by David Jesser

# An occupier's potential liability for the criminal acts of a third party – How far should the law go?

**Recent criticism of the legal profession for contributing to an increasingly litigious society in Australia has provided an impetus for the courts to take a harder line with personal injury cases.**

Well before the passage of the *Civil Liability Act* 2003 (Qld) and other legislation implementing reforms called for by the Ipp report,[1] the courts had begun to turn the tide back toward the defendant, particularly in occupier's liability cases.[2]

Such a trend could be traced from the High Court's decision *Ghantous v Hawkesbury City Council*,[3] where the majority of the court[4] stated:

> "It is in the nature of walking in the outdoors that the ground may not be as even, flat or smooth as other surfaces. . . . persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards . . . Of course, some allowance must be made for inadvertence. Certain dangers may not be readily perceived because of inadequate lighting or the nature of the danger, or the surrounding area. . . . These hazards will include dangers in the nature of a trap or . . . of a kind calling for some protection or warning."

Even in cases where the plaintiff sustained terrible injuries, the courts were reluctant to find negligence without compelling justification.[5]

There then followed an avalanche of matters where plaintiffs' claims against occupiers were dismissed.[6] Cases where once the courts might have drawn favourable inferences for plaintiffs also failed.

In *Miller v Council of the Shire of Livingston & Anor*[7] the plaintiff was found lying seriously injured below a road. There were no witnesses to the event and the plaintiff had no recollection of how or why he fell. The court was asked to draw an inference that he had probably put his foot into a gap between a concrete path and a fence and stumbled across a fence because it was too low to be safe. The trial judge found and the Court of Appeal upheld that:

> "The footpath itself was safe. It had been in use for some years without complaint to the Council. It was flat, well lit and its limits clearly defined. Whatever may have been the state of the fence, there is no basis for concluding that it was causative of the injury unless there is evidence to establish if and how the Plaintiff came to fall over it.
>
> " . . . I am not satisfied the Plaintiff has discharged the onus of establishing that the hypothesis relied upon by him occurred or was more probable than any other inference that may have been drawn from the evidence. It is not inevitable that the fence which I have found . . . to be inadequate and substantially below the design height . . . was causative of the injury."

However, as Justice Young AO recently remarked, "it seems the tide is turning back".[8] In *Junkovic v Neindorf*,[9] the Full Court of the Supreme Court of South Australia found that a home owner had breached a duty of care to an entrant who had come onto her property for the purposes of attending a garage sale. The plaintiff had tripped on an uneven joint between two slabs of the concrete driveway. The majority of the court (Doyle CJ dissenting) found at para 105:

> "Ms Neindorf invited the public at large to attend her premises. . . . Intending purchasers had no alternative but to approach the goods for sale by using the driveway . . . it could be expected the attention of entrants might be drawn to goods on display . . . As a result, through lack of awareness, an entrant could trip, stumble or fall and suffer injuries. All this was readily foreseeable. . . . A simple warning at the entrance to the property to take care – dangerous [or uneven] driveway could have been erected. . . . Some form of barrier could have been placed over or around the dangerous area. . . . She had the capacity and opportunity to assess potential hazards and take steps to remove or minimise those hazards. . . . A real risk of injury should be eliminated unless the cost of doing so is disproportionate to the risk."

The above case is an example of how lower courts are tending to erode the '*Ghantous*' principle, which embodies a high expectation that people will take reasonable care for their own safety by distinguishing between duties owed by a commercial occupier and that owed by a public authority.

1 Review of the Law of Negligence, Final Report, September 2002; Ipp, Caine, Sheldon, Macintosh http://www.reofneg.treasury.gov.au/content/report2.

2 See comments of Spigelman CJ in *Waverly Municipal Council v Swain* [2003] NSW CA 61 at [114].

3 [2001] HCA 29.

4 Gaudron, McHugh and Gummow JJ said at [163].

5 In *Borland v Makauskas* [2000] QCA 521 the Queensland Court of Appeal overturned a jury decision in favour of a person rendered a tetraplegic as a result of diving from a fence into a shallow canal. Similarly, in *Waverley Municipal Council v Swain* [2003] NSWCA 61 at [182], the New South Wales Court of Appeal rejected the case of a swimmer rendered a quadriplegic as a result of diving into a sandbar at Bondi Beach.

