

Proposed appeal raises issue of whether social hosts owe duty of care

Social host liability question appealed to SCC

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For Law Times

Social host liability may be on its way to resolution in the Supreme Court of Canada.

Barry Laushway of Laushway Law Office in Prescott, Ont., representing Zoe Childs and her family, has filed a notice of application for leave to appeal from the unanimous judgment of the Ontario Court of Appeal in *Childs v. Desormeaux*.

"The proposed appeal squarely raises the issue of whether those who host non-commercial alcohol-related events owe a duty of care to those who suffer physical injury as a result of impaired driving by their guests," writes Laushway to begin his statement of facts in support of Childs' application.

On New Year's Eve, Dwight Courier and Julie Zimmerman invited Desmond Desormeaux, one of their best friends, to a private "bring your own booze" party at their home.

In the two-and-a-half hours he was at the party, Desormeaux consumed 12 beers. Within minutes of leaving, he drove onto the wrong side of a straight clear highway, hitting an oncoming vehicle, in which Childs was a passenger, head-on.

The collision rendered Childs a paraplegic. She sued Courier, Zimmerman, and Desormeaux, among others.

At trial, Justice James Chadwick dismissed the claim against Courier and Zimmerman. He found that social host liability was a novel tort, that suffi-

cient proximity to found liability existed between the hosts and Childs, and that there had been a breach of the standard of care.

However, Chadwick concluded, public policy considerations as enunciated in *Anns v. Merton*, *Cooper v. Hobart*, and *Edwards v. Law Society of Upper Canada* prohibited Childs from succeeding. Although the social hosts in this case had a duty not to turn Desormeaux "loose on the highway," Chadwick reasoned, it was up to the legislature and not the courts to extend tort liability to them.

In May, an Ontario Court of Appeal bench composed of Associate Chief Justice Dennis O'Connor and justices Karen Weiler and Robert Sharpe upheld Chadwick's ruling on the basis that no duty of care existed because there was an insufficient degree of proximity between the hosts and Childs.

The appeal court, however, was careful to avoid the inference that social host liability could not arise in a proper case.

"On the contrary, I do not foreclose social host liability, 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 innocent third parties," wrote Weiler for the court.

Still, the reasons disappointed many lawyers because they failed to define the nature and extent of any duty of care that a social host might owe.

"The Court of Appeal obviously decided not to accept the invita-



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tion extended by counsel to deal with the social host duty directly," says Eric Williams of Ottawa's Williams McEnery, who with colleague Beth Alexander represented Zimmerman. "It seems that the court concluded that this just wasn't the right case in which to define the scope of that duty."

But Laushway believes that direction on the social host issue would serve the system well.

"I think it would be instructive if the Supreme Court outlined whether such a duty existed and what its parameters were," he told *Law Times*. "There's enough national interest in the issue to justify a hearing from the country's highest court."

Indeed, Chief Justice Roy McMurtry considered the case important enough to allow Mothers Against Drunk Driving (MADD) to intervene in the

Court of Appeal. MADD is a leading advocate in the fight against drunk driving. Its agenda includes alcohol-related civil liability.

It was the first time an organization was allowed to intervene on appeal when its representatives testified at trial — Andrew Murie, MADD's national executive director, had been subpoenaed by Laushway.

While *Childs* might at first blush appear to be an action that was private in nature, McMurtry reasoned, the issues in the case engaged a consideration of public policy.

"Whether to recognize that social hosts own an actionable duty of care to members of the public is an issue that transcends the dispute between the immediate parties to this litigation," he wrote.

Earl Cherniak and Kirk Stephens of Lerner's LLP represented MADD at the hearing of the appeal. The lawyers made submissions regarding the policy considerations that should inform the decision of whether to recognize a new tort of social host liability — if in fact social host liability was a novel tort.

But in his notice of application for leave, Laushway submits that the Court of Appeal erred in supporting Chadwick's conclusion that social host liability was a novel tort. He also submits that the court ought not to have overturned Chadwick's "mixed finding of fact and law" that a duty of care existed.

The Court of Appeal's deci-

sion, Laushway maintains, constituted an incorrect departure from the principle that the categories of negligence are never closed, and incorrectly stated that social host liability was not simply an extension of commercial host liability.

Social host liability has been a very troublesome issue across the common law world.

"There's huge judicial reticence to find hosts liable for service of alcohol," Williams notes. "I think social host responsibility is right on the line between moral responsibility and financial responsibility."

On at least four occasions, U.S. state legislatures have negated court rulings finding that social host liability existed.

And in Canada, there is only one lower court decision stating that the duty exists.

"The other reported decision dismisses the action 'even if there is such a duty,'" Williams points out. "I think courts recognize the huge difficulties facing individuals who are found liable."

In particular, commercial hosts have the corporate shield to protect them.

"But social hosts don't have numbered companies," Williams adds. "So liability for them threatens their homes and their savings, the very bases of their families' lives."

Williams also notes that commercial host liability in Ontario is founded in liquor legislation, whereas no such statutory basis exists for social hosts. **LT**