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# CIVIL LIABILITY OF COMMERCIAL PROVIDERS OF ALCOHOL

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*May 2015*

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## CIVIL LIABILITY OF COMMERCIAL PROVIDERS OF ALCOHOL<sup>1</sup>

### I. INTRODUCTION:

Social attitudes towards the consumption of alcohol have varied widely over time, within and between cultures, oscillating from condemnation to celebration and back again. Those conflicting social attitudes find their expression in the law of liquor liability. Social attitudes influence the types of cases lawyers and clients bring to the courts, and the deliberations of juries (and yes, of judges too) as they seek to balance competing interests and principles in their adjudication for alcohol-related losses.

The law of negligence imposes onerous duties upon commercial establishments who sell liquor to their patrons. The most common context in which a provider of liquor may be found liable is the commercial host context. A commercial host is a business that sells alcohol to the public from its business premises for profit. Throughout this paper, we will use the terms “commercial host”, “commercial liquor provider” and “licensee” more or less interchangeably.

Commercial hosts take a wide variety of forms – bars, cabarets, restaurants, etc... and all have a financial incentive to sell as much alcohol as possible. However, the law has developed a special relationship between the pub owner and its patrons which creates a duty to take care in dealing with their patrons while on the premises and once the patron has left the premises. The Courts have gradually imposed ever greater obligations on commercial hosts to ensure that their patrons do not become intoxicated and thereby suffer injury, or injure someone else. Indeed, one commentator placed the present broadening of liability in its historical perspective:

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<sup>1</sup> Portions of this paper draw upon – and are addressed in greater detail – the authors’ text, *i.e.*, Folick, L., et al., *Liquor and Host Liability Law in Canada*, Canada Law Book: Toronto, 2010.

*Thirty years ago, it was virtually unheard of for a bar to be held civilly liable for a car accident caused by one of its intoxicated patrons. Similarly, the idea that the intoxicated driver could recover for his or her own injuries probably would have been met with disbelief. Yet both types of claims are commonplace today ...*

[...]

*[T]he trend towards expanding liability has been consistent across the country. The 'good old days' when one could serve alcohol with impunity to any patron or guest are gone.<sup>2</sup>*

The purpose of this paper is to highlight the specific types of incidents and conduct that may give rise to liability for a liquor provider. The 5 key areas of potential liability to be discussed are:

1. Condition of the Premises;
2. Conduct of Patrons;
3. Activities Conducted on the Premises;
4. Conduct of Patrons After Leaving Premises; and
5. Use of Force by Staff.

## **II. CONDITION OF THE PREMISES:**

This category of potential liability relates to the condition of the drinking premises. A pub owner is clearly an occupier of the premises. Therefore, the pub owner has an obligation to ensure that the physical condition of the premises do not pose an undue risk of harm to those who enter. Floors should not be *too* slippery; stairs should be *adequately* lit; displays and furnishings should be sufficiently sturdy that they will not topple or collapse; etc. This also extends to keeping facilities on premises clean<sup>3</sup> and in

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<sup>2</sup> R.M. Solomon & S.J. Usprich, "Drink, Drive & Sue: Liability for the Intoxicated", *Journal of Motor Vehicle Law* (February 1993, Volume 4, No. 3).

<sup>3</sup> *Dashwood v. Pillars Club & Lounge* (2002), 112 ACWS (3d) 868 (NBQB)

good repair.<sup>4</sup> Such occupiers are in a unique situation because they invite people to enter and consume an intoxicating substance. Alcohol, by its very nature effects one's judgment and, in many cases, one's balance. As a result, commercial liquor hosts are often held to a higher standard of care to ensure that their patrons remain safe while on the premises.

The case law suggests a licensed establishment should take *special precautions* to safeguard intoxicated persons if it is foreseeable they will be present. For example, in *Niblock v. PNE*, a 56-year old plaintiff fell over a low railing on a steep staircase at the Exhibition grounds and was seriously injured.<sup>5</sup> The judge noted that the railing was 4-5 inches lower than the by-law required. The PNE raised the railing 18 inches following the mishap. The plaintiff's blood alcohol reading after the accident was three times the legal limit set for driving. The defendants argued that they had taken all reasonable precautions and that the plaintiff's fall was due to intoxication. The Court rejected these arguments:

*A risk of such staircase was that there would be crush of people, and a person might be pushed or forced towards the rail and might stumble and fall. There was a long drop to the ground. It was to be expected that people in a carnival atmosphere, might be carefree and careless. Liquor was served at three locations on the grounds, and it was to be expected people will be present, the premises must be reasonably safe for them.* [emphasis added]

An important question to consider in the context of the condition of a liquor establishment is what constitutes "reasonable foreseeability". *Savois v. Arvanitis*,<sup>6</sup> a case in which the plaintiff was struck in the eye by a plate thrown during a Greek wedding,

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<sup>4</sup> *Petersen v. 332391 B.C. Ltd.* (2000), 72 BCLR (3d) 214 (SC)

<sup>5</sup> *Niblock v. Pacific National Exhibition* (1981), 30 BCLR 20 (SC).

