Buffalo Law Review

Volume 68 | Number 2 Article 6

4-1-2020

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Buffalo Law Review

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VOLUME 68 APRIL 2020 NUMBER 2

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I. INTRODUCTION

Imagine a driver who causes a fender bender because he was texting with a friend and failed to pay attention when approaching a stop light. Of course, it seems implausible to sue the friend who was texting with the driver who caused the accident. Now, imagine a driver fighting with a friend rapidly over text messaging finally replying, "can't talk, we

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will continue this later. I am driving home now." The friend continues to text the driver, causing his phone to ring and vibrate constantly on his drive home. While looking down to see the twenty or more missed text messages from his friend, the driver crosses the centerline and hits an oncoming vehicle. The passengers of the oncoming car are killed. In this scenario, the estate of the deceased may desire to sue the friend who continued to text the driver after the driver made the texter aware that he was driving and would settle the argument later.[1]

Imposing duty on a third-party texter, more frequently referred to as sender liability, is a new development in the realm of tort law.[2] Evolving from liability assessed in distracted driving accidents, sender liability seeks to impose a duty on third parties who are not in the vehicle, but who text a driver, where such texts distract the driver and result in the driver causing an accident.[3] Presently, New York courts have not recognized sender liability, nor has the legislature addressed this growing threat to the welfare and safety of innocent individuals on the roads.[4] The law currently responds to one part of the equation here: the driver. But what about the sender? The sender of a text message who has actual knowledge the recipient is driving and will likely respond to the text message actively engages

1 *See, e.g.*, Kubert v. Best, 75 A.3d 1214, 1229 (N.J. Super. Ct. App. Div. 2013) ("[W]hen 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."); Vega v. Crane, 49 N.Y.S.3d 264, 271 (Sup. Ct. 2017) (considering the applicability of sender liability in New York); *see generally* Gallatin v. Gargiulo, No. 10401 of 2015, C.A., 2016 WL 8715650 (Pa. Ct. Com. Pl. Mar. 10, 2016) (considering applying sender liability in Pennsylvania).

2. *See Kubert*, 75 A.3d at 1229 (establishing the theory of sender liability).

3. *Id.* at 1228 ("When the sender texts a person who is then driving, knowing that the driver will immediately view the text, the sender has disregarded the attendant and foreseeable risk of harm to the public.").

4. *See Vega*, 49 N.Y.S.3d at 271 (refusing to adopt sender liability in New York). For a discussion of New York's consideration of the adoption of sender liability, see *infra* Parts III, VI.

in affirmative conduct that co-creates the risk to innocent individuals on the road. Imposing duty on a party who co-creates risk is not a revolutionary expansion of duty and therefore, the New York courts and legislature should not approach this issue reluctantly.

This Comment highlights the growing safety risk of texting while driving, explores the development of sender liability, explains how New York courts could recognize such liability without expanding duty, and considers how New York State legislation should address this prevalent gap in its tort law. Part II introduces landmark case law that has recognized sender liability and the effects of such case law on subsequent legislation. Part III examines the trivial opportunity New York courts have had to address sender liability and suggests how the courts may recognize sender liability in the future without expanding traditional duty concepts. Part IV discusses the general concept of sender liability and how it relates to other types of third-party duty, suggesting sender liability is not a revolutionary expansion of the customary concepts of duty. Part V defines and explains New York State Dram Shop law while considering how it relates to sender liability and the possibility for legislation in this developing area of tort law. Part VI proposes considerations for New York legislation recognizing sender liability and Part VII concludes this Comment by discussing the ability of the courts to recognize sender liability and discusses whether the New York State legislature should proactively address sender liability.

II. TEXTING WHILE DRIVING: AN EPIDEMIC IN NEED OF JUDICIAL ATTENTION

While tort law certainly imposes liability on the texting driver and most states have boosted penalties and fines associated with texting while driving,[5] there is another instigator, a co-creator of the risk, who often escapes liability. Distracted driving is an epidemic that kills more than 3,000 people and injures almost 400,000 people per year.[6] Texting while driving contributes to a significant portion of these deaths and injuries.[7] The penalties and fines currently in place have not reduced the incidents of texting while driving nearly as much as originally intended, thus necessitating the need for more stringent laws and recognition of the senders of text messages as co-creators of risk.[8]

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5. *See* N.Y. VEH. & TRAF. LAW § 1225(c) (McKinney 2013).

6. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DISTRACTED DRIVING 2015 (last updated Mar. 2017), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812_381_distracteddriving2015.pdf (citing that in 2015, there were 3,477 people killed and an estimated additional 391,000 injured in crashes involving distracted drivers).

7. *See* Sam Ogozalek, *With Distracted Driving Cases on the Rise, DA Takes 'It up a Notch,'* BUFFALO NEWS (July 20, 2018), https://buffalonews.com/2018/07/20/tragic-distracted-driver-case-prompted-da-to-take-it-up-a-notch-when-filing-charge/ (noting the tragic distracted driving accidents in Western New York including the death of a four-year-old boy when his father was texting and slammed into the back of a tractor trailer, the death of a sixteen-year-old pedestrian who was struck and killed by a driver who was texting, the death of a thirty-three-year-old mother of two who was killed when a distracted driver hit her disabled vehicle on the Thruway, and the death of a University at Buffalo nursing professor when a driver filling out a video game survey struck and killed her); Phil LeBeau, *Texting and Driving Worse than Drinking and Driving*, CNBC.com (June 25, 2009, updated Aug. 3, 2010), https://www.cnbc.com/id/31545004 (concluding that reaction times are up to four times slower when checking an e-mail or text message on your phone while driving than drivers who drive undistracted).

8. *See generally* Anne T. McCartt et al., Symposium, *Driver Cellphone and Texting Bans in the United States: Evidence of Effectiveness*, 58 ANNALS ADVANCES AUTOMOTIVE MED. 99–114 (2014); Steve Hughes, *Texting tickets more than double in New York but drivers are more likely to get a plea deal*, TIMES UNION (Apr. 18, 2018, 12:01 PM), https://www.timesunion.com/news/article/Cell-phone-tickets-more-than-double-in-New-York-12828177.php (concluding many New York courts reduce texting while driving tickets, resulting in less points,

The theory of sender liability is limited and specific.[9] It requires that the texter "knows or has special reason to know" that the recipient of the message is driving and that the driver is "likely to read the text message while driving."[10] This foreseeability requirement results in the texter having a duty to users of the road and, therefore, the texter should refrain from texting the driver at that time, as it may result in an accident.[11] This is not a novel theory, as it is rooted in widely accepted concepts of common-law third-party duty, such as social host duty, distracted driver liability, and passenger liability.[12]

A. Kubert v. Best*: The Groundbreaking Sender Liability Case*

While exchanging text messages with a friend, a driver of a pick-up truck collided with a couple on a motorcycle, resulting in both individuals losing their left legs.[13] The Kuberts filed a lawsuit against Best, the driver of the pick-up truck, as well as Best's seventeen-year-old friend who was texting Best immediately prior to the accident.[14] An issue of

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lower fines, and ultimately, less compliance with the law).

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

10. *Id.*

11. *See id.*

12. Michaela Cronin, *Call Me, Beep Me, if Ya Wanna Reach Me—Unless I Might Be Driving: An Analysis of Sender Liability and Why Pennsylvania Should Not Hold Citizens Responsible for Car Accidents Caused by the Drivers They Text*, 63 VILL. L. REV. 321, 336–37 (2018) ("In Pennsylvania, while no duty is generally owed by passengers, '[a] passenger may owe a duty to protect a third person from negligent acts of the driver where there is a "special relationship, joint enterprise, joint venture, or a right to control the vehicle."'" (quoting DALE G. LARRIMORE, ESQ., WEST'S PA. PRAC., § 8:15 (2016–17 ed. 2016))); Denise Jones Lord, *Beyond Social Host Liability: Accomplice Liability*, 19 CUMB. L. REV. 553, 564–65 (1989) (asserting that the situation in *Kubert* is similar to social host liability because in the context of social host liability, the social host is not present at the time of the incident, just like the texter in *Kubert* was not present at the time of the accident).

13. *Kubert*, 75 A.3d at 1219.

14. *Id.* at 1214.

first impression in New Jersey, the Superior Court, Appellate Division considered on appeal whether a third party who is texting a driver from a remote location can be liable to injured parties because the text messaging distracted the driver.[15]

Discovery during the trial revealed that Best and his friend, Colonna, exchanged sixty-two text messages on the day of the accident, including the messages that Best and Colonna sent immediately prior to the accident.[16] Consistent with other state court decisions, the court held that a party may not be liable for sending a text message merely because a driver might use his phone unlawfully, as to become distracted while driving.[17] The court also held that a court may not impose liability where an individual who knows that the recipient of his text message is driving directs a text message to that specific recipient.[18] The court then turned to the question of the sender having "special knowledge."[19]

As the first court to acknowledge the possibility of sender liability, the *Kubert* court did so carefully and strategically, requiring that "additional proofs are necessary to establish the sender's liability."[20] In order to find sender liability, the

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15. *Id.* at 1215.

