SUPREME COURT OF QUEENSLAND

CITATION:	*Packer v Tall Ship Sailing Cruises Australia Pty Ltd* [2015] QCA 108
PARTIES:	**JAY PHILLIP PACKER** (appellant) **v** **TALL SHIP SAILING CRUISES AUSTRALIA PTY LTD** ACN 069 796 514 (respondent)
FILE NO/S:	Appeal No 8824 of 2014 SC No 13523 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2014] QSC 212
DELIVERED ON:	19 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	4 May 2015
JUDGES:	Gotterson JA and Boddice and Flanagan JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be dismissed.** **2. The appellant pay the respondent's costs of and incidental to the appeal, to be assessed on a standard basis.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTIONS FOR NEGLIGENCE – DUTY OF CARE – where it was accepted that a duty of care can exist on the operator of licensed premises, for injuries suffered as a consequence of the criminal actions of another which arose from disorder created by that operator – where it was accepted that the form of that duty depended on whether the particular circumstances supported a conclusion the harm arose out of disorder as part of a state of affairs created by that operator – where the operator had a liquor license and had served alcohol to the assailant – where the trial judge found that the scope of the duty of care owed by the respondent required consideration of the circumstances on the day in question was correct – whether the trial judge erred in that decision TORTS – NEGLIGENCE – ESSENTIALS OF ACTIONS FOR NEGLIGENCE – DUTY OF CARE – REASONABLE FORESEEABILITY OF DAMAGE – where the appellant had

sought a finding it was reasonably foreseeable the assailant would become violent, as he was part of the group which was swearing and oblivious to the presence of children – where the trial judge declined to do so on the basis that the issue of foreseeability required a consideration of all of the surrounding circumstances – whether the trial judge erred in that decision

TORTS – NEGLIGENCE – ESSENTIALS OF ACTIONS FOR NEGLIGENCE – where the operator had two groups on board a catamaran – where the operator had a liquor license and had served alcohol to the assailant – where the assailant's group had been loud and boisterous while consuming alcohol, and had sworn in the presence of children – where the respondent had asked the assailant's group to cease swearing and had been rebuffed – where the respondent had ten crew members but had not engaged specialist crowd controllers – where the appellant submitted that the respondent should have had specialist crowd controllers or other crew available – where the trial judge found that even if the crew member had heard the group that was behaving loudly and swearing rebuff the appellant's initial approach, they would not have identified there was a risk there might be violent, quarrelsome or disorderly conduct by those patrons – where the trial judge found there was no failure to exercise reasonable care on the part of the respondent – whether the trial judge erred in that decision

Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420; [2009] HCA 48, applied
Club Italia (Geelong) Inc v Ritchie (2001) 3 VR 447; [2001] VSCA 180, applied

COUNSEL:	M Horvath for the appellant T Gray with B L Auis for the respondent
SOLICITORS:	Smith's Lawyers for the appellant Australasian Lawyers and Consultants for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Boddice J and with the reasons given by his Honour.

[2] **BODDICE J:** In December 2006, an unidentified assailant struck the appellant in the head whilst he was boarding a ship following a Christmas party on South Stradbroke Island. The assault, which was sudden and unexpected, left the appellant with facial injuries and long term neurological problems.

[3] In 2009, the appellant commenced proceedings against both the operator of the ship and his employer, claiming damages for negligence. He alleged each of them owed him a duty of care, and each of them breached that duty of care by failing to act with reasonable care and skill to protect him against the risk of such an assault. He further alleged their respective breaches of duty caused him loss and damage.

[4] In their defences, the respondents denied they were negligent. Each put in issue the existence of the claimed duty, breach of such a duty, and any causal link between such a breach of duty and the appellant's claimed loss and damage.

[5] On 29 August 2014, the appellant's claim against each of the respondents was dismissed, with costs. The appellant appeals that decision, insofar as it relates to the respondent, the operator of the ship.[1] At issue is whether the trial judge made factual errors as well as errors of law in finding there was no breach of duty by the respondent.

