

## **Employers' Liquor Liability: Paternalistic Obligations or Personal Responsibility?**

Employers are regularly changing their approaches to conducting business including their relationships with employees often as a result of prompting from the courts. Today, benefits often include an employee assistance programme; and alcohol and drug policies are a necessary part of the company manual. At the same time, a part of maintaining employee morale is providing firm events such as a Christmas party or summer picnic during which alcohol is served. At one time, each person was responsible for his or her own consumption and while taxi cabs or hotel accommodation might be offered to prevent people from driving after drinking, the function was considered to be a perk, not part of employment responsibilities. Safe drinking was the responsibility of the employee.

The decisions of *Hunt v. Sutton Group*<sup>1</sup> and *John v. Flynn and Eaton Yale Ltd.*<sup>2</sup> have set out certain parameters for the employer and employee in situations involving alcohol.

The first case would seem to limit employee responsibility if alcohol is served at an employment function, revising the old adage to "I am my employee's keeper". The second case, however, seems to limit the situations in which the employer can be deemed responsible.

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<sup>1</sup> Released February 5, 2001, Ontario Superior Court of Justice, Marchand, J.

<sup>2</sup> Released June 28, 2001, Court of Appeal for Ontario, Finlayson, J.A., Weiler, J.A., Goudge J.A.

## **Background**

Liquor Liability is an area of law that was first broadly defined in the decision, *Jordan House v. Menow and Honsberger*.<sup>3</sup> The Supreme Court of Canada determined that based on a special relationship between invitor (bar) and invitee (patron), if the bar over-served the patron to the point of intoxication and the patron was injured as a result of the intoxication, the bar could be found negligent for over-service. The court held that due to the fact that alcohol impairs judgement, it was foreseeable that an intoxicated person might be injured following the consumption of alcohol. Consequently, the standard of care expected of the commercial host was developed further in *Stewart v. Pettie*<sup>4</sup> as follows:

1. The host must monitor the consumption of its patrons;
2. The host must make reasonable assumptions, from the amount consumed by its patron, that he or she is likely impaired; and
3. Assuming 1 and 2, the host must take steps to prevent the patron from driving.

While this standard was developed with the commercial host in mind, it is not difficult to insert any server of alcohol into the role of host if it is determined that there is a duty of care owed.

Tavern liability was broadened to include “an innocent third person”<sup>5</sup> on the basis that it was reasonably foreseeable that if a commercial host served a patron alcohol and then let the patron drive drunk, the patron could hit and injure or kill an innocent third party.

Thus a duty of care was owed not just to the patron, but if the patron was intoxicated by

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<sup>3</sup> (1974), 38 D.L.R. (3d) 105 (S.C.C.)

<sup>4</sup> (1995), 121 D.L.R. (4<sup>th</sup>) 222 (S.C.C.)

<sup>5</sup> *Hague v. Billings*

reason of the host's service of alcohol, then to anyone who might come into contact with the patron.

Taverns have also been held accountable for any potential occupier's risks due the nature of alcohol to impair judgement<sup>6</sup>. Since taverns are selling intoxicating beverages which may affect judgement and motor control, they have an obligation to insure that their premises are safe for their patrons.

### **Development of Employer's Liquor Liability**

It has only been recently that there has been a move to find negligence against servers who are commercial establishments.

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<sup>6</sup> *Whitlow v. 572008 Ontario Ltd. (cob Cross-Eyed Bear Tavern)*, [1995] O.J. No. 77 in which a patron, who consumed a number of drinks, tried to descend a flight of stairs with a bulkhead overhead. It is presumed that he hit the bulkhead and fell to the bottom; he eventually died from alcohol poisoning and a fractured skull. The court assessed 10% liability against the tavern based on the Occupier's Liability Act stating that the premises were unsafe for an invitee especially in light of the fact that alcohol was served at the premises.

