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## HOST LIABILITY: PROTECTING YOURSELF AND YOUR EMPLOYEES

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### ***The Facts in Childs v. Desormeaux***

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- This case brought host liability to the forefront in Canadian law
  - Desormeaux attended a BYOB party on New Year's Eve
  - He left at 1:30 AM after consuming 12 beers over 2 ½ hours
  - The hosts served a small amount of champagne at midnight
  - The host walked Desormeaux to his car, asking if he was fit to drive
  - Desormeaux was involved in a head on collision that killed 1 person and rendered Ms. Child paralyzed from the waist down

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## ***Childs v. Desormeaux (2002 – Ont. S.C.J.)***

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- **Trial Judge Decision**
  - A reasonable person in the position of the hosts would have foreseen that Mr. Desormeaux might cause an accident and injure someone else
  - However, no duty of care existed
  - The action was dismissed

## ***Childs v. Desormeaux (2004 – Ont. C.A.)***

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- **Ontario Court of Appeal Decision**
  - Court determined it “cannot accept the proposition that by merely supplying the venue of a BYOB party, a host assumes legal responsibility to third party users of the road for monitoring the alcohol consumed by guests. ... It would not be just and fair in the circumstances to impose a duty of care”.
  - Appeal was dismissed

## ***Childs v. Desormeaux (2006 – SCC)***

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- **Supreme Court of Canada Decision**
  - A *prima facie* duty of care was not established
  - No finding by the trial judge that the hosts knew (or ought to have known) that Desormeaux was intoxicated
  - No positive duty to act, as a host is entitled to respect the autonomy of a guest
    - The commercial standard of care does not apply to social hosts
  - No evidence at trial that anyone relied on the hosts to monitor consumption
  - The SCC dismissed Childs' appeal

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## **The Basics of Host Liability**

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- Business and others acting as hosts can be held liable for injuries sustained or caused by impaired employees/guests
  - Special relationship between the employer and the employee heightens that responsibility
- Liability is best avoided with preventative steps
  - Complete ban on alcohol not necessary, but it must be carefully addressed

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## Employer Host Liability

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- Special relationship exists between employees and employers
  
- Greater degree of responsibility attributed to employers than other types of hosts

## Factors for Liability

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- Courts impose liability where:
  - The employer provided the alcohol to the employee;
  - The employer knew the employee was intoxicated;
  - The employer failed to take sufficient steps to prevent the harm from occurring.

## Employer Host Liability

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- Host liability arises in many circumstances
  - Holiday parties
  - Promotional events
  - End of week “wind down” events
  - Conferences
  - Business trips
  - Industry events
- In all these situations, the common element is that your employees are there because of their relationship to the employer

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## Establishing Employer Host Liability

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- In order to establish liability, the following test must be met:
  - The employer owed the employee a duty of care
  - The employer failed to meet its duty of care
  - There is a causal connection between the breach and the injuries suffered
  - The damages suffered were reasonably foreseeable

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## Scenario – The Employer’s Event

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### ▪ Scenario One

- The employer is holding a thank you event for its employees after meeting a significant sales target
- All employees are invited to drop by the company boardroom where snacks, cake and beer/liquor will be provided
- In order to keep costs down, the event is not catered
  - Employees will serve themselves from a small bar set up in the corner
- The event will be held during working hours, near the end of the day

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## Consumption with Employer Permission

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- Very high standard of care owed to employees in these circumstances
  - The employer is both the host and the provider
  - No “middle man” to help control liability or consumption
- Expectation that employer will provide a safe workplace
- Providing alcohol in the workplace opens up the employer to substantial liability

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## **Jacobsen v. Nike Canada Ltd. (1996 – BCSC)**

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### ▪ **Facts**

- Jacobsen was a 19 year old warehouseman for Nike
- The night of the accident, he was working off site with 4 other workers and 2 supervisors
- Supervisors provided alcohol and Jacobsen consumed 8 bottles of beer
- After work, Jacobsen continued drinking at 2 clubs
- On his drive home, he was involved in a car accident that rendered him a quadriplegic

## **Jacobsen v. Nike Canada Ltd. (1996 – BCSC)**

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### ▪ **Findings**

- As the employer, Nike was required to take reasonable care for the safety of its employees
- Nike failed to meet the standard of care by providing the beer in suspect circumstances, failing to monitor consumption and failing to take steps to prevent the Jacobsen from driving home drunk
- The supervisors ought to have known that a large quantity of beer was consumed, even if they didn't know the specific amount

