Shifting Ground: Alcohol Liability and the Normative Content of Tort Law in Australia

Francine Rochford, La Trobe University, Victoria, Australia

Abstract: An Australian High Court decision has found a publican not liable in tort for damage due to a patron’s decision to drive whilst intoxicated. This decision is the most recent of a series of similar cases, and legislative intervention in all states, which attribute liability on the basis of fault, consistently with traditional negligence actions. However, the exposition of normative grounds in negligence actions is often inchoate. This paper attempts to explicate alternative moral bases for negligence actions which shift loss away from the primarily responsible plaintiff to a secondarily responsible defendant, considering in particular whether there is a regressive tendency in shifting responsibility for self-preservation. It will consider whether moral responsibility is diminished by the state of intoxication and whether the decision to drink to the point of intoxication thus becomes the basis of moral censure. Finally, it considers whether the normative content of the tort of negligence is capable of withstanding non-normative decisional claims.

Keywords: Negligence, Tort, Alcohol Liability, Jurisprudence, Norms

Introduction

THE ROLE OF the law of torts in common law jurisdictions has been subject to significant philosophical critique; in particular, the ‘tension between the corrective justice and the utilitarian or wealth maximization conceptions of tort law’ has been subject to extensive debate.1 The school of thought that characterises the aims of tort law in economic or utilitarian terms has many adherents whose theses characterise public debate. However, there remains a significant residual claim that the law of torts is grounded in morality. The elements of the law of negligence in particular are situated in the moral duties and sensibilities of the ‘reasonable person’. This article traces the remaining moral aspect of the law of negligence particularly as it manifests itself in claims relating to third party alcohol liability. In other words, it addresses issues arising when damage consequential upon alcohol abuse is attributed to someone other than the intoxicated party. In this way, risk is shifted from one who is more ‘morally’ reprehensible to one who is less so. This area of law has, in Australia, been subject to legislative intervention, and cases subsequent to the legislative change have recently retraced the steps that have allowed recovery from third parties. This paper considers the relative moral positions of the defendant and the plaintiff to assess the perspective from which the law of negligence is currently considered. This account does not make any normative claims – it merely assesses the apparent basis upon which the law of negligence is currently situated.

The Normative Content of Tort Law

‘In tort, the most familiar divide today is that between the law-and-economics camp that focuses on efficient deterrence, and the philosophical camp that tends to focus on corrective justice.’\(^2\) In the tort of negligence as it applies to cases involving alcohol liability, this division can be considered from the point of view of two claims:

1. That the objective of compensation to attain the most efficient allocation of resources, so that liability achieves deterrence in the form of ‘primary accident cost avoidance’.
   As Calebrese observes/notes: ‘[A] pure market approach to primary accident cost avoidance would require allocation of accident costs to those acts or activities (or combinations of them) which could avoid the accident costs most cheaply.’\(^3\)

2. That at objective of compensation is to achieve the objective of distributive justice, so that loss is shifted from the injured person on the basis of the moral ‘blameworthiness’ of the defendant; although sometimes, when there is an element of contributory negligence, the issue is the comparative blameworthiness of the parties.

The law and economics school is essentially a realist position, and does not speak to the origins of tort law; in any event it is my position that there is sufficient residual moral force in tort law to prompt an articulation of comparative moral claims in the shifting of loss. This is a vexed issue in tort law:

[It] is initially puzzling from the point of view of distributive justice. It protects persons and property against injury and invasion without regard to the distributions it upholds. It focuses on misfortunes that one person brings on another, leaving equally devastating losses to lie where they fall. Why have an institution charged with figuring out whose problem it is when things go wrong—that answers its questions not by looking to some idea of distribution, but instead to norms of conduct governing relations between private parties, invoking duties and standards of care, questions of remoteness, proximity and causation?\(^4\)

The elements of individual torts act as proxies for the moral content of the tort, and potentially disguise the presence of any moral coding. This paper focuses in particular on the role of the law of negligence, which has as basic premise the provision of compensation to those injured by the failure of another to comply with a duty of care. The law of negligence in Australia has evolved three components: a duty to take care, a breach of that duty, and damage caused by the breach which is not too remote from the breach. Of these principles, the principle of duty had, in its origin, the most obviously moral overtones. However it suffers from significant conceptual and definitional difficulties.

