Suing the occupier after an assault

JUST HOW DIFFICULT IS CAUSATION?

By Andrew Stone

In cases of violent attacks, it is very rare that the actual assailant has assets that make them worth suing. Often the injured party's only recourse is the occupier or operator of the venue at which the attack took place.

In such cases, the onus is on the plaintiff to prove:

a) that the occupier owed a duty of care;
b) the scope of that duty;
c) that there was breach of duty of care; and
d) that the breach was causative of harm.

The existence of a duty of care can usually be established by demonstrating that the occupier or operator exercised control over the premises and, accordingly, had the capacity and duty to regulate conduct. The existence of breach depends upon the particular circumstances of the case.

What is proving truly problematic (as the cases below illustrate) is establishing that any breach of duty of care was causative of the plaintiff's harm.

MODBURY TRIANGLE

In *Modbury Triangle Shopping Centre Pty Ltd v Anzil*,[1] the plaintiff was assaulted by three unknown men, one armed with a baseball bat. The plaintiff had just left his place of work at a video store and was making his way to his car in the otherwise deserted shopping centre carpark. The carpark lights were off, despite earlier entreaties from the plaintiff's employer to leave the lights on until after the plaintiff had gone home.

The plaintiff failed when the High Court[2] found that there was no duty on the part of the occupier to control the criminal activities of the three unknown men. However, even if the plaintiff had proven that a duty existed, the plaintiff would also have failed in the High Court on causation. This was despite the trial judge and the Full Court of the Supreme Court of South Australia accepting that leaving the carpark lights on would have been likely to have averted an attack.[3]

Gleeson CJ noted the comments of the Full Court 'that common sense indicated that causation was established'.[4]

However, the Chief Justice concluded that, on an accurate legal appreciation of the duties owed by the occupier,[5]

> '[T]he appellant's omission to leave the lights on might have facilitated the crime, as did its decision to provide a carpark and the first respondent's decision to park there. But it was not a cause of the first respondent's injuries'.

COCA COLA AMATIL (NSW) PTY LTD v PAREEZER

In *Coca Cola Amatil (NSW) Pty Ltd v Pareezer*,[6] the causation problem was just as acute. The plaintiff was a contract delivery driver for Coca Cola. In 1995, he had been mugged while servicing a vending machine at Werrington TAFE, NSW. After this incident, the plaintiff had asked for his run to be adjusted so that he no longer had to visit the TAFE. He received a visit at home from Coca Cola reassuring him that things would be much safer when he returned to his job.

In 1997, the plaintiff found himself back at the Werrington TAFE to service the Coca Cola vending machines. While unloading soft drinks from his truck, he was accosted by a man with a pistol who asked for money and then demanded his keys. The assailant then shot the plaintiff in the chest and neck five times.[7] The plaintiff's wife and one of his children were in the plaintiff's delivery truck at the time.

In the Court of Appeal, Young CJ in Equity found that Coca Cola had breached the duty of care it owed to the plaintiff. The evidence of a security expert as to additional steps that could and should have been taken had been accepted by the trial judge and was also accepted by his Honour.

Mason P and Tobias JA did not join Justice Young in finding breach of duty. They held that it was not necessary to decide the question of breach as they joined Justice Young in finding that if there had been a breach of duty of care, it was not causative of injury. Justice Young had held that even if Coca Cola had taken all of the security expert's advice and implemented his various suggestions 'the same incident and consequences to the plaintiff would still have occurred'.[8]

Mason P added that the attack appeared 'particularly opportunistic and random in its viciousness'[9] and that additional security measures that Coca Cola might have adopted would probably not have averted the unfortunate shooting.[10]

ADEELS PALACE

Similar reasoning on causation as applied in Pareezer was utilised by the High Court in *Adeels Palace Pty Ltd v Moubarak*.[11]

Following a violent 'disruption' at a New Year's Eve party at the Adeels Palace restaurant, one of the diners left the restaurant and returned with a gun.[12] Two men were shot.[13] In a joint judgment, the bench of five (French CJ with Gummow, Hayne, Heydon and Crennan JJ), distinguished the facts from *Modbury* and concluded that *Adeels Palace* owed the two

injured plaintiffs a relevant duty of care. This was on the basis of the occupier's capacity to control entry to the premises.

With regards to breach, the High Court noted that both the trial judge and the Court of Appeal had found that the failure to provide licensed security guards constituted a breach of duty of care. The High Court held that it was not necessary to determine the issue of breach because of their finding on causation.

The High Court applied s5D(1) of the *Civil Liability Act* 2002 (NSW). The critical finding on causation was:[14]

> 'There was, however, no basis in the evidence for concluding that security staff at the entrance to the restaurant would have deterred or prevented the re-entry to the premises of a man armed with a gun when later events showed he was ready and willing to use the weapon on persons unconnected with his evident desire for revenge.'

