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WALKING THE LINE OF LIQUOR LIABILITY: *OHIO CASUALTY INSURANCE COMPANY V. TODD*

I. INTRODUCTION

Because nearly one-half of all automobile fatalities involve intoxicated drivers and the costs of alcohol-related accidents have been estimated at more than twenty four billion dollars per year, legislatures and courts have continually expanded the liability of servers of alcoholic beverages.[1] In 1986, Oklahoma joined the majority of states by abrogating the common law rule of tavern owner nonliability in *Brigance v. Velvet Dove Restaurant, Inc.*[2] In *Brigance*, the Oklahoma Supreme Court allowed a third party to recover from a tavern owner after the tavern owner negligently served alcohol to a patron who subsequently injured the third party.[3]

Recently, in *Ohio Casualty Insurance Co. v. Todd* (*Todd I*),[4] the Oklahoma Supreme Court extended liability even further. Concluding that the tavern owner could be found to be negligent in serving an intoxicated patron, the court allowed even the patron a cause of action to recover for injuries he inflicted upon himself while drunk. However, on rehearing only seven months later, the court vacated its earlier decision (*Todd II*).[5]

Although *Todd II* further defined the parameters of Oklahoma liquor liability, issues regarding social host and commercial vendor liability in relation to minors and mentally disabled persons remain unsettled and would be more appropriately and efficiently served with specific legislation than with judicially made law. This comment will present an overview of the history of liquor liability, explore Oklahoma's current position on liquor liability, and present a model dram shop act as an alternative to the need for further judicial interpretation.

1. Lauren A. Kostas, Note, *Negligent Failure to Refuse Service to an Already Intoxicated Patron Renders Alcoholic Beverage Licensee Liable for the Intentional Torts of Intoxicated Patrons*, 20 TEX. TECH L. REV. 1323, 1325 (1989).
2. 725 P.2d 300 (Okla. 1986).
3. *See id.*
4. 61 OKLA. B.J. 3016 (1990).
5. Ohio Casualty Ins. Co. v. Todd, 813 P.2d 508 (Okla. 1991).

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II. COMMERCIAL VENDOR LIABILITY

At common law, a negligence cause of action could not be successfully litigated against a purveyor of alcohol for injuries suffered by the inebriate or a third party.[6] Using negligence principles, courts reasoned that the drinking rather than the serving of alcohol was the proximate cause of any damages.[7] Because of the rising costs to the public, many states imposed liability on the commercial vendor through legislation.[8] Enactment of dram shop acts abrogated common law nonliability by specifically providing a cause of action against the furnisher of alcohol to those injured by the intoxicated person.[9]

While twenty-three states have imposed varying degrees of civil liability through dram shop statutes,[10] other states instead have imposed liability through judicially made law.[11] For example, in *Rappaport v. Nichols*,[12] a minor who had been served liquor at a tavern was involved in an accident injuring a third person. Although New Jersey did not have a dram shop statute providing a specific cause of action, the court allowed an action to commence under negligence principles on the grounds that the server had violated the state's alcohol beverage control statute.[13] The court's determination was a significant departure from earlier decisions that failed to find either causation or a duty on the part

6. 45 AM. JUR. 2D *Intoxicating Liquors* § 553 (1969).

7. *Id.* § 554. The sale of liquor to an intoxicated person is not the legal and natural cause of the death of a third party so as to render the seller liable in damages. *See* Belding v. Johnson, 12 S.E. 304 (Ga. 1890).

8. *See, e.g.*, ILL. ANN. STAT. ch. 43, ¶ 135 (Smith-Hurd Supp. 1991); ME. REV. STAT. ANN. tit. 28-A, §§ 2501-2519 (West 1988).

9. A person is normally considered intoxicated if, because of his consumption of alcohol there is a weakening of his physical and mental capabilities, causing his inability to act and think with ordinary care. Bass v. Rothschild Liquor Stores, Inc., 232 N.E.2d 19, 21 (Ill. App. Ct. 1967).

10. Scott Heard, Comment, *The Liability of Purveyors of Alcoholic Beverages for Torts of Intoxicated Customers*, 47 MONT. L. REV. 495, 496 n.5 (1986). The following states have dram shop acts: Alabama, Alaska, California, Colorado, Connecticut, Florida, Georgia, Illinois, Iowa, Maine, Michigan, Minnesota, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Wyoming. *Id.*

11. *See, e.g.*, Deeds v. United States, 306 F. Supp. 348 (D. Mont. 1969); Alesna v. Legrue, 614 P.2d 1387 (Alaska 1980); Ontiveros v. Borak, 667 P.2d 200 (Ariz. 1983); McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983); Freeman v. Finney, 309 S.E.2d 531 (N.C. 1983).

12. 156 A.2d 1 (N.J. 1959).

13. *Id.* at 10.

