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COURT LIMITS LIQUOR LIABILITY OF EMPLOYERS

There have been a number of recent decisions where employees who have become intoxicated at work have successfully sued their employers for injuries suffered after leaving the workplace. The most recent and notorious of these decisions was that of an Ontario court in **Hunt v. Sutton Group Incentive Realty Inc.** (2001), 52 O.R. 3d, 425 **("Hunt")**, where an employee was injured in a car accident after becoming intoxicated at a company Christmas party.

The judge in **Hunt** cited the much less well known, but potentially more significant, case of **John v. Flynn**, [2000] O.J. No. 128, rev'd (2001) 201 D.L.R. (4th) 500 (C.A.) **("Flynn")**, where the court found that the employer of an employee who had been drinking on the job was liable for damages suffered to a plaintiff who was involved in an accident with the employee after he had left work. Although the jury found the employer 30% liable for the plaintiff's damages, the Ontario Court of Appeal recently overturned their verdict and dismissed the action against the employer.

Flynn involved an employee with a known alcohol problem for which he had sought help through his company's Employment Assistance Plan several years earlier. Although unknown to the employer, he continued to drink. On the day of the accident, he drank before, during, and after his shift.

Justice Finlayson, writing for a unanimous Court of Appeal, found that the trial judge erred in confusing cases citing the duty of an employer to provide its employees with a safe work environment with those involving the duties of commercial hosts to their patrons. The Court of Appeal noted that there was no evidence that the employer was aware that the employee was intoxicated that evening and rejected the suggestion that the employer, having been made aware of the employee's alcohol problem, had a duty to monitor him to ensure that he did not continue to drink.

The Court of Appeal distinguished the commercial host cases on the basis that they all involved situations where one party was providing another with alcohol, had condoned the direct service of alcohol on its premises or knew that the patron was intoxicated, yet did nothing to prevent them from acting in a potentially dangerous manner. None of these circumstances existed in this case.

The court also distinguished a number of cases where employers had been found in breach of their duty of care to provide a safe work environment. It rejected the plaintiff's suggestion that this duty should be extended to hold employers liable for harm caused by employees to themselves or others with whom they come in contact, even when those employees are not working and not on company property.

To some extent, **Flynn** dealt with a narrow issue as to whether an employer in such circumstances owes a duty to third parties. Although the facts are unique, there are a number of comments in the judgment which suggest that the Court of Appeal is not entirely comfortable with the duties which some courts have imposed on employers and social hosts in such situations. We anticipate that when the Court of Appeal deals with the **Hunt** decision, it will provide further direction for these parties and those who insure them.

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INSURANCE OBSERVER

DIVIDING DAMAGES UNDER BILL 59:
Sullivan Estate v. Bond

Under Bill 59 defendants are divided into two classes, namely, "protected" and "the others" (unprotected defendants). Protected defendants, which include owners and operators of automobiles, are entitled to avail themselves of several damage reduction mechanisms under Bill 59. Protected defendants are immune from paying non-pecuniary damages unless the injury is fatal or causes a serious and permanent impairment or disfigurement. Even where this test is met, the general damages of the injured plaintiff and the Family Law Act claimants are subject to deductibles. Pre-trial loss of income claims are reduced to 80% of the net loss of income and health care expenses cannot be recovered from protected defendants unless the impairments are catastrophic.

The million-dollar question under Bill 59 was whether partially at fault unprotected defendants would be obliged to pay these damages. Several authors, including the writer, had concluded that the unprotected defendants would be liable to pay all of the damages the protected defendants were insulated from paying. Others had concluded that these damages should be apportioned, but the apportionment mechanism was unclear.

In the fall of 2000, Mr. Justice Dyson was asked to consider this issue in the case of **Sullivan Estate v. Bond** [2001] I.L.R. I-3899 (Ont. Sup.Ct.), rev'd [2001] O.J. No.3205 (C.A.). His Honour, after quoting one of the writer's articles, concluded that the unprotected defendants were liable to pay all of the damages that the protected defendants were insulated from paying. To put it more simply, His Honour concluded that, where there was a mix of defendants, the plaintiff would recover all of his or her common law damages. In August, the Court of Appeal, in a 2:1 split decision, allowed the appeal from this decision and adopted a different approach to apportioning damages under Bill 59.

Damages calculations under Bill 59 are complex and, frankly, confusing[1]. However, the following is a brief explanation of the apportionment rules. It should be kept in mind that the only question the Court of Appeal opined on was what damages the plaintiff is entitled to recover. It did not opine on how such damages are to be apportioned amongst the defendants. However, this decision strongly hints at the answer to this question.

