Negligence: *Busby v. Quail Creek Golf and Country Club: A Balanced Approach to Vendor Liability and Underage Drinking*

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NOTES


I. Introduction

The automobile is a constant reminder of a changed and changing America. It has made a tremendous impact on every segment of society, including the field of jurisprudence. In the "horse and buggy" days the common law may not have been significantly affected by the sale of liquor to an intoxicated person. The common law of nonliability was satisfactory. With today's car of steel and speed it becomes a lethal weapon in the hands of a drunken imbibers. The frequency of accidents involving drunk drivers are commonplace. Its affliction of bodily injury to an unsuspecting public is also of common knowledge. Under such circumstances we are compelled to widen the scope of the common law.¹

On June 7, 1994, in Busby v. Quail Creek Golf & Country Club,² the Oklahoma Supreme Court determined that a minor could bring a valid cause of action against a commercial alcohol vendor.³ Specifically, the court found that where a minor is injured as the result of vendor negligence, after consuming beer purchased from the vendor, the minor may have a cause of action against the vendor.⁴ This result was the latest in a line of cases describing dram shop liability in Oklahoma.⁵

This note will examine the requirements of a valid negligence action against commercial alcohol vendors and the extension of liability to protect minor consumers who suffer injuries as a result of their own alcohol-induced actions. First, the status of the law prior to the Busby decision will be summarized. Second, the facts of the case will be provided, supplemented by an analysis of the Oklahoma Supreme Court's opinion. Third, the consequences of the newly defined cause of action will be reviewed. Finally, the decision will be evaluated to determine its consistency with legal precedent and public policy.

2. 885 P.2d 1326 (Okla. 1994).
3. Id.; see also Mansfield v. Circle K. Corp., 877 P.2d 1130 (Okla. 1994) (involving substantially the same issue except that the minor purchased beer for consumption off the premises of the vendor).
II. Law Prior to the Case

A. Dram Shop Liability in Oklahoma Prior to Brigance

Prior to 1986, no law addressed the subject of dram shop liability in Oklahoma.\(^6\) Originally, Oklahoma enacted a dram shop statute in 1910 which imposed civil liability upon servers of alcoholic beverages.\(^7\) This statute was replaced in 1959 by the Oklahoma Alcohol Beverage Control Act.\(^6\) The new act did not provide for civil liability. Thus, Oklahoma courts were left without any legislative guidance regarding vendor liability. In addition, following the repeal of the dram shop statute, the Oklahoma Supreme Court had no occasion to consider vendor liability issues, leaving the courts bereft of judicial guidance on the subject.\(^9\) As a result, prior to \textit{Brigance v. Velvet Dove Restaurant},\(^10\) the Oklahoma Supreme Court determined that the State of Oklahoma followed the traditional common law with regard to dram shop liability.\(^11\)

At common law, a tavern owner (commercial vendor) who served alcoholic beverages was not liable for a third person's injuries caused by an intoxicated patron.\(^12\) This rule was based principally upon concepts of causation.\(^13\) As a matter of law, voluntary consumption of alcohol by the intoxicated patron was designated as the proximate cause of the third party's injuries, not the sale of liquor by the vendor.\(^14\) Because consumption of alcohol, not its sale, was the proximate cause of any injuries, the vendor could not be held legally liable for negligence.\(^15\) This

\(^{6}\) Oklahoma has no reported cases prior to \textit{Brigance.}

\(^{7}\) Prohibition Act, ch. 69, art. III, \$ 21, 1907-1908 Okla. Sess. Laws 594, 610-11 (codified at 37 Okla. Stat. \$ 121 (1951)) (repealed 1959). Title 37, \$ 121 provided:

\begin{quote}
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 corporative, who shall by selling, bartering, giving away, or otherwise furnishing intoxicating liquors, contrary to the provisions of this chapter, 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.
\end{quote}


\(^{9}\) \textit{Brigance}, 725 P.2d at 302.

\(^{10}\) 725 P.2d 300 (Okla. 1986).

\(^{11}\) Id. at 302.

\(^{12}\) Id.; see, e.g., \textit{Cruse v. Aden}, 20 N.E. 73, 74 (III. 1889) (explaining the common law doctrine of nonliability).

\(^{13}\) \textit{Brigance}, 725 P.2d at 302.

\(^{14}\) Id.

\(^{15}\) Id. The elements of common law negligence in Oklahoma have been summarized as "(1) the
traditional rule was first abandoned by New Jersey in 1959. Since then, most states have abandoned the antiquated common law rule. Oklahoma joined this emerging trend in *Brigance v. Velvet Dove Restaurant*.

**B. The Origin of Modern Dram Shop Liability: Brigance v. Velvet Dove Restaurant**

On July 8, 1986, commercial alcohol vendor liability in Oklahoma changed dramatically. The change evolved from the Oklahoma Supreme Court's decision in *Brigance v. Velvet Dove Restaurant*. In *Brigance*, the parents of a minor brought an action against an alcohol vendor, its president, and an employee. The parents alleged that the employee of the Velvet Dove Restaurant (Velvet Dove) served intoxicating beverages to a group of minors. Among the minors served was the individual who drove the group to the restaurant. This individual was known by the Velvet Dove employee to be the driver because the employee assisted the driver to his car upon the group's departure. The parents further alleged that the beverages served by the Velvet Dove caused the driver to become intoxicated or increased his prior intoxication, thereby causing a one-car accident wherein the minor-plaintiff was injured.

The trial court dismissed the negligence suit for failure to state a cause of action. The trial court based its decision on the traditional common law rule. The Oklahoma Supreme Court reversed the trial court, finding that a person injured by an intoxicated person has a valid negligence claim against the commercial vendor.

existence of a duty on the part of the defendant to protect plaintiff from injury; (2) a violation of that duty; and (3) injury proximately resulting therefrom." Sloan v. Owen, 579 P.2d 812, 814 (Okla. 1977).

