

# Court finds club negligent in failing to prevent shooting - clears security provider

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by Daniel Best, Partner and Allison Stead, Solicitor

Justice Brereton of the Supreme Court of New South Wales has recently handed down a decision finding a nightclub operator negligent in failing to provide adequate security at its venue where a patron was shot, causing traumatic brain damage, in 2002.<sup>1</sup> Although a claim was also made against the security provider, Brereton J found no negligence in the manner in which it provided the services.

The plaintiff attended Skelseys nightclub late on 15 December 2002 with a group of friends. The plaintiff was shot on the dance floor of the venue some time around 4:00am. As a result, the plaintiff suffered significant injuries with damages assessed by Brereton J at over \$6,600,000. The plaintiff alleged that the venue had failed to provide sufficient security personnel and to ensure that the security guard attended to his duties.

## Duty of care

The owners of the venue employed one security guard and had obtained the services of AWS Security Services Pty Ltd (AWS) to supply another guard. The plaintiff alleged that AWS was negligent as its security guard was not at his post on the dance floor when the shooting occurred and for failing to provide more than one security guard. The plaintiff also alleged that both the venue and AWS were negligent in failing to detect the handgun when the assailant entered the venue.

In considering the liability of the venue, the court highlighted that its duty depended upon proof that it *"knew or ought to have known facts requiring intervention to protect patrons"*. The court was bound to consider whether the venue failed to take reasonable steps to safeguard patrons from the foreseeable risk of harm (as opposed to a duty to ensure patrons' safety). This duty was qualified by a requirement that the venue had either actual or constructive knowledge of the aggressive character of the assailant while intoxicated. Brereton J acknowledged that this duty was able to be delegated to a competent security firm to undertake these steps.

Therefore, the terms upon which AWS was engaged by the venue to provide security services was crucial in determining the liability, if any, of AWS for this incident. Upon consideration of the engagement of a security guard from AWS by the venue, Brereton J determined that the venue had not delegated its duty. This conclusion was reached based on evidence that the venue was in control of the premises and both security guards worked under its direction. The court found that the venue, and not AWS, was responsible for the security plan and the number of security guards (with AWS initially having suggested that four or five be used rather than two). Crucially, the court found that the usual system put in place by the venue (where each guard patrolled an area but left that area if it looked as though the other guard needed assistance elsewhere) was unsatisfactory.

The court held that, as the owners of the venue had not delegated their duty of care, AWS was only responsible for the competent performance of its security guard of those duties dictated by the venue. In considering the performance of the security guard provided by AWS, Brereton J considered the crucial factual issues related to *"how long the incident took and whether there was sufficient time from the first signs of trouble for a security guard on station to intervene and suppress the trouble before it reached the stage of a brawl and a shooting"*. This involved consideration of the whereabouts of the security guard (who was responsible for security around the dance floor) at the time the shooting occurred.

## Liability of the venue

In the months prior to this incident, log books for the venue indicate incidents of aggression, usually between racial groups, occurred approximately twice per month. Brereton J concluded that it was reasonably foreseeable that, unless proper security was provided, patrons may be injured. Therefore, the venue was aware of the need for security and owed a duty to develop satisfactory procedures to deal with potential breaches.

In alleging that the venue had delegated its duty of security to AWS, it appears the venue accepted a minimum of three guards was appropriate, even though it only ever engaged two. Brereton J found that, by providing only two security guards, the venue failed to exercise reasonable care for the safety of its patrons as a result of its failure to provide a level of security that ensured permanent supervision of the dance floor, rather than permitting the guard, when appropriate, to come to the aid of the other guard.

## In brief

- § The New South Wales Supreme Court finds venue liable for gunshot wound to patron.
- § Security firm not liable as duties under the contract were fulfilled.

by Daniel Best, Partner

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## Liability of AWS

Witness testimony and police reports supported a view that thirty seconds passed from when the fight broke out to when the gun went off. Brereton J agreed with witnesses that this was ample time for a security guard positioned in the dance floor area to intervene before the shot was fired. However, the court found that it was the owners of the venue who had formulated the system by which a guard would leave their post to assist the other guard and that the AWS guard satisfactorily fulfilled his duty to do so. Therefore, Brereton J concluded that the plaintiff suffered personal injuries as a result of an unsatisfactory system of security as opposed to the failure of the AWS guard to carry out his duties.

Brereton J preferred the evidence of AWS over the venue that it was not asked to provide metal detectors and that the venue dictated that only one security guard, in addition to its employee, was to be supplied by AWS. In the circumstances, no liability was found against AWS.

## Conclusion

In a somewhat surprising decision, Brereton J determined that the plaintiffs' failure to exercise reasonable care for his own safety materially contributed to his injuries to the extent that 50% contributory negligence was found against him. Despite the fact that the extent of the plaintiff's injuries could not have been foreseen in light of the hand gun carried by his assailant, the court determined that the plaintiff failed to take ongoing opportunities to avoid danger to himself. This aspect of the decision, as well as the findings of fact in relation to the part the security guard could have played in preventing the plaintiff's injuries, may be the subject of an appeal in the future.

This decision highlights the need for owners of venues where security is required to ensure that full consideration has been given to the system by which its duty to patrons will be discharged. The principals of delegation of duties operated in this case to conclude that, although contracted to provide security services, the security provider had not taken conduct of the means by which security would be provided. Therefore, the party who decides how many guards are required, where the guards will be stationed and the method by which they work together to resolve breaches of security will bear liability for incidents that occur at the venue. It is crucial for the boundaries of these duties to be clearly delineated when agreements for services are entered into so that the party bearing such liability is fully alert to its responsibilities.

<sup>1</sup> *Quintano v B W Rose Pty Ltd & Anor* [2009] NSWSC 446.

## Staff news...

Carter Newell Lawyers congratulates **Glenn Biggs** on his elevation to partner within the Insurance team.

Glenn has extensive experience in insurance litigation with a special interest in aviation, transport and personal and products liability.

Glenn is actively involved in the aviation insurance industry and is currently a member of the Aviation Law Association of Australia & New Zealand.



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