

## An Ontario employer is held liable for an employee's intoxication

By Véronique Morin

In a recent Ontario decision<sup>1</sup>, an employer and the owner of a bar were held jointly and severally liable to pay a sum of \$281,229, which represented their share (25%) of the damages suffered by a drunk driver who was injured in a car accident. The Ontario Superior Court of Justice found that the Plaintiff was contributorily negligent and therefore held to assume for 75% of her damages.

### Facts of the case

On December 16, 1994, Ms. Hunt attended an office party held on the premises of her employer, Sutton Group Incentive Realty Inc. The party started at around 1:00 p.m. and ended at 6:30 p.m.

During the party, the employer's business activities continued without interruption. While participating in the festivities, Ms. Hunt attended to her usual duties as telephone receptionist and was expected to clean up the premises after the party.



Around 4:00 p.m., a representative of the employer, noting that Ms. Hunt was inebriated, suggested that she phone her husband to come and take her home. Thereafter, the representative kept an eye on her until she left the office.

Around 6:30 p.m., Ms. Hunt left her employer's premises with some co-workers and went on to another bar, less than a kilometer away.

According to the evidence accepted by the Court, Ms. Hunt apparently stayed at the bar, where she had two drinks, until 8:00 PM. The weather was stormy and the roads were slippery that evening.

Around 9:45 p.m., Ms. Hunt was involved in a car accident 12.2 kilometers from the bar. She suffered multiple fractures and severe brain injury, some of which was permanent.

Following the accident, Ms. Hunt sued her employer and the owner of the bar. In her pleadings, she claimed that her employer had a duty of care towards its employees, notably if they had consumed alcohol or taken drugs on its premises and especially if their ability to drive safely was impaired.

## Arguments accepted by the Court

Ms. Hunt's claim was based exclusively on vicarious liability principles, and more specifically on an employer's obligations towards its employees. The Court indicated that the situation would have been different in a purely social context, where an employee was not required to work during the festivities. Paragraph 43 of the judgement reads as follows:

**"It is to be made perfectly clear from the onset that the plaintiff's claim against Sutton is based entirely on the law of Master and Servant, and more specifically, the duty of care an employer owes an employee. It is also a claim that at all relevant times, while the plaintiff was attending the party on December 16, 1994, she was at that particular moment engaged as an employee. She was answering the phone, was expected to clean up after the party, and was being paid throughout. Therefore, this is not a social host-type of case."**

The Court held that as an employer, Sutton Group was not only required to ensure that the workplace was safe, but also that its employee did not consume so much alcohol on the premises as to render her incapable of driving home safely after she had finished work.

The Court dismissed the employer's claims that it could not have taken away her car keys as it would have been tantamount to theft, or that it could not have forcibly put her in a taxicab without risking being charged of kidnapping.

The Court also found that the employer should have foreseen that by maintaining an open and unsupervised bar, it would be incapable of monitoring the employee's consumption of alcohol, which could jeopardize her safety.

The employer should not have accepted Ms. Hunt's refusal to take a taxi, as the only expert witness heard by the Court testified that an intoxicated person does not have the capacity to accept or to refuse any such suggestion because his or her judgement is impaired by alcohol.

Lastly, the Court held that the employer could have reasonably foreseen that its employee would stop for a drink on the way home. An employer's duty of care cannot be delegated to a third party and it is the employer's responsibility to avail itself of the many options available under the circumstances (e.g., calling a taxi for the employee, requiring the employee to leave her car keys at the office, calling the employee's spouse to come and get her at work, asking another employee who had abstained from drinking to drive his colleague home or even paying a one night stay at a hotel for the inebriated employee).



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## Conclusions

According to this judgement, an employer is responsible for taking all possible measures to prevent an employee from driving after consuming alcohol during an office function held on the employer's premises.

The Court did not make any explicit pronouncements regarding the nature and scope of an employer's obligations towards its employees when an office function is held and paid for by the employer on premises specifically reserved for the event. Factors such as an open bar left without adequate supervision could be taken into account in determining the employer's liability, if it could be shown that one of its representatives was aware of an employee's intoxication.

Following this Ontario decision, an employer's duty of care may extend to situations where alcohol is consumed by employees in the workplace, even if it occurs in the context of a party.

In Québec, a breach of the employer's duty of care in circumstances similar to those of the *Hunt* case would not result in the employer being ordered to pay damages, because of the prohibition contained in the *Automobile Insurance Act* against civil proceedings for physical and moral damages resulting from an automobile accident.

Similarly, an employer would not be required to directly compensate an employee if the damages suffered by the employee due to alcohol consumption in the workplace constitute an "industrial accident" for the purposes of the *Act respecting industrial accidents and occupational diseases*.

However, the principles set forth in the *Hunt* case could apply in Québec. If the prejudice suffered by an employee is caused in whole or in part by the employee's consumption of alcohol in the workplace, but the damage is not covered in either the *Automobile Insurance Act* or the *Act respecting industrial accidents and occupational diseases*, the employer's duty of care may be assessed by a Court of law (e.g., if an employee suffers a fall as a result of his intoxication). The Court may seek to draw upon the principles laid down in the *Hunt* decision to define the scope of an employer's obligations.

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