wotton kearney

Case Alert

Shaping the future of insurance law

More rights against those whose wrongs are not intentional

State of Victoria v Thompson [2019] VSCA 237

28 OCTOBER 2019

AT A GLANCE

- The Victorian Court of Appeal has decided a claimant does not need to establish they have a "significant injury" to claim general damages if they allege they are the victim of an "intentional act that was done with intent to cause death or injury or that is sexual assault or other sexual misconduct".
- Critically, this decision applies to defendants that do not commit the intentional act, for example hotel operators, security and crowd controllers, prison operators, schools, care providers and shopping centre owners and managers.
- This decision may lead to an increase in claims made against insureds that have a legal liability because of injury caused intentionally by others. As awards of general damages can be very high in Victoria, this could substantially increase the exposure and liabilities of insurers that cover these types of risks.

BACKGROUND

The facts of this claim are not controversial. Thompson, while a prisoner at Dhurringile Prison, was stabbed by a fellow inmate. He brought a claim against the State of Victoria in negligence and for breach of statutory duty for failing to ensure prisoners did not have access to knives, and deficiencies regarding the supervision and guarding of prisoners.

The critical issue was whether Thompson could claim general damages against the State of Victoria even though, on the whole, he had recovered from his injuries. Since the tort law reform of 2003, the *Wrongs Act 1958* (Vic) (Wrongs Act) has imposed limits on access to general damages arising from personal injury and death in Victoria.

Part VBA of the Wrongs Act provides that a claimant must establish they have a "significant injury" before being able to claim general damages.

Under the Wrongs Act, a "significant injury" is an injury that meets the statutory threshold, which includes:

- for spinal injuries, 5% or more whole person impairment (WPI) assessed under *AMA Guides Edition IV*
- for other physical injuries, 6% or more WPI, and
- for psychiatric injuries, 10% WPI.

There are some exceptions to when a claimant must establish these thresholds, including industrial or transport accidents. There is also an exception in Section 28LC for claims where "the fault concerned is, or relates to, an intentional act that is done with the intent to cause death, injury…".

The traditional view has been that this exception only applied to claims against the person responsible for committing the intentional act. For example, that view was adopted by his Honour Judge Misso in a decision of in *Cugmeister v Maymac Foods Pty Ltd* [2012] VCC 1121. His Honour said:

> *"I think that what the legislature intended was to permit a limited category of persons to make a claim without needing to satisfy the threshold level where the claim is based on a cause of action directly connected to an intentional act on the part of the tortfeasor. Such an interpretation is consistent… with the intention of the legislature to make the tortfeasor directly and personally responsible for the consequences of his/her actions in committing an intentional act which causes death or injury. It is for these reasons that I am not satisfied that the legislature intended that a person whose negligence creates a risk that a victim might be assaulted and battered is within what the legislature intended by the use of the words "or relates to".*

Judge Misso's decision has been the basis for the prevailing view, until the matter was considered by His Honour Judge Brooks in *Thomson v State of Victoria* [2019] VCC 166.

JUDGMENT AT FIRST INSTANCE

Thompson argued that even though it was a fellow inmate who stabbed him, his claim against the State of Victoria was still one that "relates to" an intentional act (i.e. the stabbing).

The State of Victoria argued that the exception would only apply to a claim by Thompson against the fellow inmate who stabbed him, not the claim in negligence against it.

Judge Brookes noted the outcome in Cugmeister and accepted there were two interpretations available. However, he concluded that in the absence of any clear intention expressed by the Victorian Parliament to abrogate the common law rights of injured claimants in such circumstances, he was "constrained to the construction that the right to bring a claim for general damages such as is litigated before me has not been expressly removed by the relevant legislation".

As a result, he concluded that Thompson did not need to satisfy the requirements of Part VBA to pursue a claim for general damages.

APPEAL DECISION

The State of Victoria appealed Judge Brookes' decision and, on 25 October 2019, The Court of Appeal (constituted by Beach, Osborne JJA and Kennedy AJA) handed down its decision.

The Court of Appeal said Judge Brookes was right to conclude that s28LC(2)(a) operated to exclude the operation of Part VBA from Thompson's claim – and, as such, Thompson was entitled to bring a claim for general damages despite not establishing that he had a significant injury.

> **"It is enough for the exception to Part VBA to apply when there is an allegation of intention to cause injury**

The Court of Appeal said it was "not persuaded that there is any basis for giving the words 'or relates to' in s 28LC(2)(a) some different or narrower meaning than they bear on their face. In particular, there is no justification for reading the provision so that the relevant intentional act must be done by the defendant."

In coming to that conclusion, the Court of Appeal said:

> *"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 a matter of fact 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."*

The Court of Appeal also rejected the State of Victoria's submission that the claim in which the fault "is" an intentional act is limited to intentional acts done with intent to cause injury, rather than claims where there may only be an allegation of intention to cause injury. It said it is enough for the exception to Part VBA to apply when there is an *allegation* of intention to cause injury relating to the action against the defendant.

IMPLICATIONS FOR INSURERS

The full extent of the implications for insurers is not clear, but in cases where the cause of action derives from an allegation of an intentional act, the claimant will no longer need to establish an injury that meets the threshold in Part VBA Wrongs Act.

Now, all that is needed to avoid Part VBA is an allegation the claimant's injuries were intentionally caused. Examples of where the exception would apply include:

- A hotel operator that is sued because a contract security guard or a patron assaults another patron.
- A prison operator that it is said to have negligently supervised a fellow prisoner.
- A shopping centre owner that is sued because a third party robs or assaults a shopper on the premises.
- A school that is sued for failing to prevent a student being bullied by another student.
- Care providers who are responsible for the care of medical patients, minors, elderly people, people with disabilities or other vulnerable people who are assaulted by fellow patients.

Given the broad exposure, we anticipate an increase in claims for more modest, or non-permanent, injuries that would not previously have been pressed because general damages would not have been available. As Victoria is well known for its very general damages awards, and with plaintiff's costs entitlements having significantly increased in recent times, the likelihood of further litigation involving claims of this nature is very high.

It is also worth noting that the period in which the State of Victoria may appeal has not expired yet.

NEED TO KNOW MORE?

For more information please contact us.

Andrew Seiter
Partner, Melbourne
T: +61 3 9604 7906
E: andrew.seiter@wottonkearney.com.au

Jackson Pannam
Senior Associate, Melbourne
T: +61 3 9604 7957
E: jackson.pannam@wottonkearney.com.au