A further case of interest to those looking at the risks of an activity combined with alcohol, is *Jacobsen v. The Kinsmen Club of Nanaimo*. The Kinsmen Club was hosting a Bavarian beer garden as part of an event called Bathtub Day. The beer garden was held in a curling rink with 40 foot ceilings and supported by I-beams. By the time a gentleman known only as Sunshine had climbed the center I-beam, the feat had been done twice by others. Sunshine, perhaps in an effort to be different than his predecessors, walked along one of the girders when he topped and was hanging by his hands. He attempted to hoist himself up but slipped, landing on the plaintiff's head, right shoulder and back and rendering the plaintiff unconscious. Sunshine got up and walked away, never to be heard from again. The Court found the Kinsmen Club to be an "occupier" and the curling rink to be "premises" pursuant to the Act. The question was whether the Kinsmen Club owed a duty of care to the Plaintiff. If the plaintiff had been hit during the second climb, the judge "would have had great difficulty wrestling with that problem" (p. 231); however, the Club had had two warnings of this activity and by the time of Sunshine's climb, the Club had a duty to prohibit or prevent further I-beam climbing.

The Court held that the club should have done the following: 1. Threaten or revoke the invitations of the climbers in the first and second incidents: 2. Make a public announcement denouncing the activity: 3. Station club members at each of the beams to prevent further incidents of climbing. The judge went on to say, "It seems to me that where liquor, or rather beer, was being consumed in such surroundings, it should have been apparent to any responsible person that people climbing 39 foot high I-beams constituted a potential danger, not only to the climber but to those patrons in the immediate vicinity of the high beams. My conclusion therefore is that under the circumstances that prevail, the defendant failed to take reasonable care that the patrons in the curling rink were reasonably safe while enjoying themselves in their afternoon and evening of beer drinking. **It is clear that the purpose for which the alcohol is served is irrelevant when determining liability for the negligent service of alcohol.**"

The basis of employer's liability begins with the premise of the master-servant relationship wherein the master is to provide a safe working environment for his/her servant. The first significant case in this area was *Jacobsen v. Nike*<sup>7</sup>, in which the employer provided beer to employees who had been working on a trade show set-up all day. The plaintiff, who was 19, visited two pubs after work, started for his home, (which was a 40 minute drive,) fell asleep and rolled his car. He was ejected and sustained a spinal cord fracture.

The trial judge apportioned the negligence and found Nike to be 75% responsible. The judge took the view that the relationship between employer and employee was even more "special" than that between tavern owner and patron.

"The law imposes a higher standard of care on an employer than on a tavern owner. An employer is required to safeguard its employees from unreasonable risks. The risk of injury from becoming impaired from consuming alcohol and driving in that condition is obvious to any reasonable person. It is not too onerous, . . . , for an employer who provides alcohol to its employees to monitor consumption, so that it is in a position in the appropriate circumstances to take affirmative steps to prevent the foreseeable risk of injury. That is especially so in a situation such as this, where the alcohol was provided free in large quantities to a small number of young men who were working hard in a hot environment."<sup>8</sup>

The judge stated that the standard of care must be taken within the context of the individual situation. In this case, he found that the plaintiff, Jacobsen, was young, an inexperienced drinker, fatigued after a 16 hour workday and faced with a 40 minute drive. The plaintiff was under the control of the supervisor and consequently, he found even more factors against the employer:

1. The Nike supervisor failed to restrict or monitor his employees' drinking (while on the job);

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<sup>7</sup> 133 DLR (4<sup>th</sup>) 377 (B.C.S.C.)

<sup>8</sup> Ibid, p.

2. The Nike supervisor encouraged the consumption by drinking with his employees;
3. The Nike supervisor took no steps to determine if Jacobsen was impaired when he left work
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4. The Nike supervisor took no steps to prevent Jacobsen from driving when he knew he was driving home.

The employer was in a position to take preventative steps and failed to do so.

Curiously, no mention was made of the two pubs. While they were not named as defendants in the suit, there was the gap of over two hours after leaving work and the consumption of probably four additional beers. The break in causation does not seem to have been raised at trial.

However, it is the recent case of *Hunt v. Sutton Group* that has caused many companies to rethink employee events that have an alcohol component. The standard of care, which the trial judge deemed to be appropriate, has created a chill due to the high onus.

