CITATION: Wardak v. Froom, 2017 ONSC 1166
COURT FILE NO.: CV-13-00477879-0000
DATE: 20170217

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
DEAN WARDAK, DAVID WARDAK, CHRISTOPHER WARDAK, CHANTELLE WARDAK, a minor by her litigation guardian David Wardak, RENA WARDAK	)	*Leonard Kunka* and *Carr Hatch*, for the Plaintiffs
Plaintiffs	)	
– and –	)	*Daniel Reisler* and *Jessica Kuredjian*, for the Defendants
STEPHEN CARL FROOM and CAROL LORRAINE FROOM	)	
Defendants	)	
	)	**HEARD:** October 17, 2016

REASONS FOR DECISION

JUSTICE W. MATHESON

[1] This is a motion for summary judgment brought by the defendants under Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The claim against them is focused on social host liability and arises from a 19th birthday party that they held for their son in their home. The plaintiff Dean Wardak was seriously injured after he left the party impaired and on foot, then drove and ended up in a single car accident. He was 18 years old at the time.

[2] The defendants submit that the claim against them is bound to fail both as a matter of law and on the facts. The plaintiffs submit that this action is not defeated by law and that the necessary facts should not be found on this motion for summary judgment.

[3] Although there are some facts that can be found on the record before me, the relevant factual matrix quickly becomes complicated and cannot fairly and justly be determined on this motion. Nor is the claim bound to fail on the law. This motion is therefore dismissed.

Evidence on motion

[4] The nature of the evidence before me is significant to the issue of whether the facts can be fairly and justly determined on this motion. The evidence put forward by both sides has certain frailties that would not always stand in the way of summary judgment but are problematic in the circumstances of this case.

[5] The defendants have sworn affidavits in support of their motion, which are proper evidence on this motion. They each give their accounts of the events surrounding the party. The defendants also attach copies of their transcripts from their examinations for discovery as exhibits. These transcripts are not, themselves, proper evidence from the defendants.

[6] The defendants' affidavits attach a number of witness statements provided to the Peel Regional Police. Specifically, statements from both of the defendants as well as their daughter Emelia and their son Graeme are attached. None of these statements are sworn statements. Neither Emelia nor Graeme has sworn an affidavit on this motion and they both appear to be important witnesses.

[7] The transcript of the examination for discovery of the plaintiff Dean Wardak is also attached as an exhibit. Under Rule 31.11, the defendants could read into evidence any part of an opposite party's examination for discovery. However, that Rule applies only to trials. This is of little significance in this instance because the only part of the transcript relied upon is otherwise admitted. As indicated at discovery, Dean has no recollection of the events that day.

[8] The defendants' evidence also includes an affidavit of a lawyer. That affidavit, among other things, recounts certain facts about the events that this affiant does not have personal knowledge of, without necessarily indicating the source of the information.

[9] In response to this motion, the plaintiffs have also put forward discovery transcripts and various documents under the cover of a lawyer's affidavit. That lawyer's affidavit also contains facts regarding the events at issue that are not properly put forward by that affiant. The transcript from Dean Wardak's examination for discovery is also attached as an exhibit to the affidavit and is not proper evidence from the plaintiffs.

[10] The plaintiffs have included the defendants' examinations for discovery transcripts. Also attached are witness statements given to the police, including the statements from the defendants, Emelia and Graeme Froom.

[11] The plaintiffs' affiant also attaches witness summaries produced by the defendants in answer to undertakings arising from the examinations for discovery of the defendants. The summaries contain information from nine people who attended the party. The summaries are unsigned and unsworn, are double hearsay and would ordinarily not be proper evidence. However, the defendants have not objected to their use in this way.

[12] The plaintiffs' affiant also attaches a document described as the "anticipated evidence of" a police officer, attaching his or her handwritten notes made at the time of the accident. Both sides have also included the police accident report.

[13] Neither side has objected to the other side putting their evidence forward in the above fashion. For the most part, they have taken a similar approach to the evidentiary record for this motion. On that basis, I am prepared to overlook many of the technical problems with the record on this motion.