16. See Rappaport v. Nichols, 156 A.2d 1, 8 (N.J. 1959) (holding that emergence of automobile as prevalent form of transportation made the risk of injury foreseeable).


The Supreme Court of Kansas, in Ling v. Jan's Liquors, 237 Kan. 629, 703 P.2d 731 (1985), revealed just how strong the trend toward abandonment of the traditional rule was in the appendix to its opinion. It reported that fourteen states had dram shop statutes that gave a right of action to persons injured in person, property, or means of support, by an intoxicated person, or in consequence of the intoxication of any person, against the person selling or furnishing the liquor that caused the intoxication in whole or in part. That court further reported that twenty-nine jurisdictions, including the District of Columbia, had judicially abrogated the common law doctrine of no liability, and that six states with dram shop laws had judicially imposed liability in some form. Only six states had no dram shop laws and refused to impose liability judicially.


18. Commercial vendor liability should be distinguished from "social host" liability. Courts have traditionally treated "social hosts" with greater leniency because they are not state licensed alcohol vendors who sell or serve alcohol for profit. *Brigance*, 725 P.2d at 306.


20. Id. at 301.

21. Id. See supra notes 12-15 and accompanying text.
who served alcohol to the intoxicated person for on-premises consumption. In addition to creating dram shop liability, the result announced by the Brigance court is significant for three specific reasons. First, the Brigance court examined its judicial authority and determined that it had both the right and responsibility to create dram shop liability. Second, the Brigance court held that commercial vendors owed innocent third parties a duty to refrain from serving noticeably intoxicated patrons. Third, and perhaps most importantly, the Brigance court refused to apply the common law rule wherein the voluntary consumption of alcohol, rather than its sale or service, is considered as the proximate cause of injuries resulting from the actions of an intoxicated person.

By the time of the Brigance decision, many states had retreated from the traditional common law rule concerning vendor liability. Oklahoma, however, had no dram shop statute. Nor had Oklahoma courts considered the issue. Thus, before reaching a decision, the court in Brigance was forced to consider its role in the creation and interpretation of tort law. The Brigance court stated that it considered the common law a dynamic and growing thing whose rules arise from the application of reason to the changing condition of society. Therefore, the Brigance court found the development of tort law to be peculiarly a function of the judiciary. In addition, the Brigance court noted that because duty and liability are matters of public policy they are subject to the changing attitudes and needs of society. For these reasons, the Brigance court believed it was authorized to abrogate the traditional common law in favor of a new rule.

In reaching its conclusion, the Brigance court addressed two specific assertions of the vendor concerning this issue. In response to an assertion that the legislature had expressly spoken on the subject by repealing the dram shop act and by failing to enact a replacement, the Brigance court concluded that statutory silence was not indicative of legislative intent. In response to a second assertion that the area of law would be better dealt with by the legislature, the Brigance court acknowledged the "clear trend" otherwise on the subject and cited an earlier opinion wherein the court modified the common law doctrine of governmental immunity. Operating

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22. Brigance, 725 P.2d at 304.
23. Id. at 303.
24. Id. at 304.
25. Id. at 305.
26. Id. at 302. See supra note 17.
27. See supra notes 6-11 and accompanying text.
29. Brigance, 725 P.2d at 303.
31. Brigance, 725 P.2d at 304.
32. Id. at 303.
33. Id. In that earlier opinion, Vanderpool v. State, the court stated: But having come to the conclusions that the judicially recognized doctrine of governmental immunity in its present state under the case law is no longer supportable in reason, justice or in light of the overwhelming trend against its recognition, our duty is clear.
under this interpretation of its authority, the Brigance court modified the traditional rule and created a cause of action against negligent alcohol vendors for injured third parties.34

In order to create a cause of action against commercial vendors under the Brigance facts, the court had to find a duty to the injured third party.35 Thus, the Brigance court determined that a commercial vendor who sells intoxicating beverages for on-premises consumption has a duty to exercise reasonable care not to sell liquor to a noticeably intoxicated person.36 The Brigance court premised this duty on the expectation that a commercial vendor who sells alcohol to an intoxicated person should foresee the "unreasonable risk of harm to others who may be injured by such person's impaired ability to operate an automobile."37 Therefore, the Brigance court recognized a duty upon a commercial vendor for on-premises consumption "to exercise reasonable care in selling or furnishing liquor to persons who by previous intoxication may lack full capacity of self-control to operate a motor vehicle and who may subsequently injure a third party."38

The Brigance court recognized a vendor's duty to third parties and clearly noted that the duty was imposed by both statute and common law principles.39 Specifically, the court stated that the breach of duty for which it was imposing civil liability constituted a public offense under the Oklahoma Statutes.40 The Brigance court also explained that there was a common law duty to exercise ordinary care.41 The common law duty to third parties was in accordance with the general rules expressed in Restatement (Second) of Torts.42

Where the reason for the rule no longer exists, that alone should toll its death knell.
34. Brigance, 725 P.2d at 304.
35. See supra note 15.
36. Brigance, 725 P.2d at 304.
37. Id.
38. Id.
39. Id.
40. 37 OKLA. STAT. § 537 (Supp. 1985). The statute provides in pertinent part: "(A) No person shall: (1) Knowingly sell, deliver, or furnish alcoholic beverages to any person under twenty-one (21) years of age; (2) Sell, deliver or knowingly furnish alcoholic beverages to an intoxicated person or to any person who has been adjudged insane or mentally deficient." Id.
42. Section 308 of the Restatement provides:
   It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.
RESTATEMENT (SECOND) OF TORTS § 308 (1965). Section 390 provides:
   One who supplies . . . a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience or otherwise to use it in a manner involving unreasonable risk of physical harm to himself and others . . . is subject to liability for physical harm resulting to them.
Id. § 390.
Having established that a duty to third parties existed, the final issue faced by the Brigance court was causation. Under the traditional common law, even if the vendor breached a duty to third parties injured by an intoxicated patron, the vendor was not legally liable because he was not considered the proximate cause of the injuries. In other words, the chain of legal causation between the negligent selling of the alcoholic beverage and the injury was considered to be broken by the voluntary act of the patron in consuming the alcohol.

