SOCIAL HOST LIABILITY REVISITED – THE CONTINUING NEGATIVE INFLUENCE OF CHILDS

Fourteen years have passed since an earlier paper on social host liability,[1] and thirteen years since the release of the seminal decision in *Childs v Desormeaux*.[2] For reasons outlined both in the prior paper and below, it is our view that *Childs* was wrongly decided. The decision was contrary both to law and prudent policy. Social hosts, by any reasonable measure, are involved in a real and meaningful sense in the chain of events ultimately resulting in injury from drunk driving, and ought in most instances to be held accountable by way of liability for damages. *Childs*, and to a lesser extent, *Williams v Richard*,[3] the most recent appellate decision on the matter, will be considered in some detail below.

Duty of Care - The General Rule for Social Hosts

The issue considered in this paper is the question whether social hosts owe a duty of care to the victims of drivers who became intoxicated, or whose intoxication was worsened, as a result of consumption of alcohol supplied by the host, or at BYOB parties.

The "central legal issue" in *Childs* was stated to be "whether social hosts who invite guests to an event where alcohol is served owe a legal duty of care to third parties who may be injured by intoxicated guests".[4] McLachlin CJ answered that question by saying: "I conclude that as a general rule, a social host does not owe a duty of care to a person injured by a guest who has consumed alcohol".[5] She added:

> Holding a private party at which alcohol is served – the bare facts of this case – is insufficient to implicate the host in the creation of a risk sufficient to give rise to a duty of care to third parties who may be subsequently injured by the conduct of a guest.[6]

There has been little, if any, retreat from the sweeping general rule expressed in *Childs*, notwithstanding the following comment:

> I do not agree with the broad suggestion that *Childs* is binding authority that social hosts do not owe a duty to persons injured by

---

[1] Hillel David, Eleni Maroudas, and Sloane Litchen, *Social Host Liability – A Fresh Approach* (2005) 30 Adv. Q. 457.
[2] 2006 SCC 18.
[3] 2018 ONCA 889.
[4] *Childs*, at para. 8.
[5] *Childs*, at para. 1.
[6] *Childs*, at para. 43.

> an inebriated guest at a house party. I…consider that to still be an open question.[7]

That statement silently took into account a qualification expressed in *Childs* which was explicitly referenced in the following remarks:

> As to proximity, the [SCC] kept the door open for reconsideration of social host liability based on different facts when, at para. 47, McLachlin C.J. stated: "I conclude that hosting a party at which alcohol is served does not, *without more*, establish the degree of proximity required to give rise to a duty of care on the hosts of third-party highway users who may be injured by an intoxicated guest."[8]
>
> The use of the phrase "without more" allows for a duty of care to arise in other circumstances.[9]

The questions what "something more" means or requires, and why, to begin with, there is a need for "something more", will be considered below.

The Underlying Test

Among the most recognized legal concepts is the "neighbour" principle. First decisively promulgated in the landmark *M'Alister (Donoghue) v Stevenson* decision,[10] it "replaced the prior category approach with a principled approach"[11] by extending a duty of care only to those who are a person's "neighbour", with "[l]egal neighbourhood [being] 'restricted' to persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".[12]

"The question focuses on the relationship between the parties. It asks whether this relationship is so close that the one may reasonably be said to owe the other a duty to take care not to injure the

---

[7] *Avila v Couto* 2019 ONSC 400 at para. 36. In addition, reference is made (at para. 37) to "this developing area of social host liability".
[8] *Woolsey v Brennan* 2018 ONSC 6423 at para. 39 (original emphasis).
[9] *Wardak v Froom* 2017 ONSC 1166 at paras. 46-47. See also *Kim v Thammavong* 2007 CarswellOnt 7848, S.C.J. at paras. 23-25, affirmed 2008 CarswellOnt 7300, Div. Ct.
[10] [1932] A.C. 562, H.L.
[11] *Childs*, at para. 9.
[12] *Childs*, at para. 10.

other."[13] "This concept, sometimes referred to as proximity, remains the foundation of the modern law of negligence."[14]

The Modern Approach

The neighbour principle was refined in England by the decision in *Anns v Merton London Borough Council*,[15] which in turn was adopted in Canada in a series of SCC decisions which included *Nielsen v Kamloops (City)*[16] and *Cooper v Hobart*.[17]

There is now a two-part test for a duty of care. First, the question is asked whether the relationship between the parties is within or analogous to a category where a duty has already been recognized. If so, then on the "basic notion of precedent…one may usually infer that sufficient proximity is present and that if the risk of injury was foreseeable, a *prima facie* duty of care will arise."[18]

If the relationship is found to be novel, then a separate threefold test is administered:[19]

(1) The harm complained of must have been reasonably foreseeable;

(2) There must have been sufficient proximity between the plaintiff and the defendant such that it would be fair and just to impose a duty of care on the defendant; and, if a *prima facie* duty has thus been established,

(3) There must be no residual policy reason for declining to impose such a duty.

Policy Considerations

It is helpful to outline, well-known though they are, the evils of, and costs associated with, drunk driving, as described in the following judicial comments:

> There is no question impaired driving is a phenomenon in our society that cannot be tolerated…Every year drunk driving leaves a terrible trail of death, injury, heartbreak and destruction. From the

[13] *Mustapha v Culligan of Canada Ltd.* 2008 SCC 27 at para. 4.
[14] *Childs*, at para. 10.
[15] [1978] A.C. 728, H.L.
[16] [1984] 2 S.C.R. 2.
[17] 2001 SCC 79.
[18] *Childs*, at para. 15; *Mustapha v Culligan*, at para. 5. "This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances": *Cooper v Hobart*, at para. 31. See also *Kim v Thammavong*.
[19] *D.(B.) v Children's Aid Society of Halton (Region)* 2007 SCC 38 at para. 34; *Williams v Richard*, at para. 29.

