"Private Party Hangover:

Social Host Liability in Canada

after the Supreme Court of Canada's decision in

Childs v. Desormeaux"

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INTRODUCTION

In its May 2006 decision, *Childs v. Desormeaux,*[1] the Supreme Court of Canada unanimously held that the private hosts of a BYOB house party were not legally responsible for the injuries caused by an alcoholic guest who drank too much and got into a car accident while driving home from the party. In reaching its decision, the Court concluded that in general, private hosts of parties where alcohol is available do not owe a duty of care to public users of highways. In the words of the Court, "[h]olding a private party at which alcohol is served… is insufficient to implicate the host in the creation of a risk sufficient to give rise to a duty of care to third parties who may be subsequently injured by the conduct of a guest… The guest remains responsible for his or her conduct."[2]

In reaching its decision, the Court focused on the circumstances under which social hosts ought or ought not to be held responsible for the negligent conduct of drunken guests. Since *Steward v. Pettie,*[3] Canadian courts have recognized that commercial hosts may owe a duty of care to third parties injured by patrons. However, in *Childs* the Court determined that social host liability should be distinguished from commercial host liability for three reasons. First, the sale and consumption of alcohol in commercial settings is strictly regulated. Second, commercial hosts are in a better position to monitor alcohol consumption. And third, the contractual nature of the relationship between a tavern keeper and patron is fundamentally different from the social relationships at parties.[4] Accordingly, the Court recognized that the legal principles applicable to commercial host cases are not the same as the ones that apply to cases involving social hosts.

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[1] [2006] S.C.J. No. 18.
[2] *Ibid.* at paras. 44, 45.
[3] [1995] S.C.J. No. 3.
[4] *Supra*, note 1 at paras. 18 – 22.

On the facts before them, the Court in *Childs* concluded that there was an insufficient proximity between the parties involved such that a duty of care did not arise between the hosts of the private party and the injured third-party user of the highway. The Court held that the injuries suffered by the user of the highway as a result of the drunken guest's actions were not reasonably foreseeable, and that even if they were reasonably foreseeable, there was no positive duty on the private hosts to take action or to prevent their inebriated guest from driving.[5] In the Court's view, when injuries happen as a result of an adult making the choice to consume his or her own alcohol at a private party, there is no reason why others should be made to bear their costs. Accordingly, the Court dismissed the appeal.

In his paper, "Shaken, Not Stirred": Recent Changes in Alcohol Liability,[6] Ian P. Newcombe suggests that the age-old question in alcohol-related cases is whether we, as a society, ought to expect the drunk to take personal responsibility for his own actions, or whether we should require the nexus of people surrounding the drunk to intervene, and whether we should make those people liable if they don't. Mr. Newcombe suggests that in Canada the seemingly continual expansion of liability against the nexus of people around the drunk over the last few decades has been reversed by recent jurisprudence. In his opinion, this can be best evidenced by the Supreme Court of Canada's decision in *Childs*. As a representative of the defence bar, it should come as no surprise to learn of Mr. Newcombe's delight at the prospect of shrinking, and not expanding, liability on defendants and insurance companies.

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[5] *Supra*, note 1 at para. 26.

[6] Ian P. Newcombe, "Shaken, Not Stirred": Recent Changes in Alcohol Liability (alternatively titled "Car Wars": The Defence Empire Strikes Back), paper presented to the Canadian Independent Adjuster's Association Annual Conference in Niagara-on-the-lake, Ontario, September 8, 2006.

However, like the Court in the *Childs* case, Mr. Newcombe's analysis may have mistakenly placed too much emphasis upon the importance of properly identifying the parties who should be held responsible for an inebriated guest's negligent actions. Phrased in this manner, the focus of Mr. Newcombe's question, much like the focus of the Supreme Court of Canada in *Childs*, becomes: upon whom should blame or liability be placed? But perhaps this is not the question we should really be asking. Perhaps we shouldn't be embarking upon a blame game. Perhaps the question we should really be asking is: what is the appropriate role for law to play to ensure that innocent third parties, who are seriously injured as a result of an inebriated guest's negligence, get proper compensation when the inebriated guest who causes them damage has insufficient insurance or assets to cover a legitimate claim?

