Court of Queen's Bench of Alberta

Citation: Knibb v Foran, 2017 ABQB 375

Date: 20170612
Docket: 0601 05893
Registry: Calgary

Between:

Bobby Louis Knibb, a dependant adult, by his guardian, Wanda Noren

Plaintiffs

- and -

Gregory Foran & Foran Equipment Limited, John Doe I, John Doe II,Adam Piper, Seben Young, Jessie Cooper, Shannon Walroth, Ken Tkachuk, Kevin Stull, Shawn McElroy, Julia McElroy, Kevin Killen, Angela Murray, John Doe III, John Doe IV, John Doe V, and John Doe VI

Defendants

- and -

The Carstairs Battle Cats, Adam Piper, Seven Young, John Doe III through John Doe XX, ABC Corporation & Def Corporation

Third Parties

Corrected judgment: A corrigendum was issued on June 21, 2017; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Madam Justice K.M. Eidsvik

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[1] Bobby Knibb, attended a baseball tournament organised by the Carstairs Battle Cats baseball team (the "Battle Cats") on June 5, 2004. He was drinking beer at a "tent" the Battle Cats had set up and was operating. He was watching a Stanley Cup final hockey game. On his way home, he was walking southbound on 10th Avenue S in Carstairs and at 10:52 pm, he was hit by Gregory Foran who was also on his way home. Mr. Foran left the scene and left Mr. Knibb, who was severely injured, on the road. Mr. Knibb had a blood sample taken later at the Foothills Hospital that showed that he was intoxicated at the time of the collision.

[2] Mr. Knibb sued Mr. Foran in 2006. In June 2008, four years after the collision, the Battle Cats team members Adam Piper, Seven Young, Jessie Cooper, Shannon Walroth, Ken Tkachuk, Kevin Stull, Shawn McElroy, Julia McElroy, Kevin Killen, and Angela Murray (the "Team Members") were added to the action on the basis that they were commercial hosts. The allegation is that they had breached their duty of care to Mr. Knibb for failing to identify the fact that he was intoxicated, failing to monitor his consumption, and failing to intervene to ensure a safe passage home. A summary trial to have the action struck out as against these individuals on the basis that it was barred because of the limitation period had passed was dismissed (see my decision at 2013 ABQB 754).

[3] The Team Members now seek a dismissal of the action against them by way of a summary trial on the basis that they did not breach any duty of care that may have been owed to Mr. Knibb, and that they did not contribute to the truck collision.

[4] Mr. Knibb and Mr. Foran seek a dismissal of the application and a finding that the Team Members are liable for Mr. Knibb's injuries sustained that night with the degree of fault to be determined at the trial of this action set in 2018.

Issues

[5] The issues to be determined in this summary trial are the following:

1. Did the Team Members owe a duty of care to Mr. Knibb in the circumstances?
2. If there was a duty owed, what was the standard of care owed to Mr. Knibb and whether it was breached?
3. If there was a breach of the standard of care, did it cause or contribute to the collision and resulting injuries to Mr. Knibb?

1. Duty of Care

[6] The law with respect to the duty of care of a commercial host is relatively settled: ***Jordan House v Menow*** [1974] SCR 239;***Stewart v Pettie*** [1995] 1 SCR 131; ***Childs v Desormeaux*** [2006] 1 SCR 643, ***Calliou Estate v Calliou Estate*** 2002 ABQB 68 at para 33. A vendor of alcohol in a commercial setting owes a general duty of care to those to whom they serve alcohol and to those who may be affected by the conduct of these patrons (who are most often users of the highway).

[7] Here the Team Members profited from the sale of alcohol for their team and as a result, they were entrusted with special responsibilities and a special relationship to the public to curtail the risks associated with that trade (see ***Childs*** at para 37). These responsibilities, or duties, included monitoring the amount that a patron is drinking to ensure no over consumption, and if there is intoxication, that is known, or ought to have been known, that the commercial host make enquiries and ensure a safe passage home for that patron.

[8] In ***Pettie*** however the Supreme Court cautioned that although the existence of a "special relationship" will frequently warrant the imposition of a positive obligation to act, the Plaintiff must also prove that there is foreseeability of the risk. "Where no risk is foreseeable as a result of the circumstances, no action will be required." (see para 49). The foreseeable risk will arise if the commercial host is aware, or should have become aware through proper monitoring of the alcohol service, that the patron has become intoxicated and that he is in potential danger to himself or others without intervention.

