v. Best*, addressed this very issue. In *Kubert*, the Court held that as a matter of civil common law, 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.⁹²

The Court then adopted the *Kubert* rule and said “Defendant Fend may not have in fact known or should have known that Defendant Laura E. Gargiulo was operating a motor vehicle at the time of the text message.”⁹³ However, at this preliminary objection stage there was no evidence as to whether he knew or should have known.⁹⁴ The court then overruled his preliminary objection saying, “Fend should remain a party in this case at this time, and Plaintiff may explore through

82. *Id.*

83. *Id.* at 1222, 1229.

84. *Gallatin v. Gargiulo*, No. 10401, 2016 WL 8715650, at *4 (Pa. Ct. Com. Pl. Mar. 10, 2016).

85. *Id.* at *1.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at *4.

91. *Id.* at *5.

92. *Id.* at *4.

93. *Id.*

94. *Id.*

discovery whether Defendant Fend violated a duty owed to a third person.”⁹⁵ The preliminary objections for Joseph Gargiulo were also overruled for the same reasons.⁹⁶

Thus, this case clearly adopted the *Kubert* rule in regard to remote texters by stating both of these remote texters could have potential liability that could not be dismissed on these preliminary objections. However, *The Washington Post* reported that an order was entered in Lawrence County Court of Common Pleas to dismiss the case against Fend, noting Fend’s “testimony in depositions undercut a chief premise of the legal theory, namely that the person sending the text knew or should have known that the recipient was driving.”⁹⁷ This decision in favor of Fend rested on the fact that in his deposition there was no evidence that he knew, or had special reason to know, Laura Gargiulo was driving and, therefore, Fend could not be held liable under the rule created by *Kubert*.⁹⁸ Although we do not know the ultimate disposition of the case against Joseph Gargiulo as a remote texter (likely due to a settlement), what is clear is this Pennsylvania court adopted the *Kubert* rule.⁹⁹

Both the *Kubert* and *Gallatin* cases focused on what constitutes “reasonable behavior.”¹⁰⁰ In both cases, the judges decided it is reasonable for a texter to anticipate that sending texts to the driver of a moving vehicle may precipitate an accident.¹⁰¹ Thus, if the texter knows the driver is driving, both the texter and the driver would be jointly and severally liable to parties injured in an accident.

A 2010 case, *Buchanan Ex-Rel. Buchanan v. Vowell*, possibly foreshadowed the court’s decision in *Kubert*.¹⁰² In *Buchanan*, Candice Vowell was drinking at a bar and consumed enough alcohol to become intoxicated.¹⁰³ Her mother, Shannon, who was also at the bar, said she would follow Candice home to make sure she got there safely and call her on her cell phone as needed.¹⁰⁴ On her way home, Candice hit a pedestrian, Jerry Buchanan, and seriously and permanently injured him.¹⁰⁵ To seek compensation for his injuries, Jerry sued not only Candice and the bar who served her, but also Shannon.¹⁰⁶ He claimed that Shannon engaged in a negligent activity with Candice that was the proximate cause of his injuries.¹⁰⁷ Jerry’s theory was that because Shannon gratuitously undertook a duty to control Candice’s driving, including cellular communication with Candice, and Shannon’s cellular communication with Candice negligently distracted an intoxicated driver, Shannon was, in part, the cause of the accident.¹⁰⁸ The trial court dismissed the complaint against

95. *Id.*

96. *Id.* at *5.

97. Fredrick Kunkle, *Case Dismissed Against Person who Texted Driver in Fatal Pennsylvania Crash*, WASH. POST (Feb. 3, 2018), https://www.washingtonpost.com/news/tripping/wp/2018/02/03/case-dismissed-against-person-who-texted-driver-in-fatal-pennsylvania-crash/?utm_term=.1ac33ca63a74.

98. *Id.*

99. *Gallatin*, 2016 WL 8715650, at *4.

100. *Id.* at *5; *Kubert v. Best*, 75 A.3d 1214, 1223 (N.J. Super. Ct. App. Div. 2013).

101. *Gallatin*, 2016 WL 8715650, at *4.

102. *Buchanan ex rel. Buchanan v. Vowell*, 926 N.E.2d 515, 521–22 (Ind. Ct. App. 2010).

103. *Id.* at 517.

104. *Id.* at 517–18.

105. *Id.* at 517.

106. *Id.* at 518.

107. *Id.*

108. *Id.* at 519.

Shannon.¹⁰⁹ However, the appellate court reversed and remanded, noting the following:

The allegations made by Jerry in his amended complaint show that Shannon agreed to enter into a concerted activity whereby Shannon would follow the drunken Candice and would direct and/or distract her by calling her on her cell phone. . . . Furthermore, we note that Shannon owed a duty of reasonable care to those that shared the road with her, both motorists and pedestrians. Shannon, as an individual, may have breached this duty by calling and distracting a person she knew was operating a vehicle while under the influence of alcohol. Thus, Shannon may be found liable for Jerry's injuries even if she did not gratuitously assume a duty or act in concert with Candice.¹¹⁰

Buchanan is similar to *Kubert* and *Gallatin* because both courts ruled that a remote person using a cellphone to contact a driver could be liable to an injured third party if the cellular communication distracted the driver and caused an accident.

Finally, there is a New York case, *Vega v. Crane*, in which the court refused to make a remote texter liable for a resulting accident.¹¹¹ However, the situation differs from both *Kubert* and *Gallatin*. The plaintiff asked the court to extend the rule from *Kubert* and argued that the court should establish a rule that the remote texter should be liable, even though it was clear that the remote texter did not know that the person they were texting was driving.¹¹² The court refused to do so.¹¹³ According to the *Vega* court, *Kubert* held “that a third party, who had knowledge that the motorist they were texting was driving at the time the parties were exchanging text messages, could be found liable for any resulting damages.”¹¹⁴ The *Vega* court also determined that, “[w]hile undoubtedly there are certain circumstances that would establish a third-party duty . . . those facts do not exist here.”¹¹⁵ Therefore, in *Vega*, the New York court could seemingly have accepted *Kubert* if the facts would have been different. However, it is unclear what those facts would have to be.

