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## Beware - Texting Someone You Know is Driving a Car May Make You Guilty of a Crime.

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A recent decision issued by the Superior Court, Appellate Division, *Kubert v. Best*, has garnered a fair degree of attention because of its clear impact on civil automobile accident litigation. In that case, the party who was injured in an automobile accident sought damages from those responsible for the accident. Not surprisingly, the driver of the other vehicle was sued, and in fact those claims were settled. What is remarkable about the case is that the plaintiff attempted to pursue another person named in the lawsuit, who was nowhere near the scene of the accident. The plaintiff attempted to hold the 17 year old female friend of the other driver responsible for his injuries. The 17 year old female was texting back and forth with her 18 year old friend, who was driving the other car that crashed into the plaintiff resulting in the plaintiff's injuries.

This case apparently represented the first time that an injured party sought to hold someone who was texting the other driver who was involved in the accident responsible for injuries sustained. After surveying the law in this jurisdiction, and others, our Appellate Division held:

We hold that the sender of a text message can potentially be liable if an accident is caused by texting, but only if the sender knew or had special reason to know that the recipient would view the text while driving and thus be distracted.

Various news outlets and commentators have questioned the wisdom of this conclusion. See [here](#), [here](#) and [here](#) for examples. In addition, [at least one state lawmaker has vowed to introduce legislation that would have the effect of overruling the Kubert opinion](#). As of this writing, the time to seek review of this opinion by the Supreme Court of New Jersey had not yet expired, so it is not known whether this opinion will be subject to further review by New Jersey's highest court.

While the *Kubert* Opinion concerns civil liability, it does not take much imagination to see the potential impact of this Opinion on criminal cases. In New Jersey, vehicular collisions which result in death or serious bodily injury are subject to criminal prosecution under our State's vehicular homicide (sometimes known as death by auto) statute, or as aggravated manslaughter, depending on the degree of recklessness. The hallmark of evidence required to sustain a criminal conviction is recklessness. Our State's criminal code provides that a person acts recklessly when he "consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation."

Recklessness should be differentiated from the ordinary standard for civil liability, negligence, which our civil law defines "as a failure to exercise, in the given circumstances, that degree of care for the safety of others, which a person of ordinary prudence would exercise under similar circumstances. It may be the doing of an act which the ordinary prudent person would not have done, or the failure to do that which the ordinary prudent person would have done, under the circumstances then existing."

The hallmark difference between criminal recklessness and ordinary civil negligence is appreciation of the risk of harm. Recklessness requires proof of a conscious disregard of the risk of harm, while negligence is based on the failure to perceive the risk of harm.

Usually, in criminal cases arising from a motor vehicle collision, intoxication is a significant factor relied upon as proof of recklessness. Additionally, other factors such as excessive speeding, disobeying of traffic signals or attempts to elude the police, may also be considered as evidence of recklessness. On the subject of texting while driving, the Monitor has previously written about our new State statute that provides that when a driver operates a vehicle while using a mobile telephone without a hands-free device, that fact alone may give rise to an inference that the driver was driving recklessly.

Now add one more legal principle into the mix. In New Jersey, as in many states, you can commit a criminal offense either by committing it yourself, or by being an accessory or accomplice to the crime. Under different circumstances, our courts have held that it is legally possible for someone to be an accomplice to a crime committed by another that is based upon recklessness.

Adding all of these principles together, and assuming the correctness of the holding in the *Kubert* case described above, a prosecutor may argue the following:

If someone who is himself texting while driving can be considered guilty of driving recklessly, and thereby commit the offense of death by auto or aggravated manslaughter when a fatal accident ensues, anyone who knowingly aids the driver to engage in that reckless conduct may be guilty of the same offense as an accomplice.

Stated differently, these legal principles all add up to a potential theory that a person who knowingly helps someone else to drive his vehicle recklessly, whether it be by providing him with alcohol before he drives when he is visibly intoxicated already, or by suggesting that he break the speed limit by driving faster, or by prompting him to disobey a traffic signal, may be guilty of reckless driving as an accomplice. The same principle would seemingly apply to texting someone known to be driving a car, and engaging in a back and forth exchange of text messages while the other person is driving the motor vehicle. If death or serious injury results from the accident, and the driver is charged criminally, some might argue that there is no logical impediment to charging as an accomplice anyone who knowingly assisted the driver in driving recklessly.

The argument described above presupposes the correctness of the holding in *Kubert*. Until that case is considered by a court of higher authority, prosecutors may seek to further its holding by attempting to apply it in the criminal context. Such an attempt would dangerously extend the reach of criminal responsibility into an area not previously thought possible. Is our society ready to accept the notion that, by sitting on a living room couch and sending a text message to a friend driving a car, the texter commits a serious crime if the driver is foolish enough to be distracted by reading the text and causes a fatal car crash?

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