

ANOTHER DRINK, ANOTHER HOUR: USING DRAM
SHOP LIABILITY TO DETERMINE EMPLOYER
LIABILITY FOR INJURIES CAUSED BY FATIGUED
COMMUTING EMPLOYEES

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INTRODUCTION

The United States is a “chronically sleep deprived” country.¹ Americans’ lack of sleep causes a variety of problems, including an increased risk of traffic accidents.² In fact, in a 2008 survey conducted for the National Sleep Foundation, more than 36 percent of survey participants reported falling asleep while driving at least once in the past year.³ Moreover, evidence suggests that drowsiness is the “primary causal factor in 100,000 police-reported crashes each year, resulting in 76,000 injuries and 1,500 deaths.”⁴ Certain populations are more likely to cause a sleep-related car accident than others.⁵ One study suggests that at-risk populations include people who consume alcohol or take certain medications, people who have sleep disorders, people who drive at night, college students, and young adults.⁶ This study also suggests that individuals whose work schedules differ from typical 8:00 a.m. to 5:00 p.m. shifts have an increased risk of sleep-related crashes.⁷ Significantly, in 2008, 26 percent of drivers reported that they drove to or from work while drowsy at least once per month.⁸

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¹ Steve P. Calandrillo & Dustin E. Buehler, *Time Well Spent: An Economic Analysis of Daylight Saving Time Legislation*, 43 *WAKE FOREST L. REV.* 45, 84 (2008) (quoting Stanley Coren, Correspondence, *Daylight Savings Time and Traffic Accidents*, 334 *NEW ENG. J. MED.* 924, 924 (1996)).

² See *id.* at 84-85; Andrew W. Gefell, Comment, *Dying to Sleep: Using Federal Legislation and Tort Law to Cure the Effects of Fatigue in Medical Residency Programs*, 11 *J.L. & POL’Y* 645, 651-52 (2003) (describing the effects of fatigue on medical personnel).

³ NAT’L SLEEP FOUND., 2008 SLEEP IN AMERICA POLL, SUMMARY OF FINDINGS 33 (2008) [hereinafter *NATIONAL SLEEP FOUNDATION*], available at <http://www.sleepfoundation.org/sites/default/files/2008%20POLL%20SOF.PDF>.

⁴ JANE C. STUTTS ET AL., WHY DO PEOPLE HAVE DROWSY DRIVING CRASHES? INPUT FROM DRIVERS WHO JUST DID 8 (1999), available at <http://www.aaaafoundation.org/pdf/sleep.pdf>.

⁵ *Id.* at 9-10.

⁶ *Id.*

⁷ *Id.*

⁸ NATIONAL SLEEP FOUNDATION, *supra* note 3, at 34.

Because heavy or irregular work schedules increase the risk of car accidents, employers sometimes face lawsuits when fatigued employees drive home from work and crash into third parties.⁹ These third parties often sue the employer under the theory that the employer contributed to the accident by requiring the employee to work extraordinarily long hours.¹⁰ However, holding employers liable for the acts of commuting employees conflicts with the notion that employers are generally not liable for employees acting outside the scope of their employment.¹¹ This tension stems from the fact that although an employee's work schedule undoubtedly affects his ability to drive safely,¹² his choice to drive while fatigued and his activities outside of work are matters within his personal control.¹³

In this sense, the facts surrounding a car accident caused by a fatigued commuting employee are similar to the facts surrounding a car accident caused by a drunken patron in a dram shop liability case.¹⁴ In both situations, the defendant's actions¹⁵ potentially contribute to incapacitating a driver who injures a third party in a car accident, yet at the time the driver causes the car accident, he is no longer under the defendant's control or in the defendant's service. Thus, an employer who assigns an employee an additional hour of work is much like a bartender who serves a patron an additional drink.

Some sources suggest that an employer has a duty in tort to prevent a fatigued employee from driving home merely because the employer as-

⁹ See, e.g., Roy A. Ginsburg, *Courts Around the Country are Addressing Whether Employers May be Liable for the Negligent Hiring, Supervision and Retention of Employees Who Harm Others*, NAT'L L.J., Jul. 8, 1996, at B5; Robert J. Nobile & Rosemary Joyce, *A New Form of Liability: Negligence for Accidents Caused by "Fatigued" Employees*, HR ADVISOR, Jan.-Feb. 2005, at 9.

¹⁰ See, e.g., Gene P. Bowen, Note, *Wherein Lies the Duty? Determining Employer Liability for the Actions of Fatigued Employees Commuting From Work*, 42 WAYNE L. REV. 2091, 2099-2103 (1996) (describing cases); Nobile & Joyce, *supra* note 9, at 9.

¹¹ See, e.g., *Pilgrim v. Fortune Drilling Co.*, 653 F.2d 982, 985 (5th Cir. Unit A Aug. 1981) (holding that an employer was not liable for his fatigued employee's car crash because the employee was acting outside the scope of his employment when commuting home after work); *Duge v. Union Pac. R.R.*, 71 S.W.3d 358, 361-62 (Tex. App. 2001) (noting that there is no general duty "to control the conduct of third persons" and that "[i]n the absence of a relationship between the parties giving rise to the right of control, a person is under no legal duty to control the conduct of another").

¹² STUTTS ET AL., *supra* note 4, at 38 (noting that individuals who are more likely to be fatigued suffer a "significantly higher risk of involvement in a sleep-related crash").

¹³ See, e.g., *Pilgrim*, 653 F.2d at 985 (noting that, while an employer has the right to control the actions of an employee within the scope of employment, the employer may not have control over its employees outside the scope of employment).

¹⁴ See *Faverty v. McDonald's Rests. of Or., Inc.*, 892 P.2d 703, 710 (Or. Ct. App. 1995) (comparing employer liability for fatigued commuting employees to dram shop liability).

¹⁵ In the case of a fatigued commuting employee the defendant is the employer. In dram shop liability cases the defendant is the bartender or proprietor.

signed the employee a very demanding work schedule.¹⁶ However, this view is inconsistent with the legal tenets of dram shop liability, as a bartender does not have a duty to prevent a drunken patron from driving home merely because the bartender served the patron a large pitcher of beer.¹⁷ This view also undermines the concept of personal responsibility, an extremely important facet of tort law.¹⁸

Therefore, this Comment argues that an employer should not have a duty to prevent a fatigued employee from driving home merely because the employer assigned the employee a demanding work schedule. Rather, an employer should only have a duty to prevent a fatigued employee from driving home if the employer assigned work to the employee while the employee was obviously fatigued or incapacitated.¹⁹ In Part I, this Comment discusses the difference between respondeat superior and negligence liability, as well as the nature of affirmative duties in tort law. Part I then addresses how several jurisdictions—specifically, Texas, Oregon, and West Virginia—determine employer liability for fatigued commuting employees. Part I concludes by examining, and ultimately rejecting, the argument that employers should have a duty to prevent all heavily-scheduled fatigued employees from driving home.

In Part II, this Comment argues that an employer should not have a duty to prevent a fatigued employee from driving home from work unless the employer assigns work to that employee while the employee is obviously fatigued or incapacitated. Part II justifies this rule by explaining how employer liability for fatigued commuting employees relates to dram shop liability, and how dram shop liability is consistent with this Comment's suggested rule. Part II then argues that workers' compensation statutes should not apply to this analysis. Part II concludes by arguing that this Comment's suggested rule is consistent with the nature of affirmative duties and notions of personal responsibility inherent in tort law.

¹⁶ See, e.g., *Faverty*, 892 P.2d at 709-10 (holding that a jury could conclude that the employer "knew or should have known" that its employee would be a danger to others while driving, based on the employee's youth and rigorous work schedule); Bowen, *supra* note 10, at 2099-2103.

¹⁷ See *infra* Part II.A.

¹⁸ See *infra* Part II.F.

¹⁹ Although there are limited circumstances in which a commuting employee is considered within the scope of his employment—and thus an employer could be liable for his acts under respondeat superior—this Comment analyzes only those situations in which a commuting employee is outside the scope of his employment. For more on the distinction between in and out of the scope of employment, see *infra* Part I.A.

I. BACKGROUND

A. *An Employer's Duty to Control: Respondeat Superior Versus Negligence Analysis*

Although tort liability generally arises only from personal fault, courts sometimes find a party liable for another's wrongful acts.²⁰ For example, a court may find a doctor liable for failing to protect a victim from an insane patient,²¹ or a court may find an employer liable when its employee injures someone while on the job.²² The notion that one may be liable for the torts of another is often justified under rationales such as (1) increasing the likelihood that victims can recover for their injuries and (2) risk prevention by a least cost avoider.²³

An employer may be liable for the torts of its employees under either respondeat superior²⁴ or negligence.²⁵ Under respondeat superior, an employer is liable for an employee's tort if the employee commits the tort while acting within the scope of his employment.²⁶ An employee acts within the scope of his employment if his employer has "the right and power to direct and control the [employee] . . . at the very instant of the [employee's act]."²⁷ An employer need not commit a wrongful act to be liable under respondeat superior.²⁸

Courts rarely hold that employees act within the scope of their employment while commuting, so principles of negligence, as opposed to respondeat superior, generally govern whether an employer is liable to a third

²⁰ See Rhett B. Franklin, Comment, *Pouring New Wine into an Old Bottle: A Recommendation for Determining Liability of an Employer Under Respondeat Superior*, 39 S.D. L. REV. 570, 573-74 (1994) (describing the doctrine of respondeat superior).

²¹ See, e.g., *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 341 (Cal. 1976) (holding that a therapist may be liable for actions taken by a patient when the therapist knows that the patient poses a danger to others).

²² See, e.g., *Parmlee v. Tex. & New Orleans R.R.*, 381 S.W.2d 90, 94 (Tex. App. 1964); RESTATEMENT (THIRD) OF AGENCY § 7.07(1) (2006) ("An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.").

²³ Franklin, *supra* note 20, at 575-76.

²⁴ For more on the doctrine of respondeat superior, see *id.* at 572-91.

²⁵ See Timothy L. Creed, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts, yet Avoiding Liability*, 20 ST. THOMAS L. REV. 183, 187 (2008) (noting that an employer who negligently hired an employee "is directly liable for torts the employee committed even if the employee was acting outside the scope of employment").

