



**PARLIAMENT OF VICTORIA**  
**DRUGS AND CRIME PREVENTION COMMITTEE**

**OCCASIONAL PAPER**

Trends in Negligence and Public Liability:  
The evolving liability of licensees and servers of  
alcohol to their patrons and third parties.

March 2001

Drugs and Crime Prevention Committee

Level 8, 35 Spring Street

Melbourne Victoria 3000

Phone: (03) 9651 3546

Fax: (03) 9651 3603

Email: [pete.johnston@parliament.vic.gov.au](mailto:pete.johnston@parliament.vic.gov.au)

Website: <http://www.parliament.vic.gov.au/dcpc>



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The evolving liability of licensees and servers of  
alcohol to their patrons and third parties.

This Occasional Paper was written by Mr Pete Johnston, Legal Research Officer to assist the Drugs and Crime Prevention Committee in its deliberations during the Inquiry into Public Drunkenness.

The views expressed in this paper do not reflect current or proposed Victorian Government policy and they do not necessarily reflect the position of the Victorian Parliamentary Drugs and Crime Prevention Committee. The paper in no way predetermines the findings of the Committee's final report into public drunkenness.

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## **Drugs and Crime Prevention Committee**

### ***Members***

The Hon. Cameron Boardman, M.L.C – Chairman  
(from 22 August 2000)

Mr. Bruce Mildenhall, M.L.A. - Deputy Chairman

The Hon. Robin Cooper, M.L.A.(from 6 September 2000)

Mr. Kenneth Jasper, M.L.A

Mr. Hurtle Lupton, M.L.A.

The Hon. Sang Minh Nguyen, M.L.C.

Mr. Richard Wynne, M.L.A.

Mr. Kim Wells, MLA.

(Chairman 16 December 1999 to 22 August 2000  
and discharged from the Committee 6 September 2000)

### ***Committee Staff***

Ms Sandy Cook

*Executive Officer*

Mr Peter Johnston

*Legal Research Officer*

Dr David Ballek

*Research Officer*

Ms Michelle Heane

*Office Manager*

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## **Terms of Reference**

*Received from the Governor in Council on 22 February 2000 and the Legislative Assembly on 14th March 2000*

To the Drugs and Crime Prevention Committee - for inquiry, consideration and report by the first day of the Autumn 2001 Parliamentary sittings into the issue of public drunkenness. In particular, the Committee is to:

- a) consider the appropriateness of the existing law in Victoria relating to public drunkenness;
- b) identify any law reform the Committee considers necessary to deal with public drunkenness;
- c) review the adequacy of existing strategies for dealing with persons arrested for public drunkenness, such as diversion of people from police custody into sobering-up centres.

In conducting the Inquiry the Committee is to have regard to:

- A. approaches taken to this issue in other Australian jurisdictions;
- B. the Final Report (published in 1991) of the Royal Commission into Aboriginal Deaths in Custody;
- C. such other legislation, case law, reports and materials as are relevant to the Inquiry.

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## Addendum

Please note that the case of *Johns v Cosgrove* highlighted in this paper has since been appealed, see *Cosgrove and Anor v Johns* [2000] QCA 157.

The court appeal of the Supreme Court of Queensland allowed the appeal on the basis that it had subsequently been established that the previously successful plaintiff (*Johns*) had encouraged witnesses appearing on his behalf at the original trial to perjure themselves. As such it was felt the original decision should be overturned due to the fraud of the plaintiff. The case has subsequently been returned to the Supreme Court of Queensland for a re-trial.

It should be noted that none of the appeal judges commented upon the actual principles of law as espoused by Derrington J in *Johns v Cosgrove*. It is submitted that these principles still arguably reflect the trend in which this area of negligence law will develop.

# Liability of Licensees and Alcohol Providers

The apportionment of alcohol providers' liability in negligence is one of the most important developments in tort law in recent years. The experience of the Canadian courts and case law is a possible guide to the evolution of this liability in Australia.<sup>1</sup>

The literature suggests that in both Canada and Australia licensed premises contribute disproportionately to alcohol related problems.<sup>2</sup> Solomon and Payne argue that even within the general category of pubs, clubs and hotels certain practices are associated with greater problems:

Premises that cater to young males, have no or poor entertainment, do not encourage the consumption of food, do not offer low strength and non alcoholic beverages, and are over crowded, uncomfortable and understaffed are associated with greater problems. Happy hours, free drinks, extra strong drinks, double rounds, price discounts, irresponsible advertising and promotions, and drinking contests...all have a similar impact on these risks. Untrained staff, aggressive bouncers, and house policies that permit continued sales to visibly intoxicated patrons have also been found to increase the likelihood of problem (1996, p.193).

