

One More for The Road: Burgeoning Trends in Commercial Host Liability

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Commercial drinking establishments owe a duty of care to ensure that intoxicated patrons do not become a danger to themselves or others as a result of their intoxication. As the cornerstones of Canadian commercial host law, knowledge and foreseeability are the bases with which courts have placed liability upon establishments that fail to take affirmative action to prevent injury to patrons or to others with whom they may reasonably come into contact with; most prevalently—driving while impaired. The lounge is obligated to ensure intoxicated persons do not access their vehicles and potentially harm innocent bystanders.

How far our courts will extend these principles is less clear. The Supreme Court of Canada has decided that typical social host situations do not give rise to the same duty of care imposed on commercial hosts and will not result in liability on the host. A bar selling and serving alcohol owes a duty to the patron, yet a homeowner who hosts a party of guests bringing their own alcohol, does not. While these situations are clearly addressed, numerous middle-ground situations remain without clear precedents for guidance. For example, what of an employer hosting after work drinks for the staff? Are any duties owed to the employee who overindulges in the boardroom after work on Friday? More troubling for the general population may be the traditional open bar or host bar weddings. Are the bride and groom obligated to monitor their guests' alcoholic intake? Is the mandating of liability insurance the logical result? These middle-ground cases are starting to make their way through the courts. The logical next step if courts want to extend the duty is to situations involving off-sales and liquor retailers.

Although there are many potential situations, consider the following simple scenario. An intoxicated person drives up to the liquor store. The clerk can see the car pull in and the person get out and walk into the store. The obviously intoxicated individual purchases alcohol, re-enters their car, and drives away. Shortly thereafter, he or she is involved in a collision resulting in serious injuries to an innocent third party. For argument's sake, it is assumed he or she consumed some of the recently purchased alcohol in the vehicle. Does the liquor store face liability for sale of alcohol to an intoxicated person? What duty, if any, does the store owe to the patron and to innocent third parties? What factors will play into whether a duty is owed? And what will the standard of care be in these circumstances?

This situation in Canada is novel, and as such, much of the analysis herein will focus on fundamental principles of commercial host liability as it has evolved as well as the experiences of American states and the United Kingdom.

Northern Exposure

When the Supreme Court of Canada was faced with the social host liability issue in *Childs v. Desormeaux*, [2006] S.C.J. No. 18, Chief Justice McLachlin stated the duty imposed on commercial hosts did not necessarily translate to social hosts. At paragraphs 19 through 22, her Ladyship highlighted three key differences. The first was that the commercial host has an advantage over the social host in the ability to monitor alcohol consumption. They in fact have a special incentive to do so simply because the lounge needs to be paid for the drinks [para. 19].

Secondly, the sale and consumption of liquor is controlled by legislation in every province in Canada. The Court stated that “the sale of alcohol to the general public is understood as including attendant responsibilities to reduce the risk associated with that trade” [para. 20].

Finally, her ladyship drew attention to the obviously commercial nature of the commercial host-patron relationship, which sets it apart from social host contexts. At paragraph 22, she held that “[in] the cases of alcohol sales, however, it is clear that profit making is relevant. Unlike the host of a private party, commercial alcohol servers have an incentive not only to serve drinks, but to serve too many” [para.22].

Significantly, in her decision, Madam Justice McLachlin stated that:

A person who accepts an invitation to attend a private party does not park his autonomy at the door. The guest remains responsible for his or her conduct. Short of active implication in the creation or enhancement of the risk, a host is entitled to respect the autonomy of a guest [Para. 45].

One can surmise that autonomy does not play a larger role in commercial host situations because the creation or enhancement of the risk engendered through actively serving alcohol.

In contrast to the *Childs* decision is *Stewart v. Pettie*, [1995] 1 S.C.R. 131, the seminal decision regarding commercial host liability. The court found that not only do the purveyors of alcohol owe a duty to the intoxicated patrons; they also owe a duty to innocent third parties with whom the patrons may come into contact. This includes users of the highway and the patrons’ own passengers.

