

DRINKING-AND-DRIVING LAWS IN SCANDINAVIA

BY

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1. INTRODUCTION

In few fields of law has Scandinavian legislation and court practice become so well known internationally as that relating to drinking and driving.¹ For many the “Scandinavian model” has shown the way to fight the—all too—many motor accidents caused by drunken drivers. Thus, the present drive in the United States for stiffer legislation against drunken driving often refers to the Scandinavian example. Others consider the Scandinavian laws in this field excessively repressive, and some critics have cast doubt on their supposed effectiveness in preventing alcohol-related accidents. Thus, Professor H. Laurence Ross, in one of his first writings on the subject, coined the expression “the Scandinavian Myth” to characterize the faith the authorities had in the effectiveness of the Scandinavian drinking-and-driving laws.²

Although Scandinavia may appear to the outsider as a rather uniform corner of the world, on closer observation the different countries reveal substantial differences. This also holds true for the field of drinking and driving. Thus, the attitude to alcohol, and also to the combination of alcohol consumption and driving, is more liberal in Denmark than in Finland, Norway and Sweden, and this is reflected in legislation as well as in law enforcement. Moreover, considerable changes have taken place over time. On the whole these changes have tended towards more uniformity between the countries, but sometimes they have worked the other way.

2. LEGISLATION

The first statutes on drinking and driving made it an offence to drive while intoxicated (Denmark 1903, Norway 1912, Sweden 1925, Finland 1926). Later the provisions were expanded to cover driving under the influence of alcohol, a much broader concept. For example, a Norwegian study from 1932 showed that of 373 drivers who were medically examined, 212 were characterized as

¹ A more detailed account of legislation and practice in the Scandinavian countries is to be found in *Drinking and Driving in Scandinavia. Scandinavian Studies in Criminology*, vol. 6, 1978 (Universitetsforlaget, Oslo).

² H. Laurence Ross, “The Scandinavian Myth: The Effectiveness of Drinking-and-Driving Legislation in Sweden and Norway”, *The Journal of Legal Studies*, vol. IV (2), p. 285, Chicago, June 1975.

being under the influence, but only 45 as intoxicated. In the early 1930s blood alcohol analysis began to be used as a part of the medical examination of the accused, first on a voluntary basis and later based on statutory authority. The result of the chemical analysis was, however, in no way binding on the examining doctor nor on the court.

Norway was the first country to make it a criminal offence *per se* to drive with a blood alcohol content (BAC) exceeding a certain limit. This was done by an Act of 1936, which added to the prohibition against driving under the influence of alcohol, a provision which defined everybody with a blood alcohol concentration of more than 0.5 per mille as being under the influence. In the British terminology this means a concentration of more than 50 milligrams of alcohol to 100 millilitres of blood. This limit has remained in force ever since. It is therefore somewhat misleading to speak about drunken driving legislation, and to describe the offenders as drunken drivers. The law goes far beyond what these words mean in ordinary usage. It is preferable to speak about drinking-and-driving legislation.

The first country to follow the Norwegian example was Sweden, which in 1941 introduced a limit of 0.8 per mille. In 1957 the limit was lowered to 0.5 per mille as in Norway, but it was to take much longer for Denmark and Finland to introduce *per se* laws. In these two countries this did not happen until 1976. Denmark fixed the limit at 0.8 per mille, the same as in England, whereas Finland chose 0.5 as in Norway and Sweden. It should be mentioned that both in Denmark and Finland the blood alcohol concentration had come to play a very important role in the courts even before a legal limit was established. In most cases the courts would declare the driver to be under the influence if the analysis showed a BAC of more than 1 per mille.

It is remarkable that the system of *per se* legislation, which has later been emulated by most of the industrialized world, was invented in a small country in a corner of Europe, where motor traffic was still in its infancy. In 1936 Norway had about 80 000 motor cars and a population of 2.9 million, that is one car per 36 persons. The new Act met with little opposition. Medical authorities stated as an established fact that the ability to drive was usually impaired when a driver had a BAC above 0.5 per mille. Legal practitioners were pleased with the simplification of trials which would be a consequence of the new rule. And the temperance movement, which always has played a strong role in Norwegian politics, welcomed the law as victory in the fight against alcohol. The new legislation was well suited to act as a symbol of the dangers of drinking. In striking contrast to what occurred in England when their *per se* law was introduced in 1967, little publicity was given to the Act of 1936 and its coming into force. During the passage of the Bill through the Storting (Parliament) the spokesman for the Parliamentary committee in

question expressed surprise over the fact that there had not been more discussion of the matter in the press, although a step was now being taken that had no precedent in the legislation of any country. And a perusal of the country's two leading motoring journals of that time, yields the surprising result that neither the Act nor the practice to which it gave rise are mentioned at all either in 1936 or 1937.

