

# HIGH COURT OF AUSTRALIA

FRENCH CJ,  
GUMMOW, HAYNE, HEYDON AND CRENNAN JJ

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## Matter No S191/2009

ADEELS PALACE PTY LTD

APPELLANT

AND

ANTHONY MOUBARAK

RESPONDENT

## Matter No S192/2009

ADEELS PALACE PTY LTD

APPELLANT

AND

ANTOIN FAYEZ BOU NAJEM

RESPONDENT

*Adeels Palace Pty Ltd v Moubarak*  
*Adeels Palace Pty Ltd v Bou Najem*  
[2009] HCA 48  
10 November 2009  
S191/2009 & S192/2009

## ORDER

### Matter No S191/2009

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales entered on 24 March 2009, and in lieu thereof order that:*
  - (a) *the appeal to that Court be allowed with costs;*
  - (b) *the orders of the District Court of New South Wales made on 25 January 2008, as amended by order 1 of the orders of that Court made on 14 February 2008, be set aside, and in lieu thereof there be judgment for the defendant with costs.*



**Matter No S192/2009**

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales entered on 24 March 2009, and in lieu thereof order that:*
  - (a) *the appeal to that Court be allowed with costs;*
  - (b) *the orders of the District Court of New South Wales made on 25 January 2008 be set aside, and in lieu thereof there be judgment for the defendant with costs.*

On appeal from the Supreme Court of New South Wales

**Representation**

J E Sexton SC with M J Gollan for the appellant (instructed by Lee & Lyons Lawyers)

B M Toomey QC with D R Campbell SC and D C Morgan for the respondent in S191/2009 (instructed by Leitch Hasson Dent Solicitors)

S G Campbell SC with J W Catsanos for the respondent in S192/2009 (instructed by Sanford Legal)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **Adeels Palace Pty Ltd v Moubarak** **Adeels Palace Pty Ltd v Bou Najem**

Torts – Negligence – Duty of care – Where gunman shot two men at New Year's Eve function – Where shootings occurred on licensed premises – Whether defendant owed duty of care to prevent injury from conduct of other patrons – Relevance of statutory requirements under *Liquor Act* 1982 (NSW).

Torts – Negligence – Breach of duty – Where no licensed security personnel on premises – Whether licensed security personnel ought to have been provided – Relevance of size and type of function – Relevance of past incidents at premises.

Torts – Negligence – Causation – Whether absence of licensed security personnel necessary condition for shootings taking place – Whether "but for" test of causation satisfied – Relevance of nature of damage sustained – Whether an exceptional case.

Words and phrases – "necessary condition of the occurrence of the harm", "factual causation", "scope of liability", "an exceptional case".

*Civil Liability Act* 2002 (NSW), ss 5B, 5C, 5D, 5E.  
*Liquor Act* 1982 (NSW), ss 2A, 103, 125.



1 FRENCH CJ, GUMMOW, HAYNE, HEYDON AND CRENNAN JJ. The appellant in each appeal (Adeels Palace Pty Ltd – "Adeels Palace") carried on a reception and restaurant business at premises in Punchbowl, New South Wales. The premises were licensed under the *Liquor Act* 1982 (NSW) ("the Liquor Act"<sup>1</sup>). An "On-Licence (Restaurant)" licence permitted the service of alcohol on the premises on any day, between midday and 4.00 am on the day following. A condition of the licence limited the seating capacity of the premises to restaurant seating for 295 persons. The local council authorised the use of the premises as a place of public entertainment between midday and 4.00 am on the next day but limited the capacity of the premises to 283 persons. At the times relevant to these matters, a director of Adeels Palace was the licensee.

2 On 31 December 2002, Adeels Palace was open for business and many came to celebrate the New Year. The restaurant was full. Exactly how many were there was never proved. Admission to the premises, collected at the door, cost \$60 per person which included food but not alcoholic drinks. There was a band; there were singers and entertainers; patrons could dance. Seating was at long tables. The bar was open. Waiters brought drinks to the tables.

3 At about 2.30 am on 1 January 2003, there was a dispute between some women dancing on the dance floor. One accused another of brushing her hand with a lighted cigarette. Words were exchanged. Relatives and friends intervened. Fighting erupted and onlookers joined in. Punches were thrown. Chairs, plates and bottles were thrown. One witness was later to agree that the disruption "got bigger and more ferocious very quickly". As he said, there were "[a] lot of egos out there".

4 One man involved in the fight was hit in the face, drawing blood. He left the restaurant and returned soon after with a gun. Someone called out "Gun, gun, run away" and Mr Bou Najem (the respondent in the second appeal in this Court) did just that. He ran into the restaurant's kitchen but slipped over. The gunman came in. As Mr Bou Najem tried to get up, the gunman pointed the gun at him. Mr Bou Najem pleaded with him not to shoot, but shoot he did, wounding Mr Bou Najem in the leg.

