**SUPREME COURT OF CANADA**

**CITATION:** Childs *v.* Desormeaux, 2006 SCC 18
[2006] S.C.J. No. 18

**DATE:** 20060505
**DOCKET:** 30472

**BETWEEN:**

**Zoe Childs, Andrew Childs, Pauline Childs, Heather Lee Childs and Jennifer Christine Childs**
Appellants
and
**Desmond Desormeaux, Julie Zimmerman and Dwight Courrier**
Respondents
and
**Mothers Against Drunk Driving (MADD Canada) and Insurance Bureau of Canada**
Interveners

**CORAM:** McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Abella JJ.

**REASONS FOR JUDGMENT:** (paras. 1 to 49) McLachlin C.J. (Bastarache, Binnie, LeBel, Deschamps, Fish and Abella JJ. concurring)



---

childs *v.* desormeaux

**Zoe Childs, Andrew Childs, Pauline Childs,**
**Heather Lee Childs and Jennifer Christine Childs** *Appellants*

*v.*

**Desmond Desormeaux, Julie Zimmerman and Dwight Courrier** *Respondents*

and

**Mothers Against Drunk Driving (MADD Canada) and**
**Insurance Bureau of Canada** *Interveners*

**Indexed as: Childs *v.* Desormeaux**

**Neutral citation: 2006 SCC 18.**

File No.: 30472.

2006: January 18; 2006: May 5.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Abella JJ.

on appeal from the court of appeal for ontario

*Torts — Duty of care — Social host liability — Accident caused by guest driving his car after leaving party intoxicated — Whether social host owes duty of care to third parties who may be injured by intoxicated guest.*

After leaving a party held in a private home, D, who was then impaired, drove his vehicle into oncoming traffic and collided head-on with another vehicle. One of the passengers in the other vehicle was killed and three others seriously injured, including C. C brought an action against the hosts of the party for the injuries she suffered. Both the trial judge and the Court of Appeal concluded, for different reasons, that social hosts of parties do not owe a duty of care to members of the public who may be injured by an intoxicated guest's conduct.

*Held*: The appeal should be dismissed.

Social hosts of parties where alcohol is served do not owe a duty of care to public users of highways. The proximity necessary to meet the first stage of the *Anns* test has not been established. First, the injury to C was not reasonably foreseeable on the facts established in this case. There was no finding by the trial judge that the hosts knew, or ought to have known, that D, who was leaving the party driving, was impaired. Also, although the hosts knew that D had gotten drunk in the past and driven, a history of alcohol consumption and impaired driving does not make impaired driving, and the consequent risk to other motorists, reasonably foreseeable. Second, even if foreseeability were established, no duty would arise because the wrong alleged is a failure to act or nonfeasance in circumstances where there was no positive duty to act. No duty to monitor guests' drinking or to prevent them from driving can be imposed having regard to the relevant legal principles. A social host at a party where alcohol is

served is not under a duty of care to members of the public who may be injured by a guest's actions, unless the host's conduct implicates him or her in the creation or exacerbation of the risk. Short of active implication, a host is entitled to respect the autonomy of a guest. The consumption of alcohol, and the assumption of the risks of impaired judgment, is in almost all cases a personal choice and an inherently personal activity. Absent the special considerations that may apply in the commercial context, when such a choice is made by an adult, there is no reason why others should be made to bear its costs. Lastly, with respect to the factor of reasonable reliance, there is no evidence that anyone relied on the hosts in this case to monitor guests' intake of alcohol or prevent intoxicated guests from driving. While, in the commercial context, it is reasonable to expect that the provider will act to protect the public interest, the same cannot be said of the social host, who neither undertakes nor is expected to monitor the conduct of guests on behalf of the public. [24-32] [38-47]

Because a *prima facie* duty of care has not been established in this case, it is unnecessary to consider whether any duty would be negated by policy considerations at the second stage of the *Anns* test. [48]

**Cases Cited**

**Applied:** *Anns v. Merton London Borough Council*, [1978] A.C. 728; *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79; **distinguished:** *Stewart v. Pettie*, [1995] 1 S.C.R. 131; *Hendricks v. The Queen*, [1970] S.C.R. 237; *Horsley v. MacLaren*, [1972] S.C.R. 441; *Arnold v. Teno*, [1978] 2 S.C.R. 287; *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186; *Lambert v. Lastoplex Chemicals Co.*, [1972] S.C.R. 569; *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634; *Dziwenka v. The Queen in right of Alberta*, [1972] S.C.R. 419; *Bain v. Board of Education (Calgary)* (1993), 146 A.R. 321; *Dunn v. Dominion Atlantic Railway Co.* (1920), 60 S.C.R. 310; *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239; *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 O.R. (3d) 487; **referred to:** *Donoghue v. Stevenson*, [1932] A.C. 562; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69.

