Moral Blameworthiness:
A Cross-Canada Perspective on Apportionment of Commercial Host Liquor Liability

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1. Introduction

The Ontario Court of Appeal has termed impaired driving a "social evil" plaguing Canadian society.\(^1\) Positively, in 2015, police reported the lowest rate of impaired driving incidents since data was first collected, down 65% from the year 1986.\(^2\) In Canadian tort law, three major Supreme Court of Canada decisions between 1973 and 1995 widened the scope for assigning blame in alcohol-related accidents and assaults. In the landmark decisions of Menow (1973), Crocker (1988), and Stewart (1995), the Supreme Court recognized that commercial establishments, which stand to gain financially from their patrons' intoxication, should shoulder a meaningful portion of damages arising from alcohol-related accidents.\(^3\)

While certain principles regarding commercial liquor liability have been applied consistently across Canada, the exact apportionment of liability to the liable party, or parties, is highly fact specific. Further, there is variation among the provinces in the manner of analyzing a commercial establishment's liability, and in the degree of blameworthiness assigned to it. In this paper, we provide an overview of commercial host liability case law arising out of British Columbia, Alberta, and Ontario, with a focus on the differences that arise in each jurisdiction. We then identify common factors across all provinces that impact on a commercial liability assessment.

2. History

In the seminal decision of Menow (1973), the Supreme Court of Canada held that a hotel pub was partly to blame for injuries sustained by an intoxicated patron after he was evicted from the pub.\(^4\) In finding that the hotel owed a positive duty to ensure that Menow arrived home safely, or was put in the charge of a responsible person, the court noted the existence of an invitor-invitee relationship and the special knowledge that the hotel possessed about the man's level of intoxication, after serving him on its premises. However, the court did not delve into apportionment (beyond finding the plaintiff contributorily negligent), and assigned equal liability to the hotel and defendant driver.

In Crocker (1988), the Supreme Court of Canada recognized that courts have historically been reluctant to impose liability on parties who fail to take positive action. Nonetheless, it held that commercial establishments should be required to intervene to prevent foreseeable harm to intoxicated guests because they stand to gain financially from the sale of alcohol and are in a position to control and supervise consumption.\(^5\) In Crocker, the intoxicated plaintiff was rendered quadriplegic after participating in a snow-tubing contest organized by a ski resort. The Court held the resort 75% liable for his injuries (less 25% for the plaintiff's contributory negligence) for failing to take any steps to dissuade the plaintiff from competing in his apparently intoxicated state.

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3 Jordan House v Menow, 1973 CanLII 16 (SCC); Stewart v Pettie, 1995 CanLII 147 (SCC); Crocker v Sundance Northwest Resorts Ltd, 1998 CanLII 45 (SCC).
4 Ibid.
5 Crocker, supra note 3, at paras 22-23.
In *Stewart* (1995), the Supreme Court recognized a positive duty of liquor-serving establishments to intervene to prevent intoxicated patrons from driving away from the premises. In doing so, the Court expanded the duty of care owed by commercial establishments to include third party motorists at risk of encountering intoxicated guests, in addition to the guests themselves. In *Stewart*, the defendant driver enjoyed several alcoholic drinks at a dinner theatre with his wife and another couple. Two women in the group did not drink and were present throughout the dinner to witness the defendant driver's consumption. Nonetheless, the defendant driver drove the parties home, causing an accident that seriously injured the plaintiff.

While the court accepted evidence that the defendant driver did not appear intoxicated to staff, it nonetheless held that alcohol-serving establishments cannot escape liability on this basis. The duty of care owed to patrons includes an obligation to monitor consumption, and make reasonable inferences regarding a guest's level of intoxication. Nor can an establishment escape liability if the drinking environment is structured in such a way as to make monitoring impossible.

However, on the facts, the court held that the commercial defendant should not be held liable because there was no reason to suspect that the intoxicated defendant would drive when he was in the presence of two sober people who had full knowledge of his drinking that evening. Thus, the court established that merely over-serving a patron to the point of intoxication does not establish liability. Rather, the harm that resulted from the intoxication must have been reasonably foreseeable to the commercial host.

The above decisions provide guidance as to the nature and extent of duties of a commercial establishment that serves liquor. They are less helpful in determining the degree of blame that commercial parties should bear where individual defendants, or plaintiffs by way of contributory negligence, have contributed to the loss. Commentary has suggested that a "rule of thumb" of 15% liability on the part of over-serving commercial defendants exists in the case law, although it has also been recognized that apportionment in these cases involves a highly fact-specific analysis.

Below, we provide an overview of cases in Ontario, Alberta, and British Columbia addressing the issue of apportionment where a commercial host was found partially liable for damages resulting from an alcohol-related accident. While unique cases have arisen where liability has been extended to commercial defendants who do not serve liquor, we limit our analysis to cases involving commercial hosts that profit from the sale of liquor. As will be seen below, most of the case law has arisen from cases involving alcohol-related motor vehicle accidents and assaults.

3. **Analysis of Case Law**

(a) **Ontario**

Arising out of Ontario, the trial decision in *Hague* (1989) was one of the first to deal with commercial host liquor liability after the seminal decision of *Menow*. The facts in *Hague* were similar

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6 *Stewart*, supra note 3.
7 Daniel Reisler, "Updating the 15 per cent rule of thumb: The sobering task of calculating commercial host liability in Ontario case law" (2013) 33:25 The Lawyers Weekly (Canada) News Articles.
8 For example, see *Johnston v. Day*, 2013 ABQB 512 (CanLII), where a taxi cab was hijacked by a drunk driver and driven into a group of bystanders.
9 *Hague v Billings* (HCJ), 1989 CanLII 4065 (ONSC).
to Stewart (decided six years later) in that the intoxicated patron caused a motor vehicle accident, injuring other parties. The defendant patron, Billings, arrived at the defendant hotel's bar intoxicated and was served three to four beers in the span of an hour and a half. The court found that the hotel staff breached their duty by failing to properly observe Billings' intoxication, and continuing to supply him with beer. As was decided in Stewart, the court held that it was reasonably foreseeable, given the location of the hotel on a highway, that an intoxicated patron may pose a risk to other motorists.

Unlike Stewart, the court in Hague addressed apportionment of liability. The trial judge held that the actions of the defendant bar to be "just as blameworthy" as the defendant driver, and apportioned liability equally (50% each). However on appeal, the court varied the trial judge's apportionment, holding that an equal split of liability was "totally disproportionate" to the respective degrees of legal and moral culpability. It held that the conduct of the individual defendant in driving while intoxicated was so reprehensible as to warrant the lion's share of liability. Fault was reapportioned 85% to the defendant driver, and 15% to the defendant pub. However, Hague did not establish any hard and fast rule of apportionment in Ontario.

