

HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND CRENNAN JJ

Matter No H7/2009

C.A.L. NO 14 PTY LTD T/AS TANDARA MOTOR INN
& ANOR

APPELLANTS

AND

MOTOR ACCIDENTS INSURANCE BOARD

RESPONDENT

Matter No H8/2009

C.A.L. NO 14 PTY LTD T/AS TANDARA MOTOR INN
& ANOR

APPELLANTS

AND

SANDRA SCOTT

RESPONDENT

C.A.L. No 14 Pty Ltd v Motor Accidents Insurance Board
C.A.L. No 14 Pty Ltd v Scott
[2009] HCA 47
10 November 2009
H7/2009 & H8/2009

ORDER

Matter No H7/2009

1. *Appeal allowed.*
2. *Orders of the Full Court of the Supreme Court of Tasmania set aside, and in lieu thereof order that the appeal to that Court be dismissed.*
3. *The respondent is to pay the appellants' costs of the hearing in the Full Court of the Supreme Court of Tasmania and in this Court.*

Matter No H8/2009

1. *Appeal allowed.*

2.

2. *Orders of the Full Court of the Supreme Court of Tasmania set aside, and in lieu thereof order that the appeal to that Court be dismissed.*
3. *The respondent is to pay the appellants' costs of the hearing in the Full Court of the Supreme Court of Tasmania and in this Court.*

On appeal from the Supreme Court of Tasmania

Representation

J Ruskin QC with K E Read and S A O'Meara for the appellants (instructed by Richard Mole & Associates)

B W Walker SC with C J Barlett for the respondent in H7/2009 (instructed by Bartletts)

S P Estcourt QC with A Darcey for the respondent in H8/2009 (instructed by Wallace Wilkinson & Webster)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

C.A.L. No 14 Pty Ltd v Motor Accidents Insurance Board

C.A.L. No 14 Pty Ltd v Scott

Torts – Negligence – Duty of care – Operator of hotel and liquor licensee – Intoxicated patron died in road accident after leaving hotel on motorcycle – Where patron and licensee agreed motorcycle and its keys should be held by licensee and patron's wife called when patron ready to leave – Patron refused licensee's offer to call wife to collect patron as arranged and requested keys – Whether licensee had duty to take reasonable care to prevent intoxicated patron from riding motorcycle from hotel – Whether an exceptional case.

Torts – Negligence – Breach – Whether alleged duty required licensee to call wife – Whether alleged duty discharged by offer to call wife.

Torts – Negligence – Causation – Whether calling wife would have prevented death – Whether on balance of probabilities wife would have received and responded to call in time.

Words and phrases – "balance of probabilities", "an exceptional case".

Criminal Code (Tas), ss 43, 45.

Liquor and Accommodation Act 1990 (Tas), ss 62, 78, 79, 79A, 80.

Road Safety (Alcohol and Drugs) Act 1970 (Tas), ss 4, 5(1).

Traffic Act 1925 (Tas), s 41A.

- 1 FRENCH CJ. I agree that the appeals should be allowed and that the orders proposed by Gummow, Heydon and Crennan JJ should be made. I do so for the reason, explained by their Honours¹, that the appellants did not owe to the deceased, in the circumstances of this case, a relevant duty of care. I agree also with their Honours' conclusions on causation² and breach of duty³. I express no opinion on more general questions about the duty of care owed by publicans to their customers or to persons other than their customers. The resolution of these questions in future will be likely to require consideration of the liquor licensing laws and the civil liability statutes of the relevant State or Territory. The latter statutes now contain provisions dealing with the effect of intoxication upon one or more of duty and standard of care, breach and contributory negligence⁴. As pointed out in the joint judgment⁵, the *Civil Liability Act 2002* (Tas) was only enacted on 19 December 2002 and is irrelevant to these proceedings.

1 See below at [31]-[45].

2 See below at [14]-[20].

3 See below at [21]-[30].

4 *Civil Liability Act 2002* (NSW), ss 47-50; *Wrongs Act 1958* (Vic), s 14G; *Civil Liability Act 1936* (SA), ss 31(2) and 46-48; *Civil Liability Act 2003* (Q), ss 46-49; *Civil Liability Act 2002* (WA), s 5L; *Civil Liability Act 2002* (Tas), s 5; *Personal Injuries (Liabilities and Damages) Act* (NT), ss 14-17; and *Civil Law (Wrongs) Act 2002* (ACT), ss 95 and 96.

5 See below at [58].

- 2 GUMMOW, HEYDON AND CRENNAN JJ. At or shortly after 8.30pm on 24 January 2002, Shane Scott left the Tandara Motor Inn, Triabunna, Tasmania ("the Hotel"). His home was about seven kilometres away. He planned to travel there on his wife's motorcycle. He ran off the road about 700 metres from home and suffered fatal injuries. It was common ground that the accident resulted from his ingestion of alcohol. His blood alcohol reading was 0.253g per 100ml of blood. He had drunk seven or eight cans of Jack Daniels and cola at the Hotel from 5.15pm onwards.

Procedural history

- 3 *The claims.* Mr Scott's wife, Sandra Scott, instituted proceedings in the Supreme Court of Tasmania against CAL No 14 Pty Ltd, the proprietor of the Hotel ("the Proprietor"). She instituted additional proceedings against Michael Andrew Kirkpatrick, who was the licensee of the Hotel ("the Licensee"). The proceedings were consolidated. The Motor Accidents Insurance Board of Tasmania ("the Board") commenced proceedings to recover sums it had paid to or on behalf of Mrs Scott. Those proceedings, like Mrs Scott's proceedings, alleged that the Proprietor and the Licensee owed, and were in breach of, duties of care to Mr Scott.
- 4 *The trial judge.* In the Supreme Court of Tasmania, Blow J held that the Proprietor and the Licensee did not owe any relevant duty of care to Mr Scott; but that if they did, they were in breach of it, and that their breaches caused the injuries which brought about his death⁶.
- 5 *The Full Court.* Mrs Scott and the Board each appealed to the Full Court of the Supreme Court of Tasmania. The appeals were allowed by Evans and Tennent JJ (Crawford CJ dissenting). The majority differed from the trial judge and the Chief Justice in concluding that the Proprietor and the Licensee did each owe a duty of care, but agreed with the trial judge that there was a breach of duty causing damage⁷.
- 6 *The appeal to this Court.* The Proprietor and the Licensee, by special leave, have appealed to this Court against the allowing by the Full Court of Mrs Scott's appeal and the Board's appeal. Each appeal should be allowed for the following reasons.

6 *Scott v CAL No 14 Pty Ltd* (2007) 17 Tas R 72 at 80 [24] and 83-84 [36]-[37].

7 *Scott v CAL No 14 Pty Ltd t/as Tandara Motor Inn (No 2)* (2009) 256 ALR 512.

3.

The facts

7 Mr Scott worked for the Glamorgan-Spring Bay Council as a backhoe operator. The Council's depot was adjacent to the Hotel. At lunchtime on 24 January 2002, Mr Scott agreed to meet a workmate, Mr Rex Kube, for a drink at the Hotel after work. After drinking a stubby of beer at the Council's depot at about 5.00pm, Mr Scott arrived at the public bar of the Hotel at 5.15pm, where he met Mr Kube. Mr Scott had been a regular purchaser of liquor from the Hotel's bottle shop for consumption at home, but was not a regular patron of the public bar. Mr Scott began to drink cans of Jack Daniels and cola, while Mr Kube drank eight ounce glasses of full strength beer. At least initially, they made purchases from the Licensee's wife. She ceased work between 5.30 and 6.00pm. The Licensee then took over. He was responsible for all areas of the Hotel: the public bar, the bottle shop, the area in which "Keno" gambling could take place, and the lounge.

