

Recent case highlights the need for adequate insurance coverage, appropriate business structure and employment policies

Considerable media attention has been given to a recent court victory in which we were successful in achieving an award of over \$3 million in damages in a personal injury lawsuit for one of our clients. The case, *Dumencu v Atherley Arms*, significantly clarifies the obligations of the hospitality industry, and has major implications for insurance companies, business owners and employers. As a full-service law firm, Torkin Manes has clients in all of these sectors and can advise on appropriate ways to discharge such obligations. This bulletin outlines the implications of this case for each sector; should you wish to discuss your situation in the light of this case, please contact your usual Torkin Manes lawyer or any of the lawyers quoted in this bulletin.

Facts

The victim, a dentist who had been celebrating with friends after an annual golfing trip, was waiting for his friends in the parking lot of a tavern when a fight spilled out into the parking lot. In the ensuing scuffle, the victim was knocked to the ground and died within hours. A civil lawsuit was brought against the tavern, its manager, and its bouncer. The jury found the tavern and its manager each 35% liable for what happened. The bouncer and the victim were each held 15% liable. Damages in excess of \$3 million were awarded.

Implications for the Hospitality Industry

Barbara MacFarlane, who was the lead lawyer for the plaintiff in *Dumencu v Atherley Arms*, sees the case as having wide implications throughout the industry. "This award of damages serves as a warning to bars and taverns that their responsibilities to patrons go beyond regulating the consumption of those who are likely to drink and drive. Bar owners must now be aware that they have obligations to patrons to see that they are safe, including training bar staff and bouncers to deal appropriately with disruptive patrons both inside and outside the bar."

Implications for Insureds and Insurers

Mark Harrington, who heads Torkin Manes' Insurance Defence Group, notes four important implications of this case for insureds and insurers:

"1. Owners of tavern licences and occupiers of premises should ensure that their commercial and general liability coverage is at a

minimum of \$5 million. At present, the norm is \$2 million; in light of this case, \$5 million seems prudent. This will of course result in increased premium costs for bar owners.

2. I believe that the *Liquor Licence Act* 1990 needs amendment to require all liquor licence holders to have liability insurance in place at all times while operating as a commercial establishment.

3. Insurers can protect themselves by issuing endorsements for unlawful ejection by staff.

4. When faced with such large exposure, if it is possible to settle the case under the applicable insurance limits, that should be done to protect the insured."

Implications for Business Owners

Matthew Tevlin, a partner in Torkin Manes' Business Law Group, comments that this case "exemplifies the fact that a company may be held liable for the acts of employees or incidents that occur at their premises which are not fully covered by insurance. This case proves that not only do such situations actually arise, but they can also be extremely costly to a business. We have implemented

a variety of structures for our clients that effectively address these issues. Anyone who has not contemplated this scenario and has not put a plan in place needs to do so promptly. These kinds of cases will become the norm in short order and adequate precautions are imperative."

Implications for Employers

Tom Stefanik, who heads Torkin Manes' Employment & Labour Law Group, comments: "The decision in this case is a sober reminder of two important facts in Employment Law:

- Failure to train and educate employees properly in handling all necessary, foreseeable aspects of their job can lead to significant legal consequences. Employers will be held liable if it can be demonstrated that they did not provide proper training and ensure that employees fully understand the parameters of their job or how to deal with potential emergencies.
- Employers can be held vicariously liable for their

See the next page for an outline of commercial hosts' obligations, and tips on preventing and minimizing harm where alcohol is sold.

employees' acts of negligence. Employers of untrained employees are responsible both directly and vicariously for employees' actions.

"The failure of the employer to train its staff was clearly a critical issue here. While this was a civil action, and not a prosecution under the *Occupational Health and Safety Act* against the employer, it is almost certain that, if an employee had been injured or killed during the altercation that was the subject of the litigation, the Ministry of Labour would have charged the employer and possibly a supervisor under the legislation. Maximum fines under the Act are \$500,000 per offence against an employer, and \$25,000 per offence against a supervisor.

"We counsel many employers in this situation, advising on the appropriate wording of employment contracts and employer policies, which must be clearly written, received and understood by employees. These policies must be reviewed regularly, at least annually. These precautions will assist the employer in a due diligence defence should the employer be prosecuted under the *Occupational Health and Safety Act*."

If you have questions about your situation as a result of this bulletin, contact any of the lawyers quoted in this bulletin.

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Liability in the Hospitality Industry

The law holds commercial hosts (hotels, taverns, restaurants, etc.) to a high standard of care, generally set out by the industry or programs such as Smart Serve Ontario. Those in the industry have the following obligations:

- To keep people reasonably safe while on their premises (as per the *Occupier's Liability Act* and under common law)
- To refrain from selling liquor to someone if it seems apparent that the person would reach a level of intoxication where he or she would be in danger of causing injury to himself, herself or another person (as per the *Liquor Licence Act* and under common law)
- To protect against the dangers of intoxication, including the monitoring of alcohol consumption and conduct of people on their property
- To protect patrons and others from the dangers of intoxication, including fights by or between patrons, Commercial hosts must take decisive action to meet these obligations. The following ten steps will prevent many problems from occurring and will demonstrate concern for patrons' safety.

10 Steps to Prevent or Minimize Harm Where Alcohol is Sold

1. Ensure all employees are properly trained (e.g., Smart Serve type programs)
2. Organize and use effective systems for monitoring alcohol consumption
3. Beware of patrons arriving intoxicated; use a "chat and check" system
4. Pay attention to capacity restrictions and required ratio of employees
5. Watch for patrons' inappropriate behaviour, even if not due to apparent intoxication
6. Ensure that properly trained security is available to handle difficult situations
7. Ask who is driving; arrange for taxi transportation to be available
8. Pay attention to lighting issues
9. Be aware of increased risks when holding contests/ giveaways
10. Arrange safe transportation home for an intoxicated patron