²⁶ See *Pilgrim v. Fortune Drilling Co.*, 653 F.2d 982, 986 (5th Cir. Unit A Aug. 1981) (citing *Am. Nat'l Ins. Co. v. Denke*, 95 S.W.2d 370, 373 (Tex. Comm'n App. 1936); see also Franklin, *supra* note 20, at 572-73; RESTATEMENT (THIRD) OF AGENCY § 7.07(1) (2006) ("An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.").

²⁷ *Pilgrim*, 653 F.2d at 986.

²⁸ See Franklin, *supra* note 20, at 572-76.

party hurt by a fatigued commuting employee.²⁹ This is because while an employee commutes, his employer generally has no right to direct or control his acts; therefore, respondeat superior does not apply.³⁰ Thus, typically, an employer is liable for the acts of a fatigued commuting employee only if that employer acted negligently.³¹

Under a negligence analysis, a defendant is liable only if (1) the defendant has a duty, (2) the defendant breaches that duty, and (3) the defendant's breach proximately causes the injury in question.³² This means that an employer is liable for an employee's tort if the employer acts in a negligent manner, causing the employee to commit the tort.³³ Yet a defendant is not negligent unless he breaches a duty.³⁴ Thus, to decide whether an employer is liable for injuries caused by a fatigued commuting employee under a negligence analysis, a court must determine whether the employer had a duty to prevent the employee from driving home.³⁵

²⁹ See *id.* at 571 (“[T]he bulk of those who commute to work daily are not working within the ‘scope of their employment’ under the doctrine of respondeat superior.” (footnotes omitted)) There are limited exceptions in which an employee may be found to be acting within the scope of his employment while commuting home. For example, if the employer has a right to control the employee while he is commuting home, or the employee is using the chattel of the master to commute home, the employee is still within the scope of his employment. See *Faverty v. McDonald’s Rests. of Or., Inc.*, 892 P.2d 703, 708 (Or. Ct. App. 1995) (citing RESTATEMENT (SECOND) OF TORTS §§ 315, 317 (1965)). Those exceptions are inapplicable to this Comment, as this Comment focuses on situations where the employee acts outside the scope of his employment.

³⁰ *Franklin*, *supra* note 20, at 571; see also *Riley v. Keenan*, 967 A.2d 868, 874 (N.J. Super. Ct. App. Div. 2009) (holding that respondeat superior did not apply when an employee drove home, after stopping by two bars after work, because there was not a “sufficient nexus to the employer-employee relationship”); *Pilgrim*, 653 F.2d at 986. However, a court may find respondeat superior liability if an employee conducts business for his employer while commuting. See, e.g., *Ellender v. Neff Rental, Inc.*, 965 So. 2d 898, 902 (La. Ct. App. 2007) (finding employer liable under respondeat superior when employee involved in car accident was using employer-issued cell phone to conduct business for employer at the time of the accident). In the age of wireless work and employer-issued Blackberry phones, employers may find themselves liable under respondeat superior more often in employee car accident cases. Michael N. Morea & Michael R. Yellin, *The Impact of the Digital Age*, N.J.L.J., Dec. 8, 2008, at 826.

³¹ *Riley*, 967 A.2d at 874 (“[W]hile the doctrine of respondent superior may work to extend recovery against an employer to third parties injured under circumstances showing a sufficient nexus to the employer-employee relationship, . . . plaintiff in this instance seeks to impose direct liability on the employer for the negligence of an employee committed outside the workplace and not in the course of employment.”); see also *Bowen*, *supra* note 10, at 2105-06.

³² See, e.g., *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009).

³³ See, e.g., *Bowen*, *supra* note 10, at 2105-06.

³⁴ *Riley*, 967 A.2d at 874 (“[F]or liability to attach . . . there must be a duty owed to a third party . . . and a breach of that duty.”).

³⁵ See, e.g., *id.* at 874-75 (holding that plaintiff in a fatigued commuting employee case must prove that employer had a legal duty); *Pilgrim*, 653 F.2d at 984 (“[P]laintiff must prove the existence and violation of a legal duty . . . to establish tort liability.” (quoting *Abalos v. Oil Dev. Co.*, 544 S.W.2d 627, 631 (Tex. 1976))).

B. *Affirmative Duties, Employers, and Commuting Employees*

Generally, in American tort law, no one has a duty to control a dangerous individual or protect an individual from danger.³⁶ This principle derives from the early common law that valued individual freedom and therefore existed “to prevent people from harming one another, rather than to force them to confer benefits on one another.”³⁷ This principle continues to prevail today, with few exceptions.³⁸ Thus, though it may be immoral for a man to watch his neighbor drown without attempting to render aid, the man has no duty to come to his neighbor’s rescue.³⁹

One exception to the general rule is that a person can acquire an affirmative duty to act if he makes a situation worse through his actions.⁴⁰ For instance, in *Zelenko v. Gimbel Bros.*,⁴¹ a defendant attempted to help a sick woman by moving her to an infirmary.⁴² After moving the woman, however, the defendant neglected to take care of her for six hours, and she died in the infirmary.⁴³ The court reasoned that, by moving the woman, the defendant made her worse off because no one else could render her aid.⁴⁴ Accordingly, the court concluded that the defendant had assumed a duty to act

³⁶ See, e.g., Christopher H. White, Comment, *No Good Deed Goes Unpunished: The Case for Reform of the Rescue Doctrine*, 97 NW. U. L. REV. 507, 510 (2002) (discussing general lack of duty to protect others); Thomas C. Galligan, Jr., *Aiding and Altruism: A Mythopsycholegal Analysis*, 27 U. MICH. J.L. REFORM 439, 456-57 (1994) (discussing general lack of a duty to prevent others from causing harm); *Nabors Drilling*, 288 S.W.3d at 405 (“As a general rule, ‘an employer owes no duty to protect the public from the wrongful acts of its off-duty employees that are committed off the work site.’” (quoting *Loram Maint. of Way, Inc. v. Ianni*, 210 S.W.3d 593, 594 (Tex. 2006))).

³⁷ Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY. L. REV. 423, 425 (1985) (quoting Allen M. Linden, *Rescuers and Good Samaritans*, 34 MOD. L. REV. 241, 242 (1971)) (internal quotation marks omitted).

³⁸ See, e.g., Philip W. Romohr, Note, *A Right/Duty Perspective on the Legal and Philosophical Foundations of the No-Duty-To-Rescue Rule*, 55 DUKE L.J. 1025, 1025 n.3 (2006) (“[There are] four situations in which a legal duty to aid may be imposed: ‘(1) where one stands in a certain relationship to another; (2) where a statute imposes a duty to help another; (3) where one has assumed a contractual duty; and (4) where one voluntarily has assumed the care of another.’” (quoting *State v. Miranda*, 715 A.2d 680, 687 (1998), *rev’d on other grounds*, 864 A.2d 1 (Conn. 2004))); RESTATEMENT (SECOND) OF TORTS § 315 (1965) (“There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.”).

³⁹ *Yania v. Bigan*, 155 A.2d 343, 318-22 (Pa. 1959) (noting that an individual may have a moral duty to rescue, but not a legal duty).

⁴⁰ *Zelenko v. Gimbel Bros.*, 158 Misc. 904, 904 (N.Y. Sup. Ct. 1935), *aff’d*, 287 N.Y.S. 136 (App. Div. 1936).

⁴¹ 158 Misc. 904 (N.Y. Sup. Ct. 1935), *aff’d* 287 N.Y.S. 136 (N.Y. App. Div. 1936).

⁴² *Id.* at 904.

⁴³ *Id.* at 904-05.

⁴⁴ *Id.* at 905.

prudently to take care of the woman.⁴⁵ Because the defendant had assumed a duty yet acted with little care, the court found the defendant liable for wrongful death.⁴⁶ Significantly, the defendant could have avoided liability simply by ignoring the woman in the first place.⁴⁷

The facts of *Zelenko* are similar to a situation in which an employer fails to prevent a fatigued employee from commuting home. Like the defendant in *Zelenko*, who had no affirmative duty to aid the sick woman, an employer has no affirmative duty to ensure that its employees commute to and from work safely.⁴⁸ In some circumstances, however, courts have held that an employer is liable to a plaintiff injured by the employer's fatigued commuting employee.⁴⁹ This implies that, prior to the employee's commute, the employer, like the defendant in *Zelenko*, must have committed some act that gave rise to a duty that the employer subsequently breached by allowing its employee to drive home. This Comment examines what act an employer must commit to give rise to a duty to prevent a fatigued employee from commuting home.

C. *Differing Approaches to Determining Employer Liability for Fatigued Commuting Employee Crashes*

Cases from Texas, West Virginia, and Oregon illustrate differing approaches to how courts determine when employers are liable to third parties injured by fatigued commuting employees. Additionally, these cases analyze the duty element of negligence⁵⁰ in deciding whether an employer is liable. These jurisdictions therefore provide a useful cross-sectional analysis. This subpart examines, compares, and contrasts cases from these three jurisdictions.

⁴⁵ See *id.* ("This defendant assumed its duty by meddling in matters with which legalistically it had no concern.").

⁴⁶ *Id.*

⁴⁷ *Zelenko*, 158 Misc. at 904-05.

⁴⁸ See, e.g., *Pilgrim v. Fortune Drilling Co.*, 653 F.2d 982, 987 (5th Cir. Unit A Aug. 1981) ("[A]bsent a contractual provision to the contrary, the master owes his servant no duty to furnish him a way to the master's premises; instead, the servant must make the choice, and while using the way selected by him . . . getting to and from the place of work is ordinarily a personal problem for the employee and not part of his services to his employer.").

⁴⁹ See, e.g., *Faverty v. McDonald's Rests. of Or., Inc.*, 892 P.2d 703, 709-10 (Or. Ct. App. 1995) (upholding a trial court verdict for a plaintiff who was struck by the defendant employer's off-duty employee, reasoning that the employer knew or should have known of the employee's fatigued state).

⁵⁰ See *supra* note 32 and accompanying text.

1. The Texas and West Virginia Approach

Texas and West Virginia courts hold that an employer has a duty to prevent a fatigued employee from driving home only if the employer (1) notices the employee's incapacity and (2) subsequently takes an affirmative act of control over the employee.⁵¹ Therefore, under this rule an employer has no duty to prevent a fatigued employee from driving home merely because the employer assigned the employee a demanding work schedule.

