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Notes

WARR v. JMGM GROUP: MARYLAND DRAM SHOPS ESCAPE DUTY TO FORESEEABLE VICTIMS OF DRUNK DRIVING

KATHERINE O'KONSKI*

In *Warr v. JMGM Group*,[1] the Court of Appeals of Maryland considered whether it should recognize "dram shop liability" by holding a tavern liable for harm to an innocent third party caused by an intoxicated patron.[2] The court held that, absent a special relationship, it would not recognize dram shop liability and concluded that a tavern does not have a duty to prevent harm caused by an intoxicated patron.[3] The majority's focus on the tavern's *omission* in failing to prevent an intoxicated patron from driving led it to erroneously conclude that recognizing dram shop liability would impose a duty to protect the general public in violation of Maryland precedent and the *Restatement (Second) of Torts* Section 315.[4] The court should have recognized that the tavern's affirmative *action* in serving a visibly intoxicated patron was relevant to assigning liability.[5] Conceptualizing the tavern's conduct as an action is consistent with Maryland's and other states' case law, and would have enabled the court to find that the Dogfish Head tavern owed a duty to the Warrs under both the general principles of negligence and the *Restatement (Second) of Torts* Section 315.[6] While this case presents a difficult challenge in balancing the interests of Maryland's tavern businesses with the imperative to reduce drunk driving fatalities, the court should have considered that imposing

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1. 433 Md. 170, 70 A.3d 347 (2013).
2. *Id.* at 177, 70 A.3d at 351.
3. *Id.* at 199, 70 A.3d at 364.
4. *See infra* Part IV.A.
5. *See infra* Part IV.A.1.
6. *See infra* Part B.

dram shop liability would deter such destructive behavior while providing compensation for those injured.[7]

I. THE CASE

On the evening of August 21, 2008, Michael Eaton, an out-of-state resident,[8] patronized the Dogfish Head Alehouse in Gaithersburg, Maryland,[9] where he had the reputation of "being a habitual drunkard."[10] He stayed at the Dogfish Head for six hours, consuming fourteen bottles of beer, two drinks of hard liquor, and another drink someone purchased for him.[11] Eaton left Dogfish Head at 10:00 P.M., but returned forty minutes later and consumed three more bottles of beer and one shot of tequila.[12] At this point, Eaton became violent, and his server informed him that he would not be served any more alcohol.[13] A Dogfish Head employee offered to call a cab, but Eaton refused.[14] Instead he left Dogfish Head in his vehicle, driving down Interstate 270[15] at "eighty-eight to ninety-eight miles per hour."[16] He collided into the back of a car driven by William Warr, and fled from the scene.[17] Two girls were in the back of the Warrs' car when Eaton hit it.[18] Jazimen, the Warrs' ten-year-old granddaughter,[19] was killed in the crash, while her sister Cortavia sustained injuries for which she was flown in a helicopter to the hospital.[20] Eaton, who turned himself in to the

7. *See infra* Part IV.C.

8. Memorandum Opinion and Order, Warr v. JMGM Group, No. 341698-V, at 9 (Mont. Cnty. Cir. Ct. Jan. 19, 2012).

9. *Warr*, 433 Md. at 174, 70 A.3d at 349.

10. Memorandum Opinion and Order, Warr v. JMGM Group, No. 341698-V, at 2 (Mont. Cnty. Cir. Ct. Jan. 19, 2012).

11. *Id.*

12. *Id.*

13. *Id.* at 9.

14. *Id.* at 2.

15. Warr v. JMGM Group, 433 Md. 170, 175, 70 A.3d 347, 350 (2013).

16. *Id.* at 200, 70 A.3d at 365 (Adkins, J. dissenting).

17. Dan Morse, *Bar Sued After Patron's Crash Kills Girl*, WASH. POST CRIME SCENE (Dec. 14, 2010, 7:57 AM), http://voices.washingtonpost.com/crime-scene/montgomery/moco-bar-sued-after-patron-cra.html.

18. *Id.*

19. The Court of Appeals refers to Jazimen as the Warrs' daughter, while the newspapers refer to her as a granddaughter. *Compare Warr*, 433 Md. at 174, 70 A.3d at 349 (majority opinion) (calling the girls "daughters"), *with* Morse, *supra* note 17 (calling the girls "granddaughters" but noting that the Warrs were raising the girls). The Warrs' filing with the court refers to Jazimen as William Warrs' "deceased granddaughter." Corrected Brief of Petitioner at 1, Warr v. JMGM Group, 433 Md. 170, 70 A.3d 347 (2013) (No. 57), 2013 WL 6813262, at 1.

20. Dan Morse, *'I Will Never Forgive the Man'; Md. Girl, 12, Attends Sentencing Hearing for Motorist Who Killed Her Sister*, WASH. POST, July 31, 2009 at B1.

police the next morning,[21] received an eight-year prison sentence for vehicular manslaughter.[22]

William and Angela Warr filed suit in the Circuit Court for Montgomery County against JMGM Group, LLC, owner of Dogfish Head Alehouse, to recover for injuries their family sustained in the accident and for the death of Jazimen.[23] The Warrs alleged that JMGM was liable for their injuries because the bar had a duty to refuse to provide alcoholic beverages to an individual who was visibly intoxicated or who was considered a "habitual drunkard."[24] Although the circuit court was convinced that "the factual underpinnings of this case made a change in Maryland jurisprudence with respect to dram shop liability ripe to the core,"[25] it nonetheless granted JMGM's motion for summary judgment.[26] The circuit court reasoned that dram shop liability is not recognized as a cause of action under Maryland case law, and that the decision to overturn precedent was within the province of the Court of Appeals of Maryland.[27] The Warrs appealed the circuit court's decision; but before any proceedings in the Court of Special Appeals took place, the Court of Appeals granted the Warrs' petition for certiorari to consider whether Maryland should recognize dram shop liability as a cause of action.[28]

II. LEGAL BACKGROUND

Dram shop liability cases in Maryland traditionally have been argued on the grounds of proximate cause: Courts considered drinking, rather than furnishing alcohol, to be a proximate cause of any injury inflicted by the negligent conduct of the purchaser.[29] This trend continued even as other states created dram shop liability through judicial decision and legislative enactment.[30] In a parallel line of cases starting with the Court of Appeals's decision in *Lamb v. Hopkins*,[31] however, Maryland courts began to explore the extent to which a defendant could be liable in tort for failing to protect

21. Morse, *supra* note 17.

22. *Id.*

23. Memorandum Opinion and Order, Warr v. JMGM Group, No. 341698-V, at 1 (Mont. Cnty. Cir. Ct. Jan. 19, 2012).

24. Warr v. JMGM Group, 433 Md. 170, 175, 70 A.3d 347, 350 (2013).

25. Memorandum Opinion and Order, Warr v. JMGM Group, No. 341698-V, at 1 (Mont. Cnty. Cir. Ct. Jan. 19, 2012).

26. *Id.* at 14.

27. *Id.* at 13.

28. *Warr*, 433 Md. at 174, 70 A.3d at 349.

29. *See infra* Part II.A.

30. *See infra* Part II.B.

31. 303 Md. 236, 492 A.2d 1297 (1985).

the plaintiff from the actions of a third party.[32] These cases evolved into Maryland dram shop liability jurisprudence, setting the stage for the court's decision in *Warr*.

A. Maryland's Early Dram Shop Liability Cases Declined to Find Taverns Liable Because Selling Alcohol Was Not the Proximate Cause of the Injury

The Court of Appeals of Maryland first considered dram shop liability in its 1951 decision, *State v. Hatfield*.[33] A tavern owned by Elizabeth Hatfield sold alcohol to an intoxicated minor, who then drove on the incorrect side of the road and killed James Joyce.[34] The court reasoned that Hatfield was not liable because selling alcohol to a minor was not a proximate cause of Joyce's death.[35] In an oft-quoted passage, the court explained that "human beings, drunk or sober, are responsible for their own torts."[36] In so holding, the court recognized a strong common law argument that the actions of the patron—drinking alcohol and choosing to drive—were a superseding cause that protected the tavern owner from liability.[37]

When the Court of Appeals next considered dram shop liability close to thirty years later in *Felder v. Butler*,[38] it acknowledged that changing social conditions surrounding alcohol and driving could merit a change in policy.[39] In *Felder*, Madeline Hawkins drove into oncoming traffic after drinking at a bar, causing grievous injuries to the plaintiffs.[40] The plaintiffs argued that the tavern should be held liable because it illegally served Hawkins alcohol after she was visibly intoxicated.[41] The *Felder* court recognized that many other states had adopted dram shop liability, but the court nevertheless declined to follow suit.[42] Specifically, the court emphasized concerns over the inability to develop a workable test for imposing liability, fear of collusive suits, and a reluctance to expose social hosts to the possibility of liability for serving alcohol to intoxicated

32. *See infra* Part II.C.
33. 197 Md. 249, 78 A.2d 754 (1951).
34. *Id.* at 251, 78 A.2d at 755.
35. *Id.* at 254, 78 A.2d at 756.
36. *Id.*
37. *Id.* at 255, 78 A.2d at 757.
38. 292 Md. 174, 438 A.2d 494 (1981).
39. *See id.* at 182, 438 A.2d at 499 (commenting that "societal problems like that presented by the senseless carnage occurring on our highways" might require a change in law).
40. *Id.* at 175, 438 A.2d at 495.
41. *Id.* at 175–76, 438 A.2d at 495.
42. *Id.* at 182, 438 A.2d at 498–99.

guests.[43] Instead, the court left the decision of whether to adopt dram shop liability to the legislature.[44]

B. Other State Courts Adopted Dram Shop Liability Based on a Duty to Protect a Third Party from Foreseeable Injury

Although Maryland declined to adopt dram shop liability in the 1980s, many other states recognized that taverns owed a duty to protect others from foreseeable injury at the hands of their intoxicated patrons. *Waynick v. Chicago's Last Department Store*[45] and *Rappaport v. Nichols*[46] sparked dram shop liability's modern renaissance in 1959.[47] In *Waynick*, a diversity action where one of the participating states, Illinois, had a Dram Shop Act, the Seventh Circuit found an alcohol licensee liable for the sale of alcohol to intoxicated persons.[48] In *Rappaport*, the Supreme Court of New Jersey concluded that, even without a Dram Shop Act, a tavern owner was a proximate cause of the plaintiff's injuries.[49] The New Jersey court noted that "a jury could reasonably find that the plaintiff's injuries resulted" from the tavern owner's negligent conduct in serving a visibly intoxicated patron.[50]

As many more courts began to recognize dram shop liability in the ensuing decades, these courts also began to analyze taverns' duties to protect third parties from the torts of their intoxicated patrons.[51] For

43. *Id.*

44. *Id.* at 184, A.2d at 499–500.

45. 269 F.2d 322 (7th Cir. 1959).

46. 156 A.2d 1 (N.J. 1959).

47. *See Felder*, 292 Md. at 184, 438 A.2d at 499 (noting that *Waynick* and *Rappaport* initiated a "new trend of cases" departing from the common law argument of no proximate cause).

48. *See Waynick*, 269 F.2d at 326 (holding that store owners who allowed two patrons to purchase and consume large amounts of alcohol over several hours in a parking lot and then drive away to collide with another car were the proximate cause of the plaintiffs' injuries since the Illinois Dram Shop Act made the sale of liquor to any intoxicated person unlawful).

49. *See Rappaport*, 156 A.2d at 8 (reasoning that the sale of alcohol to a visibly intoxicated person should be considered the proximate cause of the injury since "the unreasonable risk of harm . . . to members of the traveling public may readily be recognized and foreseen").

50. *Id.* at 9.

