Court of Queen's Bench of Alberta

Citation: Allnutt v Carter, 2021 ABQB 51

Date: 20210121
Docket: 1303 14849
Registry: Edmonton

Between:

Scott Allnutt, Melissa Brown-Allnutt, and Her Majesty the Queen in Right of Alberta

Plaintiffs

- and -

Dale Steven, Robert Carter, Hudsons South Common Ltd., and Hudsons South Common Limited Partnership operating as Hudsons South Common

Defendants

Reasons for Decision of the Honourable Mr. Justice T.G. Rothwell

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Appeal from the Decision by
L.A. Smart, Master in Chambers

Dated the 28 day of February, 2019

I. Introduction

[1] On February 18, 2012 the Plaintiff Scott Allnutt (Allnutt) was assaulted (the Assault) by the Defendant Dale Steven Robert Carter (Carter) at the Hudsons Canadian Taphouse at South Edmonton Common (Hudsons). The Defendants Hudsons South Common Ltd and Hudsons

South Common Limited Partnership (Hudsons) operated the Hudsons where the assault occurred. Allnutt and Carter were both patrons at Hudsons. Carter has not filed a Statement of Defence and was noted in default on November 8, 2013. Carter did not participate in this appeal.

[2] Allnutt commenced his action against Hudsons in negligence as an occupier under the provisions of the *Occupiers Liability Act*, RSA 2000, c O-4 (OLA). Carter viciously attacked Allnutt in the Hudsons' washroom. Carter was intoxicated and his attack was unprovoked. Allnutt seeks to hold Hudsons responsible as a commercial host.

[3] This is an appeal from a decision of a Master in Chambers (Master) who dismissed the Plaintiffs' application for summary judgment and the Defendants' application for summary dismissal. The Plaintiffs and Defendants both appeal the Master's decision.

II. Master's Decision

Summary Judgment

[4] The Master dismissed the summary judgment application on the following bases:

- He found there was insufficient evidence to draw the inference that Carter was so intoxicated that he created a forseeable risk that would shift the burden to Hudsons under the OLA; and
- He was satisfied that there was more evidence available concerning Carter's condition and conduct prior to the assault on Allnutt.

Summary Dismissal

[5] The Master dismissed the summary dismissal application on the following bases:

- He found that there was limited evidence regarding Hudsons' implementation of the systems and policies that they had in place to protect their patrons; and
- He found the evidence was not strong enough shift the burden to Hudsons under the OLA and he was not confident enough in the factual record to grant summary dismissal.

[6] The Master held that the facts were largely not in dispute and he described it as a "close case".

III. Standard of Review

[7] Both appeals are brought under *Alberta Rules of Court*, Alta Reg 124/2010, Rule 6.14, which contemplates an appeal on the record and also permits additional evidence to be filed.

[8] This is a *de novo* hearing and the standard of review of is correctness: see ***Bahcheli v Yorkton Securities Inc,*** 2012 ABCA 166 at para 30 **[*Bahcheli*]**.

[9] ***Orr v Fort McKay First Nation***, 2014 ABQB 111 considered the appropriate standard of review in the landscape post-***Hyrniak v Mauldin***, 2014 SCC 7 and concluded that the standard of review remains correctness.

IV. Evidence

A. Evidence Before the Master

[10] Hudsons put the following evidence before the Master:

a) Affidavit of Ronald Glover (Glover) – manager of Hudsons;

b) Affidavit of Brendan Crooks (Crooks) – assistant manager of Hudsons; and

c) Affidavit of Thomas Bradley Scott (Scott) – bartender employed at Hudsons.

[11] Glover, Crooks and Scott were all questioned on their affidavits.

[12] The Plaintiffs did not place any evidence before the Master.

B. New Evidence on Appeal

[13] The Plaintiffs have filed four affidavits in support of their appeal:

a) Affidavit of Melissa Brown-Allnutt (Brown-Allnutt) – Allnutt's wife;

b) Affidavit of Leo Walter (Walter) – a toxicologist;

c) Affidavit of Kenneth Leonard, Ph.D. (Leonard) – a clinical psychologist; and

d) Affidavit of Marc-Andre Amyotte (Amyotte) – a police officer.

[14] Hudsons did not file any new evidence. In the application before the Master, Hudsons objected to the admissibility of a statement by Tyler Boyd (Boyd) to Hudsons' insurance adjuster. Boyd was the head doorman who interacted with Carter following the Assault. Hudsons no longer objects to the admissibility of Boyd's statement.

[15] Brown-Allnutt, Walter and Amyotte were questioned on their affidavits and the Defendants reserved the right to question Leonard if his report is admissible. Hudsons objects to the admissibility of the Leonard report on the basis that it opines on the ultimate issue (e.g. foreseeability of harm) before the Court.

[16] The Plaintiffs and Hudsons have questioned Carter since the applications before the Master. The entire transcript is attached to Brown-Allnutt's affidavit.

[17] No other questioning has taken place.

V. Factual Findings

A. Factual Matters Not in Dispute

[18] The following matters are not in dispute:

- Hudsons is a licenced establishment that serves alcohol and is located in South Edmonton Common.
- Every employee receives job specific training and materials and is required to participate in ProServe, a government mandated training program that teaches individuals how to identify signs of intoxication.
- Hudsons' security and managers were required to complete a security training program known as ProTect.

