HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL AND GAGELER JJ

COMCARE APPELLANT

AND

PVYW RESPONDENT

Comcare v PVYW
[2013] HCA 41
30 October 2013
S98/2013

ORDER

1. *Appeal allowed.*

2. *Set aside the orders, other than the costs order, of the Full Court of the Federal Court of Australia made on 13 December 2012 and, in their place, order that:*

   (a) *the appeal to that Court be allowed; and*

   (b) *the order and declaration, other than the costs order, of the Federal Court of Australia made on 19 April 2012 be set aside and, in their place, order that the appeal from the decision of the Administrative Appeals Tribunal dated 26 November 2010 be dismissed.*

3. *The appellant pay the respondent's costs of this appeal.*

On appeal from the Federal Court of Australia

Representation

J T Gleeson SC, Solicitor-General of the Commonwealth with T M Howe QC and A P Berger for the appellant (instructed by Sparke Helmore Lawyers)

L T Grey with J P Mrsic for the respondent (instructed by Pappas J Attorney)

CATCHWORDS

Comcare v PVYW

Industrial law (Cth) – Workers' compensation – Employee injured during overnight stay at motel booked by employer – Employee injured whilst engaged in activity – Employee claimed compensation for injuries under *Safety, Rehabilitation and Compensation Act* 1988 (Cth) – Whether employee's injuries arose in course of employment – Whether employee's injuries sustained during interval or interlude within overall period of work.

Words and phrases – "connection or association with employment", "injury … at and by reference to a place", "in the course of employment", "interval or interlude within an overall period or episode of work".

Safety, Rehabilitation and Compensation Act 1988 (Cth), ss 5A(1), 6, 14(1).

1 FRENCH CJ, HAYNE, CRENNAN AND KIEFEL JJ. The respondent was at the relevant time employed by a Commonwealth government agency. She had been required to visit a regional office of the agency in New South Wales with another work colleague to observe the budget review process, meet the regional staff and undertake training. For that purpose, she stayed overnight at a nearby motel which had been booked by her employer. During the course of the evening at the motel, the respondent engaged in sexual intercourse with an acquaintance. In that process, the glass light fitting above the bed was pulled from its mount by either the respondent or her acquaintance and it struck the respondent on her nose and mouth. As a result, the respondent suffered physical injuries and a subsequent psychological injury.

2 The respondent claimed compensation for her injuries under the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("the SR&C Act"). It provides[1] that Comcare is liable to pay compensation in respect of an "injury" suffered by an employee[2]. An injury for which compensation is payable includes a physical or mental injury "suffered by an employee … arising out of, or in the course of, the employee's employment"[3]. The question the respondent's claim for compensation raised for the Administrative Appeals Tribunal ("the AAT") and the courts below was whether her injuries were suffered "in the course of" her employment.

3 It was argued for the respondent before the AAT that because she was at a particular place – the motel – at the instigation of her employer, her injuries were suffered in the course of her employment and were compensable, absent any gross misconduct on her part. It was not suggested that her actions amounted to misconduct. The AAT concluded[4] that the respondent's injuries were unrelated to her employment. In the Federal Court, the primary judge (Nicholas J) set aside that decision[5]. A Full Court of the Federal Court (Keane CJ, Buchanan and

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1 *Safety, Rehabilitation and Compensation Act* 1988 (Cth), s 14(1).

2 Defined in s 5(1) of the *Safety, Rehabilitation and Compensation Act* 1988 to include a person employed by a Commonwealth authority.

3 *Safety, Rehabilitation and Compensation Act* 1988, ss 4(1), 5A(1)(b).

4 *Comcare v PVYW* unreported, Administrative Appeals Tribunal, 26 November 2010 at [51] per Professor RM Creyke, Senior Member.

5 *PVYW v Comcare (No 2)* (2012) 291 ALR 302.

Bromberg JJ) dismissed Comcare's appeal[6]. Comcare now appeals to this Court by special leave.

The reasoning below

4 In dismissing Comcare's appeal, the Full Court said[7] that it was applying the principle which had been reformulated in *Hatzimanolis v ANI Corporation Ltd*[8]. The objective of *Hatzimanolis*, the Full Court said, was "to state the circumstances in which injuries to employees, which did not occur during periods of actual work, would nevertheless be treated as arising in the course of employment."[9] The Full Court identified[10] the following passage from the joint judgment in *Hatzimanolis*[11] as containing the relevant tests:

> "[T]he modern cases show that, absent gross misconduct on the part of the employee, an injury occurring during such an interval or interlude will invariably result in a finding that the injury occurred in the course of employment. Accordingly, it should now be accepted that an interval or interlude within an overall period or episode of work occurs within the course of employment if, expressly or impliedly, the employer has induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way. Furthermore, an injury sustained in such an interval will be within the course of employment if it occurred at that place or while the employee was engaged in that activity unless the employee was guilty of gross misconduct taking him or her outside the course of employment. In determining whether the injury occurred in the course of employment, regard must always be had to the general nature, terms and circumstances of the employment 'and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen'." (footnote omitted)

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6 *Comcare v PVYW* (2012) 207 FCR 150.

7 *Comcare v PVYW* (2012) 207 FCR 150 at 159 [31].

8 (1992) 173 CLR 473; [1992] HCA 21.

9 *Comcare v PVYW* (2012) 207 FCR 150 at 163 [44].

10 *Comcare v PVYW* (2012) 207 FCR 150 at 155-156 [23].

11 (1992) 173 CLR 473 at 484.

5 The Full Court took the argument put by Comcare to involve the proposition that, in order to satisfy the tests in *Hatzimanolis*, an injured employee must establish two elements: that the injury occurred at a place he or she was encouraged to be *and* that the activity from which the injury arose was induced or encouraged by the employer, or was impliedly accepted[12]. The Full Court rejected this proposition. It held that *Hatzimanolis* stated a single test, which may be satisfied on proof of either element[13]. Significantly, it held that it was sufficient for the satisfaction of that test to show that the injury occurred at a place which the employer had required or encouraged the employee to attend. It was not necessary to show that the employer had encouraged or required the employee to engage in the particular activity in which the employee was engaged when injury was suffered[14].

6 The AAT had reasoned that a connection between the activity undertaken by the respondent and her employment was required and that this connection was absent[15]. However, the primary judge considered that the relevant nexus or connection was present because the injuries were suffered by the respondent when she was in a motel room in which her employer had encouraged her to stay[16]. His Honour said that the principles stated in *Hatzimanolis* concerned a temporal relationship between the employment and the injury suffered by the employee. That relationship existed because the respondent's injuries were suffered whilst she was at a particular place where her employer had induced or encouraged her to be during an interval or interlude in an overall period of work[17]. The Full Court held that the primary judge had been correct to conclude that the AAT applied the wrong legal test[18].

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12 *Comcare v PVYW* (2012) 207 FCR 150 at 163 [41].

13 *Comcare v PVYW* (2012) 207 FCR 150 at 164 [51].

14 *Comcare v PVYW* (2012) 207 FCR 150 at 162-163 [40].

15 *Comcare v PVYW* unreported, Administrative Appeals Tribunal, 26 November 2010 at [35], [50].

16 *PVYW v Comcare (No 2)* (2012) 291 ALR 302 at 312 [50], [51].

17 *PVYW v Comcare (No 2)* (2012) 291 ALR 302 at 313 [53].

18 *Comcare v PVYW* (2012) 207 FCR 150 at 165 [56].

The question on the appeal

7 Although the respondent was injured whilst engaged in an activity, she seeks to maintain the approach of the Full Court – that the relevant enquiry is not whether she had been induced or encouraged by her employer to engage in that activity. It is not disputed that the answer to that enquiry would be "no". On the approach for which the respondent contends, that enquiry does not arise, or is irrelevant, because she meets the condition of the alternative circumstance stated in *Hatzimanolis*, namely that she was required to be present at the place where she was injured.

8 The respondent may be taken to draw the following from what was said in *Hatzimanolis*. The employer had directed her to be at a location away from her permanent place of work and her residence. While at that location, she is therefore seen as carrying out an overall period of work. Her presence at a particular place – the motel – creates an interval in that period whilst she is at that place. An injury occurring in that interval is in the course of employment.

9 If this is what *Hatzimanolis* conveys, it means that, absent gross misconduct[19] on the part of an employee, 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 whilst present there. It means that the employer has become the insurer for the employee during the time that the employee is at the place. That would be so even though the injury was suffered in the course of an activity which was clearly unrelated to the employment.

10 These are odd results, yet results which the respondent says must follow because *Hatzimanolis* makes liability for an injury depend upon it simply occurring within a period of time – that is, the interval. If this is the natural consequence of what was said in *Hatzimanolis*, that decision would need to be reconsidered. It would need to be reconsidered because it would otherwise effect an undue extension of an employer's liability to pay compensation under the SR&C Act.

11 The joint reasons in *Hatzimanolis* make plain that it was not intended to do so. Those reasons were mindful of the limitation on an employer's liability

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19 Section 14(3) of the *Safety, Rehabilitation and Compensation Act* 1988 refers to "serious and wilful misconduct". *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 was decided under a different statutory framework.

which is inherent in the expression "in the course of" the employee's employment. It was said of an earlier test[20] that, on the whole, it had enabled "a satisfactory line of demarcation to be drawn between those injuries which are work-related and those which are so remote from the notion of the worker's employment as not to call for compensation by the employer." It is unlikely that, mindful of this inherent limitation, *Hatzimanolis* nevertheless stated a principle to be applied in the way for which the respondent contends. These reasons will show that *Hatzimanolis* is not to be understood to have done so.

Reading statements of principle

12 *Hatzimanolis* was not the first occasion on which a general principle has been stated as to how it might be determined whether an employee who has suffered an injury has done so "in the course of" the employee's employment. This is understandable. It has never been suggested that the development of a statement of such a principle is an easy matter. Its application can prove even more troublesome.

13 In *Whittingham v Commissioner of Railways (WA)*[21], Dixon J observed that a decision of the House of Lords[22] had pronounced finally on the words "in the course of the employment", but the application of that decision had not proved simple. Later, in *Henderson v Commissioner of Railways (WA)*[23], his Honour said that the general principle governing the ascertainment of the "course of employment" appeared then to be settled. To be in the course of employment "the acts of the workman must be part of his service to the employer. But the difficulty lies in the application of this conception."

14 Given changes which occur over time to the nature and conditions of employment[24], it may be that the principle stated in *Hatzimanolis* may itself

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20 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 479, referring to *Henderson v Commissioner of Railways (WA)* (1937) 58 CLR 281; [1937] HCA 67.

21 (1931) 46 CLR 22 at 29; [1931] HCA 49.

22 *Charles R Davidson and Company v M'Robb or Officer* [1918] AC 304.

23 (1937) 58 CLR 281 at 294.

24 As observed in *The Commonwealth v Oliver* (1962) 107 CLR 353 at 358, 364-365; [1962] HCA 38.

require reformulation in the future. This case does not require that to be undertaken. However, a current principle may require further explication in light of a factual situation which the court settling the principle could not predict. This is especially so when the principle is stated in the abstract, as it was in *Hatzimanolis*.

15 There is no doubt that the question on this appeal requires close attention to be paid to what was said in *Hatzimanolis*. However, a proper understanding of what was said in the joint reasons in *Hatzimanolis* and its application is not to be ascertained by construing its terms as if they were the words of a statute. The words of the principle articulated in *Hatzimanolis* are not to be applied literally to facts without further consideration of what is conveyed by the reasoning about the principle and without bearing in mind the terms of the SR&C Act and the limit it seeks to place upon an employer's liability for compensation.

16 A caution about construing the terms of a judgment in this way is frequently stated[25]. As Gummow J observed in *Brennan v Comcare*[26]:

> "The concern is not with the ascertainment of the meaning and the application of particular words used by previous judges, so much as with gaining an understanding of the concepts to which expression was sought to be given."

Here, that understanding necessitates an analysis of the passage in *Hatzimanolis* to which the Full Court referred[27] in light of what preceded it in the joint reasons, including the cases to which reference was made. In particular, reference to the circumstances in *Danvers v Commissioner for Railways (NSW)*[28] is essential to an understanding of what is involved in an injury which "occurred at that place". In gleaning an understanding of what was conveyed by the joint reasons in *Hatzimanolis*, it is also essential to bear in mind the association which must necessarily exist (by virtue of the "in the course of" limiter) between the

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25 See for example *Benning v Wong* (1969) 122 CLR 249 at 299; [1969] HCA 58.

26 (1994) 50 FCR 555 at 572.

27 At [4] above.

28 (1969) 122 CLR 529; [1969] HCA 64.

circumstances in which the employee was injured and the employment. This is discussed later in these reasons[29].

Hatzimanolis – reasoning and principle

17 In *Hatzimanolis*, an employee who resided in New South Wales obtained a job with his employer at Mt Newman in Western Australia. He was told by the employer's supervisor, before leaving for Mt Newman, that he would be working for three months in the area. He would work some Sundays. Whilst at Mt Newman he was accommodated in a camp. On the third Sunday, some employees, including the employee in question, were not required to work and the employer organised a trip to Wittenoom Gorge for anyone who cared to come along, and provided vehicles for that purpose. The employee was seriously injured when the vehicle in which he was travelling overturned.

