CITATION: Jonas v. Elliott et al 2020 ONSC354
COURT FILE NO.: 16-2726
DATE: January 17, 2020

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Richard Edmond Jonas and Anne Catherine Jonas Plaintiffs	J. Mays and J. Langlois, counsel for the plaintiffs
– and –	
Matthew Elliott, The City of Stratford and Carrie Goudy Defendants	R. Smith, counsel for the defendants, The City of Stratford and Carrie Goudy M. Sipos, counsel for the defendant, Matthew Elliott
	HEARD: April 9, 2019, written submissions in May and November, 2019

MCARTHUR, M.D. J.

Introduction

[1] The plaintiff, Richard Jonas, and the defendant, Matthew Elliott, were neighbours. Mr. Jonas socialized with others at Mr. Elliott's home one evening. All of them later attended a buck and doe party at the Kiwanis Community Centre. Ms. Goudy had rented the center owned by the City of Stratford where she hosted the party to celebrate her upcoming wedding.

[2] Within a short time of their attendance at the centre, Mr. Elliott physically assaulted Mr. Jonas after Mr. Elliott observed the Mr. Jonas dancing with his wife. Mr. Elliott came up behind Mr. Jonas and suddenly, without warning, grabbed Mr. Jonas' shoulder, twisted him around and caused him to fall to the ground.

[3] Mr. Jonas sustained a broken femur that required surgery. This lawsuit followed.

[4] In the amended statement of claim, the plaintiffs pled the provisions of the *Occupiers Liability Act* and *The Negligence Act*, and specifically as follows:

> 6. The Defendant, Matthew Elliott, was a guest of Carrie Goudy at the Buck and Doe event and, as such, Carrie Goudy was at all material times, responsible for situations that arose as a result of Matthew Elliott's actions.
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> 10. There was a DJ and dancing, and the Defendant Mr. Elliott, was observed to be stumbling and acting aggressively towards other attendees. Mr. Elliott continued to be served alcohol by the host and Defendant, Carrie Goudy. There was no security presence at the event.
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> 15. The host of the event, Carrie Goudy and the Corporation of the City of Stratford, as facility owner, knew or ought to have known, that service of alcohol in excess to attendees of the Buck and Doe could result in injury to their patrons. In addition, they knew or ought to have known, that parties that arrive in the late evening could have consumed substances prior to police arrival that place them at increased risk for injury to themselves or others in the event that they consume alcohol.
>
> 16. The Defendants, The Corporation of the City of Stratford, as facility owner, and Carrie Goudy, as the host of the event, had a duty to ensure that the property is used in a safe manner, and that occupiers of the facility use it in a manner that is safe, and that the Centre, any alcohol servers and bartenders, and occupiers of the facility are compliant with the law.
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> 17. The Defendants, The Corporation of the City of Stratford, as facility owner, and Carrie Goudy, knew, or ought to have known, that events involving the service of alcohol, such as the Buck and Doe, require increased oversight, often from security personnel assigned to the event to maintain peace and security. They must also ensure that the bartenders do not over-serve persons with alcohol and must monitor alcohol intake of patrons.

[5] Both Mr. Jonas and Mr. Elliott claim that the City and Ms. Goudy are also liable for Mr. Jonas' injuries. The City and Ms. Goudy claim that the assault by Mr. Elliott upon Mr. Jonas was not reasonably foreseeable.

[6] The motion by The City of Stratford and Ms. Goudy seeks summary judgment dismissing this action and crossclaims made against them.

[7] The trial record had been filed some time ago. The moving defendants formally amended their motion to request leave pursuant to Rule 48.04 that this motion be heard. This was not opposed. Leave is granted.

The Issues

[8] The issue is whether there are genuine issues requiring a trial respecting liability involving the City and Ms. Goudy. This turns on whether there is a risk of foreseeable harm established in this case.

[9] For reasons that follow, I find there are no genuine issues requiring a trial respecting liability that involve the moving defendants. The action, claims and cross-claims against the City and Ms. Goudy shall be dismissed.

Factual Background

Evidence on the Motion

[10] Joint document briefs were filed by the parties. These include the affidavit and transcript evidence of:

a. Brad Herden, the Manager of Recreation and Marketing at the City of Stratford;

b. Carrie Goudy, the moving-defendant;

c. Richard Jonas, the plaintiff;

d. Wendy Rooyakers, Rebecca Barras, Brad Faulfer, Jessie Graves - all bartenders at the event;

e. Rob Elliott and Brian Elliott, brothers of the defendant;

f. Shelby Elliott, wife of the defendant; and

g. Ryan Hinsperger, friend of the defendant, Matthew Elliott.

[11] Also included were the facility rental contract dated November 10, 2014 with the attachments and information on special occasion permits as will be referred to. I have also considered the other documents referred to in the motion record.

[12] Following submissions by the various counsel, further written supplementary submissions were filed which I have also reviewed and considered.

Facts and Context

[13] Ms. Goudy was a paramedic who resided in Stratford, Ontario. She signed a rental contract with the City of Stratford on November 21, 2014 to rent the Kiwanis Community Centre to host a buck and doe party for her and her fiancé. She eventually obtained a special occasion permit (SOP) for a private event to sell and serve alcohol. She made most of the arrangements since her fiancé was from Kitchener.