<sup>6</sup> (1993), 42 ACWS (3d) 758

considers this problem, and makes the important distinction between mere possibilities and reasonable foreseeable events. The court states:<sup>7</sup>

*Not every unexpected event, even though possible, can be said to be reasonably foreseeable and, with the greatest of respect to the able argument of counsel for the plaintiff, I can find only that the event in the case at bar was a possibility and not reasonably foreseeable. Counsel's argument appears to me to advance the proposition that the duty arises with respect to all foreseeable eventualities. This, with respect, makes the occupier an insurer of the safety of the plaintiff. A sudden fight, a fire, careless physical movements of all kinds by which the plaintiff might be injured are "foreseeable" in the sense that they could occur on the premises, but in my view to have to guard against all such contingencies on that basis makes the occupier an insurer.*

There was evidence that throwing the crockery was customary in some Greek weddings, and that other restaurants had posted signs forbidding the practice. However, the court accepted that no one had ever done so at the defendant's restaurant, and that it was not reasonably foreseeable that anyone would do so. The case was dismissed.

Therefore, if alcohol is served on the premises, and it is foreseeable that intoxicated people will be present, the premises must be reasonably safe. Accordingly, the occupier must take special care that the premises are safe because of the greater propensity for injury. The same analysis can apply to commercial hosts who allow liquor to be consumed on their property.

On the other hand, the courts accept that people who drink do not always take care for their own safety. A typical example is where a patron has consumed liquor and then proceeds to fall down stairs.<sup>8</sup> If it can be established that the stairs themselves were safe, the court will usually conclude that the fall was caused by the patron's instability

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<sup>7</sup> *Supra*, at para. 11

<sup>8</sup> *MacDonald v. Hi-Lo Ltd.* (1985), 63 NBR (2d) 437; *Burke v. Field* (1979), 23 Nfld. & PEIR 132, affd 33 Nfld. & PEIR 166 (SC)

as a result of drinking liquor and not by a defect in the premises. The fact that alcohol is consumed on the premises is a factor which the court considers in determining whether the premises were reasonably safe for *all* who may enter.

A dilemma which confronts occupiers is whether they should modify their premises after an accident in an attempt to avoid further accidents occurring from the same risk. That is, after an unexpected occurrence, should the occupier take measures amounting to extreme caution to improve upon the alleged defect, or should the occupier do nothing because his activities may condemn him? In *Cominco Ltd. v. Westinghouse*,<sup>9</sup> the B.C. Court of Appeal noted:

*No case binding upon us supports an exclusionary rule based on policy and I am not inclined to introduce such a rule. In my view a defendant will not expose other persons to injury and himself to other lawsuits in order to avoid the rather tenuous argument that because he has changed something, he has admitted fault.*

Therefore, such evidence is relevant, and admissible, but is not in itself proof of negligence. Where a plaintiff offers evidence of subsequent remedial measures, the trial judge must balance the probative value of that evidence against its prejudicial effect.

### **III. CONDUCT OF PATRONS:**

The B.C. *Occupiers' Liability Act* imposes a duty of care on the occupier in relation to the conduct of third parties (s.3(2)(c)). The typical example of where a licensed establishment can be found liable for the conduct of a third party is when an intoxicated patron inflicts injury on another innocent patron. The key issue in this context is whether the patron posed a foreseeable risk of harm. Foreseeability in this context

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<sup>9</sup> (1979), 11 BCLR 142 (CA)

requires an analysis as to whether the employees of the licensed establishment had any pre-existing knowledge of the patron's propensity for violence. If an employee becomes aware of a patron's propensity to become violent and yet fails to intervene before the patron injures another patron, the licensed premises may be found liable for failing to ensure the premises were "reasonably safe".

The case of *Stanton v. Twack* is an example of a bar being held liable for failing to intervene.<sup>10</sup> In *Stanton*, the defendant (patron) entered the pub and proceeded to insult and threaten a member of the plaintiff's party. The staff heard the threats but did nothing. The unruly patron then threw a beer glass in the plaintiff's face. The bar and the assailant were sued and the court held that the assailant's verbal abuse and threats constituted a *sufficient warning* to the employees that the assailant *may* have become violent. By simply ignoring the threats of the assailant, the bar breached its duty of care to take reasonable steps to protect the plaintiff and was liable in negligence for the plaintiff's injuries.

On the other hand, when an attack on another patron is spontaneous and unprovoked, the courts will usually exonerate the bar because such an attack is unforeseeable and the bar cannot anticipate or prevent the attack (for example, when a belligerent patron refuses to leave and then suddenly stabs another patron).<sup>11</sup> In such circumstances, the duty of the establishment is simply to intervene in a reasonable manner when the altercation occurs. One court, in dismissing an action brought in such circumstances, stated:

*The real and most important reason I find for dismissing this action, however, is that the fight occurred so quickly and with such little warning to those in attendance in the*

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<sup>10</sup> *Stanton v. Twack*, Unreported, May 10, 1982, (BCSC).

<sup>11</sup> See *McGeough v. Don Enterprises Ltd.* [1984] 1 WWR 256 (Sask. QB).



