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LAWYER'S WEEKLY MAGAZINE: COMMERCIAL HOST'S DUTY OF CARE CLARIFIED BY BCCA

Richards Buell Sutton Insurance Law Newsletter

By: Alex Eged

The British Columbia Court of Appeal has again addressed the liability of commercial hosts who serve alcohol when someone is injured by an intoxicated patron. In *Donaldson v. John Doe*, 2009 BCCA 38, the issue arose in the context of an Oktoberfest event at which souvenir glass beer mugs were distributed to patrons. One of the patrons was permanently injured when struck in the eye by a beer mug held by another patron after the event had ended. The Court of Appeal undertook a detailed analysis of a commercial host's duty of care and found that a duty was owed in the circumstances. In doing so the Court clarified the requisite duty analysis and additionally prescribed a standard of care analysis for non-drinking-and-driving fact patterns.

Factual Background

An event promoter staged an Oktoberfest celebration at a popular Vancouver club as he had done for many years. As part of the event patrons were given complimentary glass beer mugs which were said to be standard marketing tools in the liquor industry. While leaving the event at approximately 2 a.m., and after having walked a short distance from the club amidst a crowd of fellow revelers, the Plaintiff, Donaldson, was suddenly struck in the face by a mug when a fellow patron, the Defendant, Briggs, who was holding the mug, raised his left arm. It was unknown whether the blow was intentional or accidental. Following the blow a brief struggle ensued and police attended noting Briggs was intoxicated. Police however did not note to what degree Briggs was intoxicated. Donaldson sustained a permanent eye injury and scarring. Briggs did not attend trial. On judgment, the case against the promoter and club was dismissed on the basis that, even if the promoter and club knew or ought to have known Briggs had been over-served, a duty of care would not arise because allowing Oktoberfest patrons to leave with glass beer mugs did not create a foreseeable risk of harm to persons outside the club.

The Ruling

The Court of Appeal held that the parties and trial judge conflated the concept of foreseeability in a duty of



care analysis and foreseeability in a standard of care analysis. The Court held that the two legal concepts are different and must be addressed separately. To wit: in determining whether a commercial host owes a duty of care to an injured party foreseeability is a factor with respect to whether the relationship between them warrants imposing such a duty. The question is whether the injured party falls within a class of persons who could reasonably be expected to be harmed by a host's conduct. If a duty of care is found to exist, then foreseeability with respect to the specific risk of harm is considered in determining whether the host had breached the standard of care.

In the context of the subject case the Court answered the question as follows:

"the duty of care question is not whether a commercial host owes a duty to third-parties to protect them from injuries caused by intoxicated patrons who leave the host's premises with souvenir beer mugs but, rather, whether a commercial host owes a duty to third-parties to protect them from alcohol-related injuries caused by intoxicated patrons. Based on what the Supreme Court of Canada has said about the duties of commercial hosts, the answer to that question is "yes"."

The Court of Appeal then moved on to address the standard of care. Unfortunately for the plaintiff, admissible evidence as to the degree of intoxication of Briggs was not tendered against the promoter and club, and the appeal was dismissed on this basis. However, the Court, adopting standard of care principles previously put forth by the Ontario Court of Appeal, prescribed the following test in the context of non-drinking-and-driving fact patterns:

"Commercial vendors of alcohol have an obligation to monitor a patron's consumption of alcohol and should have protocols in place to ensure that all reasonable precautions are taken to prevent such patrons from becoming intoxicated to the point where they pose a foreseeable risk to third-parties. Moreover, a commercial host does not escape liability simply by not knowing that the patron became inebriated engaging in foreseeably dangerous conduct; the commercial host is liable if it or its employees knew or ought reasonably to have known in the circumstances that the patron was in such condition."

[Emphasis in original]

Considerations for Insurers and Commercial Hosts



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The trial decision in *Donaldson* may have unnecessarily placed underwriters at ease with respect to their risk exposure on events such as Oktoberfest. The Court of Appeal decision should waylay any such relaxation. Underwriters must remain wary of risks associated with events such as Oktoberfest and particularly with event props such as the glass mugs provided to patrons in *Donaldson*. It is notable that since the transpiring of events in *Donaldson* Oktoberfest has proceeded with giving patrons plastic, instead of glass mugs. Commercial hosts and underwriters should also take heed of the Court of Appeal's dictates on the standard of care applicable in non-drinking-and-driving fact patterns. This will entail ensuring that proper protocols are in place to prevent patrons from becoming intoxicated, leaving premises when intoxicated and leaving premises with potentially harmful promotional materials. Commercial hosts in particular may wish to notify patrons that promotional materials are subject to repossession in the event staff deems the patron intoxicated or potentially quarrelsome.