It is a combination of the factors enumerated above, alongside the empirical evidence of alcohol related deaths, morbidity, crime and other harms, that have led to the Canadian courts widening the boundaries of tort liability to hotel licensees and other alcohol providers. Such liability has been extended to injuries and loss sustained both on and *off* the

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1 For an excellent comparative discussion of the legal, social and empirical aspects of alcohol providers' liability in Canada and Australia, see R Solomon and J Payne, 'Alcohol liability in Canada and Australia: Sell, serve and be sued, 1996 *Tort Law Review*, Vol. 4, pp.188-241.

2 See for example, the research of Stockwell et al which suggests that although licensed premises in Australia sell approximately one third of alcohol consumed, they are associated with about two thirds of alcohol problems, including alcohol related deaths (Stockwell, Lang and Rydon 1993; Stockwell 1994). See also Lang and Rumbold 1997.



licensed premises. Whether Australian courts will follow suit to the same degree remains to be seen. Early indications and some recent cases suggest, however, that at least in part, Australian courts are prepared to take a tougher line.

### **The evolution of the Law**

The Duty of Care of servers of alcohol and licensed establishments to their patrons and third parties can be divided into liability for loss suffered, or damage incurred, both within the establishment and in the outside environs of the licensed premises.

In general terms the elements of the tort of negligence are made out if the plaintiff can prove:

- The defendant owed him or her a duty to take reasonable care;
- The defendant breached that duty by failing to take reasonable care;
- The defendant's breach of duty caused the injury or damage suffered by the plaintiff; and
- The injury or damage suffered was not too remote a consequence of the breach of duty

Traditionally the law of tort has not imposed a duty of care on one person to control or oversee the conduct of another unless a special relationship existed between them.

What counted for a special relationship has until relatively recently been narrowly defined:

Since providers of alcohol and hosts of alcohol related events were not seen as being in a special relationship with their patrons, and guests, they owed them no duty of care. Consequently, they could not be held liable for their injuries that their intoxicated patrons or guests caused or suffered. However, in the last 30 years the duty to control has expanded dramatically in Canada and to a lesser extent, Australia (Solomon and Payne 1996, p.195).

Since the 1970s the categories of persons held to be in duty of care relationships have expanded greatly. They include teachers and students, employers and employees, hospitals and patients and police or prison officials and those in their custody. As with most areas of tort law, these categories constantly evolve and are neither fixed nor immutable.

In the alcohol provider area two of the key (but not necessarily exclusive) factors that have lead to a more stringent imposition of duty of care are that:

- A defendant derives economic benefit from the relationship
- There is a clear legal authority on part of the defendant to control the conduct of the plaintiff and third party defendant

These factors will usually apply to the standard licensee, although not necessarily the social host.<sup>3</sup>

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<sup>3</sup> This paper does not intend to look at the position of the social host in any great detail. Most cases that have found the host responsible for harm caused during or after a private party or function have been American. It is unlikely in the near future that Australian courts will greatly extend the boundaries of liability in this way.



With regard to the second point, in both Canada and Australia a legal authority to control is clearly discerned in the relevant state liquor legislation.<sup>4</sup> The modern form of such legislation usually contains regulations concerning:

- Underage drinking
- Overcrowding
- Promotions
- Selling alcohol to those who are intoxicated or in the process of becoming so
- Control over who enters, drinks and remains on the premises.

For example, under Section 108(c) of the *Liquor Control Reform Act* 1998 (hereinafter the Act), licensees are not permitted to supply liquor to intoxicated persons. Nor must they permit drunken or disorderly persons to remain on licensed premises (Section 108 (e) of the Act). Clearly, breaches of statutory duty leave licensees open to penalty. In addition, infringements of the licensee's statutory responsibilities will be relevant to questions of common law civil liability in negligence.<sup>5</sup>

As with general negligence law, the particular issue of licensee's liability in negligence will often be predicated on the issue of *foreseeability*:

Serving intoxicated patrons, tolerating their presence, overcrowding, adopting marketing practices that promote intoxication, and employing aggressive staff create risks that are abundantly clear. Although the exact incidents may not be predictable, Australian research has established that these practices make alcohol related harm of some kind not just foreseeable, but highly likely. Those who provide alcohol...have ample legal authority to control who may enter, remain and drink on the premises. Indeed, many of the practices that give rise to the risks are specifically prohibited under Australian liquor licensing law. In our view, the current principle of Australian law would require imposing a duty to control on alcohol providers and hosts whose conduct has created *foreseeable risks of injury* (my emphasis) (Solomon and Payne 1996, p.200).

