The Case for Social Host Liability and a Duty of Care

Introduction

Social host liability refers to the liabilities imposed on hosts that serve or facilitate the service of alcohol at a party. It is created through statute or case law and typically applies to cases where people, sometimes minors, have become intoxicated at a social gathering (usually a party at a house or other non-commercial location), and have caused vehicle accidents or other harmful occurrences. Social host liability differs from the body of laws that govern licensed establishments and alcohol stores, and the nature of social host liability varies by jurisdiction. This is especially true in American states where precedent has created different laws in different places. In Canada however, social host liability was examined in the notable case *Childs v. Desormeaux*. This case came to the conclusion that hosts do not have a duty of care to third parties. In opposition to the findings of the Supreme Court of Canada (SCC), this paper will show that any social host who serves alcohol knows that their guests will be driving home, and thus has created a risk sufficient to give rise to a *prima facie* duty of care to third parties. It will be argued that social host liability is not a new category of duty, but rather an incremental step in the *Donoghue v. Stevenson* neighbour principle, that if you are negligent and cause loss, you should pay for your wrongdoing.

Childs v. Desormeaux is a significant SCC decision which ruled on the topic of social host liability. The Court came to the conclusion that a social host does not owe a

duty of care to its guests, particularly someone who is injured by a guest that became intoxicated at the gathering that they are the host of. It is a case that stems from a New Years Eve potluck party being held by Julie Zimmerman and Dwight Courrier. At this party, guests brought their own alcohol and food, and one guest, Desmond Desormeaux, drank about 12 beers over the span of about two and a half hours. It was agreed by the parties involved in court that the hosts did not monitor the guest's alcohol intake levels any more than the other guests who were present. After a brief discussion with the host, Desormeaux attempted to drive home, but on the way was in a car crash that paralyzed the passenger Zoë Childs and killing the other passenger, Derek Dupre.[1]

Had the court determined that there was social host liability in this case, it would have meant that there was a new duty of care. In determining whether or not there was a duty of care in this case, the three levels of court that heard this case used the test which had become standard in Canadian law – the *Anns* two-stage test. This was a test that emerged out of British case law, but was applied in Canada during *City of Kamloops v. Nielsen*. In *Cooper v. Hobart*, the nature of this test was altered in a significant way.[2]

Initially, the trial judge at the Ontario Superior Court of Justice came to the conclusion that the injury that Childs experienced was by a reasonable standard foreseeable, as it was clear that Mr. Desormeaux had consumed far more alcohol than would be permitted for him to be a safe driver. In other words, the court said that the hosts should have been able to predict the accident which occurred because of the state

[1] Childs v. Desormeaux, 2006 SCC 18, [2006] 1 S.C.R. 643
[2] Elizabeth Adjin-Tettey. "Social-Host Liability: A Logical Extension of Commercial Host Liability?" *Saskatchewan Law Review* (2002), 1.

that Desormeaux was in before he left. Nevertheless, the court declined to impose a duty of care in this case because they did not want to create public policy – they did not want to satisfy the second stage of the *Anns* test. The Court of Appeal for Ontario then confirmed the conclusions of the previous court by holding that the hosts did not owe a duty of care to the injured, but they did so for a different reason. They argued that there was not enough proximity in the relationship between the hosts and the guests, and therefore a duty of care did not exist. A primary reason for this was that the hosts did not actively serve the alcohol – it was a potluck where guests were responsible for bringing their own drinks, and more-or-less serving themselves the drinks that they brought. For this reason, the host and guests did not have sufficient information to assert that he was intoxicated to the level that he was, in addition to the fact that at the time of the party, there was no statute in place which imposed a duty by hosts to monitor the alcohol intake of guests.[3]

The case then made its way to the Supreme Court, and they too held that a duty of care was not present in this case between the social hosts and third-party users of the road who were injured by the intoxicated guest. In the same way that the Ontario Court of Appeal did, the SCC argued that there was not sufficient proximity between the plaintiffs and the defendants to warrant a duty of care. Because sufficient proximity was lacking, the court did not discuss the second part of the *Anns* test.[4]

[3] Ibid.
[4] Ibid.

The SCC was unanimous in its decision, and in his judgment, Chief Justice McLachlin argued that social hosts are not the same as commercial hosts when it comes to creating a duty of care. In a commercial setting, the hosts have an increased ability to monitor the consumption levels of its patrons. As well, the sale of alcohol in a commercial setting is regulated in a different way, which places commercial establishments in a more restrictive position – thus the duty of care that is imposed on them should be different. Additionally, in a commercial setting, the relationship is a business one as patrons purchase their beverages, thus establishing a more contractual relationship, but in a social setting, this is not the case. For this reason, the Chief Justice could not recognize a new duty of care because, based on the facts agreed on by the trial judge, the injury that the plaintiff sustained was not reasonably foreseeable, and the alleged wrongdoing in the case was rooted in a failure to act (nonfeasance), and in this case, the social hosts did not have a positive duty to act.[5]