18 The employee's appeal was allowed. In the joint reasons the conclusion was stated[30]: "that the appellant sustained injury during an interval occurring within an overall period or episode of work and while engaged, with his employer's encouragement, in an activity which his employer had organized." The approach reflected in this conclusion represented something of a departure from tests which had been stated in earlier cases. Nevertheless, it reflected much of what had been said in them.

19 For example, in *Hatzimanolis* it was observed[31] that it had early been recognised that the course of employment covered not only the actual work undertaken by an employee, but what was incidental to it. So much had been recognised in *Whittingham*, in which it was said that what was incidental to service involved "the sufficiency of the connection between the employment and the thing done by the employee" at the time he or she was injured, which was a matter of degree, in which time, place, practice and circumstance together with the conditions of employment had to be considered[32]. The difficulty with these approaches, as *Hatzimanolis* pointed out[33], is that to say something is incidental

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29 At [52]-[53].

30 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 476.

31 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 478.

32 *Whittingham v Commissioner of Railways (WA)* (1931) 46 CLR 22 at 29.

33 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 478-479.

is to state a conclusion, not a test; and the matters referred to in *Whittingham*, whilst relevant, are not themselves determinative of the question whether an injury is suffered in the course of employment.

The Henderson test

20 *Hatzimanolis* therefore turned its attention to another test, developed in *Henderson*[34]: whether the employee was doing something which he was "reasonably required, expected or authorized to do in order to carry out his actual duties." *Hatzimanolis* observed[35] that this test had, on the whole, enabled a satisfactory line to be drawn between those injuries which are work-related and those which are not. But the problem was that, in many cases, the words "in order to carry out his duties" had been given a rather strained interpretation[36].

21 *Danvers* was identified in *Hatzimanolis* as such a case[37]. In *Danvers*, a railway worker died when the van in which he was accommodated caught fire at night. The van had been provided by his employer and was fitted out to lodge two employees. The places at which employees worked were remote from their own homes and the van was moved from workplace to workplace. But, as *Hatzimanolis* pointed out[38], the employee who was killed had finished work at about 4.00 pm and had no further duties to perform until the following morning. Nevertheless, *Danvers* held that it had been open to the tribunal of fact to find that the employee's death occurred in the course of his employment.

22 In *Danvers*, Barwick CJ applied[39] the test in *Henderson* in the following way. As discussed in the joint reasons in *Hatzimanolis*[40], his Honour said that what is incidental to the performance of work includes what an employee is reasonably required, expected or authorised to do in order to carry out his actual

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34 (1937) 58 CLR 281 at 294.

35 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 479.

36 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 479-480.

37 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 480.

38 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 480-481.

39 *Danvers v Commissioner for Railways (NSW)* (1969) 122 CLR 529 at 536-537.

40 (1992) 173 CLR 473 at 480-481.

duties. This may include being at a place at which the employee's presence is so incidental or ancillary to the employment that, in being there, he is doing something in virtue, or in pursuance, of his employment. This statement should be applied to the facts and circumstances of a particular case "liberally and practically". Barwick CJ said that what may be in the course of the employment "is referable to the general nature and circumstances of the employment and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen."[41] In *Danvers*, the employee's employment conditions required him to work at places remote from accommodation. It was necessary, in a practical sense, for him to live on the job. The employer provided the van and expected the employee to use it during his working week. These facts, his Honour found, were sufficient to support a conclusion that the use of the van was in the course of the employment[42].

23 Two cases upon which the joint reasons drew in *Hatzimanolis – Henderson* and *The Commonwealth v Oliver*[43] – had in common that the injury was suffered by the employee during a lunch break, between periods of actual work. The circumstance that distinguished them was that in *Henderson*, rather like *Danvers*, the employee, a railway ganger, was living remotely in a camp for a period of time, whereas in *Oliver* the employee was injured at his permanent workplace.

24 In *Henderson*, an employee was killed in his lunch break by a train whilst crossing the railway line on his way to the camp provided by the employer. Dixon J said that an accident may arise in the course of employment notwithstanding that it occurs during an interval in actual performance[44] and went on to state the principle referred to above[45], which had regard to the nature and terms of the employment and the circumstances in which the work is done in determining what an employee is "reasonably required, expected or authorized to do" (in order to carry out his duties).

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41 *Danvers v Commissioner for Railways (NSW)* (1969) 122 CLR 529 at 537.

42 *Danvers v Commissioner for Railways (NSW)* (1969) 122 CLR 529 at 535, 538.

43 (1962) 107 CLR 353.

44 *Henderson v Commissioner of Railways (WA)* (1937) 58 CLR 281 at 293, 294.

45 At [20].

25 In *Oliver*, employees were playing cricket in their lunch break at their place of work, when one employee was injured. He had tripped over a metal disc as he walked forward to pick up a ball. In a passage which is set out in *Hatzimanolis*[46], Dixon CJ said[47] that an inference could properly be drawn that the course of employment extended over the lunch break because of the circumstances of employment, including that employees were not expected to leave the premises and that playing games was a recognised practice. Menzies J[48] explained that *Whittingham*, which had involved a similar situation to that in *Oliver* but reached a different conclusion, one denying compensation[49], was not comparable to the "widely-accepted and sensible present-day practice" of employers encouraging workers to spend intervals between working hours in recreational activities.

26 The joint reasons in *Hatzimanolis* concluded[50] that, useful as the *Henderson* test had been, its formulation no longer adequately covered all relevant cases of injury. In reformulating the principle, *Hatzimanolis* identified as a striking feature of these cases that, where an injury occurred in an interval between periods of actual work, "the employer has authorized, encouraged or permitted the employee to spend his time during that interval at a particular place or in a particular way." Clearly enough, the reference to a case involving a "particular place" was to *Danvers*. It was the only case which turned on the employee's presence at a place. *Oliver*, like the earlier cases, was a case where the employee was engaged in a particular activity.

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46 (1992) 173 CLR 473 at 480.

47 *The Commonwealth v Oliver* (1962) 107 CLR 353 at 358.

48 *The Commonwealth v Oliver* (1962) 107 CLR 353 at 364-365.

49 Dixon CJ said that he would "nowadays" have viewed *Whittingham v Commissioner of Railways (WA)* (1931) 46 CLR 22 as more naturally within the scope of employment: *The Commonwealth v Oliver* (1962) 107 CLR 353 at 357-358.

50 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 482.

An interval between periods of actual work

27 In what follows in the joint reasons[51] the notion of an "interval" between periods of actual work in which an injury is sustained was explored. It was approached in the following way.

28 In the ordinary situation, where work is performed at a permanent place of work, an injury occurring after the working day would not normally be regarded as occurring in the course of employment. An injury occurring between two discrete periods of actual work is less likely to be seen as in the course of employment. On the other hand, an injury occurring in a lunch break might be understood as occurring in an interval in an overall period of work.

29 The reasoning continues. Where an employee is required to live in a remote location for a period until a particular work-related undertaking is completed, the notion of an overall period or episode of work could apply to that whole period. Thus, on the facts in *Danvers*, it might be concluded that the time spent at the remote location and in the accommodation provided by the employer constituted one whole period of work, rather than a series of discrete periods. In such a circumstance, an injury which occurs in an interval between periods of actual work might more readily be understood as being within the course of employment than one occurring after working hours in the ordinary situation.

30 The joint reasons then observed, in the passage extracted above[52], that *Oliver* and other cases show that an interval will ordinarily 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." Indeed, absent gross misconduct, injury occurring in such an interval will invariably result in a finding that it occurred in the course of employment.

31 The principle in *Hatzimanolis* is then stated. "Accordingly", it is said, it should "be accepted that an interval or interlude within an overall period or episode of work occurs within the course of employment if, expressly or impliedly, the employer has induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way." To this it may be added "and the employee does so". That is implicit in what follows.

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51 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 483.

52 At [4].

32 An employer's inducement or encouragement may create an interval according to *Hatzimanolis*, but it is not itself a sufficient condition for liability. Further factual conditions necessary for the application of that principle are stated in the passage, following the word "Furthermore". There, it is said that an injury sustained in such an interval will be in the course of employment if it occurred at that place or while the employee was engaged in that activity. It will be so considered unless the employee has been guilty of gross misconduct.

33 To these conditions it is added, in similar words to those used in *Danvers*[53], that it will always be necessary to have regard to the "general nature, terms and circumstances of the employment" in determining the overall question, whether the injury occurred in the course of employment. Attention is not to be focused just upon the occasion giving rise to the injury.

34 It is important to identify how *Hatzimanolis* sought to define the circumstances for, and the extent of, an employer's liability for compensation. *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.

35 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*[54] 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.

36 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.

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53 (1969) 122 CLR 529 at 537.

54 See [32] above.

37 That this must be so is confirmed by a consideration of the legal reasoning involved in applying the principle stated in *Hatzimanolis* to the facts of a case. That process of reasoning does not commence with the fact of the employer's inducement or encouragement. The joint reasons sought to direct attention to the new principle and therefore stated it out of the order in which the enquiries inherent in applying the principle would arise for consideration.

Applying the Hatzimanolis principle

38 The starting point in applying what was said in *Hatzimanolis*, in order to determine whether an injury was suffered in the course of employment, is the factual finding that an employee suffered injury, but not whilst engaged in actual work. The next enquiry is what the employee was doing when injured. For the principle in *Hatzimanolis* to apply, the employee must have been either engaged in an activity or present at a place when the injury occurred. The essential enquiry is then: how was the injury brought about? In some cases, the injury will have occurred at and by reference to the place. More commonly, it will have occurred while the employee was engaged in an activity. It is only if and when one of those circumstances is present that the question arising from the *Hatzimanolis* principle becomes relevant. When an activity was engaged in at the time of injury, the question is: did the employer induce or encourage the employee to engage in that activity? When injury occurs at and by reference to a place, the question is: did the employer induce or encourage the employee to be there? If the answer to the relevant question is affirmative, then the injury will have occurred in the course of employment.

39 It follows 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. An employer's inducement or encouragement to be present at a place is not relevant in such a case.

Injury and place

40 There is a further reason for rejecting the respondent's contention[55]. She was not injured whilst present at a place in the sense in which that expression is to be understood in the joint reasons in *Hatzimanolis*. An injury occurs at a place when the circumstance of the injury is referable to the place. The circumstances of *Danvers*, which was the basis of this criterion of liability, make this plain. They explain why the mere presence of an employee at a place in circumstances

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55 See [7] above.

where an injury is associated with that place may be sufficient to bring that injury within the course of the employee's employment.

41 Most commonly, as the cases show, an employee will suffer an injury in the course of employment whilst engaged in an activity. It was because of the decision in *Danvers* that the *Hatzimanolis* principle was said to apply to a circumstance where injury occurred at a place where the employer induced or encouraged the employee to be. The circumstances of that case could not be explained by reference to activity, not least because the evidence did not permit a finding about what the employee was doing when the fire which killed him broke out.

42 The cause of the fire in *Danvers* was also unknown. Menzies J speculated[56] that the fire could have originated from a kerosene refrigerator in the van or might have been caused by a dropped cigarette. (If it had been the latter possibility, it might have raised a different question for the Court.) In the absence of direct evidence as to what the employee was doing at the relevant time, Barwick CJ was prepared to conclude[57], perhaps benevolently, that the employee was asleep and that sleeping was a use of the van in the course of the employment. That finding enabled Barwick CJ to concentrate upon the employee's mere presence in the van as founding liability.

43 The joint reasons in *Hatzimanolis* did not approve of the application of the test articulated in *Henderson* by Barwick CJ in *Danvers*, nor did they approve of the notion that the employee was to be seen as present in the van in order to carry out his employment. The principle in *Hatzimanolis* focuses instead upon what the employer might be taken to have induced or encouraged the employee to do. That question is to be determined by reference to the matters identified in *Danvers* and restated in *Hatzimanolis* as relevant: the general nature, terms and circumstances of the employment.

44 Attention must then be directed to the circumstances of the employee's death in *Danvers*. He died because the van in which he was required to live caught fire. His death occurred by reference to that place and that circumstance. The place where an employee is required to be assumes particular importance when it is the cause of an injury or death. This is not to inject notions of causation into the application of the principle, just as the statement that an injury occurred as a result of being engaged in an activity does not involve such

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56 *Danvers v Commissioner for Railways (NSW)* (1969) 122 CLR 529 at 541.

57 *Danvers v Commissioner for Railways (NSW)* (1969) 122 CLR 529 at 533, 535.

notions. To identify the relevant connection does not raise any question about causation. It simply identifies the circumstance in which the injury is suffered. It is that circumstance which must be the subject of the employer's inducement or encouragement.

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 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.

No "unacceptable extension" to liability

46 Nothing said in *Hatzimanolis* supports the notion that the employer is to be liable for an injury which occurs when an employee undertakes a particular activity, if the employer has not in any way encouraged the employee to undertake that activity, but has merely required the employee to be present at the place where the activity is undertaken. What was discussed, at two points in *Hatzimanolis*, suggests to the contrary.

47 First, the joint reasons in *Hatzimanolis* noted[58] the concession made in that case by the employer that the employee would have been in the course of his employment whilst working at the mine and travelling to and from it, and whilst eating, sleeping and enjoying recreational activity at the camp. The basis for the concession was not gone into, but it may be accepted that these are all things which an employer might be taken to have induced, encouraged and expected an employee, who was to work remotely at a mine and live at a camp provided by the employer, to do. But the employer in *Hatzimanolis* also contended that it did not follow that the employee would be in the course of his employment during the whole of the time that he was in the Mt Newman area. The joint reasons accepted this contention and said that he would not necessarily be in the course of his employment whilst engaged in an activity during an interval in his overall period of work unless the employer had expressly or impliedly induced or encouraged him to engage in that activity[59]. This statement confirms the

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58 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 485.

