

NOTE

Serving the “Apparently Under the Influence” Patron: The Ramifications of *Barrett v. Lucky Seven Saloon, Inc.*

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Given a choice between a rule that fosters individual responsibility and one that forsakes personal accountability, we opt for personal agency over dependency and embrace individual autonomy over paternalism.¹

I. INTRODUCTION

Imagine a woman named Sue meets a friend for dinner at a restaurant in downtown Seattle. The restaurant is packed with customers, and Sue decides to have a few beers. She is not loud, and she maintains her outward composure. Given these facts, the bartender would probably not be able to determine that Sue is intoxicated. He or she might subjectively determine, however, that Sue is “apparently under the influence” of alcohol because close observation would reflect that her eyes are slightly red and her breath smells faintly of beer. After a few hours, Sue leaves the restaurant, drives off in her car, and hits a pedestrian. Under the recently established standard set forth in *Barrett v. Lucky Seven*

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1. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wash. 2d 259, 280, 96 P.3d 386, 393 (2004) (Sanders, J., dissenting) (quoting *Estate of Kelly ex rel. Kelly v. Falin*, 127 Wash. 2d 31, 42, 896 P.2d 1245, 1250 (1995)).

Saloon, Inc.,² a court would probably determine that the pedestrian's injury was a foreseeable event, and the restaurant could be held liable for serving Sue alcohol, even though she was not "obviously intoxicated" at the time the restaurant served her.

A different individual—and well-known brawler—named Joe regularly drinks to excess at his neighborhood pub in a small town in Washington. One night Joe excitedly shows the bartender a switch-blade knife he recently purchased. The bartender serves Joe several pitchers of beer. Joe, like Sue, handles his liquor well and shows no outward signs of intoxication. Subsequently, Joe leaves the pub, gets into a scuffle across the street, and stabs another man to death. Despite the foreseeability of harm based on Joe's violent reputation, his new weapon, and his consumption of several pitchers of beer, the commercial vendor would probably not be liable to the third party victim for over-serving Joe, because Joe was not "obviously intoxicated"³ and did not injure his victim with an automobile.⁴

If foreseeability of harm is the foundation of negligence,⁵ is it really more foreseeable that Sue, and not Joe, would injure a third party, when Joe brandished a weapon and neither party was "obviously intoxicated"? Moreover, should we really presume that injuries caused by impaired drivers are any more foreseeable than those caused by other impaired tortfeasors?

In *Barrett*, the Washington Supreme Court erroneously expanded commercial vendor⁶ liability to third parties who are injured in automobile accidents by a patron who drives while impaired.⁷ This decision flies in the face of Washington vendor liability jurisprudence, which has shown a reluctance to hold vendors liable for negligently serving alcohol; prior to *Barrett*, courts would not do so unless the patron was a minor or was "obviously intoxicated."⁸ Nevertheless, *Barrett* rejected the

2. 152 Wash. 2d 259, 96 P.3d 386 (2004).

3. A vendor will be liable for a patron's criminal assault if the patron is "obviously intoxicated" at the time of service and the vendor is on notice of the risk of harm. *Cox v. The Keg Rests. U.S., Inc.*, 86 Wash. App. 239, 248, 935 P.2d 1377, 1382 (1997).

4. *Cf. Christen v. Lee*, 113 Wash. 2d 479, 503–04, 780 P.2d 1307, 1319 (1989) (holding that vendor serving underage patron who later assaulted patrolman was not negligent per se because prohibition of alcohol sales to minors is intended to protect against automobile accidents caused by driver error rather than criminal assault). Thus, a vendor will be liable if it serves a patron who is "apparently under the influence" if that patron subsequently injures a third party with an automobile. *Barrett*, 152 Wash. 2d at 271–72, 96 P.3d at 392 (citing *Christen v. Lee*, 113 Wash. 2d 479, 503, 780 P.2d 1307, 1319 (1989)).

5. See discussion *infra* Part IV.C.

6. For the purposes of this Note, a "commercial vendor" includes a bar, tavern, club, saloon, restaurant, or any similar seller of alcohol in a commercial setting.

7. *Barrett*, 152 Wash. 2d 259, 96 P.3d 386.

8. *Estate of Kelly ex rel. Kelly v. Falin*, 127 Wash. 2d 31, 36–37, 896 P.2d 1245, 1247 (1995).

common law "obviously intoxicated" rule in exchange for a new form of civil liability based on a criminal statute that prohibits a commercial vendor from serving a patron who is "apparently under the influence" of alcohol.⁹ Although the "obviously intoxicated" standard is highly preferable to the "apparently under the influence" standard, there are circumstances in which neither standard will suffice.¹⁰ Therefore, the Washington Legislature should enact the following standard of conduct to clarify civil liability for commercial vendors: Vendors are liable when they "*knew or should have known*" that the patron was intoxicated at the time of service.¹¹

This Note is divided into five parts that collectively explore the history of vendor liability in Washington, the mistakes made by the Washington Supreme Court in deciding *Barrett*, and how best to determine when a commercial vendor should be liable for an injury to a third party. Part II provides the history of commercial vendor liability in Washington and explains that liability traditionally attached only when the vendor was on notice that injury to a third party may occur. Part III discusses the *Barrett* opinion and how it expanded vendor liability by raising a vendor's duty of care to third parties.¹² This higher duty shifts responsibility from the patron who chooses to drink excessively to the server. Part IV argues that the court simply got it wrong. Instead of applying sound legal reasoning, the majority succumbed to its desire to compensate the severely injured victim.¹³ The court's decision to stray from the "obviously intoxicated" standard to the "apparently under the influence" standard cannot be justified; the new rule conflicts with the general rejection of negligence per se as a form of recovery in Washington, the foreseeability-of-harm requirement in a negligence claim, the doctrine of stare decisis, and the principle of legislative intent.¹⁴ Finally, in Part V, a practical and applicable standard to determine liability is presented, as are other possible solutions to the problems created by the *Barrett* decision.

II. VENDOR LIABILITY HISTORY IN WASHINGTON

The history of vendor liability in Washington reveals that, although the sale of alcohol has consistently been regulated in one form or

9. See WASH. REV. CODE § 66.44.200 (2006) ("No person shall sell any liquor to any person apparently under the influence of liquor.").

10. See discussion *infra* Part V.

11. See discussion *infra* Part V.

12. *Barrett*, 152 Wash. 2d at 274, 96 P.3d at 393.

13. *Barrett* was "profoundly and permanently injured." *Id.* at 262, 96 P.3d at 387.

14. See *infra* Part IV.

another,¹⁵ the courts and legislature have been reluctant to attach liability to a vendor unless the patron was “obviously intoxicated” at the time of service.¹⁶ This Part discusses the basic principles of negligence liability, the important distinction between the “obviously intoxicated” standard and the “apparently under the influence” standard, and the development of vendor liability until *Barrett* was decided.

A. The Basis of General Civil Liability

Under the law of torts, a person is liable for the injuries caused by his or her negligence.¹⁷ A claim for negligence requires proof of duty owed to the plaintiff, breach of that duty, and harm or damages that are proximately caused by the breach.¹⁸ Litigants in vendor liability actions dispute whether a commercial vendor is negligent for serving alcohol, focusing on the elements of duty and proximate causation.¹⁹ A vendor’s duty arises at the moment the act of serving alcohol to a patron creates a foreseeable risk of harm to third parties who may be injured by the patron.²⁰ The issue of proximate cause arises under the common law theory that the impaired driver’s conduct, not the act of serving alcohol, causes the injury to the third party.²¹

B. Dramshop Liability

The common law rule provided that a vendor who over-served a patron could not be liable for the patron’s tortious acts²²—no matter how much alcohol was served, or how foreseeable the patron’s harmful action was to the vendor—because it was the *patron* who decided to go to the bar and drink to the point of intoxication.²³ The rule was based on the

15. See *infra* Part II.B. Regulating drunken conduct has always been a priority in the City of Seattle; in fact, the very first ordinance passed there regulated drunkenness. Seattle, Wash., Ordinance 1 (Dec. 22, 1869), available at <http://www.cityofseattle.net/leg/clerk/kwikfact.htm#ordinances>.

16. See *infra* Part II.E.

17. RESTATEMENT (SECOND) OF TORTS § 281 (1965) (laying out the elements required for a cause of action for negligence).

18. *Sheikh v. Choe*, 156 Wash. 2d 441, 447–48, 128 P.3d 574, 577 (2006); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164–65 (5th ed. 1984).

19. See *infra* Part II.E.

20. See, e.g., *Estate of Kelly ex rel. Kelly v. Falin*, 127 Wash. 2d 31, 41, 896 P.2d 1245, 1249 (1995) (“As a matter of public policy, we have premised the duty of commercial vendors on the need to protect *innocent bystanders* from intoxicated patrons . . .”).

21. *Halvorson v. Birchfield Boiler, Inc.*, 76 Wash. 2d 759, 762, 458 P.2d 897, 899 (1969) (citing 30 AM. JUR. *Intoxicating Liquors* § 520 (1958)).

22. See *id.* (citing 30 AM. JUR. *Intoxicating Liquors* § 521 (1958)).

23. In *Barrett*, Justice Sanders emphasized that

in the context of negligent over-service of alcohol, we must never forget that it is the *patron* who insists on drinking, it is the *patron* who pays for the privilege, it is the *patron*

premise that a commercial vendor cannot be the proximate cause of injury to a third party simply by serving alcohol.²⁴ By shielding vendors from proximate liability, the legal system held patrons personally accountable for their voluntary decisions to drink and their poor decisions that resulted from drinking.

Nevertheless, the thinking on commercial vendor liability for serving alcohol changed over time. Such liability was established during the beginning of the Prohibition era as dramshop²⁵ acts were enacted.²⁶ In the 1830s, people abandoned hope that "drinkers would reform themselves," and prohibitionists attempted to eliminate the public's alcohol supply through legislative means.²⁷ While still a territory,²⁸ Washington enacted a dramshop act that allowed a civil cause of action against any person or vendor that provided alcohol to an intoxicated person who then caused injury to another.²⁹ Dramshop liability survived from 1879 until 1955, when the Legislature expressly repealed the statute.³⁰ Although legislative history fails to explain the rationale behind the repeal, courts have consistently inferred that the repeal indicated the legislature's disapproval of third party recovery against a commercial vendor for serving alcohol.³¹ Consequently, injured parties searched elsewhere for compensation.

who imbibes to excess, and it is the *patron*—not the business—who voluntarily elects to get behind the wheel rather than walk, take a taxi, or ride home with a sober friend.

