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INQUIRY INTO ALCOHOL RELATED VIOLENCE IN QUEENSLAND

To Whom It May Concern

This is a submission to the Queensland Parliament Law, Justice and Safety Committee Inquiry Into Alcohol Related Violence in Queensland.

This submission is on behalf of Joshua McFadzen, Karinya Valese and Kirby Amos. The before mentioned are full-time undergraduate law students at Griffith University in Brisbane. It is duly noted that this submission in no way represents the views, expressions or general opinion of Griffith University and is in no way generally endorsed or made on behalf of that education institution or any or its related affiliates.

The submission is based on the socio-legal research and critical analysis of Australia's negligence law and compensation schemes for personal injury. As a result, excessive consumption of alcohol is a widespread problem throughout Australia and overseas. A wide range of measures have been used with a view to reducing the harmful effects of such consumption, including violence. However, rather than addressing the symptoms of the problem, independent research suggests that reform be made to the existing negligence law in this field relative to the providers of alcoholic beverages. The following brief overview demonstrates an abstract of the findings concerning the research into Australia's laws of negligence.

In Australia, the present state of the common law is that licensed premises only owe a duty of care in negligence under occupiers' liability for the safety of customers *on* [*sic emphasis added*] the premises to guard against reasonably foreseeable danger caused by and to intoxicated patrons. Until 2002, it was held in a series of seminal common law cases that that the occupiers of licensed premises owe a duty of care to patrons who are grossly intoxicated and injure themselves once leaving the licensed premises as a result of being served alcohol beyond the point of intoxication. However, following the major reform to Australian negligence law in 2002, the High Court held that occupiers of licensed premises as alcohol providers do not owe a general duty of care to protect patrons from the risk of personal injury as a result of self-induced intoxication.

There is already a mechanism for visiting civil liability in this field, namely the approach taken to the established categories of negligence law by both the common law and statute in Canada, England and the United States of America. An analysis of these international jurisdictions is useful to demonstrate the inappropriateness of Australia's present position both in statute and the common law. In the United States of America, it is clear that that jurisdiction has the oldest and strictest forms of civil liability recognizing a cause of action against occupiers of licensed premises for injuries stemming from their service of alcohol.

This idea of negligence per se with its focus on whether the injured person was intended to be protected by the doctrine of statutory tort, seeks to define a legislative intent to impose civil liability for breach of an offence. Unlike Australia, the position adopted by these three international jurisdictions reflects the leading system of negligence law in the common law world. With the current state of the international law in mind, this clearly demonstrates the inappropriateness of the present position of Australia's liability in this field. Australian tort law should abrogate joint and several liability so that a defendant will not be liable for all of the plaintiff's recoverable damages but apportion comparative responsibility in line with the approach of Canada, England and America. It is suggested that under our existing civil liability schemes, Australian tort law severely lacks comparative responsibility that appropriates fault between the occupiers of licensed premises, the intoxicated tortfeasor and negligent third parties.

Bearing in mind the recent reforms to tort law in Australia and considering the themes of Canadian, English and American law, it is suggested that the role of policy in Australia's accident compensation, namely the value of personal responsibility, autonomy and contributory negligence are being emphasised to the detriment of the provision of compensation to the injured. It is submitted that the current compensation scheme for personal injury in Queensland needs to be reformed in order to extend and codify occupiers' liability to include a duty of care owed by the licensed premises to injured patrons and third parties that occur outside the premises as a result of a patron's intoxication. This can be specifically achieved through legal reform and amendments to Australia's current law concerning compensation for personal injury, the *Civil Liability Act 2003* (Qld). In doing so, this will apportion liability to occupiers of licensed premises as alcohol providers for contributory negligence in causing personal injury to intoxicated patrons and unrelated third parties outside of the premises.

This submission indirectly falls within the terms of reference of this inquiry. Reforming Queensland's *Civil Liability Act 2003* by apportioning civil liability to occupiers of licensed premises will directly ensure best practice harm minimization and potentially reduce levels of alcohol related personal injury. In this industry, the service, licensing, enforcement and regulation of alcohol service is only subject to specific accords and the limited penalties in the *Liquor Act 1992* (Qld). According to the relevant statutory provisions, the alcohol industry is accorded no legal responsibility for alcohol related harms outside of the imposition of fines. The submission suggests that 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 or unrelated third parties. Unfortunately, as a consequence, in the climate of Australian negligence law, judicial opinion concerning this field has consequently shifted the loss to the victim where the licensee's conduct has been equally instrumental in causing the personal injury.

Please find **enclosed** a policy report critically analyzing the existing area of personal injury liability in this field. The interest group submission is made on behalf of patrons of licensed premises who are served alcohol whilst intoxicated and subsequently suffer personal injury or death or cause same to unrelated third parties. The report specifically addresses the effect of the recent statutory reforms to Australia's law of negligence, specifically in the introduction of the Civil Liability Act 2003 (Qld). Additionally, the relevant policy issues and social effects of Australia's culturally embedded drinking culture is considered. Finally, the need for further necessary reforms in this particular area of civil liability are recommended.

Hopefully, this submission will contribute to minimizing alcohol related harms, personal injury and deaths in Queensland.

Please do not hesitate to contact the writer if you have any queries or require more information or clarification regarding this submission.

Yours Faithfully

Joshua McFadzen, Karinya Valese, Kirby Amos

Encl.

Submission

Queensland Parliament Law, Justice and Safety Committee Inquiry Into Alcohol Related Violence in Queensland

"Occupiers of licensed premises, as alcohol providers, owe a duty of care and must be held civilly liable to protect patrons and unrelated third parties from the risk of personal injury as a result of being served alcohol whilst intoxicated."

Presented By

Karinya Valese, Joshua McFadzen, Kirby Amos

1.0 Abstract

This liability issue relates to whether occupiers of licensed premises owe a duty of care to patrons or unrelated third parties who suffer personal injury or death outside of the premises and as a result of an individual being served alcohol beyond the point of intoxication. The importance of this area of liability rests in the current availability of alcohol service providers to use their commercial influence to generate potential risk situations and escape liability through the lack of protection the law provides to alcohol-induced injured persons. The submission will be presented with reference to the current state of liability, both preceding and following the implementation of the *Civil Liability Act* 2003 (Qld) and the policy and social effects of this area of Australian tort law. Also, further reforms are proposed through the consideration of alternative compensation systems and prominent tort theory.

The key thesis of this submission is that following the reform of Australia's tort law, the law relating to negligence liability for personal injury in Queensland, as reformed by the *Civil Liability Act 2003* (Qld), inappropriately and insufficiently balances the needs of interested parties and society in general. It is suggested that the current compensation scheme for personal injury in Queensland needs to be reformed in order to extend and codify occupiers' liability to include a duty of care owed by the licensed venues to injured patrons and third parties that occur outside the premises as a result of a patrons' intoxication.

Due to the tort reforms and the shifting opinion of Australian courts, plaintiffs are now being expected to take much more personal responsibility for their own actions and safety, representing the political agenda behind the reforms to Australia's negligence law. Also, at present, there is a disjuncture between the recent authoritative High Court decision in *Cole v South Tweed Heads Rugby League Football Club*[1] and other relevant statutory provisions that promote the safe consumption of alcohol and the attempt to limit the occurrence of intoxicated patrons. This defendant-friendly position the law has reached leaves plaintiffs outside the laws protection. With regards to the liability of alcohol service providers in relation to personal injury, it is submitted that reforms to the current law occur, mainly through amendments and additions to the *Civil Liability Act 2003* (Qld). These reforms are supported by the key tort theories of deterrence, enterprise liability theory and apportionment of liability. In relation to these fundamental theories, the principal argument is that reform is necessary to deter commercial entities from using their influence to generate potential risk situations and escape liability.

[1] *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29.

2.0 State of Liability

2.1 Present State of the Common Law Relating to Liability Issue

The established negligence category of occupiers' liability has long been recognised in Australian common law as giving rise to a duty of care.[2] However, the scope and content of that duty remains problematic in Australian common law when applied to novel or exceptional circumstances.[3] The apportionment of liability to occupiers of licensed premises as alcohol providers is one such novel category and is one of the most important developments in Australian tort law in recent years.[4] Recent decisions of Australian courts have heightened the awareness of this new emerging trend and represent the beginning of a remarkable turnaround and expansion in the present state of the law. In the wake of these judicial developments in the common law, the established category of occupiers' liability is potentially being expanded to encompass alcohol server liability for commercial licensees.

In Australia, the present state of the common law is that licensed premises owe a duty of care in negligence under occupiers' liability for the safety of customers on the premises to guard against reasonably foreseeable danger caused by and to intoxicated patrons.[5] A less settled realm of potential liability is for unintentional personal injury suffered away from the premises to intoxicated patrons or third parties. The current position of Australia's common law and the extent of judicial activism concerning this indeterminate realm of civil obligations has only contributed to the uncertainty surrounding the state of liability.

