IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Van Hove v. Boisselle,*
2012 BCSC 494

Date: 20120403
Docket: M124950
Registry: New Westminster

Between:

Alexander Gordon Thatcher Van Hove, by his litigation guardian, Christine Cuyler

Plaintiff

And

Donna Boisselle

Defendants

And

Insurance Corporation of British Columbia and L.J.D. Properties Ltd. carrying on business as The Artful Dodger Neighbourhood Pub and John Doe and Jane Doe

Third Parties

Before: The Honourable Mr. Justice Nathan Smith

Reasons for Judgment

Counsel for the Plaintiff:	D.H. Goodwin
Counsel for Third Party Insurance Corporation of British Columbia:	Timothy Pettit
Counsel for Third Party L.J.D. Properties Ltd.:	Lorne P.S. Folick
Place and Date of Hearing:	New Westminster, B.C. June 19, 2012
Place and Date of Judgment:	New Westminster, B.C. April 3, 2012

[1] This action arises out of a fatal motor vehicle accident that was allegedly caused by a drunk driver. A third party claim alleges that L.J.D. Properties Ltd ("L.J.D.") – the owner of a pub at which the defendant driver had been drinking – caused or contributed to the accident by over-serving the defendant and allowing her to leave the pub in an intoxicated state.

[2] L.J.D. applies to have the Third Party Notice against it dismissed on summary trial pursuant to Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (the "*Civil Rules*"). This case differs from most others where claims have been made against commercial hosts in that the defendant did not drive away from the pub, but was driven home before deciding to drive somewhere else.

[3] On February 22, 2008, the defendant Donna Boisselle was drinking with her partner, Mr. Goll, at L.J.D.'s pub. They left the pub together and Mr. Goll drove them to their home. They had an argument after they got home and Ms. Boisselle, who on both of their accounts was quite intoxicated, left by car. Her car then struck the car of the plaintiff's father, Jack Van Hove, who was killed.

[4] Ms. Boisselle pled guilty to impaired driving and was sentenced on November 10, 2009 to 18 months in prison and a further 36 months of probation: *R v. Boisselle,* 2009 BCPC 408. The Insurance Corporation of British Columbia ("ICBC") held her in breach of her insurance policy and exercised its statutory right to make itself a third party in this action, allowing it to defend the plaintiff's claim while denying its obligation to indemnify the defendant. ICBC then issued a further third party notice claiming contribution and indemnity from L.J.D.

[5] On this summary trial application, L.J.D. argues that even if it breached the applicable standard of care by serving alcohol to Ms. Boiselle to the point of intoxication and by failing to take steps to prevent her from driving, she in fact arrived safely home and it was not foreseeable that she would begin driving at that point. Therefore, L.J.D. argues that its duty to other users of the road was fulfilled or, alternatively, that its conduct did not cause the accident.

[6] For the purposes of this application, L.J.D. has admitted the facts as alleged in the Third Party Notice, specifically paragraphs 4-8:

> 4. On or about February 22, 2008, at approximately 7:30pm, the defendant attended the Artful Dodger with her common law partner Wesley Goll ...
>
> 5. The defendant and Mr. Goll were served alcohol by John Doe and Jane Doe while at the Artful Dodger to the point that the defendant became heavily intoxicated.
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> 6. The defendant and Mr. Goll left the Artful Dodger at approximately 9:20 p.m. to return to their residence.
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> 7. Upon arrival at their residence, the defendant and Mr. Goll had an argument at which time the defendant left the residence and drove away.
>
> 8. At approximately 9:25 pm, at or near the 3500 block of 216 street, Langley, British Columbia, a motor vehicle owned and driven by the defendant collided with the motor vehicle of Jack Van Hove.

[7] Rule 9-7(15)(a) of the *Civil Rules* provides:

> (15) On the hearing of a summary trial application, the court may
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> (a) grant judgment in favour of any party, either on an issue or generally, unless
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> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application,

[8] L.J.D. says the case is suitable for summary trial because there are no significant facts in dispute and the matter turns on applying straightforward, established law, i.e. the scope of the duty of care owed by a commercial liquor provider. It says judgment here could significantly shorten the trial scheduled for June 18, 2012. ICBC argues that there are important facts in dispute, with significant

issues of credibility and/or reliability and that these issues cannot be resolved on the basis of affidavit evidence on summary trial.

[9] The duty of care owed by a commercial liquor provider to patrons and third party highway users was set out in *Stewart v. Pettie*, [1995] 1 S.C.R. 131, at para. 28:

> It is clear that a bar owes a duty of care to patrons, and as a result, may be required to prevent an intoxicated patron from driving where it is apparent that he intends to drive. Equally such a duty is owed, in that situation, to third parties who may be using the highways. In fact, it is the same problem which creates the risk to the third parties as creates the risk to the patron. If the patron drives while intoxicated and is involved in an accident, it is only chance which results in the patron being injured rather than a third party. The risk to third parties from the patron's intoxicated driving is real and foreseeable.

