An Update Regarding the Liability of Employers for Injuries Resulting from the Intoxication of an Employee

By William E. McNally and Barbara E. Cotton [1]

The case law governing the liability of an employer for injuries resulting from the intoxication of an employee has a different origin and proceeds on different principles than that developed around the theory of commercial host liability. This is illustrated by the recent case of *Hunt (Litigation Guardian of)* v. *Sutton Group Incentive Realty Inc.*,[2] a decision of Marchand J. of the Superior Court of Justice, which has recently imposed liability on the employer, the Sutton Group. In this case the plaintiff was employed as a receptionist with the realtor. On December 16, 1994 the employer held an office party at its business establishment. The plaintiff reported to work at 1:00 in the afternoon and attended the party but, while attending the party, she would answer the telephone and was also expected to clean up after the guests were gone. At approximately 4:00 in the afternoon, after noting her state of intoxication, her employer stated that he would call her common-law husband to come and pick her up. The common-law husband was not called, however. She left the employer's office at approximately 6:30 p.m. and went on to drink with others at the Pub, where she had two more drinks. A winter storm was in progress and there was freezing rain which turned to snow. She had to drive some distance to her home. She had a motor vehicle accident on her way home and suffered brain injury. She sued her employer and the Pub.

In assessing whether the employer owed a duty of care to the plaintiff Marchand J. first noted that the claim was based on the law of employer/employee, and not on a theory of commercial host liability, *inter alia*. He then referred to the broad "neighbour" test of *M'Alister (Donoghue)* v. *Stevenson*[3] and referred to the following statements as to an employer's duty of care:

> "Smith J. of the British Columbia Supreme Court in *Rice* v. *Chan Estate* (1998), 62 B.C.L.R. (3d) 113 (S.C.) quotes *The Law of Torts*, 9th ed. (Sydney: L.B.C. Information Services 1998), in which J.G. Fleming writes at p. 559:
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> > "Today, it is well settled that an employer . . . owes an overriding managerial responsibility to safeguard [his

> or her employees] from unreasonable risks of personal injury, in regard to the fundamental conditions of employment . . . - the safety of plant, premises and method of work. The relevant standard of care from employers is high and over many years tended to increasing stringency."

At para. 44, the Court referred to the English Court of Appeal in *Naismith* v. *London Film Productions Limited*, [1939] 1 All E.R. 794 at pp. 797-98, 83 Sol. Jo. 175 (C.A.):

> "The relationship of the parties was not that of invitor and invitee, but that of employer and employee, and it follows that the jury should have been directed that the defendant's duty was not merely to warn against unusual dangers known to them, and not to the plaintiff, but also to make the place of employment, and the plant and material used, as safe as the exercise of reasonable skill and care would permit."

L.N. Klar text, *Tort Law* (Toronto: Carswell, 1996) at p. 161:

> "There are several other formal relationships which involve duties of assistance or protection. One of the clearest examples of a relationship which involves the right of one person to control the behaviour of another is the employer-employee relationship. Concomitant with this right to control is the obligation to protect . . . The employer is required to exercise reasonable care to ensure the safety of the employee. It has also been held that the duty owed by an employer to its employee to provide safe working conditions cannot be delegated to third parties.""

After referring to leading commercial host liability cases and the trial level decision of the recent case of *John* v. *Flynn* (to be discussed later), Marchand J. stated:

> "On the basis of these aforementioned cases, I find that the defendant Sutton, as the plaintiff's employer, did therefore owe a duty to the plaintiff, as its employee, to safeguard her from harm. This duty to safeguard her from harm extended beyond the simple duty while she was on his premises. It extended to a duty to make sure that she

