# *Intoxication and Minors – what role for the Law?*

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## Abstract

Section 50 of the *Civil Liability Act 2002* (NSW) forbids any recovery for intoxicated persons and provides judges with no discretion. A recent case in NSW illustrates how this led to a harsh outcome for a minor who suffered a serious injury while intoxicated and to the exculpation of the host of the social event where the injury occurred. The injustice that resulted from the inflexibility of the Act was noted by the trial judge and, shortly thereafter, by a major legislative review of the Act but the NSW government declined to consider amendments. Notably, the NSW Court of Appeal avoided any comment on these matters when the case was subsequently appealed. The fact that both common (and criminal) law provide no effective incentives for hosts to control the alcohol consumption of minors in social contexts seems at odds with current government approaches to reduce the harms caused by alcohol.

## I Introduction

Australian courts are generally reluctant to recognise that commercial hosts owe a duty to intoxicated customers

and even less willing to recognise that social hosts owe a duty to their intoxicated guests.[1] This common law position has been reinforced by legislative action to reform tort law in Australia, one result of which was to emphasise personal responsibility and restrict the liability of potential tortfeasors.[2] This combination can lead to harsh outcomes, as evidenced by the decision of the Court of Appeal of the NSW Supreme Court in the case of *Russell v Edwards*,[3] which concerned serious injuries suffered by an intoxicated minor. The relevant NSW legislation, *Civil Liability Act 2002* (NSW), is significantly more pro-defendant with respect to intoxicated plaintiffs than is comparable legislation in other states.[4]

Despite recommendations for change from the trial judge, and from a subsequent Legislative Council enquiry into NSW's tort laws,[5] there has been no action to remedy some identified anomalies regarding the treatment of intoxicated minors. Accordingly, there is no effective legal mechanism to encourage social hosts to take responsibility for the drinking of under-age guests. More broadly, it can be concluded that the law, both tort and criminal, has a very small part to play in helping control the drinking behaviour of minors. This seems surprising, given the scale of the social and economic harm caused by alcohol in Australia[6] and the frequently expressed

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1 Ian Malkin and Tania Voon, 'Social hosts' responsibility for their intoxicated guests: Where courts fear to tread' (2007) 15 *Torts Law Journal* 62.

2 Barbara McDonald, 'The impact of the Civil Liability legislation on fundamental policies and principles of the common law of negligence' (2006) 14 *Torts Law Journal* 268.

3 *Russell v Edwards* [2006] NSWCA 19.

4 Joachim Dietrich, 'Duty of care under the "Civil Liability Acts"' (2005) 13 *Torts Law Journal* 17, 35 and Graeme Orr and Gregory Dale, 'Impaired judgments? Alcohol server liability and 'personal responsibility' after *Cole v South Tweed Heads Rugby League Football Club Ltd*' (2005) 13 *Torts Law Journal* 103, 117-118, 127-128.

5 General Purpose Standing Committee No 1 (NSW Legislative Council), Parliament of New South Wales, *General Purpose Standing Committee No 1 – Report on Personal Injury Compensation Legislation* Report no 28 (2005).

6 David Collins and Helen Lapsley, *The Costs of Tobacco, Alcohol and Illicit Drug Abuse to Australian Society in 2004/5* (2008) National Drug Strategy

intentions of Federal, State and Territory governments to address alcohol abuse generally, and the problems of youthful drinking in particular.[7]

## II The Initial Action: *Russell v Edwards*

The plaintiff, Ashley Russell, claimed damages in the District Court[8] for injuries he suffered on 25 January 2000 while a guest at a birthday party for the son of the defendant, Edwards.[9] At the time, Russell was 16 years old. At the party, which was held at the defendant's home in suburban Newcastle in NSW, Russell drank alcohol provided by a friend and by Edwards. Russell was subsequently injured seriously when he dived into Edwards' swimming pool while intoxicated.

