



FACULTY OF LAW
University of Lund

Anna af Jochnick

Alcohol Provider Liability, will such a regulation be adopted in Sweden?

Master thesis
20 points

Supervisor
Christian Dahlman

Field of study
Tort Law

Spring 2005

Contents

SUMMARY	1
ABBREVIATIONS	3
1. INTRODUCTION	4
1.1 The issue	4
1.2 Purpose	4
1.3 Limitation	5
1.4 Method and Material	5
1.5 Outline	6
2. GOALS OF THE TORT LIABILITY SYSTEM	8
2.1 Deterrence and compensation	8
3. INTRODUCTION TO THE CONCEPT OF NEGLIGENCE UNDER AMERICAN COMMON LAW	9
3.1 Duty of care	9
3.1.1 <i>No duty to control others</i>	10
3.2 Breach of duty	10
3.3 Causation	11
3.4 Contributory and comparative negligence	11
4. ALCOHOL PROVIDER LIABILITY	13
4.1 The traditional view on alcohol providers	13
4.2 Dram shop statutes	14
4.2.1 <i>Supporters of dram shop</i>	15
4.2.2 <i>Opponents of dram shop</i>	15
4.2.3 <i>Dram shop legislation at present</i>	16
4.3 Alcohol provider liability under modern common law	16
4.3.1 <i>Civil liability under a negligence per se theory</i>	17
4.3.2 <i>Expansion of common law negligence principles</i>	18
4.4 Commercial alcohol provider liability in Canada	19
5. SOCIAL HOST LIABILITY	21
5.1 Social host liability in the United States	21
5.2 Social host liability in Canada	22

6. ALCOHOL PROVIDER LIABILITY, A NON-EXISTENT PHENOMENA UNDER SWEDISH LAW	24
6.1 Alternative compensation schemes	24
6.1.1 <i>The historical development of insurance as a means of compensation in Sweden</i>	25
6.1.2 <i>Traffic insurance</i>	25
6.2 How are alcohol providers dealt with in Sweden?	26
6.3 Social regulation as an alternative to legal regulation	27
7. SO WHY HAS ALCOHOL PROVIDER LIABILITY BEEN ADOPTED IN NORTH AMERICA AND NOT IN SWEDEN?	29
7.1 Legal differences	29
7.1.1 <i>Damages</i>	29
7.1.2 <i>compensation for attorneys</i>	29
7.1.3 <i>Alternative sources of compensation</i>	30
7.2 Cultural differences	31
8. AN ECONOMIC ANALYSIS OF ACCIDENT COSTS	33
8.1 Minimizing the social costs of accidents	33
8.2 The tort system as a means of reducing costs.	34
8.3 Alcohol provider liability; negligence or no fault liability	35
8.3.1 <i>Achieving the efficient level of precaution</i>	36
8.3.2 <i>Allocating accident costs</i>	37
8.4 Criticism of the economic theory of tort law	37
8.4.1 <i>an example of the ultimate economic allocation of costs</i>	38
8.4 The Swedish system of taxes as a means of reducing costs.	39
8.5 Which system is to be preferred ?	40
9. CONCLUSION	41
BIBLIOGRAPHY	43
Legal literature	43
Articles	44
TABLE OF CASES	46
Canada	46
England	46
Sweden	46
United States	46

Summary

This thesis discusses the concept of alcohol provider liability. This more recent form of liability has become a popular tool when dealing with alcohol related accidents and aims to make alcohol providers, whether of commercial or private nature, liable for irresponsible service to their patrons or guests. Such liability, in its present form, is regulated either by statute or by common law principles of negligence law. Originally, such liability was mainly aimed at commercial providers of alcohol. Today however, all kinds of groups are being targeted, the most controversial of these being private persons who serve alcohol at their homes.

Interestingly enough, alcohol provider liability is of yet only a phenomenon underway in North America and to some extent in Australia whereas in Sweden, such a concept is still unheard of. Instead of the system of torts, which appears to be one of the reigning methods by which accident victims are compensated in North America, in Sweden, personal injuries arising out of alcohol related accidents are compensated by means of social security benefits and insurance coverage. The tort system is in other words a secondary source of compensation.

The approaches taken to combat alcohol related accidents in these two parts of the world can thus be said to be very different. These differences depend on both legal and cultural disparities. Legally, the tort system of the United States is built upon an entirely different system when compared with the system of torts in Sweden. Damage awards are much greater, plaintiffs and defendants have nothing to lose by going to court, lawyers are much more prone to drive a claim seeing as their fee will be based on the success of the claim, and other sources of compensation are few. Culturally, the view on alcohol has always been more conservative in the United States with several groups constantly lobbying for a stricter alcohol policy. Even our view on the tort system differs. Whereas Americans have begun to increasingly rely on and exploit the tort system, in Sweden, tort law for personal injuries is in one sense becoming a concept of the past with alternative compensation schemes and social security taking over.

Apart from a comparative analysis to illustrate the reasons for the different approaches taken, these approaches can even be analyzed from an economical perspective. Here theories of economics can be applied on both the American system of alcohol provider liability and on the Swedish system of social security, paid for by way of taxes, to demonstrate how accident costs ultimately can be reduced.

No system of regulation is perfect. Whereas we may believe the American system of alcohol provider liability to be too harsh, the Americans may envy our elaborate system of compensation but criticise our approach in that it merely compensates but fails to deter irresponsible and negligent behaviour.

Whatever the views may be, there will often be national reasons behind why countries choose different approaches when regulating the same issue. Even if Sweden, in other areas of tort law, has taken after American models of regulation, it would surprise me greatly if we were to go so far as to adopt such a regulation as that of alcohol provider liability seeing the controversial nature of such a regulation as well as the many differences in our two society's.

Abbreviations

A.2d	Atlantic Reporter, Second Series
A.C.	Appeal Cases
Baylor LR	Baylor Law Review
BCSC	British Columbia Supreme Court
BCLR	British Columbia Law Reports
B.U. LR	Boston University Law Review
Campbell LR	Campbell Law Review
CCLT	Canadian Cases on the Law of Torts
DLR	Dominion Law Reports
Duq. LR	Duquesne Law Review
F. 2d	Federal Reporter, Second Series
Ga. LR	Georgia Law Review
Harv. LR	Harvard Law Review
OLR	Ontario Law Reports
ONCA	Ontario Court of Appeal
ONCJ. GD	Ontario Court of Justice General Division
ONHCJ	Ontario High Court of Justice
ONSCJ	Ontario Supreme
Yale LJ	Yale Law Journal

1. Introduction

1.1 The issue

Alcohol Provider liability is of yet, still only a phenomenon under way in North America and Australia. What this term implies is an increase in accountability of all providers of alcohol whether of commercial or private nature for the risky drinking of their patrons or guests. The idea builds on the belief that commercial vendors of alcoholic beverages are expected to balance the legitimate pursuit of sales and profits with the safety of customers and innocent bystanders with whom patrons may come into contact. The same goes for private hosts who are also expected to take a positive interest in the well-being of their guests and create conditions to foster low-risk drinking. When these social expectations however are transgressed and other parties are injured through actions such as drunk driving, the civil law has opened for the possibility to assign compensatory penalties to the providers of the alcohol with the aim of redressing damages and ultimately with the hope of deterring such future negligent acts. Such liability is at present, either based on legal statute, or on common law principles of negligence law. Objections to such laws and decisions have however often been raised, based on an argument that such regulations send out a signal to people that they are not responsible for their own behaviour when alcohol is involved. From a European perspective, such liability might sound absurd seeing as the phenomena is non-existent in Europe. Then again, one must remember that the development of the tort system has taken quite a different path in North America when compared with Europe and more specifically Sweden. In Sweden, there has been a general decline in the need for tort compensation on the personal injury level due to the well-established system of compensation by means of social security benefits and insurances. Whether the phenomena of alcohol provider liability therefore ever will be adopted in Sweden, or Europe for that matter, is highly questionable, but an interesting discussion.

1.2 Purpose

The purpose of my thesis is that of three. Firstly, it is to introduce to the reader the concept of alcohol provider liability, a phenomena which appears to be sweeping over North America. Secondly, it seeks to explain the somewhat different approach taken in Sweden in dealing with alcohol related accidents and lastly it aims to examine reasons for the different approaches. It should be noted, that the aim of this thesis is not to criticize the different approaches taken when dealing with alcohol related accidents but merely to illustrate the different systems and explain reasons for such diverse regulations.

Alcohol provider liability was up until this past fall, a term unheard of to me and a concept I could hardly believe would exist. To my surprise however, after doing some research on the internet, I found the phenomena to be far from uncommon if not very current in countries such as the United States, Canada and Australia where several courts, at this present moment, are in the process of deciding on several such cases. After having read into the topic, I still find it unbelievable that providers of alcohol, especially those of a non-commercial nature, have become potential targets for liability for the actions caused by the heavy drinking of their guests. Has America lost all sense of what it means to take responsibility for one's own actions? Being Swedish and having therefore become accustomed to an entirely different legal system, it is difficult to grasp how regulations of the kind in question have managed to win such acceptance in the North American courts and with the public at large. It is from here that I therefore seek to examine what reasons might lie behind the fact that our countries have such entirely different approaches when it comes to alcohol related accidents.

1.3 Limitation

Again, to my surprise, after having researched the subject for some time, I found that literature and case law on the topic were of tremendous amounts. I have therefore decided to solely focus on commercial¹ and private providers of alcohol. I will also not be discussing the development of alcohol provider liability in Australia. I will instead primarily focus on its development in the United States as its home of origin, but will even look at some Canadian cases. Canada also being a common law country has been quick in taking after the idea and has at present, according to some sources, by passed the United States in the amount of such cases being brought to court. Although differences in these two countries do exist on how such liability has been seen upon by the courts, the differences are of minor importance when trying to get a general understanding for the elements necessary in cases of alcohol provider liability. Thus although I will mention some Canadian cases, I will for the most part concentrate my efforts on the American legal system and the development of alcohol provider liability there.

1.4 Method and Material

The methods used in going about this thesis have been several. In introducing the concept of Alcohol provider liability, a historical perspective has been used so as to better understand from where such an idea arose and how it came to flourish. In explaining why this form of liability is unheard of in Sweden, the comparative analysis is required. Interwoven in this comparative analysis are aspects of historical, political and social nature all of which aim to explain why these two countries have chosen such different approaches when dealing with the costs of alcohol

¹ As in restaurants, bars and nightclub's

related accidents. Apart from a comparative analysis, the costs of alcohol related accidents can also be analyzed from an economical point of view. Here the aim is to apply theories of economics and see how well alcohol provider liability is in achieving the overall goal of reducing accident costs in comparison to the Swedish approach of using taxes to reduce such costs.

