

## **PREPARING THE CASE AGAINST THE TAVERN**

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## **INTRODUCTION**

Commercial host liability cases are challenging and always interesting. No two cases are ever the same. The case law in this area has been settled for some time and therefore counsel may come to grips with this area of the law fairly quickly. In reviewing the case law counsel should pay particular attention to the standard of care required in each case. The focus in most tavern liability cases is the standard of care. Counsel must understand this area well. With the help from an expert and perhaps an investigator, and being well prepared for discoveries, counsel will be well equipped to prepare the case against the tavern competently and confidently.

## **PRELIMINARY CONSIDERATIONS**

As with any case, preparing the case against the tavern begins when counsel meets his or her client for the first time. The initial client meeting usually enables counsel to gather information with respect to whether a case against the tavern exists and whether a case against the tavern is worthwhile pursuing.

In some cases, counsel may decide that pursuing the tavern is not worthwhile because the main defendant has adequate insurance limits and the plaintiff may not be any further ahead by involving another defendant in an otherwise straightforward motor vehicle negligence claim. Conversely, there are situations where counsel must seek out another responsible party because the main defendant may be uninsured or have

inadequate insurance limits. In such cases the plaintiff will commence an action for damages against his/her own motor vehicle liability insurer (assuming the plaintiff has insurance) under the uninsured and underinsured coverage provisions of the policy.

In cases where the defendant is uninsured or has inadequate insurance limits, counsel must keep in mind that the uninsured coverage and underinsured coverage afforded under the OPCF 44R - Family Protection Coverage Endorsement (attached to most motor vehicle liability policies) is *excess insurance*. That is, the insurer's maximum liability under the OPCF 44R is "...the amount by which the limit of family protection coverage exceeds the total of all limits of motor vehicle liability insurance...of the inadequately insured motorist *and of any person jointly liable with that motorist*".<sup>1</sup> Furthermore, the amount payable under the OPCF 44R is excess to an amount received by the eligible claimant...and excess to amounts that *were available to the eligible claimant from...the insurers of a person jointly liable with the inadequately insured motorist for the damages sustained by an insured person*".<sup>2</sup>

Therefore in some cases, counsel will have no choice but to include all potential joint tortfeasors, such as taverns, in order to trigger the excess coverage under the OPCF 44R Family Protection Coverage. This is particularly so where the main defendant has commenced third party proceedings against the tavern.

<sup>1</sup> See s.4 of OPCF 44R – Family Protection Coverage, attached to the OAP 1

<sup>2</sup> See s.7(b) of OPCF 44R – Family Protection Coverage, attached to the OAP 1

## THE LEGAL BASIS FOR LIABILITY AGAINST THE TAVERN

The first step in building a strong case against the tavern is to understand the legal basis for commercial host liability/tavern liability. Although the case law has been settled for some time, it bears repeating here.

Tavern liability comes in two forms. One is statutory liability and the other arises from the common law based in tort. Generally, the case against the tavern is founded in tort as the basis for liability is broader and easier to establish.

### Statutory Obligations

The *Liquor License Act*<sup>3</sup> is the applicable legislation that governs the licensing of establishments which sell alcoholic beverages. Statutory liability against the tavern flows from the *Act*.

Section 39 of the *Act* is the statutory basis for creating liability for the over-service of alcohol, which reads:

39. The following rules apply if a person or an agent or employee of a person sells liquor to or for a person whose condition is such that the consumption of liquor would apparently intoxicate the person or increase the persons intoxication so that he or she would be in danger of causing injury to himself or herself or injury or damage to another person or the property of another person:
  1. If the person to or for whom the liquor is sold commits suicide, or meets death by accident when so intoxicated, an action under Part

<sup>3</sup> R.S.O. 1990, c. L.19.

V of the Family Law Act lies against the person who or whose employee sold the liquor;

2. If the person to or for whom the liquor is sold causes injury or damage to another person or the property of another person while so intoxicated, the other person is entitled to recover an amount as compensation for the injury or damage from the person who or whose employee or agent sold the liquor.

There are two contemplated sets of plaintiffs under the civil liability provisions of the statute. The family members of the impaired person have an action where the impaired person dies and innocent third parties have an action when harmed by the impaired person. It is noteworthy that the civil liability provisions of the *Act* do not include provisions for the impaired person to recover damages for his or her own losses. If the impaired person claims damages from the tavern for his/her own injury, he/she must seek to do so on the basis of the common law.

The essential provisions of statutory liability are found in the preamble of Section 39, in that:

1. the liquor must be sold;
2. the person must be in a condition such that the consumption of liquor would apparently intoxicate the person or increase the person's intoxication;
3. the intoxication must give rise to a danger of causing injury.

It is a commonly held belief that if a tavern serves a patron to the point of intoxication, then the tavern will be automatically liable for the plaintiff's damages. The

*Liquor License Act* does prohibit the sale of liquor to an intoxicated person however it does not create liability, in and of itself, for civil action.<sup>4</sup> It may create liability to the tavern for a fine under the offences provision of the *Act* or for suspension of the tavern's liquor license. It is noteworthy that the Supreme Court of Canada has rejected the negligence per se theory based on over-serving to the point of intoxication<sup>5</sup>.

