W+K CASE ALERT

Vicarious liability for unlawful acts beyond child abuse?

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At a glance

- In two recent decisions, the courts have grappled with the difficult question of in what circumstances an employer should be found vicariously liable for the wrongful acts of an employee involving intentional wrongdoing.
- This area of law was clarified for historic child abuse claims in the *Prince Alfred College* decision. However, there remains an open question about whether the 'relevant approach' used in that decision has broader application.
- The fact that these two recent cases had two different outcomes suggests that the law in this area requires further clarification. The appeal to the High Court from the *Schokman* decision may provide it.

Vicarious liability for unlawful acts

In *Prince Alfred College Incorporated v ADC* (2016) 258 CLR 134 (*PAC*), the High Court sought to clarify the law regarding an employer's vicarious liability for an employee's intentional, criminal wrongdoing. The wrongdoing in that case was child sexual abuse.

The majority judgment in *PAC*[1] expounds the so-called 'relevant approach', which is to determine whether the employment role merely created the opportunity for the abuse – in which case, vicarious liability will not arise – or whether it created the occasion for the abuse. This involves considering the employment role of the perpetrator and their relationship with the victim, including whether the perpetrator was invested with, and took advantage of, authority and had the ability to create intimacy.

The minority judgment in *PAC*[2] agreed with the 'relevant approach' but added that the approach was not a 'test' nor an absolute rule.

The 'relevant approach', explained in *PAC*, has since been applied by trial courts in cases where an employer (or quasi-employer, like a religious institution) has been found vicariously liable for child abuse[3].

While the 'relevant approach' will apply to child abuse claims, a question remains about the extent to which it applies to civil litigation more broadly. PAC offers no guidance on this. The leading judgment refers only to the approach applying 'in cases of this kind'.

Two recent decisions reveal how trial and intermediate appellate courts are applying, or at least considering, the 'relevant approach' in contexts other than child abuse – with differing results.

[1] Per French CJ, Kiefel, Bell, Keane and Nettle JJ
[2] Per Gageler and Gordon JJ
[3] See recently *DP v Bird* [2021] VSC 850 and *O'Connor v Comensoli* [2022] VSC 313

Garrett v Victorian WorkCover Authority [2022] VSC 623

The plaintiff, Mr Garrett, and a co-worker were working as armed security guards. One day in 2014, whilst escorting currency printing equipment from the Mint, the co-worker pulled his firearm out of his holster and pointed it at Mr Garrett's head. The plaintiff claimed the actions of the co-worker caused him to develop psychiatric injuries, including post-traumatic stress disorder.

The plaintiff sued his employer and the matter proceeded to trial. Putting aside the negligence case, the issue was whether the employer was vicariously liable for the actions of the co-worker.

The trial judge, Tsalamandris J, found that the employer was not vicariously liable.

By applying the 'relevant approach' from *PAC*, the judge found the co-worker was not placed in a position of power, authority, trust, control or intimacy with respect to the plaintiff. There was no power imbalance between the two men.

The court found that while it was true that the employer gave the co-worker a gun and authorised him to use it in the course of his employment in certain circumstances, that alone was not sufficient to prove vicarious liability. It provided the opportunity for the unlawful act, not the 'occasion'.

The court also found that the co-worker, in aiming the firearm at the plaintiff, did not further the interests of the employer in the sense described in earlier cases involving vicarious liability for security guards[4]. It was not a 'natural extension' of his employment role.

Schokman v CCIG Investments Pty Ltd [2022] QCA 38

An employee was working at a Daydream Island resort in 2016. Like all resort workers, he had to live in shared cabin accommodation. He shared an apartment with a co-worker.

One morning, his co-worker came back to the apartment after drinking alcohol to excess. The employee heard the co-worker vomiting in the bathroom. The next thing he knew, he woke up to the distressing sensation of being unable to breathe. He realised that his co-worker was standing over him and urinating onto his face. The incident caused the plaintiff a psychological injury.

Putting aside the negligence case, the issue was whether the employer was vicariously liable for the co-worker urinating onto the plaintiff's face.

At first instance, the trial judge, Crow J, found the employer was not vicariously liable, holding that there was not sufficient connection between the employment role and the wrong. Yet on appeal, McMurdo JA (with whom Fraser JA and Mullins JA agreed) overturned the primary decision and found that the employer was vicariously liable.

