CITATION: *Sabourin v. McKeddie*, 2016 ONSC 2540
COURT FILE NO.: CV-11-1127
DATE: April 14, 2016

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
CHESSA SABOURIN, a minor by her Litigation Guardian TINA SABOURIN Plaintiff	Tracy Lyle, for the Plaintiff
– and –	
MARK McKEDDIE, TAYLOR McKEDDIE, GRAHAM McKEDDIE and ECHELON GENERAL INSURANCE COMPANY Defendants	Todd J. McCarthy and Michael R. Switzer for the Defendant Graham McKeddie B.A. Percival Q.C., for the Defendant Echelon General Insurance Company No one appearing for Mark McKeddie and Taylor McKeddie **HEARD:** December 22, 2015

JAMES J.

INTRODUCTION

[1] This is a motion for summary judgment brought by one of the defendants, Graham McKeddie, for an order dismissing the claim against him. For the reasons that follow, I have determined that the motion should be granted.

[2] The plaintiff Chessa Sabourin, a minor by her litigation guardian, Tina Sabourin, was a passenger in a car that went out of control resulting in serious injuries. She was 16 years old at the time. She had spent the day socializing with the other occupants of the vehicle in question. Alcohol had been consumed.

[3] The defendant, Mark McKeddie, was driving the vehicle when it went out of control and the plaintiff was injured. He was 31 years of age. He was visiting his family and staying at the home of his father, Graham McKeddie, at the time of the accident. He resides in Alberta.

[4] Taylor McKeddie was Mark's younger brother. He was 19 years of age and lived with his father. Taylor McKeddie was the owner of the vehicle in question. He was a passenger in the vehicle at the time of the accident. This vehicle was unplated, unlicensed and uninsured.

[5] For ease of reference, I will refer to the McKeddies by their first names.

[6] The defendant Echelon General Insurance Company ("Echelon") is a party pursuant to the uninsured and underinsured provisions of a policy of insurance in respect of which the plaintiff is an insured person. It alleges in its cross-claim that Graham is responsible for the plaintiff's damages along with his sons on the basis of social host liability.

[7] Although the plaintiff named Graham as a defendant in the statement of claim initially, at this time the plaintiff supports the request that the claim against Graham be dismissed.

[8] Both Mark and Taylor did not defend the plaintiff's claim and have been noted in default.

THE FACTS

[9] On a sunny June day in 2010 Mark and Taylor went to the beach in the afternoon. They drove there in a vehicle owned and operated by Mark. They were joined there by the plaintiff then later in the afternoon by two other friends of Taylor. The McKeddie brothers bought a case of beer during the course of the afternoon and drank about four beers each while at the beach. Taylor said that there were still four beers left in the case when they decided to leave the beach and return to the McKeddie residence.

[10] The plaintiff admits having consumed about three beer over the course of the afternoon and does not recall either Taylor or Mark drinking significantly more than she did.

[11] There is a discrepancy in the evidence regarding whether Graham was at the house when the Mark and Taylor arrived with their friends. Graham's evidence is that he returned home at about 8:30 p.m. after spending the day in Ottawa and visiting his girlfriend in Deep River. No one was present at the house when he arrived. Shortly after 9:00 p.m. Graham heard Mark and Taylor arrive home. Mark and Taylor and their friends went into the backyard when they arrived and remained there until they left. Graham was inside the house. He wasn't aware that they had friends with them.

[12] Graham said that he heard the stereo playing in the garage at a loud volume. He went into the garage and turned it down. He did not see any members of the group at that time. A brief time later the volume increased again. This time he returned to the garage and turned the stereo off. As he re-entered the residence, he looked into the backyard and saw the young people there.

[13] Graham went out onto the wooden deck at the back of the house to observe what was going on in the yard. He saw his sons and their friends, including the plaintiff. He did not see any alcohol nor did he observe anything that led him to believe that anyone was intoxicated.

[14] Graham said that the group was speaking loudly and he requested them to leave. Shortly thereafter he looked out of the front window of his residence. Graham observed Taylor's Mazda automobile driving away. He said that he did not see who was in the Mazda or who was driving it. Graham knew that Taylor's vehicle was unplated and uninsured.

