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• THE CONDOMINIUM CONUNDRUM CONTINUED — UPDATING BRITISH COLUMBIA'S LEAKY BUILDING CRISIS •

R. Glen Boswall
Clark, Wilson, Vancouver

INTRODUCTION

The purpose of this article is to provide an update to Neo J. Tuytel's paper, "The Condominium Conundrum: Dealing with British Columbia's Leaky Building Crisis," 18 Can. J. Ins. L. 37. Although it was published in this journal in May 2000, Mr. Tuytel's paper was actually prepared two years earlier for an Insurance Institute of British Columbia presentation in November 1998. This paper will explore the significant legal developments since that time.

Editors' note: In the May 2000 issue, Neo J. Tuytel wished to thank his partner, Nigel Kent, for his help in putting together the article "The Condominium Conundrum: Dealing with British Columbia's Leaky Building Crisis."

GOVERNMENT REACTION

When Mr. Tuytel wrote "The Condominium Conundrum" in 1998, the Barrett Commission of Inquiry had just issued its first report on the leaky condo crisis and the provincial government had enacted the *Homeowner Protection Act*¹ to, among other things, provide low cost repair loans to leaky condominium owners. Since then, the provincial government has passed mandatory mediation regulations under the *Homeowner Protection Act*² and enacted the *Strata Property Act*.³ The Barrett Commission has issued a second report.

The mandatory mediation regulations under the *Homeowner Protection Act* came into force in May 1999 and give any party to a residential construction lawsuit the power to compel the others to mediate. The prohibitive cost of leaky condo trials makes these regulations a godsend for owners, designers, builders and insurers. Compulsory pre-mediation conferences increase the chances that these complicated lawsuits can be effectively negotiated. The

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• COMMERCIAL HOST LIABILITY IN CANADA •

Rajesh Sharma

Student-at-Law, University of Alberta, Edmonton

Those who serve alcohol with the intention of making a profit bear a burden to protect their patrons, and others foreseeably at risk, from the dangers created by their intoxication. Canadian jurisprudence has judged that burden to be an onerous one — if not properly fulfilled, liability will ensue to the proprietor for the actions of his patrons. The commercial host (the term “host” or “innkeeper” will be used in this article for convenience) owes a duty to patrons on his premises; this duty extends to patrons who leave the premises and cause a loss either to themselves or to a third party.

The duty of care owed by a host to those on his premises is easily described. He or she must take care not to expose his patrons to unusual dangers created either by the physical condition of the premises or the physical presence of patrons that the host knows (or ought to know) could foreseeably cause injury or loss.¹

The primary focus of this article is the duty of care which may arise between an innkeeper and his patron; the standard of care expected of the innkeeper towards his patron; and the degree of liability which often results when an intoxicated patron inflicts injury to himself or a third party upon his departure from an establishment. This article will discuss what the courts have judged to be the proper discharge of the duty of care. The discharge of this duty of care is of some concern, as the courts have dramatically moved away from their position of thirty years ago. It is clear from examining recent case law that, to limit liability, the innkeeper *must* take positive steps.

GENERAL PRINCIPLES OF COMMERCIAL HOST LIABILITY

Commercial host liability in Canada essentially began with the Supreme Court decision in *Jordan House Ltd. v. Menow*.² In *Jordan House*, an innkeeper ejected an intoxicated patron from the establishment, reasonably anticipating that the patron would walk home along a busy highway at night. Not surprisingly, the patron was struck by a vehicle and suffered injury.³

Legislation in Canada typically prohibits the sale of liquor to intoxicated persons on licensed premises. Such was the case in *Jordan House*. Justice Laskin (as he then was) did not hold that the legislation was the basis for a civil action *per se* but only that it was a relevant factor in determining whether a duty of care was owed by the hotel and its employees to the plaintiff.

The case turned on its facts — the innkeeper knew that Menow had an inclination to drink and would have to walk home alone:

Given the relationship between Menow and the hotel, the hotel operator's knowledge of Menow's propensity to drink and his instruction to his employees not to serve him unless he was accompanied by a responsible person, the fact that Menow was served, not only in breach of this instruction, but as well in breach of statutory injunctions against serving a patron who was apparently in an intoxicated condition, and the fact that the hotel operator was aware that Menow was intoxicated, the proper conclusion is that the hotel came under a duty to Menow to see that he got home safely...

