

Arising out of or in the Course of Employment

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Pursuant to the current statute regulating entitlement to workers' compensation in Queensland: *Workers Compensation and Rehabilitation Act 2003* ("WCR Act"), compensation is only payable to a "worker" who has sustained an "injury": see s.108.

Each of the concepts of "worker" and "injury" is defined for the purpose of that Act. For present purposes the concern is with the definition of injury which is provided in s.32 of the WCR Act and s.32 (1) of that Act provides the basal requirements in order to establish "injury" for the purpose of the Act. There are three requirements or elements:

- A personal injury;
- Which arises out of or in the course of employment; and
- That employment must be a significant contributing factor to the injury.

It can be seen that the second and third requirements are also relevant to considering other aspects of the definition of injury in s.32, for example considerations as to an aggravation of an underlying or pre-existing condition: see s.32 (3) (which as a concept is the subject of a separate presentation in this seminar). Also the concept of arising out of or in the course of management action can be noted as an aspect of s.32 (5) of the WCR Act.

Further, it can be seen that once a particular personal injury is identified, the requirement of establishing that the injury is one "arising out of or in the course of employment" will be the starting point for consideration of the third requirement pursuant to s.32 (1), that of significant contribution by the employment (which is also the subject of a separate presentation in this seminar).

The second requirement of s.32(1) is therefore a starting point in the sense of providing a test as to the relationship of the personal injury to the employment, giving the injury the necessary "work related" characteristic. It can be seen that this requirement is directed at establishing a connection with or a form of causal relationship between personal injury and employment. However, as will be seen by reference to the decided authorities and in keeping with the beneficial nature of these legislative provisions, only a slight causal connection or relationship is required.

The phrase "arising out of or in the course of employment" can and should be considered as incorporating two separate concepts, which may, depending on circumstance, overlap or alternatively operate independently or severably.

To an extent, the sense in which these concepts may overlap can be seen from some provisions in the WCR Act which operate to deem or define circumstances in which an injury is taken to arise out of or in the course of a workers employment. Those provisions are to be found in Subdivision 3 of Division 6 of Part 4 of Chapter 1 of the Act, in sections 33 to 36.

Sections 35 and 36 are concerned with events that occur in the course of a relevant journey, which in certain circumstances are taken to arise out of or in the course of the workers employment and not to require the establishment of a significant contribution of the employment.

Of more present relevance are the following provisions:

"Subdivision 3 When injury arises out of, or in the course of, employment

33 Application of sdiv 3

This subdivision does not limit the circumstances in which an injury to a worker arises out of, or in the course of, the worker's employment.

34 Injury while at or after worker attends place of employment

(1). An injury to a worker is taken to arise out of, or in the course of, the worker's employment if the event happens on a day on which the worker has attended at the place of employment as required under the terms of the worker's employment –

- (a) while the worker is at the place of employment and is engaged in an activity for, or in connection with, the employer's trade or business; or

- (b) while the worker is away from the place of employment in the course of the worker's employment; or
 - (c) while the worker is temporarily absent from the place of employment during an ordinary recess if the event is not due to the worker voluntarily subjecting themselves to an abnormal risk of injury during the recess.
- (2). For subsection (1)(c), employment need not be a significant contributing factor to the injury.

The concept of "place of employment" is defined in the dictionary, as follows:

"place of employment means the premises, works, plant, or place for the time being occupied by, or under the control or management of, the employer by whom a worker concerned is employed, and in, on, at, or in connection with which the worker was working when the worker sustained injury."

However, and because there may be an alternative or separate or independent operation of these concepts, it is necessary to consider them separately and convenient to first consider the concept of "arising out of".

"Arising Out Of"

The view that has emerged from cases such as *WorkCover v Curragh Queensland Mining Pty Ltd* no.C89 of 2002, 16/12/02, *Avis V WorkCover* (2000) 165 QGIG 788 and *Lackey v WorkCover* (2000) 165 QGIG 2, is that the test posited by the words "arising out of" in s.32, is wider than that which would be posited by the words "caused by" and that the phrase "arising out of", whilst involving some causal or consequential relationship between the work place events and the personal injury, does not however require such a direct or proximate relationship that would be necessary if the phrase used was "caused by".

