Turning Texters into a Civil Liability: Texting and Driving Bans and New Ways of Expanding Liability on the Road

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I. INTRODUCTION

{[Daniel] Gallatin was on his motorcycle on his way to visit his daughter when he was hit and dragged by an SUV. State police quickly learned that the driver, Laura Gargiulo, had received a text just moments before the crash. "This wasn't an accident. This could have been prevented. Accidents can't be prevented," said Daniel's daughter, Michelle. According to court papers filed by state police investigators, the text read, "16 hr day. I don't get off till 5am. hun."

It was later discovered that the text was sent by Timothy Fend... [T]he Gallatin family sought legal advice... [and]... Attorney Doug Olcott... said there is a heavy burden of proof to show that a text sender should be held liable.}

The use of a cellphone while driving is undoubtedly distracting but surprisingly, fatalities in motor vehicle accidents have decreased since the beginning of the 21st century. Although significant efforts have been made to deter texting while driving, recent cases raise an issue of first impression to state courts on whether a non-driving texter should be held liable to a

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2 See Linda C. Fentiman, A New Form of WMD? Driving with Mobile Device and Other Weapons of Mass Destruction, 81 UMKC L. Rev. 133, 134-35 (2012) (explaining dangers of distracted driving yet noting decrease in traffic injuries); see also General Statistics, INSURANCE INST. FOR HIGHWAY SAFETY, HIGHWAY LOSS DATA INST., http://www.iihs.org/iihs/topics/t/general-statistics/fatalityfacts/overview-of-fatality-facts/2015 (drawing statistics of annual motor vehicle fatalities). The Insurance Institute for Highway Safety (IIHS) and Highway Loss Data Institute (HLDI) are nonprofit scientific and educational organizations with missions to reduce deaths, injuries, and property damage from motor vehicle accidents. Id. The organizations compile yearly status reports from data collected by Fatality Analysis Reporting System (FARS), an agency working under the Department of Transportation. Id. The organization has compiled the data from years 1975 to 2015. Id. Looking at the relevant period of the 21st century, between 2000 and 2005, there was a number of fatalities ranging from the lowest at 41,945 in 2000 to the highest at 43,510 in 2005. Id. The following ten years, 2006 to 2015, the highest number of deaths reached 41,259 in 2007 and the lowest number reached 32,479 in 2011. Id.
victim of distracted driving. This Note seeks to explain the history and creation of the Department of Transportation and the agency’s efforts in creating national safety regulations on highways by comparing efforts to combat drunk driving with efforts to deter texting and driving. This Note will also compare the facts of two similar cases involving third parties sending texts to drivers and explain the different outcomes of each court’s decision. Finally, this Note will address the rationales used in the outcome of each court and will highlight challenges of imposing liability on a non-driving text sender.

II. HISTORY

In President Lyndon B. Johnson’s State of the Union address, he announced his intent to create a Department of Transportation. That year, President Johnson signed the Highway Safety Act and the National Traffic and Motor Vehicle Safety Act. The Highway Safety Act of 1966 was later amended in 1970 to establish a National Highway Traffic Safety Administration (NHTSA), formerly known as the National Highway Safety Bureau. Since 1970, NHTSA has successfully established drunk driving laws, drinking age laws, seatbelt laws, and recently expanded to prevent distracted driving.