The legal relationship between Menow and the establishment (that of invitor-invitee), combined with the common-law duty of care which arises when acts can foreseeably injure or cause loss to others resulted in a positive duty upon the innkeeper. The duty of care was breached when Menow was served even while intoxicated, and later ejected with the knowledge that he would be walking along a stretch of highway at night. *Jordan House* demonstrated that this duty of care can also be extended to other persons who are injured by the actions of an intoxicated patron.

While *Jordan House* implanted the concept of commercial host liability in Canadian law, *Stewart v. Pettie*,⁵ completed its evolution. The progression of the case itself, through the various court levels, illuminates legal concepts that the lower courts were struggling with. In the final incarnation of the case, the Supreme Court of Canada laid down a complete analysis of commercial host liability and thus made

Stewart the leading Canadian case in this area of the law.

The plaintiff, Gillian Stewart, was a passenger in a single motor vehicle accident. Tragically, she was rendered a quadriplegic when the car, driven by her brother (Pettie), went out of control and struck a noise abatement wall and a light standard.

The plaintiff and her husband, along with her brother and his wife attended a dinner theatre production at the Mayfield Inn (the defendant establishment). While having several drinks before the dinner theatre, the defendant driver had between five and seven double rum and cokes. Testimony indicated that he was intoxicated at the time of the accident.

The trial decision⁶ is, in one respect, markedly different than the state of current Canadian law. Agrios J. found no liability on the part of Mayfield Inn. He stated that, in order for Mayfield to be liable, there would have to be some combination of circumstances such as visible intoxication and knowledge that Pettie was going to drive. Pettie was not obviously intoxicated, and even if he was, he was in the company of two sober individuals aware of the amount of alcohol he had imbibed. Thus, Mayfield was under no obligation to intervene. The requirement of "obvious intoxication" is not a requisite for a duty of care to emerge under present Canadian law.

At the appeal level,⁷ Hetherington J.A. said that the waitress should have known Pettie was becoming intoxicated, and also should have known that he might leave by car. The court stated that the waitress should have made inquiries as to their vehicular plans (which she did not). Mayfield thus breached two duties of care: serving Pettie past the point of intoxication and then failing to take any steps to ensure that no harm came to third parties. Justice Hetherington stated that the presence of two sober drivers did not affect the foreseeability of the fact that Pettie might drive.

DUTY OF CARE

Justice Major for the Supreme Court of Canada began his analysis by determining whether or not a duty of care existed between Mayfield and the third party (Stewart). Noting that *Jordan House* had established that there was indeed a duty of care between alcohol serving establishments and patrons, who became intoxicated, Justice Major stated:

It is a logical step to move from finding that a duty of care is owed to patrons of the bar to finding that a duty is also owed to third parties who might reasonably be expected to come into contact with the patron, and to whom the patron may pose some risk.⁸

A finding of a relationship that gave rise to a duty of care was thus easily established. It is apparent that the vast majority of commercial suppliers of alcohol will be judged as parties in such a relationship.

STANDARD OF CARE

The court then attempted to ascertain the standard of care and whether in fact it was breached. Justice Major states that by "merely" over-serving Pettie, Mayfield did not open itself up to liability. It is to be noted that only where there is foreseeable risk of harm to the plaintiff or to a third party will innkeepers be required to take action. Where no risk is foreseeable as a result of the circumstances, no action will be required, despite the existence of a special relationship.

Contrary to the judgment below, Justice Major found that the presence of two sober individuals *did* relieve Mayfield of liability. The Supreme Court reaffirmed *Jordan House*, which stated directly that the hotel's duty to Menow would have been discharged by making sure that "he got home safely by taking him under its charge or putting him under the charge of a responsible person." Applying that statement to the case before him, Justice Major stated:

Had Pettie been alone and intoxicated, Mayfield could have discharged its duty...by calling Pettie's wife or sister to take charge of him. How then, can Mayfield be liable when Pettie was already in their charge, and they knew how much he had had to drink?...It is not reasonable to suggest in these circumstances that Mayfield had to do more.⁹

Thankfully, Justice Major restricted the obligations on the commercial host — but not by much. The court reiterated that the commercial provider is not a "watchdog" of his patrons — however, the onerous duty of the innkeeper has been upheld in all recent cases.

