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Comment

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

MICHAELA CRONIN*

I. I'M YOUR BASIC AVERAGE CASE LAW AND I'M HERE TO SAVE THE WORLD (FROM TEXTERS): AN INTRODUCTION TO SENDER LIABILITY

Is there blood on your touchscreen? Check again, because your cellular activity in this very moment could be legally responsible for claiming the life of another person miles away.¹ In some contexts, this isn't so hard to believe.² For example, it seems understandable why a court would convict a girl of involuntary manslaughter after she sent text messages encouraging her boyfriend to commit suicide, as in the recent and highly publicized case of Michelle Carter.³ Although controversial, the court was

* J.D. Candidate, 2019, Villanova University Charles Widger School of Law; B.A. 2016, University of Rochester. This Comment is dedicated to my parents, Linda Cronin and Susan Newcomb, and my twin sister, Mackenzie Cronin, who have supported me relentlessly throughout my life and law school career. I would also like to thank Sharon O'Reilly for helping create the theme of my Comment, Lauren DeBona and Charlotte Merritt for giving me a family at Villanova, and everyone on *Villanova Law Review* who has helped me pursue my goals as a Staff Writer, student, and young professional.

The headings used throughout this Comment were inspired by the theme song for the Disney Channel television series *Kim Possible*. See CHRISTINA MILIAN, *CALL ME, BEEP ME! (The Kim Possible Song)*, on THE KIM POSSIBLE SOUNDTRACK (Walt Disney Records 2003).

1. See, e.g., *Commonwealth v. Carter*, 52 N.E.3d 1054, 1065 (Mass. 2016) (denying defendant's motion to dismiss indictment for involuntary manslaughter after defendant, through a series of text messages, encouraged boyfriend to commit suicide). For a further discussion of *Carter*, in which the defendant was indicted on charges of involuntary manslaughter of a victim located miles away, see *infra* note 3 and accompanying text.

2. See *Carter*, 52 N.E.3d at 1057–59 (discussing conduct of defendant). For a further discussion of the facts of *Carter*, see *infra* note 3.

3. See *id.* at 1059–65 (discussing court's reasoning for affirming defendant's indictment for involuntary manslaughter after she encouraged her boyfriend to commit suicide through series of text messages). In *Carter*, after the victim was found dead in his car, medical examiners concluded that he "had died after inhaling carbon monoxide that was produced by a gasoline powered water pump located in the [victim's] truck" and that "[t]he manner of death was suicide." See *id.* at 1056. Transcripts of text messages exchanged between the defendant and the victim leading up to the victim's death showed that "the defendant encouraged the victim to kill himself, instructed him as to when and how he should kill himself,

ultimately convinced that there was probable cause for a grand jury to consider Carter's messages lethal despite her remote physical location at the time of the victim's death.⁴

Mobile application developers have also faced legal action for allegedly remotely contributing to the injury or death of others.⁵ In 2014, the family of Sophia Liu sued Uber, a ride-share service, after its driver hit and killed the young girl while distracted by his mobile Uber application, which required him to input data while driving.⁶ One year later, a driver took legal action against Snapchat, a mobile photo-sharing platform, for allegedly inciting drivers to travel at excessive speeds in order to capture them on the application's "speed-filter."⁷ That same year, Apple faced a lawsuit for failing to incorporate a message-locking feature in its iPhone devices that would prevent iPhone users from texting while driving.⁸

assuaged his concerns over killing himself, and chastised him when he delayed doing so." *Id.* at 1057–58 (footnotes omitted). In particular, while the victim was in the process of committing suicide, he "got out of his truck because he was 'scared,' and the defendant commanded him to get back in" via text message. *See id.* at 1059 (footnote omitted). The defendant admitted that she could have prevented the victim's suicide, signifying that she understood her role in his death. *See id.*

The defendant filed a motion to dismiss for lack of probable cause, and argued that "because she neither was physically present when the victim killed himself nor provided the victim with the instrument with which he killed himself," she could not be held legally responsible for his death. *See id.* at 1061. The court rejected her argument, explaining that although it had never before considered "an indictment [for involuntary manslaughter] against a defendant on the basis of words alone," the crime of involuntary manslaughter had never required a physical act in execution of the victim's death. *See id.* at 1062. After discussing several cases in which the court had previously "contemplated the charge of involuntary manslaughter against a defendant where the death of the victim [was] self-inflicted," the court determined that the defendant's communications with the victim in his final moments overcame "any independent will to live he might have had." *Id.* at 1062–63 (citations omitted). As a result, the court held that sufficient evidence existed to find probable cause that the defendant had committed involuntary manslaughter by way of wanton or reckless conduct. *Id.* at 1063.

4. *See id.* For a discussion of the court's analysis in *Carter*, see *supra* note 3 and accompanying text.

5. For a discussion of cases brought against mobile application developers for allegedly remotely contributing to the injury or death of others, see *infra* notes 6–8 and accompanying text.

6. *See* Complaint for Damages and Demand for Jury Trial at 9–16, *Liu v. Uber Techs., Inc.*, No. CGC-14-536979, 2014 WL 285058 (Cal. Super. Ct. Jan. 27, 2014) (stating plaintiff's claim that Uber caused its driver to hit decedent).

7. *See* *Maynard v. McGee*, No. 16-SV-89, 2017 WL 384288, at *2–3 (Ga. St. Ct. Jan. 20, 2017) (addressing claim brought against Snapchat, Inc. for alleged role in causing death). In *Maynard*, Snapchat's motion to dismiss for failure to state a claim was granted because the plaintiff's claims were barred by the Communications Decency Act, which "protect[s] Internet platforms from the threat of tort-based lawsuits and maintain[s] the robust nature of Internet communication." *See id.* at *2 (citing 47 U.S.C. § 230(c) (1998)).

8. *See* *Meador v. Apple, Inc.*, No. 6:15-cv-715-RWS-KNM, 2017 WL 3529577, at *2 (E.D. Tex. Aug. 17, 2017), *appeal filed*, No. 17-40968 (5th Cir. Sept. 9, 2017) (addressing claim brought against Apple for causing injury). In *Meador*, the plain-

These situations raise legal questions of increasing significance as people continue to rely on mobile technology to communicate with others down the road, in another state, and across the globe.⁹ Facing liability for encouraging a suicide via text or developing mobile software programs to be used while driving may appear to be a remote occurrence.¹⁰ Nevertheless, anyone carrying a cell phone could be much more capable of killing than they might expect, based on the controversial theory of “sender liability.”¹¹ This theory, established by a New Jersey court in *Kubert v. Best*,¹² allows a plaintiff injured in an automobile accident to hold a remote party responsible for their injuries if that remote party sent a text message to the driver of the car knowing that the recipient of the message was driving, and that message distracted the recipient and ultimately contributed to the collision.¹³

tiffs brought strict liability and negligence claims against Apple after a non-party allegedly “used her iPhone to check messages while driving, was inattentive to the road and, therefore, caused injury to the Plaintiffs.” *See id.* at *1. The plaintiffs claimed that Apple had unreasonably and dangerously designed and marketed its iPhones by failing to install software in them that would automatically prohibit iPhone owners from using the devices while driving and by failing to warn customers of the dangers of using the iPhone while driving. *See id.* The district court adopted the report and recommendation of a United States Magistrate Judge, which recommended that the plaintiffs’ claims against Apple be dismissed with prejudice because (1) the plaintiffs did not establish that defective design or marketing of the iPhone caused the accident or resulting injuries, and (2) “any defective or negligent design was too attenuated from Plaintiffs’ injuries because of [the driver’s] neglect of her duty to safely operate her vehicle.” *See id.* (citation omitted).

9. *Cf. Global Mobile Data Traffic from 2016 to 2021 (in Exabytes per Month)*, STATISTA, <https://www.statista.com/statistics/271405/global-mobile-data-traffic-forecast/> [<https://perma.cc/J68M-GKWU>] (last visited Sept. 18, 2017) (“In 2016, global mobile data traffic amounted to 7 exabytes per month. In 2021, mobile data traffic worldwide is expected to reach 49 exabytes per month at a compound annual growth rate of 47 percent. Everyday mobile activities such as mobile social media usage, including mobile chat and voice or video calls, and mobile e-commerce drive mobile traffic . . .”).

10. For a discussion of a case in which a defendant was convicted of involuntary manslaughter for encouraging her boyfriend via text message to commit suicide, see *supra* notes 1–4 and accompanying text. For a discussion of cases in which mobile application developers were sued for creating software for use while driving, see *supra* notes 6–8 and accompanying text.

11. *See, e.g., Kubert v. Best*, 75 A.3d 1214, 1219, 1226 (N.J. Super. Ct. App. Div. 2013).

12. 75 A.3d 1214 (N.J. Super. Ct. App. Div. 2013).

13. *See id.* at 1229 (holding “when a texter knows or has special reason to know that the intended recipient is driving and is likely to read the text message while driving, the texter has a duty to users of the public roads to refrain from sending the driver a text at that time”); Emily K. Strider, Note, *Don’t Text a Driver: Civil Liability of Remote Third-Party Texters After Kubert v. Best*, 56 WM. & MARY L. REV. 1003, 1017 (2015) (discussing the foreseeability approach to sender liability outlined by *Kubert*).

Since *Kubert*, similar cases have been brought in New York and Pennsylvania.¹⁴ While New York refused to adopt sender liability in *Vega v. Crane*,¹⁵ the Pennsylvania case, *Gallatin v. Gargiulo*,¹⁶ sustained a plaintiff's complaint on a theory of sender liability, but the case was eventually settled before the court heard a motion for summary judgment.¹⁷ Despite the lack of Pennsylvania precedent on sender liability, the Court of Common Pleas in Lawrence County, Pennsylvania relied on *Kubert* to allow *Gallatin* to proceed against two remote texters, signifying the possible adoption of sender liability.¹⁸

As the third state in the country to consider the theory of sender liability after it has been adopted by one state and rejected by another, the next Pennsylvania court to decide the issue has the potential to tip the scales and establish a majority stance on the issue for other states to follow.¹⁹ Although it is impossible to be sure how a Pennsylvania court will rule, it is clear that, after an increase in the frequency of in-state distracted driving, the state has prioritized reducing the practice of texting and driving.²⁰ In 2016, Pennsylvania implemented "Daniel's Law" in the name of the decedent in *Gallatin*, which increased the penalties for accidents

14. See *Vega v. Crane*, 49 N.Y.S.3d 264, 271 (Sup. Ct. 2017) (considering theory of sender liability in New York); *Gallatin v. Gargiulo*, No. 10401 of 2015, C.A., 2016 WL 8715650, at *4 (Pa. Ct. Com. Pl. Lawrence Cty. Mar. 10, 2016) (acknowledging possibility of applying sender liability in Pennsylvania).

15. 49 N.Y.S.3d 264, 271 (Sup. Ct. 2017) (refusing to adopt sender liability in New York). For a further discussion of the *Vega* decision, see *infra* notes 46–61 and accompanying text.

16. No. 10401 of 2015, C.A., 2016 WL 8715650 (Pa. Ct. Com. Pl. Lawrence Cty. Mar. 10, 2016). For a discussion of the most recent developments in *Gallatin*, see *infra* notes 63–74 and accompanying text. Note that before a motion for summary judgment was heard in this case, the parties agreed to a voluntary dismissal; thus, the Pennsylvania trial court did not render a decision on the merits of the case.

17. See Fredrick Kunkle, *Case Dismissed Against Person Who Texted Driver in Fatal Pennsylvania Crash*, WASH. POST (Feb. 3, 2018), https://www.washingtonpost.com/news/tripping/wp/2018/02/03/case-dismissed-against-person-who-texted-driver-in-fatal-pennsylvania-crash/?utm_term=.68849145b436 [https://perma.cc/ECG6-C6H6].

18. See *Gallatin*, 2016 WL 8715650, at *4 (citing *Kubert* to acknowledge that "sender of a text message can be liable for sending a text message while the recipient is operating a motor vehicle if the sender knew or had reason to know the recipient was driving"). For further discussion of the *Kubert* decision, see *infra* notes 26–45 and accompanying text.

19. For a discussion of the opposing conclusions reached by New Jersey and New York on the adoption of sender liability, see *infra* notes 26–61.

