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# Hoteliers avoid liability on grounds of causation

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Hoteliers and operators of licensed premises are traditionally held at a high standard of care when it comes to the level of security required to ensure the safety of their patrons and employees. In two recent cases, hoteliers were able to successfully defend claims brought by an injured patron and security guard on the basis that the implementation of further precautions would not have prevented their injuries. This newsletter outlines those decisions.

## *Tidden v Gregg* [2015] NSWCA 164

### Facts

Mr Ross Tilden was injured at the Ettalong Bowling Club in February 2010 when he was punched in the face by another patron, Mr Rolland Gregg. Mr Tilden and Mr Gregg were both members of the club and had a poor relationship since 2001 and Mr Gregg had made verbal threats to Mr Tilden on numerous occasions.

On the night of the incident, the bowling club arranged four staff members to monitor the behaviour of its patrons - a security officer, the duty manager and two general duties staff responsible for collecting glasses and ashtrays. It was the bowling club's policy for staff members to report any intoxicated patrons or aggressive behaviour displayed by patrons to the duty manager and/or security officer.

On the evening of the incident, Mr Tilden and Mr Gregg were sitting at tables near each other in the outside smoking area. Mr Gregg started making sporadic abusive comments toward Mr Tilden over a period of 15 to 20 minutes. At one point Mr Gregg approached Mr Tilden's table and, upon Mr Tilden making a verbal retort, threw a punch at Mr Tilden.

Mr Tilden brought proceedings against Mr Gregg and the bowling club. He alleged the club had acted negligently by failing to have the duty manager and/or security officer keep an eye on Mr Gregg and to increase the frequency of their inspections of the outside smoking area. Mr Tilden also argued that

 


a CCTV camera should have been installed in the subject area which would have deterred Mr Gregg from harming Mr Tilden.

Mr Tilden's friend, who was sitting with Mr Tilden at the time of the incident and who was also a committee member and director of the club, gave evidence that there were two prior occasions where the bowling club's committee was notified of Mr Gregg's '*quarrelsome and argumentative*' nature, though there was no suggestion that he had a potential to be aggressive or violent, or that disciplinary action needed to be taken against him.

## Trial decision

At first instance, North DCJ held reasonable care did not require the bowling club to carry out the steps alleged by Mr Tilden. He further stated that even if those precautions were taken by Mr Tilden, given the suddenness of the assault, the club's staff would not have had sufficient time to react to the assault as to prevent Mr Tilden's injury. The claim against the bowling club therefore failed.

## Appeal decision

The Court of Appeal agreed that the circumstances did not warrant a reasonable person in the bowling club's position to keep a specific look out for Mr Gregg, nor was it necessary for the bowling club to install a CCTV camera as a deterrent.

As to the issue of causation, weight was given to the fact that both Mr Tilden and his friend believed the altercation would remain verbal only and did not anticipate Mr Gregg's attack. The court held that even if the club's staff carried out more frequent inspections of the smoking area, it was unlikely they would have concluded it was necessary to eject Mr Gregg and intervene. Similarly, the Court was not satisfied that the presence of a CCTV camera would, more likely than not, deter Mr Gregg from attacking Mr Tilden. The appeal was dismissed.

# *Baillie v Jackson* [2015] QDC 31

## Facts

In September 2007, Mr Baillie was working as a security contractor at Victoria Point Sharks Sporting Club when he was assaulted by a guest of a wedding reception at the club. The assailant was leaving the wedding reception with another guest when he approached Mr Baillie who was standing at the front counter, shook his hand and then suddenly punched him in the face.

Mr Baillie commenced proceedings against the hotel and his employer the security company. The assailant was also criminally prosecuted and sentenced for the assault. At the criminal trial he admitted to punching the plaintiff, but stated that he had no recollection of doing so as he was adversely affected by alcohol.

Mr Baillie said he did not recall seeing the assailant earlier in the night or there being any signs of trouble before the attack. He alleged that when the assailant approached him he was extremely intoxicated and was being carried by his companion. This was contradicted by the CCTV footage, which showed the assailant leaving the wedding reception normally.

Mr Baillie alleged there were around 200 patrons that evening which warranted the club engaging a second security guard. He said he was caught completely off guard and, had there been a second security guard present, one of them could have stayed in the function room the entire time which would have increased the likelihood of the assailant's growing intoxication being detected prior to the attack, resulting in him being more alert when the assailant approached him.

The club's employees gave evidence that it was a very quiet night even with the wedding guests and the number of patrons overall was closer to 100. None of the club's staff members noticed anyone particularly intoxicated or behaving in a disorderly manner. The bar attendant gave evidence that the assailant appeared to be very happy throughout the night and he found no reason to cut him off from alcoholic drinks.

## Decision

The court had serious concerns regarding Mr Baillie's credibility and accepted the club's evidence over his with respect to the number of patrons that were present at the wedding. The court held it was reasonable for the venue to engage only one security guard that evening as they were not expecting a particularly large number of patrons.

