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TORT, CINEMA AND VIOLENT CRIME

An Australian perspective

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In a tragic incident occurring on 20 July 2012 in Aurora, Colorado, a gunman opened fire at a midnight screening of *The Dark Knight Rises*. One of the most eagerly-awaited films of 2012 was now, on its release, making headlines for all the wrong reasons. Twelve people were killed and many others seriously injured. Upon his arrest, the gunman allegedly told police that he ‘was the Joker’, a reference to Batman’s nemesis played in the 2008 film *The Dark Knight* by the late Heath Ledger.

This article explores through an Australian perspective the intersection of tort, the cinema and violent crime. It considers the interrelationships between these three subject-matters, analyses the legal question as to whether Australian law would hold a cinema liable in tort for the violent and movie-inspired crimes of a patron, and addresses the policy question of whether cinemas should be so liable.

Tort law, the cinema and violent crime

Since its birth in 1895 the motion picture has become an immensely popular means of representing creative works. It is also a source of significant economic activity. Moreover, cinema is a popular recreational pastime. The movies are a place that friends go to socialise; that parents take their children; and that couples go on first dates.

Cinema represents different things to different people — a pastime; a business; a job; an investment; an industry; an art form. Criminological debate continues, however, over whether violent media causes violent crime. This issue was brought sharply into focus by the Aurora incident. The link between this gunman’s actions and the subject-matter of ‘The Dark Knight Trilogy’ was seared into social consciousness by the suggestion, upon his arrest, that he ‘was the Joker’.

Australia has not yet witnessed an evidently movie-inspired violent crime of this type. This may be a reflection of differences in US and Australian society, in particular the two countries’ respective attitudes to gun control. Australia is not popularly regarded as having a ‘gun culture’ in the same way as the US. The right to bear arms has a historical significance and a constitutional foundation there through the Second Amendment to the *United States Constitution*: these circumstances have no analogue in Australian society. Thus while the Australian government’s response to the 1996 Port Arthur massacre was to tighten gun control, the immediate social response to the incident in Aurora, Colorado was a reported surge in firearm permit applications.

In the event of an Australian incident of violent movie-inspired crime, how will and should the law respond? The criminal law’s role is clear; and a perpetrator would bear personal civil liability for loss and damage caused. However, what of the role of tort law as it pertains to a cinema? Would a cinema, on the current state of the law, be liable in tort for the violent and movie-inspired criminal acts of a patron? And from a policy perspective, should such liability attach? These are the two central questions addressed by this article.

Could cinemas be liable for the violent crimes of their patrons? A question of law

In assessing this question, legal issues which arise for consideration include occupiers’ liability, liability for the criminal acts of third parties, and the process of weighing the negligence calculus.

Claims against occupiers in the tort of negligence: the law of occupiers’ liability

Most relevant to tort liability is the law of occupiers’ liability. Occupiers’ liability is a well-recognised category of the duty of care enforced by the law of negligence and originally recognised at common law. In *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (‘Modbury Triangle’), Gleeson CJ confirmed ‘[t]hat an occupier of land owes a duty of care to a person lawfully upon the land is not in doubt’.

Occupiers’ liability is now subject to specific statutory regulation in some states and territories. However, the duty imposed by such legislation relates to the state of the premises; not immediately relevant to the present circumstances. In other jurisdictions it is regulated by general civil liability legislation. However even in such jurisdictions, the existence of a duty of care remains a common law question.

The common law does recognise that a duty of care may arise with respect to criminal conduct occurring on an occupied premises. That such a duty is distinct from that relating to the state of the premises was recognised by Gleeson CJ in *Modbury Triangle*. Thus in *Adeels Palace Pty Ltd v Moubarak*, the High Court (in a decision under the *Civil Liability Act 2002* (NSW)) treated an occupiers’ duty as encompassing the control of access to its premises.

Given these legal principles, a relevant category of the cause of action in negligence therefore exists.

Liability for the criminal acts of third parties

This duty’s abstract existence must be considered in conjunction with jurisprudence relating to tortious liability for third party criminal acts. Several Australian decisions stand for the proposition that, absent exceptional circumstances or a special relationship between occupier and entrant (or third party), occupiers do not owe a duty of care to prevent injury or damage to entrants resulting
from third party criminal acts.

The key High Court authority on point is *Modbury Triangle*. Modbury Triangle Shopping Centre Pty Ltd ('Modbury Triangle') was the owner of a shopping centre in Adelaide which leased premises to Focus Video Pty Ltd ('Focus Video'), a video rental business. Mr. Tony Anzil was the manager of this store. The store traded until 10:00pm, with the only other store open late a nearby chemist closing two hours earlier.