**Statutes and Regulations Cited**

*Liquor Control Act*, R.S.O. 1990, c. L.18.

*Liquor Licence Act*, R.S.O. 1990, c. L.19.

N.J. Stat. Ann. §§ 2A: 15-5.5 to 5.8 (West 2000).

R.R.O. 1990, Reg. 719.

**Authors Cited**

Fridman, Gerald Henry Louis. *The Law of Torts in Canada*, 2nd ed. Toronto: Carswell, 2002.

APPEAL from a judgment of the Ontario Court of Appeal (O'Connor A.C.J.O. and Weiler and Sharpe JJ.A.) (2004), 71 O.R. (3d) 195, 239 D.L.R. (4th) 61, 187 O.A.C. 111, 23 C.C.L.T. (3d) 216, 4 M.V.R. (5th) 1, [2004] O.J. No. 2065 (QL), affirming a decision of the Ontario Superior Court of Justice (Chadwick J.) (2002), 217 D.L.R. (4th) 217, 13 C.C.L.T. (3d) 259, [2002] O.J. No. 3289 (QL). Appeal dismissed.

*Barry D. Laushway*, *Scott Laushway* and *Beth Alexander*, for the appellants.

No one appeared for the respondent Desmond Desormeaux.

*Eric R. Williams* and *Jaye E. Hooper*, for the respondents Julie Zimmerman and Dwight Courrier.

*Kirk F. Stevens*, for the intervener Mothers Against Drunk Driving (MADD Canada).

*Alan L. W. D'Silva*, *Nicholas McHaffie* and *Vaso Maric*, for the intervener the Insurance Bureau of Canada.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

1. Introduction

1 A person hosts a party. Guests drink alcohol. An inebriated guest drives away and causes an accident in which another person is injured. Is the host liable to the person injured? I conclude that as a general rule, a social host does not owe a duty of care to a person injured by a guest who has consumed alcohol and that the courts below correctly dismissed the appellants' action.

2. Facts

2 This case arises from a tragic car accident in Ottawa in the early hours of January 1, 1999. At 1:30 a.m., after leaving a party hosted by Dwight Courrier and Julie Zimmerman, Desmond Desormeaux drove his vehicle into oncoming traffic and collided head-on with a vehicle driven by Patricia Hadden. One of the passengers in Ms. Hadden's car was killed and three others seriously injured, including Zoe Childs, who was then a teenager. Ms. Childs' spine was severed and she has since been paralyzed from the waist down. Mr. Desormeaux and the two passengers in his car were also injured.

3 Mr. Desormeaux was impaired at the time of the accident. The trial judge found that he had probably consumed 12 beers at the party over two and a half hours, producing a blood-alcohol concentration of approximately 235 mg per 100 ml when he left the party and 225 mg per 100 ml at the time of the accident — concentrations well over the legal limit for driving of 80 mg per 100 ml. Mr. Desormeaux pleaded guilty to a series of criminal charges arising from these events and received a 10-year sentence.

4 The party hosted by Dwight Courrier and Julie Zimmerman at their home was a "BYOB" (Bring Your Own Booze) event. The only alcohol served by the hosts was

three-quarters of a bottle of champagne in small glasses at midnight. Mr. Desormeaux was known to his hosts to be a heavy drinker. The trial judge heard evidence that when Mr. Desormeaux walked to his car to leave, Mr. Courrier accompanied him and asked, "Are you okay, brother?" Mr. Desormeaux responded "No problem", got behind the wheel and drove away with two passengers.

