Identifying Injury in “The Course of Employment” Where a Worker is Not Actually Performing Work at the Time of Injury

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The original purpose of this paper was to review recent Court of Appeal decisions relating to when a worker is “in the course of employment” within the meaning of s.4 of the Workers Compensation Act 1987 and the relationship between that concept and s.9A of the Act, particularly where at the time of injury the worker was not engaged in actual duties but was rather engaged in social or recreational activities having some association with their employment.

On 30 October 2013, however, the High Court delivered its decision in Comcare v PVYW [2013] HCA 41 in which the test regarding what constitutes the “course of employment” as established by the decision of the High Court in Hatzimanolis v ANI Corporation Limited [1992] 173 CLR 473 was revisited and refined in a way which may also have a significant impact upon the application of s.9A as it’s operation has recently been stated by the Court of Appeal.

Therefore, the focus of this paper shall now be the recent High Court decision, with some following discussion of what its effect may have been had it been decided prior to some recent Court of Appeal decisions.

In relation to personal injury, s.4 of the 1987 Act provides that in order to be compensable an injury must arise out of or in the course of employment. The “course of employment” involves a temporal relationship between work and injury, while “arising out of” employment connotes a causal connection. A causal connection must also be established under s.9A, which requires that employment be a substantial contributing factor to the injury.

The courts have long struggled with the question of when a worker might be regarded as having suffered injury in the course of employment where injury has been suffered while the worker is not actually performing duties, may have been on an interval between the performance of duties and may not have suffered injury on the premises of the employer and/or at the place of employment. The cases have often involved issues of fact, circumstance and degree and the precise line of demarcation between an injury which is and is not suffered in the course of employment has often not been clear.

For many years the accepted test was that set out by Dixon J of the High Court in Humphrey Earl Limited v Speechley [1951] 84 CLR 126, namely that an injury would be regarded as having been suffered in the course of employment where the worker was doing something which he was “reasonably required, expected or authorised to do in order to carry out his duties”. Subsequent cases, which to some extent reflected changing community attitudes, led to the words “in order to carry out his duties” being applied in a broad and somewhat fictitious manner.

The issue was revisited by the High Court in Hatzimanolis, a case involving a worker who suffered injury during a sightseeing journey on his day off while working in a remote area of WA and living in a camp provided by the employer. Significantly, the employer had arranged the sightseeing trip in order to alleviate the tedium of working in a remote area and thereby improving the morale of the employees by making working conditions more attractive.

After reviewing the leading cases prior to and after Speechley and noting that the test had led to anomalous results reflecting changing attitudes over time, the majority of High Court Judges said the following (at paras.13-16):

“The Speechley test has proved to be in the law of workers compensation, 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. ... 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 employment so that their application will accord with the current conception of the course of employment as demonstrated by the recent cases ... A striking feature of the recent cases which have held that an injury occurring in an interval between periods of actual work was within the course of employment is that in almost all of them the employer has authorised, encouraged or permitted the employee to spend his time during that interval at a particular place or in a particular way. However, 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 the time during an interval between periods of actual work at a particular place or in a particular way. That formulation would cover not only the cases of the “lunchtime” injury ... but also many cases involving injuries occurring during intervals between daily periods of work which could not fairly be regarded as within the course of employment. ... For the purposes of workers compensation law, an injury is more readily seen as occurring in the course of employment when it has been sustained in an interval or interlude occurring in the course of employment whenever the employer had authorised, encouraged or permitted the employee to spend his time during that interval at a particular place or in a particular way. That formulation would cover not only the cases of the “lunchtime” injury ... but also many cases involving injuries occurring during intervals between daily periods of work which could not fairly be regarded as within the course of employment. ... For the purposes of workers compensation law, an injury is more readily seen as occurring in the course of employment when it has been sustained in an interval or interlude occurring during an overall period or episode of work than when it has been sustained in the interval between two discrete periods of work. A tea break or lunch break within such a period occurs as an
interlude or interval within an overall work period. Something done during such a break is more readily seen as done in the course of employment than something that is done after a daily period of work has been completed and the employee has returned to his or her home. ... 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. ... 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”.