As seen by the above cases, an evolution in the law has already begun through judicial interpretation. Initially, in *Buchanan*, the court extended liability to someone who was “remotely distracting” to the driver who caused the accident (albeit not texting), and then in *Kubert* and *Gallatin*, courts expanded liability to texters more generally. The primary differences of those texting cases to the situation in *Buchanan* is that Shannon Vowell clearly knew the person she was communicating with was driving. Next, we examine the issue, the “knowledge requirement,” as it applies in the case of remote texting.

109. *Id.* at 516.

110. *Id.* at 521–22 (internal citations omitted).

111. *Vega v. Crane*, 55 Misc. 3d 811, 817 (N.Y. Sup. Ct. 2017).

112. *Id.* at 813.

113. *Id.* at 822.

114. *Id.* at 814 (internal citations omitted).

115. *Id.* at 815.

B. The Knowledge Requirement

Because it is certainly possible to be unaware of exactly what a person you are texting may be doing, the knowledge of the texter becomes a more difficult issue to prove (or to disprove) in remote texting situations. The court in *Kubert* altered the underlying facts that justify the proximate cause prong of the legal rule of negligence: if you text someone you know is driving, you could be liable for a resulting accident because it is reasonably foreseeable that someone receiving a text might look at it and/or respond to it, which could cause them to have an accident.¹¹⁶ *Gallatin* affirmed this principle.¹¹⁷

However, the potential liability for a remote texter is likely to be very narrow.¹¹⁸ The *Kubert* court specifically stated that the remote texter must either know, or have special reason to know, that the person they are texting is driving.¹¹⁹ That raises the question: What evidence is required to prove the remote texter knew or had special reason to know? First, “knowing” means that the remote texter actually knows the recipient is driving and still sends a text message. Additionally, the remote texter knows or should know that the driver will view the text.

In *Kubert*, for example, the court found that Colonna could not be held liable under this rule because she had no knowledge that Best was driving.¹²⁰ Therefore, actual knowledge that the person is driving will create liability. This is further illustrated by the *Gallatin* case.¹²¹ In *Gallatin*, the court held that Joseph Gargiulo could be held liable as the remote texter because he knew that Laura Gargiulo was driving when he texted her.¹²² In both of these cases, the critical piece of evidence was the actual knowledge that the person the defendant was texting was driving.

C. How Actual Knowledge Arises

In the *Kubert* case there was no actual knowledge, while in the *Gallatin* case there was actual knowledge. The requirement of actual knowledge addresses what is “reasonably foreseeable” under the tort of negligence. If one has actual knowledge that they are texting someone who is driving, then that remote texter

116. *Kubert v. Best*, 75 A.3d 1214, 1227 (N.J. Super. Ct. App. Div. 2013).

117. *Gallatin v. Gargiulo*, No. 10401, 2016 WL 8715650, at *4 (Pa. Ct. Com. Pl. Mar. 10, 2016).

118. *Kubert*, 75 A.3d 1214 at 1228 (internal citations omitted)

(Our conclusion that a limited duty should be imposed on the sender is supported by the “full duty analysis” described by the Supreme Court—identifying, weighing, and balancing 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. When the sender knows that the text will reach the driver while operating a vehicle, the sender has a relationship to the public who use the roadways similar to that of a passenger physically present in the vehicle. As we have stated, a passenger must avoid distracting the driver. The remote sender of a text who knows the recipient is then driving must do the same.)

(internal quotations omitted).

119. *Id.* at 1229 (“We hold that, when a texter knows or has special reason to know that the intended recipient is driving and is likely to read the text message while driving, the texter has a duty to users of the public roads to refrain from sending the driver a text at that time.”).

120. *Id.*

121. Kunkle, *supra* note 97 (“A Pennsylvania court has dismissed a lawsuit against a man who was texting a driver involved in a fatal crash. The move came after testimony in the civil case failed to show that he knew the text’s intended recipient was driving at the time.”).

122. *Gallatin*, 2016 WL 8715650, at *5.

should reasonably foresee that the driver who receives that text might have an accident and the text was part of the proximate cause of that accident. Actual knowledge could arise in several ways. First, the remote texter is told by the person they are texting that they are driving. Here are two examples of how actual knowledge could be communicated to the remote texter: (1) a text the remote texter receives could say something like, “I am driving to your business right now and want to know if you are open?” Once that message is received, the potential remote texter has actual knowledge that the person is driving and they cannot respond. Essentially, if a text by the driver informs the other person they are driving, they now have actual knowledge. (2) The other situation would be that the remote texter is either following or preceding the person they are texting. In that case the remote texter would actually know the other person is driving, thus proving “actual knowledge.”

The alternative to “knowledge” in the *Kubert* test requires the remote texter to have a “special reason to know” that the person was driving.¹²³ This is a little broader than “actual knowledge.” For example, assume a lawyer who practices in a suburban mall meets with his client and receives a text five minutes after the client leaves his office asking, “Did I leave my coat at your office?” Here, the lawyer would have special reason to know that the client is driving. His special reason consists of a combination of both the brief time since the conclusion of the meeting coupled with the lack of availability of non-vehicular transport methods. In contrast, Aaron Gevers, a J.D. candidate at the Rutgers University, speculates “special reason” means that the recipient has a habit or predilection to look at text messages.¹²⁴ We believe his interpretation is too speculative. The rule is “know or special reason to know,” not “should have reasonably known.”

Finally, one might ask how a plaintiff could establish that the recipient driver did in fact look at the text message just prior to the accident. That would be easily demonstrated by examining cell phone records of the driver to determine what happened right before the accident occurred.¹²⁵ Once the cell phone records are obtained, it is technologically possible to determine whether the texts have been read.¹²⁶

We believe that this expansion of making remote texters liable is proper jurisprudence because the purpose underlying the principle of negligence is to encourage responsibility amongst those who owe duties of care.¹²⁷ A person has a duty to use reasonable care when interacting with others, and everyone with whom that

123. *Kubert*, 75 A.3d at 1229.