5 The trial judge found that a reasonable person in the position of Mr. Courrier and Ms. Zimmerman would have foreseen that Mr. Desormeaux might cause an accident and injure someone else. However, the *prima facie* duty of care this gave rise to was negatived, in his view, by policy considerations involving the social and legal consequences of imposing a duty of care on social hosts to third parties injured by their guests, government regulation of alcohol sale and use and the preferability of a legislative, rather than a judicial, solution. Accordingly, the trial judge dismissed the action ((2002), 217 D.L.R. ($4^{th}$) 217).

6 The Court of Appeal for Ontario dismissed Ms. Childs' appeal. In its view, the circumstances did not disclose even a *prima facie* duty of care. Unless social hosts are actively implicated in creating the risk that gives rise to the accident, they cannot be found liable. Here, the social hosts "did not assume control over the supply or service of alcohol, nor did they serve alcohol to [Mr.] Desormeaux when he was visibly impaired" ((2004), 71 O.R. (3d) 195, at para. 75). Unlike commercial hosts, they were under no statutory duty to monitor the consumption of alcohol or to control the premises where alcohol was served, nor did anyone rely on them to do so. The Court, *per* Weiler J.A., concluded (at para. 75):

> ... I cannot accept the proposition that by merely supplying the venue of a BYOB party, a host assumes legal responsibility to third party users of the road for monitoring the alcohol consumed by guests. ... It would not be just and fair in the circumstances to impose a duty of care.

7 Ms. Childs appeals to this Court and asks that we reverse the courts below and conclude that Mr. Courrier and Ms. Zimmerman, as social hosts of the party where Mr. Desormeaux was drinking, are liable for the injuries she suffered.

8 The central legal issue raised by this appeal is whether social hosts who invite guests to an event where alcohol is served owe a legal duty of care to third parties who may be injured by intoxicated guests. It is clear that commercial hosts, like bars or clubs, may be under such a duty. This is the first time, however, that this Court has considered the duty owed by social hosts to plaintiffs like Ms. Childs.

## 3. Analysis

### 3.1 *The General Test for a Duty of Care*

9 Before the decision of the House of Lords in *Donoghue v. Stevenson*, [1932] A.C. 562, the law governing tort liability for wrongs to others was a complex of categories derived from cases decided over the centuries. In *Donoghue v. Stevenson*, the House of Lords replaced the category approach with a principled approach. It recognized the existence of a "general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances" (p. 580, *per* Lord Atkin). The general concept of a duty owed to those whom one might injure proved both powerful

and practical. However, it brought with it a question — a question we wrestle with to this day. How do we define the persons to whom the duty is owed?

10 Lord Atkin recognized this problem in *Donoghue v. Stevenson*. He accepted that negligence is based on a "general public sentiment of moral wrongdoing for which the offender must pay", but distinguished legal duties from moral obligation: "... acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief" (p. 580). My legal duty, he said, extends to my "neighbour". Legal neighbourhood is "restricted" to "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question" (p. 580). This concept, sometimes referred to as proximity, remains the foundation of the modern law of negligence.

11 In *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), Lord Wilberforce proposed a two-part test for determining whether a duty of care arises. The first stage focuses on the relationship between the plaintiff and the defendant, and asks whether it is close or "proximate" enough to give rise to a duty of care (p. 742). The second stage asks whether there are countervailing policy considerations that negative the duty of care. The two-stage approach of *Anns* was adopted by this Court in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, at pp. 10-11, and recast as follows:

(1) is there "a sufficiently close relationship between the parties" or "proximity" to justify imposition of a duty and, if so,

(2) are there policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which breach may give rise?

12 In *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69, the Court affirmed the *Anns* test and spoke, *per* Iacobucci J., of three stage-one requirements: reasonable foreseeability; sufficient proximity; and the absence of overriding policy considerations which negate a *prima facie* duty established by foreseeability and proximity: para. 52. Some cases speak of foreseeability being an element of proximity where "proximity" is used in the sense of establishing a relationship sufficient to give rise to a duty of care: see e.g. *Kamloops*. *Odhavji*, by contrast, sees foreseeability and proximity as separate elements at the first stage; "proximity" is here used in the narrower sense of features of the relationship other than foreseeability. There is no suggestion that *Odhavji* was intended to change the *Anns* test; rather, it merely clarified that proximity will not always be satisfied by reasonable foreseeability. What is clear is that at stage one, foreseeability and factors going to the relationship between the parties must be considered with a view to determining whether a *prima facie* duty of care arises. At stage two, the issue is whether this duty is negated by other, broader policy considerations.