In the 1993 Queensland case of *Johns v Cosgrove*,[6] Justice Derrington held that the occupiers of licensed premises owe a duty of care to patrons who are grossly intoxicated and injure themselves once leaving the licensed venue. Justice Derrington stated that "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."[7]

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[2] *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; The modern approach to this duty of care accorded under the common law is provided in *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

[3] *Glenmont Investments Pty Ltd v O'Loughlin* (2000) 79 SASR 185; The limits to the law lie in the restriction to the scope of the duty of care articulated in *Modbury Triangle Shopping Centre P/L v Anzil* (2000) 205 CLR 254; The current approach of the High Court to determining whether a duty of care is owed in novel fact situations begins with the decision in *Sullivan v Moody*.

[4] Johnson, P, Occasional Paper: Trends in Negligence and Public Liability: The evolving liability of licensees and servers of alcohol to their patrons and third parties, Parliament of Victoria Drugs and Crime Prevention Committee (2001) <http://www.parliament.vic.gov.au/dcpc/Reports%20in%20PDF/Occ%20Rpt%20amended_v2.pdf> (16 October 2009) at p 1.

[5] *Horkin v North Melbourne Football Club Social Club* [1983] VR 153; *Gorman v Williams* (1985) 2 NSWLR 662.

[6] *Johns v Cosgrove* [1997] QSC 229.

[7] *Johns v Cosgrove* [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

Similarly in the 1998 case of *Rosser v Vintage Nominees*[8] and 2001 case of *Desmond v Cullen*[9] the court was synonymous in its findings that licensees are subject to common law liabilities in negligence when an intoxicated patron is injured outside of the licensed premises.[10]

2.2 Effect of Relevant Statutory Reforms

Preceding the reform of Australia's tort law, the previous decisions in *Johns v Chevron Hotel, Rosser v Vintage Nominees* and *Desmond v Cullen* were the primary judicial opinion on the common law. In those cases it was held that the occupiers of licensed premises owe a duty of care to patrons who are grossly intoxicated and injure themselves once leaving the licensed premises as a result of being served alcohol beyond the point of intoxication. The significance of these decisions was that, for some time they appeared to expand the common law of negligence in Australia.[11] More recently though, reflecting what Professor Harold Luntz has termed a remarkable turnaround in Australian torts jurisprudence, developments opening the door to a broad based alcohol server liability to intoxicated customers have been stopped in their tracks as a side effect of the statutory reforms of Australia's tort law.[12] The analysis of these pre-statutory reform cases, in the light of the new civil liability legislation, suggests that the statutory reforms have caused a major shift in judicial opinion.

The reason for the recent reforms to Australian negligence law through the Review of the Law of Negligence, culminating in the Ipp Report and the embodiment in various civil liability legislation, was the notion of personal responsibility. However, it is clear that the statutory reforms failed to strike a balance between the legitimate pursuit of compensation and the limitation of negligence litigation by an attitudinal change towards this idea of personal responsibility. As a consequence, in the climate of Australian negligence law, judicial opinion concerning this field has consequently shifted the loss to the victim where the individual's conduct has been instrumental in causing their own personal injury.

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does not have to be predicted or envisaged; Similar to the case of *Mayfield Investments Ltd* the Court held that the mere fact of over service of alcohol is not negligent; rather personal injury must be foreseeable as a result of the impugned conduct. Importantly, Justice Derrington stated that even though the licensee was in violation of Queensland's liquor legislation, this fact alone would not be enough to extend liability to the alcohol provider because of the lack of any civil cause of action.

[8] *Rosser v Vintage Nominees* District Court (WA) Greaves C, No D980157, 5 June 1998, unreported. This case has subsequently been subject to appeal.

[9] *Desmond v Cullen* Unreported Judgements NSW CA 40515/00.

[10] See also *Sheraton v Albeth Pty Ltd* for a general discussion of a licensee's liability in negligence to its hotel patrons.[10]

[11] Hamad, A, 'The Intoxicated Pedestrian: Tortious Reflections' (2005) 13(1) Tort Law Review 14 at p 31.

[12] McDonald, B, 'The impact of the Civil Liability legislation on fundamental policies and principles of the common law of negligence' (2006) 14 Torts Law Journal 268 at p 17; Luntz, H, 'Torts Turnaround Downunder' (2001) 1 Oxford University Commonwealth Law Journal 95 at p 96; H Luntz, Luntz, H, 'Editorial Comment: Round-up of cases in the High Court of Australia in 2003' (2004) 12 Torts Law Journal 1 at p 1.

Following Australia's tort reform in 2002, the case of *Parrington v Hotel Corp*,[13] *Cole v South Tweed Heads Rugby League Football Club* and most recently in January this year, the case of *Scott v C.A.L No 14 Pty Ltd*[14], all found that occupiers of licensed premises, as alcohol providers, do not owe a general duty of care to protect patrons from the risk of personal injury as a result of self-induced intoxication. What is now evident in mass society and Australian judicial opinion is a shift in judgement and attitudes on personal injury accident compensation. It is clear that this is a direct side effect of the statutory reforms to Australia's tort law.

This shift in judicial opinion and the attitude of popular culture was evidenced in the highest pronunciation of Australia's present common law, in the case of *Cole v South Tweed Heads Rugby League Football Club*. The majority judges found occupiers of licensed premises are not subject to any broad based duty of care to protect a patron or third party from the risk of physical injury or death as the result of a patrons' self-induced intoxication. This rationale was based on the policy of individual responsibility, personal autonomy and privacy. It was concluded that people are entitled to act as they please, even if this will inevitably lead to their own death or injury.[15] Chief Justice Gleeson held that as a general rule, patrons should not be able to avoid individual responsibility for the risks that accompany a personal choice to consume alcohol.[16] Synonymously, Justice McHugh in dissent noted that it is a central thesis of the common law that a person is legally responsible for their choices. However in contrast to the majority decision, Justice McHugh held that one of the most important exceptions to the common law doctrine is that a person will seldom be held legally responsible for a choice if another owes the first person an affirmative duty of care. Hence, a licensee that has breached its duty to protect a patron from harm resulting from intoxication cannot escape liability because of voluntarily consumption of alcohol.[17]

Justices McHugh and Kirby had no hesitations in concluding that, in line with international precedents, an occupier in control of licensed premises owes a duty of care in negligence not to contribute to a danger to others.[18]

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[13] *Parrington v Hotel Corp* [2003] NSWSC 734.
[14] *Scott v CAL No 14 Pty Ltd t/as Tandara Motor Inn* (No 2) (2009) 256 ALR 512.
[15] Henningham, B, Legal Update Alcohol Servers' Liability, Wotton and Kearney Insurance Lawyers, (2003), <http://www.wottonkearney.com.au/docfiles/legalupdateparrington.pdf> (3 October 2009) at p 1; *Reeves v Commissioner of Police of the Metropolis* [2000] I AC 360, 379-80 (Lord Hope of Craighead), endorsed by Gleeson *CJ* in *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29 at [14]; Handford, P, Duty-free Alcohol Service - Case Note; Cole v South Tweed Heads Rugby League Football Club Ltd (2004) 12 (3) Tort Law Review 121 at p 122. Justices Gleeson, Gummow, Hayne and Callinan came to this rationale after considering the alleged difficulties of monitoring patrons' consumption and the varying degrees at which people are affected by alcohol.
[16] *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29 per Gleeson at [13].
[17] *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29 per McHugh at [38] Justice Justice Kirby also held at [90] that "[w]hatever difficulties free-will assumptions pose for the law in normal circumstances, such assumptions ... may ultimately be invalidated having regard to ... alcoholic drinks."
[18] Jordan House Ltd. v. Menow and Honsberger (1973), 38 D.L.R. (3d) 105 (S.C.C.); Stewart v. Pettie (1995), 23 C.C.L.T. (2d) 89 (S.C.C.); Schmidt v. Sharpe and the Arlington House Hotel (1983); Picka v. Porter and the Royal Canadian Legion (1980); *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29 per Kirby at [93].

Their Honours found that the rigorous application of basic negligence doctrine requires that the licensee should be liable for injuries sustained by a drunken patron who is injured after leaving its premises.[19] In stark contrast, Chief Justice Gleeson held that the consequences of a duty of care involve both an unacceptable burden upon ordinary social and commercial behaviour, and an unacceptable shifting of responsibility for individual choice.[20] Additionally, his Honour held that it is unnecessary to formulate a general proposition whether a supplier of alcohol in a commercial setting is under a duty to take reasonable care to protect a consumer of alcohol against the risk of physical injury resulting from consumption of alcohol.[21]

According to Justice Kirby, there is every reason for Australian courts to follow an approach similar to that taken in international jurisdictions given the social and legal environment in Australia is similar to those countries where the duty has been upheld.[22] His Honour held that the long-standing parliamentary intention, in imposing a regulatory duty on licensees not to serve the intoxicated, pointed to a common law duty of care.[23] Justice Kirby also recognised that imposing a duty of care would increase the motivation for parliament to implement legislation that regulates the control of alcohol consumption in licensed premises as a formal duty imposed by statute.[24] Accordingly, statutory provisions of such a kind would be more likely to be prosecuted often, and result in a common law duty that is backed by civil consequences sounding in direct liability to the injured.[25]

In the latest landmark decision in 2009, *Scott v C.A.L No 14 Pty Ltd*[26], Chief Justice Crawford and Justice Evans concluded that an actionable duty of care was not owed by a commercial supplier of alcohol to a patron to take reasonable care to protect that patron from the risks of physical injury resulting from the consumption of alcohol.[27] However, according to Justice Kirby, the occupier of licensed premises is subject to a duty of care to its patrons to take reasonable care to ensure that intoxicated patrons are not exposed to personal injury as a result of their inebriation.[28]

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[19] *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29 at [17]; Cf *Desmond v Cullen* (2001) 34 MVR 186 at 187. It is to be noted that the Canadian case *Jordan House Ltd v Menow* [1974] SCR 239 involved knowledge of the plaintiff's propensities, and placing him in a situation of known danger.