In Sambell (1990), the court apportioned 20% liability to a defendant pub who had over-served both the plaintiff passenger and defendant driver involved in a motor vehicle accident. This was notwithstanding that an employee of the pub gave evidence that she observed the plaintiff and defendant to be intoxicated. However, in Gouge (1994), the defendant hotel was held responsible for only 5% of the plaintiff's damages after he was injured riding his motorcycle home from a banquet. At the banquet, the hotel served alcohol by way of a cash bar, which allowed guests to purchase multiple drinks at once to bring back to a table. Servers were not aware of who consumed the drinks. The court noted the danger in this method of alcohol service and found that the plaintiff exhibited signs of intoxication, but held that it was reasonable for staff to conclude that the plaintiff had accepted a ride from one the several other guests who offered.

In Francescucci (1996), the court of appeal upheld a trial decision assigning 78% liability to the defendant tavern. The court found that the defendant's employees showed wanton disregard for the life of the defendant driver, and other members of the public, when they carried the highly intoxicated man to his vehicle, unlocked the door, and placed him inside with the keys on his lap. The facts in this case are unusual, and are not representative of the majority of liquor liability cases in Canada.

In Renaissance (2001), the court addressed a commercial host's liability for the plaintiff's injuries sustained in a brawl between two groups of friends. Both groups were drinking alcohol at the commercial establishment. Earlier that evening, a member of one group confronted a man from the other group, ripping his shirt. The manager was informed of the incident and told the parties that fighting would not be tolerated. Later in the night, the groups confronted one another again and various threats and insults were exchanged for three to four minutes before the brawl broke out that injured the plaintiff. The commercial host was ultimately found 15% liable for failing to take

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10 Hague v Billings (HCJ), supra note 9, at page 28.
15 Renaissance Leisure Group Inc. v Frazer, 2001 CanLII 28229 (ONSC).
adequate action prevent the brawl, and the individual primarily responsible for the injury was held 50% liable, with 35% contributory negligence on the part of the plaintiff.

The commercial host then sued one of the group members who instigated the fight for contribution. In assessing liability, the court followed the trial judge's apportionment of 15% of total damages to the commercial host, noting that the commercial host did not have adequate security staff, such that it was impossible to adequately monitor the bar and assess when intervention was necessary. Further, the first confrontation and the three to four minutes of conflict that preceded the brawl suggested that a violent altercation was reasonably foreseeable.

In *Dryden* (2001), the defendant driver consumed four drinks at a nightclub before he struck another vehicle on a highway, killing himself and causing significant brain damage to the passenger of another vehicle. The defendant driver was underage and showed obvious signs of intoxication while being served at the nightclub. The court also heard evidence of previous breaches of liquor service guidelines and protocol, however the court apportioned only 15% liability to the nightclub. *Dryden* is notable for the strong language used by the court in condemning the act of impaired driving and holding the impaired driver primarily responsible: "A person who knowingly and persistently continues to drink to excess and drive a motor vehicle on our highways behaves in a dangerous and reprehensible manner... the lion's share of culpability, both morally and legally, should attach to the drinking driver." It is unclear whether the court considered the impaired driver's status as a minor in determining his culpability.

Five years later in 2006, the jury in *McIntyre* apportioned 30% to the commercial host on the basis of facts similar to *Dryden*. The defendant pub had served the defendant driver Grigg before he struck and severely injured a pedestrian. The jury heard evidence of past instances where the pub failed to enforce "Smart Serve" protocol. An expert testified that Grigg was likely visibly impaired upon leaving the club, however staff failed to intervene and prevent him from driving.

On appeal, the defendant pub relied on *Dryden* to argue that a greater proportion of liability should have attached to the defendant driver. However the appellate court declined to vary the trial decision, finding that the jury's apportionment was not outside the range of reasonableness. The court noted that despite being at the high end of the range of apportionment decisions, the jury had still apportioned "lion's share" of culpability to Grigg.

*McIntyre* is unique in that the Ontario Court of Appeal upheld the trial decision to award punitive damages, although the amount of that award was decreased. The appellate court noted the use of punitive damages in impaired driving cases arising from the United States. It held that punitive damages are appropriate in such circumstances because impaired driving is a "social evil" arising from intentional and reckless disregard for the safety of others. It appears that no other cases have arisen in Canada since *McIntyre* where punitive damages were awarded against an intoxicated driver. However, in the recent decision of *Jalowiec* the court permitted an application to amend pleadings to include a punitive damages claim, finding that "punitive damages would be rare in these circumstances" but that the claim was tenable.

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18 *McIntyre v Grigg*, 2006 CanLII 37326 (ONCA).
19 ibid., at para 72.
20 *Jalowiec v Duchene*, 2016 ONSC 5970 (CanLII), at para 45.
In *Pilon* (2006), the Ontario Court of Appeal introduced a confusing new method of analysis to the issue of liability where a host has over-served both the defendant driver and plaintiff passenger.\(^{21}\) At trial, a portion of the plaintiff's damages were reduced for contributory negligence based on his decision to ride in the defendant driver's vehicle when he was fully aware of the man's drinking that evening. On appeal, the court held that the jury should have been instructed to assess the tavern's liability in two parts: first, for over-serving the driver, and secondly, for over-serving the passenger, thereby impairing his judgment. It held the tavern defendant 40% liable for the 35.5% contributory negligence attributed the plaintiff at trial, ultimately shifting blame from the plaintiff to the commercial defendant. In the end result, the commercial defendant was held 29.2% liable for the plaintiff's damages.

The approach in *Pilon* was upheld in the later decision by the Ontario Court of Appeal in *McLean* (2013). In that decision, the court held that the jury was improperly instructed and overturned the trial decision on apportionment (which had assigned only 1% fault to the defendant pub). The apportionment issue was returned to the parties, who appear to have resolved the issue outside of court. *McLean* is the most recent Ontario decision to address the apportionment issue (in other cases, the plaintiff failed to establish any liability on the part of the commercial defendant), and it remains to be seen whether Ontario courts will continue to apply a two-part liability analysis.

(b) **Alberta**

There is considerably less case law addressing commercial host liability in Alberta, however four decisions are notable in that the commercial defendant was found to have met the standard of care, or was relieved of liability because the injury was not foreseeable. In *Little Plume* (1998), the plaintiff was extremely intoxicated when he arrived at the commercial defendant's bar.\(^{22}\) He sat at a booth and appeared to be dozing off. He was not served any alcohol before the manager asked him to leave and offered to call a cab. The plaintiff walked away from the pub, but was struck by a van while attempting to cross a road.

