



# EMPLOYMENT—LABOUR LAW

*December 2004*

## CLIENT ALERT SOCIAL HOST LIABILITY

With the onset of the holiday season, we take this opportunity to remind our clients of the legal ramifications that arise from drinking at a company sponsored social occasion. Prior to 2004, the most important case was *Jacobsen v. Nike Canada Ltd.*, [1996] B.C.J. No. 363 (S.C.). In 2004 came the decision of *Childs v. Desourmeaux* [2004] O.J. No. 2065 which has essentially been adopted by the most recent case of *Mugford v. Kodiak Construction Ltd.*, 2004 A.B.C.A. 145.

In *Jacobsen*, the B.C. Supreme Court found an employer 75% liable for the injuries suffered by an employee as a result of a car accident. Prior to leaving an off-premises work site, the employee had consumed at least eight beers given to him by one of his supervisors. The Court held that the employer failed to meet its duty of care owed to its employee by providing the free alcohol, failing to monitor its consumption and by not preventing the plaintiff from driving. The Court further held that the employer's duty could have been met by the supervisor questioning the employee as to how many beers he had consumed and by ensuring the employee had a safe way home.

This past Spring, the Ontario Court of Appeal in the *Childs* case, held that the social hosts of a "Bring Your Own Bottle" ("BYOB") party were not liable after their guest, who had been drinking heavily, left the party and injured a third party in a car accident.

In that case, Mr. Desourmeaux had a known history as a heavy drinker and, indeed, had sometimes slept at the hosts' home in the past when he became drunk. This time, he left the party and caused a car accident, which left Ms. Childs paraplegic and killed her boyfriend.

The Court of Appeal noted that the considerations are different when dealing with a social host, as opposed to a commercial host. A commercial host knows or should know if and when the patron is intoxicated and about to drive. Furthermore, these hosts not only have a statutory duty not to serve alcohol to a visibly intoxicated person, but are required by statute to monitor the alcohol consumption of their patrons and in that sense to control the environment in which alcohol is served. They are also able to buy liability insurance as part of the cost of doing business, and spread the cost of these premiums among their patrons.

The Court, however, made it very clear that its decision was restricted to the facts of the particular case – i.e., that it was a BYOB party in which the hosts had not assumed control over the supply and service of alcohol; they had not served alcohol to or monitored the amount of alcohol consumed by Desourmeaux; and there was no evidence to show that they knew he was impaired when he drove away.

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The Court then went on to say that eventually, tort law might be expanded to include social host liability. However, the extent of the burden which such a tort would place on social hosts would first have to be assessed against the potential benefit of imposing such a duty on them. For example, would it mean that social hosts have an obligation to remain sober throughout the function so as to be in a position to assess a guest's sobriety and to have the judgment to prevent that guest from driving? If the host does nothing to prevent the visibly intoxicated guest from driving, is the host jointly liable for the damages arising from any resulting accident? What if the host tries to dissuade the guest, but is unsuccessful? Furthermore, what would happen to the premiums on a Home Owners Insurance Policy if the common law imposed such a duty of care, and what if the insurer then decided to exclude such occasions from coverage?

The Court raised these questions, but did not answer them. In fact there is no conclusive Canadian authority respecting social host liability. However, while not making a specific comment, the Court did comment that social host liability might occur when it is shown that "a social host knew that the intoxicated guest was going to drive a car, and did nothing to protect the innocent third party users of the road".

In *Mugford*, the Alberta Court of Appeal held that an employer was liable after its employee, while impaired and driving a company vehicle for personal use, injured a third party in a car accident. Despite a company policy prohibiting the employee from using the vehicle for personal use, the Court held that, under the Alberta *Traffic Safety Act* (a similar provision is also found under B.C.'s *Motor Vehicle Act*), the employer's express consent to the employee's possession and use of the vehicle was sufficient to hold the employer liable for the negligence of its employee. The Court concluded that the company's prohibitions placed on personal use and drinking and driving did not vitiate that consent.

It should be noted that the Courts in B.C. have not yet commented on the *Childs* or the *Mugford* decisions, but it is not unusual for Courts in this jurisdiction to adopt and apply decisions issued by the Courts of Appeal in Ontario and Alberta.

Should you have any questions about this decision or any other decision pertaining to a company's potential liability for excessive drinking at a company-sponsored function, kindly call any of the employment group lawyers at Owen Bird Law Corporation.

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