

Liability & More Liability

In this edition of the *Legal Observer* we focus on the issue of liability. With the Fall season well under way and holiday parties just around the corner, we felt this was a timely topic.

In *Social drinks with your neighbour*

we discuss an important case that our firm was recently involved with. The case involved the legal obligations of a party host for the repercussions of a guest's decision to drink and drive.

In our second article we discuss the le-

gal obligations that a commercial occupier owes to its visitors as well as how that liability can be limited or negated altogether.

Finally we profile Mark Charron in our ongoing series. 

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Social drinks with your neighbour

Our firm was recently involved in a trial which raised the issue of whether a person hosting a party in their home should be held responsible for damage caused by a guest's decision to drink and drive.

The Party

On December 31, 1998, the social hosts, Julie Zimmerman and Dwight Courier, held a New Year's Eve party at their home. Desmond Desormeaux, his girlfriend, Maureen O'Brien, and Ray Sauve were three of the more than one dozen guests at the party. Since this was a BYOB party, they brought a case of 24 beers, a bottle of Amaretto and a bottle of wine with them. They arrived together and left together. Desormeaux was the driver.

The Accident

At about 1:30 a.m., shortly after leaving

the party, Desormeaux's vehicle was involved in a head on collision with another vehicle. There were four passengers in the second vehicle. One of the passengers was killed, one (Childs) was left a paraplegic and the other two were seriously injured. A blood sample, taken from Desormeaux about 4:00 a.m., showed a blood alcohol concentration of 183mg/100ml, more than double the legal limit.

The Parties

The Plaintiffs in this case were the injured passenger, Zoe Childs, and her family. The Defendants were the impaired driver, Desmond Desormeaux and the social hosts, Dwight Courier and Julie Zimmerman. Desormeaux had no auto insurance and did not defend the action and was therefore found responsible. However, he did testify at trial. The issue at trial was solely whether the social hosts were responsible along with Desormeaux.

The Trial

The trial judge made a number of significant findings of fact. He found that Courier, a long time friend, was well aware of Desormeaux' past drinking prob-

lems, including his previous convictions for impaired driving. He also found that Zimmerman knew Desormeaux was a problem drinker, that he often drank to excess and that he had been convicted of impaired driving. The judge concluded that Courier and Zimmerman had not paid attention to how much Desormeaux, O'Brien and Sauve were drinking. He found that the three were not invited to spend the night nor was there any offer to call a taxi.

According to the expert who testified at the trial, Desormeaux would have been showing obvious signs of impairment when he left the party and he would have had a blood alcohol concentration of 235 mg/100ml at that time, three times the legal limit.

The Judge's Analysis

Traditionally in cases where liability has been found there has always been a relationship between the parties, for instance employer-employee, patron-supplier, or parent-child. In this case there was no "relationship" between Courier and Desormeaux other than their friend-

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Occupiers' Liability

A customer slips and falls at the grocery store. A child falls off the monkey bars at a city park. A teenager is injured during gym class.

The legal issue in each of the above instances is the liability of the occupier for their visitors' injuries. In Ontario, an occupier's obligations is set out in the *Occupiers' Liability Act*. In essence, an occupier of premises has a legal duty to those coming onto its premises, to take reasonable care for their safety. Although the focus of this article is on the duty of commercial establishments, it is important to know that occupiers' liability legislation applies equally to homeowners.

The following is an overview of occupiers' liability.



Who is an occupier?

An occupier is a person

- who is in physical possession of premises, or
- who has responsibility for and control over the condition of the premises or the activities taking place, or
- who has control over the persons entering the premises.

What is an occupier's responsibility?

An occupier owes a duty of care, as in all the circumstances of the case is reasonable, to see that visitors entering on the premises are reasonably safe while on the premises. This duty applies to risks caused by the condition of the premises as well as by the activities carried on.

When is an occupier not responsible?

An occupier may not be responsible for damages suffered by persons on the premises, if the occupier has restricted, modified or excluded its duty. However,

the occupier is under an obligation to bring such restriction, modification or exclusion to the attention of its visitors.

In addition, an occupier will not be responsible in respect of risks willingly assumed by visitors to the premises.

What recourse does an injured visitor have against an occupier?