> We are fully mindful that policy considerations and the balancing of the conflicting interests are the truly vital factors in the molding and application of common law principles of negligence and proximate causation. But we are convinced that recognition of the plaintiff's claim will afford a fairer measure of justice to innocent third parties whose injuries are brought about by the unlawful and negligent sale of alcoholic beverages to minors and intoxicated persons . . . .

Id.

of a tavern owner.[14] In *Rappaport*, the court concluded that a jury could reasonably find that the vendor's action of serving liquor caused a third party's injuries.[15] In looking at the legislature's intent in enacting an alcohol beverage control statute prohibiting the sale of liquor to minors and intoxicated persons, the court determined that the purpose was to protect the general public, thus creating a duty on the part of the tavern owner.[16] The court concluded that when a vendor serves liquor to a member of this protected class, the duty is breached.[17]

Many states have some form of alcoholic beverage control statutes that prohibit the furnishing of alcohol to specific classes of persons such as minors, intoxicated persons, and alcoholics.[18] In some jurisdictions, violation of a liquor control statute is negligence per se,[19] but in other states, the violation of the statute is only evidence from which one may infer negligence.[20]

Although most states will not find liability without the use of alcohol beverage control statutes or dram shop acts,[21] a few courts have found vendor liability based solely on common law negligence.[22] In these states, vendors face almost unlimited liability unless the court permits the pleading of affirmative defenses.[23] By comparison, some states with dram shop statutes have dollar limitations that shield the vendor from excessive liability.[24] Some states also require a plaintiff to give notice of his injury and of his intent to sue within a short period of time after the accident to prevent the unfair surprise of an action filed just before the expiration of the statute of limitations.[25]

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14. *See* AM. JUR. 2D, *supra* note 6, § 553.
15. *Rappaport*, 156 A.2d at 9.
16. *Id.* at 8.
17. *Id.* at 8-9.
18. *See* Heard, *supra* note 10, at 496 n.5.
19. *See, e.g.*, Trail v. Christian, 213 N.W.2d 618 (Minn. 1973); Elder v. Fisher, 217 N.E.2d 847 (Ind. 1966).
20. *See, e.g.*, Ono v. Applegate, 612 P.2d 533 (Haw. 1980); Michnik-Zilberman v. Gordon's Liquor Inc., 453 N.E.2d 430 (Mass. 1983); Longstreth v. Fitzgibbon, 335 N.W.2d 677 (Mich. Ct. App. 1983); Rappaport v. Nichols, 156 A.2d 1 (N.J. 1959); Lopez v. Maez, 651 P.2d 1269 (N.M. 1982); McClelland v. Tottenhoff, 666 P.2d 408 (Wyo. 1983).
21. *See* Alsup v. Garvin-Wienke, Inc., 579 F.2d 461 (8th Cir. 1978); Konsler v. United States, 288 F. Supp. 895 (N.D. Ill. 1968).
22. *See* Young v. Gilbert, 296 A.2d 87 (N.J. Super. Ct. Law Div. 1972).
23. RONALD S. BEITMAN, A PRACTITIONER'S GUIDE TO LIQUOR LIABILITY LITIGATION 9 (1987). However, some states which have enacted dram shop statutes have also allowed actions to proceed under negligence theories when it has been proven that the dram shop statute doesn't apply to the particular circumstances. *See, e.g.*, Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960); Blamey v. Brown, 270 N.W.2d 884 (Minn. 1978).
24. BEITMAN, *supra* note 23, at 10.
25. *Id.*

III. SOCIAL HOST LIABILITY

Social host civil liability can be founded on either liquor control statutes or the duty of general care one person owes to another.[26] Noncommercial servers include individual hosts, fraternities, groups, and employer hosts.[27] Fewer states have imputed civil liability to the social host than to the commercial server,[28] reasoning that the typical social host is less experienced than the commercial vendor in dealing with liquor and may be less capable of bearing the costs of liability.[29]

Generally, courts have not allowed social host liability based on dram shop acts.[30] In the two states (Iowa and Minnesota)[31] allowing recovery against a social host based on those states' dram shop acts, the legislatures amended their dram shop acts to prevent such a broad interpretation.[32] Not wanting to risk judicial interpretation, some states have expressly declined to create social host liability in their dram shop acts.[33]

IV. THIRD PARTY AND FIRST PARTY RECOVERY

States have not uniformly determined whether an injured party has a cause of action against a tavern owner. Among those states allowing a cause of action, there exists even more variance regarding which parties can recover. Recovering parties can be divided into two major groups: third parties and first parties.

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26. *See* Giardina v. Solomon, 360 F. Supp. 262 (M.D. Pa. 1973); Brattain v. Herron, 309 N.E.2d 150 (Ind. Ct. App. 1974); Thaut v. Finley, 213 N.W.2d 820 (Mich. Ct. App. 1973). These courts allowed alcoholic beverage control statutes to be applied against noncommercial vendors.