51. *See, e.g.*, Simmons v. Homatas, 925 N.E.2d 1089, 1100 (Ill. 2010) (holding that a nightclub owed a duty to "refrain from assisting and encouraging . . . tortious conduct" after the club ejected a visibly intoxicated patron from the premises and required him to drive away, resulting in a collision that killed another driver); Dickinson v. Edwards, 716 P.2d 814, 819 (Wash. 1986) (en banc) (finding that a restaurant and employer could be held liable for furnishing alcohol to a visibly intoxicated employee at a company banquet after that employee consumed twenty drinks and left the banquet in his car, severely injuring a motorcyclist); Carver v. Schafer, 647 S.W.2d 570, 575 (Mo. Ct. App. 1983) (holding that a tavern had a duty to avoid serving a visibly intoxicated patron under a standard of ordinary care after the patron, who had been drinking heavily at the defendant's tavern, struck a police officer standing on the shoulder of an interstate highway); Ono v. Applegate, 612 P.2d 533, 539 (Haw. 1980) (holding that Hawaii's

example, in 1964, the Supreme Court of Pennsylvania adopted dram shop liability in *Jardine v. Upper Darby Lodge No. 1973*.[52] After Thomas Gross struck two pedestrians on his way home following several hours of drinking, one of the pedestrians, James Jardine, brought suit alleging that the tavern was liable because it negligently served Gross alcohol while he was visibly intoxicated.[53] The court agreed, holding that the tavern had a duty entirely apart from statute[54] to refrain from serving Gross after he became visibly intoxicated.[55] The court explained that "[t]he first prime requisite to de-intoxicate one who has, because of alcohol, lost control over his reflexes, judgment and sense of responsibility to others, is to stop pouring alcohol into him."[56]

In *Ontiveros v. Borak*,[57] the Supreme Court of Arizona abandoned the common law rule that rejected liability and held a dram shop liable for the torts of its patrons.[58] In *Ontiveros*, Reuben Flores consumed about thirty beers at a bar owned by Peter Borak.[59] Flores left the bar in his vehicle, only to hit and severely injure a pedestrian.[60] The court held that the tavern had a common law duty to conduct itself with reasonable care and prudence when dispensing alcohol.[61] Given the universal use of automobiles, the court reasoned that the patron's decisions to consume alcohol and then get behind the wheel were foreseeable intervening acts.[62] The court explained that "in selling liquor to an intoxicated customer, where it is evident that the customer may injure himself or others as a result of the intoxication, a vendor is not acting as a reasonable person would."[63]

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liquor control statute supported the imposition of a duty on a tavern keeper to refrain from serving a visibly intoxicated individual under the general principles of negligence after a driver coming from a tavern collided head-on with the plaintiff's vehicle).

52. 198 A.2d 550 (Pa. 1964).

53. *Id.* at 551.

54. *See* 47 PA. CONS. STAT. ANN. § 4-493 (West 2012) (outlawing the sale of alcohol to intoxicated persons).

55. *Jardine*, 198 A.2d at 553.

56. *Id.*

57. 667 P.2d 200 (Ariz. 1983).

58. *Id.* at 213; *see also* Collier v. Stamatis, 162 P.2d 125, 128 (Ariz. 1945) (holding that a tavern owner who served a minor was not liable for her later detention as a "juvenile delinquent," reasoning that the young woman chose to become intoxicated and was therefore "the author of her own injury"); Pratt v. Daly, 104 P.2d 147, 149 (Ariz. 1940) (commenting that a plaintiff, deceased in an accident while extremely intoxicated, "was the author of his own death").

59. *Ontiveros*, 667 P.2d at 203.

60. *Id.* Juan Ontiveros was partially paralyzed and developed mental retardation as a result of the accident. *Id.* at 203–04.

61. *Id.* at 208–09. The court also noted that Arizona statute made it unlawful for a liquor licensee to sell alcohol to a visibly intoxicated person. *Id.* at 209.

62. *Id.* at 206.

63. *Id.* at 209 (quoting Nazareno v. Urie, 638 P.2d 671, 674 (Alaska 1981)).

Similarly, in *El Chico Corp. v. Poole*,[64] the Supreme Court of Texas adopted dram shop liability after Rene Saenz, who had been drinking heavily at a restaurant, ran a red light and killed Larry Poole.[65] The court reasoned that the restaurant had a duty to exercise reasonable care to avoid foreseeable injury to others, commenting that "[t]he risk and likelihood of injury from serving alcohol to an intoxicated person whom the licensee knows will probably drive a car is as readily foreseen as injury resulting from setting loose a live rattlesnake in a shopping mall."[66] The court remarked that the Texas Penal Code criminalized the sale of alcohol to visibly intoxicated patrons and noted that the purpose of the Code was to protect the welfare of the general public.[67] Aligned with the Code, the court held that the tavern had a duty to the general public not to serve alcoholic beverages to a visibly intoxicated person.[68] Thus, Texas and several other states grounded their reasoning for adopting dram shop liability on the ubiquitous use of automobiles and the resulting foreseeability of an intoxicated person injuring others if served more alcohol.

C. Lamb v. Hopkins *and Progeny: Influencing Maryland's Dram Shop Liability Jurisprudence*

The decision of the Court of Appeals of Maryland in *Lamb v. Hopkins* sparked a line of cases dealing with an actor's duty to protect another from injury by a third party. Initially, the court examined the extent to which an actor owes a duty of reasonable care to protect another from the acts of a third party, apart from Maryland's dram shop liability jurisprudence. The court's reasoning in these cases, however, soon became incorporated into Maryland's dram shop liability decisions.[69]

In *Lamb v. Hopkins*, the Lambs brought suit against Russell Newcomer, Jr.'s probation officers after Newcomer severely injured the Lamb's infant in a drunk driving accident.[70] The officers knew but never reported to the appropriate authorities that Newcomer had been convicted of driving while intoxicated several times during his probation.[71] The Lambs argued that the officers owed a duty to exercise due care to protect those who would be foreseeably harmed by Newcomer's dangerous drunk driving

64. 732 S.W.2d 306 (Tex. 1987).

65. *Id.* at 308–09.

66. *Id.* at 311.

67. *Id.* at 312 (citing TEX. ALCO. BEV. CODE. ANN. §101.03 (West 1978)).

68. *Id.* at 313.

69. *See infra* notes 85–90 and accompanying text.

70. 303 Md. 236, 240, 492 A.2d 1297, 1299 (1985). Laura Lamb, five months old at the time of the accident, was rendered a quadriplegic. *Id.*

71. *Id.* at 239–40, 492 A.2d at 1299.

habit.[72] In holding that the probation officers did not owe a duty to protect the Lambs, the Court of Appeals concluded that the probation officers "had neither the right nor the ability to control Newcomer's conduct."[73] Finding no binding precedent, the court applied the *Restatement (Second) of Torts*, Sections 314 and 315.[74] These sections explain that, absent a special relationship between the actor and the third person or the actor and the person harmed, an actor owes no duty to prevent a third person from causing harm to another.[75] According to the court, the probation officers could not be held liable because they did not have a special relationship with Newcomer or with the Lambs.[76]

In *Ashburn v. Anne Arundel County*,[77] a county police officer found an intoxicated John Millham sitting in his truck with the engine running and lights on.[78] Rather than charging Millham with drunk driving, the officer told him "to pull his truck to the side of the lot and to discontinue driving that evening."[79] As soon as the officer left, however, Millham drove a short distance and collided with pedestrian John Ashburn.[80] The court, citing *Lamb* and *Restatement (Second) of Torts* Section 315, reasoned that, absent a special relationship, the officer had no duty to control Millham's conduct in order to prevent harm to another.[81] Because Ashburn did not allege any facts that showed he had created a special relationship with the officer,[82] the court held that the officer owed no duty to protect Ashburn.[83]

While Maryland courts generally continued to decide dram shop liability cases on the grounds that the sale of alcohol was not a proximate cause of the plaintiff's injuries,[84] an important exception occurred a year

72. *Id.* at 241, 492 A.2d at 1300.

73. *Id.*

74. *Id.* at 242, 492 A.2d at 1300.

75. RESTATEMENT (SECOND) OF TORTS §§ 314–15 (1965).

76. *Lamb*, 303 Md. at 253, 492 A.2d at 1306.

77. 306 Md. 617, 510 A.2d 1078 (1986).

78. *Id.* at 619, 510 A.2d at 1079.

79. *Id.* at 619–20, 510 A.2d at 1079.

80. *Id.* at 620, 510 A.2d. at 1079. Ashburn lost his leg as a result of the accident. *Id.*

81. *See id.* at 628, 510 A.2d at 1083 (noting that there is generally "no duty to control a third person's conduct so as to prevent personal harm to another, unless a 'special relationship' exists either between the actor and the third person or between the actor and the person injured").

82. *Id.* at 631–32, 510 A.2d at 1085. The court explained that "[i]n order for a special relationship between police officer and victim to be found, . . . the police officer [must] affirmatively act[] to protect the specific victim . . . , thereby inducing the victim's specific reliance upon the police protection." *Id.* at 631, 510 A.2d at 1085.

83. *Id.* at 635, 510 A.2d at 1087.

84. *See, e.g.*, Vollmar v. O.C. Seacrets, Inc., 831 F.Supp.2d 862, 868 (D. Md. 2011) (finding that a resort was not liable for injuries to the plaintiff in a boating accident caused by one of its patrons, because although the resort served the patron alcohol and then allowed him to operate a boat in an intoxicated state, the sale of alcohol did not proximately cause the plaintiff's injuries);

after *Ashburn* was decided. In *Kuykendall v. Top Notch Laminates, Inc.*[85] Charles Wilkes, driving intoxicated after attending a company party, swerved across the center line and struck Evelyn Hargis's vehicle.[86] Hargis brought suit against Wilke's employer, arguing that Top Notch Laminates should be held liable because it continued serving Wilkes at the party after he was visibly intoxicated and permitted him to drive in that state.[87] In its assessment of liability, the court did not address the proximate cause arguments espoused by *Hatfield* and *Felder*.[88] Rather, the court pointed to *Lamb* for the proposition that "there is no liability to a third person absent a 'special relationship' with a clear right to control."[89] According to the court, without an existing Dram Shop Act and no special relationship between either the employer-defendant and the plaintiff or the employer and the intoxicated driver, no duty of care, and thus no liability, existed.[90]

The Court of Appeals more clearly articulated its reasoning for applying *Restatement (Second) of Torts* Section 315 in *Valentine v. On Target, Inc.*[91] After several handguns were stolen from gun retailer On Target, "Joanne Valentine was murdered outside of her home . . . by an unknown assailant" wielding one of the stolen weapons.[92] Her husband brought suit, alleging that the retailer "owed a duty . . . to exercise reasonable care in the display of handguns . . . [in order] to prevent theft and illegal use."[93] The court found that, absent a special relationship, On

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Wright v. Sue & Charles, Inc., 131 Md. App. 466, 470, 476, 749 A.2d 241, 243, 246 (2000) (finding that a liquor vendor was not liable for the sale of alcohol to a minor who later drove while intoxicated and died in a single-car accident, reasoning that "the proximate cause of the collision was not the unlawful sale of liquor but the negligence of the individual who drank the liquor"); Moran v. Foodmaker, Inc., 88 Md. App. 151, 159, 594 A.2d 587, 590–91 (1991) (finding that a restaurant was not liable for serving a visibly intoxicated patron who drove into and severely injured a pedestrian, reasoning that "Maryland remain[ed] aligned with the small minority of states" that did not recognize proximate cause between the sale of liquor and a tort committed by the buyer); Hebb v. Walker, 73 Md. App. 655, 662, 536 A.2d 113, 116 (1988) (finding that a party host was not liable for the death of a partygoer in a car accident, reasoning in part that the host was not the proximate cause of the accident since he had not served the driver any alcohol at the party).