The trial judge, Sidis DCJ, found Edwards not liable for the injuries suffered by Russell. Although Edwards owed a duty to Russell and had breached this duty, her Honour found that Edwards was exculpated by the provisions of Part 6 of the *Civil Liability Act 2002* (NSW).[10] Because of its strict nature, it is worthwhile reviewing the relevant section, s 50:

> 50 **No recovery where person intoxicated**
> (1) This section applies when it is established that the person whose death, injury or damage is the subject of proceedings for the recovery of damages was at the time of the act or omission that caused the death, injury or damage intoxicated

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Monograph No 64, Australian Government Department of Health and Ageing.

7 Australian Government Department of Health and Ageing, 'Australian Alcohol Guidelines Fact Sheet - Alcohol and Young People' <http://www.alcohol.gov.au/internet/alcohol/publishing.nsf/Content/fs-young> at 9 October 2008; Ministerial Council on Drug Strategy, 'Joint Communiqué' (Media Release, 23 May 2008); Hon Nicola Roxon and Hon Jan McLucas, 'National Binge Drinking Strategy' (Media Release, 17 November 2008).

8 *Russell v Edwards* (2004) 2 DCLR (NSW) 108.

9 Although Russell's injury was sustained in 2000, the amended statement of claim was not filed until June 2004 and thus after the introduction of the new act, the *Civil Liability Act* 2002 (NSW).

10 *Russell v Edwards* (2004) 2 DCLR (NSW) 108, [66].

> to the extent that the person's capacity to exercise reasonable care and skill was impaired.
> (2) A court is not to award damages in respect of liability to which this Part applies unless satisfied that the death, injury or damage to property (or some other injury or damage to property) is likely to have occurred even if the person had not been intoxicated.
> ...
> (5) This section does not apply in a case where the court is satisfied that the intoxication was not self-induced.

Section 50 gives the court no discretion in the award of damages as long as the plaintiff was intoxicated to the extent that his or her 'capacity to exercise reasonable care and skill was impaired'.

Nevertheless, her Honour offered some robust criticism of aspects of this legislation:

> I have noted that there are no degrees of impairment specified in s 50 and there are no exceptions provided in that section for minors or for persons inexperienced in the consumption of alcohol. Nor does it appear to allow for circumstances where the impairment resulting in intoxication is but one of a number of elements leading to the occurrence of an incident causing injury.[11]

In addition, Sidis DCJ made some strong recommendations for change:

> In my view, these consequences were not those that were considered by those who drafted the legislation and I would seriously recommend that those responsible for the legislation re-visit the provisions of Pt 6 of the Act in order to amend the harshness of its consequences.[12]

It does, however, seem clear that the legislature was quite aware of the potential consequences for intoxicated plaintiffs in general, as evidenced by the Premier's Second Reading speech:

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[11] Ibid [62].
[12] Ibid [66].

> The bill will clamp down on plaintiffs who are injured while they are intoxicated. A defendant will not owe a plaintiff a higher standard of care simply because the plaintiff was intoxicated. Nor will personal injury damages be available for an intoxicated person unless the accident was likely to have occurred even if the person had not been intoxicated.[13]

Nevertheless, it is apparent that the legislature had not given any, or due, consideration to intoxicated minors as a distinct category of intoxicated plaintiffs.[14]

## III The Appeal Court Judgment

The NSW Court of Appeal dismissed the subsequent appeal in a unanimous judgment written by Ipp JA. Since the Act provides for no judicial discretion for intoxicated plaintiffs, the focus of the judgment was understandably narrow from the outset, '[t]his appeal turns on Pt 6 of the *Civil Liability Act* 2002'.[15] First, his Honour addressed s 50(5). He noted the argument of Russell's counsel that Russell's limited experience with alcohol should be considered[16] but rejected counsel's claim that Russell's intoxication was not self-induced. He equated "self-induced" with "voluntary" intoxication and then opined that 'voluntariness will not be negated by ignorance'.[17] He also cited "ruminatory" observations of Barwick CJ to substitute the term "voluntary" for the more problematic term "self-induced".[18]

His Honour then addressed s 50(1), particularly what was meant by 'the act or omission that caused the ... injury'. His reasoning for dismissing the plaintiff's contention that the 'act or omission' referred to was Edwards' lack of supervision

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[13] New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5766 (Premier Bob Carr).

[14] A review of the relevant Hansard debates did not find any instances where the issue of intoxicated minors was addressed.