> point of view of numbers alone, it has a far greater impact on Canadian society than any other crime. In terms of the deaths and serious injuries resulting in hospitalization, drunk driving is clearly the crime which causes the most significant social loss to the country.[20]
>
> As deplorable as the reality is, personal injuries arising from impaired driving cases are far from exceptional in our society. Thousands die or are injured each year. In Canada in 2003, for example, approximately 2,939 drivers were involved in alcohol-related motor vehicle accidents in which at least one of the drivers had been drinking.[21]

The social interest in alcohol-infused hospitality must be balanced against the public interest of reducing the widespread carnage associated with impaired driving. In our view, there should be little difficulty in determining on which side of the scale that balance should rest. Prudent policy calls for a duty of care requiring reasonable monitoring of alcohol consumption by social hosts. What the level of that monitoring should be is a standard of care issue that depends on the circumstances of the particular case. It is, we believe, fair and just to impose a duty of care on a social host who, by supplying alcohol and/or a venue for the consumption of alcohol, facilitates the real possibility of catastrophic injury resulting from drunk driving. The issue of facilitation will be considered below.

Test A - Would a Duty Owed by a Social Host be a Novel Duty?

Notwithstanding the similarities in social and commercial host situations, with the latter constituting a recognized duty of care category,[22] this question was answered in the affirmative in *Childs*[23] because of three differences between social and commercial hosts:

(1) Commercial hosts enjoy an important advantage in their capacity to monitor alcohol consumption, and monitoring is expected by the host, patrons, and members of the public. In fact, commercial hosts have a special incentive to monitor consumption because they are being paid for service. Furthermore, regulators can require that servers undertake training to ensure that they understand the risks of overservice and the signs of

---

[20] *McIntyre v Grigg* (2006) 83 O.R. (3d) 161, C.A. at para. 124 (Blair J.A. dissenting in part on other grounds). See also *R. v Orbanski* 2005 SCC 37 at paras. 1, 3, 25, 55 and 71.
[21] *McIntyre v Grigg*, at para. 127.
[22] *Childs*, at para. 16, referring to the imposition of a duty of care on commercial hosts in *Stewart v Pettie* [1995] 1 S.C.R. 131.
[23] *Childs*, at para. 23.

intoxication, so that not only is monitoring inherently part of the commercial transaction, but servers can generally be expected to possess special knowledge about intoxication.[24]

(2) The sale and consumption of alcohol is strictly regulated, and the rules applying to commercial establishments suggest that they operate in a very different context than private-party hosts. This regulation is driven by public expectations and attitudes towards intoxicants, but also serves, in turn, to shape those expectations and attitudes. The regulations impose special responsibilities on those who would profit from the supply of alcohol. "The dangers of overconsumption, or of consumption by young or otherwise vulnerable persons, means that its sales and service in commercial settings is controlled. It is not treated like an ordinary commodity sold in retail stores. The public expects that in addition to adherence to regulatory standards, those who sell alcohol to the general public take additional steps to reduce the associated risks…A party host has neither an institutionalized method of monitoring alcohol consumption and enforcing limits, nor a set of expectations that would permit him or her to easily do so."[25]

(3) The contractual nature of the relationship between a commercial host and patron is fundamentally different than the range of social, non-contractual, relationships that characterize private parties. "Unlike the host of a private party, commercial alcohol servers have an incentive not only to serve many drinks, but to serve too many." The costs of overconsumption are borne by the drinker, society as a whole, and sometimes third parties, while the benefits of overconsumption go to the tavern keeper alone. "This perverse incentive supports the imposition of a duty to monitor alcohol consumption in the interests of the general public."[26]

No doubt there are differences, some of which can be viewed, in a non-contextual setting, as significant differences, between social and commercial hosts. Are those differences, however, meaningful when considered in the context of the basic underlying purpose for which a determination whether or not a social host owes a duty of care is made? In our respectful opinion, the answer is No. The common denominator in claims made against both social and commercial hosts is the overconsumption of alcohol, resulting in the inebriation of the driver. In both settings, a real risk of injury has been created by the overconsumption, and in both settings the host has had a real and meaningful involvement in the overconsumption. That central underlying similarity far outweighs the secondary differences listed in *Childs*, which are marginal by comparison.

---

[24] *Childs*, at para. 18.
[25] *Childs*, at paras. 19-21.
[26] *Childs*, at para. 22.

Even apart from the application of policy considerations, we submit that a duty of care should be recognized on the basis of the analogy principle. The following was said in *Cooper*:

> What then are the categories in which proximity has been recognized? First, of course, is the situation where the defendant's act foreseeably causes physical harm to the plaintiff or the plaintiff's property…[Various examples of that category are then listed.]…When a case falls within one of these situations or an analogous one and reasonable foreseeability is established, a *prima facie* duty of care may be posited.[27]

The issue of foreseeability will be considered below, but assuming that that element is present, an injury to a victim of drunk driving clearly falls within the established category of "physical harm to the plaintiff" and, regardless of the differences listed in *Childs*, the category of social hosts is fundamentally analogous to the established duty of care category of commercial hosts.

"[The] test, no matter how it is phrased, conceals a balancing of interests. The quest for the right balance is in reality a quest for prudent policy."[28] The imposition on social hosts of a duty of care on the basis of an analogy to commercial hosts, keeping in mind that it would also be necessary to show foreseeability, would be the "right balance"; it would be "prudent policy".