Barrett v. Lucky Seven Saloon, Inc., 152 Wash. 2d 259, 280, 96 P.3d 386, 393–94 (2004) (Sanders, J., dissenting).

24. *Halvorson*, 76 Wash. 2d at 762, 458 P.2d at 899.

25. A dramshop is "[a] place where alcoholic beverages are sold; a bar or saloon." BLACK'S LAW DICTIONARY 531 (8th ed. 2004).

26. Laura Hoexter, Note, *A Minor Hazard: Social Host Liability in Washington After Hansen v. Friend*, 68 WASH. L. REV. 227, 228 (1993).

27. *Id.* at 228 n.10 (citing Carla K. Smith, Note, *Social Host Liability for Injuries Caused by the Acts of an Intoxicated Guest*, 59 N.D. L. REV. 445, 448 (1983)). Eventually, the prohibitionists succeeded. The Eighteenth Amendment prohibited the manufacture, sale, or transportation of liquor in the United States. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

28. Washington was admitted as a state on November 11, 1889. Proclamation No. 8, 26 Stat. 1552 (Nov. 11, 1889).

29. WASH. REV. CODE § 4.24.100, *repealed by* 1955 Wash. Sess. Laws, ch. 372, § 1 (original version at Laws of Wash. 132, § 1 (1879)). Nevertheless, it has been reported that only four cases involved commercial vendor liability after the dramshop act was passed. See Sheldon H. Jaffe, *What a Long Strange Trip It's Been: Court-Created Limitations on Rights of Action for Negligently Furnishing Alcohol*, 72 WASH. L. REV. 595, 599 (1997).

30. 1955 Wash. Sess. Laws, ch. 372, § 1.

31. *Estate of Kelly ex rel. Kelly v. Falin*, 127 Wash. 2d 31, 38, 896 P.2d 1245, 1248 (1995) (affirming that the legislature rejected imposing liability by repealing WASH. REV. CODE § 4.24.100); *Burkhart v. Harrod*, 110 Wash. 2d 381, 387–88, 755 P.2d 759, 762 (1988) (suggesting that the repeal of WASH. REV. CODE § 4.24.100 indicates "disapproval of . . . liability").

C. Post-Dramshop Act Liability

Even after dramshop liability was eliminated in Washington, the Washington Liquor Control Board retained power to regulate liquor sales “for the protection of the welfare, health, peace, morals, and safety of the people of the state.”³² Since 1933, a Washington statute has prohibited commercial vendors from serving a patron who is “apparently under the influence” of alcohol.³³ Vendors violating the statute face sanctions that include fines, liquor license suspension or revocation, or imprisonment.³⁴ Significantly, the statute remains silent as to the issue of civil liability, even after amendments.³⁵ After the dramshop act was repealed,³⁶ the legislative silence on civil liability forced courts to revert to the common law rule that a commercial vendor does not owe a duty to a third party because “it is not a tort to either sell or give intoxicating liquor to ordinary able-bodied men.”³⁷ The common law rule prohibited vendor liability based on the premise that the injury resulted from the patron’s *initial* decision to drink to the point of intoxication, not the patron’s “drinking *after* [the point of] intoxication.”³⁸ This rule recognized that people are responsible for their actions, whether drunk or sober, and that, with limited exceptions,³⁹ the vendor’s sale of alcohol was not the proximate cause of the ensuing injury.⁴⁰ The limited exceptions that allow recovery against a commercial vendor for serving a patron turn on the level of the patron’s drunkenness at the time of service.⁴¹

D. “Apparently Under the Influence” and “Obviously Intoxicated” are Distinct Levels of Observable Drunkenness

In causal usage, the terms “apparently” and “obviously” may be thought of as synonyms; under the careful examination of courts defining the precise scope of a civil duty,⁴² however, the definitions differ

32. WASH. REV. CODE § 66.08.010 (2006).

33. *Id.* § 66.08.200.

34. *Id.* § 66.08.180; *see also* Washington State Liquor Control Board, Penalties for Violating Liquor Control Laws, <http://www.liq.wa.gov/enforcement/penalties2007.asp> (last visited Nov. 10, 2007).

35. *See* § 66.44.200.

36. 1955 Wash. Sess. Laws, ch. 372, § 1.

37. *Halvorson v. Birchfield Boiler, Inc.*, 76 Wash. 2d 759, 762, 458 P.2d 897, 899 (1969).

38. Theresa J. Rambosek, Comment, *A Wavering Line? Washington’s Rules of Liability for Furnishers of Alcohol*, 24 GONZ. L. REV. 167, 199 (1989) (emphasis added).

39. *See infra* Part II.E.

40. *Halvorson*, 76 Wash. 2d at 762, 458 P.2d at 899.

41. *See infra* Part II.E.

42. These terms confuse even the Washington State Liquor Control Board. Its own website reports violations as “allowing [an] *intoxicated* person to consume” and “sale to [an] *apparently intoxicated* person.” Washington State Liquor Control Board, Violations Oct. 2007,

significantly. The “apparently under the influence” standard greatly increases a commercial vendor’s duty to the injured third party—a distinction in language that the *Barrett* majority recognized.⁴³

The adverb “obviously” describes a characteristic with some certainty.⁴⁴ Something is obvious when it is “readily perceived by the senses” and “hard not to perceive.”⁴⁵ Such things can be easily seen, heard, or smelled without much insight or reflection.⁴⁶ Thus, obvious intoxication must be “so simple and clear as to be unmistakable” and “disappointingly simple and easy to discover.”⁴⁷

On the other hand, something that is “apparent” is merely “seemingly [or] evident[ly]” in existence.⁴⁸ Something is “apparent” when it is “capable of being readily perceived” by the senses or “underst[ood] as certainly existent or present.”⁴⁹ Thus, it must not be simple or clear to interpret, but must rather “require[] at least some reflection and thought.”⁵⁰

In short, a person is “obviously intoxicated” when he or she is “certainly” drunk, but a person is “apparently under the influence” when he or she is “seemingly” drunk.⁵¹ Prior to *Barrett*, third party liability did not attach when a person was merely “apparently under the influence,” under the theory that such a person did not lack will power and was still responsible for his or her actions.⁵² The vendor’s duty would arise only when a person was “obviously intoxicated” and thus in a state of helplessness or debauchery such that he or she was unable to voluntarily control bodily actions.⁵³ The majority’s opinion in *Barrett* elevated a commercial vendor’s duty by requiring reflection and inquiry into whether a

<http://www.liq.wa.gov/violations/vltn0710.asp> (last visited Nov. 10, 2007) (emphasis added). The Board’s language choice is nonsensical because it combines the common law standard of civil liability with the criminal statute, when the only language the Board should be concerned with is the “apparently under the influence” language set forth in its criminal statute. See also WASH. ADMIN. CODE 314-11-035 (2007) (using the terms “under the influence” and “intoxicated” when interpreting WASH. REV. CODE § 66.44.200 (2006)); WASH. ADMIN. CODE 314-18-070(2) (2007) (using the term “apparently intoxicated” for the standard of service under a banquet permit).

43. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wash. 2d 259, 268, 96 P.3d 386, 390 (2004).

44. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1559 (2002).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 102.

49. *Id.* (emphasis added).

50. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wash. 2d 259, 268, 96 P.3d 386, 390 (2004) (citing *Dickerson v. Chadwell*, 62 Wash. App. 426, 435 n.4, 814 P.2d 687, 693 n.4 (1991)).

51. *Id.*

52. *Id.* at 286–87, 96 P.3d at 397 (Sanders, J., dissenting) (citing 30 AM. JUR. *Intoxicating Liquors* § 521 (1958)).

53. *Id.* (citing 30 AM. JUR. *Intoxicating Liquors* § 521 (1958)); *Shelby v. Keck*, 85 Wash. 2d 911, 916, 541 P.2d 365, 369 (1975).

person is under the influence at the time of service.⁵⁴ The “apparently under the influence” standard is difficult to apply uniformly because it requires significant subjective reflection and thought.⁵⁵ Moreover, it rejects the notion that a vendor may simply rely on his or her senses to detect the patron’s intoxication.

E. Vendor Liability to Third Parties

Washington common law traditionally recognized vendor liability to third parties for automobile accident injuries in two circumstances. Liability would attach if a vendor served alcohol to either a minor⁵⁶ or an “obviously intoxicated” patron.⁵⁷

In the first circumstance, a vendor will be civilly liable for foreseeable injuries that result from serving a minor regardless of the minor’s level of intoxication.⁵⁸ The level of intoxication is irrelevant in this situation because, unlike an adult, a minor may not lawfully purchase alcohol.⁵⁹ A vendor is always in control of whether the minor is served alcohol because minors “are neither physically nor mentally equipped to handle the consumption of intoxicating liquor”; consequently, the vendor always has a duty not to serve minors.⁶⁰

Before *Barrett*, the second circumstance in which a court would attach liability for third party injury was when a commercial vendor continued to serve a patron who was “obviously intoxicated.”⁶¹ The

54. An estimated 225 alcohol-related traffic deaths occurred in Washington in 2006. See NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., 2006 TRAFFIC SAFETY ANNUAL ASSESSMENT—ALCOHOL-RELATED FATALITIES, available at <http://www.nhtsa.dot.gov/>. Although some may argue that a higher duty is necessary in light of the high number of alcohol-related traffic deaths, increasing the civil liability standard for commercial vendors will not necessarily deter drunk driving—it will deter the service of alcohol altogether, even to those who drink responsibly. The *Barrett* court’s standard does not help society remedy the specific problem of impaired drivers, and this Note argues that commercial vendors should be liable for such accidents only when the commercial vendor “knew or should have known” that the patron was “obviously intoxicated” at the time of service. See *infra* Part V.