[9] The main point of contention here is whether there was such a foreseeable risk which meant that the Team Members had a duty to intervene in these circumstances and ensure that Mr. Knibb had a safe passage home.

[10] The issue then is whether the Plaintiff has met the onus of proof in this case to show that:

(a) the Team Members were acting as commercial hosts,
(b) Mr. Knibb was served alcohol by the Team Members,
(c) if served alcohol, that he was served to the point of intoxication or, that they should have known that he was intoxicated and,
(d) that it was reasonably foreseeable that his level of intoxication put him in potential danger and that therefore the Team Members had a positive duty to intervene and ensure Mr. Knibb's safe passage home.

[11] It is in this context that the Team Members say that the Plaintiff has not met his onus to show that a duty to intervene was present, whereas, on the evidence and inferences the Plaintiff and Defendant Foran ask this Court to draw, they say that such a duty did exist.

[12] This leads us to an analysis of the evidence that was led in the summary trial on these points. In this regard, multiple affidavits, read-ins, and cross-examination transcripts were provided by all of the parties and a few third party witnesses. In addition, the Plaintiff filed the evidence of Dr. Jones, a toxicologist and the Team Members entered his cross-examination on his report. At the summary trial hearing, statements made by Mr. Knibb to a neuro-psychologist who was performing an independent medical examination were also entered. No *viva voce* evidence was called.

[13] For the most part, there are few contradictions on the evidence. Unfortunately, possibly because the Team Members were not added to the action for many years after the collision, there are many evidentiary gaps. The parties ask this Court to fill those gaps with various reasonable inferences. I will come to whether this is appropriate or possible shortly, in any event, the summary trial process is a fair one here. Not much more could be achieved in a full trial on this liability issue. Having said that, I will now turn to the evidence on the issues in question.

a) Were the Team Members commercial hosts?

[14] Here, the Team Members organised a three day weekend tournament June 4, 5 and 6, 2004 and as part of this tournament they operated a "beer tent". They obtained a liquor licence to do this. Profits from liquor sales were to go towards buying new uniforms, travel costs to tournaments and other sundries for the team.

[15] The "tent" was really a large hay tarp that was extended over the top of 10 tables adjacent to a small building (Scout Hall in Memorial Park). There was a rope that surrounded the tent area held up by rebar posts here and there but it was otherwise open sided.

[16] The Team Members served liquor and food from this area. Various Team Members manned a table set up to sell tickets and a table that then dispensed the liquor in exchange for tickets.

[17] The Team Members were all volunteers for the weekend. They did not play in the tournament. They took turns doing the activities that were necessary to operate the tournament. Some took turns behind the ticket and drink tables. There was no set schedule. Part of their duties included monitoring that outside alcohol was not brought into the tent. The idea was that alcohol was supposed to be purchased from the tent during the tournament.

[18] The members had a general understanding that they should not serve alcohol to under age drinkers, nor to an individual to the point of intoxication or to persons that appeared intoxicated. A couple of the Team Members had served alcohol before. One had worked in the service industry before and had had training (Mr. Seven Young). One recalled a discussion about making sure that if someone was intoxicated that they should make sure that he did not drive home (Mr. Piper). On the other hand, in cross-examinations on affidavits, Mr. Foran's counsel pointed out that many of the Team Members did not remember discussions about service rules or training at the time.

[19] In my view, there is little dispute that the Team Members should be categorised as "commercial hosts" and that there was a "special relationship" between the Team Members and Mr. Knibb if he was a patron of the tent and a consumer of the alcohol being sold. If in addition the Plaintiff can prove that Mr. Knibb was intoxicated and a resultant danger to himself or others which resulted in harm, there would be a general duty of care owed to Mr. Knibb and the general public who may be affected by his conduct.

b) Was Mr. Knibb served alcohol by the Team Members?

[20] In most commercial host cases, this is not an issue. Here it is hotly contested. There is no direct evidence that Mr. Knibb was served anything by the Team Members. I will review however what the evidence tells us and whether it is appropriate to make an inference in these circumstances that alcohol was served to him the night in question.

The evidence

[21] The plan was that alcohol could only be purchased in the tent during the tournament. One witness, Lynda Lyle, describes doing just that – playing baseball and between games going to the tent for some beer.