[14] Mr. Brad Herden was the manager of recreation and marketing with the City of Stratford. He confirmed that two city employees were present as custodians at the facility on the day of the event; Vicki Siertsema worked from 12:00 pm to 8:00 pm and Jordan McMichael worked from 8:00 pm to 3:00 am. Neither employee was required to monitor the patrons at the centre for signs of intoxication or violent behavior. The City did not require the services of an off-duty police officer since the event was small and the centre had only one

entrance. The host was expected to keep the party safe, follow the municipal alcohol policy and monitor guests for signs of intoxication and violent behavior.

[15] Although a licensed security guard or off-duty police were not required at the event, Ms. Goudy had a friend act as security for the event. The only matter that came to her attention that evening was an intoxicated guest who was dealt with by Ms. Goudy with her friend who was acting as security. This guest was removed from the event and placed in a taxi to be taken home.

[16] The bartenders at the event were Wendy Rooyakers, Rebecca Barras, Brad Faulfer and Jessie Graves. Each of them was SmartServe certified and had significant prior bartending and serving experience. They worked throughout the evening at a single table/bar at the centre. They served beer, liquor and wine to attendees on the basis of one to a maximum of two drinks per person at a time. This bar was located away from the entrance.

[17] None of the bartenders consumed alcohol during the evening. All had been trained and were experienced to recognize rowdy and violent behavior among patrons. None of them observed anyone behave in a rowdy, belligerent or violent fashion. There were no raised voices. They considered that the party was under control throughout the evening and none suspected that anyone was going to be physically attacked. None of them refused service to anyone because of intoxication.

[18] Ms. Barras was made aware by Ms. Goudy not to serve an intoxicated female patron, but that patron never presented herself to Ms. Barras. Ms. Barras did see Mr. Jonas immediately after the attack and he did not appear intoxicated to her.

[19] Ms. Goudy and members of her wedding party had invited guests who were family, friends and their associated friends. There was a guest list compiled from those members of the wedding party. This list was discarded during the clean-up after the event.

[20] All the individual parties in this action were friends of Ms. Goudy or associated friends. Mr. Jonas and Mr. Hinsperger were not listed on the guest list but were associated friends of Matthew Elliott.

[21] The event was hosted to make some money for Ms. Goudy's wedding, socialize and have a good time with friends and family.

[22] The hall had a capacity of 150 people. There were 200 people estimated to have come and gone from the event throughout that evening. Ms. Goudy knew 90 to 95 percent of the people that she saw come through the door. Mr. Jonas estimated there were 75 people at the centre during his attendance.

[23] Ms. Goudy had arranged for the persons posted at the hall entrance to be SmartServe Certified, look for signs of intoxication of guests like stumbling and slurring of word as well as aggressive behavior or an inability to control themselves. Other members of the wedding party assisted at the event and wore shirts that identified themselves as groomsmen or bridesmaids. Ms. Goudy did not otherwise see nor hear of anyone acting aggressively, violently or causing disturbances that evening.

[24] Matthew Elliott and his wife had hosted a pre-event party at their home that involved approximately 15 people, including Mr. Elliott's brothers and their spouses. Mr. Jonas was a neighbour who came over to the Elliott's home. He and his wife lived in a home approximately thirty feet from the Elliott's home. There had never been any prior incidents between them.

[25] Many of the men at the Elliott home were drinking beer and smoking some marijuana from approximately 7:00 pm. Prior to attending the centre, Mr. Jonas consumed a number of beers. Matthew Elliott also consumed beer at his home.

[26] Four taxis took the entire group of people to the nearby centre around 11:00 to 11:30 pm. Mr. Jonas and Mr. Elliott arrived at the hall in different taxis at around 11:30 pm.

[27] Inside the centre, Mr. Jonas ate food and spent much of his time seated at a table talking to people. He purchased drink tickets and consumed one beer while at the hall. Everyone was having a good time.

[28] Mr. Jonas asked Matthew Elliott's wife, Shelby Elliott, to dance. She agreed because Mr. Jonas looked lonely and she felt sorry for him. She knew many other people at this event.

[29] Matthew Elliott had exited the facility intending to leave for home. He was waiting for his wife. Mr. Elliott walked back into the hall and saw Mr. Jonas dancing with her. He then walked about 40 to 50 feet to confront Mr. Jonas.

[30] While slow-dancing with Mr. Jonas, Shelby Elliott became uncomfortable and made a facial expression to her brother-in-law, Rob Elliott, who cut in on the plaintiff's dance in a friendly manner. Shelby Elliott described Mr. Jonas as slow-dancing with his hands on her but not in an offensive manner. She knew Mr. Jonas had a prior leg or knee injury since he had walked with a cane.

[31] Matthew Elliott was upset and angry but did not express his anger to anyone. He did not curse, yell or make fists as he approached Mr. Jonas from behind.

[32] Mr. Jonas had no prior concerns about Matthew Elliott nor his sobriety. Matthew Elliott had previously been in a happy mood and there was nothing angry about his appearance that evening. Mr. Jonas had no warning about what was about to happen.

[33] Ms. Goudy was seated facing the dance floor and she likewise had no warning of the assault. She had consumed four beers while at the event.

[34] Ms. Goudy knew Mr. Elliot's brothers and his wife, Shelby, since she had participated in community events with her before. Ms. Goudy was not worried that Matthew Elliott or Shelby Elliott were coming. Ms. Goudy had also seen Mr. Jonas with the large group of people he came with. She did not see Mr. Jonas stumbling or falling over. She spoke to the other Elliott brothers, Shelby Elliott and Sheila Elliott. Everyone in the group appeared happy and excited.

