Cole v South Tweed Heads Rugby League Football Club Ltd - [2004] HCA 29

HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

ROSELLIE JONNELL COLE APPELLANT

AND

SOUTH TWEED HEADS RUGBY LEAGUE FOOTBALL CLUB LIMITED & ANOR RESPONDENTS

Cole v South Tweed Heads Rugby League Football Club Limited

[2004] HCA 29

15 June 2004
S403/2003

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

B W Walker SC with E G Romaniuk and P J Woods for the appellant (instructed by Hamilton Quinlan Fenwick)

D F Jackson QC with R J Carruthers for the first respondent (instructed by Colin Biggers & Paisley)

No appearance for the second respondent

CATCHWORDS

Cole v South Tweed Heads Rugby League Football Club Limited

Negligence – Duty of care – Appellant seriously injured by motor vehicle shortly after leaving respondent's premises in intoxicated state – Level of specificity of formulation of duty of care – Whether respondent owed duty to take reasonable care to monitor and moderate amount of alcohol served to appellant – Whether respondent owed duty of care to take reasonable care that appellant travelled safely away from respondent's premises – Whether duty of care existed to protect persons from harm caused by intoxication

following deliberate and voluntary decision on their part to drink to excess – Whether duty took into account the vulnerability of some persons to alcohol consumption – Relevance of statutory provisions, creating offences in relation to conduct on club premises and requiring police to eject intoxicated persons from premises, to existence or content of duty of care owed by respondent where no allegation made of breach of statutory duty – *Registered Clubs Act* 1976 (NSW) .

Negligence – Breach of duty and causation – Appellant seriously injured by motor vehicle shortly after leaving respondent's premises in intoxicated state – Whether respondent's offer of safe transport to appellant discharged any duty owed by respondent to take reasonable steps for appellant's safety – Whether assurance by other patrons that they would look after appellant discharged any onus on respondent – Whether, assuming respondent in breach of duty to monitor and moderate consumption, breach of duty was a cause of injuries ultimately sustained – Remoteness of damage – Reasonable foreseeability.

Words and phrases – "intoxication".

Registered Clubs Act 1976 (NSW), ss 44A, 67A .

1. **Following paragraph cited by:**

   Pabai v Commonwealth of Australia (No 2) (15 July 2025) (Wigney J)
   Finniss v State of New South Wales (No. 1) (22 February 2023) (Neilson DCJ)

   64. However, her Honour was in dissent. Separate decisions were given by Ipp JA and Basten JA in discussing the duty of care owed by the occupier Bostik. Basten JA said this:

   "133 In finding that both the employer and the appellant owed the plaintiff a duty of care, the trial judge stated at [79]:

   "The relationship between each of the defendants … was in the nature of a joint venture in relation to the plaintiff's work in emptying the rubbish bins at the smoko shed."

   134 His Honour approached the matter, in accordance with submissions made to him, by considering whether the facts of the case provided a closer analogy with the decision of this Court in *J Blackwood & Son Steel & Metals Pty Ltd v Nichols* [2007] NSWCA 157, or the

decision of the High Court in *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 19; 221 CLR 234. His Honour held that the circumstances of *Thompson* were "analogous to the present situation" and that, accordingly, both defendants owed the plaintiff a relevant duty of care to take reasonable steps for his safety: at [78]-[80] .

135 In determining a question of law, namely the existence of a duty of care, the content, which is often the critical component, must be identified by reference to the circumstances in which the injury occurred: see *Sutherland Shire Council v Heyman* [1985] HCA 41; 157 CLR 424 at 487 (Brennan J) and *Cole v South Tweed Heads Rugby League Football Club Ltd* [2004] HCA 29; 217 CLR 469 at [1] (Gleeson CJ) . Thus, the High Court once rejected, as without rational foundation, the contentions that a worker at a bush camp, required to cut timber for a stove, should have been provided with some implement other than a tomahawk or should have been given instruction as to how to use the tomahawk: *Electric Power Transmission Pty Ltd v Cuiuli* [1961] HCA 3; 104 CLR 177. A similar conclusion was reached by this Court in relation to the use of a ladder in *Van Der Sluice v Display Craft Pty Ltd* [2002] NSWCA 204 at [74] (Heydon JA, Meagher JA and Foster AJA agreeing) and the securing of a load on a truck in *J Blackwood & Son* at [61] and [64] (Tobias JA, Mason P and Handley AJA agreeing).

136 In the present case, the 44-gallon drums used as rubbish bins were required to be physically manhandled from the smoko shed and on to the tines of a forklift. The plaintiff had undertaken this task approximately twice each week for some six months before the injury. He gave evidence that the bins were usually not heavy. On this occasion, the bin was unusually heavy.

137 Because the employer did not appeal from the judgment against it, its responsibility to take steps to avoid the need for manual handling of an unexpectedly heavy bin is not in issue. On the other hand, findings made against it, or not contested by it, do not operate against the appellant.

138 The plaintiff was not employed by the appellant and, on the accepted evidence of the plaintiff himself, received no instruction or direction from the appellant's manager.

139 The fact that an employer may be obliged to take reasonable steps to provide a worker with a safe system of work, does not preclude the existence of a duty owed by others to take reasonable care in their dealings with the worker, whether they be other employees, independent contractors, the occupier of premises which the worker is required to attend in the course of employment or other road users encountered in the course of travel. Where work is undertaken on the premises of a third party, that party may have a duty, which commonly arises from:

> (a) the degree of control or direction exercised or which the third party is entitled to exercise over the worker;
> (b) the condition of plant or premises under the control of the third party, or
> (c) the activities of others on the site, generally for the purposes of the third party's undertaking or business.

140 The third situation may be put to one side for present purposes. The facts fall within a combination of the first and second elements. Thus, the system for clearing rubbish involved the use of the 44-gallon drums, which were provided by the appellant and the use of a forklift which did not fit under the roof of the smoko shed, which was also provided by

the appellant. On the other hand, it is clear that the appellant did not seek to control the activities the plaintiff, nor direct him as to how to perform those activities.

141 The circumstances in which an employer provides labour to a third party, commonly described as "labour hire" arrangements, are not new. *McDonald v The Commonwealth* (1946) 46 SR(NSW) 129, concerned whether vicarious liability for an accident caused by a negligent worker lay with his legal employer (referred to as the "general employer") or "the particular employer", being the party for whom the employee was working and which had control over the employee at the time of the accident. In such a case, the passing of control from one party to another may be treated as in practical terms complete, so as to render the latter the employer *pro hac vice* (for the occasion only), in the language of Lords Macmillan and Simonds in *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1 at 13 and 18. In *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* [1986] HCA 34; 160 CLR 626 at 668, Brennan J stated:

> "The rule to be derived from *Mersey Docks* and *McDonald* is not that two persons cannot be vicariously liable for the same damage or that an employee cannot be the servant of two masters, but that two employers of the same servant who negligently causes damage will not both be liable for the damage if one rather than the other has what Jordan C.J. called 'the relevant control': *McDonald*, [at 132]."

142 No doubt caution must be taken in applying principles stated in cases where the vicarious liability of a principal or employer is in question to a case where responsibility for an injury suffered by an employee is in issue. However, the duty of the principal to an employee of an independent contractor has been upheld in cases such as *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1; 160 CLR 16, where Mason J stated at 31:

> "Although the obligation to provide a safe system of work has been regarded as one attaching to an employer, there is no reason why it should be so confined. If an entrepreneur engages independent contractors to do work which might as readily be done by employees in circumstances where there is a risk to them of injury arising from the nature of the work and where there is a need for him to give directions as to when and where the work is to be done and to co-ordinate the various activities, he has an obligation to prescribe a safe system of work. The fact that they are not employees, or that he does not retain a right to control them in the manner in which they carry out their work, should not affect the existence of an obligation to prescribe a safe system."

143 In *TNT Australia Pty Ltd v Christie* [2003] NSWCA 47; 65 NSWLR 1, in relation to the plaintiff, whose labour was provided to TNT by his employer, Mason P stated at [41]:

> "TNT exercised day-to-day control over the plaintiff's work activities, treating him to all intents the same as its employees as regards work on the factory floor. … It can be seen that the plaintiff and TNT placed themselves in a relationship, day in and day out, indistinguishable from that of employee and employer. … [H]ere the plaintiff had for months been under the daily control of TNT and its managerial staff at the brewery. He was a relatively unskilled labourer. He reported daily to the brewery and everything that he did there was done under the full control of TNT."

144 Thus, in labour hire cases involving unskilled workers, there may well be a transfer of control to the business in which they are working. It appears that this was the case in respect of employees of Brolton who were provided to work for the appellant on its production lines. However, different practices appear to have arisen with respect to non-production line labour.

145 As had occurred before the trial judge, the parties in this Court sought to rely upon or distinguish particular factual circumstances drawn from cases supportive of their claims. However, the relevant comparison is not to be made between *J Blackwood & Son* (which concerned the need for instruction, not the person responsible for giving it) and *Christie* (which concerned the person on whom lay the responsibility for providing safe equipment). Nevertheless, it is clear that the situation of the appellant, with respect to control of the plaintiff, was far removed from that described in *Christie* .

146 Whether or not the appellant owed a duty of care to the plaintiff must depend to a significant extent upon the relationship between the appellant and Brolton. That appears to have been largely informal at the relevant time. As Mr Lynch explained in evidence, he had originally worked for Dow Corning, the business of which was taken over by the appellant, at which time he ceased working for Dow Corning and set up his own maintenance engineering business. He did work for the appellant and obtained a lease or licence of part of the premises occupied by the appellant. He supplied maintenance services and also labour to the appellant. Brolton was paid for those services but not, it would appear, pursuant to any written agreement. Mr Lynch gave the following evidence at Tcpt, 16/04 /08, p 181:

> "Q. The smoko shed was used not only by Bostik and direct employees, but also by Brolton employees, is that right?
> A. And others, yes.
>
> Q. And not only Brolton employees who were working for Bostik, but Brolton employees who were working directly for Brolton?
> A. Yes.
>
> Q. And I think you gave evidence this morning that Brolton Industries used the forklifts owned by Bostik on Brolton's own premises, is that right?
> A. Correct.
>
> Q. Including, if you needed to, to lift piece[s] of equipment that Brolton was working on for customers other than Bostik?
> A. Yes.
>
> Q. And to move other items around on Brolton's own premises, is that right?
> A. Yes.
>
> Q. And there was no formal arrangement where you [paid] some sort of fee to do that, was there?
> A. No.
>
> Q. And if you wanted a forklift to do something for Brolton's own business, you just went and got one if it was available, is that right?
> A. Correct.

Q. And similarly, Brolton used drums which were surplus or left over from Bostik's production line as rubbish bins on its own premises --
A. Yes.

Q. -- is that right, for its own rubbish?
A. Yes.

Q. And there was no charge for that, was there?
A. No.

Q. And the understanding or arrangement between Brolton and Bostik was both drums like that and forklifts like that could be used by Brolton for its own business activities if needed?
A. Yes.

Q. And that was the position from 2000 right through until you stopped providing services to Bostik 18 months or two years ago?
A. Correct."

147 The other party to the arrangement was the appellant. As appears from the evidence of Mr Pearce, the site manager for the appellant, set out above by Beazley JA, an inference was available that the appellant had accepted responsibility for a safe system of work with respect to non-production employees provided by Brolton: Tcpt, pp 206-207. However, in his evidence in chief, Mr Pearce also stated that he did not look after the training of Brolton employees, nor did he personally provide any training, but relied upon a "buddy system" for training people: Tcpt, p 193. He was asked if Mr Liddiard was "given over to tasks at the request of Bostik", language which he denied applied to Mr Liddiard but agreed might apply to persons working in the production area: Tcpt, pp 196(15) and 199(40). The following exchange occurred (p 208(5):

"Q. And to a lesser extent was it your observation that for non production employees there would from time to time be supervision or instruction given in relation to how those tasks were carried out?
A. Not normally, no.

Q. Sometimes?
A. No.

Q. Why not normally, if it's not sometimes?
A. Okay. It wouldn't be – I didn't see evidence of that.

Q. It would be consistent with your understanding of the arrangement between Bostick [sic] and Brolton that an employee was on Bostick's premises and not cleaning up properly or driving a forklift in a dangerous manner it would be consistent with your understanding of that arrangement that a supervisor or official from Bostick may well instruct or otherwise prohibit a Brolton employee from continuing in that behaviour?
A. If it was somebody driving a forklift quickly, yes, but if it wasn't say of not cleaning a part properly or not cleaning up properly, no that wouldn't be the case.

Q. Well why would there be a difference?
A. If a part wasn't cleaning or if an area wasn't cleaned up properly someone would

> tell me and we'd go to Ben to say that – or Ben needs to say that this person isn't doing – they're not cleaning a part properly or they're not cleaning up properly, can you attend to that please."

148 The reference to "Ben" was a reference to Mr Lynch, Brolton's manager. Further, at p 211(15) the following exchange occurred:

> "Q. How did you go about addressing that perceived responsibility in your position as site manager for Bostik?
> A. For emptying of the bins around the smoko shed?
>
> Q. Yes.
> A. I just left it up to Ben Lynch to – because he was looking after the outside of the gardens I left it up to him to be able to – you know basically get the workers to empty them."

149 Taken as whole, Mr Pearce's explanation is consistent with that given by Mr Lynch and the understanding of the plaintiff, namely that Brolton had contracted with the appellant to provide services in the outside areas, which included emptying the rubbish bins in the smoko shed, and that Brolton was responsible for the manner in which such work was to be performed. Although the bins and the forklifts may have been the property of the appellant, part of the arrangement was that Brolton could make use of such equipment as it required to carry out the functions for which it was responsible. This was not a case in which any co-ordination of contractors was required, nor was there any other reason for the appellant to devise a safe system of work for the plaintiff. To the extent that the appellant controlled activities on the premises, there was no danger or risk to the plaintiff relevant to the injury suffered, arising from the state of the premises or the activities which took place on them. It was no doubt true that steps could have been taken which would have lessened or removed the risk associated with manual handling of the waste bins. Nevertheless, neither the legal arrangement nor the practical circumstances in which the work was undertaken imposed an obligation on the appellant with respect to such steps. In my view the appellant did not owe a duty of care to the plaintiff."

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
Rail Corporation New South Wales v Donald; Staff Innovations Pty Ltd t/as Bamford Family Trust (24 April 2018) (Beazley ACJ, McColl and Meagher JJA)
Bostik Australia Pty Ltd v Liddiard (26 June 2009) (Beazley JA at 1; Ipp JA at 113; Basten JA at 128)

> 134 His Honour approached the matter, in accordance with submissions made to him, by considering whether the facts of the case provided a closer analogy with the decision of this Court in *J Blackwood & Son Steel & Metals Pty Ltd v Nichols* [2007] NSWCA 157, or the decision of the High Court in *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 19; 221 CLR 234. His Honour held that the circumstances of *Thompson* were "analogous to the present situation" and that, accordingly, both defendants owed the plaintiff a relevant duty of care to take reasonable steps for his safety: at [78]-[80] . 135 In determining a question of law, namely the existence of a duty of care, the content, which is often the critical component, must be identified by reference to the circumstances in which the injury occurred: see *Sutherland Shire Council v Heyman* [1985] HCA

41; 157 CLR 424 at 487 (Brennan J) and *Cole v South Tweed Heads Rugby League Football Club Ltd* [2004] HCA 29; 217 CLR 469 at [1] (Gleeson CJ) . Thus, the High Court once rejected, as without rational foundation, the contentions that a worker at a bush camp, required to cut timber for a stove, should have been provided with some implement other than a tomahawk or should have been given instruction as to how to use the tomahawk: *Electric Power Transmission Pty Ltd v Cuiuli* [1961] HCA 3; 104 CLR 177. A similar conclusion was reached by this Court in relation to the use of a ladder in *Van Der Sluice v Display Craft Pty Ltd* [2002] NSWCA 204 at [74] (Heydon JA, Meagher JA and Foster AJA agreeing) and the securing of a load on a truck in *J Blackwood & Son* at [61] and [64] (Tobias JA, Mason P and Handley AJA agreeing). 136 In the present case, the 44-gallon drums used as rubbish bins were required to be physically manhandled from the smoko shed and on to the tines of a forklift. The plaintiff had undertaken this task approximately twice each week for some six months before the injury. He gave evidence that the bins were usually not heavy. On this occasion, the bin was unusually heavy. 137 Because the employer did not appeal from the judgment against it, its responsibility to take steps to avoid the need for manual handling of an unexpectedly heavy bin is not in issue. On the other hand, findings made against it, or not contested by it, do not operate against the appellant. 138 The plaintiff was not employed by the appellant and, on the accepted evidence of the plaintiff himself, received no instruction or direction from the appellant's manager. 139 The fact that an employer may be obliged to take reasonable steps to provide a worker with a safe system of work, does not preclude the existence of a duty owed by others to take reasonable care in their dealings with the worker, whether they be other employees, independent contractors, the occupier of premises which the worker is required to attend in the course of employment or other road users encountered in the course of travel. Where work is undertaken on the premises of a third party, that party may have a duty, which commonly arises from:

GLEESON CJ. The appellant, having suffered personal injuries, claims that the first respondent is liable to her in damages for negligence[1]. In the circumstances of this case, it is of little assistance to consider issues of duty of care, breach, and damages, at a high level of abstraction, divorced from the concrete facts. In particular, to ask whether the respondent owed the appellant a duty of care does not advance the matter. Before she was injured, the appellant was for some hours on the respondent's premises, and consumed food and drink supplied by the respondent. Of course the respondent owed her a duty of care. There is, however, an issue concerning the nature and extent of the duty. To address that issue, it is useful to begin by identifying the harm suffered by the appellant, for which the respondent is said to be liable, and the circumstances in which she came to suffer that harm [2] . As Brennan J said in *Sutherland Shire Council v Heyman* [3] , "a postulated duty of care must be stated in reference to the kind of damage that a plaintiff has suffered". The kind of damage suffered is relevant to the existence and nature of the duty of care upon which reliance is placed. Furthermore, a description of the damage directs attention to the circumstances in which damage was suffered. "Physical injury", or "economic loss", may be an incomplete

description of damage for the purpose of considering a duty of care, especially where, as in the present case, the connection between the acts or omissions of which a victim complains and the damage that she suffered is indirect.

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[1] It is convenient to refer to the first respondent as "the respondent". The second respondent took no part in the present appeal.

[2] cf *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 262-263 [13]-[16] .

[3] (1985) 157 CLR 424 at 487.

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2. The appellant was injured as a result of being run down by a motor car on a public road. The driver of the motor car was also sued, but she is not involved in the present appeal. The respondent had no connection with the motor car, or the driver. The respondent's alleged connection with the appellant's injuries arose in the following manner. At the time she was run down (about 6.20 pm on a Sunday evening), the appellant was walking in a careless manner along the roadway. The motorist was unable to avoid her. The appellant's explanation of her careless behaviour was that she was drunk. The appellant had spent most of the day at or around the respondent's licensed club. The respondent supplied her with some, but not all, of the drink she consumed. The appellant blames the respondent for her presence on the road in an intoxicated state, and for her injuries. Two aspects of the conduct of the respondent are said to involve fault. First, it is said that the respondent supplied the appellant with drink at a time when a reasonable person would have known she was intoxicated. Secondly, it is said that the respondent allowed the appellant to leave its premises in an unsafe condition, without proper and adequate assistance.

3. **Following paragraph cited by:**

Miller v Paua Nominees Pty Ltd (01 October 2004) (Murray J, Steytler J, McLure J)

Those two allegations of negligence involve disputed assumptions about the nature and extent of the duty of care which the respondent owed to the appellant. Before turning to those assumptions, however, it is important to relate the allegations to the evidence, and the findings of fact, in the case. The allegations are stated at a certain level of generality, and can only be understood sufficiently if made more concrete. It is to be noted that they involve failure to restrain or prevent the appellant from engaging in voluntary behaviour. The appellant's written submissions, filed in advance of oral argument, complained that the respondent permitted the appellant to continue to drink. In oral argument the emphasis was on supplying her with drink, but the supply was in response to her request. The second complaint was of allowing the appellant to leave the respondent's premises in a certain condition. When acts of negligence are said to consist of permitting, or allowing, an adult person to act in a manner of her choosing, even if her judgment is affected by drink, then there is a need for careful

attention to the supposed duty, which must be a duty to prevent her from acting in accordance with her intentions.

4. The appellant was a healthy woman of mature age. She did not suffer from any physical or mental disability. The evidence did not suggest that she was an alcoholic; much less that she was known to be such by the respondent. The trial judge, Hulme J, found that the appellant, "voluntarily and in full possession of her faculties, embarked on a drinking spree". The appellant's evidence was that, at a time shortly before the respondent refused to serve her further drink, which was about two hours after the respondent last sold her drink, she was "possibly intoxicated", and "talking to people, having fun".

5. The first allegation of negligence was narrowed somewhat in the course of argument. It began as a complaint about permitting the appellant to drink on the respondent's premises, and later took the form of a complaint about supplying her with drink. The difference is not unimportant. The club premises were near a football ground. People, including the appellant, moved during the course of the day between the club premises and the playing or watching areas. The respondent was not the only source of supply of drink in the vicinity, and the appellant could well have had access to drink in addition to that which the club's employees supplied directly to her. She certainly had access to drink that had been supplied originally to her friend, Mrs Hughes. The trial judge found that the respondent was negligent in supplying the appellant with a bottle of wine at about 12.30 pm. The fact of that supply was not disputed, although the circumstances were contentious. He also found that there was a later supply of a bottle of wine by the respondent to the appellant, and that such supply also was an act of negligence. That second finding of supply was overturned by the Court of Appeal. What is to be noted, however, is that the trial judge's findings of negligence were based on supplying wine to the appellant, not upon some general permission to her to drink on the respondent's premises.

6. As to the facts relating to supply to the appellant, the following should be noted. The appellant commenced drinking at about 9.30 or 10 am. It seems clear that she continued to drink throughout most of the day. Hulme J found that the appellant purchased a bottle of wine shortly before 12.30 pm. He also found that, at that time, it should have been apparent to employees of the respondent that she was intoxicated. The Court of Appeal reversed that finding. The Court of Appeal also concluded that, although the appellant continued to drink during the afternoon, there was no evidence to support any finding that she was served alcohol by the respondent after 12.30 pm. No successful challenge has been made to the reasoning of the Court of Appeal on those matters of fact. There was evidence as to the appellant's condition at about 2.20 pm, when she told Mrs Hughes that she would not accompany her home, but would stay on at the club. According to Mrs Hughes, the appellant was "very joyous and happy", "an embarrassment" and "totally inebriated", but capable of directing a taxi driver where to take Mrs Hughes, and of making clear her decision to remain at the club with some new-found friends. Between 12.30 pm and 2.20 pm, the appellant had the opportunity to consume a substantial quantity of wine. It is not clear how much, if any, of the bottle she bought at 12.30 pm she drank herself. She shared with Mrs Hughes during the day, but her evidence was that, just as there were times when she was giving some of her wine to Mrs Hughes, so also Mrs Hughes was giving some of her wine to the appellant. The evidence

is consistent with the appellant having consumed at least a bottle of wine, and perhaps more, between 12.30 pm and 2.20 pm. That is of significance if one seeks to draw an inference as to her condition at 12.30 pm from the evidence as to her condition at 2.20 pm.

7. At about 3 pm, the wife of the manager of the respondent's club refused to serve the appellant because of her state of intoxication. Thus, on the facts as found by the Court of Appeal, there was no evidence of any supply of alcohol by the respondent to the appellant after 12.30 pm; the evidence did not support a finding that, at the time of that supply, it should have been apparent that the appellant was then intoxicated; thereafter the appellant consumed at least a bottle of wine; she had access to drink in addition to that which the respondent supplied her; and at 3 pm, when next she sought to purchase alcohol from the respondent, she was refused supply.

8. The harm suffered by the appellant was personal injury resulting from her careless behaviour as a pedestrian, the carelessness being attributable to her state of intoxication at 6.20 pm. The argument for the appellant must involve two steps: first, that the respondent, as a supplier of alcohol, owed her a duty to take reasonable care to protect her against the risk of physical injury resulting from her careless behaviour in consequence of her excessive consumption of alcohol; and secondly, that in the circumstances the conduct of the respondent, through its employees, amounted to a failure to take such care. The Court of Appeal rejected both of those contentions.

9. It is unnecessary, for the purposes of the present case, to endeavour to formulate, in abstract terms, some general proposition as to whether in any, and if so what, circumstances a supplier of alcohol, in either a commercial or a social setting, is under a duty to take reasonable care to protect a consumer of alcohol against the risk of physical injury resulting from consumption of alcohol. The question is whether there was such a duty in the circumstances of this case. The practical consequences of such a duty are worth noting.

10. **Following paragraph cited by:**

    Perkins v Redmond Company Pty Ltd (13 July 2007) (Rein SC DCJ)

Intoxication is an imprecise concept, but the laws concerning drink driving reflect the fact that a person in charge of a motor vehicle may be at risk of suffering, or causing, injury after three or four standard drinks. That is probably the best known and most clearly foreseeable risk of injury that accompanies the consumption of alcohol. The risk does not necessarily involve a high level of intoxication. There are other forms of risk of physical injury which may accompany the consumption of alcohol, even in relatively moderate amounts. Consistently with the appellant's argument, if she had gone home in the early afternoon, tripped on a doorstep, and suffered a broken wrist, she may have had a cause of action against the respondent.

