

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES:	CORROBOREE PARK TAVERN
LICENSEE:	Corroboree Park Nominees Pty Ltd
LICENCE NUMBER:	80304179
NOMINEE:	Peter Jerald Shappert
PROCEEDING:	Complaint Pursuant to Section 48(2) of the <i>Liquor Act</i>
HEARD BEFORE:	Mr John Flynn Ms Brenda Monaghan Mrs Jane Large
DATE OF HEARING:	31 July 2006 3 August 2006
DATE OF DECISION:	18 October 2006
APPEARANCES:	Mr Gerard Bryant for Director of Licensing Mr Peter Maley for Licensee

- 1) On 6 February 2006 a formal complaint against Corroboree Park Tavern was lodged by Licensing Inspector D'Alessandro with the Director of Licensing. The substance of the complaint is that on the evening of 27 October 2005, a patron at the Tavern was served liquor in breach of s102 of the *Liquor Act* (the *Act*). The alleged breach of s102 of the *Act* was denied by the Licensee and proceeded to hearing on 31 July 2006 and 3 August 2006. Final written submissions were received in August 2006.
- 2) Section 102 states:
 - a) "A licensee or a person employed by a licensee shall not sell or supply liquor to a person unless the person to whom it is sold or supplied is not intoxicated at the time (the onus of proof of which lies with the defendant)."

The way in which the reverse onus works has been considered in previous Commission decisions. In Scotty's Place¹, the Commission stated as follows:

"Once there is a case to answer in relation to a breach of Section 102, which is to say, once a sale or supply is demonstrated, together... with any reasonable ground to suspect that the recipient may have been other than not intoxicated, an onus of proof shifts to the licensee, who must prove that (the patron) was not intoxicated, or alternatively must sufficiently undermine the evidence of the sale or supply having occurred....

... as a matter of law the reverse onus is able to be discharged on the balance of probabilities."

- 3) There is no dispute about the following evidence:
- a) Mr Glagau was a man in his early 50's. He was 6'4" (194cm) and was solidly built;
 - b) He was a "regular" at the Corroboree Park Tavern (the Tavern) calling in a couple of times a week after work for a few drinks and perhaps a meal before proceeding home to Humpty Doo;
 - c) Mr Glagau normally drank schooners of mid strength beer;
 - d) On Thursday 27 October 2005, Mr Glagau was working at HB Quarry as a contractor. The quarry is situated some twelve (12) kilometres from the Tavern;
 - e) He arrived at Corroboree Park Tavern at approximately 6.00pm;
 - f) Mr Glagau commenced drinking liquor purchased from the premises and at some stage before 8.30pm, he purchased a meal. Helen Crispe, the sole barperson on duty, served him liquor throughout that night;
 - g) After the meal, Mr Glagau continued to purchase and drink liquor;
 - h) At around 9.00pm, he was joined by a workmate Shane Hamilton and they spent the rest of the evening in each other's company. They were both drinking;
 - i) The night was not busy;
 - j) Late in the evening (phone bill evidence suggests 11.21pm), Mrs Glagau rang and spoke to her husband and to Shane Hamilton;

¹ Northern Territory Licensing Commission, Reasons for Decision, Scotty's Place, February 2000.

- k) Late in the evening, Helen Crispe offered Mr Glagau a free bed for the night. He accepted;
 - l) The bar closed at midnight and Helen Crispe, Peter Glagau and Shane Hamilton moved outside. They each had one or two drinks in their possession;
 - m) At about 1.00am, Mr Glagau changed his mind about staying the night.
 - n) After considerable unsuccessful attempts to encourage Mr Glagau to remain at the premises, he left at approximately 1.30am in his vehicle.
 - o) A short time after leaving the premises, Mr Glagau lost control of the vehicle and was killed. The toxicology report has found that blood alcohol level was 0.205% at the time of his death.
- 4) It is conceded by Mr Maley, Counsel for the Licensee, that there is a case to answer in relation to a breach of Section 102 of the *Act*. On the evidence, a sale or supply is demonstrated, together with a reasonable ground to suspect that the recipient may have been other than not intoxicated. The onus of proof now shifts to the Licensee, who must prove that (the patron) was not intoxicated at the time of sale or supply to him, or alternatively must sufficiently undermine the evidence of the sale or supply having occurred.
- 5) There is undisputed evidence of a sale of liquor to Mr Glagau throughout the evening in question. For this reason, the principal thrust of the Licensee's evidence and submissions is that the Commission should be satisfied on the balance of probabilities that Mr Glagau was not intoxicated at the time of sale or supply to him.