[20] Handford, P, Duty-free Alcohol Service - Case Note; Cole v South Tweed Heads Rugby League Football Club Ltd (2004) 12 (3) Tort Law Review 121 at pg 123; *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29 at [17] - [18].

[21] From the opinion of the dissenting judges, it can be inferred that a duty imposed on servers to prevent patrons from drinking to excess is derived from the server's control of the premises and the supply of alcohol. This duty of care should extend to injury on the premises and for the duration of the intoxication, which would include the journey home.

[22] *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29 at [94].

[23] *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29 at [95].

[24] *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29 per Kirby at [94].

[25] *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29 per Kirby at [104].

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

[27] *Scott v CAL No 14 Pty Ltd t/as Tandara Motor Inn* (No 2) (2009) 256 ALR 512 at [28].

[28] *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29 per Kirby J at [53].

2.3 Critical Analysis of the State of the Law Pre and Post Reform

By providing an overview of the present state of Australia's common law, the effects of the relevant statutory reforms can be evaluated and critically analysed according to the state of the law both pre and post reform.

As was evident in the tort reforms and the shifting opinion of Australian courts, plaintiffs are now being expected to take much more personal responsibility for their own actions and safety, which represents the political agenda behind the reforms to Australia's negligence law. The primary objective of the Ipp Report was to apportion personal responsibility on individuals to take care of others and to take care of themselves.[29] While the statutory provisions will achieve the stated aim of reducing litigation for negligence and shifting responsibility to the individual, the relative provisions also work injustice. The principle critique of the state of Australia's tort law is that post reform, the law deprives seriously injured plaintiffs of any recovery of damage against a grossly negligent defendant whose conduct is a significant causative factor in the plaintiff's harm.[30]

Considering contributory negligence provisions after the tort reform, plaintiffs' interests are becoming less protected by torts law, and the various standards of liability underlying these laws are shifting to this new accord of personal responsibility. [31] In contrast, as was demonstrated in the earlier cases of the era preceding Australia's tort reform, the position of the common law was significantly different to its present state. In tandem with compensation law generally, this field has now witnessed a significant defendant-friendly shift in recent years in Australia.[32] The result is a divergence between the obligations imposed on commercial servers by liquor licensing laws and the civil law retreat from exposure to compensation.

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[29] Review of the Law of Negligence, Final Report ("Ipp Report") 2002 <http://revofneg.treasury.gov.au/content/review2.asp> (21 October 2009) at p 15; McDonald, B, 'The impact of the Civil Liability legislation on fundamental policies and principles of the common law of negligence' (2006) 14 Torts Law Journal 268 at p 17; Spigelman, J, 'Negligence: The Last Outpost of the Welfare State' (2002) 76 (7) Australian Law Journal 432.

[30] Katter, N, 'Negligence and Intoxication – Has Civil Liability Reform Gone Too Far?' (2006) Deakin Law Review Vol 11. No. 2.

[31] Orr, G, Dale, G, 'Impaired Judgements? Alcohol Server Liability and Personal Responsibility after Cole v South Tweed Heads Rugby League Football Club' (2005) 13 Torts Law Journal 103 at p 9; Legislative sloganeering, sometimes of a more blatant kind, started to emerge in Australia in the late 1990s: see G Orr, 'Names Without Frontiers: Legislative Titles and Sloganeering' (2000) 21 *Statute L Rev* 188.

[32] Orr, G, 'Is an Innkeeper Her Brother's Keeper? The Liability of Alcohol Servers' (1995) 3 Torts Law Journal 239 at p 9.

3.0 Theory on the Appropriateness of the Current State of the Law

To present an original perspective on the appropriateness of the current state of the law, it is interesting to speculate on the current application of the relevant statutory provisions to cases that preceded the reforms. For example, if section 50 of the *Civil Liability Act* 2002 (NSW) were to be applied to the case of *Cole v Tweed Heads Rugby League Football Club*, it is suggested that this would not have resulted in any injustice because the plaintiff would fail to establish any negligence according to this statutory provision.

It is recognised that imposing a duty of care on occupiers of licensed premises would affirm that responsible service of alcohol is not just a formal duty imposed by statute that is unlikely to be prosecuted.[33] Rather, what is required is reform to the law of tort to recognise a civil law duty that sounds in direct liability to the injured. The High Court's rejection of licensees' civil liability means that there will be little or no incentive for commercial alcohol providers to comply with their pre-existing statutory duties under the liquor legislation. It is suggested that by trying to impose a greater degree of personal responsibility on less deserving plaintiffs, the legislature has effectively allowed the complete exculpation of negligent defendants in some cases, thus undoing the advances in apportionment of responsibility that had been achieved by earlier common law judgements.

There is already a mechanism for visiting civil liability in this field, namely the approach taken to the established categories of negligence law by both the common law and statute in Canada, England and the United States of America.[34] An analysis of these international jurisdictions is useful to demonstrate the inappropriateness of Australia's present position both in statute and the common law. Alcohol providers and occupiers of licensed premises are subject to civil liability in Canada under common law doctrine[35] and provincial statutory legislation.[36] Similarly in England, judicial opinion has affirmed the Canadian position in common law cases.[37] In the United States of America, it is clear that that jurisdiction has the oldest and strictest forms of civil liability[38] recognizing a cause of action against occupiers of licensed premises for injuries stemming from their service of alcohol.[39]

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[33] *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29 per Kirby J at [104].

[34] Solomon, R, Payne, J, 'Alcohol Liability in Canada and Australia: Sell, Serve and be Sued' (1996) 4 *Tort L Rev* 188, *Niblock v Pacific National Exhibition* (1981) 30 BCLR 20; *Buehl v Polar Star Enterprises Inc* (1989) 72 OR (2d) 573; *McGinty v Cook* (1991) 79 DLR (4th) 95.

[35] *Schmidt v. Sharpe and the Arlington House Hotel* (1983); *Picka v. Porter and the Royal Canadian Legion* (1980); *Jordan House Ltd. v. Menow and Honsberger* (1973), 38 D.L.R. (3d) 105 (S.C.C.); *Canada Trust Co. v. Porter,* [1980] O.J. No. 252 (C.A.); *Stewart v. Pettie* (1995), 23 C.C.L.T. (2d) 89 (S.C.C.); *Holton v. MacKinnon,* [2005] B.C.J. No. 57 (S.C.); *McIntyre v. Grigg* (2006), 83 O.R. (3d) 161 (C.A.).

[36] *Liquor Licence Act*, R.S.O. 1990, c. L.19, s. 39; *Occupiers' Liability Act*, R.S.O. 1990, c. O.2, s. 3.

[37] *Munro v Porthkerry Park Holiday Estates Ltd*; *Barrett v Ministry of Defence* [1995] 1 WLR 1217; *Jebson v Ministry of Defence* [2000] 1 WLR 2055.

[38] Orr, G, 'Is an Innkeeper Her Brother's Keeper? The Liability of Alcohol Servers' (1995) 3 Torts Law Journal 239 at p 3.

[39] See *Felder v Butler*, 438 A.2d 494 (Md. 1981); *Homes v Circo*, 244 N.W.2d 65, 67 (Neb. 1976); *Williamson v Old Brogue, Inc.*, 350 S.E.2d 621, 624 (Va.1986).

Similar to Australia, courts in America were formerly reluctant to recognise this category of negligence law based on the personal responsibility rationale.[40] Given the prominence of policy considerations, United States courts and legislatures reformed the national tort law to embody what is known as dram shop liability.[41] As a result, dram shop statutes impose civil liability on licensed establishments who sell alcohol to obviously intoxicated patrons who subsequently suffer personal injury to themselves or third parties.[42] Like Australian courts, the New Jersey Supreme Court in particular has clarified that there is a distinction between the negligence of drinking to the point of intoxication and the negligence of adding to that intoxication by selling the drinker even more alcohol.[43]

This idea of negligence per se with its focus on whether the injured person was intended to be protected by the doctrine of statutory tort,[44] seeks to define a legislative intent to impose civil liability for breach of an offence. Unlike Australia, the position adopted by these three international jurisdictions reflects the leading system of negligence law in the common law world.[45] With the current state of the international law in mind, this clearly demonstrates the inappropriateness of the present position of Australia's liability in this field. Australian tort law should abrogate joint and several liability so that a defendant will not be liable for all of the plaintiff's recoverable damages but apportion comparative responsibility in line with the approach of Canada, England and America.[46] It is suggested that under our existing civil liability schemes, Australian tort law severely lacks comparative responsibility that appropriates fault between the occupiers of licensed premises, the intoxicated tortfeasor and negligent third parties.