85. 70 Md. App. 244, 520 A.2d 1115 (1987).

86. *Id.* at 246, 520 A.2d at 1115. Wilkes and another employee, Robert Wade, left the party together and were driving at high speeds, engaging in "horseplay" on the road. *Id.*

87. *Id.* at 247, 520 A.2d at 1116.

88. *See id.* at 248, 520 A.2d at 1116 (referring to *Hatfield* and *Felder* merely for the proposition that Maryland had not yet adopted dram shop law action judicially or through the legislature).

89. *Id.* at 249, 520 A.2d at 1117.

90. *Id.* at 251–52, 520 A.2d at 1118. The court noted that although the intoxicated driver was the defendant's employee, the defendant did not act affirmatively by directing the employee to drive in his intoxicated state. *Id.* at 252, 520 A.2d at 1118.

91. 353 Md. 544, 727 A.2d 947 (1999).

92. *Id.* at 547, 727 A.2d at 948.

93. *Id.*

Target did not owe a duty to protect the public from the illegal use of its firearms.[94] The court reasoned that there were no circumstances indicating an increased probability that the guns would be stolen, and it would be unfair to hold the store liable for unreasonably remote consequences.[95] To avoid imposing an "indefinite duty to the general public" upon gun shop owners, the court would not impose liability without a "special relationship" as defined by the *Restatement (Second) of Torts* Section 315.[96]

To support its contention that On Target had no duty to protect the public from criminal acts committed with its weapons, the court in *Valentine* cited *Scott v. Watson*.[97] There, James Aubrey Scott, Jr. was shot in the apartment's underground parking garage.[98] Scott's sister brought suit, claiming that the landlord breached a duty to protect Scott from criminal acts committed by third parties in common areas of the building that were within the landlord's control.[99] In holding that the landlord had no duty to protect his tenants against crimes perpetrated by third parties on premises, the court cited *Restatement (Second) of Torts* Section 315, reasoning that its holding was a subsidiary of the broader rule that, in the absence of statutes or a special relationship, a private person is under no duty to protect another from criminal acts committed by a third person.[100]

The Court of Appeals last dealt with the issue of liability for the actions of a third party in *Barclay v. Briscoe*.[101] In *Barclay*, the court considered whether an employer should be liable to an injured motorist when an employee, who had been working for over twenty-two consecutive hours, was involved in a car accident on his way home.[102] The court, in finding that the employer owed no duty to the injured driver, emphasized that the foreseeability of the accident did not itself impose a duty in negligence terms.[103] Rather, the court cited *Lamb* and the *Restatement*

94. *Id.* at 555–56, 727 A.2d at 952–53.

95. *Id.* at 551, 727 A.2d at 950. The court explained that foreseeability "is based upon the recognition that a duty must be limited to avoid liability for unreasonably remote consequences," and reasoned that the plaintiff had not argued convincingly that the shop owner should have foreseen not only that a thief would steal guns from the store, but also that a third unknown party would obtain those guns and use them in a criminal manner. *Id.*

96. *Id.* at 556, 727 A.2d at 953.

97. 278 Md. 160, 359 A.2d 548 (1976).

98. *Id.* at 162, 359 A.2d at 550. At the time, Scott was facing trial under a multi-count indictment charging him with conspiracy to distribute heroin. *Id.*

99. *Id.* at 161, 359 A.2d at 550.

100. *Id.* at 166, 359 A.2d at 552. The court also opined that "[i]f the landlord knows, or should know, of criminal activity against persons or property in the common areas, he then has a duty to take reasonable measures, in view of the existing circumstances, to eliminate the conditions contributing to the criminal activity." *Id.* at 169, 359 A.2d at 554 (emphasis omitted).

101. 427 Md. 270, 47 A.3d 560 (2012).

102. *Id.* at 273, 47 A.3d at 562.

103. *Id.* at 294, 47 A.3d at 574–75.

(Second) of Torts for the proposition that an actor is not obligated to take action to come to another's aid or protection, even when he realizes that action on his part is necessary.[104] Without a special relationship between the employer and the injured driver or the employer and the employee, no duty existed.[105]

Thus, while other states recognized dram shop liability by focusing on the duty of a tavern to take reasonable steps to avoid foreseeable injury, the Maryland Court of Appeals did not find a similar duty.[106] Rather, in case law starting with *Lamb*, it articulated the limits of an actor's duty to take steps to avoid injury to another at the hands of a third party.[107] As a result, Maryland courts began to limit a tavern's duty to protect third parties from the torts of their patrons in the dram shop context.[108]

III. THE COURT'S REASONING

In *Warr v. JMGM Group*, the Court of Appeals of Maryland affirmed the Circuit Court for Montgomery County's decision that dram shop liability is not recognized as a cause of action in Maryland.[109] In so holding, the court determined that the Dogfish Head Alehouse did not have a duty to protect the Warrs, as members of the general public, from the harm caused by the tavern's patrons.[110] In finding that the Dogfish Head owed no duty to the Warrs, the court examined (A) the existence of a duty under Maryland dram shop liability precedent; (B) the existence of a duty under the general principles of negligence; and (C) the existence of a duty under the *Restatement (Second) of Torts*.[111] The dissenting opinion countered each of these arguments in turn.[112]

A. Maryland Precedent on Dram Shop Liability

The majority's first step in considering whether to adopt dram shop liability was to examine Maryland precedent on the issue.[113] The court

104. *Id.* at 295, 47 A.3d at 575.

105. *See id.* at 295–96, 47 A.3d at 575–76 (explaining that no circumstances existed that would create a special relationship between an employer and an employee acting outside the scope of his employment, since the employee was driving in his own vehicle on a public road after working hours).

106. *See supra* Part II.B.

107. *See supra* Part II.C.

108. *See supra* note 84.

109. Warr v. JMGM Group, 433 Md. 170, 189–90, 70 A.3d 347, 358–59 (2013).

110. *Id.* at 199, 70 A.3d at 364.

111. *See infra* Parts III.A–C.

112. *See infra* Parts III.A–C.

113. *Warr*, 433 Md. at 178–80, 70 A.3d at 351–53. Judge Battaglia delivered the opinion of the court. *Id.* at 173, 70 A.3d at 349.

pointed to *Hatfield* and *Felder* as representing the current state of dram shop liability in Maryland, emphasizing that both cases held that a tavern is not liable for the torts of its patrons.[114] The court acknowledged that the analysis in both cases was limited to proximate cause, but argued that neither case provided for a tavern's duty to refrain from serving an intoxicated person.[115] While the court recognized that *Felder* pointed to an increasing prevalence of dram shop liability laws in other states, it nonetheless emphasized *Felder*'s holding that the absence of legislative action on dram shop liability counseled against its adoption by judicial decision.[116]

By contrast, the dissent emphasized that *Hatfield* and *Felder*, "our only cases on dram shop liability, demonstrate that this [c]ourt's refusal to recognize dram shop liability has been based solely on the old common law rule that the selling of alcohol was not a proximate cause of injuries resulting from the subsequent torts of an intoxicated customer."[117] The dissent argued that because *Hatfield* and *Felder* did not address duty directly, the majority had no basis for deciding that those precedents did not support a duty to the Warrs.[118] The dissent focused on the *Felder* court's invitation for legislative action on the issue[119] and argued that given the alarming rates of death resulting from drunk driving incidents, the judiciary should impose liability because the General Assembly has refused to do so in the years since *Felder* was decided.[120]

B. Liability Under the General Principles of Negligence

The court then turned to the general principles of negligence law to examine whether the Dogfish Head owed a duty to the Warrs.[121] The court examined several factors to determine whether a duty existed, including the

114. *Id.* at 179–80, 70 A.3d at 352–53.

115. *Id.* at 178–79, 70 A.3d at 352. The court pointed out that Maryland law attaches criminal, but not civil, liability for the sale of alcohol to obviously intoxicated persons. *Id.* at 179, 70 A.3d at 352. The court also asserted that it could not extrapolate civil liability from a criminal statute. *Id.* at 197–99, 70 A.3d at 363–64. This Note, however, does not address that argument, which is secondary to the majority's central conclusion that the tavern owed no duty to the Warrs.

116. *Id.* at 179–80, 70 A.3d at 353. The court explained that the legislature's failure to implement dram shop liability at the time *Felder* was decided reflects that it was disfavored as a social policy. *Id.*

117. *Id.* at 204, 70 A.3d at 367 (Adkins, J., dissenting).

118. *Id.* at 203, 70 A.3d at 367.

119. *Id.* at 204, 70 A.3d at 367. The dissent focused on the *Felder* court's assertion that it would decline "for now, to join the new trend" of judicially imposed dram shop liability laws. *Id.* (emphasis omitted) (quoting Felder v. Butler, 292 Md. 174, 184, 438 A.2d 494, 499 (1981)).

120. *Id.* at 202, 70 A.3d at 366.

121. *Id.* at 181–83, 70 A.3d at 353–54 (majority opinion).

foreseeability of the harm to the plaintiffs.[122] In concluding that Eaton's decision to drive was not foreseeable, the court reasoned that the causal relationship between the provision of alcohol to an intoxicated person and the death of a third party was not assured.[123] There was no guarantee that Eaton would drive when he left the bar; indeed, the Dogfish Head employees attempted to call a taxi for him.[124] Moreover, the court reasoned that whether Eaton would choose to drive was not foreseeable because the tavern had no control over Eaton's conduct.[125]

Further, the majority argued that foreseeability was not the relevant inquiry in the context of establishing liability for the actions of a third party to the suit.[126] Rather, the determinative inquiry was whether the tavern had control over Eaton by virtue of some special relationship.[127] The majority reasoned that Maryland courts accepted the general rule that there was no duty to control a third person's conduct so as to prevent harm to another absent a special relationship.[128] The tavern could not control Eaton's

122. *Id.* at 182, 70 A.3d at 354. In determining the existence of a duty, the court considered a multitude of factors including:

> the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.

Id. (quoting Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976) (en banc)).

123. *Id.* at 183, 70 A.3d at 354.

124. *Id.*

125. *Id.* at 183–84, 70 A.3d at 355.

126. *Id.* at 183, 70 A.3d at 355.

127. *Id.*; *see infra* Part III.C.