In Brigance, the Oklahoma Supreme Court removed this impediment to recovery. Specifically, the court held that voluntary consumption and any resulting intoxication and/or impairment which results in a third party injury constitutes merely a foreseeable intervening cause as opposed to a supervening cause. Thus, the Brigance court held that a jury could find that the vendor could have reasonably foreseen and anticipated the possible consequences of selling alcoholic beverages to a noticeably intoxicated patron who intended to drive an automobile and that the sale may have been the proximate cause of the alleged injuries.

**C. No Duty Owed to Adults Who Voluntarily Consume: Ohio Casualty Ins. Co. v. Todd**

In Brigance, the Oklahoma Supreme Court established its authority to change the common law, recognized a duty owed by commercial vendors to third parties injured by intoxicated patrons, and abolished the historical impediments to proving causation. In Ohio Casualty Ins. Co. v. Todd, a bar patron sought to extend Brigance to allow him to recover from the vendor for alcohol-induced, self-inflicted injuries allegedly suffered because the vendor served the patron after he was already intoxicated.

In Todd, the patron was injured in a one-car accident after having been served alcohol in Todd's Tavern (the Tavern). Ohio Casualty Insurance Company instituted an action for a declaratory judgment as to its duty to defend and indemnify Todd in the matter. Thereafter, the patron filed a cross-claim against the Tavern alleging that employees of the Tavern served him alcohol while he was noticeably intoxicated. Because serving alcohol to a noticeably intoxicated person is a violation of Oklahoma law, the plaintiff must establish that the alcohol was the proximate cause of the injuries suffered. See supra note 15.

43. In addition to showing duty and breach of duty, the plaintiff must establish that the alcohol was the proximate cause of the injuries suffered. See supra note 15.
44. Brigance, 725 P.2d at 305 (Okla. 1986).
46. Brigance, 725 P.2d at 305. An intervening cause which will break the causal nexus between the vendor's negligence and the resulting injury is called a supervening cause. In Oklahoma, the test to determine whether a cause is supervening is whether it is: "(1) independent of the original act, (2) adequate of itself to bring about the result and (3) one whose occurrence was not reasonably foreseeable." Thompson v. Presbyterian Hosp., 652 P.2d 260, 264 (Okla. 1982); see also Rappaport v. Nichols, 156 A.2d 1, 9 (N.J. 1959) (holding that intoxicated patron's drunk driving could have reasonably been foreseen and that consequently there was no breach in the chain of causation).
47. Brigance, 725 P.2d at 305.
48. Id. at 304-05.
law, the patron claimed that the Tavern's employees were negligent per se, entitling him to recover damages.

In order for the patron to recover on his negligence claim against the Tavern, the patron was required to show that the Tavern's employees owed him a duty of care which was breached. This was the critical issue to which the Todd court devoted its attention. Before ultimately holding that the patron did not have a valid cause of action, the Oklahoma Supreme Court considered whether the patron had an actionable negligence per se claim or an actionable negligence claim. The patron's negligence per se claim was premised on the statutory duty allegedly breached when the Tavern employees served him despite his intoxicated state. To recover for negligence per se, "(1) the injury must have been caused by the violation, (2) the injury must be of a type intended to be prevented by the ordinance, and (3) the injured party must be one of the class intended to be protected by the statute." Upon examining the patron's claim, the Todd court determined that the third element was missing. Specifically, the Todd court noted that in Brigance it declared that the purpose behind section 537(A)(2) was to protect innocent third parties who were injured by intoxicated persons. The Todd court found nothing in either section 537 or other statutes regulating alcohol that indicated legislative intent to protect the "intoxicated adult who, by his own actions, cause[d] injury to himself." In fact, the Todd court interpreted legislative intent to protect only the "unsuspecting public" — in effect all of the populace except the willing imbibers. On this basis, the Todd court determined that a violation of section 537(A)(2) did not constitute negligence per se.

Upon determining that the patron could not maintain an action based on negligence per se, the Todd court examined whether a commercial vendor had a duty to an intoxicated adult customer who injured himself. If such a duty existed, the patron would have a viable negligence claim. However, the Todd court held that a commercial vendor owes no duty to an adult customer who voluntarily consumes intoxicants and is injured.