In assessing the commercial defendant's liability, the court held that it did not owe a duty to "everyone who walks in the door".\(^{23}\) Rather, a positive duty on the part of a commercial defendant to ensure a patron's safe passage home only arises when it serves alcohol to that patron. Here, the pub's only duty was to evict the intoxicated plaintiff, pursuant to applicable liquor legislation, and the court held that the pub manager did so reasonably.

In *Temple* (1998), the plaintiff was assaulted outside a bar by another patron who had been drinking.\(^{24}\) In contrast to the Ontario decision in *Renaissance*, the claim against the bar was dismissed in *Temple*. The court held that the bar met its statutory requirements with respect to internal policies and procedures for liquor service, and had no warning that an altercation was imminent. The plaintiff was known by staff to handle alcohol well on prior occasions, and the individual defendant was not acting in any that would predict the short, violent assault that ensued. The mere fact that the plaintiff and defendant were served alcohol did not support a finding of liability on the commercial host in the circumstances.

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\(^{21}\) *Pilon v Janveauc*, 2006 CanLII 6190 (ONCA).

\(^{22}\) *Little Plume v Weir*, 1998 ABQB 523 (CanLII).

\(^{23}\) Ibid, at para 74.

\(^{24}\) *Temple v T & C Motor Hotel Ltd.*, 1998 ABQB 166 (CanLII).
Similarly, in Lam (2003), the plaintiffs and individual defendants were all patrons at the defendant hotel's premises. Upon leaving a lounge on the hotel premises, the plaintiffs encountered the defendants and a minor altercation ensued. The defendants went to a different bar on the hotel premises, and informed the staff of the altercation. The manager directed staff not to allow the plaintiffs into the pub, and told the defendants to leave through a separate entrance away from where the first altercation occurred. The plaintiffs nonetheless found their way to the far entrance and a fight broke out. While the court recognized that the commercial defendant owed a duty of care to the plaintiffs, it was found to have discharged its burden because it only had "marginal secondhand information" regarding the first altercation, and there was no evidence to suggest a second fight was imminent.

In Duncan (2008), a curling club was not liable for an accident involving a volunteer bartender at the club's annual fundraising event. At the event, two open bars were available to all guests who purchased a ticket. Lyle Duncan was a volunteer bartender, who also drove other volunteers to the event. Tragically, Mr. Duncan and four other volunteers perished in a motor vehicle accident after leaving the event. The medical examiner's certificate indicated that Mr. Duncan's blood alcohol level was .070 mg/100 ml of blood, slightly below the legal limit. However it is unclear whether this measurement accurately reflects Mr. Duncan's blood alcohol content at the time of the accident, and the court does not appear to have heard any further evidence regarding the same.

Mr. Duncan's estate brought a claim against the curling club. The claim was dismissed by way of summary trial, despite the court's finding that the curling club was a commercial host owing a duty of care to the vehicle occupants. The court was not prepared to make a finding as to whether Mr. Duncan's level of intoxication played a causal role in the accident. However, it found that the curling club did not have a positive duty to take action to prevent Mr. Duncan from driving because he did not display apparent signs of intoxication. Somewhat surprisingly, the court held that the curling club's instructions to volunteers regarding their alcohol consumption did not impact on the curling club's duty. The court stated vaguely that nothing turned on the issue of those instructions, since it was found as a fact that Mr. Duncan consumed alcohol that evening.

The reasoning in Duncan departs from the principles established by the Supreme Court of Canada in Stewart. That decision made clear that a commercial host cannot escape liability simply because a patron does not exhibit visible signs of intoxication, or because the environment is structured in such a way as to make monitoring of alcohol consumption impossible. Arguably, there is significant foreseeable risk associated with an open bar event operated by volunteers who may be inexperienced in liquor service. It seems reasonable to expect that the curling club would properly instruct volunteers in the service and monitoring of liquor consumption, and prohibit them from drinking while serving alcohol, as is required by Alberta's alcohol service guidelines. Duncan was not appealed, however this case appears to be an outlier in the body of Canadian commercial host law.

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25 Lam v Forster, 2003 ABQB 264 (CanLII).
26 Ibid, at para 42.
27 Poors v Duncan Estate, 2008 ABQB 211 (CanLII).
28 Stewart, supra note 3, at paras 52 and 56.
Recently in *Knibb* (2017), an Alberta court found that a recreational softball team that organized a fundraising event acted as a commercial host, with the attendant responsibilities. The softball team constructed a beer tent area where alcohol was made available for purchase. The plaintiff consumed liquor at the event before walking home, when he was struck by a passing vehicle. The evidence was unclear as to how much the plaintiff drank while at the tournament. However, the court referred to *Stewart* and noted that the lack of an appropriate monitoring system could lead to the conclusion that the team ought to have known the plaintiff's intoxication level.

Nonetheless, the court held that it was not foreseeable that the plaintiff was in danger when he left the tournament. The plaintiff did not have a car and was a short walk away from his home. He attended the event with an uncle and sober friend, neither of whom felt it necessary to accompany the plaintiff home. As such, the court found that the team members did not have any positive duty to act in the circumstances.

There are no Alberta cases that are instructive on the issue of apportionment. The commercial defendants in *Little Plume, Lam*, and *Knibb* avoided liability because of the unique facts. However, *Duncan* is a unique case that departed from the principles in *Stewart*, which the courts of BC and Ontario have tended to follow closely.

(c) **British Columbia**

In comparison to Ontario, the courts of British Columbia have historically apportioned greater liability to commercial host defendants, with most decisions falling into the 20-50% range. In *Lum* (1997), the defendant driver was served alcohol for several hours by one server at a golf club lounge, before driving away and striking a cyclist. The court discussed the nature of the relative blameworthiness of the commercial host and defendant driver. It found that fault of the server "passive," arising from a desire to avoid the discomfort associated with cutting the patron off. In comparison, the defendant driver's conduct was considered "outrageous," "self-absorbed," "self-indulgent," and "uncaring." Despite strong language condemning the driver's actions, the court assigned 30% liability to lounge, higher than most Ontario cases. Further, 10% contributory negligence was found on the part of the plaintiff cyclist, leaving the defendant driver responsible for only 60% of the plaintiff's damages.

In 2005, *Laface* set a high watermark for assigning blame to commercial defendants. In that case, a hotel pub served the defendant McWilliams but failed to take positive action when an acquaintance advised a doorman of McWilliams' intention to drive while intoxicated. The acquaintance also accompanied McWilliams back inside the pub in an attempt to find a sober person to drive his vehicle, and yelled for help in the middle of the pub. McWilliams drove away in his vehicle and struck five pedestrians who were crossing the road.

