IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S98 OF 2013**

BETWEEN: **COMCARE**
Appellant

AND: **PVYW**
Respondent

APPELLANT'S SUBMISSIONS

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PART I FORM OF SUBMISSIONS

1. This submission is in a form suitable for publication on the internet.

PART II ISSUES

2. (1) For workers' compensation purposes, and under the common form statutory language, must every injury to an employee which occurs:

   (i) during an interval or interlude within an overall period or episode of work; and

   (ii) at a place the employer has induced, encouraged or required[1] the employee to attend,

   be regarded as having been sustained 'in the course of employment' (unless the employer shows that the employee's conduct amounts to 'gross misconduct')?

   (2) If not, how is the test to be stated in a way which deals with such cases?

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. The appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth). None is required.

PART IV JUDGMENTS BELOW

Re PVYW v Comcare, Unreported, Professor RM Creyke, 26 November 2010

PVYW v Comcare (No 2) [2012] FCA 395; (2012) 220 IR 432

Comcare v PVYW [2012] FCAFC 181

PART V FACTS

4. In November 2007, PVYW (the respondent) was required by her employer (an Australian Government department) to travel to a country town in New

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[1] In the balance of these submissions, we will use the shorthand expression 'encouraged or required'.

South Wales to visit a regional office of the department, in order to observe a budget review process, undertake training and meet local staff. She stayed at a motel booked by her employer. She arranged to meet a male friend who lived in the area. After having dinner together that evening, they went to her motel room and had sex. The employee was injured whilst engaged in sexual intercourse when a glass light fitting above the bed was pulled from its mount by one of the two persons in the room and struck the employee on the nose and mouth, causing injuries to her nose and mouth and a subsequent psychological injury. The employee had not advised her employer how she intended to spend her time whilst at the motel or town, or who, if anyone, she would be associating with while staying there.[2]

5. The claim was to be assessed against common form statutory language, the precise form of which is set out in Section VII below.

6. The respondent's claim for compensation was made and maintained on the basis that her injury arose 'in the course of [her] employment'. She did not assert at any stage that her injury arose 'out of [her] employment'.

PART VI ARGUMENT

Some initial observations on the statutory language

7. The deceptively simple statutory language, which must be made to serve a variety of factual cases, has three elements to note at the outset, before coming to the decision below and the key authorities.

8. The first is that the compensation is payable for an *injury suffered* by an employee. The tribunal of fact must be directed to what it is that the employee claims to have suffered. The description of injury must be adequate to enable the statutory question to be answered. In the present case, the injury suffered can be described as 'physical damage to nose and mouth (from being hit with a light during an episode of sex with a partner in a motel room), and a subsequent psychological injury which arose from that primary injury having occurred'.[3]

9. Second, the suffering of injury must have some connection (exactly what connection to be discussed next) with the *employment* of the employee by the employer. This necessarily means that there must be some identification of the nature and conditions (including duties) of the employment which might be relevant in the connecting sense to the suffering of the injury. In the present case, the relevant conditions/duties might be described as 'attending the regional office of the department, entailing an overnight stay'. The

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2 *Comcare v PVYW* [2012] FCAFC 181 at [3] and *Re PVYW v Comcare*, Unreported, Professor RM Creyke, 26 November 2010 at [9]-[15].

3 The respondent accepted that if the physical injury did not occur in the course of employment, the subsequent psychological injury was not compensable.

overnight stay was necessitated by the need to perform a day of work at the regional office, but it did not constitute work itself.

10. Third, the *connection* between the suffering of the injury and the employment can be either (or both) of the injury arising '*out of* employment', or the injury arising '*in the course of* employment'. Read literally, and as interpreted in the Australian cases,[4] these limbs are disjunctive, although they will often overlap on the facts of a given case. There has also been a long-standing view in the Australian and United Kingdom cases that the former requires a *causal* connection whereas the latter requires a *temporal* connection.[5] In the present case, the issue comes down to how a tribunal of fact was required to approach the body of agreed evidence in determining whether the connection between the sex-related physical injury and the employment as identified above was sufficient for the injury to be suffered 'in the course of' (that is, relevantly temporally connected to) that employment.[6]

The Full Court's decision

11. The Full Court concluded that, absent the disqualifying conduct set out in ss 14(2) and (3) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth), the fact that the respondent's physical injuries were sustained at a 'time' which was an interval in an overall period of work (at [7]-[8]), and at a particular 'place', namely in a motel room booked for her by her employer, compelled the conclusion that her injuries were suffered 'in the course of employment' (at [45] and [51]-[52]).

12. The Full Court added that, absent disqualifying conduct, the attitude/expectations of an employer about an employee's (lawful) activities at the time of injury are irrelevant, whether or not those views (if sought) reflect disapproval or indifference (at [54]).

13. On this approach, the tribunal of fact was neither required nor permitted to consider any other aspect of the facts bearing on the connection between the suffering of the injury and the duties of the employment. The nature of what the respondent was doing when the injury was suffered, and its bearing on the duties of her employment, was legally irrelevant once 'time' and 'place' were satisfied.

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4 See, for example, *Pearson v The Fremantle Harbour Trust* (1929) 42 CLR 320; *Kavanagh v Commonwealth* (1960) 103 CLR 547 at 556, 558 and 572ff; *Zickar v MGH Plastic Industries Pty Limited* (1996) 187 CLR 310 at 316; *Kennedy Cleaning Services Pty Limited v Petkoska* (2000) 200 CLR 286 at 294 and 306-307.

