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Tragic, yet glamorous: injuries on licensed premises

At a fashionable London nightclub on the millennial New Years Eve, the eighties pop icon turned millionaire DJ 'Boy George' was hit by a massive mirror ball that fell from the ceiling of the club. As distressed punters rolled the glittering boulder off the celebrity, Boy George gave everyone a laugh by declaring that this would have been a "tragic, yet glamorous way to die." Unknowingly, he also summed up the special circumstances which expand the duty of care owed where alcohol is sold by licensed premises to members of the public.

Since *Hackshaw v Shaw*[1] and *Australian Safeway Stores P/L v Zalzuna*[2], occupiers' liability is now determined according to the ordinary principles of negligence. Although it is beyond the scope of this paper to consider these principles in great depth, I have however made observations on the relevant issues which arise in injury claims concerning licensed premises.

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Industry Background

Australia's liquor licensing laws are gradually being relaxed, and many new varieties of licensed entertainment venues are appearing. It is important to understand how the industry operates, so that one may apply the ordinary principles of negligence to the relevant facts.

There is now a continuum of venues and businesses which offer a blend of entertainment, alcohol and food. These range from the vineyard cellar doors (with takeaway retail as the main objective) to the 'one-off' big outdoor festival which focuses on delivering a single performance from a well-known musical act.

The key feature which attracts liability as a matter of policy is that the business derives its main income from ▶

liquor sales on the premises. This aspect of their operation sets the scope of the duty of care, forseeability, remoteness, proximity and even causation.

Entertainment venues will often have numerous 'occupiers' for the purposes of determining who has control over the premises. The owner of the liquor license will often lease the real property from a landlord, and some licensees conduct the entire operation themselves. However, the mounting complexity and competitiveness of the industry has led many licensees to subcontract many or all of the services they offer.

In recent years, licensees have also used franchise arrangements to attract customers interested in a particular type of venue, such as an Irish theme. No doubt these franchise agreements contain some material on managerial policies, and as such they may provide a discoverable source of material on liability, or even additional defendants where those agreements exert managerial control over the operation of the liquor license. Practitioners should also search the internet for photographs and information on venues, as many tend towards the type of hyperbolic overstatement which is not compatible with responsible management.

There is also commonly another layer of operational management called 'promotion', that specialises in enticing customers through the door. Promoters may even develop a brand name 'event' which they move from venue to venue. The skills involved in the efficient administration of a licensed operation are not necessarily compatible with the skills of a good 'promoter'. Some promoters exercise no control over the premises and are simply employed staff, but others can have genuine control.

The more popular the event, the more bargaining power the promoters have as compared to the licensee, and the more effective control the promoters may wrangle from the licensee in terms of environmental modifications or crowd control options. Promoters frequently appoint there own security and this may lead to the expected breaches of the *Private Agents Act 1990*. Many promoters also breach the terms on which they are meant to operate at a venue, and this will raise the usual causation issues in relation to negligence claims.

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Artists working at venues also vary in status between independent contractors or employees, with some filling both roles during an evening. For example, musicians tend to work under varying legal conditions and may actually be controlled by promoters rather than licensees.

The vitality of the industry means that there are many new entrants who lack experience and are prone to make operational mistakes which give rise to legal liabilities. This high turnover may also mean that an entertainment venue has changed hands since a cause of action arose. Yet, the fashion element of the business means that even venues which have not changed hands will be constantly 'reinventing' themselves with new names, themes and styles, so investigators of claims must not be deterred by an apparent difference in identity when searching for parties to litigation.

With this background in mind, we can now consider aspects of occupiers' liability in entertainment venues.

Human Factors

In Victoria, *Club Italia (Geelong) Inc. v Ritchie*[3] has now established that licensed entertainment venues will be liable for the misconduct of their patrons even outside these venues.

Briefly, the appellant (and a promoter who was not sued) conducted a regular debutante ball, which on one occasion degenerated into a debutante brawl. The club sold alcohol to patrons, who became progressively more drunk and aggressive. Their employed crowd controllers ejected victims of the aggression rather than the perpetrators, and called for police assistance twice. On the second occasion, the club failed to warn police that a full scale melee involving approximately 50 people had broken out in its car park. The respondent, *Ritchie*, was one of two police officers who answered the club's call for assistance, and on his second visit he was set upon and badly injured.

The club argued quite unsuccessfully that it was not responsible for the criminal conduct of others. Brooking, Charles and Chernov JJA held the club had been negligent in its conduct of the night and failure to warn the police of

the melee escalation. The court also affirmed the club's statutory duty to expel intoxicated persons under section 122(1)(e) of the *Liquor Control Act 1987*.