EVIDENCE OF INTOXICATION

- 6) The conflicting evidence before the Commission on this issue is both documentary and oral. At the hearing, Mr Bryant for the Director of Licensing called both Helen Crispe and Shane Hamilton to give their recollection of the events of that evening. He also tendered signed written statements made by both witnesses to both Police and Licensing Inspectors in the days after the death of Mr Glagau.
- 7) The first statement of relevance is that of Ms Helen Crispe, the bar person at Corroboree Park Tavern who served Mr Glagau on 27 October 2005. She was the sole bar attendant at the Tavern on the night in question and there is no dispute that she was the only person who served alcohol to Mr Glagau while he was at the Tavern.

- 8) Ms Crispe had commenced work at the Tavern a month earlier and had come to know Mr Glagau as a regular customer. To her knowledge, he would attend the Tavern two to three times a week after work. He would normally drink about six to eight mid strength schooners, have dinner and leave for home.
- 9) In her Statutory Declaration to Police dated 31 October 2005 (Exhibit 3), Ms Crispe states: *“On this particular evening he started off with about four (4) mid strength schooners of beer and then had dinner a bit earlier than usual. After dinner, he really got stuck into it, he was drinking schooners of mid strength, spirits, cocktails, you name it. He was in his usual jovial good mood, as far as I know he was not celebrating anything, just decided to get stuck into (it) this night. At about 9.00pm Shane Hamilton arrived, and then joined Peter for a few drinks. Peter was starting to get really drunk. At about 12.03am Peter and Shane had moved outside to the verandah where I joined them for a couple of drinks after work. Due to Peter’s condition we tried to talk him into staying for the night in a room out the back. I believed Shane and I had talked him into staying, he said he was going to stay. At about 1.30am he was really pissed, but decided he was going home. We couldn’t talk him into staying. I then saw him drive off in his white Toyota Troop Carrier.”*
- 10) The second Statutory Declaration strongly relied upon by the Director was made by Shane Hamilton, Plant Operator at H B Quarry on 31 October 2005. In this statement to Police, Mr Hamilton confirmed that he worked with Peter on 27 October 2005 at the quarry. At about 9.00pm that evening, Mr Hamilton arrived at the Tavern to buy some cigarettes. He saw Mr Glagau there and noted that *“he didn’t appear drunk at this stage, but was his usual jovial self”*.
- 11) The statement goes on to state *“during the next couple of hours Peter got stuck into it, he was drinking his usual mid strength schooners, spirits and cocktails and anything. Peter got really pissed. After the bar closed, we had moved out onto the verandah and continued to drink, we were joined by Helen who works in the bar. That was at about 12.00am. Due to Peter’s condition, I tried to talk him into staying for the night, he initially agreed to. At about 12.15am he spoke to his wife on the phone, after the conversation I think he changed his mind. Although we again tried to talk him into staying he decided he was going home. Peter left, driving his white Toyota Troop Carried at about 1.30am.”*
- 12) The two statements are quite consistent and support a view that Mr Glagau was clearly intoxicated later in the evening when he was purchasing liquor from Ms Crispe. This is supported by the evidence of both Ms Crispe and Mr Hamilton that Mr Glagau was generally buying his own drinks (as opposed to being in a shout) and was sitting at the bar in clear view for at least the latter part of the night prior to closing.