[15] Graham denied offering alcoholic beverages to any members of the group. Any alcohol that was consumed by the group at his residence had been brought there by them without his knowledge.

[16] The evidence of the plaintiff is different. She said that the group arrived at the McKeddie residence around 7 p.m. Graham was home, having a beer on the back deck when they arrived. The group set up in the backyard. A cooler containing beer was brought from the car to where they were sitting. Graham participated in discussions with the group. They remained there for substantially longer than suggested by Graham.

[17] About two years after the accident Taylor gave a statement to an insurance representative. In this statement Taylor said that they left the beach and went to the McKeddie residence between 6 and 7 p.m. Graham was home when they arrived. They went into the garage. In his version of events, Graham did not interact or socialize with the group.

[18] Everyone agrees that when the group left the McKeddie residence, they drove to a convenience store in Quebec to purchase more beer. While taking the plaintiff home after leaving the convenience store, Mark lost control of the car and crashed into a ditch.

[19] The moving party says that the issue to be determined on this motion is whether there is a genuine issue requiring a trial with respect to the claim of negligence against Graham McKeddie.

DISCUSSION AND ANALYSIS

i) Summary Judgment

[20] The procedure to be followed on motions for summary judgment is governed by the case of *Hyrniak v. Maudlin*, 2014 SCC 7. In *Hyrniak* the Supreme Court of Canada emphasized the need for a culture shift in the delivery of timely, affordable and fair access to justice in a way that reduced the emphasis on conventional trials and that promoted proportional procedures tailored to the needs of the particular case.

[21] Justice Karakatsanis, writing for a unanimous court, directed that the summary judgment rules must be interpreted broadly and observed that the previous "full appreciation" of evidence requirement was too onerous and impeded access to justice. In her view, the re-vamped summary judgment procedure adopted in 2010 was an important tool in providing a cheaper and faster alternative to a full trial. She said that the traditional use of extensive pre-trial procedures and the conventional trial no longer met the needs of many modern litigants. The rule change was intended to transform summary judgment from a means to weed out unmeritorious claims to a significant alternative model of adjudication (para. 45).

[22] The first step is to determine whether there is genuine issue requiring a trial. There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits of a motion for summary judgment. This will be the case when the process allows the judge to find the necessary facts, allows the judge to apply the law to the facts and is a proportionate, more expeditious and less expensive means to achieve a just result (para. 49). The proportionality principle involves considerations such as cost, efficiency, timeliness and the nature and complexity of the issues to be determined, all with a view to the just and expeditious disposition of cases on their merits. The culture shift contemplated by Justice Karakatsanis "requires judges to actively manage the legal process in line with the principle of proportionality" (para. 32).

[23] If the motion judge determines there is a genuine issue requiring a trial, then step two involves a discretionary assessment of whether the need for a trial can be avoided by using the new fact-finding powers to weigh evidence, evaluate credibility and draw inferences from the evidence unless it is in the interest of justice for them to be exercised only at a trial (para. 52). "Interest of justice" is not defined. It turns on a consideration of the nature of the issues, the nature and strength of the evidence and what is a proportional procedure (para. 59). Importantly, it also considers the consequences of the motion in the context of the litigation as a whole. In appropriate situations, "the resolution of an important claim against a key party (can) significantly advance access to justice, and be the most proportionate, timely and cost effective approach" (para. 60).

ii) Social Host Liability Issues

[24] *Childs v. Desormeaux*, [2006] S.C.J. 18 is one of the leading cases on social host liability. The *Childs* decision was summarized by Perrell, J in *Kim v. Thammavong*, [2007] O.J. No. 4769 in the following terms at paragraphs 18 to 21 and 23 to 24:

