Discussion

27.
There are two closely related factual findings made by the Tribunal that were challenged by the applicant in her notice of appeal on the basis that they were not open on the evidence. It is convenient to consider the applicant's challenge to these findings before considering her main argument.
28.
The first of the challenged findings (at para [50]) was that the recreational activity engaged in by the applicant during the evening in question was not countenanced by her employer. The word "countenance" in the present context means to "support or approve" but may also mean to "tolerate or permit". Either way, I do not think there was any evidence before the Tribunal (whether by way of agreed facts or otherwise) which enabled the Tribunal to make a positive finding that the recreational activity engaged in by the applicant was not countenanced by her employer.
29.
The second of the challenged findings (at para [50]) was that sexual activity was not an ordinary incident of an overnight stay in a motel room on a business trip. It may be that it was open to the Tribunal to make this finding on the basis of what is sometimes referred to as its "knowledge of human affairs": see, for example, *Cross on Evidence*, 8th Aust ed (2010) at para [3200]. But if the Tribunal's finding is understood as meaning that an employer would have no reason to expect that an employee might engage in lawful sexual activity during the course of such a stay because it rarely occurs or is somehow "out of the ordinary" then I have real doubt as to whether such a finding was open to the Tribunal. I think the vice in the finding lies in its generality. In any event, I do not think it is necessary for me to resolve this particular issue for the purposes of deciding this appeal.
30.
The starting point in the applicant's argument in support of the appeal is the joint judgment in *Hatzimanolis*. In that case, the appellant worked at Mount Newman, a remote location in Western Australia. Before he left to go there he was told by his employer (ANI) that he would be required to work Mondays to Fridays for 10 hours per day, with the possibility that he might also have to work on Sundays. The appellant's accommodation and living expenses were to be paid for by ANI which also provided vehicles for ground transportation. The appellant was told that he and his fellow employees might have the opportunity to make trips to surrounding areas. The appellant's supervisor organised one such trip to Wittenoom Gorge which he encouraged the appellant to go on. The appellant was injured when a vehicle supplied by the employer overturned during the course of the trip.
31.
Mason CJ, Deane, Dawson and McHugh JJ referred to earlier High Court authority, including *Whittingham v Commissioner of Railways* (W.A.) [1931] HCA 49; (1931) 46 CLR 22, *Henderson v Commissioner of Railways* (W.A.) [1937] HCA 67; (1937) 58 CLR 281, *Humphrey Earl Ltd v Speechley* [1951] HCA 75; (1951) 84 CLR 126, *The Commonwealth v Oliver* [1962] HCA 38; (1962) 107 CLR 353 and *Danvers v Commissioner for Railways (N.S.W.)* [1969] HCA 64; (1969) 122 CLR 529. For the purpose of determining whether an injury had been suffered by an employee in the course of employment, those cases applied what became know as the *Henderson – Speechley* test. Under that test, an employee suffered an injury in the course of employment if the injury was suffered in the course of doing something he or she was "reasonably required, expected or authorized to do in order to carry out his [or her] actual duties." (see *Henderson* at 294).
32.
Their Honours explained (at 482) that there was a need for a reformulation of the principles used to determine whether an injury occurring between periods of actual work was within the course of employment. They then observed (also at 482) that in almost all cases in which an injury had been suffered between periods of actual work, 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. That observation is central to the reformulation of the relevant principles which subsequently emerges from the joint judgment.

33.

Their Honours said (at 483):

The distinction between an injury sustained by a railway worker as in Danvers and a non-compensable injury sustained by an ordinary employee after the day's work has ceased lies not so much in the employer's attitude to the way the interval between the periods of actual work was spent but in the characterization of the period or periods of work of those employees. For the purposes of workers' compensation law, an injury is more readily seen as occurring in the course of employment when it has been sustained in an interval or interlude occurring within an overall period or episode of work than when it has been sustained in the interval between two discrete periods of work. Where an employee performs his or her work at a permanent location or in a permanent locality, there is usually little difficulty in identifying the period between the daily starting and finishing points as a discrete working period. A tea break or lunch break within such a period occurs as an interlude or interval within an overall work period. Something done during such a break is more readily seen as done in the course of employment than something that is done after a daily period of work has been completed and the employee has returned to his or her home. On the other hand, there are cases where an employee is required to embark upon some undertaking for the purpose of his or her work in circumstances where, notwithstanding that it extends over a number of daily periods of actual work, the whole period of the undertaking constitutes an overall period or episode of work. Where, for example, as in Danvers, an employee is required to go to a remote place and live in accommodation provided by his or her employer for the limited time until a particular undertaking is completed, the correct conclusion is likely to be that the time spent in the new locality constitutes one overall period or episode of work rather than a series of discrete periods or episodes of work. An injury occurring during the interval between periods of actual work in such a case is more readily perceived as being within the current conception of the course of employment than an injury occurring after ordinary working hours to an employee who performs his or her work at a permanent location or in a permanent locality.

