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Social Host Liability

House party hosts not responsible - but could be

The Ontario Court of Appeal recently decided that homeowners did not share responsibility for injuries caused by a drunk guest as he drove home from their house party. The ruling was careful to emphasize, however, that social hosts will not be immune from liability in all cases.

In ***Childs v. Desormeaux*** (2004, Ont. CA), a drunk guest on his way home from a New Years Eve house party crossed left of centre and struck an oncoming car, killing one of its passengers and leaving another a paraplegic.

Desormeaux was a self-described alcoholic with prior impaired driving convictions. At the time of the accident his blood alcohol limit was almost three times the legal limit.

The party hosts were his friends and knew of his propensity to drink. He had often slept over in the past when he had had too much to drink. The party was potluck and BYOB (bring your own bottle) and the hosts served nothing apart from a glass of champagne at midnight.

Desormeaux left the party in his car an hour or so later. The resulting accident led to a criminal conviction as well as a civil action against him and his hosts. Desormeaux had no auto insurance and no assets. The hosts, if liable to any degree, would be responsible for all damages and their homeowners insurance policy would be available to its limits.

Trial decision

The trial judge would have split liability, 85% against Desormeaux, and 15% against the hosts for failing to stop him from driving. The hosts had a duty to other persons using the road and a duty to monitor Desormeaux's drinking, according to the judge, because of his history and because he had arrived with two companions that were clearly intoxicated.

The claim against the hosts was ultimately dismissed for policy reasons, however, as the trial judge decided that social host liability was a complex issue best determined by the legislature, not the courts.

Affirmed, but for different reasons

The Court of Appeal agreed that the action should be dismissed, but took a different approach and found that social hosts *did not* owe users of the road a duty in these circumstances:

- the party was BYOB, with the hosts neither providing nor serving the alcohol consumed by Desormeaux; and
- there was no evidence that the hosts actually knew how much their guest drank that night; and
- the hosts did not know their guest was impaired when he left the party.

Although the Court of Appeal saw no duty on these facts, it was careful to say that social hosts were not immune from liability:

“Depending on the circumstances, a social host may be implicated in the creation of the risk to users of the road, especially if the social host knows that an intoxicated guest is going to drive a car and does not make reasonable efforts to prevent the guest from driving.”

The Court stated that the social hosts in this case were not “active participants in creating the danger.” They did not serve the guest to the point of intoxication, for example, knowing that he was likely to drive afterward.

The guest's own expectations could be relevant in some cases, the Court also stated. A past history of letting the guest sleep over when drunk, or of calling him a cab, might help impose a duty of care on the host.

Implications

To date at least, social hosts have tended to avoid liability for an impaired guest's negligence. But the developing law does indicate that the opposite result—with potentially serious consequences for homeowners and their insurers—could be reached on facts not so different from those found in *Childs v. Desormeaux*.

- - - - Insurer pays \$100k punitive award - - - -

After finding that an LTD insurer breached its duty of "utmost good faith," a divided BC Court of Appeal not only affirmed a \$20,000 aggravated damages award at trial but tacked on an extra \$100,000 in punitive damages. The decision, *Fidler v. Sun Life Assurance* (2004, BC CA), is the latest in a string of cases penalizing bad faith.

The insured in *Fidler* was a bank employee that developed chronic fatigue syndrome and fibromyalgia as a consequence of a kidney ailment.

The LTD accepted medical evidence of Fidler's disability and paid benefits under the policy through the two year "own occupation" period and on into the "any occupation" period. Payments in total lasted over six years but were terminated in 1997, partly on the basis of surveillance video, but without new medical evidence and without notice to Fidler.

The Court of Appeal acknowledged that the insurer was entitled to protect its own interests in assessing the claim. But in doing so, the Court stated,

"...it was bound to assess the evidence objectively, and to have due regard for the plaintiff's position of vulnerability."

Five years after termination, and on the eve of trial, the insurer reinstated benefits with arrears even though there was no change in Fidler's

medical condition and no medical evidence to support the insurer's change in position.

That length of time, the Court of Appeal ruled, and the distress and anxiety Fidler experienced through it, meant that the trial award of \$20,000 in aggravated damages was neither too high nor out of proportion in the circumstances of the case.

The insurer's "arbitrary and high-handed" conduct also warranted censure, in the Court's view.

Noting that a long-term disability policy was a "peace of mind" contract, the Court found that the insurer may not have acted from malice but was "wilfully blind" to its good faith duty and the effect of a breach of that duty on its insured.

This "one-sided approach" continued after termination of benefits. The insurer would not disclose the information it said was inconsistent with Fidler's disability, and that affected her ability to appeal the termination.

While the insurer's "capitulation" just before trial made its conduct less blameworthy, the Court still felt that extra censure beyond aggravated damages was required to meet the goals of deterrence and denunciation.

Punitive damages were set at \$100,000. One appellate judge, writing in dissent, agreed with the aggravated damages award but would not have awarded punitive damages.