It seems a fair conclusion that by our courts failing to focus on comparative fault, our existing torts compensation scheme does not apportion liability, but instead concentrates on legislative intentions behind the provisions.[47] It is submitted that the state of the law in this particular field is an unfair and inefficient system of compensation for personal injuries resulting from negligent behaviour. As demonstrated, the statutory and common law systems of other international jurisdictions have clearly evolved more suitable and effective alternatives.

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[40] *Hinegardner v Marcor Resorts* L.P. 844 P.2d 800, 802 (Nev. 1992); (Seibel v. Leach, et al., 1939, p. 775).

[41] Smith, R, 'A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation' (2000) Journal of Corporation Law, Vol. 25, No. 3 *at p 556; see McIsaac v Monte Carlo Club, Inc. 587 So. 2d 320, 324 (Ala. 1991).*

[42] Smith, R, 'A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation' (2000) Journal of Corporation Law, Vol. 25, No. 3 *at p 563.*

[43] See *Steele v Kerrigan*, 689 Q.2d 685, 693-94 (n.J. 1997); *Lee v Kiku Restaurant*, 603 A.2d 503, 511 (n.J. 1992); *Buckley v Estate of Pirolo*, 500 A.2d 703, 709 (N.J. 1985)

[44] See discussion of negligence per se and statutory tort as possible bases of server liability in R M Jones, "*Chartrand v Coos Bay Tavern, Inc*" (1986) 22 *Willamette L Rev* 175 at 179-182.

[45] Orr, G, 'Is an Innkeeper Her Brother's Keeper? The Liability of Alcohol Servers' (1995) 3 Torts Law Journal 239 at p 3-4.

[46] Smith, R, 'A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation' (2000) Journal of Corporation Law, Vol. 25, No. 3 *at pg 567.*

[47] Smith, R, 'A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation' (2000) Journal of Corporation Law, Vol. 25, No. 3 *at p 567.*

Bearing in mind the recent reforms to tort law in Australia and considering the themes of Canadian, English and American law, it is suggested that the role of policy in Australia's accident compensation, namely the value of personal responsibility, autonomy and contributory negligence, are being emphasised to the detriment of the provision of compensation to the injured.[48]

[48] Solomon, R, Payne, J, 'Alcohol Liability in Canada and Australia: Sell, Serve and be Sued' (1996) 4 *Tort L Rev* 188 at p 2.

4.0 Policy Considerations and Social Effects

It is quite evident to any onlooker that alcohol consumption plays not only a significant role in the Australian culture, but also a readily acceptable one. Drinking has become somewhat synonymous with our contemporary Aussie way of life; be it any social or celebratory setting, alcohol consumption is almost always incorporated. This dominant social role that alcohol consumption has come to enjoy can be easily evidenced by the ever-growing abundance of licensed premises throughout the entirety of society,[49] as well as a wealth of supporting and somewhat alarming statistics.

For example, in 2004, an overwhelming majority of 83% of Australians reported drinking alcohol,[50] according to the National Alcohol Strategy of 2006-2009. Further statistics gathered by the National Alcohol Strategy reveal that approximately 3,100 people die as a result of excessive alcohol consumption each year, 72,000 are hospitalised, and the annual cost of alcohol-related social problems totals approximately $7.6 billion to the Australian community.

Furthermore, while licensed premises of Australia account for less than half of all liquor sales, the majority of alcohol-related harm is directly associated with these such premises where alcohol is consumed. As a brief summary, "(u)p to 64% of drink driving offenders report hotels and clubs as the last place of alcohol consumption, half of all cases of assault in NSW occur on or adjacent to licensed premises and community surveys indicate that 72% of people experiencing alcohol-related violence have been drinking in a licensed premise".[51] In Australia, "alcohol misuse is now only second to tobacco as a preventative cause of death and hospitalisation".[52]

It is due to statistics such as these, noting the far-reaching social effects, that alcohol-related injuries have become an issue of growing concern among the general public, in addition to both the legislature and judicial counterparts of Australia. However, a considerable lacuna seems to be developing due to the disjunction between the recent majority's authoritative High Court decision in *Cole v South Tweed Heads Rugby League Football Club*[53] and other legislative provisions.

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[49] Chikritzhs, T, et al, *Predicting alcohol-related harms from licensed outlet density: A feasibility study*, National Drug Law Enforcement Research Fund, (2007) http://www.ndlerf.gov.au/pub/Monograph_28.pdf>(12 October 2009) at p 34.

[50] Ministerial Council on Drug Strategy, *Australian National Alcohol Strategy 2006-2009*, Ministerial Council on Drug Strategy, (2006), <http://www.alcohol.gov.au/internet/alcohol/publishing.nsf/content/B83AD1F91AA632ADCA25718E0081F1C3/$File/nas-06-09.pdf> (11 October 2009) at p 2.

[51] Daly, J, Campbell, E, Wiggers, J, Considine, R, 'Prevalence of responsible hospitality policies in licensed premises that are associated with alcohol-related harm' (2002) 21 *Drug and Alcohol Review* 113 at p 113.

[52] Loxley, Wendy, Dennis Gray, Celia Wilkinson, Tanya Chikritzhs, Richard Midford and David Moore, 'Alcohol policy and harm reduction in Australia' (2005) 31 *Harm Reduction Digest* 559.

[53] *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29.

The emphasis Chief Justice Gleeson and Justices Callinan, Gummow and Hayne placed on personal responsibility, in rejecting that licensed premises owed a duty of care to their patrons once they had left their establishment, seems to be at odds with statutory policy factors that highlights alcohol server responsibility. A prime example can be seen in the *Liquor Act* 1992 (Qld). The overall object of this Act is explicitly stated as "regulat(ing) the liquor industry in a way compatible with minimising harm caused by alcohol abuse and misuse"[54] (including personal injuries), while "having regard to the welfare, needs and interests of the community".[55] Clearly, by addressing issues of the safety and welfare of the public at large, the legislature has intended to confer responsibility on the licensed premises to take affirmative action in preventing alcohol-related injuries, due to the obvious contributory role that these premises play.

This is further evidenced by Part 6 of the Act, whereby s 148A, subsections (3) and (4) makes it an offence for a licensee to not "engage in practices and promotions that encourage the responsible consumption of liquor",[56] as well as not "provid(ing) and maintain(ing) a safe environment in and around the premises".[57] This theme of accountability and attributing responsibility to licensed premises with respect to alcohol-related injuries is further mirrored in the compulsory Responsible Service of Alcohol training for all staff of licensed premises who are in contact with patrons, as well as the imposition of heavy fines for licensees, managers and any staff found serving intoxicated patrons, of which the maximum in Queensland is $50,000. Furthermore, campaigns underlining responsible service practices "reinforce the fact that the onus is on licensed venues to ensure liquor abuse does not occur in the first place".[58]

The *Civil Liability Act 2003* (Qld) advances this departure away from alcohol server liability as promoted by the *Liquor Act*, mandatory RSA schemes, relevant offences and fines. The composition of the intoxication clauses, namely Division 2 sections 46-49, "essentially returns the law to the middle of the 20th century when the contributory negligence of a plaintiff was a complete defence to an action for negligence,... thus resurrecting a rule which the common law had perceived as harsh and unjust".[59] In their recommendations, the Panel of the Review of the Law of Negligence (otherwise known as the Ipp Report) noted the proposal of minimum reduction of damages with respect to cases involving contributory negligence conduct; one such category being intoxication. The Panel was of the opinion that to implement such provisions would be "generally undesirable", as "any such fixed reduction would be arbitrary and unprincipled, and could work injustice in some cases".[60]

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[54] *Liquor Act* 1992 (Qld), s 3A(a).
[55] *Liquor Act* 1992 (Qld), s 3A(b).
[56] *Liquor Act* 1992 (Qld), s 148A(3).
[57] *Liquor Act* 1992 (Qld), s 148A(4).
[58] Orr, Graeme and Gregory Dale, 'Impaired judgements? Alcohol server liability and 'personal responsibility' after *Cole v South Tweed Heads Rugby League Football Club Ltd*' (2005) 13 *Torts Law Journal* 103, at p 106.
[59] Katter, N, 'Negligence and Intoxication – Has Civil Liability Reform Gone Too Far?' (2006) Deakin Law Review Vol 11. No. 2. at p 171.
[60] Review of the Law of Negligence, Final Report ("Ipp Report") 2002 <http://revofneg.treasury.gov.au/content/review2.asp> (21 October 2009).