Justice Major in quoting the decision of Justice Laskin from the earlier decision of *Jordan House Ltd. v. Menow* (1973), 38 D.L.R. (3d) 105, states that “the common law assesses liability for negligence on the basis of a breach of a duty of care arising from a foreseeable and unreasonable risk of harm to one person created by the act or omission of another” [para. 34].

Further, at paragraph 36 Justice Major elegantly states what could be considered the essential element of commercial host liability in Canada:

Without a reasonably foreseeable risk of harm to [the patron] or a third party, the fact of over-serving [the patron] is an innocuous act. Therefore, liability on the part of [the establishment], if it is to be found, must be in their failure to take any affirmative action to prevent the reasonably foreseeable risk to [the plaintiff].

What constitutes reasonably foreseeable risk is a determination to be made based on the factual circumstances in each case. One key element, however, is the knowledge of the establishment (or its staff) of the patron's intoxication and potentially whether there is a risk of the patron driving. In *Stewart*, for example, the court found that it was reasonable to assume that since the intoxicated patron was with two sober women, it was not reasonably foreseeable that he would be driving. This may lay the foundation for the analysis of whether commercial hosts face liability in a traditional service scenario, but does not provide much guidance for the purposes of a liquor store's liability for selling to an intoxicated customer. A liquor store shares similarities to a traditional commercial host in that it is a profit driven relationship and that it is highly regulated by legislation.

In a liquor store, however, there is not the opportunity to monitor a patron's consumption over a period of time, nor is it mandated that a clerk at a liquor store be properly trained to detect signs of intoxication. The risk may be that expanding the sphere of liability to a liquor store may produce overly onerous requirements on individuals who may only have a few moments of contact with the patron. Is there sufficient proximity between the store and the patron to establish the duty of care in the first place? At a fundamental level the only difference between the two sellers of alcohol is that in a lounge, the patron must drink on the premises, whereas the liquor store mandates that they do not.

If a duty were to be found, what steps could possibly be taken by the clerk? One has to wonder whether simply not selling any more alcohol to the patron would meet the standard of care to prevent foreseeable injury. It is possible that the clerk may be obligated to refuse the sale or call the police, but it seems unreasonable for the clerk to demand the patron's keys or to ensure he is put in a cab.

Unfortunately, there is little judicial guidance with respect to this or similar fact scenarios. In *Plett v. Blackrabbit*, [2001] A.J. No. 1268, the defendant issued a third party notice to a local hotel from which he had purchased some off-sales (a case of beer and a bottle of whiskey). The hotel brought a summary dismissal application. The staff of the hotel provided evidence showing that the staff was not to sell alcohol to a customer who appeared intoxicated [paras. 30-31]. The court recognized that commercial hosts providing liquor owed a general duty of care to patrons and third parties but focused on whether there was evidence that the staff of the hotel were aware of the intoxicated state of the defendant. Justice Park in granting the dismissal of the claim against the hotel stated at paragraph 44:

However, what is striking is that there is no indication that Blackrabbit showed or demonstrated any signs of impairment to Bluebell's staff in the short time he was in that establishment. Further, there was no evidence that Blackrabbit advised any Bluebell staff that he was intending to drive after he left the establishment.

Notwithstanding the finding that there was no evidence of intoxication at the time the sale was made (there was much evidence of how much he had consumed, but the defendant's own evidence was that he was "alright" and "okay" and that was what the court relied upon), the learned Justice held that:

On the evidence presented any reasonable standard of care was clearly discharged by Bluebell on any duty of care owed. There was no evidence of any problematic conduct which was apparent or which should have been apparent to [the staff].

The court seems to suggest that the standard of care was met by doing nothing under the circumstances because the staff was not aware of the intoxicated state of the purchaser. Unfortunately the court did not discuss whether the duty of care should necessarily be imposed on a liquor store due to the inherent differences between a store and a lounge.

