
H Australian litigation on gambling

H.1 Introduction

The few instances of litigation in Australia by gamblers against venues¹ have been:

- *Preston v Star City Pty Ltd (1999 and later years)*²
- *American Express International v Simon Famularo; Simon Famularo v Burst Pty Ltd (2001)*³
- *Reynolds v Katoomba RSL All Services Club Ltd (2001)*⁴
- *Foroughi v Star City Pty Ltd (2007)*⁵
- *Kakavas v Crown Ltd (2007)*⁶ and *Kakavas v Crown Melbourne Ltd & Ors (2009)*.⁷

Of the above cases, *Famularo*, *Reynolds* and *Foroughi* have involved final decisions. *Preston* has yet to be finally decided, although it has been subject to several ‘interlocutory decisions’ (that is, decisions made in the course of dealing with the case). As a result of the interlocutory decision in *Kakavas* in 2007, the plaintiff re-pleaded his case against Crown and two Crown employees. This new case was recently decided by the Supreme Court of Victoria in November 2009. The decision has since been appealed by *Kakavas*.

These cases involved at least three possible causes of action against the venue — common law negligence (and, as part of that, a breach of duty of care by the venue), breach of statutory duty, and unconscionable conduct. This appendix reviews the outcomes of the cases in relation to each of these causes of action.

¹ Namely, the operators of gambling venues.

² There are a number of *Preston* cases. The ones considered in the appendix are [1999] NSWSC 459; [1999] NSWSC 1273; and [2005] NSWSC 1223.

³ District Court of New South Wales, McNaughton DCJ, unreported, 19 February 2001.

⁴ [2001] NSWCA 234.

⁵ [2007] FCA 1503.

⁶ [2007] VSC 526.

⁷ [2009] VSC 559.

H.2 Common law negligence

Several of the cases above involved a claim of common law negligence by the gambler against the venue and, as part of that claim, the gambler asserted the existence of a duty of care to avoid foreseeable harm.

In *Reynolds v Katoomba RSL All Services Club Ltd (2001)*, Reynolds sued Katoomba RSL to recover substantial losses incurred while gambling on gaming machines at the club. Reynolds relied on several causes of action against Katoomba RSL, including negligence. Both Reynolds and his father claimed that they had informed the club that Reynolds was a problem gambler, requested that his cheques not be cashed or that he be extended credit, and requested that Reynolds be barred from the club. Reynolds claimed that the club initially agreed to this, but later continued to cash his cheques and allow him to gamble. The New South Wales Court of Appeal (Spigelman CJ, Powell JA and Giles JA), which accepted the trial judge's findings of facts, held that Katoomba RSL did not owe Reynolds a duty to protect him against his gambling losses.

In the leading judgment in the case, Spigelman CJ (Chief Justice) considered the principles associated with a duty of care. He said that the 'economic loss occasioned by gambling' is not one for which 'the law permits recovery', except in an 'extraordinary case' [9]. He gave no examples of when an extraordinary case would arise. He also said that:

In many respects, the tort of negligence is the last outpost of the welfare state. There have been changes over recent decades in the expectations within Australian society about persons accepting responsibility for their own actions. Such changes in social attitudes must be reflected in the identification of duty of care for purposes of the law of negligence. ...

This Court should be very slow indeed to recognise a duty to prevent self-inflicted economic loss. Loss of money by way of gambling is an inherent risk in the activity and cannot be avoided. ... Nevertheless, whether a duty arises in a particular case must depend on the whole of the circumstances, even in the case of an inherent risk. [26]–[27]

Moreover, Spigelman CJ said that 'knowledge of vulnerability is a pertinent factor entitled to weight when deciding whether the circumstances of a particular case create a duty' and is also relevant to establishing whether a duty to avoid 'pure economic loss exists' [29]–[30].

In *Preston v Star City Pty Ltd (1999)*, Preston claimed that Star City was negligent by inducing him to gamble in its casino, particularly when intoxicated, as well as pleading other causes of action. He claimed that Star City provided inducements that included: promises of awarding business contacts to Preston if he remained a

high roller patron; providing Preston complimentary products, services and privileges, such as liquor, free of charge; and supplying Preston a cheque cashing facility. Preston claimed he suffered gambling losses of more than \$3 million. Although a final determination of *Preston* is yet to be made, of note are the interlocutory decisions of Wood CJ in 1999⁸ and Hoeben J (Justice) in 2005⁹ to allow Preston to pursue a claim for negligence against Star City.