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1 The *Liquor Act* 1982 (NSW) has since been repealed and replaced by the *Liquor Act* 2007 (NSW). In relevant respects the 2007 Act contains generally similar provisions to those of the 1982 Act that are mentioned later in these reasons.

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5       The gunman left the kitchen and went back into the restaurant itself. There he found the man who had struck him in the face – Mr Moubarak (the respondent in the first appeal). The gunman shot Mr Moubarak in the stomach and then left the premises.

6       The two men who were shot, Mr Bou Najem and Mr Moubarak, each brought proceedings in the District Court of New South Wales against Adeels Palace claiming damages for personal injury. Each alleged that they had suffered injury as a result of Adeels Palace's negligence in not providing any or any sufficient security during the function on New Year's Eve.

7       In the District Court, the two actions were heard together, and each plaintiff obtained judgment for damages. Adeels Palace appealed to the Court of Appeal of New South Wales and that Court (Beazley, Giles and Campbell JJA) dismissed<sup>2</sup> each appeal. By special leave, Adeels Palace appeals to this Court. Each appeal should be allowed. Consequential orders should be made entering judgment in each proceeding for Adeels Palace.

The issues

8       There was no dispute in these matters that both Mr Bou Najem and Mr Moubarak had suffered serious personal injury. The live issues in the case of each, at trial, on appeal to the Court of Appeal, and in this Court, were, however, whether Adeels Palace owed each a duty of care to prevent harm of the kind suffered, whether that duty had been breached, and whether the breach was a cause of the damage suffered. In Mr Moubarak's case, quantum of damages was a live issue at trial but not on appeal.

9       In this Court, Adeels Palace submitted that it owed no duty to those attending its premises to prevent criminal conduct by third parties. It submitted that so much is established by this Court's decision in *Modbury Triangle Shopping Centre Pty Ltd v Anzil*<sup>3</sup>. It submitted further that, if it did owe some relevant duty of care to its patrons, it was not shown that the reasonable response to the risk of violent behaviour at the function would have been to employ licensed security personnel. Finally, it submitted that it was not shown that the want of licensed security personnel was a cause of the shooting of either plaintiff.

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2   *Adeels Palace Pty Ltd v Moubarak* (2009) Aust Torts Reports ¶81-997.

3   (2000) 205 CLR 254; [2000] HCA 61.



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10 Each plaintiff raised further issues in this Court, by notice of contention. Each submitted that he had entered the restaurant under a contract, and that accordingly, by operation of s 74 of the *Trade Practices Act* 1974 (Cth) ("the Trade Practices Act"), Adeels Palace impliedly warranted that the services it provided would be provided with due care and skill (including, in this case, by provision of suitable security services). As these reasons will later demonstrate, it will not be necessary to consider this contention in any detail. Mr Moubarak further sought to contend (by an amendment of his notice of contention first proposed at the hearing of the appeal to this Court) that causation was established in this case by demonstrating no more than that the failure of Adeels Palace to engage competent security staff "resulted in a material increase in an existing risk of injury to [him] from violent acts of other patrons and so materially contributed to the injuries suffered by him".

11 In considering each of the issues of duty, breach and causation, it is of the first importance to identify the proper starting point for the relevant inquiry. In this case there are two statutes which require particular consideration: the *Civil Liability Act* 2002 (NSW) ("the Civil Liability Act") and the Liquor Act. If attention is not directed first to the Civil Liability Act, and then to the Liquor Act, there is serious risk that the inquiries about duty, breach and causation will miscarry.

#### The Civil Liability Act

12 The Civil Liability Act is taken to have commenced on 20 March 2002<sup>4</sup>. At the relevant times, s 5A of the Act provided that Pt 1A<sup>5</sup> "applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise". Part 1A of the Act included Div 2, entitled "Duty of care" (ss 5B and 5C), and Div 3, entitled "Causation" (ss 5D and 5E).

13 Although ss 5B and 5C appear beneath the heading "Duty of care", that heading is apt to mislead. The sections provided:

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4 s 2.

5 As inserted in the *Civil Liability Act* 2002 (NSW) by the *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW).

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## **"5B General principles**

- (1) A person is not negligent in failing to take precautions against a risk of harm unless:
  - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
  - (b) the risk was not insignificant, and
  - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
- (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):
  - (a) the probability that the harm would occur if care were not taken,
  - (b) the likely seriousness of the harm,
  - (c) the burden of taking precautions to avoid the risk of harm,
  - (d) the social utility of the activity that creates the risk of harm.

