HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **CCIG INVESTMENTS PTY LTD**
(ABN 57 602 889 145)
Appellant

and

AARON SHANE SCHOKMAN
Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1 This outline is in a form suitable for publication.

PART II: ISSUES

2 This appeal affords the opportunity for this Court to formulate a principled approach for the imposition of vicarious liability on a non-guilty employer and to answer the questions posed by this Court in *Prince Alfred College Incorporated v ADC* as follows:

> *[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.*
>
> *[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 common law methods. The Court cannot and does not mark out the exact boundaries of any principles of vicarious liability in this case.*[1]

3 This case affords the opportunity in accordance with the Sir John Salmond formula to develop principles to delineate the boundaries of vicarious liability particularly for non-intentional torts.

PART III: SECTION 78B OF THE JUDICIARY ACT 1903

4 The appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903*, with the conclusion being that no notice is necessary.

PART V: CITATIONS

5 The decision appealed from is *Schokman v CCIG Investments Pty Ltd* [2022] QCA 38. The judgment of the trial judge is *Schokman v CCIG Investments Pty Ltd* [2021] QSC 120.

PART V: BACKGROUND FACTS

6 The background facts are succinctly dealt with in the judgment of McMurdo JA in the Court of Appeal as follows:

> *[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*

[1] (2016) 258 CLR 134, 172 ('*Prince Alfred College*').

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.[2]

7 The Court of Appeal in an unanimous judgment from McMurdo JA found:

[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.[3]

PART VI: ARGUMENT

8 These facts, scarcely remarkable in an age of remote worksites, may appear to test the notion of "scope of employment" given the out of hours and private nature of

[2] CAB 58 [2]-[3].
[3] CAB 70 [42]. See also CAB 8 [8]-[10] and exhibit 1, document 1 before TJ reproduced at AFM 4, regarding the terms of Hewett's employment.

what such workers do in supplied accommodation after they have performed their duties on shift. In particular, the mere fact that premises are provided, and shared, as a circumstance of the particular employment might appear to be just another form of opportunity or occasion – and thus insufficient to ground vicarious liability. Nothing in the particular facts of this case provides an explanation based in principle why the decision in the Court of Appeal could be justified other than by regarding the required and shared staff accommodation as the opportunity, occasion (or location) of Hewett's wrongdoing. Nothing more is proposed to bring that conduct into the sufficiently close connection with the employment (in particular, the duties and conditions of employment), beyond the accommodation itself. This should have been enough to dismiss the claim.

9 It is difficult to see within the confines of the Court of Appeal judgment where the requisite connection with employment is satisfied in circumstances other than creating the mere opportunity for the event to occur. The Court in *Prince Alfred College* disavowed such an approach:

> *[83] … This is because such a test of vicarious liability, requiring no more than sufficiency of connection – unconstrained by the outer limits of the course or scope of employment – is likely to result in the imposition of vicarious liability for wrongful acts for which employment provides no more than an opportunity.*[4]

10 The actions of Hewett were not connected in any sensible or material way with the discharge of any of his employment duties which advance the interests of his employer.

11 There was no sensible link with employment, such as the Court found in *Bugge v Brown* (1919) 26 CLR 110 at 125-127, in which case it was held that the cooking of the midday meal was an act necessarily incidental to the carrying out of the main task which was the clearing of the reeds in the paddock, establishing a connection to the employment activities which advanced the interests of his master.

12 Here it is submitted there was no connection at all other than mere opportunity.

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[4] (2016) 258 CLR 134, 160.

13 In *Prince Alfred College*, the Court there compared the development of the doctrine of vicarious liability in the other Commonwealth jurisdictions being the United Kingdom, Canada and New Zealand. In particular, this court reviewed the approach taken by the Supreme Court of Canada in *Bazley v Curry* [1999] 2 SCR 534 and *Jacobi v Griffiths* [1999] 2 SCR 570, in the course of considering a principled difference between employment merely creating opportunity for a wrongful act to take place, that act being one that cannot be said to be in the course or scope of employment: 258 CLR 134 at 151–154.

14 *WM Morrison Supermarkets* v *The Various Complainants* [2020] AC 989 ('*WM Morrison*') involved a determination that the inferior courts had misapprehended the application of vicarious liability. In that case a copy of the payroll data was given to Skelton, an internal auditor at Morrisons to pass onto external auditors. Skelton made the payroll data publicly available to cause harm to Morrisons due to a workplace grievance relating to disciplinary proceedings against him months prior. Employees of Morrisons whose data had been disclosed brought claims against Morrisons on the basis of vicarious liability. The Court of Appeal upheld the claim as it thought that Skelton's motivation to harm was irrelevant. The Supreme Court held that Morrisons was not vicariously liable.