Research indicates that present community perceptions acknowledge the significant causal link between alcohol consumption and the risk of injury,[61] and that it is only reasonable that licensed premises assume some responsibility for such injuries. To do otherwise, and continue to ignore that a duty of care is owed by the servers of alcohol to their consumers, even after they have left the premise, due to the complete defence of the plaintiff's intoxication, would be to allow the premises' negligence to pass without impunity.[62]

This defendant-friendly position that the law has reached via the rhetoric of the majority decision in *Cole v South Tweed Heads Rugby League Football Club,*[63] as well as the lack of an existing of a duty of care within the *Civil Liability Act 2003* (Qld), has resulted in the creation of a social construct, whereby a consumer of alcohol is viewed as the sole "author of any misfortune he or she suffers". This unwarranted emphasis on individual responsibility therefore rests on the conception that "once somebody has decided to consume alcohol..., they must bear all the causally connected consequences of such intoxication irrespective of how negligent and outrageous a defendant's conduct towards the plaintiff".[64]

This therefore results in "(t)he act of drinking itself, at least to excess, now attract(ing) the social status of a 'outlaw', that is, someone who should be outside the law's protection".[65] Furthermore, this social construct neglects to recognise the plaintiff of an alcohol-related injury as someone who is essentially being taken advantage of by licensed premises, as they are the ones who stand to profit commercially out of the plaintiff's alcohol consumption. That is, in addition to its social character, as noted by the National Alcohol Strategy, "(a)lcohol plays an important role in the Australian economy, ... generat(ing) substantial employment, retail activity, export income and tax revenue".[66]

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[61] Lang, E. and Stockwell, T.R. and Rydon, P. and Lockwood, A.. 1993. Public perceptions of responsibility and liability in the licensed drinking environment. Drug and Alcohol Review 12 (1): 13-22 at p 20.

[62] Katter, N, 'Negligence and Intoxication – Has Civil Liability Reform Gone Too Far?' (2006) Deakin Law Review Vol 11. No. 2 at p 172.

[63] *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29.

[64] Dietrich, Joachim, 'Duty of care under the "Civil Liability Acts"' (2005) 13 *Torts Law Journal* 17, at p 36.

[65] Orr, Graeme and Gregory Dale, 'Impaired judgements? Alcohol server liability and 'personal responsibility' after *Cole v South Tweed Heads Rugby League Football Club Ltd*' (2005) 13 *Torts Law Journal* 103, at p 119.

[66] Ministerial Council on Drug Strategy, *Australian National Alcohol Strategy 2006-2009*, Ministerial Council on Drug Strategy, (2006), <http://www.alcohol.gov.au/internet/alcohol/publishing.nsf/content/B83AD1F91AA632ADCA25718E0081F1C3/$File/nas-06-09.pdf> (11 October 2009) at p 2.

This somewhat obvious oversight of licensed premises standing to profit via their patrons' consumption was duly noted by Justice Kirby in *Cole v South Tweed Heads Rugby League Football Club.*[67] He stated that:

> "In such circumstances, to hold that the club owed no duty of care by the standards of the common law of negligence, to patrons such as the appellant, is unrealistic. Such a patron was a person who, in the reasonable contemplation of the club and its employees, was potentially vulnerable to harm as a result of its commercial activities. Such harm was reasonably foreseeable in the given circumstances... (W)ithholding the imposition of a duty of care are overridden, in the case of the club, by the commercial interest it had in the presence of the appellant on its premises."[68]

It has been suggested that the "distressingly narrow, individualistic approach to injury and duty in the context of intoxication...represents a retrograde step and a missed opportunity for tort law to fulfill its traditional purposes. Attributing some responsibility for alcohol-related injury to those who both benefit from and are in a position to control alcohol abuse, would promote safety, deter irresponsible self-interested conduct, and set meaningful standards of acceptable behaviour. The result could be a much needed cultural and social shift towards more responsible alcohol practices".[69]

The majority opinion in *Cole,* [70] whereby the statutory context and aims of broadening licensees' responsible alcohol service obligations via regulatory provisions have be dismissed,[71] has resulted in "the courts are moving away from, rather than towards, imposing a negligence and hence insurance burden on licensees for the harms drinkers suffer" .[72] In favour of maintaining the current position of licensed premises owing no duty of care to their patrons once they have left their establishment is the conventional 'floodgates' argument; that to introduce such a duty of care would be to open the door to the personal actions too wide resulting in a proliferation of civil liability claims. However, Australia need not progress towards a 'blame-and-claim culture'.[73] Instead, it is proposed that personal responsibility of patrons needs to work in conjunction with alcohol service liability of licensed premises; both parties assuming contributory responsibility to negligent alcohol-related injuries, instead of the plaintiff accruing the burden, while the defendant enjoys a complete defence.

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[67] *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29.
[68] *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29, at p 92, per Kirby J.
[69] Watson, Penelope. 'You're not drunk if you can lie on the floor without holding on' - alcohol server liability, duty, responsibility and the law of torts [online]. James Cook University Law Review, v.11, 2004: 108-131 at p 109.
[70] *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29.
[71] Duty-free Alcohol Service - Case Note; Cole v South Tweed Heads Rugby League Football Club Ltd (2004) 12(3) Tort L Rev 121 at 123.
[72] Orr, Graeme and Gregory Dale, 'Impaired judgements? Alcohol server liability and 'personal responsibility' after *Cole v South Tweed Heads Rugby League Football Club Ltd*' (2005) 13 *Torts Law Journal* 103, at p 115.
[73] Editorial, 'Tort Monster Back in Cage', *Australian Financial Review*, 28 January 2005, p 66.

While such a proposal will inevitably result in the consequential increase of insurance premiums for licensed premises, this cost could be shared via than synonymous rise of alcohol prices or taxes; a reasonable compromise to ensure the fair spread of the costs of alcohol-related injuries are divided between both consumers and suppliers. Obviously there are many stakeholders in the issue of alcohol-related injuries. A response to the "patterns of high risk alcohol consumption that are prevalent in Australia" and the consequential injuries they are causing needs to be made. It is maintained that by implementing such reforms so as to recognise the contributory negligent role licensed premises play in alcohol-related injuries of their patrons once they have left their establishments, public utility would be better served. The current gap between the common law and statutory provisions needs to be bridged to allow for a more uniform and synergistic approach.

5.0 Recommended Further Reforms

With regards to the liability of alcohol service providers in relation to personal injury, it is recommended that reforms to the current law occur, mainly through amendments and additions to the *Civil Liability Act* 2003 (Qld). As discussed earlier, the current Act omits occupiers' liability in regards to personal injuries that occur outside of the premises and as a result of serving alcohol to patrons who are intoxicated. This is a situation of *damnum sine injuria*, meaning harm in the absence of a legal wrong, where real harm or loss to plaintiffs remains unprotected by tort law.[74] Draft amendments have been submitted, with not only the intention of rectifying the current situation of *damnum sine injuria*, but also to place Australian tort law in line with international standards. The draft amendments are modeled from Richard Smith's Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation[75]. It consists of five main sections and includes acts giving rise to liability, persons prohibited from recovering, apportionment of liability, liability for seller based on customer's intentional tort and exclusive remedy for negligent service.

Section one details when a licensed seller will be liable for personal injury occurring outside the premises and as a result of their intoxication, including a specific provision relating to service to patrons who are already intoxicated or not of legal age. Section two outlines persons who are unable to recover, including family or friends of the intoxicated customer or persons who knowingly accept risks in relation to the intoxicated persons. Section three is entitled apportionment of liability and discusses the notion of contributory negligence in relation to the intoxicated person. Section four continues by stating that the victim of an intentional tort may not recover from the occupier unless the seller had specific notice that the customer intended or was likely to commit an intentional tort. Section five concludes our draft amendments by providing an exclusive remedy for negligent service on the occupier's behalf. The draft amendments to the *Civil Liability Act* provide a reasonable balance between the responsibility of patrons and occupiers', without placing huge and unnecessary burdens on the owners of licensed venues. This balance is achieved through the direct provisions relating to contributory negligence and the persons who are unable to recover under the Act.

As evident from the proposed draft amendments, the current fault system used in Australia will continue to form the basis of compensation, although the reform in this area of tort law will shift the favour from defendants to plaintiffs. A no fault scheme, like that suggested by the academic Patrick Atiyah[76] and implemented in New Zealand, will prove insufficient in repairing this area of liability as it will not serve to deter commercial entities from using their influence to generate potential risk situations and escape liability as no fault schemes allow injured persons to receive government funded compensation

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[74] Luntz, H, Hambly, D, *Torts Cases and Commentary*, 5th ed, LexisNexis Butterworths, Victoria 2006 at p 90.
[75] Smith, R, 'A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation' (2000) Journal of Corporation Law, Vol. 25, No. 3, at p. 9.
[76] Atiyah, P, *The Damages Lottery*, Hart, Oxford 1997.

and in turn relinquish their right to sue for damages in common law.[77] A discussion of tort theory further indicates why a no-fault scheme is insufficient when considering reforms in this area of liability.

When explaining and evaluating different tort theories, the submitted draft amendments to the *Civil Liability Act* will prove to be a necessary step forward for tort law in Australia. The key notion of individual responsibility as discussed in *Cole v South Tweed Heads Rugby League Club*[78], currently surrounds and dictates the current tort law with regards to the liability of alcohol service providers in relation personal injury. This theme in tort law refers to an individual being responsible for their own actions and safety. Although this may seem to be a convincing argument put forward by the High Court, a discussion of enterprise liability theory will elucidate why further reform is necessary in this area.

