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Dram Shop Liability in Brigance v. Velvet Dove Restaurant, Inc.: A Limited Evolution toward a Progressive Rule

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NOTES

DRAM SHOP LIABILITY IN *BRIGANCE v. VELVET DOVE RESTAURANT, INC.*: A LIMITED EVOLUTION TOWARD A PROGRESSIVE RULE

I. INTRODUCTION

Under the traditional common law, a cause of action against a tavern owner for injuries to a third person caused by a consumer of alcohol was generally unrecognized.[1] This rule of non-liability was based on a theory that it was the voluntary consumption and not the sale of liquor which was the proximate cause of any resulting injuries.[2] Influenced by the nationwide battle against drinking and driving,[3] many states have abrogated the traditional common law rule, and today many states recognize that a vendor of alcoholic beverages may be liable to one injured by an inebriate.[4]

The Oklahoma Supreme Court abrogated the traditional common law rule of non-liability in *Brigance v. Velvet Dove Restaurant, Inc.*[5] The court held that a commercial vendor has a duty, under both statutory enactment and common law negligence principles, to exercise reasonable care not to serve one noticeably intoxicated for on the premises consump-

1. Brigance v. Velvet Dove Restaurant, Inc., 725 P.2d 300, 302 (Okla. 1986). *See also* Cruse v. Aden, 127 Ill. 231, 234, 20 N.E. 73, 74 (1889) ("It was not a tort at common law to either sell or give intoxicating liquor to 'a strong and able-bodied man.' "); Waller's Adm'r v. Collinsworth, 144 Ky. 3, 6, 137 S.W. 766, 767 (1911) ("[I]t cannot be said that he who sells the liquor that causes the intoxication . . . is therefore liable in damages for his wrongful act.").

2. *Brigance*, 725 P.2d at 302.

3. The tragic effects of drinking and driving seemed to influence the *Brigance* court. *See infra* notes 54-57 and accompanying text. Anti-drunk driving groups such as Mothers Against Drunk Driving (MADD) and Remove Intoxicated Drivers (RID) have had a substantial effect on the increased public awareness of the problems associated with drinking and driving. These organizations estimate that every year more than 22,000 people are killed in alcohol-related motor vehicle accidents and that at least 50 percent of all automobile accidents are alcohol related. What Young Adults Should Know about Alcohol and Driving, MADD Release (1986); Telephone interview with Ed Wheeler, President of Remove Intoxicated Drivers (RID), Tulsa, Okla. Chapter (Oct. 22, 1986).

4. *Brigance*, 725 P.2d at 302.

5. *Id.* at 305-06.

tion.[6] When a vendor breaches its duty and there is a causal connection between the sale and a foreseeable ensuing injury, civil liability will be imposed.[7] Thus, the holding provides a new civil claim for relief in Oklahoma.

The *Brigance* court nevertheless failed to fully define the parameters of commercial vendor liability and neglected to address several issues incident to vendor liability. The court did not clearly establish the vendor's civil liability to a third person injured by an illegally served minor or address the liability of liquor store owners or social hosts. Moreover, the *Brigance* opinion did not consider any of the usual defenses to negligence. Based upon an analysis of the *Brigance* holding, either legislation or further litigation is necessary to clarify the commercial vendor's duty and possible defenses, and to define the liability of liquor store owners and social hosts.

II. STATEMENT OF THE CASE

A. *Facts*

Shawn Brigance's high school post-prom festivities included a dinner at the Velvet Dove Restaurant.[8] The group of minors arrived at the restaurant in an automobile driven by Jeff Johnson.[9] During the celebration, the restaurant served intoxicating beverages to Johnson and the others in the party, and although the group's minority was obvious from their appearance, no inquiry was made as to Johnson's age.[10] The alcohol which the restaurant served to Johnson either caused his intoxication or increased his prior intoxication, and as the group left the restaurant, a Velvet Dove employee assisted Johnson to his car.[11] A one-car accident resulted in which passenger Shawn Brigance was injured.[12]

Brigance sued the Velvet Dove Restaurant alleging that the restau-

6. *Id.* Although the action was brought for negligence in serving alcoholic beverages to a noticeably intoxicated person, the court also stressed that the restaurant illegally served a group of minors. *See infra* notes 87-88 and accompanying text.

7. *Brigance*, 725 P.2d at 305 (citing Ontiveros v. Borak, 136 Ariz. 500, 667 P.2d 200 (1983); Smith v. Clark, 411 Pa. 142, 190 A.2d 441 (1963)).

8. Reply Brief for Plaintiffs/Appellants at 11-12, Brigance v. Velvet Dove Restaurant, Inc., 725 P.2d 300 (Okla. 1986) (No. 62,005).

9. *Brigance*, 725 P.2d at 302.

10. Plaintiffs'/Appellants' Brief-in-Chief at 2, Brigance v. Velvet Dove Restaurant, Inc., 725 P.2d 300 (Okla. 1986) (No. 62,005).

11. *Brigance*, 725 P.2d at 302. The opinion implied that this factor imputed knowledge of Johnson's intoxication to the defendant. *Id. See supra* notes 79-82 and accompanying text regarding the court's analysis of the foreseeability factor required for vendor liability.

12. *Brigance*, 725 P.2d at 302.

rant was negligent in serving alcoholic beverages to a noticeably intoxicated person, thereby causing the accident which resulted in Brigance's injuries.[13] Having no Oklahoma dram shop legislation or precedent on which to rely, the trial court dismissed the complaint for failure to state a claim upon which relief could be granted.[14] Seeking a reversal of the dismissal and a remand for trial on the merits, Brigance appealed to the Oklahoma Supreme Court.[15]

B. *Issue*

The court narrowly stated the issue presented in *Brigance*: does a third party passenger injured by an intoxicated driver have a civil cause of action against a commercial vendor for the negligent sale of intoxicating beverages for on the premises consumption to a person the vendor knew or should have known was intoxicated and whose consumption of alcohol was the alleged cause of injuries.[16] Relying on the modern trend to recognize such liability and the dynamic nature of the common law, the Oklahoma Supreme Court reversed the trial court and held that the injured third party does have such a cause of action.[17]

III. BACKGROUND

A. *Traditional Common Law*

Under the traditional common law, a civil cause of action against a liquor vendor for injuries to a third person resulting from the intoxication of a consumer was virtually unknown.[18] The rule of non-liability stemmed from the prevailing view that the voluntary consumption by the intoxicated person and not the sale of the liquor was the proximate cause of ensuing injuries.[19] The sale was not considered negligent as a matter of law and therefore commercial vendors escaped liability.

The modern trend in dram shop litigation illustrates a departure

13. *Id.* at 301.

14. *Id.* at 302. *See* OKLA. STAT. tit. 12, § 2012(B)(6) (Supp. 1986).

15. Plaintiffs'/Appellants' Brief-in-Chief at 1, Brigance v. Velvet Dove Restaurant, Inc., 725 P.2d 300 (Okla. 1986) (No. 62,005).

16. *Brigance*, 725 P.2d at 302.

17. *Id.* The holding in *Brigance* was unanimous. C.J. Simms concurred, with V.C.J. Doolin and J. Opala joining, by stating: in a suit brought by a consumer of alcohol against a vendor, the rule of vendor non-liability is unchanged by the *Brigance* decision. *Id.* at 306. *See infra* note 112 and accompanying text (discussing the question of whether a consumer intoxicated driver has a cause of action against a commercial vendor).

18. *See supra* note 1 and accompanying text.