55. *Barrett*, 152 Wash. 2d at 268, 96 P.3d at 390 (citing *Dickerson v. Chadwell*, 62 Wash. App. 426, 435 n.4, 814 P.2d 687, 693 n.4 (1991)).

56. *Estate of Kelly ex rel. Kelly v. Falin*, 127 Wash. 2d 31, 36–37, 896 P.2d 1245, 1247 (1995).

57. *Halvorson v. Birchfield Boiler, Inc.*, 76 Wash. 2d 759, 762, 458 P.2d 897, 899 (1969).

58. “It is illegal to sell minors alcohol[,] and if a vendor breaches this duty it will be responsible for the foreseeable injuries which result.” *Schooley v. Pinch’s Deli Mkt., Inc.*, 134 Wash. 2d 468, 480, 951 P.2d 749, 755 (1998).

59. WASH. REV. CODE § 66.44.270 (2006).

60. *Schooley*, 134 Wash. 2d at 476, 951 P.2d at 753.

61. See, e.g., *Fairbanks v. J.B. McLoughlin Co.*, 131 Wash. 2d 96, 929 P.2d 433 (1997); *Kelly*, 127 Wash. 2d 31, 896 P.2d 1245; *Christen v. Lee*, 113 Wash. 2d 479, 780 P.2d 1307 (1989); *Purchase v. Meyer*, 108 Wash. 2d 220, 737 P.2d 661 (1987); *Dickinson v. Edwards*, 105 Wash. 2d 457, 716 P.2d 814 (1986); *Barrie v. Hosts of America, Inc.*, 94 Wash. 2d 640, 618 P.2d 96 (1980); *Shelby v. Keck*, 85 Wash. 2d 911, 541 P.2d 365 (1975); *Halvorson*, 76 Wash. 2d 759, 458 P.2d 897.

rationale for requiring a patron to be "obviously intoxicated" is that the vendor becomes responsible for the patron's acts only if the vendor serves a patron who is helpless, no longer in control of his or her actions, and unable to decide whether to stop drinking.⁶² At the point of obvious intoxication, the patron presumably lacks the will power to control his or her actions.⁶³ The vendor then becomes legally responsible for the patron's actions because the vendor observed the obvious intoxication but served the patron anyway.⁶⁴ The act of serving alcohol in this circumstance becomes the proximate cause of the ensuing injury because the vendor is in the best position to prevent foreseeable harm.⁶⁵ The vendor has a duty to stop serving the patron at that point because continued service increases the likelihood that the patron will cause harm to others.⁶⁶

For over thirty-five years the Washington Supreme Court consistently applied the "obviously intoxicated" standard to define when a patron lacks will power and to determine when the court will hold a vendor liable for serving a patron.⁶⁷ For example, in *Fairbanks v. J.B. McLoughlin Co., Inc.*, the court applied the "obviously intoxicated" standard to determine whether the furnisher of alcohol was liable for negligence when an employee was in an automobile accident following a company banquet.⁶⁸ The injured bystander brought suit against the establishment and the patron's employer, claiming negligent furnishing of alcohol.⁶⁹ The court noted that a witness's subjective observation of the patron's intoxication soon after leaving the banquet could establish the "obvious intoxication" requirement for a negligence action.⁷⁰

Additionally, the court used the "obviously intoxicated" standard to determine that a commercial vendor does not owe a duty to the "obviously intoxicated" patron.⁷¹ In *Estate of Kelly ex rel. Kelly v. Falin*, a patron's family brought a wrongful death claim against a commercial establishment for serving the patron when he was "obviously

The rule has also been applied to social hosts. *See, e.g.,* *Burkhart v. Harrod*, 110 Wash. 2d 381, 755 P.2d 759 (1988); *Wilson v. Steinbach*, 98 Wash. 2d 434, 656 P.2d 1030 (1982).

62. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wash. 2d 259, 286-87, 96 P.3d 386, 397 (2004) (Sanders, J., dissenting) (citing 30 AM. JUR. 2D *Intoxicating Liquors* § 521 (1958)); *Shelby*, 85 Wash. 2d at 916, 541 P.2d at 369.

63. *Id.*

64. *See id.*

65. 43 AM. JUR. TRIALS *Liquor Provider Liability* § 4 (1991).

66. *Barrett*, 152 Wash. 2d at 286, 96 P.3d at 397 (Sanders, J., dissenting).

67. *Id.* at 288, 96 P.3d at 397-98.

68. *Fairbanks v. J.B. McLoughlin Co.*, 131 Wash. 2d 96, 98, 102-03, 929 P.2d 433, 434, 436 (1997).

69. *Id.* at 99, 929 P.2d at 434.

70. *Id.* at 103, 929 P.2d at 436.

71. *Estate of Kelly ex rel. Kelly v. Falin*, 127 Wash. 2d 31, 42, 896 P.2d 1245, 1250 (1995).

intoxicated.”⁷² The court rejected the argument that the vendor owed a duty to the patron but clarified the instances in which a commercial vendor owes a duty to third parties not to serve a patron.⁷³ The court in *Kelly* emphasized that a vendor must have notice of the obvious intoxication before a duty to third parties attaches.⁷⁴ The court also stressed that the individual who drinks must take personal responsibility for his or her actions, and it rejected the use of Revised Code of Washington (RCW) section 66.44.200 as the standard of care owed to a patron.⁷⁵ Both the majority and dissent applied the “obviously intoxicated” standard to determine the point at which a commercial vendor must abstain from serving a patron.⁷⁶ The dissent, in its application of the “obviously intoxicated” standard, adopted the principle that the bartender must *know* that the patron is intoxicated.⁷⁷

Each of these cases, and the many before them that applied the “obviously intoxicated” standard,⁷⁸ have implicitly been overturned by the *Barrett* court’s decision to expand vendor liability.

III. HOW *BARRETT* EXPANDED VENDOR LIABILITY

A. Case Background

On October 11, 1995, Jeffrey Barrett was severely injured in an accident caused by an impaired driver, Ned Maher.⁷⁹ A frequent customer of the Lucky Seven Saloon, Maher had spent approximately three hours there prior to the accident, during which time he drank at least two pitchers of beer.⁸⁰ He testified that he left because he felt a little “buzzed” and was going to go home to watch a ballgame.⁸¹ On his way home, Maher fell asleep, crossed the centerline, and hit Barrett’s vehicle.⁸² Neither the police officer at the scene nor Maher’s treating physician believed Maher

72. *Id.* at 33, 36, 896 P.2d at 1246–47.

73. *Id.* at 39–42, 896 P.2d at 1249–50.

74. *Id.* at 37, 896 P.2d at 1248.

75. *Id.* at 39, 896 P.2d at 1249.

76. *Id.* at 37, 43, 896 P.2d at 1247, 1251.

77. *Id.* at 47, 896 P.2d at 1253 (emphasis added).

78. *See, e.g.*, *Fairbanks v. J.B. McLoughlin Co.*, 131 Wash. 2d 96, 929 P.2d 433 (1997); *Kelly*, 127 Wash. 2d 31, 896 P.2d 1245; *Christen v. Lee*, 113 Wash. 2d 479, 780 P.2d 1307 (1989); *Purchase v. Meyer*, 108 Wash. 2d 220, 737 P.2d 661 (1987); *Dickinson v. Edwards*, 105 Wash. 2d 457, 716 P.2d 814 (1986); *Barrie v. Hosts of America, Inc.*, 94 Wash. 2d 640, 618 P.2d 96 (1980); *Shelby v. Keck*, 85 Wash. 2d 911, 541 P.2d 365 (1975); *Halvorson v. Birchfield Boiler, Inc.*, 76 Wash. 2d 759, 458 P.2d 897 (1969).

79. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wash. 2d 259, 262–63, 96 P.3d 386, 387 (2004).

80. *Id.*

81. *Barrett v. Lucky 7 Saloon, Inc.*, No. 46688-7-I, 2002 WL 1608479, at *1 (Wash. Ct. App. July 22, 2002).

82. *Barrett*, 152 Wash. 2d at 263, 96 P.3d at 387.

to be intoxicated.⁸³ Maher admitted to drinking, however, and later tests determined that his blood alcohol level exceeded the legal limit.⁸⁴ After Maher pleaded guilty to vehicular assault while under the influence of liquor,⁸⁵ Barrett sued Lucky Seven for negligently over-serving Maher.⁸⁶

At trial, the jury found for Lucky Seven.⁸⁷ On appeal, Barrett argued that the trial court erred in applying the "obviously intoxicated" standard in the jury instructions to define when Lucky Seven's duty not to serve Maher ripened.⁸⁸ Barrett argued that the trial court should have used the "apparently under the influence" standard set forth in the statute providing for criminal liability.⁸⁹ However, Barrett did not use the statutory language in his original complaint and instead used the common law language to argue that Lucky Seven served Maher while he was "obviously intoxicated."⁹⁰ Barrett's choice of language suggests that he knew that the appropriate standard was "obviously intoxicated" when he filed the initial complaint against Lucky Seven.

On appeal, the court of appeals affirmed the verdict for Lucky Seven, holding that the criminal statute did not create a basis for civil liability. Instead, the court found that RCW section 66.44.200 was "intended as a licensing and enforcement tool."⁹¹ This holding was consistent with the court's conclusion in 1991 in *Dickerson v. Chadwell, Inc.*,⁹² in which a patron sued a commercial vendor under the "apparently under the influence" standard.⁹³ Even though the assault in *Dickerson* did not involve an automobile, the court elaborated on the distinction between the common law duty and the criminal statute.⁹⁴ In *Dickerson*, the court relied on past Washington Supreme Court decisions and emphasized that

83. *Lucky 7*, 2002 WL 1608479, at *2.

84. *Barrett*, 152 Wash. 2d at 263, 96 P.3d at 387.

85. *Id.*

86. *Id.*

87. *Id.* at 266, 96 P.3d at 389.

88. *Id.* at 265–66, 96 P.3d at 389. The appellate court reviewed this issue despite the plaintiff's failure to object at the trial level to the jury instructions that included the "obviously intoxicated" standard. *See id.* at 281, 96 P.3d at 394 (Sanders, J., dissenting) (citing Report of Proceedings at 16, *Lucky 7*, 2002 WL 1608479). The plaintiff's failure to make objections and failure to preserve the record is an absolute bar to appeal on the issue under Washington Superior Court Civil Rule 51(f). *Id.* Although there are significant procedural reasons why the state supreme court should not have granted review of *Barrett*, this Note covers only the substantive review of the standard applied to create civil liability.

