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# BRIEFS

from THE NATIONAL CENTER FOR STATE COURTS

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# Judicature

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## The cars of the future are headed to your courtroom

**Distracted and intoxicated driving are costly problems.** And while emerging technologies aim to help reduce traffic accidents caused by human error, technology may also increase the number of accidents. For judges, staying abreast of how changing technologies may affect litigation can be a challenge.

To help, the National Center for State Courts (NCSC), in partnership with the National Highway Traffic Safety Administration (NHTSA) and the U.S. Department of Transportation, created the Traffic Resource Center ([home.trafficresource-center.org](http://home.trafficresource-center.org)). The site is a com-

prehensive resource for judges, court administrators, court clerks, and other court staff on issues related to traffic and impaired driving adjudication.

According to NHTSA, drunk driving caused 10,874 deaths in 2017. Distracted driving caused 3,166 deaths. While most people are aware that intoxicated driving means operating a vehicle under the influence of alcohol or drugs, distracted driving may be a less familiar term. NHTSA identifies distracted driving as "any non-driving activity a person engages in while operating a motor vehicle."<sup>1</sup> This includes the driver phys-

ically, visually, or mentally focusing on something other than driving, as well as factors like fatigue or a driver's physical and emotional state.<sup>2</sup>

### DISTRACTED DRIVING

NHTSA reports that "[s]ending or reading a text takes your eyes off the road for 5 seconds. At 55 mph, that's like driving the length of an entire football field with your eyes closed."<sup>3</sup> Still, drivers increasingly use phones while driving. In several cases, litigants have tried to assign responsibility for accidents to the maker of the product or service that distracted the driver. The Oklahoma Court of

Civil Appeals has reasoned that merely having “some degree of foreseeability does not make it sound public policy to impose a duty,” and found that “[e]ven if using a cell phone while driving is foreseeable, it is not necessarily foreseeable that it will cause a collision or unreasonably endanger a particular class of persons,” and it is unreasonable to anticipate injury every time a person uses a cell phone while driving.<sup>4</sup>

Will advances in technology change that sentiment? Numerous phone apps, such as Apple’s “Do Not Disturb While Driving” feature, can restrict access while a phone is in motion. But the Insurance Institute for Highway Safety found only one-in-five iPhone users turns the feature on.<sup>5</sup> Though cell phone manufacturers could force the feature’s use, courts still seem reluctant to abandon the long-established *Palsgraf* rule of proximate cause.<sup>6</sup> One federal court in Texas, in refusing to extend liability to Apple for an accident, found that although the failure to automatically disable a driver’s phone may have made the plaintiff’s injuries possible, the phone maker was too remotely connected to the injuries to constitute the plaintiff’s legal cause.<sup>7</sup>

One federal court in Texas, in refusing to extend liability to Apple for an accident, found that although the failure to automatically disable a driver’s phone may have made the plaintiff’s injuries possible, the phone maker was too remotely connected to the injuries to constitute the plaintiff’s legal cause.

#### IMPAIRED DRIVING

Congress is now considering legislation to require all new cars and trucks to include passive alcohol detection systems by 2024. Similar laws requiring seatbelts were tested in the courts in the 1980s. Challenges argued that mandatory seatbelt laws exceeded the state’s police power; violated a driver’s right to privacy; violated the right to equal protection; constituted involuntary servitude and slavery; and violated the fundamental right to be free from bodily restraint.<sup>8</sup> In rejecting such challenges, courts repeatedly found that states had a compelling interest in promoting public safety and reducing the costs associated with accident-related injuries and deaths.<sup>9</sup>

Other technologies may prove helpful in the effort to reduce accidents caused by impaired driving. NHTSA research identifies the Divided Attention Test and the Psychomotor Vigilance Test as effective in determining alcohol impairment by measuring a person’s ability to perform two tasks simultaneously and the time it takes to push a button after being presented with a visual stimulus.<sup>10</sup> These tests may also be used to ascertain illegal intoxication. Of course, requiring drivers to complete tests every time they start a vehicle has drawbacks. Even with quick tests, the inconvenience to the driver would have to be weighed against the state’s interest in public safety.

Emotions can also impact driving ability. Amazon is work-

ing on technology that analyzes a person’s voice to determine their emotional state.<sup>11</sup> Imagine a vehicle telling a parent to stop yelling at the children or it will pull itself over until everyone can get along. Is this within the scope of legitimate police power? Other researchers are developing wearable technologies that could measure alcohol, drug, and hormone levels through a person’s sweat.<sup>12</sup> Could a statute require a driver wear such a device while operating a vehicle?

#### AUTONOMOUS VEHICLES

Even if self-driving cars become the norm, questions are sure to remain. Most automakers say drivers must be prepared to take over control of any self-driving vehicle, but one 2016 study found that it took a driver about 40 seconds to re-take control of a vehicle after an alarm sounded.<sup>13</sup> Is telling drivers to remain attentive sufficient for manufacturers to avoid being considered the proximate cause of a harm?

There also are concerns in this context about decreasing driver competency, as drivers may go months or even years without controlling a vehicle. The airline industry experienced a similar transition from

# JUDICIAL HONORS

## KEM THOMPSON FROST,

chief justice of Texas's Court of Appeals, 14th District, has been named a 2019 Outstanding Texas Leader and inducted into the Texas Leadership Hall of Fame by JBS Public Leadership Institute at The University of Texas-Permian Basin. Chief Justice Frost has served on the Texas judiciary for two decades. She received her LLM from Duke Law in 2014.



