

CANADA / JUDGMENT

Widdowson v. Rockwell

2017 BCSC 385

COURT

Supreme Court of British Columbia

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2017 BCSC 385 Widdowson v. Rockwell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Widdowson v. Rockwell,

2017 BCSC 385

Date: 20170308

Docket: M135143

Registry: Vancouver

Between:

Stuart Widdowson

Plaintiff

And

Bradley James Rockwell

Ridge Sheet Metal Ltd.,

Insurance Corporation of British Columbia,

Sam Yehia, The Cambie Malone's Corporation,

The Cambie Malone's Group, John Doe and ABC Corp.

Defendants

And

Insurance Corporation of British Columbia

Third Party

And

Sam Yehia, The Cambie Malone's Corporation,
The Cambie Malone's Group, John Doe and ABC Corp.

Further Third Parties

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

Counsel for the Plaintiff:

Giuseppe Battista, Q.C.

Paul J. Bosco

Counsel for the Defendants Ridge Sheet Metal Ltd. and Insurance Corporation of British
Columbia:

E. Craig Watson

Kiran Brar

Counsel for the Defendants and Further Third Parties Sam Yehia, The Cambie Malone's
Corporation, The Cambie Malone's Group:

Lorne Folick

Michael Bellomo

Place and Dates of Hearing:

Vancouver, B.C.

February 22-23, 2017

Place and Date of Judgment:

Vancouver, B.C.

March 8, 2017

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Introduction

- [1] The parties seek summary trial of a "commercial host" liquor liability claim.
- [2] At approximately 5:00 p.m. on February 17, 2012 the plaintiff Widdowson was walking home from work along a sidewalk in Port Moody, British Columbia, when he was hit by a truck owned by the defendant Ridge Sheet Metal Ltd. ("Ridge") and driven by the defendant Bradley Rockwell. Widdowson suffered severe injuries, including brain damage.
- [3] Rockwell was highly intoxicated at the time of the accident. He was, quite literally, falling-down drunk. He had been attempting to make a right turn when he lost control of the truck, which then climbed the sidewalk and struck Widdowson.
- [4] Earlier that day, after leaving work early, Rockwell and three co-workers had visited the Cambie Bar & Grill in downtown Vancouver for drinks. The pub is owned and operated by the defendant Cambie Malone's Corporation ("Cambie Malone's"). The amount of alcohol served and consumed at the pub is at the heart of this summary trial.
- [5] Rockwell was arrested at the scene of the accident and charged with three criminal offences. He later pled guilty and was convicted of dangerous operation of a motor vehicle causing bodily harm contrary to s. 249(3) of the Criminal Code, R.S.C. 1985, c. C-46. He was sentenced to nine months in jail.
- [6] The truck was insured by ICBC. While liability coverage under that policy has been affirmed for the employer, Ridge, ICBC has denied coverage to Rockwell and, pursuant to the provisions of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, has made itself a third party in these proceedings so that it might contest any liability on the part of Rockwell to Widdowson.

- [7] Rockwell has not defended or participated in the lawsuit. Although Ridge and ICBC have formally denied liability to Widdowson for the accident, such liability is tacitly conceded in the circumstances.
- [8] No contributory negligence on the part of Widdowson is alleged in this lawsuit; it was alleged in the pleadings but the parties advised the Court during this application that no such negligence exists. The only liability issue in dispute is thus whether the pub has any legal responsibility for Widdowson's injuries and, if so, how fault for the accident should be allocated as between Rockwell and the pub.
- [9] For the reasons that follow, I find Cambie Malone's liable and allocate it 25% of the fault for Widdowson's injuries.

Suitability for Summary Trial

- [10] During the course of this application I was supplied with affidavits sworn by some 17 witnesses. Five of the affiants, four pub employees and one of Rockwell's co-workers, were cross-examined on their respective affidavits at the hearing.
- [11] The affidavit material included hospital records, police records (including transcripts of witness interviews), a report by a blood-alcohol expert, and examination for discovery transcripts. Rockwell did not attend the summary trial, although duly served with the process, nor did he provide any affidavit evidence. However, he had been examined for discovery during the course of the litigation and some of that discovery evidence was tendered at the summary trial.
- [12] Widdowson, Ridge, ICBC and Cambie Malone's all consented to this matter proceeding as a summary trial and, indeed, urged the Court to proceed in that fashion even though credibility of some witnesses was very much in issue and even though the absence of direct evidence on certain matters would require findings of fact based on inference. Agreements were made by the parties respecting the use of discovery transcripts and the admissibility of other documents so as to facilitate the summary trial.
- [13] It is clear from the submissions of counsel that resolving the issue of Cambie Malone's liability will facilitate settlement of the case.
- [14] I am satisfied that, notwithstanding the challenging findings of fact that are required, the issues raised by this summary trial application can be resolved by the summary trial process and will assist the efficient resolution of the proceeding. I therefore accede to the parties' joint request that the matter proceed as a summary trial.

Police Observations and Interactions

- [15] RCMP Cst. Dheri is the individual who arrested Rockwell at the scene of the accident and escorted him to the Coquitlam detachment. He swore an affidavit setting out his observations of Rockwell both at the scene and thereafter. Rockwell exuded a strong odour

of alcohol. His speech was slurred, rambling and profane. He was unable to maintain his balance without assistance or by leaning against walls. At one point, he almost fell over. When advised about his right to counsel, Rockwell stated he wanted to speak with Ozzie Osbourne and started to play air guitar with his hands.

- [16] Cst. Dheri is very clear in his recollections: Rockwell "was drunk when arrested" and "clearly intoxicated" throughout their interactions.
- [17] Cst. Dheri also observed Rockwell's passenger, Kevin Sahanovitch, at the scene of the accident. He too was "clearly intoxicated", belligerent and causing a disturbance.
- [18] Cst. Dheri asked Rockwell how many drinks he had consumed. According to the constable, "Rockwell advised that he had two beers and three Fireball whiskey drinks while at the Cambie Hotel". Rockwell did not state that he had anything to drink at any other location.
- [19] The evidence of Cst. Dheri, and indeed of all the police officers who swore affidavits for the summary trial, was not challenged in any way by Cambie Malone's. I accept the police affidavit evidence in its entirety and I have no hesitation in finding as a fact that at the time of the accident Rockwell was indeed "falling-down drunk".