16. *Id.* at 1219 (noting that the parties "averaged almost fourteen texts per hour for the four-and-a-half-hour, non-consecutive time-span they were in telephone contact on the day of the accident."). Phone records revealed that only seventeen seconds passed between Best sending a message to Colonna and the time he called 911. During those seventeen seconds, Best hit the Kuberts, stopped his vehicle, exited his vehicle, observed the Kuberts' injuries, and dialed 911. Therefore, the court inferred that the text message was sent almost simultaneously with Best colliding with the Kuberts. The court held that the distraction caused by texting while driving played a significant role in the collision.

17. This was a case of first impression, and therefore the court considered precedent cases of distracted driving generally, namely, cases where parties sued technology manufacturers for negligent design of a device or software. *Id.* at 1226.

18. *Id.*

19. *Id.*

20. *Id.*

court required proof that the sender "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."[21] Relating sender liability to passenger liability, the court held that a passenger could be liable even if that passenger did not actually obstruct the driver's view, but demanded that the driver advert his eyes from the road to look at a distracting object.[22] This hypothetical would lead the court to find liability because the passenger knew or had special reason to know that his actions would distract the driver.[23] The same ideology applies to senders of text messages who know or have a special reason to know that the driver will be distracted by the notifications from his phone.[24] Concerned with public policy, the court analogized texting and driving with drinking and driving, concluding that because the harm posed to others on the road is significant, there must be liability for all parties involved, as the law recognizes in drinking and driving cases.[25]

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21. *Id.* (establishing sender liability by examining analogous circumstances and applying a "full duty analysis" as discussed in Estate of Desir *ex. rel.* Estiverne v. Vertus, 69 A.3d 1247, 1249 (N.J. 2013)). *Vertus*' "full duty analysis" required evaluation of four factors: (1) the relationship of the parties, (2) the nature of the risk, (3) the ability to exercise care, and (4) public policy considerations. 69 A.3d at 1255. *Vertus*, a premises liability case decided by the Supreme Court of New Jersey, held that "a premises owner owes a duty of care to one injured off premises if the source of the injury is a dangerous condition on the premises and if the injury is the result of a foreseeable risk to an identifiable person." *Id.* at 1248. In its opinion, however, the court noted that this expansive view of the duty of care is not applied simply because the injury is foreseeable, rather, that a party negligently created a dangerous situation under the four established factors. *Id.* at 1249.

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

23. *Id.*

24. *See id.* at 1228 ("When the sender texts a person who is then driving, knowing that the driver will immediately view the text, the sender has disregarded the attendant and foreseeable risk of harm to the public. The risk is substantial, as evidenced by the dire consequences in this and similar cases where texting drivers have caused severe injuries or death.").

25. *Id.* at 1229.

B. *Post* Kubert v. Best

Kubert articulated a new duty of care by holding that the sender of a text message owes a limited duty to the public when the sender "has actual knowledge or special reason to know from prior texting experience or otherwise," that the recipient will view the text while driving.[26] In response to the texting and driving epidemic, New Jersey enacted additional legislation in hopes of deterring texting while driving.[27] "Kulesh, Kubert & Bolis' Law" adds to New Jersey's vehicular homicide statute to include an inference of reckless driving if the driver was using a phone at the time of the accident.[28] This amendment to the statute is in addition to the statutory ban on texting while driving.[29]

In her article, *Don't Text a Driver: Civil Liability of Remote Third-Party Texters After* Kubert v. Best, Emily Strider discusses the expansion of common-law negligence principles to cover third parties in social host liability contexts.[30] Describing how these additions to New Jersey statutes play out in trial, Strider notes, "[t]he key element in both the vehicular homicide and assault by auto statutes is the *reckless* driving of the vehicle."[31] The addition of the inference of recklessness in cases where a driver was using a phone increases the likelihood of conviction in vehicular homicide and assault by auto cases because evidence of texting immediately proves recklessness.[32] The legislature of

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26. *Id.* (internal citation omitted).

27. *See* N.J. STAT. ANN. § 2C:11-5(a) (West 2012).

28. *Id.*

29. 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, 1014–16 (2015).

30. *Id.*

31. *Id.* (discussing New Jersey's inclusion of the inference of recklessness when a driver is using a phone has also been added to New Jersey's assault by auto statute, which addresses incidents where reckless driving results in bodily injury to another).

32. *Id.* at 1008–09 ("Although such an inference is not binding on the jury, the jury may rely on the inference alone to find that the defendant was driving

forty-seven states, Washington, D.C., Puerto Rico, Guam, and the U.S. Virgin Islands have banned text messaging for all drivers, and some of these jurisdictions have also increased the penalties and fines associated with distracted driving and the resulting accidents.[33] Despite other states recognizing the texting and driving epidemic, none have enacted legislation as strict as the state of New Jersey, nor have any courts recognized sender liability.[34]

recklessly.").

33. *Distracted Driving*, GOVERNORS HIGHWAY SAFETY ASS'N, https://www.ghsa.org/state-laws/issues/Distracted-Driving (last visited Nov. 26, 2019).

34. *See* Kubert v. Best, 75 A.3d 1214, 1229 (N.J. Super. Ct. App. Div. 2013); Vega v. Crane, 49 N.Y.S.3d 264, 265 (Sup. Ct. 2017).

III. *VEGA V. CRANE*: A FIRST IMPRESSION SENDER LIABILITY CASE IN NEW YORK STATE

A car accident occurring on a dark and rainy evening in Genesee County, New York set the scene for New York to address sender liability in the New York Supreme Court first impression case of *Vega v. Crane*.[35] The accident occurred when the decedent's vehicle crossed the centerline and struck Vega's vehicle head-on.[36] Upon investigation, the New York State Police concluded that the decedent was likely distracted, having found a cell phone located between the decedent's legs after inspection of his vehicle.[37] Further investigation revealed that the decedent and a friend, Cratsley, were texting before the accident occurred.[38] During her deposition, Cratsley admitted to texting the decedent on the day of the accident; however, she indicated that she was unaware that the decedent was driving at the time that they were texting.[39]

Vega argued that the court should follow in the steps of *Kubert*, while Cratsley cited to precedent New York case law that refused to impose liability on individuals who did not have control over third parties.[40] The court, hesitant to

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35. *Vega*, 49 N.Y.S.3d at 265.

36. *Id.*

37. New York State Police concluded that the decedent was likely distracted because the scene lacked any signs that the decedent attempted to avoid colliding with Vega's vehicle. *Id.*

38. *Id.*

39. Upon investigation it was determined that none of the text messages between the decedent and Cratsley contradicted Cratsley's statements. *Id.*

40. Vega further relied on *Sartori v. Gregoire*, 688 N.Y.S.2d 295 (App. Div. 1999) for the proposition that a passenger may be liable for distracting a driver immediately prior to an accident. She also cited RESTATEMENT (SECOND) OF TORTS § 303 (AM. LAW INST. 1965), which provides, "[a]n 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." Cratsley reasoned that the court should follow New York precedent such as *Pulka v. Edelman*, 358 N.E.2d 1019, 1021–22 (N.Y. 1976), holding that liability will not be imposed on an individual who lacks control over

deviate from New York's long-standing adherence to negligence law first set forth in *Palsgraf v. Long Island Railroad*,[41] refused to adopt the new duty created by *Kubert*.[42] In its opinion, the court conceded that the New York State Court of Appeals has gradually expanded the duty of care, but declined to do so in this case by limiting those holdings to each case's unique fact pattern.[43]

New York courts have historically refused to broaden the scope of negligence. In some rare cases, they have slightly broadened the scope, but only did so reluctantly.[44] One of those rare cases is *Davis v. South Nassau Communities Hospital*.[45] In *Davis*, the New York State Court of Appeals expanded the duty of care to third-party medical professionals and hospitals.[46] In its holding, the court

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the third party. *Id.*

41. *See generally* 162 N.E. 99 (N.Y. 1928).

42. *Vega*, 49 N.Y.S.3d at 268 (discussing the court's strict adherence to the doctrine of negligence first debuted in *Palsgraf*. The court notes that *Palsgraf* held that no duty of care is owed to a third party if the injury is not reasonably foreseeable and asserts that if it chose to adopt the new duty created by *Kubert*, it would be broadening the *Palsgraf* scope of duty).

43. *Id.* at 270.

44. *Id.* at 267.

45. 46 N.E.3d 614 (N.Y. 2015).