Furthermore, while not explicitly using the language in the analysis, the court focused on the staff's knowledge of the patron's state of intoxication to determine the standard of care. This essentially addresses the reasonable foreseeability of risk under the circumstances. Unfortunately the court does not delve into what the standard of care would be had the staff any knowledge of the defendant's state of intoxication and specifically what affirmative steps would be needed to discharge the duty by a retail seller of alcohol.

Due to the somewhat limited analysis, the case itself only provides minimal guidance with respect to general trends in liability for a liquor store. In lieu of more Canadian jurisprudence, other common law jurisdictions will be examined for guidance.

Across the Pond

The United Kingdom is fundamentally distinct from Canada in the judicial treatment of commercial host liability. In her article, "Alcohol Provider Liability in Canada and the United Kingdom: Legal and Cultural Influences", C.L.W.R., Vol. 33:2 (April 2004), Erika Chamberlain examines the historical development of commercial host liability in the two jurisdictions. At page 104, she states:

[The] courts of the United Kingdom are hesitant to impose alcohol-related liability of any kind, even where a patron or guest becomes visibly intoxicated. The courts suggest that adults are responsible for their own alcohol consumption, and that hosts should only become liable if they clearly assume responsibility for an intoxicated individual.

Research shows that the number of alcohol liability cases against purveyors is significantly less than in Canada, a fact not lost on Chamberlain. At page 117 she states:

Unlike their Canadian counterparts, plaintiffs' advocates in the United Kingdom have been given few signs that commercial or non-commercial host claims have any potential to succeed, so it is not surprising that such claims are rarely made. The UK courts have been reluctant to impose liability, even against commercial providers, unless the defendant has taken actions to assume responsibility for the intoxicated guest. This a much narrower basis for imposing a duty of care than the Canadian "foreseeable risk of harm" approach. The UK approach suggests that adults are responsible for their own alcohol consumption, and cannot look to others when their intoxication causes injury.

Chamberlain refers to the decision of *Munro v. Porthkerry Park Holiday Estates Ltd.* (summarized at (1984) 81 LSG 1368 (QB)) at page 117. The plaintiff was at the defendant's resort and proceeded to become intoxicated at a club. He was asked to leave after becoming boisterous and decided to climb over a chain-link fence. Unfortunately, he fell from a cliff and died.

Beldam J (as he then was) rejected this claim, finding that a duty did not arise merely from the fact that the defendant had sold the plaintiff a large amount of liquor. Rather, a duty would only be imposed if the commercial host knew that the patron was so intoxicated that he was incapable of taking reasonable care of himself – an element for which there was insufficient evidence in that case. Beldam J also stresses that a commercial host was "entitled to assume that the customer would regulate his own consumption and would not consume liquor in such quantity as to become incapable of taking care of himself"[footnotes omitted].

In *Barrett v. Ministry of Defense*, [1995] 3 All E.R. 87, a naval officer became so intoxicated that he passed out and asphyxiated on his own vomit. The court held (headnote):

[The] mere existence of regulatory or public duties does not of itself create a special relationship imposing a duty of care in law for the safety of others. The characteristic which distinguished those special relationships was the element of reliance, express or implied in the relationship, which the party to whom the duty was owed was entitled to place on the other party to make provision for his safety. New duties to take care for others should be developed incrementally and by analogy with established categories. It was neither justified nor reasonable to blame one adult for another adult's lack of self-control. No one was better placed to judge the amount which he could consume than the individual himself. Therefore the deceased was the only person responsible at law for his collapse...however, once the deceased had collapsed and was no longer capable of looking after himself, it was accepted that the defendant's care for him had been inadequate.