124. Aaron Gevers, *Don't Whisper Down the Lane: Assessing New Jersey's "Kubert" Third Party Texting-While-Driving Liability*, RUTGERS J. L. & PUB. POL'Y (Dec. 27, 2013), <https://rutgerspolicyjournal.org/don%E2%80%99t-whisper-down-lane-assessing-new-jersey%E2%80%99s-kubert-third-party-texting-while-driving-liability>.

125. Dan Ketchum, *How to Get Cell Phone Records*, LEGAL BEAGLE, <https://legalbeagle.com/5140492-cell-phone-records.html> (last updated Dec. 4, 2018) (“[C]ases as mundane as civil divorce, either party may subpoena cellphone records. Alternatively, an attorney may request them during the case’s discovery phase. Of course, it doesn’t have to be all that complicated – cellphone records can also be obtained via consent, such as a written authorization.”).

126. Ashleigh Macro, *How to Tell if Someone has Read Your Text*, TECH ADVISOR (Oct. 29, 2018), <https://www.techadvisor.co.uk/how-to/mobile-phone/how-tell-if-someone-has-read-your-text-3605143/>; Francis Navarro, *How You can Tell When Someone is Seeing Your Text Messages*, KIMKOMANDO (Dec. 29, 2017), <https://www.komando.com/tips/416416/how-you-can-tell-when-someone-is-seeing-your-text-messages>.

127. See *A Brief Overview of Tort Law*, LAWS, <https://tort.laws.com/tort-law> (last visited Feb. 16, 2019).

person interacts has a right to expect that reasonable care will be used, and if not, that they will be compensated for any resulting harm. Therefore, if a person does not behave in a reasonable manner, and if their actions could reasonably be anticipated to injure another, then that person should be liable for injury resulting from those actions.¹²⁸

Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law. The duty may arise specifically by mandate of statute, or it may arise generally by operation of law under application of the basic rule of the common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others. This rule of the common law arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another. Further, the duty of care at issue may be specific, owed by the defendant to a particular plaintiff, or it may be of a general nature owed by the defendant to the public as a whole. Determining whether there exists a duty under a particular set of circumstances requires an examination of the reasonableness of the risk created by the defendant's conduct. This in turn depends upon a panorama of considerations such as the magnitude of the harm, the likelihood and foreseeability of its occurrence, weighed against the utility of the defendant's conduct.¹²⁹

We believe that in the next step of the development of law in this area, courts should expand the extant jurisprudence and adopt a policy that makes employers potentially liable in certain remote texter situations. *Tiburzi v. Holmes* established that employers may be liable for accident and injury when drivers are texting in conjunction with their duties of employment.¹³⁰ *Kubert* and its progeny established that a remote texter who texts a person they know is driving and will read and/or respond to the text could be liable to the person who is injured when that driver is distracted by the text and has an accident injuring third parties.¹³¹ Combining these two lines of reasoning, it is not a large leap for the courts to decide that when a remote texter is texting within the scope of their employment, the employer should be liable for any resulting accident and injury. Such a policy extension would increase public awareness of the risk involved in texting a person they know is driving, and the potential liability associated with such texting behavior. As a result, fewer people will text drivers, reducing the risk of automobile accidents and consequent injury.

128. *Hetterle v. Chido*, 400 N.W.2d 324, 326–27 (Mich. Ct. App. 1986).

129. *Id.* (emphasis omitted) (internal citations omitted).

130. *Tiburzi v. Holmes Transport, Inc.*, No. 4:08 CV 1151 DDN, 2009 WL 2592732, at *1 (Mo. Ct. App. Aug. 20, 2009).

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

V. PUBLIC POLICY SUPPORTING EMPLOYER LIABILITY

As a matter of public policy, we advocate that courts and legislatures should make employers liable for texting by their employees. In situations where an employee is texting someone they know is driving, and the text subject is work-related, we believe employers should be held liable for any resulting accident and injury. There are two reasons underlying this proposed expanded employer liability. First, an innocent party should be compensated for their injury, and normally the employer has significantly greater resources to provide such compensation than the employee. Second, and the reason we focus on here, is that an employer has considerable power to restrict the use of cell phones to conduct business.

By creating potential liability for an employer, there will be a stronger incentive to limit the use of cellphones, resulting in increased awareness of the risks of texting and driving among their employees and, hopefully, lower rates of accidents caused by texting. For example, Morgan Gough, a law student at the University of Baltimore, said the following:

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.’ By educating people about both the hazards of their conduct and the 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.¹³²

Holding the employer liable in employment-related remote texter cases serves both of the above purposes. It increases the likelihood of compensation to those injured, and it also provides a prophylactic device by encouraging employers to create and enforce strict no texting-and-driving policies for employment-related texts. The courts have the power to expand the liability to the employer when an act is done within the scope of employment, because

a duty is an obligation imposed by law requiring one party to conform to a particular standard of conduct toward another. The recognition or establishment of a legal duty in tort law is generally a matter for a court to decide. One scholarly treatise has put the issue in quite simple, if not specific, terms: No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists. Central to the determination of whether a duty does or should exist is a ‘value judgment, based on an analysis of public policy, and notions of fairness. The fairness and public policy considerations involve weighing several factors: [t]he relationship of the parties, the nature

132. Morgan Gough, Comment, *Judicial Messaging: Remote Texter Liability as Public Education*, 44 U. BALT. L. REV. 469, 470 (2015) (internal citations omitted).

of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution.¹³³

Therefore, the central question is whether this would be good public policy and fair to the employer. Summarizing the fairness argument, it seems fair to hold the employer liable because it makes them accept responsibility for their choices, such as not having a texting policy, and/or not enforcing one. By allowing their employees to text, employers have allowed others to be put at risk of injury and should be held responsible for their actions (or inaction).¹³⁴

To examine the fairness issue fully, one must look at (1) the relationship among the parties, (2) the opportunity and ability to exercise care, and (3) the public interest in the proposed solution. We examine each of these in turn.