27. *See* Kelly v. Gwinnell, 476 A.2d 1219 (N.J. 1984) (individual social host); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 485 P.2d 18 (Or. 1971) (fraternity); Dickinson v. Edwards, 716 P.2d 814 (Wash. 1986) (employer).

28. *See* BEITMAN, *supra* note 23, at 11-14.

29. *See* Timothy R. Duncan, *Noncommercial Liquor Vendor Liability: Social Host and Employer Host Liability in Minnesota*, 9 HAMLINE L. REV. 223, 236 (1986).

30. The following cases have held that dram shop acts do not apply to persons who gratuitously provide alcoholic beverages: DeLoach v. Mayer Elec. Supply Co., 378 So. 2d 733 (Ala. 1979); Heldt v. Brei, 455 N.E.2d 842 (Ill. App. Ct. 1983); Miller v. Owens-Illinois Glass Co., 199 N.E.2d 300 (Ill. App. Ct. 1964); Holmquist v. Miller, 367 N.W.2d 468 (Minn. 1985); Cady v. Coleman, 315 N.W.2d 593 (Minn. 1982); Settlemyer v. Wilmington Veterans Post No. 49, 464 N.E.2d 521 (Ohio 1984); Manning v. Andy, 310 A.2d 75 (Pa. 1973).

31. Williams v. Klemesrud, 197 N.W.2d 614 (Iowa 1972), *overruled by* Lewis v. State, 256 N.W.2d 181 (Iowa 1977); Ross v. Ross, 200 N.W.2d 149 (Minn. 1972). With regard to social hosts who had provided liquor to a minor, both courts broadly interpreted the state's dram shop statute to include the social host.

32. *See* IOWA CODE ANN. § 123.92 (West Supp. 1991); MINN. STAT. ANN. § 340A.801 (West 1990).

33. *See* CAL. BUS. & PROF. CODE § 25602(c) (West 1985).

A. *Third Party Recovery*

Third parties can be categorized into those suing for recovery based on their own injuries and those suing to recover for injuries of another person. A third party plaintiff is typically an innocent bystander who is injured by an intoxicated person and subsequently brings suit against the furnisher of alcohol. While most states allow third party recovery, jurisdictions vary on whether the innocent bystander may recover for personal injuries[34] and for property damage.[35]

Courts may limit or bar a third party's recovery if the plaintiff joined,[36] procured,[37] or encouraged[38] another's intoxication. Such actions may raise issues of contributory or comparative negligence.[39] In addition, some courts have barred or limited the passenger's recovery, reasoning that he assumes the risk of injury when he knowingly rides in a car with an inebriate.[40] However, courts are split on this issue as some courts have held that the third party assumed the risk,[41] while others have reasoned that riding in the car was not an adequately affirmative role to warrant the denial of recovery.[42]

The second category of third party plaintiff includes a party seeking to recover damages for personal injuries or death of another person, for loss of consortium, or for loss of support or service from an injured person.[43] Most courts will allow recovery for loss of support,[44] but recovery

34. George A. Locke, Annotation, *Recovery Under Civil Damage (Dram Shop) Act for Intangibles such as Mental Anguish, Embarrassment, Loss of Affection or Companionship, or the Like*, 78 A.L.R. 3D 1199, 1202-03 (1977).

35. *Id.*

36. *See* James v. Wicker, 33 N.E.2d 169 (Ill. App. Ct. 1941); Plamondon v. Matthews, 385 N.W.2d 273 (Mich. Ct. App. 1985); Barrett v. Campbell, 345 N.W.2d 614 (Mich. Ct. App. 1983).

37. *Id. See also* Douglas v. Athens Market Corp., 49 N.E.2d 834 (Ill. App. Ct. 1943).

38. *See supra* notes 36-37. *But see* Morris v. Farley Enterprises, Inc., 661 P.2d 167 (Alaska 1983) (finding complicity would not bar a third party's recovery).

39. BEITMAN, *supra* note 23, at 125.

40. *See* Goss v. Richmond, 381 N.W.2d 776 (Mich. Ct. App. 1985). The court set out criteria to be considered in determining whether the passenger had assumed the risk of riding with an intoxicated driver:

1. The driver's intoxication
2. The injured person's knowledge of the driver's intoxication and the danger involved
3. The availability of an alternative course to the injured party
4. The injured party's voluntary choice to accept the risk, and
5. Showing that the intoxication was the proximate cause of the injury.

BEITMAN, *supra* note 23, at 125. *But see* Rhyner v. Madden, 457 A.2d 1243 (N.J. Super. Ct. Law. Div. 1982). If the plaintiff passengers were served alcoholic beverages while visibly intoxicated, the plaintiff's conduct in riding with the drunk driver could not be a basis of a finding of the plaintiff's negligence. *Id.* at 1246.

