

# Legal

## Golf and Drinking

### *You are brother's (and sister's) keeper*

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### ***With the increase of liability in Canada, golf clubs have a growing exposure and vulnerability.***

A club could be found liable as a result of over-service under the Liquor Licence Act. Liability could also be found under the Occupiers' Liability Act because alcohol consumption these days occurs on the course as well as in the clubhouse. There is also increased potential for liability arising from private parties. Golf clubs are often the scene of wedding receptions and corporate events. The clubs provide the staff as well as the beverages.

In addition, recent changes in automobile insurance legislation mean that commercial servers of alcohol have an increased exposure as "unprotected defendants."

It might seem reasonable that the person consuming the alcohol should bear the responsibility for the consequences of their drinking. However the concept of "I am my brother's (and sister's) keeper" prevails. Golf clubs are particularly vulnerable due to their relaxed social ambiance and the fact that some drinking occurs both on the course and at the '19th hole'.

Trained staff, both in and out of the clubhouse, can reduce the vulnerability of the golf course. It is far preferable to deal with the effects of cutting off a patron than to account for the consequences of over-service.

It is also vital that bar and waitstaff be trained in the Servers Intervention Program ("SIPS"). At present, this training is only given once. The author, however, recommends that it be done on a yearly basis by each establishment. The establishment should set up an intervention program. This program should include information for gauging a patron's condition, how to handle a behaviour problem, and what to do if a patron manages to leave the premises while intoxicated.

You only have to look at recent case law to see why such preventative measures are crucial.

## Commercial Host Liability

Canadian courts have found liability against commercial servers for over-serving patrons based both on common law and statute liability.

In 1973 the Supreme Court of Canada essentially found liability where a patron,

who was known to be drunk and began walking home, was hit by a motorist. While the motorist absorbed the majority of the liability, the tavern, which had rooms available but kicked the patron out due to his behaviour, was found to have contributed to the accident. The court held that it was reasonably foreseeable that someone who was drunk could be injured while walking on a road, especially when it was a dark and curving road and he had no other means to reach home.

The standard was established that the tavern, as a result of its service, must ensure that the customer arrives home safely either through the tavern's efforts or by placing the customer into the charge of a responsible person or to ensure that the customer does not leave until the tavern is certain the customer is reasonably fit to look after him or herself.

Liability was extended to an innocent third party in 1992 by the Ontario Court of Appeal. In a case referred to here as Hague, three men went on a drinking venture. They arrived at the first bar around 7:00 p.m. after drinking and smoking marijuana for six to seven hours. The first bar served each man a drink at which time the men's conditions became apparent. The servers cut off service and tried to obtain the car keys. Unfortunately, they failed and the three men drove to their next destination, the second bar, where they were served. After one to two hours, they left. The friends eventually asked to be let out of the car because of the driver's erratic driving. He roared off and within a few minutes crashed head-on into the Hague vehicle, killing the driver and putting one of her daughters into a wheelchair permanently.

For commercial hosts, this case established a number of propositions. First, the court found that every bar is entitled to serve one beer without fear of negligence to a patron as his/her condition may not be immediately apparent. Secondly, a host has a greater obligation than to simply try to obtain keys from an inebriated customer.

The trial judge was of the view that the servers in the first bar should have called the police. The only reason liability wasn't found was that the group made it safely to the next bar, interrupting the chain of causation. Thirdly, and most importantly, the trial judge stated that it is reasonably foreseeable that if a patron leaves the establishment drunk and is driving, that not only could he or she end up in an accident, but a totally innocent driver could wind up in the same accident. Therefore, the commercial host owes a duty to the innocent party not to place danger on the road by over-serving and allowing a patron to drive.

In 1995, the Supreme Court of Canada softened the duty of commercial hosts by finding that if a group had one to two non-drinkers, it was reasonable to assume that one of those people would be driving as a designated driver.