Background

[6] In 2006, the respondent operated a pleasure cruising business on the waterways of Moreton Bay. That business included operating a venue on South Stradbroke Island, McLaren's Landing, which contained bar and restaurant facilities. Patrons of the respondent's business would be transported by ship to McLaren's Landing, where they enjoyed various water activities, as well as food and alcohol. After some hours, patrons were transported by the ship back to the mainland. The respondent provided bar facilities on the ship.

[7] McLaren's Landing was able to cater for dinners for large groups, including groups of up to 200 people. At McLaren's Landing, there was a catering manager who was assisted by six other employees, in addition to crew members of the ship. These employees cooked and served meals, served drinks at the bar, and undertook cleaning or other duties (including assisting patrons at the venue). Both the ship and McLaren's Landing were licensed premises under the *Liquor Act* 1992 (Qld).

Evidence

[8] On 2 December 2006, the appellant's employer engaged the respondent's services to provide its employees and their families with a Christmas party cruise. The appellant was one such employee. He was 35 years of age, and employed as a waterproofing applicator. He had commenced working for his employer earlier that year.

[9] The appellant was accompanied on the cruise by his girlfriend and his two children. Present also that day, as part of this group, was the appellant's friend, Mark Reece and Mr Reece's wife and children. One of those children was in recovery from a recent surgery for a brain tumour.

[10] The ship used for the cruise on 2 December 2006 was a catamaran, the *MV 2000*. It was over 30 metres long. Its lower deck was able to carry a maximum of 184 passengers. Its upper deck was able to carry a maximum of 123 passengers. However, its overall maximum passenger capacity at any time was 270 persons.

[11] On 2 December 2006, the ship was staffed by a crew of 10. The crew comprised a manager (Mr Nicholls), a master or skipper, two senior crew members, five other crew members and one crew on duty person. The ship was controlled by its master. The crew wore identifiable uniforms. There were no special security arrangements.

[12] On 2 December 2006, the ship left the mainland carrying 111 passengers. All but four of those passengers belonged to one of two separate groups. The first group, comprising the appellant, his fellow employees and their families, consisted of 48 adults and 43 children. The second group, from a business known as Malouf Marine ("the Malouf group"), comprised around 20 adults. There was no designated separation of these groups on the ship.

[13] The arrangement was for the passengers of the ship to travel to McLaren's Landing where they would enjoy various water sports and lunch. Lunch comprised seafood

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1 There is no appeal against the decision in respect of the appellant's employer.

or a meat selection, together with vegetables and other items. Alcohol was available both on board the ship, and at McLaren's Landing, through pre-ordered alcoholic drinks packages. The package for the appellant's group included basic drinks only, not including spirits or premium drinks, from midday to 4.00 pm. The Malouf group also ordered a basic beverage package but it included basic spirits, again from 12 noon to 4.00 pm.

[14] The appellant's group arrived at the mainland wharf by courtesy bus. They accessed the ship by a platform located at the stern, travelling through a gate onto an open cockpit area aft of the lower deck. They then climbed up a short flight of stairs into the lower deck cabin. At the top of those stairs passengers could either enter the main cabin area of the lower deck or proceed to access the upper deck using another set of stairs. The Malouf group boarded the ship at around this time. That group immediately travelled to the upper deck, where they remained for the trip to McLaren's Landing.

[15] At the time of boarding at the mainland wharf, there was a crew member positioned at the top of the stairs to the lower deck, who undertook the welcoming of passengers as well as counting those boarding the ship. A part of the respondent's operating procedures was for the master of the ship to make a safety announcement shortly prior to departure. It included a statement to the effect that if passengers had any questions, or saw anything out of the normal, they should inform the crew. Mr Nicholls said the announcement would have been made on 2 December 2006. The appellant and others gave evidence no such announcement was made on that date.

[16] The ship departed the mainland wharf at 10.36 am. It arrived at McLaren's Landing at 11.20 am. Members of the appellant's group then enjoyed various water sports before having lunch. The Malouf group remained on the Island throughout this time. According to Mrs Reece, part of this group stayed at the bar for the whole of the time on the Island. Mrs Reece described them as "quite loud and boisterous". They were drinking cocktails, shots and spirits.

