LIABILITY ISSUES

Social hosts were denied summary dismissal after a drunken guest got into an accident, injuring the plaintiff, after the guest had first made it home safely.

***Williams v Richard*, 2018 ONCA 889**

FACTS AND ISSUES:

Mr. Williams and Mr. Richard were work colleagues and got together several times a week after work to drink beer. On the day in issue, Mr. Williams consumed approximately 15 cans of beer over the course of about 3 hours at the residence of Mr. Richard's mother, Eileen Richard. Beyond threatening to call the police, Mr. Richard did not do anything further to prevent Mr. Williams from driving drunk. Shortly after leaving Mrs. Richard's residence, Mr. Williams loaded his children in his car and drove the babysitter home.

Mr. Richard and Mrs. Richard accompanied his mother to a store to buy cigarettes. On their way back home, Mr. and Mrs. Richard came upon the scene of Mr. Williams' accident. Mr. Williams was ejected from the vehicle and died from his injuries. Mr. Williams' children were in the vehicle and were alleged to have sustained injuries.

Mr. Williams' children and wife commenced two actions that were premised on the fact that Mr. and Mrs. Richard breached their duty of care as social hosts. Mr. and Mrs. Richard brought a motion for summary judgement, asserting that they did not owe a duty of care to Mr. Williams' children. The motion judge granted the summary judgment application and stated that the Plaintiffs had failed to establish the existence of any duty of care owed by Mr. or Mrs. Richard. Alternatively, the motion judge relied on the case of *John v Flynn* and concluded that if a duty of care did exist, the duty expired when Mr. Williams arrived safely home before departing to drive the babysitter home.

This appeal raises the following issues:

1. Did the motion judge err in her duty of care analysis regarding foreseeability and/or proximity?

2. Did the motion judge err in her reliance on *John*?

3. Should this court consider the issues of whether any residual policy considerations suggest a duty of care should not exist and whether the respondents met the applicable standard of care? If so, how do those issues impact the result?

HELD: Appeal allowed; motion judge's order set aside and the cases were remit to the Superior Court for trial

The Court reviewed the legal principles for a duty of care analysis relating to social host liability.

a. The Court summarized the leading case on social host liability is ***Childs v Desormeaux***:

> [18] ***Childs*** is the leading case in Canada regarding social host liability. The Supreme Court applied the ***Anns*-*Cooper*-*Odhavji*** framework to conclude that the social hosts in that case did not owe a duty of care to the plaintiff, a public user of the highway who was injured by the hosts' intoxicated guest: at paras. 11-15, citing ***Anns v. Merton London Borough Council*** (1977), [1978] A.C. 728 (H.L. Eng.); ***Cooper v. Hobart***, 2001 SCC 79 (CanLII); [2001] 3 S.C.R. 537; ***Odhavji Estate v. Woodhouse***, 2003 SCC 69 (CanLII), [2003] 3 S.C.R. 537. The outcome of Childs hinged on two issues: foreseeability and proximity.
>
> [20] In ***Childs***, as in the present case, the court was concerned not with an overt act by the social hosts but with their alleged failure to act. In other words, the claim was based on a failure to stop Mr. Desormeaux from driving while intoxicated. In these circumstances, the court found that the plaintiff had the onus of establishing foreseeability of harm, and in addition, other aspects of the relationship between the plaintiff and the defendant that create a "special link" or proximity: ***Childs***, at para. 34.
>
> [21] The Supreme Court articulated three situations that establish such a "special link" and that require legal strangers to take action. The court explicitly stated that these are not "strict legal categories," but recognized, at paras. 35-37, features of a relationship that bring legal strangers into proximity:

i. Where a defendant intentionally attracts and invites third parties into an inherent and obvious risk that he or she has created or controls;

ii. Paternalistic relationships of supervision and control; and

iii. Where a defendant exercises a public function or engages in a commercial enterprise that includes implied responsibilities to the public at large.

