TAVERN LIABILITY DEFENCES FROM A TO Z

I. INTRODUCTION

Defending bars and taverns can be challenging at times—defence counsel has to be part toxicologist and part academic. This paper will focus on the latter and review the legislation as well as the case law surrounding tavern liability. Tavern liability cases involve claims against alcohol serving establishments who are alleged to have over-served alcohol to their patrons. As a result of the over-serving alcohol, the tavern is alleged to have caused or contributed to an event in which the plaintiff has been injured. This paper will focus on motor vehicle accident claims. However, there are a broad range of tavern claims that may be advanced, ranging from altercations at the tavern, falls down stairs or even intoxicated dancers falling on other dancers and injuring them on the dance floor. The paper will set out the common law defences available to a tavern. It will also provide an overview regarding of the defences or protections available to a tavern defendant under the *Insurance Act*. Finally, the paper will summarize the available tavern liability case law and discuss the apportionment of liability as between the tavern and other parties involved in the law suit.

Canadian courts have long held that commercial hosts owe a duty of care to patrons who face a reasonably foreseeable risk of injury as a result of alcohol intoxication.[1] The seminal case in this area is *Jordan House Hotel Ltd. v. Menow and Honsberger*[2] where Supreme Court of Canada held that a commercial host has a duty, not only to not over-serve patrons, but also to arrange for the patron's safe transport home if the patron becomes intoxicated at its premises.

However, beyond proving a duty of care, the plaintiff in an action against a tavern must also prove that the tavern breached the relevant standard of care. The plaintiff must also show that the tavern's over-service caused the accident to occur. As will be shown below, it is possible for a tavern to escape liability if the facts demonstrate the absence of negligence or if the evidence indicates that there is no causal relationship between the service of alcohol and the plaintiff's injury.

II. THE COMMON LAW DEFENCES AVAILABLE TO TAVERNS, RESTAURANTS AND BARS

There are a number of possible defences available to a tavern. These include:

1. The plaintiff did not show any visible intoxication;
2. The plaintiff was left in the care of a responsible person;
3. The plaintiff was not driving home when they *left the tavern*; and
4. Over-service of alcohol did not cause the accident.

(a) The Patron Showed No Noticeable Intoxication

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[1] L. Folick, M. Libby & P. Dawson, Liquor and Host Liability Law in Canada (Canada Law Book, 2010)
[2] [1974] S.C.R. 239 (S.C.C.)

One a possible defence is that the patron in question, whether the plaintiff or the co-defendant, did not show any visible signs of intoxication. For example, in *Skinner v. Baker Estate*[3] it was held that a tavern's duty of care at common law did not arise where there was no evidence of obvious or apparent signs of intoxication. Dunnet J. of the Ontario Court of Justice (General Division) held:[4]

> In short, I can find no evidence of visible intoxication which Dixon either saw or should have seen. I conclude that Baker may well have been one of those remarkable people with a high blood-alcohol reading who would not show apparent obvious signs of impairment and intoxication. Moreover, the positive duty owed by a tavern owner to protect patrons and others from the dangers of intoxication does not arise in this case where there was no evidence of obvious or apparent signs of intoxication. To hold otherwise would be placing too high a standard of care on the Legion.

Similarly, in *Temple v. T & C Motor Hotel Ltd.*[5] Prowse J. of the Alberta Court of Queen's Bench dismissed the plaintiff's action against the tavern, noting that although the plaintiff and defendant were impaired, they were not exhibiting symptoms of intoxication. In the *Temple* case, the plaintiff and defendant had consumed alcohol inside the tavern and then were involved in an altercation outside the tavern during which the plaintiff was injured.

In *Thorne v. Ontario (Minister of Finance)*[6] Mossip J. of the Ontario Superior Court of Justice concluded that the plaintiff did not have a viable claim against the tavern as the driver who caused the accident, who was a patron at the tavern, did not show signs of intoxication prior to leaving the establishment. In that case, the plaintiff was a passenger in a vehicle operated by the patron. Mossip J. held that if there were no signs of intoxication, the tavern would not be obliged to keep the patron from leaving.

