IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-000214
[2014] NZHC 3378

UNDER	the Sale of Liquor Act 1989 and the Sale and Supply of Alcohol Act 2012
IN THE MATTER	of an appeal against a decision of the Alcohol Regulatory and Licensing Authority at Auckland
BETWEEN	GENERAL DISTRIBUTORS LIMITED First Appellant
	PAUL TU'UNGAFASI Second Appellant
AND	RACHAEL DE'ATH AND PETER RICHARDSON Respondents

Hearing: 13 November 2014

Appearances: D S McGill, A S Malone and J Berkhan for Appellants
A M Adams for Respondents

Judgment: 19 December 2014

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Friday, 19 December 2014 at 4.45 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

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Introduction

[1] On 22 January 2014, the Alcohol Regulatory and Licensing Authority ordered that the off-licence issued to General Distributors Limited allowing it to sell alcohol from the premises known as Countdown Takapuna, be suspended for seven days, commencing 10 February 2014, and a General Manager's certificate issued to one of its managers, Paul Tu'ungafasi, be suspended for 30 days, commencing 17 February 2014.

[2] The Police and the Auckland District Licensing Agency inspector had applied for suspension of the off-licence and the General Manager's certificate on the basis that a checkout operator at Countdown Takapuna had sold alcohol to a person who was already intoxicated in breach of s 166(1) of the Sale of Liquor Act 1989 (the 1989 Act).[1]

[3] General Distributors Limited and Mr Tu'ungafasi now appeal to the High Court against the Authority's decision under s 162(1) of the Sale and Supply of Alcohol Act 2012 (the 2012 Act),[2] which permits appeals to the High Court on questions of law only. The High Court has suspended the penalty orders made by the Authority until the appeal is heard and determined.

Alcohol Regulatory and Licensing Authority decision

[4] In its decision of 22 January 2014, the Authority noted the uncontested facts:

(a) At about 8.15 p.m. on Sunday, 19 August 2012 a member of the public called the Police. The informant believed that he was following an intoxicated driver.

(b) That driver drove his vehicle into the car park at Countdown Takapuna. He drove up a kerb into a garden. He reversed out of the garden before parking his vehicle.

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1 Repealed as from 19 December 2013 by the Sale and Supply of Alcohol Act 2012.

2 The relevant provisions of the Sale and Supply of Alcohol Act 2012 came into force on 19 December 2013 (s 2(2)).

(c) He went into the Countdown Takapuna store. There he purchased two six packs of Pure Blonde beer. The duty manager was Paul Tu'ungafasi. The checkout operator who sold the beer was Ms K. (Ms K is a mature woman and worked as a checkout operator for the licensee for nine years. She is no longer employed by licensee, but ceased her employment for reasons unrelated to this incident). In the vicinity of the checkout counter where the transaction took place was Mr Tu'ungafasi.

(d) The purchaser of the beer (Mr McBride) left the store and returned to his vehicle. He was observed by the informant to hit more kerbs as he left the car park area. He drove for approximately two kilometres to his home address, where he was located by the Police, attempting, unsuccessfully, to get his car keys out of the ignition of his motor vehicle.

(e) Mr McBride was breath tested and ultimately convicted of driving with excess breath alcohol, having a reading of 1,441 micrograms of alcohol per litre of breath.

(f) Constable Colbert, who administered the breath test to Mr McBride, stated that Mr McBride was definitely extremely intoxicated at that time. The Constable had to assist him in extricating himself from his vehicle. He was stumbling and leaned on the Constable. He reeked of alcohol and his eyes were bloodshot. His speech was very slurred and he was unable to form sentences or make sense. The breath test was administered shortly after 9.03 pm,[3] approximately three quarters of an hour after Mr McBride purchased the beer.