Early conceptualisations of duty were expressly compared with the moral position. In a sweeping re-evaluation of pre-existing particular rules, the classic formulation of duty in


Donoghue v Stevenson\(^5\) Lord Atkin said: ‘in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances.’ You owe a duty to your ‘neighbour’ only:

acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you must love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.\(^6\)

Lord Atkin’s reference to ‘the lawyer’s question’ reflects the influence of the Judeo-Christian tradition. It contains an allusion to the Christian Gospel:

\(^{25}\) And, behold, a certain lawyer stood up, and tempted him, saying, Master, what shall I do to inherit eternal life?
\(^{26}\) He said unto him, What is written in the law? how readest thou?
\(^{27}\) And he answering said, Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and
\(^{28}\) with all thy strength, and with all thy mind; and thy neighbour as thyself.
\(^{29}\) And he said unto him, Thou hast answered right: this do, and thou shalt live.
\(^{30}\) But he, willing to justify himself, said unto Jesus, And who is my neighbour?
\(^{31}\) And Jesus answering said, A certain man went down from Jerusalem to Jericho, and fell among thieves, which stripped him of his raiment, and wounded him, and departed, leaving him half dead.
\(^{32}\) And by chance there came down a certain priest that way: and when he saw him, he passed by on the other side.
\(^{33}\) And likewise a Levite, when he was at the place, came and looked on him, and passed by on the other side.
\(^{34}\) But a certain Samaritan, as he journeyed, came where he was: and when he saw him, he had compassion on him,
\(^{35}\) And went to him, and bound up his wounds, pouring in oil and wine, and set him on his own beast, and brought him to an inn, and took care of him.
\(^{36}\) And on the morrow when he departed, he took out two pence, and gave them to the host, and said unto him, Take care of him; and whatsoever thou spendest more, when I come again, I will repay thee.
\(^{37}\) Which now of these three, thinkest thou, was neighbour unto him that fell among the thieves?

\(^{5}\) [1932] AC 562.
\(^{6}\) [1932] AC 562.
37 And he said, He that shewed mercy on him. Then said Jesus unto him, Go, and do thou likewise.  

Although the Atkinian analysis directly eschewed the applicability of the higher moral standard, the comparison with religious code and the moral imperative ‘ought’ import into this analysis direct moral force. The impracticality of the duty analysis as a generalisation is, however, problematic; it fails to import certainty, so plaintiffs and defendants alike cannot accurately manage risk or determine liability in the event of injury. As the law of negligence has expanded to regulate an increasing number of commercial realms, negligent misstatement and mass torts the desire to impose certainty has battled with the reluctance to arbitrarily minimise recovery by injured parties. The quandary in Australia is articulated by the High Court in Sullivan v Moody: 8

As Professor Fleming said, ‘no one has ever succeeded in capturing in any precise formula’ a comprehensive test for determining whether there exists, between two parties, a relationship sufficiently proximate to give rise to a duty of care of the kind necessary for actionable negligence. 9

As a result of this conceptual uncertainty, various jurisdictions have trialled alternative formulations, rooted in the Atkinian test, but teasing out [potentially] more definable elements, such as foreseeability, proximity, public policy, vulnerability, and general or specific reliance. In the United Kingdom, a three stage test has been applied which requires analysis of whether it is ‘fair, just and reasonable’ to impose a duty of care, 10 although the Australian High Court has eschewed this formulation as ‘capable of being misunderstood as an invitation to formulate policy rather than to search for principle.’ 11

The inchoate moral component to the duty question is less apparent in relation to the question of breach; although questions of duty and the content of that duty are often inextricably intertwined. The question of breach is generally considered to be a question of fact: in his Concluding unscientific postscript in Berrigan Shire Council v Ballerini 12 Callaway JA noted that

the imposition of general duties of care in negligence has no sure foundation in legal principle. It involves trade-offs and value judgments that may have been better left to the legislature in 1932 and again in 1963 and 1976. 13 The search for a principle is worse than looking for a needle in a haystack. The needle is not there. The second observation is that, however the difficulties are to be resolved, duty is a question of law and breach is a question of fact. The discipline of civil juries, which we still have in Victoria,

---

7 Gospel of St Luke (10:25).
8 [2001] HCA 59.
10 Caparo Industries Plc v Dickman [1990] 1 All ER 568; [1990] 2 AC 605.
conduces to clear thinking. It reminds us that questions of breach, unlike questions of
duty, cannot involve legal policy.14

However, this is a little misleading: pragmatically, there are two steps to determining the
question of breach: to show that there has been a falling below of the standard, you must
first define the standard that is required to be met - the standard of care. This standard is one
expected by society at a given time and place, as defined by tort law – it is measured by what
the reasonable person in the circumstances would have done, which is an objective test. This
is a question of law, and involves an analysis of the trade-offs a reasonable person would
make when considering the precautions required to protect against negative consequences
of their actions. The common law articulation of the test is typified by that of Mason J in
Wyong Shire Council v Shirt: 15