Hunt carries overtones of *Jacobsen v. Nike* except that the onus upon the employer seems to be significantly broadened beyond that of the earlier case. In this case, the employer did monitor the consumption of the employee, brought her intoxication to her attention and provided some options for her to return home other than by driving herself. These options were found to be insufficient by the judge who took the view that the employer's responsibility was far greater.

Linda Hunt was a receptionist for a real estate company that had a drop-in wine and cheese party for staff and customers in 1994. She began work around 1 p.m. and by 4 p.m., her boss observed that she appeared to be intoxicated. He suggested that he would call her husband if she continued drinking. His evidence was that she did not appear intoxicated after that point. She began cleaning up at 6 p.m. and didn't leave those premises until 6:30 p.m. Her boss offered cabs to everyone and another employee who didn't drink offered rides for everyone.

Instead, she drove from work to a pub where she stayed until 8 p.m. The judge made a finding of fact that she consumed two beers in that time. The weather was especially poor that night and one of her colleagues offered her a place to stay to avoid the drive home, a 45 minute drive in good weather. The accident occurred at 9:45, one hour and forty-five minutes after she left the pub and 12.2 kms from the pub. There was evidence of a coffee at the crash scene but most of that time is unaccounted for and was not explained in the reasons for judgement.

The trial judge made a joint finding of 25% liability against the employer and the pub, however, since the pub had since become bankrupt and had no insurance, the burden of the judgement fell to the employer.

As in the Jacobsen case, the judge found that the employer had a duty to protect its employee from harm, as in, providing safe working conditions. That duty extended to insure that she did not become intoxicated while in the course of her work and subsequently, drive home.

The judge believed that by having an open and unsupervised bar, the employer was unable to monitor the consumption of alcohol of its employees. He stated that the employer “owed its employee an overriding managerial responsibility to safeguard her from an unreasonable risk of personal injury while on duty.”<sup>9</sup>

The employer argued that it did take reasonable steps to safeguard her by offering to call her husband, making a general offer of a cab, and another employee offering a ride, however, the judge rejected these efforts as insufficient. It was his view that the employer could have taken her keys from her, taken custody of her car, taken her to a hotel or called her husband. As a last resort, he stated that the employer should have called the police.

The argument of a break in the causation was made as well and rejected as well. The employer argued that while he last observed her drinking at 4 p.m., at the very least she left the business premises at 6:30, attended the pub for 1½ hours leaving a further 1¾ hours unaccounted. The judge referred to an earlier decision for comments on the issue of causation:

“ A break in the line of causation is subject to the qualification that if the intervening act is such that it might reasonably have been foreseen as anticipated, as a natural and probable result of the original negligence, then the original negligence will be regarded as an approximate cause of the injury, notwithstanding the intervening event”.<sup>10</sup>

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<sup>9</sup> Ibid, p.18

<sup>10</sup> *Cotic v. Gray* (1981, 33 O.R. (2d) 356 (Ont. C.A.) which was cited in the decision on the motion for a directed verdict in *John v. Flynn*. This case was recently overturned by the Court of Appeal and is discussed in more detail below.

The fact that the intervening events were considerably different in character was not considered.

A lesser known aspect of this case is the fact that the plaintiff was able to recover an apportionment of income which had been denied to her under the Ontario automobile no-fault legislation. Pursuant to the Statutory Accident Benefit Schedule, no one is entitled to Income Replacement Benefits if he or she was impaired at the time of the accident, regardless of fault<sup>11</sup>. Generally, the defendant in a tort action is entitled to deduction of the benefits paid to the plaintiff with some exceptions. The employer in this case, argued that it should be entitled to deduction of the benefits that would have been paid had she not been impaired. The trial judge rejected this argument stating that Ontario legislation has not specifically imposed a penalty upon an insured where he or she is convicted of a criminal offence (such as in British Columbia). Consequently, the defendant was not entitled to a reduction of what the plaintiff would have received had she been sober. In essence then, the plaintiff was able to get a portion of income replacement through the backdoor when she was disintitiled to it in the front door due to her impairment.

The Ontario Court of Appeal overturned the case on a point unrelated to the standard of care of the employer (It deemed that the jury should not have been dismissed in the middle of the trial) and it was sent back for a new trial. The case settled before the second trial.<sup>12</sup>

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<sup>11</sup> The Statutory Accicent Benefits Schedule, The Insurance Act, R.S.O. 1990, c. I.8, as amended.

