

# Legalization of Cannabis: Anticipated Social and Commercial Host Liability Claims

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# Introduction

- Novel area of law
- Civil liability - purchase/sale, supply, distribution and use of Cannabis in commercial and social settings
- How to anticipate claims?
  - Alcohol Consumption - social and commercial host context as guide

# Social Host Liability

# Social Host Liability – Alcohol Context

## Social Host

### Alcohol Context

- A casual or social host is subject to the least stringent responsibilities.
- Historically, Canadian courts adopted American position that social hosts may be held liable if they knew that the individual was intoxicated.

# Social Host Liability – Alcohol Context

## Social Host

### Alcohol Context – *Childs v. Desormeaux*

- The Supreme Court of Canada narrowed the circumstances in which social host liability may be imposed in its 2006 decision in *Childs v. Desormeaux*.
- Facts:
  - The social host held a “BYOB” New Year’s Eve Party.
  - They neither provided nor served alcohol to their guests.
  - The Defendant, Desormeaux drank at least 12 beers in 2 ½ hours, was known for his heavy drinking and had previous impaired driving convictions.
  - One host walked him to his vehicle and Desormeaux drove away and caused an accident shortly afterwards. The Defendant and his passengers were injured. One person in the other vehicle was killed and the others were seriously injured, including the Plaintiff, who became paralyzed.
  - The Plaintiff sued the social hosts.

# Social Host Liability – Alcohol Context

## Social Host

### Alcohol Context – *Childs v. Desormeaux*

- The Supreme Court found it was not reasonably foreseeable that the Plaintiff would be injured if the hosts failed to prevent Desormeaux from driving.
- Left door open for cases where a social host was aware that an intoxicated guest planned to drive home, but continued to serve the guest alcohol.
- Policy implications may still deny liability going forward.

# Social Host Liability – Alcohol Context

## Alcohol Context – Other Ontario Cases

- *Childs v. Desormeaux* remains the leading case
- Other noteworthy Ontario cases have raised social host liability - *Hamilton v. Kember* (2008) and *Oyagi v. Grossman* (2007).
- Contrast: *Kim v. Thammavong* (2007, 2008), *Ferrier v. Hubbert* (2013).
- Most recently - *Wardak v. Froom* (2017) – *Childs* will not preclude a finding of a duty of care on the social host in the right circumstances.
- Although these decisions could have expanded the scope of social host liability set out in *Childs*, none have yet to proceed to trial.

# Social Host Liability – Alcohol Context

## Alcohol Context – Other Canadian Cases

- **Quebec:** *Paquette c. Fédération (La), cie d'assurance due Canada* (2014) – social host was not liable.
  - Civil law jurisdiction case
- **British Columbia:** *Sidhu v. Hiebert* (2011), *Lutter v. Smithson* (2013) and *R v. Tremblay* (2013) - possible that the scope of social liability may be expanded in future cases.
- The case of *R. v. Tremblay* briefly touched on the liability of social hosts when children are involved: *all* adults, especially but not limited to the adult hosts, owe a duty of care towards children...
- **Alberta:** *Desanti v. Gray* (2011) - no social host liability because there was no reasonable foreseeability between the Defendant's actions as host and the incident that followed.



# Social Host Liability – Alcohol Context

## Employer Host Context

- Although employers do not serve alcohol for a profit, their duty to their employees is that of a commercial host not a social host. *Childs et al. v. Desormeaux et al.*, (2004) CanLII 15701 ONCA at para 5.
- Liability imposed when an employer provided alcohol; had knowledge of intoxication; and failed to take steps to prevent the employees from driving.
- Defeating Liability: Not providing alcohol, no knowledge of intoxication; accident/incident occurred after the employee had arrived home safely.

# Social Host Liability – Cannabis Context

## Where do we go from here?

### Social Host:

- The *Childs* decision may not preclude finding a duty of care in the right circumstances or based upon the right factual matrix.
- The law is in a state of influx
- Anticipate this to be the same in the Cannabis context.
- Case-by-case analysis.

# Social Host Liability – Cannabis Context

## What can we apply to the Cannabis Context?

### Social Host:

- “Foreseeability” principle will likely govern.
- Liability may be found: Host knowingly observed the guest’s impairment.
- Liability may be found: Adult host knowingly creates high-risk environment in which a minor is involved.
- Liability may be found: Outside the contexts of a “House Party” situation
- Liability may not be found: Parents/guardians of an actual social host if they were not actively involved.
- Liability may not be found: No reasonable foreseeability between the Defendant’s actions as host and the incident that followed.

# Social Host Liability – Cannabis Context

## Where do we go from here?

### Employer Host:

- Claims may arise when an employee consumes cannabis products while at a company function.
- May have instances in which an employer provides cannabis products to its employees.
- What will attract liability given the higher employer/employee relationship than that of a social host?

# Commercial Host Liability

# Commercial Host Liability – Alcohol Context

## Legislation

Section 29 of the *Liquor License Act*, R.S.O. 1990, c. L.19 (the “*Act*”) makes the sale or supply of liquor to any person appearing to be intoxicated illegal.

Section 30 of the *Act* makes it illegal to knowingly permit a person who appears to be under the age of 19 to consume liquor on a licensed premises in Ontario.

Section 39 of the *Act* has codified the common law duties owed by a tavern to impose civil liability on taverns in circumstances where an intoxicated person dies or injures another while intoxicated.