Mr. Newcombe recognizes that it would certainly be easier to place responsibility squarely and exclusively at the foot of drunks if it wasn't for the fact that alcohol-related cases often involve catastrophically injured people who are totally innocent of any wrongdoing, and the drunks who cause them harm are often underinsured or without sufficient funds to satisfy a judgment. As members of Canadian society, we have a natural tendency to want to see justice done, especially when people suffer injuries because of no fault of their own. But if the drunk has insufficient insurance and/or assets, how does the injured party get put back into the position that he or she would have been but for the drunk's actions? What should we as a society say to seriously injured, innocent victims if the drunken defendant that causes them damage is not in a position to properly compensate them? If the nexus of people surrounding the drunk isn't responsible, then who is?

The purpose of this paper is to analyze the Supreme Court of Canada's decision in *Childs*, and to suggest ways that the law might better position itself to properly compensate

injured parties when inebriated defendants have inadequate assets to satisfy legitimate claims. The paper will start with a discussion of the events surrounding the *Childs* accident, with an emphasis on the consequences for Zoe Childs. It will then argue that tort liability in private host cases is not necessarily shrinking in the ways that Mr. Newcombe suggests. In fact, the Court of Appeal and the Supreme Court of Canada in *Childs* suggest that private hosts may indeed be held liable for their drunken guests' negligence if they play a more active involvement in the creation or exacerbation of risk, much as many courts in the United States have already held. Finally, the paper will offer some suggestions for possible changes in the future to ensure that injured third parties receive the compensation they deserve.

THE EVENTS SURROUNDING THE CHILDS ACCIDENT

Desmond Desormeaux drank a dozen beers in a little over 2 hours at his best friend's house on New Year's Eve, 1998. It was a BYOB party hosted by Dwight Courrier, and Courrier's common-law spouse, Julie Zimmerman. Shortly after midnight, Desormeaux got in his car, drove down the road and smashed head-on into an oncoming vehicle, killing one person and seriously injuring three others. Zoe Childs sustained the most serious injuries.

Zoe was just 18 years-old at the time of the accident. She was a passenger in the back seat of the car. She was sitting beside her boyfriend. She was riding with three of her friends.

Desormeaux was a self-confessed alcoholic. He had been an alcoholic for 20 years. He had a reputation as a heavy drinker and had been known to drink as many as 24 beers in a single day. Desormeaux was in no shape to drive. By his own self-assessment if he had 9 to 12 beers he would be too drunk to get behind the wheel.

Desormeaux had twice been convicted of impaired driving, once in 1991 and again in 1994. He had also been convicted of driving while disqualified. His friend, Courrier, was well aware of Desormeaux's past drinking problems and prior convictions. Courrier had partied with Desormeaux on numerous occasions in the past and he had arranged transportation for him when he became too drunk to drive. Courrier had also allowed Desormeaux to stay at his house after nights of heavy drinking.

Zoe was left paralyzed from the waist down as a result of the accident. Her spine was severed at T10. She is now a paraplegic and will spend the rest of her life in a wheelchair.

Desormeaux arrived at the party with two inebriated guests. At the party he consumed 12 beers in a little over 2 hours. As Desormeaux was leaving the party, Courrier asked him "are you ok brother?" Desormeaux responded "no problem". Courrier did not ask how much he'd had to drink, he did not ask him to stay overnight, nor did he offer to call a taxi. He took no steps to ensure that his alcoholic buddy wasn't going to get behind the wheel of his car and kill someone.

Zoe's boyfriend's name was Derek Dupre. He was killed as a result of the collision.

Three hours after the accident a sample of Desormeaux's blood showed he had a blood alcohol concentration of 183 mg/100ml, more than twice the legal limit. At trial, an expert testified that his blood alcohol concentration would have been approximately 225 mg/100ml, or nearly three times the legal limit, when the accident occurred.

