

Noteworthy

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HUGHES AMYS^{LLP}
BARRISTERS & SOLICITORS

by *Richard Horak*

In a remarkable decision released August 30, 2002, Justice Chadwick of the Superior Court of Justice has concluded that there is good policy reason not to expand tort law to include the social host (*Childs v. Desormeaux* [2002] O.J. No. 3289). The decision is under appeal.

Facts

The action arose out of a motor vehicle accident which occurred at approximately 1:30 a.m. on January 1, 1999. An uninsured motor vehicle operated by the Defendant Desmond Desormeaux crossed into the oncoming lane and collided head-on with another vehicle. The Plaintiff Zoe Childs, a passenger in the other vehicle, was rendered paraplegic as a result of the collision.

The Defendant Desormeaux was charged with a number of offences arising out of the accident. A blood sample disclosed a blood alcohol concentration more than twice the legal limit. He pleaded guilty to these charges and was sentenced to ten years in prison.

Desormeaux had attended a New Year's Eve party hosted by the Defendants Julie Zimmerman and Dwight Courier. Courier and Desormeaux had been friends for several years; Justice Chadwick was

satisfied that Courier knew of Desormeaux's past drinking problems, including previous convictions for impaired driving. On all the evidence Justice Chadwick was satisfied that Desormeaux was showing obvious signs of impairment when he left the party.

Issues

Justice Chadwick set out the issues as follows:

"Do Dwight Courier and Julie Zimmerman, as social hosts, owe a duty of care to Zoe Childs, a passenger in a motor vehicle who was seriously injured as a result of the negligence of Desmond Desormeaux whose ability to operate a motor vehicle was impaired by alcohol which was consumed at the Courier/Zimmerman residence?"

If there is such duty, are there grounds rooted in policy which would limit or negate the finding of a duty?"

Legal Analysis

Counsel provided the court with all relevant Canadian authorities as well as authorities from many other countries. Although social hosts have been sued in a number of Canadian cases, according to Justice Chadwick, no case has found

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liability on social hosts. All of the cases turned upon their own unique fact situations, far different from the facts in the instant case; none of the previous cases considered the legal issues put forward in this action.

As Justice Chadwick concluded that the duty of care proposed was “new and novel” and not merely an extension of existing tort law, he was required to conduct a careful analysis to determine if the harm suffered by the Plaintiff was foreseeable and if so, whether there was a direct relationship of proximity or neighbourhood to the social hosts.

Commencing with the seminal decision in *Donoghue v. Stevenson* [1932] A.C. 562 (H.L.), Justice Chadwick traces the development of the law of negligence, referring to a number of landmark decisions over the years, culminating in an analysis of two recent decisions of the Supreme Court of Canada (*Cooper v. Hobart*, 206 D.L.R. (4th) 193 and *Edwards v. Law Society of Upper Canada*, 206 D.L.R. (4th) 211), (see *Noteworthy 2002, No. 3 for a discussion of the Cooper decision*). After carefully reviewing the analysis in these cases, Justice Chadwick concluded as follows:

“In my view, the various categories of duty of care referred to can be distinguished from the duty of care in the case at bar. As such, I find the proposed duty of care in this case to be new and novel. As such, a prima facie duty of care does not arise.”

Having made this finding, Justice Chadwick goes on to consider “foreseeability”. Based on the evidentiary findings he concludes that it was reasonably foreseeable that Desormeaux was not capable of driving and that a reasonably prudent person would have taken some action to prevent this from occurring.

The next issue was whether the relationship between Desormeaux and Courier/Zimmerman met the test of “proximity”. Based on the evidentiary findings, Justice Chadwick had no difficulty finding that this test was met; as such, Courier and Zimmerman had a duty “not to turn Desormeaux loose on the highway where he could cause

“I find the proposed duty of care in this case to be new and novel.”

injury or death to others”.

Based on the above findings, it was necessary to apportion liability as between Desormeaux and Courier/Zimmerman. Desormeaux’s negligence was fixed at 85%, with 15% being apportioned to Courier/Zimmerman. While the 15% attributed to Courier/Zimmerman is in accordance with apportionments associated with liability of commercial hosts (see *Hague v. Billing* (1993) 13 O.R. (3d) 298 (O.C.A.)), Justice Chadwick does not indicate the basis on which he arrived at this apportionment.

The issue of policy considerations was “the most difficult area”. It was clear that the onus rested with the Defendants to establish that public policy should be a bar to recovery.

After acknowledging that the law of tort is flexible, which evolves with a changing society, Justice Chadwick directly considers policy issues, which he views as a “two-sided coin”. On one side there is the seriously injured Plaintiff who will be inadequately compensated if Courier/Zimmerman are not liable. He acknowledges that a finding of liability, no matter how small, will bring into play the homeowners’ policy of insurance of Courier/Zimmerman and would make available to the victims the policy limits, given the principle of joint and several liability.