20. See *Is Distracted Driving on the Rise in Pennsylvania Despite Legal Bans?*, COHEN, FEELEY, ALTEMOSE & RAMBO, <http://www.cohenfeeley.com/Articles/Is-distracted-driving-on-the-rise-in-Pennsylvania-despite-legal-bans.shtml> [https://perma.cc/MET5-AZPK] (last visited Aug. 29, 2017) ("According to Fox News, last year alone, Pennsylvania drivers received 2,121 citations for distracted driving behaviors, such as texting or wearing earphones. The 1,410 drivers cited for texting in 2014 represented an increase over the 1,190 and 1,340 drivers cited in 2012 and 2013.").

caused by texting and driving that result in serious bodily injury or death.²¹

This Comment discusses the development of the law concerning the liability of remote texters involved in texting and driving accidents, and why Pennsylvania should not accept the theory of sender liability.²² First, Part II summarizes the recent New York and New Jersey case law discussing this topic.²³ Part III examines developments made in the *Gallatin* case, existing Pennsylvania statutory law concerning texting and driving, and areas of Pennsylvania law analogous to sender liability.²⁴ Finally, Part IV of this Comment analyzes why Pennsylvania should not adopt New Jersey's *Kubert* theory of sender liability, and should instead abide by the *Kubert* concurrence.²⁵

21. See *New PA Law Increases Penalties for Texting While Driving*, WGAL NEWS 9 LOCAL PA. (Jan. 4, 2017, 12:35 PM), <http://www.wgal.com/article/new-pa-law-increases-penalties-for-texting-while-driving/8243936> [https://perma.cc/X5ZD-XDCN] (“This law is named for Daniel Gallatin, a father, grandfather, military veteran, and fireman of nearly 40 years who was killed in May of 2013 when his motorcycle was struck from behind by someone who was texting while driving.”); cf. Morgan Gough, Comment, *Judicial Messaging: Remote Texter Liability As Public Education*, 44 U. BALT. L. REV. 469, 478–88 (2015) (explaining sender liability as method of public education on dangers of texting and driving). Gough expressed that imposing legal responsibility for texting a driver could be necessary in order to entice the public to pay better attention to the risks associated with texting and driving. *Id.* at 470. Gough states, “Today’s society is apathetic to the risks involved with distracted driving. Public service announcements, peer discussion, and even the prospect of a traffic ticket have failed to stem this serious hazard. Could the threat of civil liability accomplish what all of these conventional approaches to public education have not?” *Id.* Other states have taken alternative routes in condemning texting and driving behavior through the law. See, e.g., Ashlee Kieler, *New York Bill Would Require Drivers Involved in Crashes to Submit Phones to “Textalyzer”*, CONSUMERIST (April 12, 2016, 01:03 PM), <https://consumerist.com/2016/04/12/new-york-bill-would-require-drivers-involved-in-crashes-to-submit-phones-to-textalyzer/> [https://perma.cc/X9UY-DLP7] (explaining proposed “textalyzer” legislation that would require drivers to submit cell phones after car crashes for evaluation by device that would determine if driver was texting before accident).

22. For a discussion of the development of the law concerning the liability of remote texters involved in texting-while-driving accidents and why Pennsylvania should not accept the theory of sender liability, see *infra* notes 27–61, 62–179, and accompanying text.

23. For a discussion of the facts, analyses, and holdings reached in cases heard by the New Jersey and New York courts regarding the theory of sender liability, see *infra* Part II.

24. For a discussion of the facts that led the first Pennsylvania court to consider the theory of sender liability, as well as a discussion of existing Pennsylvania law concerning texting and driving, passenger liability, social host liability, and the duty owed by a physician to patients, see *infra* Part III. Note that while the *Gallatin* case settled out of court, the trial court’s opinion recognizing the possibility of sender liability in Pennsylvania remains as persuasive authority for future plaintiffs. See *Gallatin v. Gargiulo*, No. 10401 of 2015, C.A., 2016 WL 8715650, at *3–4 (Pa. Ct. Com. Pl. Lawrence Cty. Mar. 10, 2016).

25. For a discussion of why Pennsylvania ought to adopt the reasoning of the *Kubert* concurrence rather than its majority opinion, see *infra* Part IV.

II. DANGER OR TROUBLE, I'M THERE ON THE DOUBLE: THE DEBATE OVER
THE LIABILITY OF REMOTE TEXTERS IN NEW JERSEY
AND NEW YORK

The theory of sender liability has been evaluated in two state courts thus far.²⁶ It was first established by New Jersey in *Kubert*.²⁷ Four years later, a New York court debated the theory in the case of *Vega*, and ultimately rejected it.²⁸

A. *New Jersey's Establishment of Sender Liability in Kubert v. Best*

The Superior Court of New Jersey, Appellate Division heard the case of *Kubert* in 2013.²⁹ In *Kubert*, plaintiffs Linda and David Kubert were badly injured when defendant Kyle Best was texting while driving, crossed the center line of the road, and hit the Kuberts' motorcycle head-on.³⁰ After discovering that Best became distracted by text messages exchanged with his friend, Shannon Colonna, immediately before the collision, the Kuberts added her to the lawsuit.³¹ Although not enough evidence ex-

26. See *Kubert v. Best*, 75 A.3d 1214, 1229 (N.J. Super. Ct. App. Div. 2013) (establishing theory of sender liability); *Vega v. Crane*, 49 N.Y.S.3d 264, 271 (Sup. Ct. 2017) (refusing to adopt theory of sender liability). For a discussion of the opposing conclusions reached by New Jersey and New York on the adoption of sender liability, see *infra* Part II.

27. See *Kubert*, 75 A.3d at 1229 (“When a 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 harm to the public.”).

28. See *Vega*, 49 N.Y.S.3d at 271 (refusing to adopt theory of sender liability and stating that “[w]ith texting being as profligate, the potential expansion [of liability] as contemplated by the Plaintiff is astronomical”).

29. See *Kubert*, 75 A.3d at 1218–19 (considering issue of first impression against remote texters).

30. See *id.* at 1219. David Kubert was driving the motorcycle with his wife Linda riding as a passenger. See *id.* “As they came south around a curve, . . . a pick-up truck being driven north by” Best crossed the center line of the road into their lane, traveling head-on towards the Kuberts. *Id.* David Kubert attempted to evade Best’s vehicle, but was unsuccessful, and Best’s vehicle collided with the Kuberts and their motorcycle. See *id.* “The collision severed, or nearly severed, David’s left leg. It shattered Linda’s left leg, leaving her fractured thighbone protruding out of the skin as she lay injured in the road.” *Id.* “Medical treatment could not save either victim’s leg,” and thus “[b]oth lost their left legs as a result of the accident.” *Id.*

31. See *id.* at 1219–22. Cell phone records showed that Best and Colonna had exchanged sixty-two text messages on the day of the accident. See *id.* at 1219. Colonna testified that in a normal day, she would likely send over one hundred text messages, which she felt was typical of a young teenager. See *id.* at 1219–20. She also stated that “she generally did not pay attention to whether the recipient of her texts was driving a car at the time or not.” *Id.* at 20. Colonna apparently thought it was odd that the plaintiff’s attorney was trying to “pin her down on whether she knew that Best was driving when she texted him.” See *id.*

Although the context of the text messages between Best and Colonna was not introduced as evidence, the exact timing of the messages was compared to the time at which Best placed a phone call to 911 immediately after the accident to conclude that Best had been texting Colonna in the moments before the crash.

isted to ultimately establish liability on behalf of Colonna, the court ruled that “a person sending text messages has a duty not to text someone who is driving if the texter knows, or has special reason to know, the recipient will view the text while driving.”³²

As a basis for its decision, the court cited section 303 of the *Restatement (Second) of Torts* (Restatement), which states that “[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 another, a third person, or an animal in such a manner as to create an unreasonable risk of harm to the other.”³³ To illustrate section 303’s relevance, Colonna was likened to that of a passenger physically present in Best’s vehicle.³⁴ The court reasoned that from a passenger’s well-recognized duty to avoid interfering with the operations of a driver stems a passenger’s duty not to encourage a driver to look away from the road to attend to visual distractors, which exists so long as “the passenger knows, or has special reason to know, that the driver will in fact be distracted and drive negligently as a result of the passenger’s actions.”³⁵ This duty owned by passengers laid the foundation for the creation of a duty owed from remote texters to parties injured in distracted driving accidents.³⁶

See id. at 1220–21. “Seventeen seconds elapsed from Best’s sending a text to Colonna and the time of the 911 call after the accident,” during which Best must have been “stopping his vehicle, observing the injuries to the Kuberts, and dialing 911.” *Id.* at 1220. The court concluded that the text sent to Colonna by Best before he called 911 was a response to a text Colonna had sent him twenty-five seconds prior. *Id.* at 1220–21. The evidence also suggested that Best had initiated the texting conversation with Colonna “as he was about to and after he began” driving. *See id.* at 1221.

32. *See id.* at 1221. The Superior Court of New Jersey, Appellate Division affirmed the trial court’s dismissal of the plaintiffs’ claims against Colonna because the plaintiffs did not sufficiently prove Colonna knew Best was driving. *See id.* at 1221.

33. *See id.* at 1226 (quoting RESTATEMENT (SECOND) OF TORTS § 303 (AM. LAW INST. 1965)). The court also noted that “more than one defendant can be the proximate cause of [an injury] and therefore liable for causing injury.” *Id.* at 1222 (citation omitted).

34. *See id.* at 1228 (“When the sender knows that the text will reach the driver while operating a vehicle, the sender has a relationship to the public who use the roadways similar to that of a passenger physically present in the vehicle.”); *see also* Blair P. Keltner, Note, *Texters Beware: Analyzing the Court’s Decision in Kubert v. Best*, 75 A.3d 1214 (N.J. Super. Ct. App. Div. 2013), 39 S. ILL. U. L.J. 125, 126 (2014) (explaining that “the court analogized a remote texter to a passenger’s relationship with a driver” (citing *Kubert*, 75 A.3d at 1228)).

35. *See Kubert*, 75 A.3d at 1227 (explaining context of passenger’s duty not to distract driver).

36. *See id.* at 1221 (“[A] person sending text messages has a duty not to text someone who is driving if the texter knows, or has special reason to know, the recipient will view that text while driving.”). The court reiterated that when a party sends a text message to a person they know to be driving, and knows that the recipient “will read the text immediately,” the texter “has taken a foreseeable risk in sending a text at that time.” *See id.* at 1227. Because a texter in this situation

“has knowingly engaged in distracting conduct,” the court concluded that it is fair “to hold the sender responsible for the distraction.” *See id.*

The court attempted to limit its holding by explaining that “[i]mposing a duty on a passenger to avoid any conduct that might theoretically distract the driver would open too broad a swath of potential liability in ordinary and innocent circumstances.” *See id.* However, the court explained, because its holding focused on foreseeability, it was tailored closely enough to avoid overextending the duty owed by remote texters: while “[i]t is foreseeable that a driver who is actually distracted by a text message might cause an accident . . . it is not generally foreseeable that every recipient of a text message who is driving will neglect his obligation to obey the law and will be distracted by the text.” *Id.* The court’s heavy focus on the element of foreseeability in establishing the theory of sender liability is born from the close relation between foreseeability and one of the requisite elements of a negligence claim: proximate cause. *See id.* at 1221 (“On appeal before us, plaintiffs argue that Colonna is potentially liable to them if a jury finds that her texting was a proximate cause of the accident.”). To prove a negligence claim, a plaintiff must prove that: (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached this duty, (3) the defendant’s breach was the actual cause of the resulting injury to the plaintiff, (4) the defendant’s breach was the *proximate cause* of the resulting injury to the plaintiff, and (5) harm to the plaintiff. *See id.* at 1222 (reciting elements of negligence claim).

Every person owes a “duty of care” to other persons, meaning every person should reasonably avoid causing harm to others. *See The Importance of Foreseeability Tests in Personal Injury Cases*, CRAVEN, HOOVER, & BLAZEK P.C. (Jan. 6, 2016), <http://www.chblawfirm.com/blog/the-importance-of-foreseeability-tests-in-personal-injury-cases/> [<https://perma.cc/YCJ2-ZXNU>] (explaining negligence element of duty). Placing other people in harm’s way can breach this duty and result in injury. *See generally id.* (discussing elements of negligence). The actual cause of an injury is straightforward, and is often screened for by using a “but-for” test: but for the defendant’s actions, the plaintiff would not have suffered injury. *See Elements of a Negligence Case*, THOMSON REUTERS: FINDLAW, <http://injury.findlaw.com/accident-injury-law/elements-of-a-negligence-case.html> [<https://perma.cc/RD5Q-BQU5>] (last visited Mar. 16, 2018) (explaining but-for causation). Proximate causation, however, speaks to the “legal cause” of an accident, and exists only where the plaintiff’s injury is the natural and foreseeable result of the defendant’s actions. *See Proximate Cause*, THEVIRGINIALAWYER.NET, <https://www.thevirginialawyer.net/legal-news/personal-injury/proximate-cause/> [<https://perma.cc/532M-LQHR>] (last visited Mar. 18, 2018) (discussing proximate causation). For example, if a driver drives negligently and hits a pedestrian on the sidewalk with his car as a result, the driver is the actual cause of any injury resulting to the pedestrian from the collision. *See id.* (discussing causation). However, if the pedestrian walks away from the accident uninjured but mentally disoriented, continues to walk down the street and into the yard of a rabid dog, who then attacks and injures the pedestrian, the driver who hit the pedestrian with his car is not the proximate cause of any injuries resulting to the pedestrian from the dog attack because the dog attack was not a natural or foreseeable result of the driver’s negligent driving. *See id.* (using rabid dog example to explain causation). This result is supported by the generally accepted policy that it is unfair to hold people responsible for performing a duty of care to persons who are not foreseeably at risk of harm, for doing so would implicate practically unlimited liability and litigation. *See generally Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) (clarifying concept of proximate causation). The concept of foreseeability serves as the bedrock principle for the theory of sender liability. *See Kubert*, 75 A.3d at 1227 (focusing on foreseeability). As previously explained, the *Kubert* court reasoned that if a person sends a text message to someone they know is driving and will open the message, the sender has created a foreseeable risk of harm to the public by knowingly distracting the driver. *See id.* (explaining holding). Therefore, the court concluded, the

Further, the court emphasized its obligations to consider fairness and public policy.³⁷ It explained that when a grave harm can be prevented using a relatively low amount of effort, imposing a duty is fair.³⁸ It also mentioned the public's interest in the establishment of "fair measures to deter dangerous texting while driving."³⁹ Lastly, the court stressed that it is for the judiciary, not the legislature, to define the scope of duty in negligence cases.⁴⁰

Judge Marianne Espinosa concurred in the result reached by the majority but criticized its analysis.⁴¹ She argued that it was unnecessary for the court to "articulate a new duty specific to persons in remote locations who send text messages to drivers" because "traditional tort principles" are

sender is not only the actual cause but also the proximate cause of any resulting accident the driver has with a third party and can be held responsible for this third party's resulting injuries because these injuries are a natural and foreseeable result of the texter's negligent decision to text the driver. *See id.* ("However, if the sender knows that the recipient is both driving and will read the text immediately, then the sender has taken a foreseeable risk in sending a text at that time. The sender has knowingly engaged in distracting conduct, and it is not unfair also to hold the sender responsible for the distraction.").