[5] After setting out the uncontested facts, the Authority referred to previous decisions, from which it determined that neither application could be regarded as

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[3] This time is actually when Bill of Rights advice was given to Mr McBride. The Breath and Blood Alcohol Procedure Sheet records the time when the evidential breath test was administered to have been 8.45 p.m, approximately half an hour after Mr Bride purchased the beer.

having been proved unless there were some obvious signs of intoxication exhibited by Mr McBride. The Authority then stated:

> The cases recognise that the assessment of intoxication is a subjective test, although there are elements of "mens rea" in each offence. In this case, Mr McBride needed to have demonstrated an obvious disturbance or impairment of his mental or bodily faculties or functions.

[6] As to the onus and standard of proof, the Authority stated that the onus of proving the allegations contained in the applications fell on the Police and that where serious allegations are involved, the standard of proof must be very close to that of a criminal prosecution.

[7] The Authority then referred to CCTV footage of the incident. During the hearing the CCTV footage was played many times, which gave the Authority the opportunity of observing the evidence in depth. The Authority noted that whilst this was helpful, the continued viewing of the footage could lead to a misleading conclusion. This was because the staff members involved in the transaction only had the opportunity of observing Mr McBride once. Accordingly, they could not have been expected to have seen all the signs of intoxication that were observed by the Authority and the witnesses for the applicants. Nevertheless, the Authority noted that the CCTV footage disclosed a demonstrably intoxicated Mr McBride purchasing the alcohol. The Authority described the CCTV footage as follows:

> [12] When Mr McBride approached the counter with the alcohol, he was seen to almost stumble. At the counter, he swayed backwards and forwards excessively. This was not merely moving from one foot to the other. When compared with other patrons in the premises, his behaviour was noticeable. When swiping his One Card, Mr McBride fumbled with the card. Perhaps most importantly of all, when Mr McBride was handed his change he dropped the coins. [Ms K] picked them up and handed them to him. Then she handed him a note which he also dropped. She bent down and picked the note up and handed it to him again. When [Ms K] handed the note to Mr McBride his hand was open and there was no attempt made by him to clasp the note. At this point of the transaction (accepting that the sale had already been effected) Mr McBride and [Ms K] were very close together. Although [Ms K] says that she does not recall smelling alcohol on Mr McBride's breath, the evidence of Constable Colbert suggests that the alcoholic smell would have been noticeable.

[8] The Authority accepted that Ms K had only a limited opportunity of observing Mr McBride, but she engaged very little with Mr McBride and

concentrated on the transaction and not the purchaser. The Manager, Mr Tu'ungafasi, was very close to Ms K when Mr McBride approached the counter. He may not have seen Mr McBride approaching the counter, but in order for him to carry out his duties under the Act, he should have been observing persons approaching the counter. According to the Authority, if he had been observant, the Manager must have noticed Mr McBride's unusual behaviour and smelt the alcohol on his breath.

[9] The Authority concluded thus:

> [15] The Authority concludes that Mr McBride was demonstrably intoxicated when he purchased the beer at the supermarket. Further, there was sufficient signs which should have been detected by Ms K to make her suspicious. More importantly, however, the manager was in the vicinity of where the transaction was taking place and, given his responsibilities under the Act, he should have noticed the obvious signs of intoxication that were apparent and then made further inquiries.
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> [16] Accordingly, the allegations contained in each application are proved.

Grounds of appeal

[10] The nominated grounds of appeal are:

(a) That the Authority erred in law by failing to apply established legal principles used to define the state of intoxication for the purposes of s 166(1) of the 1989 Act.

(b) That the Authority erred in law by substituting its own subjective analysis of the CCTV footage for that of the appellants' witnesses.

(c) That the Authority erred in law by failing to take into consideration the evidence of the checkout operator as to her experience and knowledge of the signs of intoxication.

(d) That the Authority erred in law by taking into consideration the respondents' evidence as to the state of the customer when he was

breath tested approximately 45 minutes after the sale transaction took place.

(e) That the Authority reached a conclusion which it could not have reasonably come to on the evidence in that there was insufficient evidence to support the finding that the checkout operator sold liquor to an intoxicated person.

