

SUPREME COURT OF QUEENSLAND

CITATION: *Brophy v Dawson & Anor* [2004] QSC 372

PARTIES: **MAURICE JOSEPH BROPHY**
(Plaintiff)
v
BRETT WILLIAM DAWSON and MERIDA MARGARET DAWSON
(First Defendant)
FIDEL GIL
(Second Defendant)

FILE NO/S: 67 of 2000

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court Cairns

DELIVERED ON: 14 October 2004

DELIVERED AT: Cairns

HEARING DATE: June 2004

JUDGE: Jones J

ORDER:

[1] **Judgment for the defendant against the plaintiff.**

[2] **Adjourn the question of costs to allow parties to make submissions within the next 14 days.**

CATCHWORDS: TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE - SPECIAL RELATIONSHIPS AND DUTIES- OCCUPIERS - Where the first defendants operated hotel - where the plaintiff was a patron of the hotel - where plaintiff injured as a result of being struck in the face with a beer glass held by the second defendant - consideration of hotel occupier's duty of care to patrons - consideration of statutory and common law duties of care - consideration of foreseeability of damage - consideration of contributory negligence - consideration of assessment of damages - consideration of extent of injury and loss of earning capacity - whether the first defendants owed a duty to take reasonable care to monitor and moderate amount of alcohol served to the second defendant — whether the first defendant owed duty of care to take reasonable care to monitor the second defendants behaviour

Liquor Act 1992 (Qld) s156

Cole v South Tweed Heads Rugby League Football Club Ltd
(2004) HCA 29 followed

COUNSEL: Mr J Lee for the plaintiff

Mr R Dickson for the first defendants

SOLICITORS: Keith Scott & Associates for the plaintiff

Miller Harris Lawyers (Cairns) acting as Town Agents for
Campbell Standish Partners for the first defendants

- [3] On Saturday 15 November 1997 at the Great Northern Hotel, Gordonvale, the plaintiff suffered penetrating wounds to both his eyes. This occurred during an altercation between himself and the second defendant, Fidel Gil, who thrust a beer glass into the plaintiff's face.
- [4] On 11 December 2000 the plaintiff entered a default judgment against the second defendant (hereinafter "Gil") for damages to be assessed but has yet to pursue that assessment.
- [5] The plaintiff by this hearing proceeds with a claim against the first defendants ("the defendants") who were responsible for the operation of the hotel, the first named defendant being the nominee for the purposes of the *Liquor Act 1992*.
- [6] The amended statement of claim alleges that the assault by Gil was caused or contributed to by a breach of contract or by the negligence of the defendant by reason of –
- (a) Failing to employ sufficient security staff to ensure the safety of the plaintiff;
 - (b) Allowing Gil to enter the hotel when he was affected by alcohol and therefore constituting a danger to hotel patrons;
 - (c) Inviting and or allowing Gil to remain in the hotel when he was affected by alcohol.
 - (d) Actively inducing Gil to become affected by alcohol by selling alcohol to him;
 - (e) Failing to recognise Gil's propensity to assault the plaintiff and failing to take any proper steps to prevent such assault;
 - (f) Causing or allowing a combination of factors which increased the risk of physical injury to the plaintiff.
- [7] In the course of addresses, counsel for the plaintiff conceded that the plaintiff's success in the action against the defendants depended upon his establishing a breach of a general duty of care. The plaintiff asserts that the behaviour of Gil was such that the defendants ought to have foreseen that there would be a confrontation between Gil and the plaintiff of a kind which gave rise to a risk of injury.
- [8] Mr Gil was a live-in guest at the hotel. As a consequence he was frequently in the public areas of the hotel which he used for drinking and for recreation.