89. *Lucky 7*, 2002 WL 1608479, at *3.

90. *Barrett*, 152 Wash. 2d at 283, 96 P.3d at 395 (Sanders, J., dissenting) (citing Clerk's Papers at 187, *Lucky 7*, 2002 WL 1608479 (No. 46688-7-1)).

91. *Lucky 7*, 2002 WL 1608479, at *3 (citing *Purchase v. Meyer*, 108 Wash. 2d 220, 225, 737 P.2d 661, 664 (1987)).

92. 62 Wash. App. 426, 814 P.2d 687 (1991).

93. *Id.* at 435, 814 P.2d at 693.

94. *Id.* at 428, 434–35, 814 P.2d at 690, 693.

“[t]he duty such [commercial] establishments owe is consistently described as a duty not to serve alcohol to ‘obviously intoxicated’ persons.”⁹⁵ The *Dickerson* court remanded on the basis that it was an error to instruct the jury using the less stringent “apparently intoxicated” standard set forth in RCW section 66.44.200 instead of the “obviously intoxicated” standard.⁹⁶ Nevertheless, Barrett appealed to the Washington Supreme Court, maintaining his position that the trial court should have applied the “apparently under the influence” standard rather than the “obviously intoxicated” standard.⁹⁷

B. The Supreme Court’s Holding

On review, the state supreme court held that the statutory standard that creates criminal sanctions for serving a patron “apparently under the influence”⁹⁸ also defines the standard of care owed by commercial vendors to third parties in determining civil liability.⁹⁹ The court came to this conclusion after applying section 286 of the Restatement (Second) of Torts, which provides a test to determine whether a legislative regulation violation should also be the basis for civil liability.¹⁰⁰ According to the Restatement, a court may adopt the statutory language as the standard of conduct for a reasonable person when the purpose of the statute is

- (a) to protect a class of persons which includes the one whose interest is invaded, and
- (b) to protect the particular interest which is invaded, and
- (c) to protect that interest against the kind of harm which has resulted, and
- (d) to protect that interest against the particular hazard from which the harm results.¹⁰¹

The *Barrett* court found that section 286 provided the basis for Lucky Seven’s standard of care, or duty owed to Barrett, because the four requirements were met.¹⁰² The court determined that the purpose of RCW section 66.44.200 was to protect the health and safety of the people

95. *Id.* at 434, 814 P.2d at 692 (emphasis added).

96. *Id.* at 435, 814 P.2d at 693.

97. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wash. 2d 259, 266, 96 P.3d 386, 389 (2004).

98. WASH. REV. CODE § 66.44.200(1) (2006).

99. *Barrett*, 152 Wash. 2d at 273, 96 P.3d at 393.

100. *Id.* at 269, 96 P.3d at 390–91; RESTATEMENT (SECOND) OF TORTS § 286 (1965).

101. RESTATEMENT (SECOND) OF TORTS § 286 (1965).

102. *Barrett*, 152 Wash. 2d at 273, 96 P.3d at 392.

of Washington,¹⁰³ that Barrett fell into that protected class, and that he accordingly had a cause of action based on the standard of conduct set forth in the statute.¹⁰⁴ Further, the court held that the legislature created the statute to protect third parties like Barrett from the physical and emotional injury caused by an impaired driver.¹⁰⁵

Although the court reasoned that it had previously used section 286 to define standards of conduct owed to minors,¹⁰⁶ this was the first time the court used it to define the duty owed to a third party who is injured by an impaired adult driver based upon the statutory language of RCW section 66.44.200.¹⁰⁷ Furthermore, the court stated that it had previously used section 286 in this manner only to show *evidence* of negligence, not to establish a duty.¹⁰⁸ The court also held that the standard of conduct it applied did not impose an additional burden because commercial vendors had been required for over seventy years, under the criminal standard, not to serve those “apparently under the influence.”¹⁰⁹ This determination overturns the holding in *Dickerson* in which the court of appeals correctly emphasized the difference between the civil and criminal standards.¹¹⁰

The *Barrett* court overlooked the fact that the standard of conduct it created was, in fact, significantly different from that set forth in the criminal statute because it provided a civil cause of action.¹¹¹ Adding the possibility of civil liability to the criminal statute subjects the vendor not only to fines, permit suspensions, and imprisonment,¹¹² but also to the payment of damages to an injured third party in a civil suit.¹¹³ The court’s adoption of the “apparently under the influence” standard was incorrect, and it should not be applied to determine a vendor’s duty to third parties.

IV. A CRITIQUE OF *BARRETT*: WHY THE “APPARENTLY UNDER THE INFLUENCE” STANDARD SHOULD BE REJECTED

Four problematic consequences arise from the majority’s flawed reasoning in *Barrett*. First, a court is not required to apply the

103. *Id.* (quoting WASH. REV. CODE § 66.08.010 (2004)).

104. *Id.*

105. *Id.*

106. *Id.* at 269, 96 P.3d at 91.

107. *Id.* (noting that the issue before the court was one of first impression).

108. *Id.* at 274, 96 P.3d at 393 (emphasis added).

109. *Id.*

110. *See infra* Part IV.A.

111. *See supra* Part II.C.

112. WASH. REV. CODE § 66.44.180 (2006).

113. RESTATEMENT (SECOND) OF TORTS § 281 (1965); *see supra* Part II.A.

Restatement to create a standard for civil liability,¹¹⁴ and the majority should not have done so here. Second, the “apparently under the influence” standard amounts to negligence per se, a doctrine that has a narrow application in Washington law.¹¹⁵ Third, the standard disregards the firmly established requirement of foreseeability in a negligence claim.¹¹⁶ Lastly, the holding is inconsistent with the principles of stare decisis and legislative intent.¹¹⁷

*A. The Court’s Application of Restatement
Section 286 Was a Discretionary Mistake*

The *Barrett* court erred when it incorporated Restatement section 286 into RCW section 66.44.200 in order to define the duty owed by a commercial vendor.¹¹⁸ The relevant section reads: “The court *may* adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment”¹¹⁹ Comment (d) of section 286 states that when a statute does not contain a provision for civil liability, the court is “under no compulsion to accept it as defining any standard of conduct for purposes of a tort action.”¹²⁰ This comment applies to *Barrett* because RCW section 66.44.200 does not contain a provision for civil liability.¹²¹ Furthermore, the Reporter’s Notes state that section 286 was specifically changed in order to clarify that the court is not required to impose civil liability unless such liability is expressed or implied from the statute.¹²² The *Barrett* court made an erroneous discretionary call when it decided to apply section 286 to the case before it.

The court was correct in stating that section 286 is an avenue to establish civil liability based on the language set forth in a criminal statute;¹²³ it has adopted this section sparingly in the past to define the duty owed by vendors to minors.¹²⁴ When the court chose to apply it to the conduct of serving alcohol to minors in *Hansen v. Friend*,¹²⁵ however, scholars criticized the application as faulty.¹²⁶ The *Barrett* court justified

114. See *infra* Part IV.A.

115. See *infra* Part IV.B.

116. See *infra* Part IV.C.

117. See *infra* Part IV.D.

118. See *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wash. 2d 259, 274, 96 P.3d 386, 393 (2004).

119. RESTATEMENT (SECOND) OF TORTS § 286 (1965) (emphasis added).

120. RESTATEMENT (SECOND) OF TORTS § 286 cmt. d (1965).

121. See WASH. REV. CODE § 66.44.200 (2006).

122. RESTATEMENT (SECOND) OF TORTS § 286 reporter’s notes (1965).

123. *Barrett*, 152 Wash. 2d at 274, 96 P.3d at 393 (citing *Callan v. O’Neil*, 20 Wash. App. 32, 578 P.2d 890 (1978)).

124. See, e.g., *Hansen v. Friend*, 118 Wash. 2d 476, 480–82, 824 P.2d 483, 485–86 (1992).

125. *Id.* at 480–81, 824 P.2d at 485.

126. See Hoexter, *supra* note 26, at 240–46.

its application of section 286, as a means to establish civil liability when an adult patron is served, primarily on the section's prior limited application in situations involving minors.¹²⁷ But a different standard of care applies to adults because they have the capability to decide whether to drive to a bar and drink. Minors, on the other hand, are presumed incompetent, and a vendor always owes a duty not to serve them.¹²⁸

B. The Court's Application of Restatement Section 286 Violates Washington Law Because It Amounts to Negligence Per Se

The supreme court erred by failing to apply the common law standard to determine when a commercial vendor should be liable for injuries to a third party. This Section explains the doctrine of negligence per se and its limited acceptance in Washington law. It further explains how negligence per se and Restatement section 286 are indistinguishable and why the *Barrett* court should have declined to apply section 286 in the context of vendor liability.

1. The Doctrine of Negligence Per Se

The doctrine of negligence per se provides an avenue for tort liability if a person violates a statute, or other legislative enactment, that was created to protect against the type of accident that occurred, and the victim is within the class the statute was created to protect.¹²⁹ The doctrine allows for a civil claim in circumstances when a civil cause of action is not enumerated in the statute¹³⁰ by permitting courts to "substitute a statutory standard of conduct for the less restrictive common law standard of reasonableness."¹³¹ Thus, if Washington were a jurisdiction that indiscriminately embraced the doctrine of negligence per se,¹³² a commercial vendor would be liable for harm to a third party resulting from serving an "apparently under the influence" patron because, as the *Barrett* majority states, RCW section 66.44.200 was designed to protect innocent third party bystanders from over-served drivers.¹³³ But,

127. *Barrett*, 152 Wash. 2d at 270, 96 P.3d at 391.

128. *See supra* Part II.E.

129. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 14 (Proposed Final Draft No. 1 2005).

130. *See* RESTATEMENT (SECOND) OF TORTS § 286 cmt. d (1965) (explaining that it is within the court's discretion whether violating a legislative enactment may result in civil liability when the enactment is silent on the issue).

131. *Mina v. Boise Cascade Corp.*, 104 Wash. 2d 696, 703-04, 710 P.2d 184, 189 (1985).