> **18** In *Childs v. Desormeux*, Zoe Childs was grievously injured when the vehicle in which she was a passenger was struck by a vehicle driven by the inebriated Desmond Desormeaux who had just come from a party hosted by Dwight Courrier and Julie Zimmerman. Ms. Childs, amongst other things, sued Mr. Courrier and Ms. Zimmerman. The trial judge dismissed the action because he held that while Mr. Courrier and Ms. Zimmerman had a duty of care to Ms. Childs, the duty of care was negated by policy considerations. The Ontario Court of Appeal affirmed the dismissal of the action on the ground that there was no *prima facie* duty of care by a social host to a person injured by a guest who has consumed alcohol. The Supreme Court of Canada affirmed the judgment of the Ontario Court of Appeal and agreed that there was no *prima facie* duty of care, and the Court felt it unnecessary to opine about whether policy considerations would negate a duty of care for social host liability.
>
> **19** The judgment of the Supreme Court of Canada was written by Chief Justice McLachlin and her analytical approach followed that developed in the famous modern tort cases: *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Cooper v.*

Hobart, [2001] 3 S.C.R. 537; and *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263.

20 The contemporary analysis of liability for negligence begins by asking whether the plaintiff and the defendant are in a relationship that the law categorically recognizes as involving a duty of care or whether the relationship constitutes a new class of claim. If the relationship does not fall within a recognized class whose members have a duty of care to others, then whether a duty of care to another exists involves satisfying three requirements: (1) foreseeability, in the sense that the defendant ought to have contemplated that the plaintiff would be affected by the defendant's conduct; (2) sufficient proximity, in the sense that the relationship between the plaintiff and the defendant is sufficient *prima facie* to give rise to a duty of care; and (3) the absence of overriding policy considerations that would negate any *prima facie* duty established by foreseeability and proximity.

21 The above analysis is qualified by the recognition that in recognizing a duty of care, there is a distinction between misfeasance, which is an overt act that may be foreseen to cause harm to another, and nonfeasance which is the failure to act to prevent foreseeable harm to another. McLachlin, C.J. noted in paragraph 31 of her reasons: "[W]here the conduct alleged against the defendant is a failure to act, foreseeability alone may not establish a duty of care." This qualification recognizes that action that causes harm to another and inaction that fails to prevent harm being caused to another have different qualities of moral and legal culpability.

…….

23 In *Childs*, the Supreme Court of Canada did not find a duty of care between a social host and a third party who had been injured by a party guest. The Court, however, did not go so far as to say that a social host categorically could not have a duty of care to third parties. What the Supreme Court decided was that as a matter of foreseeability and proximity, just hosting a social party where alcohol is served does not entail a duty of care between the social host and a third party injured by a party guest. There has to be something more to engender a duty of care. In paragraph 47 of her reasons, McLachlin, C.J. stated: "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 of third-party highway users who may be injured by an intoxicated guest."

[25] In *Childs* the Supreme Court of Canada was concerned with whether a social host owed a duty of care to a person injured by a guest who had consumed alcohol at the home of the host. In *Kim* the question was framed differently because in the *Kim* case it was a guest, not

some unknown user of the road, who was injured. This difference prompted Perrell, J. to comment that:

> In terms of foreseeability and proximity, the relationship between the defendant, Tracy, and the plaintiff Mr. Kim is somewhat closer than the relationship between the parties in *Childs*, Mr. Kim was a guest at the party and not a third party passenger in a car some distance away. In my opinion, whether there is "something more" in the circumstances of the party hosted by Tracy that led to the injury suffered by Mr. Kim is a genuine issue for trial. (paragraph 25).

[26] Justice Perrell concluded that the duty of care question was a triable issue.

