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INTRODUCTION

It happens far too often. A bar or other similar establishment overserves a customer alcohol. When the bar closes for the night, the patron leaves, gets in his car, and drives off. Then: disaster. The drunk driver runs off the side of the road and smashes into a pole at a high rate of speed.[1] In other instances, the drunk driver swerves, crosses the double yellow line, and collides with another vehicle on the road—seriously injuring or tragically killing those onboard.[2] There were 9,220 alcohol-related crashes in Pennsylvania in 2021.[3] According to the National Highway Traffic Safety Administration ("NHTSA"), nationwide, approximately fifty percent of drunk drivers start drinking at a bar.[4] The toll in terms of loss of life, serious and permanent injury, and economic loss is staggering.

When a bar overserves someone and bad outcomes result, the Commonwealth of Pennsylvania provides a mechanism of recovery to the injured party under the Dram Shop Act.[5] Violation of the Dram Shop Act is "negligence *per se* and, if [such] violation was the proximate cause of plaintiff's injury, defendant [bar] is liable for [the harm]."[6] In these situations, plaintiffs typically seek to bring, within their complaint, not only a negligence *per se* claim for violation of the Dram Shop Act, but will routinely bring an additional cause of action against the bar in the form of a common law negligence claim.[7] A common law negligence claim is premised on

[1] *See* Schuenemann v. Dreemz, LLC, 34 A.3d 94, 97 (Pa. Super. Ct. 2011).

[2] *See* Petti v. Riverview Golf & Country Club, Inc., No. 2760 EDA 2013, 2014 WL 10919552, at *1 (Pa. Super. Ct. June 11, 2014); Detwiler v. Brumbaugh, 656 A.2d 944, 944 (Pa. Super. Ct. 1995); Rivero v. Timblin, No. CI-09-08267, 2010 WL 2914400, at *234 (Pa. C.P. Ct. Lancaster Cnty. Mar. 16, 2010).

[3] PA. DEP'T OF TRANSP., 2021 PENNSYLVANIA CRASH FACTS & STATISTICS 26 (2021), https://www.penndot.pa.gov/TravelInPA/Safety/Documents/2021_CFB_linked.pdf [https://perma.cc/KV4Z-Y8XN].

[4] JAMES MOSHER ET AL., LAWS PROHIBITING ALCOHOL SALES TO INTOXICATED PERSONS 4 (2009), https://www.nhtsa.gov/sites/nhtsa.gov/files/811142.pdf [https://perma.cc/PFQ7-WY4F].

[5] *See* 47 PA. CONS. STAT. §§ 4-493, 4-497 (1951).

[6] Majors v. Brodhead Hotel, 205 A.2d 873, 875–76 (Pa. 1965); Cron v. Sarjac, Inc., 714 A.2d 1024, 1025 (Pa. 1998); Holpp v. Fez, Inc., 656 A.2d 147, 149 (Pa. Super. Ct. 1995); *Schuenemann*, 34 A.3d at 100.

[7] Complaint at 6, Schuenemann v. Dreemz, LLC, 34 A.3d 94 (Pa. Super. Ct. Mar. 3, 2009) (No. 002676); Complaint at 24, Cleland v. Isiminger, No. GD-11-5712 (Pa. C.P. Ct. Allegheny Cnty. Mar. 11, 2024); Complaint, Yeager v. Younker, No. 2004-1822 (Pa. C.P. Ct. Ctr. Cnty. Feb. 17, 2006); Amended Complaint at 18, Druffner v. O'Neill, No. 10-04298 (E.D. Pa. Oct. 15, 2010).

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basic tort principles of duty, breach, causation, and damages.[8] Plaintiff's common law negligence count often includes allegations in the nature of inadequate internal policies and procedures to prevent intoxication,[9] inadequate training of employed servants to spot signs of visible intoxication,[10] negligently failing to expel defendant (intoxicated patron) from the premises,[11] and failing to prevent the intoxicated patron from operating their motor vehicle.[12]

Any time a plaintiff brings a common law negligence claim alongside a negligence *per se* claim for violation of the Dram Shop Act, the defendant bar consistently files preliminary objections seeking to strike those allegations of negligence or dismiss the common law negligence count in its entirety.[13] Defendants' arguments are the same every time; that Section 4-497 of the Dram Shop Act serves as a limiting provision that precludes any other common law theories of liability and recovery from being asserted.[14] Section 4-497 of the Pennsylvania Dram Shop Act reads:

> No licensee shall be liable to third persons on account of damages inflicted upon them off of the licensed premises by customers of the licensee unless the customer who inflicts the damage was sold, furnished or given liquor or malt or brewed beverages by the said licensee or his agent, servant or employe when the said customer was visibly intoxicated.[15]

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[8] Atcovitz v. Gulph Mills Tennis Club, Inc., 812 A.2d 1218, 1222 (Pa. 2002); W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164–65 (5th ed. 1984).

[9] Complaint at 9, Schuenemann v. Dreemz, LLC, 34 A.3d 94 (Pa. Super. Ct. Mar. 3, 2009) (No. 002676).

[10] Complaint at 26, Cleland v. Isiminger, No. GD-11-5712 (Pa. C.P. Ct. Allegheny Cnty. Mar. 11, 2024).

[11] Complaint, Yeager v. Younker, No. 2004-1822 (Pa. C.P. Ct. Ctr. Cnty. Feb. 14, 2006).

[12] Amended Complaint at 19–20, Druffner v. O'Neill, No. 10-CV-004298 (E.D. Pa. Oct. 15, 2010).

[13] Memorandum of Law in Support of Preliminary Objections of Defendant Dreemz, LLC, Schuenemann v. Dreemz, LLC, 34 A.3d 94 (Pa. Super. Ct. 2011) (No. 002676); Preliminary Objections of Defendant Robert R. Lyons, Individually and t/d/b/a Mulberry Street Inn, a/k/a Oscar's ¶ 13, Currie v. Phillips, No. 2003 Civ. 03-378 (Pa. C.P. Ct. Lackawanna Cnty. Feb. 14, 2003).

[14] Memorandum of Law, *supra* note 13 (citing Detwiler v. Brumbaugh, 656 A.2d 944, 946 (Pa. Super. Ct. 1995)); Preliminary Objections of Defendant Days Inn & Suites Lancaster at 2–3, Mahone v. Days Inn & Suites Lancaster, No. 18-00260 (Pa. C.P. Ct. Lancaster Cnty. Mar. 26, 2018).

[15] 47 PA. CONS. STAT. § 4-497 (1951).

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Defendants posit that while service of alcohol to a visibly intoxicated patron is negligence *per se*, all "other allegations of negligence must be dismissed or stricken because they assert legal duties which are not recognized by law"[16] and thus "are not the basis for a viable cause of action in the Commonwealth of Pennsylvania."[17]

Some jurisdictions in the Commonwealth reject defendant's preliminary objections on these grounds and allow plaintiffs to proceed with claims for both common law negligence as well as violations of the Dram Shop Act.[18] In other counties, the courts of common pleas sustain defendant's preliminary objections and strike plaintiff's allegations of negligence and common law counts.[19] There is disagreement among the Pennsylvania common pleas courts on this very issue.[20] To date, no appellate court in the Commonwealth has addressed the precise issue of

[16] Rivero v. Timblin, No. CI-09-08267, 2010 WL 2914400, at *255 (Pa. C.P. Ct. Lancaster Cnty. Mar. 16, 2010) (citing Cipriani v. Szopo, No. 10006 of 2003, slip op. at 4 (Pa. C.P. Ct. Beaver Cnty. Mar. 20, 2003)).

[17] Memorandum of Law, *supra* note 13.

[18] *Rivero*, 2010 WL 2914400, at *259–60 (overruled defendant's preliminary objections holding that it is not clear that Section 4-497 of the Liquor Code subsumes all common law negligence claims against a licensee); Nikoden v. Benedict, No. 10143 of 2018, slip op. at 20 (Pa. C.P. Ct. Lawrence Cnty. Dec. 3, 2019) (denied defendant's preliminary objections based on plaintiff's general negligence claim, holding that Dram Shop liability and common law negligence are not mutually exclusive, but rather complementary causes of action ultimately meant to work together); Yeager v. Younker, No. 2004-1822, slip op. at 5 (Pa. C.P. Ct. Ctr. Cnty. Aug. 23, 2006) (denied defendant's motion for summary judgement, allowing plaintiff's assertion of common law negligence claims and violation of Section 4-493(1) of the Dram Shop Act to proceed); Currie v. Phillips, No. 2003 Civ. 03-378, slip op. at 5 (Pa. C.P. Ct. Lackawanna Cnty. Aug. 15, 2003) (denied defendant's preliminary objections holding that averments in plaintiff's complaint are pertinent to plaintiff's theories which include general negligence); Joyce v. Starters Riverport Inc., No. C-0048-CV-2011-11975, slip op. at 82 (Pa. C.P. Ct. Northampton Cnty. Dec. 21, 2012) (denied defendant's preliminary objections concerning plaintiff's common law negligence allegations, holding that while the statute declares a licensee's service of alcohol to a visibly intoxicated person to be *per se* negligence, it does not follow, either under the plain language of the statute or the principles of negligence, that liability be limited to the act of service to a visibly intoxicated person).

[19] Kortum v. 1K Second Street Assocs., No. 2007-CV-09746, slip op. at 4 (Pa. C.P. Ct. Dauphin Cnty. Jan. 3, 2008) (granting defendant's preliminary objections regarding plaintiff's averments that seek to impose liability on other tort theories of negligence, holding that the Dram Shop Act not only provides a basis for liability but also restricts liability to those exact circumstances); Clark v. Thompson, No. 2002-0260-Civil, slip op. at 9 (Pa. C.P. Ct. Armstrong Cnty. Mar. 12, 2003) (granting defendant's preliminary objections, holding that the legislature intended Section 4-497 to be the sole means of tort liability for tavern owners in serving competent adult patrons alcohol); Frey v. Rivera, No. 3675-CV-2015, slip op. at 8 (Pa. C.P. Ct. Monroe Cnty. Sept. 8, 2015) (granting defendant's preliminary objections and striking the paragraphs in plaintiff's complaint that allege common law theories of liability because plaintiff's exclusive remedy is under the Pennsylvania Liquor Code and Section 4-497 is a limiting provision).

[20] Murray v. Frick, No. 2021-C-1254, slip op. at 7 (Pa. C.P. Ct. Lehigh Cnty. May 2, 2022).

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whether Section 4-497 of the Dram Shop Act acts as a limiting provision such that it preempts all other common law theories of negligence from being brought as a basis of recovery for injuries resulting from a licensee's overservice of alcohol or other misconduct.[21] As a result, the Common Pleas Courts of Pennsylvania, "have reached wildly divergent conclusions on this issue."[22] This discrepancy must be resolved in the interest of judicial integrity.