Each of these cases involves a decision by Hall P in relation to a psychological or psychiatric injury. In *Lackey's* case (the earliest of the trilogy) the concern was with a secondary psychological injury which had not arisen contemporaneously with a physical injury to the claimants' leg (which had occurred in the workplace) but which had emerged subsequently and consequent upon the sequelae of that injury, including the incidence of pain, physical disability, alterations to the workers' family life and the absence of the opportunity to go to work and socialise at work.

In relation to an assertion that an injury that had no temporal connexion with the employment could not be said to arise out of the employment, His Honour said:

"The assertion is plainly wrong. Both in the United Kingdom and in Australia early legislation in the nature of workers' compensation legislation required that the injury 'arise out of and in the course of' the employment. The history of the substitution of 'or' is outlined by Sykes and Yerbury, *Labour Law in Australia*, volume I second Edition, 1980 at para 1319 whereat the learned authors described the change as 'revolutionary'. With respect to Dr Larder to insist upon a temporal as well as a causal nexus with the employment is to revert to the old formula. I accept Mr Newton's submission that the test posited by the words 'arising out of' is wider than that posited by the words 'caused by' and that the former phrase, although it involves some causal or consequential relationship between the employment and injury, does not require the direct or proximate relationship which would be necessary if the phrase used were 'caused by', compare *State Government Insurance Commission v Stevens Brothers Pty Ltd* (1984) 154 CLR 552 at 555 and 559 and *Dickinson v The Motor Vehicle Insurance Trust* (1987) 163 CLR 500 at 505."

The next case in which this issue was considered is the *Avis* case. There President Hall was concerned with arguments about the exclusionary provisions of s.34(4) of the *WorkCover Queensland Act 1996* (the then equivalent provisions to the current provisions in s.32(5) of the WCR Act) and as noted, above, those provisions incorporate the same phrase: "arising out of or in the course of". His Honour set out the relevant findings of the Industrial Magistrate as follows:

"The Industrial Magistrate found, and the conclusion has not been challenged on the appeal, that:

'... the dominant cause of the Applicant's illness was the Applicant's reaction to loss of confidence, his sense of inadequacy and helplessness, and his distress over his perceived ineffectiveness as a teacher principally because of student discipline problems. Again, I am satisfied that the Applicant's personality played a critical part in his sense of inadequacy and helplessness and his distress and in his reaction thereto.'

On the evidence the Appellant's problems with student discipline arose after the school at which he was employed introduced a new Behavioural Management Plan. It is clear that the Appellant was critical both of the plan and its implementation. However, the Industrial Magistrate did not base his finding about s.34 (4)(a) on any resentment by the Appellant to the introduction and implementation of the plan. His Worship, whom I should interpolate found that the plan was 'reasonable management action taken in a reasonable way', expressly found that:

'... it is the Applicant's case that the student discipline problems which caused his sense of helplessness and inadequacy and his distress over his ineffectiveness as a teacher arose because of the ineffectiveness of the Behavioural Management Plan and its administration. The causative link connecting the cause of the Applicant's illness to management action appears to be direct and irrefutable on the Applicant's own case. The Applicant's case is that the stresses that caused his illness were brought about by the ill discipline of students. The ill discipline of students was facilitated by the Behavioural Management Plan and/or the way in which it was administered.

In my view, to give the provisions of paragraph 34(4)(a) their ordinary meaning and apply them to the circumstances of this case the Applicant's illness arose out of and in the course of the adoption and implementation of the Behavioural Management Plan. I have found the adoption and implementation of that plan to be reasonable management action. That being the case the Applicant's illness is excluded from the definition of injury by the provisions of paragraph 34(4)(a).'"