Blood-Alcohol Testimony

- [20] At approximately 8:00 p.m. on the day of the accident, Rockwell fell from his bed in the jail cell and sustained a laceration over his right eye. He was taken by ambulance to Eagle Ridge Hospital in Port Moody, British Columbia. He was accompanied by a police officer throughout, including on the return trip to the Coquitlam RCMP jail cells. He was observed to be intoxicated and belligerent throughout.
- [21] Following his release from jail at approximately 3:30 a.m. on February 18, 2012 Rockwell again attended Eagle Ridge Hospital. Intake notes made at 6:13 a.m. record complaints of chest pain and headaches. The "initial assessment record" notes admission time as 6:45 a.m. and notes patient complaints of "nausea", "vomiting 100 times today", and "pain to left chest and ribs". Blood chemistry testing at the hospital at 7:28 a.m. measured 28.3 mmol/L of alcohol in serum.
- [22] Also put into evidence was an expert report by Ms. Carolyn Kirkwood dated February 26, 2014. She is a forensic chemist with experience in toxicology, serology, and alcohol analysis. Ms. Kirkwood frequently appears as an expert witness in the Courts of British Columbia and has previously been qualified to provide opinion evidence on the interpretation of blood-alcohol testing results, the various stages of alcoholic influence, and the clinical signs or symptomology of intoxication.
- [23] No objection was taken by Cambie Malone's to either Ms. Kirkwood's qualifications or any aspect of her report, including the statements of fact upon which the report relied, the calculations with respect to alcohol, and the intoxication opinions expressed.

[24] Ms. Kirkwood expresses the following opinions and conclusions, all of which I accept without hesitation:

- it takes approximately 30 minutes for a drink of alcohol to be completely absorbed and the peak Blood Alcohol Concentration ("BAC") to be reached. Such factors as the amount and type of food in the stomach, concentration of the beverage, rate of consumption of the beverage, drugs, diseases and emotional states may slow the absorption of the alcohol from the stomach and small intestine;
- alcohol is eliminated from the human body at a relatively constant rate of 15mg of alcohol in 100ml of blood (15mg%) per hour. As soon as alcohol is consumed, the body begins to break down the alcohol and eliminate it from the body;
- a hospital reading of 28.3 mmol/L of alcohol in serum translates into a serum alcohol concentration of 130mg of alcohol in 100ml of serum. Serum alcohol concentrations are approximately 10% higher than a whole blood analysis, meaning that the results from the sample taken at 7:28am on February 18, 2012 which indicated 130mg of alcohol in 100ml of serum is equivalent to 117mg of alcohol in 100ml of blood, or a BAC of .117;
- Rockwell's BAC at 5:00pm on February 17, 2012 would have been approximately .334 (334mg of alcohol in 100ml of blood) or 217mg higher than the reading at 7:28am on February 18, 2012. This approximation is calculated by adjusting the February 18, 2012 reading of .117 BAC for Rockwell's body weight (161 pounds), the absence of any alcohol consumption between the time of arrest and the blood testing, and by applying the absorption/elimination factor referred to above;
- a BAC of .334 is more than four times the legal limit for operating a motor vehicle and a person with such a reading would be severely impaired, exhibiting slurred speech, loss of fine motor control, loss of balance, loss of coordination and loss of judgment;
- at a BAC of .33 virtually all the general population would exhibit gross symptoms of impairment; and
- the worst judge of an individual's state of impairment is another individual who has also been consuming alcohol.

[25] Ms. Kirkwood produced a table demonstrating the minimum amount of certain types of alcohol that a 161-pound male would need to consume during the period of noon to 4:30 p.m. in order to produce a BAC of .334 (334mg of alcohol in 100ml of blood) at 5 p.m., i.e.:

- 26.6 ounces of liquor (33%/volume alcohol);
- 21.9 x 8-ounce glasses of draft beer (5%/volume alcohol);
- 11 x 16-ounce pints of draft beer (5%/volume alcohol);
- 15.4 x 12-ounce bottles of bottled beer (5%/volume alcohol); or
- 61.5 ounces of wine (14%/volume alcohol).

- [26] She points out that these are conservative estimates and that an individual may actually need as much as 1.5 to 2 times the calculated amount of alcohol to achieve the stated BAC.
- [27] For example, a 160-pound male who began drinking at noon, had a BAC of .334 at 5:00 p.m. and who consumed a combination of 12-ounce bottles of beer as well as drinks of liquor containing 33%/volume alcohol would have had to consume:
1. 7.5 bottles of beer and 13.2 ounces of liquor, or
 2. 11 bottles of beer and 6.6 ounces of liquor.
- [28] Clearly, by 5:00 p.m. on February 17, 2012, Rockwell had consumed a very substantial amount of alcohol. The real questions in issue in this case are when and where?

Rockwell's Evidence

- [29] As indicated earlier, Rockwell has not actively defended this lawsuit and has tendered no affidavit evidence in the summary trial. He was, however, examined for discovery by all of the parties, each of whom has sought to tender excerpts from that examination in the summary trial.
- [30] Rule 9-7(5)(c) permits evidence taken on an examination for discovery to be tendered at a summary trial. Such evidence is, however, subject to Rule 9-7(6) which, in turn, makes the evidence subject to trial procedures in Rules 12-5(46) and (49) among others. These rules say that:
- any such discovery evidence is admissible only against the adverse party who was examined (i.e., Rockwell) (Rule 12-5(46));
 - the court can review the entirety of the examination and enter into evidence any other part of the examination that is closely connected with the part tendered by one or more of the parties (Rule 12-5(49)).
- [31] The parties were questioned by the Court about the limitations and implications of Rule 12-5(46). The Court was advised that the discovery evidence was to be considered admissible against all of the parties for the purposes of this summary trial, i.e., not just against Rockwell alone.
- [32] The relevant parts of Rockwell's discovery testimony include:
- he was 51 years old and weighed approximately 155 pounds at the time of the accident;
 - he has a grade 11 education, works as a journeyman sheet metal worker, and was employed by Ridge for 16 years;
 - he was a foreman for Ridge and performed such work as the installation of industrial, commercial and residential air ducts, and heating and cooling systems;
 - he was supplied with and drove a company truck which he took home at the end of each day;