## **5C Other principles**

In proceedings relating to liability for negligence:

- (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and
- (b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and
- (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and

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does not of itself constitute an admission of liability in connection with the risk."

Both provisions are evidently directed to questions of breach of duty.

14 By contrast, Div 3 (ss 5D and 5E) is directed to the subject-matter described in the heading to the division – Causation. Those sections provided:

**"5D General principles**

- (1) A determination that negligence caused particular harm comprises the following elements:
  - (a) that the negligence was a necessary condition of the occurrence of the harm (*factual causation*), and
  - (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (*scope of liability*).
- (2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.
- (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:
  - (a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and
  - (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.
- (4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether

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or not and why responsibility for the harm should be imposed on the negligent party.

## **5E Onus of proof**

In determining liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation."

15           These provisions of the Civil Liability Act are central to the questions of breach of duty and causation.

### The Liquor Act

16           Consideration of provisions of the Liquor Act is central to the question of duty of care. Why that is so is revealed by the nature of the claims that were made.

17           Each plaintiff sued Adeels Palace for damages for injury he had suffered on the premises of Adeels Palace. It was not disputed, in either matter, that "[a]t all material times [Adeels Palace] operated [the] licensed premises known as Adeels Palace"<sup>6</sup>. Nor was there any dispute that on 31 December 2002 the business conducted by Adeels Palace was controlled by two men: Mr Simon Bazouni and Mr Fouad Kouzi. Mr Bazouni was licensee.

18           The central complaint each plaintiff made was that Adeels Palace had not regulated who came onto its premises, who stayed on those premises, and how those who were on the premises conducted themselves towards other patrons. Adeels Palace, as occupier of the premises, could control who came into and who stayed on the premises. But in conducting licensed premises (of which one of its directors was licensee) Adeels Palace was much affected by the duties which the Liquor Act cast on the licensee.

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6   Liquor licensing and corporate records tendered in evidence at trial appear to suggest that a company called Adeel's Restaurant Pty Ltd was the owner of the business at the relevant time but in the light of the way in which the trial was conducted this suggestion need not be examined further. Those records, and a photograph, tendered in evidence at trial, of the sign advertising the business, suggest that the appellant's business was conducted under the name of "Adeel's Palace". It is convenient, however, to adopt the spelling used in the title of the proceedings in this Court.

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19 Section 125 of the Liquor Act regulated conduct on licensed premises. Section 125(1)(b) obliged a licensee not to permit on his or her licensed premises "any indecent, violent or quarrelsome conduct". Contravention of the provision was an offence. Section 103(1) of the Liquor Act permitted a licensee, or his or her employee, to "refuse to admit to the licensed premises" or to "turn out, or cause to be turned out, of the licensed premises any person ... who is then ... violent, quarrelsome or disorderly"<sup>7</sup> or "whose presence on the licensed premises renders the licensee liable to a penalty"<sup>8</sup> under the Act. Section 103(3A) permitted the use of "such reasonable degree of force as may be necessary ... to turn a person out" of the premises. Section 103(4) obliged a member of the police force, asked by the licensee or an employee to turn out or assist in turning out a person whom the licensee is entitled to turn out, to comply with the request and provided that the member of the police force may, for that purpose, use such reasonable degree of force as may be necessary.

20 It is next important to recognise that the particular provisions made in the Liquor Act for controlling violent, quarrelsome or disorderly conduct on licensed premises take their place in a context set by two considerations. First, sale of liquor is controlled because it is well recognised that misuse and abuse of liquor causes harm, including what the Liquor Act refers to as "violent, quarrelsome or disorderly" conduct. Section 2A of the Liquor Act provided:

**"Liquor harm minimisation is a primary object of this Act**

A primary object of this Act is liquor harm minimisation, that is, the minimisation of harm associated with misuse and abuse of liquor (such as harm arising from violence and other anti-social behaviour). The court, the Board, the Director, the Commissioner of Police and all other persons having functions under this Act are required to have due regard to the need for liquor harm minimisation when exercising functions under this Act. In particular, due regard is to be had to the need for liquor harm minimisation when considering for the purposes of this Act what is or is not in the public interest."

The second and related point to make is that the duties cast upon those responsible for the service of liquor on licensed premises can be understood as a

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7 s 103(1)(a).

8 s 103(1)(c).

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part of the price that is exacted for the statutory permission granted under the Liquor Act. The permission granted is to do what otherwise the Act forbids<sup>9</sup> – sell liquor – and to do that on premises to which members of the public may resort only in accordance with the conditions on which the licence is granted.