- 13) There is further evidence before us, however, which needs to be considered. In written statements made by both Ms Crispe and Mr Hamilton to a Licensing Inspector some two (2) weeks after the death of Mr Glagau, both witnesses appeared to qualify their earlier written statements regarding the level of intoxication of Mr Glagau. Ms Crispe in a written statement dated 9 November 2005 said:

"I became concerned about Peter about 11.00pm and suggested he take a room for the night. Whilst he appeared to still have his faculties about him, I assumed by the pure nature of his drinks he would be over the alcohol limit for driving. He agreed to take a room after Shane spoke to him and at 11.45pm I called last drinks at the bar and then at 11.55pm asked the three (3) remaining customers to take their last drinks with them outside onto the verandah so I could lock up the premises. I then joined Shane and Peter on the verandah where I myself had my knock off drinks (two stubbies) and conversed with them until approximately 1.00am. It was at this point that Peter changed his mind about staying and said he was driving home. As he got up to go to his car I realised he was starting to stagger and Shane and I followed him to his car and tried to convince him again to stay. Shane spent approximately twenty to thirty minutes talking to Peter trying to talk him out of driving but to no avail, and we watched him drive away from the premises".

- 14) Mr Hamilton's written statement to a Licensing Inspector said "I arrived at the premises at approximately 9.00pm, ran into Peter and had about seven or eight beers with him. He had about the same in schooners. He had a couple of shooters. About 11.00pm I asked Peter to stay the night because I thought that he would be over the limit and was concerned about his safety because of the one hour drive home. He agreed to stay and we continued to talk about the camp. Peter was not showing any outward signs of being drunk. Approximately 12.00am his wife rang and then at 1.00am he decided he was going home. At that time I could see that Peter was not fit to drive. I spent thirty (30) minutes asking him to stay back but he decided he had to go home. I watched him drive off the premises and up the road."

- 15) The first main difference between the earlier and later statements is that the emphasis has moved from the level of Mr Glagau's alcohol consumption rendering him "really pissed" and "getting really drunk" to simply rendering him unsafe to drive.

Ms Crispe said in her second statement:

"I became concerned about Peter about 11.00pm and suggested he take a room for the night. Whilst he appeared to still have his faculties about him, I assumed by the pure nature of his drinks he would be over the alcohol limit for driving."

Mr Hamilton said:

About 11.00pm I asked Peter to stay the night because I thought that he would be over the limit and was concerned about his safety because of the one hour drive home.

- 16) The second difference is that there is a backing away from the clear assertions in the earlier statements that Mr Glagau was visibly intoxicated whilst alcohol was still being served.

In her second statement, Ms Crispe said: *It was at this point (1.00am) that Peter changed his mind about staying and said he was driving home. As he got up to go to his car I realised he was starting to stagger and Shane and I followed him to his car and tried to convince him again to stay.*

Mr Hamilton's hand written statement to a Licensing Inspector said: *About 11pm... Peter was not showing any outward signs of being drunk. Approximately 12.00am his wife rang and then at 1.00am he decided he was going home. At that time I could see that Peter was not fit to drive."*

- 17) At the hearing, Ms Crispe confirmed the essential truthfulness of the initial statement she made to the Police. The transcript at pages 6 and 7 reads:

Do you recall making a statement to the police?---Yes.

And do you recall whether that statement was made in the days after the incident, that is, shortly after the incident?---It was made the - that same morning.

So the police came and spoke to you that same morning?---Yes.

And do you recall whether it was a male police officer or a female police officer?---It was two males.

And did you speak to the police for long?---No, I don't think so. It was only 15 minutes, probably.

Do you recall that the police asked you to provide details as to what had happened the night before?---Yes.

And to the best of your recollection, did you provide details of what you remembered from the night before?---I did.

And would it be fair to say that you endeavoured to be both truthful and accurate in what you told the police?---Yes.

Perhaps if the witness could be shown a copy of her statement. Is that the statement that you made to police the morning after this incident?---Yes.

Can you turn to the last page? Is that your signature?---It is.

And above that, there is what lawyers call the details of the jurat, that is, "And I make this solemn declaration by virtue of the Oaths Act." Do you see that?---I do.

And it says:

...consciously believing the statements contained in this declaration to be true in every particular. I acknowledge that a person wilfully making a false statement in a statutory declaration is guilty of an offence and is liable to a penalty of \$2000 or imprisonment for 12 months or both.

Did you read that before you signed the statement?---I did.

And do you maintain that the statement that you have made to police is truthful and accurate?---Yes.

18) At page 21 of the transcript, Ms Crispe made further relevant comments:

Can you look, again, at your statement? The last paragraph of the first page and just read that to yourself?---Yes.