[15] *Russell v Edwards* (2006) NSWCA 19, [2].

[16] Ibid [19].

[17] Ibid [21].

[18] *R v O'Connor* (1980) 146 CLR 64, 69.

had two elements. The **first** was a discussion[19] about (1) the timing of any breach, and (2) the fact that the trial judge had made no finding as to how Edwards might have effectively provided supervision. This latter assertion is arguable since Sidis DCJ stated explicitly that 'the preventative action, in my view, would have been to have closed the swimming pool'.[20] Moreover, it is implicit in her comments that more frequent patrolling of the backyard would have been a component of more effective supervision.

Ipp JA addressed the **second** element stating that 'there is an even more formidable obstacle that faces the proposition that Mr Edwards's failure to supervise before Mr Russell became intoxicated was *the* act or omission that caused the injury'. He continued by stating that this is the 'ordinary meaning of the words in s 50, which require the determination of a single act or omission'.[21]

His Honour noted difficulties with this approach, namely that the wording of s 50 could suggest that the 'act or omission' could refer either to the plaintiff or to the defendant and that there could be more than one such act or omission that led to the injury.[22] After noting these problems, he concluded that these 'difficulties suggest that the legislature must have intended some other means of determining the single cause'.[23] This assertion attributes the NSW legislature with more foresight and drafting skill than many are inclined to do[24] and, in particular, allowed his Honour to make the presumption that the legislature intended that there could only be one, single cause. He did not appear to consider that it could perhaps have

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[19] *Russell v Edwards* (2006) NSWCA 19, [25]-[29].

[20] *Russell v Edwards* (2004) 2 DCLR (NSW) 108, [57].

[21] *Russell v Edwards* (2006) NSWCA 19, [30].

[22] Ibid [30].

[23] Ibid [34].

[24] 'Precision in statutory drafting is not the most cultivated virtue in the Parliament of NSW': Danuta Mendelson, 'Australian tort law reform: statutory principles of causation and the common law' (2004) 11 *Journal of Law and Medicine* 492, footnote 78.

been a drafting error or an oversight, rather than a deliberate decision. Moreover, his difficulty with other wording of the Act (eg the term "self-induced" as discussed above) suggests he is otherwise unwilling to accept that the legislature's meaning is always obvious.

His Honour then developed his reasoning by suggesting that, if there must be a single act or omission, then s 50 (1) 'must be construed as referring to 'the act or omission that directly caused the ... damage'.[25] He reads in the term 'directly' and equates this with the term "proximate" which can be interpreted as meaning 'effective or dominant or operative'.[26] The strength of this approach does not appear to be bolstered by his Honour's reference to insurance case law, rather than to what he acknowledges are well-established concepts of 'current or successive tortious acts'.[27] However, others have noted the difficulties in determining causation in situations such as *Russell* where 'the harm is attributable to more than one sufficient condition (multifactorial causation)'.[28]

This critique of his reasoning can perhaps be overlooked or disregarded, since both Ipp JA and Sidis DCJ found against Russell and for the same, fundamental reason. The meaning of the relevant sections of the Act is clear, as expressed in the heading for s 50, viz 'No recovery where person intoxicated'. Moreover, the Act's application is inflexible, does not allow the court any discretion to treat minors differently and accordingly allowed no other result. It is, however, more difficult to disregard the fact that Ipp JA completed his judgment without commenting on (1) the finding of the trial judge that Edwards owed Russell a duty of care, and (2) her other conclusions about the harshness of the Act and the need for review. His Honour had the opportunity to comment but chose not to.

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[25] *Russell v Edwards* (2006) NSWCA 19, [40].
[26] Ibid [36]–[41].
[27] Ibid [31].
[28] Above n 24, 499.

## IV Commercial and Social Hosts and *Cole*

*Cole*[29] concerns the duty owed to an intoxicated **adult** by a **commercial**, as opposed to **social**, host. Moreover, the outcome in *Cole* did not depend on issues of statutory interpretation as it did in *Russell.* Despite these important differences, the judgment in this earlier case provides some further, significant perspective on the judgment of the NSW Court of Appeal in *Russell*, some four years later.