128. *Warr*, 433 Md. at 183–84, 70 A.3d at 355; *see also* Barclay v. Briscoe, 427 Md. 270, 295, 47 A.3d 560, 575 (2012) (concluding that an employer was not liable for the death of a driver killed in a collision by its employee who was driving home after twenty-two hours of consecutive work, reasoning that the employer had no special relationship either with its employee or the injured driver); Gourdine v. Crews, 405 Md. 722, 750, 955 A.2d 769, 786 (2008) (finding that an insulin manufacturer was not liable for injuries to a patient caused by the side effects of the medication because the manufacturer owed no duty to protect the plaintiff absent a special relationship, as this would amount to the manufacturer "ow[ing] a duty to the world, [as] an indeterminate class of people"); Muthukumarana v. Montgomery Cnty., 370 Md. 447, 487–90, 805 A.2d 372, 396–97 (2002) (finding that emergency dispatchers do not owe a duty to protect individuals from harm after they contact 911, reasoning that absent a special relationship, the dispatchers did not owe a duty to the general public); Ashburn v. Anne Arundel Cnty., 306 Md. 617, 628, 510 A.2d 1078, 1083 (1986) (finding that a police officer was not liable for injuries to a pedestrian inflicted by an intoxicated driver whom the police officer had stopped but had not arrested, reasoning that "absent a 'special relationship' between police and victim, liability for failure to protect an individual citizen against injury caused by another citizen does not lie against police officers"); Lamb v. Hopkins, 303 Md. 236, 242, 492 A.2d 1297, 1300 (1985) (explaining that where an actor does not control the conduct of a third party, "the fact that the actor realizes or

actions "in driving or walking, for example."[129] Thus, the majority reasoned that the tavern would only have a duty to protect the Warrs if it had a special relationship with either Eaton or the Warrs.[130] Because no special relationship existed, the majority reasoned that the tavern did not owe a duty to protect the Warrs from harm caused by Eaton.[131]

On these points, the dissent made several counter-arguments. The dissent interpreted Maryland precedent as recognizing the difference between active and passive risk creation when determining the existence of liability.[132] Citing *Barclay*, the dissent argued that "[n]o duty will lie if an employer simply knows that an employee is tired, or if a bar simply knows that a patron is drunk. The alleged duty does not attach until the bar serves an alcoholic drink following the visible intoxication."[133] Contrary to the majority's assertion that the Dogfish Head had no control over Eaton's conduct, the dissent argued that "the bar's conduct, in over-serving Eaton, actively created a risk of harm to the Warrs and others, by exposing the Warrs to a greater risk than they would have faced absent the bar's conduct."[134] Hence, what the majority categorized as the tavern's absence of control, the dissent categorized as the tavern's "misfeasance."[135] The dissent emphasized that when a defendant has actively contributed to the harm suffered by the plaintiff, Maryland precedent dictates that the "special relationship rule" laid out in *Lamb* does not apply because this rule is meant to apply only to a defendant's omissions, or, in other words, his "passive failure to act."[136]

Focusing on the Dogfish Head's affirmative act of serving Eaton after he was visibly intoxicated and the foreseeability that the Warrs would be harmed as a result, the dissent argued that a normal foreseeability analysis was the relevant inquiry in determining the Dogfish Head's liability.[137] Taking up the factors enumerated in *Tarasoff v. Regents of the University of California*,[138] the dissent argued that (1) the injury to the plaintiff was

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should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action" (internal quotation marks omitted)).

129. *Warr*, 433 Md. at 183–84, 70 A.3d at 355.

130. *Id.* at 183, 70 A.3d at 355.

131. *Id.* at 189–90, 70 A.3d at 358–59.

132. *Id.* at 219, 70 A.3d at 376 (Adkins, J., dissenting).

133. *Id.* at 220, 70 A.3d at 377 (emphasis omitted).

134. *Id.* at 208, 70 A.3d at 370.

135. *Id.* The majority responded to the dissent's contention that the tavern actively created the risk that Eaton would drive home by pointing out that no one controlled Eaton's behavior; he chose to drink and drive of his own volition. *Id.* at 185–86 n.11, 70 A.3d at 356 n.11 (majority opinion).

136. *Id.* at 216, 70 A.3d at 374 (Adkins, J., dissenting).

137. *Id.* at 227–28, 70 A.3d at 381–82.

138. 551 P. 2d 334 (Cal. 1976).

foreseeable;[139] (2) imposing a duty would create a policy of preventing future harm;[140] (3) the connection between the defendant's conduct and the injury suffered was close enough to impose liability;[141] (4) the defendant's conduct deserved moral blame;[142] and (5) establishing a common law duty to refrain from serving a visibly intoxicated patron created a negligible burden on the tavern.[143] Thus, the dissent concluded that the common law imposed an ordinary duty of reasonable care on a commercial vendor to refrain from serving any patron who is visibly intoxicated.[144]

C. Liability Under the Restatement (Second) of Torts

The majority acknowledged that when adopting dram shop liability, courts in other states—most notably Pennsylvania, Arizona, and Texas—have referred to *Restatement (Second) of Torts* Section 315.[145] The majority explained that these courts used Section 315 to uphold a tavern's "duty to control the conduct—drinking—of patrons in order to protect the general public."[146] However, the *Warr* court reasoned that it would be unfair to expect the tavern to owe an unlimited duty to the world to protect the public from the acts of its patrons.[147] Although other courts accepted such a far-reaching duty, the *Warr* court asserted that Maryland law does not support a duty to the general public.[148]

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139. *Warr*, 433 Md. at 229, 70 A.3d at 382. Judge Adkins explained that the link between drunk driving and traffic fatalities is common knowledge and that such accidents are responsible for hundreds of deaths in Maryland each year. *Id.*

140. *Id.* at 232, 70 A.3d at 384. The dissent argued that imposing liability would prompt licensed vendors to protect the public from drunk driving by training bartenders to avoid serving visibly intoxicated persons. *Id.*

141. *Id.* at 234, 70 A.3d at 385. In Judge Adkins's view, the "magnitude of the harm" imposed—here the death of a child—"justifies the imposition of a duty to a large class of individuals." *Id.*

142. *Id.* ("The majority of the general public would be outraged at a commercial vendor who, for the sake of profit, continues to serve an already drunk person well past the line of being 'visibly under the influence' . . . and then sends him on his way, where he gets behind the wheel of a vehicle and kills a ten-year-old girl.").

143. *Id.* at 234–35, 70 A.3d at 386. Judge Adkins explained that since Maryland law criminalizes service of alcohol to a visibly intoxicated person, imposing civil liability for the same offense does not impose any new burden on the tavern owners. *Id.* at 235, 70 A.3d at 385–86 (citing MD. CODE ANN., Art. 2b, § 12-108 (a)(I)(ii) (West 2013)).

144. *Id.* at 235, 70 A.3d at 385.

145. *Id.* at 192–93, 70 A.3d at 360–61 (majority opinion).

146. *Id.* at 193, 70 A.3d at 361.

147. *Id.* at 193–94, 70 A.3d at 361. Illustratively, the court points to the Supreme Court of Texas's conclusion that employees of a tavern were under "the general duty to exercise reasonable care to avoid foreseeable injury to others." *Id.* at 193, 70 A.3d at 361 (quoting El Chico Corp. v. Poole, 732 S.W.2d 306, 311 (Tex. 1987) (internal quotation marks omitted)).

148. *Id.* at 193–94, 70 A.3d at 361.

By contrast, the dissent argued that Section 315 could not properly be applied to the facts of *Warr*.[149] For the dissent, Section 315 was meant to shield the innocent bystander from liability for failing to protect another.[150] It was not meant to protect defendants like the Dogfish Head that contributed to the dangerous conduct by serving a visibly intoxicated patron.[151] To support this contention, the dissent pointed out that the commentary for these rules indicate that they apply "only where the peril in which the actor knows that the other is placed is not due to any active force which is under the actor's control."[152] The dissent concluded: "the Restatement clearly contemplates that a defendant (the bar), who creates a risk of harm is under the ordinary duty to exercise reasonable care and may be negligent if it (the bar) actively creates an unreasonable risk that a third person (Eaton) will do harm to another (the Warrs)."[153]

The dissent further argued that commentary to the *Restatement (Third) of Torts* undermined the majority's position, explaining that "Section 315, however, neglected to clarify that its no-duty rule was conditioned on the actor having played no role in facilitating the third party's conduct."[154] Since the Dogfish Head played an active role in the Warrs' injuries by serving Eaton after he was visibly intoxicated, the dissent argued that the special relationship rule should not apply.[155] Thus, while the majority cited the *Restatement (Second) of Torts* Section 315 to support its proposition that it cannot find liability without a special relationship, the dissent argued this Section makes clear that the special relationship rule did not apply to the facts of this case.[156]

Finally, while the majority emphasized that, due to the significant public policy considerations involved, the Maryland legislature is in a far better position to "impose liability on tavern owners for injuries caused by intoxicated patrons,"[157] the dissent concluded, "[W]ith no legislative action on the issue in the thirty-two years since *Felder*, and an even larger trend of

149. *See id.* at 212, 70 A.3d at 372 (Adkins, J., dissenting) ("What is clear then . . . is that the 'special relationship' rule in Section 315, which we adopted as Maryland's common law, simply does not apply in this case.").

150. *See id.* at 211, 70 A.3d at 371 ("[T]he rules in Section 314 and 315 would protect the bystander . . . because the bystander was merely passive and did not actively perform an act of force contributing to the harm suffered.").

151. *Id.* at 212, 70 A.3d at 372.

152. *Id.* at 210, 70 A.3d at 371 (emphasis omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 314 cmt. d (1965)).

153. *Id.* at 212, 70 A.3d at 372.

154. *Id.* at 213, 70 A.3d at 373 (emphasis omitted) (citing RESTATEMENT (THIRD) OF TORTS § 37 cmt. a (2012)).

155. *Id.* at 212, 70 A.3d at 372.

156. *Id.*

157. *Id.* at 199, 70 A.3d at 364 (majority opinion).

jurisdictions supporting liability, . . . the *Felder* Court's declining change 'for now' should be amended to: now is the time for change."[158]

IV. ANALYSIS

In *Warr v. JMGM Group, LLC*, the Maryland Court of Appeals held that a tavern did not owe a duty to protect "members of the general public" from the torts of its patrons.[159] This holding rests on two premises: First, the court conceptualized the tavern's contribution to the accident as an omission—that is, failing to prevent the patron from leaving the tavern in his car.[160] Second, the court concluded that the tavern had no affirmative duty to protect the "indeterminate" class of individuals that may be hurt by an intoxicated driver.[161] The court failed to properly consider the tavern's affirmative action in serving alcohol to a visibly intoxicated patron, a consideration that is consistent with Maryland precedent and the general principles of negligence when assessing an actor's liability for the actions of a third party.[162] Moreover, the court erred in its conclusion that the *Restatement (Second) of Torts* Section 315 does not support adopting dram shop liability, when in fact using Section 315 to impose a duty on the tavern protects the foreseeable victims of drunk driving and aligns with Maryland precedent as well as the reasoning of other states.[163] The court should have considered that imposing liability on the tavern not only would protect Maryland citizens by deterring taverns from over-serving individuals who will pose a danger to the community should they choose to drive, but also would help compensate the grievous harm done to victims of drunk driving accidents.[164]

A. The Warr *Court Erred by Failing to Properly Consider the Tavern's Affirmative Act of Serving Alcohol to a Visibly Intoxicated Patron*

A situation where a patron goes to a bar, is served alcohol past the point of intoxication, then drives off the premises and injures someone else involves both acts and omissions on the part of the patron and the tavern. A fundamental difference between the majority and dissent's analysis is their underlying disagreement over whether the conduct relevant to assigning liability should be classified as an act or an omission.[165] The majority

158. *Id.* at 252, 70 A.3d at 396 (Adkins, J., dissenting) (emphasis omitted).
159. *Id.* at 199, 70 A.3d at 364 (majority opinion).
160. *Id.* at 183–84, 70 A.3d at 355.
161. *Id.* at 193–95, 70 A.3d at 361–62.
162. *See infra* Part IV.A.
163. *See infra* Part IV.B.
164. *See infra* Part IV.C.
165. *See infra* Part IV.A.1.

should have considered the tavern's *actions* in serving a visibly intoxicated patron when assigning liability because doing so would have been more consistent with the approach used by Maryland courts and other states in determining when a defendant should be liable for the acts of a third party.[166] Moreover, since the relevant conduct stems from *acts* rather than *omissions*, the majority should have decided whether the tavern owed a duty to the Warrs under the general principles of negligence rather than apply the *Restatement (Second) of Torts* Section 315 "special relationship" standard.[167]

1. Maryland Precedent Suggests That the Warr *Court Should Have Conceptualized the Tavern's Role in the Accident as an Action*

The Dogfish Head served Eaton alcohol and continued to do so after he was visibly intoxicated;[168]for obvious reasons, these are the Dogfish Head's acts. After the tavern would no longer serve Eaton additional alcohol due to his violent behavior, the Dogfish Head employees failed to prevent him from driving.[169] In arguing that the tavern should not be held liable for the torts of its patrons absent a special relationship, the majority focused on the tavern's *omission* in preventing Eaton from driving as the relevant conduct in assigning liability.[170] Classifying the tavern as an innocent bystander, the majority drew from Maryland case law as well as the *Restatement (Second)of Torts* Section 315 in its reasoning that the Dogfish Head was not obligated to act to protect another from serious harm absent a special relationship, even if it had the means to do so.[171] By contrast, the dissent conceptualized the relevant conduct in assigning liability as the tavern's *action* in serving a patron that is visibly intoxicated.[172] The dissent reasoned that a jury could conclude that the tavern actively created a risk to the Warrs and others by serving Eaton after he was visibly intoxicated. [173]

166. *See infra* Part IV.A.2.