Did you tell the police this:

After dinner, he really got stuck into it. He was drinking schooners of mid-strength, spirits, cocktails, you name it.

---Apart from the "you name it" bit, which is not a term I use, that's accurate.

19) Finally, at pages 20 and 21 of the transcript, Ms Crispe stated:

All right. Can you just turn over the page? Have a look at the second line and the third line:

At about 9 pm Shane Hamilton arrived and then joined Peter for a few drinks.

Do you see that?---Yes.

And then, at the second line, you say:

Peter was starting to get really drunk.

See that?---Yes.

What period of time does that observation relate to? Can you tell us?---*After 9 o'clock.*

So after 9 o'clock, you observed Peter starting to get really drunk? Is that correct?---*Well, I wouldn't say I observed him getting drunk but, as I said, he was drinking - he had a few cocktails. On top of beer and feed, that is going to - - -*

Well, can you tell us what you meant then by that statement, "Peter was starting to get really drunk"?---*That he was starting to get really drunk?*

Yes?---*Well, I just assumed he would have to be getting drunk from drinking those drinks. He was very happy. He was - - -*

Yes, I have no further questions.

20) In cross examination, Mr Maley as Counsel for the Licensee took Ms Crispe through the normal indicators of intoxication to check whether she saw any signs of Mr Glagau being intoxicated when Ms Crispe was serving him alcohol. Ms Crispe denied any signs whatsoever being apparent during the evening. The only time she noticed such a sign was at about 1.00am in the morning when Mr Glagau staggered as he left the hotel and walked towards his vehicle.

21) Mr Hamilton's evidence at the hearing proceeded in a similar vein. He denied that Mr Glagau at any stage showed any of these normal indicators of intoxication. He commented that Pete spoke in a slow drawl all of the time. Mr Hamilton also denied the contents of his earlier statement to the Police were correct. He noted at page 63 line 15 of the transcript:

Showing the witness a statutory declaration made on 31 October 2005. Do you have that in front of you, Mr Hamilton?---Yes, I do.

All right. Just turn to the last page. Is that your signature?---Yes, it is.

All right. And did you read your statement before signing it?---Yes.

And did you read - just above your signature - did you read this paragraph:

And I make this solemn declaration by virtue of the Oaths Act, consciously believing the statements contained in this declaration to be true in every particular. I acknowledge that a person wilfully making a false statement in a statutory declaration is guilty of an offence, and is liable to pay a penalty of \$2000 or imprisonment for 12 months, or both.

?---Yes, I read that.

And having read that part of your statement, is it fair to say that you then signed your statement?--- *Yes, I did.*

All right?---*But as I told police - - -*

You mentioned earlier - sorry?---*As I told the police, I disagreed with what was written down.*

All right. Well, can you take us to the part of the statement which you say you disagree with?---*Yes, there was two incidents. There was one, where it says down here, "He was drinking his usual mixed drink, schooners." And then it's got, "Plus spirits, cocktails, and anything." That is totally wrong and I told the police that, and I thought - from my knowledge, I did not sign that page, but obviously, I did. And then it got down here, "Peter got really pissed." That I did not say to the police. They were his words that were put into here. I did not think that I signed that, and then when the Liquor Licence Commission bloke came out, I told him exactly about that.*

So are you saying that the police put words in your mouth or misquoted you?---*He mis-put it, because I said that he was over the limit for driving.*

They were the words you used?---*They were the words that I used. "He was over the limit for driving."*

You never used the words, "Peter got really pissed"?---*No, I did not.*

And you didn't tell the police during the next couple of hours, "Peter got stuck into it. He was drinking his usual mixed drink, schooners plus spirits, cocktails, and anything."?---*No, I'd said to the police that he was drinking his mid-strength schooners and we'd had a cocktail.*

A - one cocktail?---*To my knowledge, there was only two bought. I had one, and Peter had the other one.*

And no shooters?---*I didn't have any shooters, no.*

Did he have any shooters?---*No, not that I know of.*

Perhaps - - -?---*Not from the time that I was there.*

Yes, all right. Perhaps if the witness could be shown a statement that he [m]ade to the Northern Territory Liquor Commission. I'll ask you to look - now, is that signature at the bottom of the page?--- *Yes, it is.*