[22] However, the evidence also shows that there was a drinking game going on during the day sometime where there were four coolers full of beer spread out in a small baseball diamond fashion and participants would go to each base to shoot a beer. There is no evidence about who supplied this beer or organised this game. Nor do we know what happened to that beer after the game.

[23] There was also evidence, from Mr. Noren, Mr. Knibb's uncle, that it was the norm for individuals attending these types of tournaments to bring coolers of beer with them. Mr. Finlay, another tournament participant, also indicated that this was a fairly common occurrence.

[24] Mr. Knibb was 22 years old. He had moved in with his aunt and uncle in March of 2004 (three months or so before the accident) after having dropped out of his university studies. He was working as a labourer according to his uncle. One of the Team Members, Mr. Piper,

indicated that Mr. Noren had asked him to get Mr. Knibb a job in shipping. Another Battle Cat, Mr. Stull, remembered that he worked with Mr. Knibb for a couple of weeks.

[25] Mr. Knibb told Dr. Suffield that he was drinking to excess the 2 years before his injury. He had lost his licence because of a DUI conviction at age 20 and was drinking the equivalent of at least a case of beer per night.

[26] Mr. Noren on the other hand said that Mr. Knibb was only going out on weekends and that he would be hungover the next day but that he made it to work on Mondays.

[27] Mr. Knibb has cognitive problems and may well have exaggerated his level of alcohol consumption just prior to the accident when he described his drinking history to Dr. Suffield after the accident (or may have been remembering his university vs Carstairs days). Mr. Noren's evidence on his drinking habits the few months before the accident is likely more accurate although they also describe someone who was drinking to excess, perhaps more periodically, prior to the accident. Nonetheless, under either scenario, I find that Mr. Knibb was an experienced drinker despite his young age, and based on the evidence of Dr. Jones, which I will come to in more detail later, he had likely developed some tolerance to alcohol.

[28] Early June 5, Mr. Noren had tried to get Mr. Knibb to come with him to a baseball tournament in Innisfail. Mr. Knibb would often help Mr. Noren, who coached the team. Mr. Knibb did not want to get up – he had been out the night before.

[29] According to Mr. Finlay, Mr. Knibb was watching the tournament later that day although we have no indication about when he arrived. When Mr. Finlay was finished his games, he, his 12 year old son, and Mr. Knibb went over to the tent. We don't know when Mr. Finlay's games ended.

[30] The Stanley Cup finals hockey game was being shown on TVs set up in the tent. The game started at 6:18 pm. It is possible that Mr. Knibb was there for the start of the game but we do not know. Mr. Finlay, his son and Mr. Knibb sat at a table and were all drinking beer while they watched the game.

[31] Mr. Noren stopped by the tent on his way home from his baseball tournament in Innisfail. He felt that he arrived around 8:00 – 8:30 pm although he wasn't quite sure. When he arrived he said that he joined Mr. Finlay at his table and saw Mr. Knibb hanging around the beer tent. Mr. Noren bought himself a beer before he went to the table to join Mr. Finlay. Mr. Knibb joined them at the table with a can of beer in his hand. The team were selling Molson brand products and Mr. Noren thought that Mr. Knibb was drinking a Molson's.

[32] Mr. Noren bought another beer while he was there and finished it before going home. He did not say that he bought Mr. Knibb a beer too or that he saw Mr. Knibb ever buy another beer. Nor did Mr. Finlay say that he saw Mr. Knibb get up and buy a beer while they were watching the game together. Mr. Noren saw Mr. Knibb with a beer in his hand when he left around the end of the game (at 9:52 pm), but he couldn't say whether it was the same beer that he had been drinking from earlier or not.

[33] Both Mr. Noren and Mr. Finlay thought that they had left shortly before the game ended. However, they were not sure on cross-examination. In any event it would have been near the end of the game. Mr. Finlay testified that Mr. Knibb did not look intoxicated when he left. Mr. Noren though that Mr. Knibb "had a few beers in him" but also indicated that he was not concerned about Mr. Knibb's ability to get home safely when he left. He knew Mr. Knibb did not

have a car so that he wouldn't be driving and it was presumably a short walk home (a 2-3 minute drive).

