

MAX SPRY, BRISBANE

Late one night, while walking to his car which was parked in a shopping centre car park, a man is attacked by three assailants, one wielding a baseball bat. The car park is in darkness, because on that particular night, as on other nights, the lighting is turned off at 10pm. Is the owner of the shopping centre liable in negligence for the injury suffered?

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This question was addressed by the High Court in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61 (23 November 2000). As Kirby J observed, until *Modbury*, the Court had 'not previously considered the specific question of whether, at common law, a duty of care may be established and extend, in its scope, to the avoidance of foreseeable risks of injury arising out of the criminal acts of a third party' (at [65]). The decision is, therefore, of considerable importance.

While the Court upheld *Modbury Triangle Shopping Centre Pty Ltd's* (Modbury) appeal (Gleeson CJ, Gaudron, Hayne and Callinan JJ; Kirby J dissenting) it did not categorically rule out that an occupier of land may, in some circumstances, owe a duty of care to protect persons lawfully upon the land from injury caused by the criminal acts of third parties.

#### The facts

At about 10:30pm on Sunday 18 July 1993, the respondent, Mr Anzil, was attacked by three men in the car park at Modbury's shopping centre. He suffered serious injuries. At the time of the assault, Mr Anzil was an employee of a company operating a video store at the shopping centre. He had finished work for the evening, locked the video store and was walking towards his car when he was assaulted. He did not see his assailants prior to the attack. The car park was in darkness as it was the practice of Modbury to turn the car park lights off at 10:00pm, the time the video store closed.

Prior to the assault on Mr Anzil, there had been several criminal incidents in the car park, although these incidents did not 'indicate a high level of recurrent, predictable criminal behaviour' (at [33] per Gleeson CJ). Employees of the video store had also complained to Modbury as to the time the car park lights were turned off, and had asked that they be left on until about 10:20pm. Further, the cost of lighting the car park was shared by the tenants of the shopping centre, including the video store, and not Modbury.

Mr Anzil succeeded against Modbury at first instance, and on appeal to the Full South Australian Supreme Court.

#### Appeal to the High Court

There were two issues before the High Court:

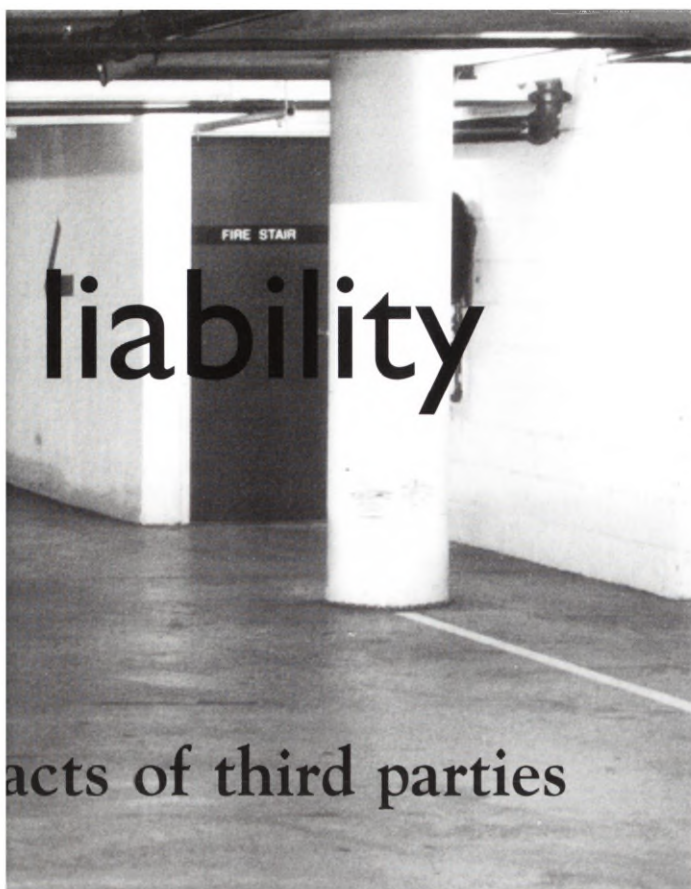
1. whether an occupier of land is liable in negligence 'to a person who, whilst on the land, is injured as a result of the deliberate wrongdoing of a third party' (at [2], per Gleeson CJ); and
2. causation.

#### The High Court's decision

While in general the law does not impose upon a person a duty of care to prevent harm to another arising out of the criminal acts of a third party, in some circumstances the relationship between the parties may give rise to such a duty. Gleeson CJ (with whom Gaudron J agreed) cited as examples of such relationships that of employer and employee, school and pupil and bailor and bailee (at [26]). In *Modbury* the Court refused to extend the categories of such relationships to include occupier of land and lawful entrant on the land.

Gleeson CJ acknowledged that there was no doubt that 'an occupier of land owes a duty of care to a person lawfully upon the land' (at [17]), but said that Modbury's duty to Mr Anzil 'did not extend to taking reasonable care to prevent physical injury

Max Spry is a Barrister, Level 17, Inns of Court, Brisbane, 4000  
PHONE 07 3236 0323 FAX 07 3236 3535



to ... [him] resulting from the criminal behaviour of third parties on that land' (at [36]).

### Control

It is the control over the premises that gives rise to an occupier's duty in relation to the condition of those premises.

Mr Anzil argued that it was the ability of Modbury to control the car park lighting that formed the basis of its duty to him. However, as Gleeson CJ stated, Modbury had no control over Mr Anzil's attackers. 'The inference that they would have been deterred by lighting in the car park is at least debatable' (at [19]).