Between paragraphs 34 and 46, their Honours articulated the policy behind their finding of liability. The club was a 'business which generates disorder', which accordingly created a 'special relationship' with those persons exposed to foreseeable consequences of that disorder.

It was interesting to note that the court accepted expert opinion that the proper number of crowd controllers in licensed entertainment venues is 1 + (1 per 100 patrons). The plaintiff was awarded $476,274 including $310,000 for future economic loss.

This case consolidates the Victorian Court of Appeal decision in *Downunder Rock Café Pty Ltd v Roberts*[4]. In that case, Winneke P, Charles and Buchanan JJA held it to be a forseeable risk that an injury could be caused by a patron swinging on (and thereby causing the collapse of) a lighting grid suspended from the roof of a live music venue, because the environment was one where patrons were encouraged to drink, the band played songs which encouraged patrons to 'perform feats of athleticism' in response to the lyrics 'jump', where the lighting grid was supported in an insecure manner, and despite the fact that no one had previously tried to 'emulate Tarzan' at the venue. The risk was slight but real, and the preventative measures were inexpensive.

The verdict of $85,000 was affirmed in relation to four months off work, multiple cervical and thoracic disc protrusions with permanent loss of function. Charles JA observed that there was a higher than usual standard of care attracted by the contractual entrance fee, affirming McCardie J in *Maclenan v Segar*[5]:

'Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties "unless it provides to the contrary" contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of anyone can make them.'

In *Johns v Cosgrove & Ors*[6] a plaintiff, who was known to the staff of his local hotel as a heavy drinker, left the hotel at closing time and staggered on to the nearby major road whilst waiting for the bus. He was then hit by an oncoming car and suffered head injuries, a fractured leg and an injured knee. Derrington J apportioned 45 percent of the half-million dollar liability (which included $75,000 general damages) to the ▶

plaintiff, with the hotelier responsible for 25 percent and the driver responsible for 30 percent. The substantive decision survived an appeal on other grounds.

In Western Australia, a magistrate's decision to refuse to hold a hotel liable in negligence as a third party for serving a defendant driver until he was 0.172 BAC was successfully appealed in the matter of *Southcorp Whitegoods v Rosser & Ors* in front of Acting Judge, Commissioner Rodney Greaves. Greaves ruled that the resulting car accident was a forseeable result of serving a patron past the point of intoxication, so the chain of causation was not broken. The decision unfortunately became a nullity when Greaves AJ ruled that his own appointment was constitutionally invalid, whereupon the matter promptly settled.

The principle which seems to be emerging is that liability will not attach to servers of alcohol unless they have some special knowledge about the circumstances of the injured person. In *Oxlade v Gosbridge*[7] the entertainment venue was liable for injuries to a plaintiff caused by a woman fleeing in her car from abuse by intoxicated patrons in the carpark of the hotel at closing time. The incident was forseeable because the management knew offensive behaviour was commonplace in the carpark at closing time, but had done nothing to prevent same.

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Even so, the principle of geographic proximity remains a strong one, as we can see that all of the successful cases occurred within a close range of the venue in question.

The principles of alcohol server liability first found judicial favour in the Canadian Supreme Court case of *Jordan House Limited v Menow*[8] where a hotel was found liable for the subsequent roadside injury of a patron whom they knew to be a chronic drunk who had no safe means of getting home, and to whom they knowingly served alcohol subsequent to observing his obvious intoxication. The cause of action became known as 'dram shop liability'.

In *Bateman v Reeve*[9], Priestley, Meagher and Handley JJA did not extend the principles of dram shop liability to a private host, instead saying the plaintiff had failed to take reasonable care when exiting the well-lit premises.

The last word on NSW at the time of writing is *Cole v Lawrence*[10], where Hulme J ruled that a club which knowingly served champagne to a grossly intoxicated female plaintiff was partly liable. The club had offended her by refusing further service, then offered her their courtesy bus for transport, which she declined in a drunken rage. She was then hit by a careless driver 100 metres from the club. The plaintiff, who admitted getting intentionally drunk, suffered multiple fractures, head injuries, and scarring with a permanent loss of function, and was awarded general damages of $150,000: past economic loss $83,284; past out-of-pocket expenses $18,000; future out-of-pocket expenses $18,000; and past and future *Griffiths v Kerkemeyer* $11,370. His Honour held that the scope of reasonable care extends to refusal of service if it can be seen that provision of alcohol is certain to, or probably will, lead to intoxication, and that the offer of the courtesy bus was only made at a point in time at which the defendant foresaw the plaintiff would refuse it, so the gesture was not a complete defence. Liability was apportioned between joint tortfeasors in proportions: plaintiff 40 percent; driver 30 percent; club 30 percent.