- Hudsons has access to a "Servall" system that allowed them to scan identification of patrons entering Hudsons to determine whether they had been banned from another establishment in the last 24 hours.
- On February 18, 2020 Hudsons had eight security cameras operating and there were 18 non-kitchen employees working including a hostess, a manager and four door hosts dedicated to security. There are no video cameras in the washroom.
- Allnutt attended Hudsons to celebrate his sister's 50th birthday party with 15-25 people.
- Allnutt arrived around 7 pm and he and his party ordered food and drinks.
- Allnutt was not drunk and did not intentionally provoke Carter's assault.
- Neither Allnutt nor anyone in his party knew Carter or had any interaction with him prior to the assault.
- At approximately 10 pm Allnutt and Carter collided with one another in the washroom and the Assault occurred. The attack was unprovoked and Allnutt suffered serious injuries.
- Carter was found unconscious in the Hudsons' washroom by Hudsons' staff.
- Carter was detained by Hudson's staff and arrested by the Edmonton Police Service.
- In October of 2013 Carter pled guilty to aggravated assault in relation to the Assault in the Provincial Court of Alberta.

B. Other Facts

i) Carter's time of arrival, degree of intoxication and conduct prior to the assault

a. Arrival

[19] Crooks was the assistant general manager on duty on the evening of the Assault. His statement indicates that Carter "probably arrived around 9:00 pm". There is no surveillance video of when Carter entered Hudsons, no written notes and the data from the Servall system was not captured. In short, there is no objective documentary evidence of when Carter arrived. Carter does not specifically recall a doorman being present when he entered Hudsons but indicated that there usually is a doorman at Hudsons. Glover's evidence was that there would have been a doorman present to screen patrons; however, Glover was not working on the evening of the Assault. It is not disputed that there were 4 doormen working that evening.

[20] Carter, in questioning, when asked how long he had been at Hudson's prior to the assault answered:

> I walked in; I ordered one drink; I finished it.15 minutes. Something like that.

[21] Hudsons urges me to accept Carter's evidence and find that he was only there for 15 minutes prior to the assault. Carter has no significant motive to tailor his evidence in this regard

and, subject to his intoxication, is in a better position than Crooks to recall when he arrived. In questioning, Carter stated that he bought one drink and consumed it and then he bought another. He paid cash for both of them. Based upon Carter's evidence about his consumption of alcohol I don't expect it would have taken him 45 to 60 minutes to consume one drink. Carter was consuming his second drink when he entered the washroom.

[22] I do not anticipate that any additional evidence would be called at trial that would offer any greater insight into when Carter arrived. I do not view this as a credibility issue, but instead an issue of reliability. Crooks' evidence on timing was equivocal and Carter's reliability is lacking. I place Carter's arrival at sometime between 9:30 and 9:45. There is no evidence that Carter was specifically screened when he entered Hudsons; however, there were 4 doormen working and screening falls within their job description. I cannot conclusively conclude whether he was screened at the door when he arrived. However, I do not think that that a finding on this issue is critical given that Crooks recalled Carter and his acquaintances arriving and found that they did not "raise any red flags".

b. Degree of Intoxication

[23] The primary evidence before the Court regarding Carter's level of intoxication prior to the assault flows from Carter. This evidence was not before the Master.

[24] During questioning he gave the following evidence:

- he started drinking around noon that day;
- he and two guys "killed a two-six"[1];
- he was over his limit;
- he had a lot to drink; and
- he was hammered.

[25] Carter was interviewed by a psychologist, Dr. Frenzel, at the Edmonton Remand Centre in connection with his criminal charges. Dr. Frenzel's report is attached as an exhibit to Brown-Allnutt's affidavit. The report still remains hearsay; however, in questioning Carter did adopt some portions of the report.

[26] Carter agreed that he had advised Dr. Frenzel that he:

- was drinking a lot;
- was really, really drunk;
- had consumed 30 ounces of alcohol in the four hours prior to the assault;
- could not recall what he had eaten that day; and
- had smoked a joint or two of marijuana.

[27] Prior to arriving at Hudsons Carter was asked to leave the Joeys Restaurant, also located in South Edmonton Common, because he and his companions were making noise and causing a disturbance. Counsel for Hudsons did not seriously dispute that Carter was intoxicated, but noted

[1] I assume that a two-six refers to a 750 ml container of liquor and that he and his companions consumed the contents of the so called "two-six".

that there was no objective/measurable level (i.e. blood alcohol content) of his intoxication before the Court.

[28] Walter, the toxicologist, provided an opinion that Carter's blood alcohol content (BAC) at the time of the Assault would have been in the range of 210-310 mg/100 ml of blood. He also offered the opinion that:

> ...Dale Carter was very likely intoxicated at the time of the Assault, meaning he was in an advanced state of impairment and, accordingly, it would be expected that his emotional stability, critical judgment, perception, balance, walking and speech were all negatively impacted at the time of this assault.

[29] Walter based his empirical calculations primarily upon Carter's testimony at questioning but he also reviewed witness statements and a video of Carter immediately prior to the Assault and shortly after the Assault.

