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## Insurance Law Ealert

### Responsible v irresponsible serving of alcohol – What duty if any does a publican have?

The Full Court of the Tasmanian Supreme Court has recently examined if a duty of care is owed by owners and licensees of a licensed premises to patrons who have become intoxicated at the premises.

#### 1. Background

Mr Scott attended the Tandara Motor Inn (“the hotel”) at Triabunna after work on 24 January 2002. At the hotel, he heard rumors about police manning a breathalyser unit in the area. The licensee of the hotel, Mr Kirkpatrick, agreed that Mr Scott could store his motorcycle in the hotel storeroom and believed that Mr Scott would arrange for his wife to collect him later that evening. Mr Kirkpatrick was provided with the keys to the motorcycle for safe-keeping.

Mr Scott arrived at the hotel at around 5.15 pm and commenced drinking at 5.30 pm. He consumed seven or eight cans of Jack Daniels and cola and was refused service at around 8 pm. At that point in time, Mr Kirkpatrick asked Mr Scott for his wife’s telephone number so that he could arrange for her to collect Mr Scott. Mr Scott responded angrily, declined to give the telephone number and swore at Mr Kirkpatrick. Shortly after, Mr Scott asked Mr Kirkpatrick for his motorcycle keys. Mr Kirkpatrick asked him whether he was “right to ride” a number of times and Mr Scott maintained that he was fine. Mr Kirkpatrick then released the motorcycle keys and motorcycle to Mr Scott.

Mr Scott left the hotel riding his motorcycle around 8.20 pm. At about 8.30 pm he collided with a guardrail of a bridge and was killed. He had a blood alcohol concentration of 0.253 grams at the time of his death.

#### 2. Trial Decision

Proceedings were brought against the hotel and Mr Kirkpatrick by Mr Scott’s widow. At first instance, court decided that there was no duty of care owed by defendants to prevent harm to Mr Scott caused by his intoxication.

The trial judge followed the High Court authority of *Cole –v– South Tweed Heads Rugby League Football Club Limited (2004) 217 CLR 469*. In that case, Gleeson CJ and Callinan J held that there was no general duty to take reasonable care to protect patrons against risks of physical injury resulting from consumption of alcohol. However, it was also noted that there may be exceptional cases in which the supplier of alcohol may come under a duty to take reasonable care to protect such persons. The trial judge found that this was not an exceptional case where a duty of care should be inferred.

#### 3. Appeal Decision

The Full Court of the Tasmanian Supreme Court overturned the trial judge’s decision 2:1. Evans and Tennent JJ found, in separate judgments, that there was no general duty of care owed by hotels, but in the specific circumstances of this case, a duty should be imposed on Mr Kirkpatrick and through him the hotel. Crawford CJ dissented.

Evans J distinguished the facts of this case from those in *Cole*. Evans J reasoned that the irresponsibility displayed by Mr Scott in asking for the keys to the motorcycle soon after he had responded aggressively at the proposition of telephoning his wife must have “compounded Mr Kirkpatrick’s concern about the level of Mr Scott’s intoxication.” His Honour found that “a reasonable person in the position of Mr Kirkpatrick would have foreseen that if he failed to do something to deflect Mr Scott from riding the motor cycle from the hotel that night, there was a risk that Mr Scott would suffer injury and that risk was not far-fetched or fanciful”. Furthermore, Mr Kirkpatrick was in a position where he could have delayed Mr Scott’s departure because he had the keys to the storeroom and the motorcycle. His Honour stated that “[p]lainly, as with any relationship that gives rise to a duty of care, the scope of the duty that arises from the relationship between a hotelier who provides alcohol and a patron, may be extended by the particular circumstances of the case”.

Tennent J also distinguished the circumstances of the case from *Cole*. His Honour noted that “there can be no doubt, based simply on what he served Mr Scott, that Mr Kirkpatrick must have known, when he eventually refused service, that Mr Scott was over the legal limit to drive, and should not have been doing so.” Tennent J went on to state: “Mr Kirkpatrick made a conscious decision to hand over both the bike and the keys knowing Mr Scott was inebriated and having stored his bike to protect against the eventuality of Mr Scott driving in that condition.”

Crawford CJ in dissent found that Mr Kirkpatrick had done all that he reasonably could do in the circumstances. Mr Kirkpatrick had offered to ring Mrs Scott but, as this offer was rejected, no duty of care requiring Mr Kirkpatrick to do any more than he did should be imposed by the court.

#### 4. Conclusion

While there is no general obligation to prevent inebriated patrons leaving and potentially harming themselves, this case indicates that there are circumstances in which owners and licensees of licensed premises can be held responsible for patrons who become intoxicated at the premises.

The defendants have applied to the High Court for special leave.

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