The injury was not foreseeable according to McLachlin because as the trial judge concluded, there was no way for the social hosts to know that Desormeaux was too intoxicated to drive. Therefore, it was the reasoning of the SCC that the injury that was sustained by the plaintiff could not have reasonably been predicted to occur by the social hosts. The court pointed out that the trial judge had determined that the injury was foreseeable because of Desormeaux's reputation as a heavy drinker and therefore the social hosts should have known that he might become involved in a motor vehicle

[5] Ibid.

accident, but as McLachlin notes, this is "problematic reasoning"[6] because having a history of alcohol use does not add anything to the ordinary risks of drinking and driving. He went on to say that even if the injuries were foreseeable by a reasonable person, it is a case of nonfeasance. Because of this, the fact that the injury could have been foreseen is not good enough to create a duty of care if the defendants did not have a positive duty to act. There are three situations where the defendants would have had a duty to act, but these situations were not the same as the one that occurred in this case: 1) social hosts attracting and/or inviting third parties into a risky situation, 2) the social hosts having a paternalistic relationship with the guests because of their supervisory and controlling role, 3) social hosts as people that exercise a public function, or as people in a commercial role that have a greater responsibility to the public. According to the SCC, none of these potential three situations took place during the incident in question as hosting a party is not inherently risky, the social hosts did not have a paternalistic relationship with their guests, and their role as private hosts did not act in a public capacity. Therefore, the social hosts did not play a role in the creation of risk that would warrant them having a duty of care to prevent the injury that took place.[7] Instead, McLachlin placed responsibility for the accident with Desormeaux: as a person that goes to a private party "does not park his autonomy at the door."[8] Even though he was at a private party, Desormeaux was responsible for his own behaviour and conduct, and the host was in their right to respect the autonomy of the host. In other words, the court concluded that

[6] Childs v. Desormeaux.
[7] Adjin-Tettey. "Social-Host Liability: A Logical Extension of Commercial Host Liability?"
[8] Childs v. Desormeaux, para. 45.

the host should not have been expected to infringe on the autonomy of the guest and make assertions about the way he should conduct himself (to drive or not to drive) once he left the party. What this is saying is that no positive duty on the part of the social hosts existed in this case.[9]

The findings by the court in this case do not imply that a positive duty of care could not exist under different factual circumstances. For example, McLachlin notes that if the social host had served alcohol to an intoxicated guest and the host knew that the guest was to drive home in this intoxicated condition, then a positive duty might be present.[10]

The case that this paper is arguing in relation to is *Donoghue v. Stevenson*. This was a decision by the House of Lords in Britain that became the basis for the tort of negligence in English law as it established the principles where one person would owe another a duty of care. Before this case took place, there was a concept in common law that stated that a person could ask for damages from another person if there was a duty of care present, and harm was created as a result of neglecting this duty of care, but before the *Donoghue* case, this duty of care was thought to only exist in very specific circumstances, for example in instances where there was a contract between two parties. In the Donoghue case, there was no contractual relationship between the parties. The most notable section of the decision in this case was that part which outlined the *neighbour principle.* "Who, then, in law, is my neighbour? The answer seems to be –

[9] Adjin-Tettey. "Social-Host Liability: A Logical Extension of Commercial Host Liability?"
[10] Childs v. Desormeaux,

persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called into question."[11]

As has been shown, the SCC failed to establish a duty of care in *Childs v. Desormeaux* because it did not satisfy any of the requirements needed to establish such a duty of care. This paper is ultimately arguing that social host liability is not a new category of duty but rather an incremental step in the *Donoghue v. Stevenson* neighbour principle, therefore it is necessary to look at other ways of interpreting the role of duty in social host liability cases. Elizabeth Adjin-Tettey explored how social host liability in Canada should be recognized. As was to be seen in the SCC case a few years later, she notes that there has been reluctance in Canada to acknowledge social host liability. She argues that, despite the fact that this reluctance is likely a consequence of collective welfarism, it works in opposition to negligence law, and also works as a disincentive for the prevention of accidents. She argues from a standpoint that would likely garner much public support, and that is that social hosts should not be immune from liability when they do not do what a reasonable person would do in a similar situation to prevent the occurrence of a reasonably foreseeable injury. She notes how the divide between public and private should dictate the nature of the standard of care, but it should not dictate the existence of a duty of care.[12] In her article, she looks at previous decisions on social host

[11] *Donoghue v Stevenson* [1932] AC 562.
[12] Adjin-Tettey. "Social-Host Liability: A Logical Extension of Commercial Host Liability?"

liability, and she shows how a duty of care has not been imposed because of an inability to create some needed requirements for negligence liability in the circumstances. As was seen, this is exactly what happened in the *Childs v. Desormeaux* case. Adjin-Tetty would not have agreed with the SCC in this case because it is her argument that: social host liability is a reasonable extension of commercial host liability, social host liability law needs to be consistent with negligence law, and a duty of care for social hosts works to foster socially responsible action on the part of the social host.[13] What she is doing here is showing that social host liability is not a new category of duty, but one that is consistent with existing laws of negligence.