13 The plaintiff bears the ultimate legal burden of establishing a valid cause of action, and hence a duty of care: *Odhavji*. However, once the plaintiff establishes a *prima facie* duty of care, the evidentiary burden of showing countervailing policy considerations shifts to the defendant, following the general rule that the party asserting a point should be required to establish it.

14 The courts in this case applied these general principles and concluded, for different reasons, that they did not give rise to a duty of care on social hosts of parties where alcohol is served, to members of the public who may be injured by an intoxicated guest's conduct. The trial judge found that the first stage of the test had been met, but that policy considerations at stage two negated a duty of care. The Court of Appeal, by contrast, found that the first stage of establishing a *prima facie* duty of care had not been met, making it unnecessary to go on to the second stage of the *Anns* test.

3.2 *Is the Proposed Duty Novel?*

15 A preliminary point arises from a nuance on the *Anns* test developed in *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79. The Court in *Cooper* introduced the idea that as the case law develops, categories of relationships giving rise to a duty of care may be recognized, making it unnecessary to go through the *Anns* analysis. The reference to categories simply captures the basic notion of precedent: where a case is like another case where a duty has been recognized, one may usually infer that sufficient proximity is present and that if the risk of injury was foreseeable, a *prima facie* duty of care will arise. On the other hand, if a case does not clearly fall within a relationship previously recognized as giving rise to a duty of care, it is necessary to carefully consider whether proximity is established. Following *Cooper*, the first issue raised in this case is whether claims against private hosts for alcohol-related injuries caused by a guest constitute a new category of claim. Like the courts below, I conclude that it does.

16 Canadian law does not provide a clear answer to the question of whether people who host social events where alcohol is served owe a duty of care to third-party members of the public who may be harmed by guests who leave the event inebriated. The closest

comparison is that of commercial alcohol providers, who have been held to owe a duty to third-party members of the public who are injured as a result of the drunken driving of a patron: *Stewart v. Pettie*, [1995] 1 S.C.R. 131. Although the action was dismissed on the facts, *Stewart* affirmed that a special relationship existed between taverns and the motoring public that could require the former to take positive steps to protect the latter.

17 The situation of commercial hosts, however, differs from that of social hosts. As discussed, in determining whether a duty of care arises, the focus is on the nature of the relationship between the parties. Three differences in the plaintiff-defendant relationship suggest that the possibility of a duty of care on commercial hosts does not automatically translate into a duty of care for social hosts.

18 First, commercial hosts enjoy an important advantage over social hosts in their capacity to monitor alcohol consumption. As a result, not only is monitoring relatively easy for a commercial host, but it is also expected by the host, patrons and members of the public. In fact, commercial hosts have a special incentive to monitor consumption because they are being paid for service. Patrons expect that the number of drinks they consume will be monitored, if only to ensure that they are asked to pay for them. Furthermore, regulators can require that servers undertake training to ensure that they understand the risks of over-service and the signs of intoxication (see e.g. *Liquor Licence Act*, R.R.O. 1990, Reg. 719). This means that not only is monitoring inherently part of the commercial transaction, but that servers can generally be expected to possess special knowledge about intoxication.

19 Second, the sale and consumption of alcohol is strictly regulated by legislatures, and the rules applying to commercial establishments suggest that they operate in a very

different context than private-party hosts. This regulation is driven by public expectations and attitudes towards intoxicants, but also serves, in turn, to shape those expectations and attitudes. In Ontario, where these facts occurred, the production, sale and use of alcohol is regulated principally by the regimes established by the *Liquor Control Act*, R.S.O. 1990, c. L.18, and the *Liquor Licence Act*, R.S.O. 1990, c. L.19. The latter Act is wide-ranging and regulates how, where, by and to whom alcohol can be sold or supplied, where and by whom it can be consumed and where intoxication is permitted and where it is not.

*20* These regulations impose special responsibilities on those who would profit from the supply of alcohol. This is clear by the very existence of a licensing scheme, but also by special rules governing the service of alcohol and, as noted above, special training that may be required. Clearly, the sale of alcohol to the general public is understood as including attendant responsibilities to reduce the risk associated with that trade.

