



**Bennett
Jones**^{LLP}

Guides



*Liability for Injuries Sustained by Employees, Clients or
Others as a Result of Alcohol Intoxication*

This booklet is intended as a basic guide for persons carrying on business in Canada to the potential for personal and corporate liability for injuries sustained by employees, clients and other persons as a result of alcohol intoxication. This guide should not be regarded as a substitute for specific legal advice and persons requiring such advice should consult legal counsel. The lawyers at Bennett Jones LLP would be pleased to provide such advice.

Sixth Edition September 2007

Host Liability

Introduction

The provision of alcoholic beverages by businesses to employees or guests at social gatherings is commonplace. However, there is a significant potential for liability associated with such activities. Although the provision of alcoholic beverages may appear innocuous, the courts have held that businesses and others acting as hosts may be responsible for injuries sustained by or caused by employees or guests who become impaired. This evolving area of law is “host liability.”

Employer, Social and Commercial Hosts

Courts have imposed liability on employers where they provided alcohol to employees, had knowledge that employees were intoxicated, and where the employer failed to take sufficient steps to prevent the employees from driving. However, employers are not likely liable where the employer did not provide the alcohol, had no knowledge the employee was intoxicated, and the accident occurred after the employee had arrived home safely.

A casual or social host is subject to the least stringent responsibilities. These are situations reflected in house parties and social gatherings where, generally, the host provides the alcohol consumed gratuitously and exerts no control over the activities of the guests. Historically, the courts have been reluctant to award damages against social hosts where some attempts had been made by the host to prevent an intoxicated individual from driving. However, many Canadian courts had adopted the American position that social hosts may be held liable for injuries suffered by a third party resulting from the negligent operation of a motor vehicle caused by intoxication when the social host allowed a guest to drive, knowing that the individual was intoxicated. Alberta trial courts have accepted this basis for liability, but have to date found the social host not liable on the facts (*Wince v. Ball*, 1996; *Calliou Estate v. Calliou Estate*, 2002).

The Supreme Court of Canada has narrowed the circumstances in which social host liability may be imposed, in its 2006 decision in *Childs v. Desormeaux*. The social hosts in the Childs case held a “B.Y.O.B.” New Year’s Eve party; they did not provide nor serve alcohol to their guests. The defendant Desormeaux drank at least 12 beers over 2½ hours; he was known for his heavy drinking and had previous impaired driving convictions. One host walked him to his car. Desormeaux drove away, and caused an accident shortly afterwards, colliding head-on with another vehicle. Desormeaux and his passengers were injured. One person in the other car was killed and the others were seriously injured, including Zoe Childs who became paralyzed. Childs sued the social hosts.

The Supreme Court of Canada found it was not reasonably foreseeable that Ms. Childs would be injured if the hosts failed to prevent Desormeaux from driving. While the Court found no duty of care on these facts, it left the door open for cases where a social host was aware that a guest who was driving home was intoxicated, but continued to serve him/her alcohol. Even on those facts, the Court indicated policy implications may still deny liability. The Court emphasized the difference between a social setting and a commercial one, where the host gains financially from serving alcohol.

A commercial host, such as a pub or a restaurant, generally has a greater duty to protect intoxicated individuals and the public, based on a close proximity or relationship between the host and the customer. If a commercial host has over-served a customer and knew or should have known that the customer was impaired, and knew that the individual was likely to drive while intoxicated, and if injury or damage to the intoxicated individual or the general public is foreseeable, then liability attaches if an accident occurs due to intoxication. However, this duty is not engaged solely in relation to drinking and driving. Any injury that results from intoxication and was foreseeable may result in liability for the alcohol provider. Thus, commercial hosts have a positive duty to protect customers and the public by taking all reasonable steps

to prevent over-consumption of alcoholic beverages and to prevent foreseeable harm.

Developing law suggests that a business host's duty to its employees may be even higher than a commercial host's duty to its customers, due to the special "relationship" between employer and employee. There is much less certainty as to circumstances in which a business host would owe any duty to the general public. The factors that may influence the extent of the duty owed by a business include whether:

- the business provides the alcohol;
- the business is aware of the employee's or guest's intoxication.

