SUPREME COURT OF QUEENSLAND

CITATION:	*Schokman v CCIG Investments Pty Ltd* [2022] QCA 38
PARTIES:	**AARON SHANE SCHOKMAN** (appellant) **v** **CCIG INVESTMENTS PTY LTD** ABN 57 602 889 145 (respondent)
FILE NO/S:	Appeal No 6940 of 2021 SC No 264 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Rockhampton – [2021] QSC 120 (Crow J)
DELIVERED ON:	18 March 2022
DELIVERED AT:	Brisbane
HEARING DATE:	11 October 2021
JUDGES:	Fraser and McMurdo and Mullins JJA
ORDERS:	**1. Allow the appeal.** **2. Set aside the judgment given in the Trial Division on 27 May 2021.** **3. The respondent is to pay to the appellant the sum of $431,738.88.** **4. The parties are to provide written submissions, not exceeding four pages in length, as to the costs in the Trial Division and in this Court and as to any further order which should be made, within 14 days of the delivery of this judgment.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – PROCEDURE – QUEENSLAND – POWERS OF COURT – ORDERS SET ASIDE OR VARIED – where the respondent employed the appellant and another employee – where the appellant and the other employee were required to live together in shared accommodation provided by the respondent as a term of their employment – where the other employee did an act causing harm to the appellant in that shared accommodation – where at trial it was held that, in doing that act, the other employee was negligent – whether the other employee's negligent act was done "in the course of his employment" – whether the negligent act was "entirely outside the relation of master and

servant, and therefore to be regarded as the act of a stranger" – whether there was the requisite connection between the other employee's employment and the negligent act – whether the respondent was vicariously liable

Bazley v Curry [1999] 2 SCR 534, considered
Bugge v Brown (1919) 26 CLR 110; [1919] HCA 5, followed
Carrier v Bonham [2002] 1 Qd R 474; [2001] QCA 234, cited
Lister v Hesley Hall Ltd [2002] 1 AC 215; [2001] UKHL 22, cited
Prince Alfred College Inc v ADC (2016) 258 CLR 134; [2016] HCA 37, followed

COUNSEL: G W Diehm QC, with R J Lynch and J P D Trost, for the appellant
M Grant-Taylor QC, with G C O'Driscoll, for the respondent

SOLICITORS: Shine Lawyers for the appellant
Cooper Grace Ward for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of McMurdo JA and the orders proposed by his Honour.

[2] **McMURDO JA:** In the early hours of 7 November 2016, Aaron Schokman was asleep in staff accommodation at his employer's resort on Daydream Island. He shared that accommodation with another employee, Sean Hewett. About half an hour earlier, Mr Schokman had heard Hewett vomiting in the bathroom. Mr Schokman went back to sleep before waking with a distressing sensation of being unable to breathe. He then realised that Hewett was standing over him and urinating on his face. He yelled at Hewett to stop, and after a short time, Hewett went to the bathroom, from which he soon emerged to apologise.

[3] Almost immediately Mr Schokman suffered a cataplectic attack. He had been previously diagnosed as suffering from cataplexy, which is a sudden and usually brief loss of voluntary muscle tone triggered by strong emotions. He had also been diagnosed with a condition called narcolepsy, which is a sleep disorder characterised by daytime drowsiness and sudden attacks of sleep.

[4] The trial judge concluded that although his conditions of narcolepsy and cataplexy were pre-existing, they were essentially dormant and kept under control by medication and planning. His Honour found that as a result of the incident, these conditions were exacerbated, such that Mr Schokman suffered a level of impairment of his whole person in the range of 10 to 20 per cent. He was also found to have suffered a post-traumatic stress disorder as a result of the incident, which had improved considerably but had left him with an adjustment disorder with mixed anxiety and depressed mood.

