

## Recent Events at Williams McEnerg


A warm welcome to the newest member of our firm, Jennifer Jolly. Our firm now offers the services of eight litigators.

This spring, in addition to our normal appellate, trial and tribunal work, we had one case heard at the Supreme Court of Canada

and another is scheduled for a hearing this fall.

In this issue of the *Legal Observer* we give you the final chapter in the case involving social host liability. This much anticipated decision clarifies what, if any, obligations

people who host parties in their home may have.

A number of significant amendments have recently been made to the Statutory Accident Benefit Schedule. We review the latest changes on page 3. 

## Supreme Court of Canada Rules on Social Host Liability

A storm of reporters descended upon Eric Williams as he came out of the lockdown at the Supreme Court of Canada on May 5, 2006; it was 9:45a.m. and he, Jaye Hooper, and the other counsel, had been granted an advance review of the much anticipated social host liability decision. Finally, it was the public’s turn. The media was there in full force: would a host be responsible for their guest’s after-event activities? The tape recorders whirred and the cameras rolled...

### The Facts

On December 31, 1998, Julie Zimmerman and Dwight Courier hosted a small, quiet New Year’s Eve Party for their family and friends. This party was a potluck, “BYOB” affair. One of the guests at the party was Mr. Desormeaux (“Desormeaux”).

Shortly after leaving the party, Desormeaux’s vehicle was involved in a head on collision with another vehicle. There were four passengers in this second vehicle including Zoë Childs. As a result of the accident, Zoë Childs was rendered paraplegic. Toxicology evidence at trial concluded that, at the time Desormeaux left the hosts’ premises, his blood alcohol was over three times the legal limit to drive.

Childs and her family brought an action against Julie Zimmerman and Dwight Courier alleging that they breached a duty owed to her as social hosts.

### The Trial decision<sup>1</sup>

The trial, by agreement, proceeded on liability only. Chadwick J. held that although there was a duty of care owed by the host to the Plaintiff, policy considerations precluded a finding of a duty of social host liability in Canadian law. The action was dismissed on that basis.

### The Court of Appeal Decision<sup>2</sup>

The injured Plaintiff’s appeal was heard by three judges of the Court of Appeal in Toronto. The Appeal Court granted MADD intervener status solely on the issue of public policy. Although the Court of Appeal upheld Chadwick J.’s dismissal of the ac-

tion, they did so on a different basis. In this case, the Appeal Court could not find the hosts responsible for failing to monitor a guest at a party based on their knowledge of past drinking habits. Further, by not serving alcohol to the drinker, the hosts did not contribute to his intoxication.

Therefore, the Appeal Court did not need to rule on policy reasons for no social host in Canada, but discussed public policy in the balance of their decision, noting that social host liability was not an easy area.

### Supreme Court of Canada Decision<sup>3</sup>

On May 5, 2006, the Supreme Court released a unanimous decision dismissing Child’s appeal. Chief Justice McLachlin delivered the decision of the Court and put the issue this way: “do social hosts who invite guests to an event where alcohol is served owe a legal duty of care to third parties who may be injured by intoxicated guests?”

In doing so, the Supreme Court diverged from the Court of Appeal and found that the service of alcohol was not a significant factor in determining liability.

see **SOCIAL HOST** page 2

### Summer 2006, Volume 22

#### In this issue:

Case Update..... p. 2

Changes to Statutory Accident Benefit Schedule..... p. 3

Bio: Jennifer Jolly ..... p. 4



**SOCIAL HOST - cont'd from page 1**

The Court did adopt the first part of the Trial Judge's and Court of Appeal's decision; namely, that social host liability is a new and novel tort and not a logical extension of commercial host liability. Thus, the Court had to determine if the tort law should be extended.

The Supreme Court reiterated that the "common law is a jealous guardian of individual autonomy"<sup>4</sup> and declined to find that a duty of care arose. In these types of cases, liability is based on the social hosts' failure to act. To find a social host liable for an omission (failure to act) would impose a duty that is only present in our law when there is a special link between the parties. This "link" usually arises out of an "economic benefit" to one party or a relationship (such as parent/child) where one party must act because of a "reliance of one party to care for the other".

In the situation of a social host, Child's argued there was such a "link" because the hosts had created a dangerous activity by "facilitating" the consumption of alcohol. However, the Court rejected that argument. It found that the cases where defendants were called upon to intervene were those where the defendant created and invited persons to participate in a highly risky venture, for ex-

ample a downhill inner tubing competition.

Holding a house party where alcohol is served is not such an activity. The risks that may ensue at a house party or afterwards arise from what guests themselves choose to do or not to do at the party. A party where alcohol is served is a common occurrence, not one associated with unusual risks demanding special precautions.<sup>5</sup>

In summary, Chief Justice McLachlin stated:

I conclude that hosting a party at which alcohol is served does not, without more, establish the degree of proximity required to give rise to a duty of care on the hosts to third-party highway users who may be injured by an intoxicated guest. The injury here was not shown to be foreseeable on the facts as found by the trial judge. Even if it had been, this is at best a case for nonfeasance. No duty to monitor guests' drinking or to prevent them from driving can be imposed having regard to the relevant cases and legal principles. **A social host at a party where alcohol is served is not under a duty of care to members of the public who may be injured by a guest's actions, unless the host's conduct implicates him or her in the creation or exacerbation of the risk.** [my emphasis]

**Principles Arising out of the Decision**

As a General Rule – Social Hosts will not be found liable to third party users of the highway.

