

# COMMERCIAL LIQUOR LIABILITY IN AUSTRALIA: GIVE ME 'TWO SHOTS' OF PERSONAL RESPONSIBILITY AND A WATERED DOWN DUTY OF CARE

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Through doctrinal analysis, this article examines the restricted Australian common law and statutory approach to the duty of care of hoteliers to patrons consuming alcohol on their premises. By comparing with the comparable jurisdiction of Canada, this article demonstrates the dramatic impact that the Australian focus on 'personal responsibility' has on the denial of a duty of care of hoteliers in our jurisdiction. A normative discussion then follows of the negative social impact of the focus on personal responsibility within the legislature and judiciary, before concluding that the shift of some responsibility to hoteliers for their serving practices would not impact the overall goal of personal responsibility, but would work in tandem with liquor licensing legislation to address the prominent social issue of alcohol related harm.

## I INTRODUCTION

The Australian common law has made a definitive shift in the past 15 years, from jurisprudence that failed to specify the precise extent of any duty of care existing between hoteliers and their patrons,<sup>1</sup> to a firm position of favouring individual autonomy and personal responsibility over principles of compensation, loss spreading and collective responsibility.<sup>2</sup> This position has been strengthened through sweeping civil liability reforms<sup>3</sup> stimulated by the 'insurance crisis' and resulting Ipp Report,<sup>4</sup> as well as through the recent High Court decision of *CAL No 14 Pty Ltd v*

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<sup>1</sup> See, eg, *Johns v Cosgrove & Chevron Queensland Ltd & Ors* (1997) 27 MVR 110 ('Johns'); and *Rosser v Vintage Nominees Pty Ltd* (1998) 20 SR (WA) 78 ('Rosser').

<sup>2</sup> Rosalind Dixon and Jason Spinak, 'Common Law Liability for Clubs for Injury to Intoxicated Patrons: *Cole v South Tweed Heads Rugby League Football Club Ltd*' (2004) 27 (3) *University of New South Wales Law Journal* 816, 817, 824.

<sup>3</sup> See *Civil Liability Act 2002* (NSW) ss 49, 50; *Civil Liability Act 2003* (Qld) ss 19, 46, 47; *Civil Liability Act 2002* (Tas) ss 5, 20; *Wrongs Act 1958* (Vic) s 14G; *Civil Liability Act 2002* (WA) s 5H, 5L; *Civil Liability Act 1936* (SA) s 46.

<sup>4</sup> Commonwealth of Australia, *Review of the Law of Negligence, Final Report* (2002).

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*Motor Accidents Insurance Board; CAL No 14 Pty Ltd v Scott*.<sup>5</sup> This has created a legal environment that places a heavy burden of responsibility on injured plaintiffs while largely protecting hoteliers from negligence claims.

This article analyses the narrow Australian common law and statutory approach to the duty of care of hoteliers to patrons consuming alcohol on their premises, particularly in light of the recent and frequently discussed *Scott* decision. This approach is contrasted with the legal position in Canada. While policy considerations are ultimately the decisive factors in determining a duty of care within both jurisdictions, the value of personal responsibility is favoured heavily within the Australian courts, compared to a focus on the ability and responsibility of hoteliers to control the actions of patrons in the Canadian courts. The striking differences in the outcomes for plaintiffs are discussed, illuminating the drastic impact that a different policy focus has in these jurisdictions.

The second half of this article discusses the negative social impact of the focus on personal responsibility within the legislature and judiciary. The key policy reasoning behind the High Court case of *Scott* is also analysed to illustrate the weaknesses of the decision in its support of values of personal responsibility over issues of hotelier negligence. This article concludes that the current Australian legal position fails to address the broader social ramifications of a denial of a duty of care for hoteliers to intoxicated patrons. Attributing some responsibility to hoteliers for their serving practices would not impair the current legislative and judicial focus on personal responsibility, but would work to reinforce liquor-licensing legislation and would contribute to addressing the prominent social issue of alcohol related harm.

## II LAW IN AUSTRALIA

### A *Duty of Care*

The modern tort of negligence and the concept of a duty of care were established in *Donoghue v Stevenson*, where Lord Atkin stated at 580:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, in law, is my neighbour? The answer seems to be – 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 that are called in question.<sup>6</sup>

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<sup>5</sup> 239 CLR 390 ('*Scott*').

<sup>6</sup> [1932] AC 562.

According to the law of negligence as it has developed, a duty may be imposed on a person to act with care towards others ('their neighbours'). If this duty is found to exist, and there has been a failure to act carefully to the standard of a reasonable man such that harm was caused to another person, then the tort of negligence has been committed.<sup>7</sup>

In Australia, given the absence of any universal and unifying propositions from which all duties of care may be deduced, the courts have generally adopted a technique of incremental development whereby courts reason by analogy from established categories of duties of care and established legal principles.<sup>8</sup> To reach this conclusion, the Court in *Sullivan v Moody*,<sup>9</sup> rejected the use of the test of 'proximity' (as it was established in *Anns v Merton London Borough Council*<sup>10</sup>), and the *Caparo Industries Plc v Dickman*<sup>11</sup> approach to developing new duties. The Court argued that this was too broad a test, and could often result in a judgment based on the judge's discretion as to 'what is fair, and just and reasonable.'<sup>12</sup> Instead, the Court discussed a need to consider the proposed development of a new category of duty of care through a 'judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle.'<sup>13</sup> The Court further specified that these principles 'must be capable of general application, not discretionary decision-making in individual cases.'<sup>14</sup>

This multi-factorial or 'salient features' approach looks to a range of legal and policy principles such as the reasonable foreseeability of the harm, the defendant's control of the circumstances giving rise to the harm or the vulnerability of the plaintiff in terms of their inability to protect themselves from that harm.<sup>15</sup> However, according to Kirby J in *Graham Barclay Oysters Pty Ltd v Ryan*,<sup>16</sup> the presence of factors such as these does not automatically require the finding of a legal obligation to take care — it is for the court to determine the 'ultimate question' of whether a duty ought to be

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<sup>7</sup> Toby Blyth, 'Hotelier and Social Host Liability for Alcohol Related Harm – A Review of the Law in Australia' (1999) 6 *Murdoch University Electronic Journal of Law* 3, 36.

<sup>8</sup> *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 197-198, 217.

<sup>9</sup> (2001) 207 CLR 562, 579 ('*Moody*').

<sup>10</sup> [1977] 2WLR 1024 ('*Anns*').

<sup>11</sup> [1990] 2 AC 605.

<sup>12</sup> *Moody* (2001) 207 CLR 562, 579.

<sup>13</sup> *Ibid* 579.

<sup>14</sup> *Ibid* 579.

<sup>15</sup> *Moody* (2001) 207 CLR 562, 578-9 [48-9]; *Rogers v Whittaker* (1992) 175 CLR 479; *Bryan v Maloney* (1995) 182 CLR 609; *Hill v Van Erp* (1997) 188 CLR 159; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.

<sup>16</sup> (2002) 211 CLR 540 ('*Ryan*').

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recognised.<sup>17</sup> As a result, the court still exercises its discretion in determining whether to recognise the duty and, thus, whether the defendant owes a legal obligation to the plaintiff. In this sense, the duty question has become normative,<sup>18</sup> and the courts have shifted towards the use of discretion and policy-based reasoning to determine new categories of duties of care.<sup>19</sup>

### **B *Attempt to Establish a Duty of Care for Commercial Hosts***

In the case of *Cole v South Tweed Heads Rugby Club Ltd*,<sup>20</sup> the High Court considered the possibility of extending the existing occupier’s duty of care to a broader duty to patrons when serving alcohol.<sup>21</sup> It was put to the Court that an extension of occupier’s liability should apply to servers to monitor and moderate the drinking of patrons and to prevent them from coming to foreseeable harm if leaving the venue while intoxicated. In this case, Ms Cole had been drinking at South Tweed Heads Rugby Club for several hours when, after leaving in a state of extreme intoxication, she was struck by a vehicle and seriously injured. The Court ultimately held by a majority of 4-2 that the appellant was not the victim of a breach of any relevant duty of care; rather that she was primarily responsible for her own injuries. This case is a clear example of reliance on a policy-based focus on individual responsibility to deny the existence of a new category of duty of care.

