

“Actually it only takes me one drink to get drunk. The trouble is I can’t remember if it’s the thirteenth or fourteenth.”¹

COLE V SOUTH TWEED HEADS RUGBY LEAGUE CLUB LTD (2004) 78 ALJR 933.

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In *Cole v South Tweed Heads Rugby League Club Ltd*² the High Court of Australia was given the opportunity to define the circumstances in which a commercial provider of alcohol owed a duty to a patron to take steps to prevent the patron from injuring himself due to effects of the alcohol. Although the claim failed, many of the important questions relating to such a duty remain unanswered.

The plaintiff, Rosalie Cole, had attended the defendant club on the day of her accident. The evidence suggested that she consumed about eight glasses of spumante between 9.30am and 10.30am and then shared at least another bottle of wine with her friend. From approximately 3pm she had been refused service because of her intoxication and at 6.15pm she had been asked to leave the premises of the club by the club manager. At this time she was in the company of two men who were said to be sober. The manager, when asking her to leave, offered her transport home in the guise of a courtesy bus or, when this was vehemently rejected, offered to ring a taxi for her. Both offers were refused and one of her male companions told the manager to “leave it with us and we’ll look after her”. The plaintiff was run down by a motor vehicle shortly after leaving the club and suffered serious injuries. She sued the driver of the motor vehicle as well as the club in negligence. The trial judge found the club liable in negligence but apportioned damages between the defendant club, the driver of the motor vehicle, and the plaintiff.

¹ George Burns, cited on <http://www.aardvarkarchie.com/quotes/drink4.htm> (at 7 December 2004).

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² (2004) 78 ALJR 933.

The New South Wales Court of Appeal (Heydon, Santow JJA, Ipp AJA) allowed an appeal by the club, rejecting the finding that the club owed the plaintiff a duty of care to protect her against a risk of physical injury resulting from her behaviour in consequence of her excessive consumption of alcohol.

THE MAJORITY DECISION

The High Court by a majority of 4–2 upheld the decision of the New South Wales Court of Appeal. Although denying the existence of a duty of care in this case, the majority did not expressly state whether, and, if so, in what circumstances, a duty of care might be owed by a supplier of alcohol to a consumer to protect the consumer from personal injury. Rather, Gleeson CJ held that, apart from extreme cases, the law makes intoxicated people legally responsible for their actions and thus they should not be able to avoid responsibility for the risks that accompany a personal choice to consume alcohol³. His Honour also found that even though the respondent did owe the appellant a duty of care as an occupier, such a duty did not extend to protecting consumers against risks of injury attributable to alcohol consumption. Accordingly, it was usually not appropriate for a restaurateur or a publican, when supplying a bottle of wine, to inquire as to how much each customer was going to drink and what exactly each of the customers was going to do after they left the premises. If the club's duty was to monitor and control the appellant's behaviour this would have involved a reasonably high interference with her privacy and her freedom of action especially as the appellant was of mature age without any physical or mental disability. These sentiments were echoed by Gummow and Hayne JJ when they held that it would be impracticable for the club to owe a duty to all of the patrons of the club to monitor and observe their behaviour.⁴ Callinan J held that, apart from extraordinary cases, when a person makes a voluntary and deliberate decision to drink to excess the law should not impose a duty of care on a third party to protect that person from harm. The plaintiff in this case should carry personal responsibility for her actions as her age and life experience had

³ Ibid 937 (Gleeson CJ).

⁴ Ibid 945 (Gummow and Hayne JJ).

given her “ample opportunity to observe and come to understand the universal effects of the consumption of alcohol.”⁵

Even if a duty had existed, the majority found that there was no breach of duty or causation. The club had last supplied the appellant with alcohol at 12.30pm and had refused her further alcohol at 3pm and offered her safe transport home. Gummow and Hayne JJ agreed; the club could do no more than offer her safe transportation home as it could not lawfully detain her⁶. Their Honours were particularly scornful of the suggestion that the plaintiff should have been counselled, stating that this was both impractical and inappropriate. Nor was causation necessarily established; as Gleeson CJ pointed out, the club was not the only source of supply of alcohol in the immediate vicinity and the appellant also had access to alcohol that was supplied directly to her by her friends. The majority also dismissed the relevance of s44A of the *Registered Clubs Act 1976* (NSW) which made it an offence to supply liquor to an intoxicated person. The action was not for breach of statutory duty and in any event the plaintiff had been evicted when the intoxication was noticed.