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50. Id. See supra note 40.
51. Todd, 813 P.2d at 510.
52. Id. at 509.
53. Id. See supra note 38.
55. Todd, 813 P.2d at 510.
56. Id.; see Cuevas v. Royal D'Iberville Hotel, 498 So. 2d 346, 348 (Miss. 1986) (holding that an intoxicated person was excluded from the class of persons meant to be protected by a similar state statute). In making this determination, the court pointed out the class to be protected was the general public, and that this class, while broad in range, could not be said to include "an adult individual . . . who voluntarily consumes intoxicants and then, by reason of his inebriated condition, injures himself." Todd, 813 P.2d at 510.
57. Todd, 813 P.2d at 510.
58. Id.; see, e.g., Brigance v. Velvet Dove Restaurant, 725 P.2d 300, 304 (Okla. 1986); see also Bertelmann v. Taas Assocs., 735 P.2d 930, 934 (Haw. 1987).
59. Todd, 813 P.2d at 510.
60. Id. at 511. Justice Opala, in his concurring opinion, explains that the causal barrier to recovery
In considering whether to extend *Brigance* to protect an inebriated adult customer, the *Todd* court identified four distinct reasons not to recognize a broader duty of care.\(^61\) First, the *Todd* court considered precedent from other jurisdictions. A review of other states indicated that the majority of them refused to create a cause of action for an inebriated adult.\(^62\) In fact, other jurisdictions had generally concluded that as a matter of public policy, drunken persons who harm themselves are responsible for their condition and should not be able to recover damages for their injuries.\(^63\) A judicially created cause of action against a commercial vendor would only reward the inebriate for his own immoderation.\(^64\) Second, the *Todd* court examined the treatment of intoxication by other areas of the law. In its examination, the *Todd* court found that in no other situation does the law similarly excuse one's failure to act responsibly.\(^65\) For example, a defendant in a criminal trial is held accountable for his acts of criminal behavior committed while in a state of voluntary intoxication.\(^66\) Likewise, Workers' Compensation law will not cover an employee's injury which results from the intoxication of the injured employee.\(^67\) Third, the *Todd* court evaluated the practical effects of its decision. Specifically, the *Todd* court contemplated the vast number of claims that might be brought by injured drunks "if they were entitled to every expense and injury that are natural concomitants of their intoxication."\(^68\) Fourth, and finally, the *Todd* court noted that other methods of punishment existed for violative vendors. Expanded civil liability was not a necessary deterrent.

In response to a dissenting opinion, the *Todd* court indicated that its holding would not ignore the conduct of the commercial vendor.\(^69\) If a third party is injured, removed by the court in *Brigance* is only removed where the court recognizes a duty of care. Thus, for innocent third parties, the causal barrier is removed. However, the barrier is not removed for inebriated adult customers. *Id.* at 513-14 (Opala, J. concurring).

61. Several strong dissents were offered by Justices Lavender, Kauger, and Wilson. *Id.* at 521, 524. See also the Court's original holding in *Todd* which recognized a valid cause of action for adult consumer-inebriates. Ohio Casualty Ins. Co. v. Todd, 61 OKLA. B.J. 3016 (1990). The case was reversed upon rehearing seven months later. *Todd*, 813 P.2d 508 (Okla. 1991).


64. *Todd*, 813 P.2d at 511. "To allow recovery in favor of one who has voluntarily procured a quantity of liquor for his or her own consumption with full knowledge of its possible or probable results 'would savor too much of allowing . . . [the] person to benefit by his or her own wrongful act.'" Allen v. County of Westchester, 109 A.2d 475, 492 (N.Y. App. Div. 1953).


68. *Id.*; see also Sager v. McClenden, 672 P.2d 697, 701 (Ok. 1983).

69. *Todd*, 813 P.2d at 512; see *Todd*, 813 P.2d at 523 (Lavender, J. concurring in part and dissenting in part).
Brigance provided a claim against the vendor. Furthermore, the commercial vendor who disregards the condition of his customers does so at the risk of criminal prosecution, as well as forfeiture of his liquor license.

D. The Importance of Causation: Sanders v. Crosstown Market, Inc.

Following Brigance and Todd, dram shop liability required an injured party to state a valid negligence or negligence per se claim. To have a valid negligence per se claim, it was imperative that the injured party be a member of the class the statute intended to protect. To state a valid negligence claim, the commercial vendor had to owe the injured party a duty of care. Only where the court found a duty of care would the traditional common law distinction regarding causation be defeated.

Several years after Todd, in Sanders v. Crosstown Market, Inc., the Oklahoma Supreme Court was required to determine whether a commercial vendor was liable to an injured minor who became intoxicated on alcohol provided by a second minor who had purchased it from the vendor. After careful consideration, the court ruled that the vendor was not liable to the injured minor.

In Sanders, a commercial vendor illegally sold beer to a minor. The purchasing minor provided the beer to a second minor at a party. The second minor became intoxicated and was injured in an automobile accident. The guardians of the second minor then instituted an action against the commercial vendor. The trial court dismissed the action but the appellate court reversed and remanded the case for trial. On appeal, the Oklahoma Supreme Court refused to extend its holding in Brigance to cover the case.

The injured minor in Sanders attempted to recover from the vendor on a claim of negligence per se. The minor contended that the commercial vendor violated an Oklahoma Statute which prohibited the sale of beer to minors. In considering the claim, the Sanders court determined that although the statute was violated, the injured minor was not within the class designed to be protected. Curiously, the Sanders

71. Id. See supra note 40.
73. Todd, 813 P.2d at 510.
74. Id. at 510; Brigance, 725 P.2d at 302.
75. See supra notes 43-46 and accompanying text.
76. 850 P.2d 1061 (Okla. 1993).
77. Id.
78. Id. at 1062.
79. Id.
80. Id.
81. Id. at 1063. Title 37, § 241 provides in material part:
It shall be unlawful for any person who holds a license to sell and dispense nonintoxicat-
ing beverages [including 3.2% beer] . . . to sell, barter, or give to any person under
twenty-one (21) years of age any beverage containing more than one-half of one percent
(1/2 of 1%) of alcohol measured by volume and not more than three and two-tenths
percent (3.2%) of alcohol measured by weight . . . .
82. Sanders, 850 P.2d at 1063. A similar rationale can be found in Ohio Casualty Ins. Co. v. Todd,
court premised this conclusion on the remoteness of the minor's injury from the original sale of beer.\textsuperscript{13} This is curious for two reasons. First, both the purchaser and plaintiff were minors, the specific class the statute was designed to protect. Second, if the Sanders court believed there was an insufficient causal connection between the minor's injury and the sale of beer,\textsuperscript{14} such a finding would prevent successful proof of causation, an element of negligence per se separate and distinct from membership in the protected class. In other words, why find the injured minor outside the protected class on the basis of an infirmity in a separate element, causation.