<sup>12</sup> 60 O.R. (3d) 665, O.C.A.

## **There is Good News for Employers**

The decision of *John v. Flynn and Eaton Yale* at the first instance<sup>13</sup> was an earlier blow for employers as it suggested that employers had duty of care to the driving public arising out of an employee's participation in an employees' assistance programme and further that the duty of care extended beyond the point where the employee left the company premises and drove safely to his home. Employers will be pleased to know that this decision was overturned by the Ontario Court of Appeal in June, 2001.<sup>14</sup>

The facts of the case were that Flynn, an employee of Eaton Yale Ltd., had an issue with alcohol. In 1990, he had accessed the company's employees' assistance plan to attend an alcohol treatment programme. Upon his return, he voluntarily signed a "Last Chance Agreement" under which he agreed to conditions of reemployment following his treatment. The conditions included attending Alcoholic Anonymous meetings, reporting to a representative of the employee assistance committee and complete abstinence from intoxicating substances. If he breached the agreement, he was at risk of termination of employment, subject to any union grievance process.

In December, 1992, Flynn consumed a number of drinks during the day capping it off at his union hall. When it was time to report to work that night, he spoke little to his supervisor in order to minimize the smell of alcohol on his breath, and wore his safety glasses to cover any symptoms from his eyes. He consumed a total of 4 further alcoholic drinks during his breaks in the parking lot. He did successfully complete his shift. Flynn

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<sup>13</sup> [2000]O.J. No. 128, Jan. 14, 2000, O.S.C.J.

<sup>14</sup> *Supra*, note 2.

then returned home, had a snack and left again to attend a social gathering. On his way, he came into collision with the plaintiff's vehicle and the plaintiff was seriously injured.

There was motion to determine if the trial should continue against the employer and the judge found that there was duty owed by the employer to its employee beyond the traditional concept of a safe working environment. Essentially, the judge held that once the employer was aware of the substance abuse problem of Flynn, it owed a duty to Flynn to insure that he was not drinking while on the job. Further, Flynn's supervisor should have been aware of the drinking that went on in the parking lot by many of the employees and specifically, he should have been aware of Flynn's drinking both when he arrived and in the parking lot. Additionally, the judge took the view that the duty of care extended to include the time Flynn was driving home from work and the time after he had been home, that he was driving to his social gathering. Finally, the duty of care was extended to the third party who was struck by Flynn.

In the appeal, Mr. Justice Finlayson, writing for the Court of Appeal, took the view that the duty of the employer to provide a safe working environment was confused with the commercial and social host's duty to patrons/guests when there is an awareness of intoxication. He stated that the employer's focus on the workplace and its duty of care, generally does not extend beyond the workplace. "The notion that an employer, operating a plant for the manufacture of truck and automobile parts, has duty to monitor its employees to determine if it is safe for them to drive home is novel in the extreme."<sup>15</sup>

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<sup>15</sup> Supra, note 2, Finlayson, J.A., p. 7.

The Court of Appeal took the view that the trial judge and consequently, the jury, accepted that the employer had a duty of care to Flynn once Flynn advised the company of his problem with alcohol and his desire to attend an alcohol treatment programme. However, the Court of Appeal reversed this view, stating that this did not impose a special duty on the employer to monitor Flynn. The Court of Appeal found that:

1. The employer was not aware that Flynn was intoxicated on the night in question;
2. The employer did not provide Flynn with alcohol on that night;
3. The employer did not condone Flynn driving while intoxicated;
4. Finally, the accident involving the innocent third party was 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.

### **What the Reaction Is**

The case of *Hunt v. Sutton Group* has created a strong emotional reaction due to the fact that a grown woman made a choice to drink knowing that she was going to drive and ultimately received compensation for that choice. However, had this case involved an innocent third party such as in *Hague v. Billings*, there may not have been the same public outcry.

The case presents many troubling aspects other than compensating an intoxicated person. There is the question of the extent that an employer is required to prevent actions made by its employees that could lead to harm, particularly in the case of consuming alcohol. Had the employer forced the keys from its employee or even called the police, it risked many employment law consequences, not the least of which would be harassment. Many

employers are going to question whether there should be company functions in which alcohol is a component which may lead to few events if any.