- [9] At the time of these events the ground floor layout of the hotel consisted of a public bar, a private bar known as “Barra Bill’s”, a bottle shop area and a larger area containing a pool table which, for convenience, I will refer to as the pool room. The layout of the private bar is depicted in a sketch, ex 25. During ordinary trading periods there was direct access between the private bar area and the pool room. However, this access could be closed off by means of a demountable folding partition. This partition was routinely closed at the close of trading. Mr Valinoti was the bar manager on the night in question. He recalls closing this demountable partition sometime before the incident.¹ Whether the partition was closed or not patrons using the pool room could gain service from the private bar by means of a servery which was, in effect, a half door with a small bench on top. This door could be opened to allow the bar staff access to and from the pool room.
- [10] The behaviour of Gil on that evening was the subject of evidence from a number of witnesses. Also there was an allegation from a Mr Norman Birkett that Gil had engaged in threatening behaviour at the hotel on an occasion two weeks before the subject incident. Mr Birkett described how after some argument between Gil and another person, Gil picked up a bar stool over his head and shaped as if going to hit the other person. Mr Birkett claims he took the stool from Gil and put it down.² Mr Birkett also claimed that he reported this incident to Brett Dawson, the first named defendant, to Mr Valinoti, bar manager and Mr Innes, bar attendant. Mr Valinoti recalls Mr Birkett mentioning something like that to him but he had no recollection of the incident.³ Ms Julie Stringer who is also employed as a bar attendant recalls being told of some such incident.⁴ Mr Innes however had no such recollection.
- [11] The second incident referred to by the plaintiff as indicating that the behaviour of Gil required some mentoring or intervention by the defendants occurred a few hours before the subject incident. Gil and another hotel guest, Glen Evans, were playing pool with a person named Hayden Holmes. During the course of a game between Evans and Holmes an argument developed. Apparently this argument was somewhat heated and attracted the attention of Mr Valinoti. He heard some shouting and he intervened. The dispute was about the application of the rules of the rule and Mr Valinoti adjudicated on this dispute. After that he said, “They all just went back to playing the game as they were.”⁵
- [12] Mr Holmes’ recollection differs, he described the exchange between himself and Evans as being somewhat heated and that after the adjudication of the rules he left them and went into the private bar area.⁶ Mr Courtney also witnessed this event but he recalled that it was Mr Innes rather than Mr Valinoti who adjudicated on the dispute. He interpreted Gil’s behaviour in the course of this dispute as “was silently aggressive”⁷. The circumstances were concerning enough for him to decide to leave the premises.
- [13] The only comment made about Gil’s behaviour after that time relates to both he and Evans generally making smart comments, a practice for which they appeared to

¹ Transcript 229/40

² Transcript 142/20

³ Transcript 236/40

⁴ Transcript 178/50

⁵ Transcript 227

⁶ Transcript 195/1

⁷ Transcript 132/1

have gained a reputation. Mr Valinoti described the ambience in this area of the hotel in the following exchange:-

“After that incident (in the pool room) was there, to your knowledge, any other incident that took your interest that night before Mr Brophy arrived? -- No, it’s been a night that seemed to go pretty smoothly and nothing happened.

In that time, from the time of that incident until the time Mr Brophy arrived – what was the behaviour of Mr Gil like? How would you describe it? – Just his normal behaviour. He’s a bit cocky. A bit of a mouth about him ---- bit of a mouth, like, you know, cheeky to the bar maids and that sort of stuff. But other than that nothing out of the unusual that night.”⁸