6 See for example: *Percy v Noosa Shire Council* [2003] QCA 250; *Spencer v City Council of Maryborough* [2002] QCA 250; *Lanyon v Noosa District Junior Rugby League Football Club Inc.*

In *Wyong Shire Council v Vairy/Mulligan v Coffs Harbour City Council*,[10] the court said:

"It would be wrong to elevate the obviousness factor into some doctrine or general rule of law. . . . All the circumstances must be looked at of which the obviousness of the risk is only one."

Further, in *Burns v State of Queensland*,[11] Chesterman J held that the defendant's argument that the plaintiff's case should fail because the hazard on which he injured himself was obvious:

"Overstated the effect of the authorities. The fact that a danger is obvious, or such that could be avoided by the exercise of the degree of care ordinarily exercised by a member of the public, will always be highly relevant to the question whether the occupant on whose premises the danger exists has failed to take reasonable care for the safety of entrants. Indeed it will usually be decisive but in the end it is a question of fact whether an occupier took reasonable care to protect an entrant against a danger which was readily apparent."

This swaying of the pendulum, begs the question of how the courts will deal in the future with the thorny issue of imposing liability on an occupier for the criminal acts of another. If the courts continue to move away from 'insurers have deep pockets' policy considerations and place continued emphasis on the individual taking care for their own safety, what prospects will a person injured on another's property by the criminal acts of a third party have of successfully claiming against that occupier?

## The *Modbury* immunity

With respect to criminal activities of others, Dixon J laid down the guiding principle in *Smith v Leurs*[12] where he stated, "The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third".

In *Modbury Triange Shopping Centre v Ansel*[13] ('*Modbury*'), the court held that the duty of an occupier does not generally extend to taking reasonable care to prevent physical injury to a person resulting from the criminal behaviour of third parties on their land ('the *Modbury* immunity'). There are of course exceptions to the rule, however, it is suggested that if the hardened stance of the court continues such exceptions will arise rarely and not be expanded lightly.

According to Heydon JA (as he then was):

"an occupier of land owes a duty to entrants in relation to its physical state and condition. The duty is not to make premises as safe . . . as reasonable care and skill on the part of anyone can make them . . . The duty is only to take what care is reasonable in the circumstances. . . . Occupiers lack the control and knowledge of the behaviour of unpredictable but potentially criminal third parties which they possess or ought to posses of the physical state of their land."[14]

Gleeson CJ outlined the primary policy consideration for not imposing such a duty when he said:

"The conduct which caused the first respondent's injuries was deliberate criminal wrongdoing. By its very nature that conduct is unpredictable and irrational. It occurs despite society devoting its resources to deterring and preventing it through the work of the police forces and the punishment of those offenders who are caught. That is, such conduct occurs despite the efforts of society as a whole to prevent it. Yet the respondent's contention is that a particular member of that society should be held liable for not preventing it."[15]

## Exceptions to the *Modbury* immunity

In what circumstances will the court be persuaded to depart from this general principle?

Heydon JA in *Ashrafi* placed particular emphasis on "control" leading to "special relationships". He said:

"The relationship of an employer and employee is one which the law has for a long time been exceptionally solicitous for the employee's interests inter alia because of the control which the employer has over the incidents of the relationship. The relationship of school and pupil is one which the pupil can be exceptionally vulnerable by reason of youth and inexperience and in which the school has the measure of control. It is inherent in relationship of bailor and bailee that the bailee has a duty to take reasonable care to keep goods bailed safe against third parties including criminal third parties, because the bailee, by reason of its control of the goods, is in the best position to fulfil it. Strangers cannot control the children of others, but parents are supposed to be able. A gaoler has control over prisoners and control imports responsibility."[16]

Thus if there is a significant measure of control over the offender, there may be an argument that the *Modbury* immunity should not be applied. Heydon JA went on to say:

"The High Court made it plain that the 'special relationships' do not constitute a closed list of categories; nor are the boundaries of each particular category fixed, because ultimately each category rests on particular circumstances which make it just to impose liability.