## **The Common Law**

The second and more broad approach to tavern liability is based on the common law under tort principles. Tort claims, as opposed to breach of statute claims, will allow the impaired person to sue for his or her own damages. Family members may sue in cases of injury and death. Third parties may also advance claims for injury or damage.

The three cornerstones of negligence based tort law are present in the tavern liability case. They are:

1. Whether the tavern owed a duty of care to the plaintiff;

<sup>4</sup> See section 29 of the *Act* which states:

No person shall sell or supply liquor or permit liquor to be sold or supplied to any person who is or appears to be intoxicated.

<sup>5</sup> In *Stewart v. Pettie* (1995), 121 D.L.R. (41) 222 at 232 (S.C.C) the Court held that the act of over-serving alone does not constitute negligence. Rather, what is also required is a reasonable foreseeable risk of harm to the injured party. Accordingly, the Court held that any liability on the part of the restaurant required a failure on its part to take "affirmative action" to prevent the reasonably foreseeable risk of harm. The Court found that on the facts of this case, there was no positive obligation to act since there was no reasonably foreseeable risk of harm given the fact that the defendant driver was already under the charge of responsible (i.e. sober) persons.

2. Whether the tavern breached the standard of care to be exercised in discharging the duty;
3. Whether the tavern's breach of the standard of care caused or contributed to the plaintiff's damages.

The tavern liability case generally centres around the standard of care issue and whether the tavern fell short of the mark. In most cases, the duty of care and the causation aspect are not seriously in dispute.

#### **(a) The Duty of Care**

The duty of care is well settled and is rarely an issue in modern tavern litigation. Simply put, a tavern owes a duty to its patron<sup>6</sup> and to third parties who might reasonably be expected to come into contact with the patron and to whom the patron may pose some risk<sup>7</sup>.

It is noteworthy that the courts have expanded this duty of care to include the duty of a tavern to take positive action to protect the patron and the public against the dangers of intoxication. While this duty is not an absolute one, a tavern must meet an

<sup>6</sup> *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239  
*Crocker v. Sundance Northwest Resorts Ltd.* (1988), 51 D.L.R. (4th) 321 (S.C.C.)

<sup>7</sup> *Stewart v. Pettie*, *supra*,  
*Hague v. Billings* (1989), 68 O.R. (2d) 321 (H.C.J.); varied on appeal (1993), 13 O.R. (3d) 298 (C.A.)

objective standard to protect against reasonably foreseeable dangers, such as drinking and driving.

### **(b) The Standard of Care**

The standard of care is usually the most contentious issue in a tavern liability case. The standard of care in tort is fluid and the courts have recognized that generally, the standard of care is directly proportional to the risk of harm involved. The standard of care required in particular circumstances is a question of fact and each case is unique. The courts however have recognized that drinking and driving is an undesirable social ill and that the consequences of an intoxicated person behind the wheel of a vehicle can be catastrophic. Therefore, the standard of care required of a tavern is generally high.<sup>8</sup>

Although the standard of care required depends upon the facts of a particular case, the following is a list of established principles with respect to the standard of care required of a tavern:

- The tavern must take effective steps to prevent the impaired person from engaging in risky activities by assessing physical displays of intoxication, by monitoring consumption and by making reasonable assumptions of impairment based on alcohol consumption. The tavern must also take active steps to prevent risky behaviour such as drinking and driving, including calling the local authorities, if necessary<sup>9</sup>.

<sup>8</sup> *Hague v. Billings*, *supra*

<sup>9</sup> *Jacobsen v. Nike Canada Ltd.* (1996), 133 D.L.R. (4<sup>th</sup>) 377 (B.C.S.C.)  
*Stewart v. Pettie*, *supra*  
*Hauge v. Bilings*, *supra*



- The tavern can no longer simply eject the impaired person from its premises or discontinue the sale of alcohol once the person is intoxicated. The risk of harm remains after the impaired person has left the tavern and therefore the tavern must exercise care to prevent the impaired person from engaging in risky behaviour which may cause harm to himself or others.<sup>10</sup>
- Separate and apart from discontinuing the sale of alcoholic beverages to an impaired patron, the tavern has a responsibility to be pro-active in preventing risky behaviour once the person has become intoxicated. This includes having alternate transportation available, making inquiries as to how the individual is going to get home, and otherwise preventing the individual from engaging in behaviour which may cause harm to himself or others. The tavern must do everything reasonably within its power to prevent the person from driving, if necessary.<sup>11</sup>
- The tavern cannot justify its failure to monitor consumption and assess levels of intoxication by conducting business in such a way that makes it impossible or difficult to do so. A tavern's tort liability cannot be avoided or abrogated in pursuit of commercial gain.<sup>12</sup>

In most cases, counsel must focus on the following key questions:

1. What did the tavern do to prevent the person from becoming intoxicated?
2. What did the tavern do to prevent the person from engaging in dangerous behaviour once they became intoxicated?