19. *Id.*

from the traditional rule of non-liability. The retreat has been accomplished in many states by either legislation or judicial decision. Some states have chosen to impose civil liability on vendors of alcohol through what are commonly referred to as "dram shop acts."[20] Typical dram shop legislation mandates that commercial vendors who serve alcoholic beverages to minors or intoxicated persons, thereby causing or increasing their intoxication, will be held liable for injuries to a third person caused by the inebriate. In other jurisdictions the conventional rule has been changed by judicial decision.[21] The courts generally base liability on principles of negligence. Because the judiciary views the common law as dynamic and amenable to change, courts have been able to reformulate the traditional causation analysis to create a remedy for an injured third party.

Oklahoma first addressed the issue of dram shop liability by legislation. The Oklahoma Legislature, however, has been virtually silent on the subject since 1959. The *Brigance* case, therefore, presented an opportunity for the Oklahoma judiciary to rule on the issue of commercial vendor liability.

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20. Some degree of civil liability has been imposed in several states by dram shop legislation. *See, e.g.*, ALA. CODE § 6-5-71 (1975); COLO. REV. STAT. § 13-21-103 (1973); CONN. GEN. STAT. ANN. § 30-102 (West 1975); GA. CODE ANN. § 105-1205 (1984); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd 1986); IOWA CODE ANN. § 123.92 (West Supp. 1986); MICH. COMP. LAWS ANN. § 436.22 (West Supp. 1986); MINN. STAT. ANN. § 340A.801 (West Supp. 1987); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978 & Supp. 1987); N.C. GEN. STAT. § 18B-121 (1983); N.D. CENT. CODE § 5-01-06 (Supp. 1985); OHIO REV. CODE ANN. § 4399.01 (Baldwin 1984); OR. REV. STAT. §§ 30.950, 30.960 (1985); R.I. GEN. LAWS §§ 3-14-1 to -15 (Supp. 1986); UTAH CODE ANN. §§ 32A-14-1, 32A-14-2 (1986); VT. STAT. ANN. tit. 7, § 501 (1972).

21. Some states have imposed vendor liability through the courts. *See, e.g.*, Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959), *cert. denied sub nom.* Saxner v. Waynick, 362 U.S. 903 (1960); Walker v. Griffith, 626 F. Supp. 350 (W.D. Va. 1986); Ontiveros v. Borak, 136 Ariz. 500, 667 P.2d 200 (1983); Kerby v. Flamingo Club, Inc., 35 Colo. App. 127, 532 P.2d 975 (1974); Davis v. Shiappacossee, 155 So. 2d 365 (Fla. 1963); Ono v. Applegate, 62 Hawaii 131, 612 P.2d 533 (1980); Alegria v. Payonk, 101 Idaho 617, 619 P.2d 135 (1980); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Pike v. George, 434 S.W.2d 626 (Ky. 1968); Michnik-Zilberman v. Gordon's Liquor, Inc., 390 Mass. 6, 453 N.E.2d 430 (1983); Munford, Inc. v. Peterson, 368 So. 2d 213 (Miss. 1979); Nehring v. LaCounte, __ Mont. __, 712 P.2d 1329 (1986); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); Lopez v. Maez, 98 N.M. 625, 651 P.2d 1269 (1982); Campbell v. Carpenter, 279 Or. 237, 566 P.2d 893 (1977); Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 198 A.2d 550 (1964); Callan v. O'Neil, 20 Wash. App. 32, 578 P.2d 890 (1978); Sorensen v. Jarvis, 119 Wis. 2d 627, 350 N.W.2d 108 (1984); McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983).

A few states with dram shop legislation have also recognized a common law right of action. *See, e.g.*, Crespin v. Largo Corp., 698 P.2d 836 (Colo. Ct. App.), *aff'd*, 727 P.2d 1098 (Colo. 1986); Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (N.Y. Sup. Ct. 1965); Hutchens v. Hankins, 63 N.C. App. 1, 303 S.E.2d 584, *review denied*, 309 N.C. 191, 305 S.E.2d 734 (1983); Mason v. Roberts, 33 Ohio St. 2d 29, 294 N.E.2d 884 (1973).

B. *Review of Oklahoma Dram Shop Law*

In 1907, the Oklahoma legislature enacted a dram shop statute.[22] By completely prohibiting intoxicants in Oklahoma,[23] the statute was more than simple dram shop legislation.[24] In essence, strict liability was imposed against anyone dealing with intoxicants; anyone injured by an inebriate had a claim for relief against the liquor supplier.[25] The days of prohibition ended, however, and in 1959, Oklahoma vastly changed its methods of liquor control.

With the passage of the Alcoholic Beverage Control Act in 1959, the Oklahoma Legislature repealed the prohibition and dram shop provisions.[26] Although it cannot be said that the dram shop act was selectively repealed, the legislature did not enact any new provisions for dram shop civil liability.[27] Therefore, parties injured by inebriates were left without a statutory claim for relief against liquor vendors.

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22. Prohibition Act, ch. 69, 1907-08 Okla. Sess. Laws 594, 610-11 (codified at OKLA. STAT. tit. 37, § 121 (repealed 1959)). OKLA. CONST. art. I, § 7 (repealed 1959) prohibited intoxicating liquors in the former Indian territories and on Indian reservations but did not govern that part of the state formerly known as Oklahoma Territory. The 1907 law extended prohibition to the entire state. Bandy, *Intoxicating Liquors in Oklahoma*, OKLA. STAT. ANN. tit 37, Commentary — Liquor Laws, 3 (West 1951). The 1907 legislation provided for civil liability for causing the intoxication of a tortfeasor:

> Every wife, child, parent, guardian, employer or other person who shall be injured in person or property, or means of support by any intoxicated person or in consequence of intoxication of any person, shall have a right of action for all damages actually sustained, in his or her own name against any person, individual or corporate, who shall, by selling, bartering, giving away, or otherwise furnishing intoxicating liquors, contrary to the provisions of this Act, have caused the intoxication of such person. On the trial of any such suit, proof that the defendant, or defendants sold, bartered, gave away, or furnished any such liquors to such intoxicated person on the day, or about the time (and prior thereto) of such injury, shall be prima facie evidence that the liquor so sold, bartered, given away, or otherwise furnished, caused such intoxication. In any action by a married woman, or other person legally entitled to recover damages for loss of support, caused by such intoxication, it shall only be necessary to prove that the defendant, or defendants, has or have given, bartered, sold or otherwise furnished intoxicating liquor of any kind to such person, during the period when such cause of action shall have accrued.

OKLA. STAT. tit. 37, § 121 (1951) (repealed 1959).

Editor's note — The Oklahoma Supreme Court appears to have been mistaken as to the date of the dram shop act. *Brigance*, 725 P.2d at 302 (referring to 1910 enactment). While the law does appear within the Rev. Laws of Okla. Ann., ch. 39, art. III, § 3629 (1910), it *first* appeared in the 1907-08 Okla. Sess. Laws. The provision was ratified and became effective on November 16, 1907. *See* Bandy, *supra* at 3.

23. Reply Brief of Plaintiffs/Appellants at 7, Brigance v. Velvet Dove Restaurant, Inc., 725 P.2d 300 (Okla. 1986) (No. 62,005).

24. A typical dram shop act provides for comparatively limited liability. *See, e.g.*. R.I. GEN. LAWS § 3-14-1 to -15 (Supp. 1986) (in contrast to Oklahoma's repealed dram shop legislation, this dram shop act was not part of a comprehensive prohibition of intoxicating liquors).