In deciding whether there has been a breach of the duty of care the tribunal of fact must
first ask itself whether a reasonable man in the defendant’s position would have foreseen
that his conduct involved a risk of injury to the plaintiff or to a class of persons including
the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to de-
termine what a reasonable man would do by way of response to this risk. The perception
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.16

This test, with minor variations, has been incorporated into the Wrongs Act 1958 (Vic) s.48
and similar legislation in other Australian states. Articulations of comparative social utility
of activities have potential moral overtones; although, of course, they could be analysed by
economic criteria.
Potentially moral questions assert themselves in the analysis of the damage requirement in
the tort of negligence; typically at the points where the law requires a policy judgment to
draw the line between recovery and non-recovery. Thus, although the concept of causation
is said to have policy (not moral) content, considerations of what is the ‘cause’ of another
act is capable of moral direction. On appeal in March v E & MH Stramare Pty Ltd 17 Mason
J noted that

[c]ommentators subdivide the issue of causation in a given case into two questions: the
question of causation in fact - to be determined by the application of the “but for” test
- and the further question whether a defendant is in law responsible for damage which
his or her negligence has played some part in producing: …It is said that, in determining
this second question, considerations of policy have a prominent part to play, as do ac-
cepted value judgments: see Fleming, p 173. However, this approach to the issue of
causation (a) places rather too much weight on the “but for” test to the exclusion of the
“common sense” approach which the common law has always favoured; and (b) implies,
or seems to imply, that value judgment has, or should have, no part to play in resolving causation as an issue of fact. As Dixon C.J., Fullagar and Kitto JJ. remarked in Fitzgerald v. Penn (at p 277): “it is all ultimately a matter of common sense” and “(i)n truth the conception in question (i.e., causation) is not susceptible of reduction to a satisfactory formula”: at p 278. …That said, the ‘but for’ test, applied as a negative criterion of causation, has an important role to play in the resolution of the question.

The principles on causation have been set out in the legislation, separating the normatively neutral question of fact from the value laden question of appropriateness, and also requiring that policy considerations dealing with remoteness of damage are considered expressly.\(^\text{18}\) In Victoria, for example amendments to the Wrongs Act 1958 (Vic) introduce the notion of ‘scope of liability’, which is a reference to remoteness of damage. Section 51 states:

1. A determination that negligence caused particular harm comprises the following elements-
   (a) that the negligence was a necessary condition of the occurrence of the harm (factual causation); and
   (b) that it is appropriate for the scope of the negligent person’s liability to extend to the harm so caused (scope of liability).

Remoteness of damage is a matter of judgment and degree, and is heavily influenced by policy. This is underlined by s 51(4), which states that ‘[t]he purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.’

It is clear that these sections are designed to compel the courts to clearly articulate and justify their choice of policy factors, but the section gives no guidance on how appropriateness should be determined, so it is likely that the settled common law principles for testing remoteness – reasonable foreseeability – will continue to apply.

In sum, moral considerations have the potential to be applied at all stages of the negligence analysis, either as a direct application of a moral duty to a ‘neighbour’, or as an inchoate manifestation of shared moral principles informing ‘policy’.

**Alcohol Liability**

Alcohol misuse is provocative in public policy because it is at once a pressing social problem and an articulation of consumer choice; at once a source of taxation revenue and a burden on the public health system. The imposition of liability on an individual for damages incurred whilst intoxicated is consistent with the principles espoused by tort law from both a moral and an economic perspective. Alcohol liability has attracted significant commentary in a number of jurisdictions.\(^\text{19}\)

---

\(^{18}\) *Wrongs Act* 1958 (Vic) s.51.

\(^{19}\) Penelope Watson, “‘You’re not drunk if you can lie on the floor without holding on’ – Alcohol server liability, duty, responsibility and the law of torts” [2004] JCULRev 6; R Solomon and J Payne, ‘Alcohol liability in Canada and Australia: sell, serve and be sued’ (1996) 4 *Tort LR* 188; Pauline Sadler, ‘Alcohol advertising and youth drinking in Australia – what are the available complaints mechanisms, legal and otherwise’ (2006) 11 *Media and*
There are circumstances in which the consumption of alcohol is a problem in itself – for instance, where the imbiber is underage. There are jurisdictions in which criminal charges may be brought against adults involved in the supervision of premises on which alcohol is consumed by underage drinkers. In tort law, however, a problem will typically arise where there is alcohol abuse. Excessive consumption of alcohol can lead to the following easily conceded consequences:

1. Physical injury or death to the person who has consumed the alcohol as a result, for instance, of alcohol poisoning or suffocation in his or her vomit.  
   a. Physical injury or death may result as a result of secondary consequences of alcohol consumption, such as impaired faculties: drink driving leading to an accident, falls, cuts by broken glass, and so on. Problems have also occurred with the provision of band entertainment, with the presence of alcohol- and possibly drug-affected patrons, security guards who are frequently external contractors, loud noise, possibly strobe lights, dancing and stage-diving, and a confused, highly stimulating environment which could lead to epileptic seizure.