"A famous instance of particular circumstances of that kind is *Haynes v Harwood* [1935] 1 KB 146 where the Defendant's carter created a source of danger by leaving a horse-drawn van unattended in a crowded street. The horses bolted when a boy threw a stone at them. A police officer who suffered injuries in stopping the horse before they injured others was held entitled to recover damages from the Defendant. To be rendered liable for having created a source of danger, of course, is to be rendered liable for more than mere inaction. Indeed, the category of 'special circumstances' or 'a special relationship' can obviously overlap with cases where liability is found because of 'a high degree of certainty that harm will follow from lack of action' . . . "[17]

If the plaintiff is not a part of these recognised 'special relationship' categories listed above, how else can they avoid the *Modbury* immunity? It appears there may be two other alternatives:

(a) where the occupier has a <u>high degree of certainty that harm will follow</u> from lack of action; or

(b) the occupier <u>failing to control access to or continued presence on the premises</u>. This exception primarily concerns the duties of hotel owners with respect to excluding or ejecting intoxicated persons.

It is proposed to deal with each of these three exceptions below.

[2002] QCA 163; *Hurst & Anor v Langford & Ors* [2002] QSC 228; *Hoyts v Burns* [2003] HCA 61; *Enright v Coolum Resort Pty Ltd & Ors* [2002] QSC 394.

**7** [2003] QCA 29.

**8** Current Issues – Flood of Litigation (2004) 78 ALJ 763.

**9** [2004] SASC 325.

**10** [2004] NSWCA 247.

**11** [2004] QCA 199.

**12** (1945) 70 CLR 265 at 262.

**13** (2001) 205 CLR 254 Gleeson CJ, Gaudron, Hayne and Callinan JJ (Kirby J dissenting).

**14** *Ashrafi Persian Trading Company Trading as Roslyn Gardens Motoring & Anor v Ashrafinia* (2002) Aust Torts Reports 81-636 at [56].

**15** Gleeson CJ, Modbury; opcit at [109].

**16** Heydon JA; Ashrafi; opcit at 65.

**17** Heydon JA; Ashrafi; opcit at [66].

## 1 The 'special relationship' exception

In *Modbury*, Gaudron J said:

"There are situations in which there is a duty of care to warn or take other positive steps to protect another against harm from third parties. Usually, a duty of care of that kind arises because of special vulnerability on the one hand, and on the other a special knowledge, the assumption of a responsibility or a combination of both. Those situations aside however, the law is, and in my view should be, slow to impose a duty of care on a person with respect to the actions of third parties over whom he or she has no control."[18]

As indicated above, the recognised categories of 'special relationship' are employer/employee; bailor/bailee, parent/child, gaoler/prisoner and school/student. Arguably, such a relationship can be found between other persons in the right circumstances.

In *Club Italia (Gelong) Inc. v Ritchie*[19] a policeman was injured in a brawl at a social club. Security staff employed by the club had recognised his assailant as a troublemaker but they had not ejected him for fear of escalating hostilities. The police had been to the pub about an hour before the brawl and performed a 'walk through'. They agreed to return later. They had not been advised that the situation had subsequently deteriorated. When they returned there was widespread fighting. An injured policeman sued the club successfully. The Victorian Court of Appeal found that there was a 'special relationship' between the club and the policeman deriving from the club's ability and its duty to control aggressive patrons.

However, in *Proprietors of Strata Plan 17226 v Drakulic*,[20] the plaintiff was injured as she returned home from work at about 2.45am after being attacked by an intruder in the entrance foyer to her unit complex.

The property manager had disarmed the locking mechanisms to the door giving entry from the driveway into the foyers of the unit complex due to complaints that the lock occasionally stuck and thereby prevented entry. The trial judge, who found for the plaintiff, obviously placed considerable significance on this, stating:

"The assault on the Plaintiff occurred inside the building. It could not have happened if the entry door had been locked and would probably not have happened . . . if the door had been capable of being locked . . . the lock to the entry door ought not to have been disarmed and rendered useless unless a reasonably safe alternative system . . . was installed at the time."

The trial judge found that there was a 'special relationship' existing between the unit proprietor and unit occupier.