*lounge area that the staff of the hotel were not in a position to anticipate it occurring or were not in a position to prevent it continuing.*<sup>12</sup>

A claim against a hotel pub was dismissed in circumstances where the plaintiff was assaulted by another patron, previously unknown to him, after the plaintiff beat him at a game of billiards. The attack came without warning and pub security were on the scene within seconds of the assault.<sup>13</sup> In another case, *Petersen v. Stadnyk*, a regular patron with no known propensity for violence assaulted the plaintiff, who was also a regular patron.<sup>14</sup> Both patrons had spent several hours at the defendant's licensed restaurant without incident and the Court held that the fight and consequent harm to the plaintiff were not foreseeable. The *Petersen* case also suggests that the standard of care of a pub or bar will generally be higher than that of a restaurant, even when the restaurant has a "prominent bar" and a live band, since the risk of violence at a pub or bar is generally greater than at a licensed restaurant

#### IV. ACTIVITIES ON THE PREMISES:

Licensed premises are often confronted with atypical conduct. Take for example the case of *Jacobsen v. Kinsmen Club of Nanaimo*.<sup>15</sup> The Kinsmen sponsored a beer garden in a curling rink after the annual Nanaimo to Vancouver bathtub race. One particularly witty commentator summarized the facts of the *Jacobsen* case as follows:

*About 90 minutes after the doors opened, a playful patron entertained the capacity crowd of 2,000 by climbing one of the I-beams which supported the roof. He then dropped his pants while hanging from the beam and, in the judge's words, "flashed a moon". Several minutes after his descent he and a friend repeated the act. Shortly thereafter, a patron*

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<sup>12</sup> *Penny v. Fort Nelson Hotel*, Unreported, Vancouver Registry No. C866153, June 17, 1988 (BCSC).

<sup>13</sup> *Ferguson v. Quick and Terrace Hotel Ltd.*, Unreported, Prince Rupert Registry No. 9632, October 9, 1997 (BCSC).

<sup>14</sup> 2003 BCSC 2012

<sup>15</sup> *Jacobsen v. Kinsmen Club of Nanaimo* (1976), 71 DLR (3d) 227 (BCSC).

*known only as "Sunshine" tried to mimic the feats of his more agile predecessors. Unfortunately, while hanging from the beam, Sunshine lost his grip and fell 30 feet onto the plaintiff knocking him unconscious. Sunshine was not injured, except for the indignity of losing his pants in the fall. He got up, pulled up his pants and was not heard from again.*<sup>16</sup>

The court said that they would not have found the club liable if the injury had occurred during the first two climbs. Clearly after the first two climbs the club staff should have recognized the danger and took measures to stop the activity. The club staff had only shouted at Sunshine to stop the activity. The failure to actively intervene to prevent this *activity* was a breach of the duty of care to the plaintiff and the beer garden was found liable for "Sunshine's" conduct.

A commercial liquor provider may also have a positive duty to prevent an intoxicated patron from participating in activities which are dangerous given the patron's intoxicated state. In *Crocker v. Sundance Northwest Resorts Ltd.*,<sup>17</sup> the defendant ski resort held a competition in which patrons slid down a mogulled portion of a steep hill in oversized inner tubes. The plaintiff was visibly intoxicated but the resort allowed him to participate – and indeed, assisted him to do so. He suffered a neck injury which rendered him a quadriplegic. The Supreme Court of Canada reinstated the trial judge's finding that the resort was 75% liable for the plaintiff's injuries.

## **V. RESPONSIBILITY FOR PATRONS' CONDUCT ONCE THEY LEAVE THE LICENSED PREMISES:**

### **A. LEGISLATION:**

In British Columbia, it is an offence to serve alcohol to intoxicated individuals. The *Liquor Control and Licensing Act* stipulates:

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<sup>16</sup> R. Solomon & S. Usprich, "Civil Liability for the Conduct of the Intoxicated Across Canada" in E. Single, ed., *Proceedings of a National Conference March 1989* (Health and Welfare Canada, 1990) 60-69, 77-78.  
<sup>17</sup> (1989), 51 DLR (4<sup>th</sup>) 321 (SCC).

*“43.(1) A person must not sell or give liquor to an intoxicated person or a person apparently under the influence of liquor.*

- (2) A licensee or the licensee’s employee must not permit*
  - (a) a person to become intoxicated, or*
  - (b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.*

*46.(1) A licensee or the licensee’s employee may*

- (a) request a person to leave; or*
- (b) forbid a person to enter*

*a licensed establishment if for any reason he or she believes the presence of that person in the licensed establishment is undesirable or that person is intoxicated.*

*(2) A licensee or the licensee’s employee, in reach an opinion under subsection (1), must not contravene the Human Rights Code.*

*(3) A person must not*

- (a) remain in a licensed establishment after he or she is requested to leave by the licensee or the licensee’s employee,*
- (b) enter a licensed establishment within 24 hours after the time he or she was requested to leave the licensed establishment by the licensee or the licensee’s employee*

Therefore, the legislation creates a positive obligation not to serve patrons to the point of intoxication, and to refuse further service to patrons who become intoxicated.

