



Workplace Safety Australia

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WORKPLACE SAFETY AUSTRALIA PTY LTD

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Employer responsible for bouncers' bashing?

At about 1:30 on the morning of Saturday 22 December 2001 Greg Sprod was found lying unconscious with his head in a pool of blood in a laneway leading from the northern side of Great Western Highway at St Marys. Police and ambulance were called. He was in a semi-conscious coma in Nepean hospital until he was transferred to the Westmead Brain Injury Unit where he remained for another two months. He had been brutally assaulted around the head and he was left with permanent brain damage.

He brought an action against the security company that had provided the bouncers to the club, claiming that as bouncers had beaten him, the Company – as their employer – was responsible for his injuries.

The owner of Dave's Midnight Pizza – next to the Club – had a deal with the Club to allow its bouncers to assist him if there was trouble in the Pizza shop. In return, discount Pizzas were provided to Club staff. The Pizza shop owner gave evidence:

Every Friday night; that arrangement extended to Friday night. They would come up and stand out the front of the shop. Sometimes they would stand inside the shop because their patrons, you know, they used to have anywhere up to 1200, 1300 people in the nightclub upstairs. A lot of them, obviously not that many, but a lot of those people would come up to the pizza shop, you know, when the club had shut at 4am, so they used to send the bouncers up to stand out the front of the shop, just to make sure that there was no trouble, so, you know, to put it in perspective, yeah, every night, every Friday night they were there. As I say, occasionally there was problems there.

The Pizza shop owner – Mr Schoer – gave evidence that on the morning of 22 December a young man, clearly the plaintiff, came into his shop and made a pest of himself. He was very drunk, generally abusive, and made extremely rude remarks to female patrons. In addition he slapped one of the patrons.

Mr Schoer then made two phone calls to The Band Club seeking assistance from the security staff following which two bouncers arrived whom he knew by sight because they had attended his shop on earlier occasions. Each man was wearing black trousers and a white shirt with the identification "P.R.O.S." on it – identifying themselves.

It was Mr Schoer's perception that it was not only the plaintiff but one or two others who were with him who were causing trouble. When the bouncers entered his shop he pointed with his finger at the men who were causing the trouble and then indicated with his thumb to take them outside. He heard the bouncers ask two men to leave and saying that they were not welcome in the shop. They refused to leave and the bouncers then dragged them out of the shop on to the footpath.

A patron of the Pizza shop who was outside at the time the bouncers took Sprod from the shop stated that he watched the two bouncers and [Sprod] and he saw them take [Sprod] up to and in to the laneway which he said was about fifty metres from the pizza shop. By this time extra bouncers had turned up from the direction of the St Marys Band Club. He saw [Sprod] held by the first two bouncers walking into the laneway to which reference has already been made and the other bouncers were just "standing looking up and down the street like keeping watch".

After a short time he saw the first two bouncers walk out of the laneway and head back towards the St Marys Band Club passing him. The two bouncers who had been standing up at the entrance to the laneway walked down towards the club at that stage. As the first

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two bouncers walked past him a man wearing a blue Hawaiian shirt with flowers on it and standing about six feet away from him asked the bouncer “Oh what did you do to him?” The bouncer who had entered the pizza shop first responded “He won’t be causing any trouble tonight. He just got his head kicked in”. They then continued walking towards The Band Club followed at a distance of about ten feet by the other two bouncers.

Although the bouncers denied assaulting Sprod, and although no criminal charges had been laid, the Supreme Court judge found that the bouncers had committed the assault. He was then required to find whether the employer – the security company – was liable for breaching any personal duty of care it owed to the plaintiff Sprod, and whether it was vicariously liable for the assault.

The plaintiff in the case, Sprod, claimed the Security company was personally negligent in a number of ways:

- (a) Failing to provide the plaintiff with a safe entertainment environment.
- (b) Failing to ensure that their employees were properly trained and supervised.
- (c) Failing to ensure that their employees did not assault, batter and/or ill treat patrons or prospective patrons of the licensed premises including the plaintiff in the circumstances.
- (d) Failing to ensure that their employees were properly trained and supervised so as to ensure that through their physical acts they did not cause harm to patrons or prospective patrons of the licensed premises including the plaintiff in the circumstances.
- (e) Failing to ensure that their employees were instructed not to physically handle patrons or prospective patrons of the licensed premises including the plaintiff.
- (f) Failing to ensure the plaintiff’s safety in circumstances where the defendant ought to have foreseen the possibility that their employees may through their physical actions cause injury to patrons or prospective patrons of the licensed premises including the plaintiff.
- (g) Failing to warn the plaintiff of the dangers of being in the presence of their employees.
- (h) Causing, permitting and allowing the servants of the defendant to attend upon the premises of Dave’s Midnight Pizza for the purpose of maintaining order and/or ejecting persons when called upon to do so by the manager or staff of Dave’s Midnight Pizza.
- (i) Failing to ensure that their employees did not assault, batter and/or ill treat persons on or about the premises of Dave’s Midnight Pizza including the plaintiff in the circumstances.
- (j) Failing to ensure the plaintiff’s safety in the circumstances where the defendant ought to have foreseen the possibility their employees may through their physical actions cause injuries to persons on or about the premises of Dave’s Midnight Pizza including the plaintiff in the circumstances.

The judge found that most of the above claims were irrelevant in the circumstances, and commented;

As for paragraph (c) the duty of care upon the defendant was not to ensure that employees did not assault or ill treat patrons. The duty was to take reasonable care that its employees did not so assault patrons. I am satisfied on the evidence that the

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defendant did take such reasonable care by ensuring that its employees were duly licensed and had received the appropriate instructions referred to above.

As to paragraph (f) I would hold that the duty upon the defendant was not to ensure the plaintiff's safety but merely to take reasonable care to ensure his safety by ensuring that its employees were appropriately licensed and instructed. This the defendant had done. The injuries to the plaintiff here were caused by employees disobeying the instructions which they had been given.

In relation to paragraph (h) the Court was not satisfied that the permitting and allowing of the servants of the security company to attend upon the premises of Dave's Midnight Pizza for the purpose of maintaining order there was in any way a breach of its duty of care...

In any event it did not materially cause or contribute to the plaintiff's injuries. Those injuries were caused and materially contributed by the actions of the two security guards in taking the plaintiff into the laneway and assaulting him there in a manner contrary to instructions they had been given.

As to paragraph (i) the Court held that there was no duty of care upon the defendant to ensure that the employees did not assault the plaintiff in the circumstances. The duty of care is to take reasonable care that its employees did not assault the plaintiff. They took reasonable care by ensuring that the employees held the appropriate license and were given the appropriate instructions described earlier.

In relation to paragraph (j) the court found that there was no duty upon the defendant to ensure the plaintiff's safety in the circumstances set out in that paragraph. The duty was to take reasonable care...

That reasonable care was provided by ensuring that the employees were duly licensed and properly instructed in the matters set out above. Furthermore, the injuries to the plaintiff were caused by those security guards going outside of their instructions in order to assault the plaintiff in the laneway.

Vicarious Liability?

In the case of *Deatons Pty Ltd v Flew* 1949 79 CLR 370 a bar maid had thrown a glass of beer into the face of the plaintiff causing him injury. The Chief Justice of the High Court found there in relation to the action of throwing the beer:

It was an act of passion and resentment done neither in furtherance of the master's interest nor under his express or implied authority nor as an incident to or in consequence of anything the barmaid was employed to do.

The Court in this case found that this description aptly fits the conduct of the two security officers here...

Theirs was an act of passion and violence done neither in furtherance of their employer's interests nor under its express or implied authority nor as an incident to or in consequence of anything they were employed to do.

The Court found that it was comfortably satisfied that the conduct of the security guards in so severely assaulting the plaintiff was far outside of their scope of employment. Their scope of employment ended by either restraining the plaintiff, using reasonable force, until the arrival of the police or taking him to the police station, again using reasonable force, or

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encouraging him, as they say they did in their records of interview, to go away. The conduct of taking him into the lane and viciously assaulting him about the head was not connected with any authorised method of doing their job. It was clearly an independent act. The only connection between the scope of their employment and the assault is that it put them in the location and afforded them the opportunity to carry out their independent act.

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Panadol in First Aid Kits in NSW

A question often asked Workplace Safety Australia is whether Panadol or other analgesics can be included in a first aid kits.

There is no *prohibition* in NSW on either providing employees with Panadol, or with having Panadol in first aid kits. However, employers should be cautious about including any sort of analgesic in their first aid kit.