> would not enter into such a state of intoxication while on his premises and on duty so as to interfere with her ability to drive home afterwards. This duty was certainly much more evident in the circumstances where the employee was required to travel a substantial distance, at night-time, in the middle of a serious winter storm. He ought to have foreseen the dangerous conditions made worse by the intoxicated condition of his employee. He ought to have anticipated the possible harm that could have happened to her, and, in fact, taken positive steps to prevent her from driving home.
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> I find that the defendant Sutton did not discharge this duty of care towards the plaintiff. I reject his position that he had done so by offering a cab to his employees generally, and even having possibly specifically invited to drive the plaintiff home as suggested by Dorothy Culbert, one of the defendant's independent real estate agents. . . Furthermore, he could have easily phoned her husband to come and pick her up. He could even have called the police if need be. These were only some of the avenues which he failed to pursue, especially considering the very bad weather conditions at the time in question. Not only was he aware, or ought to have been aware of her degree of intoxication, he also ought to have been aware of the danger he was placing his employee in in allowing her to drive home by herself while intoxicated in such bad weather conditions. Furthermore, he ought to have foreseen that by maintaining an open and unsupervised bar, he would be incapable of monitoring the alcohol consumption of an employee, which let her into the danger in question. I do not accept that he had discharged his duty simply by inquiring as to whether he ought to call her husband . . ."

And further:

> "As an employer, I find that the defendant Sutton not only owed its employee an obligation to take reasonable care to avoid acts or omissions which it could reasonably have foreseen would likely cause her some harm, it also owed its employee an overriding managerial responsibility to safeguard her from an unreasonable risk of personal injury while on duty. As stated by the Klar text on Tort Law, *supra*, this duty cannot be delegated to third parties and, therefore, the defendant Sutton owed the plaintiff a duty to personally intervene and prevent an intoxicated employee from driving home and certainly more so in the weather conditions existing at the time. It owed a duty to the plaintiff to take positive steps in that regard. It

> was open to the defendant to send the plaintiff home by taxi, if necessary to take her car keys away and to take custody of her car. Alternatively, it should have taken steps to call her common-law husband to come and pick her up. Alternatively, he could have taken her to a local hotel or found somebody else who had not been drinking to do so or to drive her home."

In the result the plaintiff was found 75% contributory negligent for her injuries, and the commercial host and the employer found to be jointly and severally liable for the remaining 25%.

On the other hand, in *John* v. *Flynn*,[4] a decision of the Ontario Court of Appeal per Finlayson J.A., an employer was held not to be liable for the injury caused to the plaintiff John as a result of the actions of the intoxicated employee Flynn. A jury had apportioned the liability of the parties 70% as against the defendant Flynn and 30% as against the employer Eaton Yale. The trial judge had given judgement in accordance with the award of the jury. At issue on appeal was whether an employer owed a duty of care to third parties who suffered injuries as a result of the negligent driving of an employee who became intoxicated partly during working hours and partly outside of working hours but in circumstances unrelated to his employment. The Ontario Court of Appeal allowed the appeal and dismissed the action against the employer.

In this case Flynn had been the employee of Eaton Yale since 1984. Eaton Yale operated a unionized plant and manufactured "leaf springs" for use in truck suspension systems. Flynn worked in the forge department where the raw steel was heated.

On the day in question, Flynn drank steadily for 8 hours before reporting for work and consumed more alcohol during his breaks, which he took in his truck in the plant's parking lot. Flynn took steps to conceal that he was drinking. He completed his shift without incident and his supervisor did not observe any signs of intoxication. Flynn then drank another beer in his truck and returned home. He then headed out again to visit a friend and the accident occurred shortly

afterwards. John sued for damages for his injuries suffered in the accident and alleged the liability of Flynn and the employer Eaton Yale.

Several years earlier, Flynn had notified his employer that he had an alcohol abuse problem so that he could participate in an employee assistance program and attend a residential substance abuse program. When he returned to work after attending the employee assistance program he signed a "Last Chance Agreement" under which he agreed to certain conditions of his re-employment. The employer did not monitor Flynn's obligations under the Last Chance Agreement and because of the company's confidentiality obligations Flynn's new supervisor was not told that Flynn had entered into the employee assistance program or that he had attended the residential treatment program. The plaintiff's theory of liability of the employer was based primarily on a failure to monitor Flynn.

In the first instance John was successful before a jury which apportioned liability 70% as against Flynn and 30% as against his employer. The appeal was allowed on the basis that the trial judge did not properly instruct the jury. The trial judge had focussed on the employer's duty of care towards the employee, and had failed to appreciate that the duty on an employer to provide a safe working environment for its employees did not extend beyond the workplace and that the duty owed was to the workforce as a whole, not to the delinquent employee. When Flynn told his employer that he had a drinking problem and sought help, this did not impose a special duty on the employer to monitor his consumption of alcohol. The employer did not owe a duty of care given that the employer was not aware that Flynn was intoxicated on the night in question, did not provide him with alcohol and did not condone his driving while intoxicated. Further, the accident was not associated with the employer in any other way than that one of its employees, who had finished his shift for the night, was involved in the crash.

