

## **CHILDS V DESORMEAUX SOCIAL HOST LIABILITY OR JUST ANOTHER CASE?**

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Within hours after the release of the unanimous decision of the Ontario Court of Appeal in *Childs v. Desormeaux*, Mothers Against Drunk Driving (MADD) were suggesting that the court had established a new “Social Host” tort. Had they? Or, was this another case of “subjective” analysis.

Childs was an appeal of an August 30, 2002 Judgment of Justice Chadwick.

The Plaintiff, Zoe Childs, “Childs”, had been injured when the car in which she was a passenger was struck by a car driven by an impaired driver, the Defendant Desormeaux, “Desormeaux”.

Prior to operating the car, Desormeaux attended a BYOB party at the home of the social hosts, Zimmerman and Courier. Childs sued Desormeaux as well as Zimmerman and Courier, alleging negligence on behalf of each of them which contributed to her injuries.

Justice Chadwick held Desormeaux liable but found that Zimmerman and Courier were not liable. Although he held that Zimmerman and Courier owed Childs a duty of care, he declined to impose that duty on policy grounds.

In his decision, Justice Chadwick concluded that social host liability involved a new duty of care, formulated the duty of care owed by social hosts to users of the road, but held that that duty of care should not apply in the case for policy reasons.

Childs appealed the dismissal of the case as against the social hosts, Zimmerman and Courier to the Court of Appeal. MADD intervened.

Justice Weiler, speaking for an unanimous court dismissed the appeal.

However, she dismissed the appeal, not on policy grounds, but on the basis that on the specific facts of this case, these social hosts did not owe the Plaintiffs duty of care.

In coming to this conclusion, Justice Weiler considered three issues:

1. Was social host liability a new duty of care?
2. Did social hosts owe a duty to users of the road?
3. Should social hosts not be found liable for policy reasons?

The Court of Appeal held that social host liability was a new duty of care.

In coming to this conclusion, the court rejected the submissions of the Plaintiff and the intervener, that social host liability fell within an established category of cases where a duty of care had been recognized. Further, the court specifically concluded that social host liability was not an extension of commercial host liability. It pointed out the significant differences between these relationships.

1. As a commercial host serves alcohol for profit, his relationship with his customers is a contractual one
2. Given the “profit” aspect of the relationship, the parties’ expectations were different.
3. Commercial hosts are regulated by statute.
4. Commercial hosts carry liability insurance as part of their cost of doing business.

In terms of the duty owed by a social host to a user of the road, the court disagreed with Justice Chadwick’s analysis of the duty, and in fact concluded that on the facts of the case, there was no duty owed.

Justice Chadwick found that the social hosts owed Childs a duty because they knew of Desormeaux’s propensity to drink, because it was a BYOB party, and because they had a paternal relationship with him, often allowing Desormeaux to stay at their home and giving him rides when he had been drinking.

The Court of Appeal held that knowledge of a person’s history of drinking was just a factor in determining whether or not the social hosts knew that the driver was intoxicated, not the basis for a duty.

The fact that it was a BYOB party imposed less, not more, of a duty on a social host. The guests brought their own alcohol and decided how much to serve themselves.

In terms of there being a paternal relationship, the court noted that Desormeaux was not a child. The fact that there may have been some expectation with respect to the host taking affirmative steps to prevent him from driving was not the same as a paternal relationship.

In terms of a social host’s obligation to monitor drinking, the court noted that at common law, there was no liability on even a commercial host, absent foreseeability that the patron would drive.

In terms of the policy issues or considerations, the court was of the view that the trial judge's consideration of insurance issues in the context of policy was appropriate, "the availability of insurance as a consideration with respect to how onerous a burden the imposition of liability on a social host would be". The court also was of the view that deterrence was a factor that need be considered. Social consensus or the lack thereof was another factor to consider in deciding the standard of care of what a reasonable person would and would not do. Another factor to be considered was whether or not the imposition of social host liability would result in incremental change to the law. If it had broad ramifications, then it was an issue best left to the legislature.

With respect to policy issues, the court ultimately concluded, "In the end, I am not persuaded by the trial judge's conclusion that legislation would necessarily be required before imposing liability on a social host. Assuming that the difficulties I have outlined above either do not present themselves in a particular case or are overcome, it may be that judicial decisions imposing a duty of care on social hosts in particular cases would incrementally crystalize into rules of general application providing an element of certainty in the law and limiting its ramifications".

## CONCLUSION/ANALYSIS

Should we as home owners refuse to host social events where alcohol is being served unless our guests sign a waiver, and/or before we increase the third party liability limits on our home owners policies?

Should the insurance industry be drafting a new "social host" exclusion to the standard home owners policy or having their underwriters determine the appropriate premium increase needed to cover this new risk?

I believe the answer no for a number of reasons.

1. The appeal was dismissed. There is still not a single decision in which a social host has been found liable to a user of the road.
2. Not only was the appeal dismissed, but the Court of Appeal concluded that the social hosts did not owe the user of the road a duty of care on these facts.
3. In coming to the conclusion that a duty of care was not owed, the Court of Appeal disagreed with the trial judge's analysis of circumstances which would give rise to the imposition of a duty of care.
4. In disagreeing with the trial judge's analysis of the circumstances which would give rise to a duty of care, the Court of Appeal drew a clear distinction

- between a social and commercial host, and noted that the former was not going to be held to the same standard of care as the latter.
5. The court's conclusion with respect to legislation not being required was obiter.
  6. Even if the court's conclusion with respect to legislation could be characterized as persuasive obiter, given the number and perhaps more importantly, the broad social factors the court has set out as policy considerations, it would be a brave court indeed which would step into that breach absent some sort of legislative direction.