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Torts: Oklahoma's Tool for Expanding Tort Liability: *O'Toole v. Carlsbad Service Station*

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Torts: Oklahoma's Tool for Expanding Tort Liability: *O'Toole v. Carlsbad Service Station.*

Drunk driving has recently become a most controversial issue. Courts and legislatures have responded to public outcry by imposing greater liability on the intoxicated driver. The underlying purpose of this increased liability is to deter intoxicated persons from driving. Common law has long held the inebriated liable for the consequences of their actions.[1] The law is currently expanding to allow injured third parties to recover damages against the commercial server of alcoholic beverages. Such laws are known as "dram shop" laws. Dram shop laws trigger liability when commercial vendors negligently serve alcohol to an obviously intoxicated patron.

At common law, courts held that the drinker of alcohol caused accidents, not the seller of alcohol.[2] Dram shop laws have expanded proximate cause to include the seller of alcohol as one potentially responsible for accidents. In recent cases, courts have been willing to expand potential tort liability even further. One example is the 1988 decision *O'Toole v. Carlsbad Shell Service Station*,[3] in which California extended proximate cause to expressly allow injured third parties to recover from a service station whose attendant had provided gasoline to an intoxicated person.[4] The *O'Toole* court based liability on the theory of negligent entrustment of gasoline to an intoxicated motorist.[5]

Recently, Oklahoma joined the ranks of states holding commerical vendors of alcohol liable for negligently selling alcohol to obviously intoxicated patrons. In *Brigance v. Velvet Dove Restaurant, Inc.*,[6] the Oklahoma Supreme Court established Oklahoma's dram shop law and expanded the traditional common law rule of proximate cause.

This note will examine the recent expansion of tort liability resulting from *O'Toole*. Further, a comparison will be made of the expansion of liability in *O'Toole* and the langage in *Brigance*. This comparison will determine if yet another step toward greater liability is forthcoming in Oklahoma. The holdings in *Brigance* and *O'Toole* will show that the foundation has been laid for Oklahoma to rapidly expand tort liability.

1. Brigance v. Velvet Dove Restaurant, Inc., 725 P.2d 300 (Okla. 1986).

2. Such a rule is based upon the concept that it is not the sale of liquor by the tavern owner, but the voluntary consumption by the intoxicated person which is the proximate cause of the resulting injuires. *Id.* at 302.

3. 202 Cal. App. 3d 151, 247 Cal. Rptr. 663 (1988).

4. *Id.* at 671.

5. *Id.* at 670.

6. 725 P.2d 300 (Okla. 1986).

California Commercial Host Liability History

In 1955, the California Supreme Court specifically approved and crystallized the legal principles concerning proximate cause and the acts of intoxicated drivers. In *Cole v. Rush*,[7] the widow of a tavern patron brought an action against a tavern. The tavern had negligently served the patron alcohol beyond his point of intoxication. Once drunk, the patron became belligerant and was killed in a fight. The *Cole* court held that, absent statutory provisions to the contrary, common law governs proximate cause.[8] Common law had established that drinking alcohol, not serving alcohol was the proximate cause of the injury.[9] Therefore, taverns were not liable for the actions of intoxicated persons who had been served too much alcohol.

Holding that drinking alcohol was the proximate cause of injuries occuring during the time an individual was under the influence of the alcohol established an important precedent. California courts were unwilling to go beyond precedent to hold anyone other than the drinker liable. Even as recently as 1985 courts were still following common law rulings.[10]

The problem facing courts using proximate cause is that the "definite limits" established within the theory of proximate cause are arbitrary. Logically, any event can be said to be proximately caused by some remotely related former event. The "but for" theory in proximate cause can invoke liability on an infinite number of defendants. As a result, proximate cause provides little guidance to courts or citizens as to where the boundaries of liability extend. Such ambiguity becomes most evident in cases where courts hold stations liable for providing gasoline to intoxicated motorists.

Liability of Nonsuppliers of Alcohol

In *Fuller v. Standard Stations, Inc.*,[11] a service station sold gasoline to an obviously intoxicated driver. Shortly after leaving the gas station, the intoxicated motorist collied with the Fullers' car, killing four passengers and severely injuring another. The plaintiff argued that the service station operators had negligently entrusted gasoline to the motorist.[12] Further, the attendants allegedly knew that the driver was intoxicated and driving in an unreasonably dangerous manner.[13] In the petition, the plaintiff followed the *Restatement (Second) of*

7. 45 Cal. 2d 345, 289 P.2d 450 (1955). *See also* Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530, 535 (1949). In *Fleckner*, a minor to whom defendants had sold alcohol was involved in a car wreck. The defendant's act of furnishing the alcohol created a situation which allowed the minor to voluntarily intoxicate himself. The voluntary act of intoxicating himself was the proximate cause. The majority held that alcohol sales do not cause accidents. *Id.*

8. Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450, 458 (1955).

9. *Id.*, 289 P.2d at 454. See also *supra* note 7.