5 See, for example, *Henderson v Commissioner of Railways (Western Australia)* (1937) 58 CLR 281 at 293; *Goward v Commonwealth* (1957) 97 CLR 355 at 364; *Kavanagh* at 556, 558, 570 572ff; *Commonwealth v Oliver* (1962) 107 CLR 353 at 355, 359, 362; *Bill Williams Pty Ltd v Williams* (1972) 126 CLR 146; *Commonwealth v Lyon* (1979) 24 ALR 300 at 303-304; *Kennedy v Telstra Corporation* (1995) 61 FCR 160 at [17]-[18]; *Telstra Corporation Ltd v Bowden* (2012) 206 FCR 207 at 213; *Scharrer v The Redrock Co Pty Ltd* [2010] NSWCA 365 at [44]; *Fitzgerald v W G Clarke and Son* (1908) 2 KB 796 at 799; *Dover Navigation Ltd v Craig* [1940] AC 190 at 199.

6 As noted in footnote 3 above, the respondent accepted that if the physical injury did not arise in the course of employment, the subsequent psychological injury was not compensable.

14. Further, on this approach, the respondent could have suffered any form of sex-related injury, or indeed any form of injury at all, and still received compensation, provided only that the injury occurred while she was in the motel room, and absent disqualifying conduct.

15. The Full Court considered that its conclusions were compelled by the earlier decision of this Court in *Hatzimanolis v ANI Corporation Limited* (1992) 173 CLR 473, especially at 484.3.

16. Before turning to the errors in the Full Court's judgment, it is necessary to identify precisely the problem which the High Court in *Hatzimanolis* considered needed addressing so as to understand what the Court meant by the new 'organising principle' which it stated in that case.

The ratio of *Hatzimanolis*

17. In *Hatzimanolis*, the plurality started at 478.3 with the observation that 'the course of employment' is not identical with the period of employment or with the work that the person performs. The judgment thereafter grapples with how to identify when it is that an injury suffered by the employee at a time outside the ordinary hours of work – in an 'interval' or 'interlude' from work – should nevertheless be treated as being 'in the course of employment'.

18. The judgment continued at 478 by expressing some difficulty with the expression of the test by Dixon J in *Whittingham v Commissioner of Railways (WA)* (1931) 46 CLR 22 as covering accidents which happen 'while the employee is doing something which is part of or is incidental to his service', in turn inviting an examination into a variety of considerations of 'time, place, practice and circumstances as well as the conditions of employment'.

19. The view was expressed that 'incidence of service' is more a conclusion than a principle capable of being applied by a tribunal of fact, and while the factual matters referred to by Dixon J were all relevant, what was needed (see 479.1) was to identify an 'organising principle' by which a tribunal of fact could determine whether, in an interval case, the connection between an employee's employment and what he or she was doing at the time of injury was sufficient to satisfy the statutory expression 'in the course of employment'.

20. The plurality then (at 479) referred to the test which had been stated later by Dixon J in *Henderson v Commissioner of Railways (WA)* (1937) 58 CLR 281 and *Humphrey Earl Ltd v Speechley* (1951) 84 CLR 126 to deal with injuries occurring during intervals between work: whether the employee was doing something which he was reasonably required, expected or authorised to do 'in order to carry out his actual duties'. The plurality observed that this test had worked in practice, even as the cases had displayed increasing 'flexibility', but only by giving a 'strained' or even 'fictitious' (482.5) interpretation of the words 'in order to carry out his actual duties'.

21. Whether these criticisms of the tests formulated by Dixon J were justified or necessary may be doubted. The tests had the benefit of requiring close attention, on the facts of each case, to the three aspects of the statutory language adverted to above at [7]-[10]: the suffering of the injury; the duties, conditions and scope of the employment; and the nature of the connection between the injury and the employment. The tests also adequately captured the results in the cases.

22. But whether that be so, what is critical is that, when the plurality then moved to consider the 'modern' cases, primarily *Commonwealth v Oliver* (1962) 107 CLR 353, *Danvers v Commissioner for Railways* (NSW) (1969) 122 CLR 529, and the decision of Deane J in *Commonwealth v Lyon* (1979) 24 ALR 300, the goal was to identify an 'organising' or 'rational' principle which accommodated the results in those cases; the stated goal was *not* to expand the scope of liability to compensation beyond the results reached in those cases.

23. This is seen clearly at 482.5:

> ... 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*.** (Emphasis added.)

24. In each of *Oliver* and *Danvers*, the injury occurred outside the ordinary hours of work: in *Oliver,* while playing cricket at lunchtime on the employer's premises; in *Danvers,* while sleeping at night in an employer-provided van which could be moved between the remote work-sites nominated by the employer. In each case, the employee was not carrying out his actual work duties at the time of injury.

25. However, what rendered each injury 'in the course of employment', reasoned the plurality, were two features.

26. First, the injury occurred at a time which could be characterised as an interval or interlude within an overall period or episode of work (483). *Oliver*, the lunchtime injury, illustrates the case where the worker performs the work during appointed hours at a permanent location, and lunch or tea breaks within the day's work form an interval within an overall work period. *Danvers,* the death at night in the van, illustrates the case where the employee is required to engage in an undertaking which takes him or her away from home and the usual 'place' of work, and where any overnight stay forms an interval within an overall work period.

27. An injury occurring during such an interval in an overall work period is 'more readily' seen to occur 'in the course of employment' than if it simply occurs between two periods of work (483.9), although not necessarily so.