> [Emphasis added]

b. The Court summarized the post-***Childs*** jurisprudence is as follows:

> [24] The post-***Childs*** jurisprudence on social host liability, discussed below, demonstrates that there is no clear formula for determining whether a duty of care is owed by social hosts to third parties or guests. Rather, the determination of whether such a duty of care exists usually hinges on fact specific determinations pertaining to two main issues. The first issue is the host's knowledge of a guest's intoxication or future plans to engage in a potentially

> dangerous activity that subsequently causes harm. This is a foreseeability analysis. The second determination asks if "something more" is present on the facts of the case to create a positive duty to act. The "something more" could be facts that suggests the host was inviting the guest to an inherently risky environment or facts that suggest a paternalistic relationship exists between the parties. This is a proximity analysis.
>
> [25] The foreseeability case law has focused heavily on a social host's knowledge as to the relevant guest's level of intoxication, whether there were signs that the guest was intoxicated, and thus whether it was reasonably foreseeable that the guest would engage in certain acts and behaviours that subsequently led to an accident… …
> [27] Much of the post-***Childs*** jurisprudence regarding proximity has engaged in a factually specific evaluation of whether "something more" is present to suggest that a positive duty to act may exist. While there is no definitive list, the case law has looked at a variety of factors to determine what could qualify as "something more" that would make a social gathering an inherent and obvious risk, including: whether alcohol was served at the party or whether guests were invited to bring their own alcohol, the size and type of the party, and whether other risky behaviour was occurring at the party, such as underage drinking or drug use.
>
> [Emphasis added]

The Court rejected the motion judge's duty of care analysis with respect to Mr. and Mrs. Richard. The Court found that there was enough conflicting evidence to suggest there is a genuine issue requiring a trial regarding both Mr. and Mrs. Richard:

> [33] As mentioned above, it is unclear from the motion judge's reasons whether she turned her mind to the issue of foreseeability as it applied to Mr. Richard. In my view, there is enough conflicting evidence to suggest there is a genuine issue requiring a trial regarding whether it was reasonably foreseeable that Mr. Williams would drive home and then drive his children and their babysitter, while under the influence of alcohol.
>
> [34] The next issue is the question of proximity as it applies to Mr. Richard. I am not satisfied that the motion judge's analogy between the facts at hand and the facts of *Childs* is apt. The motion judge did not advert to or consider the obvious factual differences between the cases. This was not a large social gathering, rather it was two men drinking heavily in a garage. There was a developed pattern of this behaviour, enough so that the men had a pact as to what to do in the event one of them drove children while under the influence. Alcohol was provided or served, to a certain extent, as the garage refrigerator the men were accessing had 30 to 40 cans of beer in it. These facts distinguish the case at bar from *Childs*. Moreover, nowhere in her analysis did the motion judge consider the statement in *Childs,* at para. 44*,* that "it might be argued that a host who continues to serve alcohol to a visibly inebriated person knowing that he or she will be driving home has become implicated in the

creation or enhancement of a risk sufficient to give rise to a *prima facie* duty of care to third parties".

[35] In my view, the facts of the case at bar raise a genuine issue requiring a trial regarding whether Mr. Richard, as a social host, may have invited Mr. Williams into an inherently risky environment that he controlled and created, thereby creating a positive duty of care.

[36] On the issue of foreseeability as it relates to Ms. Richard, the motion judge was incorrect when she concluded that there was no evidence Ms. Richard knew that Mr. Williams would be driving while intoxicated. As described above, there was in fact conflicting evidence on the point. That evidence raises a genuine issue requiring a trial.

[37] With respect to the issue of proximity and Ms. Richard, the unique circumstances of this case, including her awareness of the general pact between Mr. Richard and Mr. Williams, Mr. Williams' habitual heavy drinking on her property, and her knowledge of his alcohol consumption and intention to drive on that evening, could potentially implicate Ms. Richard in the creation or control of an obvious and inherent risk. There was conflicting evidence on these issues and I find that there is a genuine issue requiring a trial to determine the question of proximity as it relates to Ms. Richard.

[Emphasis added]

The Court found that the motions judge erred in law by concluding that, if a duty of care existed, it ended when Mr. Williams arrived home.

a. The Court distinguished ***John v Flynn*** from the case at bar.

