

Practice Notes: Assaults on Licensed Premises

Introduction

My name is John Pettit and I am a Forensic Security Consultant, having over 31 years of security industry experience. I have prepared the following practice notes that I hope all Legal Practitioners will find helpful when acting for clients who have been injured due to an assault on Licensed Premises.

Assaults on Licensed Premises

Given the close correlation between licensed premises, alcohol and violence, it is paramount that Licensee's take appropriate steps to minimise or eliminate the risk of injury to patrons and their staff from alcohol-related violence under occupational health and safety. A Licensee must also recognise that this duty of care extends all the way to the boundary of the property.

The Fallacy of Spontaneous and Instantaneous Events

No event ever happens in isolation and the argument often advanced by defendants that *'assaults in hotels are unforeseeable, spontaneous and instantaneous criminal acts and that nothing can be done to prevent them'*, is a fallacy. This outdated school of thought has successfully been challenged and long put to bed in other industries, along with such other obsolete concepts as the *'accident prone worker'*.

There is always and without exception, a precipitating chain of events that precede any concluding event. Each one of these precipitating links in the chain of destiny affords an opportunity to intervene and change the ultimate outcome of the event. Licensee's need to take an innovative and imaginative approach to identifying the links in the chain that they can influence and develop proactive systems of safety designed to disrupt the chain of causation to prevent circumstances coming together that result in injury.

Keeping a Safe House

Generally, there are five fundamental principles to keeping a safe house. A licensee **must not**:

- allow unduly intoxicated persons to enter the premises;
- allow persons to become unduly intoxicated on the premises;
- permit any indecent, disorderly, violent or quarrelsome conduct on the premises;
- permit intoxicated, disorderly, violent or quarrelsome persons to remain on the premises; and,
- let intoxicated, disorderly, violent or quarrelsome persons to come into contact and/or conflict with other patrons during their departure from the premises after being evicted.

A Licensee should make it their business to know their patrons. Unknown patrons constitute an unknown risk as the Licensee has no way of assessing the person's potential to cause trouble. For example: is the patron a quarrelsome drunk? Any risk that is unknown should always be treated as *'high risk'* until proven otherwise. Accordingly, Licensees and security staff should always err on the side of caution and pay close attention to unknown patrons until their demeanor becomes known.

Licensees often engage the service of security providers to supply crowd controllers/security guards to help manage the risk. However, the presence of security guards alone, is not an adequate safe system of security. A safe and adequate system of security also includes processes, procedures, safe systems of work and training. A safe and adequate system of security for licensed premises, would be one that:

- Is proactive rather than reactive;

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- Is designed to prevent seemingly spontaneous and unpredictable events;
- Has sufficient number of security staff to undertake the job safely;
- Controls access to the licensed premises to prevent unduly intoxicated persons entering;
- Involves actively monitoring for signs of intoxication, indecent, disorderly, violent or quarrelsome behavior;
- Clearly identifies the full range of duties that security officers are likely to encounter, including duties that are more unusual in nature;
- Has *safe systems of work* designed to deal with the full range of duties that security officers are likely to encounter, including duties that are more unusual in nature;
- Provides adequate training, information and instruction for the security officers to be able to perform the full range of duties the security officers are likely to encounter, including duties that are more unusual in nature; and,
- Entails a system of constant review to learn from past experiences so as not to repeat mistakes made in the past.

Intoxication

In 1927, the British Medical Association recommended that the term *'drunk'* should always be taken to mean that the person concerned was *"so much under the influence of alcohol as to have lost control of his faculties to such an extent as to render him unable to execute safely the occupation on which he was engaged at the material time"*.

For the purposes of the NSW and Qld Liquor Acts, a person is considered to be intoxicated or unduly intoxicated if *"the person's speech, balance, co-ordination or behaviour is noticeably affected"*.

How much alcohol is too much? According to scientific studies, signs of intoxication are detectable at levels as low as 0.02% Blood Alcohol Content (BAC) and all persons are impaired by 0.08%. The table below (figure 1) set out the stages of acute alcoholic influence/intoxication.

Based on the clinical signs and symptoms of intoxication in the table below (figure 1), a person reaching a BAC of 0.09% or above, would be clearly deemed to be intoxicated under the definitions of the Liquor Acts of NSW and Qld as the patron's *'speech, balance, co-ordination or behaviour'* would be expected to be noticeably affected.