Also, in the 1999 decision, Wood CJ made the following remarks on the circumstances in which a duty of care to a problem gambler may exist:

The precise limits of the duty of care owed in the present case, and of any breach, are likely to depend upon the facts proved — most particularly upon the extent to which the defendant had knowledge of any propensity on the part of the plaintiff to be a problem gambler, and upon the extent to which it sought to take advantage of him. Additionally, it is likely that there would be reference to matters such as industry practice, economic consequence, practicability and a variety of social and policy factors. ...

... At a minimum, however, I am of the view that it is strongly arguable that [a duty of care] would extend to a prohibition on the provision of further liquor to a problem gambler, who is seen to be intoxicated, or to be behaving in a manner that is obviously totally rash, as well as to the ‘spiking’ or ‘switching’ of his drinks. Equally arguable, in my view, is its extension to the provision of significant credit facilities or excessive encouragement through incentives, of a person who has specifically asked to be barred or to go beyond a limit that he has asked the casino to set. [131]–[132]

In *Foroughi v Star City (2007)*, Foroughi relied on several causes of action against Star City, including negligence. Foroughi, who was a problem gambler, claimed to have entered and gambled at Star City’s casino on 65 occasions over an 18 month period after having signed a voluntary exclusion agreement in 2004. He claimed gambling losses over this period of \$600 000 and claimed that, at no time, Star City detected or stopped him from gambling.

Jacobson J of the Federal Court noted that the claimed duty of care was for Star City to ‘detect and remove Foroughi from the casino as soon as possible’. He dismissed the existence of such a duty stating that Foroughi ‘expressly and voluntarily undertook responsibility for his own conduct in agreeing not to enter the gaming areas of Star City and to seek assistance and guidance of a qualified and recognised counsellor’ [128]. Even if there were a duty, Jacobson J held there would not have been a breach as he accepted that Star City had adequate measures to detect excluded persons [132]. However, he noted that the Casino Control

⁸ *Preston* [1999] NSWSC 1273.

⁹ *Preston* [2005] NSWSC 1223.

Authority was critical of systems that relied on humans to detect excluded persons, although it did not recommend changes to Star City's systems [137].

In *Kakavas v Crown Ltd (2007)* and *Kakavas v Crown Melbourne Ltd & Ors (2009)*, Kakavas who was a high roller sued Crown to recover around \$30 million in gambling losses incurred at its casino. Negligence was among the causes of action pleaded in the 2007 case. Kakavas was subject first to a voluntary exclusion order from 1995 and, then, from 1998 he was prohibited from entering Crown premises by a withdrawal of licence by the casino. Crown accepted Kakavas back into the casino in June 2005, where he recommenced gambling until August 2006, resulting in substantial gambling losses.

Kakavas claimed he suffered from 'pathological gambling' from July 2004 or thereabouts, and that Crown and Williams knew of his special disability and devised a scheme in late 2004 to lure Kakavas back to gambling in the casino. Kakavas claimed that he was provided with inducements including favourable betting arrangements, lines of credit of up to \$3.8 million (which was revised to \$4.5 million in the 2009 case), and boxes and bags of cash containing \$30 000 to \$50 000.

Harper J dismissed Kakavas' plea of a cause of action in negligence against Crown, but allowed him to re-plead his claim on the ground of unconscionable conduct, which — as seen later — was decided against him in the 2009 case. In relation to the plea of negligence, Harper J said that claims of 'active and deliberate intervention by the casino operator in the knowledge of, and for the exploitation of, the patron's vulnerability should be allowed to go to trial, but not as a claim in negligence' [47].

In conclusion, it is apparent from the cases, particularly *Reynolds*, that Australian courts are unlikely to find the existence of a duty of care owed to problem gamblers to avoid 'self-inflicted' economic losses from gambling other than in 'extraordinary circumstances'.

H.3 Breach of statutory duty

As well as claims of common law negligence, several of the cases involved claims for a breach of statutory duty.