The breach of a statutory provision, without more, does not ordinarily give rise to liability. There must be a foreseeable risk of harm to the patron or to the third parties before a duty will be imposed upon the liquor provider and the mere fact of over-consumption does not give rise to such a risk.<sup>18</sup> However, a statutory provision in Ontario should be noted. Section 39 of the Ontario *Liquor Licence Act* goes beyond merely prohibiting over-service; it imposes liability in the event that a person is served

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<sup>18</sup> *Stewart v. Pettie*, [1995] 1 SCR 131

by a commercial liquor provider past the point of intoxication and, while intoxicated, either dies or causes injury or damage to the person or property of another.<sup>19</sup>

This unique statutory provision creates a parallel basis of liability in Ontario which may not be subject to the same limitations inherent in the common law, as discussed below.<sup>20</sup>

## **B. COMMON LAW:**

A liquor provider risks liability whenever a patron leaves the premises in an intoxicated state. The commercial liquor provider can be liable to the following groups in relation to an intoxicated patron after the patron has left the establishment:

1. the patron himself or herself, as a result of injuries sustained by either the patron's own actions or the actions of another;
2. individuals accompanying the intoxicated patron who are injured as a result of the intoxicated patron's actions; and
3. innocent third parties who are injured by the intoxicated patron's actions.

### **Duty to Intoxicated Patrons**

The landmark decision of *Jordan House v. Menow and Honsberger* created the imposition of a common law duty on alcohol providers to protect their intoxicated patrons.<sup>21</sup> In this case, Menow, a visibly intoxicated patron, was ejected. He hitched a ride and was let out on the highway by an unknown driver. He was struck and injured by

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<sup>19</sup> RSO 1990, c. L.19

<sup>20</sup> *Hague v. Billings* (1993), 13 OR (3d) 298 (CA); *Haughton v. Burden*, [2001], OJ No. 4704 (SCJ)

<sup>21</sup> *Jordan House v. Menow and Honsberger* (1973), 38 DLR (3d) 105 (SCC).

Honsberger. It was held that the plaintiff, defendant driver and defendant hotel were equally negligent. The hotel knew of the plaintiff's propensity to drink to excess but had served him past the point of visible intoxication and ejected him without taking any steps to see that he could get home safely or to see that he was not ejected until he was in a reasonably fit condition to look after himself or that he could get home safely.

The reasoning in *Menow* has been applied to injuries sustained by a patron at the hands of another patron, after being ejected from a tavern. In *Murphy v. Little Memphis Cabaret*,<sup>22</sup> the plaintiff was assaulted outside the defendant's bar. The plaintiff and his friend were ejected at the same time as a group of "troublemakers" with whom they had a confrontation inside the bar. One of the "troublemakers" proceeded to assault the plaintiff outside the bar, causing him serious injury. The trial judge, applying the reasoning in *Menow*, held the bar liable for the plaintiff's injuries on the basis that "*it was eminently foreseeable that when [the plaintiff and his friend] were ejected from the tavern that they would be attacked by one or more of the group of four*". The decision was affirmed by the Ontario Court of Appeal.

### **Duty to Third Parties**

The duty of care imposed on the bar in *Menow* also extends to third parties who may suffer injury or damage at the hands of the intoxicated patron after the patron leaves the premises. In *Hague v. Billings*,<sup>23</sup> an intoxicated driver was involved in an accident which injured the plaintiff. The injured plaintiff sued the driver as well as two separate drinking establishments visited by the defendant driver before the accident. At the first drinking establishment (Oasis Tavern), the employees served the defendant driver one

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<sup>22</sup> [1996] OJ No. 4600 (Gen. Div.), aff'd (1998), 167 DLR (4<sup>th</sup>) 190 (ONCA)

<sup>23</sup> (1989) 48 CCLT 192 (Ont. SC), var'd (with respect to apportionment) (1993), 13 OR (3d) 298 (CA)

beer but he was refused any further alcohol because of his obvious signs of intoxication. The proprietor of the Oasis Tavern tried to persuade the defendant to give the keys to his car to one of his less intoxicated friends. The defendant driver ignored this advice and left the Oasis and went to another drinking establishment (Ship and Shore Hotel) where he was served another four beer. The employees of the Ship and Shore did not notice the defendant's intoxication and took no steps to see that he did not drive upon leaving the premises.

At trial, the Court found the Ship and Shore Hotel liable for:

- a) breach of its statutory obligation to not serve intoxicated patrons (under Ontario's unique statutory liability provision discussed above); and
- b) breach of its common law duty, because the employees of the hotel failed to observe the defendant's intoxication and to take steps to prevent him from driving.

Surprisingly, the Court held the Oasis Hotel had a duty to call the police if it was unable to stop the defendant from driving. The Oasis escaped liability only because the plaintiff failed to prove that the later accident could have been prevented had the Oasis called police as they should have. This decision represents one of the earlier cases to find that commercial liquor providers have an obligation to take *preventive steps* to ensure that an intoxicated patron does not drive. This obligation may include calling the police if the patron insists on driving.