37. *See Kubert*, 75 A.3d at 1223 ("[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. . . . The analysis is both very fact-specific and principled; it must lead to solutions that properly and fairly resolve the specific case and generate intelligible and sensible rules to govern future conduct." (quoting *Estate of Desir ex. rel. Estiverne v. Vertus*, 69 A.3d 1247, 1258 (N.J. 2013) (emphasis added) (internal citations omitted))). The court also noted its obligation to "take into account 'generally applicable rules to govern societal behaviors'" instead of coming to a conclusion that would "[reach] only the particular circumstances and parties before the Court" on that day. *See id.* (quoting *Vertus*, 69 A.3d at 1258).

38. *See id.* at 1228 ("When the defendant's actions are 'relatively easily corrected' and the harm sought to be prevented is 'serious,' it is fair to impose a duty." (quoting *Podias v. Mairs*, 926 A.2d 859, 866 (N.J. Super. Ct. App. Div. 2007))).

39. *See id.* at 1229 ("Finally, the public interest requires fair measures to deter dangerous texting while driving. Just as the public has learned the dangers of drinking and driving through a sustained campaign and enhanced criminal penalties and civil liability, the hazards of texting when on the road, or to someone who is on the road, may become part of the public consciousness when the liability of those involved matches the seriousness of the harm.").

40. *See id.* ("We have been asked to decide the status of the law in these circumstances, and we have applied traditional tort principles, as developed in analogous cases, to delineate the limited scope of a remote texter's duty. . . . 'It has long been true that determinations of the scope of duty in negligence cases has traditionally been a function of the judiciary.'" (quoting *Vertus*, 69 A.3d at 1258) (internal quotation, citation, and alteration omitted))).

41. *See id.* at 1229–30 (Espinosa, J., concurring) ("I concur in the result we reach today. . . . Still, I do not agree that it is necessary for us to articulate a new duty specific to persons in remote locations who send text messages to drivers, and I part company with my colleagues in their analysis of the duty imposed.").

sufficient to decide these issues.⁴² Moreover, Judge Espinosa contended that “[t]ext messages received while driving plainly constitute a distraction the driver must ignore.”⁴³

Even if creating a new duty had been appropriate, Judge Espinosa asserted that the majority’s passenger liability analysis was flawed because a remote texter not present in the vehicle at the time of the accident “lacks the first-hand knowledge” of the driver’s circumstances that a physically-present passenger would have and also has much less control over the driver.⁴⁴ Lastly, Espinosa stressed that the legislature had made no indication of considering policies like those advanced by the majority, and may have even opposed them, effectively criticizing the majority’s stance on the judiciary’s power to introduce this new duty.⁴⁵

B. *New York’s Rejection of Sender Liability in Vega v. Crane*

In February of 2017, the Supreme Court of Genesee County, New York was urged to accept the theory of sender liability in *Vega*.⁴⁶ In *Vega*, Collin Ward Crane crossed the center line of the road while driving, causing a head-on collision with the plaintiff’s vehicle, killing Crane, and seriously injuring Vega.⁴⁷ Crane’s cell phone revealed that he was texting his girlfriend, Taylor Cratsley, moments before the crash.⁴⁸ Vega added Crat-

42. *Id.* at 1229–30 (explaining primary reason for concurrence).

43. *Id.* at 1230. Judge Espinosa noted that a driver’s “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.” *Id.*

44. *Id.* (disputing majority opinion’s analogy of sender liability to passenger liability).

45. *See id.* at 1233 (disapproving majority’s creation of new duty without consideration from legislature). Judge Espinosa stated:

The dangers associated with text messaging while driving, and the devastating consequences in this case, were known to the Legislature. We have nothing before us that reflects whether the Legislature considered legislation that would have imposed either civil liability or criminal penalties for a remote texter who sends a distracting text message to a driver.

Id. She also explained that recent legislative action regarding an amendment to the state’s “assault by auto statute” had altered the grading of reckless conduct by the severity of injury sustained to the victim, “not on whether a cell phone was in use.” *See id.* (Espinosa, J., concurring). Judge Espinosa described this legislative response as “measured, even as to the driver,” and emphasized that it “did not include any action as to the remote texter,” implying that the legislature had not considered imposing liability on remote texters who cause distracted driving accidents. *See id.*

46. *See Vega v. Crane*, 49 N.Y.S.3d 264, 266 (Sup. Ct. 2017) (“Plaintiff would have this Court adopt the reasoning employed by the New Jersey Appellate Division in *Kubert* to deny [defendant’s] motion for summary judgment.”).

47. *See id.* at 265.

48. *See id.* This determination coincided with a conclusion made by police that Crane had been distracted at the time of the accident, “as there were no signs that [Crane] attempted to avoid or take evasive measures to elude contact with the Plaintiff’s vehicle.” *See id.*

sley to the action, alleging that her texts caused Crane's distraction and, thus, the accident.⁴⁹

Cratsley argued she owed no duty to Vega and moved for summary judgment.⁵⁰ In response, Vega cited to *Kubert* and argued that New York public policy justified establishing a special relationship between Vega and Cratsley, and thus a duty.⁵¹ The court held that one who sends a text message to a driver does not owe a duty to protect a third party from harm that might result from the driver becoming distracted and granted Cratsley's motion.⁵²

The court began its analysis by considering the lack of New York precedent that would create a duty owed from Cratsley to Vega.⁵³ It then clarified that, historically, "courts in New York have either been reluctant to broaden the principle of negligence law or simply refused to do so."⁵⁴ Accordingly, the court explicitly refused to "broaden the scope of duty from what should be reasonably foreseeable," despite the holding of the New Jersey court in *Kubert*.⁵⁵

The *Vega* court distinguished the passenger liability analysis used by the *Kubert* court, explaining that a greater "nexus" undoubtedly exists be-

49. *See id.* (discussing plaintiff's claims against remote texter, Cratsley).

50. *See id.* Cratsley argued that because no duty existed in New York to "control" a third party's actions, "no special relationship" between herself and the plaintiff existed and, thus, no duty was owed to Vega. *Id.*

After being added to the suit, Cratsley testified that although she had texted Crane before the accident, she was not aware that he was driving at the time. *See id.* She supported her claim by stating that Crane was often given rides from family members. *See id.* She further testified "that she never expected nor asked [Crane] to send her text messages or read text messages while driving." *Id.* None of the recovered text messages from Crane's phone disproved Cratsley's testimony. *See id.*

51. *See id.* at 265–66 (explaining that plaintiff cited *Kubert* to argue for theory of sender liability, but noting plaintiff acknowledged no New York precedent created a sufficient special relationship between sender and injured party).

52. *See id.* at 271 ("This Court agrees that, no matter how careless it may seem, not all conduct creates a duty to an unknown. This is especially true when the record fails to establish that the defendant had any knowledge that [Crane] was driving the vehicle that ultimately struck the Plaintiff.").

53. *See id.* at 267 ("The argument advanced by Plaintiff is unique in New York when considering the established body of precedent on the issues of proximate cause, foreseeability, and duty."). The court cited the infamous case of *Palsgraf v. Long Island R.R.* to explain that in order to recover for negligence, a party must first prove a duty, as well as standard of care, breach of said duty, and proximate causation between the breach and the plaintiff's injury. *See id.* at 266 (citing *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928)). The court stated that "[s]ince *Palsgraf*, New York courts have carefully examined those components to establish negligence and have elaborated on them to justify a recovery for damages." *Id.*

54. *Id.* at 267.

55. *See id.* at 268 ("Here, Plaintiff asks to modify this standard to broaden the scope of duty from what should be reasonably foreseeable. In particular, Plaintiff is asking that a party texting a person who could be driving should be held liable for the foreseeable risk that might result from this conduct. Although New Jersey may wish to employ such a departure, this Court declines to do so.").

tween a driver and his passenger than between a driver and a remote texter.⁵⁶ It then examined the state's common law doctrine on the duty owed by physicians to third parties.⁵⁷ Although a court in New York had once imposed a duty upon medical providers to "third-party motorists for patients whose medication might affect their ability to drive," the *Vega* court explained the application of this holding was narrow and limited to the reasonably foreseeable victims.⁵⁸

The *Vega* court implied that even if Cratsley knew Crane was driving when she texted him before the accident, Cratsley still could not be held

56. *See id.* at 268–69 (criticizing analogy drawn between passenger liability and sender liability). The *Vega* plaintiff relied on *Sartori v. Gregoire* to argue that "a passenger may be held liable for verbally or physically distracting a driver" in the moments before an accident. *Id.* at 266, 268 (citing *Sartori v. Gregoire*, 688 N.Y.S.2d 295 (N.Y. App. Div. 1999)). However, the court argued that the facts of *Sartori* were distinguishable from the facts of *Vega*, because "[i]n *Sartori*, 'the defendant commenced a third-party action against a *passenger in her vehicle*, alleging that his unwanted sexual advances towards her immediately before she started her vehicle caused her to forget to turn on the vehicle's headlights.'" *See id.* (emphasis added). Although the *Sartori* court held that "a passenger in a car may be liable if he distracted the driver while operating the vehicle immediately prior to the accident," Cratsley was not in the vehicle at the time of the accident in *Vega*. *See id.* at 269. Therefore, the *Sartori* ruling was not applicable because Cratsley was not afforded the "first-hand knowledge the defendant in *Sartori* enjoyed." *See id.* Further, the court explained that *Sartori* did "not address . . . whether a third party, who has no knowledge whether a defendant was driving, owes any duty to others." *Id.*

57. *See id.* at 269–71 (discussing New York's common law doctrine on the duty owed by physicians to third parties). For a discussion of the duties to third parties that New York and Pennsylvania impose on physicians, see *infra* notes 119–38 and accompanying text.

58. *See id.* at 270 (citing *Davis v. S. Nassau Cmty. Hosp.*, 46 N.E.3d 614, 618 (N.Y. 2015)) (stating that the *Davis* court held that negligence liability "must always be limited by what is foreseeable" and explaining standard New York practice of refusing to broaden principle of negligence law). In *Davis*, after a physician failed to warn his patient that the medications he prescribed to her could impair her ability to drive, the patient attempted to drive her car and struck the vehicle of the plaintiff. *See Davis*, 46 N.E.3d at 616. The court ruled that because the packaging of the medication administered to the patient before the accident listed clear instructions to warn patients of the side effects of the medication, which included impaired driving ability, the physician owed a duty to the plaintiff to warn the patient of this side effect. *See id.* at 622.

In light of the ruling in *Davis*, the *Vega* court asserted that in situations where New York had extended physician liability to third parties, there had been a clear nexus between the plaintiffs "and the offending defendant, for whom a special relationship allegedly existed" as "extension[s] of a duty physicians owed their patients." *See Vega*, 49 N.Y.S.3d at 271. For example, it argued that the *Davis* court "understood that when modifying the question of duty, its reach must always be limited by what is foreseeable," and "warned not to misinterpret its decision as a full erosion of the duty of care." *See id.* at 270–71 (citing *Davis*, 46 N.E.3d at 624). The *Vega* court also discussed the dissenting opinion in *Davis* as being "certainly instructive in dissuading a haphazard expansion of the concept of duty." *See id.* at 271 (citing *Davis*, 46 N.E.3d at 628 (Stein, J., dissenting)).

liable for Vega's death.⁵⁹ If the theory of sender liability was adopted, the court argued, a dramatic expansion of liability to all people who send text messages would result because of the wide array of parties who communicate via text message, as well as the many different purposes for which text messages are exchanged.⁶⁰ Lastly, the court did not see itself fit to establish a theory of sender liability when it had not been considered by the legislature.⁶¹

III. SO WHAT'S THE SITCH? EXISTING PENNSYLVANIA LAW AND PRECEDENT RELEVANT TO SENDER LIABILITY

Gallatin, filed in July of 2015, marked Pennsylvania's first opportunity to address the theory of sender liability in Pennsylvania.⁶² Before a motion for summary judgment was argued in *Gallatin*, the parties agreed to dismiss the case; thus, the trial court did not address the merits of the argument, but acknowledged the possibility of sender liability in a motion to dismiss order.⁶³ Nevertheless, plaintiffs could use the *Gallatin* court's

59. *See id.* at 271 (refusing to adopt theory of liability that could potentially render all those who send text messages liable for injuries caused in texting-while-driving cases). The court stated, "no matter how careless it may seem, not all conduct creates a duty to an unknown. This is *especially* true when the record fails to establish that the defendant had any knowledge that the Decedent was driving the vehicle that ultimately struck the Plaintiff." *Id.* (emphasis added).