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Stages of Acute Alcoholic Influence/Intoxication ¹		
Blood Alcohol concentration	State of Alcohol Influence	Clinical Signs/Symptoms
0.01% – 0.05%	Subclinical	Influence/effects usually not apparent or obvious Behaviour nearly normal by ordinary observation Impairment detectable by special tests
0.03% – 0.12%	Euphoria	Mild euphoria, sociability, talkativeness Increased self-confidence, decreased inhibitions Diminished attention, judgement and control Some sensory-motor impairment Slowed information processing Loss of efficiency in critical performance tests
0.09% – 0.25%	Excitement	Emotional instability, loss of critical judgement; Impairment of perception, memory and comprehension; Decreased sensory response, increased reaction time; Reduced visual acuity & peripheral vision, slow glare recovery; Sensory-motor incoordination; impaired balance; slurred speech; vomiting; drowsiness.
0.18% – 0.30%	Confusion	Disorientation, mental confusion, vertigo, dysphoria; Exaggerated emotional states (fear, rage, grief, etc.); Disturbance of vision (diplopia, etc.) and of perception of color, form, motion, dimensions; Increased pain threshold; Increased muscular in-coordination, staggering gait, ataxia; Apathy, lethargy.
0.25% – 0.40%	Stupor	General inertia, approaching loss of motor functions Markedly decreased response to stimuli Marked muscular in-coordination, inability to stand or walk Vomiting, incontinence of urine and feces Impaired consciousness, sleep or stupor
0.35% – 0.50%	Coma	Complete unconsciousness, coma, anesthesia Depressed or abolished reflexes Subnormal temperature Impairment of circulation and respiration Possible death
0.45% +	Death	Death from respiratory arrest

Figure 1 – K. Dubowski, PhD., Department of Clinical Chemistry and Toxicology, University of Oklahoma, School of Medicine

But how many drinks does it take to reach 0.09% BAC? As an illustrative guide, let us consider a male of 25 years, 180cm in height and 70kg in weight, drinking at a rate of 3 drinks per hour or one every 20 minutes. Let us also assume that he is drinking (285ml) pots of full strength beer (4.9% alcohol).

When we consume alcohol, our body absorbs it faster than we can expel it from our bodies. Therefore, as we continue to consume alcohol we have a net gain in blood alcohol content (BAC). The chart below (figure 2) sets out the male's estimated BAC at various intervals as he continues to consume alcohol over time.

Theoretically, in order not to permit this person from becoming intoxicated on the premises, a Licensee would have to stop serving the patron after his fifth drink when he reached the 0.08% mark.

This 0.08% BAC limit might well be considered generous in light of Garriott's² observations that *“although few of the studies examined performance effects at alcohol levels less than 0.05 g/dL, there was sufficient*

¹ Stages of Acute Alcoholic Influence/Intoxication

<https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjvsn8-oXQAhVGFJQKHxKhDWAQFggiMAA&url=http%3A%2F%2Fwww.drugdetection.net%2FPDF%2520documents%2FDubowski%2520-%2520stages%2520of%2520alcohol%2520effects.pdf&usg=AFQjCNEYZqKrMLLjYrGaVYef5cn7mT16Q&sig2=TjJ2LyfK-A-WpMPquEb5xw>

² Garriott, (2009). Garriott's Medicolegal Aspects of Alcohol (4th Ed). Lawyers & Judges Publishing Company.

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evidence to demonstrate that BACs of 0.05 g/dL and above produce impairment of the major component of driving performance, to include reaction time, tracking, divided attention performance, information processing, oculomotor functions, perception and other aspects of psychomotor performance”.