However, Heydon JA found no such relationship existed as:

"the Defendants did not have any particular control over third parties who might commit crimes. They had no special knowledge about them. The Plaintiff had no special vulnerability within the building which exceeded her vulnerability just before crossing the outside boundary of the land on which it was built . . .

"It is plain that the relationship of unit owner and body corporate . . . [is] not [a relationship] of the type recognised as special under the existing case law. . . . in searching for a special relationship . . . it is necessary to remember what Gleeson CJ said in the *Modbury* case at [35]:

'The principle cannot be negated by listing all the particular facts of the case and applying to the sum of them the question – begging characterisation that they are special. There was nothing special about the relationship between the appellant and the first respondent. There was nothing about the relationship which relevantly distinguished him from large numbers of members of the public who might have business at the centre, or might otherwise lawfully utilise the carpark. Most of the facts said to make the case special are, upon analysis, no more than evidence that the risk of harm to the first defendant was foreseeable.' . . .

"If new categories of 'special' relationship are to be created within which a defendant is to be liable for the criminal acts of third parties, the step is not merely factual. It would involve a matter of law – indeed a change in the law. A change in the law of that order of significance is not something that this Court should undertake. It is a matter for the High Court."[21]

Therefore, Heydon J has moved to the view that the categories of the special relationship are closed until such time as they are further extended by the High Court.

Also of interest in the *Drakulic* case is how His Honour reconciled the 'failing to control access' exemption. It was obviously argued that the defendants had failed to control the access of the assailant to the unit complex by disarming the lock. To this Heydon JA responded:

"The locked door would not have controlled the assailant so far as he chose to attack persons connected with the units outside the building, or after following them in, or after breaking the door. . . . the Defendants here had no control over the assailant: they had no power to assert control over him, they could not assert authority over him, they were not expected to be able to control him as of right. . . . if it is right to say that the Defendants had control over the assailant because a locked entry door would have controlled him, it would have been equally right to say that the Defendant in the *Modbury* case had control over the criminals because a system of denying unauthorised access to the carpark could have controlled them. . . . the possibility of returning to a locking door: is not a relevant form of control."[22]

Heydon JA also made some interesting observations as to the content of the duty (if one was owed). His Honour was critical of the trial judge's finding that the duty owed was to prevent harm to the plaintiff from the criminal conduct of the third party. He said this was too high and would require engaging armed guards. Heydon JA reiterated that the duty of a landlord of residential premises is only to take such steps as are reasonable in the circumstances. It is not to make the premises safe for residential users as reasonable care and skill on the part of anyone can make them.

He said:

**18** Gaudron J Modbury; opcit at [43].

**19** [2001] 1VR 447.

**20** [2002] NSWCA 381.

**21** Ibid at [86]-[89].

**22** Ibid at [75].

"Similarly, if there is a duty in relation to criminals, it is only a duty to take those steps to prevent harm from criminals which are reasonable in the circumstances, not an absolute duty to prevent harm. The circumstances relevant to reasonableness are those which control the response to a reasonable man to the risk: he would consider the magnitude of the risk; the degree of probability of its occurrence; the expense; difficulty and inconvenience of taking alleviating action; and any other responsibilities. . . . The outcome of that process for consideration might be that no response was called for."[23]

Relevantly, the plaintiff's case would have also failed on causation with Heydon JA stating that the person who attacked the plaintiff was a determined criminal who had already gained entry, was disguised, equipped with the means of subduing victims and armed with a dangerous weapon. Even if the door were locked, it was probable the assailant would have waited outside in a dark place and attacked there.

Another instance where the New South Wales Court of Appeal determined that the trial judge had erroneously found a 'special relationship' was the matter of *Parissis & Ors v Bourke*.[24]

In this matter, the court was considering the liability of householders in respect of a party held by their son at their house, after a considerable period of drinking, one of the guests had taken to throwing methylated spirits onto a smouldering barbecue. A flashback occurred and the bottle exploded, injuring other guests.

The trial judge found that "the combination of youth, alcohol and the presence of a dangerous substance [was] sufficient to put the Plaintiff and other guests into the position of a special relationship with [the home owners] and hence to require reasonable steps to be taken to protect them from being burnt".