41. *See* Herrly v. Muzik, 374 N.W.2d 275 (Minn. 1985).

42. *See* Mitchell v. Shoals, Inc., 227 N.E.2d 21 (N.Y. 1967).

43. *See, e.g.*, Swanson v. Ball, 290 N.W. 482 (S.D. 1940); Waynick v. Chicago's Last Dep't

for intangibles such as mental anguish or loss of consortium varies even in jurisdictions with dram shop acts.[45] Whether a third party can recover for intangibles depends mainly upon the wording of the dram shop statute.[46] Where the statute limits recovery to personal injuries or property damage, courts will strictly construe the statute, disallowing recovery for loss of intangibles.[47]

B. *First Party Recovery*

The first party case raises issues of public policy and contributory or comparative negligence.[48] The first party plaintiff is the inebriate who sues the furnisher of alcohol to recover for injuries he sustained as a result of his own intoxication.[49] In jurisdictions having contributory negligence standards, courts have found the plaintiff's intoxication to be a complete bar to recovery, holding that the plaintiff's negligence intervened and became the proximate cause of his injury.[50] Public policy has also provided the basis for rejection of a first party claim.[51] For example, in *Allen v. Westchester*,[52] the court refused to allow recovery to a widow for the pain and suffering of her deceased husband who became intoxicated and sustained fatal injuries from a subsequent fall.[53] The court reasoned that the intoxicated person should be held responsible for his

Store, 269 F.2d 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960) (holding a third party can recover for loss of consortium, support, or services of another).

44. *See* Heard, *supra* note 10, at 497.

45. *See, e.g., Swanson*, 290 N.W. at 482. *But see* Rogers v. Dwight, 145 F. Supp. 537 (E.D. Wis. 1956) (limiting recovery to loss of support only).

46. Locke, *supra* note 34, at 1205-08.

47. *See, e.g.*, Knierim v. Izzo, 174 N.E.2d 157 (Ill. 1961); State Farm Mut. Auto Ins. Co. v. Village of Isle, 122 N.W.2d 36 (Minn. 1963). There are exceptions to the general rule. In some jurisdictions damages for mental anguish and the like have been held recoverable under dram shop statutes limiting recovery to personal injury or property damage, where the anguish suffered by the plaintiff was a concomitant cause or an effect of actual physical injury. *See, e.g.*, Duckworth v. Stalnaker, 69 S.E. 850 (W. Va. 1910); Podbielski v. Argyle Bowl, Inc., 220 N.W.2d 397 (Mich. 1974). But there are exceptions to the general rule allowing recovery for mental anguish under broad dram shop statues when the plaintiff failed to prove mental anguish suffered as a consequence of the intoxication for which the defendant was responsible. *See* Robertson v. Devereaux, 188 N.W.2d 209 (Mich. Ct. App. 1971); Sissing v. Beach, 58 N.W. 364 (Mich. 1894).

48. *See* BEITMAN, *supra* note 23, at 9.

49. *Id.* at 124.

50. *See, e.g.*, Swartzenberger v. Billings Labor Temple Ass'n, 586 P.2d 712 (Mont. 1978), *overruled by* Bisset v. DMI, Inc., 717 P.2d 545 (Mont. 1986) (after Montana adopted a comparative negligence scheme).

51. *See* Allen v. Westchester, 492 N.Y.S.2d 772 (App. Div. 1985), *aff'd*, 567 N.Y.S.2d 826 (1991).

52. *Id.*

53. *Id.*

own actions.[54] However, other courts have reasoned that the state liquor control statute or dram shop act was also enacted to protect intoxicated persons from their own incompetence and helplessness, and therefore furnished a method of recovery to the first person as well.[55]

Most states have adopted some form of comparative negligence scheme which lessens the harshness of contributory negligence as a complete bar to recovery.[56] However, these jurisdictions must still determine whether comparative negligence should be limited as a defense tool when the plaintiff is a member of a particular statutorily protected class, such as a minor or a mentally disabled person. To date, only a few courts have addressed this question and the trend seems to favor the application of comparative negligence.[57]

Despite the trend favoring comparative negligence in limited circumstances, a majority of states have continued to apply the contributory negligence standard to a first party plaintiff, barring his cause of action.[58] Courts have been unwilling to find a duty by the server of alcohol under common negligence principles to the first party plaintiff who becomes voluntarily intoxicated.[59]

V. OKLAHOMA LIQUOR LIABILITY

A. *Statutory Development*

In 1907, the Oklahoma legislature enacted the Dram Shop Prohibition Act.[60] This Act banned all alcohol and made one who supplied alcohol liable to anyone injured by the intoxicated person.[61] Enactment of

54. *Id.* (citation omitted).