In *Cole*, the NSW Court of Appeal found unanimously that the intoxicated plaintiff, who was a 45 year old at the time of injury, was owed no duty of care by the defendant, the South Tweed Heads Rugby League Football Club. Ipp JA wrote the majority opinion in *Cole* as he did in *Russell.* Ipp A-JA (as he then was) devoted more than 100 paragraphs to duty of care in *Cole.* This was necessary since, at that stage, the court could not use s 50 of the Act to avoid an explicit consideration of the duty of care of the commercial host. Having gone to such lengths to analyse duty of care in *Cole*, it is notable that Ipp JA spent less than a paragraph on duty of care in *Russell*, particularly since (as noted above) the trial judge had found that Edwards did owe Russell such a duty.

It is clear from *Cole* that the judges were aware of differences between the intoxication of minors and of adults. In the course of their judgments in *Cole*, both judges (Ipp A-JA and Santow J) argued that an intoxicated person can exercise personal responsibility for his or her actions by their use of terms like the "responsible adult", eg 'the law has left it to responsible adults to assume responsibility for their own actions in consuming alcoholic drink'.[30] Both judges implicitly recognised, by their use of the term "adult", that there is a distinction between the impact that alcohol may have on the self-control of minors as opposed to adults. The fact that Santow JA used "adult" in this context **twice** in his short judgment and that Ipp A-JA

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[29] *South Tweed Heads Rugby Football Club Ltd v Cole* (2002) 55 NSWLR 113.

[30] Ibid [194].

used it **four** times in his judgment is significant and it indicates that they both understood that, with respect to intoxication as with many other matters, minors are, and need to be, treated differently to adults.

Ipp A-JA also acknowledged differences between experienced and inexperienced drinkers, since drinkers 'will also be able to call a halt to the drinking process. Ordinarily, the more experienced the drinker, the more acute the self-perception'.[31] Thus, in *Cole*, Ipp A-JA explicitly noted the significance of experience with respect to the drinking of alcohol but, as noted previously,[32] his Honour did not address this issue in *Russell* even though it was raised by Russell's counsel. It is thus surprising that Ipp JA, in his judgment in *Russell*, managed to avoid completely any meaningful consideration of the differences between intoxicated minors and intoxicated adults. It is hard to escape the conclusion that this act of avoidance by Ipp JA was deliberate.

This decision in *Cole* was appealed to the High Court[33] which, in a 4:2 ruling, rejected the appeal, finding no duty owed by the commercial host. Some important contentious issues were (1) the impracticality of instituting a duty of care, and (2) the impact of alcohol on free-will. The first issue perhaps helps explain why courts in Australia are generally unwilling to recognise a duty of care for social hosts, ie if the court feels that it is not possible to specify the scope of a duty of care for commercial hosts who, *inter alia*, (1) operate in a reasonably well-defined legislative framework, (2) deal with intoxicated patrons on a frequent basis and (3) have the capacity to train their staff in appropriate procedures, then it is understandable that the scope of a duty of care for social hosts (for whom it is likely to be an infrequent problem, where there are no clear guidelines as to appropriate behaviour and so on) is much more problematic.

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31 Ibid [192].

32 Above n 15.

33 *Cole v South Tweed Heads Rugby Football Club Ltd* (2004) 217 CLR 469.

The second issue, namely the extent to which intoxicated persons can exercise freewill, is also relevant to the issues involved in *Russell* and it can be illustrated simply by contrasting the words of two of the judges. According to Callinan J 'drinking until intoxicated should be regarded as a deliberate act taken by a person exercising autonomy',[34] whereas Kirby J (in dissent) suggested that alcohol will 'impair and eventually destroy such free will'.[35] This is a crucial issue since alcohol can have a dramatic effect; as Barwick CJ said of an intoxicated person, 'his will is warped, his disposition altered, or his self-control weakened'.[36] In this context, it should also be noted that Ipp A-JA also recognised in *Cole* that it is possible to be 'so intoxicated as to be completely incapable of any rational judgment'.[37] What then is the degree of intoxication that stops people being responsible? How might this differ for minors? The courts seem reluctant to address explicitly these admittedly difficult issues.[38]

## V Tort Law Reforms and the Role of Ipp JA

The judgments (of Sidis DCJ and Ipp JA) in *Russell* were tightly confined by the *Civil Liability Act 2002*. This Act was one outcome of a wave of State and Territory legislation in the early years of this decade prompted, in part, by a perceived need for greater emphasis on personal responsibility and autonomy. Ipp JA was a major participant in this reform process, as the Chair of the Ipp Report[39] and has been a strong proponent in non-judicial forums for the increased focus on personal responsibility. In one public address subtitled

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[34] Ibid [121].