59 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 485.

necessary correspondence between activity and encouragement to undertake it, earlier referred to.

48 Second, at an earlier point in the joint reasons it was said[60] that it would be an "unacceptable extension" of the course of employment to hold that an employee was within the course of employment whenever the employer had authorised, encouraged or permitted the employee to spend time during an interval between periods of actual work at a particular place or in a particular way. To do so would be to extend liability for injuries occurring during intervals between periods of work which "could not fairly be regarded as within the course of employment." The example then provided was of an employee who was encouraged by his or her employer to see a doctor after working hours and was injured whilst visiting the doctor. In a literal sense the employee's injury would come within the formulation, but it would not ordinarily be considered that the injury was suffered in the course of employment.

49 The reasoning in *Hatzimanolis*, when the principle there articulated came to be applied to the facts, does not suggest that any wide view is to be taken of an employer's liability in circumstances where the employer could be seen to have encouraged the employee to be at a particular place. The prospect that the employee might be regarded as having been injured because he was present at a particular place was not even mentioned. The employee was found to have been injured whilst engaged in a recreational activity which the employer had encouraged him to undertake.

Association between circumstances of injury and employment

50 It has earlier been observed[61] that the *Hatzimanolis* principle, when it is appropriate to be applied, effects a connection between the circumstances in which the employee sustains injury and the employment. The principle may create a temporal element, in the notion of an interval, but it also creates a factual association or connection with the employee's employment. It does so by the fact of the employer's inducement or encouragement.

51 The need for there to be a factual connection or association between the circumstances of the injury and the employment is implied by the definition of injury, as one suffered in the course of the employee's employment. This was recognised in the earlier authorities. Such an association may be identified in

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60 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 482-483.

61 At [36] above.

many of the circumstances listed in s 6 of the SR&C Act in which an injury is to be treated as having occurred in the course of employment. Section 6(1)(c)(i), for instance, expressly refers to the circumstance where the employee is temporarily absent from the employee's place of work and undertaking an activity "associated with the employee's employment".

52 The relevant connection or association created by the *Hatzimanolis* principle is between that activity and the employer's encouragement to engage in it. Likewise, when an injury is sustained by an employee at a place and by reference to that place, in the sense earlier discussed[62], the connection between that circumstance and the employment is provided by the fact that the employer induced or encouraged the employee to be present at that place.

53 The connection or association spoken of is not the causal connection which is attributed to the expression "arising out of … the employee's employment"[63] in the definition of "injury" in the SR&C Act[64]. It is accepted that compensation may be payable in respect of an injury which is suffered "in the course of" the employee's employment notwithstanding that there is no such causal connection[65]. The connection presently spoken of is by way of an association with the employment. In *Kavanagh v The Commonwealth*[66], Dixon CJ said that "no direct … causal connexion … is proposed as an element necessary to satisfy the conception of an injury by accident arising in the course of the employment but only an association" with the employment.

54 Dixon CJ expressed that association in two ways[67]. In a positive sense it might be said that, had it not been for the employment, the injury would not have been sustained. Put negatively, and perhaps more usefully for present purposes,

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62 At [40].

63 See *Henderson v Commissioner of Railways (WA)* (1937) 58 CLR 281 at 293; *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 556, 558, 570; [1960] HCA 25; *The Commonwealth v Oliver* (1962) 107 CLR 353 at 355.

64 *Safety, Rehabilitation and Compensation Act* 1988, s 5A(1).

65 *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 557; *The Commonwealth v Oliver* (1962) 107 CLR 353 at 359.

66 (1960) 103 CLR 547 at 557.

67 *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 557.

it requires that "the injury by accident must not be one which occurred independently of the employment and its incidents."

55 The importance of there being the necessary inducement or encouragement on the part of the employer was referred to in *Hatzimanolis*[68], by reference to *Goward v The Commonwealth*[69]. In that case, a railway employee was killed by a train at night, hours after work had ceased. It was acknowledged that living in the camp provided by the employer was an incident of the employment (and therefore connected to it)[70]. The difficulty was that it could not be ascertained why he was on the railway line at the time he was killed. It was held that his death "therefore cannot be assigned to any closer or other association with the employment than can be found in the proximity to the railway line". In *Hatzimanolis*, it was said that it was difficult to see that this case "would be decided differently today"[71]. It may also be inferred, by reference to the facts of *Goward*, that it was understood in *Hatzimanolis* that the inducement or encouragement by the employer would have provided the necessary association spoken of in that case.

56 Another case referred to in *Hatzimanolis* which involved a rejection of the injury being in the course of employment was *Humphrey Earl Ltd v Speechley*[72]. The employee was injured in his lunch break. His work involved servicing machines at shops at various locations. He had commenced such a task at one shop and stopped for lunch. He desired a particular food which was not available nearby. To obtain it necessitated a journey to somewhere further away. He was injured in a road accident on the return journey.

57 Dixon J[73] said that the employee being at the shop for the purpose of his duties and having lunch would be in the course of his duties "provided that it was reasonably related to the exigency occasioned by his duties". However, his Honour said, "it should be reasonably connected with the particular situation

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68 (1992) 173 CLR 473 at 485.

69 (1957) 97 CLR 355; [1957] HCA 60.

70 *Goward v The Commonwealth* (1957) 97 CLR 355 at 364.

71 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 485.

72 (1951) 84 CLR 126; [1951] HCA 75.

73 *Humphrey Earl Ltd v Speechley* (1951) 84 CLR 126 at 133.

which the performance of his duty to his employer had created." Whilst the eating of lunch itself was not for the purpose of his duties, the conditions of the employment may make it incidental – but it "cannot be stretched to make everything he chooses to do during the interval … incidental to his employment."[74] If he "so far deviates" on a purpose of his own, that purpose cannot be considered to be in the course of employment. McTiernan J considered[75] that the facts were insufficient in law to establish the connection between the injury and the employment connoted by the words "in the course of the employment".

58 Nothing said in *Hatzimanolis* suggests that an association between the circumstances in which injury is suffered by an employee and the employment is not necessary. In stating the purpose of earlier tests as being, properly, to limit compensation for injury which is work-related, the joint reasons in *Hatzimanolis* may be taken to acknowledge the need for that association or connection with the employment.

59 This is not to suggest that there should be added to the application of the principle in *Hatzimanolis* a separate test of connection or association. That would run counter to what *Hatzimanolis* sought to achieve and the method by which it did so. Whilst the decision did not doubt the correctness of the object of earlier tests, it was able to effect the necessary connection by other means. Instead of testing for connection, as by the enquiry whether something done was incidental to employment, it enquired whether the employer had induced or encouraged that which was done. The connection or association it achieves with the employment is a by-product of the principle, but it is not itself a test.

60 The principle in *Hatzimanolis* should nevertheless be understood to have sought, and achieved, a connection or association with employment. For present purposes that understanding is helpful to explain, if it be necessary, that for an injury occurring in an interval in a period of work to be in the course of employment, the circumstance in which an employee is injured must be connected to the inducement or encouragement of the employer. An inducement or encouragement to be at a particular place does not provide the necessary connection to employment merely because an employee is injured whilst engaged in an activity at that place.

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74 *Humphrey Earl Ltd v Speechley* (1951) 84 CLR 126 at 134.

75 *Humphrey Earl Ltd v Speechley* (1951) 84 CLR 126 at 139.

Conclusion

61 It may be accepted that the purpose and the effect of the principle stated in *Hatzimanolis* was to create an interval between periods of actual work, to better explain the connection that an injury suffered by an employee in certain circumstances has to the employment. It did so by reference to the fact that the employer induced or encouraged the employee to do something or be somewhere in particular and the fact that the employee did so and was injured. The two circumstances identified by *Hatzimanolis* were where an injury was suffered by an employee whilst engaged in an activity in which the employer had induced or encouraged the employee to engage; or where an injury was suffered at and by reference to a place where the employer had induced or encouraged the employee to be. An injury sustained in these circumstances may be regarded as sustained in the course of the employee's employment. Properly understood, whilst the inducement or encouragement by the employer may give rise to liability to compensation, it also operates as a limit on liability for injury sustained in an overall period of work.

Orders

62 The appeal should be allowed and the order of the Full Court set aside. Instead, there should be an order allowing Comcare's appeal from the decision of the primary judge.

63 An order for costs does not follow. In its application for special leave, Comcare undertook to pay the respondent's costs in this Court and not to seek to disturb the orders for costs made in the courts below.

64 BELL J. The facts are set out in the joint reasons and need not be repeated.

65 Comcare's liability to compensate the respondent depends upon whether her injuries are correctly characterised as "arising ... in the course of [her] employment"[76]. The Administrative Appeals Tribunal ("the Tribunal") purported to apply the organising principle stated in *Hatzimanolis v ANI Corporation Ltd*[77] ("the *Hatzimanolis* test") to the determination of that factual question. It found that the respondent was not in the course of her employment at the material time and affirmed Comcare's decision to reject her claim.

66 The Full Federal Court (Keane CJ, Buchanan and Bromberg JJ) upheld Nicholas J's decision that the Tribunal erred in law by superimposing an additional element on the *Hatzimanolis* test. Comcare appeals by special leave. It contends that the Full Court misapprehended the principle for which *Hatzimanolis* stands. It does not challenge the authority of that decision.

The course of employment

67 *Hatzimanolis* identified a need to reformulate the principles applying to the determination of whether an injury occurring between periods of actual work is within the concept of "the course of employment"[78]. Before turning to the statement of the organising principle formulated in that decision, some reference should be made to the development of the concept in workers' compensation law. It has been long accepted that the course of employment extends beyond the work that the worker is employed to do to include the doing of things that are incidents of the employment[79]. In the early years of the last century one test of whether doing a thing was an incident of employment asked whether the employer would have been entitled to give an order to the worker and the worker obliged to obey it[80]. A more liberal test, stated in *Pearson v Fremantle Harbour Trust*, asked whether, when the accident occurred, the workman was doing

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76 *Safety, Rehabilitation and Compensation Act* 1988 (Cth), ss 5A(1), 14(1).

77 (1992) 173 CLR 473 at 484 per Mason CJ, Deane, Dawson and McHugh JJ; [1992] HCA 21.

78 (1992) 173 CLR 473 at 482 per Mason CJ, Deane, Dawson and McHugh JJ.

79 *Charles R Davidson & Co v M'Robb* [1918] AC 304 at 321 per Lord Dunedin; *Pearson v Fremantle Harbour Trust* (1929) 42 CLR 320 at 329; [1929] HCA 19.

80 *Pearson v Fremantle Harbour Trust* (1929) 42 CLR 320 at 328; *St Helens Colliery Co v Hewitson* [1924] AC 59 at 92 per Lord Wrenbury.

something in the exercise of his functions although it was no more than an adjunct to or an incident of his service[81].

68 Defining the scope of activities that are properly characterised as incidental to employment proved to be elusive. Dixon J observed, in *Whittingham v Commissioner of Railways (WA)*, that while there could be no doubt that the accident must happen while the employee was doing something incidental to his service, it was another matter to be sure of what was included within the conception[82]. Mr Whittingham was strolling across a yard at lunchtime when he was struck in the eye by a cricket ball. The ball had been hit by a fellow worker in a lunchtime cricket game played on the employer's premises. Dixon J identified the issue as whether Mr Whittingham's presence at the place where he was struck by the ball was connected with the actual performance of his duty in a sufficient degree[83]. In determining the sufficiency of that connection, "time, place and circumstance, as well as practice, must be considered together with the conditions of the employment"[84]. In *Whittingham*, Dixon J held that the connection with a lunchtime stroll on the employer's premises was too remote to be incidental to the employment[85]. The most that could be said was that if Mr Whittingham had not been an employee, he would have probably been elsewhere. The fact that his presence in the yard was not connected to his duties was determinative against liability[86].

69 Dixon J returned to the difficulty of determining whether an activity is incidental to employment in *Henderson v Commissioner of Railways (WA)*[87]. His Honour observed that the concept had not proved to be very helpful[88]. Mr Henderson, a railway ganger, was killed by a train as he crossed the railway

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81 (1929) 42 CLR 320 at 329-330.

82 (1931) 46 CLR 22 at 29; [1931] HCA 49.

83 *Whittingham v Commissioner of Railways (WA)* (1931) 46 CLR 22 at 29.

84 *Whittingham v Commissioner of Railways (WA)* (1931) 46 CLR 22 at 29 per Dixon J.

85 *Whittingham v Commissioner of Railways (WA)* (1931) 46 CLR 22 at 30 per Dixon J.

86 *Whittingham v Commissioner of Railways (WA)* (1931) 46 CLR 22 at 31 per Dixon J.

87 (1937) 58 CLR 281; [1937] HCA 67.

88 *Henderson v Commissioner of Railways (WA)* (1937) 58 CLR 281 at 294.

line at lunchtime on his way to the railwaymen's camp. This activity was held to be incidental to the performance of his duties[89]. The test formulated by Dixon J in *Henderson*, to determine whether an accident occurring in an interval when work is suspended is in the course of employment, required consideration of the nature and terms of the employment, the circumstances in which work is done and what "the workman is reasonably required, expected or authorized to do in order to carry out his actual duties"[90].

