

TO SERVE AND PROTECT

LIQUOR LIABILITY WHO'S RESPONSIBLE?

Liquor liability is a hot topic - one that is front and centre in the eyes of the courts, who are demanding more controls and accountability for facilities serving alcohol to their patrons. Although there aren't many upsides to an increasingly litigious society, it does provide you with the perfect opportunity to examine the policies at your operation - because prevention is the key to lowering your course's liquor liability.

WORD OF THE LAW

When it comes to alcohol-related liability, understanding the law is an important first step in managing your risk. Golf club owners and operators fall within the category of commercial hosts.

The common law imposes a duty on commercial hosts to take certain steps to see that intoxicated patrons do not cause injury to themselves or others upon leaving the premises. The good news is that the law with respect to commercial host liability is well settled and offers guidance to licensed establishments on how to minimize their risk of liability.

Commercial host liability is separate and distinct and in many cases is in addition to liability arising from a breach of provincial liquor control and licensing legislation. In some cases, a club may face quasi-criminal prosecution if it does not comply with provincial liquor control

and licensing legislation, and it is therefore important that golf club owners and operators have a clear understanding of both branches of liability.

COMMERCIAL HOST LIABILITY

The obligations of a commercial host in Canada do not vary depending on whether the host is a nightclub, a pub or a golf club. Although lawsuits against commercial hosts generally involve pubs or nightclubs, golf clubs that sell alcohol are bound by the same duty.

Commercial hosts who serve alcohol have been exposed to potential liability at common law since the landmark 1973 Supreme Court of Canada decision *Jordan House Ltd. v. Menow*. In *Menow*, the court held that a commercial host owes a duty of care to its patron who becomes intoxicated and is unable to look after himself.

The plaintiff in this case, Mr. Menow, was a well-known patron of the defendant bar. On the night in question, he became intoxicated and started annoying customers. Mr. Menow was ejected from the bar, even though the bar staff knew that in order for Mr. Menow to get home he would have to walk along a busy highway.

Mr. Menow was struck by a car while walking home. Mr. Justice Laskin of the Supreme Court of Canada said that the bar owed a duty of care to Mr. Menow not to place him in a situation where he was at risk of injury. Consequently, the bar was found liable for one-third of Mr. Menow's injuries.

DUTY OF CARE

In 1995, the Supreme Court of Canada delivered a judgement in the case of *Stewart v. Pettie* whereby the duty of care owed by commercial hosts was extended to third parties who might reasonably be expected to come into contact with an intoxicated patron, and thereby be exposed to risk of harm.

In the *Pettie* case, the commercial host was not held liable. The intoxicated patron, Mr. Pettie, had been drinking in a group with three others, two of whom were sober.

Mr. Pettie himself showed no visible signs of intoxication when he left the commercial host's premises. When the group left, they had a brief discussion regarding Mr. Pettie's level of intoxication and ability to drive. They determined that he was sufficiently sober, and he drove the group home. On the way home, he was in an accident which rendered one member of the group a quadriplegic.

The Supreme Court of Canada held that the commercial host had acted reasonably in assuming that one of the sober individuals would drive. As it was not reasonably foreseeable that the intoxicated patron would drive, the commercial host did not have an obligation to inquire as to who was driving.

Therefore, although the commercial host owed a duty of care to the injured third party, it did not breach the standard of care expected of it in the circumstances.

The law is clear that a commercial host owes a duty of care to its patrons, and as a result, may be required to take reasonable steps to prevent its intoxicated patron from pursuing a course of conduct that is harmful to himself, and harmful to third parties.

Once a duty of care to a patron or a third party is established, the next question is what is the standard of care that a

commercial host is expected to meet? Although commercial hosts are not held to a standard of perfection, the standard of care expected of commercial hosts is higher than most commercial hosts would like.

FORSEEABLE RISK OF HARM

It is important that golf club owners and operators, as well as their employees, have a clear understanding of what is required of them when selling and serving alcohol on golf club premises.

In most cases, the allegation against the commercial host is that the commercial host was negligent in that it over-served the patron and it failed to take any steps to prevent harm from coming to the patron or a third person. That is, but for the over-service and lack of action on the part of the commercial host, the accident would not have happened.

It must be remembered that liability to a commercial host does not arise merely because a patron is over-served. Likewise, a violation of provincial liquor control legislation does not on its own ground indicate liability against a commercial establishment.

It is only if there is foreseeable risk of harm to the patron or to a third party that the commercial host will be required to take some action. The question then is, what action is a commercial host required to take?

The law has told us that a commercial host is required to:

- Monitor the consumption of alcohol by its patron;
- Make reasonable assumptions from the amount of alcohol consumed by a patron as to whether he or she is likely to be impaired;
- Monitor its patrons for behaviour and signs suggestive of intoxication; and
- Actively prevent the patron from engaging in any reasonably foreseeable harmful activity.