[35] Ibid [90].

[36] *R v O'Connor* (1980) 146 CLR 64, 71.

[37] *South Tweed Heads Rugby Football Club Ltd v Cole* (2002) 55 NSWLR 113, [197].

[38] South Australia and the Northern Territory have prescribed a blood alcohol level of 0.08% which is to be regarded as conclusive evidence of intoxication; *Civil Liability Act 1936* (SA) s 48(1) and *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 16, respectively.

[39] Panel of Eminent Persons (Chair The Hon D Ipp), *Review of the Law of Negligence Report* (2002).

'Striving for Balance', he argued forcefully that the common law had strayed by awarding excessive damages to careless plaintiffs and suggested that the need for reform was clear, provided that it did not go too far. Ipp JA acknowledged that a 'properly balanced position is hard to achieve ... Nevertheless, the judiciary is well aware of the conflict and the need to establish a new equilibrium'.[40] In the same address, he cited with approval from an English judgment '[p]eople of full age and sound understanding must look after themselves and take responsibility for their actions'.[41]

This raises the question whether it is reasonable, without some justification, to apply this approach to people who are (1) not of full age and, (2) with impaired understanding, ie to intoxicated minors like Russell? It is thus arguable that Ipp JA, in his judgment in *Russell*, did not demonstrate any evidence of 'striving for balance' although, very clearly, his judicial discretion was fettered by the provisions of the Act. Furthermore, by avoiding the entire problem of intoxicated minors in his judgment, his Honour did not acknowledge that there may have been any issue where it was necessary to strive for balance.

It should be noted that the NSW Parliament ignored several of the recommendations of the Ipp Report which, if they had been incorporated into the Act, would have given the Court more discretion and, perhaps, ameliorated the outcome for Russell:

> 8.14 It has been suggested to the Panel that the law of negligence should be changed to require a court to reduce damages by a certain minimum percentage in cases involving certain categories of conduct that constitute contributory negligence.

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[40] The Hon Justice David Ipp, 'Personal Responsibility in Australian Society and Law: Striving for Balance' (Edited version of Oration delivered at Annual Scientific Meeting, Australian and New Zealand College of Anaesthetists, Perth, WA, 1 May 2004 ).

[41] *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360, 368 (Lord Hoffman).

> 8.15 One such case is where the plaintiff's ability to take care for his or her own safety, at the time of death or injury, was impaired as a result of being intoxicated.
> ...
> 8.16 The Panel is of the opinion that *such provisions are generally undesirable.* ... The Panel considers that any fettering of judicial discretion to apportion damages for contributory negligence is undesirable.
> 8.17 The possibility of injustice is increased where a minimum reduction of damages is coupled with a presumption that certain types of behaviour constitute contributory negligence unless the court is satisfied that the behaviour did not in any way contribute to the plaintiff's death or injury. ... For example, being intoxicated will sometimes, perhaps often, amount to contributory negligence, but *not necessarily always*.[42]

There has been substantial criticism of the tort reforms in general and of their application to intoxicated plaintiffs.[43] A particularly strong critique of s 50 of the NSW Act is provided by Dietrich:

> This is one of the most problematic and potentially unjust provisions of all the tort 'reform' legislation. Underlying it is a harsh and misconceived notion of self-responsibility that suggests that once someone has decided to consume alcohol or some other intoxicant, they must bear all the causally connected consequences of such intoxication irrespective of how negligent and outrageous a defendant's conduct towards the plaintiff. Subsection (2) appears to mandate that, provided the intoxication is a 'but for' causative event, such that if the plaintiff had not been intoxicated the accident would not have happened, the defendant is absolved from all responsibility for his

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[42] Above n 39 (emphasis added).