One of the earliest Texas cases involving employer liability for fatigued commuting employees is *Pilgrim v. Fortune Drilling Co.*⁵² In *Pilgrim*, Elbert Pillow worked as a motorman at a drilling rig 117.5 miles away from his home.⁵³ Pillow had to drive three hours from his house to get to work.⁵⁴ Because his employer wanted to keep the drilling rig running twenty-four hours per day, all motormen worked staggered twelve-hour shifts followed by twenty-four hours off.⁵⁵ While driving home after one of his twelve-hour shifts, Pillow allegedly fell asleep at the wheel and crashed into the plaintiff.⁵⁶ Subsequently, the plaintiff sued Pillow's employer, arguing that Pillow's demanding work schedule caused him to doze off while driving.⁵⁷ The jury found that the employer was negligent in allowing Pillow to drive while exhausted.⁵⁸ Following Texas law, the Fifth Circuit reversed, reasoning that the employer could not be negligent for failing to stop Pillow from driving home while fatigued because employers have no affirmative duty to prevent fatigued employees from commuting home.⁵⁹

Two years later, the Texas Supreme Court confronted a similar case in *Otis Engineering Corp. v. Clark*.⁶⁰ In *Otis*, Robert Matheson, an employee, slipped away from work on a number of occasions to drink alcohol in his car.⁶¹ Eventually, Matheson's supervisor noticed his extreme intoxication,

⁵¹ See, e.g., *Duge v. Union Pac. R.R.*, 71 S.W.3d 358, 362 (Tex. App. 2001) (requiring "that an employer have knowledge of the employee's incapacity, and then exercise control over the incapacitated employee" (citing *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309-11 (Tex. 1983))); *Robertson v. LeMaster*, 301 S.E.2d 563, 569 (W. Va. 1983).

⁵² 653 F.2d 982 (5th Cir. Unit A Aug. 1981).

⁵³ *Id.* at 983.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 984 & n.5.

⁵⁷ *Id.* at 984 n.5 ("The plaintiffs' theory for the cause of the accident was that Pillow, after having worked a twelve hour shift . . . had fallen asleep at the wheel . . .").

⁵⁸ *Pilgrim*, 653 F.2d at 984. The jury also found the employer liable under respondeat superior analysis. *Id.* Respondeat superior liability for fatigued commuting employees is beyond the scope of this Comment.

⁵⁹ *Id.* at 986 (citing *Kelsey-Seybold Clinic v. Maclay*, 466 S.W.2d 716, 720 (Tex. 1971)); *Nealy v. Fid. Union Life Ins. Co.*, 376 S.W.2d 401, 403 (Tex. App. 1964)).

⁶⁰ 668 S.W.2d 307 (Tex. 1983).

⁶¹ *Id.* at 308 (noting that Otis "had a history of drinking on the job").

so he walked Matheson to the parking lot and suggested that Matheson go home.⁶² While driving home, as a result of his intoxication, Matheson crashed into and killed two women, whose husbands filed a wrongful death suit against the employer.⁶³ The court rejected the employer's motion for summary judgment, holding that the employer had a duty to prevent Matheson from driving home while drunk because (1) the supervisor noticed Matheson's incapacity; and (2) as a result, the supervisor took control of Matheson and sent him home.⁶⁴ The court reasoned:

While a person is generally under no legal duty to come to the aid of another in distress, he is under a duty to avoid any affirmative act which might worsen the situation. One who voluntarily enters an affirmative course of action affecting the interests of another is regarded as assuming a duty to act and must do so with reasonable care.⁶⁵

The court determined that the employer's act of sending Matheson home as a result of his intoxication gave rise to a duty to make sure that Matheson drove home safely.⁶⁶

Texas extended the reasoning in *Otis* to cases involving fatigued commuting employees in *Duge v. Union Pacific Railroad*.⁶⁷ In *Duge*, Marcelino Garcia worked nearly twenty-seven consecutive hours, including working all night on a train derailment.⁶⁸ Prior to leaving work, Garcia told his supervisor and co-workers: "I feel so good this morning, that, you know, I could keep on working."⁶⁹ After work, Garcia's supervisor drove Garcia to his car.⁷⁰ Subsequently, Garcia began driving home, first stopping at a gas station to visit a friend.⁷¹ After leaving the gas station, Garcia crashed into and killed a third party whose survivor filed a wrongful death suit against the employer.⁷² The court relied on the reasoning of *Otis*, yet came to a different conclusion.⁷³ The court observed that, unlike *Otis*, the employer in *Duge* did not know that Garcia was incapacitated, nor did the

⁶² *Id.*

⁶³ *Id.* at 308-09.

⁶⁴ *Id.* at 311 ("[T]he standard of duty . . . is: when, because of an employee's incapacity, an employer exercises control over the employee, the employer has a duty to take such action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to others.").

⁶⁵ *Id.* at 309 (citation omitted).

⁶⁶ See *Otis*, 668 S.W.2d at 311.

⁶⁷ 71 S.W.3d 358 (Tex. App. 2001).

⁶⁸ *Id.* at 360.

⁶⁹ *Id.* at 362.

⁷⁰ *Id.* at 360.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Duge*, 71 S.W.3d at 362, 364.

employer exercise any control over Garcia.⁷⁴ Therefore, the court held that the employer had no legal duty to prevent Garcia from driving home while fatigued, implicitly rejecting the idea that an employer has a duty to prevent a heavily-scheduled fatigued employee from commuting home.⁷⁵

West Virginia dealt with a case similar to *Duge*, and appeared to mirror the *Duge* court's analysis.⁷⁶ In *Robertson v. LeMaster*,⁷⁷ Troy LeMaster worked on a train derailment for twenty-seven consecutive hours in a remote location far away from his car.⁷⁸ The work was extremely grueling and nearly continuous: at the first opportunity LeMaster attempted to rest, his supervisor immediately ordered him to return to work.⁷⁹ LeMaster repeatedly complained to supervisors that he was too tired to continue working in hopes that someone could drive him back to his car so that he could drive home.⁸⁰ Eventually, as a result of LeMaster's complaints, a supervisor told him to go home, and LeMaster asked a co-worker for a ride to his car.⁸¹ As the co-worker drove, LeMaster fell asleep in the passenger seat with a lit cigarette in his hand.⁸² After getting to his car, LeMaster subsequently drove back to the work site to ask if he was fired (he was not), then began his fifty-mile commute home.⁸³ On the way, he fell asleep at the wheel, crashing into and killing a third party, whose survivor sued the employer for wrongful death.⁸⁴ The West Virginia Supreme Court of Appeals reversed an initial grant of summary judgment to the employer, holding that the jury should decide whether the employer had a duty to prevent LeMaster from driving home.⁸⁵

The *Robertson* court was not clear on what gives rise to a duty to prevent a fatigued employee from driving home. However, for two reasons, *Robertson* is arguably consistent with the Texas approach. First, the *Robertson* court showed approval for the Texas approach by explicitly using *Otis*

⁷⁴ *Id.* at 362-64 (distinguishing from cases finding that employers had a duty to control incapacitated employees because the employee in *Duge* was not obviously incapacitated, the employer had no special knowledge that he was incapacitated, and the employer did not exercise control over the employee).

⁷⁵ *See id.* at 363; *see also* Nabors Drilling, U.S.A., Inc. v. Escoto, 288 S.W.3d 401, 404, 406 n.2 (Tex. 2009) (citing *Duge* with approval and holding that an "employer [has] no duty to prevent injury due to the fatigue of its off-duty employee[s] or to train employees about the dangers of fatigue").

⁷⁶ *Robertson v. LeMaster*, 301 S.E.2d 563, 570 (W. Va. 1983).

⁷⁷ 301 S.E.2d 563 (W. Va. 1983).

⁷⁸ *See id.* at 564-65 (noting that LeMaster worked from approximately 7:00 a.m. until approximately 9:30 a.m. the following morning).

⁷⁹ *Id.* at 565.

⁸⁰ *Id.* at 564-65.

⁸¹ *Id.* at 565.

⁸² *Id.*

⁸³ *Robertson*, 301 S.E.2d at 565.

⁸⁴ *Id.* at 565-66.

⁸⁵ *Id.* at 569-70.

to distinguish itself from *Pilgrim*.⁸⁶ The court reasoned that, unlike *Pilgrim* but like *Otis*, there was evidence that the employer (1) knew that LeMaster was incapacitated, because he complained of his fatigue; and (2) committed an affirmative act despite knowing of LeMaster's fatigue when it sent LeMaster home.⁸⁷ Second, courts have cited *Robertson* for the proposition that an employer is not liable for acts of a fatigued employee if the employer does not notice the employee's fatigue.⁸⁸ Therefore, under this reading, *Robertson* holds that an employer has a duty to prevent a fatigued employee from driving home if the employer (1) notices the employee is fatigued; and (2) as a result of noticing the employee's fatigue, commits an affirmative act of control over the employee.⁸⁹ Thus, the West Virginia approach in *Robertson* is consistent with the Texas approach.

2. The Oregon Approach

The Texas and West Virginia approach stands in contrast to the Oregon approach used in *Faverty v. McDonald's Restaurants of Oregon, Inc.*⁹⁰ In *Faverty*, Matt Theurer ordinarily worked at McDonald's on Mondays from 3:30 p.m. to 7:30 p.m.⁹¹ On one particular Monday when McDonald's was short-staffed, Theurer also volunteered to work at the restaurant during an all-night cleanup project from midnight until 5:00 a.m., as well as an additional shift from 5:00 a.m. until 8:21 a.m.⁹² Theurer's supervisors noticed that he was visibly fatigued while working and knew that he had to drive home, yet they did not ask him to leave work early.⁹³ After finishing his final shift, Theurer asked a supervisor if he could be excused from his next scheduled shift because he was tired.⁹⁴ His supervisor agreed, and during Theurer's twenty-mile commute home, he crashed into a third party, who sued McDonald's for his injuries.⁹⁵ The Oregon Court of Appeals af-

⁸⁶ *Id.* at 569.

⁸⁷ *Id.*

⁸⁸ See, e.g., *Berga v. Archway Kitchen & Bath, Inc.*, 926 S.W.2d 476, 482 (Mo. Ct. App. 1996) ("In finding a duty, the court focused on the affirmative acts of requiring the worker to continue, *despite the workers' verbal indications of his condition*, and driving the employee to his vehicle, *despite obvious indications of his condition . . .*" (emphasis added)); *Black v. William Insulation Co.*, 141 P.3d 123, 130 (Wyo. 2006) (finding it "crucial[]" that the employer in *Robertson* actually noticed the employee's fatigue).

