W+K CASE ALERT

A new way of looking at vicarious liability for abuse?

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, finding the employer was not vicariously liable for an employee's act of drunken urination that occurred in employer-provided shared accommodation. We looked at the implications of that case for employers and insurers generally in this article.
+ The *Schokman* decision also has potential application for those dealing with institutional abuse claims. One of the reasons suggests that the doctrine of vicarious liability may be partitioned into three distinct concepts.
+ This approach could potentially mean vicarious liability in institutional abuse matters might be better understood as a breach of an institution's non-delegable duty of care.

The decision

In *Schokman*, the High Court unanimously upheld the applicant's appeal and determined that the employer was not vicariously liable for Mr Hewett's drunken action of urinating on his roommate, and fellow employee of the Daydream Island Resort and Spa, Mr Schokman.

There are three separate reasons published by Kiefel CJ, Gageler, Gordon and Jagot JJ; Edelman and Steward J; and Gleeson J. While each of their Honours agreed the appeal should be dismissed, there is an important distinction between the reasons of Edelman and Steward JJ and the other two reasons. Their Honours' approach has a potentially significant implication for future institutional abuse matters.

Kiefel CJ, Gageler, Gordon and Jagot JJ's reasons

The majority position started from the bedrock principle that, for an employer to be held liable for the tort of an employee, the tortious act must be committed "in the course or scope" of the employment. Other jurisdictions have strayed beyond that fundamental maxim, including Canada's 'enterprise risk' theory or the United Kingdom's notion of 'what might considered fair'. However, those views have not found support in Australia's High Court.

The key question with the Australian approach is whether a wrongful or unsanctioned act was sufficiently connected to the employment. The fact that an act is unsanctioned is not determinative – employers can be, and have been, held vicariously liable for unsanctioned or even criminal acts.

There is some nuance to the 'sufficient connection' test. Employers are not vicariously liable for all unauthorised acts of employees just because of a connection between the employment and the tort. The tortious act must be sufficiently connected to what the employee was assigned to do, which requires particular focus on the employment role. For example, the employer in *Deatons v Flew* (1949) 79 CLR 370 was found to be not vicariously liable for a barmaid throwing glass at a customer. Dixon J held that the barmaid's actions were "quite unconnected" with her employment.

Another way to look at the 'sufficient connection' test is that it requires more than the employment to have provided the opportunity for the tortious act. In many cases, the connection to the employment is only tenuous. But if the employment also provides the '*occasion*' for the tortious act – where the tortious act was made possible because the employer placed the employee in a 'special position' – the connection is stronger. The critical authority is *Prince Alfred College v ADC* (2016) 258 CLR 134 (the *PAC* decision). In *PAC*, the High Court looked for specific features of the employment role, including authority, power, trust and control. Each of these features, if present and used to carry out the abuse (creating the *occasion* for it), increases the connection between the employment role and the tort. This combination makes a finding of vicarious liability more likely.

In *Schokman*, however, Mr Hewett was not assigned any special role regarding the respondent. The employment role had done nothing more than create the opportunity for his negligent act by placing the two men together in shared accommodation. It had not created the occasion for the tort as no part of Mr Hewett's employment role had led to his drunken act of urinating on Mr Schokman in the early hours of the morning. Therefore, the connection to the employment role was insufficient.

In contrast, in *Bugge v Browne*, a worker was authorised to cook employer-provided food while working in the field. He cooked the food in an unauthorised way, negligently causing a fire. As there was sufficient connection between his employment role and the negligence, the Court found vicarious liability flowed because the worker was not "on a frolic of his own".

Edelman and Steward JJ's reasons

Edelman and Steward JJ took a different approach from Kiefel CJ, Gageler, Gordon and Jagot JJ, although they arrived at the same decision. It is this approach that may have future implications for institutional abuse matters.

Their Honours started their analysis by stepping back and asking what vicarious liability involves. In their view, the notion of vicarious liability entails several discreet legal principles that need to be disentangled from one another because the intwining of these principles has led to great confusion.

In their Honours' view, there are three discreet areas of law currently being described under the umbrella term 'vicarious liability':

1. **Vicarious liability describing attributed acts** – where the acts, as opposed to the liability, of an agent is attributed back to the principal. The basis of liability in these cases is due to the agency relationship. When the agent acts under the express or implied authority of the principal, the principal is held liable at law for the agent's actions.

Effectively, they are acting in joint enterprise. These agency relationships exist in an employment context, where the employee is the agent of the employer / principal. The agency relationship can only extend to the attribution of an agreed, procured, authorised or ratified act.

2 **Vicarious liability describing attributed liability** – where the liability of an employee who acts tortiously is attributed to the employer. This is different to the first category of vicarious liability, because the employer only assumes the liability, not the wrongs. The test in these cases involves identifying the powers and duties of employment, and then considering the sufficiency or closeness of the connection between the wrongful act (whether authorised or not) and those powers and duties. This is broader than the first category of vicarious liability because it can apply to unauthorised acts.

3 **Vicarious liability describing a non-delegable duty** – where the nature of a relationship between the parties gives rise to a special duty to ensure that reasonable care is taken. These special duties arise in an employment context. For example, an employer has a non-delegable duty to provide employees with a safe system of work. There are some cases where institutions have been found vicariously liable for child sexual abuse that might be better understood as involving a breach of non-delegable duties.