Although each case hinges on its own specific facts, there are several factors that courts will consider when determining whether the commercial host met the requisite standard of care:

- Did the commercial host have a policy in place that monitored the consumption of alcohol?
- Were the staff and management trained on the policy?
- Was the policy followed in this particular circumstance?
- Was the policy, or were pertinent parts of the policy, visibly posted?
- Was the patron over-served?
- Does the establishment have a history of over-serving patrons?
- Was an offence committed under the governing provincial liquor licensing and control laws?
- Was the patron visibly intoxicated?
- Did the intoxicated patron indicate that he or she was going to drive or engage in another potentially harmful activity?
- Was an effort made to take away the patron's keys?
- Did the establishment have knowledge of the patron's drinking habits?
- Did the establishment have knowledge of how the patron typically travels home after drinking?
- Was a taxi called?
- Were the police called?

IGNORANCE IS NO EXCUSE

The law is clear that establishments which serve alcohol must either intervene in appropriate circumstance or risk liability. It should be noted that this liability cannot be avoided where the establishment has intentionally structured the environment in such a way as to make it impossible to know whether intervention is necessary.

For instance, if a party has a "cash bar" and the establishment is unable to keep track of how much alcohol people are drinking, the establishment cannot say it could not foresee the risk created when the inability to foresee the risk was the direct result of the way the serving environment was structured.

A LINK IN THE CHAIN

The commercial host also cannot escape liability if it continues to serve an already intoxicated person. This is important because the duty of the golf club is the same even if a patron arrives intoxicated at the club. If the golf club continues to serve the patron alcohol, this maintains or increases the risk that the patron will be injured or will injure others.

If an intoxicated patron leaves a golf club and continues to drink at another establishment and then injures himself or someone else after leaving the second establishment, the golf club is not absolved of liability. If the patron is served enough at the golf club to be intoxicated when leaving, and it's reasonably foreseeable that he may cause harm to himself or a third party, the club is negligent if it fails to take steps to ensure the patron gets home safely.

To summarize the common law, a commercial host owes a duty of care to its patron. If there is a foreseeable risk of harm to the patron or a third party, the commercial host is required to take steps to prevent its intoxicated patron from pursuing a course of conduct that is harmful to himself or third parties.

PROVINCIAL LEGISLATION

In addition to the threat of civil liability, golf courses may face sanctions for breaching provincial liquor control and licensing legislation.

Provisions prohibiting licensees and the employees of licensees from over-serving a patron, serving minors, not serving in a responsible manner or continuing to serve an intoxicated patron can be found in liquor control and licensing legislation across Canada.

Most provincial liquor control and licensing legislation contains penalty provisions where individuals and corporations may be fined and individuals may be fined and/or imprisoned if the legislation is breached.

Ontario's Liquor License Act creates a civil cause of action against a commercial host for serving alcohol to a visibly intoxicated person. It should be noted that even under Ontario's legislation, the plaintiff must still prove the commercial host was negligent and fell below the required standard of care.

Most provinces require staff who serve liquor to complete a certification program, such as Smart Serve. This is a step in the right direction, however good practices will not prove what the courts



are ultimately looking for - Due Diligence. (For a listing of provincial liquor license acts and liquor certification programs visit www.ngcoa.ca and go to Benefits/Golf Business Canada Magazine/ Supplemental Articles).

POWER OF DUE DILIGENCE

Exercising Due Diligence means taking reasonable steps to prevent a risk or problem from occurring.

This is a legal test and is an absolute defence to either a criminal charge or a civil law suit. So long as it can be proven that reasonable efforts were taken and appropriate systems were in place and followed, then liability will not attach.

While Due Diligence is a defence, the onus is on the defendant to prove it and that takes proactive preparation to be able to prove accountability. The good news is that there are a number of set

requirements which need to be put in place in order to establish Due Diligence.

THE THREE P'S

At a minimum, you will need "The Three P's" - a Policy, Procedures and Proof of Compliance.

Training programs, seminars and procedures will generally tell you what to do but not how to do it and how to package your efforts for court.

More is needed and it is critical to understand that what works for prevention may not work for accountability.

Remember that if you do end up in court, you want to ensure that your processes and procedures will meet the standards required for Due Diligence. Lucky for you, there are frameworks that have been developed to help ensure that you can be prepared to meet the standards of Due Diligence.

STEP BY STEP

The Fourteen Point Formula, developed by Strategic Risk Control Ltd., is an example of one such framework. The fourteen points have been accepted and required by the courts in proving Due Diligence. Recent government regulatory requirements have indicated the need for most of the items set out in the Fourteen Points as requisites for managerial compliance.