In *Plett v. Blackrabbit*[7] Park J. of the Alberta Court of Queen's Bench, on a motion for summary judgment, dismissed the action against the commercial vendor as there was no evidence that the patron was intoxicated when he left the establishment. In that case, the patron had purchased the drinks from the commercial vendor off-sales. As a result, the court concluded that the claim against the commercial vendor had no reasonable chance of success.

Despite the above-noted case law, a commercial host will be liable if the commercial host should have known the patron was intoxicated because of the number of drinks consumed. This is the case even if patron shows no visible signs of intoxication. For example, in *Stewart v. Pettie,*[8] the court held that a tavern-owner could not escape liability simply because a patron showed no visible signs of impairment if the tavern should have known that the patron was intoxicated because of the amount of alcohol consumed. Major J. of the Supreme Court of Canada stated:[9]

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[3] (1991), 8 C.C.L.I. (2d) 154 (Ont. Gen. Div.)
[4] *Ibid* at pg. 165
[5] [1998] A.J. No. 107 (A.B.Q.B.)
[6] [2004] O.J. No. 2795 (Ont. S.C.)
[7] [2001] A.J. No. 1268 (A.B.Q.B.)
[8] [1995] 1 S.C.R. 131 (S.C.C.)
[9] *Ibid* at pg. p. 151

> I agree with the Court of Appeal that Mayfield cannot escape liability simply because Stuart Pettie was apparently not exhibiting any visible signs of intoxication. The waitress kept a running tab, and knew that Pettie had consumed 10 to 14 ounces of alcohol over a five-hour period. On the basis of this knowledge alone, she either knew or should have known that Pettie was becoming intoxicated, and this is so whether or not he was exhibiting visible symptoms.

Major J. also concluded that tavern-owners cannot escape liability if they fail to have a system for monitoring the number of alcoholic drinks consumed by patrons. Major J. stated[10]:

> [L]iability cannot be avoided where the establishment has intentionally structured the environment in such a way as to make it impossible to know whether intervention is necessary… In such circumstances, it would not be open to the establishment to claim that they could not foresee the risk created when the inability to foresee the risk was the direct result of the way the serving environment was structured.

Similarly, the Ontario Court of Appeal in *McIntyre et al. v. Grigg et al.*[11] held that commercial hosts have an obligation to monitor the number of alcoholic drinks consumed by patrons:[12]

> 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 who subsequently drive from becoming intoxicated to the point where they cannot safely operate a motor vehicle. Moreover, a commercial host does not escape liability simply by not knowing that the patron became inebriated before driving; 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 a condition.

(b) The Responsible Person Defence

Another defence that a tavern has available is the defence that the patron, whether it be the defendant or the plaintiff, was placed in the care of a responsible person when they left the establishment. This defence is implied in the leading case of *Jordan House Ltd. v. Menow*. In that case, Laskin J. writing for the Supreme Court of Canada remarked[13]:

> [T]he proper conclusion is that the hotel came under a duty to Menow to see that he got home safely by taking him under its charge or putting him under the charge of a responsible person, or to see that he was not turned out alone until he was in a reasonably fit condition to look after himself.

Based on this principle, the court has held that the tavern will not be liable if the patron left the establishment with someone who was sober who knew how much the driver had to drink. For

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[10] *Ibid* a pg. 152
[11] [2006] 83 O.R. (3d) 161(Ont.C.A.)
[12] *Ibid* at para. 23
[13] *Supra* note 2 at pg. 249

example, in *Stewart v. Pettie* the court reasoned that the tavern was not liable as the plaintiff left the restaurant with two sober people:[14]

> Had Pettie been alone and intoxicated, Mayfield could have discharged its duty as established in *Jordan House Ltd. v. Menow* by calling Pettie's wife or sister to take charge of him. How, then, can Mayfield be liable when Pettie was already in their charge, and they knew how much he had had to drink? While it is technically true that Stuart Pettie was not "put into" the care of his sober wife and sister, this is surely a matter of semantics. He was already in their care, and they knew how much he had to drink. It is not reasonable to suggest in these circumstances that Mayfield had to do more.