34.

The key passage in the joint judgment appears on the next page (at 484) where their Honours said:

Moreover, *Oliver* and the cases which follow it show that an interval or interlude in an overall period or episode of work will ordinarily be seen as being part of the course of employment if the employer, expressly or impliedly, has induced or encouraged the employee to spend the interval or interlude at a particular place or in a particular way. Indeed, the modern cases show that, absent gross misconduct on the part of the employee, an injury occurring during such an interval or interlude will invariably result in a finding that the injury occurred in the course of employment. **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" [*Danvers v. Commissioner for Railways (N.S.W.)* [1969] HCA 64; (1969) 122 CLR 529 at 537].

(Emphasis added)

35.
The applicant's main criticism of the Tribunal's reasoning is that it fails to apply these statements in the joint judgment to the applicant's case. In particular, the applicant argues that where, as here, there is no suggestion that her injuries were intentionally self-inflicted (s 14(2) of the Act) or were caused by her misconduct (s 14(3) of the Act) then the fact that they were sustained in the motel room booked for her by her employer compelled the conclusion that her injuries were suffered in the course of her employment.
36.
In support of her argument the applicant placed much emphasis upon the use of the disjunctive in the key passage of the joint judgment when it refers to the employer who "induced or encouraged the employee to spend the interval or interlude at a particular place or in a particular way."
37.
While it was not suggested that the applicant was induced or encouraged by her employer to engage in sexual activity while at the motel, it is clear that her employer induced or encouraged her to spend the night there. That, according to the applicant, is sufficient to ensure that her injuries were compensable.
38.
At the centre of the applicant's analysis of *Hatzimanolis* is the proposition that an interval or interlude spent by an employee at a particular place at which his or her employer has induced or encouraged him or her to spend such time will necessarily, except in cases involving serious misconduct or intentionally self-inflicted injury, be in the course of employment. It follows, according to the applicant, that an injury suffered by the employee during such a period will be compensable under the Act unless it was caused by serious and wilful misconduct or intentionally self-inflicted injury.
39.
The joint judgment in *Hatzimanolis* expressly recognises 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. Their Honours said (at 485):
Counsel for A.N.I. conceded that "when a person such as the appellant has been taken to a remote part of Australia and has there performed work and is housed and fed there for the duration of the employment the course of employment will go beyond the hours at which the appellant is engaged in his actual work". Consequently, he conceded that "the appellant would have been in the course of his employment while working at the mine, travelling to and from the mine, eating and sleeping and even enjoying recreational activity at the camp". But he contended that it did not follow that the appellant was in the course of his employment "during the whole of the time" that he spent in the Mt. Newman area. 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 A.N.I. had not expressly or impliedly induced or encouraged him to engage in that activity during that interval.

40.

Basten JA expanded on this point in *Watson v Qantas Airways Ltd* [2009] NSWCA 322; (2009) 75 NSWLR 539 where his Honour observed (at para [94]) that the reasoning in *Hatzimanolis*:

> ...illustrates the proposition that an employee may take himself or herself outside the course of employment (which would otherwise be continuing) by engaging in an activity unrelated to the employment and not positively supported by the employer.

41.
I doubt that the High Court intended in *Hatzimanolis* to establish an "organising principle" that is as absolute in its operation as the applicant's submissions imply. And I also doubt the reference to "gross misconduct" in the joint judgment in *Hatzimanolis* was intended to be exhaustive in defining the circumstances in which an interval or interlude in an overall period or episode of work might be interrupted in a situation where the employee had been induced or encouraged to spend the interval or interlude at the particular place where he or she was injured.
42.
A particular difficulty with the applicant's argument is that in many cases an employee will be induced or encouraged by his or her employer to spend time at a particular place solely for the purpose of allowing the employee to engage in a specific activity or range of activities. In such cases it may not be sufficient to establish that the employee had suffered his or her injuries in the course of employment simply because he or she suffered them while at that particular place.
43.
In the present case, it is not necessary to explore the outer limits of the organising principles developed in *Hatzimanolis*. I say this because I consider that, on the agreed facts, the applicant suffered her injuries in the course of her employment.
44.
While it was to be inferred that the applicant was encouraged to use the motel room for obvious purposes, including relaxing, sleeping, bathing, eating and dressing, it was accepted by the applicant that her employer did not encourage her to engage in sexual activity while in the motel room. Of course, the fact that the applicant's employer did not encourage her to engage in sexual activity does not mean that it disapproved of her doing so.
45.
There was nothing before the Tribunal to indicate whether the applicant's employer approved or disapproved of employees entertaining other people in their motel rooms with whom they might engage in lawful sexual activity during an overnight stay arranged by the employer. The agreed facts said only that the applicant did not advise her employer how she intended to spend her time while at the motel or who, if anyone, she would be associating with while there.
46.
Nor was there anything before the Tribunal to suggest that the applicant's sexual activity on the evening in question was in any respect incompatible with the nature or terms of her employment or that the applicant knew, or ought to have known, that it might somehow prevent her from performing her actual work as and when she was required to perform it. In this regard, I think it is fair to say that the Tribunal's reliance upon what it referred to as the "rider" in *Hatzimanolis* did not really lead anywhere in the circumstances of this case.
47.
The Tribunal's reasoning recognised that if the applicant's conduct did not result in an interruption of the interval or interlude, then it necessarily followed that the applicant suffered her injuries in the course of her employment. It is therefore desirable to examine more closely the reasons why the Tribunal considered that the interval or interlude was interrupted.
48.