This Note first explores the current application of the Pennsylvania Dram Shop Act as well as the history and development of dram shop laws in the Commonwealth.[23] It then explains why Section 4-497 of the Dram Shop Act is not and should not be viewed as a limiting provision preempting the entire field of tort liability for plaintiffs whose injuries have been caused by the overservice of alcohol by bars and similar establishments. Lastly, as a matter of sound public policy, this Note demonstrates why it is beneficial not only for plaintiffs, but for the public at large to allow injured parties to bring common law negligence claims alongside *per se* claims against bars for shortcomings and omissions in the service of alcohol.

I. HISTORICAL BACKGROUND

A. Pennsylvania's Dram Shop Act Today

Pennsylvania's Dram Shop Act provides for both first-party (§ 4-493)[24] and third-party recovery (§4-497).[25] First-party recovery refers to actions in which the plaintiff himself was the overserved customer and was subsequently injured in an automobile crash or otherwise.[26] Third-party suits refer to those in which the plaintiff was injured by an independent, overserved, intoxicated patron of a licensee.[27]

Section 4-493(1) of the Pennsylvania Dram Shop Act titled, "Unlawful acts relative to liquor, malt and brewed beverages and licensees," provides in pertinent

[21] *Rivero*, 2010 WL 2914400, at *259; *Nikoden*, slip op. at 11.

[22] *Nikoden*, slip op. at 11.

[23] While focusing on Pennsylvania, these principles have a broader implication nationally as many states also face the same issue of preemption surrounding their respective Dram Shop Acts.

[24] *See* 47 PA. CONS. STAT. § 4-493 (1951).

[25] *See id.* § 4-497.

[26] *Dram Shop Rule*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/dram_shop_rule [https://perma.cc/SR5L-PAYC] (last updated June 2021).

[27] *Id.*

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part: "It shall be unlawful . . . for any licensee . . . to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person visibly intoxicated . . . ."[28] Here, the Pennsylvania General Assembly defines and imposes upon licensees of alcohol a statutory duty and "standard of conduct," not to serve someone who is *visibly* intoxicated. A licensee breaches that duty and is negligent *per se* if alcohol is served to a visibly intoxicated person.[29] The licensee is then liable for all of the patron's injuries and damages proximately caused by such negligence *per se*.[30] Thus, in order for a plaintiff to recover under section 4-493 of the Dram Shop Act, they must prove two elements: (1) an employee or agent of [the defendant] served them alcoholic beverages at a time when they were visibly intoxicated; and (2) this violation of the statute proximately caused [plaintiff's] injuries.[31]

Section 4-497 of the Pennsylvania Dram Shop Act titled, "Liability of licensees," provides:

> No licensee shall be liable to third persons on account of damages inflicted upon them off of the licensed premises by customers of the licensee unless the customer who inflicts the damage was sold, furnished or given liquor or malt or brewed beverages by the said licensee or his agent, servant or employe when the said customer was visibly intoxicated.[32]

This Section empowers third parties to bring suit against a bar if their injuries were proximately caused by a patron of that bar who was served alcohol while visibly intoxicated. This Section is also what some Pennsylvania courts have deemed the "limiting provision" of the Commonwealth's Dram Shop Act.[33]

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[28] 47 PA. CONS. STAT. § 4-493 (1951).

[29] Zygmuntowicz v. Hosp. Investments, Inc., 828 F. Supp. 346, 349 (E.D. Pa. 1993).

[30] *Id.*

[31] Fandozzi v. Kelly Hotel, Inc., 711 A.2d 524, 525–26 (Pa. Super. Ct. 1998) (citing Johnson v. Harris, 615 A.2d 771, 775 (Pa. Super. Ct. 1992)); Schuenemann v. Dreemz, LLC, 34 A.3d 94, 100 (Pa. Super. Ct. 2011).

[32] 47 PA. CONS. STAT. § 4-497 (1951).

[33] Detwiler v. Brumbaugh, 656 A.2d 944, 946 (Pa. Super. Ct. 1995); Liberty Mut. Fire Ins. Co. v. Tilden, No. 11-2140, 2011 WL 7758348, at *5 (Pa. C.P. Ct. Cumberland Cnty. Feb. 2012); Encompass Ins. Co. v. Stone Mansion Rest. Inc., 902 F.3d 147, 155 (3d Cir. 2018).

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In *Detwiler v. Brumbaugh*, the Pennsylvania Superior Court held that "Section 4-497 is clearly a limiting provision designed to specifically shield licensees from liability to third parties except in those instances where the patron served was visibly intoxicated."[34] The *Detwiler* court reasoned that section 4-497 "does not *create* a cause of action against a licensee but in fact *limits* the extent of a licensee's liability."[35] Further, in *Detwiler*, the court concluded that this Section of the Dram Shop Act "acts as a shield restricting liability" to those instances in which a patron was served alcohol while visibly intoxicated.[36]

The impact of the *Detwiler* decision on Dram Shop litigation was significant. As a result, defendant bars routinely file preliminary objections asking the court to strike plaintiff's allegations of common law negligence, arguing that *Detwiler* established that section 4-497 of the Dram Shop Act "provides licensees with immunity from all claims other than those of service to a visibly intoxicated customer of legal age."[37] Defendant bars consistently argue that section 4-497 limits plaintiff's recovery solely to the Dram Shop Act to the exclusion of any common law negligence theories.[38] Therefore, defendants maintain that a plaintiff is limited only to a showing of service while visibly intoxicated.[39] According to defendant bars, all other causes of actions and allegations of other instances of negligence, such as inadequate policies and procedures or improper training of employees, have no bearing on liability since the only issue is whether a patron was serviced while visibly intoxicated, and as such, those allegations should be stricken.[40] As mentioned, some courts across the Commonwealth have accepted defendants' habitual argument and

[34] *Detwiler*, 656 A.2d at 946.

[35] *Id.*

[36] *Id.*

[37] Brief in Support of Preliminary Objections to Plaintiffs' Complaint, Rivero v. Timblin, No. CI-09-08267, 2010 WL 2914400 (Pa. C.P. Ct. Lancaster Cnty. Sept. 10, 2009).

[38] *See* Memorandum of Law, *supra* note 13; Preliminary Objections, *supra* note 14.

[39] Preliminary Objections, *supra* note 14, at 3–5.

[40] *See* Rivero v. Timblin, No. CI-09-08267, 2010 WL 2914400, at *255 (Pa. C.P. Ct. Lancaster Cnty. Mar. 16, 2010) (citing Cipriani v. Szopo, No. 10006 of 2003, slip op. at 4 (Pa. C.P. Ct. Beaver Cnty. Mar. 20, 2003)); Memorandum of Law, *supra* note 13; Preliminary Objections, *supra* note 14, at 3–5.

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strike plaintiffs' allegations of common law negligence at the preliminary objection stage.[41] Other courts have rejected them.[42]

B. Historical Underpinnings

The concept of a dram shop goes back to the colonial era.[43] A "dram shop" is a place where spiritous liquor is sold by the drink.[44] In colonial times, dram shops and saloons "could actually be fined" for not allowing their patrons to drink as much

[41] Kortum v. 1K Second Street Assocs., No. 2007-CV-09746, slip op. at 4 (Pa. C.P. Ct. Dauphin Cnty. Jan. 3, 2008) (granting defendant's preliminary objections regarding plaintiff's averments that seek to impose liability on other tort theories of negligence, holding that the Dram Shop Act not only provides a basis for liability but also restricts liability to those exact circumstances); Clark v. Thompson, No. 2002-0260-Civil, slip op. at 9 (Pa. C.P. Ct. Armstrong Cnty. Mar. 12, 2003) (granting defendant's preliminary objections, holding that the legislature intended Section 4-497 to be the sole means of tort liability for tavern owners in serving competent adult patrons alcohol); Frey v. Rivera, No. 3675-CV-2015, slip op. at 8 (Pa. C.P. Ct. Monroe Cnty. Sept. 8, 2015) (granting defendant's preliminary objections and striking the paragraphs in plaintiff's complaint that allege common law theories of liability because plaintiff's exclusive remedy is under the Pennsylvania Liquor Code and Section 4-497 is a limiting provision).

[42] *Rivero*, 2010 WL 2914400, at *259–60 (Pa. C.P. Ct. Lancaster Cnty. Mar. 16, 2010) (overruled defendant's preliminary objections holding that it is not clear that Section 4-497 of the Liquor Code subsumes all common law negligence claims against a licensee); Nikoden v. Benedict, No. 10143 of 2018, slip op. at 20 (Pa. C.P. Ct. Lawrence Cnty. Dec. 3, 2019) (denied defendant's preliminary objections based on plaintiff's general negligence claim, holding that Dram Shop liability and common law negligence are not mutually exclusive, but rather complementary causes of action ultimately meant to work together); Yeager v. Younker, No. 2004-1822, slip op. at 5 (Pa. C.P. Ct. Ctr. Cnty. Aug. 23, 2006) (denied defendant's motion for summary judgement, allowing plaintiff's assertion of common-law negligence claims and violation of Section 4-493(1) of the Dram Shop Act to proceed); Currie v. Phillips, No. 2003 Civ. 03-378, slip op. at 5 (Pa. C.P. Ct. Lackawanna Cnty. Aug. 15, 2003) (denied defendant's preliminary objections holding that averments in plaintiff's complaint are pertinent to plaintiff's theories which include general negligence); Joyce v. Starters Riverport Inc. No. C-0048-CV-2011-11975, slip op. at 82 (Pa. C.P. Ct. Northampton Cnty. Dec. 21, 2012) (denied defendant's preliminary objections concerning plaintiff's common law negligence allegations, holding that while the statute declares a licensee's service of alcohol to a visibly intoxicated person to be per se negligence, it does not follow, either under the plain language of the statute or the principles of negligence, that liability be limited to the act of service to a visibly intoxicated person).

[43] Anthony J. Bracke, *The Evolution of Dram Shop Law: Is Kentucky Keeping Up with the Nation?*, 15 N. KY. L. REV. 539, 539–40, 545–46 (1988) (The term "dram shop" derives from the seventeenth century British way of measuring alcohol which was called a "dram"); *A Guide to Dram Shop Laws*, MALLOY L. OFFS., https://www.malloy-law.com/a-guide-to-dram-shop-laws/ [https://perma.cc/VCF5-G6SG] (last visited May 26, 2024) ("The term 'Dram Shop' actually traces its roots back to 17th century Britain. A 'dram' is a unit of liquid measurement roughly equivalent to three quarters of a teaspoon. A 'dram shop,' then, was a bar, pub, tavern, or inn serving alcohol by the dram.").

[44] Snow v. State, 9 S.W. 306, 306 (Ark. 1888).