15 The Supreme Court upheld the appeal finding that the lower courts had misunderstood the principles governing vicarious liability in a number of relevant respects.[5] Lord Reed PSC giving the judgment of the Court stated that the relevant question (applying *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 at [23]) was whether Skelton's disclosure of the data was so closely connected with acts he was authorised to do that for the purposes of the liability of his employer to third parties, his wrongful disclosure may fairly and properly be regarded as being done by him whilst acting in the ordinary course of his employment.[6] Lord Reed PSC held that the answer was "*No*" having regard to the following:

> *[31] ...First, the disclosure of the data on the Internet did not form part of Skelton's functions or field of activities, in the sense in which those words*

[5] [2020] AC 989 [31].
[6] [2020] AC 989 [32].

were used by Lord Toulson: it was not an act which he was authorised to do, as Lord Nicholls put it. Secondly, the fact that the five factors listed by Lord Phillips in Various Claimants v Catholic Child Welfare Society [2013] 2 AC 1, para 35, were all present was nothing to the point. Those factors were not concerned with the question whether the wrongdoing in question was so connected with the employment that vicarious liability ought to be imposed, but with the distinct question whether, in the case of wrongdoing committed by someone who was not an employee, the relationship between the wrongdoer and the defendant was sufficiently akin to employment as to be one to which the doctrine of vicarious liability should apply. Thirdly, although there was a close temporal link and an unbroken chain of causation linking the provision of the data to Skelton for the purpose of transmitting it to KPMG and his disclosing it on the internet, a temporal or causal connection does not in itself satisfy the close connection test. Fourthly, the reason why Skelton acted wrongfully was not irrelevant: on the contrary, whether he was acting on his employer's business or for purely personal reasons was highly material. [7]

16 The Salmond formulation, as explained and adapted by Lord Millett in *Lister v Hesley Hall* [2002] 1 AC 215 at 245 [69] was further called in aid by Lord Nicholls in *Dubai Aluminium*. In the upshot, sufficiently close connection as to permit a finding of the act being within the scope of employment, was preferred to a simple "enterprise risk" approach such as that considered in *Bazley v Curry*, as noted in *Prince Alfred College* at 258 CLR 134 at 153 [59].

17 This court should affirm its approach suggested in *Prince Alfred College*, which requires more than the mere provision of opportunity or occasion for the imposition of vicarious liability. The notion of "enterprise risk" is an unsuitable approach, because it either simply rephrases the notion of opportunity or occasion, or ventures into the contradictory notion of direct liability for the employer's own negligence.

18 Paula Giliker, Professor of Law from the University of Bristol, discussed the case of *WM Morrison* in an article headed "*Can the Supreme Court halt the ongoing*

[7] [2020] AC 989 [31]

expansion of vicarious liability? Barclays and Morrison in the UK Supreme Court".[8] The author identified that:

> *The connection test is fundamental to the doctrine of vicarious liability and that it both determines the scope of the doctrine and the reason why employers (rather than any other defendant) are held vicariously liable. Prior to Lister v Hesley Hall, the Salmond test had been used. This test imposed vicarious liability where the tort could be said to be a wrongful and unauthorised mode of doing some task authorised by the employer.*[9]

19 The author quoted the follow passage from the judgment of Lord Toulson in *Mohamud v WM Morrison Supermarkets Plc*:

> *In the simplest terms, the court has to consider two matters. The first question is what functions or 'field of activities' have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job…*
>
> *Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice.*[10] (our emphasis)

20 Interestingly, the author states as follows:

> *Mohamud raised concerns amongst commentators that a test based on sufficient connection and risk would be far too readily satisfied. It was condemned by the High Court of Australia in Prince Alfred College v ADC on this basis. The HCA favoured a more restrictive test that focused on the particular features of the parties' relationship and whether they provided the occasion for the wrongful act. Courts, in its view, should*

[8] (2021) 37(2) *Journal of Professional Negligence* 55.
[9] Ibid 62.
[10] [2016] AC 677 [44]-[45].

search for principle rather than formulate policy. Mohamud, on this basis, had been wrongly decided.[11] (our emphasis)