Approach to appeal

[11] Section 162(1) of the 2012 Act provides:

> …where any party to any proceedings before the licensing authority … is dissatisfied with any determination of the licensing authority in the proceedings as being erroneous in point of law, that party may appeal to the High Court on the question of law concerned.

Section 162(1) of the 2012 Act is a restatement of the provisions of s 139(1) of the 1989 Act.

[12] The right of appeal is limited to a point or points of law. The High Court can only intervene if the Authority applied a wrong legal test; came to a conclusion without evidence or one to which, on the evidence, it could not have reasonably come to; if it has taken into consideration matters which it ought not to have taken into account; or if it has failed to take into consideration matters which it ought to have into account.[4] As noted by Kós J in *Triveni Puri Ltd v The Commissioner of Police*:[5]

> [19] It has been observed by the Courts that there is a limited scope for appeal from the Authority. The Act puts responsibility for enforcement decisions largely in the hands of the Authority, reflecting Parliament's view of its central importance to the licensing system. This Court is nevertheless bound to reach its own independent conclusion. It may give such weight as it thinks fit to the opinion of the Authority, but must not regard itself as bound by the Authority's opinions, simply because it is a specialist tribunal. However, the Authority is an experienced body, well able to assess evidence and has the advantage of actually seeing and hearing the witnesses in question and listening to the cross-examination.

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4 *Ashbridge Investments Limited v Minister of Housing and Local Government* [1965] 3 All ER 371 (CA) at 374.

5 *Triveni Puri Ltd v Commissioner of Police* [2012] NZHC 2913, [2013] NZAR 88 (citations omitted).

Discussion

[13] The five nominated grounds of appeal are all variations or developments of what the appellant submits should be the correct approach to the evidence and analysis of it by the Authority.

[14] I start with the basics. The application to suspend the General Distributors Limited licence was lodged under s 132(1) and (3)(a) of the 1989 Act on the basis that the licensed premises (Countdown Takapuna) had been conducted in breach in s 166(1) of the 1989 Act. Similarly, the application to suspend Mr Tu'ungafasi's certificate was lodged under s 135(1) and (3)(a) of the 1989 Act on the basis that he had failed to conduct the licensed premises (Countdown Takapuna) in a proper manner, in particular, in breach of s 166(1) of the 1989 Act.

[15] Section 166 of the 1989 Act made it a criminal offence to sell alcohol to an intoxicated person. It provided:

> **166 Sale or supply of liquor to intoxicated person**
> (1) Every person commits an offence and is liable on conviction to the penalty set out in subsection (4) who, being the licensee or a manager of any licensed premises, sells or supplies liquor to any other person who is already intoxicated.
> (2) Every person commits an offence and is liable on conviction to the penalty set out in subsection (4) who, not being the licensee or a manager of any licensed premises, sells or supplies liquor to any other person who is already intoxicated.
> (3) Subsection (2) of this section applies irrespective of any liability that may attach to the licensee or any manager in respect of the same offence.
> (4) The penalty is,—
> (a) In the case of a licensee,—
> (i) A fine not exceeding $10,000; or
> (ii) The suspension of the licensee's licence for a period not exceeding 7 days; or
> (iii) Both:
> (b) In the case of a manager, a fine not exceeding $10,000:
> (c) In the case of a person (not being a licensee or manager), a fine not exceeding $2,000.

[16] A key issue is the meaning of the word intoxicated in s 166(1). A number of cases establish that intoxicated means something more than under the influence of

alcohol. In *Brown v Bowden (Police)*, Stout CJ said that a state of intoxication meant:[6]

> …that state in which, through intoxicating liquors, a person has lost the normal control of his bodily and mental faculties.

[17] In *Abraham v Norwich Union Fire Insurance Society Ltd*, Beattie J said:[7]

> I consider it [intoxication] has a different meaning from "under the influence"; the word "intoxication" carries with it to my mind a reasonably advanced degree of drunkenness. The word has a stigma of more finality about it, and a greater definiteness and certainty than the other expression. It is therefore, in my view, a more difficult test for an insurer to fulfil.