According to a guiding principle established in 1995 by the High Court of Australia, a cause of action for breach of statutory duty will generally arise where a statute:

... which imposes an obligation for the protection or benefit of a particular class of persons is, upon its proper construction, intended to provide a ground of civil liability when the breach of the obligation causes injury or damage of a kind which the statute was designed to afford protection. (*Byrne & Frew v Australian Airlines* (1995) 185 CLR 410 at 424)

Reynolds alleged a breach of statutory duty in *Reynolds v Katoomba RSL All Services Club Ltd* (2001) under the *Registered Clubs Act 1976 (New South Wales)*, which provided that, as a condition of a certificate of registration of a club, the secretary must not provide a cash advance on club premises other than as a prize won as a consequence of operating a poker machine. At the original hearing, the judge dismissed this claim on the basis that the Act did not expressly confer a private right of action, nor was there a legislative intention to confer such a right.

In *Preston v Star City Pty Ltd* (1999), Preston claimed that Star City breached its statutory duty under the *Casino Control Act 1992 (New South Wales)* in allowing him to gamble whilst intoxicated as well as providing him with inducements to gamble. Among other things, the Act prohibits: intoxicated persons from gambling at the casino; the casino from selling liquor to intoxicated persons in the gaming area; and the casino from inducing patrons to enter the casino or taking part in gaming in the casino. On appeal, Wood CJ struck out Preston's claim for breach of statutory duty, contrary to the judgment at first instance. In striking out the claim, Wood CJ looked to the whole of the regulatory regime applying to the casino and held that this regime, nor the specific provisions relied upon by Preston, did not confer a private right of action.

In *Foroughi v Star City Pty Ltd* (2007), Foroughi claimed that Star City breached Part 5 of the *Casino Control Act* which provides for the removing of a person subject to a voluntary exclusion order as soon as he or she is identified. Jacobson J noted that the claim was not argued at the hearing, but said that the legislative history and case law indicated that the intention of the Act was not to confer a private right of action for damages on problem gamblers who enter a casino in breach of an exclusion order.

In conclusion, the courts have been reluctant to recognise any private cause of action by problem gamblers for a breach of statutory duty by venues. The courts appeared not only to look to the relevant statutory provision claimed to be in breach, but to the intent and history of the entire statute.

H.4 Unconscionable conduct

Some court cases have also tested whether certain behaviour by gambling venues might constitute unconscionable conduct under the *Trade Practices Act 1974*. The Trade Practices Act (Part IVA) contains a general prohibition on unconscionable conduct, recognised as part of the law of equity of Australia (section 51AA). The Act also prohibits unconscionable conduct in consumer transactions (section 51AB) and business transactions (section 51AC). In addition, the Act sets out the factors that the courts may consider in determining if unconscionable conduct has taken place. In relation to consumer transactions (section 51AB), the factors include the relative strengths of the bargaining positions and whether any undue influence, pressure or unfair tactics were used.

In *American Express International v Simon Famularo; Simon Famularo v Burst Pty Ltd (2001)*, O'Malley's hotel at Kings Cross allowed Famularo, a problem gambler, to gain cash advances using his American Express credit card for the purposes of gambling. This contradicted the contract American Express had with the hotel, which prohibited cash advances for the purposes of gambling. However, the hotel manager informed Famularo that obtaining cash advances was 'not a problem'. The hotel also misrepresented the purposes of the advances in documentation (advance stubs) indicating the purpose was for accommodation. Staff knew Famularo had a gambling problem, he often gambled when intoxicated and the hotel often supplied free drinks when he had been losing heavily. American Express sued Famularo for unpaid advances and he in turn sued the hotel.

Naughton DCJ (District Court Justice) held that the hotel had acted in an unconscionable manner when it misled Famularo by stating the cash advances were 'not a problem' and that this had encouraged Famularo to gamble more than he otherwise would have. He found this to be a breach of section 51AB of the Trade Practices Act, which entitled Famularo to compensation. Naughton DCJ held that the hotel was to pay \$64 000 in compensation to Famularo and that Famularo was to pay a similar amount to American Express.

