

Seeking significant recompense for (minor) injuries? The ‘significant injury’ threshold in intentional tort claims

1. Intentional tort claims seem to be proliferating. In Victoria, solicitors must ask themselves an important question in the area – does a plaintiff require a “Significant Injury” to claim damages for non-economic loss (i.e., general damages)?¹
2. In most cases caught by the *Wrongs Act 1958* (Vic), a person must establish a Significant Injury, by reaching a certain threshold of injury.² If that threshold is not reached, most cases will not get off the ground or settle early for a minimal sum, so escaping its clutches can be vital for plaintiffs.
3. In Victoria, under section 28LC of the *Wrongs Act*, the Significant Injury requirement does not apply to:³

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

4. The intention of Parliament under this provision was said to be to implement a Significant Injury threshold to determine an entitlement to damages for non-economic loss, except for “claims concerning...misconduct”.⁴ The idea generally was to rid the system of minor injury negligent claims in response to a so-called ‘insurance crisis’. Frequently, of course, in misconduct cases, there is no available insurance and the ‘crisis’ concerns fall away.

¹ As that term is defined in the *Wrongs Act*, section 28LB – pain and suffering, loss of amenities of life and loss of enjoyment of life.

² Such as public liability claims. This paper assumes knowledge of that regime, which has been the subject of learned papers elsewhere.

³ Section 28LC(2)(a) of the *Wrongs Act*.

⁴ *Victoria, Parliamentary Debates*, Legislative Assembly, 21 May 2003, 1783, cited in *Gebrehiwot v State of Victoria (who sues by his Litigation Guardian Tamar Hopkins) (Ruling No 2)* [2019] VCC 1229.

5. The Court of Appeal⁵ in *Thompson* has already made it clear that the phrase “relates to” in section 28LC is wide enough to encompass a claim brought in negligence against a party that relates to “*an intentional act that is done with intent to cause death or injury*”. In that case, which has been summarised elsewhere,⁶ a plaintiff stabbed by a fellow inmate did not require a Significant Injury in his negligence claim against the State who was said to have been negligent in failing to prevent that intentional act done with intent to cause injury.
6. But what has not yet been tested in Victoria is the meaning of the phrase, “*with intent to cause death or injury*”.
7. It may come as a surprise that not all “intentional tort” claims bring with them an “intent to cause death or injury”. The name is quite the misnomer. For example, negligent or reckless contact of a person may give rise to a “negligent battery,” or “negligent trespass”, as held long ago by the High Court in *Williams v Milotin*,⁷ without any intention to harm. Other cases, outside of battery, could be posited, such as arresting or imprisoning someone under a mistake, making it false, but not necessarily an intentional tort “with intent to cause death or injury”.
8. A number of cases in New South Wales have considered this issue. In that jurisdiction, a similar form of wording exists under their *Civil Liability Act 2002* (NSW) (‘CLA’). Section 3B provides:

The provisions of this Act [i.e. the Ipp Reforms limiting damages] do not apply to or in respect of civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury or death or that is sexual assault or other sexual misconduct committed by the person.

⁵ *State of Victoria v Thompson* [2019] VSCA 237.

⁶ Hamilton, P, *Case Note – State of Victoria v Allan Thompson*, 25 October 2019.

⁷ (1957) 97 CLR 465 at 474; [1957] HCA 83.

9. As can be seen from comparing the two sections, there is an important difference:
 - a. in Victoria, the *Wrongs Act* looks to a “claim”;
 - b. in NSW, the CLA looks to the “civil liability” of a person.
10. This difference is of practical importance. In NSW, a judge at trial either assesses the claim based on a ‘most extreme case’ basis or, if it meets the exception of an intentional act with intent to cause injury, assesses general damages ‘at large’. As observed above, the Victorian Act focuses on “the claim” rather than a finding of “civil liability” and at trial in Victoria a judge could not choose between the two regimes, awarding a lesser sum for general damages. If a Plaintiff is required to have a Significant Injury Certificate and does not, they are not entitled to damages for non-economic loss at all. Thus, it seems to me that cases under the NSW regime should be treated at least with some degree of caution when applying them to Victoria.
11. NSW appellate decisions have confirmed that Courts under the CLA must ask themselves two questions:
 - a. was the act an “intentional act”; and
 - b. was that intentional act done “with intent to cause death or injury”?
12. Both questions must be answered in the affirmative for general damages to be assessed ‘at large’ rather than under the restricted regime set out in the CLA.
13. In *Croucher v Cachia*,⁸ Leeming JA described the phrase “intentional tort” an “unsafe guide” to whether section 3B applied to exclude the Ipp Reforms. His Honour noted that one must look at “the character of the conduct rather than the nature of the cause of action”, because of the statutory wording under section 3B of the CLA.⁹
14. Two recent NSW Court of Appeal decisions have put this to the test.

