

NEGLIGENCE AND THIRD PARTIES

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[Editor's Note: At Corfu 2009, this paper was delivered by Bill Papastergiadis based on the law as it then stood, namely the decision of the Full Court of the Tasmanian Supreme Court, in Scott's Case, as set out below.

Since the paper was delivered, the decision of the Full Court of the Tasmanian Supreme Court was reversed by the High Court of Australia.¹ Accordingly, a number of the principles referred to by the Tasmanian Supreme Court may no longer represent good law in Australia.

However, and despite the unanimous views of the High Court of Australia, it is appropriate to publish the paper as delivered, bearing in mind the important social comment and the comments made by the Chief Justice of the High Court of Australia on the possibility of further evolution in the law so far as it relates to these aspects in years to come.]

INTRODUCTION

On 19 January 2009, in what was believed to be the first such ruling in Australia, the Full Court of the Tasmanian Supreme Court found a hotel negligent in serving a patron who died in a drink-driving crash after serving too much alcohol and failing to stop him from riding home on his motorcycle.

This ruling challenged the notion that a hotel's duty of care to a patron does not generally extend to trying to prevent harm to that patron caused by his or her own drunkenness.

The ramifications of the decision in *Scott v Tandara Motor Inn*² extend to all persons and venues that are involved in the service of alcohol. *[Editor's note: subject now to the views expressed by the High Court of Australia]*

In this paper, I examine whether this decision reflects a shift in social policy in Australia. I also consider whether this decision has been influenced by the recent press reports of drunken behaviour by youths and security guards inflicting serious injury (and death) on patrons.

ANTISOCIAL BEHAVIOUR

The starting point to any consideration of this complicated issue begins with defining what is commonly understood as constituting 'antisocial behaviour'. One way to obtain an understanding is by reference to the strategies adopted by the various States to combat

such behaviours. These strategies target a large range of activities, not only public violence, but also: 'hoon' driving, graffiti, drunkenness and illicit drug use, urinating in public, noise and minor property damage. Even the actions of young people gathering in shopping malls and at public transport hubs, is seen by some as antisocial behaviour.

Practically all of the States of Australia have implemented various strategies to reduce antisocial behaviour and to address the public perception of increased antisocial behaviour. I summarise below these strategies.

WESTERN AUSTRALIA

The Western Australia Police Force introduced preventative measures aimed at reducing anti-social behaviour and binge drinking among youth. For offenders under 16, the police record the youth offenders' name in a database and also write to parents detailing the offence.

NORTHERN TERRITORY

Tailored for the Darwin and Palmerston areas in the Northern Territory, the First Response Patrol (FRP) was established in 2008 as a daytime patrol to tackle anti-social behavior. A group of eight community engagement officers (non-sworn personnel) work with the Northern Territory Police and other organizations to patrol anti-social behavior 'hotspots'. Among other objectives, the FRP aims to gather intelligence, build relationships with the community and intervene early on the ground to reduce the causes of antisocial behavior. The FRP and a newly established night patrol operate seven days a week.

NEW SOUTH WALES

Researchers at the University of Wollongong received a \$100,000 grant from the NSW government to fund an Australian-first research project investigating the causes of anti-social behaviour among adolescents. The '*Development of Anti-Social Behaviour in Adolescents*' study will be co-ordinated with the Department of Juvenile Justice.

The Alcohol Linking Program has also been introduced in New South Wales. It involves police systematically collecting and recording the alcohol consumption characteristics of those involved in police-assisted incidents. The information includes the name and address of the last place of alcohol consumption. This information is passed to the specific licensed premises cited in the report. Premises that are associated with such activity are subject to police audit and inspections.

The information obtained from the Alcohol Links Program forms part of the Alcohol Related Crime Information Exchange ('ARCIE') database in NSW. The ARCIE database captures information on liquor-related infringements and offences, court proceedings and outcomes related to licensed premises and licensees. It enables the consolidation, exchange and sharing of accurate and timely data in relation to alcohol-related crime. This

centralised database enables NSW police and liquor licensing authorities to identify problematic premises and develop effective and strategic responses to target those small numbers of licensed premises responsible for a disproportionate amount of alcohol-related crime.