When Sweden introduced a fixed BAC limit in 1941 a distinction was made between exceeding the limit (called driving when not sober) and driving in a state of intoxication (drunken driving). The driver would be convicted of the latter offence if he was so much under the influence that it could be assumed that he could not drive the vehicle in a satisfactory manner. If he had a BAC of 1.5 per mille or more, he should be considered to have been so much under the influence as to fall within the above provision. Normally the lesser offence (driving when not sober) will lead to a fine, the more serious offence (drunken driving) to a prison sentence. Denmark and Finland have a similar distinction between the two degrees of the offence, whereas in Norway all driving with a BAC above 0.5 falls under the same provision regardless of the degree of intoxication. (In popular usage all these drivers are called "per mille drivers".) This difference is very important when it comes to sentencing. In Norway even the smallest transgression of the legal limit will lead to an unsuspended prison sentence. Further details of sentencing will be given in section 3 *infra*.

Some loopholes in the law have been covered by later legislation. When the *per se* laws were first introduced it was the BAC at the time of driving which was conclusive of the question of guilt. It happened in a number of cases where the analysis showed a BAC of more than 0.5 per mille that the driver was acquitted because he pleaded that he had consumed the alcohol immediately before driving so that the alcohol had not been absorbed into the blood at the time of driving. In order to prevent acquittals on this basis, the Norwegian law was amended in 1959, so as to apply not only to driving with a BAC above 0.5 per mille, but also to driving after having consumed so much alcohol that it would later result in a BAC above the legal limit. Thus, if the blood test showed that the per mille limit had been exceeded, criminal liability was incurred without any need to establish by means of a retrospective calculation that the per mille limit had also been reached during the course of the driving. Similar amendments have since been made in the other countries as well.

The greatest zeal to prevent any unjustified acquittals has been shown by the Norwegian legislators. It sometimes happens that a driver suspected of drunken driving, for example in connection with a traffic accident, has left the scene and temporarily has succeeded in evading the police. A blood test is later taken, and the analysis shows a BAC above the legal limit, but the driver

explains that this is due to alcohol consumption after the driving. He was so shocked by the accident that he had to take some drinks to calm himself down. In order to prevent this excuse the Act was amended in 1959 so that the consumption of alcohol during the six hours immediately after driving was equated with driving under the influence if the driver knew or ought to have known that the said driving might be the subject of police investigation. This example has not been followed by the other Scandinavian countries. The Norwegian law also has a stringent provision against a car owner who lets another person drive his car without taking steps to ascertain that this person is sober.

3. SENTENCING

As mentioned, the pattern of sentencing for drinking and driving varies considerably between the Scandinavian countries. Norwegian sentencing practice is by far the most severe: Whereas Norwegian laws normally give the courts a wide discretion in sentencing, and a suspended sentence is the normal sanction for a first offender if the crime is not very serious, the Road Traffic Act expressly provides that the sentence for driving with a BAC of more than 0.5 per mille shall be imprisonment, unless there are specially mitigating circumstances. The present Act is from 1965, but the provision in question dates back to 1926. Originally it referred to intoxicated drivers. In 1935 it was extended to driving under the influence of alcohol, which as we have seen is a considerably wider concept. And when the fixed BAC limit of 0.5 per mille was introduced in 1936, and defined as equivalent to influence, the presumption of imprisonment acquired a vastly extended field of application. The Act does not state that the sentence shall be unsuspended, but this has become the settled practice of the courts under the leadership of the Supreme Court. Only rarely is the sentence suspended, and then it is almost invariably combined with a heavy fine. This is the penalty for about 15 per cent of the convicted drivers. Fines alone are used in a handful of cases only. The term of imprisonment for a first offender will mostly be between 21 and 36 days, 21 days being the general minimum term for imprisonment. In cases of recidivism the sentence can be much higher. Some of the convicted drunken drivers have a very long record. In a case from 1979 the defendant had nine previous convictions for the same offence, and was now prosecuted for four cases of driving with very high levels of BAC (2.84, 2.45, 3.24 and 2.93 respectively).³ The District Court sentenced

³ 1979 NRt 11.

him to one year of imprisonment, but on appeal the sentence was reduced to nine months, taking into consideration that he was about to serve two previous sentences which together totalled one year of imprisonment.

