COURT OF APPEAL FOR ONTARIO

CITATION: Williams v. Richard, 2018 ONCA 889
DATE: 20181107
DOCKET: C63999

Hourigan, Miller and Trotter JJ.A.

BETWEEN

Grace Williams, Evan Williams, and Chloe Williams, minors under the age of 18 years by their Litigation Guardian, Cheryl Williams

Plaintiffs
(Appellants)

and

John Kardux, David VanLagen, Ava Hillier, Litigation Administrator of the Estate of Mark Williams, deceased, Axa Insurance (Canada), Jake Richard and Eileen Richard

Defendants
(Respondents)

AND BETWEEN

Grace Williams, Evan Williams, and Chloe Williams, minors under the age of 18 years by their Litigation Guardian, Cheryl Williams, and Cheryl Williams, personally

Plaintiffs
(Appellants)

and

John Kardux, David VanLagen, Axa Insurance (Canada), Jake Richard and Eileen Richard

Defendants
(Respondents)

Patrick Brown and William Harding, for the appellants

Brian Smith, for the respondents

Heard: October 5, 2018

On appeal from the judgments of Justice Kelly A. Gorman of the Superior Court of Justice, dated June 9, 2017, with reasons reported at 2017 ONSC 3590.

Hourigan J.A.:

A. INTRODUCTION

[1] Mark Williams and Jake Richard were colleagues and friends. They regularly got together to drink beer after work. On the evening in issue, Mr. Williams consumed approximately 15 cans of beer over the course of about three hours while visiting with Mr. Richard at the home of Mr. Richard's mother, Eileen Richard. A short time after leaving Ms. Richard's residence, Mr. Williams loaded his children into his car and drove their babysitter home. On the way back to his residence, Mr. Williams was involved in a serious accident. He was killed and his children are alleged to have been injured.

[2] This series of events spawned two court actions. In the first, Mr. Williams' children and their mother sue for personal injuries allegedly sustained by the children. In the second, the children and their mother claim damages pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3. Both actions are premised on a claim that the respondents breached a duty of care as social hosts.

[3] On a motion for summary judgment, the motion judge dismissed both claims, finding that the requisite duty of care had not been established and that even if it were established, such a duty of care would have ended once Mr. Williams arrived home to pick up his children and their babysitter. In so finding, she relied primarily on two cases: *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643 and *John v. Flynn*, 54 O.R. (3d) 774 (C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 394. These reasons explain why I have concluded that the motion judge's order cannot stand. In its place, I would order that the cases proceed to trial.

B. FACTS

[4] The factual background to this appeal may be briefly described as follows.

[5] Mr. Richard lived in his mother's home, which was located approximately 500 meters from the home Mr. Williams shared with his wife and three children.

[6] Mr. Williams and Mr. Richard worked together for approximately four years. They got together after work three to four times per week to drink beer at one or the other's home.

[7] On the day in issue, October 18, 2011, the men worked from 7 a.m. to 1 p.m. Mr. Williams dropped Mr. Richard home after work. The pair had no plans to meet again later. However, Mr. Williams showed up at Ms. Richard's home in his work van at approximately 4:30 p.m. that day.

[8] Mr. Williams and Mr. Richard went to the garage and drank for about the next three hours. During that time, Mr. Williams is estimated to have consumed approximately 15 cans of beer. There does not seem to be any debate that Mr. Williams was inebriated and that Mr. Richard knew Mr. Williams was in no condition to drive.

[9] Mr. Richard became aware of Mr. Williams' intention to drive the babysitter home in his personal vehicle and was aware that Mr. Williams would have his children in the car when he did so. The men had a pact that if either of them were going to drive while intoxicated and children were involved, the other would call the police. According to Mr. Richard, he threatened to call the police but he did not believe that Mr. Williams took that threat seriously. There is some evidence he received an assurance from Mr. Williams that he would not drive the babysitter home.

[10] It is far from clear whether Mr. Richard was satisfied with Mr. Williams' assurance. His evidence regarding whether he believed that Mr. Williams was going to drive the babysitter was internally inconsistent. There was also inconsistent evidence regarding what Mr. Richard told his mother. Mr. Richard testified that he advised his mother that Mr. Williams was going to drive the babysitter home with the children in the car. Ms. Richard testified that she understood from the conversation with her son that Mr. Williams would not be driving the babysitter home.

[11] Beyond threatening to call the police, Mr. Richard did nothing further to stop Mr. Williams from driving while drunk. He did not call Mr. Williams' wife or the babysitter to alert them to the situation. He did not ask his mother, who was not drinking, to drive the babysitter home. He did not walk to Mr. Williams' home to see if his personal vehicle was in the driveway. It is also clear that Ms. Richard took no steps to prevent Mr. Williams from driving.