[27] Similarly, in O*yagi v. Grossman*, [2007] O.J. No. 1087 Lederman J. considered the defendants' motion for summary dismissal under Rule 20. Against his parents' (the defendants Eric and Phyllis Grossman) wishes and express directions before they left on a vacation, their son Geoff, aged seventeen, held a house party that he advertised on the internet. He charged a $10 entrance fee for those who wished to partake in the beer and $5 for all others. The party grew in size to about one hundred attendees and as the evening went on, things started to disappear from the house. The plaintiff was a seventeen year old friend of Geoff's. As she was leaving the party at around 11 p.m. she saw someone running down the street with a sack of what she assumed were goods taken from the house. The putative thief got into a waiting car which was quickly surrounded by several party-goers. While the plaintiff was standing in front of the car, the driver suddenly put the car in motion and drove away after accelerating into the plaintiff who was seriously injured. Lederman J. had no difficulty concluding that the environment created by Geoff was inherently dangerous. He held that it could not be said that it was plain and obvious that those who created the environment owed no duty to the plaintiff, an invited guest. Moreover, he said it was arguable that Geoff's parents, as owners and occupiers of the house, owed a duty of reasonable care to those coming onto their property and that to leave their seventeen year old in charge was negligent (para. 10). He found that there was a genuine issue for trial and dismissed the motion.

[28] Both cases were decided in 2007. Is a similar result to the *Kim* and *Oyagi* summary judgment motions inevitable now that the Supreme Court of Canada has formulated the new summary judgment model contained in the *Hyrniak* case? In my view the precedent value of these decisions is much diminished.

[29] Returning to *Childs*, Chief Justice McLachlin said that when the act or omission complained of was (as in this case) nonfeasance rather than misfeasance, a positive duty of care may exist if foreseeability of harm is present and if other aspects of the relationship between the plaintiff and the defendant establish a special link or proximity (para. 34) The Chief Justice said that three such situations have been identified by the courts. These factors or features of the relationship bring parties who would otherwise be legal strangers into proximity and impose positive duties on the defendants that would not otherwise exist.

[30] The first situation is where a defendant intentionally attracts and invites parties to an inherent and obvious risk that he or she created or controls, e.g. an ice cream truck patrolling residential streets for customers.

[31] The second situation concerns paternalistic relationships of supervision and control, such as parent-child or teacher-student.

[32] The third situation concerns defendants who either exercise a public function or engage in a commercial enterprise that implies responsibilities to the public at large, e.g. a commercial host such as the operator of a tavern.

[33] The connecting feature of these situations "is the defendant's implication in the creation of risk or his or her control of a risk to which others have been invited" (*Childs*, para. 38).

[34] In my view, this framework can be employed to gauge the proximity requirement for someone in the plaintiff's position. If this is so, what needs to be considered is Graham's role, if any, in the context of the three situations described by the Chief Justice. Clearly on any version of the conflicting evidence Graham did not attract or invite the plaintiff to an inherently risky activity that he created or controlled. Nor did he exercise a public function or a commercial activity.

[35] It appears that the only category that may apply on the facts in this case is the presence or absence of a paternalistic relationship. The duty in these cases rests on the special vulnerability of the plaintiff and the formal position of power of the defendant (*Childs*, para. 36). It is here that the impact of the conflicting evidence of the plaintiff and Graham McKeddie becomes important. The presence of contradictory evidence raises the question: Do the evidentiary issues constitute a genuine issue requiring a trial? I would say they do not.

[36] On the evidence of Graham, it is very difficult to see how a positive duty grounded in paternalism arises on the facts here. He wasn't home when the young people arrived at the house. He didn't socialize or interact with them. Not only did he not knowingly supply alcohol, but he never saw them drinking either. He was inside the house; they were in the back yard or the garage. On these facts I would conclude that a positive duty of care did not arise. The proximity requirement remained unsatisfied.

[37] Is the situation different on the plaintiff's version of events? On her evidence, Graham was already home when his sons and their friends arrived at the house. He was sitting on the back deck, beer in hand. The guests sat on lawn chairs facing the deck. They interacted together for approximately an hour, maybe a little longer. The beer cooler was present. Although the plaintiff was only 16 years old, Graham made no inquiries regarding her age despite observing her consuming alcohol. At one point she saw Taylor and his father engaged in a discussion that resulted in Taylor telling his friends that they had to leave. At her examination for discovery the plaintiff said she had been at a party at the McKeddie residence several months previously. Graham had been present for part of the evening and knew that his son and his friends were drinking.

