Mix Cars, Drugs, Guns, and Add Water– A Recipe for Interesting Blog Reading

For more than a decade, the Marquette Law School Faculty Blog (law.marquette.edu/facultyblog) has been a forum for a wide range of ideas involving the law, public policy, and events at Eckstein Hall, among many other things. In addition to faculty members, law school graduates and current students have contributed extensively to the blog. Here are four recent pieces, three by faculty members and one by a current student, that provide fresh perspectives on matters of current interest.

Alexander B. Lemann

As we approach our autonomous future, will products liability law hold us back or shove us forward?

Alexander B. Lemann

In recent years, highly autonomous vehicles (AVs) have acquired a reputation as a technology that is perpetually just a few years away. Meanwhile, their enormous promise continues to tantalize. AVs have the potential to transform American life in a variety of ways, reducing costs both large and small. From virtually eliminating the roughly 40,000 deaths and hundreds of thousands of injuries we suffer in car accidents every year to making it possible to commute to work while sleeping, AVs are seen as potentially revolutionary.

Against this backdrop, many torts scholars have expressed concern that imposing liability on AV manufacturers threatens to slow or even deter AV development. When AVs take the wheel, will the companies that make them also take on liability for whatever crashes they can't avoid? AV development also raises the possibility—much less commonly noticed—of new liability for manufacturers of conventional vehicles. If AVs are significantly safer, will courts and juries come to see conventional vehicles as defective? According to a recent Arizona appellate court opinion, the answer is . . . maybe so.

In *Varela v. FCA US LLC*, the plaintiff, Melissa Varela, had slowed to a stop on the highway because of traffic in front of her when she was rear ended by a Jeep Grand Cherokee moving at over 60 miles per hour. Varela was injured, and her four-year-old daughter, riding in the backseat, was killed.

In filing suit, Varela argued that the Jeep was defectively designed in that it did not include an autonomous safety feature known as automatic emergency braking. Automatic emergency braking monitors the road in front of a car and can sense an impending collision. After providing a warning to the driver, the car can then stop on its own if the driver fails to act. Automatic emergency braking is gradually becoming a universal feature on new cars sold in the United States, and even in 2014, when the Jeep at issue in *Varela* was sold, it was standard on the two highest trim levels. Unfortunately for Varela, it was optional on the trim level of the car that hit her, and the driver had not elected to purchase it. The premise of her suit is that the Jeep would never have collided with her at all if it had been equipped with automatic emergency

braking, and that any Jeep sold without it is for that reason defective.

The superior court dismissed Varela's case on preemption grounds, holding that the 2017 decision by the National Highway Traffic Safety Administration (NHTSA) not to mandate the inclusion of automatic emergency braking foreclosed the possibility of state tort law doing so. Indeed, an Arizona appellate court reached the same conclusion on virtually identical facts just last year, in *Dashi v. Nissan North America, Inc.*, 445 P.3d 13 (Ariz. Ct. App. June 13, 2019).

But here the appellate court reversed, reasoning that the NHTSA's decision was based on its satisfaction that manufacturers were rapidly adopting automatic emergency braking anyway, and that an agency's decision not to mandate a national standard "does not, without more, impliedly preempt a state common-law tort action." *Varela v. FCA US LLC*, 466 P.3d 866 (Ariz. Ct. App. May 5, 2020) (citing *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002)). The court made almost no effort to distinguish *Dashi*.

With Varela's case reinstated, the question of defect looms. Varela's challenge is a fundamental one in the history of products liability law as applied to automobiles: Is a manufacturer required to equip all the cars it sells with the latest safety technology, as long as the technology meets some standard of cost-effectiveness or reasonableness? Put another way, is a car to be evaluated by comparison with the safest cars on the road, or with the typical car that has come before?

As *Varela* indicates, this question could take on a new urgency in the coming years. As manufacturers of highly autonomous vehicles like Waymo and Tesla struggle to produce cars that have no need of human drivers, most of the progress is these days being made in the form of incremental improvements to the autonomous features found on many cars already on the road. While scholars and commentators have fretted about the prospect of increased liability for manufacturers as they take responsibility for driving, it could be that manufacturers will find themselves facing new forms of liability even for the same old cars.

