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Commercial Host Liability, Apportionment of Fault and the Breached or Uninsured Co-Defendant

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1. Introduction

The Ontario Court of Appeal has termed impaired driving a "social evil" plaguing Canadian society.[1] 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.[2]

While certain principles regarding commercial liquor liability have been applied consistently by the Canadian courts, 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. There are also variations among provinces with respect to joint and several liability and this can have a significant impact on who ultimately must satisfy the judgment in cases where the impaired driver is uninsured.

In this paper, we provide an overview of commercial host liability case law and an analysis of some of the factors that can influence the commercial host's potential exposure. With a particular focus on British Columbia and Alberta, we conclude with a discussion of circumstances in which the establishment's insurer may find itself exposed to a judgment in excess of the amount associated with it insured's proportionate degree of fault.

2. The Evolution of Commercial Host Liability

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.[3] 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

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[1] *McIntyre v Grigg,* [2006] O.J. No. 4420 at para. 72 (Ont. C.A.).
[2] *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).
[3] *Ibid.*

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.[4] 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.

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.[5] 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.

Below, we provide an overview of cases in 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[6], we limit our analysis to cases involving commercial hosts that profit from the sale

[4] *Crocker, supra* note 3, at paras 22-23.
[5] *Stewart, supra* note 3.
[6] 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.

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. The Commercial Host's Portion of Fault: Principles from the Authorities in Alberta & BC

(a) Alberta

The case law addressing commercial host liability in Alberta, is not extensive. 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.[7] 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".[8] 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 manger did so reasonably.

In *Temple* (1998), the plaintiff was assaulted outside a bar by another patron who had been drinking.[9] 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 way 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.

Similarly, in *Lam* (2003), the plaintiffs and individual defendants were all patrons at the defendant hotel's premises.[10] 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

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[7] *Little Plume v Weir,* 1998 ABQB 523 (CanLII).
[8] *Ibid,* at para 74.
[9] *Temple v. T & C Motor Hotel Ltd.*, 1998 ABQB 166 (CanLII).
[10] *Lam v Forster,* 2003 ABQB 264 (CanLII).

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.[11]

In *Duncan* (2008), a curling club was not liable for an accident involving a volunteer bartender at the club's annual fundraising event.[12] 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.[13] 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.

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

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[11] *Ibid,* at para 42.
[12] *Pears v Duncan Estate,* 2008 ABQB 211 (CanLII).
[13] *Stewart, supra* note 3, at paras 52 and 56.

responsibilities.[14] 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.

(b) British Columbia

The courts of British Columbia have historically apportioned liability to commercial host defendants in 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.[15] 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.[16] In comparison, the defendant driver's conduct was considered "outrageous," "self-absorbed," "self-indulgent," and "uncaring".[17] Despite strong language condemning the driver's actions, the court assigned 30% liability to lounge. 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.[18] 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.

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[14] *Knibb v Foran,* 2017 ABQB 375
[15] *Lum v McLintock,* 1997 CanLII 2151 (BCSC)
[16] *Ibid*, at para 26.
[17] *Lum, supra* note 28, para 25.
[18] *Laface v McWilliams et al,* 2005 BCSC 291.

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 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.[19] This apportionment was upheld on appeal.[20]

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.[21] 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.[22] 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."[23] 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.[24] 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,

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[19] *Ibid,* at para 189.
[20] *Laface v. Boknows Hotels Inc. and McWilliams*, 2006 BCCA 227 (CanLII).
[21] *Holton v MacKinnon, et al.,* 2005 BCSC 41 (CanLII).
[22] *Hansen v. Sulyma*, 2013 BCCA 349 (CanLII).
[23] *Ibid,* at para 36.
[24] *Widdowson v Rockwell*, 2017 BCSC 385.

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.

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 *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 *Menow,* 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* and *Baron,* [25] 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.

- 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.

[25] *Baron v Clark,* 2017 ONSC 738 (CanLII)

- Presence of a sober acquaintance: the patron's presence in the company of other sober guest may entitle the establishment to conclude that the patron will be safely attended to.

