extra-hazardous acts). A more realistic option, therefore, might be to do away with the doctrine and concentrate instead on the degree of care which an employer must exercise in such cases. If he engages an independent contractor to carry out an activity with a high risk of serious damage, then he should be placed under a correspondingly high standard of care to ensure that the independent contractor is careful. This, of course, would not sort out the muddle that surrounds the area of non-delegable duties, but it would, at least, remove one of its ingredients.

STELIOS TOFARIS

AM I MY (DRUNKEN) NEIGHBOUR'S KEEPER?

THE common law's traditional reluctance to impose positive duties to safeguard others from the consequences of their own folly or others' actions is evident in two recent High Court of Australia decisions, which considered whether operators of licensed premises owe their customers a duty to monitor their drinking or to protect them from the consequences of their own or other customers' intoxication.

In *CAL No. 14 Pty. Ltd.* v. *Motor Accidents Insurance Board* [2009] HCA 47, Sandra Scott, whose husband had died in a motorcycle accident, brought proceedings under the Fatal Accidents Act 1934 (Tas.) against CAL No. 14 Pty. Ltd. and Michael Kirkpatrick, who were respectively the proprietor and licensee of the hotel where the deceased had spent his final evening drinking. The Motor Accidents Insurance Board of Tasmania joined these proceedings seeking to recover from the defendants the statutory benefits paid to Mrs Scott. The critical issue was whether the defendants owed the deceased a duty of care. As the deceased was not a "regular" at the hotel, the claimants relied on the arrangement that the deceased had made with the defendant-licensee to leave his motorcycle in the hotel's lockable storeroom to avoid being breathalysed by the police. The defendant-licensee retained the motorcycle's keys on the understanding that the deceased's wife would drive him home. When the defendant-licensee stopped serving the deceased, the latter refused to supply his wife's contact details and insisted on riding the motorcycle home, giving assurances that he was "right to ride". The deceased's intoxication subsequently caused him to collide with a bridge guardrail. At first instance, Blow J. rejected the existence of a relevant duty of care ((2007) 17 Tas. R. 72), but on appeal Evans and Tennent JJ. (Crawford C.J. dissenting) held that the defendants owed a narrowly-formulated duty to take reasonable care to prevent the deceased riding the motorcycle while his capacity to do so

https://doi.org/10.1017/S0008197310000073 Published online by Cambridge University Press

safely was affected by alcohol ((2009) 256 A.L.R. 512). Before the High Court of Australia, the claimants' case narrowed yet further and their counsel argued that the defendants owed a duty to take reasonable care to follow the agreed method of protecting the deceased from the risks associated with driving whilst intoxicated—effectively, a duty to telephone the deceased's wife to collect him. Allowing the appeal and finding for the defendants, the court unanimously rejected any such duty and a majority also concluded that the requirements of breach and causation were not satisfied.

The court advanced a number of reasons for rejecting this narrow duty. First, as an adult male and a "moderate to heavy" drinker, the deceased was not considered especially vulnerable to the effects of alcohol, nor had the defendants "plied" the deceased with drink. Secondly, the arrangement regarding the storage of the motorcycle was merely for the deceased's convenience, was terminable at will, and did not involve the defendants assuming responsibility to take any particular steps concerning the deceased. Thirdly, a duty to protect the deceased from himself would interfere with his freedom to engage in the lawful activity of consuming alcohol and accept responsibility for the consequences of his own actions. Fourthly, a duty requiring the defendants to threaten or forcibly prevent the deceased from driving home, or to detain the deceased or the motorcycle against his will, could conflict with other torts, the law of bailment, the criminal law, and the Australian legislative regime governing alcohol. Of greater significance, however, is the court's more general consideration of the potential civil liability of licensees in connection with the supply of alcohol. In particular, the court took the opportunity to clarify its earlier view in *Cole* v. *South Tweed Heads Rugby League Football Club* (2004) 217 C.L.R. 469 that licensees owe no general common law duty to monitor or minimise their customers' alcohol consumption or to protect them from the consequences of their excess. Not only would this wider duty conflict with notions of individual autonomy and responsibility, but (short of licensees using breathalysers or keeping customers under constant surveillance) such a duty would also be unworkable in practice given the difficulties of determining whether any given individual is intoxicated.