CAUSATION

The issue of causation is resolved on the basis of whether or not the loss would have occurred, but for

the negligence of the defendant. On this issue, Justice Major finds that there was no evidence that greater intervention by Mayfield's employees would have resulted in the sober individuals driving. It is difficult to ascertain such questions as they involve intensive use of the infallible sense of hindsight.

DUTY OF CARE

The courts have zealously *stated* that they are not prepared to impose a duty on every innkeeper to act as a "watch dog" for all patrons who enter establishments and drink to excess. *Jordan House*, as well as subsequent case law provides critical guidance on this issue. The case will turn upon its facts — the knowledge of the innkeeper and his staff regarding the patron and his condition is critical for the discernment of liability. However, the requirements of the innkeeper and his staff are exigent, regardless of the courts' moniker of the true standard.

Canadian jurisprudence has clearly established that, at common law, a duty of care may arise between a commercial host and its patrons. This duty of care can also be extended to other persons who are injured by the actions of an intoxicated patron. The duty arises when an innkeeper is aware (or should have been aware) of the patron's intoxication, and is also cognizant of the fact that the patron could be a danger to himself or others outside the innkeeper's establishment.¹⁰ It is the "should have" requirement that is worrisome to commercial providers of alcohol.

Specific knowledge is *not* required regarding the plaintiff's intoxicated condition. The issue is now whether the person working at the bar or tavern *should have known* that the patron was intoxicated. The requirement of actual knowledge on the part of the innkeeper, that the intoxicated patron would be walking or driving home, has also been diluted. In *Hague v. Billings*¹¹ the establishment was located on a highway, and the court held that the staff should have known that the majority of its patrons would leave in their vehicles. Therefore, the innkeeper is now under a duty to take positive steps to protect the patron when the innkeeper should know the patron is intoxicated and it is reasonable to assume that the patron may be walking or driving — or there is a foreseeable risk entailed to their activity.

The practical question to be asked is whether there is sufficient evidence to establish a duty of care

in any given case. Courts in Canada have considered a number of factors to determine whether a duty of care arose. *Langille v. O'Hearn*¹² established that there must be evidence that the intoxicated patron was served alcohol at the innkeeper's premises. A duty of care does not arise whereby an intoxicated patron simply walks through the innkeeper's door and subsequently leaves. Evidence that the patron was intoxicated before arriving at the innkeeper's establishment is not a defense to a claim brought against the innkeeper. Courts have held that, even where the patron was severely intoxicated before arriving, the subsequent provision of alcohol by the innkeeper either increases or maintains that dangerous level of intoxication.¹³

Any specific knowledge of the innkeeper, either about the patron's level of intoxication or whether the patron will be driving, is relevant. Non-scientific evidence is also important for the courts to determine whether or not the innkeeper knew or should have known that the plaintiff was intoxicated. The classic signs of drunkenness, such as slurred speech, glassy eyes and difficulty in walking, are often considered, as is the patron's behavior in general.

The scope of the duty of care owed by innkeepers is onerous and broad. If a person consumes alcohol on the innkeeper's premises and there is evidence of intoxication, either through visible signs or by the amount served, the duty of care arises. Clearly the duty of care extends to foreseeable third parties, including the general public who use roadways.

A breach of the duty that results in a loss will give rise to liability. Significant legal and moral culpability usually resides with the intoxicated patron, but the commercial provider will often be held accountable to a substantial degree of liability.

CONCLUSION — DISCHARGING THE STANDARD OF CARE

It is clear that the duty of the host continues even as the patron leaves his establishment, and this duty does not readily subside. Courts require innkeepers to take reasonable steps to prevent intoxicated patrons from injuring themselves or others, particularly by driving. "Reasonable" has often been judged, it seems, as everything short of physical restraint of the patron, to prevent a "foreseeable" injury.

