Security Obligations
Every licensee is obliged to insure that patrons or guests of the establishment are in a safe environment. Occupiers' liability, which is found in every province either in legislation form or in common law, provides that the occupier must provide premises that are safe regarding the actual premises, the condition of the guests and the nature of the activity being conducted on the premises.

Most examples of security focus on avoiding assaults and violence in general. A number of legal cases have narrowed in on security staff – liability was found when unreasonable force was used to eject an intoxicated patron. The unreasonable force often resulted in serious, even catastrophic injuries, - ranging from a broken arm while being forced through a doorway to permanent brain injury due to being kicked by the "bouncer" while down on the ground.

A licencee could argue that it does not allow excessive force and that the security staff have gone beyond the job description. However, due diligence in hiring and training the security staff is necessary. One case found liability against the bar for failing to do a proper background check on the "bouncer" who started his job a few hours after being hired (it was discovered that he had a criminal record with a number of assaults).

Security goes beyond preventing violence. It includes training staff to deal with emergency situations such as a fire. It also includes dealing with the unexpected occurring such as in the Jacobsen v. Nanaimo Kinsmen Club case described above.

Innocent Third Parties
Initially, the licencee was held liable only if its patron was injured as result of overservice and subsequent injury that could be related to the overservice (impaired driving, falling, assault, etc). However, a 1989 Ontario case upheld by the Court of Appeal in 1992, extended the reach of a host's liability. In Hague v. Billings et al, three young men drank all day and continued drinking at two bars in the evening. The first bar recognized that they were intoxicated and refused to serve them beyond the first drink. The second bar served them many drinks despite their obvious intoxication. The driver crashed into the Hague vehicle after leaving the second bar, killing the driver and rendering her teenaged daughter a paraplegic.

The courts found that it was reasonably foreseeable that if a patron was overserved and/or visibly intoxicated and drove a vehicle, that a collision with an innocent third party could occur resulting in injury and death. Therefore a licencee has a duty of care, not just to its patron, but to anyone the patron may come into contact with while intoxicated.

The Youth Factor
Canadian courts have stated both explicitly and implicitly that the age of the intoxicated person is a factor in considering liability of the server. All provincial liquor acts state that an establishment may not serve a person who is not "of age". The age of majority is 19 in all provinces with the exception of Alberta, Manitoba and Quebec, in which the age is 18. All U.S. states have an age of majority of 21.

Thus it is understandable that a licencee may have liability if an intoxicated person is served to that state, is underage, and is injured or killed while in that condition. The provinces also state that parents or guardians may provide alcohol to their children in their place of residence only. Therefore it is important that a licencee not allow a parent or guardian to provide alcohol in a licenced establishment (that includes weddings, banquets, family reunions, etc.) It must also be clear that a parent or guardian can provide alcohol only to his/her child, not to someone else's child.

In Ontario, a court awarded 5% liability against a 24 year old who bought a couple of bottles of rum for an 18 year old friend. While the degree of liability may seem to be small, it must be considered against a judgement of $8.7 million.

The courts have also stated that the fact that an "of age" person is an inexperienced drinker will be a factor in deciding the degree of liability. In Jacobsen v. Nike, a 19 year old employee of Nike was involved in setting up a trade show exhibit. A supervisor bought a couple of cases of beer for both the workers (there were 4 as well as the supervisor) and for clients who came to the booth. A drinking contest between 3 of the workers resulted, including the plaintiff. He had a least 6 to 8 beers and it was known that he had a 40 minute drive home. He fell asleep at the wheel, was ejected and rendered a paraplegic. In awarding 75% liability against the defendant, the judge specifically stated that the age and the inexperience of drinking were factors in his decision.

The Employer Host

The Jacobsen v. Nike case is also an example of "beyond commercial hosts" as Nike was the employer of Jacobsen. The court held that the relationship between employee and employer is higher than, and therefore more special than, that of invitee and invitor. "It is not too onerous, …, for an employer who provides alcohol to its employees to monitor consumption, so that it is in a position in the appropriate circumstances to take affirmative steps to prevent the foreseeable risk of injury." The trial judge found further factors against the employer beyond age and inexperience:

1. the supervisor failed to restrict or monitor his employees' drinking (while on the job);
2. the supervisor encouraged the consumption by drinking with his employees;
3. the supervisor took no steps to determine if Jacobsen was impaired when he left work;
4. the supervisor took no steps to prevent Jacobsen from driving when he knew he was driving home.

The employer was in a position to take preventive steps and failed to do so while also having the obligation to provide a safe workplace. The trial judge stated that it was reasonably foreseeable that providing alcohol would put the employee at risk. "It's hard to imagine a more obvious risk than introducing drinking and driving into the workplace."

The 2001 case of Hunt v. Sutton Group caused many companies to rethink employee events that have an alcohol component. The fact that the case was sent back for trial following an appeal did little to warm the "chill" factor of this case. The trial judge appeared to broaden the onus on the employer who did monitor the consumption of the employee to a limited degree, brought her apparent intoxication to her attention and provided some options for her to return home other than by driving herself. However, the options were deemed insufficient by the trial judge.

The plaintiff, Hunt was a receptionist for the defendant, Sutton Group, which had a drop-in Christmas party for staff and customers in 1994. Hunt began work at 1 p.m. and by 4 p.m., her boss noticed that she seemed be intoxicated. He suggested that he would call her husband but she told him she was fine. The evidence is that she did not appear to be intoxicated after this point. At 6:30, the boss offered cabs to everyone and another employee who didn't drink offered rides for everyone.