In writing this paper, I have primarily relied on books by scholars, case law and journals. The first five chapters dealing with the American system have been written with the help of several books on American tort law, the leading one being *The law of torts* by Dan B. Dobbs, and a variety of different American law journals. The law journals, especially, have been of tremendous help in understanding the somewhat complex development of alcohol provider liability over the years. The various law journals in combination with Westlaw were also the primary sources used for finding the relevant case law. Books and articles on the Swedish tort and insurance system were the materials used in researching and writing chapter six whereas in chapter seven the head book used when examining the legal differences was that of Pfenningstorf & Gifford with their *Comparative study of liability law and compensation schemes in ten countries and the United States*. For the last part of my paper, dealing with theories of economics, the most important sources of information came from the books by Calabresi, Shavell and Dahlman with others.

1.5 Outline

As a starting point for my thesis, I will shortly describe the goals of the tort system before narrowing my focus onto the law of negligence under which alcohol provider liability falls. In looking at the law of negligence under the American Common law system I will go through the basic elements required for a successful negligence claim to succeed. In chapter four, I follow the development of alcohol provider liability over the years, examining its role under early common law, under Dram shop legislation and in its present form today. In chapter five, I give a brief overview of the most controversial development of alcohol provider liability, that being when alcohol related accidents arise due to happenings at social gatherings. Moving on to chapter six, I will cross the Atlantic and examine how alcohol related accidents are dealt with in Sweden. Seeing as Sweden has taken an entirely different approach to alcohol related injuries, I will not be discussing the Swedish tort system but rather focus on alternative systems of compensation in addition to looking at alcohol providers from a criminal point of view. The last section in chapter six will discuss aspects of social regulation as a less dramatic method for controlling alcohol related problems in comparison with legal intervention as is used in North America. In chapter seven, I begin my comparative analysis examining both legal and cultural differences that may lie behind the reasons for the different approaches taken in regulating alcohol related accidents. Before coming to a conclusion in chapter nine, chapter eight looks at alcohol related accidents from an economical viewpoint. Here theories of economics are discussed

and applied on the approaches taken in North America, where the tort system is used to reduce accident costs, and in Sweden where the system of high taxes are used which in turn finances the elaborate system of social security.

2. Goals of the tort liability system

2.1 Deterrence and compensation

The tort liability system is a system for deciding when an injured party should be able to recover damages from someone else who has “caused” his injuries. The system responds to multiple goals of compensating accident victims, deterring wrongful conduct, encouraging socially responsible behaviour and resolving civil conflicts. These factors often point in different directions in a particular case and thus the courts must attempt to balance these conflicting goals. How courts weigh these goals during any specific historical period tells much about a society’s underlying values. During recent decades, the two main goals of the tort system have been that of deterrence and compensation. The deterrent goal of the system is to deter certain kinds of conduct by imposing liability when the conduct causes harm. The idea is that all persons, recognizing potential tort liability would tend to avoid conduct that could lead to such liability. The hope is that threat of such liability would encourage individuals and firms to invest in safety up to, but not beyond, the point where additional costs on safety or precaution no longer would be cost-efficient in preventing accidental injuries.² Tort law development over the past several decades suggests however, that the second goal of the tort system, that of compensation has become the dominating policy. This is however, nowadays better achieved through systems of insurance and social security. As a result, the principle justification of the tort system as we have it today should therefore not be to compensate victims but to create incentives toward safety.

² Pfennigstorf, W. & Gifford, D. *A Comparative Study of Liability Law and Compensation Schemes in Ten Countries and the United States*. 1991, p 10.

3. Introduction to the concept of negligence under American common law

The common law system has long recognised that, in certain circumstances, persons guilty of careless behaviour are liable in damages to their victims. The tort of negligence emerged as protecting against three different types of harm: personal injury, damages to property, and economic loss. Under American Common law, the legal standards for assessing negligence in alcohol-related injuries are complex, vary by jurisdiction, and have evolved over time. While some standards are established by statutory law, most such standards emerge from common law- the decisions made by judges and juries in civil cases over time. One element in these decisions, specific to the American system, depends on juries understanding of what a “reasonable” host would do, that is, social expectations about the consideration reasonable hosts have for the future consequences of the behaviour of their patrons or guests. Thus, such liability standards are not simple specifications of rigid standards but are a reflection of the broader normative environment. For a negligence claim to succeed, the injured party must however always show that damage has occurred, that the defendant owed the plaintiff a duty of care, that the defendant breached that duty of care and that it was the defendant’s breach of duty, which was the cause of the plaintiff’s injury.

3.1 Duty of care

Since the modern expansion of negligence began, the very generality of the notion of liability for fault has made it necessary for the courts to confine what would otherwise be an over extensive legal liability. Courts have as a result used the concept of duty of care to shape the tort of negligence, duty of care therefore essentially being a legal concept, which dictates the circumstances in which a person will be liable to another in negligence. Under Common law, the courts did not recognise the existence of a general duty in tort imposing liability for careless behaviour until the 1930’s. This duty was first clearly expressed in the English House of Lords case *Donoghue v. Stevenson* in 1932, prior to which persons could only be held liable for damages caused to another person if there was a contractual or statutory duty to avoid such damage. In his judgement, Lord Atkin found that one must take reasonable care to avoid acts or omissions which are reasonably foreseeable and which would likely injure persons who are so closely and directly affected by the act that one ought to have them in contemplation as being affected when directing ones mind to the acts or omissions in question.³ This general rule concerning to whom one owes a

³ Markesinis, B.S. & Deakin S.F. *Tort Law*.1999, pp 70-71.

duty of care became known as the “neighbour principle”. The issue of duty is thus essentially concerned with recognising in which situations and in which relationships a duty of care should arise.

3.1.1 No duty to control others

Since *Donogoe v. Stevenson* one major problem in drawing the boundaries of the tort of negligence has lain in the question of how far is the law going to compel people to act for the benefit of others when they have not agreed to do so. The common law does not impose liability for what are called pure omissions. This means that there is no general duty of care in tort to prevent harm occurring to another. The fact that the defendant foresees harm to a particular individual from his failure to act does not change the general rule. The normal mechanism for creating such affirmative duties of action is by contract or statute. However, although there may not be a general such duty, the law does also recognise specific situations in which duty of care may require reasonable affirmative steps by the defendant. These situations include when the defendant has created risks or caused harm to the plaintiff; when the defendant is in a special relationship to the plaintiff that is deemed to create a duty of care and therefore encompasses affirmative action such as that of for example parent-child, school-student or employer-employee; when the defendant takes affirmative action that is either cut short or performed negligently; and when the defendant has assumed a duty of affirmative care by action or promise that indicates such assumption.⁴ The point about these specific instances is therefore that the duty to act arises from the existence of a pre-tort relationship between the parties. These exceptions to the no duty to act rule do not however impose strict liability. In situations such as the above courts will only impose a duty to act when a reasonable person would have done so.⁵

3.2 Breach of duty

The defendant must have breached his duty of care to the plaintiff. A breach of duty arises where the conduct of the defendant is unreasonable in the sense of failing to reach the appropriate standard of care. This will be the standard of normally careful behaviour in the profession, occupation, or activity in question and is usually expressed in terms of how the “reasonable person” would have acted.⁶ In applying this standard, the courts frequently balance the degree of foreseeability or risk of harm against the costs to the defendant of avoiding the harm. The level at which the standard is set is a difficult question which the courts have acknowledged involves issues of

⁴ Dobbs, D. *The Law of Torts*. 2000, p 854.

⁵ *Ibid.* p 874.

⁶ *Brown v. Kendall*, 60 Mass. 292 (Mass. 1850).

policy and judgment, and not a question which can be addressed solely by asking whether the particular harm was foreseeable in the circumstances⁷.

3.3 Causation

The defendant's acts must cause the harm of which the plaintiff complains. In determining issues of causation, courts rely upon the inter-related concepts of proximity, remoteness, and foreseeability.⁸ In general, if an alleged cause is considered to be too remotely connected to the injury, then it will not be considered a proximate cause, and causation will not be found to exist. The establishment of proximate cause entails an examination of how far the defendant's liability should extend for the consequences of the negligent act. Generally, the foreseeability of the injury is emphasized in this determination.⁹ Where damage results from multiple causes the courts often resort to the test of "but-for-cause". This test questions whether the damage would have occurred if the defendant had not been negligent. This notion is based on the view that a defendant should only be liable to the extent of his personal responsibility for the loss in question.¹⁰ An example within our specific topic to demonstrate the idea of causation includes such situations where a negligent provider supplies alcohol to an intoxicated person. This act enhances the risk that the drinker will drive dangerously. The connection between serving the alcohol and driving drunk has at present common law, in certain cases been accepted as being a proximate cause. Proximate cause has however not been found to exist in situations where the act of providing alcohol then led to the drinker setting a house on fire¹¹ or committing battery¹². Here the provision of alcohol was not deemed to create the risk of the actions in question.

3.4 Contributory and comparative negligence

The plaintiff's conduct can also be evaluated and measured against the standard of the reasonable person. This means that the defendant can plead the defence of contributory negligence in situations where the plaintiff has contributed to his or her injury. If it is found that the plaintiff has contributed to his or her injury, then the doctrine of contributory negligence will bar recovery for the plaintiff. In most American jurisdictions today, contributory negligence is however, no longer a complete defence. Instead, the doctrine of comparative fault compares the relative degree of fault which can be attributed to the plaintiff vis a vis the defendant. Using this doctrine a

⁷ Dobbs, D. *The Law of Torts*. 2000, p 270.

⁸ Ibid, p 271.

⁹ Hickling, E & Blanchard, E. *Road Traffic Accidents & Psychological Trauma*. 1999 p 277.

¹⁰ Dobbs, D. *The Law of Torts*. 2000, p 409.

¹¹ In the 1985 New Jersey case of *Griesenbeck v. Walker*, an alcohol provider was not found liable for fire caused by an intoxicated smoker.

¹² In the 1995 Minnesota case of *Kunza v. Pantze* proximate cause was not found to exist when an intoxicated drinker who had been served by the provider attacked his wife.

plaintiff can still recover damages regardless of contributing negligence but the damage awarded will be reduced by the percentage of negligence that is attributable to the plaintiff.¹³ Comparative negligence is often an issue in cases where the plaintiff has been intoxicated.

¹³ Dobbs, D. *The Law of Torts*. 2000, p 494.