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Judith G. McMullen

Learning to be alert to addiction

Judith G. McMullen

When lawyers think about working with clients who have addictions, we often imagine clients who are young or middle-aged and facing legal consequences such as criminal charges for drug possession or for driving under the influence of alcohol or another drug. But not every person struggling with addictions is young, in trouble with law enforcement, or even using substances in a visible way that signals addiction to family members or professionals.

More than 2.5 million adults over age 55 struggle with addictions every year in the United States. As people age, their bodies become more sensitive to medications and alcohol. According to data from the CDC, 85 percent of people over the age of 60 take prescription drugs. Older people often take multiple prescription medicines, and often these drugs interact with each other, or with alcohol. Ten percent of hospital admissions of older people are related to problems with drugs or alcohol. Many older people become addicted to opioids or anxiety medications that were prescribed by their own doctors to deal with pain or anxiety. Once they become

dependent on drugs, they may feel ashamed or hopeless. Family members may mistakenly attribute physical unsteadiness or mental confusion to normal aging or even dementia. Older people struggling with addictions often suffer alone and in silence. But it doesn't have to be that way. Professionals who work with them can help them recognize the need for help and empower them to get it.

Lawyers who work in estate planning or elder law are keenly aware of the need to continually assess the mental capacities of their clients. Discussions in law school courses or continuing legal education programs often center on various kinds of dementia, how to recognize them, and how to work with clients who have periods of lucidity. As the above statistics point out, lawyers also need to recognize that confusion, speech difficulties, or memory problems could be related to drug dependence, drug interactions, or even drug doses that are too high for an elderly person's tolerance. We can recognize possible issues and refer our clients for medical or substance evaluations. Most importantly, we can normalize the experience of our clients, assure them that they need not be ashamed, and show them that there is help and hope available.

A team composed of some of my colleagues from Marquette University's Clinical Mental Health Counseling program and me has produced a very brief public service video (https://youtu.be/P4pE-vdOpRc) that could be shown to clients or their family members who are facing difficulties with possible addictions. Please feel free to share it with anyone who would find it useful.

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Robert Maniak

Rules of engagement, across the world

Robert Maniak

Afghanistan was hot. An almost indescribable amount of heat meant that you were constantly sweating as everything you wore became soaked, so that you were never truly dry. I was there in 2014 as part of what, we thought at the time, was the United States' withdrawal from the country. The unit I was a part of had the impossible task of maintaining the operation of Camp Bastion's flight line, providing all the logistics that kept the aircraft and crews happy, while also keeping them safe.

Contrary to public assumption, and most recruiting commercials, the U.S. Marine Corps isn't made of just infantry and aircraft units. There is a whole ecosystem of support jobs, which keep everything moving along. My job was one of the less glamorous, less flashy, less likely to be publicized ones. I maintained air conditioners and refrigerators. And the unit I was assigned to wasn't all that exciting either. We were a support squadron of the aircraft squadrons. We did not have any aircraft to maintain. Rather, we supplied all the less glamourous logistics for the units that did fly.

Part of that logistics support was security. After the disastrous 2012 attack that killed two Marines and destroyed millions of dollars of aircraft, the airfield, which was nested inside the larger base, was subject to increased security protocols, limiting access to only those who had business there. This meant that in addition to doing our daily jobs, like vehicle and heavy equipment maintenance, we would also be tasked to stand post at the entry points for the flight line or be on stand-by as a quick reaction force in the event that someone breached the base fence and made the one-kilometer trek to the flight line.

Occasionally, certain Marines were assigned to a longer-term security assignment. Being assigned to this meant you would not be doing your regular job at all. Rather, you would be assigned to stand a rotating medley of security posts for 12 hours a day. It was here that I found myself during that summer, stuck on the day shift in the sweltering sun.