In short, the test was whether, at least during an interval or interlude within an overall period or episode of work (such as a lunch break), the employer has expressly or impliedly induced or encouraged the worker to spend that time in a particular place or in a particular way. The only limit placed upon the test was that a worker would not be in the course of employment if guilty of gross misconduct at the time of injury.

The test as formulated in Hatzimanolis has been considered and applied in numerous cases before the Commission and by the Court of Appeal in cases involving workers who suffered injury in social or recreational circumstances. The case law makes it clear that it is necessary for a worker to establish more than that the employer simply acquiesced in or approved of the activity in question and requires that in some way the employer actively induced or encouraged the participation of its employees, although it is not necessary for attendance at the place or participation in the activity to be compulsory or required by the employer. Hence, something of a grey area surrounds the extent of the employer’s involvement required to establish encouragement or inducement.

It is significant to note that Hatzimanolis has been applied in a number of cases which did not involve the worker being in a “camp” situation or in a remote location at the time of injury and, indeed, the test has been invoked in cases which did not involve an interval or interlude within an overall period or episode of work as distinct from an interval between two discrete periods of work, notwithstanding the comments in Hatzimanolis to the effect that injury is more likely to be found to have been suffered in the course of employment in the former circumstance.

PVYW was a case in which the worker had been required to visit a regional office of her employer in order to undertake various work duties and for this purpose she had stayed overnight at a motel booked and paid for by her employer. There was, therefore, no issue that she was at that particular place, namely the motel in the country town, in the course of her employment as her employer had induced or encouraged her to be there. While at the motel, however, the worker engaged in sexual activity with a male acquaintance, during the course of which one or other of the participants pulled a light fitting off the wall which fell on the worker causing her physical and psychological injury. It was accepted that in engaging in such activity the worker was behaving lawfully and was not engaged in gross misconduct. Nor was there any suggestion that the employer had forbidden her to engage in such activity, it simply being something which the employer had not had in contemplation.

The worker brought a claim for compensation which Comcare disputed on the basis that she was not in the course of her employment at the time of injury. The worker lost before the AAT and was successful before a single Judge of the Federal Court and the Full Court of the Federal Court and Comcare ultimately appealed to the High Court. While making its way through the Courts the case attracted considerable attention from such respected legal commentators as the Daily Telegraph and television current affairs programs although it should not, of course, be suggested that this in any way influenced the High Court.

The worker succeeded at both levels in the Federal Court on the basis that Hatzimanolis established a single test which would be satisfied if the worker at the time of injury were either at a particular place or engaged in a particular activity induced or encouraged by the employer. On this basis, it was concluded that as the worker was at the motel with the inducement or encouragement of the employer she was in the course of her employment regardless of the activity being undertaken at the time of injury. Thus, the worker had succeeded as her presence at a particular place was with the inducement or encouragement of the employer and the activity in which she was engaged at the time of injury was therefore irrelevant.

Allowing the appeal by a majority of four (French CJ, Hayne, Crennan and Kiefel JJ) to two (Bell and Gageler JJ) concluded that if the approach adopted by the Full Court of the Federal court were correct Hatzimanolis would need to be reconsidered as it would “otherwise effect an undue extension of an employer’s liability to pay compensation”. The majority concluded, however, that the majority decision in Hatzimanolis was not intended to state the test to be that adopted by the
Full Court and proceeded to elucidate and clarify the Hatzimanolis test.