60. *See id.* (justifying rejection of duty from Cratsley to plaintiff because "the expansion of liability to individuals who text message would be exponential"). The court felt that expanding duty as far as requested by the plaintiff in *Vega* "would set a crushing exposure to liability, which Courts generally must protect against." *See id.* (citation omitted). It pointed out that text messages are exchanged for an almost endless array of purposes day to day, including to spread important news, notify patients when their prescriptions "are ready for pick up," remind people to pay overdue bills, and more. *Id.* For this reason, the court concluded that "the potential expansion as contemplated by the Plaintiff [would be] astronomical." *Id.*

61. *See id.* at 272 (explaining reluctance to expand duty as common law even though court was aware of efforts made by New York and other states to combat dangers of texting and driving because court did not "believe it [to be] the province of a Court to establish a precedent for want of a statute that otherwise [had] not been considered, let alone approved, by a legislative body"). In addition to the *Vega* court's refusal to adopt the theory of sender liability as advanced by the plaintiff, it also asserted that "[i]t is not the role of the judiciary to sit on high and promulgate what it believes should have been a policy determination made elsewhere." *See id.* Instead, the court felt it more appropriate to defer "to the wisdom, or absence of it, of the legislature in defining what is actionable and what is not." *See id.* (citations omitted).

62. *See Gallatin v. Gargiulo*, No. 10401 of 2015, C.A., 2016 WL 8715650, at *1 (Pa. Ct. Com. Pl. Lawrence Cty. Mar. 10, 2016). The court declared itself "unaware of Pennsylvania precedent specifically regarding the duties or liability of the sender of a text message to a person who is simultaneously operating a motor vehicle." *See id.* at *4.

63. *See Kunkle, supra* note 17 (describing how following testimony in *Gallatin* it became clear that the texter did not know the recipient was driving at the time).

opinion as persuasive authority in future cases.⁶⁴ In examining whether or not Pennsylvania should accept this theory as law, it is important to consider the recent rulings on preliminary objections raised in *Gallatin*, as well as current texting and driving law in Pennsylvania and areas of Pennsylvania law analogous to the theory of sender liability.⁶⁵

A. *Pennsylvania Court Allows Gallatin v. Gargiulo to Proceed
Against Remote Texters*

In *Gallatin*, Daniel Gallatin was allegedly slowing down to make a right-hand turn on his motorcycle as Laura Gargiulo traveled behind him in her car.⁶⁶ Purportedly, as Ms. Gargiulo neared Gallatin's motorcycle, she was text messaging Joseph Gargiulo or Timothy Fend from her cell phone.⁶⁷ The complaint avers that the text messages distracted Ms. Gargiulo, which caused her to hit Gallatin's motorcycle.⁶⁸ As a result, Gallatin was "pinned and dragged" under Ms. Gargiulo's vehicle and later died from his injuries.⁶⁹ Gallatin's estate sued Mr. Gargiulo and Fend for negligence.⁷⁰

Both Mr. Gargiulo and Fend filed preliminary objections, requesting that the charges filed against them be dismissed with prejudice.⁷¹ In response, the court acknowledged the lack of specifically-applicable and binding Pennsylvania precedent, but cited *Kubert* to suggest the applicability of sender liability.⁷² The court also cited section 876 of the Restatement, which instructs that "a third party can be liable if he/she encourages another in violating a duty."⁷³ Bearing in mind both the *Kubert* ruling and section 876 of the Restatement, as well as its obligation

64. See generally *Gallatin*, 2016 WL 8715650 (sustaining plaintiff's complaint premised on sender liability).

65. For a discussion of the recent rulings in *Gallatin*, current texting while driving law in Pennsylvania, and areas of Pennsylvania law analogous to the theory of sender liability, see *infra* notes 66–138 and accompanying text.

66. See *Gallatin*, 2016 WL 8715650, at *1 (discussing allegations made in complaint).

67. See *id.*

68. See *id.* ("The Complaint further avers that Defendant Laura E. Gargiulo was distracted by the cell phone and was inattentive, causing her to strike the rear of Decedent's motorcycle.")

69. See *id.* (discussing facts of case and injuries sustained by victim after being dragged approximately 100 feet under Ms. Gargiulo's vehicle).

70. See *id.*

71. See *id.* at *3. Fend argued that the claims against him should be dismissed because no applicable law imposed "a duty of liability for a person who merely sends a text message . . . to a person operating a vehicle." See *id.* Similarly, Mr. Gargiulo argued that he owed no duty to the plaintiff to refrain from texting his wife while she was driving. See *id.* at *5.

72. See *id.* at *4 (acknowledging lack of Pennsylvania precedent but citing *Kubert* and explaining its holding as possible mechanism of liability in *Gallatin*).

73. *Id.* at *3–4. The court provided section 876 of the *Restatement (Second) of Torts*, which states:

§ 876 Persons Acting in Concert

to consider all averments made in the preliminary objection stage in the light most favorable to the plaintiff, the court ruled that Mr. Gargiulo and Fend would remain parties to the case.⁷⁴

B. *Current Texting and Driving Law in Pennsylvania*

Current Pennsylvania law prohibits drivers from texting while driving.⁷⁵ Recent state legislation increased the penalties for texting and driving behavior that causes serious bodily injury or death.⁷⁶ No statutory law or case law in Pennsylvania addresses the liability of a remote texter for injuries caused by the message's recipient who read the message while

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

- (a) does a tortious act in concert with the other or pursuant to a common design with him, or
- (b) knows that the other's conduct constitutes a breach of duty and *gives substantial assistance or encouragement to the other so to conduct himself*, or
- (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Id. at *3-4 (emphasis added) (quoting RESTATEMENT (SECOND) OF TORTS § 876 (AM. LAW INST. 1979)).

74. *See id.* at *4-5 (overruling defendants' preliminary objections and refusing to dismiss case against them). The court explained that while the defendants may not have known or have had reason to know, that Ms. Gargiulo was driving when they sent her text messages, because the case was at the preliminary objection stage, all averment had to be considered in the light most favorable to the plaintiff. *See id.* "In reflecting upon Section 876 of the Restatement and *Kubert*, and in considering the averments in the light most favorable to the Plaintiff as the law requires, the Court conclude[d] that" the defendants should remain parties to the case. *Id.* Both objections were denied in order to allow the plaintiff the chance to explore, through discovery, whether either defendant had indeed violated a duty. *See id.*

75. *See* 75 PA. STAT. AND CONS. STAT. ANN. § 3316 (West 2018).
§ 3316. Prohibiting text-based communications.

- (a) Prohibition.—No driver shall operate a motor vehicle on a highway or trafficway in this Commonwealth while using an interactive wireless communications device to send, read or write a text-based communication while the vehicle is in motion. A person does not send, read or write a text-based communication when the person reads, selects or enters a telephone number or name in an interactive wireless communications device for the purpose of activating or deactivating a voice communication or a telephone call.

Id.

76. *See* Press Release, Press Office of Governor Tom Wolf, *Governor Wolf Signs Bill to Deter Texting and Driving* (Nov. 4, 2016), <https://www.governor.pa.gov/governor-wolf-signs-bill-to-deter-texting-and-driving/> [<https://perma.cc/8S36-HN3H>] ("Today, Governor Wolf signed 'Daniel's Law,' which enhances the penalties for an accident caused by texting while driving resulting in serious bodily injury or death."). "Daniel's Law" was enacted as an effort to emphasize the serious consequences of texting and driving, and "is named for Daniel Gallatin, a father, grandfather, military veteran, and fireman of nearly 40 years who was killed in May of 2013 when his motorcycle was struck from behind by someone who was texting while driving." *Id.* For further discussion of Daniel's Law, see *supra* note 21 and accompanying text.

driving.⁷⁷ Although *Gallatin* marked the first time a Pennsylvania court had the opportunity to address the theory of sender liability, several areas of existing, analogous Pennsylvania law should inform the next court that renders a decision on the merits.⁷⁸

C. *Analogous Sections of Pennsylvania Law That Should Inform the State's Stance on Sender Liability*

To analyze which side of the sender liability debate Pennsylvania should fall, the next Pennsylvania court to consider the issue in light of the *Gallatin* opinion should consider several areas of existing state law analogous to sender liability.⁷⁹ First, state law on passenger liability should be considered because both the *Kubert* and *Vega* courts analogized it to sender liability.⁸⁰ Second, Pennsylvania courts should consider both the duties owed by a social host to their guests and those owed by a physician to third parties because both involve the legal obligations of remote third parties and, therefore, can be analogized to sender liability.⁸¹

1. *Passenger Liability*

The courts and commentators that have discussed the theory of sender liability have taken different views on the analogy of sender liability to passenger liability and the duty owed by passengers riding in a vehicle.⁸² In Pennsylvania, while no duty is generally owed by passengers, “[a]

77. See *Gallatin*, 2016 WL 8715650, at *4 (“The Court is unaware of Pennsylvania precedent specifically regarding the duties or liability of the sender of a text message to a person who is simultaneously operating a motor vehicle.”); see also *supra* note 75 for Pennsylvania law that prohibits *drivers* from texting-while-driving.

78. For a discussion of the areas of law that should inform a decision on whether to adopt sender liability in Pennsylvania, including passenger liability, social host liability, and the duty owed from physicians to third parties, see *infra* notes 79–138 and accompanying text.

79. See, e.g., Gough, *supra* note 21, at 476–78 (discussing analogous areas of law drawn on by the *Kubert* court); Strider, *supra* note 13, at 1012–17 (analogizing social host liability, duty not to distract the driver, and products liability to sender liability).

80. See *Kubert v. Best*, 75 A.3d 1214, 1224–25 (N.J. Super. Ct. App. Div. 2013); *Vega v. Crane*, 49 N.Y.S.3d 264, 268–69 (Sup. Ct. 2017). For a discussion of the operation of passenger liability in Pennsylvania, see *infra* notes 82–111 and accompanying text.

81. See, e.g., *Vega*, 49 N.Y.S.3d at 269 (comparing sender liability and physician third-party liability); Strider, *supra* note 13, at 1014 (noting that social host liability is analogous to sender liability because neither were present for the incident). For a discussion of social host liability and the duty owed by physicians to third parties in Pennsylvania, see *infra* notes 117–38 and accompanying text.

82. Compare *Kubert*, 75 A.3d at 1221, 1224–25 (analogizing passenger liability to sender liability and finding existence of sender liability), with *Vega*, 49 N.Y.S.3d at 268–69, 271 (discussing passenger liability and sender liability and rejecting the existence of sender liability), and Strider, *supra* note 13, at 1012 (“Although the situation in *Kubert* itself is unique, it shares similarities to other tort cases in which courts have traditionally imposed civil liability. For example, there are a number

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.’⁸³ Pennsylvania courts have often declined to extend liability to passengers who allegedly distract drivers, who then get into accidents.⁸⁴

of parallels between the situations of a remote third-party texter and a passenger in the vehicle who is distracting the driver.”). Strider explained that although the situations are analogous to a certain extent, they differ because the remote texter is not physically present in the car when the accident occurs, while a passenger is. *See* Strider, *supra* note 13, at 1013. Additionally, she argued that the choice to “open and read a text” while driving differs from the unavoidable physiological reaction that occurs when a driver is yelled at or visually distracted by a passenger. *See id.*

83. *See* 13 DALE G. LARRIMORE, ESQ., WEST’S PA. PRAC., § 8:15 (2016–17 ed. 2016) (quoting *Welc v. Porter*, 675 A.2d 334, 340–41 (Pa. Super. Ct. 1996)) (explaining when passenger owes duty). According to Larrimore:

This might include situations where the passenger “encouraged [the driver] to demonstrate the vehicle’s performance ability[,]” encouraged the driver to ignore the speed limit, provided alcohol to the driver while he drove the vehicle, encouraged the operation of the vehicle by a driver in an impaired condition by continuously refilling a marijuana pipe, or “forced, pressured or induced” the driver to drink alcohol while the driver was operating the car.

Id. (quoting *Welc*, 675 A.2d at 338–39). A passenger may also owe a duty to a third party “where the driver is acting as the passenger’s servant or agent or where the passenger has the ‘right of equal control’ of the vehicle.” *Id.* (citing *Welc*, 675 A.2d at 340–41). In order to establish agency, “there must be ‘a manifestation by a principal that an agent shall act for him,’ followed by an acceptance by the agent of the undertaking, and a mutual understanding by both parties ‘that the principal is to be in control of the undertaking.’” *Id.* (quoting *Clayton v. McCullough*, 670 A.2d 710, 713–14 (Pa. Super. Ct. 1996) (internal citations omitted)). Agency must be established explicitly; it cannot be assumed. *See id.* (citing *Volunteer Fire Co. of New Buffalo v. Hilltop Oil Co.*, 602 A.2d 1348, 1351 (Pa. Super. Ct. 1992)).

Passenger liability has most frequently been examined in Pennsylvania in regards to a “passenger’s ability to recover when a defendant contends that the passenger contributed to the accident by his or her conduct.” *See id.* Pennsylvania passengers may have a duty to “act in the face of manifest danger . . . when the passenger had a duty equally with the driver to observe.” *See id.* (citing *Nutt v. Pa. R.R. Co.*, 126 A. 803, 805 (Pa. 1924)). However, generally, passengers have no duty to “pay close attention to the actions of the driver.” *See id.* (first citing *Kilpatrick v. Phila. Rapid Transit Co.*, 138 A. 830, 833 (Pa. 1927) (holding passenger not “negligent for reading a newspaper and not paying attention to road”); and then citing *Simrell v. Eschenbach*, 154 A. 369, 371 (Pa. 1931) (holding “passenger not negligent for sleeping at time of the crash”)). Passengers also “will not be held to be negligent, as a matter of law, for failing . . . to interfere with the driver in the operation of the vehicle.” *Id.* (citing *Landy v. Rosenstein*, 188 A. 855, 857 (Pa. 1937) (“To require a guest to take part in driving an automobile from a rear seat position would destroy the efficiency of the driver.”)).