4 In Victoria the relevant legislation is the *Liquor Control Reform Act* (LCRA) 1998.

5 With regard to intoxicated persons and licensees' responsibilities under the Act, Burke makes the following comment:

When a person comes into licensed premises in a state of intoxication, the first duty of the person in charge is not to supply them with any more liquor. Their next duty is to take reasonable steps to prevent drunkenness by getting the person off the premises altogether (Burke 2000, p.3570).

The above statement may be a correct reading of current law. Nonetheless, it is ironic given recent developments in licensees' liability at common law, that a licensee may arguably be liable in negligence if he or she allows an intoxicated patron to leave the premises without first ensuring that the patron is not in any reasonably foreseeable danger of injury because of his intoxicated state. The means by which a licensee could possibly avoid such liability may include calling a taxi to take the patron home, providing a room on the premises to sober up, calling a member of the patron's family, an employer, or the police to collect the intoxicated person. See ensuing discussion below.



The High Court has also placed emphasis on the need for a relationship of *proximity* between the parties.<sup>6</sup> Unlike the more open ended approach in Canada, this development has the potential to somewhat limit liability in negligence. Notwithstanding any academic or judicial criticism of this approach,<sup>7</sup> it is posited that in most, if not all, cases of alcohol providers and their patrons, the relationship will indeed be one of proximity.

The development and expansion of these principles over the last 20 years has formed the backdrop for one of the more important recent cases in this area of law. *Jones v Cosgrove* is a case decided by the Supreme Court of Queensland. It is therefore not binding on Victorian courts, unless the principles enunciated therein are adopted in a later High Court of Australia decision or indeed by the Victorian courts themselves.

This case can be viewed as a bell-wether for the trends in the western law of negligence. It would seem that in some respects public policy is now looking to the courts as a major player in reducing the economic and social costs associated with alcohol by 'hitting the industry where it hurts'.

### ***Jordan House Ltd v Menow*<sup>8</sup>**

*Jones v Cosgrove* follows and adopts the principles handed down in the leading and landmark Canadian case of *Jordan House Ltd v Menow*.

In this case the Supreme Court of Canada stated there was a discrete common law duty on alcohol providers to protect their patrons. Mr Menow was a regular patron of his local pub. He had a reputation for becoming intoxicated, belligerent and irresponsible. At one stage he was banned from the hotel. After the ban had been lifted staff were instructed not to serve him alcohol unless he was accompanied by a responsible adult. On the night of the accident, Menow was drinking alone for three hours. He became increasingly and visibly intoxicated. Eventually, after he was seen annoying other patrons, the staff ejected him. Menow staggered home along a highway and was hit by a driver who himself was negligent. Menow sued the driver and the hotel. He argued that the hotel had a common law duty to protect him in his intoxicated condition. The court upheld his suit stating inter alia:

- Hoteliers and licensees owe a common law duty of care to their (intoxicated) patrons;
- Despite provincial legislation requiring hotel staff to eject intoxicated patrons, it was subject to a 'higher obligation' not to eject any person 'if doing so would expose him or her to a foreseeable risk of injury';
- The court refused to accept the defence of voluntary assumption of risk. It stated that Menow was simply too intoxicated to 'appreciate let alone assume responsibility for his own conduct';
- The court did, however, accept the defence of contributory negligence and apportioned liability at one third each to the driver, the hotel and Menow.

<sup>6</sup> See, *Sutherland Shire Council v Heyman* (1985) 157 CLR 424

<sup>7</sup> See, for example, the discussion in Solomon and Payne 1996, pp. 202-203.

<sup>8</sup> (1973) 38 DLR (3d) 105



Two aspects of this case pay particular attention and were to be revisited in *Jones v Cosgrove*

First, Justice Laskin emphasised the fact that the hotel and its staff had particular knowledge of Menow's drinking habits, history, and particularly his irresponsibility when intoxicated. The inference one may draw from this is that liability of the hotel may not be so easily established if the patron was a complete stranger to any particular establishment.<sup>9</sup>

Second, Justice Ritchie, whilst agreeing with the Court's result, seems to be positing a broader and more stringent test of provider liability. For Ritchie J the liability seems to flow from serving Menow with alcohol past the point of intoxication in the first place. One can infer from his judgement that for Justice Ritchie the duty lies in *preventing* intoxication not merely protecting patrons after they have become intoxicated.