# Commercial Host Liability – Alcohol Context

## Duty to a Patron

- A commercial host - greater duty to protect impaired individuals and the public, based on a close proximity or relationship between the host and the customer.
- If injury or damage to the impaired individual or the general public was foreseeable, then liability may attach to the commercial host if an accident occurred due to impairment.
- Duty is not engaged solely in relation to drinking and driving.
- Commercial hosts have a positive duty to protect customers and the public.

*See Jordan House Hotel Ltd. v. Menow and Honsberger, [1974] S.C.R. 239 (S.C.C.). (seminal case establishing a duty of care on a tavern to take reasonable steps to prevent injury where the risk of harm is foreseeable).*

# Commercial Host Liability – Alcohol Context

## Legislation

The Court's' willingness to impose a high duty of care to intoxicated patrons has been extended to the duties owed by a tavern under the *Occupiers' Liability Act* (the "Act").

*Whitlow v. 572008 Ontario Ltd. (c.o.b. The Cross-Eyed Bear Tavern)* established that section 3(1) of the *Act* applies to the duty of care a tavern owes to its patrons while on the premises.



# Commercial Host Liability – Alcohol Context

## *Whitlow v. 572008 Ontario Ltd.*

- Plaintiff was harmed as a result of the condition of the premises in conjunction with the Plaintiff's impairment.
- Court found that the Defendant's stairs were maintained at a reasonable standard but a protruding bulkhead created a danger to intoxicated patrons and thus breached the duty owed.
- Subsequently held that *special and particular precautions* must be taken in the design and construction of stairways for the use of beverage room patrons. See *Beauchamp v. Ayotte*, [1071] O.J. No. 1590.

# Commercial Host Liability – Alcohol Context

## *Whitlow v. 572008 Ontario Ltd.*

1. An affirmative duty is imposed on the taverns/bars;
2. Cannot ignore that persons are likely to come under the influence of alcohol with attendant consequences to judgment and otherwise sober human behaviour;
3. Occupier not an insurer liable for any damage suffered by persons entering the premises; liability is governed by the concept of reasonableness in all of the circumstances of the case;
4. Not liable to the person entering the premises if he/she willingly assumed the risk of injury;
5. Principals of contributory negligence govern.

# Commercial Host Liability – Alcohol Context

## Duty Owed to Others

- A tavern's duty of care extends to persons who might reasonably come into contact with an intoxicated patron. See *Stewart v. Pettie*, [1995] S.C.R. 131.
- The precondition to a finding of liability is based upon foreseeability
- A great deal turns on knowledge of the operator or its employees of the patron and their condition.

# Applying These Principles to the Cannabis Context

# Commercial Host Liability – Cannabis Context

## Legislation

- Part 4 of the proposed *Cannabis Act* prohibits the authorized selling of cannabis and cannabis products to young persons (defined in the *Act* as an individual under the age of 18).
- “Section 39 of the *Liquor License Act*” style provision be implemented as relating to cannabis consumption?
- How will the law evolve given that the protection of patrons in the alcohol and cannabis contexts may differ?

# Commercial Host Liability – Cannabis Context

## The Following Principles Can Likely Be Applied:

- Likely a greater duty to protect impaired individuals and the public.
- An affirmative duty will likely be imposed.
- Special and particular precautions will have to be taken by the cannabis commercial host.
- Defensible claim should the patron have willingly assumed the risk of injury or the patron caused or contributed to his/her injuries.

# Commercial Host Liability – Cannabis Context

## Anticipated Incidents Where Liability May Arise

### Condition of the Premises

- *Special precautions* to safeguard impaired persons on the premises may include:
  - Ensuring elevations are clearly demarcated and built to code (especially stairwells);
  - Ensuring the premises has adequate lighting to enable an impaired guest to navigate it properly;
  - Posting clear and obvious signage to assist in navigation;
  - Being mindful of building design and location of objects given the possible impaired state of its customers – limit level of distractions in high-risk areas; and,
  - Avoiding tripping and slipping hazards, such as items on the floor, slippery floors, etc.

# Commercial Host Liability – Cannabis Context

## Anticipated Incidents Where Liability May Arise

### Activities Conducted on the Premises

- Novel area, with uncertainty.
- Activities will materialize into the future.
  - Are purchasers allowed to consume products on the premises?
  - Will the sale of cannabis products and the consumption of alcohol be permitted on the premises?
  - Will “Coffee Shop” lounges and patios for consumption arise?

### Conduct of Patrons After Leaving Premises

- Observed impairment while on the premises?
- Actions prior to leaving the premises?
- Preventative steps taken by host?



# The Courts Treatment of Apportioning Fault

Commercial Host Liability  
in the Alcohol Context

# Commercial Host Liability – Alcohol Context

## Apportioning of Fault

### Alcohol Context

- The fault attributed to a liquor-serving commercial host: 10% to 33.3% (though 50% has been apportioned in some instances).
- The fault attributed to a patron (in the alcohol overconsumption context): 25% to 95% in various factual circumstances.
- Case-by-case analysis will likely to rule the day.
- Difficult to determine how the courts will apportion fault in *Occupier* cases as the factual matrix will likely determine the proper apportionment of fault.

# Commercial Host Liability – Cannabis Context

## Anticipated Future Concerns

- Potential increase in a Defendant's exposure to out-of-pocket expenses in a tort action?
- Greater exposure to extended health care benefit insurers?
- Determination of impairment for the purposes of apportioning liability in a tort action?
- Other concerns will likely materialized into the future.

Questions?  
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