4. Alcohol provider liability

The long-recognized and unacceptable high social cost of improper conduct by intoxicated persons has led to repeated efforts by members of the public¹⁴, courts and various legislatures to reduce the risk of injury and to spread the risk of loss by enlarging the pool of potential defendants. The efforts have resulted in focusing on the person supplying the alcohol or intoxicating substance in an attempt to coerce responsible behaviour and to provide a solvent defendant in the event of intoxication and resulting injury. Historically, courts have used three methods for imposing liquor liability, the oldest form being early common law attempts to impose such liability, the second being dram shop acts¹⁵, and the newest being a more modern common law approach. Despite these three different approaches, many states are still struggling with how to best regulate alcohol provider related problems. Some have therefore decided to solely rely on dram shop statutes that impose liability on liquor sellers under certain circumstances whereas others have chosen to rely on the modern common-law duty of reasonable care that can hold both liquor sellers and social providers of alcohol liable for alcohol induced injuries. Some American states have however taken the complete opposite view and enacted statutes precluding liquor provider liability in certain circumstances.¹⁶

4.1 The traditional view on alcohol providers

Historically under common law, it was not a tort to either sell or give intoxicating liquor to an able-bodied person. As a result, a supplier of alcohol could not be held responsible for the injury or death of a person who consumed the alcohol, nor could the supplier be held responsible for the injury or death caused to a third party by the acts of an intoxicated patron. Injured third parties were therefore limited to causes of action against the intoxicated patron. There were several rationales behind this old common law rule. The one most commonly cited was that consuming the liquor, not supplying it was the proximate cause of injury. Many however saw the proximate cause rationale for rejecting liability as doubtful. These believed the drinker's intoxication and subsequent negligent acts to be foreseeable, and the risk created by the defendant, intoxicated driving, exactly the risk that came about as a result. For this group, the common law rule therefore looked more like a no-duty rule rather than a proximate cause rule.¹⁷ Another theory supporting the old common law rule was that even if the sale

¹⁴ M.A.D.D. (Mothers Against Drunk Drivers) a nationwide association whose purpose is to decrease the number of deaths and accidents caused by drunk drivers.

¹⁵ Laws that impose liability for negligence on the sellers of alcoholic beverages for sales to persons under the legal drinking age or to those obviously intoxicated.

¹⁶ Markesinis, B & Deakin, S. *Tort Law*. 1999, p 223.

¹⁷ Dobbs, D. *The Law of Torts*, 2000, p 899.

or furnishing of liquor was found to have caused a patron's intoxication, any subsequent injury to a third party was deemed an unforeseeable consequence of the sale of the alcoholic beverage. This latter situation was therefore first addressed in dram shop laws. A third justification for the common law rule was that the business of selling liquor was legitimate and thus only the purchaser could be held responsible. Finally, it was thought that decisions regarding liability should be made by the legislature not the courts.¹⁸ The few cases that did impose liability at early common law usually involved more than the negligent sale of alcoholic beverages to able bodied men, often requiring some sort of extreme conduct on the part of the vendor.¹⁹ In the leading case of *McCue v. Klein*, the Texas Supreme court in 1883 recognized a cause of action for a decedent who died in a drunken stupor induced by the defendants. Despite warnings from bystanders, the defendants induced the decedent, a habitual drunkard, to swallow quickly three pints of whisky, resulting in his death. The court found that the defendants had every opportunity of knowing that fatal results would without doubt follow their acts, yet they carelessly persisted in them, and were as a result liable for all the damages that arose.²⁰

4.2 Dram shop statutes

The second bases for liquor liability in America are the so-called dram shop acts. These statutes are passed by legislative decision and impose strict liability under various circumstances upon commercial servers of alcohol for the damages caused by their intoxicated patrons.²¹ The rationale for the enactment of these acts was to deter bars from selling alcohol to minors, the obviously intoxicated, and other classification of persons who were likely to injure themselves or third persons. In addition, the acts help in awarding compensation to innocent victims for injuries suffered at the hands of the intoxicated.²² The first Act from the 1870's sought to *suppress Intemperance, Pauperism and Crime*. The Act had a social benefit objective and aimed to discourage licensees "from serving intoxicated persons, and those susceptible to liquor in squandering their money on alcohol rather than providing food and sustenance to the members of their family". During the prohibition years of the 1920's and early 30's US states continued to enact dram shop acts as part of the campaign for temperance. Although many of these states repealed their dram shop acts after the end of the prohibition movement in 1933, several of the states began to re-enact dram shop acts in the 1970's.²³ The enactment of these laws did however greatly contrast with

¹⁸ Easley, A. *Vendor Liability*, 21 Campbell LR. 1998-1999, p 284.

¹⁹ Morrison, M & Woods, G. *An Examination of the Duty Concept*, 36 Baylor LR. 1984, p 407.

²⁰ *Ibid.* p 408.

²¹ Kocher, B. *Liability of Commercial Vendors of Alcohol*, 26 Duq. LR. 1987-1988, p 798.

²² Olmstead, B. *In Search of a Drinking Companions Complicity under Illinois Dram shop Act*, U. Ill. LR. 1994, p 218.

²³ Easley, A. *Vendor Liability*, 21 Campbell LR. 1998-1999, p 285.

the view of early common law that innkeepers were generally to be immune from liability for injuries caused by their intoxicated patrons.

4.2.1 Supporters of dram shop

The main purpose of dram shop liability is to provide victim compensation and to prevent alcohol-related crashes. Imposing civil liability upon licensed vendors significantly increases the chances that an injured victim will receive complete compensation. In states that have no right of action against liquor vendors, liability is otherwise usually limited to claims against the drinking driver. However, drinking drivers often fall short in fully compensating victims due to either limited automobile insurance or no insurance at all. Liquor vendors, on the other hand, typically are able to purchase extensive liability insurance that is specifically written to reimburse costs of tort liability and can spread the cost of insurance by increasing prices. In addition, the belief is that businesses profiting from the sale of liquor should be considered partially responsible for the social cost of liquor sales and that it is therefore more fair to impose the cost of accidents on those making a profit from the sale of liquor than on an innocent, injured third party.²⁴ Concerning the idea of prevention, the rationale is that the potential risk of liability will encourage vendors to operate their business in a more responsible manner. Without the threat of lawsuit, alcohol servers would be less willing to educate their employees or to establish responsible standards of service. Other reasons for putting responsibility on alcohol providers includes their expertise in judging whether a person is a minor or intoxicated and their possibilities to better control a patron's consumption.²⁵

4.2.2 Opponents of dram shop

Opponents of liability argue that financial incentives other than lawsuits already exist. Alcohol servers may be penalized for violation of laws prohibiting over-service through fines or license revocation. These opponents also believe that alcohol providers are often sued as a result of a "deep pocket theory of liability". This theory builds on the idea that financial awards made to plaintiffs are not always commensurate with the commercial alcohol provider's responsibility but rather based on a perception of the person's ability to pay. Opponents emphasize the importance of drawing a line between acknowledging some responsibility and being held totally accountable by virtue of being a "deep pocket".²⁶ The most serious complaint against dram shop or any other form of server liability is that these laws do not strike at the root of the problem. They randomly punish over-service, but do not address the broader issues of individual responsibility and prevention of alcohol misuse. The right solution can therefore only be achieved by changing the public attitude

²⁴ Ibid. p 286.

²⁵ *The First Northeast Conference on Alcohol Server Liability*. 1984, p 21.

²⁶ Ibid.

toward alcohol consumption by making excessive drinking socially unacceptable, and by fostering an awareness of primary responsibility resting with each individual.

4.2.3 Dram shop legislation at present

At present 43 states in the United States have incorporated some form of dram shop liability, with only nine states refraining. The degree of liability does however vary from state to state. In Alabama, Alaska, and Michigan for example, liability is limited to illegal alcohol sales, such as serving minors or known alcoholics. Nonetheless, the vast majority of states allow for recovery simply when the defendant knew (or should have known) the customer was intoxicated, a difficult test in application. Some states have however at least tried to address this problem through more exacting tests. Missouri's recently revised dram shop law now requires proof that the party demonstrates "significantly uncoordinated physical action or significant physical dysfunction" and in Texas, a patron must be so obviously intoxicated that he presents a clear danger to himself and others. Some states have on the other hand abandoned any pretext of fairness such as Illinois, where plaintiffs can recover damages after demonstrating 1) proof of sale of alcohol to the patron; 2) injuries sustained by the patron; 3) proximate cause between the alcohol sale and intoxication; and 4) that intoxication was at least one cause of the third party damages. Notably absent from this list is that the defendant knew or should have known the patron was intoxicated, meaning that every person who sold the patron alcohol, whether or not he was intoxicated at the time, can face some degree of liability.²⁷ Because of the many different views on dram shop laws, many states have concluded that the classical dram shop acts are not an adequate solution to the problem of alcohol related injuries. Just as dissatisfaction with the early common law regulation of liquor liability led to the enactment of dram shop acts, dissatisfaction with these acts prompted many jurisdictions to adopt a new common law approach to the problem.²⁸

4.3 Alcohol provider liability under modern common law

Modern negligence principles are the third basis for liquor liability. Under modern negligence principles, the new duty of alcohol providers may be based either on the "new" common law theory of negligence per se used by a majority of jurisdictions or on an expansion of pure common law negligence principles.

²⁷ Murphy, E. *Blame it on the Bars*. Centre for individual freedom. Jan 2004.

²⁸ Morrison, M & Woods, G. *An Examination of the Duty Concept*, 36 *Baylor LR*. 1984, p 410.

4.3.1 Civil liability under a negligence per se theory

Several courts have held that criminal statutes prohibiting sales of alcohol to specified persons were enacted for the benefit of the public at large and violation of these provisions therefore constitute actionable negligence. This view began in the mid 1950's when courts started to reject the Common law rule of non-liability. During this period, courts therefore began creating a cause of action based on the violation of an alcohol beverage statute. Specifically, the decisions required a plaintiff to establish the seller's failure to exercise reasonable care in serving intoxicating beverages to a patron, resulting in foreseeable intoxication and injury.²⁹ In 1959, *Waynick v. Chicago's Last Department Store* was the first case to dispense with the dram shop approach and to find liability using the newer common law. In the case, a Michigan plaintiff was injured in Michigan by an Illinois motorist who had been served alcohol by an Illinois storeowner who in turn had violated Illinois criminal code provision proscribing the sale of alcoholic beverages to an intoxicated buyer. The court held that the Illinois penal statute created an enforceable duty at common law and that proof of breach and proximate causation would support a finding of the storeowner's liability for the plaintiff's injury by the intoxicated patron.³⁰ Following *Waynick* a New Jersey court in *Rappaport v. Nichols* allowed a decedent's widow to recover from four tavern owners who had violated a criminal statute by serving alcohol to an obviously intoxicated minor who subsequently killed the plaintiff's husband in an automobile collision. The court stated that "one is generally liable whenever his conduct is a substantial factor in creating a situation, which involves an unreasonable risk of harm to third parties as a result of the foreseeable action of another". Selling alcoholic beverages to a person who is visibly intoxicated or who, from all circumstances should be recognized as a minor creates such an unreasonable risk.³¹ Since *Rappaport*, the traditional common law rule of non-liability has therefore steadily been eroded. Courts finding liability have recognized the fact that society has changed and have often stressed that, whatever earlier notions of foreseeability might have been, the involvement of an intoxicated person in an automobile accident can be, in a mobile society, a natural, probable and foreseeable consequence of the sale of alcohol by a tavern keeper.³² It should however be noted that the new common law regime for alcohol providers is not one of strict liability. The plaintiff must still prove negligence.³³ By using the negligence per se doctrine however, plaintiffs are able to prove negligence merely based on a

²⁹ Dobbs, D. *The Law of Torts*. 2000, p 315.