2. Physical injury or death to a third party as a result of the actions of the intoxicated person, whether they are accidental or deliberate.

3. Damage to property belonging to the person who has consumed the alcohol - for instance, a damaged vehicle;

4. Damage to property belonging to a third party.

5. More obliquely, an uncontrolled environment of alcohol consumption and abuse may result in dangerous, threatening or harassing conditions.

In all cases, the danger arises as a consequence of the consumption of alcohol, and it could be asserted that the consumer is the party primarily responsible for the consequences. However, there are frequent circumstances in which liability can shift – or be shared – with a third party, typically the server of the alcohol.

Alcohol liability is one of the increasingly broad terrains in tort law in which liability may be ‘peripheral’ - that is, the tortfeasor is not directly involved in the action giving rise to the problem.
loss, but is in a relationship of control or influence over the person who is directly involved,
or where there are other factors which may increase the scope of the duty of care. Liability,
therefore, is primary, rather than vicarious, but in an ordinary causal sense the tortfeasor is
not directly responsible for the action.

The response to this question addresses a more general concern with the liability of peripheral
parties which is ‘a growing feature of modern tort law’. Whereas the question extends into
a number of situations, ‘the most noteworthy and troublesome form of this phenomenon is
the increase in the past twenty years in the number of novel claims alleging that the defendant
had negligently failed to control or deter the active injuring party or warn the plaintiff about
the latter’. This species is considered to be most problematic because ‘there can very often
be a mismatch between who is being sued and the perceived relative unimportance of that
party’s role in producing the damage: in other words, very often, the party who is alleged
to have failed to control the third party is peripheral in a causal sense’.

To impose liability in such a case carries two dangers. First, it is often true that a plaintiff
could plausibly implicate the omissions of very many parties to control the third party
who in fact injured him or her. Hence to hold liable all those whose omissions were so
implicated would signal a vast inhibition on freedom. Secondly, imposing liability on
a peripheral party who had merely failed to control a third party deflects attention away
from the party or parties directly and principally responsible for the damage.

Accordingly, the circumstances in which a person has a duty to control another’s actions to
prevent harm to strangers are the exception rather than the rule. In certain circumstances
a person may be held liable in negligence for the actions of third parties causing harm;
however, those circumstances are limited.

Nevertheless, it is well established that a person may owe a duty of care to prevent someone
under their control or on their premises from harming a third party, although there are limits
on the circumstances in which this would be the case. For instance, *Smith v Leurs* sets
out the limits of a parent’s liability to control children; *Dorset Yacht Co Ltd v Home Office*
discusses the liability of a prison authority to landowners in the vicinity of an institution
for acts of escaped inmates; *Hogan v Gill* deals with the situation in which a six year old
gained access to a gun which discharged, causing injury and *Curmi v McLennan* arose
when 16 or 17 year old children gained access to guns which discharged, causing injury.
The occupier of premises to which the public is admitted may be under a duty to prevent
one patron from causing injury to another.

---

25 Ibid.
26 Ibid.
27 Ibid.
28 *Smith v Leurs* (1945) 70 CLR 256 (Dixon J).
29 (1945) 70 CLR 256.
Alcohol liability cases have had mixed results, and hinge on their facts. In *Chordas v Bryant (Wellington) Pty Ltd* the plaintiff was struck by another patron at a bar and claimed that the negligence of the hotel owner had resulted in the provision of alcohol to the already drunk patron, and that it was unsafe so to do. However, the patron had not been causing any problems prior to his altercation with the plaintiff, and the assault was unforeseeable. It seems likely that the result would have been different if the patron had been visibly intoxicated and had been causing a disturbance prior to the assault. Conversely, in *Wormald v Robertson* hotel staff were aware that the patron was causing a disturbance, but did not act. The plaintiff intervened when the intoxicated patron grabbed a woman at the bar. The patron smashed a glass beer jug in the plaintiff’s face. In that case the court held that the hotel owner had breached its duty of care by failing to eject the intoxicated patron.