- [14] I find there was nothing in the behaviour of Gil on that evening which, to the time of the plaintiff’s arrival, would have required the hotel staff to intervene. There is no evidence to suggest that Gil was intoxicated or unable to control his actions. It seems that Gil had spent most of the day in the hotel premises but given the circumstances that he resided there I do not conclude that he was drinking throughout the whole of that time. Witness Wayne Nicholls observed Gil during the course of the evening. He had seen Gil drinking in the hotel on previous occasions and had occasionally seen Gil affected by alcohol. His comment on Gil’s state on this particular evening was that he was “a bit more chirpy than usual”⁹ and was “making a lot more comments, being very smart.”¹⁰ A feature of the hotel’s entertainment that evening was the presence of a topless bar attendant. This fact may have explained these noticed differences in Gil’s behaviour.
- [15] The plaintiff on that evening attended a presentation night dinner for his fishing club. He in fact received one of the awards. After the dinner he and his companions were intending to return to their home but on the way met Mr Lucy and Mr Courtney whom they invited to share a drink with them. The plaintiff and Ms Stringer returned to the hotel to purchase some takeaway drinks and whilst there, decided to have a drink with some of the hotel patrons in the private bar and with some of the hotel staff with whom Ms Stringer worked. For this purpose the plaintiff and Ms Stringer and others were sitting in the private bar area. It seems that Gil and his friend Evans were in the pool room adjacent to the half door servery.
- [16] When the plaintiff came into the private bar area Gil made a smart remark referring to the plaintiff, saying, “We’ve got a hero in the bar.”¹¹ This was a reference to an earlier event when the plaintiff received some publicity for rescuing from drowning a three year old boy who had fallen into the Johnstone River.¹² The plaintiff interpreted this remark as being sarcasm directed to himself.¹³ He responded by saying that anybody in his position would have done the same. The plaintiff and his companion finished their drink and having purchased their takeaway drinks were intending to leave. By this time the hotel staff (Valinoti and Innes) had closed the

⁸ Transcript 227/40-55

⁹ Transcript 124/45

¹⁰ Transcript 127/10

¹¹ Transcript 46/50

¹² See ex 16

¹³ Transcript 36/32

partition between the private bar and the pool room and were in the process of closing off tills and securing the hotel.

- [17] As the plaintiff and his companion Ms Stringer were about to leave the hotel premises Gil made an offensive remark about Ms Stringer.¹⁴ The remark was not heard by Ms Stringer but it was by the plaintiff and he found it, “very insulting to his girlfriend”. The plaintiff proceeded back to the bar, put the bag of drinks he was carrying on the bar, and noted that Gil had stepped away from the servery. The plaintiff then climbed up onto the bar, stepped from that onto the servery and was in a crouching position intending to get down from servery when he was struck in the face by the beer glass. The plaintiff said that he got onto the servery in order to confront Gil about his remarks. It is obvious that the plaintiff’s movements of jumping onto the bar and across to the servery were very quick. These movements were witnessed by Mr Valinoti who had just come into the private bar from the bottle shop area. His evidence reads:-

“What was he [the plaintiff] doing? – Jumping the bar, but I don’t know what he was doing ‘cos his back was to me.

When you say “jumping the bar”, what does that mean? -- Well, he went from – leaping across the bar.

And how would you describe it in terms of speed? – Oh, it happened very quickly.”¹⁵

Mr Valinoti did not hear the remark that prompted the plaintiff’s action nor was there any time for either him or any other member of the hotel staff to intervene. Mr Innes was also returning to the private bar area from the bottle shop, the first recall he had was of seeing the plaintiff on the servery.¹⁶

- [18] On the evidence before me I can find no conduct on the part of Gil to indicate that he was likely to be a source of danger to hotel patrons that evening. The incident concerning the pool rules was a single event that did not involve Gil directly and did not have any aftermath once it was settled. Gil’s subsequent behaviour in making smart comments were not said to be so offensive as to require intervention of the hotel staff. Ms Stringer gave evidence that she did not anticipate any trouble from Gil at all.¹⁷ There is no evidence to suggest that Gil was adversely affected by liquor at the time of this incident or at any earlier time. It was the plaintiff who put himself in the position of danger and he did so quickly and by taking a route across the bar which could not reasonably have been anticipated by hotel staff. I find that the assault on the plaintiff was a consequence of Gil’s reaction to the plaintiff’s own conduct in moving into the position he did with the speed at which he did.
- [19] I find that the plaintiff has not made out any of the particulars upon which it relies to establish a breach of duty of care on the part of the defendants.
- [20] My findings that the plaintiff has failed to show any breach of duty on the part of the defendant makes unnecessary detailed consideration of the relevant principles but I should in deference to the arguments raised make a brief reference to the