In addition to actions in negligence and breach of statutory duty, Reynolds claimed in *Reynolds v Katoomba RSL All Services Club Ltd (2001)* that Katoomba RSL had engaged in unconscionable conduct. Reynolds argued that the fact he was a problem gambler put him in a position of 'special disadvantage' in relation to the club and of which position the club was aware. He argued that by facilitating his use of gambling facilities, the club took advantage of Reynolds' position of special disadvantage to profit from his continued gambling and his continued losses. The Court of Appeal, however, found that there was no unconscionable conduct on the part of the club.

In *Foroughi v Star City Pty Ltd (2007)*, Foroughi claimed unconscionable conduct by Star City under sections 51AA and 51AB of the *Trade Practices Act 1974*. Foroughi claimed that Star City employees had made statements to him at the time he signed a voluntary exclusion agreement with the casino in 2004 to the effect that he would definitely be identified and removed if he were to try and enter the casino. Star City rejected that the statements were made. Jacobson J rejected Foroughi's claims, finding him to be an unreliable witness.

In *Kakavas v Crown Ltd (2007)*, although Harper J rejected Kakavas' claim in negligence, he allowed Kakavas to re-plead his claim on the ground of unconscionable conduct. The judge noted in that case that this would not necessarily mean that the law should give gamblers a remedy.

Looked at in the light of ordinary concepts of fair and just dealing, it is at least arguably wrong, morally and ethically, for a casino operator by conscious and deliberate policy to prey upon a patron known by the operator to be a compulsive gambler ...

The moral and ethical position may be judged against the provision of the [Casino Control Act]. It forbids the operators of casinos from, among other things, promoting gaming.

But to say that, is to say no more than *perhaps* the law should align itself with the moral and ethical position, and in doing so provide the gambler with a private remedy in the form of recovery of his or her losses, in whole or in part. It is not of itself a reason to conclude that the law *necessarily* should, still less that it does, provide such a remedy. It is, after all, also arguable that people would be responsible for their actions. Most gamblers lose most of the time. Why should some be favoured with the pleasure without the pain? [2007] VSC 526 at [22]–[24]

Kakavas subsequently re-pleaded his claim on the basis of unconscionable conduct against Crown (and two Crown employees) in *Kakavas v Crown Melbourne Ltd & Ors (2009)*. He claimed that, because he suffered from a condition known as pathological gambling, he was at a special disadvantage in his dealings with Crown in that his ability to make decisions and judgments as to what was in his own interests, and to act accordingly was significantly impaired. He claimed that each of the defendants either knew this or knew of facts which would cause a reasonable person to form the opinion that it was more probable than not that this was true. Crown's conduct was therefore unconscionable at common law and in contravention of section 51AA of the Trade Practices Act.

Harper J rejected Kakavas' claim of unconscionable conduct. He found that there was no evidence of a plan to exploit Kakavas. Kakavas was in a very strong bargaining position vis-à-vis Crown because of his ability to go elsewhere to gamble and his ability to self-exclude. Indeed, Kakavas was able to negotiate very favourable terms for his visits to Crown, and was able to abstain from visiting the

casino until his demands were met. The court found that the nature of high-stakes baccarat is such that very high wins and losses are common, so the loss of \$2.3 million in 28 minutes was not proof of a gambling problem. Indeed, on one occasion, Kakavas left the casino with \$10 million in winnings. The various inducements held out by Crown, including access to credit facilities, travel allowances and use of Crown's private jet, food, accommodation and monetary gifts did not lure an unwilling Kakavas back to Crown. Rather, they were negotiated after Kakavas agreed to return and were comparable to benefits he was offered at casinos in Las Vegas and elsewhere.

Harper J criticised Crown's disorganised way of allowing excluded patrons back into the casino and also its failure to recognise the application of certain legislation to Kakavas which would have prevented him from gambling, but in the end remarked that Kakavas could not shift responsibility to Crown for his own decisions.