In the other Scandinavian countries the pattern of sentencing is less Draconian, and the differences have been growing. In Sweden the normal penalty for "driving while not sober", that is up to a BAC of 1.5, is a heavy fine, and for drunken driving, that is driving with a BAC above 1.5, a month of imprisonment. In cases of recidivism the sentence is sometimes increased to two months. In Denmark the pattern is similar, but with somewhat shorter sentences. Through an amendment in 1981 the limit for fines as the normal punishment was raised from 1.5 to 2 per mille BAC. It should be added that this change was perhaps motivated more by the wish to save prison space and thus reduce the queue of convicts waiting to serve their sentences than by considerations of what in itself was the most desirable course of action.

The greatest change in recent years has taken place in Finland. Traditionally the sentences for drunken driving in Finland have been very severe, often unsuspended prison terms of 3 to 6 months. A reform in 1977 brought a fundamental change.⁴ For driving with a BAC up to 1.5 per mille the sentence now will be a fine; this even applies to the bulk of recidivists. For aggravated drunken driving, that is if the BAC exceeds 1.5 per mille or the driving has been dangerous, the normal penalty for a first offender will be a suspended prison sentence of 1 to 3 months plus a fine. Of the total number of offenders convicted in 1980 of having driven with more than the legal limit of 0.5 per mille only 12 per cent received an unsuspended prison sentence.

It would be somewhat misleading to deal with sentencing without mentioning the revocation of the driving licence which is a normal consequence of a conviction of drinking and driving. This revocation is not legally a penalty, but for the convicted drivers this legal distinction hardly seems important. For many of them the revocation of the driving licence is what hurts most. Again Norway has the harshest system. A first offender will normally by decision of the police lose his driving licence for two years. In cases of recidivism the loss will be for ever, but with a possibility for the Ministry of Justice to grant a mitigation. Also in the other countries revocation of the driving licence is an important part of the sanctions system, but the periods are shorter. In Denmark the revocation is suspended if the BAC does not surpass 1.2 per mille. It could be added that whereas the revocation of the driving licence in Norway and Sweden is made by administrative authorities, in Denmark and Finland it is a matter for the court.

⁴ The reform and its effects are described by Tapio Lappi-Seppälä in *Lakimies* 1982, pp. 598-633, and J. Andenaes in *Lov og Rett* 1982, pp. 382-6.

4. ENFORCEMENT

When the British Road Safety Act of 1967 introduced a fixed limit of 0.8 per mille it resulted in a considerable fall in the number of alcohol-related accidents, but most of this effect seemed to have been lost by the end of 1970. Professor H. Laurence Ross, in his thorough study of the British Act, explains this primarily by the weak enforcement of the law.⁵ The great publicity accompanying the new law had given the public unrealistic ideas about the risk of detection and conviction, but in fact little was done to enforce the law. The police did not consider enforcement of the new provisions an important task, and the public learnt that they had overestimated the risk.

In the Scandinavian countries enforcement of the drinking-and-driving laws are taken seriously—though perhaps somewhat less seriously in Denmark than in the other countries. The police consider control of drinking and driving an important task, and detected offenders are promptly prosecuted. If there is reasonable cause to suspect a violation the police are authorized to take a blood test. The normal procedure will be first to take a breath test, and if this shows that the suspicion is well founded, to proceed to a blood test.

