IT'S THE MOST WONDERFUL TIME OF THE YEAR…
EXAMINING SOCIAL HOST LIABILITY IN ONTARIO

In a scenario that is unfortunately, not uncommon, a person hosts a party for friends, family members or co-workers. The guests consume alcohol. After leaving the party, one guest drives while intoxicated and causes an accident where another person is injured. The question then arises – is the host liable to the injured third party?

Whereas the commercial alcohol providers have long been held to owe a duty to members of the public who are injured as a result of the actions of a patron who was driving drunk, the liability of social hosts has remained uncertain until fairly recently.

I. THE LAW

1) *Childs v. Desormeaux*, (2006)

Where a guest attends a party and an injury occurs on the premises, the duty on the social host is imposed by statute – the *Occupier's Liability Act (*the "OLA" or the "*Act*"). Where the injury occurs *off the premises* (such as on a public highway, after a guest leaves the party), the *Act* has no application, and the ordinary laws of negligence govern. The leading Canadian case in determining whether a duty of care arises in the latter circumstances is the Supreme Court of Canada decision in *Childs v. Desormeaux*.[1]

In *Childs,* the defendant attended a "BYOB" (bring-your-own-booze) New Year's party where he consumed alcohol. He was known by his hosts to be a heavy drinker and to have been previously convicted of impaired driving. The hosts spoke to the defendant before he left the party, and he assured them that he was not too intoxicated to drive. It was found as fact that the hosts did not know that the defendant was too drunk to drive, even though his alcohol level was three times the legal limit.

After driving away, the defendant caused a serious accident where one person was killed and three others were seriously injured. The plaintiff, Childs (a passenger in the other vehicle) was rendered a quadriplegic. The plaintiff argued that social hosts are in an analogous position to commercial hosts who have long been held to owe a duty of care to protect those who might be injured by their intoxicated patrons.

In *Childs*, the Supreme Court held 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". However, the absence of a duty

[1] *Childs v. Desormeaux*, [2006] 1 SCR 643 (SCC).

of care was found on the specific facts of the case, including that the intoxicated driver had brought and consumed his own alcohol, and that the hosts did not know that he was too intoxicated to drive.

The court left it open to argue for the imposition of a duty of care in other, more extreme circumstances, such as where a host provides, and continues to serve alcohol to an intoxicated guest knowing that that person will be driving. So while simply hosting a party where alcohol is served is insufficient to create a duty, a duty may be imposed where the social host has become implicated or has participated in ***"the creation or enhancement of risk"*** to the plaintiff. The court held that:

> Holding a private party at which alcohol is served – on 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. … ***More is required to establish a danger or risk that requires positive action***. ***It might be argued that a host who continues to serve alcohol to a visibly inebriated person knowing that he or she will be driving home has become implicated in the creation or enhancement of a risk sufficient to give rise to a prima facie duty of care to third parties, which would be subject to contrary policy considerations at the second stage of the Anns test.*** … We need not decide that question here. ***Suffice it to say that hosting a party where alcohol is served, without more, does not suggest the creation or exacerbation of risk of the level required to impose a duty of care on the host to members of the public who may be affected by a guest's conduct.***[2]

The Supreme Court thus left open the possibility that a positive duty of care may exist where the foreseeability of harm is present and there is a special relationship between the social host and the plaintiff. While the court identified three distinct categories of relationships where such a duty may be arise, the common element among all three is the host's involvement in the creation, enhancement and/or control of the risk of harm to the plaintiff. The three categories of relationships identified in *Childs* are as follows:

1. **Inherent & Obvious Risk:** A positive duty may exist where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls (e.g. boating party; dangerous sporting event);

2. **Paternalistic Relationship:** Paternalistic relationships of supervision and control, such as those of parent-child or teacher-student may create a duty of care; and,

3. **Public Function/Commercial Enterprise:** Defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large.

Importantly, the Court also emphasized that adults who attend private parties "do not park their autonomy at the door". The court observed that:

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[2] *Childs v. Desormeaux*, supra, at para 44.

> ***[t]he 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 context, ***when such a choice is made by an adult, there is no reason why others should be made to bear its costs.***[3]

Accordingly, there is no question that adults who consume alcohol at a private function are assumed to be making a personal choice and will be held responsible for their own behaviour.

2) Jurisprudence in Ontario following *Childs*

Jurisprudence in Ontario on social host liability since *Childs* has been limited, suggesting that counsel may view the window for potential for liability left open by the Supreme Court as too narrow to warrant litigation.