21 In considering whether a common law duty of care should be held to exist in these cases, it is important to recognise that the provisions of the Liquor Act that have been mentioned have close analogies in other States and Territories. Though variously expressed, all States and Territories make provision for a licensee of licensed premises to remove from, or prevent the entry to, licensed premises of violent or quarrelsome persons<sup>10</sup>. All State and Territory liquor legislation forbids the sale of liquor without a licence. All State and Territory liquor legislation provides for the licensing of premises on which liquor may be sold and consumed, and not only regulates the sale and service of liquor in such places, but also (as already noted) directly or indirectly regulates the conduct of persons who are on the premises.

22 It is against this statutory background that the question of duty of care must be considered, not for the purpose of developing the common law by analogy with statute law<sup>11</sup>, but to ensure that the imposition of a common law duty of reasonable care of the kind now in question would not run counter to the statutory requirements imposed on licensees in all Australian jurisdictions.

#### Duty of care?

23 Contrary to the submissions on behalf of Adeels Palace, this Court's decision in *Modbury* does not dictate the conclusion that Adeels Palace owed no relevant duty of care to the plaintiffs in the present cases. Like the claims now under consideration, the claim that was made in *Modbury* was for damages for personal injury suffered as a result of a criminal assault. The injured plaintiff in

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9 s 122.

10 *Liquor Control Reform Act* 1998 (Vic), s 114(2), and see also s 108(4)(b) of that Act; *Liquor Licensing Act* 1997 (SA), s 124(1); *Liquor Act* 1992 (Q), ss 165, 165A; *Liquor Control Act* 1988 (WA), s 115; *Liquor Licensing Act* 1990 (Tas), ss 62, 79A; *Liquor Act* (NT), ss 105, 121; *Liquor Act* 1975 (ACT), s 143.

11 cf *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 59-63 [18]-[28]; [1999] HCA 67.

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*Modbury* had been attacked in a shopping centre car park at night when the lights in the car park were off. He alleged that the shopping centre proprietor was negligent in not leaving the car park lights on. A majority of the Court<sup>12</sup> held that the shopping centre did not owe the plaintiff a duty to take reasonable care to prevent injury to the plaintiff resulting from the criminal behaviour of third persons on the shopping centre's land. It is important to recognise, however, that the duty alleged in *Modbury* was said to be founded only on the defendant's position as occupier of the land controlling the physical state of the land (there the level of its illumination). What is said in *Modbury* must be understood as responding to those arguments. No complaint was made<sup>13</sup> that the defendant should have controlled, but did not control, access by the assailants to the land it occupied.

24 It is, of course, important to recognise that the decision in *Modbury* forms part of a line of cases in which consideration has been given to whether and when one person owes another a duty to take reasonable care to control the conduct of a third person<sup>14</sup>. And the fact that the conduct in question is criminal conduct is of great importance in deciding not only what, if any, duty is owed to prevent its commission, but also questions of breach and causation.

25 Several considerations set the present case apart from *Modbury* and point to the conclusion that Adeels Palace owed each plaintiff a relevant duty of care. First, the complaint that was made in these cases was that the occupier of premises failed to control access to, or continued presence on, its premises<sup>15</sup>. Secondly, the premises concerned were licensed premises where liquor was sold. They were, therefore, premises where it is and was well recognised that care must be taken lest, through misuse and abuse of liquor, "harm [arise] from

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12 (2000) 205 CLR 254 at 266-267 [29], 268-269 [36] per Gleeson CJ, 270 [42]-[43] per Gaudron J, 291-294 [108]-[118] per Hayne J, 302 [147] per Callinan J.

13 (2000) 205 CLR 254 at 290 [106].

14 See, for example, *Smith v Leurs* (1945) 70 CLR 256 at 262 per Dixon J; [1945] HCA 27; *Howard v Jarvis* (1958) 98 CLR 177; [1958] HCA 19; *New South Wales v Bujdos* (2005) 227 CLR 1; [2005] HCA 76; cf *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215; [2009] HCA 15; *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* [2009] HCA 47.

15 cf *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 293-294 [117].

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violence and other anti-social behaviour"<sup>16</sup>. And thirdly, the particular duty said to have rested on the occupier of the premises (who was the operator of the business that was conducted on the premises) is a duty to take reasonable care to prevent or hinder the occurrence of events which, under the Liquor Act, the licensee was bound to prevent occurring – violent, quarrelsome or disorderly conduct. (And although variously expressed in the legislation of other Australian jurisdictions, the evident scheme of all liquor licensing laws in Australia is to minimise anti-social conduct both on and off licensed premises associated with consumption of alcohol.)