[30] Hudsons' counsel questioned Walter on his affidavit and he conceded that:

- He was relying upon Carter's self-reported alcohol consumption;
- Self-reported alcohol consumption tends to be unreliable;
- He did not know how much Carter had to eat;
- Food consumption can affect the absorption rate of alcohol;
- A person who has a high tolerance for alcohol generally will become more tolerant and mask the outward signs of impairment;
- He had not reviewed a pre-sentence report that detailed Carter's pattern of alcohol consumption nor had he reviewed Dr. Frenzel's report which also commented on Carter's dependence upon alcohol; and
- One cannot draw conclusions about how much alcohol an individual has consumed based upon the smell of alcohol emanating from the individual.

[31] Walter has a Master's degree in bio pharmacy and worked for the RCMP for over 35 years in their forensic laboratories and has testified in over 200 court cases. In short, I have no concerns with Walter's qualifications and based upon my review of his questioning he made appropriate concessions regarding the information he did not possess and the scope of his qualifications (i.e. he is a not a psychologist or behavioural specialist).

[32] Walter's conclusions regarding Carter's state of intoxication is generally consistent with the evidence of Boyd and Amyotte. I review Boyd and Amyotte's evidence in the next section.

c. Conduct Prior to the Assault

[33] The evidence regarding Carter's conduct prior to the assault is limited. Crooks' evidence regarding Carter and his companions is:

- He recalls them arriving and they did not raise any "red flags";
- There were no incidents until the Assault; and
- He does not recall them being at Hudsons before the Assault.

[34] Scott's evidence is similar. He does not recall any issues with Carter or his companions prior to the Assault.

[35] Carter's evidence is consistent with Crooks and Scott. He does not recall having any arguments or issues with anyone at Hudson's prior to the Assault. I do note that when he was questioned about his conduct prior to the Assault he indicated that he might not remember certain matters.

[36] Based upon the evidence before me I find that prior to the Assault Carter did not cause a disturbance or engage in any behaviour that would have caused him to come to the attention of Hudsons' staff.

ii) Carter's Condition Post Assault and the Video

a. Post Assault

[37] As soon as Allnutt was discovered in the bathroom Crooks immediately took steps to call 911 and a witness identified Carter and one his companions as the assailants. Boyd approached Carter on the dance floor and he became aggressive with Boyd but Boyd was able to "talk him down". Boyd shook Carter's hand and noticed that his hands were covered with blood. With respect to intoxication Boyd stated:

- He was impaired in my opinion;
- His eyes were glazed and he was talking in circles; and
- I think it was alcohol and maybe something else.

[38] Boyd took Carter to the front door to be watched by another doorman until the Edmonton Police Service arrived. Amyotte's affidavit attached his police report from his attendance at Hudsons.

[39] Amyotte's report notes that he attended Hudsons at 10:15 pm and detained Carter. Amyotte observed that Carter was heavily intoxicated, uneasy on his feet and smelled of alcohol. At 10:34 pm Carter was arrested for assault and he advised that he understood his rights and requested the opportunity to speak with a lawyer.

[40] Amyotte's affidavit, sworn December 2, 2019, stated that he immediately knew Carter was heavily intoxicated because he had slow and slurred speech and that he swayed back and forth. Hudsons takes issue with Amyotte's additional evidence contained in the affidavit given that these particulars were not contained in his narrative or notes prepared in 2012. He swore his affidavit almost eight years after the night of the Assault. Counsel for Hudsons also points to Walter's testimony that the smell of alcohol on an individual's breath is unrelated to the amount of alcohol they consumed.

b. Video

[41] Three short video clips from the security system at Hudsons were attached to Glover's affidavit and described in Scott's affidavit.

[42] The video described as Cam 6 in Scott's affidavit is 51 seconds long and provides the best footage of Carter and his companion. The video shows Carter and his companion exiting the bathroom post Assault in a hugging fashion. They approach the bar and Carter takes off his coat

and stumbles a bit. Carter's companion picks him up in a bear hug embrace and lifts him off the ground. Both walk towards the camera and disappear.

[43] The video described as Cam 7, which is 4 minutes and 30 seconds in length, depicts Carter and his companion exiting the washroom but it only shows them briefly. The third clip, also described as Cam 7, is 1 minute and 11 seconds long and does not appear to depict Carter.

C. Conclusion Regarding Intoxication

[44] Like Carter's time of arrival, it is unlikely that any further evidence would emerge at a trial that would allow the Court to determine Carter's precise level of intoxication. While the level of Carter's intoxication is an important factor it is not necessary or possible, in my view, to determine his level of impairment with exact precision.

[45] Boyd describes Carter as impaired. Amyotte describes him as heavily intoxicated. Carter himself admits he was over his limit and really drunk. Carter admitted that he had been drinking since noon on the day of the Assault.

[46] I do not question Walter's credibility or expertise and if Carter did consume 30 ounces of alcohol I accept his estimate of a BAC of 210-310 mg/100 ml. The breadth of the estimate can be attributed to Walter's incomplete information. Given Carter's evidence that he was "really drunk" and "hammered" I have concerns about the reliability of his numerical estimates of how much he had to drink.

[47] I do not find that Amyotte's additional evidence regarding Carter "swaying on his feet" or having "slow and slurred speech" provides any greater clarity as it is consistent with someone who is "heavily intoxicated". I do note that after the Assault Carter was able to initially deny any involvement, understand his *Charter* rights and took the opportunity to utter an obscenity at Amyotte when he was advised that his charge of assault was being upgraded from common assault to aggravated assault.