The majority, while rejecting the notion that any test of causation is to be introduced, determined that the enquiry first to be undertaken is whether the circumstances of the injury are such as to render a case under consideration a “place” case or an “activity” case and then, once that is determined, to proceed to consider whether the injury was suffered in circumstances induced or encouraged by the employer. The reasoning and the approach to be adopted were explained in the following way (between paras.35 and 60):

“Because the employer’s inducement or encouragement of an employee, to be present at a particular place or to engage in a particular activity, is effectively the source of the employer’s liability, the circumstances of the injury must correspond with what the employer induced or encouraged the employee to do. It is to be inferred from the factual conditions stated in Hatzimanolis that for an injury to be in the course of employment, the employee must be doing the very thing that the employer encouraged the employee to do, when the injury occurs. Moreover, it is an unstated but obvious purpose of Hatzimanolis to create a connection between the injury, the circumstances in which it occurred and the employment itself. It achieves that connection by the fact that the employer’s inducement or encouragement. Thus where the circumstances of the injury involved the employee engaging in an activity, the question will be whether the employer induced or encouraged the employee to do so. ... The starting point in applying what was said in Hatzimanolis ... 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 the injury occurs at and by reference to a place, the question is: Did the employer induce or encourage the employee to be there? ... It follows that where an activity was engaged in at the time of 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. ... An injury occurs at a place when the circumstances of the injury is referable to the place. ... Most commonly, as the cases show, an employee will suffer an injury in the course of employment whilst engaged in an activity. ... 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. 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 injuries 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 a place is not. 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. ... (T)he Hatzimanolis 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. ... 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, 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. ... The connection presently spoken of is by way of association with the employment. ... 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, it requires that “the injury by accident must not be
one which occurred independently of the employment and its incidents”.  ...  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.  ...  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.  ...  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 principle in Hatzimanolis should nevertheless be understood to have sought, and achieved, a connection or association with employment.  ...  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”.

The minority judgments in PVYW did not consider that the test established in Hatzimanolis required any further refinement or qualification but rather considered that the test had been properly stated and applied by the Full Court.  They would, therefore, have dismissed the appeal and confirmed the worker’s entitlement to compensation.

It may be anticipated that the majority decision in PVYW requiring a determination to be made as to whether the circumstances of the injury are “referable” to the “place” or “activity” will confront decision makers with significant challenges, particularly bearing in mind that this enquiry is to be undertaken before consideration of the employer’s inducement or encouragement is to be undertaken and there is no suggestion that there must be some sort of novus actus in order to convert a “place” case into an “activity” case or that the relevant “activity” constitutes unlawful conduct, gross misconduct or something not approved of by the employer.

It is appropriate to now consider several recent decisions of the Court of Appeal involving the concept of “in the course of employment” and its relationship with s.9A of the 1987 Act in light of the decision in PVYW in order to consider whether a different outcome would have occurred.

Badawi v Nexon Asia Pacific Pty Limited t/as Commander Australia Pty Limited [2009] NSWCA 324 was a case in which the worker was required to attend a ski resort for the purposes of undertaking employment duties and suffered injury while skiing with her partner for recreational purposes not directly related to her work duties, save that she had been telephoned by her superior and asked to return to the resort area to attend a meeting.  Significantly, it was conceded by the employer and therefore not in issue that the worker was in the course of her employment while at the ski resort applying the Hatzimanolis test as it was then understood.  Applying PVYW, the circumstances of the worker’s injury were clearly referable to an “activity” (skiing) and the relevant question in relation to whether injury occurred in the course of employment was whether the employer had expressly or impliedly induced or encouraged the worker to engage in that activity.  Once again the uncertainty as to the concept of “induced or encouraged” may have arisen if it be assumed that the employer permitted or acquiesced in the worker skiing, she being “on her own time” when doing so, but did not specifically induce or encourage her to engage in that activity at that time.  In any event, it may readily be seen that the employer may well have not conceded the issue of “course of employment” had PVYW been decided at that time.

Further, the emphasis placed in PVYW on the necessity of establishing a connection between the employment and the activity being engaged in at the time of injury may well have rendered the approach of the Court of Appeal in Badawi erroneous as a particular error of law found by the Court of Appeal to have been made by Keating P in finding that the worker’s employment was not a substantial contributing factor to her injury within the meaning of s.9A was that he had focused on the activity engaged in at the time of injury rather than the employment concerned and its causal connection to the injury.