26 In the circumstances reasonably to be contemplated before the restaurant opened for business on 31 December 2002 as likely to prevail on that night, Adeels Palace owed each plaintiff a duty to take reasonable care to prevent injury to patrons from the violent, quarrelsome or disorderly conduct of other persons. The duty is consistent with the duty imposed by statute upon the licensee and which was a duty enforceable by criminal processes. No question arises of translating a statutory power given to a statutory body into the common law "ought"<sup>17</sup>. The duty is not absolute; it is a duty to take reasonable care. It is not a duty incapable of performance. It is a duty the performance of which is supported by the provision of statutory power to prevent entry to premises and to remove persons from the premises, if needs be by using reasonable force. Although it is a duty directed to controlling the conduct of others (for the avoidance of injury to other patrons) it is a duty to take reasonable care in the conduct of activities on licensed premises, particularly with regard to allowing persons to enter or remain on those premises.

#### Breach of duty?

27 The question of breach of duty must be considered by reference to the relevant provisions of the Civil Liability Act – in particular s 5B.

28 It may be accepted, for the purposes of argument, that there was a risk, of which Adeels Palace knew or ought to have known<sup>18</sup>, that there would be violent, quarrelsome or disorderly conduct in the restaurant. It may also be accepted that

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16 *Liquor Act* 1982 (NSW), s 2A.

17 cf *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 375 [122]; [1998] HCA 3.

18 s 5B(1)(a).



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this risk "was not insignificant"<sup>19</sup>. The question then becomes whether a reasonable person in the position of Adeels Palace would have taken the precautions that the plaintiffs alleged should have been taken<sup>20</sup>. Those precautions were the provision of licensed<sup>21</sup> security personnel who would act as crowd controllers or bouncers.

29 Just how many security personnel the plaintiffs alleged should have been provided was not always made clear in argument. The plaintiffs pleaded their cases on the basis that there should have been not only security personnel controlling the entrance to the premises but also sufficient security personnel to intervene in any dispute that broke out within the restaurant. Because the restaurant was on the second floor of a building it seems to have been accepted that to supervise what was happening inside the restaurant would have required personnel who were different from those who controlled access to the premises. Some evidence led at trial suggested that as many as six or eight persons would have been necessary to supervise both the interior of, and the entrance to, the restaurant.

30 Whether any, and how many, security personnel should have been provided to satisfy the duty of Adeels Palace to take reasonable care depended upon the considerations identified in s 5B(2) of the Civil Liability Act: the probability that the harm would occur, the likely seriousness of the harm, the burden of taking precautions to avoid the risk, and the social utility of the activity that created the risk. No doubt the chief focus of those inquiries in these cases would fall upon the first three of those considerations.

31 Many different matters were relevant to the questions that thus were posed. They included, but were not limited to, such matters as the number of patrons expected to attend the restaurant, the atmosphere that could reasonably be expected to exist during the function, and whether there had been any suggestion of violence at similar events held in comparable circumstances, either at this restaurant or elsewhere. And all of those questions fell to be answered, and the probability of harm and other considerations mentioned in s 5B(2) assessed,

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19 s 5B(1)(b).

20 ss 5B(1)(c) and 5B(2).

21 Under the *Security Industry Act* 1997 (NSW).

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prospectively<sup>22</sup>, not with the wisdom of hindsight. That is, they were to be assessed *before* the function began, not by reference to what occurred that night.

32 The evidence led in these cases included evidence of the opinions of persons who described themselves as security consultants. The trial judge understood the evidence of the experts called by the plaintiffs and by Adeels Palace as accepting that there had been a "need for 'access control' as the 'front line of defence' ... having the purpose of discouraging at least, if not preventing, the return of unruly or troublesome patrons who [had] left the premises". Whether or to what extent this opinion of the experts was based on their consideration of what had happened on this occasion (an irrelevant inquiry), as opposed to the probability of violence if "access control" were not provided<sup>23</sup>, was not expressly considered by the trial judge.

33 No finding was made below that there should have been security personnel supervising conduct in the restaurant. Both the trial judge and the Court of Appeal proceeded on the footing that it was sufficient to find that the failure to provide security personnel who would control access to the restaurant was a breach of the duty of care owed by Adeels Palace. That is, both the trial judge and the Court of Appeal concluded that the failure of Adeels Palace to provide licensed personnel to act as crowd controllers or bouncers at the door of the premises (in addition to whomever Adeels Palace used to take the cost of admission from patrons at the door) was a breach of the duty of care owed by Adeels Palace to its patrons.

34 Having regard to the Civil Liability Act, this conclusion could be reached only if the probability of "unruly or troublesome patrons who [had] left the premises" returning to do violence to other patrons, or the probability of other persons likely to do violence to patrons seeking to gain entry to the premises, was such that a reasonable person in the position of Adeels Palace would have employed security personnel to control access to the restaurant.