In recent years the police have been authorized to take random breath tests in connection with traffic control (road-blocks), and if the driver has been involved in an accident a breath test can be taken routinely without any specific reason for suspicion. The purpose of these provisions is, of course, to increase the risk of detection, and thereby enhance the deterrent effect of the law. Legislation authorizing random tests was first introduced in Sweden in 1976, and the example has later been followed by the other Scandinavian countries. Especially in Sweden and Finland such random controls have been used as an important part of the traffic safety work of the police. Such controls also give information needed for assessing the incidence of drinking and driving in normal traffic. Thus, in 1981–82 in Norway a research program with this purpose, including 72 000 breath tests, was carried out in cooperation between the police and the Institute of Transport Economics.

5. THE EFFECTS OF THE LEGISLATION

One effect of the system is indisputable: It has put a considerable strain on the prison system. This is especially the case in Norway. The number of drivers convicted has increased approximately in the same proportion as the number of motor cars, although there has been a small drop since 1977. Of all persons

⁵ H. Laurence Ross, "Law, Science, and Accidents: The British Road Safety Act of 1967", *Journal of Legal Studies*, vol. IV (2) (1973).

given unsuspended prison sentences in Norway, about one half are motorists convicted of drinking and driving. Since the prison terms for this offence are quite short, the offenders do not constitute a corresponding part of the prison population, but they do make up approximately 20 per cent of the prison population. In the other Scandinavian countries the corresponding figure is between 10 and 15 per cent.

What then about the effect of the law upon the behaviour of drivers and on the volume of alcohol-related accidents?⁶

First driver behaviour. On impressionistic evidence it has been generally accepted in the past that drinking and driving is rare in the Scandinavian countries, and that this to a great extent is due to strict legislation and effective law enforcement. In a paper many years ago I summed up the situation in this way:

A person moving between Norway and the United States can hardly avoid noticing the radical difference in the attitudes towards automobile driving and alcohol. There is no reason to doubt that the difference in legal provisions plays a substantial role in this difference in attitudes. The awareness of hazards of imprisonment for intoxicated driving is in our country a living reality to every driver, and for most people the risk seems too great. When a man goes to a party where alcoholic drinks are likely to be served, and if he is not fortunate enough to have a wife who drives but does not drink, he will leave his car at home or he will limit his consumption to a minimum. It is also my feeling—although I am here on uncertain grounds—that the legislation has been instrumental in forming or sustaining the widespread conviction that it is wrong, or irresponsible, to place oneself behind the wheel when intoxicated.⁷

Such impressions do not constitute hard evidence, and it could be objected that what has been described is the situation as it presents itself to middle class or upper middle class groups. How far it fits for other social groups is more uncertain. However, roadside surveys from recent years have shown that the frequency of drinking and driving in Scandinavian countries is, in fact, much lower than in most other industrialized countries. The frequency varies with day and hour, the highest figures being recorded on Friday and Saturday nights.

In the USA, Canada, and the Netherlands roadside surveys at night time have found as many as 10 to 15 per cent of drivers with a BAC above 0.5 per mille. In Norway and Sweden findings in similar surveys have been from one to two per cent.⁸ And large-scale roadside surveys, distributed in order to

⁶ For a more detailed discussion, see J. Andenaes, "The Effects of Scandinavia's Drinking-and-Driving Laws: Facts and Hypotheses", *Drinking and Driving in Scandinavia* (see note 1 *supra*), pp. 35–53.

⁷ J. Andenaes, *Punishment and Deterrence*, p. 60, University of Michigan Press (1974).

⁸ P. Christensen, S. Fosser and A. Glad, *Promillekjøring og trafikksikkerhet* (Drunken Driving and Traffic Safety). Transportøkonomisk institutt (Institute of Transport Economics), Oslo 1978. (See table 8.)

obtain a representative sample of all motor traffic, have shown extremely low figures of drivers under the influence of alcohol. Thus, the Norwegian research mentioned earlier, with 72 000 breath tests, found only about two out of one thousand drivers with a BAC above the legal limit of 0.5 per mille.⁹ Swedish large-scale surveys show similar results. It is, of course, impossible to know for certain how much the laws and law enforcement have contributed to these low figures of drinking and driving. However, Scandinavians are not known as especially moderate drinkers. The total alcohol consumption is relatively low, but excessive drinking on festive occasions is quite widespread. When the combination of drinking and driving is so rare, it corroborates the impressionistic evidence as to the motivating effect of the strict law and law enforcement described earlier.