<sup>10</sup> *Gouge v. Three Top Investment Holdings* (1994), 22 C.C.L.T. (2d) 281 (H.C.J.)

*Stewart v. Pettie*, *supra*

*Hauge v. Billings*, *supra*

<sup>11</sup> *Francescucci v. Gilker*, [1996] O.J. No. 474 (Ont. C.A.)

*Whitlow v. 572008 Ontario Ltd.*, [1995] O.J. No. 77 (O.C.G.D.)

*Stewart v. Pettie*, *supra*

*Jacobsen v. Nike Canada Ltd.*, *supra*

*Hague v. Billings*, *supra*

<sup>12</sup> *Canada Trust v. Porter* [1980] 2 A.C.W.S. (2d) 428 (O.C.A.)

*Stewart v. Pettie*, *supra*

*Hague v. Billings*, *supra*

*Gouge v. Three Top Investment Holdings*, *supra*

3. What policies and procedures did the tavern have in place regarding the monitoring of liquor consumption, assessing impairment levels, and intervention techniques?

**(c) Causation**

It is incumbent upon the plaintiff to prove that the tavern's breach of duty led to the injury. The plaintiff generally must show that the tavern's failure to act in a positive manner contributed to the plaintiff's damages. The plaintiffs in *Stewart v. Pettie* ultimately lost in the Supreme Court as they were unable to establish that the tavern's lack of intervention caused or contributed to the plaintiff's injuries.

Causation is not a serious issue in most tavern liability cases. However, depending on the theory of the case, counsel may want to elicit important information from the defendants on discovery.

For example, if the defence theory is that the impaired person became intoxicated *after* he left the tavern, then counsel must establish that the impaired person did not consume alcohol after leaving the tavern. If the theory of negligence is that the tavern failed to call the police when the impaired person drove away, then counsel must determine how far away a police station is from the tavern, how long after the impaired person left the tavern did the accident occur, whether employees were instructed to call the police in such circumstances, etc.

## **PRE-TRIAL CONSIDERATIONS**

### **Pleadings**

As with any tort action, the statement of claim will define the scope of relevant and permissible questions on examination for discovery. The statement of claim should contain broad allegations of negligence against the tavern to allow counsel the greatest latitude possible. The statement of claim should therefore create the foundation that will allow counsel to ask questions regarding the standard of care required of a tavern. A sample statement of claim is found at Appendix A.

### **Investigation**

Preparing the case against the tavern usually involves some form of investigation on the part of the plaintiff. Counsel may wish to retain an investigator to assist as quickly as possible. The passage of time and the consumption of alcohol on the night in question will cause memories to fade rapidly. Therefore your investigator must act quickly in order to interview witnesses that were present on the night in question. He or she may also investigate the type of bar involved (i.e. is it a pub, family restaurant, watering hole, etc), obtain some background information on the relevant employees of the tavern, and obtain statements from employees before an action is commenced.

## **Expert Evidence**

Counsel will usually retain a toxicologist or other appropriate expert such as a pharmacologist to assist with the alcohol related issues. A toxicologist has the qualifications to express an opinion regarding the probable blood alcohol concentration level found in the impaired person's blood at a particular point in time (i.e. the collision; upon leaving the tavern, upon entering, etc). The blood alcohol concentration (BAC) is the concentration of ethyl alcohol measured (or estimated) in whole blood. The BAC is commonly expressed in milligrams (mg) of alcohol per 100 millilitres (ml) of blood. The legal limit for driving in Ontario is 80 mg of alcohol per 100 ml of blood, or what we commonly know as .08%.

Once the expert has calculated the impaired person's BAC he or she can express an opinion regarding the person's level of intoxication, observable signs of impairment, effects on ability to operate a motor vehicle, etc. Ideally, the expert should have documents pertaining to the impaired person's BAC. Blood alcohol levels may be found in hospital records (in the laboratory results), coroner's report, or police records (breathalyzer results/blood tests) where the person is charged with "impaired driving" or "care and control over 80". Blood alcohol levels in hospital laboratory records are usually expressed as millimoles per litre (mmol/L). The expert will convert the data found in the laboratory records and express the BAC in the form we are familiar with (i.e. mg of alcohol per 100 ml of blood).

Counsel may use the following formula to convert mmol/L to 'mg of alcohol per 100 ml of blood': simply divide the mmol/L number by 217.5. For example, if the laboratory results indicate that the defendant had 27.0 mmol/L of ethanol in his blood, that amount converts to 0.124 mg of alcohol in 100 ml of blood (a little more than one and a half times the legal limit).

### **Documentary Discovery**

The documentary information counsel must obtain prior to discoveries comes from several sources including the impaired person, the tavern, the client (if he is not the impaired person) and various public sources. Counsel must secure all relevant documents prior to discoveries such as the ambulance call report; complete police records; impaired person's hospital records; coroner's report if a death is involved; and information regarding the tavern through the *Freedom of Information Act*.