President Hall went on to observe that it was the Industrial Magistrate's use of the terminology "causal link" which was the subject of the argument put on appeal. He summarised his conclusion as follows:

"The submission is that s.34(4)(a) will attach only where the management action in itself triggers the psychiatric or psychological disorder. The contention is that in this case the taking and implementation of the management action did not trigger the illness. It is contended that in the wake of the management decision and its implementation a set of circumstances arose in which the Appellant could not do his job with a consequential loss of confidence and a feeling of inadequacy, helplessness and ineffectiveness. Reliance is placed on the decision of Davies AJA in *Manly Pacific International Hotel v Doyle* [1999] NSW CA 465 upon a provision on a similar subject matter in the Workers' Compensation Act 1987 (NSW). I'm unable to accept the submission. The New South Wales provision related to circumstances in which an injury was 'caused by' reasonable action (of defined type). S.34(4)(a) of the *WorkCover Queensland Act 1996* is directed at an illness 'arising out of' reasonable management action taken in a reasonable way. I adhere to the view which I expressed in *Lackey v WorkCover Queensland* (2000) 165 QGIG 22 at 22 (admittedly on another limb of s.34) that the test posited by the words 'arising out of' is wider than that posited by the words 'caused by' and that the phrase 'arising out of' whilst involving some causal or consequential relationship between the employment and the injury, does not require that direct or proximate relationship would be necessary if the phrase used were 'caused by'."

In the third decision: the *Curragh Queensland Mining* case, Hall P was again concerned with the concept of a psychological disorder arising out of reasonable management action, as then provided in s.34(5) of the *WorkCover Queensland Act 1996*. By way of context, His Honour summarised the Industrial Magistrate's findings as follows:

"the Industrial Magistrate found that the Respondent's actions in appointing Mr Burgess to the position of Contracts Officer and in expanding the role of that office constituted reasonable management action. The Industrial Magistrate also found that management took that action in a 'reasonable way'. Those findings are not challenged on the appeal. The contention that is advanced is that the actions taken by management did not cause Mr Burgess to decompensate. On the evidence of the psychiatrist called by the Appellant, Dr Oelrichs, that proposition would seem to be correct. Dr Oelrichs' evidence was that it was not the changes which brought about the decompensation but Mr Burgess' reaction to his inability to cope which developed in consequence of the change. (Dr Shrapnel, the treating doctor, I should add, thought that the development of the anxiety which became depression could be traced back to the anxiety experienced by (the conscientious) Mr Burgess confronting a new role, i.e. to the change). The obstacle to success on the appeal is not the facts but the law. Section 35(5) does not withdraw from the definition of injury psychological disorders caused by reasonable management action taken in a reasonable way. It withdraws from the definition of injury psychological disorders arising out of reasonable management action taken in a reasonable way. It was settled by the decision in *Avis v WorkCover Queensland* (2000) 165 QGIG 788 that the test posited by the words 'arising out of' is wider than that posited by the words 'caused by' and that a psychological disorder following in the wake of reasonable management action, including turbulence in the

workplace flowing from reasonably taken changes, is withdrawn from the definition of injury by the phrase 'arising out of' at s.34(5)."

His Honour went on to refer specifically to his decision in the *Avis* case and to note that the decision was less than two years old, with no contrary line of authority having been identified. His Honour found that there was no reason for departing from the earlier decision.

However, it can be noted that President Hall went on to further observe:

"in fairness to His Worship I should record that there is no substance in the criticism that it is the effect of the decision that, because every worker will at some point in his/her history have (quite reasonably) been appointed by the employer, every Queensland worker who suffers a psychiatric or psychological injury is withdrawn from the protection of the *WorkCover Queensland Act 1996*. Slight though the causal nexus required by 'arising out of' may be, greater connection than that is required. The analogous situation will be one in which a conscientious worker becomes anxious upon appointment, almost immediately has difficulty with workload and shortly thereafter is confronted with the changes to his/her position which increase workload further."

By way of an aside and perhaps to exemplify that last observation, reference can be made to one of President Hall's decisions, given earlier in the year 2002, in *Exide Australia Pty Ltd v WorkCover Queensland* (2002) 170 QGIG 95. In that case His Honour upheld the finding of the Industrial Magistrate in favour of the worker, which finding had been to the effect that the provisions of s.34(5) of the *WorkCover Queensland Act 1996* had been excluded. The circumstances were summarised by His Honour as follows:

"His Worship, or so it seems to me, is asserting that the decision to re-structure was a reasonable management decision but, that in standing idly by whilst workers tried to cope with an increased work load flowing from the restructuring and in failing to provide assistance, the employer implemented the otherwise reasonable decision to restructure in an unreasonable way."