[48] I am cognizant that Carter had a motive to embellish his consumption when he was interviewed by Dr. Frenzel as he may have thought that intoxication would serve as a mitigating factor in the criminal proceedings.

[49] When I consider all of the evidence I make the following findings of fact:

- Carter had been drinking since noon;
- Carter was heavily intoxicated when he arrived at Hudsons;
- Carter purchased two drinks at Hudsons;
- Carter consumed one of those drinks; and
- Carter did not come to the attention of Hudsons' staff as a result of any inappropriate behaviour prior to the Assault.

[50] My finding of fact that Carter was heavily intoxicated is based upon the evidence of Amyotte, Boyd and Carter. If I were to only review the video clips I would not conclude that Carter was heavily intoxicated. He and his companion were engaged in "rough housing" and their gait was perhaps affected by them walking arm in arm or because they were intoxicated or a combination of both. However, they did not appear to be "fall down drunk" or to be causing any problems.

[51] The video clips are short snapshots of time that Carter was at Hudsons; however, they are consistent with the evidence from Hudsons' staff that Carter did not cause any problems prior to the assault and/or that he was not identified as being so intoxicated that he should not have been served.

D. Leonard Affidavit

[52] Leonard, the psychologist, attached a 3.5 page report along with some references and his 65-page curriculum vitae to his affidavit. Leonard holds a Ph.D. in psychology, is a licenced psychologist in New York State and is currently the director of the Clinical and Research Institute on Addictions at State University of New York at Buffalo. Leonard has published 47 peer review papers and 17 chapters specifically focussed on alcohol and violent behaviour.

[53] Leonard reviewed Carter's questioning transcript, Boyd's statement, Amyotte's narrative report, the videos and sentencing reasons of the Honourable Judge J.L. Dixon. He offered the following opinion:

> Dale Carter would have been at a substantially increased risk of engaging in violent behaviour, as well as a substantial risk of injury to himself and others. The danger to himself as well as the danger of violence towards others would have been a real risk and a foreseeable outcome.

[54] Leonard notes that there are numerous studies demonstrating a strong nexus between intoxication/alcohol consumption and violent and physical aggression. Hudsons objects to Leonard's evidence on the basis that he opines on the "ultimate issue" - reasonable foreseeability of harm.

[55] There is no general rule that automatically excludes expert opinion evidence in respect of the ultimate issue: ***R v Johnston,*** 2010 ABCA 230 at para 52 **[*Johnston*]** and ***R v Juneja,*** 2010 ABCA 262 at para 12 **[*Juneja*].**

[56] In ***R v Mohan***, [1994] 2 SCR 9 [***Mohan***] the Court set out a four-part test for the admission of expert evidence: relevance, necessity and assistance to the trier of fact, the absence of any exclusionary rule and proper qualification of the expert. In ***Johnston,*** at para 53, the Court also instructs that the probative value of the evidence should be weighed against the prejudicial effect.

[57] ***Mohan***, paras 28-29, also cautions that the closer the evidence gets to the ultimate issue the more cautious a court should be and that a heightened degree of scrutiny is warranted.

[58] As well, at para 26, the Court in ***Mohan*** explained that opinion evidence must be necessary and that it is generally intended to assist the judge or jury with matters that are outside of their knowledge or experience.

[59] In ***Juneja*** the opinion evidence in question concerned the operation of bawdy houses which the Court of Appeal hoped was outside the knowledge and experience of a judge. In the present case Leonard's evidence that a nexus exists between the consumption of alcohol and violence is within the knowledge and experience of most citizens, even those who do not drink, as they have likely encountered or witnessed individuals who have over-imbibed. It is certainly within the experience of a judge given their own experiences of witnessing over consumption and from hearing a litany of cases involving the adverse effects that flow from the irresponsible consumption of alcohol.

[60] In ***R v D(D),*** 2000 SCC 43 at para 47, Justice Major, in citing ***Mohan,*** re-affirmed that "mere helpfulness" is not sufficient and that the evidence must be necessary in order to allow the fact finder to appreciate facts due to their technical nature or if ordinary persons require the assistance of an expert.

[61] Leonard's conclusion that Carter's danger to himself and others was "a real risk and a foreseeable outcome" approaches the ultimate issue before this Court.

[62] While I do not question Leonard's expertise or literature review I do find that his evidence does not satisfy the necessity aspect of the *Mohan* test and I decline to admit it. The determination of reasonable foreseeability in the present case does not involve the examination of technical or complicated scientific evidence or matters that are outside the ordinary knowledge of an individual. While it is relevant, interesting and somewhat helpful it does not meet the necessity test for the reasons that I have outlined.

V. Position of the Parties

A. Allnutt

[63] Allnutt seeks judgment against Hudsons on the basis that they should have identified Carter as an intoxicated individual who had the potential to harm one of their patrons. Allnutt points to Hudsons' own policies that implore staff to ensure that patrons are not overserved and to seek to identify intoxicated patrons. Glover acknowledged that intoxicated individuals present behavioural uncertainties and may be violent.

[64] Allnutt concedes that Hudsons has an impressive set of policies and procedures in place to create a safe environment, but argues that there is no evidence that those policies were followed. For example, there is no evidence that Carter was greeted at the door, the Servall records do not exist, there is no evidence that Carter's sobriety was assessed, etc. Further, Allnutt argues that it is not enough for a commercial host to advance the position that it is not required to react until a danger presents itself.