There have been many decisions in Canada throughout the years that have altered the nature of social host liability law. The British Columbia Supreme Court decision in *Prevost (Committee of) v. Vetter* was significant because was the first ruling of its kind to impose a liability on parents for the actions of their teenage child's friend driving home drunk from their house (in other words, the court found that they were liable social hosts). In this case, two teenage sons of Greg and Shari hosted a backyard party in their parents (the family) home, and at this party, most or all of the teenage guests were consuming alcohol. One of the guests, Desiree Vetter allegedly drove from the party with guests in her car. Not long after, this car was involved in a crash, and serious injuries were sustained by the plaintiff. Lawsuits were then placed against many people, including the parents of the teenage hosts, because they failed to take reasonable steps to prevent the occurrences that took place that evening. The trial judge held that because

[13] Ibid

there was a house rule in place which made it illegal for minors to consume alcohol at homes meant that because the parents facilitated this process by allowing the party to take place, they owed a duty of care to the people that attended the party to ensure that they would not do such unsafe things as drive home drunk. As such, the parents would be found to be liable because they did not take steps to prevent the accident which was foreseeable.[14] The implication of this ruling in law is that a duty of care can be imposed on social hosts who are not the people that cause the harm, but facilitate the harm though an act of negligence. However, a new trial was ordered by the British Columbia Court of Appeal and it set aside the decision of the original trial judge and said that a duty of care could not be established without proper causation. The new decision worked to maintain a divide between social host liability and commercial host liability.[15]

Adjin-Tetty looks more closely then at the jurisdictional basis of social host liability. She notes how common law imposes liability only on misfeasance or dangerous conduct, and not on nonfeasance, or the failure to act to the benefit of another. There are cases though, where a special relationship has created a duty of care in nonfeasance situations. Courts have said that there is a special relationship between establishments that serve alcohol, their patrons, and third parties who could be affected in some way by the actions of patrons that became intoxicated at the alcohol-serving establishment. This special relationship though has typically centered on a commercial relationship, where a patron buys a drink from a proprietor. The idea is that since the establishment is

[14] *Prevost (Committee of) v. Vetter* 2002 BCCA 202.
[15] Adjin-Tettey. "Social-Host Liability: A Logical Extension of Commercial Host Liability?"

economically benefitting from the relationship, they have a special duty of care to ensure that no foreseeable harm develops as a consequence of their economic gain. This is the same distinction that was used in *Childs v. Desormeaux* to determine that there was not a duty of care in that case.[16]

Adjin-Tetty makes the argument that an emphasis on profitability when it comes to creating a distinction between a commercial host and a social host is misplaced. She notes how…

> "duties of affirmative action have also been imposed even when there is no economic benefit to the defendant. Even in the context of commercial relationships, the linchpin of affirmative duty is not the economic benefit that inures to the establishment, but the reasonable foreseeability of injury. In my opinion, the economic factor is best considered in the context of the standard of care, that is, what is required of commercial hosts to discharge the duty imposed on them, which might be different from what is required of a particular social host."[17]

Here she is showing how the lack of a special relationship should not dictate the presence of a duty of care, but should dictate the nature of the standard of care.

Social host liability should be more of an extension of the neighbour principle because it is mostly aligned with legal precedent and negligence principles. The case of *Childs v. Desormeaux* went through the various stages of courts, and in each stage the *Anns* test was used. According to this test, "a *prima facie* duty of care arises where parties are in proximate relationship and injury to the plaintiff is reasonably foreseeable.

[16] Ibid.
[17] Ibid, 2.

The presumptive duty can be limited or negated on the basis of policy considerations."[18] This second part of the *Anns* test stems from the unknown social and economic implications of making firm policy with regard to social host policy. The trial judge in *Childs v. Desormeaux* believed that there was a duty of care, but did not want to make policy considerations and therefore neglected to rule for the plaintiff. He was concerned with what might come, socially and economically, from making a ruling that would have policy implications. The *Anns* rule is flawed though, as legal principles and general policy issues ought to be kept separate from social and economic matters because this stands in the way of courts recognizing social host liability as a reasonable extension of common host liability in some instances. It is also what stands in the way of social host liability being seen an incremental step in the neighbour principle, and not a new category of duty.[19]

There are reasons that social host liability has not been seen as just an incremental step in the neighbour principle, and the following will address those reasons. It will provide a basis for of a duty of care in negligence law, and then will review the way that Canada has come to develop its own case law on both social and commercial host liability. From there it can be shown why courts have been reluctant to satisfy the second part of the *Anns* test and recognize social host liability. From there, an examination of Canadian case law will show that social host law should be an extension of commercial host law as well as an extension of the neighbour principle. It will also look at American

[18] Ibid.
[19] Ibid.

jurisprudence and it will be clear that the American experience on this issue can also be cited to show that in some cases, the host of a party could be deemed liable for the actions of one of their intoxicated guests, but that the conditions for liability must be stricter than they would be under commercial circumstances.

