[2000] WASCA 258

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE FULL COURT (WA)
CITATION	**:**	EXECUTIVE DIRECTOR OF HEALTH -v- LILY CREEK INTERNATIONAL PTY LTD & ORS [2000] WASCA 258
CORAM	**:**	IPP J OWEN J MILLER J
HEARD	**:**	7 AUGUST 2000
DELIVERED	**:**	12 SEPTEMBER 2000
FILE NO/S	**:**	FUL 202 of 1999
BETWEEN	**:**	EXECUTIVE DIRECTOR OF HEALTH Appellant AND LILY CREEK INTERNATIONAL PTY LTD First Respondent PETER JOHN SAYERS DEBORAH LEE SAYERS Second Respondent AUZGEN PTY LTD Third Respondent AAPC PROPERTIES PTY LTD Fourth Respondent

Catchwords:

Liquor licensing - Appeal against grant of unrestricted hotel licence in Kununurra - Intervention by appellant under s 69(8a) *Liquor Licensing Act 1988*

- Whether judge misconstrued the Act in concluding that evidence of harm or ill health to a group of people is only relevant once such harm is proved, on the balance of probabilities, to stem from grant of a licence - Whether the judge erred in rejecting the expert evidence led by the appellant relating to s 69(8a) of the Act - Importance and interrelation of the objects stated in s 5 of the Act

Evidence - Expert evidence - Whether expert opinions of appellant's witnesses were "mere conjecture, guesswork or surmise" - Distinction between principles governing admissibility of expert evidence and the appropriate weight to be given to such evidence - An inference drawn from past facts is not mere conjecture - Evidence on the ultimate issue is relevant according to the usual considerations as to weight - The relationship between availability of liquor and levels of community consumption of alcohol is not within the ordinary knowledge of the court

Legislation:

Liquor Licensing Act 1988, s 5, s 41(1)(b), s 69(8a), s 74, s 97(2)

Result:

Appeal allowed

Representation:

Counsel:

Appellant	:	Mr G T W Tannin & Mr R C Bathurst
First Respondent	:	Mr A D Wilson
Second Respondent	:	No appearance
Third Respondent	:	No appearance
Fourth Respondent	:	No appearance

Solicitors:

Appellant	:	Crown Solicitor's Office
First Respondent	:	Messrs Chalmers & Partners
Second Respondent	:	No appearance
Third Respondent	:	No appearance
Fourth Respondent	:	No appearance

Case(s) referred to in judgment(s):

Australian Securities Commission v McLeod [2000] 34 ACSR 135
Bradshaw v McEwans Pty Ltd, unreported; High Court of Australia; 27 April 1951
Gurnett v Macquarie Stevedoring Co Pty Ltd (1955) 55 SR (NSW) 243
Kerr v Ayr Steamshipping Co Ltd [1915] AC 217
Luxton v Vines (1952) 85 CLR 352
Malec v JC Hutton Pty Ltd (1990) 169 CLR 638
Nominal Defendant v Owens (1978) 22 ALR 128
Osland v The Queen (1998) 197 CLR 316
R v Wright [1980] VR 593
Re Charlie Carter (Kununurra) Pty Ltd (1991) 8 SR (WA) 169
Re Gull Liquor (1999) 20 SR (WA) 321
Samuels v Flavel [1970] SASR 254
Sellars v Adelaide Petroleum NL (1994) 179 CLR 332

Case(s) also cited:

Kelly v Licensing Court of New South Wales & Ors, unreported; SCt of NSW; BC 9603021; 15 July 1996
Liquorland (Aust) Pty Ltd v Porton Pty Ltd, unreported; FCt SCt of WA; Library No 950287; 8 June 1995
State Housing Commission v Martin (1999) EOC 92-975
Woolworths (WA) Ltd v Liquorland (Aust) Pty Ltd, unreported; FCt SCt of WA; Library No 940553; 7 October 1994

IPP J:

The licence sought for the new hotel in Kununurra

1 This is an appeal from an order made by the Liquor Licensing Court granting Lily Creek International Pty Ltd ("Lily Creek") a hotel licence for premises to be constructed on the Victoria Highway, Kununurra.

2 The licence was not granted as "a hotel-restricted licence" in terms of s 41(1)(b) of the *Liquor Licensing Act 1988.* A hotel-restricted licence is a hotel licence subject to a condition prohibiting the sale of packaged liquor to persons other than lodgers and restricting other sales to liquor sold for consumption on the licensed premises. Thus, the hotel licence granted to Lily Creek enables it to sell packaged liquor on an unrestricted basis. The permitted hours of sale under such a licence are those set out in s 97(2) of the Act. Generally speaking, the holder of such a hotel licence is entitled to sell liquor for consumption on and off the premises between 6 am and midnight seven days a week.

3 The contest in the Liquor Licensing Court concerned that part of the licence that allowed the sale of packaged liquor on an unrestricted basis. There was no objection by any party to the grant of a restricted hotel licence. In particular, there was no objection to the sale of liquor to hotel guests. The objection was directed solely at sales of packaged liquor to the public.

4 The proposed hotel complex was described as "a substantial tourist facility". When built it would comprise several buildings, including a restaurant and bar, 72 motel-style rooms, a reception building containing a shop and offices, and substantial on-site car-parking. Relevantly for the purposes of this appeal, the hotel would also incorporate a drive-in bottle shop "containing a browse area of 50 square metres with a one-way covered driveway of 56 square metres."