[5] In this proceeding, Mr Schokman sued his employer, claiming damages upon two bases. His primary argument at the trial was that the respondent was in breach of the employer's duty of care owed to him as its employee. His alternative argument was that Hewett had committed a tort for which the respondent, as Hewett's employer, was vicariously liable. The trial judge rejected each argument and gave judgment for the respondent. On the vicarious liability case, the judge found that

Hewett's act was tortious, but concluded that the respondent was not vicariously liable because the tort was not committed in the course of Hewett's employment.[1]

[6] By this appeal, Mr Schokman challenges that last mentioned conclusion. He no longer presses his case that the respondent breached its own duty of care.

[7] The respondent's argument here is that the judge correctly held that Hewett's act was not in the course of his employment in the relevant sense, and further that the judgment should stand because it should have been found that Hewett's act was not tortious.

[8] For the reasons that follow, Mr Schokman's case of vicarious liability should have been upheld, and there should be a judgment in his favour in the amount of damages as provisionally assessed by the trial judge.[2]

The incident

[9] Little more need be said to describe the incident. Mr Schokman's evidence about it was uncontested, and Hewett was not a witness.

[10] Mr Schokman finished work at about 11 pm, changed and went to the staff bar for a few drinks. He saw Hewett there and said that Hewett was drinking but was not then "overly intoxicated". Mr Schokman left the bar about two hours later and went back to the room. Soon after, at approximately 1.15 am, Hewett came to the room, and was visibly upset in making complaints about his work environment. Mr Schokman was Hewett's direct supervisor. He told Hewett that they could discuss those issues on the next day. Hewett accepted this and left their room taking some drinks with him.

[11] Hewett returned at about 3 am. It was then that Mr Schokman heard Hewett vomiting in the bathroom that adjoined the room where the two men slept. Mr Schokman's bed was close to the bathroom. Mr Schokman said nothing and went back to sleep. It was about 30 minutes later that he woke to find Hewett urinating on him.

Was there a tort?

[12] It is necessary to discuss the pleadings, evidence, arguments and findings as to Hewett's state of mind.

[13] By paragraph 17A of the statement of claim, it was pleaded that Hewett had informed a member of the respondent's human resources department that Hewett had a history of sleep walking, so that he would like to be moved to a room of his own. It was pleaded that this request was refused. The respondent denied those allegations as being untrue, in that Hewett had not told its staff that he had a history of sleep walking. The respondent pleaded that Hewett had asked to be moved to a room of his own because he was concerned about Mr Schokman's alcohol consumption when taken together with Mr Schokman's medication for his conditions.

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1 *Schokman v CCIG Investment Pty Ltd* [2021] QSC 120 (Judgment).

2 An amount of $431,738.88; Judgment paragraph [182].

[14] It was pleaded that at the time of the incident, Hewett:

> "(a) was grossly intoxicated; or
>
> (b) was sleep walking; or
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> (c) was in a state of intoxication induced sleep walking; or
>
> (d) was in a state of semi-consciousness."

The respondent denied that Hewett was grossly intoxicated, but admitted that Hewett was intoxicated to the extent that he had consumed two drinks at the staff bar and four to six drinks which he had taken from the fridge in the room.

[15] Mr Schokman pleaded the facts by which it was claimed that the incident was caused by a breach of duty by the respondent. They included the alleged fact that the respondent had failed to respond to Hewett's disclosure of his history of sleep walking.

[16] His case of vicarious liability was pleaded as follows:

> "22. Further or in the alternative, the urination event was caused by the negligence of Hewett for which the defendant is vicariously liable by:
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> (a) failing to disclose to the defendant or to the plaintiff his history of sleep walking;
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> (b) allowing himself to become so intoxicated that he lost the ability to properly conduct himself in the accommodation;
>
> (c) urinating in circumstances where he was not certain of his surrounding environment."