New Hampshire Supreme Court Chief Justice **ROBERT J. LYNN** was honored by the

state's bar association with the 2019 Justice William A. Grimes Award for Outstanding Judicial Professionalism. The award honors a judge who is known for being a person "of learning and experience in the laws, of exemplary morals and great patience." Lynn retired in August after 27 years on the supreme and superior trial courts.

## M. MARGARET MCKEOWN

was presented with the John Marshall Award at the American Bar Association Annual Meeting in San Francisco in August. Judge McKeown, who was the first female partner of the law firm Perkins Coie LLP and was

appointed to the U.S. Court of Appeals for the Ninth Circuit in 1998, has been a leader on gender issues, judicial ethics, and international rule of law. In the wake of #metoo, she was named by Chief Justice John Roberts to the national Workplace Environment Working Group.

**WILLIAM E. SMITH**, chief judge of the U.S. District Court for the District of Rhode Island, received the 2019 Chief Justice Joseph R. Weisberger Judicial Excellence Award. Named in honor of its first recipient, retired Chief Justice Joseph R. Weisberger, the

award is given to a Rhode Island jurist for exemplifying and encouraging the highest level of competence, integrity, judicial temperament, ethical conduct, and professionalism.

**DUANE SLONE** of the Circuit Court in the Fourth Judicial District of Tennessee received the National Center for State Court's William H. Rehnquist Award for



Judicial Excellence. The award is presented by the Chief Justice of the United States and honors a state court judge who demonstrates integrity, fairness, and other qualities; Slone was recognized for his innovative judicial work in addressing the opioid epidemic. His motivation is both professional and personal; in 2011, Judge Slone and his wife, Gretchen, adopted an infant son who had suffered opioid withdrawals from his birth mother's use.

Judge **CARL E. STEWART** of the U.S. Court of Appeals for the Fifth Circuit received the 2019 Edward J. Devitt Distinguished Service to Justice Award. The award "honors an Article III



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human-controlled to mostly machine-controlled planes, with pilots' lack of experience resulting in incidents that may have otherwise been avoidable. Litigation over such accidents may offer guidance as judges continue to prepare for a new era of technology on the road.

*Find a longer, annotated version of this report, as well as more information about impaired and distracted driving and the courts, at the Traffic Resource Center (<http://home.trafficresourcecenter.org>). Points of view or opinions expressed in this article do not represent the official positions of the NCSC or NHTSA.*

- <sup>1</sup> *Policy Statement and Compiled FAQs on Distracted Driving*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <http://www.nhtsa.gov.edgesuite-staging.net/Driving+Safety/Distracted+Driving/Policy+Statement+and+Compiled+FAQs+on+Distracted+Driving> (last visited Oct. 28, 2019).
- <sup>2</sup> *Id.*
- <sup>3</sup> *Distracted Driving*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <https://www.nhtsa.gov/risky-driving/distracted-driving>.
- <sup>4</sup> *Estate of Doyle v. Sprint/Nextel Corp.*, 248P.3d 947, 950-51 (Okla. Civ. App. 2010).
- <sup>5</sup> *Modest Use for iPhone 'Do Not Disturb' Blocker*, INST. FOR HIGHWAY SAFETY, <https://www.iihs.org/news/detail/modest-use-for-iphone-do-not-disturb-blocker> (Jan. 24, 2019).
- <sup>6</sup> *Vega v. Crane*, 49 N.Y.S.3d 264, 268 (N.Y. Sup. Ct. 2017).
- <sup>7</sup> *Meador v. Apple, Inc.*, No. 6:15-CV-715, 2016 WL 7665863, at \*4 (E.D. Tex. Aug. 16, 2016), *aff'd*, 911 F.3d 260 (5th Cir. 2018).
- <sup>8</sup> See *State v. Hartog*, 440 N.W.2d 852, 853 (Iowa 1989); *People v. Weber*, 494 N.Y.S.2d 960, 962 (Town Ct. 1985); *State v. Swain*, 374 S.E.2d 173, 173 (N.C. Ct. App. 1988); *City of Tulsa v. Martin*, 775 P.2d 824, 825 (Okla. Crim. App. 1989); *Richards v. State*, 743 S.W.2d 747, 748-49 (Tex. App. 1987).
- <sup>9</sup> See, e.g., *People v. Coyle*, 251 Cal. Rptr. 80, 81-82 (Cal. App. Dep't Super Ct. 1988); *Hartog*, 440 N.W.2d 852 at 856.
- <sup>10</sup> *Distracted Driving*, *supra* note 3.
- <sup>11</sup> Matt Day, *Amazon Is Working on a Device That Can Read Human Emotions*, BLOOMBERG (May 23, 2019), <https://www.bloomberg.com/news/articles/2019-05-23/amazon-is-working-on-a-wearable-device-that-reads-human-emotions>.
- <sup>12</sup> Cathy Russey, *Wearable Sensor Uses Sweat to Check Blood Alcohol Content*, WEARABLE TECHS. (Nov. 28, 2018), <https://www.wearable-technologies.com/2018/11/wearable-sensor-uses-sweat-to-check-blood-alcohol-content/>.
- <sup>13</sup> Hannah Fry, *The Road to Self-driving Cars Is Full of Speed Bumps*, DISCOVER MAG. (Oct. 25, 2018), <http://discovermagazine.com/2018/nov/baby-can-you-drive-my-car>.