167. *See infra* Part IV.A.3.

168. Warr v. JMGM Group, 433 Md. 170, 174–75, 70 A.3d 347, 349–50 (2013).

169. *Id.* at 175, 70 A.3d at 350.

170. *See id.* at 182, 70 A.3d at 354 (explaining that because the tavern did not affirmatively control whether Eaton operated a motor vehicle in his intoxicated state, the Dogfish Head did not owe a duty to protect the public from harm he caused while driving under the influence).

171. *Id.* at 194–95, 70 A.3d at 361–62. The court explained that an "actor is not subject to liability if he fails, either intentionally or through inadvertence, to exercise his ability so to control the actions of third persons as to protect another from even the most serious harm." *Id.* at 194, 70 A.3d at 361 (quoting Barclay v. Briscoe, 427 Md. 270, 295, 47 A.3d 560, 575 (2012)).

172. *Id.* at 208, 70 A.3d at 369–70 (Adkins, J., dissenting).

173. *See id.* (focusing on the fact that the Dogfish Head "took a non-dangerous Eaton and, by serving him drink after drink after drink, helped to transform him into a dangerous Eaton").

The majority's conclusion that the tavern should not be liable is only sound if the conduct properly considered is the tavern's omission in failing to prevent Eaton from driving. The majority, however, overlooks the fact that the tavern actively contributed to the Warrs' injuries, making an intoxicated person more dangerous by continuing to serve him alcohol.[174] Put another way, the Dogfish Head is in the business of operating a tavern—an aspect of this business is ensuring that customers who have consumed enough alcohol to pose a danger to the community do not get behind the wheel.[175] In this sense, the entire scenario of serving a patron and taking reasonable measures to ensure he or she does not drive should be characterized as a tavern's acts. By either classification, the tavern was not an innocent bystander. It actively contributed to the Warrs' injuries; and thus, liability should not be determined by the "special relationship rule" of Section 315, but rather by the general principles of negligence.[176]

The court also erred by considering the tavern's duty to protect others from the torts of its patrons within the framework of Maryland's third-party liability jurisprudence stemming from *Lamb v. Hopkins*. The court correctly interpreted that line of cases to suggest that an actor should not be held liable for the actions of a third party it could not control.[177] The Dogfish Head, however, had control over Eaton's level of intoxication and whether he drove away from the tavern while intoxicated. The facts of *Warr* are thus distinguishable from both *Lamb* and its companion case *Ashburn* in that the tavern-defendant actively took part in making Eaton dangerous by serving him at least twenty drinks until he became a violent, aggressive, and intoxicated patron.[178] By contrast, the probation officers in *Lamb* did not actively contribute to probationer Newcomer's drinking habits or his decision to drive drunk; they merely failed to inform the sentencing court of

174. *Id.*

175. Alcohol service training programs in Maryland and in other states recognize that taverns must address many risks involved in alcohol service. *See, e.g.*, MARYLAND REST. ASS'N, *Alcohol Awareness and Responsible Alcohol Service Training*, http://www.marylandrestaurants.com/RAM/Classes/Alcohol_Awareness_Certification/RAM/_Classes/Alcohol_Awareness_Training.aspx?hkey=d066d745-0234-40fa-9a69-90d51e8f5c82 (last visited Feb. 25, 2014) ("Alcohol service involves many risks. Failure to act responsibly could result in fines, imprisonment, losing your liquor license, increased insurance costs, or losing your business."); MAINE DEP'T OF HEALTH AND HUMAN SERVICES, OFFICE OF SUBSTANCE ABUSE, A GUIDE FOR BARS AND RESTAURANTS SERVING ALCOHOL 12 (2010) (recommending that taverns, in refusing to serve intoxicated patrons, attempt to find them an alternate ride home and noting that every employee "plays a part in protecting the establishment's liquor license, bottom-line, reputation and safety of . . .customers").

176. *Warr*, 433 Md. at 209, 70 A.3d at 370 (Adkins, J., dissenting).

177. *Id.* at 186, 70 A.3d at 356 (majority opinion). The majority asserted that Eaton's conduct, rather than the conduct of the tavern, should be at issue. *Id.* at 185, 70 A.3d at 355–56.

178. *Id.* at 199–200, 70 A.3d at 365 (Adkins, J., dissenting).

his prior convictions.[179] Similarly, the police officer in *Ashburn* did not actively contribute to John Millham's drunken condition; the officer merely failed to arrest Millham after finding him drunk behind the wheel.[180] Because the tavern in *Warr* was an active participant in creating Eaton's dangerous condition, the court's reasoning in *Lamb* and *Ashburn* that an actor owes no duty of care when it has neither the right nor the ability to control a third party's conduct is inapplicable.

Similarly, the court cited *Barclay v. Briscoe* for the proposition that Maryland case law supported its application of the "special relationship" rule to the facts of Warr.[181] The majority erred, however, because it failed to recognize *Barclay*'s significance for determining the point at which liability for the acts of a third party should attach. The majority frames the situation in *Barclay* as the employer's omission, stating that there was no duty to prevent a fatigued employee from driving home.[182] Indeed, "[n]o duty will lie if an employer simply knows that an employee is tired, or if a bar simply knows that a patron is drunk."[183] The majority overlooked the crucial distinction that the Dogfish Head acted affirmatively by serving Eaton drinks past the point of visible intoxication, while the employer in *Barclay* did not assign any more shifts to the employee after he became fatigued.[184] Had the employer subsequently assigned work to the employee once it became clear that the employee was fatigued, *Barclay* would be analogous to the facts of *Warr*.[185] The holding in *Barclay* reflects its understanding that liability can only attach for an employer's *acts*: "[A]n affirmative act of control by the employer following and prompted by the employee's incapacity must be present in order for a duty to arise . . . ."[186] The Dogfish Head, unlike the employer in *Barclay*, negligently contributed to Eaton's compromised state by serving him alcohol after he was visibly intoxicated.[187] Thus, assigning the tavern a duty to protect others from

179. *See* Lamb v. Hopkins, 303 Md. 236, 241, 492 A.2d 1297, 1300 (1985) (explaining that the probation officers owed no duty of care to the Lambs because the officers "had neither the right nor the ability to control Newcomer's conduct").

180. Ashburn v. Anne Arundel Cnty., 306 Md. 617, 619–20, 510 A.2d 1078, 1079 (1986).

181. *Warr*, 433 Md. at 185, 70 A.3d at 356 (majority opinion).

182. *Id.* at 184, 70 A.3d at 355.

183. *Id.* at 220, 70 A.3d at 377 (Adkins, J., dissenting).

184. *See* Barclay v. Briscoe, 472 Md. 270, 306, 47 A.3d 560, 582 (2012) (asserting that the employer had no duty to protect other drivers since it did not act affirmatively by assigning the fatigued employee any more shifts).

185. George W. Ingham, Comment, *Another Drink, Another Hour: Using Dram Shop Liability to Determine Employer Liability for Injuries Caused by Fatigued Commuting Employees*, 17 GEO. MASON L. REV. 565, 578–79 (2010) (arguing that dram shop liability jurisprudence should form a basis for determining the liability of employers for the torts of fatigued employees).

186. *Barclay*, 472 Md. at 306, 47 A.3d at 582 (emphasis omitted).

187. *Warr*, 433 Md. at 220, 70 A.3d at 377.

Eaton, once it acted affirmatively in over-serving him, aligns squarely with Maryland precedent.

2. Recognizing the Tavern's Role in the Accident as an Action Rather Than an Omission Aligns with the General Principles of Negligence

Since the tavern was an active participant in creating Eaton's dangerously intoxicated condition, the court should have applied the general principles of negligence instead of the "special relationship" rule, meant for innocent bystanders, to determine whether a tavern owed a duty to the Warrs.[188] Although the court noted that an important factor in determining the existence of a duty is the foreseeability of harm to the plaintiff, the court gave short shrift to the foreseeability analysis by asserting that "[i]t is simply not a given that imbibing alcohol and driving are coextensive."[189] But this reasoning is only accurate in a vacuum; the court ignored the widely acknowledged problem of drunk driving in the nation and in Maryland. While the majority asserted that only the consequences of an actor's own behavior are readily derived,[190] a tavern is in the business of serving alcohol—-a natural and frequent result of which is drunk driving. When the tavern continued to serve Eaton alcohol after he became visibly intoxicated, it should have been abundantly clear that in his compromised state, he might make the irrational decision to drive.[191] Indeed, the Dogfish Head servers were aware that this was Eaton's intention, especially because he had arrived to the Dogfish Head by car and lived out-of-state.[192] Thus, it was completely foreseeable that Eaton would leave the Dogfish Head in his vehicle and pose a danger to others after refusing a cab.

The tavern had a duty to take reasonable steps to protect the Warrs from that eventuality.[193] The tavern's duty arises because its action in serving Eaton after he was visibly intoxicated greatly increased the risk of

188. For a list of these principles, see *supra* note 122 and accompanying text.

189. *Warr*, 433 Md. at 183, 70 A.3d at 354–55 (majority opinion).

190. *Id.*

191. *See* Richard Smith, *A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation*, 25 J. CORP. L. 553, 559 (2000) (explaining that the rationale for the visibly intoxicated standard is that when an "intoxicated person attempts to purchase alcohol, it should be abundantly clear to the server that it is dangerous to add to the customer's intoxication").

192. *See* Memorandum Opinion and Order, Warr v. JMGM Group, No. 341698-V, at 9 (Mont. Cnty. Cir. Ct. Jan. 19, 2012) (noting that the bartenders at the Dogfish Head realized that Eaton "would not make it home quickly" because he had an out-of-state driver's license).

193. *See* Ashburn v. Anne Arundel Cnty., 306 Md. 617, 627–28, 510 A.2d 1078, 1083 (1986) (explaining that the existence of duty is a function of many factors, including most importantly the foreseeability of the harm to the plaintiff).

harm to the Warrs.[194] The tavern was in a unique position to prevent a foreseeable harm and was obligated to take reasonable care to do so.[195] Moreover, the *Tarasoff* factors that the majority used to determine whether the tavern owed a duty to the Warrs clearly indicate this affirmative responsibility.[196] The close connection between the tavern's conduct of serving Eaton over twenty drinks and the Warrs' injury, as well as the moral blame associated with the tavern's conduct and the imperative to prevent future drunk drivers from harming others on the road, counsels that the tavern owed a duty to protect the Warrs under the general principles of negligence.[197]

Because the tavern had a duty to protect drivers who were on the road simultaneously with Eaton, the *Warr* court should have analyzed the tavern's behavior relative to this duty using a standard well-articulated by Prosser and Keaton:

> The duty to take precautions against the negligence of others . . . involves merely the usual process of multiplying the probability that such negligence will occur by the magnitude of the harm likely to result if it does, and weighing the result against the burden upon the defendant of exercising such care.[198]

In a recent study, thirteen percent of drivers nationwide reported driving under the influence of alcohol.[199] In Maryland, approximately one-third of all traffic deaths involve alcohol.[200] This destructive behavior is all too frequent, and the magnitude of the harm that can result from such activity is astronomical.[201] In *Warr*, this behavior resulted in the death of a ten-year-old girl.[202]

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194. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 33 (5th ed. 1984) (explaining that "[t]here are other situations in which the defendant will be held liable because his affirmative conduct has greatly increased the risk of harm to the plaintiff through the criminal acts of others").

