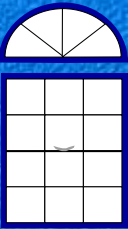




***WILL SOCIAL HOST  
LIABILITY SURVIVE THE  
CHILDS CASE?***

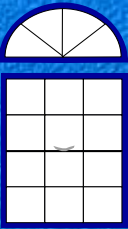
by John A. Olah  
Beard Winter LLP

November 19, 2005



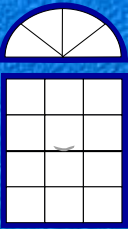
# ***The Childs Case: The Facts***

- *On January 1. 1999 at about 1:35 a.m. Zoe Childs, **17 years old**, was rendered a **paraplegic** as a result of a motor vehicle accident*
- *Her vehicle was **struck head on by another car**, driven by Desmond Desormeaux, when the Desormeaux vehicle crossed the centre line*
- ***Childs' boyfriend was killed** in the accident and the passengers in the two cars were **seriously injured***



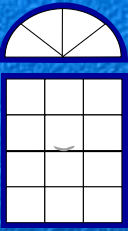
# ***The Childs Case: The Facts***

- *Desormeaux was **extremely intoxicated** at the time of the accident*
- ***Expert evidence** showed that Desormeaux's blood alcohol level at the time of the accident was **235 milligrams per 100 milliliters of blood***
- *Desormeaux's blood alcohol level was almost **three times the legal limit***
- *His companions' blood alcohol level was **similarly elevated***



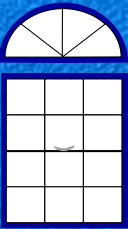
# ***The Childs Case: The Facts***

- *Desormeaux was coming from a New Year's party **hosted by Zimmerman and Courier***
- *This was a pot luck party and **a BYOB party***
- *The social host, Courier, and the driver Desormeaux, had been long standing friends and had **known each other for close to 20 years***



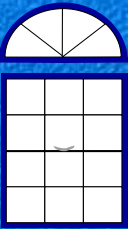
# ***The Childs Case: The Facts***

- ***In fact Courier and Desormeaux had lived together for short period of time a number of years prior to the accident***
- ***Desormeaux had visited Courier's and Zimmerman's residence over the years on a number of occasions***



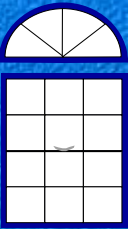
# ***The Childs Case: The Facts***

- ***Desormeaux was a long standing alcoholic***
- ***He had been convicted of impaired driving on two prior occasions***
- ***He had been convicted of driving while his licence was suspended***



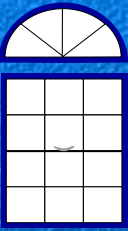
# ***The Childs Case: The Facts***

- *When he drank, Desormeaux would become **so intoxicated** that his room mates had to put **plastic on the furniture** to prevent him from wetting the furniture*
- *On occasion Desormeaux would sit down and **consume 24 beers***



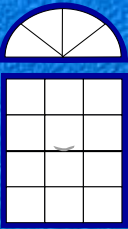
# ***The Childs Case: The Facts***

- *On the night of the accident, Desormeaux arrived at the party at about 10:00 p.m. with some food, **a case of 24 beer, a bottle of Amoretto and a bottle of wine***
- *His **two friends** who came with him, were **visibly intoxicated***



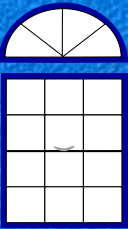
# ***The Childs Case: The Facts***

- *At about midnight **the social hosts served some champagne**, about 1 ounce to each guest*
- *Shortly after midnight, one of Desormeaux 's companions, **Sauve**, got into an altercation with another guest*
- *Desormeaux and his friends left the party at about 1:00 a.m.*



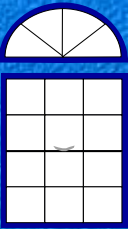
# ***The Childs Case: The Facts***

- *As noted earlier, Desormeaux 's blood alcohol level at the time of the accident was **235 milligrams per 100 milliliters of blood***
- *The **expert evidence** indicated that Desormeaux had **12 beers** between his arrival and the time he left the party around 1:00 a.m.*
- *His blood alcohol level **at midnight, when the champagne was served** by the social hosts, would have been **235 mg. or somewhat higher***



## ***The Childs Case: The Facts***

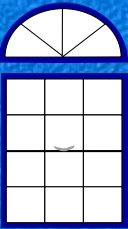
- ***The expert evidence further showed that given Desormeaux 's blood alcohol level he would have been visibly intoxicated***
- ***As Desormeaux was leaving, Courier spoke to him on the driveway***
- ***Courier never took any steps to prevent Desormeaux from getting in the car and driving***