The Alcohol and Gaming Commission of Ontario has a web site at [www.libo.on.ca](http://www.libo.on.ca) which is helpful and informative. The web site has general information about the licensing of establishments as well as information on establishments that have been subject to discipline by the Commission for violations of the *Liquor License Act*. Counsel should make a *Freedom of Information Act* request to obtain documentation with respect to the licensing of the tavern, with respect to any violations of the Act, and with respect to conditions imposed on the tavern. Counsel may also

search the Alcohol and Gaming Commission database in Quicklaw for reported decisions regarding that particular tavern in question.

Other documents that counsel will want to obtain prior to discoveries include: copy of the tavern's liquor license (it will indicate its maximum capacity); materials the tavern may have from the Smart Serve Program or Server Intervention Program; Smart Serve Certificates of employees; copy of the insurance policy if insurance limits are a concern; copies of any training manuals, written policies/procedures regarding the responsible service of alcohol, the monitoring of consumption, and regarding intervention techniques; records of sales for the night in question/credit card receipts which document the amount of liquor sold to the impaired person.

### **Smart Serve Training Program**

I have listed this topic as a separate section because of its importance. Smart Serve® is a responsible alcohol beverage service training program that is recognized as the standard for responsible alcohol beverage training in Ontario. Responsible server training has been available in Ontario since the 1980s. Prior to Smart Serve, the Ontario Hotel and Motel Association introduced the Server Intervention Program (SIP). The SIP program was revised and improved and is now known as Smart Serve.

Smart Serve was developed under the direction of an advisory board consisting of the hospitality industry, the Alcohol and Gaming Commission of Ontario (AGCO), the

Centre for Addiction and Mental Health, the Hotel and Restaurant Employees Union, Bacchus Canada, and the Insurance Bureau of Canada. Approximately 200,000 individuals have taken the Smart Serve Training Program since March, 1995, when Smart Serve was first introduced,

It is noteworthy that certain licensees are mandated by the AGCO to train their staff in responsible beverage service. This includes licensees who are new, had their license transferred, catering and golf club endorsements, and others designated by the AGCO. Furthermore, many municipalities in their Municipal Alcohol Policy, require that all wait staff must have their Smart Serve certificate at events where alcohol is being served on city property.

Whether the tavern monitored a patron's liquor consumption, whether it observed signs of intoxication, and whether it took appropriate intervention action are typically key issues in commercial host liability cases. The Smart Serve Training Program is an important tool used within the hospitality industry to educate servers and tavern owners on these issues and other issues including the following:

- facts about alcohol;
- how alcohol works in the body;
- blood alcohol concentration levels;
- signs of intoxication;
- monitoring consumption;
- legal rights and responsibilities;
- civil liability;
- prevention and intervention techniques, and;
- risk assessment

There is a wealth of information for plaintiff's counsel contained in the Smart Serve Workbook which counsel may purchase for a reasonable fee.<sup>13</sup> The materials make exceptional discovery tools and cross-examination tools at trial. Virtually all tavern owners/servers have either taken the course or have heard of it. I have yet to hear a witness say on discovery that he or she disagrees with anything in the materials that deal with the responsible service of alcohol.

The Workbook provides instruction regarding the responsible service of alcohol based on standard of care principles established by the case law. The information provided in the program represents the state of the law in Ontario at the time of publishing.

It is a win-win situation to question the witness on discovery and at trial regarding Smart Serve. The witness will have no choice but to agree with its contents if he or she has taken the course or risk losing all credibility. The witness who has not taken the course may be ignorant of the program but will nonetheless agree with its contents on questioning or risk disagreeing with the 'gold standard' in the industry.

Here are some examples of instruction contained in the Workbook:

- You must know the number of standard drinks consumed by the guest to estimate their level of intoxication.

<sup>13</sup> Please see [www.smartserve.ca](http://www.smartserve.ca)



- Cash bars can be difficult to monitor if the bartender is the only person serving and monitoring the guest's consumption of alcohol. At least two staff members should be assigned to this type of function.
- Part of your job as a server is to monitor and pace the service of alcohol. Monitoring alcohol consumption will help you to recognize any problems and take proper action before trouble starts.
- Tips to help prevent an intoxicated person from driving: Try to hold the person's car keys until they are sober; arrange for a taxi, provide free parking, if the intoxicated guest refuses all attempts to prevent him/ her from driving, call the police.
- A licensee should not: encourage intoxication; supply liquor which causes intoxication; inadequately monitor and supervise a guest's liquor consumption; fail to properly control consumption; fail to notice intoxication; continue to serve liquor to an intoxicated guest; fail to take appropriate steps to stop an intoxicated guest from driving or leaving the premises.

Counsel is in a position to obtain valuable admissions on discovery based on information contained in the Workbook.

