No duty of care owed by hotel operators

CAL No. 14 Pty Ltd v Motor Accidents Insurance Board; CAL No. 14 Pty Ltd v Scott [2009] HCA 47 (10 November 2009)

By Anna Walsh and Greg Walsh

The duty of care of a hotel operator and licensee in regards to a patron who suffered a fatal motor bike accident recently came before the High Court on appeal from the Full Court of Tasmania. The Court rejected the allegation that a duty of care existed in the particular circumstances. It is relevant to note that Tasmania's *Civil Liability Act* was not enacted until 19 December 2002 and did not apply to this case. Accordingly, the construction of the relevant sections of the Act dealing with intoxication, duty, breach, causation and contributory negligence were not considered.

FACTS

The respondent's husband, Mr Shane Scott, was drinking with a friend, Mr Kube, at the Tandara Motor Inn in Tasmania, from about 5.15pm onwards. Mr Scott had ridden there on his wife's motorcycle. At 8.00pm, his blood alcohol level was 0.253 g/100ml of blood.

At around 6.00pm, news circulated that there was either a speed camera or police breathalyser close to Mr Scott's house. Mr Kube suggested that Mr Scott lock his motorcycle in the storeroom of the Inn. The licensee agreed, and the motorcycle was put in the storeroom. The licensee placed Mr Scott's keys in the petty cash tin, the usual place for keys handed over by patrons. The licensee believed that Mr Scott's wife would pick him up later.

At around 7.00pm, Mr Kube's wife arrived and offered to drive Mr Scott home several times, but he refused and said he would call his wife to collect him. Mrs Kube did not believe that Mr Scott was intoxicated. After the Kubes had left the Inn, the licensee refused further alcohol service to Mr Scott and asked him for his wife's phone number so that he could call her to come and pick him up. Mr Scott refused to provide the number and his tone was angry and aggressive. This was witnessed by a Mrs Thirlway, who had talked with Mr Scott both before and after his exchange with the licensee. Despite his unpleasantness, Mrs Thirlway did not believe Mr Scott to be intoxicated.

After leaving the Inn for a few minutes, Mr Scott asked the licensee for the keys to his motorcycle. The licensee asked Mr Scott three times whether he was all right to drive, and he responded that he was fine. The licensee opened the storeroom, Mr Scott got on his motorcycle, and drove off. His house was about seven kilometres away. At around 8.30pm, Mr Scott was 700 metres from home when he collided with a guardrail on a bridge and suffered fatal injuries.

CLAIM

Mrs Scott brought proceedings against the proprietor and the licensee of the hotel. The Motor Accidents Insurance Board of Tasmania began proceedings to recover sums it had paid to Mrs Scott. The initial allegations of negligence included a failure to ring Mrs Scott; failure to deflect, delay or stall or manifest some resistance; failure to refuse to hand over the motorcycle and failure to drive Mr Scott home.

At first instance, the trial judge followed the High Court decision in *Cole v South Tweed Heads Rugby League Football Club*[1] and found that the proprietor and licensee did not owe a duty of care to Mr Scott but noted that if they did, they were in breach of it and the breach caused the damage.[2] On appeal, a majority of the Full Court found that the proprietor and the licensee had a duty to take reasonable care to prevent Mr Scott from riding the motorcycle while so affected by alcohol that his ability to ride safely was significantly impaired. In finding that there was a duty, the Full Court referred to Mr Scott's vulnerability and the capacity of the proprietor and licensee to influence events as being significant factors calling the duty into existence.[3]

HIGH COURT

In the High Court, the respondents advanced only one specific duty, which was 'a duty to take the reasonable care selected prospectively by Mr Scott and the licensee as the means by which Mr Scott's interests in not facing the risks of driving the motorcycle whilst intoxicated could be protected'.[4] The duty was said to be capable of being discharged by the licensee ringing Mr Scott's wife so she could come and pick Mr Scott up.[5]

The majority of the High Court, consisting of Gummow, Heydon and Crennan JJ, held that, save for exceptional circumstances, publicans owe no duty of care to their customers in relation to how much alcohol is served and the consequences of serving it. In rejecting the allegation that a duty of care was owed, the majority considered whether Mr Scott was in fact vulnerable due to his reduced capacity to make sensible decisions. They held that Mr Scott was 41 years old, an experienced drinker, had assured the licensee that he was fit to drive, was able to drive the motorcycle out of the storeroom without alerting the licensee to any

incapacity to drive and he knew the short route home very well.[6]

