

Case Note

Comcare v PVYW: Are Injuries Sustained While Having Sex on a Business Trip Compensable?

Eric L Windholz*

Abstract

The noteworthiness of the High Court decision in *Comcare v PVYW* extends beyond the titillating nature of its subject matter. What constitutes a ‘work-related’ injury for which workers’ compensation is payable is an important concept with significant social and economic implications. The judges in *Comcare v PVYW* grappled with one aspect of the concept — the circumstances in which an injury incurred during an interval in an overall period of work is compensable. The decision of the majority of the High Court clarifies and injects a level of pragmatism into the concept. Notwithstanding this, however, what constitutes a compensable ‘work-related injury’ remains a matter of degree and dispute that will continue to be litigated.

I Introduction

The decision of the majority of the High Court in *Comcare v PVYW*¹ denying workers’ compensation to an employee for injuries incurred while engaged in vigorous sex on a business trip has been heralded as a victory for common sense;² many in the mainstream previously having received the Federal Court decisions (at first instance and on appeal) awarding compensation for those injuries with a degree of incredulity.³ However, the decision’s noteworthiness extends beyond the titillating nature of its subject matter. The decision’s significance lies in the clarity and pragmatism it brings to an important legal concept with significant social and economic implications.

* Lecturer and Associate, Monash Centre for Regulatory Studies, Faculty of Law, Monash University.

¹ (2013) 88 ALJR 1.

² Eric Abetz, Minister for Employment and Minister Assisting the Prime Minister for the Public Service, ‘Victory for Common Sense’ (Media Release, 30 October 2013) <<http://abetz.com.au/news/victory-for-common-sense>>. See also ‘High Court Ruling a Sensible Outcome’, *Canberra Times* (online), 31 October 2013 <<http://www.canberratimes.com.au/comment/ct-editorial/high-court-ruling-a-sensible-outcome-20131031-2wm3f.html>>.

³ The Federal Court decisions were widely reported in the mainstream media, both in Australia and internationally. Many of those reports (and the commentary that accompanied them) had a ‘believe-it-or-not’ air to them. See, eg, Paul Sheehan, ‘Judges’ Frolic Folly Costs Us Dearly’, *The Sydney Morning Herald* (Sydney), 20 May 2013, 22; ‘Australian Woman Gets Workers’ Comp for Sex-related Injury During Business Trip’, *Fox News* (online), 17 December 2012 <<http://www.foxnews.com/world/2012/12/17/australian-woman-gets-worker-compensation-benefits-for-injury-during-sex-on/>>.

What constitutes a ‘work-related’ injury for which workers’ compensation is payable is an issue that has vexed policymakers and jurists alike. As Bell J observes in the present case, it is a ‘notoriously difficult question’.⁴ Answering this question involves balancing a mix of legal, social and economic values, including fairness, equity, distributional justice, individual responsibility and economic sustainability. The balance struck often reflects a battle between competing economic and social interests: with employers and insurers arguing that an employer should only be responsible for risks over which it is able to exercise some control; and employees and unions arguing that an employee should be insured for all risks incidental to or associated with their employment (that is, those to which they are exposed for the employer’s benefit and/or to which they would not be exposed but for their employment).⁵ Moreover, it is a balance that has varied over time in response to labour market changes brought on by technological progress and changing social and economic priorities. Clayton, Johnstone and Sceats note that as a result, what constitutes a ‘work related injury’ is often determined as much by pragmatism and experience, as principle.⁶

This case note examines the contribution made by *Comcare v PVYW* to this experience. It commences by outlining the facts of the case, and the relevant statutory provisions and case law upon whose interpretation the decision rested. Next, the case note examines the history of the case: starting with Comcare’s initial determination, through its various appeals, and culminating in the High Court decision. It then examines each of the judgments of the High Court, beginning with the majority decision of French CJ, Hayne, Crennan and Kiefel JJ, followed by the separate dissenting judgments of Bell and Gageler JJ. The case note concludes by considering the robustness of the majority decision and its implications for this important area of law.

II The Facts

The facts of the case were not contested. In November 2007, the respondent commenced employment with a Commonwealth government agency. That same month, the agency required the respondent to visit its regional office in Nowra to observe a budget review process, undertake training and meet local staff. This work could not be completed in one day, so the agency arranged for the respondent

⁴ *Comcare v PVYW* (2013) 88 ALJR 1, 23 [106].

⁵ The debate reflects the positions adopted by employers (and their representative organisations) and employees (and unions) in compensation policy debates generally. Although ‘employer control’ has never formed part of a universal threshold test for liability to pay compensation (and there remain many injuries for which an employer is held financially responsible (through its insurance) notwithstanding an inability to control the risk (see below n 17)), in recent compensation policy debates ‘employer control’ has emerged as an increasingly important (if not principal) basis for defining coverage under workers’ compensation schemes. See, eg, Industry Commission, *Workers’ Compensation in Australia*, Report No 36 (1994) 94–9; Productivity Commission, *National Workers’ Compensation and Occupational Health and Safety Frameworks*, Report No 27 (2004) 170; Peter Hanks, *Safety, Rehabilitation and Compensation Act Review Report* (Department of Education, Employment and Workplace Relations, 2013) 58 [5.140].

⁶ Alan Clayton, Richard Johnstone and Sonya Sceats, ‘The Legal Concept of Work-Related Injury and Disease in Australian OHS and Workers’ Compensation Systems’ (2002) 15 *Australian Journal of Labour Law* 1, 3.

to stay overnight at a nearby motel. During that evening, the respondent engaged in sexual intercourse in her motel room with an acquaintance. During sexual intercourse, a light fitting above the bed was pulled from its mount, striking the respondent in the face. As a result, the respondent suffered physical and psychological injuries for which she claimed compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ('*SRC Act*').

III The Relevant Statutory Provisions

Section 14(1) of the *SRC Act* provides that: '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'. This is qualified by ss 14(2) and (3), which state that compensation is not payable in respect of an injury that is intentionally self-inflicted, or an injury that is caused by the serious and wilful misconduct of the employee (unless the injury results in death, or serious and permanent impairment).

Injury is defined in s 5A of the *SRC Act*. Central to this case was s 5A(1)(b) of the definition, which states that an injury for which compensation is payable includes an 'injury arising out of, or in the course of, the employee's employment'.

For completeness, it should be noted that s 6 of the *SRC Act* articulates a number of circumstances in which an injury to an employee shall, for the purposes of the *SRC Act*, be treated as having arisen 'out of, or in the course of, his or her employment'. One such circumstance is where the injury was sustained while the employee was temporarily absent from the employee's place of work undertaking an activity associated with the employee's employment, or at the direction or request of the Commonwealth.⁷ The parties agreed that the facts of the case did not fall within this subsection: that the sexual activity was neither associated with her employment, nor engaged in by the respondent at the direction or request of her employer. Importantly, though, the circumstances listed in s 6 are non-limiting, and allow for other circumstances in which an employee's injury might arise 'out of, or in the course of, his or her employment'. It is on the nature of these other circumstances that this case focused.