[35] Approximately a half hour after arriving at the centre, Shelby Elliott observed her husband, Matthew Elliott, walk from the bar area over to Mr. Jonas. She did not believe he was going to place his hands on Mr. Jonas.

[36] Mr. Elliott grabbed Mr. Jonas's shoulder and twisted him around. Mr. Jonas' knees buckled and he fell to the floor. Mr. Elliott did not otherwise strike Mr. Jonas. Mr. Elliott tried to help Mr. Jonas up but was quickly removed from the area by his brother, Rob Elliott.

[37] By all accounts, the entire incident was brief and perhaps took 20 to 30 seconds. Ms. Goudy and two other people came to the assistance of the plaintiff and requested that 911 be called. When police arrived, the event ended.

[38] Mr. Elliott was charged and, on November 9, 2015, pled guilty to a charge of criminally assaulting Mr. Jonas.

The Position of the Parties

The defendants, City of Stratford, and Ms. Goudy

[39] These defendants request summary judgment and the dismissal of the action as well as the crossclaim by the defendant, Matthew Elliott, against them. They submit there are no genuine issues involving them that require a trial.

The plaintiffs and the defendant, Matthew Elliott

[40] The plaintiffs submit that summary judgment is premature, there are genuine factual issues in dispute and conflicts in the evidence that require credibility evaluation at trial.

[41] The plaintiffs allege the moving defendants were negligent in failing to observe and operate in accordance with the requirements of the special occasion permit (SOP) and the published municipal alcohol policy and this created a situation where it was reasonably foreseeable that alcohol related risks would arise and cause or contribute to the plaintiff's injury.

[42] By way of supplementary submissions, the plaintiffs maintained that the SOP application, the rental contract with the attached municipal alcohol policy and the requirements of the SOP informed an objective understanding of whether tortious acts are reasonably foreseeable among guests in the context of a social gathering at which alcohol is being sold. The plaintiffs submit Ms. Goudy must have known that disturbances were a distinct and real possibility since she thought the event needed a security person.

[43] The plaintiff also submits, where one or both of the moving defendants formed the thought that disturbances by the sale of alcohol could occur, a triable issue arises since there are too many interconnected relationships between the evidence of the participants to be able to form proper conclusions which necessitates a trial.

[44] The defendant, Matthew Elliot supports the position of the plaintiffs that a trial is required and necessary to determine the roles and responsibilities of the moving defendants who created an event where it was reasonably foreseeable that dangerous interactions among

patrons could and did occur. He maintains the defendants structured the environment to make it impossible to know whether intervention was necessary.

[45] During the hearing, the plaintiffs made reference to other cases and submissions not contained in the materials at the hearing. These cases and positions were subsequently addressed by further written submissions provided by the parties.

The Law

Summary Judgment

[46] Summary judgment motions are governed by Rule 20.04 which states:

> (2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence;…
>
> (2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence
>
> 2. Evaluating the credibility of a deponent
>
> 3. Drawing any reasonable inference from the evidence.
>
> (2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

[47] The leading case on summary judgment is *Hryniak v. Mauldin*, 2014 SCC 7. At para. 66, Karakatsanis J. for the court wrote:

> On the motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice.

> Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[48] Thus, the judge hearing the summary judgment motion must ask:

1) On the basis of the evidentiary record alone, are there genuine issues that require a trial?

2) If there are, does the evidentiary record provide the evidence needed to "fairly and justly adjudicate the dispute"?

[49] The onus of establishing that there is no genuine issue requiring a trial rests on the moving party. Where the moving party establishes that there is no genuine issue requiring a trial, the evidentiary onus shifts to the responding party to establish that there is a genuine issue requiring a trial: *Sweda Farms Ltd. v. L.H. Gray & Son Ltd.*, 2014 CarswellOnt 11926 (ON CA) at para. 26; *New Solutions Extrusion Corp. v. Gauthier*, 2010 ONSC CarswellOnt 913 at para. 12.

[50] A responding party must set out in affidavit material or other evidence the specific facts that establish that there is a genuine issue requiring a trial. The responding party cannot rest on mere denials of allegations of a party's pleading: *Sweda*, para. 27. It is not enough to allude to evidence that may be adduced in the future. A party must put its best foot forward, lead trump or risk losing: *Sweda*, para. 28.

[51] The judge hearing the motion must:

1) determine the motion on the pleadings and evidence actually before the court on the motion. The judge is entitled to assume that the record contains all the evidence that would be adduced at trial; and

2) take a hard look at the evidence and the merits of the action at this preliminary stage: *Sweda*, paras. 26-28.

Negligence and Reasonable Foreseeability

[52] In this case the central issues are the standard of care and whether the risk of injury sustained by the plaintiff was, or should have been, reasonably foreseeable in the circumstances.

Commercial Host Liability

[53] This case involves commercial host liability. The law is this regard is well-settled. See *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239, *Stewart v. Pettie*, [1995] 1 S.C.R. 131.

Liquor Licence Act

[54] Under the *Liquor Licence Act*, R.S.O 1990, c. L.19, no person shall sell liquor except under the authority of a licence or permit to do so. The Act provides that a person may apply for a special occasion permit. Ontario Regulation 389/91 provides for two types or special occasion permits: a sales permit authorizing the sale and service of liquor and a no-sale permit authorizing the service of liquor without charge. Special occasions are defined in the regulation at Section 3 as a private event for invited guests only that is conducted without the intention of gain or profit from the sale of liquor, a public event or an industry promotional event.