One exception – an area where we *have* seen some developments in case law – concerns social host liability in cases involving minors. This is not surprising for two reasons: first, the Supreme Court in *Childs* expressly left often the possibility that a duty of care may arise in paternalistic relationships of supervision and control; and second, given that the Court's comments regarding personal autonomy were limited to "adults", some plaintiffs have sought to distinguish their own cases on the basis that they involved intoxicated minors.

Since, in Ontario, none of these cases appear to have gone to trial (the only reported cases having been decided under the summary judgment framework pursuant to Rule 20), there are important implications as to value of these cases as precedent, as discussed below.

Precedent-setting Cases – Where Summary Judgment Was Granted

In *Ferrier v. Hubbert*,[4] the court dismissed the case against the parents (property owners), concluding that they did not owe a duty to the plaintiffs, because even though they were present, they had not invited the guests, and had not supplied food or alcohol to the guests. It was found in *Ferrier* that the parents did not have a duty to supervise their adult son (age 24), were free to respect his autonomy, and could not be held liable for allowing him and his girlfriend to host a party on their property. In the circumstances, the parents did not owe a duty of care to the guests.

More recently, in *Sabourin v. McKeddie*,[5] summary judgment in favour of the homeowner parent was also granted. *Sabourin* involved a claim by a 16-year-old plaintiff for injuries suffered while she was a passenger in a vehicle driven by the homeowner's adult son who left the house while intoxicated. The plaintiff was a guest at the house prior to the accident. She consumed alcohol, together with the defendant brothers, the sons of the homeowner (M – age 31, driver of the vehicle and T – age 19, owner of the vehicle and passenger). There was conflicting evidence in this case as to the extent to which the homeowner father knew about the use of alcohol by the

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[3] *Childs v. Desormeaux*, supra, at para 44.
[4] *Ferrier v. Hubbert*, [2015] O.J. No. 5116 (SCJ).
[5] *Sabourin (Litigation guardian of) v. McKeddie*, [2016] O.J. No. 2003 (SCJ).

plaintiff and his sons. According to the plaintiff's evidence (which was disputed), the father was home during the material time, observed the drinking, and did not inquire about the plaintiff's age despite observing her consume alcohol.

The court found that the only potentially applicable category on which duty could be imposed was the presence of a paternalistic relationship. However, even on the plaintiff's version of events, there was an "absence of evidence" that the father (i) knew the plaintiff's age; (ii) knew that there were underage drinkers present; (iii) provided alcoholic drinks to anyone; (iv) knew that excessive drinking was taking place; or (v) saw anyone showing obvious signs of intoxication. Accordingly, there was insufficient evidence to establish a paternalistic obligation on the father's part, and the plaintiff's claim against him was dismissed.

Both *Ferrier* and *Sabourin* applied *Childs* to conclude that the facts in those cases did not establish a paternalistic relationship and that the parents' conduct did not create or enhance the risk of harm to the plaintiffs. On the facts of those cases, no duty of care could arise, and there was no genuine issue to be tried. These cases serve as valuable precedents for future cases with similar fact situations.

Limited Precedent Value Where Summary Judgment Was Not Granted

Unlike *Ferrier* and *Sabourin*, the precedential value of the following cases where the courts have *declined* to grant summary judgment is extremely limited. In these cases, the courts concluded only that there remain genuine issues to be tried, without applying *Childs* to make findings on the merits. In this way, these decisions serve more as examples of the courts' reluctance to dismiss cases on summary basis, than examples of the application of the law on social host liability. This is especially the case since these cases involved claims framed both in negligence and pursuant to the OLA, with no clear differentiation between the two bases of liability. Since none of these cases have gone trial, there has been no determination to date as to whether a duty of care was in fact owed in any of these situations.

For instance, *Hamilton v. Kember*[6] involved a party hosted by a 17 year old. Her parents had given the teenager permission to have a party, subject to certain rules, including: (i) a limited number of guests; (ii) no alcohol consumption; and (iii) that their liquor cabinet be locked. The parents left to go camping for the weekend. The teenager locked the liquor cabinet and did not serve any of the guests. The party spiralled out of control, with approximately 100 students attending, and many (including the plaintiffs and the defendant driver) becoming seriously intoxicated. The defendant attended the party, and then drove impaired, colliding with the two plaintiffs who were standing on the side of the road in front of the residence. The plaintiffs suffered catastrophic injuries.