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as they wanted.[45] Initially, at common law, alcohol suppliers incurred no liability for serving "a strong and able-bodied man"[46] who later injured himself or others due to over intoxication.[47] The rationale behind this rule of nonliability was premised on two basic considerations. First, courts viewed the furnishing of alcohol as "too remote to be the proximate cause of [a patron's] intoxication."[48] Consumption, rather, was the root cause of a customer's inebriation,[49] and a person was solely responsible for his own actions.[50] Second, injury to a third person was not contemplated as a foreseeable result of the customer's over intoxication.[51]

In the 1850s, public awareness about the dangers and potential for harm caused by intoxication increased.[52] As such, states began to diverge from the common law rule of non-liability for tavernkeepers by adopting legislative statutes that provided persons injured by an intoxicated patron a cause of action against the establishment or person selling the alcohol.[53] In 1854, the Commonwealth of Pennsylvania passed its first "Dram Shop Act" titled, "To protect certain domestic and private Rights, and

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[45] He (Vivian) Li, Project, An Overview of Dram Shop Law and Its Validity with an Emphasis on California: A Case for Imposing Civil Liability on Commercial Drinking Establishments 4 (Fall 2016) (M.S. in Hospitality Management project, California State Polytechnic University, Pomona), https://scholarworks.calstate.edu/downloads/kd17cv80g [https://perma.cc/9Z4W-SP27].

[46] Cruse v. Aden, 20 N.E. 73, 74 (Ill. 1889). As the *Cruse* court stated:

> It was not a tort, at common law to either sell or give intoxicating liquor to a 'strong and able-bodied man,' and it can be said safely, that it is not anywhere laid down in the books that such act was ever held, at common law, to be culpable negligence, that would impose legal liability for damages upon the vendor or donor of such liquor.

Id.

[47] *Id.* at 75; Julius F. Lang Jr. & John J. McGrath, Comment, *Third Party Liability for Drunken Driving: When "One for the Road" Becomes One for the Courts*, 29 VILL. L. REV. 1119, 1121 (1984).

[48] Lang & McGrath, *supra* note 47, at 1121; Joyce v. Hatfield, 78 A.2d 754, 756 (Md. 1951) ("The law (apart from statute) recognizes no relation of proximate cause between a sale of liquor and a tort committed by a buyer who has drunk the liquor.").

[49] Lang & McGrath, *supra* note 47, at 1121.

[50] *Joyce*, 78 A.2d at 756 ("Human beings, drunk or sober, are responsible for their own torts.").

[51] Rivero v. Timblin, No. CI-09-08267, 2010 WL 2914400, at *246 (Pa. C.P. Ct. Lancaster Cnty. Mar. 16, 2010).

[52] Lang & McGrath, *supra* note 47, at 1124.

[53] *Id.*

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prevent abuses in the Sale and Use of Intoxicating Drinks."[54] The first Section of the Act made it illegal to provide alcohol to "any person of known intemperate habits, to a minor, or to an insane person . . . [or] to any person when drunk or intoxicated."[55] The third Section subjected tavern owners to civil liability for any injuries caused by the unlawful furnishing of alcohol to any person.[56]

In 1951, the Act of 1854 was repealed and replaced with Pennsylvania's modern Liquor Code, 47 P.S. §§ 1-101–10-1001.[57] Section 1 of the 1854 Act was incorporated into the modern Code at 47 P.S. § 4-493(1).[58] Initially, Section 3 of the 1854 Act, the portion providing for civil liability, was not incorporated into the new Liquor Code of 1951.[59]

In the 1958 case of *Schelin v. Goldberg*, the plaintiff sought to impose civil liability on a licensee despite the fact that the new Liquor Code of 1951 contained no civil liability provision.[60] In *Schelin*, the plaintiff entered the defendant's taproom already intoxicated, was served more alcohol, and then got into an argument with other patrons.[61] Shortly thereafter, as he was leaving the bar, the plaintiff was struck from behind by one of the other patrons and suffered injuries.[62] The plaintiff's theory of liability was based upon violation of Section 4-493 when the defendant taproom served him while he was visibly intoxicated.[63] The question thus became whether the plaintiff could recover for his injuries based upon violation of that Section of the act (§ 4-493), since the Liquor Code contained no civil liability provision.[64] The Superior Court held that "[w]hen an act embodying in expressed terms a principle of law is repealed by the legislature, then the principle as it existed at common law is

[54] Law of May 8, 1854, No. 648 (repealed 1951).

[55] *Id.* § 1.

[56] *Id.* § 3; Fink v. Garman, 40 Pa. 95, 104 (1861).

[57] 47 PA. CONS. STAT. §§ 1-101–10-1001 (1951).

[58] *Id*. *See also* Schelin v. Goldberg, 146 A.2d 648, 651 (Pa. Super. Ct. 1958).

[59] Rivero v. Timblin, No. CI-09-08267, 2010 WL 2914400, at *242 (Pa. C.P. Ct. Lancaster Cnty. Mar. 16, 2010).

[60] *See Schelin*, 146 A.2d at 649.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 651.

[64] *Id.*

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still in force."[65] The Superior Court quoted from an 1861 Pennsylvania Supreme Court decision, *Fink v. Garman*, where Justice Woodward stated: "It would probably be found, if it were worthwhile to go into an examination of all prior legislation, that it never was lawful, but always unlawful negligence in Pennsylvania to furnish liquors to men actually drunk at the time, or known to be habitually intemperate."[66] From this, the *Schelin* court concluded that Section 3 of the 1854 Act, the civil liability provision, was not the real basis of liability for licensees.[67] As will be discussed later in this Note, this reasoning hints to the notion that the basis of liability for licensees comes not only from statute but from common law negligence principles as well.[68]

Six years later, in *Jardine v. Upper Darby Lodge No. 1973, Inc.*, the Supreme Court of Pennsylvania relied on the *Schelin* court's analysis when it held that bar owners have a common law duty *independent* from statute to serve alcohol responsibly.[69] In *Jardine*, a pedestrian was seriously injured when he was struck by a drunk driver who was served alcohol at defendant bar.[70] The Court held that "[t]he first prime requisite to deintoxicate [sic] 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. *This is a duty which everyone owes to society and to law entirely apart from any statute*."[71] The Court went on to describe the dangers of driving while under the influence, noting that "[a]n intoxicated person behind the wheel of an automobile can be as dangerous as an insane person with a firearm."[72] With such a holding, the Supreme Court recognized that injury to a third person was an eminently foreseeable result of the overserving of alcohol. Shortly after the *Jardine* decision, the Pennsylvania Legislature added Section 4-497 (third-party recovery) to the Liquor Code in 1965.[73]

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[65] *Id.*

[66] Fink v. Garman, 40 Pa. 95, 105 (1861).

[67] *Schelin*, 146 A.2d at 652.

[68] *See infra* Section III.C.

[69] Jardine v. Upper Darby Lodge No. 1973, Inc., 198 A.2d. 550, 553 (Pa. 1964).

[70] *Id.* at 551.

[71] *Id.* at 553 (emphasis added).

[72] *Id.*

[73] 47 PA. CONS. STAT. § 4-497 (1951).

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II. A "LIMITING" PROVISION?

As mentioned previously in this Note, the *Detwiler* court construed Section 4-497 of the Pennsylvania Dram Shop Act as a "limiting provision" such that it preempts other causes of action—such as common law negligence—from being brought by plaintiffs alongside a *per se* claim for violation of the Act.[74] This portion of this Note explains why Section 4-497 contains no such "limiting provision" and should not be viewed as having such an effect.

A. Statutory Construction

The Pennsylvania courts of common pleas are split on the issue of whether Section 4-497 contains a "limiting provision" such that it bars the plaintiff from bringing common law negligence claims alongside the statutory claim.[75] With the degree of disagreement among the counties across the Commonwealth on this issue, it is evident that Section 4-497 is subject to varying interpretations. In deciding this issue, it is useful to turn to principles of statutory construction to determine the intent of the Legislature when it enacted Section 4-497 into the Liquor Code in 1965.

The Statutory Construction Act of 1972 provides five presumptions to ascertain the intention of the General Assembly in the enactment of a statute.[76] Two of these presumptions are particularly relevant in discerning the legislative intent behind Section 4-497 of the Liquor Code.

First, is "[t]hat the General Assembly intends to favor the public interest as against any private interest."[77] When defendant bars assert that Section 4-497 is a limiting provision, such that it "acts as a shield restricting liability,"[78] preventing any other claims from being brought against them, they are suggesting that Section 4-497 was passed by the General Assembly *for them*. They are suggesting that the Pennsylvania Legislature enacted Section 4-497 for the purposes of limiting the liability of *private* bars and similar establishments. Disallowing claims of common law negligence from being brought by plaintiffs clearly serves the interests of the private defendant bar to the detriment of the public at large by setting a narrow instance in which to impose liability and limiting the introduction of other possible avenues of recovery. If plaintiff's sole mechanism of recovery is through the Dram Shop Act, they would be forced to rely on the existence and sufficiency of evidence

[74] Detwiler v. Brumbaugh, 656 A.2d 944, 946 (Pa. Super. Ct. 1995).

[75] Murray v. Frick, No. 2021-C-1254, slip op. at 7 (Pa. C.P. Ct. Lehigh Cnty. May 2, 2022).

[76] 1 PA. CONS. STAT. § 1922 (1972).

[77] *Id.* § 1922(5).

[78] *Detweiler*, 656 A.2d at 946.

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that the drunk patron was served while visibly intoxicated to have any hope of recovery. If it just so happened that there was an absence of such evidence and plaintiff was prohibited from introducing other negligent conduct (because Section 4-497 is interpreted to disallow such evidence), the plaintiff would have zero prospect of recovery. This cannot be the proper construction of the Act, considering that Section 1922(5) of the Statutory Construction Act of 1972 presumes that the Legislature intends to favor public interests over any private interest.

Further, the case law does not support such a construction. In *Zygmuntowicz v. Hospitality Investments, Inc.*, the District Court for the Eastern District of Pennsylvania, interpreting Pennsylvania law, held that the primary purpose behind the liquor code is "to protect an individual's rights from the harm caused by the negligent service of alcohol. Specifically, Pennsylvania purports to protect society in general and the intoxicated persons themselves from their inability to exercise due care."[79] Further, in *Malt Beverages Distributors Association v. Pennsylvania Liquor Control Board*, the Supreme Court of this Commonwealth specifically declared that the "purpose of the [Liquor] Code is to restrain the sale of alcohol and to protect the public welfare, health, peace, and morals of the citizens of Pennsylvania."[80]

In 2011, in response to issues involving the apportionment of damages between multiple tortfeasors, the Pennsylvania General Assembly passed the Fair Share Act.[81] The passage of the Fair Share Act reinforces the proposition that the purpose behind Section 4-497 was to protect the public at large—not to act as a shield, limiting the liability of private bars. Before the passage of the Fair Share Act, under the "old" rule in Pennsylvania, in a case with multiple defendants, if any one defendant was found even 1% responsible for causing the plaintiff's injuries then that defendant could be compelled to pay the entire verdict.[82] The plaintiff could choose to collect the entire verdict against a tortfeasor regardless of the degree of liability determined by the jury.[83] Under the new law, each defendant would only be responsible to pay the percentage of the jury award that matched the percentage of

[79] 828 F. Supp. 346, 349 (E.D. Pa. 1993).