10. Manasarian v. California, 168 Cal. App. 3d 79, 214 Cal. Rptr. 26, 27 (1985) (intoxication of the driver and not the sale of gasoline was the proximate cause as a matter of law).

11. 250 Cal. App. 2d 687, 58 Cal. Rptr. 792 (1967).

12. *Id.*, 58 Cal. Rptr. at 793.

13. *Id.*

Torts ("Restatement Second") which indicated that supplying alcohol to someone who will use it in a manner involving risk of harm to others is subject to liability for the injury.[14] In its analysis, the court further examined negligent entrustment in a discussion of gas stations supplying "motive power" to drunk drivers.[15] "Motive power," a theory of causation, is simply the connection between the intent to do an act and the end result.[16] Without supplying the motive power, the end cannot be achieved. Motive power could be gasoline, spark plugs, jumper cables or some other component necessary before an automobile injury can occur.[17]

The *Fuller* court avoided the problems associated with the older, stricter application of proximate cause by using the narrower theory of negligent entrustment. Basically, negligent entrustment is a theory of liability used when the owner of a chattel entrusts it to an unsuitable user and is held liable for the user's negligence. Courts impose liability on the owner for the owner's negligence in failing to prevent the user's foreseeable harms.[18] The risk of harm from negligent entrustment is similiar to that which arises when one serves alcohol negligently.[19]

Gasoline Supplies Motive Power

The *Fuller* court considered a duty of care argument which could justify holding service station operators liable for selling gasoline to an obviously intoxicated motorist.[20] Negligence was present where operators created a

14. RESTATEMENT (SECOND) OF TORTS § 390 (1965):
> One who supplies directly or through a third person 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 whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm.

15. Fuller v. Standard Stations, Inc., 250 Cal. App. 2d 687, 58 Cal. Rptr. 792, 795 (1967) (supplying motive power to a drunk driver involves a recognizable and obvious danger to other motorists and pedestrians).

16. RESTATEMENT (SECOND) OF TORTS § 320 comment a (1965), provides, in relevant part, that: "[A]nyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act." *See also* Leppke v. Segura, 632 P.2d 1057, 1059 (Colo. 1981). In *Leppke*, the tavern keeper jump-started an intoxicated patron's car and was liable for the damages from the subsequent wreck caused by the patron. The court found that providing a jump-start was an affirmative act that resulted in the foreseeable collision. The jump-start provided motive power.

17. *Fuller*, 250 Cal. App. 2d 687, 58 Cal. Rptr. at 795 (providing gasoline to drunk driver supplies motive force and involves recognizable danger to others). *See also* Leppke v. Segura, 632 P.2d 1057, 1058 (Colo. 1981); Richardson v. Ham, 44 Cal. 2d 772, 285 P.2d 269 (1955) (suggests motive power could be spark plugs or tires).

18. PROSSER AND KEETON ON THE LAW OF TORTS § 104, at 717 (5th ed. 1984).

19. Comment, *Third Party Liability for Drunken Driving: When "One for the Road" Becomes One for the Courts*, 29 VILL. L. REV. 1115, 1175 (1983-84). Liability may be imposed on a defendant either for entrusting the automobile to a person who is intoxicated at the time of entrustment or who may reasonably be expected to become intoxicated. *Id.*

20. *Fuller*, 250 Cal. App. 2d 687, 58 Cal. Rptr. at 793.

recognizable risk of harm to third persons.[21] The risks of supplying gas to the intoxicated driver were certainly recognizable.[22] The gasoline supplied the drunk driver with the motive power to endanger other motorists and pedestrians.[23]

The court, however, refused to follow this line of reasoning to impose liability on the service station operator. The court determined that stare decisis forced adherence to older doctrines.[24] The court believed that it had an obligation to "take the law as we find it and [not to] re-examine doctrines approved by the Supreme Court with a view to enunciating a new rule of law."[25]

Nevertheless, the *Fuller* court's analogy between the selling of gasoline and the selling of alcohol contributed to the expansion of tort liability.[26] The court held that there was no distinction between gasoline and alcohol concerning their ability to cause foreseeable injury.[27] However, without the duty of care approach to an adjudication of negligence, the court was left with the "obsolete" view of proximate cause.[28] Accordingly, the court refused to hold the service station liable for providing gasoline to the intoxicated motorist.

Proximate cause, rather than negligent entrustment, limited the holding in *Manasarian v. California*.[29] In *Manasarian*, a tow truck operator helped an intoxicated driver continue driving by supplying gasoline. The drunk driver subsequently collided with the Manasarians' automobile and injured its passengers. The appellate court unanimously followed the common law rule of proximate cause by choosing not to impose liability upon the commerical tow truck operator, even though he assisted the drunk driver to continue driving.[30]

Manasarian is an interesting holdout from progress in light of the current emphasis on ridding the nation of drunk driving. This ruling placed more emphasis on the free movement of traffic than on the safety of motorists.

21. *Id.* at 795.

