CASE NOTE

COMMON LAW LIABILITY OF CLUBS FOR INJURY TO INTOXICATED PATRONS: *COLE v SOUTH TWEED HEADS RUGBY LEAGUE FOOTBALL CLUB LTD*

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I INTRODUCTION

In *Cole v South Tweed Heads Rugby League Football Club Ltd*[1] ('*Cole*'), the High Court considered the liability in negligence of a registered club for injury to a patron injured shortly after leaving the club in a state of extreme intoxication. The Court held by a majority of 4–2 (Heydon J taking no part, having sat in the matter in the Court of Appeal of New South Wales) that the appeal should be dismissed, there being no breach of any relevant duty of care.

Cole was a case which turned strongly on its facts. It does, however, provide significant guidance as to the position at common law in relation to liability of licensed premises for injuries to patrons injured as a result of their own intoxication, and to third persons injured by reason of a patron's intoxication.[2]

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1 (2004) 207 ALR 52.

2 The question of liability to persons injured as a result of their own intoxication has been the subject of recent legislation in all States, but the second question remains one which the common law position will substantially govern. See *Civil Liability Act 2002* (NSW) (as amended by *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW)) ss 49 (no duty to or higher standard of care in relation to person by reason of fact they are intoxicated), 50(2) (no award for death, personal injury or damage to person's property to be made where person was intoxicated, unless court satisfied that injury would have occurred even if person had not been intoxicated); *Civil Liability Act 2003* (Qld) ss 19 (no liability for personal injury suffered from obvious risks of dangerous recreational activities), 46 (no duty to or higher standard of care in relation to person by reason of fact they are intoxicated); *Civil Liability Act 2002* (Tas) s 20 (no liability for harm suffered from obvious risk of dangerous recreational activities); *Wrongs Act 1958* (Vic) (as amended by the *Wrongs and Other Acts (Law of Negligence) Act 2003* (Vic)) s 14G

Secondly, and perhaps more importantly, the decision in *Cole* provides confirmation of the direction of the Court's jurisprudence in terms of a contraction in the law of negligence, as 'the last outpost of the welfare state'.[3] In line with a broad roll-back of liability occurring by legislative amendment and lower court decision,[4] as well as in the High Court itself,[5] the reasoning of two members of the Court decisively embraced the importance to the law of negligence of values of individual autonomy, privacy and responsibility, over principles of compensation, loss-spreading, welfare-maximisation and collective responsibility. The reasoning of the Court also provides some guidance as to how the Court will approach questions of voluntariness of choice in other contexts. It is worthy of attention for these reasons.

In addition, the facts of *Cole* suggest that we might as a community want to pause to reconsider the balance struck between the privacy of individual consumers of alcohol and broader community safety concerns. That debate is, of course, a very far-reaching one, and one largely best left to the legislative sphere. However, we submit that it is one raised by the experience of Ms Cole.

II THE FACTS

The respondent Club hosted a breakfast before a day of football, at which it served free spumante. The appellant attended the breakfast with friends and consumed a large quantity of the free alcohol, before sharing in a further bottle of spumante purchased by a friend, Ms Hughes. At 12:30pm, Ms Cole purchased a further bottle of alcohol, and continued to drink into the afternoon, though it was not shown whether or not she had purchased any alcohol after 12:30pm, or whether it was supplied to her by two men she was with at that time. At 3pm, the respondent refused to serve Ms Cole, and at about 5:30pm asked that she leave, and offered to arrange a complimentary transfer bus or a taxi. Ms Cole refused this offer and left the Club. At about 6:20pm she was struck by a car as she walked along the verge of the highway, 100 metres from the Club.

(intoxication of plaintiff to be considered in determining question of breach); *Civil Liability Act 2002* (WA) s 5H (no liability for harm from obvious risks inherent in dangerous recreational activities). See also the provisions creating a rebuttable presumption that the intoxicated person was contributorily negligent: *Civil Liability Act 2003* (Qld) s 47; *Civil Liability Act 1936* (SA) (as amended by *Law Reform (Ipp Recommendations) Act 2004* (SA)) s 46; *Civil Liability Act 2002* (Tas) s 5; *Civil Liability Act 2002* (WA) s 5L.