Prior to the accident, the manager hired a private investigator to monitor staff performance, whose reports were produced at trial. The reports demonstrated that the hotel manager was aware of frequent breaches of "Serving It Right" guidelines by employees, however staff were only disciplined

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29 *Knibb v Foran*, 2017 ABQB 375
30 *Lum v McLintock*, 1997 CanLII 2151 (BCSC)
32 *Lum*, supra note 28, para 25.
33 *Laface v McWilliams et al*, 2005 BCSC 291.
when the financial interests of the hotel were perceived to be at risk. In finding that the hotel “flagrantly ignored its responsibilities as a commercial host”, the court apportioned 50% liability to the hotel, and 50% to McWilliams.34 This apportionment was upheld on appeal.35

In Holton (2005), 30% liability was assigned to the commercial defendants, although there were two pubs to shoulder the blame. In that case, the plaintiff and individual defendant, MacKinnon, were friends who had spent the evening drinking at two pubs.36 After leaving the last pub, the parties returned to the plaintiff’s house, where they stayed for a short time, before heading to a party. MacKinnon drove the parties throughout the night. Despite that the parties arrived at the plaintiff’s house without harm, the court held that the pubs’ duty to the plaintiff and third parties continued until MacKinnon was put in the charge of a competent, sober individual or until he arrived safely at his own home.

In Hansen (2013), the court of appeal overturned a trial decision where apportionment to the pub was found to be far too low.37 The plaintiff was rendered quadriplegic when the defendant driver struck the vehicle that she was a passenger in. The vehicle had run out of gas and was parked on the shoulder of a dark, winding road. The vehicle’s headlights were off. The defendant impaired driver spent the previous five hours drinking at a pub, and consumed about twelve ounces of whiskey without any food. The defendant pub continued to serve him despite obvious signs of intoxication.

At trial, the judge apportioned only 5% to the defendant pub, for failing to take any action to prevent the individual defendant from driving. The BC Court of Appeal noted the high standard for interfering with a trial judge’s apportionment of liability but found that the apportionment in this case was “grossly disproportionate to [the commercial defendant's] comparative blameworthiness, including their disregard of their statutory obligations.”38 The Court of Appeal assigned 20% liability to the pub defendants, 70% to the impaired driver, and 10% to the driver of the plaintiff vehicle, for failing to activate the vehicle’s lights.

Recently in Widdowson (2017), the individual defendant was served five to six drinks at a pub before driving away and striking a pedestrian.39 The court heard evidence that employees of the pub did not monitor patrons’ consumption in the absence of obvious intoxicated, and that an intoxicated patron would generally be provided water and allowed leave on their own. Nonetheless, in apportioning liability, the court found that the pub did not deliberately disregard its obligations. Rather, the court recognized that errors occur when an establishment is busy or understaffed, and that the circumstances here attracted lesser blame in comparison to Rockwell’s recklessness. The court assigned 75% fault to Rockwell, and 25% to pub.

Widdowson and Hansen show a slight decrease in the degree of fault that BC Courts attribute to commercial hosts. Conversely, the most recent Ontario decisions in McIntyre and Pilon represent an upward trend in the responsibility attributed to commercial hosts in that province.

34 Ibid, at para 189.
35 Laface v. Boknows Hotels Inc. and McWilliams, 2006 BCCA 227 (CanLII).
38 Ibid, at para 36.
39 Widdowson v Rockwell, 2017 BCSC 385.
4. Factors Considered in Weighing Apportionment

Despite some discrepancy in treatment by different courts, the following factors appear to be determinative in an apportionment analysis:

• Negligence versus deliberate disregard: In *Francescucci*, 78% liability was assigned to the defendant tavern for showing "wanton disregard" when employees actively carried a highly intoxicated man to his vehicle, unlocked the door, and placed him inside with the keys on his lap. However, in *Widdowson*, the court held there was “no evidence of deliberate disregard” on part of the pub, which was busy and understaffed, and apportioned 25% liability.

• Apparent danger/risk of injury to the intoxicated patron: In *Knibb*, an intoxicated plaintiff who was injured while walking a short distance home during the summer was not found to be in any imminent danger requiring intervention from the commercial host. However in *Menov*, the commercial host should have taken steps to ensure the plaintiff arrived home safe when discharged from the premises into a cold winter night while in a remote location.

• Special knowledge of a patron's tendency toward aggression or evidence suggesting an assault is imminent: In *Temple, Lum* and *Baron*, the plaintiffs were assaulted by another patron of the bar however the claims against the commercial hosts were dismissed because there was no evidence to support that an attack was reasonably foreseeable. Yet, in *Renaissance*, a prior confrontation where one patron ripped another's shirt and several minutes of verbal arguing proceeding the attack was sufficient to attach 15% liability to the commercial host.

• Special knowledge regarding the patron's level of intoxication and intention to drive: *Stewart* established that a commercial host will not be excused of liability when a patron does not appear intoxicated because it is in a position to monitor consumption. However, in *Laface*, an acquaintance of the impaired driver warned the commercial host of his level of intoxication and intention to drive home, and sought help to arrange alternate transportation. The commercial host failed to act, and was apportioned 50% liability.

• Presence of a sober acquaintance: In *Gouge*, the defendant hotel was held responsible for only 5% of the plaintiff's damages after he was injured riding his motorcycle home from a banquet because several other sober guests had offered him a ride home and it was reasonable for the hotel to conclude he had accepted.

• Impecuniosity of driver: The court in *Lum* held that responsibility placed on commercial hosts is likely to be most effective as a deterrent and that plaintiffs are at risk of the driver being impecunious.

40 *Baron v Clark*, 2017 ONSC 738 (CanLII)
• Staffing/amount of patrons: In *Widdowson*, it was recognized that “mistakes can happen when the establishment is understaffed or is particularly busy”.41

5. Conclusions and Future Considerations

In sum, it is questionable that a "15% rule of thumb" provides guidance in assessing the potential liability of commercial hosts who over-serve patrons that injure themselves or others. While greater liability has historically been apportioned to commercial hosts in British Columbia, recent decisions in Ontario have raised the standard for commercial host liability. As such, while it may never be possible to pinpoint a "rule of thumb" for predicting apportionment, 15% may now represent the lower end of the range of apportionment across Canada. It seems that courts have recognized the utility of apportioning liability for realizing the pragmatic policy objective of keeping intoxicated drivers off the roads.