## **Jacobsen v. Nike Canada Ltd. (1996 – BCSC)**

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- The employer is held to a higher standard than a commercial host
  - There is an obligation to monitor the consumption of the employees
  
- Options for monitoring included:
  - Keeping the alcohol under lock and key
  - Stationing a supervisor near the cooler
  - Asking Jacobsen or his co-workers how much they had to drink
  - Counting the empty cans to make an educated guess
  - Ensuring that Jacobsen was returned home safely

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## **Jacobsen v. Nike Canada Ltd. (1996 – BCSC)**

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### **Total value of the award was \$2,719,213.48**

- General damages - \$251,963
- Special damages - \$65,378.48
- Future Care Agreed - \$ 246,000 (plus G.S.T.)
- Attendant/Homemaker - \$907,500 (plus G.S.T.)
- House modification - \$55,000
- Vehicle - \$90,972
- Past Wage Loss - \$65,000
- Future Wage Loss - \$1,000,000
- "In Trust" Claim for family caretaker - \$37,400

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## ***Hunt v. Sutton Group Incentive Realty (2001 – Ont. S.C.J.)***

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### ▪ **Facts**

- Sutton hosted a “self serve” Christmas party at their offices during business hours
- Hunt drank enough that by late afternoon a manager raised concern about her state
- Hunt left the party and went to drink at a bar with coworkers
- She drove home in poor weather conditions and had a serious accident

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## ***Hunt v. Sutton Group Incentive Realty (2001 – Ont. S.C.J.)***

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### ▪ **Trial Judge Decision**

- The employee was performing work during the party, making this different than a typical social host case
- Sutton owed the employee a duty of care which extended beyond her physical presence at work
- The employer failed to discharge its duty by preventing Hunt from driving home
- Sutton knew or ought to have known that an open bar would make it impossible to control drinking

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## ***Hunt v. Sutton Group Incentive Realty (2002 – Ont. C.A.)***

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- **Ontario Court of Appeal Decision**
  - The test for determining remoteness is the foreseeability that harm may occur
    - If the original act was likely to lead to the intervening act, its presence does not absolve the first party of responsibility
  - The Court found the trial judge made two errors
    - Failed to deal with evidence showing Hunt was not intoxicated when she left the party
    - Failed to deal with assumptions in the toxicologist's report about how much Hunt drank and when
  - New trial ordered

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## ***Implications of Sutton and Jacobsen***

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- **Points to take away**
  - Employers will be held to a high standard when alcohol is being served in the workplace
    - Drinking in the office and during business hours exposes the employer to substantial liability
  - Providing alcohol (particularly self-service) is risky
  - Employers must monitor consumption and should not be consuming alcohol themselves
  - A plan must be developed before the event about how employees and others will get home safely

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## Scenario – The Employer Sponsored Event

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### ▪ Scenario Two

- Your organization is sponsoring a holiday event at a local restaurant
- Employees along with their significant others are invited to participate in a tasting menu comprised of various foods and wine pairings
- The event is being run by the restaurant, under the direction of your organization
- The party is scheduled to start at 7:00 PM on a Friday, after working hours

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## Employer Event at 3<sup>rd</sup> Party Location

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- Less liability as consumption is controlled by trained staff
- Employer must still be careful regarding its choice of location, food and accessibility of alcohol
  - Choose a location accessible by transit or taxi
  - Consider limiting free drinks based on tickets or a cocktail hour only
- This reduces liability, but will not absolve the employer
  - *Clark v. Connell* [1997] A.J. No. 609 (Alberta Court of Queen's Bench)

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## Employer Event at 3<sup>rd</sup> Party Location

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- **Factors which serve to increase liability**
  - Open bar events
  - Management abdicating all responsibility to venue provider
  - Excessive drinking is encouraged or condoned
  - No positive steps taken to ensure safe travel home
  - No company policy exists about the consumption of alcohol
  - The employer did not instruct the bar to be shut down at a specific time or limit the number of drinks to be served at one time
  - The event is held at an inaccessible location

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## Beware of Harassment Claims

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- **Remember Bill 168 Obligations**
  - One employer recently faced an embarrassing public scandal after employees launched civil law suits regarding behavior at an office party
  - A female employee complained she had been groped and harassed at the event where staff was drinking heavily
  - Both herself and a co-worker who corroborated her story felt compelled to leave the firm due to a poisoned work environment

