

CANADA / JUDGMENT

## Donaldson v. John Doe

2009 BCCA 38

### COURT

British Columbia Court of Appeal

### DECIDED

4 February 2009

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2009 BCCA 38 Donaldson v. John Doe

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Donaldson v. John Doe,

2009 BCCA 38

Date: 20090204

Docket: CA035019

Between:

Derek Blair Donaldson

Appellant

(Plaintiff)

And

John Doe, Pacific Promotions Ltd.,

530077 B.C. Ltd. carrying on business as the

Commodore Ballroom, and Pensionfund Properties Ltd,

Christopher George Briggs

Respondents

(Defendants)

Before:

The Honourable Madam Justice Rowles

The Honourable Madam Justice Prowse

The Honourable Mr. Justice Frankel

D.G. Cowper, Q.C. and K.A.J. Grist

Counsel for the Appellant

M.K. Skorah and D.R. Mackenzie

Counsel for the Respondent

Pacific Promotions Ltd.

J.C. Taylor and K.R. Taylor

Counsel for the Respondent

Commodore Ballroom

Place and Date of Hearing:

Vancouver, British Columbia

October 15, 2008

Written Submissions Received:

October 21 and 27, 2008

Place and Date of Judgment:

Vancouver, British Columbia

February 4, 2009

Written Reasons by:

The Honourable Mr. Justice Frankel

Concurred in by:

The Honourable Madam Justice Rowles

The Honourable Madam Justice Prowse

Reasons for Judgment of the Honourable Mr. Justice Frankel:

## INTRODUCTION

- [1] This appeal concerns the liability of commercial hosts who serve alcohol when someone is injured by an intoxicated patron. This issue arises in the context of an Oktoberfest event at which souvenir glass beer mugs were distributed to patrons. After the event ended and the patrons had left the host premises, one of the patrons was permanently injured when struck in the eye by a beer mug held by another patron.
- [2] Following a trial, Mr. Justice Bernard of the Supreme Court of British Columbia, held that neither the promoter of the event, nor the owner of the venue, owed a duty of care to the injured party. As a result, he dismissed the claims against them. However, with the agreement of the parties, he fixed damages at \$350,000.00: 2007 BCSC 557, 72 B.C.L.R. (4th) 111.
- [3] For the reasons that follow, I have concluded that both the promoter and the owner owed a duty of care to the injured party. However, I would decline to pronounce in detail on the standard of care because, regardless of what standard of care is appropriate, there are evidentiary gaps in the injured party's case that make it impossible to affix either the promoter or owner with liability. I would, therefore, dismiss the appeal.

## FACTUAL BACKGROUND

- [4] On the evening of Saturday, November 27, 1999, Pacific Promotions Ltd. held an Oktoberfest event at the Commodore Ballroom on Granville Mall, in downtown Vancouver, British Columbia. Coincidentally, this was the night before the Grey Cup football game was to be played in Vancouver.
- [5] David Frinton, the sole shareholder of Pacific Promotions, had organized many Oktoberfests in the past. The vast majority of those had been held at the Commodore. However, this was the first one held there since the Commodore had closed in the fall of 1996, and re-opened under new management in early November, 1999. Mr. Frinton was not aware of anyone having been injured by a glass beer mug at previous Oktoberfests. Gordon Knights, the Commodore's general manager, testified that handing out souvenir glassware (e.g., wine glasses, beer mugs) was a standard marketing tool in the liquor industry.
- [6] Mr. Frinton organized the event, and contracted with the Commodore for the use of those premises. The Commodore was responsible for food and beverage service, and security. Pacific Promotions received all of the revenue from ticket and souvenir sales. The Commodore received the food and beverage revenue.
- [7] Tickets to the event were sold both in advance and at the door. The ticket price included admission, a souvenir glass beer mug, a mug of beer, and a German sausage in a bun. The mugs were handed out upon entry, and were to be taken home by patrons at the end of the evening. The mugs displayed an "Oktoberfest 99" logo, and the logos of four companies that had paid sponsorship fees to Pacific Promotions. Patrons could have their mugs refilled by

purchasing beer from servers who circulated about the premises. Other alcoholic beverages were also available.