[17] At about 3.00 pm, both groups began to return to the ship in preparation for departing to the mainland. The appellant assisted Mrs Reece and her children to get back onto the ship. Mr Reece was in front of them. Again, a crew member was positioned at the top of the stairs leading to the lower deck cabin. Mr Reece gave evidence there was another crew member located at the "base of the boat where the ramp goes onto the boat".[2]

[18] The appellant said as he accessed the platform to the lower cockpit floor, he noticed a group of four or five men from the Malouf group who were swearing and being very loud "amongst themselves".[3] They were carrying on "like in a drunken manner". Whilst still on the platform, the appellant said words to the effect "come on, fellows. It's a family day out. Can you keep your language down? It's not appropriate".[4] In response the appellant was told "just like 'piss off'".[5] There was no suggestion any member of this group otherwise approached the appellant or gestured to him.

[19] Mrs Reece also heard some men from the other group swearing and being very loud as she boarded the ship that afternoon. She did not hear any exchange between them and the appellant whilst boarding the ship. Mr Reece, who was in front of his wife at this stage, also did not hear any interchange between the appellant and members of the other group. He did hear a group of men swearing and joking amongst themselves

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2 AB 96/15.
3 AB 34/20.
4 AB 34/30.
5 AB 34/36.

as he boarded the boat. At the time, he was at the top of the stairs to the lower deck cabin. The group of men were at least three metres behind him.[6]

[20] After this interchange, the appellant proceeded onto the ship. He entered the lower deck cabin with Mrs Reece's daughter. The other group of four or five men boarded after him and walked past him. The appellant could hear them "getting louder and just more language and swearing".[7] The appellant again approached the group, now at the bar. He repeated his request they keep their language down, as there were women and children on board. The appellant said before he finished his request, he was punched in the side of the face from behind. Mr Reece observed this interchange and the altercation, although he placed it as occurring at the top of the stairs.[8]

[21] The appellant had little recollection thereafter. He remembered vomiting and being in hospital later in the day, although he could not recall going to the hospital. He described the assault as occurring about three or four metres away from where one of the crew members of the ship was standing at that time. He could not identify the assailant. At the time of the assault, Mrs Reece's child was still with the appellant. She was apparently knocked into a nearby door or panel.

[22] Mr and Mrs Reece and another member of their group, Mr Lyden, were immediately on the scene. They assisted the appellant. Mr Reece said crew members responded within 20 to 30 seconds and separated the groups.[9] Mrs Reece did not see the appellant being struck by the assailant. She heard a big commotion and saw Mr Reece, the appellant and two or three people from the Malouf group in the main area of the lower deck at the top of the stairs from the lower cockpit area. She observed people pushing and shoving with a crew member behind them.[10] The two or three people with her husband and the appellant at this time were from the group she had previously observed drinking at the bar at McLaren's Landing.[11]

[23] Mr Nicholls was informed of the incident and attended the scene. Arrangements were subsequently made for members of the Malouf group to be taken onto another ship or ships. Mr Nicholls said that happened before departure of the ship from McLaren's Landing. Other witnesses gave evidence they were not immediately taken off, but agreed at some point they were removed from the ship.

Trial Judge's findings

[24] The trial judge accepted the general safety announcement was made at the beginning of the voyage. However, the trial judge found the appellant was an able-bodied, robust, knockabout fellow who would not have considered it necessary to approach a crew member to intervene before making a reasonable request to the group that was loud and abusive to tone down their language. The appellant had no reason to apprehend that that sensible and reasonable approach would provoke the atrocious response of being struck from behind.

[25] The trial judge found there was no particular evidence connecting the group observed by Mrs Reece at the bar at McLaren's Landing with the group from which the appellant's assailant came, but considered it reasonable, in any event, to think the

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6 AB 98/1.
7 AB 36/30.
8 AB 98/32.
9 AB 99/11.
10 AB 110/18.
11 AB 110/25.

group from which the assailant came had probably been drinking for some hours. The trial judge did not consider it possible to make a finding that group had become drunk after about one hour, or that they had become louder over the following two hours. The trial judge accepted the respondent's employees were in a position to observe the group, and had power to withdraw alcohol services from them. However, noisy or boisterous behaviour did not necessarily require monitoring of that kind.