The following discussion of the apportionment rules assumes each defendant has sufficient insurance to pay any judgment against it. It should also be kept in mind that each head of damages must be calculated separately. The Court of Appeal held that a plaintiff may only recover the greater of the product of the damages calculated at common law and the unprotected defendant's percentage liability *and* the damages the plaintiff is entitled to recover from a protected defendant under Bill 59. The decision also strongly hints at the following rules for

[1] A complete discussion of these calculations is contained in the writer's article entitled "Bill 59 - The Aftermath of **Sullivan Estate v. Bond**" which can be found at the firm's website: www.blaney.com.

apportioning damages amongst defendants. The unprotected defendant will always pay the product of the damages calculated at common law and its percentage fault. If that is less than the plaintiff's recoverable damages, then the balance will be paid by the protected defendant.

A couple of examples may assist in understanding these rules. Let us assume that the plaintiff's pre-trial gross loss of income is $100,000.00, but a protected defendant would only be liable for $50,000.00 (i.e., 80% of net income). Let us also assume that the protected defendant is 75% at fault and the unprotected defendant is 25% at fault. The plaintiff would recover the greater of ($100,000.00 x 25%) *and* $50,000.00 or $50,000.00. The unprotected defendant would pay $25,000.00 or half of this amount. The protected defendant would pay the other half.

Let us change the above example by reversing the liability split. In this case, the plaintiff recovers the greater of ($100,000.00 x 75%) *and* $50,000.00 or $75,000.00. The unprotected defendant would pay this entire amount and the protected defendant would pay nothing.

These rules will result in the unprotected defendant always paying the product of the common law damages and its percentage fault. Where this amount exceeds the amount the plaintiff could recover from a protected defendant under Bill 59, then the unprotected defendant will pay all of the damages. Where it is less, then the unprotected defendant will pay more of the damages than its percentage fault would suggest. In the first example above, the unprotected defendant is only 25% at fault but is liable for 50% of the plaintiff's recoverable damages. To put it somewhat differently, where the damage reduction mechanisms reduce the plaintiff's recovery, every penny of that reduction finds its way into the protected defendant's pocket. Bill 59 does not affect the liability of the unprotected defendant.

What is the strategic significance of these rules. First, unless the protected defendant has insufficient insurance, the unprotected defendant will need to be substantially at fault before there is any advantage to suing such a defendant. For example, in the classic tavern liability case where the tavern's liability is unlikely to exceed 25%, there is no advantage in suing the tavern.

However, as the above examples demonstrate, the protected defendant may be entitled to a significant contribution towards the damages it is liable to pay the plaintiff from even a modestly liable unprotected defendant. There is still an incentive to drag such parties into the litigation. However, it is now the protected defendant rather than the plaintiff who has that incentive.

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INSURANCE OBSERVER

***Dicta*, a regular opinion column featuring personal views on broader legal issues of interest, will not be published in the Fall issue of Insurance Observer. *Dicta* will return in the Winter issue.**

INSURED PAYS PUNITIVE DAMAGES

Insureds beware: He who speaks with forked tongue risks forfeiture and financial sanction. The Alberta Court of Queen's Bench has reaffirmed the principle that a contract of insurance is one of "perfect good faith on both sides." An insured who fails to exhibit good faith to an insurer may forfeit the insurance and, in addition, may expose herself to an award of punitive damages.

In **Andrusiw v. Aetna Life Insurance Co. of Canada**, [2001] A.J. No. 789 (Alta. Q.B.), the plaintiff claimed total disability benefits under a policy of insurance issued by the defendant insurer. The insurer counterclaimed for the return of benefits paid over a ten year period beginning in 1987. In 1986, the plaintiff suffered a stroke. At that time, he was the president and part owner of a manufacturing company. Less than a year after the stroke, the plaintiff returned to work. Nevertheless, he claimed that he was unable to perform the important duties of his occupation or employment. He contended that he relied upon the office staff to run the business. However, the picture that emerged at trial was of an intelligent businessman who was a "hands-on manager."

The trial judge found that the plaintiff was "performing a substantial portion of his duties with the company." He also found that the plaintiff knowingly misrepresented his ability to be gainfully employed. As a result of the plaintiff's deceit, the Court held:

- The policy was terminated effective January 1, 1987.
- The plaintiff was ordered to repay the benefits.
- The plaintiff was not entitled to relief from forfeiture.
- The making of wilfully false statements on which the insurer relied vitiated his entire claim whether or not he may have been eligible for benefits under a different definition of disability in the policy.
- The breach of his obligation to put forward his claim honestly and in good faith constituted an actionable wrong for which he was liable to pay to the insurer punitive damages in the amount of $20,000.

Whether a tonic to **Whiten v. Pilot Insurance Co.**, or a timely example of the principle of mutuality, insurers should welcome this decision.

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