- [8] Patrons could purchase additional beer mugs as souvenirs, or acquire them from other patrons. Some who acquired multiple mugs hung them from their waist-belts.
- [9] The Commodore's licensed capacity is 900 patrons. The staff on duty for Oktoberfest consisted of the general manager, two managers, two greeters at the door, ten bartenders, 12 waiters serving food and drinks, five porters assisting the bartenders, five "busers" for clean-up, and five coat checkers. All of them had taken "Serving It Right", a program that trains staff to be alert for persons who have consumed too much alcohol. The Commodore contracted with International Crowd Management, which provided ten security personnel.
- [10] The Commodore's staff was instructed to monitor the level of intoxication of the patrons, "to head-off problems before they began". If the security personnel noticed patrons acting inappropriately, then they would report them to one of the Commodore's managers.
- [11] Mr. Knights was not aware of anyone having been "cut-off" from bar service that night, although two persons were asked to leave because of intoxication, and one person was physically ejected. Mr. Knights said that it was possible for a patron to drink all night without coming into direct contact with a server or bartender, if this person had someone else order his or her drinks. He described the event as festive, and the patrons as a well-behaved, and easy-going group.
- [12] Mr. Knights did not know that every patron was to be given a glass beer mug until the night of the event, when the first ticket was presented at the door at 7:30 p.m. He testified that it never occurred to him that anyone would use a mug as a weapon, or intentionally break a mug that had been purchased.
- [13] Derek Blair Donaldson and some friends arrived at the Commodore at about 10:00 p.m. They left with the majority of the patrons, when the event ended at 2:00 a.m. Mr. Donaldson described himself as "intoxicated" and "pretty relaxed, but not stumbling or anything" at the time he left.
- [14] After Mr. Donaldson had walked a short distance from the Commodore, he was struck in the face by a glass mug that Christopher George Briggs was holding in his left hand. This occurred when Mr. Briggs suddenly raised his left arm. Mr. Briggs and Mr. Donaldson did not know each other. Whether Mr. Briggs struck Mr. Donaldson intentionally or accidentally is not known. As a result of being struck with the beer mug, Mr. Donaldson suffered irreparable damage to his right eye, and facial scarring.

- [15] One of Mr. Donaldson's friends took hold of Mr. Briggs, and there was a brief scuffle until the police arrived. Constable Mark Burgess handcuffed Mr. Briggs, who had several glass beer mugs with the Oktoberfest logo hanging from his belt. At trial, the officer testified that Mr. Briggs was intoxicated, but could not recall to what degree. He described the level of intoxication of those in the area as "moderate to severe".
- [16] Several police officers described the crowd on Granville Mall as being larger and more disorderly than is normal for a Saturday night. In general, the police found the levels of intoxication and violence (i.e., fighting) to be higher than that usually found when the bars and nightclubs in that area close. Sergeant Mark Joseph Lavallee, a shift supervisor with the Vancouver Police Department, described the street scene as a "mini-version of the Stanley Cup riot", which occurred in Vancouver in 1994. He further stated that the police had not been given advance notice that Oktoberfest was being held, or that glass beer mugs were being given out. Had Sergeant Lavallee been aware of this, then he would have gone to the Commodore and suggested that beer mugs not be given out that evening.
- [17] Mr. Briggs did not participate at the trial. However, Mr. Donaldson "read-in" a number of answers from Mr. Briggs's examination for discovery. In these answers Mr. Briggs said that before going to the Commodore on the night of November 27, 1999, he drank six or seven beers at home. He and several friends went to Oktoberfest to "socialize and have fun", arriving between 7:00 p.m. and 8:00 p.m. While there, Mr. Briggs drank eight to ten mugs of beer, getting a new mug each time. He had eight to ten mugs hung on his belt when he left the event. Mr. Briggs said that the number of beers he drank that night was more than he would normally consume at a party. He agreed he had "got drunk", and that he had a hangover the next day.
- [18] The practice of giving out glass beer mugs at Oktoberfest was discontinued after the 1999 event. Plastic mugs are now given out.