As a result of the accident, Desormeaux was charged with a number of offenses, including impaired driving causing death. He pleaded guilty to these charges and received a sentence of 10 years in prison. He was remanded to a halfway house in Ottawa in 2002 after serving one-third of his sentence.

Desormeaux did not have insurance. Although Zoe was entitled to accident benefits insurance, Ontario law is not able to fully and properly compensate her if the at-fault driver has no insurance or assets to pay.

A trial ensued in which the question arose as to whether Courrier and Zimmerman, as private social hosts of the party, owed a duty of care to Childs, a passenger in a motor vehicle who was seriously injured as a result of the negligence of Desormeaux, whose ability to operate a motor vehicle was impaired by alcohol which was consumed at the Courrier/Zimmerman residence.

The Trial Decision[7]

At trial the Judge said that if Courrier and Zimmerman owed a duty of care to Childs, the duty was not simply an extension of the duty a commercial host owes to its patrons and third parties that could be injured by them. Instead, the duty would be a new and novel duty as-of-yet unrecognized in the law of negligence in Canada.[8]

In order for the Trial Judge to determine whether a new duty of care should be recognized in law, he employed the *Anns*[9] test and asked: a) whether there was a sufficiently proximate relationship between the parties, and whether the injuries suffered by Childs were reasonably foreseeable by Courrier and Zimmerman when they allowed Desormeaux to leave their home and drive on the highway, and if so, b) whether there were any policy reasons to negative or limit the imposition of such a duty.

The Trial Judge found that the consequence of Courrier and Zimmerman turning Desormeaux loose on the highway where he could cause injury or death to others was

[7] *Childs v. Desormeaux,* [2002] O.J. No. 3289 (Ont. Sup. Ct.).
[8] *Ibid.* at para. 94.
[9] *Anns v. Merton London Borough Council,* [1978] A.C. 728.

reasonably foreseeable.[10] Courrier and Zimmerman knew of Desormeaux's problems with alcohol, they were long-time friends, and they should have monitored his consumption while he was at their home. According to the Trial Judge, the fact that it was a BYOB party did not relieve Courrier and Zimmerman of their duty to monitor and make inquiries of Desormeaux. In fact, the BYOB situation placed more of a duty on them because they wouldn't have known how much their guests were consuming.[11]

However, the Trial Judge found that policy considerations weighed against the imposition of such a duty of care on social hosts. He found that imposing liability on Courrier and Zimmerman would place an inordinate burden on all social hosts. If this happened, social hosts would be obligated to inquire of their guests whether they had consumed any alcohol or medicine before arriving, and then they would have to measure the effects of such consumption. Further, social hosts would be required to make inquiries about their guests' ability to drive at the time of departure, and this would be difficult, especially if the social host had also consumed alcohol.[12] The Trial Judge preferred a legislative, rather than a judicial, solution and accordingly dismissed the action.

The Court of Appeal Decision[13]

The Court of Appeal dismissed Childs' appeal but for different reasons. In its view, the circumstances of the accident did not disclose even a *prima facie* duty of care on Courrier and Zimmerman. The Court held that Courrier and Zimmerman did not provide, nor did they serve, the alcohol consumed by Desormeaux; they were not aware of how much Desormeaux drank at the party (in part because the function was a BYOB affair); and that

[10] *Supra*, note 7 at para. 104.
[11] *Supra*, note 7 at para. 97.
[12] *Supra*, note 7 at paras. 112 – 114.
[13] *Childs v. Desormeaux*, [2004] O.J. No. 2065 (Ont.C.A.).

they were not aware that Desormeaux was impaired when he left the party.[14] Further, the Court of Appeal held that a person's history of drinking is not the basis for imposing any duty on a social host to monitor a guest's drinking at a BYOB party where alcohol is neither provided nor served by the social host.[15]

However, the Court of Appeal left open the possibility that social hosts may be liable to third-party users of the road for damages caused by impaired guests who drive a car, particularly in circumstances where it can be shown that the social host knew that an intoxicated guest was going to drive a car and did nothing to protect innocent third-party users of the road.[16] Further, the Court said that if a social host served a person alcohol to the point of intoxication while knowing the person was likely to drive afterwards, the social host would be contributing to the risk of the guest committing a dangerous act and would be an active participant in creating the danger of an accident due to intoxication.[17]