46. *Id.* at 624 (holding that despite the holding in Purdy v. Public Adm'r of County of Westchester, 526 N.E.2d 4 (N.Y. 1988) courts have imposed a duty of care where there exists a special relationship between the parties). In *Davis*, the hospital gave a patient a controlled substance and then discharged her. Shortly after the administration of the medication and her discharge, the patient crashed her vehicle into a bus operated by the plaintiff, injuring him. *Id.* at 617. The court reasoned that the patient was not properly educated regarding the medication she was prescribed and how it would affect her ability to operate a vehicle. *Id.* at 623. Therefore, the court held that the medical professionals and hospital, as third parties, had a "special relationship" with the plaintiff and therefore imposed a duty. *Id.* at 622. In its analysis the court reasoned:

> [O]ur calculus is such that we assign the responsibility of care to the person or entity that can most effectively fulfill that obligation at the lowest cost. It is against that backdrop that we conclude that, under the facts alleged, defendants owed plaintiffs a duty to warn Walsh that the medication defendants administered to Walsh impaired her ability to safely operate a motor vehicle.

reasoned, "[a] critical consideration in determining whether a duty exists is whether 'the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm.'"[47] However, as illustrated by *Vega*, New York courts are cautious in expanding duty to third parties and in cases such as this, prefer to defer to the legislature to determine what is actionable.[48]

There is no reason for *Vega* to be the last word on sender liability in New York. When it comes to recognizing texters as co-creators of risk, it should not matter that New York courts have historically refused to broaden the scope of duty. Recognizing sender liability is not in any way a revolutionary expansion of duty. A texter is a co-creator of risk just like the bartender who overserves a patron who then gets behind the wheel and causes an accident; or the social host who allows teens to throw a party with underage drinking at their home, and one of those teens tragically dies after overconsumption; or the healthcare provider who prescribes a sedative to an individual without proper warning, resulting in the individual using the drug, driving, and subsequently causing an accident.[49] Texters are not passive third-party observers. Texters are third parties who engage in affirmative conduct that poses risk to innocent individuals.[50]

Id. at 618.

47. *Id.* (quoting Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1061 (N.Y. 2001)).

48. *See Vega*, 49 N.Y.S.3d at 272 ("[C]ourts are not free to decide what should be founded in statutory authority. This is the realm of the legislature. Simply put, if the legislature wishes to make actionable a third party's texting to a motorist, notwithstanding their lack of knowledge that the person to whom they are texting is driving, they should do so. This Court refuses to establish this cause of action by judicial fiat.").

49. *See, e.g.*, *Davis*, 46 N.E.3d at 617; Rust v. Reyer, 693 N.E.2d 1074, 1076 (N.Y. 1998); Place v. Cooper, 827 N.Y.S.2d 396, 397 (App. Div. 2006); Carr v. Kaifler, 601 N.Y.S.2d 8, 9 (App. Div. 1993); Custen v. Salty Dog, Inc., 566 N.Y.S.2d 348, 348 (App. Div. 1991); Montgomery v. Orr, 498 N.Y.S.2d 968, 970–71 (Sup. Ct. 1986).

50. *See* Commonwealth v. Carter, 115 N.E.3d 559, 572–73 (Mass. 2019). On

IV. SENDER LIABILITY: ROOTED IN WELL-ESTABLISHED DUTY PRINCIPLES

A. *Social Host Liability*

New York State recognizes social host liability.[51] Even in circumstances where injury occurs off premises, New York typically finds liability under common-law negligence.[52] In cases of social host liability, a court may hold a host liable for harm caused by guests to third parties where the furnishing of alcohol is the proximate cause of injury.[53] However, New

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appeal, the defendant argued she did not inflict serious bodily harm on the victim. The defendant contended "infliction" required direct, physical causation of harm, not mere proximate causation, and that from her remote location, she could not have inflicted serious bodily harm on the victim under the relevant statute. The court held defendant's argument was an "unduly narrow" interpretation and that by its terms, the statute required the offense involve the infliction of serious bodily harm, not that the defendant herself be the one who directly inflicted it. The court stated, "[i]f we were to interpret the statute to include such a requirement, it is difficult to see how a [suspect] could be indicted as a[n] . . . offender for, say, hiring a third party to carry out an attack on a victim." It is enough, the court continued, "that involuntary manslaughter in these circumstances inherently involves the infliction of serious bodily harm." Further, the court held the defendant was reckless in her actions stating, "based on her own knowledge of the danger to the victim and on her choice to run the risk that he would comply with her instruction to get back into the truck." *Id.* at 573. Ultimately, the court held the defendant was reckless in her conduct of texting the victim because she knew of the danger of her conduct toward the victim and chose to run the risk that the victim would comply. Recognition of sender liability falls in line with the court's reasoning in *Carter*. Where a texter recklessly texts a driver knowing the danger of their conduct and that the driver is likely to answer the text, the texter runs the risk that the victim will answer. There is no reason to find direct, physical causation of harm, rather, the infliction of serious bodily harm, even from a remote location is enough. *See id.* at 574.

51. *See* N.Y. GEN. OBLIG. LAW §§ 11-100, 11-101 (McKinney 2010); *Rust*, 693 N.E.2d at 1076–77; *Montgomery*, 498 N.Y.S.2d at 972.

52. *See Montgomery*, 498 N.Y.S.2d at 972.

53. *See* Jennifer Edelson, "*ETA?*" *Estimated Time of Arrival: An Analysis of New Jersey's Remote Texting Liability*, 37 CARDOZO L. REV. 1939, 1956 (2016) ("Perhaps the most analogous form of imputed liability to remote texting is social host liability."); *Social Host Liability*, THOMSON REUTERS: FINDLAW, https://injury.findlaw.com/accident-injury-law/social-host-liability.html (last visited Nov. 26, 2019) ("Most states have enacted laws holding party hosts liable for any alcohol-related injuries that occur as a result of providing alcohol to minors. This includes injuries to the minor as well as any other individuals whose injuries or death

York courts apply social host duty only in instances where injury occurs on the individual's premises where a minor is furnished alcohol.[54]

Oftentimes, injuries occur off premises after an individual furnishes alcohol to a minor.[55] In these cases, New York courts have applied common-law negligence to reach the third-party individual who furnished alcohol.[56] Given this gap in legislation, common-law negligence implicates a person who is not physically present at the place and time of the event that gives rise to the cause of action.[57] Applying the common law in this manner, New York courts have interpreted third-party liability in a way similar to New Jersey's sender liability.[58]

In *Montgomery v. Orr*, the New York Supreme Court, Oneida County, held that a parent could be liable under common-law negligence because the parent allowed minors to consume alcohol at a graduation party, which resulted in a fatal car accident after one of the minors left the party.[59] Despite New York's inability to recognize a cause of action against a social host for negligence of a guest that occurs away from the site, the court analyzed the issue under common-law negligence as well as a violation under N.Y. PENAL LAW § 260.20.[60] The court noted that its opinion

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resulted from the minor being provided with alcohol. Some states have more general social host liability laws, which are not limited to just minors but to anyone who was encouraged or allowed to drink excessively to the point where he or she was injured or killed, or caused another's injury or death.").

54. *See* GEN. OBLIG. § 11-100; *Rust*, 693 N.E.2d at 1077.

55. *See, e.g.*, *Rust*, 693 N.E.2d at 1075; *Montgomery*, 498 N.Y.S.2d at 970.

56. *See Rust*, 693 N.E.2d at 1076–77; *Montgomery*, 498 N.Y.S.2d at 973.

57. Strider, *supra* note 29, at 1014 (discussing the expansion of common-law negligence principles to cover third parties in social host liability contexts).

58. *See id.*

59. 498 N.Y.S.2d at 972–74 (deciding the case under N.Y. PENAL LAW § 260.20, but noting that, "[h]ad this accident occurred but some 118 days later, plaintiff's cause of action would fall squarely within the provisions of [GEN. OBLIG. § 11-100].").

60. *Id.* at 972 (holding that a third party may bring an action in common-law

supported public policy notions, including a need to reduce underage drinking and the injuries that result.[61]

New York courts have viewed social host liability and common-law negligence liberally in cases of underage drinking and resulting third-party injuries.[62] In further expanding social host liability under public policy considerations, *Rust v. Reyer* held that N.Y. GEN. OBLIG. LAW § 11-100 should be interpreted broadly, as to impose liability on social hosts who furnish alcoholic beverages to minors.[63] The court in *Rust* focused intently on the definition of "furnishing," as used in the statute and expanded it by holding that the purpose of the statute was to employ civil penalties as a deterrent against underage drinking.[64] Public policy directs courts to interpret the statute broadly as to deter underage drinking by imposing civil penalties to those who provide, supply, or give alcohol to an underage person.[65]

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negligence for injuries that are shown to be causally connected to a breach of § 260.20(4)).

61. *Id.* ("Experience has shown that drinking by underage persons produces not only injurious consequences to the minor, but to others. This is especially so when you combine the drinking with driving. Recent state and national studies have shown a direct corollary between teenage drinking and the number of motor vehicle accidents and resulting injuries and deaths.").

62. *See, e.g.*, Rust v. Reyer, 693 N.E.2d 1074, 1077 (N.Y. 1998); *Montgomery*, 498 N.Y.S.2d at 974.

63. 693 N.E.2d at 1077 (holding that Reyer, a teen hosting a party at her parents' house while they were out of town, could be liable as a social host under GEN. OBLIG. § 11-100). Reyer agreed to allow students from a fraternity to bring beer to a party and charge those who attended the party in exchange for a share of the profits. *Id.* at 1075. A fight ensued at the party and a guest was injured. Analyzing the facts under GEN. OBLIG. § 11-100 the court held that "[t]he facts alleged demonstrate that Reyer was more than an unknowing bystander or an innocent dupe whose premises were used by other minors seeking to drink" and "was more than a passive participant who merely knew of the underage drinking and did nothing else to encourage it. Reyer played an indispensable role in the scheme to make the alcohol available to the underage party guests." *Id.* at 1077 (internal citations omitted).