[17] The pleading in response to paragraph 22 was as follows:

> "9. The Defendant denies the allegations in paragraph 22 of the Statement of Claim as the allegations are untrue as the Defendant is not vicariously liable as a matter of law or fact for the negligence of Hewett in that the incident as pleaded was an involuntary act that Hewett was unaware of and could not have been contemplated by Hewett that it was going to occur on the evening instead in that:
>
> (a) Hewett was not negligent in failing to disclose his history of sleep walking as there was no obligation on him to do so;
>
> (b) Hewett was not negligent by allowing himself to become so intoxicated he lost the ability to properly conduct himself in the accommodation;
>
> (c) urinating in those circumstances was not a voluntary act."

[18] The closing written submissions for Mr Schokman to the trial judge summarised his case of vicarious liability as follows:[3]

> "There can be no doubt that Hewett committed a tort against the plaintiff. The evidence is insufficient to make a finding that it was committed intentionally, but notwithstanding, the actions of Hewett were undoubtedly committed in the course of his employment with the defendant. He was accommodated in that room with the plaintiff in furtherance of his employment with the defendant. The defendant, by placing Hewett in such close proximity to the plaintiff in such a vulnerable, intimate setting provided the occasion for the incident to occur. The connection between Hewett's wrong and the employment enterprise is so powerful as to justify a finding of vicarious liability."

[19] The respondent's written submissions to the trial judge contained relevantly the following. It was submitted that the case failed "on breach of duty and causation" where the actions of Hewett were not in the course of his employment, they were not a deliberate or intentional act and they were done whilst Hewett was "unaware where he was".

[20] At another place in the respondent's written submissions[4] to the trial judge, it was submitted that there was insufficient evidence to find that the incident occurred "as a result of alcohol" or was "caused by sleep walking [or] alcohol induced sleep walking." It was submitted that the evidence did not establish the extent to which Hewett had consumed alcohol on the night or Mr Hewett's capacity to consume certain levels of alcohol. It was said that there was no evidence from which it could be inferred that the amount of alcohol he had consumed could have caused him to be completely unaware of what he was doing. It was further submitted that the inference that he must have been sleep walking was not open. Those submissions concluded with the following statement:[5]

> "It is respectfully submitted the only finding of fact or inference reasonably open … is that Hewett was unaware where he was and unaware of what he was doing."

[21] In oral submissions, the respondent's counsel said that there was no medical evidence or otherwise about the effect of alcohol upon Hewett's conduct. He said that there was no evidence that Hewett had a problem with sleep walking, save for hearsay evidence from a witness Ms Anthony, who was a human resources officer at the resort, that Hewett had said after the event that he had a sleep walking disorder.[6] At that point, counsel for Mr Schokman interrupted to say that this evidence did prove that, in fact, Hewett had a sleep walking disorder. Counsel for the respondent then said that there was no probative evidence advanced that sleep walking was the cause of the urination event.[7]

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3 Submissions, paragraph 93.
4 Submissions, paragraph 33.
5 Submissions, paragraph 34.
6 AR 640.
7 AR 670.

[22] The judge's findings about Hewett's state of mind were contained in that part of the Judgment where his Honour discussed whether the alleged negligence *by the respondent* was causative of the injury. After quoting the paragraph of the statement of claim which I have set out earlier at [14], his Honour made these findings:

> "[128] Whilst the act of Mr Hewett in vomiting and having hiccups approximately half an hour before the urination event does support the conclusion that Hewett, at the time of the urination event, was grossly intoxicated, the actions of Hewett after the event of profusely apologising and stripping Mr Schokman's bed is not entirely consistent with Hewett being grossly intoxicated. There is no evidence that Hewett had any difficulty with sleep walking. I do, however, accept at the time of the urination event, Hewett was in a state of semi-consciousness precipitated by his level of intoxication.
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> …
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> [131] Further, in terms of scope of liability causation, s305D(1)(d), I consider that it is inappropriate in the present case for the scope of the liability of the defendant to extend to the injury so caused. I conclude that scope of liability causation has not been proven as the urination event constituted an act of assault by one employee, Mr Hewett, upon another employee, Mr Schokman, in circumstances where I find that the act of the assault was not a deliberate assault, but rather represents a mistake by Hewett, precipitated by Mr Hewett's alcohol consumption, as to the whereabouts of a toilet in the early hours of the morning on 7 November 2016.
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> [132] As is shown in Exhibit 1, the photograph of the room, Mr Schokman's bed was located in close proximity to the toilet and I find that the likelihood is that Mr Hewett had intended to urinate into the toilet, but due to his state of intoxication and the late hour, he had made the error of urinating upon Mr Schokman. In those circumstances, I do not consider that it is proper to visit the urination event and responsibility for the injury caused by the urination event to be upon the employer defendant.
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> [133] In the present case there is no evidence that Hewett had any problems with alcohol nor had been involved in any prior incidents with respect to alcohol. Furthermore, there is the evidence of Ms Hansen generally that alcohol incidents among staff were uncommon. Given that it was not only a contractual requirement of employees to share accommodation but likely a necessary requirement for the conduct of the resort (as the staff accommodation was full), it is inappropriate that the defendant be held responsible for the act of Mr Hewett."

(Footnotes omitted.)

[23] In the next part of the Judgment, his Honour dealt relatively briefly with the alternative claim of vicarious liability. In the course of that reasoning, his Honour said:[8]

> "I accept that Hewett committed a tort against Mr Schokman and that the evidence is insufficient to make a finding that it was committed intentionally."

[24] The respondent's notice of contention advances two grounds. One is that the trial judge erred in finding that Hewett had committed a tort against Mr Schokman. The second is that the judge erred in finding that the incident was foreseeable and not insignificant. That ground, however, is irrelevant to the case of vicarious liability, because it challenges findings made by the judge as to the content of the duty of care which was owed by the respondent.

[25] The relevant ground contained in the notice of contention challenges the finding that Hewett committed a tort, upon the basis that Hewett's act was an "unintentional and unwilled act". The submission fastens upon the judge's finding[9] that "Hewett was in a state of semi-consciousness precipitated by his level of intoxication." Reliance is also placed upon his Honour's statement[10] that there was no evidence that Hewett "had any problems with alcohol".

[26] His Honour did find that this was not an intentional tort: Hewett was not intending the consequence of his act of urination. But there was no finding that his act was unwilled, meaning that it was involuntary. A finding of "semi-consciousness" was not a finding of unconsciousness; nor was it suggested, let alone found, that this was an involuntary act caused by incontinence. Mr Schokman said that Hewett's shorts had been pulled down and his penis was exposed. The judge found that Hewett was so drunk that he was mistaken as to where he was. That finding was not only open, but on the evidence and the issues ultimately joined, it was the only reasonable inference. Hewett had been drinking for hours and not long before the incident, he had vomited.

[27] The alleged tort of Hewett was negligence: see the pleading extracted at [17] earlier. It could not be disputed that Hewett owed a duty to exercise reasonable care in his use of the room so as to avoid an injury to Mr Schokman, and that he failed to do so. Once the argument that Hewett's act was involuntary is rejected, as the trial judge was correct to do, a finding of negligence was inevitable. Hewett's drunkenness would not diminish his liability in negligence because it had no effect at law on the standard of care which was owed by him, which is to be judged by the standard of the ordinary and reasonable person: *Carrier v Bonham*.[11]

The judge's reasoning on vicarious liability

[28] The entirety of the judge's reasoning on the critical issue in this appeal was as follows:

> "[135] Paragraph 93 of the Outline of Submissions on Behalf of the Plaintiff state:
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> > "93. There can be no doubt that Hewett committed a tort against the plaintiff. The evidence is insufficient to make

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8 Judgment [136].
9 Judgment [128].
10 Judgment [133].
11 [2002] 1 Qd R 474; [2001] QCA 234.