25. Prohibition Act, ch. 69, 1907-08 Okla. Sess. Laws 594, 610-11 (codified at OKLA. STAT. tit. 37, § 121 (repealed 1959)).

26. OKLA. STAT. tit. 37, § 501 (Supp. 1959).

27. The prohibition statutes were repealed as a whole in 1959. Thus, the legislature apparently

In 1972, the Oklahoma Court of Appeals addressed the issue of vendor liability in *Snap v. London*.[28] The plaintiff in *Snap* alleged that she was injured by an intoxicated customer while in defendant's tavern.[29] As in *Brigance*, the plaintiff in *Snap* sued the defendant on common law negligence grounds.[30] The trial court sustained the defendant's demurrer,[31] but the court of appeals reversed with instructions to the lower court to reinstate the cause of action and proceed by giving the plaintiff the opportunity to prove causation.[32]

The court of appeals stated that a dram shop statute was not necessary to impose liability because the tavern keeper's liability was depen-

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did not decide to abrogate specifically the rule of vendor liability. *See infra* notes 49-53 and accompanying text.

Perhaps the Oklahoma legislature did not retain a dram shop statute because the 1907 statute was never judicially used to impose dram shop civil liability. *See* Snap v. London, 43 OKLA. B.J. 959 (Okla. Ct. App. 1972) (an unofficial decision stating that vendor liability was an open question in Oklahoma because the Oklahoma Supreme Court had no occasion to consider the issue before or since the repeal of the 1907 statute). *Id.* at 960.

28. *Snap*, 43 OKLA. B.J. 959 (Okla. Ct. App. 1972). The *Snap* opinion presents many interesting points not present in *Brigance*. First, although the *Snap* court did not state how the plaintiff's injuries occured, it is arguable that the were not caused by a drunk-driving accident. Thus, perhaps any personal injury caused by an inebriate may be attributed to the commercial vendor. *See, e.g.*, Shelby v. Keck, 85 Wash. 2d 911, 541 P.2d 365 (1975) (action to recover damages for accidental shooting of the plaintiff's husband by an inebriate on defendant's premises).

Second, instead of discussing proximate causation as the court did in *Brigance*, 725 P.2d at 305, the *Snap* court stated the causation issue in terms of multiple causation. *Snap*, 43 OKLA. B.J. at 960. The *Brigance* decision is much more progressive in that the *Brigance* court apparently considered the vendor's actions to be the sole legal cause of a plaintiff's injuries. *Brigance*, 725 P.2d at 305. *See infra* notes 66-70 and accompanying text. Instead of applying multiple causation to the patron's voluntary consumption along with the vendor's sale as was done in *Snap*, the issue of multiple causation should apply only to a case involving joint tortfeasors. Other jurisdictions recognize that more than one tavern owner may be held liable for a single plaintiff's injuries. *See, e.g.*, Trail v. Village of Elk River, 286 Minn. 380, __, 175 N.W.2d 916, 921 (1970) (nothing precluded the plaintiff from suing three state liquor stores for damages except meeting the requisite causation elements under a civil damage act). This notion is suggested in *Brigance* where the court discussed the vendor's duty to recognize a consumer's "prior intoxication." *Brigance*, 725 P.2d at 304.

Snap also varied from *Brigance* because the beverage served to the intoxicated customer in *Snap* was only 3.2 beer and not intoxicating liquor. *Snap*, 43 OKLA. B.J. at 961. Importantly, 3.2. beer is statutorily defined as non-intoxicating. *See infra* note 42. The *Snap* court noted that 3.2 beer had been held to be intoxicating for criminal purposes even though it is non-intoxicating for licensing and taxing purposes. *Snap*, 43 OKLA. B.J. at 961 (citing Ashcraft v. State, 68 Okla. Crim. 308, 315, 98 P.2d 60, 64 (1940)). Even though it was not a statutory violation to sell 3.2 beer to an intoxicated person, the court determined that the absence of such a statute was of no significance except that it eliminated any claim of negligence *per se*. *Id.* For a discussion of negligence *per se* see *infra* note 61. Perhaps this reasoning may be used in a similar future case with *Brigance* as support. However, a sale to minors would be a statutory violation because it is unlawful in Oklahoma to sell 3.2 beer to those under twenty-one years of age. *See infra* note 92.

29. *Snap*, 43 OKLA. B.J. at 960.

30. *Id.*

31. *Id.*

32. *Id.* at 962.

dent upon common law negligence principles.[33] The court considered that the risks caused by one's intoxication were considered to be well known and easily foreseeable to a tavern keeper.[34] The vendor therefore had a duty of care in dealing with intoxicated individuals.[35] Although the opinion in *Snap v. London* has no precedential value in Oklahoma,[36] the case did represent the first time that the Oklahoma courts addressed the issue of vendor liability either prior to or after the repeal of the dram shop act of 1907.[37]

C. *Recent Legislative Effort*

In 1985, the Oklahoma legislature attempted to enact new dram shop legislation.[38] The attempt failed, however, because the bill was defeated in committee.[39] The legislation was very broad because, as proposed, a claim for relief was available to any person injured in any manner as a result of another's intoxication.[40] According to the bill, the

33. *Id.* at 961. The opinion suggests that even if there were a dram shop act it would have had little significance on the *Snap* holding because dram shop acts do not preclude liability on principles of negligence but only deal with strict liability. *Id.* For a listing of some of the jurisdictions that have imposed vendor liability on common law negligence grounds despite the presence of dram shop legislation, see *supra* note 21.

34. *Snap*, 43 OKLA. B.J. at 960. The risks of injury to both a third party and an intoxicated consumer were considered to be foreseeable to the tavern keeper. Even so, a cause of action against the vendor by the consumer was not considered by the *Brigance* court. *See infra* note 112 and accompanying text.

35. *Snap*, 43 OKLA. B.J. at 961-62.

36. OKLA. STAT. tit. 20, § 30.5 (1981). The statute confers only limited authority to the Oklahoma Court of Appeals. Civil cases are assigned to the court of appeals by the Oklahoma Supreme Court but no opinions are binding or cited as precedent unless approved for publication by a majority of the justices of the supreme court. *Id.*

37. *Snap*, 43 OKLA. B.J. at 960.

38. S. 116, 40th Leg., 1st Sess. (1985). The proposed legislation was introduced to impose civil liability as follows:

> A. Any person who shall be injured in person, property, means of support, or otherwise by an intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by selling to, serving, or unlawfully assisting in procuring any alcoholic beverage or non-intoxicating beverage, as defined in this title, for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.
>
> B. In case of the death of either party, the action or right of action given by this section shall survive to or against his or her executor, administrator, or personal representative, and the amount so recovered by a husband, wife or child shall be his or her sole and separate property.
>
> C. No person who has gratuitously provided alcoholic beverages to a guest in a social setting may be held liable to any person for bodily injury, death or property damage arising from the intoxication of the social guest.

Id.

39. Telephone interview with Senator Jerry Smith (Aug. 10, 1986) (Senator Smith introduced the 1985 proposed dram shop statute to the Oklahoma legislature).

40. S. 116, 40th Leg. 1st Sess. (1985).

injured party could recover actual and exemplary damages from any person, other than a social host,[41] who caused or contributed to the intoxication by selling, serving, or unlawfully assisting in procuring alcoholic or non-intoxicating beverages.[42] In addition, if the injuries resulted in death, the proposed legislation specifically provided for a wrongful death cause of action.[43] The Oklahoma legislature, however, failed to enact the suggested statute which would have once again imposed civil liability upon commercial vendors of alcoholic beverages. The judiciary, therefore, was free to address the issue of vendor civil liability in Oklahoma.