11. In *R v O'Connor* [4] , a case concerning the effect of intoxication upon criminal responsibility, Barwick CJ said:

"The state of drunkenness or intoxication can vary very greatly in degree. A person may be intoxicated in the sense that his personality is changed, his will is warped, his disposition altered, or his self-control weakened, so that whilst intoxicated to this degree he does [an] act voluntarily and intentionally which in a sober state he would or might not have done. His intoxication to this degree, though conducive to and perhaps explanatory of his actions, has not destroyed his will or precluded the formation of any relevant intent. Indeed intoxication to this degree might well explain how an accused, otherwise of good character, came to commit an offence with which he is charged."

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[4] (1980) 146 CLR 64 at 71.

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12. Some consumers of alcohol respond quickly to its effects, while others can consume a large quantity without much change of appearance or demeanour. People in both categories may be at risk of injury if they drive a car. To impose on suppliers of alcohol a general duty to protect consumers against risks of injury attributable to alcohol consumption involves burdensome practical consequences. It provides no answer to say that such a duty comes into play only when a consumer is showing clear signs of a high degree of intoxication. The risk sets in well before that. The appellant argued that there is a duty on a supplier to "monitor" alcohol consumption. The capacity of a supplier of alcohol to monitor the level of risk to which a consumer may be exposed is limited. If a restaurant proprietor serves a bottle of wine to two customers at a table, the proprietor may not know what either of them has had to drink previously, the proportions in which they intend to share the bottle, or what they propose to do when they leave the restaurant. Few customers would take kindly to being questioned about such matters.

13. **Following paragraph cited by:**

Smith v Body Corporate for Professional Suites (30 March 2012) (Robin QC DCJ)
Hardy v Mikropul Australia Pty Ltd (03 March 2010) (J. Forrest J)

59. In *Cole v South Tweed Heads Rugby League Football Club Ltd*, [79] the High Court considered the issue of whether there was a duty to protect persons from harm caused by intoxication following their deliberate and voluntary decision to drink to excess. *Cole* did not involve an employer-employee relationship, however, the observations of Gleeson CJ are relevant to Mr Hardy's contention that the duty of an employer extends to what occurs outside work in a private capacity:

Most adults know that drinking to excess is risky. The nature and degree of risk may be affected by the extent of the excess, or by other circumstances, such as the activities in which people engage, or the conditions in which they work or live. A supplier of alcohol, in either a commercial or a social setting, is usually in no position to assess the risk.

> The consumer knows the risk. It is true that alcohol is disinhibiting, and may reduce a consumer's capacity to make reasonable decisions. *Even so, unless intoxication reaches a very high degree (higher than that achieved by the appellant in this case), the criminal and the civil law hold a person responsible for his or her acts. ... Save in extreme cases, the law makes intoxicated people legally responsible for their actions. As a general rule they should not be able to avoid responsibility for the risks that accompany a personal choice to consume alcohol*. [80] (Emphasis added)

His Honour also said:

> Again, as a general rule a person has no legal duty to rescue another. How is this to be reconciled with a proposition that the respondent had a duty to protect the appellant from the consequences of her decision to drink excessively? There are many forms of excessive eating and drinking that involve health risks but, *as a rule, we leave it to individuals to decide for themselves how much they eat and drink. There are sound reasons for that, associated with values of autonomy and privacy*. [81] (Emphasis added)

via

[80] Ibid [13].

Hardy v Mikropul Australia Pty Ltd (03 March 2010) (J. Forrest J)

59. In *Cole v South Tweed Heads Rugby League Football Club Ltd*, [79] the High Court considered the issue of whether there was a duty to protect persons from harm caused by intoxication following their deliberate and voluntary decision to drink to excess. *Cole* did not involve an employer-employee relationship, however, the observations of Gleeson CJ are relevant to Mr Hardy's contention that the duty of an employer extends to what occurs outside work in a private capacity:

> Most adults know that drinking to excess is risky. The nature and degree of risk may be affected by the extent of the excess, or by other circumstances, such as the activities in which people engage, or the conditions in which they work or live. A supplier of alcohol, in either a commercial or a social setting, is usually in no position to assess the risk. The consumer knows the risk. It is true that alcohol is disinhibiting, and may reduce a consumer's capacity to make reasonable decisions. *Even so, unless intoxication reaches a very high degree (higher than that achieved by the appellant in this case), the criminal and the civil law hold a person responsible for his or her acts. ... Save in extreme cases, the law makes intoxicated people legally responsible for their actions. As a general rule they should not be able to avoid responsibility for the risks that accompany a personal choice to consume alcohol*. [80] (Emphasis added)

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via

[81] Ibid [15], see also *Boyded Industries v Canuto* [2004] NSWCA 256.

Blaxter v Commonwealth of Australia (08 May 2008) (Mason P; McColl JA; Basten JA)
Wagstaff v Haslam (26 February 2007) (Santow JA; Bryson JA; Basten JA)

> 42 As noted by Gleeson CJ in *Cole v South Tweed Heads Rugby League Club*, at [10], "[i]ntoxication is an imprecise concept". Further, as his Honour noted at [11], by reference to the judgment of Barwick CJ in *R v O'Connor* (1980) 146 CLR 64 at 71 :
>
> > "The state of drunkenness or intoxication can vary greatly in degree. A person may be intoxicated in the sense that his personality is changed, his will is warped, his disposition altered, or his self-control weakened … ."
>
> It must also be accepted that alcohol is disinhibiting and may reduce a person's capacity to make reasonable decisions: *Cole* at [13] . It is foreseeable that some people will become aggressive when drunk, but it does not follow that a publican must, acting reasonably, treat every intoxicated patron as a potential source of unprovoked violence.

Blaxter v The Commonwealth (20 September 2005) (Hidden J)

> 51 In supplementary submissions, senior counsel for the defendant referred me to *Cole v South Tweed Heads Rugby League Football Club Limited* (2004) 217 CLR 469 and, in particular, to the observations of Gleeson CJ at [13] , [14] and [18] about the personal responsibility which adults should normally accept for their own drinking. He referred also to the observations of Ipp AJA in the Court of Appeal in that same case, reported in (2002) *55* NSWLR 113 at [156]ff. In addition, he relied upon some observations about that matter in three cases which themselves arose from the Melbourne/Voyager collision: *Commonwealth of Australia v Ryan* [2002] NSWCA 372 per Hodgson JA at [82] – [83] , the judgment of Studdert J in *McLean v Commonwealth of Australia* (unreported, 28 February 1997), and the judgment of Cripps AJ in *Hill v The Commonwealth [*2003] NSWSC 1025 at [25]. It is sufficient to say that all those cases are

distinguishable on their facts. I am satisfied that the plaintiff's alcohol abuse was, and remains, beyond his control. I might add that the issue of personal responsibility was not raised with him in cross-examination, the thrust of the questioning being the origin and extent of his drinking and the measure of his impairment.

Boyded Industries Pty Ltd v Canuto (30 July 2004) (Beazley and Santow JJA, Stein AJA)

4 Recent case law in the area of negligence reveals a trend whereby greater emphasis is to be placed upon the personal responsibility of individuals for their own actions. That emphasis may be seen in *Woods v Multi-Sport Holdings Pty Limited* (2002) 208 CLR 460; *Ghantous v. Hawkesbury Shire Council* (2001) 206 CLR 512; *Cole v South Tweed Heads Rugby League Football Club Ltd* [2004] HCA 29. In *Cole* Gleeson CJ observed at [13] , that *"… the civil law [holds] a person responsible for his or her acts"*. Callinan J, in dealing directly with the facts in that case, also emphasised matters of personal responsibility at [131] when he said: *"…in general… vendors of products containing alcohol will not be liable in tort for the consequence of the voluntary excessive consumption of those products…"*

There is a further question of principle bearing upon the reasonableness of the imposition of a duty of the kind for which the appellant contends. Most adults know that drinking to excess is risky. The nature and degree of risk may be affected by the extent of the excess, or by other circumstances, such as the activities in which people engage, or the conditions in which they work or live. A supplier of alcohol, in either a commercial or a social setting, is usually in no position to assess the risk. The consumer knows the risk. It is true that alcohol is disinhibiting, and may reduce a consumer's capacity to make reasonable decisions. Even so, unless intoxication reaches a very high degree (higher than that achieved by the appellant in this case), the criminal and the civil law hold a person responsible for his or her acts. If, in the present case, the appellant, deliberately or negligently, had damaged the respondent's property, or caused physical injury to some third party, she would have been liable for the damage. There is no suggestion that she lacked the mental capacity to form the necessary intent. Save in extreme cases, the law makes intoxicated people legally responsible for their actions. As a general rule they should not be able to avoid responsibility for the risks that accompany a personal choice to consume alcohol.

14. **Following paragraph cited by:**

Schuller v S J Webb Nominees Pty Ltd (12 November 2015) (Acting Gray CJ; Stanley and Lovell JJ)
Hunter Area Health Service v Presland (21 April 2005) (Spigelman CJ, Sheller and Santow JJA)

336 Finally there is the question of principle bearing upon the reasonableness of the imposition of a duty of the kind here asserted, or the reasonableness of so

extending causal responsibility. Here the law does make value judgments such as respecting personal autonomy; compare for example Gleeson CJ in *Cole* (supra) at [13] to [15] . That principle with its normative aspects necessarily underlies consideration of the extent of any duty, and the extent of causal responsibility. It is connected to the question of coherence in legal principle and values when, as here, we are considering a relatively novel extension of a recognised form of duty of care. Coherence in values (the phrase used by Gleeson CJ in *Cole* at [14]) affects the weight to be given to factors such as vulnerability and control as affecting the capacity to make impartial decisions under the Act . The statutory scheme requires the civil rights of the individual to be accommodated and balanced against the need for restraint of a mentally ill or disturbed person so affording him access to treatment in the interests of both patient and the wider community. The critical task is to assess whether the person meets the statutory description of a mentally ill person or mentally disturbed person and then ensuring that "*any interference with their rights, dignity and self-respect are kept to the minimum necessary in the circumstances*" (s4(2)(b) of the Act , quoted below).

The significance of a need for coherence in legal principle and values, when addressing a proposal for the recognition of a new form of duty of care, was stressed by this Court in *Sulliv an v Moody* [5] . Although there are exceptional cases, as Lord Hope of Craighead pointed out in *Reeves v Commissioner of Police of the Metropolis* [6] , it is unusual for the common law to subject a person to a duty to take reasonable care to prevent another person injuring himself deliberately. "On the whole people are entitled to act as they please, even if this will inevitably lead to their own death or injury." This principle gives effect to a value of the law that respects personal autonomy. It is not without relevance to ask what the appellant says the respondent should have done by way of monitoring and controlling her behaviour. Whatever exactly it might have been, it would seem to involve a fairly high degree of interference with her privacy, and her freedom of action. It is not difficult to guess what the appellant's response would have been if the person who sold her a bottle of wine at 12.30 pm had demanded to be told whether she intended to drink it all herself. A duty to take care to protect an ordinary adult person who requests supply from risks associated with alcohol consumption is not easy to reconcile with a general rule that people are entitled to do as they please, even if it involves a risk of injury to themselves. The particular circumstances of individual cases, or classes of case, might give rise to such a duty, but we are not here concerned with a case that is out of the ordinary.

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[5] (2001) 207 CLR 562 at 581 [55] .

[6] [2000] 1 AC 360 at 379-380 .

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15. Again, as a general rule a person has no legal duty to rescue another. How is this to be reconciled with a proposition that the respondent had a duty to protect the appellant from the consequences of her decision to drink excessively? There are many forms of excessive eating

and drinking that involve health risks but, as a rule, we leave it to individuals to decide for themselves how much they eat and drink. There are sound reasons for that, associated with values of autonomy and privacy.

16. Counsel for the appellant drew attention to a provision in the *Registered Clubs Act* 1976 (NSW) (s 44A) which makes it an offence to supply liquor to an intoxicated person. This may explain why the appellant was refused service at 3 pm. It was not argued that the appellant had a cause of action based on breach of statutory duty. On the facts found by the Court of Appeal, there was no breach. For other reasons, as well, the provision does not assist the appellant's argument. A person may be at risk of physical injury following the consumption of alcohol even if the person is well short of the state of intoxication contemplated in the provision. As has been noted, the most obvious example of such a risk is that involved in driving a motor vehicle, and the risk becomes real and significant well before a person has reached the state at which a supplier is legally obliged to refuse service. If the argument for the appellant is correct, the legal responsibility of a supplier is more onerous than that imposed by s 44A . Indeed, as a guide to the responsibilities of suppliers, s 44A would be something of a trap.

17. **Following paragraph cited by:**

    Weston v Stinson Nominees Pty Ltd (06 May 2009) (Sleight DCJ)

It is possible that there may be some circumstances in which a supplier of alcohol comes under a duty to take reasonable care to protect a particular person from the risk of physical injury resulting from self-induced intoxication [7] . However, the appellant cannot succeed in this case unless there is a general duty upon a supplier of alcohol, at least in a commercial setting, to take such care. I do not accept that there is such a general duty. I would add that, if there were, it is difficult to see a basis in legal principle, as distinct from legislative edict, by which it could be confined to commercial supply. When supply of alcohol takes place in a social context, there may be a much greater opportunity for appreciating the risks of injury, for monitoring the condition of the consumer, and for influencing the consumer's behaviour. In a social, as in a commercial, context, the risk of injury associated with the consumption of alcohol is not limited to cases where there is an advanced state of intoxication. Depending upon the circumstances, a guest who has had a few drinks and intends to drive home may be at greater risk than a guest who is highly intoxicated but intends to walk home. If there is a duty of the kind for which the appellant contends, it would be the degree of risk associated with the consumption of alcohol, rather than the degree of intoxication, that would be significant. In many cases the two would go together, but in some cases they would not.

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[7] cf *Desmond v Cullen* (2001) 34 MVR 186 at 187. It is to be noted that the Canadian case *Jordan House Ltd v Menow* [1974] SCR 239 involved knowledge of the plaintiff's propensities, and placing him in a situation of known danger.

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18. **Following paragraph cited by:**

Hoffmann v Boland (06 June 2013) (Basten and Barrett JJA, Sackville AJA)

The consequences of the appellant's argument as to duty of care involve both an unacceptable burden upon ordinary social and commercial behaviour, and an unacceptable shifting of responsibility for individual choice. The argument should be rejected.

19. Even if there were a duty on the respondent to take reasonable care to protect the appellant from the risk of physical injury resulting from careless behaviour in consequence of excessive consumption of alcohol, the evidence does not establish failure to take reasonable care.

20. At the level of breach, as at the level of duty, it is material to consider that the appellant was a healthy, mature woman who, for her personal enjoyment, decided to embark upon a drinking spree.

21. The Court of Appeal concluded that reasonableness did not require any more of the respondent, by way of care for the safety of the appellant, than was actually done. Two aspects of the conduct of the parties are of particular significance. First, the Court of Appeal found that there was no supply of alcohol by the respondent to the appellant at any time after 12.30 pm, some six hours before her injury, and that at that time there was no reason for the employee who supplied the bottle of wine to regard the appellant as significantly intoxicated. The next time the appellant sought supply from the respondent, at 3 pm, she was refused. There was no further supply to the appellant by the respondent.

22. At about 5.30 pm, the appellant's disorderly behaviour drew attention. She was in the company of two men, who themselves were apparently sober. The manager of the respondent's club asked her to leave the premises. He offered to provide her a courtesy bus to drive her home. Alternatively, he said that, if she preferred it, he would call for a taxi to take her home. She refused both offers in blunt and abusive terms. One of her male companions told the manager to "leave it with us and we'll look after her". A few minutes later the appellant and the men left.

23. The appellant is not complaining of damage to her liver from drinking too much. The harm she suffered was the direct and immediate consequence of her own careless behaviour as a pedestrian, about half an hour after she left the club. There is no evidence as to how she spent that half-hour. On the evidence, the club refused to sell her drink the first time she asked for it in a significantly intoxicated condition. It did not sell her any drink after that. When she was asked to leave the premises, the club offered to provide free transport home or, alternatively, to obtain a taxi to take her home. She declined those offers. Two reasonably sober male companions then said they would look after her, and she left.

24. There is no reason to disturb the Court of Appeal's finding that the respondent took reasonable care to protect the appellant from the risk of injury that ultimately occurred. That the offers of a courtesy bus and a taxi were part of the club's procedures no doubt reflects the fact that the most obvious risk to someone who has consumed excessive amounts of alcohol is the risk

associated with drink driving. It was a standard procedure for the club, even in the case of people who might have had much less to drink than the appellant. It was a useful and sensible facility for customers. The appellant's rejection of the manager's offers might have reflected the fact that her judgment was affected by drink. It might have reflected her enjoyment of the company that was available to her. It could simply have been the result of resentment at being asked to leave. There is no way of knowing. Whatever the reason for the rejection of the offers, they were made in good faith, and if they had been accepted it is unlikely that, half an hour later, the appellant would have been walking on the roadway. Furthermore, the respondent had no reason to doubt the genuineness of the intention of the two men to look after the appellant, or their capacity to do so.

25. As to causation, the appellant's condition of intoxication was never so extreme that she was not legally responsible for her actions. The respondent did not eject her from the club onto the roadway. She refused an offer to be driven home. What then went on between the time she left the club and the time she was run down by the car is not known. Her rejection of the offer of transport to take her home would be material if an issue of causation had arisen. For the reasons already given, no such issue arises.

26. The appeal should be dismissed with costs.

27. McHUGH J. The question in this appeal is whether a licensed club is legally responsible for the injuries sustained by a customer when she was struck by a motor vehicle shortly after leaving the club after spending most of the day drinking in the club and becoming highly intoxicated.

28. In my opinion the club is legally responsible for the injuries suffered by the customer. The facts of the case are set out in other judgments. I need not repeat them. Because my view of the case is a dissenting one, I can state my conclusions summarily by reference to basic principle and without the necessity to embellish the judgment with an extensive discussion of case law.

29. Basic principle in the law of negligence holds that a defendant is liable in negligence only when the defendant owed a duty of care to the plaintiff[8], breached that duty, and, as a result, caused injury to the plaintiff of a kind that was reasonably foreseeable. If the defendant owed a duty of care to the plaintiff, breach of duty is determined by considering whether an act or omission of the defendant gave rise to a risk of injury to the plaintiff that, by the exercise of reasonable care, could have been foreseen and avoided. In determining the breach issue, what the defendant knew or ought to have known is critical. If the duty has been breached, the defendant will be responsible for any injury suffered by the plaintiff that, as a matter of common sense, is causally connected with the breach and is of a kind that was a reasonably foreseeable consequence of the breach.

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[8] Or, in cases where the plaintiff sues in respect of injury to a third person – such as cases under Lord Campbell's Act, or in actions for nervous shock or *per quod servitium amisit* – the third person.

30. **Following paragraph cited by:**

Broughton v Competitive Foods Australia Pty Ltd (18 May 2005) (Handley and Hodgson JJA, Brownie AJA)

The common law has long recognised that the occupier of premises owes a duty to take reasonable care for the safety of those who enter the premises. That duty arises from the occupation of premises. Occupation carries with it a right of control over the premises and those who enter them. Unless an entrant has a *proprietary* right to be on the premises, the occupier can turn out or exclude any entrant – even an entrant who enters under a contractual right. Breach of such a contract will give an entrant a right to damages but not a right to stay on the premises.

31. **Following paragraph cited by:**

Brophy v Dawson (14 October 2004) (Jones J)

20. My findings that the plaintiff has failed to show any breach of duty on the part of the defendant makes unnecessary detailed consideration of the relevant principles but I should in deference to the arguments raised make a brief reference to the appropriate duty. The general duty of care which seems to me to have been contemplated by the parties in this case is that of an occupier of premises in which customers are served intoxicating alcohol. As McHugh J (dissenting as to the question of breach) pointed out in his judgment in *Cole v South Tweed Heads Rugby League Football Club Ltd [18]* :-

> "The duty of an occupier is not confined to protecting entrants against injury from static defects in the premises. It extends to the protection of injury from all the activities on the premises. Hence, a licensed club' s duty to its members and customers is not confined to taking reasonable care to protect them from injury arising out of the use of the premises and facilities of the club. It extends to protecting them from injury from activities carried on at the club including the sale or supply of food and beverages. In principle, the duty to protect members and customers from injury as a result of consuming beverages must extend to protecting them from all injuries resulting from the ingestion of beverages. It must extend to injury that is causally connected to ingesting beverages as well as to internal injury that is the result of deleterious material, carelessly added to the beverages.

> > > If the supply of intoxicating alcohol by a club to a customer gave 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, the club is liable for the injury suffered by the customer provided the exercise of reasonable care would have avoided the injury. That statement is subject to the qualification that the injury must be of a kind that was reasonably foreseeable. However, it is not necessary that the club should reasonably foresee the precise injury that the customer suffered or the manner of its infliction. It is enough that the injury and its infliction were reasonably foreseeable in a general way." [19]
>
> > Kirby J agreed with this statement of duty as it is presently understood. [20]
>
> *via*
> [19] Ibid at paras 31 , 32
>
> Brophy v Dawson (14 October 2004) (Jones J)

The duty of an occupier is not confined to protecting entrants against injury from static defects in the premises. It extends to the protection of injury from all the activities on the premises. Hence, a licensed club's duty to its members and customers is not confined to taking reasonable care to protect them from injury arising out of the use of the premises and facilities of the club. It extends to protecting them from injury from activities carried on at the club including the sale or supply of food and beverages. In principle, the duty to protect members and customers from injury as a result of consuming beverages must extend to protecting them from all injuries resulting from the ingestion of beverages. It must extend to injury that is causally connected to ingesting beverages as well as to internal injury that is the result of deleterious material, carelessly added to the beverages.

32. If the supply of intoxicating alcohol by a club to a customer gave 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, the club is liable for the injury suffered by the customer provided the exercise of reasonable care would have avoided the injury. That statement is subject to the qualification that the injury must be of a kind that was reasonably foreseeable. However, it is not necessary that the club should reasonably foresee the precise injury that the customer suffered or the manner of its infliction. It is enough that the injury and its infliction were reasonably foreseeable in a general way.

33. Mrs Cole commenced drinking at the Club around 9.30am. No later than lunchtime, signs of her inebriation were plain to anyone who cared to look. A friend of Mrs Cole said that at midday she was drunk and carrying on and arguing and that her speech was "a bit funny". At 3pm, Mrs Cole was so intoxicated that the wife of the Club manager refused to serve her any more liquor. At around 5.30pm, the manager said that she was "very, very drunk". She had to be held up. She was behaving so badly that the manager told her to leave the premises.

34. Upon these facts, the inference is irresistible that, by early afternoon, liquor supplied by the Club had reduced Mrs Cole to such a physical and mental state that there was a real risk that she would suffer harm of some kind. The inference is also irresistible that the more she drank the more opportunities there were that she would suffer harm and the greater the likelihood that the harm would be serious. If the Club ought to have foreseen that her consumption of alcohol had reached a point that further alcohol might expose her to an alcohol-induced risk of injury, it does not matter whether she purchased the further alcohol she drank or whether her companions purchased the alcohol that she drank. The Club owed her a personal duty not to expose her to the risk of injury and, by directly supplying her, or by permitting her companions to supply her, with further alcohol, the Club breached the personal duty of care that it owed to her. It is not relevant to the breach of duty issue that her conduct in drinking an excessive amount of alcohol brought about her intoxicated condition. That conduct is relevant in assessing whether she was guilty of contributory negligence and, if so, to what extent that contributed to the harm that she suffered. It may also be relevant to the issue of causation. But it has nothing to do with the breach of duty issue. The Club had the right to control the conduct of Mrs Cole and her companions and could enforce that right in various ways including ejecting her and her companions from the Club premises. Like employers, teachers, professional persons, guardians, crowd controllers, security guards, jailers and others who have rights of control over persons, property or situations, the duty owed by clubs to entrants extends to taking affirmative action to prevent harm to those to whom the duty is owed. It may extend from the giving of advice and warnings to the forcible ejection from the premises of one or more of those present.

35. Upon the evidence, the Club ought to have foreseen by early afternoon at the latest that Mrs Cole's drinking had the effect that she was exposed or becoming exposed to the real possibility of suffering injury and taken action to prevent it. It is not to the point, as the learned judges in the Court of Appeal thought, that this might require the Club to constantly survey the condition of those drinking alcohol on the premises. The need to monitor the conduct of others and to intervene by advice, warning or more drastic action are frequent characteristics of affirmative duties. No one could plausibly deny that, if a club's failure to monitor the conduct of persons on the premises led to a club member sustaining injury, the club would be liable in negligence for its failure. And where, as here, a club has a duty to protect an entrant from injury, it is beside the point that the discharge of its duty may require the club to monitor the conduct including the sobriety of persons on the premises. Not much experience of clubs and hotels is needed to know that, in many – probably most – of them, management is constantly monitoring the conduct and condition of those on the premises. Indeed, many clubs and hotels employ personnel for no other purpose than to monitor and, where necessary, control the conduct of patrons.