[65] In short, Allnutt argues it was foreseeable that Carter presented a risk of harm to Hudsons' patrons. Allnutt seeks summary judgment against Hudsons on the basis that they have established negligence, causation and liability under the OLA.

B. Hudsons

[66] Hudsons seeks dismissal on the basis that Carter's assault of Allnutt was not foreseeable. Hudsons concedes that it owes Allnutt a duty of care but argues it did not breach that duty of care. Hudsons submits that Allnutt failed to demonstrate that Carter posed a foreseeable risk of harm to Allnutt or any other patron that would support a finding of negligence on the part of Hudsons.

[67] Hudsons relies heavily upon ***Stewart v Pettie***, [1995] 1 SCR 131 **[*Stewart*]** for the proposition that over-service/intoxication by itself is not sufficient to ground negligence against a commercial host. Hudsons points to the fact that Carter was only at Hudsons for a relatively short period of time, he was served two drinks, he did not cause a disturbance and the Assault was sudden and unprovoked.

[68] Hudsons seeks summary dismissal on the basis that Allnutt has not established liability and that there is no merit to his claim.

VI. The Law

A. Test for Summary Judgment

[69] Rule 7.3(1) of the *Rules of Court* provide:

> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> (a) there is no defence to a claim or part of it;
>
> (b) there is no merit to a claim or part of it;
>
> (c) the only real issue is the amount to be awarded.

[70] ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 [***Weir-Jones***] is the leading authority on summary judgment in Alberta. The proper approach to summary judgment is set out at para 47 of ***Weir-Jones***:

> The proper approach to summary dispositions, based on the *Hryniak v Mauldin* test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:
>
> a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
>
> b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the *facts* of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
>
> c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
>
> d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.
>
> (*emphasis in original*)

[71] This approach was reviewed and confirmed in ***Hannam v Medicine Hat School District No 76***, 2020 ABCA 343.

B. Appropriate for Summary Judgment?

[72] Not all matters are appropriate for summary judgment. When this matter was before the Master he found that the facts were largely not in dispute but pointed to gaps in the factual record and suggested that more evidence must exist. Unlike the Master, I have a more fulsome record in front of me which addressed many of his concerns. Both parties suggest that the matter is appropriate for summary disposition. I agree for the following reasons:

- While the factual record is not perfect most of the shortcomings flow from issues of reliability and not credibility. I feel comfortable making the necessary factual findings based upon the affidavits and transcripts before the Court.
- The Assault occurred over eight years ago. Memories will not improve and it is unlikely that additional witnesses will be found to fill in the gaps.
- I am satisfied that I have been able to make the necessary findings of fact to reach a finding on judgment/dismissal.
- The determination of liability in this matter will not be determined by the evidence of the individual Plaintiffs. It is not necessary for the Plaintiffs to be questioned. Instead, it will be determined by a Court's findings of fact flowing from the evidence of the Defendants and other witnesses. This has largely occurred. From a fairness perspective I am not persuaded that a trial is necessary.
- Carter's evidence was not present before the Master. A transcript of his questioning now exists. This evidence assists in fact finding and supports a finding that this matter is appropriate for summary disposition.

C. Negligence and the OLA

[73] In order to succeed in a claim of negligence, Allnutt must establish the following:

a) That Hudsons owed him a duty of care;

b) That Hudsons' behaviour breached the standard of care;

c) That Allnutt sustained damage; and

d) That the damage was caused, in fact and in law, by Hudsons' breach.

(***Mustapha v Culligan of Canada Ltd***, 2008 SCC 27 [***Mustapha***])

[74] Sections 5 and 6 of the OLA state:

> 5 An occupier of premises owes a duty to every visitor on the occupier's premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there.
>
> 6 The common duty of care applies in relation to
>
> (a) the condition of the premises,

(b) activities on the premises,

(c) the conduct of third parties on the premises.

[75] In ***Wood v Ward,*** 2009 ABCA 325 **[*Wood*]** at para 6 the Court in discussing the OLA stated:

> The effect of the Act is to modify the duty of care owed by the occupier to the visitor at common law.

[76] At para 7 the Court in ***Wood*** went onto hold that:

> It does not follow that the occupier is automatically liable for any injury suffered as a result of a foreseeable risk. Foreseeability of the risk creates a duty to the visitor, **but it is still necessary to show negligence on the part of the occupier to impose liability. (emphasis added)**

[77] Hudsons has acknowledged that it is an occupier under the OLA and that they owe a duty of care of Allnutt. This case, in my view, turns on the second factor (standard of care) set out in ***Mustapha***.

[78] In ***McAllister v Calgary (City)***, 2019 ABCA 214 **[*McAllister*]** the Court of Appeal had to consider whether the City of Calgary was liable for an assault that McAllister suffered while walking on a pedestrian overpass associated with Calgary's light rail system. Mr. McAllister was intentionally assaulted by his girlfriend's former boyfriend. In that case the Court of Appeal framed the issue at para 46 as:

> The issue is whether the occupier failed to meet the standard of care on it to mitigate the foreseeable risk created by potential torts of the third party.