#### TRIAL JUDGE'S REASONS

- [19] The trial judge described the incident giving rise to Mr. Donaldson's injury as follows:
- [36] The incident was not part of a general melee occurring on the Mall. If there were disturbances or brawls occurring along the Mall, they were in other discrete locations and had no bearing on the incident which caused injury to Mr. Donaldson.
- [37] There is no evidence that the alleged inebriation among the crowd on the mall contributed, in any way, to the incident in question; moreover, there is a dearth of evidence that the inebriation of either Mr. Donaldson or his assailant was a factor. The preponderance of the evidence establishes that the incident was, in essence, a single, unexpected blow without precipitating events. It began and ended within a split second. It remains unknown whether it was a deliberate or accidental blow.

- [38] There is no evidence that any other circumstance peculiar to the outdoors on the night in question contributed to the incident. For example, the glass mug did not break against the pavement before it caused injury, and Mr. Donaldson's assailant did not lose his footing because of icy conditions, with the mug in his hand.
- [20] The trial judge was satisfied, on a balance of probabilities, "(a) that Mr. Briggs was [Mr. Donaldson's] assailant; (b) that Mr. Briggs had been a patron of the Oktoberfest held at the Commodore that night; and (c) that Mr. Briggs struck [Mr. Donaldson] with a glass mug which Mr. Briggs carried out of the Commodore at the end of the event": para. 40.
- [21] The trial judge then turned to the question of whether Pacific Promotions and the Commodore owed a duty of care to Mr. Donaldson. In so doing, he had regard to the leading authorities from the Supreme Court of Canada: *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, 2006 SCC 18; *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79; *Stewart v. Pettie*, [1995] 1 S.C.R. 131; *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239. He also had regard to the decision of the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728.
- [22] Citing *Childs*, the trial judge found that, as commercial hosts, Pacific Promotions and the Commodore owed a prima facie duty of care to persons such as Mr. Donaldson:
- [45] In the case at bar, the question is whether the proposed duty of care is analogous to a previously recognized category of cases in which a duty has been recognized. The dicta in *Childs* supports the view that commercial hosts owe a general duty to prevent foreseeable harm caused to third parties by their guests, and that this proposition is not tied to motorists (as in *Stewart v. Pettie*); rather, it covers all those who, as a class of persons, may come into contact with the guest.

- [46] In discussing commercial hosts in *Childs*, McLachlin C.J.C. states at para. 37:

In these cases, the defendants offer a service to the general public that includes attendant responsibilities to act with special care to reduce risk. Where a defendant assumes a public role, or benefits from a service to the public at large, special duties arise. The duty of a commercial host who serves alcohol to guests to act to prevent foreseeable harm to third-party users of the highway falls into this category: *Stewart v. Pettie*.

[Emphasis added by trial judge]

- [47] The phrase "falls into this category" suggests that *Stewart* is but one example of the broad proposition in the preceding lines.
- [48] In light of all the foregoing, I conclude that the relational proximity that has been established as between the commercial host and third-party users of the highway can be extended by simple analogy to Mr. Donaldson, as pedestrian on Granville Mall. The proposed duty is not novel, and the *Cooper/Anns* test need not be applied. Specifically, I find that proximity is established and that there are not sufficient policy reasons that serve to limit the scope of the prima facie duty of care. The only remaining issue at the duty of care

stage, then, is whether the injury to the plaintiff was reasonably foreseeable.