35 But why a reasonable person would have taken that step was never clearly articulated in argument or in the reasoning of the trial judge. Considered in isolation, the numbers attending the restaurant, and the type of customers (spread

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22 *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 461-463 [126]-[129]; [2005] HCA 62.

23 *Civil Liability Act* 2002 (NSW), s 5B(2)(a).

over a range of ages, with some in family or friendship groups extending over several generations), did not demonstrate a need for provision of security personnel controlling access to the restaurant. And despite the plaintiffs' attempt to prove at trial that the venue had a history of violent incidents, there appears to have been nothing in that history (which went no further than some reports of threatening conduct by passers-by *outside* the restaurant premises) which would have warranted the conclusion that there was the probability of violence erupting in or about the restaurant. No argument to that effect was advanced orally in this Court.

36           Reference was made in argument in this Court on behalf of Mr Bou Najem to the possibility that security personnel supervising the floor of the restaurant may have been able to intervene in the dispute on the dance floor and prevent the rapid descent into general violence that followed. To do that would have required several more security personnel than the small number it was suggested should have been controlling access to the restaurant.

37           The argument necessarily asserted that licensed security personnel were the appropriate response to this risk. That is, the argument was that any exchange of words between patrons at this function would require an immediate and decisive response by persons having what might be called the "presence" or "physical authority" of bouncers or crowd controllers.

38           Of course there is always a risk that there will be some altercation between patrons at almost any kind of event. And the risk of that happening is higher if the patrons are consuming alcohol. But unless the risk to be foreseen was a risk of a kind that called for, as a matter of reasonable precaution, the presence or physical authority of bouncers or crowd controllers to deal with it safely, failure to provide security of that kind would not be a breach of the relevant duty of care. As noted earlier, there was no finding at trial or in the Court of Appeal that a risk of that kind should have been foreseen.

39           The absence of consideration at trial of the matters prescribed by s 5B of the Civil Liability Act may have been reason enough to conclude that the question of breach of duty was not determined properly by the trial judge. It is, however, not profitable to examine that issue further.

40           It is not profitable to do that because resolution of the issue of breach would necessarily depend only upon the evidence that was led at trial. The points to be made that are of general application are first, that whether a reasonable person would have taken precautions against a risk is to be determined prospectively, and second, that the answer given in any particular

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case turns on the facts of that case as they are proved in evidence. It follows from the second of these considerations that deciding the question of breach in these cases would not establish any rule about when or whether security personnel should be engaged by the operators of licensed premises. It is not useful<sup>24</sup> in these circumstances for this Court to form a conclusion about whether breach was proved in these cases. In particular, it is not necessary to examine the evidence that was led at trial to determine whether the finding of breach could be supported. Instead, it is desirable to consider the question of causation. Examination of that issue reveals that the negligence found against Adeels Palace was not shown to have been a cause of the injuries suffered by the plaintiffs.

### Causation

41           The first point to make about the question of causation is that, in these cases, it is governed by the Civil Liability Act.

42           Section 5D(1) of that Act divides the determination of whether negligence caused particular harm into two elements: factual causation and scope of liability.

43           Dividing the issue of causation in this way expresses the relevant questions in a way that may differ from what was said by Mason CJ, in *March v Stramare (E & M H) Pty Ltd*<sup>25</sup>, to be the common law's approach to causation. The references<sup>26</sup> in *March v Stramare* to causation being "ultimately a matter of common sense" were evidently intended to disapprove the proposition "that value judgment has, or should have, no part to play in resolving causation as an issue of fact". By contrast, s 5D(1) treats factual causation and scope of liability as separate and distinct issues.

44           It is not necessary to examine whether or to what extent the approach to causation described in *March v Stramare* might lead to a conclusion about factual causation different from the conclusion that should be reached by applying s 5D(1). It is sufficient to observe that, in cases where the Civil

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24 cf *Pokora v Wabash Railway Co* 292 US 98 at 105-106 (1934) per Cardozo J.

25 (1991) 171 CLR 506 at 515; [1991] HCA 12.

26 (1991) 171 CLR 506 at 515 quoting from *Fitzgerald v Penn* (1954) 91 CLR 268 at 277; [1954] HCA 74.

Liability Act or equivalent statutes are engaged, it is the applicable statutory provision that must be applied.

45       Next it is necessary to observe that the first of the two elements identified in s 5D(1) (factual causation) is determined by the "but for" test: but for the negligent act or omission, would the harm have occurred?