[18] The comments of Beattie J were cited with approval by the Court of Appeal in *Parsons & Ors v Farmers Mutual Insurance Association.*[8] Richmond P said:

> To what extent then need a person be affected by liquor before he would, in the ordinary use of language, be described as "intoxicated"? Dealing with the ordinary case of a person who is active and awake, I believe that such a person would not be described as intoxicated unless he had at least reached the stage where, either in his movements or speech or behaviour, he demonstrated an obvious disturbance of his mental or bodily faculties. A person may be materially affected by alcohol for certain purposes, such as driving a car, and yet may not have reached the stage where the ordinary person would describe him as intoxicated.

[19] The approach taken in the above cases has been adopted by the Alcohol Regulatory and Licensing Authority and its predecessor, the Liquor Licensing Authority. In *Hepburn v Clary 2002 Limited*,[9] the Authority referred to the above cases and accepted that a person may be driving impaired without being intoxicated. In other words, it accepted that a person under the influence of alcohol was in a lesser state of drunkenness than a person who was intoxicated. The Authority went on to say, however, that a person who exceeded a breath/alcohol limit of 1,000 micrograms of alcohol per litre of breath was probably intoxicated. It said:[10]

> For the purposes of this case, we would be prepared to accept that a patron who exceeded a breath/alcohol limit of 1,000 micrograms per litre of breath, or a blood/alcohol limit of 200 milligrams of alcohol per 100 millilitres of

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6 *Brown v Bowden (Police)* (1900) 19 NZLR 98, (1900) 2 GLR 374 (SC) at 102.
7 *Abraham v Norwich Union Fire Insurance Society Ltd* [1970] NZLR 968 (SC) at 978.
8 *Parsons & Ors v Farmers Mutual Insurance Association* [1972] NZLR 966 (CA) at 972.
9 *Hepburn v Clary 2002 Limited* LLA PH825/2004, 30 November 2004.
10 At [56].

> blood, was probably intoxicated. Furthermore, that such a person probably displayed signs of being in that state.

[20] It should be noted that in the present case Mr McBride had a breath/alcohol reading of 1,441 micrograms of alcohol per litre of breath, which is three and a half times the legal limit for driving and well over the limit of 1,000 micrograms of alcohol per litre of breath, which the Authority was prepared to accept that a person was probably intoxicated and that such person probably displayed signs of intoxication.

[21] Although not defined by statute, the meaning of intoxicated is therefore reasonably well established by case law. The Health Promotion Agency, in conjunction with Hospitality New Zealand and the New Zealand Police has also produced an "Intoxication Assessment Tool", which defines intoxication and sets out some key indicators of intoxication. It defines intoxication as:

> Intoxicated means observably affected by alcohol, other drugs, or other substances (or a combination of two or all of those things) to such a degree that two or more of the following are evident, (a) appearance is affected; (b) behaviour is impaired; (c) coordination is impaired; (d) speech is impaired.

[22] The Intoxication Assessment Tool lists the key indicators of intoxication as including, but not limited to:

(a) Speech – slurring, difficulty forming words, loud, repetitive, loses train of thought, nonsensical, unintelligible.

(b) Coordination – spills drinks, stumbles, trips, weaves, walks into objects, unable to stand unaided or sit straight.

(c) Appearance – bloodshot eyes, eyes glazed, inability to focus, tired, asleep, dishevelled.

(d) Behaviour – seriously inappropriate actions or language, aggressive, rude, belligerent, obnoxious behaviour affecting customers.

[23] The appellants rely on the Intoxication Assessment Tool and its key indicators of intoxication in support of their submission that the CCTV footage does not disclose a demonstrably intoxicated Mr McBride purchasing alcohol, but because Mr McBride's speech and appearance, in particular his facial appearance, is unable to be gauged from the CCTV footage, the appellants' reliance on the Intoxication Assessment Tool is of limited value.