Finlayson J.A. stated that the essential error made by the trial judge was in confusing cases which articulated the duty of an employer to provide its employees with a safe work

environment with those cases in which a commercial host was found liable for injuries suffered by or caused by intoxicated patrons. The two duties are unrelated. Finlayson J.A. stated:

> "This is where, in my view, the case went off the rails. There is a clear duty on an employer to provide a safe work environment for its employees. Where safety rules have been promogulated, management should insist that they be observed. Where an individual employee is observed to be in violation of a work rule (eg. not wearing safety goggles) he should be admonished for his own safety. Where he is operating a piece of machinery in a manner that endangers other workers, he should receive further instruction. But the focus is on the workplace and in broad terms the duty of care to its employees does not extend beyond the workplace. The notion that an employer, operating a plant for the manufacture of truck and automobile parts, has a duty to monitor its employees to determine if it is safe for them to drive home is novel in the extreme."

An earlier case is *Jacobsen* v. *Nike Canada Ltd.*,[5] a decision of Levine J. of the British Columbia Supreme Court. In this case the plaintiff was a 19-year old who had been employed by Nike for approximately three months. He was working from 8:30 in the morning until 11:30 at night setting up a display for a trade show. His immediate supervisors brought in beer for the work crew to consume and did not monitor how much beer they were drinking. The crew in fact had 8 to 10 beers, and played a drinking game. When the crew left at 11:30 at night the supervisors did not ask them how much they had drank, nor whether they were capable of driving home. They were not offered taxi fare or suggested any other alternative transportation. These supervisors had specifically requested that the work crew bring their own transportation to work in the morning. On the way home the employee Jacobsen drove his car into the ditch and was rendered a quadriplegic. He sued his employer

Levine J. referenced the duty on an employer to provide a safe workplace as established by *Regal Oil & Refining Co.* v. *Campbell*,[6] and *Naismith* v. *London Film Productions Ltd.*[7] He found that the standard of care imposed on the employer was higher than the standard of care imposed on commercial host tavern owners in that an employer had to take reasonable care for the safety of its employees. He stated that the employer had a responsibility not to introduce into the

workplace conditions that were reasonably foreseeable to put the employee at risk, such as providing alcohol, when the employee was required to drive to work.

Levine J. further held that there was a specific obligation on the employer to monitor the consumption of alcohol by the employees. He stated:

> ". . . The law imposes a higher standard of care on an employer than on a tavern-owner. If it is considered too onerous for the tavern-owners to monitor their patron's consumption, the same cannot be said of employers who provide alcohol to their employees. An employer is required to safeguard its employees from unreasonable risks. The risk of injury from becoming impaired from consuming alcohol and driving in that condition is obvious to any reasonable person. It is not too onerous, in my view, for an employer who provides alcohol to its employees to monitor consumption, so that it is in a position in the appropriate circumstances to take affirmative steps to prevent the foreseeable risk of injury. That is especially so in a situation such as this, where the alcohol was provided free in large quantities to a small number of young men who were working hard in a hot environment."

Levine J. further held that the policy of Nike at the Christmas party of providing taxi vouchers to their employees for the trip home and arranging discounted rooms at the hotel where the party was held satisfied the standard of care of the employer.

Further, Levine J. agreed with the plaintiff's counsel that the standard of care owed to the plaintiff depended on the specific circumstances. In this case the plaintiff was the youngest member of the work crew and an inexperienced driver with a 40 minute drive to his home after a long shift. For this reason, the employer was required to exercise more care, and not less, with respect to this plaintiff's safety.

Levine J. concluded:

> "The plaintiff was under the control and supervision of the defendant while the drinking took place on September 6, 1991. He had no prior expectation that he would be drinking that night. He had no

> opportunity to make plans in advance for the effects of drinking, such as arranging for a designated driver or alternate transportation or lodging, as he testified he normally did before attending a party where there would be drinking or going to a bar. His employer effectively encouraged drinking by providing the alcohol and drinking with the plaintiff. It took no steps to restrict or monitor the plaintiff's consumption, took no steps to determine if the plaintiff was impaired when he left work and took no steps to prevent him from driving when it knew the plaintiff would drive home."