46       In the Court of Appeal, Giles JA, who gave the principal reasons, pointed out<sup>27</sup>, correctly, that the reasoning of the trial judge on the question of causation was "not fully articulated". The reasoning was reconstructed<sup>28</sup> by Giles JA in the following terms:

"From the evidence, security staff would have been aware of a significant fracas on the dance floor. Even if [the gunman] had not been identified at the time as the man who had got into a fight with Mr Moubarak, the presence of blood on his face would have caused the security staff at the street entrance, particularly with knowledge of the fracas, to deny him entry, or at least to require that he submit to search as a condition of being permitted to enter. On the balance of probabilities, security staff at the street entrance would have deterred or prevented [the gunman's] re-entry, and he therefore would not have shot Mr Moubarak and Mr Bou Najem."

47       Security personnel may have been able to deter or prevent re-entry by the drunk or the obstreperous would-be patron willing to throw a punch. 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.

48       The evidence at trial did not show that the presence of security personnel would have *deterred* the re-entry of the gunman. That conclusion could have been reached only if it was assumed that the gunman would have acted rationally. But, as was pointed out in *Modbury*<sup>29</sup>, "[t]he conduct of criminal assailants is not necessarily dictated by reason or prudential considerations". The gunman's

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27 (2009) Aust Torts Reports ¶81-997 at 62,744 [107].

28 (2009) Aust Torts Reports ¶81-997 at 62,744 [107].

29 (2000) 205 CLR 254 at 291 [107].

French CJ  
Gummow J  
Hayne J  
Heydon J  
Crennan J

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conduct at the restaurant on this night was dictated neither by reason nor by prudential considerations. He shot the man who had struck him during the *mêlée* that broke out after the confrontation on the dance floor. And before shooting that man, the gunman had shot a man who had done nothing to him and who, defenceless, begged for mercy.

49 Nor did the evidence show that security personnel could or would have *prevented* re-entry by the gunman: a determined person armed with a gun and irrationally bent on revenge. The evidence given at trial by the plaintiffs' expert security consultant did not go beyond the assertion that a security person confronting the gunman at the entrance to the restaurant "would have at least altered the chain of events and thereby likely altered the outcome". The security consultant called on behalf of Adeels Palace emphasised that the overriding principle which should govern the conduct of security personnel confronted by a gunman is "safety for all parties" and that "once a determined gunman is targeting a victim or victims there [is] no guaranteed safe or effective option".

50 Recognising that changing any of the circumstances in which the shootings occurred *might* have made a difference does not prove factual causation. Providing security at the entrance of the restaurant *might* have delayed the gunman's entry; it might have meant that, if Mr Bou Najem was a random victim, as seemed to be the case, someone else might have been shot and not him. But neither plaintiff proved factual causation by pointing to possibilities that might have eventuated if circumstances had been different.

51 Nor was "but for" causation established in these cases by observing that the relevant duty was to take reasonable care to prevent injury to patrons from the violent, quarrelsome or disorderly conduct of other persons. That is, the question of factual causation was not answered in these cases by pointing out that the relevant duty of care was to take reasonable steps to prevent violent assault, that each plaintiff was the victim of a violent assault, and that the damage sustained by the plaintiffs was "the very kind of thing" which the relevant duty obliged Adeels Palace to take reasonable steps to prevent<sup>30</sup>. That observation may bear upon questions about scope of liability<sup>31</sup>. Describing the injury as "the very kind

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30 cf *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1030 per Lord Reid; *Stansbie v Troman* [1948] 2 KB 48 at 51-52.

31 cf *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at 638-639 [26]-[27], 641-642 [40]-[41]; [2005] HCA 69.

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of thing" which was the subject of the duty must not be permitted to obscure the need to prove factual causation. Unlike *Home Office v Dorset Yacht Co Ltd*<sup>32</sup> and *Stansbie v Troman*<sup>33</sup>, these are not cases where the evidence demonstrated that the taking of reasonable care would probably have prevented the occurrence of injury to the plaintiffs.

52 Counsel for the plaintiffs, in this Court, relied upon passages in *Chappel v Hart*<sup>34</sup>. But in that case the majority proceeded on the basis that but for the failure to warn the event would not have happened; the question then was whether certain additional factors, combined with the satisfaction of the "but for" test, were sufficient to establish causation<sup>35</sup>.

53 In the present case, in contrast, the "but for" test of factual causation was not established. It was not shown to be more probable than not that, but for the absence of security personnel (whether at the door or even on the floor of the restaurant), the shootings would not have taken place. That is, the absence of security personnel at Adeels Palace on the night the plaintiffs were shot was not a necessary condition of their being shot. Because the absence of security personnel was not a necessary condition of the occurrence of the harm to either plaintiff, s 5D(1) was not satisfied. Did s 5D(2) apply?