A pivotal event in this area was the Supreme Court of Canada's 1995 decision in *Stewart v. Pettie*,<sup>24</sup> in which the Court explained the duty of care a commercial liquor provider owes to patrons who consume liquor on their premises. In that case, two couples attended an evening of dinner and live theatre. One waitress had served Pettie 10-14 ounces of alcohol over the course of the evening. Upon leaving, the passengers in the car allowed Pettie to drive, although they were sober and he was not. The driver's sister was seriously injured when Pettie lost control of the vehicle. Pettie's blood alcohol level was well above the legal limit an hour after the accident.

The Alberta Court of Appeal apportioned 10% fault for the plaintiff's injuries to the dinner theatre. On appeal, the Supreme Court of Canada held that the theatre was *not* negligent in discharging its obligations, for the reasons set out below.

Of keen interest to commercial providers of alcohol is the determination of how far they must go to ensure that a patron does not drive after leaving their establishment. Is it enough to simply warn the patron not to drive? Must the establishment attempt to take away a patron's keys, even against his or her will? Should the police be called? *Stewart* provides some limited guidance in attempting to answer these difficult questions.

What *Stewart v. Pettie* attempts to clarify is the circumstances which will require a liquor establishment to take positive steps to prevent a patron from driving. The test is: Were the circumstances are that a reasonably prudent establishment should have foreseen that an intoxicated patron would likely operate a motor vehicle. If so, the establishment *must* take positive steps to prevent the patron from driving, in order to avoid liability.

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<sup>24</sup> [1995] 1 SCR 131

In *Stewart v. Pettie* the Court confirmed that liability should not flow from the mere fact that a patron was over-served. To impose liability in such circumstances would be to ignore the fact that the injury to a class of person must be foreseeable as a result of the impugned conduct. Only if there is some foreseeable risk of harm to the patron or a third party, could the host be required to take action.

The Court found that because one waitress served Pettie 10-14 ounces of alcohol she should have known Pettie was becoming intoxicated, regardless of whether Pettie was exhibiting any visible signs of intoxication. However, it was not necessary for the employee to inquire as to who would drive because Pettie left the restaurant in the company of two sober adults. It was not reasonably foreseeable that Pettie's sober wife and sister would allow him to drive, knowing as they did that he was intoxicated.

For liquor-serving establishments, *Stewart v. Pettie* does not offer relief from the duty to prevent over-service of alcohol or to prevent patrons from driving if they have over-imbibed. However, the decision suggests that it is not necessary to inquire and take positive steps to prevent a patron from driving, if the patron is in the obvious company and care of others who are sober. The key to avoiding liability is to train staff to inquire as to how a patron may be getting home to ensure that patrons do not injure themselves and others once they leave the premises.

### **Foreseeability and Causation**

As alluded to above, liability in tort requires that a) the risk of injury or damage be foreseeable to the defendant and b) a causal connection be shown between the negligence of the defendant and the injury or damage to the plaintiff. The causal



connection links the foreseeable risk of harm, the breach of the defendant's duty to take steps to prevent that harm, and the harm suffered by the plaintiff.

In *Salm v. Coyle*,<sup>25</sup> the defendant Coyle attended a pub with some friends and drank to excess. A sober friend drove her home safely, whereupon she took her parents' car to drive to a party. On her way home, while still intoxicated, she was involved in a motor vehicle accident which injured the plaintiff. The Court accepted the pub's arguments that it could not be liable because the plaintiff's injuries were not causally connected to any breach of duty by the pub.

No causal connection was found in *Salm v. Coyle* because Coyle (a) left the bar with a sober driver and (b) arrived home safely, whether or not the pub took any steps to see that either occurred. Put another way, any injury or damage that occurred *after* Coyle arrived home safely was not foreseeable to the pub.

The decision in *Salm v. Coyle* was distinguished in *Holton v. McKinnon*.<sup>26</sup> The facts in *Holton* were similar to *Salm v. Coyle* except that the defendant driver was not driven home safely. Instead, he and the plaintiff, a friend of the defendant, went to two pubs and then drove to the plaintiff's home, where they consumed more alcohol. The two then left the plaintiff's home to attend another party. The defendant lost control of his vehicle and the plaintiff was rendered a quadriplegic in the ensuing accident.

The Court in *Holton* considered *Salm v. Coyle* as well as the Ontario cases *Haughton v. Burden*<sup>27</sup> and *John v. Flynn*<sup>28</sup> and distinguished them on the basis that, in each of those

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<sup>25</sup> 2004 BCSC 112

<sup>26</sup> (2005), 136 ACWS (3d) 1161

<sup>27</sup> [2001] OJ No. 4704 (SCJ)

<sup>28</sup> (2001), 54 OR (3d) 774 (CA)

cases, the intoxicated individual had arrived home safely before going out again and causing injury, while still intoxicated. In *Holton*, the defendant driver never arrived at his home safely. He only had a brief stopover at the *plaintiff's* home. The *plaintiff's* arrival at his own home may have ended any duty owed by the pubs in relation to the *plaintiff's* subsequent conduct, but it did not sever the chain of foreseeability and causation in relation to the defendant who accompanied him there.