Establishing a Duty of Care in Negligence Law

Canada has not yet recognized social host liability, because based on the tests in the *Anns* test; Canada has not satisfied the second part of it in any of the judgments that further examination. As noted, the first part of the test looks at the proximity or closeness of the actions of the defendant and the injury to the defendant. In *C.N.R. v. Norsk Pacific Steamship Co.,* Justice McLachlin noted on behalf of the majority, "Proximity may consist of various forms of closeness – physical, circumstantial, causal or assumed… Viewed thus, the concept of proximity may be seen as an umbrella, covering a number of disparate circumstances in which the relationship between the parties is so close that it is just and reasonable to permit recovery in tort."[20]

The problem, as can be seen, with the *Anns* test is that the second part of it allows for the negation of a duty of care because of the potential social and economic consequences that might come of it. They are forced to decide the case based on perceived or real consequences to duty or no duty. Thus far, when it has come to social host liability, courts in Canada have for mostly said that the economic and social

[20] *C.N.R. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, 91 D.L.R. (4th) 1152.

consequences of imposing a duty of care on social hosts would be too high to justify it. As such, it can be said that policy considerations in Canada have stimulated recognition of commercial host liability and stifled recognition of social host liability. This has worked to take the focus off of the real source of liability in many cases, which is being able to reasonably foresee injury. It is once again for this reason that this paper is arguing that social host liability is not a new category of duty, but rather an incremental step in the neighbour principle.

Case Law on Commercial and Social Host Liability in Canada

In the case *Jordan House Ltd. V. Menow* the SCC came to the recognition that establishments that serve alcohol have a duty of care to act in a way that will prevent foreseeable harm or injury from occurring to intoxicated patrons. In this case, the court held that the establishment that had over-served the patron and then kicked him out, forcing him to walk home on a visible highway was indeed liable when he was struck on the highway. In this case, the court held that the establishment had a duty of care and was thus liable for the injuries because they exposed the patron to foreseeable harm – they served him beyond the point of intoxication, and then they expelled him from the bar knowing that he would have to negotiate a busy highway on foot in his intoxicated condition.[21] The commercial host duty of care was then expanded in *Stewart v. Pettie* to include third parties, or people that might be harmed by intoxicated individuals, for

[21] *Menow v. Jordan House Ltd.*, [1974] S.C.R. 239.

example, the intoxicated driver of a car that hits a pedestrian after leaving the establishment.

Courts in Canada have steered away from making policy on social host liability for injuries suffered by the actions of intoxicated guests. In *Baumister v. Drake* it was shown that Canada does not recognize social host liability when it comes to driving while under the influence and their guests.[22]

Why have Courts in Canada been Reluctant to Recognize Social Host Liability?

The condition of 'reasonable foreseeability of injury' is one that is clear when speaking of commercial and social host circumstances. When people drink, they increase their risk of causing direct or indirect harm. When the host of a party is aware that one of the guests is consuming a large amount of alcohol, regardless of where the alcohol came from, it is clear that the host is aware of the risk and can foresee the potential for harm. As such, this should satisfy the neighbour principle and the first parts of the *Anns* test. Therefore, a duty of care should be in place when the host acts in a way that facilitates or promotes the execution of foreseeable injury. Courts in Canada have been able to avoid making binding policy on social host liability by using the second part of the *Anns* test as a means of avoidance. One way the courts have done this is through the separation of commercial and social host liability – the implication that they are wholly different, when it is the argument of this paper that they are necessarily connected.

[22] Baumeister v. Drake (1986), 5 B.C.L.R. (2d) 382 (S.C.).

The 'economic nature' of commercial establishments has been cited as the reason for the separation – because they get financially compensated through the relationship, they should have a duty to take more preventative steps to prevent harm from occurring as a result of the alcohol service that they provide. Unlike commercial hosts, social hosts do not share this same time of economic relationship with their guests, and therefore it has been said that the relationship is wholly different. But this emphasis on the 'economic nature' of the relationship is not sufficient enough to justify a duty of care on one but not the other. According to Klar speaking about negligence law, there should be "nothing inherently special about profiting from an activity."[23] Does the duty of care that faces a driver of a car change in relation to the status of the driver as being paid or not? Both categories of people owe the same duty of care to the public – although the standard of care might be different.

In sum, we cannot justify a duty of care for commercial hosts and not justify a duty of care for social hosts simply by relying on the economic nature of the relationship. Liability should be rooted in the nature of the negligence that takes place in the case, and in many social host situations, negligence does take place on the part of the host. The nature of the harm does not change based on whether it is commercial or private, so nor should the nature of the liability. The duty should stem from the provision of alcohol, or more generally, the opportunity to consume alcohol. In both commercial and social host scenarios, the host should have a duty of care to prevent foreseeable injury. In *Stewart*, the duty of care was created on the basis that there was probable risk of injury, not on the

[23] L.N. Klar, "The Role of Fault and Policy in Negligence Law" (1996) 35 Alta. L. Rev. 24, 36.

'economic nature' of the relationship, thus showing the similarities between commercial and social host situations. According to Justice Major:

> "There is little difficulty with the proposition… that a general duty of care exists between establishments… and persons using the highways. I do however, have difficulty accepting the proposition that the mere existence of this *special relationship* will frequently warrant the imposition of a positive obligation to act, but the *sine qua non* or tortuous liability remains the foreseeability of the risk. Where no risk is foreseeable as a result of circumstances, no action will be required, despite the existence of a special relationship."[24]

The key here is that social host liability should be an extension of commercial host liability and an incremental step in the neighbour principle because liability should rest solely on the reasonable foreseeability of injury, not on the existence of an economic relationship.

