

SEX AND THE CIVICS
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This article is the edited text of a paper presented by Robert Skinner at the SLLP Big Licensing Conference in Glasgow on Friday 5th June 2015. In this talk Mr Skinner looked at some of the case law involving licensing of the sexual entertainment industry.

The operation of sexual entertainment venues has long been the source of controversy in Scotland. It is fair to say that for the most part such entertainment has been viewed with thinly veiled hostility by our local politicians.

At present such venues at least in theory could be licensed as a place of public entertainment under the Civic Government (Scotland) Act 1982 as a place of public entertainment if a resolution to that effect had been passed in terms of section 9 by the relevant local authority. However in reality no such venue could operate without a liquor licence. In terms of section 46 of the 1982 Act, where there is a liquor licence in place, no public entertainment licence was required.

Under the liquor licensing legislation in broad terms a licence must be granted unless one of more of the grounds for refusal applies to it. Again in broad terms this means that such licence can only be refused where some socially deleterious consequence will ensue if the licence is granted or remains in force– for instance crime, nuisance or disorder.

The practical effect of all of this was that where the lap dancing club was well run – and almost all were- the board although they might wish to were powerless to refuse an application for such a venue; not that that stopped them trying!

For instance in ***Risky Business Ltd v Glasgow Licensing Board* 2000 SLT 923**, decided under the 1976 Act, an application was made for the grant of a new provisional entertainment licence for premises at which it was intended to provide “exotic dancing”. The premises then held a licence for use as a proprietary club to screen films and provide live entertainment. Such entertainment had previously included exotic dancing, without trouble arising. The board relied on their background knowledge and experience and refused the application on the ground that the premises were not suitable or convenient for the sale of alcohol under [s 17 \(1\) \(b\)](#) of the 1976 Act as the premises would attract male patrons, who under the influence of alcohol, **could** be irrational and

engage in violent conduct of a sexual nature towards women. The applicants appealed to the sheriff who allowed the appeal and granted the licence, holding that there was no proper factual basis for the board's decision as they had not attempted to assess the degree of risk and had not suggested that violent conduct of a sexual nature towards women was a probable consequence of the application being granted. The board appealed to the Court of Session, arguing that the sheriff's decision raised doubts for licensing boards as to the limits on their freedom to proceed on the basis of their background knowledge and experience, which had been expressly relied on in this case. An Extra Division of the Court of Session held (1) that if the board relied on their local knowledge and experience in reaching a decision this had to be identified in explaining the reasons for their decision, in the same way as any relevant part of the evidence (2) that it was impossible to discover from the board's reasons what background knowledge or experience they had invoked, and there was no material before the board which any reasonable board could have held to constitute the necessary grounds for refusal under s 17 (1) (b) (; (3) that the proper course in the circumstances was for the sheriff to have remitted the application to the board with a direction to grant the application

Further antipathy was shown in the case of ***Brightcrew Ltd v City of Glasgow Licensing Board* 2012 SC 67**. The background was that the Glasgow Board made up a Code of Conduct for adult venues which they incorporated into their statement of policy. This code was said to be drafted with a view to complying with the licensing objectives. This code went way beyond their functions as a licensing board charged with the regulation of the sale of alcohol and included items such as the provision of a kettle for dancers in their changing rooms; content of flyers for the clubs and the temperature at which changing rooms for dancers were to be kept.

Spearmint Rhino ran premises at Drury Lane. They had traded for many years under the 1976 Act as the Truffle Club without any difficulty. When they sought conversion to a premises licence under the 2005 Act, the Board refused the application. They did so largely because of a failure to comply with certain aspects of their code which - as already noted - had little to do with the licensing objectives. The Board argued that under the 2005 Act their functions went beyond the regulation of the sale of alcohol at licensed premises and the 2005 Act created 'an interlocking, schematic arrangement with a far broader impact than the old Act'. It was 'explicit' that adult entertainment was to be regulated under the 2005 Act. The licensing objectives went beyond the regulation of the sale of alcohol.