8 *The "arrangement"*. Between 6.00 and 6.30pm, a rumour circulated that there was a police breathalyser or speed camera near Orford, where Mr Scott lived. Mr Kube suggested to Mr Scott that he place his wife's motorcycle in a lockable room known as the storeroom or plant room. Mr Scott agreed. Mr Kube asked the Licensee whether the motorcycle could be secured in that way. It was the Licensee's understanding that Mrs Scott would pick up her husband later that night and that he would collect the motorcycle the next day. Mr Scott and Mr Kube, aided by the Licensee, put the motorcycle in the storeroom a little later. The Licensee then placed the keys to the motorcycle in the petty cash tin, which was the normal receptacle for keys handed over by customers.

9 At about 7.00pm Mrs Helen Kube arrived. She offered Mr Scott a lift home two or three times, but he refused, and said on the last occasion that he would call his wife to come and get him. Mrs Kube did not detect signs of intoxication in Mr Scott. She said that he "seemed okay" and "was talking okay"; that he did not seem to be uncoordinated, clumsy, fumbling, unsteady, slurred in speech, or agitated; and that he did not lack focus. She did not support suggestions that he was smelling of alcohol and had glazed eyes. Mr and Mrs Kube left between 7.45 and 8.15pm.

10 *Mr Scott refuses the Licensee permission to ring Mrs Scott.* After the Kubes had left, a significant incident took place. Mrs Patricia Thirlway and her 10 year old daughter entered the public bar in order to watch tennis on television. Mrs Thirlway had a conversation with Mr Scott about her brother, who also worked for the Council. Mr Scott appeared "friendly and normal". Mr Scott then left the public bar. He returned 10 or 15 minutes later and placed his head on his hands on the bar. The Licensee came into the bar, told Mr Scott he had had

4.

enough, said it was time to go home, and asked for Mrs Scott's telephone number so that she could be contacted to come and get him. According to Mrs Thirlway, Mr Scott said: "If I want my wife I'll fucken ring her myself". According to the Licensee, after he had asked Mr Scott whether he wanted him to ring Mrs Scott, Mr Scott became agitated and said: "If I want you to ring my fuckin' wife, I'd fuckin' ask ya." The Licensee responded: "Whoo hang on, whoo, whoo, whoo, this is not, you know, don't go crook at me, this is not the arrangement that was made." Mrs Thirlway told Mr Scott that the Licensee was only trying to do the right thing. Mr Scott then directed to Mrs Thirlway "a bit of a rant about the local council" – "a bit of a hate session about the local council and the local community". Mrs Thirlway said he had changed "very quickly", he "fired up all of a sudden", he became agitated, angry, stropic and sufficiently strange and unpleasant for her not to want to talk to him again. Mrs Thirlway did not want to be involved in a confrontation and tried to ignore Mr Scott. Mr Scott put his head back on the bar and went quiet. Mrs Thirlway and her daughter then left. Like Mrs Kube⁸, Mrs Thirlway did not notice any signs of intoxication in Mr Scott, either before he left the public bar or after he returned.

11 *Mr Scott's departure.* Mr Scott went outside for a couple of minutes and upon his return asked the Licensee for the motorcycle and its keys. The Licensee asked three times whether Mr Scott was "right to ride" and each time Mr Scott answered: "Yes, I'm fine". The Licensee then said he would grab the motorcycle keys and the keys to the plant room. He unlocked the plant room. Mr Scott jumped on the motorcycle, backed it out on his own without any apparent trouble, adjusted his helmet straps and drove off. The failure of the Licensee to insist that he call Mrs Scott to collect her husband constitutes the only alleged breach of duty which remained a live issue in this Court.

12 *Mrs Scott's alarm.* On the evening in question Mrs Scott had planned not to return home until 8.00pm, since she had to run an errand after work. She thought this may have been a reason for Mr Scott staying at the Hotel instead of going home. She reached home at 8.00pm. By 8.30pm she began to feel worried because her husband had not returned. She drove past his place of work to see if he was working late. She also drove past the Hotel but did not see the motorcycle and returned home. The fatal accident took place around 8.30pm.

The outcome of the appeal

13 The Proprietor and the Licensee must succeed for each of three independent reasons. First, even if there was a duty of care, and even if it was

8 See [9] above.

5.

breached, it has not been shown that the breach caused the death. Secondly, even if there was a duty of care, it was not breached. Thirdly, there was no duty of care.

Causation

14 For the Board and Mrs Scott to succeed, it is necessary for them to prove that if the Licensee had complied with the alleged duty by telephoning Mrs Scott, that act would have prevented the damage. The death of Mr Scott made causation inherently difficult to prove.

15 The Licensee accepted in his evidence that he had often rung the wife of a customer who had been "abusive" or a "handful" and asked her to collect him. Mrs Scott gave evidence that if the Licensee had telephoned her and requested her to collect her husband at about 8.30pm, she would have done so. However, there are several obstacles to be surmounted before it could be concluded on the balance of probabilities that the Licensee could have called Mrs Scott, that if he had she would have received the call, and that if she had come to the Hotel, Mr Scott would have gone home in her car.

16 First, although Mrs Scott had a telephone at home and a mobile telephone, there is no evidence that the Licensee knew either number. It was not suggested that the mobile telephone number was available in the local telephone directory. The records of dealings with Mr Scott in the Hotel's bottle shop did not contain his telephone number. Both the trial judge and Evans J said that simple inquiries would have produced one of the telephone numbers, but the evidence was that at the time Mr Scott left there was no-one else in the public bar, and there was no evidence that anyone else was on the premises. Hence it cannot be concluded that there was anyone present of whom the Licensee could have made inquiries except for Mr Scott.

17 Secondly, it cannot be concluded that if Mr Scott had been asked for one of his wife's telephone numbers he would have given it. The Licensee had already asked him once, but that request had apparently angered Mr Scott so much that, in the presence of a woman and a small girl, he refused with such aggression as to preclude, for practical purposes, any further request being sensibly made. The reaction to the Licensee's request had created an unpleasant and bitter atmosphere. The reaction was so strong that it caused the Licensee to wonder whether there was not something in Mr Scott's family life which had caused it, and whether, just as Mr Scott obviously had troubles at work, he could have had troubles at home. The trial judge was not mealy-mouthed in his assessment of the Licensee's credibility: he considered that he was not reliable about the quantity Mr Scott drank, that an answer to an interrogatory on that subject was dishonest, and that he "might well have invented" another part of his

6.

evidence. But he did not criticise what the Licensee said about the possible causes of Mr Scott's anger. Hence any further broaching by the Licensee of a telephone call by him to Mrs Scott would only have been likely to produce a second outburst, not a telephone number.

18 Thirdly, there was necessarily imprecision in the times assigned by witnesses for the events of the evening, and particularly for the times leading up to Mr Scott's departure from the Hotel and the time of Mrs Scott's departure from her home to search for Mr Scott. This is no criticism of either the witnesses who gave the evidence or the counsel who elicited it. The Scott home was only about seven kilometres away. Even if the Licensee had discovered the home number, it is not possible to conclude on the balance of probabilities that a call would have reached Mrs Scott, before she left home to search for Mr Scott or after she had returned, at a time which would have enabled her to come to the Hotel in time to forestall her husband's departure by motorcycle.