84. *See, e.g.*, *Clayton v. McCullough*, 670 A.2d 710, 713 (Pa. Super. Ct. 1996) (affirming dismissal of complaint and therefore declining to extend liability to passenger); *Salem v. Dolan*, 159 A.2d 253, 255 (Pa. Super. Ct. 1960) (refusing to extend liability to passenger); *Resseguie v. Reynolds*, 11 Pa. D. & C.4th 558, 565 (Ct. Com. Pl. Union Cty. 1991) (refusing to extend liability to passenger), *aff’d*, 613 A.2d 34 (Pa. Super. Ct. 1992). For a discussion of Pennsylvania court decisions

In *Resseguie v. Reynolds*,⁸⁵ Richard Resseguie was hit and killed by Daniel Klingler.⁸⁶ At the time of the accident, Steven Reynolds was a passenger in Klingler's vehicle.⁸⁷ Representatives for Resseguie sued Reynolds for distracting Klingler while he was driving in violation of the "quiet passenger duty."⁸⁸

In addressing this theory of liability, the court emphasized that the primary duty in question was owed from the driver to the decedent and had clearly been violated.⁸⁹ Although the plaintiff argued a duty was owed by the passenger of the vehicle—which might include "the duty not to actively interfere with the driver, by blinding his vision, or affecting the steering, or throwing matter into his lap or upon his feet"—such a duty had not been recognized in Pennsylvania.⁹⁰ The court explained that while the quiet passenger duty represents issues of important societal concern, similar distractions occur in cars carrying loud children or friends sharing food.⁹¹ The court cited *Salemno v. Dolan*⁹² in which the Superior Court of Pennsylvania ruled that a driver's testimony that his passenger requested he light her cigarette spoke only to his own negligence, and that even if the court believed his story about his passenger's request, "it would be tenuous evidence of contributory negligence" by the passenger.⁹³ The *Resseguie* court refused to expand Pennsylvania law by recognizing "the

declining to extend liability to passengers who allegedly distracted drivers, leading to accidents, see *infra* notes 85–110 and accompanying text.

85. 11 Pa. D. & C.4th 558 (Ct. Com. Pl. Union Cty. 1991), *aff'd*, 613 A.2d 34 (Pa. Super. Ct. 1992).

86. *See id.* at 558.

87. *See id.*

88. *See id.* at 559, 562. The plaintiff claimed Klingler distracted the driver by handing him beer, speaking to him, and adjusting the radio while the vehicle was in motion. *See id.* at 562. This argument was "premised upon fundamental negligence principles, i.e., defendant had a duty not to interfere with the driver and breached that duty, causing injury to a third party to whom the passenger is responsible." *Id.* at 560.

89. *See id.* at 562 ("The principal duty in issue is the duty of due care of the driver Klingler. The breach of that duty, as set forth in plaintiff's complaint, was evidenced by speeding, crossing the center line, and proceeding in the wrong lane.").

90. *See id.* ("If, as plaintiff suggests, a separate duty arises from the passenger to the decedent, no Pennsylvania court has yet recognized it."). In *Resseguie*, the defense counsel argued that the so-called quiet passenger duty "probably includes the duty not to actively interfere with the driver, by blinding his vision, or affecting the steering, or throwing matter into his lap or upon his feet." *Id.*

91. *See id.* at 563 ("In this case, the allegations are certainly a cause for societal concern. In essence, however, the same distractions are prevalent in cars which contain crying babies or tired adolescents, or riders who share ice cream cones.").

92. 159 A.2d 253 (Pa. Super. Ct. 1960).

93. *See Resseguie*, 11 Pa. D. & C.4th at 563 (explaining denial of passenger's negligence in *Salemno*); *see also Salemno*, 159 A.2d at 255 (explaining evidence that passenger was contributorily negligent was "extremely weak").

passenger's contributory negligence to a theory of independent liability for injuries to third parties."⁹⁴

In contrast, some Pennsylvania courts have held passengers negligent for distracting drivers.⁹⁵ These cases have generally involved a passenger physically interfering with the driver's ability to attend to the road.⁹⁶ For example, Pennsylvania passengers have been held negligent for kissing drivers and showing them documents.⁹⁷

The Pennsylvania ruling in *Clayton v. McCullough*⁹⁸ further represents the modest duty owed by passengers in the state.⁹⁹ In *Clayton*, pedestrian Fred Herrod was hit and killed by Sandra Steinhoff.¹⁰⁰ Rebecca McCullough was a passenger in the car when the accident occurred.¹⁰¹ Allegedly, Steinhoff and McCullough were drinking before entering the car on the night of the accident.¹⁰² Before the accident, McCullough requested Steinhoff allow her to drive the car because she felt Steinhoff was too intoxicated to drive but Steinhoff refused.¹⁰³ As Steinhoff began to drive "erratically," McCullough saw the decedent on the side of the road.¹⁰⁴

94. See *Resseguie*, 11 Pa. D. & C.4th at 564. The *Resseguie* court noted that its reluctance to expand Pennsylvania law in this way relied in part on the state's historical rejection of both the family purpose doctrine and the joint enterprise theory of vehicular liability. See *id.* Instead, Pennsylvania courts have "accented the right to control the operation of the vehicle." See *id.* (citation omitted). Because "no right to control the vehicle" or "allegations of interference with the vehicle" had been presented, the driver and passenger had engaged in a joint enterprise, "lubricated by alcohol, and ending in tragedy." *Id.* at 565. As no state cases had "extended responsibility to a passenger to actively avert such a tragedy," the passenger could not be held liable. See *id.*

95. See, e.g., *Lyons v. Wargo*, 126 A.2d 411, 411-12 (Pa. 1956) (finding passenger negligent for distracting driver by leaning over to kiss him which "inspired" him to respond to her); *Campbell v. Campbell*, 175 A. 407, 407-08 (Pa. 1934) (allowing issue of contributory negligence to be submitted to jury because sufficient evidence existed to show grandmother passenger distracted granddaughter driver by engaging her in examination of documents). But see *Welch v. Porter*, 675 A.2d 334, 342 (Pa. Super. Ct. 1996) (declining to hold passenger-defendant liable under theory that passenger had right to control car that intoxicated driver was operating).

96. See, e.g., *Lyons*, 126 A.2d at 412 (blaming passenger for distracting driver and thus causing accident).

97. See *Lyons*, 126 A.2d at 411-12 (concluding passenger was negligent for distracting driver by leaning over to kiss him which "inspired" him to respond to her); *Campbell*, 175 A. at 407-08 (allowing issue of contributory negligence to be submitted to jury because sufficient evidence existed to show grandmother passenger distracted granddaughter driver by engaging her in examination of documents).

98. 670 A.2d 710 (Pa. Super. Ct. 1996).

99. See *id.* at 714 (affirming dismissal of complaint and therefore failing to extend liability to passenger).

100. See *id.* at 711.

101. See *id.*

102. See *id.*

103. See *id.*

104. See *id.* at 712.

McCullough warned Steinhoff of the decedent's presence but Steinhoff nonetheless proceeded to strike him with the vehicle.¹⁰⁵

Herrod's estate sued McCullough for negligence, and also alleged that Steinhoff acted as an agent for McCullough, making McCullough vicariously liable for her actions.¹⁰⁶ On appeal, the Superior Court of Pennsylvania first reasoned that in order to hold McCullough liable, the plaintiff would need to prove that she had violated a duty, and that duties arise only in certain situations.

Although each person may be said to have a relationship with the world at large that creates a duty to act where his own conduct places others in peril, Anglo-American common law has for centuries accepted the fundamental premise that mere knowledge of a dangerous situation, even by one who has the ability to intervene, is not sufficient to create a duty to act.¹⁰⁷

Next, the court explained that although Clayton argued her theory of liability under section 876(b) of the Restatement—which regards a party as negligent who has “given substantial assistance or encouragement” to another party in violating a duty—the court had not adopted the section and, therefore, was not bound by it.¹⁰⁸ Even if it had adopted section 876(b), the court explained, no factual averments existed in the complaint to suggest McCullough had given Steinhoff such assistance.¹⁰⁹ Further, the court ruled that Clayton had failed to establish an agency relationship

105. *See id.* at 711–12.

106. *See id.* at 712. McCullough filed preliminary objections for failure to state a cause of action, which were sustained and the complaint dismissed. *See id.* Clayton appealed the decision. *See id.*

107. *Id.* (quoting *Elbasher v. Simco Sales Serv. of Pa.*, 657 A.2d 983, 984–85 (Pa. Super. Ct. 1995)) (explaining that knowledge of dangerous situation does not create duty to act). For an opposing view regarding a passenger's duty, *see, e.g.*, ROBERT RAMSEY, 25 NEW JERSEY PRACTICE, MOTOR VEHICLE L. & PRAC. § 10:8 (4th ed. 2016) (“Until there is evidence of unsafe driving, there is no duty by a passenger to supervise the driving, keep a lookout for danger or to warn of danger. However, when it becomes apparent to a reasonably prudent passenger that the vehicle in which he or she is riding is being driven negligently, reasonable care requires the passenger to protest or argue with the driver in an effort to persuade him to drive carefully. If such protests are disregarded, the passenger has a duty to leave the car when a reasonable opportunity is afforded, if a reasonably prudent person would do so in like circumstances.” (footnotes omitted)).

108. *See Clayton*, 670 A.2d at 713 (explaining that Pennsylvania had not previously adopted section 876(b) of the Restatement); *see also* RESTATEMENT (SECOND) OF TORTS § 876(b) (AM. LAW INST. 1979) (explaining third-party liability when that party has “give[n] substantial assistance or encouragement to” another party in violating a duty).

109. *See Clayton*, 670 A.2d at 713 (“[T]here are no factual averments in the complaint to indicate that McCullough gave ‘substantial assistance or encouragement to [Steinhoff] so to conduct [her]self[.]’” (alterations in original) (quoting RESTATEMENT (SECOND) OF TORTS § 876(b) (AM. LAW INST. 1979))).

between Steinhoff and McCullough.¹¹⁰ As a result, the court affirmed the decision to dismiss Clayton's complaint.¹¹¹

2. *Social Host Liability*

The theory of sender liability has recurrently been compared to social host liability—the liability imposed on social hosts for alcohol-related injuries that occur as a result of the host serving alcohol to guests.¹¹² These forms of liability are similar because neither the social host nor the remote texter is physically present when the accident occurs but can nonetheless be held responsible for the injuries and damage sustained.¹¹³ However, Pennsylvania does not recognize social host liability, except as it applies to adults who serve alcohol to minors.¹¹⁴ Adult social hosts in Pennsylvania owe no duty to third parties for serving alcohol to guests of legal drinking age, even if they are aware that their guests will drive drunk.¹¹⁵ The *Res-*

110. *See id.* at 714 (“Here, the facts averred that McCullough requested that Steinhoff drive her to the American Legion. Such a contention, in and of itself, is not sufficient to establish an agency relationship.”).

111. *See id.*

112. *See* Jennifer Edelson, Note, “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.”); Strider, *supra* note 13, at 1014 (“The situation in *Kubert* also bears some similarities to social host liability”); *Social Host Liability*, THOMSON REUTERS: *FINDLAW*, <http://injury.findlaw.com/accident-injury-law/social-host-liability.html> [<https://perma.cc/P9NM-TYTH>] (last visited Aug. 29, 2017) (“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 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.”).

113. *See* Strider, *supra* note 13, at 1014 (“Similar to the liability of a remote third-party texter, social host liability implicates a person not present at the place and time of the event giving rise to the cause of action.”).

114. *See Social Host Liquor Liability Laws in Pennsylvania*, *DRAM/DUI LAWYERS*, <http://dramduilawyers.com/pa/social-host-laws/> [<https://perma.cc/PLZ4-8NYJ>] (last visited Sept. 11, 2017) (“Social hosts . . . can only be held accountable for injuries caused by people under the age of 21, Pennsylvania’s legal drinking age.”); *see also Dram Shop Liquor Liability Laws*, *DRAM/DUI LAWYERS*, <http://dramduilawyers.com/pa/dram-shop-laws/> [<https://perma.cc/LZG5-ZZ8G>] (last visited Nov. 20, 2017) (noting that Pennsylvania does, however, have “dram shop laws,” which impose liability on “any licensed establishment that sells alcohol to a visibly intoxicated patron can be held liable for injuries caused by that patron after they leave the premises”).