[24] The most important issue in this case is the way in which intoxication is established for the purposes of s 166(1) of the 1989 Act. It is here that the Authority has, in my view, adopted terminology that is misleading and confusing, in that it has referred to a subjective test of intoxication and elements of mens rea in each offence. The Authority had earlier said in *Hepburn v Clary 2002 Limited*:

> [41] There are two main issues to be determined. One, whether the Police have proved that the licensed premises have been conducted in breach of ss 166 and 167 of the Act. Two, if so, whether it is desirable to vary the hours of trading.
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> [42] In assessing the weight of the evidence, we are conscious that the allegations must be proved on the balance of probabilities. In respect of allegations of serving intoxicated patrons or allowing them to remain, the standard of proof required can be elusive. Not only is the assessment of intoxication a subjective test, but there are elements of mens rea in each offence.

[25] This passage from *Hepburn v Clary 2002 Limited* was repeated with approval in *Sargent v General Distributors Limited.*[11] The Authority then repeated these two concepts in the decision under appeal when it stated:

> [6] Decisions such as *Martin Claud Hepburn v Clary 2002 Limited* NZLLA PH 825/2004 and *Tanya Jane Surrey v The Bullock Bar Limited* NZLLA PH 938-940/2007 have determined that neither enforcement application can be regarded as having been proved unless there were obvious signs of intoxication exhibited by (in this case) Mr McBride. The cases recognise that the assessment of intoxication is a subjective test, although there are elements of "mens rea" in each offence. In this case, Mr McBride needed to have demonstrated an obvious disturbance or impairment of his mental or bodily faculties or functions.

[26] The concepts of a subjective test of intoxication and elements of mens rea in each offence are, however, not explained nor developed. In my view they are

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[11] *Sargent v General Distributors Limited* LLA PH385/2009, 386/2009, 9 April 2009.

misleading and confusing because they conflate a factual assessment with a requirement of intent.

[27] The first point to note is that the Authority refers to "each offence". This passage appears to be taken from the Authority's previous decision of *Hepburn v Clary 2002 Limited* where the Police had alleged that the licensed premises in question had been conducted in breach of both ss 166 and 167 of the 1989 Act. Section 167 made it an offence for the licensee or manager of any licensed premises to "allow" any person to become intoxicated of the licensed premises. The application to suspend the General Distributors Limited licence and to suspend Mr Tu'ungafasi's certificate alleges a breach of s 166, but not s 167. There is an element of mens rea required to be proved in s 167 because the offence is one of allowing any person to become intoxicated, but with respect, I am of the view that there is no element of mens rea in s 166, which creates an offence of supplying or selling liquor to a person who is already intoxicated.

[28] In *Glennie v McGlyn,*[12] one of the sections at issue was s 181 of the Licensing Act 1908, which provided:

> If any innkeeper…sells any liquor to any person already in a state of intoxication…he shall be liable to a fine.

McCarthy J referred to previous decisions of the High Court and held that s 181 was absolute in its prohibition and that the prosecution was not required to prove that the barman or licensee knew that the customer to whom they sold liquor was already intoxicated.

[29] McCarthy J's use of the word "absolute" should be seen in light of the later Court of Appeal decision in *Civil Aviation Department v McKenzie*, a seminal case in the development of the law relating to what have become known as public welfare regulatory offences.[13] The Court of Appeal adopted the division of offences into three categories set out in the Canadian Supreme Court decision of *R v City of Sault Ste Marie*:[14]

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12 *Glennie v McGlyn* [1958] NZLR 344 (SC).
13 *Civil Aviation Department v McKenzie* [1983] NZLR 78, 1 CRNZ 38 (CA).
14 *R v City of Sault Ste Marie* [1978] 2 SCR 1299, [1978] 85 DLR (3d) 161.

(a) those offences in which mens rea such as intent, knowledge or recklessness must be proved by the prosecution;

(b) those offences in which the doing of the prohibited act prima facie imports the offence leaving it open to the accused to avoid liability by proving that he took all reasonable care; and

(c) absolute offences.