Arising in the Course of Employment

The second or alternative limb of this aspect of the test relating to injury is that a personal injury may be demonstrated to arise in the course of employment.

Whilst the concept of "arising out of employment" as noted above, involves something in the nature of a causative or consequential relationship, the concept of "arising in the course of employment" largely connotes a temporal relationship between the injury and the employment: see *Weston v The Great Boulder Gold Mines Ltd* (1964) 112 CLR 30 and *Kavanagh v The Commonwealth* (1960) 103 CLR 547.

However it is not enough to simply establish a mere temporal relationship, or put alternatively, it may not be enough that the workplace is simply the setting or context in which an injury occurs. The requirement, in specific reference to the High Court decision in the *Kavanagh* case, was explained by President Hall, in his decision in *WorkCover Queensland v BHP (QLD) Workers' Compensation Unit* [2002] QIC 27, as follows:

"The critical case is *Kavanagh v Commonwealth* (1960) 103 CLR 547. The case concerned a worker who had ruptured his oesophagus as a result of vomiting at work. By a majority the High Court held that it was enough that Mr Kavanagh's vomiting fit occurred while he was 'at work'. Dixon C.J. (at 557) and Fullagher J. (at 559) expressly repudiated the view that an accident would not occur 'in the course of the employment' if the workman could equally well have sustained the injury had he not been at work at all. I accept, of course, that a mere 'temporal' relationship between the injury and the work is insufficient. An employee who sustains an injury whilst on a frolic of his own in his employer's time has no entitlement to compensation. The essential notion is that of 'being on the job', Sykes & Yerberry, *Labour Law In Australia*, (2nd Edition) Butterworths at para [1322]. In *Charles R. Davidson v McRobb* [1918] AC 304 at 321 Lord Dunedin put the matter in this way:

"In my view, "in the course of employment" is a different thing from "during the period of employment". It connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt it need not be actual work, but it must, I think, be work or the natural incidents connected with the class of work...".

In the *BHP* case, President Hall was concerned with the findings of an Industrial Magistrate which had confirmed the rejection of a claim by a worker who had experienced a sharp pain across his lower back as he bent down to pick up his boots, after removing them in the change room, after completing his shift. By reference to the above mentioned principles, His Honour decided that the Industrial Magistrate was wrong to reject the contention that the claimed injury had arisen in the course of the employment. His Honour said:

“It seems to me to be plain that a workman who changes his clothes in the change room provided by his employer at the conclusion of his shift is whilst doing so, engaged in a natural incident of his employment, indeed, so much was common ground between counsel on the appeal. It was also common ground between counsel on the appeal to the Industrial Magistrate. In my view, in a civil proceeding, the Industrial Magistrate should have acted upon the concession.”

However, the appeal was dismissed on the basis that His Honour saw the application of the requirement of significant contribution of the employment as being a different matter and he was not being prepared to differ from the conclusion of the Magistrate in that respect.

Usually there will be no difficulty when the incidence of injury is temporally connected with the actual work which a person is employed to do and often such a situation will fall squarely within the provisions of s.32 of the WCR Act. However, more difficulty can arise in relation to deciding those aspects which are incidental to the employment.

It can be noted that although the *BHP* case was determined by reference to the *WorkCover Queensland Act 1996*, that earlier Act contained an equivalent provision to that in s.32 of the WCR Act (numbered s.34 in that Act).

In relation to incidental aspects which are not covered by s.32 of the WCR Act, the determination whether something falls within the course of the employment requires examining what the worker was reasonably required, expected or authorised to do in order to carry out his or her duties: see *Hatzimanolis v A.N.I Corporation Ltd* (1992) 173 CLR 473 at 478-484 and cf: *Gregory v ComCare* (1997) 72 FCR 196.