- in the period before the accident the company had been short-staffed and for at least five weeks he had been working double shifts, putting in between 60 to 70 hours of work a week;
- at the time of the accident he was working on two jobs for Ridge, one at what is now called the "Point Pub" on Abbott Street in Gastown, as well as additional work at night at the Bental buildings;
- he arrived home from work the night before the accident at approximately 1:30 a.m. and only had about 3 1/2 hours sleep before getting up again. He had to be at the Abbott Street location for 6:30 a.m. He drove directly from his home in Port Moody to the Abbott Street location making one stop on the way for coffee. He had nothing to eat for breakfast. He had another coffee and a muffin at approximately 10:00 a.m.;
- he and Sahanovitch were the only Ridge employees working at the Abbott Street location as they were finishing up the project. It was Sahanovitch's last day with Ridge as he was going to "sheet-metal school" starting the following week. The two other Ridge employees who were drinking with them at the pub were Messrs. MacKinnon and Sauve, although they were working elsewhere on that day;
- Sahanovitch had reached out to MacKinnon and arranged to meet at the pub for some good-bye drinks;
- Sahanovitch asked if they could leave work early. Rockwell agreed as the work on the job was essentially finished "and I was pretty tired";
- Rockwell and Sahanovitch arrived at the pub shortly before noon. Rockwell greeted the others and then left to go to a nearby bank to get some cash, returning a few minutes later;
- Rockwell picked up Sahanovitch at the pub at approximately 3:00 p.m. in order to drive home. He had left some 20 to 30 minutes earlier in order to load up the truck which was parked outside the Abbott Street location a couple of blocks away;
- in the 2 to 2 1/2 hours that Rockwell was at the pub, he consumed only 2 1/2 bottles of Budweiser beer. Sahanovitch, however, was "drinking hard" and "getting really intoxicated" such that Rockwell thought he "was in no shape to take public transit at the time", which was why Rockwell had offered to drive him out to Port Moody so Sahanovitch's mother could pick him up at Rockwell's house;
- Sahanovitch was "slurring and staggering and pretty drunk". MacKinnon was also drinking a lot and was "pretty lit up" and "feeling no pain";
- Rockwell does not recall being served by a waitress. He recalls members of the group going up to the bar to buy rounds of drinks;

- the others had already purchased a round by the time Rockwell returned to the pub from the bank. Rockwell went to the bar himself twice, each time to buy "beers and two vodka things", the latter for Sahanovitch. On the second occasion he also bought the other three "some kind of cinnamon drink", a Fireball cinnamon whiskey shot;
- "All told [Rockwell] ordered six Budweiser and four of those [vodka] drinks and three fireballs". He thinks the vodkas were doubles because they were so expensive but he "cannot say that positively";
- apart from the drinks purchased by Rockwell, MacKinnon also went up to the bar to buy "vodka drinks" for Sahanovitch and "more beer" for himself and Sauve. The last beer that Rockwell partially consumed before leaving the pub was purchased by Sauve;
- Rockwell stated, "I was drinking my beer slow. Like I said, I don't drink much, so I wasn't slamming like those guys";
- after leaving the pub at approximately 3:00 p.m., Rockwell and Sahanovitch drove down Hastings Street stopping at a 7-Eleven store so Rockwell could purchase a coffee;
- further down Hastings Street, heading east towards the Barnett Highway, Sahanovitch requested Rockwell to stop at a beer and wine store whereupon Sahanovitch bought a six-pack of beer and a "mickey of whiskey";
- Sahanovitch drank some of the whiskey before getting back into the truck and also drank "some beers" during the drive out to Port Moody;
- Rockwell "didn't think" he was feeling any effects of the alcohol, although he was "feeling extremely tired";
- at Rockwell's house in Port Moody Sahanovitch called his mother and learned that she was unable to pick him up, rather he would have to meet her at Coquitlam Centre, a mall in Coquitlam, British Columbia, "That's why [Rockwell] had to drive after that";
- Rockwell and Sahanovitch were at the former's house for approximately 15 to 20 minutes. Sahanovitch wanted to have a drink with Rockwell before they left. Because Rockwell "didn't want another beer" nor "that whiskey", and because Sahanovitch was urging him on, they split the remains of some flavoured vodka which Rockwell said was the only liquor he had in the house;
- they each had one shot of vodka using "a little shot glass" which could not have contained "more than an ounce and a quarter, ounce and a half may be". All of the vodka remains were gone after the two shots;
- Rockwell and Sahanovitch got into the truck with the former driving. At a blind turn on Guildford Way he "gunned" the truck to get ahead of an approaching vehicle causing his truck to "fishtail" in the pouring rain whereupon he lost control and the truck mounted the sidewalk, striking Widdowson; and

- Rockwell has no memory of the accident nor, indeed, of anything else until his attendance at Eagle Ridge Hospital the following morning.

Rockwell Co-worker Evidence

- [33] Cambie Malone's tendered two affidavits from Sauve and MacKinnon respectively. Both were served with a subpoena to attend the summary trial hearing for cross-examination on their affidavits. Sauve attended and was cross-examined. MacKinnon did not.
- [34] The parties agree that the failure of MacKinnon to attend for cross-examination does not necessarily mean his affidavit must be struck and his evidence completely disregarded. However, counsel agree that the effect of the case law in this area is that MacKinnon's testimony should be accorded little weight in the circumstances.
- [35] In their affidavits, both MacKinnon and Sauve place the time of their arrival at the pub at approximately 1:00 p.m. Both place their departure from the pub about an hour thereafter. Neither described the amount of alcohol consumed by anyone other than Rockwell.
- [36] In his affidavit Sauve says he recalls Rockwell consuming one or two bottles of beer at the pub. MacKinnon says only that Rockwell "was not drinking heavily". Both affiants say Rockwell did not exhibit any signs of intoxication.
- [37] On cross-examination Sauve stated that he was not paying attention to how much the others were drinking and that he has little recollection of what actually happened. He cannot remember who bought what alcohol or who paid.
- [38] Notwithstanding this failure of recollection, however, Sauve did acknowledge under cross-examination that Sahanovitch was obviously drunk, that he was red in the face, slurring his words and becoming louder.
- [39] The transcript of MacKinnon's police interview is included in the police file put into evidence. Among other things, MacKinnon told the police:
- he and Sauve around arrived approximately arrived at the pub approximately 1:00 p.m. and left after half an hour or 45 minutes, possibly as late as 2:00 p.m.;
 - Rockwell and Sahanovitch were already at the pub when MacKinnon and Sauve arrived but Sahanovitch was "drinking heavy", including double vodkas and cranberry, and looking "like he's going to get hammered tonight ... He was slamming those vodkas pretty hard";
 - MacKinnon believed he had a Moosehead beer and he believes Rockwell also only had one bottle of beer; and
 - MacKinnon was "not a hard liquor kind of guy" and answered "no" when asked, "Did you guys do shooters?"