Both the *Munro* and *Barrett* cases were considered in the decision of *Joy v. Newell*, [2000] N.I. 91, where the plaintiff entered the defendant's premises already intoxicated, attempted to sit on a stool but fell off and severely injured himself. The court held that (headnote):

[A] positive duty to save someone from danger only arose where there had been an assumption of responsibility to ensure that person's safety. Despite it being a criminal offence for a licensee to serve alcohol to an obviously intoxicated customer, it was

unreasonable to assume that a licensee had assumed a positive duty on the basis that a customer could become so drunk that he would be unable to take care of himself. It had not been proved that either [of the defendants] knew the extent of [the plaintiff's] intoxication and expert evidence showed that the bar stool was stable so that it did not constitute an obvious danger...

The U.K. experience was also addressed by Julian Fulbrook in his article "Alcohol and Third Parties – "Dram Shop Liability" and Beyond", J.P.I. Law 2007, 3, 220-237. On page three of his work, he succinctly sums up the law:

So far in the UK there does not appear to have been a case on this "loss shifting" principle, of third party alcohol liability for a commercial vendor, for an employer, or for a social host. But such a possibility is certainly foreseeable, although several technical matters need to be analysed. Generally when harm is self-inflicted by a drunken claimant, then British judges are likely to hold that they are the 'author of their own misfortune.' It follows that no-one else is liable for harm resulting from this reckless conduct. Even if liability of some sort can be established against another person, perhaps on the principle of apportionment of blame, then drunkenness will inevitably open the possibility of arguing defences of *volenti non fit injuria* or contributory negligence.

The British jurisprudence suggests, and analysts such as Chamberlain and Fulbrook seem to agree, that the extension of commercial host liability in Britain is not as automatic as it appears to be in Canada. British courts focus on the elements of complete incapacity to care for one's own well-being before a duty arises on the host. Further, there must be an assumption of responsibility for the safety of an intoxicated plaintiff. There is little focus on the foreseeability of harm as in Canada. One could argue that commercial host cases bear similarities to the law regarding the liability of a rescuer in Canadian tort law.

Clearly there is a greater emphasis on individual autonomy under the British common law such that a drunken individual may not always look to the seller of spirits to reduce his or her own degree of culpability. This provokes speculation as to whether British theory should be expanded and adopted in other jurisdictions to cater towards individual responsibility rather than blame apportionment.

South of the Border

Often when there is a dearth of Canadian jurisprudence, our courts examine the experience of the United States. The sheer volume of litigation in the United States often means that a novel situation in Canada has American precedent. Unfortunately, in the area of commercial host liability, American Jurisprudence is only of limited use.

Simply stated, liability for commercial host, "Dram Shop Liability", is legislated. Some states recognize liability on the part of the liquor seller (though not all do) because of specific legislation.

In *Thomas vs. The Great Atlantic and Pacific Tea Company Inc.*, 233 F.3d 326, C.A.5 (Miss.), November 27, 2000 (NO. 99-60919), the Fifth Circuit Court of Appeals

reviewed a summary dismissal of the claim against the Sav-a-Center which had allegedly sold alcohol to an intoxicated person who later drove and caused a fatal collision.

The applicable legislation states (Footnote 3 of the judgment):

MISS. CODE ANN. § 67-1-53, which prohibits the sale of alcohol “to any person visibly or noticeably intoxicated.” Mississippi’s “dram shop” statutes do provide a safe harbor for licensed sellers of alcohol who legally sell alcoholic beverages to persons who, due to intoxication, cause injury, death, or property damage.

However, § 67-3-73. Liability limitations, states that:

(4) The limitation of liability provided by this section shall not apply to any person who causes or contributes to the consumption of alcoholic beverages by force or by falsely representing that a beverage contains no alcohol, or to any holder of an alcoholic beverage, beer or light wine permit, or any agent or employee of such holder when it is shown that the person making a purchase of an alcoholic beverage was at the time of such purchase visibly intoxicated.

Essentially, liability will flow to the seller if the sale was made to a visibly intoxicated person, and not otherwise.