Public welfare offences will prima facie fall within the middle category unless it is clear from the statute that either absolute liability or full mens rea is specifically intended.

[30] Richardson J expressed the rationale as follows:[15]

> There are two reasons why in our judgment the Court should now follow the path taken by the Canadian decision [*R v City of Sault Ste Marie* [1978] 85 DLR (3d) 161) and recognise, first, that in the case of public welfare regulatory offences such as we are concerned with in this case under s 24 [Civil Aviation Act 1964] a defence of total absence of fault is available unless clearly excluded in terms of the legislation; and second, the onus of proving such a defence to the balance of probabilities standard rests on the defendant. First, it is artificial to speak in terms of mens rea. Liability under legislation of this kind rarely turns on the presence or absence of any particular state of mind. But in social policy terms compliance with an objective standard of conduct is highly relevant. Courts must be able to accord sufficient weight to the promotion of public health and safety without at the same time snaring the diligent and socially responsible. The principle of English criminal law that the burden of proof of a requisite mental state rests on the prosecution is not whittled down where in matters of public welfare regulation in an increasingly complex society the defence of due diligence is allowed because it is recognised that the price of absolute liability is too high. Second, as was emphasised in *Sault Ste Marie*, the defendant will ordinarily know far better than the prosecution how the breach occurred and what he had done to avoid it. In so far as the emphasis in public welfare regulations is on the protection of the interests of society as a whole, it is not unreasonable to require a defendant to bear the burden of proving that the breach occurred without fault on his part. As was emphasised in *Creedon*, a high standard of care is properly expected of a defendant in such a case and he must prove that he did what a reasonable man would have done. It would not in our view be appropriate to have a variable standard of negligence depending on subjective considerations affecting the individual concerned, as was suggested in argument at one point.

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15 *Civil Aviation Department v McKenzie*, above n 17, at 85.

[31] In *Hunter v Police*,[16] the section at issue was s 155 of the 1989 Act, which prohibited the licensee or manager of any licensed premises from selling or supplying any liquor or allowing any liquor to be sold or supplied on or from licensed premises to any person who was under the age 18 years. Thomas J drew a distinction between the offence of selling alcohol to a minor and the offence of allowing alcohol to be sold to a minor, holding that the former gave rise to absolute and vicarious liability,[17] whereas the latter required the prosecution to prove mens rea on the part of the defendant.

[32] The same reasoning applies to ss 166 and 167. I am of the view that s 166 creates an absolute prohibition which is ameliorated by the availability of a no fault defence. It can therefore be termed a strict liability offence, whereas s 167 contains a mens rea element. The Authority has acknowledged this, although not always consistently. In *Smith v Gratton*,[18] the Authority said:

> In respect of the ss 167 and 168 offences, "mens rea" is relevant: (see, for example Hutt Café and Bar Limited NZLLA PH89-90/2007). However the offence described in s 166 is one of strict liability; *Glennie v McGlyn* [1958] NZLR 344.

[33] Here I agree with counsel for the respondents that there are sound jurisprudential and policy reasons for concluding that s 166(1) creates a public welfare offence of strict liability, given that it is in a statute whose object is "to establish a reasonable system of control of the sale and supply of liquor to the public, with the aim of contributing to the reduction of liquor abuse".[19]

[34] Because s 166(1) creates a public welfare offence of strict liability, the subjective assessment of whether Mr McBride was intoxicated made by the checkout operator, Ms K, is not of any more significance than any other evidence in the case. It is certainly not determinative. That is because Ms K does not need to know or have appreciated that Mr McBride was intoxicated for an offence to have been committed under s 166(1). Ms K's assessment goes into the pool of evidence from

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16 *Hunter v Police* HC Auckland AP36/93, 19 April 1993.

17 Thomas J did not refer to *Civil Aviation Department v McKenzie*, which recognised the availability of a no fault defence ameliorating the harshness of an offence provision, which on its face imposes absolute liability.