[26] The trial judge found the group from which the assailant came was loud and swearing in the presence of children during its approach to the ship. There was a crew member at the top of the stairs into the lower deck cabin area near the incident. There may also have been a crew member on the ramp to the gantry platform. The trial judge accepted the group was swearing loudly enough to be heard by the crew member at the top of the stairs, at least when they were in the bar in the cabin.

[27] The trial judge accepted the appellant was struck from behind after he approached the assailant's group and asked them to stop swearing. That assault was sudden, unprovoked and occurred without warning. Whilst there was no duty to protect a person from the criminal conduct of third parties, the trial judge accepted a duty can arise where a party undertakes the care, supervision or control of a person, or assumes responsibility for their safety in circumstances where the person affected might reasonably expect that due care will be exercised.

[28] The trial judge also accepted a licensee, or a person operating licensed premises, may owe a duty of care in respect of injuries suffered by the violence of a third party where a situation of disorder or a state of affairs has been created by the licensee. However, consideration must be given to the particular circumstances when determining whether such a duty arises, and whether there has been a breach of that duty. This was the case whether the duty arose in tort or contract. The trial judge found the critical question was what constituted the alleged breach by the respondent of the duty of care owed to the class of persons being passengers of the ship of which the appellant was a member.

[29] The trial judge accepted the respondent owed a general duty of care to patrons, including the appellant, as the respondent was serving alcohol to passengers. It was accepted there was a risk, of which the respondent ought to have known, that there might be violent, quarrelsome or disorderly conduct by passengers who may have had too much to drink returning after a day's cruise. However, the trial judge concluded the risk was not a high one in the present case.

[30] In reaching that conclusion, the trial judge did not accept expert evidence relied upon by the appellant. The trial judge found that evidence largely related to questions about "crowd controllers", and was based on inaccurate premises. There was no evidence that any of the ship's staff were in the vicinity when the appellant first approached the loud group and asked them to tone down their language. There was also no evidence a member of the loud group approached the appellant and assaulted him. The appellant re-approached that group inside the cabin and again asked them to tone down their language. It was while making that request that he was suddenly and unexpectedly assaulted from behind.

[31] The trial judge concluded there was no failure to exercise reasonable care on the part of the respondent, in failing to have specialist "crowd controllers" or other security personnel in addition to the 10 crew members manning the ship on that day. That was particularly so having regard to the nature of the trip, the identities of the two groups involved, their numbers and composition, and the likely agenda of the day's

activities and the time over which the events were planned, all known to the respondent. Whether reasonable care would require a particular precaution to be taken is to be determined prospectively, and turns on the facts of the case proved in evidence.[12] This involves an assessment of the kind of threat in the unfolding circumstances of which the licensee is aware or ought to have been aware and which calls for action.[13]

[32] The trial judge found that even if it be accepted that the crew member at the top of the stairs observed a group of four or five people swearing loudly, that crew member's failure to act in the relatively short interval that elapsed between when the group entered the lower deck cabin or were swearing at the bar, and when the assault occurred, did not constitute a failure to take reasonable care for the appellant's or other passengers' safety.

[33] Whilst strictly unnecessary to determine, the trial judge found that if there had been a breach of the respondent's duty of care to the appellant in the circumstances, that breach, on the balance of probabilities, caused the appellant's loss and damage. Had the respondent responded appropriately to the circumstances, the appellant would not have been assaulted and suffered the loss and damage.

Appellant's submissions

[34] The appellant submitted the trial judge made a number of factual errors. First, there was evidence the group drinking at the bar on the Island and the group involved in the assault of the appellant on the ship were the same group. Second, there was uncontradicted evidence that group was drunk within an hour of arrival at McLaren's Landing. Third, there was evidence a crew member was at the bottom of the stairs who could have taken care of boarding while the crew member at the top of the stairs dealt with the loud and abusive group on board the ship. Finally, there was evidence the respondent knew or ought to have known of the threat posed by the loud and abusive group. That group was drunk within an hour, and continued drinking for the rest of the time on the Island. This group was swearing and confrontational during boarding, and were pushing each other after boarding the ship.