### C. APPORTIONMENT OF FAULT:

Assuming a commercial liquor provider is found liable for failing to take reasonable steps to prevent an intoxicated patron from driving while impaired, the next question will be the percentage of fault attributed to the establishment.

Traditionally, the fault attributed to the liquor-serving establishment is in the range of 10% to 33<sup>1/3</sup>%. Even where a pub knew its patron had consumed 12 ounces of whiskey without food and another pub patron was concerned enough for the intoxicated pub patron that they offered to rent a room over night for the patron, the Court only apportioned 20% liability against the pub.<sup>29</sup> The rationale has been that the greater fault lies with the individual who engaged in the morally-reprehensible act of drinking and driving. This sentiment is reflected in the following passage from the Ontario decision *Dryden (Litigation Guardian of) v. Campbell Estate*:<sup>30</sup>

*A person who knowingly and persistently continues to drink to excess and drive a motor vehicle on our highways behaves in a dangerous and reprehensible manner. When others are drawn into the vortex of this conduct and are found to have been contributorily negligent, the lion's share of culpability, both morally and legally, should attach to the drinking driver.*

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<sup>29</sup> *Hansen v. Sulyma*, 2013 BCCA 349

<sup>30</sup> [2001] OJ No. 829 (SCJ) at para. 215

A similar sentiment is apparent in the Ontario Court of Appeal's decision in *Hague v. Billings*, where the fault attributed to the bar was reduced from 50% to 15%.

There are exceptions to this general "cap" of 33<sup>1/3</sup>% of liability. For example, in *Laface v. McWilliams*,<sup>31</sup> a British Columbia judge apportioned liability 50-50 between a pub and an intoxicated patron who drove away from the pub and ran into a crowd of pedestrians gathered on or near the roadway. The Court was animated by the fact that another person had alerted the pub that the patron was intoxicated and should not be permitted to drive and the pub apparently took no steps to prevent the intoxicated patron from driving.

#### **D. JOINT VENTURE DRINKING**

It is becoming increasingly common in commercial host cases for insurers to encounter a situation where two patrons drink to excess in the same licensed establishment and then leave together in the same vehicle. Predictably, after a motor vehicle accident occurs, the injured passenger asserts that they are blameless and attempt to downplay the degree to which their own choices contributed to their resulting predicament. In such cases, the passenger will often be found contributorily negligent if he over-imbibes in the consumption of alcohol with the other patron prior to the fateful decision to accept the ride. These cases have been referred to as "joint venture drinking" cases. The Ontario Court conducts a two-part commercial host liability analysis as set out in the

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<sup>31</sup> 2005 BCSC 291, aff'd 2006 BCCA 227

2005 and 2006 Ontario Court of Appeal decisions of *Pilon v. Janveaux* (“*Pilon #1*”<sup>32</sup> and “*Pilon #2*”).<sup>33</sup>

In *Pilon*, the plaintiff and the defendant attended a tavern after a baseball game. They became intoxicated over a 3 hour period in the tavern before leaving together in Janveaux’s truck. Pilon sustained a brain injury when Janveaux drove his truck off the road. Pilon sued both Janveaux and the tavern. At trial, the tavern did not accept responsibility for Pilon’s injuries because he had “willingly” accepted a ride when he knew or ought to have known Janveaux was impaired. The jury apportioned liability 49.5% to the driver Janveaux, 15% to the Mattawa Tavern and 35.5% to the plaintiff Pilon. Pilon appealed the judgment.

In *Pilon #1*, the Court of Appeal determined that the jury should have been asked these two liability questions:

1. First, what is the liability of the commercial host for causing or contributing to the accident by its negligent conduct towards the driver?
2. Second, what is the liability of the commercial host for causing or contributing to the plaintiff’s damages by its negligent conduct towards the driver and the plaintiff?

In *Pilon #2*, the Court of Appeal heard further submissions from the parties on the allocation of fault. The Court ultimately found the tavern 40% responsible for the plaintiff’s 35.5% share of fault (in addition to the finding that the tavern bore 15%

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<sup>32</sup> 2005 CanLII 39863 (ONCA)

<sup>33</sup> 2006 CanLII 6190 (ONCA)

responsibility for the accident). The plaintiff accepted the ride and failed to wear his seatbelt partly because he had been “over-served” to the point of intoxication by the tavern. The tavern was therefore responsible for an additional 14.2% of the liability for the plaintiff’s damages (40% of 35.5%).

Most recently, the Ontario Court of Appeal published reasons for judgment in *McLean v. Knox*.<sup>34</sup> In *McLean*, the Ontario Court of Appeal held that the assessment of fault in “joint venture drinking” cases involves two phases: first, the commercial host’s liability for the accident; and second, the host’s responsibility for the plaintiff’s own degree of fault (where the host’s “over-service” compromised a passenger’s ability to think rationally). The Court of Appeal commented:

*The degree of the commercial host’s responsibility for allowing the driver to become impaired, as a matter of logic, will normally be similar to the degree of the commercial host’s responsibility for allowing the passenger to become impaired.*<sup>35</sup>

However, the Court cautioned this would not always be the case. Each case will turn on its own facts.