On 18 July 1993 at 10:30pm, Anzil closed the video store and walked about 10 metres towards his car in a nearby car park. He was attacked by three unknown assailants, one armed with a baseball bat; he suffered serious injuries.

Evidence was admitted at trial that the video store faced the car park which, at night, was dark. There was only slight illumination from nearby fluorescent lighting. There were four lighting towers controlled by timing devices in the car park, however at the time of the incident these lights were not on. Prior to the incident, complaints were made to Modbury Triangle about the time at which the lights turned off; however no action was taken. Anzil’s complaint was that Modbury Triangle’s failure to leave the lights on and adequately light the car park caused the attack. Importantly for this article’s analysis, Anzil’s action against the shopping centre was based on the tort of negligence framed around occupiers’ liability.

The High Court’s analysis in *Modbury Triangle* focussed on the relevance of third party criminality to two elements of the negligence action — the extent of the duty of care owed, and the issue of causation. The majority decided both issues against Anzil based on the tort of negligence framed around occupiers’ liability.

The majority suggested that special cases could include cases of reliance, assumption of responsibility, cases of ‘special vulnerability’ and ‘special knowledge’, cases involving the assertion of control, and particular relationships such as employer and employee, school and pupil, and bailor and bailee. Chief Justice Gleeson also adverted to situations where ‘the criminal conduct is attended by such a high degree of foreseeability, and predictability, that it is … taken out of the operation of the general principle’. No special relationship was found on the facts of *Modbury Triangle*. In particular, despite some prior minor illegal activity occurring in the area, such evidence ‘did not indicate a high level of recurrent, predictable criminal behaviour’.

In relation to causation, various members of the Court referred to the randomness and irrationality of violent criminal behaviour. The concern was that such behaviour does not necessarily follow rhyme or reason and that it could not confidently be said that the presence of lighting would have prevented the attack. Thus Gleeson CJ suggested that the attackers ‘might have been desperate to obtain money, or interested only in brutality’ with it being ‘debatable’ that ‘they would have been deterred by lighting’. Justice Callinan similarly observed that criminal conduct ‘may be both unpredictable in actual incidence, wanton and random, and, on that account, always on the cards’. His Honour postulated it was at least as likely as the competing inference that ‘having brought their bat with them to commit an assault, [the assailants] would not take it home without first using it for that purpose, lighting or not’. In this respect, it would be difficult for a plaintiff to establish that alleged negligence was a necessary condition of the occurrence of harm as now set out in state and territory civil liability legislation.

Subsequent case law has further considered the special circumstances which might ground tortious liability for third party criminal acts. A recent decision of the Victorian Court of Appeal dismissed, on both duty of care and causation grounds, a claim by a shopping centre’s Father Christmas against centre management for an on-premises assault — the risk was deemed far-fetched or fanciful thus not attracting the protection of a duty of care, and there was no evidence that the purpose of a security escort would have been protective (as opposed to simply facilitating the appellant’s movements to his changing facilities). Referring to *Modbury Triangle*, the NSW Court of Appeal also rejected (on duty of care and causation grounds) a tenant’s claim against her residence’s body corporate for injuries inflicted by an intruder on common property. In *Adeels Palace Pty Ltd v Moubarak*, a case involving a New Year’s Eve shooting at licensed premises, a duty of care was upheld given the peculiarities of relevant liquor laws, however the claim failed on causation grounds because of the irrationality of criminal conduct. A duty of care was upheld in *Spedding v Noble*, also involving injury at licensed premises, given sufficient control over the risk again existing as a result of licensing laws. In *TAB Ltd v Beaman* it was noted that an employer’s duty of care had been conceded; unsurprising given that the employer-employee relationship was a category of case recognised in *Modbury Triangle* as involving a duty’s scope extending to encompass criminal acts. In the most recent successful litigation on point, *Karajias v Deakin University*, a duty of care was upheld by the Victorian Court of Appeal. In that case Deakin University possessed knowledge of the presence of the intruder who had assaulted the appellant, as well as exercised control over the appellant’s movements (the appellant being an employee of an on-campus catering contractor). The Court found that contractors’ employees should be treated no differently in principle to contractors themselves, and thus extended the principle in *Stevens v Brodribb Sawmilling Co Pty Ltd*.