## **Oral Examination for Discovery**

### **(a) The Tavern**

Counsel will find that if they leave it to the tavern to produce a representative of their choice for discovery, then the person who appears on discovery has surprisingly little knowledge of the events in question. The representative may also have little information about the tavern's operations. Counsel must therefore utilize Rule 31.03(2) which allows the plaintiff to select any employee, officer or director of the corporation for discovery.

In most cases counsel should select the employee who served the impaired person. Counsel will obtain the best evidence regarding liquor service and consumption from that employee. Counsel may also elicit evidence regarding training (Smart Serve) and any policies and procedures the tavern had in place regarding the responsible service of alcohol.

Counsel should seek to obtain facts as to whether the tavern had policies and procedures in place to meet the standard of care, and whether, on the day in question, it in fact met the standard of care required. As previously discussed, the standard of care requires the tavern to monitor consumption, make reasonable assumptions based on consumption, assess physical displays of intoxication to determine impairment and to intervene to prevent risky behaviour by an impaired patron. Generally, the plaintiff seeks to obtain evidence at the discovery to prove the following:

1. The impaired person was a patron of the tavern (if it has not otherwise been established or admitted);

2. The tavern served alcohol to the impaired person to either the point where the individual was visibly intoxicated, or to the point where reasonable assumptions would lead to a conclusion of intoxication/impairment;
3. The tavern took no or inadequate steps to determine the person's level of intoxication or amount of alcohol consumed;
4. The tavern and its employees did not understand alcohol intoxication, rates of elimination, the responsible service of alcohol, and proper intervention techniques (see Smart Serve materials);
5. The tavern failed to take appropriate steps to ensure the intoxicated person arrived home safely (i.e. did not call a cab; did not take keys away; did not call the police, etc);
6. The tavern conducted business in such a way that made it impossible to monitor consumption and to practice "responsible alcohol service" as described in the Smart Serve materials.

It is not uncommon for counsel to come away from such a discovery with evidence from the tavern such as, "...he seemed fine; he did not look impaired to me; he only had 2 drinks, etc". Counsel can easily deal with this evidence with the help of the expert who can express an opinion as to the expected signs of intoxication in a person with a given BAC. Counsel will usually also obtain help in the form of evidence from the impaired person who is either the plaintiff or a defendant.

**(b) The Impaired Person**

Counsel should establish a “timeline of evidence” for the impaired person that begins the day before the motor vehicle collision and ends some time after the collision. Your expert will want as much information as possible in order to calculate accurately the impaired person’s BAC at a given point in time, especially if no medical/forensic records exist regarding the BAC. The timeline should begin the day before the collision because information such as prior liquor consumption, medication/drug intake, illnesses, food consumption, and hours of sleep all effect the body’s rate of alcohol absorption and/or a person’s level of impairment. Counsel must obtain detailed facts leading up to the accident that include how much liquor was consumed and how much food was consumed.<sup>14</sup>

Counsel must also confirm that the impaired person did *not* consume liquor after he left the tavern and after the motor vehicle collision. Further liquor consumption after leaving the tavern will effect your expert’s calculations regarding the BAC at the time he left the tavern and at the time of the collision. It is important to cover these areas off and obtain particulars of any drinking that may have occurred after the person left the tavern. The same would apply to liquor that the person consumed before entering the tavern. Counsel should attempt to show that the impaired person consumed most if not all of the liquor while attended at the tavern.

<sup>14</sup> For an informative article regarding the effects of alcohol see, *BAC and the Effects of Alcohol*, Harold Kalant M.D., PhD. In, *Parties and Booze Don’t Mix: Alcohol Liability in the New Millennium*, CBAO, November 10, 2000

While an examination for discovery is only limited by the ingenuity of counsel, some of the areas that need to be covered by way of discovery are found at Appendix “B”. The list should act as a general guideline for counsel and it is by no means exhaustive.

## **OTHER CONSIDERATIONS**

### **Jury Trial or Judge Alone?**

The question of whether to file a jury notice is always a difficult decision in tavern liability cases and host liability cases in general. As a general rule, I do not file a jury notice where my client (the plaintiff) is also the impaired person. On the other hand, I will serve a jury notice if the plaintiff is an innocent victim injured at the hands of a drunk driver. After conducting several focus groups in tavern cases I have confirmed for myself that the lay person holds an inherent bias against the drunken person seeking damages. Lay people will instinctively view these plaintiffs as ‘authors of their own misfortune’. Counsel may get over this initial hurdle, however it is a *high* hurdle.