5 The site of the proposed hotel complex is approximately one kilometre south-west of the Kununurra town centre. It is to be located on the northern side of the Victoria Highway. Access to the site is to be via a service road connected to the Victoria Highway. The Victoria Highway is a "major highway" and is the highway between Darwin, Derby and Broome. It is also the road to the Kununurra airport. Particularly during the tourist period it carries a high volume of traffic. On the side of the road opposite to that where the hotel is to be constructed is a major reserve and a gathering area for Aboriginal people.

The Executive Director of Public Health intervenes: his contentions are rejected

6 The potential effect that the granting of the licence would have on the Aboriginal community in Kununurra led the Executive Director of Public Health ("the Executive Director") to intervene in the proceedings in the Liquor Licensing Court. Standing to so intervene is afforded to the Executive Director by s 69(8a) of the Act, which provides:

> "The Executive Director … may intervene in proceedings before the licensing authority for the purpose of introducing evidence or making representations in relation to the harm or ill-health caused to people, or any group of people, due to the use of liquor, and the minimization of that harm or ill-health."

7 The Executive Director contended that the Liquor Licensing Court should not grant Lily Creek's application on an unrestricted basis. He submitted that the grant of an unrestricted hotel licence, enabling Lily Creek to sell packaged liquor to the public, would increase the consumption of liquor by Aboriginal communities in and in the vicinity of Kununurra and would cause harm or ill-health to members of those communities.

8 Expert and other evidence was led by the Executive Director in support of his contention. The learned Liquor Licensing Judge, however, rejected his arguments. Essentially, his Honour found:

> "[I]t is no more than mere conjecture, guesswork or surmise to infer from this evidence [tendered by the Executive Director], however, that the grant of this application may cause harm or ill health to this group of people which is undue, when considered against the weight of the evidence in support of the grant of a further hotel licence in this affected area."

9 The "evidence in support of the grant of a further hotel licence" to which the learned Judge referred was not evidence that contradicted that tendered by the Executive Director. Rather, it was evidence that supported the finding by his Honour that "a significant section of the public residing in, resorting to and passing through the affected area has a subjective requirement to obtain liquor, accommodation and related services at these proposed premises." In fact, there was no evidence that was adduced in opposition to that tendered by the Executive Director.

10 The learned Judge held that the onus was on the Executive Director "to satisfy the Court on a balance of probabilities that the application should be refused in the public interest, in order to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor", and found that he was not so satisfied.

The grounds of appeal

11 The Executive Director now appeals against the grant of the licence on an unrestricted basis. The grounds of appeal fall into two broad categories.

12 Firstly, it is said that the learned Judge misconstrued the Act in concluding that he was only required to take into account harm or ill-health caused to any group of people due to the use of liquor if it was proved, on a balance of probabilities, that such a group would suffer undue harm should a licence be granted. It was submitted that the Act required the learned Judge to have regard to the potential of harm or ill-health even if it were not proved on a balance of probabilities that such harm or ill-health would be caused by the grant of the licence.

13 Secondly, it was submitted that the learned Judge, in rejecting the evidence tendered by the Executive Director, misapplied the laws of evidence insofar as they concern expert testimony. This, it was said, led his Honour into material error.

The object of minimising harm and ill-health caused by the use of liquor

14 The minimisation of harm or ill-health caused by the use of liquor is one of the two primary objects of the Act. Section 5(1) of the Act provides:

> "5(1) The primary objects of this Act are –
>
> (a) to regulate the sale, supply and consumption of liquor; and
>
> (b) to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor."

15 Section 5(2) of the Act enjoins the Licensing Authority, in carrying out its functions under the Act, to "have regard to the primary objects of this Act" and to other objects stipulated in that sub-section. The other objects are not described as "primary". They include regulating the

development of the liquor and hospitality industries (s 5(2)(a)), catering for the requirements of the tourism industry (s 5(2)(b)), facilitating the use and development of licensed facilities reflecting the diversity of consumer demand (s 5(2)(c)), providing adequate controls over the sale, disposal and consumption of liquor (s 5(2)(d)), and providing a flexible system for the administration of the Act (s 5(2)(e)).

16 Section 5(1) in its present form was inserted into the Act by the *Liquor Licensing Amendment Act 1998.* Prior to that amendment, the Act did not contain any reference to its "primary objects". In my opinion, the amendment elevates in importance the objects set out in s 5(1) and converts the objects set out in s 5(2) to subsidiary objects. The deliberate division of s 5 into s 5(1), which sets out the "primary" objects, and s 5(2), which describes objects which are not primary, supports this conclusion. Moreover, s 5(2) itself recognises the distinction between "the primary objects of this Act" and "the following objects" which, by necessary inference, are objects which are not primary.

17 In the course of his reasons granting the application, the learned Liquor Licensing Court Judge quoted extensively from his own reasons he had earlier delivered in ***Re Gull Liquor*** (1999) 20 SR (WA) 321. These quotations embodied his Honour's approach to the object of minimising "harm or ill-health caused to people, or any group of people, due to the use of liquor." In the course of his reasons in ***Re Gull Liquor*** (at 339) the learned Judge expressed the opinion that Parliament did not intend, by the insertion of s 5(1) in the Act and the reference to the objects set out therein as being the "primary objects", to make the objects expressed in s 5(2) subsidiary to the objects contained in s 5(1). This opinion permeated his Honour's reasons in the present case and in my view caused him to fall in to material error.