21 The importance of this regulatory environment does not relate to the statutory requirements *per se*, but what they demonstrate about the nature of commercial alcohol sales and about the expectations of purveyors, patrons and the public. Selling alcohol is a carefully regulated industry. The dangers of over-consumption, or of consumption by young or otherwise vulnerable persons, means that its sale and service in commercial settings is controlled. It is not treated like an ordinary commodity sold in retail stores. The public expects that in addition to adherence to regulatory standards, those who sell alcohol to the general public take additional steps to reduce the associated risks. Furthermore, patrons are aware that these special responsibilities have very real and visible manifestations. The imposition of a “cut-off” at the bar is understood, and expected, as part of the institutionalization of these responsibilities. Similarly, in many

establishments, “bouncers” both enforce admission and assist other members of the staff who might have to deal with patrons who may have become intoxicated. These features have no equivalent in the non-commercial context. A party host has neither an institutionalized method of monitoring alcohol consumption and enforcing limits, nor a set of expectations that would permit him or her to easily do so.

22 Third, the contractual nature of the relationship between a tavern keeper serving alcohol and a patron consuming it is fundamentally different from the range of different social relationships that can characterize private parties in the non-commercial context. The appellants argue that there is “nothing inherently special” about profit making in the law of negligence. In the case of alcohol sales, however, it is clear that profit making is relevant. Unlike the host of a private party, commercial alcohol servers have an incentive not only to serve many drinks, but to serve too many. Over-consumption is more profitable than responsible consumption. The costs of over-consumption are borne by the drinker him or herself, taxpayers who collectively pay for the added strain on related public services and, sometimes tragically, third parties who may come into contact with intoxicated patrons on the roads. Yet the benefits of over-consumption go to the tavern keeper alone, who enjoys large profit margins from customers whose judgment becomes more impaired the more they consume. This perverse incentive supports the imposition of a duty to monitor alcohol consumption in the interests of the general public.

23 The differences just discussed mean that the existence of a duty on the part of commercial providers of alcohol cannot be extended by simple analogy to the hosts of a private party. The duty proposed in this case is novel. We must therefore ask whether a duty of care is made out on the two-stage *Anns* test.

3.3 *Stage One: A Prima Facie Duty?*

24 Applying the first stage of the *Anns* test requires, as noted above, an examination of the relationship between the parties to determine if it meets the requirement of sufficient proximity. The question is: What, if anything, links party hosts to third-party users of the highway?

25 The law of negligence not only considers the plaintiff's loss, but explains why it is just and fair to impose the cost of that loss on the particular defendant before the court. The proximity requirement captures this two-sided face of negligence.

26 I conclude that the necessary proximity has not been established and, consequently, that social hosts of parties where alcohol is served do not owe a duty of care to public users of highways. First, the injury to Ms. Childs was not reasonably foreseeable on the facts found by the trial judge. Second, even if foreseeability were established, no duty would arise because the wrong alleged is a failure to act or nonfeasance in circumstances where there was no positive duty to act.

3.3.1 Foreseeability

27 Ms. Childs argues that the parties are linked by the foreseeability of physical harm due to the manner in which the party hosts exercised "control or influence over" the party at which Mr. Desormeaux was drinking.

28 The question of foreseeability is complicated by ambiguity in the findings of the trial judge. The trial judge found that Mr. Desormeaux would be showing "obvious signs

of impairment" (at para. 73), but did not find that the hosts in the circumstances knew, or ought to have known, that Mr. Desormeaux was too drunk to drive. The risks of impaired driving, and their consequences for motorists and their passengers, are well known. However, if there is no finding that the hosts *knew*, or ought to have known, that the guest who was about to drive was impaired, how can it be said that they should have foreseen that allowing him to drive might result in injury to other motorists?

29 Instead of finding that the hosts ought reasonably to have been aware that Mr. Desormeaux was too drunk to drive, the trial judge based his finding that the hosts should have foreseen injury to motorists on the road on problematic reasoning. He noted that the hosts knew that Mr. Desormeaux had gotten drunk in the past and then driven. He inferred from this that they should have foreseen that unless Mr. Desormeaux's drinking at the party was monitored, he would become drunk, get into his car and drive onto the highway. The problem with this reasoning is that a history of alcohol consumption and impaired driving does not make impaired driving, and the consequent risk to other motorists, reasonably foreseeable. The inferential chain from drinking and driving in the past to reasonable foreseeability that this will happen again is too weak to support the legal conclusion of reasonable foreseeability — even in the case of commercial hosts, liability has not been extended by such a frail hypothesis.