[43] See McDonald, above n 2; Tina Cockburn, 'No care, all (your) responsibility?: Social Host liability in a post *Civil Liability* Act environment' (Paper presented at Australian Insurance Law Association conference [Insurance intensive papers], Brisbane, 26 May 2006); Erika Chamberlain, 'DUTY-FREE ALCOHOL SERVICE' (2004) 12 *Tort Law Review* 121; Bill Madden, 'Social host liability for intoxication – rough justice?' (2005) 1(10) *Australian Civil Liability* 117; Orr and Dale, above n 4.

> or her conduct, even if such conduct is also a causative factor contributing to the accident.[44]

Dietrich then provides a hypothetical example to illustrate the potential harshness of s 50:

> To take an example: a mildly intoxicated plaintiff falls off a boat and into the water. The seriously intoxicated defendant driver of the boat runs over the plaintiff causing serious injury. Such a defendant will not be liable, even if driving with gross negligence, if it can be shown that the intoxication caused the plaintiff to stumble (eg, by fooling around on the side of the boat). For in that case, the death or injury would not have occurred, had the plaintiff not been intoxicated. Such a conclusion would presumably follow even if the drunk defendant weaved the boat around the water for 10 minutes in a vain attempt to rescue the plaintiff before running over him or her.[45]

Further indications of the 'Draconian effect' of the NSW Act, and a comparison with the relevant legislation of other states and territories, are provided by Malkin and Davies.[46] Despite these criticisms the NSW Government has not acknowledged the substance of the issue nor, as indicated in the next section, given any indication that some change might be considered.

## VI Government Response

Shortly after the decision in the initial District Court action, the then Attorney-General, the Hon Bob Debus, was reported in the local Newcastle press as being willing to consider the issues raised in *Russell* in a review of the Act.[47] Subsequently, however, the NSW Government has refused to consider any amendments to the Act in response to the treatment of

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[44] Above n 4, 36.

[45] Ibid 36-7.

[46] Martin Davies and Ian Malkin, *Butterworths Tutorial Series: Torts* (5th ed, 2008) 222.

[47] Gabriel Fowler, 'Family seeks a rewrite', *Newcastle Herald* (Newcastle) 25 March 2005.

intoxicated minors. In a substantial report on Personal Injury Compensation Legislation,[48] a multi-party Committee of the NSW Legislative Council considered, amongst other matters, the *Civil Liability Act 2002* and in particular s 50, No recovery where person is intoxicated. Two submissions regarding s 50 were made to the Committee, both citing *Russell*.

The first, by the NSW Bar Association, criticised the legislation:

> It is the inflexibility if (sic) the provision and its incapacity to work justly in every case which would prompt reasonable minds to consider its urgent reconsideration. ...
>
> Whilst reasonable minds may disagree about the responsibilities of a 16 year old who drinks liquor bought to a party by a friend, consider an alternate set of circumstances. What if the plaintiff had only been 12 and was nonetheless intoxicated on liquor that had been exclusively supplied by the parties' (sic) host. Section 50 of the Civil Liability Act would still operate to deny the claimant damages. Is this what the Parliament intended?[49]

The second submission was from Chase Lawyers, who acted as solicitors for Russell in the initial District Court action, and it suggested amendments to Part 6 of the Act so that it was 'excluded from operating in cases involving minors, namely persons injured while intoxicated and who are under the age of 18 years' and to bring it 'in line with earlier NSW legislation, namely s 114 of the Liquor Act, which provides that it is an offence to sell or supply alcohol to a minor'.[50]

The Committee acknowledged these difficulties and recommended action:

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[48] Above n 5, 195-197.

[49] Submission No 29 to Legislative Council General Purpose Standing Committee No 1, Parliament of New South Wales, 17 March 2005, [7.10.4]-[7.10.5] (New South Wales Bar Association).

[50] Submission No 5 to Legislative Council General Purpose Standing Committee No 1, Parliament of New South Wales, 28 February 2005 (Chase Lawyers).

