

Alcohol-Related Civil Liability: The Current State of Ontario Law

SMARTRISK Learning Series

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INTRODUCTION

Section 1: An Overview

- (a) The nature of the problem.
- (b) The organization of the seminar.
 - (i) Vulnerability to civil suit.
 - (ii) Rights, powers and obligations of licensees, permittees, occupiers, hosts, and sponsors.
 - (iii) Strategies for minimizing the risks of civil suits and prosecution.

Section 2: Myths About Alcohol-Related Liability

- (a) Liability in Canada is more limited than in the United States.
- (b) The impaired driving problem has been largely solved.
- (c) The risks of harm and thus liability are largely limited to “hard-core” drinkers.
- (d) The risks of harm and thus liability are largely confined to drinking and driving.
- (e) There is a need for a made-in-Canada approach to address the full range of potential liability.

PART I: VULNERABILITY TO CIVIL SUIT

Section 1: The Civil Liability of Alcohol Providers

- (a) Who is an alcohol provider?
- (b) The two bases of liability.
 - (i) Statutory liability under the *Liquor Licence Act*, R.S.O. 1990, c. L.19, s. 39.
 - *Trice v. Robinson* (1888), 16 O.R. 433 (Ch. Div.).
 - (ii) Common law liability.
- (c) The Provider Liability Cases:
 - *Jordan House Ltd. v. Menow and Honsburger* (1973), 38 D.L.R. (3d) 105 (S.C.C.).
 - *Canada Trust Co. v. Porter*, [1980] O.J. No. 252 (C.A.).
 - *Meldrum v. Fleming* (1990), unreported.
 - *Stewart v. Pettie* (1995), 23 C.C.L.T. (2d) 89 (S.C.C.).
 - *Holton v. MacKinnon*, [2005] B.C.J. No. 57 (S.C.).
 - *McIntyre v. Grigg* (2006), 83 O.R. (3d) 161 (C.A.).
- (d) Summary: Serving past the point of intoxication.

Section 2: The Civil Liability of Occupiers

- (a) Introduction.
 - (i) Who is an occupier?
 - (ii) Expanding liability under the *Ontario Occupiers' Liability Act*, R.S.O. 1990, c. O.2, s. 3.
- (b) Liability for the condition of the premises.
 - *Niblock v. Pacific National Exhibition* (1981), 30 B.C.L.R. 20 (S.C.).
 - *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (C.A.).
 - *Whitlow v. 572008 Ontario Ltd.*, [1995] O.J. No. 77 (Gen. Div.).
- (c) Liability for the conduct of those permitted to enter.
 - *Lehnert v. Nelson*, [1947] 4 D.L.R. 473 (B.C.S.C.).
 - *Mellanby v. Chapple*, [1995] O.J. No. 1299 (Gen. Div.).
 - *Murphy v. Little Memphis Cabaret Ltd.* (1998), 167 D.L.R. (4th) 190 (Ont. C.A.).

- (d) Liability for activities permitted on the premises.
- *Jacobson v. Kinsmen Club of Nanaimo* (1976), 71 D.L.R. (3d) 227 (B.C.S.C.).
 - *Meunier v. Lapman* (1989), unreported.
- (e) Summary: Reasonable foreseeability of injury posed by conditions, entrants or activities.

Section 3: Additional Bases of Liability

- (a) Liability of employers.
- *Barrett v. Ministry of Defence*, [1995] 3 All E.R. 87 (C.A.).
 - *Jacobsen v. Nike Canada Ltd.* (1996), 133 D.L.R. (4th) 377 (B.C.S.C.).
 - *John v. Flynn*, (2001), 54 O.R. (3d) 774 (C.A.).
 - *Hunt v. Sutton Realty* (2002), 215 D.L.R. (4th) 193 (Ont. C.A.).
- (b) Liability of social hosts.
- *Baumeister v. Drake* (1986), 5 B.C.L.R. (2d) 382 (S.C.).
 - *Dryden (Litigation Guardian of) v. Campbell Estate* (2001), 11 M.V.R. (4th) 247 (Ont. S.C.J.).
 - *Childs v. Desormeaux* (2006), 39 C.C.L.T. (3d) 163 (S.C.C.).