A. The Relationships Among the Parties

There are four potential parties to consider: the employer, the employee sending the text, the recipient of the text (who may or may not be driving), and any innocent third parties who may be injured as a result of the texting behavior. For now, we focus on the relationship between the employer and the texting employee.

In our analysis, we assume that the employee is texting the recipient for a work-related matter. Therefore, the employer potentially benefits from its employee sending the text, with the nature of the benefit depending on the relationship of the text recipient to the employer.¹³⁵ To the extent that the employer does potentially benefit from the employees' conduct, therefore, it is fair to expand the circle of liability to include the employer.

B. The Opportunity and Ability to Exercise Care

While the relationship among the parties suggests it would be fair to hold the employer responsible, such is the case only if the opportunity and ability to exercise care is also present in the texting moment. The employer has control over the work-related behavior of its employees and can create policies that reduce the risk of injury to others arising from the actions of their employees. Therefore, a plaintiff should be entitled to legal protection when the employer does not exercise responsible control by developing and enforcing reasonable rules that employees should follow. Most employers already have policies prohibiting their employees from texting and driving, demonstrating that they have control and can create policies related to texting that reduce risk and potential liability.¹³⁶ Expanding those extant texting

133. *Acuna v. Turkish*, 930 A.2d 416, 424 (N.J. Sup. Ct. 2007) (internal quotations omitted) (internal citations omitted); *Sharma v. Bazsika*, No. L-0141-05, 2010 WL 4056873, at *1 (N.J. Super. Ct. App. Div. July 16, 2010) (quoting *Acuna* with approval).

134. See Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 SOUTHERN CAL. L. REV. 193, 219–20 (2000) (providing a full discussion of this).

135. For example, if the recipient is a customer or potential customer, the text may result in more revenue for the employer; if the recipient is a supplier or potential supplier, the employer may gain new or better or cheaper access to supplies, and so on.

136. Julie Ferguson, *Distracted Driving & Employer Policies*, ESI GROUP (Nov. 1, 2009), <https://www.theeap.com/best-practices/distracted-driving-employer-policies> (“A new survey of more than 2,000 employers conducted by the National Safety Council found that 58[%] had some type of cell

policies to cover situations where the employee is texting someone they know or have special reason to know is driving, rather than texting and driving themselves, may not be a huge additional burden on the employer.

By analogy, there is already a model available for creating employer liability for employee actions that ultimately injure an innocent third party, namely the move to expand liability for drinking and driving that happened in the 1980s.¹³⁷ Remote liability (liability imposed on someone other than the driver) in drunk driving accidents is not unusual.¹³⁸ Under certain circumstances, the owner of a bar, restaurant, tavern, or other establishment can be sued if an intoxicated patron causes a car accident. For example, in states such as Georgia, the persons who could be liable in a drunk driving accident include the driver, the bar or restaurant owner (the employer), the staff, a party host, or someone who loaned a car to the drunk driver.¹³⁹ All but the driver are remote persons in regard to the accident.

In addition, a bartender or wait staff who serves alcohol to a noticeably intoxicated person whom they know will soon be driving can create liability for their employer (the bar or restaurant) if that intoxicated person drives and injures a third party.¹⁴⁰ That third party may sue the bar or restaurant and receive compensation for their injuries.¹⁴¹ This is very similar to an employee texting someone they know

phone usage policy in place, and roughly one-quarter of those surveyed prohibit both hand-held and hands-free devices while driving for some or all employees.)”

137. *MADD History Impact of Mothers Against Drunk Driving*, ELITE DRIVING SCH., <https://driving-school.net/madd-history-impact-mothers-drunk-driving> (last visited Feb. 17, 2019)

(In 1980, the year Candy Lightner founded Mothers Against Drunk Driving (MADD). . . . In the 35 years since its founding, MADD has not only dramatically reduced the number of alcohol-related traffic deaths each year, but they have changed the way America looks at drinking and driving. . . . Over the years, MADD has been instrumental in getting drunk driving laws passed and the legal acceptable blood alcohol level reduced. By 1982, more stringent DUI laws were introduced in 35 states and passed by 24 states. A year later, 129 new DUI laws had passed, and the snowball effect continued. They also got the support of the federal government for raising the legal drinking age to 21, and in 1983 President Reagan signed the Uniform Drinking Age Act into law. In 2000, after years of lobbying, President Clinton signed legislation that would effectively lower the legal blood alcohol level in the US to .08.)

138. See, e.g., *Social Host Liability Laws and Lawsuits Over Alcohol-Related Accidents*, NOLO, <https://www.nolo.com/legal-encyclopedia/social-host-liability-laws-and-lawsuits-over-alcohol-related-accidents.html> (last visited Feb. 17, 2019)

(Social host liability is a legal concept that some states follow, allowing a host of a party or other gathering to be held liable in certain situations where a guest becomes intoxicated and ends up causing an injury to a third party. Social host liability is similar to dram shop laws. The difference is that a dram shop law imposes liability only on sellers of alcoholic beverages (like bars, liquor stores, and restaurants) whereas social host liability can be imposed on anyone who provides alcoholic beverages to guests or visitors, if that guest goes on to injure someone while intoxicated. Most states have dram shop laws, but not all states have social host liability laws.)

(internal quotations omitted).