22. *Id. See also* Note, *O'Toole v. Carlsbad Shell Station*, 31 ATLA L. REP. 293 (Sept. 1988) (affirmative act of supplying gasoline, motive power, to intoxicated customer created foreseeable risk to others).

23. *Fuller*, 250 Cal. App. 2d 687, 58 Cal. Rptr. at 795.

24. *Id.* The court would have found an affirmative duty to detain the drunk driver if the question of liability was open. Stare decisis required adherence to common law rules set out in Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949).

25. *Fuller*, 250 Cal. App. 2d 687, 58 Cal. Rptr. at 796.

26. *Id.*

27. *Id.* There is no significant distinction of logic, social policy or law between sellers of liquor and gas to a drunk individual. Both commodities play parallel roles in the combination of circumstances culminating in foreseeable injury. *Id.*

28. *Id.* The court stated that: "*Cole v. Rush* and its California antecedents approach the initial adjudication of negligence via the obsolete gateway of proximate cause rather than duty. Thus these cases may be unreliable and ripe for qualification or disapproval. In *Cole*, however, the supreme court [of California] declared that *Fleckner v. Dionne* represents the law until disapproved by it." *Id.*

29. 168 Cal. App. 3d 79, 214 Cal. Rptr. 26, 27 (1985). In both *Manasarian* and *Fuller*, the drunk driver needed and was given gasoline. Because of the fuel, the driver was able to resume driving and harm others.

30. *Id.*

The court held that the best of several ways for the tow truck operator to assist the intoxicated driver in order to keep traffic moving was to give him gasoline.[31] However, the court evasively stated the tow truck operator was not obligated to determine which method involved the greatest amount of risk.[32]

Duty of Care to Stop Drunk Drivers

In *Manasarian*, the court described a duty of care as a special relationship which imposes a duty upon the actor to control the third person's conduct.[33] In construing this description, the court held that only a very limited application of duty exists in relation to assisting motorists.[34] The court expressly found that no duty-of-care relationship existed between the tow truck operator and the Manasarians.[35] Any action taken by the tow truck operator in this particular case involved risks and the burden of a judicial judgment of duty could not be placed on a citizen.[36] In *Manasarian*, no duty existed because tow truck drivers have no power to arrest or detain another person.[37]

The court based its holding in *Manasarian* on proximate cause, rejecting the theories of negligent entrustment and duty-based obligation.[38] A growing number of dissenting opinions challenged majority opinions, such as *Manasarian*, which are based on established tort principles. Previous cases had dodged the issues of negligence and proximate cause.[39] Accordingly, courts should not "bow to the reasoning of those decisions."[40] Rather than seeking to find a duty of obligation breached to a third party, one argument advocated expanding the root of proximate cause.[41] "[N]egligence may be the proximate cause of an injury to another even though the act of a third person intervenes,

31. *Id.* at 30. The court decided that towing the drunk driver or calling the highway patrol for assistance would have involved leaving traffic obstructed by blocking a lane of the road. The blocked road would increase the danger of a motorist colliding with the drunk driver's car.

32. *Id.* at 31. Although the tow truck operator was not required to choose the safest method of moving the drunk driver, it should be noted that no duty existed because the court relied on *Flecker v. Dionne*. The *Flecker* court found no duty of care to exist because the serving of alcohol did not proximately cause the resulting injuries. *Flecker*, 94 Cal. App. 2d at 251. By following *Flecker*, the conclusion of no liability in *Manasarian* is a questionable decision.

33. *Manasarian*, 168 Cal. App. 3d 79, 214 Cal. Rptr. at 29. *See also Fuller*, 250 Cal. App. 2d 687, 58 Cal. Rptr. at 795 (assuming a duty of care approach is used, operators are negligent as to persons beyond their vision when their conduct creates a recognizable risk of harm to them).

34. *Manasarian*, 214 Cal. Rptr. at 29 (the duty is so limited that even between the highway patrol and the stranded motorist a special relationship does not automatically occur).

35. *Id.* at 30.

36. *Id.* The tow truck operator is under no duty, so his actions cannot be judicially controlled after the fact. *Id.*

37. *Id.* at 29. "[The tow truck operator] had no simple, hazard-free alternative for avoiding peril, nor did he have the power of a police officer to enforce his will over [the drunk driver]." *Id.*

38. The court specifically held that negligent entrustment did not apply. See *Manasarian*, 168 Cal. App. 3d 79, 214 Cal. Rptr. at 30-31, for a concise discussion.

39. *Fleckner*, 94 Cal. App. 2d at 251 (dissenting opinion of Dooling, J.).