55. *See, e.g.*, Galvin v. Jennings, 289 F.2d 15, 18-19 (3d Cir. 1961); Soronen v. Olde Milford Inn, Inc., 218 A.2d 630 (N.J. 1966).

56. *See infra* note 107, at 230.

57. *Cf.* Munford, Inc. v. Peterson, 368 So. 2d 213 (Miss. 1979) (allowing assumption of risk as defense); Dynarski v. U-Crest Fire Dist., 447 N.Y.S.2d 86 (1981) (allowing the defense of comparative negligence). *But see, e.g.*, Rhyner v. Madden, 457 A.2d 1243 (N.J. Super. Ct. App. Div. 1982) (refusing to allow comparative negligence as a defense).

58. *See* BEITMAN, *supra* note 23, at 9.

> There appears to be a growing trend in state statutes to deny recovery to the intoxicated person himself. Legislatures have apparently concluded, even if state courts have not, that an injured person should not recover for his injury if he had a hand in it by the over consumption of alcoholic beverages.

Id.

59. *See, e.g.*, Paul v. Hogan, 392 N.Y.S.2d 766 (App. Div. 1977); Hollerud v. Malamis, 174 N.W.2d 626 (Mich. Ct. App. 1969).

60. Prohibition Act, ch. 69, 1907-1908 Okla. Sess. Laws 594 (codified as OKLA. STAT. tit. 37, § 121 (1951)) (repealed 1959).

61. *Id.*

the 1959 Alcoholic Beverage Control Act repealed the Dram Shop Prohibition Act.[62] Since this effective repeal, the Oklahoma legislature has not imposed any specific statutory liability on the tavern owner in conjunction with serving liquor.[63] In fact, the legislature in 1985 attempted to establish new dram shop legislation only to have the bill defeated.[64] However, as illustrated, many states have imposed liability against furnishers of alcohol simply by judicial decision. Hence, when faced with *Brigance v. Velvet Dove Restaurant, Inc.*,[65] the Oklahoma Supreme Court was not alone in imposing liability on tavern owners in the absence of specific dram shop legislation.

B. *Judicial Development*

Brigance marked the beginning of Oklahoma's judicial development of liquor liability. The Velvet Dove Restaurant served alcohol to a minor who was subsequently in a one-car accident which injured his passenger Shawn Brigance.[66] Brigance sued the Velvet Dove Restaurant to recover for his injuries.[67] Having no Oklahoma dram shop legislation or precedent on which to rely, the trial court dismissed the complaint for failure to state a claim.[68] Brigance appealed to the Oklahoma Supreme Court seeking reversal of the dismissal.[69]

The Oklahoma Supreme Court determined that a commercial alcohol vendor may be held liable when a third person is injured by an intoxicated patron who was negligently served alcohol.[70] The court found duty on the part of the tavern owner based in part on Oklahoma's Alcohol Beverage Control Act which prohibits tavern owners from furnishing alcoholic beverages to intoxicated persons and minors.[71] The court also established duty based on the negligence principles of section 390 of the Restatement (Second) of Torts, which provides liability against a person who knowingly furnishes a chattel to others that could cause them harm.[72]

To find causation on the part of the tavern, however, the patron's

62. OKLA. STAT. tit. 37, § 501 (1981).
63. Brigance v. Velvet Dove Restaurant, Inc., 725 P.2d 300, 302 (Okla. 1986).
64. S. 116, 40th Leg., 1st Sess. (1985).
65. 725 P.2d 300 (Okla. 1986).
66. *Id.* at 302.
67. *Id.*
68. *Id.*
69. *Id.* at 301.
70. *Id.* at 302.
71. *See id.* at 304.
72. *Id. See also* RESTATEMENT (SECOND) OF TORTS § 390 (1965).

operation of a motor vehicle must not have been a supervening cause of the plaintiff's injuries.[73] Accordingly, the court examined whether the patron's driving was a cause of injury "(1) independent of the original act, (2) adequate of itself to bring about the result, and (3) one whose occurrence was not reasonably foreseeable," but found that a jury could find that the driving was not independent and adequate of itself, or that plaintiff's injuries were a foreseeable result of the negligent sale of alcohol.[74] Therefore, the legal chain of causation between the negligent sale and the plaintiff's injuries was unbroken.[75]

Having established civil liability on the part of the tavern owner toward third parties injured as a result of the negligent service of alcohol, the Oklahoma Supreme Court opened the door for further expansion of liquor liability. Additional opportunity to define the parameters of commercial vendor liability was soon provided in the case of *Todd I*.[76]