Legal Principles

For employer/business host liability cases, the injured party must prove that:

- *the employer owed him/her a duty to take care* – (an employer owes an employee a safe workplace environment; it is not yet clear in which circumstances an employer owes a duty to those who might be injured by an intoxicated employee; by supplying alcohol the business may be found to have created the risk);
- *the employer failed in its duty of care* – eg. it did not meet the standard of care (introducing alcohol to a workplace adds an element of risk; did the employer do everything it should have to prevent harm? Standard measures are to monitor consumption and to take "reasonable steps" to prevent foreseeable harm if it is known, or should be known, that an employee or guest is intoxicated);
- *there is a causal connection between the breach of the standard and the injuries suffered* – (did the employer's actions or failure to act "cause" the injuries, and could the employer have prevented the injury?);

- *the plaintiff suffered damages that were reasonably foreseeable* – (grave personal injury is a reasonably foreseeable result of intoxication, particularly if driving is also involved; this also extends to assaults or falling down stairs or reckless behaviour such as diving off a dock into shallow water).

The Ontario Court of Appeal decision in *John v. Flynn* (2001) outlines factors that can exonerate employers from liability in the event an intoxicated employee injures himself/herself or a third party. For eight hours prior to his shift, and during his shift, Flynn drank steadily. Despite his prodigious intoxication, Flynn managed to leave work and arrive home safely where he continued to drink. It was only when he was driving to the home of a friend that he was involved in a collision with another person, John. Knowing Flynn had a drinking problem, the trial jury held that the employer, Eaton Yale, failed to protect a foreseeable third party by preventing Flynn from driving. On appeal, this finding was overturned.

The Court of Appeal held that Eaton Yale was not liable for the injuries suffered by John because no duty of care was owed by the employer to the general public, including John. None of Flynn's superiors knew he had been drinking on the night in question; the employer did not provide the alcohol consumed by Flynn; Flynn exhibited no outward signs of intoxication; nor did the employer condone driving while intoxicated. In fact, the employer had a policy that any employee who appeared intoxicated at work was immediately sent home in a taxi and was potentially subject to disciplinary action. Based on the facts and the Court of Appeal's unwillingness to extend an employer's duty of care to encompass John, Eaton Yale was exonerated of any liability. An application for leave to appeal was dismissed by the Supreme Court of Canada.

The Supreme Court of Canada's decision in *Chibils v. Desormeaux* (2006) suggests that where an employer or business host does provide alcohol to guests, is aware that the particular guest has been drinking,

and it is reasonably foreseeable that the intoxicated guest may drive, the duty of care of the employer or business host may be expanded to include the general public, such as users of the road. This is particularly so where there is financial gain for the host, even if it is indirect.

The British Columbia case, *Jacobsen v. Nike Canada Ltd.* (1996), was the first case in Canada to apply host liability within the context of the work environment. While at a worksite, the employer provided alcoholic beverages to its employees, including Jacobsen. Subsequently, Jacobsen went to a local bar and continued to drink. On his way home, he was involved in a serious car accident that left him a quadriplegic. Jacobsen sued his employer. The Court held that, although the employee voluntarily chose to drink to the point of intoxication, the employer failed to provide a safe workplace by introducing alcohol at work. Jacobsen was awarded \$2.7 million in compensation, of which amount the employer was responsible for 75 per cent.

The Ontario case *Hunt (Litigation guardian of) v. Sutton Group Incentive Realty Inc.* (2001) is another example of employer host liability. An employee, Hunt, had continued to drink after leaving an office Christmas party and was seriously injured in a motor vehicle accident. The employer had hosted the festivities during office hours, and Hunt continued to perform her usual duties throughout the celebration. The Court found the employer ought to have been aware of the degree of Hunt's intoxication. By not making sufficient attempts to see that Hunt got home safely, the employer was partly liable for her damages, which were assessed at \$1 million. The Ontario Court of Appeal ordered a new trial in the case, on grounds relating to the trial judge's discharge of the jury (*Hunt v. Sutton*, 2002). However, that decision did not cast doubt on the possibility of employers being found liable for injuries due to intoxication of employees, in appropriate circumstances.

In *Gartner v. 520631 Alberta Ltd.* (Alta. Q.B., 2005), an employer was found not liable for injuries to its employee who, contrary to the *Employment Standards Code*, was required to work 19 hours. Following work, the employee drank beer while as a passenger and at another

employee's home. He then drove his own vehicle and was injured in an accident caused by his intoxication. The Court found that while the employer had breached the Code, there was no causation between the length of workday and the injuries he sustained. No alcohol was consumed during the workday, and the employee left work sober and alert. A further factor was that the employee refused an opportunity for a ride to his home and chose instead to drive his own vehicle.

Responsibility of the Corporation

A business has a high duty to provide a safe workplace. The legal expression of this duty is that a corporation, through its management, must conduct itself in a manner that conforms with what is reasonably expected of a corporation in like circumstances so as to not cause injury to employees, guests or others. As such, when alcoholic beverages are served by a business, the host has an obligation to ensure that employees or guests are not served so much alcohol that they become a danger to themselves or to others.