In the course of so concluding, the majority in Badawi said (at paras.101 and 102):

“Section 9A(1) requires a determination as to whether the employment is a substantial contributing factor to the injury.  The determination so called for is not performed in a case such as this by looking at the recreational activity and then seeing whether any aspect of the employment concerned might have strengthened the linkage with that employment.  Rather, a decision maker, in determining under s.9A whether the employment concerned is a substantial contributing factor, is required to consider the employment concerned and the circumstances surrounding the occurrence of the injury, including activities that might be undertaken during an interval in the employment.  Those circumstances may be fully encompassed by the factors specified in s.9A(2), or there may be other factors that are relevant to take into account.  However, to approach the question in s.9A from the perspective of the non-employment activity undertaken during an interval in the employment, rather than from the perspective of the employment concerned, was to
misunderstand the statutory test”.

The President’s error was highlighted in particular by the fact that he ascribed relevance to the fact that the worker would have been required to ski down the mountain at some stage in any event rather, than placing due weight upon the fact that she was doing so in response to her supervisor’s request that she return to the bottom of the mountain. More generally, it appears to have been considered that the President failed to give any weight to the fact that the worker would not have been skiing had she not been required to attend the resort for business purposes and was there in the course of her employment.

Basten JA, who gave a separate decision in which he agreed with the majority, made the following observations:

“Where it is the very activity of the claimant, which was the conduct authorised, encouraged or permitted by the employer (and in this case, the conduct exhibited all of those characteristics), the conclusion that the employment was a substantial contributing factor to the injury is the only conclusion reasonably open. … The critical factor which led the Commission to a different view was the conclusion that the Claimant was not “performing any work activity at the time that she received the injury, but was skiing with her partner because they had time on their hands”. This is, however, to answer the wrong question. It focuses not on the connection between the employment and the injury, but on the closeness of the connection between the activity of the claimant giving rise to the injury and her duties as an employee, a question potentially relevant to the conceded issue, namely that the injury had arisen in the course of her employment. … Thus, subject to one qualification, if the conduct out of which the injury arose occurred in the course of employment and was the effective cause of the injury (there being no pre-existing condition or involvement of another person) the only conclusion reasonably open is that the employment was a substantial contributing factor to the injury. … Furthermore, the statement that satisfaction of one or both of the s.4 tests will not as such satisfy s.9A(1), is not to preclude satisfaction of all three tests by reliance on the same facts.”

The relationship between “in the course of employment” and s.9A was considered by the Court of Appeal in two further cases: Da Ros v Qantas Airways Limited [2010] NSWCA 89, a case in which a flight crew member was knocked off his bicycle by a car while returning to hotel accommodation in LA provided by the employer, and Van Wessev v Entertainment Outlet Pty Limited [2011] NSWCA 214, a case in which a worker who was in the course of his employment because he was “on call” when he was killed while cycling for recreational reasons.

In Da Ros, the court found in favour of the worker on the basis that the Presidential Member had erred in law in emphasising the lack of employment connection to the circumstances of the injury (a similar error to that identified in Badawi) and in placing weight upon the fact that the immediate cause of the injury was the negligence of the person who knocked him off his bike. The Court unanimously said (at paras.21 and 24):

“The second and more important error arose from what the Deputy President referred to as “employment factors”. Those factors were to be weighted against the other causal element, which was seen to be the negligent driving of the other cyclist. That, however, is not the exercise required by s.9A. In simple terms, the accident occurred because the two bicycles were in the same place at the same time. The Appellant was there, on his bicycle, “in the course of his employment”. That finding having been made, it would appear to follow that the employment concerned was a substantial contributing factor. … The employment concerned appears to have been discounted on the basis that, although the class of conduct in which the Appellant was engaged was both permitted and encouraged by the employer, the specific activity was not required by it. Alternatively, it may have been thought that riding a bicycle for relaxation, exercise or recreation while in a “slip port” was too far removed from the activities for which the Appellant was employed, namely as a flight attendant on an international flight. If reasoning of either kind were applied, it would have been erroneous. … In the present case, the collision with the courier was an incident or state of affairs to which the Appellant was exposed in the course of his employment and to which he would not otherwise have been exposed. Because it was one of the two contributing factors (the other being the presence of the courier at the same place at the same time) it is difficult to understand why it would not be a substantial contributing factor”.