It should also be noted that while there are great similarities in the structure, design and underlying principles and concepts of Commonwealth, state and territory workers' compensation schemes,⁸ there are also significant variations. Relevantly, some jurisdictions have further qualified the 'arising out of, or in the course of, employment' requirement. For example, in New South Wales, for an injury to be compensable, employment must be a 'substantial contributing factor',⁹ and for a disease to be compensable it must be a 'main contributing factor'.¹⁰

⁷ *SRC Act* s 6(1)(c).

⁸ The similarities in the schemes originally reflected their common British heritage; subsequently, it is reflective of their evolution being influenced by similar economic, social and political forces and actors.

⁹ *Workers Compensation Act 1987* (NSW) s 9A(1).

¹⁰ *Ibid* s 4(b)(i).

Similarly, in Victoria, certain diseases and injuries are compensable only if employment was a ‘significant contributing factor’.¹¹

IV The Relevant Case Law

The key authority for all courts before which this matter came was the 1992 High Court case of *Hatzimanolis v ANI Corporation Ltd*.¹² Therefore, to understand the various judgments in the case, it is first necessary to understand a little about *Hatzimanolis*. And to understand *Hatzimanolis*, it is helpful to have an overview of the concept of ‘work-related injury’ in workers’ compensation law.

A Work-related Injury

What constitutes a ‘work-related injury’ for which workers’ compensation is payable is a concept that varies according to the nature and terms of employment, and the circumstances in which the injury occurred. Clayton, Johnstone and Sceats provide a helpful framework for understanding these variations.¹³ They divide workers’ compensation scheme parameters into two broad categories. The first category is ‘external boundary setting’ parameters. These define who is entitled to compensation (and therefore the boundaries between a workers’ compensation scheme and social security and other compensation schemes). Under s 14(1) of the *SRC Act*, this is defined to be an ‘employee’. However, an examination of the definition of ‘employee’ in s 5(1) reveals that the term extends beyond the traditional notion of a person employed under a contract of service to include members of the Australian Federal Police and Australian Defence Forces, members of Commonwealth authorities, certain search and rescue personnel, and volunteers working at Commonwealth cultural, scientific and environmental organisations.¹⁴

The second category identified by Clayton, Johnstone and Sceats is ‘internal boundary setting’ parameters. These define which injuries sustained by an employee are compensable. Section 5(1) of the *SRC Act* defines these as injuries ‘arising out of, or in the course of, the employee’s employment’. ‘Arising out of employment’ denotes a causal relationship between the injury and the employment. This requires the employee to demonstrate that the injury was caused by the actual risks of the job he or she was employed to do.¹⁵

‘In the course of employment’, on the other hand, denotes a temporal (not causal) connection between the injury and the employment.¹⁶ Under this limb, an injury is compensable, not because it is caused by the actual risks of the job the person is employed to do, but because of some nexus of time, place and/or activity

¹¹ *Accident Compensation Act 1986* (Vic) s 82(2B)–(2C). The same tests also apply under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), which commences on 1 July 2014.

¹² (1992) 173 CLR 473 (*Hatzimanolis*).

¹³ Clayton, Johnstone and Sceats, above n 6.

¹⁴ Many of these are found in Notices declared by the Minister under s 5(6) of the *SRC Act*.

¹⁵ *Brooker v Thomas Borthwick & Sons (Australasia) Ltd* [1933] AC 669; *Smith v Australian Woollen Mills Ltd* (1933) 50 CLR 504.

¹⁶ *Kavanagh v Commonwealth* (1960) 103 CLR 547.

with the employment relationship. In some cases the nexus is clear, such as when the injury occurs while the employee is at work and during work hours.¹⁷ However, in other cases — where the injury does not occur at work and/or during work hours — the requisite nature of that nexus is not always clear. *Hatzimanolis* was concerned with these more difficult cases.

B *Hatzimanolis v ANI Corporation Ltd*

Mr Hatzimanolis was employed by ANI Corporation to work at a remote mine in Mount Newman, Western Australia on a three-month contract. The contract required Hatzimanolis to work 10-hour days for six days a week and to be available to work on the seventh day. Under the contract, ANI Corporation provided and paid for Hatzimanolis' accommodation and living expenses at the mine. ANI Corporation also provided employees on the site with access to vehicles, which they were told they could use to explore surrounding areas. On one such trip, arranged by Hatzimanolis' supervisor, Hatzimanolis was injured when the vehicle he was travelling in overturned.

The High Court unanimously held that Hatzimanolis' injuries were sustained in the course of his employment and were compensable under the New South Wales *Workers Compensation Act 1987*. Two judgments were delivered: joint reasons were given by Mason CJ, Deane, Dawson and McHugh JJ; Toohey J gave separate reasons. Of these, it was the joint reasons that came to be seen by subsequent courts as articulating the circumstances in which injuries incurred by employees outside periods of actual work would nevertheless be treated as arising 'in the course of employment'. And it is on the joint reasons that this case note focuses.

Prior to *Hatzimanolis*, the test applied in Australia to determine whether an injury occurring during intervals between work was 'in the course of employment' was the *Henderson–Speechley* test. Based on judgments given by Dixon J in *Henderson v Commissioner of Railways (WA)* and *Humphrey Earl Ltd v Speechley*, the test asked whether, at the relevant time, the employee was doing something which he or she was reasonably required, expected or authorised to do to carry out his or her duties.¹⁸

¹⁷ These are often referred to as 'recess' claims. An injury that occurs during an authorised recess within the working day is 'in the course of employment' even though the accident was not within the employer's control. An example of such a situation is the case of *Carlton and United Breweries v Hegedis* (2000) 4 VR 296 (at first instance); [2002] VSCA 61 (Court of Appeal). In that case an employee was awarded compensation for injuries incurred when he lacerated his hand peeling an apple during a paid meal break in an amenities room provided by the employer for that purpose. The main issue in the case was whether Victoria's additional requirement that employment be a 'significant contributing factor' (see above n 11) applied to the employee's injury. The Courts held it did not, and the High Court denied special leave to appeal.

¹⁸ Originally articulated in *Henderson v Commissioner of Railways (WA)* (1937) 58 CLR 281, 294, ('*Henderson*'), the test asked whether the employee was doing something that he was 'reasonably required, expected or authorized to do in order to carry out his actual duties'; the adjective 'actual' was omitted when Dixon J restated the test in *Humphrey Earl Ltd v Speechley* (1951) 84 CLR 126, 133 ('*Speechley*').