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## Scenario – Informal Employee-Hosted Event

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### ▪ Scenario Three

- A manager has invited his direct reports to his cottage for a team building party on a Saturday (non-work day)
- There is no obligation to attend, but the party is an opportunity for all members of the team to get to know each other
- Alcohol will be provided by the manager himself, without funding from the company

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## Employees Drinking with Management

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- The manager is now a social host, but the event is still considered work-related
  - Accordingly, the employer may still risk liability
- The employer still owes a significant standard of care to its employees for after hours events
- Liability arising from inherently dangerous activities, general accidents due to drinking or sexual harassment
  - Includes both during or after the event

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## Employees Drinking with Management

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- **Minimizing Liability for the Manager and the Organization**
  - Monitor consumption of alcohol by guests
  - Ensure physical premises are safe and in good repair
  - Provide alternative transportation
  - Take active steps to prevent employees who have been drinking from driving home
  - Do not combine alcohol with inherently dangerous activities
  - Keep the event to a reasonable size
  - Require the manager to remain sober

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## Scenario – The “pre-drink”

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- **Scenario Four**
  - Several sales and marketing employees are on a training seminar in another city. Prior to a conference dinner, an employee invites others back to his hotel room for “pre-drinking”
  - Employees of your company and outsiders arrive, each bearing their own alcohol
  - The room’s occupants have a number of drinks and leave for the gala inebriated
  - Management is not present, nor are they aware that “pre-drinking” took place

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## Employees Drinking Privately

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- Reduced liability, since the employer has no control over the situation
  - Duty of care remains for employees
  - Decreases when employers are not aware of the drinking
- Assumption that employer is not providing the alcohol
  - Do not pay for mini-bar or alcohol ordered by room service
- Preventative steps suggested to further reduce liability

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## Employees Drinking Privately

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- **Employers Should Still be Proactive to Avoid Liability**
  - Draft a policy to address alcohol consumption while on business
  - Do not pay for any alcohol consumed in the hotel room
  - Avoid setting up “hospitality suites” where employees serve themselves
  - Ensure managers are aware of their responsibilities regarding alcohol consumption

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## ***John v. Flynn (2001 – Ont. C.A.)***

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- Flynn was an employee of Eaton Yale with a history of alcoholism
- Unbeknownst to his employer, he had consumed a significant amount of alcohol before and during his shift
- He suffered no injuries at work, but was involved in a car accident following his shift and injured John
- The plaintiff alleged that Eaton Yale was partially liable since it knew that employees consumed alcohol at work

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## ***John v. Flynn (2001 – Ont. C.A.)***

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- There was no duty of care between Eaton Yale and the injured driver
  - The employer did not know Flynn had been drinking the night of the accident
  - Eaton Yale did not provide the alcohol
  - There was a policy against intoxication in the workplace
  - The employer was not involved in the accident
- The employer was not liable for the accident caused by Flynn

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## Sources of Liability

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- Liability for alcohol consumption can come from many sources:
  - Civil liability claims, tort (negligence) claims
  - Anti-harassment and anti-violence obligations (Bill 168)
    - Requires employees be free from harassment and violence in all work environments
  - Workplace safety regimes (WSIB, OHSa)
    - Employers have the duty to take all reasonable precautions for the safety of workers
    - Particularly true if the event occurs in the course of employment

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## Tips for Reducing Employer Liability

## **Tips for Reducing Employer Liability**

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- Avoid making alcohol the focus of the event
- Those in charge of the event should limit their own consumption of alcohol
- Provide drink alternatives and food
- Double check your insurance policy's third party liability coverage

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## **Tips for Reducing Employer Liability**

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- Hire bartending staff to monitor consumption and volume of alcohol in mixed drinks
- Host events at hotels/restaurants where alcohol is served by professionals
- Provide safe transportation home
  - Taxis, designated drivers or hotel rooms
- Intervene to prevent drunk driving
  - Confiscate keys, call police

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## **Tips for Reducing Employer Liability**

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- Discourage any drinking games that may arise
- Stop serving alcohol one hour before the party ends
- Do not announce “last call”
- Do not encourage intoxication (double drinks, shooters)
- Do not serve alcohol during work hours on company property

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***Questions?***

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