[55] To obtain a special occasion permit, a person must complete and submit an application to a local LCBO store. The regulation also outlines the permit holder's requirements and duties. Section 32 of the Act provides that the permit holder shall not permit drunkenness, unlawful gambling or riotous, quarrelsome, violent or disorderly conduct to occur on the premises under control of the permit holder.

[56] Section 39(2) of the Act provides for a civil right of action if a person or an agent or an employee of a person sells liquor to or for a person whose condition is such that the consumption of liquor would apparently intoxicate the person or increase the person's intoxication so that he or she would be in danger of causing injury to himself or herself or injury or damage to another person or the property of another person, or if the person to or for whom the liquor is sold causes injury or damage to another person or the property of another person while so intoxicated.

Occupiers Liability Act

[57] Section 3 of this Act provides as follows:

> (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons, are reasonably safe while on the premises.
>
> (2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on, on the premises.

Foreseeability

[58] Liability only arises if the risk of the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged. All cases consistently hold that no host liability arises unless the risk of harm was reasonably foreseeable. The objective test

is whether someone in the defendants' positions ought to reasonably have foreseen the harm to the class of plaintiff rather than whether a specific defendant did?

[59] In the Supreme Court of Canada decision of *Rankin v. J.J.*, 2018 SCC 19, [2018] 1 S.C.R. 587, two youths attended a car garage business and checked unlocked cars to steal valuables. In one car's ashtray the youths discovered keys and decided to steal the car and pick up a friend. The car crashed and the passenger was severely injured. The court found on a straight application of principles that the business did not owe a duty of care to the plaintiff; the harm to the plaintiff was not a reasonably foreseeable consequence of the defendant's conduct. A business will only owe a duty to someone who is injured following the theft of a vehicle when, in addition to theft, the unsafe operation of the stolen vehicle was reasonably foreseeable.

[60] In *Bucknol v. 2280882 Ontario Inc.*, 2018 ONSC 5455, summary judgment was granted dismissing the plaintiff's claim for personal injury at a commercial establishment. The plaintiff had attended a nightclub late one evening and received a serious eye injury when he was struck by a beer bottle thrown by an unidentified person. The court found that the plaintiff had failed to point to some act or failure to act on part of the defendant that led to the injury and, further, to provide evidence setting out the relevant standard of care.

[61] In *Bucknol*, Justice Coroza found the incident was not reasonably foreseeable; the entire incident took seconds; there was no evidence that intoxication by a patron led to the incident; and the particular location where the plaintiff was not proven to be dangerous. There was no evidence of prior instances of beer bottle throwing, or any history of altercations or disputes involving customers in that bar.

[62] Justice Coroza also commented that although some harm is possible, this does not mean that it is reasonably foreseeable. For harm to be reasonably foreseeable, more than a mere possibility must be established. In relation to foreseeability, Justice Coroza identified that the issue was whether the plaintiff had offered facts to persuade the court that the risk to the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged. As Justice Coroza observed, the foreseeability question must be framed in a way that links the impugned act to the harm suffered. The court's analysis should not, in hindsight, be clouded by the fact that an incident actually did occur: *Bucknol, supra* at para. 92.

[63] The moving defendants also rely on the decision of *McKenna v. Greco* 52 O.R. (2d) 85 (Ontario High Court of Justice) that was affirmed by the Ontario Court of Appeal at 58 O.R. (2d) 63). A patron was seriously injured by one of the individual defendants in an altercation of short duration at a commercial bar. The trial judge found the hotel not liable; it was reasonably staffed for clientele at the time and the individual defendants were not known to be intoxicated persons who constituted a danger to the hotel's invitees. Moreover, there was nothing to alert the hotel to any danger on the occasion in question or on previous occasions. The judge found the injury was caused solely by one of the individual defendants whose actions could not be apprehended, reasonably anticipated nor prevented by the hotel.

[64] In *Dickerson v. 1610396 Ontario Inc.*, [2010] O.J. 5682, Section 39 of the *Liquor Licence Act* was found to impose a statutory liability in certain circumstances on a commercial establishment for harm caused by its business of selling alcohol. The plaintiff had been consuming alcohol at a pub with two friends. The defendant was with his own group of friends and maintained he was intoxicated. Both groups got into a minor scuffle that was broken up by pub staff in the parking lot. A short time later, the defendant, unprovoked, punched the plaintiff in the head causing him significant injuries.

[65] The Ontario Court of Appeal in *Dickerson* observed as follows:

> [35] While it is not necessary to decide in this case, there are two respects in which the statutory liability analysis required by s. 39 may differ from that required by the common law of negligence, although in practice circumstances where either would arise are difficult to imagine.
>
> [36] First, section s. 39 requires only that the risk of injury be reasonably foreseeable, not that in a general way, the type or kind of injury actually suffered be reasonably foreseeable. Second, s. 39 requires only that there be a reasonably foreseeable risk of injury to another person, not that the person injured be within the category of persons foreseeably at risk. These issues do not arise in this case, as the jury evidently concluded that there was no foreseeable risk of injury at all.

[66] The court in *Dickerson* found the harm was not foreseeable and did not interfere with the jury's conclusion that the defendant, who assaulted the plaintiff, was not overserved to the point of causing injury to himself or another person. The court rejected the argument that a breach of the *Liquor Licence Act* results in automatic liability and affirmed that principles of common law foreseeability still apply.

