



Am I my brother's (or sister's) keeper?:

Alcohol server liability and *Cole v South Tweed Heads Rugby League Football Club*

By Penelope Watson

Tort law is all about loss-shifting and loss-spreading. The outcome of individual cases often turns on where the line is drawn between individual responsibility and collective or corporate responsibility. Over recent years, tort 'reform' has overwhelmingly tended to shift responsibility on to injured plaintiffs. In this context, the decision in the *Cole* case is a particularly significant example.

Rosellie Cole has finally lost her ten-year fight to obtain compensation for injuries she suffered when hit by a car on her way home from an all-day drinking binge, beginning with a champagne breakfast at about 9.30am. She was run down and seriously injured some nine hours later while walking along the roadway after dark with a blood alcohol reading of 0.238. The breaches of duty alleged against the club were: supplying Ms Cole with alcohol when a reasonable person would have known she was intoxicated; and allowing her to leave the premises in an unsafe condition without proper and adequate assistance.¹ Gleeson CJ noted that both alleged breaches 'involve failure to restrain or prevent the appellant from engaging in voluntary behaviour',² thus raising the issue as to whether an affirmative duty to protect, control or rescue exists in relation to alcohol service. Ms Cole had been awarded \$420,000 by Hulme J in the NSW Supreme Court, with liability apportioned 30% each to the car driver and club, and 40% to the plaintiff. The NSW Court of Appeal³ held her fully responsible, and the High Court agreed 4:2, with McHugh and Kirby JJ dissenting.

FACTS

The majority of the High Court accepted the view of the Court of Appeal (contrary to that of the trial judge), that there had been no supply of alcohol by the defendant after 12.30pm, six hours before the injury occurred. At that time there was no reason for the server to regard the plaintiff as significantly intoxicated.⁴ Ms Cole apparently continued to drink, becoming 'totally inebriated' and 'an embarrassment.'⁵ Views differed as to the source of the later alcohol.⁵ When she next attempted to buy a drink, at 3pm, she was refused service, and was finally asked to leave the premises at 5.30pm because of disorderly behaviour. At that time she was 'very, very drunk ... [and] being held up by someone else',⁶ in the opinion of the club manager. The club offered to call a

taxi or provide a courtesy bus to take her home, which was their standard procedure. She refused both, telling the manager to 'get f***ed', and left in the company of two 'reasonably sober' recent acquaintances who had said they would look after her.

INDIVIDUAL AUTONOMY AND PERSONAL RESPONSIBILITY

The majority judgments stressed individual responsibility, free will, personal autonomy and choice in denying or avoiding a decision on a duty of care. 'On the whole people are entitled to act as they please, even if this will inevitably lead to their own death or injury.'⁷ According to Gleeson CJ, 'this principle gives effect to a value of the law that respects personal autonomy ... privacy and ... freedom of action,'⁸ and to impose a duty on alcohol servers would involve 'both an unacceptable burden upon ordinary social and commercial behaviour, and an unacceptable shifting of responsibility for individual choice'.⁹ Callinan J expressed similar views, while Gummow and Hayne JJ regarded it as 'inappropriate' and unnecessary to decide the existence or content of any duty.

Gleeson CJ rejected the existence of any general duty of care on servers to protect adults from the risk of physical injury resulting from self induced intoxication, but went on to add that 'if there were, it would be difficult to see a basis in legal principle, as distinct from legislative edict, by which it would be confined to commercial supply'.¹⁰ He referred to the 'burdensome practical consequences', and the fact that the supplier of alcohol, in either a 'commercial or social setting' is 'in no position to assess the risk ... [whereas] the consumer knows the risk'. Social host liability – that is, liability arising in non-commercial settings involving alcohol – is a familiar concept in both USA and Canadian tort law, but has not been tested as yet in Australia. Callinan J said 'the law should not recognise a duty of care to protect persons from harm caused by intoxication following a deliberate and voluntary decision ... to drink to excess ... exercising autonomy for which that person should carry personal responsibility in law'.¹¹

Tort law is all about loss-shifting and loss-spreading. It is one mechanism for determining whether and when the loss that falls on a given individual will be transferred to others in the community. This transfer to defendants in negligence is achieved primarily through the attribution of fault, or relationships giving rise to strict liability. In most cases, transfer occurs to the community more broadly through 'an intricate series of economic links',¹² notably insurance, taxation, and pricing of goods and services. The fundamental issue is where to draw the line between individual responsibility and community or collective responsibility for injury. So-called 'tort reform' in recent years has drawn the line much more stringently against injured plaintiffs, making the decision in *Cole* hardly surprising.