IV. THE COURT'S HOLDING

In *Brigance* the Oklahoma Supreme Court abrogated the conventional common law rule of non-liability.[44] Concluding that liquor vendors may be subject to civil liability when a third person is injured by the impaired driving of a negligently served patron, the court addressed the scope of vendor liability.

In light of early legislative involvement in the area of dram shop liability, the court was faced with the task of establishing its authority to address and rule on the issue.[45] The appellee in *Brigance* claimed that the power to change the common law lay only in the province of the legislature, and that the judiciary, therefore, lacked authority to impose liability.[46] By rejecting appellee's argument, the court implicitly deter-

41. The proposed legislation received so much opposition within the Oklahoma legislature that social host liability was excluded in hopes of an increased chance in getting the legislation passed. Telephone interview with Senator Jerry Smith (Sept. 17, 1986). The adamant opposition to any rule of this type of civil liability may be some indication that the Oklahoma legislature will attempt to limit the effects of *Brigance*. *See infra* note 48.

42. S. 116, 40th Leg., 1st Sess. (1985). The provision was made for both alcoholic and non-intoxicating beverages in an attempt to impose liability for statutory violations on purveyors of 3.2 beer as well as suppliers of intoxicating liquors. *See* OKLA. STAT. tit. 37, § 163.2(a) (1981) (defining beverages with less than 3.2 percent alcohol by weight as non-intoxicating). Under the proposed legislation, liability could have conceivably attached to owners or employees of convenience stores, grocery stores, etc., that provided 3.2 beer to an inebriate, as well as to tavern and liquor store owners. Telephone interview with Senator Jerry Smith (Aug. 10, 1986).

43. S. 116, 40th Leg., 1st Sess. (1985).

44. *Brigance*, 725 P.2d 300 (Okla. 1986).

45. *Id.* at 303.

46. *Id.* Defendants/Appellees' Response Brief at 7, Brigance v. Velvet Dove Restaurant, Inc., 725 P.2d 300 (Okla. 1986) (No. 62,005).

Perhaps the appellee was relying on a constitutional separation of powers principle: where the legislature has the authority to rule in an area, the judiciary may not infringe on its powers. OKLA. CONST. art. IV, § 1. The argument seems to be that imposing vendor liability is in the interest of public safety which falls within the legislature's police powers. *See, e.g.*, Gray v. State, 601 P.2d 117 (Okla. Crim. App. 1979) (stating that the legislature has the power to determine what is dangerous or injurious to the public health, morals, or safety). However, the Oklahoma courts do not always accede to this view. *See, e.g*, Ford v. Board of Tax-Roll Collections, 431 P.2d 423, 427-30 (Okla.

mined that because the rule of non-liability was created by common law which is inherently dynamic in nature, the judiciary has the power to modify its rules to adapt to the changing conditions of society.[47] Deciding that tort law development was peculiarly a judicial function, the court reemphasized its view that when a judicially recognized doctrine is no longer supportable in reason, in justice, or in light of the overwhelming trend against its recognition, the judiciary and not the legislature has the duty to abrogate the rule.[48]

In stating that it was proper for the judiciary to address the issue of dram shop liability, the *Brigance* court took a critical look at the legislature's inaction since the 1959 repeal of Oklahoma's dram shop act.[49] Determining that the failure to enact new dram shop legislation was not an affirmative decision by the Oklahoma legislature to allow liquor vendors to escape liability for their negligent actions, the court reasoned that the legislature did not selectively repeal the dram shop statute.[50] The act was merely a component of the former prohibition ordinance which was entirely abrogated when the statute was repealed in Oklahoma in 1959.[51] The court concluded that statutory silence did not unequivocally demonstrate legislative intent,[52] dismissed the issue by refusing to indulge in a psychoanalysis of legislative motive, and turned to what the court saw as the important societal need for a new rule of vendor liability.[53]

1967) (stating that while the police power is generally considered an exclusive power of the legislature, it may be exercised by the courts). For a further discussion of the tension between the legislature and the judiciary, see *infra* note 48.

47. *Brigance*, 725 P.2d at 303-04.

48. *Id.* (referring to Vanderpool v. State, 672 P.2d 1153, 1157 (Okla. 1983) where the Oklahoma Supreme Court modified the common law doctrine of governmental immunity).

Perhaps by this reasoning the court was setting the stage for future legislative input in the area of dram shop liability. If the legislature enacts a dram shop law that attempts to limit the effects of *Brigance*, the Oklahoma judiciary may be faced with a constitutional struggle if it wants to take the concept of vendor liability any further than *Brigance*. The courts could use the common law as its arsenal to determine that the judiciary has the authority to decide the issue without deference to the legislature. However, the separation of powers principle enunciated in OKLA. CONST. art. IV, § 1 may create a problem. *See, e.g.*, Champlin Ref. Co. v. Oklahoma Tax Comm'n, 25 F. Supp. 218, 220 (W.D. Okla. 1938) (stating that it is the duty of the courts to give effect to legislative acts, not to amend, repeal, or circumvent them); Allgood v. Allgood, 626 P.2d 1323, 1327 (Okla. 1981) (a court may not ignore the plain words of a statute).

49. *Brigance*, 725 P.2d at 303.

50. *See supra* note 27 and accompanying text. If the legislature had wanted to specifically abrogate the rule of vendor liability, presumably it would have enacted "reverse" dram shop legislation. "Reverse" dram shop acts typically provide that individuals such as tavern owners or social hosts will not be held civilly liable for injuries to a third person caused by an inebriate.

51. *Brigance*, 725 P.2d at 303. For a discussion of the 1907 dram shop act, see *supra* note 22.

52. *Brigance*, 725 P.2d at 303. This view is in accord with the federal court's interpretation of congressional silence. *See, e.g.*, Cort v. Ash, 422 U.S. 66 (1975) (illustrating the view that legislative silence does not always reflect legislative intent).

53. *Brigance*, 725 P.2d at 303-04.

The frequency of drunk driving accidents and ensuing bodily injuries[54] affected the *Brigance* decision. The court noted that in the "horse and buggy" days the common law of torts was not significantly affected by the sale of liquor to an intoxicated person.[55] The current use of automobiles, however, dictated the need to modify the common law because, in the words of Justice Hughes, steel and speed become "a lethal weapon in the hands of a drunken imbiber."[56] The rule of non-liability was considered unrealistic, inconsistent with modern tort theories, and a complete anachronism in today's society.[57] Conceivably, if vendors exercise due care in serving intoxicating liquors, they should be able to help curb the effects of drinking and driving. Although a rule of civil liability may only marginally affect the drinking and driving statistics, any deterrent is likely to be welcomed by a society that has become greatly concerned about the tragedies caused by intoxicated drivers.[58]

The *Brigance* court found the duty of the commercial vendor in ordinary common law negligence principles and statutory mandate.[59] The elements of common law negligence were summarized as duty, breach, causation, and damages.[60] Thus, a plaintiff is required to prove each element of negligence before liability can be imposed under the *Brigance* decision.

According to *Brigance*, both common law negligence principles and statutory enactment dictate the commercial vendor's duty.[61] The court

54. *Id.* at 304. *See supra* note 3 (drunk-driving statistics).

55. *Brigance*, 725 P.2d at 304.