[79] Allnutt cited a number of cases that considered the OLA and how the OLA is integrated into the law of negligence. Allnutt referred the Court to the decision of ***Swagar v Loblaws Inc***, 2014 ABQB 58 **[*Swagar*].** In ***Swagar*** Justice Campbell outlines the following principles, at paras 66-67:

- An occupier's duty of care is not absolute and the OLA does not make an occupier an insurer;
- OLA places an evidentiary burden on the occupier to demonstrate that is has applied a degree of reasonable care to keep visitors reasonably safe; and
- The occupier must establish two elements: 1) That it has implemented a reasonable system to keep visitors safe; and 2) That it actually adhered to that system.

[80] See also ***Anderson v Canada Safeway Ltd***, 2004 ABCA 239 [***Anderson***] and ***Heard v Canada Safeway Ltd***, 2008 ABQB 439 **[*Heard*].**

Reasonably Foreseeability

[81] In ***Rankin (Rankin's Garage & Sales) v JJ***, 2018 SCC 19 **[*Rankin*]** the Supreme Court of Canada had to determine whether it was reasonably foreseeable that third parties would be injured by vehicles that were stolen from Rankin's Garage. Rankin's had a practice of leaving the keys in unattended vehicles which made them easier to steal.

[82] The Court in ***Rankin*** at paras 46 and 53 enunciated the following principles that guide the determination of reasonable foreseeability:

- The fact that something is possible does not mean it is reasonably foreseeable;
- Evidence is required to establish foreseeability;
- Reasonable foreseeability is an objective test;
- Courts should be careful not to cloud their analysis by the fact that the event in question did occur; and
- A court should not rely upon the benefit of "20/20 hindsight".

[83] In assessing foreseeability, it is not necessary for Allnutt to prove the extent of injury or specific manner of occurrence; it is only necessary to prove the foreseeability of the type or kind of injury: see ***Phillip (Next Friend of) v Bablitz,*** 2011 ABCA 383 [***Phillip***]

[84] ***Stewart*** was the first time the Supreme Court of Canada considered a case where a plaintiff sought to recover damages from a commercial host where the plaintiff had not become inebriated at the host's premises. The ***Stewart*** decision is particularly relevant because it informs the standard of care owed by a commercial host to its patrons and third parties.

[85] Ms. Stewart attended a dinner theater Christmas party and she suffered catastrophic injuries in a traffic accident on the way home. She was driven home by her brother Mr. Pettie. Mr. Pettie had become intoxicated at the dinner theater over the course of the evening.

[86] In ***Stewart,*** Justice Major in considering whether the dinner theater should be held liable for Ms. Stewart's injuries, held at para 35:

> I doubt any liability can flow from the mere fact that Mayfield may have over-served Pettie. …It is only if there is some foreseeable risk of harm to the patron or to a third party that Mayfield and others in their position will be required to take some action...

[87] At paragraph 49 Justice Major, commenting on the "special relationship" between a commercial host and its patrons, noted:

> ...Where no risk is foreseeable as a result of the circumstances, no action will be required, despite the existence of a special relationship...

[88] Justice Major contrasted the dinner theater situation with the case of ***Crocker v Sundance Northwest Resorts Ltd,*** [1988] 1 SCR 1186 **[*Crocker*]**. Crocker was an individual who became intoxicated at a ski resort's bar and was then permitted to participate in a tubing contest and he was rendered a quadriplegic. Crocker was visibly intoxicated and the tubing race organizers recommended he not participate but allowed him to in any event. Sundance was found liable on the basis that Crocker's injuries were foreseeable.

[89] There are a number of Alberta cases that have considered claims against licenced establishments by individuals that have suffered injury at the hands of another patron. I note the two following cases:

> ***Temple v T&C Motor Hotel Ltd,*** 1998 ABQB 166 **[*Temple*]** – Temple attended the licenced premises of T&C Motor Hotel Ltd. (Hotel) and consumed alcohol.

> He was in the parking lot of the Hotel and intervened in a verbal dispute between a man and woman. The man assaulted Temple. Temple was a regular at the Hotel and did not have a history of causing any problems. The action was dismissed against the Hotel on the basis that Temple did not suffer damage from a foreseeable and reasonable risk of harm.
>
> ***Harding v Hudsons Canadian Hospitality Ltd,*** 2015 ABQB 38 **[*Harding*]** – Harding was the subject of a violent unprovoked attack at a Hudsons Taphouse at West Edmonton Mall. Harding was hit with a bottle by an unknown individual. The assailant was with a group that had been observed to be causing a disturbance and Harding had brought this to the attention of the Hudsons' doormen. There had been no interaction between Harding and the group prior to the assault. There was no reliable evidence regarding the level of intoxication of the assailant. Citing ***Temple***, Justice Read dismissed Harding's case.