Talk of personal choice and freedom is often a mask for denial of community responsibility for activities of dubious social worth, which benefit strong commercial interests and provide government revenue. The tobacco and alcohol

industries are both cases in point. Abuse of alcohol is a social and public health problem of major proportions in Australia. It derives from a cultural context which views excessive alcohol consumption as a sign of manhood and maturity, and is part of the Australian national myth¹³ going as far back as the First Fleet, the Rum Corps and Rum Rebellion. In 1997, for example, Australia had the second highest per capita consumption of absolute alcohol of the English-speaking countries, second only to the UK, and more than 3,600 Australians died due to the effects of alcohol.¹⁴

Alcohol abuse is heavily implicated in motor vehicle accidents, loss of productivity in the workplace, crime, violence, and diseases such as cancer, liver cirrhosis, brain damage, and heart disease.¹⁵ It has enormous cost implications for the public health system, policing and the criminal justice system, and society generally. As such, an individual's decision to drink to excess must be seen as going well beyond the limits of personal autonomy, and intruding into the collective sphere. In the words of Kirby J, 'the withered view of community and legal neighbourhood propounded by Gleeson CJ and Callinan J is one that I would reject'.¹⁶

DISSENTING VIEWS

McHugh J arrived at his decision by means of 'the rigorous application of basic negligence doctrine'. He said, 'Once it is seen that the club had a legal duty to prevent [Ms Cole] drinking herself into a state where she was liable to suffer injury ... the club had a legal responsibility for the injury. Instinct must give way to the logic of the common law.'¹⁷ Much of his reasoning was based on principles of occupiers' liability. As with other groups such as employers, teachers, and professional persons who have rights of control over others, 'the duty owed by clubs to entrants extends to taking affirmative action to prevent harm'. The duty of an occupier '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 ... [including] injury that is causally connected to ingesting beverages'.¹⁸ If the supply of alcohol to a customer gives rise to 'a reasonable possibility' of that customer suffering a type of injury not likely to be suffered by a sober customer, the club will be liable where the exercise of reasonable care would have avoided the injury.

The crux of McHugh J's opinion is that 'the club had an affirmative duty to take steps to prevent [Ms Cole] from drinking'.¹⁹ While not denying the common law's recognition of the principle of autonomy, he saw affirmative duties as one of the most important exceptions. A duty of the type contemplated by McHugh J extends far beyond mere refusal of service, or offers of transport to intoxicated patrons. In his view, the club breached its duty long before Ms Cole left the premises, by failing to prevent further drinking. The patron's abusive rejection of the offer of transport was not a novus actus breaking the chain of causation, since it was 'just the kind of response that might be expected to flow from the club's breach of duty'.²⁰ In Kirby J's view, assumptions about free will require re-examination in the context of alcohol, >>

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since by its very nature alcohol can 'impair, and eventually ... destroy, any such free will. This fact imposes clear responsibilities upon [sellers or suppliers] to moderate the quantity of supply; to supervise the persistent sale or supply to those affected; and to respond to, and ameliorate, the consequences ... when it is clear that the recipient ... [is unable] to take proper care for ... her own safety.'²¹

STRATEGIES FOR ALCOHOL CONTROL

A range of strategies is available to combat alcohol abuse, centred around education, environmental features, deterrence, and/or regulation. Licensing laws, regulation of opening hours and drinking ages, taxation and other financial imposts, deterrence programs such as random breath-testing, educative programs, drug and alcohol summits, all have a part to play. In the USA, dram shop liability laws²² date from the temperance era in the late 19th century and have featured widely since the 1980s. These hold alcohol-servers responsible for harm that intoxicated or underage patrons cause to other people, or in some cases, themselves. These laws are established at the state level through common law, legislation, or both, and vary considerably in terms of liability imposed.²³ Mandated server training, such as that introduced in Oregon in the early 1990s,²⁴ is also a feature in some states. Voluntary server intervention began in Australia with Queensland's Patron Care Program in 1981, and extended nationally in 1990 with the 'National Guidelines for Responsible Service'. Various industry codes of practice are also in place, as well as legislation such as the *Registered Clubs Act 1976* (NSW). In Canada, by the late 1970s, a 'coalition of factors created a legal and social environment that fuelled a rapid expansion in the number and kinds of alcohol liability claims'.²⁵ These were based on established tort principles, reflecting 'broader developments in tort law and a hardening of public attitudes towards alcohol-related harms'.²⁶ Significant cases include *Jordan House Ltd v Menow*,²⁷ *Stewart v Pettie*,²⁸ *Chordas v Bryant (Wellington) Pty Ltd*,²⁹ and *Munro v Porthkerry Park Holiday Estates Ltd*.³⁰