⁸⁹ See *Black*, 141 P.3d at 130 (characterizing the holdings of *Robertson* and *Faverty* as resting on the fact that the employer in those cases actually knew its employee was fatigued).

⁹⁰ 892 P.2d 703 (Or. Ct. App. 1995).

⁹¹ *Id.* at 705.

⁹² *Id.*

⁹³ *Id.* at 710. In fact, McDonald's supervisors knew that at least two of its employees fell asleep at the wheel and caused car accidents after working late shifts. *Id.* at 705.

⁹⁴ *Id.* at 705.

⁹⁵ *Id.*

firmed a jury verdict for the injured plaintiff, holding that the employer was negligent for working Theurer “more hours than was reasonable.”⁹⁶ The court’s analysis did not consider whether, despite having knowledge of Theurer’s fatigue, the employer committed an affirmative act of control over Theurer, such as scheduling him for additional hours.⁹⁷

The Oregon court’s analysis in *Faverty* differs from Texas’s analysis in *Duge* and West Virginia’s analysis in *Robertson*. All three cases have similar fact patterns: an employee worked long hours, the employee was too tired to drive, the employee drove home from work, and as a result of fatigue, the employee crashed into a third party who sued the employer.⁹⁸ The *Duge* and *Robertson* courts emphasized that the controlling factor for whether the employer had a duty to prevent the fatigued employee from driving home was whether the employer knew of the employee’s fatigue and took an affirmative act of control over the employee.⁹⁹ In *Duge*, the employer did not know of the employee’s fatigue, so the employer had no duty to control the employee, whereas in *Robertson*, the employer knew of the employee’s fatigue and took an affirmative act of control over the employee by sending him home.¹⁰⁰ This affirmative act imposed a duty on the employer. On the other hand, in *Faverty*, the court emphasized that McDonald’s was liable simply because it worked Theurer “more hours than was reasonable.”¹⁰¹

It is unclear whether the Texas and West Virginia approach, the Oregon approach, or some other approach is the correct one. The differences between these approaches raise the question: what act by an employer should trigger the employer’s duty to prevent a fatigued employee from driving home?

D. A Duty to Schedule Reasonably

In a 1996 Note in the *Wayne Law Review*, Gene P. Bowen analyzes whether and when an employer has a duty to prevent a fatigued employee

⁹⁶ *Faverty*, 892 P.2d at 710, 716 (internal quotation marks omitted); see also *id.* at 710 (implying that an employer allowing someone to work for a very long time “without any rest or sleep might very well constitute affirmative misconduct . . . but [it] may be a matter of degrees” (internal quotation marks omitted) (second alteration in original)). But see *Black v. William Insulation Co.*, 141 P.3d 123, 130 (Wyo. 2006) (describing the holdings of *Robertson* and *Faverty* by stating: “[c]rucially . . . the employer had actual knowledge of their employee’s fatigued state”).

⁹⁷ See *Faverty*, 892 P.2d at 710, 716.

⁹⁸ *Duge v. Union Pac. R.R.*, 71 S.W.3d 358, 360 (Tex. App. 2001); *Faverty*, 892 P.2d at 705; *Robertson v. LeMaster*, 301 S.E.2d 563, 564-66 (W. Va. 1983).

⁹⁹ See *Duge*, 71 S.W.3d at 362, 364; *Robertson*, 301 S.E.2d at 569.

¹⁰⁰ See *Duge*, 71 S.W.3d at 362, 364; *Robertson*, 301 S.E.2d at 569.

¹⁰¹ *Faverty*, 892 P.2d at 710, 716 (internal quotation marks omitted).

from commuting home.¹⁰² Bowen suggests that if an employer's scheduling constitutes an "extraordinary demand" on an employee, then the employer has a duty to make sure the employee does not drive home while fatigued.¹⁰³ Bowen explicitly asserts that this duty arises solely from the employer's act of scheduling, without regard to whether the employee exhibits signs of fatigue.¹⁰⁴ In other words, Bowen claims that an employer has a duty to prevent an employee from driving home if the employer schedules that employee for an "objectively unreasonable quantity and/or quality of work."¹⁰⁵ Therefore, Bowen suggests imposing on employers a duty to schedule reasonably.

Bowen argues that if courts analyze employer liability for fatigued commuting employees under the assumption that scheduling alone does not give rise to a duty, injured third parties would almost never be able to recover from employers.¹⁰⁶ He further asserts that employers who act in a manner that theoretically increases the risk of harm to others should have "to conform to the legal standard of reasonable conduct in light of the apparent risk."¹⁰⁷ Bowen reasons that heavy scheduling constitutes an act that increases the risk of harm to others.¹⁰⁸ Therefore, an employer who heavily schedules an employee has a duty to prevent that employee from driving home.¹⁰⁹

Bowen supports his assertion by analogizing his argument to workers' compensation statutes.¹¹⁰ Under workers' compensation statutes, employees generally cannot recover for injuries suffered while commuting to and from work.¹¹¹ However, Bowen notes that if an employer imposes a schedule on an employee that constitutes an "extraordinary demand" and that schedule causes fatigue that leads to a car crash, the employee can usually recover under workers' compensation for injuries suffered in the car crash.¹¹² Bo-

¹⁰² Bowen, *supra* note 10, at 2091.

¹⁰³ *Id.* at 2111. For an argument similar to Bowen's, see Gefell, *supra* note 2, at 659-76.

¹⁰⁴ See Bowen, *supra* note 10, at 2111 ("[A] court should look to the employer's conduct at the point of scheduling. The analysis should then turn on whether the conduct represents an extraordinary demand that generates foreseeable exposure to the type of risks that the employer has a duty to guard against." (footnote omitted)).

¹⁰⁵ *Id.*

¹⁰⁶ See *id.* at 2104 ("Embarking on a nonfeasance analysis of the employer's duty would virtually preclude third party recovery in these cases.").

¹⁰⁷ *Id.* at 2107 (quoting *Robertson v. LeMaster*, 171 S.E.2d 563, 567 (W. Va. 1983)).

¹⁰⁸ See *id.* at 2110 (distinguishing situations where the employee's personal conduct leads to the employee's fatigue from those where the employer's excessive scheduling "create[s] an unreasonable risk of harm to its employee").

¹⁰⁹ See *id.* at 2107.

¹¹⁰ See Bowen, *supra* note 10, at 2095-98.

¹¹¹ *Id.* at 2095. An employee's inability to recover under workers' compensation for injuries suffered while commuting to or from work is commonly referred to as the "going and coming" rule. *Id.*

¹¹² See *id.* at 2096. Bowen notes that the "special errand rule has . . . engendered modifications which look to whether the employer, in requiring overtime work, has created an additional 'special risk'

wen claims that courts should use workers' compensation analysis to determine when an employer has a duty to prevent a fatigued employee from commuting home.¹¹³ Bowen acknowledges that one difficulty with this approach is determining, as a matter of law, when an employee's schedule is too demanding.¹¹⁴ He asserts that this is a question of fact and degree, and that this determination should be made in light of what constitutes an "extraordinary demand" in workers' compensation cases.¹¹⁵

Although no court explicitly follows Bowen's duty to schedule reasonably, his claims offer a useful contrast to this Comment, particularly because his analysis relies on *Faverty*, *Otis*, and *Robertson*.¹¹⁶ Specifically, Bowen supports his arguments using both workers' compensation statutes and the doctrine of dram shop liability,¹¹⁷ which brings into question whether other areas of law ought to apply to employer liability for fatigued commuting employee crashes. Moreover, Bowen's analysis leaves open the question of what role personal responsibility plays in determining an employer's liability for a fatigued employee's car crash. These issues are both positively and normatively important in determining when an employer has a duty to prevent its fatigued employees from driving home after work.

II. ANALYSIS

An employer should not have a duty to prevent a fatigued employee from commuting home simply because the employer heavily scheduled that employee or because the employer noticed that the employee was fatigued and allowed the employee to leave work early. Such a rule would be inconsistent with the limited nature of affirmative duties, the limited nature of an employer's duty to control off-duty employees, and the legal tenets of dram

during the commute." *Id.* Further, Bowen cites a 1968 case from the District of Columbia, which allowed recovery under workmen's compensation after an individual, who had worked twenty-six consecutive hours, sustained injuries after falling asleep on his drive home. *Id.* (citing *Van Devander v. Heller Elec. Co.*, 405 F.2d 1108, 1109 (D.C. Cir. 1968)).

¹¹³ See *id.* at 2106. However, Bowen disagrees with the strict liability nature of workmen's compensation statutes, and therefore contends that, in situations where the employer works an employee excessively, "it [is] not the employer's failure to act [to remedy the situation] that posit[s] liability, but rather the employer's affirmative action which created a special risk that harm might in fact occur after the employee left his scope of employment." *Id.* Moreover, like the "special risk" rule used in workmen's compensation cases, Bowen argues that the employer acquires a duty to protect its employees when it makes an "extraordinary demand" on those employees, such as through scheduling. *Id.* at 2111-12.

¹¹⁴ *Id.* at 2107-08.

¹¹⁵ *Id.* at 2108-11.

¹¹⁶ See, e.g., Bowen, *supra* note 10, at 2099, 2101, 2102 n.50. Bowen's approach may be identical to *Faverty*, although that is not clear, because *Faverty* did not explicitly explain what gave rise to employer liability. See *supra* Part I.C.2.

¹¹⁷ See Bowen, *supra* note 10, at 2093, 2102 n.50.

shop liability. The correct rule is that an employer has a duty to prevent a fatigued employee from commuting home if (1) the employee is obviously fatigued or incapacitated and (2) the employer subsequently assigns work to the employee.