QUEENSLAND

Liquor Enforcement and Proactive Strategies ('LEAPS') have been implemented to address alcohol-related violence and disorder associated with, or occurring in and around licensed premises. The LEAPS utilize a computerized database to collect, collate, store and interpret a wide range of variables associated with alcohol-related incidents. This database is used to generate intelligence reports for police, drawing on both general and incident-specific information, identifying '*hot spots*' and other premises that are at risk of becoming problematic. In the past ten years, LEAPS has been rolled out across Queensland.

SOUTH AUSTRALIA

In November 2007, South Australia began its Alcohol Information Reporting database. This database captures the last place that the victim and/or offender drank and an assessment of either the victim or offender's level of intoxication at the time of police contact.

VICTORIA

A number of initiatives have been introduced in Victoria. Some of these have been successful while others have been abandoned relatively quickly.

First, the Victorian Police commissioned '*Australia 21*', a non-profit, public interest company, to conduct a roundtable investigation and prepare a report on the recent upsurge in antisocial behaviour, including violence in public places.

Secondly, Victoria is currently trialling the Alcohol and Drug Recorded Intelligence for Tackling project ('*ADRIFT*').

Thirdly, OPERATION Nightlife has been instituted, which involves police foot patrols in the CBD during peak times, radio communication between police, nightclubs, the safe city taxi rank and late-night food venues, identification scanners in nightclubs and increased camera surveillance.

Fourthly, Victoria Police established a '*SafeStreets*' public safety research team in October 2007. The SafeStreets project is charged with identifying triggers and precursors to public safety-related crime and behaviour establishing the effectiveness of existing and potential policing and regulatory strategies, and identifying and engaging partners for an inter-governmental approach to public safety generally. The SafeStreets Taskforce has

been mobilised to operate every Friday and Saturday night with over 50 police personnel patrolling the streets of Melbourne. The concept is still in its early stages, but it is envisaged that other agencies will be called upon over time to assist with safety initiatives.

Fifthly, Taskforce Razon, an undercover force of 20 police officers has been established to crack down on licensing breaches and irresponsible practice. Its aim is to *'crack down on pubs and clubs that continue to serve people when they are intoxicated'*. Nick-named *'the grog squad'* by the media, the task force brings together regulation and enforcement and works covertly and overtly to identify poor practice and unlawful activity in licensed premises.

Sixthly, in 2008, the Government instituted a 3-month trial lockdown of 2am late entry bans for hotels, bar and nightclub. During the trial, licensees in certain city areas could not allow patrons to enter their venues between 2am to 7am. Patrons who were already in a venue could remain until closing but could not leave and re-enter the premises. Licensees who breached the lockdown by allowing people into their venues after 2am faced fines of up to \$6,800. KPMG was commissioned by the government to survey both venues and patrons after the lockdown trial ended. It was reported that the trial had not worked effectively. In fact, it was reported that violent crime increased during the trial period. The State Government determined it would not continue the lockdown plan.

Finally, Melbourne Lord Mayor Robert Doyle initiated an anti-violence summit which was attended by more than 100 city club and hotel licensees. At the summit, it was agreed that red and yellow cards will be used in a new warning system designed to crack down on drunk trouble-makers in pubs and clubs. Licensees in Melbourne will issue a yellow card warning to anyone showing signs of trouble, while a red card will be used to evict patrons who refuse to settle down. The response by Lord Mayor Robert Doyle was triggered by the release of shocking video footage of nightclub revellers bashing one another at 9.30am on a Sunday morning in Melbourne.

TASMANIA

Public Order Response Teams (*'PORTs'*) established in Tasmania in 2007 target areas prone to anti-social behavior and public order incidents. The regular monitoring and enforcement activities in and around licensed premises is a central part of the PORTs' responsibilities. The PORTs' role is to monitor licensed venues through regular *'walk-throughs'* to check on responsible services of alcohol practices, security, and general administrative requirements.

The PORTs provide information to liquor licensing authorities about licensees and venues. They also contribute to discussions about potential licensees, objections to a change in license conditions or recommendations about disciplinary procedures. They are actively involved in front-line policing strategies.

AUSTRALIAN CAPITAL TERRITORY

Recent legislation provides police with an option to issue infringement notices to individuals consuming liquor within 50 metres of a bus interchange, a shop, licensed premises or a place prescribed by legislation [*Crimes Amendment Act 2008* (ACT); *Magistrates Court (Crimes Infringement Notices) Regulation 2008* (ACT) and the *Magistrates Court (Liquor Infringement Notices) Regulation 2008* (ACT)].