115. *See* *Manning v. Andy*, 310 A.2d 75, 75 (Pa. 1973) (affirming lower court ruling that “[o]nly licensed persons engaged in the [s]ale of intoxicants have been held to be civilly liable to injured parties”); *see also* LARRIMORE, *supra* note 83, § 8:15 (“Adult social hosts owe no duty to third parties for providing alcoholic beverages to adult guests, even when the host is aware a guest will drive while intoxicated. An individual who furnishes alcohol to a driver cannot be held liable for injuries to third parties if the person providing the alcohol is a minor. Further, an adult or

seguie court clarified Pennsylvania's stance that "it is the consumption of alcohol rather than the furnishing thereof, that is the proximate cause of any subsequent damage."¹¹⁶

3. *A Physician's Liability to Third Parties*

The plaintiff in *Vega* supported her assertion that the court could hold a remote texter responsible for her injuries by citing New York precedent establishing a duty to warn their patients of the potential side effects of medicines administered to them owed by physicians to third parties.¹¹⁷ Like social host liability, this form of liability is similar to sender liability in that it allows for the imposition of a duty on a remote third party.¹¹⁸ However, the *Vega* court rejected the plaintiff's argument, instructing that although New York had expanded the scope of a duty owed in the previous negligence action cited, it did so with great caution, reluctance, and support from sound policy reasoning.¹¹⁹

Similarly, Pennsylvania courts have been reluctant to hold physicians liable for negligent patient treatment that allegedly injured third par-

minor who is merely a passenger in a vehicle where the driver is intoxicated does not owe a duty to a third person absent a showing that the passenger forced or coerced the driver to drink while operating the car. Absent a 'special relationship, joint enterprise, joint venture or a right to control the vehicle,' a passenger does not owe a duty to a third person in instances where the driver of the car is intoxicated or when the passengers participated 'in the joint procurement and ingestion of alcohol' with the driver." (citations omitted)).

Several other states impose similarly modest duties on social hosts. *See, e.g.*, N.Y. GEN. OBLIG. LAW §§ 11-100–101 (McKinney 2018) (providing that liability for injuries caused by intoxicated tortfeasor under age of twenty-one limited to sellers of alcohol). Some states place much heavier burdens on social hosts. *See, e.g.*, N.J. STAT. ANN. § 2A:15-5.6 (West 2018) (assigning liability to social hosts who serve alcohol to intoxicated guests that negligently operate vehicles and cause personal injury or property damage as result); *Dower v. Gamba*, 647 A.2d 1364, 1367 (N.J. Super. Ct. App. Div. 1994) (discussing codification of social host liability by New Jersey legislature).

116. *See Resseguie v. Reynolds*, 11 Pa. D. & C.4th 558, 561 (Ct. Com. Pl. Union Cty. 1991) (internal quotations omitted) (quoting *Congini v. Portersville Valve Co.*, 470 A.2d 515, 517 (Pa. 1982)), *aff'd*, 613 A.2d 34 (Pa. Super. Ct. 1992).

117. *See Vega v. Crane*, 49 N.Y.S.3d 264, 269 (Sup. Ct. 2017) (stating plaintiff's reliance on holding in *Davis v. South Nassau Communities Hospital* in arguing for expansion of foreseeability doctrine). For a discussion of the *Vega* court's response to this argument advanced by the plaintiff, see *supra* note 58 and accompanying text.

118. *See, e.g.*, *Davis v. S. Nassau Cmty. Hosp.*, 46 N.E.3d 614, 623 (N.Y. 2015) (holding physicians liable to third-party motorists for failing to notify patients that their medication could impair their ability to drive).

119. *See Vega*, 49 N.Y.S.3d at 271 ("Inasmuch as the Court of Appeals expanded the breadth of the duty owed in a negligence case, it did so cautiously and reluctantly.").

ties.¹²⁰ In *Soto v. Frankford Hospital*,¹²¹ the court ruled that physicians who treated a woman exposed to dangerous levels of carbon monoxide in her home owed no duty to her husband, also living in the home, who later died as a result of the fumes and that the physicians' incorrect diagnosis of the woman's condition had not caused her husband's death.¹²² After reviewing doctors' duties concerning the spread of infectious diseases, the *Soto* court held that any negligence committed by the doctors was too far removed from the decedent's death to be considered legally responsible.¹²³

Moreover, in both *Crosby v. Sultz*¹²⁴ and *Waddell v. Bowers*,¹²⁵ Pennsylvania courts declined to hold physicians responsible for failing to prohibit their patients from driving impaired.¹²⁶ In *Crosby*, the superior court ruled that a physician was not liable to an injured third party for failing to report a diabetes patient to the Department of Motor Transportation.¹²⁷ The Pennsylvania Vehicle Code mandates that patients may not drive if, in their physicians' opinion, any of several enumerated conditions, including

120. See S. GERALD LITVIN & GERALD AUSTIN MCHUGH, JR., 3 WEST'S PENNSYLVANIA PRACTICE, TORTS: LAW AND ADVOCACY § 7.6 (2016) (explaining that courts in Pennsylvania "have been hesitant to impose liability on a physician for acts of negligence in treating a patient which are alleged to have had an adverse impact on some third-party rather than the patient").

121. 478 F. Supp. 1134 (E.D. Pa. 1979).

122. See *id.* at 1136–37 ("For these reasons, we have concluded that the defendant physicians did not owe a duty to plaintiff's husband, nor was the alleged negligence of the defendant physicians a substantial cause of [the plaintiff's husband's] injuries."). The plaintiff argued that had the doctors made the proper diagnosis, she would have been afforded the opportunity to take appropriate steps and prevent her husband's death. See *id.* at 1135.

123. See *id.* at 1136 (explaining that doctors could not foresee injury to the husband, and moreover, husband would have suffered injuries regardless of treatment given to wife). The court explained that the doctors' actions did not cause the plaintiff's husband's death because (1) the plaintiff's doctors were not obligated to control the conduct of the plaintiff, (2) the plaintiff and her husband were not injured "by a communicable disease," and (3) the plaintiff's husband "was not injured as a result of an act performed by" the plaintiff. See *id.*

124. 592 A.2d 1337 (Pa. Super. Ct. 1991).

125. 609 A.2d 847 (Pa. Super. Ct. 1992).

126. See *Waddell*, 609 A.2d at 851 (holding doctors did not owe duty third party where advice or treatment was not necessary to prevent harm to individuals other than the patient); *Crosby*, 592 A.2d at 530 (holding that doctor owes no duty to third parties to control patient's driving).

127. See *Crosby*, 592 A.2d at 1338 (holding "that a doctor has no duty to control his patient's driving habits or to protect third persons from the injuries occasioned by unforeseeable accidents"). In *Crosby*, Ms. Crosby and her children were walking when struck by a vehicle being driven by James Jackson. See *id.* Ms. Crosby, her children, and her husband filed suit against Jackson to recover for the severe injuries they sustained. See *id.* at 1338–39. During discovery, it was determined that Dr. Sultz had been treating Jackson for diabetes, which had caused him to lose consciousness behind the wheel and hit the plaintiffs with his car. See *id.* at 1339. Dr. Sultz filed preliminary objections alleging, among other things, that the Crosbys had failed to state a cause of action. See *id.* at 1339–40. His objections were sustained, and the Crosbys appealed. See *id.* at 1340.

“[u]nstable or brittle diabetes,” are likely to interfere with their ability to drive.¹²⁸ The court concluded that the condition of the patient in question did not qualify under the statute, and even if it did, the statute created no private cause of action for third parties.¹²⁹ The court expressed that the statutory duty imposed on physicians to report their patients’ conditions to the authorities when appropriate varies significantly from a duty to protect the public at large from any harm their patients may cause, the latter of which would “discount the important element of foreseeability.”¹³⁰ Further, the court decided that requiring a physician to (1) determine that a patient’s diabetes might flare up and cause an accident, and (2) report the patient’s disability in order to avoid suit if an injured victim were to pursue legal action would “def[y] logic” and prove “unworkable.”¹³¹ In *Waddell*, the same court relied on *Crosby* to dismiss the plaintiff’s third party complaint against her dentist for failure to state a cause of action, when she alleged that he failed to stop her from driving in a dangerous state.¹³²

128. *Id.* at 1341 (quoting 67 PA. CODE § 83.5(a)(2) (1986)).

129. *See id.* at 1343. The court established that “the issue of whether the physicians owed a duty to the third persons turned upon the question of foreseeability.” *See id.* Because the court concluded that the plaintiffs were not foreseeable victims of any actions or inaction taken by the doctor in regards to the diabetes patient, it held that the doctor owed no duty of care to the plaintiffs. *See id.* at 1345.

The court concluded that the patient’s medical condition did not fall within the applicable provision of the Pennsylvania Administrative Code because although the statute called for physicians to report patients suffering “unstable or brittle diabetes,” physicians did not have to do so if there had been “a continuous period of at least six months freedom from a related syncopal attack,” which the patient satisfied. *See id.* at 1344. The same reasoning released the doctor’s duty to report the patient under subsection four of the statute, which prohibited individuals experiencing “periodic losses of consciousness, attention or awareness from whatever cause” from driving. *See id.* (paraphrasing statutory language).

Further, although the catchall provision provided by subsection nine of the statute could have applied to the patient at issue, the court determined that this provision was intended to cover conditions not mentioned anywhere else in the statute (such as diabetes). *See id.* at 1344–45. Finally, the court concluded that holding a diabetic condition that had not been proven “unstable,” “brittle,” or “subject to attacks” as encompassed by the statute would ignore the purpose of the statute’s existing subsection addressing diabetes. *See id.* at 1345.

130. *See id.* at 1345 (“To discount the important element of foreseeability here is effectively to overrule well-established and precedential tort law, as well as to extend liability limitlessly to treating physicians vis-a-vis third party victims.”).

131. *See id.* at 1346 (citation omitted) (explaining refusal to hold doctor liable for plaintiff’s injuries). The court explained that “the legislature’s goal of ensuring and promoting safe highways by monitoring the driving abilities of the sick and infirm is merely tangential to a doctor’s duty to diagnose and treat his/her patient properly.” *Id.* at 1347.

132. *See Waddell v. Bowers*, 609 A.2d 847, 849–50 (Pa. Super. Ct. 1992) (relying on *Crosby* to dismiss plaintiff’s complaint against her dentist). *Waddell* was a passenger in a vehicle struck by a car operated by appellant Bowers. *See id.* at 848. Bowers filed third-party complaints against York Hospital and Dr. Gregory Goding, who had treated her in the Dental Clinic of the hospital. *See id.* While at the clinic,

Although Pennsylvania courts have been hesitant to hold physicians liable to third parties, in *DiMarco v. Lynch Homes-Chester County, Inc.*¹³³ the Supreme Court of Pennsylvania held that if a third party is at risk of contracting a communicable disease from a patient, and the patient's physician gives unsound medical advice to the patient that leads to the infection of the third party, the third party has a cause of action against the physician.¹³⁴ However, the court qualified its ruling by explaining that

Bowers fell ill as a result of her underlying diabetic condition, of which the medical providers were aware. *See id.* Bowers alleged that the providers were negligent in failing to: (1) "summon a doctor to examine her," (2) "ensure that she was physically capable of driving before leaving," (3) "telephone her family and friends," (4) "properly treat her condition[.]" and (5) keep her from "leav[ing] the hospital when they knew or should have known that she was physically incapable of driving." *Id.* For these reasons, Bowers proposed that the providers accept legal responsibility for causing the accident involving Waddell, which took place after Bowers became ill and left the dental clinic. *See id.* The Court of Common Pleas in York County concluded that Bowers had failed to state a claim for which relief could be granted and Bowers appealed. *See id.*

Relying on *Crosby*, the court held that Bowers had failed to show that the doctors' treatment of her was necessary for the protection of third parties. *See id.* at 850. Because Bowers had not established what treatments the doctors had rendered to her at the clinic, if the doctors knew her diabetes would cause her to fall unconscious, or what exact condition she was in when she left the clinic, the court concluded that she failed to show that the doctors should have concluded her unfit to drive. *See id.* Further, the doctors were not treating Bowers for her diabetes, and the court could not "impute to a dentist the knowledge of a physician treating a person for diabetes." *See id.*

133. 583 A.2d 422 (Pa. 1990).

134. *See id.* at 424. In *DiMarco*, Janet Viscichini, a blood technician, was accidentally pricked with a needle that had been used on a patient carrying hepatitis. *See id.* at 423. Viscichini sought the treatment of appellant doctors, who advised her that if she remained without symptoms for six weeks, she could be sure that she had not contracted hepatitis. *See id.* They did not instruct her to abstain from sexual activity for any period of time after being exposed to the disease, but she did so for eight weeks. *See id.* After remaining symptom-free for those eight weeks, she resumed her sexual relationship with appellee, Joseph DiMarco. *See id.* Shortly after, both Viscichini and DiMarco were diagnosed with hepatitis B. *See id.*

DiMarco sued the doctors, alleging that their failure to warn Viscichini "that having sexual relations within six months of the exposure could cause her sexual partner to contract hepatitis" was negligent. *See id.* The doctors filed preliminary objections and the complaint against them was dismissed with prejudice for the lack of duty owed from the doctors to DiMarco. *See id.* DiMarco appealed the decision to the superior court, which reversed and held that the doctors owed a duty to act reasonably in directing Viscichini on how to prevent the spread of hepatitis. *See id.* (citing *DiMarco v. Lynch Homes-Chester Cty., Inc.*, 559 A.2d 530, 535 n.3 (Pa. Super. Ct. 1989)). The doctors appealed. *See id.* at 424.