28. At this point, we pause to observe that, with changes in work practices over the last 20 years, the concept of an injury occurring within an interval in an overall work period will not be useful in all cases. How does it accommodate the worker who works 3 days a week, 2 in the office and 1 at home? How does it accommodate the worker who regularly checks work emails at home at night or in a cafe?

29. These questions do not need to be resolved in the present case because, on the facts, it fits into a more traditional *Danvers*-type situation of an employee being required to embark upon an undertaking away from home and the usual 'place' of work; the overnight stay may be accepted to be an interval within the overall 2 day work period.

30. But the point of this caution is to illustrate that nothing the plurality said in *Hatzimanolis* can be taken as a substitute for applying the statutory language to the particular case, always having regard to the three matters identified in [7]-[10] above.

31. The second feature identified by the plurality about *Oliver* and *Danvers* was that the employer had encouraged or required the employee to spend that interval between actual periods of work at a 'particular place' or in a 'particular way' which gave rise to the injury (482.6, 484.1-5).[7]

32. This passage has given rise to a number of questions in the ensuing cases: is the test disjunctive (as the language appears) or conjunctive? How 'particular' does the encouragement or requirement have to be in each case?[8]

33. The Full Court considered that the gravamen of the appellant's case was to argue for a conjunctive reading of the passage, and that this did not match the language or the intent of the plurality: see [43]-[45] of the judgment.

34. But this is to miss a more fundamental point: even assuming the plurality in *Hatzimanolis* meant to state a disjunctive test (to which we return at [43] below), what was it intending to comprehend by 'place case', and how would it differ from an 'activity case'?

35. The answer to that can be found only by going back to *Oliver* and *Danvers* themselves, remembering always that the plurality was seeking to state a principle that embraced, but did not expand beyond, the results in those cases: see [22]-[23] above.

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7 In the balance of these submissions, we will use the shorthand terms 'place limb' and 'place case' (when referring to the High Court's use of the words 'at a particular place') and 'activity limb' and 'activity case' (when referring to the High Court's use of the words 'in a particular way').

8 See, for instance, *Inverell Shire Council v Lewis* (1992) 8 NSWCCR 562 at 556E, 570-571; *McCurry v Lamb* (1992) 8 NSWCCR 556 at 559B-E; *Comcare v McCallum* (1994) 49 FCR 199 at 204; *Comcare v Mather* (1995) 56 FCR 456 at 462-463; *Watson v Qantas Airways* (2009) 75 NSWLR 539 at 560.

36. *Oliver* was a case where the injury occurred at the 'place' of work during a lunch hour cricket match, in particular on a concrete apron in front of an aircraft hanger. Although the employer expected the employee to be at this 'place' of work at that time, Dixon CJ and Menzies J did not regard mere presence at 'place' as sufficient of itself to bring the case within the course of employment, no doubt because playing cricket is not an ordinary or incidental use of an employer's premises. The critical additional factor adverted to by Dixon CJ (at 355.4 and 358.8) was that it was a recognised practice for the employees to play cricket at that 'time' and 'place'. Menzies J also noted (at 360.3) that the playing of cricket was 'countenanced, if not encouraged, by the Commonwealth'. It was therefore the performance of 'activities' induced or encouraged by the employer, rather than the mere fact that the injury occurred at the 'place' of work, which was regarded as bringing the injury within 'the course of employment': see *Oliver* at 358.8 and 364-365, quoted with approval by the plurality in *Hatzimanolis* at 480.

37. *Oliver* thus illustrates that one cannot resort to the 'place limb' of the test in *Hatzimanolis* (if the test be disjunctive) in a case where an adequate comprehension of how the employee suffered injury requires attention beyond the mere fact of 'place' to the nature of the 'activity' being carried out by the employee at the 'place'. The employee in *Oliver* did not suffer the injury merely because he was at a 'place' he was encouraged to be at that 'time', on the concrete apron in front of the hanger; a necessary further element in the suffering of the injury was that the employee was engaging in a particular 'activity' at the 'place' – the playing of cricket. If the employer had not sanctioned the practice of playing cricket at lunchtime, mere presence at 'place' would not have brought the case within 'the course of employment'.

38. In *Danvers*, as we have seen, the employee (a railway worker) was killed when the van provided by his employer for his accommodation caught fire during the night. Again, mere presence at 'place' was not regarded as sufficient in all cases of injury, even injury suffered during an interval within an overall work period. The crucial finding in *Danvers* was that the employee was injured while using the 'place' in the very manner, and for the very purpose, intended or expected by the employer (i.e., sleeping or resting in the van).

39. Barwick CJ said (at 535.2):

> No doubt even when a workman's presence at some particular place at or in which he has no duty to perform for his employer is in the circumstances of his employment incident to that employment, **every injury sustained by him at the place will not be compensable. But in this case there is no room for any finding that the deceased at the time of the receipt of his injury was doing any particular thing which caused or contributed to that injury**. Nor could any finding of misconduct be made adversely to him or to his dependants. Thus, if **to use the van as his nightly residence** whilst working at a place whence he could not reasonably be expected to return to his home was an incident of his employment, **an injury attributable to that use and to no other activity could be regarded as occurring in the course of the employment**. As I have indicated, the evidence, in my opinion, would justify a finding that he died whilst sleeping or at least resting **which on that assumption would be a use of the van in the course of the employment**. Thus, if it be right to conclude that

> the course of his employment extended to the use of the van as a dormitory during week nights, no further examination of the facts would be called for in this case. **His sleeping or resting in the van was part of its use as such a residence**. (Emphasis added.)

