PERSONAL INJURY AND COMMERCIAL HOST LIABILITY

CASE LAW AND LEGISLATIVE UPDATE

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I. Introduction

This paper is intended to be an introduction to recent cases addressing issues of host liability as well as any changes to relevant legislation. Undoubtedly, many of these cases will be the topic of further discussion in the other papers delivered at this course.

In *Jordan House v. Menow and Honsberger*, [1974] S.C.R. 239, the Supreme Court of Canada first established that a commercial host held a special duty of care to its patrons who purchased and consumed alcohol. That duty has since been extended to a duty of care by commercial host to third parties and, subsequently, to employer hosts and, most recently, social hosts. The cases outlined below suggest a trend that the courts are more willing to pass on some of the responsibility to those who serve alcohol.

II. Commercial Host

A. Salm v. Coyle et al., 2004 BCSC 112, Truscott J.

The Court rejected, on a summary judgment basis, submissions that a commercial host's duty extended after an intoxicated patron had arrived safely at home.

Brighid-Mary Coyle ("Coyle"), who was two months shy of her 19th birthday, had been out drinking with friends at home and subsequently at the Cat and Fiddle Pub. After closing time, about 1:30 a.m., Coyle and her friends were driven home by Collins, a friend who was with them at the pub and who was the sober designated driver. When they got home, at about 2:00 a.m., Coyle entered the house and got the keys to her father's Chevrolet. The two vehicles then left, Collins driving one and Coyle driving the Chevrolet with her friend, Foley, as a passenger. They drove around Coquitlam and Surrey. Finally, Collins went home. Coyle ended up in New Westminster where Coyle's vehicle struck the plaintiff's vehicle.

ICBC, as third party, on its behalf and on behalf the defendant, Brian Coyle, third partied the pub alleging, *inter alia*, that the pub was negligent in continuing to serve Coyle alcohol when they knew, or ought to have known, she was intoxicated and in continuing to serve her alcohol when they knew or ought to have known she not of legal drinking age. For the purposes of the application, the allegations were assumed to be true.

The pub argued that standard of care required of it was to take reasonable steps that an intoxicated patron had safe passage home. The pub submitted that it satisfied its duty because Coyle was in the care of Robertson (a friend who was sober) and Collins, the designated driver. Further, in reliance on two Ontario authorities (*Haughton v. Burden* and *John v. Flynn*, outlined below), the pub's duty was discharged once she had made it safely home as required by *Jordan House*, *supra*.

ICBC did not challenge the Ontario authorities but submitted that Coyle, a minor, was likely to be irresponsible and mischievous and the pub had a duty to ensure that she was placed directly in the control of her parents. His Lordship said that this argument might have some merit if Coyle was a "minor of tender years" but did not since she was only two months shy of her nineteenth birthday. His Lordship found:

> I am of the opinion that all duties of care to Coyle and to the plaintiff as a result of Coyle's intoxication, were satisfied when Coyle did not drive away from the pub and when she was delivered home safely by Collin. It does not matter if Millers Pub did not see to these safe arrangements itself but some else did. The result was that all of its duties were satisfied and any risk of injury from Coyle's intoxication after she arrived home safely was not caused by any breach of duty on the part of Miller's Pub.

B. Holton v. MacKinnon et al., 2005 BCSC 41, Hood J.

This action arises from a significant accident following a night of drinking in Whistler by the plaintiff, Holton, the defendant driver, MacKinnon and the defendant passenger, Martineau. The evening began with drinking at the plaintiff's home. Thereafter they drove to a lounge called the Crab Shack where they were given free drinks and then on to a nightclub called Garfinkel's. They left Garfinkel's shortly after 1:00 a.m., and the three were driven by MacKinnon to the plaintiff's home where they stayed briefly and then left to drive to a party in Pemberton. The accident occurred on the way to the party, when the vehicle skidded backwards down the highway, entered a ditch and rolled over onto its roof seriously injuring Holton who was in the rear seat.