The Supreme Court of Queensland caused a groundswell of dissent in *Johns v Cosgrove* by awarding damages to a man struck by a car on his way home after being served to a state of ‘gross intoxication’ in a Surfers Paradise hotel. Whereas Justice Des Derrington specified some limitations on the circumstances in which a duty of care would be owed, the decision still urged caution upon those who provide alcohol or allowed the service of alcohol. He said that, while it was not negligent to serve a patron to the point of drunkenness, it was negligent if it was likely the person would be endangered by being drunk. In this case, “[t]he plaintiff was served up to the state of gross intoxication when he was a danger to himself for it was known to the bar staff that he would then go home by a route that would take him into close proximity to a busy highway’. Justice Derrington noted that the hotel owner would not have been held liable merely because the patron was served alcohol to the point of intoxication. The fact which led to liability was the knowledge of the hotelier that the patron would be placed in a dangerous situation by the consumption of alcohol. The case was heard on appeal in the Queensland Court of Appeal on another point.

Until the recent decision in the High Court in *Tandara*, the most significant case had been *South Tweed Heads Rugby League Football Club Limited v Cole*. The New South Wales Court of Appeal found that a club was not liable for injury to a patron caused when the patron was struck by a vehicle whilst making her way home from a day of drinking, and the High Court agreed, holding that the club had not breached any duty it owed to the woman.

Ms Cole had been at the Club from around 9:30 am, firstly taking advantage of free Spumante at a Champagne breakfast, then purchasing bottles of Spumante. She was refused service in the afternoon, on the grounds of intoxication, and was ejected at around 5:30 pm. She was offered the services of a taxi and a bus and driver by the management, but declined. She was hit by a car after leaving the club and suffered serious injuries from the accident and has continuing disabilities. A majority of the High Court held that the club was not liable on the basis that no duty was owed. Chief Justice Gleeson noted that a successful claim would give rise to ‘both an unacceptable burden upon ordinary social and commercial behaviour and an unacceptable shifting of responsibility for individual choice.’ He also considered

---

34 (1988) 91 ALR 149.
36 See also Speer v Nash (Unreported) NSW Supreme Court, 17 December 1992.
37 Unreported, Derrington J, Supreme Court of Queensland, 12 December 1997.
38 *Johns v Cosgrove* (Unreported, Derrington J, Supreme Court of Queensland, 12 December 1997.
that she was not so intoxicated as to be held not legally responsible for her own actions. Justice McHugh, in dissent, found that an occupiers’ duty applied to the club, whereas Kirby J in dissent considered that “[t]he club, that began the day with a breakfast with the supply of free bottles of spumante in large quantities and thereafter tolerated the continued presence on its premises of a patron … who was obviously drunk … cannot say that it owed no duty of care to her.”

The most recent statement in the High Court as to the liability of a server of alcohol to an intoxicated patron occurred in CAL No 14 Pty Ltd t/as Tandara Motor Inn v Motor Accident Insurance Board (Tandara). In that case the Court allowed an appeal by the owners and licensees of a hotel against the Motor Accidents Insurance Board, the Tasmanian statutory body which provides compulsory insurance against the personal injury as a result of traffic accidents in that state. Scott, a motorcyclist, was drinking at the appellant’s premises and was intoxicated when he attempted to ride home. He suffered fatal injuries when he ran off the road close to his home. In proceedings in negligence, it was asserted that a duty of care was owed to Scott by the licensee, that the relevant duty was breached, and that as a consequence of that breach Scott was killed. The Supreme Court of Tasmania found that no duty was owed to Scott, as did the High Court on Appeal. The Court also found that if there had been a duty, it had not been breached, and if it had been breached it had not been shown that the breach had caused the death.

The matter which is potentially morally relevant, and the one at issue in the High Court, is the existence of a duty of care owed by the licensee to the motorcyclist. Justices Gummow, Heydon and Crennan, with French J and Hayne J concurring, noted that a range of duties were clearly owed by the licensee to the motorcyclist, including a duty to ensure that the premises were safe, and to ensure that the equipment did not injure the drinker. However, no duty arose to prevent the motorcyclist from riding home after drinking, or to call his partner to ensure that she collected him. The motorcyclist’s position was distinguished from ‘exceptional’ cases in which, for instance, ‘a person is so intoxicated as to be completely incapable of any rational judgment or of looking after himself or herself, and the intoxication results from alcohol knowingly supplied by an innkeeper to that person for consumption on the premises’. Nor was the case analogous to other exceptions, such as may arise in the case of ‘intellectually impaired drinkers, drinkers known to be mentally ill, and drinkers who become unconscious’. The court, without extending the influence of the principle, left open the potential for distinguishing between plaintiff recovery of damages on the basis of their capacity to make coherent and autonomous decisions, where the defendant would know of the incapacity.