[14] On close examination of the evidence by both sides, I conclude that while aspects of the events giving rise to this action can readily be found on the evidence before me, there are also considerable differences and gaps in the evidence during two critical periods of time. I have highlighted those areas below and will return to the significance of that evidence in my analysis of the issues on this motion.

Events giving rise to action

[15] In April 2011, the defendants Mr. and Mrs. Froom had a party in their home for their son Graeme on the occasion of his 19th birthday. The plaintiff Dean Wardak, a very good friend of Graeme's, lived down the street. Dean walked to the party.

[16] The defendants did not serve alcohol, but they were aware that there would be drinking at the party. The party was "bring your own booze".

[17] Dean was one of the first guests to arrive at the party. There were about 17 guests, most of whom were 18 or 19 years old. Dean was 18 years old and therefore underage from the standpoint of drinking. The defendants were aware that several of the guests were underage.

[18] The Froom family was at the party. Apart from the family members, there were at least five guests who were under 19 years of age, including Dean.

[19] The defendants have admitted that they were hosting the party and that throughout the party they supervised their guests.

[20] Most of the party guests, including Dean, were in the basement playing pool or listening to music. Guests in the basement were drinking. Some guests were playing a drinking game called "Beer Pong", including Dean.

[21] The defendants were in the kitchen and family room area on the main floor for most of the party, which gave them a view of people coming and going. They also went down to the basement, about four times each, through the evening. There was no washroom in the basement, so they would also see the guests when they came upstairs to use the washroom.

[22] The first critical time period is the party itself – a few hours leading up to the second critical time period around 11PM.

[23] Dean was mainly in the basement, along with most of the party guests. There are different accounts from the witness summaries about to what extent Dean showed signs of becoming drunk. The information in the witness summaries is often scant, especially on timing.

[24] Party guests did see Dean drinking, as did Graeme Froom. There is evidence that Dean brought and drank vodka and also had beer. Various guests said that Dean was a bit drunk or quite intoxicated. One witness said Dean was the "most drunk" of the party guests. Witness summaries regarding other party guests who were 18 years old say that they were drinking too.

[25] The defendants made a total of about eight trips down to the basement over the course of the evening. Mr. Froom said that when he spoke to Dean downstairs Dean seemed fine, coherent and sober, and that he did not see Dean drinking. Mrs. Froom also attested that she had spoken to Dean in the kitchen before the end of the evening and he seemed perfectly fine.

[26] Thus, there are differences in the accounts of when and how much Dean was showing the effects of his drinking. The evidence lacks pertinent detail regarding timing, among other things.

[27] There is no evidence that the defendants attempted to get Dean or any of the other underage party guests to stop drinking at any point in time.

[28] The second critical time period is just before 11PM. There was a series of events regarding Dean in that time period. Dean came up from the basement and headed to the front door. Mr. Froom noticed that Dean was wobbling and his behaviour was odd, and he offered to walk him home. Mr. Froom's evidence is that Dean replied that he wanted to use the washroom; Dean did so and went back downstairs.

[29] Mr. Froom's affidavit indicates that he asked his daughter Emelia and her boyfriend to keep an eye on Dean. Emelia did not swear an affidavit on this motion and did not mention this in her statement to the police. There is no evidence from the boyfriend.

[30] A short time later, Dean came back upstairs and headed toward the front door again. Mr. Froom offered to walk Dean home again. His evidence is that Dean yelled at him, said he was going to the washroom and he "stomped" and "growled" into the washroom where he continued to make noise.

[31] According to Mr. Froom's discovery, at that point he did not think Dean was going to walk home – he thought Dean was out to do something. He thought Dean would be able to walk home but did not buy that he was going to do so. He had no idea what Dean was going to do but it was probably something else and Dean did not want Mr. Froom there. Mr. Froom was concerned that Dean might do something dangerous to himself.

[32] Mr. Froom's evidence is that during this time another guest needed to use the washroom and he decided to leave Dean and show the other guest up to the washroom on the second floor. His evidence is that he gestured for his daughter Emelia and her boyfriend to keep an eye on Dean. This is disputed. Emelia did not mention this in her statement to the police. The length

of time Mr. Froom was upstairs is also disputed, although on any account it was just a few minutes.