In considering the nature of the arrangement between Mr Scott and the licensee that the motorcycle be placed in the storeroom and Mr Scott would be picked up by his wife, the majority noted that this was nothing more than an informal arrangement to meet the convenience of Mr Scott, so he would avoid being breathtested by the police, not to avoid being physically injured or killed. Therefore, the licensee had no authority over the motorcycle; Mr Scott had not been deprived of the right to demand immediate possession of the motorcycle; there was no duty on the licensee to ring Mrs Scott and the arrangement left it open for Mr Scott to terminate it if he wished, with the sub-bailment of the keys and the motorcycle being both gratuitous and at will.[7]

Legislative regimes exist with regards to the service of alcohol. In Tasmania, the *Liquor and Accommodation Act* 1990 imposed a statutory duty on the licensee to refuse Mr Scott service and not provide him with liquor if he appeared drunk; and requires him to leave the hotel and take reasonable steps to prevent the commission of an offence – but only on licensed premises. A citizen has no power to forbid someone to drive their motorcycle, direct them to deliver up their keys, to render their motorcycle immobile or put it somwhere safe.[8]

The majority noted that the duty of care alleged was very narrow and based upon a particular chain of circumstances leading to Mr Scott's death. The alleged duty would have conflicted with Mr Scott's autonomy.[9] Additionally, formulating a duty would conflict with the law of bailment and other torts, such as the licensee's duty not to commit assault and battery and not to commit corresponding crimes. They noted, 'torts should not be narrowed by recognising new justifications as the result of a side wind blowing from the law of negligence. They are torts which ought not to receive significant reduction in scope unless the legislature sees fit.'[10] In conclusion, the majority held that in these circumstances, the case was not exceptional and there was no duty of care.

French CJ agreed with the majority but would not be drawn on more general questions about the duty of care owed by publicans to their customers or to persons other than their customers, noting that resolving these questions would likely require consideration of the liquor licensing laws and the civil liability statutes of the relevant jurisdiction.[11]

Hayne J agreed with the majority and noted that framing the duty so specifically would merge the separate inquiries about duty of care and breach. The merger carried with it the 'vice of retrospective over-specificity of breach' such that the duty alleged was framed by too specific a reference to the particular course of the events that had happened. In his Honour's opinion, this failing in itself was a sufficient reason to reject the proposed duty of care.[12]

In terms of causation, the majority noted that, to succeed, the respondents would need to prove that telephoning Mrs Scott would have averted the death of Mr Scott. There were difficulties in accepting that the licensee could have obtained Mrs Scott's telephone number given that he had already asked Mr Scott for his wife's telephone number earlier in the evening, and Mr Scott had refused in an angry tone. Additionally, even if the licensee had telephoned Mrs Scott, she would have had to have been at home to receive the call and, even if she had gone to the hotel, Mr Scott would have had to have gone home in her car.[13] For these and other reasons, they held that even if the licensee complied with the alleged duty by telephoning Mrs Scott, it could not be shown on the balance of probabilities that the accident would have been prevented.[14]

For these reasons, the High Court upheld the appeal and found against the respondent on the grounds that there was no duty of care, and that even had such a duty existed, the appellant would have been unable to satisfy the requirements of breach or causation. ■

Notes: **1** [2004] HCA 29. **2** *Scott v CAL No 14 Pty Ltd* (2007) Tas R 72. **3** *Scott v CAL No 14 Pty Ltd t/as Tandara Motor Inn No 2* (2009) 256 ALR 512. **4** At [32]. **5** At [32]. **6** At [33]. **7** At [36]. **8** At [41]. **9** At [38]. **10** At [39]. **11** At [1]. **12** At [68]. **13** At [15]. **14** At [17].

Anna Walsh *is a Principal in the Medical Law Department of Maurice Blackburn Lawyers.* **PHONE** *(02) 8267 0934* **EMAIL** *AWalsh@mauriceblackburn.com.au.*
Greg Walsh *is a lecturer in the School of Law at the University of Notre Dame Australia and a solicitor in the Medical Law Department at Maurice Blackburn Lawyers.* **PHONE** *(02) 8204 4304* **EMAIL** *gwalsh1@nd.edu.au*