Innkeepers Liability in WA: Tourist Accommodation Operates Under Uncertain Laws

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Throughout Australia the law governing the relationship between hotels and guests is a confusing mix of ancient common law rules and piecemeal statutory amendments. In Western Australia the confusion is compounded by uncertainty over the extent to which the common law rules still apply following the repeal of the 1970 statute which extinguished innkeepers' duties and liabilities. The need to clarify the position presents the legislature with the opportunity to join an Australia-wide approach towards a uniform Tourist Accommodation Act which meets contemporary needs and international standards.

AT common law an innkeeper is under a strict duty to safeguard the property of guests, and liability for loss is absolute and unlimited.[1] The origin of this rule can be traced back to ancient times and the Roman praetorian edict designed to protect travellers from unscrupulous innkeepers.[2] However by the end of the 19th century the roles had reversed and most common law countries enacted legislation to amend the common law rules to limit strict liability so as to protect innkeepers from unscrupulous guests.[3]

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1. The only exceptions recognised to the strict liability of an innkeeper as insurer of a guest's goods are where the loss or damage results from the negligence of the guest or from an act of God or act of the Queen's enemies or where the guest retains exclusive possession of the goods. These issues are outside the scope of this paper.
2. DS Bogen 'Ignoring History: The Liability of Ships' Masters, Innkeepers and Stablekeepers under Roman Law' (1992) 36 American Legal History Journ 326-330.
3. It is interesting to note that most civil codes have also retained the Roman praetorian rule of strict liability subject to a limit using a model similar to that in common law countries.

Western Australia first addressed the problem with the Innkeepers Act 1920 which limited innkeepers strict liability to £30. This was in similar terms to the English Act of 1863[4] which established the general model for similar Acts passed in each Australian state[5] and indeed in most common law countries. However the Western Australian parliament later repealed this Act by the Liquor Act 1970 (WA) (1st Schedule), which further provided under section 173:

> (1) Without affecting the application of any other rule of law, *a rule of law that imposes a duty or liability on a person, by reason only of his being an innkeeper, no longer applies in the State.*
> (2) Nothing in this section relieves an innkeeper of any duty or liability imposed on him by this or any other Act.[6]

The intention was to remove altogether the special strict liability of an innkeeper at common law leaving intact general liability in contract and tort and for breach of statute and statutory duty. No other Australian state and, as far as the author is aware, no other common law country has ever done this. The common law provides a balance of rights (eg, the innkeeper's lien) and duties and, as discussed later, to remove one without the other upsets the long-established balance in the innkeepers doctrine.

CURRENT STATUTE

In 1988 Western Australia purported to revert to the general model by enacting the Liquor Licensing Act (WA), which by section 176 repealed the Liquor Act 1970 (WA) and provided in section 107:

> A licensee is not liable beyond such amount as may be prescribed [presently $200] to a lodger for loss or damage[7] to the property

4. Innkeepers Liability Act 1863 ('An Act to amend the law respecting the liability of innkeepers and to prevent certain frauds upon them').
5. For a discussion of the current position in Queensland, which has recently removed the statutory limitation: see TC Atherton 'Tourist Accommodation Operators Beware: The Inns and Outs of Innkeepers Liability for Guests' Goods' Proctor (1996) 16(4) Qld Law Soc 12-13.
6. Liquor Act 1970 (WA) s 173 (emphasis added).
7. At common law there is doubt whether strict liability applies for damage as opposed to loss of a guest's goods. Contra: *Morgan v Ravey* (1861) 158 ER 109; *O'Dea v O'Hara* SA Advertiser 17 May 1895; *Nott v Maclurcan* (1903) 20 WN (NSW) 135; *Kellett v Cowan* [1906] Qd St R 116 which found the innkeeper strictly liable; *Winkworth v Ravey* [1931] 1 KB 652; *Williams v Owen* [1956] ER 1 which required negligence. See also 'The Liabilities of Innkeepers' (1931) 5 ALJ 21-22. See Eng Law Reform Committee *Innkeepers' Liability for Property of Travellers, Guests and Residents* (London: HMSO, 1961) 1, which considered that there was no reason and no clear decision requiring a

of the lodger while the property is on the licensed premises, or premises to which section 105(3) applies,[8] unless:

(a) the property was lost or damaged due to the wilful act, default or neglect of the licensee or a person in the employment of the licensee;
(b) the property was entrusted to the licensee expressly for safekeeping and the lodger complied with the requirements of the licensee with respect to safekeeping; or
(c) the licensee did not, at the time the lodger brought the property onto the licensed premises, have displayed, in a manner easily visible to potential lodgers, a notice indicating that liability for loss or damage to the property of a lodger may be limited to the prescribed amount.