# ***The Trial Judge's Reasons***

➤ *Justice Chadwick held as follows:*

*"I am satisfied on all of the acceptable evidence that **Dwight Courier was well aware of Desmond Desormeaux's past drinking problems including his previous convictions.** When Desmond Desormeaux arrived at the party along with Maureen O'Brien and Ray Sauve, who were obviously intoxicated, it should have put Dwight Courier on red alert that Desmond Desormeaux had been with them and probably had consumed as much alcohol, if not more than the other two.*

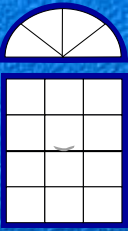


# ***The Trial Judge's Reasons***

*" I am also satisfied on the evidence that Dwight Courier **deliberately did not pay any attention to how much alcohol was brought in by the Desormeaux group or how much was consumed while on the premise.***

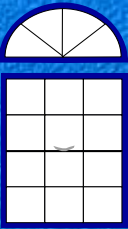
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*I am satisfied on all of the evidence **Desmond Desormeaux would be showing obvious signs of impairment when he left the party.**" (at para.66-67, 73)*



# *The Trial Judge's Reasons*

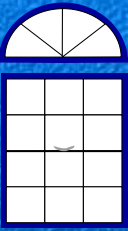
- *Justice Chadwick then applied the Anns test and concluded on the first branch of the test:*
  - *The case **did not fall into one of the recognized categories** in which proximity has been recognized*
  - *It was **foreseeable** that Desormeaux was not capable of driving and that **he was putting his passengers and other users of the highway "at grave risk"** [para.98]*



# ***The Trial Judge's Reasons***

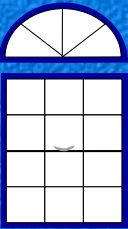
- ***In view of Courrier:***
  - *Being a long time friend of Desormeaux,*
  - *had lived with Desormeaux a short period of time and*
  - *was aware of his problems*

***The test of proximity was met***



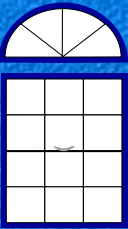
# *The Trial Judge's Reasons*

- *The Trial Judge then moved to the **second branch of the Anns test** and took a number of factors into account: including:*
  - *If Desormeaux was uninsured, **the social hosts would be liable even though their negligence was small***
  - *It would bring into play their **homeowner's policy***



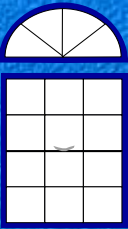
# *The Trial Judge's Reasons*

- *It would impose an **inordinate burden on the social host***
- *The imposition of such a duty **would not serve much of a deterrent***
- *Social hosts would be **automatically added to law suits** where there was an accident following a party where alcohol was served,*
- *Social hosts would have to **obtain insurance coverage** for such law suits*



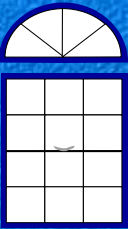
# ***The Trial Judge's Reasons***

- *Concluded that there were **good policy reasons not to expand tort law** in this fashion*
- *Legislature should determine social host liability*



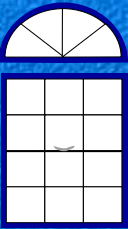
# *The Court of Appeal*

- *Weiler J. also applied the Anns test and pointed out that **under the first branch of the test the court has to look at 2 things:***
  - *Is there a sufficiently close relationship between the parties such that **in the reasonable contemplation of the parties the defendant's carelessness might cause damage to the plaintiff?***



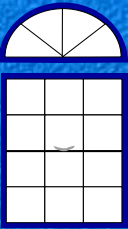
# *The Court of Appeal*

- *Are there any considerations that ought to **negative or limit***
  - *the **scope of the duty**,*
  - ***class of persons** to whom the duty is owed,*
  - ***the damages** to which the breach may give rise*



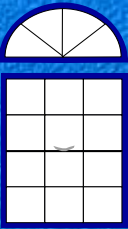
# *The Court of Appeal*

- *Justice Weiler pointed out that as **part of the proximity analysis** one has to consider under the first branch of the Anns test whether it is **"just and fair to impose a duty of care on a defendant"***
- *The factors are case specific*



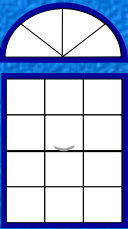
# *The Court of Appeal*

- *These factors include*
  - *the expectation of the parties,*
  - *representations,*
  - *reliance, and*
  - *the nature of the property or interests involved [para.20]*



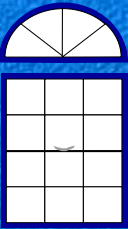
# ***The Court of Appeal***

- ***In no previous case had social hosts been held liable***
- ***Social host liability is not simply an extension of commercial host liability***
  - ***Due to the profit factor***
  - ***Contractual relationship between the parties***
  - ***Commercial hosts are regulated by statute***
  - ***Social hosts do not assume control over the supply and service of alcohol***
  - ***Commercial hosts carry liability insurance***