[Emphasis added]

- [23] Turning to foreseeability, the trial judge stated the question he had to decide as "whether it was reasonably foreseeable, in all the circumstances, that a pedestrian on Granville Mall would be injured by Mr. Briggs": para. 51. In answering this question "no", the trial judge, after reviewing the evidence with respect to staffing-levels and what had been done at the Commodore to monitor alcohol consumption, stated:
- [60] In the absence of evidence of: (a) knowledge of actual consumption; and/or (b) signs of impairment which ought to have been observed by the staff but, due to inadequacies in monitoring, were not, there is an insufficient foundation for imputing knowledge of Mr. Briggs' degree of intoxication (whatever it might have been) to the commercial hosts.
- [61] The absence of actual or constructive knowledge that Mr. Briggs was drunk is a circumstance which is, in my view, determinative of the question of reasonable foreseeability of harm. There can be no reasonably foreseeable risk of harm to others and no required action on the part of the commercial hosts in the absence of such knowledge.
- [24] However, the trial judge went on to hold that even if Mr. Briggs had been over-served, and Pacific Promotions and the Commodore knew or ought to have known that he was drunk, he would not have found a duty of care because allowing Oktoberfest patrons to leave with glass beers mugs did not create a foreseeable risk of harm to persons on Granville Mall:
- [65] In relation to the glass mug, I would not draw a distinction between it and innumerable other hard and/or sharp objects which might pose a risk of harm if thrust into a vulnerable part of the human body. Benign objects such as ballpoint pens and keys could cause considerable harm if held in the hand which struck a person in the face. Glass mugs are not inherently dangerous objects, even in the hands of persons whom are consuming liquor. If this were not so, then one would not expect to see such widespread and widely accepted usage of glassware for the service of alcoholic beverages in bars, nightclubs, and restaurants.
- [66] In *Stewart v. Pettie* the court held that a commercial host has a duty of care to see that an intoxicated patron does not drive. As observed by McLachlin C.J.C. in *Childs*, a duty of care is justified in such circumstances because "the risks of impaired driving and their consequences for motorists and their passengers are well known" (at para. 28). The same cannot be said about the risks and consequences of a drunken man walking with a glass mug in his hand.

## ANALYSIS

### Duty of Care

[25] In their respective submissions on the duty of care issue, the parties focussed on whether injury from a beer mug was reasonably foreseeable in the circumstances of this case. As Mr. Donaldson put it in his supplemental submissions, "the general question is whether it was reasonably foreseeable that letting patrons, including intoxicated patrons, carry away unpackaged souvenir glass steins was likely to cause injury". Not surprisingly, Mr. Donaldson said the answer to this question is "yes", while Pacific Promotions and the Commodore say the answer is "no".

[26] By focussing on how Mr. Donaldson sustained his injury, the parties have conflated the concept of foreseeability in a duty of care analysis, and foreseeability in a standard of care analysis. A similar error was committed by the trial judge. These are two different legal concepts. In determining whether A owes a duty of care to B, foreseeability is a factor with respect to whether the relationship between them warrants imposing such a duty. The question is whether B falls within a class of persons who could reasonably be expected to be harmed by A's conduct. If a duty of care is found to exist, then foreseeability with respect to the specific risk of harm is considered in determining whether A was negligent, i.e., whether there has been a breach of the standard of care.

[27] The general nature of a duty of care analysis is evinced in *Stewart*. In paragraph 32, Mr. Justice Major stated:

The question of whether a duty of care exists is a question of the relationship between the parties, not a question of conduct. The question of what conduct is required to satisfy the duty is a question of the appropriate standard of care.

[28] In support of this statement, Major J. quoted with approval a passage from Fleming, *The Law of Torts*, 8th ed. (Sydney: Law Book Co., 1992), which includes the following:

"Duty" is more appropriately reserved for the problem of whether the relation between the parties (like manufacturer and consumer or occupier and trespasser) warrants the imposition upon one of an obligation of care for the benefit of the other, and it is more convenient to deal with individual conduct in terms of the legal standard of what is required to meet that obligation.

[29] This point is also made in Osborne, *The Law of Torts*, 3rd. ed. (Toronto: Irwin Law Inc., 2007) at 70:

The foreseeability requirement of a duty of care is more narrowly focused than the similar inquiry in respect of the standard of care. The essence of negligent conduct is foreseeability of some damage. The essence of a duty of care is foreseeability of damage to the plaintiff.

