

CASE NOTE

LAWSON V DUNLEVY [2012] NSWSC 48

by Ryan Harvey

BACKGROUND

This case arose out of an assault occasioned by the plaintiff. The plaintiff was arrested, taken back to Wilcannia Police Station, and charged with occasioning actual bodily harm under section 59(1) of the *Crimes Act 1900* (Cth) ('*Crimes Act*'). He was granted bail after agreeing 'to observe specified requirements as to [his] conduct whilst at liberty on bail'. These bail conditions required, among other things, that the plaintiff was 'not to consume alcohol for any reason' and was 'to submit to a breath test when requested by a police officer'. Before his arraignment, the plaintiff applied to a magistrate to remove the following words from his bail conditions: '...and is to submit to a breath test when requested by a police officer' ('*alcohol bail condition*'). However, that application was unsuccessful and the magistrate maintained the plaintiff's bail in its original form.

Significantly, section 37 of the *Bail Act 1978* (NSW) ('*Bail Act*') places certain '[r]estrictions' on authorised officers or courts when imposing bail conditions:

- (1) Bail shall be granted unconditionally unless the authorised officer or court is of the opinion that one or more conditions should be imposed for the purpose of:
 - (a) promoting effective law enforcement, or
 - (b) the protection and welfare of any specially affected person, or
 - (c) the protection and welfare of the community, or
 - (d) reducing the likelihood of future offences being committed by promoting the treatment or rehabilitation of an accused person.
- (2) Conditions shall not be imposed that are any more onerous for the accused person than appear to the authorised officer or court to be required:
 - (a) by the nature of the offence, or
 - (b) for the protection and welfare of any specially affected person, or
 - (c) by the circumstances of the accused person.

ISSUES

The Court considered whether the alcohol bail condition was unlawful; specifically, whether that condition is

capable of fulfilling any one or more of the first three purposes listed in section 37(1) of the *Bail Act*.¹

DECISION

The plaintiff won the case. The alcohol bail condition was unlawful.

COMMENTARY

As a preliminary point, it is worth noting in the second defendant's submission that the condition provided a:

- a) *ready means for the detection* of the breach of the bail condition requiring the plaintiff to refrain from consuming any alcohol, and
- b) *deterrent* to the plaintiff so as to ensure that he complied with the bail condition requiring him to refrain from drinking alcohol (emphasis added).

It was said that these purposes did not fall within any of the three purposes listed in section 37(1) for several reasons. First, the impugned condition did not promote 'effective law enforcement': section 37(1)(a). A bail condition that is designed to readily determine a breach of an 'agreement' under section 36(2), or else to deter a breach of that 'agreement', does not directly or indirectly address the issue of law enforcement because that agreement does not create any enforceable obligation at law. Instead, the law enforces the 'agreement' not by obliging the person subject to bail conditions to carry out a particular act, but by revoking or discontinuing that person's bail. Further, the *Bail Act* does not make breach of a bail condition an offence, except where a person is arrested and arraigned for a breach and fails to appear without reasonable excuse: section 51.

Secondly, the impugned condition could not be properly described as existing for the purposes of the 'protection and welfare of [...] any specially affected person, or [...] the community': sections 37(1)(b)–(c). The question here is whether a particular 'specially affected person' may need protection or whether the community generally is in need of protection so as to justify a person being subject to a conduct requirement. However, the word 'protection' in section 37 suggests protection from conduct involving the commission of further offences, or else protection from

physical and mental threats posed to a particular individual. The impugned condition, the purpose of which is to deter a breach of a bail condition, or else to make the detection of a breach more readily established, does not adequately serve as 'protection'.

Thirdly, Part 7 of the *Bail Act*, particularly section 50, deals with non-compliance with undertakings and conditions. However, the only penalty envisaged by section 50 is that a failure to comply with a bail agreement may lead to its reconsideration or revocation. Other than those statutory consequences, section 50 does not contemplate the imposition of any deterrent. Hence it is unsuitable for the court to fill a void left by the legislation and to impose a condition that deters people from breaching their bail agreement.

Fourthly, the term 'breath test' is vague and legally ambiguous, bearing in mind its multiple understandings in various statutory instruments. Such tests are common, but are not exactly the same, and depend on different devices, locations and procedures.

Finally, the bail condition is contrary to section 37(2) of the *Bail Act*: it is far too broad and onerous on the plaintiff.

The condition does not call for:

- the police officer making the request to have a reasonable suspicion of the consumption of alcohol;
- the specification of the location of the test or method of testing;
- the number of times in any one hour or day that a person can be requested to undergo a breath test; or,
- any connection between the result of a breath test and proof of the consumption of alcohol.

One interpretation of the condition, for instance, could mean that the plaintiff would be subject to breath tests at 15 minute intervals at a location some distance from their place of residence.

For these reasons the alcohol bail condition was declared unlawful and was quashed.

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1 No question arose as to applicability of s 37(1)(d).

Untitled

Natalie Puantulura

Ochre on linen