DISSENTING JUDGMENTS

McHugh and Kirby JJ dissented. McHugh J (with whom Kirby J agreed on this point) held that as an occupier the club’s duty to its patrons extended to the protection of injury from all of the activities on the premises. Their Honours also found a breach of duty, Kirby J saying that the club’s action of offering her transportation home was simply too little, too late. Nor was causation a bar to recovery; according to McHugh J, Mrs Cole’s abusive refusal of the offer of transport home was exactly the kind of response that might have been expected to flow from the club’s breach of duty in allowing her to continue to drink alcohol.⁷ Both McHugh and Kirby JJ were also unconvinced by the majority’s concern with the plaintiff’s autonomy if a duty be found. McHugh J stated that finding any duty of care, especially when the duty extended to taking affirmative action, curtailed the autonomy of the defendant to the extent of the duty⁸, and for

⁵ Ibid 952 (Callinan J).

⁶ Ibid 946 (Gummow and Hayne JJ).

⁷ Ibid 942 (McHugh J).

⁸ Ibid 941 (McHugh J).

Kirby J the commercial nature of the relationship between the parties⁹ overrode the (alleged) plaintiff's interest in free will and autonomy. Kirby J also saw the recognition of a duty of care in these circumstances as sending a message to other publicans and businesses who served alcohol to act responsibly.¹⁰ This is in line with his view that the law of torts exists partly to set standards in society.¹¹

THE NATURE OF THE DUTY WITH RESPECT TO INTOXICATION

One of the difficulties with the decision of the High Court in *Cole* is its failure to deal explicitly with when a duty of care might be owed to a consumer of alcohol. Because of this the nature of any such duty was not discussed. This is unfortunate, because the duty could be based on four inter-related factors. First, the duty could be based on the fact that the defendant supplied alcohol. Secondly, the duty could be based on the fact of the plaintiff's intoxication. Thirdly, the duty could be based on the fact that the defendant supplied alcohol on the defendant's premises so as to place the plaintiff in an intoxicated state. Finally, the first and third duties might be mandated only when the defendant was a commercial supplier of alcohol. At various times in the judgments all four factors seem to be seen as relevant in either accepting or rejecting any duty of care.

(a) The Supply of Alcohol

It is submitted that any duty should not be based on the mere supply of alcohol. Even for the minority an important consideration was that the club as occupier had some measure of control over the plaintiff's consumption of alcohol. This would be different from a purchase from a bottle shop although such a difference may be more apparent than real. For example, a sober customer may inform a bottle shop that he is going to drink himself into a stupor with the alcohol he is buying. However, the difficulty with such a duty is exposed by asking what steps the employee of the bottle shop could take to discharge such a duty. The only effective measure would be to refuse to sell the alcohol.

⁹ Ibid 948 (Kirby J).

¹⁰ Ibid 950-51 (Kirby J).

¹¹ Ibid 948 (Kirby J).

Further, knowledge of the recipient's intended use would not necessarily be required to impose a duty as it is clearly foreseeable that a person buying alcohol may drink it and place themselves at risk of injury through such consumption. A duty imposed on this basis goes too far and would, arguably, be contrary to the legislative policy that allows persons over the age of 18 to purchase alcohol.

