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&
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Case Comment: B.C. Court of Appeal takes a step back and reconsiders the liability of a Pub in the case of *Hansen v. Sulyma* (2013) BCCA 349

In many motor vehicle accident cases involving commercial host liability, a trial judge is faced with the task of apportioning fault between an intoxicated driver who injured a third party, and a commercial host who "overserved" the driver. The courts commonly conclude that a person who knowingly and persistently continues to drink to excess and then drives a motor vehicle has behaved reprehensibly and should bear the "lion's share" of culpability. Where commercial hosts are found at fault in such situations, the range of fault apportioned to them typically falls between 5%-33%.

In the recent case of *Hansen v. Sulyma,* 2013 BCCA 349, the British Columbia Court of Appeal apportioned liability consistent with this approach, despite the presence of aggravating factors arising from the commercial hosts' actions.

In that tragic case, the plaintiff was left quadriplegic as the result of a car accident. The plaintiff had been sitting in the passenger seat of her car next to the driver, the first defendant Sulyma. They had run out of gas and were parked off the paved portion of the road. Their vehicle was struck from behind by a vehicle driven by the second defendant Leprieur. Mr. Leprieur had been drinking at a nearby pub, and had become intoxicated. Michael Libby of Dolden Wallace Folick LLP represented the commercial host in this case. Prior to trial, a resolution was reached between the commercial host and the other parties, and as a result, the commercial host did not participate in the trial (which was primarily concerned with the fault of the defendant Sulyma, but which also addressed the pub's degree of fault). The trial proceeded on the basis of an agreed statement of facts which had been authored and agreed to

by counsel for the remaining parties, and no evidence was received from the pub's staff.

The agreed facts, as they pertained to the commercial host, included the following: (a) Mr. Leprieur ran up a bar tab in excess of one hundred dollars (which included some drinks purchased for others); (b) Mr. Leprieur most likely consumed at least six drinks, each containing a minimum of two ounces of alcohol; (c) He did not purchase any food at the pub; (d) During a staff shift change the retiring bartender did not tell her replacement how long Mr. Leprieur had been drinking in the pub; (e) While staff did not observe Mr. Leprieur to be showing signs of being "an extremely drunk person", another patron offered to pay for a room for him at the attached inn; (f) Mr. Leprieur's blood alcohol content at the time of the motor vehicle accident was between 147mg% and 167mg%; (g) The pub staff did not take any steps to evict Mr. Leprieur or otherwise stop serving him; and (h) Nor did they take any steps to determine whether he would be driving when he left the pub, or to prevent him from driving away even though they should have realized he was likely to do so.

The trial judge apportioned only 5% of the total fault to the commercial host. However, the Court of Appeal concluded that the trial judge's allocation of minimal responsibility to the pub was grossly disproportionate to its comparative blameworthiness including its disregard of its statutory obligations. The court concluded that the pub was 20% at fault for the accident, with Sulyma bearing 10% of the fault, and Leprieur having the remaining 70%.

This case is of interest to insurers of commercial hosts for two principal reasons.

First, it serves to further confirm the "typical" range of liability to be borne by a negligent commercial host. Second, it serves as a judicial example of a moderate apportionment to a commercial host in light of what were clearly aggravating factors and significant blameworthiness on the part of the pub.

Counsel for Sulyma has sought leave to appeal this decision to the Supreme Court of Canada. A decision as to whether or not leave to appeal will be granted is expected in early 2014. Even if leave is granted, it is unlikely that any subsequent decision by the Supreme Court of Canada will alter the apportionment of fault to the pub in this case.

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