139. GA. CODE ANN. § 51-1-40(b) (1988).

140. *Dram Shop Law States Bars Can Be Held Liable for Drunk Driving Accidents*, ENJURIS, <https://www.enjuris.com/car-accident/dram-shop-law.html> (last visited Feb. 17, 2019) (“Liability is usually limited to cases in which the individual being served . . . was visibly drunk but still received service.”); see also *Legal Risks Bartenders Face for Overserving Alcohol*, ALCOHOL.ORG (Nov. 8, 2018), <https://www.alcohol.org/laws/over-serving> [hereinafter *Risks Bartenders Face*] (“Bartenders who serve intoxicated patrons may be at risk for legal and civil charges as a result of these actions. Many states have enacted legislation to allow for prosecution and civil suits of commercial establishments that serve alcohol to visibly intoxicated individuals.”).

141. *Risks Bartenders Face*, *supra* note 140.

is driving, in the context of a work-related matter, whose text results in the recipient having an accident that injures an innocent third party. By analogy, the third party should be able to sue and recover from the employer, because the dangers of texting while driving are very similar to, or possibly even more extreme, than those of drunk driving.¹⁴²

Some might argue that creating employer liability for their employees' texting behavior should be done via statute. However, the courts routinely create common law through court decisions without waiting for a statute to be passed. As noted by Katherine O'Konski, a J.D. candidate from the University of Maryland, courts previously created common law in regards to drunk driving:

The court (in *Warr v. JMGM Group*¹⁴³) should have recognized that the tavern's affirmative action in serving a visibly intoxicated patron was relevant to assigning liability. Conceptualizing the tavern's conduct as an action is consistent with Maryland's and other states' case law, and would have enabled the court to find that the Dogfish Head tavern owed a duty to the Warrs under both the general principles of negligence and the Restatement (Second) of Torts Section 315.6. While this case presents a difficult challenge in balancing the interests of Maryland's tavern businesses with the imperative to reduce drunk driving fatalities, the court should have considered that imposing dram shop liability would deter such destructive behavior while providing compensation for those injured.¹⁴⁴

O'Konski's focus is on promoting a policy to reduce dangerous behavior in driving and making the person who had an opportunity to prevent that dangerous driving also responsible for the damages caused. Therefore, if a server at the bar knows the person they are serving is going to be driving, it is clearly foreseeable by the server that allowing the patron to continue drinking and/or allowing them to drive could very well result in an accident.

Not only has there been legislative expansion of drunk driving laws, but there is also jurisprudence supporting such an extension. For example, in *Jardine v. Upper Darby Lodge No. 1973, Inc.*, the Supreme Court of Pennsylvania adopted dram shop liability.¹⁴⁵ In that case, while Thomas Gross was on his way home after

142. See Summer Galitz, *Killer Cell Phone and Complacent Companies: How Apple Fails to Cure Distracted Driving Fatalities*, 72 U. MIAMI L. REV. 880, 890 (2018) ("This means that it is 'safer' to drive drunk than to text and drive.") (citing Ben Spencer, *Texting While Driving 'Slows Reaction Times More Than Drink or Drugs'*, DAILY MAIL, <https://www.dailymail.co.uk/news/article-2652015/Texting-driving-slows-reaction-times-drink-drugs.html> (last updated June 8, 2014)); Jonathan Michaels, *Texting and Driving: Public Enemy No. 1*, MLG ATT'YS L. (Dec. 6, 2016), <https://mlgaplc.com/texting-and-driving-public-enemy-no-1/> ("The National Highway Traffic Safety Administration classifies texting and driving as six times more dangerous than drinking and driving.").

143. *Warr v. JMGM Group, LLC*, 70 A.3d 347 (Md. 2013).

144. Katherine O'Konski, *Warr v. JMGM Group: Maryland Dram Shops Escape Duty to Foreseeable Victims of Drunk Driving*, 73 MD. L. REV. 1206, 1206-07 (2014) (internal citations omitted).

145. *Jardine v. Upper Darby Lodge No. 1973, Inc.*, 198 A.2d 550 (Pa. 1964). *Dram Shop Laws*, FINDLAW, <https://dui.findlaw.com/dui-laws-resources/dram-shop-laws.html> (last visited Mar. 10, 2019) (dram shop "laws are enforced through civil lawsuits, allowing DUI victims or their families to sue alcohol vendors or retailers for monetary damages."); GERALD N. HILL & KATHLEEN HILL, *NOLO'S PLAIN-ENGLISH DICTIONARY* 142 (Shae Irving ed., 1st ed. 2009) ("A law that makes a business that sells alcoholic drinks or a host who serves liquor to an obviously intoxicated person strictly liable to anyone injured by the drunken patron or guest.").

several hours of drinking, he struck two pedestrians.¹⁴⁶ One of them, James Jardine, sued the tavern claiming it was liable because it was negligent in serving Gross, who was visibly intoxicated.¹⁴⁷ The court agreed with Jardine, even though Pennsylvania lacked an applicable statute, saying, “The first prime requisite to de-intoxicate one who has, because of alcohol, lost control over his reflexes, judgment and sense of responsibility to others, is to stop pouring alcohol into him.”¹⁴⁸ As a result, the Pennsylvania court established a duty for a tavern to exercise their ability to reduce the risk of drunk driving in this kind of a circumstance.

Arizona had a common law rule that did not hold taverns liable for the actions of their patrons, and it was challenged in *Ontiveros v. Borak*.¹⁴⁹ However, the Supreme Court of Arizona rejected that rule and instead held that taverns could be liable for acts of their customers.¹⁵⁰ In *Ontiveros*, Reuben Flores drank about 30 beers at Borak’s bar.¹⁵¹ After Flores left the bar, he hit a pedestrian with his car, causing severe injury to the pedestrian.¹⁵² The court held that a tavern had a common law duty to conduct itself with reasonable care and prudence when dispensing alcohol.¹⁵³ The court stated, “In selling liquor to an intoxicated customer, where it is evident that the customer may injure himself or others as a result of the intoxication, a vendor is not acting as a reasonable person would.”¹⁵⁴ In this case, the court made a rule that overturned a prior rule made by the court.¹⁵⁵

The Supreme Court of Texas in *El Chico Corp. v. Poole* also adopted dram shop liability.¹⁵⁶ Rene Saenz had been drinking heavily at a restaurant, left the restaurant, ran a red light, and killed Larry Poole.¹⁵⁷ The court decided the circumstances were foreseeable and the restaurant should remain liable, saying “The risk and likelihood of injury from serving alcohol to an intoxicated person whom the licensee knows will probably drive a car is as readily foreseen as an injury resulting from setting loose a live rattlesnake in a shopping mall.”¹⁵⁸ Additionally, the court addressed the fact that a bar/restaurant also had a duty to the general public to prevent potential harm.¹⁵⁹ Essentially, this is a policy statement balancing the interest of the bar’s owners against the interest of the public, and the public interest won.