[33] When Mr. Froom was upstairs, Dean left. He first fumbled around at the front door looking for his shoes. According to Emelia's police statement, there were a number of people around the front door at the time. Dean ultimately left without his shoes and, as was later determined, without his jacket.

[34] Emelia saw Dean leave and said in her police statement that he was "completely zoned out" and looked like he was going to be sick. She was leaving at around the same time with her boyfriend. As set out in her police statement, as they drove away they decided to put on the high beams and look for Dean. When they approached his house, she saw the brake lights on the car in Dean's driveway. Emelia got out of the car to try and talk to Dean as he reversed out of the driveway. He drove away. She called 911 and reported that Dean was driving and was "visibly" intoxicated. She and her boyfriend tried to follow him in their car, but lost him.

[35] When Mr. Froom came down from the second floor, Dean was gone. Mr. Froom looked for Dean in the basement. He and his son Graeme then went on foot to look for Dean. When they got to Dean's house, they noticed that his car was not in the driveway. Ultimately, they knocked on the door and spoke with Dean's father, who went out to look for him too.

[36] Dean was driving only a short time before the accident. He drove over a fire hydrant and hit a tree. He was taken to hospital and a blood alcohol test showed .274 (274 mg. of alcohol to 100 ml. of blood), more than three time the legal limit. As a result of the accident, Dean is now a quadriplegic with cognitive impairments.

[37] This action was commenced in 2013. In addition to defending the action, the defendants served a jury notice requiring that this action be tried by a jury.

Analysis

[38] The defendants move for summary judgment under Rule 20. Under subrule 20.04(2), summary judgment shall be granted if the Court is satisfied that there is no genuine issue requiring a trial with respect to, on this motion, the plaintiffs' claim.

[39] As set out in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 49, there will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits using the summary judgment process. This will be the case when the process: "(1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result."

[40] On a motion for summary judgment, the judge should first determine if there is a genuine issue requiring a trial based only on the evidence before him or her without using the fact-finding powers in subrule 20.04(2.1). If there appears to be a genuine issue requiring a trial,

Rule 20.04(2.1) permits the motion judge, at his or her discretion, to: (1) weigh the evidence, (2) evaluate the credibility of a deponent, or (3) draw any reasonable inference from the evidence unless it is in the "interest of justice" for these powers to be exercised only at trial: *Hryniak*, at para. 66. The motion judge is also permitted to use the expanded powers under Rule 20(2.2) to direct a procedure such as a mini-trial, rather than a full trial.

[41] The responding parties may not rely on the prospect of additional evidence that may be tendered at trial; the respondents must put their best foot forward on the motion for summary judgment: *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200, at para. 26, aff'd 2014 ONCA 878, leave to appeal to SCC refused, [2015] S.C.C.A. No. 97.

[42] The delivery of a jury notice does not automatically preclude summary judgment. However, a jury notice must be considered when deciding whether or not to use the expanded fact-finding powers under Rule 20: *Yusuf (Litigation guardian of) v. Cooley*, 2014 ONSC 6501, at paras. 26-27, leave to appeal dismissed, 2015 ONSC 3244 (Div. Ct.); *McDonald v. John Doe*, 2015 ONSC 2607, at paras. 40-45; *Mitusev v. General Motors Corp.*, 2014 ONSC 2342, at paras. 86, 91-92.

Issues

[43] The defendants submit that this summary judgment motion should be granted for two reasons: because the established law precludes finding a duty of care; and, in any event, because the defendants met the applicable standard of care.

(1) Social host liability law

[44] The defendants submit that they owed no duty of care because they did not serve alcohol. They rely on the Supreme Court of Canada's conclusion in *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643 and an earlier Ontario Superior Court decision – *Stevenson v. Clearview Riverside Resort*, [2000] O.J. No. 4863 (S.C.J.).

[45] The starting point for any consideration of social host liability is the Supreme Court of Canada decision in *Childs*. The central legal issue in *Childs* was whether social hosts owed a legal duty of care to third parties who may be injured by intoxicated guests. This was the first time the Supreme Court had considered the duty owed by social hosts.

