

CaseNote

— Insurance

12 November 2009

"Restaurant Rage"
HCA decision:
Adeels Palace Pty
Ltd v Moubarak;
Adeels Palace Pty
Ltd v Bou Najem
[2009] HCA 48

The facts

On 10 November 2009 the High Court handed down its decision concerning an appeal by the licensees of Adeels Palace Pty Ltd (Adeels). They had appealed against the Court of Appeal's decision to uphold the NSW District Court's finding that they were negligent in failing to provide adequate security personnel.

By way of background, an altercation between two women developed into a fight involving a large number of people. A man was struck in the face, drawing blood. The man left the premises and returned with a gun. He shot two patrons, one being his alleged assailant, and the other an innocent bystander.

The injured men, Mr Bou Najem and Mr Moubarak (the respondents), brought proceedings against Adeels in the NSW District Court. They obtained judgment and were awarded damages. Adeels were unsuccessful in their appeal to the Court of Appeal. However, their appeal to the High Court was allowed.

Was a duty of care owed?

The High Court held that, in addition to responsibilities under the *Liquor Act 1982* (NSW) to ensure that no "indecent, violent or quarrelsome conduct" occurred on the premises, Adeels also owed a duty of care to

all patrons under the *Civil Liability Act 2002* (NSW) (the Act) to take reasonable care to prevent injury arising from the disorderly conduct of other persons.

Did Adeels breach that duty?

The respondents contended that there was a significant risk of violence given that there had been altercations outside the club and the fact that service of alcohol increases the likelihood of such conduct. Adeels ought to have been aware of this and taken greater precautions.

However, based on the evidence at trial, the High Court could not conclusively find that Adeels were aware, or ought reasonably to have been aware, that such violence may occur on the premises.

Ultimately, the High Court did not consider it necessary to determine whether Adeels breached their duty of care given that the evidence did not establish that the provision of greater security would have deterred or prevented the gunman from re-entering the premises.

Causation

Instead, the Court found it "profitable" to consider the issue of causation.

Section 5D(1) of the Act provides that, in order to determine whether negligence is the cause of the damage suffered, it must be shown that:

- (a) the negligence was the necessary condition of the occurrence of the harm (factual causation), and
- (b) it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability)

On the issue of factual causation, the Court of Appeal had concluded that, if security personnel were deployed at the entrance of the premises, the gunman would not have gained re-entry and would not have subsequently shot the respondents.

The High Court disagreed, stating that no evidence had been led to support that conclusion. The High Court considered it was unreasonable to find that security personnel could prevent, or would have prevented, the re-entry of the gunman, let alone that their presence acted as a deterrent to a person who was armed and hell-bent on revenge. The High Court stated:

"recognising that changing any of the circumstances in which the shootings occurred might have made a difference does not prove factual causation. Providing security at the entrance of the restaurant might have delayed the gunman's entry; it might have meant that ... someone else might have been shot and not him. But neither plaintiff proved factual causation by pointing to possibilities that might have eventuated if circumstances had been different."

The High Court also concluded that this was not an "exceptional case" pursuant to section 5D(2) of the Act. This section provides that, in determining whether negligence should be accepted as establishing factual causation, the Court is to consider (among other things) whether or not any responsibility for harm should be imposed on the negligent party. As such, the High Court found it was unreasonable to hold Adeels responsible in circumstances where the failure to provide security personnel was not necessarily a cause of the harm and the provision of security personnel may have (rather than would have) prevented the injuries.

Conclusion

This case confirms that the duty of care owed to patrons is of a high standard. Licensees must give careful thought to security arrangements. An allegation that the provision of any or more security personnel could have prevented a violent act from occurring must be proven on the balance of probabilities. This decision "raises the bar" for prospective plaintiffs.

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