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Insurance e-alert

The Service of Alcohol – Beware the Exceptional Case

Tandara Motor Inn and anor v MAIB [2009] HCA 47

The High Court on 10 November decided that a publican who gave a customer his motorcycle keys back, knowing he had consumed an amount of alcohol likely to impair him in relation to driving, was not liable for damages arising from his subsequent death. The publican would have committed an offence had he refused to hand the keys back or not allowed him access to the bike. The person concerned was also still functional and not obviously impaired.

The court stated “that outside exceptional cases, which this case is not, persons in the position of the Proprietor and the Licensee, while bound by important statutory duties in relation to the service of alcohol and the conduct of the premises in which it is served, **owe 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.**”

It is important that those serving alcohol continue to follow the statutory obligations imposed on them. Each state and Territory has its own laws, should you require information in this respect contact your local Hunt & Hunt office.

The decision in this case turned on its facts. It was not found to be an exceptional case, **there remains a duty**. However the Court, realising the important implications of the decision outlined its views of responsibility at common law of publicans. It is in our view a good decision consistent with the High Court’s recent tendency to narrowly view common law obligations. It is clearly intended to discourage litigation.

“*There is in general no duty*”. GUMMOW, HEYDON AND CRENNAN JJ

Who Are “The Exceptionals”?

The High Court stated:

Examples of exceptional cases may include those where “a person is so intoxicated as to be completely incapable of any rational judgment or of looking after himself or herself, and the intoxication results from alcohol knowingly supplied by an innkeeper to that person for consumption on the premises.” Blow J thought that it would be reasonable also to make exceptions for “intellectually impaired drinkers, drinkers known to be mentally ill, and drinkers who become unconscious.”

So what does this mean? For example in regard to the unconscious does this relate to the night in question and/or prior history. What sort of mental illnesses?

Unfortunately the High Court has left us with an unclear and relatively wide range of exceptional cases. We counsel caution in regard to how the exceptions will be interpreted by other courts. However, in our view it is clear that the High Court wants the exceptions to be viewed narrowly and that the exceptional case will be one in which **there is a particular vulnerability in relation to the particular customer that is known or ought to have been known**.

In essence if the person is unable to walk and talk lucidly, be careful you may have duty.

What Duty And To Do What?

The High Court stated that publicans owe 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 duty is twofold. First, there is a duty to monitor and minimise the service of alcohol and the behaviour of the consumer to a reasonable extent (i.e. not to the extent of committing the torts of false imprisonment, assault or any breach of duty as bailee by refusing to hand over keys to a vehicle as in this case) to “the exceptionals”.

The statutory obligations regarding the responsible service of alcohol impose in most states and territories a greater level of responsibility than the common law. We suggest that by meeting your statutory obligations in this regard you should as a result meet your responsibilities under the common law.

The second duty is to **protect** the “exceptionals” from the consequences of the alcohol they choose to consume. In the context of this decision it would appear that the issue here is the immediate consequence of the consumption of alcohol, such as getting home safely. The problem then is that there is a dilemma between the publican’s duty to the person in negligence and the danger of committing the torts of false imprisonment or battery.

From a practical perspective however, the responsible service of alcohol should minimise the situations where “the exceptionals” need to be protected from the consequences of the alcohol they choose to consume. Where they do need or may need protection the problems arise. We strongly suggest that publicans continue to maintain clear protocols as to how they will deal with customers in these situations or develop such so that they are able to demonstrate if sued that they took their responsibility seriously. Err on the side of caution by offering to arrange for them to be taken home and tucked in rather than shovelling them out the door.

The decision in *Adeels Palace v Moubarak* [2009] HCA 48 was also handed down on 10 November 2009 by the High Court.

Some of the media reports regarding this decision are misleading.

In this case a large fight broke out in a restaurant. One of those involved in the fight left the restaurant and then returned with a gun shooting two people.

The High Court found that Adeels Palace owed each plaintiff a duty to take reasonable care to prevent injury to patrons from the violent, quarrelsome or disorderly conduct of other persons. However on the facts, the restaurant had not breached its duty to the victims.

The Court did not find that it was established that the restaurant should have engaged door or general security in the first place. There was no evidence that the level of front door security that the restaurant may have engaged for the function would have been able to prevent the gunman from re-entering the premises in any case. It is also important to note that this decision was decided on the basis of the NSW Civil Liability Act, which imposes some restrictions on liability.

In contrast to the impression given by some commenting on the decision in the media, the case does not justify a reduction in security arrangements. The need for security should always be considered prior to functions and reviewed on a regular basis, with attention being paid to the duty to prevent injury noted above.

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