At present, the court outside of Ontario have not explicitly adopted the two-part commercial host liability analysis in cases involving concurrent breaches of duties to two patrons. The Courts in other provinces have tended to “eyeball” liability, often apportioning it between the three parties without fully explaining the apportionment in any specific terms. However, as a result of *McLean*, courts outside of Ontario may elect to follow the two-phase liability assessment adopted in that case. The results could be

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<sup>34</sup> 2013 ONCA 357

<sup>35</sup> *Supra*, at para. 64

higher shares of liability being apportioned to commercial hosts in “joint venture drinking” cases.

## **VI. USE OF EXCESSIVE FORCE BY EMPLOYEES OF LICENSED PREMISES:**

### **A. LIABILITY OF BAR OWNERS AND EMPLOYEES:**

Bar owners can be vicariously liable for the conduct of their employees in the handling of patrons. The most common situation arises when a bouncer is requested by a staff member to remove an intoxicated patron. The patron refuses to leave and the bouncer takes steps to forcibly remove the unruly patron. As is all too often the case, the bouncer gets carried away in the task and uses more than reasonable force to expel the patron.

Generally, employees cannot use any force until the person has been asked to leave. Once the patron has been asked to leave and has been afforded an opportunity to leave and they do not leave, then the employee can use *reasonable force* to remove the patron. The manner in which the ejection is performed is critical, and whether the force exerted is found to be reasonable will depend highly on the circumstances. The physical setting,<sup>36</sup> nature of the premises,<sup>37</sup> methods of forcing someone to leave,<sup>38</sup> and the personal characteristics of both the plaintiff patron and the defendant employee<sup>39</sup> will all be considered by the Court when it concludes if *reasonable force* was used. It is perfectly acceptable to grab a patron’s arm to remove the patron from the premises. If the patron physically resists, only reasonable force can be used. Only in situations where employees reasonably believe that the conduct of the patron puts the employees

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<sup>36</sup> *Godenzie v. Club Soda Cabaret Ltd.* (1992), 35 ACWS (3d) 350

<sup>37</sup> *Petersen v. Stadnyk*, 2003 BCSC 2012

<sup>38</sup> *Livingston v. Zantav Ltd.*, [1990] OJ No. 682

<sup>39</sup> *McCluskey v. Metrotown Hotel Inc.* (1994), 46 ACWS (3d) 243

or other patrons in danger can they inflict harm, and then only to the extent necessary for self defence. The right of self-defence was described in *Salmond on Torts*:<sup>40</sup>

*It is lawful for any person to use a reasonable degree of force for the protection of himself or any other person against any unlawful use of force. Force is not reasonable if it is either (i) unnecessary – i.e. greater than is requisite for the purpose – or (ii) disproportionate to the evil to be prevented...*

*In order that it may be deemed reasonable within the meaning of this rule, it is not enough that the force was not more than was necessary for the purpose in hand. For even though not more than necessary it may be unreasonably disproportionate to the nature of the evil sought to be avoided. A man cannot justify a maim for every assault; as if A strike B, B cannot justify the drawing of his sword and cutting off his hand; but it must be such an assault whereby in probability the life may be in danger.' One cannot lawfully defend oneself against a trivial assault by inflicting death or grievous bodily harm, even though the assault cannot be prevented in any other way. Still, 'if You are attacked with a deadly weapon you can defend yourself with a deadly weapon or with any other weapon which may protect your life. The law does not concern itself with niceties in such matters. If you are attacked by a prize-fighter you are not bound to adhere to the Queensbury rules in your defence.' He on whom an assault is threatened or committed is not bound to adopt an attitude of passive defence: 'I am not bound to wait until the other has given a blow, for perhaps it will come too late afterwards,' it was said in the *Chaplain of Gray's Inn's Case* in 1400 (y.B.2 Hen.IV, fs. 8, pl. 40). The defendant will be justified so long as he does not go beyond what is reasonable as a measure of self-defence. Nor need he make any request or give any warning, but may forthwith reply to force by force.*

Factors to be considered to address the merits of the defence of self-defence are the nature and seriousness of the attack or threatened attack, as well as the relative size and strength of the combatants. The onus is on the defendant to prove the defence.<sup>41</sup>

A key issue for liability insurers when confronted with a civil suit arising from injuries sustained from a forcible ejection is whether coverage extends to the employee who allegedly inflicted the harm. Clearly, if the injured patron was injured during the course of removal from the bar, the employee was acting within the scope of his

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<sup>40</sup> *Salmond on Torts*, 13<sup>th</sup> ed., pp. 310-11, as cited in *Cottreau v. Rodgerston* (1965), 53 DLR (2d) 549 (NSSC)

<sup>41</sup> *Mann v. Balaban*, [1970] SCR 74

employment and the insurer will extend coverage to that employee. The test applied by the courts to determine whether the employee was acting within the scope of his employment is whether the conduct complained of was “closely and directly connected with the authorized duties of the employee”. The fact that bouncers are hired to remove unruly or intoxicated patrons means that most injuries inflicted by a bouncer when removing a patron are within the scope of their employment duties and therefore the bar owner will be found vicariously liable.