The evidence was unclear as to how much each had to drink and how much time was spent at each location. The three men were frequent drinkers and had a high tolerance to alcohol. Witnesses who knew them described them as not being sober. MacKinnon's blood alcohol reading two and a half hours after the accident was .141. His estimated blood alcohol content at the time of the accident was between .177 and .218.

Mr. Justice Hood was asked to address whether there was any negligence on the part of the Crab Shack and Garfinkel's and, if so, to apportion liability including as against the plaintiff.

His Lordship described difficulties with the lay evidence (at times sparse, inconsistent and contradictory) and thus the crucial evidence was the scientific evidence. After an extensive review of the evidence, he found that the three became intoxicated at the Crab Shack and even more so at Garfinkel's. Despite being accomplished drinkers, they would have been showing signs of intoxication which staff at both establishments should have observed and should have been aware of the likelihood that one of them might be driving the others. Accordingly, there was risk that one of them might cause harm to a third party including the two other friends and the establishments should have taken preventative steps.

The Court apportioned liability 40% to MacKinnon, 30% to Holton and 15% to each of the Crab Shack and Garfinkel's. In doing so, his Lordship observed that the establishments owed a two-fold duty to the plaintiff: "as an intoxicated patron, that duty being based on his intoxication, and as a third party passenger, that duty being based on MacKinnon's intoxication."

His Lordship found the fact that the plaintiff had arrived home safely prior to the accident was irrelevant stating at para. 385:

> In my opinion, at that point in time, both MacKinnon and Holton were still intoxicated as a result of the alcohol they had consumed at the two establishments, and were still unable to handle the situation in which each found himself due to his intoxication. The reasonably foreseeable risk of harm to MacKinnon's passengers, and to other users of the road, drivers and passengers alike, was not affected or changed by the brief stop-over at Holton's residence. Those duties extended at least to the point when the accident occurred while MacKinnon was driving his vehicle in his intoxicated state.

Mr. Justice Hood said the following at paras. 422 to 429:

> ... The submission that the arrival home should not discharge the duty when the intoxicated patron remains in his intoxicated state would appear to be both reasonable and logical. It is foreseeable that the risk of harm to the intoxicated patron remains because he is still in an intoxicated state and unable to take care of himself even though he has arrived home. He still needs protection from his own intoxication. However, the full passage in *Menow* which counsel relies on can be found at 248-9 and is as follows:
>
> > ... the proper conclusion is that the Hotel came under a duty to *Menow* to see that he got home safely by taking him under its charge or putting him under the charge of a reasonable person, or to see that he was not turned out alone until he was in a reasonably fit condition to look after himself.
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> Taking him under its charge, or putting him under the charge of a reasonable person, seemingly referred to the method of seeing that the intoxicated patron got home safely.
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> Further, the position does not seem to deal with the Supreme Court of Canada's apparent basis for its determination in *Menow*, that arriving home ends or discharges the duty of care where the duty is that which is owed to the intoxicated person to protect him from the risk of harm from his own intoxication, which appears to be

the breaking for the chain of foreseeability and causation. That determination has now been extended to a duty of care to a third party who might reasonably be expected to come into contact with the intoxicated patron, and to whom the patron may pose some risk; this includes passengers in the offending vehicle.

In any event, these interesting questions are matters of policy and are for the higher courts. I propose to deal only with counsel's submission pertaining to the last mentioned duty where I believe the case at Bar is distinguishable from the cases cited by the defendants, with the result that in my opinion the duty owed to Holton by the establishments was extended or in place at least until the accident occurred. With regard to the latter duty, 'third party duty,' Mr. Ragona submitted that it continued until the intoxicated MacKinnon was put in the charge of a competent, sober individual and prevented from driving his vehicle, or until he arrived at his own home safely, neither of which occurred. I find merit in this submission.

This duty of care has nothing to do with the fact that Holton was a patron of, and became intoxicated in, the establishments. These facts are irrelevant, as is the fact that Holton arrived home safely from the establishments. The duty of care arose because Holton was a member of the class of persons who could be expected to be on the highway. It was MacKinnon's intoxication which created the risk to those persons, including his passengers, Holton and Martineau.