Once again, applying PVYW, it may well have been concluded in Da Ros that the worker’s injury was not suffered in the course of employment because once attention is focused on the activity being undertaken at the time of injury (bike riding) it could be concluded that the worker’s undertaking of that activity was not induced or encouraged by the employer, notwithstanding that the worker was required to be at that place (Los Angeles) by the employer. Noting that the Court of Appeal had
observed that employment will almost always be a substantial contributing factor to an injury suffered in the course of employment, based on its conclusion in Badawi that the focus of the enquiry is to be the employment connection rather than the activity being undertaken, and it would appear likely that an opposite conclusion would now be reached were the injury found not to have been suffered in the course of employment in accordance with PYYW.

In Van Wessem, however, the worker failed on the basis that although he was in the course of his employment as he was on call at all times, there was nothing about his employment which contributed to him being in that particular place at the time his injury was suffered, his bike riding being a purely recreational activity which was in no way connected to his employment. In the course of so concluding, the Court emphasised that because “causation is a quite different concept from temporal occurrence”, there may be cases, such as that under consideration, in which the comments in Da Ros to the effect that employment will be a substantial contributing factor where injury is suffered in the course of employment will not hold good. The clear distinction between Badawi and Da Ros on the one hand and Van Wessem on the other is that in the first two cases the worker would not have been at the place at the time injury occurred but for the circumstances of their employment. Applying PYYW would have produced the same result in Van Wessem but on a different basis, namely that the matter was an “activity” case and that the employer did not induce or encourage the worker to engage in that activity.

The above consideration of the decisions of the Court of Appeal is intended to be illustrative rather than exhaustive and is intended to show that the refined test relating to injury in the course of employment in PYYW may have produced different outcomes in relation to this threshold issue and may also have an impact on the approach to be taken to s.9A as it would appear that Badawi may have been wrong in stating that the focus is to be on the connection between injury and employment rather than injury and the particular activity being undertaken when it was suffered. That said, it must be acknowledged that different tests are applicable in relation to “course of employment” and s.9A and that the more likely effect of PYYW is that a higher proportion of cases will fail on the threshold issue of injury, meaning that s.9A will not arise for consideration.

In conclusion, prior to PYYW the Hatzimanolis test was generally understood to include two alternative considerations, namely whether injury happened at a particular place or in undertaking a particular activity with the inducement or encouragement of the employer, with the satisfaction of either alternative being sufficient to establish that injury was suffered in the course of employment. PYYW, however, now establishes that a two stage process is to be undertaken for the purposes of determining whether injury was suffered in the course of employment, they being:

(a) To first determine whether the circumstances of the injury are referable to a “place” or an “activity”; and then

(b) Consider whether the employer induced or encouraged the worker to be at that place or to engage in that activity. As the facts of that case show, this approach can produce a situation where a worker is not injured in the course of employment notwithstanding that the injury happened at a place at which the worker’s presence was induced or encouraged by the employer. The case therefore represents a significant limitation of the circumstances in which injuries might be found to have been suffered in the course of employment. This may, in appropriate circumstances, reduce the number of cases in which it is necessary to consider whether employment was a substantial contributing factor to an injury within the meaning of s.9A and may further have some impact upon how the s.9A issue is considered given that, contrary to what was stated by the Court of Appeal in Badawi, it is appropriate to focus on the activity being undertaken at the time of injury rather than the relevant employment connection in a broader context. On the other hand, the observation by the Court of Appeal that employment will be a substantial contributing factor in almost every case in which injury is found to have been suffered in the course of employment is probably still correct, save that fewer cases will satisfy the second requirement.

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