

Duty of care and the good Samaritan

Lanahmede Pty Ltd v Koch [2004] SASC 204

By Penny Kaempf

This is a recent decision of the Full Court of the South Australian Supreme Court on appeal from a decision of a single judge in the District Court. It touches on two particular issues of interest – the extent of the duty of publicans to their patrons, and whether patrons who expose themselves to risk by assisting to control unruly customers are guilty of contributory negligence.

The appeal was unanimously dismissed.

THE FACTS

Stephen Koch, the plaintiff (and respondent on appeal), was an employee of a local winery. He was with a group of workmates who attended the defendant/appellant's hotel, Hotel Lyndoch, following Christmas break-up celebrations on 18 December 1998.

A young man, who was one of the party from work, became involved in an altercation with a fellow drinker at the hotel. Mr Koch, who was the young man's supervisor, attempted to mediate, but eventually removed the young man from the premises with the assistance of the hotel manager, forcibly taking the young man outside. The hotel manager then returned inside, leaving Mr Koch and the young man outside. The young man attempted to return to the hotel but was restrained by Mr Koch. A struggle ensued on the grassed area in front of the hotel adjacent to a main road. Between the road and the hotel building the ground was built up with concrete sleepers and a grassed area in front of the hotel verandah. During the scuffle, as Mr Koch and the young man rolled towards the road, Mr Koch caught his foot behind the sleeper which was loose. He then fell on top of the young man onto the road. The dislodged concrete sleeper in turn fell on Mr Koch's lower leg and foot, causing an ankle injury.

HOTEL'S DUTY OF CARE, BREACH AND FORESEEABILITY

Justice Bleby in a separate judgment on the issue of liability only, found that there was no breach of duty of care by the defendant or its employees in failing to eject the young man prior to the time when he was restrained by the respondent. He then went on to say, 'Furthermore, without much more evidence as to the available options, I would not be prepared to hold that a duty of the defendant or its employees to control unruly patrons extended beyond the boundaries of

the licensed premises.'

Despite this, he found that the hotel failed to properly maintain the retaining wall and the immediately adjacent surfaces and that this was an inherently dangerous situation. He would not, however, find that the hotel was negligent in failing to erect a fence, as the District Court judge had found.

Justice Gray, with whom Justice Perry agreed, found that the hotel had a duty to control unruly or disorderly patrons, and that for the hotel to leave the unruly patron on the verandah and grassed area fighting with Mr Koch was a breach of their common-law duty of care.

His Honour stated that, 'it was not far-fetched or fanciful for the defendant to foresee that fighting, scuffling, wrestling and the like might occur between patrons. If this arose on the grassed area the danger created by the condition of the top sleepers, the hollowing of the ground and the lack of any adequate barrier or fencing of the vertical drop was foreseeable.'

He went on to say, 'The precise circumstances of an incident need not be foreseen. The incident that occurred in the present case could not be said to be extremely likely to occur. The risk in the present case could be described as an obvious risk.' He then concluded that 'the incident was reasonably foreseeable'.

CONTRIBUTORY NEGLIGENCE: 'GOOD SAMARITAN'

The appellant contended that Mr Koch was guilty of contributory negligence. The judge at first instance rejected this contention on the basis that Koch's behaviour was reasonable in the circumstances and that he was merely assisting the hotel to prevent the young man re-entering the hotel, a task the judge considered should have been undertaken by the hotel.

On this point Justice Gray commented, 'In a sense, Mr Koch acted as a good Samaritan. He was attempting to protect the young man from further trouble. At the same time he attempted to subdue the young man in the interests of the defendant. These circumstances do not give rise to any basis for a finding of contribution.' ■

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