NEWSLETTER

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INSURANCE

CASE NOTE: Adeels Palace Pty Ltd v Moubarak

Two male guests at a New Year's Eve function in a restaurant/reception centre were shot by another guest following an altercation between the shooter and one of the two injured men. The injured guests were successful in suing the reception centre in the NSW Supreme Court and received a substantial award of damages. However, following appeals by the reception centre, the matter came before the High Court this month.

The issues for determination by the High Court were:

- Did the reception centre owe the plaintiff a duty of care to prevent harm of the kind suffered?
- Did the reception centre breach its duty of care?
- Was the breach a cause of the damage suffered by the injured guests?

The reception centre argued:

1. It owed no duty to those attending its premises to prevent criminal conduct by third parties.
2. If it did owe some relevant duty of care to its patrons, it was not shown that the reasonable response to the risk of violent behaviour would have been to employ security staff.
3. It was not shown on the evidence that the want of licensed security personnel was a cause of the shooting.

The High Court held:

1. The question of the existence of a duty of care must be considered in the context of the liquor licensing legislation to ensure that the imposition of a common law duty of reasonable care of the kind in question would not run counter to the statutory requirements. The High Court noted the liquor licensing legislation in all states makes provision for licensees to remove, or prevent from entry, violent or quarrelsome persons and imposes requirements about the service of alcohol and conduct of persons on the premises.
2. The reception centre owed the plaintiff a duty to take reasonable care to prevent injury to patrons from the violent, quarrelsome or disorderly conduct of other patrons. This duty is consistent with liquor licensing legislation requirements.
3. Although the duty is directed to controlling the conduct of patrons (for the avoidance of injury to other persons), it is a duty to take

reasonable care in the conduct of activities on licensed premises, particularly with regard to allowing persons to enter or remain on those premises.

4. The possibility that guests would be violent or quarrelsome was not insignificant. The question thus, in determining any breach of duty, becomes whether a reasonable person in the position of the reception centre would have taken precautions that the plaintiff alleges should have been taken – providing security personnel at the premises.

5. Whether any security was required to satisfy the duty of care imposed on the reception centre depends upon the considerations set out in the New South Wales Civil Liability Act (which is based on the common law), including the following:
   - probability that the harm would occur;
   - likely seriousness of the harm;
   - burden of taking precautions to avoid the risk; and
   - social utility of the activity that created the risk.

6. In determining what measures a defendant ought to have had in place to satisfy the requirements of the duty of care, many different matters need to be taken into account, including the number of patrons expected at the premises, the atmosphere that could reasonably be expected during the function and whether there has been any suggestion of violence at similar events.

7. Importantly, these factors need to be considered prospectively, not with the wisdom of hindsight.

8. In the Supreme Court, it was accepted it was sufficient to find the failure to provide security was a breach of the duty of care owed by the reception centre. This position could only be reached if a reasonable person in the position of the reception centre would have employed security personnel as a result of the probability of unruly patrons who had left the premises returning to do violence. The Supreme Court did not clearly articulate why a reasonable person would have taken that step.

9. There was nothing in the evidence to demonstrate before the shooting that security was needed. The court noted the numbers of people attending the reception centre and the type of customers (spread over a range of ages, with some in family or friendship groups, extending over several generations) did not demonstrate a need for security personnel to control access to the premises.

10. There is always a risk of some altercation between patrons at almost any event and the risk is higher if the patrons are consuming alcohol but, unless the risk to be foreseen was a risk of a kind that called for, as a matter of reasonable precaution, the presence of security personnel to deal with it safely, failure to provide security of that kind would not be a breach of the relevant duty of care. In the present case, no finding of a risk of that kind should have been foreseen.

11. From a causation point of view, there was no evidence that the shooter would have been deterred by the presence of security. The submission by the injured guests that their injuries were caused by the reception centre's failure to take steps that might have made the shooting less likely, should be rejected. It was not shown that an absence of security materially contributed to their injuries.