Similarly, in *Reiter (Litigation Guardian of) v. Olynyk Estate*[15] Master Sharp of the Manitoba Court of Queen's Bench held that the forseeability of harm was not made out as four of the individuals with the defendant were sober when he left the tavern.

Also, in *Feaver Estate v. Briggs*[16] Russell J. of the New Brunswick Court of Queen's Bench dismissed the a Third Party Claim against a tavern on a motion for summary judgment partly on the basis that the Plaintiff had left the tavern with three other sober people. In *Feaver*, the Plaintiff had left the establishment after consuming alcohol and was struck by a car shortly when he stepped off the sidewalk. Russell J. stated:[17]

> Even if he was visibly intoxicated the fact is, however, the Fairleys knew there was a sidewalk leading from their place to Minglers. More importantly (and unlike the case of Mr. Menow, Mr. Feaver was placed in the hands of three other people, including his wife, who were responsible for him. Mrs. Fairley knew the group were going to be driven home from the nearby restaurant.

However, were the patron leaves the establishment with other persons who are also visibly intoxicated, the tavern will not escape liability. This was the case in *Neufeld v. Foster* [18] where the court noted that all of the patrons in the group were intoxicated and as a result the tavern could not escape liability by relying on the responsible person defence. The court distinguished the facts of the case from *Stewart* mentioned above. The court stated:[19]

> [N]one of them was fit to drive or to make sensible decisions. This is a distinguishing feature from *Stewart v. Pettie* where two of the four persons in the party were sober and therefore presumptively capable of rational decision-making. I also take into consideration that the Neufelds and their friends were the final patrons to leave the pub at closing time.

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[14] *Supra* note 8 at pg. 151-152
[15] [1998] M.J. No. 221 (M.B.Q.B.)
[16] [2009] 351 N.B.R. (2d) 371 (N.B.Q.B.)
[17] *Ibid* at para. 15
[18] [1999] B.C.J. No. 764. (B.C.S.C.)
[19] *Ibid* at para. 32

(c) The Intoxicated Patron will Not be Driving

If the patron is being driven home, then there is likely no reasonably foreseeable risk that the patron would cause injury to himself or others. As a result, a tavern will have a defence where the patron if being driven home by a sober friend or taxi. This defence is similar to the defence available where the Plaintiff leaves with a sober companion. This defence was suggested in *Jordon* where Laskin J. (as he then was) noted[20]:

> There is, in my opinion, nothing unreasonable in calling upon the hotel in such circumstances to take care to see that Menow is not exposed to injury because of his intoxication. No inordinate burden would be placed upon it in obliging it to respond to Menow's need for protection…a taxi-cab could be summoned to take him home, or arrangements made to this end with another patron able and willing to do so.

As a result, a number of courts have held that if patron was being taken home by a taxi or another person then there would be no liability. For example, in *Thorne v. Ontario (Minister of Finance)* Mossip J. of the Ontario Superior Court of Justice observed that because the patron in question was not licensed to drive it was reasonable to conclude that his friend would drive him home. As a result, there was no reasonably foreseeable risk of harm. The court concluded[21]:

> Even if the tavern operator or owner tried to prevent Michael from leaving the tavern to drive a car, Michael, in all likelihood, would have advised him/her that he was not licensed to drive a car and that his friend, who was driving, was waiting for him to drive him home.

Similarly, in *Reiter (Litigation Guardian of) v. Olynyk Estate* Master Sharpe accepted that the plaintiffs' claim could not succeed because the evidence established that the patron was not driving his vehicle when his vehicle left the hotel parking lot.