---

41 [2009] HCA 47.
42 At para [31].
43 At para [32].
44 South Tweed Heads Rugby League Football Club Ltd v Cole (2002) 55 NSWLR 113 at 146 [197] per Ipp AJA, cited in CAL No 14 Pty Ltd t/as Tandara Motor Inn v Motor Accident Insurance Board (Tandara) [44].
45 Scott v CAL No 14 Pty Ltd (2007) 17 Tas R 72 at 84 [37] cited in in CAL No 14 Pty Ltd t/as Tandara Motor Inn v Motor Accident Insurance Board (Tandara) [44].
The Moral Trajectory in Australian Cases

Tort law is immersed in the lifeworld. It is grounded in customary law and shifts and alters with the redefinition of socially contingent concepts, such as reasonableness. However, a system of law as a cultural system does not necessarily constitute a coherent, ordered set of rules. A designation as the sum of all rules enacted by a valid legislative body in a particular social order would mislead, because laws and institutions change over time, whereas the legal system is characterised by continuity.

However where, as in this case, there is confusion in the background assumptions of the society informing the lawmaker, the apparent moral legitimacy of a law is in question, without necessarily altering the validity of the legal system. If society’s views have altered, and the law has not reflected that shift, or the law has changed, and society’s views do not now converge with the law, tension may arise.

The obligatory nature of a legal norm makes the problem of choice between two established norms seem clear on its face; however a certain degree of tension must arise because the background presumption of the legitimacy of the legal system is challenged by this evidence that the norms systematized in the legal system are not directly or clearly informed by the norms arising in the course of cultural exchange. At times the distinction between a legal and a social norm is by no means clear, given the degree of interaction between the two.

It could be argued that, in the case of the law of torts, the perception of a ‘crisis’ was manifestation of a lack of convergence between legal and moral norms. There were, in fact, multiple systemic failures which contributed to the crisis, but the perception of crisis inflamed a form of ‘moral panic’ in relation to certain types of tortious claim. In claims involving injury to parties considered to be themselves at fault, the language of crisis invokes fear and the scapegoating of unpopular litigants delivers personal vindication. In Australia, proponents of the tort law crisis had some characteristics of moral entrepreneurs.

Is it correct to characterise this as a ‘moral’ question? The characteristic of these actions which speaks to moral behaviour is the sublimation of personal autonomy and hence responsibility – refusing to take the consequences of blameworthy behaviour. In this case, the personal decision to drink to excess is morally blameworthy, however when that decision delivers undesirable consequences the costs of those consequences are shifted to another, who is or may be less blameworthy. This invokes a reaction of outrage, facilitated by the agency of newspapers. For instance, after the decision of the Supreme Court of Queensland in *Johns v Cosgrove* the media attention focused on the case as a threat to the current social order. The decision was consistent with existing authority, but much of the disquiet prompted by the case was caused by the fear that it was a manifestation of the extension of duty and standard of care engineered by insurance companies seeking to shift their own liability.

As already indicated, the notion of ‘duty of care’ in negligence has, at its core, a moral aspect. This is typically framed from the perspective of the defendant. Whereas it is not

---

46 Stanley Cohen, *Folk Devils and Moral Panics* 1972, St Albans: Paladin.
48 (Unreported), Derrington J, 12 December 1997.
equivalent to a moral duty, the legal duty has at its base a moral component. In dissent in *Neindorf v Junkovic* ⁵⁰ Justice Kirby considered in some detail the notion of duty. The analysis indicates the value judgments to be made in the determination of breach, and the contestability of the idea of reasonable risk, but he goes further to note that

To the extent that the Court turns away from the earlier principles, in my respectful view it endorses notions of selfishness that are the antithesis of the Atkinian concept of the legal duty that we all owe, in some circumstances, to each other as ‘neighbours’. This is a moral notion, derived originally from Scripture, that has informed the core concept of the English law of negligence that we have inherited and developed in Australia. It is the notion that, in the past, encouraged care and attention for the safety of entrants on the part of those who invite others onto their premises. (It also encouraged such persons to procure insurance against risk). To the extent that these ideas are overthrown, and reversed, this Court diminishes consideration of accident prevention. (It also reduces the utility and necessity of insurance). From the point of view of legal policy, these are not directions in which I would willingly travel. ⁵¹

From The Individual’s Perspective, the Moral Framework would be Constructed Thus:

![Diagram](image)

The **freedom** of a person to do X (say, play loud music, or smoke, or drink to excess) must be balanced against the obligations X owes to the community not to so play or smoke or drink in a manner which will impede the freedom of others. The **right** of X to expression of musical tastes, inhalation of legal substances or eat or drink is balanced by the duty owed ⁵⁰ *Neindorf v Junkovic* [2005] HCA 75 (Kirby J [53]). ⁵¹ Ibid [85].