[80] 974 A.2d 1144, 1153 (Pa. 2009).

[81] Daniel E. Cummins, *Law of Fair Share Act Left Unsettled by Recent Decision*, TORT TALK (Aug. 10, 2021), http://www.torttalk.com/2021/08/article-law-of-fair-share-act-left.html [https://perma.cc/WY8F-Q993].

[82] *Id.*

[83] *See id.*

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fault the jury assigned to that particular defendant.[84] However, the Act does provide that if any one defendant was found to be sixty percent or more at fault, then the plaintiff could recover the entire verdict from that defendant.[85]

There were four exceptions built into the Fair Share Act's new joint and several liability protection scheme that specifically allow a plaintiff to recover the full amount of a verdict against any defendant regardless of the degree of liability.[86] One such exception was for cases involving Dram Shop claims.[87] For Dram Shop claims, pure joint and several liability would remain.[88] That means that if a defendant bar overserved a patron, who then got into his car and struck a third-party plaintiff, and the jury determined that the intoxicated driver was ninety-nine percent at fault and the bar was merely one percent at fault, the plaintiff could recover the entire verdict from the defendant bar.[89] The Dram Shop exception to the Fair Share Act should reinforce for the courts that the Legislature did not intend Section 4-497 to limit the liability of bars but rather was meant to protect the interests of the public at large. Even if a defendant bar is found by the jury to be only one percent responsible for the plaintiff's injuries, the plaintiff can recover the entire verdict from that defendant, thus guarding against the situation in which the defendant drunk driver does not have enough insurance or funds to compensate the plaintiff in full for his injuries. In that situation, the defendant bar becomes *fully* responsible for compensating the injured plaintiff. By carving out an exception requiring the defendant bar to compensate the plaintiff fully despite the jury finding that bar to be only one percent at fault for the plaintiff's injuries, the legislature has clearly indicated that the Commonwealth values the interests of the public at large over the interests of private bars. The General Assembly clearly had the public in mind by ensuring that an injured party will be compensated fully by a defendant bar even in instances where that bar is determined not to be largely at fault. If Section 4-497 of the Liquor Code was enacted to shield defendant bars from liability, we should see that same desire from the

[84] *Id.*

[85] *Id.*

[86] Dickie, McCamey & Chilcote's Product Liability Group, *Impact of Pennsylvania Fair Share Act*, DICKIE MCCAMEY (Aug. 18, 2011), https://www.dmclaw.com/wp-content/uploads/2018/04/pubs_1566_8_18_2011.pdf [https://perma.cc/F24C-LZSQ].

[87] *Id.*

[88] *Id.*

[89] *Id.*

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Legislature to protect private bars by applying the Fair Share Act's new joint and several liability scheme to Dram Shop situations.

Another presumption useful in discerning the legislative intent behind Section 4-497 of the Liquor Code is that "the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable."[90] If Section 4-497 of the Liquor Code is truly a limiting provision that precludes common law negligence claims, it would lead to absurd results not intended by the General Assembly. Consider an all-too-common scenario where a patron is overserved by a bar, gets behind the wheel of a vehicle, and then crashes into someone. And for whatever reason, evidence that the bar served that patron while he was visibly intoxicated is severely lacking. There is no question that the patron drank alcohol and became drunk at the bar. There is no question that that patron is significantly intoxicated and unable to safely operate a motor vehicle, as confirmed later by blood analysis. And there is no question that there is a severely injured or even dead innocent victim as a result. If violation of the Dram Shop Act is the exclusive claim that can be brought, such that all other claims are preempted, and without evidence of service to the patron while visibly intoxicated, the plaintiff would simply have no case. Surely the General Assembly did not intend to leave a seriously injured plaintiff without a remedy in such a likely scenario where evidence of service while visibly intoxicated is not present. If the plaintiff is barred from asserting other claims against the licensee such as negligently allowing the drunk patron to get in his vehicle, or failing to properly train employees to recognize the signs of visible intoxication, it would be an "absurd" result to allow a defendant bar to escape liability in such a situation.

B. An Exclusivity Provision Requires Clear Language

Section 4-497 is not an exclusivity provision preempting common law negligence claims and should not be given such effect, because exclusivity provisions require clear language from the Legislature. The Supreme Court of Pennsylvania has made clear that for a statute to take away a potential avenue of recovery for a plaintiff, the language of the act must be crystal clear.[91] In *Metropolitan Property and Liability Insurance Co. v. Insurance Commissioner of Pennsylvania*, the court rejected the argument that the Unfair Insurance Practices Act

[90] 1 PA. CONS. STAT. § 1922(1) (1972).

[91] *See* Metro. Prop. & Liab. Ins. Co. v. Ins. Comm'r of Commonwealth of Pa., 580 A.2d 300, 302 (Pa. 1990).

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("UIPA") supplanted the insurer's contractual, common law right of recission.[92] In doing so, the court held that "[t]he legislature must affirmatively repeal existing law or specifically preempt accepted common law for prior law to be disregarded."[93] In *Birth Center v. St. Paul Companies, Inc.*, the court rejected the argument that because the Bad Faith Insurance Statute (42 Pa. C.S.A. § 8371) does not mention common law compensatory damages, the award of such damages is precluded.[94] The court held that Section 8371 "does not reference the common law, does not explicitly reject it, and the application of the statute is not inconsistent with the common law."[95] For these reasons the court held that the common law remedy must survive.[96]

This same method of analysis can and should be applied to Section 4-497 of the Dram Shop Act. That Section of the Act, like the Bad Faith Insurance Statute, does not reference the common law, does not explicitly reject it, and application of it would not be inconsistent with common law principles.[97] Therefore, like the court held in *Birth Center*, a common law remedy is not and should not be preempted by Section 4-497 of the Dram Shop Act.

It is useful to look at the language of various other statutes in which the General Assembly has clearly and specifically preempted common law claims and compare its language to that of Section 4-497 of the Dram Shop Act. The Workers' Compensation Act is one such example.[98] Section 481 of that Act is titled "Exclusiveness of remedy; actions by and against third party; contract indemnifying third party."[99] It reads, "[t]he liability of an employer under this act shall be *exclusive* and in place of *any and all other liability* to such employes."[100] Thus, under settled Pennsylvania law, an injured worker has no cause of action against their employer at common law. Compensation is provided by the Act as the exclusive remedy against

[92] *Id.* at 303.

[93] *Id.* at 302.

[94] Birth Ctr. v. St. Paul Cos., Inc., 787 A.2d 376, 386 (Pa. 2001).

[95] *Id.*

[96] *Id.*

[97] *See* 47 PA. CONS. STAT. § 4-497 (1951).

[98] *See* 77 PA. CONS. STAT. § 481 (1915).

[99] *Id.*

[100] *Id.* § 481(a) (emphasis added).

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his or her employer.[101] The Legislature specifically provided that the provisions of the Act would completely occupy the field with respect to workplace injuries.[102]

Similarly, the Post-Conviction Relief Act provides a remedy for relief to persons who were convicted of crimes they did not commit and persons serving illegal sentences.[103] The language of this statute clearly and explicitly preempts other causes of action from being brought in order to obtain relief.[104] Section 9542 of the Act reads, "[t]he action established in this subchapter shall be the sole means of obtaining collateral relief and *encompasses all other common law* and statutory remedies for the same purpose."[105]

Another such example is Title 23 Sections 2731–2742 of the Pennsylvania Code, which govern Post-Adoption Contact Agreements.[106] Post-Adoption Contact Agreements are arrangements that permit contact between a child's adoptive family and members of the child's biological family after that child's adoption has been finalized.[107] Section 2738(f) of the Act, titled "Exclusivity of remedy," states, "[t]his section constitutes the *exclusive remedy* for enforcement of an agreement, and *no statutory or common law remedy* shall be available for enforcement or damages in connection with an agreement."[108]

These examples make clear that when the Legislature intends for a statute to serve as the sole remedy available to a prospective plaintiff/claimant, it makes that intention certain and unambiguous through the language of the statute. There is no similar exclusivity provision in Section 4-497 or any other section of the Pennsylvania Dram Shop Act. Language such as "in place of any and all other liability" (workers' compensation),[109] "encompasses all other common law . . .

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[101] *See generally* Capetola v. Barclay-White Co., 48 F. Supp. 797 (E.D. Pa. 1943); Hykes v. Hughes, 835 A.2d 382 (Pa. Super. Ct. 2003); Albright v. Fagan 671 A.2d 760 (Pa. Super. Ct. 1996).

[102] *See* 77 PA. CONS. STAT. § 481 (1915).

[103] *See* 42 PA. CONS. STAT. §§ 9541–9546 (1982).

[104] *See id.* § 9542.

[105] *Id.* (emphasis added).

[106] *See* 23 PA. CONS. STAT. §§ 2731–2742 (1981).

[107] *Id.* § 2731.

[108] *Id.* § 2738(f) (emphasis added).

[109] 77 PA. CONS. STAT. § 481(a) (1915).

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remedies" (Post-Conviction Relief Act),[110] or "constitutes the exclusive remedy for enforcement" (Post-Adoption Contact Agreements),[111] is conspicuously absent from the language of Section 4-497 of the Dram Shop Act. Since the Legislature of this Commonwealth, through statute, clearly and specifically preempted common law means of recovery in other arenas, but not in the liquor liability arena, this leads to the conclusion that the Legislature did not intend for such a result in the Dram Shop Act. As such, Section 4-497 of the Liquor Code does *not* preempt common law negligence claims against bars for injuries resulting from the over service of alcohol to patrons and other misconduct.

C. Dram Shop Acts in Other States

It is also effective to turn to Dram Shop Acts in other states in eschewing the notion that Section 4-497 of Pennsylvania's Act serves as a limiting provision preempting common law claims of negligence from being brought as a basis for liability. A look at other states' liquor liability acts reveals a common theme; if state legislatures wish to exclude the availability of common law negligence as a means of recovery, they do so through clear and explicit language. Much like the Pennsylvania Act, the New Jersey "Licensed Alcoholic Beverage Server Fair Liability Act" makes it negligence *per se* to serve someone alcohol while they are visibly intoxicated.[112] This language obviously mirrors the Pennsylvania Statute. Section 4 of the New Jersey Act, however, states "[t]his act shall be the *exclusive civil remedy for personal injury* or property damage resulting from the negligent service of alcoholic beverages by a licensed alcoholic beverage server."[113] Accordingly, the courts of New Jersey consistently dismiss plaintiffs' common law negligence claims when they are brought alongside Dram Shop Act violations.[114]

Similarly, the Michigan Liquor Control Code makes it unlawful to sell or furnish alcohol to an individual who is visibly intoxicated.[115] Section 436.1801(9) of

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[110] 42 PA. CONS. STAT. § 9542 (1982).