19 Fourthly, even if the Licensee had overcome all these obstacles and managed to procure the attendance of Mrs Scott at the Hotel before Mr Scott had departed, it cannot be inferred on the balance of probabilities that Mr Scott would have responded meekly to her arrival. On the case against the Licensee, if he decided to procure the arrival of Mrs Scott before Mr Scott left on the motorcycle and to obtain Mrs Scott's telephone number by means other than asking Mr Scott, he would have had to have adopted tactics of delay and deception. And he would have had to disobey Mr Scott's emphatically expressed command not to ring Mrs Scott⁹. Once Mr Scott appreciated that these tactics had been used against him, the possibility that he would have grabbed the keys and driven off on the motorcycle is at least as likely as the possibility that he would have agreed to being driven home by his wife.

20 For those reasons it has not been shown that, even if the Licensee had complied with the alleged duty, the accident would have been prevented.

Breach of duty

21 *Five alleged breaches of duty.* The Full Court majority considered that the Proprietor and the Licensee had breached a duty to take reasonable care to "avoid Mr Scott riding" the motorcycle while so affected by alcohol as to have a reduced capacity to do so safely. Avoidance here must mean prevention. Evans J found breach in three respects – a failure by the Licensee to ring Mrs Scott; his failure to "deflect" Mr Scott from driving the motorcycle, or

9 See above at [10].

7.

"delay" his departure, or "stall" him, which was said to be "easy" to do; and his failure "to have manifested some resistance to the return of the motorcycle."¹⁰ To these three breaches Tennent J added a fourth – the Licensee could have simply refused to hand over the motorcycle – and a fifth – the Licensee could have taken Mr Scott home himself.

22 These five alleged breaches may be taken in turn.

23 *Failure to ring Mrs Scott.* The first alleged breach, namely the failure to ring Mrs Scott, was essentially the only one relied on by counsel for the Board and for Mrs Scott in this Court¹¹. It is unsound for some of the reasons already given in relation to causation: the Licensee had no means of ringing Mrs Scott unless he asked Mr Scott for the number, and to do so would be likely to generate, not the number, but a further violent – perhaps more violent – scene.

24 *Failure to deflect, delay, stall or manifest some resistance.* The second and third alleged breaches involve the difficulty that deflecting, delaying or stalling Mr Scott, apart from the deception which it would probably require and which itself might have irritated Mr Scott, could not have lasted very long. If it lasted for any length of time, it would have involved non-compliance with Mr Scott's desire to exercise his legal rights to possession of the motorcycle. It would be unlikely, given Mr Scott's mood, that the Licensee could maintain a posture of open non-compliance for long, for a point would soon have been reached at which any manifestation of resistance by the Licensee to returning the motorcycle would involve the actual commission of a tort in refusing possession and would provoke Mr Scott into an attempt to vindicate his rights by self-help. The Licensee could not lawfully detain Mr Scott, or his wife's motorcycle, or the keys to it. Deflecting, delaying or stalling would have been as ineffective as offering counselling to Mrs Cole in *Cole v South Tweed Heads Rugby League Football Club Ltd*, or persuading her to regain her sobriety in a quiet place before departing from the Club¹².

25 There are two flaws underlying the reasoning of Evans J (which was supported by Tennent J) in relation to the second and third alleged breaches. One

10 *Scott v CAL No 14 Pty Ltd t/as Tandara Motor Inn (No 2)* (2009) 256 ALR 512 at 528 [57].

11 Senior counsel for the Board and Mrs Scott who appeared in this Court did not appear in either the trial or the Full Court.

12 (2004) 217 CLR 469 at 504 [125]; [2004] HCA 29.

rests on the view that all that matters in assessing the question of breach is what the person allegedly in breach of duty thought at the time. Thus Tennent J said¹³:

"Much was made of the legal position of [the Licensee] and Mr Scott in relation to the bike. That is, could [the Licensee] have refused to hand the bike over and, had he done so, could Mr Scott have used [force] to recover it? However, it is implausible to suggest that either of the men gave any thought at all to those issues. They have, with respect, been raised in hindsight to justify what actually happened."

And Evans J was "inclined to the view of Tennent J that it is implausible to suggest that, at the time, either of the men addressed [the] question" of the legal rights and obligations of Mr Scott and the Licensee in relation to the motorcycle¹⁴. The actual thinking of the person allegedly in breach of a duty of care is not irrelevant, but since the issue turns on what a reasonable person in the circumstances in which the person allegedly in breach is placed would do, factors other than those which actually occurred to that person can also be material¹⁵.

26 The second flaw appears in what Evans J said of the third breach of duty¹⁶:

"I am ... not suggesting that [the Licensee] should have refused to return the motorcycle at all costs. It would, however, have been reasonable for him to have manifested some resistance to the return of the motorcycle. A response to the effect that he would release the motorcycle upon checking with Mrs Scott that she was content that Mr Scott ride her motorcycle home in the state that he was in would not have been inappropriate. Had Mr Scott responded to any resistance with the threat of violence, it may well have been reasonable to have given way. I am not, however, satisfied that if [the Licensee] had resisted providing the motorcycle to Mr Scott he would have been met with the threat of violence. It was not necessary for [the Licensee] to do anything, let alone manhandle Mr Scott, in order to

13 *Scott v CAL No 14 Pty Ltd t/as Tandara Motor Inn (No 2)* (2009) 256 ALR 512 at 531-532 [73].

14 *Scott v CAL No 14 Pty Ltd t/as Tandara Motor Inn (No 2)* (2009) 256 ALR 512 at 528 [57].

15 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48; [1980] HCA 12.

16 *Scott v CAL No 14 Pty Ltd t/as Tandara Motor Inn (No 2)* (2009) 256 ALR 512 at 528 [57].

deny him access to the motorcycle which was locked away in a storeroom."

Similarly, Tennent J said that there was no evidence that Mr Scott was likely to be physically aggressive¹⁷. To the contrary, Mr Scott had manifested a fair bit of verbal violence in relation to the question of his wife being telephoned. To say that he would not have threatened or used physical violence is to speculate, not to reach a conclusion sustainable on the balance of probabilities. While the Licensee did not have to manhandle Mr Scott to deny him access to the motorcycle, he may have had to defend himself physically if Mr Scott had begun to demand the keys and back the demand by force. Detached reflection is not demanded in assessing whether to give motorcycle keys to a man who is entitled to them and who, though he has been drinking and is angry, does not appear to be unfit to drive. Counsel for the Proprietor and the Licensee correctly submitted that a duty which required the Licensee to deny Mr Scott access to the keys carried a risk of exposing him to physical harm.

27 *Refusal to hand over the motorcycle.* As to the fourth alleged breach of duty – that the Licensee could simply have refused to hand over the motorcycle – counsel for the Board and Mrs Scott correctly declined to defend what Tennent J said. If the Licensee had done that, he would have been committing an illegal act.

28 *Licensee's failure to drive Mr Scott home.* Counsel refused to support the view that a fifth breach of duty was to be found in the Licensee's failure to drive Mr Scott home. There is no reason to suppose that Mr Scott would have submitted tamely to being driven home by the Licensee. Mr Scott had already refused two or three offers of a lift from the Kubes. The trial judge specifically found that in view of Mr Scott's mood he would have refused an offer of transport from the Licensee or from anyone else whom the Licensee may have arranged as a driver. Would it have been reasonable for the sole person in charge of the Hotel and its various areas to leave it for the period necessary to enable a drive of about 15 kilometres to be undertaken? This question was not investigated in the evidence. If it had been, the Licensee's departure from his post may have been revealed to be a breach of his contractual or statutory duties. It is far from clear that the answer to the question should be in the affirmative.