36. Nor is it to the point that alcohol affects persons differently and that it is often very difficult to judge the extent to which a particular person is affected by liquor. Clubs, hotels, restaurants and others are held to the standard of reasonableness, not mathematical precision. It may be an axiom of business management that you can't manage what you can't measure. But in this area of management control, precise measurements are not required. It is not a question of whether the plaintiff had a blood alcohol reading of .11 or .15 or some other figure. It is a question of whether a reasonable licensee, having the opportunity to observe a customer, would think that further drinking by the customer might give rise to a real possibility that the customer would suffer harm.

37. Nor is any question of the autonomy of Mrs Cole or the management of the Club involved in this case. The autonomy of the management is not involved because the Club, through its management, owed a duty of care to Mrs Cole and that duty extended to taking affirmative action. Questions concerning a defendant's autonomy are relevant in determining whether the defendant owed a duty of care to the plaintiff. But once it is held that a duty is owed – especially when the duty extends to taking affirmative action – the autonomy of the defendant is, to the extent of the duty, curtailed.

38. Nor does the autonomy of Mrs Cole enter into the issue of breach of duty. It is a central thesis of the common law that a person is legally responsible for his or her choices. The common law regards individuals as autonomous beings who are entitled to make, but are legally responsible for, their own choices. But like all common law doctrines, there are exceptions. One of the most important is that a person will seldom be held legally responsible for a choice if another person owes the first person an affirmative duty of care in relation to the area of choice. An employer does not automatically escape liability for failing to lay down a proper system of work because its employee took it upon himself to do the work in a manner that caused his injury. Particularly where the duty owed extends to protecting the plaintiff, it is unlikely that the voluntary choice of the injured person will preclude a right of action. Such a choice is likely to exclude liability only when it can be said that the choice is the sole cause of the plaintiff's injury. Hence, a club that has breached its duty to protect a member from harm resulting from intoxication cannot automatically escape liability for a member's injury because the member voluntarily consumed the alcohol. If a club member's intoxication causes him or her to fall down a flight of stairs, the club cannot escape liability merely by asserting that the intoxication was self-induced.

39. Nor does it matter whether several hundred persons were on the Club's premises at various times that day or whether Mrs Cole went out to watch the match that was being played. The Club had a duty to monitor the behaviour and condition of those present. In any event, it had numerous opportunities to observe Mrs Cole's increasingly intoxicated condition. She was at the bar buying wine at 12.20pm and 3pm and sitting at a table inside the Club between 12.20 pm and 2.20pm and between 3pm and 5.30pm. Yet, despite the Club's opportunities to observe her condition, it is impossible to resist the inference that the Club took no steps to prevent her drinking, until probably close to 5.30pm when the manager told her to leave. Once the Club through its employees should reasonably have foreseen that the time had come for Mrs Cole to stop drinking if she was to avoid a serious risk of injury, the Club had an affirmative duty to take steps to prevent her drinking. The Club may have discharged its duty by advising or warning her that she had had too much to drink. Or more drastic steps may have been required. If she refused to take advice or a warning to stop drinking, discharge of the Club's duty may have required the Club to remove her from the premises. As long as the Club had acted promptly in removing her from the premises after it ought to have been aware that further drinking might result in her suffering harm, the Club could not be responsible for what happened to her outside the premises. That is because on that hypothesis the Club would not be in breach of its duty. However, the Club did not discharge its duty by refusing to *sell* her any more liquor at 3pm. Discharge of its duty required the Club to prevent her from drinking more alcohol after the time when it ought to have realised that any further drinking by her could result in her suffering harm.

40. Once it became apparent that Mrs Cole was so intoxicated that her condition gave rise to a significantly increased risk of harm that she would not be exposed to if she were sober, the

Club's failure to prevent her drinking more alcohol constituted a breach of the duty owed to her. It is not necessary in this case, as it might be in other cases of this kind, to specify the precise time when the breach of duty occurred. That is because, on any view of the evidence, the Club permitted her to drink long after it should have taken steps to stop her drinking and because her rising intoxication increased the chance that she would suffer injury of the kind that she did.

41. Accordingly, sometime in the early afternoon, the Club breached the duty that it owed to Mrs Cole to take reasonable care to protect her from harm. With great respect to those who take the contrary view, it is a mistake to see the question of breach as arising at or about the time Mrs Cole was leaving the premises. What occurred at that stage is relevant to the causation issue but, in the circumstances of this case, it has nothing to do with the breach issue. The Club was in breach of its duty long before Mrs Cole left the premises. If she had fallen over and injured herself as the result of her intoxication at (say) 4pm, she would have had an action against the Club because by then the Club had been in breach of its duty for some time, probably for close to three hours.

42. Furthermore, unless Mrs Cole's refusal of management's offer of a courtesy bus and driver or, alternatively, a taxi broke the causal chain between the Club's breach of duty and her injury, Mrs Cole must succeed on the causation issue. Her injury was the direct result of the alcohol consumed by her as the result of the Club's breach of duty. Under the common law doctrine of causation, however, the voluntary choice of a plaintiff to take a course of action that leads to injury may destroy the causal link between breach of duty and the injury even though the breach contributed to the injury. But that principle has no application where the voluntary choice of the plaintiff or the intervening act of a third party is the direct result of the defendant's breach of duty. The plaintiff who elects to jump aside to avoid the risk of injury from a negligently driven vehicle is not deprived of a cause of action because no injury would have been suffered if the plaintiff had remained where he or she was.

43. In the present case, Mrs Cole's abusive rejection of management's transport offers was just the kind of response that might be expected to flow from the Club's breach of duty in permitting her to continue to drink alcohol on the Club's premises. Her refusal of the offers of transport, therefore, no more broke the causal link between the Club's breach of duty and her injury than the voluntary act of the thief breaks the causal chain between a security company's breach of duty and the plaintiff's loss from theft. Nor was the causal chain broken by the offer of Mrs Cole's new-found companions to look after her. Going off with those persons might have founded an intervening cause argument if it had been established that their conduct had contributed to the injuries that she suffered. But there was no such evidence. The fact that she left the premises in their company is therefore not an intervening act that severs the causal connection between the Club's breach of duty and Mrs Cole's injuries.

44. The most difficult question in the case is that of remoteness of damage. Was it reasonably foreseeable in a general way that, as a result of the Club's breach of duty, Mrs Cole might suffer injury of the kind and in the general way that she did? It is not necessary that the Club should reasonably foresee the precise injury or the manner of its occurrence. The received doctrine is that a defendant, in breach of duty, is liable for injury causally connected to the breach if the injury and the manner of its occurrence were reasonably foreseeable in a general way. Hence, the issue of remoteness has to be determined by asking: was it reasonably foreseeable in a general way that permitting Mrs Cole to continue to drink after the Club

should have stopped her drinking might lead to her being struck by a car in the vicinity of the Club's premises up to 50 minutes after she left the Club?

45. Given Mrs Cole's state of intoxication, it was reasonably foreseeable that that state might result in her suffering injury for up to an hour or even longer after she left the Club premises. Furthermore, injury as a pedestrian was high up on the list of injuries that she was at risk of suffering as the result of her intoxication. Accordingly, given that it is not necessary that either the precise injury or the manner of its infliction should be foreseen, her injury was reasonably foreseeable. It was reasonably foreseeable in a general way that within 50 minutes of leaving the Club she might be struck by a motor vehicle while walking on the road.

46. **Following paragraph cited by:**

Hunter Area Health Service v Presland (21 April 2005) (Spigelman CJ, Sheller and Santow JJA)

The rigorous application of basic negligence doctrine requires the reversal of the Court of Appeal's decision and the restoration of the trial judge's verdict in favour of Mrs Cole. No doubt some minds may instinctively recoil at the idea that the Club should be liable for injuries sustained by a drunken patron who is run down after leaving its premises. But once it is seen that the Club had a legal duty to prevent her drinking herself into a state where she was liable to suffer injury, the case wears a different complexion. The Club has a legal responsibility for the injury. Instinct must give way to the logic of the common law.

Order

47. The appeal should be allowed with costs.

48. GUMMOW AND HAYNE JJ. On Sunday, 26 June 1994, the first respondent ("the Club") held a champagne breakfast at its clubhouse, next to grandstands built beside the Club's football ground. Several football matches were played at the ground that day, from about 11.30 am to about 5.00 pm.

49. The appellant went to the breakfast with three friends. The appellant consumed a lot of liquor. One of the friends who went to the Club with her later gave evidence that, by about 1.45 pm, the appellant was "absolutely drunk". Two of the appellant's friends left the Club at about noon; the third, Mrs Fay Hughes, left during the early part of the afternoon. The appellant, having met some New Zealanders, decided to stay at the Club.

50. At about 6.00 pm, approximately eight hours after the appellant had first arrived at the Club's premises, she was asked to leave the clubhouse. (The appellant and her companions were said to have been touching each other indecently.) The Club's manager offered the appellant safe transport home, either by the Club's courtesy bus, or by taxi. She bluntly (and crudely) refused both offers. One of her companions told the Club's manager that they (her companions) would "look after her". A few minutes later she and her companions had left the premises, whether together or separately the evidence does not reveal.

51. At about 6.20 pm, on a road about 100 metres north of the Club's premises, the appellant was struck by a four wheel drive vehicle driven by the second respondent. No one was then with the appellant. The appellant's blood alcohol content was later found to be 0.238 gm per 100 ml. It was estimated that to reach this blood alcohol result she would have had to have consumed 16 standard drinks[9].

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[9] A "standard drink" was defined as a drink delivering 10 gm of alcohol: 285 ml of full strength beer, 30 ml of spirits or 120 ml of table wine.

The proceedings below

52. The appellant brought an action in the Supreme Court of New South Wales for damages for the injuries she sustained in the collision, naming as defendants the Club and the driver of the vehicle that struck her. At first instance, the appellant obtained judgment against both the Club and the driver [10] . The primary judge (Hulme J) found the appellant to have been contributorily negligent and apportioned responsibility between the parties, as to 30 per cent against the driver, 30 per cent against the Club and 40 per cent against the appellant.

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[10] *Cole v Lawrence* (2001) 33 MVR 159.

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53. On appeal to the Court of Appeal of New South Wales (Heydon and Santow JJA and Ipp AJA), the Club's appeal and the driver's crossappeal were both allowed[11]. The judgment entered at trial was set aside and, in its place, judgment was entered for the Club and the driver.

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

The issues

54. By special leave, the appellant now appeals against only those parts of the judgment of the Court of Appeal which related to the liability of the Club.

55. Special leave was granted to examine what, if any, duty of care the Club, as a seller of liquor, owed to the appellant. The appellant alleged that her collision with the driver's vehicle was caused, or contributed to, by the Club's negligence.

56. **Following paragraph cited by:**

Neal v Ambulance Service of New South Wales (10 December 2008) (Tobias JA ; Basten JA ; Handley AJA)

> 24 An alternative argument was that no duty of care arose, or, if it arose did not continue, in circumstances where the person sought to be assisted rejected offers of help. This more restrained argument raised a different issue. Although it is commonly said that the existence of a duty of care is a question of law, it is not to be viewed as such, abstracted from a factual context: *Cole v South Tweed Heads Rugby League Football Club Limited* [2004] HCA 29; 217 CLR 469 at [56] and [81] (Gummow and Hayne JJ) ; *Amaca Pty Ltd v AB & P Constructions Pty Ltd* [2007] NSWCA 220; (2007) Aust Torts Rep ¶81-910 at [46]-[47] (Giles JA), [93] (Ipp JA) and [137]-[140] . Nor is there any bright line separating the existence of a duty from its scope and content in particular circumstances. Finally, the question as to whether a duty exists is not helpfully answered without consideration of the particular respects in which breach is alleged. For present purposes, nothing is gained by asking, in the abstract, whether ambulance officers owed the plaintiff a duty of care: the only relevant question is whether the ambulance officers owed the plaintiff a duty which required them to advise the police that the plaintiff needed to be conveyed to hospital.

Panagiotopoulos v Rajendram (28 September 2007) (Tobias JA at 1; McColl JA at 2; Basten JA at 3)
Amaca Pty Ltd v Hannell (02 August 2007) (Martin CJ Steytler P McLure JA)
Skulander v Willoughby City Council (18 May 2007) (Mason P; Beazley JA; Basten JA)
Wagstaff v Haslam (26 February 2007) (Santow JA; Bryson JA; Basten JA)

> 38 In *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at [56] Gummow and Hayne JJ, by reference to a passage in the judgment of McHugh J in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [81] and [106] noted:
>
> > "His Honour also emphasised that the more specific the terms of the formulation of the duty of care, the greater the prospect of mixing the anterior question of law (the existence of the duty) with questions of fact in deciding whether a breach has occurred. On the other hand, the articulation of a duty of care at too high a level of abstraction provides an inadequate legal mean against which issues of fact may be determined."

In *Graham Barclay Oysters Pty Ltd v Ryan* [12] , McHugh J observed:

> "Ordinarily, the common law does not impose a duty of care on a person to protect another from the risk of harm unless that person has created the risk."

His Honour also emphasised [13] that the more specific the terms of the formulation of the duty of care, the greater the prospect of mixing the anterior question of law (the existence of the duty) with questions of fact in deciding whether a breach has occurred. On the other hand, the articulation of a duty of care at too high a level of abstraction provides an inadequate legal mean against which issues of fact may be determined.

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[12] (2002) 211 CLR 540 at 575576 [81] .

[13] (2002) 211 CLR 540 at 585 [106] .

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57. The present litigation was pleaded and conducted in such a fashion as to conflate asserted duty and breach of that duty and to make it inappropriate to decide on this appeal any issue respecting the existence or content of a duty of care.

58. Although put in several different ways, the appellant's case in this Court was anchored in two complaints. First, it was alleged that the Club had been negligent in continuing to serve the appellant alcohol when the Club knew or should have known she was intoxicated. Secondly, it was said that the Club was negligent in allowing her to leave the premises in an intoxicated state. Thus the duties relied on were duties first, to take reasonable care to monitor and moderate the amount she drank, and second, to take reasonable care that she travelled safely away from the Club.

59. These reasons will seek to show that whether the Club owed either of those duties need not be decided. If the Club owed the appellant a duty to take care that she did not fall into danger of physical injury when she left the Club, it discharged that duty of care by offering her safe transport home, only to be met by her refusal and the offer, from her apparently sober companions, to look after her. If the Club owed the appellant a duty to take care in monitoring and moderating the amount of liquor she took, any breach of that duty was not a cause of the injuries she sustained.

A disputed question of fact

60. It is convenient to deal first with a question of fact about which the Court of Appeal differed from the primary judge. How much alcohol did the Club serve the appellant?

61. About 100 people attended the regular Sunday morning champagne breakfasts held by the Club. At each breakfast, two dozen bottles of spumante were provided by the Club for those attending. On the day of the accident, these 24 bottles were consumed in the period between about 9.30 am and 10.30 am, or a little later. Mrs Hughes, one of the friends who had come to the Club with the appellant, said that she, herself, would have had "around about eight" glasses of the free wine. She was unable to say how much the appellant had of the free wine but there is no reason to think it would have been significantly less than Mrs Hughes drank. By contrast, however, another member of the party, Mrs Hughes' husband, took no alcohol.

62. Once the free wine ran out, Mrs Hughes bought another bottle of the same wine. The appellant and Mrs Hughes consumed that bottle.

63. At about 12.30 pm Mrs Hughes saw the appellant drinking straight out of another full bottle of spumante. There was no direct evidence that the appellant had bought this bottle herself, but the primary judge found that she did, and the Court of Appeal did not overturn that finding. It may be accepted, therefore, that at about 12.30 pm the Club sold her this bottle of wine ("the 12.30 pm bottle").

64. The primary judge found that it was probable that the Club served the appellant alcohol *after* serving her with the 12.30 pm bottle [14] . As Ipp AJA rightly pointed out in the Court of Appeal [15] , drawing the inference that the appellant bought alcohol from the Club after the 12.30 pm bottle did not take into account other possibilities that were inconsistent with that inference. Ipp AJA referred to her buying alcohol from persons other than Club employees, and it may be that, as the appellant submitted, this possibility can be discounted. But what cannot be discounted is the real possibility that those in whose company the appellant spent the afternoon at the Club, watching football, gave her the alcohol that she most likely drank during that afternoon. She had, after all, refused to go home with Mrs Hughes because she preferred to stay with others. When it is recalled that there was evidence which the primary judge accepted that the Club refused to serve liquor to the appellant at about 2.30 pm or 3.00 pm, it is evident that the Court of Appeal was right to conclude that the evidence did not permit the primary judge to infer, as he did, that the appellant bought more liquor from the Club after 12.30 pm. All that the evidence showed was that it was more probable than not that she consumed more alcohol during the afternoon. The evidence was silent about who supplied it to her and was silent about whether those who supplied alcohol to the appellant did so from stocks they brought with them to the ground or from purchases made at the Club.

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[14] (2001) 33 MVR 159 at 170 [63] .

[15] (2002) 55 NSWLR 113 at 135 [140] .

A duty to monitor and moderate the appellant's drinking?

65. The appellant's contention that her collision with the driver's vehicle was caused or contributed to by the Club's negligence in continuing to serve her alcohol, when the Club knew or should have known that she was intoxicated, was a contention that depended upon taking a number of steps, some (perhaps all) of which may be contested.

66. First, what exactly is meant by "serving" the appellant alcohol? Does it encompass, or is it limited to, selling alcohol which it is known that the appellant will consume? Does it extend to selling, to others, alcohol which it is suspected that the appellant will consume? How is the Club to control what other patrons may do with bottles of alcohol which the Club sells

them? Given the uncertainties about how and from whom the appellant obtained alcohol during the second half of the day, these are questions that go directly to the formulation of the duty which is said to have been breached.

67. Secondly, the evidence of what the Club knew, or could reasonably be taken to have known, of what alcohol the appellant took during the day was very slight. Mrs Hughes described the appellant as "flitting around and dancing" at about noon. She described the appellant drinking directly from a bottle at about 12.30 pm but she said that then the appellant went outside the clubhouse to "the football area". To do that she passed from an area where Mrs Hughes was playing a poker machine and would have been "in the view of anyone if they had been looking for her to see her for at least 3 or 4 seconds". There was no evidence about how the "football area" was or could have been monitored by Club staff. There was no evidence about whether patrons coming to watch matches could or did bring alcohol with them. Again, these are questions which would have to be considered in deciding whether the Club owed the appellant a duty which it breached.

68. Unsurprisingly, there was no evidence which would have revealed that servants of the Club could have (let alone reasonably should have) been able to observe how much the appellant drank during the morning. That is, as we say, unsurprising when it is recalled how many patrons attended the Club. About 100 or 120 had attended breakfast. Some of those patrons stayed at, and no doubt others came to, the clubhouse and the ground to attend the several football games to be played that day. There was, therefore, a large and shifting population to observe. If it is said that the Club owed the appellant a duty to monitor and moderate the amount that she drank, it owed *all* its patrons such a duty. All that the evidence showed was that there were points during the day where Mrs Hughes recognised that her friend was drunk and that in the afternoon the appellant was refused service. Presumably she was then evidently intoxicated. But whether, or when, her intoxication should have been evident to others, and in particular Club staff, was not revealed by the evidence.

69. Next, what level of intoxication is said to be relevant? Does it mean not lawfully able to drive a motor car? Some drivers may not drive a motor car if they have had any alcohol. Other drivers may be unfit to drive after very few glasses of alcohol. Does "intoxicated" mean, as the primary judge held, "loss of selfcontrol or judgment which is more than of minor degree" [16] ? If that is so, many drinkers will arrive at that point after very little alcohol.

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[16] (2001) 33 MVR 159 at 169 [58] .

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70. All of these questions would have to be answered in deciding what duty of care was owed. None can be answered in isolation. All would require consideration of the purpose for which it is said that the duty alleged is to be imposed.

71. In this case, the appellant alleged that the collision in which she was injured was caused by the Club negligently continuing to serve her alcohol. Thus, "intoxicated" must refer to some state in which her capacity to care for herself was adversely affected, and the nature of the duty said to be imposed on the Club must be one to take reasonable steps to prevent her reaching *that* state. But if that is so, it is evident that other considerations must intrude.

72. Is the content of the duty to be imposed on the Club to vary according to what it knows, or what it should know, about what arrangements the appellant had made (if any) to leave the Club? Or are all patrons to be treated alike, regardless of whether they have made arrangements to be safely taken home? Where, until about midday, the appellant was in a party of four people of whom one did not drink at all, was the Club under a duty to moderate her drinking or not? Could it rely on there being one member of the party who would be responsible for shepherding the party home safely? What steps was the Club expected to take during the afternoon, or after the point it is said that it should have recognised that she was intoxicated? If it should have not supplied her alcohol in the afternoon, it was not shown that the Club did so after the 12.30 pm bottle. If it should have done more than refuse her service, what exactly was to be expected of it?

73. All of these, and more, questions would have to be answered to identify the duty alleged to exist. And in answering them it would be necessary to pay due regard to the facts that the appellant and others in the Club were adults, none of whom could be expected to be ignorant of the intoxicating effects of the alcohol they voluntarily consumed.

The statutory context

74. The appellant submitted that it was relevant to notice that the Club was registered under the *Registered Clubs Act* 1976 (NSW) and that, under s 44A of that Act, it was an offence to permit intoxication on Club premises and an offence to sell or supply liquor to an intoxicated person. It was also said to be relevant to notice that s 67A of the *Registered Clubs Act* required a member of the police force, when requested by the secretary or an employee of the Club, to turn out or to assist in turning out of the premises of the Club any person who was then intoxicated, violent, quarrelsome or disorderly.

75. Both of these provisions appear to have been directed chiefly, if not exclusively, to the maintenance of order in registered clubs' premises, not to the safety of the intoxicated patron. Whether or not that is so, no allegation was made of breach of statutory duty, and these provisions shed no light on the problems now presented.

Any breach of duty to monitor and moderate not causative

76. Even assuming the various difficulties identified about the formulation of a duty of care to monitor and moderate the amount of liquor the appellant drank could be overcome, the breach of such a duty, however it is expressed, was not a cause of the injuries the appellant sustained. That is revealed by considering the case, contrary to the facts found by the Court of Appeal, that the Club carelessly sold the appellant further liquor during the course of the afternoon, when it knew or ought to have known that she was intoxicated. In such a case the fact would remain that, before turning the appellant out of its premises, the Club offered her safe transport home. This she refused and once she refused it, the Club could do nothing more to require her to take care. In particular, it could not lawfully detain her. If, as happened here, she left the Club and was injured, any carelessness of the Club in selling her liquor was not a cause of what happened. Why that is so is revealed by considering the allegation that the Club breached its duty by allowing her to leave in an intoxicated state.

Breach of a duty by allowing her to leave?

77. The appellant contended that the Club broke its duty by allowing her to leave its premises in an intoxicated state. It was said that the Club should have "counselled" her before she left, to impress upon her the dangers that might await her. Why that should be so when she was willingly in the company of two apparently sober men offering to look after her is far from clear. And exactly what form this counselling might usefully have taken is equally unclear.

78. The appellant was an adult woman whose only disability at the time she was turned out of the Club was the state of intoxication she had induced in herself. 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?

79. It was suggested that the Club should have called the police [17] . But again it must be asked: to do what? If the police had been called they would have been bound (by s 67A of the *Registered Clubs Act*) to turn the appellant out of the Club's premises. But what else is it suggested that the police might have done? No satisfactory answer was given to this question. All that was said was that it could not be supposed that the police would have left her to fend for herself. That assumes that the appellant would have reacted differently to a suggestion that she take the courtesy bus or a taxi – differently, that is, from her crudely blunt response to the Club's manager.

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[17] cf *Jordan House Ltd v Menow* [1974] SCR 239 at 247248 per Laskin J.

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80. Again, even if there were some duty to take reasonable care not to allow her to leave the premises except by a safe means of transport, the Club did not breach that duty. It took reasonable steps to make safe transport available to her.

Questions of duty of care not decided

81. In these circumstances it is neither necessary nor appropriate to decide any question about the existence of a duty of care. It is not necessary to do so for the reasons given earlier. It is not appropriate to do so because any duty identified would necessarily be articulated in a form divorced from facts said to enliven it. And, as the present case demonstrates, the articulation of a duty of care at a high level of abstraction either presents more questions than it answers, or is apt to mislead.

82. **Following paragraph cited by:**

Moss v Amaca Pty Ltd (Formerly James Hardie and Co Pty Ltd) (22 December 2006) (LE Miere J)
Hannell v Amaca Pty Ltd (Formerly James Hardie & Co Pty Ltd) (22 December 2006) (LE Miere J)

Here, as in so many other areas of the law of negligence, it is necessary to keep well in mind that the critical question is whether the negligence of the defendant was a cause of the plaintiff's injuries. The duty that must be found to have been broken is a duty to take reasonable care to avoid what *did* happen, not to avoid "damage" in some abstract and unformed sense. Thus asking whether it is careless to sell liquor to an obviously intoxicated patron may, when the question is cast in that abstract form, appear to invite an affirmative answer. And giving an affirmative answer may be thought to conduce to the careful and responsible service of a product which, if misused, can be dangerous. But as the events which give rise to this appellant's claim demonstrate, the simplicity of a question framed in the way described serves only to obscure the complexity of the problems that lie beneath it.