[111] 23 PA. CONS. STAT. § 2738(f).

[112] *See* N.J. STAT. ANN. § 2A:22A-1–7 (West 1987).

[113] *Id.* § 2A:22A-4 (emphasis added).

[114] Truchan v. Sayreville Bar and Rest., Inc., 731 A.2d 1218, 1225 (N.J. Super. Ct. App. Div. 1999) (holding that common law claims arising out of negligent serving of alcohol are barred by the exclusivity provisions of the Act); Verni *ex rel.* Burstein v. Harry M. Stevens Inc., 903 A.2d 475 (N.J. Super. Ct. App. Div. 2006).

[115] *See* MICH. COMP. LAWS ANN. § 436.1801(1) (West 2019).

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that Act provides "[t]his section *provides the exclusive remedy* for money damages against a licensee arising out of the selling, giving, or furnishing of alcoholic liquor to a[n] . . . intoxicated person."[116]

In Texas, the Alcoholic Beverage Code provides a cause of action for individuals harmed by patrons of a licensee when that patron was served alcoholic beverages while he was "obviously intoxicated."[117] Section 2.03(a) of that Act states "[t]he liability of providers under this chapter for the actions of their employees, customers, members, or guests who are or become intoxicated is *in lieu of common law* or other statutory law warranties and duties of providers of alcoholic beverages."[118]

Language such as "exclusive civil remedy for personal injury" (New Jersey),[119] "provides the exclusive remedy" (Michigan),[120] or "in lieu of common law" (Texas)[121] is nowhere to be found in the "limiting" provision of the Pennsylvania Dram Shop Act. When state legislatures write their Dram Shop Acts to preempt common law negligence claims, they do so explicitly, with clear and unambiguous language. The Pennsylvania Legislature did no such thing.

Conversely, some state legislatures wrote their Dram Shop Act to specifically allow for common law negligence claims to be brought. In Rhode Island, the Liquor Liability Act deems it negligent for a licensee to serve alcohol to a visibly intoxicated individual.[122] That licensee is then liable for any damages proximately caused by such individual's consumption of alcohol.[123] Section 3-14-9 of the Act specifically allows common law negligence claims to be brought alongside claims based on a violation of the Dram Shop Act stating, "[c]ommon law claims and defenses

[116] *Id.* § 436.1801(9) (emphasis added).

[117] TEX. ALCO. BEV. CODE ANN. § 2.02(b)(1) (West 2005).

[118] *Id.* § 2.03(a) (emphasis added).

[119] *See* N.J. STAT. ANN. § 2A:22A-4 (West 1987).

[120] MICH. COMP. LAWS ANN. § 436.1801(9) (West 2019).

[121] TEX. ALCO. BEV. CODE ANN. § 2.03(a) (West 2003).

[122] 3 R.I. GEN. LAWS §§ 3-14-5–6 (2023).

[123] *Id.*

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applicable to tort actions based on negligence and recklessness in this state shall not be limited by this chapter."[124]

While the language of the Pennsylvania statute is not as clear in allowing common law claims of negligence like that of Rhode Island's Act, it does not matter. Without clear preemptive language like that of New Jersey, Michigan, or Texas, it is obvious that the Legislature of this Commonwealth never intended its Dram Shop Act to have such an effect. Further, without such clear preemptive language, the answer cannot be to altogether remove a viable cause of action from an often severely injured or even deceased member of the Commonwealth to the advantage of a private business. As noted previously, when the Legislature chooses to take away a cause of action available to the public, they do so through clear and unambiguous language.[125]

D. Visible Intoxication as a Gateway to Common Law Negligence—Hiles v. Brandywine Club

Shortly after *Detwiler* was decided, the Pennsylvania Superior Court, in *Hiles v. Brandywine Club* took a new approach to the issue of preemption.[126] In *Hiles*, a drunk driver fell asleep at the wheel and crashed into another vehicle, killing its operator.[127] The husband of the deceased brought wrongful death and survival actions against the bar where the drunk driver was drinking that night, predicated on violations of the Dram Shop Act.[128] There was not sufficient evidence to indicate that the drunk driver was served at defendant bar while he was visibly intoxicated.[129] In such a situation, if the Dram Shop Act was the plaintiff's sole means of recovery, preempting any common law negligence allegations from being brought, the bar would escape liability. Realizing that this evidence was lacking, the plaintiff alleged that the driver was served by the defendant at "unlawful hours" within the meaning of Section 4-493(16).[130] Plaintiff argued that service of liquor past its 3:00 AM cutoff could act as the basis of liability for the defendant bar regardless of proof of service

[124] *Id.* § 3-14-9.

[125] *See* Metro. Prop. & Liab. Ins. Co. v. Ins. Comm'r of Commonwealth of Pa., 580 A.2d 300, 302 (Pa. 1990).

[126] Detwiler v. Brumbaugh, 656 A.2d 944 (Pa. Super. Ct. 1995); Hiles v. Brandywine Club, 662 A.2d 16 (Pa. Super. Ct. 1995).

[127] *Hiles*, 662 A.2d at 16–17.

[128] *Id.*

[129] *Id.* at 19.

[130] *Id.*

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while visibly intoxicated.[131] The court rejected this argument holding that "[v]isible intoxication must be proven under Section 4-497 as a prerequisite to imposing any liability upon a licensee."[132]

Admittedly, plaintiff in this case was not attempting to bring a common law negligence claim against the defendant bar. Rather, plaintiff argued that liability could be predicated upon violation of a different section of the Dram Shop Act (§ 4-493(16)), not the section about service while visibly intoxicated.[133] However, some courts in Pennsylvania have taken the *Brandywine* "prerequisite" concept to expand the potential avenues in which to allege liability. Those courts have determined that once a plaintiff establishes that defendant bar served a patron while visibly intoxicated, this opens the door, allowing other common law negligence claims to be asserted.[134] Judge R. Stanton Wettick in *Sims v. Frank B. Fuhrer Holdings, Inc.*, held that "any common law claims of negligence can be asserted only 'once the threshold level of negligence has been established, i.e., serving a visibly intoxicated patron.'"[135] If one accepts the proposition that common law theories of negligence can be asserted once a plaintiff shows that a patron was served while visibly intoxicated, an obvious question comes to mind. If a plaintiff can prove service while visibly intoxicated and causation, they win as a matter of law. Why then, would they bother to bring a common law negligence claim as well, especially considering the fact that "[a]dding additional counts of negligence will not enhance their case against the licensees"?[136]

III. THE VALUE OF COMMON LAW NEGLIGENCE CLAIMS

While the *Brandywine* prerequisite approach endorsed by Judge Wettick is certainly better than an absolute bar to the assertion of common law negligence claims, this Note argues that claims predicated on traditional common law principles should be permitted even in the *absence* of evidence of service while visibly intoxicated.

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[131] *Id.*

[132] *Id.* at 20.

[133] *Id.* at 17.

[134] Rivero v. Timblin, No. CI-09-08267, 2010 WL 2914400, at *253 (Pa. C.P. Ct. Lancaster Cnty. Mar. 16, 2010); Sims v. Frank B. Fuhrer Holdings, Inc., 2012 Pa. D. & C. LEXIS 309, at *5 (Pa. C.P. Ct. Allegheny Cnty. 2012).

[135] *Sims*, 2012 Pa. D. & C. LEXIS 309, at *5.

[136] Frey v. Rivera, No. 3675 CV 2015, slip op. at 9 (Pa. C.P. Ct. Monroe Cnty. Sept. 8, 2015).

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Now that the idea of section 4-497 as a "limiting" provision has been dispensed with, the remainder of this Note focuses on the value of common law claims of negligence in this arena. The rest of this Note will focus on why bars owe duties to their patrons and to the public at large beyond not serving someone while they are visibly intoxicated. It will explore why plaintiffs should not be confined to claims under the Dram Shop Act, as this results in unfair prejudice, bad outcomes for the public, and an erosion of the fundamental goals of tort law.

A. Why Bother with Common Law Anyway?

If a plaintiff has ample evidence of defendant bar serving a patron while visibly intoxicated, why would they even bother to bring a common law negligence claim as well? After all, if plaintiff can show that defendant served someone who was visibly intoxicated, defendant becomes strictly liable under the Dram Shop Act for all injuries proximately caused by such service of alcohol.[137] And adding additional counts of common law negligence will not enhance the plaintiff's recovery.[138] Why would those counts be desirable or necessary?

In this sense, Pennsylvania's Dram Shop Act is a double-edged sword. On the one hand, it makes it easier for plaintiffs to prove liability. All plaintiffs must do to recover for their injuries is show that they or the drunk driver was served alcohol while visibly intoxicated.[139] Then the defendant bar becomes strictly liable for all injuries that were the proximate cause of that overservice.[140] This rests on a reliance that the jury will follow the law, and the judge's instructions. At the end of the day, evidence of service while visibly intoxicated and causation might not be enough for twelve people on a jury (even though the law says it should be) to award a plaintiff monetary damages. The jury wants to know *why*.[141] They want a fuller picture of the situation. How did this happen? Why was that patron overserved that night? Was the

[137] KEETON ET AL., *supra* note 8, § 81, at 581 (Dean Prosser describes a dram shop act as one "impos[ing] strict liability, without negligence, upon the seller of intoxicating liquors, when the sale results in harm to the interests of a third person because of the intoxication of the buyer.").

[138] *Frey*, No. 3675 CV 2015, at 9.

[139] *See* 47 PA. CONS. STAT. § 4-497 (1951).

[140] KEETON ET AL., *supra* note 8, § 81, at 581.

[141] *See* Michael Maggiano, *Is Anyone Listening? The Psychology of Juror Persuasion*, MAGGIANO DIGIROLAMO LIZZI P.C., https://www.maggianolaw.com/attorney-resources/the-psychology-of-juror-persuasion/ [https://perma.cc/9LXE-HZJ6] (last visited May 28, 2024) ("Your jury wants to know the 'how' did this happen and the 'why.' Not just who dropped the ball but how and why was the ball dropped.").