The issue before the court was whether the evidence that the impaired driver had actually consumed the liquor purchased was sufficiently before the court to warrant further litigation. The court held (unnumbered paragraphs):

Mississippi’s “dram shop” act makes clear that the consumption of alcoholic beverages, and not the sale, service, or furnishing of such beverages, is the proximate cause of any injury inflicted by an intoxicated person upon himself or another person. Mississippi thus requires a showing that the intoxicated person actually consumed the alcoholic beverages before liability will attach to the seller of the beverages.

The appeal was granted, the summary dismissal was reversed and the case remanded for further proceedings.

In 2009, the Superior Court of Connecticut considered the similar issue in *Welton v. Ferrara*, 47 Conn. L. Rptr. 655. The General Statutes § 30-102 states:

If any person, by such person or such person's agent, sells any alcoholic liquor to an intoxicated person, and such purchaser, in consequence of such intoxication, thereafter injures the person or property of another, such seller shall pay just damages to the person injured, up to the amount of two hundred fifty thousand dollars, or to persons injured in consequence of such intoxication up to an aggregate amount of two hundred fifty thousand dollars, to be recovered in an action under this section, provided the aggrieved person or persons shall give written notice to such seller within sixty days of the occurrence of such injury to person or property of such person's or persons' intention to bring an action under this section.

The court, notwithstanding the above, considered a summary dismissal application for count nine of the motion which alleged negligence other than in the furnishing of alcohol against the establishment. Essentially, the discussion turned on whether a general duty of care was owed to the intoxicated patron in addition to the liability imposed by the legislation.

The court held at *7:

Count nine of the plaintiffs' complaint alleges "negligence other than in furnishing alcohol." As previously discussed, if societal expectations foster a duty of care between these two parties, it has to arise because of a special relationship. If the furnishing of alcohol is not to be considered in this count, the court must consider possible alternative relationships. Essentially, Ferrara was a patron at a place of business that served alcohol. Although driving while intoxicated is a serious problem in our society and has received much attention over the past decade, the Connecticut courts have never found that society expects such a business to restrain intoxicated patrons or provide alternative means of transportation for them upon leaving their property.

And at *8:

To find that society supports the broad expectation that the plaintiff's articulate would be to say that if an intoxicated person wandered into delicatessen or a grocery store, the owner would be expected to prevent the patron from leaving the store. Alternatively, a clothing store would be expected to call a taxi for a customer who appeared inebriated, rather than letting that customer leave the store on his own accord. To the contrary, as these simple hypothetical scenarios illustrate, without the service of alcohol, our society has no expectation that an occupier of land must affirmatively act to prevent an intoxicated invitee from leaving its premises and driving.

In general, there is no duty imposed based on the commercial host-patron relationship similar to that in Canada. The recent decision confirms that liability does not arise from a breach of a duty to supervise or monitor without a special relationship that places an aura of custody or control on the defendant. However, liability attaches in a stricter sense to the vendor when the sale is made to an intoxicated person (and presumably consumed by them).

It is interesting that commercial host liability exists in a legislated form rather than a common law negligence form. This is a marked difference from Canadian law, notwithstanding legislative provisions such as the following from Alberta's *Gaming and Liquor Act*, R.S.A. 2000, c. G-1:

Duty to intoxicated person
75.1 No liquor licensee may
(a) sell or provide liquor in the licensed premises to a person apparently intoxicated by liquor or a drug...

The existence of legislative controls suggests that where individual autonomy may be affected, the forum for instituting such measures lay with the legislatures rather than the

courts. However, the fact that such legislation exists at all is striking considering the American preference of autonomy over state interference. Regardless, the American experience provides a middle ground between the United Kingdom and Canada as to how liability is established against the commercial host.

