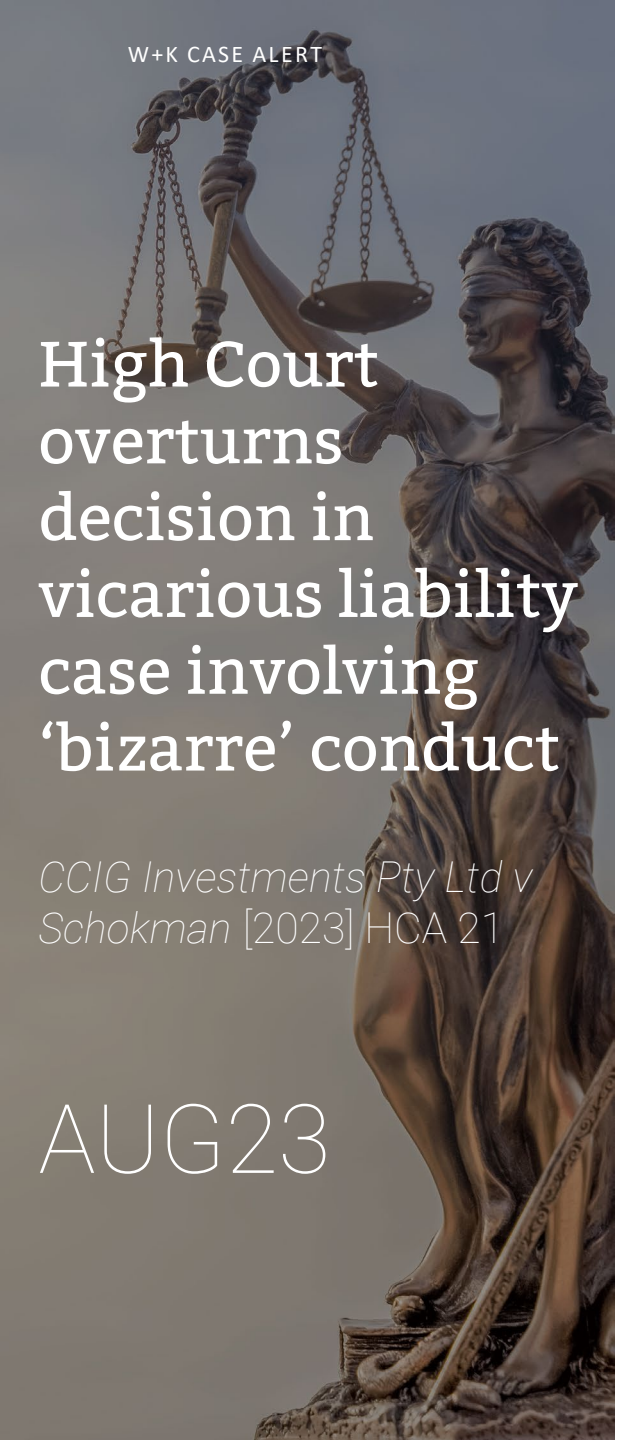

W+K CASE ALERT

High Court overturns decision in vicarious liability case involving 'bizarre' conduct

CCIG Investments Pty Ltd v Schokman [2023] HCA 21

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At a glance

+ On 2 August 2023, the High Court of Australia overturned an appeal from the Queensland Court of Appeal to find the employer was not vicariously liable for an employee's act, which occurred in employer-provided shared accommodation.
+ The plaintiff had initially successfully proved in the Queensland Court of Appeal that the tortious act was sufficiently connected to the perpetrator's employment.
+ Overall, the High Court considered that the mere opportunity for an act was an insufficient connection to employment to establish vicarious liability.
+ This decision provides guidance in cases where there is an introduction of the relevant parties through employment, but where the tortious act occurs outside of that employment.

Background

Aaron Schokman (**plaintiff**) brought a claim against CCIG Investments Pty Ltd (**appellant**) for a cataplectic attack he suffered as a result of an incident that occurred on 6 November 2016 in his shared staff accommodation on Daydream Island. The plaintiff shared accommodation with Sean Hewitt, a fellow employee at the Daydream Island Resort and Spa in the Whitsunday Islands.

On the night of the incident, after returning from a night of drinking and while in a semi-conscious and intoxicated state, Hewett urinated on the plaintiff's face while he was sleeping. The plaintiff woke up with a distressing sensation of being unable to breathe. He then yelled at Hewett to stop and almost immediately suffered a cataplectic attack. He was also found to have suffered a post-traumatic stress disorder as a result of the incident.

The plaintiff had previously been diagnosed with cataplexy, which is a sudden and usually brief loss of voluntary muscle tone triggered by strong emotions, and a sleep disorder. However, the plaintiff was managing both conditions.

The plaintiff brought proceedings against the appellant for damages on two alternate bases:

1) the first was that the appellant had breached its duty of care owed to him as an employee, and
2) the second was that the appellant was vicariously liable for the negligent act of its employee.

The High Court of Australia overturned an appeal on a previous finding of vicarious liability. The plaintiff had previously successfully proved in the Queensland Court of Appeal that the tortious act was sufficiently connected to the perpetrator's employment.

Trial judge findings

Although the occasion for Hewett to commit the incident arose out of the appellant's requirement for shared accommodation, the trial judge did not consider that it was fair to impose vicarious liability on the appellant for the drunken misadventure of Hewitt.

There was no history of Hewett being intoxicated that would have put the employer on notice that Mr Hewett may have engaged in what was bizarre conduct.[1]

Court of Appeal

The Court of Appeal considered that the circumstances of the case were analogous to those in *Bugge v Brown*[2] where the employer was held vicariously liable for the acts of the employee by reference to the terms of his employment.