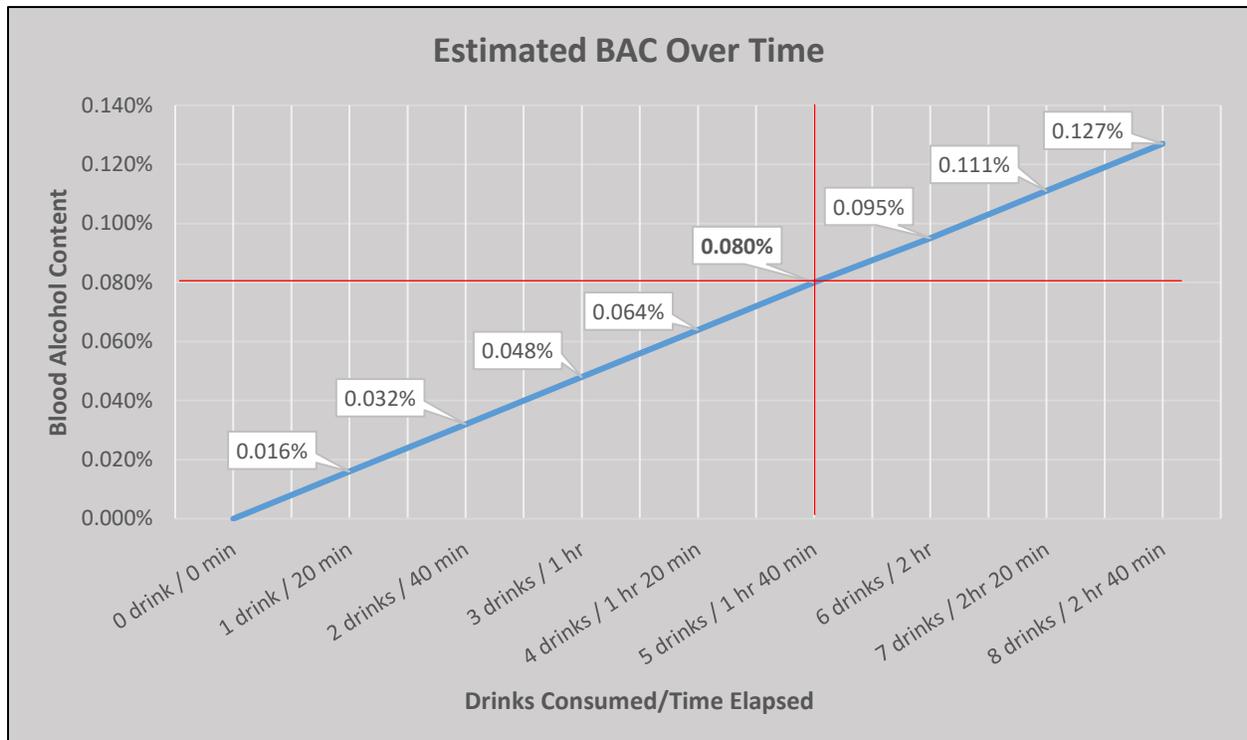


Figure 2 – Estimated BAC Over Time: Source Data - RUPissed.com.

It may be useful to note that a person’s estimated gross level of intoxication can be calculated using the Widmark Equation if certain factors such as, the type of alcohol, the duration of consumption and gender, and size and weight of a person is known. This formula could be used to estimate the gross level of intoxication of an assailant at the time of the assault if these elements are known and to provide evidence that the licences permitted a person to become intoxicated on the premises.

Assailants often make admissions during their police record of interview as to the amount of alcohol that they consumed on the night in question. Accordingly, Legal Practitioners would be well advised to always attempt to obtain a copy of the assailant’s police record of interview or sentencing remarks to help establish the state of intoxication of the assailant.

CCTV

To properly assess a client’s potential claim, it is recommended that at least 30 minutes of CCTV vision containing the assailant in the time leading up to the assault be requested from the defendant as a minimum.

Ideally, Legal Practitioners should request, from the defendants, all the CCTV vision of the event from the time the assailant entered the premises up until a short time after the assault occurred.

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This prior video may contain vital evidence to a plaintiff's case. For example, in "slip, trip and fall" cases in shopping centers, this preceding CCTV vision (usually 20 minutes) has been used in the courts to establish whether an adequate systems of inspections were in place at the time in order to clean up spills in a timely fashion and when the last time the area was inspected by cleaners.

Similarly, Legal Practitioners could argue that this 20-minute rule should be adopted in the security inspections of toilets and other areas of the hotel where assault occasionally happen, while high risk areas such as dance floors and bar areas should be under constant observation by security staff.

In the context of assaults on licensed premises, this preceding CCTV surveillance footage could be used in a similar way to establish whether an adequate system of inspections, was not only in place, but was being carried out by security officers at the time, to monitor or identify patrons who were, or had become intoxicated, disorderly or quarrelsome, after entering the premises. It could also be used to establish the manner, how often and who conducted these inspections.

CCTV footage could be used to establish at what time the assailant arrived and how long they had been on the premises prior to an incident. This CCTV footage could also be used to establish whether the assailant was adequately vetted by security for signs of intoxication or quarrelsome behavior before being allowed to enter the premises.

Prior CCTV video footage of an incident could also potentially show that the assailant was demonstrating visual signs of intoxication (i.e. stumbling, falling, spilling drinks, excessive drinking, etc.) in the lead up to an assault. It may show the assailant's quarrelsome or disorderly interaction with other patrons.