The teenager and her parents brought a motion for summary judgment, contending that they were not liable because, as was the case in *Childs*, they had not served alcohol. The judge disagreed, stating that, in his view, "*the fact that [the 17-year old host] did not serve alcohol is not sufficient to negate potential liability by the parents in these circumstances; therefore it cannot*

[6] *Hamilton v. Kember*, [2008] O.J. No. 734 (SCJ).

be said that the defendants owed no duty of care to the plaintiffs and this results in a genuine issue for the trial judge to consider".[7]

In *Oyagi v. Grossman,*[8] the court also dismissed the summary judgment motion brought by the parents of a 17-year old social host. The court held that it was at least arguable that that the homeowner parents of the teenager were negligent in leaving their son with minimal supervision when they went on vacation. This was the case even though the teenager hosted the house party against his parents' express wishes and direction.

The most recent Ontario case in this area – the February, 2017 decision in *Wardak v. Froom*[9], also involved a summary judgment motion. In *Wardak*, the defendants (homeowners) hosted a birthday party for their 19-year-old son. The plaintiff, who was 18 at the time, lived down the street and walked to the party. The defendant parents did not serve alcohol since the party was "BYOB", but they were aware that some of the underage guests, including the plaintiff were drinking. As he was about to leave, the defendants observed that the plaintiff was showing signs of intoxication and offered to walk him home. The plaintiff refused. A short time later, while the defendants where otherwise occupied, the plaintiff left the party on foot. After arriving home, he got into his car, and shortly thereafter caused a single vehicle accident which rendered him quadriplegic with serious cognitive impairments.

Dismissing the parents' motion, Matheson J. emphasized that since *Childs* was concerned with the duty of care to third parties, it did not preclude a finding of liability where the injured party was a guest, rather than a third party user of the road. In this regard, her Honour relied on the following statement in *Childs* where the Chief Justice held for the court:

> 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 ***to third-party highway users*** who may be injured by an intoxicated guest.[10]

According to Matheson J., there remained a possibility that the facts in *Wardak,* if proven, could indeed amount to the "*more*" that was contemplated in *Childs*. Specifically:

1. Since the plaintiff was under legal drinking age, and since the defendants knew he was drinking, this could be said to constitute a paternalistic relationship of supervision and control that may lead to a positive duty to act;

2. The parents in *Wardak* admitted that they were "hosting and supervising" the party and that they knew that their teenage guests were drinking. This was significant because it may have constituted the parents' "material implication in the creation of risk or [their] control of a risk to which others have been invited", leading to a positive duty.

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[7] *Hamilton v. Kember*, supra, at para 21.
[8] *Oyagi v. Grossman*, [2007] O.J. No. 1087 (SCJ).
[9] *Wardak v. Froom*, [2017] O.J. No. 829 (SCJ).
[10] *Childs v. Desormeaux*, [2006]1 S.C.R. 643 (SCJ), cited in *Wardak v. Froom*, supra, at para 46.

It is crucial to note that in cases involving catastrophic injuries, the courts are loathe to dismiss claims on a summary basis. Since these cases are typically very fact driven, and since there are usually some facts that are disputed or could be challenged, the courts are likely to refer such cases to trial in an effort to ensure a decision on the merits. This is especially so in the context of social host liability cases: given the presence of alcohol, the parties' recollections may be unreliable and the facts could be challenged fairly easily – all of which substantially increases the likelihood of the court dismissing a summary judgment motion. It is therefore important to stress that *Wardak*, as well as similarly fact specific decisions in *Hamilton* and *Oyagi* ought to be read with extreme caution.

3) No Positive Duty to Rescue

One thing that most social liability cases have in common is that they are concerned not with positive action, but with the allegations that the defendant's *failure to act* caused the injuries complained of. In *Childs*, the Supreme Court made it clear that in general, when a claim alleges such a failure to act,

> 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***.[11]

The Supreme Court in *Childs* thus not only focused on individual autonomy, but underscored that the law does ***not*** require third parties witnessing risk to become rescuers or otherwise intervene. The court held:

> 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 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 patron who may drive, or a teacher 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.***[12]

This approach was reiterated in *Karn v. Sturgeon*,[13] a case involving a 17-year-old who died while at a party at the defendant's residence. The plaintiff was diabetic, consumed alcohol and failed to take his insulin for two days. The plaintiff's family brought an action against the occupier of the house alleging that she had a positive duty to render assistance and failed to do so. Justice McMillan confirmed that,

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[11] *Childs v. Desormeaux*, supra, at para 31.
[12] *Childs v. Desormeaux*, supra, at para 39.
[13] *Karn v. Sturgeon*, [2008] O.J. No. 6010 (SCJ).