40. *Id.*

41. *Id.* at 252.

if a person of ordinary prudence could reasonably anticipate the probability of the third person's intervening conduct."[42]

Enactment of Dram Shop Laws

The current trend of dram shop liability is based upon many different theories and analogies. In 1961, one court held there was a common law right of redress for injuries wrongfully inflicted.[43] Showing considerable foresight, this court analogized the dispatch of a car with defective brakes to the dispatch of a "defective" driver.[44] Thus, a duty exists to prevent the use of impaired automobiles as well as to prevent impaired drivers from using automobiles. It has been established that a duty of care exists between an unlicensed driver and the car owner.[45] This duty of care exists because an unlicensed driver can readily be viewed as being "defective." The implication is obvious: intoxicated drivers are also "defective." Therefore, there is a duty to prevent intoxicated drivers from driving.

California created a new realm of liability when it finally accepted the extension of liability to servers of alcohol in intoxicated patron cases.[46] However, after extending the commercial host liability, the legislature amended the statutes to reflect the nonliability in prior case law.[47] The California courts have been able to avoid this limitation by working from the premise that every contributing cause is not united into a single, intervening cause entitled "drinking."[48] The broad interpretation of the statutes has enabled the courts to retain a method of recovery for wrongfully injured persons.

History of Oklahoma Dram Shop Liability

With the repeal of the Dram Shop Act of 1959,[49] Oklahoma used negligence law to keep from imposing liability on tavern keepers for harm caused by patrons of their establishment.[50] The elements for a negligence cause of action

42. *Id.*

43. Nault v. Smith, 194 Cal. App. 2d 257, 14 Cal. Rptr. 889 (1961).

44. *Id.* at 897. California's guest statute does not limit the common law liability of the owner of a vehicle for his own negligence as owner. *Id.* at 899.

45. Blake v. Moore, 162 Cal. App. 3d 700, Cal. Rptr. 703 (1984) (intoxicated car owner allowed intoxicated friend to drive his car and was held liable for damages from wreck under negligent entrustment). *See also* CAL. CIV. CODE § 1714 (1984) which states: "No social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of such beverages."

46. Vesely v. Sager, 5 Cal. 3d 153, 95 Cal. Rptr. 623, 486 P.2d 151 (1971). *See also* Bernhard v. Harrah's Club, 16 Cal. 3d 313, 128 Cal. Rptr. 215, 546 P.2d 719 (1976); Coulter v. Superior Court, 21 Cal. 3d 144, 145 Cal. Rptr. 543, 577 P.2d 699 (1978).

47. CAL. CIV. CODE § 1714 (1989).

48. *Blake*, 162 Cal. App. 3d 700, 208 Cal. Rptr. at 705.

49. 37 OKLA. STAT. § 121 (repealed 1959).

50. *Brigance*, 725 P.2d at 302. Under common law, a tavern owner who furnished alcoholic beverages to a patron is not civilly liable for a third person's injuries caused by the acts of an intoxicated patron. *Id.*

are: (1) a duty of the defendant to protect the plaintiff from harm, (2) a violation of that duty, and (3) an injury proximately resulting therefrom.[51] The limitations inherent in a narrow interpretation of proximate cause or a duty of care theory placed all of the liability on the intoxicated driver. Oklahoma needed either to expand its view of proximate cause or accept a broader view of duty before it could hold commercial hosts liable.

Commercial Host Liability In Oklahoma

In 1986 in *Brigance v. Velvet Dove Restaurant, Inc.*,[52] Oklahoma joined a rapidly increasing number of states imposing tort liability on negligent tavern keepers. This new level of liability was predicated upon the creation of a duty.[53] Like other dram shop measures, Oklahoma established the liability of tavern keepers to third parties injured from the negligent serving of alcohol.[54]

Oklahoma's Dram Shop Case

The *Brigance* court recognized the need for an expansion of the liability.[55] The Oklahoma Supreme Court held nonliability to be an "antiquated and illogical" rule.[56] The court retreated from this rule and applied a duty of care obligation holding commercial vendors liable for creating unreasonable risks to third parties, much like the rule employed in *O'Toole*.[57] *Brigance* imposed liability for a drunk driver's actions on a person who had served alcohol to the driver, by holding that the server was the cause of the plaintiff's injuries.[58]

In Oklahoma, the legislature had addressed the problem of commercial host liability but failed to enact statutory remedies.[59] The *Brigance* court was free to establish a civil cause of action through the common law because the legislature had not addressed the problem. The court noted that common law rules change with the progression of society to justify its expansion of civil liability.[60] The *Brigance* court summarily concluded that a seller of alcohol for on-premises consumption has a duty not to sell alcohol to obviously intoxicated persons.[61]

51. Sloan v. Owen, 579 P.2d 812, 814 (Okla. 1977).

52. 725 P.2d 300, 302 (Okla. 1986).

53. *Id.* at 304. ("One who sells intoxicating beverages for on the premises consumption has a duty to exercise reasonable care not to sell liquor to a noticeably intoxicated person.").

54. *Id.*

55. *Id.* at 305.

56. *Id.* at 302. (ability to change the common law premised on "the concept that the common law is a dynamic and growing thing and its rules arise from the application of reason to the changing condition of society").

57. *Id.* Shell's liability was derived from its duty not to furnish gasoline, the motive force, and put a known drunken driver in a position where the driver could foreseeably endanger others. *Id.* at 671.