The joint reasons observed that, in many cases, the *Henderson–Speechley* test had only kept pace with the changing nature of employment through ‘a strained reading of the words “in order to carry out his duties”’,¹⁹ and that in many cases the finding that an employee was injured while carrying out his or her duties was ‘simply fictitious’.²⁰ They noted that Barwick CJ had previously referred to the need to apply the test ‘liberally and practically’,²¹ and Deane J to the need to temper the words ‘in order to carry out his duties’ ‘to accord with the current views on what comes within the scope of employment which are more liberal than those present at the time Dixon J formulated [the test]’.²²

Consequently, the joint reasons concluded that the *Henderson–Speechley* test ‘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’,²³ and that:

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.²⁴

The reformulated test — or the ‘organising principle in *Hatzimanolis*’, as it has come to be known — is reproduced below in full and without elucidation, explanation or examination. That is left to this note’s consideration of the various decisions in *Comcare v PVYW* that sought to explain, interpret and apply it.

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’.²⁵

Before proceeding to examine the various judgments in *Comcare v PVYW*, there are two other passages from the joint reasons worthy of mention, given their significance to the interpretation and application of the organising principle in *Hatzimanolis* in some of those judgments.

In the first passage, the joint reasons distinguish between ‘interval’ injuries and ‘non-interval’ injuries.²⁶ ‘Interval’ injuries are those injuries incurred during an interval within one single overall period or episode of work. An interval can be

¹⁹ (1992) 173 CLR 473, 480.

²⁰ Ibid 482.

²¹ Ibid 481, citing *Danvers v Commissioner for Railways (NSW)* (1969) 122 CLR 529, 536.

²² Ibid 481–2, citing *Commonwealth v Lyon* (1979) 24 ALR 300, 303.

²³ Ibid 482.

²⁴ Ibid.

²⁵ Ibid 484 (footnotes omitted).

²⁶ Ibid 482–3.

short, such as a tea- or lunch-break within an ordinary working day; or can be long, such as when an employee is required to spend a night, or nights and days at a remote location over an extended period of time as was the case in *Hatzimanolis*. ‘Non-interval’ injuries, on the other hand, are those incurred between two discrete periods or episodes of work, such as between the end of one working day and the start of the next for an employee who performs his or her work at a permanent location. The joint reasons make clear that the principle they are expounding applies only to ‘interval’ injuries. The joint reasons observe that to apply the criterion of ‘employer encouragement’ to ‘non-interval’ injuries ‘would be an unacceptable extension of the course of employment’.²⁷ The joint reasons give as an example an employee who is encouraged by his or her employer to see a doctor after working hours. The joint reasons conclude that an injury incurred while seeing the doctor would not be in the course of employment.²⁸

The second passage relates to a contention made by Hatzimanolis’ employer, ANI Corporation. ANI Corporation conceded that the period within which Hatzimanolis was in the course of employment extended beyond the hours during which he was engaged in actual work and that he was in the course of employment while travelling to and from the mine and eating, sleeping and engaging in recreational activities at the camp. ANI Corporation contended, however, that it did not follow that Hatzimanolis was in the course of employment during the whole of the time that he spent in the Mt Newman area.²⁹ Of this contention, the joint reasons stated:

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.³⁰

C *Post Hatzimanolis Cases*

Hatzimanolis was decided more than 20 years ago. Since then it has been applied to award compensation to employees in numerous cases. However, its application in some of these cases has not been without its controversies. The joint reasons in *Hatzimanolis* sought to avoid the ‘strained’ interpretations and ‘fictitious’ findings of the cases that preceded it. But in doing so, they extended ‘the course of employment’ to include situations where the injury occurred away from the work place, outside of working hours, and while the employee was engaged in an activity not normally thought of as work-related. For example, the principle has been applied to award compensation for injuries sustained as a result of: being shot

²⁷ Ibid 482.

²⁸ Ibid 483. The joint reasons also observe that ‘[a]n injury occurring during the interval between periods of actual work ... is more readily perceived as being within the current conception of the course of employment than an injury occurring after ordinary working hours’.

²⁹ Ibid 485.

³⁰ Ibid.

in the course of romantic disputes (real and perceived);³¹ slipping in the shower of a hotel room;³² being randomly assaulted in the car park of a motel;³³ and recklessly riding a trail bike for the purposes of impressing a woman;³⁴ notwithstanding the difficulties the cases presented for some judges involved (as indicated in the quotations in the footnotes). In mentioning these cases, it is not suggested that any were necessarily decided incorrectly. Rather, they are provided to illustrate the breadth of injuries and happenstance that the *Hatzimanolis* organising principle brings within the course of employment, the diversity of some of the prior outcomes and the discomfort of some judges in reaching the outcomes they felt *Hatzimanolis* dictated.

V The Judgments

With the above description of the facts, statute and case law as background, let us now turn to the various judgments in the current matter. Before doing so, however, there is one issue that is best dealt with upfront — namely, whether sexual intercourse on a business trip constitutes gross misconduct disentitling the

³¹ These involved two cases decided on the same day by the same court six months after *Hatzimanolis*. In the first, *McCurry v Lamb* (1992) 8 NSWCCR 556 (*McCurry*), the claimant (a shearer temporarily resident on a shearing station) was awarded compensation for injuries sustained when a fellow employee shot him on finding him in bed with a third female employee with whom the second employee had previously had a romantic relationship. In the second, *Inverell Shire Council v Lewis* (1992) 8 NSWCCR 562 (*Inverell*), the claimant was awarded compensation for injuries sustained when shot by the brother of a resident of a caravan park at which the claimant was a temporary resident while attending a training course organised by his employer. Handley JA, with whom Clarke JA agreed in both cases, described the outcomes as ‘anomalous or even bizarre’ but ‘nevertheless compelled’ by *Hatzimanolis*: *Inverell* at 571; *McCurry* at 559–60.

³² In *Comcare v McCallum* (1994) 49 FCR 199, the claimant was required by her employer to stay overnight in a country town for work purposes. The claimant was awarded compensation for injuries sustained when she slipped in the shower of the hotel at which she had chosen to stay (and for which she was provided with a travel allowance).

³³ In *Kennedy v Telstra Corporation* (1995) 61 FCR 160, the employee also was required by his employer to stay overnight in a country town for work purposes. The claimant was awarded compensation for injuries sustained when assaulted by strangers while returning to the motel after an evening socialising with colleagues. In reaching this decision, Tamberlin J said, in language reminiscent of judicial exhortations for the *Henderson–Speechley* test to be applied ‘liberally and practically’: ‘I do not think that the principles laid down in *Hatzimanolis* should be construed narrowly but rather they should be applied in a commonsense and practical manner to accord with the realities of human behaviour’: at 169.

³⁴ In *WorkCover Authority (NSW) v Walling* (1998) 16 NSWCCR 527 (1 January 1998), the employee was injured during a break in the working day while riding a trail bike to impress a woman. Of the part of the *Hatzimanolis* joint reasons that states it is sufficient for an injury to be in the course of employment for the employee to be at a particular place induced or encouraged by the employer (which was the basis on which the Court concluded the injuries were compensable), Mason P and Beazley JA (with whom Stein JA agreed) noted:

The difficulty lies with treating it as determinative that the injury was at a particular place, when ... it may make the world of difference that the injury occurs a short distance away from the remote camp or work location. Workers compensation law is used to drawing fine lines, but we have difficulty in seeing the principle which determines how defining the place of work and residence is always determinative in this area: at 533.

respondent to compensation pursuant to s 14(3) of the *SRC Act*.³⁵ It was not argued by Comcare that the respondent's conduct constituted gross misconduct. Therefore, whatever impact the nature of the respondent's conduct might have had on the various judge's attitudes to the case — something to which I will return later — there was no suggestion in any of the judgments that her sexual activities that night constituted serious, wilful or gross misconduct.