83. The appeal should be dismissed with costs.

84. **Following paragraph cited by:**

Lanahmede Pty Ltd v Koch (16 July 2004) (Perry, Bleby and Gray JJ)

KIRBY J. A problem with the consumption of alcohol, persisted with beyond small quantities, is that it has a capacity to destroy the ability of the consumer to make reasoned choices, to observe proper self-protection and to behave in a civil and rational way.

85. **Following paragraph cited by:**

Grills v Leighton Contractors Pty Ltd (27 March 2015) (Beazley P, Barrett and Gleeson JJA)

101. Leighton submitted that the existence of these factors as relevant to the existence of a duty of care at common law was not new: *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; 211 CLR 540 at [84] ; *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; 200 CLR 1 at 34-35 ; *Cole v South Tweed Heads Rugby League Football Club Ltd* [2004] HCA 29; 217 CLR 469 at [85] , [92] . Again, this may be accepted.

These facts are generally known to supplier and consumer alike. However, the consumer may be a person highly vulnerable to alcohol-induced conduct that is harmful and self-destructive. What for most members of the community is, if taken in prudent quantities, an enjoyable and relaxing pastime is for a small minority of consumers a highly dangerous and potentially lethal poison. Even for those who do not fall into the category of highly vulnerable people, alcohol, of its nature, has the capacity to affect adversely people with full faculties, when it is consumed to excess. Vulnerable people are not only those who drink to excess. Alcohol adversely affects many people in different ways.

86. A rational system of law will recognise these differentials. It will not allow suppliers, who have a commercial interest in supplying alcohol to consumers, to wash their hands of legal responsibility for the safety of those to whom the alcohol they supply becomes the cause of serious injuries. That is what the appellant alleges happened in her case.

Conclusions at trial and on appeal

87. The primary judge in the Supreme Court of New South Wales (Hulme J)[18] approached the contest between Mrs Cole (the appellant) and the respondent Club ("the Club") with the foregoing realities in mind. He found that the Club, with relevant statutory duties and with economic and physical control over the supply of alcohol to patrons on its premises, owed the appellant a duty of care in accordance with the common law of negligence. He concluded that the Club had breached its duty of care and was partially the cause of the serious injuries suffered by the appellant. Those injuries were a result of the appellant's disorientation on a public road 100 metres from the Club's premises soon after she had left those premises in a serious state of intoxication.

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[18] *Cole v Lawrence* (2001) 33 MVR 159.

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88. On the evidence proved in this case, the primary judge was entitled to reach the conclusions of fact and law that he did. The Court of Appeal was not warranted to disturb the judgment which the appellant recovered against the Club. This Court is not concerned with the issue of the liability of the driver of the motor vehicle that struck the appellant. However, the judgment at trial in favour of the appellant against the Club should be restored.

The Club owed the appellant a duty of care

89. Two central problems were said to stand in the way of recovery by the appellant. The first was the suggested absence of a duty of care owed in law to a person in the position of the appellant to ensure that she did not become so seriously intoxicated that she might be confronted with the foreseeable risks of the kind that befell her and, if she did become so intoxicated, to ensure that she was taken home or to some other safe place where she could recover further from the alcohol-induced intoxication before venturing beyond the Club's premises to circumstances potentially of great danger.

90. The reasons of Gummow and Hayne JJ ("the joint reasons") prefer to postpone resolution of the issue of the duty of care although hinting at difficulties which their Honours see in its availability[19]. The reasons of Gleeson CJ [20] and Callinan J [21] deny the existence of a duty of care. Their Honours' reasons are, with respect, replete with expressions reflecting notions of free will, individual choice and responsibility[22]. This is reinforced in the reasons of Callinan J by his Honour's references to the opinion of Heydon JA in the Court of Appeal from which the appeal comes [23] . Whatever difficulties free-will assumptions pose for the law in normal circumstances [24] , such assumptions are dubious, need modification and may ultimately be invalidated having regard to the particular product which the Club sold or supplied to patrons such as the appellant, namely alcoholic drinks. The effect of that product

can be to impair, and eventually to destroy, any such free will. This fact imposes clear responsibilities upon those who sell or supply the product in circumstances like the present to moderate the quantity of the supply; to supervise the persistent sale or supply to those affected; and to respond to, and ameliorate, the consequences of such sale or supply where it is clear that the recipient has consumed enough of the product to be in a temporary state of inability to take proper care for his or her own safety. On the findings of the primary judge, such was the case of the appellant.

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[19] Joint reasons at [57], [59], [65]-[73].

[20] Reasons of Gleeson CJ at [18].

[21] Reasons of Callinan J at [125].

[22] Reasons of Gleeson CJ at [13]-[14]; see also for an example the statement in the joint reasons at [78]: "The appellant was an adult woman … [in a] state of intoxication she had *induced in herself*." (emphasis added)

[23] Reasons of Callinan J at [130] referring to *South Tweed Heads Rugby League Football Club Ltd v Cole* (2002) 55 NSWLR 113 at 115-116 [4]-[7] .

[24] See eg discussion of one such difficulty in Taylor, "Should Addiction to Drugs be a Mitigating Factor in Sentencing?", (2002) 26 *Criminal Law Journal* 324 citing *R v Smith* [1987] 1 SCR 1045 at 1053 ; *Lawrence* (1988) 10 Cr App R (S) 463.

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91. **Following paragraph cited by:**

Lanahmede Pty Ltd v Koch (16 July 2004) (Perry, Bleby and Gray JJ)

33. In *Cole v South Tweed Heads Rugby League Football Club Ltd* Mc Hugh made the following general observations: [3]

> The common law has long recognised that the occupier of premises owes a duty to take reasonable care for the safety of those who enter the premises. That duty arises from the occupation of premises. Occupation carries with it a right of control over the premises and those who enter them. Unless an entrant has a proprietary right to be on the premises, the occupier can turn out or exclude any entrant — even an entrant who enters under a contractual right. Breach of such a contract will give an entrant a right to damages but not a right to stay on the premises.
>
> The duty of an occupier is not confined to protecting entrants against injury from static defects in the premises. It extends to the protection of injury from all the activities on the premises. Hence, a licensed club's duty to its members and customers is not confined to taking reasonable care to protect them from injury arising out of the use of the premises and facilities of the club. It extends to protecting them from injury from activities carried on at the club including the sale or

> supply of food and beverages. In principle, the duty to protect members and customers from injury as a result of consuming beverages must extend to protecting them from all injuries resulting from the ingestion of beverages. It must extend to injury that is causally connected to ingesting beverages as well as to internal injury that is the result of deleterious material, carelessly added to the beverages.

Kirby J agreed and observed: [4]

> The law of tort exists not only to provide remedies for injured persons where that is fair and reasonable and consonant with legal principle. It also exists to set standards in society, to regulate wholly self-interested conduct and, so far as the law of negligence is concerned, to require the individual to act carefully in relation to a person who, in law, is a neighbour. The Club had a commercial interest to supply alcohol to its members and their guests, including the appellant. Doing so tended to attract them to an early morning breakfast, to induce them to use profitable gambling facilities in the Club's premises and to encourage them to use the restaurant and other outlets where alcohol would continue to be purchased or supplied to the profit of the Club. As McHugh J points out in his reasons, with which I agree, the common law has long recognised that the occupier of premises owes a duty to take reasonable care for the safety of those who enter the premises. That duty arises from the occupation of premises. It extends to protection from injury from all of the activities on the premises, including, in registered premises such as the Club's, the sale of alcoholic drinks.

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[4] [2004] HCA 29 at [91]

The law of tort exists not only to provide remedies for injured persons where that is fair and reasonable and consonant with legal principle. It also exists to set standards in society, to regulate wholly self-interested conduct and, so far as the law of negligence is concerned, to require the individual to act carefully in relation to a person who, in law, is a neighbour [25] . The Club had a commercial interest to supply alcohol to its members and their guests, including the appellant. Doing so tended to attract them to an early morning breakfast, to induce them to use profitable gambling facilities in the Club's premises and to encourage them to use the restaurant and other outlets where alcohol would continue to be purchased or supplied to the profit of the Club. As McHugh J points out in his reasons [26] , with which I agree, the common law has long recognised that the occupier of premises owes a duty to take reasonable care for the safety of those who enter the premises. That duty arises from the occupation of premises. It extends to protection from injury from all of the activities on the premises, including, in registered premises such as the Club's, the sale of alcoholic drinks [27] .

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[25] *Donoghue v Stevenson* [1932] AC 562 at 580.

[26] Reasons of McHugh J at [30].

[27] Reasons of McHugh J at [31].

92. In such circumstances, to hold that the Club owed no duty of care by the standards of the common law of negligence, to patrons such as the appellant, is unrealistic. Such a patron was a person who, in the reasonable contemplation of the Club and its employees, was potentially vulnerable to harm as a result of its commercial activities. Such harm was reasonably foreseeable in the given circumstances. The appellant was within the proximity of the Club in a physical sense. The policy reasons, concerned with free will and personal autonomy, that might in other circumstances justify withholding the imposition of a duty of care are overridden, in the case of the Club, by the commercial interest it had in the presence of the appellant on its premises and the known propensity of the alcoholic product, made available there, to expose at least some individuals to the risk of serious harm.

93. With all respect to those with doubts or holding contrary views, I therefore have no hesitation in concluding that the Club owed the appellant a duty of care of the kind posited. There is much support for this proposition in Canada:

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[28] [1974] SCR 239 .

[29] [1995] 1 SCR 131 ; cf *Desmond v Cullen* (2001) 34 MVR 186. See also *Oxlade v Gosbridge Pty Ltd* unreported, New South Wales Court of Appeal, 18 December 1998 per Mason P; *Rosser v Vintage Nominees Pty Ltd* (1998) 20 SR (WA) 78; cf *Johns v Cosgrove* (1997) 27 MVR 110. There were particular features of these cases that do not exist in the present case and vice versa.

[30] (1988) 20 FCR 91 .

[31] [1984] TLR 138 per Beldam J. See Orr, "Is an innkeeper her brother's keeper? The liability of alcohol servers", (1995) 3 *Torts Law Journal* 239; Solomon and Payne, "Alcohol Liability in Canada and Australia: Sell, Serve and Be Sued", (1996) 4 *Tort Law Review* 188. See also O'Halloran, "Social Host And Vendor Liability For Driving-Related Injuries Caused By Intoxicated Guests And Customers", (1987) *Annual Survey of American Law* 589.

Jordan House Ltd v Menow [28] and *Stewart v Pettie* [29] . There are many decisions elsewhere that support the general proposition that a person in control of licensed premises owes a duty of care in negligence to take reasonable precautions in the circumstances not to contribute to a danger to others: *Chordas v Bryant (Wellington) Pty Ltd* [30] and *Munro v Porthkerry Park Holiday Estates Ltd* [31] . The withered view of community and legal neighbourhood propounded by Gleeson CJ and Callinan J is one that I would reject.

94. There is no reason for this Court to endorse the narrower legal principle for Australia. There is every reason for it to follow an approach similar to that taken in other jurisdictions[32]. The social and legal environment in Australia is similar to those countries where the duty has been upheld. This conclusion is also endorsed by the indications of the purposes of Parliament in

the statutory provisions regulating control of, and standards in, registered licensed clubs in the State of New South Wales where the appellant's injuries occurred [33] . Although these provisions do not themselves give rise to a statutory cause of action (and none was alleged) they do shed light on the problems presented because they make plain the purpose of Parliament that intoxicated persons are not to be sold, or supplied with, alcohol on such club premises. Doing so is a criminal offence in proof of which the onus of establishing innocence is exceptionally placed on the club secretary, not the accuser.

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[32] Solomon and Payne, "Alcohol Liability in Canada and Australia: Sell, Serve and Be Sued", (1996) 4 *Tort Law Review* 188 at 189.

[33] See reasons of Callinan J at [125], fn 46, [127] citing ss 44A and 67A of the *Registered Clubs Act* 1976 (NSW) : see also reasons of Gleeson CJ at [16]; joint reasons at [74] -[75].

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95. Statutory provisions of such a kind can only be explained by Parliament's recognition, and acceptance, of the special risks that selling, supplying or condoning the sale and supply of excessive quantities of alcohol to sometimes vulnerable patrons on such premises occasions to them and to others. The principles of the common law of negligence remain to be expressed in the context of these realistic statutory provisions. They reinforce the conclusion, which commonsense affirms, that the Club owed a duty of care to the appellant as claimed. In the circumstances of this case, they help to overcome the common law's usual reluctance to impose on strangers duties of affirmative action to take care of others. Here the appellant was not a legal stranger to the Club. The *Registered Clubs Act* 1976 (NSW) imposed duties in respect of her. To the appellant, the Club was, in law, a neighbour.

96. The Club, a registered purveyor of alcoholic drinks that began the day with a breakfast with the supply of free bottles of spumante in large quantities and thereafter tolerated the continued presence on its premises of a patron who became drunk, and who eventually was obviously drunk (drinking at one stage directly from a bottle of wine and acting in a disordered, sometimes indecent and even offensive manner), cannot say that it owed no duty of care to her. It cannot do so when soon after she left its premises the virtually inevitable motor accident occurred with serious injuries to her person.

97. There was no error in the conclusion of the primary judge on the duty issue. The Court of Appeal erred in disturbing his conclusion.

A breach of duty contributed to the appellant's damage

98. That leaves the issues of breach and causation. Once the duty of care is accepted, the breach of duty is clearly established because the Club had the right to control the conduct of the appellant on the Club's premises. This included in the supply of alcoholic drinks for her consumption, the termination of such supply and her ejection from the Club premises long before it became highly dangerous to do so [34] . The Club breached its duty long before any issue of causation arose to be decided [35] . The real possibility that the appellant would suffer injury, as she did, was clearly foreseeable in the circumstances.

[34] Reasons of McHugh J at [34].

[35] cf reasons of McHugh J at [41].

99. Causation is the substantial issue in this appeal. Its resolution ultimately reduces to the question of whether the Club did enough by offering the appellant transport home in a "courtesy bus" or taxi at about 6.00pm on the day of her injuries. Relevant to the decision on this issue is the intervention of two male New Zealander companions of the appellant who said they would "look after her". Was this sufficient? Did it sever the link between, on the one hand, the duty of care and the breach of that duty found by the trial judge and, on the other, his Honour's conclusion that the acts and omissions of the Club were partly the cause of the damage suffered by the appellant soon after she left the Club's premises?

100. I accept that the situation of the appellant at about 6.00pm on the day of her injuries presented the Club and its secretary/manager with a difficult situation. It was, however, one partly, even substantially, of their own making. What they were to do was governed by the circumstances then arising. Those circumstances included the very prolonged course of supply of alcohol to the appellant, one way or another, on the Club's premises following the spumante breakfast. The obvious state of intoxication of the appellant over a long interval and the profound effect this had on the appellant's intellectual and motor capacity – as well as the obvious risks she faced if she were left to her own devices on or near a public highway on leaving the Club's premises – made the possibility of an accident reasonably foreseeable in the circumstances of her condition.

101. By 5.30pm or 6.00pm on the day of the accident the secretary/manager of the Club saw the appellant in a condition which was described as "grossly intoxicated". At around 3pm, Mrs Pringle, wife of the secretary/manager, had refused to serve her and described her as unsteady on her feet. At 2.15pm to 2.30pm, the appellant's friend Mrs Hughes had described her as "totally inebriated" and "an embarrassment". This was not, therefore, a case of chance or unexpected intoxication at a late hour. It was an instance of prolonged and obvious drunkenness on the Club's premises over an extended period.

102. It is not adequate to respond with Sunday School horror to the fact that the appellant said to Mr Pringle "get fucked" when he told her, at last, at about 6.00pm, that she would have to leave the premises and offered her transport home. An object of the law applicable to this case, statutory and common law, is to prevent things coming to such a pass. If the appellant had by that hour, indeed much earlier, dropped her "ladylike" behaviour, this was precisely the outcome of serving her with, or permitting the sale or supply to her of, much more alcohol than it was safe for her to consume.

103. In his report received into evidence, Dr Starmer, an expert pharmacologist, explained features of such alcohol consumption that are largely within common knowledge. He summarised its elements:

"Alcohol exerts its major effects on the structures of the brain which are responsible for balance and co-ordination. Alcohol also affects mental and cognitive ability (ie judgement, reasoning, memory). Alcohol reduces peripheral awareness as well as impairing speed and distance judgements. The ability to successfully divide attention between two or more inputs is significantly degraded at blood alcohol concentrations as low as 0.05g/100ml and impairment increases exponentially with rising blood alcohol concentration. Glare resistance is also reduced under alcohol and perspective is distorted. In many collisions involving alcohol-intoxicated pedestrians, although the pedestrian has been shown to have detected the presence of an oncoming vehicle, she has continued to cross the road. This has usually been attributed to an alcohol-induced increase of the time-intervals between detection, decision and action. Another feature common to many such collisions is an increase in uncertainty on the part of the intoxicated pedestrian. Often, the pedestrian realises her miscalculation and stops or hesitates just before the impact. If an avoidance strategy is decided upon, then the intoxicated pedestrian experiences other difficulties, in terms of decreased agility and lack of co-ordination. These deficits taken together with increased perception and reaction times, substantially reduce the chances of successfully avoiding an impact."

The proper operation of the law of tort

104. Either this Court accepts that the law imposes a duty of care on those in effective control in such circumstances (the Club and its employees) or it transfers responsibility solely to a person whose capacity to exercise responsibility had been repeatedly and seriously diminished over a very long time by the type of conditions that existed in the Club's premises, as described in the evidence. If responsibility – even partial – is imposed on the Club by the law of negligence a message is sent that control is not just a formal duty imposed on the Club and its officers by Parliament and by statutory offences unlikely to be prosecuted often. A holding of liability in negligence would reinforce such duties[36] by visiting civil consequences that would sound in direct liability to the injured, with a resulting increase in insurance premiums that might stimulate a desirable change of culture and conduct. The Club's eventual response to the appellant's conduct can be seen for what it was: an instance of too little, too late. By their decision, the majority of this Court tolerate and perpetuate this state of affairs. I dissent from their view. It is not the concept of the law of tort that I hold.

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[36] Young, "Dram Shop Liability: A Sobering Thought for Licensees", (1998) 18(1) *Proctor* 30 at 33.

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105. Some Australians find such drunkenness amusing and socially tolerable. Sometimes, in certain environments and some degrees, it may be so. But the picture portrayed in the case of the appellant's behaviour at the Club's premises is of a human being who eventually became profoundly affected by alcohol over an extremely long period, actually ill, and was effectively turned out of the Club's premises drunk, on the flimsy possibility that new-found male

companions would "look after" her. Unsurprisingly, given her condition, they did not do so. Soon after, she was wandering onto the highway where she was struck by a motor vehicle and seriously injured. This consequence was readily foreseeable if not inevitable. Certainly, it was one of a number of serious risks that it was open to the primary judge to conclude were reasonably foreseeable in the circumstances.

106. For those in the Club's premises who had a large (certainly the primary and also the statutory) responsibility for her state, what was offered was not enough. It was proposed far too late. The common law required more. The trial judge was right to so hold. The rejection of this appeal will reinforce indifference and belated and formal offers of transport by a club where proper standards of reasonable care require a significantly more prompt and higher standard of attention to the case of such a vulnerable individual. Until that higher standard is imposed by the law, including the common law of negligence, purveyors of alcoholic liquor will continue to gather significant profits with no substantial economic contribution to the occasional victims who are injured as a result, such as the appellant.

107. As a matter of principle, the result in this appeal is contrary to my view of the operation of the Australian common law of negligence. The case joins an increasing number of decisions where judgments of negligence in favour of plaintiffs at trial are taken away not by statutory deprivation but by appellate courts endorsed by this Court, despite the advantages the trial judge has in evaluating all of the evidence relevant to the multifunctional assessment of the existence of a duty of care and to the commonsense assessment of whether breach of that duty caused the plaintiff's damage[37].

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[37] Luntz, "Torts Turnaround Downunder", (2001) 1 *Oxford University Commonwealth Law Journal* 95; Stapleton, "The golden thread at the heart of tort law: Protection of the vulnerable", (2003) 24 *Australian Bar Review* 135.

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108. By the standards of commonsense the Club, through its secretary/manager and employees who also had important statutory duties to observe, should have taken steps much earlier to prevent sale or supply of more alcohol to the appellant. The Club, the secretary/manager and the employees should have been more strict about it. If necessary, they should have called the police as the applicable legislation contemplates. Doing so would doubtless have put in motion a realistic and enforced procedure for taking the appellant home by transport supplied by the Club. That, in my view, is what the common law required, and should require, of a vendor of alcoholic drinks in circumstances such as these. The appellant was unlikely to have responded to the police as she did to the secretary/manager of the Club. Had she done so, I do not doubt that, at the least, the police would, properly, have taken her in hand, put her off the premises and insisted on her taking the proffered transport home. Clearly, this is what would once have happened in Australia as it happened elsewhere [38] . I do not see that the law today condones a lesser standard of care in our community for a person rendered substantially dependent on others for her physical safety, even her life, by the commercial operations of those with full lawful charge over the sale and supply of alcohol to vulnerable recipients.

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[38] cf *Jordan House Ltd v Menow* [1974] SCR 239 at 248.

109. Greater firmness on the part of the Club and its employees in handling the predicament to which the appellant had been brought was essential. Instead, the Club secretary/manager's position was one of weakness, indecision and ultimate inaction. This was conduct substantially in keeping with the sale and tolerated supply of alcohol to the appellant over a long day starting with breakfast and continuing until about 6.00pm. As to suggesting that the appellant remain on the premises until she was fit to travel in a world of fast-moving motor vehicles proceeding in the dark, the secretary/manager was asked:

> "Q. And you didn't think to ask the lady to remain until perhaps she became more composed?
>
> A. After the confrontation, I was involved in other duties and didn't really take notice again until after.
>
> Q. You were just anxious to get her off the premises?
>
> A. Basically, yes."

Conclusions and orders

110. The majority of this Court disagrees with my conclusion. However, in my opinion the expressed attitude of the Club's secretary/manager and the conduct and "blind eyes" of the other employees of the Club did not reach the standards of the common law. The Club was not a kindergarten. But it was not a place for substantial indifference to a person who became steadily, obviously and seriously intoxicated. Statute imposed, or implied, relevant duties on those in charge of the Club and its premises. And so did the common law. It was open to the primary judge to so conclude. The Court of Appeal erred in interfering in the judgment in favour of the appellant against the Club based on the trial judge's assessment.

111. The appeal should be allowed with costs. The orders of the Court of Appeal of the Supreme Court of New South Wales in pars (a), (d) and (e) should be set aside to the necessary extent. In place thereof, it should be ordered that the appeal against the judgment entered at trial against the respondent South Tweed Heads Rugby League Football Club Ltd be dismissed with costs.

112. CALLINAN J. Mrs Cole, the appellant, had worked in a buffet car on the railways, as a waitress in a restaurant on South Molle Island, in a nightclub for two periods, and at a tavern as a function manager at the Gold Coast. She was 45 years old at the time of the events with which this Court is concerned. It is inconceivable that by then, in 1994, she had not had ample opportunity to observe and come to understand the universal effects of the consumption of alcohol.

113. The appellant systematically and deliberately drank herself into a state of intoxication at or in the vicinity of the licensed premises of the first respondent ("the respondent"), starting at

about 9.30am and continuing throughout the day of 26 June 1994. It is far from clear how much of the liquor that she drank during that day was supplied to her by the respondent.

114. The appellant spent some of the day at the premises talking to, and drinking with friends. For part of the time she played gambling games. Unsurprisingly, she could not account for her movements and activities at other times although she remembers, as the primary judge found, that "she had a very good time" [39] . Equally unsurprisingly, by one-thirty in the afternoon the appellant was manifesting to some people signs of her inebriation. Her friend Mrs Hughes said that as early as midday the appellant was drunk, carrying on and arguing, and her speech was "a bit funny". Mr Pringle, the manager of the respondent spoke to the appellant at about 5.30pm. He saw a bottle of wine on the table where she was seated and later described her as then being "very, very drunk". He thought that she was being held up by someone else. He said to her "You are affected by alcohol, I won't tolerate your behaviour, you will have to leave". Because Mr Pringle thought the appellant needed help to reach her home safely, he offered her the use of the club's courtesy bus and driver. The alternative of a taxi was offered, which again was a service provided by the respondent from time to time. The appellant's response to both offers was, as Mr Pringle recalled, "Get f.....". Mr Pringle told the appellant that he would not tolerate her behaviour. One of two Maori men who were then in the appellant's company told Mr Pringle to "leave it with [them] and [that he would] look after her". Within a matter of minutes the Maori men and the appellant left. Mr Pringle had already told the men in the group that because of their behaviour, they would not be served again. They did not however appear to him to be drunk.

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[39] *Cole v Lawrence* (2001) 33 MVR 159 at 160 [5] .