> ***[a]bsent any special relationship, the common law does not impose a general duty to rescue someone in peril*** from a source unrelated to the defendant, notwithstanding that there may not be any risk to the putative rescuer.[14]

McMillan J.'s decision followed the judgment of the Court of Appeal in *Horsley v. MacLaren*, where Jessup J.A. described the principle of law as follows:

> ... no principle is more deeply rooted in the common law than that there is no duty to take positive action in aid of another no matter how helpless or perilous his position is.[15]

This issue also arose in *Kim v. Thammavong* in the context of a summary judgment motion brought by homeowner parents after an attendee at their daughter's party suffered an injury. In his reasons, Perell J. stressed that actions that cause harm and inactions that fail to prevent the harm being caused "*have different qualities of moral and legal culpability*."[16] In granting summary judgment in favour of the parents, he held as follows:

> In the case at bar, ***the court is not concerned with an overt act by Mr. and Mrs. Cheung but with their alleged failure to interfere with their adult daughter's autonomy to host a party where alcohol would be served***. [The plaintiff's case against the parents] amounts to no more than that they went on vacation and they did not control in their home their adult daughter, who was known to drink alcohol. ***In my opinion, these circumstances do not rise to establish a relationship that prima facie entails a duty of care***.[17]

The extent to which the property owner is required to get involved and assist someone who is injured on their property is also an issue that was central in the case of *Holburn v. Vincent*,[18] where our firm acted for the insured owner/occupier.

Vincent arose from an accidental, but self inflicted drug overdose and subsequent death of a 15-year old girl while in the upstairs bedroom of the insured's (homeowner's) house. Unbeknownst to the insured, the teenager and the insured's adult son (who was her then boyfriend) were doing drugs, including injecting Fentanyl, when she overdosed and died. Although the insured did not observe, and in fact, was unaware of any drug use at his home, the evidence was disputed as to whether he saw the teenager being assisted out of the house, and whether or not she was still alive at that time. The family of the deceased brought an action against the insured alleging that he is liable in negligence and under the *OLA* for failure to provide medical assistance to the teenager.

While this case was undoubtedly tragic, it was also clear that the homeowner father did not owe a duty to the plaintiffs. The insured did not host any party. He was unaware that any drug use

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[14] *Karn v. Sturgeon*, supra, at para 92.
[15] *Horsley (Next friend of) v. MacLaren*, [1970] 2.O.R. 487 (CA), at page 7, cited in *Karn v. Sturgeon*, supra, at para 92.
[16] *Kim v. Thammavong*, [2007] O.J. No. 4769 at para 21 (SCJ).
[17] Justice Perell's decision striking the claim against the parents was upheld on appeal: *Kim v. Thammavong*, [2008] O.J. No. 4908 (SCJ).
[18] *Holburn & Doiron v. Vincent, Ells & Boden*, [2005] Court File No. 40741/05.

was taking place at his house and unaware that the teenager was in need of medical assistance.[19] He was therefore less a social host and more an ordinary homeowner, who just happened to be home at the material time. On these facts, we took the position that there was no evidence of *either* foreseeability *or* any special relationship between the insured and the deceased, and no positive duty to render medical assistance. Our position in this regard was conceded, and the case was successfully settled out of court.

II. THE OCCUPIERS' LIABILITY ACT

Although a fulsome discussion of the *Occupiers' Liability Act* is outside the scope of this paper, it is important to note that, where an alcohol or drug related injury occurs on their property, the owners/occupiers may face claims under the *OLA* in addition to any claims asserted against them in tort.[20]

However, unlike the ordinary tort claims (where the onus is on the plaintiff to establish a duty of care), the duty on an occupier[21] under the *OLA* is imposed by statute. Thus, pursuant to section 3, the occupier owes a duty to take reasonable measures to ensure that the persons entering the premises are reasonably safe while on the premises.[22] Importantly, the *Act* does not generally apply where ***the danger does not arise from the condition of the premises or an activity carried on at the premises***.