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3 See infra Part III (posing first impression issue on state courts).
4 See infra Part II (demonstrating background of United States highway safety regulations).
5 See infra Part III (comparing different court holdings of two similar cases).
6 See infra Parts VI-IV (analyzing courts’ decisions and drawing conclusion).
7 See Creation of Department of Transportation – Summary, U.S. DEP’T OF TRANSP. (Feb. 3, 2016), https://www.transportation.gov/50/creation-department-transportation-summary (explaining creation of Department of Transportation). President Johnson was inspired by former Administrator of the Federal Aviation Agency (FAA), Najeeb Halaby, who thought independent agencies would work efficiently if formed into a federally governed executive department. Id. After facing criticism from independent agencies like the FAA, President Johnson proposed to Congress the introduction of the Department as a means to “provide leadership resolution in transportation problems.” Id.
10 See Understanding the National Highway Traffic Safety Administration (NHTSA), supra note 8 (discussing various areas involved with NHTSA).
The NHTSA’s effort to prevent drivers from texting while driving is similar to the prevention of drunk driving. In the 1980s, President Reagan addressed the national issue of drunk driving and created the Presidential Commission on Drunk Driving in 1982, which influenced social norms through media and inspired legislators to enact laws to deter drunk driving. Similarly, the NHTSA seeks to deter distracted driving and has conducted studies to determine how to achieve the result effectively. In 2010, the NHTSA designed a distracted driving demonstration program that was tested in Syracuse, New York and in Hartford, Connecticut. The program monitored the amount of time spent on media messages aiming to raise awareness of distracted driving laws and the number of citations issued by officers. The NHTSA’s objective in modifying driver behavior was notably effective in reducing cellphone use by thirty-two percent in Syracuse and fifty-seven percent in Hartford over a ten-month period.

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12 See Executive Order 12358—Presidential Commission on Drunk Driving, RONALD REAGAN PRESIDENTIAL LIBRARY & MUSEUM, (Apr. 14, 1982), available at http://www.reaganlibrary.gov/research/speeches/41482c (declaring President Reagan’s intentions to combat drunk driving). President Reagan stated the Department of Transportation would provide administrative services for the following functions:

(a) heighten public awareness of the seriousness of the drunk driving problem;
(b) persuade States and communities to attack the drunk driving problem in a more organized and systematic manner, including plans to eliminate bottlenecks in the arrest, trial and sentencing process that impair the effectiveness of many drunk driving laws;
(c) encourage State and local officials and organizations to accept and use the latest techniques and methods to solve the problem; and
(d) generate public support for increased enforcement of State and local drunk driving laws.

Id.; see also Alexis M. Farris, Note, LOL? Texting While Driving is No Laughing Matter: Proposing a Coordinated Response to Curb this Dangerous Activity, 36 WASH. U. J.L. & POL’Y 233 (drawing similarities between DOT’s actions against drunk driving and distracted driving).


14 See id. at 1 (describing NHTSA’s experiment to determine effective approach to curtail texting and driving). The NHTSA developed four high-visibility enforcement demonstration waves which allowed law enforcement from Syracuse and Hartford to patrol drivers after the media in each state was infiltrated with enforcement-based messages. Id. The study was conducted over a ten-month period with four intervals that were to measure the effects of the media on the drivers with the ultimate goal of decreasing the drivers’ use of hand-held phones. Id.

15 See id. (noting NHTSA’s research goal).

16 See id. at 10 (noting decrease cellphone use after fourth wave).
In conjunction with the federal government's effort to combat texting and driving, the National Transportation Safety Board ("NTSB"), an independent agency investigating major accidents in civil aviation and other forms of transportation since 1967, made a suggestion in 2011 to all fifty states and the District of Columbia to create a ban on texting while driving. As of July 2017, the Governors Highway Safety Association, a nonprofit organization addressing behavioral highway safety issues, collected data and forty-seven out of fifty states, as well as the District of Columbia, Puerto Rico, Guam, and the Virgin Islands have banned text messaging while driving.

### III. FACTS

Advocates against texting and driving, like the Gallatin family of Pennsylvania, have proposed tougher legislation to local governments. The Appellate Division of New Jersey’s Superior Court decided in *Kubert v. Best*, that a non-driving text message sender is potentially liable for any resulting damages of a motor vehicle accident if the party had knowledge

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17 See No Call, No Text, No Update Behind the Wheel: NTSB Calls For Nationwide Ban on PEDs While Driving, NAT’L TRANSP. SAFETY BD. OFFICE OF PUBLIC AFFAIR (Dec. 13, 2011), https://www.ntsb.gov/news/press-releases/Pages/No_call_no_text_no_update_behind_the_wheel_NTSB_calls_for_nationwide_ban_on_PEDs_while_driving.aspx (noting growth in cellphone use in transportation accidents resulting in fatalities). The NTSB investigated accidents caused by cellphone use and other portable electronic devices in various modes of transportation, such as collisions with a commuter train and freight train, a motor-coach, a truck-tractor, and an airline. *Id.* However, the NTSB’s suggestion was triggered by the most recent incident at the time happening in Missouri. *Id.*