3 Justice James Spigelman, 'Negligence: The Last Outpost of the Welfare State' (2002) 76 *Australian Law Journal* 432.

4 See, eg, *Prast v Town of Cottesloe* (2000) 22 WAR 474 (no liability for body-surfing injury); *Secretary of the Department of Natural Resources and Energy v Harper* (2000) 1 VR 133 (no liability for bush-walking injury); *Waverley Municipal Council v Swain* [2003] Aust Torts Reports ¶81-694 (no liability for injury from diving into sandbar in surf). See also Kieran Tapsell, 'Turning the Negligence Juggernaut' (2002) 76 *Australian Law Journal* 581; Harold Luntz, 'Torts Turnaround Downunder' (2001) 1 *Oxford University Commonwealth Law Journal* 95.

5 See, eg, *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 (no liability for failure to provide helmet or other padding in indoor cricket game).

Ms Cole sued the respondent Club and the driver in negligence, and the trial judge, Hulme J, found negligence on the part of both respondents. His Honour also found Ms Cole to have been contributorily negligent, and apportioned liability as between Ms Cole, the driver and the Club in the amount of 40, 30 and 30 per cent respectively. The respondents appealed to the Court of Appeal of New South Wales, which by unanimous judgment (Ipp AJA, Santow and Heydon JJA concurring) allowed the appeal by both respondents, and set aside the findings of negligence. Special leave to appeal against the decision of the Court of Appeal setting aside judgment against the first respondent (the Club) was granted to the appellant on 20 June 2003.

III THE JUDGMENTS

Chief Justice Gleeson held that there was no relevant duty to take reasonable care to protect the appellant from personal injury occasioned by excessive consumption of alcohol. The Chief Justice started from the proposition that the law protects the individual freedom of mature adults to make choices regarding the consumption of alcohol.[6] To impose a duty of care on persons serving alcohol to prevent consumers becoming dangerously or excessively intoxicated would interfere with that freedom.[7] It would also require monitoring of patrons which would present practical difficulties, as well as diminish individual privacy.[8] To impose liability on the server of alcohol for voluntary choices by the consumer, in the face of obvious dangers to them from such consumption, would be to fail to respect values of personal responsibility.[9]

The Chief Justice also drew attention to the difficulty in confining any such liability to circumstances where a person is extremely intoxicated, as such levels of intoxication are hard to discern,[10] and relatively modest alcohol consumption in combination with an intention to drive might be considered more dangerous than higher consumption where a person intends to walk home.[11] His Honour did not think it possible clearly to distinguish between a duty in a commercial as opposed to a social setting, given the increased opportunity for monitoring and influence in the latter setting.[12]

In any event, the Chief Justice held that there was no evidence that the appellant was served alcohol after 12:30pm, or that she was noticeably and 'significantly intoxicated' when served alcohol at 12:30pm.[13]

In terms of the Club's alleged failure to ensure safe transport for the appellant, the Chief Justice held that there is in law no general duty to rescue, and that there

6 *Cole* (2004) 207 ALR 52, 58.
7 Ibid 56–7.
8 Ibid.
9 Ibid 56.
10 Ibid 52.
11 Ibid 58.
12 Ibid.
13 Ibid.

was no basis for finding an exceptional duty in these circumstances. In any event, the Chief Justice was of the view that any such duty was discharged by offers to call a taxi or provide a courtesy bus, and by obtaining assurances from the appellant's companions that they would take care for her safety.[14]