> **Recommendation 23**
> That the Government commission a review by the NSW Law Reform Commission of the duty of care and establishment of liability provisions of the *Civil Liability Act 2002*, particularly as they affect children and young people.[51]

However, there has been no such review because the NSW Government did not adopt the Report's recommendation. In a subsequent document which addressed all 26 recommendations of the Committee[52], the Government's reasons for not supporting Recommendation 23 were stated as follows:

> While the Government sees merit in keeping certain aspects of its reforms under review, such as the duty of care provisions, it is too early for this to occur given the limited number of cases which have been determined under the new provisions. Further, it is noted that the reforms were undertaken on a national level throughout Australia's State and Territory jurisdictions. If any review is to be undertaken, the Government is of the view that consideration should be given as to whether it may be more appropriate for a review to be undertaken on a national level.[53]

This response is unsatisfactory for several reasons. First, it suggests (somewhat callously) that the government needs to have evidence of additional, similar cases before it considers change, ie that the government requires more instances where intoxicated minors, like Ashley Russell, sustain serious injury. Second, there is some ad hoc evidence[54] that suggests that more cases like *Russell* are unlikely to come to court precisely

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51 Above n 5, 197.

52 New South Wales Government, 'Response to the Legislative Council General Purpose Standing Committee No 1 Report into Personal Injury Compensation Legislation' (2006) <http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/6deb694c553e0db8ca2570d100000c9a/$FILE/Govt%20Response%208%20June%202006.pdf> at 9 October 2008.

53 Ibid 28.

54 Interview with Monica Ross-Maranik, of Chase Lawyers (above n 50) (Telephone interview, 8 August 2008).

because of the precedent established by the judgment of Ipp JA. Third, the suggestion that a national review is required may be seen just as another reason for further delay.

There have been subsequent representations to the NSW Government suggesting amendments to the Act with regard to intoxicated minors but the Government has consistently indicated that it is not prepared to do so.[55]

## VII Synthesis and Conclusions

It is clear that the provisions of s 50, as interpreted by Ipp JA, resulted in a harsh outcome for Russell. In addition, Edwards has been inappropriately and unjustly exculpated since undoubtedly he was not blameless. More broadly, an opportunity to review or discuss the responsibilities of parents (and other social hosts) in controlling the drinking of minors has been lost. It is thus disappointing that the Court was unwilling to acknowledge these issues. Clearly the Court's discretion was tightly constrained in this case by the particularly strict provisions of the Act, but it would still have been possible to attract the attention of the legislature, and others, to the issues. Much more disappointing, however, is the stance of the NSW legislature, or more accurately, the Executive arm, which has ignored, and continues to ignore, the problems with the Act's treatment of intoxicated minors.

Alcohol abuse and misuse in Australia is a major and widely acknowledged problem,[56] particularly as it affects young people.[57] It is thus perhaps surprising that governments (both

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[55] Interview with Alastair McConnachie, Director Law Reform and Public Affairs, NSW Bar Association (Telephone interview, 11 July 2008).

[56] The annual cost of alcohol abuse in Australia has been estimated at approximately $15 billion annually. See above n 6, Tables 33 and 34 at pages 64-5.

[57] See, for example, Australian Government Department of Health and Ageing, *Australian Alcohol Guidelines Fact Sheet - Alcohol and Young People* <http://www.alcohol.gov.au/internet/alcohol/publishing.nsf/Content/fs-young> at 9 October 2008 and Anne-Marie Laslett, Sharon

State and federal), experts and other stakeholders do not seem to regard the law, specifically tort law, as a significant element in the battle against alcohol. Rather, tools such as increased taxes, reduced density of outlets, restrictions on opening hours, an increase in the drinking age and more effective enforcement seem to be preferred.[58]

A clear reason for this is the authority that the High Court established in *Cole*[59] that there was no general liability for commercial hosts with regard to their adult customers. Recognising a liability for social hosts is (as discussed in Part IV above) accordingly more difficult as outlined succinctly by Tobias JA in *Parissis v Bourke*,[60]

> in my opinion the community does not generally expect the host or the owner/occupier of the home to bear even that responsibility, the burden of which would inevitably result in social functions where alcohol is served becoming a thing of the past. The increased insurance premiums on public liability policies would inevitably see to that.[61]

It seems to have been generally accepted that these difficulties are effectively insuperable.

