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Comcare v PVWY [2013] HCA 41
(30 October 2013)

Key Points

- Whether the worker's injuries arose in the course of her employment
- Whether the worker's injuries were sustained during an interval or interlude in an overall period of employment
- Whether it was sufficient that the worker was induced or encouraged to be in a particular place, even though she was not induced or encouraged to engage in the particular activity which caused her injuries

Background

At the time of her injury, the worker was employer by a Commonwealth government agency, which required her to travel for work and stay overnight at a nearby motel, which had been booked by her employer. During the evening at the hotel, the worker engaged in sexual intercourse with a friend, and was injured when a glass light fitting above the bed was pulled off its mount and struck her in the face. The worker suffered physical injuries and subsequent psychological injury. Initial liability for the worker's injuries was denied by Comcare.

The Law

Decisions of the Tribunal, Federal Court and Full Federal Court

The question to be decided at all levels was whether the worker's injuries were suffered "in the course of her employment", as required by section 5A of the *Safety Rehabilitation and Compensation Act* 1988 (Cth) (**the SRC Act**).

At first instance, it was argued by the worker that, because she was at a particular place (ie the motel) at the instigation of her employer, her injuries arose in the course of her employment and were therefore compensable, absent gross misconduct on her part. The Tribunal concluded that the worker's injuries were unrelated to her employment, and affirmed the Reviewable Decision.

The worker appealed the Tribunal's decision to the Federal Court, where it was set aside.

Comcare appealed this decision to the Full Federal Court, where it was upheld on the basis of the principles outlined in *Hatzimanolis v ANI Corporation Ltd* [1992] HCA 21. Specifically, the Full Court noted from *Hatzimanolis* that absent gross misconduct on the part of an employee, an injury occurring during an interval or interlude in an overall period of employment will invariably result in a finding that the injury occurred in the course of employment. The Full Court held that, so long as a worker could establish that the injury had occurred in a place he was induced or encouraged to be by his employer, or that the activity from which the injury arose was induced, encouraged or

implicitly accepted by the employer, then the test for whether the injury arose in the course of employment was satisfied.

Comcare was granted special leave to appeal the Full Federal Court's decision to the High Court of Australia. The High Court's decision was delivered today, and Comcare's appeal was successful. The High Court's reasoning is summarised below.

Reasoning of the High Court

The reasoning set out below is taken from the joint reasons of Chief Justice French, and Justices Hayne, Crennan and Keifel. Justices Bell and Gageler dissented and provided their own reasons, which we have not summarised.

The majority of the High Court found that the principles set out in *Hatzimanolis* had been misinterpreted, and that the findings of the Full Federal Court could not be upheld. Using the interpretation relied on by the worker and the Full Federal Court, it would follow that an employer who requires an employee to be present at a particular place away from their usual place of work will be liable for any injury which the employee suffers while present there, absent gross misconduct. The High Court stated that this was clearly not the intention expressed in *Hatzimanolis*, and noted that the judgment in that case should not be interpreted as though it were a statue, but should be read with a view to gaining an understanding of the concepts being expressed.

Because of its relevance, the High Court provided a detailed overview of *Hatzimanolis.* In that case, the worker resided in NSW but was employed in WA, and resided at a camp. On one of his days off, the worker's employer organised a trip to Wittenoom Gorge and provided vehicles for that purpose. The employee was seriously injured when the vehicle he was travelling in overturned.

The injury was found to be compensable as it arose during an interval or interlude in an overall period of employment while the worker was engaged, encouraged by his employer, in an activity which his employer had organised. In *Hatzimanolis*, the High Court recognised that the course of employment extended to more than just the actual work undertaken by an employee. The Court concluded that the tests previously relied upon to decide whether an injury arose in the course of employment no longer adequately covered all relevant cases of injury, and needed to be reformulated.

After analysing previous cases, the High Court in *Hatzimanolis* observed that an interval will generally be accepted as being part of the course of employment if the employer has induced or encouraged an employee to spend the interval *"at a particular place or in a particular way"*. Absent gross misconduct, an injury occurring in such an interval will be found to have occurred in the course of employment.