132. With limited exceptions, Washington has rejected the doctrine of negligence per se. *See* WASH. REV. CODE § 5.40.050 (2006).

133. *See Barrett v. Lucky Seven Saloon, Inc.*, 152 Wash. 2d 259, 273-74, 96 P.3d 386, 392 (2004).

significantly, Washington enacted a statute limiting when negligence per se may be invoked as a cause of action, and over-serving is not a factual situation that invokes the limited application of the doctrine.¹³⁴

2. Negligence Per Se Has Limited Application in Washington

In the 1980s the Washington legislature went through a period during which it recognized the need to protect business owners from excessive tort liability.¹³⁵ Consequently, the Tort Reform Act was adopted in 1986 that, in part, limited a plaintiff's use of a statutory violation to show only *evidence* of negligence.¹³⁶ As part of the Tort Reform Act, the legislature explicitly eliminated the doctrine of negligence per se as a cause of action through the enactment of RCW section 5.40.050, which reads in part: "A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se"¹³⁷ The statute created four limited exceptions when a party will be found to have breached a duty of care based solely on the fact that he or she violated a standard of conduct created by a statute.¹³⁸ These exceptions include violating rules "relating to [1] electrical fire safety, [2] the use of smoke alarms, [3] sterilization of needles and instruments used in tattooing or electrology . . . or [4] driving while under the influence of intoxicating liquor or any drug."¹³⁹ The act of over-serving a patron is not one of the specific exceptions enumerated in the statute.¹⁴⁰

The exception that allows a plaintiff to establish negligence based on the violation of a statute that prohibits the act of "driving while under the influence of intoxicating liquor" is most relevant to the facts in *Barrett*.¹⁴¹ This exception, however, is explicitly aimed only at the irresponsible drinker's conduct of driving while impaired, not the vendor's conduct of furnishing alcohol.¹⁴² Courts prior to *Barrett* held that the statute

134. See § 5.40.050.

135. S. 49-4630, Reg. Sess. (Wash. 1986).

136. § 5.40.050 (emphasis added).

137. *Id.*

138. *Id.*

139. *Id.*

140. See *id.*

141. See *id.*

142. *Fraser v. Beutal*, 56 Wash. App. 735, 739-40, 785 P.2d 470, 478-79 (1990). Despite the unambiguous distinction between the act of an impaired driver and the act of a commercial vendor, the Washington Supreme Court has applied negligence per se doctrine to create a cause of action when a vendor violates the standard of conduct set forth in a statute prohibiting the service of minors. See, e.g., *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wash. 2d 468, 473, 951 P.2d 749, 751 (1998). This acknowledgment appears to be a stretch by the court based on policy since it is inconsistent with the statutory language.

rejecting negligence per se is "clear and unambiguous" and refused to expand the limited exceptions to include the act of furnishing alcohol.¹⁴³ Nevertheless, this is exactly what the Washington Supreme Court did in *Barrett* through the use of Restatement section 286.

3. Negligence Per Se and Restatement Section 286 Are Indistinguishable

Surprisingly, the *Barrett* court failed to recognize the unambiguous connection between its application of section 286 and the doctrine of negligence per se.¹⁴⁴ Evidence of the connection is exemplified by Restatement (Second) of Torts section 288B, other jurisdictions' recognition of the connection, the notes following section 286 itself, and Washington Pattern Jury Instructions.¹⁴⁵

Section 288B of the Restatement (Second) of Torts provides: "The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself."¹⁴⁶ Furthermore, comment (a) explicitly states that a standard of conduct adopted under section 286 "is negligence 'per se,' or in itself."¹⁴⁷ Thus, when a court defines a duty based on statutory language through the application of section 286, the court is adopting the doctrine of negligence as a matter of law, or negligence per se.¹⁴⁸

The connection between section 286 and negligence per se is also exemplified in the fact that the majority of courts properly recognize that a plaintiff has a claim based on negligence per se when the four elements under section 286¹⁴⁹ are met.¹⁵⁰ Even within section 286, the exemplary cases following the case citations in the reporter's notes consistently refer to negligence per se to describe the cause of action created under the

143. *Fraser*, 56 Wash. App. at 739–40, 785 P.2d at 478–79.

144. Other jurisdictions have recognized this connection, determining that once a legislative enactment is defined as a standard of care under section 286, violating the statute amounts to negligence per se. See, e.g., *Lukaszewicz v. Ortho Pharm. Corp.*, 510 F. Supp. 961, 964–65 (E.D. Wis. 1981).

145. See *infra* Part IV.B.3.

146. RESTATEMENT (SECOND) OF TORTS § 288B(1) (1965); see also Nathan Isaac Combs, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, 250 n.35 (2005) (explaining that section 286 defines the circumstances in which a violation of legislation amounts to negligence per se).

147. RESTATEMENT (SECOND) OF TORTS § 288B cmt. a (1965).

148. See Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 75 n.36 (2001) (noting that the standards of negligence per se were incorporated into section 286).

149. See *supra* Part III.B.

150. Kaye A. Pfister, Note, *A Review of Shipowners' Statutory Duty Under Section 905(b) of the Longshoremen's and Harborworkers' Compensation Act: Does Scindia Require a Change in Course?*, 1983 DUKE L.J. 153, 160 (1983).

section.¹⁵¹ These courts correctly analyzed that defining a defendant's duty under section 286 is indistinguishable from permitting a claim under the doctrine of negligence per se.

A final example of the connection can be found in Washington Pattern Jury Instructions regarding negligence per se.¹⁵² The jury instructions require that the court instruct the jury that the plaintiff must satisfy the four elements of section 286 before the jury can find liability based on negligence per se.¹⁵³ This instruction should apply only to situations in which negligence per se is permissible—under the limited exceptions in RCW section 5.40.050—to define the standard of conduct.

Although section 286 is not titled “negligence per se,” negligence per se and section 286 are not distinct theories of liability, but rather identical ones—each defines a duty and creates a civil cause of action based on a legislative enactment.¹⁵⁴ The *Barrett* court ignored this connection and instead used section 286 to get around the legislature's explicit prohibition of negligence per se as an avenue for a cause of action.¹⁵⁵ One possible explanation is that the court's decision allows a plaintiff who is otherwise unable to prove common law negligence to bring a cause of action.¹⁵⁶ The *Barrett* court, however, should have required Barrett to prove that Lucky Seven owed a duty under the common law “obviously intoxicated” standard.

4. Negligence Per Se's Presence in *Barrett* and the Requirement of a Common Law Claim

Barrett indirectly and impermissibly adopted the doctrine of negligence per se. The court determined, after applying Restatement section 286, that RCW section 66.44.200 defines the duty or “minimum standard of conduct” owed by a commercial vendor to a third party.¹⁵⁷ Consequently, it created the rule that a violation of the criminal statute¹⁵⁸ is also a breach of the duty of care in a civil action against a commercial vendor.¹⁵⁹ The practical consequences of the court's decision make the

151. See RESTATEMENT (SECOND) OF TORTS § 286 (1965).

152. 6 WASH. SUPREME COURT COMM. ON JURY INSTRUCTIONS, WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS—CIVIL WPI 60.01.01 (5th ed. 2005).

153. *Id.*

154. See discussion *supra* Part IV.B.3.

155. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wash. 2d 259, 274, 96 P.3d 386, 393 (2004).

156. See RESTATEMENT (SECOND) OF TORTS § 286 cmt. d (1965) (explaining that it is within the court's discretion whether violating a legislative enactment may result in civil liability when the legislative enactment is silent on the issue).

157. *Barrett*, 152 Wash. 2d at 274, 96 P.3d at 393.

158. WASH. REV. CODE § 66.44.200 (2006).

159. *Barrett*, 152 Wash. 2d at 274, 96 P.3d at 393.

violation of the statute sufficient to establish negligence.¹⁶⁰ The court's adoption of RCW section 66.44.200 as the standard of care was an indirect application of the negligence per se doctrine because the court "look[ed] to statutes and regulations rather than common law to determine the existence and scope of an actor's obligation of care."¹⁶¹

Prior to *Barrett*, the rule was clear that the violation of a statutory duty could only be used as evidence of negligence, and the plaintiff was still required to prove that a common law duty existed in order to establish liability.¹⁶² Based on the common law rule, the breach of a statutory standard of conduct alone is insufficient to establish negligence because it "resurrect[s] the doctrine of negligence per se."¹⁶³ Consequently, each element of a negligence claim must be present to have a common law cause of action.

In the commercial vendor liability context, the common law standard for establishing a negligence claim for violation of a duty of care to third parties had consistently been the "obviously intoxicated" standard.¹⁶⁴ *Barrett* should have been required to prove the traditional elements of a common law vendor liability claim—including that the patron was "obviously intoxicated" at the time of service.¹⁶⁵ Instead, the court held that "the statutory standard establishes a standard for civil liability."¹⁶⁶ The court's declaration resolved the breach of duty issue that is essential to establish negligence, which is exactly the role negligence per se plays.¹⁶⁷ Thus, when the court established a standard of reasonable conduct based on the language contained in RCW section 66.44.200, it contravened RCW section 5.40.050's abolition of the negligence per se doctrine.

Although the prohibition of negligence per se as a cause of action should have prevented application of the "apparently under the

160. When a plaintiff can establish the elements of duty and breach by proving a statutory violation, the remaining element of causation is also essentially established, as the service of alcohol establishes causation under the negligent service theory. Assuming proof of damages can be satisfied, a plaintiff's negligence claim is easily established under the doctrine of negligence per se. See *supra* Part III.A.

161. See John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 *VAND. L. REV.* 657, 743 (2001) (describing the doctrine of negligence per se).

162. *Estate of Templeton ex rel. Templeton v. Daffern*, 98 Wash. App. 677, 687, 990 P.2d 968, 974 (2000).

163. *Id.* at 686, 990 P.2d at 973.

164. See *supra* Part II.E.

165. See *Templeton*, 98 Wash. App. at 685–86, 990 P.2d at 973; see also *supra* Part II.E.

166. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wash. 2d 259, 269, 274, 96 P.3d 386, 390–91, 393 (2004).