> "Maintaining a distinction between commercial and social hosts and holding the former liable for injury to or caused by their intoxicated patrons is an attempt to situate negligence liability within a contractual framework, though not strictly based on the privity of contract. Although there is no requirement that the patron who consumed the alcohol should have been a contracting party, liability appears to be confined to situations where the host derived economic benefit from the service of alcohol."[25]

As has been mentioned, a duty of care should exist with both commercial and social host liability, but the 'economic nature' should inform the standard of care that is used. Following this, commercial hosts should be expected to abide by a higher standard when it comes to taking steps to prevent risks to guests. They have an increased responsibility to prevent harm because they are benefitting in an economic way from the

[24] Adjin-Tettey. "Social-Host Liability: A Logical Extension of Commercial Host Liability?", 5.
[25] Ibid.

relationship. As well, commercial hosts are likely to be more apt in figuring out ways of preventing harm, as well as identifying when a guest is sufficiently intoxicated to warrant preventative measures being taken.[26]

It can be seen how courts in Canada have made reference to the 'economic nature' of commercial hosts in determining liability, but as has been shown, this special relationship should determine the nature of the duty of care, not the existence of it. For this reason, social host liability should be recognized in instances when there is a foreseeable risk of harm.

Theoretical Underpinnings of Tort Law

One of the primary objectives of tort law has seemingly been the compensation of victims. It is a reactive system because it serves to compensate, and not really work to prevent in the case of social host liability. As such, social hosts should be included in the goals of compensation and distribution of loss.

Since the time when the *Anns* test came to be used in Canada, courts in this country have been clear about the role that policy considerations have had in creating the existence of a legal duty and therefore tort liability. Social host liability often occurs within the context of an automobile accident that causes injury to the driver and to others, and hosts do not have insurance to cover their liability in cases like this. However, the financial consequences of being found liable can have serious consequences. Even

[26] Ibid,

though social liability can be included in home and tenant insurance policies, it is unreliable, and there is no assurance that everyone has this type of coverage. Unlike social hosts, commercial hosts are expected to have insurance to cover the liability that comes with doing business. This makes commercial hosts more attractive as far as defendants go, because there is not the worry of the loss-spreading function of tort law. Commercial hosts are able, in a way that social hosts are not, to absorb and redistribute the cost of accidents to their customers, and therefore commercial hosts are perfect channels for loss spreading and social hosts are not. Social host liability would also serve to have a negative effect on social relations. It is a combination of these factors which has led the courts in Canada to be weary of recognizing social host liability.[27]

The inability for courts in Canada to establish a duty of care for social hosts has been for policy reasons – concerns over the probable devastating social and economic effects of social host liability, as well as the unlikelihood of being able to spread the losses. Emphasis on the loss-spreading component of tort law seems to encourage a sense of collective welfare, moral responsibility, and may be the reason for the court's reluctance to rule in favour of recognizing social host liability. The court's failure to impose liability has worked against the goal of preventing accidents – it makes the objectives of tort law weaker (deterrence and education) and creates a moral hazard. It also lessens the notion of personal fault, which serves as the foundation of tort law in Canada. This position that Canadian courts have taken works against their role of being socially responsible because it compromises the safety of the public. For this reason,

[27] Ibid.

social host liability and commercial host liability should be in the same category, as this would be beneficial for collective security as it would promote socially responsible behaviour on the part of social hosts.[28]

Through recognition of social host liability, the courts would exhibit a reflection of personal responsibility, and it would work toward the goal of accident prevention, as well as creating a mentality of disapproval in society when social hosts do not take the necessary steps to prevent foreseeable injury. Most importantly though, recognition of social host liability is aligned with the fault-based framework that underlies Canadian tort law, and it is only because of a reluctance to make policy considerations that social host liability has not yet been recognized.[29] As this paper has argued though, these policy considerations should not stand in the way of making needed changes to the way that social host liability it dealt with in Canada. The next section will argue that social host liability is mostly consistent with negligence law.

Social Host Liability in Canada

This section will continue to argue that social host liability should be recognized in Canada. In other words, it will continue the argument that social host liability is not a new category of duty, but rather an incremental step in the neighbour principle – that if

[28] Ibid.
[29] Ibid.

you are negligent and cause loss, you should pay for your wrongdoing. The following will look at cases in Canada to show that social host liability should be recognized.

Despite what is widely believed about the *Baumeister* decision, it is not against social host liability. In the circumstances of that case, no duty of care could reasonably have been established. The driver was negligent, but they were one of many guests that had crashed the party and were consuming alcohol that they had brought on their own. In this case, there was no special relationship between the injured and the host, there was no proximity, and the foreseeability of injury was not clear in this case. The hosts in this case got off from liability because they did not supply the alcohol.[30]

Courts in Canada have started down the road of imposing liability on social hosts for injuries to or caused by the guests that became intoxicated at their gatherings. In *Stevenson v. Clearview Riverside Resort*, Justice Wilson said that social host liability has come to be an extension of commercial host liability.[31] Courts look to the existence of a special relationship between the host and the party that has been injured, evidence that the guests are impaired when they leave the social event, and foreseeability that they might hurt themselves or others in their intoxicated state after they leave the party. It is these factors that work to justify a duty of care for social hosts.