> a finding that it was committed intentionally, but notwithstanding, the actions of Hewett were undoubtedly committed in the course of his employment with the defendant. He was accommodated in that room with the plaintiff in furtherance of his employment with the defendant. The defendant, by placing Hewett in such close proximity to the plaintiff in such a vulnerable, intimate setting provided the occasion for the incident to occur. The connection between Hewett's wrong and the employment enterprise is so powerful as to justify a finding of vicarious liability."

[136] I accept that Hewett committed a tort against Mr Schokman and that the evidence is insufficient to make a finding that it was committed intentionally. I do not accept that the actions of Hewett were committed in the course of his employment with the defendant. In the Canadian Supreme Court case of *Bazley v Curry*, McLachlin J said:

> "Underlying the cases holding employers vicariously liable for the unauthorized acts of employees is the idea that employers may justly be held liable where the act falls within the ambit of the risk that the employer's enterprise creates or exacerbates. Similarly, the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question in each case is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence."

[137] In *Prince Alfred College Inc v ADC*, Gageler and Gordon JJ considered the approach of McLachlin J in *Bazley v Curry* to be instructive. Utilising the approach of McLachlin J in *Bazley v Curry*, the question to be answered is whether there is a connection or nexus between the employment enterprise and the wrong that justifies the imposition of vicarious liability on the employer for the wrong in terms of a fair allocation of the consequence of the risk and/or deterrence.

[138] In the present case I conclude that there is not a connection or nexus between the employment enterprise and the wrong committed by Mr Hewett that could justify the imposition of vicarious liability on the defendant for Mr Hewett's wrong. I do not consider it a fair allocation of the consequence of the risk to impose vicarious liability upon the defendant employer for the drunken misadventure of Mr Hewett in respect of his toileting. Whilst I accept the occasion for the tort arose out of

> the requirement of shared accommodation, I do not consider that of itself, or coupled with the risks as discussed above inherent in sharing accommodation leads to a conclusion that it is fair that the defendant be held vicariously liable for Mr Hewett's wrong. In this case, there is no history of Mr Hewett becoming intoxicated or having an intoxication related incident that would put the defendant on notice that Mr Hewett more than any other person may have engaged in the bizarre conduct which forms the urination event."

(Footnotes omitted.)

In essence, his Honour considered that it was not fair to impose a vicarious liability on the respondent, as a "fair allocation of the consequences of the risk created by [the respondent's] business." He did so in purported application of the judgment of McLachlin J (as she then was) in *Bazley v Curry*,[12] which his Honour understood to have been approved by Gageler and Gordon JJ in *Prince Alfred College Inc v ADC*.[13] In my respectful opinion, his Honour was incorrect in applying that test, as the respondent accepts.[14]

[29] Before returning to the judgments in *Prince Alfred College* and other authorities, something more should be said about the evidence. As the judge remarked,[15] the respondent required its employees to share accommodation facilities on the island. Ms Anthony gave evidence of the management of this accommodation, from which it was clear that the respondent controlled the allocation of rooms to employees, according to the employee's work duties at the resort. Ms Anthony would routinely review each month whether rooms should be reallocated.

[30] Mr Schokman's employment contract contained a term which was set out in the reasons at [8], which was as follows:

> "As your position requires you to live on the island, furnished shared accommodation located at Daydream Island Resort and Spa will be made available to you when engaged in this position at a cost of $70 per week."

[31] The agreement further provided that a tenancy agreement between the parties would be provided for Mr Schokman's review, completion and return, covering "the basic terms and conditions of the rental agreement". It provided that once his employment ceased, he was to give up vacant possession of his accommodation within 24 hours. It provided that his employment might be terminated upon grounds which included any conduct that could bring the employer into disrepute. And it provided that he was to take reasonable care that his acts did not adversely affect the health and safety of other persons.

[32] Mr Hewett's contract was not in evidence, but the case was conducted upon the premise that the terms of his contract, more precisely in relation to his accommodation, were relevantly the same.