Counsel for commercial alcohol servers (or insurance providers) have to ensure that they impart the

true import of such an onerous duty to their clients. Once the existence of the duty of care has been established, the next issue is whether the innkeeper's actions meet the requisite standard of care. Courts have listed a number of ways in which an innkeeper may successfully discharge its obligations resulting from the duty of care owed to its patrons and others. Leading cases on commercial host liability have apportioned liability to the establishment between zero per cent and 33.3 per cent.¹⁴ Given the rather significant degree of culpability accorded to the establishment, it is in the innkeepers' pecuniary interest to take positive steps to limit liability.

Factors such as the physical layout and location of the innkeeper's premises are also relevant. Courts will comment on whether the physical layout of the establishment provides for adequate observation of the patrons. If the establishment is small or not busy, the innkeeper is faced with the argument that there is no excuse for not noticing the intoxicated condition of the patron.¹⁵ Innkeepers should instruct their employees to be particularly alert when there are fewer individuals. Evidence of such policies may be helpful in the event of litigation.

Courts have stated that the innkeeper must take "all reasonable steps" to properly discharge the duty of care. However, "all reasonable steps" in some cases has resulted in particularly taxing requirements. In *Gouge v. Three Top Investment Holdings Inc.*,¹⁶ the hotel staff believed that the intoxicated patron had accepted a ride home with a sober individual. The patron changed his mind and drove off in his own vehicle. The service of alcohol was done as a "cash bar" and thus eliminated the opportunity to monitor the plaintiff's consumption. The court judged that this constituted negligence on the part of the hotel — the fact that the plaintiff was to leave as a passenger did *not* affect the finding of liability. Justice Pardu noted that:

Counsel for the defendant argues that the hotel was absolved of responsibility once it was assured that the plaintiff had a ride home, however, the bizarre behavior of the plaintiff in suddenly changing his mind and refusing a ride in the parking lot is a direct result of his extreme intoxication.

Thus, courts have established that service arrangements that allow adequate observation of the patron, as well as some sort of record, such as cash receipts,

that would indicate the amount of alcohol purchased, will aid in the determination of fault.

If alcohol is served to the patron and is subsequently "cut-off," the innkeeper should be able to discharge his duty of care. In practical terms, however, the patron will usually be intoxicated before the innkeeper realizes that service should be stopped. In any event, it is imperative for insurance purposes that every employee has taken an alcohol server course. Employees should be particularly observant of patrons' behavior — and should move without hesitation to stop alcohol service to any individual who shows signs of intoxication.

The innkeeper can arrange for the patron to leave in a taxicab or with a responsible individual. However, the courts have held that "reasonable steps" (required to discharge the duty of care) dictates that the innkeeper in certain situations, ensure that the patrons utilize the taxi service. In *Neufeld v. Foster*,¹⁷ the innkeeper called the taxi, but was found liable when the patrons changed their minds and drove their own vehicle. The fact that the group was the last to leave left no excuse for the server not to ask for car keys from all of the customers or ensure that they actually got into a taxi once they left the pub. Calling a taxi may be enough if the establishment is busy, and it would not be reasonable to observe the patrons leave in the taxi. Many establishments currently have some sort of service that provides rides home to the intoxicated patron — sometimes in their own vehicle.

If it is within the power of the innkeeper, he must prevent the intoxicated patron from engaging in a dangerous activity or an activity made dangerous through intoxication. In *Crocker v. Sundance Northwest Resorts Ltd.*,¹⁸ the defendant Sundance held a tubing competition to promote its resort. The races involved teams of two people per over-sized inner tube sliding down a mogul portion of a steep ski hill. The plaintiff had consumed alcohol before the event and bought drinks from the resort's bar. Representatives of the defendant noticed that Crocker was intoxicated. At the top of the hill, Crocker fell down and his inner tube slid down the hill. Crocker was visibly intoxicated and the manager of Sundance suggested that he should stop competing. The plaintiff insisted on entering the race and no further steps were taken to restrain him. During the second race, the two men were flipped out of their inner tube and Crocker was rendered a quadriplegic.

