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LEGAL PRACTICE



High Court finds employer not vicariously liable for employee's negligent urination

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Date: Monday November 20, 2023

In August 2023, the High Court of Australia found an employer not vicariously liable for the actions of an intoxicated employee who urinated on a work colleague. In CCIG Investments Pty Ltd v Schokman [2023] HCA 21, the High Court unanimously overturned the earlier decision of the Queensland Court of Appeal that had originally found an employer was vicariously liable for the wrongful act of an intoxicated employee who had urinated on a colleague sleeping in staff accommodation.

What is vicarious liability?

Vicarious liability is a legal concept which holds one party accountable for the actions of another, regardless of whether there is fault or not.

This type of strict liability is most often linked to employer and employee relationships, with employers liable for an employee's negligence if it took place within their employment-related duties. An employer can be liable for negligent acts or omissions by an employee "in the course of employment", regardless of whether there is permission for the action.

Background

The respondent, Mr Schokman, commenced employment at Daydream Island Resort and Spa as a food and beverage supervisor. His employment contract required him to live on the island in shared accommodation.

The respondent was sharing the accommodation with another employee, Mr Hewett, when at about 3.00 am one morning, whilst he was sleeping, the respondent was woken by Mr Hewett urinating over him. The respondent inhaled urine and choked.

Mr Hewett, who had been drinking, kept urinating on the respondent for a short period of time and then stepped away. The respondent suffered a cataleptic fit as a result.

The respondent issued proceedings in the Supreme Court of Queensland, suing the employer for damages for a breach of duty of care and, alternatively, that the employer was vicariously liable for Mr Hewett's negligent act.

Both claims failed at first instance.

The respondent appealed to the Court of Appeal, where the claim based on vicarious liability succeeded.

The employer then lodged an appeal to the High Court of Australia.

High Court decision overturns decision of the Court of Appeal

The majority (Kiefel CJ, Gageler, Gordon and Jagot JJ) noted that, for an employer to be held liable for the wrongful or negligent act of an employee, the common law requires that the tortious act be committed in the course or scope of the employment.

The principle is that it is just to make the employer responsible for injury caused to another by the employee when that employee is acting in the course of employment rather than to require that the other innocent party bear their loss or have only the remedy of suing the individual employee.

The majority observed to the effect that:

- The question of whether a tortious or other wrongful act was committed in the course or scope of employment depends on the particular circumstances.
- Whether an act was committed in the course or scope of employment is not determined by reference to whether the tortious employee's act was authorised by the employer.
- An act done when the employee was on a frolic of their own will not attract liability.
- Consistently with the policy of the law, an employer should not be held liable for acts totally unconnected with the employment.
- There needs to be a logical enquiry about whether a tortious act has a sufficiently strong connection with the employment, given what is entailed in it, to say that the act was done in the course of the employment.

Connection to employment required for a finding of vicarious liability

Because the law strives for coherence, the courts commonly look to prior cases for guidance as to when vicarious liability may be said to arise.

Therefore, in considering the intensity of the connection with employment required for a finding of vicarious liability, the majority considered the earlier decision in *Bugge v Brown* (1919) 26 CLR 10, which involved a jackaroo who had negligently lit a fire to make his meal which subsequently spread to neighbouring properties. In that case, the employer had been held vicariously liable for the acts of the employee by reference to the terms of his employment.

Mr Schokman tried to rely on that case as analogous to his because, in both cases, the tortious act of the employee occurred whilst on a break from employment, and each employee was fulfilling the requirements of his employment when carrying out the tortious act.

The majority did not agree with that analogy and noted that the physical proximity between the two employees provided the opportunity for the drunken actions of one to affect the other. However, that mere opportunity was an insufficiently strong connection with the employment to establish vicarious liability.

Instead, the focus was upon the position in which Mr Hewett was placed by the employment and what it entailed. Mr Hewett was at leisure and not at his place of work when he committed the tortious act. The functional, geographical and temporal aspects of his course or scope of employment were absent.

The majority held that Mr Hewett could only be said to be acting in accordance with his employment contract by sharing the accommodation provided for and being present in it. That was not a proper connection to the employment.

The connection will be tenuous if the employee has done something so remote from their duties such that the act is altogether outside of, and unconnected with, their employment. In other words, employment must provide more than the opportunity for the employee's wrongful act to take place.

Accordingly, the majority allowed the appeal and, ultimately, overturned the decision of the Court of Appeal.

Key takeaways when employers are facing vicarious liability issues

For an employer to be vicariously liable for the wrongful or negligent act of an employee, the act must be committed in the course of or scope of the employment. For this to be so, the circumstances must demonstrate a sufficiently close connection between the tortious act and the employment.

Get help from an employment lawyer

Employees have a responsibility to act appropriately at work, and employers have a duty of care to keep employees safe from harm while at work. If you find yourself in a situation where that duty of care has been breached, whether directly or due to vicarious liability, you should seek legal advice from a lawyer experienced in employment law.

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