

No threshold in Victorian criminal compensation

***DPP v Esso Australia Pty Ltd* [2004] VSC 440
(Supreme Court of Victoria, 5 November 2004)**

By Lisa Maynard

Like many others of the same name, this case involved an application for compensation pursuant to the *Sentencing Act* 1991 (Vic). The applicant, Norman Lindsay Robertson, was working at the Longford Gas Plant operated by Esso Australia (the respondent) when a rupture and explosion killed two men and injured many others on 25 September 1998. Other employees at the plant had previously applied for, and received, compensation from this court for physical and psychiatric injuries under s85B of the *Sentencing Act*. This Act gives a court power to order the offender in a criminal offence to pay compensation to a person who has suffered injury as a direct result of the offence. Esso was found guilty on 28 June 2001 of 11 counts of breaches of ss21 and 22 of the *Occupational Health and Safety Act* 1985 (Vic).¹

The applicant in this case, like those before him, sought compensation directly from the respondent for psychiatric injuries suffered as a result of the 1998 disaster, in the form of post-traumatic stress disorder.

At the hearing of the applicant's application, the respondent submitted that his claim was subject to the requirements of the *Wrongs Act* 1958 (Vic). Part VB of this Act covers claims for damages for personal injury. Amendments to the *Wrongs Act* in May and October 2003 had imposed thresholds on the amount of recovery available in personal injuries cases, and restricted those who could claim damages only to those certified as having suffered a significant injury. A significant injury is one that is assessed as more than 5%² physical, or more than 10% psychiatric, impairment.³

The respondent submitted that as claims made under the *Sentencing Act* were not excluded from the operation of the *Wrongs Act*, they fell within the scope of Part VB, as this part covers damages that relate to the death of or injury to a person caused by the fault of another. This meant that the applicant was not entitled to claim compensation as he had not satisfied the significant injury test. None of the medical evidence provided to the court by the applicant assessed his level of permanent impairment.

His Honour Judge Cummins was not persuaded by the respondent's arguments. He found that the amendments to the *Wrongs Act* referred to have no application to *Sentencing*

Act applications such as this one. His Honour found that the *Wrongs Act* requirements did not apply to such applications, as the term 'damages' comprehended by the s28LE *Wrongs Act* category of 'damages for non-economic loss' does not include statutorily provided compensation to a victim for a criminal act.

His Honour also found that the *Wrongs Act* amendments did not implicitly repeal the compensation provisions contained in the *Sentencing Act*. He found that the purpose and effect of the *Sentencing Act* compensation provisions are a much 'broader concept than, and a different subject matter from, the concept of "significant injury" contained in Part VBA of the *Wrongs Act*.⁴

This decision reinforces an important distinction between a civil claim covered by the *Wrongs Act* and a punitive award of compensation to a victim within a criminal law case.

Although applications under s85B of the *Sentencing Act* were not expressly excluded from the operation of the *Wrongs Act*, this decision allows victims of crime to seek compensation from the offender without having to satisfy an impairment threshold, or be subject to monetary limits. ■

Notes: **1** This Act has been replaced by the *Occupational Health and Safety Act* 2004 (Vic). Section 21 provided that an employer 'shall provide so far as is practicable for employees a working environment that is safe and without risks to health'. Section 22 provided that an employer is required to 'ensure so far as is practicable that non-employed persons are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer'. **2** As assessed in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th Edn. **3** Section 28LF *Wrongs Act* 1985 (Vic). Also includes loss of a foetus and loss of a breast. **4** At para 21.

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