INTERPRETATION

While the Act succeeds in reintroducing the statutory limitation applicable in the English model[9] there must be some doubt as to whether the common law has been revived. The problem arises because of rules of statutory interpretation — particularly following a decision of the High Court of Australia which, curiously enough, also concerned those obscure rules of the common law which deal with the ancient callings of innkeepers, carriers and warehousemen.[10]

In *Majeau Carrying Co Pty Ltd v Coastal Rutile,*[11] the High Court considered whether a warehouseman was entitled to a possessory lien at common law to secure the cost of cartage and storage of goods. Stephen J (with whom Menzies J agreed) held that a warehouseman had no general right to a lien at common law and that there was insufficient evidence of any special custom or usage to support such a lien in this case. That part of the decision is not relevant to the issue discussed in this paper. However Gibbs J, in a separate judgment, also concluded that there was no warehouseman's lien but on different grounds which are particularly relevant to innkeepers duties and liabilities at common law in Western Australia.

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distinction but acknowledged that there was some doubt on the point. In England the matter was then settled by the Hotel Proprietors Act 1956 which does not distinguish between loss and mere damage.

8. This covered operations where the accommodation was provided at a site adjacent to the licensed premises.
9. Subject to the matters discussed below.
10. See the analysis of *Majeau* infra n 11 in NE Palmer *Bailment* 2nd edn (Sydney: Law Book Co, 1991) 874-875 and the discussion of principle referred to in (1974) 37 Mod L Rev 240, 360, 480..
11. (1973) 1 ALR 1.

Gibbs J decided that the Warehouseman's Lien Act 1938 (Qld), by granting warehousemen a general right of lien, impliedly extinguished any right of lien which may have existed at common law. His Honour further reasoned:

> That Act was repealed by section 24 of the Disposal of Uncollected Goods Act 1967 (Qld). That repeal did not revive the common law right to a warehouseman's lien, assuming that such a right had existed. By section 20(1)(a) of the Acts Interpretation Act 1954 (Qld) it is provided that the repeal by one Act of a former Act shall not, unless the contrary intention appears, inter alia: 'revive anything not in force or existing at the time at which such repeal ... took or takes effect. This provision raises the presumption that the intention of Parliament, in repealing the Act of 1938, was not to revive the common law rules (if any) that were displaced by the repealed instrument.[12] There is nothing in the Act of 1967 to rebut that presumption. The result is that a warehouseman in Queensland had not at any material time any common law right to a lien such as is claimed in the present case.[13]

For similar reasons Turner[14] has concluded that the strict liability of common carriers under common law no longer applies in Queensland. He contrasts the position of innkeepers in Queensland where the Act which was repealed did not extinguish but merely limited the application of the common law rules.[15]

APPLYING MAJEAU IN WESTERN AUSTRALIA

If the foregoing reasoning is applied to the legislation on innkeepers in Western Australia one is led to a surprising result. For clarity the argument is traced through four steps as follows:

1. Extinguishment of common law

Section 173 of the Liquor Act 1970 (WA) expressly provided that 'a rule of law that imposes a duty or liability on a person, by reason only of his being an innkeeper, no longer applies in the State'. This is even clearer than the *Majeau* case where the statutory rights displaced and thereby impliedly extinguished the common law rights.

2. Repeal of the extinguishing Act

Section 176 of the Liquor Licensing Act 1988 (WA) repealed the Liquor Act 1970 (WA) as in the *Majeau* case.