21 It is important to note, as the author points out, that:

The language used by the Court is significant and should be read carefully. The connection is no longer described as "sufficient" but "close". The connection is to "acts which [Skelton] was authorised to do". This is the tighter formulation used by Lord Millett in Lister and Lord Nicholls in Dubai Aluminium, not the broader formula of Lord Toulson in Mohamud. This terminological shift is far from accidental. Having examined how the close connection test had been expressed in Lister and Dubai Aluminium, the Court determined that the simpler version of the test in Mohamud had not been intended to change the content of the test. Lord Toulson's judgment had to be read in context. It was not, as commentators had suggested, indicative of a move towards a test of temporal or causal connection between the employment and wrongdoing, nor setting out a broad test of social justice. If, therefore, Mohamud is read in the light of Lister and Dubai, Skelton's disclosure of data could not be seen as part of his field of activities. While there was a causal connection between his post and the tort, this would not satisfy a test of close connection.[12] *(our emphasis)*

22 The author went on to affirm what the Court stated that *Mohamud* was not wrong but misunderstood and confirmed as is the case in this appeal, that there is an exception made for sexual abuse cases that require a tailored response.[13]

23 The learned author identifies one of the issues relevant to this appeal where it stated, as follows:

4. Assessing the impact of Barclays and Morrison

As I have shown, Barclays and Morrison represent a potential turning point for vicarious liability. Having been "on the move" for so many

[11] Giliker (n 8) 63.
[12] Ibid 64.
[13] Ibid 64-66.

years, the Supreme Court has indicated that it is time to slow down and adopt a more measured approach. Principle is emphasised over policy in both cases. Examination of the facts of the relationship and the duties allocated to the tortfeasor are stressed. The merits of a case-by-case incremental approach praised. However, as we have seen, by refusing to overturn the decisions in Armes and Mohamud, certain expansion joints persist. Armes heads a potential counter-offensive of "doubtful" cases, which both re-introduce policy reasoning into the discussion and diminish the force of Lady Hale's argument that, in future, it should be the details of the relationship, not policy, that determine whether a relationship exists giving rise to vicarious liability. Equally, Morrison suggests that there will be a sub-category of sexual abuse cases where policy concerns will be relevant. The scope of these exceptions is ill-defined, and this will need to be resolved. Given the number of vicarious liability cases in recent years that have involved some form of sexual abuse, this latter category may potentially provide a significant exception to the general approach. As discussed earlier, it may also influence the first category of claims. The reason for the exceptions is self-evident: they permit the Court to explain away, rather than reverse, earlier case law that is inconsistent with the general approach it advocates. The result, however, is to undermine to a certain extent its new framework by re-introducing a discussion of policy.[14]

24 It is instructive that the author came to the conclusion that the interpretation of the cases of *Barclays* and *Morrison* show a clear intention of the UK Supreme Court to reduce the number of cases where policy could be justified as an expansion to further extensions of doctrine and again confirmed what this Court has identified in *Prince Alfred College* concerning a principled development of this strict liability doctrine. The author observed that:

[14] Ibid 68.

The expansion of vicarious liability was undoubtedly based on well intentioned efforts of the Courts to ensure vulnerable victims could access compensation but ultimately failed to provide clear guidance for courts.[15]

25 Further, the learned author stated, "*Barclays and Morrison are important decisions. They signify concern at the highest level that the doctrine of vicarious liability was being applied too generously by the courts…*"[16] and should be wound back.

26 In the New Zealand Business Law Quarterly, the authors in an article "*Recent Developments in Liability Law and Liability Insurance*" stated as follows:

3.1 The New Zealand Position

10 *The New Zealand Courts in determining the scope of an employer's liability for the acts or omissions of its employees, or a principal for the acts of its agents, have adopted a three-point test. This has been summarised by Stephen Todd in his leading text, Todd on Torts:*

1. *Has a tort, or other civil wrong, been committed?*

2. *What is the nature of the relationship between the person who committed the tort and the person who is alleged to be vicariously liable for it?*

The key relationship where vicarious liability can apply is the relationship between an employer and employee. Another key example is the
20 *relationship between principal and agent. Vicarious liability should also attach to other relationships that are "akin to employment."*

A key consideration for point two is the degree of control that one party has over the other. However, the relationship question is highly factual.

3. *What connection exists, if any, between the tort and the relationship in question?*

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[15] Ibid 71.
[16] Ibid 71-72.

Here the courts ask whether the conduct in question was "closely connected" with the employment or agency relationship, or relationship analogous to employment. [17]

27 The authors stated, making observations with respect to the *Mohamud* case, as follows:

3.3 New Zealand Reception

Stephen Todd, New Zealand's leading tort academic, cautioned in 2020, before the Various Claimants decision, that "care needs to be taken to ensure that the decision in Mohamud does not lead to employers being held liable for anything an employee does at work and on the employer's premises." He noted that the High Court of Australia had rejected the decision in Mohamud in Prince Alfred College Inc v ADC. In the post-script of his paper, Todd addressed the Various Claimants judgment, stating that "the long-standing notion that an employer is not liable where the employee goes on a 'frolic of his own' has made an emphatic return." Another commentator, Edward Bayley, has suggested that there is scope for further refinement and expansion of the doctrine of vicarious liability, and that Morrison is unlikely to be the last word on this developing area of the law.