In reviewing the decision, the Pennsylvania supreme court stated that as a requirement of foreseeability, DiMarco would have had to show "that the defendant [had] undertaken 'to render services to another which he should [have] recognize[d] as necessary for the protection of a third person' (in this case, the plaintiff, appellee)." *See id.* (quoting *Cantwell v. Allegheny Cty.*, 483 A.2d 1350, 1353-54 (Pa. 1984)). The court concluded that because a physician treating a patient exposed to a communicable or contagious disease is responsible for giving such a patient advice on how to prevent the disease from spreading, third parties at risk of contracting the disease are foreseeably at risk when such advice is not

doctors are the “first line of defense against the spread of communicable diseases” because they know best how to prevent the spread of such diseases, which justifies holding them responsible for advising affected patients.¹³⁵ Because precautions taken by patients suffering communicable diseases are not meant to protect the already-infected patients but others likely at risk of infection, the court held that these physicians are responsible for safeguarding third parties from harm.¹³⁶ Three justices dissented, arguing that the physician had no duty to protect a third party he had neither treated nor been aware existed.¹³⁷ The dissenters stressed that “the dangers of adopting a negligence concept of duty analyzed in terms of scope of the risk or foreseeability are considerable and are to be avoided.”¹³⁸

IV. WHEN YA WANNA TEXT ME IT SHOULD BE OKAY IN PENNSYLVANIA: PENNSYLVANIA SHOULD NOT ADOPT SENDER LIABILITY

Although Pennsylvania has yet to rule on the theory of sender liability, an examination of existing state law makes clear that this concept should not be adopted.¹³⁹ For this reason, as well as because of the validity of the criticism the theory has met, the *Gallatin* court properly dismissed the case, and an appellate court should likewise refuse to hold remote texters responsible for the plaintiff’s injuries.¹⁴⁰ Moreover, the

offered. *See id.* at 424–25. For this reason, the court affirmed the ruling of the superior court. *See id.* at 425.

135. *See id.* at 424 (“Physicians are the first line of defense against the spread of communicable diseases, because physicians know what measures must be taken to prevent the infection of others. The patient must be advised to take certain sanitary measures, or to remain quarantined for a period of time, or to practice sexual abstinence or what is commonly referred to as ‘safe sex.’”).

136. *See id.* (“Such precautions are taken not to protect the health of the patient, whose well-being has already been compromised, rather *such precautions are taken to safeguard the health of others.*”). The court explained that “the duty of a physician in such circumstances extends to those ‘within the foreseeable orbit of risk of harm.’” *Id.* (quoting *Doyle v. S. Pittsburgh Water Co.*, 199 A.2d 875, 878 (Pa. 1964)). Therefore, if a third person falls within the “foreseeable orbit” and is “likely” at risk of infection from the patient, “and if erroneous advice is given to that patient to the ultimate detriment of the third person, the third person has a cause of action against the physician, because the physician should recognize that the services rendered to the patient are necessary for the protection of the third person.” *Id.* at 424–25.

137. *See id.* at 426–27 (Flaherty, J., dissenting) (expressing concern that expanding professionals’ scope of liability to unknown third parties could cause professionals to render valuable services in a more limited way to avoid liability).

138. *See id.* at 426 (explaining dangers of “adopting a negligence concept of duty analyzed in terms of scope of the risk or foreseeability,” especially when scope of foreseeability extends to unknown potential third parties).

139. For a discussion of why analyzing existing state law suggests that Pennsylvania should not adopt sender liability, see *infra* Part IV.

140. For a discussion of the criticism of sender liability, see *infra* Part IV(A). *See generally* Kunkle, *supra* note 17.

court should follow the reasoning employed by the *Kubert* concurrence in deciding to reject the theory of sender liability.¹⁴¹

A. *An Analysis of Existing Pennsylvania Law Relevant to Sender Liability and the Criticisms of Kubert*

Pennsylvania courts have established that the duty to avoid distracted driving accidents rests primarily with drivers, which opposes the fundamental policies that underlie the theory of sender liability.¹⁴² For example, Pennsylvania courts have imposed relatively modest duties on vehicular passengers, which suggest that it would be extraordinary for the state to hold remote texters liable to injured parties even if it likened them to passengers physically present in vehicles.¹⁴³ In *Resseguie*, the plaintiff driver attempted to hold his passenger responsible for the accident the driver caused by way of violating the quiet passenger duty.¹⁴⁴ The court rejected this argument, and began its analysis by reiterating the primary duty in question: the “duty of due care” owed by the driver.¹⁴⁵ This will be a difficult barrier to overcome for the next plaintiff that cites to the *Gallatin* opinion in an effort to hold remote texters liable for causing a distracted driving accident.¹⁴⁶

141. For a discussion of the concurring opinion in *Kubert* and why the next Pennsylvania court to consider sender liability should follow the *Kubert* concurrence rather than the *Gallatin* opinion, see *infra* Part IV(B).

142. Compare *Resseguie v. Reynolds*, 11 Pa. D. & C.4th 558, 564–65 (Ct. Com. Pl. Union Cty. 1991) (refusing to shift blame for car accident to passenger who was distracting), with *Kubert v. Best*, 75 A.3d 1214, 1221, 1228 (N.J. Super. Ct. App. Div. 2013) (establishing theory of sender liability on the principal idea that it is foreseeable to text message sender that the driver could become distracted by reading the message). The *Kubert* court reasoned that when a person sends a text message to another person they know to be driving and knows that the driver will view the text while driving, that person has disregarded a substantial risk of “harm to the public.” See *id.* at 1228. The *Kubert* court further explained that because the extreme danger presented by texting while driving—which the public has great interest in deterring—could be easily remedied by imposing a duty on texters to avoid texting drivers, the holding was justified. See *id.* at 1228–29.

143. Compare *LARRIMORE*, *supra* note 83, § 8:15 (“To hold a passenger liable for injuries sustained by a third party, the plaintiff must show that the passenger ‘breached a duty or obligation recognized by law, which required him to conform to a certain standard of conduct for the protection of persons such as the plaintiff.’ Such a duty would arise out of general negligence principles, not out of any duty imposed by the Vehicle Code.” (quoting *Merritt v. City of Chester*, 496 A.2d 1220, 1221 (Pa. Super. Ct. 1985))), with *RAMSEY*, *supra* note 107, § 10:8 (“In general, a passenger in a motor vehicle is charged with two basic responsibilities under New Jersey law.”).

144. See *Resseguie*, 11 Pa. D. & C.4th at 562 (declining to hold that passenger violated quiet passenger duty).

145. See *id.* (“The principal duty in issue is the duty of due care of the driver . . .”).

146. See *Keltner*, *supra* note 34, at 126 (“[I]t was unnecessary for the [*Kubert*] court to formulate a new duty regarding a remote third party’s obligation not to text the driver of a motor vehicle because the duty to avoid texting while driving

The *Resseguie* court relied on *Salememo* to support its refusal to impose the quiet passenger duty.¹⁴⁷ In *Salememo*, the driver argued that his passenger was responsible for an accident he caused because she requested he light her cigarette while driving, which the court held did *not* establish negligence.¹⁴⁸ Requesting a driver to light a cigarette can be compared to texting a driver you know to be driving, because in both situations the driver is invited to physically divert attention from the road while still maintaining the ability to decide whether or not to do so.¹⁴⁹ In both *Salememo* and texting-while-driving cases, an affirmative act taken by the driver (causing the collision) breaks the chain of causation between the risky behavior (a sender's text message or a passenger's distracting request) and a dangerous display of negligence (texting or lighting a passenger's cigarette while driving).¹⁵⁰ On the other hand, Pennsylvania cases holding passengers responsible for distracting drivers support the importance of holding passengers responsible for the situations they directly cause in part while in the car.¹⁵¹

In addition to holding drivers responsible for circumstances within their control, Pennsylvania courts have held that passengers who are aware of dangerous conditions owe no duty to prevent harm to vulnerable third parties.¹⁵² The *Clayton* court clarified that while morality may create a duty to act when a person's "own conduct places others in peril," the law has traditionally refused to hold that awareness of a dangerous situation, even when the option to intervene is available, creates a legal duty to

should fall solely on the driver."); *supra* note 71 and accompanying text for an explanation of the defense advanced in *Gallatin*.

147. See *Resseguie*, 11 Pa. D. & C.4th at 563 (relying on *Salememo v. Dolan* for proposition that fact driver allowed himself to become distracted by passenger's behavior only bolstered argument in favor of driver's negligence).

148. See *Salememo v. Dolan*, 159 A.2d 253, 255 (Pa. Super. Ct. 1960) (explaining failure of driver's argument that passenger committed contributory negligence for asking him to light her cigarette while driving because it was "doubtful whether [passenger's] request constituted contributory negligence").

149. See *Strider*, *supra* note 13, at 1013 ("[O]pening and reading a text message is voluntary. The driver must choose to open the text message and read it. He is in no way forced to react to the receipt of the message. In fact, he has the option to simply ignore the message until a safer time presents itself.").

150. See *id.* ("The driver has to *choose* to be distracted by a text message" (emphasis added)).

151. See *id.* ("A person's decision to open and read a text message is distinct from their physiological reaction to a stimulus presented to them. A driver has no choice but to hear the words yelled at him by a passenger or to see the object put in his line of vision by a passenger. His reaction to that stimulus represents more of an unavoidable physiological response than a voluntary undertaking."). For a discussion of Pennsylvania cases holding passengers responsible for physically distracting drivers, see *supra* notes 82–111 and accompanying text.

152. See, e.g., *Clayton v. McCullough*, 670 A.2d 710, 713 (Pa. Super. Ct. 1996) (declining to impose passenger liability when passenger was merely aware driver may have breached duty, but passenger did not contribute or participate in that breach).

act.¹⁵³ This general principle can be applied to remote texters who may know the recipients of their messages will pose harm to nearby motorists and pedestrians by reading their messages while driving.¹⁵⁴

A similar premise underlies Pennsylvania's stance on the duty owed by social hosts.¹⁵⁵ In Pennsylvania, social hosts owe duties only to underage drinkers they serve alcohol to.¹⁵⁶ Thus, hosts in the state owe nothing to guests of legal drinking age who they know might be too intoxicated to safely drive themselves home.¹⁵⁷ Notably, New York, the first state to reject sender liability, holds social hosts to a similarly modest duty, while New Jersey, which developed the theory of sender liability, places much greater obligations on social hosts.¹⁵⁸

153. *See id.* at 712 (“Although each person may be said to have a relationship with the world at large that creates a duty to act where his own conduct places others in peril, Anglo-American common law has for centuries accepted the fundamental premise that mere knowledge of a dangerous situation, even by one who has the ability to intervene, is not sufficient to create a duty to act.” (quoting *Elbasher v. Simco Sales Serv. of Pa.*, 657 A.2d 983, 984–85 (Pa. Super. Ct. 1995))).

154. *See Keltner, supra* note 33, at 137 (arguing that *Kubert* court “mistakenly held a remote sender has any duty at all to avoid texting someone they know is driving, as the duty to avoid texting while driving falls completely on the driver”).

155. For a discussion of the duty owed by social hosts, see *supra* notes 112–16 and accompanying text.

156. *See, e.g., Klein v. Raysinger*, 470 A.2d 507, 510–11 (Pa. 1983) (distinguishing between liability that arises when serving minors alcohol versus serving of-age persons alcohol).

157. *See, e.g., Manning v. Andy*, 310 A.2d 75, 75 (Pa. 1973) (holding that non-licensed person who provides alcohol to eventual tortfeasor owes no duty of care to third parties).

158. *Compare* N.Y. GEN. OBLIG. LAW §§ 11-100–101 (McKinney 2018) (providing cause of action against provider of alcohol only if provider furnished alcohol to someone under age twenty-one), *with Dower v. Gamba*, 647 A.2d 1364, 1367 (N.J. Super. Ct. App. Div. 1994) (discussing codification of social host liability in New Jersey). New Jersey's social host liability statute declares:

b. A person who sustains bodily injury or injury to real or personal property as a result of the negligent provision of alcoholic beverages by a social host to a person who has attained the legal age to purchase and consume alcoholic beverages may recover damages from a social host only if:

(1) The social host willfully and knowingly provided alcoholic beverages either:

(a) To a person who was visibly intoxicated in the social host's presence; or

(b) To a person who was visibly intoxicated under circumstances manifesting reckless disregard of the consequences as affecting the life or property of another; and

(2) The social host provided alcoholic beverages to the visibly intoxicated person under circumstances which created an unreasonable risk of foreseeable harm to the life or property of another, and the social host failed to exercise reasonable care and diligence to avoid the foreseeable risk; and

(3) The injury arose out of an accident caused by the negligent operation of a vehicle by the visibly intoxicated person who was provided alcoholic beverages by a social host.

Pennsylvania's policy reflects the legislature's opinion that it is the responsibility of the guest, not the host, to avoid causing alcohol-related accidents.¹⁵⁹ Thus, because awareness of dangerous conditions does not trigger a legal duty owed by third parties in Pennsylvania, the same should remain true for remote texters.¹⁶⁰ The duty to avoid distracted driving accidents should reside with drivers, who are responsible for making the ultimate decision to text while driving.¹⁶¹

Further, while holding vehicular passengers and remote texters responsible for distracting behavior could serve important societal concerns, imposing such duties would reach further than is fair or feasible.¹⁶² For example, the *Resseguie* court noted that a crying child in the backseat of a car would risk violating the proposed quiet passenger duty.¹⁶³ Comparably, although the dangers of texting and driving are great, holding remote texters liable for accidents caused by drivers they text extends liability to a seemingly endless class of people who reasonably should know the recipient is driving or could be driving.¹⁶⁴

Pennsylvania courts have likewise exhibited an unwillingness to hold physicians liable to third parties, thus providing additional support for the rejection of the analogous theory of sender liability.¹⁶⁵ In *Frankford Hospital*, the court refused to hold doctors liable for the death of a patient's husband after misdiagnosing his wife, who had been poisoned by excess

N.J. STAT. ANN. § 2A:15-5.6(b)(1)–(3) (West 2018). “Provide” as used in the statute has been held to include “self-service by guests.” *Social Host Liability*, *supra* note 112.