70 The same test (absent the adjective "actual") was articulated in *Humphrey Earl Ltd v Speechley*[91] ("the *Henderson-Speechley* test"). Mr Speechley was injured in a motor vehicle accident on his return to work after lunch. Obtaining and eating a meal, it was said, may be incidental to the performance of a worker's duties. However, not everything a worker chooses to do during the lunch interval would be incidental to employment[92]. Mr Speechley had made "a party of the occasion"[93], leaving the premises at which he was performing his duties, and travelling some distance to find an establishment at which he and his companion could obtain a hot fish meal. The excursion was not in the course of Mr Speechley's employment.

71 In *The Commonwealth v Oliver*[94] Dixon CJ applied the criteria that he had identified 30 years earlier in *Whittingham* to facts very much like the facts in *Whittingham*. The application of these criteria on this occasion produced a different result. Mr Oliver suffered injury while playing cricket at his workplace at lunchtime. He tripped on a metal disc as he moved forward to pick up the ball. His employer had posted a notice some years earlier, stating that games of any description must not be played. However, the prohibition was not enforced. The County Court at Melbourne allowed Mr Oliver's appeal against a determination that his injury was not compensable under s 9(1) of the *Commonwealth Employees' Compensation Act* 1930 (Cth) ("the 1930 Act"). The Commonwealth appealed unsuccessfully to this Court, contending that *Whittingham* was determinative against liability.

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89 *Henderson v Commissioner of Railways (WA)* (1937) 58 CLR 281 at 294 per Dixon J, 297 per McTiernan J.

90 (1937) 58 CLR 281 at 294 per Dixon J.

91 (1951) 84 CLR 126 at 134 per Dixon J; [1951] HCA 75.

92 *Humphrey Earl Ltd v Speechley* (1951) 84 CLR 126 at 134 per Dixon J.

93 *Humphrey Earl Ltd v Speechley* (1951) 84 CLR 126 at 134 per Dixon J.

94 (1962) 107 CLR 353; [1962] HCA 38.

72 The majority's conclusion in *Oliver* took into account the progressive enlargement of liability under workers' compensation legislation. This trend was exemplified by the amendment to the 1930 Act which substituted the alternative condition, that the injury arise *either* "out of *or* in the course of his employment", for the former cumulative condition, that the injury arise "out of *and* in the course of his employment" (emphasis added)[95]. The main object of changing the conjunction was to eliminate the necessity for a causal connection between the injury and the employment or its incidents[96]. The practical boundaries of the conception of what is incidental, ancillary or consequential to work had widened in the years since *Whittingham*[97] and the proper inference was that the course of Mr Oliver's employment extended over the lunch break such that his accident was within it, notwithstanding that the accident arose from a game[98].

73 Dixon CJ in *Oliver*, referring to the earlier case of *Kavanagh v The Commonwealth*[99], held that the question of whether an injury arises out of employment is causal, but the temporal question raised by the alternative condition of whether an injury arises in the course of employment is entirely independent of whether the employment contributed causally to the accident[100]. His Honour commented in *Oliver* on a habit of thought, which he characterised as "the instinctive feeling ... that the accident or injury must be in some measure occasioned by or related to the employment"[101], and which he observed had nonetheless persisted after the amendment. As will appear, Comcare's submissions hark back to that habit of thought.

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95 See *The Commonwealth v Oliver* (1962) 107 CLR 353 at 355-356 per Dixon CJ.

96 *The Commonwealth v Oliver* (1962) 107 CLR 353 at 359 per Dixon CJ, citing *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 558-559 per Fullagar J; [1960] HCA 25.

97 *The Commonwealth v Oliver* (1962) 107 CLR 353 at 356 per Dixon CJ, 364 per Menzies J.

98 *The Commonwealth v Oliver* (1962) 107 CLR 353 at 358-359 per Dixon CJ 364-365 per Menzies J.

99 (1960) 103 CLR 547.

100 *The Commonwealth v Oliver* (1962) 107 CLR 353 at 355, 359, citing *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 556 per Dixon CJ, 558-559 per Fullagar J.

101 *The Commonwealth v Oliver* (1962) 107 CLR 353 at 356.

74 The tension between the *Henderson-Speechley* test, which inquired what the workman was reasonably required to do in order to carry out his duties, and modern decisions reflecting a changed industrial setting, was the impetus for the development of the *Hatzimanolis* test. *Oliver* was one decision that was influential in this respect. *Danvers v Commissioner for Railways (NSW)*[102] was another.

75 Mr Danvers, a railway worker, died in a fire which destroyed the railway van that had been provided for his accommodation. He had completed his work sometime after 4.00 pm on the afternoon of his death and he had no further duties until the following morning. The cause of the fire was unknown and there was no evidence of what Mr Danvers was doing when it took hold. His widow brought a claim for compensation under the New South Wales statute[103], contending that her husband's death occurred in the course of his employment. The Workers' Compensation Commission ("the Commission") found that Mr Danvers' death arose both out of and in the course of his employment. There was no elaboration of the Commission's reasons for concluding that either condition was established.

76 The New South Wales Court of Appeal allowed an appeal from the Commission's determination. It was plain that Mr Danvers' fatal injury did not arise out of his employment. The majority in the Court of Appeal reasoned that neither the statutory language nor the principles developed by appellate courts justified interpreting the phrase "in the course of employment" to extend to the whole of the period of a worker's presence in and use of accommodation provided by the employer for the convenience of both the worker and the employer.

77 The issue in this Court was whether it had been open to the Commission to find that Mr Danvers died in the course of his employment. He had been expected to live in the railway van on week nights while employed to do maintenance and repair work at places along the railway line[104]. Barwick CJ said that the *Henderson-Speechley* test was satisfied in circumstances in which the worker's presence at a place is consequential upon or incidental or ancillary to the employment such that by being in the place the worker is doing something in

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102 (1969) 122 CLR 529; [1969] HCA 64.

103 *Workers' Compensation Act* 1926 (NSW), s 6(1), s 7(1).

104 *Danvers v Commissioner for Railways (NSW)* (1969) 122 CLR 529 at 533 per Barwick CJ.

virtue, or in pursuance, of his employment[105]. The test was to be applied liberally and practically[106]. His Honour went on to say[107]:

> "What may be in the course of the employment is referable to the general nature and circumstances of the employment and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen."

78 This statement underlined the liberal application of the test. On a strict view it had not been necessary for Mr Danvers to reside in the railway van at the time of his death. Hotel accommodation was available nearby. However, it was wrong to decide whether living in the van was in the course of Mr Danvers' employment simply by looking at the specific situation at the time of the accident. The general nature and circumstances of Mr Danvers' employment required him to work in places that were remote from all accommodation[108]. The circumstances that it was practically necessary for Mr Danvers to live on the job, and that the employer provided the van and expected Mr Danvers to use it as his living quarters during the working week, were sufficient to support the conclusion that his use of it for that purpose was in the course of his employment[109].

79 A third decision that was influential in the development of the *Hatzimanolis* test was *Commonwealth v Lyon*[110]. Deane J, then a member of the Federal Court, dismissed an appeal from a decision of the Commonwealth Employees' Compensation Tribunal making an award of compensation. Mr Lyon, a clerk in the Bureau of Customs, had sustained an injury while playing football for the Customs team at the Sydney Domain. The employer had encouraged the game. Deane J suggested that the *Henderson-Speechley* test, if employed as a criterion of exclusion, required a gloss on the words "in order to

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105 *Danvers v Commissioner for Railways (NSW)* (1969) 122 CLR 529 at 536, citing *Henderson v Commissioner of Railways (WA)* (1937) 58 CLR 281 at 293 per Dixon J.

106 *Danvers v Commissioner for Railways (NSW)* (1969) 122 CLR 529 at 536 per Barwick CJ.

107 *Danvers v Commissioner for Railways (NSW)* (1969) 122 CLR 529 at 537.

108 *Danvers v Commissioner for Railways (NSW)* (1969) 122 CLR 529 at 537 per Barwick CJ.

109 *Danvers v Commissioner for Railways (NSW)* (1969) 122 CLR 529 at 538.

110 (1979) 24 ALR 300.

carry out his duties" so as to temper its prima facie intractability to accord with "current views" of what is within the scope of employment[111].

Hatzimanolis

80 Mr Hatzimanolis was employed by ANI Corporation Ltd ("ANI") to work at a mine located near Mt Newman in Western Australia. He was required to work for six days each week and possibly on some Sundays. ANI provided accommodation for Mr Hatzimanolis at a camp located about 15 or 20 minutes' walk from the town of Mt Newman. It supplied vehicles to transport its employees to and from the workplace. Mr Hatzimanolis travelled in an ANI vehicle to Wittenoom Gorge on an excursion organised by ANI on a Sunday when he was not working. On the return journey the vehicle overturned and Mr Hatzimanolis suffered serious injury.

81 The Compensation Court of New South Wales found that Mr Hatzimanolis' injury was sustained in the course of his employment and awarded him compensation. The New South Wales Court of Appeal reversed the decision, holding that the journey had not been incidental to the performance of Mr Hatzimanolis' duties. Mr Hatzimanolis' appeal succeeded in this Court on the ground that his injury was sustained during an interval or interlude occurring within an overall period or episode of work and while he was engaged, with his employer's encouragement, in an activity which his employer had organised[112].

82 The analysis in the joint reasons in *Hatzimanolis* commenced by observing that the conclusion that an injury is sustained while doing something that is incidental to employment reflects the application of some principle or standard[113]. The decisions of appellate courts upholding awards for injuries sustained between intervals of work were no longer consonant with the application of the principle or standard articulated in *Henderson* and *Speechley*[114]. In many instances, the finding that the worker was doing

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111 (1979) 24 ALR 300 at 303.

112 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 476 per Mason CJ, Deane, Dawson and McHugh JJ.

113 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 478 per Mason CJ, Deane, Dawson and McHugh JJ, citing *Charles R Davidson & Co v M'Robb* [1918] AC 304 at 321 per Lord Dunedin.

114 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 482 per Mason CJ, Deane, Dawson and McHugh JJ.

something in order to carry out his duties at the time of injury was a fiction[115]. Their Honours endorsed Deane J's criticism of the *Henderson-Speechley* test when used as a criterion of exclusion[116]. They concluded that the rational development of the law required the reformulation of the principle to conform to the "current conception" of the course of employment[117], evidenced by recent decisions and, in particular, by *Oliver* and *Danvers*.

83 The analysis proceeded upon the view that an injury is more readily seen as occurring in the course of employment when it is sustained in an interval occurring within an overall period or episode of work than when it is sustained in an interval between two discrete periods of work[118]. A daily period of work ordinarily ends when the employee completes his or her ordinary or overtime hours for the day. The lunch break is an interval in a daily period of work which may be within the course of employment[119], as was the case in *Oliver*. In the case of an employee who is required to work at a location that is distant from the permanent workplace, the time spent at the distant locality is likely to constitute one overall period of work[120]. Intervals between periods of actual work, including overnight, may be within the course of employment[121], as was the case in *Danvers*. The principle formulated in *Hatzimanolis* applies to the identification of the intervals, whether in a daily period of work or in an overall period of work, that are within the course of the employee's employment.

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115 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 482 per Mason CJ, Deane, Dawson and McHugh JJ.

116 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 481-482 per Mason CJ, Deane, Dawson and McHugh JJ, citing *Commonwealth v Lyon* (1979) 24 ALR 300 at 303.

117 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 482 per Mason CJ, Deane, Dawson and McHugh JJ.

118 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 483 per Mason CJ, Deane, Dawson and McHugh JJ.

119 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 483 per Mason CJ, Deane, Dawson and McHugh JJ.

120 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 483 per Mason CJ, Deane, Dawson and McHugh JJ.

121 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 483 per Mason CJ, Deane, Dawson and McHugh JJ.

84 The organising principle was stated in these terms[122]:

> "an interval or interlude within an overall period or episode of work occurs within the course of employment if, expressly or impliedly, the employer has induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way. Furthermore, an injury sustained in such an interval will be within the course of employment if it occurred at that place or while the employee was engaged in that activity unless the employee was guilty of gross misconduct taking him or her outside the course of employment."

85 A rider was added to it[123]:

> "In determining whether the injury occurred in the course of employment, regard must always be had to the general nature, terms and circumstances of the employment 'and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen'." (footnote omitted)

86 The decision in *Hatzimanolis* turned on the fact that at the time of his injury Mr Hatzimanolis was participating in an excursion that had been arranged by ANI[124]. The organising principle that their Honours formulated applies generally to the determination of whether an interval in an overall period of work is within the course of employment. In this case, the Tribunal was obliged to apply that principle to the determination of whether the respondent's injuries arose in the course of her employment.

The Tribunal

87 It was common between the parties that the respondent's two day visit to the regional office constituted an overall period of work, that her employer had encouraged her to stay overnight at the motel and that her injuries occurred while she was in her room at the motel. It was also common between the parties that the respondent's choice to have sexual relations during the interval between the

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122 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 484 per Mason CJ, Deane, Dawson and McHugh JJ.

123 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 484 per Mason CJ, Deane, Dawson and McHugh JJ.

124 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 485 per Mason CJ, Deane, Dawson and McHugh JJ.

performance of her duties was not gross misconduct[125]. The Tribunal held that these undisputed facts were insufficient to establish her claim for compensation. The Tribunal said that the activities which led to the injuries must be induced or encouraged by the employer and the respondent's employer had not induced or encouraged her sexual conduct. The respondent's injuries were unrelated to her employment. Her sexual activity was of a private nature and it took place in her leisure time and not in an interval in an overall period of work, that interval having been "interrupted" by that conduct. The Tribunal distinguished activities such as showering, sleeping, eating or returning to a place of temporary residence from a social occasion, which were ordinary incidents of an overnight stay. It followed that the injuries did not arise in the course of employment.