First, as I have mentioned, the Tribunal considered (at para [51]) that the applicant was engaged in a private activity and that, "once an employee embarks upon a private activity, the interval is interrupted." The administrative decision referred to by the Tribunal in support of that proposition (*Re Crook v Comcare* [2001] AATA 352) was not one involving an interval or interlude in an overall period or episode of work. Nor did the Tribunal in that matter apply or endorse the general proposition attributed to it by the Tribunal in this case.

49.

In considering the correctness of the proposition that an interval or interlude is interrupted when an employee embarks upon "a private activity" a question arises as to what that expression actually means. If it means no more than an activity "unrelated to employment" then it merely states a conclusion which can only be arrived at upon a consideration of all relevant factors. But if it was intended by the Tribunal to mean an activity usually undertaken in private then it does not provide any assistance in determining whether an interval or interlude in an overall period or episode of work involving an overnight stay at a motel has been interrupted. Many of the activities which an employee might be expected to engage in during such a stay are engaged in private: see, for example, *Comcare v McCallum* [1994] FCA 975; (1994) 49 FCR 199 (where an employee who slipped while showering in her hotel room was found to have been injured in the course of her employment).

50.

Secondly, while it was common ground that the employer had not expressly or impliedly induced or encouraged the applicant's sexual activity during the evening in question, it does not follow that the interval or interlude was interrupted during the period in which it took place. The underlying question which the Tribunal was required to determine (assisted by the organising principles developed in *Hatzimanolis*) was whether there was a sufficient connection or nexus between the injuries suffered by the applicant and her employment. 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.

51.

Thirdly, the Tribunal found that the employer did not know or reasonably expect that the employee would engage in sexual activity at the motel and that, unlike showering, sleeping and eating, sexual activity was not an ordinary incident of an overnight stay in a motel room during a business trip. Again, I do not see why the fact that the applicant was, during the time that she was in her motel room, engaged in sexual activity that her employer might not have expected her to engage in should be seen as interrupting the interval or interlude. The relevant connection or nexus to employment continued while the applicant was in the motel room in which her employer had induced or encouraged her to stay.

52.

I return now to the questions of law said to arise in the appeal. While the applicant has raised a number of questions which I have previously set out, I think the question of law that arises may be expressed much more simply than it has been. The essential question is whether it was open to the Tribunal to hold that the applicant was not in the course of her employment at the time she suffered her injuries.

53.

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.

54.

The joint judgment in *Hatzimanolis* implies, when read in the context of the specific provisions of the Act, that absent serious and wilful misconduct or an intentionally self-inflicted injury, an employee who is at a particular place at which he or she is induced or encouraged to be by his or her employer during an interval or interlude in an overall period

or episode of work will ordinarily be in the course of employment. While it is true that in determining whether an injury occurred in the course of employment, regard must always be had to the general nature, terms and circumstances of the applicant's employment, there was nothing of that description in the present case which could justify a finding that the interval or interlude was interrupted by the applicant's lawful sexual activity.

55.

In my opinion the Tribunal erred in holding (at para [35]) that for the applicant 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. If the applicant had been injured while playing a game of cards in her motel room she would be entitled to compensation even though it could not be said that her employer induced or encouraged her to engage in such an activity. In the absence of any misconduct, or an intentionally self-inflicted injury, the fact that the applicant was engaged in sexual activity rather than some other lawful recreational activity while in her motel room does not lead to any different result.

56.

There will be an order that the Tribunal's decision be set aside. I shall also make a declaration that the injuries suffered by the applicant on 26 November 2007 were suffered by her in the course of her employment. The respondent must pay the applicant's costs of the appeal and her costs of the proceedings before the Tribunal.