18 In ***Re Gull Liquor*** his Honour considered there to be a conflict between the object contained in s5(1)(a) and that in s 5(1)(b). He referred (at 335) to the need to "relieve the tension between the two primary objects". In my view, however, there is no tension between the two primary objects. The object described by s 5(1)(a) is to regulate the sale, supply and consumption of liquor. The object contained in s 5(1)(b) is to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor. When s 5(1)(a) is read together with s 5(1)(b), it is apparent that the Licensing Authority, in regulating the sale, supply and consumption of liquor, is required to have regard to the object of minimising harm or ill-health caused to people, or any group of people, due to the use of liquor.

19 It is obvious, however that tension may arise between the object of minimising harm or ill-health caused to people, or any group of people, due to the use of liquor and certain of the objects contained in s 5(2). There will be occasions when s 5(2) objects could only be achieved by the grant of licences for the sale and supply of liquor in circumstances under which such grants may tend to cause harm or ill-health to people. Section 5 makes it plain that the Licensing Authority is required to bear s 5(2) objects in mind as well as the primary objects when fulfilling its functions. This indicates that the Licensing Authority must undertake a weighing and balancing exercise when conflict between objects arises.

20 It is significant that the primary object in s 5(1)(b) is to "minimize" harm or ill-health, not to prevent harm or ill-health absolutely. The word "minimize" is consistent with the need to weigh and balance all relevant considerations. This concept also underlies those sections of the Act that provide for objections to the grant of licences on grounds based on harm or ill-health to people. Section 73(2) provides (subject to that section) for a right to object to an application made under the Act "on any ground permitted by s 74". Section 74(1)(b) permits an objection to be made on the ground that "the grant of the application would cause undue harm or ill-health to people, or any group of people, due to the use of liquor". The word "undue" in s 74(1)(b) emphasises that the Licensing Authority is required to undertake a comparative task where there is a conflict between the primary object in s 5(1)(b) and the other objects described in s 5(2).

21 It follows that the mere fact that s 5(1)(b) is a primary object does not necessarily mean that where harm or ill-health may be caused to people by the grant of a licence, no licence should be granted. Where there is a prospect of harm or ill-health being caused by the grant of a licence, and that grant will advance s 5(2) objects, the resolution of the conflict that then arises will depend on the degree of importance that is to be attributed to each of the relevant factors in the particular circumstances (bearing in mind that the object under s 5(1)(b) is to be accorded primacy).

22 The Licensing Authority may decide that the possibility of harm or ill-health is so remote or so insignificant that it should not be taken into account. It may be that a possibility of harm or ill-health of a particular serious nature will be sufficient to cause the Licensing Authority to impose stringent conditions on a licence or refuse the grant absolutely. The decision in each case will depend on the particular circumstances.

23 The question then arises: In carrying out the balancing exercise, must the Licensing Authority only take into account the prospect of harm or ill-health to people, or to any group of people, due to the use of liquor if it is proved on a balance of probabilities by an intervener or objector that such harm or ill-health will occur? The learned Judge answered this question in the affirmative. As mentioned, his Honour said that the onus was on the Executive Director "to satisfy the Court on a balance of probabilities that the application should be refused in the public interest, in order to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor".

24 His Honour relied largely on s 73(2) and s 74(1)(b) of the Act for this conclusion. The learned Judge referred to his own remarks in ***Re Gull Liquor*** (at 340) where his Honour said that the insertion of the word "undue" in s 74(1)(b) meant that:

> "[A]n objector who relies upon this ground of objection must establish on the balance of probabilities, and on the merits of the case as a whole, that the grant of the application would cause harm or ill health to people, or any group of people which, on the evidence is found to be undue when considered against the weight of the evidence in support of the further licence applied for."

25 I do not, with respect, accept this reasoning. As a matter of language, the word "undue" in s 74(1)(b) has no bearing whatever on the standard of proof applicable to establishing "harm or ill-health" as referred to in s 5(1)(b). There is no reference to "undue" in s 69(8a), which section empowers the Executive Director to intervene in proceedings before the Licensing Authority "for the purpose of introducing evidence or making representations in relation to the harm or ill-health caused to people, or any group of people, due to the use of liquor, and the minimisation of that harm or ill-health". Section 69(8a) assumes that evidence and representations as to harm or ill-health caused by the use of liquor will be relevant, whether or not it establishes that the harm or ill-health is "undue". I have explained that in my view the word "undue" is inserted in s 74(1)(b) merely to emphasise that a comparative exercise is required to be undertaken in the event that a conflict arises between the minimisation of harm or ill-health, on the one hand, and the need to achieve one or more of the objects contained in s5(2), on the other.

26 The primary object under s 5(1)(b) is "to minimize harm or ill-health *caused* to people, or any group of people, *due to* the use of liquor." Each

of s 5(1)(b), s 69(8a) and s 74(1)(b) import the notion of causation in the way italicised. Whether such harm or ill-health would arise in a particular case requires predicting the future. In ***Malec v JC Hutton Pty Ltd*** (1990) 169 CLR 638, Deane, Gaudron and McHugh JJ observed (at 643):

> "The future may be predicted and the hypothetical may be conjectured. But questions as to the future or hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof."