Test B, Part a - Foreseeability (Generally)

Having found that a social host constitutes a novel category, the second part of the modern test for duty of care was triggered in *Childs*. As indicated above, the second part of the test is composed of three parts, the first involving foreseeability.

There are several general principles associated with the matter of foreseeability:

a. The required foreseeability is that of harm to the plaintiff.[29] Was it reasonably foreseeable that the defendant's acts or omissions might harm the plaintiff, either as a known victim or as a member of a particular class of persons?[30]

b. The likelihood of harm that must be foreseeable is whether there is a "real risk, *i.e.* one which would occur to the mind of a reasonable man in the position of the defendant…and which he would not brush aside as far-fetched".[31]

---

[27] *Cooper v Hobart*, at para. 36.
[28] *Cooper v Hobart*, at para. 29, adopted in *D.(B.) v Children's Aid Society*, at para. 31.
[29] *Cooper v Hobart*, at para. 30; *D.(B.) v Children's Aid Society*, at para. 34.
[30] *D.(B.) v Children's Aid Society*, at para. 35; *Williams v Richard*, at para. 29.
[31] *Mustapha v Culligan*, at para. 13.

c. It is not necessary to foresee the manner in which the injury occurs (the "precise concatenation of events"); "it is enough to fix liability if one can foresee in a general way the class or character of injury which occurred".[32] Foreseeability is not determined by a consideration of "the specific chain of events" that ultimately led to the harm, but rather by the question whether "the general harm, not its manner of incidence, was reasonably foreseeable".[33]

Foreseeability - Whether the Host Must be Aware of the Guest's Intoxication

Emphasis has been placed on a need for the host to have been aware of the guest's intoxication:

> The foreseeability case law has focused heavily on a social host's knowledge as to the relevant guest's level of intoxication, whether there were signs that the guest was intoxicated, and thus whether it was reasonably foreseeable that the guest would engage in certain acts and behaviours that subsequently led to an accident.[34]

In *Childs*, it was held that the injury was not reasonably foreseeable to the social hosts because, despite the findings made by the trial judge that

- the defendant driver was inebriated to the extent that he would have been showing obvious signs of impairment;
- the hosts knew the driver to be "a heavy drinker";
- the hosts knew that the driver had previously driven while inebriated; and
- one of the hosts had accompanied the driver to his car before he drove away (although there was no evidence that the driver displayed signs of intoxication during that brief encounter),

there was no finding that the hosts knew or ought to have known that the driver was too drunk to drive.[35] That was considered to be a critical missing element:

> [I]f there is no finding that the hosts *knew*, or ought to have known, that the guest who was about to drive was impaired, how can it be said that they should have foreseen that allowing him to drive might result in injury to other motorists?[36]

---

[32] *Millette v Cote* [1976] 1 S.C.R. 595 at para. 8; *Frazer v Haukioja* 2010 ONCA 249 at para. 51.
[33] *Bingley v Morrison Fuels* 2009 ONCA 319 at para. 24.
[34] *Williams v Richard*, at para. 25. In addition to the cases cited there, see *Avila v Couto*, at para. 38, *Lutter v Smithson* 2013 BCSC 119 at paras. 25-26, and *Sidhu (Litigation guardian of) v Hiebert* 2011 BCSC 1364 at paras. 34-41.
[35] *Childs*, at paras. 4 and 28-30.
[36] *Childs*, at para. 28 (original emphasis).

By the time the guest is intoxicated, the risk of harm to the guest or others is fully-formed. All that is left is for the risk to materialize into harm. At this point, there can be no doubt that a real risk of harm exists, whether through drunk driving or otherwise. In the period leading up to the actual intoxication, however, there is only the potential for intoxication and consequential harm. The question to be asked is whether the settled principles relating to foreseeability require that the host be aware that a guest has *in fact* become intoxicated, or whether it is enough that the host be aware of a "real risk" that a guest *may* become intoxicated. The passage which is partly reproduced above[37] reads in full as follows:

> Much has been written on how probable or likely a harm needs to be in order to be considered reasonably foreseeable. The parties raise the question of whether a reasonably foreseeable harm is one whose occurrence is *probable* or merely *possible*. In my view, these terms are misleading. Any harm which has occurred is "possible"; it is therefore clear that possibility alone does not provide a meaningful standard for the application of reasonable foreseeability. The degree of probability that would satisfy the reasonable foreseeability requirement was described in *The Wagon Mound (No. 2)* as a "real risk, *i.e.* one which would occur to the mind of a reasonable man in the position of the defendant…and which he would not brush aside as far-fetched".[38]

From a practical standpoint, virtually every claim to which the duty of care issue would be relevant will involve a driver who in fact was intoxicated to a level which would affect his or her ability to drive safely (although in some cases there may be a dispute about whether the intoxication occurred after the guest left the private party or event). We are, after all, discussing drunk-driving claims. As noted in the passage reproduced above, the materialization of the risk in these cases, and the resulting harm, do not involve possibilities; they have actually occurred.

As stated, however, once intoxication has occurred, there can be no doubt that a risk of harm is present. If foreseeability turns on awareness of a guest's intoxication, then foreseeability requires certainty of the existence of a risk of harm. That is not, however, what foreseeability requires. Awareness of a real potential for intoxication is sufficient to satisfy the settled principle, which requires awareness only of a "real risk" of harm. The question ought not to be whether the host was aware of a guest's actual intoxication, but rather whether the host was aware of a "real risk" that one or more guests might become intoxicated. Foreseeability of harm is present whenever there is a real risk of intoxication.

---

[37] At fn. 31.
[38] *Mustapha v Culligan*, at para. 13.