[12] According to Mr. Richard, approximately ten minutes after Mr. Williams left, he accompanied his mother to a variety store in Otterville to buy cigarettes. He did so in part because he was worried that Mr. Williams might have driven the babysitter home. Mr. Richard admitted to being concerned about the situation before he left with his mother. His mother's evidence was that they did not leave the house to go to the store until approximately a half hour after Mr. Williams left.

[13] While driving to the Otterville store, Mr. Richard noted that Mr. Williams' personal vehicle was not in his driveway. He went in the store and found that it did not have his mother's brand of cigarettes. Upon leaving the store, Mr. Richard called the police from a payphone outside the store to alert them about a drunk driver. He and his mother then travelled to another store in Norwich to buy cigarettes.

[14] On the way back from Norwich, Mr. Richard and his mother came upon the scene of Mr. Williams' accident. He had driven into the rear of a stationary tractor

towing a trailer. Mr. Williams was ejected from the vehicle and died as a result of his injuries.

[15] These actions were commenced naming various defendants. The only remaining defendants are Mr. Richard and Ms. Richard.

[16] The respondents brought a motion for summary judgment, asserting that they owed no duty of care to the appellants. The motion judge ruled in their favour. She was of the view that the appellants had failed to establish the existence of any duty of care owed by Mr. Richard or Ms. Richard. In the alternative, she concluded, relying on *John*, that if a duty did exist, it was spent when Mr. Williams arrived safely home before departing again to drive the babysitter.

C. ISSUES

[17] This appeal raises the following issues:

(i) Did the motion judge err in her duty of care analysis regarding foreseeability and/or proximity?

(ii) Did the motion judge err in her reliance on *John*?

(iii) Should this court consider the issues of whether any residual policy considerations suggest a duty of care should not exist and whether the respondents met the applicable standard of care? If so, how do those issues impact the result?

D. ANALYSIS

(1) Duty of Care

(a) Legal Principles from *Childs*

[18] *Childs* is the leading case in Canada regarding social host liability. The Supreme Court applied the *Anns-Cooper-Odhavji* framework to conclude that the social hosts in that case did not owe a duty of care to the plaintiff, a public user of the highway who was injured by the hosts' intoxicated guest: at paras. 11-15, citing *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (H.L. Eng.); *Cooper v. Hobart*, 2001 SCC 79; [2001] 3 S.C.R. 537; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 537. The outcome of *Childs* hinged on two issues: foreseeability and proximity.

[19] With respect to foreseeability, the Supreme Court noted the absence of a finding by the trial judge that the hosts in *Childs* knew or ought to have known that Mr. Desormeaux, the social guest, was too drunk to drive. Further, the court held that foreseeability was not established by the fact that the hosts had knowledge of the guest's past drinking and driving: *Childs,* at paras. 28 - 29.

[20] In *Childs*, as in the present case, the court was concerned not with an overt act by the social hosts but with their alleged failure to act. In other words, the claim was based on a failure to stop Mr. Desormeaux from driving while intoxicated. In these circumstances, the court found that the plaintiff had the onus

of establishing foreseeability of harm, and in addition, other aspects of the relationship between the plaintiff and the defendant that create a “special link” or proximity: *Childs*, at para. 34.

[21] The Supreme Court articulated three situations that establish such a “special link” and that require legal strangers to take action. The court explicitly stated that these are not “strict legal categories,” but recognized, at paras. 35-37, features of a relationship that bring legal strangers into proximity:

(i) Where a defendant intentionally attracts and invites third parties into an inherent and obvious risk that he or she has created or controls;

(ii) Paternalistic relationships of supervision and control; and

(iii) Where a defendant exercises a public function or engages in a commercial enterprise that includes implied responsibilities to the public at large.

[22] Common to the above three situations 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”: *Childs*, at para. 38.

[23] In *Childs* the court found that simply holding a house party where alcohol is served is not an invitation to participate in highly risky activity. More is required to establish a risk that requires positive action: *Childs*, at para. 44.

(b) Legal Principles from post-*Childs* jurisprudence

[24] The post-*Childs* jurisprudence on social host liability, discussed below, demonstrates that there is no clear formula for determining whether a duty of care is owed by social hosts to third parties or guests. Rather, the determination of whether such a duty of care exists usually hinges on fact specific determinations pertaining to two main issues. The first issue is the host's knowledge of a guest's intoxication or future plans to engage in a potentially dangerous activity that subsequently causes harm. This is a foreseeability analysis. The second determination asks if "something more" is present on the facts of the case to create a positive duty to act. The "something more" could be facts that suggests the host was inviting the guest to an inherently risky environment or facts that suggest a paternalistic relationship exists between the parties. This is a proximity analysis.