C. Public Interest

In examining the expansion of drunk driving laws, it is important to note the impact of public policy seeking to reduce drunk driving. States have extended liability for injuries to third parties not only to employers, but beyond business

146. *Jardine*, 198 A.2d at 551.

147. *Id.* at 552.

148. *Id.* at 553.

149. *Ontiveros v. Borak*, 667 P.2d 200, 204 (Ariz. 1983).

150. *Id.* at 213.

151. *Id.* at 203.

152. *Id.* at 203–04.

153. *Id.* at 208–09.

154. *Id.* at 209 (quoting *Nazareno v. Urie*, 638 P.2d 671, 674 (Alaska 1981)).

155. *Id.* at 213.

156. *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987).

157. *Id.* at 308–09.

158. *Id.* at 311.

159. *Id.* at 315.

organizations to include social hosts.¹⁶⁰ These state laws vary, ranging from making social hosts liable for serving minors to making any social host liable, regardless of the age of the person they served at their event.¹⁶¹ Social host liability differs from dram shop liability; in the latter, a business is selling alcohol, whereas in the former, alcohol is simply given away and the social host derives no economic benefit at all.¹⁶² However, they could still be liable to an innocent third party when a host's drunken guest has an automobile accident and injures a third party.¹⁶³ This broad protection of innocent third parties shows how important it is, as a public policy consideration, to provide numerous and varied disincentives for providing alcohol to anyone who may subsequently be driving.

There is evidence that dram shop liability, social host liability, and broader public knowledge of potential liability helped to reduce the number of alcohol-related car accidents.¹⁶⁴ For example, a report by Mothers Against Drunk Driving ("MADD") shows that filing a dram shop liability case reduced subsequent vehicle crashes.¹⁶⁵ "[W]hen a dram shop liability case was filed in Texas in 1983, single vehicle crashes that occurred at night and resulted in injuries decreased by 6.5[%]. Another case was filed in 1984, and a 5.8[%] decrease was noted."¹⁶⁶ In addition, "MADD also believes that dram shop liability state laws contribute to more publicity in regard to over-serving; thus, managers and servers in these establishments are more aware of the liability."¹⁶⁷

Making the public aware of negative consequences can deter undesirable activities. "In 2001, researchers found a 5.8[%] decrease in fatal crashes from dram shop liability. Other studies have shown a similar deterrent effect from dram shop liability from 3[%] to 5[%]."¹⁶⁸ "The U.S. Task Force on Community Preventive Services, based on the systematic review of 11 qualifying studies, 'concludes on the basis of strong evidence that dram shop liability is effective in preventing and reducing alcohol-related harms.'"¹⁶⁹ A groundbreaking study which focuses on dram shop liability and social host liability found that "despite their relative unpopularity,

160. *Social Host Liability*, FINDLAW, <http://injury.findlaw.com/accident-injury-law/social-host-liability.html> (last visited Feb. 16, 2019)

(States with social host liability laws applicable to guests of all ages: Alaska, Arkansas, Connecticut, Hawaii, Maine, Maryland, Massachusetts, Missouri, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Washington, [and] Wisconsin.).

161. *Id.*

162. *Id.* ("Laws imposing liability on social hosts for alcohol-related deaths and injuries vary from state to state, while some states have passed statutes that explicitly give immunity to social hosts."). See generally Mary M. French, Jim L. Kaput & William R. Wildman, *Social Host Liability for the Negligent Acts of Intoxicated Guests*, 70 CORNELL L. REV. 1058 (1985).

163. *Id.*

164. Kacey R. Scott, "In Heaven There Is No Beer, That's Why We Drink It Here:" *Making Kansas Roads Safer with Dram Shop Liability*, 57 WASHBURN L. J. 543, 572-74 (2018).

165. *Dram Shop and Social Host Liability*, MADD (2012), https://www.madd.org/wp-content/uploads/2017/08/Dram_Shop_Overview.pdf.

166. *Do Dram Shop Laws Reduce Alcohol-Related Accidents?*, TURLEY L. FIRM (Apr. 23, 2015), <https://www.wturley.com/do-dram-shop-laws-reduce-alcohol-related-accidents>.

167. *Id.*

168. PROJECT EXTRA MILE, DRAM SHOP LIABILITY AND REDUCING ALCOHOL-RELATED HARMS (Jan. 8, 2016), http://files.www.projectextramile.org/policy/underage-drinking-in-nebraska-the-facts/Dram_Shop_Fact_Sheet_1.8.16_FINAL.pdf.

169. *Id.*

tort laws are very effective in reducing accidents—even more than criminal sanctions.”¹⁷⁰

To summarize, as with the development of the law with respect to drunk driving, this expanding pattern of case law and legislation establishes a rule that a person who knows his or her actions have a foreseeable risk of injuring the public has a duty to act and reduce the risk. Returning to the issue at hand of texting and driving, the *Kubert* court echoed these policy considerations, stating that once you are aware of a situation (the person you are texting is driving) that could cause an innocent third party injury, and you have the power to prevent that act (by refraining from further texting), and if you do not take these preventive measures, you could be liable to that third party.