Motor Vehicle Claims: Foreseeable Consequences

As a result of a collision between a motor vehicle and a tram, the tram operator, Metrolink, claimed from the driver of the motor vehicle who was at fault, the performance penalties which it was obliged to pay to the Director of Public Transport under its franchise agreement because of the delays caused to the running of the tram system. Metrolink claimed the economic loss totalled approximately $7,000.

Initially, the magistrate dismissed Metrolink's claim. The magistrate observed the claimed loss would not be reasonably foreseeable because it was not only unlikely but also far-fetched. The magistrate noted it was a kind of damage that would not occur to a reasonable person in the position of the negligent driver.

Metrolink appealed the decision to a single judge of the Supreme Court. The judge dismissed the appeal and upheld the magistrate's decision.

Metrolink appealed again, this time to the Court of Appeal, which found in favour of Metrolink in a 2-1 judgment.

The Court of Appeal held:

(i) Although the precise means by which Metrolink's claimed economic loss was to be calculated may not have been known to the negligent driver, the loss fell within a class of damage which, if categorised correctly, was foreseeable. The performance payment penalty which Metrolink was obliged to pay can be seen as part of the system of remuneration payable to Metrolink for the operation of the tram system.

(ii) The magistrate erred in defining too narrowly the quantum of loss Metrolink suffered. The appropriate categorisation was simply one which required foreseeability of 'revenue lost as a result of the inability to operate the tram service'.

(iii) In answer to the question of whether the loss of revenue as a result of the inability to operate the tram should have been foreseeable to the negligent driver, the court considered that one needed to consider whether there was a real risk – one which would occur to a reasonable man in the negligent driver's position and which he would not brush aside as far-fetched.

(iv) It is in no way far-fetched that the collision, causing an inability to operate the tram, might result in a loss of revenue.

The decision is instructive when analysing the extent to which compensable economic losses may flow from an incident of property damage. In the course of the hearing, the negligent driver conceded that a claim for the loss of fares was foreseeable. However, the judgment makes clear that Metrolink's economic loss extended beyond the loss of fares.

The judgment is likely to lead public and private corporations to include, in their claim for damages, claims for financial losses demonstrably incurred as a direct result of the property damage suffered.

CASE NOTE: C A L No 14 Pty Ltd v Scott

The High Court has recently considered whether a publican had a duty to take reasonable care to prevent an intoxicated patron riding his motorcycle home.

The patron and the publican had agreed that the keys to the motorcycle the patron had ridden to the hotel would be held by the publican and the patron's wife would be called to give her husband a lift home when he was ready to leave. When the patron decided to leave he refused the publican's offer to call his wife and proceeded to ride his motorcycle. Unfortunately, he lost control of his motorcycle and was killed.

The court considered that in the circumstances no relevant duty of care was owed to the patron. The Full Court of the Supreme Court of Tasmania had previously identified the relevant duty to be one to take reasonable care to prevent the patron from riding his motorcycle when he was so affected by alcohol that he had a reduced capacity to ride safely. In the High Court it was argued that the relevant duty obliged the publican to ring the patron's wife so she could come and give him a lift home.

The High Court did not accept that the publican owed such a duty to the patron, or that there was any breach of duty, or that as a matter of causation the actions of the publican had caused the accident.

Significantly, the High Court took the opportunity to state that while people in the position of a publican, although bound by important statutory duties in the service of alcohol and conduct of the premises where it is served, owed no general duty of care at common law to customers which requires them to monitor and minimise the service of alcohol or to protect customers from the consequences of the alcohol they choose to consume.

The majority of the High Court also considered the question of the duty of care of publicans to persons other than their customers. The court noted that some of the arguments against imposing a duty of care on publicans to their customers may have less application where the plaintiff is a third party injured by a customer. The court declined to make any pronouncement on this issue, suggesting that the discussion must be left to a case raising the issue.

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