12. Cf *Marshall v Smith* (1907) 4 CLR 1617, 1635,1645.
13. *Majeau* supra n 11, 3.
14. C Turner 'The Innkeeper's Lien and Liability for Travellers' Goods in Queensland' (1995) 16 Commercial Law 5-6.
15. Id, 7. However Turner's suggestion that innkeepers may contract out of strict liability is contrary to the authorities: see Atherton supra n 5.

3. Presumption that common law not revived

Section 37(1)(a) of the Interpretation Act 1984 (WA) provides that, 'Where a written law repeals an enactment, the repeal does not, unless the contrary intention appears — (a) revive anything not in force or existing at the time the repeal takes effect.'

These terms are almost identical to section 20(1)(a) of the Queensland Act considered in the *Majeau* case. Thus the presumption is that the legislature did not intend to revive the common law on innkeepers' duties and liabilities.

4. Can the presumption be rebutted?

The Liquor Licensing Act 1988 (WA) does not make any express attempt to revive the common law. Does the required contrary intention appear by implication? The preamble and the objects section[16] are not helpful and there is no reference in the definitions or other sections to the common law terms 'inn', 'innkeeper' and 'guest'.[17] The meaning of section 176 could hardly be clearer. It does not mention the common law but says simply: 'The Liquor Act 1970 is repealed'. The author could find no reports on the point and the second reading speech does not mention the subject.

However if the common law is not revived what does section 107 do? It follows the general model of innkeepers legislation used around the world to amend and complement the common law — that is, it sets a limit beyond which an innkeeper will not be liable unless: (a) the loss or damage is due to a wilful act, neglect or default of the innkeeper or employee; (b) the property was entrusted to the innkeeper for safekeeping; or (c) statutory notice of the limit to liability was not displayed.

Without the special strict liability of an innkeeper at common law this section would not appear to make much sense. Above the limit, liability under (a) would arise under the general contract or tort law, and liability[18] under (b) would arise under the general law of bailment. Hence there would appear to be no need for these provisions. If (a) and (b) do not apply then

16. S 5.
17. In fact, the definitions and s 107 use the term 'lodger' to describe the customer which is in sharp contrast to the common law. At common law the innkeeper's strict liability applies only to 'guests' (ie, transients) and not to 'lodgers' (ie, boarders or others on an extended stay): *Turner v Queensland Motels Pty Ltd* [1968] Qd R 189; *Theeman v Forte Properties Pty Ltd* [1973] 1 NSWLR 418; *Oakford Executive Apartments v Van der Top* (unreported) Vic Sup Ct 23 Jan 1992 no 10458 O'Brien J; cf *Daniel v Hotel Pacific* [1953] VLR 437.
18. Including liability for breach of the warranty of services implied by s 74 of the Trade Practices Act 1974 (Cth) and s 40 of the Fair Trading Act 1987 (WA). See TC Atherton 'Changes to TPA Increase Liability' (1992) Tourism & Travel Rev 7.

there would appear to be no other basis under the general law for liability either up to the limit of $200 or above the limit under (c) for failure to display the statutory notice.[19] Such liability would have to be created by implication from the section itself or by the implied revival of the common law. Matters of such importance deserve clear and explicit language.

The modern approach to interpretation of a statute such as this has been neatly summarised as follows:

> The function of the court ... is to give effect to the intention of the legislature. This it may do without difficulty where it appears from the terms of the legislation that the legislature directed its attention to the question and expressed an intention upon the effect to be given to the particular provision. But in most cases ... such an intention is not expressed and the court's task is, by the application of the appropriate principles, to divine or impute that intention.[20]

A legislative intent to make these implications cannot be discerned from the plain meaning of this Act. Without such implication it does not appear possible to avoid the absurd construction above. There appears to be nothing in the extraneous material to assist in identifying what mischief or defect the legislature perceived which would justify the implication and, 'even if the ... material does reveal the legislative purpose there will continue to be boundaries beyond which the words used will not stretch even where it is known that they were intended to do so'.[21]

Section 18 of the Interpretation Act 1984 (WA)[22] requires a court to prefer a construction which is consistent with the purpose of the Act to one that is not. However it is doubtful whether this would itself justify revival of the common law by implication especially in the absence of a clear indication of the legislative purpose and against the presumption to the contrary under section 37(1)(a).