VI. *OHIO CASUALTY INSURANCE CO. V. TODD*

Rick Robertson, filed a cross-claim in federal court against co-defendant Phil Todd, owner of Todd's Tavern, for injuries Robertson sustained as a result of a one-car accident which occurred after leaving Todd's Tavern.[77] Robertson claimed that, in violation of Oklahoma's Alcoholic Beverage Control Act,[78] he was served liquor while he was noticeably intoxicated and contended that the tavern was liable for his injuries.[79] Because the action had been brought in federal court raising a novel issue of law, the question of first party recovery was certified to the Oklahoma Supreme Court.[80]

In response, the Oklahoma Supreme Court ruled that a tavern patron had a cause of action against a tavern owner for injuries suffered in a one car accident after such patron was served alcohol by the tavern.[81] The court found no statutory duty based on Oklahoma's Alcoholic Beverage Control Act on the part of the tavern, but instead, found a duty based on the common law duty of a person not to create an unreasonable

73. *Brigance*, 725 P.2d at 305.
74. *Id.* (quoting Thompson v. Presbyterian Hosp., Inc., 652 P.2d 260, 264 (Okla. 1982)).
75. *Id.*
76. Ohio Casualty Ins. Co. v. Todd, 61 OKLA. B.J. 3016 (1990).
77. *Id.* at 3017.
78. OKLA. STAT. tit. 37, § 537 (Supp. 1991).
79. *Todd*, 61 OKLA. B.J. at 3017.
80. *Id.*
81. *Id.*

risk of harm to others.[82] Seven months later, the court granted the plaintiff's motion for rehearing.[83]

On rehearing, the court vacated its previous decision finding that an adult who voluntarily becomes intoxicated and is subsequently injured in an automobile accident does not have a cause of action against the tavern owner.[84] The court based its decision on an interpretation of Oklahoma's Alcoholic Beverage Control Act and public policy.[85] Examining the requisite elements of a negligence cause of action, the court found the element of duty to be missing.[86] Reasoning that the *Brigance* innocent bystander cause of action was intended to protect only the unsuspecting public, the court refused to impose such a duty with regard to the inebriate.[87] Moreover, the court refused to impose a duty based on the common law duty of every person to avoid creating an unreasonable risk of harm to others, stating that it would be against public policy to reward the inebriate for his immoderation.[88]

Robertson argued that an intoxicated person lacks the requisite self control to understand risks and asserted that the court should impose a common law duty on the tavern owner.[89] The court rejected this argument and found that the tavern owner had neither a common law nor a statutory duty to an intoxicated patron.[90]

Although the *Brigance* decision recognized a duty based on the Oklahoma Alcoholic Beverage Control Act's prohibition of the sale of liquor to intoxicated persons,[91] the *Todd II* court determined that this statute was not enacted to protect the inebriated driver himself.[92]

> We find nothing in [Oklahoma's Alcoholic Beverage Control Act] or in any of the statutes regulating the sale of alcohol, which indicates that the legislature intended to protect the intoxicated adult who, by his own actions, causes injury to himself. Instead, it appears that the legislature intended to protect the unsuspecting public—in effect all of the populace except the willing imbiber.[93]

82. *See id.* at 3019.
83. Ohio Casualty Ins. Co. v. Todd, 813 P.2d 508 (Okla. 1991).
84. *Id.* at 512.
85. *Id.* at 509.
86. *Id.* at 510-11.
87. *Id.* at 510.
88. *Id.* at 511.
89. *See* Brief for Respondent at 3-4, *Todd* (No. 72,490).
90. *See Todd*, 813 P.2d at 512.
91. OKLA. STAT. tit. 37, § 537(A)(2) (Supp. 1985).
92. *See Todd*, 813 P.2d at 510.
93. *Id.* (footnote omitted).

VI. ANALYSIS

By refusing to allow first party liability, Oklahoma joined the majority of states that have denied recovery to an adult who voluntarily becomes intoxicated and subsequently injures himself.[94] Generally, these jurisdictions have determined that the voluntary inebriate should not be rewarded for his self-indulgent acts.[95] On the other hand, some courts have used common law negligence principles to extend such liability to the tavern owner.[96] These courts hold that a tavern owner owes a duty of care when serving a patron alcoholic beverages. The duty of care can be determined by a number of public policy factors: (1) the ethical and moral factor, (2) the economic factor, and (3) the prophylactic factor.[97] However, in weighing factors such as these against the first party plaintiff, the *Todd II* court decided that no duty should be established.[98]

A. *An Inebriate Should Not Be Rewarded For His Own Immoderation*

Although there are a vast number of injuries and deaths sustained by drunken drivers,[99] it is unfair to place the blame and responsibility on the tavern owner. These drivers were not forced to drink. Although arguably they were not able to exercise free will at the time of driving, the fact remains that they freely chose to drink to excess. Under *Brigance*, a tavern owner has a duty to the innocent bystander; however, this finding does not mandate a finding of duty to the inebriate himself.