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12 [1999] 2 SCR 534.
13 (2016) 258 CLR 134 at 172 [129] (*Prince Alfred College*).
14 Transcript of hearing 1-27 line 40.
15 Judgment [95].

Vicarious liability: consideration

[33] In *Prince Alfred College*, the respondent had sought to bring proceedings against the school which he had attended more than 40 years earlier, claiming that it was vicariously liable for what he alleged was the sexual abuse upon him by a boarding house master employed by the school. He required an extension of time within which to bring the proceedings. The Full Court of the Supreme Court of South Australia held that the school was vicariously liable for that person's conduct and that an extension of time should be granted. The High Court unanimously held that an extension of time should not have been granted, in circumstances where the loss of relevant evidence significantly prejudiced a fair trial of the respondent's claims against the school and the respondent had made a deliberate decision not to commence proceedings nearly 10 years earlier. The two judgments discussed the relevant approach in such a case to the question of whether the employer was vicariously liable, whilst not expressing a concluded view about whether there was a vicarious liability that case.

[34] I will discuss first the joint judgment of French CJ, Kiefel, Bell, Keane and Nettle JJ. Their Honours commenced their discussion of vicarious liability as follows:[16]

> "[39] Vicarious liability is imposed despite the employer not itself being at fault. Common law courts have struggled to identify a coherent basis for identifying the circumstances in which an employer should be held vicariously liable for negligent acts of an employee, let alone for intentional, criminal acts. There have been concerns about imposing an undue burden on employers who are not themselves at fault, and on their business enterprises. On the other hand, the circumstances of some cases have caused judges to exclaim that it would be "shocking" if the defendant employer were not held liable for the act of the employee. No doubt largely because of these tensions vicarious liability has been regarded as an unstable principle, one for which a "fully satisfactory rationale for the imposition of vicarious liability" has been "slow to appear in the case law".
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> [40] Vicarious liability has not to date been regarded as a form of absolute liability, although policy choices, and the questions posed for the determination of vicarious liability, can lead in that direction. The traditional method of the common law of confining liability, in order to reflect some balance between competing interests, is the requirement that the employee's wrongful act be committed in the course or scope of employment. At the least this provides an objective, rational basis for liability and for its parameters."
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> (Footnotes omitted.)

They continued:[17]

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16 (2016) 258 CLR 134 at 148.
17 (2016) 258 CLR 134 at 149.

> "[41] Difficulties, however, often attend an inquiry as to whether an act can be said to be in the course or scope of employment. It is to some extent conclusionary and offers little guidance as to how to approach novel cases. It has the added disadvantage that it may be confused with its use in statutes, where it has a different operation. In statutes providing compensation for injury suffered by employees it operates as a limit upon a right to compensation; in the common law it is an essential requirement for vicarious liability. But it has not yet been suggested that it should be rejected. It remains a touchstone for liability.
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> [42] Long ago, Sir John Salmond proposed tests for determining whether an act was in the course of employment. They were whether the act (a) is authorised by the employer; or (b) is an unauthorised mode of doing some other act authorised by the employer. He went on further to explain that an employer would also be liable for unauthorised acts provided that they are "so connected" with authorised acts that they may be regarded as modes, although improper modes, of doing them."
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> (Footnotes omitted.)

[35] Their Honours then discussed recent decisions of the courts of Canada and the United Kingdom, which had developed new tests of the requisite connection between the wrongful act and the employment, ultimately according to what a judge determined to be fair and just.[18] Their Honours rejected that approach, expressing a preference "for the present" to "continue with the orthodox route of considering whether the approach taken in decided cases furnishes a solution to further cases as they arise."[19]