Even more disturbing was the potential for this case to lead to social host findings. The trial judge made a specific point in stating that this was not a social host case, but rather a master/servant case. However, if there is special relationship between patron and bar, and employee and employer, could it go to the next step? The Supreme Court of Canada ruled in 2006 that social host liability could only exist in very narrow circumstances if it did exist but what about muddy areas such as client entertainment? Will it be interpreted that the client is a non-employee and therefore no special duty of care is owed or could it be found that since the client has been “plied” with drinks, that the person who done the “plying” has assumed some responsibility for the client if intoxicated?

Further, *Hunt* sends mixed messages. While governments have taken an approach of “don’t drink and drive”, both in social messages and legislation such as those governing automobile insurance benefits as well as the Criminal code, the civil courts are rewarding behaviour that began with the individual’s decision to take the first drink. Few people will argue that alcohol impairs judgement, but by taking the first drink, the consumer has made a conscious decision to impair his or her judgement. Yet in both *Jacobsen* and *Hunt*, both drinkers have been compensated for that decision.

The appeal decision in *John v. Flynn* seems to limit the extent of the employer’s duty of care in alcohol situations by indicating that there needs to be an awareness of the

intoxication, an actual serving of the alcohol by the employer and certain level of acceptance of drinking and driving. If those are the only guidelines, however, it may be difficult for the *Hunt* decision to be overturned as there was an awareness of the plaintiff's intoxication at some point in the proceedings and the alcohol was provided by the employer. What does assist the employer is an effort to stop the employee from drinking and driving but it remains to be seen whether the Court of Appeal will be satisfied with the efforts made.

### **Future Potential – Company Social Host Liability**

Employer's liquor liability is no longer just the perspective of the employer and the employee. Many companies have client events and some host charitable events as well. Social host liability has long been a concept and still not a true legal reality. In the winter of 2001, parents were held to be liable for damages for injuries sustained by a teenager who attended a party at the home of the parents and their son.<sup>16</sup> There had been a history of parties at the home as the parents preferred to have the kids in sight rather than attending bush parties, etc. Because there had been an established relationship in that the parents appeared to condone teenage parties with alcohol (although they did not serve it), and because the son had woken the mother on the night in question to indicate a problem (she fell back to sleep after being assured that everything was under control), there was liability found.

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<sup>16</sup> *Prevost v. Vetter*, British Columbia Supreme Court, March 14, 2001

The case can be distinguished on the basis that the people involved were underage and considered to be inexperienced drinkers. Further, the trial judge stated that generally, people cannot be considered to human breathalyzer machines.

However, as stated above, if there is a special relationship and a duty of care between a bar and its patron, and an employer and employee, it is not difficult to imagine that a special relationship and duty of care could be found between a client and its service provider, or between friends.

This decision was reversed on appeal in March 2002, but only with respect to issues involving liability. The British Columbia Court of Appeal held that issues of liability could not be found until a trial but did indicate that the parents would be defendants at trial.<sup>17</sup>

The Supreme Court of Canada recently found that a social party host was not liable on facts that included that the party was BYOB (Bring Your Own Bottle).<sup>18</sup> The host knew that the guest had a history of impaired driving convictions and generally overconsuming at parties, but the evidence did not clearly show that the host knew the guest was intoxicated when he drove away from the party. The Supreme Court essentially found that it would be too great a burden on social hosts to be monitoring the consumption of their guests especially as they are trained in the area. The court left a narrow window in

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<sup>17</sup> [2002 B.C.J. No. 602, BCCA

<sup>18</sup> [2006] S.C.J. No. 18, SCC

stating that if a host knew a guest was intoxicated, continued serving him or her and then let him or her drive right away, that was a potential for social host liability.

### **What The Result Should Be**

From a general perspective, employers need to decide if an alcohol policy would benefit them. If the decision is in the affirmative, the company would be wise to have representatives from different sectors of the company involved in the development. It is also critical to remember the three “C’s”: clarity, consistency and communication. It is essential that the policy be clearly understood by all the stakeholders, that the policy be consistently used and enforced and that there be ongoing communication with the stakeholders. Had the employer in *John v. Flynn* maintained consistency and communication, it is possible that the lawsuit might have been avoided all together, at least with respect to the employer’s involvement.