It is much easier for the juror to identify with the innocent victim who is struck by a drunk driver because the juror will say to themselves, “That could have been me instead of the plaintiff”. Jurors on the other hand will instinctively say to themselves, “I would never get so drunk and then attempt to drive”, in the case of the drunken plaintiff. It is difficult to put these biases aside, even for well intentioned jurors. There are

exceptions of course, and a jury may be appropriate in cases where the actions or omissions of the tavern are particularly egregious.<sup>15</sup>

If you find yourself stuck with a jury because opposing counsel filed a jury notice (and there is no reasonable prospect of discharging the jury) then you may wish to conduct a focus group to get a feel for where the 'landmines' are located in the case and obtain feedback on how to overcome the juror bias.<sup>16</sup>

<sup>15</sup> See *Francescucci v. Gilker*, *supra*, where the court of appeal upheld a jury's finding of 75% liability on the tavern and 25% on the plaintiff where the staff carried the drunken plaintiff out of the tavern and placed him into his vehicle, behind the wheel, and tossed the keys into his lap. Within seconds of driving off, the highly intoxicated plaintiff was involved in a head-on collision and suffered serious injuries.

<sup>16</sup> Please see Gayle T. Brock's paper on Focus Groups found in the binder.

**APPENDIX “A”**

Court File No. G22734-98

**ONTARIO COURT (GENERAL DIVISION)**

**B E T W E E N:**

ROBERT SISSON, MARTIN SISSON,  
VICTORIA SISSON, MARY ISOBEL SISSON a  
minor by her Litigation Guardian Martin Sisson,  
ALEXANDER NELSON SISSON a minor by his  
Litigation Guardian Martin Sisson, DONALD  
SISSON, MARJORIE SISSON and ISOBEL  
SMALL

Plaintiffs

- and -

NORTHWOOD INN LIMITED,  
MALCOLM D. MAXWELL and  
TERRY WELLINGTON MCILMOYLE

Defendants

**STATEMENT OF CLAIM**

**TO THE DEFENDANT(S)**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff(s). The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiff's lawyer, or where the Plaintiff(s) do(es) not have a lawyer, serve it on the Plaintiff(s), and file it, with proof of service, in this Court office, **WITHIN TWENTY DAYS** after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the Rules of Civil Procedures. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. If you wish to defend this proceeding but are unable to pay legal fees, legal aid may be available to you by contacting a local Legal Aid office.

Date:

Issued by \_\_\_\_\_  
Registrar

Address of Court Office:  
114 Worsley Street  
Barrie, Ontario  
L4M 1M1

TO: Mr. Terry Wellington McIlmoyle  
485 Larmer 7<sup>th</sup> Line  
Fraserville, Ontario  
K0L 1V0

AND TO: Northwood Inn  
Haliburton, Ontario  
K0M 1S0

AND TO: Malcolm D. Maxwell  
Northwood Inn  
Haliburton, Ontario  
K0M 1S0



**CLAIM**

1. The plaintiff Robert Sisson claims:
  - (a) general damages in the amount of \$5,000,000.00;
  - (b) special damages in the amount of \$250,000.00
  - (c) pre-judgment and post-judgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended;
  - (d) its costs of this action;
  - (e) such further and other relief as to this Honourable Court may seem just.
2. The plaintiff Martin Sisson claims pursuant to the *Family Law Act*, R.S.O. 1990, c.F.3, as amended:
  - (a) damages in the amount of \$150,000.00;
  - (b) pre-judgment and post-judgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended;
  - (c) his costs of this action;
  - (d) such further and other relief as to this Honourable Court may seem just.
3. The plaintiff Victoria Sisson claims pursuant to the *Family Law Act*, R.S.O. 1990, c.F.3, as amended:
  - (a) damages in the amount of \$150,000.00;
  - (b) pre-judgment and post-judgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended;
  - (c) her costs of this action;
  - (d) such further and other relief as to this Honourable Court may seem just.
4. The plaintiff Mary Isobel Sisson, a minor by her Litigation Guardian Martin Sisson, claims pursuant to the *Family Law Act*, R.S.O. 1990, c.F.3, as amended:
  - (a) damages in the amount of \$100,000.00;
  - (b) pre-judgment and post-judgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended;
  - (c) her costs of this action;
  - (d) such further and other relief as to this Honourable Court may seem just.
5. The plaintiff Alexander Nelson Sisson, a minor by his Litigation Guardian Martin Sisson, claims pursuant to the *Family Law Act*, R.S.O. 1990, c.F.3, as amended:
  - (a) damages in the amount of \$100,000.00;

- (b) pre-judgment and post-judgement interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended;
- (c) his costs of this action;
- (d) such further and other relief as to this Honourable Court may seem just.

6. The plaintiff Donald Sisson claims pursuant to the *Family Law Act*, R.S.O. 1990, c.F.3, as amended:

- (a) damages in the amount of \$75,000.00;
- (b) pre-judgment and post-judgement interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended;
- (c) his costs of this action;
- (d) such further and other relief as to this Honourable Court may seem just.

7. The plaintiff Marjorie Sisson claims pursuant to the *Family Law Act*, R.S.O. 1990, c.F.3, as amended:

- (a) damages in the amount of \$75,000.00;
- (b) pre-judgment and post-judgement interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended;
- (c) her costs of this action;
- (d) such further and other relief as to this Honourable Court may seem just.