A person, who is injured while on another's property, may be entitled to recover monetary damages if it can be established that the occupier was liable for the damages that were sustained. In making this determination, a court will take a number of factors into account, including:

- The inherent or unusual danger at the premises.
- The reasonable likelihood of a particular incident occurring.
- The sufficiency of the occupier's program of care and maintenance.
- The visitor's willingness to assume a foreseeable risk.
- The age of the visitor.
- The status of the visitor.
- The nature and extent of any warnings or waivers of liability on the part of the occupier.
- The sufficiency of the connection between the accident and the alleged breach by the occupier.

We have chosen several relevant court cases to help illustrate the obligations of an occupier.

The School Gym

Premises: School Gymnasium

Occupier: School Board

Visitor: Student

Facts: The 16-year old student suffered a dislocated elbow when he hit the gym's hardwood floor after the protective mats separated during a wrestling match. It was not uncommon for

the mats to separate during wrestling exercises. The only precaution taken against such separation was a standing instruction to the non-participating students to sit around the perimeter of the mats with their feet pressed against the edges of the outside mats.

Result: The student successfully sued the school board.

Reasons: The judge concluded that the school board had failed to discharge the burden of proving that it had adopted the best safety precautions reasonably possible for the protection of students taking part in physical education courses. He found that the so-called perimeter system was a dangerous one when the wrestling reached the competitive stage, particularly since the separation of the mats was foreseeable.

The Municipal Tennis Court

Premises: Tennis Court (owned by the local paper mill but leased to the municipality)

Occupier: Municipality

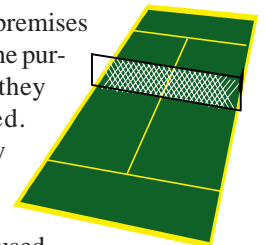
Visitor: Competitive Tennis Player

Facts: The 33 year old tennis player suffered torn ligaments in his knee when, during a competitive tennis match, his toe got lodged in a crack on the court. The tennis player regularly played on these particular courts and was aware of the state of disrepair. The municipality inspected the courts each spring and was aware of the numerous cracks. However, it did not want to resurface the court before obtaining a Wintario grant.

Result: The tennis player's lawsuit was dismissed.

Reasons: The tennis courts were dangerous premises keeping in mind the purpose for which they were constructed.

The municipality had an obligation to provide facilities that could be used safely and it was insufficient for the municipality to simply make an on-site in-



spection in the spring. **However**, the tennis player was aware of the dangers and notwithstanding that knowledge, chose to play anyway and therefore he voluntarily incurred the risk.

The Municipal Playground

Premises: Municipal Playground

Occupier: Municipality

Visitor: Child

Facts: The two-year old child suffered a skull fracture when she fell



from the playground structure. She hit her head on the concrete foundation used to anchor the structure. The mu-

nicipality maintained a regular system of inspection of equipment and parks as well as a repair program.

Result: The mother’s lawsuit, on behalf of the child, was dismissed.

Reasons: The municipality’s inspection program with respect to parks and playgrounds was entirely reasonable. The existence of the concrete foundation was not hazardous in the circumstances or any more hazardous than the structure itself.

Private Water Park

Premises: Privately-Run Water Park

Occupier: Popkum Water Slides Ltd.

Visitor: Customer

Facts: The 52-year old customer injured herself when she slipped on the

wet walkway, separating two wading pools. Although the surface of the walkway was generally wet, ground walnut shell grit was sprinkled on the painted surface. This was a commonly used method of making what would otherwise be a slippery surface into a slip-resistant surface.

Result: The customer’s lawsuit was dismissed.

Reasons: The water park had taken sufficient steps to make the premises reasonably safe for pool users.

If you have been injured on another’s premises, it is important to seek legal advice. Depending on where the injury occurred, the limitation period for commencing legal action might be very short. ☞

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ship. As a result, if Courier was found to owe a duty of care then it would be a new and novel one as no Canadian or Commonwealth court has found a social host to be responsible in such circumstances.

In order to determine if Courier and Zimmerman could be held liable for the injuries suffered by Childs and her family, the judge applied the following test.

- a) Was the harm to Childs the reasonably foreseeable consequence of Courier and Zimmerman’s act?
- b) Are there reasons, notwithstanding the proximity between Childs and Courier and Zimmerman, that liability should not be recognized here?
- c) If the answers to a and b are yes then a prima facie duty of care arises. It is then necessary to determine whether there are other policy reasons why the duty should not be imposed.