[40] Sahanovitch cannot be located by any of the parties and has not provided any affidavit evidence. He too was interviewed by the police and a transcript of that interview, which was held at 1:00 a.m. on February 18, 2012, is in the police file. His memory of events was extremely poor and he was unable to remember how or why he came to be in jail.

[41] Among other things, Sahanovitch stated during his interview:

- he initially thought they had stopped work at the normal time of 3:00 p.m. that day but then remembered that they actually left work about noon;
- while at the pub, Sahanovitch had "five beer and then I had about seven or eight double vodka and cranberry because they were on special";
- he thinks they may have been in the pub for four to six hours;
- he thinks Rockwell only drank one or two beer;
- he and Rockwell drove out to Rockwell's house in the latter's truck;
- on the way home they stopped so Sahanovitch could buy a "mickey of Fireball, and a six or eight-pack of beer";
- he did not think they had actually stopped at Rockwell's house before the accident; and
- he initially denied any recollection of an accident but then vaguely recalled one, although not the details, "It's a blur from there. And then I remember getting handcuffed and then waking up."

Pub Employee Evidence

[42] The evidence from the pub employees has little value. None of the manager, the two barmen or the waitress on duty that day have any recollection of the Rockwell group.

[43] All three serving staff swore affidavits containing identical paragraphs on important substantive issues. For example, the three affidavits sworn by them contain the following identical paragraphs:

- "Moreover, upon being hired by the Cambie, I reviewed, and agreed to abide by the Cambie's written policies and procedures for serving alcohol (the "Policies and Procedures"). In particular, the Cambie's written Policies and Procedures require all serving staff, including myself, to take care that patrons do not become intoxicated at the establishment. The Cambie's Policies and Procedures further require all serving staff to immediately stop serving an intoxicated patron and take steps to ensure that an intoxicated patron is provided with a safe means of transportation home ..."
- "I would never serve a patron who was slurring her words, staggering, unable to count their money or exhibiting any other signs of intoxication."

· "I did not observe any patrons exhibiting signs of intoxication on February 17, 2012 or serve alcohol to any patrons at the Cambie who were exhibiting signs of intoxication during my shift on February 17, 2012. Had I observed patrons exhibiting signs of intoxication, I would not have served them further alcohol, and I would have taken steps to ensure that the intoxicated patron had a safe ride home, by calling a cab if necessary."

- [44] These paragraphs deserve little if any weight. They were drafted by a lawyer and purportedly adopted by the witnesses. They clearly do not represent the witnesses' own words. The content is "lawyer speak" not "ordinary person speak". And having observed these various witnesses being cross-examined, it is clear that if asked proper questions on direct examination, none of them would have given this evidence in the same words or syntax found in these paragraphs. These paragraphs are in effect testimony manufactured by counsel, and the use of such identical language in multiple affidavits from different witnesses is simply not an acceptable method of adducing evidence (let alone credible evidence) on a summary trial.
- [45] Furthermore, the cross-examination of the employees revealed that some of the assertions in the affidavits are not true or, at least, did not represent the actual conduct of the employees on the day in question. For example, the waitress Kennedy stated that if she saw a person drunk in the bar she would "give them water and wait for them to leave on their own". The bartender Wyse stated that if four people in the space of two hours consumed eight beer, four double vodkas, and six shooters, this is something that would not attract his attention. He also stated what I consider to very likely be the reality of day-to-day practice in this establishment, namely, that intervention depends on how the patrons are behaving and would not likely occur if they do not act like they are drunk.
- [46] It should be noted that the pub had a surveillance camera system in place in February 2012 which recorded activities within the bar including the conduct of patrons. The police attended at the pub shortly following the accident to secure a copy of the camera footage on the day in question, however neither the bar manager nor the server knew how to download the video without corrupting it in the process. Hence, the video was not available to the police investigators nor, indeed, to the Court, although this result was simply accidental and not intentional.

Analysis and Findings re Alcohol Consumption

- [47] There is little reliable about the Sahanovitch statement to the police and it is not admissible on this summary trial for the truth of its contents. I give it no weight.
- [48] Sauve has no meaningful recollection of what happened at the pub on the day in question, or how much his co-workers had to drink. His evidence on these critical matters is not reliable enough to attract any significant weight.

- [49] I also give MacKinnon's affidavit evidence little weight. His failure to address the totality of the drinking (i.e., how much all parties) consumed is a significant omission. As will be seen, I prefer and give more weight to, the more complete evidence of Rockwell on most of these matters.
- [50] It is unfortunate that I was unable to hear and observe Rockwell testify in person. It would have assisted me in assessing his credibility (truthfulness/honesty) and the reliability (accuracy) of his evidence. I did, however, carefully review all of the transcripts of his examination for discovery in the application record so as to assess his evidence as a whole, a step I considered both fair and necessary in light of the parties' insistence that the determination of the pub's liability proceed by way of summary trial.
- [51] It should also be noted that in determining facts (i.e., making findings on the balance of probabilities as to what actually occurred in any given case) the court is free to reject some aspects of a witness's evidence and accept others and, indeed, to assign different weight to different parts of a witness's evidence. While I am prepared to accept some aspects of Rockwell's evidence at discovery, I assign less weight to others, particularly his evidence respecting the extent of his own alcohol consumption.
- [52] The proverbial elephant in the room is Rockwell's BAC. The pub did not challenge the accuracy of the blood chemistry testing undertaken at Eagle Ridge Hospital at 7:28 a.m. on February 18, 2012. Nor did it in any way challenge the calculations and conclusions made by the blood-alcohol expert, Ms. Kirkwood. I have accepted this evidence and I find as a fact that Rockwell's BAC was .334 (334mg of alcohol in 100ml of blood) at 5:00 p.m. on February 17, 2012.
- [53] It is apparent from the BAC, as well as the observations of the police officers at the scene of the accident, that Rockwell was severely intoxicated by alcohol when this accident happened. What, then, can be reasonably inferred from this evidence as to when and where Rockwell consumed the alcohol necessary to achieve this level of intoxication? In my view, the only reasonable inference is that Rockwell consumed a significant amount of alcohol at the pub.
- [54] *R. v. Villaroman*, 2016 SCC 33, is the Supreme Court of Canada's latest statement on the law respecting the "range of reasonable inferences that can be drawn" from circumstantial evidence. Any such inferences must be "considered in light of all the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense". The party having the burden of proof, here the plaintiff and Ridge/ICBC, may have to negative other reasonable possibilities based on the evidence but they do not have to negative "every possible conjecture no matter how irrational or fanciful".
- [55] I accept Rockwell's testimony and find as a fact that he and his co-workers spent about two hours in the pub from approximately 12:30 to 2:30 p.m., and that he left the pub to load up his truck at the worksite and returned to pick up Sahanovitch at or shortly before 3:00 p.m. I also find as a fact that it took Rockwell and Sahanovitch between 50 minutes and an hour to

negotiate the Friday afternoon traffic from downtown Vancouver to Rockwell's residence in Port Moody, and that enroute Sahanovitch stopped into a beer and wine store to purchase a mickey of Fireball cinnamon whiskey and a six-pack of Budweiser beer.

