

WINTER
IS COMING

A GAME OF TORTS

SARAH SINGH

**WHO AM
I?**

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First thing we do,
let's kill all the lawyers.

William Shakespeare

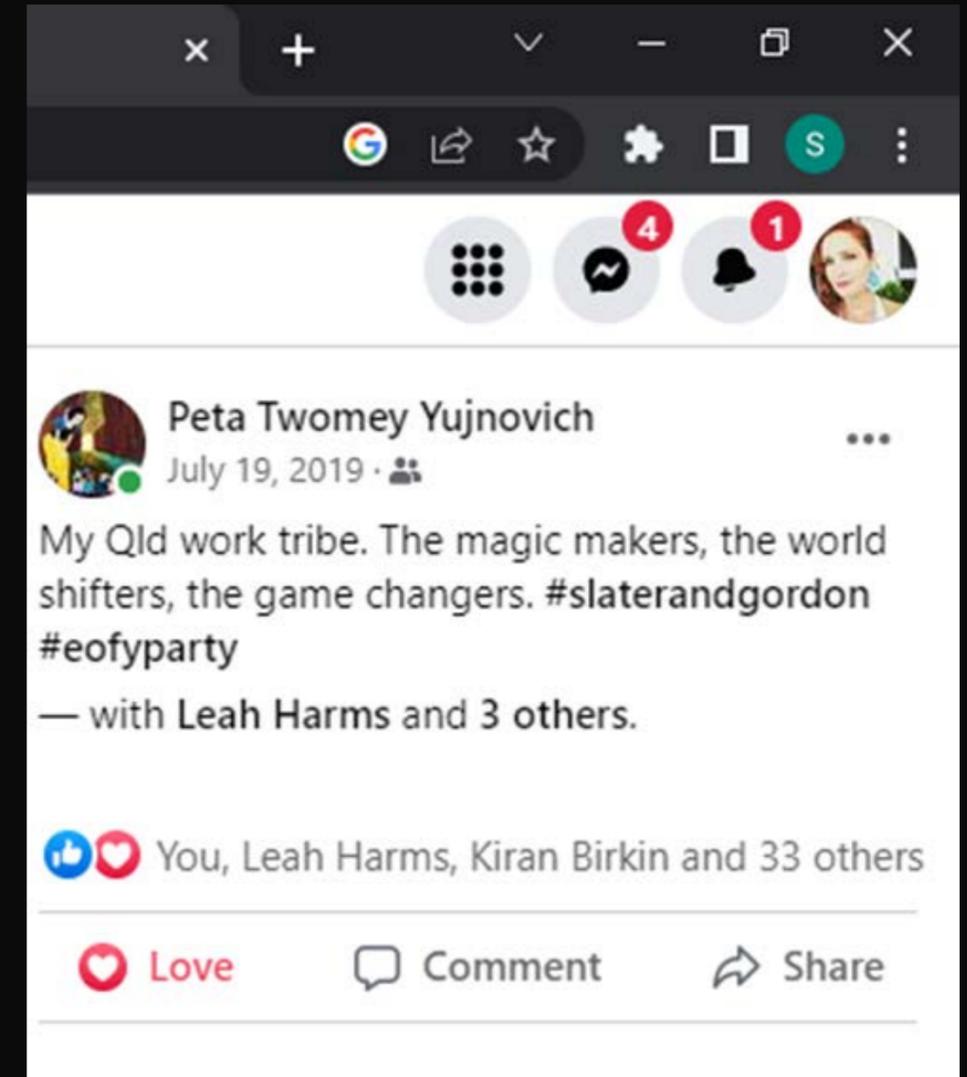


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WHY IS WINTER COMING?

With reference to a couple of cases in 2022.

Decisions have come out in 2022 that directly relate to how we assess common law claims and interpret the applicable legislation.

These cases effect the day to day of every working Australian and their rights if they become injured and are unable to work.

Recent decisions of

- Schockman- Vicarious Liability
- Kozarov- reasonable foreseeability of psychological injury
- RBK v Montague- application of the MAIA



**SCHOKMAN V
CCIG
INVESTMENTS**

Court of Appeal Decision
Fraser, McMurdo and Mullins JJA

Mr Schockman was a restaurant supervisor at Daydream Island.

As part of his employment contract he was living on the island. He was placed in shared accommodation with a co-worker, Mr Hewett. Mr Hewett was a 'team leader' which was a slightly sub-ordinate position.