Although the relative frequency of drinking and driving is very low, the total amount of such driving sums up to impressive numbers. Thus, on the basis of the large Norwegian roadside study, the total number of drivers with a BAC above 0.5 per mille was estimated to be at least 7 000 per day. The number of convictions, however, amounts to about 7 000 *per year*. This means that the risk of detection is very small. For the low BAC levels between 0.5 and 1.0 per mille the risk can be estimated at one in two thousand. Obviously this low risk of detection weakens the deterrent effect of the threat of punishment, although most drivers probably overestimate the risk.

Whereas the law seems to have been successful in minimizing drinking and driving generally, the evidence for a strong effect on accidents is much less impressive. Professor Ross in his paper on the "Scandinavian myth" applied the interrupted time-series method to the introduction of the *per se* legislation in Norway in 1936 and Sweden in 1941 without finding any drop in accidents which could serve as evidence of an effect of the new legislation.¹⁰ However, in later writings he recognizes that the laws were introduced at a time when other historical events may have been strongly influencing accidents, and the measures of the effect variables were relatively insensitive.¹¹ Thus, it would have been surprising to find clear statistical evidence of a deterrent effect even supposing that such effects were in fact achieved.

Another approach is to compare the frequency of alcohol-related accidents in different countries. One of the best measures is the percentage of intoxicated drivers among drivers killed in motor accidents. The most comprehensive Scandinavian study of this type included all fatal accidents in Norway during

⁹ Alf Glad, *Promillekjøring i Norge* (Drunken Driving in Norway. The results of a nation-wide road-side survey 1981–82). Transportøkonomisk institutt (Institute of Transport Economics), 1983.

¹⁰ See *supra*, note 2.

¹¹ H. Laurence Ross, *Deterring the Drinking Driver*, Lexington Books 1981, pp. 60–63.

one year (1976–77).¹² About 30 per cent of the deceased drivers had a BAC above 0.5 per mille. Other studies in Norway and Sweden have given similar results. These figures are moderate in an international perspective, and certainly lower than in the United States, but they do not stand out as exceptional. They seem, to mention just one example for comparison, to be about on the same level as figures from the U.K. before the introduction of the British *per se* law in 1967. To avoid misunderstanding it should be added that the death toll which drunken drivers take among other accident victims is much lower. Thus, the Norwegian study just quoted, found that in accidents where other persons were killed, an intoxicated driver was involved in not more than 5 to 8 per cent of the cases. Drinking and driving is much more dangerous for the driver himself than for other road users. The typical alcohol accident is a single vehicle accident at night-time.

Without going into further detail it could be safely stated that the Scandinavian countries have not been so effective in combating alcohol accidents as in combating driving after alcohol consumption. How can this apparent contradiction be explained?

The most reasonable hypothesis seems to be this:

The law has been a success with regard to the ordinary social drinkers. Most of these are people who also without the strict rules of the law would have been moderate consumers and have shown some feeling of responsibility while driving, in spite of being under the influence to some extent. Motorists driving with very high BAC levels, and therefore representing a high risk factor in traffic, more often than not are persons with serious alcohol problems, often aggravated by other social shortcomings. These people are poor targets for the deterrent and moral effect of the law. The Norwegian recidivist case cited in section 3 *supra* provides impressive illustration of this. In short, it is reasonable to believe that the law's motivating effect is strongest among those who would have represented only a moderate traffic risk even if they had consumed alcohol in excess of the legal limit.

Another point of great practical importance deserves to be mentioned. Up to now, criticism of the Norwegian practice of insisting on prison sentences even for very small violations of the legal limit, has been met with the argument that any mitigation would reduce the deterrent and moral effect of the law, and that no such experiments should be tried when life and health are at stake. However, available data from recent research tend to show that Sweden does not have more drinking and driving, or more alcohol-related accidents, than its neighbour country Norway, despite a very different pattern of sentencing. This

¹² J. Andenaes and R. K. Sørensen, "Alkohol og dødsulykker i trafikken" (Alcohol and Fatal Accidents in Traffic), *Lov og Rett* 1979, pp. 83–109.

gives reason to believe that the effect of the prison sentence for low degrees of BAC has been strongly overrated in the Norwegian discussions. The results of the Finnish reform of 1977 points in the same direction. This reform brought a drastic reduction of prison sentences, and at the same time introduced the *per se* system and authorized random checks by road-blocks. The reform was designed to increase the risk of detection instead of relying on severity of sanction. In the years following the reform the trend both of convictions for drunken driving and of alcohol-related accidents seems to have been very favourable. The weak point in the deterrence mechanism in this field is not the severity of the sanction, but the low risk of detection. A heavy fine and revocation of licence is sufficiently serious to have a deterrent effect if the risk of detection is not negligible.