64. *Id.* at 1076–77.

65. *Id.* at 1077 (citing the purpose of the legislature in enacting GEN. OBLIG. § 11-100 and comparing § 11-100 with Dram Shop laws). The court quoted the legislature stating that:

B. *Distracted Driver and Passenger Liability*

A passenger has a duty not to distract a driver when the driver is operating the vehicle.[66] Courts typically impose liability on passengers who breach this duty, either by holding that the passenger is contributorily liable, or completely liable for injuries to plaintiffs.[67] In *Collins v. McGinley*, a passenger sued a driver who failed to stop at an intersection and collided with another vehicle.[68] In its holding, the court considered evidence that the passenger distracted the driver and ultimately apportioned liability between both the passenger and the driver.[69] In a more egregious case, the court in *Good v. MacDonell* held that the passenger, who tugged the steering wheel and caused the vehicle to collide with pedestrians, was liable for all of the injuries inflicted.[70]

One of the first cases to decide manufacturer liability for distracted driving was *Durkee v. Geologic Solutions, Inc.*[71] In *Durkee*, a truck driver was using an in-truck text messaging system and, while distracted with the system, collided with

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> Over the years, numerous court cases have dealt extensively with the question of common law liability on the part of those who knowingly furnish alcoholic beverages to under-age persons at graduation parties, church socials, wedding receptions, office parties, and college campuses. Under-age persons consuming excess alcohol at these social events unquestionably have the same propensity to do harm to the traveling public as those who have been served alcohol pursuant to a sale. (1983 N.Y. Legis. Ann., at 281).

66. *See* Collins v. McGinley, 558 N.Y.S.2d 979, 980 (App. Div. 1990); Good v. MacDonell, 564 N.Y.S.2d 949, 952 (Sup. Ct. 1990).

67. *Collins*, 558 N.Y.S.2d at 980.

68. *Id.*

69. *Id.*

70. 564 N.Y.S.2d at 953 ("The sudden yanking of the steering wheel by the defendant Garris without prior warning was clearly the sole proximate cause of the car striking the pedestrian and going out of control.").

71. 502 F. App'x 326, 327 (4th Cir. 2013), *aff'g* Durkee v. C.H. Robinson Worldwide, Inc., 765 F. Supp. 2d 742 (W.D.N.C. 2011).

vehicles that had stopped in front of him.[72] The court held that "the accident was caused by the driver's inattention, not the texting device itself, and that manufacturers are not required to design a product incapable of distracting a driver."[73] Since *Durkee*, many courts have considered the question of whether a technology manufacturer may be liable under theories of negligence, products liability, or both, for software that fails to "lock" a cellphone while a car is in motion.[74] In 2010, an appellate court in Oklahoma held that "[t]he purchase and use of a cellular phone or cellular service are not inherently dangerous acts, nor is it foreseeable that the sale and subsequent use of such a phone would cause an accident."[75] In 2018, following a distracted driving accident in Texas that involved a driver using FaceTime, the issue was yet again whether a smartphone maker has a duty to prevent the use of an application that may distract drivers.[76] In *Modisette*, the California Court of Appeal, Sixth District held that Apple did not owe a duty of care to the parents of the deceased when a motorist who was using FaceTime while driving hit and killed their daughter.[77] The court further held that the facts as presented lacked a showing of

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72. *Id.*

73. *Id.* at 327–28.

74. *See* Meador v. Apple Inc., 911 F.3d 260, 263 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 2649 (2019); Modisette v. Apple Inc., 241 Cal. Rptr. 3d 209, 213 (Ct. App. 2018); Estate of Doyle v. Sprint/Nextel Corp., 248 P.3d 947, 949 (Okla. Civ. App. 2010).

75. *Estate of Doyle*, 248 P.3d at 951 (discussing negative public policy if the court imposed duty on the cellphone company). The court in *Estate of Doyle* stated that "[i]t is foreseeable to some extent that there will be drivers who eat, apply make up [sic], or look at a map while driving and that some of those drivers will be involved in car accidents because of the resulting distraction" but that "it would be unreasonable to find it sound public policy to impose a duty on the restaurant or cosmetic manufacturer or map designer to prevent such accidents." *Id.* at 950–51 (quoting Williams v. Cingular Wireless, 809 N.E.2d 473, 478 (Ind. Ct. App. 2004)).

76. *See Modisette*, 241 Cal. Rptr. 3d at 213–14.

77. *Id.* at 213.

causation.[78]

Meador was the most recent case to tackle the question of whether a technology manufacturer owes a duty to third-party drivers because the software fails to "warn" drivers or "lock" the device.[79] Although the court refused to find that the iPhone 5 or its software was a cause in fact of the injuries alleged, the court did not do so directly.[80] Given the Fifth Circuit did not directly reject the plaintiff's arguments, but rather declined to decide an issue that the state had yet to speak directly on, it seems that this issue will continue to permeate the courts as technology continues to evolve and consume all aspects of daily life.[81]

C. *Healthcare Provider Third-Party Duty*

New York courts have found third-party duty where a healthcare provider failed to provide a patient sufficient instruction upon discharge. In *Davis v. South Nassau Communities Hospital*, the New York State Court of Appeals expanded the duty of care to third-party medical professionals and hospitals.[82] In its holding, the court reasoned, "[a] critical consideration in determining whether a duty exists is whether 'the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm.'"[83]

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78. *Id.*

79. *Meador*, 911 F.3d at 263 (considering plaintiff's claims that that receipt of a text message triggers in the recipient "an unconscious and automatic, neurobiological compulsion to engage in texting behavior," and therefore, Apple failed to implement the patent on the iPhone 5 and failed to warn iPhone 5 users about the risks of distracted driving).

80. *Id.* at 267 (holding that under Erie R.R. v. Tompkins, 304 U.S. 64 (1938), it was not for the court to decide whether "Texas law would regard a smartphone's effect on a user as a substantial factor in the user's tortious acts.").

81. *See id.*

82. 46 N.E.3d 614, 624 (N.Y. 2015).

83. *Id.* at 618 (quoting Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1061 (N.Y. 2001)).

In its opinion, the court stated that taking the step of administering the medication without warning the patient about the disorienting effects of the drug was to create a danger that affected all motorists on the road.[84] Further, the court noted that the healthcare provider was the only person that could have given the patient the proper warning of the negative effect of the drugs.[85] Therefore, the court held the healthcare provider had a duty to warn the patient about the potential for the drug to impair her ability to safely operate an automobile.[86] This does not differ from sender liability, where the texter is the only person that could refrain from sending their text to the driver and effectively negate the risk of the driver responding to the text while driving.

D. *Distinction from Sender Liability: Manufacturer Liability*

Although courts have yet to impose liability on technology manufacturers, they are less reluctant to consider imposing liability when an individual takes a foreseeable risk in sending a text message to a driver.[87] Plaintiffs argue that a key difference between these circumstances is that in the context of an individual texting a driver, there is stronger evidence of foreseeability.[88] Bearing in mind public policy, courts have been more liberal in considering finding liability where an individual takes a foreseeable risk when texting a driver, compared to a technology manufacturer failing to include software that "warns" all drivers or "locks" all phones

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84. *Id.* at 622.

85. *Id.*

86. *Id.*

87. *See* Kubert v. Best, 75 A.3d 1214, 1228 (N.J. Super. Ct. App. Div. 2013).

88. *Compare id.* at 1227 ("[I]f the sender knows that the recipient is both driving and will read the text immediately, then the sender has taken a foreseeable risk in sending a text at that time. The sender has knowingly engaged in distracting conduct, and it is not unfair also to hold the sender responsible for the distraction."), *with* Estate of Doyle v. Sprint/Nextel Corp., 248 P.3d 947, 951 (Okla. Civ. App. 2010) ("[N]or is it foreseeable that the sale and subsequent use of such a phone would cause an accident.").

while a vehicle is in motion.[89]

Evidence of foreseeability in accidents caused by distracted driving is essential, but not determinative of a third-party duty.[90] The court in *Modisette* created an exception to the duty of care even in a circumstance where it found foreseeability.[91] However, the *Kubert* court held that in circumstances where an individual takes a foreseeable risk and sends a text message to a driver, it is fair to hold this sender of a text message responsible for the distraction.[92] The relationship between distracted driving, foreseeability, and duty is both complicated and controversial, creating an imperative issue for New York State to begin to consider.

89. *See Kubert*, 75 A.3d at 1227; *Estate of Doyle*, 248 P.3d at 950.

90. *See* Modisette v. Apple Inc., 241 Cal. Rptr. 3d 209, 220–21 (Ct. App. 2018).

91. *Id.* at 221 (holding that it was foreseeable that Apple's design of the iPhone 6 which failed to incorporate lockout technology could result in a car accident, however, that such foreseeability did not result in the court recognizing a duty of care).