54 Section 5D(2) makes provision for what it describes as "an exceptional case". But the Act does not expressly give content to the phrase "an exceptional case". All that is plain is that it is a case where negligence cannot be established as a necessary condition of the harm; the "but for" test of causation is *not* met. In such a case the court is commanded "to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party". But beyond the statement that this is to be done "in accordance with established principles", the provision offers no further guidance about how the task is to be performed. Whether, or when, s 5D(2) is engaged must depend, then, upon whether and to what extent "established principles" countenance departure from the "but for" test of causation.

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32 [1970] AC 1004.

33 [1948] 2 KB 48.

34 (1998) 195 CLR 232; [1998] HCA 55.

35 (1998) 195 CLR 232 at 238-239 [8], 257 [66]-[67], 269-270 [93].

55 At once it must be recognised that the legal concept of causation differs from philosophical and scientific notions of causation<sup>36</sup>. It must also be recognised that before the Civil Liability Act and equivalent provisions were enacted, it had been recognised<sup>37</sup> that the "but for" test was not always a *sufficient* test of causation. But as s 5D(1) shows, the "but for" test is now to be (and has hitherto been seen to be) a *necessary* test of causation in all but the undefined group of exceptional cases contemplated by s 5D(2).

56 Even if the presence of security personnel at the door of the restaurant *might* have deterred or prevented the person who shot the plaintiffs from returning to the restaurant, and even if security personnel on the floor of the restaurant *might* have been able to intervene in the incident that broke into fighting in time to prevent injury to anyone, neither is reason enough to conclude that this is an "exceptional case" where responsibility for the harm suffered by the plaintiffs should be imposed on Adeels Palace. To impose that responsibility would not accord with established principles.

57 It may be that s 5D(2) was enacted to deal with cases exemplified by the House of Lords decision in *Fairchild v Glenhaven Funeral Services Ltd*<sup>38</sup> where plaintiffs suffering from mesothelioma had been exposed to asbestos in successive employments. Whether or how s 5D(2) would be engaged in such a case need not be decided now. The present cases are very different. No analogy can be drawn with cases like *Fairchild*. Rather, it would be contrary to established principles to hold Adeels Palace responsible in negligence if not providing security was *not* a necessary condition of the occurrence of the harm but providing security *might* have deterred or prevented its occurrence, or might have resulted in harm being suffered by someone other than, or in addition to, the plaintiffs. As in *Modbury*<sup>39</sup>, the event which caused the plaintiffs' injuries was deliberate criminal wrongdoing, and the wrongdoing occurred despite society devoting its resources to deterring and preventing it through the work of police

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36 *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 509; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 412-413, 418-419, 428; [1992] HCA 27; *Chappel v Hart* (1998) 195 CLR 232 at 238 [6], 255 [62].

37 *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 413; *Chappel v Hart* (1998) 195 CLR 232 at 257 [66]-[67].

38 [2003] 1 AC 32.

39 (2000) 205 CLR 254 at 292-293 [113].



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forces and the punishment of those offenders who are caught. That being so, it should not be accepted that negligence which was not a *necessary* condition of the injury that resulted from a third person's criminal wrongdoing was a cause of that injury. Accordingly, the submission that the plaintiffs' injuries in these cases were caused by the failure of Adeels Palace to take steps that *might* have made their occurrence less likely, should be rejected.

#### The Trade Practices Act contention

58 As noted earlier in these reasons, each plaintiff sought to support the orders made in his favour in the Court of Appeal by contending that s 74 of the Trade Practices Act was engaged. Even if that were so, each plaintiff could recover damages for breach of such an implied warranty only if he established at least that breach of the warranty was a cause of (in the sense of materially contributed to) his loss<sup>40</sup>. Whether more than material contribution to loss must be established to make good a claim for breach of an implied warranty need not be considered. For the reasons given earlier, a "but for" causal connection between absence of security and injury to either plaintiff was not established in these cases. It was not shown that absence of security materially contributed to either plaintiff being injured. The contention that the judgment below is to be supported by reference to s 74 of the Trade Practices Act should be rejected.

#### Conclusion and orders

59 Each appeal should be allowed with costs. In each case the orders of the Court of Appeal of the Supreme Court of New South Wales entered on 24 March 2009 should be set aside and in their place there should be orders that the appeal to that Court is allowed with costs, the judgment of the District Court of New South Wales set aside and in its place there be judgment for the defendant with costs.

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40 See, concerning contraventions of the *Trade Practices Act* 1974 (Cth), *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 127-129 [54]-[58]; [2002] HCA 41.