Evidence that the Sanders court considered causation to be at issue is found in the following statement: "Crosstown's employees had no obligation to anticipate that Scott [purchaser] might give beer to Sanders, and that Sanders might get drunk, and might drive under the influence of alcohol."\textsuperscript{15} The statement indicates that the Sanders court recognized that the injury to the plaintiff was not foreseeable to Crosstown Market. Since foreseeability is an element of causation, this infirmity would prevent a successful claim of either negligence or negligence per se.\textsuperscript{16} The Sanders court, however, held only that the remoteness of the injured minor's connection to the vendor placed her outside the Brigance ruling, without further explanation.\textsuperscript{17}

While the reasoning of the Oklahoma Supreme Court may not be extremely clear, the outcome in Sanders emphasizes the continued importance attached to causation. Even where the courts recognize a statutory or common law duty, causation is still necessary for a valid negligence claim.


Tomlinson v. Love's Country Stores, Inc.\textsuperscript{18} discussed the question of whether to expand the holding in Brigance to include liability against commercial vendors of beer for consumption off the premises when the vendors sold to minors. In Tomlinson, the commercial vendor sold beer to three minors, Brad Tomlinson, Jason Budd, and Marcus Urias. At the time of the sale, the employees of the vendor knew that the minors intended to drink the beer while driving in a motor vehicle. As a result of being intoxicated, Budd, the driver, wrecked the vehicle. Tomlinson died as a result of injuries sustained in the wreck. A claim was thereafter filed alleging that the vendor was negligent in violating the statute prohibiting sale of beer to minors. Upon defendant's motion, the complaint was dismissed by the trial court.

\begin{itemize}
  \item \textsuperscript{13} 813 P.2d 508, 510 (Okla. 1991).
  \item \textsuperscript{14} Sanders, 850 P.2d at 1063.
  \item \textsuperscript{15} Id. at 1064, 1065. (Wilson, J., dissenting).
  \item \textsuperscript{16} Id. at 1064.
  \item \textsuperscript{17} Tomlinson v. Love's Country Stores, Inc., 854 P.2d 910, 916-17 (Okla. 1993). See infra notes 95-99 and accompanying text.
  \item \textsuperscript{18} Sanders, 850 P.2d at 1064.
  \item \textsuperscript{19} 854 P.2d 910 (Okla. 1993).
\end{itemize}
because prior case law imposed liability only where the sale of alcohol was for consumption on a vendor's premises.\(^9\)

After review, the Oklahoma Supreme Court determined that common law liability extended to the sale of alcohol to minors for consumption off the premises of the vendor.\(^9\) In deciding to expand the rule enunciated in *Brigance*, the *Tomlinson* court determined that the vendor owed the minors a duty of care. Specifically, the *Tomlinson* court recognized that Oklahoma Statutes prohibited the sale of nonintoxicating beverages to minors.\(^9\) Without explicitly considering whether the claim was valid as negligence per se, under which the minor must be in the class designed to be protected, the *Tomlinson* court concluded that, "based upon the reasoning in *Brigance*, the duty not to sell beer to persons under the age of twenty-one is established."\(^9\) Furthermore, the *Tomlinson* court declared that upon selling beer to a minor, the vendor breached his duty, whether he sold the beer for consumption on-premises or off-premises.\(^9\)

Having recognized both a statutory and common law duty to minors in *Tomlinson*,\(^9\) the sole remaining issue was causation. Due to the nature of off the premises consumption, the *Tomlinson* court reiterated the necessity of proving causation.\(^9\) Specifically, the *Tomlinson* court reaffirmed that

proximate cause must be the efficient cause that sets in motion the chain of circumstances leading to an injury; if the negligence complained of merely furnishes a condition by which the injury was made possible and a subsequent independent act caused the injury, the existence of such condition is not the proximate cause of the injury.\(^9\)

In Oklahoma, foreseeability is an essential element of proximate cause.\(^9\) Where an injury is foreseeable as the result of a breach of duty, the breach constitutes proximate cause.\(^9\) Only a supervening cause can then break the causal nexus between the initial breach and the subsequent injury.\(^9\) In *Tomlinson*, the vendor sold beer to minors for consumption off the premises. The sale breached both statutory and common law duties. Because the employees of the vendor were aware that the minors intended to drink the beer while driving or riding in their car, the resulting

\(^{89}\) *Id.*; see *Brigance v. Velvet Dove Restaurant*, 725 P.2d 300 (Okla. 1986).
\(^{90}\) *Tomlinson*, 854 P.2d at 915.
\(^{91}\) *Id.* Title 37, § 241 provides: "It shall be unlawful for any person to sell, barter, or give to any person under twenty-one (21) years of age any nonintoxicating beverage, as defined in Section 163.2 of this title." 37 OKLA. STAT. § 241 (1991).
\(^{92}\) *Tomlinson*, 854 P.2d at 915.
\(^{93}\) *Id.*
\(^{94}\) *Id.*
\(^{95}\) *Id.*
\(^{97}\) *Tomlinson*, 854 P.2d at 916; see *Atherton v. Devine*, 602 P.2d 634, 636 (Okla. 1979).
\(^{98}\) *Tomlinson*, 854 P.2d at 916; see also *Long v. Ponca City Hosp.*, 593 P.2d 1081, 1086 (Okla. 1979).
\(^{99}\) *Tomlinson*, 854 P.2d at 916. See supra note 46.
injuries to the minors were foreseeable. Thus, absent a supervening cause, the breach was the proximate cause of the accident.