[38] Taking the plaintiff's evidence at its highest, there is an absence of evidence that Graham knew the plaintiff's age or knew that there were underage drinkers present, that he provided alcoholic drinks to anyone, that excessive drinking was taking place or that anyone was showing obvious signs of intoxication.

[39] Does a positive duty arise on these facts? There are surprisingly few cases in this area. In *Prevost (Committee of) v. Vetter*, [2001] BCJ No. 495, Coultas, J. found that a duty of care arose when the defendant homeowners routinely permitted underage friends of their son to drink at their home and then drive. The evidence there established that Mrs. Vetter would look after minors who had consumed too much alcohol, allowing them to stay over or driving them home. The court found that the defendants recognized the danger posed by allowing visitors to drive after drinking and established a paternalistic relationship with the minors who had visited their home for parties in the past. In these circumstances, Coultas J. refused to grant the defendant summary judgment dismissing the claim of a person who was injured in an accident involving a youthful guest who had just left a party at the Vetters' home. He qualified the potential scope of his decision with this comment:

> To find liability there must be evidence that would cause a reasonable adult to suspect that a minor was intoxicated based on the consumption of alcohol consumed at the adult's home or based on physical symptoms of insobriety. This is a threshold requirement. (pp. 315-316)

[40] *Vetter* was considered in the Ontario case of *John v. Flynn* 2001, 54 O.R. (3d) 774 (C.A.). There the defendant entered his employer's voluntary assistance program for help with his alcohol abuse problem. The employer did not monitor the defendant's obligations under the agreement which included attending meetings and maintaining abstinence. Nearly two years later the defendant consumed alcohol while at work. Returning to his home after his shift, the defendant drank more alcohol then operated his vehicle, resulting in a collision and serious injuries to the plaintiff. Finlayson J.A. dismissed the suggestion that the employer had permitted the defendant and others to consume alcohol on the premises and in particular in the parking lot during breaks despite the employer having acknowledged that some drinking was likely going on. He rejected the notion that the employer had a duty to protect the defendant from the consequences of his alcoholism and that this duty extended beyond the workplace and beyond the defendant himself. The duty asserted by the plaintiff was not one owed to the plaintiff directly but rather to its employees as a class, resulting from the fact that the employer knew or ought to have known that its employees, including the defendant, would become impaired and attempt to drive their vehicles, posing a risk to themselves and others (para.23).

[41] In 2015 Belch J. granted summary judgment in *Ferrier v. Hubbert et al*., 2015 ONSC 5286 dismissing a claim against parents whose adult son and his girlfriend hosted a party at the parents' cottage while the parents were there. In that case, one guest drove a vehicle in which another guest was injured after spending the day at the cottage. The parents did not supply food or alcohol to the guests. The party was a birthday celebration for their son's girlfriend, who sent the invitations. The father provided his boat for waterskiing and drove the boat when it was his son's turn but otherwise the parents did not engage with the

celebrants. He said the parents had no duty to supervise their adult son, were entitled to respect his autonomy and could not be held liable for allowing him and his girlfriend to host a party on their property (para. 62).

DISPOSITION

[42] There is insufficient evidence to establish a paternalistic obligation on Graham's part. At the hearing of this motion Echelon did not provide a single case authority confirming the existence of private (as opposed to commercial) social host liability in circumstances similar to those present here. The incident in question took place nearly six years ago and the action has been underway for about four years. It is on a list to be heard by a judge and jury in the near future. The liability issues in relation to the plaintiff as a passenger in the vehicle are not complicated. There is a reasonable prospect that the time required for trial may be shortened if the moving party is successful. It appears to me that the fundamental issue to be determined on this motion is a legal one rather than factual i.e. did Graham owe the plaintiff a duty of care? In my view even on the most favourable version of the facts, Echelon cannot establish a duty of care in these circumstances. The issue of Graham's potential liability can be resolved justly without a trial.

[43] In the result the motion should be granted. If the parties are unable to agree on costs, counsel may provide costs submissions within thirty days on a mutually-acceptable schedule.

The Hon. Mr. Justice M. James

Released: April 14, 2016

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– and –

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Defendants

REASONS FOR DECISION

James J.

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