- [56] I find as a fact that Rockwell and Sahanovitch spent approximately 30 minutes in Rockwell's residence in Port Moody, where they learned that Sahanovitch's mother was unable to pick him up. This development was the reason they were in Rockwell's truck heading towards the Coquitlam Centre mall when the accident happened.
- [57] Insofar as consumption of alcohol is concerned, I find as a fact that Sahanovitch was drinking aggressively at the pub and consumed a large number of beer, vodka drinks, and fireball shooters before departing the premises with Rockwell. It is not necessary to identify the exact number of drinks that Sahanovitch consumed at the pub but suffice it to say I find as a fact that by the time he left he had become substantially and visibly intoxicated, slurring his speech and talking loudly.
- [58] Insofar as Rockwell's consumption is concerned, I do not accept his evidence that he only consumed 2 1/2 beers at the pub. Rather, I find as a fact that each of the co-workers bought at least one round of drinks for the other members of the group (and possibly more) and that Rockwell himself bought at least two rounds that included beer (for himself and Sauve), vodka (for Sahanovitch) and Fireball whiskey shooters (for all). I find as a fact that by the time he left the pub to retrieve his truck, Rockwell had consumed at least five to six drinks, a combination of beer and liquor, and that he was significantly intoxicated by alcohol. I also have no doubt, and I find as a fact, that the influence of alcohol on Rockwell was exacerbated by both a lack of food in the preceding 12 to 15 hours (and probably longer), and a high level of fatigue caused by extremely long work hours and inadequate sleep over an extended period of time. His ability to drive safely was significantly impaired when he left the pub.
- [59] I recognize another possible theory of Rockwell's intoxication is that he drank only two to three beers at the pub and in the two-hour period thereafter, he consumed substantial quantities of beer and/or liquor, whether at home or elsewhere, before the accident occurred. While it certainly appears that Sahanovitch was an aggressive and irresponsible drinker of a sort who might engage in such behaviour, there is no evidence to support such a characterization of Rockwell. When one subtracts the amount of time that it would have taken for Rockwell to drive home, this theory would require him to have consumed an enormous amount of alcohol in less than an hour, a proposition which is not consistent with his previous conduct and which, assessed from the perspective of robust logic and common sense, amounts to nothing more than wishful thinking and unfounded speculation on the part of Cambie Malone's.

[60] I am also satisfied however, and find as a fact, that Rockwell did indeed consume further alcohol after he departed the pub. On the balance of probabilities, I find that this occurred at his residence and included consumption of vodka or other liquor in quantities more than Rockwell claims in his evidence.

[61] It is not necessary to ascribe a precise figure to the amount of alcohol that Rockwell consumed after he left the pub. It is sufficient to find that he was significantly intoxicated when he left the pub and that he became even more severely intoxicated through the consumption of additional alcohol before the accident happened.

The Law of Commercial Host Liability

[62] In Ontario, s. 39 of that province's Liquor Licence Act, R.S.O. 1990, c. L. 19 imposes civil liability on commercial hosts to:

- a person who suffers injury or property damage that is caused by a "person to or for whom the liquor is sold";
- if, when the liquor was sold to or for that person, that person's "condition is such that the consumption of liquor would apparently intoxicate the person or increase the person's intoxication so that he or she would be in danger of causing injury to himself or herself or injury or damage to another person or the property of another person".

[63] There is no statutory equivalent in British Columbia, so the question of commercial host liability in this province is to be determined by principles of common law. Such liability is simply a variant of the tort of negligence. Liability in negligence requires a plaintiff to prove on the balance of probabilities the following constituent elements of the tort:

1. the defendant owed the plaintiff a duty of care (to avoid acts or omissions which might be reasonably foreseeable to cause injury to the latter);
2. the defendant's acts or omissions breached the standard of care applicable to that duty;
3. the plaintiff suffered damage of the sort that is recognized and compensable in law; and
4. the defendant's breach was causative, in both fact and law, of the plaintiff's damage.

See *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 96; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3; *Ediger v. Johnston*, 2013 SCC 18 at para. 24.

[64] The legislation that was in effect in British Columbia at the time of the accident, the Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267, did not expressly impose civil liability similar to its Ontario counterpart, it did however impose mandatory obligations on a commercial host in respect of "drunkenness". At the relevant time, s. 43 of the Act provided that such a commercial host:

- must not sell or give liquor to an intoxicated person or a person apparently under the influence of liquor; and
- must not permit a person to become intoxicated.

The Act did not define the perhaps elastic terms "intoxicated" or "under the influence of liquor". The general intent of the prohibition, however, cannot be denied.

[65] It is worth noting that the current version of British Columbia's Legislation, Liquor Control and Licensing Act, S.B.C. 2015, c. 19, also does not expressly impose civil liability similar to what exists in the Ontario legislation.

Commercial Host Liability at Common Law

[66] The seminal case respecting a commercial host's liability is generally considered to be *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239. In that case, a frequent patron of the hotel's beverage room, well known for his propensity to become intoxicated, was ejected from the premises after consuming beer over several hours. He was struck by a vehicle while walking home on the center line of the highway. The Court concluded that by virtue of Menow's intoxication on the premises:

the hotel came under a duty to Menow to see that he got home safely by taking him under its charge or putting him under the charge of a responsible person, or to see that he was not turned out alone until he was in a reasonably fit condition to look after himself. ... The harm that ensued was that which was reasonably foreseeable by reason of what the hotel did (in turning Menow out) and failed to do (in not taking preventive measures) (at 249).