As part of the pre-deployment training that our unit underwent, we drilled, often and repeatedly, the procedures of what to do when at an entry point. Tell the person to stop, cognizant of the fact that they probably don't speak English, so hand signals and patience are a priority. Once they stop, pat them down and use a metal detector to ensure they don't have anything dangerous. Since our unit was going to be policing only internal checkpoints, we didn't need to worry about vehicle-borne explosives or harder-to-conceal rifles. We were worried about knives and handguns or other improvised weaponry.

Occasionally, base intelligence would get wind of something it didn't like and order the base to enter a heightened defensive posture. This happened once while I was assigned to the unforgivingly hot 12-hour post. It didn't happen during the day, of course; it happened in the middle of the night. Another Marine and I found ourselves hustled out of bed to don our gear and provide overwatch protection. We were about 50 yards from a hastily constructed entry control point that was stopping traffic on the road rather than at the normal entry point. We overlooked the road on a natural hill, so we ended up looking down onto the vehicles being stopped. We watched as truck after truck, backlit by the moon and unnatural floodlights, was stopped and searched.

The first few presented no issues. The drivers, though confused by the existence of the control point, cooperated without issue, happily turning over their identification and proper permits to the corporal in charge. But then an issue arose. One driver's paperwork wasn't in order. He was missing something, and suddenly everyone was on edge. As the corporal called in for a supervisor, the driver knew something was wrong. This stop was taking far longer than any other truck ahead of him. The Marines staring at him were tense. The driver, a man from India, whose job was to do what Americans would not, namely clean port-a-johns, was drained of all color, looking whiter than the moon.

As luck would have it, the truck he was driving was older, rickety, and poorly maintained. He was asked to step out of the vehicle, and when he engaged the parking brake, the truck lurched forward. Suddenly, every Marine, myself included, drew our rifles up. The driver, now faced with a total of six different muzzles pointed at his chest, used whatever strength he had to raise his hands above his head. The tension lessened as we realized what had happened. The driver, who was shaken and no doubt scared for his life, fell out of the truck on to the ground. Our supervisors arrived and double-checked the paperwork. There wasn't an issue after all. The permit had been issued using the European dating system, day-month-year, rather than the American one, month-day-year.

Looking back to that incident six years later, I am reminded of why we didn't open fire that night. As part of pre-deployment training, we had to memorize the rules of engagement. Before firing our weapons, we had to have positive identification of our target and either that target needed to show a hostile intent, an example of which would be leveling a weapon at someone, or the target needed to show a hostile action, such as firing a weapon at someone. That night, despite the fact that we were all on edge, despite being fatigued from spending all day in the hot sun, despite the fact that each Marine that night carried 180 rounds of ammunition and had training in how to shoot a hostile target, the six of us came to the same conclusion: The driver was scared and made a mistake. It wasn't hostile; it was human.

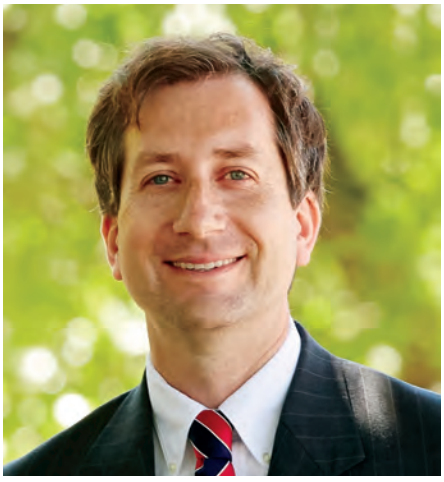
As yet another video emerges, as yet another community is in mourning, as yet another person was shot by police, I think of that night. The six Marines that night all decided that the driver of a large truck located in a war-torn country, where we would be woken up by rocket attacks and the sound of gunfire, was not a threat. And yet over the past few months America has been inundated with horrific events in which people are shot and, in some cases, killed by police officers. Some were sleeping in their beds; others begged for their mothers as they were choked to death; and others still were shot in the back. And that is a damn travesty.

Robert Maniak is a third-year student at Marquette Law School. This post was written in the wake of the shooting of Jacob Blake by a police officer in Kenosha, Wis., on August 23, 2020.