In general, most decisions across jurisdictions appear to fall with the 15-30% range, absent evidence of wilful negligence or disregard. However, apportionment of fault in commercial liquor service cases is highly fact dependant. Rather than relying on a general rule of thumb, commercial hosts, insurers, and counsel may be best served by considering the factors that impact on a court's assessment of liability, and which may not be addressed in standard liquor service training, such as weather conditions and other potential risks to patrons and third parties.

41*Ibid*, at para 91.
Commercial Host Liability – Case Law Index

**British Columbia**

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<td><strong>Widdowson v Rockwell, 2017 BCSC 385</strong></td>
<td>The plaintiff Widdowson was walking home on a sidewalk when he was struck by a truck operated by defendant Rockwell, who was highly intoxicated, causing severe injuries including brain damage. Rockwell was attempting a right turn but drove his vehicle on to the sidewalk. Rockwell had visited Cambie Bar &amp; Grill and consumed 5-6 drinks. Expert evidence estimated his BAC at .334 mg alcohol/100 ml blood. Rockwell was arrested at the scene of the accident and sentenced to 9 months in jail. Liability coverage was denied on behalf of Rockwell; Rockwell did not defend law suit – ICBC made itself third party to contest liability on behalf of Rockwell. HELD: Host liable despite that defendant likely drank at home after attending pub – still found he was &quot;significantly intoxicated when leaving pub&quot; – <strong>75% to Rockwell, 25% to Pub (Cambie Malone's)</strong></td>
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<td><strong>Hansen v Sulyma, 2013 BCCA 349</strong> (appeal to SCC dismissed with costs – 2014)</td>
<td>The plaintiff Hansen was rendered quadriplegic when the parked vehicle she was sitting in as a passenger was struck by Leprieur. Sulyma was the driver of the plaintiff vehicle who parked on the side of a dark, winding road because it had run out of gas. The plaintiff had suggested Sulyma turn on the vehicle’s hazard lights, but Sulyma dismissed the idea as &quot;silly&quot;. Driving conditions were wet and foggy. Prior to the accident, Leprieur attended a pub on Texada Island for about five hours (he had driven there and taken a ferry). The trial judge found that he was served at least six 2 oz. rye whiskey drinks ($100 tab). One bartender served him until 7:00pm, and then one other served him after the first bartender’s shift ended. The second bartender took note of the drinks already on his tab. She testified that he did not show signs of being “an extremely drunk person, such as falling down or slurring his words” (para 11). However another patron at the pub offered to pay for a room for Leprieur to stay over. An expert estimated his BAC between .147-.167 at the time of collision. The trial judge apportioned liability <strong>70% to defendant; 5% to pub; and 25% to driver, Sulyma</strong> (for failing to activate hazard lights)</td>
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Court may not interfere with trial judge’s apportionment unless “very strong and cogent reasons.” Even so, found that minimal responsibility to pub defendants was grossly disproportionate – re-apportioned 20% liability to pub, 70% to driver, 10% to Sulyma.

**Holton v MacKinnon et al., 2005 BCSC 41**

The plaintiff, the defendant driver (MacKinnon), and a friend were drinking together at two pubs (Crab Shack and Garfinkel's, both defendants). Later, MacKinnon drove the friends to plaintiff's home, where they stayed for a short time. They left the house to go to a party, with MacKinnon driving. A single vehicle accident ensued, rendering the plaintiff quadriplegic. The defendant pubs argued that any duties to plaintiff were discharged when the men returned home.

HELD: Despite the possibility that party drank at the plaintiff's house afterwards, most of drinking was likely done at the pubs. The party likely only spent twenty minutes at the plaintiff’s house after they left the last pub (para 61).

The pubs owed duty of care to reasonably foreseeable third parties who might be harmed as a result of other patrons, including the plaintiff. Pubs owed separate duties to the plaintiff, both as a patron and as a third party coming into contact with another patron (MacKinnon) (para 384). The pubs had a duty to ensure the plaintiff got home safely (for brief period of time), but this is not affected by the concurrent duty to protect him, and others, from harm caused by MacKinnon operating his vehicle while drunk.

Court found that the parties were showing signs of intoxication when they left both the first and second pubs, and employees should have inquired into transportation home and whether any of them were driving (para 390). It was reasonably foreseeable that MacKinnon would present a risk to P and other third parties by driving in an intoxicated state. Pubs should have taken steps to prevent MacKinnon from driving (para 405). Pubs' duty would have continued until the intoxicated MacKinnon was put in the charge of a competent, sober individual and prevented from driving his vehicle, or until he arrived at his own home safely, neither of which occurred (para 424).

Court held the plaintiff contributorily negligent because he was "joint venturer" in drinking and was fully aware of MacKinnon's intoxication. **Apportionment:** 40% MacKinnon, 30% Holton, 15% Crab Shack, and 15% Garfinkel's. Quotes Lum: in pragmatic terms, responsibility place on commercial hosts likely to be most effective deterrent … (para 439). Person who gets into vehicle with intoxicated person must bear portion of burden, although less than driver (para 440).