Negligence in the common law is a relational concept. A duty of care is not owed to the world. It is owed only to those whom the defendant might reasonably foresee as being adversely affected by his failure to take care. It is not, however, necessary that the particular individual be foreseen

so long as he belongs to a class of persons who might foreseeably be harmed if care is not taken.

[Italics in original; underlining added]

- [30] *Hill v. Hamilton-Wentworth Regional Services Board*, [2007] 3 S.C.R. 129, 2007 SCC 41, evinces the principle that it is the general relationship between the alleged tortfeasor and the injured party that is central to a duty of care analysis. That case involved the issue of whether Canadian law recognizes the tort of negligent investigation, i.e., whether police owe a duty of care to persons under investigation. In finding that such a duty exists, Chief Justice McLachlin considered foreseeability by examining the relationship between a police officer and his or her suspect, without regard to the specific facts of that case: paras. 21 - 27. Further, although Madam Justice Charron dissented and would not have recognized the tort of negligent investigation, she also found that the nature of the relationship between investigator and suspect met the foreseeability aspect of the duty of care analysis: para. 118. More recently, in *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114, 2008 SCC 27, a case in which Mr. Mustapha sought to recover damages for a psychiatric injury he suffered as a result of seeing dead flies in a bottle of water supplied by Culligan, the question of whether Culligan owed a duty of care to Mr. Mustapha was determined solely on the basis of their manufacturer-consumer relationship: paras. 6, 7. See also: *Simpson v. Baechler*, 2009 BCCA 13 at para. 29.
- [31] Turning to the case at bar, in my view, the duty of care question is not whether a commercial host owes a duty to third-parties to protect them from injuries caused by intoxicated patrons who leave the host's premises with souvenir beer mugs but, rather, whether a commercial host owes a duty to third-parties to protect them from alcohol-related injuries caused by intoxicated patrons. Based on what the Supreme Court of Canada has said about the duties of commercial hosts, the answer to that question is "yes".
- [32] As McLachlin C.J. indicated in *Childs* (at para. 15), the first step in a duty of care analysis is to determine whether the duty being claimed is a novel one, or if it fits within, or is analogous to, a relationship previously recognized as giving rise to a duty of care. If the duty claimed fits within, or is analogous to, a previously recognized one, then a duty of care will have been established, without the need to apply the two-stage test set out by the House of Lords in *Anns*. This approach was reiterated in *Mustapha*, where, in holding that the defendant (manufacturer) owed a duty of care to the plaintiff (consumer), the Chief Justice stated:
- [4] The first question to consider in an action for negligence is whether the defendant owed the plaintiff a duty of care. The question focuses on the relationship between the parties. It asks whether this relationship is so close that the one may reasonably be said to owe the other a duty to take care not to injure the other: *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.). Whether such a relationship exists depends on foreseeability, moderated by policy concerns: *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.).

- [5] In many cases, the relationship between the plaintiff and the defendant is of a type which has already been judicially recognized as giving rise to a duty of care. In such cases, precedent determines the question of duty of care and it is unnecessary to undertake a full-fledged duty of care analysis. As stated by A. M. Linden and B. Feldthusen, categories of relationships that have been recognized and relationships analogous to such pre-established categories need not be tested by the Anns formula: *Canadian Tort Law* (8th ed. 2006), at p. 302; *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79, at paras. 35 - 36.
- [6] The relationship between the parties in this case does not belong to a novel category. It has long been established that the manufacturer of a consumable good owes a duty of care to the ultimate consumer of that good: *Donoghue v. Stevenson*. It follows that Culligan owed Mr. Mustapha a duty of care in the supplying of bottled water to him.

[Emphasis added]

See also: *Design Services Ltd. v. Canada*, [2008] 1 S.C.R. 737, 2008 SCC 22 at para. 27.

- [33] It is noteworthy that Mr. Justice Linden and Dean Feldthusen, at page 302 of their book, *Canadian Tort Law*, state:

It must also be remembered that not every new fact situation can be considered a new category of case. Duty is a general notion describing a class or type of case, not a particular fact situation. The minute details of impugned conduct is not the stuff of duty but the task of the breach analysis.