Enterprise liability theory provides further reasons as to why a loss should be shifted from a plaintiff to defendant, other than that the plaintiff suffered harm as a result of the defendant's fault. This theory proposes that larger organizations bear the loss, as they continue to perform loss-generating activities for their own gain, mostly through the generation of profits.[79] The organization is then able to spread the risk of, or actual loss through insurance or increasing the price of the goods and services they provide. The minority judgments in *Cole v South Tweed Heads Rugby League Club*,[80] provided by Justice Kirby and Justice McHugh, reflect the application of the enterprise liability theory to the area of tort law under question. Justice Kirby stated "the policy reasons concerned with free will and personal autonomy, that might in other circumstances justify withholding the imposition of a duty of care are overridden, in the case of the club, by the commercial interest it had in the presence of the appellant on its premises and the known propensity of the alcoholic product, made available there, to expose at least some individuals to the risk of serious harm."

The Tort Reform Institute, a consumer activist body, follows this line of thought in their submission on the proposed Civil Liability Bill of 2002.[81] It is quoted that "the intoxication provisions need amendment so that owners of licensed premises who profit from the sale of alcohol are not protected from the consequences of their own negligence towards patrons who may become intoxicated because of alcohol sold and consumed on those premises. Publicans and other similar operators derive significant profits from the sale of alcohol. They promote its consumption yet the provisions of the Bill protect them from adverse consequences to their customers even if the publican himself, through recklessness causes calamity."[82]

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[77] Bismark, M and Patterson, R, 'No-Fault Compensation in New Zealand: Harmonizing Injury Compensation, Provider Accountability and Patient Safety' (2006) 25 Health Affairs (1):278 83 at p 1.
[78] *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29.
[79] McGlone, F, Stickley, A, *Australian Torts Law*, LexisNexis Butterworths, Victoria 2005 at p 11.
[80] *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29.
[81] Tort Reform Institute, *Submission on the proposed Civil Liability Bill 2002*, Tort Reform Institute, (2003), <http://www.tortreforminstitute.com.au/clb_submission.pdf> (1 October 2009) at p. 9.
[82] Tort Reform Institute, *Submission on the proposed Civil Liability Bill 2002*, Tort Reform Institute, (2003), <http://www.tortreforminstitute.com.au/clb_submission.pdf> (1 October 2009) at p. 9.

It is submitted that enterprise liability theory holds particular significance and application to the recommendations for further reform in the area of occupiers' liability for alcohol induced personal injury. Licensed occupiers are raking in immense profits from the sale of alcohol to both sober and already intoxicated patrons, gaining monetary advantage from their own risk-producing activities and situations. The occupiers of licensed venues should therefore owe a duty of care and be held liable for injuries resulting from their own commercial activities. The crux of this argument is that individual responsibility is overridden by the commercial entity's need to protect consumers from their risk-generating, and excessive alcohol service. Therefore a duty of care should be owed to the alcohol-induced, injured patrons, and the loss shifted to the defendant. This will serve as a necessary deterrent against commercial entity's taking advantage of their position and escaping liability.

6.0 Concluding Remarks

In reference to the state of liability and the policy and social effects of negligence relating to alcohol-induced injury, it is therefore submitted that the *Civil Liability Act 2003* (Qld) inappropriately and insufficiently balances the needs of interested parties and society in general. It is therefore necessary to reform the current compensation scheme for personal injury in Queensland, in order to extend and codify occupiers' liability to include a duty of care owed by the licensed premises to injured patrons and third parties that occur outside the venue as a result of a patrons' intoxication.

Draft amendments to the *Civil Liability Act 2003* (Qld) have been proposed to shift the High Court's current focus on individual responsibility to a more plaintiff-friendly approach to this area of liability. This argument has been supported through a discussion of international standards, the current disjuncture between *Cole v South Tweed Heads Rugby League Football Club* and other relevant statutory provisions promoting safety in alcohol service, enterprise liability theory and alternative fault systems. The failure of the current system to adequately protect patrons from injuries they sustain through the excessive consumption and supply of alcohol epitomises the courts' disregard for the commercial abuse of power and escapement of liability enjoyed by occupiers of licensed venues.

REFERENCE LIST

Books

Luntz, H, Hambly, D, *Torts Cases and Commentary*, 5th ed, Lexis Nexus Butterworths, Victoria, 2006.

Luntz, H, Hambly, D, Burns, K, Dietrich, J, Foster, N, *Torts: Cases and Commentary*, 6th ed, Lexis Nexus Butterworths, Victoria, 2009.

McGlone, F, Stickly, A, *Australian Torts Law*, Lexis Nexus Butterworths, Victoria, 2005.

Journal Articles

Author Unknown, 'Common-Law Negligence Action Held to Lie against Tavern Owners for Injuries Resulting from Illegal Sales of Liquor' (1960) Columbia Law Review Vol. 60, No. 4.

Author Unknown, 'Conflict of Laws. Obligations. Tort. Minnesota Civil Damage Act Provides Remedy against Liquor Seller for Illegal Sale within the State Resulting in Injury outside the State. Schmidt v. Driscoll Hotel, Inc.'(1958) Harvard Law Review Vol. 71, No. 7.

Author Unknown, 'Conflict of Laws. Standard of Care. Illegal Sale of Liquor to Intoxicant in Illinois Renders Tavernkeeper Liable in Tort for Acts of Intoxicant in Michigan' (1959) Virginia Law Review, Vol. 45, No. 7.

Author Unknown, 'Joint Tortfeasors In General Recovery from Tavern Keeper under Dram Shop Act Barred by Unconditional Release of Concurrent Tortfeasor from Wrongful Death Act Liability' (1952) Harvard Law Review Vol. 65 No. 8.

Bender, J M, 'Tort Liability for Serving Alcohol: an Expanding Doctrine' (1985) 46 Montana Law Review 381.

Boyd, J, Vickory, F, Maroney, P, 'The Trends in Dram Shop Laws and How They Affect the Hospitality Industry: Balancing Competing Policy Considerations of Tort Reform and Curbing Drunk Driving' (1991) Journal of Hospitality & Tourism Research Vol. 15, No. 1.

Butler, D, 'A comparison of the adoption of the Ipp report recommendations and other personal injuries liability reforms' (2005) 13 Torts Law Journal 203.

Cameron, J, Ritter, A, 'Contingency management: perspectives of Australia service providers' (2007) 26 *Drug and Alcohol Review* 183.

Cane, P, 'Reforming Tort Law in Australia: A Personal Perspective' (2003) 27 Melbourne University Law Review 649.

Daly, J, Campbell, E, Wiggers, J, Considine, R, 'Prevalence of responsible hospitality policies in licensed premises that are associated with alcohol-related harm' (2002) 21 *Drug and Alcohol Review* 113.

Debus, R, 'Tort Law Reform in New South Wales: State and Federal Interactions'(2002) 25 (3) University of New South Wales Law Journal 825.

Dietrich, J, 'Duty of care under the "Civil Liability Acts"' (2005) 13 *Torts Law Journal* 17, at p 36.

Dixon, R, Spinak, J, 'Common Law Liability of Clubs for Injury to Intoxicated Patrons: Cole v. South Tweed Heads Rugby League Football Club Ltd' (2004) 27 University of New South Wales Law Review 816.

Goldberg, J 'One for the road: liquor liability broadens' (1987) 73 American Bar Association Journal 84

Graham, K, 'Preventive Interventions for On-Premise Drinking: a Promising but Underresearched Area of Prevention' (2000) 27 Contemporary Drug Problems 593.

Hamad, A, 'The Intoxicated Pedestrian: Tortious Reflections' (2005) 13(1) Tort Law Review 14.

Handford, P, 'Occupiers' Liability Reform in Western Australia - and Elsewhere' (1987) 17 University of Western Australia Law Review 182.

Handford, P, Duty-free Alcohol Service - Case Note; Cole v South Tweed Heads Rugby League Football Club Ltd (2004) 12 (3) Tort Law Review 121.

Jones, S, Hall, D, Munro, G, 'How effective is the revised regulatory code for alcohol advertising in Australia?' (2008) 27:1 *Drug and Alcohol Review* 29.

Katter, N, 'Negligence and Intoxication – Has Civil Liability Reform Gone Too Far?' (2006) Deakin Law Review Vol 11. No. 2.

Lang, E, Stockwell, T, Rydon, P and Betel, A, 'Can training bar staff in responsible serving practices reduce alcohol-related harm?' (1998) 17 *Drug and Alcohol Review* 39.

Lang, E, Stockwell, T R, Rydon, P, Lockwood, A, 'Public perceptions of responsibility and liability in the licensed drinking environment' (1993) 12 Drug and Alcohol Review 13.

Loxley, W, Gray, D, Wilkinson, C, Chikritzhs, T, Midford, R, Moore, D 'Alcohol policy and harm reduction in Australia' (2005) 31 *Harm Reduction Digest* 559.

Lunney, M, Werren, J, 'Cole v South Tweed Heads Rugby League Club Ltd' (2004) 78 University of New England Law Journal 933.