The Court of Session rejected that proposition. They stated:-

*"While the objectives so catalogued are couched in very general terms such as 'preventing crime and disorder', it is important to note that those objectives are not, so to speak, 'freestanding'. They are qualified by the introductory reference to their being 'licensing' objectives. Since the licensing with which the statute is concerned is the licensing of the sale of alcohol, it follows in our view that, in the context of [sec 23\(5\)\(c\)](#) of the statute, inconsistency with a licensing objective is inconsistency flowing from the permitting of the sale of alcohol on the premises in question. The fact that the objectives listed in [sec 4](#) are all desirable in a general sense does not empower a *77 licensing board to insist on matters which, while perhaps unquestionably desirable in that sense, are nevertheless not linked to the sale of alcohol. For a licensing board so to insist would be to divert a power from its proper purpose, to use the terminology of French administrative law, a 'détournement de pouvoir'.*

So if these premises were well run and trouble free – as Spearmint Rhino was – there was no proper basis for refusal. However, this did not mean, in my view that there was no power to regulate adult entertainment venues under the 2005 Act. Quite the reverse. Adult entertainment is of course a discrete 'activity' for the purposes of the 2005 Act and requires to be authorised as such. However what it meant was that since adult entertainment was a lawful activity a board couldn't refuse to licence it simply because they disapproved of such an activity. But if the premises were causing or were likely to cause problems, disturbance, crime or nuisance – for instance if the dancers were being assaulted by customers – or customers were causing problems to women in the area surrounding the club - then the board had powers to vary revoke or suspend the licence effectively closing the club.

However that was not enough for many politicians who sought further controls over such premises. Under the Air Weapons and Licensing Bill (AWLB) now going through Scottish Parliament there are big changes afoot. It is now proposed to require "Sexual Entertainment Venues" (SEVs) to be licensed under the 1982 Act. Even (contrary to the previous position) premises which hold a liquor licence. Grounds for refusal are those set out in Schedule 2 of the 1982 Act and are similar to sex shops. These grounds are different from the grounds under the Licensing (Scotland) Act 2005.

However, an obligation is now placed upon local authorities to determine the appropriate number of SEVs for their area and to publicise the determination in such manner as they consider appropriate. What is undoubtedly hoped by certain politicians is that the local

authorities will determine that the appropriate number of SEVs is nil and that all such clubs will require to shut down.

However, if such a determination is made will (as was suggested by the Police) the local authority require to provide a reasoned basis for their decision to set number at nil backed by evidence specific to their area eg assaults sexual crimes etc? (Or can they simply say we disapprove of these premises on grounds of morality). There are no grandfather rights, so if a nil figure is decided then all premises within board's area providing sexual entertainment must close. And if the number set is above zero but below the current number how is it to be determined which venues stay and which should close?

But there is a potential problem with this dual licensing system – highlighted by Jack in an article for Scottish License Trade News. The problem of definition.

Under the 2005 Act certain clubs are authorised to sell alcohol and to provide “adult entertainment”. The 2005 Act does not define adult entertainment albeit that it is a discrete heading under operating plan for the purposes of the Premises Licence (Scotland) Regulations 2007. Only definition of adult entertainment that exists is found in the Late Hours Catering Regulations in which provides:-

“*adult entertainment*” means any form of entertainment which:-

- a) involves a person performing an act of an erotic or sexually explicit nature;
and
- b) is provided wholly or mainly for the sexual gratification or titillation of the audience.”

Definition of “sexual entertainment” in the AWLB is much more verbose:-

“*sexual entertainment*” means:-

- a) any live performance, or
- b) any live display of nudity,

which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience (whether by verbal or other means).

(4) For the purposes of the definition of “sexual entertainment”, “display of nudity” means:-

- a) in the case of a woman, the showing of (to any extent and by any means) her nipples, pubic area, genitals or anus,
- b) in the case of a man, the showing of (to any extent and by any means) his pubic area, genitals or anus.

As definitions (and indeed the adult entertainment definition strictly only applies during late hours) are not the same this has the potential to cause problems. On one view "adult entertainment" must be with the intention or for the purpose of providing "sexual gratification of the audience"; the test for "sexual entertainment" may be objective "it must reasonably be assumed".

Further consider premises which have, as its authorised activity, "adult entertainment". The owner applies for and is refused a licence for sexual entertainment; or is within an area which has set the appropriate number of SEVs as nil. Would a charge that providing sexual entertainment without a licence (which carries a fine up to £20,000 and/or up to six months in jail) be met with a response that it is not sexual entertainment – it is adult entertainment which the owner is authorised to provide under the 2005 Act?

So nudity would require a licence under the Civic Government (Scotland) Act; but other entertainment falling short of that might not.

So we have clubs now (perhaps) being required to be licensed by different bodies applying different tests to the grant and different definitions to the activities in question and where straying from "adult" into "sexual" may result in a heavy fine and/ or imprisonment. In other words the usual shambles!

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