[Emphasis added]

- [34] In my view, the Supreme Court of Canada in *Stewart* determined that alcohol-serving commercial host/third-party is a category of relationship that gives rise to a duty of care. In that case, a passenger in a motor vehicle was injured when the driver, who had been drinking alcohol at a dinner theatre, lost control and drove off the road. As I read that case, it rests on an acceptance of the proposition that alcohol-serving establishments owe a duty of care to persons who may be harmed by intoxicated patrons. This duty is not restricted to third-party users of the highways.
- [35] The duty of care analysis in *Stewart* is based on the "neighbourhood principle" first articulated in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.). In *Stewart*, Major J. reiterated this principle as follows (at para. 25):

[T]hat actors owe a duty of care to those whom they ought reasonably have in contemplation as being at risk when they act.

- [36] Later, in *Stewart*, Major J., after referring to *Jordan House Ltd. v. Menow*, in which it was held that alcohol-serving establishments owe a duty of care to their intoxicated patron, said (at para. 28):

It is a logical step to move from finding that a duty of care is owed to patrons of the bar to finding that a duty is also owed to third parties who might reasonably be expected to come into contact with the patron, and to whom the patron may pose some risk.

[37] That the duty of care recognized in *Stewart* is not restricted to third-party users of highways, is evinced in the reasons of McLachlin C.J. in *Childs*:

37 The third situation where a duty of care may include the need to take positive steps concerns defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large: *Dunn v. Dominion Atlantic Railway Co.* (1920), 60 S.C.R. 310; *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239; *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 O.R. (3d) 487 (Gen. Div.). In these cases, the defendants offer a service to the general public that includes attendant responsibilities to act with special care to reduce risk. Where a defendant assumes a public role, or benefits from offering a service to the public at large, special duties arise. The duty of a commercial host who serves alcohol to guests to act to prevent foreseeable harm to third-party users of the highway falls into this category: *Stewart v. Pettie*.

[Emphasis added]

[38] Like the trial judge in the case at bar (see para. 22 above), I take Chief Justice McLachlin as having accepted that commercial hosts who serve alcohol have a responsibility to protect members of the public from their intoxicated patrons, and that those members of the public who use the highways are a subset of this category. However, as already indicated, I do not agree with the trial judge that foreseeability with respect to the manner in which a third-party was injured is part of the duty of care analysis. The policy rationale for imposing a duty of care on commercial hosts arises from the profit-making nature of their activities, coupled with the inherent dangers of intoxicants: *Childs* at paras. 18 - 22. This reasoning remains the same regardless of how a specific plaintiff came to be injured by an intoxicated patron. I, accordingly, agree with the following statement by Mr. Justice Somers in *Haughton v. Burden*, [2001] O.J. No. 4704 (QL) (S.C.J.):

[22] The common law imposes a duty on commercial hosts to take steps to see that intoxicated patrons do not cause injury to themselves or others upon leaving the premises. The standard of care required will vary depending on the circumstances,

[39] In conclusion, I find that *Pacific Promotions* and the *Commodore* did owe a duty of care to protect persons such as Mr. Donaldson from injury by patrons of Oktoberfest who left that event intoxicated.