To elucidate this suggested rule, assume the following hypothetical. In scenario one: Employee is in a normal, non-fatigued state; Boss assigns Employee to twenty-four consecutive hours of work; Employee agrees to work those hours; and Employee crashes into Plaintiff while driving home after work. In scenario one, under the suggested rule, Boss is not liable to Plaintiff because, although Employee worked very long hours, Boss assigned those hours to Employee while Employee was in a non-fatigued state. In scenario two: Employee is in a normal, non-fatigued state; Boss assigns Employee to twenty-three consecutive hours of work; Employee agrees to work those hours; at the twenty-third hour, when Employee is obviously exhausted, Boss assigns Employee an additional hour of work; Employee accepts; and Employee crashes into Plaintiff while driving home after work. In scenario two, under the suggested rule, Boss is liable to Plaintiff because although Employee worked the same number of hours as in scenario one, Boss saw Employee in an obviously fatigued state yet assigned Employee additional work.

The crucial point of this suggested rule is that, to trigger potential liability, the act of scheduling must occur *after* the employee's fatigue or incapacity is obvious. This is important because when an employee is fatigued or incapacitated, he is unlikely to be able to make a rational decision.¹¹⁸ This requirement makes the suggested rule coherent with dram shop liability, the limited nature of affirmative duties, and notions of personal responsibility inherent in tort law.

This Part explains the rationale behind this suggested rule. First, this Part discusses the similarities between dram shop liability cases and fatigued commuting employee cases. This Part then applies dram shop liability law to the situation of fatigued commuting employees to demonstrate a coherent analysis. Next, this Part rejects the argument that workers' compensation statutes should guide the analysis of this issue. Finally, this Part concludes by discussing how this Comment's suggested rule is consistent with notions of personal responsibility.

¹¹⁸ ANDREA SHAW, GUIDELINE ON FATIGUE MANAGEMENT 2 (2003), available at http://fatigue.mishc.uq.edu.au/docs/Guideline_on_Fatigue_Management.pdf (noting that individuals are more likely to "exercise poor judgment and . . . are less able to respond effectively to changing circumstances" when fatigued).

A. *The Analogy to Dram Shop Liability*¹¹⁹

Dram shop liability is not a recent development in the United States; in fact, it has been around since the nineteenth century.¹²⁰ The early common law rule was that bartenders were not liable to third parties injured by patrons who left the bar intoxicated because “it was not the sale of the liquor, but rather the consumption of it which was the proximate cause of the plaintiff’s injuries.”¹²¹ However, an early exception to this rule that still exists today is that vendors can be liable when they serve alcohol to obviously intoxicated patrons, because patrons are unlikely to be able to make rational decisions while intoxicated.¹²² Since the nineteenth century, many states have shown their approval of this rule by codifying dram shop liability and the obviously intoxicated patron exception into statutes.¹²³ The reasoning in dram shop liability even receives favorable judicial treatment in those states where there is no statutory basis, as some states impose dram shop liability through the common law.¹²⁴ Some states go so far as to extend dram shop liability reasoning to social hosts who serve alcohol to guests.¹²⁵

The dram shop liability rules in Texas, Oregon, and West Virginia are very similar. In all three states, dram shop liability derives from statute.¹²⁶ In Texas, a bartender is liable to a plaintiff injured by a patron under dram shop liability if, at the time the bartender serves a drink to a patron, that patron is “*obviously intoxicated* to the extent that he or she present[s] a

¹¹⁹ For more about dram shop liability, see FRANK A. SLOAN ET AL., DRINKERS, DRIVERS, AND BARTENDERS: BALANCING PRIVATE CHOICES AND PUBLIC ACCOUNTABILITY 111-44 (2000), and Kathryn M. Knudsen, Note, *Serving the “Apparently Under the Influence” Patron: The Ramifications of Barrett v. Lucky Seven Saloon, Inc.*, 31 SEATTLE U. L. REV. 385, 391-94 (2008) (discussing the meaning of the “obviously intoxicated” rule).

¹²⁰ See Jessica L. Krentzman, *Dram Shop Law—Gambling While Intoxicated: The Winner Takes It All? The Third Circuit Examines a Casino’s Liability for Allowing a Patron to Gamble While Intoxicated*, 41 VILL. L. REV. 1255, 1257-58 (1996); Robert G. Franks, Note, *Common Law Liability of Liquor Vendors*, 31 MONT. L. REV. 241, 244 (1970); see also *id.* at 244 n.22 (compiling cases).

¹²¹ Franks, *supra* note 120, at 242 (citing *Hitson v. Dwyer*, 143 P.2d 952 (Cal. Dist. Ct. App. 1943)).

¹²² Krentzman, *supra* note 120, at 1257-58.

¹²³ *Id.* Texas, Oregon, and West Virginia have enacted such statutes. See *infra* note 127.

¹²⁴ Krentzman, *supra* note 120, at 1258.

¹²⁵ See, e.g., *Born v. Mayers*, 514 N.W.2d 687, 690 (N.D. 1994).

¹²⁶ Compare TEX. ALCO. BEV. CODE ANN. § 2.02(b)(1) (Vernon 1995) (“[Violation if] at the time the provision occurred it was apparent to the provider that the individual being sold, served, or provided with an alcoholic beverage was obviously intoxicated to the extent that he presented a clear danger to himself and others.”), with OR. REV. STAT. § 471.565(2)(a) (1989) (violation if bartender or social host “served or provided alcoholic beverages to the patron or guest while the patron or guest was visibly intoxicated”), and W. VA. CODE § 60-7-12(a)(4) (1986) (violation to sell “nonintoxicating beer, wine or alcoholic liquors, for or to any person known to be deemed legally incompetent, or for or to any person who is physically incapacitated due to consumption of nonintoxicating beer, wine or alcoholic liquor or the use of drugs”).

clear danger.”¹²⁷ In Oregon, a bartender is liable to a plaintiff injured by a patron under dram shop liability if, at the time the bartender serves a drink to the patron, the patron is “visibly intoxicated” and it is reasonably foreseeable that the patron would leave the bar in an automobile.¹²⁸ In West Virginia, a bartender is liable to a plaintiff injured by a patron under dram shop liability if, at the time the bartender serves a drink to the patron, a reasonably prudent bartender could tell the patron is drunk.¹²⁹

Although the dram shop laws in these states use different language, they all create the same rule. In all three states, a bartender has no duty to prevent a patron from driving home from a bar simply because the patron drank a certain amount at the bar or because the patron exhibited signs of intoxication. Rather, under dram shop liability, a bartender has a duty to prevent an intoxicated patron from driving home only if the bartender serves the patron a drink while the patron is obviously intoxicated.¹³⁰

This rule is preferable to a rule imposing a duty on a bartender to prevent a patron from driving home simply as a result of serving the patron an objectively excessive number of drinks. One major reason is because it is extremely difficult to define an objectively excessive number of drinks, as individuals have varying tolerances to alcohol. A patron’s alcohol tolerance differs widely based on what food he recently ate, what medicines he recently took, his weight, his previous use of alcohol, and other such fac-

¹²⁷ TEX. ALCO. BEV. CODE ANN. § 2.02(b) (Vernon 1995) (“Providing, selling, or serving an alcoholic beverage may be made the *basis of a statutory cause of action* . . . upon proof that: (1) *at the time* the provision occurred *it was apparent to the provider* that the individual being sold, served, or provided with an alcoholic beverage *was obviously intoxicated* to the extent that he presented a clear danger to himself and others” (emphasis added)); *see also* Venetoulis v. O’Brien, 909 S.W.2d 236, 239 (Tex. App. 1995) (quoting TEX. ALCO. BEV. CODE ANN. § 2.02(b)(1)); F.F.P. Operating Partners, L.P. v. Duenez, 237 S.W.3d 680, 684-85 (Tex. 2007) (discussing the meaning of section 2.02). *But see* Perseus, Inc. v. Canody, 995 S.W.2d 202, 206 (Tex. App. 1999) (holding that the alcohol provider does not necessarily have to witness intoxicated behavior if the intoxicated behavior was so obvious to everyone at the bar that the bar employees should have noticed it). The Texas Legislature passed section 2.02 in response to *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987), which held that a bartender could be liable for providing alcohol if he knew or should have known the patron was intoxicated. *Duenez*, 237 S.W.3d at 684-85 (Tex. 2007).

¹²⁸ *Hawkins v. Conklin*, 767 P.2d 66, 69 (Or. 1988) (emphasis added); *see also* OR. REV. STAT. § 471.565(2) (1989) (“A [bartender or social host] is not liable for damages caused by intoxicated patrons or guests unless the plaintiff proves by clear and convincing evidence that: (a) the [bartender or social host] served or provided alcoholic beverages to the patron or guest while the patron or guest was visibly intoxicated”).

¹²⁹ *Bailey v. Black*, 394 S.E.2d 58, 60 (W. Va. 1990) (citing W. VA. CODE § 60-7-12(a)(4) (1986)).

¹³⁰ *See* Krentzman, *supra* note 120, at 1257-58; 45 AM. JUR. 2D *Intoxicating Liquors* § 466 (2008) (“If an alcohol provider stops serving a noticeably intoxicated person, he or she is not liable for damages that the person later inflicts . . . a vendor does not have a duty to deny service to individuals who will or might become intoxicated as a result of service of alcoholic beverages.”).

tors.¹³¹ Because an excessive number of drinks means different things to different people, judicially or legislatively establishing a number of drinks that would constitute “excessive” would inevitably add up to too many drinks for some, and too few drinks for others.

Moreover, the Texas, Oregon, and West Virginia formulations of dram shop liability are consistent with the nature of affirmative duties. In American tort law, a defendant’s affirmative duty to protect or control the conduct of another is limited, particularly when the defendant does not act wrongfully.¹³² Likewise, it is outside a bartender’s control, and thus not wrongful on the bartender’s part, if someone walks into a bar intoxicated, or becomes drunk after just one drink at the bar because of a low alcohol tolerance. Yet it is within the bartender’s control, and wrongful, for the bartender to serve an obviously intoxicated patron an additional drink. Therefore, if a bartender serves an obviously intoxicated patron a drink, he assumes a duty to control that individual.¹³³ In other words, the bartender has no duty to correct a dangerous situation (intoxication), but the bartender has a duty not to make that dangerous situation worse (by serving another drink).¹³⁴

Dram shop liability can be analogized to cases involving employer liability for fatigued commuting employees, as there are clear parallels between these two areas of law.¹³⁵ Both dram shop liability and fatigued commuting employee liability cases generally involve: (1) incapacitation of an individual who later drives while incapacitated, (2) injury to a third party caused by the incapacitated individual’s driving, and (3) a suit against a party connected with the driver’s incapacitation.¹³⁶ The *Faverty* court recognized the similarities between these two types of cases when it explicitly compared the facts of a fatigued commuting employee case to dram shop liability: “[D]efendant was much like a bartender who served alcoholic be-

¹³¹ Michaele P. Dunlap, Biological Impacts of Alcohol Use: An Overview, <http://www.oregoncounseling.org/ArticlesPapers/Documents/ETOHBIOFx.htm> (last visited Oct. 17, 2009).