³⁰ Reeves, J. *Case for Tavern Keeper Liability in Georgia*, 9 Ga. LR. 1974-1975, p 244.

³¹ *Ibid.* p 245.

³² *Ibid.* p 246.

³³ Dobbs, D. *The Law of Torts*. 2000, p 900.

criminal violation of an alcohol beverage statute. In such cases, no excuse is recognised and neither reasonable ignorance nor all proper care will avoid liability. Such a statement is therefore in the end one resembling that of strict liability rather than that of negligence and is as a result easier to establish than civil liability under normal common law negligence principles.³⁴ It should be noted that normally there is no compulsion by which a purely criminal statute must lead to any civil liability. Such a result can therefore only arise by a court decision.³⁵

4.3.2 Expansion of common law negligence principles

There are many situations in which the hypothetical reasonable person could be expected to anticipate and guard against the conduct of others. In general, where a risk is relatively slight, a person is free to assume that other people will exercise reasonable care in what they do. But when a risk becomes a serious one, either because the threatened harm is great, or because there is a special likelihood that a specific harm will occur, reasonable care may demand precautions against “such occasional negligence” which otherwise is a common element of human behaviour.³⁶ The duty to take precautions against the negligence of others thus involves merely the usual process of multiplying the probability that such negligence will occur by the magnitude of the harm likely to result if it does, and weighing the result against the burden upon the defendant of exercising such care. It becomes most obvious when the actor has reason to know that he is dealing with persons whose characteristics make it especially likely that they will do unreasonable things such as an alcohol provider who clearly sees that a patron is intoxicated but continues to serve him or refrains from controlling his behaviour.³⁷ While the courts in both *Waynick* and *Rappaport* relied on penal statutes to find alcohol providers duty, other courts have recognized a general common law duty not to create unreasonable risks by either the sale or furnishing of alcoholic beverages. This being a duty which everyone owes to society and which is entirely apart from any statute.³⁸ Courts have had varying views on what should be required of an alcohol provider for negligence to arise. Some courts have for example stated that a liquor provider can only be liable if he has committed “affirmative acts” more than merely providing the liquor and which have increased the danger, such as ejecting a helplessly intoxicated

³⁴ Easley, A. *Vendor Liability*, 21 Campbell LR. 1998-1999, p 289.

³⁵ *Ibid.* p 229.

³⁶ Prosser, W & Keeton, W. *On the Law of Torts*. 1984, p 198.

³⁷ *Ibid.* p 199.

³⁸ Morrison, M & Woods, G. *An Examination of the Duty Concept*, 36 Baylor LR. 1984, p 413.

customer from a tavern.³⁹ This has even been the view taken by Canadian courts.

4.4 Commercial alcohol provider liability in Canada

Over the years it has been reasonably well established in Canadian common law that commercial establishments which serve alcohol have a duty of care not only to intoxicated patrons, but also to others in the community (particularly sharers of roadways) to protect them against injury or death brought on by: over-serving, failing to monitor a patron's increasing intoxication and failing to ensure that the patron in question is delivered home safely (either by asking for car keys, providing a safe drive home, or by calling the police). Such liability, as in the United States, is based on either statutory regulation or on common law principles of negligence.

In Canada, the liability of commercial hosts was first established by the 1973 Supreme Court of Canada decision in *Jordan House Ltd v Menow*.⁴⁰ Menow was a regular patron of the defendant hotel, and had been banned on a previous occasion due to his tendency to become intoxicated and disruptive. When management allowed him to return, the staff was informed that Menow was not to be served unless accompanied by a responsible adult. Although Menow arrived at the hotel with co-workers on the night in question, he later drank alone for three hours. He was thrown out by staff when he became intoxicated and began to annoy other patrons. Menow attempted to stagger home along the highway, when he was struck by a negligent driver. He sued both the driver and the hotel. The hotel was held liable in this case due to several factors. The staff had personal knowledge of the plaintiff's excessive drinking habits and tendency to become rowdy. Contrary to the liquor licensing legislation, the hotel staff had served Menow past the point of intoxication, and had thrown him out onto a dangerous highway when they knew he had no safe transportation home. The hotel staff could have easily protected Menow by arranging transportation, calling the police or taxi, or allowing him to spend the night in the hotel. The case thereby established that alcohol-serving establishments owe a duty of care to intoxicated patrons not to expose them to reasonably foreseeable risks of injury.

In *Schmidt v. Sharpe*,⁴¹ Mr. Schmidt, a 16-year-old passenger in Mr Sharpe's car, was rendered a quadriplegic after a motor vehicle accident that occurred a short time after Mr Schmidt and Mr Sharpe left the Arlington Hotel. Although the hotel had served Mr Sharpe only three beers, and there was no evidence that Mr Sharpe had been acting in an obviously intoxicated

³⁹ Robertson, D. *Negligence: Liability for Crimes and Intentional Torts Committed by Others*, 67Tu LR. 1992-1993, p 153.

⁴⁰ (1974), 38 DLR (3d) 105.

⁴¹ (1983), 27 CCLT 1 (ONHCJ).

manner, the Ontario Supreme Court found that the hotel was negligent on the grounds that it had served alcohol to someone who was already intoxicated. The Hotel was therefore held liable for Sharpe's conduct.

Even where a tavern employee in *Hague v Billings*⁴² refused a second drink to an intoxicated plaintiff and where the owner attempted to convince the intoxicated person to give his car keys to another, apparently less intoxicated person, the hotel was held liable when in the court's words, the employees and the owner: "...stood at the window...and watched the patrons drive south on Highway 28, knowing they were a danger for all people travelling on Highway 28".

⁴² (1993), 13 OLR (3d) 298 (ONCA).

5. Social host liability

Although the vast majority of alcohol provider liability cases involve bars, restaurants and other commercial licensed establishments, this type of liability can even apply to anyone who sells or otherwise provides alcohol to others. Claims have as a result been brought against universities, service clubs, sponsors of alcohol related events and private social hosts. This latter liability has however proven to be very unpopular with many courts and legislatures with the result being that social host liability today remains the exception rather than the rule. While it is clear that commercial hosts owe a duty of care to their patrons, courts have been reluctant to transfer that duty to the social host although they have acknowledged the possibility of such duty. Unknowingly, courts have however, to a large degree developed a substantial body of law on the required elements for a successful claim against a social host. By explaining when social host liability will not be imposed, the courts have outlined the circumstances when liability will be imposed. These circumstances include: the provision of alcohol by the social host, observable signs that the guest is intoxicated, and foreseeable risk of harm.

5.1 Social host liability in the United States

The first successful imposition of social host liability based on common law principles occurred in 1984, in *Kelly v. Gwinnell*⁴³, where the New Jersey Supreme Court found a social host liable for negligently serving alcohol to an intoxicated guest who subsequently injured a third party in an automobile accident. The court ruled that “a host who serves liquor to an adult social guest, knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle, is liable for injuries inflicted on a third party resulting from the drunken driving”. Although commentators enthusiastically embraced *Gwinnell*, many states have since then refused to recognize a similar cause of action against social hosts.⁴⁴ One rationale for refusing to impose such liability lies in the significant differences between bar owners and social hosts. These differences include the social host’s lack of experience in recognizing intoxication, the fact that a bar owner derives a profit from the service of alcohol and is more knowledgeable and better equipped financially to monitor customers, and the social host’s lack of insurance coverage.⁴⁵ Several courts have however not rejected the imposition of social host liability altogether. Whilst Massachusetts and Iowa have followed *Gwinnell* in imposing a general common law duty of care on negligent social hosts, other state courts have recognised more limited forms of social host liability, grounding liability in liquor control statutes rather

⁴³ *Kelly v. Gwinnell* 476 A.2d 1219 (NJ 1984).

⁴⁴ Seminara, M. *When the Party’s Over: The Emergence of a Social Host Liability Standard in Massachusetts*, 68 B.U.L.R. 1988, p 201.

⁴⁵ *Ibid.* p 198.

than on common law principles, and most often limiting liability to social hosts serving minors.⁴⁶ Here the rationale is that although hosts are not in as strong a position as vendors to control drinking on their premises, they can often take some steps to prevent their guests from causing accidents. For example, a diligent host might collect the guest's car keys before serving drinks, thereby ensuring an opportunity to examine the guest's fitness to drive before returning their keys.⁴⁷

5.2 Social host liability in Canada

As mentioned in section 4.4 above, it has since long, been well accepted throughout all of Canada that commercial servers of alcohol can face liability if an intoxicated patron harms himself or other users of the road in a motor vehicle accident. The commercial host has therefore a positive duty to take such steps as are reasonably required to prevent the drunken patron from operating the vehicle. In contrast, however, the duty of a social host to take similar steps to ensure that intoxicated guests do not drive upon departure from the social event, has still not been settled by the country's courts. Of the 12 social host liability cases that have to date been heard in Canada, not one has succeeded. Many of these ruling have determined that it does not necessarily follow that social host liability is a natural extension of commercial alcohol provider liability.

The earliest Canadian case to deal specifically with social host liability was *Baumeister v Drake*⁴⁸. The plaintiff suffered severe brain damage when he fell out of the back of a pick-up truck driven by Drake, who was intoxicated. Both had left an all-night graduation party at the Carefoot's home. The liability claim failed however, on the grounds that the Carefoot's had in no way provided the uninvited guests with alcohol and had even attempted to discourage the boys once on the premises from driving.

Several cases since then have all been declined when the social host has not provided the alcohol. However, even when the social host has provided alcohol, the host will not be held liable unless there was a reason to believe that the guest was intoxicated. In the case of *Broadfoot v Ontario*⁴⁹ the judge stated that despite the fact that the driver had accepted several alcoholic drinks from the host during the evening, and that the host had accompanied him to his vehicle and knew he was driving, there were not grounds for liability seeing as the issue was not the quantity of alcohol consumed but the degree of impairment which could be observed.

In the most recent case of social host liability,⁵⁰ the courts considered the liability of a private homeowner for damages caused by a guest who

⁴⁶ Harv. LR. p 552.

⁴⁷ Ibid. p 553.

⁴⁸ (1986), 5 BCLR (2d) 382 (BCSC).

⁴⁹ (1997), 32 OLR (3d) 361 (ONCJ. GD).

⁵⁰ *Childs v Desormeaux* (2002) 217 DLR (4d) 217 (ONT SCJ).

consumed alcohol in the home, drove drunk and injured another user of the road. With regards to the particular facts of the case, the court determined that the homeowners did not owe a duty of care to third party users of the road. This decision was based on three reasons. Firstly, the party was a BYOB⁵¹ party, meaning that the homeowners neither provided nor served the alcohol consumed by the driver. Secondly, there was no evidence to suggest that the homeowners knew how much alcohol the driver had consumed at the party. Lastly, from the evidence given, the courts determined that the homeowners did not know that the driver was impaired when he drove away from the party. The court was however careful to note that its decision was restricted to the fact in *Childs*, it was therefore not deciding whether liability against social hosts in all circumstances should be turned down. In fact, the court was very clear in stating that its decision could very well have been another had the circumstances been different. Thus it would appear that it is only a matter of time before such a case wins ground even in Canada.