VI Comcare and the Administrative Appeals Tribunal

The respondent lodged her claim for compensation on 28 November 2007. The claim was initially accepted by Comcare on 14 January 2008. However, after an internal review of the decision pursuant to s 62 of the *SRC Act*, on 21 January 2010, Comcare revoked its earlier determination and denied the respondent compensation, having concluded her injuries were not incurred in the course of employment.

The respondent appealed Comcare's denial of her claim to the Administrative Appeals Tribunal ('AAT'), which affirmed Comcare's decision.³⁶ The AAT interpreted the 'organising principle' developed in the joint reasons of Mason CJ, Deane, Dawson and McHugh JJ as requiring a two-step process. The first step involved asking whether the injury was incurred during an interval or interlude within an overall period or episode of work. The second step involved asking whether the activity in which the respondent was engaged was expressly or impliedly induced or encouraged by the employer.

With respect to the first step, the AAT found that the respondent's injury occurred during an interval or interlude within one overall period of work consisting of the two days the respondent was required by her employer to be at the regional office. The fact that her employer programmed her work for both days, and booked and paid for her stay at the motel, were important to this conclusion.

With respect to the second step, however, the AAT concluded that the respondent's injuries were not sufficiently connected to her employment to be compensable. The AAT found that although the activity took place in an interval in an overall period of work, the interval was interrupted by the applicant engaging in private activities that the employer had not induced, encouraged or countenanced, and about which the employer did not know and could not reasonably be expected to have contemplated.³⁷ In reaching this conclusion, the AAT differentiated the respondent's sexual conduct from activities it considered to be 'an ordinary

³⁵ As noted earlier, under s 14(3) of the *SRC Act*, compensation is not payable in respect of an injury caused by the serious and wilful misconduct of the employee.

³⁶ *Comcare v PVYW* (Unreported, Administrative Appeals Tribunal, Professor R M Creyke, Senior Member, 26 November 2010). An order was made under s 35 of the *Administrative Appeals Tribunal Act 1975* (Cth) prohibiting publication of the decision. This case note's analysis of the Tribunal's decision is based on the summary of the decision contained in the decision of Nicholas J of the Federal Court: *PVYW v Comcare (No 2)* (2012) 220 IR 432, 435–7 [14]–[24]. The subsequent footnote references to the Tribunal's decision are to Nicholas J's description of it.

³⁷ *PVYW v Comcare (No 2)* (2012) 220 IR 432, 437 [23].

incident of an overnight stay like showering, sleeping, eating, or returning to the place of residence from a social occasion elsewhere in the vicinity'.³⁸

The AAT also rejected the respondent's argument that simply being at a particular place at the express or implied instigation and organisation of her employer made her injuries compensable.³⁹ In the AAT's opinion, such an argument was inconsistent with what has come to be described by some as the 'rider' to the *Hatzimanolis* organising principle, that:

[i]n 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'.⁴⁰

From this, the AAT concluded 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.⁴¹

In summary, the AAT interpreted the joint reasons in *Hatzimanolis* as requiring the respondent to establish both a nexus with an employer-endorsed place and a nexus with an employer-endorsed activity in order for an injury to have occurred 'in the course of employment'. The AAT concluded that the respondent had failed to establish a nexus with an employer-endorsed activity and that, as a result, her claim failed.

VII Federal Court at First Instance

The respondent appealed the AAT's decision to the Federal Court. The appeal was heard by Nicholas J, who upheld the appeal, concluding that the respondent's injuries arose in the course of her employment. In doing so, Nicholas J adopted a different interpretation of the High Court's judgment in *Hatzimanolis*.

First, Nicholas J found the AAT's 'reliance upon ... the "rider" in *Hatzimanolis* did not really lead anywhere in the circumstances of the case', having concluded there was nothing 'before the Tribunal to suggest that the [respondent's] sexual activity on the evening in question was in any respect incompatible with the nature or terms of her employment'.⁴² Rather, Nicholas J

³⁸ Ibid.

³⁹ Ibid 436–7 [22].

⁴⁰ *Hatzimanolis* (1992) 173 CLR 473, 484.

⁴¹ *PVYW v Comcare (No 2)* (2012) 220 IR 432, 436–7 [22].

⁴² Ibid 442 [46]. The respondent challenged two findings of fact made by the AAT: first, that the recreational activity engaged in by the respondent was not 'countenanced' by her employer; and second, that the sexual activity was not an ordinary incident of an overnight stay in a motel room on a business trip. Nicholas J opined that there was no evidence before the Tribunal upon which it was open to it to make those findings, but that it was not necessary for him to resolve the issues for the purposes of deciding the appeal: at 438–9 [27]–[29].

focused on the observation in the joint reasons that in almost all the cases they considered, ‘the injury had been suffered in circumstances where 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’. In Nicholas J’s opinion, this observation was ‘central to the reformulation of the relevant principles which subsequently emerges from the joint judgment’.⁴³

Nicholas J went on to say that the underlying question raised by the case was whether there was a sufficient connection or nexus between the injuries suffered by the respondent and her employment.⁴⁴ His Honour answered this question in the affirmative, concluding that the ‘relevant connection or nexus to employment was present in this case by virtue of the fact that the applicant’s injuries were suffered while she was in the motel room in which her employer had encouraged her to stay’.⁴⁵

Nicholas J continued:

What is of critical importance under the organising principles developed in *Hatzimanolis* is the temporal relationship between the applicant’s employment and the injuries suffered by her. Here the temporal relationship between the applicant’s injuries and her employment is that they were suffered by her while she was at a particular place where her employer induced or encouraged her to be during an interval or interlude between an overall period or episode of work.⁴⁶

Unlike the AAT, which interpreted *Hatzimanolis* as requiring a nexus between the injury and both an employer-endorsed place and an employer-endorsed activity, Nicholas J found that it sufficed for the injuries to be in the course of employment for there to be only one connection, that being between the injury and the employer-endorsed place. Indeed, Nicholas J held that:

the Tribunal erred in holding (at [35]) that for the [respondent] to succeed it was necessary for her to show that the particular activity which led to her injury was one that had been expressly or impliedly induced or encouraged by her employer.⁴⁷

In doing so, Nicholas J placed great emphasis on the disjunctive in the key passage in *Hatzimanolis* when it refers to the employee being induced or encouraged by his or her employer ‘to spend that interval or interlude at a particular place *or* in a particular way’.⁴⁸ However, Nicholas J himself had earlier noted that the law was not as simple as applying an absolute ‘either/or’ dichotomy. Referring to the acceptance of the contention of ANI Corporation that an employee ‘would not necessarily be in the course of employment while engaged in an activity during an interval or interlude in his overall period or episode of work if [his employer] had not expressly or impliedly induced or encouraged him to engage in that activity during that interval’, Nicholas J concluded that the High

⁴³ Ibid 439–40 [32].