The court found that, up until the point when the assailant was punched, there was no indication that he might be aggressive to Mr Baillie or anyone else. The court was not satisfied that, had Mr Baillie been on notice of the assailant's intoxication, it would have allowed him to defend the attack more effectively as to avoid the assault. The claim therefore failed.

## Conclusion

Plaintiffs often seek to assign blame to a defendant hotelier or security company by pointing to ways in which the hotelier could have '*tightened up*' its security system. While it is incumbent that operators of licensed premises have in place a system to monitor the alcohol consumption and behaviour of its patrons, comfort can be taken in the Courts' willingness to recognise that some assaults are so spontaneous and unpredictable, no further action of a reasonable nature could be taken to prevent their occurrence.

These decisions affirm that it is not sufficient for a plaintiff to simply argue that taking certain preventative steps '*might*' have averted the incident. The onus is on the plaintiff to satisfy the court that taking those steps would, more like than not, have produced a materially different outcome, and that the taking of those steps in the first place was reasonable.

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# Court of Appeal decision takes the wind out of Tall Ships appeal


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## *Packer v Tall Ships Sailing Cruises Aus P/L & Anor* [2015] QCA 108

## Introduction

In September 2014, Carter Newell's newsletter '*Cruise ship not liable for assault on passenger*' discussed a personal injuries claim heard in the Queensland Supreme Court. The case involved an appellant who had suffered serious injuries when he was assaulted by an unidentified assailant whilst boarding a ship following a work Christmas party on South Stradbroke Island. At first instance, the appellant claimed damages for the assault from the operator of the ship, Tall Ships Sailing Cruises Australia Pty Ltd (**Tall Ships**), as well as from his employer, Commercial Waterproofing Services Pty Ltd (**employer**). The appellant's claim was dismissed against both respondents. He appealed the decision of the trial judge against Tall Ships only.

## Background

In December 2006 the employer held its annual Christmas party for its employees and their families onboard the cruise ship which was operated by Tall Ships. The ship transported passengers to South Stradbroke Island where Tall Ships operated a venue including a bar and restaurant. After a few hours on the island the passengers were then transported back to the mainland. As the appellant boarded the ship he noticed a group of people swearing loudly and carrying on in a drunken manner and asked that they keep their language down. A few minutes later the appellant saw the same group of people at the bar and again approached them to ask that they stop swearing. He was then punched in the head from behind. The trial judge accepted the assault was sudden and unprovoked.

 

On appeal, the appellant submitted that the trial judge made a number of factual errors, namely, there was evidence that Tall Ships knew or ought to have known that the group from which the assailant had come had been acting loudly and boisterously while on the island, were drunk within an hour of arrival on the island, continued drinking over several hours and were swearing and confrontational during boarding. The appellant submitted that this was sufficient to place an obligation on Tall Ships' employees to have taken steps to prevent against the risk of violence occurring such as stopping the service of alcohol to the group or prohibiting the assailant from reboarding the ship.

## Decision of the Court of Appeal

The Court of Appeal concluded there was no factual or legal errors made by the trial judge and dismissed the appeal with an order that the appellant pay Tall Ships' costs.

The court reaffirmed the decision of the trial judge that Tall Ships owed passengers a duty to take reasonable care to avoid a foreseeable risk of injury and in a situation where alcohol is served, there was a risk that passengers who had too much to drink may become violent, quarrelsome or disorderly. However, the court thought the trial judge was warranted in taking into consideration all the surrounding circumstances when considering the foreseeability of the risk, not just the presence of alcohol. Whether there was a risk that the group from the bar would engage in violent, quarrelsome or disorderly conduct which required Tall Ships to take reasonable precautions was a question of fact.

On the evidence available, the court thought it was open for the trial judge to find that it was not reasonably foreseeable in the circumstances that a member of the group would engage in such conduct. Even though the group were drinking alcohol, swearing and carrying on, there was no evidence that their behavior was directed at any other patrons and there was no commotion or interchange which suggested a risk of violent behavior towards other patrons. Furthermore, the court noted that the use of offensive language by the group and noisy or boisterous behavior was not sufficient so as to constitute violent, quarrelsome or disorderly conduct. As such, there was no obligation on behalf of Tall Ships to take steps to exclude the group from the ship, withdraw the service of alcohol to the group or otherwise monitor their behavior. The appellant therefore failed to satisfy the court that Tall Ships had breached its duty of care and the appeal failed.

## Comment

This decision confirms that, for a plaintiff to succeed in such a case, they must show that an occupier was aware or ought to have been aware that a patron was acting violently or disorderly. Although there is always a risk of an argument or altercation between patrons and this risk increases when alcohol is served, it does not necessarily mean that a situation will erupt into physical violence as arguments and swearing are quite commonplace in bars. Whether an occupier of a licenced premises should take steps to prevent potential violence will depend on the particular facts of each case and courts are reluctant to find occupiers liable for sudden, unprovoked and unpredictable assaults committed by one patron on another. The decision of the Court of Appeal in this case merely affirms the courts' previous line of reasoning on this point.

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