29 *Earlier compliance with duty.* Another obstacle to the case advanced by the Board and Mrs Scott on breach of duty is that the duty was complied with

17 *Scott v CAL No 14 Pty Ltd t/as Tandara Motor Inn (No 2)* (2009) 256 ALR 512 at 531 [72].

once the Licensee had made the offer to Mr Scott to ring Mrs Scott. There is an analogy with the finding in *Cole v South Tweed Heads Rugby League Football Club Ltd*¹⁸ that the Club discharged any duty of care to Mrs Cole by offering her safe transport home.

30 For those reasons, even if there was a duty of care, it was not breached.

Duty of care: the specific allegation in this case

31 *The duty found by the Full Court majority.* There is no doubt that the Proprietor and the Licensee owed Mr Scott various duties to take reasonable care – for example, a duty to take reasonable care to ensure that the premises were physically safe, and a duty to take reasonable care to ensure that equipment in operation, like gambling machines and kegs, did not injure him. As indicated above¹⁹, the duty relied on by the Full Court majority was a duty to take reasonable care to prevent Mr Scott from riding the motorcycle while so affected by alcohol as to have a reduced capacity to ride it safely. It was not a duty to restrict service of alcohol to Mr Scott.

32 *The duty advocated by counsel.* In this Court counsel defended a somewhat narrower version of the duty relied on by the Full Court majority. The duty was said to be 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 while intoxicated could be protected. The relevant means of taking care was to ring Mrs Scott so that she could collect Mr Scott. Counsel for the Board and Mrs Scott defended the Full Court majority's finding that the duty – or at least that more qualified version of it – existed by referring to Mr Scott's vulnerability and to the capacity of the Proprietor and the Licensee to influence events. They also referred to the central features of the relationship between the Proprietor and the Licensee, on the one hand, and Mr Scott, on the other. Those features were said to be as follows. Conformably with the commercial self-interest of the Proprietor and the Licensee, it was repeatedly stressed, intoxicating drinks were being served to Mr Scott. Mr Scott was known to have arrived on the motorcycle. The Licensee understood that the drinks had the capacity to impair, and had probably already affected, Mr Scott's capacity to ride the motorcycle home safely. The rumoured

18 (2004) 217 CLR 469 at 488 [59], 491 [76] and 492 [80] per Gummow and Hayne JJ; see also at 479-480 [22]-[24] per Gleeson CJ and at 504-505 [125]-[126] per Callinan J.

19 See [21].

deployment of a breathalyser check led to the Licensee and Mr Scott arranging for the motorcycle to be locked away because it was likely that Mr Scott would break the law if he were to ride it away. The arrangement permitted the Licensee to continue serving intoxicating drinks to Mr Scott, if Mr Scott so chose, because he would not be trying to ride away drunk on the motorcycle. The contemplated impairment of Mr Scott's capacity to ride safely included a diminished capacity to make sensible judgments. The solution reached by the arrangement was for Mrs Scott to be contacted when Mr Scott was ready to go home. Eventually, the Licensee decided, reasonably, that Mr Scott had had enough to drink. Mr Scott then announced his changed judgment, such as it was, that he would try to ride home.

Duty of care: the specific allegation rejected

33 *Was Mr Scott vulnerable?* So far as this defence of the Full Court majority reasoning depends on the view that Mr Scott was "vulnerable" or afflicted by a reduction in his capacity to make sensible judgments, it must be rejected. He was a man of 41. He was an experienced drinker – "moderate to heavy", according to Mrs Scott. Neither Mrs Kube nor Mrs Thirlway noticed any of the conventional signs of drunkenness in him. The Licensee did refuse Mr Scott service, but he was likely to be conscious of his own capacity under the influence of drinking. He assured the Licensee three times that he was fit to drive. He drove the motorcycle out of the storeroom without alerting the Licensee to any incapacity to drive. He knew the short route home very well.

34 *Commercial conduct.* As to the commercial aspect of the parties' dealings, counsel did not suggest that the Licensee was pressing drinks on Mr Scott, and accepted that the Licensee may not even have supplied Mr Scott with any more drinks after the arrangement was made.

35 *No duty.* Even if there can sometimes be a duty of care on a publican to take reasonable care in relation to the future service of alcohol or the consequences of having served it in the past, no duty can arise in the present circumstances.

36 *Nature of the arrangement.* The first reason why that is so turns on the nature of the arrangement. In some respects it was mischaracterised in the arguments of counsel for the Board and Mrs Scott. The arrangement was no more than an informal arrangement instigated by Mr Kube to meet Mr Scott's convenience. The goal was to store the motorcycle in order to avoid Mr Scott being breathalysed, not in order to avoid him being physically injured or killed. It was Mr Kube, not Mr Scott, who requested that the motorcycle be locked up. The arrangement gave no authority over the motorcycle to the Licensee. The arrangement did not deprive Mr Scott of his right of immediate possession of the

motorcycle. The arrangement imposed no duty on the Licensee to ring Mrs Scott: it merely assumed that Mrs Scott would come in response to a call from Mr Scott or Mr Kube. The arrangement left it open to Mr Scott to terminate it if he wished: the sub-bailment of the keys and the motorcycle was both gratuitous and at will.

37 *Narrow formulation of duty.* The second reason for rejecting the duty of care found by the Full Court majority, or any qualified version of it, lies in the following circumstances. The formulation of the duty of care propounded on behalf of the Board and Mrs Scott is narrow. It selects a particular chain of circumstances leading towards Mr Scott's death and contends that there was a duty to take care to prevent that chain of circumstances from occurring by preventing Mr Scott from riding the motorcycle. The formulation obscures difficulties in recognising the duty.

38 *Mr Scott's autonomy.* One of those difficulties is that the duty conflicts with Mr Scott's autonomy. The duty on the Licensee would have prevented Mr Scott from acting in accordance with his desire to ride his wife's motorcycle home²⁰. This conflict does not arise where for some supervening or overriding reason a person who is owed the putative duty is not autonomous, or fully autonomous – because, for example, some control must be exercised by the defendant over another person who either was vulnerable before the control was first exercised, or has become vulnerable by reason of the control having begun to be exercised. That is so for pupils in relation to their teachers, wards in relation to their guardians, prisoners in relation to the risk of fire caused by the negligence of gaolers²¹, prisoners in relation to the risk of harm from other prisoners not properly restrained by gaolers²², patients in relation to hospitals, crowds in relation to those charged with the duty to control them, and employees in relation to their employers. But the relationship between Mr Scott, on the one hand, and the Proprietor and the Licensee, on the other, did not impair Mr Scott's autonomy, and neither did the informal arrangement devised by Mr Kube.

39 *Lack of coherence with other torts.* Another difficulty obscured by the narrow formulation of the duty of care in the light of the particular eventuality which came to pass is that of legal incoherence. If the duty claimed to rest on the

20 Cf *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at 473 [3] per Gleeson CJ and 503 [121] per Callinan J.

21 *Howard v Jarvis* (1958) 98 CLR 177 at 183; [1958] HCA 19.

22 *New South Wales v Bujdosó* (2005) 227 CLR 1; [2005] HCA 76.

13.

Licensee existed, it would be incompatible with other duties owed by the Licensee²³. If the claimed duty extended to a duty to threaten or to use physical force to prevent Mr Scott from obtaining the keys to the motorcycle, for example, it clashed with the Licensee's duty not to commit the torts of assault and battery, and not to commit corresponding crimes. There are justifications which may be relied on as defences to those torts, but the significance of those torts in preventing violence – abuse of police power against subjects and disorders between subjects – means that the 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.