The proceedings in the Federal Court

88 The respondent appealed to the Federal Court, contending that the Tribunal did not apply the correct legal test to the determination of liability[126]. Nicholas J found that the Tribunal erred in holding that it was necessary for the respondent to show that the activity which led to her injuries had been induced or encouraged by her employer[127]. The relevant connection between the injuries and the respondent's employment was that her injuries were sustained while she was in the motel room in which her employer had encouraged her to stay[128].

89 On appeal, the Full Court upheld Nicholas J's decision, observing that the Tribunal's approach treated the conditions stated in *Hatzimanolis* – "at a particular place or in a particular way" – as though they were conjunctive rather than disjunctive[129]. The Full Court said that there were two ways that an injury in an interval in an overall period of work would be compensable: inducement or encouragement to spend the interval between periods of actual work at a particular place; or inducement or encouragement to spend the interval in a particular way. In either case, the Full Court said that an injury sustained in the interval between periods of actual work would be within the course of employment unless the employee acted in a way amounting to gross misconduct

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125 The Tribunal also found that the conduct was not "serious and wilful misconduct" under s 14(3) of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) such as to disentitle the respondent to compensation.

126 *Administrative Appeals Tribunal Act* 1975 (Cth), s 44(1).

127 *PVYW v Comcare (No 2)* (2012) 291 ALR 302 at 313 [55].

128 *PVYW v Comcare (No 2)* (2012) 291 ALR 302 at 312 [50].

129 *Comcare v PVYW* (2012) 207 FCR 150 at 163 [43].

and thereby taking him or her outside the course of employment[130]. In this instance it sufficed that the respondent's injuries occurred at a place at which she had been encouraged by her employer to stay[131]. On the undisputed facts Nicholas J had been correct to hold that the respondent was entitled to compensation[132].

Comcare's submissions

90 On appeal in this Court, Comcare accepts that the Tribunal was bound to apply the organising principle stated in *Hatzimanolis* to its determination. It contends that the Tribunal did so, and that the Full Court erred by approaching the test in a mechanistic way that gave no work to the rider. It argues that, correctly understood, the organising principle formulated in the joint reasons does not reduce to a disjunctive test that looks only to employer induced or encouraged "place" or "activity". The reference to injury occurring at a "particular place" is to be understood in light of the stated intention to accommodate the decision in *Danvers*. It should not be taken as extending liability to every injury that occurs at a place that the employer has encouraged the employee to stay in an interval in an overall period of work. In "place" cases, Comcare argues, it is necessary to determine whether the injury arose "in circumstances which, fairly viewed, come within the ambit of the employer's encouragement or requirement of being away from work and at that 'place'" ("the circumstances of injury inquiry").

91 Comcare contends that, when the joint reasons in *Hatzimanolis* are read as a whole, it is plain that the mere occurrence of injury at the "particular place" is insufficient to conclude the question of liability. It points to their Honours' statement that[133]:

> "[Mr Hatzimanolis] would not necessarily be in the course of his employment while engaged in an activity during an interval or interlude in his overall period or episode of work if ANI had not expressly or impliedly induced or encouraged him to engage in that activity during that interval."

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130 *Comcare v PVYW* (2012) 207 FCR 150 at 156 [24].

131 *Comcare v PVYW* (2012) 207 FCR 150 at 162-163 [40].

132 *Comcare v PVYW* (2012) 207 FCR 150 at 165 [56].

133 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 485 per Mason CJ, Deane, Dawson and McHugh JJ.

92 It also relies on the reference that follows in *Hatzimanolis*[134] to *Goward v The Commonwealth*[135], to which it will be necessary to return.

93 Another reason, Comcare argues, for rejecting the Full Court's treatment of the *Hatzimanolis* test as disjunctive is that it creates an unjustified difference in the determination of liability in "interval cases" from "non-interval cases". In the latter category of case, Comcare observes that while presence at the workplace may be a strong factor in favour of compensation, it is not always a sufficient factor.

Discussion

94 It will be recalled that liability under the first of the alternative conditions under the statute – "arising out of ... employment" – requires proof of a causal relation between the injury and the employment. Liability under the second alternative condition – "arising ... in the course of ... employment" – requires proof of a temporal relation between the injury and the employment. *Hatzimanolis* is concerned with the determination of liability under the second, temporal, condition. This explains the focus in the joint reasons' analysis on identifying whether the injury occurs in an interval within an overall period of work. In the event that it does, the employer's inducement or encouragement to spend that interval at a particular place or in a particular way provides the nexus with the employment. Absent gross misconduct taking the employee outside the course of employment, an injury occurring in an interval that is spent in either of these ways is said to be compensable.

95 Comcare's concern that the Full Court's approach to the *Hatzimanolis* test serves to expand employers' liability echoes the sentiments expressed by Windeyer J, in dissent, in *Kavanagh*. His Honour said that to construe the 1930 Act as entitling a worker to receive a payment in every case in which the worker falls sick or suffers any mishap is not to compensate "injuries that befall men because they are workers in industry, but rather an incomplete and erratic form of general health, accident and life insurance"[136]. It remains that the "circumstances of injury inquiry" for which Comcare contends does not sit readily with *Kavanagh*: the death of a Commonwealth employee from a ruptured oesophagus was held to be compensable[137]. This was so notwithstanding that the

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134 (1992) 173 CLR 473 at 485 per Mason CJ, Deane, Dawson and McHugh JJ.

135 (1957) 97 CLR 355; [1957] HCA 60.

136 *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 586.

137 *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 557 per Dixon CJ, 558 per Fullagar J, 576-577 per Menzies J.

rupture was unconnected to the employment and might have occurred at any other time, at any other place and in any other external conditions[138]. Dixon CJ said that the words "arising in the course of the employment" do not imply even a slender causal connection[139].

96 Comcare disavows that the "circumstances of injury inquiry" is an inquiry respecting a causal relation. However, it does not embrace the Tribunal's analysis of an interruption of the temporal relation. Comcare acknowledges that, at least for some purposes, the respondent was within the course of her employment at the motel notwithstanding that she happened to be having sexual intercourse. The analysis is one which postulates that a person may be in the course of employment for one purpose and not in the course of employment for another purpose. The distinction is between purposes within the ambit of the employer's encouragement to be at the place and those that are not. On this analysis, if the light fitting had fallen of its own motion while the respondent was having sexual intercourse, any resulting injury would be compensable. In such an event, the circumstance of the injury – that it was occasioned by a defect in the premises – would be within the ambit of the employer's encouragement to stay at the motel. It would be an injury arising in the course of the respondent's employment. However, if the circumstances of the injury were occasioned by a lawful pursuit not within the ambit of the employer's encouragement to stay at the motel, it would not be compensable. The respondent would not have been in the course of employment.

97 As earlier observed, Comcare is critical of the Full Court's application of the *Hatzimanolis* test without recourse to the rider. The Full Court noted that the rider is taken from Barwick CJ's judgment in *Danvers* and that its function was to make clear that an injury does not become non-compensable without reference to the overall circumstances of the employment[140]. Comcare submits that in every case the trier of fact must take the rider into account, and that in some cases it will expand liability, and in others such as the present it will confine liability. What Comcare does not explain is how consideration of the nature and the terms and conditions of the respondent's employment relevantly bears on the application of the *Hatzimanolis* test. Consideration of the matters under the rider does not import the "circumstances of injury inquiry" proposed by Comcare.

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138 *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 554 per Dixon CJ.

139 *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 555.

140 *Comcare v PVYW* (2012) 207 FCR 150 at 156 [24].

98 More than 20 years before *Hatzimanolis*, the New South Wales Court of Appeal in *Baudoeuf v Department of Main Roads*[141] upheld an award of compensation for a worker who was injured when he slipped in the shower at his hotel. The employer argued that taking a shower is a personal activity of a kind that could not be regarded as occurring in the course of employment. The facts contained in the stated case included that the employer had arranged and paid for the hotel accommodation. The accident occurred after the end of the day's work. The worker was not subject to any direction from his employer as to the manner in which he spent his leisure hours. His employment did not occasion any special need for showering. There was no feature of the accommodation which served to differentiate the circumstance of showering at the hotel from the ordinary incidents of life unassociated with the worker's employment. Jacobs JA (as his Honour then was) observed that implicit in the employer's argument was a notion of the need for a causal relationship between the act leading to the injury and the employment[142]. He rejected the notion that the activity at the time of the injury must bear some special relationship to the employment or the employer[143]. It went too far to hold that an injury might not be compensable simply because, at the time of its occurrence, the worker was using the hotel premises in the same way that he would use his own home[144].

99 An employee who is required in connection with his or her employment to stay overnight at a motel will be compensated for an injury sustained by slipping in the shower[145]. Comcare accepts that in such a case the ambit of the employer's encouragement extends to using the facilities at the motel to shower because the employer has an interest in the employee presenting for work clean and refreshed. The same employee is not compensated for an injury sustained from slipping in the shower at his or her own home at the end of a daily period of work. Nonetheless, the employer has the same interest in the employee presenting for work clean and refreshed. One difference is that in the former case the employee is in an interval in an overall period of work and in the latter he or she is not. Consideration of the circumstances of the injury and its relation to the ambit of the employer's encouragement to be at the place is a distraction from the determination of the temporal question. It overlooks the point made in *Hatzimanolis* in the context of modern employment relations, which is that the

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141 (1968) 68 SR (NSW) 406.

142 *Baudoeuf v Department of Main Roads* (1968) 68 SR (NSW) 406 at 413.

143 *Baudoeuf v Department of Main Roads* (1968) 68 SR (NSW) 406 at 413.

144 *Baudoeuf v Department of Main Roads* (1968) 68 SR (NSW) 406 at 413 per Jacobs JA.

145 *Comcare v McCallum* (1994) 49 FCR 199.

difference between an injury sustained by a worker such as Mr Danvers, and a non-compensable injury sustained by an ordinary employee after the day's work has ended, lies not so much in the employer's attitude to the way the interval is spent but in the characterisation of the period or periods of work[146].

100 The *Hatzimanolis* test provides, in terms, for the circumstances that will take the occurrence of injury outside the course of employment. The employee's gross misconduct will have that effect. That statement of the exclusion is otiose if, correctly understood, liability under the *Hatzimanolis* test does not attach to any injury occurring in circumstances that are outside the ambit of the employer's encouragement. Consideration of the connection between the circumstances of the injury and the employment relation is not within the organising principle formulated in *Hatzimanolis*. To incorporate it into that principle would be to return to refinements of a kind that *Hatzimanolis* laid to rest. The point is illustrated in *Oliver* by Menzies J. His Honour asked: if, in the course of the lunch break, obtaining and eating his lunch was incidental to Mr Oliver's employment, when had he ceased doing something incidental to that employment and commenced doing something merely for his own amusement[147]? He continued, "[i]f the answer to be offered is, when he began to play cricket, the retort might be made: 'But not if he happened to have been eating an apple at the same time'"[148]. There was no intrinsic connection between eating lunch and employment that other lunchtime activities lacked.

101 Comcare's submission that the Full Court's application of the *Hatzimanolis* test produces differences in treatment of "interval cases" from "non-interval cases" provides no basis for revisiting the organising principle. The submission relies on decisions relating to injuries sustained during ordinary hours of work in which the fact of presence at the workplace was not determinative of liability[149]. Each concerned an injury sustained in an altercation at the workplace. As Comcare submits, in each the analysis centered on the circumstances at the time

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146 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 483 per Mason CJ, Deane, Dawson and McHugh JJ.

147 *The Commonwealth v Oliver* (1962) 107 CLR 353 at 363.

148 *The Commonwealth v Oliver* (1962) 107 CLR 353 at 363.

149 *McCord v The Commissioner for Railways* [1943] WCR (NSW) 116; *Kerr v Department of Prisons* [1946] WCR (NSW) 81; *Walsh v New South Wales Government Stores Department* [1950] WCR (NSW) 1; *Dunn v Macquarie Stevedoring Co Pty Ltd* [1950] WCR (NSW) 19; *Stojkovic v Telford Management Pty Ltd* (1998) 16 NSWCCR 165; *Martin v Bailey* (2009) 26 VR 270.

of the injury[150]. In the earlier cases the focus was on the connection between the injury and the employment. Engagement in an altercation was in each case found to be outside the scope of employment[151]. The more recent cases approached the issue by considering whether the course of employment was interrupted or abandoned by the altercation[152]. The starting point in the analysis in these decisions was a presumption that a worker who is at work is within the course of employment.

102 In *Rantino v Collins & Moss Pty Ltd* the New South Wales Court of Appeal considered the circumstance that injury was occasioned at work during working hours, in the absence of evidence of interruption or abandonment by the employee, as prima facie giving rise to entitlement to compensation[153]. The decision illustrates the point made by the Full Court in this case that liability for injury arising from an employee's unauthorised acts during periods of actual work is subject to strict tests before the employee is treated as acting outside the course of employment[154]. The more recent decisions suggest that where a worker starts a fight over a private matter at the workplace he or she will not be compensated for resulting injury[155]. Fault was central to the analysis in each case.