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Matthews and Paul Dietze, *The Victorian Alcohol Statistics Handbook Volume 8: Alcohol use and related harm among young people across Victorian Local Government Areas 2006* (2006) Turning Point Alcohol and Drug Centre <http://www.turningpoint.org.au/library/vas08.pdf> at 8 October 2008.

58 See for example Ministerial Council on Drug Strategy, *National Alcohol Strategy* 2006-2009: *Towards Safer Drinking Cultures* (2006); Roger Nicholas, *Understanding and responding to alcohol-related social harms in Australia: Options for policing* (2008) National Drug Law Enforcement Research Fund, 18-25; John Toumbourou, 'Is there a scientific rationale for raising the drinking age to 21?' (Paper presented at Thinking Drinking: Achieving cultural change by 2020, Melbourne, 21-23 February 2005).

59 *Cole v South Tweed Heads Rugby Football Club Ltd* (2004) 217 CLR 469.

60 [2004] NSWCA 373.

61 Ibid [9].

Another approach that is sometimes considered is the use of the criminal law to provide substantial disincentives to the supply of alcohol to minors in social settings. In this context, the NSW law is often cited with approval.[62] Section 114 of the *Liquor Act 1982* (NSW) provided that it was an offence to sell or supply alcohol to a minor, not just in licensed premises but more broadly, and with only one exception, namely the parent or guardian of the minor so supplied.[63] However, it appears that this particular statute is rarely, if ever, used to prosecute those supplying alcohol to minors in social settings such as backyard barbeques.[64] The NSW Government's Health Department has introduced its 'Supply means Supply' initiative to reduce sale of alcohol to adolescents and with some success, but its focus to date has been largely on publicity, education and enforcement activities near licensed premises rather than on drinking in the family home.[65]

Thus, tort law in particular appears to have been marginalised in addressing the problems caused by alcohol in Australia. Academic commentators argue that tort law can have deterrent effect and should not be regarded solely as a means of getting compensation. According to Penelope Watson:

> Tort law is a powerful tool for articulating values, educating, promoting safety, setting minimum standards of acceptable

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62 For example see Druginfo Clearinghouse, *Fact Sheet No 6.4 – What is 'secondary supply'?* (2008) and Office of Liquor, Gaming and Racing, *Young People and the NSW Liquor Laws* (2006).

63 This Act has been superseded by the *Liquor Act 2007* (NSW) but with similar provisions in s 117.

64 Interviews with Monica Ross-Maranik (above n 54) and Doug Tutt, Area Director Health Promotion, Northern Sydney and Central Coast Area Health Service, NSW Department of Health (Telephone interview, 3 November 2008). The suggested reasons for the infrequent use of s 114 in such social settings related mainly to such policing practicalities as difficulties in gathering evidence and collecting witness statements.

65 See <http://www.caan.adf.org.au/newsletterasp?ContentId=t20080407> at 3 November 2008 and <http://www.healthpromotion.com.au/SecondarySupplyIndex.htm> at 3 November 2008.

> behaviour in a community, and bringing about social change, as well as for delivering compensation.[66]

Similarly, Malkin and Voon state generally:

> Actions for damages in negligence can serve useful purposes in some kinds of cases; successful litigation and the threat of instituting proceedings arguably have positive effects on behaviour.[67]

With specific regard to social host liability, they argue that 'the trend in Australia away from imposing liability in tort makes social hosts just one more example of potential tortfeasors with little incentive to engage in responsible conduct'.[68] These academic views are thus at odds with those of Australia's appellate courts and the NSW government, at least with respect to social host liability for intoxicated minors. It also seems clear from the broad approaches to problems of alcohol abuse being adopted by Commonwealth, State and Territory governments that tort law is not regarded as having any significant deterrent role. This is disappointing – given the scale and pervasiveness of the problems caused by alcohol in Australia, it would seem sensible to attempt to use every available tool.

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[66] 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) 11 *James Cook University Law Review* 108, 130.

[67] Above n 1, 86.

[68] Ibid 62.