The Court of Appeal held that it was a term of Hewitt's employment that he reside in staff accommodation and occupy the room with the plaintiff. It followed that there was the requisite connection between the employment and the employee's actions.

Analogies

Prince Alfred College

The plaintiff sought to draw an analogy between the circumstances in *Prince Alfred College*[3] and those arising from the shared accommodation in this case. The plaintiff contended that his compulsory housing with Hewett made him vulnerable because he was required to sleep in a setting that was intimate.

Bugge v Brown

The plaintiff also contended that an analogy might be drawn between his case and the case of *Bugge v Brown*. The two circumstances that he identified as common to both cases were that:

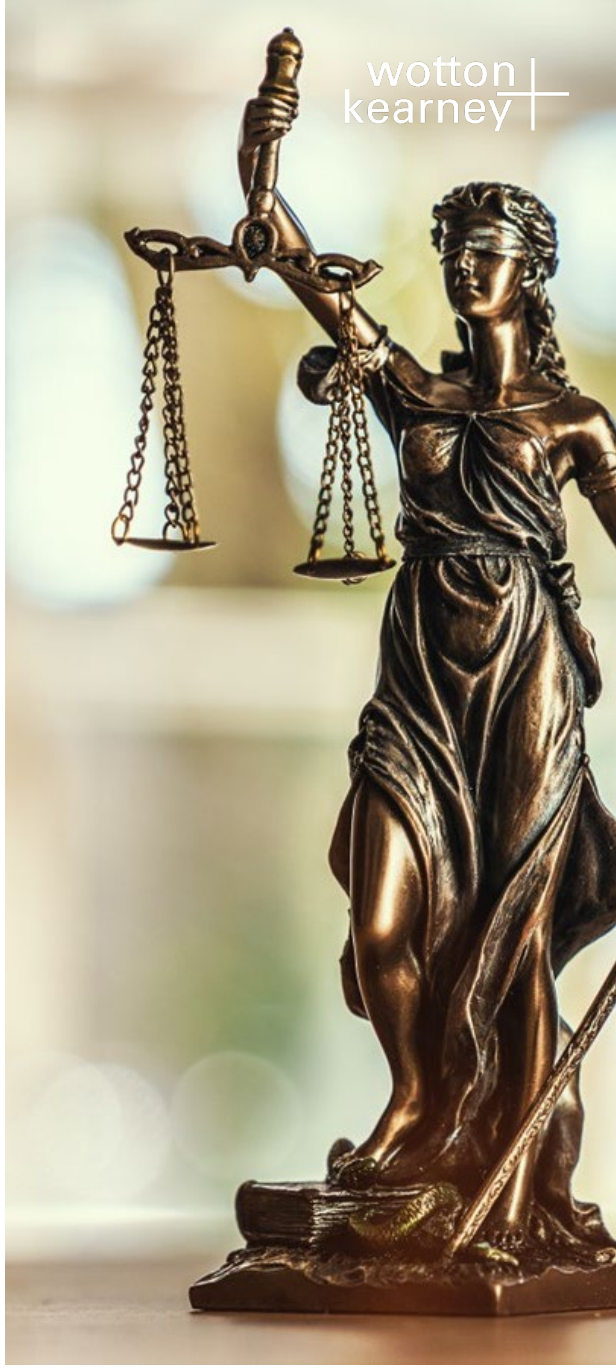
- the tortious act of the employee occurred while he was on a break from his employment, and
- each employee was fulfilling the requirements of his employment when carrying out the tortious act.

Judgment

The High Court considered that the plaintiff misapprehended what was said in *Prince Alfred College*, noting that:

- Hewett was not assigned any special role concerning the plaintiff
- no part of what Hewett was employed to do was required to be done in the accommodation, and
- the most that could be said to arise from the circumstance of shared accommodation was that it:
  - created physical proximity between the two men, and
  - provided the opportunity for Hewett's drunken actions to affect the plaintiff.

Overall, the High Court considered that the mere opportunity for an act was an insufficient connection to his employment to establish vicarious liability.



[1] *Schokman v CCIG Investments Pty Ltd* [2021] QSC 120 at [138].
[2] (1919) 26 CLR 110, cited in *Schokman v CCIG Investments Pty Ltd* (2022) 10 QR 310 at 326-327 [42].
[3] [2016] HCA 37.

The plaintiff's argument focussed on his position of vulnerability, which suggested a duty of care owed by the employer to protect the plaintiff from a risk of harm that might arise from the circumstances of shared accommodation. Whether there was a duty of care to protect the plaintiff, however, did not arise in a case concerning the employer's vicarious liability. Direct liability was not on appeal.

The Court also considered the plaintiff's comparisons with *Bugge v Browne*, noting that:

- Hewett was at leisure, and not at his place of work, when he committed the tortious act. He was on a 'break' only in the sense that it occurred outside of, or in the period between, carrying out his duties. The functional, geographical and temporal aspects between Hewett's act and scope of employment were absent.
- Hewett could only be said to be acting in line with his employment contract by sharing the accommodation and being present in it. This was not a proper connection to the employment.
- The circumstances in *Bugge v Brown* are in no way analogous to the present case. Nothing in the present case points to the drunken act in question being authorised, being in any way required by, or being incidental to, the employment.

The appellant was successful in its appeal and the plaintiff was ordered to pay the appellant's costs. The orders of the Queensland Court of Appeal were set aside.

Implications

This decision cements that there must be a connection between the employment and the employee's actions for the employer to be found vicariously liable for an employee's wrongful act.

Decisions such as those in *Prince Alfred College*, where perpetrators' employment affords them with power, control and intimacy continue to be a high threshold for claimants to meet. The decision in *Schokman* may provide some distinction in cases where there is an introduction of the relevant parties through employment, but where the tortious act occurs outside of that employment.

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Need to know more?

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