

## THE DAMAGE DONE

by Randy Bundus

The holiday season is upon us, and with it comes office Christmas parties and informal get-togethers. Unfortunately, this time of year also brings an increased incidence of drinking and driving, as witnessed by several RIDE programs across the country.

In Ontario, for example, there were 768 drivers charged with impaired driving, and another 2,500 had their licences suspended in 2000/2001 from the RIDE program, according to the Ministry of Transportation. A total of 16,000 drinking-and-driving convictions were recorded in Ontario in 2000. Every year, the police charge approximately 80,000 drivers across Canada with impaired driving offences as a result of routine patrols, spot-check programs, citizen reports and crash investigations.

There has been significant progress in terms of anti-drinking and driving campaigns. In the 1980s, tough new laws were introduced and enforcement efforts were redoubled to put the issue at the forefront of public awareness – a move that the Insurance Bureau of Canada (IBC) helped to spearhead. IBC continues to support any initiatives to improve road safety and reduce personal injury and property damage on our roads and highways.

Over the years, changes in public attitudes have ensued, with surveys showing a general decline in the number of impaired drivers on the road. As one measurement, the percentage of fatally injured drivers with above-legal blood-alcohol concentration levels had dropped from more than 60 per cent in the early 1980s to about 34 per cent in 1999.

Nevertheless, there is a sense that “in recent years we may have reached a plateau in attempting to improve the situation,” according to Transport Canada documents. In a publication

called *Smashed*, the federal department pinpoints “a relatively small group of heavy drinkers who frequently drive after consuming large amounts of alcohol. This group of ‘hard core’ offenders is responsible for a high proportion of all alcohol-related driving problems.” It is estimated that about 75 to 80 per cent of convicted drunk drivers are first-time offenders.

### **To what extent are managers and supervisors responsible for the safety of employees who choose to drink at staff functions (and continue to drink afterward)?**

Drinking and driving is a criminal offence that often leads to tragic consequences on Canada’s roads. It is also an increasingly important issue for today’s risk managers, lawyers and insurers, especially in the area of employer–employee duty of care.

To what extent are managers and supervisors responsible for the safety of employees who choose to drink at staff functions (and continue to drink afterward)? How is liability apportioned when a person drives drunk and injures or kills himself or herself, or others, after an office event? These questions have formed the backdrop for many recent legal cases on employer liquor liability.

One of the most significant was the well-publicized *Hunt v. Sutton Group Realty Inc.* (Also see *LegalFocus*,

November 2002.) In that case, Ontario Superior Court Justice C. Marchand apportioned partial liability to an employer, Sutton Group, for a car accident in which one of its employees, Linda Hunt, was seriously injured. Hunt had attended an office party during the afternoon of December 16, 1994, consumed alcohol and then left for a pub at 6:30 p.m. After having two more drinks at the pub, Hunt left to drive home in a winter snowstorm. Just 12 kilometres from the pub, Hunt was involved in a collision resulting in serious injuries to herself. The trial judge found that Sutton Group did owe a duty to the plaintiff, as its employee, to safeguard her from harm. Marchand J. apportioned liability at 75 per cent to the plaintiff and 25 per cent to the employer and pub combined (the pub had since gone bankrupt), with total damages set at \$1.12 million.

Sutton Group appealed the decision and, in August 2002, the Ontario Court of Appeal upheld the appeal, ordering a new trial for both liability and damages. The main reason cited by the Court of Appeal was the trial judge’s decision to discharge the jury. Although it garnered much publicity, the case *Hunt v. Sutton Group* is just the latest in a long history of liquor liability law extending back to the 1970s. Other cases, such as *Jacobsen v. Nike Canada Ltd.* (1996) and *John v. Flynn and Eaton Yale Ltd.* (1995), have established some legal guidelines for employer liability in alcohol-related incidents.

While some of these cases have been overturned on appeal, there is no doubt that the employer’s duty of care to its employees is an important concern. In general, the court has found that an employer owes the same duty as commercial drinking establishments to take positive steps to prevent the employee from driving while impaired. Generally,

the standard of care that the law imposes is to act reasonably to avoid the risk of foreseeable harm. Of course, defining “reasonable” and “foreseeable” is the area in which question marks exist for employers and risk managers. Insurers are also concerned, as most CGL policies currently cover this type of loss.

The importance of this issue is highlighted by the latest figures on drinking and driving in Canada. According to Transport Canada, every year over four million Canadians admit to driving after drinking, which adds up to more than 12.5 million trips made by people who thought they may have had too much to drink. Each year, more than 1,000 people die in alcohol-related car crashes (1,035 in 1999), with thousands more sustaining serious injuries. It is estimated that the annual costs associated with healthcare, damaged property and lost wages resulting from crashes involving alcohol in Canada exceed \$5 billion.

The government has done its job, introducing changes to the federal Criminal Code in 1999 to create stiffer fines and jail sentences for impaired driving. At the provincial level, a first conviction will result in a driver’s licence suspension of 12 months in most cases. For a third offence, some provinces now suspend the driver’s licence for life. In addition, some jurisdictions require offenders to pay a reinstatement fee, complete an alcohol assessment, and/or attend a rehabilitation program to regain their licence.

Many provinces have also passed immediate licence suspension laws. These laws allow a police officer to suspend your driver’s licence for up to 90 days for failing a breath test or refusing to provide a breath or blood sample. Depending on the province, the suspension takes effect immediately or within a few days. In most provinces, drivers who blow a “warn” signal on an approved screening device

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can have their licence suspended for up to 24 hours. In five provinces, “ignition interlock” programs are in place or pending, which require convicted drunk drivers to blow into an alcohol breath-screening device before they can start the car. In Ontario, the Ministry of Transportation announced in October that it had signed an agreement with Guardian Interlock Systems to install the devices starting in early 2003.

Impaired driving is the number one cause of criminal death and injury in Canada. It’s an issue that many groups, including insurers, have tried to put in the public spotlight through awareness and enforcement measures. Federal and provincial governments have taken a firm stand on drinking and driving. It is now also an issue that employers and risk managers need to address as a part of prudent safety and loss-prevention programs.

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– Nelson Henderson