However, some cases have required that the tavern go further and confirm that the patron has actually entered into the taxi. For example, in *Neufeld*, the court suggested that a tavern is under an obligation to confirm that the intoxicated patron is placed in a taxi and even to pay for taxi fare if need be. In the *Neufeld* case, the tavern had spoken to one of the four patrons in the group and asked him for his keys. However, the court nonetheless found the tavern liable noting that: "the employees did not ask the other three patrons for their car keys nor did they provide funds for the taxi, give money to the driver or otherwise confirm that the taxi was taken.[22]"

(d) The Defence That Over-Service of Alcohol Did Not Cause the Accident

The applicable test for causation is the "but for" test. The Plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred.[23] The Supreme Court has stated that the "but for" causation test should be applied in a

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[20] *Supra* note 2 at pg. 111-112
[21] *Supra* note 6 at para. 46
[22] *Supra* note 18 at para. 16
[23] *Clements v. Clements* [2012] SCC 32 (S.C.C.)

common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury[24]. In short, the Plaintiff must establish that the accident would not have occurred "but for" the tavern's over-service of alcohol. If the Plaintiff fails in this regard, there will be no liability.

In *Dryden (Litigation guardian of) v. Campbell Estate* [25], the tavern put forward the argument that the accident would have occurred even without the over-service of alcohol. In that case, the tavern argued that the patron had a habit of speeding and driving recklessly even when not using alcohol. The court rejected this argument noting that the evidence showed that alcohol intoxication would impair concentration and judgment.

Of the defences listed above, the causation defence will be the most difficult to prove. This is because generally alcohol is known to cause impairments in judgment and physical coordination which could lead to an accident in a number of different ways. The plaintiff will usually lead expert evidence from a toxicologist showing that physical and judgment functions are impaired at relatively low levels of alcohol ingestion. As a result, a tavern wishing to rely on a causation defence must point to some specific and credible evidence that support the defence theory that alcohol did not play a factor in the accident, despite the fact that the patron was intoxicated.

III. INSURANCE ACT DEFENCES

(a) Immunity from Subrogated OHIP claims

Section 267.8(18) of the *Insurance Act*[26] bars subrogated claims by the Ministry of Health and Long-Term Care in motor vehicle accident cases against any person insured under a motor vehicle liability policy issued in Ontario. The court has held that as long as the defendant is insured under an Ontario motor vehicle liability policy, a subrogated OHIP claim will not be permitted, even if that defendant was not involved in the use or operation of a motor vehicle at the time of the accident and even if the motor vehicle liability policy does not respond to the claim.

The Ontario Court of Appeal established this principle in *Georgiou v. Scarborough (City).*[27] In the *Georgiou* case, a municipality was alleged to have been negligent is maintaining the roadway and thus causing or contributing to a car accident. The municipality was insured under a motor vehicle liability policy with respect to vehicles which it owned. However, that policy did not respond to the loss as the municipality was not being sued for negligence arising from the use or operation of a vehicle, but for negligent road maintenance. In any event, the Court found that OHIP was not permitted to maintain a subrogated claim given that the Municipality was insured under a motor vehicle liability policy.

Based on this case law, a tavern will be immune from OHIP subrogated claims in motor vehicle accident cases, if the tavern is insured under an Ontario automobile policy.

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[24] *Snell v. Farrell,* [1990] 2 S.C.R. 311 (S.C.C.)
[25] [2001] O.J. No. 829 (Ont. S.C.)
[26] R.S.O. 1990, c. I.8
[27] [2002] 61 O.R. (3d) 285 (Ont. S.C.)

(b) The Ability to Deduct Insurance Benefits

Under section 267.8(4) and (1) of the *Insurance Act* a defendant is entitled to a deduction of the health care benefits and income replacement benefits in the form of private or statutory accident benefits paid to the Plaintiff as a result of a motor vehicle accident. This can be a significant factor in reducing the tavern's exposure. In Ontario, motor vehicle accident victims generally have significant statutory accident benefits available to them. A more detailed discussion of this area of the law will be found in one of the other papers being presented at this program.

With respect to taverns, it is important to bear in mind the distinction made between "protected" and an "unprotected" defendants under the *Insurance Act*. Under section 267.5(1)(3)(5) and (6) of the *Insurance Act* a protected defendant includes the owner or occupant of a vehicle or other person present during the accident who is insured under an Ontario motor vehicle liability policy. All other persons are unprotected.