⁵¹ Bring Your Own Booze.

6. Alcohol provider liability, a non-existent phenomena under Swedish law

The law of non-contractual liability in Sweden has its basis liability founded on individual wrongful behaviour. In the provisions of the Swedish Tort liability Act of 1972 (*skadeståndslagen*) this is stated in chapter 2 §1 as *Whoever causes personal injury or property damage intentionally or negligently must make reparation, unless otherwise provided herein...* As under common law principles the elements of damage, duty, breach of duty and causation must all be present for a tort claim to be successful. Concerning alcohol providers there has however of yet never been a case where an alcohol provider has become liable for the injuries obtained by a patron due to the patrons or guests intoxication nor for injuries obtained by a third party who has been injured by the intoxicated. Theoretically though, the same arguments concerning duty of care and causation, which are used in North America as a ground for alcohol provider liability, could be applied in Sweden. However, due to fundamental differences both legally and culturally with regards to the tort system in both these countries, Sweden has not had any reason to look closer on how such cases would be dealt with if such a case ever were to arise. Instead, Sweden has dealt with personal injuries arising from intoxication or intoxicated driving by means of alternative compensation schemes. The chain of responsibility has therefore never been pursued further back as is the case in North America.

6.1 Alternative compensation schemes

In Sweden, tort law has long been criticized for not being an effective method of compensating personal injuries. Although prevention is generally mentioned besides reparation of losses as one of the chief objectives of tort law, Swedish scholars have since the 1940's questioned the effectiveness of prevention in the field of tort. Instead, more focus has been put on the importance of reparation.⁵² The principle of insurance coverage developed therefore as an alternative to the distribution of the costs of injuries through tort law and tort process. Instead of placing the burden of compensating damages entirely or in part upon the responsible person who caused the damage, the loss is placed upon a third party, the insurance company.⁵³ Particularly concerning damages for personal injury, it is also significant that Sweden has an elaborate social security system that covers a large share

⁵² Dufwa, B. *Development of International Tort Law*, 41 Tort Liability and Insurance: Scandinavian Studies in Law. 2001, p 92.

⁵³ Bruggemeier, G. *Common Principles of Tort Law* 2004, p 267.

of the economic losses sustained in accidents resulting in personal injury, particularly medical expenses and loss of income. As far as personal injury is concerned, the main function of the tort system in Sweden is therefore to provide supplementary cover in order to fill the various gaps and limitations in the social security system, in particular to compensate for loss of income over and above the limits set by the social security system, as well as to compensate for so called non-pecuniary consequences of an injury, such as pain and suffering, permanent injury and the like.⁵⁴

6.1.1 The historical development of insurance as a means of compensation in Sweden

The development of alternative compensation schemes began in Sweden in the 1970's. During that decade the so-called *occupational safety insurance* was introduced (1972), *patient insurance* (1975), *third party motor insurance* (1976) and *pharmaceutical injuries insurance* (1978). These compensation schemes were not developed on the basis of an overall plan, but resulted from some fundamental viewpoints on the design of the compensation system, particularly within the area of personal injuries, as expressed in the legislative history of the Swedish Tort Liability Act. The main viewpoint was that the general law of torts was an unsuitable compensation mechanism, and that instead the aim should be to develop insurance schemes that were better designed to meet injured parties needs for compensation that encompassed social policy objectives, a rational use of resources, as well as simplified, efficient and quick claims settlement. Compensation was to be awarded regardless of whether anybody was liable in damages.⁵⁵

6.1.2 Traffic insurance

In Sweden, under the Traffic Damages Act of 1975 (*Trafikskadelagen*), car owners are strictly liable for their actions when driving a car. This means that a car owner is responsible for any personal injuries arising out of his driving regardless of fault. Injured pedestrians receive compensation from the insurer of the vehicle by which they were struck, passengers are covered by the insurance of the vehicle in which they were riding and injured drivers receive benefits from their own insurers, regardless of fault. Personal injury tort claims against the driver, owner, or insurer of another vehicle are thereby precluded seeing as compensation is obtained through the car insurance instead.⁵⁶ Unique for the Swedish car insurance system is that the insurance scheme offers full compensation equal to the damages that could

⁵⁴ Von Eyben, B. *Alternative Compensation Systems*, 41 Tort Liability and Insurance: Scandinavian studies in Law. 2001, p 194.

⁵⁵ *Ibid.* p 201.

⁵⁶ Hellner, J. *Compensation for Personal Injuries in Sweden*, 41 Tort Liability and Insurance: Scandinavian Studies in Law. 2001, pp 257-260.

be recovered under tort law. Damage awards are also remarkably consistent and predictable thanks to coordination by the Road Traffic Injuries Commission, (Trafikskadenämnden) a panel established by statute and composed of independent lawyers and representatives of insurers and the public. Among other things, the commission develops guidelines and schedules for the amounts to be awarded for pain and suffering etc. Alcohol related injuries arising out of an automobile accident can even be compensated through the social security benefits. The social security benefits which are received are however, then taken into account in determining compensation payable under the automobile insurance system.⁵⁷ It should be noted though, that damages can be reduced if the injured person contributed to the loss such as is the case in many voluntary intoxications. Reduction will however only occur if the injured person was intentionally or grossly negligent and in general, the reduction will seldom exceed 50 percent.⁵⁸ There are several possible reasons for why the Swedish car insurance scheme has succeeded so well. For the first, it may depend on the vague standard of “reasonable” compensation, which in Sweden is given precise content through rather detailed schedules for the different items of damage, including pain and suffering. Secondly, the schedules are constantly reviewed, refined, and updated by the official mediation boards and lastly the damages awarded are generally accepted and observed by claimants and their attorneys and by the courts. It is however doubtful whether schedules of this kind would work smoothly in a country as the United States considering its size and varying legal views.

6.2 How are alcohol providers dealt with in Sweden?

Seeing as the tort system in Sweden is not used to the same extent for receiving compensation for damages as it is in North America, Alcohol providers have of yet not become a source of compensation. However, as in North America, the act of serving alcohol to minors and of over-serving those already intoxicated is a criminal offence even under the Swedish Alcohol Act which can lead to the commercial alcohol provider being fined or jailed up to a period of two years. Other sanctions available are warnings and license revocation. Although the threat of liability is small for alcohol providers in Sweden, it would appear that the threat of a license revocation would serve the same function as that of liability in deterring irresponsible alcohol service and put pressure on alcohol providers to satisfy minimal standards of safety. Insisting on minimal safety standards whether through the system of torts or by threat of other sanctions, will ensure that at least certain precautions are taken. One may even wonder if not such a threat as that of license withdrawal serves as a better method for deterrence than that of liability seeing as in the long run a license revocation may very well

⁵⁷ Pfennigstorf, W. & Gifford, D. *A Comparative Study of Liability Law and Compensation Schemes in Ten Countries and the United States*. 1991, p 122.

prove to amount to a larger profit loss in comparison with potential tort claims. In addition, the chance that a claim against an alcohol provider is filed and succeeds is less likely compared with the possibility that a municipal authority intervenes and revokes a license. Social authorities often possess superior information and are better positioned than victims to detect the actual occurrence of harm or its source and have greater resources to intervene when compared with a private person who must on his or her own take the initiative to file a liability claim. An organisation of interest for this specific topic is the National Alcohol board (Alkohol tillsynsmyndigheten) governing over the abidance of the Alcohol Act. This authority makes usual rounds at licensed premises often disguised as a normal civilian and makes sure licensed premises are abiding by both legal regulations as well as reigning alcohol policies. Licensed alcohol premises are therefore never aware of when such a check is being made and must as a result always be on their guard and make sure that the service of alcohol is at all times being performed responsibly. Apart from the threat of license revocation, responsible alcohol service can even be achieved by way of social policy regulations.

6.3 Social regulation as an alternative to legal regulation

Policing by legal regulation such as that of alcohol provider liability is tremendously expensive, but can be very effective in enhancing the perception of risk. Self-regulation however, offers a more viable solution giving the alcohol industry a chance to show it can sort itself out on a voluntary basis. Industries are in addition often best qualified to set their own fair and equitable regulatory standards. The latest trend in an attempt to reduce and prevent the harm associated with excessive alcohol consumption has been the recent shift of focus from the individual to the setting in which drinking takes place and practices within this setting. One such environmental prevention strategy is the programme of “Responsible Beverage Server” (RBS). In particular, the programme focuses on changing the behaviour of those selling and serving the alcohol. The programme trains staff to recognise signs of intoxication and to cease service of alcohol to people approaching intoxication as well as manage intoxicated patrons appropriately (such as ensuring safe transportation home). The programme builds on the laws that prohibit alcohol sales to minors and to drunken people and aims to assist alcohol servers in complying with these laws.⁵⁹ The concept of RBS originated in the USA during the 1960’s where the policy was implemented on the basis that servers of alcohol were best positioned to identify customers with possible alcohol related problems. Today such alcohol policies are in line with current European agreements, which state that by the end of 2005, all countries of the European region should ensure: a reduction in alcohol related problems within the drinking

⁵⁹ Sewel, K. *International Alcohol Policies: a selected literature review*. 2002, p 3.

environment, a reduction in the number of intoxicated persons leaving licensed premises and subsequently involved in assaults, violence and alcohol-related traffic accidents and lastly the implementation of appropriate measures to restrict young people access to alcohol.⁶⁰ In North America where the threat of liability for a liquor licensee is far greater than in Sweden, the response to such programmes have been quite popular with efforts being focused in the areas of server education and customer awareness. Consumer awareness includes placing “know your limit” cards in restaurants, establishing ride programs and designated driver programs in which the driver is served free non-alcoholic beverages during the course of the evening.⁶¹

In Sweden where the threat of such liability has of yet never been heard of, efforts have nonetheless over the years been taken to tackle problems relating to alcohol consumption. These efforts were first tested in Stockholm and were in 2004 summarised in a thesis where it was proven that they had positive effects on the service of alcohol. Statistics from the experiment show that in 1996, 5% refused alcohol service to intoxicated patrons, whereas in 1999 the percentage had increased to 47%.⁶² Moreover, in 1996 the refusal rate for alcohol service to underage patrons was 55%, whereas 68% in 2001.⁶³ The thesis also showed that the public opinion in Stockholm was overall supportive of strategies focusing on the responsibility of the licensed premises to prevent intoxication and violence. 86% supported the notion that licensed premises should lose their license if they were to serve intoxicated or underage patrons and 60% supported RBS training of servers. Public opinion did however not support such strategies, which aimed to reduce number of licensed premises, reduce opening hours, or increase the price of alcoholic beverages.⁶⁴ According to the thesis, it would appear that it is the combination of activities over the years (community mobilization, RBS-training, policy initiatives, and efficient monitoring) that, to a large degree, has contributed to the decrease in alcohol-related problems at licensed premises in Stockholm.