30 Ms. Childs points to the findings relating to the considerable amount of alcohol Mr. Desormeaux had consumed and his high blood-alcohol rating, coupled with the fact that Mr. Courrier accompanied Mr. Desormeaux to his car before he drove away, and asks us to make the finding of knowledge of inebriation that the trial judge failed to make. The problem here is the absence of any evidence that Mr. Desormeaux displayed signs of intoxication during this brief encounter. Given the absence of evidence that the hosts in

this case in fact knew of Mr. Desormeaux's intoxication and the fact that the experienced trial judge himself declined to make such a finding, it would not be proper for us to change the factual basis of this case by supplementing the facts on this critical point. I conclude that the injury was not reasonably foreseeable on the facts established in this case.

3.3.2 Failure to Act: Nonfeasance Versus Misfeasance

31 Foreseeability is not the only hurdle Ms. Childs' argument for a duty of care must surmount. "Foreseeability does not of itself, and automatically, lead to the conclusion that there is a duty of care": G. H. L. Fridman, *The Law of Torts in Canada* (2nd ed. 2002), at p. 320. Foreseeability without more *may* establish a duty of care. This is usually the case, for example, where an *overt act of the defendant* has *directly caused foreseeable physical harm* to the plaintiff: see *Cooper*. However, where the conduct alleged against the defendant is a *failure to act*, foreseeability alone may not establish a duty of care. In the absence of an overt act on the part of the defendant, the nature of the relationship must be examined to determine whether there is a nexus between the parties. Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved.

32 In this case, we are concerned not with an overt act of the social hosts, but with their alleged failure to act. The case put against them is that they should have interfered

with the autonomy of Mr. Desormeaux by preventing him from drinking and driving. It follows that foreseeability alone would not establish a duty of care in this case.

33 The appellants' argument that Mr. Courrier and Ms. Zimmerman committed positive acts that created, or contributed to, the risk cannot be sustained. It is argued that they *facilitated* the consumption of alcohol by organizing a social event where alcohol was consumed on their premises. But this is not an act that creates risk to users of public roads. The real complaint is that having organized the party, the hosts permitted their guest to drink and then take the wheel of an automobile.

34 A positive duty of care may exist if foreseeability of harm is present *and* if other aspects of the relationship between the plaintiff and the defendant establish a special link or proximity. Three such situations have been identified by the courts. They function not as strict legal categories, but rather to elucidate factors that can lead to positive duties to act. These factors, or features of the relationship, bring parties who would otherwise be legal strangers into proximity and impose positive duties on defendants that would not otherwise exist.

35 The first situation where courts have imposed a positive duty to act is where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls: *Hendricks v. The Queen*, [1970] S.C.R. 237; *Horsley v. MacLaren*, [1972] S.C.R. 441; *Arnold v. Teno*, [1978] 2 S.C.R. 287; and *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186. For example, it has been held that a boat captain owes a duty to take reasonable care to rescue a passenger who falls overboard (*Horsley*) and that the operator of a dangerous inner-tube sliding competition owes a duty to exclude people who cannot safely participate (*Crocker*).

These cases turn on the defendant's causal relationship to the origin of the risk of injury faced by the plaintiff or on steps taken to invite others to subject themselves to a risk under the defendant's control. If the defendant creates a risky situation and invites others into it, failure to act thereafter does not immunize the defendant from the consequences of its acts. These cases are akin to the positive and *continuing* duty of manufacturers or transferors of goods to warn of inherently dangerous products or dangerous uses of safe products: *Lambert v. Lastoplex Chemicals Co.*, [1972] S.C.R. 569; *Hollis v. Dow Corning Corp*., [1995] 4 S.C.R. 634.

