

Noteworthy

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SOCIAL HOST LIABILITY: TO BE OR NOT TO BE

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The much anticipated decision of the Ontario Court of Appeal in the case of *Childs v. Desormeaux* has now been released (May 19, 2004). The unanimous decision was written by Madam Justice Weiler, with O'Connor, A.C.J.O. and Sharpe, J., concurring. The court concludes on the facts of the case that no liability rests with the social hosts, but expressly leaves open the possibility that social host liability may well be imposed in another case.

There is little doubt that this decision will be analyzed extensively over the coming months. The issue is one which may well be considered by the Supreme Court of Canada.

The decision of the Court of Appeal is a most interesting one on many levels. We will attempt to set out below some of the salient points.

Overview

Justice Weiler begins her analysis by setting out the question to be decided. In her words the issue is as follows:

“Whether homeowners owe a duty of care to a user

of the road who is injured by the driving of an impaired guest after attending a Bring Your Own Booze Party (“BYOB”) at their home”.

The facts of the case are well known. The Plaintiff, Zoe Childs, was seriously injured when the car in which she was riding was struck by a vehicle driven by the Defendant Desmond Desormeaux, who was impaired. Prior to the collision Desormeaux had attended a BYOB party at the home of the Defendants Julie Zimmerman and Dwight Courier. At issue was whether Zimmerman and Courier as social hosts could be held liable to Childs.

For a more detailed analysis of the factual circumstances see the discussion in Noteworthy 2002, Volume 8.

While Justice Weiler agreed with the decision of the trial judge (Chadwick, J.) that the action should be dismissed as against Zimmerman and Courier, she did so for different reasons. She concluded that on the specific facts of the case the social hosts did not owe a duty of care to users of the road. This conclusion was based on a number of factors,

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including the fact that this was a BYOB party, there was no evidence to suggest that the social hosts knew how much alcohol Desormeaux consumed and the failure of the trial judge to make a finding that the social hosts knew that Desormeaux was impaired when he drove away.

Having reached this decision on the specific facts, Justice Weiler declined to make a determination as to whether any duty of care should be negated for policy reasons (see the discussion below). She expressly left that determination to be made another day and refused to hold that social hosts are immune from liability to innocent third party users of the road. She concluded her “overview” by stating as follows:

“On the contrary, I do not foreclose social host liability particularly when it is shown that a social host knew that an intoxicated guest was going to drive a car and did nothing to protect innocent third parties.”

After reviewing the factual scenario Justice Weiler set out three issues to be considered as follows:

1. Did the trial judge err in concluding that social host liability involves a

novel duty of care?

2. Did the trial judge err in his formulation of the duty owed by social hosts to users of the road?
3. Did the trial judge err in holding that tort law should not be expanded to include social host liability for policy reasons?

Issue 1

Justice Weiler applied the *Anns*¹ test to determine whether a duty of care existed. The *Anns* test requires a two step analysis; the first step requires determination of “proximity”.

In determining whether or not there is a relationship of proximity the court must consider case-specific factors. These factors include the nature of the injuries, whether there is a statute regulating the activity and whether the statutory obligations affect the expectations of the parties.

Upon completing this analysis the court is then to move to the second stage of the *Anns* test, which requires a decision as to whether there are other residual policy considerations that might affect the imposition of a duty of care. Justice Weiler stated as follows:

“The policy considerations concern the affect of recognizing a duty of care on other legal obligations, it’s impact on the legal system and society more generally . . . The court may also consider deterrence, which is a policy consideration that favours liability.”

Justice Chadwick had concluded at trial that this case did not fall within one of the recognized categories of duties. After carefully considering a number of other decisions, Justice Weiler indicated that the decision of the trial judge in this regard was correct. She stated as follows:

“Social host liability is not simply an extension of commercial host liability . . . There are significant differences between the relationship of a commercial host and a social host. Commercial hosts serve alcohol for profit and, as a result, the relationship between the commercial host and the drinker is a contractual one giving each party certain legitimate expectations. The relationship between a social host and a guest, who is often a family member or a friend, is an informal one, and as a result, the expectations they have of one another differ widely.”

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¹*Anns v. Merton London Borough Council* [1978] A.C. 728 (House of Lords)

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Justice Weiler went on to note different insurance considerations as between commercial hosts and social hosts (see discussion below).

