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"Intercourse is out of the course"

Comcare v PVYW [2013] HCA 41

Insurance & Risk Update

On 30 October 2013, the High Court handed down its decision in *Comcare v PVYW* [2013] HCA 41 which considered whether an employee's injuries arose in the course of employment where those injuries were suffered while the employee was engaged in sexual intercourse with an acquaintance during an overnight stay at a motel that was booked by the employer. During the sexual activities, the glass light fitting above the bed was pulled from its mount by either the employee or her acquaintance and struck the employee on her nose and mouth.

The High Court considered the principle in *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 which provided that an injury will be *"in the course of employment"* if it occurred during an interval or interlude within an overall period of work and the employer has, expressly or impliedly, induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way.

The injured employee claimed that the *Hatzimanolis* test meant that an employer who required an employee to be present at a particular place away from their usual place of work would be liable for any injury which the employee suffered whilst at that particular place (except in the case of gross misconduct).

The majority of the High Court (split 4 – 2) disagreed and found that the circumstance in which the employee was injured must be connected to the inducement or encouragement of the employer.

The High Court stated that the place where an employee is required to be is important if it was associated with the circumstance of the injury or death. For example, if the light fitting which injured the employee had been insecurely fastened into place and simply fell on the employee, the employer would be

Who does this affect?

- Anyone who deals with workers' compensation claims.

Article Highlights

- The High Court ruled that an employee was not in the course of her employment when injured during sexual relations while on a work trip.
- The article considers the test for whether injuries will be in the course of employment during intervals or breaks from work.

responsible for that injury because the employer had put the employee in a position where the injury occurred because of something to do with the place.

By contrast, the two dissenting judgments held that the principle involved a consideration of the characterisation of the entire interval as opposed to a consideration of the way the interval was spent by the employee. To look at the way in which the interval was spent would involve an intrusive inquiry of the employee's personal choices, on an hour by hour or minute by minute basis.

However, the majority took a different view and considered that if the injury arose from the employee performing an activity that was not (expressly or impliedly) induced or encouraged by the employer, the injury would not be in the course of the employment, despite those injuries occurring at a place where the employee was induced or encouraged to stay.

Two clear mutually exclusive questions were set by the majority:

1. When an activity was engaged in at the time of the injury – did the employer induce or encourage the employee to engage in that activity?
2. When an injury occurs at and by reference to a place – did the employer induce or encourage the employee to be there?

If the answer to the relevant question is yes (either question, depending on the facts of the case), then the injury will be in the course of the employment.

Whilst the decision has not fundamentally altered the law, the decision is a useful reminder about how difficult it can be for employers and insurers to confidently decline liability for injuries to workers who are required to work in remote locations. The decision should nevertheless be welcomed as a good articulation of the often cited rule in *Hatzimanolis*.

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