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bar overcrowded? Was the bar understaffed? Were bartenders and other employees trained properly to spot signs of visible intoxication? How could this have been prevented? Per defendant bars, these types of considerations have no bearing on whether a patron was served while visibly intoxicated and as such cannot be alleged or even mentioned through plaintiff's Dram Shop claim.[142] This type of evidence would necessarily have to be brought by way of a common law negligence claim. The allegations in such a claim would provide the jury with the necessary knowledge to "fill in the gaps" and provide a fuller picture of the circumstances surrounding the incident in question, allowing a more informed and thought-out verdict. From a purely public policy perspective, allowing such evidence enhances safety by encouraging bars to establish and enforce safe protocols.[143]

B. Plaintiffs Should Not Be Forced to Put all Their Eggs in One Basket

On the other side of the coin, in the absence of evidence of service while visibly intoxicated, and if Section 4-497 acts as a limiting provision barring common law negligence claims, plaintiffs would be unduly prejudiced and left without a remedy for their injuries inflicted by the negligent acts or negligent omissions of a bar or similar establishment. If plaintiff's only mechanism of recovery was through the Dram Shop Act, they would be forced to rely, to their detriment, on the existence and sufficiency of evidence showing that the drunk patron was served alcohol while he was visibly intoxicated. What if that evidence, for a variety of reasons, simply does not exist? The security tapes were down that day. There are not any witnesses who can attest to the patron's drunkenness. The bartenders and servers are, of course, reluctant to admit that they witnessed signs of visible intoxication. The possibilities are endless, and the injured plaintiff would be left without recourse. The result is a fortuitous "windfall" to the negligent defendant and advances no general public policy benefit.

Additionally, consider circumstances in which a drunken customer was definitively *not* served alcohol while visibly intoxicated. For example, a man walks into a bar completely sober. He goes up to the bartender and orders twenty shots of whiskey at once. The bartender obliges and pours him twenty shots at once. The bartender has just created a monster. And yet under the Dram Shop Act, the bar would face no liability, since the man was not served those twenty shots while he was visibly intoxicated. No reasonable person could doubt the effects of those drinks on his level of sobriety or ability to operate a motor vehicle. After finishing his

[142] *See* Preliminary Objections, *supra* note 14.

[143] *See* relevant discussion *infra* Sections III.C–D.

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twenty shots, the man stumbles out of the bar and in plain sight of the bouncers gets into his car and drives off. He then crashes his car into the plaintiff inflicting severe injuries. If common law negligence claims are preempted, the plaintiff has zero means of recovery. The bar escapes liability despite its conduct falling so obviously below any reasonable concept of a standard of care. No reasonable bar owner would suggest that serving someone twenty shots of whiskey at once is judicious conduct, and yet that bar would face *zero* liability because the patron was not served while visibly intoxicated.

Consider another example. A customer goes into a bar with his friends. The bar's atmosphere is one that encourages over intoxication. The customer does not buy a single drink that night. His friends do. By night's end the customer is stumbling around the bar, and it is obvious that he is heavily intoxicated. In front of bar employees, he announces that he intends to drive home. The employees do nothing. The customer is permitted to leave the bar, get in his car, and drive off. Again, he smashes into the plaintiff inflicting severe injuries. And again, if plaintiff's only mechanism of recovery was through the Dram Shop Act, the bar would escape liability because the customer was never served alcohol while he was visibly intoxicated. But shouldn't the bar have stopped that customer from going home? Shouldn't they have prevented him from getting into a motor vehicle? Shouldn't they have done *something* to prevent such an obvious and foreseeable outcome that results when a severely intoxicated person gets behind the wheel?

Both of these examples illustrate "absurd"[144] results that would flow from the Pennsylvania Dram Shop Act if it were read to exclude common law claims of negligence. As noted, the General Assembly never intends such when they implement a statute.[145] Situations such as these are infinite. Common law negligence claims should be permitted in order to account for the endless scenarios in which a bar clearly fails to act with prudence but does not serve someone alcohol while they are visibly intoxicated. Bars should not be permitted to escape liability on a mere technicality that they did not serve someone while they were visibly intoxicated. In such situations, recovery would be denied against the party most capable of preventing the harm and the most able to compensate the injured party. As Justice Musmanno noted in *Flagiello v. Pennsylvania Hospital*, "[n]on-liability is an anachronism in the law of today. It is a plodding ox on a highway built for high-

[144] 1 PA. CONS. STAT. § 1922(1) (1970).

[145] *Id.*

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speed vehicles. It is 'out of tune with the life about us, at variance with modern-day needs and with concepts of justice and fair dealing.'"[146]

C. Bars Owe More than One Duty Toward Their Patrons and Society as a Whole

Through the Pennsylvania Dram Shop Act, the General Assembly has imposed a statutory duty on establishments serving alcohol.[147] That duty is to refrain from serving someone alcoholic beverages when they are visibly intoxicated.[148] When the *Detwiler* court and defendant bars posit that section 4-497 preempts all other causes of action and theories of negligence, they are effectively arguing that drinking establishments owe just one, single duty to the public: not to serve someone while they are visibly intoxicated.[149] This cannot be the case. Bars are involved in an inherently dangerous business. The potential for catastrophe is high.[150] This high likelihood of injury is what gave rise to the creation of the Dram Shop Act in the first place.[151] Bars do not sell ice cream. Bars sell a mind-altering substance that effects vision, reflexes, and cognitive function.[152] Recognition of such danger can be found in the myriad of permits, taxes, and Liquor Control Boards that go into alcohol's

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[146] Flagiello v. Pa. Hosp., 208 A.2d 193, 201 (Pa. 1965).

[147] 47 PA. CONS. STAT. § 4-493 (1951).

[148] *Id.*

[149] Detwiler v. Brumbaugh, 656 A.2d 944 (Pa. Super. Ct. 1995).

[150] *Impaired Driving Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/impaired-driving/facts/index.html [https://perma.cc/FLP2-CWKR] (last visited May 28, 2024) ("In 2020, 11,654 people were killed in motor vehicle crashes involving alcohol-impaired drivers, accounting for 30% of all traffic-related deaths in the United States. . . . 32 people in the United States are killed every day in crashes involving an alcohol-impaired driver–[] one death every 45 minutes.").

[151] Majors v. Brodhead Hotel, 205 A.2d 873, 876 (Pa. 1965); Commonwealth v. Koczwara, 155 A.2d 825, 829–30 (Pa. 1959). In enacting the Liquor Code, the legislative intent was

> to place a very high degree of responsibility upon the holder of a liquor license to make certain that neither he nor anyone in his employ commit any of the prohibited acts upon the licensed premises. Such a burden of care is imposed upon the licensee in order to protect the public from the potentially noxious effects of an inherently dangerous business.

Id.

[152] *See How Alcohol Impacts the Brain*, NW. MED., https://www.nm.org/healthbeat/healthy-tips/alcohol-and-the-brain [https://perma.cc/PTM5-7PWF] (last updated Nov. 2023).

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regulation.[153] Eating ice cream behind the wheel is merely distracting. The mixture of an intoxicated driver and an automobile is lethal.[154] As the *Jardine* court put it, "[a]n intoxicated person behind the wheel of an automobile can be as dangerous as an insane person with a firearm."[155] As such, bars certainly have a multitude of other duties that extend beyond simply refraining from serving someone alcohol while visibly intoxicated.

As mentioned previously in this Note, Justice Woodward's comments in *Fink v. Garman* suggest that the basis of liability for licensees comes not only from statute but from common law negligence principles as well.[156] Surely, bars must have common law duties beyond the singular statutory duty set forth in the Dram Shop Act. Cases going back over 100 years have recognized various general common law duties that bars owe to their patrons and to the public at large.[157]

The legal concept of duty is situational.[158] It varies depending on the particular circumstances of each case but is nevertheless inextricably intertwined with, and

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[153] Emery J. Mishky, *The Liability of Providers of Alcohol: Dram Shop Acts?*, 12 PEPP. L. REV. 177, 178 (1984).

[154] *See Impaired Driving Facts*, *supra* note 150; *see also* accompanying text, *supra* note 151.

[155] Jardine v. Upper Darby Lodge No. 1973, Inc., 198 A.2d. 550, 553 (Pa. 1964).

[156] *See* Fink v. Garman, 40 Pa. 95, 105 (1861).

[157] *See* Rommel v. Schambacher, 120 Pa. 579, 582 (1887) (holding that defendant bar owner had a duty to protect his guest from the violent conduct of a drunken patron and that such duty is "a plain matter of common law and good sense, and does not depend on the act of 1854, or any other statute"); Ash v. 627 Bar, Inc., 176 A.2d 137, 139 (Pa. Super. Ct. 1961) ("It is the duty of the defendant to keep its bar or taproom orderly and reasonably well policed, and it is the duty of the bartender to maintain this order."); Cross v. Laboda, 152 A.2d 792, 793 (Pa. Super. Ct. 1959) (holding that defendant bar must exercise care to see that its patrons or guests are protected from injury).

[158] William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953).

> There is a duty if the court says there is a duty; the law, like the Constitution, is what we make it. Duty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question. When we find a duty, breach and damage, everything has been said. The word serves a useful purpose in directing attention to the obligation to be imposed upon the defendant, rather than the causal sequence of events; beyond that it serves none. In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community, "always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."

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grounded in, abstract public policy considerations and social utility principles.[159] Further, the extent of an individual's duty to another person also depends upon foreseeability, probability, and the magnitude of potential harm, as well as the cost or burden of guarding against such harm.[160] With bars, the magnitude of potential harm is great. The foreseeability and probability of bad outcomes when alcohol and motor vehicles are mixed is high. As such, it simply cannot be the case that a bar or tavern owner owes but one singular duty to its patrons. There must be more. And yet, it is not the place of this Note to try and define what those exact extra duties are. That is for the trier of fact to decide in each unique case. As mentioned previously, duties owed are situational and circumstance dependent.[161] Because of the infinite number of different situations and circumstances that may arise inside of a bar, it would be an exercise in futility to attempt to list every duty a bar owner owes to its patrons and to the public at large.

Id.

[159] Kleinknecht v. Gettysburg Coll., 786 F. Supp. 449, 452–53 (M.D. Pa. 1992).

> In determining the existence of a duty of care, it must be remembered that the concept of duty amounts to no more than 'the sum total of those considerations of policy which led the law to say that the particular plaintiff is entitled to protection' from the harm suffered. To give it any greater mystique would unduly hamper our system of jurisprudence in adjusting to the changing times.

Id. (quoting Leong v. Takasaki, 55 Haw. 398, 407 (1974)).

> These are shifting sands, and no fit foundation. There is a duty if the court says there is a duty; the law, like the Constitution, is what we make it. Duty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question. When we find a duty, breach and damage, everything has been said. The word serves a useful purpose in directing attention to the obligation to be imposed upon the defendant, rather than the causal sequence of events; beyond that it serves none. In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community, "always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."

Id.

[160] Karle v. Nat'l Fuel Gas Distrib. Corp., 448 F. Supp. 753, 759 (W.D. Pa. 1978).

[161] Prosser, *supra* note 158.