¹³² See *supra* Part I.B.

¹³³ *Hawkins*, 767 P.2d at 69.

¹³⁴ *Id.* (holding that, under Oregon law, “serving alcohol to someone who is visibly intoxicated is the only conduct for which tavern owners may be held liable for off-premises injuries”). Notice the obvious parallels to *Zelenko v. Gimbel Bros.*, 158 Misc. 904 (N.Y. Sup. Ct. 1935), *aff’d*, 287 N.Y.S. 136 (App. Div. 1936). In *Zelenko*, the court held that the defendant would not have been liable for watching an ill woman die, but became liable by negligently attempting to care for that sick woman. *Id.* at 905. For more on *Zelenko*, see *supra* Part I.B.

¹³⁵ See, e.g., *Faverty v. McDonald’s Rests. of Or., Inc.*, 892 P.2d 703, 710 (Or. Ct. App. 1995) (“[D]efendant was much like a bartender who served alcoholic beverages to a visibly intoxicated person who then caused an automobile accident that harmed another.”).

¹³⁶ Compare *Campbell v. Carpenter*, 566 P.2d 893 (Or. 1977) (third party sued tavern owner after bartender served drinks to a visibly intoxicated patron who drove home and crashed into a third party as a result of his intoxication), with *Robertson v. LeMaster*, 301 S.E.2d 563 (W. Va. 1983) (third party sued employer after employer noticed employee’s fatigue, employer sent employee to his car to drive home, and employee crashed into a third party while driving home as a result of his fatigue).

verages to a visibly intoxicated person who then caused an automobile accident that harmed another.”¹³⁷

The judicial reasoning in dram shop liability also extends to the situation of employer liability for fatigued commuting employees because of the informational difficulties inherent in both situations.¹³⁸ Like a bartender who may not know each of his patrons’ alcohol tolerances, an employer may not know how well each of his employees reacts to a difficult work schedule.¹³⁹ For example, an employee’s tolerance to a difficult work schedule can vary based on a number of factors, such as whether the employee has a second job, whether the employee has a long commute, and whether the employee is currently under a lot of stress.¹⁴⁰ Even if an employer knew this kind of information, it would be very difficult to parse through it each time the employer assigned work to an employee.

Moreover, like a bartender in a crowded bar who must serve many patrons and may not know exactly how many drinks he serves to each one, an employer with many employees will have to assign work to many employees and may not know exactly how many hours or how much work he assigns to each employee. Additionally, like a bartender who may not know exactly how much alcohol is in each drink he serves to each patron, an employer may not know exactly how many hours an employee works to accomplish a given task. Therefore, because of the similarities between dram shop liability and fatigued commuting employee cases, courts determining

¹³⁷ *Faverty*, 892 P.2d at 710. *But see* *Otis Eng’g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983) (asserting that by affirming a rule that would impose liability on an employer for affirmatively taking control of an incapacitated employee and sending him home, the court was not judicially creating dram shop liability because the defendant’s liability would not be based on “mere knowledge” of intoxication/incapacitation). However, this statement does not disprove the fact that dram shop liability reasoning can apply to cases involving employer liability for fatigued commuting employees for two reasons. First, a defendant is not liable under dram shop liability because of “mere knowledge” of intoxication; a defendant is liable because the defendant serves another drink to an obviously intoxicated patron. *See Venetoulas v. O’Brien*, 909 S.W.2d 236, 239 (Tex. App. 1995) (quoting TEX. ALCO. BEV. CODE ANN. § 2.02(b)(1)) (Vernon 1995)). Secondly, the idea of applying the legal tenets of dram shop liability to this type of case does necessarily “extend” dram shop liability to other areas of the law. Rather, it simply means that courts consider applying the reasoning they used in dram shop cases to the analogous situation of employer liability for fatigued commuting employees.

¹³⁸ *Cf. Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 410 (Tex. 2009) (suggesting that it is more difficult to detect fatigue than intoxication).

¹³⁹ *See, e.g., id.* at 410-11 (“[I]t is not clear that an employer could consistently judge when employees have gone beyond tired and become impaired. . . [N]o certain amount or type of work is known to consistently cause fatigue impairment in all persons.”).

¹⁴⁰ *See generally*, Giovanni Costa, *The Impact of Shift and Night Work on Health*, 27 APPLIED ERGONOMICS 9-14 (1996) (listing factors influencing tolerance to shiftwork, including age, type of work, stress, outside life events, and personality).

employer liability for fatigued commuting employees should use the rationale of dram shop liability to determine when an employer is liable.¹⁴¹

B. *A Duty Should Not Arise Merely from Scheduling or Sending a Tired Employee Home*

Imposing liability on an employer merely for heavily scheduling its employees is inconsistent with dram shop liability. Gene Bowen's "duty to schedule reasonably" means that the act of assigning an employee an objectively excessive number of hours can give rise to an employer's duty to prevent an employee from driving home while fatigued.¹⁴² However, in the analogous situation of dram shop liability, courts do not find a bartender liable for serving a patron a certain number of drinks and then failing to prevent the patron from driving home.¹⁴³

It is also inconsistent to follow the Texas and West Virginia approach.¹⁴⁴ The Texas and West Virginia approach imposes a duty on an employer to prevent an employee from commuting home when the employer notices the employee's fatigue and subsequently asks the employee to leave work early. In dram shop liability, if a drunken individual wanders into a bar, a bartender is not liable for throwing the individual out of the bar even if the individual later injures a third party, as long as the bartender does not serve the individual a drink while the individual is obviously drunk.¹⁴⁵ Likewise, an employer should not be liable for sending home a fatigued employee who subsequently crashes into a third party as long as the employer did not assign the employee additional hours when the employee was obviously fatigued or incapacitated.

Instead, under dram shop liability, liability arises when a patron is obviously intoxicated, the bartender serves the patron a drink, and the bartender then fails to prevent the patron from driving home.¹⁴⁶ Likewise, an employer should only be liable for a crash caused by its fatigued commuting employee if the employer assigns work to the employee while the employee is obviously fatigued or incapacitated.

¹⁴¹ But see Bowen, *supra* note 10, at 2102 n.50 (noting that, in Michigan, the dram shop statute is narrowly construed such that it applies only to dram shop claims (citing *Millross v. Plum Hollow Golf Club*, 413 N.W.2d 17 (Mich. 1987))).

¹⁴² *Id.* at 2107.

¹⁴³ See, e.g., *Hawkins v. Conklin*, 767 P.2d 66, 69 (Or. 1988).

¹⁴⁴ See *supra* Part I.C.1

¹⁴⁵ See, e.g., *Hawkins*, 767 P.2d at 69-70 (holding that the only means of imposing liability on an bartender is where the bartender serves a "visibly intoxicated patron").

¹⁴⁶ See, e.g., *id.* at 69.

C. *Applying Dram Shop Liability Logic to Fatigued Commuting Employee Cases*

The legal tenets inherent in dram shop liability should be used to analyze the major cases involving employer liability for fatigued commuting employees. This Section applies dram shop liability reasoning to *Faverty*, *Robertson*, and *Duge* to help to elucidate the effects and meaning of this Comment's suggested rule. This Section then concludes by noting how this application is consistent with affirmative duty analysis.

The decision by the Oregon Court of Appeals in *Faverty* should be read in light of dram shop liability.¹⁴⁷ In fact, the *Faverty* court explicitly admitted a connection to dram shop liability when it compared the facts of the case to dram shop liability.¹⁴⁸ Specifically, when comparing *Faverty* to dram shop liability, the court stated: "[T]he courts have held that, because the bartender saw the driver in a visibly intoxicated state, and it is reasonably foreseeable that the customer will drive when he or she leaves, the bartender is liable for the consequences of the automobile accident."¹⁴⁹ Yet the court contradicted the tenets of dram shop liability when it asserted that, with regard to whether the employer had a duty to prevent its fatigued employee from driving home: "The point is whether . . . defendant 'was negligent in working [the employee] more hours than was reasonable.'"¹⁵⁰ This statement implies that *Faverty* holds that an employer has an affirmative duty not to heavily schedule its employees. This is analogous to modifying the dram shop liability rule to create a duty for a bartender to prevent a patron from driving simply because the bartender served the patron a so-called objectively excessive number of drinks.

However, under the doctrine of dram shop liability in Oregon, there is no affirmative duty for a bartender to prevent a patron from driving home simply because the bartender served the patron a certain number of drinks.¹⁵¹ Rather, a bartender has a duty to prevent a patron from driving

¹⁴⁷ For a recitation of the facts of *Faverty*, see *supra* Part I.C.2.

¹⁴⁸ *Faverty v. McDonald's Rests. of Or., Inc.*, 892 P.2d 703, 710 (Or. Ct. App. 1995).

¹⁴⁹ *Id.* at 710 (citing *Campbell v. Carpenter*, 566 P.2d 893, 896-97 (Or. 1977)). Interestingly, *Campbell* does not stand for the proposition that a bartender is liable simply for seeing a driver in an intoxicated state and foreseeing that the driver might drive home. *Campbell* held that a bartender is not liable under dram shop liability unless he serves a patron a drink *after* the patron is visibly intoxicated. *Campbell*, 566 P.2d at 895-96 ("[T]he question is not whether there was sufficient evidence . . . that Mrs. Pierce was 'visibly' intoxicated at the time she left the tavern . . . but whether there was substantial evidence . . . that at the time Mrs. Pierce was served the last (or any) drink prior to leaving the tavern she was 'visibly' intoxicated.").

¹⁵⁰ *Faverty*, 892 P.2d at 710.