Their Honours pointed out that the law takes account of future or hypothetical events in terms of the degree of probability of those events occurring. Accordingly, in those cases where damages depend on future or hypothetical events, the damages will be assessed by reference to the *degree* of probability that an event would have occurred, or might occur, and adjusts its award to reflect the degree of probability: ***Malec v JC Hutton Pty Ltd*** at 643; ***Sellars v Adelaide Petroleum NL*** (1994) 179 CLR 332.

27 Whether harm or ill-health will in fact be caused to people, or any group of people, due to the use of liquor is a matter for the future and, in the sense referred to in ***Malec v JC Hutton Pty Ltd***, is essentially a matter of prediction. The Licensing Authority will only be able to determine the likelihood of harm or ill-health occurring by reference to a degree of probability.

28 In my opinion, where the degree of probability is less than 51 per cent, it does not follow that the possibility of such harm or ill-health is to be ignored. In my view, there is nothing in the wording of s 5(1)(b) that leads to such a view. On the contrary, the public interest considerations that underlie s 5(1)(b) indicate that the potential of harm or ill-health is to be taken into account irrespective of whether the prospect of harm or ill-health is a possibility or a probability. The wording of s 69(8a) is also indicative of an intent to this effect.

29 Section 33 of the Act confers upon the Licensing Authority an absolute discretion to grant or refuse an application on any ground that the Licensing Authority considers in the public interest. The potential of harm or ill-health to people, irrespective of whether the harm or ill-health is proved on a balance of probabilities, would be a powerful public interest consideration. The section is therefore consistent with the view that the mere possibility of harm or ill-health would always be a relevant matter for the Licensing Authority when discharging its functions.

30 In my view the learned Judge erred in concluding that the prospect of harm or ill-health being caused to people, or any group of people due to the use of liquor, was only to be taken into account by the Liquor Licensing Court if it were to be established, on the balance of probabilities, that such harm or ill-health would ensue.

31 I should add that, in the course of his reasons, the learned Judge referred to his own decision in ***Re Charlie Carter (Kununurra) Pty Ltd*** (1991) 8 SR (WA) 169 at 182 in the course of explaining how the court should exercise its discretion in the public interest under s 33(1) of the Act. His Honour said:

> "I have come to the conclusion that in the end it is in the public interest that people of Aboriginal descent and others be left to determine their own future individually and collectively. In my opinion, it is not in the public interest that a facility such as this proposed liquor store, where it should otherwise be available to the community, should be denied because it appears to the court that it might be better for some members of the community if the application were refused. Such an approach would seem to smack of paternalism the consequences of which may be as devastating if not more so than the over-consumption of alcohol."

The learned Judge adopted this reasoning and this coloured the ultimate conclusion to which he came.

32 ***Re Charlie Carter (Kununurra Pty Ltd)*** was decided before s 5 was amended by the insertion of s 5(1)(a) and the division of s 5 into s 5(1) and s 5(2). I therefore say nothing about the correctness of those observations at the time the judgment was delivered. In my view, however, the amendment to s 5 of the Act negates the opinion so expressed. If, on the grounds of harm or ill-health that would otherwise result from the grant of a licence, it would "be better for some members of the community if the application were refused", then it might well be that the grant of a licence should be denied. That is because s 5(1)(b) read with s 5(2) specifically contemplates such a result. Those sections indeed require the Licensing Authority to have regard to whether it would "be better for some members of the community if the application were refused" where that is necessary to minimise harm or ill-health caused to that community due to the use of liquor. In such circumstances, to grant a licence merely because of a personal view that not to do so "would seem to smack of paternalism" would be to act contrary to the intention of Parliament as expressed in the Act.

33 In the circumstances, the learned Judge's approach to the evidence and the representations tendered on behalf of the Executive Director was erroneous. I would uphold the appeal on the first main ground of appeal.

34 In my opinion, for the above reasons, the decision of the Liquor Licensing Court should be set aside and the matter returned to the Court to be dealt with according to law. It seems to me that in such circumstances it would be helpful were I to express my conclusions concerning the second main category of appeal grounds which was fully argued.

The arguments concerning expert evidence

35 The Executive Director called several witnesses who testified that for various reasons they were of the opinion that the grant of a licence allowing Lily Creek to operate a drive-in bottle shop selling packaged liquor would be likely to cause harm or ill-health to the Aboriginal communities in and around Kununurra. The learned Judge held that this testimony was not persuasive and rejected it on several grounds.

36 Firstly, his Honour considered that no weight should be given to the opinion evidence tendered by the Executive Director, as that evidence was not based on a sufficient degree of specialised knowledge to call for the testimony of expert opinion.

37 Secondly, his Honour considered that the opinion evidence tendered by the Executive Director was "no more than mere conjecture, guesswork or surmise" and therefore not worthy of any weight.

38 Thirdly, his Honour considered that the opinion evidence in question was directed at the ultimate issue to be decided by him, and for that reason, in effect, should be disregarded.

39 Fourthly, his Honour considered that the question whether increased availability of liquor led to increased consumption was a "question within the ordinary experience of the tribunal of fact" and for that reason the evidence on the issue should be afforded no weight.