36 The second situation where a positive duty of care has been held to exist concerns paternalistic relationships of supervision and control, such as those of parent-child or teacher-student: *Dziwenka v. The Queen in right of Alberta*, [1972] S.C.R. 419; *Bain v. Board of Education (Calgary)* (1993), 146 A.R. 321 (Q.B.). The duty in these cases rests on the special vulnerability of the plaintiffs and the formal position of power of the defendants. The law recognizes that the autonomy of some persons may be permissibly violated or restricted, but, in turn, requires that those with power exercise it in light of special duties. In the words of Virtue J. in *Bain*, in the context of a teacher-student relationship, "[t]hat right of control carries with it a corresponding duty to take care for the safety of, and to properly supervise the student, whether he or she is a child, an adolescent or an adult" (para. 38).

*37* The third situation where a duty of care may include the need to take positive steps concerns defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large: *Dunn v. Dominion Atlantic Railway Co.* (1920), 60 S.C.R. 310; *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239; *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of*

*Police* (1998), 39 O.R. (3d) 487 (Gen. Div.). In these cases, the defendants offer a service to the general public that includes attendant responsibilities to act with special care to reduce risk. Where a defendant assumes a public role, or benefits from offering a service to the public at large, special duties arise. The duty of a commercial host who serves alcohol to guests to act to prevent foreseeable harm to third-party users of the highway falls into this category: *Stewart v. Pettie*.

38 Running through all of these situations is the defendant's material implication in the creation of risk or his or her control of a risk to which others have been invited. The operator of a dangerous sporting competition creates or enhances the risk by inviting and enabling people to participate in an inherently risky activity. It follows that the operator must take special steps to protect against the risk materializing. In the example of the parent or teacher who has assumed control of a vulnerable person, the vulnerability of the person and its subjection to the control of the defendant creates a situation where the latter has an enhanced responsibility to safeguard against risk. The public provider of services undertakes a public service, and must do so in a way that appropriately minimizes associated risks to the public.

39 Also running through the examples is a concern for the autonomy of the persons affected by the positive action proposed. The law does not impose a duty to eliminate risk. It accepts that competent people have the right to engage in risky activities. Conversely, it permits third parties witnessing risk to decide not to become rescuers or otherwise intervene. It is only when these third parties have a special relationship to the person in danger or a material role in the creation or management of the risk that the law may impinge on autonomy. Thus, the operator of a risky sporting activity may be required to prevent a person who is unfit to perform a sport safely from participating or,

when a risk materializes, to attempt a rescue. Similarly, the publican may be required to refuse to serve an inebriated patron who may drive, or a teacher be required to take positive action to protect a child who lacks the right or power to make decisions for itself. The autonomy of risk takers or putative rescuers is not absolutely protected, but, at common law, it is always respected.

*40* Finally, the theme of reasonable reliance unites examples in all three categories. A person who creates or invites others into a dangerous situation, like the high-risk sports operator, may reasonably expect that those taking up the invitation will rely on the operator to ensure that the risk is a reasonable one or to take appropriate rescue action if the risk materializes. Similarly, a teacher will understand that the child or the child's parents rely on the teacher to avoid and minimize risk. Finally, there is a reasonable expectation on the part of the public that a person providing public services, often under licence, will take reasonable precautions to reduce the risk of the activity, not merely to immediate clients, but to the general public.

41 Does the situation of the social host who serves alcohol to guests fall within the three categories just discussed or represent an appropriate extension of them having regard to the factors of risk-control and reasonable preservation of autonomy that animate them? I conclude that it does not.

42 The first category concerns defendants who have created or invited others to participate in highly risky activities. Holding a house party where alcohol is served is not such an activity. Risks may ensue, to be sure, from what guests choose to do or not do at the party. But hosting a party is a far cry from inviting participation in a high-risk sport or taking people out on a boating party. A party where alcohol is served is a common

occurrence, not one associated with unusual risks demanding special precautions. The second category of paternalistic relationships of supervision or control is equally inapplicable. Party hosts do not enjoy a paternalistic relationship with their guests, nor are their guests in a position of reduced autonomy that invites control. Finally, private social hosts are not acting in a public capacity and, hence, do not incur duties of a public nature.

43 More broadly, do the themes that animate the cases imposing positive duties to act — risk enhancement and control, autonomy and reasonable reliance — suggest that the social hosts in this case owed a duty of care to third-party users of the highway, to take reasonable steps to prevent what happened? Again, the answer is that they do not.