¹⁵¹ *Campbell*, 566 P.2d at 895 ("Ordinarily, a host who makes available intoxicating liquors to an adult guest is not liable for injuries to third persons resulting from the guest's intoxication. There might be circumstances in which the host would have a duty to deny his guest further access to alcohol. This would be the case where the host has reason to know that he is dealing with persons [who are] especially

home only if the bartender serves an additional drink to the patron when the patron is visibly intoxicated.¹⁵² In fact, Oregon imposes no duty for a bartender to control an extremely intoxicated patron who poses a danger to others as long as the bartender does not serve the patron a drink when he is visibly intoxicated.¹⁵³

Imagine the fact pattern in *Faverty* as a situation of dram shop liability. Here, McDonald's is the bartender and Theurer, the fatigued employee, is the patron. In this hypothetical, McDonald's did not serve its patron (employee) an additional drink (hour of work) at a time when McDonald's knew its patron (employee) was drunk (exhausted). Because McDonald's did not provide additional drinks (hours) to a drunken (exhausted) patron (employee), it has no duty to prevent the drunken (exhausted) patron (employee) from driving home.

Interestingly, a different analysis of the facts in *Faverty* could support liability under a dram shop liability rationale. On the night before the accident, Theurer worked from 3:30 p.m. to 7:30 p.m., volunteered to work from 12:00 a.m. to 5:00 a.m., and then worked another shift from 5:00 a.m. to 8:21 a.m.¹⁵⁴ If, prior to being assigned the final 5:00 a.m. to 8:21 a.m. shift, Theurer exhibited signs of obvious fatigue, then under the rationale of dram shop liability McDonald's would have a duty to prevent him from driving home. Thus, under this interpretation of the *Faverty* facts, McDonald's would be liable for breaching its duty to prevent Theurer from driving home. However, the court does not follow this line of reasoning, and appears to find a duty solely based on scheduling.

In contrast, both the facts and the result in *Robertson* can be read as consistent with dram shop liability.¹⁵⁵ In *Robertson*, the West Virginia Supreme Court of Appeals rejected the employer's motion to dismiss after its employee, LeMaster, crashed into a third party while driving home from work.¹⁵⁶ However, the employer did more than simply assign LeMaster a demanding work schedule.¹⁵⁷ Instead, although LeMaster worked an unexpectedly long shift and exhibited obvious fatigue, the employer forced LeMaster to continue working.¹⁵⁸ Essentially the employer assigned LeMaster, an obviously fatigued employee, additional hours of work. Thus, the employer acted like a bartender who served a drink to an obviously intoxicated

likely [to] do unreasonable things." (quoting *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 485 P.2d 18, 21 (Or. 1971)) (internal quotation marks omitted)).

¹⁵² *Hawkins v. Conklin*, 767 P.2d 66, 69 (Or. 1988).

¹⁵³ *Id.* at 69-70.

¹⁵⁴ *Faverty*, 892 P.2d at 705.

¹⁵⁵ For a recitation of the facts of *Robertson*, see *supra* Part I.C.1

¹⁵⁶ See *Robertson v. LeMaster*, 301 S.E.2d 563, 564-65, 570 (W. Va. 1983).

¹⁵⁷ *Id.* at 565.

¹⁵⁸ *Id.*

patron, and the court, consistent with dram shop liability, found that the employer could potentially be liable for its actions.¹⁵⁹

However, a literal reading of *Robertson* is inconsistent with dram shop liability. Unlike proper dram shop liability reasoning, *Robertson* held that the employer could be liable for LeMaster's car accident simply because it affirmatively sent LeMaster home as a result of his fatigue.¹⁶⁰ If *Robertson* were entirely consistent with dram shop liability, the court would have held that an employer could only be liable if it assigned its employee additional work after the employee was obviously fatigued or incapacitated.¹⁶¹ In contrast, the *Robertson* holding is analogous to the idea that a bartender is liable for throwing obviously intoxicated people out of a bar that later cause injuries to others even if the bartender did not serve them drinks while they were obviously intoxicated. Since dram shop cases do not assign liability for throwing an intoxicated patron out of a bar without having served the patron, a literal reading of *Robertson* is inconsistent with dram shop liability.¹⁶²

Finally, although a literal reading of *Duge* is inconsistent with dram shop liability,¹⁶³ the facts and result of *Duge* are consistent.¹⁶⁴ In *Duge*, the Texas Court of Appeals dealt with facts extremely similar to *Robertson*: an employee, Garcia, worked for a long number of hours on a train derailment; Garcia's employer drove him to his car; and then Garcia crashed into a third party while driving home.¹⁶⁵ The court distinguished *Robertson* on one particular ground: there was no evidence that Garcia's employer could tell that Garcia was incapacitated from fatigue.¹⁶⁶ Unlike the employee in *Robertson*

¹⁵⁹ *Id.* at 570 (reversing employer's directed verdict and remanding).

¹⁶⁰ *See id.* at 569-70.

¹⁶¹ *Cf. Bailey v. Black*, 394 S.E.2d 58, 59 (W. Va. 1990) (noting that dram shop liability applies only when the alcohol provider affirmatively sells more alcohol to one who is physically incapacitated).

¹⁶² *Hawkins v. Conklin*, 767 P.2d 66, 69-70 (Or. 1988). Although a bartender is not required to make sure all drunken people that happen to pass through his bar drive home safely, a bartender may be liable if he enables a drunk to drive when the drunk would otherwise not be able to drive home. *See Leppke v. Segura*, 632 P.2d 1057, 1058 (Colo. App. 1981) (holding that when a defendant jump-starts an automobile for an obviously intoxicated person, he can be held liable for injuries caused to third parties by the drunk driver). Under this rationale, perhaps the employer in *Robertson* who asked a co-worker to drive the fatigued employee to his car committed an act sufficient to create liability.

¹⁶³ *See Duge v. Union Pac. R.R.*, 71 S.W.3d 358, 362 (Tex. App. 2001) (distinguishing *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307 (Tex. 1983), on the ground that the employer in *Duge* did not exercise an affirmative act of control over the employee by ending his shift early and sending him home). A literal reading of *Duge* is inconsistent with dram shop liability for the same reasons as why a literal reading of *Robertson* is inconsistent with dram shop liability.

¹⁶⁴ For a recitation of the facts of *Duge*, see *supra* Part I.C.1.

¹⁶⁵ *Duge*, 71 S.W.3d at 360-62.

¹⁶⁶ *Id.* at 363 (noting that there was "no indication that [Garcia] was fatigued").

who complained of fatigue frequently and fell asleep with a lit cigarette in his hand, Garcia stated that he felt “good” just before leaving work.¹⁶⁷

The court in *Duge* did not find the employer liable, reasoning that if the employer had no knowledge of Garcia’s fatigue or incapacity, scheduling Garcia for additional hours or driving Garcia to his car did not give rise to a duty to prevent Garcia from driving home.¹⁶⁸ This is analogous to a situation in which a bartender gives a patron several drinks but never serves the patron a drink after the patron becomes obviously intoxicated. If a patron is not obviously intoxicated, the act of giving him a drink does not give rise to any duty to prevent him from driving home.¹⁶⁹ Therefore, the facts and result of *Duge* are consistent with dram shop liability.

Applying dram shop liability to fatigued commuting employee cases also makes sense because it is consistent with affirmative duty analysis.¹⁷⁰ Under dram shop liability, by default, a bartender has no duty to stop a drunk from leaving a bar and starting mischief.¹⁷¹ However, a bartender can trigger a duty to control a drunken patron if the bartender serves a drink to the patron while he is obviously intoxicated.¹⁷² Likewise, by default, an employer has no duty to prevent a fatigued employee from driving home.¹⁷³ However, the employer can trigger a duty to prevent a fatigued employee from driving home if the employer assigns work to an obviously fatigued or incapacitated employee.¹⁷⁴

D. *Workers’ Compensation Statutes Are Inapplicable*

Although courts should use dram shop liability to determine whether employers are liable for crashes caused by fatigued commuting employees, courts should not turn to workers’ compensation statutes.¹⁷⁵ The differences between workers’ compensation cases and fatigued commuting employees cases are significant.

¹⁶⁷ Compare *Robertson v. LeMaster*, 301 S.E.2d 563, 569 (W. Va. 1983), with *Duge*, 71 S.W.3d at 362.

¹⁶⁸ *Duge*, 71 S.W.3d at 362-64.

¹⁶⁹ *Venetoulis v. O’Brien*, 909 S.W.2d 236, 240-41 (Tex. App. 1995) (noting that, under the Texas statute, a bartender is not liable unless the patron he serves is “obviously intoxicated”).

¹⁷⁰ See *Hawkins v. Conklin*, 767 P.2d 66, 69 (Or. 1988).

¹⁷¹ *Id.* (noting that the common law only assessed liability for serving alcohol to those who were “visibly intoxicated”).

¹⁷² *Id.*

¹⁷³ See *Pilgrim v. Fortune Drilling Co.*, 653 F.2d 982, 987 (5th Cir. Unit A Aug. 1981) (recognizing the general rule that an employee is not acting within the scope of his employment while travelling to and from work).

¹⁷⁴ See *supra* Part I.B.

¹⁷⁵ But see *Bowen*, *supra* note 10, at 2103-08 (arguing that workers’ compensation analysis should apply).

First, workers' compensation statutes have a different purpose than fault-based forms of liability.¹⁷⁶ Workers' compensation statutes exist across the nation for the same major purpose: to insure against work-related injuries.¹⁷⁷ Specifically, the statutes aim "to change the common law by shifting the burden of all work-related injuries from individual employers and employees to the consuming public with *the concept of fault being virtually immaterial*."¹⁷⁸ On the other hand, negligence liability and dram shop liability do not rest on notions of liability without fault or the principle of insurance.¹⁷⁹ Rather, negligence liability and dram shop liability require that a defendant be at fault before he is liable for harm.¹⁸⁰

Second, workers' compensation statutes differ from negligence liability and dram shop liability because of the party who pays for injuries. Under most workers' compensation statutes, the state acts as an insurer by compensating injured employees from a workers' compensation fund to which employers contribute.¹⁸¹ In contrast, in negligence and dram shop liability, a private individual or employer directly compensates the injured party.¹⁸² Thus, whereas no particular employer bears the burden when an injured party collects under workers' compensation statutes, the defendant bears the burden in negligence and dram shop liability.¹⁸³

Workers' compensation is a system of no-fault insurance, while tort liability is rooted in fault. Accordingly, courts should be extremely skeptical before they analogize the relatively relaxed liability standard of workers'

¹⁷⁶ See Justin M. Rains, Note, Flavio Rios Guerrero v. OK Foods, Inc.: *Advocating for a Broader Intentional-Tort Exception to the Workers' Compensation Exclusive-Remedy Doctrine*, 61 ARK. L. REV. 133, 138 (2008) (describing the purposes of workmen's compensation laws).