40 I shall proceed to consider each of these bases for rejection of the opinion evidence tendered by the Executive Director.

Expert evidence: the lack of sufficient degree of specialised knowledge

41 The learned Judge referred to the role of expert evidence in the proceedings before him and said that this "question" was one that

"relate[d] to the weight which should be given to evidence of opinion relating to liquor consumption and to liquor control". He then quoted a passage from *Cross on Evidence*, 5th Australian edition, par 29050, at 787 on the basis that the learned authors were there expressing the principles governing the weight to be attributed to the evidence in question. The passage is as follows:

> "If the Court comes to the conclusion that the subject of investigation does not require a sufficient degree of specialised knowledge to call for the testimony of an expert, expert opinion will generally be excluded, especially where the witness is produced merely to present in a cogent and vivid form the case of the party calling that witness. The danger of this evidence is that it dresses up matters which are within the ordinary experience of the tribunal of fact in a beguiling scientific garb which may conceal the blemishes within."

This approach by the learned Judge revealed a fundamental error. The passage quoted from *Cross on Evidence* relates to the admissibility of opinion evidence, and not to weight. The learned authors discuss there the exclusion of opinion evidence in circumstances where the issue to which the opinion evidence is directed does not "call for the testimony of an expert". It is only if and when opinion evidence is admitted that the court is required to consider the weight that is to be accorded to it, and different considerations then arise. His Honour, however, relied on the principles governing the admissibility of the opinion evidence in determining the weight to be attributed thereto.

42 There is a distinction between opinion evidence and expert evidence. Expert evidence will inevitably involve the expression of an opinion, but opinion evidence is not always expert evidence: see ***R v Wright*** [1980] VR 593 at 596; ***Australian Securities Commission v McLeod*** [2000] 34 ACSR 135. In ***R v Wright***, Young CJ explained that non-expert opinion evidence "may be received whenever it is practically impossible to separate the inferences which the witness draws from the observed facts from which the inferences are drawn". The learned Chief Justice pointed out that this proposition was not intended necessarily to cover the only instances in which non-expert opinion evidence is admissible. In the same case, Kaye J said (at 606 - 607):

> "In determining whether opinion evidence is permitted in any particular case, it is necessary to consider the matters required to be proved and the relevance of the opinion to those matters. Such evidence is allowed if [the trier of fact], because of its lack

> of knowledge, would be unlikely to be capable of deciding the matters without evidence of those skilled or experienced in the same."

In ***Australian Securities Commission v McLeod***, Owen J (with whom Ipp and Anderson JJ agreed) observed that:

> "[T]he central issue is whether the subject matter of the evidence is within or without the common knowledge of the trier of fact."

His Honour pointed out that:

> "A trier of fact may well decide that he or she can determine the issue without the need to take evidence on the topic."

His Honour remarked, nevertheless, that it was, in any event, open to the trier of fact to admit non-expert evidence which would be of assistance in deciding the issue in question.

43 As regards expert evidence, the following remarks of Gaudron and Gummow JJ in ***Osland v The Queen*** (1998) 197 CLR 316 (at 336) are pertinent:

> "Expert evidence is admissible with respect to a relevant matter about which ordinary persons are '[not] able to form a sound judgment … without the assistance of [those] possessing special knowledge or experience in the area' and which is the subject 'of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience.' *R v Bonython* (1984) 38 SASR 45 at 46 - 47, per King CJ."

44 Some of the witnesses called by the Executive Director gave evidence that was obviously expert in nature. Some gave opinions on certain issues that were arguably within the ordinary knowledge of the Court. No objections were made to any of this opinion evidence. No questions of admissibility arose and all the evidence was admitted without comment. That is readily understandable on the basis that the respondent considered that the evidence that was not obviously expert was nevertheless sufficiently removed from the knowledge of the Court to be properly admissible. There were good grounds for coming to such a view.

45 Admissibility of evidence concerns questions of law (although those questions may depend upon preliminary findings of fact). The weight of evidence, on the other hand, is a question of fact. Matters that may

influence the weight to be attributed to opinion evidence are innumerable. Examples are the certainty of the facts on which the opinion is based, the persuasiveness of the reasoning involved and the inferences that are drawn, the experience and skill of the witness, the reliability of the procedures used, the degree of knowledge on which the opinion is based and which is required for the opinion, and the impartiality of the witness. Thus, the determination as to weight is fundamentally different to the inquiry into admissibility. Once the evidence of the Executive Director was admitted, it was inappropriate to apply the considerations referred to in *Cross on Evidence* at par 29050 in assessing the weight to be attributed thereto.

46 Counsel for the respondent sought to resist the conclusion that the appeal should succeed on this ground by submitting that even if the expert testimony adduced by the appellant were taken at face value, it would not establish on a balance of probabilities that the grant of the licence would probably cause harm or ill-health to the Aboriginal communities in and around Kununurra.

47 One answer to this proposition is that, as I have held, evidence which merely establishes a potential for harm or ill-health is relevant and must be taken into account, even though that evidence does not establish that harm or ill-health will result on the balance of probabilities.

