

Employment and Labour

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Avoiding Employer Liability Relating to Company Sponsored Social Events

The recent Ontario Superior Court decision in *Hunt v. Sutton Group Incentive Realty Inc., et al* ("Hunt"), has caused concern amongst many employers. This decision has made employers uncertain of their obligations to their employees at company sponsored social functions where alcohol is served. A review of the Hunt decision and some suggestions for employers to follow when company social events are held can help to minimize uncertainty which may exist as well as reduce an employer's risk of liability.

Summary of the Hunt decision

In the Hunt case, an employee sued her employer for failing to take adequate steps to prevent her from leaving her place of employment while she was in a state of intoxication. The employee also sued the pub where she and her colleagues went for additional drinks on the way home. While the employer conceded that he had a duty to keep his place of employment safe, he denied that he had a duty to supervise his employee's drinking or to control his employee's private life, which would have extended his duty beyond the premises of employment.

The court found in favour of the employee and held the employer and the pub jointly and severally liable for 25% of the employee's injuries, amounting to an award in excess of \$300,000.00 (the employee plaintiff was found responsible for the balance 75% of the damages). As the pub had gone out of business and carried no insurance, the employer bore the full brunt of the 25% award.

Employer Liability as Clarified by the Hunt Decision

The Hunt decision is not the only recent decision which has found that an employer owes its employees a "duty of care" to protect them from "foreseeable harm" in circumstances of alcohol being consumed on an employer's premises. In Hunt, the court specifically stated that an employer's duty of care extends beyond a simple managerial responsibility to safeguard employees from the risk of personal injury while on duty, to a more general responsibility to take steps to ensure that its employees do not engage in any harm which is "reasonably foreseeable" to the employer, regardless of where such harm takes place. Accordingly, the judge clarified that the employer's duty included an obligation to ensure that the employee would not enter into a state of intoxication while on the work premises so as to interfere with her ability to safely drive home afterward. Additionally, once the employer became aware, or ought to have been aware, that the employee was, in fact, intoxicated, there was a further obligation to prevent that employee from getting behind the wheel of her car.

Other Ontario decisions indicate that the employer's obligations found in the Hunt decision are not necessarily new. In Hunt the court referenced another recent case, (*John v. Flynn*) in which an employer had long-standing knowledge that a small group of its employees frequently consumed alcohol in cars in the company parking lot during work breaks. The employer was found to have an obligation to take reasonable care for the safety of its employees such that when it was apparent at the end of the work shift that one of these employees was about to drive, the employer had an obligation

to take away the employee's car keys, to take custody of his car, to send him home from work by taxi, or to place him in the possession of a responsible person. This decision indicates that an employer may have an obligation to take action where the employer is simply aware that employees have been drinking on company property, even if the employer did not actually provide the alcohol. Consequently, an employer may not avoid liability on the basis that employees obtain alcohol from another source, if it is reasonably foreseeable for an employer to know that an employee is intoxicated such that the employee presents a risk to themselves or others.

In a similar case, (*Jacobson v. Nike Canada Ltd.*) an employee, while on his shift, drank beer provided by his supervisor, and got into a serious accident on his way home. It was held that the employer breached its duty of care by introducing into the workplace conditions that would reasonably and foreseeably put an employee at risk. In addition, the employer failed to meet the standard of care by not preventing the employee from driving when he was apparently intoxicated.

In view of these decisions, the ruling in Hunt should not necessarily be considered to be surprising. In the Hunt case, alcohol was being served at an office party which took place during office hours, on work premises. By imposing an obligation on the employer to monitor the alcohol consumption of his employees, and to take positive steps to prevent employees who became intoxicated from driving, the court's decision is consistent with previous rulings.

Employer Liability as Distinguished From Social Host Liability

In the Hunt decision, the court was careful not to base its finding on principles associated with "social host" liability. Such liability, which has been largely limited to US court decisions, results in a host, who serves alcohol to an adult social guest, knowing both that the guest is intoxicated and will thereafter be operating a car, being liable for injuries arising as a result of the negligent operation of that car, when such negligence is caused by the intoxication. In fact, the court in Hunt imposed a higher duty of care on the employer, particularly as the office party took place on office premises, during office hours, while the employee was expected to perform work-related duties.

It is not clear from the Hunt decision which duty of care (as between the social host duty of care and the

employer/employee duty of care) would be imposed on an employer, in favour of its employees, for holding a party off-premises and outside of normal work hours and where the employees were not, at the time of the party, fulfilling "employee duties". Out of an abundance of caution, employers should implement policies which would satisfy the higher duty of care imposed in the employer/employee relationship.

Recommended Employer Actions

In Hunt the court identified what actions it expected of an employer. These actions can be included in the relatively simple steps which an employer can take to help avoid the imposition of liability with which the employer of Ms. Hunt was faced. The court in Hunt stated that the employer should have (1) insisted that the employee's car keys be left at the office, or (2) insisted that the employee take a cab home at the company's expense (such that the employee would have no alternative but to accept the offer for alternative transportation). The court also stated that the duty of care on the employer cannot be delegated to a third party, so an employer is required to personally intervene to prevent an intoxicated employee from driving home. The court confirmed that it was insufficient for the defendant employer in this case to simply inquire of the employee whether he should arrange for an alternative mode of transportation (recognizing that the worst person to ask for guidance in such circumstances is the drunk person whose judgment is no doubt impaired). The court also rejected the employer's defence that it was reluctant to take more intrusive action for fear that appropriating the employee's car keys would have amounted to theft or that forcibly putting the employee in a taxi cab would amount to false imprisonment and/or kidnapping.

Other options open to an employer would include taking active steps to limit the amount of alcohol served at company functions. Part of the problem in Hunt was that the bar at which Ms. Hunt was drinking was an open one at which the employees could serve themselves. This should be avoided. Instead, employers should stop serving alcohol before the end of the function and the bar attendant should be instructed not to serve anyone who appears to be intoxicated. If the function is held at a licensed facility, the bar attendants should also be instructed to advise a member of company management if any employee has been refused service.

Communication with employees prior to the event is also encouraged. This can include instructions on how company-provided taxi chits can be obtained before and at the event. Employees should be encouraged not to drink to excess and never to drink and drive. The company can advise its staff that intoxicated employees will be put into cabs. Car pools and designated drivers can be encouraged, even to the point of paying mileage and parking for that driver. Where functions are being held at a hotel, the company can try to arrange for reduced rates and ensure that employees are advised of the arrangements which have been made.

Although the obligations which are proposed through these recommendations may appear to be onerous, the courts have given careful consideration to the potential effect its rulings may have on social gatherings, and has concluded that it is far outweighed by the deterrent effect that such policies may have in reducing drinking and driving. Additionally, these steps are well worth it when considering the potential risks of a lawsuit.

In addition to these recommendation employers can also consider introducing a company policy which

can be communicated to all employees by memo which can be introduced at any time and re-circulated prior to every company function. Employers should also review their insurance policies to ensure that adequate general/comprehensive insurance coverage is in place for employee injuries and damage.

More information regarding this issue and regarding an appropriate human resources policy can be obtained by contacting any of Goodmans' lawyers practicing in this area including:

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