[46] In *Childs*, the injured person was a third-party, not a party guest. The Chief Justice, for the Court, held that there was no duty on the *Childs* facts, but left the door open for other cases, at para. 47, as follows:

> I conclude that hosting a party at which alcohol is served does not, without more, establish the degree of proximity required to give rise to a duty of care on the hosts to third-party highway users who may be injured by an intoxicated guest. … [Emphasis added.]

[47] The use of the phrase "without more" allows for a duty of care to arise in other circumstances. In that regard, the Court held that a positive duty of care may exist if foreseeability of harm is present and other aspects of the relationship between the plaintiff and the defendant establish a special link or proximity. Those other aspects of the relationship "bring parties who would otherwise be legal strangers into proximity and impose positive duties on defendants that would not otherwise exist": *Childs*, at para. 34.

[48] In *Childs*, the Supreme Court noted three situations that could lead to a positive duty to act. One was a paternalistic relationship of supervision and control: at para. 36.

[49] On the subject of proximity and whether a duty would be imposed, it is significant that these defendants agree that they were hosting and supervising the party. In *Childs*, the Supreme Court found that the connecting factor between the three situations where there may be a duty "is the defendant's material implication in the creation of risk or his or her control of a risk to which others have been invited": at para. 38.

[50] The plaintiffs submit that the facts of this case are the "more" that the Supreme Court allowed for in *Childs*, and more specifically, that this case falls within the contemplated paternalistic duty. The *Childs* facts did not involve under-age drinking. Although Dean was 18 and therefore formally an adult, he was not legally permitted to drink.

[51] Perhaps most significantly, Dean was a guest, not a third-party. In terms of foreseeability and proximity, a host's relationship with a guest is likely closer than the relationship between a host and a third-party: *Kim v. Thammavong*, [2007] O.J. No. 4769, 2007 CanLII 52791 (S.C.J.), at para. 25.

[52] It is apparent that the Supreme Court's ruling in *Childs* does not preclude finding a duty of care where there is a paternalistic relationship or where the injured party is a guest rather than a third-party.

[53] The second case relied upon by the defendants, *Stevenson*, was decided before the Supreme Court of Canada decision in *Childs*. In *Stevenson*, the motion judge relied heavily on the law of commercial host liability. The motion judge set out the essential elements of commercial host liability and held that these were the principles that applied when considering potential liability in a social context: at paras. 21-22. Not surprisingly, actually serving a patron is an important element of commercial host liability. Using the starting point of commercial host liability, the motion judge made the finding upon which the defendants rely, specifically that a "duty of care requires that a host must serve alcohol to a guest whom he or she knows is impaired": at para. 28. Because the defendants did not serve alcohol to Dean, they submit that they did not owe a duty of care to Dean.

[54] I find the analysis and findings in *Stevenson* of little assistance given the intervening decision of the Supreme Court in *Childs*. While serving alcohol is certainly relevant, it is not, by

itself, determinative of social host liability post-*Childs*: *e.g.*, *Oyagi v. Grossman*, [2007] O.J. No. 1087 (S.C.J.); *Lutter v. Smithson*, 2013 BCSC 119; *Ferrier v. Hubbert*, 2015 ONSC 5286.

[55] I therefore conclude that neither *Childs* nor *Stevenson* preclude a finding of a duty of care in this case.

[56] The other cases put forward by the parties illustrate the importance of the factual context in the determination of whether a duty is owed: e.g., *Kim*; *Oyagi*; *Ferrier*; *Lutter*; *Sabourin (Litigation guardian of) v. McKeddie*, 2016 ONSC 2540; *Prevost (Committee of) v. Vetter*, 2002 BCCA 202. The difficulties with determining the factual context on the record before me are discussed under the second issue since the relevant facts overlap.

(2) Standard of care

[57] The defendants submit that even if they had a duty of care, they met the standard of care and the claim should be dismissed. As summarized in the defendants' factum, they rely on these facts:

(i) that the defendants did not serve Dean drinks or encourage him to drink;

(ii) that the defendants did not see Dean drink:

(iii) that the defendants did not see Dean act in a suspicious manner in advance of his two attempts to leave just before 11PM;

(iv) that once they suspected something was wrong, the defendants did "everything they could to get him home safely", specifically,

(a) Mr. Froom offered to walk Dean home twice;

(b) after the first attempt to leave, Mr. Froom asked Emelia and her boyfriend to keep an eye on Dean;

(c) after the second attempt to leave, when Mr. Froom left to take someone upstairs, he had Emelia make sure Dean did not leave alone; and,

(d) Emelia followed Dean home and attempted to stop him from driving.