On August 5, 2010, on a section of Interstate 44 in Gray Summit, Missouri, a pickup truck ran into the back of a truck-tractor that had slowed due to an active construction zone. The pickup truck, in turn, was struck from behind by a school bus. That school bus was then hit by a second school bus that had been following. As a result, two people died and 38 others were injured. The NTSB’s investigation revealed that the pickup driver sent and received 11 text messages in the 11 minutes preceding the accident. The last text was received moments before the pickup struck the truck-tractor.

18 See Distracted Driving Laws by State, GHSA.ORG, http://www.ghsa.org/sites/default/files/2017-07/DistractedDrivingLawChart_July17.pdf (last updated July 2017) (collecting data of texting and driving laws of all U.S. states and territories). All but four out of the forty-seven states and territories have primary enforcement. *Id.* A state with primary enforcement laws may cite a driver for texting without any other traffic offense. *Id.*

19 See Governor Tom Wolf, Governor Wolf Signs Bill to Deter Texting and Driving, COMMONW. OF PA (Nov. 04, 2016), https://www.governor.pa.gov/governor-wolf-signs-bill-to-deter-texting-and-driving/ (noting Governor Tom Wolf’s bill enhancing penalties for distracted driving).

that the motorist was driving while sending a text.  
In 2009, Linda and David Kubert were severely injured after being struck by a pickup truck driven by 18-year-old Kyle Best ("Best"). The Kuberts proceeded to file a negligence suit against the distracted driver, Best, and his friend, Shannon Colonna ("Colonna"), who sent him the text while driving.

The claim for compensation against Best was settled before trial and the Kuberts appealed the trial court's dismissal of the claim brought against Colonna. The New Jersey Motor Vehicles and Traffic Regulation statute makes hand-held use of cell phones illegal and punishable with a fine of $100, but the statute did not address the issue faced on appeal. During trial, Colonna's attorney argued that Colonna was not present at the scene and therefore did not have liability for the accident. The defense also argued that Colonna did not know Best was driving and did not have a legal duty to avoid sending the text. The appellate court determined that the defendant's conduct was negligent and found Colonna owed a duty to the plaintiffs. Furthermore, the court held that more than one defendant can be the

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21 See id. (stating case holding and further reasoning).
22 See id. at 1219 (stating facts of case). As a result of the accident, both Linda and David Kubert lost their left legs. Id.
23 See id. (mentioning case procedural history). Kyle Best texted his friend Shannon Colonna at 5:48 PM, just before crashing into the plaintiffs. Id. at 1220. Best received a text message one minute prior to the crash from Colonna. Id. The Kuberts' attorney also discovered evidence of Best and Colonna's relationship, and noted that they texted each other sixty-two times on the day of the accident. Id. at 1219.
24 See Kubert, 75 A.3d at 1214 (mentioning case procedural history).

The use of a wireless telephone or electronic communication device by an operator of a moving motor vehicle on a public road or highway shall be unlawful except when the telephone is a hands-free wireless telephone or the electronic communication device is used hands-free, provided that its placement does not interfere with the operation of federally required safety equipment and the operator exercises a high degree of caution in the operation of the motor vehicle.

Id.
26 See Kubert, 75 A.3d at 1214 (stating defense argument).
27 See id. at 1221 (stating defense another argument of not having legal duty). The appellate court rejected the plaintiffs' claim that the jury could infer from the evidence that Colonna knew Best was driving home from work when she was texting him. Id. at 1221-22.
28 See id. at 1222 (noting court's holding). The court established that a plaintiff holding a defendant liable for negligent conduct in a lawsuit must prove all four elements of a negligent tort claim. Id. The elements include "(1) that the defendant owed a duty of care to the plaintiff, (2) that the defendant breached that duty, (3) that the breach was a proximate cause of the plaintiff's injuries, and (4) that the plaintiff suffered actual compensable injuries as a result." Id.
proximate cause of a plaintiff’s injuries. However, additional proof is necessary to establish the sender’s liability and to do so, the plaintiff must find that the text sender knew or had special reason to know that the driver would read the message while driving and become distracted from operating the vehicle. The person who sends the text to a driver is not liable for the driver’s negligence, instead the driver is responsible for his or her own negligence created by the rules of the road. However, a text sender does have a duty to other drivers on public roads to refrain from sending a driver a text.