F. The Status of the Law Preceding Busby v. Quail Creek Golf & Country Club

The decision in Tomlinson broadened dram shop liability in Oklahoma. Essentially, victims had two options for tort recovery. First, an injured party could bring a negligence per se action against a commercial vendor. A claim would require that the injured party be among the class the relevant statute meant to protect. If so, a violation of the statute would suffice to show the existence and breach of a duty to the party. Second, the injured party could bring a negligence claim against the commercial vendor. Under such circumstances, the party must show that the vendor owed him a duty of care. The Oklahoma Supreme Court has recognized several such duties. A commercial vendor serving or selling alcohol to patrons on the vendor's premises owes the entire "unsuspecting public" a duty not to sell alcohol to an already intoxicated patron. In addition, commercial vendors owe to third parties the duty not to sell alcohol or beer to minors for on or off the premises consumption. In recognizing these common law duties, the court authorized negligence actions for their violation.

Once an injured party establishes duty and breach thereof, recovery is contingent upon proof of causation. Historically, causation prevented recovery because voluntary consumption of alcohol intervened to shift the legal cause of subsequent injury to the person imbibing, not the alcohol vendor. While careful to note that the historical impediment has not been uniformly abolished, the court in Sanders did abrogate the rule in situations where it found the necessary duty to an injured party.

Thus, following Tomlinson, judicially created dram shop liability in Oklahoma required a successful plaintiff to clearly demonstrate the existence of a duty of care, which when breached, caused the subsequent injuries. Absent such a showing, vendor liability was unavailable.

III. Statement of the Case: Busby v. Quail Creek Golf & Country Club

On July 22, 1990, Patricia Busby, an eighteen-year-old North Carolina resident, attended a party at the Quail Creek Golf and Country Club (the Club). Those

100. See supra note 54 and accompanying text.
101. See supra note 73.
102. See supra note 15 and accompanying text.
103. See supra note 74 and accompanying text.
104. See supra notes 35-42 and accompanying text.
105. See supra notes 90-93 and accompanying text.
107. See supra notes 43-47, 95-99 and accompanying text.
108. See supra notes 44-45 and accompanying text.
110. Tomlinson, 854 P.2d at 916-17.
attending the party were almost exclusively minors. Nevertheless, the party sponsors contracted with the Club to provide food and beverages, including wine and beer. Upon entering the party, the attendees were checked for identification. Attendees over twenty-one were marked with an "X" on the back of their hand. Busby did not receive an "X" upon entering. However, an unauthorized marker was passed around and Busby may have received a mark on her hand in this manner.

Throughout the evening, beer and wine were served on open, unrestricted tables in violation of Oklahoma Statutes. Busby, also in violation of Oklahoma law, consumed beer. After becoming intoxicated, with a blood alcohol level exceeding 0.21, Busby stepped backwards and fell over a second floor balcony railing to a marble floor below.

As a result of injuries sustained in the fall, Busby filed a complaint against the Club. Busby alleged that she was negligently served beer which resulted in her injuries. In addition, she claimed that the Club was negligent per se for violating local and state ordinances which prohibit serving alcohol to a minor. The Club filed a motion for summary judgment and the district court certified the following question to the Oklahoma Supreme Court:

May an 18-year-old person who consumed 3.2% beer on-premises state a cause of action against the vendor for her subsequent on-premises alcohol-related injuries, when both the vendor and purchaser presumably violated the provisions of state law prohibiting the sale or purchase of beer by or to persons under 21 years of age?

The court answered in the affirmative.

In considering the issue posed in Busby, the court revisited its holding in Tomlinson. In Tomlinson, the court recognized a duty to third parties not to sell beer to persons under the age of twenty-one. Thus, precedent clearly established that an injury to a third person caused by the sale of alcohol to a minor was actionable. However, the Tomlinson court had not considered whether the duty would extend to a minor who voluntarily consumed intoxicants and injured himself.

In reaching its determination that vendors owe minors such a duty of care, the Busby court examined both the views of other jurisdictions and Oklahoma's alcohol statutes. Although a few jurisdictions maintain the common law rule of non-

111. See supra notes 81, 91. 112. Title 37, § 246(A) provides in pertinent part: "No person under twenty-one (21) years of age shall (1) consume or (2) possess with the intent to consume nonintoxicating beverages, as defined in Section 163.2 of this title, in any public place." 37 Okla. Stat. § 246(A) (1991).
114. Id. at 1326.
115. Id.
117. See id. at 915.
118. Id. at 910.
119. Id.
120. Busby, 885 P.2d at 1330.
liability, the majority of states allow a cause of action against a commercial vendor on behalf of a minor who voluntarily drinks to the point of intoxication and is thereby injured. The states recognizing the cause of action have generally concluded, as a matter of public policy, that minors as a class are incompetent, by reason of their youth and inexperience, to deal responsibly with the effects of alcohol. "The fact that minors violate statutes when purchasing or consuming beer does not preclude a cause of action — because as between the seller and the minor — it is the seller who is the responsible party in the action."

Furthermore, the Busby court noted that in Oklahoma, the legislature has enacted statutes which treat minors differently than adults with regard to alcohol. Those statutes, which prohibit selling beer to minors and prohibit minors from possessing and consuming beer, constitute legislative recognition of the foreseeable danger to minors. Accordingly, the Busby court determined that the statutes were intended to protect minors, thus rendering a statutory violation negligence per se.

While the Busby court recognized the right of intoxicated minors to recover from commercial vendors for their injuries, it did not do so without limiting the breadth of potential recoveries. First, the Busby court held that under either common law negligence or the negligence per se doctrine, a breach of duty regarding sale of alcohol to a minor may be excused if the vendor can establish that the purchaser appeared to be of age and that reasonable methods of identification were used to ascertain the minor's age. The court further noted that excusability is a fact question for the jury. Second, the Busby court noted that the jury will still be able to apportion fault among the parties via comparative negligence.

IV. Analysis

The Oklahoma Supreme Court's decision in Busby v. Quail Creek Golf & Country Club extended the liability of commercial vendors when minors are negligently served or sold alcohol. To properly evaluate the verdict, it should be examined for both its practical effects and its consistency with legal precedent and public policy.