Has the door been left open for extraordinary circumstances? It is our interpretation of the Supreme Court's decision that, if a host were to be liable, the host must be akin to a joint actor with the drinker. In cases where there is egregious behaviour (i.e. encouraging someone to drive while intoxicated), the host may be found to be part of the eventual act. However, even if there was a legal basis established for host liability, there are still broad policy issues that must be considered as to whether or not to extend social host responsibility. This decision protects those that partake in every day, normal social gatherings.

If an action were brought against a host today there are significant legal impediments to a finding of liability. Such determination, at minimum, would require a decision of the Court of Appeal. ☞

<sup>1</sup> (2002), 217 D.L.R. (4<sup>th</sup>) 217 (Ont. Sup. Ct.)

<sup>2</sup> 71 O.R. (3d) 195 (C.A.)

<sup>3</sup> 2006 SCC 18 (released May 5, 2006)

<sup>4</sup> IBID, para 31

<sup>5</sup> IBID, para 42

**FIRM NEWS**

Congratulations to **Paul T. McEnery** who was awarded the **Student Nominated Award of Excellence as a Professor** by the Faculty of Law, English Common Law Program, University of Ottawa in March 2006. Mr. McEnery lectures in the area of real estate law.

Congratulations to **Jaye Hooper** on her recent election as a **Trustee to the County of Carleton Law Association**. This new trustee position was created for a lawyer practicing at the Ottawa Bar for less than seven years, and was heavily contested. Jaye has long provided a voice for young lawyers in our legal community. She has been involved in the Civil Bench & Bar Committee and was a member of the Young Lawyers Division of the Ontario Bar Association and was part of its executive for two years. ☞

**CASE UPDATE**

On April 20, 2006, the Supreme Court of Canada granted leave to hear the Appeal of *Herbison v. Lumbermans Mutual Casualty Company*.

This hearing will be the second occasion, in less than one year, that a civil matter involving significant insurance law issues will proceed before Canada's highest Court. The first was, of course, *Childs v. Desormeaux*, highlighted above.

The *Herbison* Appeal will be argued at the Supreme Court by the team of Mark Charron and Jaye Hooper. Mark was counsel at trial as well as before the Ontario Court of Appeal.

A tentative hearing date has been set for November 19, 2006. ☞

## Changes to Statutory Accident Benefit Schedule

The Provincial Government has yet again made changes to the Statutory Accident Benefits Schedule. As of March 1, 2006 the DAC (Designated Assessment Centre) Examination is a thing of the past. However, DAC assessments that were scheduled to take place after March 1, 2006 or that were requested prior to March 1, 2006 will continue to completion. The DAC system was widely criticized, both for its expense to the insurer and the length of time it took for a claimant to be assessed. While strict timelines have been imposed with the new system now that DACs have been eliminated, the insurer will still be required to have a medical assessment done before denying benefits.

An insurer who wishes to challenge the findings of a medical assessment or of an ongoing benefit must request a separate medical or health care examination from a health care provider of the insurer's choice. Section 42 assessments are now applicable to all benefits, including medical and rehabilitation benefits. These examinations must take place within 10 business days. If the claimant fails to attend at an insurer's examination there will be cost consequences assessed at arbitration in addition to having the benefit suspended or stopped during the period of non-attendance.

A claimant is entitled to a "rebuttal" to the insurer examination. This examination is to be completed by the health professional who submitted a treatment plan or disability certificate, or a member of the same health profession who conducted the Section 42 examination on behalf of the insurer, or any health care professional if two or more health care professionals conducted the Section 42 assessment. The material provided to the person doing the rebuttal is limited to what was before the insurer's health professional and is usually limited to a "paper" review rather than a complete medical examination. The rebuttal examination must be conducted and the report provided within 40 business days (80 for catastrophic impairment cases).

While the rebuttal is not binding on the insurer, the insurer must pay for the cost of it.

Benefits that are subject to the insurer's examination will continue to be paid while the insurer's examination is in progress and until the claimant is notified of the outcome. Also, the claimant will still require an assessment from his or her own health care provider when applying for benefits and the insurer is not required to pay for any expenses not submitted on a treatment plan.

The insurer can also request a new disability certificate that must be submitted within 15 days. The disability certificate can be no older than 10 days. Failure to submit the new certificate can result in benefits being terminated.

There is also the possibility of a "paper review" or an examination being conducted by review of medical documentation. This

process is mandatory when the examination is to determine eligibility for:

- ancillary goods and services in accordance with the pre-approved framework (PAF);
- an examination to determine whether the PAF applied to a medical or rehabilitation good and service;
- an examination to determine whether a good and service is supported by a treatment plan where it was previously rejected;
- an examination in response to an application for approval at an assessment; and
- an examination to determine whether or not a person has a brain impairment that results in a score of 9 or less on the Glasgow Coma Scale.