⁶⁰ Ibid. p 9.

⁶¹ *The First Northeast Conference on Alcohol Server Liability*. 1984, p 22.

⁶² Wallin, E. *Responsible Beverage Service: Effects of a Community Action Project*. 2004, p 33.

⁶³ Ibid. p 34.

⁶⁴ Ibid. p 35.

7. So why has alcohol provider liability been adopted in North America and not in Sweden?

7.1 Legal differences

There are several reasons for why alcohol provider liability has succeeded in North America and why it may never develop in Sweden. The reasons are mostly based on legal and cultural differences of which I will begin with the legal.

7.1.1 Damages

An important difference between the American tort system and the Swedish is the disparity in damages. In Sweden, damages are calculated by judicial or administrative officials who follow relatively strict schedules or guideline for compensation. In the United States, by contrast, the determination of damages is made by the jury with little guidance from the judge on how pain, suffering, and other non-economic damages are to be measured and with a minimum of judicial control. It is therefore a common perception that the jury system leads to more frequent finding of liability and much higher damage awards. This depends on the fact that their decisions, unlike a judges, is not required to be accompanied by reasons and is therefore not subject for review by a higher court.⁶⁵ The American reliance on juries is a matter of basic political philosophy and restrictions on the discretion of juries are seen as tampering with fundamental rights of Americans.⁶⁶ Another factor, which appears to have affected the amounts of damages awarded, is that plaintiffs' attorneys and economic experts retained by plaintiffs' counsel have become much more sophisticated in persuading juries that their clients are entitled to large damage awards.⁶⁷

7.1.2 compensation for attorneys

The American system for compensating plaintiff's counsel is unique unlike any other system in the world. In most tort cases, the plaintiff counsel's fee is computed on a contingency percentage basis, which means that the plaintiff pays no fee if he does not recover. When the plaintiff does recover, the fee is calculated as a percentage of the amount received from the defendant. The most typical fee charged is "one-third" of the recovery.

⁶⁵ Pfennigstorf, W. & Gifford, D. *A Comparative Study of Liability Law and Compensation in Ten Countries and the United States*. 1991, p 27.

⁶⁶ Ibid. p 160.

⁶⁷ Ibid. p 29.

However, the percentage of the fee varies depending on the complexity of the case and at which stage it is. Thus the further the case progresses through the trial and the appellate process, the greater the percentage will be. The basis of the contingent fee is to place the financial risks of litigation on the attorney and not on the client.⁶⁸ Under Swedish law however, the losing party has much to risk by going to court. Should he lose he must pay, not only his own counsel's fees, but that of the opposing side's, in addition to the actual damage awarded. The Swedish system therefore produces substantially different incentives for both plaintiffs and defendants during the litigation process. In addition, whereas under the American system, the contingent fee system leaves the setting of lawyer's fees to private contract, free from government regulation, in Sweden the system requires the court to approve the lawyer's fees as reasonable.⁶⁹ The most important consequence of the Swedish rule is probably that it discourages parties from asserting claims when there is any substantial risk that the claim will not prevail. Whilst it appears that the Swedish people regard litigation as an undesirable complication, the system of the United States although widely used has been criticized for leading to excessive litigation.

7.1.3 Alternative sources of compensation

In comparison to Sweden and many other European countries, an accident victim in the United States receives few benefits from government entitled programs due to the strong American sentiment of limited government and political decentralization. This results in greater reliance on tort litigation awards than would be typical if greater governmental benefits were available. Further, tort damages are not reduced by payments from governmental programs or private compensation sources. Consequently, the incentive to resort to the tort system to recover economic damages is substantial, particularly when coupled with the plaintiff's ability to recover for non-economic losses as well. In Sweden as I have discussed above, reliance on the tort system for compensation in personal injury cases is almost non-existent due to the elaborate system of social security benefits, which in combination with diverse insurances compensates for a large part of damages that arise. Also, the lack of a collateral source rule in Sweden means that injured victims cannot recover medical expenses and other expenses paid by such social security benefits in a simultaneous tort action. Thus should a tort claim be filed, all benefits and alternative compensations that have been given are fully deductible in determining damages under tort law.⁷⁰

⁶⁸ Ibid. p32.

⁶⁹ Ibid. p33.

⁷⁰ Ibid. p46.

7.2 Cultural differences

Explanations for the divergent trends in regulating alcohol related accidents can even be found in different cultural attitudes toward alcohol. It would not be unreasonable to assume that the attitude of courts in North America reflect, to a certain extent, the more conservative view of the public toward alcohol consumption in general. The legal drinking age has in America, since long been that of 21 in contrast to that of most European countries where it is 18. The conservative view on alcohol has further been reinforced due to the numerous organizations promoting responsible-use of alcohol. One of the perhaps best known of these organizations is Mothers Against Drunk Driving (MADD), which became a national organization in 1980. Such organizations have considerable political power and have successfully lobbied for several initiatives including the minimum drinking age of 21 and have as a result with time succeeded in transforming public attitudes toward drinking and driving.⁷¹ These organisations have as a result had a big role in shaping public policy to alcohol in the United States, alcohol provider liability being a result of such policy. In sharp contrast to the conservative alcohol culture of North America, the Swedes, having a drinking culture going back to at least the time of the Vikings, have always been more liberal in their view on alcohol.

The American war against drunk driving has also played a big role in the development of alcohol provider liability. Such liability and Dram shop litigation has pressured insurance companies to require their tavern clients to train bartenders in techniques that will discourage patrons from becoming intoxicated, and in helping patrons find other ways home. This “war” has in addition both strengthened the disgrace associated with drunk driving and helped create a level of shame for others who fail to intervene when someone is about to drive drunk. The war against drunk driving has also had a marked effect. The percentage of drivers who were involved in fatal automobile accidents declined from nearly 26 percent in 1985 to about 19 percent in 1995.⁷²

Another cultural difference appears to be the deeply rooted sentiment amongst parts of the American population that a business enterprise cannot justly disclaim responsibility for accidents, which may fairly be said to be characteristic of its activities. Whether the defendant actually caused the unreasonable harm to the plaintiff, is not of priority. Of greater importance is who is in the best position to pay damages. The principle that those who benefit should pay or the so-called deep pocket theory reflects values that have been accepted amongst large parts of the North American population in recent decades. That such a theory exists in the United States might not surprise many with regards the amounts of money that many large corporations and companies make and seeing the direction in which the tort system seems to be developing. Recent trends include finding new duties of

⁷¹ Bogus, T. *Why Lawsuits are Good for America*. 2001, p 143.

⁷² *Ibid.* p 144.

care and expanding the range both of the persons subject to the duties and of persons protected by them. This new trend only encourages more people to try their luck with the system. The tort system has thus in many ways become a system of on to whom one can shift the blame.⁷³

⁷³ Atiyah, PS. *The Damages Lottery*. 1997, p 139.

8. An economic analysis of accident costs

8.1 Minimizing the social costs of accidents

All commercial activities generate costs in one form or other. The majority of these costs are taken care of by those operating the activity in question seeing as they are the ones who primarily profit from the activity. Some costs however, are external costs, which affect others than those operating the activity and for whom such costs are of no benefit. Let us now take alcohol related injuries as an example of an external cost. If we presume that those who sell alcohol have no responsibility for accidents arising out of alcohol consumption than the cost of such accidents becomes an external cost. The profit from selling the alcohol benefits the owner of the activity, whereas the consequence of consuming the alcohol becomes a cost that must be worn by someone other than the seller. If there is no obligation for the seller to compensate those having become injured as a result of having consumed alcohol, then the cost of damages will remain an external cost.⁷⁴ The problem with external costs, as seen by society, is that such costs have a negative effect on how activities are run, with the result being that the overall prosperity of a society is not maximized. All people seek to maximize their own profits, meaning that all those running a business always run it in a way so that their specific business benefits as much as possible. The best route to take for a business to profit is however seldom the best route if society as a whole is to gain.⁷⁵ People's behaviour, is therefore assumed to be determined by the theory of expected utility. According to this theory, if a person is to choose among different actions, each of which would result in some consequence with certainty, then he would simply select the action leading to the consequence having the greatest "utility" to him.⁷⁶ External costs, being costs affecting others than those involved in an enterprise, should therefore, instead, be incorporated into the businesses own economy. This notion that losses should be borne by the doer, the enterprise, rather than distributed on the basis of fault has become known as Enterprise liability and implies that the enterprise can best pass damages arising, on to the consumers, by raising the prices of the products consumed or services used.⁷⁷ This general view, on how to best reduce and allocate accident costs, is based on how to maximize the overall profit of society.

⁷⁴ Dahlman, C. & Glader, M. & Reidhav, D. *Rättsekonomi: En Introduktion*. 2004, p 113.

⁷⁵ Ibid. p 115.

⁷⁶ Shavell, S. *Economic Analysis of Accident Law*. 1987, p 2.

⁷⁷ Calabresi, G. *Some Thoughts on Risk Distribution and the Law of Tort*. Yale LJ. 1961, p 499.

8.2 The tort system as a means of reducing costs.

According to the economic analysis of tort law, its function is to optimally reduce accident costs in such a way that society profits as a whole. This is ultimately achieved by way of a two-step process. The first step involves getting people to behave with an efficient level of precaution, which will in turn make accidents occur less frequently. However, even if an efficient level of precaution were to be achieved, accidents will nevertheless occur. The second step therefore involves allocating the costs of such accidents onto those best able to bear them.

Without the threat of tort, enterprises would have no reason to limit such external costs as those discussed in chapter 8.1 above. Tort law is therefore a system that forces businesses and the public in general to reconsider what measures they must take so as to not become liable under tort law. The potential threat of a lawsuit leads to businesses taking steps to prevent accidents occurring so long as such steps do not exceed what is made in profits. Through the tort system, businesses will therefore go about their activities in a way that benefits both society as a whole, and the business in question. To decide when businesses have not taken adequate measures to limit their costs and thus where liability can become an issue, The Learned Hand rule is used. This rule states that when a person has taken precautionous steps that fall short of what would otherwise be optimal from an economical viewpoint, then liability due to negligence is at hand. The rule compares two aspects, the first being the value of the expected harm some individuals conduct may impose on others, the second being the costs to that individual of taking precautions that would reduce the risk of the harm. When the costs of the harm (to others) discounted by the probability of its occurrence exceeds the cost of added precautions, then a failure to take such precautions is negligent.⁷⁸ The learned hand rule is thus merely another expression of the economic goal of tort law.