56. *Id.*

57. *Id.*

58. *See supra* note 3. As part of its effort to increase awareness of the problems associated with drinking and driving, Remove Intoxicated Drivers (RID) works with owners and employees of bars and taverns, so the overall impact may prove to be more than marginal in the long-run. Telephone interview Ed Wheeler, President of RID, Tulsa, Okla. Chapter (Oct. 22, 1986).

59. *Brigance*, 725 P.2d at 304. *See infra* note 61 (discussion of negligence *per se* principles in relation to the Oklahoma statute addressing the furnishing of alcoholic beverages to an intoxicated person).

60. *Brigance*, 725 P.2d at 302.

61. Under OKLA. STAT. tit. 37, § 537(A)(2) (Supp. 1986) it is illegal to serve alcohol to an intoxicated person. The court noted the statutory violation in its holding but did not delve into a negligence *per se* analysis. *Brigance*, 725 P.2d at 304 & n.7. If a party violates a statute or ordinance which imposes only criminal liability, the violation also can be used to inflict civil liability. A statute or ordinance is logically considered to impose a duty upon a person to act in a manner that complies with the law so the violation may be defined as evidence of negligence for civil liability purposes. W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS, § 36 (5th ed. 1984). *See also* Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613 (Okla. 1980) (violation of mechanical code ordinance found to be negligence *per se*).

There are several possible reasons why the court failed to fully address the statutory violations. The court might have wanted to reassert its authority to rule on the issue of vendor liability without giving deference to the legislature. Or perhaps the court did not use a theory of negligence *per se* in

noted the statutory violation in serving liquor to one noticeably intoxicated and then focused on common law negligence concepts.[62] Generally, if circumstances demonstrate that it is reasonable to expect that one's actions will result in an unreasonable risk of harm to others, the actor then has a legal duty to behave in a reasonable manner.[63] In applying this general proposition, the *Brigance* court stated that the commercial vendor has a duty to exercise reasonable care not to sell or furnish liquor to a noticeably intoxicated person in anticipation that the patron's impaired driving ability could cause injury to others.[64] Based upon the facts and circumstances presented in *Brigance*, the foreseeable occurrence of injury to the plaintiff as a result of the driver's impaired ability to operate an automobile imposed a duty upon the vendor to act reasonably, and the failure to do so constituted a breach of duty.[65] Although the facts easily suggested findings of duty and breach, the causation element of negligence presented a more complicated issue to the *Brigance* court.

To establish vendor liability, the court had to find that the vendor's breach of duty proximately resulted in the plaintiff's injuries.[66] By holding that the breach proximately caused the injury, the court effectively abrogated the traditional rule of non-liability which provided that the consumption and not the sale of liquor was the proximate cause of ensuing injuries.[67] By demonstrating that the intoxicated person's consumption of liquor was not a supervening cause, the court established that the commercial vendor's breach of duty was the proximate cause of the plaintiff's injuries.[68] Because the consumption was considered a foreseeable consequence of the sale, the chain of legal causation between the

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Brigance, because it feared that relying on a legislative enactment to impose liability would bind it to any future legislation on dram shop liability. Or maybe the court was broadening the way for future litigation because the facts before it were so narrow.

Several jurisdictions have imposed civil liability on liquor suppliers on a negligence *per se* theory. *See, e.g.*, Davis v. Shiappacossee, 155 So. 2d 365 (Fla. 1963); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Pike v. George, 434 S.W.2d 626 (Ky. 1968); Chausse v. Southland Corp., 400 So. 2d 1199 (La. Ct. App. 1981); Lopez v. Maez, 98 N.M. 625, 651 P.2d 1269 (1982); Davis v. Billy's Con-Teena, Inc., 284 Or. 351, 587 P.2d 75 (1978); Callan v. O'Neil, 20 Wash. App. 32, 578 P.2d 890 (1978).

62. *Brigance*,725 P.2d at 304 & n.7.

63. *Id.* at 304.

64. *Id.*

65. *Id.*

66. *Id.* at 305.

67. *See supra* note 2 and accompanying text.

68. *Brigance*, 725 P.2d at 305. The court defined a supervening cause as an intervening cause that breaks the causal nexis between the negligent sale of liquor and the plaintiff's injury. *Id.* The test to determine whether a cause is supervening is whether it is "(1) independent of the original act,

negligent sale and the resulting injuries was not broken, and the vendor could be held civilly liable to the injured plaintiff.[69] Under the *Brigance* causation analysis a plaintiff must prove that the "illegal sale of alcohol led to the impairment of the ability of the driver which was . . . a causal connection between the sale and a foreseeable ensuing injury."[70]

By adopting a rule of liability, the Oklahoma Supreme Court created a new civil cause of action.[71] The court determined that "public policy is better served by holding that the common law principles of negligence are applicable where a commercial vendor for on the premises consumption is shown to have sold or furnished intoxicating beverages to a person who was noticeably intoxicated."[72] The rule of liability adopted in *Brigance* was applied to the parties in the case and is to be applied prospectively to similar causes of action.[73] Although the *Brigance* decision creates a new cause of action in Oklahoma, several issues incident to vendor liability remain unresolved.

V. ANALYSIS

Brigance came before the Oklahoma Supreme Court at a time when the issue of dram shop liability was particularly significant because of the frequency of drunk-driving accidents and ensuing bodily injuries to an unsuspecting public.[74] The Oklahoma legislature failed to enact any new laws in the area despite the fact that a majority of jurisdictions either enacted dram shop acts or judicially imposed civil liability on vendors of intoxicating beverages.[75] Given these facts and the Oklahoma Supreme Court's view that it had the power to act on the issue,[76] the imposition of a new rule of vendor liability is not surprising. The court's holding is

(2) adequate of itself to bring about the result and (3) one whose occurrence was not reasonably foreseeable." *Id.; e.g.*, Thompson v. Presbyterian Hosp., Inc., 652 P.2d 260, 264 (Okla. 1982).

The *Brigance* court ultimately determined that an inebriate's consumption of liquor following a negligent sale did not constitute a supervening cause. *Brigance*, 725 P.2d at 305. In making this determination the court focused primarily upon the foreseeability factor of the supervening cause test. The car accident caused by the drunk driver was considered a foreseeable consequence of the negligent sale of liquor. *Id.*

69. *Brigance*, 725 P.2d at 305.

70. *Id.*

71. *Id.* at 306.

72. *Id.* at 305.

73. *Id.* at 306. The issue is now how far the judiciary will be able to expand the *Brigance* decision. For a discussion of a few of the unresolved issues, see *infra* text accompanying notes 77-105.

74. *Brigance*, 725 P.2d at 304. *See supra* note 3.

75. *See supra* notes 26-27 and accompanying text; notes 20-21 and accompanying text.

76. *See supra* notes 45-48 and accompanying text.

extremely narrow, however, and will ultimately force injured plaintiffs to litigate issues left unresolved by the decision unless the legislature steps in and clearly defines the parameters of the new rule of civil liability.

A. *Unresolved Issues*

Because the court was limited by the facts before it, questions remain. Among the obvious unresolved issues are questions about the scope of the vendor's duty, civil liability based on illegal sales to minors, liability of liquor store owners, social host liability, and the usual defenses of assumption of risk and comparative negligence.