The British Columbia Supreme Court decision of *Rice* v. *Chan Estate*[8] imposed liability on the basis of a breach of an employer's duty to keep the workplace safe. The 16 year old Rice worked for Chan in his garage. On the night in question Chan had asked Rice to come to the garage to assist him. Rice and Chan were later found in the car, with the keys in the ignition and the gas tank half full. Rice was slumped over the front seat in a comatose condition and Chan was in the back seat, dead. Rice sued Chan's estate in negligence. L. Smith J. found that Chan owed Rice a duty of care as her employer. He had breached the standard of care by providing her with alcohol, possibly having sex with her, failing to monitor her consumption of alcohol and failing to keep control of the motor vehicle by retaining the keys and remaining conscious.

In *Clarke* v. *Connell*,[9] a decision of Sanderman J. of the Alberta Court of Queen's Bench, the plaintiff was injured during an altercation with the defendant employee Connell who had been provided alcohol during an office Christmas party, paid for by the defendant employer Hydra. The plaintiff claimed that the employer had known the tendency of the employee to become abusive when consuming alcohol and that the employer had owed the plaintiff a duty of care which was breached. An application for a summary dismissal of the action by the employer was dismissed. Sanderman J. held that the employer had a sound argument that it owed no duty to the plaintiff and that, even if it had a duty, it could not have forseen the risk of an altercation between the plaintiff and Connell. Even though he found that the plaintiff had only a marginal chance of succeeding he further found that there was a genuine issue to be tried.

Reference should also be made to the leading cases on commercial host liability as the cases dealing with employer liability frequently refer to them. The seminal case establishing liability in a commercial host relationship is *Jordan House Ltd.* v. *Menow and Honsberger*.[10] In this case Menow was well-known to the hotel operator and had been barred from the premises in the past. The hotel fronted a major highway and the beverage room operator knew that Menow would have to go home by way of the highway. The hotel served Menow alcohol, which increased his state of inebriation. They then turned Menow out and he was struck by the Honsberger vehicle. The accident occurred within a half hour after he was ejected from the hotel, while he was staggering near the centre of the highway.

The plaintiff advanced two theories of liability of the hotel: (i) that the hotel was in breach of a common law duty to Menow not to serve him intoxicating drink when he was visibly intoxicated, and (ii) that the hotel had a duty not to eject an intoxicated patron into potentially dangerous circumstances. There were two judgments written by the Supreme Court of Canada, that of Laskin J. and that of Ritchie J. Laskin J. found the liability of the hotel on the basis of the duty not to eject an intoxicated patron into dangerous circumstances; Ritchie J. found the liability of the hotel on the breach of its duty not to serve an intoxicating drink when he was visibly intoxicated.

Laskin J. stated at pp. 110-113:

> "Given the relationship between Menow and the hotel, the hotel operator's knowledge of Menow's propensity to drink and his instructions to employees not to serve him unless he was accompanied by a responsible person, the fact that Menow was served, not only in breach of this instruction, but as well in breach of statutory injunctions against serving a patron who is apparently in an intoxicated condition, and the fact that the hotel operator was aware that Menow was intoxicated, the proper conclusion is that 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 second leading case from the Supreme Court of Canada is *Stewart* v. *Pettie* .[11] In this case the Stewarts and the Petties went to the Mayfield Theatre. Over the course of the entertainment, Stuart Pettie became drunk. His wife and Mrs. Stewart were sober when they left, however, and agreed to Stuart Pettie driving the car. He lost control and Mrs. Stewart was rendered a quadriplegic. At issue before the Supreme Court of Canada was whether the Mayfield Hotel was liable under the *Jordan House* principle. Major J. stated at p. 235:

> "Every person who enters a bar or restaurant is in an invitor-invitee relationship with the establishment, and is therefore in a "special relationship" with that establishment. However, it does not make sense to suggest that, simply as a result of this relationship, a commercial host cannot consider other relevant factors in determining whether in the circumstances positive steps are necessary.
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> The existence of this "special relationship" will frequently warrant the imposition of a positive obligation to act, but the *sine qua non* of tortious liability remains a foreseeability of the risk."