40. As is seen at 481.3 of *Hatzimanolis*, the judgment of Barwick CJ was understood as one where the employee's use of the 'place' amounted to doing something by virtue of or in pursuance of his employment, particularly if the test was applied liberally and practically and regard was had to the general nature and circumstances of the employment, and not merely to the circumstances surrounding the particular injury.

41. Windeyer J's comments in *Danvers* at 544.8 were to similar effect:

> A worker who is using a place provided for his use by his employer as an incident of his employment is ordinarily in the course of his **employment if he is using it for the purpose for which it was made available to him** and at a time when he might be expected to do so. It may be a sleeping place, a luncheon place or a shower-bath. (Emphasis added.)

42. So, the reason that *Danvers*, unlike *Oliver*, could be treated as a 'place case' is because an adequate comprehension of how the employee suffered injury could be grasped merely by knowing that the employer encouraged or required (or at least expected) the employee to be at that 'place' at that 'time' for a work-related reason (sleeping or resting there overnight so he could continue his work in the remote location the next day), and the employee was doing nothing other than making the very use of the 'place' which the employer encouraged or required (or expected) when the injury then occurred (sleeping or resting).

43. To return to the question set aside at [34], does it make sense then to speak of the test in *Hatzimanolis* being disjunctive? The reality, as Dixon J had recognised as early as *Whittingham* in 1931 (see [18] above), is that, in every case, the ultimate answer will be a question of degree in which matters of 'time, place, practice and circumstances, as well as the conditions of employment', have to be considered, and will have differing significances.

44. The only point in distinguishing 'place cases' from 'activity cases' would be to recognise that, amongst the infinite variety of differing fact situations, it will sometimes be the case (e.g., *Danvers*) that being at a 'place' for a work-related reason will have such a powerful explanatory force in understanding how the injury occurred that it may come to be the predominant factor in the exercise. But even then, it will not be the sole factor. It will only be because 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 that the temporal connection between the suffering of the injury and the employment is satisfied.

45. By contrast, it may remain useful to distinguish 'activity cases' (e.g., *Oliver)* to recognise that, often, to know the 'time' and 'place' of the suffering of the injury does not adequately comprehend how the injury was suffered. In this

type of case, 'time' and 'place' are matters of necessary background, but the key matter explaining the suffering of injury is the nature of the 'activity' carried on by the employee at that 'time' and 'place'. In such cases, the employer's encouragement or requirement must extend beyond 'time' and 'place' to the particular 'activity' for the temporal connection to be met.

46. Viewed in this fashion, the disjunctive approach could remain of assistance as a way of guiding tribunals of fact in some but not all cases, while never substituting for the statutory language and never going beyond the true limits on what is a 'place case'.

47. In some factual circumstances, it will not make sense to separate out either 'place' or 'activity' as the predominant factor in the exercise. Thus in *Lyon,* the third key case cited in *Hatzimanolis,* a Customs clerk sustained an injury playing football for the Customs team in a lunchtime match. The employer had extended its encouragement to the 'activities' of the team and had transported the players in a departmental bus to the 'place' (i.e., the Sydney Domain) where the game was played. The plurality in *Hatzimanolis* noted that each of these factors played an important part in the finding of liability.[9]

48. The critical passage of the plurality's judgment in *Hatzimanolis,* relied on by the Full Court (484.3), then reads:

> 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.

49. This passage should be read subject to the limitations we have indicated above. It was not intended to expand the law on 'place cases' beyond the actual result in *Danvers* or so as to reinterpret the reasoning in *Oliver.* It was not intended to make the employer the insurer of the employee for any and all 'activities' (falling short of disqualifying conduct) that the employee might think appropriate to engage in, merely because the site of the 'activities' was a 'place' where the employee was encouraged or required to be.

50. The Full Court has accordingly misinterpreted the key passage in the judgment.

Two further aspects of Hatzimanolis: the 'rider' and the actual decision

51. First, immediately after the key passage at 484.5, the plurality added the following statement (referred to by the Tribunal as 'the rider'):

> 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

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9 *Hatzimanolis* at 481.7.

'and **not merely** to the circumstances of the particular occasion out of which the injury to the employee has arisen' (citing *Danvers* (1969) 122 CLR, at 537). (Emphasis added.)

52. There has been debate about whether these are words of expansion or confinement: see the Full Court at [24] of the judgment. In the particular context in which Barwick CJ used them in *Danvers*, they operated to confirm his earlier conclusion that the mere proximity of the employee on the relevant night to a town where he might have gone to stay in a hotel, rather than in the employer-provided van, was 'accidental' in relation to 'the course of [his] employment' and thus did not cause his use of the employer-provided van to fall outside 'the course of employment'. On the facts, this consideration operated to confirm a more liberal result for the employee.

53. But this is not to say that Barwick CJ (or later the plurality in *Hatzimanolis*) considered that reference to the general nature, terms and circumstances of employment could *never* operate in the opposite direction; and of course the use of the expression 'not merely...' indicated that Barwick CJ (and the plurality) considered that all of the circumstances of the particular occasion also needed to be borne in mind.[10]

54. In *Danvers*, the circumstances of the particular occasion had, as we have seen, been disposed of by Barwick CJ at 535. The employee was not doing anything at the time of injury that could be said to have caused or contributed to it (other than the mere sleeping or resting that the employer expected). Being asleep or resting in the van when the fire broke out explained the suffering of injury. The question then, viewed generally, was whether being in the van was something done in pursuance of the employment relationship?