195. *See id.* (noting that "the defendant's special responsibility may arise because he is in a position to control the dangerous person, or is in some other unique position to prevent the harm, and so may be held to have an obligation to exercise reasonable care to do so").

196. Warr v. JMGM Group, 433 Md. 170, 235, 70 A.3d 347, 386 (2013) (Adkins, J., dissenting).

197. *Id.* at 233–34, 70 A.3d at 384–85.

198. KEETON ET AL., *supra* note 194.

199. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN., NSDUH-109, THE NSDUH REPORT: STATE ESTIMATES OF DRUNK AND DRUGGED DRIVING (2012).

200. *See infra* text accompanying note 246.

201. *See, e.g.*, El Chico Corp. v. Poole, 732 S.W.2d 306, 311 (Tex. 1987) (noting the connection between drinking and driving fatalities to support the application of dram shop liability).

202. *Warr*, 433 Md. at 200, 70 A.3d at 365.

Considering the harm that results from drunk driving, the burden placed on the tavern to avoid serving visibly intoxicated people is not particularly onerous; as the dissent noted, the Maryland General Assembly already imposes this burden by assigning criminal liability for this behavior.[203] Prosser and Keaton further counsel that "[i]t becomes most obvious when the actor has reason to know that he is dealing with persons whose characteristics make it especially likely that they will do unreasonable things."[204] Certainly the tavern employees—after serving Eaton over twenty drinks and cutting him off when he became intoxicated, aggressive, and violent[205]—would have known that Eaton might, with his impaired judgment, decide that he was fit to drive home.

Because the tavern acted affirmatively in assisting to make Eaton dangerous to other drivers on the road, it had a duty to protect these drivers under both Maryland precedent and the general principles of negligence. In failing to stop serving Eaton alcohol once he became visibly intoxicated, the Dogfish Head did not meet a reasonable standard of care. Thus, the tavern should be exposed to liability for Eaton's conduct.

B. The Majority Erred in Its Conclusion That Restatement (Second) of Torts *Section 315 Does Not Support Adopting Dram Shop Liability*

While the *Warr* court concluded that the *Restatement (Second) of Torts* Section 315 did not support the imposition of liability on the tavern without a special relationship, courts in Pennsylvania, Arizona, and Texas relied on this section for the precise purpose of imposing dram shop liability.[206] The *Warr* court argued that it could not apply Section 315 absent a special relationship because the states that did so imposed a duty on the tavern to protect the public as a whole, an outcome that Maryland law does not support.[207] This argument, however, is unconvincing: First, imposing dram shop liability on taverns would not mean creating an indefinite duty to the public at large, but rather a duty to those foreseeable victims of drunk driving accidents.[208] Second, of the states that applied Section 315 to support adopting dram shop liability, only the Supreme Court of Texas used Section 315 to impose a duty on the tavern to protect the public at large;

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203. *Id.* at 234–35, 70 A.3d at 385–86 (citing MD. CODE ANN., Art. 2b, § 12-108 (a)(1)(ii) (West 2013)).

204. *See* KEETON ET AL., *supra* note 194. They elaborate that "the actor may be required to . . . refrain from . . . [letting] an intoxicated person . . . have an automobile, or more liquor." *Id.*

205. Memorandum Opinion and Order, Warr v. JMGM Group, No. 341698-V, at 9 (Mont. Cnty. Cir. Ct. Jan. 19, 2012).

206. *See supra* Part II.B.

207. *Warr*, 433 Md. at 193–94, 70 A.3d at 361 (majority opinion).

208. *See infra* Part IV.B.1.

Maryland should follow the approach of Pennsylvania and Arizona by framing the tavern's responsibility as one to refrain from serving a visibly intoxicated patron to protect foreseeable victims of drunk drivers.[209]

1. *Assigning the Tavern a Duty to Protect Foreseeable Victims of Drunk Driving Aligns with the Interpretation of Section 315 in Maryland Case Law*

To support its application of the "special relationship" rule of Section 315, the court pointed to the rule's underlying rationale, articulated in *Valentine v. On Target*.[210] There, the court explained that "[o]ne cannot be expected to owe a duty to the world at large to protect it against the actions of third parties, which is why the common law distinguishes different types of relationships when determining if a duty exists."[211] This rationale, however, is unconvincing for several reasons. First, imposing a duty on the Dogfish Head would not require it to protect the public as a whole, but rather those foreseeable victims of drunk driving accidents—drivers who are on the road simultaneously with an intoxicated patron. This imposition makes sense because the tavern's ability to prevent harm caused by intoxication is inherently limited.[212] While a tavern can prevent an intoxicated patron from getting behind the wheel, it has no control over any of the patron's acts subsequent to making the decision to drive. Any other harm committed by the patron is too attenuated from the original act of serving him alcohol while visibly intoxicated for liability to attach.[213] For example, a tavern that served a patron after he was visibly intoxicated could not be held liable if that patron later committed assault, because the criminal intent behind the patron's act is a superseding cause.[214] Indeed, states that recognize dram shop liability do not hold taverns liable for unforeseeable criminal acts committed by their patrons, even if these patrons were served alcohol after they became visibly intoxicated.[215]

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209. *See infra* Part IV.B.2.

210. *Warr*, 433 Md. at 193–94, 70 A.3d at 361.

211. Valentine v. On Target, Inc., 353 Md. 544, 553, 727 A.2d 947, 951 (1999).

212. *See* Smith, *supra* note 191, at 554 (explaining that the purpose of dram shop laws are not to prevent drunkenness, but rather to reallocate the social harms of drinking to the businesses that profit from the sale of alcohol).

213. *See* Palsgraf v. Long Island R. Co., 162 N.E. 99, 100 (N.Y. 1928) ("The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is a risk to another or to others within the range of apprehension.").

214. *See* RESTATEMENT (SECOND) OF TORTS § 448 (1965) ("The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime . . . .").

215. *See infra* note 234.

Second, as the dissent indicated, Maryland law does not impose unlimited liability to any member of the public, but rather limits an individual's duty of care only to those who would foreseeably be harmed by the conduct.[216] In so doing, Maryland courts have recognized that it would be unfair not only to impose on actors a duty to protect the public as a whole, but also that an actor should not be released from liability merely because the victim of its negligence was unidentifiable.[217] While the majority analogized the facts of *Warr* to those of *Valentine*, the situations are distinguishable. The movements of a stolen weapon are nearly impossible to trace and may impact an unidentifiable class of persons.[218] Unlike the owner of the shop in *Valentine*, who did not know of any circumstances that would indicate an increased probability that a thief would steal guns from the store and use them in an illegal manner,[219] the danger an intoxicated person poses to his fellow drivers is both concrete and applicable to a discrete number of individuals. Thus, because there is a specific, foreseeable class of victims likely to be harmed by a drunk driver, Section 315's "special relationship" standard is not applicable in this context.

Finally, Maryland precedent on third-party liability is misstated in *Valentine*. In holding that a store owner does not owe a duty to protect people from the illegal use of its weapons, the *Valentine* court cited *Scott v. Watson* for the rule that a private person is under no special duty to protect

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216. Warr v. JMGM Group, 433 Md. 170, 226–27, 70 A.3d 347, 381 (2013) (Adkins, J., dissenting); *see also* Hartford Ins. Co. v. Manor Inn of Bethesda, Inc., 335 Md. 135, 148, 642 A.2d 219, 226 (1994) (commenting that Maryland courts have "recognized that the concept of duty as owing to all persons the exercise of reasonable care to protect them from harm has to be limited if liability for unreasonably remote consequences are to be avoided"); Henley v. Prince George's Cnty., 305 Md. 320, 336, 503 A.2d 1333, 1341 (1986) (finding that an employer could be liable for the death of a third party at the hands of an employee who had threatened prospective intruders, reasoning that the employer had a duty to protect those that would foreseeably "be expected to come into contact with" the employee). *But see* Rosenblatt v. Exxon Co., U.S.A., 355 Md. 58, 77, 642 A.3d 180, 189 (1994) (finding that Exxon, the prior occupier of land, did not owe a duty to the subsequent lessee to avoid contamination of the property because it was not foreseeable that Exxon's failure to act would result in harm to the subsequent lessee).

217. *Compare* Lamb v. Hopkins, 303 Md. 236, 253, 492 A.2d 1297, 1306 (1985) (finding that although probation officers owed a duty to the court to report any probation violations, this duty did not extend to the general public) *and* Muthukumarana v. Montgomery Cnty., 370 Md. 447, 499–500, 805 A.2d 372, 403 (2002) (explaining that 911 operators do not owe a duty in tort to the general public absent a special relationship between the operator and the specific individual, because to hold otherwise "might jeopardize the availability" of 911 services), *with Henley*, 305 Md. at 336, 503 A.2d at 1341 (finding that, even if those persons who would likely be injured could not be identified in advance, an employer owed a duty to those persons foreseeably injured by his employee).

218. *See* Valentine v. On Target, Inc., 353 Md. 544, 553, 727 A.2d 947, 951 (1999) (explaining that the class of persons to whom the gun storeowner would owe a duty to protect from the theft and illegal use of weapons was "indeterminate").

219. *Id.* at 551, 727 A.2d at 950.

another from criminal acts by a third person.[220] Yet this is an overly-simplified account of *Scott*'s holding because the *Scott* court also held that if a landlord knew of criminal action taking place in the common areas of his property, he had a "duty to take reasonable measures . . . to eliminate the conditions contributing to the criminal activity."[221] Thus, *Scott* indicated not that a special relationship was required to find the gun store owner liable as the *Valentine* court suggested, but rather that where a retail merchant knew of circumstances indicating that his weapons are likely to be stolen and used illegally, he owed a duty to exercise ordinary care in eliminating those conditions by securing the weapons.[222] Applied to the facts of *Warr*, *Valentine* actually suggests that the tavern staff, aware of Eaton's intoxicated condition and his intent to drive,[223] owed a duty of reasonable care to rectify that danger by refraining from serving Eaton after he became visibly intoxicated. While the *Warr* court concluded that imposing a duty on the tavern is contrary to Maryland law set out in *Valentine*,[224] the tavern's awareness that its patron would pose harm to other drivers makes the case so distinguishable from *Valentine* that its reasoning does not apply.

2. Assigning the Tavern a Duty to Refrain from Serving Visibly Intoxicated Patrons Based on Section 315 Protects Foreseeable Victims of Drunk Driving, Not the Public as a Whole

The *Warr* court reasoned that courts that judicially adopted dram shop liability—specifically Pennsylvania, Arizona, and Texas—applied Section 315 to uphold a tavern's duty to protect the public as a whole.[225] However, this characterization of other states' reasoning is overbroad. The *Warr* court should have acknowledged that these states frame liability under

220. *Id.*

221. Scott v. Watson, 278 Md. 160, 169, 359 A.2d 548, 554 (1976) (emphasis omitted).

222. *See Valentine*, 353 Md. at 560–61, 727 A.2d at 955 (Raker, J., concurring) (explaining that gun merchants owe a duty to secure their product because the theft of an unsecured handgun to be used for violent crime is foreseeable, but that no facts indicated that the merchant had actually breached this duty of care).