⁴⁴ Ibid 443 [50].

⁴⁵ Ibid.

⁴⁶ Ibid 443 [53].

⁴⁷ Ibid 444 [55].

⁴⁸ (1992) 173 CLR 473, 484 (emphasis added).

Court in *Hatzimanolis* acknowledged that there may be situations in which the interval or interlude at the employer-endorsed place may be interrupted by employee conduct ‘not expressly or impliedly induced or encouraged by his or her employer’,⁴⁹ and that these situations were not limited to ‘gross misconduct’.⁵⁰ However, Nicholas J did not consider it necessary to explore what these situations might be and what employee conduct short of gross misconduct might interrupt the interval or interlude.⁵¹ The only guidance Nicholas J gives us is that it is not enough that the activities engaged in are of a ‘private’ nature,⁵² concluding that the interval would not be interrupted by relaxing, sleeping, bathing, eating and dressing,⁵³ or by playing a game of cards or engaging in sexual intercourse.⁵⁴

VIII Full Federal Court

Comcare appealed Nicholas J’s decision. The appeal was heard by the Full Federal Court, comprising Keane CJ, Buchanan and Bromberg JJ. They were unanimous in affirming Nicholas J’s decision that the AAT had applied the wrong legal test.⁵⁵ However, their reasoning differed in one important respect. Whereas Nicholas J was not prepared to apply the *Hatzimanolis* test as an absolute ‘either/or’ proposition and left open the possibility that there could be circumstances other than ‘gross misconduct’ in which activities undertaken at an employer-endorsed place might not be compensable, the Full Federal Court had no such qualms.

According to the Full Court, the ‘governing criterion for entitlement with which the High Court was concerned in its reformulation of the principle in *Hatzimanolis*’ was the characterisation of the periods (intervals or interludes) in which the injury occurred,⁵⁶ and ‘the governing enquiry was to decide whether an injury occurred in an interval during “one overall period or episode of work rather than a series of discrete periods or episodes of work”’.⁵⁷ This, and not ‘an employer’s attitude to the way in which the interval between periods of actual work was spent’,⁵⁸ explained the distinction between what should be regarded as in or outside the course of employment.

In the case of an injury occurring in an interval during one overall period or episode of work, the Full Court interpreted the joint reasons in *Hatzimanolis* as setting out two ways in which such an injury would be compensable. The first was encouragement or inducement to spend that time (the interval or interlude) at a particular place (the ‘place test’); the second was encouragement or inducement to spend that time (the interval or interlude) in a particular way (the ‘activity test’).

⁴⁹ *PVYW v Comcare (No 2)* (2012) 220 IR 432, 441 [39].

⁵⁰ *Ibid* 442 [41].

⁵¹ *Ibid* 442 [43].

⁵² *Ibid* 443 [49].

⁵³ *Ibid* 442 [44].

⁵⁴ *Ibid* 444 [55].

⁵⁵ *Comcare v PVYW* (2012) 207 FCR 150, 165 [56].

⁵⁶ *Ibid* 155 [21].

⁵⁷ *Ibid* 155 [22].

⁵⁸ *Ibid* 155 [20].

In so concluding, the Full Court interpreted *Hatzimanolis* differently from both the AAT and Nicholas J. What the AAT saw as a ‘rider’ qualifying or containing the scope of the *Hatzimanolis* organising principle, the Full Court interpreted as having an opposite and expansionary effect. According to the Full Federal Court, ‘[t]hat statement was included to emphasise that an injury did not become non-compensable without reference to the overall circumstances of employment’.⁵⁹

And whereas Nicholas J interpreted the joint reasons’ acceptance of ANI Corporation’s contention as expressly recognising that an interval or interlude might be interrupted if an employee engages in an activity that is not expressly or impliedly induced or encouraged by his or her employer, the Full Court saw nothing in the contention or its acceptance that qualified the organising principle or its foundations.⁶⁰ In the Full Court’s opinion, that acceptance served only to restate the second of the two ways an injury suffered during an interval or interlude in an overall episode of work might be compensable — namely, that if an employee is not in a particular place induced or encouraged by the employer, then an injury suffered by the employee will only be compensable if sustained while engaged in an activity expressly or impliedly induced or encouraged by his or her employer.⁶¹ The Full Court concluded that the passage relied upon by Nicholas J did not have the effect of ‘super-imposing an activity test on a place test’.⁶² It applied only to the activity test.

In summary, the Full Court applied the *Hatzimanolis* conditions disjunctively. According to the Full Court, ‘there is no combined or two-stage test arising from *Hatzimanolis*. There is a single test that may be satisfied in either one of two ways’⁶³ — either by an employee being at an employer-encouraged place or by an employee engaging in an employer-encouraged activity. Once one of these two qualifying conditions is met, the burden then passes to the ‘employer to show that an employee’s conduct is such as to take it outside the course of employment for reason that it should be regarded nevertheless as gross misconduct’.⁶⁴

IX High Court

Comcare sought and obtained leave to appeal the Full Federal Court’s decision to the High Court. The case was heard by a bench comprising French CJ, Hayne, Crennan, Kiefel, Bell and Gageler JJ. Keane J did not sit, having been part of the Full Federal Court that had earlier dismissed Comcare’s appeal. Three judgments were delivered.⁶⁵ The majority, comprising French CJ, Hayne, Crennan and Kiefel JJ, delivered a joint judgment in favour of Comcare. Bell and Gageler JJ each gave separate dissenting judgments. Each judgment will now be considered in turn.

⁵⁹ Ibid 156 [24].

⁶⁰ Ibid 156–7 [26].

⁶¹ Ibid 156–7 [25]–[26].

⁶² Ibid 164 [50].

⁶³ Ibid 164 [51].

⁶⁴ Ibid 163 [45].

⁶⁵ *Comcare v PVYW* (2013) 88 ALJR 1.

A *The Majority – French CJ, Hayne, Crennan and Kiefel JJ*

The majority commence their reasons by describing the result reached by the Full Federal Court (and Nicholas J, for that matter) as ‘odd’.⁶⁶ The majority state that should that result be ‘the natural consequence of what was said in *Hatzimanolis*, that decision would need to be reconsidered ... because it would otherwise effect an undue extension of an employer’s liability to pay compensation under the [*SRC Act*]’.⁶⁷ The majority, however, conclude that the joint reasons in *Hatzimanolis* make plain that this was not the intended result, and proceed to explain how *Hatzimanolis* should be properly understood.