In my opinion, at the time that the three men left the establishments, their employees knew, or ought to have known that all three were impaired, and that there was a real risk that at least one of them might be driving. At that time the standard of care required of them was to make enquiries, and to put each of the men in the charge of a responsible sober person, and to take steps to assure that MacKinnon did not drive his vehicle.

However, neither establishment put MacKinnon in charge of a sober responsible person. Nor did they take any steps to see that MacKinnon, as well as Holton and Martineau, got home safely. What they did, in effect, was to leave Holton and Martineau in the charge or care of the intoxicated MacKinnon, and they were still in his charge at the time of the accident. In my opinion, the brief stay at Holton's residence did not change anything. The clearly foreseeable risk of harm to MacKinnon's passengers, whoever they were, and to other users of the highway as well, whether a driver or a passenger in another vehicle, remained unchanged. The risk remained as did the duty, until either MacKinnon arrived home safely, or he was involved in an accident, as was the case.

It is important to note that MacKinnon never arrived home safely, and the chain of foreseeability and causation was never broken. In the primary cases relied on by the defendants, *Salm*, *Haughton* and *John*, the impaired driver of the vehicle who caused the harm, that is, the party in the position of MacKinnon in the case at Bar, arrived home safely and then went out again, driving his vehicle and causing the harm. This did not happen in the case at Bar, and for this reason those cases are distinguishable.

I am satisfied then that at the time of the accident the Crab Shack and Garfinkel's both owed a duty of care to users of the highway, including MacKinnon's passengers, Holton and Martineau, arising out of MacKinnon's intoxication. That duty was not discharged by the brief stop-over at Holton's residence, or by the fact that Holton had arrived home safely and discharged any duty arising out of his intoxication. Therefore, the standard of care required of the Crab Shack and Garfinkel's was not met. Accordingly, their negligence caused or contributed to the cause of the accident and the injuries suffered by Holton. They are liable to the degree of fault found on their part.

At para. 461, His Lordship says that he did not find it necessary to refer in any detail to the provisions of the *Liquor Control and Licensing Act*, its Regulations or to the Server Program manual; other than to say that the Crab Shack and Garfinkel's was in breach of all three and of the standards of reasonable conduct reflected by them.

The matter is before the Court of Appeal and is set for hearing on October 11, 2005.

C. LaFace v. McWilliams, 2005 BCSC 291, Kirkpatrick J.

This case represents the high water mark for a finding against a commercial host (50%).

It involves five actions arising from a motor vehicle accident that occurred at the intersection of Chatham and First Avenue in Richmond at approximately 1:20 a.m. on June 12, 1999. The accident happened about a bock away from the Steveston Hotel, where the defendant, McWilliams, had been drinking. Shortly after closing time, McWilliams drove his vehicle into a group of 20 to 40 young adults that had dispersed between the sidewalk and a pick-truck driven by LaFace (a defendant in four of the actions and a plaintiff in his own action) which was stopped facing eastbound on Chatham. Another vehicle, driven by the third party, Strang, had come to stop behind LaFace's pick-up truck. McWilliams stopped behind Strang for a moment and then pulled to the right and accelerated through the crowd striking five pedestrians. His vehicle came to rest further down Chatham with Mr. LaFace impaled in his windshield. McWilliams had a blood alcohol reading of .180 at 2:40 a.m. and .170 at 2:58 a.m. He subsequently pled guilty to impaired driving and received a 14-month conditional sentence.

Coincidentally, Strang and Valdez (the owner of the vehicle driven by Strang, also a third party), had encountered McWilliams in the parking lot of the hotel at about 1:00 a.m. She recognized that McWilliams was drunk and about to drive. She unsuccessfully tried to persuade him to allow her to drive him home but did talk him into going back into the hotel to find a friend to drive him home. At first, the doorman would not let them into the pub because it was closing time. She persuaded him to allow them in explaining that she needed to find McWilliams a ride home. Strang was 17 years old. Once inside, she was not successful in finding alternate driving arrangements. In frustration, she yelled "at the top of her lungs": "Is anyone going to help me find someone to drive his car home for him?" People turned to look, but no one offered help. In frustration, she walked out of the pub and left. The accident happened minutes later.