The scope of an entertainment venue's duty to provide crowd control, or 'security', has been considered in several cases. In *Chordas v Bryant (Wellington) Pty Ltd*[11], an entertainment venue was found not liable for not restraining a patron who subsequently assaulted another patron. The assailant was known to the licensee, was 'well affected by liquor', but did not have a violent disposition, and had not appeared to be violent on the night in question. In short, the plaintiff's abuse of the assailant had completely precipitated the attack. It was also held that the relevant licensing laws did not give rise to any private right to claim a breach of statutory duty as the wording of those rules revealed no intention to create private rights.

But the tables turned where prior complaints about a drunk patron were received by the management in *Wormald v Robertson*[12]. The Queensland Court of Appeal held it to be forseeable that if management did not take the lead in controlling rowdy patrons, other members of the public might come forward to do so and be injured as a result.

In *Speer v Nash*[13] it was held that it was not enough for management to simply 'ask' a drunk patron to leave; they needed to be capable of effective control of the person whom they had intoxicated.

Intervention can also be too forceful, as in *Horkin v North Melbourne Football Social Club*[14] where a plaintiff was ejected for consuming free alcohol to which he was not entitled in a private area of the club. The club was found liable for battery when two security guards lifted up the physically passive, but argumentative, plaintiff and bodily threw him down concrete stairs. The

defendant was required to use reasonable force even though they had asked the plaintiff to leave on several occasions in a short space of time. Although the plaintiff was found to be 30 percent responsible, this was irrelevant since the plaintiff had pleaded an intentional tort.

Environmental Factors

Floors in entertainment venues provide the usual issues for occupiers, as in *Botwell v Hovan & Anor*[15]. In this case the plaintiff's familiarity with the hotel, and the fact that his level of intoxication was moderate, outweighed the expert evidence that the raised fireplace hearth was unsafe, so the venue was not liable.

In light of the cases discussed above, one could imagine that this case might have been decided differently had the plaintiff been substantially intoxicated as a result of the venue's sale of alcohol to him. This appears to have been the case in *Gorman v Williams*[16] where a regular and intoxicated customer was invited by the publican to make a round of drinks, whereupon he slipped and fell on the spillage he himself had created behind the bar. The plaintiff was known to be wearing thongs, have no experience at bar work, and the floor was vinyl. As the transaction was for the benefit of the venue in a public relations sense, their duty of care was higher than for a sober plaintiff. McHugh JA endorsed this view in *Phillis v Daly*[17]:

'A reasonable person would expect a higher standard from a person in the position of the [entertainment venue] than from a private householder.'

Dance floors have been the subject of two decisions. In *Demczuk v Polish Society Dom Mikolaja Inc*[18] the occupier of the premises sprinkled a sawdust-like preparation onto a dance floor which had already been treated with spirit wax. The combination of the two substances made the floor particularly slippery, causing the plaintiff to fall. The plaintiff succeeded against the Society and the pleas of 'assumption of risk' and 'contributory negligence' failed.

In *Soutter v P & O Resorts P/L & Anor*[19] the Queensland Court of Appeal found an entertainment venue was not liable for injuries caused by the 'slam dancing' of a patron, as the injured person was aware of the patron's habits as a drinker and dancer (forseeability), and chose to face away from him and not keep a proper lookout.

The safety of a venue's external grounds was considered in *Corliss v Adams*[20]; by expert intoxicants Judge, his Honour Justice Studdert, who found liability where an injured patron, who was familiar with the premises, fell in a hole in the ground in grassed area behind the hotel. Although comprising unmowed lawn, the area was regularly used as a thoroughfare and there were no warning signs. There was no contributory negligence in relation to the sprained ankle, and the award comprised of non-economic damages $50,000; interest for past $3,375; past medical costs $2,145; loss earning capacity $25,000; for a total award of $80,520.

South Australia seems to have a monopoly on cases involving temporary liquor vendors. In *Jones v Whyalla Basketball Association Inc*[21], Doyle CJ, Bleby and Martin JJ considered the liability of a mobile liquor selling booth at a basketball carnival. The booth had no artificial light so it was placed in position to receive light from an external source, but in doing so, it significantly obstructed a natural pathway, where a moderately intoxicated plaintiff collided with the booth. The 35-year-old male carpet cleaner/fitter suffered 15 percent permanent disability and was awarded past economic loss $1,200; future economic loss $25,000; past non-economic loss $12,000; future non-economic loss $8,000; past special loss $611; interest $1,179. But his total assessment of $47,989 was reduced due to contributory negligence of 40 percent to $29,265.