8. The plaintiff Isobel Small claims pursuant to the *Family Law Act*, R.S.O. 1990, c.F.3, as amended:

- (a) damages in the amount of \$75,000.00;
- (b) pre-judgment and post-judgement interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended;
- (c) her costs of this action;
- (d) such further and other relief as to this Honourable Court may seem just.

## THE PARTIES

9. Robert Sisson resides in West Guilford, Ontario. He was a seat belted passenger in a motor vehicle that was involved in a collision.

10. The plaintiffs Martin Sisson, Victoria Sisson, Mary Isobel Sisson and Alexander Nelson Sisson, are the father, mother, sister and brother respectively of Robert Sisson. These Plaintiffs reside in West Guilford, Ontario, and Robert Sisson resides with his parents and siblings.

11. The plaintiffs Donald Sisson, Marjorie Sisson, and Isobel Small are the grandfather and grandmothers respectively, of Robert Sisson. Donald and Marjorie Sisson reside in Minden, Ontario and Isobel Small resides in Meaford, Ontario.

12. The defendant Terry Wellington McIlmoyle was the driver and owner of a 1988 Chevrolet Truck (the defendant motor vehicle).

13. The defendant Northwood Inn Limited (Northwood) is a company which carries on the business of selling alcoholic beverages to the public, among other things. It was the owner, occupier and controller of certain premises which were licensed for the purpose of serving alcoholic beverages to the public. Northwood was at all material times the holder of a license issued under the *Liquor License Act*, R.S.O. 1990, c.L.19, as amended.

14. The defendant Malcolm D. Maxwell is the sole officer, director, and shareholder of the defendant Northwood. The defendant Maxwell was responsible for making all decisions regarding the business operations of the Northwood.

## **THE FACTS**

15. On or about the evening of August 8, 1997 and early morning hours of August 9, 1997 the defendant Terry Wellington McIlmoyle attended at the defendant Northwood place of business. While there, the defendant Maxwell and the employees of the defendants Northwood and Maxwell served and sold liquor to the defendant McIlmoyle. The defendant Northwood continued to serve and sell liquor to the defendant McIlmoyle until he became intoxicated and his ability to operate a motor vehicle was impaired. The defendant McIlmoyle continued to drink on the premises and eventually left the premises using the defendant motor vehicle as transportation, even though he knew he was highly intoxicated and his ability to operate a motor vehicle was grossly impaired due to his consumption of liquor.

16. That same morning on or about August 9, 1997 at 3:30 a.m. Robert Sisson was a rear seat passenger in a motor vehicle being driven by Donald Todd. The vehicle was lawfully proceeding eastbound on Highway 118 near County Road 14 in the County of Haliburton. The defendant motor vehicle was travelling westbound on Highway 118 when suddenly and without warning it crossed the centre line and collided violently head-on with the Todd motor vehicle.

17. Robert Sisson suffered injuries causing catastrophic impairment as a result of the motor vehicle collision.

## **THE NEGLIGENCE**

18. The collision was caused as a result of the joint and several negligence of the defendants.

19. As to the defendant Terry Wellington McIlmoyle, he was negligent in that:
- (a) he failed to keep a proper lookout;
  - (b) he was travelling at an excessive rate of speed;
  - (c) he made an unexpected and unlawful entry into the eastbound lane of Highway 118;
  - (d) he created a situation of danger and emergency;
  - (e) he failed to take reasonable care to avoid an accident which he knew or should have known was likely to occur;
  - (f) he was operating a motor vehicle which was unsafe to other users of the road;
  - (g) he was incompetent to operate a motor vehicle with normal care and attention because his faculties of observation, perception, judgement, and self-control were impaired due to his consumption of alcohol and drugs;
  - (h) he failed to observe the rules of the road as required by the *Highway Traffic Act*, R.S.O. 1990, c.H.8, as amended.
20. As to the defendants Northwood and Maxwell, they were negligent in that:
- (a) they permitted the defendant McIlmoyle to consume liquor in such quantity over such a period of time that he became impaired in violation of the law and the terms of their license to serve liquor;
  - (b) they permitted the defendant McIlmoyle to leave the licensed premises in an impaired and/or intoxicated condition, lacking in the ability to operate a motor vehicle with normal care and attention, and they should have prevented him from doing so;
  - (c) they failed to arrange alternate transportation for the defendant McIlmoyle when they knew or ought to have known this was necessary under the circumstances;
  - (d) they continued to serve liquor to the defendant McIlmoyle when they knew or ought to have known that he was impaired and/or intoxicated and would soon operate his motor vehicle;
  - (h) they continued to serve liquor to the defendant McIlmoyle past 2 a.m. on the night in question in violation of the law and they had done so in the past on numerous occasions;
  - (i) they continued to serve liquor to the defendant McIlmoyle despite being aware and having prior knowledge of his drinking habits and propensities;
  - (j) they employed incompetent staff in a licensed premises;
  - (k) they failed to ensure that all staff members had completed the Smart Serve Program or the SIP Program;
  - (l) they failed to instruct properly or at all their staff in the responsible service of liquor nor in the importance of monitoring patrons' liquor consumption;

