

The Basics of Alcohol Liability

Alcohol liability, as we know it, is a fairly recent legal construct. The first case that proceeded to the Supreme Court of Canada was just 37 years ago. Until that time, there were fewer automobiles on the road (and therefore fewer impaired driving crashes), less disposable income and therefore less to spend on excessive alcohol consumption, and specifically, stricter rules in the university environment as well as a higher drinking age. That isn't to say there weren't alcohol related legal cases, but they were far fewer than in the late 1970's to present day.

This is Part I of the basics, with Part II to be included in the next issue. Part I will focus on two key elements of alcohol liability – special relationship and foreseeability.

Initially, these cases were referred as commercial host cases, as commercial hosts, those who sell alcohol, were the only ones being successfully sued. With time, more and more “hosts” were added to the list, creating what is now known as host liability or alcohol liability.

“Special Relationship”

The first case to proceed to the Supreme Court of Canada was an Ontario case, *Jordan House v. Menow v. Honsberger* in 1973. Mr. Menow was a person known to consume excessive amounts of alcohol and become obnoxious and annoying to other patrons. He had just finished a three month ban at the Jordan House and was allowed to return on certain conditions: that he didn't drink excessively (if he did so, he would be ejected) and he was supposed to be supervised by his boss, something that didn't happen.

Over the course of the evening, Mr. Menow did consume too much alcohol and became obnoxious and annoying, however, it was some time before he was “cut off” by bar staff and asked to leave. (It should be noted that the Jordan House had rooms to rent). His boss had already left but he did obtain a ride part of the way home. He was dropped off at a point where he still had a good walk left to his destination, under dark conditions and with the road at a particularly winding point. Mr. Honsberger was driving along, didn't see Mr. Menow in the middle of the road and hit him, causing serious injuries.

The question for all the levels of court (trial, Court of Appeal, and Supreme Court of Canada) was whether there was any liability on the commercial host, Jordan House. Ontario's Liquor Licence Act contained (and still does) a provision that any server who served alcohol to a patron to the point of intoxication or beyond intoxication, was liable if that patron was injured or died; or caused injury or death to another person. This particular section is found only in Ontario and North West Territories liquor acts. The section contributed, in part, to a finding of liability against the bar.

However, the Supreme Court also provided that there was a common law responsibility owed by the bar to its patron. We all owe a duty of care to our “neighbours” to ensure that our actions or lack of actions do not cause harm to our neighbour. This is how negligence is determined by a court – what is our duty of care; what is the standard of

care at the establishment; could the actions, or lack thereof, reasonably lead to harm of another.

However, in cases in which alcohol is served, the duty of care relationship becomes a “special relationship” as the alcohol is placing the patron at risk due to the patron’s decreased judgement.

Further, the Supreme Court stated that since a commercial host is making money from the sale of alcohol, there is a cost of doing this business – keeping an eye on patrons and ensuring that they do not drink excessively and put themselves at risk.

Initially there was resistance to following *Jordan House*, but over time, more and more Ontario courts refined the obligations owed by a commercial host to its patron. It would be another 16 years before the next significant step in the evolution of alcohol liability.

“Foreseeability”

The concept of foreseeability is always necessary to determining if negligence exists and was a component in finding liability in “*Jordan House*”. However, in *Hague v. Billings et al*, it was discussed in greater detail since this was the first case to hold a commercial host liable for the harm to an innocent third party.

Billings and his two friends, Foster and Major, decided to have a party day. They consumed a considerable amount of alcohol and also, smoked some pot. By 7:30 they arrived at a bar called the Oasis. They were each served one beer, and then it was obvious to the staff that they were quite drunk. The staff refused to serve anymore, and suggested that one of the friends should drive, not Billings. The group left, with Billings driving, and stopped next at the Ship and Shore bar. They were served there and consumed a few drinks. As they left this bar, the two friends decided that Billings was too drunk for them to ride with him. He dropped them off and within a few minutes came into collision with the Hague vehicle. Mrs. Hague was returning home with her two daughters. She was killed and her daughter, Melissa, was rendered a paraplegic.

The trial court found that the Oasis was negligent – the staff did not do enough to prevent Billings from driving when they knew that he was drunk. The finding is that they should have called the police to intercept him when he would not give up his keys to the staff. However, no liability was found because there was no certainty that the police would have stopped him before he arrived at the Ship and Shore. This decision was in 1989, and with the evolution of alcohol liability, there may be liability found today for failing to call the police.

The court had no difficulty in find liability against the Ship and Shore. The bar served already impaired patrons and then let them leave. Since the location of the bar was in the country, it was logical to assume that the patrons would drive there and thus leave, by driving. The court found that it was reasonably foreseeable that a drunk driver would come into contact with a sober driver on the road, therefore a bar’s duty of care was not just to its patrons, but to those the patron might meet while they were intoxicated.

Foreseeability – a Different Angle

The concept of foreseeability was discussed in a different context in a British Columbia case in the mid-70's. In *Jacobsen v. Nanaimo Kinsmen Club*, the local Kinsmen held a beer garden in the curling rink for a festival. One patron shinnied up an "I" beam, and "mooned" everyone in the garden. He climbed down and a few minutes later, shinnied up the beam with a friend where they performed another form of "entertainment". After another few minutes, a third man, known as "Sunshine", shinnied up the I beam, then walked along a horizontal beam when he slipped and landed on a patron sitting below the beam. Sunshine walked away but the patron, Mr. Jacobsen, suffered a few injuries and sued the Kinsmen Club.

The court stated that had the fall taken place the first time someone shinnied up the I beam, he would likely have found no liability as it was not foreseeable. He made no call about the second incident, but by the third climb, it was clear that the Kinsmen should have people securing the I beam and any other to prevent this situation as it was foreseeable that someone would fall.

This case is a good example of how a situation may not be foreseeable but circumstances change the liability exposure quickly. Also, it is an example of how a host needs to be ready to deal with the unexpected.

What this Means to Today's Hosts

It could be argued that "Special Relationship" and "Foreseeability" are not unique to alcohol liability but they are necessary components to prevention and policy for those who serve alcohol. The reality is that alcohol is a legal drug that can seriously impair our ability to make good choices such as drive, go home with strangers, or involve ourselves in a fight. The combination of provincial legislation with the common law has placed some responsibility on a commercial enterprise that is making money to care for its patrons, not allow them to drive when impaired, take actions to prevent potential assaults and in fact, know when to cut off patrons who might be ready to cross the line.

Good risk management requires that commercial hosts have an alcohol policy in place, train staff to understand the risks associated with alcohol service, have a plan for certain situations such as cutting off a difficult patron, just to name a few strategies.

Part II will look at more specific components as well as "beyond commercial hosts".