1. Scope of the Commercial Vendor's Duty

The holding in *Brigance* does not clearly explain the common law duty of a commercial vendor. Does the vendor have a duty *not* to serve a noticeably intoxicated patron, or is the vendor allowed to serve but to exercise reasonable care in doing so? The court twice stated the vendor's duty explicitly, but used materially different language in both instances.[77] While it may only be a matter of semantics for purposes of determining that the *Brigance* court held that a vendor may be civilly liable to a third person injured by an inebriate, the variation in language presents a problem in establishing what exactly the commercial vendor's duty entails. If faced with a civil liability claim, it would be difficult under *Brigance* for a vendor to assert that he exercised reasonable care in serving the one who injured the plaintiff, because the supreme court failed to establish any guidelines for defining the vendor's standard of care. In examining the court's failure to define a standard of care and the Oklahoma criminal statute addressing the issue of serving intoxicating beverages, *Brigance* should be read as holding that the commercial vendor has a duty *not* to serve alcoholic beverages to a noticeably intoxicated person when the vendor can reasonably foresee the unreasonable risk of harm to others as a result of the inebriate's impaired ability to operate an automobile.

The commercial vendor may not be protected from civil liability by exercising reasonable care in serving one noticeably intoxicated[78] because

77. For instance, in concluding that the judiciary had the authority to modify the common law, the court stated: "[W]e, thus, hold that one who sells intoxicating beverages for on the premises consumption has a duty to exercise reasonable care *not* to sell liquor to a noticeably intoxicated person." *Brigance*, 725 P.2d at 304 (emphasis added). Whereas, in analyzing duty, the court held that "the commercial vendor for on the premises consumption is under a duty . . . to exercise reasonable care in *selling or furnishing* liquor to [intoxicated persons]." *Id.* (emphasis added).

78. *Id.*

the court did not define what constitutes a standard of reasonable care. The court's failure to establish guidelines by which a commercial vendor is to conduct himself when dealing with intoxicated customers suggests that when a third party is injured by an inebriate, hindsight will always dictate that reasonable care in serving was not exercised. At first blush, this analysis may appear to be ignoring the elements of negligence and suggesting a strict liability standard. However, the negligence theory is still intact, because although the court basically ignored the vendor's standard of care, it did focus on what the vendor must foresee in order to escape civil liability.[79] Foreseeability is an element of negligence causation, and the vendor's duty under *Brigance* is to foresee the unreasonable risk of harm to others.[80] Thus, if a vendor recognizes that a patron is intoxicated,[81] the vendor should reasonably assume that the customer will rely on an automobile for transportation which will cause potential danger to others. Thus, the vendor should refuse to serve intoxicating beverages to an intoxicated patron. If the plaintiff cannot prove that the vendor served the patron while the customer was noticeably intoxicated, the vendor should escape liability under *Brigance*.[82]

Additional support for the proposition that a commercial vendor should exercise reasonable care *not* to serve one noticeably intoxicated is found in statutory authority. The Oklahoma statute that imposes criminal liability on persons who serve liquor to intoxicated persons was a basis for imposing civil liability on the vendor in *Brigance*.[83] A vendor has a duty to act in compliance with the statute and serving one noticeably intoxicated was a violation implicitly found by the court to be negli-

79. *Id.*

80. *Id.*

81. Not only did the court fail to clearly define the vendor's standard of care, it also failed to set forth guidelines to ascertain whether a patron's intoxication meets the standard of "noticeably intoxicated."

See Kyle v. State, 366 P.2d 961, 965-66 (Okla. Crim. App. 1961), where the court defined the standard for determining whether one is intoxicated within the meaning of the liquor control statute. A seller is guilty of selling alcoholic beverages to an intoxicated person when the one to whom the sale was made was "so far under the influence of intoxicants that his conduct and demeanor were not up to standard" which is "reasonably discernible to a person of ordinary experience." A seller cannot repudiate responsibility by failing to observe or by ignoring the patron's intoxicated state. *Id.* There are a variety of standards used in other jurisdictions for ascertaining whether one is intoxicated. See Note, *Dram Shop Civil Liability in Arizona—Ontiveros v. Borak, 136 Ariz. 500, 667 P.2d 200 (1983); Brannigan v. Raybuck, 136 Ariz. 513, 667 P.2d 213 (1983),* 1984 ARIZ. ST. L.J. 369, 382-84, for a discussion of some of the usual criteria.

82. *Brigance*, 725 P.2d at 306. It is assumed that proving that a customer was noticeably intoxicated at the time of the illegal sale is plaintiff's burden along with the other elements of the negligence claim.

83. OKLA. STAT. tit. 37, § 537(A)(2) (Supp. 1986); *Brigance*, 725 P.2d at 304.

gence as a matter of law.[84] Thus, a vendor should be aware that the refusal to serve liquor to a noticeably intoxicated person is wiser than attempting to comply with an equivocal "duty to exercise reasonable care in serving one noticeably intoxicated."[85] In addition to the failure to clearly establish the vendor's standard of care when dealing with intoxicated persons, the *Brigance* court failed to analyze the vendor's potential civil liability to a third person injured by an illegally served minor.

2. Civil Liability for Illegal Sales to Minors

Although suggested by the facts, the *Brigance* court did not specifically rule on the issue of a vendor's civil liability to a third person injured by the impaired driving of an illegally served minor.[86] The issue before the court was the negligent sale of intoxicating beverages to an intoxicated person, but the court specifically noted that the negligently served person was also a minor.[87] Moreover, when the court discussed the sale as a statutory violation, it cited the provision that prohibits the sale of liquor to minors along with the provision that prohibits the sale to intoxicated persons.[88] Thus, the court could have further defined the vendor's duty by explicitly recognizing that civil liability to third persons injured by illegally served minors may be imposed. Several jurisdictions have held vendors civilly liable for negligent sales to minors[89] on either a negligence *per se* or common law negligence theory.[90]

Legislation prohibiting the sale of alcohol to minors often has an underlying public policy goal to protect minors.[91] With public policy in

84. *Supra* note 61 and accompanying text.

85. *Brigance*, 725 P.2d at 304.

86. *Id.*

87. *Id.* at 302.

88. *Id.* at 304 & n.7.

89. *See, e.g.*, Morris v. Farley Enter., 661 P.2d 167 (Alaska 1983); Brannigan v. Raybuck, 136 Ariz. 513, 667 P.2d 213 (1983); Migliore v. Crown Liquors, 448 So. 2d 978 (Fla. 1984); Alegria v. Payonk, 101 Idaho 617, 619 P.2d 135 (1980); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Lewis v. State, 256 N.W.2d 181 (Iowa 1977); Pike v. George, 434 S.W.2d 626 (Ky. 1968); Chausse v. Southland Corp., 400 So. 2d 1199 (La. Ct. App. 1981); Michnik-Zilberman v. Gordon's Liquor, Inc., 390 Mass. 6, 453 N.E.2d 430 (1983); Munford, Inc. v. Peterson, 368 So. 2d 213 (Miss. 1979); Nesbitt v. Westport Square, Ltd., 624 S.W.2d 519 (Mo. Ct. App. 1981); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); Porter v. Ortiz, 100 N.M. 58, 665 P.2d 1149 (N.M. Ct. App. 1983); Davis v. Billy's Con-Teena, Inc., 284 Or. 351, 587 P.2d 75 (1978); Smith v. Clark, 411 Pa. 142, 190 A.2d 441 (1963); Smith v. Evans, 421 Pa. 247, 219 A.2d 310 (1966); Sorensen v. Jarvis, 119 Wis. 2d 627, 350 N.W.2d 108 (1984); McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983).

Usually there is no requirement that the minor be noticeably intoxicated before liability can be imposed. *See, e.g., Brannigan*, 136 Ariz. 513, __, 667 P.2d 213, 216 (where the court discussed the foreseeable hazard as the minor *becoming* drunk and injuring himself or others).