EXPANDING SOCIAL HOST LIABILITY

The Supreme Court of Canada agreed with the lower courts that claims against private hosts for alcohol-related injuries caused by a guest constitute a new category of claim, but the Court dismissed the appeal, as mentioned above, on the basis that an insufficient proximity existed between Courrier and Zimmerman, and Childs, such that no duty of care arose on the facts at hand. The Court noted that the party was a BYOB affair, the hosts were not responsible for monitoring their guests' consumption of alcohol, and that Desormeaux did not appear to be intoxicated when he left the party.[18]

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[14] *Ibid.* at para. 7.
[15] *Supra*, note 13 at para. 8.
[16] *Supra*, note 13 at para. 10.
[17] *Supra*, note 13 at para. 74.
[18] *Supra*, note 1 at para. 44.

Like the Court of Appeal, the Supreme Court of Canada left open the possibility that liability might be imposed on private hosts in different fact situations. In our opinion, this means that the Court decided the case very much on the facts at hand, and, that given even a slightly different fact scenario, the Court will likely reach an entirely different conclusion regarding social host liability. Accordingly, social host liability is not shrinking; it was merely prevented in the specific instances of the case at hand. In the words of Chief Justice Beverley McLachlin:

> "It might be argued that a host who continues to serve alcohol to a visibly inebriated person knowing that he or she will be driving home has become implicated in the creation or enhancement of a risk sufficient to give rise to a *prima facie* duty of care to third parties, which would be subject to contrary policy considerations at the second stage of the *Anns* test. This position has been taken in some states in the U.S.A. We need not decide that question here. Suffice it to say that hosting a party where alcohol is served, without more, does not suggest the creation or exacerbation of risk of the level required to impose a duty of care on the host to members of the public who may be affected by a guest's conduct."[19]

The Court declined to answer the question of whether a private party host would be liable if he or she more actively participated in the serving or provision of alcohol to a visibly intoxicated guest that he or she knew, or ought to have known, would likely drive a motor vehicle after leaving the party. That fact scenario simply wasn't before the Court. Instead, the Court dealt exclusively with a BYOB party where the only alcohol served by the hosts was three-quarters of a bottle of champagne in small glasses at midnight, and the hosts were both unaware of how much the intoxicated guest had to drink at the party or that he was impaired when he left the party to drive home.

[19] *Supra*, note 1 at para. 44.

The comments of the Chief Justice echo the sentiments of the Court of Appeal in its decision dismissing the appeal from the trial judgment. At para. 74 of the appellate decision, Weiler J.A. had noted:

> "In serving a person alcohol to the point of intoxication while knowing that the person is likely to drive afterwards, the host contributes to the risk of the guest committing a tort against the plaintiff. The host places the guest and users of the highway in a potentially hazardous position and is an active participant in creating the danger of an accident due to intoxication. A person who undertakes to do an act has an obligation not to act carelessly."

In leaving open the possibility of imposing liability on social hosts in slightly different circumstances, the Supreme Court of Canada followed the development of American jurisprudence south of the border. In the U.S.A., many states have imposed liability on social hosts in circumstances where the host has served alcohol to a visibly inebriated guest that the host knew or ought to have known was likely to operate a motor vehicle while intoxicated. The fact scenarios under which liability has been imposed on social hosts in the U.S.A. are remarkably similar to the hypothetical fact scenarios referred to by the Supreme Court of Canada and the Ontario Court of Appeal in *Childs*, suggesting that the law on social host liability in Canada may yet be revised and expanded.

The American cases are illustrative. In *Kelly v. Gwinnell,*[20] a five to two decision of the New Jersey Supreme Court in Appeal, Chief Justice Willentz of the majority said:

> "We therefore hold that a host who serves liquor to an adult social guest, knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle, is liable for injuries inflicted on a third party as a result of the negligent operation of a motor vehicle by the adult guest when such negligence is caused by the intoxication."[21]

And at page 1228:

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[20] 476 A. 2d 1219 (N.J. 1984).
[21] *Ibid.* at p. 1224.