58. *Id.*

59. *Id.* at 303. The court held that the legislature's reasons for a failure to impose civil liability were unknown. However, the lack of action did not demonstrate legislative intent. *Id.*

60. *Id.* at 304.

61. *Id.*

The Restatement Supports Brigance

The Oklahoma Supreme Court established this duty in *Brigance* based upon the rationale of avoiding the imposition of an unreasonable risk of harm to others.[62] The court cited the *Restatement Second* section 390 to support imposing the duty.

The court's reliance on the *Restatement Second's* language expressed a willingness to expand liability beyond a mere dram shop rule, which holds only the alcohol supplier liable. Further, the court liberally construed the already broad wording of the *Restatement Second* in reaching its holding. This liberal construction is especially evident in the court's analogy between an intoxicated motorist and the *Restatement Second's* language of "youth, inexperience or otherwise."[63]

Brigance burdened the plaintiff with proving that the sale of alcohol led to the impairment of the driver's ability, which ultimately led to the plaintiff's injury.[64] The tavern keeper's act of negligently serving an already intoxicated patron must be found to have proximately caused the resulting injury.[65] A simple "but for" analysis of the tavern keeper's act will reveal that but for the negligent serving of alcohol the patron would not have become intoxicated.

Expanding Liability to Nonsuppliers of Alcohol

California Expands Liability

In *O'Toole v. Carlsbad Shell Service Station*,[66] the California Supreme Court took the one remaining analytical step that Oklahoma has not yet taken. *O'Toole* imposed liability upon persons supplying an intoxicated driver with gasoline. The court supported its rationale by analogizing the "motive power," supplying gasoline, to other precedent discussing similar forces. Accordingly, the new rule was merely a broader interpretation of established laws.

In *O'Toole*, Christine Eigsti was obviously drunk when she entered the Carlsbad Shell Service Station on July 24, 1983. The Shell employees had Ms. Eigsti drink four or five cups of coffee and detained her for one and one-half hours. They also gave her money to call her mother to pick her up and encouraged her not to drive. Ms. Eigsti apparently insisted on driving home, so the employees sold gasoline to her. The employees thus violated the Shell company policy which forbade selling gasoline to an intoxicated

62. *Id.* The civil right of action is based on the theory enunciated in Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959). *Rappaport* held that when alcoholic beverages are sold to an intoxicated person, the unreasonable risk of harm to members of the public is readily recognizable and foreseeable. *Id.*, 156 A.2d at 8.

63. The court held that the commercial alcoholic beverage vendor is under a common law duty to exercise ordinary care. Their holding was supported in part by the RESTATEMENT (SECOND) OF TORTS § 390 (1965): "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." (emphasis added).

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

65. *Id.*

66. 202 Cal. App. 3d 151, 247 Cal. Rptr. 663, 670 (1988).

motorist. After receiving gas, advice and assistance, Ms. Eigsti drove toward her home. On the way, she struck a motorcycle from behind killing both its driver and passenger.[67]

The issue in *O'Toole* was whether furnishing gasoline to an obviously drunk driver gave rise to a cause of action against the service station.[68] The court found Shell liable despite years of common law holding to the contrary.[69] Shell's liability was grounded upon the furnishing of the motive power, gasoline, to a known drunk driver and therefore foreseeably empowering her to foreseeably endanger others.[70]

Comparing O'Toole to Fuller

The *O'Toole* court examined *Fuller*[71] because the similer fact pattern made its discussion highly probative. Although the service station was not held liable in *Fuller*, that court's reasoning ultimately established the basis of the decision in *O'Toole*.[72] The connection between dram shop liability and the liability imposed upon Shell was the court's analogy between selling alcohol and selling gasoline in situations involving drunk drivers.[73] A duty of care rationale similar to a tavern keeper's duty can be applied to a service station attendant. Selling gasoline to an obviously drunk motorist created the same risk of harm to others as a motorist who has been sold alcohol.[74]

Fuller combined all of the elements necessary to impose liability on non-suppliers of alcohol, but stopped short because of stare decisis.[75] *O'Toole* simply changed the assumption that those selling gasoline to intoxicated motorists could not create liability under dram shop laws. The same decision rendered in *O'Toole* can be reached by following the earlier reasoning in *Fuller* to its logical conclusion. The only innovation made by the *O'Toole* court was its refusal to follow the dictates of stare decisis.

Although it had declined to find liability, the *Fuller* court recognized a duty of care based upon selling gasoline to a drunk driver when injury to others could be reasonably foreseen.[76] These same elements of negligent entrustment and foreseeability of harm existed in *O'Toole*.[77] The Shell attendant in *O'Toole*

67. *Id.*, 247 Cal. Rptr. at 664.

68. *Id.*, 247 Cal. Rptr. at 665.

69. *Id.*, 247 Cal. Rptr. at 671. ("[n]either 1714, subdivisions (b) and (c) nor Fuller v. Standard Stations, Inc. . . . prevents the accrual of a cause of action against Shell").