Finally, in *Nguyen v Hiotis*[22] Doyle CJ, Mullighan and Bleby JJ attributed no liability to the owners of the town hall when an event organiser who hired the hall provided inadequate security to prevent a fight at a fashion parade. There was no non-delegable duty of care to take reasonable care to ensure the plaintiff's safety and security at the hall.

Legislative Developments

Under *Astley v Austrust*[23], plaintiff's had been able to avoid contributory negligence defences by concurrently pleading the claim in contract and negligence. The insurance industry was of the view that this ruling was too expensive, and convinced the Commonwealth Attorneys-General to change the law in each of their respective states. Victoria was the first state to comply, with the *Wrongs (Amendment) Act 2000* providing the expected blueprint other state legislatures will put forward.

Section 25 of the Principal Act now defines a Wrong, inter alia, as 'a breach of a contractual duty of care that is concurrent and co-extensive with a duty of care in tort' whereupon section 26 permits a reduction in damages 'to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.' This means that apportionment for contributory negligence is now allowed even though there is a successful claim in contract which traditionally admits no such thing.

The legislative drafting, however, gives plaintiffs who anticipate significant difficulties with contributory negligence an option to plead only the contractual claim (say, breach of an implied term that a premises will be safe) and thereby avoid the effect of the Act unless the defendant pleads its own negligence to create concurrent liability.

Subsection (1B) also gives primacy to any contractual limitation of damages, and so it would seem that prudent risk managers will now print such a term on any admission ticket as a matter of course.

Section 28AA makes this all retrospective in its effect, even for claims already on foot, so that anyone dealing with a claim which includes an *Astley* pleading may simply ignore it.

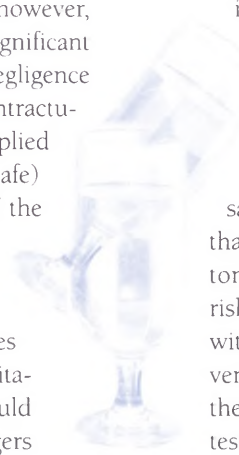
On the law reform front, the *Public Liability Issues Facing Local Councils* report from the Public Bodies Review Committee (NSW Parliament) tabled 1 November 2000 includes a recommendation exempting councils from liability for falls on council occupied land provided they acted in good faith and in reliance of a recognised standard.

Conclusion

This survey of recent case law reveals there has been significant, but as yet unreported, case law at the superior court level in most states of Australia. This includes five decisions of State Appellate Courts, with all decisions presenting varying ratios and facts. As such, it seems that the stage is set for a High Court pronouncement on liability for injuries arising from the sale of alcohol, and with respect, I submit the following unifying principles can be drawn from recent cases .

Where environmental agents have inflicted the injuries, the standard of reasonable care will be higher than usual due to policy considerations arising from the entertainment venue's profit being derived from the sale of a substance which makes consumers more vulnerable to injury.

Where human agents cause the injuries, liability will attach where the venue has 'special knowledge' of the plaintiff's vulnerable state. However, there is also a line of authority which seems to say that it is simply forseeable that seriously intoxicated customers will take unnecessary risks, and that liability will attach with nothing stronger than the venue's awareness of the level of the plaintiff's intoxication. Either test could be justified on a common sense basis. PL



Footnotes:

1 (1984) 155 CLR 614.
2 (1987) 162 CLR 479.
3 [2001] VSCA 180 (17 October 2001).
4 (1998) ATR 81 – 481, [1998] VICSC 101 (28 May 1998).
5 [1917] 2 K.B. 325, at 332-3.
6 [1997] QSC 229 (12 December 1997).
7 (NSWCA, Unreported, Mason P, Sheppard and Fitzgerald AJJA, 18 December 1998).
8 (1974) SCR 239.
9 [1999] NSWCA 49.
10 [2001] NSWSC 92.
11 (1988) 91 ALR 149, (1988) 20 FCR 91.
12 (1992) ATR 81-180.
13 (NSWSC, Unreported, Studdert J, 17 December 1992).
14 [1983] 1 VR 153.
15 [1999] NSWCA 53 (10 March 1999).
16 (1985) NSWLR 662.
17 (1988) 15 NSWLR 65 at 77.
18 (1987) 47 SASR 223.
19 [1998] QCA 51 (13 March 1998).
20 [1999] NSWSC 948.
21 (1999) 202 LSJS 232; [1999] SASC 131.
22 (2000) 76 SASR 522; (2000) 208 LSJS 239.
23 [1999] HCA 6.