Just like in commercial host liability, a duty of care is not created simply because the host created the opportunity for guests to consume alcohol, rather a duty of care exists only when there is a foreseeable risk of injury, for example when the host knowingly

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[30] Ibid.
[31] Stevenson v. Clearview Riverside Resort, [2000] O.T.C. 908 (S.C.J.).

serves past the point of intoxication to someone that is known will be driving home. In a situation like this, the host has a duty to take preventative steps to ensure that the guest does not drive home in their intoxicated and dangerous state. In cases like *Haggarty v. Desmarais* and *Broadfoot v. Ontario (Minister of transportation and Communication),* courts have declined to recognize a duty of care because there has not been a clear risk of foreseeable injury. It is not the supplying of alcohol that creates a duty of care, rather it is the level of impairment of the guests, and the likelihood that harm will be inflicted. Different people have different levels of tolerance, so a duty of care should not be determined by the amount of alcohol served, but rather by the risk of foreseeable harm.[32]

Through saying that social host liability arises not from the serving of alcohol, but rather from the reasonable foreseeable risk of injury from being intoxicated from alcohol, some of the concerns about the effects of making policy about social relations should be lessened. It is reasonable under the law that a duty of care only apply to intoxicated guests, not guests that have been merely been served alcohol, or been given a medium for consuming alcohol. "A duty should arise in the face of observable signs of intoxication coupled with the likelihood that the guest would pose a danger to her-or himself or others. A duty of care might also arise where a guest, to the host's knowledge, consumes a significant amount of alcohol and a reasonable person might have reason to suspect that he or she might be intoxicated, even in the absence of signs of insobriety."[33] A duty can also arise if the host has knowledge about the drinking habits of the guest, and there is an

[32] Broadfoot v Ontario (Minister of Transportation & Communication) (1997) 32. OR (3d) 361 (Gen Div).
[33] Adjin-Tettey. "Social-Host Liability: A Logical Extension of Commercial Host Liability?", 7.

expectation that he or she will put themselves in harm's way, for example by driving a car, after consuming alcohol.

In cases when a duty is recognized, social host liability is still dependent on the existence of a reasonable foreseeability of injury that arises from the consumption of alcohol, and a failure by the host from taking steps to prevent the injury or harm from materializing. Much of the risk of injury in cases like this comes from the chance that an intoxicated guest will become involved in drunk driving.[34]

This discussion shows how recognizing social host liability is unlikely to negatively affect social relations as is commonly thought. Additionally, courts are likely to use a high threshold level when determining that there was evidence of impairment in cases of social host liability. It will be difficult to establish in all but the most obvious cases, that the social host had an awareness of the intoxicated state of the guest, to the point that they should take preventative measure to address the risk of foreseeable harm, and it is for this reason that recognizing social host liability is unlikely to have significant social implications. Liability will be imposed on a host only after it is clear that they neglected to fulfill their duties as a responsible host to prevent the occurrence of harm which could have reasonably been predicted.[35]

The liability that was found in *Chretien* was created based on principles of general negligence which expect a reasonable person not to create a reasonable chance of foreseeable harm. The defendant was found liable because they were negligent and did

[34] Ibid.
[35] Ibid.

not take the proper measures to ensure that the bridge in the case was safe for people.[36] Following that logic: "It is not unreasonable to expect hosts to ensure, within reasonable limits, that their intoxicated guests do not pose a danger to themselves or to the public. Hosts should make reasonable efforts to stop guests who they know would be driving from drinking past the point of visible intoxication or prevent them from driving while intoxicated."[37]

Liability was created in the same way in *Prevost*, where the British Columbia Supreme Court imposed liability because the parents did not take preventative measures to ensure that the teenagers did not drive home while intoxicated. Liability in this case does not stem from the fact that the parents allowed the consumption of alcohol by teenagers in their home, but they did not take preventative steps to ensure that once the alcohol had been consumed and the guests were intoxicated, they did not drive home.[38]

It has been shown with the preceding discussion of social host liability in Canada that even though there has been little progressed made on the issue in courts, it is not appropriate to say that it has not been recognized in Canadian jurisprudence. From what has been shown, social host liability is not a new category of duty, rather it is a logical extension of commercial host liability, and principles of negligence in general. Claims against social hosts have not worked because a duty of care could not be imposed given the circumstances, because there was no breach in the duty, or both. As mentioned, in cases of social host liability, the threshold will be much higher, and this ought to relieve

[36] Ibid.
[37] Ibid, 8.
[38] Ibid.

tensions about the unwanted consequences that might come with recognizing social host liability and doing-away with the second stage of the *Anns* test which allows policy considerations to stand in the way of the recognition of social host liability. As has been shown, liability in social host cases will only be imposed when the host neglected to take preventative steps to prevent injury when a foreseeable risk of injury was present, and not just when for example, alcohol is being served.