Whether there is a real risk that a guest may become inebriated depends on the facts and circumstances of the case. There should be little dispute that, as a general proposition, overconsumption is reasonably foreseeable at almost any event where alcohol is supplied by the host[39] or is otherwise available (such as at a BYOB party); the prevalence of social host claims is grim testament to that. That does not mean that overconsumption is *always* foreseeable. Examples of non-foreseeability might be where the supply or availability of alcohol is strictly limited, or where the host, either personally or through others, has made a stringent effort to try to ensure no overconsumption.[40] Given, however, that overconsumption is generally foreseeable wherever liquor is supplied or available, there should be a rebuttable presumption of foreseeability of a real risk that a guest might become intoxicated and thereby become a danger to him- or herself and others. The onus should rest with the host to rebut that presumption. The plaintiff should have no obligation to show that the host was aware of the guest's intoxication. Had that approach been taken, the element of foreseeability would have been satisfied in *Childs*.

The *Williams* decision refers to a "spectrum" of fact situations,[41] as to part of which we agree and part we do not:

> There are many different factual permutations of what could transform a social gathering into an invitation to an inherent and obvious risk. It is helpful to think of these situations as being situated along a spectrum. At one end of the spectrum is *Childs*, which was a "bring your own alcohol" party where the hosts provided minimal alcohol. Similarly, private parties of a reasonable size are usually viewed by the courts as not inherently risky…Likewise, an invitation to a co-worker's home to have dinner and after-work drinks outside is not inherently dangerous or risky…Moving further down the spectrum, a young adult throwing a "wild" Halloween party and providing alcohol for around 40 people, some of whom are using illegal drugs, may implicate a host in the creation of an inherent risk…On the far end of the spectrum, a teenager throwing a house party at which over 100 people attend, most of whom are underage drinkers, while their parents are out of town, likely implicates the host in the creation of an inherent risk.[42]

---

[39] While supplying alcohol is a relevant consideration, it is said not to be determinative: *Wardak v Froom*, at paras. 53-54.
[40] This is an area where the issues of duty and standard of care intermingle.
[41] Although it does so in the context of proximity, not foreseeability: *Williams v Richard*, at paras. 24 and 27-28.
[42] *Williams v Richard*, at para. 28.

The concept of a "spectrum" is certainly useful, as are the examples relating to spots along the spectrum. The part that we do not agree with is the requirement for an "inherently dangerous or risky" situation,[43] coupled with the description of the types of situations in which that requirement would or would not be met. Why is it necessary that the event create an "inherently dangerous or risky" situation? That is a far stricter test than reasonable foreseeability of a "real risk" of harm.

In addition, why is a situation such as that in *Childs* not one that in fact is "inherently dangerous or risky"? The hosts there knew that alcohol was being consumed (even if they were not supplying it), knew the guest to be a heavy drinker, and knew that he had previously driven while drunk. While the trial judge did not expressly make a finding that the hosts were aware that the guest was intoxicated, he found that the guest was inebriated to the extent that he would have been showing obvious signs of impairment (a sort of "automobile there to be seen" situation,[44] although this knowledge was probably not relevant unless and until a duty of care requiring monitoring of guests had been established). At a minimum, an argument can be made that *Childs* involved an inherently dangerous or risky situation. It was certainly a setting where there was a real risk of inebriation and drunk driving.

It is our respectful opinion that reasonable foreseeability of a real risk of inebriation and harm would be present in each of the situations described in *Williams*, just as it was in *Childs*.

Jumping beyond the issue of duty of care, the issue of standard of care depends as well on the facts and circumstances of the case. The more freely the liquor is flowing, the more likely it is that one or more guests will become intoxicated, and the more stringent the duty of the host to monitor the condition of the guests, and to take reasonable steps to try to ensure that guests who appear to, or might, be intoxicated not do anything that would cause danger to themselves or others, such as get behind the wheel of a car.

Test B, Part b – Proximity (Generally)

Proximity is a slippery concept. "The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic…'[p]roximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different

[43] A concept apparently borrowed from *Childs* (at para. 38).
[44] *Nolin v Tingey* (1985) 36 M.V.R. 199, Ont. H.C.J. at para. 16, rev'd on other grounds 1987 CarswellOnt 2109, C.A. See also *Harrison v Bourn* [1958] S.C.R. 733 at para. 4: "[W]here there is nothing to obstruct the vision and there is a duty to look, it is negligence not to see what is clearly visible".

factors'".[45] Proximity has been equated with a "special relationship" or "special link" between the plaintiff and the defendant.[46]

Policy considerations, including the goal of deterrence, are a major factor:

> The importance of *Anns* lies in its recognition that policy considerations play an important role in determining proximity in new situations. Long before *Anns*, courts in Canada and elsewhere had recognized that the decision of how far to extend liability for negligence involved policy considerations.[47]
>
> The law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, *and that is socially useful*.[48]

Proximity and Foreseeability - Overlap

There is an overlap between foreseeability and proximity. "The usual indication of proximity is foreseeability…However, foreseeability does not of itself, and automatically, lead to the conclusion that there is a duty of care".[49] While foreseeability, in the sense that the wrongdoer ought to have had the plaintiff in mind as a person potentially harmed by the former's wrongful conduct, indicates satisfaction of the "close and direct" effect on the victim which is an element of the proximity test,[50] foreseeability is not sufficient to create a duty of care where "the wrong alleged is a failure to act or nonfeasance in circumstances where there was no positive duty to act."[51]

Proximity - "Something More"

While there is no doubt that proximity and foreseeability are separate concepts, there appears to be some confusion regarding the relationship between them.