55. In a factual case unlike *Danvers* (but like the present), where the employee *was* doing something which caused or contributed to the injury, the 'rider' serves to confirm the need to identify the connection between the manner in which the injury was suffered and the employment relationship, even viewed in the general sense. Viewing the relationship in the broadest sense, and not being distracted by matters purely 'accidental' to the relationship, was having sex in the motel room something done by virtue of or in pursuance of that relationship? Or did it involve the element of 'real choice' or 'choice for other than employment reasons' that Barwick CJ adverted to a number of times as potentially taking a matter outside 'the course of employment' (*Danvers* at 535.2, 536.8, 537.2, 538.3).

56. Second, there is the debateable passage commencing at 485.2 as part of the plurality's application of its organising principle to the facts:

> Counsel for ANI conceded that 'when a person such as the appellant has been taken to a remote part of Australia and has there performed work and is housed and fed

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[10] Indeed, the approach of the Full Court is quite inconsistent with the general 'rider' in *Hatzimanolis* because the Full Court had regard only to 'place' of injury, being *one* (among others) of 'the circumstances of the particular occasion out of which the injury to the employee has arisen'.

there for the duration of the employment the course of employment will go beyond the hours at which the appellant is engaged in his actual work'. Consequently, he conceded that 'the appellant 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'. But he contended that it did not follow that the appellant was in the course of his employment 'during the *whole* of the time' that he spent in the Mt Newman area. **This contention is correct because the appellant 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.** (Emphasis added.)

57. The appellant embraces this passage as showing that mere presence at 'place' will not of itself be enough to establish liability without further enquiry. The worker at the 'time' of injury was at one of the 'places' where the employer encouraged or required him to be, at least viewed broadly. His primary 'place' of work was at the camp and mine, but because he had to go to such a remote area, the employer encouraged (and indeed invited) him to range more broadly in his free time into the surrounding Mt Newman area.

58. The evidence disclosed that supervisors of the employee had told him in advance that:

58.1. 'if (he) got the chance, (he) could visit the areas around Mount Newman and the Pilbara region of Western Australia' (at 477.4); and

58.2. 'he could take a trip to Wittenoom Gorge on a Sunday when he wasn't working' (at 477.8-478.1).

59. But it was not any injury happening in the surrounding area that would fall within 'the course of employment'; there was any number of 'activities' in which the worker might choose to engage in that area. What founded liability were the further more specific findings that the injury occurred at a 'time' when he was in a vehicle which suffered an accident on a trip to the Gorge, being a day trip and vehicle specifically organised by the worker's supervisor, acting on behalf of the employer (486).

60. So, one way of viewing *Hatzimanolis* is that the analysis resembles that in *Oliver*: while findings about an employment connection with the 'place' at which injury was suffered (the greater Mount Newman area) might be made, they did not adequately comprehend the manner of suffering of injury, and the Court needed to go on to examine the 'activity' which led to the injury and determine if the 'activity' was sufficiently employment-related.

61. Another way of viewing the facts is that the 'place' where the worker suffered the injury was in the vehicle. Being in the vehicle travelling to and from Wittenoom, as part of the visit to the town itself, was the very 'place' the employee was encouraged or required to be. The employee's attendance at the 'place' where he was injured was expressly encouraged or required by his employer. Then the analysis becomes closer to that in *Danvers*: the employer (through the supervisor) made it a work-related 'activity' to be in

that 'place' (i.e., the vehicle) at that very 'time' and it was merely being there, and not any other 'activity' of the worker, that led to the injury.

62. Yet the Full Court at [50]-[51] of the judgment has interpreted the 'place' for the purposes of the passage at 485 of *Hatzimanolis* differently. The Full Court considered that the only relevant authorised 'place' was the camp but not the greater Mount Newman area or for that matter being in the vehicle.

63. This constricted view of the 'place' has difficulties on the facts. In setting out the relevant factual background in *Hatzimanolis* (at 477), the plurality did not suggest that the employee was encouraged or required to be present at the camp but not other parts of the Mount Newman area. Nor was any other distinction drawn between the camp and the greater Mount Newman area. In fact, the contrary appears to have been the case.

64. And if being in a stationary vehicle can be being in a 'place' (as in *Danvers*), why not being in a moving one?

65. More fundamentally, the Full Court's approach shows the real difficulty in isolating out a category of 'place cases', if that carries with it the conclusion that any injury suffered at the 'place' (save for disqualifying conduct) becomes compensable, whereas every injury suffered outside the 'place' must undergo further enquiry into the nature of the 'activity' leading to the injury and its connection to the employment relationship.

66. On the Full Court's approach, lines then have to be drawn which become most artificial and productive of arbitrary differences in outcomes depending on how broadly one draws the 'place'. For example, if an employee is encouraged or required to travel interstate for work, but the choice of the employee's accommodation is left to the employee (rather than being arranged by the employer), it is not at all clear whether the employer would be considered to have encouraged or required the employee to spend the interval or interlude in any part of the relevant city or only certain parts of it, such as the hotel where the employee decided to stay.

67. Closer to the present facts, sex-related injuries in a motel booked by the employer are compensable on the 'place limb' of the test, according to the Full Court. But if the employer leaves the choice of hotel to the employee, but pays for it, is the result the same? If the employee chooses to engage in the very same sexual activity, but chooses the residence or hotel of the partner in the same town or city, is the result the same?

68. The point is not merely to multiply examples, or to suggest that line-drawing is unknown in this field of law. It is rather that 'place' cannot be made into a discrete category of compensability, if it carries with it the consequence found by the Full Court.