(b) The Fact of Intoxication

A more likely candidate for the factor that creates a duty is the presence of an intoxicated person on premises. Counsel for Mrs Cole argued that the club breached its duty in allowing her to leave the premises once intoxicated and in all of the judgments attention is drawn to the steps taken by the club once it was known that the plaintiff was intoxicated. For Kirby and McHugh JJ this issue went to causation, indicating that they saw no duty being owed by the mere fact of intoxication. Although in many situations (as in *Cole*) there is scope to argue two duties – one in relation to serving alcohol on premises, one in relation to the presence of an intoxicated patron on the premises – it is submitted that the minority were correct to identify a duty only in relation to serving. Imagine a pub crawl where the plaintiff consumed alcohol at a number of other hotels before arriving, drunk, at the defendant's hotel. Would the defendant be liable for failing to take steps to ensure the plaintiff does not injure himself due to his alcoholic state? If so, it seems onerous on the defendant, whose actions made no contribution to the plaintiff's condition which would be the source of the duty. What of the plaintiff who consumes a skinful at Hotel 1 and becomes intoxicated, staggers fortuitously to Hotel 2, is served an additional drink, and then is injured whilst walking home? It may be that either hotel could join the other as a third party and claim contribution, although it is at least possible that Hotel 1 could argue successfully that the later breach of Hotel 2 was the sole cause of the injury. This would seem hard on Hotel 2. However, Hotel 2 is in a worse position where the plaintiff leaves Hotel 1 affected by alcohol but short of being intoxicated and has the drink that 'puts him over the top' in Hotel 2. If Hotel 2 fails to take reasonable steps to prevent the plaintiff from injuring himself it will be liable yet Hotel 2's contribution to the plaintiff's state may be minimal. Of course, this may be viewed as another example of 'moral luck' but it may legitimately be questioned whether Hotel 2's culpability in such a case is

sufficient for it to bear 100% of the responsibility vis-à-vis Hotel 1 (as Hotel 1's conduct is not tortious).¹²

Many more questions arise in relation to such a duty but two more will be mentioned briefly. First, how might such a duty be discharged? As Gummow & Hayne JJ noted the club could not detain a patron to prevent harm to the patron and any attempt to do so would constitute battery. With respect to the appellant's counsel, who suggested that the plaintiff should have been 'counselled', such a suggestion is, in the words of Callinan J, 'fanciful'.¹³ For a start it does not overcome the problem of the plaintiff who wants to leave without being counselled. It was also suggested that the police could be called but this misses the point; police are called when a patron will not leave, not to stop a patron leaving because it may be unsafe for them to do so.¹⁴ In any case it is hard to see much public support for police time being used to shepherd voluntarily-intoxicated patients home after a night out. Secondly, if the duty of care is based upon the plaintiff's intoxication, it is hard to see why the duty of care should be limited to commercial providers of alcohol, a point of clear importance to the minority. The common law generally imposes a duty to act only where there is a special relationship between the parties. If that special relationship can be found merely by the presence of an intoxicated plaintiff on the defendant's premises it is hard to see why a distinction should be drawn between commercial and domestic premises where alcohol is served. Should the host of a party come under a duty when intoxicated guests arrive? It is also not clear why the fact that the premises, commercial or domestic, is serving alcohol is relevant to creating the duty of care where the duty is based not on the serving of alcohol *per se* but on the fact of intoxication.¹⁵ It would go much further than the common law has in the past to impose a duty to act in favour of a stranger *merely* because the defendant can foresee he is in danger of injuring himself.

¹² For a discussion of these issues see Boivin, 'Social host liability in Canada: Mixed message from the Ontario Court of Appeal' (2004) 12 *Tort Law Review* 164, 173.

¹³ (2004) 78 ALJR 933, 954.

¹⁴ *Ibid* 946.

¹⁵ Boivin, above n 12, 171-172.

(c) The Supply of Alcohol Consumed on the Defendant's Premises

All of this analysis suggests that the duty with which the High Court was, in fact, concerned was a duty related to the serving of alcohol by the defendant on its premises as part of its business. It is important to define exactly what this duty would be. It would not be a duty to take steps to ensure that the plaintiff does not create a risk of injuring himself by drinking alcohol. Statistically, any consumption of alcohol will create a risk of injury and the defendant bar or club would, arguably, be in breach merely by serving alcohol. The duty is only workable, if at all, by reference to the standard of intoxication – the defendant should not serve an intoxicated patron because, in the words of McHugh J, this would give rise to a reasonable possibility that the customer would suffer injury of a kind that a customer who was not under the influence of liquor would be unlikely to suffer.¹⁶ Leaving aside the almost insurmountable difficulties in determining intoxication for any given person, the question arises of what steps the defendant must take to satisfy the requirement of reasonableness. If the relevant duty is to take steps to prevent intoxication, discharge of the duty will require monitoring of the drinking habits of patrons *prior* to the point of intoxication. In other words, the breach may occur before the point of intoxication is reached although it will only crystallise upon serving an intoxicated patron. However, McHugh J went even further, holding that the discharge of the duty required not just that Mrs Cole was not *served* alcohol but also that steps were taken to *prevent* her from drinking. Unsurprisingly, McHugh J refrains from specifying exactly what steps such a requirement might entail by saying that, on the facts, it was clear that the duty was breached. Realistically, there will be little that the club can do to prevent the patron drinking other than not serving him or her, and perhaps ensuring that overt attempts by third parties to purchase alcohol on behalf of the patron are avoided. If this is correct then the breach of any such duty will normally lie in the serving of alcohol once the plaintiff is intoxicated. Of course, there may be easy cases – the staggering drunk asking for service in an empty bar – but commercial providers of alcohol are entitled to have some idea of the practical steps they need to take to comply with any duty. In particular, will clubs be required to interrogate patrons as to the purpose of their alcoholic purchase or monitor the drinking patterns of patrons? This latter