[90] There are also a number of cases from other provinces that have come to similar findings, each with their own set of facts. I note the following:

> ***Wandy v River Valley Ventures Inc***, 2014 SKCA 81 [***Wandy***] - Wandy was hit in the head by a chair thrown by a Danyluk. Danyluk was a long time patron of the licenced establishment and admitted to drinking a lot on the evening in question and had a hard time recalling all the events. He had an argument with his girlfriend and knocked a table over and then threw a chair in response to a sarcastic comment from another patron. Wandy's claim was dismissed on the basis that there was no prior or potential misconduct giving rise to foreseeable risk of harm.
>
> ***Hartley v RCM Management Ltd,*** 2010 BCSC 579 [***Hartley***] – Hartley intervened to assist another individual who was involved in a bar fight. He was hit with a bottle and lost his vision in his right eye. The fight that Hartley intervened in was allowed to continue for two to two and a half minutes. In finding liability the Court held that the bar fight should not have been allowed to continue for two to two and a half minutes and the bar's failure to stop the fight was a breach under the British Columbia OLA.
>
> ***Baron v Clark,*** 2017 ONSC 738 [***Baron***] **–** Baron attended a bar for a Halloween party and was assaulted by another patron who was intoxicated. The assailant arrived at the bar under the influence of alcohol and became intoxicated at the bar. The assailant (like Carter in the present case) had difficulty remembering the evening and also did not engage in any inappropriate activity prior to the assault that should have alerted the bar's owners that he might become violent. Unlike the present case the assailant became intoxicated at the bar as opposed to arriving intoxicated. Citing ***Stewart*** and ***Wandy*** the Court dismissed the claim and noted that there was no foreseeable risk of harm.

[91] I note two other principles of tort law:

- Tort law generally does not place liability on parties that have acted reasonably[2]; and
- It is exceptional to hold one defendant liable for the intentional torts of another[3].

VII. Application of Law to Facts

[92] In this case, I would frame the issue as: Has Hudsons failed to meet the standard of care on it to mitigate the foreseeable risk created by potential torts of the third party (i.e. Carter)? The risk must be foreseeable and Hudsons must have acted negligently. If Allnutt proves, on a balance of probabilities, foreseeability and negligence then the burden shifts to Hudsons under the OLA to prove that it took reasonable care to prevent its patrons from being injured.

[93] The standard of care is set out in s. 5 of the OLA: to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited.

[94] The cases that I have reviewed above confirm that each case must be considered on its own facts. However, the authorities considering licenced establishments both in Alberta and elsewhere in Canada have generally dismissed actions against licenced establishments where the injury suffered by plaintiff was not expected and/or the assailant did not exhibit any aggression or inappropriate behaviour prior to an unexpected assault.

[95] Hudsons argues that ***Stewart*** is the complete answer and that the level of Carter's intoxication is irrelevant because ***Stewart*** stands for the proposition that over service/intoxication by itself can't ground liability.

[96] In the present case I have found that Carter was intoxicated when he entered Hudsons; however, he did not exhibit any significant or troubling outward signs of intoxication and he did not come to the attention of Hudsons' staff prior to the assault. Unlike the situation in ***Stewart*** Hudsons had not served Carter all evening. In ***Stewart*** Justice Major noted that the dinner theater could not rely upon Pettie's lack of visible intoxication as they had served him 10 to 14 ounces of alcohol over a 5-hour period. As I noted at paragraph 50, while I find that Carter was intoxicated, this is on the basis of his own evidence and that of Boyd and Amyotte post assault.

[97] The Assault was unprovoked and in that regard was similar to the findings in ***Harding***, ***Baron***, ***Temple*** and ***Wandy***. Similarly, there was no prior adverse conduct to suggest or forewarn Hudsons that Carter would act violently. A lack of prior adverse conduct distinguishes this case from the circumstances in ***Hartley.***

[98] Carter was only present at Hudsons for approximately 15- 30 minutes prior to the assault and had consumed one drink there and purchased a second. While he was intoxicated his behaviour prior to the assault and his consumption of alcohol at Hudsons do not support a finding that it was reasonably foreseeable that he would harm another patron.

[99] Allnutt relies upon both the ***Anderson*** and ***Swagar*** cases which arise in the context of slip and fall accidents in grocery stores. Both of these decisions focus on the reasonableness of the

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[2] ***Stewart*** at para 50.
[3] ***McAllister*** at para 50 and 79.

systems that the grocery stores had in place to ensure that their customers were kept reasonably safe.

[100] In both cases the slipping hazards were foreseeable risks and the burden shifted to the grocery stores under the OLA. While these cases are instructive they arise in a somewhat different context. Detecting the presence of a broken egg or a banana peel on the floor of a grocery store can be undertaken by a quick visual scan of the premises. Determining the sobriety of patrons of a licenced establishment is a dynamic and fluid process as patrons are coming and going and may have consumed alcohol or other substances prior to their arrival. There is no documentary evidence of Hudsons having screened Carter; however, they did have 4 doormen on duty that evening and Carter indicated that Hudsons usually has a doorman present at the entrance. Individuals also exhibit different behaviours as a result of the consumption of alcohol or other substances. A visual inspection of an individual, unlike a grocery store floor, will not always be accurate.

[101] In the present case Carter did not exhibit any significant or outward signs of intoxication prior to the assault. While a commercial host is obligated to monitor its premises, it is likely that the majority of the individuals in its premises have consumed some alcohol. Short of administering a breath test it is difficult to accurately assess an individual's level of intoxication[4]. Hudsons is only required to take such reasonable steps to ensure reasonable safety.

[102] Allnutt referred the court to paragraph 56 of ***Stewart*** where Major J held that commercial hosts must intervene in appropriate circumstances or risk liability and that they are unable to avoid liability by structuring their environment in such a way that that they will not know when intervention is necessary. Major J references two decisions where it was impossible for hosts to properly monitor the amount of alcohol consumed and/or to determine if intervention was necessary.