[35] The appellant submitted Mrs Reece's observation of people drinking significant liquor for three or perhaps four hours, and then swearing in front of women and children and pushing each other, was sufficient to place an obligation on the respondent's employees to have taken steps to prohibit the ultimate assailant from reboarding the ship.[14] Such steps were consistent with the duty placed on a licensee of a licensed premises to take steps to ensure any incident does not escalate into violence. Members of this group were "intoxicated, quarrelsome and disorderly before the assault", which was sufficient to activate the requisite duty. The fact they told the appellant initially to "piss off", rendered violence likely. The respondent ought to have known of that likelihood.

[36] The appellant further submitted the trial judge erred in finding the crew member at the top of the stairs did not have time to intervene at the time of boarding. "It was not just a case about a punch." The group, as they passed that crew member, were making sufficient noise, and one to two minutes would have been sufficient time for a crew member to intervene before the assault. Alternatively, the respondent's duty required it to provide security guards to take care of monitoring of passengers, if other crew were engaged in too many tasks.

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12 *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 440 [40].

13 *Wagstaff v Haslam* (2007) 69 NSWLR 1, 15 [61].

14 T.1-14/35.

[37] The appellant submitted there was time to monitor and stop the service of alcohol, as well as monitor the group's behaviour once intoxicated and, if appropriate, to prevent them from boarding or eject them after boarding or to intervene between boarding and the alleged assault. This circumstance was relevant to the duty to take reasonable care to prevent injury from the violent, quarrelsome and disorderly conduct of other persons. There was no basis to distinguish this incident from one arising from a disorder or a state of affairs created by the respondent.

[38] Finally, the appellant submitted the trial judge erred in failing to separately consider the question of the duty of care on the basis the appellant was a contractual entrant. That duty extends to activities, and requires the person owing the duty to make the premises as safe as reasonable care can make them.[15]

Respondent's submissions

[39] The respondent submitted the evidence supported a conclusion the assault on the appellant involved a random act of violence which was instantaneous and unexpected. It was a criminal act which was neither foreseeable nor something which the respondent caused or contributed to by breach of any duty or obligation owed to the appellant. The injury, and consequential damage, was solely the responsibility of the unidentified assailant, who was not proven to be part of the group it is alleged ought to have been better controlled by the respondent.

[40] The respondent further submitted the trial judge correctly found the appellant did not establish any greater degree of control would have prevented the incident occurring as there was not established any likelihood violence would occur from the conduct of the loud and abusive group. This group was boisterous amongst themselves, not others. There was no evidence of violence, aggression or even of a warning the conduct might eventuate.

[41] The evidence of the incident was that the appellant was struck from behind as he approached the group in question. The appellant had not even concluded the sentence he was speaking when he was attacked without warning in an unprovoked and instantaneous attack. There was no time for anyone to do anything to prevent the injury occurring in the immediate timing of the incident. No amount of additional security could have prevented it. That the appellant was an entrant pursuant to a contractual arrangement made no difference in the circumstances.

Discussion

Factual errors?

[42] The trial judge's finding that there was no particular evidence connecting the group at the bar observed by Mrs Reece with the group from which the appellant's assailant came must be viewed in context. The actual assailant was never identified by the appellant or any other witness. It was only an inference the assailant came from the group who had been loud and abusive when re-boarding the ship. Against that background, the finding there was no particular evidence connecting those two groups is factually correct. That said, a reasonable inference was that the appellant, who was assaulted whilst he was re-engaging with the group that had been loud and boisterous, had been assaulted by someone from within the group which included the two or three men identified by Mrs Reece shortly after the incident as being from the group she had seen at the bar at McLaren's Landing.

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[15] *Wright v KB Nut Holdings* [2013] QCA 66 at [48]-[49].