****Case distinguished from Salm because MacKinnon was not stopped from driving and P was left in care of intoxicated person (in Salm, plaintiff was in care of sober person). Further, MacKinnon himself never arrived home safely (he went to Plaintiff's) and therefore chain of foreseeability was never broken.P 30%
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<td><em>Laface v McWilliams et al</em>, 2005 BCSC 291</td>
<td>McWilliams drank at pub in Steveston Hotel. A friend of McWilliams notified a pub employee of McWilliams' intent to drive intoxicated, and the friend and McWilliams made obvious attempts to find help to get his vehicle home while in the pub (friend gave evidence that she &quot;screamed at the top of her lungs for help&quot;). Hotel had hired a private investigator to examine employees conduct on several prior occasions – reports were produced, showed that employees flagrantly flaunted both the house rules and the Serving It Right guidelines (ie. drinking on the job, over-pouring, and free-pouring went undisciplined).&lt;br&gt;<strong>HELD:</strong> Court found hotel pub did not enforce the &quot;Serving it Right&quot; program requirements, did not discipline employees when it knew of violations. Pub failed to monitor McWilliams' consumption of alcohol. McWilliams showing obvious signs of intoxication. Court gave significant weight to fact that a companion told a doorman that McWilliams was drunk and needed to find someone to drive his car for him – thus had knowledge of risk (para 148-150). &quot;McWilliams' conduct is inexcusable. Similarly, the hotel flagrantly ignored its responsibilities as a commercial host... equally egregious&quot; <strong>Apportionment:</strong> 50% hotel, 50% driver.</td>
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<td><em>Lum v McIntack</em>, 1997 CanLII 2151 (BCSC)</td>
<td>The plaintiff was riding his bicycle when he was struck by a van driven by the defendant driver. The defendant driver's BAC was more than three times the legal limit (286 -291 mg alcohol/100 ml blood). The defendant driver showed no concern for the plaintiff after the accident. He was charged with nine months in jail and a 3-year driving prohibition.&lt;br&gt;&lt;br&gt;Driver had been golfing with friends, drank in lounge for two hours after golf, then stayed and continued to drink after his friends left. Server (Comer) knew the driver well and testified that he seemed upset over marital problems. She sat with him after her shift to eat a salad. She walked out of the lounge with the driver, got in her own vehicle and drove off (para 9). The other server said that the driver appeared drunk but she thought that Comer would prevent defendant from driving.&lt;br&gt;&lt;br&gt;<strong>HELD:</strong> In pragmatic terms, responsibility placed on commercial hosts is likely to be most effective as a deterrent (para 27). The court noted that risk of impecuniosity of a driver. Each case is fact dependent (para 15). <strong>2/3 apportioned to driver, 1/3 to lounge minus contributory negligence (60% driver, 30% lounge, 10% Plaintiff)</strong></td>
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<td><em>Jacobsen v Nike Canada Ltd.</em>, 1996 CanLII 3429 (BCSC)</td>
<td>The plaintiff was young employee provided drinks at end of very long shift as warehouse worker (16 hour shift) – drinks and food supplied by Nike. After shift, plaintiff continued on to two clubs. While driving home he drove into ditch and became quadriplegic&lt;br&gt;&lt;br&gt;Plaintiff was selected to help assist setting up trade show -- had been told to drive to work to transport some items to the show. Supervisors supplied food</td>
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and tub of beer. Younger workers were playing drinking game and attempting to hide how much they were drinking, however they were not monitored and no restrictions were placed on amount they could drink (just told not to get drunk). Plaintiff had consumed 8 beers in 3 hours. The supervisors did not ask whether crew could drive home or required cab. Estimated BAC was .104 - .171 (para 84).

HELD: Duty owed by employer to employee is higher than that owed by an invitor to an invitee (para 42). Employer created conditions of vulnerability (asking P to drive to work then supplying liquor) (para 54). Confirmed that host liability imposes a positive duty to monitor alcohol consumption. Mentions that Nike providing taxi vouchers and discounted rooms discharged its duty at Christmas party. Factors considered: Plaintiff had no prior expectation that he would be drinking that night; no opportunity to make alternate plans for transportation; employer encouraged drinking without any steps to monitor/restrict, or determine if he was intoxicated when leaving work; employer had control over when plaintiff could leave. Notes that the preventative measures would not have imposed a significant burden.

75% liability against employer; 25% against Plaintiff (single vehicle accident)

| Alberta |
|----------------|---------------------------------------------------------------|
| **Knibb v Foran, 2017 ABQB 375** | The plaintiff attended a fundraiser softball tournament that was organized by a local recreational sports team. The team had set up a "beer tent" where alcohol was made available for purchase. The plaintiff consumed liquor at the event before walking home, when he was struck by a passing vehicle. The evidence was unclear as to how much the plaintiff drank while at the tournament but the court referred to Stewart and noted that the lack of an appropriate monitoring system could lead to the conclusion that the team ought to have known the plaintiff's intoxication level.  

HELD: Although the plaintiff may have been intoxicated, it was not foreseeable that the plaintiff was in danger when he left the tournament. The plaintiff did not have a car and was a short walk away from his home. Neither his uncle or a sober friend, who were with him at the event, thought it necessary to accompany the plaintiff home. The team members did not have any positive duty to intervene. |
| **Pears v Duncan Estate, 2008 ABQB 211 (CanLII)** | HELD: Clubs were not host, did not breach duty because no evidence of impairment |
| **Lam v Forster, 2003 ABQB 264 (CanLII)** | The plaintiffs were drinking at a lounge on hotel premises. While leaving, a minor confrontation broke out outside the lounge with the defendants. The defendants then entered a different bar on the hotel premises and advised the |
manager of the prior altercation. The manager advised staff not to let the plaintiffs in and advised the defendants to leave through a different exit away from where the first altercation occurred, which was also away from the taxi stand. For unclear reasons, the plaintiffs ended up at the far exit and confronted the defendants.

HELD: Duty owed to patrons not restricted to dangers posed by consumption of alcohol (para 29). Here, bar owed a duty of care to plaintiff, but standard of care was not breached because it was not reasonably foreseeable that they would be assaulted. They only had “marginal secondhand information as to what had transpired”, and there was no reason to suspect further altercation (para 42).

Cases like this turn on facts (para 36). 0% liability

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<th>Little Plume v Weir, 1998 ABQB 523 (CanLII)</th>
<th>The plaintiff was severely intoxicated when he arrived at bar. He entered, sat down at a table with friends, and was asked to leave after 5-10 minutes. The manager offered to call a cab but no further steps were taken to ensure safe passage home.</th>
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<td><strong>HELD:</strong> The court noted <em>Stewart v Pettie</em> at para 146 – courts have been reluctant to impose liability for failure of an individual to take positive action, but warranted where a special relationship of &quot;invitor-invitee&quot; exists. However, invitor-invitee relationship alone is not enough to establish a positive duty to act – need to have contributed to intoxication. Also notes legislation requiring bar to evict intoxicated persons. Here, bar did so reasonably (no force used, cab offered). Nothing about his behaviour that would have merited call to police. No past interaction with him providing special knowledge about his behaviour.</td>
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"There is no unlimited general duty on the owner of a commercial drinking establishment to ensure that anyone who enters the establishment but is not served alcohol due to an appearance of intoxication is conducted safely home. Each of these cases must be determined on its circumstances, including the relationship between the patron and the bar, the degree of appearance of intoxication and the foreseeability of risk." (para 78)

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<th>Temple v. T &amp; C Motor Hotel Ltd., 1998 ABQB 166 (CanLII)</th>
<th>Plaintiff was assaulted outside a bar by another patron who had been drinking.</th>
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<td><strong>HELD:</strong> Claim against bar was dismissed. The fact of the plaintiff and defendant drinking alone did not lead to liability. Bar staff had no warning – Plaintiff was known on prior occasions to handle drinking well, and defendant was not acting in any that would predict the short, violent assault on plaintiff.</td>
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<td>Baron v Clark, 2017 ONSC 738 (CanLII)</td>
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<td><strong>HELD:</strong> The pub owed duty of care to plaintiffs (patrons who may be injured</td>
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who were at risk of injury from another patron who was over served – proximity established). However, there was no breach of standard of care because the attack was not foreseeable. Although Clark consumed several drinks and got drunk at pub, no evidence that staff knew of a propensity to become violent once intoxicated and nothing in his conduct to suggest he would be a danger. Over-serving alone is not enough.