---

⁵⁰ *Neindorf v Junkovic* [2005] HCA 75 (Kirby J [53]). ⁵¹ Ibid [85].
to those injured by the manifestation of those rights. Every freedom/right is balanced by a
duty/obligation.

When dealing with non-primary or peripheral liability, however, the question is more
complex. The right of a licensee to sell intoxicating beverages is balanced by the duty to the
community not to sell it in such a way as to cause adverse consequences in the community.
These correlative rights and duties are enforced by penal statutes. The imposition of tortious
liability imposes a secondary rights/duties corollary – the right to sell intoxicating beverages
may be balanced by a duty to the drinker and perhaps to third parties and by a shifting of
the financial risk so that the risk of adverse outcomes shifts from the drinker or alternatively
is shared by the drinker and the server. The policy reasons for liability under penal legislation
seem clear; the policy priorities in the case of tortious liability are a mix of utilitarian and
moral motives. Servers of alcohol are in a position to monitor the drinking of patrons, have
the putative capacity to control the level of drinking – by refusing service – and are potentially
in a position to monitor and control the consequences of intoxication – by the provision of
in-house security, or by providing alternative mechanisms of transport for patrons who are
drivers. Moreover, it is argued that the cost should fall upon the server, as the one profiting
from the provision of alcohol.

However, a more nuanced approach which considered the comparative moral position of
the drinker and the server. The High Court in Tandara, considering the duty owed by the
licensee to the drinker, noted that ‘the duty conflicts with [the drinker’s] autonomy. The
duty on the Licensee would have prevented Mr Scott from acting in accordance with his
desire to ride his wife’s motorcycle home52.’ If however, (absenting a universal traffic insur-
ance scheme), the drinker had collided with and injured a pedestrian, or another motorist,
would the moral autonomy afforded to the drinker necessitate him taking financial as well
as moral responsibility for his actions? The unarticulated moral stance would apparently
find no duty owed to the proximate drinker who had responsibility for his or her actions;
does that necessarily mean that no duty was owed to the entirely innocent third party, injured
as a consequence of the server’s desire for revenue untrammelled by risk?

The idea of autonomy is problematic when intoxication is at issue. Intoxication strips the
subject of autonomy, as it strips him or her of decision-making capacity. At what point is
moral autonomy to be exercised? When the decision is made to drink the first drink? When
the decision is made to drink the alcohol which tips the drinker into the state of intoxication?
When the decision in made to carry out the injurious act whilst intoxicated? Problematically,
unless the drinker has set out to become intoxicated at the outset, the drinker’s moral agency
is compromised by intoxication. Even if the drinker has set out to become intoxicated, does
that necessarily import responsibility for all actions taken whilst intoxicated? Other areas of
law, notably contract law, recognise the distinct position of the intoxicated person – if so
intoxicated that their reason is impaired. The court’s consideration in Tandara of the notion
of autonomy made a distinction between the existence of a duty when the defendant was
aware of their impaired capacity – thus their impaired autonomy – and the position of the
drinker before that state was reached. However, the extent of that duty was not relevant to
the case and accordingly not clearly articulated.

and 503 [121] (Callinan J).
Morality and Modernity

In alcohol liability the odd corollary to modernity has been the utilisation of what could be called ‘moral panic’ strategies to achieve pecuniary ends, by drawing on assumptions of a declining moral trajectory to argue for limits on a purportedly burgeoning liability.

The perception of increasing potential liability became a matter of legislative concern as a result of a perception of a ‘crisis’ in tort litigation and liability insurance which was overcompensating victims or shifting loss in circumstances where it should have been allowed to lie where it fell. Legal commentators noted that the argument that the tort system had become increasingly burdensome had not been verified, and there had, in fact, been a judicial shift towards a more restrictive attitude to tort actions. However the perception was supported by a largely unquestioning media.

The Commonwealth government appointed an expert panel in May 2002 to review the law of negligence, however its mandate was limited by Treasury so that certain premises remained undisputed. The report of the panel (‘Ipp Report’) prompted a range of legislative reforms on a state by state basis. Some of the changes to the legislation are in the form of restatements or clarification of the common law position; some make wide ranging changes to the law. The report resulted in widespread legislative reform resulting in major limitations on the ability of plaintiffs to recover damages for loss.