In a series of Canadian cases that adopted *Menow*, Justice Laskin's narrow test was soon superseded. Canadian courts now prefer to follow the broader test espoused by Justice Ritchie.<sup>10</sup>

### *Jones v Cosgrove*<sup>11</sup>

In the Queensland case of *Jones v Cosgrove*, the fact situation was strikingly similar to that in the Canadian case.

The plaintiff Jones was a well-known drinker at a pub in Surfers Paradise. On the relevant night in question, he had been drinking steadily at this bar from late afternoon to closing time. This was in accordance with his usual habits, which were well known to hotel staff. He soon became intoxicated which was also in accordance with his usual habits. At closing time, he left the pub to catch a bus home from a bus stop on the other side of a busy highway. This was also his usual practice and was known to at least some of the staff. On this night he unexpectedly staggered into the roadway and was struck by a vehicle and seriously injured.

Jones sued the driver of the vehicle and the hotel. Justice Derrington in the Supreme Court of Queensland apportioned liability amongst the driver, the hotel and found Jones contributorily negligent to the extent of 45%. The apportionment of blame is not important for the purpose of this Inquiry.<sup>12</sup> What is noteworthy is the fact that the Queensland courts have shown themselves willing to follow the *Menow* principle. The following points are worth stressing:

- The fact that the plaintiff was 'grossly at fault' in deliberately becoming heavily intoxicated does not absolve either the driver or the

9 This may be particularly the case in circumstances where the drinker arrives at an establishment (Hotel A) after having drunk heavily at one or many prior establishments. If the drinker does not present as noticeably intoxicated and he or she has only one or two drinks at Hotel A, it may be arguable that any injury he sustains after leaving Hotel A may not be reasonably foreseeable on the part of Hotel A and they would not therefore be liable.

10 For a discussion of these cases, see Solomon and Payne 1996, pp.216ff.

11 [1997] QSC 229, Supreme Court of Queensland.

12 The driver was apportioned 30% of the blame and the hotel 25%.



hotel from taking all reasonable care to prevent the plaintiff sustaining reasonably foreseeable injury

- A publican cannot continue to supply a patron with the means of greater intoxication 'without regard to the danger to which he is thereby contributing'.
- The publican's duty of care requires him or her to ensure that the patron is not injured because of his intoxication. This duty will be more stringent when the publican or [his] staff are aware of the patrons habits etc. The court quoted with approval the following passage from *Menow*:

No inordinate burden would be placed [on the licensee] in obliging it to respond to Menow's need for protection. A call to the police or a call to his employer immediately come to mind as easily available preventive measures; or a taxi cab could be summoned to take him home, or arrangements made to this end with another patron able and willing to do so...<sup>13</sup>

- Statutory injunctions and licensing laws will have some bearing on whether the publican has acted in breach of their duty of care. This will be particularly the case when state laws prohibit the serving of alcohol to intoxicated persons.
- Justice Derrington qualified the above statement by making the following remarks:

It is not negligence merely to serve a person with liquor to the point of intoxication; but it is so if because of the circumstances it is reasonably foreseeable that to do so would cause danger to the intoxicated party, such as, for example where the intoxication is so gross as to cause incapacity for reasonable self preservation when it is or should be known that he or she may move into dangerous circumstances and where no action is taken to avert this.<sup>14</sup>

- Conversely, obiter from Derrington's judgement suggests that even if the licensee was in violation of state liquor legislation, this fact alone would not be enough to extend liability to the provider, if the injury or harm sustained by the plaintiff could not be said to be reasonably foreseeable. It would, however, be strong evidence tending to suggest that a publican was in breach of his or her duty of care.
- On the facts of this case, it was known that the drunken Jones would be negotiating a dangerous and busy road unescorted to reach the bus stop. Given his intoxicated state, it was reasonably foreseeable by the staff of the hotel that Jones may come to some harm, even if they could not predict the exact course it might take. On the principles of vicarious liability, the hotel licensee/owner would bear responsibility.

A recent case in Western Australia has also found licensees subject to common law liabilities in negligence when personal injury results from

<sup>13</sup> (1973) 38 DLR (3d) 105 at 111-112, per Laskin J.

<sup>14</sup> [1997] QSC 229, at 235 per Derrington J. The cases suggest, however, that on balance whilst *some* form of harm or injury needs to be reasonably foreseeable, the *exact* type of harm or injury does not have to be predicted or envisaged.



the actions of an intoxicated patron. In *Rosser v Vintage Nominees*<sup>15</sup> the licensee of a hotel was found liable when an intoxicated patron was injured by a third party's motor vehicle after leaving the hotel.