CONCLUSION

Tort law is a powerful tool for articulating values, educating, and bringing about social change, as well as for delivering compensation. One of its purposes is 'to set standards in society, to regulate wholly self-interested conduct, and ... in negligence ... to require the individual to act carefully in relation to a person who, in law, is a neighbour'.³¹ The action finally taken by the club in *Cole* was 'an instance of too little, too late'.³² The choice facing the court was either to accept 'that the law imposes a duty of care on those in effective

control ... (the Club and its employees) or it transfers responsibility solely to a person whose capacity to exercise responsibility had been repeatedly and seriously diminished ... by the type of conditions that existed in the club's premises'.³³ By defining alcohol abuse narrowly as an individual rather than a community problem, the High Court has missed an opportunity in *Cole* to send a message 'that control is not just a formal duty imposed ... by Parliament [and] unlikely to be prosecuted often'. Placing the onus on servers as in Canada is fair and reasonable because they are the beneficiaries of alcohol sales, as well as being in a strong position to control its use, minimise risks, and spread costs. The majority's denial of collective responsibility 'is not the concept of the law of tort that I hold'.³⁴ ■

Notes: **1** *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29, per Gleeson CJ at para 2. **2** *Ibid*, at para 3. **3** *South Tweed Heads Rugby League Football Club v Cole* (2002) 55 NSWLR 113, Heydon and Santow JJA and Ipp AJA. **4** Thus there was no breach of the *Registered Clubs Act 1976* (NSW), s44A which makes it an offence to supply alcohol to intoxicated persons. Breach of statutory duty was not argued. **5** The trial judge's findings included later supply of a bottle of wine by the club, which the Court of Appeal regarded as an unwarranted inference. Callinan J described the evidence as 'far from clear' on how much of the alcohol consumed by the appellant was supplied by the club. **6** At para 114. **7** *Reeves v Commissioner of Police of the Metropolis*, [2000] 1 AC 360, per Lord Hope of Craighead at 379-80. **8** *Cole*, per Gleeson CJ at para 14. **9** *Ibid*, at para 18. **10** At para 17. **11** At para 121. **12** *Dimond v Lovell* [2000] 2 All ER 897 (HL), per Lord Hoffman at 907-8. **13** Room R, 'The Dialectic of Drinking in Australian Life: From the Rum Corps to the Wine Column' (1988) 7, *Australian Drug and Alcohol Review*, 413-37. **14** 'Alcohol Use In Australia', *My Doctor*, Australian Drug Foundation, 2002. **15** Edwards G et al, *Alcohol Policy and Public Good*, Oxford University Press, 1994. **16** At para 93. **17** At para 46. **18** At para 31. **19** At para 39. **20** At para 43. **21** At para 90. **22** See J F Mosher, *Liquor Liability Laws*, New York, 1987, containing the text of liability laws for each state and updated annually. **23** 'Brief Review of the Literature on Dram Shop Liability Laws,' *Alcohol-Related Injury and Violence*, <http://www.tf.org/tf/alcohol/ariv/reviews/dram5.html> **24** H Holder and A C Wagenaar, 'Mandated Server Training and Reduced Alcohol-Involved Traffic Crashes: A Time Series Analysis of the Oregon Experience', National Commission Against Drunk Driving, (1994) 26 *Accident Analysis and Prevention*, pp89-97. **25** R Solomon and J Payne, 'Alcohol Liability in Australia and Canada: Sell, Serve and Be Sued', *Tort Law Review* 4, 1996, p188. **26** *Ibid*. **27** [1974] SCR 239. **28** [1995] 1 SCR 131. **29** (1988) 20 FCR 91. **30** [1984] TLR 138. **31** Per Kirby J at para 91. **32** Per Kirby J at para 104. **33** *Ibid*. **34** *Ibid*.

Penelope Watson is a lecturer in the Division of Law, Macquarie University. **PHONE** (02) 98507071
EMAIL penelope.watson@mq.edu.au