Actions were pursued against McWilliams, LaFace and the Steveston Hotel. The hotel third partied Strang and Valdes. At issue was whether there was any negligence against LaFace and Strang/Valdes (for creating an obstruction and failing to activate their hazard lights), whether there was any contributory negligence on the part of the pedestrians and whether the hotel was liable.

Kirkpatrick J. found that there was no liability against the plaintiffs, LaFace or Strang and Valdes.

The hotel called several witnesses who gave evidence of religiously following the "Serve It Right" standards. During the hotel owner's testimony, he testified that the hotel had hired private investigators from time to time; a fact not previously disclosed. The private investigator's reports were ordered produced and revealed significant breaches of the "Serve It Right" Program which breaches were ignored by the management. There was also evidence from many witnesses about how the hotel was a good place to get drunk.

Commencing at para. 142, Her Ladyship said:

> I have already reviewed the evidence in respect of the hotel's conduct in some detail. I have made findings of credibility. It is clear that Mr. McWilliams' consumption of alcohol was not monitored by the pub. Indeed, the fact that patrons were permitted

> to mill about the pub made it very difficult to monitor alcohol consumption at all. The only rational inference to be drawn from the evidence I have accepted is that the pub failed to meet the standard of care require of licensed premises.
>
> The evidence clearly establishes that Mr. McWilliams was demonstrating obvious signs of intoxication while in the pub. These signs included staggering and slurring of speech that were noticed by casual, untrained observers. ...
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> ...
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> Mr. McWilliams' level of intoxication went unnoticed by the management and staff of the pub. That is likely so because the pub was understaffed. Alternatively, the staff may have been distracted on that night as they were observed to have been on the occasions when the private investigator visited the pub.
>
> Lastly, given my grave reservation concerning the testimony of Mr. Grant and his employees, I cannot rule out the possibility that they simply have chosen to lie and conceal their actual observations on June 11 and 12, 1999.
>
> However, the most compelling piece of evidence is the hotel's actual, specific notice that there was an impaired person on the premises who intended to drive. Ms. Strang was only 17 years old at the time, but she did everything that could reasonably be expected of her in notifying the pub of Mr. McWilliams' state of inebriation. She specifically told the doorman that Mr. McWilliams was drunk and needed to find someone to drive his car for him. She shouted 'at the top of her lungs' asking for assistance with the person who she knew was incapable of driving.
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> The hotel, despicably in my view, attempted to shift the blame for failing to find a safe ride home for Mr. McWilliams from the hotel to Ms. Strang and other patrons of the pub. The country's highest court has stated unequivocally that the duty is on the commercial host. It obviously does not rest on the slender shoulders of a 17 year old or, indeed, any person other than the hotel's employees.

Madam Justice Kirkpatrick found that the conduct of McWilliams and the hotel was equally egregious and apportioned liability equally between them.

The case is under appeal.

D. Haughton v. Burden, [2001] O.J. No. 4704, Somers J.

A motion for summary dismissal by a defendant, nightclub, was dismissed.

The plaintiff and defendant had been drinking in the nightclub until the plaintiff was asked to leave because he was intoxicated. They left by cab and went home. Shortly thereafter, they left to go to a restaurant, with Burden driving. Burden lost control and had an accident.

It was held that there was a genuine issue arising from s. 39 of the *Liquor Licence Act* which specifically provides for civil liability for alcohol-serving hosts. Somers J. held that the fact that Haughton and Burden had arrived home safely by taxi (regardless of who had arranged for the taxi) would have been fatal to any claim against the nightclub under the common law.