An attentive business host understands that a reasonably foreseeable risk entails more than the concern that an intoxicated employee will drive. A foreseeable risk encompasses any activity where alcohol impairment could potentially result in harm to an employee, a guest or a third party. Such dangers include: injuries suffered by intoxicated employees or clients at home or at the social gathering, directly resulting from their level of intoxication; vandalism or mischievous behaviour; or, as in the Alberta case of *Clarke v. Connell*, an assault. While the most significant risk may be driving while impaired, the host needs to be alert to other dangers presented by a person being intoxicated. It may be simply trying to walk home lightly dressed on a cold winter night.

Corporate responsibility towards employees, guests and others arises as soon as a business provides alcoholic beverages or encourages the consumption of alcohol while the employee or client is under company

“control.” There are, of course, situations where a corporation will have greater responsibility because of the amount of control it assumes over an employee or a client. By removing workplace gatherings from the workplace and employing a commercial host to take responsibility for the provision of alcohol, the employer largely removes itself from the position of host (although not from all responsibility). Socializing off-site recognizes the employer’s duty to not introduce conditions into the workplace that could facilitate reasonably foreseeable harm. However, an employer must still be prudent. For example, in selecting a commercial host and location where driving becomes a necessity, another foreseeable risk factor is introduced.

If a business facilitates any of the following, it may be held responsible for injuries to employees, guests or members of the general public, depending on all the facts of the case:

- the employer provided the alcohol responsible for an employee’s impairment and/or the employer is aware of an employee’s level of intoxication;
- the employer condoned drinking and driving by failing to take “reasonable steps” to prevent an intoxicated employee from getting behind the wheel (this is especially true in cases where it is likely that employees, guests or others will be leaving by motor vehicle);
- the directors and officers of the corporation drank alcoholic beverages with employees or guests and thus know, or ought to know, if someone is intoxicated and poses a danger to himself/herself or others;
- the business has not initiated a policy addressing its position on drinking in relation to the workplace and to workplace activities;
- the business creates an environment that encourages alcohol drinking “games;”
- the business knowingly permits or condones consumption of alcoholic beverages at work even though it does not provide the beverages.

Corporate Standard of Care

The obligation at law is to adhere to a standard of conduct measured by what reasonable persons would do in like circumstances to ensure that the safety of employees, guests or others is not compromised. This is, of course, a legal fiction. The courts do not take a random survey of common corporate or social practices—they impose their own perception based on the evidence presented of what is reasonable in like circumstances. In situations when alcoholic beverages are served, a business or other host is required to implement policies and procedures that enable it to properly monitor the alcohol consumption of employees and guests, to make reasonable assumptions from the amount of alcohol that is consumed and to take positive steps to prevent an intoxicated person from harming himself/herself or others.

Although it is difficult to monitor the consumption of every employee and guest at a function, it is a legal duty. Further, a business is at least expected to take reasonable affirmative steps to prevent an intoxicated employee or guest from, for example, driving a motor vehicle where it knows, or should know, that the employee or client is likely to do so. As host, the employer is subject to a heavy burden to keep an eye on obviously impaired employees and to take all “reasonable steps” to protect the individuals from harming themselves or others by driving in an inebriated state or other conduct. Such “reasonable steps” include:

- refusing to continue serving intoxicated employees or guests;
- providing alternative means of transportation or designated drivers;
- providing accommodations for intoxicated guests;
- confiscating the vehicle keys of an intoxicated individual;
- calling local police if none of the above options is effective.

A business organization also cannot wash its hands of responsibility by intentionally structuring the environment so as to make it impossible to know whether intervention is necessary. In *Gouge v.*

Three Top Investment Holdings Inc. (1995), the Court held that a “cash bar” effectively deprives a host of a means of preventing over-service. In eliminating the opportunity to monitor a guest’s level of alcohol consumption, the Court found the host to be partially liable for any injuries caused, whether to the guest or a third party, as a result of a guest’s intoxication.

However, a business organization may delegate the responsibility of monitoring consumption to an independent commercial alcohol provider, thereby minimizing its exposure to potential liability. Even then one must take reasonable steps in selecting the commercial host so that the latter will not over-serve alcoholic beverages and will take appropriate steps if someone becomes intoxicated.