Once the three types of vicarious liability are untangled, their Honours found liability could only be imposed in *Schokman* under the second category of vicarious liability, which they called "true" vicarious liability. Using this approach, their Honours determined Mr Hewett's powers and duties and then considered if his wrongful act was sufficiently connected with those powers and duties. They found Mr Hewett's negligent urination was not sufficiently or closely connected with any of his authorised powers and duties.

Gleeson J

Gleeson J wrote a separate judgment. Her reasons draw from both of the other published reasons. She spoke to the requisite test for unauthorised acts, which is to determine whether there is a connection between the wrongful act and the features of the tortfeasor's employment role.

While Mr Hewett's employment contract addressed taking reasonable care that his actions did not adversely affect other persons, those provisions were generic and directed at workplace health and safety. They did not govern his conduct while at leisure.

Implications for institutional abuse

The *Schokman* decision has potential implications in the institutional abuse space.

There is no suggestion in the principal joint judgment, or Gleeson J's reasons, that vicarious liability regarding institutional abuse is different to vicarious liability more broadly. The decision in *PAC* and the relevant approach in terms of determining whether the employment role created the 'occasion' for the tort has broader application.

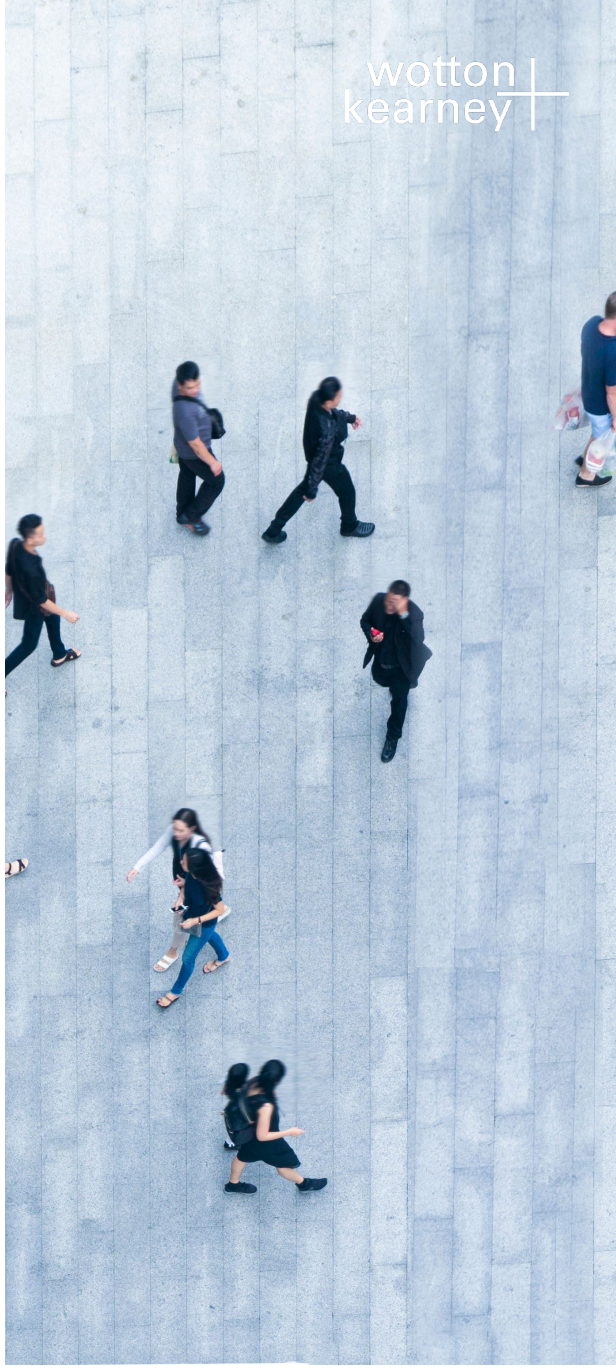
The relevant approach articulated in *PAC* involves adopting the general 'scope of employment' and 'sufficiency of connection' tests. These are well understood to apply across vicarious liability more broadly and to an abuse context. The principal joint judgment reconciles the *PAC* approach with the general 'sufficiency of connection' test at [23], holding that the two tests are effectively the same but a matter of different 'focus'.

There is, however, a tension, or at least a difference in approach, between the decision of Kiefel CJ, Gageler, Gordon and Jagot JJ and the decision of Edelman and Steward JJ.

The former appear to presume, in a case like *PAC*, that the liability of an institution derives from an orthodox application of the ordinary principles of vicarious liability. In Edelman and Steward JJ's approach, however, the liability of the institution is not an incident of 'true' vicarious liability but rather of non-delegable duties of care.

Their Honours note at [81] that the factors to be considered in *PAC* when determining vicarious liability – authority, power, trust, control, ability to achieve intimacy – are similar to the features to be determined when finding a non-delegable duty – care, supervision and control. Edelman and Steward JJ cite, with apparent approval, the work of academics to the effect that imposing liability for breach of non-delegable duties of care would be more appropriate than shoehorning that liability into the doctrine of vicarious liability.

For the moment, liability for institutional abuse is still to be determined regarding the relevant approach espoused in *PAC*, as cited with approval in the principal joint judgment in *Schokman*. It is still all about vicarious liability. However, the Edelman and Steward JJ approach offers an interesting alternative: perhaps liability for institutional abuse might not be an artefact of vicarious liability at all. Perhaps it is a question of non-delegable duties instead. Whether or not the Edelman and Steward JJ's proposed taxonomy of the law of vicarious liability finds favour with the Court in future decisions, and becomes the law of Australia, remains to be seen.



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