¹⁷⁷ *Id.* at 137-38 (citing *Young v. G.L. Tarlton, Contractor, Inc.*, 162 S.W.2d 477, 477 (Ark. 1942)).

¹⁷⁸ *Id.* at 140 (quoting *Brown v. Finney*, 932 S.W.2d 769, 771 (Ark. 1996)) (internal quotation marks omitted and emphasis added); see also 82 AM. JUR. 2D *Workers' Compensation* § 5 (2003) ("Additional purposes of such acts are . . . to guarantee prompt, limited compensation for an employee's work injury, regardless of fault . . .").

¹⁷⁹ Peter M. Gerhart, *The Death of Strict Liability*, 56 BUFF. L. REV. 245, 311 (2008) (arguing that strict liability is merely verbiage in tort law today and can be explained by negligence law and concepts of fault); see also 82 AM. JUR. 2D *Workers' Compensation* § 1 (2003) (noting that workers' compensation exists to *replace* common-law negligence principles).

¹⁸⁰ In common law negligence liability, the defendant must breach some duty of care to be liable. See, e.g., *Crow v. TRW, Inc.*, 893 S.W.2d 72, 77 (Tex. App. 1994) ("[T]o establish tort liability, a plaintiff must initially prove the existence and breach of a duty owed to him by the defendant." (citing *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1984))). To be liable under dram shop liability, a defendant must serve a patron a drink when the patron is obviously intoxicated to be liable. See, e.g., *Venetoulas v. O'Brien*, 909 S.W.2d 236, 240-41 (Tex. App. 1995).

¹⁸¹ 82 AM. JUR. 2D *Workers' Compensation* § 47 (2003).

¹⁸² See Rains, *supra* note 176, at 140 (citing *Brown v. Finney*, 932 S.W.2d 769, 771 (Ark. 1996)) (noting that workmen's compensation laws replaced a system where employers and individuals were personally liable for damages with a system allowing employees to draw damages from a larger fund).

¹⁸³ See *id.*

compensation statutes to an area of tort, such as an employer's liability for accidents caused by fatigued commuting employees.

E. *Personal Responsibility*

One concern that echoes throughout the realm of employer liability for employee torts is personal responsibility. Although an employer has the power to influence its employees' activities and lifestyles, the ultimate choice of whether to act in a certain manner rests with the employee.¹⁸⁴ If an employee receives a job offer from an employer that requires the employee to work eighty hours per week, the employee has a choice whether to accept that offer. If the employee accepts, he is on notice that he will work long hours and will probably be tired. It is his choice whether to live far from work and commute every day, whether to drive home or take a taxi, and whether to go to bed early or stay up late to watch television. These decisions are outside of the employer's control, and they might have a greater impact than the employee's work hours on whether an employee causes a fatigue-induced car accident.¹⁸⁵

In almost all cases, plaintiffs injured by an employee want to be able to sue an employer instead of or in addition to the employee.¹⁸⁶ This is because the employer often has more money than the employee and is less likely to be judgment-proof.¹⁸⁷ However, imposing liability purely because of a defendant's deep pockets wholly misses the personal responsibility aspect of tort law. Tort law is not a public insurance system by which everyone is compensated for his or her injuries.¹⁸⁸ Rather, tort law compensates those whose injuries are caused by a defendant's breach of duty.¹⁸⁹

An employer is liable for the torts of an employee under respondeat superior when the employee acts within the scope of his employment.

¹⁸⁴ See *Pilgrim v. Fortune Drilling Co.*, 653 F.2d 982, 986 (5th Cir. Unit A Aug. 1981) (noting that the doctrine of respondeat superior relies on the notion that an employer can control the conduct of its employees within the scope of employment).

¹⁸⁵ For example, the employees involved in accidents in some of the cases cited in this Comment had extremely long commutes. See, e.g., *Faverty v. McDonald's Rests. of Or., Inc.*, 892 P.2d 703, 705 (Or. Ct. App. 1995) (twenty-mile commute each way); *Robertson v. LeMaster*, 301 S.E.2d 563, 564 (1983) (fifty miles each way); *Pilgrim*, 653 F.2d at 983 (117.5 miles each way).

¹⁸⁶ See, e.g., Ehud Guttel & Michael T. Novick, *A New Approach to Old Cases: Reconsidering Statutes of Limitation*, 54 U. TORONTO L.J. 129, 175 (2004) (recognizing that employers are more attractive defendants since they are more likely to be in a position to be able to pay large judgments assessed against them).

¹⁸⁷ *Id.* at 175 ("The employer, typically possessing 'deep pockets,' is not only less likely than the employee to be judgment-proof but also less likely to attract a jury's sympathy.").

¹⁸⁸ See generally, e.g., Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHL-KENT L. REV. 407, 408-10 (1987).

¹⁸⁹ See, e.g., *id.* at 408 (noting that liability depends on both the "defendant's wrongdoing and the plaintiff's resultant injury").

However, because our society does not generally impose affirmative duties on individuals to control others who might cause harm,¹⁹⁰ the employer's duty to control the employee is limited when the employee acts outside the scope of his employment.¹⁹¹ Moreover, the case of an employee and employer deals with two contracting parties.¹⁹² Contracting parties, particularly in an employer-employee relationship, may be liable for torts created as a result of their contractual affairs.¹⁹³ However, a contracting party is almost never liable when the contract he creates is too demanding for the other party, and it causes the other party to commit torts or fail to complete his other contracts.¹⁹⁴ Rather, each contracting party has the personal responsibility, when he enters into the deal, to be able to manage his own affairs outside of the contract.

This Comment suggests a rule consistent with this notion of personal responsibility. This rule rests on the fact that if an employee is not exhausted or incapacitated when he receives a demanding work assignment, then he has the mental capacity to prepare for his commute home by refusing the assignment, arranging for a taxi ride, or similar alternatives. If an employee still has the mental capacity to make a rational decision when his employer assigns him more work, it is not the employer's fault if the employee does not make sure he can get home safely. On the other hand, this rule leaves open the possibility of employer liability if an employer assigns work to an already fatigued or incapacitated employee who may not be capable of making a rational decision when he accepts the work.

Federal law recognizes this notion of personal responsibility in the Fair Labor Standards Act ("FLSA").¹⁹⁵ The FLSA does not limit the number of hours an employer can require an employee to work if the employee is at least sixteen years old.¹⁹⁶ In other words, the FLSA recognizes that when

¹⁹⁰ See *supra* Part I.B.

¹⁹¹ See *supra* Part I.A.

¹⁹² See, e.g., 19 RICHARD A. LORD, WILLISTON ON CONTRACTS § 54:1 (4th ed. 1990) ("[T]he employment relationship is a voluntary and consensual one, which is contractual in nature" (citations omitted)); *Lamah v. Doherty Employment Group, Inc.*, 737 N.W.2d 595, 598 (Minn. Ct. App. 2007) ("Courts rely on contract principles to determine the nature of the employment relationship." (citing *Smith v. Employers' Overload Co.*, 314 N.W.2d 220, 222-23 (Minn. 1981))).

¹⁹³ See *Pilgrim v. Fortune Drilling Co.*, 653 F.2d 982, 986 (5th Cir. Unit A Aug. 1981) (citing *Am. Nat'l Ins. Co. v. Denke*, 95 S.W.2d 370, 373 (Tex. Comm'n App. 1936)); see also *Franklin*, *supra* note 20, at 572-73 (describing the doctrine of respondeat superior).

¹⁹⁴ See, e.g., RESTATEMENT (SECOND) OF TORTS § 766B (1979) (noting that a defendant is not liable for interfering with another's contractual relations unless, with improper intent, he intentionally interferes with the relation); see also *id.* § 766B cmt. b (providing historical references for the rule). If a defendant only incidentally interferes with another's contractual relations by forming a contract with a party, and the defendant has no improper intent, then the defendant is not liable for the interference. *Id.* § 766B.

¹⁹⁵ 29 U.S.C. §§ 201-219 (2000).

¹⁹⁶ See generally 29 U.S.C. §§ 203(l), 207, 212; see also United States Dep't of Labor, Fair Labor Standards Act Advisor, <http://www.dol.gov/elaws/esa/flsa/screen6.asp> (last visited Oct. 18, 2009).

someone is over the age of sixteen, he or she is responsible enough to make a rational decision in choosing a demanding work schedule.

The doctrine of dram shop liability similarly recognizes that when someone is sober and over the age of twenty-one, a bartender is not liable for serving him a drink.¹⁹⁷ Like the FLSA, dram shop liability recognizes that a sober adult, even when faced with a large pitcher of beer, can choose to reject the beer or choose to make plans to get home safely.

Employees are in the best position to know how much work they can handle and to decide whether to accept a demanding work schedule. Thus, employers should not face liability for injuries caused by fatigued commuting employees unless the employers assign employees work when the employees are too fatigued or incapacitated to make a rational decision. Holding employers liable simply for scheduling would pervert the notion of personal responsibility inherent in tort law.

CONCLUSION

As employees continue to work long hours, their fatigue will continue to cause car accidents. Similarly, as patrons continue to drink alcohol at bars, their intoxication will continue to cause car accidents. Under dram shop liability, bartenders are not liable for these accidents—no matter how much alcohol they serve a patron—unless they serve the patron alcohol while the patron is obviously intoxicated. Because of the close similarities between dram shop liability and employer liability for fatigued commuting employees, it is inconsistent to impose liability on employers simply because they have heavily scheduled their employees. Rather, an employer should be liable for a fatigue-induced car accident caused by its employee only if the employer assigns work to the employee while the employee is obviously fatigued or incapacitated. Such a rule is consistent with the tort law concepts of dram shop liability, respondeat superior, affirmative duties, and personal responsibility.

¹⁹⁷ See, e.g., *Bailey v. Black*, 394 S.E.2d 58, 60 (1990); *Hawkins v. Conklin*, 767 P.2d 66, 69 (Or. 1988); *Venetoulis v. O'Brien*, 909 S.W.2d 236, 239 (Tex. App. 1995).