MEDIA ANALYSIS

The media in Australia has been at the forefront of the States' response to antisocial behaviour. The media has captured public attention by depicting images of antisocial behaviour and the costs associated with that behaviour.

Below are some of the recent headlines from Melbourne newspapers;

'Fatal stabbing suspect flees overseas';

'Violence is everybody's problem';

'Lord Mayor puts rogue nightclubs on notice';

'Living in a drunken state';

'CBD violence a critical issue';

'Violence lands 6 in hospital';

'Stab victims brother calls for crackdown on violence';

'Keeping the streets safe is everybody's problem'

'No excuses make the violent pay';

'British backpacker in hospital after bashing'.

From the headlines, one might believe that Australia is on the crest of a youth crime wave. Statistically speaking, crime in Australia is down but antisocial behaviour has skyrocketed. The most common problems are offensive language and behaviour, and alcohol related offences.

The tragedy of the above is the cost of antisocial behaviour on the community. In May 2009, 29-year-old Luke Mitchell, was killed in an attack in Brunswick in the early hours of Sunday. Luke was stabbed five times by a group of men outside a 7-Eleven store as his sister-in-law and her friends watched. The men had followed him to the store after Luke

broke up a fight in which they had been involved outside a nightclub about two blocks away.

Luke's example is one of many. On the same weekend that Luke was killed, the newspapers reported of two young Indian men being attacked with a screwdriver, a third hit over the head with a bottle and a fourth man suffered head injuries after a clash with gatecrashers at a party.

In the past 18 months in Melbourne, five young men lost their lives after being bashed outside licensed premises. Many thousands of people are injured as a consequence of antisocial behavior.

In June 2009, *The Age* revealed that Victoria's only agency for alcohol-related brain injuries, Arbias, had treated about 600 young people in the past year. This number is up from just 120 a decade ago.

The media has also reported on numerous instances of Australian youth caught up in antisocial behaviour internationally. The most reported is Doujon Zammit, the Australian tourist bashed during a night out in Greece. The 20-year-old died after suffering head injuries in a fight with nightclub bouncers on the island of Mykonos.

Police arrested four employees of a nightclub. Zammit was among six Australians involved in an earlier confrontation with four staff at the Tropicana club on Paradise Beach, a well-known summer hotspot. The Australians were suspected of having stolen bags and wallets in the nightclub, an accusation later dismissed by police.

The bouncer was formally charged with murder, illegal possession of a weapon (an extendable baton) and impersonating a police officer. The bouncer told the court that although he was involved in the fight, it was not his intention to kill anyone. The owner of the Tropicana club gave evidence that the bouncer was not on duty at the time of the assault.

AUSTRALIAN COURT RESPONSES FROM A CIVIL PERSPECTIVE

In Australia, the civil courts' decisions reflect the growing trend towards financial compensation for antisocial behaviour. Most of the civil decisions relate to overzealous security providers injuring patrons and recent cases in this regard are relevant.

In *Zabow & Ors v Zorom Enterprises*³, a security provider was found vicariously liable for the acts of its employees in assaulting Mr Zabrow. Mr Zabrow and a group of friends had been asked to leave a hotel. A shoving match ensued between Mr Zabrow and his friends and approximately seven or eight security providers. Mr Zabrow was struck in the head and suffered significant head injuries.

In *Starks v RSM Security Pty Ltd & Ors*⁴ a security provider to a hotel was found liable to a patron as the court found that the security provider's actions were within the scope of his duties as a 'bouncer'. However, the hotel was held not liable for the acts of the security provider. In this case the patron was head butted by a security guard who had asked him to leave the hotel. The patron brought an action against the security guard, the security guards employer, the owner/occupier of the hotel, the hotels licensee and claimed damages for the injuries suffered.

In New South Wales in *Sprod v Public Relations Oriented Security Pty Limited*⁵ the Court of Appeal held that a security company was vicariously liable for the conduct of its security officers who assaulted a man and left him with permanent brain damage. In the early hours of the morning, Mr Sprod went to a pizza shop near the Wagon Wheel Hotel. He was intoxicated and behaving in an aggressive manner. The owner of the pizza shop had an arrangement with the nearby Hotel whereby security staff who worked at the Hotel were offered a discount rate on pizzas and drinks in return for their assistance with security issues which arose in the pizza shop. When Mr Sprod began causing trouble, the owner of the pizza shop contacted Hotel security staff, following which two staff arrived. The security staff requested that Mr Sprod and his friend leave. When they refused to leave, the security staff grabbed Mr Sprod and dragged him outside. Mr Sprod was swearing, abusing and insulting the security staff and was then assaulted by the security staff. The Court held that the security staffs' conduct was within the scope of their authority as employees.