Chief Justice Gleeson and Justice Callinan rejected the suggestion that an occupier’s duty of care to entrants could be extended to apply to intoxicated patrons. Chief Justice Gleeson reasoned primarily that the law protects the freedom of adults to make choices regarding alcohol consumption and thus any duty to mitigate alcohol consumption would be an intrusion into individual autonomy.<sup>22</sup> He supported this argument with references to the unacceptable burden that such an action would place upon ordinary social and commercial behaviour; the practical difficulties involved in implementing the suggested duty of care; the intrusion into individual privacy by any monitoring of alcohol consumption; and, the rejection of values of personal responsibility that such a system would produce.<sup>23</sup> Similarly, Callinan J stated that the law should not recognise a duty of care to protect persons ‘from harm caused by intoxication following a deliberate and voluntary decision on their part to

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<sup>17</sup> Ibid 628 [242-3]; see also *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 32-3 (McHugh J).

<sup>18</sup> *Ryan* (2002) 211 CLR 540, 626-7 [238].

<sup>19</sup> Ibid 628-9 [244].

<sup>20</sup> (2004) 217 CLR 469 (*‘Cole’*).

<sup>21</sup> Ibid 472-3 [1] (Gleeson CJ).

<sup>22</sup> Ibid 476-7 [12-15] (Gleeson CJ).

<sup>23</sup> Ibid 476-7 [12-15] (Gleeson CJ).

drink.’<sup>24</sup> Justices Gummow and Hayne also ultimately upheld the rejection of a duty of care in this instance, noting that any articulation of a duty of care derived from the facts at hand would be ‘at a high level of abstraction’ and would be likely to mislead.<sup>25</sup>

The dissenting judgments of McHugh and Kirby JJ addressed the above issues pragmatically rather than through reference to unquantifiable values of personal responsibility and individual autonomy. Justice McHugh concluded that the club had an affirmative duty to take reasonable care to prevent injury caused by, and that was reasonably foreseeable as a result of, consumption of alcohol on the premises.<sup>26</sup> Justice McHugh rejected the arguments put forward by Gleeson CJ, stating that the common law does not always hold individuals absolutely responsible for their choices, citing examples such as employees who act carelessly in performing their work, reasoning that it is still the duty of the employer to put in place safe work practices to protect these employees. He further articulated that the argument regarding ‘intrusion of privacy’ is misleading, as monitoring of alcohol consumption is already required to fulfil duties of occupiers to prevent patrons causing injury to one another.<sup>27</sup> Justice Kirby likewise rejected the argument supported by reference to values of personal autonomy and responsibility, by stating that such notions were overridden by the context of a commercial setting where alcohol was supplied for profit.<sup>28</sup>

Justice McHugh’s argument that practical factors such as the difficulty in determining levels of intoxication went to the reasonableness of the defendant’s conduct (rather than working to deny the existence of a duty of care) was particularly powerful. His line of reasoning showed a preference for adherence to legal principle rather than general arguments of policy (which are normative arguments about where the law *ought* to be).<sup>29</sup> A focus on principled reasoning over ever changing public policy issues is ultimately preferable given the alleged intention of the law to maintain consistency and predictability to support its legitimacy.<sup>30</sup> Furthermore, McHugh J was able to articulate the steps that the club’s employees should have taken, including asking Ms Cole to leave once they became aware of her intoxication,

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<sup>24</sup> Ibid 503 [121] (Callinan J).

<sup>25</sup> Ibid 492 [81] (Gummow and Hayne JJ).

<sup>26</sup> Ibid 483 [37] (McHugh J).

<sup>27</sup> Ibid 483-4 [39] (McHugh J).

<sup>28</sup> Ibid 494-5 [91], 499 [106] (Kirby J).

<sup>29</sup> Christian Witting, ‘Tort Law, Policy and the High Court of Australia’ (2007) *Melbourne University Law Review* 22, 24.

<sup>30</sup> Martin Stone, ‘Formalism’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002) 166, 414.

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warning her about further drinking, monitoring her to make sure she did not consume any further alcohol on the premises, or removing her from the premises at that time.<sup>31</sup>

The final decision in favour of the hotelier was both a reflection of the strong fact pattern that suggested that the hotelier had done everything in his power to ensure that the plaintiff had left safely, as well as the policy-based arguments of the majority that the plaintiff should be held responsible for her own actions. Given the hesitation of Gummow and Hayne JJ to comment on a duty of care in general, the case ultimately left the position of a broader duty of care for hoteliers in confusion. This position would not become clearer until the case of *Scott*.<sup>32</sup>

### *C Rejection of a Duty of Care for Commercial Hosts*

The decision in *Scott* conclusively rejected any extension of a duty of care for hoteliers to monitor drinks served to patrons or ensure their safe passage home when they are intoxicated.<sup>33</sup> The decision concerned a patron (Mr Scott), who died in an accident while attempting to ride his motorcycle home after consuming six to seven standard drinks. Mr Scott had entered into an arrangement with the hotelier, whereby his motorcycle would be stored in a shed and, when he was ready to leave, his wife would be contacted and she would come and collect him. At around 8:00pm, when Mr Scott was refused further service due to his intoxication, the hotelier offered to call Mr Scott's wife. Mr Scott aggressively refused the offer and requested access to the motorcycle. The hotelier questioned Mr Scott several times whether he was fit to ride the bike, to which Mr Scott replied yes. The time of the crash was estimated to be 8:30pm.

The High Court reasoned that on the facts, there was no causation, there was no breach, and furthermore, there was no duty of care.<sup>34</sup> The judges argued that there was no causation as there was little evidence to say that Mr Scott's wife *could* have been called, as the hotelier did not have her phone number, and there is no indication that Mr Scott would have waited for her.<sup>35</sup> Secondly, there was no breach as the hotelier could not lawfully refuse to give Mr Scott the keys to the motorcycle. Furthermore, as in *Cole*, the hotelier discharged any duty of care by offering to call Mr Scott's wife.

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<sup>31</sup> *Cole* (2004) 217 CLR 469, 483-4 [39] (McHugh J).

<sup>32</sup> *Scott* (2009) 239 CLR 390.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid* 399 [13].

<sup>35</sup> *Ibid* 399-401 [14-20].

Of critical importance, the judgments clarified the current Australian position on the duty of care. Chief Justice French tentatively denied the existence of any such duty, stating 'the resolution of these questions in future will be likely to require consideration of the liquor licensing laws and the civil liability statutes of the relevant State or Territory.'<sup>36</sup> More directly, Gummow, Heydon and Crennan JJ in a joint judgment stated that

outside exceptional cases.... persons in the position of the Proprietor and the Licensee, while bound by important statutory duties in relation to the service of alcohol and the conduct of the premises in which it is served, owe no general duty of care at common law to customers that requires them to monitor and minimise the service of alcohol or to protect customers from the consequences of the alcohol they choose to consume.<sup>37</sup>

The facts of *Scott* are seemingly clearer than *Cole* in suggesting that a duty of care should have existed between the hotelier and the patron, as there was both knowledge of inebriation and of intent to drive; however, the High Court specifically denied any such duty. As a result, this case has clearly and unequivocally demonstrated a lack of support for a duty of care existing between a hotelier and a patron, outside of a general duty of occupiers to ensure that the premises is safe for the purpose for which it is being used.<sup>38</sup>

Like *Cole*, the Court rejected the extension of a duty of care on the basis of two main grounds; primarily, the attractiveness of the principles of individual autonomy and responsibility given the nature of the social activity of alcohol consumption, and the impracticality of implementing any measures by which to control a patron's consumption of alcohol.<sup>39</sup> They also noted that should hoteliers be forced to detain patrons that were too intoxicated to leave premises safely, it could result in a legal incoherence by requiring hoteliers to commit a tort of battery or unlawful detention to avoid breaching a primary duty of care.<sup>40</sup>

The majority judgments in both *Cole* and *Scott* are decisions based largely on policy and principle, focussing on the attractiveness of the value of personal responsibility in the context of the consumption of alcohol. However these arguments fail to address the broader social ramifications of a denial of a duty of care for hoteliers to intoxicated patrons. A deeper analysis of the weakness of the two majority judgments follows later in this article.