> "It should be noted that the difficulties posited by the dissent as to the likely consequences of this decision are purely hypothetical. Given the facts before us, we decide only that where the social host directly serves the guest and continues to do so even after the guest is visibly intoxicated, knowing that the guest will soon be driving home, the social host may be liable for the consequences of the resulting drunken driving. We are not faced with a party where many guests congregate, nor with guests serving each other, nor with a host busily occupied with other responsibilities and therefore unable to attend to the matter of serving liquor, nor with a drunken host. We will face those situations when and if they come before us."

A common thread that runs through the American cases on social host liability is the active participation that social hosts usually play in the provision of alcohol to visibly inebriated guests when liability is imposed. For example, in *Walker v. Kennedy*,[22] a unanimous decision of the Supreme Court of Minnesota in Appeal, Chief Justice Amdahl said:

> "An essential element for social host liability is that the guest is "given or furnished" alcoholic beverages by the person from whom recovery is sought.... Since it is undisputed that Welin was not "given or furnished" liquor by any member of the Kennedy family, social host liability is inappropriate in the present case, regardless of the fact that Welin was a minor."[23]

However, some courts in the U.S.A. have also recognized that liability may be imposed upon social hosts even when they have not played an active role in the provision or furnishing of alcohol. In *Huston v. Konieczny,*[24] liability was imposed on a teenage host's parents in an action brought for personal injuries sustained by a passenger in a car allegedly driven by an underage driver who had acquired intoxicating liquor during an unsupervised teenage party. The Court made this decision on the basis that the parents (who were out-of-state at the time and knew that there would be no parental or other supervision at the party) authorized the use of their home for a teenage party at which intoxicants would be consumed and that they knew or should have known that their children would furnish alcohol to underage guests. The lack of supervision was therefore found to be relevant;

[22] 338 N.W. 2d 254.
[23] *Ibid*, at p. 255.
[24] 52 Ohio St. 3d 214.

presumably the judge concluded that had supervisors been present, they would have or could have prevented the drunken teenager from driving.

The finding in *Huston v. Konieczny* echoes the analysis used by the Chief Justice in *Childs* in determining whether a duty of care arises in situations where physical harm is foreseeable but the alleged conduct of the defendant is a failure to act. In its decision, the Court recognized that a positive duty of care has been held to exist in paternalistic relationships of supervision and control, such as those of parent-child or teacher-student. The Court said that "[t]he duty in these cases rests on the special vulnerability of the plaintiffs and the formal position of power of the defendants. The law recognizes that the autonomy of some persons may be permissibly violated or restricted, but, in turn, requires that those with power exercise it in light of special duties."[25] This duty of care is analogous to the duty placed upon the absent parents in *Huston v. Konieczny*. We are of the opinion that the Court's decision in *Childs* will not prevent other Canadian courts from reaching similar conclusions if presented with the same fact scenario as the American case, above.

SUGGESTIONS FOR REFORM

Although the Supreme Court of Canada's decision in *Childs* seems at first blush to have closed the door on the imposition of liability on social hosts in BYOB situations where the hosts are unaware of a guest's intoxication, and left the door open for social host liability in other circumstances, there are alternate ways that the law can ensure proper compensation for innocent victims who are injured as a result of the negligence of inebriated, but insolvent, guests. For example, Kirk Stevens, counsel for the intervening party Mothers Against Drunk Driving in the *Childs* case, has suggested that provincial politicians be pressured to impose social host liability legislatively. Ontario already has liability statutes, such as the

[25] *Supra*, note 1 at para. 36.

Occupiers' Liability Act and the *Negligence Act*, which impose liability under certain circumstances.

