The Latest Ruling on Social Host Liability

Tom Macmillan
June 2020

The recently-released British Columbia Supreme Court decision of *McCormick v. Plambeck*, 2020 BCSC 881, adds the latest chapter to Canada's grappling with the issue of social host liability. It follows on the heels of the Ontario Court of Appeal decision of *Williams v. Richard*, 2018 ONCA 889, in which that Court overturned the motion judge's ruling for summary judgment in favour of the defendants.

Both of these cases, along with a handful of others, represent and effort by lower courts to explore the boundaries of the 2006 Supreme Court of Canada decision of *Childs v. Desormeaux*, 2006 SCC 18. In *Childs,* the Supreme Court found that no duty of care was owed by the hosts of a party to a plaintiff who was later that night injured when a guest of the party, while intoxicated, struck the vehicle in which the plaintiff was a passenger.

Background on the Childs Decision

In *Childs*, the hosts were aware that the guest was a "heavy drinker," and observed him consume approximately 12 beers over two and a half hours at the party. As the guest was leaving, one of the hosts asked him if he was alright to drive. The guest replied that he was.

The Supreme Court found that there was no duty of care, relying on the distinction between nonfeasance (a negligence failure to act) and misfeasance (a negligent overt act). The Court found that the behaviour of the hosts in *Childs* is best characterized as nonfeasance, and outlined that,

> …where the conduct alleged against the defendant is a failure to act, foreseeability alone may not establish a duty of care.

In short, the Supreme Court outlined that when the law seeks to impose liability on a party for failing to take certain actions in relation to another person's behaviour, something more is required than mere foreseeability that the person's behaviour could cause harm to another. In the case of *Childs*, while it may have been foreseeable that the guest's actions would cause injury to the plaintiff, in order to find a duty of care in that case, more was required, because it was a case of nonfeasance.

The rationale underpinning this legal principle is that the court is hesitant to impose legal liability on individuals for failing to act to restrict the autonomous activities of another. Chief Justice McLachlin put it as follows in *Childs*:

> …Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved.

The Supreme Court enumerated three categories of relationships that do give rise to a duty of care, even in cases of nonfeasance. Those are:

1. Where the defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls;

2. Paternalistic relationships of supervision and control, such as those of parent-child or teacher-student; and

3. Where the defendant exercises a public function or engages in a commercial enterprise that includes implied responsibilities to the public at large.

Some prematurely concluded, following *Childs*, that the Supreme Court had effectively closed the door on social host liability. Since that ruling, however, there have been a number of cases which have addressed some of the softer factual points in the case.

Court of Appeal's Decision in William

Recently, the Court of Appeal in *Williams,* was faced with a situation where the defendant host actually provided to the at-fault driver the alcohol that got him intoxicated. Furthermore, the host knew of his guest's intention not only to drive, but to drive others in his vehicle, all while intoxicated. Contrast this with *Childs*, where the guest supplied his own alcohol, and where the hosts at least took a small step to ask if the guest was alright to drive.

The Court of Appeal in *Williams* allowed the plaintiffs' appeal of the motion judge's ruling on summary judgment, pointing out that the facts of this case make it such that it is not a foregone conclusion that there is no duty or standard of care by the host to the plaintiff passenger of the guest's vehicle.

It is worth noting that the recent ruling in *Williams* was merely that the questions of the duty and standard of care are triable issues. There was no finding that a duty of care toward the host to the plaintiffs actually did exist, or that if it did, the standard was not met. Importantly, there remains no case of social host liability involving the intoxication of a guest who then later commits a tort.

The door is still closed, at least for now.

Where the Guests are Minors

Enter *McCormick*, out of sleepy Salt Spring Island in British Columbia. In this case, the defendant adult homeowners agreed to host a number of teenagers at their house to celebrate. Both they and their teenaged daughter were present at the party, with the adults walking through the party to gauge the atmosphere.

At one point in the evening, the plaintiff and his friend left the party, walked to a nearby property, and stole a vehicle using keys that were left in the vehicle itself. They subsequently drove off the road, resulting serious injuries to the plaintiff, and the death of the driver.

The surviving plaintiff brought an action against the owners of the vehicle. That action resulted in a settlement prior to trial. He also brought an action against the hosts of the party, for failing to prevent his injuries.

The trial judge, in a detailed and well-written decision, concluded, on the facts of this case, no duty of care existed by the hosts to the plaintiff. Although this is a case of nonfeasance, the trial judge found that the injuries to the plaintiff were not foreseeable by the hosts, so there was no need to look at the enumerated grounds set out in *Childs*.