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115. The appellant must have consumed a very great quantity of alcoholic liquor. All of her consumption was entirely voluntary. Some time after she finished drinking the content of alcohol in her blood was 0.238. The evidence, contrary to the finding of the primary judge, did not establish that the respondent had supplied the appellant with any alcohol after about 12.30pm. In fact Mrs Pringle, who was assisting at the club, had refused to serve her at about 3.00pm.

116. The appellant's last recollection of events before she was injured was of speaking to the driver of a taxi cab to tell him the address to which her friend should be taken, and of returning to the club to watch a football match in progress on a playing field in front of it. Her next recollection is of waking up in hospital in Brisbane.

117. A further sighting of the appellant, a very brief one, was made by Mrs Lawrence in the headlights of the motor vehicle that she was driving in a southerly direction along Fraser Drive in the vicinity of the respondent's premises at about 6.20pm in darkness. The appellant was walking towards her on Mrs Lawrence's side of the roadway but near the edge of the bitumen carriageway. The appellant was wearing dark clothing. Mrs Lawrence initially saw only her face. The vehicle struck the appellant. She suffered serious injuries.

118. The appellant sued Mrs Lawrence and the respondent in the Supreme Court of New South Wales [40] . The case was heard by Hulme J. In one passage in his judgment he described the appellant's conduct in walking on the roadway in this fashion [41] :

> "Thus, despite the almost unbelievable stupidity (at least for a sober person) of continuing to walk towards, or stand in the way of, a lighted oncoming car at night, it seems to me that the probabilities are that that is what the [appellant] did. Of course, it may be that it was a case of her just not moving off the carriage way in time and for enough time for the car to pass."

His Honour found both Mrs Lawrence and the respondent to be negligent. His conclusion in relation to the respondent was as follows [42] :

> "There can be no doubt that the supply of alcohol in the form of what I may call the 12.30 bottle and the later one, was a contributing cause of the injury she later suffered."

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[40] *Cole v Lawrence* (2001) 33 MVR 159.

[41] *Cole v Lawrence* (2001) 33 MVR 159 at 167 [44] .

[42] *Cole v Lawrence* (2001) 33 MVR 159 at 170 [68] .

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119. The primary judge apportioned liability for the appellant's injuries, as to the appellant herself 40 percent, and as to Mrs Lawrence and the respondent, 30 percent each [43] .

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[43] *Cole v Lawrence* (2001) 33 MVR 159 at 173 [81] .

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120. Both Mrs Lawrence and the respondent successfully appealed to the Court of Appeal of New South Wales [44] (Heydon and Santow JJA and Ipp AJA) and in consequence, the appellant's action was dismissed with costs. As will appear, I agree with the decision of the Court of Appeal which I regard as an inevitable one.

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

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121. **Following paragraph cited by:**

Portelli v Tabriska Pty Ltd (05 December 2007) (Hislop J)

45 The conclusion of the Court of Appeal in *South Tweed* was upheld on appeal to the High Court [2004] HCA 29 though on various grounds. Callinan J commented at [121] :

> "The voluntary act of drinking until intoxicated should be regarded as a deliberate act taken by a person exercising autonomy for which that person should carry personal responsibility in law."

The Court of Appeal held that when the appellant purchased a bottle of wine from the respondent at 12.30pm her state of intoxication would not have been known to the respondent's employees. Likewise, the evidence was not capable of establishing on the balance of probabilities that, after 12.30pm, the appellant bought alcohol from the respondent or that it supplied alcohol to her. The source of alcohol she acquired during the afternoon is a matter of speculation. Except for 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 to excess. The voluntary act of drinking until intoxicated should be regarded as a deliberate act taken by a person exercising autonomy for which that person should carry personal responsibility in law. The respondent owed the appellant only the ordinary general duty of care owed by an occupier to a lawful entrant. Heydon JA, with Santow JA agreeing held that to extend the duty to the protection of patrons from self-induced harm caused by intoxication would subvert many other principles of law and statute which strike a balance between rights and obligations, and duties and freedoms [45] .

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[45] *South Tweed Heads Rugby League Football Club Ltd v Cole* (2002) 55 NSWLR 113 at 116 [7] .

The appeal to this Court

122. The appellant appeals to this Court against the exculpation by the Court of Appeal of the respondent only. The answer to the last of the appellant's grounds of appeal provides an answer to the whole of the appellant's appeal. That ground is:

> "that the Court of Appeal erred in holding that the first respondent's offer of safe transport to the appellant whilst intoxicated discharged any duty that the first respondent might have had to take reasonable steps for the appellant's safety."

123. It is convenient to deal with it immediately.

124. The appellant submits that the respondent was under a duty, either to attempt "to achieve a sobering up of the appellant and/or the actual sobering up of the appellant ... [i]n effect, facilitating the regaining of composure by the appellant." It was said that:

> "Mr Pringle decided to avoid further confrontation rather than assist or facilitate the appellant regaining some composure. Assisting or facilitating the regaining of composure would have materially affected the appellant's ability to get home safely. It could have been achieved with a relative minimum of effort: ceasing service of alcohol, preventing consumption of alcohol, supplying non-alcoholic drinks and beverages and when some composure has been regained or some sobriety obtained, again offering transport to the appellant when she was not in a state where she had lost complete control and when a more reasoned and rational response was probable. Mr Pringle knew that the appellant's rudeness and rejection of his suggestion was similar to the conduct of 'most drunks' to 'get upset when you turn the grog off' and common experience informs that grossly intoxicated persons can be troublesome, disinhibited and non-compliant when compared to sober persons acting rationally."

125. Let me assume, contrary to what I would hold to be the case, that the respondent owed a duty of care of the kind suggested, to the appellant before and at about the time that she left its premises. There was no breach of such a duty. The notion that the appellant, as far gone and as offensively abusive as she was, would have been amenable to counselling, or simple restraint, or indeed to any measures intended to restore her composure, is fanciful. Forceful restraint was out of the question. No sensible person would ever remotely contemplate such a course, capable, as it would be, of leading to a physical altercation, an assault, and the possibility of criminal and civil proceedings in relation to it. The same consequences could equally flow from any attempt to induce the appellant to regain her sobriety in a room or other quiet place at the respondent's premises. As for the suggestion made in oral argument, that a police officer could and should have been called, these responses should be made. It is highly improbable that a heavily pressed police force would have had, or would have been likely if it did have them, to provide, sufficient personnel to enable a police officer or officers to make a timely and effective visit to the premises. And in the unlikely event that a police officer did make a timely call at the premises, it is equally unlikely that his or her official duty could have been discharged otherwise than by doing what the respondent itself did, that is, "turn [the appellant] out … of the premises of the club" [46] . There is another complete answer to this ground of appeal. It is that the appellant when she left did so voluntarily and apparently with a group of men. The men said that they would look after her. In those circumstances there was nothing that the respondent could do. There is no obligation upon anyone to engage in a futility.

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[46] This was a requirement of s 67A of the *Registered Clubs Act* 1976 (NSW) which at the relevant time provided as follows:

"**Removal of persons from premises of registered club**

Where a member of the police force is requested by the secretary or an employee of a registered club to turn out, or to assist in turning out, of the premises of the club any person –

(a) who is then intoxicated, violent, quarrelsome or disorderly;

(b) who, for the purposes of prostitution, engages or uses any part of the premises;

(c) whose presence on the premises renders the club or the secretary of the club liable to a penalty under this Act; or

(d) who hawks, peddles or sells any goods on the premises,

it is the duty of the member of the police force to comply with the request and he may, for that purpose, enter the premises and use such reasonable degree of force as may be necessary."

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126. Even assuming a relevant duty of care the respondent would have fully discharged it by doing what it did, offering the appellant the use of a courtesy bus, or a taxi.

127. Reference was made in argument by the appellant to s 44A of the *Registered Clubs Act* 1976 (NSW) which was as follows at the relevant time [47] :

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[47] The section was amended in 1996 by the amendment of s 44A(3) and the insertion of s 44A(4) . These sub-sections now provide:

"(3) If a person on the premises of a registered club is intoxicated, the secretary is taken to have permitted intoxication on the premises unless it is proved that the secretary and all employees selling or supplying liquor took the steps set out in subsection (4) or all other reasonable steps to prevent intoxication on the premises.

(4) For the purposes of subsection (3), the following are the relevant steps:

(a) asked the intoxicated person to leave the premises,

(b) contacted, or attempted to contact, a police officer for assistance in removing the person from the premises,

(c) refused to serve the person any alcohol after becoming aware that the person was intoxicated."

"**Conduct on club premises**

44A (1) A secretary of a registered club who:

(a) permits intoxication on the club premises; or

(b) permits any indecent, violent or quarrelsome conduct on the club premises,

is guilty of an offence.

Maximum penalty: 20 penalty units.

(2) A person who, in a registered club, sells or supplies liquor to an intoxicated person is guilty of an offence.

Maximum penalty: 20 penalty units.

(3) If a person on the premises of a registered club is intoxicated, the secretary is taken to have permitted intoxication on the premises unless it is proved that the secretary and all employees selling or supplying liquor took all reasonable steps to prevent intoxication on the premises."

128. Although that section provides some indication of the nature of the responsibilities of clubs it was not suggested that it gave rise to any statutory causes of action. In any event, the respondent probably complied with the section by taking the step of asking the appellant to leave the premises. The evidence, even as to whether the respondent did permit the appellant to be intoxicated on the premises, certainly after 12.30pm, was to say the least obscure. The section does not assist the appellant in this case.

129. What I have so far said is sufficient to dispose of the appeal. Nonetheless I would wish to endorse fully and explicitly some of the propositions stated in the judgments of the Court of Appeal. I think this desirable not only because those propositions are correct, but also because the statement of them achieves a high degree of certainty with respect to the duty to customers of vendors of alcoholic liquors, the matter which excited the interest of the Court on the application for special leave.

130. I agree with these pronouncements by Heydon JA [48] :

"Ipp A-JA has identified several factors pointing decisively against the recognition of a duty of care owed by publicans not to serve customers whom they know will become or have become intoxicated in order to prevent the customers causing injury to themselves.

Underlying those factors are two matters of particular significance both for potential plaintiffs and for potential defendants.

One is that if the duty existed it might call for constant surveillance and investigation by publicans of the condition of customers. That process of surveillance and investigation might require publicans to direct occasional oral inquiries to customers. Inquiries of this kind would ordinarily be regarded as impertinent and invasive of privacy. Quite apart from the inflammatory effect of these activities on publican-customer relations and on good order in the hotel or club, the impact of these activities on the efficient operation of the businesses of publicans would 'contravene their freedom of action in a gross manner'.

The other significant matter is that if a customer reached a state of intoxication requiring that no further alcohol be served and the customer decided to depart,

recognition of the duty of care in question might oblige publicans to restrain customers from departing until some guarantee of their safety after departure existed. The [appellant's] arguments in this case repeatedly stressed the proposition that the club was at fault in permitting the [appellant] to leave without ensuring that it was safe for her to do so. How are customers to be lawfully restrained? If customers are restrained by a threat of force, prima facie the torts of false imprisonment and of assault will have been committed. If actual force is used to restrain customers, prima facie the tort of battery will have been committed as well as the tort of false imprisonment. Further, the use of actual force can be a criminal offence: *Crimes Act* 1900, s 59 and s 61. It is a defence to these torts to prove lawful justification – reasonable and probable cause. However, the constitutional significance of the torts in question in protecting the liberties of citizens – they create, after all, important limitations on police power – means that 'lawful justifications' should not lightly be found independently of legislative sanction even outside the immediate police context. Subsections (1) and (3) of s 67 A(1) of the *Registered Clubs Act* 1976 make it lawful for the secretary or an employee of a registered club to use whatever reasonable force is necessary to 'turn out' of a club intoxicated persons. But the legislation says nothing about using reasonable force to keep intoxicated persons in pending the appearance of some guarantee for their safety after departure. In short, if the tort of negligence were extended as far as the [appellant] submitted, it would 'subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms'."

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[48] *South Tweed Heads Rugby League Football Club Ltd v Cole* (2002) 55 NSWLR 113 at 115-116 [4]-[7] .

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131. **Following paragraph cited by:**

Davies v George Thomas Hotels Pty Ltd (21 April 2010) (Murrell SC DCJ)

I am also of the opinion that in general – there may be some exceptional cases – vendors of products containing alcohol will not be liable in tort for the consequences of the voluntary excessive consumption of those products by the persons to whom the former have sold them. The risk begins when the first drink is taken and progressively increases with each further one. Everyone knows at the outset that if the consumption continues, a stage will be reached at which judgment and capacity to care for oneself will be impaired, and even ultimately destroyed entirely for at least a period.

132. It follows that I would disagree with any propositions to the contrary deducible from the Canadian cases referred to in argument: *Stewart v Pettie* [49] and *Jordan House Ltd v Menow* [50] .

[49] [1995] 1 SCR 131 .

[50] [1974] SCR 239 .

133. The appeal should be dismissed with costs.

Cited by:

Pabai v Commonwealth of Australia (No 2) [2025] FCA 1575 -
Van Rullen v Royal Melbourne Hotel [2024] VCC 1568 (15 October 2024) (Clayton J)

> 239 The Hotel relied on the formulation of the duty in *Cole v South Tweed Heads* [4] where the Court held the respondent owed the appellant only the ordinary general duty of care owed by an occupier to a lawful entrant.

Van Rullen v Royal Melbourne Hotel [2024] VCC 1568 (15 October 2024) (Clayton J)

> 239 The Hotel relied on the formulation of the duty in *Cole v South Tweed Heads* [4] where the Court held the respondent owed the appellant only the ordinary general duty of care owed by an occupier to a lawful entrant.
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> *via*
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> [4] [2004] HCA 29 ; 217 CLR 469, paragraph [65]-[73]

Van Rullen v Royal Melbourne Hotel [2024] VCC 1568 -
Sanders v Mount Isa Mines Limited [2023] QSC 188 (25 August 2023) (Williams J)
Cole v South Tweed Heads Rugby League Football Club Limited (2004) 217 CLR 469
Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd

Finniss v State of New South Wales (No. 1) [2023] NSWDC 83 (22 February 2023) (Neilson DCJ)

> 64. However, her Honour was in dissent. Separate decisions were given by Ipp JA and Basten JA in discussing the duty of care owed by the occupier Bostik. Basten JA said this:
>
> "133 In finding that both the employer and the appellant owed the plaintiff a duty of care, the trial judge stated at [79]:
>
> > "The relationship between each of the defendants ... was in the nature of a joint venture in relation to the plaintiff's work in emptying the rubbish bins at the smoko shed."

134 His Honour approached the matter, in accordance with submissions made to him, by considering whether the facts of the case provided a closer analogy with the decision of this Court in *J Blackwood & Son Steel & Metals Pty Ltd v Nichols* [2007] NSWCA 157, or the decision of the High Court in *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 19; 221 CLR 234. His Honour held that the circumstances of *Thompson* were "analogous to the present situation" and that, accordingly, both defendants owed the plaintiff a relevant duty of care to take reasonable steps for his safety: at [78]-[80] .

135 In determining a question of law, namely the existence of a duty of care, the content, which is often the critical component, must be identified by reference to the circumstances in which the injury occurred: see *Sutherland Shire Council v Heyman* [1985] HCA 41; 157 CLR 424 at 487 (Brennan J) and *Cole v South Tweed Heads Rugby League Football Club Ltd* [2004] HCA 29; 217 CLR 469 at [1] (Gleeson CJ) . Thus, the High Court once rejected, as without rational foundation, the contentions that a worker at a bush camp, required to cut timber for a stove, should have been provided with some implement other than a tomahawk or should have been given instruction as to how to use the tomahawk: *Electric Power Transmission Pty Ltd v Cuiuli* [1961] HCA 3; 104 CLR 177. A similar conclusion was reached by this Court in relation to the use of a ladder in *Van Der Sluice v Display Craft Pty Ltd* [2002] NSWCA 204 at [74] (Heydon JA, Meagher JA and Foster AJA agreeing) and the securing of a load on a truck in *J Blackwood & Son* at [61] and [64] (Tobias JA, Mason P and Handley AJA agreeing).

136 In the present case, the 44-gallon drums used as rubbish bins were required to be physically manhandled from the smoko shed and on to the tines of a forklift. The plaintiff had undertaken this task approximately twice each week for some six months before the injury. He gave evidence that the bins were usually not heavy. On this occasion, the bin was unusually heavy.

137 Because the employer did not appeal from the judgment against it, its responsibility to take steps to avoid the need for manual handling of an unexpectedly heavy bin is not in issue. On the other hand, findings made against it, or not contested by it, do not operate against the appellant.

138 The plaintiff was not employed by the appellant and, on the accepted evidence of the plaintiff himself, received no instruction or direction from the appellant's manager.

139 The fact that an employer may be obliged to take reasonable steps to provide a worker with a safe system of work, does not preclude the existence of a duty owed by others to take reasonable care in their dealings with the worker, whether they be other employees, independent contractors, the occupier of premises which the worker is required to attend in the course of employment or other road users encountered in the course of travel. Where work is undertaken on the premises of a third party, that party may have a duty, which commonly arises from:

> (a) the degree of control or direction exercised or which the third party is entitled to exercise over the worker;
> (b) the condition of plant or premises under the control of the third party, or
> (c) the activities of others on the site, generally for the purposes of the third party's undertaking or business.

140 The third situation may be put to one side for present purposes. The facts fall within a combination of the first and second elements. Thus, the system for clearing rubbish involved the use of the 44-gallon drums, which were provided by the appellant and the use of a forklift which did not fit under the roof of the smoko shed, which was also provided by the appellant. On the other hand, it is clear that the appellant did not seek to control the activities the plaintiff, nor direct him as to how to perform those activities.

141 The circumstances in which an employer provides labour to a third party, commonly described as "labour hire" arrangements, are not new. *McDonald v The Commonwealth* (1946) 46 SR(NSW) 129, concerned whether vicarious liability for an accident caused by a negligent worker lay with his legal employer (referred to as the "general employer") or "the particular employer", being the party for whom the employee was working and which had control over the employee at the time of the accident. In such a case, the passing of control from one party to another may be treated as in practical terms complete, so as to render the latter the employer *pro hac vice* (for the occasion only), in the language of Lords Macmillan and Simonds in *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1 at 13 and 18. In *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* [1986] HCA 34; 160 CLR 626 at 668, Brennan J stated:

> "The rule to be derived from *Mersey Docks* and *McDonald* is not that two persons cannot be vicariously liable for the same damage or that an employee cannot be the servant of two masters, but that two employers of the same servant who negligently causes damage will not both be liable for the damage if one rather than the other has what Jordan C.J. called 'the relevant control': *McDonald* , [at 132]."

142 No doubt caution must be taken in applying principles stated in cases where the vicarious liability of a principal or employer is in question to a case where responsibility for an injury suffered by an employee is in issue. However, the duty of the principal to an employee of an independent contractor has been upheld in cases such as *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1; 160 CLR 16, where Mason J stated at 31 :

> "Although the obligation to provide a safe system of work has been regarded as one attaching to an employer, there is no reason why it should be so confined. If an entrepreneur engages independent contractors to do work which might as readily be done by employees in circumstances where there is a risk to them of injury arising from the nature of the work and where there is a need for him to give directions as to when and where the work is to be done and to co-ordinate the various activities, he has an obligation to prescribe a safe system of work. The fact that they are not employees, or that he does not retain a right to control them in the manner in which they carry out their work, should not affect the existence of an obligation to prescribe a safe system."

143 In *TNT Australia Pty Ltd v Christie* [2003] NSWCA 47; 65 NSWLR 1, in relation to the plaintiff, whose labour was provided to TNT by his employer, Mason P stated at [41] :

> "TNT exercised day-to-day control over the plaintiff's work activities, treating him to all intents the same as its employees as regards work on the factory floor. ... It can be seen that the plaintiff and TNT placed themselves in a relationship, day in and day out, indistinguishable from that of employee and employer. ... [H]ere the plaintiff had for months been under the daily control of TNT and its managerial staff at the brewery. He was a relatively unskilled labourer. He reported daily to the brewery and everything that he did there was done under the full control of TNT."

144 Thus, in labour hire cases involving unskilled workers, there may well be a transfer of control to the business in which they are working. It appears that this was the case in respect of employees of Brolton who were provided to work for the appellant on its production lines. However, different practices appear to have arisen with respect to non-production line labour.

145 As had occurred before the trial judge, the parties in this Court sought to rely upon or distinguish particular factual circumstances drawn from cases supportive of their claims. However, the relevant comparison is not to be made between *J Blackwood & Son* (which concerned the need for instruction, not the person responsible for giving it) and *Christie* (which concerned the person on whom lay the responsibility for providing safe equipment). Nevertheless, it is clear that the situation of the appellant, with respect to control of the plaintiff, was far removed from that described in *Christie* .

146 Whether or not the appellant owed a duty of care to the plaintiff must depend to a significant extent upon the relationship between the appellant and Brolton. That appears to have been largely informal at the relevant time. As Mr Lynch explained in evidence, he had originally worked for Dow Corning, the business of which was taken over by the appellant, at which time he ceased working for Dow Corning and set up his own maintenance engineering business. He did work for the appellant and obtained a lease or licence of part of the premises occupied by the appellant. He supplied maintenance services and also labour to the appellant. Brolton was paid for those services but not, it would appear, pursuant to any written agreement. Mr Lynch gave the following evidence at Tcpt, 16/04/08, p 181:

> "Q. The smoko shed was used not only by Bostik and direct employees, but also by Brolton employees, is that right?
> A. And others, yes.
>
> Q. And not only Brolton employees who were working for Bostik, but Brolton employees who were working directly for Brolton?
> A. Yes.
>
> Q. And I think you gave evidence this morning that Brolton Industries used the forklifts owned by Bostik on Brolton's own premises, is that right?
> A. Correct.
>
> Q. Including, if you needed to, to lift piece[s] of equipment that Brolton was working on for customers other than Bostik?
> A. Yes.
>
> Q. And to move other items around on Brolton's own premises, is that right?
> A. Yes.

Q. And there was no formal arrangement where you [paid] some sort of fee to do that, was there?
A. No.

Q. And if you wanted a forklift to do something for Brolton's own business, you just went and got one if it was available, is that right?
A. Correct.

Q. And similarly, Brolton used drums which were surplus or left over from Bostik's production line as rubbish bins on its own premises --
A. Yes.

Q. -- is that right, for its own rubbish?
A. Yes.

Q. And there was no charge for that, was there?
A. No.

Q. And the understanding or arrangement between Brolton and Bostik was both drums like that and forklifts like that could be used by Brolton for its own business activities if needed?
A. Yes.

Q. And that was the position from 2000 right through until you stopped providing services to Bostik 18 months or two years ago?
A. Correct."

147 The other party to the arrangement was the appellant. As appears from the evidence of Mr Pearce, the site manager for the appellant, set out above by Beazley JA, an inference was available that the appellant had accepted responsibility for a safe system of work with respect to non-production employees provided by Brolton: Tcpt, pp 206-207. However, in his evidence in chief, Mr Pearce also stated that he did not look after the training of Brolton employees, nor did he personally provide any training, but relied upon a "buddy system" for training people: Tcpt, p 193. He was asked if Mr Liddiard was "given over to tasks at the request of Bostik", language which he denied applied to Mr Liddiard but agreed might apply to persons working in the production area: Tcpt, pp 196(15) and 199(40). The following exchange occurred (p 208(5):

"Q. And to a lesser extent was it your observation that for non production employees there would from time to time be supervision or instruction given in relation to how those tasks were carried out?
A. Not normally, no.

Q. Sometimes?
A. No.

Q. Why not normally, if it's not sometimes?
A. Okay. It wouldn't be – I didn't see evidence of that.

Q. It would be consistent with your understanding of the arrangement between Bostick [sic] and Brolton that an employee was on Bostick's premises and not cleaning up properly or driving a forklift in a dangerous manner it would be consistent with your understanding of that arrangement that a supervisor or official from Bostick may well instruct or otherwise prohibit a Brolton employee from continuing in that behaviour?
A. If it was somebody driving a forklift quickly, yes, but if it wasn't say of not cleaning a part properly or not cleaning up properly, no that wouldn't be the case.

Q. Well why would there be a difference?
A. If a part wasn't cleaning or if an area wasn't cleaned up properly someone would tell me and we' d go to Ben to say that – or Ben needs to say that this person isn't doing – they're not cleaning a part properly or they're not cleaning up properly, can you attend to that please."

148 The reference to "Ben" was a reference to Mr Lynch, Brolton's manager. Further, at p 211(15) the following exchange occurred:

"Q. How did you go about addressing that perceived responsibility in your position as site manager for Bostik?
A. For emptying of the bins around the smoko shed?

Q. Yes.
A. I just left it up to Ben Lynch to – because he was looking after the outside of the gardens I left it up to him to be able to – you know basically get the workers to empty them."