- Staffing/amount of patrons: In *Widdowson,* it was recognized that "mistakes can happen when the establishment is understaffed or is particularly busy".[26]

5. Contributory Negligence and the Apportionment of Fault to the Commercial Host

The aforementioned principles governing apportionment of fault generally indicate that, absent egregious conduct on the part of the commercial establishment, its proportionate share of fault should be less than 50%, and often considerably less than 50%. Thus, where there are funds to satisfy a judgment on behalf of the co-defendant intoxicated person, and any others who may have contributed to the loss, the commercial host and its insurer may face comparatively limited exposure. However, the fact that the case law suggests that there is an informal cap around the 50% mark may be of little assistance to the establishment that finds itself liable alongside an impecunious co-defendant.

The starting point to appreciating the risk that a commercial host faces when liable alongside an impecunious co-defendant begins with the principle of joint and several liability. If the vehicle operated by the intoxicated patron is uninsured, the commercial establishment and its insurer face real risk of increased exposure on account of the principle of joint and several liability.

In Alberta, and almost every other province in Canada, there is joint and several liability as between two at-fault defendants even in cases where contributory negligence has been found as against the plaintiff. In Alberta, a finding of contributory negligence on the part of the Plaintiff will not sever joint and several liability. The commercial host and its insurer still face the risk of joint and several liability even when the Plaintiff has been found to be negligent.

However, in BC, there is a lifeline for the commercial host. The *Negligence Act*, at sections 1, 2 and 4, sets out that there is several liability as against each defendant when the plaintiff is contributorily negligent. Thus, a finding of contributory negligence on the part of the Plaintiff in a British Columbian case can, depending on the facts, ensure that the commercial host is accountable only for the portion of damages equal to its share of fault.

In sum, the principle of joint and several liability is a risk for the liable commercial establishment, and its insurer, in both British Columbia and Alberta. In Alberta, however,

[26] *Ibid,* at para 91.

that risk is not abated by the possibility of a finding of contributory negligence on the part of the Plaintiff.

6. Implications when a co-Defendant Impaired Driver has an Automobile Policy

The risk that a commercial host defendant faces due to the principle of joint and several liability is enhanced when the negligent co-defendant is an uninsured motorist.

From the outset, it is important to distinguish between a motorist who is intoxicated contrary to his or her obligations, and a purely uninsured motorist. There are material differences between British Columbia and Alberta with respect to the ability of an automobile insurer to recover against its insured, but the provinces are consistent in that an injured third party has recourse against the impaired driver's insurance policy up to its limits assuming, of course, that policy exists.

In British Columbia, an impaired operator of a motor vehicle is likely to be in breach of the provisions of his or her insurance policy. In that event, the Plaintiff continues to have a claim *against the policy* as a function of statute. In British Columbia, section 55 of the *Insurance (Vehicle) Regulation* B.C. Reg. 447/83 addresses breaches of the policy's conditions. Regarding intoxication, it provides as follows:

> (8) An insured shall be deemed to have breached a condition of section 49 and Part 6 where
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> (a) the insured is operating a vehicle while the insured is under the influence of intoxicating liquor or a drug or other intoxicating substance to such an extent that he is incapable of proper control of the vehicle,

The relevant provisions governing the plaintiff's rights against the breach motorist's policy, and the automobile insurer's abilities in that context, are set out in sections 76 and 77 of the *Insurance (Vehicle) Act* R.S.B.C. 1996 c. 231 The automobile insurer can determine that the intoxicated driver is in breach of the policy's terms and conditions. The automobile insurer will typically add itself as a statutory third party to the plaintiff's action. Standing as a statutory third party enables the insurer to defend the claim and settle it if it sees fit. The insurer can then pursue the intoxicated driver for recovery of the amount paid to the plaintiff, provided that amount was arrived at in good faith and on notice to the driver.

In Alberta, the arrangements are somewhat different, but the implications for plaintiffs and jointly liable co-defendants are the same. The standard automobile policy in Alberta is the S.P.F. No. 1. Section A contains the third party liability coverage. When the vehicle insured pursuant to an S.P.F. No. 1 is involved in an accident attributable to an intoxicated patron, the automobile insurer remains obligated to respond to third party liability claims and to make available to the coverage under Section A. Simply

put, the injured third party continues to have recourse to the Section A third party liability insurance. Section 579(4) of Alberta's *Insurance Act* is the key provision.

On the defence side, the automobile insurer's obligations are favourable to the position of a commercial host as a party should not face being jointly liable with an impecunious co-defendant.