A recent case example will illustrate the point. In *Miller v. Loughheed Ventures Ltd.*,<sup>42</sup> the bar argued that it was not liable for injuries an employee doorman inflicted on a patron because the employee was not acting within the scope of his employment. The employee in the *Miller* case heard glass breaking in the bar’s parking lot; he approached the plaintiff to ask whether he had stolen a beer mug from the bar. An argument ensued and the employee assaulted the patron in the parking lot. The written policy of the bar stipulating that the employees duties included “...ensuring that patrons do not take any drinks or glasses out of the premises when leaving”. Although the employee lost control and used excessive force outside of the premises, the court held that when the employee approached the plaintiff concerning the broken glass, he was discharging his duties as a doorman and all events that followed were therefore within the scope of his employment. The bar was therefore found vicariously liable for the vicious beating by the employee in the parking lot.

The courts are extremely reluctant to relieve an employer from liability for the conduct of its employees. However, if you can establish that the assault was not closely connected with the employee’s duties, a bar owner can be relieved of liability. For

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<sup>42</sup> *Miller v. Loughheed Ventures Ltd.*, Unreported, New Westminster Registry No. C880723, November 28, 1989 (BCSC).



example, in a situation where a drunk patron swears at a waiter who proceeds to go outside and involve himself in an altercation with the patron, the waiter's authorized duties were restricted to the service of drinks. Therefore, the assault was not part of the employee's authorized duties and the bar was not vicariously liable.<sup>43</sup> In order for a bar owner as employer to avoid liability for the conduct of its employee, it is necessary to establish on the evidence that the conduct complained of can be attributed solely to the fulfillment of the employee's *own purposes* - for example, when an employee chases someone in order to take his own personal revenge. If an employee embarks upon a private folly unrelated to his duties as doorman, the bar may be able to escape vicarious liability for injuries inflicted by that employee.

#### **B. LIABILITY OF BAR OWNERS FOR CONDUCT OF VOLUNTEERS WHO ASSIST EMPLOYEES TO REMOVE PATRONS:**

Bar owners may also be held liable for the conduct of non-employees who assist the bar's employee during a forcible ejection. In *Montgomery v. Black*,<sup>44</sup> a Victoria pub owner was found vicariously liable for the conduct of its employee *and* a patron who assisted the employee in ejecting a patron from the bar. The "helpful" patron was a bouncer at another club. An altercation ensued between the plaintiff, the patron and the employee. The bar manager watched the entire event. The court held that the patron had "*completely unjustifiably inserted himself into the bar's operation by assisting in the plaintiff's ejection*", and that the non-employee's intervention occurred with the bar's full knowledge and acquiescence, so the bar was vicariously liable for the patron's conduct.

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<sup>43</sup> See *Brezinski v. Shultz*, [1975] 3 WWR 467 (Sask. QB).

<sup>44</sup> *Montgomery v. Black*, Unreported, Victoria Registry No. 1190/87, September 26, 1989 (BCSC).

### **C. PERSONAL LIABILITY OF SHAREHOLDERS FOR CONDUCT OF EMPLOYEES:**

It is a basic principle of corporate law that a shareholder is protected from personal liability arising from the liability of the corporation or its employees. However, directors, officers and their senior employees of a corporate entity can be held personally liable when their acts or omissions cause or contribute harm to another. In the case of commercial liquor providers, company management may be personally liable for their management failings, as well as for their conduct in the liquor establishment, when an injury occurs.

In the case of *Downey v. 503277 Ontario Ltd.*,<sup>45</sup> a patron was removed from the premises and viciously beaten by two bouncers in the parking lot. Two of the principal shareholders of the company were also managers and supervisors of the bar responsible for the hiring of bouncers, one in his capacity as a senior employee and the other in his capacity as a director and officer. The court held both individuals personally liable in negligence for hiring doormen whom they knew or ought to have known to be violent or dangerous and would pose a threat of violence or danger to patrons. The court held that the failure of the shareholder/managers to properly check the references of the bouncers or make any reasonable inquiries as to their criminal background amounted to negligence and the shareholders were held personally liable.

### **VII. SUMMARY AND CONCLUSION:**

This paper highlights some of the emerging issues and trends that all liquor providers should be aware of. The rationale for the imposition of such onerous obligations is

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<sup>45</sup> *Downey v. 502377 Ontario Ltd.*, Unreported, January 28, 1991 (Ont.SCJ).

founded in public policy. Mr. Justice Granger, in the *Hague v. Billings* case discussed above, explained the perspective of the courts when confronted with alcohol provider situations:

*If tavern owners are allowed to sell intoxicating beverages, they must accept as a price of doing business, a duty to attempt to keep the highways free of drunk drivers ... The duty to take affirmative action is for the protection of the general public. Society's view of drinking and driving is changing dramatically and the public has a right to assume that a person or corporation making a profit from the sale of these intoxicants will acknowledge and carry out this duty.*

Liquor providers must carefully train employees as to the service and handling of their patrons and establish written policies to address specific fact situations. Only those commercial liquor providers who implement and enforce specific guidelines, and train staff accordingly, will be able to avoid the broadening scope of liability imposed by this evolving areas of the law.