40

Lack of coherence with law of bailment. The claimed duty also clashes with the Licensee's duty as sub-bailee to hand over the keys and the motorcycle to Mr Scott, bailee for his wife²⁴. The postulated duty on the Licensee would further clash with s 45 of the *Criminal Code* (Tas)²⁵ which gave Mr Scott the right to use force to obtain the keys and the motorcycle. It is true that the Licensee was entitled to use reasonable force to protect the keys and the motorcycle from being taken by a trespasser²⁶. But Mr Scott was not a trespasser. In addition to these clashes with the common law of Australia and the

23 *Sullivan v Moody* (2001) 207 CLR 562 at 581 [55] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ; [2001] HCA 59.

24 *The Premier Group Pty Ltd v Followmont Transport Pty Ltd* [2000] 2 Qd R 338.

25 It provides:

"It is lawful for a person entitled by law to the possession of movable property to take it from a person who is in possession of the property, but who neither claims right to it nor acts by the authority of a person so claiming, and if the person in possession resists him, to use such force as is necessary to obtain possession of the property; provided that such force is not intended and is not likely to cause death or grievous bodily harm."

26 *Criminal Code* (Tas), s 43, which provides:

"It is lawful for any person in peaceable possession of any movable property, and for any person lawfully assisting him or acting by his authority, to use such force as he believes on reasonable grounds to be necessary to resist the taking of such property by a trespasser, or to retake it from a trespasser; provided that such force is not intended and is not likely to cause death or grievous bodily harm to the trespasser."

enacted law of Tasmania, if the claimed duty extended to a duty to prevent Mr Scott leaving the premises on the motorcycle to the possession of which he was entitled and which he had requested, it clashed with the Licensee's duty not to commit the tort of false imprisonment.

41 *Lack of coherence with legislative regimes in relation to alcohol.* Further, even though the claimed duty did not clash directly with the schemes appearing in the enacted law of Tasmania for controlling excessive drinking in hotels, it did not sit well with them. The Licensee had a statutory duty to refuse Mr Scott service²⁷ and not to supply him with liquor²⁸ if he appeared to be drunk, to require him to leave the Hotel²⁹, and to take reasonable steps to prevent the

27 *Liquor and Accommodation Act* 1990 (Tas), s 78. It provided, on pain of a fine: "A person shall not sell liquor to a person who appears to be drunk." The legislation is now entitled "*Liquor Licensing Act* 1990" – see *Liquor and Accommodation Amendment Act* 2004 (Tas), s 5.

28 *Liquor and Accommodation Act* 1990 (Tas), s 79. It provided, on pain of a fine:

"A person shall not supply liquor to a person who appears to be drunk on –

(a) licensed premises; or

(b) premises specified in a special permit."

29 *Liquor and Accommodation Act* 1990 (Tas), ss 62 and 80(1). Section 62 provided:

"A licensee shall require a person who –

(a) is acting in a violent, quarrelsome or disorderly manner; or

(b) is using disgusting, profane or foul language –

to leave the licensed premises."

Section 80(1) provided, on pain of a fine:

"A person shall leave licensed premises when required to do so by –

(a) the licensee or a person acting with the authority of the licensee;
or

(b) a police officer –

acting in accordance with this Act."

Section 80(2) provided, on pain of a fine:

(Footnote continues on next page)

15.

commission of an offence – but only on licensed premises³⁰. A police officer had power to arrest Mr Scott if that officer had reasonable grounds to suspect that Mr Scott had committed an offence by driving a vehicle under the influence of liquor to the extent that he was incapable of having proper control of a vehicle³¹.

"A person who –

- (a) has left licensed premises in compliance with subsection (1); or
- (b) has been removed from licensed premises by a police officer acting in accordance with this Act –

shall not re-enter or attempt to re-enter those premises within the period of 24 hours immediately after leaving or being removed from the premises."

Section 80(3) provided:

"A police officer may –

- (a) arrest without warrant a person whom the police officer reasonably believes is committing, or has committed, an offence under subsection (1) or (2); and
- (b) use such reasonable force as may be necessary to remove from licensed premises a person whom the police officer reasonably believes is committing, or has committed, an offence under subsection (1) or (2)."

30 *Liquor and Accommodation Act 1990 (Tas)*, s 79A. It provided, on pain of a fine:

"A licensee who knows or has reason to believe that an offence under this or any other Act is being, or is about to be, committed on the licensed premises must take reasonable action to prevent the commission of the offence."

31 *Road Safety (Alcohol and Drugs) Act 1970 (Tas)*, ss 4 and 5(1). Section 4 provides:

"A person who drives a vehicle while under the influence of one or more of the following things to the extent that he or she is incapable of having proper control of the vehicle is guilty of an offence:

- (a) intoxicating liquor;
- (b) a drug."

Section 5(1) provides:

(Footnote continues on next page)

A police officer had power to forbid Mr Scott to drive the motorcycle if that officer was of the opinion that he was incapable of having proper control of it, to direct him to deliver up the keys of the motorcycle, and to take such steps as may have been necessary to render the motorcycle immobile or to remove it to a place of safety³². As Crawford CJ pointed out³³, the legislation did not give power of this kind to citizens who were not police officers. The failure to comply with a direction so given or the doing of an act so forbidden is a criminal offence, provided the police officer had reasonable grounds for believing that, in all the circumstances of the case, the direction or prohibition was necessary in the interests of Mr Scott, or of any other person, or of the public³⁴. The legislation

"If a police officer has reasonable grounds to suspect that a person has committed an offence against section 4, the police officer may exercise either or both of the following powers:

- (a) arrest the person without warrant;
- (b) impound the vehicle driven by the person and have it removed to a convenient place for safe-keeping."

32 *Traffic Act 1925* (Tas), s 41A(1). It provides:

"Where a police officer is of the opinion that a person who is for the time being in charge of a motor vehicle is, by reason of his physical or mental condition, however arising, incapable of having proper control of the motor vehicle, the police officer may –

- (a) forbid that person to drive the motor vehicle;
- (b) direct that person to deliver up to the police officer forthwith all ignition keys and other keys of the motor vehicle that are in that person's possession; and
- (c) take such steps as may be necessary to render the motor vehicle immobile or to remove it to a place of safety."

33 *Scott v CAL No 14 Pty Ltd t/as Tandara Motor Inn (No 2)* (2009) 256 ALR 512 at 522 [40].

34 *Traffic Act 1925* (Tas), s 41A(2). It provides:

"A person who fails to comply with a direction given to him under subsection (1) or does an act that is for the time being forbidden under that subsection is guilty of an offence against this Act, but no person shall be convicted of an offence under this subsection unless the court before which
(Footnote continues on next page)

contains further detailed safeguards for those persons subjected to the prohibitions, directions, and other conduct of police officers pursuant to its terms³⁵. These provisions leave no room for the suggestion that the law relating

he is charged is satisfied that the police officer had reasonable grounds for believing that, in all the circumstances of the case, the direction or prohibition was necessary in the interests of the defendant, or of any other person, or of the public."

35 *Traffic Act 1925* (Tas), s 41A(3)-(4). Section 41A(3) provides:

"Subject to subsection (4), where a police officer exercises the powers conferred by subsection (1), he shall retain the ignition keys and other keys of the motor vehicle and cause the motor vehicle to be kept immobile or in a place of safety until such time as, in his opinion, the person referred to in the last-mentioned subsection is capable of having proper control of the motor vehicle."