90. For a discussion of negligence *per se*, see *supra* note 61.

91. *See, e.g.*, Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959) (landmark case in the area

mind, courts consider it especially reprehensible to sell intoxicating liquor to minors.[92] When a sale ultimately results in injury to a third party, the courts are quick to place the blame on the liquor vendor and find negligence as a matter of law.[93]

A liquor vendor can also be held civilly liable for selling liquor to a minor on ordinary negligence grounds, because the vendor should reasonably foresee that minors may cause harm to others if they are intoxicated.[94] Because minors are often considered too immature and inexperienced to be held completely accountable for some of their actions, it is considered foreseeable that a minor may act negligently if entrusted with certain instrumentalities.[95] It follows that when a minor who intends to operate a motor vehicle is served intoxicating beverages, the unreasonable risk of danger to the public is foreseeable.[96] Therefore, a duty to take precautions and to protect others from the minor's inexperience, which is dangerously heightened by alcohol, can easily be assigned to the commercial vendor of intoxicating beverages.

In addition to its holding, the *Brigance* court could have explicitly recognized that a vendor may be civilly liable to a third person injured by an illegally served minor. The relevant facts were before the court and Oklahoma law has already clearly imposed a duty upon liquor licensees when dealing with minors.[97] Liability could have been imposed through a finding of either negligence *per se* or ordinary negligence. Not only did the *Brigance* court fail to clearly establish the commercial vendor's standard of care when dealing with either intoxicated persons or with minors,

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of vendor civil liability for the negligent sale of intoxicating beverages to a minor. Many jurisdictions which recognize a civil right of action against a liquor vendor do so on the theory enunciated in *Rappaport*). *Brigance*, 725 P.2d at 302-03.

92. *Id.*

93. Morris v. Farley Enter., 661 P.2d 167 (Alaska 1983); Davis v. Billy's Con-Teena, Inc., 284 Or. 351, 587 P.2d 75 (1978); Young v. Caravan Corp., 99 Wash. 2d 655, 663 P.2d 834 (1983).

94. Minors are thought to react more violently to the effects of alcohol than are adults. Telephone interview with Ed Wheeler, President of RID, Tulsa, Okla. Chapter (Oct. 22, 1986). The extreme reactions combined with a lack of maturity and awareness of the effects of alcohol create a danger for others. *Id.*

95. *See, e.g.*, Vance v. Thomas, 716 P.2d 710 (Okla. Ct. App. 1986) (plaintiff who was shot in the eye with a BB gun had a claim for relief on a negligence theory against the parent of the child handling the gun).

96. Brannigan v. Raybuck, 136 Ariz. 513, __, 667 P.2d 213, 216 (1983). The court also mentioned the unreasonable risk that the minor may injure himself. *Id.*

97. A vendor has the responsibility to determine the age of a customer, and where facts, circumstances, or appearances offer the slightest indicia of suspicion, a licensee is required to make a deliberate effort to ascertain the age of the patron before any sale is consumated. Oklahoma Alcoholic Bev. Control Bd. v. Moss, 509 P.2d 666, 668-69 (Okla. 1973). If there is any doubt about the customer's age, the sale of alcoholic beverages must be refused. Thus, a vendor may not repudiate his duty by ignoring the obvious. *Id.*

the Oklahoma Supreme Court also failed to indicate what position it will take if future claims of liquor store owner liability or social host liability come before the court.

3. Liability of Liquor Store Owners

Although the *Brigance* court focused on commercial vendors for on the premises consumption, liquor store owners may also be held liable under the same principles that govern tavern owner liability. Both are classified as licensees under the Oklahoma Alcoholic Beverage Control Act.[98] A duty derived from the Oklahoma liquor control laws thus may apply to liquor store owners as well as to tavern owners.

While it may be argued that injury to a third person is less foreseeable to a liquor store clerk because the alcohol is less likely to be consumed on the premises,[99] a sale to an intoxicated person or a minor would nevertheless constitute a statutory violation.[100] Therefore, a liquor store owner may be found negligent as a matter of law.[101] Because *Brigance*, however, focused on the concept of foreseeability for both duty and causation, it may be more difficult to prove the requisite causal connection between the sale and the ensuing injuries.[102] Accordingly, *Brigance* can be used as a foundation for liquor store owner liability; but until there is further litigation or legislation on the issue, a petition seeking recognition of such liability should be supplemented with negligence *per se* as an alternative method of recovery.

4. Social Host Liability

The Oklahoma Supreme Court specifically stated that it did not address the issue of social host civil liability in the *Brigance* opinion.[103] In

98. OKLA. STAT. tit. 37, § 506(12) (Supp. 1986). *See also* Note, *supra* note 81 at 385 (introducing the notion that liquor store owners could be held liable under the same principles that govern tavern owner liability due to their licensee status in the law).

99. OKLA. STAT. tit. 37, § 534(B) (Supp. 1986) (package store licensees may only sell alcoholic beverages for consumption off the premises).

100. OKLA. STAT. tit 37, § 537(A)(1)(2) (Supp. 1986). Under this analysis a purveyor of 3.2 beer could also be held liable for an illegal sale to a minor. OKLA. STAT. tit. 37, § 241 (Supp. 1986).

101. A statutory violation as evidence of negligence is discused *supra* note 61. *See also* Note, *supra* note 81, at 384-85 (suggesting that such sales would be negligence *per se*).

102. *See* Note, *supra* note 81, at 385 (discussing the difficulties in proving the requisite causal connection). Because the court restricted the holding to sales for on the premises consumption, this may be some indication that the court would consider injury caused by an illegal sale for off the premises consumption less foreseeable. However, if an injured plaintiff can prove that the sale was made to a noticeably intoxicated person, the foreseeability factor of the *Brigance* analysis may be met.

103. *Brigance*, 725 P.2d at 306 n.12.

fact, nothing in the holding indicates that the court even considered the possibility of recognizing social host liability, because the court expressly limited its holding to the issue of commercial vendor liability for on the premises consumption.

By examining the court's analysis, however, some of the same factors that were applied to commercial vendors may also be applied to social hosts. The court spoke of liability primarily in terms of the foreseeability factor. Thus, under the appropriate circumstances, a social host may be expected to foresee the unreasonable risk of harm to others caused by furnishing liquor to a minor or to an intoxicated person. In fact, a social host may be more likely to have knowledge of one's intoxication or minority; so in terms of foreseeability, social host liability may not be precluded in future litigation despite the narrow holding in *Brigance*.[104]

The civil liability of social hosts finds even more support in Oklahoma's liquor control laws. The same statute relied upon by the *Brigance* court to impose vendor liability could also be used to impose social host liability. The law provides that *no person* shall knowingly sell, deliver, *or furnish* alcoholic beverages to any person under twenty-one years of age or to an intoxicated person.[105] This broad language suggests that social host liability may be recognized as a matter of law. Thus, if the foreseeability element used in *Brigance* and negligence shown by statutory violation are combined, social host liability in Oklahoma may be recognized in the future. Furthermore, in light of the nationwide campaign against drinking and driving, the imposition of social host liability may be considered to be in the public interest unless Oklahoma precludes its recognition by specific legislation or further litigation.

B. *Defenses*

The defendant in *Brigance* did not assert any of the usual defenses to negligence; instead, the defendant relied on the traditional rule of nonliability and simply claimed that the court was not free to change the rule.[106] In light of the trend to recognize vendor civil liability, the tavern

104. Recall that the Oklahoma legislature sought to enact a dram shop statute in 1985 which while providing some civil remedies, specifically precluded social host liability. *See supra* note 38 and accompanying text. The implication is that if the legislature attempts to limit the *Brigance* holding by statute, recovery from social hosts may be expressly denied.