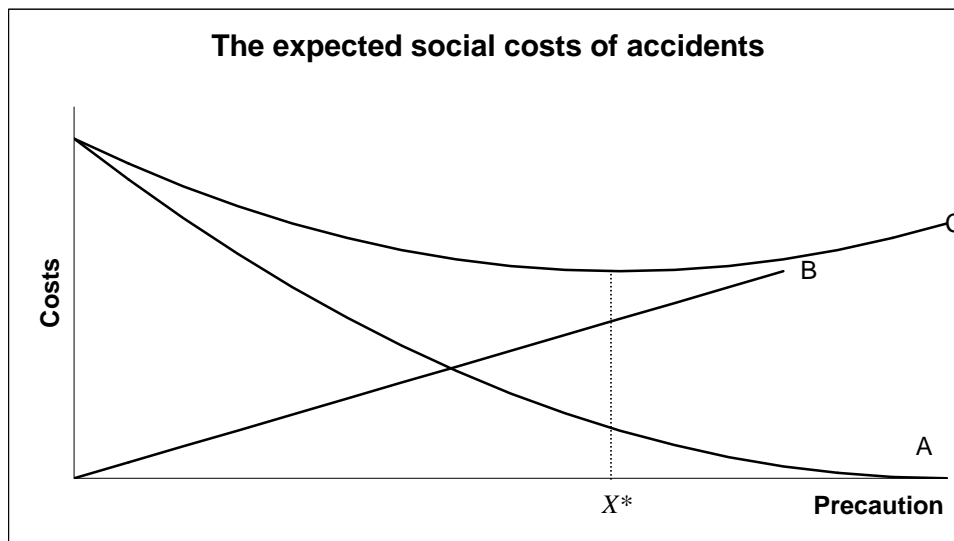
The American approach of alcohol provider liability is one method by which the economic aim of tort law is attained. Here it would appear that the precaution that must be taken to escape liability is one of responsible alcohol service so as to avoid patrons or guests becoming excessively intoxicated. Should intoxication nevertheless occur, precautions that might further be expected are those of making sure that patrons in one manner or other are safely transported home. Costs of precaution, might involve training each employee in responsible serving or on the social host front, taking guests car keys on arrival. The cost of these amongst other precautions will be weighed against potential cost of harms taking into account the probability of such harm occurring. The threat of liability and the costs associated with such a threat therefore aims to make alcohol servers think twice before they serve someone who is intoxicated another drink. From the commercial point of view, the idea is that even if refusing to

⁷⁸Cooter, R & Ulen, T. *Law & Economics*.2004, pp 333-336.

serve a patron a drink results in less of a profit, it will in the long run result in a better overall profit in comparison when having to pay for damages arising out of a potential lawsuit. It is therefore about balancing the profit or enjoyment that can be made an evening, against the costs that might arise if a lawsuit due to negligence were to arise.

8.3 Alcohol provider liability; negligence or no fault liability

One might wonder if alcohol provider liability is not, in one sense, a no fault liability in disguise. Although such liability today is said to be based on common law principles of negligence law, there are arguments that support the contrary. Firstly, under dram shop legislation, alcohol providers are strictly liable, under given circumstances, for the injuries to their patrons/guests and for subsequent injuries to third parties. Secondly, under modern common law principles such liability is often based on a negligence per se theory, which as discussed in chapter 4.3.1 merely requires violation of an alcohol beverage statute for liability to come into question. The boundary for what constitutes negligent behaviour is in other words entirely dependant on the content in such statutes rather than on a negligent examination of whether the elements of duty of care, breach of such duty, causation and damage are present. Having thus established that alcohol provider liability can to some extent be seen as a no fault liability it is interesting to look at how a no fault liability in comparison with a negligent based liability differs when using the economical analysis of tort law. The diagram on the following page will help in this comparison.



A: curve indicating that expected cost of harm decreases as precaution increases

B: Total amount spent on precaution

C: Total expected social costs of accidents (this slope is obtained by adding line **A** and **B** at every level of precaution).

X*: the efficient level of precaution at which the social cost of accidents is minimized.⁸⁰

8.3.1 Achieving the efficient level of precaution

The first step of the economic goal of tort law is to make people behave with an efficient level of precaution. Under negligence liability, which imposes a legal standard of care with which actors must comply in order to avoid liability, people would aim to place themselves at point x in the diagram above, which can be said to be the point at which taken precautions equal the legal standard of care decided on by courts. Point x is in other words the level at which sufficient precautions have been taken in relation to what will benefit society as a whole and thus the level of precaution that minimizes the expected social costs of accidents. Should less precautions be taken, the probability of an accident occurring increases and liability due to negligence may arise. Should more precautions be taken, the alcohol provider will be paying for unnecessary costs of precaution in relation to the probability of an accident occurring. An alcohol provider has therefore an incentive to set precautions at this level in order to minimize overall costs. A negligence rule also provides incentives for efficient precautions to be taken by the victim. In situations where the alcohol provider has satisfied

⁷⁹ It should be noted that the diagram has been drawn based on different scales for the Y and X-axis.

⁸⁰ Cooter, R & Ulen, T. *Law & Economics*.2004, pp 320-322.

the legal standard of care, the costs of accidents will be worn by the victim, and should therefore be an incentive for the victim to also be cautious.⁸¹ Under a no fault liability where liability will arise regardless of fault, alcohol providers would, interestingly enough, also aim to place themselves at point x. Where less precautions to be taken, then the number of accidents of which alcohol providers must pay for would increase, whereas where more precautions to be taken than required, alcohol providers would, as under a negligence rule, be paying for unnecessary costs of precaution in relation to the probability of an accident occurring. Thus it would appear that alcohol providers, regardless whether they fall under a negligence or no fault liability, would put down the same amount on costs of precautions, so as to reach to most socially efficient level of precaution where the overall costs of accidents are reduced to a level that benefits both those running an activity and society as a whole.⁸² The difference between these two forms of liability becomes more apparent when examining the second step of the economic goal of tort law.

8.3.2 Allocating accident costs

The second step of the economic theory of tort seeks to allocate the costs of accidents, which nevertheless occur, onto those best able to bear such costs. Under a negligence liability, alcohol providers will only have to bear such costs if they fail to fulfil the efficient level of precaution, being at point x. If sufficient precautions have been taken, the cost of an accident will instead be worn by the victim in question. Under a no fault liability however, it makes no difference whether an alcohol provider has fulfilled the efficient level of precaution. He will regardless have to bear all potential alcohol related costs. To the population in general, such a solution may sound unfair, but to economists of law it is the underlying public goal that is of importance, this goal being to allocate costs onto those who best can bear them so as to have society as a whole benefit to the maximum. Tort law, being a method by which such costs are allocated, has however been criticized for appearing to be public law in disguise and for being a solution which disregards all notions of fairness.

8.4 Criticism of the economic theory of tort law

The economic theory of tort law is primarily interested in optimal risk reduction, deterrence, cheapest cost avoidance, loss spreading and wealth maximization. Such a theory is as a result interested in questions of how good the injurer is at reducing accidents of the type in question, at what cost, whether incentives should be placed on both victim and injurer to achieve the optimal deterrence, how such incentives should be done and so

⁸¹Ibid. pp 326-328.

⁸²Ibid. pp 320-326.

forth. For the economist tort law is in other words a theory of social goals.⁸³ The actual tort system however, is a normative system of rights which focuses on the relationship between injurer and victim and on the central concepts of tort law- wrong, duty, responsibility and repair. Lacking in all theories of economics is therefore a ground feature of tort law that deals with aspect of morality. This morality first formulated in Aristotle's discussion of corrective justice, and elaborated by Kant, treats doing and suffering as the basis for what the rights of another require one to abstain from doing. Corrective justice aims to show how the basic structure of tort law can be understood as embodying a coherent non-instrumental idea. Such a theory with its normative dimension is thus problematic for economic analyst's who merely see tort law as a method by which to accomplish the social goals mentioned above.⁸⁴ Goals such as that of deterrence and compensation can for example not be explained if one sees the tort relationship from a moral point of view. Deterrence focuses only on the injurer, even in the absence of any sufferer, and compensation applies only one sidedly to the sufferer. Thus, neither of these goals succeed in embracing the relationship between injurer and sufferer in a specific situation.⁸⁵ The same has been argued concerning the allocation of costs. Here the argument is that just because specific enterprises have the capacity to pay for damages that may in some way be associated with the their enterprise, is not a just reason to shift the costs of damages on to them. It may be the best solution seen from an economical point of view seeing as it maximizes the overall wealth of society, but it greatly disadvantages all those offering services to society. The criticism is thus again directed toward how the injurer is pointed out. If one were to apply the economical theory to the maximum, a plaintiff would bring evidence to support the claim that the defendant is a better risk reducer than he is and not because he actually is the wrongdoer in question.⁸⁶ Is alcohol provider liability therefore not an expression for such an economical theory, targeting those who might be in a better position to reduce the costs of accidents, rather than the immediate tortfeasors?

8.4.1 an example of the ultimate economic allocation of costs

If one of the aims of tort law, from an economical perspective, is that of cost avoidance, then why is not the person who can best reduce the costs for society made responsible in all tort cases instead of the actual injurer? The answer to this question must lie in the fact that such a solution would make innocent third parties whom have had very little, if anything at all, to do with the costs in question responsible. To demonstrate how the ultimate solution according to theories of economics would allocate costs I will look

⁸³ Weinrib, E. *Understanding Tort Law*, 23 Val. U.L.R. 1989, p 487.

⁸⁴ Weinrib, E. *The Special Morality of Tort Law*, 34 McGill LJ. 1989, pp 410-412.

⁸⁵ Weinrib, E *Understanding Tort Law*, 23 Val. U.L.R. 1989, p 218.

⁸⁶ Coleman, J. *The Practice of Principles*. 2001, p 23.

at an alternative outcome to the Swedish case of NJA 1981 s. 683. In the case, a company had been working on repairing a hole in the road outside of an apartment building. The reparation was almost complete, with only a slight disparity in the road level remaining, but was put on hold during the weekend during which the area in question was encircled by traffic cones with the aim of keeping people away. During the Saturday night however, several of the cones were removed by an unknown person, which in turn led to a pedestrian injuring himself the morning after when tripping on the uneven area of the reparation. The pedestrian sued the company in question claiming negligence. If we now were to assume that one of the inhabitants in the surrounding apartment building had noticed that cones had been removed, then from an economical perspective, this would be the person who most easily and to the least amount of costs could have prevented the accident by notifying the community that cones were missing and of the thereby potential danger. This would have possibly prevented the accident and subsequent costs and would have been of no nuisance for the notifier in question. Such an action would have profited society as a whole. This person is therefore to blame and should become liable under the economical theory. However, to place the blame on individuals merely because they are in the best position to control a risk is to go against all ideas of fairness and to depart from the concepts on which the tort system builds on. The same can be argued with regards to the idea of alcohol provider liability. Alcohol providers may be in a better position to control a patrons drinking and in turn in a better position to reduce the risk of an accident. However, this is not their responsibility unless the person is underage or heavily intoxicated. Then again, is an alcohol provider really in the best position to judge if a patron should be drinking anymore? Possibly, if the patron is on his own and sits at the bar, but if in a group, is it not the companions who better can judge the patrons behaviour? In that case, the companions should be the ones who better can control the situation and consequently prevent potential costs. Such a solution however, as it must sound, would be absurd in addition to unreasonable. Should it not be the immediate tortfeasor (the consumer of alcohol who in turn may drive recklessly) who should be held liable for the costs of an accident? Apparently not if we are to have society benefit as a whole.