[36] Their Honours then considered *Bazley v Curry*,[20] that being a case involving sexual abuse by an employee of an institution conducting residential care facilities for the treatment of emotionally troubled children. They said that that person's role with respect to the children was effectively that of a substitute family, so that there could be little doubt about the power and control which he was able to exert over the children in his charge.[21] Nevertheless, they observed, the Supreme Court of Canada decided that case on a "wider, more general, theory."[22] Their Honours continued:[23]

> "[59] The theory of liability stated in *Bazley v Curry* is that it is appropriate to impose liability where there is "a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom". The requirement of connection might be based on what had been said by Salmond, as referred to above. However, the risk-allocation aspect of the theory is based largely on considerations of policy, in particular that an employer should be liable for a risk that its

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18 (2016) 258 CLR 134 at 149 [43].
19 (2016) 258 CLR 134 at 150 [46].
20 [1999] 2 SCR 534.
21 (2016) 258 CLR 134 at 153 [58].
22 Ibid.
23 (2016) 258 CLR 134 at 153 [59].

> business enterprise has created or enhanced. Such policy considerations have found no real support in Australia or the United Kingdom."

(Footnotes omitted.)

[37] Their Honours then traced the development in the United Kingdom of a "more general principle" of vicarious liability,[24] which was that it was necessary to establish "a very close connection between the torts of [the employee] and his employment",[25] and the closeness of the connection was to be assessed according to whether "it would be fair and just to hold the employers vicariously liable".[26] Their Honours remarked that a test of connection did not seem to add much to an understanding of the basis for an employer's liability, and the requirement that the connection be such that it be "fair and just" to impose liability imported a value judgment on the part of a primary judge which would not proceed on any principled basis or by reference to previous decisions.[27]

[38] French CJ, Kiefel, Bell, Keane and Nettle JJ then set out what they described as the relevant approach "in cases of the kind here in question." It sufficiently appears that the present case, where the act was negligent and not intentional or criminal, is not one of that kind.[28] Their Honours then said:[29]

> "[81] Consequently, in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable."

[39] Justices Gageler and Gordon agreed that the appeal should be allowed on the basis that no extension of time should have been granted and added only a few observations as to vicarious liability for intentional wrongdoing. They observed that decisions on this question were "particularly fact specific".[30] They further observed that the decisions of the courts of final appeal in the United Kingdom and in Canada "expose a difficulty in undertaking any analysis by reference to generalised 'kinds' of case."[31] It was in that context that their Honours said what was misunderstood by the trial judge in the present case. Their Honours said:[32]

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24 (2016) 258 CLR 134 at 155 [64].
25 *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 227 (20) per Lord Steyn.
26 *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 230 (28) per Lord Steyn.
27 (2016) 258 CLR 134 at 156 [68].
28 (2016) 258 CLR 134 at [80].
29 (2016) 258 CLR 134 at 159-160.
30 (2016) 258 CLR 134 at 171 [128].
31 Ibid.

> "[129] The decisions of *Bazley v Curry* and *Jacobi v Griffiths* in the Supreme Court of Canada are instructive. Both involved the sexual abuse of children by employees. Judgment in each was delivered on the same day by an identically constituted court. In *Bazley*, the employer was held vicariously liable in a unanimous judgment. In *Jacobi*, the Court, by a majority of four judges to three, held that the employer was not vicariously liable. The particular facts of each case were critical, both for drawing comparisons with decided cases and to avoid drawing generalised conclusions based on perceived similarities.
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> [130] We accept that the approach described in the other reasons as the "relevant approach" will now be applied in Australia. That general approach does not adopt or endorse the generally applicable "tests" for vicarious liability for intentional wrongdoing developed in the United Kingdom or Canada (or the policy underlying those tests), although it does draw heavily on various factors identified in cases involving child sexual abuse in those jurisdictions.
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> [131] The "relevant approach" described in the other reasons is necessarily general. It does not and cannot prescribe an absolute rule. Applications of the approach must and will develop case by case. Some plaintiffs will win. Some plaintiffs will lose. The criteria that will mark those cases in which an employer is liable or where there is no liability must and will develop in accordance with ordinary common law methods. The Court cannot and does not mark out the exact boundaries of any principle of vicarious liability in this case."