Justice Callinan was prepared to go further than the Chief Justice in considering whether a duty of care was owed in circumstances of the relevant kind, finding that except in extraordinary cases, the law should not recognise a duty of care to protect persons 'from harm caused by intoxication following a deliberate and voluntary decision on their part to drink'.[15] Like the Chief Justice, his Honour stressed the values of personal autonomy and responsibility relied on by the Court of Appeal,[16] and the infringement upon privacy and liberty of any duty to monitor or restrain patrons, adopting in relation to the latter point the entirety of the reasoning of Heydon JA in the Court of Appeal.[17] Justice Callinan stressed that the decision to drink carried with it the known risk that the capacity to make decisions about further consumption would be progressively impaired.[18]

Justice Callinan also followed the Chief Justice in finding that there was no evidence that the appellant's intoxication would have been apparent to the respondent's employees at 12:30pm, or that any alcohol was supplied directly to her thereafter.[19] No breach of any duty to take care existed in the circumstance, nor in allowing the appellant to leave the premises with 'a group of men', having refused the offer of transport.[20]

In a concurring judgment, Gummow and Hayne JJ confined their decision more closely to the facts of the particular case, as it was pleaded. Their Honours found that the appeal should be disposed of on the basis that there was no breach of any duty to take reasonable care to ensure that the appellant did not leave the premises in an intoxicated state, by reason of the fact that the Club offered her safe transport home.[21] It did not have any additional duty to counsel her against refusing the offer, or to involve the police.[22] This was especially so, their Honours held, given that the appellant was 'willingly in the company of two apparently sober men offering to look after her'.[23] In addition, any breach of a duty to take reasonable care to monitor and moderate the amount of alcohol the appellant consumed did not cause her injury, as her refusal of transport home was an intervening cause of that injury.[24]

Their Honours did also suggest, however, that it would be important in determining cases of this kind to have regard to the fact that patrons of bars were adults, 'none of whom could be expected to be ignorant of the intoxicating

14 Ibid 58–9.
15 Ibid 78.
16 Ibid 78.
17 Ibid 81.
18 Ibid.
19 Ibid 78.
20 Ibid 79–80.
21 Ibid 66, 69.
22 Ibid 69.
23 Ibid.
24 Ibid 66, 69–70.

effects of the alcohol they voluntarily consumed'.[25] In addition, difficulties in knowing (or monitoring) what alcohol patrons consume, or determining what level of intoxication had been reached, would inform the scope of any relevant duty.[26]

In dissent, McHugh and Kirby JJ held that the respondent Club's duty, as occupier with absolute control over the premises, was an affirmative one.[27] It extended to taking reasonable care to prevent injury caused by, and reasonably foreseeable as a result of, consumption of alcohol on the premises.[28]

In terms of the values of autonomy and personal responsibility, McHugh J held that where an affirmative duty is owed to a defendant by a plaintiff, the common law does not hold the plaintiff absolutely responsible for their choices. His Honour compared this case to that of an employee who acts carelessly in performing their work.[29] In terms of the majority's concerns in relation to monitoring and privacy, McHugh J held that such monitoring already occurs and is inherent in an affirmative duty to take care.[30] Monitoring will also be required to fulfil duties on the part of an occupier to prevent patrons causing injury to one another.

Justice Kirby held that values of personal autonomy and responsibility, which might in some cases favour a finding that no liability exists, were overridden by the context of the commercial setting in which the alcohol was supplied for profit.[31] His Honour relied on the statutory context of the *Registered Clubs Act 1976* (NSW), and analogous Canadian case law, as supporting the imposition of a duty in the circumstances of *Cole*.

In Justice McHugh's view, difficulties in determining levels of intoxication went to the reasonableness of a defendant's conduct, not to the existence of a duty of care.[32] The Club should have monitored Ms Cole's drinking, but in any event, it became aware of her high level of intoxication in the early afternoon before the accident. The content of its duty was then to take steps to prevent her drinking – not only by refusing to serve her alcohol, but also by warnings, by ensuring that she was not served alcohol purchased by others, and if need be, by removing her from the premises at that time.[33] Having breached its duty in the early afternoon, it was irrelevant that the appellant later refused the offered transport (the very thing that might have been expected from allowing her to consume further alcohol) or that the Club relied on assurances by third persons, as these events did not (contrary to the finding of Gummow and Hayne JJ) constitute a *novus actus interveniens*.[34]

25 Ibid 68.
26 Ibid.
27 Ibid 60–1 (McHugh J), 71–2 (Kirby J).
28 Ibid 60.
29 Ibid 62.
30 Ibid 61.
31 Ibid 71–2.
32 Ibid 61.
33 Ibid 60–2.
34 Ibid 63.