The majority begin their analysis of *Hatzimanolis* by giving a short lesson in judicial interpretation. Quoting with approval advice given by Gummow J in *Brennan v Comcare*,⁶⁸ the majority observe that ‘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’.⁶⁹ Rather, what is required is to understand the concepts to which expression was sought to be given. And, to understand those concepts, it is necessary to analyse the *Hatzimanolis* organising principle in context. The majority identify the following three important contextual considerations:

1. That the principle was formulated in light of factual situations previously before the courts, with the consequence that ‘a current principle may require further explication in light of a factual situation which the court setting the principle could not predict’;⁷⁰
2. The purpose of the provisions of the *SRC Act* being interpreted, which the majority articulated as seeking to place limits upon an employer’s liability for compensation;⁷¹ and
3. The analysis in the joint reasons of the cases that preceded it and with whose benefit the organising principle was framed.⁷²

With these factors in mind, the majority commence their analysis of the *Hatzimanolis* organising principle by examining the cases considered in the joint reasons to identify the purpose and main characteristic according to which those reasons defined the extent of an employer’s liability for compensation. The majority identify as the ‘source of the employer’s liability’, ‘the employer’s inducement or encouragement of an employee, to be present at a particular place or to engage in a particular activity’,⁷³ and its ‘obvious purpose ... to create a

⁶⁶ Ibid 6 [10].

⁶⁷ Ibid.

⁶⁸ *Comcare v PVYW* (2013) 88 ALJR 1, 6 [16], quoting *Brennan v Comcare* (1994) 50 FCR 555, 572: ‘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.’

⁶⁹ Ibid 6 [15].

⁷⁰ Ibid 6 [14].

⁷¹ Ibid 6 [15].

⁷² Ibid 6–7 [16].

⁷³ Ibid 9–10 [35].

connection between the injury, the circumstances in which it occurred and the employment itself'.⁷⁴ Thus, the majority conclude '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'.⁷⁵

To determine if this is the case, the majority set out in the following series of questions to be asked and answered:⁷⁶

- First ask: did the employee suffer the injury while not engaged in actual work?
- If the answer to that question is 'yes', next ask: what was the employee doing when injured? 'For the *Hatzimanolis* principle to apply, the employee must have been either engaged in an activity or present at a place when the injury occurred.'
- Then you ask: how was the injury brought about? Was it by reference to a place, or by reason of the employee being engaged in an activity? The majority describe this as the 'essential inquiry'.
 - If 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?'
 - If the injury occurred at and by reference to the place, 'the question is: did the employer induce or encourage the employee to be at that place?'
- If the answer to either of the last two questions is 'yes', then the injury will have occurred in the course of employment.

From this passage it can be seen that the majority, like the Full Federal Court, interpret the joint reasons in *Hatzimanolis* as applying a disjunctive test: an injury is in the course of employment if it satisfies either the 'place test' or the 'activities test'. With respect to the activities test, the majority and the Full Federal Court both require the activity to be one that the employer induced or encouraged the employee to undertake. However, it is with respect to the place test that the two judgments diverge. For the Full Federal Court, it was enough that the injury occurred at the particular place the employer induced or encouraged the employee to be at. The majority of the High Court, however, require more. They require that the employee's injury not only occur at that place, but also that the injury be 'by reference to' that place.⁷⁷ By way of example, the majority state:

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

⁷⁴ Ibid 10 [36].

⁷⁵ Ibid 10 [35].

⁷⁶ Ibid 10 [38].

⁷⁷ See also *ibid* 10 [40], where the majority state: 'An injury occurs at a place when the circumstance of the injury is referable to the place.'

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.⁷⁸

Thus, according to the majority, mere presence at a particular place at the inducement or encouragement of the employer is not enough. Either the injury suffered must have ‘occurred at and by reference to that place’ (for example, because an insecurely fastened light fitting falls), or the employee must be engaged in activities induced or encouraged by the employer. Thus, injuries incurred while eating, sleeping and bathing at the place are compensable because they are things that an employer might be taken to have induced, encouraged or expected of an employee required to work remotely. These would also include recreational activities authorised, encouraged or permitted by the employer during an interval or interlude within an overall period or episode of work.

How, then, did the majority apply the *Hatzimanolis* principles to the facts of the case before them? Here, the majority decision is not as explicit as it could (or should) have been. However, in denying the respondent compensation, the majority must have concluded:

1. That her injuries were not incurred by reference to the place where the employer had induced or encouraged her to be — that is, the motel. The light fitting did not simply fall on the respondent (circumstances the majority held would have made the injury compensable). Rather, the light fitting fell by reason of the activities in which the respondent was engaged.
2. Those activities were not induced or encouraged by the employer. Unlike eating, sleeping and showering, sexual intercourse is not an activity that an employer might be taken to have induced or encouraged of an employee required to stay overnight at a remote location.

B *Bell J*

Bell J concurs with the reasoning of the Full Federal Court, whose analysis she describes as ‘a correct and faithful application of the *Hatzimanolis* test’.⁷⁹ Like the Full Court, her Honour concludes that the key point made in *Hatzimanolis* is that the difference between a compensable injury sustained during an interval in an overall period of work and a non-compensable injury sustained by an employee after the end of a day’s work, lies ‘not ... in the employer’s attitude to the way the interval is spent but in the characterisation of the period or periods of work’.⁸⁰ If the employee is in an interval in an overall period of work (which is the situation addressed by the *Hatzimanolis* principle), then:

⁷⁸ Ibid 11 [45].

⁷⁹ Ibid 22 [104].

⁸⁰ Ibid 21 [99].

the employer's inducement or encouragement to spend that interval at a particular place or in a particular way provides the nexus with 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.⁸¹

Her Honour states: '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.'⁸² In so doing, Her Honour agrees with the Full Court that the 'rider' to the *Hatzimanolis* organising principle underlines that the test is to be applied liberally,⁸³ and that the statement in the joint reasons accepting ANI Corporation's contention 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'.⁸⁴

C *Gageler J*

Gageler J commences his judgment by observing that there is no novelty in the question to be decided by the Court, and that it is to be decided according to the 'nature, content and application' of the principles expressed in the joint reasons in *Hatzimanolis*.⁸⁵ Gageler J starts his quest to understand those principles by examining the cases that preceded *Hatzimanolis*. His Honour observes that these cases reflected changed and enlarged conceptions of the nature and incidents of the employment relationship.⁸⁶ Moreover, Gageler J observes that this expansion had placed the previous *Henderson–Speechley* test under strain, and that the objective of the reformulation of that test in the joint reasons was to ensure the principles that determine whether an injury occurring between periods of actual work is within the course of the employment were consistent with the conception of the course of employment as demonstrated by the cases that preceded it.⁸⁷

Gageler J states that applying the *Hatzimanolis* operating principle involves a two-stage process. The first stage of the *Hatzimanolis* analysis requires one to ascertain whether there is one overall period or episode of work or discrete periods of work.⁸⁸ If the answer to that question is that there is one overall period or episode of work, then one moves to the second stage of the *Hatzimanolis* analysis. That stage states that an injury suffered in an interval or interlude within that

⁸¹ Ibid 20 [94].

⁸² Ibid 23 [106].