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

V. NEW YORK STATE LEGISLATURE'S RECOGNITION OF CO-CREATORS OF RISK: DRAM SHOP LAWS

The New York State legislature has enacted laws to halt epidemics that offend public policy.[93] The New York State legislature established the first DWI law in 1890, which was amended to mirror "modern" statutes in 1910.[94] Over a half-century later, New York passed chemical testing laws, which allowed prosecutors to use compulsory blood tests as evidence to prove alcohol in the bloodstream for liability under DWI laws.[95] Most notably, however, is the legislature's recognition of the driving-while-intoxicated epidemic through its enactment of the Dram Shop Act. First passed in 1873, the legislature has amended and supplemented the Dram Shop Act frequently, but the fundamental foundation of imposing liability on a remote third party remains.[96]

Common law does not impose liability on a bar owner who provides alcohol to a customer who later injures another due to his intoxication.[97] In these circumstances, the courts historically held that the intoxicated customer was the proximate cause of his own inebriation and any injury that followed—whereas such injury to another was unforeseeable to the bar owner.[98]

As a response to the driving-while-intoxicated epidemic, which results in hundreds of fatalities per year, the New

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93. *See* Daniel Gross, *Closing the Loophole: Shea's Law and DWI Blood Draws in New York State Under Vehicle and Traffic Law § 1194(4)(A)(1)*, 74 ALB. L. REV. 951, 952–54 (2011).

94. *Id.* at 953.

95. *Id.* (suggesting that chemical testing legislation as well as New York's "STOP DWI" campaign were moves by the legislature that "clearly expressed its interest in promoting the goal of public safety . . . .").

96. *See id.* at 953–55.

97. *See* Sheehy v. Big Flats Cmty. Day, Inc., 541 N.E.2d 18, 22 (N.Y. 1989) (holding that there was no common-law cause of action for persons injured because of their own voluntary intoxication).

98. *See, e.g.*, D'Amico v. Christie, 518 N.E.2d 896, 898 (N.Y. 1987); Berkeley v. Arthur Park, 262 N.Y.S.2d 290, 293 (Sup. Ct. 1965).

York State legislature enacted N.Y. GEN. OBLIG. LAW § 11-101 in 1963 and amended the law in 1980.[99] This portion of New York's Dram Shop law imposes liability on a party who sells alcohol to an intoxicated individual if that intoxicated individual injures another.[100] Under the statute, the following three elements must be proved in order to find the party who sold the alcohol liable: (1) the seller unlawfully sold or procured alcohol for the intoxicant; (2) the seller sold the alcohol to the intoxicant when the intoxicant was visibly intoxicated; and (3) there exists a "reasonable connection" between the intoxication and the plaintiff's injury.[101]

The first element of the statute is that the seller unlawfully sold or procured alcohol for the intoxicant.[102] Courts have consistently interpreted that this element of the statute only applies in the context of commercial sales of alcohol.[103] In *Carr v. Kaifler* and *Custen v. Salty Dog, Inc.*, the courts held that a restaurant or bar's custom of providing free alcoholic beverages to its employees during work shifts did not constitute a commercial sale and therefore, declined to impose Dram Shop liability.[104] Further, in *Place v. Cooper*, a minor's mother provided alcohol to her son and his friend and the court declined to impose Dram Shop liability because it was undisputed that the mother did not commercially sell alcohol to her son or his friend.[105] Even when a court determines that a commercial sale exists, the plaintiff must prove that the sale of alcohol was directed to the individual who caused the injury to another in order for Dram Shop

99. N.Y. GEN. OBLIG. LAW §§ 11-100, 11-101 (McKinney 2010).

100. *Id.*

101. *See generally id.*; *Sheehy*, 541 N.E. 2d at 20.

102. GEN. OBLIG. §§ 11-100, 11-101.

103. *See, e.g.*, Place v. Cooper, 827 N.Y.S.2d 396, 396 (N.Y. App. Div. 2006); Carr v. Kaifler, 601 N.Y.S.2d 8, 9 (N.Y. App. Div. 1993); Custen v. Salty Dog, Inc., 566 N.Y.S.2d 348, 348 (N.Y. App. Div. 1991).

104. *Carr*, 601 N.Y.S.2d at 9; *Custen*, 566 N.Y.S.2d at 348.

105. *Place*, 827 N.Y.S.2d at 396 (establishing that liability under Dram Shop requires the commercial sale of alcohol).

liability to apply.[106] In *Sherman v. Robinson*, the court held that a convenience store was not liable for an indirect sale because the purchaser was not intended to be the sole consumer of the alcohol.[107] In its analysis, the court noted that the intoxicated individual must have been present during the sale, provided the money for the alcohol, or took possession of the alcohol once the sale was made in order to show a "direct sale."[108]

The second element of the Dram Shop Act requires that the sale of alcohol be made to an intoxicated individual.[109] This element limits the expansive liability the Dram Shop Act places on commercial sellers by requiring that the seller have a reasonable basis for knowing that the consumer was intoxicated at the time of sale.[110] This imposes a foreseeability component because an individual who sells alcohol to an intoxicated person could reasonably foresee that the intoxicated individual could injure another.[111] In *Wolf v. Paxton-Farmer*, the court held that evidence of an individual consuming one mixed beverage and a portion of another was insufficient to establish that the individual was intoxicated.[112] This holding establishes that under the Dram Shop Act, there must be sufficient evidence to establish that the individual was visibly intoxicated. Demanding such, along with the third element requiring a "reasonable

106. Sherman v. Robinson, 606 N.E.2d 1365, 1368–69 (N.Y. 1992).

107. *Id.* ("Given the Legislature's choice not to provide liability for the indirect sale in this case, we decline to expand the common law to impose such liability." (quoting Kelly v. Gwinnell, 476 A.2d 1219 (N.J. 1984))). The court commented on the legislature's power, stating, "[i]n this State, 'the very existence of a Dram Shop Act constitutes a substantial argument against expansion of the legislatively-mandated liability.'" *Id.* at 1369 (quoting D'Amico v. Christie, 518 N.E.2d 896, 900 (N.Y. 1987)).

108. *See id.* at 1368–69

109. *Id.*

110. *See id.* at 1367.

111. *See* Howard S. Shafer & Mika Mooney, *A Refresher on New York Dram Shop Liability*, 37 TORTS, INS. & COMP. L. SEC. J. 17, 17–18 (2008).

112. 803 N.Y.S.2d 468, 468 (N.Y. App. Div. 2005).

connection" between the individual's intoxication and the plaintiff's injury, are essential to ensuring that the Dram Shop Act does not impose sweeping liability.[113] Because the Dram Shop Act is a deviation from the common law, it is strictly applied only in cases where there is sufficient evidence to prove that the seller sold to a visibly intoxicated person.[114]

The last element required by the Dram Shop Act to impose liability is the existence of a "reasonable connection" between the intoxication and the plaintiff's injury.[115] This requirement frames the legislation to apply only in cases where the selling of alcohol to an intoxicated person results in injury to another.[116] One result of this requirement is that intoxicated persons may not recover under the Dram Shop Act if they injure themselves in their own intoxicated condition.[117] In *Searly v. Wegmans Food Markets, Inc.*, a minor consumed alcohol he obtained from a Wegmans grocery store and lost control of his vehicle, resulting in a car crash and subsequently, his death.[118] The Appellate Division, Fourth Department held that the statute does not create a cause of action in favor of one injured as a result of his or her own intoxication and there is no common-law cause of action either.[119]

New York State's Dram Shop Act reflects the legislature's intent to correct the ongoing driving while

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113. *See id.*

114. *See id.*

115. *See* N.Y. GEN. OBLIG. LAW §§ 11-100, 11-101 (McKinney 2010); Shafer & Mooney, *supra* note 111, at 19.

116. *See* GEN. OBLIG. §§ 11-100, 11-101.

117. *See id.*

118. 807 N.Y.S.2d 768, 768 (N.Y. App. Div. 2005).

119. *See id.* ("It is well settled that General Obligations Law §§ 11-100 and 11-101 do not create a cause of action in favor of one injured as a result of his own intoxicated condition.").

intoxicated epidemic.[120] Imposing liability on remote third parties who play a material role in driving while intoxicated incidents, such as bar owners who serve intoxicated individuals, spreads liability and deters not only drinking while driving, but also serving individuals who are drinking while driving.[121]

Critics of Dram Shop laws are concerned with the lack of personal responsibility imposed on individuals in cases where the courts hold third parties liable for serving visibly intoxicated persons.[122] The argument follows that the person who overconsumes alcohol then decides to drive while intoxicated, resulting in injury to another, should bear the entire burden of their actions, including liability in lawsuits.[123] Further, critics highlight that Dram Shop laws punish businesses that serve alcohol because these businesses must carry expensive liability insurance as well as fees associated with being sued over accidents caused by intoxicated patrons when sued under exceptions to their policies.[124] It is argued that Dram Shop laws also punish

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120. *See* GEN. OBLIG. §§ 11-100, 11-101; Wolf v. Paxton-Farmer, 803 N.Y.S.2d 468, 469 (N.Y. App. Div. 2005); Shafer & Mooney, *supra* note 111, at 19.

121. *See* GEN. OBLIG. §§ 11-100, 11-101.