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<sup>36</sup> Ibid 396 [1] (French CJ).

<sup>37</sup> Ibid 413 [52] (Gummow, Heydon and Crennan JJ).

<sup>38</sup> *Australian Safeway Stores Pty Ltd v Zalunza* [1987] HCA 7.

<sup>39</sup> *Scott* (2009) 239 CLR 390, 414-5 [54-5] (Gummow, Heydon and Crennan JJ).

<sup>40</sup> Ibid 406 [39] (Gummow, Heydon and Crennan JJ).

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### D *Impact of the Focus on Personal Responsibility in the Civil Liability Amendments*

The firm position of the Australian courts against any duty owed by hoteliers to inebriated patrons has been reinforced through a series of amendments to Civil Liability Acts across the various States and Territories.<sup>41</sup> These amendments were instigated by the increasing public concern between 2001 and 2002 regarding steadily rising insurance premiums.<sup>42</sup> Insurers claimed that the rise in premiums was a result of unsustainable personal injury compensation payments. These claims gained wide support, to the extent that the government appointed a panel to review the law of negligence as it stood.<sup>43</sup>

As articulated by the resulting 'Review of the Law of Negligence Final Report' (the Ipp Report),<sup>44</sup> personal injury law prior to 2002 appeared to impose on people 'too great a burden to take care of others and not enough of a burden to take care of themselves.'<sup>45</sup> The report released in October 2002 proposed wide-ranging change and focussed primarily on limiting liability and quantum of awards of damages.<sup>46</sup> The report recommended a legislative framework that favoured a definition of personal responsibility as emphasising individual autonomy and a need to take responsibility for one's *own* actions and safety, rather than relying upon others to take responsibility for *their* actions.<sup>47</sup> Despite strong criticism by a range of groups including academics,<sup>48</sup> lawyers,<sup>49</sup> consumer organisations,<sup>50</sup> economists,<sup>51</sup> and other parties, Australian state governments adopted many of the recommendations.<sup>52</sup>

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<sup>41</sup> See, eg, *Civil Liability Act 2002* (NSW) ss49, 50; *Civil Liability Act 2003* (Qld) ss19, 46, 47; *Civil Liability Act 2002* (Tas) ss5, 20; *Wrongs Act 1958* (Vic) s14G; *Civil Liability Act 2002* (WA) s5H, 5L; and *Civil Liability Act 1936* (SA) s46.

<sup>42</sup> Prue Vines, 'Tort Reform, Insurance and Responsibility' (2002) 25 (3) *University of New South Wales Law Journal* 842, 842.

<sup>43</sup> Tort Reform Institute, *Federal Government Review* (8 August 2002) <<http://www.cartercapner.com.au/tortreforminstitute.com.au/news.html>>.

<sup>44</sup> Commonwealth, *Review of the Law of Negligence, Final Report* (2002).

<sup>45</sup> *Ibid* 15.

<sup>46</sup> Vines, above n 42, 843.

<sup>47</sup> *Ibid* 844.

<sup>48</sup> See, eg, Peter Underwood, 'Is Mrs Donoghue's Snail in Mortal Peril?' (2004) 12 *Torts Law Journal* 139; John Keeler, 'Personal Responsibility and the Reforms Recommended by the Ipp Report: Time future contained in time past' (2006) 14 *Tort Law Review* 48.

<sup>49</sup> See, eg, Robert Davis, 'The Tort Reform Crisis' (2002) 25 *UNSW Law Journal* 865.

<sup>50</sup> See, eg, Australian Competition and Consumer Commission, 'ACCC Consumer Express' (Media Release, 1 August 2002) 1 <<http://www.accc.gov.au/content/item.php?itemId=815>>



With specific reference to intoxication, the amendments made in 2002 have resulted in a drastically increased level of difficulty for persons claiming compensation for injuries occurring as a consequence of intoxication, as well as lowering the standard of care owed by hoteliers to intoxicated patrons.

The *Civil Liability Act 2002* (NSW) provides an example of the pertinent sections. In particular, s 49 details that a person's intoxication is irrelevant to the standard of care owed, and s 50 establishes that a court is not to award damages for liability unless the harm sustained was likely to have occurred even if the individual had not been intoxicated. Furthermore, if it is established that the harm was likely to have occurred regardless of intoxication, there will be a presumption of contributory negligence of 25% or above.<sup>53</sup>

These NSW sections are perhaps the most stringent of the States and Territories, precluding *any* claim for damages if the injury would not have occurred had the plaintiff been sober. As argued by Katter,<sup>54</sup> this legislation could have the alarming effect of preventing an award of damages in cases where the plaintiff *was* intoxicated, but where the defendant was *also* grossly negligent and contributed to the plaintiff's injury. Katter points out that the negligent actor would be wholly protected by s 50, which effectively returns the law to the Middle Ages where contributory negligence (in this case intoxication) was a complete defence.<sup>55</sup> As Barry has observed, the hotelier who creates the patron's impairment by selling the intoxicating substance 'can readily escape liability for the dangerous condition of his premises,' should any accident occur that is contributed to by the intoxicated state of the patron.<sup>56</sup>

These provisions, coupled with the already constrained common law approach to the duty of care of hoteliers in cases of intoxicated patrons, can result in a lack of fairness and create unbalanced outcomes given the heavy burden of proof on intoxicated plaintiffs. For example, as observed in *Jackson v Lithgow City Council*,<sup>57</sup> the Court

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698&nodeId=2cdf5b4dfedb fd5f388c2f5295cc2cb7&fn=ACCC%20consumer%20express—August%202002.pdf>.

<sup>51</sup> See, eg, Henry Ergas, 'Review of the Law of Negligence', *Australian Financial Review* (Australia), 11 September 2002, 17.

<sup>52</sup> *Civil Law Wrongs Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Civil Liability Act 2002* (WA); *Civil Liability Act 2002* (Tas); *Civil Liability Act 2003* (Qld); *Personal Injuries (Liability and Damages) Act 2003* (NT); *Wrongs Act 1958* (Vic); *Wrongs Act 1936* (SA).

<sup>53</sup> *Civil Liability Act 2002* (NSW) s 50(4).

<sup>54</sup> Norman Katter, 'Negligence and Intoxication – Has Civil Liability Reform Gone Too Far?' (2006) 11 (2) *Deakin Law Review* 161, 170.

<sup>55</sup> *Ibid.*

<sup>56</sup> Christopher Barry, 'Hoteliers' Liability to Patrons' (2006) 1 *Law Society Journal* 47, 48.

<sup>57</sup> (2008) *Aust Torts Reports* ¶¶81-981.

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limited the Plaintiff's recovery by 25% due to his intoxication. Damages were limited despite concluding that a sober man walking through the park at night would not have seen the wall and 1.5m drop into a concrete drain that the Plaintiff unwittingly tripped down, consequently suffering severe injuries. In this case, the particular issue was the difficulty for the plaintiff to provide satisfactory evidence to the Court that intoxication played *no* part in his injury.<sup>58</sup>

The NSW Parliament did not address the limitations discussed above when it considered the proposed amendments to the *Civil Liability Act 2002* (NSW). As articulated in the second reading speech of the Civil Liability Amendment (Personal Responsibility) Bill 2002, the rationale behind the strictness of these sections was the strong negative feelings of the community towards claims made by intoxicated individuals for injuries that were primarily a result of their own actions, as well as the dramatic increases in insurance premiums in the decade before the amendments.<sup>59</sup> The parliamentary debates surrounding the introduction of this Bill indicate a strong support for the measures,<sup>60</sup> with members articulating their concerns over insurance premiums and the culture of blame and shifting of responsibility currently present in society.<sup>61</sup> However, Parliament left unaddressed the issues raised above with respect to contributory negligence of defendants and intoxicated plaintiffs, and the likelihood of an unfair application of the section given its difficult burden of proof for plaintiffs.