Another case of note is *Preston v Star City Pty Limited*.<sup>16</sup> In this case the plaintiff sued the Star City Casino in negligence and for breach of statutory duty when he suffered economic loss as a result of gambling at the casino. He argued inter alia that the casino was negligent in allowing him to gamble knowing he was in a highly intoxicated state. Although the judgement primarily concerned procedural and interlocutory matters, Master Harrison of the Supreme Court of New South Wales did not rule out the possibility that the plaintiff may have a reasonable claim in negligence. Citing the relevant sections of the New South Wales legislation that forbids intoxication within the gaming area, gambling by intoxicated persons and the serving of alcohol to intoxicated persons, he stated:

At the relevant time there was a relationship between the casino as provider of gambling facilities, services and alcohol on the one hand and the plaintiff as a consumer of such facilities, services and alcohol on the other. The plaintiff submitted that there are causal connections between the acts of the defendant complained of... (namely inducing the plaintiff to gamble and allowing him to gamble whilst intoxicated from alcohol provided by the defendant to him on its premises) on the one hand and the injuries and economic loss which he suffered in consequence of such acts on the other...I accept that [this premise] ...is arguable and that there is a relationship of proximity that can be seen as special as between the casino license operator and the gambler who is offered with inducements in excess of that which can be expected in the commercial world and allows or encourages a gambler to continue to gamble while he is intoxicated (at paras 35 and 37).

Although much of the reasoning of Master Harrison can be linked to the specific prohibition against gambling inducements in the *Casino Control Act 1992* (NSW), obiter dicta of Master Harrison suggests that the liability may be more generally founded:

The defendant may owe a greater duty of care where the patron is heavily intoxicated, his reasoning is impaired and he does not appreciate the consequences of offering inducements where the defendant knows the plaintiff is heavily intoxicated maybe considered to go beyond ordinary commercial activity.

It can also be argued that the risk of a psychiatric injury and economic loss to a patron of the defendant's casino as a result of a failure to take reasonable care by the casino operator was reasonably foreseeable by a reasonable person in the position of the defendant. It can also be argued that the risk of injury was not

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15 District Court (WA) Greaves C, No D980157, 5 June 1998, unreported. This case has subsequently been subject to appeal. See also *Sheraton v Albeth Pty Ltd* for a general discussion of a licensee's liability in negligence to its hotel patrons. (Supreme Court of Victoria per Mac Donald J, No 9058, 2 August 1993, Unreported).

16 *Preston v Star City Pty Limited* [1999] NSWSC 459



far fetched or fanciful (at paras 38 and 39).

Although none of the above cases including *Jones v Cosgrove* are binding on Victorian courts they do have far reaching implications. As Burke states:

[t]hey demonstrate a recent trend towards such liabilities on licensees, and have the potential to impose massive orders of damages and costs against licensees. Furthermore, the trend of holding licensees liable is still in a state of flux and may extend to licensees other than holders of a general licence in future, such as packaged liquor licensees or vigneron licensees. It also appears a licensee will be held vicariously liable for acts and knowledge attributable to the licensee's staff (Burke 2000, p.1226).

## Conclusion

The above discussion has not canvassed the more traditional areas of tort liability that may apply to licensed premises found liable for harm occurring to patrons or third parties. Occupiers' liability and actions under the *Wrongs Act* are obvious examples. This is because this is a general form of liability that has no bearing on the type of premises or the product (ie: alcohol) with which the premises is associated.

Instead, the above discussion focuses on the burgeoning area of a distinct category of tort liability applicable to licensees and other alcohol providers. These recent developments in the law of negligence are still in an embryonic and evolutionary form. It is envisaged that they will increasingly cover other areas where alcohol can have problematic effects and result in various harms. Such areas may come to include off the premises purveyors of alcohol such as bottle shops and licensed supermarkets. It is not unthinkable that social and private hosts will eventually be held liable for any harm befalling their guests arising out of alcohol being provided at that function. The trends are premised on the growing concern of government, social agencies and individual citizens about the levels and cost of alcohol related deaths, injuries, violence and associated harm. As these trends continue, government, policymakers and the courts will search for new means to address alcohol related problems. Solomon and Payne rightly note that in many common law jurisdictions and particularly Canada, the use of the courts and the new civil liability precedents have assisted in deterring irresponsible hospitality practices and resulted in a variety of responsible server education programmes. How far Australia goes down this track remains to be seen.



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