Hayne J (with whom Gaudron J also agreed) expressed the duty allegedly owed by Modbury as 'a duty to take reasonable steps to hinder or prevent criminal conduct by third persons which would injure persons lawfully on the appellant's premises' and as 'a duty to take reasonable steps to attempt to affect the conduct of persons whom it had no power to control' (at [109]). His Honour concluded that such a duty should not be recognised. Modbury exercised no control over Mr Anzil's attackers, and was not in a position to do so: 'It is not enough to say that [Modbury] had power to act in a way that may have made the occurrence less likely (by leaving the lights on)' (at [113]).

### Assumption of responsibility

Gleeson CJ rejected Mr Anzil's submission that Modbury had assumed responsibility for the lighting of the car park (at [23]). This submission, his Honour said, confuses Modbury's capacity to control the lighting and whether it had 'assumed an obligation to care for the security of persons' in Mr Anzil's position from the criminal acts of third parties (at [23]). And, the evidence did not disclose anything to suggest that Modbury had assumed any such obligation.

Kirby J, in dissent, said that in refusing to leave the car park

lighting on after the request from the video store employees, as it was entitled to do, Modbury 'assumed legal responsibility for damage caused to the respondent by the want of reasonable care to a legal neighbour inherent in that response' (at [91]). The extent of the liability owed by Modbury to other entrants would, his Honour continued, depend on the circumstances:

*Other entrants were not repeatedly exposed to danger. They had not made special complaints and requests. Their presence within the centre would not have been so closely bound up in the mutual economic interests of the appellant, its tenants and their employees.* (at [91])

### Foreseeability and predictability of criminal behaviour

While Modbury's appeal was upheld, the majority Justices did leave open the possibility that in certain circumstances an occupier may indeed be liable in negligence for the damage caused to an entrant by the criminal acts of third parties. Gleeson CJ observed:

*There may be circumstances in which, not only is there a foreseeable risk of harm from criminal conduct by a third party, but, in addition, the criminal conduct is attended by such a high degree of foreseeability, and predictability...that the law may impose a duty to take reasonable steps to prevent it.* (at [30])

Similarly, Hayne J left open the proper approach in cases where it is alleged that the occupier 'failed to control access to or continued presence on the premises' or where the 'occupier has a high degree of certainty that harm will follow from lack of action' (at [117]).

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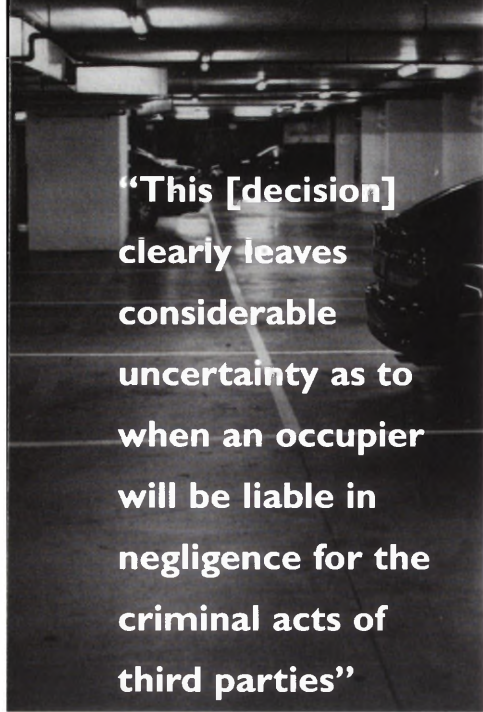
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PO Box 1353, Neutral Bay, NSW 2089  
DX 21727, Neutral Bay

Tel: 02 9929 2921 Fax: 02 9929 9218 Email: susanw@smartchat.net.au



**“This [decision] clearly leaves considerable uncertainty as to when an occupier will be liable in negligence for the criminal acts of third parties”**

stances, or the nature of the relationship between the plaintiff and the defendant’ (at [147]).

#### **Causation**

As to causation, Gleeson CJ said that while Modbury’s ‘omission to leave the lights on might have facilitated the crime, as did its decision to provide a car park’, it was not a cause of Mr Anzil’s injuries (at [40]; and see also Hayne J at [107]). Callinan J agreed, observing:

*It by no means strikes me as a matter of common sense that the*

And, while concluding that Modbury’s duty to Mr Anzil did not extend to maintaining the car park lighting after the video store had closed, Callinan J said that that ‘does not mean that there can never be a duty ... to take precautions to prevent or reduce the chances of criminally inflicted injury or loss by third parties’ (at [147]). His Honour continued, stating ‘for such a duty to arise, there must be something special in the circum-



*absence of the relevant lighting in this case made the attack here inevitable, or caused, or indeed invited it* (at [150]).

In dissent, Kirby J acknowledged that the direct cause of Mr Anzil’s injuries was the criminal conduct of his assailants. However, his Honour continued, it was open to the trial judge to conclude that Modbury’s omission ‘materially contributed’ to Mr Anzil’s injury (at [96]). Modbury argued that even if the car park had been lit, Mr Anzil would still have suffered injury. The onus rested on Modbury to persuade the trial judge to accept that conclusion, and it had failed to do so.

#### **Conclusion**

While the appellant occupier was successful in *Modbury* the Court did not close the door completely on plaintiffs seeking damages as a consequence of injuries caused by the criminal acts of third parties while lawfully on the occupier’s land. Where there are ‘special circumstances’ or, where there is ‘a high degree of certainty that harm will follow from lack of action’ or an occupier fails to control access to the premises, for example, an occupier might be liable to the entrant.

This clearly leaves considerable uncertainty as to when an occupier will be liable in negligence for the criminal acts of third parties. In particular, does Hayne J’s reference to an occupier failing to ‘control access to or continued presence on the premises’ oblige occupiers to put in place some form of security? It will be interesting for plaintiff lawyers to map the development of these issues and their decided outcomes. **PL**



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