18 *Smith v Gratton* LLA PH-869-872, 18 August 2010.

19 Sale of Liquor Act 1989, s 4.

which the Authority makes an objective factual assessment or determination whether Mr McBride was already intoxicated in terms of s 166(1) when Ms K sold him the beer, and whether there is a defence of total absence of fault available. In making its determination, the Authority is able to give the weight it thinks proper to individual pieces of evidence, such as Ms K's evidence, the CCTV footage, the breath/alcohol reading and Constable Colbert's evidence.

[35] The Authority's reference to the assessment of intoxication as being a subjective test is therefore misleading. First, it is unclear who the Authority is referring to when it talks of a subjective assessment of intoxication. In this case, both Ms K and Constable Colbert made subjective assessments of Mr McBride's intoxication. Ms K stated:

> I do not recall there being anything about the customer's behaviour that would stop me conducting a sale of alcohol to him. He is clearly over the age of 18 years. I am certain that if he had been showing signs of intoxication I would have noticed, and declined to sell the alcohol to him, as I have done in the past. I believe in my heart that I could not smell alcohol on this customer.

[36] On the other hand, Constable Colbert stated:

> For the last six years I have specialised in road policing with intoxicated drivers on a routine basis. On this occasion the driver McBride exhibited signs of extreme intoxication. At times he was unable to stand unassisted, and was unsteady on his feet. His speech was slurred and he was barely able to form sentences. His eyes were bloodshot and he smelt strongly of recent alcohol consumption. McBride told me he had driven to Countdown at Takapuna to buy alcohol on his way home from the pub.

[37] Secondly, the assessment that counts is the one undertaken by the Authority and it is objective in nature. Although the Authority expressed itself inaptly when it said that the assessment of intoxication is a subjective test and there are elements of mens rea in each offence, I am of the view that the Authority did in fact make an objective factual assessment of Mr McBride's intoxication. The Authority took into account all the evidence when it concluded that Mr McBride was demonstrably intoxicated when he purchased the beer. It specifically referred to the call made by a member of the public to the Police about Mr McBride's erratic driving behaviour, the evidence of Ms K, the CCTV footage, the breath/alcohol reading, the evidence of Constable Colbert and the evidence of the manager of Countdown Takapuna about

staff training. All of it was appropriately weighed by the Authority in coming to its determination.

[38] Turning then to the five specific points on appeal, the first ground is that the Authority erred in law by failing to apply established legal principles used to define the state of intoxication for the purposes of s 166(1) of the 1989 Act. Counsel for the appellants submits that while the Authority's analysis of the applicable legal principles and the test to be applied in this case is correct, the Authority nonetheless erred in failing to apply the established legal principles, specifically, the principle that the assessment of intoxication is a subjective test, to this case. Counsel then reviewed the evidence of Ms K at some length, presumably on the basis that it was the subjective assessment of Ms K which was determinative. That is, however, not the case. As noted above, it is the Authority's objective factual assessment that counts and not Ms K's subjective assessment although that is a piece of evidence that the Authority can and should take into account in reaching its own assessment.

[39] The second ground of appeal is that the Authority erred in law by substituting its own subjective analysis of the CCTV footage for that of the appellants' witnesses. This is a development of the first ground of appeal. I am of the view, however, that the Authority did not substitute its own subjective analysis of the CCTV footage for that of the appellants' witnesses. The CCTV footage and the evidence of the appellants' witnesses were both considered as part of the evidence and the weight to be given to each was clearly a matter for the Authority. The CCTV footage had the advantage of being an accurate visual record of the transaction, while Ms K acknowledged that she only had a vague recollection of the sale. In those circumstances, the Authority was entitled to give more weight to the CCTV footage rather than the evidence of Ms K.