39] After completing her duty of care analysis, the motion judge extended an alternative reason for dismissing the claims. She stated that if she were incorrect on the issue of a duty of care, any such duty expired when Mr. Williams arrived safely at his home. In reaching that conclusion, she relied on a statement made by this court in ***John*** *at para. 50* as follows:

> There is no duty of care on the part of Eaton Yale to members of the driving public arising out of Flynn's participation in the EAP [a counselling program] and if there was such a duty, it did not extend beyond the point where Flynn left the company premises and drove safely to his home. Any suggestions as to how Eaton Yale could have controlled Flynn's activities beyond that point are hopelessly speculative.

[40] The motion judge then stated at para. 64 of her reasons, "any suggestion that Eileen and Jake could have controlled Mark's activities beyond the point he arrived at his home is similarly speculative. If Jake in fact, owed Mark a duty of care, that duty concluded once Mark arrived at his home."

[41] The facts of *John* are very different than the facts in the case at bar. In that case, the individual defendant was an employee of the

corporate defendant, working the overnight shift. The employee, who had previously sought assistance for his drinking problem through an employer supplied counseling program, drank steadily for eight hours before reporting for work, and consumed more alcohol during his breaks. The corporate defendant did not provide liquor to its employees, nor was it the host of a party or social occasion of any kind on the night in question.

b. The Court held that a social host's duty of care does not necessarily end when a drunken guest arrives home.

> [45] It is clear from the reasons that the disposition of the appeal was based on a finding that no duty of care was extant in the circumstances of that case. The statement made, without analysis, that if such a duty existed it ended when the employee returned home was *obiter dicta*. In any event, I do not read the statement as standing for the proposition that in all circumstances a duty of care ends when a drunk driver returns safely home.
>
> [46] The motion judge seemed to accept that such a general rule was established in ***John***. She seized upon the fact that Mr. Williams arrived home safely to find that any duty of care ended when Mr. Williams reached that point. That was an error in law. In a social host liability case, there is no automatic rule that the duty of care expires once the intoxicated driver arrives home safely. The limits of the duty are determined by the facts of the case. The motion judge was obliged to explain why the duty of care ended on Mr. Williams' arrival home, especially since the evidence focused not on whether Mr. Williams would drive home, but on whether he would drive the babysitter home.
>
> [47] In my view, the motion judge erred in concluding that any duty of care automatically expired when Mr. Williams arrived home. Assuming that such a duty existed, it is an issue for the jury to determine if and when the duty ended.
>
> [Emphasis added]

The Court declined to find whether the duty owed by Mr. and Mrs. Richard should be negated by broader policy considerations.

> [49] The issue of whether a duty of care is negated by policy considerations is best dealt with after the duty has been found to exist. That way any consideration of countervailing policy arguments can be undertaken with the benefit of an evidentiary record supporting the finding of a duty of care. Similarly, an analysis of whether the duty of care has been met should be considered after the precise nature of the duty has been established.

COMMENTARY:

With respect, the Supreme Court of Canada held in ***Childs*** that courts cannot infer from a host's knowledge that a guest has a history of drinking and driving that it was foreseeable to the host that the guest would do so in the current

time frame absent knowledge on the part of the host that the guest was impaired, at paras. 29 – 30:

> 29 Instead of finding that the hosts ought reasonably to have been aware that Mr. Desormeaux was too drunk to drive, the trial judge based his finding that the hosts should have foreseen injury to motorists on the road on problematic reasoning. He noted that the hosts knew that Mr. Desormeaux had gotten drunk in the past and then driven. He inferred from this that they should have foreseen that unless Mr. Desormeaux's drinking at the party was monitored, he would become drunk, get into his car and drive onto the highway. The problem with this reasoning is that a history of alcohol consumption and impaired driving does not make impaired driving, and the consequent risk to other motorists, reasonably foreseeable. The inferential chain from drinking and driving in the past to reasonable foreseeability that this will happen again is too weak to support the legal conclusion of reasonable foreseeability – even in the case of commercial hosts, liability has not been extended by such a frail hypothesis.
>
> 30 Ms. Childs points to the findings relating to the considerable amount of alcohol Mr. Desormeaux had consumed and his high blood-alcohol rating, coupled with the fact that Mr. Courrier accompanied Mr. Desormeaux to his car before he drove away, and asks us to make the finding of knowledge of inebriation that the trial judge failed to make. The problem here is the absence of any evidence that Mr. Desormeaux displayed signs of intoxication during this brief encounter. Given the absence of evidence that the hosts in this case in fact knew of Mr. Desormeaux's intoxication and the fact that the experienced trial judge himself declined to make such a finding, it would not be proper for us to change the factual basis of this case by supplementing the facts on this critical point. I conclude that the injury was not reasonably foreseeable on the facts established in this case.