On the one hand there is, as stated above, an overlap between foreseeability and proximity, in that foreseeability *per se* is often a sufficient basis for proximity. For example, it was said in

---

[45] *Cooper v Hobart*, at para. 35. Other decisions emphasizing the importance of the facts and circumstances of the case are *Wardak v Froom*, at para. 56 and *Woolsey v Brennan,* at para. 50.
[46] *Stewart v Pettie*, at para. 47; *Childs*, at paras. 16 and 34; *Williams v Richard*, at paras. 20-21.
[47] *Cooper v Hobart*, at para. 25. Whether there is a relationship which leads to a duty of care "depends on foreseeability, moderated by policy concerns": *Mustapha v Culligan*, at para. 4.
[48] *Mustapha v Culligan*, at para. 16 (emphasis added).
[49] *Design Services Ltd. v R.* [2008] 1 S.C.R. 737 at para. 49.
[50] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 S.C.R. 129 at para. 29. See also *Childs*, at para. 10.
[51] *Childs*, at para. 26.

Childs that an earlier SCC decision "merely clarified that proximity will not always be satisfied by reasonable foreseeability".[52] On the other hand, statements have been made which suggest that foreseeability is *never* a sufficient foundation for proximity, and that "something more" will always be required:

> [D]oes the reference to persons so closely and directly affected by the conduct in question that the defendant ought reasonably to have had them in contemplation conflate foreseeability of harm and duty? Or does it require something in addition to foreseeability of harm?
>
> In *Cooper*, the court clearly stated that the latter approach is the correct one. At para. 29 of their joint reasons, McLachlin C.J. and Major J. stated that there must be reasonable foreseeability of harm "plus something more". At para. 31, they concluded that this "something more" is proximity; in order to establish that the defendant owed the plaintiff a duty of care, the reasonable foreseeability of harm must be supplemented by proximity. It is only if harm is a reasonably foreseeable consequence of the conduct in question *and* there is a sufficient degree of proximity between the parties that a *prima facie* duty of care is established.[53]

Compounding this confusion, it should be noted that the passage reproduced above comes from the decision which, according to *Childs*, "merely clarified that proximity will not always be satisfied by reasonable foreseeability".

Regardless of whether "something more" than foreseeability is always, or only sometimes, necessary to establish proximity, *Childs* went on to hold that, in cases involving nonfeasance in the absence of any positive duty to act, foreseeability is an inadequate foundation for proximity; in such situations, "something more" is always required.[54] So far as social hosts are concerned, it is clear that "something more" will always be required,[55] as indicated in the following passages:

---

[52] *Childs*, at para. 12, referring to *Odhavji Estate v Woodhouse* 2003 SCC 69.
[53] *Odhavji Estate v Woodhouse*, at paras. 47-48 (original emphasis).
[54] *Childs*, at paras. 31-32. In *Paton Estate v Ontario Lottery and Gaming Corporation* 2016 ONCA 458, this was stated to be a requirement both for foreseeability of harm *and* a special link or proximity (at para. 134, original emphasis).
[55] Although in two lower court decisions it was stated that "In terms of [both] foreseeability and proximity, a host's relationship with a guest is likely closer than the relationship between a host and a third party…It is apparent that the Supreme Court's ruling in *Childs* does not preclude finding a duty of care where there is a paternalistic relationship or where the injured party is a guest rather than a third party": *Wardak v Froom*, at paras. 51-52. See also *Kim v Thammavong*, at paras. 25-26.

> The post-*Childs* jurisprudence on social host liability…demonstrates that there is no clear formula for determining whether a duty of care is owed by social hosts to third parties or guests. Rather, the determination of whether such a duty of care exists usually hinges on fact-specific determinations pertaining to two main issues. The first issue is the host's knowledge of a guest's intoxication or future plans to engage in a potentially dangerous activity that subsequently causes harm. This is a foreseeability analysis. The second determination asks if "something more" is present on the facts of the case to create a positive duty to act. The "something more" could be facts that suggest the host was inviting the guest to an inherently risky environment or facts that suggest a paternalistic relationship exists between the parties. This is a proximity analysis.[56]
>
> Much of the post-*Childs* jurisprudence regarding proximity has engaged in a factually-specific evaluation of whether "something more" is present to suggest that a positive duty to act may exist. While there is no definitive list, the case law has looked at a variety of factors to determine what could qualify as "something more" that would make a social gathering an inherent and obvious risk, including: whether alcohol was served at the party or whether guests were invited to bring their own alcohol, the size and type of the party, and whether other risky behaviour was occurring at the party, such as underage drinking or drug use…[57]

Proximity - Nonfeasance Where There is No Positive Duty to Act

It is trite to say that negligent conduct includes both acts and omissions. However, expanding on the relationship between foreseeability and proximity, the following comment was made in *Childs*:

> Foreseeability without more may establish a duty of care. This is usually the case, for example, where an *overt act of the defendant has directly caused foreseeable physical harm* to the plaintiff: see *Cooper*. However, where the conduct alleged against the defendant is a *failure to act*, foreseeability alone may not establish

[56] *Williams v Richard*, at para. 24.
[57] *Williams v Richard*, at para. 27.

> a duty of care. In the absence of an overt act on the part of the defendant, the nature of the relationship must be examined to determine whether there is a nexus between the parties. Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not of itself impose any kind of duty on those in a position to become involved.[58]

Childs held that in a social host setting, "We are concerned not with an overt act of the social hosts, but with their alleged failure to act. The case put against them is that they should have interfered with the autonomy of [the guest] by preventing him from drinking and driving."[59] In that situation, "even if foreseeability were established, no duty would arise because the wrong alleged is a failure to act or nonfeasance in circumstances where there was no positive duty to act."[60] The distinction was further explained in a later decision as follows: "This qualification recognizes that action that causes harm to another and inaction that fails to prevent harm being caused to another have different qualities of moral and legal culpability."[61]

Before considering whether "something more" is required and, if so, is present in a claim against a social host, two questions that deserve further examination are: (a) is a claim made against a social host based solely on a failure to act, and (b) does a social host have a positive duty to act?

