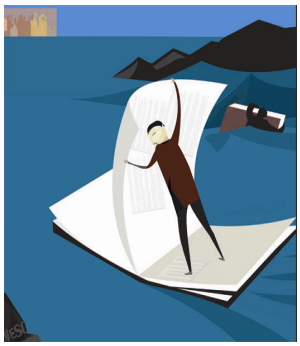

RECENT DECISIONS EXPAND LIABILITY FOR COMMERCIAL HOSTS

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I. INTRODUCTION

It is now well-settled law that a duty of care exists between commercial hosts which serve alcohol and their patrons who consume it. This duty of care requires hosts to take steps to ensure that patrons who consume alcohol do not injure themselves or other patrons. The legal duty originates both from provincial legislation and in common law. The two most important pieces of legislation are:

i. *The Liquor Control and Licensing Act*, which establishes a comprehensive scheme for regulating the sale and service of alcohol in licensed establishments. The Act requires licensed establishments to control the activities that take place in their establishments, by prohibiting gambling, violence and disorderly conduct. The Act also requires establishments to obtain Responsible Beverage Service certification for all licensees and managers and certain servers. The Act also requires establishments to refuse entry to minors and to ask intoxicated patrons to leave; and

ii. *The Occupier's Liability Act*, which requires all hosts, regardless of whether or not they serve alcohol, to take reasonable care to ensure that people are safe while they are at the establishment. This duty has been particularly recognized as arising from the presence of intoxicated persons who constitute a danger to the establishment's guests.

The duty of care imposed on commercial hosts also has it sources from the common law principles of negligence, which requires all persons to take reasonable steps to prevent injury to others where risk of harm is reasonably foreseeable. In *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239, the Supreme Court of Canada recognized that a tavern owner had a legal duty to protect intoxicated persons from injuries that they might suffer on or off its premises. In determining whether or not a commercial host has discharged its duty, the Court will often consider whether or not the host has complied with the *Liquor Control and Licensing Act*. Since identifying the existence of a duty, Courts have held commercial hosts liable for a variety of conduct and in a variety of different circumstances, for example:

- Bars have a duty to prevent patrons from becoming intoxicated [see *Schmidt v. Sharpe* (1983), 27 C.C.L.T. 1 (Ont. H.C.)]

- Bar staff have a legal duty to eject intoxicated patrons [see *Lehnert v. Nelson* (1947), 2 W.W.R. 25 (B.C.S.C.)]

- Establishments have a duty to monitor the behaviour of intoxicated patrons to prevent dangerous activities [see *Jacobson v. Kinsmen Club of Nanaimo* (1976), 71 D.L.R. (3d) 227 (B.C.S.C.)]

II. DUTY TO PREVENT INTOXICATED PATRONS FROM DRIVING

The duty of care owed by commercial hosts is not confined to ensuring the safety of patrons while they are in the host's establishment. The Courts have explained that this duty also requires hosts to take steps to prevent patrons from driving after they have been drinking. The extension of the duty of care beyond ensuring the safety of patrons and others inside a drinking establishment to ensuring the safety of patrons and others after the patron has left the premises was explained by the Supreme Court of Canada in *Stewart v. Pettie,* [1995] 1 S.C.R. 131:

> "It is a logical step to move from finding that a duty of care is owed to patrons of the bar to finding that a duty is also owed to third parties who might reasonably be expected to come into contact with the patron, and to whom the patron may pose some risk. It is clear that a bar owes a duty of care to patrons, and as a result, may be required to prevent an intoxicated patron from driving where it is apparent that he intends to drive. Equally such a duty is owed, in that situation, to third parties who may be using the highways. In fact, it is the same problem which created the risk to the third parties as creates the risk to the patron. If the patron drives while intoxicated and is involved in an accident, it is only chance which results in the patron being injured rather than a third party. The risk to third parties from the patron's intoxicated driving is real and foreseeable."

Because of the potential for serious injuries in motor vehicle accidents, the duty to prevent intoxicated patrons from driving presents significant potential liability for commercial hosts, and tremendous risk for their insurers.

The Courts have said that, depending on the circumstances, the steps required to discharge this duty, can include one or more of the following:

- making inquiries as to how the patron intended to get home;
- confiscating the patron's car keys;
- arranging a ride home for the patron with a taxi cab, a friend, family member or sober patron; and
- calling the police

III. RECENT DECISIONS

Two recent decisions of the Supreme Court of British Columbia in this area will be of interest to, and a concern for commercial hosts and their liability insurers.

The first decision, *Holton v. MacKinnon,* considers how far the duty imposed on hosts extends. It says that the commercial host's duty does not necessarily end when the intoxicated patron arrives safely at their home. The second decision, *Laface v. McWilliams,* illustrates the extent of liability faced by commercial hosts that fail to take appropriate steps to prevent intoxicated patrons from driving.

HOW FAR DOES THE DUTY EXTEND?