Justice Kirby also held that the Club did not discharge its duty of care by offering transport at the time and manner in which it did. He found that it ought to have taken steps earlier in the day to ensure that Ms Cole was not served any further alcohol, and reached home safely.[35]

IV COMMENT

A The Law of Occupier's Liability

Given that Gummow and Hayne JJ deliberately refrained from addressing the question of duty, the Court in *Cole* was evenly divided as to whether, as a matter of common law, absent exceptional circumstances, a registered club will owe a duty of care to its patrons to prevent harm to them resulting from their intoxication.

The Chief Justice and Callinan J thought considerations of freedom of choice, privacy, and personal responsibility meant that no duty should be imposed.

Justices McHugh and Kirby held a relevant duty should be held to exist, by reason of an occupier's control over premises and the activities conducted therein, and in Justice Kirby's view, by reason of their commercial interest in the supply of alcohol, and existing duties of care under statute.

However, one may safely assume from the judgment of Heydon JA in the Court of Appeal, that his Honour would agree with the Chief Justice and Callinan J, in finding that values of privacy, liberty and bodily integrity militate against the imposition of a duty of care. Further, while Gummow and Hayne JJ explicitly reserved their position, their Honours' references to risks known to adults, and practical difficulties in monitoring and determining the relevant level of intoxication at which the duty would be enlivened, would suggest that they would favour imposing at most a fairly narrow duty on the part of a supplier – perhaps in the case of a supply in the face of actual knowledge of gross intoxication, or where the supplier knew of actual circumstances which would make a lesser degree of intoxication a significant risk to the patron's safety.

Liability at common law to persons injured by their own intoxication is therefore likely to be very narrowly confined.

The position of liability to third persons injured by an intoxicated person is not expressly considered by the Court. The Court's reasoning does, however, speak to the potential liability of licensed premises in circumstances such as those considered in *Chordas v Bryant (Wellington) Pty Ltd*[36] ('*Chordas*') and *Oxlade v Gosbridge Pty Ltd*[37] ('*Oxlade*'), where a hotel was sued for negligent failure to protect patrons from harm resulting from the actions of other intoxicated patrons.

The reasoning of the majority in *Cole* casts some doubt on the reliance placed by the Full Federal Court in *Chordas*, and by adoption by the Court of Appeal of

35 Ibid 75–6.

36 (1988) 20 FCR 91.

37 Unreported, Supreme Court of New South Wales, Court of Appeal, Mason P, Sheppard and Fitzgerald AJJA, 18 December 1998.

New South Wales in *Oxlade*, on the notion of an affirmative duty of care on the part of an occupier toward patrons.[38] However, it is suggested that *Cole* should not be read as casting doubt on the entirety of the reasoning in *Chordas*.[39]

Rather, to the extent that liability according to the reasoning in *Chordas* depends on hotel staff knowing or having reason to know – in the absence of intrusive monitoring – that a patron poses a danger by reason of their intoxication, it is suggested that the *Chordas* line of cases remains good law.[40] Where a patron poses a danger to others, that individual is no longer free to choose to remain on the premises consuming alcohol. A concern to protect individual autonomy becomes less relevant, and judicial concern to uphold personal responsibility does not bar imposition of liability. In addition, the reading of the *Registered Clubs Act 1976* (NSW) favoured by Gummow and Hayne JJ (in contrast to Kirby J) as designed to preserve order in licensed premises, rather than protect individuals from the results of intoxication, would support imposition of liability in this kind of circumstance.