In the result, however, Major J. held that the release of the intoxicated Stuart Pettie into the charge of his sober wife and sister-in-law was sufficient to absolve the responsibility of the Mayfield Hotel as the Mayfield had taken a sufficient "positive step" to meet its duty of care.

Stewart v. *Pettie* was referenced in *John* v. *Flynn* as setting out the modern principles to determine the existence of a duty of care. There are two questions to be asked:

(1) Is there a significantly close relationship between the parties so that it might be reasonably contemplated that carelessness on one parties part might cause damage to the other?

(2) Are there any considerations which ought to negative or limit the scope of the duty, the class of persons to whom the duty is owed or the damages which flow from the breach?

A further leading case is *Crocker* v. *Sundance Northwest Resorts Ltd.* [12], wherein a resort sponsored a tubing competition on the ski hills. Crocker bought alcoholic drinks from the bar at the resort throughout the day of the competition and entered the competition inebriated. He suffered severe injuries and sued the resort.

Wilson J., writing for the Supreme Court of Canada, noted that the trial judge had found the resort guilty of negligence because: "Under the principle laid down in *Jordan House* . . . the defendant resort was under an affirmative duty to prevent the plaintiff from putting himself at risk".

Wilson J. then reviewed *Jordan House* in detail. She stated: "The *Jordan House* case, *supra*, is the leading Supreme Court authority on the imposition of a duty to take positive action to protect another. Thus a relationship between the hotel operator and the patron in this case was close enough to justify the imposition of a duty of care. The duty of care required the defendant to take certain positive steps to avert potential calamity."

There are several cases in which employees have successfully brought action on the basis of commercial host liability. For example, in *Neufeld* v. *Foster*,[13] a decision of C.A. Smith J. of the British Columbia Supreme Court, an action was brought against a commercial host when the plaintiff was involved in a motor vehicle accident following a night of drinking. In this case four workers employed by a moving company decided to go for a "quick beer", which led to a night of drinking. They were, in fact, the last patrons to leave the bar. The bartender had asked one of them to hand over his car keys, but he denied that he had them, saying that he had given them to someone else. She did not ask the other three members of the drinking party to turn over their car keys. She then dialled a number for a taxi, and told one of the parties how to give the taxi driver the right directions to get them home, but she did not ensure that they were actually placed in the taxi. The commercial host was found to be liable because the bartender did not ask all members of the

drinking parties for their car keys, did not provide the funds for the taxi, did not directly give money to the taxi driver or otherwise confirm that the taxi was taken by the drunken patrons.

In an earlier case, *Gouge* v. *Three Top Investment Holdings Inc*.,[14] a decision of Pardu J. of the Ontario Court of Justice (General Division), the plaintiff attended a union social event a hotel. He drank continuously throughout the evening, purchasing alcohol from a cash bar. At the end of the evening he was extremely intoxicated and the organizer of the event offered him a ride home. He changed his mind and insisted on driving his motorcycle home and was in a serious motor vehicle accident. It was held that in providing a cash bar arrangement as requested by the union, the hotel had effectively deprived itself of any opportunity to monitor the alcohol consumption of the patrons.

A tangentially analogous recent case in which one hockey team was held not to be liable for the injuries suffered by the intoxicated hockey players of another team is *Calliou Estate (Public Trustee)* v. *Calliou Estate*,[15] a decision of Moen J. of the Alberta Court of Queen's Bench. In this case there was a hockey tournament hosted by the Andrew Raiders hockey team. Members of the Andrew Raiders hockey team were joined as third and fourth parties in the action commenced by the plaintiff for personal injuries. It was alleged that these team members had provided alcohol to the defendant motor vehicle driver, who was a member of the Kikino Chiefs hockey team, which attended the tournament. In the motor vehicle accident several people were injured or killed, including four hockey players from the Kikino Chiefs. The Kikino Chief players were provided with beer in their dressing room. After the game the Kikino Chiefs drove to a tavern where they redeemed coupons given to them by the Andrew Raiders team for free jugs of beer. Following this they drove to a liquor store and purchased more beer. They then attended at a saloon. It was later that night that the motor vehicle being driven by Calliou, a Kikino Chief member, crossed the centre line and collided with a truck. All four Kikino Chief members died.

