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EMPLOYER'S LIABILITY FOR PROVIDING ALCOHOL

By Andrew Tolomizenko

This is the season to be jolly, and if you are going to have staff parties or crew wraps where you supply the alcohol, it's also the season to be cautious. A very complex and evolving topic is that of the employer's liability for impaired employees.

Most of you have heard of the *Hunt vs. Sutton Realty* case where Ms. Hunt, a receptionist at the employer Sutton Realty began drinking in the early afternoon at Sutton's staff Christmas party. Ms. Hunt was drinking while she was on duty answering the phones. Later in the afternoon, and noticing that she was slightly intoxicated, her employer asked her if she needed a ride, or if he could call her spouse to come pick her up. She refused any assistance and, at about 6:30 p.m. on December 16, 1992, she left the office with some other co-workers and went to a nearby bar where she drank some more. At about 8:00 p.m., the party broke up and, in very bad weather conditions, Ms. Hunt got into her car to drive home. Tragically, she lost control of her car and collided with an oncoming vehicle resulting in severe permanent injuries to Ms. Hunt. Ms. Hunt, through her litigation guardian, sued her employer and the bar. The trial judge found Sutton Realty, and the bar, jointly and severally liable for 25% of her damages or \$281,229.

This decision sent shock waves through the corporate community since most employers did not expect such a high standard of care to be imposed upon them during these types of staff functions. However, in the summer of 2002, the Ontario Court of Appeal quashed the trial judge's decision on the ground of a number of errors in law made by the trial judge. The Ontario Court of Appeal did not render a decision on the matter but instead directed a new trial on both the issues of liability and damages. This new trial is yet to be heard.

Another sobering case better related to film location scenarios is a 1996 decision, *Jacobsen vs. Nike Canada*. Jacobsen was a 19 year old warehouseman employed by Nike. In the summer of 1991, Nike instructed Jacobsen to attend at B.C. Place Stadium to assist in constructing a display for an upcoming trade show. On the morning of September 6, 1991, Jacobsen, along with 4 other employees all of whom had greater seniority, began working on the display. They worked throughout the day taking appropriate meal breaks and, at about 7:00 p.m., the manager in charge felt the crew needed a break. He went to his car and returned with chips, pop and a cooler full of beer. Throughout the remainder of the evening the crew worked and drank beer until about 11:30 p.m. The court found that Jacobsen had about 8 beers by that

time. At 11:30 p.m. Jacobsen, with one other crew member, walked to a nearby pub and drank a few more beers, then crossed the street to a second pub and continued to drink until 1:45 a.m. After leaving the last pub, Jacobsen asked the other crew member for road directions to Port Moody where Jacobsen lived. During his drive home, Jacobsen passed out behind the wheel and drove his car into a ditch. The accident resulted in a spinal cord fracture rendering him severely and permanently disabled. In this case, the trial judge found Nike 75% liable for Jacobsen's damages or \$2,039,410.

Of particular importance in this decision is the standard of care the judge imposed upon an employer in these circumstances. He said, "The law imposes a higher standard of care on an employer than on a tavern-owner", primarily because the employer is in a position to monitor the amount of alcohol consumed by its employees. Although the judge did not detail the standard of care expected of an employer in these circumstances, he did make reference to another decision implying that the following standard of care is the least that can be expected: i) to monitor the consumption of alcohol by the individuals, ii) to make reasonable assumptions, from the amount consumed by an individual, that he/she is likely to be impaired, and, iii) to take steps to prevent an individual from driving when you know or ought to know that the person is likely impaired and is likely to drive.

As previously stated, this area of negligence law is complex and continues to evolve. In reading the relevant cases, it is clear that there are many permutations and combinations of facts and issues that can influence a decision. Some of these include: who supplied the alcohol; did the drinking occur at the workplace; did the drinking occur during working hours; did an accident occur during a ride from work or was there some intervening event, such as a stop at a bar; what was the relationship between the employer and the person suing (e.g. was the suing person an employee, independent contractor, simply a guest at a party or a third person injured by an impaired employee); was it reasonable to monitor the consumption of alcohol and was there an attempt to monitor/restrict the consumption of alcohol; did the person seem impaired. These are all matters a court will consider when apportioning liability in these cases.

So, as the holiday season approaches and we get into the spirits, or if you desire to supply your film crew with some beer for a job well done, remember to apply, at least, the aforementioned standard of care if you know, or ought to know that an employee or crew member is driving. ■