[67] The plaintiffs in oral and written submissions relied, among other cases, on *Zsoldos v. Canadian Pacific Railway Co.*, [2007] O.J. 942 where the plaintiff struck a train in the dark at a railway crossing and suffered serious injuries. Justice Rady cited the decision of Justice Major in *Ryan v. Victoria (City)*, [1991] 1 S.C.R. 201 at paras 37 and 38 and found legislative standards are relevant to the common law standard of care but the two are not necessarily co-extensive. The fact a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. In addition, she found the weight to be given to statutory compliance in the overall assessment of the reasonableness depends on the nature of the statute and the circumstances of the case.

[68] Justice Rady in *Zsoldos* found that mere compliance was not sufficient to exhaust the standard of care. There was an objective risk of harm established on the evidence because the way the railway crossing was configured presented an objective risk of harm to users of the highway, the risk was reasonably foreseeable and that Canadian Pacific Railway had not taken inspection steps that would have mandated additional protection. This also amounted to a breach of the *Occupier's Liability Act* in failing to take reasonable care in

the circumstances to see that persons entering the premises were safe. *Zsoldos* was affirmed on appeal to the Ontario Court of Appeal, 2009 ONCA 55.

Position of the Plaintiffs as to Genuine Issues

[69] The plaintiffs allege that the moving defendants were negligent by:

a. Failing to prevent Mr. Elliott's assault on the plaintiff;

b. Permitting Mr. Jonas entry to the centre when intoxicated and to obtain and consume additional alcohol after entry;

c. Breaching the *Occupier's Liability Act* and the *Liquor Licence Act*.

[70] The plaintiffs maintain there are a number of genuine issues requiring a trial. These can be summarized as follows:

a. The moving defendants failed to produce evidence from specific individuals or otherwise that the event was under sufficient control;

b. The moving defendants failed to operate in accordance with the requirements of the special occasion permit and City's municipal alcohol policy;

c. Reasonable security was not present;

d. The level of Mr. Jonas' intoxication upon arrival and during the event raises a genuine issue.

Discussion and Analysis

The standard of care

[71] It is for the court to determine the existence of a duty relationship and to lay down in general terms the standard of care by which to measure the defendant's conduct. The court must then determine the particular standard suitable for the case in hand and to decide whether the standard has been attained.

[72] The question of whether a duty of care exists is a question of relationship between the parties, not a question of conduct. The question of what conduct is required to satisfy the duty is a question of the appropriate standard of care. See *Stewart v. Petti*, *supra* at para. 32. The standard of care requires consideration of the factual context of the case.

[73] In some cases, the duty of care may arise from a statutory provision or by common law. In any situation, the standard of care is one of reasonableness, not perfection.

[74] The plaintiffs submit the municipal alcohol policy of the City informs both the standard of care and the foreseeability of harm. This submission is answered by the *Zsoldos* decision where Justice Rady finds that weight is to be given to statutory compliance in the overall

assessment of the reasonableness that depends on the nature of the statute and the circumstances of the case.

[75] The plaintiffs and Mr. Elliott both raise the possibility of disturbances. However, the mere possibility of disturbances alone is insufficient to base a duty of care and liability. This case is also not an alcohol-related injury situation caused by a guest, as in most of cases involving social and commercial host liability.

Foreseeability and requirements of the SOP and municipal alcohol policy

[76] The stated purpose of the City's alcohol policy was to reduce alcohol-related problems, the risks of injury and death and liability while increasing the user's enjoyment of the facilities. This purpose is laudable, obvious and uncontroversial.

[77] Counsel for the plaintiffs and Matthew Elliott contend that the moving defendants did not comply with some of the terms of the SOP and the municipal alcohol policy. They also both vigorously submitted that the moving defendants could not claim they could not foresee the risk created since the serving environment was structured by the failure to meet some of the requirements of the municipal alcohol policy.

[78] Ms. Goudy's evidence was that she had not read the terms of the policy even though her signature appears on the page acknowledging she had received and reviewed a copy of the policy attached to the rental agreement.

[79] There is no dispute that Ms. Goudy did not strictly operate the event in accordance with the conditions and requirements of the SOP and the municipal alcohol policy. These included the following:

a. a guest list existed but was discarded during the clean-up;

b. Mr. Jonas and Mr. Hinsperger were not on the guest list but were permitted entry;

c. Ms. Goudy as a host and holder of the SOP had consumed some alcoholic beverages during the event;

d. some alcohol was provided by alcohol shots and there were drinking games at the event;

e. part of the reason for the event was to make money for Ms. Goudy and her fiancé;

f. some invitations were not sent directly to guests when sent in a Facebook posting that may be regarded as a public notification;

g. one or two of the monitors, unlike the bartenders in attendance, were not SmartServe certified; and

h. there was no proof of SmartServe certifications being provided to the City two weeks prior to the event.

[80] The mere fact that alcohol was served at the event and that some requirements of the permit or the policy were not strictly followed are not necessarily determinative of liability. Foreseeability is the issue in this case.

[81] The defendant, Matthew Elliott, goes further to submit that the defendants' individual or collective failures in following the municipal alcohol policy preclude the defendants from arguing that the injuries to Mr. Jonas were not foreseeable. I do not agree. Failure to follow some requirements of a policy are not necessarily determinative of a breach of a standard of care nor can they presumptively or logically trump foreseeability. To do otherwise would improperly impose strict liability.