United States Case Law on Social Liability

The United States' experience with social liability has been different than the experience in Canada as they have not hesitated in their imposition of liability for the negligence of guests, especially those who are not of the legal drinking age. Generally in the United States, if someone serves or facilitates the service of alcohol to a minor with the knowledge that they will then operate a vehicle, then they are deemed liable for what might happen. Liability of social hosts has been recognized in the United States, both under common law and under statutes.

While the case law in the United States has been pretty clear with regard to minors, it has been more divided with regard to the social host liability of adult guests that are intoxicated. Those courts in the United States that have recognized social host liability have done so on the basis that there exists a duty of care which is determined through a reasonable foreseeability in injury to guests and other third parties on the basis

of actions undertaken by the host. There are some states that have refrained from imposing social host liability, and they have done so not because they dispute the reasonable foreseeability of risk, but because they have cited a series of policy considerations like a lack of profit for the provision of alcohol, and troubles that might arise from monitoring the consumption patterns of guests. They too are concerned about the social implications of creating social host liabilities. Other courts have declined to make rulings on social host liability because they want to keep it in the domain of the legislatures. Because of the nature of social host liability rulings, many courts think that it would be more appropriate for law-making bodies to deal with the issue so that they can determine the scope of the duty of care.[39]

Mostly, courts in the United States that have neglected to impose social host liability have done so because they have confused the existence of a duty of care with the standard of care. In *Graff v. Beard* the Texas Court of Appeal, in a landmark decision, decided that social hosts can have a liability to third parties for the actions of intoxicated guests that they knew might get themselves into that situation.[40] This decision was later reversed by the Texas Supreme Court because of the complexity involved in finding social host liability, for example, how much control does a host need to have to create liability? It might also be difficult for a host to properly monitor the alcohol consumption of a guest and know when they have reached the point where a duty of care would begin. And to what extend would the host have to go to in preventing the intoxicated individual

[39] D.B. Dobbs, *The Law of Torts* (St. Paul, Minn.: West Group, 2000), 902-903.
[40] Graff v. Beard, 858 S.W.2d 918, 921 (Texas 1993).

from putting themselves and others in harms way? Would they be required to physically and forcibly prevent the intoxicated individual from driving, or would they just have to take less abrasive measures?

These questions are some of the problems that have come up in trying to create social liability in some American jurisdictions, but there has been an overall acceptance of the idea in American jurisprudence, that if there is a liability, it stems from a failure to act on a reasonably foreseeable risk of injury, and not merely on the provision of alcohol.

There are some jurisdictions in the United States where the laws on this issue of misguided. For example, in *Homan v. George,* the laws of Ohio were relevant. At the time of that case, that state's laws stated that it was the consumption and not the provision of alcohol that created risk of injury. As such, the defendants in this case were not seen to have liability even though they provided alcohol to the guests fully knowing that they would later attempt to drive home. For this reason, no social host liability could be found, and there was no case against the defendants. This is an unfortunate outcome as it takes liability away from those who should have it. This reasoning is the same that has abdicated such parties as venue owners for events like tailgating from social host responsibility – while they may facilitate the party, they do not provide the alcohol.[41]

The reluctance of courts to recognize social host liability is based on the personal autonomy of people – courts do not want to transfer responsibility from a person to another, rather they prefer the method of personal accountability. But the reality is that in

[41] Gregory P. Diamantopoulos. "A look at the social host dram shop liability from pre-game tailgating t post-game barhopping," *DePaul Journal of Sports Law & Contemporary Problems.* (2008).

social host situations, there are a plethora of situations in which the actions of the host can be negligent and contribute in a significant way to the injury that is sustained by the guest or a third party in the wake of intoxication at the hands of the host. This logic place responsibility in the hands of an intoxicated person – someone who inherently has compromised judgement – and takes it away from the person who facilitated this intoxication and then showed negligence in the way they handled the situation.[42]

There are some states though that does see social host liability as a logical extension of negligence law. One example is *Kelly v. Gwinnell* which was heard in the New Jersey Supreme Court. The case held that a social host that is aware that the guest that they are serving alcohol to, to the point of intoxication, will be driving, is liable to third parties for injuries that might be suffered as a result of this negligence. In *Walker v. Kennedy*, the Minnesota Supreme Court declined to find liability because the hosts only provided the venue for consumption, but they did not provide the alcohol which caused the intoxication. According to the Chief Judge speaking for the court in this case, "An essential element for social host liability is that the guest is given or furnished alcoholic beverages by the person for whom recovery is sought… Since it is undisputed that [the guest] was not given or furnished liquor by the member of the Kennedy family, social host liability is inappropriate in the present case."[43] In *Hart v. Ivey*, the North Carolina Supreme Court recognize social host liability using principles of common law negligence

[42] John C. P. Goldberg. "Ten Half-Truths About Tort Law," *Valparaiso University Law Review*. (2008).
[43] Ibid.

when they determined that a host is socially liable if they provide alcohol to a minor who then becomes involved in a accident while driving intoxicated.[44]