6. SUMMARY AND DISCUSSIONS

A characteristic feature in the Scandinavian system of combating alcohol-related accidents is the *per se* legislation, where the fact of driving with a BAC above a certain limit has been made an offence in itself, without the necessity of proving that the driver was drunk or unfit to drive. This system was first introduced in Norway in 1936, and has later been accepted by most countries in the industrialized world.

Against *per se* legislation it has often been objected that people react differently to alcohol, and that a BAC which makes one driver unfit to drive does not have the same effect on others. A similar argument could be made against speed limits: One driver may be able to drive safely at a speed which would make another a danger on the road. The objection is not convincing. The point is that for most people alcohol consumption above a certain level reduces their ability to drive safely; that this effect increases very strongly with increasing BAC; and that BAC levels therefore give an objective indication of a person's reduced fitness for driving, whereas clinical examinations or other evidence of the influence of alcohol consumption are very subjective.

The *per se* system, combined with effective enforcement and severe sanctions, seems to have worked well in reducing the frequency of drinking and driving, although it should be acknowledged that the effect on alcohol-related accidents is not of the same magnitude as the effect on driver behaviour. The reason for this is probably that a great many alcohol-related accidents are caused by drivers with serious alcohol problems, who do not react to the threat of punishment in the same way as the average driver.

The gains in traffic safety are achieved at considerable cost, for society as well as for the individuals concerned. This is especially so in Norway, where

the normal penalty is imprisonment even for slight violations of the legal limit. Comparisons between Norway and Sweden, and experiences of a law reform in Finland, indicate clearly that this extraordinary severity does not have any appreciable pay-off in traffic safety. Norway, which was the pioneer in the field, has clung stubbornly to a system of sanctioning created in the 1930s, and has shown little willingness to make use of new insights and experiences from other countries.

Thus the example of Norway illustrates one pitfall in the *per se* system: It may lead to an excessive emphasis on the violation of the legal limit of BAC as such, without taking sufficient account of the degree of intoxication with the enormous differences in risk which the various levels of intoxication represent. This has led to excessive severity in dealing with minor violations. The other Scandinavian countries have been better equipped to avoid this danger by establishing two limits of BAC, reserving imprisonment for the aggravated or repeated offence of drinking and driving. And the development in these countries seems to be moving towards a further reduction of the use of imprisonment. Instead of relying on the severity of the sanction more emphasis is laid on increasing the risk of detection by random checks. Thus, the most critical observer of the Scandinavian drinking-and-driving laws, Professor Ross, rightly gives his latest contribution on the subject the title "Liberalization and Rationalization of Drunk-Driving Laws in Scandinavia".¹³ Even stubborn Norway seems to be on the move. A few days before the writing of the present paper (October 1983) the new Minister of Transport publicly announced that the Ministry will make an unbiased study of the sanctions system in the field. What will come out of this initiative remains to be seen, but it is an encouraging sign that a member of the Government for the first time challenges one of the strongest taboos in Norwegian political life and opens it up for a serious discussion.

However, it should be realized that the criminal law approach to the problem of drinking as a factor in the traffic accidents has its limitations. To put it in somewhat provocative terms: The moderate cases of drinking and driving can be quite effectively combated by threat of punishment and strict enforcement, but this does not mean much for the number of accidents. The dangerous cases of drunken driving are hard to combat, since such drivers are nearly always persons with serious alcohol problems who are rarely able to react rationally to the risk of punishment. As long as we have our present drinking customs with their production of problem drinkers—and I see no prospect of a change in this situation in the foreseeable future—we shall have to live with drunken driving as an important cause of traffic accidents.

¹³ Paper presented at the 9th International Conference on Alcohol, Drugs and Traffic Safety, Puerto Rico, November 1983.