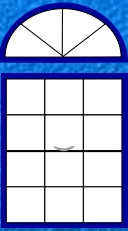
# ***The Court of Appeal***

- *The **trial judge erred** in holding that the social host owed a duty to the users of the road*
- *Knowledge of Desormeaux's drinking habits and convictions for impaired driving **could not be the basis of imposing an obligation**, it was merely one factor to consider*



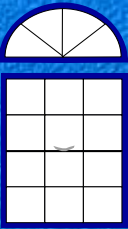
# *The Court of Appeal*

- *Weiler J. then applied the “just and fair to impose liability” test*
  - *Simply because Desormeaux’s companions were intoxicated did not require Courier to monitor Desormeaux’s consumption*
  - *On the evidence **unclear that the social hosts knew that Desormeaux was going to drive home afterwards***
  - *Trial Judge did not find that social hosts must have observed the signs of impairment*



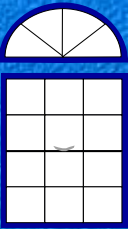
# *The Court of Appeal*

- *Trial Judge failed to appreciate that this was a BYOB party*
- *In short the social hosts were **not active participants** in the creation of the danger*
- *In the circumstances it was **not "just or fair"** to impose a duty of care [p.20]*



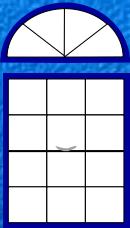
# *The Court of Appeal*

- *As a result the Court **did not have to deal with the issue** of whether policy reasons tort law should be expanded to include social host liability*
- *However Justice Weiler **addressed a number of factors** that would be relevant to the issue*



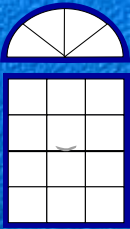
# ***Will The Supreme Court of Canada Cross the Rubicon?***

- *Trying to foretell what the Supreme Court of Canada is likely to do is a like gazing into a crystal ball*
- *It is telling that four judges heard the case and **all four have ruled against social host liability***
- *On the other hand the Supreme Court of Canada did grant leave which tells us **they want to write on the subject matter***



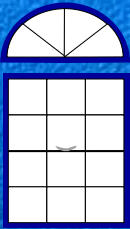
# ***Will The Supreme Court of Canada Cross the Rubicon?***

- ***There is a sufficient evidentiary platform to find foreseeability and proximity in view of:***
  - ***Service of alcohol, small amount, at midnight when Desormeaux had a blood alcohol level of 235 mg. or higher***
  - ***There was unique knowledge by the social host***
  - ***At the time Desormeaux left the party the trial judge found that he “would be showing obvious signs of impairment”***
  - ***The social host, Courier was sufficiently concerned at that time that he asked Desormeaux if he was ok***



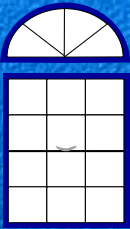
# ***Will The Supreme Court of Canada Cross the Rubicon?***

- *The real underlying policy issue is whether social host liability should be found in view of **the profound impact** such a ruling would have on the average Canadian*
  - ***Limited insurance policies or no coverage** thereby exposing the assets of the social host*
  - *Concern that **insurers will exclude social host liability** in the future*
  - *The **onerous and potentially imprecise duty** it would impose on social host*



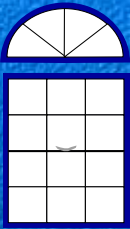
# ***Will The Supreme Court of Canada Cross the Rubicon?***

- *The **wide range of activities** the principle would embrace*
- *Whether it would have any real preventative effect*
- *That **this kind of change** should be left to the legislature*



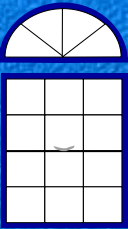
# ***Will The Supreme Court of Canada Cross the Rubicon?***

- *On the other hand, our approach to alcohol and its service in social settings **has changed dramatically in the last 25 years***
- *As Chief Justice Laskin observed in **Menow v. Jordan House Ltd.:***



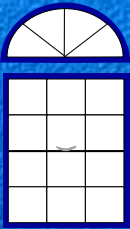
# ***Will The Supreme Court of Canada Cross the Rubicon?***

*"...since liability is predicated on fault, the guiding principle assumes a nexus or relationship between the injured person and the injuring person which makes it reasonable to conclude that **the latter owes a duty to the former not to expose him to an unreasonable risk of harm.** In considering whether the risk of injury ... is one that he should not reasonably have to run, it is relevant to relate **the probability and gravity of injury to the burden that would be imposed on the prospective defendant in taking avoiding measures.**"*



# *Will The Supreme Court of Canada Cross the Rubicon?*

- *Two golden threads run through these cases:*
  - *First the duty not to place another person in position where it is **foreseeable that the individual could suffer injury due to his or her inability to handle the situation due to intoxication or some other incapacity***
  - *Finally, the **control that the defendant exercises whether it be over the premises or the relationship***



# *Will The Supreme Court of Canada Cross the Rubicon?*

- *It will be interesting to see how the Supreme Court of Canada will **balance this duty** not to put another in a position of danger against the **intrusion it would cause** in the lives of Canadians*