122. *See* Tobias v. Sports Club, 474 S.E.2d 450, 456 (S.C. Ct. App. 1996) ("In our view, a rule which allows an intoxicated individual to hold a tavern owner liable without regard to his own actions in continuing to consume alcohol promotes irresponsibility and rewards drunk driving."); Estate of Kelly v. Falin, 896 P.2d 1245, 1250 (Wash. 1995) ("Given a choice between a rule that fosters individual responsibility and one that forsakes personal accountability, we opt for personal agency over dependency and embrace individual autonomy over paternalism.").

123. The Supreme Court of South Carolina in *Tobias*, 474 S.E.2d at 454 addressed Dram Shop critics' viewpoint which allowed intoxicated drivers to have a first party cause of action against tavern owners when injured in an accident, as established by *Christiansen v. Campbell*, 328 S.E.2d 351, 354 (S.C. Ct. App. 1985). *Tobias* overturned *Christiansen*, limiting the protection of intoxicated individuals who drink and drive by establishing that alcohol control statutes do not create a first party cause of action for an intoxicated adult person, but that they do permit a third party action.

124. Mary M. French, Jim L. Kaput & William R. Wildman, *Social Host Liability for the Negligence Acts of Intoxicated Guests*, 70 CORNELL L. REV. 1058,

businesses by requiring refusal of service to patrons who appear visibly intoxicated, resulting in declining sales.[125]

Dram Shop laws impose liability on remote third parties for serving alcohol to intoxicated persons.[126] However, refusing service or evicting customers poses its own legal issues.[127] Dram Shop laws require that those who serve alcohol refrain from serving visibly intoxicated customers, but improper refusal of service can lead to customer suits under the Americans with Disabilities Act, which restaurant and bar owners try to avoid at all costs.[128] Furthermore, evicting an intoxicated individual who continues to order alcoholic beverages can pose issues because upon eviction from the premises, the intoxicated individual may choose to

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1120 (1985) ("Between approximately 1971 and 1979, for example, one California tavern owner's premium climbed from $10,000 to $190,000. About one-third of California's 25,000 tavern owners chose to risk liablity [sic] rather than pay the high premium." (footnotes omitted)). Tort law aims to provide innocent victims compensatory justice in the event of a loss. Dram Shop laws seek to compensate injured persons, especially in situations where the injured person cannot be made whole from the automobile insurance of the intoxicated driver or the assets of the intoxicated driver. Further, tort law seeks to deter behavior that is injurious to others. An argument could be made that some establishments that do not carry sufficient insurance will not be punished effectively under Dram Shop laws and furthermore, the injured party will not be made whole if the establishment's insurance is not sufficient or the establishment is able to file bankruptcy, become effectively judgment-proof, and then reopen under another name. Regardless, statistics prove the effectiveness of Dram Shop laws. Since the implementation of Dram Shop laws in the early 1980s, the number of drunk driving deaths has been cut in half. Further, the percentage of all traffic fatalities that are alcohol-related has declined from about fifty-four percent in 1986 to about thirty-nine percent in 1997. The alcohol-induced fatality rate has continued to decline through 2013, from forty-four percent in 2004 to thirty-four percent in 2013. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *Alcohol-Impaired Driving* (Dec. 2014), http://www-nrd.nhtsa.dot.gov/Pubs/812102.pdf (reporting 2013 traffic safety facts).

125. *See* French, Kaput & Wildman, *supra* note 124, at 1121–22.

126. *See* GEN. OBLIG. §§ 11-100, 11-101.

127. *See* Kramer v. Cont'l Cas. Co., 641 So. 2d 557, 570 (La. Ct. App. 1994); Dogan Gursoy, Christina G. Chi & Denney G. Rutherford, *Alcohol-Service Liability: Consequences of Guest Intoxication*, 30 INT'L J. HOSP. MGMT. 714, 716 (2011).

128. *See* Gursoy et al., *supra* note 127, at 716.

drive—initiating the issue that Dram Shop laws seek to prevent.[129] Dram Shop laws also incentivize commercial establishments that serve alcohol to invest in additional insurance to assist in potential future lawsuits under Dram Shop.[130] The issues associated with Dram Shop laws, including improper refusal or eviction and increased insurance implications, result in critics concluding that Dram Shop laws are ineffective and ultimately aim to punish the wrong party.[131] At the end of the day, individuals are responsible for their own negligence and many argue that Dram Shop laws simply place liability on a third party who cannot control the acts of individuals who choose to drive while intoxicated.[132]

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129. In *Kramer*, a motel allowed a high school party where underage attendees drank alcohol. After several complaints, the motel evicted all non-registered attendees. 641 So. 2d at 561. The plaintiff left in a vehicle driven by an attendee of the party. The attendee crashed his vehicle, resulting in serious injury to the plaintiff. The court held that the motel's "actions of throwing out intoxicated under age teenagers onto the motoring public was the worse [sic] possible option the [motel] did exercise, after allowing them to get intoxicated there." *Id.* at 570.

130. *See generally* GEN. OBLIG. §§ 11-100, 11-101.

131. *See* Ivan Lovegren, *Dram Shop Laws Penalize the Wrong People*, THE DAILY NEBRASKAN, http://www.dailynebraskan.com/ivan-lovegren-dram-shop-laws-penalize-the-wrong-people/article_4628022f-891e-5b0c-837e-7cd78dac827c.html (last updated Mar. 3, 2006) (discussing an initial jury award of $35 million against a liquor store in F.F.P. Operating Partners, L.P. v. Duenez, 237 S.W.3d 680 (Tex. 2005) while the drunk driver was not held civilly liable).

132. *See id.*

VI. WHEN JUDICIALLY CREATED LAW LAGS: THE NEED FOR LEGISLATION

The United States is comprised of approximately 326 million people; however, there are 396 million cell phone service accounts.[133] The United States Supreme Court has described cell phone usage in the U.S. as "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."[134] Solidifying this sentiment, the *Modisette* court noted that "[i]t is not only foreseeable that millions of people will have their cell phones in their cars—it is almost a certainty."[135]

Although New York courts could absolutely recognize sender liability without expanding the traditional concepts of duty, it may take many years for the right case to percolate through the system, giving the courts an opportunity to recognize sender liability. In the event the courts do not find the opportunity to recognize this basic concept of duty, the legislature should step in before more innocent people are injured or killed due to texting while driving. New York State has recognized the pervasive use of cellphones by drivers and the associated dangers.[136] Section 1225(c) of New York State's Vehicle and Traffic Law restricts drivers from holding a mobile telephone to the user's ear, dialing or answering a mobile telephone, or reaching for a mobile telephone in a way that requires the driver to move to a position that is not a driving position.[137] Recently, New York has become stricter with its distracted driving laws, where a violation of such results in five violation points and a fine.[138] Reducing

133. Modisette v. Apple Inc., 241 Cal. Rptr. 3d 209, 221 (Cal. Ct. App. 2018).

134. Riley v. California, 573 U.S. 373, 385 (2014).

135. *Modisette*, 241 Cal. Rptr. 3d at 222.

136. *See* N.Y. VEH. & TRAF. LAW § 1225(c) (McKinney 2013).

137. *Id.*

138. *Cell Phone Use & Texting*, N.Y. DEP'T MOTOR VEHICLES (last visited Feb. 11, 2020), dmv.ny.gov/tickets/cell-phone-use-texting.

distracted driving has been an imperative initiative in New York, opening the doors for possible recognition of sender liability by the legislature.[139]

A. *The Development of Cellphone Software to Limit Use when Driving*

Following complaints of technology manufacturers' failure to incorporate software that "warns" drivers or "locks" the phone from allowing distractions, many applications, or "apps," have been developed to meet demands.[140] Apps that block texting while driving include Cellcontrol, Live2Txt, and Drive Safe Mode.[141] Cellcontrol includes a device, which the manufacturer installs under the dashboard of a car and blocks sending or receiving text messages while the vehicle is in motion.[142] Both Cellcontrol and Drive Safe Mode will alert parents when the device is disabled or overridden.[143] Live2Txt is unique in that, when activated, the app alerts the sender of a text message with a message that the driver is unable to respond at the moment.[144] These apps not only deter drivers from texting while driving, but apps such as Live2Txt also provide the sender of text messages with knowledge that the driver is unable to respond.[145] The most extreme of these new technologies to deter distracted driving is ORIGOSafe, a device that, when installed, restricts the vehicle from starting until the phone is docked into the center console.[146] Currently, it seems that particularly large

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139. Kingsley Nwamah, *Reasonable Mistakes of Law in the Digital Age Following Heien v. North Carolina*, 10 ALB. GOV'T L. REV. 532, 547–48 (2017).

140. *See* Evan Shamoon, *Best Apps to Block Texting While Driving*, VERIZON WIRELESS, https://www.verizonwireless.com/articles/best-apps-to-block-texting-while-driving/ (last updated Jan. 24, 2016).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *See id.*

146. ORIGOSAFE DISTRACTED DRIVING SYSTEM, https://vehicletechstore.com/

companies who are looking to reduce incidents of their drivers engaging in distracted driving have considered this technology in a limited capacity.[147] These apps, software, and locking devices are novel technologies, but, as more statistical data is gathered, they may become more prevalent among licensed drivers.