Section 41A(4) provides:

"Notwithstanding anything in subsection (3), a person who is directed or forbidden to do anything, pursuant to subsection (1), may, at the time when the direction or prohibition is given or imposed or at any time thereafter, request that –

- (a) his capacity to have proper control of the motor vehicle be determined by a police officer (in this subsection referred to as 'the senior police officer') of a higher rank than the police officer who gave the direction or imposed the prohibition, if the last-mentioned police officer is of a rank lower than inspector; or
- (b) he be permitted to submit himself for examination by a legally-qualified medical practitioner –

and if it is reasonably practicable that the request be granted the police officer who gave the direction or imposed the prohibition shall make the necessary arrangements accordingly, and if the senior police officer or the medical practitioner, as the case may be, certifies that he is of the opinion that that person is capable of having proper control of the motor vehicle, the police officer who has possession of the ignition keys and other keys of the motor vehicle shall forthwith return them to that person and, if the motor vehicle has been rendered immobile, shall also without further delay cause it to be again returned to running order."

to the tort of negligence gave the Licensee, without regard to the careful statutory safeguards against abuse of police power, a power to arrest Mr Scott or control his freedom to use property – the motorcycle and its keys – to which he had a right of possession. Perhaps recognising this, counsel for the Board and Mrs Scott contended at trial that the Licensee had a duty to call the police so that they could exercise their statutory powers, but the trial judge rejected the view that this would have prevented the accident. That rejection was accepted by Evans J, and the contention was not put to this Court. Further, the assumption underlying the general criminal law of Tasmania and the *Liquor and Accommodation Act* 1990 (Tas)³⁶ is that licensed premises are to be conducted in such a way as to minimise the risk of antagonism and violence. The conduct which the claimed duty was said to require of the Licensee – paltering with Mr Scott, deceiving him, repeating suggestions about ringing Mrs Scott which had upset him, refusing his lawful requests for his wife's property – was liable to stimulate antagonism and violence, not minimise it. As this case is dealing with the common law of negligence across Australia, not just in Tasmania, it should be noted that all jurisdictions have legislation raising similar problems of legal coherence to those which are raised by the Tasmanian legislation.

42 *Conclusion on legal coherence.* In the words of Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ in *Sullivan v Moody*³⁷, to conclude that the law of negligence creates a duty in the present circumstances "would subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms."

43 *Conflict between case on duty and case on breach.* Yet another difficulty is that the case urged by counsel for the Board and Mrs Scott in relation to duty conflicts with the case which Evans J accepted in relation to breach. As already noted, Evans J said in relation to breach that the Licensee should have delayed, deflected and stalled in order to prevent Mr Scott getting the keys and hence the motorcycle; that he should have "manifested some resistance" to returning those items, but not that he "should have refused to return the motorcycle at all costs."³⁸ The assumptions underlying this reasoning are that the Licensee had no power to refuse to return the keys and the motorcycle, and no power to resist Mr Scott's desires. The assumptions underlying the duty case, once it is moved, as it must be, away from its narrow formulation tailored to the precise circumstances of the

36 Especially ss 62 and 79A: see above at [41], n 29 and [41], n 30.

37 (2001) 207 CLR 562 at 576 [42].

38 See [26] above.

damage, are that the Licensee did have power to refuse to return the keys and the motorcycle, and did have power to use force if Mr Scott tried to obtain the keys and the motorcycle by force, or tried to leave on the motorcycle. These contradictions point against the soundness of the case on duty.

44 *An "exceptional" case?* Judges who have generally opposed the creation of duties of care on the part of publicans to their customers in relation to the consequences of serving alcohol have left open the possibility that they may exist in "exceptional" cases³⁹. 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"⁴⁰. 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 unconscious⁴¹. But the present circumstances bear no resemblance to those. This was not an exceptional case in that sense, nor, though counsel repeatedly hinted to the contrary, in any other sense.

45 *Conclusion.* For those reasons Blow J and Crawford CJ were correct to hold that no duty of care was owed by the Proprietor or the Licensee.

Duty of care owed by publicans to customers: general

46 *General questions.* Do publicans owe a duty to take care not to serve customers who have passed a certain point of inebriation? And do they owe a duty to take positive steps to ensure the safety of customers who have passed that point after they leave the publican's premises⁴²?

39 *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at 477 [14] per Gleeson CJ and 507 [131] per Callinan J. See also *South Tweed Heads Rugby League Football Club Ltd v Cole* (2002) 55 NSWLR 113 at 146 [197] per Ipp AJA.

40 *South Tweed Heads Rugby League Football Club Ltd v Cole* (2002) 55 NSWLR 113 at 146 [197] per Ipp AJA.

41 *Scott v CAL No 14 Pty Ltd* (2007) 17 Tas R 72 at 84 [37].

42 Counsel for the Board and Mrs Scott contended that while these duties lay on persons supplying liquor for consideration, they did not lie on social hosts and hostesses. The latter issue need not be resolved in these appeals, but Gleeson CJ saw it as difficult to confine any duty of care owed by the suppliers of alcohol to
(Footnote continues on next page)

47 Because of the very specific duty which the Full Court majority found in this case, and the even more specific duty which counsel for the Board and Mrs Scott advocated in this Court, these general questions in one sense do not arise. The approach at least of counsel assumes that in general the answers to those questions will be in the negative. Counsel pursued their clients' interests by concentrating instead on endeavouring to treat the present case as falling within an exception to those general principles of non-liability.

48 *A question of stare decisis.* However, it is important to note that the proceedings in the Supreme Court of Tasmania reveal a split in approach to stare decisis. Blow J adopted one approach. The Full Court majority adopted another. The latter approach was erroneous and potentially damaging. The split arises in this way.

49 The decision of this Court in *Cole v South Tweed Heads Rugby League Football Club Ltd*⁴³ was not, strictly speaking, an authority binding the Tasmanian courts to hold that publicans owe no duty of care to patrons in relation to the amount of alcohol served and the consequences of its service, save in exceptional cases. Callinan J upheld that proposition⁴⁴. Gleeson CJ⁴⁵ decided that in the circumstances of that case there was no duty of care, but did so in terms consistent with the proposition upheld by Callinan J. On the other hand, McHugh J denied the proposition⁴⁶. So did Kirby J⁴⁷. Gummow and Hayne JJ expressly declined to decide the point⁴⁸. Blow J⁴⁹, while not considering the decision of this Court to be binding in relation to duty, did follow the ratio decidendi of the decision of the New South Wales Court of Appeal in *Cole's*

commercial supply: *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at 478 [17].

43 (2004) 217 CLR 469.

44 (2004) 217 CLR 469 at 506-507 [129]-[132].

45 (2004) 217 CLR 469 at 475-478 [9]-[18].

46 (2004) 217 CLR 469 at 481-484 [32]-[39].

47 (2004) 217 CLR 469 at 494-497 [90]-[97].

48 (2004) 217 CLR 469 at 492 [81]-[82].

49 *Scott v CAL No 14 Pty Ltd* (2007) 17 Tas R 72 at 83 [35].

case, which this Court upheld in the result⁵⁰. The proposition that there was no duty save in exceptional cases was one ratio of that case. It was the duty of Blow J to follow that decision unless he thought it plainly wrong. This was required by the decision of this Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*⁵¹. He did not think it plainly wrong, and he complied with that duty.

50 It was said by the New South Wales Court of Appeal in *Gett v Tabet*⁵² that *Farah Constructions* "expanded" the principle applied to the construction of national legislation and explained in *Australian Securities Commission v Marlborough Gold Mines Ltd*⁵³. But that is not correct. The principle has been recognised in relation to decisions on the common law for a long time in numerous cases before the *Farah Constructions* case. It was also recognised in Blow J's judgment in this very case⁵⁴. The principle simply reflects, for the operation of the common law of Australia within Australia, the approach which this Court took before 1986 in relation to English Court of Appeal and House of Lords decisions, as stated in *Wright v Wright*⁵⁵.