Issue 2

In considering the reasons given by the trial judge Justice Weiler was critical of the emphasis on the knowledge of the social hosts of the past drinking habits and past convictions for impaired driving of Desormeaux. In her view, while knowledge was a factor in commercial host cases, it was not the basis of the duty to monitor drinking and accordingly such a finding would be inappropriate in the social host context. The most important factors were knowledge of visible intoxication and the foreseeability of injury.

On the evidence Justice Weiler concluded that the social hosts did not assume control over the behaviour of Desormeaux and there was no “paternal relationship” established. Desormeaux’s evidence as to what he expected of the social hosts was equivocal. However, his expectation (based on past experience) was a factor that would militate in favour of the imposition of a duty of care if the hosts knew he was intoxicated.

As the trial judge did not

make a finding that the social hosts knew Desormeaux was impaired, and it was not clear that the social hosts knew when Desormeaux arrived at the party that he would be driving home afterwards, Justice Weiler concluded that the social hosts had no reason to monitor his alcohol consumption.

The acceptance by the trial judge of the expert evidence called by the Plaintiff, to the effect that Desormeaux would have showed signs of obvious impairment when he left the party, was a finding he was entitled to make. However, his failure to find that the social hosts must have observed these signs of obvious impairment, and would therefore have known that Desormeaux was impaired, was fatal to his conclusion. The fact that Desormeaux had previously drunk to excess did not mean that the social hosts “should have known” he would do so on this occasion.

Justice Weiler stated as follows:

“As it was the guests who brought their own alcohol and who decided how much to serve themselves, there was no reason for the social hosts to think that their guests were relying on them to control their alcohol con-

sumption . . . In the absence of some assumption of control by a person or justified reliance on that person by another, arising out of the circumstances or as a result of the imposition of a statutory duty, the common law does not make one person liable for the conduct of a second person simply because the second person occasions damage to a third party that is reasonably foreseeable. The person sought to be held liable must be implicated in the creation of the risk. In this case the social host did not assume control over the supply or service of alcohol, nor did they serve alcohol to Desormeaux when he was visibly impaired . . . I can not accept the proposition that by merely supplying the venue of a BYOB party, a host assumes legal responsibility to third party users of the road from monitoring the alcohol consumed by guests, even when the guest includes a known drinker.”

Issue 3

Given the above findings, Justice Weiler indicated that it was not necessary to consider this issue. However she went on to deliver several obiter comments which are of con-

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siderable interest.

The trial judge's consideration of insurance was in her view appropriate. Deterrence was also a factor to be considered.

Justice Weiler stated as follows:

“In order to determine whether the potential benefits of imposing a duty of care on social hosts towards users of the road - such as a reduction in drunk driving and accidents - outweigh the burden placed on social hosts in their interaction with their guests, the extent of the burden must first be determined. The imposition of liability on social hosts would involve a change in lifestyle choices

that would in turn have an immediate impact on the lives of many people.”

Justice Weiler noted that one of the factors used to determine what is reasonable in the circumstances is social consensus. The court must set boundaries to assist in determination of the imposition of liability. For example, calling the guest a taxi, asking for car keys, etc., might not constitute an inordinate burden, but requiring a social host to call the police to prevent someone from driving home might well be considered to onerous.

Although Justice Weiler considered whether this issue was one best left to the legislature, she concluded that the view ex-

pressed by the trial judge in favour of a legislative solution was not necessarily required.

Conclusion

The decision of the Court of Appeal emphasizes the importance of the evidence and the factual findings made by a trial judge. While dismissing the action against the social hosts in this case, the Court of Appeal has clearly left open the door for a liability finding to be made at common law in future cases.

The Supreme Court of Canada may well conclude however that the instant case is an appropriate one for just such a determination to be made.

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Jamie Trimble will be chairing the OBA Civil Litigation program on The Efficient and Effective Conduct of a Civil Action on June 11, 2004.

Mary Teal will be speaking at the same program about Efficient Trial Preparation.

Mario Pietrangeli will be speaking at a Canadian Defence Lawyers program on June 17, 2004 on the topic of Defending Employees from Vicarious Liability Tort Claims.