Courts have yet to impose the use of these types of applications or devices in cases where drivers caused accidents by texting and driving.[148] However, it is conceivable that courts may order offenders to install interlock devices after charges associated with distracted driving in the future.[149] Similar to those convicted of drunk driving being ordered to pay for, install, and maintain interlock equipment that disables the vehicle until a negative breathalyzer test is administered, courts may impose those convicted of distracted driving to submit to an interlock device that disables the vehicle until a cellphone is docked and remains docked.[150] Although courts have not implemented this practice, the Rhode Island legislature has considered this approach to deterring rates of repeat distracted-driving offenses.[151] Unfortunately, given the courts' reluctance to require recidivist distracted drivers to install interlock devices or software applications and the lack

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product/origosafe-distracted-driving-system/ (last visited Nov. 26, 2019).

147. *Id.*

148. Adam M. Gershowitz, *Texting While Driving Meets the Fourth Amendment: Deterring Both Texting and Warrantless Cell Phone Searches*, 54 ARIZ. L. REV. 577, 611 (2012) ("[T]here is no reason why states cannot require offenders convicted of texting while driving to use such devices, just as most states require drivers convicted of driving drunk to use alcohol ignition interlock devices.").

149. *See id.*

150. It is conceivable that future courts may consider requiring distracted driving offenders to install an interlock device in their vehicles. Distracted driving is equally as dangerous as driving while intoxicated and courts are willing to require the installation of interlock devices to "reduce the dangers of recidivist drunk driving." *See id.*

151. *Id.* (noting that the proposal has been at a standstill since being shelved after it was proposed during a committee hearing).

of action on behalf of state legislatures, this innovative idea may not become a reality for years to come.

B. *Cellphone Software's Insufficiency to Solve Texting and Driving Accidents*

Although innovative, technology, software, and apps developed to deter texting while driving have been less than effective overall.[152] Products such as Live2Txt are making steps in the right direction; however, they still allow the driver's phone to receive a text message, causing the phone to notify the driver of the message.[153] Phone companies are not willing to disable phones, as the technology can be unreliable, resulting in passengers' phones being disabled while in a moving vehicle.[154] Even if manufacturers could improve the technology to disable drivers' phones, companies remain hesitant to control their customers, who pay the service to "communicate on the go."[155] Without technology manufacturers such as Apple and Samsung deploying message-blocking software, parties continue to seek other avenues of relief through imposing liability on third parties.

C. *Dram Shop Law as a Blueprint for Sender Liability*

Sender liability seeks to impose a duty on third parties who are not in the vehicle but who text a driver and which text distracts the driver, resulting in the driver causing an

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152. *See* Matt Richtel, *Phone Makers Could Cut off Drivers. So Why Don't They?*, N.Y. TIMES (Sept. 24, 2016), https://www.nytimes.com/2016/09/25/technology/phone-makers-could-cut-off-drivers-so-why-dont-they.html.

153. *See generally id.*

154. *Id.*

155. Documents uncovered during a recent trial suggest that Apple has patented technology on software that would lock a driver's phone. This software is able to detect if the phone is moving and if the driver is using the phone. Despite this, Richtel suggests that Apple has not deployed this technology because controlling its paying customers could have a negative effect on its profits. *Id.*

accident and injuring another.[156] New York's Dram Shop laws seek to impose a duty on third parties who are not at the site of an accident but who serve an intoxicated customer, resulting in an intoxicated driver causing an accident and injuring another.[157] When defined side by side, sender liability and Dram Shop laws do not look significantly different.[158] Both laws seek to curb an epidemic by placing liability on remote third parties, where their negligence contributed significantly to the resulting harm.[159] Therefore, New York's Dram Shop Act serves as an appropriate blueprint for the legislature to design a sender liability statute.

1. Major Differences and Gaps in the Law

Dram Shop laws and sender liability have a few conceptual similarities; however, this does not erase the fact that there are notable differences between the two types of third-party liability. There is no doubt that sender liability does not neatly fit into Dram Shop laws, as Dram Shop laws focus intently on commercial suppliers of alcohol, and the third party, namely, the seller of alcohol, has direct contact with the intoxicated individual prior to the accident.[160]

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

157. N.Y. GEN. OBLIG. LAW §§ 11-100, 11-101 (McKinney 2010).

158. *See* LeBeau, *supra* note 7 (summarizing findings from a test designed to test reaction times when sober, when legally drunk at 0.08 blood alcohol content, when reading an e-mail, and when sending a text message). When unimpaired, the driver took .54 seconds to break and when legally drunk this added four feet to the location where the vehicle came to a full stop. Compare these numbers to the thirty-six feet added when reading an e-mail and seventy feet added when sending a text message.

159. *See* Meador v. Apple Inc., 911 F.3d 260, 266 (5th Cir. 2018) (comparing technology manufacturer liability to Dram Shop laws). The court stated, "[t]o our minds, the closest analogy offered by Texas law is so-called dram shop liability: the liability of commercial purveyors of alcohol for the subsequent torts or injuries of the intoxicated customers they served." Under that law, the court continued, "a person remains liable for her own negligent acts, but the incapacitating qualities of the product, which contribute to the person's negligence, can subject the seller to liability as well." *Id.*

160. GEN. OBLIG. §§ 11-100, 11-101.

The first two elements of New York's Dram Shop Act require that the seller unlawfully sold or procured alcohol for the intoxicant and that the seller sold the alcohol to the intoxicant when the intoxicant was visibly intoxicated.[161] Foundational to these requirements is a direct contact between the seller and intoxicated individual.[162] This gives the seller an opportunity to view the intoxicated individual and to make a sound decision to refuse to continue to sell based on direct observation.[163] On the other hand, sender liability implicates a third-party remote texter who may not have had any physical contact with the driver in days, weeks, or at all.[164] This element of sender liability further removes the third-party texter from the driver, causing foreseeability concerns.[165]

New York's Dram Shop Act also requires that the seller be commercial.[166] In *Place*, the court did not hold the mother liable for providing alcohol to the driver because liability under New York's statute requires there to be a commercial sale of alcohol.[167] Support for this requirement can be found in the holding of *D'Amico v. Christie*, a landmark New York decision in the context of Dram Shop law and interpretation.[168] The *D'Amico* court held, "[t]hat the statute is properly limited to sellers of intoxicating liquors is made plain even by its title: 'Compensation for injury caused by the illegal sale of intoxicating liquor.'"[169] The body of the statute also speaks of "unlawfully selling" alcohol.[170] This

161. *Id.*

162. *See id.*

163. *See id.*

164. *See* Kubert v. Best, 75 A.3d 1214, 1228 (N.J. Super. Ct. App. Div. 2013).

165. *Id.* at 1227.

166. Place v. Cooper, 827 N.Y.S.2d 396, 398 (App. Div. 2006).

167. *Id.*

168. 518 N.E.2d 896, 896 (N.Y. 1987).

169. *Id.*

170. *Id.* ("When the Legislature intended to reach the broader category of

requirement adds an element of responsibility to commercial establishments in particular, where employees are trained to identify intoxicated individuals, as opposed to a mere individual providing alcohol to another.

2. Significant Similarities of Dram Shop Law and Sender Liability

New York's Dram Shop Act is not a perfect model for sender liability to copy verbatim. However, its similarities are prominently more significant than its differences. Few laws are perfect reiterations of one another, yet they can build upon each other and evolve current law to address contemporary epidemics.[171]

First, Dram Shop laws have focused on imposing liability on third parties who are not present at the scene of the incident.[172] Sender liability also seeks to impose liability on remote third-party "texters" who distract drivers, resulting in harm to another.[173] A policy consideration for imposing this type of liability on third-party texters is a strategic move to marry moral duty with legal duty, resulting in liability for those who have control in sending a distracting text message, thus engaging in a reasonably foreseeable risk.[174] A secondary policy comparison is that driving while intoxicated

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alcohol providers—as it did in 1983 in adding General Obligations Law § 11-100, applicable to minors—it said exactly that.").

171. *See* Meador v. Apple Inc., 911 F.3d 260, 265–66 (5th Cir. 2018); Jordan Michael, *Liability for Accidents From Use and Abuse of Cell Phones: When are Employers and Cell Phone Manufactures Liable?*, 79 N.D. L. REV. 299, 299 (2003) (indicating that approximately eighty-five percent of Americans who own cell phones use them while they are driving); LeBeau, *supra* note 7 (concluding that texting and driving is, on average, more dangerous than drinking and driving).

172. *See generally* N.Y. GEN. OBLIG. LAW §§ 11-100, 11-101 (McKinney 2010).