Harper J concluded the case as follows:

I find that Crown did not seek to exploit the plaintiff's gambling disability. It knew of a problem. It might have acknowledged, if asked in 2004, whether the problem would re-surface when Mr Kakavas returned to the Casino, that that was a possibility. If asked, it ought to have acknowledged that his was a disability which on the balance of probabilities would be to its advantage were Mr Kakavas to remain as a patron over the medium to long term. It should now accept that its structures for dealing with its own desire to have Mr Kakavas resume his patronage were inadequate. Informal meetings of committees the jurisdiction of which and even the names and identities of which are uncertain, and which meet without an agenda or proper minutes, are a pathetic excuse for world's best practice in dealing with the possible return of gamblers with a history of problems. In the end, however, nothing emerges from the miss-mash to indicate the existence of a scheme to exploit. More significantly, Mr Kakavas wanted to return to the Melbourne Casino, and (with some fluctuations in his position) wanted to remain a patron thereafter. He took the relevant decisions. Crown did not dictated the outcome of his deliberations about those decisions. Of course it sought to influence them. But it did not have the power to have him do that which he in truth did not want to do. He now seeks to blame Crown for his own decisions; to place upon it responsibility for failing to do for him that which he failed to do for himself. But this is not something to which equity can accede. The responsibility was his. In the words of the [psychologist's] report: he knew how to self-exclude, and he would do it if that was his wish. [661]

Kakavas subsequently appealed this decision to the Court of Appeal in the Supreme Court of Victoria.

In conclusion, it is apparent that, apart from the case of *Foroughi*, the courts have been reluctant to find unconscionable conduct in venues towards their gambling

patrons. This reluctance in the courts was most recently confirmed in the *Kakavas* case.

H.5 Self-responsibility

An important underlying factor explaining why Australian courts have been reticent in finding for a gambler against a venue in the cases above has been the notion of self-responsibility — namely, that gamblers are ultimately responsible for their own actions.

In the *Kakavas* case, Harper J noted that, although equity is concerned to protect the vulnerable, persons must ordinarily be responsible for their own actions or inactions, stating:

The seeds of tyranny are to be found in the footsteps of those who profess to know more about what is good for the subjects of their attention than do the subjects themselves. [2009] VSC 559 [426]

And later:

The limits of individual responsibility are more a question for the theologians and politicians than for judges. Nevertheless, the principles of law and equity should mark in tune with general community conceptions of those limits. That means ... that the law must require that, in the general case, men and women of full age and capacity cannot shift to an external party responsibility for what they do. Speaking generally, we should not be compelled to be our siblings' keepers. Accordingly, the law must be very careful before it imposes on third parties a requirement to protect someone else from the consequences of the decisions of that other person. [2009] VSC 559 [437]

In relation to the facts of that case, Harper J found:

... Mr Kakavas wanted to return to the Melbourne Casino, and (with some fluctuations in his position) wanted to remain a patron thereafter. He took the relevant decisions. Crown did not dictate the outcome of his deliberations about those decisions. Of course it sought to influence them. But it did not have the power to have him do that which he in truth did not want to do. He now seeks to blame Crown for his own decisions; to place upon it responsibility for failing to do for him that which he failed to do for himself. But this is not something to which equity can accede. The responsibility was his. In the words of the [psychologist's] report: he knew how to self-exclude, and he would do it if that was his wish. [2009] VSC 559 [661]

In the *Reynolds* case, Spigelman CJ also acknowledged the trend in community sentiment about person accepting responsibility for their own actions:

There have been changes over recent decades in the expectations within Australian society about persons accepting responsibility for their own actions. Such changes in

social attitudes must be reflected in the identification of duty of care for purposes of the law of negligence. [2001] NSWCA 234 [26]

On the facts of that case, Spigelman CJ found:

It may well be that [Reynolds] found it difficult, even impossible, to control his urge to continue gambling beyond the point of prudence. However, there was nothing which prevented him staying away from the club. The suggested duty on the club to advise him to resign his membership emphasises the point. He could have resigned at any time. The requests to refuse to cash cheques when asked, did not shift his personal responsibility for his own actions to the club. [2001] NSWCA 234 [48]

H.6 Cases involving the service of alcohol

There are parallels between the cases above and cases dealing with the liability of servers of alcohol to intoxicated patrons.

In *Cole v South Tweed Heads Rugby League Football Club Limited (2004)*,¹⁰ Cole embarked on an all-day drinking spree at a club. She was severely injured after leaving the premises in an intoxicated state when she was knocked down by a car. Cole claimed the club was negligent by supplying Cole with drink at a time when it should have known she was intoxicated and by allowing Cole to leave the its premises in an unsafe condition, without assistance.