[103] Had Hudsons detected Carter's level of impairment they likely should have not sold him two additional drinks. However, his evidence was that he was able to order two drinks and pay for them without any difficulty. The evidence also discloses that Hudsons had sufficient staff employed on the night in question including four doormen, eight security cameras were operational, its employees were trained in ProServe and ProTect as required and there was no history of such incidents at this Hudsons location. While Hudsons did not have any records regarding the implementation of their "security and safety" measures on the night in question I am not able to conclude that they structured their environment in a manner that would preclude them from knowing when intervention was necessary.

[104] I do not want conflate foreseeability with the analysis under the OLA; however, I believe I should consider this evidence when considering the threshold issue of foreseeability. If a licenced premises was understaffed, over crowded and/or had a track record of violent assaults the likelihood of an unprovoked attack might be more foreseeable. Further, an unprepared establishment would also be less unable to intervene and deal with rowdy or violent patrons.

[105] Allnutt relies heavily upon the post-assault observations of Boyd and Amyotte to establish that Carter was intoxicated and argues that it was reasonably foreseeable that he would assault another patron. While I have considered this evidence, I must not run afoul of the caution in ***Rankin*** and allow my assessment to be clouded by the fact the Assault occurred or look in the

[4] I rely upon the evidence of Walter in this regard. See pages 27-28 of transcript of questioning on his affidavit.

proverbial rear-view mirror and benefit from hindsight. It is possible that Carter's intoxication became more apparent when he was confronted by Boyd and Amyotte as he anticipated being detained/arrested. Boyd took immediate steps to deal with Carter as soon as he became aware of the Assault. Prior to the Assault, Carter's behaviour does not support a finding that it was reasonably foreseeable that he posed a harm to others.

[106] When provided with information about Carter's background, the details concerning his consumption of alcohol and marijuana prior to arriving at Hudsons it is much easier to predict that he might possibly assault someone. Again, the test is not one of possibility, but instead an objective test of reasonable foreseeability.

[107] The evidence concerning the circumstances of the Assault must be considered:

- Carter and Allnutt did not know one another;
- They had not interacted with one another prior to the Assault;
- The Assault was unprovoked and therefore difficult to predict;
- The Assault was perpetrated by a spilled drink; and
- Carter was not known to Hudsons as a troublemaker.

[108] This evidence also does not support a finding that the Assault was reasonably foreseeable.

[109] Hudsons and Allnutt have both cited a number of other decisions that all have slightly different combinations and permutations regarding: where an individual became intoxicated, rural vs. urban locations or whether the assailant was known or unknown to the licenced premises. In particular, Allnutt notes the decision of ***Mellanby v Chapple***, 1995 CarswellOnt 5327 **[*Mellanby*]** where the commercial host was held liable.

[110] In ***Mellanby*** the court held the commercial host liable on the basis that they had structured their environment "in such a way as to make it difficult to detect trouble and virtually impossible to respond" (at para 48). Allnutt relies on the comments of the court in ***Mellanby*** regarding the foreseeability of the incident (i.e. fight between patrons).

[111] In ***Mellanby*** there were two altercations prior to the final altercation that gave rise to the finding of liability. I have already rejected the "structured environment" argument from ***Stewart*** and I do not interpret the Court's comments regarding foreseeability in the same manner as Allnutt. While the Court references that a busy weekend crowd could give rise to a risk the Court made its finding based upon the existence of two altercations that preceded the assault. In the present case the event in issue was an unprovoked attack by one patron upon another. In ***Mellanby,*** a simmering feud existed that was allowed to boil over and the commercial host did not employ dedicated security personnel.

[112] I am not bound by all of the authorities that I have cited; however, I agree with the weight of the authorities that in the absence of a prior disturbance or inappropriate behaviour an unprovoked assault is not reasonably foreseeable. Had Hudsons detected Carter's level of intoxication they should not have served him two additional drinks; however, as noted in ***Stewart***, "over service" by itself cannot establish liability.

[113] It is possible that any intoxicated person might become angry and attack a patron or staff member at Hudsons. However, for the reasons outlined above I am unable to conclude, on a balance of probabilities, that Carter's attack on Allnutt was a foreseeable risk of harm. To conclude otherwise would make Hudsons an insurer of Allnutt and make Hudsons liable for the acts of any patron who was intoxicated whether they exhibited signs of impairment or not.

[114] Accordingly, in light of my finding on foreseeability I unable to find that Hudsons is liable to Allnutt. There is no genuine issue for trial. It is unnecessary for me to proceed to consider the second portion of the analysis under the OLA.

[115] Conversely, in light of my finding regarding the absence of foreseeable harm it is not possible for me to grant Allnutt summary judgment because there is no merit to Allnutt's claim.

VIII. Conclusion

[116] I grant the appeal of the Hudsons Defendants seeking summary dismissal and dismiss the action of the Plaintiffs. I also dismiss the appeal of the Plaintiffs seeking summary judgment against the Hudsons Defendants.

[117] I thank counsel for their thorough submissions.

[118] The parties may arrange to speak to me regarding costs if necessary within 30 days.

Heard on the 16th day of October, 2020.
Dated at the City of Edmonton, Alberta this 21st day of January, 2021.

T. G. Rothwell
J.C.Q.B.A.

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