Luntz, H, 'Editorial Comment: Round-up of cases in the High Court of Australia in 2003' (2004) 12 Torts Law Journal 1.

Luntz, H, 'Torts Turnaround Downunder' (2001) 1 Oxford University Commonwealth Law Journal 95.

Luntz, H, 'Turning Points in the Law of Torts in the Last 30 Years', (2003) 15 Insurance Law Journal 1.
McDonald, B, 'The impact of the Civil Liability legislation on fundamental policies and principles of the common law of negligence' (2006) 14 Torts Law Journal 268.

McMahon, B, 'Conclusions on Judicial Behaviour from a Comparative Study of Occupiers' Liability'(1975) The Modern Law Review, Vol. 38, No. 1.

McMahon, B, 'Occupiers' Liability in Canada' (1973) 22 International and Comparative Law Quarterly 515.

Miller, A, 'Negligence: Proximate Cause: Liability of Tavern-Keeper to Third Person Injured by One to Whom Tavern-Keeper Had Made an Unlawful Sale of Liquor' (1960) Michigan Law Review Vol. 58, No. 7.

Mosher, J, 'Alcohol Policy and the Nation's Youth' (1985) Journal of Public Health Policy, Vol. 6, No. 3.

Mosher, J, 'The Merchants, Not the Customers: Resisting the Alcohol and Tobacco Industries' Strategy to Blame Young People for Illegal Alcohol and Tobacco Sales' (1995) Journal of Public Health Policy Vol. 16, No. 4.

Mosher, J, Traci, L, Toomey, C, Harwood, E, Wagenaar, A, 'State Laws Mandating or Promoting Training Programs for Alcohol Servers and Establishment Managers: An Assessment of Statutory and Administrative Procedures' (2002) Journal of Public Health Policy Vol. 23, No. 1.

Orr, G, Dale, G, 'Impaired Judgements? Alcohol Server Liability and Personal Responsibility after Cole v South Tweed Heads Rugby League Football Club' (2005) 13 Torts Law Journal 103.

Priest, G, 'The Current Insurance Crisis and Modern Tort Law' (1987) The Yale Law Journal Vol. 96, No. 7.

Ricci, V, 'Dram Shop Liability: A Judicial Response' (1969) California Law Review, Vol. 57, No. 4.

Robin, G, 'Alcohol-Service Liability: What the Courts are Saying' (1991) Cornell Hotel and Restaurant Administration Quarterly Vol. 31.

Sloan, F, Reilly, B, Schenzler, C, 'Effects of Tort Liability and Insurance on Heavy Drinking and Drinking and Driving' (1995) Journal of Law and Economics Vol. 38, No. 1.

Smith, R, 'A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation' (2000) Journal of Corporation Law, Vol. 25, No. 3.

Smith, R, 'A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation'(1999) 25 Journal of Corporation Law 553.

Solomon, R, Payne, J, 'Alcohol Liability in Canada and Australia: Sell, Serve and be Sued' (1996) 4 *Tort L Rev* 188

Spigelman, J, 'Negligence: The Last Outpost of the Welfare State' (2002) 76 (7) Australian Law Journal 432.

Stockwell, T, 'Alcohol supply, demand, and harm reduction: What is the strongest cocktail?' (2006) 17 *International Journal of Drug Policy* 269.

Stockwell, T, 'Responsible alcohol service: lessons from evaluations of server training and policing initiatives' (2002) 20 *Drug and Alcohol Review* 257.

Stockwell, T, Hawkes, D, Lang, E, Rydon, P, 'Unravelling the preventive paradox for acute alcohol problems' (1996) 15 *Drug and Alcohol Review* 7.

Toomey, T, Wagenaar, A, 'Policy Options for Prevention: The Case of Alcohol' (1999) Journal of Public Health Policy Vol. 20, No. 2.

Wagenaar, A, et.al 'Liability of Commercial and Social Hosts for Alcohol-Related Injuries: A National Survey of Accountability Norms and Judgments' (2001) The Public Opinion Quarterly Vol. 65, No. 3.

Watson, P, 'Am I my brother's (or sister's) keeper? Alcohol server liability and Cole v South Tweed Heads Rugby League Football Club' (2004) 65 Precedent 34.

Watson, P, 'You're not drunk if you can lie on the floor without holding on' - alcohol server liability, duty, responsibility and the law of torts' (2004) James Cook University Law Review, v.11 108.

Wellbourne-Wood, D, 'Harm reduction in Australia: some problems putting policy into practice' (1999) 10 *International Journal of Drug Policy* 403.

Wiggers, J, et al, 'Strategies and outcomes in translating alcohol harm reduction research into practice: the Alcohol Linking Program' (2004) 26 *Harm Reduction Digest* 355.

Wiggers, J, et al, 'Increasing the Practice of Health Promotion Initiatives by Licensed Premises' (2001) 28 *Health Education and Behaviour* 331.

Young, T, Dram shop liability: a sobering thought for licensees' (1998) 18 Proctor 30.

Interest Group Submissions

Australian Government Preventative Health Taskforce, *Australia The Healthiest Country by 2020 Technical Report 3 Preventing alcohol-related harm in Australia: a window of opportunity*, Australian Government Preventative Health Taskforce (2009) <http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/09C94C0F1B9799F5CA2574DD0081E770/$File/alcohol-jul09.pdf> (4 October 2009).

Australian Law Reform Commission, *Community Law Reform for the Australian Capital Territory: Third Report - Occupiers' Liability*, Final Report tabled in Federal Parliament in April 1988, (1984) ALRC 42 http://www.alrc.gov.au/inquiries/title/alrc42/index.htm (4 October 2009).

Chikritzhs, T, et al, *Predicting alcohol-related harms from licensed outlet density: A feasibility study*, National Drug Law Enforcement Research Fund, (2007) http://www.ndlerf.gov.au/pub/Monograph_28.pdf>(12 October 2009).

Commonwealth Government Drug Strategy and Health Promotion Branch, *National Alcohol Research Agenda*, National Drug Strategy, (2002), <http://www.health.gov.au/internet/drugstrategy/publishing.nsf/Content/994839902864A37DCA2575B40013539A/$File/alc_agenda.pdf> (2 October 2009).

Cox, M, Angus, P, *Responsible Occupiers of Licensed Premises Give Disorderly Patrons the Boot*, Turks Legal, (2008), <http://www.turkslegal.com.au/uploads/Responsible_Occupiers_of_Licensed_Premises_Give_Disorderly_Patrons_the_Boot_MD.pdf> (1 October 2009).

Doherty, S, Roche, A, Australian and Licensed Premises: Best Practice in Policing – A Monograph for Police and Policy Makers, National Drug Law Enforcement Research Fund, (2003) http://www.nceta.flinders.edu.au/pdf/licensed-premises/licenced-premises.pdf> (14 October 2009).

Freeman, J, et al, *Reducing alcohol-related injury and harm: The impact of a licensed premises lockout policy*, 9th World Conference on Injury Prevention and Safety Promotion Mexico, (2008), http://eprints.qut.edu.au/13235/ (1 October 2009).

Ireland Law Reform Commission, *Report on Occupiers' Liability*, Ireland Law Reform Commission, (1994) <http://www.lawreform.ie/publications/data/lrc79/lrc_79.html> (21 October 2009).

Ireland Law Reform Commission, *Consultation Paper on Occupiers' Liability*, Ireland Law Reform Commission, (1993), <http://www.lawreform.ie/publications/data/lrc75/lrc_75.html> (15 October 2009).

Johnson, P, *Occasional Paper: Trends in Negligence and Public Liability: The evolving liability of licensees and servers of alcohol to their patrons and third parties*, Parliament of Victoria Drugs and Crime Prevention Committee (2001) <http://www.parliament.vic.gov.au/dcpc/Reports%20in%20PDF/Occ%20Rpt%20amended_v2.pdf> (16 October 2009).

Klockau, J, *Liquor Liability Insurance and The Illinois Dram Shop Act*, Illinois Casualty Company, (2005), <http://www.ilcasco.com/resources/liquor_liability_insurance.pdf> (5 October 2009).

Law Reform Commission New South Wales, *Working Paper 3 (1969) – Occupier's Liability*, Law Reform Commission New South Wales, (1969) http://www.lawlink.nsw.gov.au/lrc.nsf/pages/wp3toc (4 October 2009).

Ministerial Council on Drug Strategy, *Australian National Alcohol Strategy 2006-2009*, Ministerial Council on Drug Strategy, (2006), <http://www.alcohol.gov.au/internet/alcohol/publishing.nsf/content/B83AD1F91AA632ADCA25718E0081F1C3/$File/nas-06-09.pdf> (11 October 2009).

New South Wales Office of Drug and Alcohol Policy, *Fact Sheet: BOCSAR Alcohol-Related Crime Research*, New South Wales Government, (2006) http://www.alcoholinfo.nsw.gov.au/__data/page/1385/FactSheet_BOCSAR_AlcoholRelatedCrimeResearch.pdf (12 October 2009).

Nicholas, R, *The Antecedents of Alcohol Related Violence in and Around Licensed Premises*, Australasian Centre for Policing Research, (2004), <http://www.acpr.gov.au/pdf/drugs/Antecedents%20of%20alcohol%20related%20violence.pdf> (13 October 2009).