[34] The game ended at 9:52 pm and everyone cleared out after a disappointing loss of the "home team", the Calgary Flames. The Team Members cleaned up and the tent was shut down at around 10:15. There is no evidence when exactly Mr. Knibb left, although he was still there when Mr. Noren and Mr. Finlay left around the end of the game.

[35] In sum, Mr. Knibb was in the tent for sure between 8 – 8:30 pm and likely to about 10 pm. He likely arrived somewhat earlier with Mr. Finlay when his games were over – and may have gone in to watch the start of the game at 6:18 pm or shortly thereafter. So he was likely in the tent for about three hours.

[36] According to the expert opinion of the toxicologist, when the blood alcohol sample was taken at the hospital after the accident, Mr. Knibb had the equivalent of 8.7-10.7 beers in his system (and maybe more depending on what assumptions you use, which are not important for this part of the discussion).

Discussion

[37] Nobody saw Mr. Knibb buy the beer that was in front of him or any other beer for that matter. It may be a reasonable conclusion that since it was a Molson's beer that he was seen drinking, that he was in a tent meant for the purchase of beer, that he was there for a good period of time, that the Team Members were monitoring for outside beer, and that he had about 10 beer in him at the time of the sample, that Mr. Knibb purchased the beer in front of him, and plenty more from the Team Members.

[38] On the other hand, Mr. Knibb could have been drinking all afternoon watching the baseball. There were sources of alcohol that were available to him other than from the Team Members by way of the coolers of beer involved in the drinking game that was played, and possibly from other participants and attendees' own coolers since it was the norm to bring such coolers full of beer to such tournaments. He could have also brought his own beer, or other alcohol, to the tournament. Finally, he could have bought alcohol after the tent closed and before his collision from bars that were only a block away.

[39] Since he was seen drinking from a can (not a glass), this is easily portable and could have been brought into the tent. Molson's is a popular brand. The very fact that the Team Members were monitoring for outside liquor could mean that this was a problem – i.e. that people would bring their own beer in.

[40] He was sitting with his uncle, a friend and a 12 year old during the time that he was watching the hockey game so it is possible that he would have been distracted from purchasing and drinking a lot of beer in front of this group. There is no evidence that he got up from the table while watching the game to buy beer, or that either his uncle or friend bought him a beer. However, there is evidence that he was drinking beer during this time.

[41] Further, Mr. Knibb left the tent at around 10 pm but was not on hit until 10:53 pm. There were two bars in Carstairs one block north of the ball diamonds. There is no evidence that he purchased any beer from there, but he would have had time to walk a block, purchase or have a beer or two, before he turned south to go home.

[42] The Plaintiff argues that there are enough pieces of evidence, when combined, that can justify an inference that the Team Members served Mr. Knibb alcohol in the tent that night.

[43] The Team Members argue that all they need do to neutralise or negative a circumstantial inference of fact is to show that another reasonable inference is also possible. Since the Plaintiff has the onus of proof, the alternative inference need not be equal in strength, or weight to the Plaintiffs, but merely possible. They rely on ***Jordon v Power*** 2002 ABQB 794 at paras 17 and 18, ***Nova, an Alberta Corporation v Guelph Engineering Co.*** 1989 ABCA 253 at para 232-237;and ***Sorochan v Bouchier*** 2015 ABCA 215 at para 37. In ***Sorochan*** the court said at para 37:

> [37] An inference can be drawn only where the evidence supports no other reasonable conclusion. Where the evidence supports two or more available inferences, it does not establish the truth of any one of them..

[44] In my view, it would be a reasonable possibility to find that Mr. Knibb was served some beer in the tent that night. It is not an all (10 beer or so) or nothing proposition as argued by the parties. Frankly, the basic problem here is that there is an evidentiary gap about what, where and when Mr. Knibb drank in order to get as intoxicated as he did. I am cognisant that Mr. Knibb has the burden of proof, and that with this evidentiary gap, it may be unsafe to speculate to fill in the gaps by way of the inference the Plaintiff asks that this Court to make considering that it has been somewhat neutralised by another possible theory of what happened that night.