[10] In *Stewart*, the intoxicated driver was part of a group of four who left together. Only two of whom consumed had consumed alcohol and the court at para. 53 referred to its previous decision in *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239:

> ... Laskin J. in *Jordan House Ltd. v. Menow*, *supra*, made it clear that the hotel's duty to *Menow* in that case could have been discharged by making sure "that he got home safely by taking him under its charge or putting him under the charge of a responsible person ..." [p. 249]. Had Pettie been alone and intoxicated, Mayfield could have discharged its duty as established in *Jordan House Ltd. v. Menow* by calling Pettie's wife or sister to take charge of him. How, then, can Mayfield be liable when Pettie was already in their charge, and they knew how much he had had to drink? While it is technically true that Stuart Pettie was not "put into" the care of his sober wife and sister, this is surely a matter of semantics. He was already in their care, and they knew how much he had to drink. It is not reasonable to suggest in these circumstances that Mayfield had to do more.
>
> [Emphasis added.]

[11] L.J.D. argues it's duty was discharged once Ms. Boiselle reached home safely, that her subsequent driving was not foreseeable and that her arrival home broke any chain of causation between its alleged breach of duty and the accident in which Mr. Van Hove was killed.

[12] Some support for that proposition can be found in *Salm v. Coyle,* 2004 BCSC 112, where an intoxicated patron was picked up from the defendant's pub and driven

home by a sober friend. She then went inside, took her father's car keys and drove away. In a judgement on summary trial the court said at para. 23:

> I am of the opinion that all duties of care to Coyle and to the plaintiff as a result of Coyle's intoxication were satisfied when Coyle did not drive away from the pub and when she was delivered home safely by Collin. It does not matter if Millers Pub did not see to these safe arrangements itself but someone else did. The result was that all of its duties were satisfied and any risk of injury from Coyle's intoxication after she arrived home safely was not caused by any breach of duty on the part of Millers Pub.

[13] *Salm* was distinguished in *Holton v. MacKinnon,* 2005 BCSC 41. There the plaintiff, the defendant and a friend had been drinking together at two pubs. They drove to the plaintiff's home, then left with the defendant driving and the plaintiff a passenger. An accident followed and the plaintiff was injured. The court said, at paras. 428-429, *Salm* did not apply because the defendant did not reach his own home:

> It is important to note that MacKinnon never arrived home safely, and the chain of foreseeability and causation was never broken. ..
>
> I am satisfied then that at the time of the accident the Crab Shack and Garfinkel's both owed a duty of care to users of the highway, including MacKinnon's passengers, Holton and Martineau, arising out of MacKinnon's intoxication. That duty was not discharged by the brief stop-over at Holton's residence, or by the fact that Holton had arrived home safely and discharged any duty arising out of his intoxication.

[14] In *Donaldson v. John Doe*, 2009 BCCA 38, the Court of Appeal stressed the importance of separately analysing and not conflating issues going to the separate concepts of duty of care, standard of care and causation. In that case, the plaintiff and a defendant had both been at a nightclub, which had given out souvenir glass beer mugs. While walking on the street outside the club, the defendant suddenly raised his arm and struck the plaintiff in the face with the beer mug.

[15] The trial judge dismissed the plaintiff's case against the operators of the nightclub, saying there was no duty because no foreseeable risk of harm had been created. The court of appeal upheld the result but said:

> By focussing on how Mr. Donaldson sustained his injury, the parties have conflated the concept of foreseeability in a duty of care analysis, and

> foreseeability in a standard of care analysis. A similar error was committed by the trial judge. These are two different legal concepts. In determining whether A owes a duty of care to B, foreseeability is a factor with respect to whether the relationship between them warrants imposing such a duty. The question is whether B falls within a class of persons who could reasonably be expected to be harmed by A's conduct. If a duty of care is found to exist, then foreseeability with respect to the specific risk of harm is considered in determining whether A was negligent, i.e., whether there has been a breach of the standard of care.

[16] The duty of care that commercial hosts who serve alcohol owe to the general public arises out of the profit making nature of the enterprise and the well-known dangers associated with the product. It is generally foreseeable that intoxicated patrons may, as a direct result of their intoxication, cause injury to others.

[17] The question then becomes one of the standard of care – whether, in the circumstances of a particular case, the commercial host did what was necessary to fulfill the duty. That inquiry includes the question of the whether the actual circumstances and means of injury were foreseeable.

[18] A plaintiff who proves breach of both the duty and the standard of care must then prove causation – whether the breaches actually caused the injury, which would not have occurred “but for” the negligent conduct of the defendant.

[19] L.J.D. in effect submits that Ms. Boiselle’s safe arrival home proves that the standard of care was complied with and/or proves that the chain of causation was broken. In my view, that ignores the highly fact-specific nature of both inquiries. The proposition that L.J.D. puts forward may well be one the properly applies in many, if not most, cases of this kind, but it cannot be treated as a principle of law that applies regardless of any additional facts that may arise in an individual case.

[20] One such fact in this case, on which I do not have sufficient evidence, is the level of Mr. Goll’s intoxication. If L.J.D.’s employees knew or ought to have known that he was as intoxicated as Ms. Boiselle, or nearly so, it may be open to a trial judge to find, on all of the evidence, that allowing her to leave the pub in his company did not meet the standard of care. It may also be open to a trial judge to

find that her arrival home with an equally intoxicated person did not amount to a "safe" arrival within the meaning of the authorities and did not break the chain of causation.

[21] I therefore find myself unable to find the facts necessary to decide this matter on summary trial and the third party's application must be dismissed.

"Smith, J."