Applying the various strands of reasoning from these cases to an occupier’s duty of care, it seems unlikely that the relationship between moviegoer and cinema is of the kind that would enliven negligence liability in the case of a violent and movie-inspired crime. There is no position of special knowledge enjoyed by a cinema vis-à-vis its patrons with respect to extreme criminal conduct given the nature of the criminality involved. The relationship is therefore very different to a case such as *Karajias* where the ongoing presence of the assailant on university property was known. There is no clearly established category of case present such as in *Beaman*. Further, while a cinema does exercise some control over its patrons, that control is not with particular respect to the criminality in question. This control is thus of a significantly different nature to that conferred by virtue of liquor licensing laws in *Adeels Palace* and also *Spedding*, where duties of care were upheld. It may also be of particular importance that an incident of violent and evidently movie-inspired crime has not yet occurred in an Australian cinema. Even Kirby J, who in *Modbury Triangle* found for Anzil in a dissenting judgment, noted on two separate occasions that in foreign jurisprudence it is difficult to establish negligence ‘[w]ithout some past incident or complaint’. As in *Bainbridge* and also *Drakulic*, it seems that both a duty of care and also causation would be lacking in the circumstances under consideration.
Establishing negligence: the negligence calculus and breach of the duty of care

A further legal issue to consider is whether a breach of the duty of care could be made out. Could a cinema, in the circumstances under consideration, be labelled ‘negligent’ and thus in breach of a duty of care even if the duty’s scope could extend to the conduct in question and the causation hurdle (hypothetically) overcome? Much would depend on the facts of a particular case. As will be seen, however, the ‘breach’ element of a negligence action represents a further obstacle to a successful claim.

In determining whether a breach of a duty of care is made out, the precautions against risk required to be taken were originally captured in the common law test set out in Wyong Shire Council v Shirt. According to Mason J:

The perception of the reasonable man’s response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant’s position.31

As this passage makes clear, the emphasis is on reasonable precautions, not necessarily the elimination of a risk.32 These factors are now recognised in state and territory civil liability legislation such as the Wrongs Act 1958 (Vic) s 48(2)33 which identify the four considerations to be balanced in assessing breach of the duty of care:

(a) probability that the harm would occur if care were not taken;
(b) likely seriousness of the harm;
(c) burden of taking precautions to avoid the risk of harm;
(d) social utility of the activity that creates the risk of harm.

The key question in assessing breach of duty relates to the precautions a cinema should have taken to prevent the injury from criminal conduct. Several factors established as part of the negligence calculus would have relevance to this question. While not relevant in all cases,34 the social utility factor may assume particular importance in the case of violent crime inspired by a movie. This is because the relevant activity (screening films) relates to the artistic expression of filmmaking. Where conduct serves an important social purpose, the law of negligence may tolerate an otherwise unacceptable risk — ‘if all the trains in this country were restricted to a speed of 5 miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down’.35

Artistic expression is considered an important social and cultural function. Further, the social experience of cinema-going stands to be harmed by the presence of heavy security, a point this article returns to below with respect to the normative question of whether cinemas should bear civil liability. Of course, public policy considerations also affect the imposition of a duty of care.36 Whether considered as a matter of public policy at the duty stage or social utility in the context of breach, the nature of a cinema’s activities would be an obstacle to a plaintiff’s claim.

Naturally, given that application of the negligence calculus involves a weighing exercise, social utility is not decisive. It is only one factor to be balanced against others in assessing breach of the duty of care. The gravity of the risk is potentially high — demonstrated by the 12 lives lost in Aurora. Conversely the likelihood of the risk is extremely low (having never occurred before in Australia). It could further be imagined that the burden on cinemas of taking effective security precautions against this danger would be onerous and potentially disproportionate to the risk. As the errant cricket ball in Bolton v Stone37 demonstrated, a defendant is only required to take reasonable precautions against a risk.

This final observation is important in balancing the negligence calculus. If the police force and the criminal justice system cannot prevent crime, how can a private cinema operator in a market economy be expected to do so? As outlined above, the law of negligence does not require risk elimination. Any duty of care owed must be viewed prospectively, not retrospectively — the question is what an occupier (a cinema operator) should have reasonably done to prevent an injury considering reasonably foreseeable events and consequences.38 This reasonableness standard is a powerful factor militating against the imposition of tortious liability on the current state of Australian law. It was a factor specifically referred to in the judgment of Hayne J in Modbury Triangle:

By its very nature [criminal] conduct is unpredictable and irrational. It occurs despite society devoting its resources to deterring and preventing it through the work of police forces and the punishment of those offenders who are caught. That is, such conduct occurs despite the efforts of society as a whole to prevent it. Yet the respondents’ contention is that a particular member of that society should be held liable for not preventing it.39

Thus even if the scope of an occupiers’ duty of care and causation are put to one side, establishing a breach of the duty of care represents a further obstacle to a successful claim. It is unlikely in Australia that a cinema would be held liable for the violent and movie-inspired crimes of a patron.