70. *Id.*

71. 250 Cal. App. 2d 792 (1967).

72. *O'Toole*, 202 Cal. App. 3d 151, 247 Cal. Rptr. at 671. Shell used the reasoning and holding of *Fuller* and numerous similar cases to defend its position claiming nonliability. The *O'Toole* court used the same reasoning as *Fuller* but did not defer to stare decisis. The arguments Shell used to defend itself were used to defeat its position in *O'Toole*. *Id.*

73. Fuller v. Standard Stations, Inc., 250 Cal. App. 2d 687, 58 Cal. Rptr. 792, 795 (1967).

74. *O'Toole*, 202 Cal. App. 3d 151, 247 Cal. Rptr. at 666.

75. *Fuller*, 250 Cal. App. 2d 687, 58 Cal. Rptr. at 796. The court specifically held that "We would at this point turn to [the issues of negligent entrustment and motive power] were the question of liability an open one." *Id.*

76. See *supra* text accompanying notes 18 & 19.

77. *O'Toole*, 202 Cal. App. 3d 151, 247 Cal. Rptr. at 671.

could reasonably foresee the accident and thus had a duty not to provide the "motive power," which enabled the drunk driver to continue on her way.

A commercial host should not be immune from liability for his negligent acts. An obviously drunk patron does not become a sober one for the purposes of being entrusted with a car.[78] Liability should be imposed for negligent entrustment even without relying on the dram shop rationale. The *O'Toole* court expressed a firm belief in the general principle that one wrongfully injured should have a method of recovery.[79]

The *O'Toole* court used the principle that an owner who allows an incompetent driver to control a chattel is liable for the reasonably foreseeable damages.[80] The court also applied the theory of negligent entrustment to incompetent drivers.[81] *O'Toole* imposed liability on Shell for the foreseeable injuries resulting from entrusting gasoline to an intoxicated driver.[82]

Combining these factors, the *O'Toole* court also held Shell to have proximately caused the resulting deaths.[83] The court declined to accept Shell's argument that the consumption of alcohol was the proximate cause of the collision rather than the supplying of gasoline.[84]

Supplying gasoline to drunk drivers obviously endangers other motorists.[85] By comparing the tavern keeper's commodities with those of a service station, the *O'Toole* court found that the two commodities play parallel roles in the combination of circumstances culminating in foreseeable injury.[86] While Ms. Eigsti was obviously drunk when she hit the motorcycle, that does not relieve Shell from the parallel liability based on the supplying of motive power. Under this reasoning, the presence of an intervening cause, such as Ms. Eigsti's drunkenness, did not relieve Shell of liability.[87] Liability is imposed when the resulting injury is reasonably foreseeable.

Company Policy Against Aiding Drunk Drivers

Shell's company policy forbade the sale of gasoline to a drunk driver. The court agreed that selling gas to an intoxicated motorist violated a duty of

78. Blake v. Moore, 162 Cal. App. 3d 700, 208 Cal. Rptr. 703 (1984). The court stated that common law principles provide full redress for wrongfully inflicted injuries and require a strict construction of statutes purporting to diminish recovery. *Id.*

79. *Id.*

80. See *supra* note 18. *See also* Hughes v. Warwell, 117 Cal. App. 2d 406, 409, 255 P.2d 881, 883 (1953) (auto owner who knowingly permitted an unfit driver to use his car was liable for the unfit driver's negligence while using the car).

81. *Id.*, 255 P.2d at 883.

82. *O'Toole*, 202 Cal. App. 3d 151, 247 Cal. Rptr. at 670.

83. *Id.*

84. See *supra* note 71.

85. *Fuller*, 250 Cal. App. 2d 687, 58 Cal. Rptr. at 796.

86. The *O'Toole* court held: "A defendant's negligence is not required to be the sole cause of a plaintiff's injury; it is sufficient that it be a cause of the injury. When the separate and distinct negligent acts of two persons are in substantially simultaneous operation, and contribute to cause the injury, each is and both are the proximate cause." *O'Toole*, 202 Cal. App. 3d 151, 247 Cal. Rptr. at 668.

87. *Id.* Shell's liability is "parallel" with other defendants because of the simultaneous and independent acts of negligence. *Id.*

due care.[88] If Shell's employees were to entrust a care to a person whom they knew to be insane, intoxicated or utterly incompetent to drive, it would shock common understanding not to hold them liable for the resulting injury.[89] A violation of the company's own rule of due care was evidence of negligence and an independent basis for liability.[90]

Problems With O'Toole

Gas/Automobile Analogy

The reasoning of the *O'Toole* court is not without fault. The cases cited deal only with the entrustment of a car. In *O'Toole*, the only chattel involved was gasoline. In order to impose liability on Shell through either a negligent entrustment theory or a duty of care theory, a logical jump is necessary to equate a car with gasoline. Further, there is an obvious distinction between a car owner entrusting his car and a service station's agent selling gasoline. The two do not share proportionate amounts of responsibility in causing the injury.