To incentivize further responsibility, we advocate extending this same principle to the employer. This evidence supports extending remote texter liability to employers in certain circumstances because employers benefit from the work-related texting activities of their employees and should be held responsible for the consequences of these activities. Doing so provides a deterrent to employees texting individuals they know are driving. Dan Munley, a personal injury and trucking trial lawyer from Pennsylvania, said the following:

Gallatin is the type of decision plaintiffs’ attorneys have long been waiting for. If you put people on notice that if they engage in that type of activity with another individual who they know is actually driving a vehicle they can be subject to some form of liability if there’s an injury. . . . I think that behavior will be curbed.¹⁷¹

The creation of stricter laws against drunk driving, both by court decisions and by statute, has reduced drunk driving deaths.¹⁷² Deaths related to texting while driving are increasing.¹⁷³ Therefore, we expect that similarly strict laws for texting and driving, including both statutory and court-imposed liability, should reduce accidents and injury caused by texting and driving.

VI. CONCLUSION AND RECOMMENDATION

In this article, we examined the development of law related to texting and driving. First, we showed that most jurisdictions have legislation and/or case law

170. FRANK A. SLOAN, EMILY M. STOUT, KATHERYN WHETTEN-GOLDSTEIN & LAN LIANG, DRINKERS, DRIVERS, AND BARTENDERS: BALANCING PRIVATE CHOICES AND PUBLIC ACCOUNTABILITY 300 (2000).

171. Ben Seal, *Texting a Distracted Driver Could Now Bring Liability*, PA. L. WEEKLY (May 3, 2016), <http://www.rawle.com/news-events/articles/pa-law-weekly-may-3-2016-texting-a-distracted-driver-could-now>; see also *Distracted Driving is an Increasingly Deadly Problem*, VAN BLOIS L. (May 30, 2017), <http://www.vanbloislaw.com/blog/2017/05/distracted-driving-is-an-increasingly-deadly-problem.shtml>; Joel D. Feldman, *The Landscape of Distracted Driving*, AM. ASS’N FOR JUST. (Feb. 2017), <https://www.justice.org/what-we-do/enhance-practice-law/publications/trial-magazine/landscape-distracted-driving> (“We likely see more cases brought against remote testers . . . [w]ith the epidemic of distracted driving crashes, hopefully more courts will allow juries to hear these cases.”).

172. Jacob Masters, *Texting While Driving vs. Drunk Driving: Which is More Dangerous?*, BRAIN INJ. SOC’Y (Oct. 27, 2013), <https://www.bisociety.org/texting-while-driving-vs-drunk-driving-which-is-more-dangerous>.

173. *Id.*

making it illegal for drivers to text and drive. Then, we examined situations where employees were texting and driving within the scope of their employment and observed that many employers are being held liable for resultant accident and injury in such cases. Next, we reviewed the developing case law regarding liability of remote texters. The emerging law suggests that remote texters may be liable when they text a driver who they know, or have special reason to know, is driving. We argued that it is a short leap to combine these lines of jurisprudence, and we anticipate that *employers* may soon be held liable for *employees* who text a driver in the context of their work responsibilities who they know, or have reason to know, is driving. Such a shift to employer liability to reduce the risk of dangerous driving behavior parallels what happened earlier with drinking and driving laws. Moreover, we articulated that such an extension of law constitutes good public policy by drawing attention to the risks of texting and driving. We hope that by extending employer liability, both the incidence of texting and driving, as well as ensuing accident and injury, will decrease over time.

An employer may be able to reduce the risk of texting and driving, as well as the risk of litigation and negative judgment, by developing and enforcing an effective texting policy.¹⁷⁴ Knowledgeable employers anticipate potential liability and create a prophylactic device to reduce that risk. In this case, the prophylactic would be a comprehensive texting policy, encompassing both employees texting and driving. The texting policy would also encompass texting others who the employee knows, or has special reason to know, are driving. Given both the current state of the law and the possible extension of liability, employers must create a texting policy that covers both cases of employees who text and drive and cases where employees text persons whom they know to be driving.

Such policy may not preclude employer liability, but it may help to reduce any eventual judgment. Leslie Wolfe, an attorney with Cleveland-based Walter Haverfield LLP, states the following:

In today's litigious society, a prudent employer knows that an employee's risky or unauthorized conduct can, at times, expose the employer to liability. To lessen the risk, employers should provide specific policies identifying prohibited conduct for employees both in and outside the workplace. These policies should be regularly reviewed and discussed with all

174. Hof, *supra* note 61, at 734

(Effective deterrence from employee use of cell phones while driving must be coupled with an incentive for the employer to actually enforce its cell phone policies. A rational employer will not enforce a policy if mere presence of the policy, without more, satisfies the applicable standard of care and exempts the employer from liability. For the same reasons, however, an employer may be just as likely not to enforce a policy if it is held liable regardless of its enforcement policy. Fortunately, the Roszkowski test solves this dilemma...Conversely, a cell phone policy is of little value if employees were not actually reprimanded or discharged for violating the policy. If the employer tolerated its employees' use of their phones while driving, the employer cannot then argue that such conduct was "unusual or startling" merely because an accident resulted from that conduct. Employees using their cell phones while driving would not be surprising to that employer; it would be expected and thus, implicitly encouraged behavior.)
(internal citations omitted).

employees, and employees should be invited to raise concerns and questions regarding what conduct will be tolerated.¹⁷⁵

A comprehensive employee cell phone use policy should include a traditional cell phone use policy, such as no texting while driving on work-related business or engaging in work-related communications at any time of the day, from any location. Such a policy may also limit or prohibit the use of cell phones at work for non-related work activities. However, we are not specifically addressing this type of policy in this article, as most employers already have such a policy that is fairly comprehensive and covers these traditional areas.¹⁷⁶ ExxonMobil and Shell Oil were among the first companies to implement total bans on cell phone use more than a decade ago, mandating that employees are not allowed to use cell phones while driving for company business, even with a hands-free device.¹⁷⁷ “Owens Corning, a Toledo-based company with about 16,000 employees in 26 countries, implemented its own policy in 2012.”¹⁷⁸ Many other companies followed suit.¹⁷⁹ In their survey of the Fortune 500 in 2010, the National Safety Council “found that 20% of the companies had policies that ban handheld and hands-free use.”¹⁸⁰ Because those areas of texting are already covered by many companies, we will not include this in our recommendations, although companies that lack such a policy should develop one forthwith. Herein, we focus on developing policy to reduce remote employee texter liability that, through *respondeat superior*, could otherwise be passed on to the employer.