The court has determined that in motor vehicle accident cases even unprotected defendants are entitled to deduct insurance benefits under the *Insurance Act*. This was established in *Burhoe v. Mohammed et al*[28] where the Wein J. of the Ontario Superior Court stated that unprotected Defendants, in that case a hotel, were also entitled to deduct collateral benefits. Wein J. stated[29]:

> Central to the questions in this case is the interpretation of s. 267.8 of the Insurance Act, dealing with collateral benefits. The opening words of the section simply state that damages are to be reduced by certain amounts. The wording does not refer to either protected or unprotected defendants: it does not distinguish between the two.

As a result, a tavern will be entitled to deduct private insurance benefits and statutory accident benefits for income replacement and healthcare in motor vehicle accident cases.

(c) The Availability of Uninsured Motorist Coverage

The plaintiff will be unable to claim under the uninsured motorist provisions of his or her motor vehicle insurance policy if even one insured motorist is 1% liable. This is known as the 1% rule[30].

In a tavern liability case, assuming the Plaintiff is struck by an uninsured vehicle, the Plaintiff will likely still be able to claim under the uninsured provisions of his or her motor vehicle policy, even if an insured tavern is found 1% liable. The applicable legislation[31] specifically provides that the plaintiff's uninsured insurer is not liable to provide uninsured coverage if the Plaintiff is entitled to recover money under the third party liability section of a motor vehicle liability policy. However, a tavern would likely be insured under a commercial general liability policy and not a motor vehicle policy.

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[28] [2009] 97 O.R. (3d) 391 (Ont. S.C.)
[29] *Ibid* at para. 27
[30] *Barton et al. v. Aitchison et al* (1982), 39 O.R. (2d) 282 (Ont.C.A.)
[31] Uninsured Automobile Coverage, R.R.O. 1990, Reg. 676, Clause 2(1)(c)

Ontario courts have stated that unless an insurance policy is approved as such by the Financial Services Commission of Ontario it would not be considered a motor vehicle liability policy.[32] These approved motor vehicle liability policy generally includes the standard Ontario Automobile Policy (OAP1) as well as the various endorsements approved by the Commission. The commercial general liability policies are generally not part of the regulated Ontario motor vehicle insurance scheme.

As a result, in tavern liability cases, the Plaintiff's uninsured motorist carrier may become an additional pocket for the Plaintiff to look to for compensation. The result will be that the tavern's exposure may be lessened somewhat.

IV. THE DUTY OF GOOD FAITH

Canadian courts have held that an insurer has an obligation of good faith and fair dealing which includes a duty to act promptly when investigating, assessing and settling claims. A consideration particularly applicable to tavern liability cases is the fact that damages can at times exceed the tavern's insurance liability limits. This is particularly a concern when the other defendants or parties are either uninsured, have few assets or have lower insurance policy limits than the tavern. This is often the case in tavern fight cases where the co-defendant will be uninsured and may not defend the case. Because of the principle of joint and several liability, if the tavern is found liable at even 1%, the tavern may end up paying all or most of the damages. Where the Plaintiff has a large claim, this can give rise to the prospect of a claim against the tavern in excess of the tavern's policy limits. A conflict of interest can arise. The tavern would like to avoid any personal exposure. The insurer will want to avoid paying the entire policy limit.

The court has stated that where the evidence indicates the insured is liable and damages will likely exceed the policy limits, the insurer has an obligation to protect the insured from an excess judgment and resolve the matter within policy limits if possible. For example, in *Shea* v. *Manitoba Public Insurance Corp.*[33] Finch J. of the British Columbia Supreme Court stated:[34]

> Those reasonable efforts include affirmative attempts to settle, and where a finding of liability is highly probable, and where the judgment to be awarded will probably exceed the policy limits, include the affirmative duty to offer to pay the third party liability policy limits in exchange for a release of its insured.

In *Shea*, the infant Plaintiff was seriously injured in an accident and it became apparent that the damages would exceed the $300,000 policy limit. The Plaintiff offered to settle for the policy limit. The insurer refused. The action proceeded to trial and the Plaintiff was awarded judgment against for damages of $831,327, plus interest of $101,030. The court found that the insurer had breached the duty of good faith it owed to the insured and was liable for the excess judgment.