The *O'Toole* court held that the chattel of gasoline was the "motive power" causing the plaintiff's injury.[91] The court said gasoline was the "equivalent of the key to the car."[92] Therefore, the court imposed liability on Shell independent from the supplier of alcohol for providing the motive power to an intoxicated motorist.[93]

The logical "jump" made by *O'Toole* may be better described as a "leap." An analogy comparing the entrustment of a car with entrusting gas is difficult to perceive. Under the *Restatement Second*, when one is supplying a chattel to another and the supplier knows its use will involve unreasonable risk of harm to others, both share the liability.[94] Therefore, the *Restatement Second* supports the logic of *O'Toole*, stating that Shell is liable for the injuries foreseeable through its own negligence.[95]

88. *Id.* at 670.

89. *Id.*, 247 Cal. Rptr. at 671.. The court held that Shell's safety rules were evidence of a standard of "due care." By not following the rules, the rules were evidence of negligence. *Id.*, 247 Cal. Rptr. at 670. A jury may conclude from the mere violation of the rule that the employee conducted himself carelessly. *Id. See also* Dillenbeck v. Los Angeles, 69 Cal. 2d 472, 446 P.2d 129, 72 Cal. Rptr. 321 (1968) (safety rules implicitly represent an informed judgment as to the feasibility of certain precautions without undue frustrations of the goals of the particular enterprise).

90. Rocca v. Steinmetz, 61 Cal. App. 102, 214 P. 257 (1923).

91. *O'Toole*, 202 Cal. App. 3d 151, 247 Cal. Rptr. at 669.

92. See *supra* note 17 and accompanying text.

93. *O'Toole*, 202 Cal. App. 3d 151, 247 Cal. Rptr. at 670.

94. *Id.*, 247 Cal. Rptr. at 669.

95. *Id.*, 247 Cal. Rptr. at 668. The key to the rules in both the RESTATEMENT and O'Toole is that foreseeability is the major issue. If one can foresee and prevent the harm by failing to add some needed motive force (*e.g.*, gasoline), then there is a duty of care. *See also* American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578 P.2d 899, 146 Cal. Rptr. 182 (1978). In *American Motorcycle Association*, a minor filed against multiple defendants to recover for injuries. The court held that a tortfeasor's action need only be a proximate cause, not the sole cause. *Id.*, 146 Cal. Rptr. at 190.

The holding in *O'Toole* imposes liability on one whose actions proximately enabled a drunk driver to endanger others. Such a holding is conceivable in light of recent rulings requiring a tortfeasor's actions to be only a proximate cause, not the sole cause.[96]

Alcohol Tolerance Confuses Nonsuppliers of Alcohol

A threshold problem for serving the "obviously" drunk patron is the varying levels of tolerance in people. While the decision is difficult for a tavern keeper to make, the task in far more difficult for a service station attendant who has little or no experience with such decisions. Further, the tavern keeper is more keenly aware of the symptoms of inebriation than a service station attendant. The task becomes even more onerous if the patron never leaves the car and exhibits characteristics of intoxication. Often there is also a minimum age requirement for serving alcohol, though none exists for pumping gas. The maturity required of a tavern keeper to determine the gray areas of intoxication cannot be expected of a teenaged service station attendant.

Inability to Detain Undermines Law

If in fact, the service station attendant can even determine a patron is drunk, the problem grows still more difficult. He has no authority to detain, creating a question of how much force he may use to detain a patron before incurring tort liability of a different kind.[97] This problem must have been particularly vexing for the employees of the service station in *O'Toole* because they had been trained not to fuel intoxicated motorists' cars. However, lacking the authority to prevent the drunk driver from continuing they were unable to achieve the inferred goal: helping to reduce the number of drunk drivers on the road. The tavern keeper does not face such a problem because the keeper, arguably, no longer serves after patrons reach their personal tolerance limit.[98]

Degree of Motive Power Incurring Liability

An additional issue exists if the intoxicated driver is not completely out of gas when purchasing fuel. What if the drunk driver had enough gas to drive thirty more miles before refueling? The question becomes whether liability would be appropriate if the wreck occurred within twenty miles of the station. Logically, the station's liability should be limited to injuries occurring outside the thirty mile radius. A judicial resolution of such a hypothetical would be difficult. The service station's supplying of gas probably would be held a per se violation under *O'Toole*.

96. See *supra* notes 85 and 86.

97. Detaining another person could lead to charges of false imprisonment against the detainer. Further, any force used to effect the detainment would also constitute a tortious act.

98. Tavern keepers are more familiar with the effects of alcohol on their patrons. However, the varied effects of alcohol from one time to another keeps even past history from being an accurate indicator. Even the tavern keeper cannot see when the patron has reached his tolerance limit, thus making liability difficult to assess.

A legislative enactment which prohibited assisting a drunk driver, and thus endangering other lives, would create some clarity. The best defense against liability will still be the attendants' ignorance of the patron's condition. However, the patron's subsequent blood alcohol content measure will still determine how "obvious" the patron's intoxication should have been.