51 In contrast, the Full Court majority did not say whether it thought the decision of the New South Wales Court of Appeal in *Cole's* case was plainly wrong, but it did not follow it. It distinguished it. This was a legitimate course to take, and consistent with the New South Wales Court of Appeal's approach, if the Full Court majority regarded the present case as "exceptional". Counsel for the Board and Mrs Scott submitted to the Full Court, as they also submitted to

50 (2002) 55 NSWLR 113.

51 (2007) 230 CLR 89 at 151-152 [135]; [2007] HCA 22.

52 (2009) 254 ALR 504 at 564 [286].

53 (1993) 177 CLR 485 at 492; [1993] HCA 15.

54 (2007) 17 Tas R 72 at 83 [35]. See also, for example, *Marshall v Watt, Struthers, and County* [1953] Tas SR 1 at 14-16 (to which Blow J referred at 83 [35]); *Body Corporate Strata Plan No 4303 v Albion Insurance Co Ltd* [1982] VR 699 at 705; *Grime Carter & Co Pty Ltd v Whytes Furniture (Dubbo) Pty Ltd* [1983] 1 NSWLR 158 at 161; *Akins v Abigroup Ltd* (1998) 43 NSWLR 539 at 547 (where Mason P applied the principle to a Full Federal Court decision relating to the impact of uniform legislation on the common law); *R v Morrison* [1999] 1 Qd R 397 at 401; *S v Boulton* (2006) 151 FCR 364 at 369-370 [22]-[27].

55 (1948) 77 CLR 191 at 210; [1948] HCA 33, where Dixon J described diversity in the development of the common law as an "evil".

this Court, that the present case was exceptional, and that Blow J had erred in not finding that it was exceptional⁵⁶. The Full Court majority did not in terms describe the case as exceptional. Unless the Full Court majority had concluded, giving reasons, either that the present case was exceptional, or that the New South Wales Court of Appeal was plainly wrong, it was its duty to follow the New South Wales Court of Appeal. The Full Court majority did not conclude that the present case was exceptional or that the New South Wales Court of Appeal was plainly wrong. Hence it did not carry out its duty to follow the New South Wales Court of Appeal. If these appeals had not been brought, there would have been an undesirable disconformity between the view of the New South Wales Court of Appeal as to the common law of Australia and the view of the Tasmanian Full Court majority. At best the Full Court decision would have generated confusion. At worst it would have encouraged the commencement of baseless and ultimately doomed litigation, to the detriment both of the unsuccessful plaintiffs and of the wrongly vexed defendants.

52 *There is in general no duty.* The conclusion in this Court that the Full Court majority decision must be reversed as a practical matter overcomes these problems. However, even though the arguments in this Court proceeded in a much narrower way, being closely tied to the specific facts of this case, it is desirable to avoid repetition in future of what happened in this case by explicitly stating the fundamental reason why the Full Court majority decision on duty of care is wrong. The reason is 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. That conclusion is correct because the opposite view would create enormous difficulties, apart from those discussed above⁵⁷, relating to customer autonomy and coherence with legal norms. The difficulties can be summarised as follows.

53 Expressions like "intoxication", "inebriation" and "drunkenness" are difficult both to define and to apply. The fact that legislation compels publicans not to serve customers who are apparently drunk does not make the introduction of a civil duty of care defined by reference to those expressions any more

56 *Scott v CAL No 14 Pty Ltd t/as Tandara Motor Inn (No 2)* (2009) 256 ALR 512 at 519 [29] and 530 [64]-[65].

57 At [38]-[42].

workable or attractive. It is difficult for an observer to assess whether a drinker has reached the point denoted by those expressions. Some people do so faster than others. Some show the signs of intoxication earlier than others. In some the signs of intoxication are not readily apparent. With some there is the risk of confusing excitement, liveliness and high spirits with inebriation. With others, silence conceals an almost complete incapacity to speak or move. The point at which a drinker is at risk of injury from drinking can be reached in many individuals before those signs are evident. Persons serving drinks, even if they undertake the difficult process of counting the drinks served, have no means of knowing how much the drinker ingested before arrival. Constant surveillance of drinkers is impractical. Asking how much a drinker has drunk, how much of any particular bottle or round of drinks the purchaser intends to drink personally and how much will be consumed by friends of the purchaser who may be much more or much less intoxicated than the purchaser would be seen as impertinent. Equally, to ask how the drinker feels, and what the drinker's mental and physical capacity is, would tend to destroy peaceful relations, and would collide with the interests of drinkers in their personal privacy⁵⁸. In addition, while the relatively accurate calculation of blood alcohol levels is possible by the use of breathalysers, the compulsory administration of that type of testing by police officers on the roads was bitterly opposed when legislation introduced it, and it is unthinkable that the common law of negligence could compel or sanction the use of methods so alien to community mores in hotels and restaurants.

54

Then there are issues connected with individual autonomy and responsibility. Virtually all adults know that progressive drinking increasingly impairs one's judgment and capacity to care for oneself⁵⁹. Assessment of impairment is much easier for the drinker than it is for the outsider⁶⁰. It is not against the law to drink, and to some degree it is thought in most societies – certainly our society – that on balance and subject to legislative controls public drinking, at least for those with a taste for that pastime, is beneficial. As Holmes J, writing amidst the evils of the Prohibition era, said: "Wine has been

58 *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at 475-476 [10]-[12] and 506 [130]; *South Tweed Heads Rugby League Football Club Ltd v Cole* (2002) 55 NSWLR 113 at 140-142 [166]-[171].

59 *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at 476 [13] and 507 [131].

60 *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at 476 [13]. See also *South Tweed Heads Rugby League Football Club Ltd v Cole* (2002) 55 NSWLR 113 at 141 [166].

thought good for man from the time of the Apostles until recent years."⁶¹ Almost all societies reveal a propensity to resort to alcohol or some other disinhibiting substance for purposes of relaxation. Now some drinkers are afflicted by the disease of alcoholism, some have other health problems which alcohol caused or exacerbates, and some behave badly after drinking. But it is a matter of personal decision and individual responsibility how each particular drinker deals with these difficulties and dangers. Balancing the pleasures of drinking with the importance of minimising the harm that may flow to a drinker is also a matter of personal decision and individual responsibility. It is a matter more fairly to be placed on the drinker than the seller of drink. To encourage interference by publicans, nervous about liability, with the individual freedom of drinkers to choose how much to drink and at what pace is to take a very large step. It is a step for legislatures, not courts, and it is a step which legislatures have taken only after mature consideration. It would be paradoxical if members of the public who "may deliberately wish to become intoxicated and to lose the inhibitions and self-awareness of sobriety"⁶², and for that reason are attracted to attend hotels and restaurants, were to have that desire thwarted because the tort of negligence encouraged an interfering paternalism on the part of those who run the hotels and restaurants.

55 A duty to take reasonable care to ensure that persons whose capacity to care for themselves is impaired are safeguarded also encounters the problems of customer autonomy⁶³ and legal coherence⁶⁴ discussed above. A further problem of legal coherence arises where legislation compels a publican to eject a drunken customer but the tort of negligence requires the person's safety to be safeguarded by not permitting the person to drive or to walk along busy roads, and hence requires the person to be detained by some means. Even if the customer wants to leave, the publican is caught between the dilemma of committing the torts of false imprisonment or battery and committing the tort of negligence.

⁶¹ *Tyson & Brother v Banton* 273 US 418 at 446 (1927).

⁶² *South Tweed Heads Rugby League Football Club Ltd v Cole* (2002) 55 NSWLR 113 at 141 [166].

⁶³ At [38].