Disparate treatment of interval injuries and non-interval injuries

69. The approach of the Full Court means that in interval cases, mere presence at 'place' is sufficient of itself to attract liability and (absent gross misconduct or similar statutory disqualifying conduct) the circumstances surrounding an injury are irrelevant. This can be contrasted with the treatment of liability in non-interval cases (such as where an employee is injured while at the workplace and during work hours). In such cases presence at a particular 'place' may be a strong factor in favour of compensation, but will not be a sufficient factor in all cases, and the circumstances surrounding an injury will remain relevant to liability.[11] Accordingly, contrary to the finding of the Full Court at [43], the approach favoured by it actually introduces a different treatment of liability in interval cases from that which applies when an employee is at work during work hours.

70. This is starkly illustrated by *Bill Williams Pty Ltd v Williams* (1972) 126 CLR 146 where the High Court held that there had been no error in a tribunal finding that an employee, who was shot whilst fleeing from his workplace as a result of a quarrel at the workplace concerning the shooter's wife, was not injured in the course of employment. Whilst the employee was shot in the street immediately adjacent to the employer's premises, rather than on the employer's premises, all members of the Court clearly considered that it was open to the tribunal to find that the course of employment had been interrupted while the employee was still on the employer's premises (see McTiernan J at 148.7, Menzies J at 151.8-152.3, Walsh J at 156-157, and Stephen J at 159.8). *Williams* was cited with approval by Dawson, McHugh and Gummow JJ in *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 227 (footnote 127) in support of the proposition that a claim for workers' compensation may fail on the basis of an interruption in the course of employment. The Full Court's approach sits uncomfortably with this proposition: it would mean that, in non-interval cases, a quarrel at the workplace concerning another person's spouse (or, indeed, sexual activity in the workplace) could interrupt the course of employment, but a quarrel (or sexual activity) in a hotel during a work trip could not.

71. It is also instructive here to refer to *Kavanagh v Commonwealth* (1960) 103 CLR 547 where, in a case of an injury at work, strong differences of opinion were expressed between the majority and the minority. The majority held that injury suffered through a sudden episode of vomiting at work leading to a ruptured oesophagus arose 'in the course of employment', without need to establish that any circumstance of the employee's 'place' of work or his work was a necessary condition of the vomiting episode. It was enough that the injury happened while the worker was doing something in the exercise of his duties or incidental to them (at 556.6 (Dixon CJ), 559.2 (Fullagar J) and 572.3 (Menzies J)). As Menzies J further expressed it, the phrase 'in the

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[11] See, for instance, *Martin v Bailey* (2009) 26 VR 270; *McCord v Commissioner for Railways* [1943] WCR (NSW) 116; *Kerr v Department of Prisons* [1946] WCR (NSW) 81; *Walsh v NSW 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.

course of employment' can be understood as a concept of 'time measured by activity of a particular character' (at 570.9 and 575.3). By contrast, Taylor J and Windeyer J, regarded the majority's conclusion as severing any requirement for a connection between the worker and his employment, and thus wrongly converting the workers' compensation scheme into 'an incomplete and erratic form of general health, accident and life insurance' (at 586 (Windeyer J)).

72. Even accepting the majority's more liberal view of the statutory language, this was still a case where 'time' could be adequately measured by regard both to 'place' and 'activity': the worker was at the 'place' of work and doing nothing other than the ordinary things expected of him at work when the injury was suffered. *Kavanagh* does not suggest that, in cases of injury at work (or otherwise), 'time' can always be measured by 'place' alone, or by 'place' without further enquiry into what it is that the employee is doing when the injury is suffered.

Vicarious liability

73. The reliance by the Full Court on legal principles concerning vicarious liability was, with respect, misguided. Neither the quote extracted by the Full Court (at [54] of the judgment), nor the principles of vicarious liability, support the view that inducement or encouragement of an employee's actions is irrelevant. As the quote extracted by the Full Court makes clear, what constitutes 'the course of employment' for the purposes of vicarious liability requires a multi-faceted enquiry and 'not everything that an employee does at work, or during work hours, is sufficiently connected with the duties and responsibilities of the employee to be regarded as within the scope of the employment'.

74. Accordingly, even to the extent that the scope of vicarious liability may be relevant for present purposes,[12] it does not support the notion that mere presence at 'place' is sufficient.

Consistency with the causal limb

75. The Full Court's isolation within the temporal limb of a special category of 'place cases' tends to undermine the separate role for the causal limb ('arising out of').

76. There may be many factual cases where the injury occurs while the employee is at a 'place' in which he or she is encouraged or required to be in an interval in work, but where it is some particular 'activity' which the

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[12] There is real doubt that it is. For example, in *Kavanagh*, Dixon CJ stated (at 556-557) that 'the question whether an injury is suffered in the course of the employment can hardly be governed by the same considerations as the question whether one has been inflicted in the course of employment' and in *Hatzimanolis*, Toohey J said (at 488.5) 'That is not to say that the learning of vicarious liability in the law of torts should be imported into workers' compensation law; there is good reason why that should not be done'.

employee has chosen to carry on which is relevant in understanding the suffering of injury.

77. On the Full Court's approach, the temporal limb is satisfied without more (absent disqualifying conduct), leaving no work for the causal limb to do.

78. On the appellant's approach, there are two further, potentially overlapping but nevertheless conceptually discrete, enquiries before compensation is payable: (under the causal limb) was the suffering of injury something which causally arose out of the employment relationship intended to be furthered by the employee being at that 'place'? And/or (under the temporal limb) was the suffering of injury something which had a sufficient temporal connection with the employment relationship intended to be furthered by the employee being at that 'place'? In each case the enquiry starts with a full appreciation of how the injury was suffered at the 'place'.