Another threshold problem for *O'Toole* would be determining what amount of interaction and assistance to an intoxicated motorist would invoke liability. If a drunk driver stops at a service station for directions, the ensuing wreck is, in a literal sense, proximately caused by the directions. Further, without authority to detain an attendent's only alternative would be to provide the shortest or safest route home. Apparently, from *Brigance* the degree of foreseeability would influence a court's decision.

An easier alternative would be to follow *O'Toole*'s lead and predicate liability on "motive power." The motive power theory can be used to clearly delineate between minor assistance (for example, giving directions) and the supplying of an element that but for its existence the driver could not have continued driving.

Social Host Liability

The liability of a social host differs greatly from that of a commercial host. Social hosts have traditionally been immune from dram shop liability.[99] The penal nature of dram shop measures has deterred courts from liberally construing the laws and applying them to all suppliers of alcohol. Courts are generally only willing to punish those who profit from the sale of alcohol.[100]

Although moving closer toward the theory of negligent entrustment, the social host remains immune from the risks associated with supplying liquor to guests.[101] However, that same immunity does not apply when entrusting a car to one who is obviously intoxicated.[102] The entruster's knowledge of the driver's intoxication before entrusting the car establishes the requisite negligence.[103]

Logic would extend liability to include social as well commercial hosts. However, the social host must face such dilemmas as detaining guests, refusing further drinks to employers and recognizing an individual guest's intoxication. These unique problems ultimately place social hosts in a category distinct from commercial hosts.

99. The social host's immunity is justified by the vendor's ability to insure against liability and spread the risk to all customers as a cost of doing business. Kohler v. Wray, 114 Misc. 2d 856, 452 N.Y.S.2d 831 (Sup. Ct. 1982). *See also* Note, *Dram Shop Liability in Brigance v. Velvet Dove Restaurant, Inc.: A Limited Evolution Toward a Progressive Rule*, 22 TULSA L.J. 351, 368 (Spr. 1987).

100. Comment, *Third Party Liability for Drunken Driving: When "One for the Road" Becomes One for the Courts*, 29 VILL. L. REV. 1115, 1147 (1983-84).

101. The immunity for supplying alcoholic beverages protects the host only against the risks directly flowing from the supply of the alcohol. The immunity does not apply to the entrustment of the car. Therefore, two concurrent causes are at work. Blake v. Moore, 162 Cal. App. 3d 700, 208 Cal. Rptr. 703, 704 (1984).

102. *Id.*, 208 Cal. Rptr. at 704.

103. *Id.*

Comparison of O'Toole to Brigance

The courts in *O'Toole* and *Brigance* both overruled precedent by expanding tort liability in this area. The *O'Toole* court's decision did not create any new legal rationales. Its decision was based on prior case law. The earlier cases would not impose liability on nonsuppliers of alcohol because of stare decisis. *O'Toole* concurred with established reasoning but refused to be limited by stare decisis. The resulting minor change created a major expansion of tort liability—nonsuppliers of alcohol are now liable for the actions of their intoxicated patrons.

Brigance was grounded in the same language that the California court used to establish the expansive liability in *O'Toole*. Both find negligence in a broader duty of care. The reasoning in *Brigance* closely coincides with the reasoning used in *O'Toole*. The extensive reliance on the *Restatement Second* and the purposeful attempts to eliminate outdated laws in Oklahoma pave the way for future holdings to go beyond dram shop liability. When the issue of liability for nonsuppliers of alcohol comes before an Oklahoma court, the language in *Brigance* will provide all of the elements required to further expand the theory of duty.

Conclusion

Public concern over the growing number of drunk drivers and the amount of damage and injury caused each year has certainly been an impetus for the adoption of dram shop liability. Nevertheless, the problem of the drunk driver exists in spite of these laws and society's awareness of the dangers.

Oklahoma is a relative late-comer to tavern keeper liability. However, the decision in *Brigance v. Velvet Dove Restaurant, Inc.* brought the state up to current reasoning very quickly. In addition, the language and case support for the decision closely coincide with the reasoning of a recent California case.

The concern expressed by Oklahoma about the issue of drunk driving makes it a very important issue for both the courts and the legislature. The language in *Brigance* is indicative that Oklahoma is determined to eliminate antiquated rules of law surrounding alcohol and motorists.

In response to the need to develop a more comprehensive area of liability, dram shop laws were taken to the next logical step. *O'Toole v. Carlsbad Shell Service Station* held that giving a drunk driver the motive power to travel was a proximate cause of ensuing deaths. The limited tavern keeper liability was given a broad interpretation.

O'Toole expanded liability to a new class of defendants. Having authority based in many of the same cases and rules, *Brigance* is close in its reasoning to the California decisions. In fact, it is grounded in the same language the *O'Toole* court used to establish expansive liability. When the issue arises, Oklahoma has every reason to follow *O'Toole*.

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