Furthermore, in ***Childs*** at paras. 35 – 37, the Court noted that a positive duty on a host to act should not be recognized because a social host does not fall into any of the three categories where such a positive duty to act can be found:

1. The host inviting the guest to an inherent and obvious risk that the host controls, such as where the host is complicit in the guest's overdrinking;

2. The host is in a special relationship with the guest the involves supervision and control, such as parent-child, or teacher-student; or

3. The host exercises "a public function or engages in a commercial enterprise that includes implied responsibilities to the public at large".

Also, in ***Childs***, the Supreme Court held that even where the social host falls into one of the above categories, the host's duty of care is to the guest – social hosts do not owe a duty to third party users of the highway, at paras. 44 – 45:

> 44 Holding a private party at which alcohol is served — the bare facts of this case — is insufficient to implicate the host in the creation of a risk sufficient to give rise to a duty of care to third parties who may be subsequently injured by the conduct of a guest. The host creates a place

where people can meet, visit and consume alcohol, whether served on the premises or supplied by the guest. All this falls within accepted parameters of non-dangerous conduct. More is required to establish a danger or risk that requires positive action. It might be argued that a host who continues to serve alcohol to a visibly inebriated person knowing that he or she will be driving home has become implicated in the creation or enhancement of a risk sufficient to give rise to a prima facie duty of care to third parties, which would be subject to contrary policy considerations at the second stage of the Anns test. This position has been taken in some states in the U.S.A.: N.J. Stat. Ann. §§ 2A: 15-5.5 to 5.8 (West 2000). We need not decide that question here. Suffice it to say that hosting a party where alcohol is served, without more, does not suggest the creation or exacerbation of risk of the level required to impose a duty of care on the host to members of the public who may be affected by a guest's conduct.

45 Nor does the autonomy of the individual support the case for a duty to take action to protect highway users in the case at bar. As discussed, the implication of a duty of care depends on the relationships involved. The relationship between social host and guest at a house party is part of this equation. A person who accepts an invitation to attend a private party does not park his autonomy at the door. The guest remains responsible for his or her conduct. Short of active implication in the creation or enhancement of the risk, a host is entitled to respect the autonomy of a guest. The consumption of alcohol, and the assumption of the risks of impaired judgment, is in almost all cases a personal choice and an inherently personal activity. Absent the special considerations that may apply in the commercial context, when such a choice is made by an adult, there is no reason why others should be made to bear its costs. The conduct of a hostess who confiscated all guests' car keys and froze them in ice as people arrived at her party, releasing them only as she deemed appropriate, was cited to us as exemplary. This hostess was evidently prepared to make considerable incursions on the autonomy of her guests. The law of tort, however, has not yet gone so far.

Finally, the conclusion that a host's duty of care is not necessarily discharged once the drunken guest gets home safely is on shaky ground. How long does a drunken patron have to remain at home before the commercial host's duty of care ends? Even a short, temporary stay at home has been found to be sufficient to end the duty of care: ***John v. Flynn***; ***Salm v. Coyle*** [2004] B.C.J. No. 167 (B.C.S.C.); ***Gartner v. 520631 Alberta Ltd.***, [2005] A.J. No. 194 (Alta.Q.B.)

Calgary
400 - 444 7 AVE SW
Calgary AB T2P 0X8
T 403-260-8500
F 403-264-7084
1-877-260-6515

Edmonton
2500 - 10175 101 ST NW
Edmonton AB T5J 0H3
T 780-423-3003
F 780-428-9329
1-800-222-6479

Yellowknife
601 - 4920 52 ST
Yellowknife NT X1A 3T1
T 867-920-4542
F 867-873-4790
1-800-753-1294