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[32] *Keelty et al. v. Bernique et al* [2002] 57 O.R. (3d) 803 (O.N.C.A.); *Heuvelman v. White* [2004] O.J. No. 1716 (Ont. C.A.)

[33] (1991) 55 B.C.L.R. (2d) 15 (B.C.S.C.).

[34] *Ibid* at para. 298

Similarly, in *Dillon v. Guardian Ins. Co.*[35] Fitzpatrick J. of the Ontario High Court of Justice held the insurer liable for the excess judgment after the insurer refused to settle within the policy limits. In that case, the defendant had an automobile policy with limits of $50,000. The insurer's assessment of the probable award was about $43,000, the plaintiff's final offer was $46,000 and the insurer instructed its lawyer to pay no more than $40,000 or go to trial. The actual award at trial was about $78,000.

Although the court has stated that an insurer has a duty to settle claims within the policy limits if possible, neither the Supreme Court of Canada nor the Ontario Court of Appeal have had an opportunity to address the insurer's duty. It is unclear if the insurer will be liable in every case where it rejects an offer to settle within the policy limits and an excess judgment is later obtained or whether the insurer is simply required to act reasonably under the circumstances. There are few report decisions on this issue and the court will likely deal with such cases going forward on a case by case basis.

It is unclear under what conditions an insurer could be found liable for punitive damages for failing to settle the claim within the policy limits. Such punitive damages have been awarded against an insurer where the insurer has unreasonably withheld first party benefits.[36] The writers are unaware of any Canadian cases where punitive damages have been awarded against an insurer for failing to settle an insured's claim within the policy limits and an excess judgment was later obtained.

Given the case law, when an offer is presented for the insurer to pay the insurance limits, defence counsel must carefully assess the claim to determine if damages could exceed the policy limits at trial. The insurer should be advised of the potential for liability to the tavern for amounts in excess of the policy limits if the plaintiff's offer to settle is rejected. This should be in writing and you should ensure that your instructions on this important point are in writing.

V. APPORTIONMENT OF LIABILITY

The following chart sets out various cases involving commercial hosts or taverns where the court has apportioned liability between the tavern and other parties involved in the accident. Based on the case law, the court will consider a number of factors in attributing liability to a tavern, including:

- Did the patron show visible signs of intoxications?
- Was it expected that the patron would walk or drive home?
- Did the tavern have previous knowledge of the patron's tendency to become intoxicated?
- Was the patron intoxicated when he arrived at the tavern?
- Did the tavern have a system for monitoring the amount of alcohol consumed?
- Did the tavern attempt to arrange for transportation for the patron?

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[35] [1983] I.L.R. 1-1706 (Ont. H.C.)
[36] *Whiten v. Pilot Insurance Co.,* [2002] 1 S.C.R. 595 (S.C.C.)

- Did the patron or the people with the patron request transportation?

- Did the tavern serve both the defendant driver and plaintiff passenger involved in an accident?

The most common result is the tavern is found 15% liable. Most cases fall inside the range of 33% to 5%. A higher amount is suggested in cases where:

- Staff ejected the patron from the establishment;

- Staff ignored requests that transportation be arranged;

- Staff themselves consumed alcohol; and

- The establishment is also found liable for failing to keep the premises safe where the plaintiff is injured at the tavern.