44 Holding a private party at which alcohol is served — the bare facts of this case — is insufficient to implicate the host in the creation of a risk sufficient to give rise to a duty of care to third parties who may be subsequently injured by the conduct of a guest. The host creates a place where people can meet, visit and imbibe alcohol, whether served on the premises or supplied by the guest. All this falls within accepted parameters of non-dangerous conduct. More is required to establish a danger or risk that requires positive action. It might be argued that a host who continues to serve alcohol to a visibly inebriated person knowing that he or she will be driving home has become implicated in the creation or enhancement of a risk sufficient to give rise to a *prima facie* duty of care to third parties, which would be subject to contrary policy considerations at the second stage of the *Anns* test. This position has been taken in some states in the U.S.A.: N.J. Stat. Ann. §§ 2A: 15-5.5 to 5.8 (West 2000). We need not decide that question here. Suffice it to say that hosting a party where alcohol is served, without more, does not

suggest the creation or exacerbation of risk of the level required to impose a duty of care on the host to members of the public who may be affected by a guest's conduct.

45 Nor does the autonomy of the individual support the case for a duty to take action to protect highway users in the case at bar. As discussed, the implication of a duty of care depends on the relationships involved. The relationship between social host and guest at a house party is part of this equation. A person who accepts an invitation to attend a private party does not park his autonomy at the door. The guest remains responsible for his or her conduct. Short of active implication in the creation or enhancement of the risk, a host is entitled to respect the autonomy of a guest. The consumption of alcohol, and the assumption of the risks of impaired judgment, is in almost all cases a personal choice and an inherently personal activity. Absent the special considerations that may apply in the commercial context, when such a choice is made by an adult, there is no reason why others should be made to bear its costs. The conduct of a hostess who confiscated all guests' car keys and froze them in ice as people arrived at her party, releasing them only as she deemed appropriate, was cited to us as exemplary. This hostess was evidently prepared to make considerable incursions on the autonomy of her guests. The law of tort, however, has not yet gone so far.

46 This brings us to the factor of reasonable reliance. There is no evidence that anyone relied on the hosts in this case to monitor guests' intake of alcohol or prevent intoxicated guests from driving. This represents an important distinction between the situation of a private host, as here, and a public host. The public host provides alcohol to members of the public, under a strict regulatory regime. It is reasonable to expect that the public provider will act to protect the public interest. There is public reliance that he will comply with the rules that prohibit serving too much alcohol to a patron and that if this

should occur and the patron seeks to drive, that the public host will take reasonable steps to prevent the person from driving. The same cannot be said of the private social host, who neither undertakes nor is expected to monitor the conduct of guests on behalf of the public.

47 I conclude that hosting a party at which alcohol is served does not, without more, establish the degree of proximity required to give rise to a duty of care on the hosts to third-party highway users who may be injured by an intoxicated guest. The injury here was not shown to be foreseeable on the facts as found by the trial judge. Even if it had been, this is at best a case of nonfeasance. No duty to monitor guests' drinking or to prevent them from driving can be imposed having regard to the relevant cases and legal principles. A social host at a party where alcohol is served is not under a duty of care to members of the public who may be injured by a guest's actions, unless the host's conduct implicates him or her in the creation or exacerbation of the risk. On the facts of this case, I agree with the Court of Appeal, at para. 75, *per* Weiler J.A.:

> The person sought to be held liable must be implicated in the creation of the risk. ... The social hosts had no statutory duty to monitor the consumption of alcohol or to control the structure of the atmosphere in which alcohol was served. There is no evidence that anyone relied on them to do so. ... I cannot accept the proposition that by merely supplying the venue of a BYOB party, a host assumes legal responsibility to third party users of the road for monitoring the alcohol consumed by guests. ... It would not be just and fair in the circumstances to impose a duty of care.

48 Having concluded that a *prima facie* duty of care has not been established, it is unnecessary to consider whether any duty would be negated by policy considerations at the second stage of the *Anns* test.

4. Conclusion

49 I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the appellants: Laushway Law Office, Prescott.*

*Solicitors for the respondents Julie Zimmerman and Dwight Courrier: Williams McEnery, Ottawa.*

*Solicitors for the intervener Mothers Against Drunk Driving (MADD Canada): Lerners, Toronto.*

*Solicitors for the intervener the Insurance Bureau of Canada: Stikeman Elliott, Toronto.*