In the *Hatzimanolis* case the High Court decided that the worker was entitled to compensation in circumstances where he had specifically applied for a job with his employer which would require him to travel to a remote location in Western Australia and which required the worker to stay at that location working about ten hours each day for six days each week. Before leaving it was explained that on the Sunday of each week he may not be required to work and that if given the chance he could visit areas around Mt Newman and the Pilbara region of Western Australia and that transport would be provided for them that purpose. This is what did occur in the course of the third week of the employment and when the Supervisor organised a trip to Wittenoom Gorge. On the return journey the vehicle in which the worker was travelling overturned and he was injured. It was determined by the High Court that this trip was organised by the employer and the worker was invited to participate and that although the injury was sustained during an interval between carrying out his ordinary duties, it was sustained in the course of his employment.

In coming to this conclusion the High Court stated (at 484) the following general principle for the purpose of Workers' Compensation Law:

“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 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 nearly to the circumstances of the particular occasion out of which the injury to the employee has arisen’ [*Danvers* (1969), 122 CLR., at p. 537.]”

That statement of principle followed a considered summation of a number of earlier decisions in relation to determining if events occurring in intervals between periods of actual employment did or did not fall within the concept of the course of employment. That summation can be found at pp.478-483 and includes reference to a number of cases where injuries occurred during the playing of games such as cricket or football in luncheon intervals and included the following reference at 480:

“Since *Oliver*, Appellate Courts have upheld many awards of compensation in favour of workers in cases where injury has occurred away from the place of work, outside of or between working hours, and while the worker was engaged in an activity that is ordinarily performed for private necessity, convenience or enjoyment. That, as we have indicated, in many cases these decisions have been reached only by a strained reading of the words ‘in order to carry out duties.’”

Those words may be traced back to the test suggested by Dixon J in *Henderson v Commissioner of Railways (W.A.)* (1997) 58 CLR 281, at p.294, in the following terms: “the test of whether an injury had been sustained in the course of employment ultimately depended upon whether the workman was doing something which he was ‘reasonably required expected or authorised to do in order to carry out his actual duties.’”

Further, that review of authority by the High Court in *Hatzimanolis* included the following observation (at p 484):

“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.”

In the case of *Gregory v ComCare* there are some pertinent observations made by Cooper J (in a decision of the Federal Court) in respect of a claim for compensation which arose out of circumstances where the Applicant broke his leg during a social soccer match, which took place at a party held in honour of his discharge from the RAAF. In specific reference to applying the decision in *Hatzimanolis* His Honour said:

“The judgment of the majority in *Hatzimanolis* did not, in any view, effect the proposition that for an injury to be said to arise in the course of employment the connection which must be established between the occurrence of the injury and the employment is a temporal connection (see *Commonwealth of Australia v Lyon* 24 ALR at 303 -303). What their Honours did in *Hatzimanolis* was provide to tribunals of fact reasoned guidance, by way of a “unifying principle”, in determining whether that temporal connection exists in circumstances where the injury in question is sustained during an interval between periods of actual work. Their Honours concluded that the distinction between a compensable and a non-compensable injury occurring in such an interval, where the employer had induced or encouraged the employee to spend the interval at a particular place or in a particular way and the injury was sustained at that place or while the employee was engaged in that activity, was to be drawn by a characterisation of the period or periods of work of the particular employee. That characterisation highlights the temporal nature of the connection between the place or activity at or during which the injury occurred and the employment.

The logical corollary of the approach adopted by the majority in *Hatzimanolis* is that, ordinarily, an injury which occurs in an interval between two discrete periods of work, even if the injury occurs at a place or in the course of an activity which the employer induced or encouraged the employee to spend the interval in or doing, will not be an injury which occurs in the course of employment. This is because, putting aside injuries suffered while traveling to and from work and the like which are specifically provided for under the Act (see s.6), the end of the discrete period of work breaks any temporal connection between the employment and the place at which or activity during which the injury is sustained.

The example given by the majority in *Hatzimanolis* of the employee who is encouraged by his or her employer to see a doctor after working hours illustrates the point. Whilst it might be said that an injury sustained by the employee while visiting the doctor is in some way causally connected to his or her employment, there can be no question of a temporal connection.

That is not to say that an injury occurring in an interval between two discrete periods of work can never be one occurring in the course of employment. In any given case, there may be a feature or features of the particular facts and circumstances which establishes a sufficient temporal connection between the place or activity and the employment.