Last Call - Conclusions

Courts in the UK have been reluctant to impose blame upon commercial hosts. Individuals are judged as best suited to monitor their own alcohol intake and their own proclivities. Until hosts assume responsibility for the care of patrons (upon them being unable to care for themselves), there will be no liability borne by the host for the inebriated patron's unfortunate actions. Preference will be given to individuals' autonomy – they are the authors of their own misfortunes. Individuals are free to act as they will and it is only in rare circumstances that a patron can put the blame on another for his or her own actions.

The American experience demonstrates that traditional common law does not recognize negligence on the host for failing to take positive steps to prevent injury by or to an intoxicated patron. Where liability does exist, it is legislated. Autonomy reigns supreme, though a vendor can bear some blame where it provides a customer with alcohol knowing the customer is already inebriated. Elected officials, rather than the judiciary, use laws to create the threat of liability, in an attempt to deter public problems associated with alcohol.

Canadian courts have recognized that where a commercial host serves a patron and there exists a foreseeable risk of harm due the patron's intoxication (such as potential for driving), there is an onus on the host to take positive steps to prevent harm to the patron and to innocent third parties. Knowledge is the key element in determining whether there is a foreseeable risk. However, liability in general comes from interpretation of common law negligence principles. Notwithstanding liquor license laws that prevent sale to intoxicated individuals, liability comes from the common law rather than legislation.

Returning to the factual scenario mentioned above involving the liquor store: British courts would likely hold that there is no duty to the customer without an assumption of responsibility over him. A visibly impaired person who enters a store is likely not incapacitated, nor does he or she expect the custody and care of the shopkeeper. Liability would likely be borne by the individual alone (though the store may have violated the terms of its license by selling to an impaired customer). It is unlikely the store clerk will be under a duty to take positive steps to prevent the customer from driving (though one may hope he feels a moral obligation to do so).

American law is clear. Based on the applicable state's law, liability may fall on the store for selling to a visibly intoxicated person. The plaintiff may need to show that consumption of that alcohol actually occurred and the extent of liability is determined by the statute. There is no general duty owed by the clerk and to the customer, as there is no special relationship recognized.

Canadian law recognizes a special relationship between a commercial host and a customer. The features of this have been discussed by the Supreme Court of Canada in *Childs*, including how it differs from a social host. However, not all these features transfer to a liquor store where the contact with the customer is minimal; the training received by the staff is likely different and there is no real ability to monitor the consumption of the liquor. There is no legislated liability on the vendor for selling to an intoxicated individual, though the duty to the patron is legislated. Does the store clerk owe a duty to the customer? What is the standard of care if such a duty exists? Unfortunately, without judicial consideration there is no clear answer.

In explicating unprecedented scenarios in commercial host liability, more questions arise than are answered. Common sense suggests that the extension of commercial host liability to store clerks would be an unreasonable burden upon those who have such a limited ability to act and react to such a variable situation. The limitless permutations make for potentially unclear scenarios. For example, what if the individual does not buy anything, but simply leaves on another drunken errand. Though recognition may widen the pool of recovery for an injured plaintiff, the repercussions for individual responsibility seem to outweigh the benefits. To force a store with a limited relationship to an intoxicated individual to be partially responsible for the outcomes likely seems an unreasonable extension of commercial host liability. At what point do individuals face personal responsibility for their actions? The intent of negligence law is to hold those actually culpable, liable for their actions. Extending liability further may signal a shift towards simply increasing the pool of insurance as much as possible, which may skew and damage the pith of tort law.

This is not to say that a store in such a scenario is free from culpability. Rather, if liability should attach, it should perhaps be legislated such as in the American sphere, rather than imposed through judicial extension. Impaired driving and other alcohol related issues are social problems that perhaps require a social solution. Though the deterrence effect of liability may be great, who is responsible for its origination? Furthermore, the core tension must be addressed: if individual responsibility for one's actions is to be reduced, should it be done through judge made law? One hopes that the comments made in *Childs* that one "does not park his autonomy at the door" applies also to the liquor store.