While the typical third party plaintiff is the innocent bystander who took no part in the drinking and had no opportunity to prevent his injury, the first party plaintiff is a voluntary inebriate who should not benefit from his bad judgement. In fact, where the third party is not innocent but has contributed to the driver's intoxication, many courts have limited or denied his recovery.[100] With the advent of third party recovery, courts concluded that an abrogation of the common law rule of nonliability was justified to protect the innocent bystander from the drunken

94. *See* BEITMAN, *supra* note 23, at 9.

95. *See, e.g.*, Allen v. County of Westchester, 492 N.Y.S.2d 772, 776 (N.Y. App. Div. 1985); Trujillo v. Trujillo, 721 P.2d 1310, 1313 (N.M. Ct. App.), *cert. denied*, 720 P.2d 708 (N.M. 1986).

96. *See, e.g.*, Deeds v. United States, 306 F. Supp. 348 (D. Mont. 1969); Alesna v. Legrue, 614 P.2d 1387 (Alaska 1980); Ontiveros v. Borak, 667 P.2d 200, 207 (Ariz. 1983); McClellan v. Tottenhoff, 666 P.2d 408, 412 (Wyo. 1983); Freeman v. Finney, 309 S.E.2d 531 (N.C. 1983).

97. *See* Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1034 (1928).

98. *See Todd*, 813 P.2d at 512.

99. *See* Kostas, *supra* note 1, at 1325.

100. *See, e.g.*, James v. Wicker, 33 N.E.2d 169 (Ill. App. Ct. 1941); Plamondon v. Matthews, 385 N.W.2d 273 (Mich. Ct. App. 1985); Barrett v. Campbell, 345 N.W.2d 614 (Mich. Ct. App. 1983).

driver.[101] However, this reasoning should not be extended to the inebriate who had the opportunity to prevent his own injury. For example, a worker may not recover for injuries sustained as a result of his own intoxication.[102] Similarly, a criminal defendant is held responsible for his criminal behavior committed during his intoxication.[103]

The *Todd II* dissent argued that it is illogical to distinguish between the first party driving the car, and the third party who is an intoxicated passenger.[104] Although an intoxicated passenger is not the typical innocent bystander, he would theoretically still have the benefit of a *Brigance* cause of action against the commercial vendor. However, in such scenarios, courts have often limited or even denied recovery.[105] The *Todd II* dissent ignored the fact that the intoxicated passenger did not drive the car and endanger innocent people's lives. Although this person cannot be called an "innocent" bystander, he is still highly distinguishable from the first party inebriate. He is not a drunken *driver.*

Furthermore, allowing the inebriate to recover for his injuries would open the "floodgates" of litigation. By extension, the patron might sue not only for his automobile-related injuries, but also for his falling down as he leaves the tavern.[106] In an extreme case, the patron might even claim that the tavern should be responsible for his intentional torts.[107] Consequently, a great amount of judicial time would be wasted in disposing of cases having little or no merit.

B. *Scope of the* Todd II *Decision*

While *Brigance* originally established commercial vendor liability, the *Todd II* decision has limited this liability to third parties. However, *Todd II* is restricted to narrow facts and numerous important issues are still unresolved. Questions concerning sales made to minors or mentally disabled persons remain unanswered. Although the court found a lack of duty to the inebriate, minors and mentally disabled persons require a

101. *See* Brigance v. Velvet Dove Restaurant Inc., 725 P.2d 300 (Okla. 1986); Rappaport v. Nichols, 156 A.2d 1 (N.J. 1959).

102. *Todd,* 813 P.2d at 512.

103. *Id.* (citation omitted).

104. *See id.* at 522.

105. *See, e.g.,* James v. Wicker, 33 N.E.2d 169 (Ill. App. Ct. 1941); Plamondon v. Matthews, 385 N.W.2d 273 (Mich. Ct. App. 1985); Barrett v. Campbell, 345 N.W.2d 614 (Mich. Ct. App. 1983).

106. *See Todd,* 813 P.2d at 512. "Pause, if you will and contemplate the vast number of claims that may be urged by drunks, if they were entitled to every expense and injury that are natural concomitants of their intoxication." *Id.* (citation omitted).

107. *See generally* Madeleine E. Kelly, *Liquor Liability and Blame Shifting Defenses: Do They Mix?* 69 MARQ. L. REV. 217 (1986).

higher standard of care. By analogy, one is negligent if he places a loaded firearm within reach of young children or mentally disabled persons, and one in possession of a dangerous instrumentality readily accessible to children is required by law to protect them from injury.[108] Minors and mentally disabled persons are distinguishable from an adult who becomes voluntarily intoxicated since, unlike the adult, they are unable to understand and appreciate the risks related to their actions even before such actions are taken.[109] Therefore, when minors and mentally disabled persons are first party plaintiffs, it would be reasonable to find that public policy does not bar a duty on the part of the tavern owner.