105. OKLA. STAT. tit. 37, § 537(A)(1)-(2) (Supp. 1986) (emphasis added). Furthermore, "person" may include an individual. OKLA. STAT. tit. 37, § 506 (23) (Supp. 1986).

106. *Brigance*, 725 P.2d at 303; Defendants/Appellees' Response Brief at 8, Brigance v. Velvet Dove Restaurant, Inc., 725 P.2d 300 (Okla. 1986) (No. 62,0005).

owner must utilize defenses other than the traditional rule of non-liability. The usual defenses to negligence liability include assumption of risk and contributory or comparative negligence.[107]

1. Assumption of Risk

If a plaintiff knowingly exposes himself to danger, he may be subject to the affirmative defense of assumption of risk.[108] An assumption of risk defense requires a finding of two elements: (1) the plaintiff must know risk is present and understand its nature, and (2) his choice to incur it must be free and voluntary.[109] The choice to ride in an automobile with a drunk driver could arguably meet the assumption of risk requirements, thus making the defense applicable to vendor liability.

The facts in *Brigance* suggest that an assumption of risk defense may have been appropriate. The commercial vendor could have reasonably argued that Brigance assumed the risk by riding in the car with an intoxicated driver and that the plaintiff's conduct in encountering a known risk should have been considered unreasonable. Defining taking risk as unreasonable, however, suggests that the injured plaintiff may also be accused of comparative negligence. Although a comparative negligence defense may be more applicable to a suit brought by an injured consumer,[110] the unreasonable conduct factor inherent in an assumption of risk defense indicates that both types of defenses should be asserted by the vendor in a civil liability claim brought by an injured third party.

2. Comparative Negligence

If the injured consumer becomes a recognized plaintiff in Oklahoma dram shop litigation, and is thus able to assert a civil liability claim against a liquor vendor for damages incurred as a result of his intoxication, the liquor vendor should assert a comparative negligence defense to the patron's claim.[111] The *Brigance* majority expressly declined to ad-

107. Tome v. Berea Pewter Mug, Inc., 4 Ohio App. 3d 98, 446 N.E.2d 848 (1982). The opinion notes that in some claims of negligence *per se*, contributory negligence is not recognized as a defense; however, contributory negligence may be invoked even where the defendant is found to have committed negligence *per se*. Id. For a discussion of negligence *per se*, see *supra* note 61.

108. *Tome*, 4 Ohio App. 3d at __, 446 N.E.2d at 853.

109. W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS, § 68 at 487 (5th ed. 1984).

110. *See infra* note 111 and accompanying text. Comparative negligence is more applicable to a suit brought by the injured consumer because the vendor will want to assert that the patron was negligent in driving an automobile while intoxicated. However, the defense may not be a valid one to assert against a vendor liability claim. *See infra* note 115.

111. Oklahoma avoids the harshness of a strict contributory negligence doctrine by statutorily recognizing a comparative negligence defense. OKLA. STAT. tit. 23, § 13 (1981). Instead of com-

dress the question of whether a consumer intoxicated driver has a new cause of action against the commercial vendor for on the premises consumption, hence the issue is conceivably open to either further litigation or legislative response.[112] Some jurisdictions hold that a contributory negligence defense is unavailable to a tavern owner. Because the defense completely bars any recovery by the plaintiff, the scope of vendor liability would be meaningless if he could claim that it was the patron's own fault for drinking too much.[113] However, under Oklahoma's comparative negligence statute, the commercial vendor may have a more viable defense under the appropriate circumstances.

If a vendor can successfully claim that the injured consumer plaintiff was negligent in causing his own injuries, the vendor may have a valid comparative negligence defense to a civil liability claim. However, because the Oklahoma statute providing the defense states that comparative negligence may completely bar a plaintiff's recovery if the plaintiff's negligence is of a greater degree than the defendant's negligence,[114] the liquor vendor should be aware that the Oklahoma courts may view this defense as effectively undermining the cause of action created in *Brigance* and thus invalidate the defense.[115] Paradoxically, therefore, it seems that the vendor may be better off accepting partial responsibility for damages in anticipation that a court may invalidate the defense to vendor liability which will thus place full liability on the vendor if he attempts to show that the plaintiff's negligence greatly outweighed his own.[116] However,

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pletely barring a negligent plaintiff's cause of action, the comparative negligence theory allows a degree of negligence to attach to each party to illustrate their comparative fault. *Id.* A plaintiff may therefore still recover a portion of his damages.

112. *Brigance*, 725 P.2d at 305 n.11. The concurring opinion states that traditional common law rule of vendor non-liability with regard to the injured consumer as plaintiff is still intact. *Brigance*, 725 P.2d at 306. The statement may be some indication that this cause of action will be flatly denied by the court in the future, but until that decision is made, the vendor should be aware of the comparative negligence defense.

113. *See* Ontiveros v. Borak, 136 Ariz. 500, __, 667 P.2d 200, 205 (1983) (acknowledging that one cannot become intoxicated if one does not drink; but that the obverse is equally true, that one cannot become intoxicated by drinking liquor unless someone furnishes it).

114. OKLA. STAT. tit. 23, § 13 (1981).

115. When the plaintiff's negligence is of a greater degree than the defendant's negligence, the defense effectively changes from comparative negligence to contributory negligence and the defendant will escape liability completely. However, because comparative negligence is a proximate cause issue, a determination that the patron's negligence legally caused his own injuries would be an effective abrogation of the new rule of vendor liability set forth in *Brigance*.

116. However, the court may want to completely deny the defense to avoid inundating the courts with lawsuits on the issue of the plaintiff's negligence. The defense could be used so effectively that the *Brigance* rule would be undermined.

as with asssumption of risk, comparative negligence is a jury question.[117] If judicially considered to be a valid defense to dram shop litigation, the tavern owner may still raise the defense in hopes that the jury will determine that the patron's cause of action should be completely negated or at least determine that the plaintiff should only be allowed partial recovery.

VI. CONCLUSION

In *Brigance v. Velvet Dove Restaurant, Inc.*, the Oklahoma Supreme Court abrogated the traditional common law rule of commercial vendor liability, holding that the vendor has a duty to exercise reasonable care not to serve one noticeably intoxicated, who may lack the ability to safely operate a motor vehicle and who may create an unreasonable risk of harm to others. The tavern keeper's duty arises in light of foreseeable circumstances and statutory mandate.

Commercial vendors must take steps to guard against liability by educating their employees to exercise reasonable care in dealing with their patrons. The *Brigance* standard is admittedly nebulous, but the tavern keeper must take care to recognize a customer's intoxication and comply with Oklahoma's liquor control statutes when dealing with intoxicated persons and minors.

Finally, the commercial vendor should be aware of the possible defenses to civil liability and realize that reliance on the traditional common law rule and a theory of exclusive legislative authority is no longer wise in Oklahoma. The unresolved liability issues alert the liquor store owner and the social host that they may be subject to liability for injuries caused by one to whom they have furnished alcohol. The final effect of *Brigance*, however, may be to urge the legislature to refine the civil liability of the commercial vendor, liquor store owner, and social host.

Marilyn Mollet

117. The defenses of contributory negligence and assumption of the risk are questions of fact for determination by the jury. *See* OKLA. STAT. tit. 23, § 12 (1981).