In contrast, the New York Supreme Court of Genesee County recently held in Vega v. Crane, a case of first impression, that a text sender is not liable to the victim of a distracted driver. In 2012, Carmen Vega (“Vega”) was struck by car driver, Collin Crane who died as a result of the crash. Vega, the plaintiff who later brought suit to recover for injuries caused by the accident, alleged that Collin’s girlfriend, Taylor Crastley

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Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought or was not greater than the combined negligence of the persons against whom recovery is sought. Any damages sustained shall be diminished by the percentage sustained of negligence attributable to the person recovering.

Id. See RESTATEMENT 2D OF TORTS § 867 (1976) (explaining individual held liable if knowing another’s conduct constitutes breach of duty). The Restatement provides the following example: “A and B participate in a riot in which B, although throwing no rocks himself, encourages A to throw rocks. One of the rocks strikes C, a bystander. B is subject to liability to C.” Id.; see also Tarr v. Ciasulli, 853 A.2d 921, 929 (N.J. 2004) (noting New Jersey adopted Restatement approach to determine joint liability). Contra Durkee v. C.H. Robinson Worldwide, Inc., 765 F. Supp. 2d 742, 745 (W.D.N.C. 2010) (citing New Jersey case used to defeat claim against remote third party). The plaintiffs sued the manufacturer for a design defect of a text-messaging device that was installed in a tractor. Id. The truck driver was able to view the device while driving which caused the driver to become distracted. Id. at 753. However, the court ultimately did not hold the manufacturer liable for the plaintiff’s injuries, finding that the driver had a duty to avoid the distraction. Id. at 754.

30 See Kubert, 74 A.3d. at 1226 (determining special reason to know requirement as part of foreseeability test). The Kubert court compares a passenger present in the vehicle obstructing the view of the driver to a remote text sender distracting the attention of the driver. Id. at 1227.

31 See id. at 1229 (showing how sender of text is not negligent).

32 See id. at 1229 (holding text sender liable to public).

33 49 N.Y.S.3d 264 (Sup. Ct. 2017) (comparing diverse findings).


35 See id. at 265 (stating facts of case).
("Crastley"), texted him while he was driving and caused the accident. The plaintiff attempted to use the holding in *Kubert* as neighboring state precedent because of the lack of precedent in New York that would protect a third party plaintiff from harm. The plaintiff's issue would have forced the court to re-examine *Palsgraf* and propose an expanded interpretation of foreseeability in negligence claims. Although the plaintiff found a recent New York case which established a precedent permitting an expansion of foreseeability, the court drew a distinction and limited the application of this precedent to physicians owing a duty to the public at large and not to texters. The Court of Appeals in New York gradually expanded the duty

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36 See id. at 265 (summarizing elements of case). The New York State Police discovered the decedent's cell phone in his car, which was damaged. *Id.* The phone was later examined and appeared to expose that Crastley and the decedent exchanged texts while he was driving. *Id.* Crastley's lack of knowledge that decedent was driving while she sent the texts was confirmed in an affidavit and deposition. *Id.*

37 See *Vega*, 49 N.Y.S.3d at 266 (noting use of New Jersey precedent holding texter liable for resulting harm of distracting driver); see also *Sartori v. Gregoire*, 259 A.D.2d 1004, 1004 (N.Y. App. Div. 1999) (holding car passenger liable for verbally or physically distracting driver). Vega attempted to use this ruling as persuasive support to help prove the remote text sender liable by dissenting that whether the defendant was present or not, the harm is still the same. *Vega*, 49 N.Y.S.3d at 266; see also *RESTATEMENT (SECOND) OF TORTS* § 303 (1965) (defining negligent act). "An act is negligent if the actor intends it to affect, or realizes or should realize that it is likely to affect, the conduct of a third person in such a manner as to create an unreasonable risk of harm to the other." *Id.* Vega sought to create a special relationship between Crastley and the plaintiff in order to establish a duty owed by Crastley, an idea consistent with public policy in New York. *Vega*, 49 N.Y.S.3d at 267.