79. The Full Court's approach artificially constricts the enquiry into the suffering of injury and thereby collapses into a single enquiry into 'place' the discrete (although not mutually exclusive) causal and temporal enquiries identified under the statute.

Authority below High Court level in relation to interval cases

80. Three key propositions emerge from the cases listed below. First, judges have expressed caution, or dissatisfaction, with any view of the temporal limb which requires mere presence at 'place', without more, to found compensation.[13]

81. Second, in most cases under the temporal limb, there have been findings sufficient to attract the 'activity limb' of the test in *Hatzimanolis*, such that it has not been necessary squarely to confront the proposition advanced by the Full Court that, under the 'place limb', an enquiry into what the employee was doing at the 'time' of injury is legally irrelevant (save for disqualifying conduct).[14]

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[13] See, for example, *Inverell Shire Council v Lewis* at 566E and 567D (Handley JA; Clarke JA agreeing) and 568B and 571D (Sheller JA); *McCurry v Lamb* at 559F-G and 559B-D (Handley JA; Clarke JA agreeing) and 561B (Sheller JA); *Comcare v McCallum* at 203E-204G; *Workcover Authority of NSW v Walling* [1998] 16 NSWCCR 527 at 533 [18] (referring, with apparent approval, to the observations of Sheller JA in *Inverell*); *Kennedy v Telstra Corporation* (1995) 61 FCR 160 at 167G-168A (again referring, with apparent approval, to the observations of Sheller JA in *Inverell*); *McMahon v Lagana & Anor* [2004] NSWCA 164 at [38]; and *Watson v Qantas Airways* at [29] (Allsop P, Beazley JA, McColl JA and Handley AJA) and [80], [82] and [93]-[94] (Basten JA). Further, even though the Full Court suggested that its approach to *Hatzimanolis* was exactly the same as that of the primary judge (see [28]-[29] and [56]), this was not the case. Paragraphs [38]-[42] of Nicholas J's judgment suggest that, unlike the Full Court, his Honour did not regard the mere fact that the respondent's employer had encouraged or required her to spend the night in the hotel was sufficient to ensure that any injuries she suffered there were compensable.

[14] *Walling* is the only case among those cited in footnote 13 where (arguably) there were not findings sufficient to attract the 'activity limb'.

82. Third, in *Comcare v Mather and Anor* (1995) 56 FCR 456, Kiefel J grappled with issues close to those raised presently and, after referring to the earlier decision of Lockhart J in *Comcare v McCallum* (1994) 49 FCR 199, stated (at 462):

> [Lockhart J] did observe (at 204) that injury occurring whilst she had chosen to attend a cinema or club that evening may not have the necessary connection with her employment. **That may be so, it seems to me, because the activity may fall outside the ambit of what was involved in the employer's requirement for an overnight stay.** (Emphasis added.)

10 83. The appellant embraces this passage as emphasising the central need to focus on exactly how the suffering of injury occurred and its connection to the employer's requirement for an overnight stay. To focus solely on a 'place' without attending to the use being made of the 'place' is in error.

The position overseas

84. The overseas jurisdictions with similarly worded statutes are the UK, Canada and the United States. Often, the statutory language remains in the original UK formulation, where the language was conjunctive (i.e., 'arising out of **and** in the course of employment'). Nevertheless, the distinction between a causal limb and a temporal limb has been identified and remains in the
20 authorities.

85. Under the temporal limb, the focus has been on an enquiry into 'time', 'place' and 'activity'. The focus remains – consistently with the earlier UK authorities, and the position in the Australian authorities prior to *Hatzimanolis* – on asking whether the injury occurred at a 'time' when it could be said that the worker was either carrying out the duties of employment or doing something which was an incident of employment.[15]

86. Importantly for present purposes, where the injury arises squarely in an interval between work periods, there has been no adoption overseas of the

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[15] In the UK, see, for example, *Fitzgerald v W G Clarke and Son* (1908) 2 KB 796 at 799 (where Buckley LJ said '[t]he words "out of" point, I think, to the origin or cause of the accident; the words "in the course of" to the **time, place, and circumstances** under which the accident takes place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place.') (emphasis added); *Davidson v M'Robb* [1918] AC 304; *Armstrong v Redford* [1920] AC 757; *St. Helens Colliery Company Limited v Hewitson* [1924] AC 59; *Smith v Stages* [1989] AC 928; Douglas Brodie, 'Away Days and Employers' Liability: Reynolds and Strutt and Parker' (2012) 41(1) *Industrial Law Journal* 93. In Canada, see, for example, *VSL Canada Ltd v Workplace Health, Safety and Compensation Commission and Duguay et al* (2011) NBCA 76 at [6],[22]; *Workmen's Compensation Board* v *Boissonneault* [1977] NBJ No 182, 18 NBR (2d) 621 at 625-626. In the US, see, for example, Westlaw International, *American Jurisprudence* (2nd ed) (updated May 2013) 82 Workers' Compensation, XI.B.1.b. 'Tests as to whether accident or injury arose in the course or in the scope of employment' at [245]; *Hubert L Gagne v Ruth and James Oreck d.b.a The Flame, et al* 122 N W 2d 589 (where the Minnesota Supreme Court ruled that, if the employee was 'in pursuit of amour his mission was personal', and that the relevant workers' compensation legislation was not intended 'to insure against the consequences of such ventures').

notion that mere presence at 'place', without any further enquiry into what the employee was doing at the 'place', is sufficient to satisfy the temporal limb.[16]

The appropriate test for compensation for injuries outside the ordinary work period

87. Drawing together the threads of the above argument, the appellant offers the following observations at a level of principle, where the injury occurs outside the ordinary work period.