The above cases focus on antisocial behaviour by security providers. Even more interesting is the issue of hoteliers' and security provider's liability to patrons when the aggressor is another patron in the venue.

In the matter of *Portelli v Tabriska Pty Ltd & Anor*⁶, the NSW Court of Appeal held that the owner and licensee of a hotel and the hotel's security firm were not liable for an assault on a patron which occurred outside the hotel's premises.

Mr Portelli and his friends were involved in a fracas with other patrons. Mr Portelli and his friends were left to finish their drinks while the other patrons involved in the fracas were removed via the front door. Mr Portelli and his friends were let out via the back door which led into a lane. After walking approximately 30 metres down the lane and away from the hotel, the other patrons (earlier ejected) attacked Mr Portelli, who was punched and kicked in the head and was seriously injured.

The Court found that the conduct of the hotel and security provider was satisfactory because they had done everything 'reasonable' to prevent confrontation between the patrons. Further, it is accepted practice in such events to remove one party from the venue and keep the other party inside until the threat of violence (from the party removed) has dissipated.

As set out in the introduction to this paper, the liability of hotels in circumstances where the patron is clearly intoxicated was considered in the recent Tasmanian decision of *Scott v Tendara Motor Inn*. In this instance, 41 year old Mr Scott attended the hotel for a drink after finishing work. He left the hotel and rode home on his motorcycle. He lost control of the motorcycle, collided into a guard rail of a bridge and died. His blood alcohol concentration was 0.253.

Mr Scott's motorcycle keys were initially held by the Hotel but he demanded their return and the keys were given to him. The Court of Appeal in Tasmania found that the hotel owed Mr Scott a duty of care and breached that duty. The decision acknowledged 'exceptional circumstances' that may give rise to a duty of care by a licensee to a patron, to prevent harm caused by the patron's own intoxication.

[Editor's Note; the existence of the duty of care and associated aspects were reviewed in the High Court of Australia, where French CJ concluded:

FRENCH CJ. I agree that the appeals should be allowed and that the orders proposed by Gummow, Heydon and Crennan JJ should be made. I do so for the reason, explained by their Honours that the appellants did not owe to the deceased, in the circumstances of this case, a relevant duty of care. I agree also with their Honours' conclusions on causation and breach of duty.

I express no opinion on more general questions about the duty of care owed by publicans to their customers or to persons other than their customers. The resolution of these questions in future will be likely to require consideration of the liquor licensing laws and the civil liability statutes of the relevant State or Territory. The latter statutes now contain provisions dealing with the effect of intoxication upon one or more of duty and standard of care, breach and contributory negligence. As pointed out ... the Civil Liability Act 2002 (Tas) was only enacted on 19 December 2002 and is irrelevant to these proceedings.

While the High Court of Australia has set aside the decision of the Court of Appeal in Tasmania, from French CJ's comments it is possible that the law may evolve further on these issues in due course.]

The cases of *Koch v Lanahmede Pty Ltd*⁷ and *O'Meara v Dominican Fathers*⁸ suggest that alcohol consumption may be an element in heightening the standard of care expected by those in control of licensed premises, similar to the decision in *Scott v Tendara Motor Inn*.

In recent years, the High Court has been divided in its approach when considering whether suppliers of alcohol owe a duty of care to customers who become intoxicated and suffer injuries.

The majority view in the matter of *Cole v South Tweed Heads Rugby League Football Club*⁹ held that no duty of care was owed by suppliers of alcohol to customers. The view was based on notions of personal autonomy, the privacy of consumers and freedom of action. In that case, Ms Cole became intoxicated at the Club and after leaving the club,

sustained injuries in a road accident. Ms Cole had been at the Club for a champagne breakfast, continued to drink all day and was asked to leave due to her behaviour at 6pm. Ms Cole was hit by a vehicle while walking home.

[Editor's Note: Perhaps there is now more uncertainty following the decision in the High Court of Australia. While Scott's case was decided on its merits, it may be very much a fact driven outcome and the door "left open" for further judicial development and review, given the comments made by French CJ.]