- (m) they failed to have policies and procedures in place with respect to monitoring their patrons' liquor consumption and with respect to appropriate intervention when a patron has had too much to drink;
- (n) they failed to supervise staff, failed to put competent people in charge, and fostered an atmosphere where drinking liquor and over-serving was encouraged in an effort to make more money;
- (o) they conducted business in such a way that made it impossible for staff to monitor their patrons' liquor consumption;
- (p) the premises were overcrowded because they failed to have measures in place to ensure that patrons did not exceed the maximum capacity of the tavern;

21. As against the defendants Northwood and Maxwell, the Plaintiffs plead and rely upon sections 29, 30 and 39 of the *Liquor License Act*, R.S.O. 1990, c.L.19, as amended, and in this regard the Plaintiffs plead that the defendants Northwood and Maxwell breached their statutory duty to the plaintiffs.

22. The Plaintiffs plead and rely upon the provisions of the:

- (a) *Highway Traffic Act*, R.S.O. 1990, c.H.8, as amended;
- (b) *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended;
- (c) *Negligence Act*, R.S.O. 1990, c.N.1, as amended;
- (d) *Family Law Act*, R.S.O. 1990, c.F.3, as amended;
- (e) *Liquor License Act*, R.S.O. 1990, c.L.19, as amended.

## THE DAMAGES

23. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

## **APPENDIX “B”**

### **Discovery Checklist**

#### **INFORMATION TO OBTAIN FROM THE TAVERN**

##### **Physical Description and Location of Tavern**

- Where is it located?
- Is it near public transportation?
- Is there a large parking lot?
- Is it on or near a major highway?
- What is its capacity? (capacity is stated on the liquor license)
- What type of establishment is it?
- How long has been in business?
- What type of crowd does it cater to?
- What type of atmosphere does it promote?
- What restrictions, if any, are on its liquor license?
- How is the tavern laid out physically? (obtain photos)
- What is the ability of management and staff to observe the patrons?

##### **Operations**

- What type of liquor does it sell?
- How much liquor in a standard drink?
- How many staff do they have?
- What requirements do they have for their employees by way of training?
- What training do they give to their employees?
- What written/verbal policies regarding alcohol service and intervention do they have?
- Have the employees completed a Server Intervention Program or Smart Serve Program?
- How does tavern prevent overcrowding – how does it keep track of the number of patrons?

##### **The Day of the Incident**

- Was the impaired person there?
- What day of the week was it – what time?
- Who served the impaired person?
- Obtain their employment file/Smart Serve Certificate
- What training did they have?

- What did they learn from the Smart Serve Program?
  - Go through materials and obtain important admissions
- What did they know about the visible signs of intoxication?
- What did they know about rates of alcohol elimination?
- What do they do if someone has had too much to drink?
- What other employees were working that day?
- Where were they positioned in the tavern?
- What was their experience?
- How busy was the establishment?
- How many people were in the tavern?
- How do they keep track of the number of patrons?
- Were there any other incidents that night?
- Were there any promotions or events going on?
- What time did they stop serving liquor?

### **The Impaired Person**

- Was he/she a regular?
- How much liquor was he/she served?
- How was it paid for?
- Who was he/she with?
- Were the others drinking; was there a designated driver?
- Was the tavern aware that there was a designated driver?
- Attempt to identify any documents such as receipts or credit card slips or cash register printouts connected to the impaired person.
- How did the impaired person appear?
- Did he/she speak with any staff?
- Where were the car keys?

### **Monitoring and Intervention**

- What system (if any) did the tavern have in place to monitor service and consumption of liquor?
- What system (if any) did the tavern have in place to assess signs of impairment/intoxication in patrons?
- What policies and procedures did it have in place regarding intervention techniques?
- How was the impaired person's consumption monitored?
- What steps did the tavern take to determine whether the person was impaired?
- What discussions did staff have with the intoxicated person?
- What steps did the tavern take once it determined that a person was impaired?
- What controls are in place to prevent over-serving of alcohol?
- What does tavern do with someone who is impaired?
- Do the staff members try to determine whether the patron is driving?

- Has it ever had its license suspended for over-serving?

**INFORMATION TO OBTAIN FOR THE EXPERT FROM THE IMPAIRED PERSON INCLUDES:**

**General**

- drinking history, pattern, and alcohol tolerance
- usual beverage of choice
- personality changes with alcohol
- illnesses/medications
- apparent signs of intoxication displayed by the person

**Day of the incident and day before incident**

- body weight and height on day in question
- liquor consumption on day of and day before incident
- food consumption
- hours slept the night before
- when drinking started
- where drinking occurred
- what type of drink - size of drink (i.e. beer bottle; 18 oz glass, etc)
- how the alcohol was paid for
- drinking companions
- prescription or illicit drug use on that day
- witnesses at the tavern or scene of the accident
- police records/videos
- toxicology report
- hospital records (laboratory results)/coroner's report