[67] *Jordan House* dealt with the duty of care owed to the patron. It was not until *Stewart v. Pettie*, [1995] 1 S.C.R. 131, that the Supreme Court addressed the liability of a commercial host to third persons other than the intoxicated patron himself. In that case a sober passenger in a car driven by her intoxicated brother was rendered a quadriplegic when he lost control of the vehicle and collided with a light pole and wall. The Court held there was "no question" that commercial vendors of alcohol owed a general duty of care to third parties who might reasonably be expected to come into contact with their intoxicated patron and to whom that patron may pose some risk.

[68] The Court also emphasized that the existence of the duty of care must not be confused with the standard of care. As well, at paras. 60-65, the Court emphasized that, in order for liability to flow, there must be proof that the breach of the standard of care "actually caused the loss complained of".

[69] Insofar as the standard of care was concerned in the circumstances of the case, the Court noted:

- the establishment could not escape liability simply because the patron was apparently not exhibiting any visible signs of intoxication. The waitress knew or ought to have known that the patron was becoming intoxicated by virtue of the number of drinks he had consumed regardless of whether he was exhibiting visible symptoms (at para. 52);
- as in *Menow*, the establishment could discharge its duty of care by putting the patron "under the charge of a responsible person" such as his sober wife and sister with whom he had come to the event (at paras. 53-55);
- while "establishments which serve alcohol must either intervene in appropriate circumstances or risk liability", the presence of sober companions with whom the patron was travelling precluded the need for intervention in this case (at paras. 53-57); and
- in any event, there was no proof that intervention would have made any difference (because the two sober women had concluded that the patron was competent to drive) (at paras. 54-55).

[70] In *Childs v. Desormeaux*, 2006 SCC 18, the Court addressed the question of social host liability, i.e., whether a social host owed any duties of care to third parties who may be injured by their intoxicated guests. In dismissing such a cause of action, the Court made a point of emphasizing the differences between a social host and commercial host situation and why the latter was required to take "positive steps to protect" third-party members of the public:

- monitoring consumption is relatively easy for a commercial host and servers can generally be expected to possess special knowledge about intoxication (at para. 18);
- the sale and consumption of alcohol is strictly regulated and these regulations impose special responsibilities (to reduce the risk associated with the trade) on those who would profit from the supply of alcohol (at para. 19);
- commercial hosts had a "perverse incentive" not only to serve many drinks, but to serve too many in order to increase profit this supports the imposition of a duty to monitor alcohol consumption in the interest of the general public (at para. 22).

[71] In *Donaldson v. John Doe*, 2009 BCCA 38, our Court of Appeal expressly agreed with the following proposition from *McIntyre v. Grigg* (2006), 83 O.R. (3d) 161 (C.A.), at para. 49:

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.

[Emphasis in original.]

[72] In *Haughton v. Burden*, [2001] O.J. No. 4704 (S.C.J.), cited in *Salm v. Coyle and ICBC et al*, 2004 BCSC 112, at para. 17, the court stated:

The common law imposes a duty on a commercial host 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, but may include actions such as putting the patron into a taxi or into the care of sober persons, or calling the police.

[73] In this particular case the affidavits from the pub employees all referred to the employees having successfully completed the "Serving It Right", which is British Columbia's mandatory "Responsible Beverage Service Program". This is a program sponsored by the provincial government and the hospitality industry which offers information about intoxication, as well as guidelines and suggestions for, as the tagline suggests, "responsible beverage service". Rather cleverly, none of the employee affidavits expressly disclosed the information and conduct guidelines suggested in the "Serving It Right" program. Instead, all that was proffered was what was said to be Cambie Malone's written "Policies and Procedures" which included the following paragraph:

It is your responsibility to ensure patrons do not become intoxicated while in the establishment. You must refuse entrance and/or service to any person who is apparently under the influence of alcohol or drugs. Moreover, persons visibly under the influence of drugs or alcohol may not be permitted to remain in the establishment. You must refuse the person service, have the person removed and see that they depart safely. Intoxicated persons must NOT be permitted to drive. It is your duty to ensure that a safe ride home is used. This is a crucial responsibility of everyone in the alcohol service industry.

[74] While the standard of care expected of a commercial host will, in large part, be governed by the particular circumstances of any given case, there are several general standards of conduct that could well apply simply as a matter of common sense, including:

- ensure there are adequate supervision, monitoring and training systems in place so employees know and abide by responsible serving practices;
- ensure there is a sufficient number of serving staff on duty so that effective monitoring of alcohol consumption by patrons is possible;
- ensure employees know the signs of intoxication and the various factors that influence intoxication (gender, weight, rate of consumption, food, et cetera);
- inquire if the patron is driving and identify any "designated driver" for groups of patrons;
- know how to estimate blood-alcohol concentrations and ensure any driver does not consume more than the appropriate number of drinks to stay on the "right side" of the legal limit;
- display "tent cards" on tables, posters on walls and washrooms, and menu inserts with easy-to-read charts and information about blood-alcohol concentration;

- ask apparently-intoxicated patrons if you contact anyone to assist them or if you can get them a taxi and, if necessary, offer to pay for it;
- display posters advertising free ride-home services available in the neighbourhood; and
- if the patron rejects alternative options and insists on driving, despite being urged otherwise, contact the police to seek assistance and/or provide whatever information might encourage their intervention.

[75] None of these things occurred in the present case. Rather, the pub's employees utterly failed in abiding by their own employer's directive that "intoxicated persons (e.g., Rockwell) must not be permitted to drive". I have no hesitation in concluding that the employees, and therefore Cambie Malone's, did not meet the requisite standard of care in the circumstances of this particular case and that their conduct was accordingly negligent.

Is arrival at home a complete defence?

[76] The pub argues that a commercial host's duty of care ends when, and there can be no liability for conduct after, the intoxicated patron arrives at his own home safely. In making this argument the pub is seizing upon one of the suggestions made in *Jordan House* and it refers to several cases which have adopted the proposition including *Salm, supra* and *Schryer (Litigation Guardian of) v. 1232215 Ontario Ltd. (Lakeview Beachbar)*, [2009] O.J. No. 3578 (S.C.J.).