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<th><strong>Pilon v Janveauc, 2006 CanLII 6190 (ONCA)</strong></th>
<th>Defendant bar over-served both the driver and plaintiff passenger. HELD: The jury should have been asked to apportion responsibility for the appellant's damages in four parts: (1) to the driver (and owner) of the vehicle; (2) to the injured passenger for his contributory negligence; (3) to the tavern for over-serving the driver; and (4) to the tavern for over-serving the passenger. ***First recognition that bar can be liable for overserving a passenger, such that it impaired his decision to ride with intoxicated driver (to reduce contrib neg).</th>
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| **McIntyre v. Grigg, 2006 CanLII 37326 (ON CA)** | ***Appeal from decision of jury trial. Plaintiff was pedestrian struck by vehicle operated by Grigg, who had been drinking previous at a pub. Grigg was speeding, did a wide right turn and also struck a lamp post. BAC was 2-3 times over legal limit (expert evidence demonstrated his blood alcohol level was likely 218 mg alcohol/100 ml blood, and was served up to 18 drinks at the pub). There was evidence that the pub did not follow "SmartServe" protocols. Plaintiff's family also brought action, pursuant to s. 39. At trial, general damages were awarded (70% to Grigg, 30% to McMaster (pub)). Aggravated and punitive damages were also awarded against Grigg, solely. McMaster appealed based on the TJ's instruction to jury, argued TJ should have indicated to jury that "the lion's share of culpability, both morally and legally, should attach to the drinking driver" Dryden (Litigation Guardian of) v. Campbell Estate, [2001] O.J. No. 829 ***Grigg charged with impaired driving but was dropped – convicted of careless driving and fined $500. HELD: TJ's apportionment of liability, on instruction from jury, was upheld. Court agreed that the proposed instruction would have been preferable, but no reason to interfere in the absence of a material misdirection or non-direction, or where the verdict is so plainly unreasonable and unjust that no properly instructed jury would have arrived at that conclusion (para 38). Further, the jury DID attribute lion's share to Grigg and "while perhaps at the high end – is not out of the range of findings in other cases involving commercial host liability" – cites Hague, Francescucci, and Menow (para 39). Re: punitive damages – this is a novel case. No prior case law awarding punitive damages were cited. ***This is in contract to the US where punitive damages are often awarded against impaired drivers (para 55). Court held that instances of impaired driving are appropriate for punitive damages because: drunk driving is
a "social evil," conduct was deliberate and intentional – reckless disregard for lives and safety of others (para 75). Was not sufficiently punished by $500 fine – cites Whiten v. Pilot Insurance Co., 2002 SCC 18 (CanLII) for principle that criminal proceedings are relevant but not necessarily a bar to punitive damages such as where a prescribed fine may be disproportionately small to the level of outrage the jury wishes to express. Court held that punitive damages were appropriate but amount too high – reduced to $20,000.

***NOTE: Andrew Grigg played for Tiger-cats from 8 years and was inducted into Hamilton Tiger-Cats Walk of Fame in 2013

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The corporate plaintiffs were owner and manager of a resort who were held 15% liable for damages after an altercation occurred in cocktail lounge, injuring a patron, Mellanby. The plaintiffs brought a claim for contribution against a friend of Mellanby, Frazer.

Facts: Two groups of friends engaged in a brawl in a pub. On the night of the brawl, the pub was over capacity (licensed for 281 patrons – 317 were admitted) There was a "first incident" where a man from one group (Chapple) attempted to dance with a woman who was dating a man from the other group. The boyfriend confronted Chapple and Chapple ripped the shirt of the boyfriend. The shirt was owned by Frazer. Manager was informed of this incident by staff. She spoke directly to Chapple and the boyfriend, told them fighting would not be tolerated.

Frazer later approached Chapple and requested he pay $30 for the shirt. Various threats and insults were exchanged for 3-4 minutes ("Second incident"). A brawl then broke out between the groups. Mellanby was injured.

HELD: In assessing apportionment of liability between Frazer and the plaintiffs, the court assessed the plaintiffs' preparedness for dealing with situation. It noted that the plaintiff commercial hosts did not have any security staff as it was decided this would "lower the tone". Security thus fell to general manager who was not trained to deal with security in bars of this size (para 77). The court accepted expert evidence that there should have been security staff visible to deter fights, given size of bar and time of year with mixed local residents and summer visitors. This was a case where " in the words of Sopinka J., “the establishment… intentionally structured the environment in such a way as to make it impossible to know when intervention [was] necessary” and that, by so doing, the Plaintiffs were in breach of the duty of care owed to their patrons—including Mellanby." (para 82). There was 3-4 minutes of raised voices, bad language, pushing – risk that a violent altercation would ensue was reasonably foreseeable. Adequate security measures would have permitted intervention and prevented escalation into the brawl that followed. The plaintiff commercial hosts should have ejected instigators after first incident – first incident was "not trivial" and by failing to eject these patrons, manager was taking a calculated risk, which was reasonably foreseeable, that an altercation would break out leading to liability (para 85). Quoted expert "failure to eject participants in a skirmish goes
against all the principals [sic] of reasonable operation… Allowing arguments to fester and grow with further consumption of alcohol is a sure way to provoke a reoccurrence. Typically, a scuffle raises the participants aggressiveness and they are only likely to cool off if they are physically separated” (para 84)

Apportionment: 80% to Frazer (fight instigator); 20% to the commercial hosts.

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<th><strong>Hunt v Sutton Group Incentive Realty Inc., 2001 CanLII 28027 (ONSC)</strong></th>
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| Plaintiff was an employee of a real estate office, attending a work party but was still performing office duties while party was going on. She was showing signs of intoxication by 4pm and her employer advised he would be calling her common law partner to pick her up if she carried on. After the party, the plaintiff and some coworkers went to a pub and continued to drink (court found she likely had 2 drinks). She left the pub around 8 pm and drove home (winter conditions), and was involved in a single vehicle accident. Pub did not defend action.

Held: The evidence demonstrated that the Plaintiff was showing signs of inebriation both at the work party and at the pub. Employer owed duty after supplying alcohol. Chain of causation was not broken by plaintiff attending pub after because the pub was a natural and probable result of the original negligence (foreseeable she would go to pub to continue drinking) – distinguished from Flynn. Thus, duty extended beyond the work premises – ought to have foreseen dangerous driving conditions, should have taken positive steps to prevent her from driving (para 55).