A host’s primary responsibility is to monitor the alcohol consumption of guests and, where employees or guests become intoxicated, to take all reasonable steps to ensure that inebriated individuals and third parties are not at risk of foreseeable harm. If a host is aware that an employee or guest is intoxicated, it may be enough to ensure that a sober companion will take responsibility for the individual’s safe transport home. By ensuring safe transport, the host protects itself against liability much more effectively than by assuming safe transport.

Management Responsibility

Directors, as the guiding minds of corporations, must ensure the corporation has adopted and implemented policies and measures designed to preclude employees or clients from being served so much alcohol they become a danger to themselves or to others. If a director has not fulfilled his or her responsibilities toward an employee or a client, a court might disregard the corporate structure and hold a director personally responsible for the injuries sustained by an employee, client or other persons, depending upon his or her level of involvement, or lack thereof, in the decision-making process and personal knowledge with regard to the social gathering.

Although officers are not necessarily responsible for formulating and implementing corporate policies and procedures that ensure the safety of employees or other persons, they too may be held personally responsible for injuries sustained by employees or other persons in cases where they failed to fulfill their responsibilities.

The fact that a director or officer is not personally involved in the function serving alcoholic beverages does not necessarily absolve him or her of responsibility. A director or officer is generally entitled to delegate his or her responsibilities; however, potential liability may remain if the delegation is not made with due care and to competent personnel who will ensure that the employees or clients do not become a danger to themselves or to others.

The senior management directly responsible for the organization of a social function are at the greatest risk for individual liability, on the same basis as outlined above. The corporate veil is not a shield from liability.

Financial Responsibility

If a corporation or its directors, officers or managers are found responsible for the injuries sustained by an employee, client or another person, they will be obliged to compensate the injured person for “special” and “general” damages.

In the case of “special” damages, the injured person will be entitled to claim from the corporation, or individual(s), found responsible for some of the expenses incurred prior to the time of trial. This may include such things as medical and travel expenses.

“General” damages are intended to compensate for future financial losses and expenses, including such things as the loss of enjoyment of life, loss of future earnings and future medical costs.

The sum of both “general” damages and “special” damages may result in a corporation or individual, having to pay large sums of money. In a British Columbia case (*Jacobsen v. Nike*, 1996), the award was \$2.7 million and the accident only involved one person.

Workers’ Compensation

A company which contributes to WCB cannot assume it is safe from civil liability if an employee is injured as a result of drinking at a corporate social gathering. Although the legislation precludes an employee from suing an employer if WCB benefits are assessed, such an action is only precluded where the injury results during the “course of employment.” Because drinking and driving are not usually aspects of an employee’s job, the statutory bar may not apply, and it could be open for an employee to seek civil damages.

Furthermore, WCB provisions do not prevent claims where a third party is injured as a result of an employer providing alcohol to an employee and failing to discharge its duty of care.

Suggested Measures

While the following is not an exhaustive list of possible options available to a corporation or a director in avoiding liability, it is intended to provide helpful suggestions.

A business can avoid responsibility by refusing to provide alcoholic beverages at its social gatherings. Many businesses have recently taken this approach. However, in a social climate where alcohol may be seen as an integral part of doing business, this option may be impractical.

The two major responsibilities of a host are:

- (1) to avoid over-consumption of alcohol by guests and

- (2) to take steps to ensure guests arrive home safely if they become intoxicated.

Should a corporation or other business decide to provide alcoholic beverages, it must monitor and limit the levels of consumption by employees and guests. This requires that the consumption of each person attending the social gathering be monitored, not just the general consumption patterns of the group. However, monitoring consumption is difficult. Moreover, individual alcohol tolerance levels vary and what may appear to be reasonable consumption for one will not be reasonable for another.

A host must also dissuade an intoxicated person from exposing himself/herself and others to danger, such as driving a motor vehicle. However, this too raises practical problems. Although it is difficult to be definitive as to what is a reasonable course of action in dissuading a person from driving a motor vehicle, the following are some considerations:

- provide taxi vouchers to all employees or guests at the start of the function;
- get friends of the person to intervene, to offer a ride or persuade the person not to drive;
- have staff available to drive the person home in his or her own car, or engage a company that provides this service;
- have the person wait until the effects of the alcohol wear off;
- take the keys to the motor vehicle away from the person until he or she is sober;
- as a last resort, if the person insists on driving a motor vehicle, advise them that you will call the local police—and make the call.

Similar considerations apply to other dangers, such as an intoxicated person setting out to walk home lightly dressed on a cold winter night.