223. Memorandum Opinion and Order, Warr v. JMGM Group, No. 341698-V, at 9 (Mont. Cnty. Cir. Ct. Jan. 19, 2012).

224. Warr v. JMGM Group, 433 Md. 170, 193–94, 70 A.3d 347, 361 (2013). The *Warr* court also pointed out Maryland courts have previously applied the "special relationship" rule to the drunk driving context. *Id.* at 194, 70 A.3d at 361 (citing Kuykendall v. Top Notch Laminates, Inc., 70 Md. Ct. Spec. App. 244, 520 A.2d 1115 (1987)). However, this example is unconvincing because the *Kuykendall* court identified the crux of its holding as the absence of some affirmative action by the employer to order the employee to drive despite knowing his level of intoxication. *Kuykendall*, 70 Md. Ct. Spec. App. at 250–51, 520 A.2d at 1117–18. As argued previously, however, a tavern's role in serving its patron past the point of visible intoxication is properly conceptualized as an affirmative action. *See supra* Part IV.A.

225. *Warr*, 433 Md. at 192–93, 70 A.3d at 360–61.

Section 315 as the duty to refrain from serving an intoxicated patron in order to protect those foreseeable victims of drunk driving because doing so would have allowed the court to impose liability to the tavern based on Section 315.

For example, the Supreme Court of Pennsylvania in *Jardine* focused its liability analysis on the foreseeability of an intoxicated patron causing harm to those around him.[226] The court reasoned that the patron was intoxicated when the tavern sold him liquor, and such excessive alcohol consumption made him a danger to the community.[227] Drawing on *Jardine*'s authority, lower Pennsylvania courts have cited Section 315 for the proposition that a tavern does not act as a reasonable person would when it sells liquor to an intoxicated patron because it is further putting at risk those that might be injured by that patron.[228]

Similarly, the Supreme Court of Arizona relied on Section 315 in adopting dram shop liability, citing it for the proposition that "the common law recognizes a duty to take affirmative measures to control or avoid increasing the danger from the conduct of others."[229] Since Arizona precedent already recognized the duty of a tavern operator to protect his patrons from reasonably foreseeable injury at the hands of another patron,[230] the court in *Ontiveros* merely extended this principle to apply to non-patrons that would be foreseeably injured outside of the tavern.[231] The *Ontiveros* court reasoned that the "relation of the licensed supplier of liquor and his patron" afforded the tavern owner a degree of control over his patrons.[232] Therefore, the tavern owed a duty to protect those in the

226. *See* Jardine v. Upper Darby Lodge No. 1973, Inc., 198 A.2d 550, 553 (Pa. 1964) ("[A]n intoxicated person is and can be an instrument of danger to others, especially if he is operating a motor vehicle.").

227. *See id.* (commenting that an intoxicated person behind the wheel is as dangerous to the community as "a stick of dynamite"); *see also* Majors v. Brodhead Hotel, 205 A.2d 873, 876 (Pa. 1965) (explaining that "it is the high probability that intoxicated persons will be injured that, in part, gave rise to the statute prohibiting defendant from serving the plaintiff when visibly intoxicated").

228. *See, e.g.*, Rivero v. Timblin, No. CI-09-08267, 2010 WL2914400, at *246–47 (Pa. Com. Pl. Mar. 16, 2010) ("In selling liquor to an intoxicated patron, where there is evidence that the customer may injure himself or others as a result of the intoxication, a vendor is not acting as a reasonable person would."). *Jardine* "has been cited in at least 18 jurisdictions around the country as recognizing a common-law cause of action against a licensee for injuries caused by an intoxicated customer." *Id.* at 247–48.

229. Ontiveros v. Borak, 667 P.2d 200, 508–09 (Ariz. 1983) (en banc).

230. *See* McFarlin v. Hall, 619 P.2d 729, 733–34 (Ariz. 1980) (en banc) (recognizing that a tavern owner had a duty to protect a patron who was stabbed at the hands of another patron in the tavern's parking lot, when that the tavern owner was aware that the patron had a propensity for violence and had recently been in jail).

231. *Ontiveros*, 667 P.2d at 208.

232. *Id.*

surrounding community who might be injured from the acts of its visibly intoxicated patrons.[233] Following *Ontiveros*, Arizona courts have not invoked Section 315 to impose an indefinite duty to the public, but rather to impose a duty to take reasonable steps to control the actions of patrons under a tavern keeper's control.[234]

Finally, the Supreme Court of Texas cited Section 315 when it adopted dram shop liability in *El Chico Corp. v. Poole*.[235] The *El Chico* court recognized that a tavern, in acting affirmatively to serve a patron after he was visibly intoxicated, owed a duty to protect those foreseeably injured by a drunk driver.[236] Similar to courts in Pennsylvania and Arizona, the Supreme Court of Texas noted that Section 315 reflected a "duty to take affirmative action to control or avoid increasing the danger from another's conduct which the actor has at least partially created."[237] Although the *El Chico* court articulated the tavern's duty as one owed to "the general public," it specifically framed its holding around the Texas Alcoholic Beverage Code's purpose "to protect the safety and welfare of the general public."[238] The *Warr* court took this holding to mean that Section 315 may only be applied without a special relationship when the law accepts that an actor owes a duty to the public at large.[239] The *El Chico* court, however, still acknowledged the duty of an alcoholic beverage licensee to protect

233. *Id.* at 211.

234. *See, e.g.*, Hebert v. Club 37 Bar, 701 P.2d 847, 849–50 (Ariz. Ct. App. 1984) (declining to find a tavern owner liable after a frequent patron shot another in an alcoholic blackout, reasoning that while tavern owners are under a duty of care and may be held liable when they sell liquor to an intoxicated customer, the bar in this case had no ability to foresee the patron's extraordinary actions since he exhibited no violent tendencies); *see also* Patterson v. Thunder Pass, Inc., 153 P.3d 1064, 1069 (Ariz. Ct. App. 2007) (finding that the tavern had fulfilled its duty of affirmative care to a patron and the public after cutting off the intoxicated patron and driving her home when a taxi could not be obtained, since the tavern had no way of knowing that the patron would return to the bar to retrieve her vehicle the same night, injuring another driver in a head-on collision).

235. 732 S.W. 2d 306, 312 (Tex. 1987).

236. *See id.* at 309 (affirming the lower court's holding that a tavern owner who encourages a patron to drink too much and serves him while he is visibly intoxicated, knowing that he will operate a vehicle, owes a duty to take reasonable precautions to prevent him from driving and causing foreseeable injury).

237. *Id.* at 312.

238. *Id.* at 313; *see also* Chapa v. Club Corp. of America, 737 S.W.2d 427, 429 (Tex. App. 1987) (commenting that the Texas Supreme Court affirmed that the Alcoholic Beverage Code "was enacted to protect the safety of the general public"); Fuller v. Maxus Energy, Corp., 841 S.W.2d 881, 884 (Tex. App. 1992) (noting that "*El Chico* recognized the duty of an alcoholic beverage licensee . . . not to serve a person when the licensee knows or should know that the patron is intoxicated" based on both the general principles of negligence and the Alcoholic Beverage Code).

239. Warr v. JMGM Group, 433 Md. 170, 193, 70 A.3d 347, 361 (2013).

victims foreseeably harmed by drunk driving.[240] That Texas chose to tailor its holding to fit the state's existing law does not negate the alternate framing of the issue as a duty to foreseeable victims of drunk driving, and certainly would not prevent Maryland from adopting the latter approach.

Thus, the *Warr* court erred in its conclusion that imposing a duty on the tavern under Section 315 would be contrary to Maryland law. The court should have characterized the class of persons owed a duty by the tavern as those drivers foreseeably harmed by an intoxicated patron. This would have allowed the court to apply Section 315 consistently with both Maryland and other states' third-party liability jurisprudence, and find that the Dogfish Head owed a duty to protect the Warrs.

C. The Warr *Court's Reliance on* Lamb *Produces Results That Are Contrary to the Deterrence and Compensation Goals of the Tort System, and Do Not Protect the Interests of Maryland Citizens*

While the common law proximate cause argument that "[h]uman beings, drunk or sober, are responsible for their own torts"[241] carries considerable weight in the minds of courts that recognize dram shop liability,[242] the *Warr* court erred by failing to consider the utility of holding a tavern liable for the torts of its patrons in the context of our societal understanding of drunk driving. The court should have recognized that imposing dram shop liability can deter dangerous serving practices and more fairly compensate injured victims while still protecting businesses.[243]

1. Dram Shop Liability Can Deter Dangerous Serving Practices

States that have enacted dram shop liability do so in part to deter taverns from sending highly intoxicated patrons out onto the road.[244] Drunk driving is a well-documented problem in Maryland and throughout the nation: The most current data from the National Highway Traffic Safety

240. *See El Chico*, 732 S.W.2d at 311 (concluding that injury to a third person was no longer unforeseeable since drunk driving fatalities had become so frequent within the state, and that "based on foreseeability, the duty of an alcoholic beverage licensee is apparent").

241. State v. Hatfield, 197 Md. 249, 254, 78 A.2d 754, 756 (1951).

242. *See, e.g.*, Taylor v. Ruiz, 394 A.2d 765, 766 (Del. Super. Ct. 1978) (referring to *Hatfield* for the common law proximate cause argument but deciding that such reasoning is not sufficient to protect the public from the acts of intoxicated persons); Hutchens v. Hankins, 303 S.E.2d 584, 588, 595–97 (N.C. Ct. App. 1983) (citing *Hatfield* as one of a "handful of courts . . [that] follow the old rule of nonliability," but finding more persuasive the reasoning that the consumption, resulting intoxication, and injury producing conduct are foreseeable intervening causes).

243. Smith, *supra* note 191, at 554.

244. *See* Frank A. Sloan et al., *Liability, Risk Perceptions, and Precautions at Bars*, 43 J. L. & ECON. 473, 498–99 (2000) (finding that dram shop liability laws were effective in preventing servers from engaging in unsafe practices and preventing excessive alcohol use).

Administration ("NHTSA") show that in 2012, about 10,000 fatal crashes were the result of drunk driving.[245] In Maryland, alcohol-impaired driving resulted in 160 fatalities, representing about a third of all traffic deaths in the state.[246] Exposing taverns to liability for the torts of their patrons would help prevent these fatalities by forcing taverns to be more vigilant in monitoring to whom they serve alcohol and how much they are serving.[247] Moreover, studies show that a substantial reduction in alcohol-related harm results from the enforcement and prosecution of dram shop laws.[248] In fact, courts and legislatures began to reestablish dram shop legislation in the 1980s as a response to the increased prevalence of drunk driving and the resulting fatalities.[249]

Although Maryland law mandates that liquor provider licensees in many counties undergo training in alcohol awareness programs,[250] the continuing carnage on Maryland's roads as a result of drunk driving accidents clearly indicates that these programs are insufficient. The current scheme of liability insulates a tavern—the party best able to prevent an accident—from any responsibility to other drivers.[251] In upholding this liability scheme, the *Warr* court has forced the community surrounding the Dogfish Head to rely on the judgment of highly intoxicated patrons like Eaton to make the right decision not to drive.[252]

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245. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., 2012 MOTOR VEHICLE CRASHES: OVERVIEW 6 tbl.9 (2013), *available at* http://www-nrd.nhtsa.dot.gov/Pubs/811856.pdf.

246. *Id.*

247. *See* Sloan et al., *supra* note 244, at 495–96 (studying the deterrent effect of dram shop liability law and concluding that these laws help taverns prevent patrons from excessively consuming alcohol).