[43] However, whether that is so matters little in a consideration of the trial judge's ultimate conclusion. The trial judge expressly found it was reasonable to think the group from which the assailant came had probably been drinking for some hours. As intoxication is a key element in the appellant's contention that the duty owed by the respondent was wider than a situation requiring something about the actual behaviour of the particular patron, the trial judge's finding that the group from which the assailant came had probably been drinking for some hours was sufficient.

[44] Similarly, the trial judge correctly declined to make a finding the group at the bar became drunk after about one hour. Whilst Mrs Reece said this group were "getting pretty blotto",[16] Mrs Reece's evidence did not expressly deal with the question of intoxication to the point of being drunk within the first hour. She described the group as "rowdy within the first – like, after about an hour. They were quite loud and boisterous".[17] That description does not mean they were drunk after about an hour.

[45] In respect of the respondent's knowledge, the trial judge accepted the respondent's employees at the bar would have been able to observe this behaviour. However, his Honour correctly observed that noisy or boisterous behaviour does not itself necessarily require withdrawal of alcohol services or monitoring of the group. Such steps only arise if the risk of an altercation between patrons calls for them, as a reasonable precaution in all the circumstances.

[46] The remaining factual error contended for by the appellant relates to whether there was a crew member at the bottom of the stairs from the cockpit area into the lower deck cabin when passengers were reboarding the ship at McLaren's Landing. The trial judge accepted there was a crew member located at the top of those stairs but did not accept there was a member of the crew at the bottom of those stairs, although that was possible. The trial judge did accept another crew member may have been located on the ramp to the gantry platform off the ship itself.

[47] That finding accorded with the evidence, as a whole. Mrs Reece only referred to a crew member at the top of the stairs.[18] Mr Reece said he saw a crew member at the base of the boat, where the ramp goes onto the boat, and a crew member at the top of the stairs of the boat. That earlier description left unclear whether the particular crew member was actually on the boat or on the platform adjacent to its base. Against that background, it was open to the trial judge to refuse to make a positive finding there was a crew member located at the bottom of the stairs at the relevant time.

[48] In any event, the evidence did not support a conclusion any crew member situated either at the bottom or the top of the stairs must have heard the initial exchange between the appellant and members of this group. Neither Mrs Reece nor Mr Reece gave evidence of hearing the exchange with the appellant. Both gave evidence of hearing the group swearing loudly. If they did not hear it, a crew member so positioned is also unlikely to have heard the exchange.

Foreseeability

[49] The appellant had also sought a finding it was reasonably foreseeable "the assailant would become violent as he was part of the group that was swearing and oblivious to

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16 AB 107/43.
17 AB 108/11.
18 AB 110/11.

the presence of children". The trial judge declined to do so, observing the issue of foreseeability required a consideration of all of the surrounding circumstances. That conclusion was plainly correct. The circumstances are not limited to swearing and the presence of children. They include the presence of alcohol and foresight of the risk of an assault by the unidentified assailant.

Duty

[50] In *Club Italia (Geelong) Inc v Ritchie*[19], it was recognised a duty of care can exist on the operator of licensed premises, for injuries suffered as a consequence of the criminal actions of another which arose from disorder created by that operator. However, the form of that duty depended on whether the particular circumstances supported a conclusion the harm arose out of disorder as part of a state of affairs created by that operator.

[51] The importance of the particular circumstances to the form and content of any such duty was expressly recognised by the High Court in *Adeels Palace Pty Ltd v Moubarak*:[20]

> "In the circumstances reasonably contemplated before the restaurant opened for business on 31 December 2002 as likely to prevail on that night, Adeels Palace owed each plaintiff a duty to take reasonable care to prevent injury to patrons from the violent, quarrelsome or disorderly conduct of other persons. The duty is consistent with the duty imposed by statute upon the licensee and which was a duty enforceable by criminal processes. … it is a duty to take reasonable care in the conduct of activities on licensed premises, particularly with regard to allowing persons to enter or remain on those premises."