⁸ [2016] NSWCA 132.
⁹ At [35].

15. In *State of New South Wales v Ouhammi*,¹⁰ a police officer negligently closed a door on a prisoner and injured him which was a (negligent) battery, and thus an ‘intentional act’, but not an act done “with intent to cause injury”. Accordingly, the restrictions on general damages applied.
16. In *Dickson v Northern Lakes Rugby League Sport & Recreation Club Inc*,¹¹ the plaintiff suffered injury from a spear tackle in a football game, causing injury. The claim was brought in negligence. The Court accepted that the tackle was an “intentional act”, in the sense that the tackler intended to effect the tackle, but rejected the argument that there was an “intent to cause injury”; it was simply a negligent act. This is to be contrasted to the intention of the defendant in *Graves v West (No 2)* to injure the plaintiff when punching him during a football match.¹²
17. The upshot of these cases is that, if, in effect, the claim is one in negligence, it would not meet the “intent to cause death or injury” test, regardless of how the claim might be framed.
18. That said, plaintiffs have succeeded in establishing both limbs of this test in a number of cases.
19. First, in *New South Wales v Ibbett*,¹³ Spigelman CJ accepted that a police officer raising their gun at a person, causing that person to suffer fear, was an intentional act “done with intent to cause injury”. Ipp JA was of the same view, adding that the “injury” in that act encompassed stress and anxiety to the plaintiff.

¹⁰ [2019] NSWCA 225.

¹¹ [2020] NSWCA 294.

¹² [2015] NSWSC 306. The intention to cause injury was, in part, based on the Defendant’s guilty plea to a recklessly causing grievous bodily harm charge. For a useful summary of the case, see Morrissey, N, "A Punch 'Off the Ball': *Graves v West (No 2)* [2015] New South WalesSC" [2015] PrecedentAULA 65; (2015) 130 Precedent 44, available on Austlii.

¹³ (2005) 65 NSWLR 168; [2005] NSWCA 445.

20. Secondly, in *Dean v Phung*,¹⁴ a medical procedure performed where consent was vitiated by fraud, satisfied the “with intent to cause injury” test. This can be compared to *White v Johnston*,¹⁵ in which the Court found no evidence to support the allegation that the treatment had been performed without therapeutic intent and hence there was no battery claim and no “intent to cause injury”.
21. Thirdly, in *Fede v Gray by his tutor New South Wales Trustee and Guardian*,¹⁶ a biting of another’s thigh was an intentional act done with intent to cause injury.
22. Fourthly, in *Hamilton v State of New South Wales (No 13)*,¹⁷ a police officer grabbed the plaintiff’s arm and swung him around. This caused the plaintiff to crash into a wall. There was no intention by the officer to injure the plaintiff by having the plaintiff hit the brick wall, but an infliction of pain by grabbing and swinging the plaintiff was enough, such that it met the test of “with intent to cause injury”.
23. By the end of a trial, it would be easy enough to see whether, subjectively, the defendant committed an act “with intent to cause death or injury”. But the question remains – how should that occur in Victoria given the threshold question of Significant Injury relating to a “claim” and the ‘all or nothing’ regime for non-economic loss under the *Wrongs Act*.
24. On this issue, the learned authors Davies and Malkin in *Focus Torts*¹⁸ draw a distinction between NSW (and Tasmania¹⁹) and Victoria (and South Australia and Western Australia), seemingly because both NSW and Tasmania look to the conduct of the person and their civil liability, rather than the nature of the “claim”.
25. The authors go on to state:

¹⁴ [2012] NSWCA 223.

¹⁵ [2015] NSWCA 18.

¹⁶ [2018] NSWCA 316.

¹⁷ [2016] NSWSC 1311.

¹⁸ 9th Edition.

¹⁹ Which has identical wording to NSW in this respect.

...unlike NSW and Tasmania, the statutory modifications of what constitutes negligence do not apply to a case of negligent trespass in South Australia, Victoria, or Western Australia.

26. It is unclear what the authors mean here, and no case law is cited in support of it.
27. In the leading Court of Appeal case of *Thompson*²⁰ in Victoria, albeit not squarely on point,²¹ the Court did not appear to adopt a two-limb approach to section 28LC of the sort analysed in the NSW cases.
28. What the Court there said was that, for intentional tort claims, no Significant Injury Certificate was required to obtain non-economic loss damages, whereas claims in negligence would require it, including for the same set of facts. At paragraph [35], the Court said:

Contrary to the defendant's submissions, where an injured person makes a claim 'where the fault concerned is an intentional act that is done [by the person against whom the claim is made] with intent to cause death or injury' and an alternative claim against the same person in negligence in respect of the same injury (but without any allegation of a requisite intent on the part of that person or any other person), Part VBA will almost certainly require the claimant to comply with its provisions in respect of the negligence claim, but will not require any compliance in respect of the claim that contains the allegation that the party sued had the requisite intention.