Jordan House v. Menow and Honsberger, [1974] S.C.R. 239 (SCC)	The patron was over-served alcohol and expelled from the bar and was then struck by a vehicle shortly thereafter. The patron was known to drink and known to walk home alone. Instructions had been given to employees not to serve the patron unless a responsible person accompanied him, but he was served regardless of these instructions.	Liability was apportioned 33 1/3% to the tavern, 33 1/3% to the driver and 33 1/3% to the patron.
Picka Estate v. Porter [1980] O.J. No. 252 (Ont. CA)	In that case, the patron became intoxicated at a tavern. The patron then left the tavern and drove to a restaurant where he stayed for an hour. The patron then drove from the restaurant and then collided with another vehicle. The tavern had a cash bar system and was not able to adequately monitor alcohol consumption.	The tavern was 15% liable and the patron was 85% liable.
Niblock v. Pacific National Exhibition (1981), 30 B.C.L.R. 20 (B.C.S.C.)	In that case, the patron was served alcohol while intoxicated at the tavern and then fell down a staircase. The railing was lower than that called for by the applicable city bylaw.	The tavern would found 75% liable and the patron 25% liable.
Crocker v. Sundance Northwest Resorts Ltd. (1988), 51 D.L.R. (4th) 321 (SCC)	The patron was very intoxicated at a ski hill and was injured in tubing race. The resort knew that the patron was intoxicated and advised the patron not to enter the race.	The tavern was found 75% liable and the patron was found 25% liable.

Hague v. Billings (1993), 13 O.R. (3d) 298 (Ont. CA)	The patron attended at two bars. The first bar served one drink then refused further service because the patron showed signs of intoxication. The first bar attempted to have the patron take a taxi home, but the patron refused. The second bar served the patron several drinks despite the facts that the patron showed obvious signs of intoxication. The patron the left the establishment in his vehicle and struck the Plaintiff.	The second tavern was found 15% liable. The first tavern was found 0% liable. The patron was found 85% liable.
Gouge v. Three Top Investment Holdings Inc. (c.o.b. Windsor Park Hotel), [1994] O.J. No. 751 (Ont. Gen. Div.)	In that case, there was a cash bar and the tavern over-served the Plaintiff patron. The patron was ultimately "cut off" and agreed to accept a ride home. Once in the parking lot, the patron changed his mind and drove off on his motorcycle and was involved in an accident.	The tavern was found 5% liable and the plaintiff 95% liable.
Depres v. Nobleton Lakes Golf Course Ltd. [1994] O.J. No. 1166 (Ont. Gen Div)	In that case, the court concluded that that the tavern staff ought to have been aware that the patron was intoxicated and it was dangerous to allow him to leave. The court further noted that the tavern was in a small hamlet where it would have been reasonable to expect all the patrons would have come by car. Shortly after leaving the tavern the patron lost control of his vehicle and collided with an oncoming vehicle killing the other driver and causing serious injury to himself.	The tavern was found 10% liable and the patron was found 90% liable.
Whitlow v. 572008 Ontario Ltd [1995] OJ No. 77(Ont Gen Div)	In that case, the patron was over-served at the first bar and then went to a second bar and was also over-served. The patron fell over the stairs at the second bar. The court found that the stairs were a hazard.	The court found that the first tavern was 5% liable, the second tavern was 15% liable and the patron was 80% liable.
Francescucci v. Gilker, [1996] O.J. No. 474 (Ont.CA)	In that case, a highly intoxicated patron was removed from a restaurant by staff, placed in his car, and keys were thrown on his lap.	The tavern was found 78% liable and the patron 22% liable.
Lum (Guardian of) v. McLintock (1997), 45 B.C.L.R. (3d) 303 (B.C.S.C.)	In that case, the patron was served alcohol for several hours at a tavern by a server and became intoxicated. The server walked him to his car. The patron then drove away and struck a cyclist who was not wearing a helmet.	The tavern was found 30% liable, the patron 60% liable and the plaintiff cyclist 10% liable.