[25] The foreseeability case law has focused heavily on a social host's knowledge as to the relevant guest's level of intoxication, whether there were signs that the guest was intoxicated, and thus whether it was reasonably foreseeable that the guest would engage in certain acts and behaviours that subsequently led to an accident: see *Sidhu (Litigation guardian of) v. Hiebert*, 2011 BCSC 1364; *Wardak v. Froom*, 2017 ONSC 1166, 38 C.C.L.T. (4th) 166; *Lutter v. Smithson*, 2013 BCSC 119, 18 C.C.L.I. (5th) 294; *Sabourin (Litigation*

guardian of) v. McKeddie, 2016 ONSC 2540; *Kim v. Thammavong*, 2007 CanLII 52791 (Ont. Sup. Ct.), affirmed 2008 CanLII 63230 (Ont. Div. Ct.).

[26] In the context of summary judgment motions, some of the jurisprudence has suggested that the presence of conflicting evidence about the level of a host's knowledge of a guest's intoxication is enough to render a full trial necessary: see *Sidhu* at paras. 40-41; *Wardak*, at paras. 58-61; *Lutter*, at paras. 26, 29-30. In particular, cases that offer conflicting evidence on a host's knowledge of a guest's intoxication via affidavits may be particularly unsatisfactory; there could be a "significant risk of injustice" if such issues were not further explored in a full trial: *Lutter*, at para. 30. However, this does not mean that any ambiguity in the evidence on a host's knowledge of a guest's intoxication will result in summary judgment being denied. For example, in *Sabourin,* the motion judge found that even if the plaintiff's evidence was taken at its highest, there was a lack of evidence that the host knew there was excessive drinking or that any guest was showing obvious signs of intoxication: para. 38. As such, there was a lack of reasonable foreseeability and summary judgment was granted.

[27] Much of the post-*Childs* jurisprudence regarding proximity has engaged in a factually specific evaluation of whether "something more" is present to suggest that a positive duty to act may exist. While there is no definitive list, the case law

has looked at a variety of factors to determine what could qualify as “something more” that would make a social gathering an inherent and obvious risk, including: whether alcohol was served at the party or whether guests were invited to bring their own alcohol, the size and type of the party, and whether other risky behaviour was occurring at the party, such as underage drinking or drug use: see generally *Childs*, *Sidhu*, *Wardak*, *Lutter*, *Sabourin*, *Kim, Allen v. Radej*, 2014 ABQB 171, *Oyagi v. Grossman*, 2007 CanLII 9234 (Ont. Sup. Ct); *Wenzel v. Desanti,* 2011 ABCA 226, 510 A.R. 327, leave to appeal to S.C.C. refused, [2011] S.C.C.A. No. 437.

[28] There are many different factual permutations of what could transform a social gathering into an invitation to an inherent and obvious risk. It is helpful to think of these situations as being situated along a spectrum. At one end of the spectrum is *Childs*, which was a “bring your own alcohol” party where the hosts provided minimal alcohol. Similarly, private parties of a reasonable size are usually viewed by the courts as not inherently risky: see *Robinson v. Lewis*, 2015 ABQB 385, at paras. 72-77. Likewise, an invitation to a co-worker’s home to have dinner and after-work drinks outside is not inherently dangerous or risky: see *Allen*, at para. 78. Moving further down the spectrum, a young adult throwing a “wild” Halloween party and providing alcohol for around 40 people, some of whom are using illegal drugs, may implicate a host in the creation of an inherent risk: see *Kim*, at paras. 9-10, 25. On the far end of the spectrum, a teenager

throwing a house party at which over 100 people attend, most of whom are underage drinkers, while their parents are out of town, likely implicates the host in the creation of an inherent risk: *Oyagi*, at paras. 6-7, and 12.

(c) Motion Judge's Duty of Care Analysis

[29] With these principles in mind, I consider the analysis of duty of care in the present case. Normally, a duty of care analysis in the context of an allegation that a social host failed to act should consist of three elements. First, is the issue of whether the injury was reasonably foreseeable. Second, is the issue of whether there is sufficient proximity such that there is a duty to act. If these elements are satisfied, a *prima facie* duty of care has been established and the third issue is whether this duty is negated by other, broader policy considerations: see *Childs*, at paras. 12 and 31.