Very early one morning, Mr Schokman woke to find Mr Hewett urinating in his mouth.

As a result he sustained a psychological injury and aggravation of pre-existing cataplexy.



To be successful in a Workers' Compensation common law claim, the employee must prove:-

1. The Defendant owed the Plaintiff a Duty of Care
2. The Defendant breached that Duty
3. The Defendant's breach of duty caused the plaintiff's personal injury



Why are we concerned about this decision?

This decision effects:-

- 1. assessment of claims as to what constitutes a TORT**
- 2. What constitutes 'in the course of employment'/Vicarious liability of part of a non-guilty employer**

**What did the Court of Appeal
find?**

The actions of Mr Hewitt were a TORT

- **Mr Hewitt owed a duty of care to Mr Schockman to exercise reasonable care in his use of the room so as to avoid an injury to Mr Schockman. He failed to do so.**
- **Mr Hewitt's drunkenness would not diminish his liability in negligence because it had no effect on the standard of care owing by him**

Was the Tort in the 'course of his employment'

At trial, Crow J found that the injury did not occur during the course of Mr Schockman's employment, meaning that the claim failed.

The Court of Appeal found in contrary to this. They unanimously found that Daydream Island was vicariously liable (responsible) for the actions of Mr Hewitt whilst he was in the shared accommodation as Mr Schockman and Mr Hewitt were required to stay there as part of their employment.

What is happening now?

High Court of Australia

The defendant submits that the actions of Mr Hewitt were 'not connected with his employment' and therefore the employer could not be held vicariously liable. The only connection is *mere opportunity*

Kozarov v Victoria [2022] HCA 12

(13 April 2022)



This High Court decision related to a lawyer who was injured during the course of her employment working at the Victorian Office of Public Prosecutions in the sexual offences unit.

This Decision effects the manner in which Courts will assess whether an employee's risk of psychiatric injury in the workplace is reasonably foreseeable to an employer, and therefore whether an employer has a relevant duty of care to proactively reduce the risk of injury.

Where an employee is engaged to perform an occupation that presents an obvious and inherent risk of psychiatric injury, and the employer has knowledge that employees face this obvious and inherent risk in the performance of their regular duties, a duty of care arises on the part of an employer to take proactive steps in respect of all employees performing that role to reduce their risk of psychiatric injury.

There was clear evidence that the OPP was well and truly aware of the risk that its employees were at risk of sustaining a psychological injury and were required to take steps to prevent its employees from sustaining such injury. Those steps could include:-

- rotations
- vicarious trauma training
- welfare check
- referral for occupational screening

RBK v Montague [2022] VSCA

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Application of Motor Accident Insurance Act and what a CTP Insurer could be held liable for



On 7 January 2012, the Plaintiff was found unconscious in the backseat of a vehicle. The vehicle had been parked in a street in Brighton, near the address of Mr Montague, the Defendant.

In the two days prior, the Plaintiff had purchased heroin from Mr Montague and had injected it in his company. Within minutes of the injection, the Plaintiff fell unconscious, and Mr Montague moved her onto the back seat of the vehicle. He then drove to his residence and left the parked vehicle with its windows up. During the two days that the Plaintiff lay unconscious in the vehicle, the outside air temperature exceeded 40 degrees.

The Plaintiff alleged that she had suffered injuries as a result of being left in the vehicle including cardiac arrest, bilateral pulmonary emboli, heatstroke, multiple organ failure, hypoxic brain injury, and paraplegia.

What Did the Courts find?

The Plaintiff lost at trial but was successful on appeal.

Whilst it might be said that the injuries arose out of some 'non-normal' use of a car, it does not mean that the same injuries cannot also be said to have arisen out of some other (and, in this case, later in time) use of the vehicle as a motor vehicle.

It was found that the Plaintiff's injuries arose out of the the use of the car in driving it to and parking resulting in her being exposed to excessive heat within the vehicle and thereby causing injury to her. It was considered that the temperature within the car was plainly a consequence of the physical features of it and the driver's decision to park it outside and exposed to the elements.

Is Winter coming?

Continue to watch closely the decisions of the Courts and its interpretation of legislation.

Been a mix of successful/unsuccessful Plaintiff cases last year. The most concerning is what the High Court's decision will be in Schockman which could potentially effect how employers are seen to be vicariously liable for the actions of its employees

Where can you find me?

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Thank you!