

## Controversial Christmas party decision sent back for new trial by Court of Appeal

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A recent decision by the Ontario Court of Appeal, while giving some comfort to employers, is nevertheless a timely reminder of the risks associated with the office party season. The comfort comes from the fact that a highly controversial decision that imposed steep obligations on employers to take positive steps to ensure impaired party-goers stay off the road has been sent back for a new trial. However, the employer's appeal was allowed on technical legal grounds, and employers must still be aware that they owe a duty of care to protect their employees from harm. Further, when serving alcohol to employees, that duty likely extends beyond the workplace.

The case, *Hunt v. Sutton Group Incentive Realty Inc.* (August 14, 2002) involved a receptionist who sued her employer after sustaining serious injuries while driving home in a snow storm after an office party. Hunt, the receptionist, claimed her employer should have intervened to prevent her from driving home. At trial, the court found the employer partially liable, despite the fact that it had offered to make other arrangements to drive Hunt home, and that Hunt's accident had occurred after she had consumed more alcohol at a pub she had stopped at on the way home (See ["Ontario Court: Employers obliged to "personally intervene" to prevent drunk employees from driving home"](#) on our Publications page).

One of the grounds of appeal argued by the employer was that even if it had been negligent, its negligence was not the proximate cause of Hunt's injuries, due to her having had more to drink at the pub before the accident. It asserted that the trial judge's findings of fact were not sufficient to support finding a chain of causation between the employer's conduct and the accident. Alternatively, the employer argued that even if one were to accept the trial judge's factual findings regarding causation, there could not have been a causal connection due to the lapse of three and one quarter hours between Hunt's departure from the office and the accident.

The Court agreed that the trial judge's findings of fact on the issue of causation were flawed, but held that it was not in a position to substitute its own findings on this question. Ultimately, in overturning the trial judge's verdict, the Court of Appeal based its decision not on the causation issue, but on the judge's decision to discharge the jury from hearing the case, a decision which the Court held had been based on the wrong legal principles.

### **WHEN DRINKING AND DRIVING BECOMES PART OF THE JOB**

While the outcome of *Hunt* still remains to be seen, it is clear that in the appropriate circumstances, employers are under a duty to take positive steps to prevent employees from driving while impaired. This is made clear by the Ontario Court of Appeal in *John v. Flynn* (see ["Ontario Court of](#)

[Appeal reverses verdict holding employer liable for road accident caused by employee](#)" on our Publications page). Citing a 1996 decision of the British Columbia Supreme Court, *Jacobsen v. Nike Canada Ltd.*, the Court described the employer's obligations in the following terms:

"In [*Jacobsen*], an employer who supplied a cooler of beer to its employees during working hours was found to have breached its duty of care to an employee when, after work, the intoxicated employee was injured in an accident while driving home. The employee, and other employees, drank openly and notoriously during working hours and displayed obvious signs of impairment. The court held that the duty owed by the employer was equivalent to the duty owed to patrons by commercial vendors of alcohol. Nike provided alcohol and then required, in effect, that the employees drive home from the remote, non-usual, work location. By doing so it made drinking-and-driving part of the day's working conditions. On these facts, the employer's responsibility went beyond merely watching for signs of impairment, and included an obligation to take positive steps to prevent the employee from driving while impaired."

## **POSITIVE STEPS TO A SAFE WORKPLACE PARTY**

This raises the issue of what positive steps an employer can reasonably be expected to take in connection with workplace parties at which alcohol is served. In *Hunt*, the trial judge provided the following suggestions:

"Sutton owed the plaintiff a duty to personally intervene and prevent an intoxicated employee from driving home and certainly more so in the weather conditions existing at the time. ... It was open to the defendant to send the plaintiff home by taxi, if necessary to take her car keys away and to take custody of her car. Alternatively, it should have taken steps to call her common-law husband to come and pick her up. Alternatively, he could have taken her to a local hotel or found somebody else who had not been drinking to do so or to drive her home."

While such measures may be reasonable in many circumstances, they do raise some concerns. For example, is it unlawful confinement to prevent an inebriated employee from leaving? Is confiscating an employee's car or car keys theft? If force is required to prevent the employee from driving, is the employer guilty of assault?

However, there are other less problematic steps available to the employer who wishes to minimize its potential liability during the holiday season:

- Never have an open, unsupervised bar. Ensure there are trained staff who can supervise employees' consumption of alcohol.
- Consider charging for alcoholic beverages. This will moderate consumption.
- Place a limit on the number of drinks served to each employee, by providing a limited

- number of tickets to each employee.
- Make the entire event alcohol-free.
  - Stop serving alcohol two hours before the end of the party.
  - Provide food and a wide variety of non-alcoholic beverages. Food should be rich in starch and protein, as these slow the absorption of alcohol into the bloodstream. Salty, greasy or sweet foods should be avoided, as they make people thirsty.
  - If an intoxicated employee insists on driving home, call the police: driving while impaired is a crime. Provide all attendees with taxi chits or other transportation.
  - Hold the event at a public facility, such as a hotel. The hotel, as the host, will assume some of the responsibility for the consumption of alcohol by guests.
  - If the event is at a hotel, arrange for a block of rooms for the party at a reduced rate.

Implementation of some of the foregoing suggestions will go a long way towards protecting your business, while maintaining a seasonal tradition that helps boost employee morale.

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