

STATE OF VICTORIA V THOMPSON [2019] VSCA 237

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1. The Court of Appeal upheld the decision of Judge Brookes (see Common Law update 2 of 2019) that the significant injury provisions in the *Wrongs Act* do not apply to claims which relate to intentional torts, where the claim is brought in negligence against a defendant, who did not commit the intentional tort.

Facts and procedural history

2. The plaintiff, Allan Thompson, was injured as a prisoner in jail, when another prisoner stabbed him. The plaintiff commenced proceedings against the State of Victoria for negligence and breach of statutory duty.
3. The State of Victoria pleaded that the plaintiff could not claim non-economic loss damages because he did not comply with the significant injury provisions of the *Wrongs Act 1958* (Vic). The plaintiff applied to the Court to strike out that part of the defence.¹
4. A plaintiff cannot claim non-economic loss damages (for injuries caused by someone else's fault) unless that person has a significant injury – [s 28LE](#). However, an exception applies for “a claim where the fault concerned is, or relates to, an intentional act that is done with intent to cause death or injury” – [s 28LC\(2\)\(a\)](#).
5. The issue for the Court was whether that exception applied to the plaintiff's claim. The State of Victoria argued it did not apply because the defendant was not vicariously liable for the intentional act. The issue was whether the fault alleged in the plaintiff's claim against the State relates to an intentional act done with intent to cause injury.
6. Judge Brookes found both parties' statutory constructions were open, but ultimately, that the exception to the significant injury provisions applied. The relevant part of the defence was struck out.
7. The State of Victoria sought leave to appeal, arguing that Judge Brookes erred in the construction of the exception and erred by striking out part of the defence.

¹ [Thompson v State of Victoria \(Ruling\) \[2019\] VCC 166](#)

8. The Court of Appeal granted leave but dismissed the appeal in a joint judgment (Beach, Osborn JJA and Kennedy AJA).²

Parties' submissions

9. Section 28LC(2)(a) of the *Wrongs Act* provides:

“(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;

....”.

10. The State of Victoria argued that the exception only applies for intentional acts of the defendant in question. As stated at [16] of the Court of Appeal judgment:

“The defendant submitted that the words ‘is, or relates to’ do no more than make clear that section 28LC(2)(a) covers both claims in which the fault or act of the tortfeasor is an intentional act done with intent to cause injury; and claims in which the fault or act of the tortfeasor need not include any intention to cause injury – such as claimed in battery, assault and false imprisonment – but to which an allegation of intention to cause injury may ‘relate’ so as to found an associated claim against the tortfeasor for exemplary damages.”

11. The plaintiff argued the decision at first instance should be upheld as

- (a) it is consistent with the plain text reading of the exception;³
- (b) it is consistent with the omissions in the statutory definition of ‘fault’.⁴ The defendant need not do an intentional act (as the State of Victoria suggests) because the claim could involve the defendant’s omission;⁵ and
- (c) the words “relates to” had wide import.⁶

² [State of Victoria v Thompson \[2019\] VSCA 237](#)

³ [Ibid](#) [23].

⁴ [Ibid](#) [24].

⁵ [Ibid](#) [25].

⁶ [Ibid](#) [23].

Court's consideration

12. The Court of Appeal referred to the statutory construction principles in *R v A2*.⁷ Namely, the ordinary and grammatical meaning including the context and legislative purpose.⁸
13. The Court compared the exceptions in [s 28C\(2\)\(a\)](#) and [28LC\(2\)\(a\)](#). Section [28C\(2\)\(a\)](#) applies when the fault is an intentional act. Whereas [s 28LC\(2\)\(a\)](#) is wider. It applies when the fault is, or relates to an intentional act.
14. The Court of Appeal held, commencing at [36]:

[36] in our opinion, and again contrary to the defendant's submissions, the better view is that the words 'or relates to' were inserted into section 28LC(2)(as) as part of the Parliament's attempt to balance the rights of people to sue for personal injuries and the need to for access to affordable insurance as described in the second reading speech relating to the 2003 Act.

[37] The words 'relates to' are words of wide and general import. As has been said before, the precise ambit of the expression can only be discerned from the context in which it has been used. But in the present case as matter of resulting from the application of the ordinary meaning of the words, the plaintiff's claim relates to an intentional act done with intent to cause death or injury.

15. The Court ultimately found the intentional act could be done by someone other than the defendant.⁹ In *obiter*, the Court also held if a claim is made for both an intentional act and alternatively, an unintentional act, the significant injury provisions still apply to the claim based on an unintentional act.¹⁰
16. The appeal was dismissed.

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⁷ [Ibid](#) [27]-[29]. See [R v A2 \[2019\] HCA 35](#) [124] – [125], then [33] – [34], [36]. Also [Alcan \(NT\) Alumina Pty Ltd v Commissioner of Territory Revenue](#) (2009) 239 CLR 27; [Saeed v Minister for Immigration and Citizenship](#) (2010) 241 CLR 252; and [Baini v The Queen](#) (2012) 246 CLR 469.

⁸ [State of Victoria](#) [27].

⁹ [Ibid](#) [38].

¹⁰ [Ibid](#) [34]-[35].