Is the Claim Based Solely on a Failure to Act?

It should be noted that *Childs* was a BYOB situation – the guest became intoxicated as a result of consuming alcohol that he personally brought to the party. In many other instances, however, the alcohol consumed by the guest who then drives while inebriated is supplied by the social host. In that setting, the claim against the host obviously involves concrete (positive) action on the host's part – an "overt act" - and not merely a failure to act.

Childs made the following response to the argument that, even in a BYOB setting, the claim against the host is not based solely on a failure to act:

> The [plaintiffs'] argument that [the defendant hosts] committed positive acts that created, or contributed to, the risk cannot be

[58] *Childs*, at para. 31 (original emphasis).
[59] *Childs*, at para. 32.
[60] *Childs*, at para. 26.
[61] *Kim v Thammavong*, at para. 21.

> sustained. It is argued that they *facilitated* the consumption of alcohol by organizing a social event where alcohol was consumed on their premises. But this is not an act that creates risk to users of public roads. The real complaint is that having organized the party, the hosts permitted their guest to drink and then take the wheel of an automobile.[62]

It is noteworthy that the court recognized that a social host commits "an act" – *i.e.* that the host is engaged in positive conduct. It is the nature and consequences of that act that are discounted. The "act" is said not to be one "that creates a risk to users of public roads", and it is the subsequent failure to act that is said to be the real complaint.

That, with respect, is a mischaracterization of the issue, and is an explanation that ignores the factual reality that, apart from situations where the supply of alcohol is strictly limited and/or its consumption stringently monitored, there is a real risk of overconsumption and inebriation in virtually every situation where alcohol is being consumed. It is not the consumption, but the *over*consumption of alcohol that a social host facilitates by supplying alcohol and/or organizing the event and supplying the venue for it. Given the universally-acknowledged level of the problem, it can hardly be denied that a real risk of overconsumption, with resulting inebriation, leading to the real risk of drunk driving, resulting in a real risk to, *inter alia*, users of the roads, is present at almost every private party where the supply of alcohol is not strictly limited and/or its consumption monitored. That sequence of real risks follow one from the other as night follows day. Foreseeability of a real risk of overconsumption of alcohol is tantamount to foreseeability of a real risk of injury to users of the roads.

By conveniently referring only to the facilitation of the consumption of alcohol, and not *over*consumption, the court ignored the plain and obvious truth that the facilitation of overconsumption is a positive act which is a contributing factor in the ultimate injury. Putting on blinders does not alter reality. Furthermore, the social host's positive conduct in many cases involves more than the facilitation of the overconsumption of alcohol; the host often supplies the alcohol which the guest overconsumes, or which results in the worsening of the guest's existing state of inebriation. How can that not be described as an "overt act"?

Organizing the party and supplying the venue, if not the alcohol, is itself a positive act. Creating or helping to create the occasion at which the intoxication occurred is not a failure to act.

---

[62] *Childs*, at para. 33 (original emphasis). That position was restated in *Williams v Richard* (at para. 20) as follows: "In other words, the claim [in *Childs*] was based on a failure to stop [the inebriated guest] from driving while intoxicated."

In addition, the statement "But this is not an act that creates risk to users of public roads" appears to require that the host's conduct be the sole or effective cause of the risk and resulting injury. It is a basic principle of tort law that conduct need only be a contributing cause of an injury to attract liability.[63] The questions that should have been, but were not, asked are: Does the facilitation of the overconsumption of alcohol contribute to the creation of risks to users of the roads? Is the facilitation of intoxication a contributing cause of injuries from drunk driving? We say the answer to each of those questions is a resounding Yes.

It is important to note that, so long as a particular cause is a "but for" cause of the loss or injury, "A contributing factor is material if it falls outside the *de minimis* range".[64] The reality is that a social host, whether by supplying alcohol and/or the organization/venue for the occasion, actively and materially contributes, even if not much beyond the *de minimis* range, to the creation of a real risk of inebriation and injury from drunk driving. Whether or not that risk was reasonably foreseeable, and whether it was a "but for" cause of the injury, depends, as indicated above, on the facts and circumstances of the case.

Does a Social Host have a Positive Duty to Act?

Childs employed the term "material implication in the creation or exacerbation of the risk" for the purpose of determining whether a social host had a connection or involvement sufficient to create a positive duty to act, such that a *prima facie* duty of care would arise:[65]

> Running through all of these situations [where proximity has been found] is the defendant's material implication in the creation of risk, or his or her control of a risk to which others have been invited…Holding a private party at which alcohol is served…is insufficient to implicate the host in the creation of a risk sufficient to give rise to a duty of care to third parties who may be subsequently injured by the conduct of a guest…Short of active implication in the creation or enhancement of the risk, the host is entitled to respect the autonomy of a guest…A social host at a party where alcohol is served is not under a duty of care to members of the public who may be injured by a guest's actions,

---

[63] "It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the *sole cause* of the injury…As long as a defendant is *part* of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury": *Athey v Leonati* [1996] 3 S.C.R. 458 at para. 17 (original emphasis).

[64] *Athey v Leonati*, at para. 15.

[65] That description (which was used in the CA decision in *Childs* and then adopted by the SCC – see para. 47) has been employed in other decisions: *Williams v Richard*, at paras. 22 and 34; *Wardak v Froom*, at para. 49; *Paton Estate v Ontario Lottery and Gaming Corporation*, at paras. 39-40.