THE CURRENT LAW

The result is that it is doubtful whether the common law rules of innkeepers liability have been revived in Western Australia. As far as liability for guests' property is concerned the matter would now appear to depend only upon fault and the general rules of contract,[23] tort and bailment.

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19. The historical purpose of the notice is to alert travellers to the limitation on strict liability at common law.
20. *Hatton v Beaumont* [1977] 2 NSWLR 211, 225.
21. *Federal Commissioner of Taxation v Walsh* (1983) 69 FLR 240, Fitzgerald J 264.
22. This provision is similar to Commonwealth legislation and provisions in other states. *Webb v Harris* (1983) 47 ACTR 17, Blackburn CJ 23 stated that they are merely a legislative expression of the purpose or mischief rule.
23. Together with the warranties implied by s 74 of the Trade Practices Act 1974 (Cth) and s 40 of the Fair Trading Act 1987 (WA).

1. Other duties of innkeepers

Further, if this view is correct, there are also other important responsibilities of an innkeeper at common law which would not apply in Western Australia. The main duties of an innkeeper at common law comprise:

(i) Duty to receive and entertain guests

This duty is summarised by *Halsbury* as follows:

> An innkeeper ... is bound by the common law or custom of the realm to receive and lodge in his inn all comers who are travellers and, regardless of race or sex, to entertain them at reasonable prices, without any special or previous contract, unless he has some reasonable ground for refusal.[24]

This has been confirmed in Australia in *Lambert v Monaghan*,[25] *Gemmell v Goldsworthy*[26] and most recently by Lee J in *Irving v Heferen*.[27]

Section 108 of the Liquor Licensing Act 1988 (WA) does impose statutory duties upon licensees to receive customers and supply them with liquor during trading hours subject to various grounds of refusal similar to those at common law. However the definition of 'licensee' would exclude innkeepers who do not hold a liquor licence.

(ii) Duty to take reasonable care for the safety of guests

Again *Halsbury* provides a useful summary of the duty:

> It ...[is the duty of an innkeeper] to take reasonable care of the persons of his guests so that they are not injured by anything happening to them through his negligence while they are his guests. No absolute liability to insure the personal safety of his guests is, however, imposed on him such as exists with respect to the safety of their goods.... There is, however, an implied warranty by the innkeeper that, for the purposes of personal use by the guest, the inn premises are as safe as reasonable care and skill on the part of anyone can make them.[28]

This duty has also been confirmed by the Australian courts in dicta in many cases such as *Nott v Maclurcan*[29] and *Irving v Heferen*.[30] However the author could not find an Australian case directly in point. Perhaps this is because the scope of liability as innkeeper appears to be little different

24. *Halsbury's Laws of England* 4th edn (London: Butterworths, 1991) vol 24, ¶ 1113 (footnotes omitted).
25. (1917) 19 WAR 99, 101.
26. [1942] SASR 55.
27. [1995] I Qd R 255, 262.
28. *Halsbury* supra n 24, ¶ 1123 (footnotes omitted).
29. (1903) 20 WN (NSW) 135.
30. Supra n 27, 261.

from liability under the general law of tort, particularly negligence and occupiers liability.[31] Where there is a contractual relationship between hotel and guest the reasonable care and fitness term would also be implied, probably under the general law but in any event with the assistance of section 74 of the Trade Practices Act 1974 (Cth) and section 40 of the Fair Trading Act 1987 (WA) which imply such a warranty in contracts for services such as those supplied by an innkeeper.[32]

(iii) Duty to receive, stable and feed a guest's horse and to receive a carriage

The horse and buggy days have long passed and the common law has adapted the principle to incorporate a motor vehicle.[33] Nevertheless the obligation to look after a guest's horse still remains in jurisdictions where the common law rule has not been amended.[34] So far as it relates to horses this is one innkeeper's duty which few will miss in Western Australia. However a motor vehicle often forms a very important part of the guest's property for which an innkeeper is liable and over which an innkeeper enjoys a lien.[35]