123. Busby, 885 P.2d at 1331.
124. Id.
125. Id. at 1332. See supra notes 81, 91.
126. Busby, 885 P.2d at 1332. See supra note 112.
127. Busby, 885 P.2d at 1332.
128. Id.
129. Id. at 1333; see Anderson v. Moulder, 394 S.E.2d 61, 68 (W. Va. 1990).
130. Busby, 885 P.2d at 1333.
131. Id. at 1334; see also 23 OKLA. STAT. § 13 (1991) (Oklahoma's comparative negligence statute).
As a practical result of the decision, it is questionable whether the ruling will significantly increase commercial vendor liability. Although the case gives more potential plaintiffs a cause of action against vendors, the effects on vendor pocketbooks may be limited for two reasons. First, the majority of prudent, law-abiding vendors will be protected from increased suits by the provision regarding excusability. Specifically, the vendor can rebut a prima facie case of negligence by showing that the purchaser appeared to be of age and that the vendor used reasonable means of identification to ascertain the minor's age.\footnote{133} If a jury refuses to excuse the conduct of a vendor, it can still ameliorate the liability of the vendor by utilizing the comparative negligence statute to allocate fault among the parties.\footnote{134} It thus seems likely that juries will be less tolerant of large awards to older minors when the minor not only became voluntarily intoxicated but violated the law to do so. A further practical benefit of the ruling is that commercial vendors will be strongly encouraged by the threat of more lawsuits and the danger of large awards to obey the law with less impunity. Certainly, stringent adherence to customer age verification programs would almost preclude the vendor from future dram shop liability for alcohol sales to minors. However, it must be remembered that the burden of proof for excusability falls upon the vendor.

One potential problem with the practical results of the decision will be the occasional case involving a sympathetic client. \textit{Mansfield v. Circle K. Corp.}\footnote{135} is a perfect example. In \textit{Mansfield}, the twenty-year-old plaintiff purchased beer from a convenience store, consumed the beer, and subsequently leaped head-first into a shallow pool. The plaintiff suffered severe spinal injuries and was paralyzed from the neck down. In this case, the plaintiff was clearly negligent to some degree for knowingly violating the law and causing his own injury. However, in cases where the plaintiff has suffered terribly, the affirmative defenses authorized by the court are less likely to be correctly employed by juries. Therefore, in cases involving sympathetic plaintiffs, jury awards may not be consistent with fault. Therein lies the danger in the new cause of action for minors.

While the practical effects of \textit{Busby} appear to be primarily positive, the decision does raise some interesting questions with regard to legal precedent and public policy. The greatest difficulty will be reconciling the court's action with its ruling in \textit{Todd}. In \textit{Todd}, the court refused to extend vendor liability protection to intoxicated patrons who injured themselves as a result of their inebriated condition.\footnote{136} In contrast, \textit{Busby} extended liability to the almost analogous situation where a minor voluntarily consumes alcohol and thereby injures himself.\footnote{137} This dichotomy might not seem as significant if the two different infirmities were not jointly protected by state law. Article 28, section 5 of the Oklahoma Constitution makes it unlawful for

\begin{itemize}
\item \textit{Id.} at 1333.
\item \textit{Id.} at 1334. If the conduct of the vendor is found to be willful, wanton, or intentional, then fault must not be apportioned between the parties. Tomlinson \textit{v. Love's Country Stores, Inc.}, 854 P.2d 910, 917 (Okla. 1993); Graham \textit{v. Keuchel}, 847 P.2d 342, 361-63 (Okla. 1993).
\item 877 P.2d 1130 (Okla. 1994).
\item \textit{Busby}, 885 P.2d at 1330.
\end{itemize}
any liquor licensee to sell or furnish any alcoholic beverage to "a person under twenty-one (21) years of age; or a person who has been adjudged insane or mentally deficient; or a person who is intoxicated."\(^{138}\) The plain reading of this provision, as noted by Justice Wilson in her dissent to \emph{Todd}, is that minors and intoxicated adults both are to be protected by the liquor licensee.\(^{139}\) Thus, the court's willingness to find a violation of such provisions to be negligence per se in the case of minor-inebriates,\(^{140}\) but not in the case of adult-inebriates,\(^{141}\) might seem inconsistent.

Justice Wilson argued that the Constitutional provision should be interpreted to include intoxicated persons within the protection of tort law.\(^{142}\) The majority disagreed, determining that the plaintiff in \emph{Todd} was not within the class of persons the statute or Constitution meant to protect.\(^{143}\) Specifically, the \emph{Todd} majority found nothing in any of the statutes regulating the sale of alcohol which indicated legislative intent to protect the intoxicated adult who, by his own action, caused injury to himself.\(^{144}\) Instead, it found only that the legislature intended to protect the "unsuspecting public: — in effect all of the populace except the willing imbibers."\(^{145}\)

Finally, the \emph{Todd} majority concluded that "Nowhere [in the Oklahoma Constitution, article 28, section 5] do we perceive any design to alter the common law so as to provide a civil remedy in tort for the adult imbibers against his barkeeper."\(^{146}\)

In addition to precluding recovery under negligence per se, the \emph{Todd} majority found that the alcohol vendor owed no duty to the adult imbibers who subsequently injured himself.\(^{147}\) In reaching this conclusion, the \emph{Todd} majority considered the results within other jurisdictions, public policy concerns, personal accountability, and the potential effects of its ruling. After reviewing this information, the \emph{Todd} majority cited with approval several cases concluding, "[A]s a matter of public policy drunken persons who harm themselves are responsible for their condition, and should not prevail either under a common law or statutory basis."\(^{148}\)

By denying recovery to an adult-imbiber who injures himself, the \emph{Todd} majority fulfilled its self described purpose. "A court that creates, as in \emph{Brigance}, a cause of action based on public policy has a burden to responsibly chart the boundaries beyond which the new cause of action does not serve the public, and should not be the law."\(^{149}\)