Neufeld v. Foster [1999] B.C.J. No. 764 (B.C.S.C.)	In that case, a group of four friends were over served at table and visibly intoxicated. The tavern staff attempted to get keys from one of the patrons and confirm that no one was driving. Tavern staff called cabs for the group, but some of group drove anyway. Shortly after, the patrons were involved in an accident. The court concluded that the tavern staff should have asked for car keys from all four patrons and ensured that they left in the taxi.	The tavern was found 20% liable, the driver was found 50% liable and the plaintiff passenger was found 30% liable.
D'Entremont v. Smallwood [1999] O.J. No. 4567 (Ont. SC)	In that case, the patron and his friends became intoxicated at a tavern. The court held that the tavern could not determine exactly how much alcohol each patron consumed. The patron and his friends had left the tavern without being detected. The patron drove away and struck another vehicle head on killing himself and injuring the other driver.	The bar was found 15% liable for the accident and the patron 85% liable.
Dryden (Litigation Guardian of) v. Campbell Estate, [2001] O.J. No. 829 (Ont. SC)	In that case, an underage and intoxicated patron was admitted to the tavern and given liquor at the nightclub. The patron's adult friend had bought and supplied the patron alcohol throughout the day before the two arrived at the nightclub. The patron continued to be served alcohol after he arrived at the nightclub. The nightclub did not have any wait staff, only bartenders. The patron left the tavern in an intoxicated state and collided with a car, killing himself, one passenger and severely injuring another.	The tavern was found 5% liable, the patron was found 80% liable and the adult friend was found 15% liable.
Holton v. MacKinnon, [2005] B.C.J. No. 57 (B.C.S.C.)	In this case, the patron and two friends consumed alcohol at lounge for three hours, then left the lounge and went to a nightclub and drank more alcohol there. They then drove back to one of the friends' home; each had another beer and they then decided to drive to a party. On the way to the party, the three friends were involved in a single vehicle accident rendering the one of the friends, the plaintiff, and a quadriplegic. The court found that staff at both the lounge and the nightclub should have foreseen that one of the visibly intoxicated patrons might be driving and should have taken steps to enquire as to how they were getting home or if any were driving.	The lounge was found 15% liable and the nightclub was found 15% liable. The patron who was driving the vehicle was found 40% driver, and the plaintiff passenger was found 30% liable.
Steveston Hotel,	In that case, a visibly intoxicated patron was over-	The tavern was found

Laface v. McWilliams ([2005] B.C.J. No. 470 (B.C.S.C.)	served alcohol and allowed to drive. Friends of the patron asked the bar's staff to arrange transportation for the patron, which was refused. A private investigator hired by the pub owner to check on his staff had found evidence of the employees drinking while working, over-pouring and free-pouring alcohol to patrons.	50% liable and patron was found 50% liable
Pilon v. Janveaux [2006] O.J. No. 887 (Ont. CA)	In this case, the driver and passenger involved in an accident became intoxicated after being over-served alcohol in the tavern. Although the driver was intoxicated, he was not showing signs of impairment. However, the server offered to call a taxi for both the passenger and driver, but they refused. The court noted that the tavern personnel had expertise in recognizing signs of impairment and knew how much they had served the men even though the driver did not appear to be impaired.	The tavern was found 14.2% liable, the passenger was 21.3% liable and the driver was found 64.5% liable. The court noted that the tavern liability should include both the liability of over-serving the Defendant driving and the plaintiff passenger.
McIntyre v. Grigg [2006] 83 O.R. (3d) 161 (Ont. CA)	In this case, the patron had been drinking at a tavern after stops at two other establishments earlier in the day. The tavern had not followed suggested protocols and the driver's blood alcohol level was at a level where he would have shown visible signs of intoxication. After leaving the tavern, the patron drove his vehicle and struck a pedestrian.	The tavern was found 30% liable and the driver was found 70% liable.

VI. CONCLUSION

The cases above demonstrate that when alcohol is a factor in an accident and where one of the parties became intoxicated at a tavern, bar or restaurant, it is likely that the commercial host will be sued and possibly found liable. Depending on the facts in the case, the commercial host could face a significant damage award. As a result, there is a significant risk to taverns in these types of cases.

In order to avoid such liability, the case law suggests that a commercial host must have a system of monitoring the amount of alcohol patrons consume in place. Staff should be alert to patrons showing visible signs of intoxication. If a patron becomes intoxicated, the tavern may be required to do more than simply ask if the patron requires transportation. Some courts have gone as far as to require that the tavern arrange for transportation, pay for the transportation and ensure the patron is not driving or walking home. This is a very high standard which may be difficult for many taverns to meet. In short, when facing this type of a claim, taverns will have to demonstrate unusual vigilance in order to avoid liability.