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150 *McCord v The Commissioner for Railways* [1943] WCR (NSW) 116 at 117; *Kerr v Department of Prisons* [1946] WCR (NSW) 81 at 82; *Walsh v New South Wales Government Stores Department* [1950] WCR (NSW) 1 at 3; *Dunn v Macquarie Stevedoring Co Pty Ltd* [1950] WCR (NSW) 19 at 24; *Stojkovic v Telford Management Pty Ltd* (1998) 16 NSWCCR 165 at 175-176 [57]; *Martin v Bailey* (2009) 26 VR 270 at 279 [36] per Maxwell P, 280 [44] per Redlich JA.

151 *McCord v The Commissioner for Railways* [1943] WCR (NSW) 116 at 117; *Kerr v Department of Prisons* [1946] WCR (NSW) 81 at 82; *Walsh v New South Wales Government Stores Department* [1950] WCR (NSW) 1 at 3; *Dunn v Macquarie Stevedoring Co Pty Ltd* [1950] WCR (NSW) 19 at 24.

152 *Stojkovic v Telford Management Pty Ltd* (1998) 16 NSWCCR 165 at 187 [91]; *Martin v Bailey* (2009) 26 VR 270 at 279 [35] per Maxwell P, 280 [44] per Redlich JA.

153 (1983) 57 WCR (NSW) 94 at 97 per Hope JA.

154 *Comcare v PVYW* (2012) 207 FCR 150 at 163 [43].

155 *Stojkovic v Telford Management Pty Ltd* (1998) 16 NSWCCR 165 at 189 [97]; *Martin v Bailey* (2009) 26 VR 270 at 279 [35]-[37] per Maxwell P, 280 [44] per Redlich JA.

103 The differences between "non-interval cases" and "interval cases" explain the differing approach to the analysis of liability. The concept of the interruption or abandonment of duties that may be material to liability where injury is sustained at work is not apt for the analysis of injury sustained in an interval between periods of actual work. Moreover, engaging in conduct of a private nature during work may have a different significance from engaging in the same conduct during an interval between periods of actual work.

104 The Full Court's analysis was a correct and faithful application of the *Hatzimanolis* test. As the Full Court observed, the statement in the joint reasons acknowledging that Mr Hatzimanolis would not necessarily have been in the course of his employment while engaged in activities not encouraged by ANI did not qualify the statement of the test[156]. The whole of the period that Mr Hatzimanolis was working at the Mt Newman mine and living at the camp was an overall period or episode of work, but the whole of the Mt Newman region was not a place at which ANI had induced or encouraged him to be[157]. Mr Hatzimanolis would not have been in the course of his employment when he was engaged in activities outside the camp if the activities were not induced or encouraged by ANI. Contrary to this part of Comcare's argument, the acceptance in the joint reasons of a concession made by ANI's counsel is consistent with the Full Court's analysis. The concession was that Mr Hatzimanolis would have been in the course of his employment even while engaging in recreational activities at the camp[158].

105 The reference to *Goward* in the joint reasons does not support Comcare's submission. Their Honours considered that, while *Goward* had been decided before the modern approach evidenced by *Oliver* and *Danvers*, it was difficult to think it might have been decided differently[159]. Mr Goward, a railway employee, was living in a railway workers' camp at the time he suffered fatal injury. His body was found on the railway line some distance from the camp. He had been struck by a train. The evidence did not establish why he had left the camp or where he was going at the time of the accident. The focus in *Goward* appears to have been on whether, as the claimant widow maintained, the fatal injury was

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156 *Comcare v PVYW* (2012) 207 FCR 150 at 164 [50].

157 *Comcare v PVYW* (2012) 207 FCR 150 at 164 [50].

158 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 485 per Mason CJ, Deane, Dawson and McHugh JJ.

159 *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 at 485 per Mason CJ, Deane, Dawson and McHugh JJ.

one arising out of Mr Goward's employment[160]. Mr Goward's death was held not to be compensable under the 1930 Act since his presence on the railway line could not be said to be an incident of his employment[161]. Applying the *Hatzimanolis* test, the same conclusion is reached because the fatal injury occurred at a time when Mr Goward was not at a place at which his employer had encouraged him to be, nor was he doing something that his employer had encouraged him to do[162].

106 *Hatzimanolis* may, in practice, have served to extend employers' liability respecting injuries occurring in intervals within an overall period of work. Appellate courts considered that it had that effect when applying the test shortly after the decision was delivered[163]. That was more than 20 years ago. As the respondent notes, the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) has been amended in ways having the effect of extending liability in some respects and confining it in other respects. The amendments have not been directed to the *Hatzimanolis* test. The test provides clear and workable guidance for the tribunal of fact in the determination of the notoriously difficult question of whether injury is within the course of employment. To superimpose on the test consideration of the connection between the circumstances of the injury and the employment relation would be to add complexity at the cost of certainty and consistency.

107 The Full Court was correct to conclude that, on the undisputed facts, the respondent's injuries were sustained in the course of her employment.

108 The appeal should be dismissed with costs.

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160 *Goward v The Commonwealth* (1957) 97 CLR 355 at 358, 364 per Dixon CJ, Williams, Webb and Kitto JJ.

161 *Goward v The Commonwealth* (1957) 97 CLR 355 at 358, 364 per Dixon CJ, Williams, Webb and Kitto JJ.

162 See further *Inverell Shire Council v Lewis* (1992) 8 NSWCCR 562 at 566-567 per Handley JA.

163 *McCurry v Lamb* (1992) 8 NSWCCR 556 at 558-559 per Handley JA; *Inverell Shire Council v Lewis* (1992) 8 NSWCCR 562 at 567 per Handley JA.

GAGELER J.

Introduction

109 The *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("the Act") makes Comcare liable to pay compensation in respect of an "injury suffered by an employee" that "results in death, incapacity for work, or impairment"[164]. The only exceptions are in respect of an injury that is "intentionally self-inflicted"[165] or that is "caused by the serious and wilful misconduct of the employee"[166].

110 The Act's definition of "injury" is expressed to include a physical or mental injury "arising out of, or in the course of, the employee's employment"[167]. Legislative refinement and judicial explication of the language of that definition in the context of workers compensation legislation in Australia has fixed its meaning and given that meaning a relatively stable content.

111 The definition has two distinct limbs. The first limb, encompassing an injury "arising out of" the employee's employment, posits a connection which is wholly one of causation. The second limb, encompassing an injury "in the course of" the employee's employment, posits a connection which is wholly one of timing.

112 This appeal is concerned with a question of the application of the second limb of the definition to an injury occurring in an interval between episodes of work. There is no novelty in the question. It is the subject of principles laid down in the joint reasons for judgment of four members of the High Court (Mason CJ, Deane, Dawson and McHugh JJ) in *Hatzimanolis v ANI Corporation Ltd*[168].

113 *Hatzimanolis* has stood for over 20 years. It has been applied on countless occasions by courts and tribunals throughout Australia. There is no challenge to its continuing authority. The appeal turns rather on the nature, content and application of the principles it expressed.

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164 Section 14(1).

165 Section 14(2).

166 Section 14(3).

167 Section 5A(1)(b).

168 (1992) 173 CLR 473; [1992] HCA 21.

Before *Hatzimanolis*

114 Understanding *Hatzimanolis* begins with examining the course of authority that unfolded in the High Court and in other courts and tribunals in Australia over the previous 70 years. The principles articulated and revised during that period were framed consciously against the background of markedly changing conceptions of the nature and incidents of the employment relationship.

115 The pre-*Hatzimanolis* course of authority also straddled a small but significant amendment to the definition of "injury" in workers compensation legislation in most Australian jurisdictions, which occurred around the middle of the twentieth century. The definition as drawn from antecedent English legislation referred originally to an injury "arising out of and in the course of the employment"[169]. The effect of the amendment was that the two limbs were detached (by the substitution of "or" for "and") so as to become distinct alternatives[170]. Only in the early 1960s, as the full implications of that detachment came to be assimilated into the case law, did the wholly temporal nature of the second limb come squarely to be recognised. The concept of injury "in the course of" employment was then held unequivocally to involve "nothing more … than time measured by activity of a particular character"[171] and to be "independent altogether of the question whether the employment contributed causally to the accident"[172]. Earlier authorities need to be appraised in light of that development.

116 What was required for an injury to be characterised as "in the course of" employment was first considered by the High Court in 1929 in *Pearson v Fremantle Harbour Trust*[173]. Reviewing English authorities to that date[174], the Court (Knox CJ, Rich and Dixon JJ) noted that restrictive tests stated in the

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169 *Workmen's Compensation Act* 1906 (UK), s 1.

170 See eg s 4 of the *Commonwealth Employees' Compensation Act* 1948 (Cth), amending s 9 of the *Commonwealth Employees' Compensation Act* 1930 (Cth).

171 *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 570; [1960] HCA 25.

172 *The Commonwealth v Oliver* (1962) 107 CLR 353 at 355; [1962] HCA 38. See also *Weston v Great Boulder Gold Mines Ltd* (1964) 112 CLR 30; [1964] HCA 59; *Bill Williams Pty Ltd v Williams* (1972) 126 CLR 146; [1972] HCA 23.

173 (1929) 42 CLR 320; [1929] HCA 19.

174 (1929) 42 CLR 320 at 326-329, referring to *St Helens Colliery Co v Hewitson* [1924] AC 59; *Lancashire and Yorkshire Railway v Highley* [1917] AC 352; *Howells v Great Western Railway* (1928) 138 LT 544.

House of Lords just five years earlier (namely, whether the workman at the time he sustained the injury was discharging a duty which he owed to his employer, and whether, at the moment of the accident, the employer would have been entitled to give the workman an order, and the man would have owed the duty to obey it) had by then already been tempered by the English Court of Appeal taking an expansive approach to the concept of "duty" (namely, not limiting that concept to the doing of things which the workman's contract of service obliged him to do). The Court stated that the result of the authorities was to show that the statutory language described "a condition which is satisfied if the accident happens while the workman is doing something in the exercise of his functions although it is no more than an adjunct to or an incident of his service"[175].

117 In 1931, as a member of the majority in *Whittingham v Commissioner of Railways (WA)*[176] upholding a denial of liability in respect of an injury sustained during a lunch hour, Dixon J said that "[t]here can no longer be any doubt that the accident must happen while the employee is doing something which is part of or is incidental to his service"[177]. He went on to explain that "the sufficiency of the connection between the employment and the thing done by the employee cannot but remain a matter of degree, in which time, place and circumstance, as well as practice, must be considered together with the conditions of the employment"[178].

118 In 1937, as a member of the majority in *Henderson v Commissioner of Railways (WA)*[179] upholding a finding of liability in respect of an injury sustained by an employee during a lunch hour, Dixon J was able to state that the "general principle governing the ascertainment of the 'course of employment' appears now to be settled": "[t]o be in the course of the employment, the acts of the workman must be part of his service to the employer" but "service consists in more than the actual performance of the work which the workman is employed to do" and "includes the doing of whatever is incidental to the performance of the work"[180].

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175 (1929) 42 CLR 320 at 329-330.

176 (1931) 46 CLR 22; [1931] HCA 49.

177 (1931) 46 CLR 22 at 29.

178 (1931) 46 CLR 22 at 29.

179 (1937) 58 CLR 281; [1937] HCA 67.

180 (1937) 58 CLR 281 at 294.

He went on to formulate a test applicable to an injury occurring in an interval between episodes of work, which came to be taken up in later cases[181]:

> "Where the accident arises shortly before the beginning of actual work or shortly after its cessation, or in an interval when labour is suspended, and it occurs at or near the scene of operations, the question whether it arises in the course of the employment will depend on the nature and terms of the employment, on the circumstances in which work is done and on what, as a result, the workman is reasonably required, expected or authorized to do in order to carry out his actual duties."

119 Essentially the same test was restated by Dixon J with the concurrence of other members of the Court in 1951 in *Humphrey Earl Ltd v Speechley*[182], overturning a finding of liability in respect of an injury sustained by an employee who chose to go for a "special lunch". He said[183]:

> "Whatever is incidental to the performance of the work is covered by the course of the employment. When an accident occurs in intervals between work the question whether it occurs in the course of the employment must depend upon the answer to the question whether the workman was doing something which he was reasonably required, expected or authorized to do in order to carry out his duties".

Dixon J went on to explain that "the satisfaction of a recurrent human want" may, but need not, satisfy that test of incidentality, depending on "the conditions of the employment"[184]. The questions raised by application of the test "must involve matters of degree"[185]. There was, he said, "a great difference" between a worker "acting in a way which is reasonably calculated to fulfil the purposes of his employment and at the same time provide for his own reasonable wants" (thereby acting in the course of his employment) and a worker "taking advantage of an allowable interval … in order to make it the occasion of an excursion for his own purposes" (thereby acting outside the course of his employment)[186].

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181 (1937) 58 CLR 281 at 294.

182 (1951) 84 CLR 126; [1951] HCA 75.

183 (1951) 84 CLR 126 at 133.

184 (1951) 84 CLR 126 at 134.

185 (1951) 84 CLR 126 at 134.

186 (1951) 84 CLR 126 at 134.

120 The *Henderson-Speechley* test – whether the worker at the time of injury was doing something he was reasonably required, expected or authorised to do in order to carry out his duties – came to be applied "liberally and practically". The need for that to occur was made express by Barwick CJ in 1969 as a member of the majority in *Danvers v Commissioner for Railways (NSW)*[187] upholding liability in respect of an injury sustained by a railway worker in a fire while he was sleeping or resting at night in employer-provided accommodation at a remote location. Barwick CJ emphasised that "[w]hat may be in the course of the employment is referable to the general nature and circumstances of the employment and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen"[188].