The Court concluded that there was no evidence that the presence of security personnel would have deterred the re-entry of the gunman, especially when the gunman was prepared to act irrationally.[15]

The High Court also found that the evidence did not show that security personnel could or would have prevented re-entry of the gunman.[16] If the gun was a pistol rather than a rifle, security would not have been able to detect the gun without metal detectors or body searches. Although they did not explicitly say so, the High Court judges were presumably reluctant to set a standard of care that required the installation of metal detectors at nightclubs and other venues where the clientele might use a concealed handgun to settle a dispute.

JOVANOVSKI v BILBERGIA

It is not only direct violent attacks that pose a problem for plaintiffs in proving causation. In *Jovanovski v Bilbergia Pty Ltd*,[17] the plaintiff was a contract truck driver working on a building project. The plaintiff had some personality issues – he was described as being short-tempered and abrupt in his manner, and there was evidence that this had caused him to become unpopular with others on the site.[18]

At least one of the workers or independent contractors on the building site found a mechanism for expressing distaste with Mr Jovanovski's personality – on several occasions, they smeared grease on the door handle or step of his truck.[19] Mr. Jovanovski reported these incidents to the site manager.[20] The site manager did little about it. Shortly thereafter, Mr Jovanovski was injured when he slipped on a greasy rung while trying to climb up on the back of his truck.[21]

It was submitted that the site supervisor should have given a stern warning to all employees and contractors on site that they faced immediate dismissal for engaging in a practical joke with potentially dangerous consequences. The trial judge, Davies J, accepted that there was a duty of care and a breach of that duty in the supervisor failing to give such a warning. However, he found that the plaintiff had not discharged his onus of establishing that a strong warning would have caused the anonymous prankster to desist from smearing grease.[22]

The Court of Appeal endorsed this conclusion, stating:[23]

> 'The risk of injury to the appellant from grease on the steps was plain, and it is difficult to accept that whoever applied the grease was a mere prankster, or was unaware of the seriousness of what he or she was doing. The appellant had gained unpopularity … A number of persons on the site, a class left rather open-ended on the evidence and one over members of which the respondent held varying sway, could have been determined to apply grease to the truck. Given the risk of injury, the perpetrator had departed from fully rational conduct, as shown by the series of applications of grease in February 2004, and was intent on something of a campaign against the appellant. It is likely that the perpetrator already appreciated his or her exposure to criminal liability and to dismissal from lucrative employment if discovered as the perpetrator.
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> [21]It may have been that a warning would have deterred the person from the last application of grease. But that depended on the person's resolve and the likelihood of discovery, and the resolve appears to have been firm and there were ready opportunities for application of grease without discovery. It is not enough that the warning might have had effect.'

The net result for the plaintiff was that he lost on causation at trial and again on appeal.

CONCLUSION

Four cases; four verdicts for the defendant; four injured plaintiffs uncompensated and owing costs to defendants; four sets of plaintiff's lawyers being unpaid for their hard work. Not good!

Unfortunately, there are no easy lessons to be gleaned from the above cases, other than to look seriously at the issue of causation before commencing proceedings. Expert evidence from security experts might have helped in *Modbury*, but it was not enough to shift the outcome in either *Pareezer* or *Adeels Palace*. The harsh reality is that with cases involving attacks or assaults by third parties, it is necessary to carefully consider causation before commencing proceedings.

If they could be identified, the perpetrators of the assault (impecunious as they may be) could theoretically be put in the witness box to say that more stringent security measures might have deterred their assault. With such evidence, the plaintiff might have a fighting chance on causation. However, without such evidence the plaintiff is at real risk of establishing that a duty exists, establishing breach of that duty and failing on the basis that it is not proven that a determined assailant would have been deterred, even had more fulsome security measures been taken. ■

Notes: **1** [2000] HCA 61. **2** Comprising Gleeson CJ, Hayne and Callinan JJ in the majority and Kirby J dissenting. **3** See for example Gleeson CJ (with Gaudron and Hayne JJ agreeing) at [39], per Kirby [93]-[96] and Callinan J at [149]-[152]. **4** At [38]. **5** At [40]. **6** [2006] NSWCA 45. **7** Per Young CJ at [29]. **8** At [143]. **9** At [10]. **10** *Ibid.* **11** [2009] HCA 48. **12** At [3]. **13** At [4]-[6]. **14** At [47]. **15** See [47]-[48]. **16** At [49]. **17** [2011] NSWCA 135. **18** At [10]. **19** At [11]-[13]. **20** *Ibid.* **21** At [12]. **22** Per Giles JA at [15] citing Davies J at [83]. **23** Per Giles JA (with Hodgson and Macfarlan JJA agreeing) at [20]-[21].

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