149 Taken as whole, Mr Pearce's explanation is consistent with that given by Mr Lynch and the understanding of the plaintiff, namely that Brolton had contracted with the appellant to provide services in the outside areas, which included emptying the rubbish bins in the smoko shed, and that Brolton was responsible for the manner in which such work was to be performed. Although the bins and the forklifts may have been the property of the appellant, part of the arrangement was that Brolton could make use of such equipment as it required to carry out the functions for which it was responsible. This was not a case in which any co-ordination of contractors was required, nor was there any other reason for the appellant to devise a safe system of work for the plaintiff. To the extent that the appellant controlled activities on the premises, there was no danger or risk to the plaintiff relevant to the injury suffered, arising from the state of the premises or the activities which took place on them. It was no doubt true that steps could have been taken which would have lessened or removed the risk associated with manual handling of the waste bins. Nevertheless, neither the legal arrangement nor the practical circumstances in which the work was undertaken imposed an obligation on the appellant with respect to such steps. In my view the appellant did not owe a duty of care to the plaintiff."

Minister for the Environment v Sharma [2022] FCAFC 35 (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

8. In their application at [2] and their concise statement at [22] the respondents sought to express the posited duty at a high level of abstraction: Whether the Minister owed the respondents and the children whom they represented a duty to exercise the power under ss 130 and 133 of the EPBC Act with reasonable care not to cause the respondents harm. The duty was said to arise out of positive action, not omission. Expressed at that high level of abstraction and divorced from concrete facts and referable to any decision under ss 130 and 133 it can be seen to be of little assistance. A postulated duty of care must be stated by reference to the kind of damage that a plaintiff will suffer: *John Pfeiffer Pty Ltd v Canny* [1981] HCA 52; 148 CLR 218 at 241–242 (Brennan J); *Sutherland Shire Council v Heyman* [1985] HCA 41; 157 CLR 424 at 487 (Brennan J); *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; 205 CLR 254 at 262–263 [13]–[16] (Gleeson CJ); *Cole v South Tweed Heads Rugby League Football Club Ltd* [2004] HCA 29; 217 CLR 469 at 472–473 [1] (Gleeson CJ); see also *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; 234 CLR 330 at 345 [43]–[44] (Gummow J) and *Sydney Water Corporation v Turano* [2009] HCA 42; 239 CLR 51 at 71 [47] (the Court).

Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Lightfoot v Rockingham Wild Encounters Pty Ltd [2018] WASCA 205 (23 November 2018) (Buss P; Murphy and Beech JJA)

Cole v South Tweed Heads Rugby League Football Club Ltd [2004] HCA 29 ; (2004) 217 CLR 469

Lightfoot v Rockingham Wild Encounters Pty Ltd [2018] WASCA 205 (23 November 2018) (Buss P; Murphy and Beech JJA)

43. The duty of care was formulated at a higher level of generality than the questions of foreseeability which arose at the breach stage. That is not unusual or inappropriate. [88]

via

[88] ***Wyong Shire Council v Shirt*** [1980] HCA 12; (1980) 146 CLR 40, 47 ; ***Graham Barclay Oysters Pty Ltd v Ryan*** [2002] HCA 54; (2002) 211 CLR 540 [191] - [192]; ***Cole v South Tweed Heads Rugby League Football Club Ltd*** [2004] HCA 29; (2004) 217 CLR 469 [56]; ***Vairy v Wyong Shire Council*** [2005] HCA 62; (2005) 223 CLR 422 [72]; ***Amaca Pty Ltd v Hannell*** [2007] WASCA 158; (2007) 34 WAR 109 [350].

Rail Corporation New South Wales v Donald; Staff Innovations Pty Ltd t/as Bamford Family Trust [2018] NSWCA 82 -
Rail Corporation New South Wales v Donald; Staff Innovations Pty Ltd t/as Bamford Family Trust [2018] NSWCA 82 -
Homsi v Homsi [2016] VSC 354 (28 June 2016) (J Forrest J)

70. Part of this exercise is to consider the consequences were a duty as that contended by Iman to be recognised. As Gleeson CJ stated in *Cole v South Tweed Heads Rugby League Football Club Ltd*:

> The consequences of the appellant's argument as to duty of care involve both an unacceptable burden upon ordinary social and commercial behaviour, and an unacceptable shifting of responsibility for individual choice. The argument should be rejected. [61]

via

[61] (2004) 217 CLR 469 , 478 [18] .

Edwards v State Trustees Ltd [2016] VSCA 28 -
Schuller v S J Webb Nominees Pty Ltd [2015] SASCFC 162 (12 November 2015) (Acting Gray CJ; Stanley and Lovell JJ)

Fox v Percy (2003) 214 CLR 118; *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 ; *O'Connor v SP Bray Ltd* (1937) 56 CLR 464; *Byrne v Australian Airlines* (1995) 185 CLR 410; *Pap ps v Police* (2000) 77 SASR 210; *Keith v Gal* [2013] NSWCA 339; *Whisprun Pty Ltd v Dixon* (2003) 77 ALR 1598; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247; *Roggenkamp v Bennett* (1950) 80 CLR 292; *Carey v Lake Macquarie City Council* [2007] NSWCA 4; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; *K-Generation Pty Ltd & Anor v Liquor Licensing Court & Anor* (2009) 237 CLR 501; *In Re an Appeal from Credit Tribunal by John Martin & Co Ltd* (1974) 8 SASR 237; *Thomps on v Australian Capital Television Thompson* (1994) 54 FCR 513; *King v Philcox* (2015) 89 ALJR 582; *Carr v Western Australia* (2007) 232 CLR 138; *Packer v Cameron* (1989) 54 SASR 246; *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569; *Burford v Steer* (1984) 118 LSJS 139; *Wade v Allsopp* (1976) 10 ALR 353; *Watts v Rake* (1960) 108 CLR 158; *Terry v Leventeris* (2011) 109 SASR 358, considered.

Schuller v S J Webb Nominees Pty Ltd [2015] SASCFC 162 -
Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 (27 March 2015) (Beazley P, Barrett and Gleeson JJA)

101. Leighton submitted that the existence of these factors as relevant to the existence of a duty of care at common law was not new: *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; 211 CLR 540 at [84] ; *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; 200 CLR 1 at 34-35 ; *Cole v South Tweed Heads Rugby League Football Club Ltd* [2004] HCA 29; 217 CLR 469 at [85] , [92] . Again, this may be accepted.

Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 -
Carlyon v Town & Country Pubs No. 2 Pty Ltd T/A Queens Hotel Gladstone [2015] QSC 13 -
Carlyon v Town & Country Pubs No. 2 Pty Ltd T/A Queens Hotel Gladstone [2015] QSC 13 -
Carlyon v Town & Country Pubs No. 2 Pty Ltd T/A Queens Hotel Gladstone [2015] QSC 13 -
Price v Southern Cross Television (TNT9) Pty Ltd [2014] TASSC 70 (22 December 2014) (Porter J)

31. A fundamental question is whether the defendants owed the plaintiff any relevant duty of care. There is a dispute as to whether there was a concluded agreement between the plaintiff and Southern Cross and/or Mr Davis so as to give rise to a consideration of the existence of

an implied term of a duty of care. As to a general law duty of care, it is pleaded against both defendants as one which existed in relation to the plaintiff "undertaking the jump". As to Southern Cross, although the debate was in terms of whether a duty of care was owed in relation to the plaintiff jumping from the cliff, the issue might more accurately be described as one as to the nature and extent of a duty of care: *Cole v South Tweed Heads Rugby Club* (2004) 217 CLR 469 per Gleeson CJ at 472 [1] . It may be accepted that the relationship between Southern Cross and the plaintiff was such that, in broad terms, it owed to her a duty to take reasonable care in relation to foreseeable risks of injury in connection with its activities in which she was involved.

Schuller v S J Webb Nominees P/L [2014] SADC 178 (30 October 2014) (Stretton J)

8. Further, it must be understood that after some uncertainty in recent years, [1] a recent High Court case established that unless there are exceptional circumstances, there is no general duty of care at common law to customers to monitor and minimise the service of alcohol or to protect customers from the consequences of the alcohol they choose to consume. [2] In simple terms, hotels are not legally liable to compensate people who get drunk and hurt themselves on hotel premises.

via

[1] *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29 , where the High Court disagreed 2-2 on the issue.

Schuller v S J Webb Nominees P/L [2014] SADC 178 -
Butler v The State of Queensland [2013] QSC 354 (19 December 2013) (Boddice J)

101. Whether or not a duty of care exists is a question of law. [13] However, a duty of care is not owed in the abstract. It is a defined legal obligation arising out of the "relations, juxtapositions, situation or conduct activities". [14] In the context of an ascertained defendant or class of defendants and an ascertained plaintiff or class of plaintiffs, the kind of damage suffered is relevant to the existence and nature of a duty of care. [15]

via

[15] *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at 472-473 [1] .

Butler v The State of Queensland [2013] QSC 354 -
Meredith v Commonwealth (No 2) [2013] ACTSC 221 (20 November 2013) (Refshauge J)

480. At issue, however, was whether there was a duty of care owed to Mr Meredith by the Commonwealth. One of the difficulties in approaching this issue is that Mr Meredith did not articulate the precise duty of care that he said was owed. This is not only important for a court tasked with identifying whether such a duty exists, but also because of the difficulty in avoiding an articulation that creates its own problems. As Gummow and Hayne JJ said in *Col e v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at 487 ; [56]-[57]:

> [T]he more specific the terms of the formulation of the duty of care, the greater the prospect of mixing the anterior question of law (the existence of the duty) with questions of fact in deciding whether a breach has occurred. On the other hand, the articulation of a duty of care at too high a level of abstraction provides an inadequate legal mean against which issues of fact may be determined.
>
> The present litigation was pleaded and conducted in such a fashion as to conflate asserted duty and breach of that duty and to make it inappropriate to

decide on this appeal any issue respecting the existence or content of a duty of care.

Ibrahim v Davis [2013] VSCA 238 -
Hoffmann v Boland [2013] NSWCA 158 -
Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5) [2012] FCA 1200 (05 November 2012) (JAGOT J)

2867. Accordingly, as a matter of fact, the councils were still relying on S&P's AAA rating as at and after 20 December 2007. Even if LGFS had informed the councils of the placement on "CreditWatch Negative" the fact is that even at 20 December 2007 S&P was maintaining the rating of AAA. The case is not in any way analogous to *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469; [2004] HCA 29 or *Eric Preston Pty Ltd v Euroz Securities Limited* (2011) 274 ALR 705; [2011] FCAFC 11. The former is a personal injury case involving an intoxicated person. The latter is a case in which by a particular date the claimant knew full well the true character of the margin lending scheme and was in a position to avoid the loss later suffered.

Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5) [2012] FCA 1200 (05 November 2012) (JAGOT J)
Cole v South Tweed Heads Rugby League Football Club Ltd (2004) 217 CLR 469; [2004] HCA 29
Coleman v Myers

Elliot James Lawrence Stone v The Owners - Units Plan 1214 and Nectaria Nominees Pty Ltd and Debra Nominees Pty Ltd and Hawkesbury Nominees Pty Ltd [2012] ACTSC 164 (25 October 2012) (Sidis AJ)

177. Those cases, however, involved situations where it was held that there was no negligence on the part of the defendants. In the case of *Cole* the defendant's duty of care was found not to extend to the protection of the intoxicated plaintiff from harm after she left its premises. In *D ederer* , the plaintiff deliberately took an obvious risk against which the High Court held that the defendant had no obligation to protect him.

Elliot James Lawrence Stone v The Owners - Units Plan 1214 and Nectaria Nominees Pty Ltd and Debra Nominees Pty Ltd and Hawkesbury Nominees Pty Ltd [2012] ACTSC 164 -
Elliot James Lawrence Stone v The Owners - Units Plan 1214 and Nectaria Nominees Pty Ltd and Debra Nominees Pty Ltd and Hawkesbury Nominees Pty Ltd [2012] ACTSC 164 -
Barclay v Penberthy [2012] HCA 40 (02 October 2012) (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ)

155. The action per quod servitium amisit has been referred to in numerous decisions of this Court [205] and has readily been applied in the sphere of employer and employee. In *Zhu v Treasurer of New South Wales* [206] , Kitto J's analysis in *Attorney-General for NSW v Perpetual Trustee Co (Ltd)* [207] of an employer's rights in the services of a servant as quasi-proprietary was said to have "significant support". Most recently, in *CSR Ltd v Eddy* [208] , the action was recognised as one of a very few limited, direct avenues of recovery available to those who have lost the benefit of an injured person's services. In consequence of this Court's continued acceptance of the existence of the action, the courts of the States and Territories have continued to award damages in such an action [209] . There is no basis shown for a refusal to continue to recognise it.

via

[205] *Treloar v Wickham* (1961) 105 CLR 102 at 122 per Menzies J; [1961] HCA 11 ; *Paff v Speed* (1961) 105 CLR 549 at 566 per Windeyer J; [1961] HCA 14 ; *R W Miller & Co Pty Ltd v Australian Oil Refining Pty Ltd* (1967) 117 CLR 288 at 297 per Windeyer J; [1967] HCA 50 ; *Caltex Oil (Australia) Pty Ltd v The*

Dredge "Willemstad" (1976) 136 CLR 529 at 546-547 per Gibbs J, 598 per Jacobs J; *Groves v The Commonwealth* (1982) 150 CLR 113 at 124 per Stephen, Mason, Aickin and Wilson JJ; [1982] HCA 21 ; *Northern Territory v Mengel* (1995) 185 CLR 307 at 342 per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ; [1995] HCA 65 ; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 245 [178] per Gummow J; *Cattanach v Melchior* (2003) 215 CLR 1 at 32 [67] per McHugh and Gummow JJ; [2003] HCA 38 ; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 537 [47] per McHugh J; [2004] HCA 16 ; *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at 480 [29] per McHugh J ; [2004] HCA 29 ; *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 572-573 [123]-[125] per Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ; *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 66 [70] per McHugh, Gummow and Hayne JJ; [2005] HCA 50 ; *CSR Ltd v Eddy* (2005) 226 CLR 1 at 22 [44] per Gleeson CJ, Gummow and Heydon JJ, 42-43 [102]-[103] per McHugh J.

Barclay v Penberthy [2012] HCA 40 -
Jeffs v Perkins [2012] WADC 140 -
Jeffs v Perkins [2012] WADC 140 -
Kelly v Trentham Holdings P/L [2012] QDC 141 -
Kelly v Trentham Holdings P/L [2012] QDC 141 -
Kelly v Trentham Holdings P/L [2012] QDC 141 -
Graham Hadaway v Cregan Hotel Management Pty Ltd [2012] HCASL 79 -
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 (04 April 2012) (McLure P, Pullin JA, Buss JA)

221. The fact that the greater risk of damage is from the escape of the fire rather than damage caused by smoke from the fire, does not mean that the nature of the duty differs depending on the nature of the damage. The kind of damage suffered may be relevant in some cases to the existence and nature of a duty of care: see ***Cole v South Tweed Heads Rugby League Football Club Ltd*** [2004] HCA 29; (2004) 217 CLR 469 [1] (Gleeson CJ); ***Sutherland Shire Council*** (487) (Brennan J). Those cases, however, did not involve established categories of duty and were concerned with omissions, there being an indirect relationship between the defendant's actions and the ensuing harm.

Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 (04 April 2012) (McLure P, Pullin JA, Buss JA)

88. This is not a case where the existence or scope of a duty is wellestablished or well understood except at a high level of generality which is of no practical assistance. A duty formulated at too high a level of abstraction may provide an inadequate legal mean by which to determine the issue in a particular case. It will be too abstract if it is divorced from the facts said to enliven the duty: ***Cole v South Tweed Heads Rugby League Football Club Ltd*** (2004) 217 CLR 469 [56], [81] (Gummow & Hayne JJ). On the other hand, it is wrong to formulate the duty with such particularity as to in effect circumvent the requirement of reasonableness at the breach stage of the analysis: ***Graham Barclay Oysters Pty Ltd v Ryan*** (2002) 211 CLR 540 [191] [192] (Gummow & Hayne JJ).

Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -
Smith v Body Corporate for Professional Suites [2012] QDC 49 -
Cadoo v BHP Billiton Limited [2012] SADC 31 -
Cadoo v BHP Billiton Limited [2012] SADC 31 -
Patrick Stevedores Holdings Pty Ltd v Director of Public Prosecutions [2012] VSC 31 (09 February 2012) (Robson J)

83. The High Court explained how the Supreme Court of Tasmania should have dealt with both the High Court and the New South Wales Court of Appeal decisions in *Cole* . The High Court said: [73]

[49] The decision of this Court in *Cole v South Tweed Heads Rugby League Football Club Ltd* 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 proposition. Gleeson CJ 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 proposition. So did Kirby J. Gummow and Hayne JJ expressly declined to decide the point. Blow J, 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* case, which this Court upheld in the result. 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.* 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* that *Farah Constructions* 'expanded' the principle applied to the construction of national legislation and explained in *Australian Securities Commission v Marlborough Gold Mines Ltd*. 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 case. 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*.

[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 this Court, that the present case was exceptional, and that Blow J had erred in not finding that it was exceptional. 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. (my emphasis and citations omitted)

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Patrick Stevedores Holdings Pty Ltd v Director of Public Prosecutions [2012] VSC 31 -
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Cregan Hotel Management Pty Ltd v Hadaway [2011] NSWCA 338 (08 November 2011) (Allsop P, Giles and Basten JJA)

81. There was no dispute on the appeal that the owner and operator of licensed premises owed a duty of care to its patrons, which extended to taking reasonable care to prevent them being attacked by other persons who were aggressive, or were likely to be aggressive because affected by liquor: see *Chordas v Bryant (Wellington) Pty Ltd* (1988) 20 FCR 91, applied by this Court in *Wagstaff v Haslam* [2007] NSWCA 28; 69 NSWLR 1 at [39] . The earlier cases in which such claims have been upheld by injured patrons have mainly related to attacks which occurred on licensed premises, as in *Wagstaff* : see also *Spedding v Nobles; Spedding v McNally* [2007] NSWCA 29; 69 NSWLR 100; *Collingwood Hotel Pty Ltd v O'Reilly* [2007] NSWCA 155 and *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420, although in each of the latter cases the claims failed on the facts. There have been further cases where claims have been brought in respect of assaults which occurred beyond the boundaries of the licensed premises. In some cases the duty has been claimed on behalf of the inebriated patron who has been injured (or killed) as a result of his or her own conduct: *Cole v South Tweed Heads Rugby League Football Club Ltd* [2004] HCA 29; 217 CLR 469 and *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* [2009] HCA 47; 239 CLR 390.

Lowes v Amaca Pty Ltd [2011] WASC 287 (26 October 2011) (Corboy J)

Cole v South Tweed Heads Rugby League Football Club Ltd [2004] HCA 29 ; (2004) 217 CLR 469

Lowes v Amaca Pty Ltd [2011] WASC 287 -
Gunnersen v Henwood [2011] VSC 440 (07 September 2011) (Dixon J)

303. In *Cole v South Tweed Heads Rugby League Football Club Ltd* , [105] the issue was whether a licensed club owed a general duty to take reasonable care to protect patrons against risks of physical injury resulting from the consumption of alcohol. The plaintiff was seriously injured when struck by a car after leaving the club premises, having been asked to leave on account of drunken and indecent behaviour. Gleeson CJ considered the direction to be obtained from having regard to the nature of the damage and the circumstances in which it was suffered may be of particular value where the connection between the acts complained of and the damage suffered is indirect. Gummow and Hayne JJ concluded that even if there was a duty, there would not, in the circumstances, be breach of it nor could any breach be causative of the plaintiff's damage. Their Honours then stated: [106]

> In these circumstances it is neither necessary nor appropriate to decide any question about the existence of a duty of care. It is not necessary to do so for the reasons given earlier. It is not appropriate to do so because any duty identified would necessarily be articulated in a form divorced from facts said to enliven it. And, as the present case demonstrates, the articulation of a duty of care at a high level of abstraction either presents more questions than it answers, or is apt to mislead.

> Here, as in so many other areas of the law of negligence, it is necessary to keep well in mind that the critical question is whether the negligence of the defendant was a cause of the plaintiff's injuries. The duty that must be found to have been broken is a duty to take reasonable care to avoid what *did* happen, not to avoid 'damage' in some abstract and unformed sense. Thus asking whether it is careless to sell liquor to an obviously intoxicated patron may, when the question is cast in that abstract form, appear to invite an affirmative answer. And giving an affirmative answer may be thought to conduce to the careful and responsible service of a product which, if misused, can be dangerous. But as the events which give rise to this appellant's claim demonstrate, the simplicity of a question framed in the way described serves only to obscure the complexity of the problems that lie beneath it.

In *Graham Barclay Oysters Pty Ltd v Ryan* ,[107] McHugh J observed that ordinarily, the common law does not impose a duty of care on a person to protect another from the risk of harm unless that person has created the risk.

via

[105] (2004) 217 CLR 469 .

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via

[107] (2002) 211 CLR 540, 575 [81] . See also *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469, 487 [56] (Gummow & Hayne JJ).

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Gunnersen v Henwood [2011] VSC 440 -
Gunnersen v Henwood [2011] VSC 440 -
Parker v BHP Billiton Ltd [2011] SADC 104 -
Parker v BHP Billiton Ltd [2011] SADC 104 -
Hodge v Barham [2011] WADC 71 (19 May 2011) (Derrick DCJ)

160. Ordinarily the common law does not impose a duty of care on a person to protect another from risk of harm unless that person has created or increased the risk of harm: ***Smith v Leurs*** [

1945] HCA 27; (1945) 70 CLR 256, 261 - 262; ***Hargrave v Goldman*** [1963] HCA 56; (1963) 110 CLR 40 ; ***Mahon v Sutherland*** [1971] 1 NSWLR 502; ***Graham Barclay Oysters v Ryan*** [81]; ***Cole v South Tweed Heads Rugby League Football Club Ltd*** [2004] HCA 29; (2004) 217 CLR 469 [56].

Hodge v Barham [2011] WADC 71 -
French v QBE Insurance (Australia) Limited [2011] QSC 105 (13 May 2011) (Fryberg J)
Cole v South Tweed Heads Rugby Club: [2004] HCA 29 ; (2004) 217 CLR 469 , cited

French v QBE Insurance (Australia) Limited [2011] QSC 105 -
Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11 (04 May 2011) (French CJ, Gummow, Heydon, Crennan and Bell JJ)

22. Different classes of care may give rise to different problems in determining the nature or scope of a duty of care [15] . In many cases a duty formulated as being one to take "reasonable care" may suffice for the finding of duty in that particular case. Cases that involve the duty of a solicitor to his or her client to exercise professional skill in accordance with the retainer [16] , the duty of a motorist towards other users of the road [17] , or the duty owed by an occupier of land to an entrant with respect to the condition of the premises [18] , ordinarily involve no real controversy over the scope and content of the duty of care; these are considered at the "high level of abstraction" spoken of by Glass JA in *Shirt v Wyong Shire Council* [19] . But where the relationship falls outside of a recognised relationship giving rise to a duty of care [20] , or the circumstances of the case are such that the alleged negligent act or omission has little to do with that aspect of a recognised relationship which gives rise to a duty of care [21] , a duty formulated at too high a level of abstraction may leave unanswered the critical questions respecting the content of the term "reasonable" and hence the content of the duty of care [22] . These are matters essential for the determination of this case, for without them the issue of breach cannot be decided. The appropriate level of specificity when formulating the scope and content of the duty will necessarily depend on the circumstances of the case.

via

[20] See, eg, *Perre v Apand Pty Ltd* (1999) 198 CLR 180; *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469; [2004] HCA 29 .

Warner (By Her Next Friend Airs) v Kernke [2010] SADC 170 (24 December 2010) (Soulio J)

77. Per McHugh J in *Cole v South Tweed Heads Rugby League Football Club Ltd & Anor* at 482 : [2]

> Like employers, teachers, professional persons, guardians, crowd controllers, security guards, jailers and others who have rights of control over persons, property or situations, the duty owed by clubs to entrants extends to taking affirmative action to prevent harm to those to whom the duty is owed.

Warner (By Her Next Friend Airs) v Kernke [2010] SADC 170 (24 December 2010) (Soulio J)

79. The duty of TransAdelaide as an occupier is not confined to protecting entrants against injury from static defects in the premises. It extends to the protection of injury from all the activities on the premises. [4]

via

[4] *Cole v South Tweed Heads Rugby League Football Club Ltd & Anor* (2004) 217 CLR 469 per McHugh J .

Warner (By Her Next Friend Airs) v Kernke [2010] SADC 170 (24 December 2010) (Soulio J)

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[2] (2004) 217 CLR 469 .