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But that is the beauty of common law principles of negligence, and of the "reasonableness" standard. The whole point is that we cannot account for every possible scenario that may arise in the randomness of our world. A statute cannot be written for what the proper standard of care is in every possible situation. And the General Assembly does not attempt to embark on such a foolhardy mission. The common law exists to account for this very fact. Pennsylvania courts have long held that negligence, and the standard of care applicable in a given situation is never static, but rather shifts with the specific facts and circumstances of a given case.[162] The "reasonableness" standard provides the necessary flexibility to judge a man's actions in different situations. The Dram Shop Act lacks this flexibility. It assigns liability only in one single situation: when a patron is served while visibly intoxicated. But the number of situations a bar owner faces are endless and infinite. General standards of reasonableness have been relied upon for assignments of fault and liability in tort since the days of the King's Bench in *Hulle v. Orynge*.[163] And later, the concepts of foreseeability were more fully fleshed out in *Palsgraf v. Long Island R.R. Co.*[164] There are no valid public policy reasons to eliminate these fundamental tort concepts in the arena of liquor liability. Rather, they are imperative to achieve the full effect and purpose of tort law.

To immunize a licensee's negligent acts and omissions just because they are not captured by the Dram Shop Act would stand the whole public policy purpose of the Act on its head. The Dram Shop Act was passed with the intention of safeguarding society in general from a bar's inability to exercise due care.[165] Leaving injured plaintiffs without a remedy would do little to cultivate such a purpose. Common law negligence allegations can account for the myriad of situations that a bar owner will inevitably face. We should not foreclose such claims from being brought by plaintiffs. Let the plaintiff allege that he or she was owed various duties by the defendant bar. Let the lawyers on either side argue about those supposed duties and their scope. And ultimately, let the jury—the conscience and voice of the community—based on their own life experiences, values, and beliefs, evaluate whether such a bar really owed those duties to the injured party. In this way, the

[162] *See* Pa. R.R. Co. v. Peters, 9 A. 317, 318 (Pa. 1887); *see also* Powelson v. United Traction Co., 54 A. 282 (Pa. 1903).

[163] Y.B.M 6 Edw. IV, fol. 7, pl. 18 (1466) (Eng.) ("[I]f a man does a thing he is bound to do it in such a manner that by his deed no injury or damage is inflicted upon others.").

[164] 248 N.Y. 339 (1928).

[165] *See* Zygmuntowicz v. Hosp. Invs., Inc. 828 F. Supp. 346 (E.D. Pa. 1993); *see also* Malt Beverages Distribs. Ass'n v. Pa. Liquor Control Bd., 974 A.2d 1144, 1153 (Pa. 2009).

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public at large will be adequately protected from the often-deleterious effects of the overconsumption of alcohol.

D. Without Extra Duties the Deterrent Function of Tort Law Is Lost

In their first-year torts class, every law student learns that the function of tort law is twofold.[166] The first fundamental goal of tort law is to compensate an injured party; to make them whole;[167] to put them in the same position as they would have been had the incident never occurred.[168] The Dram Shop Act alone, can, in some instances, accomplish this first important goal of compensating an injured party. When there is sufficient evidence of service while visibly intoxicated, an injured party may be able to recover against the defendant bar for their injuries. But as mentioned previously, in the absence of this evidence, and in the face of preemption, a plaintiff is left without a remedy.

The second goal is to deter wrongful conduct and encourage good behavior.[169] Tort law is aimed at reducing overall injury to society by deterring unsafe activity and creating proper standards of behavior.[170] William Prosser described this aspect of tort law as an "exercise in social engineering," designed to achieve "a desirable social result."[171] Ultimately, the deterrence purpose of tort law is the mechanism by which the jury is able to prevent danger from reoccurring and protect themselves, their families, and their communities.[172]

However, this critical second function of tort law, to deter wrongful conduct, is *never* realized if common law claims of negligence are preempted by the Dram Shop Act. If the Dram Shop Act is the sole mechanism of recovery, a bar will only be found liable when they serve a patron that is visibly intoxicated. Without the

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[166] Flagiello v. Pa. Hosp., 208 A.2d 193, 201 (Pa. 1965) ("Insistence upon respondeat superior and damages for negligent injury serves a two-fold purpose, for it both assures payment of an obligation to the person injured and gives warning that justice and the law demand the exercise of care.").

[167] Trosky v. Civ. Serv. Comm'n, 652 A.2d 813, 817 (Pa. 1995); Feingold v. Se. Pa. Transp. Auth., 517 A.2d 1270, 1276 (Pa. 1986).

[168] RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (AM. L. INST. 1979).

[169] RESTATEMENT (SECOND) OF TORTS § 901(c) (AM. L. INST. 1979).

[170] *See* Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115, 115 (1993) ("Deterrence delineates tort law. Tort law seeks to reduce injury by deterring unsafe behavior and that goal informs tort standards for behavior.").

[171] *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 15 (1st ed. 1941).

[172] *See* DAVID BALL & DON KEENAN, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION 19 (2009).

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allowance of common law negligence claims, no other duties can serve as a basis for liability. A bar will never be found liable solely because they did not staff the bar with enough employees to adequately monitor the premises and patrons. So, they have no reason to do so. A bar will never be found liable because they did not have adequate policies and procedures in place to prevent over-intoxication. So, they have no reason to implement those policies. A bar will never be found liable because they failed to adequately train their bartenders and other employees. So, they have no reason to implement such training. A bar will never be found liable because they created an atmosphere that encouraged patrons to overconsume alcohol. So, they have no reason not to do so. A bar will never be found liable for watching a drunk patron get into his vehicle and doing nothing to stop it. So, they have no reason to stop him. The list goes on. But because none of these allegations can serve as a basis for liability, a defendant bar has *zero* incentive to act as a reasonable and prudent liquor establishment should. The deterrent effect of tort is entirely lost.

Allowing a plaintiff to make these common law allegations and allowing them to serve as a basis for liability would encourage good behavior on the part of bars. It would encourage bars to have adequate policies and procedures in place to limit over-intoxication. It would encourage bars to engage in safe practices when it comes to the service of alcohol. It would encourage bars to properly train its servers and bartenders and hire enough of them for each night. As Judge Hodge explained in *Nikoden v. Benedict*, liability under the Dram Shop Act and common law negligence are not mutually exclusive, "but rather complementary causes of action ultimately meant to work together in prodding licensees toward safe, responsible service of alcohol to patrons."[173] By allowing common law negligence claims to be asserted, the second important goal of tort law is accomplished, and a safer society emerges, or as Prosser put it, we "achieve a desirable social result."[174]

E. An Analogy to Corporate Negligence in the Med Mal Context

The case against preemption and for the allowance of common law negligence claims in this arena can be argued through analogy to corporate negligence in the medical malpractice context. As well as making bars strictly liable for injuries, the Pennsylvania Dram Shop Act, in essence makes bars "vicariously liable"[175] for the

[173] Nikoden v. Benedict, No. 10143 of 2018, slip op. at 20 (Pa. C.P. Ct. Lawrence Cnty. Dec. 3, 2019).

[174] PROSSER, *supra* note 171.

[175] Crowell v. City of Philadelphia, 613 A.2d 1178, 1181 (Pa. 1992).

> Vicarious liability, sometimes referred to as imputed negligence, "means in its simplest form that, by reason of some relation existing between A and B, the

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negligent conduct of its agents, in this case, its bartenders and other servers of alcohol. Injured plaintiffs bring their claims against the corporation as a whole, rather than the actual bartenders who overserved the drunk driver.[176] In the Dram Shop arena, the bar's liability is derivative of its agent bartenders' breach of their statutorily imposed duty of care to the plaintiff to refrain from serving alcohol to someone who is visibly intoxicated. However, the Supreme Court of this Commonwealth has also accepted that a corporation may owe additional duties of care directly to a plaintiff, *independent* from those owed by its agents.[177] As such, the understanding that corporations act through their agents has "not been held to be a fatal impediment to haling a corporation into court on direct liability tort claims."[178]

In 1991, the Supreme Court of Pennsylvania addressed the question of whether a corporate hospital could be held directly liable for negligence.[179] In *Thompson v. Nason Hospital*, the plaintiff was hospitalized following a car accident.[180] Her condition continued to worsen as she developed progressive neurological issues and paralysis.[181] The general practitioner took no immediate action until eventually the plaintiff's paralysis became permanent.[182] The plaintiff sued the defendant hospital on theories of vicarious liability and direct liability.[183] The *Thompson* Court held that a "hospital operating primarily on a fee-for-service basis can be held liable if it breaches the non-delegable duty of care owed directly to the patient to ensure 'the patient's safety and well-being' while at the hospital."[184] Here, the Court adopted a

> negligence of A is to be charged against B although B has played no part in it, has done nothing whatever to aid or encourage it, or indeed has done all that he possibly can to prevent it."

Id. (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 69 499 (5th ed. 1984)).

[176] *See* 47 PA. CONS. STAT. § 4-497 (1951).

[177] *See* Thompson v. Nason Hosp., 591 A.2d 703 (Pa. 1991).

[178] Scampone v. Highland Park Care Ctr., LLC, 57 A.3d 582, 598 (Pa. 2012).

[179] *See Thompson*, 591 A.2d at 704.

[180] *Id.*

[181] *Id.* at 705.

[182] *Id.*

[183] *Id.*

[184] Scampone v. Highland Park Care Ctr., LLC, 57 A.3d 582, 601 (Pa. 2012).

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novel theory of liability for the medical malpractice arena—"corporate negligence."[185]

The *Thompson* Court identified "four general areas" in which to assign duties owed by a hospital directly to its patients:[186]

> (1) duties to use reasonable care in the maintenance of safe and adequate facilities and equipment; (2) duties to select and retain competent physicians; (3) duties to oversee all persons who practice medicine within the hospital's walls; and (4) duties to formulate, adopt, and enforce adequate rules and policies to ensure quality patient care.[187]

The court reasoned that these duties flow from defendant corporation to plaintiff by way of Section 323 of the Restatement (Second) of Torts, which reads:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.[188]

The courts of this Commonwealth have held this rule to mean that anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable person to protect against an unreasonable risk of harm to them arising out of the act.[189] Comments to this Restatement explain that the rule is applicable "whether the harm to the other . . . results from the defendant's negligent conduct in the manner of his performance of the undertaking, or from his failure to exercise reasonable care to complete it or to protect the other when he discontinues it."[190] The basic requirement

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[185] *Id.*

[186] *Id.*

[187] *Thompson*, 591 A.2d at 707 (citations omitted).

[188] RESTATEMENT (SECOND) OF TORTS § 323 (AM. L. INST. 1979).

[189] *See* Blessing v. United States, 447 F. Supp. 1160, 1188 (E.D. Pa. 1978).

[190] RESTATEMENT (SECOND) OF TORTS § 323 cmt. a (AM. L. INST. 1979).