Effectively, the insurer of the breached motorist will defend the case, and may settle it for an amount up to the policy limits. Alternatively, the matter may proceed to trial. The automobile policy is in play vis-à-vis the Plaintiff's claim. Accordingly, in the intoxicated driver scenario, provided that the policy limits on the vehicle are sufficient to meet with the settlement or judgment, the commercial host may well only be responsible for payment of the amount associated with its degree of fault.

7. Implications when a co-Defendant Impaired Driver has No Insurance

The circumstances are different when the operator was uninsured because there was no automobile insurance policy on the vehicle. This is the uninsured driver scenario wherein there is no policy of automobile insurance that responds on account of the operator's liability to the injured third party. A claim made against an intoxicated patron who is uninsured because there was no automobile liability policy on the vehicle can have significant consequences for the co-defendant establishment (and its insurer) if it is determined to be jointly liable to the injured third party as a consequence of its service of alcohol to the intoxicated driver.

When a claim is made against an uninsured driver, the Albertan plaintiff can receive funds from the Motor Vehicle Accident Claims Program pursuant to the *Motor Vehicle Accident Claims Act*. However, the Alberta program is only engaged when there is no liable party that can satisfy the entirety of the damages award to the plaintiff. Put another way, if there is a liable co-defendant that has sufficient funds to pay the judgment, the Motor Vehicle Accident Claims Program will not respond. Accordingly, as a result of the principle of joint and several liability, the liable co-defendant is potentially exposed for more than its share of the loss. The insurer of that liable co-defendant can likely expect to pay in excess of the amount that corresponds with the percentage of its insured's fault.

Similarly, in BC, there is a fund established pursuant to section 20 of the *Insurance (Vehicle) Act* to compensate innocent plaintiffs who are injured by an uninsured motorist. Both programs have a maximum limit for all personal injuries arising from an accident in the amount of $200,000.

Where there is no liability on the part of the plaintiff, such as in the case of an innocent motorist who has the misfortune of being struck by an impaired driver, the principle of joint and several liability will apply irrespective of whether the accident occurred in Alberta or British Columbia. However, depending on the jurisdiction, things can look quite a bit different when there is contributory negligence on the part of the plaintiff. As

discussed above, in Alberta, liability is not several where there is contributory negligence on the part of the Plaintiff. Thus, the insurer of a liable commercial host may face greater exposure in Alberta than in BC if the liable co-defendant driver is uninsured.

By way of example, an individual decides to take a ride with someone who they know is impaired. An accident occurs and the passenger is injured. The driver of the vehicle became intoxicated at a commercial establishment and is uninsured. The passenger commences an action against the driver and the commercial establishment for compensation for personal injuries. The court determines that the passenger is 15% contributorily negligent, the commercial establishment is 25% liable, and the impaired driver is 60% liable.

In Alberta, the commercial establishment and the uninsured impaired driver are jointly and severally liable to the plaintiff. This allows the plaintiff to recover the entirety of her judgment against the commercial establishment (and its insurer). The commercial establishment's only recourse is to personally pursue the uninsured driver for his proportionate share of liability. This is an endeavour with an uncertain outcome.

In BC, the commercial establishment and the uninsured impaired driver are only severally liable because of the plaintiff's contributory negligence. Thus, the plaintiff can only collect 25% of her judgment against the commercial establishment (and its insurer) and must pursue the uninsured impaired driver for the remaining 60% of her damages.

In both provinces there is no ability for the commercial host's insurer to make a claim against the funds established for innocent plaintiffs as those funds are the "last resort" and only pay where the plaintiff is completely incapable of pursuing other parties. So even though the uninsured impaired driver is incapable of paying any portion of the plaintiff's damages, the commercial host remains liable for the entirety of the judgment without assistance from the funds.

8. Conclusions and Future Considerations

In summary, it is questionable that a "15% rule" provides guidance in assessing the potential liability of commercial hosts who over-serve patrons that injure themselves or others. As such, while it may never be possible to pinpoint a clear rule for predicting apportionment, 15% may now represent the lower end of the range of apportionment. 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, 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.

However, the prospect of a lower percentage apportionment may only be useful to the commercial host in these contexts: 1) where there intoxicated co-defendant driver

procured an automobile insurance policy with adequate third party liability limits; and 2) in British Columbia, where there is contributory negligence on the part of the Plaintiff. The commercial host's actual exposure may be greater than its proportionate share of fault when a defendant in an Alberta matter faced with joint and several liability, and particularly so when the co-defendant driver is uninsured.