⁸³ Ibid 16–17 [77]–[78]. Bell J notes that the rider comes from comments made by Barwick CJ in *Danvers v Commissioner for Railways (NSW)* (1969) 122 CLR 529, 537 in support of his position that the then applicable *Henderson–Speechley* test should be applied 'liberally and practically'.

⁸⁴ Ibid 22 [104].

⁸⁵ Ibid 23–4 [112]–[113].

⁸⁶ Ibid 24–6 [114]–[123].

⁸⁷ Ibid 27 [126].

⁸⁸ Ibid 30–1 [147]. Like the Full Federal Court and Bell J, Gageler J finds that the underlying premise of the *Hatzimanolis* principle is that the question whether an injury is 'in the course of employment' comes down to a characterisation of the period of time during which the injury occurs: at 30 [144].

overall period or episode of work is in the course of employment if either one of the following two conditions is satisfied:

1. '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'; or
2. 'that the employee is, during the interval or interlude, undertaking a particular activity, which the employer has expressly or impliedly induced or encouraged the employee to undertake'.⁸⁹

Applying this test to the facts of the case, Gageler J concludes:

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.⁹⁰

Thus, Gageler J interprets *Hatzimanolis* consistently with the Full Federal Court and reaches the same conclusion. What is notable about Gageler J's decision, however, is the strength of his critique of attempts to superimpose an activity test on the place test in the manner proposed by Comcare in its submissions to the Court. Gageler refers to it as an 'outmoded, artificial and intrusive form of analysis';⁹¹ one that does not respect the privacy and autonomy of the employee and which requires an:

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 [by reference to what the employer is presumed to have encourage or required of the employee].⁹²

X Discussion

Comcare v PVYW has many attributes of a hard case: competing interests and values; extreme facts; an apparent conflict between legal principle and mainstream common sense; and differences of interpretation and application in the lower courts. The case brought into stark relief the underlying tension inherent in determining 'work-relatedness' in the workers' compensation context: between

⁸⁹ Ibid 31 [148]. The exception is where the employee is engaged in gross misconduct at the time of the injury.

⁹⁰ Ibid 32–3 [159].

⁹¹ Ibid 31 [152].

⁹² Ibid 31 [151].

employer claims that they should be responsible only for risks within their control; and employee claims that they should be insured against risks to which they would not otherwise have been exposed but for the employment relationship. The case also involved conduct that for some is morally ambiguous and that risks distorting judgments. The decisions of the Federal Court (at first instance and on appeal) had been met with a sense of incredulity (if not embarrassment) by many in the mainstream, something the High Court, too, was at risk of experiencing, depending on the decision it made.

The challenge for the High Court was not to allow this hard case to produce bad law.⁹³ In this author's opinion, the majority of the High Court has succeeded in meeting this challenge. By narrowing the 'place' test only to allow compensation for injuries incurred at and by reference to the place at which the employer has induced or encouraged the employee to be, the majority inject a level of certainty and pragmatism into the *Hatzimanolis* organising principle that avoids some of the more extreme results likely to be seen to be at odds with common sense and community acceptance.⁹⁴ The narrower 'place test' also strikes a reasonable balance between competing employer and employee values and interests. It is only fair and logical that if an employer requires an employee to stay at a particular place, that the employer assumes some responsibility for ensuring the place is suitable for the purpose and does not impose risks to the employee's health and safety. Of course, the majority's interpretation of *Hatzimanolis* extends an employer's liability to all risks referable to the place and not just those risks to health and safety that the employer could eliminate or reduce through reasonably practicable measures (which is the employer's obligation under applicable occupational health and safety legislation).⁹⁵ However, that is only consistent with the no-fault philosophy underpinning workers' compensation schemes. With the narrowing of the 'place' test, for an injury that is not referable to that place to be compensable, the injury must have been sustained while the employee was engaged in an activity induced or encouraged by the employer. This too seems only logical and fair, and consistent with marrying employer liability to employer control.

⁹³ 'Hard cases make bad law' is a legal adage attributed to Rolfe J in *Winterbottom v Wright* (1842) 10 M&W 109; 152 ER 402, 405–6: 'This is one of those unfortunate cases ... in which, it is, no doubt, a hardship upon the plaintiff to be without a remedy but by that consideration we ought not to be influenced. Hard cases, it has frequently been observed, are apt to introduce bad law.' The adage is generally taken to mean that an extreme case is a poor basis for formulating a law of general application.

⁹⁴ The narrower 'place' test also avoids one of the problems with the decisions of the Full Federal Court, and of Bell and Gageler JJ. Those decisions would have made the employer financially responsible for private conduct of the employee, unrelated to the employment relationship and with respect to which an employer has no right to direct or control. Imagine the privacy and industrial concerns that would arise if an employer issued a directive forbidding employees from engaging in sexual activities on a business trip, or otherwise attempted to itemise what they can and cannot do?

⁹⁵ See, eg, *Work Health and Safety Act 2011* (Cth) ss 18–19, which implement the model *Work Health and Safety Act* agreed by the Council of Australian Governments and adopted by all jurisdictions except Victoria and Western Australia. In Victoria, see *Occupational Health and Safety Act 1984* (Vic) ss 20–21; and Western Australia, *Occupational Safety and Health Act 1984* (WA) s 19.

Narrowing the ‘place’ test also increases the significance and role to be played by the ‘activity’ test. Employees faced with the narrower ‘place’ test will increasingly need to link their injury to an activity induced or encouraged by their employer; and employers (and their insurers), faced with such claims, will seek to argue that the specific activity engaged in by the employee at the time of injury was not so induced or encouraged. This dynamic exposes the application of the principle to the artificial, intrusive and fragmented analysis so stridently criticised by Gageler J, and Bell J to a lesser degree.

There are two responses to this concern. The first is that the risk is overstated. With respect to both the ‘place’ and ‘activity’ tests, courts generally have shown themselves capable of applying the *Hatzimanolis* organising principle ‘in a commonsense and practical manner’, to borrow the words of Tamberlin J in *Kennedy v Telstra Corporation*.⁹⁶ An excellent example of this practical, common sense approach is the case of *Lee v Transpacific Industries Pty Ltd*.⁹⁷ The decision in that case was reserved pending the High Court judgment in *Comcare v PVYW*. Heard before Siopis J of the Federal Court, the case involved an employee (Mr Lee) who was based at a remote mining site in the Pilbara, Western Australia. Mr Lee had sustained a compensable knee injury. As part of his return-to-work program, his employer required him to see an orthopaedic specialist in Port Hedland, which was a five-hour drive away. The employer made the appointment for Mr Lee, provided a car for the trip and gave his girlfriend (another employee) compassionate leave to drive him to the specialist. On the return trip, Mr Lee stopped at the Auski Roadhouse for a toilet break. There he slipped on either oil or water on the roadhouse forecourt, injuring his ankle. Siopis J applied the *Hatzimanolis* organising principle as explained by French CJ, Hayne, Crennan and Kiefel JJ at [38] of their judgment in *Comcare v PVYW*. In accordance with the principle, Siopis J asked (and answered):

- Did the employee suffer an injury while not engaged in work? Yes.⁹⁸
- What was the employee doing when injured? The employee was walking in the forecourt of the roadhouse on his way to the toilet.⁹⁹
- How was the injury brought about? Was it by reference to a place, or by reason of the employee being engaged in an activity? Both: the employee was at a place (the roadhouse), and was engaged in an activity (taking a toilet break).¹⁰⁰
- With respect to the toilet break, did the employer induce or encourage the employee to engage in that activity? Yes: ‘taking a toilet break in the

⁹⁶ (1995) 61 FCR 160, 169. See, eg, the broad and practical interpretation given to the place (motel) by Tamberlin J in *Kennedy v Telstra Corporation* (1995) 61 FCR 160; Lockhart J’s refusal artificially to fragment the respondent’s employment into periods of time at which she was at her place of work, at her hotel, and travelling between her place of work and the hotel: *Comcare v McCallum* (1994) 49 FCR 199, 204.