## Standard of Care

- [40] As the trial judge found that neither Pacific Promotions nor the Commodore owed a duty of care to Mr. Donaldson, he did not find it necessary to pronounce on the standard of care required of commercial hosts holding a beer-drinking event at which glass mugs are taken away by patrons, or on whether that standard had been met. At the hearing of this appeal, and in their supplemental submissions, the parties addressed this issue, parsing the trial judge's reasons for factual findings to support their respective positions.
- [41] Mr. Donaldson submits that, as a matter of common sense, allowing glass beer mugs to be taken away from a beer-drinking event creates a foreseeable risk that third-parties will be injured by intoxicated patrons, particularly when patrons leave with several mugs in their possession. He further submits that Pacific Promotions and the Commodore did nothing to manage or minimize that risk. He says this is a case of misfeasance, as the monitoring that did take place did not account for the risks associated with allowing persons to leave with glass mugs, and did nothing "to control the carrying away of multiple beer steins by intoxicated patrons". Mr. Donaldson says it is simply a matter of "good luck" that no one had been similarly injured at a previous Oktoberfest.
- [42] Pacific Promotions and the Commodore submit that, unlike the risk of harm associated with drinking and driving, the risk of injury from a souvenir glass beer mug taken away from an event at which alcohol is served is not readily apparent. They point to the lack of any previous incidents as evidence that the injury suffered by Mr. Donaldson was not foreseeable, at least not in 1999. They further say that a glass beer mug is a benign object and that, in any event, there was an adequate monitoring system in place. They also rely on the fact that Mr. Donaldson did not tender any evidence regarding the standard in the industry with respect to an Oktoberfest-type event.
- [43] In my view, a full standard of care analysis is unnecessary to the disposition of this appeal. As I will explain, as against Pacific Promotions and the Commodore, Mr. Donaldson failed to adduce evidence with respect to Mr. Briggs's drinking and conduct. This evidence was necessary to prove both a breach of the standard of care (i.e., negligence), and the element of causation. Even if Pacific Promotions and the Commodore were negligent in that their actions fell below the required standard of care, evidence that Mr. Donaldson's injury would not have occurred "but for" that negligence is lacking.

## Lack of Proof of Breach of the Standard of Care

- [44] I have difficulty accepting that the mere fact that a person who has been drinking leaves an alcohol-serving establishment with glassware gives rise to a foreseeable risk of harm to others. However, assuming, without deciding, that (a) such a risk exists, and (b) that the appropriate standard of care requires the establishment to have a monitoring system in place to reduce that risk, the establishment will only have failed to meet that standard if that person's level of intoxication is sufficient to objectively raise concerns that he or she may

act, deliberately or carelessly, in such a way as to injure someone with the glassware. If the person was not in fact intoxicated to a level that objectively raises such concerns, then regardless of what standard of care is appropriate, a breach of that standard will not have occurred. To conclude otherwise would be to hold a commercial host to a standard of perfection, and make it liable for the acts of its patrons regardless of their actual level of intoxication. Perfection, however, is not what the law requires.

- [45] In a commercial-host case, the plaintiff must prove that the level of intoxication of the patron was such that, in the circumstances, that person posed a foreseeable risk to others. The classic example is, of course, the highly intoxicated patron who is allowed to get behind the wheel of a motor vehicle and drive away. In the case at bar, however, the evidence admissible against Pacific Promotions and the Commodore is not capable of proving that Mr. Briggs, by reason of his level of intoxication, posed a foreseeable risk to others when he left the Commodore carrying a glass beer mug.
- [46] Mr. Briggs was not called as a witness at trial. However, as set out in paragraph 17 above, Mr. Donaldson "read-in" some of the testimony Mr. Briggs gave at his examination for discovery. This as done pursuant to Rule 40(27)(a) of the Rules of Court, B.C. Reg. 221/90, which provides:

If otherwise admissible, the evidence given on an examination for discovery by a party may be given in evidence at trial, unless the court otherwise orders, but the evidence is admissible only against

- (i) the adverse party who was examined.

- [47] On the basis of the evidence from the witnesses who were called to testify, including the police officer who said Mr. Briggs was intoxicated to some unknown degree, it would be reasonable to infer that Mr. Briggs attended Oktoberfest, and drank beer there. It would also be reasonable to infer, from the time and place of the incident involving Mr. Donaldson, that Mr. Briggs left the Commodore at or near 2:00 a.m., when the event ended. However, I agree with Pacific Promotions and the Commodore that, by reason of Rule 40(27)(a)(i), the "read-in" evidence from Mr. Briggs's examination for discovery was only admissible against Mr. Briggs, and cannot be used by Mr. Donaldson to support his claim against them. Because of this, there is no evidence admissible against Pacific Promotions and the Commodore to establish that Mr. Briggs (a) drank six or seven beers before he went to the Commodore, (b) arrived at the Commodore at or near the beginning of the event, (c) drank eight to ten beers while there, or (d) considered himself to be "drunk" when he left.