Whilst the NSW sections are arguably the most extreme in the States and Territories, the other various Acts are similarly phrased. For example, the relevant Acts in all the other States and Territories, except for Victoria, contain comparable provisions presuming contributory negligence when a person is intoxicated at the time of an accident.<sup>62</sup> The Queensland,<sup>63</sup> Tasmanian,<sup>64</sup> Northern Territory<sup>65</sup> and South

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<sup>58</sup> Ibid 82.

<sup>59</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002 (Mr Bob Carr, Premier of NSW).

<sup>60</sup> The Bill was not put to a vote in the Legislative Assembly and was passed straight through to the Legislative Council after the usual Parliamentary debates. It was passed in the Legislative Council, with minor amendments, with 30 ayes and 4 noes: New South Wales, *Minutes of Proceedings*, Legislative Council, 19 November 2002, No 47, 495.

<sup>61</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 October 2002, 6205, 6245, 6249, 6255, 6256, 6269, 6263.

<sup>62</sup> *Civil Law Wrongs Act 2002* (ACT) s 95 (1); *Civil Liability Act 2002* (WA) s 5L (3); *Civil Liability Act 2002* (Tas) s 5 (1); *Civil Liability Act 2003* (Qld) s 47(1), (2); *Personal Injuries (Liability and Damages) Act 2003* (NT) s 14 (1); *Wrongs Act 1936* (SA) s 46 (1).

<sup>63</sup> *Civil Liability Act 2003* (Qld) s 47 (2), (4).

<sup>64</sup> *Civil Liability Act 2003* (Tas) s 5 (1), (3).

<sup>65</sup> *Personal Injuries (Liability and Damages) Act 2003* (NT) s 17.

Australian<sup>66</sup> Acts also require a reduction of damages by 25% or greater unless the injured party can establish that their intoxication did not contribute to the injuries sustained.<sup>67</sup> Despite these similarities, there are clear departures from the NSW approach in many of the Acts, with the result being a seemingly less harsh result for plaintiffs injured whilst intoxicated. For example, in Queensland, while s 46(1) prohibits intoxication from being considered when establishing a duty of care,<sup>68</sup> s 46(2) prevents it from being used in cases where the injury was sustained through conduct occurring on licensed premises.<sup>69</sup> This provision gives greater protection to plaintiffs in the context discussed in this article. The *Wrongs Act 1958* (Vic) also shows greater lenience, providing little restriction on intoxicated plaintiffs other than to require that a plaintiff's level of intoxication be considered when negligence is alleged.<sup>70</sup>

Although it is apparent that the various States and Territories have taken differing approaches to the 2002 civil liability reforms, the effect of the amendments (particularly in NSW and Tasmania) is a reinforcement of the common law position favoring personal responsibility and individual autonomy with respect to alcohol consumption, over any duty for others to take care when dealing with intoxicated parties. As Callinan J noted in *Cole*, 'the voluntary act of drinking until intoxicated should be regarded as a deliberate act taken by a person exercising autonomy for which that person should carry personal responsibility in law.'<sup>71</sup> However, this policy decision to place such a heavy emphasis on personal responsibility instead of responsibility for one's actions that affect others is narrow and ill advised, particularly given the gravity of the risk of intoxication. Before undertaking a close normative examination of the dangers created by this emphasis on personal responsibility, the contrasting approach in Canada is examined.

### III A COMPARATIVE PERSPECTIVE: LAW IN CANADA

Canadian courts have also consistently expanded the idea of a duty of care to encompass new categories. However, unlike Australian courts that rejected the framework developed in *Anns*,<sup>72</sup> in favour of an incremental approach,<sup>73</sup> Canadian

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<sup>66</sup> *Civil Liability Act 2003* (SA) s 46 (1), (3).

<sup>67</sup> *Civil Liability Act 2003* (Qld) s 47 (1), (2), (4).

<sup>68</sup> *Ibid* s 46 (1).

<sup>69</sup> *Ibid* s 46 (2).

<sup>70</sup> *Wrongs Act 1958* (Vic) s 14G (2).

<sup>71</sup> *Cole* (2004) 217 CLR 469, 503 [121].

<sup>72</sup> [1977] 2 WLR 1024.

<sup>73</sup> *Moody* (2001) 207 CLR 562, 579 [49].

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courts have continued to reiterate the usefulness of this decision, most recently in *Cooper v Hobart*.<sup>74</sup>

In *Cooper*, the Supreme Court of Canada clarified the test set out in *Anns*, dividing it into two distinct stages. The first step deals with the relationship between the two parties in the court. The onus of proof is on the plaintiff at this stage, who must establish that the defendant owed a prima facie duty of care in light of the existing circumstances. The court will then ask whether the damage sustained by the plaintiff was a reasonably foreseeable consequence of the defendant's conduct. If the answer is yes, the court will continue by asking whether the parties were in a relationship of sufficient proximity to give rise to a duty of care. If the relationship between the defendant and the plaintiff is one that has already given rise to a duty (such as occupiers to entrants), then the court will likely recognise a duty in the case at hand, subject to strong policy considerations under the second arm of the test.<sup>75</sup>

The courts also have an additional framework available to assist in situations where there is no recognised duty already established between the plaintiff and defendant (such as in the case of commercial host to patron in Australia). The courts consider a number of established principles, such as expectations held by both parties, the reasonableness of reliance of the plaintiff on the defendant, representations made by the defendant to the plaintiff, and any assumptions of responsibility expressed or implied by the defendant (with a higher responsibility likely for defendants who benefit economically from the relationship).<sup>76</sup> However, the most important factor considered is the power or legal authority on the part of the defendant to control the conduct of the plaintiff. In the absence of such authority, no duty to control is likely to be recognised.<sup>77</sup> This is different to the Australian approach where there are no established principles that can be considered, but rather, where a general application of legal and policy factors occurs.

For example in *Jordan House v Menow*,<sup>78</sup> the Court held that a commercial host has a duty to control the behaviour of a client who is known to be impaired. The Court stated that the host must exercise reasonable care to ensure that patrons are not exposed to any foreseeable risk of injury upon leaving the establishment.<sup>79</sup> In this case there was both an ability to control the behaviour, as well as knowledge of the

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<sup>74</sup> [2001] 3 SCR 537 ('*Cooper*').

<sup>75</sup> Denis W Boivin, 'Social Host Liability in Canada: Mixed Message from the Ontario Court of Appeal' (2004) 12 *Tort Law Review* 164, 167.

<sup>76</sup> Robert Solomon and John Payne, 'Alcohol Liability in Canada and Australia: Sell, Serve and be Sued' (1996) 4 *Tort Law Review* 188, 196.

<sup>77</sup> *Ibid* 197.

<sup>78</sup> [1974] SCR 239 ('*Menow*').

<sup>79</sup> Boivin, above n 75, 164.

‘propensity for irresponsible behaviour under the influence’ by the patron.<sup>80</sup> The judge specified that this knowledge distinguished the obligation from a general obligation existing for every ‘tavern owner’.<sup>81</sup> The policy factors focussed upon included the fact that the defendant hotel had a higher duty than persons in general due to its ability to control the plaintiff’s behaviour, that the defendant had knowledge of the plaintiff’s intoxicated condition, and the fact that there was a probability of risk of injury to the plaintiff.<sup>82</sup>

Similarly, in *Canada Trust Co v Porter*,<sup>83</sup> the injured plaintiff sued both the drunk driver who caused his injuries and the hotel he had been drinking at prior to the incident. The Court extended a broad duty of care by focussing on the ability of the hotelier defendant to control the conduct in question, holding that despite the lack of knowledge of intoxication, it was the responsibility of the hotelier to establish safe-serving practices to ensure that patrons were not served past the point of intoxication.<sup>84</sup>

With respect to authority to control patron behaviour, similar to Australian legislation,<sup>85</sup> Canadian provincial and territorial liquor legislation imposes stringent obligations on, and grants broad powers to, licensees to deny entry or eject violent, intoxicated or underage patrons,<sup>86</sup> to prevent drinking contests,<sup>87</sup> and to refrain from selling or giving alcohol to those who are, or are becoming, intoxicated.<sup>88</sup> Therefore it is unsurprising that recognition of a duty to control has arisen, given the known intoxicating effects of alcohol, the annual toll of alcohol related deaths and injuries, and the broad statutory obligations and powers that alcohol providers and occupiers have to control their patrons and guests.<sup>89</sup> What is surprising is the Australian court’s unwillingness to do the same.