[45] More specifically, although I can accept that it is a reasonable inference that Mr. Knibb may have purchased some beer at the tent (maybe the two he was seen drinking), especially considering the time he spent in the tent watching the game, it is not known when or how much he may have purchased them or others, if at all. Or, for that matter whether other people bought him some beer. Accordingly, although I accept that the Team Members most likely acted as a commercial host to Mr. Knibb that night, the gap of evidence about the parameters of their interaction with Mr. Knibb makes it difficult to assess the next factors that need to be proven to assess liability against any of them, as will be discussed below.

c) Was Mr. Knibb served to the point of intoxication to the Team Members' knowledge or to the point that the Team Members should have known?

[46] Considering that I am prepared to infer that Mr. Knibb was served some beer by the Team Members, making them a "commercial host" to Mr. Knibb in the circumstances, did they serve him to the point of intoxication to their knowledge or to the point that they should have known that he would have been intoxicated?

[47] The Plaintiff argues that the Team Members did not have a proper monitoring system to ensure that they did not overserve their patrons. Further, that the expert evidence of Dr. Jones shows that Mr. Knibb was intoxicated when he left the tent and that his intoxication most likely would have been visible so that even if they weren't monitoring, the Team Members should have known that he was intoxicated, and should not have served him anything further, and should have intervened to ensure that he got home safely.

[48] The Team Members on the other hand argue that Mr. Knibb was an accustomed drinker and that he may not have exhibited signs of intoxication at the time that he was in the tent. Further that the direct evidence suggests otherwise: neither his uncle nor friend, Mr. Finlay, believed that Mr. Knibb was intoxicated or need help getting home and the Team Members that

knew him did not remember him even being in the tent that night. They further emphasise the lack of evidence about what might have been served at all and when which is important in assessing the "lack of monitoring" potential liability.

Discussion

[49] There was a debate on the evidence about how intoxicated Mr. Knibb was when he was in the tent mainly because different assumptions about when alcohol was consumed leads to differing conclusions about levels of intoxication. Having said that, the range of intoxication is always above the "legal limit" for driving. The main point of contention in the range is whether any signs of intoxication would or should have been obvious to a commercial host.

[50] Dr. Jones opined that the sample taken at 12:23 am in the hospital on June 6 showed a whole blood concentration (BAC) of approximately 228 mg/100ml at that time (80mg/100ml is the legal driving limit). Dr. Jones' analysis is all extrapolated back from that time period.

[51] So, for example, under Dr. Jones' "Scenario #1", if Mr. Knibb was not served alcohol after 9:30 then at 10:53 (when he was hit) his blood concentration would have been 243 to 258 mg/100ml (with an outside range of 231 – 237). Further, that extrapolating back to 9 pm on these same assumptions, his BAC would have been between 200 and 230 (Dr. Jones agreed that there was an error in his report on his prior calculation).

[52] In cross-examination, Dr. Jones agreed that if Mr. Knibb drank two or three beer between 9:30 and 10:53 however (a period just before and after he left the tent), this calculation changes. Dr. Jones agreed that Mr. Knibb's BAC would have been below 200mg/100ml at 9 pm but he couldn't say by how much.

[53] For this part of the analysis, the important times in question about Mr. Knibb's potential BAC is when he could have been potentially served alcohol by the Team Members and when he left the tent at around 10 pm.

[54] The Team Members didn't argue that they had an appropriate monitoring system in place in terms of serving alcohol. This is not surprising because unlike a full time establishment where you would expect professional staff, appropriately trained, and computer cash register systems, the Team Members were volunteers, "serving" by manning a table that exchanged tickets for alcohol.

[55] However, even if the Team Members did have a system and professionally trained staff – would it have made a difference? They argue no since on the facts that we know, it is quite possible that Mr. Knibb would not have appeared impaired. In this regard, considering that Mr. Knibb could have had a BAC less than 200 mg/100ml, Dr. Jones agreed that, based on Mr. Knibb's likely tolerance to alcohol, it is possible that he would not have appeared impaired to a server. More precisely, although "most people would be visibly intoxicated at BACs approaching or above 200 mg/100ml," the "precise effects will of course vary from individual to individual" and he agreed in cross-examination that "the extent of those signs of intoxication would be low or small compared to somebody who was not a chronic alcoholic."