The Superior Court took a very dim view of this finding, stating that whilst the particular guest's conduct was probably sufficient to establish criminal liability:

"What excludes criminal behaviour from the occupier's responsibility is not specifically its criminality but its extreme nature in relation to what the occupier could reasonably foresee and should reasonably control. When behaviour is extremely unlikely, extremely irresponsible or otherwise extreme, it may be beyond the limits of the occupier's responsibility whether or not on close consideration it is subject to some criminal sanction. Extreme behaviour cannot be reasonably foreseeable because either 1) the risk is reasonably foreseeable but the maturation of the risk depends on criminal behaviour; or 2) the risk is not reasonably foreseeable because the maturation of risk depends on unpredictable criminal behaviour. If behaviour is unpredictable, the harmful outcome of the maturation of the risk may not be reasonably foreseeable. [The offender's] conduct was obviously extremely dangerous, and this must have been obvious to him, and that in my mind, is enough to place his conduct outside the range of occupier's liability."[25]

The court went onto say that, even if the injury was foreseeable:

"The reasonable response to such a risk was to leave a group of 10 or 12 young adults, with their liquor, to their own devices. That is what practically every adult in Australia would do. It is remote from the realities of Australian lives that the elder generation would remain awake or keep an eye every few minutes on younger adults until 2.00am or thereabouts although wishing to retire at about midnight. The magnitude of any risk that an event would occur of the kind which did occur, and the degree of probability of its occurring were very slight."

Importantly, the court said that the householders were not in any special relationship with the guest and there was no established relationship of social host and guest in Australian negligence law.

In *Riley v Francis*,[26] the plaintiff suffered scarring when another patron at a nightclub struck her in the face with a glass. The plaintiff had gone to the ladies toilet when she was attacked by a woman with whom she had been in a previous altercation. The plaintiff was then set upon again by a male who struck her hard in the face and held her to the wall. Security staff intervened, dragging away the male assailant.

As they went to remove the female assailant, she threw a glass over one of the bouncer's shoulders, hitting the plaintiff in the face. The plaintiff's claim against the club failed on the basis that the bouncers had acted reasonably in making their first priority to remove the male who was actually assaulting the plaintiff. Further, the bouncer was unaware the female was holding a glass it was not reasonably foreseeable and that she might attempt to injure the plaintiff whilst the bouncer, who was very large, had positioned himself between them.

Essentially the finding was that this was a random act that the bouncer could not readily have anticipated.

The opposite finding was made in *Wormald v Robertson*.[27] In this matter the plaintiff had attended a function at a hotel. Robertson, another patron, had been jumping on tables, breaking glass and molesting other guests for about half an hour. Two complaints were made to hotel staff but nothing was done. Robertson continued to misbehave for another half an hour. He then grabbed a female friend of the plaintiff. The plaintiff called out to him, then went over to him and tapped him on the shoulder. Robertson swung around and smashed a glass beer jug into the plaintiff's face.

The Queensland Court of Appeal found that:

"In effect, a powder keg situation existed and trouble should reasonably have been anticipated. . . . The Plaintiff's action would not have been viewed as an external factor placing a different complexion on the pattern of behaviour at the hotel which the licensee was negligently accepting and taking no steps to control. The Plaintiff's approach to Robertson was not a supervening cause in any relevant sense. . . . The exact form of Robertson's aggression might not have been predictable but the real likelihood was that because of his highly provocative conduct some disturbance or violence might be the outcome and that one or other patrons might be injured."

Here the situation developed such that a real likelihood of violence was imminent and the hotel was

23 Ibid at [93].
24 [2004] NSW CA 373.
25 *Parissis & Ors v Bourke* [2004] NSW 373 per Bryson JA at [60].
26 [1999] NSW CA 52.
27 (1992) Aust Torts per 81-180.
28 [2004] NSWCA 113.
29 *The Home Office v Dorsett Yacht Company Ltd* [1970] AC 100.

found to have a duty to intervene.

Thus, the thrust of later cases, particularly from the NSW Court of Appeal, led by Heydon J, now of the High Court, appears to be that the categories of 'special relationship' should not be readily extended. The courts have conceded, however, that there has been some overlap between the 'special relationship' exception and the duty to control presence on premises.