III. Employer Host

In the last decade host liability has gone beyond that of commercial host liability. The leading case in the area of employer host in B.C. remains *Jacobson v. Nike*, [1996] B.C.J. No. 363, in which it was found that the relationship between an employer and an employee was higher than that of a pub and patron. Madam Justice Levine said: "it is hard to imagine a more obvious risk that introducing drinking and driving into the work place."

A. John v. Flynn, [2001] O.J. No. 2578, Finlayson, Weiler and Goudge JJ.A.

Flynn showed up for his overnight work shift at a manufacturing plant, Eaton Yale, after having been drinking. He consumed more alcohol on his breaks in his truck in the parking lot and after his shift. He left home shortly thereafter and while driving with an open beer bottle between his legs was involved in the accident with John. Eaton Yale did not permit drinking on the job but was aware that drinking occurred in the parking lot. Flynn had participated in an employee assistance program for alcohol abuse and returned to work after signing a Last Chance Agreement, but there was no ongoing monitoring of Flynn. The program was confidential and Flynn's supervisor was not aware of Flynn's participation in the program.

A jury found Flynn 70% at fault and Eaton Yale 30%. The jury verdict was overturned on appeal on that basis that Flynn was not at work at the time of the Accident nor was he returning to or coming from work. Eaton Yale's duty of care did not extend beyond the workplace nor did any special duty to monitor Flynn arise as a result of the Last Chance Agreement. His employers were not aware that he was intoxicated that evening, they did not provide him with alcohol nor did they condone driving while impaired. Even if there was a duty of care, it did not extend beyond the point that Flynn had driven home safely.

Application for leave to appeal to the Supreme Court of Canada dismissed on May 22, 2002, [2001] S.C.C.A. No. 394.

B. Hunt (Litigation guardian of) v. Sutton Group Incentive Realty Inc., 2002 O.J. No. 3190, Austin, Simmons and Gillese JJ.A.

Hunt, an employee of Sutton's attended an office party at which she consumed alcohol from a self-serve open bar. After the party, she and a number of other employees went to a restaurant where she consumed two more drinks. She was alone, on her way home, when she lost control of her car and suffered significant injury. Her blood alcohol level was above the legal limit.

The trial proceeded before a jury and near the conclusion of the trial, the judge allowed the plaintiff's motion to dismiss the jury. He found the plaintiff 75% at fault, Sutton and the restaurant 25% at fault jointly and severally. On appeal, the decision was allowed and a new trial ordered.

The trial judge had failed to deal with evidence that showed the plaintiff was not impaired when she left the party as well as errors arising from the toxicologist's evidence. Further, the jury should not have been dismissed.

The case was settled after the appeal.

IV. Social Host

A social host may well have a similar duty to the commercial host or the employer, however, so far, liability has not been found against a social host who has not permitted, encouraged or enabled a driver to become intoxicated (*Mayfield Investments v. Stewart*, [1995] 1 S.C.R. 131; *Baumeister v. Drake* (1986), 5 B.C.L.R. (2d) 382).

The most recent pronouncement from the Ontario Court of Appeal, *Childs v. Desormeaux et al.*, confirms that social host liability is a viable tort, subject to the appropriate facts.

A. Dryden (Litigation guardian of) v. Campbell Estate, [2001] O.J. No. 829, Cavarzan J.

This case involved a car accident that occurred when, Campbell, who was extremely intoxicated, sped through a red light and crashed into a vehicle in which Dryden was a passenger. Dryden suffered severe injuries. Campbell was 18 years old at the time, and had a reputation of drinking to excess and of driving when intoxicated.

The defendant, Parchem, a 24-year old friend of Campbell, was found 15% at fault for having purchased the alcohol for Campbell and consuming it in Campbell's truck with Campbell at the wheel. Parchem left him with alcohol and after they departed company, Campbell went to a nightclub. Parchem was familiar with Campbell's drinking history.

Campbell was 80% at fault. The nightclub was found 5% liable for having admitted Campbell, who was underage and intoxicated on arrival and in failing to find him safe transportation.