Where, however, the danger posed by a patron to other patrons (or for that matter to road-users or domestic partners) is not reasonably apparent, the majority's concern about individual privacy retains force, and the relevance of the statutory duty diminishes. Further, any duty owed to a third party would need to accommodate the fact that licensed premises are not entitled to restrain or detain patrons, other than for the lawful purpose of ejecting them.

B Broader Trends in the Law of Negligence

Cole thus forms part of a noticeable trend in Australian jurisprudence toward a more restrictive concept of liability in negligence, especially where liability occurs in the context of high-risk activities which involve 'obvious' risks clearly apparent to adult participants.[41] It confirms the shift in the case law toward treating considerations which were once considered relevant to defences of contributory negligence[42] or voluntary assumption of risk (that is, as partial or rarely available answers to an allegation of negligence) as determining the existence and scope of the duty of care.

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38 In *Chordas* (1988) 20 FCR 91, the Full Federal Court suggested in dicta that a hotel might be liable as an occupier for failure to supervise or eject a patron who was known or ought to have been known to pose a danger to other patrons: at 97, 99–100. That reasoning was adopted by the Court of Appeal of New South Wales in *Oxlade* (Unreported, Supreme Court of New South Wales, Court of Appeal, Mason P, Sheppard and Fitzgerald AJJA, 18 December 1998), in which a majority of the Court (Fitzgerald AJA dissenting) held the respondent hotel liable in contribution for a failure to take reasonable care to ensure the safety of patrons in the car-park area at closing time, from dangers posed by other intoxicated patrons.

39 On a previous occasion, the High Court has specifically reserved the question whether *Chordas*-type liability constitutes an exception to the general rule that the law will not impose a duty to prevent harm from the criminal conduct of a third party even if the risk of harm is foreseeable: *Modbury Triangle Shopping Centre v Anzil* (2000) 205 CLR 254, 294 (Hayne J).

40 For cases applying these principles, see, eg, *Wormald v Schintler* [1992] Aust Torts Reports ¶81-180; *Speer v Nash* (Unreported, Supreme Court of New South Wales, Studdert J, 17 December 1992).

41 See cases cited above nn 4, 5.

42 For the High Court's previous approach, requiring that questions about duty and contributory negligence remained distinct, see, eg, *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431, 456–7 (Toohey and Gummow JJ).

Cole is also important in that it provides clarification of the attitude of at least some members of the Court to the content of the concept of 'knowing and voluntary assumption of risk', as it relates to the duty of care or breach stage of the inquiry.

It is clear that both Gleeson CJ and Callinan J treated this question as having a strongly normative rather than simply descriptive character. That is, their Honours were concerned to hold persons responsible for choices to assume risks to their safety or wellbeing, as the necessary quid pro quo of individual freedom to make those choices,[43] rather than investigate a person's actual decision-making capacity at various stages. Their Honours held that, once a person chooses to engage in an activity with known risks, the fact that they become increasingly unable to form judgments and take actions to avoid those risks does not diminish their moral responsibility for the consequences of their actions. Choices to assume a risk have a once-and-for-all character, rather than a more gradated or contextual meaning (such as, for example, a series of decisions to attend the breakfast, to drink the alcohol supplied, and to buy more alcohol after the alcohol supplied was consumed).

While reserving their position, Gummow and Hayne JJ appeared to offer some support for this view, in holding that the appellant's only disability as an adult woman 'was the state of intoxication she had induced in herself'.[44]

Therefore, it may perhaps be inferred that the dismissal by the High Court of an application for special leave to appeal in *Reynolds v Katoomba RSL All Services Club Ltd*[45] was based on a similar *normative* rather than descriptive conception of voluntariness. In that case, the plaintiff (to the knowledge of the defendant) had a gambling addiction, but the Court of Appeal of New South Wales held that his gambling activity 'beyond the point of prudence' was voluntary, in that he had a choice to stay away from the Club altogether.[46]

By contrast, in dissent in *Cole*, Kirby J strongly contested this understanding of choice, preferring a more situational notion of choice, and a more collective notion of responsibility for individual safety and wellbeing.