[58] There is, however, countervailing evidence regarding most of the above propositions:

(i) although not serving or encouraging Dean to drink, the defendants knew that there would be drinking at the party and that a group of the guests were underage;

(ii) between the two defendants, they went down to the basement about eight times and there is evidence from partygoers that there was drinking and Beer Pong going on in the basement and Dean was intoxicated;

(iii) there is an inconsistency between the accounts of Dean's behaviour in the basement, where he appeared very drunk at least to some people, and Mr. Froom's evidence that Dean was fine, coherent and sober;

(iv) nothing was done by the defendants to stop Dean from drinking after the first occasion when he came upstairs to leave and Mr. Froom saw him wobbling and acting odd;

(v) the suggestion that Mr. Froom asked Emelia and her boyfriend to keep an eye on Dean is not mentioned in her police statement and there is no affidavit from either Emelia or her boyfriend;

(vi) the suggestion that Mr. Froom left Emelia in charge when he took another partygoer to the upstairs washroom is not mentioned in Emelia's police statement and again there is no affidavit from her;

(vii) on the evidence before me, Emelia and her boyfriend were leaving anyway – they did not leave in order to see Dean home; and,

(viii) Dean's father was home; after Dean first refused a walk home and Mr. Froom began to suspect Dean was up to something, the plaintiffs submit that the defendants ought to have called Dean's father for assistance.

[59] The frailties in the evidence before me have an impact on the determination of these factual issues. The evidence of partygoers who were in the basement is relevant to what actually transpired in the basement and whether or not the defendants' evidence that they saw nothing amiss should be accepted. While I am not suggesting that affidavits from everyone are required, it is unsatisfactory to have only double hearsay, unsigned, unsworn summaries of what a number of those people said when interviewed by an unnamed person. Similarly, the evidence of Emelia (and her boyfriend) is relevant to the steps taken by Mr. Froom when he became concerned that Dean was going to do something that would put him in danger.

[60] At the hearing, the defendants' counsel submitted that even if I were to take the facts at their highest from the standpoint of the plaintiffs, this action should be dismissed. This can be a good strategy on this type of motion, and a strategy that could overcome frailties in the evidentiary record. However, I conclude that it would not be fair and just to do so in this case.

[61] I return to *Hyrniak*. I must first determine whether there is a genuine issue requiring a trial based only on the evidence before me, without using the fact-finding powers in subrule 20.04(2.1). For the reasons set out above, I conclude that there are genuine issues requiring a trial on the facts needed to reach a decision on the merits.

[62] Under the second step in *Hyrniak*, I may then, in my discretion, use the fact-finding powers under subrule 20.04(2.1). I conclude that it would not be in the interests of justice to do so. I am not persuaded that it would be fair and just to either side of this dispute to evaluate the credibility of the defendants or draw the inferences from the evidence that are necessary to decide this matter on the record before me.

[63] Subrule 20.04(2.2) also provides the power to order a mini-trial. I am not satisfied that a mini-trial would be an efficiency in this case. However, even if it were, I would find that a mini-trial should not be ordered to determine integral factual issues where there is a jury notice: *Yusuf,* at paras. 24, 27.

Conclusion

[64] This motion is therefore dismissed. In accordance with *Skunk v. Ketash*, 2016 ONCA 841, at para. 62, I have specifically considered to what extent I have made determinations of law that are intended to be binding on the parties at trial. I do not intend to make any such determinations. I therefore do not invoke subrule 20.04(4).

[65] If the parties are unable to agree on costs, the plaintiffs shall deliver brief written submissions together with a costs outline by March 10, 2017. The defendants may respond by delivering brief written submissions by March 31, 2017. This timetable may be modified on agreement between the parties provided that I am notified of the new timetable by March 10, 2017.

Justice W. Matheson

Released: February 17, 2017

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