

Insurance for Your Party

Picture yourself hosting a party for some good friends. Some like their booze and have brought it along. You collect all their bottles before they drink and take inventory. Then you count every drink each friend downs. Many have driven themselves over, and are well aware of the dangers of driving while impaired. You collect their keys anyway. You photocopy their car insurance documents, telling them it's nothing personal. Finally, after everyone's had a good, though awkward, time, you whip out the portable breathalyser your insurance agent told you about and offer the guest room to anybody who blows over the limit. Are you having fun yet?

It's unlikely your home insurance agent would suggest any of these inhospitable measures. On the other hand, if you could be sued on your home insurance, for damages caused by your guests, you might just cancel the invitation and ask people over to the nearest bar. The rules are clearer there. You expect the staff to stop serving you if you're too intoxicated to stop yourself. Social hosts of private parties may soon face similar rules.

In its decision in *Childs v. Desormeaux* (May 2004) the Ontario Court of Appeal dismissed a claim against social hosts brought by a young woman (Childs) who an impaired driver (Desormeaux) had seriously injured after drinking at a party thrown by his friends, the social hosts. Childs sued the social hosts because Desormeaux, in contravention of the law, drove without insurance and didn't have the funds to compensate her. In 2002, after a six-day trial, a judge had found that, although the social hosts were negligent, the courts should not impose liability against social hosts generally, for policy reasons.

In argument before the Court of Appeal, lawyers for the parties could find no case in Canada that has yet imposed liability against social hosts. Justice Weiler addressed the circumstances in which courts should expand the common law of torts to provide new remedies. Although the Court declined to impose liability in this case, it disagreed with the trial judge that policy reasons forbid ever imposing liability against social hosts. Going further than they needed to, the judges on appeal stated that, in a different case with different facts, they would consider requiring party hosts to pay damages, just as bar owners do now. If party hosts serve liquor, they should monitor how much each guest drinks, and take steps to prevent impaired guests from driving, or otherwise courting injury to themselves or others. Hosts who fail to control their guests may pay later for the foreseeable consequences of their guests' actions.

The notion that I may have to pay for my friend's folly raises important moral questions. What right do I have to limit another adult's choices in a free society?

The party Mr Desormeaux attended was BYOB. Although it was New Year's Eve, the hosts served only a glass of champagne. Lawyers for Ms Childs couldn't

prove that the hosts served Desormeaux anything. Secondly, it was not proved that the hosts knew Desormeaux would drive home. Although he was a friend who they knew to be a heavy drinker, he also had their permission to stay overnight anytime he felt too intoxicated to drive.

Desormeaux's autonomous decision to impair his driving figured largely in the Court's refusal to impose liability. In these circumstances, the Court was unwilling to say the hosts should have known he would drive, or that they should have counted his drinks. Unlike commercial drinking establishments, the host of a private party may not have insurance, cannot pass on the cost of injury to customers, and is not required by any statute to stop serving when a guest becomes visibly intoxicated. All these differences, the Court held, mean that any liability for social hosts must find a different rationale.

First, proof of a deterrent effect would help justify imposing a duty on hosts to look out for their guests and for strangers their guests may injure. In *Childs, Mothers Against Drunk Driving* helped convince the Court that making hosts pay would deter them from courting these risks. Second, the benefits of increased safety should not be outweighed by unreasonable restrictions on hosts who wish to avoid liability. Will it be enough to offer the guest a safe ride home, without knowing whether the guest will take it? Should a host take car keys from every inebriated guest? Must we call the police if our friends insist they know best? The Court of Appeal believes it can set ground rules of reasonable conduct on a case by case basis. In other words, it will not wait for the legislature to act if the right case cries out for relief.

When will social hosts risk liability? For the Ontario Court of Appeal, it will be when they create a risk of harm. Risk is created when hosts assume some control over their guests, such as supplying or serving alcohol, controlling the time when they must leave, limiting the available transportation home, etc. In that case, "a social host may be implicated in the creation of the risk to users of the road, especially if the social host knows that an intoxicated guest is going to drive a car and does not make reasonable efforts to prevent the guest from driving."

In the 1930s, English common law converted the Christian injunction "love your neighbour" into a legal duty to care for "persons so closely and directly affected by [our] act that [we] ought reasonably to have them in contemplation" (*Donohue v. Stevenson*, cited in *Childs*). Disregard for the welfare of others, even strangers, became negligence when the stranger was near enough to being our neighbour that we ought to have foreseen the risk we caused them.

Seventy years later, neighbours may include strangers on the highway who our friends may hit after drinking from our hand. The highest court in Ontario has served notice that it will have no difficulty redefining negligence in those circumstances.

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