[82] In *Stewart v. Pettie*, [1995] 1 S.C.R. 131, Mr. Pettie was in the company of the plaintiffs at a dinner theatre establishment. He was consuming alcohol but was not visibly intoxicated. He drove a vehicle that was involved in an accident shortly after leaving the establishment. One plaintiff was seriously injured. Mr. Pettie's alcohol level clearly exceeded the legal limit at the time of an accident.

[83] One issue in *Stewart v. Pettie* was whether the establishment had an obligation to take positive steps to ensure that Mr. Pettie not drive. Mr. Pettie had been with the plaintiff and his wife throughout the entire evening and the establishment knew how much Mr. Pettie had to drink. The court found it was not reasonable to suggest that the establishment had to do more in those circumstances.

[84] Foreseeability is the *sine qua non* of tortious liability. See *Stewart v. Pettie, supra, at para 49*.

[85] In oral argument and subsequent written submissions, the plaintiffs raised the *The Wagon Mound (No. 1),* a decision by the Privy Council in 1961.[1] In view of the pronouncements made by the Supreme Court of Canada in *Stewart v. Pettie* and other cases since as to the issue of foreseeability in these contexts, it is unnecessary to deal any further with *The Wagon Mound* decision.

[86] Justice Major stated at para. 56 in *Stewart v. Pettie* as follows:

> I agree that establishments which serve alcohol must either intervene in appropriate circumstances or risk liability, and this liability cannot be avoided where the establishment has structured the environment to make it impossible to know whether intervention is necessary.
>
> This, however, must be read in the context of his reasons and particularly in relation to para. 57 where it was observed that the defendant, Mayfield, was aware of the circumstances of Mr. Pettie and it was not reasonable for them to intervene.

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[1] *Overseas Tankship (U.K.) Ltd. v. Mort's Dock and Engineering Co., The Wagon Mound (No. 1*), [1961] A.C. 388 1 All E.R. 404 (P.C.).

[87] The question as mentioned previously in *Bucknol*, and which is equally applicable in this case, is whether the plaintiff has offered facts to persuade the court that the risk to the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged. The foreseeability question must be framed contextually in a way to link the impugned act to the harm suffered.

[88] The injury to Mr. Jonas was caused solely by Matthews Elliott whose actions could not be apprehended, reasonably anticipated nor prevented by the defendants. This situation is factually very similar to that in *McKenna v. Greco, supra*.

[89] Also, like *Bucknol*, the entire incident in this case was a matter of seconds, there were no prior instances of altercations, difficulties or any enmity amongst any of the attending parties. Not even Matthew Elliott's wife, Shelby, had any thought he was going to assault Mr. Jonas. Mr. Jonas' entry and presence at the centre, the service and consumption of alcohol to Mr. Jonas while there, nor his condition was the cause of the incident.

[90] On the record before me, I conclude that neither the conduct nor the condition of Mr. Jonas reasonably and objectively could be seen to precipitate or warrant, in any way, any physical assault and harm to him. The assault was brief, sudden and completely unexpected. I find the plaintiffs have failed to offer facts to persuade the court that the risk of an assault was reasonably foreseeable.

Alcohol consumption, condition and conduct of Matthew Elliott

[91] Matthew Elliott's evidence is that he consumed five or six beers at his home that evening before leaving to the centre around approximately 11:00 p.m. He had stopped drinking two and one half hours before he went to the centre. He did not consume any alcohol at the hall. He testified that he had a buzz on when he went to the centre but had control of his faculties. This is largely the only evidence of Matthew Elliott's alcohol consumption.

[92] By any reasonable measure, Matthew Elliott could not be objectively regarded as intoxicated by alcohol when he attended and was at the centre. Also, contrary to the pleadings by the plaintiffs, there is no evidence of Matthew Elliott stumbling and acting aggressively towards any other attendees, other than his sudden assault on Mr. Jonas.

[93] Matthew Elliott's actions were sudden and brief and the assault on the plaintiff was unexpected by everyone, including his wife. His consumption of alcohol was solely and entirely while at his home, hours before attending the centre. On Matthew Elliott's evidence, the moving parties had nothing to do with his consumption of alcohol nor could anyone objectively or reasonably foresee or act to prevent such sudden and assaultive conduct by him in the circumstances.

[94] The plaintiffs also point to the municipal alcohol policy where

a. the permit holder was to provide "sufficient controls in place to prevent intoxication or rowdy people from entering or being at the event and that the aforementioned participants will be refused service and escorted safely from the event". The policy also required "the permit holder and the SmartServe Monitor have the right to

refuse admittance to persons who are under age or to an individual who appears intoxicated,"

b. the policy also encouraged the permit holder or the monitor to intervene by informing the offending individuals of the policy violation and ask it to stop, and

c. there were further steps referred to that the municipality could take in the event of a violation.

[95] As to evidence of Ms. Goudy knowing of Matthew Elliott's earlier rougher days and that he fought before, this must be seen in the broader context of the totality of evidence that Matthew Elliott was invited along with his wife and other family who Ms. Goudy also knew. Ms. Goudy's uncontroverted evidence was that she knew the Elliott family extensively, particularly Robert Elliott, Brian and Sheila Elliott and this extended to other events. This event was held in a small community and comprised of family, friends and associated friends. Matthew Elliott was invited and known to be attending with his wife, brothers and their wives and associated friends. Mr. Jonas was part of the group of friends who travelled together to the centre.

[96] I find the plaintiffs have not provided evidence to show objectively that alcohol-related disturbances and harm were a distinct and real possibility at this event.

Conflicts in the evidence as to Mr. Jonas' consumption of alcohol and condition

[97] In this case, Mr. Jonas' condition at the centre, whether intoxicated or not, is not the issue.