Surveillance video could also be used to establish what the assailant was drinking. i.e. shots, sprits, beer, jugs, etc. This evidence could later be used to calculate the gross level of intoxication of the assailant at the time of the incident.

In addition, CCTV footage can also be used to established how long it took security to respond to the incident, how they responded, how many responded, and the type or manner of restraints used by security staff during an eviction. CCTV footage can also be used to establish what security were doing at the time and where they were positioned immediately prior to the event occurring. (i.e.: were they goofing off or speaking to women rather than observing the crowd)

Solicitors should always request a floorplan of the venue showing the field of view of all the CCTV cameras to ensure that all available and relevant CCTV vision has been disclosed. Should a defendant raise concerns that such disclosure might compromise their security, the counter argument that should be raised is that the primary reason for CCTV being installed in venues is for public safety, not security.

Excessive Force

In addition to the '*use of force*' being authorized, justified or excused in law and proportionate, the '*use of force*' must also meet the of the provisions of the Workplace Health and Safety Act.

Accordingly, any '*use of force*' must be free from risk, so far as reasonably practicable. Furthermore, a security officer or police officer, as a worker, must take reasonable care that their acts or omission do not adversely affect the health and safety of other people in the execution of their duties. For this reason, security officers should be trained in '*uses of force*' that **do not causes serious or permanent injury**.

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Injury often follows the *use of force* due to the:

- propensity of the hold, method of restraint or the application of force to cause injury;
- prolonged application of the hold, method of restraint or physical force;
- excessive application of the hold, method of restraint or physical force;
- incorrect application/use of the hold, method of restraint or physical force;
- victim struggling to relieve the pressure/pain caused by the excessive, prolonged or incorrect application of the hold, method of restraint or physical force;
- victim struggling due to the inability to breath caused by the excessive, prolonged or incorrect application of the hold, method of restraint or physical force;
- uncontrolled landing on the ground caused by the excessive, prolonged or incorrect application of force, hold, method of restraint or physical force; and,
- closed hand strikes or hits to vulnerable parts of the body.

Hamdorf, Boni, Webber, Pikel and Packer³ define '*excessive use of force*' as:

- Any force when none is needed;
- More force than is needed;
- Any force or level of force continuing after the necessity for it has ended;
- Knowingly wrongful use(s) of force;
- Well-intentioned mistakes that result in undesired use(s) of force.

Training of Security Staff

Today all Security Officers/Crowd Controllers must undertake pre-vocation training by registered training organisations (RTO's) before they can obtain a Crowd Controller's/Security Officers licence. This fact is often raised by defendants in response to allegations of failing to adequately train their security staff.

This pre-vocational training is only general in nature. It is beyond the scope of RTO's to be able to develop *safe systems of work* for the full range of duties that security officers are likely to encounter, including duties that are more unusual in nature after entering the workforce. These matters are best known and understood by the employer and therefore this responsibility falls squarely on the employer's shoulders.

Sufficient Numbers of Crowd Controller's

Licensee's often rely on various ratios of patrons to crowd controllers to establish their security manpower needs. However, these ratios are in fact a 'minimum number' set by the various Departments of Liquor Licensing purely to satisfy the requirements of the Liquor Act.

In practice these numbers may not necessarily be adequate or sufficient to ensure that the work can be performed safely and therefore they cannot be relied upon. For example, in Queensland the ratio is 1 Crowd Control for the first 100 patrons. Clearly, if a brawl were to break out involving 20 patrons, it would not be safe or appropriate for 1 security officer on his own to attempt to quell the riot.

³ Hamdorf, R., Boni, N., Webber, I, Pikel, A, & Packer, J. (1998). National minimum guidelines for incident management, conflict resolution and use of force. Report Series No. 132.1

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Similarly, a single officer could not be expected to physically evict a violent patron, as this task is a two-man job if it is to be performed safely.

The correct number of security officers, the nature of training and the design of the systems of work is determined by a proper assessment of the full range of duties the offices are likely to encounter, including those duties that are more unusual in character. Further, the systems of work should not only be safe for the security officers but also for the patron they must physically deal with.

Preventing Assaults on Licensed Premises - Proactive Vs Reactive Systems

There is a general duty 'not to expose' workers and non-workers to risks to their health and safety in the first instance. The term 'non-worker' is very broad and encompasses patrons of hotels, guest of motels, customers of shopping centres and even criminals being arrested by police.

This duty *'not to expose'* workers and other persons, cannot be adequately discharged by reactive *systems of work*, especially when dealing with situations where people have the propensity to act irrationally, spontaneously and unpredictably.