Adopt Policies and Procedures

Drafting a business policy and procedure is an important exercise because it ensures that management and employees of the corporation are aware of the expected standard of conduct and the consequences of failing to meet that standard. The application of a standard policy will also serve to reduce potential liability; however, it must be consistently applied and made known to all employees. The following is a list of some of the provisions that should be considered for a corporate policy directive:

- structure social events so drinking is limited (eg. provide two drink tickets per guest, limit the hours the bar is open and close the bar one or two hours before the event ends);
- provide non-alcoholic beverages and food;
- host events that have entertainment or activities as the focus, with drinking as incidental (e.g. theatre or sports events);
- strictly prohibit all games involving alcoholic beverages at social gatherings;
- adopt zero tolerance regarding the consumption of alcohol as part of the conditions of the workplace (there may be situations, for example, where employees of the corporation make drinking alcoholic beverages an accepted standard of conduct, such as Friday lunch sessions; a policy directive of this nature should dissuade this type of behaviour pattern);
- strictly prohibit drinking alcoholic beverages at the workplace;
- provide taxi vouchers to all employees and guests that attend company-sponsored social gatherings where alcohol is provided (in *Jacobsen v. Nike*, the Court held that a policy of providing taxi vouchers “may” satisfy a corporation’s obligation towards its employees or others and that such a policy may do away with the necessity of having to monitor alcoholic consumption— monitoring, though this is still recommended);
- put a “designated driver” program in place prior to hosting a social gathering;

- advise employees in an information circular prior to all social gatherings that overdrinking is not condoned, that drinking and driving is dangerous and is to be avoided and alert employees to the necessity of making alternate travel arrangements;
- expect all directors, officers and employees to consume in moderation when entertaining company clients (this sensitizes everyone to the need to drink alcoholic beverages in moderation when entertaining for company purposes);
- do not make social events for employees mandatory (attendance should be voluntary).

Devising policies and procedures that are effective also requires the corporation to follow through on its policies. Directors, officers or employees who do not comply with the expected standard of behaviour should be subject to sanctions. The corporation must adhere to the policy directive if it is to have any value.

Insurance

Most businesses maintain some form of liability insurance that will provide coverage for injuries sustained by employees or guests; however, some policies exclude activities conducted outside the workplace or activities conducted outside the scope of employment. Accordingly, before hosting a social function at which alcoholic beverages will be served, a review of the terms of the insurance policy and its exclusions is advised to ensure adequate coverage in the event that claims are made.

Common Questions

Is a business responsible for injuries caused to third parties by an intoxicated employee or guest that is under its control?

- A business may be held responsible to a third party injured by an intoxicated employee or guest who was under its control if it was reasonably foreseeable that the injured party would be endangered by the intoxicated employee or guest. However, the corporate host must know, or ought to know, that the employee or guest was intoxicated and could pose a danger in order for a duty of care to arise.

Is a business responsible for the actions of an intoxicated employee who drinks alcoholic beverages and becomes intoxicated outside the workplace or on his or her own spare time?

- A business that knowingly encourages an employee to drink outside the workplace may be held responsible for the injuries sustained by both the employee and third parties.

Is a business responsible for the injuries sustained by an intoxicated employee, guest or third party if it has simply refused to continue to provide alcoholic beverages once the person was visibly intoxicated?

- Responsibility does not stop there. If alcoholic beverages are served at a corporately-hosted function, the business has a duty to ensure that an employee or guest does not pose a threat to himself/herself or to any other person. This duty requires that reasonable affirmative steps be taken to ensure intoxicated employees or guests are prevented from injuring themselves or others.

Is a business responsible for the injuries sustained by the intoxicated person and others in cases where the intoxicated employee or guest leaves a social gathering with a sober companion?

- Provided there is no reason to expect a sober companion will not assist, there should be no further responsibility. In *Stewart v. Pettie*, the Supreme Court of Canada held that it is reasonable for even a commercial host to assume that a sober companion will take responsibility for the safe transportation of an intoxicated person.

To what sort of social gatherings does corporate responsibility extend?

- A business organization may be held responsible for injuries sustained by an intoxicated person or others in cases where it hosts a social gathering. Accordingly, corporate responsibility may arise in the context of such functions as dinner parties, lunches or company parties.

Closing Note

While the foregoing is couched in terms of what might be done to avoid liability, the objective of this guide, as is that of the courts in formulating these principles, is to avoid as far as is reasonably possible a motor vehicle accident or any other incident occurring as a result of an employee's or other guest's intoxication. The potentially tragic consequences of such accidents affect the injured persons and their families as well as anyone associated with the function where the drinking began. Avoiding such personal losses, and not just the legal responsibilities for those losses, is imperative for the business organization, its employees and the general public.



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