That said, the court recognised that there might be "exceptional cases" when a licensee might owe a duty to safeguard customers from the effects of alcohol. Whilst not considering the precise circumstances in detail, the court suggested that licensees might owe a duty to safeguard intellectually impaired, mentally ill, or unconscious drinkers (as suggested in *Joy* v. *Newell* [1998] N.I.J.B. 111) or customers who are "so intoxicated as to be completely incapable of any rational judgment or of looking after himself or herself", particularly when the alcohol is

https://doi.org/10.1017/S0008197310000073 Published online by Cambridge University Press

"knowingly supplied" to the customer. Furthermore, it was recognised that licensees had a duty to ensure that their premises were physically safe and that any equipment did not injure customers. Indeed, the issue of how far this particular duty could extend arose in the second appeal considered by the High Court, *Adeels Palace Pty. Ltd.* v. *Moubarak* [2009] HCA 48, which related to gunshot wounds that the claimants had received when a fight broke out during New Year's Eve celebrations on the defendant's licensed premises. Although the High Court ultimately dismissed the claim on causation grounds, it agreed with the lower courts that the licensee owed a duty to protect customers from "the violent, quarrelsome or disorderly conduct" of others on the premises. Whilst this conclusion was largely based on the applicable Australian legislation, given the extent to which licensees can regulate access to their premises and the likelihood of violence between intoxicated customers, it is right that the duty to provide safe premises should extend beyond their physical condition to encompass those present there (as the English High Court suggested in *Cunningham* v. *Reading Football Club Ltd.* (1991) The Times, 22 March).

The clarification provided by *CAL No. 14* is certainly welcome and there are indications that the United Kingdom Supreme Court might well adopt a similar approach when considering the civil liability of licensees. First, the High Court's insistence on respecting individual autonomy by refusing to impose overly-paternalistic duties finds echoes in Lord Hoffmann's classic rejection of a general liability for failing to act in *Stovin* v. *Wise* [1996] A.C. 923. Secondly, the relationship between a licensee and his customers generally lacks the elements of control and dependence that usually characterise the situations where a positive duty to safeguard others has been imposed, such as the relationship between pupil and teacher (*Van Oppen* v. *Bedford Charity Trustees* [1990] 1 W.L.R. 235) and custodian and suicidal prisoner (*Reeves* v. *Metropolitan Police Commissioner* [2000] 1 A.C. 360). Thirdly, the English Court of Appeal has rejected the existence of any general duty upon either an operator of licensed premises to prevent a person from abusing alcohol until they collapse (*Barrett* v. *Ministry of Defence* [1995] 1 W.L.R. 1217) or a bookmaker to prevent a habitual gambler from gambling (*Calvert* v. *William Hill Credit Ltd.* [2009] Ch. 330). Unfortunately, the English position cannot yet be regarded as completely settled, since in *Jebson* v. *Ministry of Defence* [2000] 1 W.L.R. 2055, the organisers of a drunken night-out were held liable for the death of an intoxicated soldier who fell out of an army vehicle when returning to camp. Furthermore, the imposition in Canada of more onerous duties on licensees with respect to their customers' alcohol consumption (*Jordan House Ltd.* v. *Menow*

https://doi.org/10.1017/S0008197310000073 Published online by Cambridge University Press

[1974] S.C.R. 239) might yet provide a ready means of sidestepping *CAL No. 14* when the point arises. Hopefully, this course will not be taken.

Unfortunately, *CAL No. 14* leaves one significant issue open, namely whether there is similarly an absence of any general duty of care on licensees *vis-à-vis* non-customers injured by their intoxicated customers. Whilst the Supreme Court of Canada has recognised a licensee's "general duty of care to persons who can be expected to use the highways" (*Stewart* v. *Pettie* (1994) 121 D.L.R. (4th) 222), *CAL No. 14* might make such a conclusion less likely in Australia and England.

CHRISTOPHER HARE

LEGISLATE IN HASTE, REPENT AT LEISURE

AN unhappy practice of our present Government is to reform the law in demagogic dialogue with the tabloids. In response to Monday's "scandal" comes Tuesday's ministerial "pledge", and on Wednesday this is followed by an instant Bill, rushed through Parliament with inadequate debate. That legislation made like this is often unsatisfactory should need no demonstration. If it does, however, *Adorian* v. *Metropolitan Police Commissioner* [2009] EWCA Civ 18, [2009] 1 W.L.R. 1859 provides it.

When the Norfolk farmer Tony Martin was jailed for shooting down two fleeing burglars, killing one and injuring the other, he was canonised by sections of the popular press, which thought that he deserved not prison but a medal. When later it emerged that the surviving burglar, on his own release from gaol, planned to sue the farmer for damages, tabloid fury was redoubled – not abating even when the burglar decided, on reflection, to drop his claim. Responding to pressure from the Conservatives – responding in their turn to pressure from the media – the Government promptly added to their current by-now-annual Bill to "rebalance" criminal justice a new clause designed to make law-suits of this type more difficult.

In due (or undue!) course, this became law as section 329 of the Criminal Justice Act 2003. In 455 words of convoluted legislative prose, this provides that where a claimant brings an action for trespass to the person, and "the claimant has been convicted of an imprisonable offence … committed on the same occasion as that on which the act is alleged to have been done", his action shall not proceed without judicial leave. It then provides that leave shall be given only in one or other of two situations: first, where there is evidence suggesting that the

https://doi.org/10.1017/S0008197310000073 Published online by Cambridge University Press