8.4 The Swedish system of taxes as a means of reducing costs.

The Swedish approach seeks also to achieve a pro economical solution but has sought to reduce the costs of accidents by means of a more elaborate system of tax revenues. Instead of making certain groups liable for the cost of damages, such costs are distributed on a more equal basis. Indirectly certain taxes exist for the purpose of reducing the use of a specific activity. One example is the high taxes relating to automobiles. By imposing such

taxes, the aim is to have people choose alternative methods of transportation in hope of reducing automobile accidents and in turn costs for society. Those who nonetheless choose automobiles as a mean of transportation will also be those paying more taxes seeing as they have a higher risk of becoming the victim of an automobile accident. Another example is the tax on alcohol, which in Sweden, specifically, is enormously high in comparison with other countries within the European Union.⁸⁷ It is these taxes, amongst others, that pay for the social security system that in turn pays for the costs arising out of for example alcohol related accidents. On the other hand, the Swedish approach, which attempts to allocate costs to cheapest cost avoiders by taxing specific categories and which in turn raises the social insurance fund, can be criticized for failing to deter wrongful acts as adequately as the system of torts.

8.5 Which system is to be preferred ?

There is no right or wrong system for how the costs of alcohol related accidents are best to be reduced. It depends on which goals and values are in focus in a given society at a given time and on both cultural and political aspects such as those discussed in chapter seven. In one sense, the Swedish system might be to prefer, seeing as both goals of the tort system are achieved even if they aren't fulfilled by means of tort regulation. The goal of deterrence is achieved through the potential threat of a license revocation and the goal of compensation through the alternative compensation schemes and the elaborate social security system. Alcohol provider liability in contrast, may be a method by which to deter irresponsible alcohol service, but it is questionable whether such liability is a satisfactory method by which to compensate victims and whether it on the whole can be considered a just and moral system.

⁸⁷ In several EU countries the tax for strong spirits is 20 Swedish kronor, which is also the minimum required within the EU. In Sweden however, the tax for such spirits is over 200 kronor.

9. Conclusion

To conclude, there are many reasons for why countries in general choose different approaches when regulating issues of society. These reasons depend on cultural, legal, and historical differences and reflect general values within a given society. Alcohol provider liability, although a foreign concept for us in Sweden, and most likely for many other Europeans, is an integrated and accepted approach in the North American battle to reduce alcohol related accidents, drunk driving and excessive alcohol consumption. It is however, questionable if such forms of liability ever will gain ground in Sweden seeing as our legal system and culture has paved the way for a completely different view on the tort system and on such liability in general. Apart from the fact that we do not rely on the tort system to the same extent as in North America, even our views on alcohol differ. Whereas the signal being sent out in North America when alcohol is involved is: don't worry there is always someone else who we can make responsible, the view in Sweden is still that we must take responsibility over our own actions when alcohol is involved seeing as it is something we have chosen to consume of our own free will. Considering how absurd certain claims within the American tort system have become, it should not surprise me that providers of alcohol have become targets for lawsuits, and yet I have difficulty accepting that such liability has prevailed.

It is to some extent understandable why lawsuits are a necessary element of the North American continent seeing as compensation from other sources are few in comparison with the system we have in Sweden. What is less understandable is how the notion of responsibility for one's own actions, has managed to become so manipulated. I agree that it is negligent to commercially serve alcohol to known minors, or to intentionally keep serving a patron, who one clearly sees, should no longer be drinking. These actions are however sanctioned by way of license revocation, fines or jail, and yet, according to the American approach these sanctions do not suffice. One may wonder for what reasons, because they do not deter enough or because sources of compensation must be expanded? Alcohol establishments do not force themselves on the population, people come of their own free will when they want to drink and everyone who consumes a drink is aware of the potential effects such a drink may have. Yes, one might call it negligent to eject a very intoxicated patron out onto the street. Then again, where do we draw the line for when we owe one another a duty of care, especially in situations where parties have brought the risk upon themselves? How can one possibly know how much alcohol a person can tolerate? Some people can function after ten drinks, some only after one. Then there is the whole issue of causation which I also have difficulty understanding. How is it possible to assess how much of an accident is based on intoxication at a specific establishment? These are all questions that baffle my mind, and which make me sceptical to the whole concept of alcohol provider liability.

Being already quite negative towards the general concept of alcohol provider liability, I have even less understanding for liability of private alcohol providers. It is a natural part of our society to have social gathering at private homes where alcohol is involved and where at times guests become intoxicated. It is of course unfortunate when guests after leaving parties decide to drive and as a result cause injuries to third party users of the road, but to shift the blame for such a happening on the to the host of the gathering would be to fundamentally alter the environment in which social happenings occur.

Having now reached the end of my thesis, certain conclusions can be drawn. In Sweden, at present, we do not have the same view on alcohol, the same need of finding sources for compensation, nor the legal system to uphold tort claims in personal injury cases. It is even questionable whether such liability is anything to strive after from an economical point of view seeing as the Swedish system of taxes serves the same purpose of reducing accident costs. In addition, apart from the fact that such a sanction as license revocation would appear to fill the same function of deterrence as that of liability, it would even appear that the social regulation attempts in Sweden has in many aspects proven to foster changes in alcohol service, in which case the need for further intervention by way of alcohol provider liability, at this point in time, is unnecessary. I see therefore no immediate risk that alcohol provider liability will become an issue in Sweden, even if we in other areas of tort law, such as that of vicarious liability, have tended to take after American models of regulation. However, even if such liability should never become an issue in Sweden, responsible alcohol service should by no means be undermined. It should in all ways be debated, controlled and improved.

Bibliography

Legal literature

- Atiyah, Patrick S. *The Damages Lottery*. Oxford, Hart Publishing, 1997
- Bogus, Carl T. *Why Lawsuits are Good for America*. New York, University Press, 2001
- Bruggemeier, Gert *Common Principles of Tort Law*. The British Institute of International and Comparative Law, 2004
- Calabresi, Guido *The Costs of Accidents: A Legal and Economic Analysis*. London, Yale University Press, 1970
- Cooter, Robert
Ulen, Thomas *Law & Economics*, 4 ed. Boston, Pearson Education, Inc., 2004
- Dahlman, Christian *Konkurrerande Culpakriterier*. Lund, Studentlitteratur, 2000
- Dahlman, Christian
Glader, Marcus
Reidhav, David *Rättsekonomi: En Introduktion*, 2 ed., Lund, Studentlitteratur, 2004
- Dobbs, Dan B. *The Law of Torts*. Minnesota, West Group, 2000.
- Goodman, N. *Shifting the Blame*. New Jersey, Princeton University Press, 1998
- Hall, Kermit L. *Tort Law in American History*. New York, Garland Publishing, Inc. 1987
- Hickling, Edward J.
Blanchard, Edward B. *Road Traffic Accidents & Psychological Trauma*. UK, Elsevier Science Ltd. 1999
- Huber, Peter *Liability: The Legal Revolution and its Consequences*. New York, Basic Books Inc. 1988

- Markesinis, Basil
Deakin, Simon *Tort Law*. 4th ed., Oxford, Clarendon Press, 1999.
- Pfennigstorf, Werner
Gifford, Donald *A Comparative Study of Liability Law and Compensation Schemes in Ten Countries and the United States*. Insurance Research council, 1991
- Prosser, William Lloyd
Keeton, W. Page *On the Law of Torts*. 5ed. Minnesota, West Pub. Co., 1984
- Schmidt, Doris
Peters, James *The First Northeast Conference on Alcohol-Server Liability*. Intermission Ltd 1984.
- Sewel, Kate *International Alcohol Policies: A Selected Literature Review*. Scottish executive central research unit, 2002
- Shavell, Steven *Economic Analysis of Accident Law*. London, Harvard University Press, 1987
- Wallin, Eva. *Responsible Beverage Service: Effects of a Community Action Project*. Karolinska Institutet. 2004

Articles

- Calabresi, Guido *Some Thoughts on Risk Distribution and the Law of Tort*. Yale Law Journal. 1961
- Coleman, Jules *The Practice of Principle*. Oxford, 2001
- Easley, A *Vendor Liability*. Campbell Law Review. Vol. 21.1998-1999
- Koch, B.
Koziol, H. *Compensation for Personal Injury in a Comparative Perspective*. Tort and Insurance Law. Vol. 4. 2003
- Kocher, Bryan *Liability of Commercial Vendors of Alcohol*. Duquesne Law Review. Vol. 26. 1987-1988

- Morrison, Michael
Woods, Gregory *An Examination of the Duty Concept*. Baylor Law Review. Vol. 36. 1984
- Olmstead, Brett *In Search of a Drinking Companions Complicity under Illinois Dramshop Act*. University of Illinois Law Review. 1994
- Reeves, John *Case for Tavern Keeper Liability in Georgia*. Georgia Law Review. Vol. 9. 1974-1975
- Robertson, David *Negligence: Liability for Crimes and Intentional Torts Committed by Others*. Tulane Law Review. Vol. 67. 1992-1993
- Seminara, Mary *When the Party's Over: The Emergence of a Social Host Liability Standard in Massachusetts*. Boston University Law Review. Vol. 68. 1988
- Weinrib, Ernest J. *The Special Morality of Tort Law*. McGill Law Journal. Vol. 34. 1989
- Weinrib, Ernest J. *Understanding Tort Law*. Valparaiso University Law Review. Vol. 23. 1989

Table of cases

Canada

Baumeister v. Drake (1986) 5, BCLR (2d) 382 (BCSC)

Broadfoot v. Ontario (1997) 32 OLR (3d) 361 (ONCJ.GD)

Childs v. Desormeaux (2002) 217 DLR (4d) (ONSCJ)

Hague v. Billing (1993) 13 OLR (3d) 298 (ONCA)

Jordan House v. Menow (1974) 38 DLR (3d) 105 (SCC)

Schmidt v. Sharpe (1983), 27 CCLT 1 (ONHCJ)

England

Donoghue v. Stevenson (1932) A.C. 562

Sweden

NJA 1981 s. 683

United States

Brown v. Kendall, 60 Mass. 292 (Mass. 1850)

Griesenbeck v. Walker 488 A.2d 1038 (N.J.1985)

Kelly v. Gwinnell 476 A.2d 1219 (N.J.1984)

Kunza v. Pantze 531 N.W. 2d 839 (Minn. 1995)

Mccue v. Klein 60 Tex. 168 (Tex. 1883)

Rappaport v. Nichols 156 A.2d 1 (N.J. 1959)

Waynick v. Chicago's last department store 269 F. 2d 322 (7th Cir. 1959)