In any event, employers need to have plan in place if they choose to continue company-sponsored activities in which alcohol may be served. They also need to be aware that those activities are not just Christmas parties, but can include client functions, golf tournaments and professional association events.

The first step is to check the policy of insurance. At this time, most CGL policies cover this type of loss as was the case in *Hunt v. Sutton Group*. Homeowners policies have provided coverage in the few social host cases. That could change if this becomes a serious risk. It may be that a Special Occasion Permit is required and there is also special

event insurance available which does contemplate the risk of over-consumption of alcohol.

It is also important to be aware of the ramifications of serving too much alcohol to the point that it becomes willful blindness. There has been a recent Supreme Court of Canada<sup>19</sup> decision in which the court outlined the behaviour required for punitive damages. Because the door has been opened to this head of damage, there is a risk if the server's negligence is beyond ordinary. Punitive damages have been assessed at \$1 million and are not covered by insurance.

It is important to think about the type of event that is the best for the occasion. If the event is held at a home or in the company boardroom, a special occasion permit is not required however, the host could be accepting all the liability if an incident occurs. It may be possible to hire a caterer with an endorsement to serve alcohol or to hold the event at a restaurant, bar or hall where the owner should have insurance. This is one way to remove the employer from the role of the host, or at least, to minimize exposure. However, if the company chooses to hold an event and handle all the details including the bar, there are some further ideas to consider:

1. The province of Ontario has endorsed a programme called Smart Serve that was designed for commercial hosts and their staff but which is available to anyone. A company should designate one or two people to be the alcohol experts and to take the Smart Serve programme.

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<sup>19</sup> Whiten v. Pilot Insurance.

2. To prevent any problems, the company should take a zero tolerance stance in which no employee will drink and drive, not even one drink. This message must be conveyed often and clearly to all employees prior to an event.
3. At a minimum, it is illegal to serve a person who is under the drinking age, a person the point of intoxication or to serve an already intoxicated person.
4. Waivers have limited value but if they are used, they must be signed in advance of any alcohol consumption.
5. Each event needs to have people designated as the monitors of the consumption of others. These monitors should not drink if they are to effectively do their job. The monitoring process needs to include someone in the parking lot to insure that a person hasn't said one thing and is doing another.
6. In addition to the above, work out a security system and have it in place. Whoever is in charge of this aspect, must have strong dispute resolution skills to deal with refusal of service and any other disagreements that may arise.
7. If a problem does arise, there should always be two people to try to diffuse the situation. The most important factor is not to put anyone in danger. If the problem continues, threaten to call the police and do so if necessary.
8. Free alcohol must be limited if it exists at all, instead, promote that each employee pay for his or her drinks. There must be non-alcoholic options available.
9. The best way to protect everyone is to have a professional bartender to handle the bar. However, if one or two of the employees act as bartenders, don't have any self-service and keep the alcohol behind the bar allowing easy access only to non-alcoholic mix.

10. Make sure there is food. Foods high in sugar can create a problem with the alcohol. Salty foods encourage more drinking. Try to have a mix of various foods.
11. There is a debate as to whether a cash bar or sale of tickets is the better way to sell alcohol. Both have their flaws and must be considered carefully and within the context of the event. The best option would be to have staff service. Also, close the bar at least one hour before the end of the event. Hopefully, guests will take advantage of non-alcoholic options and most importantly, use the time to allow the alcohol to leave their systems.
12. Taxi chits or hotel rooms need to be encouraged.

In any event, the host is responsible for its guests, particularly if the guest has consumed alcohol. The responsibility could conceivably last until the person is no longer intoxicated.

Finally, any server has to be aware that an intoxicated person is not just a risk on the road. Violence, occupier's risks and alcohol poisoning are just some of the other consequences of excessive alcohol consumption.

While it may be difficult to sympathize with the person who chose to drink too much, consideration must be made for the innocent third party in the wrong place at the wrong time.

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