An analogy can be made between such proposed legislation and the *Occupiers' Liability Act*. The purpose of the *Occupiers' Liability Act* is to impose a duty on owners and managers of property to take care to ensure that people entering onto their property are reasonably safe. Legislatures could be asked to impose a similar duty on people who host private parties where alcohol is available to ensure that intoxicated guests do not operate motor vehicles after leaving the party and cause injury to third parties. While the Supreme Court of Canada recognized in *Childs* that this type of approach may result in unwelcome infringements upon the individual autonomy of party guests, it is our position that the costs associated with the potential injuries that may arise from an intoxicated guest's negligent behaviour far outweigh the costs associated with imposing such a duty upon private party hosts. Homeowners' insurance is already available to cover accidents that occur on a homeowner's property. Perhaps it should be extended to cover social host liability as well.

The defence bar is likely to argue that it shouldn't be the insurance companies' responsibility to bear the burden of paying out on claims where the primary negligence has been at the hands of an inebriated guest, and not the homeowner, especially where the homeowner may have had little to do with the provision of the alcohol that caused the intoxication and led to the subsequent injury. Further, from a defence perspective, to impose liability upon social hosts through legislative enactment would necessarily result in increased premiums for homeowners as social hosts scramble to ensure that they have adequate coverage to satisfy potential claims. However, the costs imposed on the health care system, the social services industry and on the social fabric of Canadian society itself as a result of the carnage left by uninsured motorists is, in our opinion, equally as high.

Another option is to pressure provincial politicians to increase the amount of compensation available through the statutory accident benefits scheme. At present, a third party suffering a catastrophic injury in a motor vehicle accident that occurs on or after November 1, 1996, is entitled to receive a maximum of $1,000,000.00 in medical, rehabilitation and attendant care benefits from their no-fault insurer. The person is also entitled to receive the greater of $185.00 or 80% of his or her net weekly income. There is no provision in the statutory accident benefits schedule for non-pecuniary (pain and suffering) damages. Increasing the amount of compensation available to innocent third-party victims would go a long way towards compensating them in situations where the tortfeasor is insolvent, but of course, there would likely be corresponding increases in the amount of auto insurance premiums as insurers adjusted their rates to ensure adequate profits and reserves.

A final option is to eliminate optional coverage under provincial auto insurance policies. There are two aspects to this suggestion. First, the minimum level of coverage could be increased from $200,000.00 to ensure that at-fault drivers are better positioned to compensate for catastrophic injuries that they may cause. And second, the provision of underinsured coverage could be made mandatory in all auto insurance policies in Ontario to ensure that third parties injured by drivers with no insurance are adequately compensated. Again, implementing either of these options has a corresponding cost in the sense that auto insurance premiums will likely rise. But insurance companies are in a better position to spread the cost of increased premiums amongst the wide variety of users who purchase private insurance.

CONCLUSION

Much of the recent commentary on social host liability in Canada has focused on the proper apportionment and allocation of blame in cases where a third party gets injured as the result of an intoxicated guest's negligence. This paper suggests that the recent Supreme Court of Canada decision in *Childs* is fact specific, and that social host liability is still very much an issue ripe for determination in Canada. It is our opinion that *Childs* does not prevent Canadian courts from finding social host liability in situations where the hosts play a more active role in the creation and exacerbation of risk. Accordingly, social host liability is not shrinking; rather, it is being finessed to ensure that only the proper defendants are held to account for the actions of their inebriated guests. It is our impression that it is only a matter of time before the courts in Canada follow the American lead.

Lost in the discussion of who should be blamed for the negligence of intoxicated guests is the issue of how innocent third parties are going to be properly compensated when at-fault drivers have insufficient insurance or assets to satisfy legitimate claims. This paper suggests that legislative changes can be made to impose liability upon social hosts or to increase the amount of coverage available under the current auto insurance regime to ensure that adequate funds are available. In the final analysis, it is our opinion that the plight of the catastrophically injured person ought not to be overlooked when embarking upon a discussion of who is going to be held liable for the havoc wreaked by uninsured, intoxicated motorists. The law has a role to play to ensure that as far as possible, seriously injured people are placed back in the positions they would have been in but for the negligence of the inebriated drivers that hit them.