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<sup>80</sup> Penelope Watson, ‘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) 11 *James Cook University Law Review* 108, 114.

<sup>81</sup> *Menow* [1974] SCR 239, 250.

<sup>82</sup> *Ibid* 249-250.

<sup>83</sup> (1980) 2 ACWS (2d) 428 (Ont CA).

<sup>84</sup> *Ibid*.

<sup>85</sup> *Liquor Act 2007* (NSW); *Liquor Act* (NT); *Liquor Act 2002* (Qld); *Liquor Control Act 1988* (WA); *Liquor Control Reform Act 1998* (Vic); *Liquor Licensing Act 1997* (SA).

<sup>86</sup> See, eg, *Liquor Control and Licensing Act*, RSBC 1979, s 46 (1); *Liquor Control Act*, RSA 1980, C L 17, s 85, s 95(2); *Liquor License Act*, R.R.O 1990, s 45.1.

<sup>87</sup> See, eg, *Liquor License Act*, R.R.O 1990, s 18.2.

<sup>88</sup> See, eg, *Liquor Control and Licensing Act*, RSBC 1979, s 43; *Liquor License Act*, R.R.O 1990, s 34(5).

<sup>89</sup> Solomon and Payne, above n 76, 197.

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The second half of the *Anns* test more closely resembles the Australian approach to the duty of care (to the extent that residual policy factors are considered). The onus is placed upon the defendant to convince the court that a duty of care should not be recognised, notwithstanding the foreseeability and proximity established in the first stage. The focus turns to the impact of the court's findings on the justice system as a whole, and the values cherished by society. Relevant considerations include social, judicial and economic policies. The plaintiff may also introduce considerations such as the objectives of tort law (for example deterrence and compensation) to counter any of the defendant's arguments. The court will then weigh the costs and benefits of determining whether liability for negligence should be extended beyond its current reach.<sup>90</sup>

In *Stewart v Pettie*,<sup>91</sup> the Court weighed these factors and suggested a further extension of the existing duty of care by indicating that a commercial host may also be liable towards a third party who is within the zone of foreseeable danger created by the patron's intoxication. According to *Stewart*, this class includes users of a public highway located within the vicinity of the defendant's establishment. They regarded it as a 'logical step' to move from finding that a duty of care is owed to patrons of the bar (as in *Jordan House*) to finding that a duty of care is also owed to third parties who might reasonably be expected to come into contact with the patron, and to whom the patron may pose some risk.<sup>92</sup>

The Canadian courts have expressed a clear trend of expanding the liability of those who sell alcohol to others. The courts have gone beyond the narrow duty that Laskin J established in *Jordan House*,<sup>93</sup> holding alcohol providers liable even though they had no prior dealing with the patron, no knowledge of the patron's susceptibility to alcohol and no actual knowledge of the patron's intoxication.<sup>94</sup> It is interesting given the similarity in tests for the extension of the duty of care in Canada and Australia that the courts in the two nations have come to such different conclusions. However, in the string of cases since the landmark *Jordan House*,<sup>95</sup> Canadian courts have focussed upon the ability of hoteliers to control the actions of patrons, rather than ideas of personal responsibility, resulting in a steady extension of the duty of commercial hosts.

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<sup>90</sup> *Childs v Desormeaux* [2004] OJ 2065, 33-40 ('*Childs*').

<sup>91</sup> [1995] 1 SCR 131.

<sup>92</sup> *Ibid* 28.

<sup>93</sup> *Menow* [1974] SCR 239.

<sup>94</sup> Solomon and Payne, above n 76, 220.

<sup>95</sup> [1974] SCR 239.

## IV NORMATIVE ANALYSIS: THE FOCUS ON PERSONAL RESPONSIBILITY

### A *The Common Law and Legislative Focus on Personal Responsibility*

As can be clearly seen through the above analysis of the Australian common law and legislation, both the courts and Parliament have placed a heavy emphasis in recent years on individuals (particularly intoxicated individuals) taking responsibility for their actions. This is a remarkable turnaround from the sentiment in the 1990s, where it appeared that alcohol server liability was likely to be extended into a fairly broad category of duty of care.<sup>96</sup> For example, the court in cases such as *Johns v Cosgrove*<sup>97</sup> and *Rosser v Vintage Nominees Pty Ltd*<sup>98</sup> held hotels liable for accidents involving drunken patrons after they had left the licensed premises. In contrast, the cases of *Cole* and *Scott*, discussed in some detail above, are clear messages from the High Court that principles of individual autonomy and personal responsibility are now considered more valuable than principles of compensation, corrective justice and collective responsibility; providing confirmation that the court intends for a contraction of the law of negligence as the 'last outpost of the welfare state.'<sup>99</sup>

Similarly, the amendments to the State and Territory civil liability provisions were openly motivated by the desire to increase the responsibility of individuals for their actions. The short title of the NSW amending legislation - *The Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) - and the ardent opinions expressed in the second reading speech and general parliamentary debates, as discussed above, provide clear evidence of this impetus. The Acts go far beyond the common law (in a number of avenues), and in the case of intoxicated patrons in NSW, leave the loss entirely on the shoulders of the injured plaintiff, potentially even when on ordinary common law principles the defendant may have been guilty of serious negligence.<sup>100</sup>

Despite the firm views of the courts and the effect of the civil liability statutes, liquor licensing legislation seems to be focussed instead on broadening and deepening the

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<sup>96</sup> Graeme Orr and Gregory Dale, 'Impaired judgments? Alcohol Server Liability and Personal Responsibility After *Cole v South Tweed Heads Rugby League Football Club Ltd*' (2005) 13 *Torts Law Journal* 103, 103.

<sup>97</sup> *Johns* (1997) 27 MVR 110.

<sup>98</sup> *Rosser* (1998) 20 SR (WA) 78.

<sup>99</sup> Dixon and Spinak, above n 2, 817; J Spigelman, 'Negligence: The Last Outpost of the Welfare State' (2002) 76 ALJ 432.

<sup>100</sup> Barbara McDonald, 'The Impact of the Civil Liability Legislation on Fundamental Politics and Principles of the Common Law of Negligence' (2006) 14 *Torts Law Journal* page 268, 298.

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obligations of licensees.<sup>101</sup> In NSW for example, the *Liquor Act 2007* (NSW) and the *Liquor Regulation 2008* (NSW) have introduced higher standards for commercial hosts to implement 'harm minimisation' techniques, with provisions now including mandatory liquor signage and limited trading hours, as well as maintaining other provisions such as the requirement of 'Responsible Service of Alcohol' certificates for all persons working with alcohol.<sup>102</sup> Similarly, in Queensland, there are requirements to ensure that 'liquor is served, supplied and promoted in a way that is compatible with minimising harm',<sup>103</sup> as well as provisions warning against actions such as failing to help patrons arrange transport from the premises.<sup>104</sup> Comparable laws exist in other States and Territories.<sup>105</sup> This contrast evidences the tension in Parliament's motivations; between desires to reinforce the importance of the value of personal responsibility of individuals choosing to consume alcohol, and the parallel intention of providing controls to curb the excessive consumption of alcohol and the negative effect this has on society.