121 But the *Henderson-Speechley* test was by then under strain. In 1962 Dixon CJ had avoided all reference to the test as a member of the majority in *The Commonwealth v Oliver*[189] upholding liability in respect of an injury sustained by an employee during a lunch hour in circumstances which he acknowledged to be practically indistinguishable from those in which liability had been denied three decades earlier in *Whittingham*. Dixon CJ noted instead the irrelevance of the presence or absence of any causal connection between the injury and the employment and alluded to the conception of the sphere of activity covered by "course of employment" having been "somewhat restricted" in and after *Pearson*. He quoted with approval an earlier but, at least in its verbal formulation, distinctly more expansive statement of Lord Loreburn LC in the House of Lords in 1909[190]:

> "Everything, of course, must depend upon the nature of what he has to do, but allowance should be made for the ordinary habits of human nature and the ordinary way in which those employed in such an occupation may be expected to act. A man may be within the course of his employment not merely while he is actually doing the work set before him, but also while he is where he would not be but for his employment, and is doing what a man so employed might do without impropriety."

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187 (1969) 122 CLR 529 at 536; [1969] HCA 64.

188 (1969) 122 CLR 529 at 537.

189 (1962) 107 CLR 353.

190 (1962) 107 CLR 353 at 356, quoting *Low or Jackson v General Steam Fishing Company Ltd* [1909] AC 523 at 532.

Dixon CJ then observed[191]:

> "The field covered by the general conception of what is incidental, ancillary or consequential to work but yet sufficiently within the sphere of the man's employment to make it proper to say that when he is within it he is in the course of employment has doubtless widened its practical boundaries with the enlarged conception of what belongs to the factory or other organized industrial unit in the amenities and welfare of the members of the staff or labour force."

122 The "enlarged conception" to which Dixon CJ referred was evident in unanimous decisions of the Full Court, and Court of Appeal, of the Supreme Court of New South Wales in 1957[192], 1968[193] and 1980[194], the second and third of which were cited in *Hatzimanolis* as examples supporting the general observation that intermediate appellate courts after *Oliver* upheld many awards of compensation in respect of injuries which occurred "away from the place of work, outside of or between working hours, and while the worker was engaged in an activity which is ordinarily performed for private necessity, convenience or enjoyment"[195]. The award of compensation upheld in the first case was in favour of a drover who was burnt while lying too close to a camp fire while he was "at a place, namely the camp, where his employment required him to be"[196]. The award of compensation upheld in the second case was in favour of a surveyor's assistant who slipped taking a shower after work while staying overnight at a hotel paid for by his employer. Highlighting the temporal nature of the critical inquiry, Jacobs JA (with the agreement of Sugerman JA) said[197]:

> "If the residing in the hotel is held to be incidental to the employment, it is then necessary to identify what is involved in the concept of residing in the hotel. If an injury occurs in the course of something which is identified as being within the concept of residing in the hotel, then the

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191 (1962) 107 CLR 353 at 356.

192 *Murray v Moppett* [1958] SR (NSW) 59.

193 *Baudoeuf v Department of Main Roads* (1968) 68 SR (NSW) 406.

194 *Qantas Airways Ltd v Kirkland* unreported, Court of Appeal of the Supreme Court of New South Wales, 9 October 1980.

195 (1992) 173 CLR 473 at 480.

196 [1958] SR (NSW) 59 at 63.

197 (1968) 68 SR (NSW) 406 at 412.

applicant is entitled to succeed, whatever the cause of the injury may be. There is no need for a causal relationship between the injury and either the employment or the condition or thing incidental to the employment".

The award of compensation upheld in the third case was in favour of an international flight attendant who slipped on a wet floor in a restaurant in Greece during a 23 hour rest period after having completed a flight from Frankfurt to Athens via Belgrade and before returning to Sydney.

123 By 1979, Deane J sitting alone as a judge of the Federal Court was able to refer to the *Henderson-Speechley* test as having been "applied by courts on innumerable occasions since its formulation". He stressed, however, that if used as a "criterion of exclusion" the *Henderson-Speechley* test needed to be "tempered to accord with the current views of what comes within the scope of employment which are more liberal than those prevalent at the time Dixon J formulated it"[198].

Hatzimanolis

124 The precise question asked and affirmatively answered in *Hatzimanolis* was whether a worker who was employed to work ten hours a day six days a week at a mine at Mt Newman in Western Australia, near where he lived in employer-provided accommodation within a camp, was in the course of his employment when he was involved in a road accident on an 800 kilometre round trip sightseeing tour to Wittenoom Gorge on his day off. The affirmative answer was explained in the joint reasons for judgment on the basis that the injury was sustained "during an interval occurring within an overall period or episode of work and while [the worker was] engaged, with his employer's encouragement, in an activity which his employer had organized"[199].

125 The structure of the reasoning adopted to arrive at that answer repays close attention. The joint reasons started with an acceptance of the explanation given by Dixon J in *Whittingham*: that an injury, to be in the course of employment, must occur while the employee is doing something which is "part of" or is "incidental" to his employment; that the sufficiency of the connection between the employment and the thing done by the employee to found a conclusion that the employee was doing something "incidental" to his employment is one of degree; and that for the purpose of determining the sufficiency of the connection between the employment and the thing done by the employee in a particular case, considerations of time, place and circumstance, as well as practice, must be taken into account together with the conditions of the

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198 *Commonwealth v Lyon* (1979) 24 ALR 300 at 303.

199 (1992) 173 CLR 473 at 476.

employment. The difficulty identified in the joint reasons was in articulating a "principle or standard" by reference to which those considerations were to be evaluated: for "[w]ithout the assistance of an organizing principle, a tribunal of fact cannot know which of them is or are determinative"[200].

126 The joint reasons then turned to examine the *Henderson-Speechley* test in the light of the course of authority, ultimately to conclude that "its formulation no longer accurately covers all cases of injury which occur between intervals of work and which are held to be within the course of employment" and that in many cases in which the test had been applied the finding that the employee had been doing something "in order to carry out his duties" was "simply fictitious"[201]. It was said[202]:

> "Consequently, the rational development of this area of law requires a reformulation of the principles which determine whether an injury occurring between periods of actual work is within the course of the employment so that their application will accord with the current conception of the course of employment as demonstrated by the recent cases, particularly the decisions of this Court in *Oliver* and *Danvers*."

127 Turning to undertake that "reformulation of principles", the joint reasons made two preliminary observations. The first was that "it would be an unacceptable extension of the course of employment to hold that an employee was within the course of employment whenever the employer had authorized, encouraged or permitted the employee to spend the time during an interval between periods of actual work at a particular place or in a particular way"[203]. The second was that the distinction between an injury of the kind sustained by the railway worker in *Danvers* and a non-compensable injury sustained by an ordinary employee in an overnight interval between daily periods of work lay "not so much in the employer's attitude to the way the interval between the periods of actual work was spent but in the characterization of the period or periods of work of those employees"[204]. The point was that "an injury is more readily seen as occurring in the course of employment when it has been sustained in an interval or interlude occurring within an overall period or episode of work

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200 (1992) 173 CLR 473 at 478-479.

201 (1992) 173 CLR 473 at 482.

202 (1992) 173 CLR 473 at 482.

203 (1992) 173 CLR 473 at 482.

204 (1992) 173 CLR 473 at 482.

than when it has been sustained in the interval between two discrete periods of work"[205].

128 The joint reasons continued[206]:

> "Moreover, *Oliver* and the cases which follow it show that an interval or interlude in an overall period or episode of work will ordinarily be seen as being part of the course of employment if the employer, expressly or impliedly, has induced or encouraged the employee to spend the interval or interlude at a particular place or in a particular way. Indeed, the modern cases show that, absent gross misconduct on the part of the employee, an injury occurring during such an interval or interlude will invariably result in a finding that the injury occurred in the course of employment."

129 The joint reasons then reformulated the principles to determine whether an injury occurring between periods of actual work is within the course of the employment in the following terms[207]:

> "Accordingly, it should now be accepted that an interval or interlude within an overall period or episode of work occurs within the course of employment if, expressly or impliedly, the employer has induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way. Furthermore, an injury sustained in such an interval will be within the course of employment if it occurred at that place or while the employee was engaged in that activity unless the employee was guilty of gross misconduct taking him or her outside the course of employment."

Adopting the language of Barwick CJ in *Danvers*, the joint reasons added[208]:

> "In determining whether the injury occurred in the course of employment, regard must always be had to the general nature, terms and circumstances of the employment 'and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen'".

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205 (1992) 173 CLR 473 at 483.

206 (1992) 173 CLR 473 at 484.

207 (1992) 173 CLR 473 at 484.

208 (1992) 173 CLR 473 at 484.

130 Applying those principles, the joint reasons noted with approval a concession of the employer that the worker "would have been in the course of his employment while working at the mine, travelling to and from the mine, eating and sleeping and even enjoying recreational activity at the camp" and went on to accept also the contention of the employer that "it did not follow that the [worker] was in the course of his employment 'during the *whole* of the time' that he spent in the Mt Newman area". The contention was said to be correct because the worker "would not necessarily be in the course of his employment while engaged in an activity during an interval or interlude in his overall period or episode of work if [the employer] had not expressly or impliedly induced or encouraged him to engage in that activity during that interval"[209]. The joint reasons noted in that respect the decision in *Goward v The Commonwealth*[210], which in 1957 held that there was no entitlement to compensation in circumstances where a railway worker living in a camp as an incident of his employment was struck by a train on a nearby railway line some hours after the cessation of actual work. It was said that, although *Goward* was decided before *Oliver* and *Danvers*, "it is difficult to accept that it would be decided differently today, having regard to the primary findings of fact which were made in that case"[211].

131 The significance and extent of the reformulation of principles in the joint reasons in *Hatzimanolis* was highlighted six months later in 1992 in two cases decided by the Court of Appeal of the Supreme Court of New South Wales, each upholding a finding of injury in the course of employment. In one case, the employee was temporarily resident at a caravan park while attending a practical training course organised by his employer, when he was shot by a stranger while participating in an evening of social activity in another caravan within the park[212]. In the other case, the male employee was sleeping in the bed of a female employee in lodgings provided by the employer at a shearer's camp when he was shot by a deranged fellow employee[213]. In each case the employee was found to have sustained his injury while "at a particular place", namely the park or the camp, where he had been induced or encouraged by his employer to be and while engaged in an activity which involved no misconduct.

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209 (1992) 173 CLR 473 at 485.

210 (1957) 97 CLR 355; [1957] HCA 60.

211 (1992) 173 CLR 473 at 485.

212 *Inverell Shire Council v Lewis* (1992) 8 NSWCCR 562.

213 *McCurry v Lamb* (1992) 8 NSWCCR 556.

132 In neither case could it be said, without extreme artificiality, that the particular activity in which the employee was engaged at the precise time of the injury was either undertaken "in order to carry out his duties" or in any way "induced or encouraged" by his employer. Handley JA recorded that the result in each case "may seem to some anomalous or even bizarre" but was "nevertheless compelled" by *Hatzimanolis*[214].

133 Noting the reference in *Hatzimanolis* to *Goward*, and distinguishing the outcome in *Goward* from the outcome in *Danvers*, Handley JA usefully explained in the first case[215]:

> "The worker in *Danvers* died when a fire broke out in the van in which he was sleeping in a remote camp provided by the employer. The injury occurred in 'the particular place' where the worker had been encouraged to sleep close to his work. In *Goward* on the other hand the worker was killed when he was struck by a train near his camp. He was not at the camp itself, this being 'the particular place' where his employer, the Postmaster General's Department, had encouraged him to reside while he worked as a member of a linesmen's gang in a remote location in Western Queensland. Moreover the employer had not encouraged the deceased worker to undertake 'the particular activity' outside the camp in which he was engaged when he was killed. These facts no doubt explain why the case would be decided the same way today although the dependents' appeal in that case was only supported on the basis that the death of the deceased arose *out of* his employment."

134 Two other cases, decided by the Federal Court in 1994 and 1995, also illustrate the significance and extent of the change wrought by *Hatzimanolis*.

135 In the first case[216], the Full Court (Lockhart, Hill and Whitlam JJ) upheld the conclusion of the Administrative Appeals Tribunal that an employee sustained an injury in the course of employment when she slipped in the shower in a hotel she had booked when required for the purposes of her work to travel to a country town where she had to stay overnight. Acknowledging that there might be activities in which an employee might engage during an overnight stay (such as attending a club) that might break the nexus with employment, Lockhart J

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214 (1992) 8 NSWCCR 562 at 567; (1992) 8 NSWCCR 556 at 559-560.

215 (1992) 8 NSWCCR 562 at 566-567.

216 *Comcare v McCallum* (1994) 49 FCR 199.

emphasised the artificiality of fragmenting the overall time the employee spent at the town into discrete episodes. He said[217]:

> "The old cases are replete with the making of fine distinctions about such matters as this; but the High Court has established the present law authoritatively in *Hatzimanolis.* The only sensible and realistic conclusion to draw on the facts of this case is that the injury was sustained by the [employee] in an interval or interlude during an overall period or episode of work which was part of the course of her employment."