> unless the host's conduct implicates him or her in the creation or exacerbation of the risk.[66]

Childs listed three situations in each of which there is a positive duty to act.[67] That list does not include what may be described as Good Samaritan situations: "Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved."[68] A social host, however, is not in the Good Samaritan category. The host is not merely a bystander who becomes aware of a person facing danger, or one who has become a danger to others; the host has actively contributed to the creation or exacerbation of that danger, either by supplying the alcohol which led or contributed to the guest's intoxication, or by organizing/supplying the occasion and venue for the consumption of that alcohol. The host has in fact been "materially implicated in the creation or exacerbation of the risk", even if only at a level not much beyond that of *de minimis*. "Conduct is negligent if it creates [or contributes to the creation of] an objectively unreasonable risk of harm."[69] An inebriated person who might get behind the wheel of a car constitutes an "objectively unreasonable risk of harm".

The autonomy of the person was a factor emphasized in *Childs* in support of the proposition that a social host has no positive duty to act:

> Also running through the examples is a concern for the autonomy of the persons affected by the positive action proposed. The law does not impose a duty to eliminate risk. It accepts that competent people have the right to engage in risky activities. Conversely, it permits third parties witnessing risk to decide not to become rescuers or otherwise intervene. It is only when these third parties have a special relationship to the person in danger *or a material role in the creation or management of the risk* that the law may impinge on autonomy. Thus, the operator of a risky sporting activity may be required to prevent a person who is unfit to

---

[66] *Childs*, at paras. 38, 44, 45, and 47.

[67] Where a defendant intentionally attracts and invites third parties to an inherent and obvious risk which he or she has created or controls; paternalistic relationships of supervision and control, such as those of parent-child or teacher-student; and defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large: *Childs*, at paras. 35-37. See also *Williams v Richard*, at para. 21 and *Sabourin v McKeddie* 2016 ONSC 2540 at paras. 29-36. In *Sidhu (Litigation guardian of) v Hiebert*, the court highlighted (at para. 46) the comment in *Childs* that the three listed categories were not strict legal categories, but served to elucidate factors that can lead to positive duties to act. A fourth situation was tentatively recognized (in that a motion for summary judgment was dismissed) in *Lutter v Smithson*, at paras. 27-29, that being a host permitting a minor to consume alcohol in contravention of legislation prohibiting that.

[68] *Childs*, at para. 31. See also *Paton Estate v Ontario Lottery and Gaming Corporation*, at para. 134.

[69] *Ryan v Victoria* [1999] 1 S.C.R. 201 at para. 28. The same statement, minus the word "objectively", was made in *Mustapha v Culligan*, at para. 7.

> perform a sport safely from participating or, when a risk materializes, to attempt a rescue. Similarly, the publican may be required to refuse to serve an inebriated person who may drive, or a teacher may be required to take positive action to protect a child who lacks the right or power to make decisions for itself. The autonomy of risk-takers or putative rescuers is not absolutely protected, but, at common law, it is always respected.[70]
>
> A person who accepts an invitation to attend a private party does not park his autonomy at the door. The guest remains responsible for his or her conduct. *Short of active implication in the creation or enhancement of the risk*, a host is entitled to respect the autonomy of a guest. The consumption of alcohol, and the assumption of the risks of impaired judgment, is in almost all cases a personal choice and an inherently personal activity. Absent the special considerations that may apply in the commercial host context, when such a choice is made by an adult, there is no reason why others should be made to bear its costs.[71]

As stated above, we have difficulty seeing how it can reasonably be denied that hosts who supply the alcohol which led or contributed to the guest's intoxication, or even those who merely organize/supply the occasion and venue for the consumption of that alcohol, have, at a level beyond *de minimis*, "a material role in the creation or management of the risk"; an "active implication in the creation or enhancement of the risk". Given that connection (which, it should be noted, in each instance involves active conduct), the autonomy of the guest is essentially irrelevant; in determining whether the host should be liable, the focus must be on the conduct of the host, not the autonomy of the guest. The guest's "personal choice" and "inherently personal activity" is not an independent intervening event, and is not a justification for excusing the host's active contributing involvement in the creation or heightening of a risk which ultimately materializes into harm.

Another factor considered in *Childs* was reliance:

> Finally, the theme of reasonable reliance unites examples in all three categories [of situations where there is a positive duty to act]. A person who creates or invites others into a dangerous situation, like the high-risk sports operator, may reasonably expect that those taking up the invitation will rely on the operator to ensure that the

[70] *Childs*, at para. 39 (emphasis added).
[71] *Childs*, at para. 45 (emphasis added). See also the passages reproduced at fns. 58 and 59 above.

> risk is a reasonable one or to take appropriate rescue action if the risk materializes…there is a reasonable expectation on the part of the public that a person providing public services, often under licence, will take reasonable precautions to reduce the risk of the activity, not merely to immediate clients, but to the general public.[72]
>
> This brings us to the factor of reasonable reliance. There is no evidence that anyone relied on the hosts in this case to monitor guests' intake of alcohol or prevent intoxicated guests from driving…[T]he private social host…neither undertakes nor is expected to monitor the conduct of guests on behalf of the public.[73]

That reasoning places the cart before the horse. There ought to be a presumption, without any need for evidence, that the public relies on social hosts to take steps to try to ensure that their guests do not become intoxicated and do not drive while intoxicated. Those steps would include monitoring the guests (although that involves the issue of standard of care, not whether a duty of care exists). Surely that form of presumed reliance is both reasonable and necessary, given the horrific extent and gravity of the harm caused by drunk driving,[74] much of which results from inebriation created or increased at private parties. It goes without saying that a social host does not *undertake* to monitor the conduct of guests on behalf of the public, but he or she should, as a matter of policy, be *expected* to do so.