It is likely that the approach in Various Claimants will be adopted in New Zealand when the next vicarious liability case is heard. Todd's analysis is likely to be influential. That aside, New Zealand case law does not appear to have ever fully embraced Mohamud or the idea of the "unbroken sequence of events" in the wider sense rejected by Lord Reed. However, the UK cases will contribute to the continued judicial discussion about vicarious liability that Edward Bayley, and indeed Tipping J, have stressed is needed. The cases also take the Courts back to a holistic consideration of the connection between the wrongdoing and the relationship, and policy

[17] Kellee Candy et al, 'Recent Developments in Liability Law and Liability Insurance' (2022) 26 *New Zealand Business Law Quarterly* 257, 264.

considerations as to whether it is fair and just to hold an employer or principal responsible for the conduct in question.

Employers, principals, and insurers will certainly welcome the limitations imposed by Various Claimants.[18]

28 Jason Taliadoros, Associate Professor at Deakin Law School, in an article "*The 'course of employment' tests in vicarious liability and workers' compensation law: Incoherence and convergence*" states:

'Relevant approach' in ADC

Almost two decades after Lepore, the High Court in ADC set out yet another approach to determining this aspect of vicarious liability. In a majority joint judgment that comprised five members of the bench (the 'leading judgment') with which the remaining two members agreed, the High Court provided unanimous, if not definitive, guidance on the issue. Although the court came to its ultimate decision on the basis of a limitation of action issue, the leading judgment specifically considered vicarious liability for intentional acts by way of obiter dicta. Nevertheless, while obiter, the majority clearly expected lower courts to regard these remarks as binding for future cases.

The leading judgment acknowledged 'the differing views' expressed in Lepore and the 'need for … guidance ... so as to reduce the risk of unnecessary appellate processes arising out of the existing uncertainties'. It therefore set out what it termed a 'relevant approach' to determining vicarious liability:

> *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*

[18] Ibid 266.

> *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.*

It is necessary to unpack this passage in the context of the entire reasoning of the leading judgment, the Salmond test, and the previous tests in Lepore as they relate to the requirement for vicarious liability that the wrongdoing occur in the course of the employee's employment.

First, the leading judgment confirmed that the requirement that the employee's wrongful act be committed 'in the course or scope of employment ... remains a touchstone for liability'. Accordingly, its 'relevant approach' set out above provides guidance on the circumstances when wrongdoing by an employee will be considered to be in the course or in the scope of employment, and so attract vicarious liability to the employer.

Second, the relevant approach in ADC is arguably similar to Gleeson CJ's test formulated in Lepore. As noted above, Gleeson CJ's approach focuses on the relationship created between the employee wrongdoer and the victim. The ADC relevant approach, as Crawford rightly observes, 'enquires whether, in the specific instance in question, the employer placed the employee in a special position vis-a-vis the victim, by reference to particular features of a role'. These 'particular features' 'include', and so are not confined to, 'authority, power, trust, control and the ability to achieve intimacy with the victim'. These particular features, it earlier explained, were identifiable in accordance with 'the orthodox route of considering whether ... decided cases furnish[ed] a solution to further cases as they arose'.

Further, this 'special role' of the employee wrongdoer arguably centres on the notion of 'risk'. The leading judgment stipulated that it is 'not enough' that the 'employment provides an opportunity for the commission of a wrongful act', but the special role of that employment must also provide the 'occasion for' the wrongful act. This appears to place the relevant focus on the risk that the employer has created by placing the employee in the particular position they were in at the time of the wrongdoing, and also their overall position in relation to the victim.

This 'risk analysis' in ADC has apparent similarities with the 'enterprise risk' approach applied in Bazley and approved by Kirby J in Lepore, namely that 'the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community'. But the ADC relevant approach differs in several significant aspects: it does not require an evaluation of the employer's enterprise to see whether it increased certain risks, but instead focuses on the employment role and its relationship with the victim in question; further, it does not allow public policy alone to be a reference point for the test.

Third, ADC definitively rejected the approach of Gummow and Hayne JJ in Lepore. As Crawford has observed, that approach was arguably based on the so-called 'master's tort theory', a position that does not obtain in Australian law, and reduced vicarious liability to an analysis of agency principles.