The result of shifts in the common law and civil liability statutes towards a focus on individual responsibility has been a reallocation of the burden of the cost of negligence from defendants and their insurance companies, to the individual. Feldman comments that such a result seems to contradict two traditional goals of tort law: making tort victims whole, and discouraging excessively dangerous conduct or products by requiring tortfeasors to internalise the full costs of their behavior.<sup>106</sup>

### **B Benefits of an Extension of a Duty of Care for Commercial Hosts in Australia**

This shift to a focus upon individual responsibility (particularly with respect to intoxication) has had, and will continue to have, a negative impact on both society and the individual. The current approach of both the courts and the legislature is narrow and overlooks clear policy reasoning to extend (as has occurred in Canada) at least a partial duty of care to hoteliers. While there is much to be said for increasing the personal responsibility of individuals, ignoring the importance of hoteliers in exercising *some* form of responsibility for their actions is dangerous, since it means that there is no requirement of personal responsibility on the part of those

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<sup>101</sup> Orr and Dale, above n 96, 110.

<sup>102</sup> *Liquor Act 2007* (NSW) and the *Liquor Regulation 2008* (NSW), Part 5.

<sup>103</sup> *Liquor Act 2002* (Qld) s148A(1).

<sup>104</sup> *Liquor Regulation 2002* (Qld) s41.

<sup>105</sup> *Liquor Control Act 1988* (WA); *Liquor Licensing Act 1997* (SA); *Liquor Act* (NT); *Liquor Control Reform Act 1998* (Vic).

<sup>106</sup> Heidi Feldman, 'Harm and Money: Against the Insurance Theory of Tort Compensation' (1997) 75 (7) *Texas Law Review* 1567, 1582.



individuals who have the most to gain from irresponsible conduct of others. Furthermore, given the parallel intention of Parliament to control and minimise both the excessive consumption of alcohol and the negative effects it has on society, it would appear prudent for the courts to assist in this approach by ensuring additional incentives for hoteliers to assist in the curbing of anti-social behaviour.

Alcohol related harm costs Australian society over \$15 billion dollars every year (when factors such as crime and violence, treatment costs, productivity loss and premature death are taken into account).<sup>107</sup> This amounts to 3.2% of the total burden of disease and injury in Australia.<sup>108</sup> There is clear evidence to suggest that Australians have difficulties in controlling their alcohol consumption, with one in five Australians drinking at risky levels at least once a month.<sup>109</sup> Furthermore, between the years of 1992 and 2001, more than 31,000 Australians died from alcohol-related injury and disease, with more deaths a result of acute rather than chronic conditions.<sup>110</sup> Alcohol is also a leading contributory factor in a number of other injuries, including 44% of fire injuries, 34% of falls and drownings, 47% of assaults, and 34% of homicides.<sup>111</sup> Particularly startling is evidence that shows alcohol as the main cause of death on Australian roads, leading to 30% of motor vehicle accidents.<sup>112</sup> As Watson suggests, these types of injuries suggest a pattern of drinking

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<sup>107</sup> David Collins and Helen Lapsey, 'The avoidable costs of alcohol abuse in Australia and the potential benefits of effective policies to reduce the social costs of alcohol' (2008) National Drug Strategy Monograph Series Number 70, Commonwealth Department of Health and Ageing, ix.

<sup>108</sup> Stephen J Begg, Theo Vos, Bridget Barker, Lucy Stanley and Alan D Lopez, 'Burden of disease and injury in Australia in the new Millennium: measuring health loss from diseases, injuries and risk factors' (2007) *Medical Journal of Australia* 188, 196 – 210.

<sup>109</sup> Australian Institute of Health and Welfare, 'National Drug Strategy Household Survey: First Results' (Drug Statistics Series No 20, Australian Institute of Health and Welfare, 2008) 23.

<sup>110</sup> Preventative Health Taskforce, 'Preventing Alcohol Related Harm in Australia: A Window of Opportunity' (Technical Paper 3, Australian Government Department of Health and Ageing, 2009) 11[3.1].

<sup>111</sup> Australian Government: Department of Veterans' Affairs, *Alcohol and Injury* (October 2009) The Right Mix <[http://www.therightmix.gov.au/resources/documents/P01994D\\_Alcohol\\_-\\_Injury.pdf](http://www.therightmix.gov.au/resources/documents/P01994D_Alcohol_-_Injury.pdf)>

<sup>112</sup> Australian Bureau of Statistics, *Alcohol Consumption in Australia: A Snapshot 2004-2005*, cat 4832.0.55.001; Tim Stockwell, Roberta Mcleod, Margaret Stevens, Mike Phillips, Matthew Webb and George Jelinek, 'Alcohol consumption, setting, gender and activity as predictors of injury: A population-based control study' (2002) 63 (33) *Journal of Studies on Alcohol* 342, 372-379.

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to intoxication, with more people dying from the short-term effects of alcohol consumption rather than chronic factors.<sup>113</sup>

It is unsurprising, therefore, that within Australia attitudes to alcohol consumption are steadily changing and a wider recognition of the relationship between heavy drinking, accidental injury and violence has developed. An acknowledgement of the impact that drinking has on driving skills has led to some of the most comprehensive and strict alcohol-related laws in the world.<sup>114</sup> There has also been recognition of the role that commercial establishments play in alcohol-fuelled harm, with measures such as early morning 'lockout periods'<sup>115</sup> and limitation of concentrated spirits and other high-risk alcohol products after midnight,<sup>116</sup> being implemented in a number of the States and Territories. However, society appears to remain divided between respecting the value of individual autonomy and personal responsibility in one's choice to drink and the increasing evidence linking alcohol with high rates of death and injury.

Given the strong evidence demonstrating that alcohol is a social problem, and the recognition of the importance of other mechanisms to control the consumption of alcohol (such as the liquor licensing laws discussed above) it appears contradictory that the Australian Government and the judiciary have shifted the burden of alcohol induced injury entirely onto plaintiffs. Furthermore, given that the current legislative schemes (including civil liability statutes, liquor licensing regulations and criminal sanctions) are not perfect in their intention to curb anti-social behaviour, injuries, and harm caused by drinkers, an additional incentive for hoteliers to follow liquor licensing regulations would aid in addressing the social impact of alcohol related harm.

For example, liquor licensing laws intended to produce safer serving practices, whilst assisting in the overall cause, have not been overwhelmingly successful. A recent study undertaken by Scott, Donnelly, Poynton and Weatherburn provided evidence that only 22% of adult drinkers surveyed had reported being refused service when displaying multiple signs of intoxication on licensed premises. The remaining 78% either continued to be served or received no responsible service of alcohol initiatives

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<sup>113</sup> Watson, above n 80, 109.

<sup>114</sup> See, eg, the zero tolerance of alcohol for learner and provisional drivers, the strict fines for being breathalysed with over the legal concentration of alcohol within your system and the random breathalyser capabilities of police officers.

<sup>115</sup> See, eg, Division 5 of the *Liquor Act 2007* (NSW) and ABC News, 'Three-hour alcohol ban for pubs and clubs', *ABC News* (Sydney), 22 March 2011, 5, Jason Ardit, 'Liquor, Licenses and Lockouts' (Parliamentary Library, NSW Parliament, 2008) 16.

<sup>116</sup> Lucy Rickard, 'Northbridge alcohol clampdown aims to cut booze-fuelled violence', *Western Australia Today* (Western Australia), 6 May 2011, 6.

(such as being offered water, or it being suggested that they get some fresh air).<sup>117</sup> Even more illuminating is the data that in the past decade only a proportionally small number of fines have been issued by regulators to hoteliers with respect to the continued service of alcohol to intoxicated patrons, despite clear evidence of such practices existing.<sup>118</sup> A Western Australia report tabled in State Parliament in March 2011 highlighted the fact that in the previous three years, less than 1% of licensed premises in the State had been penalised for unsafe serving practices.<sup>119</sup> Similarly, a report by the NSW Bureau of Crime Statistics stated that only 2% of licensed premises had been prosecuted in the Licensing Court, notwithstanding earlier studies clearly indicating large numbers of patrons being served alcohol on licensed premises despite being plainly intoxicated.<sup>120</sup> The key issue with such laws, as raised by the recent policy examination undertaken by the Department of Health and Ageing, is that the policies rely on heavy law enforcement to produce noticeable benefits.<sup>121</sup> As a result, the stringent laws in place are likely to have little effect in encouraging safer hotelier practices without proper enforcement, as the fear of being fined for inappropriate service of alcohol is most likely not high enough to outweigh the commercial incentive to sell more drinks. With this in mind, creating an additional threat of liability for hoteliers if they continue to serve patrons well past the point of intoxication or fail to implement basic safeguards in protecting their patrons from the effects of excessive alcohol consumption, would promote additional incentives to abide by these hard-to-enforce policies.