¹⁴ Transcript 37/13

¹⁵ Transcript 233/1-10

¹⁶ Transcript 216/10

¹⁷ Transcript 183/15-25

appropriate duty. The general duty of care which seems to me to have been contemplated by the parties in this case is that of an occupier of premises in which customers are served intoxicating alcohol. As McHugh J (dissenting as to the question of breach) pointed out in his judgment in *Cole v South Tweed Heads Rugby League Football Club Ltd*¹⁸:-

“The duty of an occupier is not confined to protecting entrants against injury from static defects in the premises. It extends to the protection of injury from all the activities on the premises. Hence, a licensed club’s duty to its members and customers is not confined to taking reasonable care to protect them from injury arising out of the use of the premises and facilities of the club. It extends to protecting them from injury from activities carried on at the club including the sale or supply of food and beverages. In principle, the duty 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. It must extend to injury that is causally connected to ingesting beverages as well as to internal injury that is the result of deleterious material, carelessly added to the beverages.

If the supply of intoxicating alcohol by a club to a customer gave rise to a reasonable possibility that the customer would suffer injury of a kind that a customer who was not under the influence of liquor would be unlikely to suffer, the club is liable for the injury suffered by the customer provided the exercise of reasonable care would have avoided the injury. That statement is subject to the qualification that the injury must be of a kind that was reasonably foreseeable. However, it is not necessary that the club should reasonably foresee the precise injury that the customer suffered or the manner of its infliction. It is enough that the injury and its infliction were reasonably foreseeable in a general way.”¹⁹

Kirby J agreed with this statement of duty as it is presently understood.²⁰

- [21] In the light of my finding the duty imposed by the *Liquor Act* 1992 prohibiting the service of liquor to a person who is “unduly intoxicated or disorderly” pursuant to s 156 does not apply in the circumstances of this case.
- [22] On the facts as I have found them to be, the plaintiff has not satisfied me that there was any breach of duty as defined above. Consequently there will be judgment for the first defendant against the plaintiff.
- [23] I shall turn then to the assessment of quantum.

Quantum

- [24] The plaintiff was born on 6 May 1965. Thus, at the time of the incident he was 32 years old and is now 39 years.

¹⁸ (2004) HCA 29

¹⁹ Ibid at paras 31, 32

²⁰ Ibid at para 91

- [25] As a result of the injury to his left eye, it was enucleated on 24 November 1997 and he was subsequently fitted with a prosthesis. At the same time as that operation the lensectomy /vitroectomy procedure was performed on his right eye. In the ensuing years the condition of his right eye has stabilised. Fortunately he is able to achieve a 6/6 visual acuity in that eye corrected by use of aphakic spectacles. The plaintiff continues to have the difficulties associated with having only one functioning eye. Further, he remains at risk of developing the uncommon condition (1 in 8000) of sympathetic ophthalmia which could result in total blindness.²¹
- [26] The plaintiff suffers from some minor scarring disfigurement from the laceration caused during the assault and from a psychiatric injury the extent of which is subject to some contention. Dr Curtis who examined the plaintiff in December 1997 and again on 11 June 2004 assessed the plaintiff as initially suffering severe depression from which he has made a good recovery. Dr Curtis opines that the plaintiff continues to suffer mild residual depression related to his visual deficiencies and an adjustment order which is in remission.
- [27] Dr Elkhorn, psychiatrist, interviewed the plaintiff on 16 July 2002. He also had recourse to a history taken by Ms Gilders, psychologist. Dr Elkhorn opined that the plaintiff suffered an adjustment disorder with depressed and angry mood and that he also suffered from alcoholism which predated the injury. There is little difference in the opinions as to the plaintiff's present condition but Dr Elkhorn's assessment of the plaintiff's pre-morbid condition appears to have been unduly influenced by the information which he received from Ms Gilders' report.
- [28] I accept that the plaintiff had severe depressive reaction and that this resulted in increased alcohol abuse after the incident. I accept that the plaintiff has made a good recovery from his depressive illness. That, bespeaks a "good pre-morbid personality structure" to which Dr Curtis referred.²² I am not convinced that the plaintiff had any endemic problem with alcohol prior to the accident. The plaintiff was a very active man pursuing a number of hobbies and sports. He was also engaged in the hospitality industry particularly on Dunk Island and no doubt had a higher than average opportunities to consume alcohol.
- [29] The plaintiff's leisure activities included the pursuit of hobbies and sports. He particularly enjoyed fishing, polo cross, riding race horses, cricket and touch football. Many of these sports are now denied him and in his pursuit of others he is much more limited than previously.
- [30] I assess general damages at **\$70,000**.
- [31] Taking into account that most of the effects of the disabilities as suffered by the plaintiff in the past but as well taking into account his receipt of \$15,000 in mid 1999, I allow interest on \$30,000 of the general damages at 2% per annum for seven years. This computes to an allowance of **\$4,200**.