This was confirmed in *Alchimowicz v. Schram.*[23] In that case, the plaintiff consumed a significant quantity of alcohol over the course of an evening which ended at a public beach. At the beach, the plaintiff dove into shallow water and sustained a spinal cord injury rendering him a quadriplegic. The plaintiff brought an action against the municipality as the owner of the beach, alleging that it breached its duty under the OLA by failing to post sufficient signs warning of the depth of the water. Justice Quinn held that the municipality could not be held liable under the *Act*, describing that the premises, namely the beach, as not inherently dangerous despite the lack of signage regarding the depth of the water or lack of warning against diving.

According to Quinn J., the "danger" was not the premises but rather the plaintiff's consumption of alcohol and subsequent behaviour, which could have been brought to any other location – such as another house, sidewalk, or another private or public place with the same result.

Similarly, in *Fitkin Estate v. Latimer*,[24] a case where the plaintiff dove into a swimming pool after consuming a considerable amount of alcohol and suffered serious injuries, the Court of Appeal upheld a dismissal of the action against the owner of the premises. In arriving at this conclusion, the court relied on the reasoning in *Stewart v. Pettie*,[25] where the Supreme Court held

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[19] In fact, it was our position that by the time the insured saw the teenager, she was already deceased. Thus, even if duty was established, the father's failure to call for medical assistance did not cause the teenager's death.

[20] As noted above, the OLA is only relevant where an injury occurs on the premises. Where an injury occurs off the premises, the OLA has no application and the ordinary law of negligence governs.

[21] defined as anyone who is: (a) in physical possession of the premises; or (b) has control over premises with the power to admit or exclude others: *Occupiers' Liability Act*, R.S.O. 1990, c. O.2, Section 1.

[22] *Occupiers' Liability Act*, R.S.O. 1990, c. O.2, Section 3.

[23] *Alchimowicz v. Schram*, [1997] O.J. No. 135 (SCJ).

[24] *Fitkin Estate (Litigation administrator of) v. Latimer*, [1997] O.J. No. 1449 (CA).

[25] *Stewart v. Pettie*, [1995] 1 S.C.R. 131 (SCC).

that mere consumption of alcohol by the deceased at the defendant's premises was insufficient to impose liability on the defendants whose pool he dove into. The Court of Appeal observed that:

> ***… the respondents had no reason to know Mr. Fitkin was severely intoxicated***. No one had ever climbed the railing surrounding the pool previously. Mr. Fitkin gave no indication by his words or conduct that he was going to do so. The trial judge found that he climbed the railing so quickly and so unexpectedly that no one had any opportunity to stop him. The conduct of Mr. Fitkin was outside the realm of foreseeable uses in connection with the swimming pool. ***Since the injury was not a reasonably foreseeable result of the activity carried on by the respondents on their premises, there is no liability under the Occupiers' Liability Act.***[26]

In effect, the Court held that: (i) the owner had no reason to know or suspect that the plaintiff was severely intoxicated; (ii) the plaintiff gave no indication by his words or by conduct that he was going to dive; and (iii) the owner did not have an opportunity to stop him. As a result, the injury was not a reasonably foreseeable result of any activity carried on by the defendants on their property, and there was no liability under the *OLA*.

These cases, taken together, indicate that liability under the *OLA* requires that the danger be caused by the premises or by the defendant's activities on the premises, and does not include the unforeseeable and intentional conduct of guests, such as consumption of significant amount of alcohol or drugs or reckless behaviours (e.g. diving) while under the influence.[27]

In addition, although these cases pre-date *Childs*, they remain good law because the reasoning underlying these decisions is fully consistent with the legal principles set out in *Childs*, namely: personal responsibility, adult autonomy, and the courts' refusal to impose liability unless the defendant participated or was implicated in the creation or enhancement of a risk that resulted in the plaintiff's injuries.

III. THE WORK CHRISTMAS PARTY - EMPLOYER HOST LIABILITY

In the Ontario case of *Hunt (Litigation guardian of) v. Sutton Group Incentive Realty Inc*.,[28] the employer real estate brokerage hosted a Christmas party at their offices during office hours. The employee, Hunt, continued to drink after leaving the party and was seriously injured in a motor vehicle accident.