48 I should say, however, that I am not persuaded that the testimony to which counsel for the respondent referred is to be construed as submitted by him. The arguments of the respondent in this regard focused on the evidence of Prof Gray, a medical anthropologist, to whose qualifications and testimony I shall later refer in greater detail. Prof Gray expressed the opinion that the greater the availability of alcohol the greater the level of consumption. In his evidence-in-chief he expressed the opinion that:

> "[I]t is likely that the granting of another liquor licence in Kununurra will result in increased consumption and related harm - although it is not possible to predict the magnitude of this."

In cross-examination, however, Prof Gray said that one more licence "*may* make an appreciable difference". He was asked whether it "will" make an appreciable difference, but was not prepared to go that far. Other evidence of Prof Gray in cross-examination was to the same effect. For example, he referred to "the possibility" that an additional licence may increase the already high levels of consumption and harm.

49 There are two points to be made in connection with this evidence. Firstly, it is not entirely clear whether Prof Gray was referring to the "magnitude" of harm that would ensue, rather than whether some harm of some kind would inevitably follow from the grant of a licence. Secondly, it is by no means certain whether Prof Gray was using the word "may" and "possibility" in the sense that a lawyer uses these terms in connection with the civil standard of proof, namely proof on a balance of probabilities. Prof Gray's evidence in this respect can readily be understood as the opinions of a scientist who is not intending to express an opinion as to the degree of likelihood of harm occurring as this issue would be understood by a lawyer. These aspects of his evidence were not canvassed when he testified.

50 In any event, I consider that the error in approach when assessing the weight of the evidence was so fundamental as to require a re-hearing on the overall factual questions.

Expert evidence: "Conjecture, guesswork or surmise "

51 Prof Gray was an important witness called by the Executive Director. He is an associate professor of medical anthropology at the National Centre for Research for the Prevention of Drug Abuse, Curtin University of Technology. He holds degrees of doctor of philosophy in anthropology and master of public health, and for 24 years has worked as a researcher, teacher and practitioner in the public health field, particularly as it applies to Aboriginal people. He has written widely on Aboriginal health issues, has been involved in research and evaluation of alcohol use upon Aboriginal people, and has conducted research on liquor licensing laws and their effects on Aboriginal people. It was not suggested that he was not an expert in the areas in respect of which he testified.

52 According to Prof Gray, the grant of the licence would lead to increased consumption of alcohol by the Aboriginal communities in and in the vicinity of Kununurra, and this, in turn, would have adverse effects upon various programs initiated by the local Aboriginal people to reduce alcohol consumption and the harm to them that flowed from that. He described the harm as being an increase in arrest rates for alcohol-related offences, an increase in the mortality rate for alcohol-related conditions, that was already 4.2 times the norm in Western Australia, and an increased hospital discharge rate for alcohol-related conditions among Aboriginal people.

53 Prof Gray was of the view that there was a positive relationship between levels of per capita consumption in populations and the frequency and range of social and health problems. This he sought to establish by reference to a considerable body of research that extended back for 30 years. He said that international literature and research have demonstrated that consumption levels are influenced by the availability of alcohol. He was of the opinion that while earlier work was equivocal in its results:

> "The most recent methodologically sound studies demonstrate that outlet densities (defined as the number of outlets per unit of population) have a significant positive effect on alcohol sales. Outlet density has also been shown to be associated with the frequency of alcohol-related motor vehicle crashes."

He stated that experts in the field "are unanimous in their conclusions that - although the relationship is complex and may vary in magnitude over time and place – there is a clearly demonstrable, positive relationship between the availability of alcohol and the level of consumption." He expressed the view that increased alcohol consumption in Kununurra would adversely affect the health of the local Aboriginal communities, would result in increases in the annual rates of arrest for alcohol-related offences, and in an increased number of motor vehicle accidents in the area. He stressed his opinion that alcohol consumption in Kununurra had not yet reached saturation point. He was therefore of the view that one more licence could make an appreciable difference.

54 The Executive Director relied further on the testimony of Sgt Murray, the senior sergeant in charge of the Kununurra police station, a man with considerable experience of alcohol-related offences in Aboriginal communities. Unlike Prof Gray, Sgt Murray was of the opinion that the grant of the licence would be unlikely to alter to any marked degree the overall amount of alcohol purchased in Kununurra.

55 It was an open question as to whether the view expressed by Prof Gray was to be preferred to the view expressed by Sgt Murray. Plainly, the view expressed by Prof Gray was based on research and experience and was fortified by academic analysis. Sergeant Murray's view was based on his personal experience. It was a matter for the learned Judge to determine which of these two views he preferred. He does not appear to have embarked on this exercise.

56 Sergeant Murray was of the opinion that the proposed drive-in bottle store would attract people in the Aboriginal community to the vicinity of

that outlet which was on the fringe of the town and on the highway which allows passage of heavy vehicles. He expressed the view that the safety and security of the people attracted to that area would be at risk.

57 Mr Edward Carlton, the co-ordinator of the Waringarri Alcohol Project, testified. Mr Carlton has been concerned with the containment of alcohol abuse in the Kununurra area for some 10 years. He has considerable experience in the area and holds the degree of bachelor of science and Aboriginal community management and development and has studied and worked in the area of alcohol education amongst the community for many years. He is plainly an expert on the topic. He expressed the opinion that the grant of a licence would break down voluntary arrangements and agreements made by the Aborigines in the Kununurra area concerning limitation of alcohol use. He said that it would result in "a dramatic increase in access to alcohol by Aboriginal people". He was of the view that that would "increase the level of problems in Kununurra and surrounding areas". He said, also:

> "The Victoria Highway is a major road and carries a high volume of traffic during the tourist period. Any alcohol licence on this thoroughfare will increase the risks of an alcohol-affected person being injured especially when one town camp is directly over the road. Any increase in alcohol accessibility will increase the level of alcohol and related problems to aboriginal [*sic*] people in Kununurra and surrounding communities as already described."