136 In the second case[218], Tamberlin J held it not open to the Administrative Appeals Tribunal to conclude that an employee who was required to be away from his normal place of residence for the purposes of his work was not in the course of his employment when assaulted by strangers in a car park while returning to the hotel in which he had chosen to stay from another hotel to which he had gone to have "a few beers and watch the dogs on Sky channel". Rejecting the Tribunal's characterisation of the employee as having been at the time of the assault "on a frolic of [his] own", Tamberlin J said that the *Hatzimanolis* principles "should be applied in a commonsense and practical manner to accord with the realities of human behaviour"[219].

Nature

137 Before turning to the content of the principles as reformulated in *Hatzimanolis*, it is desirable to say something of their nature.

138 The statutory reference to a physical or mental injury "in the course of ... the employee's employment" is to a statutory standard or criterion. The application of that statutory standard or criterion to the facts of a particular case involves in every case the making of an evaluative judgment. Professor Zines has explained[220]:

> "Any standard or criterion will have a penumbra of uncertainty under which the deciding authority will have room to manoeuvre – an area of choice and of discretion; an area where some aspect of policy will inevitably intrude. The degree of vagueness or discretion will be affected

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217 (1994) 49 FCR 199 at 204.

218 *Kennedy v Telstra Corporation* (1995) 61 FCR 160.

219 (1995) 61 FCR 160 at 169.

220 Zines, *The High Court and the Constitution*, 4th ed (1997) at 195, quoted in *Thomas v Mowbray* (2007) 233 CLR 307 at 351 [91]; [2007] HCA 33.

> by what is conceived to be the object of the law and by judicial techniques and precedents. Given a broad standard, the technique of judicial interpretation is to give it content and more detailed meaning on a case to case basis. Rules and principles emerge which guide or direct courts in the application of the standard."

139 Appellate courts have a particular responsibility for the emergence of such rules and principles. The role of an appellate court in providing guidance as to the making of an evaluative judgment in the application of a statutory standard or criterion is no different in principle from the role of an appellate court in providing guidance as to the exercise of a judicial discretion. Of the latter, it has been observed[221]:

> "The authority of an appellate court to give guidance is not to be doubted. It is inevitable that the wisdom gained in continually supervising the exercise of a statutory discretion will find expression in judicial guidelines. That is not to invest an appellate court with legislative power but rather to acknowledge that, in the way of the common law, a principle which can be seen to be common to a particular class of case will ultimately find judicial expression. The orderly administration of justice requires that decisions should be consistent one with another and decision-making should not be open to the reproach that it is adventitious."

While a rule or principle developed by an appellate court to guide the exercise of a statutory discretion does not itself have the force of law, "[t]here may well be situations in which an appellate court will be justified in setting aside a discretionary order if the primary judge, without sufficient grounds, has failed to apply a guideline in a particular case" and "[w]here there is nothing to mark the instant case as different from the generality of cases, the failure will suggest that the discretion has not been soundly exercised"[222].

140 Whatever its form, however, a rule or principle formulated by an appellate court through the accumulation of judicial experience is inherently provisional. The rule or principle is always able to be revised, in light of further accumulation of judicial experience, in accordance with rules of precedent applicable within the judicial hierarchy.

141 The *Henderson-Speechley* test was an attempt to expound, at the ultimate appellate level, a principle capable of guiding the making of the necessary evaluative judgment across a spectrum of cases in which the statutory standard or criterion might fall to be applied. The principles as reformulated in

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221 *Norbis v Norbis* (1986) 161 CLR 513 at 536; [1986] HCA 17.

222 (1986) 161 CLR 513 at 537.

Hatzimanolis, in the light of the further accumulation of judicial experience, although more modest in their ambition, are principles of essentially the same nature.

142 Appeal or review of the application of a statutory standard or criterion to the facts of a particular case in the context of workers compensation legislation is now, and almost always has been, limited to appeal or review on a question of law. Whether a particular evaluative judgment is reasonably open on the facts of a particular case is a question of law[223]. So too is whether a particular evaluative judgment has been reached by a legally permissible process of reasoning[224].

143 For so long as the principles as reformulated in *Hatzimanolis* stand unrevised by the High Court, a court or tribunal seeking to apply the statutory standard or criterion will err in law if it adopts a process of reasoning which departs from those principles or if it makes an evaluative judgment which is not reasonably open on the application of those principles to the facts of the particular case.

Content

144 The premise of the principles as reformulated in *Hatzimanolis* is that the question whether an injury is "in the course of" an employee's employment is always a question of the characterisation of the period of time during which the injury occurs. That must be so, given that the cause of the injury is wholly irrelevant.

145 The principles do not deny the relevance to that ultimate question of characterisation of considerations of time, place, circumstance, practice and conditions of employment as identified by Dixon J in *Whittingham.* They do not deny the utility of the *Henderson-Speechley* test, if applied practically and liberally and if used as a criterion of inclusion. They reject that test as expressing a single, all-embracing criterion of liability and they are not framed to express a single, all-embracing criterion of liability in its place.

146 The principles as reformulated in *Hatzimanolis* rather set out a framework for analysis by which considerations of time, place, circumstance, practice and conditions of employment are to be assessed as sufficient to provide an

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223 *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 450 [24]; [2001] HCA 12, citing *Australian Gas Light Co v The Valuer-General* (1940) 40 SR (NSW) 126 at 138.

224 *Sharp Corporation of Australia Pty Ltd v Collector of Customs* (1995) 59 FCR 6 at 12.

affirmative answer to the ultimate question of characterisation in a category of case where an injury occurs in an interval or interlude between periods of work.

147 It is critical to recognise that the analysis proceeds in two stages. As succinctly stated in the joint reasons for judgment of four members of the Court of Appeal of the Supreme Court of New South Wales (Allsop P, Beazley and McColl JJA and Handley AJA) in 2009 in *Watson v Qantas Airways Ltd*[225], the "reformulation requires at the outset the process of characterisation of the period or periods of work to ascertain whether there is one overall period or episode of work or discrete periods of work"[226]. That is to say, it is "crucial first to characterise the period or periods of work, before focussing on how the interval between actual performance of work [is] spent"[227].

148 Where the correct characterisation at that first stage of the analysis is that there is one overall period or episode of work, the *Hatzimanolis* principles postulate at a second stage of analysis that it is sufficient to characterise an injury in an interval or interlude within that overall period or episode of work as occurring in the course of employment if either one of two further conditions is satisfied. The first is that the employee is, during that interval or interlude, at a particular place, at which the employer has expressly or impliedly induced or encouraged the employee to be. The second is that the employee is, during that interval or interlude, undertaking a particular activity, which the employer has expressly or impliedly induced or encouraged the employee to undertake. The exception, having the potential in some cases to interrupt the course of employment, is where the employee is engaged at the time of the injury in gross misconduct.

149 It is also critical to recognise that the reformulation postulates no more than a test of sufficiency applicable to a limited category of case. There will inevitably be cases the facts of which do not fit squarely within the *Hatzimanolis* analytical framework and in which further analysis will therefore be required[228]. That does not detract from the appropriateness of, and, for so long as they stand, necessity for applying, the *Hatzimanolis* principles as a test of sufficiency in those many cases the facts of which do fit squarely within the *Hatzimanolis* analytical framework.

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225 (2009) 75 NSWLR 539.

226 (2009) 75 NSWLR 539 at 548 [38].

227 (2009) 75 NSWLR 539 at 546 [30].

228 See eg *Comcare v Mather* (1995) 56 FCR 456; *WorkCover Authority (NSW) v Walling* (1998) 16 NSWCCR 527.

150 Consistent with the *Hatzimanolis* principles, an injury that an employee sustains at a place where an employer has induced or encouraged the employee to be during an interval or interlude in an overall period or episode of work is, without more, properly to be characterised as an injury in the course of the employee's employment, unless the employee is engaged at the time of the injury in gross misconduct. It is not necessary that the employee, during that interval or interlude, also be undertaking a particular activity which the employer has expressly or impliedly induced or encouraged the employee to undertake. Nor, absent gross misconduct, is any inquiry into particular private activity of the employee relevant.

151 The approach reflected in the *Hatzimanolis* principles accords with a contemporary understanding of the employment relationship, which respects the privacy and autonomy of an employee as consistent with continuation of employment. Gone is the artificial fragmentation of an interval or interlude in an overall period or episode of work spent by an employee at a particular place at the inducement or encouragement of an employer into yet shorter periods of time each of which is to be further separately accounted for and discretely related to the employment relationship. Gone also is the intrusive inquiry that such artificial fragmentation entails into personal choices made by an employee, hour-by-hour or minute-by-minute, during an interval or interlude. In its place, it is sufficient for an injury sustained by an employee during an interval or interlude in an overall period or episode of work to be in the course of the employee's employment that (to adapt Lord Loreburn's language) the employee is where the employee would not be but for his or her employment, and is doing what a man or woman so employed might do without gross impropriety.

152 The central submission of Comcare in the appeal – that an injury that an employee sustains at a place an employer has induced or encouraged the employee to be during an interval or interlude in an overall period or episode of work is not compensable "unless the injury came about through the very use of the 'place' at the 'time' and for the work-related purpose that the employer encouraged or required the employee to be there" – is to be rejected. Not only is a test for compensation stated in those terms inconsistent with the *Hatzimanolis* principles; it is a return to the outmoded, artificial and intrusive form of analysis that the *Hatzimanolis* principles were formulated to overcome.

153 An example given by Comcare, of the application of the test for compensation it proposes, illustrates the fine distinctions that test would entail and in so doing highlights its flaws. According to Comcare, an employee who was required by his or her employer to stay overnight in a hotel booked and paid for by the employer would be in the course of employment if and when the employee slipped in the shower (presumably on the basis that the employer encouraged or required the employee to be clean) and also would be in the course of employment if and when the employee slipped at breakfast or dinner in the hotel restaurant (presumably on the basis that the employer encouraged or

required the employee to be fed). But, says Comcare, the employee would not be in the course of employment if and when the employee slipped in the hotel gymnasium unless the conditions of the employment were such that the employer expressly or impliedly encouraged or required the employee to be fit. Thus, the single overnight stay at the hotel would, on Comcare's mode of analysis, be broken up into a series of discrete events each to be parsed separately. The event of an employee slipping in the shower after using the hotel gymnasium would appear to be one of especial difficulty.

Application

154 In the proceeding which gave rise to the present appeal, the agreed facts before the Administrative Appeals Tribunal established that the present respondent was in 2007 instructed by her employer to work for two consecutive days away from her normal place of residence in a country town where she stayed overnight at a motel booked by the employer. She was injured in her motel room while having sex with an acquaintance when a light fitting above the bed was pulled from its mount and struck her on the nose and mouth.

155 Affirming the decision of Comcare rejecting liability for compensation, the Tribunal formulated the principle to be applied in the following terms[229]:

> "[T]he Tribunal finds that it is insufficient for the employee simply to be at a particular location during an interval or interlude in an overall period or episode of work for liability for injury to arise. The activities engaged in during that interval which led to the employee's injury must be expressly or impliedly induced or encouraged by the employer. Although the connection need not be a close one, a nexus is essential before liability will be incurred."

156 The Tribunal concluded[230]:

> "Applying these principles to the applicant, although it is conceded that the nexus should not be interpreted in any narrow fashion, the requisite connection is absent. The employer had not expressly or impliedly induced or encouraged the applicant's sexual conduct that evening. Nor did the employer know or could reasonably expect that such an activity was contemplated by her. The activity was not an ordinary incident of an overnight stay like showering, sleeping, eating, or returning

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229 *Comcare v PVYW* unreported, Administrative Appeals Tribunal, 26 November 2010 at [35].

230 *Comcare v PVYW* unreported, Administrative Appeals Tribunal, 26 November 2010 at [50].

> to the place of residence from a social occasion elsewhere in the vicinity. Rather she was involved in a recreational activity which her employer had not induced, encouraged or countenanced."

157 Setting aside the decision of the Tribunal in an appeal on a question of law, and going on to make a declaration that the injuries were suffered by the respondent in the course of her employment, Nicholas J in the Federal Court held: first that the principle formulated and applied by the Tribunal was wrong in law[231]; and secondly that the conclusion embodied in the declaration was the only conclusion open on the principles in *Hatzimanolis*[232]. The Full Court of the Federal Court (Keane CJ, Buchanan and Bromberg JJ) agreed[233]. So do I.

158 The Tribunal was wrong in law to apply, as an exclusive criterion of liability, a test which merged the two conditions identified in *Hatzimanolis* as each sufficient to conclude that an injury occurring in an interval or interlude within an overall period or episode of work is within the course of the employment. Faithful application of the *Hatzimanolis* principles could have led the Tribunal to only one result: the opposite of the result it reached.

159 The two consecutive days that the respondent was required by her employer to visit the country town were an overall period of work. The overnight stay between working hours was an interval within that overall period of work. The respondent was at a place (sufficiently identified for the purposes of the case as the motel) at which her employer had encouraged her to be. In the absence of any suggestion that she was engaged at the time of injury in misconduct, those facts were sufficient to conclude that the injury the respondent sustained during that interval, and when at that place, was sustained in the course of her employment. The particular activity in which the respondent was engaged at the time she was injured does not enter into the analysis.

Conclusion

160 The appeal should be dismissed.

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231 *PVYW v Comcare (No 2)* (2012) 291 ALR 302 at 313 [55].

232 (2012) 291 ALR 302 at 313 [55].

233 *Comcare v PVYW* (2012) 207 FCR 150.