[56] The studies (put to and adopted by Dr. Jones as authoritative) in this area are not intuitive. The statistics there showed that up to 25% of chronic drinkers would not show any signs of intoxication at the same levels of Mr. Knibb (200 mg) and that there were even some people at concentrations of 300 mg who did not show any signs! This is in part because it has been demonstrated that chronic drinkers develop a more efficient process of detoxification in

clearance of alcohol. Further the capability of certain individuals to withstand high blood alcohol concentrations with little or no clinical evidence of intoxication appears to be a tolerance phenomena similar to that seen in narcotic addicts. (Perper, Twerski, Wienand, ***Tolerance at High Blood Alcohol Concentration:a Study of 110 Cases and Review of Literature***, Journal of Forensic Sciences, Vol 31, No 6 , January, 1986).

[57] Based on the statements Mr. Knibb gave to Dr. Suffield, Dr. Jones agreed that Mr. Knibb would likely have developed a significant tolerance to alcohol. So that it was quite possible that even with a blood alcohol level of 200 to 260 mg %, Mr. Knibb may not have been exhibiting signs of intoxication before he left the tent at 10 pm.

[58] I am cognisant on this point that Mr. Knibb may have been mis-remembering when he was drinking at this level and I am prepared to accept that he may have tempered his drinking habits somewhat while living with his uncle and aunt. Nonetheless, this is an inexact science and as I said above, I am prepared to find that Mr. Knibb had developed a tolerance to alcohol compared to others and that it is possible that he could have exhibited less signs than others at the same BAC levels of intoxication.

[59] As to whether he did show such signs or not, we have the evidence of the Team Members, none of whom remember him at the tent, but this is not terribly helpful because other credible evidence has him in the tent that night. It does suggest however that he did not make a scene or stand out at least.

[60] We also however have direct testimony of the uncle and friend which, I agree with defence counsel, is quite compelling about his outward exhibition of signs of intoxication – and that was that there were little to none. His uncle swore that Mr. Knibb was talkative and that you could tell that "he had a few drinks in him". Mr. Finlay agreed that Mr. Knibb did not look intoxicated while sitting with him that night. Neither speaks of any significant level of intoxication which would have suggested that he should not have been served by the Team Members. Nor that the Team Members should have known, without more that Mr. Knibb was intoxicated in the plus or minus 200mg range.

[61] In sum, we know that Mr. Knibb was intoxicated in that his BAC was well above 80 mg while in the tent but on the direct evidence it appears that he may well have been one of those drinkers that did not exhibit significant intoxication signs that would have alerted the Team Members to the fact that he was at the level he was.

[62] However, merely observing the signs of intoxication is no substitute for monitoring the number of drinks consumed by patrons (see ***Pettie*** at para 52 and ***Holton v MacKinnon*** 2005 BCSC 41 at para 136). The problem here, again, is that we don't know if and when Mr. Knibb consumed any alcohol purchased from the Team Members. It could be that even if the Team Members had a reasonable monitoring system in place it would not have led them to assume that Mr. Knibb was intoxicated by the time he left the tent because of this gap in evidence. Further, we don't know when he might have purchased the beer so as to try and ascertain his level of intoxication at that time or how many beers were served to find that the Team Members were derelict in their monitoring duty. It seems common sense that you can only be liable for failing to monitor consumption if the Plaintiff can show at least approximately how much was actually served – as noted above there is a serious evidentiary gap in this regard.

[63] Nonetheless, even if I found that this lack of appropriate monitoring system for a commercial host would have meant that the Team Members ought to have known that Mr. Knibb was intoxicated when he left the tent, the next question that would have to be analysed is whether it was reasonably foreseeable that Mr. Knibb's level of intoxication put him in potential danger and that therefore the Team Members had a positive duty to intervene and ensure Mr. Knibb's safe passage home.

d) Duty to intervene?

[64] The Plaintiff argues in this regard that considering Mr. Knibb's level of intoxication that they knew of or should have known of, the Team Members had a duty to intervene to ensure his safe passage home.

[65] The Team Members say however, that his level of intoxication was not so high that a duty to intervene arose, relying mainly on his uncle's lack of intervention on the known facts of this case. In other words, that there was no reasonable risk of harm considering that he was with his sober friend and uncle who knew that he was not going to be driving but only walking home a short distance on a quiet country street.

Discussion

[66] With respect to the duty to intervene the Plaintiff relies on the cases of ***Holton*** and ***McIntyre v Grigg*** [2006] OJ No 4420 (Ont. CA). Both of these cases deal with commercial hosts who failed to intervene when an intoxicated person left their premises and drove home. Here Mr. Knibb did not have a car and did not drive home – he was walking home. Nonetheless, the Plaintiff argues that this raises the potential risk since if struck by a car while walking, the injuries can be more catastrophic.