A Licensee is required to be proactive and take steps to first eliminate the risk to the health and safety of patrons. If this is not possible, then they are required to reduce the risk so far as reasonably practicable.

Examples of proactive systems designed to eliminate the risk, include:

- Vetting persons for signs of intoxication before allowing them entry to the premises;
- Denying entry to persons *'unduly intoxicated'*;
- Actively monitoring for signs of intoxication, indecent, disorderly, violent or quarrelsome behaviour on the premises and removing intoxicated, indecent, disorderly, violent or quarrelsome persons before physical violence can arise;
- Constant monitoring and supervision of persons who are drinking heavily;
- Denying the service of alcohol before patrons can become unduly intoxicated;
- After evicting an intoxicated, indecent, disorderly, violent or quarrelsome person, making sure that they:
 - Don't come into conflict with other patrons as they leave the premises;
 - Are adequately supervised and controlled as they leave;
 - Leave the vicinity and do not attempt to return to cause trouble.
- Stationing guards in strategic locations around the hotel to ensure a rapid response to emerging situations.

Examples of reactive systems:

- Evicting patrons after a fight has begun;
- Evicting patrons well after they are allowed to become *'unduly intoxicated'* or indecent, disorderly, violent or quarrelsome;
- Responding to fights after they begin; and,
- Providing first aid to an injured patron.

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Evictions – Dealing with intoxicated, indecent, disorderly, violent or quarrelsome persons

When evicting intoxicated, indecent, disorderly, violent or quarrelsome persons, security guards and Licensees can ill afford not to be proactive in the management of these types of situations. Such events should always be treated as *'high risk'* due the propensity for such persons to act irrationally, spontaneously and unpredictably. It is for these reasons that intoxicated, indecent, disorderly, violent or quarrelsome persons are not permitted to remain on licensed premises. Accordingly, security guards and Licensees should always err on the side of caution when managing an eviction for the sake of their own safety and the safety of other patrons.

While the physical restraint of an evicted patron is not always warranted, it is however necessary and justified that they be closely supervised to ensure that they don't come into contact or conflict with other unsuspecting patrons as they leave. Further, an evicted patron should be closely supervised to ensure that they do in fact leave the vicinity of the licensed premises and they do not attempt to return to again cause a nuisance.

Close supervision requires that security guards position themselves in close proximity to the evictee to be able to swiftly intervene before contact, conflict or injury can arise.

When dealing with potentially dangerous situations, the plan is simple *'cordon, contain, separate, isolate, evacuate, negotiate and resolve'*.

When dealing with an eviction, security officers should never allow matters to become more complexed and involved than need be. This can be done by keeping those parties not directly involved away from the proceedings.

Evidence Check List

Licensed Premises

- Security Incident Register
- Security Plans
- CCTV Surveillance (Preferably from the time the assailant enters the premises or at least 30 minutes before the incident)
- Floor plan including details of CCTV camera locations;

Security Firms

- Training records
- Operations Manuals, security procedures, policies or guidelines (i.e. use of force policies)
- Security Plans
- Post orders, standing instructions, etc.

Police

- Prosecution brief in relation to the assault
- Police records of interview with the assailant
- Witness statements

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- CCTV footage of incident

Liquor Licensing

- Liquor Licensing investigations into the event

City Councils

- Public space CCTV footage of the incident

Insurer

- Investigators/Loss Adjuster reports of the incident

Courts

- Transcripts and Sentencing Remarks from the assailant trial

Independent Witnesses

- Video captured on mobile phones
- Comments, photo's or video uploaded to social networking sites. i.e.: Facebook etc.

For further questions regarding security issues, feel free to contact John Pettit direct on 0418 720 187.

John Pettit has over 31 years of security industry experience having worked as a security officer/crowd controller for a period of 27 years.

John is also Board Certified in Security Management by ASIS International, having earned the coveted Certificated Protection (CPP), Professional Certified Investigator (PCI) and Physical Security Professional (PSP) designations.

John holds the following vocational and tertiary qualifications:

- Master of Occupational Health & Safety with a '*Specialisation in Occupational Safety*'
- Master of Criminology
- Bachelor of Science (Security)
- Diploma of Security and Risk Management
- Diploma of Government Investigation
- Certificate IV in Training and Assessment
- Certificate III in Micro Business Operations
- Certificate III in Security (Guarding)
- Certificate II in Security Operations

To download a full copy of John's CV follow the link below:

http://security-advisor.com.au/doc/Professional_CV_-_JPettit_2016.pdf

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