Parchem was found 15% liable on the following basis:

> The conduct required of Parchem to satisfy that duty is, as the case law indicates, a question of the appropriate standard of care. There ought to be no need to resort to statutory proscriptions in order to discern the requisite standard of care here.
>
> A 24-year-old adult ought not be purchasing liquor for an 18-year-old high school student with a drinking problem and, worse still, a known propensity to drink and drive. To make matters worse Parchem participated in the consumption of alcohol with Campbell in the truck and while Campbell was at the wheel. Having consumed one bottle, Parchem compounded the error and the wrong by purchasing a second bottle and leaving it in Campbell's possession.
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> I agree, nevertheless, with plaintiff's submission that the most obvious guidelines society has for this standard of care are the provisions of the Ontario *Liquor Licence Act*, R.S.O. 1990, c. L.19 as amended. The 'Responsible Use' provisions of that Act include the following:
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> 29. No person shall sell or supply liquor or permit liquor to be sold or supplied to any person who is or appears to be intoxicated.
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> 30(1) No person shall knowingly sell or supply liquor to a person under nineteen years of age.
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> 30(8) No person under nineteen years of age shall have, consume, attempt to purchase or otherwise obtain liquor.
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> 32(1) No person shall drive or have the care or control of a motor vehicle as defined in the *Highway Traffic Act* ... while there is contained in the vehicle any liquor, except under the authority of a licence or permit.
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> Parchem, by his conduct, either breached or was a party to the breach of the above provisions. Parchem did not comply with the standard of care required of him by the law and by ordinary common sense.

B. Calliou Estate (Public Trustee of) v. Calliou Estate, [2002] A.J. No. 74, Moen J.

This accident followed a hockey game between the Andrew Raiders and the Kikino Chiefs. The Raiders, the hosts of a hockey tournament, had given the Chiefs' team 24 cans of beer shortly after 10:00 a.m. About an hour later, the Chiefs left the arena, consumed three jugs of beer at a local tavern, bought 24 more cans of beer at a liquor store and stopped at another tavern. The accident happened just after 8:00 p.m. Third and fourth party claims were advanced against the Raiders.

The third and fourth party actions were dismissed. The relationship that existed in this case was more than a mere social relationship but not a full commercial relationship. The Raiders had charged an entry fee for the tournament and had supplied beer but the team members had essentially purchased the beer themselves through a volunteer intermediary. Although the relationship was such that there was the possibility of that the Raiders had a duty of care, none arose as there was no knowledge of any intoxication or expectation that the Chiefs would drink the beer while driving.

C. Prevost (Committee of) v. Vetter, 2002 BCCA 202, Donald, Levine and Smith JJ.A.

This was an appeal from a summary judgment application in which a defendant was found liable for allowing an intoxicated driver to drive after having consumed alcohol while on the defendant's property. The issue of liability between the driver and the plaintiff had not yet been determined. The appeal was allowed. The Court of Appeal found that the issues ought not to have been determined by way of a summary judgment application. It was not possible to determine the existence of a duty of care, the appropriate standard of care or a breach without also deciding facts that the plaintiff had to establish to prove causation. The question of social host liability was a controversial and unsettled one and the attention of the Supreme Court of Canada might be engaged in this case. It was an issue best dealt with after a trial.

The matter was settled after the appeal.

D. Childs v. Desormeaux et al., [2004] O.J. No. 2065, O'Connor A.C.J.O., Weiler and Sharpe JJ.A.

Desormeaux was a heavy drinker and twice convicted of impaired driving. On the night of the accident, he attended a potluck and BYOB party at friends' home. On those occasions, in the past, when Desormeaux became impaired he spent the night at the hosts' home. On this night, he became impaired and, after he drove away from the party, he crossed into the oncoming lane of traffic striking another vehicle rendering the plaintiff a paraplegic.

The trial judge dismissed the action against the social hosts. In doing so, he found that they had a duty to monitor Desormeaux's drinking because he had a history of heavy drinking and had arrived at the party with two passengers that were drunk. However, he declined to impose a duty of care on the social hosts for policy reasons. The plaintiff appealed.