[98] Mr. Jonas's counsel submitted that there is evidence that Mr. Jonas was stumbling due to intoxication and that he reeked of alcohol. However, Mr. Jonas's own evidence was that he was not intoxicated when he attended the facility and that he consumed one beer at the centre.

[99] There are indeed conflicts in the evidence between Mr. Jonas and others as to his condition throughout that evening. I will first review the evidence in detail in this regard and then outline the implications of such conflicts in the evidence in relation to the issues on this motion.

Mr. Jonas' evidence

[100] Mr. Jonas was approximately age 51 at the time of the incident and was employed as a screw machine operator. He testified he worked until 7:00 p.m. that evening, came home and had one beer with dinner and went over uninvited to the Elliott property. Most of the others at the Elliott property were in their '20's. Mr. Jonas's evidence is that he consumed six beers up to 11:30 p.m. while at the shed with others. Mr. Jonas states that Matthew Elliott invited him to the party at the centre.

[101] When Mr. Jonas attended the entrance at the centre, he purchased a ticket for $10.00 to get inside and then bought 4 drink tickets for $20.00. He then exchanged two drink tickets for

two plastic cups of Coors Light beer at the bar. He consumed one beer and gave the other beer to Matthew Elliott. He estimated that there were 75 people in attendance.

[102] Mr. Jonas' evidence was that he was not stumbling, not slurring his words, not acting aggressive or unusual and he felt in control of his faculties. He had a detailed recall of matters throughout the evening and at the centre. This included what transpired when he was assaulted and then taken to the hospital. His evidence was also that he did not plan to get drunk that evening and was eating a lot at the centre.

Rebecca Barras' evidence

[103] Rebecca Barras was one of four bartenders who together worked the bar that evening. She was also a paramedic. She did not consume any alcohol that evening. She did observe Mr. Jonas immediately after the attack and came to assist him and assessed his injuries. Mr. Jonas did not appear to be intoxicated at that time.

Matthew Elliott's evidence

[104] Matthew Elliott's evidence was that he consumed five or six beers between 6:00 p.m. and 9:30 p.m. and that Mr. Jonas consumed 10 to 11 beers while at his property; Mr. Jonas brought 4 beers with him and had 5 or 6 of Mr. Elliott's beers before going to the centre. Mr. Elliott denied inviting Mr. Jonas to the centre or receiving a beer from Mr. Jonas at the centre, buying any drink tickets or consuming any alcohol while at the centre. Matthew Elliott said he had a buzz on but was in control of his faculties.

Shelby Elliot's evidence

[105] Shelby Elliott, Matthew Elliott's wife, states in her affidavit sworn October 12, 2018 that when Mr. Jonas arrived at their house, Mr. Jonas was already impaired by alcohol, he continued to drink alcohol and was clearly impaired by alcohol when he left their house; he was loud, slurring his words and stumbling around. On further examination, Shelby Elliott's evidence was that she noticed Mr. Jonas had two beers in his hand walking over to their house. While dancing at the centre with Mr. Jonas, her evidence was that Mr. Jonas "reeked like alcohol" but there was nothing inappropriate or offensive in Mr. Jonas's conduct toward her.

Robert Elliott's evidence

[106] Robert Elliott, Matthew Elliott's older brother, attend the party at the Elliott's and saw Mr. Jonas who he had known previously. Robert Elliott was consuming alcohol casually along with others in the shed. He made no other particular observations of Mr. Jonas. At the centre, he testified that Shelby Elliott gave him the eyes-to-help look. His evidence was that Mr. Jonas was grinding a little bit and dancing up really close to her. Robert Elliott then went between Shelby and Mr. Jonas as they were dancing. Mr. Jonas went to the side and stopped dancing.

Ryan Hinsperger's evidence

[107] Ryan Hinsperger, a friend of Matthew Elliott for five to six years through their work, states in his affidavit sworn October 19, 2018, that Mr. Jonas was at the Elliott residence and "was hammered" since he was stumbling all over the place, intoxicated by alcohol and that his condition did not change between the party at the Elliott's and the centre. On examination, his evidence was that he found out that same evening about the buck and doe event and tagged along. He also stated Mr. Jonas fell earlier on the way over to his house and that he helped Mr. Jonas to his back deck and made sure Mr. Jonas got into his house. He had been in the shed with Mr. Jonas and others drinking beer the entire time. Mr. Hinsperger consumed three beers. He says he told Mr. Jonas that it might be a good idea to hang back and not go along to the buck and doe event.

[108] Mr. Hinsperger was surprised to see Mr. Jonas at the centre, saw him stumbling around, get a beer at the bar and sit down. Mr. Hinsperger did not see the attack. The assault did not happen very long after they arrived at the hall. His evidence was that Mr. Jonas had a couple of beers at the hall, he did not remember Matthew Elliott being intoxicated, violent or rowdy before the incident which was a surprise, sudden, of 20 to 30 second duration and something he did not see coming at all. During these seconds, he observed Matthew Elliott looked angry while looking off at the dance floor and walked quickly past him.

Implications of Mr. Jonas' condition

[109] The plaintiffs and Matthew Elliott submit that if Mr. Jonas had been visibly intoxicated and if there had been door monitors, then he ought to have at least been denied entry at the centre and not served any alcohol in any event. If denied entry, he would not have been injured. Plaintiffs' counsel cites this as a genuine issue that requires a trial. I do not agree.