The majority of the High Court — Gleeson CJ, Callinan, Gummow and Hayne JJ — found the club was not liable to Cole for negligence. In doing so, two of the majority judges expressed strong views about the self-responsibility and individual choice of patrons.

Save in extreme cases, the law makes intoxicated people legally responsible for their actions. As a general rule, they should not be able to avoid responsibility for the risks that accompany a personal choice to consume alcohol. (Gleeson CJ at [13])

... Except for extraordinary cases, the law should not recognise a duty of care to protect persons from harm caused by intoxication following a deliberate and voluntary decision on their part to drink to excess. The voluntary act of drinking until intoxicated should be regarded as a deliberate act taken by a person exercising autonomy for which that person should carry personal responsibility in law. (Callinan J at [121])

However, Kirby and McHugh JJ dissented and considered that the club did owe a duty of care. Kirby J in particular was critical of the views expressed by Gleeson CJ and Callinan J in respect of self-responsibility and individual choice:

¹⁰ [2004] HCA 29.

Their Honours' reasons are, with respect, replete with expressions reflecting notions of free will, individual choice and responsibility. ... Whatever difficulties free-will assumptions pose for the law in normal circumstances, such assumptions are dubious, need modification and may ultimately be invalidated having regard to the particular product which the Club sold or supplied to patrons such as the appellant, namely alcoholic drinks. The effect of that product can be to impair, and eventually to destroy, any such free will. This fact imposes clear responsibilities upon those who sell or supply the product in circumstances like the present to moderate the quantity of supply; to supervise the persistent sale or supply to those affected; and to respond to, and ameliorate, the consequences of such sale or supply where it is clear that the recipient has consumed enough of the product to be in a temporary state of inability to take proper care for his or her own safety. [90]

In *C.A.L. No 14 Pty Ltd v Motor Accidents Insurance Board and Scott (2009)*,¹¹ Scott left the Tandara Motor Inn at around 8.30 pm on his wife's motorcycle for his home 7 kilometres away. He ran off the road about 700 metres from home and suffered fatal injuries. The accident resulted from his ingestion of alcohol. He had drunk seven or eight cans of Jack Daniels and cola at the hotel from 5.15 pm on. His wife sued the hotel for negligence.

The High Court (French, CJ, Gummow, Heydon, Crennan and Hayne JJ) rejected the wife's claim. Among other things, it held that there was no general duty of care owed by proprietors or licensees to protect customers from the consequence of alcohol. As Gummow, Heydon and Crennan JJ stated:

... outside exceptional cases, ... persons in the position of the Proprietor and the Licensee ... owe no general duty of care at common law to customers which requires them to monitor and minimise the service of alcohol or to protect customers from the consequences of the alcohol they choose to consume. That conclusion is correct, because the opposite view would create enormous difficulties, ... relating to customer autonomy and coherence with legal norms. [52]

In relation to the facts of the case, the High Court found that there was not duty owed by the hotel to Scott. Among the factors that influenced their finding was that Scott was not vulnerable (he was a man of 41 and an experienced drinker) and Scott's autonomy.

The High Court also found that even if there were a duty there was no breach of that duty by the hotel: failing to ring Scott's wife; failing to detain Scott or his motorcycle; refusing to hand over the motorcycle (which was given to the hotel to look after); or failing to drive Scott home.

¹¹ [2009] HCA 47.

In relation to individual autonomy and responsibility generally, Gummow, Heydon, Crennan and Hayne JJ said:

... it is a matter of personal decision and individual responsibility how each particular drinker deals with ... [the] difficulties and dangers [of alcohol]. Balancing the pleasures of drinking with the importance of minimising the harm that may flow to a drinker is also a matter of personal decision and individual responsibility. It is a matter more fairly to be placed on the drinker than the seller of drink. To encourage interference by publicans, nervous about liability, with the individual freedom of drinkers to choose how much to drink and at what pace is to take a very large step. It is a step for legislatures, not courts, and it is a step which legislatures have taken only after mature consideration. [54]