And you told us previously that the statement that you made to the Liquor Commission was truthful and accurate?---*Yes.*

Perhaps if you go down to the sixth line?---*I can read it there: "He had a couple of shooters." What I was talking - - -*

Does that help you - is that the truth?---*What I was talking about was cocktails. We had a couple of cocktails. Now, with this one to the Licensing Commission bloke, I was still very upset. I couldn't even write it. I asked him to write it and I would tell him what happen, and he was writing it down.*

Did you read the contents of your statement before signing it?---*Yes, I think I did.*

Well, is it fair to say that you haven't altered in any way the reference to Peter Glagau having a couple of shooters?---*What I meant by that was cocktails, which are different from shooters, I know, but it was - but while I was there - I know this makes it looks - doesn't look right, but what I was talking was cocktails.*

And in what sort of glass were these cocktails served in?---*From memory, they're bigger than a shooter glass.*

So a larger quantity of alcohol?---*Well, I don't know what goes in them.*

You - - -?---*I had a Black Russian. I had a Black Russian, and what goes in that, I do not know.*

And I think you told us that Peter Glagau purchased that for you. Is that right?---*Yes, he did.*

Do you know what he bought?---*Same thing, I think.*

CONSIDERATION OF EVIDENCE ON INTOXICATION

22) The Commission is faced with conflicting evidence as to whether or not Mr Glagau was intoxicated at any stage whilst service of liquor was available on 27 October 2005. The original statements made by Ms Crispe and Mr Hamilton to the police investigating the road accident in which Mr Glagau was killed, quite clearly spoke of the deceased being intoxicated later in the evening of the 27th. The evidence from their second statements some two (2) weeks later and much of the evidence provided by them at the hearing support a different finding.

23) We have carefully considered the conflicting evidence before us and ultimately, we prefer the evidence of the original statements made by Ms Crispe and Mr Hamilton to Police. The Police spoke to both witnesses on 28 October 2005, the day that Mr Glagau had died. The statutory declarations were then written up by police and signed by both persons a few days later. Senior Constable Gilmour said that such statements are taken verbatim from earlier conversation/s with a witness. Ms Crispe

agrees in her evidence that the words used were her own apart from the comment "you name it". Mr Hamilton however, denies that he ever said that Mr Glagau was "really pissed" or that he "got stuck into it" and considers that his words were misinterpreted. We do not accept Mr Hamilton's evidence on this issue. Whilst there may be some minor inaccuracies in the words used to express what the witnesses said, we accept the first statements as truthful accounts and prefer that evidence to the evidence of the witnesses at the hearing on this issue.

24) We are well aware that in the later statements made to Licensing Inspectors some two (2) weeks later, both witnesses appear to backtrack away from their earlier statements. They suggest that Mr Glagau was not intoxicated but was "over the limit." They state that he was not showing any outward sign of intoxication until after the bar had closed. They repeated such evidence at the hearing. We accept the submissions by counsel for the Director of Licensing that this evidence is "self serving." By the time she was interviewed by Licensing Inspectors, Ms Crispe, as the sole staff member serving liquor to Mr Glagau, would have been well aware of the ramifications of her earlier statement for both herself and her employer. Her argument that her concern for Mr Glagau and her offer of a bed was because he would be over the limit for driving and tired is simply not plausible in all the circumstances. It doesn't ring true. It appears far more likely that it was Ms Crispe's knowledge of Mr Glagau's level of consumption and his demeanour at the time that lead her to have concerns and to offer him a free bed. The Commission formed the view that, when giving her evidence at the hearing, Ms Crispe showed a very selective memory on some issues. She remembered what Mr Glagau and Mr Hamilton were talking about but seemed to be very vague about how much and what liquor they were drinking.

25) Apart from his first statement, we found Mr Hamilton's evidence on this issue of intoxication particularly lacking in credibility. Once again, we consider it likely that Mr Hamilton is most reluctant to see the Licensee and bar staff member from his local tavern in strife with the Licensing Commission. His later denial of the contents of his first statement in all material particulars is not something we accept. The first statement taken was a two step process. Mr Hamilton was interviewed and it was a few days later that he was asked to read and sign his statement. He would have us believe that he signed a statement that completely misrepresented him. We find this evidence implausible.