[110] The plaintiff must be able to pinpoint some act or failure to act on the part of Ms. Goudy that caused his injury. The *Occupier's Liability Act* does not impose strict liability and the presence of any hazard does not lead inevitably to the conclusion that the occupier has breached its duty to take such reasonable care to see that persons on the premises are reasonably safe while on the premises. That duty does not extend to the removal of every possible danger. As mentioned earlier, the standard is reasonability, not perfection.

[111] On the evidence before the court, Ms. Goudy had SmartServe trained and experienced staff for a modest gathering of family, friends and friends of friends. She arranged for a person as security at the entrance, four bartenders at a single bar location along with a number of others in the wedding party assisting. There was no rowdy or violent behavior throughout the evening by Matthew Elliott nor anyone else. Matthew Elliott engaged in no prior conduct that would lead any objective observer to conclude that he was going to be a risk of physical harm to the attendees.

[112] I find that the plaintiff has failed to pinpoint some act or failure on the part of the moving defendants that caused his injury or that they violated the reasonable test set out in the *Occupier's Liability Act*.

[113] In addition, I find the attack was an unforeseeable event that no reasonable host could have foreseen or prevented.

[114] In these circumstances, it becomes unnecessary to address the conflicts in the evidence as to Mr. Jonas' alcohol consumption and his condition. Mr. Jonas's condition and conduct are not causative. A trial is unnecessary since no genuine issue arises from the conflicts in the evidence as mentioned above *vis-à-vis* the moving defendants.

Failure to produce evidence by the defendants on the motion

[115] The plaintiffs also submit that an adverse inference ought to be drawn against the moving defendants because they ought to have provided evidence from anyone who might have had some form of door duty at the event or from the City's representative, a janitor who was present at the event.

[116] Rule 20.02(1) provides that the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having knowledge of the contested facts. However, this part of the rule must be read in context of the entire rule which permits affidavit evidence on a motion for summary judgment may be based on information and belief. See Rule 39.01(4).

[117] Furthermore, Rule 20.02(2) provides that in response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations and denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing there is a genuine issue requiring a trial.

[118] There is no property in a witness. There is no obligation on any party to call evidence for the other.

[119] Furthermore, there is no suggestion in the materials or submissions that any such persons have any knowledge of any contested facts. The plaintiffs are the responding party to this motion and specifically cannot rest solely on allegations and denials. Rather, the responding party has the obligation to lead evidence by affidavit or other evidence of specific facts. On this record, there is no merit to the plaintiffs' submission that it would be inappropriate to draw an adverse inference against the defendants.

[120] The plaintiffs also submit that the defendant moving parties' assertion that the party was under control ought not to be made when the court does not have evidence from individuals having some sort of duty at the door. The plaintiff contends this evidence and persons are known to and named by Ms. Goudy and the representative from the City.

[121] The plaintiffs have not been precluded from obtaining this evidence. In view of a motion for summary judgment, as is well-known and reported, the responding party must lead trump or risk losing.

[122] There is no merit to the plaintiff's assertion that summary judgment is not appropriate on the basis of the failure to produce evidence. This does not raise a genuine issue requiring a trial.

Summary

[123] I have concluded that no genuine issue requiring a trial is established for the following reasons:

a. under the *Occupier's Liability Act*, the occupier owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on premises are reasonably safe while on the premises. The plaintiffs have not been able to pinpoint some act or failure to act on the part of the occupier that caused Mr. Jonas' injury;

b. the duty of care does not extend to the removal of every possible danger. The standard is reasonableness, not perfection;

c. there were no incidents of disturbances at the centre prior to the incident. There was one minor concern that involved one intoxicated patron who was dealt with by Ms. Goudy and another person. This patron was appropriately removed from the party, placed in a taxi and taken home;

d. neither Mr. Jonas nor Matthew Elliott exhibited prior signs of aggressive behaviour or conduct that evening;

e. the attack by Matthew Elliott on Mr. Jonas was entirely unexpected, even to Mr. Elliott's wife, and could not have been reasonably been foreseen by the moving defendants;

f. Ms. Goudy, as a commercial host for a modest gathering of family, friends and friends of friends, arranged for a person as security at the entrance, four bartenders at a single bar location as well as a number of others in the wedding party to assist at the centre.

g. Any matters that arose were addressed by Ms. Goudy in a timely and appropriate manner and, other than the sudden and unforeseeable attack by Matthew Elliott, there were no other violent or rowdy events that arose. The event was under reasonable control by Ms. Goudy as a commercial host.

Conclusion

[124] As outlined in these reasons, there are no genuine issues requiring a trial involving the moving defendants.

[125] There shall be an order granting summary judgment in favour of the defendants, The City of Stratford and Carrie Goudy, and dismissing the action against them, including the crossclaim of the defendant, Matthew Elliott.

[126] If the parties cannot agree as to costs, the moving defendants may submit brief written submissions within 14 days. The plaintiffs and defendant, Matthew Elliott, may submit brief written submissions 14 days after receipt of the moving defendants' submissions.

"Justice M. D. McArthur"

Justice M. D. McArthur

Released: January 17, 2020

CITATION: Jonas v. Elliott et al 2020 ONSC354
COURT FILE NO.: 16-2726
DATE: January 17, 2020

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Richard Edmond Jonas and Anne Catherine Jonas

Plaintiffs

– and –

Matthew Elliott, The City of Stratford and Carrie Goudy

Defendants

REASONS FOR JUDGMENT

McArthur J.

Released: January 17, 2020