As to the scope of the duty owed by a person in a special relationship, this issue was examined in *The State of New South Wales v Godfrey & Godfrey*.[28] Spigelman CJ stated:

> "Dorsett Yacht,[29] with its focus on the immediate vicinity of the gaol, may be based on the proposition that a prison authority should be taken to still have control at that point, because the possibility of recapture is at its highest . . . If Dorsett Yacht does represent the law in Australia, its application should, in my opinion, be confined to the course of the escape, where control is capable of being reasserted by the persons who should have prevented the escape. No such duty has ever been found to encompass conduct hundreds of kilometres from, and months after, an escape. . . . That a prison authority has duties within the confines of a prison, where it exercises a high degree of control, can readily be accepted. . . . such a situation is not of the same character as that which arises after an escape, where, by definition, the authority no longer has any element of control. . . . Control has been emphasised as a relevant factor in a number of cases . . . in substance, this is not a case about the ability to control the conduct of others. This is a case about a duty not to lose control."[30]

In this instance, indeterminacy issues weighed against the imposition of such a duty.

With respect to the issue of when a breach will be found when a special relationship does arise, some recent cases of the New South Wales Court of Appeal are again instructive. The *State of New South Wales v Finnan*,[31] the respondent was a Year 9 school student who had injured his knee jumping over a fence whilst running away from a fellow student who had threatened him.

That duty of care was owed was not in doubt. On the issue of breach, however, the Court of Appeal, overturning the trial judge's decision, found that the plaintiff had not satisfied the onus of proof in demonstrating a failure to take reasonable care by way of supervision in the "fleeting moments"[32] in which these events took place.

Contrast that to the decision in *Bujdoso v State of New South Wales*[33] where a prisoner had been severely bashed whilst in a minimum-security prison. It was again not disputed that the prison authority owed the plaintiff a duty of care because "the control vested in a prison authority is the basis of special relationship which extends to a duty to take reasonable care to prevent harm stemming from the unlawful activities of third parties".[34]

Again, the question was whether there was a breach. Here the trial judge had found there was no such breach on the basis that inmates had passed through every possible check before being put into a low security, work release section and they had much to lose if they stepped out of line. On appeal, however, the plaintiff's claim was upheld on the basis that:

**1.** There had been known breaches of trust;

**2.** The authorities in fact knew the plaintiff had been threatened with actual violence;

**3.** The plaintiff, as a paedophile, was at a greater general risk of violence in any event.

**4.** The authority had reduced the number of guards for reasons unrelated to prisoner safety.

> "Those in control and who knew that the [Plaintiff] had been threatened did not even inform the guard at the units . . . of this fact, and did not even provide the [Plaintiff] with a more secure lock on his door. Nothing was done. In my view that was negligence."[35]

## 2 High degree of certainty of harm exception

The existence of this exception is by no means certain. Gleeson CJ has commented that:

> "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 predicability, that it is possible to argue that the case will be taken out of the operation of the general principle and the law may impose a duty to take reasonable steps to prevent it. . . . It is unnecessary to express a concluded opinion as to whether foreseeability and predicability of criminal behaviour could ever exist in such a degree that, even in the absence of some special relationship, Australian law would impose a duty to take reasonable care to prevent harm to another from such behaviour. It suffices . . . as a matter of principle that such a result would be difficult to reconcile with the general rule that one person has no legal duty to rescue another."[36]

In the *Modbury* case, evidence of illegal activity in the area was that a restaurant in the car park had been broken into, there had been two attempts to break into an automatic teller machine and the car window of an employee in the video shop had been smashed.

These events had occurred over about a one-year period. Gleeson CJ said, "This does not indicate a high level or recurrent, predictable criminal behaviour" and was "nowhere near" enough to the enliven such an exception.[37]

## 3 Failing to control access or presence on premises exception

The law in this regard is also by no means settled. It certainly appears to be the area where most inroads into the *Modbury* immunity can be made.

In *TAB Ltd v Atlis*,[38] the court was divided 2-1 on the issue of what the scope of duty was and whether there had been a breach. The particular TAB was located at a western suburb of Sydney. The premises described by Ipp JA as "small" with a "family type atmosphere" and "relatively sedate".