Manifestations of a shifting moral trajectory in liability for injury due to alcohol abuse can be seen most obviously in the legislative provisions themselves. Part 6 of the Civil Liability Act 2002 (NSW), for example, deals specifically with intoxication. Section 49(1) states

---

53 Arguably a perception only: the prevailing view of the explosion of tort claims is not necessarily reflected in actual claims. However, this does not diminish the prevalence of the idea of risk of litigation, over which the individual has little or no control, giving rise to uncertainty. O’Malley notes that ‘uncertainty is a characteristic modality of liberal governance that relies both on a creative constitution of the future with respect to positive and enterprising dispositions of risk taking and on a corresponding stance of reasonable foresight or everyday prudence (distinct from both statistical and expert-based calculation) with respect to potential harms.’ Pat O’Malley, ‘Uncertain subjects: risks, liberalism and contract’ (2000) 29 Economy and Society 460, 461. Indeed, risk literature indicates a higher level of tolerance of risk when the individual at risk has control over the risk. The idea of a reflexive spiral conceptualises attempts to control the risk of litigation, feeding into the general pervasive idea of risk. However, it is important to note that the experience of uncertainty on which the entrepreneur thrives (O’Malley, 464) is not the experience of the householder, who may not be equipped with ‘the responsibility and skills for managing uncertainty’ (at 463).


56 The ‘Ipp Panel’ - the panel was chaired by Justice David Ipp.

57 ‘The Review of the Law of Negligence’ October 2002 (‘Ipp Report’). There were two reports — the second contained the first.

58 Changes are represented in the Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002 (SA), amending the Wrongs Act 1936 (SA) ("Wrongs Act"), and Law Reform (Ipp Recommendations) Act 2004 (SA), resulting in the renaming of the Wrongs Act as the Civil Liability Act 1936 (SA). Elsewhere see Trade Practices Amendment (Liability for Recreational Services) Act 2002 (Cth); Civil Liability Act 2002 (NSW); Civil Liability Amendment (Personal Responsibility) Act 2002 (NSW); Wrongs and Other Acts (Law of Negligence) Act 2003 (Vic); Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002 (Vic); Civil Liability Act 2003 (Qld); Personal Injuries Proceedings Act 2002 (Qld); Civil Liability Act 2002 (WA); Civil Liability Act 2002 (Tas); Volunteers (Protection from Liability) Act 2002 (WA); Civil Law (Wrongs) Act 2002 (ACT); Personal Injuries (Liabilities and Damages) Act 2003 (NT); Personal Injuries (Civil Claims) Act (NT).
that a person is not owed a duty of care merely because intoxicated, and intoxication does not of itself affect the standard of care. Section 50 applies where a plaintiff in civil proceedings was intoxicated, and where injury or death occurred. The Court is not to award damages to the plaintiff unless the injury would have occurred regardless of the intoxication. These provisions were inserted by the Civil Liability (Personal Responsibility) Act 2002 (NSW), signalling the assertion of principles of moral autonomy. The legislation relevant in Tasmania, the Civil Liability Act 2002 (Tas) contains in s.5 a presumption of contributory negligence where a person is intoxicated.

The dominant theme in the legislation has been that persons should take responsibility for themselves, and if they choose to become intoxicated, and as a consequence are injured, then the loss will be more likely to lie where it falls, rather than be shifted through the agency of the law of negligence. Realistically, this will have the consequence that the loss will remain with the statutory insurer (compulsory vehicle accident insurance schemes in Australian states are typically no-fault schemes) or, where a motor vehicle is not involved, will fall upon the intoxicated injured party.

**Conclusions**

The tort of negligence has significant residual moral content. Although alternative justifications for the functions of tort law exist – most notably by articulation of the economic costs of alternative risk allocation – when tort allocation mechanisms have appeared to deliver morally disagreeable outcomes the legislature has intervened to require the judiciary to alter the moral trajectory of tort law. In alcohol liability this is manifested in an instruction to take account of the moral autonomy of the intoxicated person by requiring them to take the consequences of their actions. This appears to rebalance the perception that individual autonomy is compromised by allowing the individual to shift responsibility for their voluntary actions to a less morally compromised defendant. This decision may be more consistent with a moral conceptualisation of tort liability than one based on wider social interests, such as the desire to spread risk, or the desire to place the obligation to manage drinkers on the one with the financial interest in doing so. However, the general moral trajectory of tort law simultaneously ascribes moral autonomy to the injured intoxicated, and also allows the financial repercussions of risky behaviour to remain with the risk-taker.

**About the Author**

Dr. Francine Rochford

Dr Francine Rochford belongs to the Bendigo campus of La Trobe University in Victoria, Australia, where she teaches in the Law of Contracts, Law of Torts, Constitutional Law and Business Law subjects. Her research interests include jurisprudence, the law and policy relating to rural water delivery, and the law of education. Previous research relating to jurisprudence has considered Habermas and the discursive resolution of norms. Previous research relating to the law of torts includes papers on the tortious liability of higher education institutions, the tortious liability of water supply authorities for contaminated water, and the standard of care in torts. In 2010 she is a visiting researcher at Lewis and Clark Law School in Oregon.