⁶⁴ At [39]-[42].

56 *The Canadian position.* The conclusion that there is no relevant duty accords with English authority⁶⁵. It has, however, been rejected in the Supreme Court of Canada in *Jordan House Ltd v Menow*⁶⁶. That case is distinguishable. The defendant, unlike the Proprietor and the Licensee in this case, was aware of the plaintiff's intoxicated condition. Martland, Spence and Laskin JJ noted that the defendant knew that the plaintiff "had a tendency to drink to excess and then to act recklessly" and annoy other customers, that a year earlier he had been banned from the hotel for a period of time because he annoyed other customers, and that the hotel's employees had been instructed not to serve him unless he was accompanied by a responsible person⁶⁷. Judson and Ritchie JJ stressed that the defendant knew of the plaintiff's "somewhat limited capacity for consuming alcoholic stimulants without becoming befuddled and sometimes obstreperous"⁶⁸. More fundamentally, however, the reasoning is unconvincing because of its failure to take into account and analyse the considerations of principle referred to above, particularly the consideration of legal incoherence⁶⁹. Australian authorities which have adopted or appear to have approved the Canadian approach should not be followed⁷⁰.

Duty of care of publicans to persons other than their customers

57 The conclusion that, save in 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 says nothing about whether publicans owe a duty to third parties who may be damaged by reason of the intoxication of those customers. Defendants owe duties of care not to the world, but to particular plaintiffs. 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

65 For example, *Barrett v Ministry of Defence* [1995] 1 WLR 1217; [1995] 3 All ER 87 (which illustrates the absence of a general duty up to the point when the drinker collapsed, but its existence as an "exceptional" matter thereafter).

66 [1974] SCR 239.

67 [1974] SCR 239 at 242.

68 [1974] SCR 239 at 251.

69 At [39]-[42].

70 For example, *Johns v Cosgrove* (1997) 27 MVR 110 at 113-114; *Desmond v Cullen* (2001) 34 MVR 186 at 192-194 [32]-[41]; *Rosser v Vintage Nominees Pty Ltd* (1998) 20 SR (WA) 78 at 82.

injured by the customer. The Supreme Court of Canada has recognised, in statements not necessary to the decision, that there is a duty of care to a third party⁷¹. The Supreme Court regarded this as a logical step from the conclusion that there is a duty to the customer⁷². In this country, since there is generally no duty to the customer, the step cannot be taken on that ground. Whether it is open on some other ground must be left to a case raising the issue.

The Civil Liability Act 2002 (Tas)

58 Mr Scott died on 24 January 2002. The *Civil Liability Act* 2002 (Tas) contains some provisions relevant, in cases involving intoxication, to contributory negligence and breach of duty. But since the legislation was only enacted on 19 December 2002 and came into force thereafter prospectively, it is irrelevant to the issues in these appeals.

Orders

59 The following orders should be made.

Matter No H7 of 2009

1. Appeal allowed.
2. Orders of the Full Court of the Supreme Court of Tasmania set aside and in lieu thereof order that the appeal to that Court be dismissed.
3. The respondent is to pay the appellants' costs of the hearing in the Full Court of the Supreme Court of Tasmania and in this Court.

Matter No H8 of 2009

1. Appeal allowed.
2. Orders of the Full Court of the Supreme Court of Tasmania set aside and in lieu thereof order that the appeal to that Court be dismissed.
3. The respondent is to pay the appellants' costs of the hearing in the Full Court of the Supreme Court of Tasmania and in this Court.

71 *Stewart v Pettie* [1995] 1 SCR 131.

72 *Stewart v Pettie* [1995] 1 SCR 131 at 143.

Gummow J
Heydon J
Crennan J

27.

60 HAYNE J. Mr Shane Scott, the husband of the respondent to one of these appeals, died when the motorcycle he was riding home from a hotel near his workplace left the road and collided with the guardrail on a bridge. He was about 700 metres from home. He had a blood alcohol reading of 0.253g per 100ml of blood.

61 Mr Scott's widow and the Motor Accidents Insurance Board alleged that the Proprietor and the Licensee of the hotel at which Mr Scott had been drinking owed and breached a duty of care to Mr Scott and that the negligence of each was a cause of his death. The facts and the arguments of the parties are set out in the joint reasons of Gummow, Heydon and Crennan JJ.

62 I agree with Gummow, Heydon and Crennan JJ that, for the reasons their Honours give, neither the Proprietor nor the Licensee owed Mr Scott a relevant duty. Questions of breach and causation need not be decided.

63 I also agree with what their Honours say under the heading "A question of stare decisis".

64 There was no relevant duty of care. For the reasons given by Gummow, Heydon and Crennan JJ, outside exceptional cases, persons in the position of the Proprietor and the Licensee 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. Whether or when there could be any exception to that general rule need not be decided. This was not such a case.

65 It was not submitted that the Proprietor or the Licensee breached any duty of care by serving or continuing to serve alcohol to Mr Scott. That is, it was not submitted that either the Proprietor or the Licensee owed a duty of care that required them to monitor or minimise the service of alcohol to Mr Scott. As the joint reasons show, this Court's decision in *Cole v South Tweed Heads Rugby League Football Club Ltd*⁷³, and the decision of the Court of Appeal of New South Wales from which that appeal was brought⁷⁴, would have presented serious obstacles in the way of any such submission.

66 In this Court the duty allegedly owed by the Proprietor and the Licensee concerned protecting Mr Scott from the consequences of the alcohol he chose to consume. As ultimately framed in oral argument, the duty was very specific – to

73 (2004) 217 CLR 469; [2004] HCA 29.

74 *South Tweed Heads Rugby League Football Club Ltd v Cole* (2002) 55 NSWLR 113.

take reasonable steps to do as the Licensee and Mr Scott had originally agreed: telephone Mrs Scott when Mr Scott was ready to go home. Expressing the duty in this way had the parties to the arrangement fix the content of the duty which one owed to the other. It did that not as a particular statement of some more general duty to take reasonable care for the safety of another, but as if the arrangement were one for breach of which damages should be allowed. But there was no contract.

67 I would add to the reasons given by Gummow, Heydon and Crennan JJ for rejecting this formulation of the duty of care, the following additional consideration.

68 Because the duty relied on in this Court was framed so specifically, it merged the separate inquiries about duty of care and breach of duty. The merger that resulted carried with it the vice of retrospective over-specificity of breach identified in *Romeo v Conservation Commission (NT)*⁷⁵ and in the diving cases of *Vairy v Wyong Shire Council*⁷⁶, *Mulligan v Coffs Harbour City Council*⁷⁷, and *Roads and Traffic Authority (NSW) v Dederer*⁷⁸. The duty alleged was framed by reference to the particular breach that was alleged and thus by reference to the course of the events that had happened. Because the breach assigned was not framed prospectively the duty, too, was framed retrospectively, by too specific reference to what had happened. These are reasons enough to reject the formulation of duty advanced in argument in this Court.

69 The appeal should be allowed and consequential orders made in the form proposed by Gummow, Heydon and Crennan JJ.

75 (1998) 192 CLR 431 at 490-491 [163]-[164]; [1998] HCA 5.

76 (2005) 223 CLR 422 at 433-434 [29], 441 [54], 443 [60]-[61], 460-463 [122]-[129]; [2005] HCA 62.

77 (2005) 223 CLR 486 at 501-502 [50]; [2005] HCA 63.

78 (2007) 234 CLR 330 at 353 [65]; [2007] HCA 42. See also *New South Wales v Fahy* (2007) 232 CLR 486 at 505 [57], 524-525 [123], [125]; [2007] HCA 20.