***Holton v. MacKinnon* 2005 BCSC 41** (January 14, 2005)

The Plaintiff, Thomas Holton, was a 30 year-old man, who suffered a broken back with permanent spinal damage when the vehicle he was traveling in left the road and rolled into a ditch along the Sea-to-Sky highway, between Whistler and Pemberton. The accident occurred in the early morning hours, following an evening of drinking with friends at bars in Whistler.

Holton and two of his friends began the evening by sharing a 6-pack of beer at Holton's residence. At 9:00 pm, the three men drove into Whistler Village to attend a lounge, known as the "Crab Shack". The men spent approximately 3 hours at the Crab Shack, consuming beers and shots of hard alcohol. At midnight the men left the Crab Shack and walked to a nightclub known as "Garfinkel's". At Garfinkel's, the men had three more drinks. At around 1:00 am, the men left Garfinkel's, returned to the Defendant MacKinnon's vehicle and drove back to Holton's residence. Back at Holton's house, the men had another beer and then decided to drive to a house party in Pemberton. The motor vehicle accident occurred on the way to the party. The Defendant MacKinnon was driving. Holton was a passenger in the back seat.

The Plaintiff sued the two friends, MacKinnon who was the driver of the vehicle and the other who was the front passenger. The Plaintiff also sued the operators of both the Crab Shack and Garfinkel's, alleging that the commercial hosts were negligent for failing to take sufficient precautions to see that the men were not injured as a result of their intoxication

In defending the claim, the bars each bar took the position that the Plaintiff could not prove that he and his friends became intoxicated at their establishment, could not prove that they were exhibiting signs of intoxication and could not prove that the accident was caused by the driver's intoxication. The Court rejected each of these defences.

Reviewing the evidence of the young men, the employees of the bars and other witnesses, as well as an assessment of technical evidence of rates of absorption and elimination of alcohol, the Judge found that the Plaintiff had proven that he and his friends became intoxicated at the Crab Shack and then became further intoxicated at Garfinkel's, to the point where they were unable to care for their own safety or for the safety of others. The Judge also found that the three men were exhibiting signs of intoxication that should have caused employees of both establishments to conclude that they were intoxicated and that one of them might be driving. Finally, the Judge concluded that alcohol was the primary cause of the accident.

The bars also argued that, even if the patron's intoxication was the cause or a contributing factor to the accident, any legal duty imposed on the bars was discharged when the group of friends arrived home safely from Garfinkel's. The Court rejected this argument.

The Court said that once an intoxicated patron arrives home safely, as Holton did in this case, then a commercial host has discharged its duty to protect *that patron from his or her own intoxication*. However, the Court found that the duty owed by the bars to third parties, (which in this case, included Holton as a passenger in the vehicle driven by another intoxicated patron, the Defendant MacKinnon) is broader than the duty owed individually to Holton and each of his friends, as intoxicated patrons.

In this analysis, the fact that Holton arrived home safely was irrelevant. What was important was that Holton was a member of the class of persons who could be expected to be traveling on the Sea-to-Sky highway, and thus at risk of harm due to MacKinnon's intoxication. The Court explained that the

foreseeability of risk to Holton and other drivers on the highway was not affected by the brief stopover and the additional beer consumed at Holton's residence, and therefore, the liability remained.

In apportioning liability between the Defendants, the Court concluded that the intoxicated driver must bear a substantial portion of the liability. The Court also found that a Plaintiff who became intoxicated and got into a vehicle with his intoxicated companion must also bear some responsibility. Accordingly, the Court apportioned liability as follows:

Intoxicated Driver, MacKinnon	40%
Plaintiff (contributory negligence)	30%
Crab Shack	15%
Garfinkel's	15%

The important principle to be taken from this decision is that the duty owed by commercial hosts to third parties is not discharged once their intoxicated patron arrives home safely. Rather, it continues until the patron has recovered to the point where he or she is in a condition to look after themselves, or until he or she is placed under the charge of a responsible person.

HOW MUCH LIABILITY FOR COMMERCIAL HOSTS?

Laface v. McWilliams 2005 BCSC 291 (March 9, 2005)

The second recent British Columbia decision demonstrates the extent of liability faced by commercial hosts who are found to have failed in their duty to prevent their patrons from driving when they are intoxicated.

In this case, the Defendant McWilliams, a 19-year old man who had been drinking at the pub at the Steveston Hotel in Richmond, got into his vehicle and drove into a group a young people who had gathered on the side of the road next to some stopped vehicles.

The Court found that McWilliams was intoxicated and was demonstrating obvious signs of intoxication while in the pub. Other patrons testified that he was staggering and had slurred speech. In addition, one of McWilliams' young friends spoke to the doorman and told him that McWilliams was drunk and needed someone to drive his vehicle for him. The Court concluded that, notwithstanding the fact that the pub staff had actual knowledge both of McWilliams' intoxication and his likeliness to drive, they took no positive steps to prevent him from doing so. Accordingly, the Court apportioned liability equally between the intoxicated driver, McWilliams and the pub; each 50% liable for the injuries sustained by the five youths.