An attempt to dissuade the patron from driving, without any further effort by the innkeeper, will likely be sufficient to meet the standard of care. The owner of the Oasis Tavern unsuccessfully attempted to persuade the patron not to drive in *Billings*.¹⁹ By itself, this was insufficient to fulfil the tavern's duty to take affirmative action to keep the highways safe from impaired drivers. Several cases indicate that, if all other attempts at persuasion fail, the innkeeper should contact the police and advise them that an intoxicated patron will be driving.²⁰

The innkeeper gains economic benefit by profiting from alcohol sales. It appears that this economic gain will be offset by a resultant duty of care towards the inebriated patron and others foreseeably at risk. Commercial host liability fits solidly within established negligence principles, as those that provide alcohol must be held accountable to the patron and society at large.

[*Editor's note:* Raj Sharma has just completed his second year in the Faculty of Law at the University of Alberta in Edmonton. The author compiled this article while working last summer as a research student at Burnet, Duckworth & Palmer, a Calgary law firm.]

- ¹ Robert D. Kligman, "Civil Liability of Commercial Suppliers and Social Hosts for Intoxicated Patrons and Guests," (1987) 45 M.V.R. 216.
- ² 1974] S.C.R. 239, 38 D.L.R. (3d) 105 [hereinafter "*Jordan House*"].
- ³ E.A. Dolden, "The Innkeepers' Civil Liability for intoxicated Patrons Inside and Outside the Bar" (1991) 2 C.I.L.R. 1 at 5.
- ⁴ *Supra*, note 2, at 249.
- ⁵ [1995] 1 S.C.R. 131 [hereinafter "*Stewart*"].
- ⁶ *Stewart v. Pettie* (1991), 22 Alta. L.R. (3d) 97 (Q.B.).
- ⁷ *Stewart v. Pettie* (1993), 10 Alta. L.R. (3d) 113 (C.A.), supplementary reasons at (1993), 13 Alta. L.R. (3d) 142.
- ⁸ *Supra*, note 5, at 143.
- ⁹ *Supra*, note 5, at 151-152.

- ¹⁰ *Canada Trust Co. v. Porter* (1980), 2 A.C.W.S. (2d) 427 (Ont. C.A.). Evidence indicated that Porter drank from nine to eleven-and-a-half bottles of beer at the defendant establishment. Numerous witnesses observed the defendant's inebriated condition before running a stop sign and killing three other motorists. The court found that the defendant Legion breached its duty of care by failing to notice the defendant's condition.
- ¹¹ (1989), 48 C.C.L.T. 192 (Ont. H.C.) [hereinafter "*Billings*"].
- ¹² (1975), 12 N.S.R. 511 (T.D.). Justice Hart held, at 523, that it "appears that the law of this country renders the proprietor of a lounge responsible for injury that may be suffered by an evicted intoxicated patron only if the proprietor or his employee was responsible for the state of intoxication of the patron and the patron's condition is such that it is readily foreseeable that injury to him might occur if he were placed on his own."
- ¹³ *Billings*, *supra*, note 11. See also *Sambell v. Hudago Enterprises Ltd.* (November 30, 1990), Doc. 2792/88, [1990] O.J. No. 2494 [hereinafter "*Sambell*"].
- ¹⁴ See *Whitlow v. 572008 Ontario Ltd.*, [1995] O.J. No. 77.
- ¹⁵ *Gibbons v. Yates* (1983), 22 A.C.W.S. (2d) 50 (Ont. Co. Ct.). See also *Sambell*, *supra*, note 13. In *Sambell*, Justice Gautreau held that the tavern was small, uncrowded and the group of patrons obviously impaired. Given the circumstances, Justice Gautreau held that positive action was called for — the police station was across the street and he felt that notification was reasonable.
- ¹⁶ *Gouge v. Three Top Investment Holdings Inc.* (1994), 22 C.C.L.T. (2d) 281 (Ont. Gen. Div.) [hereinafter "*Gouge*"].
- ¹⁷ [1999] B.C.J. No. 764. The establishment had argued that it had done what was reasonable by asking for Foster's keys and telling him he was not to drive and calling a taxi. Nevertheless, Justice Smith distinguished the case from *Stewart* by stating that, in this situation, none of the group members were fit to make rational decisions or fit to drive.
- ¹⁸ (1988), 44 C.C.L.T. 225 (S.C.C.).
- ¹⁹ *Billings*, *supra*, note 11.
- ²⁰ *Sambell*, *supra*, note 13.