ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S98 OF 2013

**BETWEEN:** **COMCARE**
Appellant

**AND:** **PVYW**
Respondent

# APPELLANT'S SUBMISSIONS IN REPLY



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## PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

## PART II REPLY

2. The Appellant does not seek to overturn the decision in *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473. Accordingly, the issues identified by the Respondent at [2] and [3] of the Respondent's submissions do not arise. The issues identified by the Respondent at [4] do arise. Resolution of those issues will almost certainly require the Court to clarify aspects of the reasoning in *Hatzimanolis*.

3. The Respondent is not correct in asserting at [8] that 'there was no evidence of what the employer knew, or might have foreseen, about how the Respondent might spend her free time on the evening of 26 November 2007'. There was evidence to the effect that the Respondent had not advised her employer how she intended to spend her time whilst at the motel or town, or who, if anyone, she would be associating with while staying there.[1]

4. Further, the Respondent's recitation at [8] of other matters in respect of which there was 'no evidence' does not adequately reflect the fact that she was only entitled to succeed in the Tribunal if the Tribunal was positively satisfied that her injury was sustained in the course of her employment. The Respondent adduced no evidence which suggested that: (i) her employer ought to have anticipated the possibility of her having sex in her motel room; (ii) the performance of sexual activity related, in a relevant way, to the terms and conditions of her employment; (iii) Departmental guidelines and/or terms of employment supported any link or connection between sexual activity and employment; or (iv) any other matter or thing referable to 'the employment' supported the notion that an injury in the course of sexual activity would arise, or would be regarded as arising, within the course of employment and therefore be compensable.[2]

5. At [16] the Respondent notes that this Court in *Hatzimanolis* accepted that all of the matters of time, place, circumstances, and conditions of employment must be examined for the purpose of determining whether an injury was sustained in the course of employment – yet contends that in interval cases (within an overall period of work) only 'place' is relevant.

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1 *Comcare v PVYW* [2012] FCAFC 181 at [3] and *Re PVYW v Comcare*, Unreported, Professor RM Creyke, 26 November 2010 at [9]-[15]. See also Statement of Agreed Facts, AB 2 at [4].

2 See *L & B Linings Pty Ltd v WorkCover Authority of NSW* [2012] NSWCA 15 at [34].

6. The Respondent's attempt at [19] to bring her claim within the concession made by the employer in *Hatzimanolis* is unpersuasive. That concession was that the employee would have been within the course of employment 'even [when] enjoying recreational activity at the camp'. That concession was made in circumstances where: (i) the camp consisted of a group of other co-employees; (ii) the camp was located remotely; (iii) the camp included some recreational facilities; and (iv) the circumstances surrounding the employment (including hours of work and length of time spent in the camp) were such that it was clearly within the contemplation and interests of the employer that employees would undertake particular recreational activities when not working. Further, the concession was not to the effect that every conceivable recreational activity would necessarily be within the course of employment.

7. At [26] the Respondent argues that there is nothing in *Hatzimanolis* to support the conclusion that the plurality did not intend to expand the law on 'place cases' beyond the actual result in *Danvers*[3] or so as to reinterpret the reasoning in *Oliver*.[4] This is incorrect. At 482.5 the plurality made clear that the organising principle identified by them was intended to be applied so as to result in outcomes which 'accord with the current conception of the course of employment as demonstrated by the main cases, particularly the decisions of this Court in *Oliver* and *Danvers*'.

8. Paragraphs [27]-[31] of the Respondent's submissions go to the heart of the difference between the parties. The Respondent's argument accepts that her reading of *Hatzimanolis* results in a formulation of the scope of liability for compensation which is *wider* than that which would flow from the actual reasoning of the Court in *Danvers* and *Oliver*. Accordingly, she seeks to reinterpret *Danvers* and *Oliver* to find an explanation for their results radically different to that adopted in the cases themselves.

9. Thus *Danvers* becomes a case where compensation was available even if the claimant caused the fire by smoking in bed (the very conclusion on the facts which Barwick CJ rejected).[5] *Oliver* becomes a pure 'place case' where one ignores the critical finding relied on by Dixon CJ that the employer had encouraged the claimant and other employees to carry out the very activity at the place which led to the injury (or at least recognised or countenanced that activity).[6]

10. The Appellant's simple point is that the Court in *Hatzimanolis* did not intend to engage in such a revision and expansion of the scope of liability. It did not

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3 *Danvers v Commissioner for Railways* (NSW) (1969) 122 CLR 529.

4 *Commonwealth v Oliver* (1962) 107 CLR 353.

5 *Danvers* at 533; see also at 540 (McTiernan J) and at 541 and 542 (Menzies J).