Randall argues that the social costs of drinking are the issue of everyone in society, and therefore social liability needs to be placed on adults that facilitate the process of under-age drinking. He says that not only should the adults that serve minors be liable, but so should the adults that condone it. This is in response to the movement in Florida which imposed social host liability on parents that allow their children to have parties which will clearly be involving (often large) sums of alcohol.[45] This is something that was also advanced in *Fassett v. Delta Kappa Epsilon* as the social host liability law in the United States found liability on the part of a Fraternity House that facilitated injury.[46]

Steven B. Berneman examines social host liability in the United States by looking into whether Major League Baseball clubs would be held liable for an injury if, after serving alcohol to the players and staff in the clubhouse, one of them got into an accident while driving away from the ballpark. In doing so, he determines that these organizations are committing negligence by serving at the clubhouse after games, in light of trends regarding substance abuses that surround baseball (alcohol included). With reference to the Restatement (Second) of Torts' definition of third party liability, he argues that these clubs are taking large risks. "If the actor does an act, and subsequently realizes or should

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[44] Donna L. Shumate. "The Recognition of Social Host Liability in North Carolina – Hart v. Ivey" *Campbell Law Review.* (1993).
[45] Samuel Randall. "Loco Parents: A Case for the Overhaul of Social Host Liability in Florida" *University of Miami Law Review.* (2008).
[46] Denise Jones Lord. "Beyond Social Host Liability: Accomplice Liability" *Cumberland Law Review.* (1988/89).

realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect."[47] As such, they should change their policies to make them more aligned with their responsibilities in regard to the prevention of foreseeable danger.[48]

Razook makes the argument that social host liability is essential because of its affiliation with common law. People should be expected to apply high standards to their own conducts and actions, and this is just in line with the expectations of common law – that people act in accordance with the law. People that go beyond this for example people that act in a way that is absent of this higher standard, should hold as a possibility that their actions will be dealt with by a court in ways that have been in seen in this discussion of social host responsibility. For example, is a parent allows their children to have a 'keg party' at the family house should have an inclination that people will be driving to and from, and therefore there is a high possibility of some of the guest driving while intoxicated, then this parent should share in liability simply because they did not act in accordance with a high standard for their actions. They acted against the principles of common law, and therefore should not be surprised if they are held liable for injuries or damages that were sustained as a result of their negligence. He goes on to note how the distinction between commercial and private needs to be loosened when it comes to questions of negligence. He makes his argument in much the same way that has already been done in this paper, as he says that there should be no difference whether someone is

[47] Steven B. Berneman. "One Strike and You're Out: Alcohol in the Major League Clubhouse" *Vanderbilt Journal of Entertainment and Technology Law.* (2009).
[48] Robert H. Humphrey. "Social Host Liability" *Rhode Island Bar Journal.* (2009).

under a personal or professional capacity when deciding what standard they should apply to their action. People should always be expected to apply a high standard to their actions, and therefore a duty of care should exist anyway. Much like the other authors though, he says that the role people are playing (professional or private) can have an influence on the standard of care. Nevertheless, this author believes that social hosts should be subject to negligence liability in an increased manner in the United States.[49]

But as has been argued, the provision of alcohol is not the only requirement for social host liability. In *McGuiggan* the court noted that the host does not need to provide the alcohol, liability can be ascertained as long as the host facilitated the process of the guest becoming intoxicated, and then did not take the essential preventative measure to prevent the occurrence of reasonable foreseeable harm.[50]

The experience in the United States confirms the argument of this paper that is that the nature of the host liability relationship (commercial or social) should affect the standard of care, but not the presence of a duty of care.

Conclusion

Throughout this paper, it has been shown that social host liability is not a new category of duty, but rather is a logical extension of commercial host liability, and is therefore also an incremental step in the neighbour principle. Issues that have

[49] Nim Razook. "Obeying Common Law" *American Business Law Journal.* (2009).
[50] Adjin-Tettey. "Social-Host Liability: A Logical Extension of Commercial Host Liability?"

traditionally been used to support the exclusion of social host liability – such as the provision of alcohol, the 'economic nature' of the relationship, the ability to absorb and spread risks, should not be used to determine whether a duty of care exists, but instead to determined the standard of care. It has been shown that in Canada, courts have been reluctant to recognize social host liability because of concerns over policy, but these should not reasonably stand in the way of the creation of a duty of care where the host has neglected to do what is necessary to prevent the reasonable risk of foreseeable injury that has developed from the circumstances of the social gathering – typically the over-consumption of alcohol. By recognizing social host liability, we can reconcile the theoretical underpinnings of tort law in Canada – we make wrongdoers pay for their wrong-doings, and we encourage socially responsible behaviour in society. If Canadian courts recognize that there are some occasions where it is necessary to invoke social host liability, then it will foster a culture of more socially responsible behaviour in this country by hosts, and this will serve to positively influence accident prevention.

Progress in this area has been stymied because of concern over the social and economic implications of creating policy that recognizes social host liability. But this should not be a concern, because if social host liability is recognized, the threshold for liability will be high, and it will only be used in appropriate cases where the degree of negligence was high. From this paper it is clear that the separation between commercial host liability and social host liability in Canada is misguided, as social host liability is not

a new category of duty, but rather an incremental step in the neighbour principle, that if you are negligent and cause loss, you should pay for your wrongdoing.

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