McMurdo JA found that vicarious liability should flow considering *Bugge v Brown* (1919) 26 CLR 110. In that case, a defendant was found to be vicariously liable for an employee on a grazing property negligently lighting a fire. The employee was provided with food and lunch by the defendant, but was instructed to cook it at a different place from where he lit the fire. The majority of the High Court found that vicarious liability should flow in such circumstances, as the fire lighting was not "entirely outside the relation of master and servant". The employee was cooking food provided by his employer for the day's work. The fact that he cooked it in the wrong place did not take his act entirely outside the employment relationship.

By analogy, the co-worker in the *Schokman* case was staying in the hotel room assigned to him by his employer. He occupied the room as a term of his employment. There was a sufficient connection between his employment and his actions in urinating on the plaintiff's face for vicarious liability to flow.

[4] *Zorom Enterprises Pty Ltd v Zabow* (2007) 71 NSWLR 354; *Sprod v Public Relations Orientated Security Pty Ltd* [2007] NSWCA 319

Where to from here?

In *Garrett* and *Schokman*, two employees committed obvious wrongdoings – respectively, pointing a gun at, and urinating on, a colleague. While these cases are fact-specific, it is difficult to reconcile how different results were achieved in them.

One way in which the decisions might be reconciled is that the Court of Appeal in *Schokman* held that the urination event was not intentional. The co-worker had intended to urinate, but not onto his colleague's face. He therefore did not commit battery, although he was plainly negligent. Yet there was no question the co-worker in *Garrett* intended to point the gun at his colleague, which distinguishes the two cases.

Still, some might be concerned that vicarious liability could turn on so fine a point. Employers and their insurers may wonder why – at the level of principle – they could be liable for acts of gross negligence by employees outside the formal employment role, yet not for intentional acts. Was the appalling negligence in *Schokman* really so far removed from the 'brain snap' in *Garrett*? And what of the fact that both acts are plainly outside the employment role?

It is also noteworthy that all courts involved in these decisions applied different tests. The trial judge in *Garrett* applied the *PAC* 'relevant approach', as well as asking whether the act was a 'natural extension of employment'. The trial judge in *Schokman* asked whether there was a 'nexus' between the employment and the wrong, applying the Canadian case of *Bazley v Curry*. The Queensland Court of Appeal in *Schokman* held that *Bazley* was not the correct test. The Court of Appeal considered that it was not appropriate to apply the *PAC* test, as there was no intentional wrongdoing. The Court of Appeal instead had recourse to *Bugge v Brown*.

These different approaches suggest the law of vicarious liability regarding intentional acts or acts of gross negligence is unsettled, at least beyond child sexual abuse cases where the 'relevant approach' applies.

Clarification on this area of law may be on its way as the High Court has granted the employer special leave to appeal the *Schokman* decision.

The appellant's submissions note that the actions of the co-worker in urinating were not connected in any material way with the discharge of his employment duties. The appellant urges the High Court to affirm its approach suggested in *PAC*, which requires more than the mere provision of 'opportunity' for the imposition of vicarious liability. If this submission is accepted, it will suggest the 'relevant approach' in *PAC* has broader application than intentional wrongdoing and it can also apply to cases of gross negligence, such as in *Schokman*. It will also suggest that *PAC* is not confined to cases involving child sexual abuse.

The plaintiff / respondent's submissions indicate the *PAC* analysis can be called on to support their argument that the employer should be vicariously liable. It is submitted that the employment role of the two men created the 'occasion' for the urination event, in the sense that the plaintiff / respondent had to trust his colleague not to cause him harm when he was asleep.

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The implications for employers and insurers

The divergent outcomes in *Garrett* and *Schokman* highlight how the law of vicarious liability regarding intentional wrongdoing (and perhaps gross negligence) is unsettled outside an historic child abuse context.

The 'relevant approach' articulated in *PAC* may also be applied to cases involving intentional wrongdoing, as was done by the trial judge in *Garrett*. However, the scope of cases that the 'relevant approach' applies to is not clear from the text of the *PAC* decision.

The *Schokman* appeal provides an opportunity for the High Court to further clarify the law in this area. It is an important case that might provide more certainty in the difficult area of vicarious liability at the margins of the employment role. We will continue to watch this case with interest and report on the developments.

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