Warner (By Her Next Friend Airs) v Kernke [2010] SADC 170 -
Partridge v Hobart City Council [2010] TASSC 62 -
Wicks v State Rail Authority (NSW) [2010] HCA 22 -
Davies v George Thomas Hotels Pty Ltd [2010] NSWDC 55 (21 April 2010) (Murrell SC DCJ)

33 The defendants refer to the High Court decisions in *C.A.L No 14* and *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29 . In the context of discussing whether publicans owe a duty to monitor and limit the consumption of alcohol by patrons in order to prevent patrons from injuring themselves, in *C.A.L No 14* at [54], Gummow, Heydon and Crennan JJ observed: "Virtually all adults know that progressive drinking increasingly impairs one's judgment and capacity to care for oneself". In *Cole* at [131] Callinan J observed:

> *"The (risk of a patron injuring him/herself) begins when the first drink is taken and progressively increases with each further one. Everyone knows at the outset that if the consumption continues, a stage will be reached at which judgment and capacity to care for oneself will be impaired, and even ultimately destroyed entirely for at least a period."*

Davies v George Thomas Hotels Pty Ltd [2010] NSWDC 55 -
Davies v George Thomas Hotels Pty Ltd [2010] NSWDC 55 -
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [No 2] [2010] WASC 45 -
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [No 2] [2010] WASC 45 -
Hardy v Mikropul Australia Pty Ltd [2010] VSC 42 (03 March 2010) (J. Forrest J)

59. In *Cole v South Tweed Heads Rugby League Football Club Ltd,* [79] the High Court considered the issue of whether there was a duty to protect persons from harm caused by intoxication following their deliberate and voluntary decision to drink to excess. *Cole* did not involve an employer-employee relationship, however, the observations of Gleeson CJ are relevant to Mr Hardy's contention that the duty of an employer extends to what occurs outside work in a private capacity:

> Most adults know that drinking to excess is risky. The nature and degree of risk may be affected by the extent of the excess, or by other circumstances, such as the activities in which people engage, or the conditions in which they work or live. A supplier of alcohol, in either a commercial or a social setting, is usually in no position to assess the risk. The consumer knows the risk. It is true that alcohol is disinhibiting, and may reduce a consumer's capacity to make reasonable decisions. *Even so, unless intoxication reaches a very high degree (higher than that achieved by the appellant in this case), the criminal and the civil law hold a person responsible*

> *for his or her acts. ... Save in extreme cases, the law makes intoxicated people legally responsible for their actions. As a general rule they should not be able to avoid responsibility for the risks that accompany a personal choice to consume alcohol.* [80] (Emphasis added)

His Honour also said:

> Again, as a general rule a person has no legal duty to rescue another. How is this to be reconciled with a proposition that the respondent had a duty to protect the appellant from the consequences of her decision to drink excessively? There are many forms of excessive eating and drinking that involve health risks but, *as a rule, we leave it to individuals to decide for themselves how much they eat and drink. There are sound reasons for that, associated with values of autonomy and privacy*. [81] (Emphasis added)

via

[80] Ibid [13].

Hardy v Mikropul Australia Pty Ltd [2010] VSC 42 (03 March 2010) (J. Forrest J)

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Hardy v Mikropul Australia Pty Ltd [2010] VSC 42 -
CAL No 14 Pty Ltd v Motor Accidents Insurance Board [2009] HCA 47 (10 November 2009) (French CJ, Gummow, Hayne, Heydon and Crennan JJ)

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 brought [74] , would have presented serious obstacles in the way of any such submission.

CAL No 14 Pty Ltd v Motor Accidents Insurance Board [2009] HCA 47 (10 November 2009) (French CJ, Gummow, Hayne, Heydon and Crennan JJ)

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" cases [39] . 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 unconscious [41] . 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.

via

[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.

CAL No 14 Pty Ltd v Motor Accidents Insurance Board [2009] HCA 47 (10 November 2009) (French CJ, Gummow, Hayne, Heydon and Crennan JJ)

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 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.

CAL No 14 Pty Ltd v Motor Accidents Insurance Board [2009] HCA 47 (10 November 2009) (French CJ, Gummow, Hayne, Heydon and Crennan JJ)

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 proposition [44]. Gleeson CJ [45] 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 proposition [46]. So did Kirby J [47]. Gummow and Hayne JJ expressly declined to decide the point [48]. Blow J [49], 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* case, which this Court upheld in the result [50]. 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.

via

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

CAL No 14 Pty Ltd v Motor Accidents Insurance Board [2009] HCA 47 (10 November 2009) (French CJ, Gummow, Hayne, Heydon and Crennan JJ)

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 oneself [59]. Assessment of impairment is much easier for the drinker than it is for the outsider [60]. 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 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.

via

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

CAL No 14 Pty Ltd v Motor Accidents Insurance Board [2009] HCA 47 (10 November 2009) (French CJ, Gummow, Hayne, Heydon and Crennan JJ)

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CAL No 14 Pty Ltd v Motor Accidents Insurance Board [2009] HCA 47 (10 November 2009) (French CJ, Gummow, Hayne, Heydon and Crennan JJ)

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 premises [42]?

via

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

CAL No 14 Pty Ltd v Motor Accidents Insurance Board [2009] HCA 47 (10 November 2009) (French CJ, Gummow, Hayne, Heydon and Crennan JJ)

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 Club [12].

CAL No 14 Pty Ltd v Motor Accidents Insurance Board [2009] HCA 47 (10 November 2009) (French CJ, Gummow, Hayne, Heydon and Crennan JJ)

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 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.

via

[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.

CAL No 14 Pty Ltd v Motor Accidents Insurance Board [2009] HCA 47 (10 November 2009) (French CJ, Gummow, Hayne, Heydon and Crennan JJ)

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 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 privacy [58] . 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.

via

[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] .

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Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 (31 August 2009) (Allsop P at 1; Basten JA at 149; Simpson J at 242)

179 On the other hand, the higher the level of abstraction at which the duty is identified, the less likely it is to provide any useful role in determining the outcome of the case: *Vairy* at [73] (Gummow J); see also *Amaca Pty Ltd v AB & P Constructions Pty Ltd* [2007] NSWCA 220; (2007) Aust Torts Rep 81-910; 5 DDCR 543 at [137] . In other circumstances, the High Court has emphasised the desirability of having regard to the harm suffered by the plaintiff in considering the scope of the relevant duty, if any: see also *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd ("Wagon Mound [No 1]")* [1961] AC 388 at 425 (PC – Viscount Simonds). As explained by Gummow and Hayne JJ, in *Cole v South Tweed Heads Rugby League Football Club Ltd* [2004] HCA 29; 217 CLR 469 :

> "81 In these circumstances it is neither necessary nor appropriate to decide any question about the existence of a duty of care. ... It is not appropriate to do so because any duty identified would necessarily be articulated in a form divorced from facts said to enliven it. And, as the present case demonstrates, the articulation of a duty of care at a high level of abstraction either presents more questions than it answers, or is apt to mislead."
> 82 Here, as in so many other areas of the law of negligence, it is necessary to keep well in mind that the critical question is whether the negligence of the defendant was a cause of the plaintiff's injuries. The duty that must be found to have been broken is a duty to take reasonable care to avoid what *did* happen, not to avoid 'damage' in some abstract and unformed sense."

Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 (31 August 2009) (Allsop P at 1; Basten JA at 149; Simpson J at 242)

Cole v South Tweed Heads Rugby League Football Club Ltd [2004] HCA 29 ; 217 CLR 469
CSR Ltd v Young

Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 (26 June 2009) (Beazley JA at 1; Ipp JA at 113; Basten JA at 128)

134 His Honour approached the matter, in accordance with submissions made to him, by considering whether the facts of the case provided a closer analogy with the decision of this Court in *J Blackwood & Son Steel & Metals Pty Ltd v Nichols* [2007] NSWCA 157, or the decision of the High Court in *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 19; 221 CLR 234. His Honour held that the circumstances of *Thompson* were "analogous to the present situation" and that, accordingly, both defendants owed the plaintiff a relevant duty of care to take reasonable steps for his safety: at [78] -[80] . 135 In determining a question of law, namely the existence of a duty of care, the content, which is often the critical component, must be identified by reference to the circumstances in which the injury occurred: see *Sutherland Shire Council v Heyman* [1985] HCA 41; 157 CLR 424 at 487 (Brennan J) and *Cole v South Tweed Heads Rugby League Football Club Ltd* [2004] HCA 29; 217 CLR 469 at [1] (Gleeson CJ) . Thus, the High Court once rejected, as without rational foundation, the contentions that a worker at a bush camp, required to cut timber for a stove, should have been provided with some implement other than a tomahawk or should have been given instruction as to how to use the tomahawk: *Electric Power Transmission Pty Ltd v Cuiuli* [1961] HCA 3; 104 CLR 177. A similar conclusion was reached by this Court in relation to the use of a ladder in *Van Der Sluice v Display Craft Pty Ltd* [2002] NSWCA 204 at [74] (Heydon JA, Meagher JA and Foster AJA agreeing) and the securing of a load on a truck in *J Blackwood & Son* at [61] and [64] (Tobias JA, Mason P and Handley AJA agreeing). 136 In the present case, the 44-gallon drums used as rubbish bins were required to be physically manhandled from the smoko shed and on to the tines of a forklift. The plaintiff had undertaken this task approximately twice each week for some six months before the injury. He gave evidence that the bins were usually not heavy. On this occasion, the bin was unusually heavy. 137 Because the employer did not appeal from the judgment against it, its responsibility to take steps to avoid the need for manual handling of an unexpectedly heavy bin is not in issue. On the other hand, findings made against it, or not contested by it, do not operate against the appellant. 138 The plaintiff was not employed by the appellant and, on the accepted

evidence of the plaintiff himself, received no instruction or direction from the appellant's manager. 139 The fact that an employer may be obliged to take reasonable steps to provide a worker with a safe system of work, does not preclude the existence of a duty owed by others to take reasonable care in their dealings with the worker, whether they be other employees, independent contractors, the occupier of premises which the worker is required to attend in the course of employment or other road users encountered in the course of travel. Where work is undertaken on the premises of a third party, that party may have a duty, which commonly arises from:

Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 -
Weston v Stinson Nominees Pty Ltd [2009] WADC 67 -
Weston v Stinson Nominees Pty Ltd [2009] WADC 67 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Politarhis v Westpac Banking Corporation [2009] SASC 96 -
Politarhis v Westpac Banking Corporation [2009] SASC 96 -
Walsh v Little and Ors;O'Brien v Little and Ors [2009] NSWSC 267 (08 April 2009) (Hall J)

53 He relied in support upon the observation of Callinan J in **Cole v Tweed Heads Rugby Football Club Limited** (2004) 78 ALJR 933 at 954 to 955 to the effect *"there exists at law no power to restrain from departing occupied premises without facing the tort of 'false imprisonment'"*. It was submitted for the applicants that the plaintiffs were seeking to impose a duty of care *"... in circumstances where there exists no power at law to perform"* (written submissions, p.46).

Walsh v Little and Ors;O'Brien v Little and Ors [2009] NSWSC 267 (08 April 2009) (Hall J)
Cole v Tweed Heads Rugby Football Club Limited (2004) 78 ALJR 933
Dey v Victorian Railways Commissioners

Walsh v Little and Ors;O'Brien v Little and Ors [2009] NSWSC 267 (08 April 2009) (Hall J)

69 On the issue of consumption of alcohol, it was submitted that the applicants, being neither the licensee or the occupier, were not in a position to exercise any control or to regulate the consumption of alcohol on the hotel/motel land. Even if they had been in that position, reliance was placed upon the observations of Gleeson CJ at [18] and Callinan J at [125] in **Cole** (supra).

Walsh v Little and Ors;O'Brien v Little and Ors [2009] NSWSC 267 -
Adeels Palace Pty Ltd v Moubarak [2009] NSWCA 29 (26 February 2009) (Beazley JA; Giles JA ; Campbell JA)

78 The cases to which there was reference also included *TAB Ltd v Atlis* [2004] NSWCA 322. *TAB Ltd v Atlis* was not a hotel case at all: the defendant was the occupier of a TAB outlet. Mason P said bluntly at [3] that the defendant owed a duty of reasonable care to patrons who came to its premises to place bets, the content of which extended "to the taking of reasonable measures to control rowdy and dangerous patrons whose activities had the potential to thereafter threaten the safety of other patrons". Ipp JA, with whom Beazley JA agreed, said after referring to the duty of care as recognised by Mason P In *Oxlade v Gosbridge Pty Ltd* -

> "35 Such a duty is capable of being extended in scope. In my reasons in *South Tweed Heads Rugby League Football Club Limited v Cole* (2002) 55 NSWLR 113 (with which Heydon JA and Santow JA agreed) I said (at 137, [152]):
>
> > '[The general duty on the part of the occupier to take reasonable care to avoid a foreseeable risk of injury to the entrant] ordinarily concerns risk of injury from the condition of the premises, but this is not an inevitable limitation on the scope of the duty. If, to the knowledge of the occupier, activities conducted on the premises bring about a risk of injury to the entrant, the circumstances may give rise to a duty of care wide enough to encompass a duty to take reasonable care to avoid a foreseeable risk of injury arising

from those activities: *Canterbury Municipal Council v Taylor* [2002] NSWCA 24. Typically, the foreseeable risk of injury in such a case is the risk of physical injury directly caused by the known activities on the premises.'

Nothing in the reasons of the High Court in this case (*Cole v South Tweed Heads Rugby League Football Club Limited* (2004) 78 ALJR 933) is inconsistent with these remarks.

36 The opponent complains that the claimants negligently failed to control the continued presence of the two young men on the premises. The facts in the present case, therefore, differ fundamentally from *Modbury* . In fact they fall squarely within the possible exception to the rule in *Modbury* explained by Hayne J (at 293-294 [117]).

37 In *Modbury* Hayne J (at 292 [112]) observed that "[t]he occupier of land has power to control who enters and remains on the land and has power to control the state or condition of the land". Hayne J remarked that that power of control established a relationship between occupier and entrant that could suffice to create a duty of care.

38 Accordingly, while it is true that no liquor was sold at the TAB, that is by no means conclusive of the question.

39 Foreseeability of harm is an important factor in this context. It is very much to the point that, by the time Mr Youngman spoke to the two men, he realised that their activities on the claimants' premises constituted a risk of injury to the other patrons."

Portelli v Tabriska Pty Ltd [2009] NSWCA 17 -
Portelli v Tabriska Pty Ltd [2009] NSWCA 17 -
Scott v C. A. L. No 14 Pty Ltd (No 2) [2009] TASSC 2 (19 January 2009) (Crawford CJ, Evans and Tennent JJ)

26. On appeal to the High Court in *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 , two of the six judges, Gleeson CJ and Callinan J, agreed with the Court of Appeal that there is no general duty to take reasonable care to protect patrons against risks of physical injury resulting from a consumption of alcohol. Two of the judges, Gummow and Hayne JJ, did not find it necessary to decide the question. The other two judges, McHugh and Kirby JJ, disagreed with the Court of Appeal and were of the view that the club owed Mrs Cole a personal duty to take reasonable care not to expose her to the risk of injury brought about by her intoxication as a result of drinking an excessive amount of alcohol on the club's premises. Their Honours based their conclusion on the common law duty of occupiers of premises to take reasonable care for the safety of those who enter the premises.

Scott v C. A. L. No 14 Pty Ltd (No 2) [2009] TASSC 2 (19 January 2009) (Crawford CJ, Evans and Tennent JJ)

63. The learned trial judge, commencing at par25, referred to the decision of the High Court in *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 . That was an appeal from a decision of the New South Wales Court of Appeal in which there was a unanimous decision to the effect that the licensed club in that matter did not owe a duty of care to the particular intoxicated patron. The appeal to the High Court was ultimately

unsuccessful, with members of the court expressing different views about the nature of any duty which might exist. His Honour quoted some of these views and then canvassed some other decisions on the topic, including one from Canada. He then said at par35:

> "There is no binding High Court authority as to whether a publican has a duty of the type suggested by counsel for the plaintiffs. The only decision of an Australian appellate court that is directly in point is that of the New South Wales Court of Appeal in *Cole*. In the absence of any binding authority, a decision of the appellate court of another State should ordinarily be followed: *Marshall v Watt* [1953] Tas R 1 at 14 – 15 ; *Carrick v J* (1989) 39 A Crim R 235 at 250 – 251 . I do not think I should follow the Canadian case relied on by counsel for the widow because of the different social conditions and statutory provisions that it reflects."

He then concluded that the New South Wales Court of Appeal decision in *Cole* (*South Tweed Heads Rugby League Football Club Ltd v Cole* (2002) 55 NSWLR 113) was authority for the proposition that "a publican's duty of care to a customer does not generally require the taking of care to prevent harm caused by a customer's own intoxication." He went on to say that it followed that "the defendants did not owe the deceased any duty to stop serving him earlier than they did, or to avoid the risk of him having a motorcycle accident, *unless there was some reason to treat this as an exceptional case in which some such duty did exist*." (my emphasis). The learned trial judge referred to a passage in the judgment of Ipp A-JA in *Cole* at 146, and then identified some circumstances which might be considered to be exceptional. He then determined by reference to certain facts that this matter did not fall outside the general rule.

Scott v C. A. L. No 14 Pty Ltd (No 2) [2009] TASSC 2 -
Scott v C. A. L. No 14 Pty Ltd (No 2) [2009] TASSC 2 -
Neal v Ambulance Service of New South Wales [2008] NSWCA 346 (10 December 2008) (Tobias JA ; Basten JA ; Handley AJA)

> 24 An alternative argument was that no duty of care arose, or, if it arose did not continue, in circumstances where the person sought to be assisted rejected offers of help. This more restrained argument raised a different issue. Although it is commonly said that the existence of a duty of care is a question of law, it is not to be viewed as such, abstracted from a factual context: *Cole v South Tweed Heads Rugby League Football Club Limited* [2004] HCA 29; 217 CLR 469 at [56] and [81] (Gummow and Hayne JJ) ; *Amaca Pty Ltd v AB & P Constructions Pty Ltd* [2007] NSWCA 220; (2007) Aust Torts Rep ¶81-910 at [46]-[47] (Giles JA), [93] (Ipp JA) and [137]-[140] . Nor is there any bright line separating the existence of a duty from its scope and content in particular circumstances. Finally, the question as to whether a duty exists is not helpfully answered without consideration of the particular respects in which breach is alleged. For present purposes, nothing is gained by asking, in the abstract, whether ambulance officers owed the plaintiff a duty of care: the only relevant question is whether the ambulance officers owed the plaintiff a duty which required them to advise the police that the plaintiff needed to be conveyed to hospital.

Neal v Ambulance Service of New South Wales [2008] NSWCA 346 -
Blaxter v Commonwealth of Australia [2008] NSWCA 87 (08 May 2008) (Mason P; McColl JA; Basten JA)

> 49 There is, however, also a material distinction between a case where a plaintiff drinks to excess as a result of psychological consequences resulting from negligent conduct of the defendant and a case in which a plaintiff alleges a duty on the part of the defendant not to permit her to drink to excess. Cases such as *Cole* and *Reynolds* involve questions as to the imposition of a duty on a third party with respect to the plaintiff's voluntary acts. Cases such as *Medlin* and the present case, are concerned with acts taken by a plaintiff in an attempt to alleviate the consequences of the defendant's negligent conduct. Although it differs on its facts, the present case, like *Medlin* , involves a question of causation.

Blaxter v Commonwealth of Australia [2008] NSWCA 87 -

Blaxter v Commonwealth of Australia [2008] NSWCA 87 -
Portelli v Tabriska Pty Ltd [2007] NSWSC 1256 (05 December 2007) (Hislop J)

45 The conclusion of the Court of Appeal in *South Tweed* was upheld on appeal to the High Court [2004] HCA 29 though on various grounds. Callinan J commented at [121] :

> "The voluntary act of drinking until intoxicated should be regarded as a deliberate act taken by a person exercising autonomy for which that person should carry personal responsibility in law."

Portelli v Tabriska Pty Ltd [2007] NSWSC 1256 -
Scott v C.A.L. No.14 Pty Ltd [2007] TASSC 94 -
Scott v C.A.L. No.14 Pty Ltd [2007] TASSC 94 -
Scott v C.A.L. No.14 Pty Ltd [2007] TASSC 94 -
Panagiotopoulos v Rajendram [2007] NSWCA 265 -
Panagiotopoulos v Rajendram [2007] NSWCA 265 -
Panagiotopoulos v Rajendram [2007] NSWCA 265 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Amaca Pty Ltd v Hannell [2007] WASCA 158 (02 August 2007) (Martin CJ Steytler P McLure JA)

Cole v South Tweed Heads Rugby League Football Club Ltd (2004) 217 CLR 469

Amaca Pty Ltd v Hannell [2007] WASCA 158 -
Perkins v Redmond Company Pty Ltd [2007] NSWDC 147 (13 July 2007) (Rein SC DCJ)
Cole v South Tweed Heads Rugby League Football Club Ltd (2004) 217 CLR 469; [2004] HCA 29
Collingwood Hotel Pty Ltd v O'Reilly

Perkins v Redmond Company Pty Ltd [2007] NSWDC 147 -
New South Wales v Fahy [2007] HCA 20 -
Skulander v Willoughby City Council [2007] NSWCA 116 (18 May 2007) (Mason P; Beazley JA; Basten JA)

87 The next question is how specifically the content of the duty should be defined. The existence (and content) of the duty is categorised as a question of law, whereas breach is categorised as a question of fact: see, eg, *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at [56] (Gummow and Hayne JJ). The distinction has less practical importance since the demise of civil jury trials, but remains critical in cases (of which this is not one) in which appeals are limited to questions of law. Even this dichotomy may be expressed too starkly: as explained by Gleeson CJ in *Swain v Waverley Municipal Council* (2005) 220 CLR 517 at [4] , "the alleged duty of care might depend upon contested facts". As Gummow and Hayne JJ point out in *Cole* , "the articulation of a duty of care at too high a level of abstraction provides an inadequate legal mean against which issues of fact may be determined". See also *Leichhardt Municipal Council v Montgomery* [2007] HCA 6 at [8] (Gleeson CJ, Crennan J agreeing).

Skulander v Willoughby City Council [2007] NSWCA 116 (18 May 2007) (Mason P; Beazley JA; Basten JA)
Cole v South Tweed Heads Rugby League Football Club Ltd (2004) 217 CLR 469
Evans v Minister for Immigration

Skulander v Willoughby City Council [2007] NSWCA 116 -
Ross Brown v Drummoyne Sports Club Ltd [2007] NSWDC 170 -
Ross Brown v Drummoyne Sports Club Ltd [2007] NSWDC 170 -
Wagstaff v Haslam [2007] NSWCA 28 (26 February 2007) (Santow JA; Bryson JA; Basten JA)

42 As noted by Gleeson CJ in *Cole v South Tweed Heads Rugby League Club*, at [10], "[i]ntoxication is an imprecise concept". Further, as his Honour noted at [11], by reference to the judgment of Barwick CJ in *R v O'Connor* (1980) 146 CLR 64 at 71 :

> "The state of drunkenness or intoxication can vary greatly in degree. A person may be intoxicated in the sense that his personality is changed, his will is warped, his disposition altered, or his self-control weakened ... ."

It must also be accepted that alcohol is disinhibiting and may reduce a person's capacity to make reasonable decisions: *Cole* at [13] . It is foreseeable that some people will become aggressive when drunk, but it does not follow that a publican must, acting reasonably, treat every intoxicated patron as a potential source of unprovoked violence.

Wagstaff v Haslam [2007] NSWCA 28 (26 February 2007) (Santow JA; Bryson JA; Basten JA)

38 In *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at [56] Gummow and Hayne JJ, by reference to a passage in the judgment of McHugh J in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [81] and [106] noted:

> "His Honour also emphasised that the more specific the terms of the formulation of the duty of care, the greater the prospect of mixing the anterior question of law (the existence of the duty) with questions of fact in deciding whether a breach has occurred. On the other hand, the articulation of a duty of care at too high a level of abstraction provides an inadequate legal mean against which issues of fact may be determined."

Wagstaff v Haslam [2007] NSWCA 28 (26 February 2007) (Santow JA; Bryson JA; Basten JA)

Cole v South Tweed Heads Rugby League Club Ltd (2004) 217 CLR 469 ; *R v O'Connor* (1980) 146 CLR 64, considered.

Wagstaff v Haslam [2007] NSWCA 28 (26 February 2007) (Santow JA; Bryson JA; Basten JA)
Cole v South Tweed Heads Rugby League Football Club Ltd (2004) 217 CLR 469
Graham Barclay Oysters Pty Ltd v Ryan

Moss v Amaca Pty Ltd (Formerly James Hardie and Co Pty Ltd) [2006] WASC 311 (22 December 2006) (LE Miere J)

Cole v South Tweed Heads Rugby League Football Club Ltd (2004) 217 CLR 469

Moss v Amaca Pty Ltd (Formerly James Hardie and Co Pty Ltd) [2006] WASC 311 (22 December 2006) (LE Miere J)

Cole v South Tweed Heads Rugby League Football Club (2004) 217 CLR 469

Moss v Amaca Pty Ltd (Formerly James Hardie and Co Pty Ltd) [2006] WASC 311 -
Hannell v Amaca Pty Ltd (Formerly James Hardie & Co Pty Ltd) [2006] WASC 310 -
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Hannell v Amaca Pty Ltd (Formerly James Hardie & Co Pty Ltd) [2006] WASC 310 -
Ellis, Executor of the Estate of Paul Steven Cotton (Dec) v The State of South Australia [2006] WASC 270 (08 December 2006) (EM Heenan J)

Cole v South Tweed Heads Rugby League Football Club Ltd [2004] HCA 29 ; (2004) 217 CLR 469

Ellis, Executor of the Estate of Paul Steven Cotton (Dec) v The State of South Australia [2006] WASC 270 (08 December 2006) (EM Heenan J)

738. Hence it is said that contributory negligence is independent of the idiosyncrasies of the particular person whose conduct is in question - per McHugh J in ***Joslyn v Berryman*** [2003] HCA 34; (2003) 214 CLR 552 at [39] and per Gummow and Callinan JJ at [70] and Hayne J at

[153]. By analogy, the second defendant submits that the court should not permit any personal condition, inclination or weakness of the claimant, to alter the standard of care of the duty due to him or to her by a defendant - ***Cole v South Tweed Heads Rugby League Football Club Ltd*** [2004] HCA 29; (2004) 217 CLR 469 per Gleeson CJ at [13] [15] or in relation to the significance, from the claimant's viewpoint, of conduct alleged to constitute contributory negligence - ***Jones v Bradley*** [2003] NSWCA 81 and the intermediate appeal in the New South Wales Court of Appeal in ***South Tweed Heads Rugby League Club Ltd v Cole*** [2002] NSWCA 205; (2002) 55 NSWLR 113 per Santow JA at [20] and per Ipp JA at [179]. While there may be limits to this inflexibility which arise at a point where the plaintiff can no longer be regarded as acting voluntarily, or where unconscientious behaviour by the defendant has induced the plaintiff to act in a particular way (as to which see Gleeson CJ in ***Cole v South Tweed*** (*supra*)) at [13]; and Callinan J at [121] and [131]), the submission is that any addiction or dependence which Mr Cotton may have developed upon his tobacco smoking will not avoid or diminish what, otherwise, might be contributory negligence.

