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Drunken Accident or "At Work"?

High Court of Australia Provides Relief to Employers as to the Scope of Employment

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The doctrine of vicarious liability extends liability to otherwise faultless employers for their employees' wrongful acts that are "closely connected" to the course or scope of their authorised employment. Though theoretically straightforward, the requisite degree of connection is often unclear, resulting in "absurd and distorted reasoning" by courts in vicarious liability cases.

In *CCIG Investments Pty Ltd v Schokman* [2023] HCA 21 (the *Daydream* case), however, the High Court has provided some stability to the "unstable principle" of vicarious liability by insisting on a sufficiently "close connection" between the wrongful act in question and the employee's scope of employment.

Background

In the *Daydream* case, the respondent, Mr. Schokman, was a food and beverage supervisor at Daydream Island Resort and Spa located on the Whitsunday Islands, Queensland. As part of his employment, Mr. Schokman was required to live on the island in shared accommodation. Mr. Schokman was assigned accommodation with another employee, Mr. Hewett.

In the early hours of 7 November 2016, Mr. Schokman woke up, inhaling and choking on urine as an intoxicated Mr. Hewett stood over and urinated on him. As a result, Mr. Schokman suffered from a cataplectic attack triggered by the emotional stress from the incident. Before the Supreme Court of Queensland, Mr. Schokman unsuccessfully claimed damages from the appellant company for breaching its duty of care as an employer, or alternatively, for being vicariously liable for Mr. Hewett's negligence.

Decision

Although the opportunity for Mr. Hewett to commit the act did arise as a result of the company's requirement for shared accommodation, the Supreme Court of Queensland did not consider it fair to impose vicarious liability on the company for Mr. Hewett's drunken misadventure. There was no history of Mr. Hewett becoming intoxicated, and nothing that would have put the company on notice that Mr. Hewett may have engaged in what was "bizarre conduct". Accordingly, both of Mr. Schokman's claims were rejected at first instance.

The Court of Appeal allowed Mr. Schokman's appeal on the vicarious liability claim due to its factual similarities with *Bugge v Brown* (1919) 26 CLR 110; [1919] HCA 5. In that case, an employer instructed an employee to cook his allocated midday meal by lighting a fire at an old homestead away from the paddock. The employee started a fire in a hut on the paddock, which spread to the plaintiff's neighbouring land. The employer was held vicariously liable for the employee's wrongful act due to its "close connection" to the course of his authorised employment duties and powers.

In the *Daydream* case, the High Court unanimously quashed the Court of Appeal's decision, which was based on the finding that Mr. Hewett's wrongful act had been performed while occupying the shared room with Mr. Schokman under his contract of employment. For the High Court, however, Mr. Hewett's drunken act, unlike the employee's act of lighting a fire in *Bugge v Brown*, was never authorised or in any way required by, or incidental to, his employment. Notably, the High Court confirmed that a "mere opportunity" for an act was an insufficient connection to Mr. Hewett's employment to establish vicarious liability.

What Does This Mean for Employers?

The High Court's decision provides some level of comfort for employers and insurers alike. In practical terms, where employment merely provides the context and opportunity for an employee's wrongful act, a court is unlikely to be satisfied that there was a sufficiently "close connection" to extend liability to innocent employers. Rather, vicarious liability is likely to be limited to matters that have a connection with an employee's employment, including those where the conduct is authorised, required by or incidental to the employee's employment.

That said, whether an act was committed within the scope of an employee's employment ultimately depends on the specific facts and circumstances of the case. Accordingly, employers should continue to adopt an expansive view as to when an employee may be considered "at work", and ensure appropriate policies and procedures are in place to set expectations and requirements for employees in respect of their workplace conduct, to mitigate risks arising as a result.

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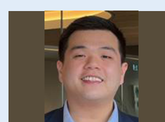

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