At trial, the Court found that Ms. Hunt was "inebriated" when she left the office party and that the employer ought to have been aware of the degree of her intoxication. The trial judge concluded not only that the employer owed the plaintiff a duty of care, but that this duty of care was not discharged merely by offering a cab to its employees generally or by another employee offering Ms. Hunt a place to stay. According to the court, the employer should have insisted that Ms. Hunt: leave her keys at the office, take a taxi, call her husband, or, if all else failed, should have telephoned the police.[29]

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[26] *Fitkin Estate (Litigation administrator of) v. Latimer*, supra, at para 6.
[27] While it is open to the defendants facing a claim under the OLA to assert a defence of voluntary assumption of risk under section 4 of the *Act*, the analysis of legal principles in this regard is outside the scope of this paper.
[28] *Hunt (Litigation guardian of) v. Sutton group Incentive Realty Inc*., [2001] O.J. No. 374, (SCJ).
[29] *Hunt (Litigation guardian of) v. Sutton group Incentive Realty Inc*., supra, at para 20.

By not making sufficient attempts to see that Ms. Hunt got home safely, the employer was partially liable for her damages, which were assessed at $1 million.[30] The *Hunt* decision thus seems to suggest that where an employer provides alcohol to employees, is aware that a particular guest has been drinking, and it is reasonably foreseeable that the intoxicated guest may drive, the employer may owe a duty of care to the injured employee and potentially, to third party users of the road.

Although the fact situation in *Hunt* (i.e. an employer serving alcohol to its employees at a social function) does not neatly fit into any of the three categories of special relationships identified in *Childs*, the basis upon which the employer in *Hunt* was held liable appears to be consistent with the principles set out in *Childs.* Specifically, when serving alcohol to its employees, an employer could be said to be in an analogous position to a commercial host in terms of the employer's control over, and/or or participation in the creation or enhancement of the risk of harm to its intoxicated employees. It will be interesting to see how future cases post-*Childs* will address similar fact scenarios.

IV. CONCLUSION

As the foregoing discussion demonstrates, the cases in the area of social host liability law are largely fact driven. Although each case will be determined upon its own facts, broadly speaking, the courts post-*Childs* have engaged in a three-fold analysis as follows: (1) was the plaintiff's injury foreseeable? (2) does the relationship between the parties involve a special link or proximity? and (3) did the defendant control the risk, or was implicated in the creation or enhancement of the risk of harm to the plaintiff?

In the majority of cases, there will considerable overlap between these lines of inquiry. Whether these elements will be established, and duty of care imposed in a particular case will then depend on answers to important factual questions, including the following:

1) Did the injury occur *on* or *off* the premises?
   (a) if on the premises, did the danger arise from:
      (i) the condition of the premises?
      (ii) an activity carried on at the premises? or
      (iii) unforeseeable / intentional conduct of the plaintiff?
2) Was the plaintiff a guest or a third party?
3) How old is the plaintiff?
4) What relationship did the insured have with the plaintiff? Was it that of:
   (a) parent/child?
   (b) teacher/student?

[30] The Ontario Court of Appeal ordered a new trial in the case, on unrelated grounds (i.e. relating to the trial judge's discharge of the jury): *Hunt (Litigation guardian of) v. Sutton Group Incentive Realty Inc.*, [2002] 60 O.R. (3d) 665 (CA).

(c) employer/employee?

5) To what extent did the insured exercise control over, create or increase the risk of harm?

   (a) did the insured invite others to "an inherent and obvious risk" that he created or controlled?

   (b) was alcohol served as part of a commercial enterprise or public function?

6) Was the party "BYOB", or did the host provide and serve alcohol?

7) Was the insured present?

8) What did the insured know (or ought to have known) re: drinking/drugs/dangerous activities?

9) What did the insured see?

   (a) did the insured observe drinking/drugs/obvious signs of intoxication?

   (b) did he or she observe high risk/dangerous activities?

10) What did the insured do?

   (a) did he commit a positive act (e.g. continue to serve alcohol to a visibly intoxicated person?)

   (b) did he take steps to prevent risk of harm (e.g. try to stop an intoxicated person from driving; call a taxi; offer accommodations; call the police; etc.)?

11) Are the plaintiff's injuries minor or catastrophic?

With the holiday season fast approaching, there will undoubtedly be an increase in cases where the principles of social host liability will be relevant. Regrettably, apart from summary judgment decisions, there remains a paucity of jurisprudence in Ontario conclusively dealing with these issues. It will be most valuable for the courts to provide further guidance by way of a determination, following a complete trial, as to what amounts to the "something more" contemplated by the Supreme Court in *Childs* to warrant the imposition of a duty in a social context.

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