58 Dr Stephen Lefmann, a medical practitioner with the East Kimberley Aboriginal Medical Service, was also called as a witness by the Executive Director. Dr Lefmann testified that he had been employed with the East Kimberley Aboriginal Medical Service for nearly 13 years. He described in graphic terms the health problems suffered by Aboriginal children and Aborigines generally in consequence of alcohol consumption. He expressed the opinion that the problem of drunkenness "and its spin-off problems" would increase "enormously" if the licence were to be granted.

59 The opinion evidence to which I have referred was not controverted. Other than the internal conflicts between the testimony of Prof Gray and Sgt Murray as to whether a further outlet would result in increased alcohol consumption, there were no conflicting opinions. Whether the conflicting inferences drawn by Prof Gray and Sgt Murray give rise to equal degrees of probability is seriously open to question. After all, Prof Gray based his inference on a considerable body of research as well as experience, while

it is not clear what gave rise to the opinion expressed by Sgt Murray. Further, Prof Gray is an acknowledged expert on the relationship between the availability of alcohol and the level of consumption, while Sgt Murray, arguably, is not.

60 In rejecting the evidence of the Executive Director's witnesses, the learned Judge said:

> "I take the law to be as stated by the learned authors of *Cross on Evidence* (Australian Edition) at para 9055:
>
> > 'Where satisfaction of the civil standard of proof depends on inference, there must be something more than mere conjecture, guesswork or surmise. That is, there must be more than "conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture." (*Nominal Defendant v Owens* (1978) 22 ALR 128 at 132...)' "

The learned Judge also relied on the following statement at par 29010 of *Cross on Evidence*:

> "[T]here comes a point where an inference, although expressed by a qualified person, enters upon the field of mere speculation and will therefore be rejected as such."

61 His Honour appeared to be of the view that the opinions expressed by the witnesses concerned were nothing more than "conjecture, guesswork or surmise" and "speculation".

62 The phrase "conjecture, guesswork or surmise" and the word "speculation" in the passages referred to in *Cross on Evidence* are used by the learned authors in a particular context, namely that derived from the authorities they cited for the propositions contained in the paragraphs in question. Amongst the authorities so cited is ***Luxton v Vines*** (1952) 85 CLR 352. That case concerned a claim for damages for negligence arising out of a motor vehicle collision. The plaintiff relied on inferential processes to establish the circumstances and cause of his injury and negligence itself. The plaintiff was unable to remember the accident. There was no primary evidence as to the size and kind of vehicle said to have struck the plaintiff, as to how the collision occurred at all, in what manner the plaintiff had driven, and as to how the plaintiff came into contact with the other vehicle. Dixon, Fullagar and Kitto JJ concluded (at 360):

> "Any answer that you give to such questions is a guess. All lies in conjecture. The fact is that whatever reasons you can find for one explanation of the accident, reasons of equal sufficiency or insufficiency exist for other explanations.
>
> The circumstances give rise to nothing but conflicting conjectures of equal degrees of probability and no affirmative inference of fault on the part of a driver of a motor car can reasonably be made."

Their Honours referred (at 358) to ***Bradshaw v McEwans Pty Ltd,*** unreported; High Court of Australia; 27 April 1951 where the court said, in dealing with the civil standard of proof:

> "In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture … But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise … "

63 In ***Nominal Defendant v Owens*** (1978) 22 ALR 128 (another authority cited by *Cross on Evidence*) Muirhead J (at 133) referred to the succinct distinction between inference and conjecture drawn by Lord Shaw in ***Kerr v Ayr Steamshipping Co Ltd*** [1915] AC 217 at 233, where his Lordship said:

> "The distinction is as broad as philosophy itself. It is that an inference rests upon premises of fact and a conjecture does not."

"Conjecture" in this sense is given the same meaning as in ***Luxton v Vines***.

64 In ***Gurnett v Macquarie Stevedoring Co Pty Ltd*** (1955) 55 SR (NSW) 243 at 248, Street CJ (in a statement relied on in ***Nominal Defendant v Owens***) said:

> "A guess is a mere opinion or judgment formed at random and based on slight or uncertain grounds. In contradiction to such a conjectural opinion, an inference is a reasonable conclusion drawn as a matter of strict logical deduction from known or

> assumed facts. It must be something which follows from given premises as certainly or probably true, and the mere possibility of truth is not sufficient to justify an inference to that effect."

65 It is apparent that the phrase "conjecture, guesswork or surmise" and the word "speculation" as they are used in the passages referred to in paras 9055 and 29010 of *Cross on Evidence* do not apply to inferences falling short of certainty but which are reasonably derived from proved primary facts. They also do not necessarily apply to inferences or predictions as to future facts which give rise to a degree of probability of less than 51 per cent. This can be seen from the following remarks of Deane, Gaudron and McHugh JJ in ***Malec v JC Hutton Pty Ltd*** (at 643):

> "If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring … But unless the chance is so low as to be regarded as speculative – say less than 1 per cent – or so high as to be practically certain – say over 99 per cent – the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability."