The rationale that there can be no liability for nonfeasance on the part of a social host because there is no positive duty to act is based on a false premise: there *is* a positive duty to act in circumstances where there is a real risk of overconsumption of alcohol followed by inebriated operation of an automobile. As outlined above, the bald assertion of nonfeasance is similarly a false premise.

Why is "Something More" Necessary?

If, as we believe:

- a claim against a social host is not based on a failure to act;
- in most situations, a social host has, in any event, a positive duty to act;
- the host is, in many if not most instances, materially implicated in the creation or exacerbation of the real risk of inebriation, and the resulting risk of drunk driving;

---

[72] *Childs*, at para. 40.
[73] *Childs*, at para. 46.
[74] Organizations such as MADD do not come into being (and persist for decades) unless there is a profound and continuing societal problem.

- the factor of the autonomy of guests is of such secondary importance as to almost be irrelevant; and
- the postulated non-reliance by the public on social hosts to take reasonable steps to try to ensure that their guests do not become intoxicated and then get behind the wheel of a car is precisely the opposite of what prudent and reasonable policy demands,

then why does a duty of care require "something more"?

If reasonable vigilance is too high a price, the private party should be alcohol-free. Supplying alcohol at a private function, or permitting its availability, is a privilege, not a right.

Test B, Part c – Residual Policy Considerations

This element is well-summarized in the following remarks:

> [P]olicy is relevant at both the "proximity" stage and the "residual policy concerns" stage of the *Anns* test. The difference is that, under proximity, the relevant questions of policy relate to factors arising from the particular relationship between the plaintiff and the defendant. In contrast, residual policy considerations are concerned not so much with "the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally" (*Cooper*, at para. 37).
>
> The possibility of some blending of policy considerations was noted by McLachlin C.J. and Major J. in *Cooper*:
>
> > Provided the proper balancing of the factors relevant to a duty of care is considered, it may not matter, so far as a particular case is concerned, at which "stage" [policy is considered]. The underlying question is whether a duty of care should be imposed, taking into account all relevant factors disclosed by the circumstances. [para. 27][75]

While this element is exclusion-, rather than inclusion-, related,[76] the latter passage highlights the "underlying question", which is "whether a duty of care should be imposed, taking into account

[75] *D.(B.) v Children's Aid Society*, at paras. 32-33.
[76] Leading to the following comment: "The issue of whether a duty of care is negated by policy considerations is best dealt with after the duty has been found to exist": *Williams v Richard*, at para. 49.

all relevant factors disclosed by the circumstances". For reasons outlined above, it is our view that a duty of care *should*, in most circumstances, be imposed on a social host.

"[O]nce the plaintiff establishes a *prima facie* duty of care, the evidentiary burden of showing countervailing policy considerations shifts to the defendant".[77] Apart from unusual circumstances which might result in them, there are no countervailing policy considerations which would negate the imposition of a duty of care on a social host.

A Further Rationale for Liability of a Social Host

Apart altogether from liability imposed on the basis of breach of a duty of care, another potential footing for liability stems from the principle that, as between two innocent parties, a loss ought to be borne by the one who, while not owing any duty of care nor being guilty of wrongdoing, nevertheless exposed the other to the risk of loss by his or her carelessness.[78] That principle does not create a distinct cause of action,[79] but "where the carelessness of one party involves active participation in [a third person's wrongdoing] and results in the wrongdoing being able to inflict the loss, that party must bear the burden of the loss."[80]

As this basis for liability is founded on carelessness, it would be necessary for the injured plaintiff to show that the social host was careless in regard to the development or worsening of the driver's intoxication.

It might also be mentioned that a further possible basis for a social host's liability is that of occupier's liability.[81]

Conclusion

As stated at the outset, it is our view that *Childs* was a mistake. It was an unwise decision based on flawed reasoning. To say that a social host, particularly one who supplies the alcohol which results in or increases the guest's intoxication, is not "materially implicated in the creation or exacerbation of the risk" is to ignore reality. *Childs* rests on a weak, indeed illusory, foundation and promotes the wrong policy. The court should have made an effort to disincentivize the overconsumption of alcohol at private parties, rather than casting about for ways to excuse a host from liability for harm resulting from that inherently dangerous conduct. This was a case of a bold step not taken.

---

[77] *Childs*, at para. 13.
[78] *Marvco Color Research Ltd. v Harris* [1982] 2 S.C.R. 774 at para. 24.
[79] *Moss v National Armoured Ltd.* (1999) 174 D.L.R. (4th) 493, Ont. C.A. at para. 11.
[80] *Isaacs v Royal Bank* 2011 ONCA 88 at para. 7.
[81] See *Hamilton v Kember* 2008 CarswellOnt 1012 at para. 11; *Avila v Couto*, at para. 38; *Tuffnail v Meekes* 2016 ONSC 710 at paras. 19-26; *Kim v Thammavong*, at paras. 17 and 30.

Unfortunately *Childs* is a decision whose effect can be cured only by legislation (and even that on a province-by-province basis) or a reversal by the SCC, neither of which is likely to occur any time soon. There is, however, hope on the horizon. While a judicial or legislative fix is unlikely, a gradual disappearance of the drunk-driving crisis is forthcoming as a result of technological breakthroughs in the form of autonomous (self-driving) vehicles. In the meantime, however, the carnage continues, with scant judicial effort for abatement through deterrence, nor even through the application of established principles of law.

Hillel David and Annette Uetrecht-Bain
Both of McCague Borlack LLP in Toronto