38 See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928) (holding negligent conduct resulting in injury results in liability only if reasonably foreseeable). "In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted the injury." *Id.* at 342; see also *Davis v. South Nassau Cmty. Hosp.*, 46 N.E.3d 614, 616 (N.Y. 2015) (stating New York precedent potentially expanded foreseeability doctrine); 79 NY. JUR. 2D Negligence § 47 (2018) (supporting negligence law principle of imposing liability only if act is proximate cause of injury).

39 See *Davis*, 46 N.E.3d at 616 (applying expanded foreseeability to cases involving physicians). An emergency room physician administered a patient Dilaudid, an opioid narcotic pain-killer, and Ativan, a benzodiazepine drug which an expert later stated typically have cautionary warnings for patients who are driving. *Id.* at 617. The court held that a physician owes a duty to warn the patient of the drug’s side effects. *Id.* at 618. Thus, a physician who is responsible for warning the patient about the side effects of a drug is liable to the public at large, because an accident is likely foreseeable when a patient is administered impairing drugs and later operates a motor vehicle. *Id.* at 617. Compare *Eiseman v. State*, 511 N.E.2d 1128, 1134-36 (N.Y. 1987) (declining duty of State to treat claimants like physicians), with *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 350 (Cal. 1976) (noting physician's duty to warn when serious danger of violence is known). In *Eiseman*, the parolee was being treated for mental disorders while incarcerated, in which after his release, parolee enrolled into college where he raped and murdered a student. 511 N.E.2d at 1130-31. The court concluded that "the physician plainly owed a duty of care to his patient and to persons he knew or reasonably should have known were relying on him for this service to his patient. The physician did not, however, undertake a duty to the community at large." *Id.* at 1135. In *Tarasoff*, the psychologist
owed to individuals but always required the existence of a special relationship between the plaintiff and the injured defendant. However, taking into consideration the New York Court of Appeals’ caution of expanding the concept of duty, the Vega Court decided not to expand liability to individuals who send a text, as “the potential expansion . . . is astronomical.”

IV. ANALYSIS

Creating a duty that is not over-broad and imposing that duty inevitably results in a danger of potentially finding liability for non-driving text senders who should not be held liable. Kubert sets out a bright line ruling which appropriately distinguishes that someone who texts a driver is not automatically liable versus a texter who knows or has special reason to know that the driver is operating a motor vehicle at the time the text is sent. A misinterpretation of this rule could easily lead to the liability of a person who did not have knowledge that the person was driving. However, this rule can be applied to a case where a third party did have knowledge or special reason to know that a person was driving, thus resorting to the expense of litigation, which entails carefully sifting through records of texts viewed in order to demonstrate that the texter knew that the person was driving. If discovery were to go as far as viewing text messages, and the

was told by the psychiatric patient his intention to kill a victim. The court held that he had a duty to warn because the psychologists had special knowledge of patient’s intent to kill decedent. Id. at 351.


See Vega, 49 N.Y.S. at 271 (stating court’s reluctance to expand duty any further).

[T]exts are routinely sent to, for example, advise the public of breaking news, that prescriptions are ready for pick up, or that a bill is to be paid, the sender would be responsible for any injuries that could be caused should a driver become distracted by their receipt. With texting being as so prevalent, the potential expansion as contemplated by the plaintiff is astronomical.

Id.

See Kubert, 75 A.3d at 1227 (hesitating to impose broaden scope of liability) (quoting Estate of Desir ex. Rel Estiverne v. Vertus, 69 A.3d 1247 (N.J. 2013)).

See Kubert, 75 A.3d at 1226 (establishing rule with special knowledge requirement).

See id. (establishing rule).

