

'But for' causation

Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem

[2009] HCA 48; (2009) 84 ALJR 19

By Dallas Morgan and Kasarne Robinson

In the early hours of 1 January 2003, a dispute broke out between two women on the dancefloor of Adeels Palace at a New Year's Eve function. The fight escalated, with friends, relatives and onlookers joining in. One man, who was struck in the face, left the restaurant and returned with a gun. He shot two other patrons, with one of whom he had been in the physical altercation earlier. It was not a disputed fact that there was no dedicated security staff present for the function.

The claims for damages by both of the men who were shot were initially successful. An appeal from the trial judge's decision was dismissed, but upheld by the High Court.

DUTY OF CARE

The High Court held that the hotel owed a duty of care to patrons to take reasonable care to prevent injury occurring from the violent, quarrelsome or disorderly conduct of other persons, a duty supported by the *Liquor Act 1982* (NSW).

BREACH OF DUTY

The High Court was not prepared to reach a conclusion as to whether breach of duty of care was established by the plaintiffs, but only to make some general observations (at [40]). The Court stressed that this question had to be resolved by application of the *Civil Liability Act*, s5B (CLA).

CAUSATION

The High Court held that the evidence did not show that the provision of additional security would, on the balance of probabilities, have prevented the injuries suffered by the plaintiffs. The evidence only went so far as to show that extra security might have prevented the damage caused by the gunman. The High Court held that s5D of the CLA required the plaintiffs to establish that Adeels Palace's negligence in failing to provide sufficient security was a necessary cause of the damage they each suffered, which they failed to do.

GENERAL PRINCIPLES

The principles that can be extracted from the judgment are:

1. Occupiers of licensed premises owe a duty of care to take reasonable care to prevent injury to patrons from the violent, quarrelsome or disorderly conduct of other patrons.
2. The test of causation under s5D(1) of the CLA is an application of the 'but for' test.

3. Breach of duty is to be considered only by reference to the CLA (s5B).
4. Causation is to be considered only by reference to the CLA (s5D).
5. Consideration of causation being established on the basis of a 'material contribution' may only have relevance to an application of s5D(2) CLA.
6. In cases of harm caused by the criminal conduct of third parties, where there exists a duty of care such as that owed by operators of licensed premises, the plaintiff must satisfy s5D(1) CLA.
7. The class of case attracting the operation of s5D(2) as being 'exceptional' is as yet undefined. Although the Court referred to asbestos inhalation cases as the likely intended class of case, this must be wrong given their express exclusion from the operation of the CLA.

BACK TO THE 'BUT FOR' TEST

An important analysis of the 'but for' test of causation was made in *March v Stramare* (1991) 171 CLR 506, particularly by McHugh J at 525-37.

In *March v Stramare*, the court was unanimous in holding that causation was established, although McHugh J did so by applying the 'but for' test in language bearing a close resemblance to the provisions of s5D. Closer analysis of these judgments is, in our view, warranted, given the resurrection of 'but for' as a test of causation in cases governed by the CLA. By a majority of 4:1, criticism was levelled at the application of the 'but for' test as the sole test of causation. McHugh J dissented on that issue, but not in the result. He held that the 'but for' test was to be seen to be the 'threshold test' of causation, and supported the finding of causation in that case in any event. Of the various criticisms levelled at the utility of the 'but for' test by the other four judges, those highlighted are, in the authors' view, situations that ought to place a matter in the 'exceptional' category and thus attract the operation of s5D(2) CLA. Such a case ought to be categorised as 'exceptional' where the 'but for' test of factual causation leads to absurd or unjust results. ■

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