### **C *Flaws in the High Court Rejection of a Duty of Care for Commercial Hosts***

In addition to the clear incentive for the extension of a duty of care to hoteliers from a parliamentary perspective, such an extension would also be desirable from the perspective of the common law. A number of questionable policy arguments,

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<sup>117</sup> Linda Scott, 'Young Adults' Experience of Responsible Service Practice in NSW: An Update' (Alcohol Studies Bulletin, No 9, Bureau of Crime Statistics and Research, 2007).

<sup>118</sup> Suzanne Briscoe and Neil Donnelly, 'Liquor Licensing Enforcement Activity in New South Wales' (Alcohol Studies Bulletin No 4, NSW Bureau of Crime Statistics and Research, June 2003) 7-12; Colin Murphy, 'Raising the Bar: Implementing Key Provisions of the *Liquor Control Act* in Licensed Premises' (Report 1, Western Australian Auditor General's Report, March 2011) 8.

<sup>119</sup> Ibid.

<sup>120</sup> Suzanne Briscoe and Neil Donnelly, above n 118.

<sup>121</sup> David Collins and Helen Lapsey, 'The avoidable costs of alcohol abuse in Australia and the potential benefits of effective policies to reduce the social costs of alcohol' (National Drug Strategy Monograph Series Number 70, Commonwealth Department of Health and Ageing, 2008) 30.

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addressed in the Australian cases of *Cole* and *Scott*, have been misguidedly used to justify the denial of a duty of care of hoteliers to limit the intoxication of patrons or to provide safe transport home if an accident is reasonably foreseeable. These include the argument that such duty of care would be contrary to the important values of personal responsibility and individual autonomy,<sup>122</sup> would be an unacceptable burden upon ordinary commercial behaviour,<sup>123</sup> and would be too impractical to implement.<sup>124</sup> These arguments, while pertinent, are unable to overcome the strong policy factors in favour of enforcing the duty of care in question.

The importance of the value of individual responsibility was raised as a fundamental argument against establishing a duty of care in both *Cole* and *Scott*, and is also reflected in the amendments to civil liability legislation in the various States and Territories as discussed above. However, this narrow ideal of 'personal responsibility' and the rejection of any duty of care for hoteliers to intoxicated patrons ignore the role that hoteliers have to play in the provision of alcohol. As discussed by Orr and Dale, the 'person who drinks heavily, has, through rhetoric, been constructed not as a partial victim of the industry that profits from him or her, but as the entire author of any misfortune he or she suffers.'<sup>125</sup> Justice Kirby highlighted this issue in *Cole*, pointing out that licensed premises have a commercial motivation to continue serving patrons past the point of intoxication.<sup>126</sup> The current common law position (particularly given the aforementioned low rates of enforcement of current liquor licence regulations) has created a situation whereby it is in the interest of hoteliers to allow orderly, but intoxicated, patrons, to continue drinking. As the risk of a fine or other penalty is very low given poor enforcement rates,<sup>127</sup> it is more commercially viable to continue serving the patron until they become rowdy, or too noticeably intoxicated, whereupon the hotelier can simply eject them from the premises and 'wipe their hands' of any further responsibility.

While some may view any injury occurring after such ejection as the result of an individual decision by the patron to drink to excess, this view ignores the hotelier's commercial benefit created through this situation. As discussed in the Canadian decision of *Childs v Desormeaux*,<sup>128</sup> the Court felt that it was unjust to allow hoteliers to profit from an inherently dangerous product, alcohol, without requiring them to provide some measure of compensation for those injured as a result of this

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<sup>122</sup> *Cole* (2004) 217 CLR 469, 487 [56-8]; *Scott* (2009) 239 CLR 90, 406 [38], 414 [54].

<sup>123</sup> *Cole* (2004) 217 CLR 469, 476-7 [13], 478 [17].

<sup>124</sup> *Ibid* 475-8 [10-17]; *Scott* (2009) 239 CLR 90, 413-14 [53].

<sup>125</sup> Orr and Dale, above n 96, 114.

<sup>126</sup> *Cole* (2004) 217 CLR 469, 493 [86], 495 [91].

<sup>127</sup> Suzanne Briscoe and Neil Donnelly, above n 118; Colin Murphy, above n 117.

<sup>128</sup> [2004] OJ No 2065.

commercial venture.<sup>129</sup> The Court also noted that it is a commercial reality that those in the business of distributing dangerous products are specifically insured against the risks of liability associated with their products.<sup>130</sup> These factors were used to distinguish between commercial and social host liability, with the Court holding that the well-established duty of care for commercial hosts could not be extended to a duty of care for social hosts to their intoxicated guests.<sup>131</sup> The recognition of this commercial responsibility of hoteliers would both enable a more just result by ensuring that hoteliers take responsibility for the commercial role that they play in the intoxication of patrons, as well as transferring costs currently borne by individual patrons alone, partially back to hoteliers. These costs could then be diluted through increased drink prices, which would be a respectable means of spreading the cost of alcohol related harm.<sup>132</sup>

A second key policy argument raised is that upholding a duty of care for hoteliers to intoxicated patrons would be contrary to the important value of individual autonomy. As Callinan J argued in *Cole*, the law generally protects the civil liberty of adults to make choices regarding alcohol consumption.<sup>133</sup> Restrictions on adults to make this decision themselves could lean towards paternalism and become an unwelcome intervention by the State on individual choice. Furthermore, in Australia, unlike Canada, drinking past the point of intoxication has long been seen as an accepted feature of social interaction, which is consistent with the prevailing views of individual responsibility.<sup>134</sup>

However, these arguments ignore three key points. Firstly, while it may be considered a 'right' for individuals to choose to consume an intoxicating amount of alcohol, extending a duty of care for hoteliers to curb consumption of alcohol *in commercial establishments* does not extinguish this 'right'. Individuals are still free to elect to consume excessive alcohol in other situations, for example in the privacy of their own homes. Such a duty would merely impose limits on excessive alcohol consumption within commercial establishments and increase the onus on hoteliers to actively enforce safe service practices through a heightened threat of liability.

Secondly, consumption of alcohol has wider social impacts that take regulation out of the sphere of interfering with an 'individual' right. Alcohol consumption has a broad range of adverse social consequences for both the drinker and others in the

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<sup>129</sup> Boivin, above n 75, 169.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Childs* [2004] OJ No 2065 at [33].

<sup>132</sup> Orr and Dale, above n 96, 114.

<sup>133</sup> *Cole* (2004) 217 CLR 469, 503 [121].

<sup>134</sup> Solomon and Payne, above n 76, 212.

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community. As discussed by the National Preventative Health Taskforce, alcohol abuse can also impact family members, friends and workmates, bystanders and strangers. Some commentators have coined the term 'passive drinking' to refer to the effect of drunken behaviour on third parties.<sup>135</sup>

Finally, this supposed limitation on individual autonomy is *already in place* under liquor licensing laws. The variety of legislation in this area in the States and Territories clearly makes it an offence for hoteliers to serve individuals past the point of intoxication. For example, s 73 of the *Liquor Act 2007* (NSW), s 156 of the *Liquor Act 1992* (Qld) and s 108 of the *Liquor Control Reform Act 1998* (Vic) make it an offence for licensees to sell or supply liquor to an intoxicated person, or allow them to remain on the premises. It is inadequate to argue that a duty of care for hoteliers would extinguish any existing right of patrons to elect to consume intoxicating amounts of alcohol, as it is abundantly clear that such a 'right' does not exist, given the State and Territory liquor licensing provisions.