6 *Oliver* at 355 and 358; see also at 360 (Menzies J).

say it was doing so and gave no reasons why such a course was necessary or appropriate.

11. The Respondent's attempt at [27]-[30] to marginalise the relevance of the approaches in *Danvers* and *Oliver* (as being referable to the old *Henderson-Speechley* test[7]) is misconceived. The plurality cited the cases of *Oliver* and *Danvers* as emblematic of the 'current conception of the course of employment'.

12. The Respondent's assertion at [32] that 'there can be little doubt that Barwick CJ [in *Danvers*] was using the rider as "words of expansion"' is not supported by any reasoning. Nor can it be. It would be a curious result indeed if consideration of something as broad as 'the general nature and circumstances of the employment' could only ever operate to confer, rather than deny, compensability.

13. The Respondent's attempt at [33] to rationalise the sufficiency of presence at place, by reference to gross misconduct being 'an upper limit on the use of the place', is unconvincing. If the Respondent had occasioned her injury in the course of a wild drunken party in her motel room, it is far from self-evident that such an injury should be regarded as having been sustained in the course of employment. The suggestion that compensability could only be denied if the injury resulted from gross misconduct (because of a pre-existing written instruction not to have any guests in the room) demonstrates the problem which inheres in the Respondent's approach: first, the 'practicality' of employers giving directions of that nature may be doubted (noting the Respondent's emphasis upon the practicality of the formulation in *Hatzimanolis*); and secondly, very real doubt would attend the lawfulness of any such directions precisely because they would seemingly go beyond the realm of an employer's legitimate interests.[8]

14. The Respondent at [40] seeks to explain various interval cases on the basis that they all involved findings by the relevant court that both limbs of the *Hatzimanolis* test were satisfied on the specific facts. This is incorrect. In the cases in question the courts considered the nature of the activity being undertaken at the time of injury and determined whether, to adapt the words of Kiefel J in *Comcare v Mather and Anor* (1995) 56 FCR 456, that activity fell outside the ambit of the employer's requirement that the employee work away from his or her home and ordinary place of work.[9] Presence at place

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7 See *Henderson v Commissioner of Railways (WA)* (1937) 58 CLR 281 and *Humphrey Earl Ltd v Speechley* (1951) 84 CLR 126.

8 Under the common law an employer is only empowered to give such directions as are lawful and reasonable: see *R v Darling Island Stevedoring and Lighterage Co Ltd; Ex parte Halliday and Sullivan* (1938) 60 CLR 601 at 621-622; *McManus v Scott-Charlton* (1996) 70 FCR 16.

9 See *Inverell Shire Council v Lewis* (1992) 8 NSWCCR 562 at 566E and 567D and *McCurry v Lamb* (1992) 8 NSWCCR 556 at 559F-G and 559B-D, noting that Sheller JA specifically rejected the proposition that, in interval cases, presence at place is sufficient of itself to attract liability (see

was considered a relevant factor, in accordance with the notion that time, place, circumstances and conditions of employment are all matters for consideration. In a number of these cases various judges specifically rejected the suggestion that presence at place ought be regarded as sufficient.

15. The Respondent's attempt at [41]-[46] to align the concept of an 'interruption to employment' in non-interval cases with gross misconduct in interval cases is unconvincing. Clearly, the approach of the Court below involves a different treatment of liability in interval cases from that which applies when an employee is at work during work hours. The differential treatment is not displaced or overcome by s 14(3), which operates as an exception to liability not as an exception to when an injury occurs in the course of employment.

16. The Respondent's submissions at [58]-[59] ought be rejected. The relevant finding was open to the Tribunal on the evidence, and merely amounted to an inference drawn from the agreed facts. In any event, even if that finding can somehow be impugned, it cannot possibly be converted into a positive finding that the Respondent's injury was sustained while performing an activity *within* the ambit of her employer's requirement for an overnight stay.[10]

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*Inverell* at 568.2 and 571D and *McCurry* at 561B; see also *Comcare v McCallum* (1994) 49 FCR 199 at 303E-204G; *Comcare v Mather and Anor* (1995) 56 FCR 456 at 460-463; *Workcover Authority of NSW v Walling* [1998] 16 NSWCCR 527 wherein reference was made, in approving terms, to the observations of Sheller JA in *Inverell*; *Kennedy v Telstra Corporation* (1995) 61 FCR 160 at 167G-168A wherein the observations of Sheller JA in *Inverell* were also referred to with approval; *McMahon v Lagana & Anor* [2004] NSWCA 164 at [38]; *Watson v Qantas Airways* (2009) 75 NSWLR 539 at [29], [80], [82], [93]-[94].

10 *Akora Holdings Pty Ltd v Ljubcic* [2008] NSWCA 339 at [20].

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