167. DAN B. DOBBS & PAUL T. HAYDEN, *TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY* 139 (5th ed. 2005).

influence” standard, the court also failed to adequately consider its decision’s impact on the concept of foreseeability in a negligence claim.

C. The “Apparently Under the Influence” Standard Is Inconsistent with the Foreseeable Injury Requirement of a Negligence Claim

Even if the court did not recognize that it should have rejected the “apparently under the influence” standard based on Washington’s general rejection of negligence per se, it still should have rejected the standard because it does not satisfy the foreseeability of harm requirement of a negligence claim.¹⁶⁸ In *Kelly*, the court stated that “adults are expected to temper their alcohol consumption or simply refrain from driving when intoxicated.”¹⁶⁹ Yet, a long-established exception to that rule is that a commercial vendor breaches a duty of care by creating a situation in which harm to others is foreseeable.¹⁷⁰ The moment in time when a vendor’s duty arises based on foreseeable risk of harm to a third party is imperative because the vendor becomes liable for the conduct of another.¹⁷¹

The foreseeability requirement in a negligence claim limits the scope of the negligent actor’s duty because it requires the actor to prevent only foreseeable risks of harm.¹⁷² The “apparently under the influence” standard is inconsistent with this requirement because it minimizes the level of observable intoxication that is required before a vendor’s duty arises.¹⁷³ The standard assumes that even when the vendor serves alcohol to a seemingly—but not obviously—drunk patron, it is foreseeable that the patron is going to leave in his or her car, get in an accident, and injure someone. The standard requires a subjective inquiry or investigation by the commercial vendor and its employees to ensure that someone does not “seem” under the influence before that person is served.¹⁷⁴ Given the difficulty in determining whether a patron is “apparently under the influence,” the standard imposes a broad basis for liability when injury from impaired driving may not be foreseeable or predictable.

A vendor has a duty not to serve a person based on foreseeability of harm when the vendor is on notice that the patron is so intoxicated that he or she is out of control and unable to make informed choices; that

168. See *Johnson v. Martin*, 28 Wash. App. 774, 775, 626 P.2d 525, 526 (1981).

169. *Estate of Kelly ex rel. Kelly v. Falin*, 127 Wash. 2d 31, 39–40, 896 P.2d 1245, 1249 (1995).

170. See *Purchase v. Meyer*, 108 Wash. 2d 220, 225, 737 P.2d 661, 664 (1987).

171. See *supra* Part II.E.

172. *Johnson*, 28 Wash. App. at 775, 626 P.2d at 526.

173. See *supra* Part II.D.

174. See *supra* Part II.D.

duty logically arises when the patron is "obviously intoxicated," or, more appropriately, when the vendor *knows or should know* that the patron is intoxicated.¹⁷⁵ Prior to the point of obvious intoxication, a vendor becomes responsible for injuries caused by the actions of a patron that it cannot foresee. Even though imposing liability on a vendor may act as an incentive to prevent drunk driving,¹⁷⁶ a duty based on foreseeability of harm should arise only when the vendor is put on notice that continuing to serve the patron could lead to serious injury. "[N]otice of the risk . . . at a time when that risk may still be reasonably dealt with is inherent in the concept of reasonable conduct."¹⁷⁷ When a patron is "obviously intoxicated," the vendor is on notice of the risk of harm, and reasonable care requires that the vendor stop serving the patron.¹⁷⁸

The preference for the "obviously intoxicated" rule is analogous to criminal drunk driving statutes that distinguish between levels of culpability for the acts of driving "under the influence" and driving "while intoxicated."¹⁷⁹ The term "intoxication" denotes a higher degree of drunkenness than the descriptor "under the influence."¹⁸⁰ Intoxication is defined as a "diminished ability to act with full mental and physical capabilities"; "under the influence" is defined as "depriv[ation] of clearness of mind and self-control."¹⁸¹ The law recognizes a difference in culpability and responsibility for the same conduct depending on the extent of a person's level of intoxication.¹⁸² Similarly, a commercial vendor's liability should not attach when a person is "apparently under the influence," but when the patron's high level of intoxication is obvious. A commercial vendor is in a position to deal with the risk of harm, and possibly prevent harm to a third party, only when he or she is on notice of such a risk.¹⁸³

Interestingly, courts have placed more emphasis on the requirement of foreseeability and notice in determining liability for non-vehicular

175. See *infra* Part V.

176. *Dickinson v. Edwards*, 105 Wash. 2d 457, 479, 716 P.3d 814, 826 (1986) (Utter, J., concurring).

177. Stanley H. Barer, *Tavernkeeper's Liability for Act of Guests*, 37 WASH. L. REV. 263, 269 (1962).

178. See *Purchase v. Meyer*, 108 Wash. 2d 220, 225, 737 P.2d 661, 664 (1987).

179. See Act of May 28, 1991, 1991 Wash. Sess. Laws, ch. 290 (expanding the language for liability for drunk driving in six provisions of the Revised Code of Washington from "driving while intoxicated" to the broader language of "driving under the influence").

180. BLACK'S LAW DICTIONARY 841 (8th ed. 2004).

181. *Id.* at 1562.

182. See Act of May 28, 1991, 1991 Wash. Sess. Laws, ch. 290.

183. Barer, *supra* note 177, at 269 (determining that "notice of the risk . . . at [a] time when that risk may still be reasonably dealt with, is inherent in the concept of reasonable conduct").

torts committed by patrons.¹⁸⁴ For example, in an assault case, a vendor will not be liable for over-serving unless the vendor is on notice of the possibility of harm based on the patron's prior actions and the patron is "obviously intoxicated" at the time of service.¹⁸⁵ This circumstance requires a higher level of foreseeability of injury before a duty arises, even though the act of the vendor is the same: serving an intoxicated patron. The *Barrett* standard does not require notice based on prior actions or obvious intoxication; it merely requires that the patron be "apparently under the influence."¹⁸⁶ The same emphasis on notice should be required in determining when a vendor owes a duty to third parties who are injured by a patron who drives while impaired. Whether the instrument that causes harm is a knife or an automobile, the requisite level of foreseeability should be the same because the act of the vendor is the same.

The *Barrett* decision complicated the foreseeability issue in tort claims by lowering the standard that determines the point in time when the vendor should recognize the potential for injury. The "apparently under the influence" standard does not give the vendor adequate notice of risk of harm. Not only did the court diminish the importance of foreseeability, but it also disregarded precedent and thwarted the aims of the Washington Legislature.¹⁸⁷

D. The Court Failed to Follow Judicial Precedent and Legislative Intent

This Section argues that the court mistakenly failed to follow the rule it had consistently applied in determining vendor liability prior to *Barrett*. This Section further contends that the court's decision is incompatible with the legislature's intent and historical pattern in alcohol sale regulation.

1. Stare Decisis

The majority opinion in *Barrett* ignored that the "obviously intoxicated" standard was a well-established rule in Washington, successfully used for years to determine when a commercial vendor is liable to third

184. The *Barrett* court pointed out that RCW section 66.44.200 was not designed to protect citizens from other torts; consequently, the statute could not be used to define the duty owed to third parties who are not harmed in automobile accidents. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wash. 2d 259, 272, 96 P.3d 386, 392 (2004).

185. *Christen v. Lee*, 113 Wash. 2d 479, 498, 780 P.2d 1308, 1316 (1989); *see also Johnson v. Martin*, 28 Wash. App. 774, 776, 626 P.2d 525, 526 (1981) (declining to impose liability for assault when commercial establishment's employees had no notice that they were serving an intoxicated person, "let alone one who had lost his willpower").

186. *Barrett*, 152 Wash. 2d at 274, 96 P.3d at 393.

187. *See infra* Part IV.D.

parties for over-serving its patrons.¹⁸⁸ In so doing, the majority violated the principle of stare decisis.¹⁸⁹

Under stare decisis, a court may not abandon an established rule of law unless the rule is clearly “incorrect and harmful.”¹⁹⁰ The *Barrett* majority explicitly rejected the “obviously intoxicated” standard in favor of the “apparently under the influence” test.¹⁹¹ As Justice Sanders pointed out in his dissent, however, the court did not even address the stare decisis issue and failed to show that the “obviously intoxicated” standard was either incorrect or harmful.¹⁹² Perhaps the majority ignored this issue because it knew the “obviously intoxicated” standard is not incorrect or harmful—on the contrary, the standard provides a more just path to imposing liability by recognizing a duty based on the foreseeability of harm. The “obviously intoxicated” rule should have been protected by the doctrine of stare decisis.¹⁹³

It must be conceded that cases establishing liability for serving alcohol are “especially susceptible to reconsideration”¹⁹⁴ despite the doctrine of stare decisis. One possible explanation for this phenomenon is that, as was true during the Prohibition era, people have abandoned the idea that “drinkers would reform themselves” and have turned to their lawmakers for help.¹⁹⁵ Regardless, the *Barrett* court did not need to stray from the common law rule and disrupt stare decisis because, even without defining liability based on a statute, a plaintiff can always “default” to the common law rule to establish a cause of action.¹⁹⁶

2. Legislative Intent

The court not only ignored its own precedent, which consistently applied the “obviously intoxicated” standard, but its decision also contradicted the history of legislative intent regarding commercial vendor liability. First, the decision reflects a resurfacing of the Washington dramshop act repealed in 1955.¹⁹⁷ Second, RCW section 66.44.200 was

188. See *supra* Part II.E.

189. *Barrett*, 152 Wash. 2d at 298, 96 P.3d at 402–03 (Sanders, J., dissenting).

190. *City of Fircrest v. Jensen*, 158 Wash. 2d 384, 402 n.2, 143 P.3d 776, 785 n.2 (2006) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wash. 2d 649, 653, 466 P.2d 508, 511 (1970)).

191. *Barrett*, 152 Wash. 2d at 274, 96 P.3d at 393.

192. *Id.* at 298, 96 P.3d at 402–03 (Sanders, J., dissenting).

193. See *City of Fircrest*, 158 Wash. 2d at 402 n.2, 143 P.3d at 785 n.2.

194. Jaffe, *supra* note 29, at 608.

195. Hoexter, *supra* note 26, at 228 n.10 (citing Carla K. Smith, Note, *Social Host Liability for Injuries Caused by the Acts of an Intoxicated Guest*, 59 N.D. L. REV. 445, 448 (1983)).