Conclusion

The High Court stated that it was possible that the principles in *Hatzimanolis* may require reformulation in the future, but that this was not required in this case. It stated [34 - 36]:

> *"Hatzimanolis sought to provide a legal justification for an injury, which occurred between periods of actual work, being regarded as occurring in the course of the employee's employment. It did so by characterising the interval by reference to the employer's inducement or encouragement. The employer's liability in such circumstances depends upon what the employer induced or encouraged the employee to do. Hatzimanolis did not seek to extend the employer's liability beyond that.*
>
> *Because the employer's inducement or encouragement of an employee, to be present at a particular place or to engage in a particular activity, is effectively the source of the employer's liability, the circumstances of the injury must correspond with what the employer induced or encouraged the employee to do. It is to be inferred from the factual conditions stated in Hatzimanolis that for an injury to be in the course of employment, the employee must be doing the very thing that the employer encouraged the employee to do, when the injury occurs.*
>
> *Moreover, it is an unstated but obvious purpose of Hatzimanolis to create a connection between the injury, the circumstances in which it occurred and the employment itself. It achieves that connection by the fact of the employer's inducement or encouragement. Thus, where the circumstances of the injury involve the employee engaging in an activity the question will be whether the employer induced or encouraged the employee to do so."* (our emphasis)

The High Court clarified that where an activity was engaged in at the time of the injury, the relevant question is not whether the employer induced or encouraged the employee to be at a place. **The relevant question in that instance, and in *PVWY*, is whether the employer induced or encouraged the employee to engage in that activity. An employer's inducement or encouragement to be present at a place is not relevant in such a case.**

The High Court stated that the worker in *PVWY* was not injured while present in a place in the sense that the expression was intended for the purposes of the test in *Hatzimanolis*. In order for the test to apply, the circumstances of the worker's injury must have been referable to the place. The High Court provided an example of how the "*in a place"* test in *Hatzimanolis* was intended to operate [45]:

> *"An injury occurring to an employee by reference to or associated with a place where the employee is present may involve something occurring to the premises or some defect in the premises. For example, if the light fitting in this case had been insecurely fastened into place and simply fell upon the respondent, the injury suffered by her would have arisen by reference to the motel. The employer would be responsible for the injury because the employer had put the respondent in a position where injury occurred because of something to do with the place. Liability in those circumstances is justifiable. Liability for everything that occurs whilst the employee is present at that place is not."*

For injuries caused when a worker is engaged in an activity, the relevant connection is not between the activity and the place at which a worker is induced or encouraged to be present by his employer. The correct connection is between the activity and the employer's inducement or encouragement to engage in that activity.

In light of the High Court's decision, the correct process for determining whether an injury has been suffered in the course of a worker's employment when they are not at their usual place of employment is a follows [38 and 39]:

1. There must be a factual finding that the employee has suffered an injury, but not while engaged in work.

2. The next question is what the employee was doing when injured. For *Hatzimanolis* to apply, the employee must have been either engaged in an activity, or present at a place when the injury occurred.

3. The next question, and the point that has been clarified by *PVYW*, is how the injury was brought about. If the injury occurred at and by reference to a place, or while the employee was engaged in an activity, then the *Hatzimanolis* principles become relevant as follows:

    a. When an activity was engaged in at the time of the injury, the question is: did the employer induce or encourage the employee to engage in that activity?

    b. When an injury occurs at and by reference to a place, the question is: did the employer induce or encourage the employee to be there?

4. If the answer to the relevant question is yes, then the injury will have occurred in the course of employment.

Lessons Learnt

The decision of the High Court provided some much needed clarity to the relevant cases which deal with whether an injury was suffered in the course of a worker's employment, particularly *Hatzimanolis*. The decision is beneficial to employers, as the extent of liability in circumstances where a worker is injured while not engaged in work is now limited and more clearly defined.

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