[40] The third ground of appeal is that the Authority erred in law by failing to take into consideration the evidence of the checkout operator as to her experience and knowledge of the signs of intoxication. Again, this is a development of the first and second grounds of appeal. Ms K's experience and knowledge of the signs of intoxication was, however, of limited relevance. The Authority did acknowledge her maturity and experience, but noted the evidence of the store manager that checkout

operators were not provided with any formal training in the identification of intoxicated customers. The Authority was well able to conclude as it did that there were sufficient signs of intoxication which should have been detected by Ms K to make her suspicious.

[41] The fourth ground of appeal is that the Authority erred in law by taking into consideration the respondent's evidence of Mr McBride's condition when he was breath tested approximately 45 minutes after the sale. I am however of the view that the Authority was entitled to take Mr McBride's appearance in the hour after the sale into account in assessing whether he was already intoxicated when he purchased the beer.

[42] Although the evidential breath test was not carried out until 8.54 pm, Mr McBride was stopped in his vehicle at about 8.20 pm – just four or five minutes after leaving the car park at Countdown Takapuna. The breath screening test, which Mr McBride failed, was administered at 8.25 pm and Mr McBride was required to accompany Constable Colbert to a place where the evidential breath test could take place at 8.26 pm. It was, in my view, a logical inference properly drawn by the Authority that Mr McBride was very likely to be exhibiting the same signs of intoxication in Countdown Takapuna during the sale to those signs which were evident to Constable Colbert immediately upon stopping him.

[43] The fifth ground of appeal is that the Authority reached a conclusion which it could not have reasonably come to on the evidence, in that there was insufficient evidence to support the finding that the checkout operator sold liquor to a person who was already intoxicated. I am however of the view that there was ample evidence for the Authority to make the findings, which it did. In summary Mr McBride drove erratically and was unable to park his car properly in the supermarket car park. The Police were called by a concerned member of the public who said he was obviously drunk. In the supermarket he almost stumbled when he approached the checkout counter. At the counter he swayed backwards and forwards excessively. He fumbled with his One Card. He dropped the coins when he was handed his change. He also dropped a banknote. During the transaction, Mr McBride and Ms K were very close together. Although Ms K had a limited

opportunity of observing Mr McBride, the CCTV footage indicated that she engaged very little with him and concentrated on the transaction and not on the purchaser. The manager was also close by when Mr McBride was seen to be swaying backwards and forwards on the CCTV footage. The manager walked behind Mr McBride when he was at the counter. The concerned member of the public followed Mr McBride when he left the car park and relayed information to the Police about his erratic driving. When he was stopped by the Police four or five minutes after leaving the car park, he reeked of alcohol and had bloodshot eyes. His speech was incomprehensible at times and he had trouble standing. Finally, he also had a breath alcohol reading three and a half times the legal driving limit 45 minutes later.

[44] The Authority correctly noted that where serious allegations are involved, stronger evidence than the norm for a balance of probabilities test is required. Where the consequences of a successful application by the Police could be the suspension of a licence or a General Manager's certificate, the standard of proof must be very close to that of a criminal prosecution. That is the standard which the Authority said it applied.

[45] Here the Police allege the breach of s 166(1). Although the appellants did not specifically rely on a defence of complete absence of fault, such a defence was not open to the appellants in the present case because, as noted by the Authority, the measures put in place by the appellants to avoid breaching the Act were inadequate. In particular, the Authority noted that checkout operators did not receive any formal training in the identification of intoxicated customers. The Authority correctly commented that there was a statutory obligation on licensees and managers that required appropriate systemic measures to be put in place to avoid breaching the Act.

[46] In all the circumstances, the appeal on a question of law is dismissed. There is no appeal against sentence. The orders of suspension made by the Authority are therefore confirmed, but varied to change the dates from which the suspensions are to commence. The following orders are made:

(a) the off-licence issued to General Distributors Limited allowing it to sell alcohol from the premises known as Countdown Takapuna is

suspended for seven days, commencing Monday, 9 February 2015; and

(b) the General Manager's certificate issued to Paul Tu'ungafasi is suspended for 30 days, commencing Monday, 16 February 2015.

[47] The respondents are entitled to costs on a 2B basis.

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Woolford J