**CASE NOTE: STATE OF VICTORIA v ALLAN THOMPSON**

**BACKGROUND**

On 25 October 2019, the Victorian Court of Appeal handed down a significant decision of *State of Victoria v Allan Thompson* [2019] VSCA 237 (per Beach and Osborn JJA, and Kennedy AJA). This case deals with the application of the ‘significant injury’ threshold for damages for non-economic loss in cases concerning or relating to an intentional act under the *Wrongs Act 1958* (Vic).

Thompson brings his claim against the State in negligence and breach of statutory duty arising from a stabbing by a fellow inmate at Dhurringile Prison, Murchison.[[1]](#footnote-1)

The Plaintiff seeks damages for non-economic loss against the State without having satisfied the ‘significant injury’ threshold required under Part VBA of the *Wrongs Act 1958* (Vic).

Section 28LC(2) provides, relevantly:

*(2) This Part* [Part VBA] *does not apply to the following claims for the recovery of damages for non-economic loss-*

*(a) a claim where the fault concerned is, or relates to, an intentional act that is done with intent to cause death or injury or that is sexual assault or other sexual misconduct;*

*...*

In this dispute, the Plaintiff contended that his claim against the Defendant ‘relates to’ an intentional act done by the fellow inmate. Thus, although his case is in negligence and breach of statutory duty against the Defendant, it ‘relates to’ an intentional act.

The Defendant submitted that he would only be entitled to seek damages for non-economic loss without satisfying ‘significant injury’ as against the perpetrator of the intentional act, not a third party.

**DECISION**

The Court held that the Plaintiff did not require a ‘significant injury’ to claim damages for non-economic loss. His claim against the State related to an intentional act of the fellow inmate and that was enough to meet the exclusion in section 28LC(2) on its plain wording. There was no justification for narrowing this provision to claims brought against the perpetrator only, or to vicarious liability cases.[[2]](#footnote-2) Unlike the first instance judge, the Court said it did not need to rely on the principle of legality to come that this conclusion.[[3]](#footnote-3)

Other noteworthy aspects of the decision are:

* if the case concerns allegations of an intentional act, and in the alternative a mere negligent infliction of harm, a plaintiff will require a ‘significant injury’ for the claim in negligence;[[4]](#footnote-4)
* claims to which the exception to ‘significant injury’ apply are not limited to intentional acts done with intent to cause injury, such as is recognised by *Wilkinson v Downton*,[[5]](#footnote-5) but extend to alleged intention to cause injury claims, such as battery, assault and false imprisonment;[[6]](#footnote-6)
* the relevant Part VB exception for intentional acts, section 28C(2)(a), which restricts damages in personal injury claims pursuant to various of the Ipp reforms, is narrower in its application than Part VBA’s exception for intentional acts. This is because section 28C(2)(a) does not include the words “or relates to” an intentional act.[[7]](#footnote-7) It therefore appears a case like that against the State would not meet its definition. However, even section 28C(2)(a) would appear to include actions against the perpetrator of intentional acts of battery, assault and false imprisonment and other such claims.[[8]](#footnote-8)

**FUTURE CASES**

For all cases which concern or relate to an intentional act, including *Wilkinson v Downton* claims, and an assault, battery or false imprisonment, whether or not the Plaintiff claims against the perpetrator or some third party in negligence or breach of statutory duty, this case makes it plain that the Plaintiff does not require a ‘significant injury’ to seek damages for non-economic loss.

On the other hand, if the case involves allegations of both an intentional act but in the alternative a wrongful, but not intentional act, to seek damages for non-economic loss, a Plaintiff will require a ‘significant injury’ for the alternative wrongful act or omission case.

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OWEN DIXON CHAMBERS

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1. This decision arises from a fight on the pleadings about ‘significant injury’. [↑](#footnote-ref-1)
2. See paragraph 17 and footnote 5. [↑](#footnote-ref-2)
3. That, unless there is clear language in the statute, parliament is presumed not to take away common law rights. [↑](#footnote-ref-3)
4. Paragraph 35. [↑](#footnote-ref-4)
5. [1897] 2 QB 57. [↑](#footnote-ref-5)
6. Paragraph 39. [↑](#footnote-ref-6)
7. Paragraph 31. [↑](#footnote-ref-7)
8. Paragraph 39. [↑](#footnote-ref-8)