⁹⁷ (2013) 62 AAR 63.

⁹⁸ *Ibid* 70 [45].

⁹⁹ *Ibid* 70 [46].

¹⁰⁰ *Ibid* 70 [47].

course of a long road trip ... was plainly within the scope of the activity ... that the employer had encouraged or induced Mr Lee to undertake'.¹⁰¹

- With respect to the roadhouse, did the employer induce or encourage the employee to be at that place? Yes: the employer induced or encouraged Mr Lee to undertake the road trip to Port Hedland; the toilet break was an incident of taking that long road trip; therefore the employer induced or encouraged Mr Lee to be at the Auski Roadhouse. Moreover, the injury occurred by reference to the place: 'the slippery surface of the forecourt of the Auski Roadhouse, at which his employer had encouraged or induced him to be'.¹⁰²

The second response to Gageler J's concerns is that in any formulation of a test there will be matters of degree and dispute at the edge. Often these are revealed by the hard cases, the facts of which were not contemplated or foreseen at the time the test was being formulated. Both an employer-endorsed place and an employer-endorsed activity exist on a continuum within which there is plenty of grey. For example, what constitutes the 'place' at which the employee was induced or encouraged to be by the employer? Is it just the motel the employee stays at? Does it extend to the town in which the motel is located? What if the employee chooses to eat at a nearby restaurant and is injured at that restaurant? Or goes to a theatre or bar at which he or she is injured? Similarly, what constitutes an activity induced or encouraged by the employer? Is it limited to only to those activities consistent with the employer's expectations of employment, such as showering, eating and resting? Or does it extend to recreational and social activities and, if yes, which ones? If an employer encourages employees to be healthier by providing or subsidising gym memberships, for example, would exercise during the evening of a business trip be an activity expressly or impliedly induced or encouraged by the employer? And if one of the purposes of the trip is to build better relationships with colleagues, would socialising at a bar or club be an activity expressly or impliedly induced or encouraged by the employer?

Importantly with respect to the 'activity' test, the answers to these questions cannot be divorced from the nature of the activity itself. Clearly, the values of an employer are relevant to ascertaining the type of activities that employer can reasonably be assumed to have induced or encouraged the employee to engage in. And values are subjective. In *Comcare v PVYW*, no evidence was led as to what activities the Commonwealth agency contemplated, expected, required or prohibited employees from undertaking while on overnight stays. It was therefore a matter for each court to determine with reference to the findings of fact before it, and its 'knowledge of human affairs'.¹⁰³ The AAT concluded that sexual activity

¹⁰¹ Ibid 70 [48].

¹⁰² Ibid 70–1 [49].

¹⁰³ As Nicholas J observed, it is open it a court to make findings of fact 'on the basis of what is sometimes referred to as its "knowledge of human affairs"', citing J D Heydon, *Cross on Evidence*, (LexisNexis, 8th ed, 2009) [3200]: *PVYW v Comcare (No 2)* (2012) 220 IR 432, 439 [29]. During argument for special leave to appeal, counsel for the respondent asked whether 'there has been some moral judgment applied to the behaviour of the worker in this case': Transcript of Proceedings, *Comcare v PVYW* [2013] HCATrans 114 (10 May 2013) (Mr L T Grey). While it is

was not an ordinary incident of an overnight stay in a motel room on a business trip, a finding that Nicholas J doubted was open to it on the evidence.¹⁰⁴ The Full Federal Court did not directly address the matter, and the High Court majority, by virtue of its decision, accepted that sexual intercourse was not an activity that this employer induced or encouraged this respondent to engage in during the overnight stay.

These assessments of the extent to which the employer could reasonably be assumed to have induced or encouraged the employee to engage in sexual activity during an overnight stay were clearly impacted by the judges' understanding of the activity in question, and the context in which it took place. This raises a number of interesting hypotheticals. For example, would the court have reached a different decision had the respondent engaged in sexual intercourse with her spouse, or if the respondent had been required to stay in the country town for a longer period, say three months? In *McCurry*,¹⁰⁵ the employee (a shearer staying on a remote shearing station) was awarded compensation for injuries sustained when shot sleeping in the bed of a fellow employee with whom he had just had sexual intercourse. In that case, the NSW Court of Appeal concluded that the employee was injured while he was doing something reasonably incidental to his temporary residence on the shearing station. Important findings of fact in that case included: that male and female employees were co-located at a remote location; that the employer knew of the employees' sexual relationship and that the two employees had shared a bed in the past; and that the employer had not raised an objection or taken any steps to prevent it continuing.

XI Conclusion

In conclusion, let us return to the question posed in the title of this note: Are injuries sustained while having sex on a business trip compensable? One would be excused for thinking that after the careful thought given to this question by the High Court, it would now have a definitive answer. This is not the case, however. The answer to the question remains — 'it depends'. Central to answering the question is ascertaining what particular places and what particular activities an employer can be taken to have induced or encouraged an employee to be present at, or to engage in.¹⁰⁶ Absent express evidence, this will continue to be a matter of inference and implication to be drawn from: the nature and values of the employer; the demographics of its workforce; the custom of the industry in which it operates; the length and purpose of the business trip; the scope and nature of the employment relationship; past practice; what may have been said (and not said)

the values — and expectations — of the employer that are important in determining the type of activities the employer can reasonably be assumed to have induced or encouraged, it would be naïve to think of the courts here as value-neutral determiners of the facts.

¹⁰⁴ *PVYW v Comcare (No 2)* (2012) 220 IR 432, 439 [29].

¹⁰⁵ (1992) 8 NSWCCR 556 (discussed above n 31).

¹⁰⁶ As the High Court majority observed: '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': *Comcare v PVYC* (2013) 88 ALJR 1, 14 [61].

between the parties; and the other circumstances of the particular case. Thus, while the decision of the majority of the High Court in *Comcare v PVYW* clarifies what constitutes a compensable ‘work-related injury’ in circumstances where the injury is incurred during an interval in an overall period of work, and injects a level of pragmatism into the concept, the answer to the question posed by this note will continue to be the subject of disputation and, no doubt, future litigation.