If the medical assessment and rebuttal do not resolve the dispute over the claimant's entitlement to the benefit, the parties will proceed directly to mediation under the auspices of the Financial Services Commission of Ontario (FSCO). If mediation fails, the claimant has the option of selecting arbitration through FSCO or proceeding to litigation.

The new changes to the legislation establish strict timelines. Applications for accident benefits must be accompanied by a disability certificate that is not more than 10 business days old. An insurer is not obligated to pay for benefits pre-dating the application. The insurer's response to the application must also be provided within 10 business days.

A new disability certificate can be requested from a claimant at any time and must be submitted within 15 days of completion to be effective.

Notice is required for a Section 42 examination, be it in person (5 days notice) or by a paper review of medicals (2 days notice). The insured then has 5 days to provide all relevant information/documents to the examiner. Once notice is given the timelines for assessment and reporting begin.

An insurer has to accept an application for determination of a catastrophic impairment within 30 days of receipt; there are 30 business days to complete the examination and a further 10 business days to provide a copy of the report.


Other relevant changes in the legislation include the possibility of pre-claim examinations undertaken with the consent of the claimant to assist the insurer in determining benefit eligibility. This examination can be conducted following an accident or when

**SABS - cont'd from page 3**

a claimant has been admitted to hospital or is being discharged from the hospital.

As well, insurer approval is not required for certain assessments or examinations from a claimant's health care provider, if the cost of such does not exceed \$200.00.

Perhaps more onerous for the insurance industry is the expansion of the Unfair or Deceptive Acts and Practices Regulation. The list of unfair and deceptive acts and practices has been expanded and the changes are primarily aimed at avoiding the delays of insurer examinations. They include:


- the failure or refusal of an insurer without reasonable cause to pay a claim for goods or services, where the cost of an assessment is in the time period prescribed for payment;
- a determination that a claimant is not entitled to a benefit before obtaining the insurer examination report as required;
- the making of a statement to adjust or settle a claim that the insurer knows or ought to know misrepresents or unfairly presents the findings of an insurer examination;
- the requirement by an insurer to attend an insurer examination conducted by a person the insurer knows or ought to know is not reasonably qualified for the purpose of examination;
- the requirement by an insurer that a claimant attend an insurer examination where the insurer knows or ought to know that it is not reasonably required under the Regulation. 

## Jennifer E. Jolly

Jennifer studied at Queen's University in 1986 and graduated with a Bachelor of Arts (Honours) in Political Studies. She went on to study International Relations at the University of British Columbia where she received her Masters of Arts. She pursued her legal education at Dalhousie University Law School.

After articling in Toronto, Jennifer was called to the Bar in 1993. The Ottawa native then returned home to develop a practice with a special focus on employment law. She complemented her private practice with a position in labour relations at NAV Canada and by serving as legal counsel to the Canada Industrial Relations Board.

Jennifer has advised and represented clients in many areas of practise, including Insurance Defense, Personal Injury Law, Labour and Employment Law, Family Law and Commercial Litigation. Having argued successfully at all Court levels in Ontario and before several Boards of Arbitration she is a skilled litigator.

Jennifer is committed to promoting continuing legal education and is a member of the organizing committee for the popular Civil Litigation Updated Conference held annually at Montebello. She has also taught the Ontario Bar Admission Course and is a frequent speaker at legal seminars. 

If you prefer to receive this publication by e-mail,  
please notify us at: [newsletter@williamsmcenery.com](mailto:newsletter@williamsmcenery.com).



**williams mcenery**  
barristers & solicitors

169 Gilmour Street  
Ottawa, Ontario K2P 0N8  
**Phone:** (613) 237-0520  
**Fax:** (613) 237-3163

**Eric R. Williams**  
[williams@williamsmcenery.com](mailto:williams@williamsmcenery.com)

**Paul T. McEnery**  
[pmcenery@williamsmcenery.com](mailto:pmcenery@williamsmcenery.com)

**Chris F. Reil**  
[creil@williamsmcenery.com](mailto:creil@williamsmcenery.com)

**Aaron E. Moscoe**  
[amoscoe@williamsmcenery.com](mailto:amoscoe@williamsmcenery.com)

**Mark O. Charron**  
[mcharron@williamsmcenery.com](mailto:mcharron@williamsmcenery.com)

**Paul W. Muirhead**  
[muirhead@williamsmcenery.com](mailto:muirhead@williamsmcenery.com)

**Jennifer E. Jolly**  
[jjolly@williamsmcenery.com](mailto:jjolly@williamsmcenery.com)

**Jaye E. Hooper**  
[hooper@williamsmcenery.com](mailto:hooper@williamsmcenery.com)

**Juliet L. Knapton**  
[jknapton@williamsmcenery.com](mailto:jknapton@williamsmcenery.com)

### Areas of Practice

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