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for the rule is that the defendant has specifically undertaken to perform the task he is charged with having performed negligently.[191]

In the arena of liquor liability, when bars, taverns, and the like hold themselves out to the public as sellers and providers of alcohol, they assume a variety of duties to administer such alcohol safely. And these duties, much like the duties owed by hospitals, are owed directly from the corporation *independent* of those that flow from their agents. Such duties are similar to the "four general areas" of a hospital's responsibilities to its patients laid out in *Thompson*.[192] For example, corporate licensees of alcohol have a duty to select and retain competent bartenders and other servers of alcohol. They have a duty to oversee all employees engaged in the service of alcohol. They also have a duty to formulate, adopt, and enforce adequate rules and policies to ensure the safe administration of alcohol. These are all duties that necessarily flow directly from the corporation itself rather than from its agent bartenders and thus could only be asserted through a claim for common law negligence. A court faced with the issue of preemption, in a Dram Shop case could apply the theory of corporate negligence and thus allow the plaintiff's common law negligence claim and allegations to proceed.

CONCLUSION

Under the Pennsylvania Dram Shop Act, licensees are liable for all injuries that are proximately caused by violations of Section 4-493 and Section 4-497 of the Liquor Code which make it impermissible to serve a patron who is visibly intoxicated.[193] It is common practice in these types of cases for the plaintiff to allege common law theories of negligence alongside a negligence *per se* claim for violation of those provisions of the liquor code.[194]

Courts across the Commonwealth are split on whether to permit such common law claims of negligence to serve as a basis of liability for a licensee.[195] While some

[191] *See Blessing*, 447 F. Supp. at 1188.

[192] *Thompson*, 591 A.2d at 707.

[193] *See* 47 PA. CONS. STAT. §§ 4-493, 4-497 (1951).

[194] *See supra* note 7 and accompanying text.

[195] Murray v. Frick, 2021-C-1254, slip op. at 7 (Pa. C.P. Ct. Lehigh Cnty. 2022); Rivero v. Timblin, 12 Pa. D. & C. 233 (Pa. C.P. Lancaster Cnty. 2010); Nikoden v. Benedict, No. 10143 of 2018, slip op. at 11 (Pa. C.P. Ct. Lawrence Cnty. 2019).

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courts allow such claims,[196] others routinely dismiss them at the preliminary objection stage, holding that Section 4-497 of the Dram Shop Act preempts common law claims of negligence.[197] Those latter courts declare that a plaintiff's sole mechanism of recovery is through the Dram Shop Act.[198]

This conflict should be resolved in the interest of judicial integrity. The discrepancy has a negative effect on the legitimacy of our legal system, one that strives to promote consistency, predictability, and stability.[199] As the Supreme Court of the United States has said, having consistent and uniform rules of law within a jurisdiction "promotes the evenhanded, predictable, and consistent development of

[196] Rivero v. Timblin, No. CI-09-08267, 2010 WL 2914400, at *259–60 (Pa. C.P. Ct. Lancaster Cnty. Mar. 16, 2010) (overruled defendant's preliminary objections holding that it is not clear that section 4-497 of the Liquor Code subsumes all common law negligence claims against a licensee); Nikoden v. Benedict, No. 10143 of 2018, slip op. at 20 (Pa. C.P. Ct. Lawrence Cnty. Dec. 3, 2019) (denied defendant's preliminary objections based on plaintiff's general negligence claim, holding that Dram Shop liability and common law negligence are not mutually exclusive, but rather complementary causes of action ultimately meant to work together); Yeager v. Younker, No. 2004-1822, slip op. at 5 (Pa. C.P. Ct. Centre Cnty. Aug. 23, 2006) (denied defendant's motion for summary judgement, allowing plaintiff's assertion of common-law negligence claims and violation of section 4-493(1) of the Dram Shop Act to proceed); Currie v. Phillips, No. 2003 Civ. 03-378, slip op. at 5 (Pa. C.P. Ct. Lackawanna Cnty. Aug. 15, 2003) (denied defendant's preliminary objections holding that averments in plaintiff's complaint are pertinent to plaintiff's theories which include general negligence); Joyce v. Starters Riverport Inc. No. C-0048-CV-2011-11975, slip op. at 82 (Pa. C.P. Ct. Northampton Cnty. Dec. 21, 2012) (denied defendant's preliminary objections concerning plaintiff's common law negligence allegations, holding that while the statute declares a licensee's service of alcohol to a visibly intoxicated person to be per se negligence, it does not follow, either under the plain language of the statute or the principles of negligence, that liability be limited to the act of service to a visibly intoxicated person).

[197] Kortum v. 1K Second Street Assocs., No. 2007-CV-09746, slip op. at 4 (Pa. C.P. Ct. Dauphin Cnty. Jan. 3, 2008) (granting defendant's preliminary objections regarding plaintiff's averments that seek to impose liability on other tort theories of negligence, holding that the Dram Shop Act not only provides a basis for liability but also restricts liability to those exact circumstances); Clark v. Thompson, No. 2002-0260-Civil, slip op. at 9 (Pa. C.P. Ct. Armstrong Cnty. Mar. 12, 2003) (granting defendant's preliminary objections, holding that the legislature intended Section 4-497 to be the sole means of tort liability for tavern owners in serving competent adult patrons alcohol); Frey v. Rivera, No. 3675-CV-2015, slip op. at 8 (Pa. C.P. Ct. Monroe Cnty. Sept. 8, 2015) (granting defendant's preliminary objections and striking the paragraphs in plaintiff's complaint that allege common law theories of liability because plaintiff's exclusive remedy is under the Pennsylvania Liquor Code and Section 4-497 is a limiting provision).

[198] *Kortum*, slip op. at 4; *Clark*, slip op at 9; *Frey*, slip op. at 8.

[199] Kendrick v. Dist. Att'y of Phila. Cnty., 916 A.2d 529, 539 (Pa. 2007); Yudacufski v. Commonwealth of Pa. Dep't of Transp., 454 A.2d 923, 926–27 (Pa. 1982).

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legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[200]

As has been challenged in this Note, Section 4-497 of the Pennsylvania Dram Shop Act should not function as a limiting provision such that it preempts other causes of action from being asserted. The argument against preemption begins with statutory interpretation. The General Assembly presumes that statutes are passed with public interests in mind over any private interest.[201] To conclude that Section 4-497 was passed in order to shield private, corporate bars from liability to the detriment of severely injured members of the public would fly in the face of this basic presumption. Further, the General Assembly does "not intend a result that is absurd, impossible of execution or unreasonable."[202] If the only remedy available to plaintiffs was through the Dram Shop Act, bars would be able to escape liability on a mere technicality when evidence of service while visibly intoxicated was absent, despite actions taken (or not taken) on behalf of the licensee falling clearly below the standard of care. The General Assembly would never have intended such an untenable and absurd result through the passage of a statute.

Additionally, the courts of this Commonwealth have made clear that for a statute to take away a potential cause of action from a plaintiff, the language of the act must be clear.[203] We see this type of clear language from the General Assembly in other statutes that preempt common law claims.[204] Section 4-497 of the Dram Shop Act contains no such clear limiting language. As such, we can presume that the General Assembly did not intend for such section to preempt other causes of action.

And finally, a survey of other states' Dram Shop Acts can put the preemption question to rest. When other states' legislatures seek to make violations of their liquor code the only basis of liability for a licensee, they do so through unambiguous language.[205] The Pennsylvania Legislature chose not to take such an approach. Without such clear limiting language, the General Assembly of this Commonwealth

[200] Payne v. Tennessee, 501 U.S. 808, 828 (1991).

[201] 1 PA. CONS. STAT. § 1922(5) (1972).

[202] *Id.* § 1922(1).

[203] *See* Metro. Prop. & Liab. Ins. Co., v. Ins. Comm'r of Commonwealth of Pa., 580 A.2d 300, 302 (Pa. 1990); Birth Ctr. v. St. Paul Cos., Inc., 787 A.2d 376, 386 (Pa. 2001).

[204] *See* 77 PA. CONS. STAT. § 481 (1915); 42 PA. CONS. STAT. § 9542 (1982).

[205] *See* N.J. STAT. ANN. § 2A:22A-4 (West 1987); MICH. COMP. LAWS ANN. § 436.1801(1) (West 2019); TEX. ALCO. BEV. CODE ANN. § 2.03 (West 2003).

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has signaled to the public the availability of common law negligence claims being brought against licensees.

Not only are common law negligence claims not preempted, but their value to the public and to the safety of our communities cannot be overstated. Bars are engaged in an inherently risky business. Allowing common law negligence allegations to serve as a basis for liability against a licensee would ensure that bars are implementing safe practices when it comes to the distribution of alcohol. Bars would be unable to shirk liability when their clearly negligent act or failure to act does not fall within the ambit of the liquor code. Common law negligence claims would give every injured plaintiff a chance at recovery, regardless of the existence or sufficiency of evidence of service while visibly intoxicated.

Permitting common law claims of negligence would more accurately reflect the randomness of the world we live in and the multitude of unique situations that a tavern may face. The reasonableness standard provides adequate flexibility to judge a bar's actions in any situation.[206] The Dram Shop Act lacks this flexibility, assigning liability in only one situation. This cannot be the standard. Because of the very nature of the business, a bar cannot owe just one duty to its patrons and to the public.

Further, common law negligence claims would hold bars fully accountable for their actions. If bars owed extra, independent duties directly to their patrons, breaches of which could serve as a basis for liability, it would incentivize safe practices in the distribution of alcohol. The all-important deterrence effect of tort law would be realized. Bars would have a reason to supervise their employees, to train their bartenders properly, to dissuade drunk patrons from getting into their vehicles, and to have adequate policies and procedures in place to prevent over intoxication.

Common law claims of negligence must not be preempted by the Dram Shop Act in this Commonwealth. The Pennsylvania Supreme Court has not yet confronted this precise issue of whether Section 4-497 of the Dram Shop Act preempts common law negligence claims and allegations from being asserted against the defendant bar.[207] When the appropriate case does come before our Supreme Court, I would urge those Justices to rule against preemption and for a safer Commonwealth.

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[206] *See* Pa. R.R. Co. v. Peters, 9 A. 317, 318 (Pa. 1887); *see also* Powelson v. United Traction Co., 54 A. 282 (Pa. 1903).

[207] *See* Murray v. Frick, 2021-C-1254, slip op. at 7 (Pa. C.P. Ct. Lehigh Cnty. May 2, 2022); Rivero v. Timblin, No. CI-09-08267, 2010 WL 2914400 (Pa. C.P. Ct. Lancaster Cnty. Mar. 16, 2010); Nikoden v. Benedict, 10143 of 2018, slip op. at 11 (Pa. C.P. Ct. Lawrence Cnty. Dec. 3, 2019).

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