HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	B43/2022
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Important Information

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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

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification for publication

1. The respondent certifies that this outline is in a form suitable for publication on the internet.

Part II: Outline of the propositions to be advanced in oral argument

2. The Court of Appeal found vicarious liability on the basis of the analogy it drew with the facts in *Bugge v Brown* (1919) 26 CLR 110 [RS 33].

3. That analogy was apt [RS 34].

4. In *Bugge v Brown* (1919) 26 CLR 110 the relevant facts were that a farm worker (in 1917) was to spend the day working land distant from the homestead. The terms of his employment entitled him to "keep", which included the provision of a hot meal for his lunch. On this day he was to cook the meal himself. As was the practice, he was also using a fire to boil a billy for tea. He was directed to go to an old abandoned homestead a mile from where he would be working to make the fire. He instead lit the fire at another place nearer to where he was working. By his neglect, the fire escaped, damaging a neighbour's property.

5. Isaacs J held the employer vicariously liable. His Honour would have done so regardless of the direction. Vicarious liability arose because the employee was not acting as a stranger to the employer (at 118). The cooking of the meat was intimately connected with the day's tasks (at 125, 127 and 128). Higgins J was also of the view the lighting of the fire to cook was in the course of employment (at 132).

6. Here Hewett, like Winter in *Bugge v Brown*, was on a break between the performance of the specific tasks he performed as a barman. The employer required him to be in the accommodation for the purposes of his employment and provided him the facilities he had to have to meet that requirement [RS 28].

7. The task of toileting was as necessary as that of taking sustenance [RS 30, 32 and 34].

8. The act of toileting was impliedly authorised by the provision of a toilet within the premises provided by the employer, as they are conventionally provided by employers [RS 30]. Even if not authorised, it was an act necessarily incidental to the work Hewett was employed to do [RS 32].

9. Dixon J gave an example of self defence possibly being in the course of employment as being incidental to the work in *Deatons v Flew* (1949) 79 CLR 370 at 381.

10. On this footing the case involves the application of well-established principle to facts materially indistinguishable from those in the precedent. This case does not create the complexities generated by intentional torts committed by employees.

11. The use of authority in this way has been acknowledged as apt in this context by this Court in Prince Alfred College INC v ADC (2016) 258 CLR 134 at 150 [46] – [47] and at 172 [129], [131].

12. Contrary to the Appellant's written reply submissions, acceptance of the liability here to the Respondent does not make the employer's liability absolute [ARS 5]. The result in *Deatons v Flew* (1949) 79 CLR 370 would not be changed on this reasoning. Nor would the employer here have been vicariously liable for one employee punching another while eating breakfast (ARS 7), without something more.

13. Even if this case, by its particular facts, was thought to be materially distinguishable from the analysis in *Bugge v Brown*, the relationship created between Hewett and the Respondent still founds vicarious liability for this tort [RS 36 and 37]. The compulsory housing of them together created a vulnerability for the Respondent, by being asleep in an intimate setting, that saw him necessarily having to trust in Hewett to avoid such a tort being committed upon him (See *Prince Alfred College v ADC* 28 CLR 134 at[84]).

Dated: 08 March, 2023

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Geoffrey Diehm KC