In contrast to the \emph{Todd} court's findings regarding adults, the \emph{Busby} court found that Oklahoma law was meant to protect minors from the illegal sale or service of

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138. \textit{Oklahoma Const.} art. 28, § 5, \emph{quoted in Todd}, 813 P.2d at 524, 525 (Wilson, J., dissenting).
139. \textit{Todd}, 813 P.2d at 524, 525 (Wilson, J., dissenting).
140. \textit{Busby}, 885 P.2d at 1332.
141. \textit{Todd}, 813 P.2d at 512.
142. \textit{Id.} at 524, 525 (Wilson, J. dissenting).
143. \textit{Id.} at 510.
144. \textit{Id.}
145. \textit{Id.}
146. \textit{Id.}
147. \textit{Id.} at 511.
148. \textit{Id.}
149. \textit{Id.} at 512.
alcohol. Specifically, the *Busby* court determined that "the Legislature, recognizing the foreseeable danger to third parties and minors who injure themselves, [had] taken specific steps to treat minors differently from adults by preventing minors from consuming and possessing alcohol." Since the *Busby* court found, as a matter of public policy, that minors were, as a class, incompetent to deal responsibly with the effects of alcohol, it concluded that the public had a right to demand that a commercial vendor act more prudently and with a greater duty towards minors than adults.

Under these circumstances, the logic of the Oklahoma Supreme Court seems appropriate. After all, most citizens would probably agree with the framework of dram shop liability as it has been delineated. The difficulty is that the satisfactory results are not consistent with the plain meaning of the Oklahoma Constitution and Statutes. Only by creative interpretation has the court carved out nonliability in the case of adult consumers who injure themselves. In fact, the first time the Oklahoma Supreme Court considered whether to extend *Brigance* to cover the facts in *Todd*, the court found that state law clearly authorized such a cause of action. Only upon rehearing seven months later did the court determine that public policy barred such actions. Therefore, while the outcome seems reasonable, the distinction between *Todd* and *Busby* lacks a firmly rooted foundation.

While there does not appear to be a significant problem of precedent, the decisions in *Busby* and *Mansfield*, when read with *Sanders* and *Tomlinson*, suggest another area of unresolved difficulty in Oklahoma dram shop law. Specifically, *Busby* and *Mansfield* establish a cause of action for a minor who purchases or consumes alcohol and injures himself. *Sanders*, on the other hand, suggests that alcohol purchased by one minor and shared with others may not give rise to the same rights. Described differently, if a minor friend of *Mansfield* had purchased the beer and provided it to him, *Sanders* suggests that *Mansfield* would not have a valid negligence claim. This raises the as yet unresolved question: To what extent is the vendor liable to minors other than the one making the purchase? If the court were to follow the precedent

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151. *Id.* at 1331.
152. *Id.* at 1332.
   We likewise see no rational distinction for a rule that would impose a duty running in favor of third parties while at the same time failing to recognize a duty in regard to the patron himself. It would ignore the obvious for us to rule, as we did in *Brigance*, which involved injury to a passenger riding with the intoxicated driver, that injury to third parties traveling on our highways is foreseeable whereas injury to the consumer-inebriate driver was not so foreseeable. It would also be counter to common sense and basic logic.
   Further, although we do not rely on a statute or constitutional provision in ruling a duty is owed, our decision does not place tavern owners under a greater duty than they are already under by virtue of the Oklahoma Constitution and the statutes of this State.
   *Id.* at 3018-19.
cited in Tomlinson, it would take a broad view of causation and allow injured minors more flexibility to show causation. The difficulty therein is that such a result would be somewhat inconsistent with Sanders.

V. Conclusion

The rule announced in Busby may not be entirely consistent with the holding from Todd and other Oklahoma dram shop cases, but a close examination reveals that the decisions can be consonant in Oklahoma law. Taken together with other Oklahoma dram shop cases, they form a fair, relatively consistent, and substantially comprehensive set of rules governing commercial vendor liability. While the judicially developed doctrine of vendor liability in Oklahoma is practical and probably indicative of the system in many states, difficulties will continue to arise in this field as long as the legislature abdicates its authority to regulate the conduct of alcohol vendors and consumers. On significant issues of public policy, such as addressed in dram shop cases, the public should expect elected officials to postulate the broad policies, leaving the judiciary with more interpretive and less legislative authority. For this reason, Oklahoma should strongly consider enacting dram shop legislation.

Michael Craig Adkins

156. See Davis v. Billy's Con-Teena, Inc., 587 P.2d 75, 77 (Or. 1978); Munford, Inc. v. Peterson, 368 So. 2d 213 (Miss. 1979); Matthews v. Konieczny, 527 A.2d 508 (Pa. 1987) (holding that "the duty of adults engaged in serving alcoholic beverages extends beyond the minor to whom the liquor was served; it also encompasses those who may be affected by the illegal service"); Anderson v. Moulder, 394 S.E.2d 61 (W. Va. 1990).

The question, then, becomes whether one who sells beer or alcoholic beverages to a minor can ever reasonably foresee that the underage purchaser will share such beverages with other minors, who will, in turn, become intoxicated and cause injury to themselves or others. Other jurisdictions have concluded that in certain circumstances, such a result is reasonably foreseeable at the time of the unlawful sale. E.g., Morris v. Farley Enters., Inc., 661 P.2d 167 (Alaska 1983); Floyd v. Bartley, 727 P.2d 1109 (Colo. 1986); Kvanli v. Village of Watson, 272 Minn. 481, 139 N.W.2d 275 (1965); Thompson v. Victor's Liquor Store, Inc., 523 A.2d 269 (1987).

Anderson, 394 S.E.2d at 73.