[40] In *Bugge v Brown*,[33] the defendant's employee on a grazing property was negligent in lighting a fire which spread and destroyed property on an adjoining farm. The employee had been provided by his employer with the food for his lunch and was instructed to cook it at a different place from where he lit the fire. By a majority (Isaacs and Higgins JJ, Gavan Duffy J dissenting), the employer was held to be vicariously liable for the employee's negligence. Isaacs J discussed the content of the condition for vicarious liability that the employee must have acted "in the course of his employment". He said:[34]

> "That phrase and various corresponding phrases, such as "scope of employment" (*Citizens' Life Assurance Co v Brown,*; *Lancashire and Yorkshire Railway Co v Highley*) and "sphere of employment" (*Plumb's Case*) and other similar phrases, are used to indicate the just limits of a master's responsibility for the wrongdoing of his servant. We have seen that the narrow view of "limits of authority" whether actual or implied, or even where a definite prohibition against doing the act complained of exists, or where even the law itself forbids the

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32 (2016) 258 CLR 134 at 172.
33 (1919) 26 CLR 110.
34 (1919) 26 CLR 110 at 117-118.

> act, does not determine the question of liability to answer for the wrong; for the act complained of may nevertheless be within the course of the employment. But the law recognizes that it is equally unjust to make the master responsible for every act which the servant chooses to do. The limit of the rule — expressed in the widest form by the phrase "the course of the employment" or "the sphere of the employment" — is when the servant so acts as to be in effect a stranger in relation to his employer with respect to the act he has committed, so that the act is in law the unauthorized act of a stranger (*Turberville v Stampe*; *Cheshire v Bailey*; *Black v Christchurch Finance Co*). This is the root of the matter.
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> …
>
> The act of the servant complained of is regarded as outside the relation, and as that of a stranger: (*a*) if he did not assume to act within the scope of his employment (*Hutchins v London County Council; Highley's Case*; *Limpus's Case)*; or (*b*) if what he did was a thing so remote from his duty as to be altogether outside of, and unconnected with, his employment (*Barnes v Nunnery Colliery Co*; *Black v Christchurch Finance Co*; *Harding's Case*; *Weighill's Case*)."
>
> (Citations Omitted.)

[41] Isaacs J reasoned that the employee's act was not an act "entirely outside the relation of master and servant, and therefore to be regarded as the act of a stranger".[35] The employee was cooking the food which his employer had provided for his sustenance for the day's work, and the employee's departure from his instructions as to where the meal was to be cooked did not make his act entirely outside the employment relationship.

[42] The present case is analogous to *Bugge v Brown*, although the act in this case occurred in the course of the provision of shelter, rather than sustenance, to the employee. It was a term of Hewett's employment that he reside in the staff accommodation on the island, and more particularly in the room assigned to him. Whilst he remained employed at the resort, he was required to live there, and once he ceased to be employed at the resort, he was required to leave. The terms of his employment required him to take reasonable care that his acts did not adversely affect the health and safety of other persons. That was an obligation which governed his occupation of this room. He was not occupying the room as a stranger, but instead as an employee, pursuant to and under the obligations of his employment contract. There was in this case the requisite connection between his employment and the employee's actions. The respondent should have been held to be vicariously liable for his negligence and the loss which it caused.

Orders

[43] I would order as follows:

1. Allow the appeal.

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35 (1919) 26 CLR 110 at 121.

2. Set aside the judgment given in the Trial Division on 27 May 2021.

3. The respondent is to pay to the appellant the sum of $431,738.88.

4. The parties are to provide written submissions, not exceeding four pages in length, as to the costs in the Trial Division and in this Court and as to any further order which should be made, within 14 days of the delivery of this judgment.

[44] **MULLINS JA:** I agree with McMurdo JA.