[48] I am not suggesting that when a plaintiff injured by an intoxicated patron alleges that a commercial-host defendant was negligent, that it is necessary for the plaintiff to show that the defendant had actual knowledge of the patron's level of intoxication. It is enough for the plaintiff to establish that the defendant ought to have known of the patron's level of intoxication. In this regard, I agree with the following from *McIntyre v. Grigg* (2006), 274 D.L.R. (4th) 28 (Ont. C.A.) at para. 23:

Commercial vendors of alcohol have an obligation to monitor a patron's consumption of alcohol and should have protocols in place to ensure that all reasonable precautions are taken to prevent such patrons who subsequently drive from becoming intoxicated to the point where they cannot safely operate a motor vehicle. Moreover, a commercial host does not escape liability simply by not knowing that the patron became inebriated before driving; the commercial host is liable if it or its employees knew or ought reasonably to have known in the circumstances that the patron was in such a condition.

[Italics in original]

[49] In the context of a non-drinking-and-driving fact pattern, I would reword the foregoing extract to read:

Commercial vendors of alcohol have an obligation to monitor a patron's consumption of alcohol and should have protocols in place to ensure that all reasonable precautions are taken to prevent such patrons from becoming intoxicated to the point where they pose a foreseeable risk to third-parties. Moreover, a commercial host does not escape liability simply by not knowing that the patron became inebriated engaging in foreseeably dangerous conduct; the commercial host is liable if it or its employees knew or ought reasonably to have known in the circumstances that the patron was in such a condition.

[Emphasis added]

[50] I have underlined portions of the reworded extract to indicate that, to affix a commercial host with liability, a plaintiff must establish that the patron was intoxicated to the point where he or she posed a foreseeable danger to others. If the patron was not in such a condition, then there is nothing that the commercial host could know, or ought to have known, that would require the host to take some action.

[51] In this case, the evidence adduced at trial, when viewed in a light most favourable to Mr. Donaldson, is capable of proving only that Mr. Briggs was intoxicated to some unknown degree when he left the Commodore. This is not sufficient to establish a breach of the standard of care by commercial hosts. Accordingly, notwithstanding the fact that the trial judge erred in dismissing Mr. Donaldson's claim against Pacific Promotions and the Commodore on the basis that they did not owe him a duty of care, that claim was bound to fail in any event.

## Lack of Proof of Causation

- [52] To paraphrase what Major J. said in *Stewart* (at para. 59), an equally compelling reason to dismiss this appeal flows from the absence of proof of causation.
- [53] A plaintiff must prove, on a balance of probabilities, "that the defendant's impugned conduct actually caused the loss complained off": *Stewart* at para. 60. To do that, "the plaintiff bears the burden of showing that 'but for' the negligent act or omission of each defendant, the injury would not have occurred": *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333, 2007 SCC 7 at para. 21; see also: *Bohun v. Segal*, 2008 BCCA 23, 77 B.C.L.R. (4th) 85 at para. 53.
- [54] In the present case, the evidence admissible against Pacific Promotions and the Commodore is capable of proving only that Mr. Briggs drank some beer at Oktoberfest, left the event carrying a glass beer mug and, for some unknown reason, raised his arm, injuring Mr. Donaldson with that mug. This, in my view, is not sufficient to satisfy the "but for" causation test, as it would be speculation to infer that alcohol was a factor in Mr. Briggs's actions. In other words, even assuming that the monitoring system at the Commodore was inadequate, the evidence is not capable of proving, on a balance of probabilities, that Mr. Donaldson would not have been injured had a proper system been in place.

## CONCLUSION

[55] I would dismiss this appeal.

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Madam Justice Rowles"

I AGREE:

"The Honourable Madam Justice Prowse"

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Prepared on 29 October 2026 · Esheria