PART II: STRATEGIES FOR MINIMIZING THE RISKS

Section 1: Critical Review of Current Problems, Policies and Practices

Section 2: A Checklist for Alcohol-Related Events

PLANNING

- ✓ Prepare written policies governing alcohol at the workplace and all employment-related events, broadly distribute them, train the staff, and explain to managers that they are accountable for ensuring that the policies are followed.
- ✓ Do not sponsor, organize, supervise, or allow on your premises or property any inherently dangerous activities, such as drinking contests, under-aged drinking, and all-you-can drink stags or similar events.
- ✓ Avoid combining alcohol and potentially dangerous activities. If this is not possible, alcohol should only be available after the physical events are completed. Event staff should screen potential participants for signs of intoxication.
- ✓ Consider hiring additional trained servers and staff to help run large events.
- ✓ Investigate any prior alcohol problems with an event or group, and take steps to avoid a recurrence. Licensees and permittees who ignore past problems or known risks severely compromise their legal position in any subsequent civil suit or prosecution.
- ✓ Develop a comprehensive set of alternative transportation policies which are widely advertised and prominently displayed.
- ✓ Develop a system for documenting all alcohol incidents and problems.

MANAGING

- ✓ Ensure that all licensed premises and events are managed by individuals who have experience in the food and beverage industry.
- ✓ Inspect the premises and the surrounding area to ensure that they comply with all relevant building, fire and safety codes, and are reasonably safe for those who will be drinking. Even minor changes, such as improving the lighting in stairways and adding handrails, can significantly reduce risks.
- ✓ Ensure that security arrangements are adequate given the size of the premises or event, its location, the likely participants, and any previous problems.
- ✓ Adopt a policy of greeting entrants at the door. This allows staff to turn away intoxicated, rowdy or otherwise troublesome patrons. It also facilitates compliance with room capacity limits.
- ✓ If the event is one that young people will be attending, implement identification procedures, such as requiring young patrons to produce a driver's licence, age of majority card or other similar identification.
- ✓ Ensure that servers have some experience and training. At a minimum, they should be able to identify the signs of intoxication, understand their obligations under the liquor legislation, and realize that they may be held civilly liable.
- ✓ Require the staff to abstain from drinking before and while they are working.

SERVING

- ✓ Do not serve, provide or make alcohol available to any person who is or may be under the legal drinking age.
- ✓ Make food and non-alcoholic beverages available. People who have eaten absorb alcohol more slowly than those who have not, thereby lowering their peak level of intoxication.
- ✓ If you are providing alcohol, serve drinks rather than having an open, self-serve bar. Such bars encourage some people to drink excessively.
- ✓ Do not encourage intoxication by serving extra-strong drinks, double shots or high alcohol-content beer. Do not make or allow drinking to be the focus of an event.
- ✓ If alcohol is being sold at the event, do not set the price so low as to encourage heavy consumption. Limit the number of drinks that can be purchased at any one time.
- ✓ Stop serving alcohol long before the event is to end. Do not announce "last call." It is simply not smart to serve people alcohol just before they drive or otherwise try to get home.

SUPERVISING

- ✓ All staff should be trained to avoid and defuse potential confrontations. They should be instructed to use force as a last resort and then only when it is absolutely necessary to defend themselves, patrons or other staff.
- ✓ Do not provide or permit alcohol to be given to a person who is or may be intoxicated. Such conduct only increases the risks of a mishap and the chances of being sued.
- ✓ The servers should be given explicit authority to refuse service to anyone who they believe is underage, intoxicated or rowdy. Managers should support the servers' decisions, regardless of the person involved.
- ✓ Staff should be trained to focus on the patrons' behaviour and appearance. The staff should be prepared to have a friendly word with anyone who is becoming intoxicated.
- ✓ If persuasion fails, the staff may have to verbally insist that an intoxicated patron not attempt to drive home, even if that means threatening to call or calling the police.
- ✓ Arrange for patrons who may be intoxicated to be taken home safely.
- ✓ Document the efforts made to discourage an intoxicated patron from driving.

PART III: CONCLUSION

Section 1: The New Environment

- (a) Expansion of provider liability.
- (b) Expansion of occupiers' liability.
- (c) Recognition of new bases of liability and new defendants.

Section 2: Partial Solutions

- (a) Waivers, exemption clauses, and save harmless clauses.
- (b) B.Y.O.B. strategies.
- (c) Sponsoring, but not hosting events.
- (d) Alternate transportation policies.
- (e) Training, without management follow-up.

Section 3: The Need for a Comprehensive Strategy

- (a) Moving beyond serious lip service.
- (b) Awareness and education campaigns, without policy development.
- (c) Policy development, without enforcement.