CRIMINAL COURT

As a civil lawyer, much of my understanding of the Criminal Courts is derived from newspaper reports. Recent articles appear to reveal a shift in the Criminal Court's approach. For instance, two days prior to my departure for Greece, I scanned The Age newspaper and noted an article entitled '*Jail for vicious booze - fuelled assault*'.

The Age article reported that a David Mitchell, was hit, kicked and had his head stomped on outside a nightclub after he tried to act as a '*peacemaker*' between two groups of men. His attacker was sentenced to six years jail in the Victorian County Court.

His Honour Judge John Nixon described the action of an '*alcohol-fuelled*' attacker who was '*vicious, brutal and after David Mitchell had been knocked to the ground, particularly cowardly*'. The article reported that Judge Nixon hoped that the punishment would serve as a warning that mindless alcohol driven violence would not be tolerated.

CONCLUSION

The harm associated with drinking was reported in a recent article in The Age as being at \$15 billion, not to mention the lives lost. The same recent article in The Age stated:

'the Federal Government estimates that 4 people aged under 25 are dying every week from alcohol related injuries, whether that be in car accidents, drunken brawls or choking on their own vomit. This carnage has been especially visible on Melbourne's streets. Every week, police, doctors, politicians, judges and other community leaders seem to be fronting the media, lamenting another sickening 'booze -fuelled incident. New crime statistics, released by Victoria Police last month, confirmed the anecdotal evidence. In the past year, 21,500 people were arrested for being drunk, up 4,000 on the previous year. Assaults were also up 5 per cent and homicides increased 7 per cent, although it is unclear how much of this was driven by alcohol alone.'

Most experts agree that reducing alcohol consumption and alcohol related harm requires a sophisticated mix of long and short term measures.

The Courts are no doubt sending a message particularly in the Civil Courts that businesses need to enforce responsible service of alcohol and to control security staff. Significant awards of damages are being made against businesses.

No doubt damages clearly affect the hip pocket of hotel and security public liability insurers. This will to some extent lead to, and has led to, changes in the conduct of proprietors and security agencies. The Courts are cognisant of the role they can play in this matter.

Even though the patron was unsuccessful in the matter of *Cole v South Tweed Heads Rugby League Football Club*, in his minority judgment, Justice Kirby stated that if the existence of a duty of care to patrons such as Ms Cole existed, and this led to an increase in insurance premiums, then that *'might stimulate a desirable change of culture and conduct'*. Justice Kirby's decision may involve insurance companies in issues of social responsibility.

However, The Age has reported that Geoff Munro, head of the Australian Drug Foundation has maintained that the most effective measures to reduce harmful consumption of alcohol are increased pricing and reduced availability. He says that Australia may have reached the tipping point *'where the problems associated with regulation of alcohol has peaked'*.

The Age has also reported on research by Professor Homel which revealed that evidence of what has worked in reducing bar aggression violence world wide was *'remarkably thin'*. The Age reported that *'At a time when there is an increasing demand in many countries for the authorities to do something about the malignant affects of the night time economy on public health and safety, experts are not in a position to offer affirmative advice, at least not advice that is firmly grounded in robust evidence'*. Professor Homel concluded in his initial findings that *'we actually know very little about how to systematically stop violence and aggression'*.

Clearly, the Courts are playing a role in recent cases in increasing the accountability of security providers and licencees. At the same time, it is obvious that this represents only a small component of the likely measures required to deal with what is a very serious social issue.

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¹ C.A.L. No 14 Pty Ltd v Motor Accidents Insurance Board; C.A.L. No 14 Pty Ltd v Scott [2009] HCA 47 (10 November 2009)

² Scott v CAL No 14 Pty Ltd t/as Tandara Motor Inn (No 2) (2009) 256 ALR 512

³ Zorom Enterprises Pty Ltd v Zabow & Ors [2007] NSWCA 106

⁴ Starks v RSM Security Pty Ltd, [2004] NSWCA 351 (New South Wales Court of Appeal)

⁵ Sprod v Public Relations Oriented Security Pty Limited [2007] NSW CA 319.

⁶ Portelli v Tabriska Pty Ltd [2007] NSWSC 1256 (first instance); see Portelli v. Tabriska Pty Ltd & Ors [2009] NSWCA 17

⁷ Lanahmede Pty Ltd v Koch [2004] SASC 204. 65

⁸ O'Meara v Dominican Fathers [2003] ACTCA 24

⁹ Cole v Sth Tweed Heads Rugby Club [2004] HCA 29; 217 CLR 469; 207 ALR 52; 78 ALJR 933