29. The Court went on to say at [39]:

We also reject the defendant's submission that claims in which the fault 'is' an intentional act are limited to intentional acts done with intent to cause injury

²⁰ [2019] VSCA 237.

²¹ As it looked at the phrase, "relates to".

(eg, *Wilkinson v Downton* and *Bradley v Wingnut Films Ltd*) rather than claims where there may be an allegation of intention to cause injury (such as claims in battery, assault and false imprisonment).

30. In other words, causes of action do not specifically require an ‘intent to cause injury’ of the *Wilkinson v Downton* type (which is an intentional infliction of harm cause of action) to fall within “the fault concerned is, or relates to, an intentional act that is done with intent to cause death or injury” limb of the section, and extend to battery, assault and false imprisonment.
31. The Court in *Thompson* was also careful to consider the case from a pleadings perspective.
32. If the subjective intention of each tortfeasor’s act had to be assessed to determine whether the Significant Injury threshold applied to each act that gave risk to a cause of action, it seems that this could become unworkable,²² and only something properly to be determined at the close of the evidence at a trial, which is contrary to the provision relating to the “claim”, not the Defendant’s “civil liability”. This is especially so when many intentional tort claims involve multiple events. That would seem to require every plaintiff to seek a Significant Injury in the event that, regardless of the apparent circumstances up until trial, a defendant could establish a lack of a subjective intention to cause death or injury in the ‘intentional act’ at trial.
33. On one side of the argument, it could be said that, to the extent the claim is or relates to an intentional tort claim with an intent to cause injury, there is no requirement to obtain a Significant Injury, but to the extent the claim relates to negligence, including a negligent battery, a Significant Injury is required. This would avoid too close a scrutiny

²² See *Gebrehiwot v State of Victoria (who sues by his Litigation Guardian Tamar Hopkins)* (Ruling No 2) [2019] VCC 1229 at [209].

of the subjective intention of the tortfeasor, and rely more on the pleaded case or “claim” being made. In this way, this area could be seen as more aligned to medical causation questions, whereby a Medical Panel assesses causation only on the injuries alleged in the claim, leaving medical causation for determination at trial.²³ And after all, the wording of the Act itself says “a claim”, not a Court finding of “civil liability” required in NSW.

34. On the other hand, if the determination were based simply on what was pleaded in a case, a plaintiff may be able to get around the clear wording of the *Wrongs Act* to seek damages for non-economic loss that it be limited to cases where there is “an intent to cause death or injury”, notwithstanding the lack of a “Significant Injury”. This would seem to stretch the wording of the Act too far in a plaintiff’s favour.
35. And what about cases such as the false imprisonment by mistake?
36. Perhaps the answer is a generous interpretation of what is meant by “an intent to cause death or injury” being alleged in the claim, without delving into the subjective intention of an act, but excluding claims essentially pleaded in negligence, such as negligent battery. In this way, practitioners would need to scrutinise the pleadings to see how a claim is characterised. If the pleading morphed from an intentional battery to a negligent battery by trial or during the trial, then it would seem that a Significant Injury would be required for the negligent battery part of the claim.
37. We await with interest how the Courts will ultimately determine this issue.
38. For completeness, it is worth noting that, in many intentional tort claims, one is entitled to claim non-economic loss damages outside those types of non-economic loss damages defined by the *Wrongs Act*.²⁴ For example, in unlawful arrest and false imprisonment

²³ See section 28LL(3) of the *Wrongs Act 1958* (Vic).

²⁴ Pain and suffering, loss of amenities of life and loss of enjoyment of life.

cases, often a significant part of the compensatory damages is for damage to one's reputation.

39. In a 'false imprisonment' action, McDonald J in *Waddington v State of Victoria & Ors* [2018] VSC 746 held that the Plaintiff was not making a claim for 'personal injuries', but for "deprivation of liberty and any loss of dignity or harm to reputation". At [15], the Judge said:

Where false imprisonment is established, damages may be claimed for deprivation of liberty and any loss of dignity or harm to reputation, but these are not damages that relate to personal injuries. 'Personal injury' is defined to include 'any disease and any impairment of a person's physical or mental condition'. Damages that relate to personal injury were not claimed by the plaintiff.

40. This, it seems, is clearly claimable regardless of the Significant Injury threshold issue.

41. Until Victorian Courts rule on the Significant Injury issue of "intent to cause death or injury", it seems that it may be necessary for plaintiff practitioners to proceed cautiously down the Significant Injury path in all but the clearest of intentional tort claims done with intent to cause injury or death and, where that has not occurred, for defendants to plead a failure on the part of the plaintiff to establish a right to non-economic loss damages as defined in the *Wrongs Act*.

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