[67] The Plaintiff argues that the Team Members should have made sure that Mr. Knibb was put in charge of sober persons such as Messrs. Finlay or Noren, and or inquired as how he was getting home and ensured that he had a safe ride home.

[68] The significant problem that the Plaintiff has with his argument is that even if he could have shown that he was served alcohol to a certain point of intoxication (the level of which is very unclear when he left the tent) would it have been reasonable to expect the Team Members to stop him from walking home? His uncle, who left shortly beforehand, did not feel that it was necessary to intervene and offer his nephew a ride home. The Plaintiff says this was because he was still mad at him for not helping at the baseball tournament. A more logical explanation in my view, is that he left him only because he thought that he could walk home safely. The distance between the baseball diamonds and home was quite short – Mr. Noren said that it would take him "2-3 minutes" to get home by car. An uncle, upset or not, would not have left his nephew if he thought that he was so intoxicated that he would need assistance home – I simply find this proposition hard to believe and it does not coincide with the evidence.

[69] So if a reasonable person would not intervene, and one who obviously cared personally about Mr. Knibb's wellbeing, not just because he owed any sort of legal duty of care like a commercial host, how can it be said that the Team Members should have intervened? In my view the evidence does not support such a finding.

[70] I note that in the classic ***Jordan*** case, the Supreme Court found on the evidence before them that it was unsafe to allow the Plaintiff, Mr. Menow, to leave the premises without taking steps to ensure his safe passage home. There was evidence that the Plaintiff, a well-known

patron, was ejected onto a major, snowbank lined, highway on a dark and rainy night in January. He lived several miles away and was hit a half hour later (and after hitching a ride part way home) when he had been "staggering" in the middle of the highway.

[71] Here we know that Mr. Knibb was intoxicated but not to the knowledge of the Team Members (although there is an argument that they ought to have known had they had a proper monitoring system – an argument which also has problems on the evidence as discussed above). There is no evidence that he was staggering, and he was not walking in the middle of the road but off to the side of it. The road home for Mr. Knibb, unlike Mr. Menow's for instance, was short and on a very quiet country street with a 50 km/hour speed limit. The witnesses that last can attest to his abilities had no concerns that he was either intoxicated at all (Mr. Finlay) or that he needed a ride home (Mr. Noren). Neither of them had any concerns about Mr. Knibb walking the short distance home, otherwise they would have taken steps themselves to intervene.

[72] In my view, this case is akin to the ***Pettie*** case where the Supreme Court discussed the foreseeability of risk even when a "special relationship" has been established as a commercial host. In ***Pettie***, it was reasonable in the circumstances that the sober persons who were with the Plaintiff would take care of him on his way home. Similarly here, had they known of Mr. Knibb's level of intoxication, it would have been reasonable for the Team Members to assume that Mr. Knibb's friend and uncle would take care of him if necessary to ensure his safe passage home since they all left at approximately the same time as far as we know. It is not reasonable therefore to find that the Team Members owed a duty of care in these circumstances to intervene in Mr. Knibb's planned way home.

2. Standard of care breached?

[73] Considering my findings as noted above, the Plaintiff has only shown that it can be inferred that the Team Members may have served some beer, but he has not met the burden to show that he was overserved or, that in the alternative, that a duty of care arose to intervene in the circumstances because he may have been overserved. Accordingly, I need not deal with what the standard of care would have been to fulfill the duty to intervene. Had I had to answer this question however, for the reasons I have outlined above, in my view the standard of care was not breached in this case.

3. Causation

[74] Had I found that the Team Members had overserved Mr. Knibb and that they failed in their duty to intervene and ensure a safe passage home (by getting a lift home with a sober person or ensuring that he was in the care of one for instance), has the Plaintiff proven that this failure caused or contributed to the collision with Mr. Foran's truck?

[75] We know, based on Mr. Foran's admissions that he had been drinking that night himself and right before the collision with Mr. Knibb he had been distracted by his child in the back seat and had turned to help her. He turned around on two occasions to help her and when he returned his gaze to the road the second time Mr. Knibb was right in front of him (he estimated about 10 to 15 feet away). He only managed to touch his brakes and hit Mr. Knibb.