See id. at 1220 (reviewing messages sent by remote texter to driver for proof of knowledge).
records do not plainly identify that the texter knew the person was driving, finding extrinsic evidence to determine the texter’s exact knowledge of the drivers whereabouts would be an extreme undertaking.\footnote{See id. at 525 (Epinosa, J. concurrence) (explaining difficulty in determining remote texter’s awareness of tortious activity under aiding and abetting theory). Although the concurring opinion points out the difficulty in measuring the remote texter’s awareness of having a role in a tortious activity of distracting the driver under an aiding and abetting theory, being able to determine the remote texter’s knowledge would be equally difficult, even if the aiding and abetting theory did not apply. Id.}

The decision in Kubert v. Best holds that a non-driving text sender owes a limited duty of care to a plaintiff injured by a distracted driver.\footnote{See Kubert, 75 A.3d at 1228 (concluding remote texters owe limited duty to third party injured by distracted driver). The court followed the traditions of tort law in stating that establishing a duty is a question of law for the court to decide. Id. at 1229. The court also noted that “[t]he bar set by the majority for the imposition of liability is high and will rarely be met since the duty created arises when the conduct of a person, not in an automobile, interferes with the driver’s operation of the vehicle.”). Id.} However, there must be evidence to prove that the remote texter breached their duty, and the plaintiff must consider the efforts in determining evidence about whether the texter knew if the recipient was driving at the time.\footnote{See id. at 1223 (considering when a duty exists).} As the concurring opinion noted, persuading the judge that the remote texter breached a duty is a difficult task.\footnote{See id. at 1229 (“[T]he bar set by the majority for the imposition of liability is high and will rarely be met since the duty created arises when the conduct of a person, not in an automobile, interferes with the driver’s operation of the vehicle.”). Id.} The concurring opinion validly recognized that the driver has the ultimate responsibility of obeying traffic laws and avoiding distractions that are either present in the car or at a remote location.\footnote{See Kubert, 75 A.3d at 1230 (discussing driver’s responsibilities).}

One of the several arguments that the plaintiffs asserted to show that the defendant owed a duty of care was their suggestion that the defendant

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[W]hether a person owes a duty of reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy. That inquiry involves identifying, weighing, and balancing several factors — the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution. . .
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\begin{quote}
See id. at 1229 (“[T]he bar set by the majority for the imposition of liability is high and will rarely be met since the duty created arises when the conduct of a person, not in an automobile, interferes with the driver’s operation of the vehicle.”). Id.
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\begin{quote}
[T]he driver carries the personal responsibility to obey traffic laws and exercise appropriate care for the safety of others. This responsibility includes the obligation to avoid or ignore distractions created by other persons, whether in the automobile or at a remote location, that impair the driver’s ability to exercise appropriate care for the safety of others. Text messages received while driving plainly constitute a distraction the driver must ignore.
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Id.
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aided and abetted the distracted driver to violate the law. The court accurately held that there was not enough evidence to prove liability under an aiding and abetting theory. In order to demonstrate that an aiding and abetting issue existed, the plaintiff will have to show with whatever evidence is available, that the defendant is liable for giving substantial assistance or taking affirmative steps to get the driver to violate the legal duty of driving carefully on the road. Given that the Kuberts did not find evidence available to support their argument, the court stated that a plaintiff dealing with a similar cases would have to look at the “aiders” knowledge of the whereabouts of the driver. This knowledge requirement mentioned by the court is in fact a logical standard to go by in determining a text-sender’s liability. As the plaintiff argued that a passenger in the car has the same duty as the remote texter in knowing not to distract the driver, to which the majority opinion agreed, the concurrence provided that a passenger in the car naturally has a precise awareness of the driver’s conduct than a remote texter. Even though the majority did not encourage the future use of an aiding and abetting theory, the prospect of making a remote texter’s awareness equal to a present passengers awareness of a driver’s conduct is unfair.

51 See id. at 1223 (arguing remote texter “electronically present”). As the attempt to compare the remote texter to a passenger present in the car distracting the driver was argued to the court, the plaintiff said the remote texter was “electronically present.” Id. The court did not find any evidence that the remote texter encouraged the driver to violate his duty of driving carefully. Id. The act of sending a text is not sufficient enough to qualify as encouragement. Id. at 1224.