In the instant case, it is clear from the Tribunal's reasons, and in particular from paragraph 10 quoted above, that the Tribunal found that the applicant's injury occurred in an interval between two discrete periods of work, rather than in an interval during an overall period of work, such as a lunch break or the kind of interval which the High Court was concerned in *Hatzimanolis*. The Tribunal did not find nor, in my view, could it properly have found on the evidence before it, that the farewell barbecue at which the applicant was injured was an interval occurring during an overall period or episode of work. There was no basis for the Tribunal to find that the Applicant's period of employment in the RAAF at the Base was an undertaking extending over a number of daily periods or work so as to constitute an overall period or episode of work.

Having so found, the Tribunal considered whether there was anything in the nature or circumstances of the farewell barbecue and the soccer match which indicated a sufficient connection with the applicant's employment so as to make the injury sustained by the applicant a compensable one. The Tribunal concluded that there was not. Counsel for the applicant urged me to conclude that the Tribunal's finding in this respect was one which was not reasonably open to it. I am not persuaded that it was not a finding reasonably open to the Tribunal. The question for the Tribunal was a question of fact and inherently one of degree. There was evidence before the Tribunal to support the finding. Indeed, having regard to the principles enunciated by the majority in *Hatzimanolis* and to the Tribunal's finding that the Applicant's injury occurred during an interval between two discrete periods of work, a finding to the contrary would have been more readily susceptible to challenge as being one not reasonably open."

Another case and one which exemplifies both the distinction to be drawn between the concepts of arising in the course of employment and arising out of employment and the need to look to what is expected of a worker in connection with his or her employment, in either situation, is *Roncevich v Repatriation Commission* (2005) 79 ALJR 1366. The following relevant facts are taken from the headnote:

"the Appellant was a non-commissioned officer in the Australian Army. One evening, while serving in the Army, the Appellant attended a dinner at his barracks. It was the Army's expectation and custom that all non-commissioned officers at the barracks attended the dinner because Australia's most senior soldier, who was unexpectedly visiting the barracks, would be present. Over a four and a half hour period, the Appellant became intoxicated. With permission the Appellant left the dinner intending to change out of his military fatigues and iron his uniform for the following day before returning to the dinner. Back in his second story room the Appellant, needing to clear his throat, stood on a trunk below the window and lent forward to expectorate but fell through the window. The fall caused an 'internal derangement' to the left knee."

It should be noted that the relevant test to be satisfied pursuant to the *Veterans' Entitlement Act of 1986* (Cth): s.70[5], was that "the injury arose out of, or was attributable to, any defence service."

The following observations can be extracted from the joint judgment of McHugh, Gummow Callanan and Heydon JJ:

"[23] the evidence in this case is capable of providing an affirmative answer to the correct question. As Dixon J said in the passage from Henderson cited by Heerey J in the Full Court, whether an event arises in the course of an activity, or as here, out of 'an activity', depends upon such matters as the nature of the person's employment, circumstances in which it is undertaken, and what, in consequence, the person is required or expected to do to carry out the actual duties. The connexion must however be a causal and not merely temporal one.

[24] there is little doubt in this case that there was a requirement, albeit not one to be found in formal military orders, and an expectation, of attendance at the Sergeants' Mess and the consumption in some quantity, even perhaps to the point of intoxication short of physical incapacity, of alcoholic drinks. So too, the need for the Appellant's return to his quarters and the preparation of his uniform for the next day, are capable of being seen to have arisen out of, or having been attributable to, his defence service. The remaining question is whether, climbing onto the box to expectorate through the open window, and then falling because he was inebriated, similarly either arose out of, or was attributable to his defence service."

Their Honours went on to emphasise that the particular test, there being applied, required a causal rather than merely temporal connection. Their Honours went on to observe:

“[55] causal not merely temporal connexion: ...The need for such a causative relationship is indicated by the phrase “arose out of or was attributable to”. As the primary judge correctly noted, that expression was explained by this court in *Repatriation Commission v Law* (1981) 147 CLR 635 at 649 per Aitkin J (with whom Gibbs CJ, Steven and Mason JJ concurred). This court accepted that the natural meaning of the words pointed to a ‘causal connexion’ rather than a temporal one’. To this extent the words were, by 1981 when they were considered in *Law*, viewed as significantly narrower than the formulae then common in workers’ compensation legislation affording an alternative basis for entitlement, namely causal or temporal connexion to the posited service: see, eg *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 555-557 considering the Commonwealth Employees’ Compensation Act 1930 (Cth), s.9(1); of *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 335, 351-352.”

