



Personal Injury Update

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1. Liability of hotel owners/licensees

There have been three high profile cases handed down in the Court of Appeal recently which dealt with the liability of a licensee of licensed premises for the conduct of intoxicated and violent patrons. In both cases special leave applications have been made to appeal the matters to the High Court.

The liability of occupiers who sell and promote the consumption of alcohol to the patrons on their licensed premises is an area where we are seeing an increase in litigation.

We are seeing an increasing interest from plaintiff's lawyers in the possibility of suing hotels/clubs for injuries sustained by intoxicated patrons after they have left the premises.

1.1 A case on point

*Cole v South Tweed Heads Rugby League Football Club Limited*¹(Club)

The plaintiff attended the defendant's club premises for a champagne breakfast. The plaintiff continued drinking at the premises all day and was ultimately refused service on the basis that she was intoxicated.

The plaintiff was asked to leave the Club at around 6pm. The Club offered to arrange for the plaintiff safe transport home in the form of a taxi and the Club courtesy bus, which were both refused. The plaintiff left the premises with two newly acquired male friends.

The plaintiff was struck by a car not far from the premise after wandering on to the road.

The trial judge found the driver of the vehicle negligent and also found the club liable for continuing to serve the plaintiff alcoholic drinks when it knew or should have known she was intoxicated. The driver's liability was assessed at 30%, the Club's at 30% and the plaintiff's contributory negligence was assessed at 40%.

The Club appealed and was successful based on the following principles:

1. except for in extraordinary circumstances an occupier will not be held liable for injuries sustained because of a patron's decision to drink to excess and become intoxicated;
2. the voluntary act of drinking until intoxicated was a deliberate act and should carry with it personal responsibility; and
3. the Club only owed the plaintiff the general duty owned by an occupier to a patron.

The plaintiff was granted special leave and appealed to the High Court.

The plaintiff was not successful in the High Court by 4-2. The High Court was divided on the issue of personal responsibility.

Two of the majority High Court judges (Gummow and Hayne JJ) declined to make a definitive determination that servers of alcohol could not be in breach of a duty of care in certain circumstances.

¹ *Cole v South Tweed Heads Rugby League Football Club Limited* [2004] HCA 29

The injury sustained by the plaintiff in *Cole*² was as a result of her own intoxication which caused her to walk out in front of a car.

While this case arose from the law prior to the civil liability reforms in 2002 following the HIH collapse the liability aspects of the case would not be any different if the reforms were applied.

2. Duty to protect

Two recent cases handed down in the Court of Appeal, *Portelli v Tabriska Pty Ltd*³ and *Rooty Hill RSL Club Ltd v Karimi*⁴, considered not only the liability of a hotel/club for injury sustained by intoxicated patrons but also the scope of the hotel or club's duty to protect a patron from an assault by a third party.

The duty of an occupier of licensed premises is an exception to the principle that one person does not owe a duty to protect another from the criminal actions of a third party, *Modbury Triangle Shopping Centre Pty Limited v Anzil*⁵. Two exceptions to that general principle discussed in that case are as follows:

1. where, by virtue of the degree of control that the defendant has over the third party, it is appropriate to impose a duty; and
2. Gleeson CJ and Hayne J, tentatively suggested that a duty may arise where the criminal conduct that occurred is "*attended by such a high degree of foreseeability and predictability*" that such a duty should be imposed.

The degree of control exercised by an occupier of licensed premises over patrons has been held to be sufficient to establish a duty to act reasonably to prevent one patron from injuring another.

It is well established that this duty extends to a duty to eject a person from the premises where it ought to be apparent (usually because of intoxication or a prior violent incident) that there is a risk that that person might cause harm to another (*Wagstaff v Haslem*⁶ and *Spedding v Nobles*⁷).

2.1 Cases on point

*Rooty Hill RSL Club Ltd v Karimi*⁸

In April 2003 Karimi suffered serious injury as a result of an assault on him in the car park of the Rooty Hill RSL Club (**Club**) by a patron named Michael Smith.

Following an initial incident between Karimi and Smith, both men were evicted by security guards employed by Allied Security Group. Allied staff ensured that Mr Smith left by the front entrance (he was seen to exit the car park as a passenger in a car driven by his girlfriend) before releasing Karimi out the rear (Western) entrance.

Shortly after the plaintiff exited the Club, Smith approached Karimi in the car park and "*king hit*" him. Karimi was knocked unconscious and remained in a coma for around two

² Ibid.

³ *Portelli v Tabriska Pty Ltd* [2007] NSWSC 1256 (Supreme Court); *Portelli v Tabriska Pty Ltd* [2009] NSWCA 17

⁴ *Rooty Hill RSL Club Ltd v Karimi* [2009] NSWCA 2.

⁵ *Modbury Triangle Shopping Centre Pty Limited v Anzil* (2000) 2005 CLR 254.

⁶ *Wagstaff v Haslem* [2007] NSWCA 28.

⁷ *Spedding v Nobles* [2007] NSWCA 29.

⁸ Above.

months. He subsequently suffered significant residual brain damage as a result of the assault.

Karimi sued the Club, Allied and Smith in negligence. At first instance the trial judge found all defendants liable.

The primary judge concluded that it was foreseeable that Smith might have driven out of the front car park and into the western car park to assault Karimi. The primary judge also found that discharge of a duty of reasonable care owed by the Club and Allied and Mr Karimi required three measures:

1. Monitoring the entrance to the western car park to restrain Smith from re-entering;
2. Staggering the interval between Karimi departure and Smith's departure by a longer period; and
3. Providing a security guard to escort Karimi to his car.