196. DOBBS & HAYDEN, *supra* note 167, at 141. For a discussion of the common law cause of action, see *supra* Part IV.B.4.

197. 1955 Wash. Sess. Laws, ch. 372, § 1.

passed as a criminal provision and was specifically silent on the issue of civil liability.¹⁹⁸

When the legislature has been inactive in a particular area of law, the judiciary may have the freedom to “perform a creative role.”¹⁹⁹ In the area of commercial vendor liability, the Washington legislature has been quite active.²⁰⁰ Although it adopted dramshop liability early on, it later abandoned it in order to limit causes of action against commercial vendors.²⁰¹ Prior to *Barrett*, Washington courts regularly rejected imposing liability based on “broader exceptions to the common law rule,” when doing so would contravene the repeal of the dramshop act.²⁰² Instead, courts recognized the value in deferring to the legislature when dealing with issues of accountability in alcohol-related accidents.²⁰³ The “apparently under the influence” standard revives the dramshop act by once again easing the route to recovery against a commercial vendor through the doctrine of negligence per se.

The *Barrett* court also flouted legislative intent by misusing a criminal statute to define a civil negligence standard. RCW section 66.44.200 regulates the *service or sale* of liquor.²⁰⁴ It does not, in fact, provide any grounds for a civil action.²⁰⁵ Rather, the statute defines a crime and provides for sanctions in the event of its violation.²⁰⁶ Because the legislature is in the best position to weigh who should be held accountable for injuries caused by impaired drivers,²⁰⁷ the *Barrett* court should not have inferred that the statute was intended to provide an avenue for civil liability. *Barrett* “blurred the distinction between tort and crime” in this area of law in a jurisdiction that has expressly eliminated tort actions based solely on the breach of a criminal statute.²⁰⁸

Furthermore, a negative inference can be made that the legislature did not intend to allow negligence per se to apply to the conduct of

198. See WASH. REV. CODE § 66.44.200 (2006).

199. *Buckhart v. Harrod*, 110 Wash. 2d 381, 389, 755 P.2d 759, 763 (1988) (citing Cornelius J. Peck, *Comments on Judicial Creativity*, 69 IOWA L. REV. 1 (1983)).

200. See *supra* Part II.B–C.

201. See *supra* Part II.B–C.

202. See *Estate of Kelly ex rel. Kelly v. Falin*, 127 Wash. 2d 31, 37, 896 P.2d 1245, 1248 (1995).

203. *Id.* at 38, 896 P.2d at 1248.

204. See WASH. REV. CODE § 66.44.200 (2006). *But see Barrett v. Lucky Seven Saloon, Inc.*, 152 Wash. 2d 259, 272, 96 P.3d 386, 392 (2004) (holding that “the purpose of the statute is to protect third parties from drunk driving accidents caused by a commercial host’s over-service of an adult patron”). Although the statute may have been created with the protection of bystanders in mind, it is a criminal statute that does not suggest any form of civil liability.

205. § 66.44.200.

206. *Id.*; see § 66.44.180 (2006).

207. *Kelly*, 127 Wash. 2d at 38, 896 P.2d at 1248.

208. Jaffe, *supra* note 29, at 623.

serving alcohol. The rule of statutory construction regarding implied negatives provides that when a statute sets forth an affirmative rule, as it does here, it implies a negative of any alternative requirement.²⁰⁹ The legislature's specific enumeration of only four specific instances in which negligence per se applies²¹⁰ creates an unambiguous implication that the legislature did not intend for the doctrine to apply to other conduct.

Statutes must be construed to avoid absurd or strained consequences.²¹¹ Because Washington is a jurisdiction in which a civil duty may not be established simply from the violation of a statutorily created standard of care, the *Barrett* court illogically construed RCW section 66.44.200 when it permitted a civil cause of action based on this criminal statutory language.²¹²

V. POSSIBLE SOLUTIONS TO THE PROBLEMS POSED BY *BARRETT* AND A CALL FOR LEGISLATIVE ACTION

The *Barrett* decision requires corrective legislative action that clarifies when a vendor becomes liable for a patron's harmful conduct. This Part explains what the standard should be and why alternative standards fail. Although compensating victims for their injuries is a central principle of tort law,²¹³ this goal should not be met by allowing recovery from defendants based solely upon their financial resources.²¹⁴ In vendor liability matters, the concept and significance of foreseeability cannot be casually disregarded, and the law should not take the emphasis off of the primary tortfeasor, especially when the commercial vendor can be as innocent as the victim.²¹⁵ When the irresponsible driver is unable to pay

209. NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 24.04 (6th ed. 2002); *see, e.g.*, *Smith v. Stevens*, 77 U.S. 321, 326–27 (1870) (stating that “[i]t needs no argument or authority to show that the statute, having provided the way in which these . . . lands could be sold, by necessary implication, prohibited their sale in any other way”).

210. *See* WASH. REV. CODE § 5.40.050 (2006).

211. *Kelly*, 127 Wash. 2d at 39, 896 P.2d at 1249 (quoting *Wright v. Enqum*, 124 Wash. 2d 343, 351, 878 P.2d 1198, 1202 (1994)).

212. *See* § 5.40.050.

213. DAN B. DOBBS, THE LAW OF TORTS § 10, at 17 (2000).

214. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wash. 2d 259, 280, 96 P.3d 386, 394 (2004) (Sanders, J., dissenting) (emphasizing that “deep pockets” do not affect a negligence analysis). Although a vendor likely has more resources, it may not be the only source of damages under Washington's joint and several liability system. When the other tortfeasor (the driver, for example) is insolvent, however, the vendor would still be forced to fully compensate victims. *See* WASH. REV. CODE § 4.22.040(1) (2006) (allowing vendor to seek contribution from patron based on joint and several liability).

215. *Dickinson v. Edwards*, 105 Wash. 2d 457, 496, 716 P.2d 814, 834 (1986) (Durham, J., dissenting). In a mobile society, the law should not presume commercial vendor liability for the act of selling a certain product, even though that legal product can become dangerous when

for the injury he or she caused, the law should not arbitrarily look to the establishment because it is likely to have more financial resources.

The “apparently under the influence” standard is untenable because it shifts too much responsibility to the commercial vendor and opens the door to unwarranted liability. Although the “obviously intoxicated” standard is consistent with the foreseeability requirement, common law, and legislative intent, there are instances when it fails to attach liability at times the commercial vendor should be held accountable. Sometimes even a standard requiring clear, obvious intoxication is still not high enough.²¹⁶ Washington courts have rejected the argument that the amount of alcohol served can determine whether a person is “obviously intoxicated” due to the different effects alcohol can have on the body.²¹⁷ Common sense suggests, however, that there must be some point at which the quantity of alcohol served puts the vendor on notice that a patron is intoxicated despite his or her outward, obvious manifestations.²¹⁸ For example, under the “obviously intoxicated” standard, a waiter or waitress might have to serve a 250-pound man who is a heavy drinker twenty drinks before he is “obviously intoxicated.”²¹⁹ Surely a reasonable person should know that a patron is probably intoxicated after even fifteen beers, despite his or her size or tolerance; such intoxication would likely be obvious if the patron were required to stand up or to perform even a mundane task.²²⁰ In such a circumstance, the “obviously intoxicated” standard will not suffice to put the vendor on notice of the risk of harm at the time of service unless the vendor required the patron to engage in some sort of sobriety test.

The standard in determining third party liability should be whether the commercial vendor “knows or should know” that the patron is “obviously intoxicated.”²²¹ Thus, the legislature should supplement

over-consumed. Even in areas with inadequate public transportation, a commercial vendor should not be required to presume that every person who walks into his or her business will drink to excess and get behind the wheel of a car.

216. See *infra* Part V.

217. *Christen v. Lee*, 113 Wash. 2d 479, 490–91, 780 P.2d 1307, 1312 (1989); *Purchase v. Meyer*, 108 Wash. 2d 220, 226 n.12, 737 P.2d 661, 665 n.12 (1987). But see *Dickinson*, 105 Wash. 2d at 464–65, 716 P.2d at 818 (determining that patron’s admission of the amount of liquor consumed raised an issue of material fact as to whether vendor “knew or should have known” that the driver was intoxicated).

218. See *Dickinson*, 105 Wash. 2d at 465, 716 P.2d at 818 (where patron was served between 15 and 20 drinks, a permissible inference arose that vendor could have observed that patron was “obviously intoxicated”).

219. See, e.g., *Purchase*, 108 Wash. 2d at 225, 737 P.2d at 665 (noting that a heavy drinker may not appear intoxicated even with a high blood alcohol level).

220. See *Dickinson*, 105 Wash. 2d at 465, 716 P.2d at 818.

221. See, e.g., *Shelby v. Keck*, 85 Wash. 2d 911, 916, 541 P.2d 365, 369 (1975) (explaining that the common law rule of negligence requires that the vendor “knew, or should have known in the

RCW chapter 66.44 with a provision defining an objective reasonable standard of care in the context of alcohol service. That duty should be defined as follows:

A commercial vendor owes a duty to third parties to not serve a patron when the vendor:

- (1) knows the patron is intoxicated based on the patron's obvious, outward manifestations; or
- (2) should know that the patron is intoxicated based on the excessive quantity of alcohol served to the patron by the vendor.

When injury to a third party results from a breach of this duty, the third party has a civil cause of action against the commercial vendor.

Washington should adopt the reasonable person standard, indicated by the phrase "knew or should have known," because it is an objective standard that will be easier for practitioners, judges, and juries to apply. Even after the court's careful analysis of what "apparently under the influence" might look like,²²² the application of the standard would be difficult to apply in comparison to the "knew or should have known" standard because it requires a jury to determine whether the patron was "seemingly drunk."²²³ The "knew or should have known" standard is more objective and can be applied based on common experiences. It removes the subjective guesswork required to determine what "apparently under the influence" standard means in context. While what is apparent to one person may not be apparent to another, what is obvious to one person is likely obvious to all.²²⁴ Civil liability should not attach until a reasonable person knows or should know that a patron is "obviously intoxicated," based on either his or her outward composure or on the

exercise of reasonable care, that the furnishing of liquor to [the] individual posed a foreseeable threat of serious harm to another"); *see also* 45 AM. JUR. 2D *Intoxicating Liquors* § 466 (cause of action for negligently continuing to serve alcoholic beverages incorporates common law principles in determining liability, based on whether vendor "knew or should have known" patron was intoxicated); 48A C.J.S. *Intoxicating Liquors* § 647 (1981) (liability rests on whether server "knew or should have known" patron was intoxicated).

222. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wash. 2d 259, 268, 96 P.3d 386, 390 (2004).

223. *See supra* Part II.D.

224. Although the Washington Administrative Code sets forth the guidelines for mandatory alcohol server training, it does not provide any objective guidance on how to determine "apparent intoxication." WASH. ADMIN. CODE 314-17-005 to -115 (2007); WASH. ADMIN. CODE 314-11-035 (2007). A provision does, however, require commercial vendors to ensure that its employees obtain a serving permit. WASH. ADMIN. CODE 314-17-030 (2007).

quantity of drinks he or she has consumed. The “knew or should have known” standard fairly puts the commercial vendor on notice and will produce more standardized and consistent results in determining commercial vendor civil liability.

The “knew or should have known” standard is also preferable because it can put the vendor on notice of the risk of harm based on the quantity of liquor sold. Even after serving twenty drinks, the commercial vendor may not be able to discern a specific person’s level of intoxication because the outward signs vary from patron to patron; at that point, however, the vendor *should know* that the patron is intoxicated, regardless of visual cues. Whereas a standard based solely on the patron’s outward manifestations might delay attaching liability until it is too late for the vendor to prevent third party injury, the standard suggested in this Note will mitigate this problem. Although the “obviously intoxicated” standard was created under the theory that the vendor cannot know how much a person has consumed prior to entering the establishment,²²⁵ a bartender has first-hand knowledge about how much he or she has served the patron. Thus, serving a patron an excessive quantity of alcohol would put the bartender on notice that the patron is “obviously intoxicated” despite his or her outward appearance.²²⁶

When a vendor knows or should know that a patron is intoxicated based on the “obviously intoxicated” standard or the quantity of alcohol served, the choice not to serve the patron does not make the patron any less dangerous behind the wheel of a car. Rather, the patron has likely already reached a point of intoxication that would impair his or her driving skills. The *vendor*, however, should not be liable for serving a patron until it has notice of the risk of harm—which the “knew or should have known” standard encompasses. Subsequent injury becomes foreseeable based on the vendor’s conduct only if the vendor continues to serve the patron alcohol after he or she knows or should know that the patron is intoxicated.²²⁷ At that point, the vendor can engage in conduct that could prevent foreseeable harm to a third party. In fact, the court has applied the “knew or should have known” standard in the past.²²⁸ The suggested

225. *Purchase v. Meyer*, 108 Wash. 2d 220, 225, 737 P.2d 661, 664 (1987).

226. *Dickinson v. Edwards*, 105 Wash. 2d 457, 465, 716 P.2d 814, 818 (1986).

227. The vendor’s serving of the patron is a negligent act because the patron at this stage is so helpless that he or she lacks the will power to say “no.” See *Barrett*, 152 Wash. 2d at 287, 96 P.3d at 397.

228. *Dickinson*, 105 Wash. 2d at 465–66, 716 P.2d at 818–19 (analyzing whether the vendor “knew or should have known” in the exercise of reasonable care that the drinker was intoxicated); see also *Shelby v. Keck*, 85 Wash. 2d 911, 916, 541 P.2d 365, 369 (1975) (explaining that the common law rule of negligence requires that the vendor “knew, or should have known in the exercise of reasonable care, that the furnishing of liquor to [the] individual posed a foreseeable threat of serious harm to another”).

standard is consistent not only with the foreseeability and notice requirements, but also with current Washington law because it does not require the court to violate the prohibition against the doctrine of negligence per se.

A second alternative solution would be to follow the lead of those jurisdictions that have completely eliminated the possibility of establishing liability against a commercial vendor for over-serving a patron, no matter how "obviously intoxicated" the patron may have been at the time of service.²²⁹ Although the jurisdictions that prohibit vendor liability emphasize personal responsibility, they fail to recognize that situations can arise when a patron is so intoxicated that he or she cannot possibly make a reasonable decision whether to have another drink. The "knew or should have known" standard succeeds in addressing this while also ensuring that the vendor does not pay for the acts of others for which it is not responsible.

A third interesting alternative is to create a fund which would compensate those victimized by impaired drivers.²³⁰ Through this remedy, a party injured by an impaired driver would be able to recover without imposing an undue burden on the negligent individual commercial vendor because the entire alcohol industry would be required to contribute to the fund, including manufacturers and distributors.²³¹ As a result, the standard of care owed by an individual establishment would probably be irrelevant because the costs of injury would be dispersed first from the driver and then from this general fund. A major drawback to this concept is that it allows a commercial vendor to escape paying damages at times when it should be held accountable.²³² Although some might consider a commercial vendor's business a high-risk privilege given the product sold,²³³ responsible vendors that do not over-serve their patrons should not shoulder the burden of paying for the negligence of one careless establishment. For example, if a vendor consistently served "obviously intoxicated" patrons, it should be individually liable for the resulting injuries. A compensation fund may allow a vendor to escape

229. See S.D. CODIFIED LAWS § 35-11-1 (2007) (prohibiting causes of action against taverns); WIS. STAT. § 125.035 (2007) (providing taverns with immunity from civil suits, with few exceptions); *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 273 Kan. 828, 828, 47 P.3d 402, 403-04 (2002) (no cause of action exists against suppliers of alcohol for persons injured as a result of the torts of intoxicated patrons, even when the patrons are minors).

230. PAUL A. LEBEL, JOHN BARLEYCORN MUST PAY: COMPENSATING THE VICTIMS OF DRINKING DRIVERS 225 (1992).

231. *Id.*

232. The commercial vendor should be held accountable when it "knows or should know" that the patron is "obviously intoxicated." See discussion *supra* Part V.

233. See *Halvorson v. Birchfield Boiler, Inc.*, 76 Wash. 2d 759, 764, 458 P.2d 897, 900 (1969) ("Liquor licensees . . . operate their businesses by way of privilege, rather than as of right . . .").

responsibility for its consistent negligence resulting in third party injuries.

The compensation fund option resembles the theory behind insurance coverage—it spreads the risk of harm and cost of tort liability from the insured (the commercial vendor) to the paying consumer.²³⁴ Although the fund and insurance systems compensate the injured victim, they pass the financial responsibility resulting from irresponsible drinking not only to the commercial vendor, but also to all consumers—even the responsible consumers. While a solution based on a victim compensation fund or insurance might be attractive from a public policy standpoint because it compensates the injured, it still places the financial burden on the commercial vendor when the law should impose personal accountability on those who choose to drink to excess and get behind the wheel of a car. A compensation fund would place the vendor in the role of an insurer for the irresponsible acts of others.²³⁵

The confusion surrounding commercial vendor liability calls for legislative clarity under Washington liquor control statutes and corresponding Washington Administrative Code provisions. Not only is the standard adopted by *Barrett* potentially confusing to tavern owners and restaurants because it changes a long-established rule,²³⁶ but it was also adopted contrary to explicit statutory provisions.²³⁷ The *Barrett* court blindly adopted the statutory language of RCW section 66.44.200 without considering the “knew or should have known” alternative that is easier to apply, is more consistent with the theory of negligence, and does not contradict the law. Although the “obviously intoxicated” standard is preferable to the “apparently under the influence” standard, it is not the most desirable. The Legislature needs to draw a clear line that defines when a commercial vendor becomes liable for the acts of a patron who drank at its establishment.

234. See LEBEL, *supra* note 230, at 205–06 (recognizing that the cost of liability insurance can be spread among the customers who are part of the population that engage in commercial transactions (alcohol sales) that can result in vendor liability). Even though the consequence of high premiums for liability insurance might create an incentive for commercial vendors to follow “safer practices in the service and sale of alcohol,” the imposition of tort injury costs on the business owner does not deter impaired driving because there is no incentive—aside from criminal liability—for the individual to avoid irresponsible drinking when he or she knows that another will pay for the harm done. *Id.* at 205–06.

235. See *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wash. 2d 259, 292, 96 P.3d 386, 400 (2004) (Sanders, J., dissenting).

236. See *supra* Part II.E.

237. See WASH. REV. CODE § 5.40.050 (2006).

VI. CONCLUSION

The *Barrett* court made many mistakes in finding a basis for civil liability in a criminal statute. The court was evidently trying to do something extraordinary in allowing Barrett to make this civil claim based on his degree of injury. The highest court in Washington should know better than to author a decision that applies a standard based on a permissive Restatement provision,²³⁸ violates this state's prohibition on negligence per se, and essentially judicially revives Washington's repealed dram-shop act.²³⁹ Furthermore, the court not only ignored the requirement of foreseeability, a fundamental principle of a negligence claim, but also disregarded judicial precedent and legislative history. As a result, the court dismantled a well-established rule to back a policy that a tort victim should not bear the cost of his or her injury when the driver cannot pay.²⁴⁰ The court overlooked that "[allowing an] intoxicated adult to hold a commercial vendor liable fosters irresponsibility."²⁴¹ Although driving while impaired can result in tragedy and extreme monetary damages, "we should [not] sacrifice the concept of individual responsibility as part of a crusade against furnishers of alcohol."²⁴² Legislative action is necessary to clarify the standard of conduct to which third party liability attaches, in order to prevent the court from again creating a new form of civil liability through the application of Restatement section 286. Apparently, explicit statutory language to the contrary was not enough.

238. *See supra* Part IV.A.

239. *See supra* Part IV.B-C.

240. *See supra* Part V.

241. *Cf. Estate of Kelly ex rel. Kelly v. Falin*, 127 Wash. 2d 31, 41, 896 P.2d 1245, 1250 (1995). Although the court's reasoning refers to responsibility for injuries to the impaired driver, the same principle should apply to injuries to third parties.

242. *Dickinson v. Edwards*, 105 Wash. 2d 457, 499, 716 P.2d 814, 836 (1986) (Durham, J., dissenting).