Instead she drove to a pub where she stayed until 8 p.m. There was mixed evidence as to how much she drank, but the court made a finding of fact that it was 2 beers. The weather was poor and she was offered a place to stay by one her co-workers as she had a 45 minute drive home. She declined the offer. At 9:45, one hour and 45 minutes after she left and 12.2 kms from the pub, the collision occurred. Most of the time was unaccounted and she had suffered a head injury and therefore had no memory.

There was a finding of 25% liability against both the employer and the pub. However, the pub was uninsured at the relevant time and had gone bankrupt by the trial, so that the burden of the judgement fell to the employer.

The trial judge found the employer had a duty to protect its employee from harm, as in, providing safe working conditions, and the duty extended to insure that she did not become intoxicated while in the course of her work and subsequently drive home. By having an open and unsupervised bar, the employer was unable to monitor the consumption of alcohol of its employees. The employer "owed its employee an overriding managerial responsibility to safeguard her from an unreasonable risk of personal injury while on duty."

The offers to call her husband or call a cab were deemed insufficient. It was the view of the judge that the employer could have taken her keys from her, taken custody of her car, taken her to a hotel or called her husband. As a last resort, the employer could have called the police.

The Court of Appeal sent the case back for trial but it did not rule on the duty of care owed by the employer to the employee. (the reasons for the success of the appeal were that the was some problems with evidence and the jury should not have been dismissed). As a result, there are aspects of the case which could be relied upon by employees.

There was some talk that the Hunt case could be a "social host" case as the employer was not receiving money for the alcohol. However, both Jacobsen and Hunt clearly set out a

duty that is specific to employers, as there is the requirement to provide a safe workplace. The leading social host case, Childs v. DesOrmeaux which did not make a finding against the social host, is not helpful to the employer.

Both cases deal with an employee who is drinking and working and there could be other situations that are similar, most commonly the employee who taking a client for a social meeting (lunch, dinner, golf) and alcohol is consumed. In that scenario, the employer must be cautious of both the employee and the client and could be found to owe a duty of care to both.

The company/office party still exists, not just at Christmas but includes other gatherings. Those situations can risk excessive drinking as well as sexual harassment and bullying if there is not proper monitoring.

Impairment on the Job

There are also employees who have addiction issues and may be impaired on the job. Human Rights legislation is very clear that employment cannot be terminated due to addiction. If there is concern about an employee, there must be monitoring of the job performance to insure that there isn't a risk to the employee or others. While employment can be terminated due to poor job performance, it is not black and white and the employer must make efforts to assist the employee before termination occurs.

Drug testing is generally not allowed under Canadian law.

Strategies to Minimize Risk Exposure

Most employers would benefit from an alcohol policy. If a policy is just being developed, it would be wise to have representatives from different sectors of the company involved in the development. It is also critical to remember the three "C's": clarity, consistency and communication. It is essential that the policy be clearly understood by all stakeholders, that the policy be consistently used and enforced and that there be ongoing communication with the stakeholders. The policy should be reviewed at least every two years to ensure that it still meets its goals

Employers need to have a plan in place if they choose to continue company-sponsored activities in which alcohol may be served. They also need to be aware that those activities are not just Christmas parties, but can include client functions, golf tournaments and professional association events. Think about the event less about alcohol and more about entertainment and camaraderie.

Check the policy of insurance. Hold the event at a reputable place that has training and insurance (don't assume that there is insurance or training, insurance is not a requirement of licence and training could be very low level). Rethink having the event in the boardroom or someone's home as the host could be accepting all the liability. If it is in a boardroom, hire a caterer who has a bartender and insurance – do not have an open bar! It may be that a Special Occasion Permit is required and there is also special event insurance available which does contemplate the risk of over-consumption.

Further tips:

1. If you host a number of events, it is worth having a few members of your staff trained in Smart Serve – and take it from a trainer, not on-line.
2. A company should have zero tolerance regarding drinking and driving, especially from employees who drive as part of their employment.
3. It is illegal to serve someone who is under the age of majority (18 in Alberta, Manitoba and Quebec, 19 everywhere else in Canada, 21 in the U.S.); it is illegal to serve someone to the point of intoxication or who is already intoxicated.
4. Waivers have limited value, but if they must be used, they must be signed in advance of any alcohol consumption.
5. Each event should have designated non-drinkers to monitor the consumption of others, including a monitor in the parking lot, if relevant.
6. Work out a security system. Whoever is in charge, must have strong dispute resolution skills to deal with refusal of service and any other disagreements that may arise.
7. If a dispute does arise, no less than two people should try to diffuse the situation, but they must not put themselves in danger. If there is any concern of violence, call the police.
8. As said above, don't have an open bar and don't allow anyone but bartenders and designated monitors behind the bar. Insure that there are non-alcoholic drinks available.
9. Make sure that there is food which has high fat and protein.
10. Don't have a last call, it is an invitation for last minute rush drinking and then the alcohol hits when the person is behind the wheel.
11. Have taxi chits and hotel rooms available.

Keep in mind that the host is responsible for the guests and until they are sober.

Shelley Timms
Timshel Services Inc.
416-767-4210
Timshel@timshelservices.com