[77] In *Salm*, an intoxicated patron was picked up from the defendant's pub and driven home by a friend. She then went inside, took her father's car keys and drove away. In dismissing the commercial host liability claim on a summary trial, the court said, at para. 23:

I am of the opinion that all duties of care to Coyle and to the plaintiff as a result of Coyle's intoxication, were satisfied when Coyle did not drive away from the pub and when she was delivered home safely by Collin. It does not matter if Millers Pub did not see to these safe arrangements itself but someone else did. The result was that all of its duties were satisfied and any risk of injury from Coyle's intoxication after she arrived home safely was not caused by any breach of duty on the part of Millers Pub.

[78] In *Schryer* the plaintiff was injured falling down a flight of stairs in her home after being over served at the defendant's bar. The court dismissed the resulting personal injury lawsuit declaring, at para. 79:

... Once a patron arrives at his or her final destination safely, the tavern's duty is discharged, irrespective of whether the bar took active steps to ensure that the person arrives safely.

[79] I am not bound by *Salm* as it was not a case where the intoxicated patron got into his vehicle and drove away from the pub. Nor am I bound by the *Schryer* decision as it emanates from Ontario. In any event, and with all due respect, I question whether these rulings either failed to apply or have been superseded by the case law addressing causation principles in tort.

- [80] The defendant pub made the same submission in *Van Hove (Litigation Guardian of) v. Boisselle*, 2012 BCSC 494, i.e., that the pub's duty of care was discharged once the intoxicated patron reached home safely. The court was referred to the same cases that were referred to me. In dismissing the pub's application for summary trial dismissal of the case, the court noted:
- [18] A plaintiff who proves breach of both the duty and the standard of care must then prove causation - whether the breaches actually caused the injury, which would not have occurred "but for" the negligent conduct of the defendant.
- [19] L.J.D. in effect submits that Ms. Boisselle's safe arrival home proves that the standard of care was complied with and/or proves that the chain of causation was broken. In my view, that ignores the highly fact-specific nature of both inquiries. The proposition that L.J.D. puts forward may well be one that properly applies in many, if not most, cases of this kind, but it cannot be treated as a principle of law that applies regardless of any additional facts that may arise in an individual case.
- [20] ... It may also be open to a trial judge to find that her arrival home with an equally intoxicated person did not amount to a "safe" arrival within the meaning of the authorities and did not break the chain of causation.
- [81] In my view, there is little logic to the bald proposition that a safe arrival home "breaks the chain of causation" or otherwise discharges the pub's duty of care. Ought it really matter whether the pub-induced intoxication triggers a fall while walking home as opposed to a fall once the drunken patron has successfully crossed the threshold into his house? Does it make any sense that liability can be imposed for alcohol-caused injury to third parties before arrival at home but not if same injury occurs after leaving the home a few minutes later?
- [82] The test for causation in tort is set out in *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Resurfice Corp. v. Hanke*, 2007 SCC 7; *Blackwater v. Flint*, 2005 SCC 58; and *Clements v. Clements*, 2012 SCC 32: causation is established when the plaintiff proves on a balance of probabilities that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The general, but not necessarily conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant. Causation is essentially a practical question of fact which can best be answered by ordinary common sense. And it is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury as long as it is part of the cause of an injury, the defendant is liable: *Athey* at para. 17
- [83] In the present case it would be artificial in the extreme to say that Rockwell's intoxication, which was caused at least in part by the excessive consumption of alcohol at the pub, was not a cause of the subsequent accident simply because he spent a few minutes at home before again venturing onto the road. I have found as a fact that the pub's breach of duty led to Rockwell being substantially impaired when he first left the pub and got into his vehicle. That intoxication still existed at the time of the accident, albeit increased by subsequent

alcohol consumption, and hence it was clearly part of the cause of the accident and of the resulting injuries sustained by the plaintiff. Applying the causation principles referred to above, that is sufficient to found liability on the part of the pub in this case.

[84] I recognize the argument that because of Rockwell's attendance at home, the pub's breach of duty might no longer have been a "proximate cause" of the accident or:

in other words, that the damage was not too remote from the factual cause. ... The remoteness inquiry assumes that but for the defendant's wrongful act, the plaintiff's loss would not have occurred, but places legal limits on the defendant's liability: *Hussack v. Chilliwack School District* No. 33, 2011 BCCA 258 at para. 54.

[85] It may well be that our Court of Appeal will determine, as a matter of general principle, that arriving safely home should limit (or eliminate) a pub's liability for damage thereafter caused to third parties by an intoxicated patron. Thus far at least, there is no authority to that effect that is binding upon me and I decline to make such a ruling in the circumstances of this particular case. In my view, delivery of the intoxicated patron into the hands of a sober and responsible person might arguably permit the elimination of otherwise indeterminable liability, but that did not occur here.

[86] I hold that the pub is liable to the plaintiff. All that remains is to determine the degree of fault that should be apportioned to the pub so that issues of contribution and indemnity as between the pub and ICBC/Ridge can be determined.

Allocation of Fault

[87] I repeat the law respecting allocation of fault in tort cases summarized in *Matkin v. Hogg*, 2015 BCSC 560, as follows:

[65] Apportionment of liability under the Negligence Act is not based on assessing degrees of causation but rather assessing degrees of "fault". In this context, the concept of fault means "blameworthiness" and the task is to gauge the amount by which each party's conduct in causing the accident fell short of the standard of care required of that person in all the circumstances. This latter inquiry is informed by various factors, including the nature and magnitude of the departure from the required standard of care and the gravity of risk thereby created. (See *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 100 BCSC 212, and the case law discussed in *Aberdeen v. Langley (Township)*, 2007 BCSC 993.)

[66] In the *Aberdeen* case *supra*, the following discussion of fault apportionment appears:

[58] The B.C. Court of Appeal established in *Ottosen v. Kasper* (1986), 37 C.C.L.T. 270 (B.C.C.A.) that the apportionment of fault under section 1 of the Negligence Act should be based on the weight of fault that should be attributed to each of the parties, not on the weight of causation. Lambert J.A. based this conclusion on the wording of the Negligence Act, which speaks of "fault," and equated fault with blameworthiness. This approach to apportionment was subsequently confirmed in *Cempel*, *supra*, as follows at [para.] 19:

The Negligence Act requires that the apportionment must be made on the basis of "the degree to which each person was at fault". It does not say that the apportionment should be on the basis of the degree to which each person's fault caused the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances.

[59] The relative blameworthiness approach is therefore quite clearly established as the appropriate approach to apportionment of damages in British Columbia.