Statutory duty is found in liquor licence acts which are in force provincially from

B.C. to Ontario. Quebec relies upon the Code Civil and the Maritime provinces rely solely upon court made law. The legislation places a strict duty upon servers of alcohol not to over-serve and not to serve someone underage. Further, in Ontario there is a section that allows for compensation to an innocent third party as described in the third point under Hague.

### Occupiers' Liability

Many golf clubs provide for the service of beer on the course and many golfers bring their own alcohol on the course with them. It is essential that the drivers of the refreshment carts keep track of the condition of golfers to the best degree possible. While it is recognized that golf courses have inherent risks, if there is service of alcohol or even acknowledgement of consumption, there is going to be some impairment of judgment. Once judgment is impaired, the courts have been known to find some percentage of liability for creating an occupier's risk with the service of alcohol.

In an extreme case, the Supreme Court of Canada found that a participant in a winter innertube race who had consumed most of his alcohol prior to arriving at the ski resort, was still entitled to a high degree of compensation. The "racer" had consumed alcohol prior to arriving at the resort and was carrying a flask, had one to two drinks at the chalet, had signed a waiver of liability and had been warned by employees not to participate. However, the waiver was considered to be null and void because as he was intoxicated at the time he signed it, he had limited or no understanding of its meaning. In that case, the resort was found to be 75% responsible for his injuries which included paralysis. Fortunately most cases have not gone to that degree and liability is usually found between 5% to 25% responsibility against the commercial host.

There have been more recent cases in which establishments have been found partially liable under occupiers' liability, including a 1995 case involving a fall down stairs after hitting a bulkhead. The sports bar in this case had its washrooms located down a flight of stairs. While there was a warning sign about the bulkhead, it was found that after a few drinks the sign could become potentially meaningless (somewhat like the resort case above).

There were no reported cases found involving drinking on the golf course and its relation to occupiers' liability. This doesn't mean that they don't exist but rather they may have settled before going to court. However, if the drinking is reported or even noticeable, the golf course runs the risk that the argument of assumption of risk is watered down correspondingly by the amount of alcohol consumed and the increasing incapacity to understand the risk.

### Receptions/Parties

In some circumstances, a group such as a corporate party or reception may have a ticket bar or cash bar. The courts have frowned on this policy indicating that it is too easy to lose control of the situation. When tickets are sold, there is no way to monitor to whom those tickets are going nor the condition of the recipient. It is recommended that there should be sufficient wait staff to monitor consumption and conditions as well as a door person.

A club should also insist that its own staff serve the party or reception. In some cases, a group may offer to bring its own bartender. The difficulty is that the club has no way of determining the training nor experience of the outsider and may be liable for his/her negligence because the party is on the club's premises and it agreed to the outsider.

### **Unprotected Defendants**

Recent changes in Ontario automobile insurance legislation have included the creation of the "unprotected defendant." Under the Insurance Act, a protected defendant is the negligent owner/ operator of a motor vehicle (the definition may be even broader). This defendant benefits in that he/she will be entitled to deductions that an unprotected defendant will not. Deductions include the \$15,000.00 deductible (on most claims) on general and pecuniary damages; the potential of the threshold on general damages which means that an injured person must have suffered permanent and serious physical and psychological injuries of a continuing nature; and a particular calculation of loss of income (which is a percentage of after tax income). The unprotected defendant, i.e., a commercial server of alcohol, does not receive the benefit of any of the above. There is some debate as to the deductibility of no fault benefits but a recent case suggests that all defendants should receive that benefit.

What this means is that there is likely to be a trend to add unprotected parties to a claim because their assessment will be 100% of their share. Because many accidents have an alcohol component, commercial establishments will be required to be even more vigilant in their service of alcohol.

*(This article is not intended to be a complete statement of the law or an opinion on the subject discussed. No club should act upon any of the statements herein without a thorough examination of the law after the facts of a situation have been considered and proper legal advice has been received from its own legal advisors. This article may not be reproduced without prior written permission of the author.)*