52 See id. at 1225 (dismissing plaintiffs’ theory).

53 See id. (discussing aiding and abetting issue).

54 See id. at 1220 (showing difficulty in determining driver’s whereabouts through text). The plaintiff would have to show, with extrinsic evidence, that the remote texter knew that the recipient was actually driving. Id. at 1220-21. In Kubert, the court noted that Colonna was a young teenager who texted on average, 100 times per day. Id. at 1220. The court also stated that Colonna did not pay attention to whether the recipient of her texts was driving a car. Id. The majority highlighted the difficulty in plaintiffs’ attempt to come by this type of information. Id.

55 See Kubert, 75 A.3d at 1227 (assessing standard of having knowledge or special reason to know driver is distracted).

56 See id. at 1231-32 (comparing passenger and remote texters’ awareness of drivers conduct).

57 See id. (acknowledging fault in aiding and abetting argument).
The Supreme Court of New York heard similar arguments brought by a plaintiff who sought to create a duty of care owed by a texter, but appropriately declined to do so. New York has followed its established precedent of creating a duty of care when the injuries caused by the defendant’s careless conduct are those that might have been foreseeable by a person of ordinary intelligence and prudence. That precedent originating from Palsgraf, stands as an immense barrier to which a plaintiff will have a hard time overcoming in any New York court.

The argument raised in the Vega case was based on the same arguments presented in the Kubert case. The court in New Jersey compared the distractions from a passenger present in the car to the distractions stemming from a remote texter. The New York court completely rejected this comparison in holding that a remote texter cannot have first-hand knowledge of the driver’s conduct, further denying that the remote texter’s knowledge of the driving could be determined by reviewing the texting records. The New York court correctly interpreted the concept of controlling the expansion of duty, as the future consequences of such an expansion would create a vast amount of duties owed to unknown persons.

V. CONCLUSION

The NHTSA’s efforts have gone as far as preventing drivers from being distracted by their cellphones through infiltrating the media to send messages of awareness about the dangers caused from texting while driving. However, preventing persons in remote locations who are texting people while they are driving is a feat which has been brought out by cases reaching two different results. On one end, holding a remote text sender liable to third parties is permissible if the correct evidence is discovered. The other end

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59 See id. at 267 (discussing foreseeability of damages). “The injuries or the damages complained of must have been those which might have been foreseen by a person of ordinary intelligence and prudence, although not necessarily in the precise form in which they occurred.” Id. (citing Kellogg v. Church Charity Found. of Long Island, 96 N.E. 406 (N.Y. 1911)).

60 See Vega, 49 N.Y.S.3d at 266 (stating courts disfavor of reexamining established precedent from Palsgraf case).

61 See id. at 268 (denying use of reasoning set out in Kubert case).

62 See Kubert, 75 A.3d at 1231 (finding present passenger who may distract has knowledge more so than remote texter).

63 See Vega, 49 N.Y.S. at 269 (holding remote texter deprived of firsthand knowledge).

64 See id. at 269 (denying expansion of duty). In Davis, the medical providers owed a duty to third-party motorists because the risk of a patient taking a drug after a procedure and driving afterwards could potentially cause an accident. Id. This expansion was justified because there was a warning label written on the drug for the medical provider to follow. Id.
holds that the evidence would involve expanding a scope of liability which is too far removed from the set precedent in *Palsgraf*. The New York court's precedent has been followed in many jurisdictions and going against this tradition would not be favorable to practitioners who have heavily relied on this precedent.

Unfortunately, the details in determining a non-driving texter's liability is a far stretch for a plaintiff's counsel which leaves a victim with a very high burden of proof. Pinpointing the texter's knowledge or reason to know that a driver was operating the vehicle while reading and responding to a text involves more guessing than proof of a conclusive nature. Reviewing the phone records of plaintiff and defendant may bring one closer to an answer, but the remaining issue would be whether to expand the scope of liability. This also would be similar to holding a remote texter to the same standard of awareness as a passenger present in the car. Overall, the New York Supreme Court correctly rejected the arguments brought by the plaintiffs.

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