[30] The motion judge's duty of care analysis, which is very brief, does not follow this structure. She indicated that the first issue was whether proximity had been established. However, she then proceeded to examine the issue of foreseeability as it related to Ms. Richard. At para. 48 she found, "there is no evidence that Eileen Richard knew that Mark was about to drive while impaired". She concluded, therefore, that foreseeability had not been established. The motion judge then found at paras. 49 and 51 that proximity had not been established in regard to Ms. Richard because none of the features of a

relationship that bring legal strangers into proximity, as cited by the Supreme Court in *Childs,* were present.

[31] With respect to Mr. Richard, the motion judge never made an explicit finding regarding foreseeability but observed at para. 54, “Jake obviously knew that Mark intended to drive the company van to his home approximately 5 minutes away.” She then stated, “the question becomes one of ‘proximity’.” Specifically, the motion judge said at para. 56 that the issue to be determined is, “was Jake a social host, whom invited Mark into an inherently risky environment which he controlled or created”. Her analysis of that issue began with a quote from para. 42 of *Childs*:

> The first category concerns defendants who have created or invited others to participate in highly risky activities. Holding a house party where alcohol is served is not such an activity. Risks may ensue, to be sure, from what guests choose to do or not do at the party. But hosting a party is a far cry from inviting participation in a high-risk sport or taking people out on a boating party. A party where alcohol is served is a common occurrence, not one associated with unusual risks demanding special precautions. The second category of paternalistic relationships of supervision or control is equally inapplicable. Party hosts do not enjoy a paternalistic relationship with their guests, nor are their guests in a position of reduced autonomy that invites control. Finally, private social hosts are not acting in a public capacity and, hence, do not incur duties of a public nature.

[32] Then at para. 58 she stated, “accordingly, I must conclude that Jake neither created nor controlled an inherently and obviously risky environment. Proximity has not been established.”

(d) Duty of Care of Jake Richard

[33] As mentioned above, it is unclear from the motion judge’s reasons whether she turned her mind to the issue of foreseeability as it applied to Mr. Richard. In my view, there is enough conflicting evidence to suggest there is a genuine issue requiring a trial regarding whether it was reasonably foreseeable that Mr. Williams would drive home and then drive his children and their babysitter, while under the influence of alcohol.

[34] The next issue is the question of proximity as it applies to Mr. Richard. I am not satisfied that the motion judge’s analogy between the facts at hand and the facts of *Childs* is apt. The motion judge did not advert to or consider the obvious factual differences between the cases. This was not a large social gathering, rather it was two men drinking heavily in a garage. There was a developed pattern of this behaviour, enough so that the men had a pact as to what to do in the event one of them drove children while under the influence. Alcohol was provided or served, to a certain extent, as the garage refrigerator the men were accessing had 30 to 40 cans of beer in it. These facts distinguish the case at bar from *Childs*. Moreover, nowhere in her analysis did the motion judge

consider the statement in *Childs,* at para. 44*,* that “it might be argued that a host who continues to serve alcohol to a visibly inebriated person knowing that he or she will be driving home has become implicated in the creation or enhancement of a risk sufficient to give rise to a *prima facie* duty of care to third parties”.

[35] In my view, the facts of the case at bar raise a genuine issue requiring a trial regarding whether Mr. Richard, as a social host, may have invited Mr. Williams into an inherently risky environment that he controlled and created, thereby creating a positive duty of care.

(e) Duty of Care of Eileen Richard

[36] On the issue of foreseeability as it relates to Ms. Richard, the motion judge was incorrect when she concluded that there was no evidence Ms. Richard knew that Mr. Williams would be driving while intoxicated. As described above, there was in fact conflicting evidence on the point. That evidence raises a genuine issue requiring a trial.

[37] With respect to the issue of proximity and Ms. Richard, the unique circumstances of this case, including her awareness of the general pact between Mr. Richard and Mr. Williams, Mr. Williams’ habitual heavy drinking on her property, and her knowledge of his alcohol consumption and intention to drive on that evening, could potentially implicate Ms. Richard in the creation or control of

an obvious and inherent risk. There was conflicting evidence on these issues and I find that there is a genuine issue requiring a trial to determine the question of proximity as it relates to Ms. Richard.