[60] Although assessing the relative blameworthiness of the parties is the correct approach, there is some difficulty in quantifying that concept. In this regard, the words of Lambert J.A. in *Cempel*, *supra*, at [para.] 24 are instructive:

In the apportionment of fault there must be an assessment of the degree of the risk created by each of the parties, including a consideration of the effect and potential effect of occurrences within the risk, and including any increment in the risk brought about by their conduct after the initial risk was created. The fault should then be apportioned on the basis of the nature and extent of the departure from the respective standards of care of each of the parties.

[61] Finch J.A. (as he then was) expanded upon the concept of relative fault in *Alberta Wheat Pool v. Northwest Pile Driving Ltd.* (2000), 80 B.C.L.R. (3d) 153, 2000 BCCA 505 at [para.] 46 as follows:

Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

[62] Thus, fault is to be determined by assessing the nature and extent of the departure from the standard of care of each of the parties. Relevant factors that courts have considered in assessing relative degrees of fault were summarized by the Alberta Court of Appeal in *Heller v. Martens*, *supra*, at [para.] 34 as follows:

1. The nature of the duty owed by the tortfeasor to the injured person
2. The number of acts of fault or negligence committed by a person at fault
3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault
4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy. Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis

5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy

[Authorities omitted.]

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[63] Many of the above-noted factors are discussed in Chiefetz, *Apportionment of Fault in Tort*, supra, at pp. 102-104. Considering that, I conclude it would be appropriate to add the following as relevant factors:

6. the gravity of the risk created;
7. the extent of the opportunity to avoid or prevent the accident or the damage;
8. whether the conduct in question was deliberate, or unusual or unexpected; and
9. the knowledge one person had or should have had of the conduct of another person at fault.

[64] These factors were applied, for example, in *Cempel*, supra, a case where the plaintiff had climbed over a fence onto the defendant's private property to access a hot spring pool, and suffered severe burns as a consequence. In that case, the defendant had created a serious hazard with the pool of hot water, bore sole responsibility for maintaining the fence around the hot pool to prevent access, failed to post signs warning of that hazard, and knew that young persons often went to the pool at night.

[65] However, the fact that the fault results from an active versus a passive act of a party should not impact on the assessment of the degree of relative fault. Lambert J.A. observed in *Cempel*, supra, at [para.] 23:

I do not think that the fact that the fault on the part of the plaintiff was an active fault, whereas the fault on the part of the defendant was a passive fault, at least at the time of the incident itself, should form any basis in this case for attributing more of the fault to the plaintiff than to the defendant.

Liability was apportioned 60% to the defendant and 40% to the plaintiff, reversing the trial judge's apportionment of 25% and 75%, respectively.]

[66] Another important factor in assessing the relative degree of blameworthiness of the parties is the magnitude of the departure from the standard of care. For example, in *Alberta Wheat Pool*, supra, the plaintiff's grain loading facility was destroyed by a fire caused by molten slag from the defendant's welding activities. The defendant was negligent in not thoroughly wetting the area in which welding was taking place. The plaintiff was contributorily negligent in having a fire protection system which did not meet recommended standards. On the issue of apportionment, Finch J.A. for a majority of the Court of Appeal found that both parties exhibited a substantial or significant departure from the standard of reasonable care expected of each. He noted at [para.] 55 that "[w]hile the fault of the two is different in kind, I do not see how one can justify a conclusion that their faults differ in degree." Thus,

liability was apportioned equally pursuant to s. 1(2) of the Negligence Act. McEachern C.J.B.C. in dissent found the owner's fault to be higher: the owner's failure was considered and deliberate, while the contractor's fault was accidental and unexpected. The contractor had failed to water sufficiently, but it did not fail to water at all.

- [67] Thus, the key inquiry in assessing comparative blameworthiness is the relative degree by which each of the parties departed from the standard of care to be expected in all of the circumstances. This inquiry is informed by numerous factors, including the nature of the departure from that standard of care, its magnitude, and the gravity of the risk thereby created.
- [67] The Aberdeen trial decision was overturned on appeal with respect to the question of contributory negligence on the part of the plaintiff and the issues of contributory negligence and apportionment (in the event of a finding of contributory negligence) were remitted for a re-trial: *Aberdeen v. Zanatta*, 2008 BCCA 420 and 2009 BCCA 160. However, the exposition of law in the trial decision has been cited in many subsequent cases and the list of "Aberdeen factors" for assessing relative degrees of fault have attracted widespread application.
- [88] The apportionment of fault by the courts as between intoxicated patrons and commercial hosts varies in the case law.
- [89] In *Holton v. MacKinnon et al*, 2005 BCSC 41, the court allocated the aggregate amount of 30% fault against the two pubs who had contributed to the intoxication. In *Neufeld v. Foster*, [1999] B.C.J. No. 764 (S.C.), 20% fault was allocated to the pub. In *McIntyre v. Grigg* (2006), 83 O.R. (3d) 161 (C.A.), a jury allocation of 30% fault to the pub was affirmed on appeal. In *Laface v. McWilliams et al.*, 2005 BCSC 291, fault was allocated 50/50 between the drunk driver and the pub responsible for his intoxication.
- [90] Each case will, of course, turn upon its own facts. However, as a matter of general principle, it seems to me that the responsibility for damages in commercial host cases should lie primarily with the drunk driver and particularly so where, as here, the driver's conduct is completely inexcusable and resulted in reckless endangerment of the public. Such deliberate misconduct is much more blameworthy than negligence simpliciter.
- [91] In this case, the pub was clearly negligent but there is no proof of any deliberate disregard of its obligations. Mistakes can happen when the establishment is understaffed or is particularly busy. This does not excuse the pub from liability but in appropriate circumstances can rightly attract a lesser degree of blameworthiness and particularly so where, as here, the patron recklessly compounded the risk by consuming more alcohol following his departure from the premises.
- [92] In the circumstances, a fair allocation of fault as between Rockwell and the pub in this case would be 75% and 25% respectively.

Summary and Conclusion

[93] While contributory fault on the part of the plaintiff is alleged in the pleadings, the parties have all agreed no such fault exists on the facts. Both Rockwell/Ridge and Cambie Malone's are therefore jointly and severally liable to the plaintiff for the accident and the resulting injuries. As between the two of them, for the purposes of contribution and indemnity, fault is allocated 75% to Rockwell/Ridge and 25% to Cambie Malone's. The claims against the other defendants and third parties are dismissed.

[94] Costs will follow the event unless there are matters that should be brought to my attention that might lead to a different result. If so, the parties are at liberty to make further submissions within 30 days.

"KENT J."

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