248. *See* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT. OF TRANSP., PREVENTING OVER-CONSUMPTION OF ALCOHOL – SALES TO THE INTOXICATED AND "HAPPY HOUR" (DRINK SPECIAL) LAWS 3 (revised 2005) (finding that laws restricting the sale of alcohol to intoxicated persons can reduce alcohol-related harm if adequately enforced); *see also* Alexander C. Wagenaar & Harold D. Holder, *Effects of Alcoholic Beverage Server Liability on Traffic Crash Injuries*, 15 ALCOHOLISM: CLINICAL AND EXPERIMENTAL RES. 942, 947 (1991) (conducting an empirical study in Texas that found exposing taverns to liability prompted servers to cut off obviously intoxicated patrons and assist them in using alternate transportation, resulting in a "statistically significant reduction in alcohol-related traffic crashes").

249. *See* Smith, *supra* note 191, at 556 (explaining that although most states repealed their Dram Shop Acts after the end of Prohibition, "[b]y 1987, at least twenty-eight states had reestablished some form of tort liability for the sale of alcohol").

250. MD. CODE ANN., Art. 2b, § 13-101 (West 2013). Counties requiring alcohol awareness training programs include Montgomery (the site of the accident at issue in *Warr*), Howard, Kent, Washington, and Caroline. *Id.*

251. *Cf.* GUIDO CALABRESI, THE COSTS OF ACCIDENTS 135 (1970) (explaining that the most efficient approach to avoiding future accidents is to assign liability to the entity that "could avoid the accident costs most cheaply").

252. *See id.* at 312 (noting that "a system of accident law that minimizes the effect of accidents on the poor . . . emphasiz[es] deep pocket secondary cost avoidance").

2. Dram Shop Liability Can More Fairly Compensate Injured Victims While Still Protecting Businesses

Furthermore, dram shop liability is an effective tool to compensate the victims of drunk driving accidents because the insurance policies of drunk drivers may be inadequate to compensate severely injured victims. The NHTSA estimated that an alcohol-involved crash costs a victim anywhere from a few thousand dollars to over one million dollars, depending on the severity of the injury.[253] Dram shop liability creates a far more efficient scheme of compensation because it assigns the cost of the accident to the tavern's insurance policy.[254] While this means that tavern insurance policies might increase slightly in price,[255] the effect, if an increase occurred, is that the community as a whole would pay to compensate an innocent drunk driving victim, instead of the victim bearing the cost alone. Thus, recognizing dram shop liability creates a more efficient allocation of costs.[256] The court's decision in *Warr* instead means that the Warrs cannot recover from JMGM Group for the death of their ten-year-old granddaughter, notwithstanding the fact that the tavern continued to serve Eaton past the point of visible intoxication and unleashed him in this dangerous condition onto Interstate-270.[257]

The experiences of other states are instructive in analyzing the potential success of dram shop liability law to protect Maryland citizens from drunk drivers while still allowing taverns to operate as economically viable businesses. At present, dram shop liability is fairly uniform: In most jurisdictions, a tavern "may be held liable for selling . . . alcohol to . . . a visibly intoxicated person," though generally a tavern's "customers may not recover for injuries caused by their own intoxication."[258] States do not

253. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., THE ECONOMIC IMPACT OF MOTOR VEHICLE CRASHES, 2000, 41 tbl.12 (2002).

254. *See* Richard A. Posner, *Guido Calabresi's The Cost of Accidents: A Reassessment* 64 MD. L. REV. 12, 18–19 (2005) (explaining that the fault system of tort law deters accidents by decentralizing and privatizing the losses "through its effect on liability-insurance premiums").

255. *See Civil Action—Wrongfully Selling or Furnishing Alcoholic Beverages: Hearing on S.B. 209 Before the S. Judicial Proceedings Comm.*, 2014 Leg., 431st Sess. (Md. 2014) (statement of Melvin R. Thompson, Senior Vice President, Gov't Affairs and Pub. Policy, Maryland Rest. Ass'n) (expressing concern that a proposed dram shop liability statute would substantially increase liability insurance rates, and this cost may also be passed on to consumers in the form of slightly higher alcohol prices).

256. *See* Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 714 (1965) (explaining that "if many pay the cost of an accident rather than one . . . the social dislocation costs of the accident may be reduced; this is the basis of the theory of loss spreading. And even if loss spreading means no spreading—if it means only that the man with the deeper pockets pays—the same cost-reduction effect may be said to exist.").

257. Warr v. JMGM Group, 433 Md. 170, 173–77, 70 A.3d 347, 349–51 (2013).

258. Smith, *supra* note 191, at 557.

impose unlimited liability upon taverns; many states have made substantial efforts to protect taverns by, for example, apportioning liability between the tavern and the intoxicated individual.[259]

In addition, many state legislatures have limited a dram shop's liability by imposing damage caps, sometimes set as low as $50,000.[260] These damage caps benefit taverns by lessening the possibility that a suit will put the dram shop out of business and allowing the dram shop to purchase less insurance than it would have to otherwise purchase.[261] Further, in these types of suits, punitive damages are generally unavailable.[262] While this approach may unfairly limit an injured plaintiff's possibility of compensation when medical expenses arising from an accident exceed the limits of an applicable damage cap, it is still a valid tool with which states can experiment to ensure that drunk driving victims have some, albeit imperfect, method of compensation.[263]

Furthermore, state legislatures have limited the potential liability of taverns by imposing heightened evidentiary requirements. For example, the vast majority of states provide a cause of action for drunk driving torts resulting from the sale of alcohol to an obviously intoxicated patron.[264] A successful plaintiff must prove by eyewitness testimony and by blood alcohol reading at the time of injury that the customer was visibly intoxicated at the time of service.[265] This standard may be difficult for plaintiffs to meet, as tavern employees rarely admit to serving a patron who is visibly intoxicated.[266] Other states require that the plaintiff also prove the tavern knew or should have known that the intoxicated patron would soon be driving an automobile.[267]

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259. *See id.* at 572 (discussing contribution claims).

260. *Id.* at 573.

261. *Id.*

262. *See, e.g.*, Jackson v. Tullar, 285 S.W.3d 290, 298–99 (Ky. Ct. App. 2007) (holding that punitive damages are unavailable under Kentucky's Dram Shop Act); Steak & Ale of Texas, Inc., v. Borneman, 62 S.W.3d 898, 909 (Tex. App. 2001) (finding that Texas's Dram Shop Act precludes recovery of punitive damages).

263. *See* Smith, *supra* note 191, at 573 (noting that the goal in this approach is to compensate people who have been harmed in tort).

264. *See id.* at 559 (explaining that only Florida, North Carolina, and Wisconsin do not use the visibly intoxicated standard).

265. *Id.* at 559–60.

266. *See, e.g.*, Reed v. Breton, 718 N.W.2d 770, 777 (Mich. 2006) (finding that a plaintiff, in order to rebut the statutory presumption of the tavern's nonliability, must present evidence of actual, visible intoxication, including the testimony of a server trained to recognize intoxication).

267. *See, e.g.*, GA. CODE ANN. § 51-1-40 (2000) (providing that a person who "knowingly . . . serves alcoholic beverages to a person who is in a state of noticeable intoxication, knowing that such person will soon be driving a motor vehicle, may become liable for injury or damage caused by or resulting from the intoxication . . . when the sale . . . is the proximate cause of such injury or damage").

Illustratively, while the Supreme Court of Texas in *El Chico* held that "an alcoholic beverage licensee owes a duty to the general public not to serve alcoholic beverages to a person when the licensee knows or should know the patron is intoxicated,"[268] the Texas legislature that same week passed a Dram Shop Act.[269] The statute protected taverns by creating a more onerous burden of proof where plaintiffs had to prove that at the time of sale, "it was apparent to the provider that the individual being . . . served . . . was obviously intoxicated to the extent that he presented a clear danger to himself and to others."[270] A recent study found that most states have similarly tightened restrictions on tavern liability, thereby "limit[ing] the scope of the courts' rulings," since dram shop laws were adopted in the 1980s.[271] Indeed, many states impose a higher burden of proof, stronger evidentiary requirements, or have tightened damage caps.[272]

While taverns are productive members of Maryland's economy, it is imperative that they function responsibly. That other states struggle to both provide a cause of action for injured plaintiffs and protect taverns from exposure to unlimited liability reflects the difficulty in finding this balance. Yet in *Warr*, rather than compensating the Warrs for the tragic death of their granddaughter, the Court of Appeals of Maryland left the decision of whether to apply dram shop liability to the General Assembly.[273] The *Warr* court decided that the legislature's "failure to enact dram shop liability reflected that its imposition was disfavored as a matter of public policy."[274] Legislative inaction does not, however, reflect the policy of the state; it is the court's responsibility to change the common law to take into account changing societal conditions.[275] The court had the power to bring the Warrs justice by recognizing a cause of action and the potential for compensation, without the family having to battle against industry cries of economic catastrophe and judicial uncertainty that sound in the state legislature on

268. 732 S.W.2d 306, 314 (Tex. 1987).

269. *See* Smith v. Merritt, 940 S.W.2d 602, 605 (Tex. 1997) (noting the act superseded the holding in *El Chico*).

270. TEX. ALCO. BEV. CODE ANN. § 2.02(b)(1) (West 2005).

271. James F. Mosher et al., *Commercial Host (Dram Shop) Liability Current Status and Trends*, 45 AM. J. PREV. MED. 347, 348 (2013).

272. *Id.* at 350–51.

273. Warr v. JMGM Group, 433 Md. 170, 199, 70 A.3d 347, 364 (2013).

274. *Id.* at 179–80, 70 A.3d at 353.

275. *See* Donald G. Gifford & Christopher J. Robinette, *Apportioning Liability in Maryland Tort Cases: Time to End Contributory Negligence and Joint and Several Liability*, 73 MD. L. REV. 701, 712–19 (2014) (similarly arguing that the Court of Appeals of Maryland should not have deferred to the state legislature to adopt comparative negligence in part because Maryland precedent indicates that the court is not precluded from incorporating the substance of a proposed bill into law merely because it failed to pass in the General Assembly).

this topic.[276] Indeed, the *Warr* court's holding that the tavern has no responsibility to protect the community from a patron who they served over twenty drinks is intuitively troubling and does not reflect the best interests of the people of Maryland.

V. CONCLUSION

In *Warr v. JMGM Group*, the Court of Appeals of Maryland concluded that a tavern does not owe a duty to protect the public from the torts of its patrons absent a special relationship.[277] The court's analysis of liability was premised on the incorrect assumption that the relevant conduct to consider when determining whether a duty exists is the tavern's omission in failing to prevent its visibly intoxicated patron from driving.[278] Instead, the court should have considered the tavern's affirmative conduct in serving Eaton after he was visibly intoxicated.[279] Focusing on actions rather than omissions aligns with Maryland's and other states' case law,[280] the *Restatement (Second) of Torts*,[281] as well as the deterrence and compensation goals of the tort system.[282] Had the court looked to the tavern's actions in serving a visibly intoxicated patron as the relevant conduct for determining liability, it would have determined that the tavern owed a duty to protect the Warrs as foreseeable victims of drunk driving.[283]

276. *See id.* at 768 (noting that the courts have an advantage in adopting policies like comparative negligence—or dram shop liability—because they are "somewhat insulated from the powerful political forces that block" reform in the legislature); *see also* Brief of the Maryland State Licensed Beverage Ass'n, Inc. and the Rest. Ass'n of Maryland, Inc. as Amici Curiae in Support of Respondent, Warr v. JMGM Group, 433 Md. 170, 70 A.3d 347 (2013) (No. 57), 2013 WL 1945961, at *10 nn.7–8 (arguing that "considerable uncertainty" and "potential meaningful economic impacts on small businesses" would result should the court choose to adopt dram shop liability).

277. *Warr*, 433 Md. at 199, 70 A.3d at 364.

278. *See supra* Part IV.A.

279. *See supra* Part IV.A.

280. *See supra* Part IV.A.

281. *See supra* Part IV.B.

282. *See supra* Part IV.C.

283. *See supra* Parts IV.A–B.