The Ontario Court of Appeal dismissed the appeal finding that social host liability is not simply an extension of commercial host liability. Before imposing liability for a new duty of care, the court must be satisfied that: firstly, the relationship of the parties is sufficiently close to give rise to a duty of care and, secondly, there are no policy considerations that negate or limit the scope of the duty. The Court disagreed with the trial court's finding that the social hosts owed a duty of care to users of the road on the specific facts of the case. The trial judge had erred in holding that, because they were aware of Desormeaux's drinking history, they should have known that he was impaired that night.

At paras. 75 to 76, Weiler J.A., says:

> To summarize, in the absence of some assumption of control by a person or justified reliance on that person by another, arising out of the circumstances or as a result of the imposition of a statutory duty, the common law does not make one person liable for the conduct of a second person simply because the second person occasions damage to a third party that is reasonably foreseeable. The person sought to e held liable must be implicated in the creation of the risk. In this case, the social hosts did not assume control over the supply or service of alcohol, nor did they serve alcohol to Desormeaux when he was visibly impaired. The social hosts had no statutory duty to monitor the consumption of alcohol or to control the structure of the

> atmosphere in which alcohol was served. There is no evidence that anyone relied on them to do so. The social hosts had no reason to monitor Desormeaux's consumption of alcohol because he could have stayed over if he wished to do so. I cannot accept the proposition that by merely supplying the venue of a BYOB party, a host assumes legal responsibility to third party users of the road for monitoring the alcohol consumed by guests, even when the guest includes as known drinker. As I have indicated, the hosts' knowledge of Desormeaux's drinking history is a factor in determining the social hosts' knowledge of his intoxication. The trial judge did not find that the social hosts knew Desormeaux was intoxicated at the time he left the party. A person's drinking history is not, of itself, a sufficient basis on which to hold that a social host should know a person is intoxicated. To the extent the trial judge implicitly **[page 221]** concluded that the social hosts should have known Desormeaux was impaired because of his drinking history and because they did not monitor his drinking, he erred. The trial judge's errors taint his holding that the social hosts were also negligent because they did not stop Desormeaux from driving. Counsel for the appellant did not point to other evidence to support that finding. It would not be just and fair in the circumstances to impose a duty of care.
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> While I would hold that no duty of care arises in the circumstances of this case to third party users of the road, I would not exclude from future consideration the imposition of a duty of care upon a social host. Depending on the circumstances, a social host may be implicated in the creation of the risk to users of the road, especially if the social host knows that an intoxicated guest is going to drive a care and does not make reasonable efforts to prevent the guest from driving.

Although not required to do so, the Court addressed the trial judge's comments regarding the policy reasons for failing to find a new duty of care: that legislation would be required before imposing liability on social hosts because of the competing issues of compensation for injured persons and the interference with a person's freedom to pursue his or her activities without the imposition of too high a legal liability. At para. 89 to 90, the Court held:

> In the end, I am not persuaded by the trial judge's conclusion that legislation would necessarily be required before imposing liability on a social host. Assuming that the difficulties I have outlined above either do not present themselves in a particular case or are overcome, it may be that judicial decisions imposing a duty of care on social hosts in particular cases would incrementally crystallize into rules of general application providing an element of certainty in the law and limiting its ramifications.
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> To summarize, the issue of social host liability is not an easy one. This judgment should not be interpreted to mean that social hosts are immune from liability to innocent third party users of the road caused by an impaired guest's driving. On the contrary, I do not foreclose social host liability to innocent third parties particularly when it is shown that a social host knew that an intoxicated guest was going to drive a car and did nothing to protect the innocent third party users of the road.

Leave to Appeal to the Supreme Court of Canada was granted on February 17, 2005.

V. Legislative Changes

Effective December 2, 2002, the Liquor Control and Licencing Regulations require that Licensees check the identification on any patron who appears under 25 (previously 19) and two pieces of identification must be produced (previously only one).