Pub served Plaintiff alcohol, triggering duty of care (para 62) and it was foreseeable that driving home at night in a snowstorm was dangerous (para 64). Pub did not discharge positive duty to "get her a taxi home, to require her to hand over the keys to her motor vehicle or alternatively, and if necessary, even to call the police" (para 65). Pub and employer held jointly liable for 25% (court held it was "impractical" to quantify respective degree of negligence, but did not explain why).

Plaintiff 75% contributorily negligent – self-induced, "self-indulgence", ought to have foreseen her judgment would become impaired and misjudge ability to drive.

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<th><strong>Dryden (Litigation Guardian of) v. Campbell Estate, [2001] O.J. No. 829</strong></th>
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<td>Plaintiff (13 year old boy returning home from Christian rock concert) was struck by defendant (18 year old – underage in ON) who was &quot;grossly&quot; inebriated, operating a truck. Defendant Campbell had a history of alcoholism and of driving drunk frequently, even after friends made efforts to physically remove keys from him. Campbell and his friend (Parchem) were drinking throughout the day, and Campbell was driving drunk at a high speed – dimmed dashlights to obscure speedometer and turned up music to drown out passenger's protests. Arrived at a very large nightclub (NRG; capacity 1000) in the evening. Club had 2-3 security staff at entrance; claimed it had policy to pay for taxi cab home if a patron needed it but could not pay. ***No insurance</td>
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policy on the truck*** Post-accident, Plaintiff had reduced IQ (considered mentally challenged).

HELD: Ample evidence that Campbell was visibly intoxicated while at NRG, purchased and consumed alcohol there, 4 drinks (obvious signs: "stumbling, slurring speech, spilling drink, groping a woman" – para 68). None of this attracted attention of NRG staff, except fact that he had a cap on. BAC was 214 mg/100ml.

Parchem owed duty to other users of the road, should have prevented Campbell from driving.

"Given that catastrophic injuries can result from the operation of a motor vehicle by an inebriated person, a high standard of care is imposed on commercial establishments which supply alcohol, in order to ensure that they do not create a danger to users of the highways." (para 92)

Standard of care: relied on "SIP programme" – check for underage patrons, assess prior drinking, monitor service, check for driving, arrange for safe transportation.

Apportionment (para 219): Campbell – 80%; Night club (Stars Inc.) – 15%; Parchem (friend) – 5%. "Parchem's direct involvement with Campbell ended several hours before Campbell left NRG. The staff at NRG, on the other hand, admitted this underage patron, supplied alcoholic beverages to him even though he exhibited signs of intoxication, and permitted him to drive away from the premises without ensuring that he could do so safely." … Campbell behaved in accordance with past patterns, resisted attempts to stop him from driving intoxicated.

"A person who knowingly and persistently continues to drink to excess and drive a motor vehicle on our highways behaves in a dangerous and reprehensible manner. When others are drawn into the vortex of this conduct and are found to have been contributorily negligent, the lion's share of culpability, both morally and legally, should attach to the drinking driver." (para 215)

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<th>Francescucci v. Gilker, 1996 CanLII 3109 (ONCA)</th>
<th>The Ontario Court of appeal upheld a trial judgment finding a pub 78% liable, finding that “[the pub’s] employees displayed wanton and reckless disregard for the life and safety of Gilker and other members of the public when they picked up Gilker in his highly inebriated state, carried him to the side door of the restaurant, unlocked the door of his automobile and placed him behind the wheel of the car before tossing the keys into his lap and shutting the door.”</th>
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<td>Whitlow v 372008 Ontario Ltd., [1995] OJ No 77</td>
<td>Plaintiffs were wife and two brother of deceased, who died after falling down stairs leading to men's washroom in a tavern (Cross-Eyed Bear). The deceased had been drinking at a Royal Canadian Legion before attending the tavern. The causes of death were found to be acute alcohol intoxication and skull fracture.</td>
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Canvassed impaired cases – range of liability of commercial establishment 0-33%

HELD: Both establishments over-served the deceased when he was already visibly intoxicated. The Legion was held 5% liable. The tavern was assigned greater liability (15%) because a protruding bulkhead over the stairs was dangerously low, constituting a hazard. Deceased found 80% contributorily negligent.

**Gouge v Three Top Inv Holdings Inc., [1994] OJ No 751**

Plaintiff attended his union’s annual dinner for members, which was hosted at a hotel. Alcohol was served from a cash bar where patrons could walk up, purchase several drinks, and return to their table. The plaintiff was offered several rides home from acquaintances, but declined and rode his motorcycle home, injuring himself. Court heard evidence from staff of observed intoxication.

HELD: Intoxication was apparent to hotel staff. Cash bar was structured in a way that a patron's drinking could not easily be monitored or prevented where intoxicated. Had there been table service or a limited number of drink tickets available, the hotel would be in a better position to stop plaintiff from drinking. The court apportioned 5% of damages to the hotel.


Plaintiff was passenger in a vehicle driven by intoxicated friend. The group had been drinking before arriving at a pub (plaintiff estimate 12-15 beers). Defendant driver was obviously intoxicated. A waitress gave evidence that she was concerned about their ability to drive (red eyes, smelling of alcohol, late at night), however they were served beer and no one questioned them about driving or notified police who were stationed across the street.

HELD: Didn’t matter that parties had been drinking before – bar added to risk. The bar was aware they would be driving and took no positive action whatsoever. Apportionment: 50% defendant driver, 20% Squire Tavern, 30% plaintiff’s contributory negligence.

**Hague v Billings, [1989] OJ No 630**

Defendant driver, Billings, was intoxicated when he collided with an oncoming vehicle, killing a woman and injuring her two daughters. Billings had been drinking and smoking marijuana with friends since 9:30 a.m. The group went to a tavern where they were served one beer but refused a second because of obvious signs of intoxication. The tavern owner attempted to persuade Billings to give the keys of his car to a friend who appeared more sober, but Billings refused. The group went to a hotel bar, where Billings was served 3-4 glasses of beer over 1.5 hours. The court heard expert evidence that the amount of

HELD: The court held that the tavern had a positive duty to take action to prevent Billings from driving, and that he should have called the police to intervene, which he had done on a prior occasion. However, it held that the plaintiffs failed to provide evidence of how the police would respond or whether the police would have been successful in stopping Billings. With respect to the
The hotel defendant appealed the trial decision on several issues, including apportionment.

**HELD:** Court overturned 50-50 apportionment and assigned 85% fault to drunk driver, 15% to pub. "Without in any way diminishing the legal responsibility cast on the tavern not to serve liquor to an intoxicated person, it seems to me that the conduct of Billings in all the circumstances of this case was so reprehensible as to require that he be fixed with the largest degree of liability."