On the other side of the coin, Justice Chadwick concludes that a finding of liability would “place an inordinate burden on all social hosts”. He discusses at some length the problems faced by a social host, considering the decision in *Kelly v. Gwinnell* 476 A. (2d) 1219, 96 (N.J.S.C.), a split decision which squarely sets out the competing principles.

Justice Chadwick concludes that a finding of social host liability would not serve as much of a deterrent.

Interestingly, evidence was given by the National Executive Director of Mothers Against Drunk Driving (MADD). After noting that their campaigns have created a significant shift in the

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public's attitude towards drinking and driving, which is now considered socially unacceptable, Justice Chadwick notes that MADD has identified the social host as a "potential problem".

Justice Chadwick went on to review Ontario Statutes which legalize and licence the use of alcohol. He noted that the Provincial Government, in 2000-01, profited from sales at the LCBO of more than \$1 billion (dividend and tax contribution combined). This review of legislation was to "show the role of government".

In conclusion, Justice Chadwick states as follows:

"The policy in this case is whether the courts should expand the tort law to include social host liability, or whether this is best left to the government . . . It

would be a simple task to provide the criteria as to when a social host is liable. This would avoid the chaos which would develop if left to the common law . . . If social hosts liability were expanded by the courts then the insurance companies would face financial expenses resulting in increased premiums to all clients."

In Justice Chadwick's view, the legislature could determine clearly understood criteria which would limit actions. The legislature could also provide a fund to compensate innocent accident victims who had exhausted insurance limits (this fund could be established from profits of the LCBO).

As such, Justice Chadwick concluded that there is good policy reason not to expand tort law, and the matter should be left to the legislature to determine social host liability and also to

properly compensate innocent victims.

Commentary

As noted above, this case is under appeal. While in a narrow context the issue relates to social host liability, the underlying issue relates to the proper attribution of power as between the courts and the legislature.

It will be most interesting to see whether the Court of Appeal uses this case as an opportunity to broadly consider this underlying issue, or if it will restrict its comments to the narrow issue of social host liability. We anticipate that the court may well use this opportunity to reaffirm the importance of the common law.

In any event, we expect that this case could well ultimately find its way to the Supreme Court of Canada. The issues raised are of supreme importance to the development of our law in the

Supreme Court of Canada Upholds Dismissal of HIV Actions

by Mario Pietrangeli

In a decision released September 5, 2002, the Supreme Court of Canada dismissed the plaintiffs' application for leave to appeal in the *Robb/Rintoul/Farrow* "tainted blood" litigation.

These actions arose from the HIV infection of three hemophiliacs through the use of a blood product known as "Factor IX". As a result of their infection, the plaintiffs sued the Red Cross as collector and distributor of blood and blood

products to Canadians; Bayer, which processed the Factor IX from Red Cross plasma; and, the Province of Ontario, by virtue of its membership in the Canadian Blood Committee ("CBC") which made recommendations concerning funding of the Red Cross.

Mario Pietrangeli, assisted by James Maloney and others, acted as lead counsel for Ontario throughout the trial and appeals.

The action was tried before

Madam Justice Ellen M. Macdonald from November 1998 to November 1999, with additional argument in February and March, 2000. In reasons released June 21, 2000, Justice Macdonald imposed liability on the part of the Red Cross and Canada, to the extent of 75% and 25%, respectively. Her Honour dismissed the action against Ontario, finding that Ontario was neither negligent, nor vicariously liable for any negligence on the part of the

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Red Cross. Justice Macdonald also rejected the argument that Ontario was liable on the basis of “spoliation” or destruction of evidence. The claims against Bayer were also dismissed (*see June 2000 Special Edition of Noteworthy for detailed summary of the trial decision*).

On appeal to the Ontario Court of Appeal, the Red Cross and Canada successfully appealed from the findings of liability against them. The plaintiffs’ cross-appeals of the dismissal of the action against Ontario and Bayer were dismissed (*see December 2001 Edition of Noteworthy for detailed summary of the Court of Appeal decision*).

In the Court of Appeal, the plaintiffs limited their arguments against Ontario solely to the claim for damages for the tort of spoliation. The plaintiffs argued that the Canadian Blood Committee, of which Ontario was a member, destroyed verbatim transcripts and tape recordings at the behest of Ontario, the federal and other provincial governments in order to hide evidence of wrongdoing. The Court of Appeal rejected this argument and upheld the trial judge’s finding.

The plaintiffs sought leave to appeal to the Supreme Court of Canada. In order to obtain leave, the plaintiffs needed to show that the proposed appeals raise issues of national impor-

tance. The Supreme Court of Canada dismissed the application for leave, without reasons, in a brief written Judgment dated Thursday, September 5, 2002.

The Supreme Court of Canada’s decision brings closure to a complex and difficult case involving the liability of blood bankers, pharmaceutical manufacturers, and governments for biological products. As a result of the settlement of claims against the Red Cross pursuant to a court-approved Plan of Compromise under the *Companies and Creditors Arrangement Act*, it appears that *Robb/Rintoul/Farrow* may be among the last cases to be tried arising from the tainted-blood scandal of the