However on this particular occasion, two intoxicated men had begun to swear loudly and behave offensively.

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**30** Spigelman CJ Ibid at para [34-35] and [48-49].
**31** [2004] NSWCA 314.
**32** Ibid at [36].
**33** [2004] NSW CA 307.
**34** Mason P in *State of New South Wales v Napier* [2002] NSW CA 402 at [75].
**35** Ipp JA, Ibid at [64].
**36** Gleeson CJ, Modbury, opcit at [30]-[34].
**37** Ibid at [34].
**38** [2004] NSW CA 322.

Throughout the course of the afternoon they had been asked to quieten down by an elderly patron, a female employee of the TAB and the TAB manager. The elderly patron had reprimanded the two younger men on three occasions for their noisy behaviour. On the third occasion he told them to leave. One of the men then threw a bottle, striking the elderly man in the face. He then grabbed the elderly man around the neck. The injured plaintiff, Mr Atlis, tried to assist by pulling the drunken attacker away. He injured his shoulder in the course of wrestling this larger man.

Ipp JA in the majority, found that a duty was owed, but ultimately dismissed the plaintiff's claim.

**The general thrust of the cases appears to be that where there is an overarching element of control – meaning a power to assert control over the criminal third party – a departure from the fundamental principle will be seriously considered.**

The TAB of course relied upon the *Modbury* immunity, however, Ipp JA referred to his own judgment in *South Tweed Heads Rugby League Football Club Ltd v Cole*[39] (with which he said Heydon JA and Santow JA agreed and the High Court did not disagree in the subsequent appeal), where he said that "The general duty on the part of the occupier to take reasonable care to avoid a foreseeable risk of injury to the entrant, ordinarily concerns risk of injury from the condition of the premises, but this is not an inevitable limitation on the scope of the duty. If, to the knowledge of the occupier, activities conducted on the premises bring about a risk of injury to the entrant, the circumstances may give rise to a duty of care wide enough to encompass a duty to take reasonable care to avoid foreseeable risk of injury arising from those activities. Typically, the foreseeable risk of injury in such a case is the risk of physical injury directly caused by the known activities on the premises."[40]

Ipp JA noted that the plaintiff's complaint in this case was the failure to control the continued presence of the two young men on the premises. He said this distinguished it fundamentally from *Modbury*. Ipp JA felt it fell squarely within the exception espoused by Hayne J where he said "The occupier of land has power to control who enters and remains on the land and has power to control the state or condition of the land".[41]

The TAB also argued that no liquor was sold on the premises but Ipp JA said this was not conclusive. Ipp JA felt it was very much to the point that the manager, at the time he spoke to the men, realised their activities on the premises constituted a risk of injury to other patrons. Ipp JA said that in his view, the circumstances were such as to give rise to the imposition of the duty on the claimants to take reasonable steps to prevent injury to other patrons. His Honour said: "This conclusion is simply the product of the concept of reasonableness."

Ipp JA referred to Gleeson CJ's statement that:

> "The concept of care and carelessness themselves require closer definition. The police officer in the case of Miss Tame made a mistake. In that sense, he was careless. He made a slip; he noticed the error within a fairly short time, and corrected it. His error was the consequence of a lack of care. However, in the context of the law of negligence, carelessness involves a failure to conform to a legal obligation. It does not necessarily involve a mistake. It involves the failure to protect the interests of someone with whose interest the Defendant ought to be concerned. A definition of the ambit of a person's proper concern for others is necessary for a decision about whether a Defendant's conduct amounts to actual negligence. The essential concept in the process of definition is reasonableness. What is the extent of concern for the interests of others which it is reasonable to require as a matter of legal obligation, breach of which will sound in damages?"[42]

Gleeson CJ referred back to Lord Atkin's test in *Donoghue v Stevenson* where his Lordship spoke of the effects of acts or omissions on "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".[43]

Gleeson CJ said it was therefore the reasonableness of a requirement the defendant should have certain persons, and certain interests, in contemplation that determines the existence of a duty of care.