Parliament of Victoria Drugs and Crime Prevention Committee, *Inquiry into Strategies to Reduce Harmful Alcohol Consumption Final Report*, Parliament of Victoria Drugs and Crime Prevention Committee, (2006) <http://www.parliament.vic.gov.au/dcpc/Reports/DCPC-Report_Alcohol_Vol1_2006-03.pdf> (5 October 2009).

Queensland Parliament Law, Justice and Safety Committee, *Inquiry Into Alcohol-Related Violence in Queensland*, Queensland Parliament Law, Justice and Safety Committee, (2009). http://www.parliament.qld.gov.au/view/committees/documents/lcarc/otherPublications/IP%20Alcohol%20Related%20Violence.pdf (12 October 2009).

Review of the Law of Negligence, Final Report ("Ipp Report") 2002 <http://revofneg.treasury.gov.au/content/review2.asp> (21 October 2009).

Solomon, R, *Canadian Alcohol Liability*, Study commissioned by Insurance Bureau of Canada and Insurance Institute of Canada, (1994) <http://www.cap-insurance.com/docs_public/Canadian%20Alcohol%20Liability%20Study.pdf> (4 October 2009).

Solomon, R, *Alcohol-Related Civil Liability: The Current State of Ontario Law*, Smartrisk Learning Series Conference, University of Western Ontario, (2008) <http://www.oninjuryresources.ca/downloads/SLS/2008/SLS-2008W-Alcohol_liability-slides.pdf> (21 October 2009).

Tort Reform Institute, *Submission on the proposed Civil Liability Bill 2002*, Tort Reform Institute, (2003), <http://www.tortreforminstitute.com.au/clb_submission.pdf> (1 October 2009).

Waverley Council, *Responsible Serving of Alcohol Project*, Australian Government Criminology Research Council, (1994) <www.criminologyresearchcouncil.gov.au/reports/16-91.pdf> (9 October 2009).

Wyoming Council, White Paper - Dram Shop Laws Prepared for Wyoming Governor Dave Freudenthal by his Council on Impaired Driving, Wyoming Council, (2004), <http://www.impaireddrivingcouncil.org/ResearchTopics/docs/Dram_Shop_white_paper.doc> (4 October 2009).

Socio-Legal Research Publications

Wright, E W, 'National Trends in Personal Injury Litigation: Before and After Ipp' (2006) 14 (3) Torts Law Journal 233.

Griffith University Key Centre for Ethics, Law, Justice and Governance Publications

Burns, K, 'The Way the World is: Social Facts in High Court Negligence Cases' (2004) 12 Torts Law Journal 215.

Graham, K, Bernards, S, Osgood, D, Homel, R, and Purcell, J, 'Guardians and handlers: The role of bar staff in preventing and managing aggression' (2005) Addiction.

Hauritz, M, Homel, R, McIlwain, G, Burrows, T, and Townsley, M, 'Reducing violence in licensed venues: Community safety action projects' (1998) 101 Trends and Issues in Crime and Justice 1.

Hauritz, M, Homel, R, McIlwain, G, Burrows, T, and Townsley, M. 'Reducing alcohol-related harm through local government safety action projects: The Queensland experience' (1998) 25 Contemporary Drug Problems 511.

Homel, R, 'Review of T. Stockwell (ed), An examination of the appropriateness of efficacy of liquor-licensing laws across Australia' (2001) 91 Addiction 1231.

Homel, R, Carvolth, R, Hauritz, M, McIlwain, G, and Teague, R, 'Making licensed venues safer for patrons: what environmental factors should be the focus of interventions?' (2004) 23 Drug and Alcohol Review 19.

Homel, R, Clark, J, 'Predicting and Preventing Violence in Clubs and Pubs' (1994)

Homel, R, Tomsen, S, 'Pubs and violence: Violence, public drinking, and public policy' (1991) Current Affairs Bulletin 20.

Homel, R, Tomsen, S, and Thommeny, J, 'Public Drinking and Violence: Not just an Alcohol Problem' (1992) 22 The Journal of Drug Issues 679.

Homel, R, *Preventing Alcohol-Related Crime Through Community Action: The Surfers Paradise Safety Action Project*, Griffith University School of Justice Administration, (1993) <http://www.griffith.edu.au/__data/assets/pdf_file/0014/13370/surfers.pdf> (12 October 2009).

Orr, G, 'Is an Innkeeper Her Brother's Keeper? The Liability of Alcohol Servers' (1995) 3 Torts Law Journal 239.

Law Firm Publications

Buckhurst, B, *New Development in Liability of Hoteliers to Patrons*, Turks Legal (2009) <http://www.turkslegal.com.au/uploads/New_Development_in_Liability_of_Hoteliers.pdf> (21 October 2009).

Duane, J, *The impacts of the Australian Alcohol Guidelines for low-risk drinking on the liquor industry*, Deacons Lawyers, (2009) <http://www.deacons.com.au/our_shout/articles/0509-The-impacts-of-the-Australian-Alcohol-Guidelines.pdf> (21 October 2009).

Henningham, B, Legal Update Alcohol Servers' Liability, Wotton and Kearney Insurance Lawyers, (2003), <http://www.wottonkearney.com.au/docfiles/legalupdateparrington.pdf> (3 October 2009).

Hughes, R, *Liability for Intoxicated Patrons – Has Anything Changed?*, McCullough Robertson Lawyers, (2004) http://oampslaser.com.au/Liability%20for%20Intoxicated%20Patrons.pdf (21 October 2009).

McDonnell, P, Berezowskyj, S, *Recent Decisions Expand Liability for Commercial Hosts*, Singleton Urquhart Legal Counsel, (2009) <http://www.singleton.com/publications/insurance/Paper_McDonnell.pdf >(21 October 2009).

Minter Ellison Lawyers, *Tort Law Reform Throughout Australia – A Brief Review of Recent Amendments*, Minter Ellison Lawyers, (2007) <http://www.minterellison.com/public/resources/file/ebab4f47d03e086/RG-TortLawReform_0710.pdf> (14 October 2009).

Trusted Legal Process Lawyers, *Liability of Alcohol Servers*, Trusted Legal Process Lawyers, (2001), <http://www.tllawyers.com/resources/Liability%20of%20Alcohol.pdf> (1 October 2009).

News Publications

Australian Medical Association, *Reports Highlight Need For Urgent Action On Problem Drinking*, Australia, (22 September 2009), Medical News Today Website, <http://www.medicalnewstoday.com/articles/164745.php> (3 October 2009).

Author Unknown, *Wedding guest sues Hyatt hotel for $1million after brother of bride 'broke her wrist while dancing at reception*, (13 October 2009), Mail Online World News, <http://www.dailymail.co.uk/news/worldnews/article-1220110/Wedding-guest-sues-brother-bride-broke-wrist-dancing.html#ixzz0UWXq3FRj> (15 October 2009).

Cheney, K, *House advances bar, restaurant liability insurance bill*, (2 October 2009), Wicked Local, <http://www.wickedlocal.com/swampscott/news/x1699611012/House-advances-bar-restaurant-liability-insurance-bill> (6 October 2009).

Fass, M, *Duty to public held to justify dram shop law contribution*, (September 28, 2009) New York Law Journal.

Gallagher, M, *Tavern held not liable for death of patron not served alchohol*, (2009) New Jersey Law Journal.

Henderson, B, *Family sues restaurant after New York DWI fatality*, (6 October 2009), DUI Attorney, <http://www.duiattorney.com/news/5865-family-sues-restaurant-after-new-york-dwi-fatality> (7 October 2009).

Herman, H, *Victim's mother sues Reading bar; drunken friend struck, killed her son*, (10 September 2009) Reading Eagle, <http://www.readingeagle.com/article.aspx?id=160650> (5 October 2009).

Hopkins, M, *Driving the dram-shop case: too often, victims of drunk drivers are left with devastating injuries - and are poorly compensated for their losses. Use these techniques to enforce the law that says liquor licensees are responsible when they serve alcohol to visibly intoxicated patrons,* (February 2008) Trial Magazine 44 2.

Medew, J, *Liquor laws blamed for drink harm*, (23 September 2009), The Age, <http://www.theage.com.au/national/liquor-laws-blamed-for-drink-harm-20090922-g0j5.html> (4 October 2009).

Peters, J, *Defining the risk of liquor liability*, (February 1986), 220(2) Restaurant Business 85.

Toutant, C, *Dram shop suit over injuries suffered in car fire settles for $1.06M in Middlesex*, (June 8, 2009) New Jersey Law Journal.

Townsend, H, *Warning Over Alcohol-Fuelled Violence*, The Age, (8 September 2008), <http://www.theage.com.au/national/warning-over-alcoholfuelled-violence-20080908-4bm2.html> (3 October 2009).

Vogel, E, *Justices rule against quadriplegic's claim in resort case*, (2 October 2009) Las Vegas Review Journal, <http://www.lvrj.com/news/breaking_news/Justices-rule-against-quadriplegics-claim-in-resort-case-63293587.html> (5 October 2009).