The employer’s texting policy must include both content and procedural elements. From a content perspective, there is a range of options. The simplest and broadest policy is to ban all texting by employees for employment-related matters at all times and from any place, period. In addition, the policy could ban all texting from the workplace to anyone, even if the texting is not specifically within the scope

175. Leslie Wolfe, *When are Employers Liable for Employee Behavior?*, CRAIN’S CLEVELAND BUS. (Nov. 11, 2013, 1:30 AM), <http://www.crainscleveland.com/article/20131111/BLOGS05/311119998/w-hen-are-employers-liable-for-employee-behavior>.

176. See Dave Monte & Phil Wilson, *We Told Our Employees to Put Away Their Phones*, NISOURCE (May 24, 2017), <https://www.nisource.com/news/article/we-told-our-employees-to-put-away-their-phones> (“We’re proud to be part of a small and growing number of companies that have eliminated mobile phone use while driving. Yes, that means employees are not allowed to use their mobile devices while driving – including hands free. It was a big move, but one that was absolutely necessary.”); Kevin Druley, *No Cellphones While Driving*, SAFETY+HEALTH (Oct. 29, 2017), <https://www.safetyandhealthmagazine.com/articles/16263-no-cellphones-while-driving>; Laura Walter, *NSC: Fortune 500 Companies Prohibit Employee Cell Phone Use While Driving*, EHS TODAY (Jan. 13, 2011), <https://www.ehstoday.com/safety/management/nsc-fortune-500-cell-phone-use-0113>

(One out of five Fortune 500 companies that responded to a recent National Safety Council (NSC) survey has a total ban on cell phone use while driving that covers all employees. More than half of these policies were implemented since 2008 – indicating corporate America is heeding the public’s growing call to eliminate cell phone use behind the wheel.)

177. Sandy Smith, *ExxonMobil Enacts Cell Phone Policy for Employees*, EHS TODAY (June 24, 2004), https://www.ehstoday.com/news/ehs_imp_37076; *Company Liability for Employees’ Cell Phone Use While Driving*, *Quirky Question # 37*, DORSEY, <https://quirkyemploymentquestions.com/negligence/company-liability-for-employees-cell-phone-use-while-driving-quirky-question-37> (last visited Mar. 3, 2019).

178. Kelly Wallace, *Distracted Driving: Urging Companies to Crack Down*, CNN (Apr. 4, 2017, 9:26 AM), <https://www.cnn.com/2017/04/04/health/distracted-driving-company-cell-phone-bans-impact/index.html>.

179. See Walter, *supra* note 176.

180. Wallace, *supra* note 178.

of employment. This policy could be extended to an absolute ban of cell phones while at work, in addition to the texting and driving ban.¹⁸¹ Such a ban would virtually eliminate the risk of employees texting from the workplace to someone who is driving. However, we realize that such a comprehensive ban on texting is likely to be met with many objections. Therefore, employers may need to consider policies that limit texting without outright banning it.

Implementing a more limited policy must consider the expanding scope of employment, as a seemingly innocuous text by an employee could expose the employer to liability. From a conservative perspective, the employer's policy should broadly interpret "scope of employment" and be more, rather than less, restrictive and limiting of employees' texting behaviors.

Presuming that any texting is allowed by the policy, the policy should explicitly state that if the employee knows, or has special reason to know, that the text recipient is driving, then they cannot text that person at all. Additionally, if the employee finds out during the texting process that the recipient is driving, they must stop immediately. Immediately means that the employee cannot even text something such as, "I know you are driving so I have to stop texting you." The texting must simply stop at that point, without further explanation.

The policy should also contain progressive disciplinary measures for violations.¹⁸² Those disciplinary measures could include placing a note on the employee's file, suspending the employee's company-provided cell phone, or termination. Discipline must be severe enough that the employee will exert effort to adhere to the policy.

From a procedural point of view, the policy should be documented, disseminated, and strictly enforced by the employer. The policy should be reviewed with and signed by the employee on a regular basis. This review could be done in a group session, individually as part of a job review, or at some other salient moment. The goal of such a procedure is both to communicate to the employee the seriousness with which the company takes its policy as well as to provide documentation that can help protect the company in the event of litigation.

In terms of further guidance in developing and implementing a comprehensive texting policy, the National Safety Council developed a kit that can be downloaded and used as a guide and starting point.¹⁸³ However, that kit does not address the remote texter liability issue that we covered here, so employers must expand on it to include the new potential liability.

In conclusion, the liability for someone texting a driver who subsequently has an accident is expanding, but still unsettled. It is clearly potentially fertile ground for lawsuits, legal firms are aware of that possibility,¹⁸⁴ and they will try to reach into the deepest pocket they can. Employers must act now in order to reduce their potential liability from their employees' texting and driving related accidents.

181. See Michael, *supra* note 48 at 306–07.

182. RAYMOND A. NOE, JOHN R. HOLLENBECK, BARRY GERHART & PATRICK M. WRIGHT, *FUNDAMENTALS OF HUMAN RESOURCE MANAGEMENT* 345–47 (8th ed. 2018).

183. *NSC Safe Driving Kit*, NAT'L SAFETY COUNCIL, <https://www.nsc.org/pages/nsc-safe-driving-kit-materials> (last visited Mar. 10, 2019).

184. *Texters Beware: Potential Liability for Those Who Send Texts to Drivers*, ANKIN L. OFF., <https://ankinlaw.com/texters-beware-potential-liability-for-those-who-send-texts-to-drivers/> (last visited Mar. 10, 2019).