Economic loss

- [32] The plaintiff, after leaving school, obtained qualifications in hotel management and thereafter undertook an apprenticeship as an electrical fitter/mechanic. He

²¹ Report Dr Atkinson ex 2

²² Ex 3 at para 9.5

completed that apprenticeship in 1988. He found work in various capacities at Mulgrave Central Mill and in construction work at Dunk Island. He has also worked on construction sites at Green Island and at Kalimantan, Borneo. He worked as a deck hand and during that time obtained Master Certificate V which allowed him to be a skipper on vessels not exceeding 22 metres with a range of 100 nautical miles from any safe port or haven. The plaintiff also worked as a truck driver for a period in Sydney. As a consequence of his receiving these injuries the plaintiff was precluded from working at all until May 1999. Thereafter he has worked in reduced capacities in various activities for rates which have been identified in the defendants' submissions on the quantum of damages. I accept those submissions as most accurately depicting the appropriate allowance for past economic loss. I would allow past economic loss in the sum of **\$115,000** with interest on that sum, after discounting for Centrelink payments, allowed at **\$30,000**.

- [33] The plaintiff has also lost employer superannuation contributions which should be assessed at 7% of the economic loss total. This calculates to an allowance of **\$8,050**.

Future economic loss

- [34] As has been recounted the plaintiff had a number of qualifications in very diverse fields. This gave him great flexibility in the type of work which would be available to him throughout his working life. It meant also that he could pick and choose what work he would undertake. His main interest was in boating and particularly taking tourists on fishing excursions. Evidence was given about the high rewards that could be earned in working as a relief skipper. Mr Woods gave evidence of rates between \$60,000/\$70,000 per annum.²³
- [35] The time of trial the plaintiff was working essentially as a labourer in an aquaculture farm run by Aussea Holdings where he earns approximately \$220 per week. At the time of the incident he was employed by JMM Switchboards earning approximately \$450 per net. The plaintiff, in evidence, said that had he not been injured he expected that his interests would have inclined him to earning income whilst pursuing his interest in using his skipper's certificate on a game fishing boat.
- [36] I am satisfied that the plaintiff is not working to his full capacity in his present position. I am satisfied also that his injuries have deprived him of earning high incomes in the game fishing industry on a regular basis. Taking all these matters into consideration I would allow a differential in earning capacity of \$250 per week projected over 25 years (754) which computes to \$188,500. Allowing some minor discounting I would allow for loss of earning capacity the sum of **\$175,000**.
- [37] Loss of employers' superannuation should be assessed at 9% of that sum adding a further component of **\$15,750**.

Other items

- [38] The items of claim for past and future care and for special damages including interest have been agreed between the parties at **\$45,000**.

²³

[39] In summary I would assess the plaintiff's damages in accordance with the following allowances:-

General damages	\$ 70,000.00
Interest	\$ 4,200.00
Economic Loss	\$115,000.00
Interest	\$ 30,000.00
Past employers superannuation	\$ 8,050.00
Future earning capacity	\$175,000.00
Employers Superannuation	\$ 15,750.00
Other items	<u>\$ 45,000.00</u>
	<u>\$463,000.00</u>

Orders

[40] I give judgment for the defendant against the plaintiff. I will adjourn the question of costs to allow parties to make submissions within the next 14 days.