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

174. Morgan Gough, *Judicial Messaging: Remove Texter Liability As Public Education*, 44 U. BALT. L. REV. 469, 483 (2015) ("Just as providing an insane person with a firearm, or continuing to serve alcohol to a patron who is likely to drive, irresponsibility enhances the risk of harm, so, too, does willfully inducing a driver to text while driving.").

and distracted driving are both trends that grew significantly over time, causing substantial injury and death, demanding legislative action.[175]

Beyond policy considerations, there is clear statutory language that suggests Dram Shop laws provide an effective blueprint for the New York legislature to consider in enacting sender liability. In order to find liability under Dram Shop laws, one must prove that: (1) a commercial establishment sold alcohol to (2) a visibly intoxicated individual, and (3) such behavior resulted in injury to another.[176] Likewise, the court in *Kubert* held that sender liability could only be found when, (1) a texter sends a message to (2) an individual they know or should know is driving and would be distracted by the message, and (3) such behavior resulted in injury to another.[177]

The *Kubert* court structured sender liability around the full duty analysis presented in *Desir*, which includes considerations of the following four factors when imposing third-party liability: (1) the relationship of the parties, (2) the nature of the risk, (3) the ability to exercise care, and (4) public policy considerations.[178] In sender liability cases, the parties typically know each other well, the texter knows that if the recipient receives a text message it will be distracting, refraining from texting is an easy and effective solution, and there are vast public policy arguments that urge drivers not to drive distracted and risk the innocent lives of others.[179]

The relationship of the parties negates some of the criticisms regarding the ability to relate sender liability to

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175. *See* Ogozalek, *supra* note 7 and accompanying text; LeBeau, *supra* note 7 (concluding that reaction times are up to four times slower when checking an e-mail or text message on your phone while driving than drivers who drive undistracted).

176. *See* GEN. OBLIG. §§ 11-100, 11-101.

177. *Kubert*, 75 A.3d at 1219.

178. *See supra* note 21 and accompanying text.

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

Dram Shop laws. Although a texter may not have the same direct physical contact with the driver as does a bartender with an intoxicated consumer, texters and drivers tend to have an arguably closer personal relationship than any given intoxicated person has with a bartender. Most individuals frequently text their significant others, close friends, siblings, and parents. These people are close to the individual and typically know the individual's habits such as whether or not they text and answer calls while driving, whether they allow more than three minutes to pass before sending a response, or whether they habitually leave their phone in the glovebox when they are in the car. This personal knowledge of the third party about the character, behavior, and habits of the driver is unique to third-party liability scenarios. Perhaps it is this strong personal knowledge and relationship that establishes a sufficient connection between the driver and third-party texter that makes it possible to hold the third party liable. Therefore, it follows that a texter sending a message to a driver who, due to a special, personal relationship, knows that the driver will be urged to immediately respond to the text message, can foresee that their behavior could reasonably cause a harm to the public.[180] This special relationship and foreseeability is debatably much stronger than the relationship between a bartender and a random intoxicated customer.

3. Considerations for a Sender Liability Statute in New York State

Given that distracted driving continues to become a societal norm, New York State should proactively address this issue through sender liability legislation. *Vega* was the first and only opportunity that the New York courts had at analyzing and determining the merits of sender liability. Unfortunately, the facts of the case were weak, with evidence proving that Cratsley did not have knowledge, nor should she

180. *See id.*

have reasonably known that the decedent was driving.[181] Without a special relationship between the parties that would arguably prove that Cratsley knew the decedent was driving and that the text messages would provoke him in such a manner as to distract him from driving, the court did not have a fact pattern to work with to sufficiently consider sender liability.[182] Given the lack of evidence, the case did not survive summary judgment.[183] Notably, the court stated:

> This court is not ignorant of the many steps taken by not only this state, but others in the nation, to protect against motorists texting while driving. While that certainly is not the only issue presented for consideration, this court does not believe it is the province of a court to establish a precedent for want of a statute that otherwise has not been considered, let alone approved, by a legislative body. Though many would prefer a court simply to make law where either a legislative body or executive has failed to do so, this court does not believe that is its role. It is not the role of the judiciary to sit on high and promulgate what it believes should have been a policy determination made elsewhere. Instead, the courts have deferred to the wisdom, or absence of it, of the legislature in defining what is actionable and what is not.[184]

The court's language in *Vega* does not outright reject the concept and principles of sender liability.[185] Rather, the court leaves the issue open for the New York State legislature to address.[186] Although the courts could still recognize sender liability, as it is not a revolutionary expansion of duty, given the distracted driving epidemic in New York, the legislature should address the issue by creating law instead of waiting for more tragic accidents to occur.

Sender liability is very structured and limited to quite specific situations.[187] The New York State legislature could

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181. Vega v. Crane, 49 N.Y.S.3d 264, 266–67 (Sup. Ct. 2017).

182. *Id.* at 268.

183. *Id.* at 272.

184. *Id.*

185. *See id.*

186. *Id.*

187. *See generally id.*; Kubert v. Best, 75 A.3d 1214, 1229 (N.J. Super. Ct. App.

create a sender liability statute that will deter the occurrence of texting while driving while not egregiously expanding third-party duty. In her article that suggests cell phones are a new form of "weapons of mass destruction," Linda Fentiman notes that insurance companies address issues more swiftly when the companies themselves feel the "sting of large jury verdicts."[188] If the legislature enacted sender liability law, insurance companies would be likely to follow suit by revising structures to provide rewards to those in compliance.[189] Fentiman suggests that insurance companies reward employers who enact company policies against distracted driving, individuals who take "safe driving" courses that speak to the dangers of distracted driving, or even provide incentives to drivers who install devices in their vehicles that disable the driver's phone while the car is in motion.[190]

Although critics argue that sender liability may cause a "slippery slope" for liability, realistically, this is unlikely to be the case.[191] Enacting sender liability legislation would not negate the duty that drivers have to use reasonable care while driving, including not allowing distracting stimuli to interfere with their driving.[192] Furthermore, sender liability implicitly requires a level of conscious awareness on behalf of the texter of the danger before the text is sent.[193] This

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Div. 2013).

188. Linda C. Fentiman, *A New Form of WMD? Driving with Mobile Device and Other Weapons of Mass Destruction*, 81 UMKC L. REV. 133, 180 (2012).

189. *Id.* at 180–81.

190. *Id.* at 182 ("[S]trict product liability law revolutionized the behavior of product manufacturers and dram shop and social host liability statutes cut down on the behavior of furnishing alcohol to presently or potentially inebriated drivers." (footnote omitted)).

191. Gough, *supra* note 174, at 485 (considering the argument that the *Kubert* rule may not remain confined to text messaging and could include distractions created by any app such as Facebook messages, Twitter replies, Snapchat images, email, or even voicemail messages).

192. *Id.*

193. *Id.* at 487.

knowledge requirement limits sender liability sufficiently.

VII. CONCLUSION

A special relationship is formed when an individual texts another who is driving and they reasonably know that the driver will be distracted by the text message and encouraged to at least read and potentially respond.[194] In this circumstance, the texter has a duty to act reasonably when the action they are about to make foreseeably creates a risk of harm to others.[195] This traditional negligence concept appears in many third-party duty statutes, such as social host and Dram Shop liability.[196] Using this concept to enact a sender liability statute would effectively deter distracted driving, especially in cases of texting and driving.

The New York legislature enacted the Dram Shop Act in response to the epidemic of driving while intoxicated, which caused hundreds of fatalities per year.[197] Today's epidemic of distracted driving is analogous to that of the prevalence of drunk driving, which demanded attention from the legislature.[198] New York's Dram Shop Act provides a blueprint for potential sender liability law because it limits liability to those who have a special relationship with the driver, requires a knowledge component that the driver is a foreseeable risk to others, and imposes a causation requirement where the behavior of the third party was materially significant in causing the incident. Similarly, sender liability imposes liability on a third-party texter who has knowledge that the individual is driving and will be distracted by the text message and such distraction is

194. *See* Kubert v. Best, 75 A.3d 1214, 1226 (N.J. Super. Ct. App. Div. 2013).

195. *Id.*

196. *See generally* N.Y. GEN. OBLIG. LAW §§ 11-100, 11-101 (McKinney 2010); Rust v. Reyer, 693 N.E.2d 1074, 1076 (N.Y. 1998).

197. *See* GEN. OBLIG. §§ 11-100, 11-101; D'Amico v. Christie, 518 N.E.2d 896, 898 (N.Y. 1987); Berkeley v. Arthur Park, 262 N.Y.S.2d 290, 293 (Sup. Ct. 1965).

198. *See* GEN. OBLIG. §§ 11-100, 11-101; Ogozalek, *supra* note 7; NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 6 and accompanying text; LeBeau, *supra* note 7.

materially significant in causing an accident.[199]

The New York State courts have not been allotted the opportunity to consider a case containing facts that would survive summary judgment and allow full sender liability analysis. Without this, as concluded by the *Vega* court, it is the role of the New York State legislature to step in and intervene in an epidemic that kills more than 3,000 people and injures almost 400,000 people in a year.[200] Sender liability, if recognized by the New York legislature, will discourage dangerous conduct efficiently. The elements are difficult to meet, as it requires a remote texter with knowledge that the recipient is driving and will be distracted by the text.[201] However, in the cases where it does apply, it will stop individuals from mindlessly distracting drivers who must take care while on the road, resulting in fewer accidents and ultimately, fewer deaths. If recognition of sender liability in New York saved even one life, it would be well worth the effort.

199. *Kubert*, 75 A.3d at 1226.

200. *See* Vega v. Crane, 49 N.Y.S.3d 264, 271 (Sup. Ct. 2017); NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 6 and accompanying text.

201. *Kubert*, 75 A.3d at 1226.