(f) Summary

[38] In summary, the motion judge's duty of care analysis was flawed and incomplete. There is conflicting evidence on many of the key issues. A trial is required to determine whether Mr. Richard and/or Ms. Richard owed a duty of care to Mr. Williams and/or his children

(2) *John v. Flynn* Analysis

[39] After completing her duty of care analysis, the motion judge proffered an alternative reason for dismissing the claims. She stated that if she were incorrect on the issue of a duty of care, any such duty expired when Mr. Williams arrived safely at his home. In reaching that conclusion, she relied on a statement made by this court in *John* at para. 50 as follows:

> There is no duty of care on the part of Eaton Yale to members of the driving public arising out of Flynn's participation in the EAP [a counselling program] and if there was such a duty, it did not extend beyond the point where Flynn left the company premises and drove safely to his home. Any suggestions as to how Eaton Yale could have controlled Flynn's activities beyond that point are hopelessly speculative.

[40] The motion judge then stated at para. 64 of her reasons, “any suggestion that Eileen and Jake could have controlled Mark’s activities beyond the point he arrived at his home is similarly speculative. If Jake in fact, owed Mark a duty of care, that duty concluded once Mark arrived at his home.”

[41] The facts of *John* are very different than the facts in the case at bar. In that case, the individual defendant was an employee of the corporate defendant, working the overnight shift. The employee, who had previously sought assistance for his drinking problem through an employer supplied counseling program, drank steadily for eight hours before reporting for work, and consumed more alcohol during his breaks. The corporate defendant did not provide liquor to its employees, nor was it the host of a party or social occasion of any kind on the night in question.

[42] The individual defendant concealed that he had been drinking. He completed his shift without incident, and his supervisor did not observe any signs of intoxication. He drank another beer in his truck and returned home. He then headed out again to visit a friend and was involved in an accident shortly thereafter. The individual defendant was intoxicated at the time of the accident. At trial, the jury apportioned liability 70 per cent as against the individual defendant and 30 per cent as against the corporate defendant.

[43] On appeal, this court held that the trial judge confused two unrelated duties: the duty of an employer to its employees to provide them with a safe work environment and the duty of a commercial host (and in specific circumstances, a social host) to its guests where the host has knowledge of the intoxication of the patrons or guests: *John*, at para. 19.

[44] In *John*, the respondents argued that employers have a duty to provide employees with a safe work environment and that they should be held liable for harm caused by employees to themselves or to others they come in contact with, even when those employees are not working on company property. That argument was rejected. The court held that the duty to provide a safe work environment for employees does not extend to members of the public who may come into contact with an employee outside the workplace: *John*, at paras. 48 and 50. The court noted that the employer did not provide the employee with alcohol and was unaware that the employee was intoxicated. Further, the accident was not associated with the employer in any way besides the fact that it was caused by one of its employees: *John*, at para. 33.

[45] It is clear from the reasons that the disposition of the appeal was based on a finding that no duty of care was extant in the circumstances of that case. The statement made, without analysis, that if such a duty existed it ended when the employee returned home was *obiter dicta*. In any event, I do not read the

statement as standing for the proposition that in all circumstances a duty of care ends when a drunk driver returns safely home.

[46] The motion judge seemed to accept that such a general rule was established in *John*. She seized upon the fact that Mr. Williams arrived home safely to find that any duty of care ended when Mr. Williams reached that point. That was an error in law. In a social host liability case, there is no automatic rule that the duty of care expires once the intoxicated driver arrives home safely. The limits of the duty are determined by the facts of the case. The motion judge was obliged to explain why the duty of care ended on Mr. Williams' arrival home, especially since the evidence focussed not on whether Mr. Williams would drive home, but on whether he would drive the babysitter home.

[47] In my view, the motion judge erred in concluding that any duty of care automatically expired when Mr. Williams arrived home. Assuming that such a duty existed, it is an issue for the jury to determine if and when the duty ended.

(3) Other Issues

[48] In the alternative, the respondents assert that if they owed a duty of care, this court should determine whether it is negated by other, broader policy considerations and, if it is not, whether their actions met the standard of care. I would decline to consider these issues on appeal.

[49] The issue of whether a duty of care is negated by policy considerations is best dealt with after the duty has been found to exist. That way any consideration of countervailing policy arguments can be undertaken with the benefit of an evidentiary record supporting the finding of a duty of care. Similarly, an analysis of whether the duty of care has been met should be considered after the precise nature of the duty has been established.

E. DISPOSITION

[50] I would: (i) allow the appeal and set aside the motion judge's order; (ii) remit the cases to the Superior Court for trial; (iii) order the respondents to pay the appellants their costs of the appeal in the agreed upon, all-inclusive sum of $4,000; and (iv) remit the costs of the motion below to the trial judge.

Released: "C.W.H." November 7, 2018

"C.W. Hourigan J.A."
"I agree. B.W. Miller J.A."
"I agree. G.T. Trotter J.A."