¹⁶ (2004) 78 ALJR 933, 940.

requirement did not seem to bother McHugh J as clubs already had a duty to monitor patrons. However, the burden placed on clubs to monitor patrons for unruly behaviour is much less onerous than that which would be placed on them by monitoring alcoholic consumption. For a start the former is manifested overtly which is not always the case in respect of intoxication.

A final difficulty with imposing a duty of care in relation to the serving of alcohol may be noted. The breach of duty occurs when alcohol is served to an intoxicated person but in many cases the damage may occur at a later date (as was the case in *Cole*). Given that the defendant is in breach in this way, what might it do to try remedy the breach before the damage is caused? If *Cole* had been decided in favour of the plaintiff the answer might be that there is nothing the defendant can do. Once the defendant can be said to have served the intoxicated plaintiff, the defendant may have to just wait and hope for the best. This is reflected in *Cole* by Kirby J's statement that the offer of transport was 'too little too late.' It is rare for the law of negligence to place the defendant in a position where there is nothing it can do subsequent to the breach but before damage is caused to prevent that damage. Of course, this conclusion can be avoided but only by accepting that counselling and the other steps are, contrary to what is argued above, a possible means of eliminating the risk to the plaintiff.

(d) The Commercial Supply of Alcohol

If any of the duties examined above are recognised should it be limited to commercial providers of alcohol? Clearly Kirby J thought the nature of the defendant an important factor and in support of his conclusion he cited statutory provisions prohibiting the serving of intoxicated persons that only applied to commercial enterprises. If such a distinction is to be drawn it will need to be done so explicitly on grounds of public policy.¹⁷ Vis-a-vis the commercial provider, the social host may have greater control over the consumption of alcohol and will normally be in as good a position, if not better, to know the state of intoxication of his guests.¹⁸ The risk to the plaintiff is the same in both cases, and it is at least arguable that the law should take the same approach as it does for commercial providers.

¹⁷ Boivin, above n 12.

¹⁸ Ibid.

CONCLUSION

Much of the division between the majority and minority views in *Cole* turn on the role to be given to autonomy. The sight of an intoxicated Rosalie Cole was unedifying but, perhaps, a belief in autonomy requires the acceptance that it may be used self-destructively. Mrs Cole was not unaware of the effects of alcohol and it is not unknown for people to set out to become blind drunk. Acceptance of such attitudes may well have led to a society in which accidents related to drunkenness are too common.¹⁹ Courts, however, deal with questions of culpability in actions for negligence and to seek more from court decisions may be reaching for the moon. It may also be instructive that the body that normally deals with such wide-ranging social and political questions – the New South Wales legislature – has now passed legislation which would prevent such an action from succeeding.²⁰ In light of this reform it is difficult to see how the decision in *Cole* may be said to frustrate the legislative intention behind prohibiting the sale of alcohol to intoxicated persons.

In many ways *Cole* was an easy case in which to deny the existence of a duty of care. Perhaps the reticence of the majority to rule out such a duty in all cases shows that they were mindful of the more difficult case where the drunken patron injures an innocent third party. It remains to be seen whether this factor will outweigh the autonomy argument that underpins the majority decision in *Cole* and other recent High Court decisions in the field of negligence.

¹⁹ See the report of the National Drug Strategy cited in Chamberlain, 'Duty-free Alcohol Service' (2004) 12 *Tort Law Review* 121, 122-3.

²⁰ *Civil Liability Act 2002* (NSW) Part 6.