The judge further ruled that, if he was wrong and a duty of care did exist, that the hosts in this case met the standard of care.

The hosts had kept a loose tally of who was present at the party, and with the assistance of their daughter, collected the car keys of guests who drove there. The evidence was that the hosts asked the guests to contact their parents for rides home, if needed.

One of the hosts ultimately drove five of the guests to their homes herself. One guest was permitted to sleep over on the porch. The plaintiff had walked to the party, and the evidence of the hosts was that at no point did they see the plaintiff intoxicated.

While the party clearly contravened provincial statutory schemes on alcohol consumption by minors, the trial judge finally noted the well-established principle that a breach of statute does not create liability in negligence. There was no duty of care owed by the hosts to the plaintiff.

In deciding whether the hosts owed the plaintiff a duty of care in the circumstances, the trial judge outlined that he would have to find that it was foreseeable that guests at their party would leave and steal a vehicle, and drive it in an unsafe manner.

The trial judge rejected that it this was a foreseeable outcome of hosting the party. While evidence was put forward that it was commonplace on Salt Spring Island for residents to leave their cars unlocked with keys in or near them, the judge found that this is precisely evidence that residents there did not expect vehicular theft.

It was not foreseeable to the hosts that, simply by virtue of having under-aged guests consuming alcohol at their premises, the guests would steal a car and drive it in a dangerous manner.

Standard of Care Met in Any Event

The judge found that, in any event, even if a duty of care did exist to the plaintiff, the hosts would have met the standard expected of them. In stressing that the standard is not perfection and that the hosts were not required to prevent any and all misfortunes that may befall their guests, the judge noted that the following was undertaken by the hosts:

-they circulated through the party a number of times throughout the evening;

-they collected car keys from guests who drove;

-they encouraged people to call their parents to pick them up;

-they drove people home themselves who were not able to secure rides;

-they allowed one guest to sleep over.

The judge found that it was reasonable for the hosts to not have a specific "plan" in place for those like the plaintiff who walked to the party. It was reasonable of the hosts to expect that those who walked to the party would walk home at the end of their night.

The trial judge looked at the standard of care of a careful and prudent parent, which requires a consideration of community standards and the age of the child.

In this case, the judge focused on the relatively relaxed community standards on Salt Spring Island, as well as the fact that the plaintiff was 17 years old. He distinguished this case from those involving small children, where there would be a higher expectation of supervision on the part of parents.

So Where Are We Left?

As noted above, there remains no case in Canada where there has been a finding of "social host liability" for circumstances such as *Childs* and now *McCormick*. The BC case is noteworthy in that it addresses the issue of adult hosts knowingly hosting a party for minors involving alcohol consumption.

Before writing the eulogy for social host liability in Canada, it is worth noting some key factual findings from this case which leave the door open for different fact scenarios in the future.

First, the trial judge found that the plaintiff was not intoxicated at the time that he left the party. As noted previously, in *Williams* this issue is very much live, and it will be fascinating to see how it is dealt with, if that matter proceeds to trial.

Second, the plaintiff in this action was involved in the theft of a vehicle from a neighbour's property. One can imagine that the analysis would have been more challenging if, for example, the plaintiff had driven to the party, and was either able to get his keys back, or was never forced to give over his keys in the first place.

The judge in *McCormick* stressed that there was no evidence of any guests who did drive getting into an accident after the party. If one had, then we would have had a fact situation closer to *Childs*, except involving minor guests. Would the court still have found that no duty of care existed?

Third, a lot of emphasis was placed by the judge on the community standards of Salt Spring Island, and its relatively relaxed attitude. In reading the ruling, the island at times appeared to be almost a party itself to the action. These community standards influenced

the judge's interpretation of the behaviour of the hosts toward their guests. It is possible to imagine that a court in the future may rule another way on similar facts, but in a different geographical setting.

Parties for Minors

Leaving aside the legal analysis, this case stands both as a source of relief for social hosts, and as a stark reminder of the tragedy that can unfold following such gatherings. The hosts in *McCormick* went to some lengths to ensure the safety of their guests, knowing that they were minors consuming alcohol. The hosts did not serve their guests alcohol, and provided rides home for those who requested them.

Frankly, however, it would likely be a mistake for prospective hosts of such parties to look at the list of precautionary elements put in place by the hosts here as a checklist by which civil liability can be avoided. As noted above, there are a lot of facts in this case which contributed to there being no duty of care, which the hosts did not have control over.

In short, hosting such parties for minors remains a risk. There is no telling whether courts will remain inclined to find there is no duty of care for social hosts, or whether a fact situation will come along that tilts the other way. One can imagine that if there is, there is a good chance that it involves minor guests.