26) There is also other evidence to support the fact that Mr Glagau had consumed a considerable amount of alcohol on the night in question. The BAC results are indicative of high consumption. Even more significant is the fact that Mrs Glagau spoke by phone to her husband at about 11.21pm for about five (5) minutes. She gave evidence that she could tell from the "tone" of his voice and conversation that he had been drinking quite a bit and she was very concerned about him. She also spoke to Mr Hamilton and expressed her concerns. Ms Crispe admitted in evidence that she

overheard these conversations and at some stage during this late evening period, she offered Mr Glagau a free bed for the night. More importantly, after the phone call from Mrs Glagau, Ms Crispe admitted in evidence that she continued to serve Mr Glagau alcohol. The transcript at page 18, line 27 reads as follows:

Did you continue to serve Mr Glagau alcohol after he had received the call from his wife?--- Yes.

- 27) The Licensee has failed to prove that Mr Glagau was not intoxicated at the time he was served alcohol late in the evening. Accepting as we do the veracity of the initial statement made by Ms Crispe to Police, we note that she was aware that Mr Glagau had consumed a considerable amount of alcohol and that after meeting with Mr Hamilton at 9pm, he was “starting to get really drunk.” She was the only person serving him and we know that he was seated at the bar at 9.00pm when Mr Hamilton arrived. Mr Hamilton gave evidence that there were only three or four people in the bar at that time. This number dwindled throughout the evening and at closing time on Ms Crispe’s evidence there was only one other person apart from Mr Hamilton and Mr Glagau in the bar.
- 28) We form the conclusion on the balance of probabilities that at the time of Mrs Glagau’s phone call, her husband was showing signs of intoxication; his wife could hear it on the phone and we do not accept the oral evidence of Mr Hamilton and Ms Crispe that he was showing no outward signs at this time. Ms Crispe, in her first statement to Police said that after Hamilton arrived, “Peter was starting to get really drunk”. It seems a reasonable assumption that being an experienced barperson, she formed this view at least in part on her observations of the deceased. Further, we note that Ms Crispe had never been told formally by her boss that she could ask people to stay the night for free. It is reasonable to assume that she decided to do so on this occasion partly because of her concern that Mr Glagau was intoxicated.
- 29) Ms Crispe’s admission that she continued to serve Mr Glagau after the phone call from his wife is evidence to support a conclusion that those occasion/s of service took place at a time when Mr Glagau was intoxicated. In other words, the Licensee has not proved that the patron was not intoxicated at this time.
- 30) It is irrelevant whether or not Mr Glagau was showing fewer signs of intoxication than many people would. Ms Crispe was well aware that Mr Glagau “was starting to get really drunk.” She was in a good position to form this view. She was the only bar staff member serving Mr Glagau throughout the entire evening and for most of the time after dinner, he appears to have been sitting at the bar and purchasing his own drinks. The takings show that trade on the night in question was average. The evidence is that at 9.00pm there were very few people left in the bar and by last drinks, there were only three (3).

- 31) In these circumstances, an experienced barperson would no doubt rely on a number of indicators including the amount of alcohol the patron had drunk to reach a conclusion about the level of intoxication of a patron. It would be different if the bar had been very crowded or the service had been conducted by a number of bar staff or the patron was involved in a "shout" but this was not the case.
- 32) We do not accept on the balance of probabilities that the Licensee has proved that Mr Glagau was not intoxicated at the times he was served after the phone call from his wife at 11.21pm. We consider it more likely that the Licensee believed at that time that Mr Glagau was staying the night at the hotel and therefore felt it was safe to allow him to continue drinking.
- 33) We find the complaint against the Licensee of a breach of Section 102 to be proved and a time will be arranged in the near future for Counsel to give submissions on penalty. We indicate at this stage that there are some mitigating factors in this case that we are likely to take into account. We note that Ms Crispe did everything in her power to try to get Mr Glagau to stay at the hotel once she realised he was intoxicated. She appears to have only served a small quantity of alcohol in the late evening before closing and her admitted occasion/s of service on Mr Glagau during this period were at a time when she thought he was intending to stay the night.

John Flynn
PRESIDING MEMBER

18 October 2006