Employer Liability for Drinking Employees

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At this time of year, we thought it prudent to remind you of your potential for negligence claims when alcohol is supplied at company events or in the workplace. Based on the principles arising from recent jurisprudence, we have assessed the duty of care owed to a ‘drinking’ employee at a company function and have set out a number of recommendations to reduce employer liability following these social events.

The recent Ontario decision of Hunt v. Sutton [2001] O.J. No. 374, released on February 5, 2001 and the Court of Appeal decision John v. Flynn released June 12, 2001, provide a chilling reminder of the risk employers face when employees cause injuries to themselves or others after consuming alcohol on company premises or at a company sponsored event.

In Hunt v. Sutton Group Incentive Realty et al. (which decision is under appeal to the Ontario Court of Appeal), the employer, Sutton Group held an afternoon office party on its premises and provided an open bar. During the course of the party, Hunt, an employee of Sutton Group, consumed enough alcohol to become noticeably intoxicated. At one point, the employer commented on her state and offered to phone her husband. Hunt said that was not necessary and so the employer did not make this call. Hunt later left with co-workers to continue the party at a local pub. Once there, she consumed two more drinks and later drove home in a severe snowstorm. She was in a car accident and suffered traumatic injuries.

The court found that the employee was 75% responsible for her own injuries. The employer and the local pub were found to be jointly responsible for the remaining 25% of Hunt’s total damages, which were assessed to be in excess of $1.1 million. As the pub had gone out of business and held no insurance, the employer was liable for $281,229.99 plus prejudgment interest calculated from the date of the Statement of Claim.

It is significant that the company-sponsored event took place during business hours. This fact distinguishes this case from social host-type cases. In finding the employer liable, the court was saying that the efforts made by the employer were not sufficient. The Court held that the employer has a duty to take positive steps to safeguard the employee from harm.

In another decision, John v. Flynn, the Ontario Superior Court had found an employer 30% liable to a pedestrian struck by an employee who had become intoxicated on company premises. In this case, the employer did not supply alcohol, but the court found that the employer owed a ‘duty of supervision’ and was obliged to take steps to ensure employees did not leave the workplace impaired. Although no one saw the employee drinking at work on the night in question, there was evidence that the company knew that night shift employees consumed alcohol in the parking lots during breaks and that this particular employee had a history of alcohol abuse.
The Court of Appeal reversed the lower court decision and found that the employer was not liable for damages caused by a worker who secretly drinks on the job and later gets into an accident. The relevant facts in this case were that the employee had gone home from work and then out again, after which time, the accident occurred. The Court of Appeal found that there was no basis to hold the employer liable for the loss suffered by the plaintiffs given that the employer was not aware that the employee was intoxicated on the night in question, did not provide the employee with alcohol on that night and did not condone his driving while intoxicated, combined with the fact that the accident was not associated with the employer in any way other than that one of its employees, who had finished his shift for the night, was involved in the crash. As such, the Court of Appeal held that the employer did not owe a duty of care to the plaintiffs injured by the intoxicated employee. The court also held that even if there was such a duty, it did not extend beyond the point where the employee left the company premises and drove safely to his home. While no liability was found on the part of the employer in this case, the Court of Appeal emphasized the fact that the employer was not aware that the employee had been drinking that night and was intoxicated. Thus, it can be inferred that there will be some situations where liability will fall to an employer for the negligence of an impaired employee.

**Recommendations for Employers**

In light of these new decisions, there are some practical measures that employers can take to attempt to protect themselves from liability. Of course, the absence of alcohol is the best insurance against any liability. However, if alcohol is to be served at company-sponsored functions, then the following are some general recommendations that should reduce the risk of liability.

*Communicate with Employees Prior to the Event*

- Revise internal policies
- Before the party, send out an office-wide memo or email reminding employees not to drink to excess and never to drink and drive. Advise them not to drink if they are on medication or allergy formulae. Remind them that attendance is voluntary and encourage employees to act responsibly and to control their own behaviour.

*Carefully choose the Type of Event*

- Do not combine alcohol with potentially dangerous activities, such as boating, snowmobiling, skiing or swimming, or ensure that alcohol is served after these events.
- Ensure that the venue of the event is free of potential hazards. Examples include, locking the gate to a pool, or placing a sign on a glass window.
- If the weather conditions are going to affect employees’ ability to drive, the duty on the employer increases. Offer accommodation at a hotel in such cases.
At the Event

- If the event is at a hotel, then ensure that the contract clearly states that any liability shifts to the hotel or facility.
- Part of the problem in Hunt was that the bar was an open one at which the employees could serve themselves. This should be avoided. Have drinks served by professional bartenders rather than having a self-service bar. This would allow you, as the employer, to be confident that a professional is monitoring the amount of alcohol employees are consuming.
- Bar attendants should be instructed not to serve anyone who appears to be intoxicated. As well, bar attendants should be instructed to advise a member of company management if any employee has been refused service.
- Limit the amount of alcohol served at the function. Use bar tickets. There may well be 'trading' of tickets, which should be discouraged.
- Serve alcohol only when serving food.
- Do NOT announce last call.
- Stop serving alcohol at least one hour before the end of the party.
- Designate party monitors to monitor guests.

Transportation from the Event

- Arrange to have security monitor the guests as they are leaving. For those guests suspected of consuming too much, arrange for accommodation or a taxi home.
- Encourage employees to take a taxi home by supplying them with taxi chits paid for by the employer. Note that in Hunt, this by itself is not enough to discharge the employer's duty of care to a 'drinking employee'.
- Car pools and designated drivers should be encouraged, even to the point of paying mileage and parking for that driver.
- If the event is at a hotel, the company may want to arrange for reduced rates and ensure that employees are advised of the arrangements that have been made with the hotel.
- Ask guests to place their car keys in a basket as they arrive at the party. At the end of the night, if a guest is inebriated, refuse to return the keys. [This would not be considered theft according to the judge in Hunt.]
- If an employee is refusing to be reasonable, call their spouse or a family member to come pick them up. If the intoxicated employee insists on driving, the employer should call the police.

Other Recommendations

- Due to the decision in Hunt, don't serve alcohol during work hours.
- Even if the employer merely allows the employees to drink alcohol at the event (i.e. the employer is not the source of the alcohol), the employer is still expected to supervise their consumption.
As well, other issues arise at such events, including harassment. It is suggested that the employer enforce a strict policy against harassment at the job and at events sponsored by the employer. Remind employees of the company's harassment policy and the company's expectations about employees' behaviour.

Employers should revise their internal policies to reflect these new employer obligations. Re-circulating these policies prior to every company event is recommended.

Implementing some or all of these recommendations will reduce the risk of incidents and therefore liability. When incidents do occur, employers who follow these recommendations will be better positioned to defend claims. These suggestions may seem onerous, but courts have considered the chilling impact of their rulings and have nonetheless decided that the negative impact on social events is outweighed by the deterrent effect that such judgements may have on drinking and driving.