2. Rights of innkeepers

The rights of innkeepers at common law would appear to continue because section 173 of the Liquor Act 1970 extinguishes only the 'duty or liability' of an innkeeper. The most important right of an innkeeper at common law is the possessory lien over all property brought into the inn by guests. There is an important relationship between the rights and duties of

31. In WA occupiers liability in respect of premises is prescribed by the Occupiers Liability Act 1985 (WA) while liability in respect of activities at the premises is preserved at common law according to the general law of negligence: *Ogwo v Taylor* [1988] AC 431; *Revill v Newbery* [1996] 2 WLR 239: see P Handford 'Occupiers' Liability Reform in WA — and Elsewhere' (1987) 17 UWAL Rev 182. In states without such legislation occupiers liability has now been completely overtaken by the general law of negligence with the relationship between the parties establishing no more that the existence of an ordinary duty of care: *Australian Safeway Stores v Zaluzna* (1987) 69 ALR 615 where the High Court approved this formulation in *Hackshaw v Shaw* (1984) 155 CLR 614, Deane J 662-663. Arguably this is also happening to innkeepers liability for the personal safety of guests, ie, that the innkeeper/guest relationship does no more than establish the ordinary duty of care: cf *Chordas v Bryant (Wellington)* (1988) 20 FCR 91; *Wormald v Robertson & Ors* (1992) Aust Torts Reports 81-180.
32. See Atherton supra n 18.
33. *Williams v Linnitt* [1951] 1 KB 565.
34. *Irving v Heferen* supra n 27, Lee J 262: 'In addition to the obligation to receive a traveller, an innkeeper is bound to receive, stable and feed a traveller's horse, receive his carriage [now his car], if facilities are available': *Williams v Linnitt* ibid.
35. In jurisdictions where motor vehicles have not been excluded for these rules.

innkeepers. Lee J in *Irving v Heferen*[36] recently described the relationship in these terms:

> In view of this strict obligation, a reciprocal right is conferred on the innkeeper. His right to a lien at common law arises as a compensation for the strict obligations imposed upon him by receiving travellers at his inn as well as their goods.[37]

If, as it appears, an innkeeper's right to a lien over his guest's property continues even though the innkeeper's duties have been extinguished, then the balance between the rights and duties of innkeepers which other jurisdictions regard as being of fundamental importance has been abandoned in Western Australia.

THE NEED FOR A TOURIST ACCOMMODATION ACT

The rules governing the relationship between a hotel and its guests should be clear, fair and simple. No less is required for an industry which by its nature must deal on a daily basis with guests and travellers in large numbers from interstate and around the world. Western Australia's growing tourism industry is too important to wait for a test case to determine what is the current state of the law and the matter ought to be clarified by legislation. A liquor Act is not the appropriate place for statutory modifications of these rules as liquor is incidental to accommodation rather than the reverse and many accommodation establishments are not licensed.[38]

To meet contemporary needs there are various matters which ought to be addressed in a new Tourist Accommodation Act. Ideally these provisions should be uniform across Australia and should also meet international standards. Europe has had a uniform approach to innkeepers laws since 1967.[39] UNIDROIT has proposed a draft convention on the hotelkeeper's contract and the matter has been debated internationally since the 1930s.[40] The General Agreement on Trade in Services (GATS) 1994 now requires a concerted effort to achieve transparency. It is an opportune time for Western Australia to join in these efforts. The Centre for Tourism Law and Policy at Bond University has a research project under way on these matters.

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36. Supra n 27, 263.
37. *Gordon v Silber* (1890) 25 QBD 491; *Robins & Co v Gray* [1895] 2 QB 501, Lord Esher 504; *Hanson v Barwise* [1930] St R Qd 285, Douglas J 290.
38. The supply of alcohol is neither a necessary nor sufficient condition for premises to qualify as an inn at common law: *Cunningham v Philp* (1895) 12 TLR 352.
39. *Convention on the Liability of Hotel Owners for the Property of Their Guests* Treaty Series No 9 1967 (Cmnd 3205).
40. It is interesting to compare the progress made in reaching international consensus on the liability of the transport components of tourism.