Fourth, what is the scope of the relevant approach in ADC? That is, to what types of wrongdoing does it apply? The leading judgment states that the relevant approach applies 'in cases of this kind' but does not specifically define the scope of that term. At the very least, 'cases of this kind' is a reference to cases 'concerning the sexual abuse of children in educational, residential or care facilities by persons who were placed in special positions with respect to the children', as the leading judgment earlier noted when discussing the divergent views about the approach to be taken to vicarious liability. Does it extend beyond this to other intentional acts, merely negligent acts, or both? Crawford is of the view

that the High Court's reference to 'cases of this kind' is a reference to cases involving intentional torts, whether criminal or not. Giliker gives support to this reading by reference to the court's recourse to its previous decision in Deatons in specifying a test of 'occasion'. Crawford supports this reading:

> *Just as Lepore has been subsequently applied to various kinds of factual scenarios, there is no reason to think that ADC will only be applied to cases of child sexual abuse and not also commercial torts.*

It appears, therefore, that, like the tests in Lepore, ADC is intended to apply to cases of wrongdoing involving intentional, including criminal, acts. [19]

29 The Court of Appeal erred in its finding the appellant is vicariously liable because:

a) the appellant's employee's tortious act was not within the "scope of employment";

b) the relevant tortious act was so remote from his duty as to be altogether outside of and unconnected with his employment;

c) the relevant tortious act occurred outside of hours and bore no sensible relationship to any aspect of the discharge of his work duties;

d) the provision of accommodation for its employees did not provide occasion or opportunity for the employee's wrongdoing in such a case to render the appellant liable;

e) it was not otherwise just to extend the employer's responsibility to the tortious act; and

f) the Court's decision in *Bugge v Brown* (1919) 26 CLR 110 did not require the appellant to be held to be liable.

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[19] (2021) 27 *Torts Law Journal* 83, 90-92.

30 The Court of Appeal erred in finding that the provision of accommodation meant the act was done within the scope of employment when in reality it provided no more than the mere opportunity. The approach should focus attention on features of the employment in order to determine liability as was done in the Canadian cases and commented on in *Prince Alfred College*.[20] As stated by this Court in *Prince Alfred College*:

> *[46] Since the search for a more acceptable general basis of liability has thus far eluded the common law of Australia, it is as well for the present to continue with the orthodox route of considering whether the approach taken in decided cases furnished solution to further cases as they arise. This has the advantage of consistency in what might, at some time in the future, develop into principle. And it has the advantage of being likely to identify factors which point towards liability and by that means provide explanation and guidance for future litigation.*
>
> *[47] Such a process commences with the identification of features of the employment role in decided cases although they may be dissimilar in many factual respects explained why vicarious liability should or should not be imposed.*[21]

31 As the jurisprudence in the United Kingdom, Canada and New Zealand all seem to affirm, there needs to be some connection with the actual performance of his employment duties and a direct link in a sensible way, which in a relevant sense could be said in an old fashioned way to advance his master's interests. No doubt the commission of criminal acts which are inconceivable to be actually authorised will require case by case attention – as was proposed in *Prince Alfred College* itself for the criminal sexual abuse alleged in that case. For the present case, and its contribution to an evolving body of case law, it suffices to observe that one does not need to attribute criminality to the urination on a companion in order to conclude its alien character from the course or duties of employment.

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[20] (2016) 258 CLR 134, 157-158 [74].
[21] (2016) 258 CLR 134, 150.

32 If demonstration of that conclusion requires support in a concrete principle beyond simply an intuitive summation that the circumstances make vicarious liability fair and just, as this court should hold, than that principle should involve the requirements of close connection and scope or course of employment. Although such tests, if they can be regarded as tests, are open to criticism given the evident difficulties in marginal cases, they are nonetheless respectably founded in authority, acceptable in policy, and salutary in preventing recourse to overt intuitive value judgment. And this approach will often usefully permit decisions by a kind of negative criteria: the conduct of Hewett cannot sensibly answer the necessary description.

33 The Court of Appeal erred in its findings in that the provision of the accommodation provided no more than the opportunity for the tort to occur.

PART VII: ORDERS SOUGHT

34 The orders sought by the appellant are:

a) Set aside the orders made by the Court of Appeal of the Supreme Court of Queensland on 18 March 2022 and 5 April 2022.

b) In lieu thereof, order that the appeal to the Court of Appeal be dismissed.

c) Order that the respondent pay the costs of the appellant in the Court of Appeal and in this court.

PART VIII: TIME REQUIRED

35 The appellant estimates 2 hours for oral argument.

Dated: 4 November 2022

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