In the same vein, in *Dovuro Pty Ltd v Wilkons* McHugh J emphasised that "If negligence law is to serve a useful social purpose, it must ordinarily reflect the foresight, reactions and conduct of the ordinary members of the community. . . . to hold Defendants to standards of conduct that do not reflect the common experience of the relevant community can only bring the law of negligence, and with it the administration of justice, into disrepute".[44]

The entirety of the NSW Court of Appeal in the *TAB* case were therefore prepared to find that the facts removed the TAB from the *Modbury* immunity. This was on the basis that this was not an unanticipated or random attack from persons unknown. It was as Mason P put it "the very thing that Mr Young was concerned might happen" when he issued his earlier warning to the two young men.

Where the Court of Appeal differed was on whether that duty had been breached. Ipp JA noted that the trial judge's conclusion and the conclusion of Mason P that the duty was breached because the men were not removed by police prior to the fight taking place.

Ipp JA noted that the TAB did not employ security guards and there was no suggestion that it should have done so. There was nothing in its history of some 19 years that indicated that such step was necessary. Ipp JA was also not prepared to accept that it was reasonably practical for the manager, a 54-year-old man, to have physically removed two younger aggressive men. Ipp JA noted that realistically the only way the men could have been removed was by the police. In this regard, Ipp JA noted that only about 10 or 15 minutes had elapsed from the time the two men made bets to the occurrence of the violence. There was no suggestion that the police could have arrived in time to prevent the fight that occurred. Therefore, the finding that the removal of the young men would have been an effective measure in preventing the injury could not be sustained.

His Honour stated:

> "The men had only been behaving badly for a matter of minutes. . . . It was not aimed at any individual patrons. Although under the influence

39 (2002) 55 NSW LR 113.

40 *South Tweed Heads Rugby League Football Club Ltd v Cole* (2002) 55 NSW LR 113 at 137, [152].

41 Modbury, opcit at [112].

42 *Tame v State of NSW* (2002) 211 CLR 317, 330. [8].

43 [1932] AC 562 at 580.

44 (2003) 215 CLR 317 at 329 [34].

45 *TAB v Atlis*; opcit at [63] - [65].

of alcohol, they did not seem to be uncontrollable. They had shown no signs of violence to other patrons (albeit that [the manager] recognised the possibility of violence) and, as indicated, they quietened down at first. While [the manager] feared that violence could occur, particularly if a patron accosted the men while they were behaving so aggressively and obscenely, as he stood at his office door he adjudged the situation to be reasonably safe.

"[The manager] may have made an error of judgment in not telling the men to go and that he would call the police immediately however I do not think that amounted to negligence. In my view, a finding to that effect would have been an impermissible finding of negligence by hindsight." [45]

Thus, the New South Wales Court of Appeal was happy to further diminish the extent of the *Modbury* immunity but it ultimately concluded that it would not be fair, just or reasonable to hold that the TAB manager's omission to threaten to call the police or to actually call them to remove the men was an omission that could properly be described as negligence.

## Conclusion

The courts have openly expressed the desirability of the law of negligence according with the prevailing standards of the community. The general principle that, in the absence of some special relationship or special circumstances, an occupier should not be responsible for the criminal acts of a third party, would clearly reflect that position as to do otherwise would be manifestly unfair on the occupier.

As with most other guiding principles, however, difficulties arise at the periphery.

The general thrust of the cases appears to be that where there is an overarching element of control – meaning a power to assert control over the criminal third party – a departure from the fundamental principle will be seriously considered. This means the third exception – the duty to control access or presence on premises – grows in significance if it can be shown that:

**1.** An occupier is, or should be, aware of an emerging danger caused by the presence of a person on the premises; and

**2.** They have the power to assert control over such a person; and

**3.** It is reasonable in the circumstances for the occupier to have the potential plaintiff in mind when determining whether or not to take some form of alleviating action;

**4.** It is reasonable, fair and just to require the occupier to take that alleviating action;

**5.** The injury would have been avoided if the occupier had acted.

the *Modbury* immunity will not stand. If, however, in the absence of an established 'special relationship', the injury is shown to be caused by a senseless and random act of violence which could not have been reasonably anticipated by the occupier, the *Modbury* immunity will protect the occupier from any claim. It is submitted that this approach best allows for the application for the law to a novel case whilst at the same time according to community expectations.

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