Understanding the Fourteen Point Formula:

A Statement of the Risk: It is necessary to be able to demonstrate that there is a full understanding of the risks of dealing with alcoholic beverages. Your Risk Control Team (see below) should meet and work out the dangers and repercussions involved in serving. These are well set out in many of the programs and

literature available but you should adopt your own wording that you are comfortable with.

Your Policy: This should be similar to a mission statement and demonstrate your resolve not to allow incidents to occur. Your Risk Control Team should involve personnel at all levels so that there will be acceptance and buy-in to the policy.

Standards: It should be firmly entrenched that your organization will abide by all of the legislation and regulation dealing with serving. This, however, is a bare minimum and, in some instances, insufficient to deflect civil liability. You should accordingly indicate that the standard of Due Diligence is being adopted and followed in addition to regulatory compliance.

Controls: Your controls will be the rules and regulations which you probably have in place if you have subscribed to your provincial liquor serving course, such as Smart Serve. They can be integrated into your Due Diligence Manual by reference to existing practices and be upgraded where necessary while working towards certification.

Inspection Procedures: It is critical for any system evidencing Due Diligence to be able to demonstrate a regular system of inspection to ensure that the stated Standards are being met.

Reporting Procedures: When it comes time to deal with accountability, this is one of the greatest weaknesses of most systems. Reports are either inadequate or too cumbersome. Your Risk Management Team must work on reporting methods and forms that will be user friendly and still demonstrate that your systems have been properly followed.

Maintenance and Repair: This applies not only to your premises but to your systems. These will need periodic overhauls and upgrades to deal with inefficiencies or gaps exposed by inspections or audits.

Emergency Response Procedures: When an incident occurs, you need to know who is in charge of what, who is to be contacted and what is to be done. Your Risk Control Team should deal with all anticipated scenarios and have a protocol to deal with each one.

Education Procedures: Formalize and document the education provided to all staff. You need to be able to prove that your people have taken all applicable courses, understand the Fourteen Points and are familiar with what to do.

Risk Control Team: Use your front-line staff to help develop your system. Your Team needs to involve people who work on a day to day basis with the risks and can speak to what is practical for them. This will result in buy in as well as more efficiency.

Records Control: Ideally records of events should include electronic storage of reports, surveillance videos and photographs to prove that your people have done the right thing and to preserve critical evidence. You also need day to day records to substantiate compliance with the 14 Points.

Compliance Enforcement: You must have a program of rewards and sanctions to show that you are serious about the risks of serving alcohol. Providing incentives may help ensure everyone is motivated to follow through with procedures.

Strategic Audits: Your systems, procedures and records need to be audited internally to ensure compliance and utility and should be subject to external audits to provide proof of insurability and certification.

THE FOURTEEN POINT SOLUTION™



Management Review: Directors and Officers are vulnerable to liability if they do not ensure that systems are in place and that they are working properly. External Third Party audits will provide proof that the proper attention is being paid to the prevention of incidents and adherence to a supportable system.

Implementation of the Fourteen Points: Implementation of the Fourteen Points is not complicated, especially if you take into consideration that it is not a whole new bureaucratic system but rather a recognizable and measurable framework which enables a course to fold its existing practices and procedures into the matrix and upgrade them where required.

The importance of using a framework, such as the Fourteen Points is demonstrated by the fact that some insurers are treating Fourteen Point Certification as a benchmark in measuring risk profiles and are offering reduced premiums.

James Ritchie, of Moore & McLean Corporate Insurance Ltd., indicates that if an operator becomes certified this will allow for a reduction in their liability rating.

The Golfmax Insurance program has a kit available to help incorporate your current practices into the Fourteen Points, line up a Gap Analysis and proceed to Fourteen Point Certification, which may result in favourable treatment in your premiums.

Further discussion with Shari Dodsworth at Lombard Insurance, underwriters for the Golfmax Insurance Program, advises that they are in the process of creating the materials that will reflect the certification requirements. Even operators who are not certified will still see changes in their inspections. For example, loss control reports are being adjusted to reflect liability losses versus their current focus on property loss. Inspections will also include questions that will determine whether a plan is in action or just on paper.

PREVENTION IS KEY

In light of the threat of potential liability under the common law and the provincial liquor statutes, it is imperative that clubs are proactive in how they manage the risk associated with alcohol related liability.

If you are going to put systems in place, work with a team of brokers and insurers who understand Due Diligence and somebody who knows what is required when things go wrong.

Remember to use a system that can work in court, like the Fourteen Points, and consider certification to obtain favourable treatment from your insurers and ensure that you are trial ready.



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OWEN SMITH

Owen is the founder and CEO of Strategic Risk Control Ltd., a New Liskeard, Ontario based company dedicated to helping companies prevent and deal with liability risks. Owen developed The Fourteen Point Formula™, which transforms good practices into Trial Ready™ Due Diligence. Contact Owen at (705) 647-7760 or osmith@smithlawteam.com.



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