If the first aid kit is publicly accessible (i.e. anyone can 'help themselves' to its contents), it has often been the case that stocks of drugs such as Panadol are very rapidly depleted. Therefore it is suggested that if you are going to make Panadol available to employees, they are kept by a staff member and distributed one or two at a time on request. They should then be kept locked in that staff members drawer or some other not-publicly-accessible place.

WorkCover NSW states the following in relation to whether analgesics can be contained in a first aid kit...

These drugs have been shown to be the major source of abuse and pilfering of first-aid kits. Accordingly analgesics should be included in first aid kits only after consultation with employees and when an appropriate management plan is in place.

Employees should be responsible for carrying and dispensing their own prescribed or over-the-counter medications.

The protocol recommended for the supply of simple analgesics by a workplace first aid provider is:

- no more than one pack of analgesic to be held in any first aid kit;
- analgesics must remain in the original packaging containing the standard dosage and the required warning and caution statements;
- the caution and warning statement on the pack should be communicated to the employee;
- supply only on direct request by an employee;
- supply limited to the recommended dose (generally up to two tablets four hourly);
- supply recorded in the first aid register.

In short, the answer is they can be included, but it is preferable not to include them. If you are going to include them, ensure the advice given above is followed. **PLEASE NOTE!!** This information applies only to NSW – different rules apply in different states. In fact, although some states *prohibit* supply of analgesics in the first aid kit, some states *require* that the kit include painkillers.

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Highest penalty ever against an individual in Queensland

A partner in a Toogoolawah sawmilling company was fined \$20,000 after a workplace death last year—the highest penalty ever ordered against an individual for a breach of the *Workplace Health and Safety Act 1995*.

The partner pleaded guilty in the Toowoomba Industrial Magistrates Court to breaching the Act, for having failed to ensure the safety of workers at work. Three other partners were all placed on good behaviour bonds of \$10,000 over a six month period.

A worker at the company died when a piece of wood was ejected at high speed from a bench saw, piercing him in the chest. The court heard that on the day of the incident the sawmiller was using a bench saw, which was not properly guarded and which had no anti-kickback devices that would prevent wood being ejected from the saw during its use.

The workplace health and safety investigation revealed that the obligation holders were aware of the condition of the machine and of previous incidents of timber being ejected prior to the incident, but had failed to ensure proper guarding and use of the saw. As a result of the incident, the company has taken steps to ensure that such an incident does not recur.

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Audit of ACT childcare providers complete

ACT WorkCover Inspectors visited childcare businesses across the ACT throughout October as part of a major safety audit in the industry. Approximately 111 early childhood and childcare centres, playschools and centre-based children's services were visited during the inspection program. ACT WorkCover Commissioner/CEO Erich Janssen stated prior to the beginning of the audit:

The childcare sector employs over 1700 people in the ACT and has a surprisingly high rate of workplace injury, reflected by the number of accepted workers compensation claims. Inspectors will be checking for risk management processes, manual handling procedures, reporting of injuries and dangerous occurrences and the level of safety training in the workplace. Inspectors will also audit for factors specific to child care services such as disposal of nappies, hand washing facilities, sandpit and wading pool hygiene and policies for dealing with children or staff with infectious diseases

The aim of the audit was to promote awareness of health and safety in the sector and ensure employers are meeting their obligations under the *Occupational Health and Safety Act 1989*.

Key hazards associated with the childcare industry include slips, trips and falls and manual handling injuries such as muscular stress from lifting, carrying or putting down objects – including children.

The audit also targeted compliance in the areas of first aid, workplace consultation on OHS issues and the use and availability of personal protective equipment such as disposable gloves.

A report of the findings of the Audit is expected to be published soon.

Yours Faithfully,

Workplace Safety Australia Pty Ltd.

Important Note

The information contained in this Safety Alert is in general terms only and does not constitute legal advice or other professional advice. The information contained in this Safety Alert should not be relied upon and is no substitute for seeking legal or other professional advice as appropriate to any facts, circumstances and materials that might be necessary for you to provide to a professional advisor. While all reasonable care is taken in producing Safety Alerts, Workplace Safety Australia, its consultants and all others involved in providing this Safety Alert All expressly disclaim all and any liability for the results of any actions or failure to act taken on the basis of this Safety Alert, and for any error or omission arising therefrom. Should you wish to discuss this further, please contact Workplace Safety Australia on 02 9387 1248.

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