A further consideration that the Australian High Court addressed in both *Scott* and *Cole* was the practical difficulties surrounding the implementation of a duty of care. In a detailed judgment, Gleeson CJ raised certain concerns including the difficulties that hoteliers face in determining the intoxication of individuals (such as ascertaining how many drinks they have consumed *before* entering a premises), the issue of monitoring individuals and potential breaches of personal privacy (which in Gleeson CJ's view, would lead to an unacceptable burden on ordinary commercial behaviour), and the problem of what to do with individuals once their level of intoxication has been realised – as detaining them could potentially constitute battery or unlawful detainment.<sup>136</sup> The policy explanation for such a denial of a duty rests on the notion that pubs and clubs are busy establishments that serve important roles in Australian society, a society that is known for its partiality to alcohol. The burden of the duty of care – to deny service, to routinely organise and oversee drinkers into taxis or courtesy busses, and to eject patrons that have reached a point of intoxication – would be significant and would cause irritation to most patrons. Hence, the Australian common law has vehemently rejected the existence of any such duty of care.

As McHugh J articulated it in his dissenting *Cole* decision, however, it would appear more reasonable to recognise a duty of care for hoteliers and instead consider any practical difficulties of implementing safe service practices in a discussion of whether

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<sup>135</sup> National Preventative Health Taskforce, 'Australia: The Healthiest Country by 2020 – A Discussion Paper' (Commonwealth Government Department of Health and Ageing, 2008) 13.

<sup>136</sup> *Scott* (2009) 239 CLR 390, 406 [39], 407-14 [40-53].

they breached their duty of care by falling below the standard of care expected. As has been codified by the civil liability reforms (excluding the Northern Territory) a person will not be considered negligent in failing to take precautions against a risk of harm unless it was a foreseeable risk, the risk was not insignificant, and in the circumstances, a reasonable person in the position of the defendant would have taken precautions.<sup>137</sup> In deciding whether a reasonable person would have taken precautions, the court will also consider the 'negligence calculus' discussed by Mason J in *Wyong Shire Council v Shirt*<sup>138</sup> (now codified by statute); namely the probability that the harm would have occurred if care had been taken, the likely seriousness of the harm, the burden of taking precautions, and the social utility of the harm.<sup>139</sup> These factors will be taken into consideration in determining whether the hotelier has acted reasonably, and will act to restrict their liability to the consequences of a failure to act as a reasonable man would in the circumstance. This would extend to considerations such as the difficulty of implementing preventative measures to stop patrons becoming intoxicated, or difficulties in providing safe passage home for patrons. As a result, rather than a denial of a duty of care outright, the actions of the hotelier could be taken into consideration.

Furthermore, it is erroneous of the Australian courts to dismiss a duty of care entirely using the impracticality of resolutions as one of the justifications. It is evident through the examination of cases in the Canadian jurisdiction that there are appropriate options available to hoteliers to implement some form of a duty of care to intoxicated patrons. For example, as articulated in the Canadian decision of *Hague v Billings*,<sup>140</sup> the hotelier denied service of alcohol to a patron recognised to be inebriated, and attempted to encourage the plaintiff's sober friends to take his keys and drive him home. The Court held that whilst the defendant should have also called the police when it became clear that the intoxicated plaintiff was still going to attempt to drive, on the facts, the actions taken in an attempt to protect the plaintiff were ultimately enough to satisfy the duty of care.<sup>141</sup> Similarly, as discussed in the case of *Jordon v Menow*,<sup>142</sup> options considered reasonable included allowing the

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<sup>137</sup> *Civil Law Wrongs Act 2002* (ACT) s 43(1); *Civil Liability Act 2002* (NSW) s 5B(1); *Civil Liability Act 2002* (WA) s 5B(1); *Civil Liability Act 2002* (Tas) s 11(1); *Civil Liability Act 2003* (Qld) s 9(1); *Wrongs Act 1958* (Vic) s 48(1); *Wrongs Act 1936* (SA) s 32(1).

<sup>138</sup> [1980] 146 CLR 40, 47-48.

<sup>139</sup> *Civil Law Wrongs Act 2002* (ACT) s 43(2); *Civil Liability Act 2002* (NSW) s 5B(2); *Civil Liability Act 2002* (WA) s 5B(2); *Civil Liability Act 2002* (Tas) s 11(2); *Civil Liability Act 2003* (Qld) s 9(2); *Wrongs Act 1958* (Vic) s 48(2); *Wrongs Act 1936* (SA) s 32(2).

<sup>140</sup> (1989) 68 OR (2d) 321.

<sup>141</sup> Solomon and Payne, above n 76, 218.

<sup>142</sup> *Menow* [1974] SCR 239.

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plaintiff to spend the night in the hotel, or arranging for safe transportation home.<sup>143</sup> Furthermore, as Kirby J noted in *Cole*, there are already a number of mechanisms in place to measure levels of intoxication, such as security personnel observing individuals’ behaviour prior to entry into establishments, bartenders observing the behaviour of patrons consuming drinks and Responsible Service of Alcohol Monitors patrolling establishments to be alert to anti-social or inebriated behaviour.<sup>144</sup> Rules requiring ejection from the premises as soon as a person is recognised to have become intoxicated, if actively enforced, would prevent further intoxication occurring inside the premises and limit the risks to that patron should he or she be allowed to remain.

### V CONCLUSION

After the ‘insurance crisis’ and the sweeping reforms initiated by the Ipp Report, Australia has undoubtedly succumbed to a dramatic contraction in the law of negligence, particularly with respect to liability for alcohol-related harm. Both the States and Territories, in amendments to the Civil Liability Acts, and the judiciary, in decisions such as *Cole* and *Scott*, have implemented a strong policy-driven focus to ensure intoxicated patrons take personal responsibility for their drinking habits, over any responsibility of hoteliers to manage serving practices.

The Court in *Scott* approached the question of a duty of care from a policy perspective and through a focus on the value of personal responsibility it denied the existence of any duty of care between hoteliers and their patrons. Adopting a similar focus on the value of personal responsibility, the amendments to the various Civil Liability Acts discussed above dramatically reduced the ability for intoxicated plaintiffs to ensure that at fault defendants contribute to the costs of their injuries. This move was in stark contradiction with the recognition of the damaging social impact of alcohol-related harm, with preventative initiatives such as broad liquor licensing legislation, deterrence programs such as random breath testing, and community education programs being utilised in an attempt to control the issue.

However, the focus on personal responsibility in both the legislature and judiciary has created a dangerous situation whereby hoteliers are not held accountable for their negligent serving practices or profits obtained through the intoxication of customers. While there is much to be said for increasing the personal responsibility of individuals, ignoring the importance of hoteliers in exercising *some* form of responsibility for their actions is unwise.

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<sup>143</sup> *Ibid* 249.

<sup>144</sup> *Cole* (2004) 217 CLR 469, 500[108].



To address the extreme shift in responsibility that has occurred in the past 10 years, civil liability legislation must be refined to prevent defendants from being exculpated from gross negligence, and to prevent an unjust burden of proof being placed upon injured plaintiffs. Similarly, with respect to the common law, the extension of a duty of care of hoteliers to monitor drinking practices and to ensure safe passage home of intoxicated patrons, must be reconsidered after adequately reflecting on the broad social impact that such a decision will have. Contrary to the majority discussions in *Scott*, recognition of a duty of care of hoteliers to their patrons would *not* dramatically impair personal responsibility or individual autonomy and any practical difficulties of implementation would be able to be addressed by an application of the 'reasonable man test' when determining breach of duty. Rather, a broader duty of care would promote additional incentives for hoteliers to follow liquor licensing provisions, would assist in negating commercial motivation to encourage intoxication of patrons and would contribute to addressing the social cost of alcohol abuse in Australian society. It is time for hoteliers to take personal responsibility for *their* actions.