Smith did not enter an appearance in the proceedings. Both the Club and Allied appealed to the Court of Appeal.

The Court of Appeal upheld the Club and Allied's appeals.

Bell J (now a High Court Justice) noted a number of measures taken by the security guards which were relevant to consideration of the reasonableness of the measures that were adopted in handling the eviction. They included:

1. the assessment made by Allied guards of Smith's condition was that he had calmed down;
2. the Allied staff remained with Smith for 10 minutes talking to him;
3. the security staff ensured that Karimi did not leave until Smith had driven off, whilst it was not apparent that some greater interval time than four minutes that was allowed was required;
4. Karimi was not asked to leave until the security staff confirmed that Smith had been driven out of the Club's premises by his girlfriend;
5. Karimi was one of a group of men when he left the Club; and
6. The security guards provided evidence that they had not previously encountered an evictee travelling from one car park to another.

Justice Bell found that the initial incident at the Club, although involving an unprovoked assault on Karimi, was not of a character to call for greater measures than those which the Club and Allied took in order to reasonably protect Karimi from further injury at the hand of Smith.

Justice Bell further noted that the primary Judge's critical finding on causation was that the presence of a security guard as an escort to Karimi was likely to have inhibited the attack. Justice Bell stated that one could not conclude that it was probable that the assault would not have occurred had the measures that the primary Judge proposed been employed.

Portelli v Tabriska Pty Ltd⁹

Portelli was seriously injured by blows and kicks to the head during a fight which occurred in a public street in Jindabyne.

Earlier in the evening he and his companions had been involved in an altercation at a hotel with two of the later assailants. After the altercation the assailants had been ejected from the premises using the front door of the hotel.

A short time later Portelli and his companion were let out of the back door of the hotel which opened on to a lane way. The fight occurred in a street intersecting with the lane way as he and his companion walked back to their accommodation.

Portelli claimed damages for negligence from the owner and occupier of the hotel, the licensee of the hotel and the provider of the security services.

The claim was heard in the Supreme Court of NSW and the claims against each of the defendants failed at first instance. Portelli appealed.

One point, upon which the appeal was based, was that the trial judge made an error in finding the evidence did not disclose that the defendants knew or should have known of any danger to Portelli.

The Court of Appeal unanimously found that any duty of care owned in this case could only have been based on the conclusion that the circumstances gave rise to an apprehension in the defendants of risk to Portelli.

3. Commentary

Both matters explored the factual boundaries of the duty of a licensed club/hotels to its patrons. The court was asked to consider whether a licensed premises could be liable for an assault on a patron which occurred outside the club's premises.

It had been held in *Modbury Triangle Shopping Centre v Anzil*¹⁰, that in general, liability cannot attach to the occupier of premises for an assault occasioned to a plaintiff if the attack occurred in a nearby street or anywhere other than the land occupied by the defendant.

However, in *Portelli*¹¹, it was held that the duty of a licensed hotel to protect its patrons from an assault occasioned by a fellow patron does not cease at the boundary of its premises and can extend to an assault occurring as far as a nearby public street. The Court of Appeal held that the occupiers still has an obligation to take reasonable steps to respond to a foreseeable risk of injury to the remaining patron. This does not mean that the hotelier is required to marshal troops away from the premises. That would be contrary to *Modbury*¹². However, its legal enquiry is how to manage things on the premises, e.g. by staggered departures etc.

The court stopped short however, of holding that the duty extends to a positive obligation on the part of a licensed club to become the protector or guardian of the innocent patron whenever danger outside the hotel is reasonably foreseeable.

⁹ Above.

¹⁰ Above.

¹¹ Above.

¹² Above.

Portelli's claim was dismissed however, due to the finding that any duty of care that existed could have only been based on the defendants having knowledge of the fact that the plaintiff was at risk of further harm.

The question of when the duty of an occupier of licensed premises to protect patrons from harm ceases, has been left open by the court to some extent. The guidance given in *Portelli*¹³ was that it would have been prudent to call the police. However, this is relatively non specific for the purposes of understanding the necessary measures required to discharge the duty of a licensed operator.

The other guide for ensuring that such a duty is discharged was outlined in *Karimi*¹⁴. The court held that the imposition of a duty on the part of the occupier of licensed premises to protect their patrons from the criminal conduct of third parties depends upon them having actual or constructive knowledge of the aggressive character of the person when intoxicated.

In a recent case, *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem*¹⁵, it was held that a nightclub operator owed a general and wide duty to take care to avoid injuries caused by the unlawful actions of patrons on its premises. It found the night club was in breach of its duty because the security arrangements in place at the relevant time fell far short of what reasonable care and skill required in the circumstances. The Court of Appeal confirmed that this inadequacy materially contributed to the injuries the respondents suffered. Thus the NSW Court of Appeal found that the club owed the plaintiffs a duty to take reasonable care to guard against any injury caused by the unlawful conduct of other patrons.

Hence, it is still sound law that in relation to the duty of an occupier or licensee of licensed premises to exercise reasonable care for the safety of patrons, a finding on liability will depend upon proof that the occupier or licensee knew or ought to have known facts requiring intervention to protect patrons and in those circumstances they failed to take reasonable steps to safe guard the injured person from a foreseeable risk of harm.

¹³ Above.

¹⁴ Above.

¹⁵ *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* [2009] NSWCA 29