[76] The expert reconstruction evidence was to the effect that Mr. Foran was driving between 61 and 70 km an hour on a road with a 50 km speed limit. The road was two lanes of 3.65 metres in width plus a shoulder of .7 metre on one side of the road (about 26 feet across). The road was flat, straight and dry. It was a quiet country road and Mr. Foran indicated that there was no traffic

on it when he turned onto it shortly before the accident. Mr. Knibb was walking about three to four feet from the edge of the road. There would have been over 20 feet of clear road to get around him.

[77] When Mr. Foran returned his gaze to the road he saw Mr. Knibb but it was too late to drive around him. There was no evidence that Mr. Knibb was staggering or had other coordination problems – he was seen (briefly) walking down the road.

[78] Mr. Knibb was walking with his back to traffic. It might possibly have been safer to have been walking against traffic in this situation and he could have also then walked in the shoulder instead of in the driving lane proper.

[79] Dr. Jones indicated that at the time Mr. Knibb was struck he was likely at the level of intoxication that he equated to the "Excitement stage" and this includes issues such as "loss of critical judgement". However, it is not a given that Mr. Knibb's level of intoxication led him to act negligently. When he was hit he was walking the right direction on a quiet road towards his home three to four feet from the side of the road where there was lots of room for any car or truck to get by him. He might well have walked the very same way many times before stone cold sober. It is a far cry from the facts in ***Jordan*** where the Plaintiff was "staggering" in the middle of a busy highway on a cold, dark and rainy night.

[80] In any event, even if it was negligent for Mr. Knibb to walk down the road as he was, can it be said that his intoxication contributed to this collision? But for Mr. Foran's obvious negligence in taking his eyes off of the road, failing to watch where he was going, and speeding, this collision was completely preventable. There was a lot of room to have driven around Mr. Knibb.

[81] The Plaintiff argues that the "material contribution" test should apply here since it is impossible to show which act or acts contributed to the risk of injury. This argument presupposes that I have found that the Team Members had some negligence that contributed to the injuries vs Mr. Foran's negligence. I find that there is not a proven causal relationship as discussed. Accordingly, the "material contribution" test is not applicable in these circumstances.

[82] In sum, in my view, the Plaintiff has failed to prove that the intoxication on Mr. Knibb's part that night contributed to the collision between him and Mr. Foran. In the result, the Plaintiff has also failed to prove that the Team Members actions the evening of June 5, 2004 caused or contributed to the tragic injuries Mr. Knibb suffered from.

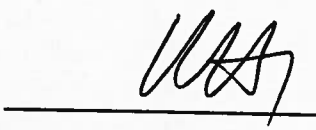
Conclusion

[83] In sum, as discussed above in detail, the case against the Team Members suffers many frailties: 1.a gap in evidence about whether and how much Mr. Knibb may have consumed in the beer tent, and even once I infer that he drank some beer purchased from the Team Members it is unclear how much or when it was purchased. 2. A gap in evidence about whether Mr. Knibb had already drank alcohol before he arrived, whether he brought alcohol into the tent from the fields, and whether he drank after he left the tent and before the collision 3. The fact that he was with a friend and relative that did not think that they needed to intervene to get Mr. Knibb home safely hence making any risk of harm unforeseeable on the part of the Team Members 4. The fact that Mr. Knibb was walking, not driving, a short way home on a quiet country street when he was hit

5. And finally my finding that Mr. Knibb's intoxication did not contribute to the collision with Mr. Foran who was clearly negligent and caused this collision.

[84] In conclusion, I will allow the Team Members' application for dismissal of this action against them. The Plaintiff has failed to prove that the Team Members' actions caused or contributed to the injuries he sustained on June 5, 2004. The case against them is dismissed.

Heard on the 29th and 30th days of March, 2017.
Dated at the City of Calgary, Alberta this 12th day of June, 2017.



K.M. Eidsvik
J.C.Q.B.A.

Appearances:

Walter Kubitz, QC
Peter Trieu
for the Plaintiffs

Paul Stein, QC
For the Defendant and Third Party Team Members and Battle Cats

Daniel Downe, QC
for the Defendant Foran and Foran Equipment Limited

Corrigendum of the Reasons for Judgment
of
The Honourable Madam Justice K.M. Eidsvik

On page 13, Peter Trieu was added as co-counsel for the Plaintiff.