Oklahoma courts have also not yet addressed the issue of the social host.[110] While public policy concerning drinking and driving may support liability, the average social host is less economically able to sustain liability than the average commercial vendor. More importantly, a social host would be less experienced at recognizing the signs of intoxication than a commercial vendor. Many courts have reasoned that the social host, unlike the commercial vendor, receives no economic gain from furnishing alcohol.[111] Consequently, it would be unfair to hold the social host to the same standard as the vendor.

C. *Model Dram Shop Act*

In Oklahoma's future, the area of dram shop liability will most certainly demand a great deal of litigation to answer the questions of social host liability and whether persons under disabilities are owed a special duty. Oklahoma could avoid the costs of further litigation with the immediate enactment of dram shop legislation. The author suggests the following model based on dram shop acts of other states:[112]

108. *Todd*, 813 P. 2d at 516 n.11 (citing Hart v. Lewis, 103 P.2d 65, 67 (Okla. 1940); Wroth v. McKinney, 373 P.2d 216, 219 (Kan. 1962)).

109. *See Todd*, 813 P.2d at 516.

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

111. BEITMAN, *supra* note 23, at 13 (citing Harriman v. Smith, 697 S.W.2d 219 (Mo. Ct. App. 1985)).

112. *See, e.g.*, ME. REV. STAT. ANN. tit. 28-A, §§ 2501-2519 (West 1988); R.I. GEN. LAWS §§ 3-14-1 to 3-14-15 (1987); ILL. ANN. STAT. ch. 43, ¶ 135 (Smith-Hurd Supp. 1991).

MODEL DRAM SHOP ACT

Definitions

In this chapter:

(l) "Provider" means a person who sells or serves an alcoholic beverage under authority of a license or permit issued under the terms of this code or who otherwise sells an alcoholic beverage to such individual.

(2) "Provision" includes, but is not limited to, the sale or service of an alcoholic beverage.

Plaintiffs

1. Except as provided in subsection 2, any individual who suffers damage, as provided in this Act may bring an action under this Act against a provider for negligently serving liquor to an individual.

2. The following may not bring an action under this Act against a provider for negligently serving liquor to an individual:

A. The intoxicated individual if he or she is 18 years of age or older when served by the server;

B. The estate of the intoxicated individual if the intoxicated individual was 18 years of age or older when served by the server.

Negligent service of liquor; liability

1. A provider who negligently serves liquor to a minor is liable for damages proximately caused by that minor's consumption of the liquor.

2. A provider who negligently serves liquor to a visibly intoxicated individual is liable for damages proximately caused by that individual's consumption of the liquor.

3. A provider who negligently serves liquor to a mentally disabled person is liable for damages proximately caused by that person's consumption of liquor.

4. Service of liquor to a minor, to a mentally disabled person or to an intoxicated individual is negligent if the provider knows, or if a reasonable and prudent person in similar circumstances would know, that the individual being served is a minor, mentally disabled or is visibly intoxicated.

5. A provider is not chargeable with knowledge of an individual's consumption of liquor or other drugs off the provider's premises, unless the individual's appearance and behavior, or other actions known to the provider would put a reasonable and prudent person on notice of such consumption.

Damages

1. Damages may be awarded for property damage, bodily injury, and death proximately caused by the consumption of liquor served by the provider.

Liquor Service Education

The commercial vendor shall provide to employees responsible for serving liquor educational services regarding retail liquor sales including but not limited to seminars, pamphlets or informational signs on the following subjects:

1. The effects alcohol can have on the body and on a person's behavior, in particular, driving ability.

2. Characteristic signs of the problem drinker and of intoxication.

3. State liquor liability and drunk driving statutes.

4. The possible effects one may experience when combining alcohol and legal or illegal drugs.[113]

VII. CONCLUSION

Although the court's decision in *Todd II* prohibited first party recovery from vendors, server liability with respect to third party "innocent bystander" plaintiffs was preserved. The enactment of a comprehensive dram shop act would establish more definite guidelines for the provider of alcohol and would benefit the public directly by promoting server intervention. Providing the server with statutory guidelines would also decrease the costs of litigation by eliminating imprecise and vague standards. Furthermore, several states in the Tenth Circuit have already enacted some form of dram shop legislation.[114] By requiring specific actions of the commercial vendor, such as employee education, the instances of drunken driving would decrease. With the great

113. BEITMAN, *supra* note 23, at 20.

114. *See* UTAH CODE ANN. § 32A-14-101 (1991); N.M. STAT. ANN. § 41-11-1 (Michie 1989); COLO. REV. STAT § 13-21-103 (1987).

number of alcohol-related injuries and deaths, enactment of a dram shop act would enable commercial servers to reduce or completely eliminate their potential liability, as well as misfortune to others.

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