88. First, the statutory language must always be the beginning and end point.

89. Second, that language always requires attention to the three matters identified in [7]-[10] above: the suffering of injury; the nature, conditions and scope of the employment; and the causal or temporal connection between the injury and employment.

90. Third, the question of applying the statutory language to the facts will usually be one of degree.

91. Fourth, the statutory question cannot be answered without an adequate description of the suffering of injury. There can be no short-cuts here. An injury always occurs by reason of something (external or internal) happening to someone at some 'time' and 'place'. This is true for both the causal and temporal limb.

92. Turning specifically to the temporal limb in the following points, fifth, factors of 'time, place, practice and circumstances, as well as the conditions of employment' (see again [18] above), have to be considered, and their weights in each case will usually vary.

93. Sixth, depending on the nature of the employment, in many but not all cases it will remain useful, as an informing step, to characterise whether the injury occurred during an interval within an overall work period or in an interval between two separate work periods – the former being more likely, but not necessarily so, to satisfy the temporal connection.

94. Seventh, in many cases, it also remains useful as an analytical tool to distinguish 'place cases' from 'activity cases', but only if the true limitations on a 'place case' are recognised – the 'place' category encompasses the case where the employee is required or encouraged by the employer to be at a particular 'place' at a particular 'time' for an employment-related purpose and an injury occurs while an employee is using the 'place' for that very purpose.

95. Eighth, the fact that an employee is present at 'place' will ordinarily be a very relevant – often a decisive – factor. But when workers' compensation liability depends on 'the course of employment', the need for a relevant temporal

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[16] See, for example, *Faulkner v Chief Adjudication Officer* [1994] PIQR P244.

connection must still be satisfied. The employment relationship must subsist, and the injury must be sustained 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' (see again [82] above).

96. Ninth, if being at the 'place' is within 'the course of employment', there will be some incidental uses of the 'place' which are so necessary or reasonably to be expected (such as eating, sleeping and attending to one's personal hygiene) that they fall within the use of the 'place' for the employment purpose and within the employment relationship.

97. Tenth, that will leave a range of 'activities' in which the employee may or may not choose to engage at the 'place' or by reason of being at the 'place' which are none of the employer's business, and represent the carrying on of the separate, private life of the employee (pursuing his or her own endeavours and aspirations as an autonomous person). In such cases, presence at 'place' is no more than a mere background fact or condition against which the employee makes a wholly private choice to engage in an 'activity' which falls outside the ambit of the employer's requirement that the employee be away from the usual 'place' of work. Such choices will carry their own benefits, risks and consequences which the employer is not required to be an insurer against.

Application to the present case

98. It was open to the tribunal of fact to find that the respondent's injury arose out of her choice to engage in an 'activity' which carried its own benefits, risks and consequences and was outside the ambit of her employer's requirement for an overnight stay.

99. The respondent apparently accepts that she could not have sought compensation for the same injury arising out of the same choice if the sex had occurred in the lodgings of her sexual partner, or some other chosen 'place' in the regional town. That she chose to use the hotel room her employer had provided as the setting, rather than some other 'place', does not bring her injury within the temporal rubric of employment.

100. 'Time', for the purposes of the 'in the course of employment' limb, is to be measured with due regard both to 'place' and 'activity' as they present on the given facts. The critical question is whether it could sensibly be said that at the 'time' of the injury, having regard both to 'place' and 'activity', the respondent was doing something in pursuance of the employment relationship or incidental thereto. That question was open to be answered in the negative by the Tribunal in this case.

101. Accordingly, on the findings of fact made by the Tribunal at [50], and by reference to the facts agreed between the parties, it was open to the Tribunal to reach the conclusion that the respondent's injuries did not occur 'in the course of employment'.

PART VII LEGISLATIVE PROVISIONS

102. The applicable statute as it existed at the relevant time is set out below. Those provisions are still in force in that form, at the date of making these submissions.

***Safety, Rehabilitation and Compensation Act 1988* (Cth)**

14 Compensation for injuries

(1) Subject to this Part, Comcare is liable to pay compensation in accordance with this Act in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment.

(2) Compensation is not payable in respect of an injury that is intentionally self-inflicted.

(3) Compensation is not payable in respect of an injury that is caused by the serious and wilful misconduct of the employee but is not intentionally self-inflicted, unless the injury results in death, or serious and permanent impairment.

5A Definition of *injury*

(1) In this Act:

injury means:

(a) a disease suffered by an employee; or

(b) an injury (other than a disease) suffered by an employee, that is a physical or mental injury arising out of, or in the course of, the employee's employment; or

(c) an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee's employment), that is an aggravation that arose out of, or in the course of, that employment;

but does not include a disease, injury or aggravation suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment.

PART VIII ORDERS SOUGHT

103. The following orders are sought:

103.1. The appeal be allowed.

103.2. The orders, other than the cost orders, made by the Full Court of the Federal Court on 13 December 2012 and the Federal Court on 19 April 2012 be set aside.

103.3. The respondent's appeal to the Federal Court from the decision of the Tribunal given on 26 November 2010 be dismissed, save in respect of costs.

103.4. The appellant pay its own costs and the respondent's costs of this appeal.

PART IX ESTIMATED HOURS

104. It is estimated that 2 hours will be required for the presentation of the oral argument of the appellant.

Date of filing: 14 June 2013

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Andrew Berger

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