Limitations

Statutory recognition of the exceptions referred to above in relation to gross misconduct or the concept of a worker acting such as to take himself or herself outside the course or scope of his or her employment, are provided in the legislation in sections 129 and 130 of the WCR Act and potentially extended in application to the issue of “arising out of employment”, as well.

Section 129 of the WCR Act provides that “compensation is not payable for an injury sustained by a worker if the injury is intentionally self-inflicted.”

Further s.130 of the WCR Act places limitations upon a worker’s entitlement to compensation for an injury that is caused by the worker’s serious and wilful misconduct. The concept of serious and wilful misconduct is not defined in the legislation. However s.130(4) provides as follows:

“(4) in this section –

Serious and wilful misconduct of a worker does not include conduct engaged in at the express or implied direction of the worker’s employer.”

There are older cases which discuss the concept of a worker acting in a fashion such as to take himself or herself outside of the scope of his or her employment, such that the worker is not acting in the course of employment: see e.g. *Murray v Dee Why RSL Club* 1965 WCR 85 and *Deetons Pty Ltd v Flew* 1949 79 CLR 320. These are examples of situations where bouncers or bar staff have become involved in fights or assaulted someone.

In some cases a specific risk of employment related injury must be recognised because of the nature of an employees duties and the inherent danger arising there from. For instance, in the cases of security personnel, crowd control staff doorman and bouncers, it may have to be recognised that they are required to deal with unruly persons and sometimes to apply reasonable force. However there are some authorities that recognise that if such a worker commits an unlawful act and assaults a patron, the course of employment may be interrupted or that in such circumstances and if injured in doing so, the employee is acting outside the scope of and not in the course of the employment.

In the *Commonwealth v Oliver* 1962 107 CLR 353 Menzies J observed (at p.360):

“a worker may disobey an order or regulation but still remain in the course of his employment.”

There is also authority that the course of employment is not broken where an employee performs an authorised act in a prohibited manner: *Mt Isa Mines Ltd v Bates* 1972 46 ALJR 408.

However, difficulty may arise in cases where an employee performs a prohibited act having regard to the provisions of s.130 of the WCR Act. Depending upon the precise terms and context of the employment, misconduct may conceivably be established by defiance of a specific directive or instruction. However, the legislative intent appears to be that misconduct alone is not enough to disentitle a worker. That disentanglement will, however, occur upon proof of serious and wilful misconduct.

It can be noted that s.130 of the WCR Act operates to exclude the payment of compensation in all cases where serious and wilful misconduct is established except if the injury results in death or the insurer considers the injury could result in a work related injury assessment of fifty percent or more (except where that fifty percent assessment arises from a psychiatric or psychological injury or the combination of such an injury with another injury). It can be noted that if there is no agreement as to the whether the assessment would exceed fifty percent or more, that matter can only be determined by a Medical Assessment Tribunal.

Conclusions

Noting that the same phraseology is used in relation to s.32(5) of the WCR Act (and that, as noted above, this may have particular implications in certain cases), the present relevance of the phrase "arising out of or in the course of", is as to the basal requirement of connection of personal injury to employment pursuant to s.32(1).

It has been demonstrated above that to an extent, the two limbs of the requirement may be contrasted. The concept of arising in the course of employment largely connotes a temporal connection to the employment, including those things necessarily incidental to the employment. Accordingly, the necessary connection is one established in a direct sense.

On the other hand the concept of arising out of the employment, whilst requiring a slight causal or consequential link, will potentially have wider application when the concern extends beyond a direct link to the course of employment or those things incidental to it. Therefore this limb will allow for more indirect link to employment and is particularly applicable to the development of psychological injuries (which often depend upon the subsequent reactions of a person to events that occur in or are connected to the workplace) and especially to subsequent or secondary psychological injuries, which may arise out of the consequences of physical injury (which is itself otherwise shown to be compensable).