Foreseeability

In this case, the judge found that based on Desormeaux’ previous convictions for impaired driving and his previous

conduct when drinking, it was reasonably foreseeable that Desormeaux was not capable of driving when he left the party and that he was putting his passengers and other users of the highway at grave risk. He concluded that Courier and Zimmerman should have been on the alert that Desormeaux may have been drinking before arriving at the party, based on the fact that O’Brien and Sauve were intoxicated when they arrived as well as Desormeaux’ propensity for drinking.

Proximity

In looking at proximity, the judge said he had no difficulty in finding that the relationship between Courier and Desormeaux, as longtime friends, met the test of proximity. He therefore found that under this specific relationship, Courier and Zimmerman, as social hosts, had a duty of care not to turn Desormeaux loose on the highway where he could cause injury to others. The judge stated:

Desmond Desormeaux was clearly the negligent driver who caused the injuries to Zoe Childs, and others. Dwight Courier and Julie Zimmerman’s breach of duty would be by way of contributory

negligence. I would assess Desmond Desormeaux’ negligence at 85% and Dwight Courier and Julie Zimmerman’s negligence at 15%.”

Policy Consideration

In reviewing the policy consideration, the judge likened it to a two-sided coin. On the one hand you have the victims who have suffered unbelievable harm as a result of Desormeaux’s decision to drink and drive as well as Courier and Zimmerman’s decision not to stop him. On the other hand, a finding of liability against Courier and Zimmerman, would place an inordinate burden on all social hosts.

However, after reviewing what other jurisdictions have done as well as the provincial government’s role in the importation, sale and promotion of alcohol, the judge could find no good reason to expand the law to include social host liability. In his view it should be left to the legislature to determine social host liability and also to properly compensate the innocent victims.

The Decision

In the end the judge did find a duty of

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Mark Charron

Our profiles of members of the firm leads us now to Mark Charron.

For those of you who have been fortunate enough to meet Mark, you will all agree that Mark is an outgoing engaging speaker who is entertaining and not afraid to embarrass either himself or someone else!

On a more serious note, Mark's outgoing engaging style has been successful in his extensive trial experience both with juries and in non-jury matters. Since he was called to the Bar of Ontario in 1984, he has practised exclusively in the area of civil litigation, including commercial and insurance litigation. He has appeared on numerous occasions before appellate Courts, including the Ontario Divisional Court and the Ontario Court of Appeal.

Mark's clients include a number of public and para-public authorities, including municipalities, law enforcement agencies and school boards. He has also been involved in the Ottawa Construction Association and the Ottawa-Carleton Board of Trade. In addition, Mark has experience in acting as a private arbitrator on behalf of local counsel and their clients. He has provided a number of papers to local organizations on the litigation, mediation and arbitration processes.

Mark's soccer skills are legendary.....just ask him. He and his wife, Susan Murphy, enjoy their two children, Maria and Celia, and they too will tell you about Mark's legendary skills. 📁

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care on the social hosts, Courrier and Zimmerman, based on the facts of the case but would not expand the tort law because of policy reasons. As such he dismissed the claim.

Aftermath

The Plaintiffs have appealed this decision. MADD (Mothers Against Drunk Driving) have indicted they will seek intervenor status.

The Court of Appeal will now have an opportunity to review the matter to determine whether Justice Chadwick was correct in his conclusions. The appeal will likely be heard by this time next year.

What Does this Mean?

As the law now stands following this decision, a social host who provides al-

cohol to a guest is not responsible for the actions of that guest once he or she leaves the host's house. The Court of Appeal may very well disagree with Justice Chadwick's decision that, for policy reasons, the court should not expand the law to hold social hosts liable.

The important point to be taken from this case is the fact that Justice Chadwick did find there was a duty of care on the home owners. No other court in Canada or the Commonwealth has ever found this duty.

The Court of Appeal, and/or ultimately the Supreme Court of Canada, will have a chance to determine whether it should be the courts or the legislature who decide whether social hosts should be responsible for the alcohol they serve their guests. One way or another, either through this case or another, this is not the last we have heard of this issue. 📁



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