159. *Cf. Resseguie v. Reynolds*, 11 Pa. D. & C.4th 558, 561 (Ct. Com. Pl. Union Cty. 1991), *aff'd*, 613 A.2d 34 (Pa. Super. Ct. 1992) (explaining that “in the case of an ordinary able-bodied man, it is the consumption of alcohol rather than the furnishing thereof, that is the proximate cause of any subsequent damage” (citing *Orner v. Mallick*, 527 A.2d 521, 523 (Pa. 1987))).

160. For a discussion of why awareness of dangerous conditions does not trigger a legal duty owed by passengers or social hosts in Pennsylvania, see *supra* notes 152–56 and accompanying text.

161. See *Edelson*, *supra* note 112, at 1962 (“One obvious critique of imputing liability on remote texters is that it was the illegal act of the driver, not the actions of the remote individual, which actually caused the accident.”).

162. See, e.g., *Resseguie*, 11 Pa. D. & C.4th at 563 (refusing to extend duty owed by passengers, despite pressing societal concerns, for fear of it reaching too far); *Edelson*, *supra* note 112, at 1962 (criticizing *Kubert* court for ignoring principles of proximate cause and foreseeability).

163. See *Resseguie*, 11 Pa. D. & C.4th at 563 (“In this case, the allegations are certainly a cause for societal concern. In essence, however, the same distractions are prevalent in cars which contain crying babies or tired adolescents, or riders who share ice cream cones.”).

164. See, e.g., *Vega v. Crane*, 49 N.Y.S.3d 264, 271 (Sup. Ct. 2017) (“In this day and age, where texts are routinely sent to, for example, advise the public of breaking news, that prescriptions are ready for pick up, or to advise 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.”).

165. For a discussion of the duty owed by physicians to third parties in Pennsylvania, see *supra* notes 119–38 and accompanying text.

levels of carbon monoxide, because they ruled his death too far removed from the negligent medical treatment provided to their patient.¹⁶⁶ Further, in *Crosby*, the court refused to hold a doctor responsible for injuries sustained by a third party after failing to prevent his patient from driving while impaired.¹⁶⁷ The *Vega* plaintiff argued for a similar duty, but fell short of convincing the court to adopt sender liability.¹⁶⁸ Alternatively, in *DiMarco*, a Pennsylvania court held a doctor liable for negligently advising a patient suffering a communicable disease on how to manage the condition, which ultimately led to the infection of a third party, but the court justified its decision by explaining that the nature of a doctor's job when treating patients suffering communicable diseases goes directly to preventing their spread.¹⁶⁹ The court explained that this circumstance created a foreseeable risk and thus duty owed to vulnerable third parties.¹⁷⁰ However, unlike the doctor in *DiMarco*, remote texters are not the "first line of defense" against automobile accidents—drivers are.¹⁷¹

166. See *Soto v. Frankford Hosp.*, 478 F. Supp. 1134, 1135–36 (E.D. Pa. 1979) (refusing to extend physicians' liability to third party husband of patient).

167. See *Crosby v. Sultz*, 592 A.2d 1337, 1347 (Pa. Super. Ct. 1991) (refusing to extend liability to physician when third party was victim of motor vehicle accident caused by patient). In *Crosby*, the court expressed that requiring a physician to (1) define when a patient's condition might cause an accident and (2) report the patient's disability in order to avoid being sued by an injured third party would create far too heavy a burden on physicians. See *id.* at 1346. The *Crosby* court stated:

We would decline to impose upon the treating physician the burden of not only determining the possibility that a patient's diabetes may flare up and act as the causal link to a subsequent accident, but in addition, reporting the illness in light of the physician's "diagnosis" and prognosis so as to avoid liability *if* the injured victim sues. This responsibility defies logic and is unworkable.

Id. (citing *Commonwealth v. Stewart*, 544 A.2d 1384 (Pa. Super. Ct. 1988)).

168. For a discussion of the plaintiff's argument in *Vega* and why the *Vega* court found it insufficient to justify the theory of sender liability, see *supra* notes 56–61 and accompanying text.

169. See *DiMarco v. Lynch Homes-Chester Cty., Inc.*, 583 A.2d 422, 425 (Pa. 1990) (holding physician liable to third party for failing to prevent spread of communicable disease).

170. See *id.* at 424–25 (justifying extension of physician's liability to infected third party). For a discussion of the justification offered by the *DiMarco* court for extending the liability of the defendant physician to a third party, see *supra* notes 134–36 and accompanying text.

171. See *DiMarco*, 583 A.2d at 424 ("Physicians are the first line of defense against the spread of communicable diseases, because physicians know what measures must be taken to prevent the infection of others."). The element of foreseeability that justified holding the physician in *DiMarco* responsible to a third party is lacking for remote texters, unless they are assumed to expect that the drivers they text will break the law and read their message while driving. See Edelson, *supra* note 112, at 1964–65 ("Proponents of remote texting liability may argue that, in light of the prevalence of distracted driving in today's society, experience informs senders of text messages that a recipient may reach for the phone while driving. However, the problem with this line of reasoning is that it suggests that senders of text messages should anticipate that the recipient will violate the law."). Moreover, because the choice to text and drive is made affirmatively by the driver, "it can be

Lastly, *Crosby* addressed the applicability of a statute requiring doctors to report patients with certain medical conditions to the Department of Motor Transportation and concluded not only that the driver's condition did not fall under the statute, but also that the statute did not create a private cause of action for third parties.¹⁷² Similarly, the court in *Resseguie* acknowledged that the type of duty advanced by the plaintiff had not been recognized as state law.¹⁷³ Correspondingly, while current Pennsylvania law prohibits texting while driving and assigns harsh penalties for texting-while-driving-related accidents that result in grave injury, no private cause of action against remote texters has been acknowledged.¹⁷⁴

B. *Pennsylvania Should Follow the Kubert Concurrence*

Instead of adopting sender liability, Pennsylvania courts should follow the concurrence in *Kubert*, which argued that creating a new duty was both unnecessary and unwise because “traditional tort principles” could have been used to decide the case, and the Pennsylvania legislature had made no indication of considering imposing liability on remote third parties who send distracting text messages to drivers.¹⁷⁵ The concurrence advocated for placing the burden of avoiding texting-while-driving-related accidents on drivers instead of texters.¹⁷⁶ Because prior Pennsylvania precedent has demonstrated a likelihood of agreeing with this opinion, Pennsylvania courts should rely on existing law imputing liability to third parties for aiding and abetting others in violating a duty to evaluate claims brought against remote texters.¹⁷⁷ Even if Pennsylvania were to adopt

argued that the driver's illegal operation of the motor vehicle [is] an unforeseeable intervening cause of the accident.” *See id.* at 1965.

172. *See Crosby*, 592 A.2d at 1344–46 (explaining that even though physicians have a reporting duty, that duty did not create a third party cause of action against physician).

173. *See Resseguie v. Reynolds*, 11 Pa. D. & C.4th 558, 562 (Ct. Com. Pl. Union Cty. 1991) (“If, as plaintiff suggests, a separate duty arises from the passenger to the decedent, no Pennsylvania court has yet recognized it.”), *aff'd*, 613 A.2d 34 (Pa. Super. Ct. 1992).

174. For a discussion of existing Pennsylvania law concerning texting while driving, see *supra* notes 75–78 and accompanying text.

175. *See Kubert v. Best*, 75 A.3d 1214, 1232, 1233 (N.J. Super. Ct. App. Div. 2013) (Espinosa, J., concurring) (arguing lack of necessity and legislative support for establishment of sender liability).

176. *See id.* at 1230 (arguing that driver's 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”).

177. *See Edelson*, *supra* note 112, at 1975 (advocating use of aiding and abetting analysis over application of sender liability in examining liability of remote texters). Edelson argued that, as asserted in the *Kubert* concurrence, existing tort principles are sufficient to evaluate the liability of remote third parties in texting and driving cases. *See id.* Edelson did not deny the potential liability of remote texters, but suggested that in such situations courts “defer to an aiding and abetting analysis” which is “a preexisting and widely recognized tort doctrine.” *See id.* Conveniently, in addition to the theory of sender liability, the *Gallatin* court relied

sender liability, the legal standard set forth in *Kubert* is very hard to satisfy, so texters should rest assured that their texts are unlikely to trigger liability.¹⁷⁸ Moreover, this topic may be better suited for debate in the legislature.¹⁷⁹

on section 876 of the Restatement when allowing the case to proceed against remote texters, which imposes liability on parties who assist other parties in breaching a duty. *See* Gallatin v. Gargiulo, No. 10401 of 2015, C.A., 2016 WL 8715650, at *3–4 (Pa. Ct. Com. Pl. Lawrence Cty. Mar. 10, 2016) (quoting RESTATEMENT (SECOND) OF TORTS § 876 (AM. LAW INST. 1979)) (allowing case to proceed against remote texters).

178. *See* Strider, *supra* note 13, at 1017–19 (explaining difficulty of proving liability under *Kubert* standard). Strider explained that sender liability can be applied when a texter either has actual knowledge that the recipient of the message would read it while driving or has a special reason to know that the driver would read the text while driving. *See id.* at 1017. Plaintiffs will have difficulty proving the first scenario because text message services are not “100 percent reliable” for guaranteed delivery, making it hard to show that the texter knew with certainty that the recipient would read the message. *See id.* (citing Maisie Ramsay, *Is SMS Reliability a Problem?*, WIRELESS WEEK (Apr. 2, 2010, 09:25 AM), <http://www.wirelessweek.com/articles/2010/04/sms-reliabilityproblem> [<https://perma.cc/5PY5-PWPH>]). Additionally, it is hard to prove that a texter knew for certain whether the recipient of their message was driving. *See id.* at 1018–19. Discussing the difficult knowledge standard under this theory of liability, Strider argues:

Although the sender might anticipate that the recipient will be driving when he receives the message, the inherent unpredictability of the future makes absolute certainty difficult. For example, the driver might make an unexpected stop for a variety of reasons—a health emergency, a vehicle emergency, such as a lack of gasoline or a flat tire, or simply the desire to stop and get a cold drink—and therefore, might not read the message while driving.

Id. Further, proving that the sender had special reason to know the recipient would open the message while driving is difficult because although past experience could inform the texter that the recipient often reads text messages while driving, “[p]ast conduct is not necessarily indicative of future behavior.” *See id.* at 1019.

179. *See* Vega v. Crane, 49 N.Y.S.3d 264, 272 (Sup. Ct. 2017) (“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.”). It is important to allow the legislature to decide whether to adopt the theory of sender liability because, given Pennsylvania’s reluctance to hold passengers, social hosts, and physicians liable to third parties, the legislature may choose to increase the duties owed by *drivers* instead of by remote parties. *See, e.g.,* Crosby v. Sultz, 592 A.2d 1337, 1340 (Pa. Super. Ct. 1991) (explaining that Pennsylvania imposes affirmative duty on physicians to report patient conditions that render them incapable of driving).

After the *Vega* court refused to adopt the theory of sender liability for lack of support from the legislature, the legislature addressed the dangers posed by texting and driving by introducing legislation that would require drivers involved in automobile accidents to submit their cell phones for examination by a “textalyzer” device. *See* S.B. 2306-A, St. Sen., 2017–18 Reg. Sess. (N.Y. 2017) (purporting to amend existing state laws to “[p]rovide[] for the field testing for use of mobile telephones and portable electronic devices while driving after an accident or collision”); Assemb. B. 3955, St. Assemb., 2017–18 Reg. Sess. (N.Y. 2017) (assembly version of Senate Bill 2306). For a discussion of the proposed New York legislation, *see* Kieler, *supra* note 21 (explaining proposed “textalyzer” legislation). This device would discern if the driver had been using the phone at the time of the accident, but would not be able to produce information about the content or ori-

V. YOU KNOW THAT YOU ALWAYS CAN TEXT KIM POSSIBLE:
A CONCLUSION

Although there is a valuable lesson to be learned from *Kubert* about the dangers of texting while driving, existing Pennsylvania law suggests that the theory of sender liability should not be adopted.¹⁸⁰ Instead, the Pennsylvania courts considering sender liability should rely on existing legal principles to evaluate claims brought against remote texters.¹⁸¹ By doing so, Pennsylvania will establish a majority stance on the issue of sender liability and set the stage for more states to deny adoption of the theory, which ultimately fails to hold drivers responsible for their actions and expands the scope of liability to a dangerous, impractical, and unnecessary extent.¹⁸²

gin of communications exchanged. *See id.* This legislation reflects New York's commitment to holding drivers accountable for their actions instead of imposing liability on third parties.

180. *See Gough, supra* note 21, 478–82 (discussing public lessons offered by *Kubert*). Gough argued that in addition to compensating victims of harm for their injuries, liability rules create incentives to avoid bringing about the harm. *See id.* at 470. Ultimately, Gough contends that the theory of sender liability provides “a valuable instrument of public education about a novel and serious public safety problem,” and represents “an appropriate example of judicial innovation” when “[p]ublic service announcements, peer discussion, and even the prospect of a traffic ticket have failed to stem [the] serious hazard” presented by texting while driving. *See id.* For a discussion of existing Pennsylvania law that advises against the adoption of the theory of sender liability, see *supra* notes 79–81 and accompanying text.

181. For a discussion of the existing legal principles that can be used to evaluate claims against remote texters, see *supra* notes 142–74 and accompanying text.

182. For a discussion of how the theory of sender liability fails to hold drivers responsible for their actions and expands the scope of liability to a dangerous and unnecessary extent, see *supra* notes 41–45, 159–64 and accompanying text.