C A Need for Community and Legislative Reconsideration?

Finally, the decision in *Cole* is interesting for what it leaves out. As Gleeson CJ noted, what 'went on between the time [Ms Cole] left the club and the time she was run down by the car is not known'.[47] All that is known from the reported decisions is that Ms Cole left the premises, possibly with the two men she had previously been with, and 50 minutes later was walking on the road 100 metres away from the club, in a dazed state. Whether that gap could tell us anything, in an evidentiary sense, about the reasonableness of a club's reliance on the assurances by the two men that they would 'take care' of the appellant cannot be

43 See, eg, *Agar v Hyde* (2000) 201 CLR 552, 561 (Gleeson CJ), 583 (Gaudron, McHugh, Gummow and Hayne JJ); *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 223–4 (McHugh J).

44 *Cole* (2004) 207 ALR 52, 69.

45 [2001] HCA 244 (Unreported, Gleeson CJ and Hayne J, 9 August 2002).

46 (2001) 53 NSWLR 43, 53.

47 *Cole* (2004) 207 ALR 52, 59.

known. One might still ask, however, whether reliance on those kinds of assurances should have been regarded as reasonable in the circumstances, given the lack of any particular known relationship between Ms Cole and her companions, and their apparent personal interest in her being allowed to stay.[48]

The serious injury to Ms Cole and the economic position she now faces suggest that this kind of question may be worthy of further community consideration, along with other assumptions about the value of patrons' autonomy or privacy as drinkers, above interests in safety and bodily integrity.

In this latter respect, the putatively narrow 'zone of interests' of the *Registered Clubs Act 1976* (NSW) may specifically warrant revisiting by the legislature to include a broader concern for the welfare of intoxicated persons themselves. One measure that might be considered in this direction is an explicit provision in the Act imposing a duty to prevent the indirect supply of alcohol to intoxicated persons, via the sale of bottles of alcohol or large numbers of alcoholic drinks purchased by one person for a group of companions. Reconsideration might also be given in this context to the appropriateness of licensed premises such as the respondent club in *Cole* serving effectively unlimited quantities of free alcohol for some relevant period.

V CONCLUSION

Cole thus raises very practical questions for policy-makers regarding standards governing the sale of alcohol.

It also provides guidance to practitioners and judges in the field of personal injury. *Cole* confirms that, where individuals engage in risky activities or behaviours, the contraction of the common law of negligence can be expected to continue, in line with statutory developments.[49]

Cole is also of interest to common law practitioners in the way in which it embodies a broader philosophical shift between the Mason and Gleeson Courts. It shows that the balance struck by the Court between loss-spreading concerns, which might be described as 'dignitarian' in aspiration, and more libertarian concerns about autonomy and privacy, has decisively altered.

It thus demonstrates the way in which the development of the common law may be influenced by what are clearly rights-based concerns, even in the absence of any relevant written rights instrument. Whether the unwritten nature of our rights tradition carries with it some inherent bias toward libertarian over more dignitarian concerns is a question which we do not explore here. We simply note that *Cole* may have the potential to contribute to our understanding of the

48 See ibid 64 as to the 'indecent touching' occurring between the appellant and her companions at or about the time she was approached by the respondent's manager. But see ibid 69:

> There was a thinly veiled suggestion that, because it seemed that the appellant's companions may have had sexual designs upon her, they were 'unsafe' companions with whom to allow her to leave the Club. But what business would the Club have had to attempt to look after the moral wellbeing of the appellant?

49 See statutory developments cited above n 2.

relationship between these rights-based concerns[50] and the common law, as well as to our understanding of the law of negligence.

50 Or, what might perhaps loosely be described as the small 'c' constitution: see, eg, Michael Detmold, 'Australian Constitutional Equality: The Common Law Foundation' (1996) 7 *Public Law Review* 33, 42.