Liability in tort for criminal conduct of a third party

TAB Limited v Atlis [2004] NSWCA 322

By Tracey Carver

The common law has always been reluctant to impose a duty to control third parties.[1] However, an occupier of land has power to control both the state or condition of the land; and those who enter and remain upon it.[2] Therefore, an occupier's duty may include not only risks arising from the condition of the premises, but may extend to protecting patrons from activities that are conducted on the premises with the occupier's knowledge.[3] As the NSW Court of Appeal in this case reconfirms,[4] such activities include the criminal conduct of others that threatens customer safety.

The first appellant (TAB Limited) operated a betting agency in Sydney managed by the second appellant (Youngman). In 1999, while visiting the agency, the respondent (Atlis) injured his shoulder and was struck on the head. These injuries occurred while he was assisting a patron (Benson) who was being attacked by one of two intoxicated entrants to the betting agency. Alcohol was not sold on the premises. During the fight, when asked by a woman to leave, the inebriates vacated the premises.

Atlis argued that the appellants negligently failed to control the presence of the two men on the premises. At first instance, the district court found for Atlis, and while the court's decision was appealed both as to liability and damages, the parties agreed to reduce the quantum of damages awarded by $20,000, to $71,189.55.

APPEAL ON LIABILITY

In holding that Atlis was owed a duty of care,[5] Ipp JA (Beazley JA concurring) considered important the:

- Appellants' power of control, which established the necessary relationship between occupier and entrant; and
- Foreseeability of harm. Youngman realised that the men's activities constituted a risk of injury to other patrons, in that if they approached the men (as Benson had done) they might react violently. This is why, prior to the altercation, he had spoken to one of the men about curbing their behaviour and subsequently observed them momentarily to ensure that things were under control.

In considering breach,[6] it was concluded that the district court's finding[7] – that the only effective measure was removing the men – could not be sustained. Given past history, there was no requirement for the TAB to employ security guards. It was also impracticable for Youngman to have personally removed two men half his age in circumstances likely to amount to assault. In addition, had the police been called, they could not have arrived in the 10 to 15 minutes it took for the fight to develop. Nor, it was found, would the mustering of other staff have added force to Youngman's request that the men behave.

Given the men's later willingness to leave the premises, it was also claimed that, had Youngman told them 'to leave or >>

the police would be summoned', Atlis's injury would not have occurred. However, notwithstanding this, no breach was found. As the men had been badly behaved only for some minutes, Youngman had to make an immediate judgement in circumstances not admitting of an obvious answer. Hence Ipp JA[8] concluded that while

> '... *Youngman may have made an error of judgement in not telling the men to go and that he would call the police immediately ... I do not think that that amounted to negligence. In my view, a finding to that effect would be an impermissible finding of negligence by hindsight.*'

While reaching similar findings to the majority in relation to duty of care and causation, Mason P (dissenting)[9] would have disallowed the appeal on the basis of breach in failing to take steps to remove the men from the premises. Given Youngman's capacity to require the men to leave, and to support this request by summoning the police, his Honour opined that such action would have been likely to prevent patrons from taking their own action; and either influence the two men to depart or act non-violently.

CONCLUSION

This decision confirms that negligence requires a failure to conform to a 'legal obligation'. Not every mistake by a defendant will sound in liability. The central criterion remains reasonableness.[10] ■

Notes: **1** *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, 263-4. **2** *Ibid,* 292 (Hayne, J). **3** See, for example, *Cole v South Tweed Heads Rugby League Football Club Limited* (2004) 207 ALR 52, 60, 72. **4** See, for example, *Chordas v Bryant* (1989) 91 ALR 149; *Crown Limited v Hudson* [2002] VSCA 28 where a duty of care to protect entrants from the criminal conduct of others has previously been found. **5** *Ibid* [12] (Beazley JA), [33-40] (Ipp JA). **6** *Ibid* [41-65] (Ipp JA). **7** *Ibid* [31], [46], [51] referring to statements made by Phegan DCJ, DC 2428/02. **8** *Ibid* [65] (Beazley JA concurring). **9** *Ibid* [2-10]. **10** See, for example, *ibid* [40], [62]; *Tame v New South Wales* (2002) 211 CLR 317, 330 (Gleeson CJ).

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General damages for 'wrongful birth'

Brown V Dr Thoo (Unreported)

By Anna Walsh

The case of *Brown v Dr Thoo* was recently decided in the NSW District Court by Sorby DCJ. This was a 'wrongful birth' medical negligence case arising from the negligent administration by the defendant of the contraceptive device 'Implanon' into the plaintiff, leading to the birth of the plaintiff's fifth child.

The plaintiff was successful. The case was novel because it was the first time that the court had been asked to decide the appropriate method of calculating the cost of raising a child to age 18 years. The court was also required to fix non-economic loss for pregnancy and childbirth as a percentage of a most extreme case, pursuant to Part 2 Division 3 of the *Civil Liability Act* 2002.

Unfortunately, damages for the costs of raising a child born as a result of negligence are no longer allowable in NSW under ss70 and 71 of the *Civil Liability Amendment Act* 2003.

THE FACTS

Following the birth of the plaintiff's fourth child in late 2001, the plaintiff decided to have the long-acting contraceptive device, Implanon, implanted into her arm. The plaintiff obtained the appropriate prescription from her obstetrician and made an appointment with her GP for insertion.

The defendant purported to insert the rod, palpated the plaintiff's arm and assured her that everything was all right. She returned to see him two days later and he again advised her that all was well. About a week later, the plaintiff became concerned that she could not feel the rod in her arm. She telephoned her obstetrician. After that discussion, she said she felt at ease.