Livermore v Crombie [2005] QSC 367 -
Livermore v Crombie [2005] QSC 367 -
Belinda McNally v Douglas Spedding And Nicole Nobles v Douglas Spedding [2006] NSWDC 113 (19 June 2006) (Neilson DCJ)

Cole v South Tweed Heads Rugby League Football Club Ltd (2004) 217 CLR 469
Proprietors of Strata Plan 17226 v Drakulic

Belinda McNally v Douglas Spedding And Nicole Nobles v Douglas Spedding [2006] NSWDC 113 (19 June 2006) (Neilson DCJ)

93 **TAB Ltd v Atlis** [2004] NSWCA 322 dealt, inter alia, with the question of the extent of the duty of care of the occupier of a betting shop, not the occupier of licensed premises. Mason P (dissenting) and Ipp JA (with whom Beazley JA agreed) accepted that the duty of care extended to the taking of reasonable measures to control rowdy and dangerous patrons whose activities had the potential to threaten the safety of other patrons. Commencing at [33] Ipp JA said:

> *"As regards the duty of care question, the claimants relied on Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254 . They submitted that the circumstances did not impose on the claimants a duty of care to take reasonable steps to prevent patrons of the TAB from suffering harm by reason of the criminal behaviour of third parties.*
>
> *[34] In Oxlade v Gosbridge Pty Ltd (unreported, NSWCA, 18 December 1998) Mason P said:*
>
> > *'It is exceptional for the law to impose a duty to exercise care in controlling a third party to prevent the third party doing damage to another (see generally Smith v Leurs (1945) 70 CLR 256). But a duty to exercise reasonable care to protect patrons has been imposed upon the manager of a hotel as regards intoxicated or dangerous customers. Whatever the outer limits of such duty, it encompasses the protection of a patron while he or she is on or departing from the licensed premises.'*
>
> *See also Chordas v Bryant (Wellington) Pty Ltd (1988) 20 FCR 91 ; Club Italia (Geelong) Inc v Ritchie (2001) 3 VR 447 and Gordon v Tamworth Jockey Club [2003] Aust Torts Reports 81-698 .*

[35] Such a duty is capable of being extended in scope. In my reasons in South Tweed Heads Rugby League Football Club Ltd v Cole (2002) 55 NSWLR 113(wit h which Heydon JA and Santow JA agreed) I said (at 137, [152]):

> *'[The general duty on the part of the occupier to take reasonable care to avoid a foreseeable risk of injury to the entrant] ordinarily concerns risk of injury from the condition of the premises, but this is not an inevitable limitation on the scope of the duty. If, to the knowledge of the occupier, activities conducted on the premises bring about a risk of injury to the entrant, the circumstances may give rise to a duty of care wide enough to encompass a duty to take reasonable care to avoid a foreseeable risk of injury arising from those activities: Canterbury Municipal Council v Taylor [2002] NSWCA 24 . Typically, the foreseeable risk of injury in such a case is the risk of physical injury directly caused by the known activities on the premises.'*

Nothing in the reasons of the High Court in this case (Cole v South Tweed Heads Rugby League Football Club Ltd (2004) 78 ALJR 933) is inconsistent with these remarks.

[36] The opponent complains that the claimants negligently failed to control the continued presence of the two young men on the premises. The facts in the present case, therefore, differ fundamentally from Modbury . In fact they fall squarely within the possible exception to the rule in Modbury explained by Hayne J (at 293–294 [117]).

[37] In Modbury Hayne J (at 292 [112]) observed that '[t]he occupier of land has power to control who enters and remains on the land and has power to control the state or condition of the land'. Hayne J remarked that that power of control established a relationship between occupier and entrant that could suffice to create a duty of care.

[38] Accordingly, while it is true that no liquor was sold at the TAB, that is by no means conclusive of the question.

[39] Foreseeability of harm is an important factor in this context. It is very much to the point that, by the time Mr Youngman spoke to the two men, he realised that their activities on the claimants' premises constituted a risk of injury to the other patrons.

[40] In my view, the circumstances were such as to give rise to the imposition of a duty on the claimants to take reasonable steps to prevent injury to the TAB patrons from the activities of the two men. This conclusion is simply the product of the concept of reasonableness: see Tame v State of New South Wales (2002) 211 CLR 317 per Gleeson CJ at 330, [8] ."

Belinda McNally v Douglas Spedding And Nicole Nobles v Douglas Spedding [2006] NSWDC 113 - Harriton v Stephens [2006] HCA 15 (09 May 2006) (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)

65. Elsewhere, factors capable of supporting a duty of care have been identified. These include (1) vulnerability on the part of the plaintiff [135] ; (2) special control [136] ; or (3) knowledge [137] possessed by the defendant about the circumstances that gave rise to the damage suffered by the plaintiff.

via

[135] See, eg, *Perre* (1999) 198 CLR 180 at 194-195 [11]-[13], 202 [41]-[42], 204 [50], 225-226 [118]-[119], 236 [149]-[151], 259-260 [215]-[217], 290 [298], 328 [416] ; *Graham Barclay* (2002) 211 CLR 540 at 577 [84], 597 [149], 664 [321] ; *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at 493 [85] , 495 [92] . See Stapleton, "The golden thread at the heart of tort law: protection of the vulnerable", (2003) 24 *Australian Bar Review* 135 at 141-149.

Harriton v Stephens [2006] HCA 15 (09 May 2006) (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)

225. A right of action and a duty of care are inseparable [342] . In a case like this, the existence and extent of a duty of care can usefully be considered by reference to the nature of the damage suffered [343] because a cardinal principle of imposing liability for negligence in novel circumstances is that the party complained of should owe to the party complaining a duty to take care, which the law can recognise as a matter of principle [344] , and that the party complaining should be able to prove that actual loss or damage has been suffered as a consequence of a breach of that duty [345] . Proving that actual loss or damage has been suffered requires proof of interference with a right or interest recognised as capable of protection by law [346] .

via

[343] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 487 per Brennan J; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 290 [104] per Hayne J. See also *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at 472 [1] per Gleeson CJ ; cf *Vairy v Wyong Shire Council* (2005) 80 ALJR 1 at 16 [62] per Gummow J; 221 ALR 711 at 727.

James v Alinta Gas Networks Pty Ltd [2006] WADC 6 -
Gherm v Pesl [2005] NSWSC 577 -
Gherm v Pesl [2005] NSWSC 577 -
Preston v Star City Pty Limited (No 3) [2005] NSWSC 1223 (05 December 2005) (Hoeben J)

6 The defendant acknowledged that many of the matters raised before me were considered by Wood CJ at CL and dealt with in *Preston v Star City Pty Limited* [1999] NSWSC 1273. That case involved strike out proceedings in relation to an earlier statement of claim. The defendant submitted, however, that there have been a number of important decisions in this field since that judgment which would lead the court to reach a different conclusion. The decisions relied upon were *Reynolds v Katoomba RSL All Services Club Limited* (2001) 55 NSWLR 43 , *South Tweed Heads Rugby League Football Club Limited v Cole & Anor* (2002) 55 NSWLR 113 and *Cole v South Tweed Heads Rugby League Football Club Limited* (2004) 217 CLR 469 .

Preston v Star City Pty Limited (No 3) [2005] NSWSC 1223 -
Wynne v Pilbeam [2005] WASCA 200 -
Blaxter v The Commonwealth [2005] NSWSC 941 (20 September 2005) (Hidden J)

51 In supplementary submissions, senior counsel for the defendant referred me to *Cole v South Tweed Heads Rugby League Football Club Limited* (2004) 217 CLR 469 and, in particular, to the observations of Gleeson CJ at [13] , [14] and [18] about the personal responsibility which adults should normally accept for their own drinking. He referred also to the observations of Ipp AJA in the Court of Appeal in that same case, reported in (2002) 55 NSWLR 113 at [156]ff. In addition, he relied upon some observations about that matter in three cases which themselves arose from the Melbourne/Voyager collision: *Commonwealth of Australia v Ryan* [2002] NSWCA 372 per Hodgson JA at [82] – [83] , the judgment of Studdert J in *McLean v Commonwealth of Australia* (unreported, 28

February 1997), and the judgment of Cripps AJ in *Hill v The Commonwealth [*2003] NSWSC 1025 at [25]. It is sufficient to say that all those cases are distinguishable on their facts. I am satisfied that the plaintiff's alcohol abuse was, and remains, beyond his control. I might add that the issue of personal responsibility was not raised with him in cross-examination, the thrust of the questioning being the origin and extent of his drinking and the measure of his impairment.

Blaxter v The Commonwealth [2005] NSWSC 941 -
Gillam v Serco Australia Pty Limited [2005] WADC 171 (05 September 2005) (REGISTRAR KINGSLEY)

7 I have been referred to ***Cole v South Tweed Heads Rugby League Football Club Ltd*** (2004) 78 ALJR 933 by the defendants counsel. At [1] Gleeson C J notes that there is little assistance to consider issues of duty of care, breach and damages at a high level of abstraction divorced from the concrete facts. Gleeson C J continues in [1] to comment that there was an obvious duty of care owed by respondent to the appellant – the appellant had been on the respondents premises for some hours, and had

(Page 4)

consumed the food and drink supplied by the respondent – but there was an issue concerning the nature and extent of the duty, "To address that issue, it is useful to begin by identifying the harm suffered by the appellant, for which the respondent is paid to be liable, and the circumstances in which she came to suffer that harm" (Gleeson C J [1]).

Gillam v Serco Australia Pty Limited [2005] WADC 171 (05 September 2005) (REGISTRAR KINGSLEY)
Cole v South Tweed Heads Rugby League Football Club Ltd (2004) 78 ALJR 933
Hackshaw v Shaw

Gillam v Serco Australia Pty Limited [2005] WADC 171 -
Roncevich v Repatriation Commission [2005] HCA 40 (10 August 2005) (McHugh, Gummow, Kirby, Callinan and Heydon JJ)

84. Self-evidently, no different principle of general application could apply to the resolution of issues arising out of intervening intoxication because the appellant was a woman with a problem of alcohol tolerance and the appellant was an intoxicated soldier, otherwise commendable in his service as such. In *Cole* , Gleeson CJ described the appellant's extended drinking as "voluntary behaviour" [96] . There are similar references to voluntariness of alcohol consumption in the reasons of Callinan J [97] . His Honour remarked, in words seemingly applicable to the present appellant [98] :

"Everyone knows as the outset that if the consumption continues, a stage will be reached at which judgment and capacity to care for oneself will be impaired, and even ultimately destroyed entirely for at least a period."

via

[96] (2004) 217 CLR 469 at 473 [3] .

Roncevich v Repatriation Commission [2005] HCA 40 (10 August 2005) (McHugh, Gummow, Kirby, Callinan and Heydon JJ)

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via

[98] (2004) 217 CLR 469 at 507 [131] .

Roncevich v Repatriation Commission [2005] HCA 40 (10 August 2005) (McHugh, Gummow, Kirby, Callinan and Heydon JJ)

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via

[97] (2004) 217 CLR 469 at 502 [115] .

Roncevich v Repatriation Commission [2005] HCA 40 (10 August 2005) (McHugh, Gummow, Kirby, Callinan and Heydon JJ)

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85. In their joint reasons, Gummow and Hayne JJ rejected the argument of liability in negligence by reference to the concept of causation [99] :

> "Even assuming the various difficulties identified about the formulation of a duty of care to monitor and moderate the amount of liquor the appellant drank could be overcome, the breach of such a duty, however it is expressed, was not a cause of the injuries the appellant sustained. ... [T]he Club could do nothing

more to require her to take care. In particular, it could not lawfully detain her. If, as happened here, she left the Club and was injured, any carelessness of the Club in selling her liquor was not a cause of what happened."

via

[99] (2004) 217 CLR 469 at 491 [76] .

Roncevich v Repatriation Commission [2005] HCA 40 (10 August 2005) (McHugh, Gummow, Kirby, Callinan and Heydon JJ)

87. *Conclusion: distinguishable issues*: I will assume for present purposes that the issues raised about voluntariness and causation in *Cole* are special to the facts of that case or limited to the law of negligence. Certainly, because of my own views in *Cole* [100] , I would not want to extend any principle of exemption from legal liability of the suppliers of alcohol products for which that case stands[101]. The considerations emphasised for the respondent in this appeal as to the voluntariness of the appellant's consumption of alcohol may yet prove important for the resolution of the facts of this case. This analysis brings me to the point under the Act that ultimately carries the day for the appellant.

Roncevich v Repatriation Commission [2005] HCA 40 -
Roncevich v Repatriation Commission [2005] HCA 40 -
Roncevich v Repatriation Commission [2005] HCA 40 -
Roncevich v Repatriation Commission [2005] HCA 40 -
Roncevich v Repatriation Commission [2005] HCA 40 -
Roney v Priestman [2005] TASSC 52 -
Commissioner of Main Roads v Jones [2005] HCA 27 (20 May 2005) (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ)

76. The majority in the Full Court approached the matter as if the appellant were the creator of the danger that caused the respondent's injury [37] . A duty of care may of course, indeed often does, arise even in cases in which a defendant has not been the author of a hazard, but different considerations will apply if that is not the case. Ordinarily, and absent particular circumstances, for example, the existence of a statutory duty [38] , an allurement to children [39] , the existence of a special relationship such as employer and employee [40] , or occupier and entrant [41] , a court will be less ready to find a defendant who has not created the danger liable for it [42] . The construction and maintenance of the highway along the great length that it extends, did not create the danger presented by straying animals.

via

[42] *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540 at 575-576 [81] per McHugh J; *Cole v South Tweed Heads Rugby League Football Club* (2004) 78 ALJR 933 at 944 [56] per Gummow and Hayne JJ ; 207 ALR 52 at 65.

Broughton v Competitive Foods Australia Pty Ltd [2005] NSWCA 168 -
Broughton v Competitive Foods Australia Pty Ltd [2005] NSWCA 168 -
Broughton v Competitive Foods Australia Pty Ltd [2005] NSWCA 168 -
Hunter Area Health Service v Presland [2005] NSWCA 33 (21 April 2005) (Spigelman CJ, Sheller and Santow JJA)
Cole v South Tweed Heads Rugby (2004) 78 ALJR 933
Cole v Taylor 301 NW 2d 766 (1981)

Hunter Area Health Service v Presland [2005] NSWCA 33 (21 April 2005) (Spigelman CJ, Sheller and Santow JJA)

336 Finally there is the question of principle bearing upon the reasonableness of the imposition of a duty of the kind here asserted, or the reasonableness of so extending causal responsibility. Here the law does make value judgments such as respecting personal autonomy; compare for example Gleeson CJ in *Cole* (supra) at [13] to [15] . That principle with its normative aspects necessarily underlies consideration of the extent of any duty, and the extent of causal responsibility. It is connected to the question of coherence in legal principle and values when, as here, we are considering a relatively novel extension of a recognised form of duty of care. Coherence in values (the phrase used by Gleeson CJ in *Cole* at [14]) affects the weight to be given to factors such as vulnerability and control as affecting the capacity to make impartial decisions under the Act . The statutory scheme requires the civil rights of the individual to be accommodated and balanced against the need for restraint of a mentally ill or disturbed person so affording him access to treatment in the interests of both patient and the wider community. The critical task is to assess whether the person meets the statutory description of a mentally ill person or mentally disturbed person and then ensuring that "*any interference with their rights, dignity and self-respect are kept to the minimum necessary in the circumstances*" (s4(2)(b) of the Act , quoted below).

Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Van Der Wegen v O'Callaghan [2005] WADC 26 (23 February 2005) (Martino DCJ)
Cole v South Tweeds Heads Rugby League Football Club Limited (2004) 78 ALJR 933
Commissioner for Railways v Ireland

Van Der Wegen v O'Callaghan [2005] WADC 26 (23 February 2005) (Martino DCJ)
Cole v South Tweeds Heads Rugby League Football Club Limited (2004) 78 ALJR 933
Commissioner for Railways v Ireland

Straney v Lithgow and District Workmens Club Ltd [2005] NSWSC 69 (17 February 2005) (Master Harrison)

10 In Cole & Anor v South Tweed Heads Rugby League Football Club Ltd [2004] HCA 29 (15/06 /2004); (2004) 207 ALR 52 ; Mrs Cole attended a breakfast at the Club and drank alcohol throughout the day. Some, but not all, of the alcohol was supplied by the Club. The Club manager's wife refused to serve Mrs Cole any more alcohol at about 3.00 pm. Mrs Cole was offered use of the Club' s courtesy bus and driver or, alternatively, the use of a taxi; Mrs Cole refused those offers. After Mrs Cole left the Club she was hit by a taxi and was injured.

Straney v Lithgow and District Workmens Club Ltd [2005] NSWSC 69 -
Straney v Lithgow and District Workmens Club Ltd [2005] NSWSC 69 -
TAB Limited v Atlis [2004] NSWCA 322 -
TAB Limited v Atlis [2004] NSWCA 322 -
Brophy v Dawson [2004] QSC 372 (14 October 2004) (Jones J)

20. My findings that the plaintiff has failed to show any breach of duty on the part of the defendant makes unnecessary detailed consideration of the relevant principles but I should in deference to the arguments raised make a brief reference to the appropriate duty. The general duty of care which seems to me to have been contemplated by the parties in this case is that of an occupier of premises in which customers are served intoxicating alcohol. As McHugh J (dissenting as to the question of breach) pointed out in his judgment in *Cole v South Tweed Heads Rugby League Football Club Ltd [18]* :-

> "The duty of an occupier is not confined to protecting entrants against injury from static defects in the premises. It extends to the protection of injury from all the activities on the premises. Hence, a licensed club's duty to its members and customers is not confined to taking reasonable care to protect them from injury arising out of the use of the premises and facilities of the club. It extends to protecting them from injury from activities carried on at the club including the sale or supply of food and beverages. In principle, the duty to protect members

and customers from injury as a result of consuming beverages must extend to protecting them from all injuries resulting from the ingestion of beverages. It must extend to injury that is causally connected to ingesting beverages as well as to internal injury that is the result of deleterious material, carelessly added to the beverages.

If the supply of intoxicating alcohol by a club to a customer gave 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, the club is liable for the injury suffered by the customer provided the exercise of reasonable care would have avoided the injury. That statement is subject to the qualification that the injury must be of a kind that was reasonably foreseeable. However, it is not necessary that the club should reasonably foresee the precise injury that the customer suffered or the manner of its infliction. It is enough that the injury and its infliction were reasonably foreseeable in a general way." [19]

Kirby J agreed with this statement of duty as it is presently understood. [20]

via

[19] Ibid at paras 31 , 32

Brophy v Dawson [2004] QSC 372 (14 October 2004) (Jones J)

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Kirby J agreed with this statement of duty as it is presently understood. [20]

Brophy v Dawson [2004] QSC 372 -
Brophy v Dawson [2004] QSC 372 -
Brophy v Dawson [2004] QSC 372 -
Miller v Paua Nominees Pty Ltd [2004] WASCA 220 (01 October 2004) (Murray J, Steytler J, McLure J)

Cole v South Tweed Heads Rugby League Football Club Ltd (2004) 78 ALJR 933

Miller v Paua Nominees Pty Ltd [2004] WASCA 220 -
Geroheev Pty Ltd v Wheare [2004] WASCA 206 -
Geroheev Pty Ltd v Wheare [2004] WASCA 206 -
The Hellenic Club of Canberra Limited v Youseff Omari [2004] ACTSC 67 (13 August 2004) (Master Harper)

Cole v South Tweed Heads Rugby League Football Club Limited [2004] HCA 29, 15 June 2004
ACTEW Corporation Limited v Mihaljevic

The Hellenic Club of Canberra Limited v Youseff Omari [2004] ACTSC 67 -
Edwards v Attorney General [2004] NSWCA 272 (06 August 2004) (Spigelman CJ, Mason P and Young CJ in Eq)

Cole v South Tweed Heads Rugby League Football Club Ltd [2004] HCA 29
Commissioner of Taxation v Simionato Holdings Pty Ltd

Boyded Industries Pty Ltd v Canuto [2004] NSWCA 256 (30 July 2004) (Beazley and Santow JJA, Stein AJA)

4 Recent case law in the area of negligence reveals a trend whereby greater emphasis is to be placed upon the personal responsibility of individuals for their own actions. That emphasis may be seen in *Woods v Multi-Sport Holdings Pty Limited* (2002) 208 CLR 460; *Ghantous v. Hawkesbury Shire Council* (2001) 206 CLR 512; *Cole v South Tweed Heads Rugby League Football Club Ltd* [2004] HCA 29. In *Cole* Gleeson CJ observed at [13] , that "*... the civil law [holds] a person responsible for his or her acts*". Callinan J, in dealing directly with the facts in that case, also emphasised matters of personal responsibility at [131] when he said: "*...in general... vendors of products containing alcohol will not be liable in tort for the consequence of the voluntary excessive consumption of those products...*"

Boyded Industries Pty Ltd v Canuto [2004] NSWCA 256 (30 July 2004) (Beazley and Santow JJA, Stein AJA)

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Lanahmede Pty Ltd v Koch [2004] SASC 204 (16 July 2004) (Perry, Bleby and Gray JJ)

33. In *Cole v South Tweed Heads Rugby League Football Club Ltd* Mc Hugh made the following general observations: [3]

> The common law has long recognised that the occupier of premises owes a duty to take reasonable care for the safety of those who enter the premises. That duty arises from the occupation of premises. Occupation carries with it a right of control over the premises and those who enter them. Unless an entrant has a proprietary right to be on the premises, the occupier

can turn out or exclude any entrant — even an entrant who enters under a contractual right. Breach of such a contract will give an entrant a right to damages but not a right to stay on the premises.

The duty of an occupier is not confined to protecting entrants against injury from static defects in the premises. It extends to the protection of injury from all the activities on the premises. Hence, a licensed club's duty to its members and customers is not confined to taking reasonable care to protect them from injury arising out of the use of the premises and facilities of the club. It extends to protecting them from injury from activities carried on at the club including the sale or supply of food and beverages. In principle, the duty to protect members and customers from injury as a result of consuming beverages must extend to protecting them from all injuries resulting from the ingestion of beverages. It must extend to injury that is causally connected to ingesting beverages as well as to internal injury that is the result of deleterious material, carelessly added to the beverages.

Kirby J agreed and observed: [4]

The law of tort exists not only to provide remedies for injured persons where that is fair and reasonable and consonant with legal principle. It also exists to set standards in society, to regulate wholly self-interested conduct and, so far as the law of negligence is concerned, to require the individual to act carefully in relation to a person who, in law, is a neighbour. The Club had a commercial interest to supply alcohol to its members and their guests, including the appellant. Doing so tended to attract them to an early morning breakfast, to induce them to use profitable gambling facilities in the Club's premises and to encourage them to use the restaurant and other outlets where alcohol would continue to be purchased or supplied to the profit of the Club. As McHugh J points out in his reasons, with which I agree, the common law has long recognised that the occupier of premises owes a duty to take reasonable care for the safety of those who enter the premises. That duty arises from the occupation of premises. It extends to protection from injury from all of the activities on the premises, including, in registered premises such as the Club's, the sale of alcoholic drinks.

via

[4] [2004] HCA 29 at [91]

Lanahmede Pty Ltd v Koch [2004] SASC 204 (16 July 2004) (Perry, Bleby and Gray JJ)
Cole v South Tweed Heads Rubgy League Football Club Ltd [2004] HCA 29 ; *Club Italia (Geelong) Inc v Ritchie* (2001) 3 VR 447; *Gordon v Tamworth Jockey Club* [2003] NSWCA 82; *Bragg v R.S.L.* (2003) 86 SASR 58; *Wyong Shire Council v Shirt* (1980) 146 CLR 40, considered.

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