This decision, although a concern for liability insurers, should not be taken as establishing a new benchmark for commercial host liability. Where there has been a finding of negligence on the part of a commercial host, the Courts have generally assessed the host's liability in the range of 15% - 30%. In this case, the unusually high liability was clearly related to the Court's finding that the pub in this case had "flagrantly ignored its responsibilities as a commercial host", not just on the night in question, but on earlier occasions.

The Court heard evidence that a private investigator hired by the pub to monitor staff documented that pub staff:

- played card games while on shift;
- free-poured drinks;
- consumed alcohol while on shift;
- served alcohol to intoxicated patrons;
- witnessed, on average, one or two "drunks" in the bar every night

The importance of this evidence to the ultimate determination of liability was discussed by the Court:

> "Based on Mr. Grant's evidence, I am driven to conclude that the Steveston Hotel did not enforce the Serving It Right program in the assiduous manner that Mr. Grant and his employees would have the court believe. Employees flagrantly flaunted the house rules and the Serving It Right guidelines. Discipline was only meted out when the perceived direct financial interests of the pub were affected by staff conduct.... My conclusion in this regard explains why certain events occurred on June 11 and 12, 1999."

And:

> "...[T]he most compelling piece of evidence is the hotel's actual, specific notice that there was an impaired patron on the premises who intended to drive. Ms. Strang was only 17 years old at the time, but she did everything that could reasonably be expected of her in notifying the pub of Mr. McWilliams' state of inebriation. She specifically told the doorman that Mr. McWilliams was drunk and needed to find someone to drive his car for him. She shouted 'at the top of her lungs' asking for assistance with the person who she knew was incapable of driving.
>
> The hotel, despicably in my view, attempted to shift the blame for failing to find a safe ride home for Mr. McWilliams from the hotel to Ms. Strang and other patrons of the pub."

It is also clear from the decision that the Court's impression of the testimony of the bar's witnesses likely contributed to the inordinately high liability assessed against the host in this case. For example, the Court described the evidence of the owner and manager of the pub, Mr. Grant:

> "I have already noted that in Mr. Grant's earlier testimony he frequently responded to questions by saying, 'it's possible'. That unhelpful response continued. However, even more troubling were Mr. Grant's obtuse responses to questions put to him in cross-examination. He left the impression that he did not know and did not care about critical aspects of the pub's operation that were central to the litigation."

And:

> "It is obvious from the foregoing review of the evidence concerning the Steveston Hotel that I have no confidence in the credibility of Mr. Grant and the employees of the hotel who testified. Wherever their evidence is in conflict with the evidence of Ms. Strang and the

> others who testified as to the level of supervision in the pub, I accept the evidence of Ms. Strang and the others over the evidence of the Steveston Hotel's witnesses."

Although this case involved some exceptional circumstances, it demonstrates the potential liability faced by commercial hosts who fail to properly discharge their legal duty. The decision illustrates that the Court's review of the pub's operations will be carefully scrutinized, and the scrutiny will not be confined to the evening in question. The decision is also an important reminder to all litigants of the important role of witnesses and the manner in which their evidence is received by the Court in determining the ultimate result.

IV. CONCLUSION

The message from the Courts is clear: establishments which serve alcohol must monitor the consumption of alcohol, the behaviour of their patrons and intervene in appropriate circumstances. Establishments which do not, risk significant liability for alcohol-related accidents. There is no question that the commercial host's duty (and thus the host's exposure to liability) continues long after intoxicated patrons leaves their premises and may even continue after the patron has arrived home. Therefore, it is essential that the host's staff take steps before the patron leaves.

Discharging the legal duty involves three key aspects:

1) **Monitoring** Establishments must organize their operation to ensure that there is a system for monitoring the alcohol consumption of their patrons and their behaviour;

2) **Assessing** Staff must be trained to make reasonable assessments of intoxication from the amount of alcohol consumed by patrons and their behaviour; and

3) **Intervening** Bars must instruct staff on the nature of intervention that may be required to prevent an intoxicated patron from driving.

It has been said that an occupier of premises is not an insurer and cannot guard against every eventuality [see *Sulmona v. Serraglio*, [1984] B.C.J. No. 1247 (B.C.S.C.)]. However, to limit its liability, it is essential that every commercial host that serves alcohol take reasonable steps, which must include developing and implementing a system that incorporates each aspect of this 3-part duty. Hosts which fail to properly discharge this duty could face significant liability for personal injuries, potentially in an amount equal to that of the intoxicated driver who caused the accident. With the operation of joint and several liability, the commercial host could be responsible for the full amount of damages if the intoxicated driver is without or is in breach of their motor vehicle insurance