It is noteworthy that their Honours regard only a chance so low as "say less than 1 per cent" as "speculative".

66 In my view, few, if any, of the opinions expressed by the witnesses called by the Executive Director could properly be classified as conjecture, guesswork, surmise or speculation. The opinions to which I have referred above were all based on inferences drawn from past facts which were undisputed, and were based on many years of experience in the particular field. Many of the opinions were based on research and analysis as well. The opinions were, in essence, predictions, but that alone does not turn them into conjecture, guesswork, surmise or speculation, as his Honour appeared to believe. I would uphold the argument of the Executive Director in this respect.

Expert evidence: the ultimate issue

67 His Honour rejected the evidence of Prof Gray, on the further ground that, as he said, "It is a question for the Court to determine." In my opinion, that was no reason not to accept Prof Gray's evidence.

68 The general rule is, as expressed by Owen J in ***Australian Securities Commission v McLeod*** (after referring to what was said in ***Wright*** and ***Samuels v Flavel*** [1970] SASR 254 (at 261 – 262)):

> "[A] witness, particularly an expert witness, should only be allowed to give evidence in terms of the ultimate issue to be decided by the court where it was absolutely necessary to do so."

In ***Wright***, Young CJ said (at 598) in regard to evidence as to the "ultimate issue":

> "In the last resort the justification for its reception must lie in the nature of the issue, an issue created by the statute, and although the Court must always be astute to ensure that evidence on an ultimate issue is not received unless it is necessary to do so, it is my opinion that it was necessary in this case."

69 I repeat that the evidence of Prof Gray was adduced without objection and, once having been admitted, the usual considerations as to weight had to be applied to it. The mere fact that he testified as to the issue the Court was required to determine did not mean that, for that reason, no weight should be attributed to his testimony on that issue. Nor does the weight that would otherwise apply to that testimony necessarily diminish because it concerns the ultimate issue. Of course the court is not bound to accept that testimony, but must weigh it in the balance in accordance with the usual rules.

70 The same problems which I have identified in regard to the evidence of Prof Gray (concerning the issue whether increased availability of liquor leads to increased consumption) apply to the evidence on similar issues given by Dr Lefmann. Dr Lefmann explained the consequences which alcohol abuse might have for consumers, their families and the wider community. The learned Judge said in regard to this evidence that Dr Lefmann saw "this drunkenness problem and its spin-off problems increasing enormously if liquor is made available from yet another drive-through bottle shop". His Honour proceeded:

> "Exposed as Dr Lefmann is to the existing levels of harm caused by the consumption of liquor, I accept that is an opinion which Dr Lefmann genuinely holds, but it is an opinion on the ultimate issue which the court must be left to determine on the whole of the evidence."

The view expressed in the last sentence of the passage to which I have referred is undoubtedly correct, but it seems that his Honour did not accept Dr Lefmann's evidence at least partly because that evidence concerned the ultimate issue. The only other reason discernible from his Honour's reasons for this decision was that Dr Lefmann's evidence, like all the evidence tendered by the Executive Director in regard to the likelihood of harm or ill-health being caused to people of Aboriginal descent in the Kununurra area, was "no more than mere conjecture, guesswork or surmise". In my opinion, this approach by the learned Judge also reveals error.

Expert evidence: whether the issue was within the ordinary knowledge of the court

71 In deciding not to accept the evidence of Prof Gray that increased availability of liquor outlets in a particular community causes increased consumption, his Honour said:

> "In the end, … it is a question within the ordinary experience of the tribunal of fact."

72 Prof Gray's testimony concerning the relationship between availability of liquor and consumption of liquor was said by him to be based on his research and experience. In my opinion, this question does not fall within the ordinary experience of a judicial officer. It is open to serious question (on which I do not express a concluded view) whether even a specialist tribunal such as the Liquor Licensing Court has the knowledge and experience with which to deal with the issue, but this is not the ground on which the factual finding was justified by the learned Judge. As mentioned, his Honour put it on the basis that the issue was simply a question within the ordinary experience of the trier of fact - in other words, by any court. In my opinion, this is an issue which could only be reliably commented upon by a person who is knowledgeable on the issue by reason of appropriate research or experience or both. It is not a matter within the ordinary knowledge of a judicial officer.

73 The learned Judge did not himself put to Prof Gray any personal view to the contrary. In my view, before making a finding against Prof Gray in this regard, in circumstances where it was not otherwise known that the learned Judge would rely on his own knowledge to reject Prof Gray's testimony, his Honour was required to put to Prof Gray the factual basis on which he was considering coming to a different conclusion to that expressed by the witness.

74 In my opinion, this was a further ground on which the learned Judge's assessment of the expert evidence was erroneous.

Conclusion

75 I would set aside the grant of the licence and remit the matter to the Liquor Licensing Court to be dealt with according to law in the light of these reasons.

76 **OWEN J**: I have read the reasons to be published by Ipp J. I agree with them and his Honour's conclusions. I have nothing further to add.

77 **MILLER J**: For the reasons given by Ipp J I agree that the grant of the licence should be set aside and the matter remitted to the Liquor Licensing Court to be dealt with according to law in the light of the reasons.