In assessing whether a duty of care was owed by the Andrews Raiders to the Kikino Chiefs, Moen J. reviewed the governing principles as follows:

> "The duty of care must arise from a special relationship of proximity, such as where commercial vendors of alcohol serve alcohol to patrons who may be expected to use the roads. . . This duty is also owed to third parties that are using the highways.
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> There is no duty of care owed when one adult supplies alcohol to another, unless the recipient is grossly intoxicated: . . .
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> Where there is a social host, there is no liability if the host had no knowledge of intoxication of his guest and that he would be operating a motor vehicle . . . Where the host has personal knowledge of the drinking habits of his guest and has knowledge that his guest is intoxicated, he has a duty of care . . . Where a host has knowledge of the amount of alcohol the guest has consumed and has reason to suspect that the guest is intoxicated, the duty of care has been established . . .
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> The host must do or omit to do something which contributes to the drunken driving . . .
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> A commercial host can exist based on factors other than the mere existence of an invitor-invitee relationship. Those factors include: the relationship between the parties, the degree of appearance of intoxication and the forseeability of risk . . ."

In the result the Andrews Raiders were held not to be liable as they did not owe a duty of care to the Kikino Chiefs. The relationship was held to be more than a mere social host situation, but less than a full commercial relationship. Although the Andrews Raiders had charged a fee for entering into the tournament and supplied some beer to the teams from the proceeds of the entry fee, the Kikino Chief members had essentially bought the beer themselves throughout the day. Although there was the possibility of a duty of care based on the relationship between the parties, there was no evidence of any appearance of intoxication of the Kikino Chiefs and thus a duty of care did not arise. The thread running through the cases is the knowledge of the state of intoxication on the part of the guest who drives and injures himself or a third party.

Conclusion

As can be seen the case law regarding the liability of an employer for damages resultant from the intoxication of an employee is in a state of flux. It seems clear that the cases imposing liability on an employer are to be distinguished from commercial host liability cases in that the duty of an employer is to provide a safe workplace for the employee. The recent case of *John* v. *Flynn* illustrates that the courts may be reticent to "confuse" this specific duty of an employer with liability arising from breach of the duty of care owed by a commercial host and may be careful to limit the employer's duty to safeguarding the workplace. The case law is likely still in too early a stage of development to ascertain the potential scope of the liability of an employer for injuries resulting from the intoxication of an employee, however, and we will have to await further developments.

ENDNOTES

1. William E. McNally is the senior partner of McNally Cuming Allchurch, Calgary, Alberta and practices extensively in the personal injury and class action areas; Barbara E. Cotton is the principal of Bottom Line Research & Communications, Calgary, Alberta.

2. *Hunt (Litigation Guardian of)* v. *Sutton Group Incentive Realty Inc*. (2001), 196 D.L.R. (4th) 738

3. *M'Alister (Donoghue)* v. *Stevenson*, [1932] A.C. 562

4. *John* v. *Flynn* (2001), 54 O.R. (3d) 774; leave to appeal to the Supreme Court of Canada filed at [2001] S.C.C.A. 394

5. *Jacobsen* v. *Nike Canada Ltd.* (1996), 133 D.L.R. (4th) 377

6. *Regal Oil & Refining Co.* v. *Campbell*,[1936] S.C.R. 309

7. *Naismith* v. *London Film Productions Ltd*., [1939] 1All E.R. 794

8. *Rice* v. *Chan* (1998), 62 B.C.L.R. (3d) 113

9. *Clarke* v. *Connell* (1997), 10 C.P.C. (4th) 276

10. *Jordan House Ltd.* v. *Menow and Honsberger*, [1974] S.C.R. 239; (1975), 38 D.L.R. (3d) 105 (S.C.C.)

11. *Stewart* v. *Pettie*, [1995] 1 S.C.R. 131; (1995), 121 D.L.R. (4th) 222

12. *Crocker* v. *Sundance Northwest Resorts Ltd*., [1988] 1 S.C.R. 1186; (1988), 29 O.A.R. 1 (S.C.C.)

13. *Neufeld* v. *Foster*, [1999] B.C.J. No. 764

14. *Gouge* v. *Three Top Investment Holdings Inc*., (1994), 11 M.V.R. (3d) 216

15. *Calliou Estate (Public Trustee)* v. *Calliou Estate*, [2002] A.J. No. 74