Should cinemas be liable for the violent crimes of their patrons? A question of policy

In addition to this positive analysis, the normative policy question of whether cinemas should be liable for the violent and movie-inspired crimes of their patrons can be asked. Such a question is particularly important in the context of tort law. As the High Court itself has recognised, policy (alongside precedent and principle) plays its role in the formulation and extension of negligence standards.40 This question can be approached by considering the policies underpinning tort law and also by taking into account the social nature of the cinema experience.

The policies underpinning liability in tort

In assessing whether liability should attach to Australian cinemas for the violent and movie-inspired crimes of a patron, a key consideration is the fit between such liability and the policy bases of tort law.
At its core, tort law:

is best seen as a system of ethical rules and principles of personal responsibility (and freedom) adopted by society as a publicly enforceable statement about how its citizens may, ought and ought not to behave in their dealings with one another.41

The connection between tort law and morality was made in the seminal judgment of Lord Atkin in Donoghue v Stevenson where his Lordship asserted that ‘liability for negligence … is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay’.42 According to Cane, the direct aims of tort law are compensation, disgorgement, punishment, vindication, the control of future conduct and the deterrence of tortious conduct.43 Against its ethical backdrop, one can readily appreciate why compensation and deterrence are traditionally cited as the key policies informing tort law.

The compatibility of tortious liability for third party criminal behaviour with the policy bases of tort law was considered by Hayne J in Modbury Triangle. His Honour made the following remarks in a passage highlighting the importance of policy considerations in fixing the boundaries of a duty of care:

To hold that the appellant owed a duty to take reasonable steps to prevent or hinder the attack on the first respondent is not only to hold the appellant responsible for conduct it could not control, it is to impose liability on it when its contribution to the occurrence, compared with that of the assailants, is negligible. [The values of deterrence and individual responsibility] would be diminished if the appellant is held to owe a duty of care of the kind for which the respondents contend. To accept the respondents’ submissions would be to impose a duty which does nothing to deter wrongdoing by the appellant or other occupiers. Further, it would shift financial responsibility for the consequences of crime from the wrongdoer to individual members of society who have little or no capacity to influence the behaviour which caused injury.44

Considering Hayne J’s observations against Cane’s identification of the direct aims of tort law, a persuasive case can be made against the desirability of imposing tortious liability on Australian cinemas for violent and movie-inspired crimes of their patrons. Taking into account the limited control a cinema could exercise against violent and movie-inspired crime, a minimal degree of reliance on cinemas by moviegoers with respect to their physical security, and the innocuous nature of a cinema’s activities, this conclusion is also consistent with the ‘salient features’ approach currently employed in Australian law.45

The cinema experience

In addition to the policy bases of tort, attention can also be given to a more abstract consideration — the social function of cinema as a recreational pastime. Would liability of cinemas in negligence for the violent and movie-inspired crimes of their patrons be compatible with ‘the cinema experience’?

As identified above, cinema means different things to different people. It can be a business, job, investment, industry or art form. From the viewpoint of cinema-goers, however, it is generally seen as a form of recreational pastime. It is a service that is consumed for pleasure — entertainment is the objective.

The desirability of attaching tortious liability to cinemas in the circumstances considered here can be approached by asking whether such liability would harm the social experience of cinema-going. It is easy to imagine the kinds of security measures that liability might induce cinemas to take — metal detectors, baggage checks and personal searches are all within the realms of possibility. Can society accept such measures at the ‘gateway’ to the cinema experience? Strict security measures are accepted as necessary in contexts such as airports and court complexes. There is however something romantic about the cinema pastime that jars with these kinds of precautions. While parenting and the ratings system have a role to play in controlling access to movies,46 the nature and function of the cinema experience suggest that the civil liability of cinemas should not — even if Australian law rejects the ‘fair, just and reasonable’ duty of care test employed in the United Kingdom.47 The cinema is a place where many go to escape reality — rather than to confront society’s ugly underbelly before the experience has even begun.

Conclusion

Little can be done to make sense of violent crime. As the High Court recognised in Modbury Triangle, it is often irrational. All society can often do is deal with its aftermath as best it can. The role of tort law as it applies to cinemas in the context of violent and movie-inspired crime is one small but conceptually important piece of this jigsaw puzzle.

This article has analysed the interrelationship between tort law, the cinema and violent crime. It has shown that if a case of violent and movie-inspired crime were to occur in an Australian cinema, it is unlikely that Australian law would support a claim against an occupier in the tort of negligence. Further, it has also shown that this is probably the best approach from a policy perspective, an important reinforcement of the current legal position.

Australia is fortunate enough to be in the position that a local event of the kind occurring in Aurora, Colorado on 20 July 2012 has not yet occurred. It can only be hoped that the role of Australian tort law in regulating the aftermath of such an incident remains untested for at least some time to come.

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4. Esposito, above n 1.