[52] That duty is not absolute. It is a duty to take reasonable care. In the context of the particular contentions in *Adeels*, namely, that the risk of any exchange of words between patrons would require an immediate and decisive response by persons having the authority of bouncers or crowd controllers, the High Court observed[21]:

> "Of course there is always a risk that there will be some altercation between patrons at almost any kind of event. And the risk of that happening is higher if the patrons are consuming alcohol. But unless the risk to be foreseen was a risk of a kind that called for, as a matter of reasonable precaution, the presence or physical authority of bouncers or crowd controllers to deal with it safely, failure to provide security of that kind would not be a breach of the relevant duty of care."

[53] The trial judge's conclusion that the scope of the duty of care owed by the respondent required consideration of the circumstances on the day in question was plainly correct.

Breach

[54] The trial judge found there was no failure to exercise reasonable care on the part of the respondent. That finding followed from the conclusion that even if the crew member at the top of the stairs or, indeed, any crew member located on the ramp, had heard the group that was behaving loudly and swearing rebuff the appellant's initial approach, they would not have identified there was a risk there might be violent,

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19 (2001) 3 VR 447 at 460 [44].
20 (2009) 239 CLR 420 at 437 [26].
21 At 439 [38].

quarrelsome or disorderly conduct by those patrons. There was, accordingly, no obligation to take steps to exclude the group from the ship, and no failure to exercise reasonable care by failing to have specialist crowd controllers or other crew available.

[55] There was ample evidence to support that finding. Whilst alcohol had been served, and on Mrs Reece's evidence, members of the Malouf group had indulged to excess, there was no evidence members of that group were involved in "disorder". There had been no commotion or interchange to suggest a risk of violent aggression to other patrons if members of that group were not controlled by the respondent's staff, including denying them access to the ship.

[56] Mrs Reece's evidence that members of the group had been loud and boisterous whilst drinking at the bar did not suggest the group had sought to interact or engage with any other patrons at McLaren's Landing. Similarly, the evidence of their behaviour when approaching the ship was of being loud and boisterous amongst themselves. There was no pushing of anyone outside their group. Whilst there was swearing, there is no suggestion that swearing was directed toward any other patron.

[57] That members of this group used offensive language, in earshot of others, will not of itself constitute "disorder", as discussed in *Club Italia*, or "quarrelsome or disorderly conduct" as discussed in *Adeels*. Unlike the circumstances in those cases, there was no prior interaction between the two groups and no gesturing, aggressively or otherwise, from the group observed at the bar.

[58] Although the group responded abruptly to the appellant's reasonable request that they desist in that conduct, there was no suggestion they exhibited any form of aggression towards the appellant. They did not attempt to move in his direction in an aggressive way, or gesture towards him or indicate an intention to continue this interchange. The next contact occurred when the appellant again approached this group, and sought to remonstrate further with them.

[59] The circumstances, viewed as a whole, did not raise a foreseeable risk a member of this group would engage in a violent attack on the appellant. There was no indicia of physical violence to others from this group. As the trial judge observed, there was no conduct which gave "an inkling that the situation was either likely to or might produce violence".[22]

[60] Further, the circumstances as they unfolded did not give rise to any conduct warranting eviction by the respondent. Any risk of an exchange between this group and the appellant did not, as a matter of reasonable precaution, call for members of the Malouf group to be refused permission to board the ship, or require the presence of crew as security guards or controllers.

Contractual duty

[61] A finding the appellant was also owed a duty to make the premises as safe as reasonable care can make them, by reason of his being a contractual entrant, would not have altered the trial judge's ultimate conclusion. The trial judge therefore correctly concluded the appellant's claim was not further advanced by characterising his status as that of a contractual entrant.

[62] The steps that had been taken by the respondent rendered the premises as safe as reasonable care could make them. There were no further steps the respondent could

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22 AB 445 [86].

reasonably be expected to take in all the circumstances. There was no suggestion the respondent sought to delegate responsibility for the taking of reasonable care in respect of foreseeable risk of injury to an entrant.

Conclusion

[63] The trial judge made no material factual error. There was also no error of law. The trial judge correctly concluded the appellant's claim must be dismissed.

Orders

[64] I would order:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs of and incidental to the appeal, to be assessed on a standard basis.

[65] **FLANAGAN J:** I agree with the orders proposed by Boddice J and with the reasons given by his Honour.