David A. Strifling

Attorney General Kaul, Wisconsin DNR reverse slide of Wisconsin's public trust doctrine

An important shift in Wisconsin water policy has taken place, one that will likely have quantitative effects on Wisconsin water quality. It relates to the relative influence of the public trust doctrine in the state. On several occasions, I have written on this blog about the doctrine's apparently declining influence in Wisconsin. The public trust doctrine is generally taken to mean that a state must act as "trustee" of certain natural resources, particularly the navigable waters of the state, and manage them for the trust beneficiaries—its people.



David A. Strifling

Operationalizing those general terms has been difficult and has proceeded in fits and starts. For present purposes, I will focus on the 2011 Wisconsin Supreme Court decision in *Lake Beulah Management District v. Wisconsin Department of Natural Resources*. The court concluded that the public trust doctrine gave the Wisconsin Department of Natural Resources (WDNR) "the authority and a general duty to consider whether a proposed high-capacity well may harm [other] waters of the state" via water level drawdown and other potential impacts. In Wisconsin, high-capacity wells (HCW) are statutorily defined as wells with the capacity to pump more than 100,000 gallons of water per day. The court further held that, when considering HCW applications, WDNR had the authority to "deny a permit application or include conditions in a well permit" to prevent the harm to other nearby waters.

Around the same time, a new statute arguably undercut that same authority. While the case was before the court, the legislature enacted 2011 Wisconsin Act 21, creating Wis. Stat. § 227.10(2m). The statute provides that "[n]o agency may implement or enforce any standard, requirement, or threshold, including a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule . . . ." For several years, uncertainty persisted over the tension between the Supreme Court opinion and the statute because the WDNR's public trust authority is not "explicitly" stated in the statutes or in WDNR's administrative rules.

On May 10, 2016, then-attorney general Brad Schimel issued an opinion giving priority to the statute over the *Lake Beulah* opinion. AG Schimel determined that DNR had no "explicit authority" to impose conditions on a high-capacity well permit, or to evaluate the drawdown and related impacts that those wells might cause on nearby waters of the state. For that reason, he wrote, "much of the Court's reasoning in *Lake Beulah*, including the breadth of DNR's public trust authority discussed below, is no longer controlling."

That was an important statement of policy. The Marquette Water Law and Policy Initiative performed a quantitative analysis to analyze its empirical effects. We used WDNR-published data from 2013 to 2018 to answer two questions: First, how many high-capacity well applications were filed? Second, how long did WDNR take to grant or deny the application? The preliminary data appear to show that more applications were filed, and that the time to grant or deny them decreased significantly. I presented those findings at an event in the Law School's Lubar Center on March 4, 2020.

The chart below depicts the number of days the agency took to approve a high-capacity well application (plotted on the *y*-axis) against the date the application was filed (plotted on the *x*-axis). The average time for approval decreased from about 270 days in 2015 to about 63 days in 2017.

The tide turned shortly after the March 2020 event. In early May, the current attorney general, Josh Kaul, revoked former AG Schimel's opinion, writing that "the crux of [the opinion] is incorrect" in light of *Lake Beulah*. Kaul cited a circuit court case following *Lake Beulah* instead of former AG Schimel's opinion, and noted that an appeal in the case has been certified to the Wisconsin Supreme Court. The court's consideration of the case means that the policy shift announced by Kaul may be only temporary, pending a decision of the court.

Following Kaul's action, the WDNR announced that it would revise its HCW review process in response to the changed policy. Repeatedly citing *Lake Beulah,* DNR said it will "make a fact-specific determination in each case and will consider environmental impacts when reviewing a proposed high-capacity well application if presented with sufficient concrete, scientific evidence of potential harm."

Environmental law observers have often lamented the lack of empirical scholarship tracking how changes in law and policy quantitatively affect environmental metrics. The events detailed in this post provide a case study along those lines. We will continue to track the effects of this important shift in the law to determine whether it reverses the previously observed effects, and we plan to publish a paper reporting the results of our work to date.

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Time for Wisconsin DNR Approval of HCW Applications (in Days)