

Liability for psychological injury caused by a criminal act

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21

Roger Walter & Courtney Rothall | March 2017 | Insurance & Financial Services

Summary

On 17 February 2017, the New South Wales Court of Appeal delivered its decision in *Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright* [2017] NSWCA 21.

The decision examined the application of section 32 (Mental harm-duty of care) of the *Civil Liability Act 2002* ('the Act') and the circumstances in which an occupier of premises might be held liable for psychological injury caused by the criminal act of an entrant to the premises. Both the plaintiff and the assailant were hired by the defendant occupier, Optus. It was argued that Optus owed no duty to the plaintiff except that owed by an occupier to a lawful entrant, and that it should escape a finding of liability on the basis of the general principle applied in *Modbury*¹ that an occupier is not liable for injury to lawful entrants caused by the criminal acts of third parties on the occupier's land.

Background and Supreme Court Decision

On 15 March 2001, Mr George attempted to murder Mr Wright when he tried to throw him off the roof of a building occupied by Optus. Mr Wright and Mr George were employed by separate labour hire companies and were at the premises to undergo a training course being

run by Optus. They were otherwise unknown to each other.

Mr George, who apparently had developed the desire to kill someone, repeatedly asked other trainees and Optus staff to inform Mr Wright that he wanted to see him on the roof. Mr Wright ignored these requests. Sometime later two employees of Optus ascertained that Mr George was on the roof and mistakenly formed the view that he was known to Mr Wright. The two Optus employees were concerned for Mr George's wellbeing as he appeared unresponsive and to be in a trance-like state repeatedly asking for "Glenn". The two Optus employees then directed Mr Wright to see Mr George on the roof and watched from about 15 metres away when Mr Wright reluctantly approached Mr George. Mr George then assaulted Mr Wright and attempted to throw him from the roof.

Mr Wright suffered chronic post-traumatic stress disorder following the attempt on his life and sued Optus arguing that while he was undertaking the training course, he was under the direction, supervision and control of Optus. He also sued Optus in their capacity as the occupiers of the premises.

At first instance, Justice Campbell of the New South Wales Supreme Court found Optus liable and held that because the terms of the agreement between Mr Wright's labour hire company and Optus included a term that Mr Wright was subject to the direction and control of Optus, the duty of care owed by Optus to Mr Wright was analogous to the duty owed by an employer to its employee.

The plaintiff had not pleaded that Optus was vicariously liable for the conduct of the team leader, Mr Williams, who was the employee who arranged for the plaintiff to

be brought up to the roof and Optus was not expressly held by his Honour to have incurred any liability vicariously. To an extent, the collective knowledge of the three employees of Optus who were observing Mr George acting strangely on the roof and arranging for a response from Optus management to effect his removal from the premises was attributed by his Honour to Optus. Importantly, Mr Williams was characterised by his Honour as Optus's 'man on the ground for dealing with this matter'.

Justice Campbell identified that the 'activity that created a risk of harm in the present context was permitting, allowing, authorising and encouraging a worker, Mr Wright, to put himself in close physical proximity to Mr George while steps were being taken to have him removed from the premises'.

His Honour held that it was reasonably foreseeable that Mr George would assault Mr Wright, and that as a result Mr Wright might suffer a recognised psychiatric illness. Section 32 of the Act was therefore held not to prevent a finding that a duty of care was owed. Subsection 32(1) of the Act provides that a defendant 'does not owe a duty of care to another person ("the plaintiff") to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken'.

The Appeal

The main issues on appeal were:

- whether Optus owed any relevant duty of care to Mr Wright not to cause him mental harm; and
- whether the foreseeability requirement in section 32 of the Act was satisfied, i.e., whether Optus ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care was not taken.

The majority of the Court of Appeal found that the relevant question was whether it was reasonably foreseeable in the circumstances that one trainee might assault another in a manner so serious as to cause psychiatric illness in a person of normal fortitude.

In relation to the duty of care to protect others from mental harm, Justice Basten of the majority in the Court of Appeal stated:

The critical step in determining the scope or content of any duty owed by Optus to the plaintiff required identification of the risk of particular events which might give rise to mental harm. In a case where the mental harm resulted from an attack by a third party upon the plaintiff, it was important to identify with care the nature of the conduct which the appellant should have foreseen.' – [69]

The majority in the Court of Appeal found that none of the three Optus employees who responded to the situation could reasonably have foreseen that Mr George would attempt to kill Mr Wright. In this regard, Justice Basten said that "predictability is an essential element of reasonable foresight" [81], and despite Mr George exhibiting strange, somewhat "psychotic" [22] behaviour shortly prior to the incident, it was not predictable that his behaviour would lead to an attempt on Mr Wright's life. It followed that Optus's employees could not have been expected to foresee that Mr Wright would suffer a recognised psychiatric illness as a result of an event which itself was not reasonably foreseeable.

In his dissenting opinion in the Court of Appeal, Justice Gleeson held that Mr Williams was negligent and that Optus was vicariously liable for his conduct. Importantly, Justice Gleeson also found that it was not necessary for Mr Williams to have foreseen that there would be an attempt on the plaintiff's life. In his Honour's opinion, it was sufficient for the purposes of satisfying section 32 that the particular circumstances were such that there was a foreseeable risk of an assault on the plaintiff while he was in close proximity to the edge of the roof.

Implications

- This decision provides an interesting discussion and some guidance about how courts will tend to approach the statutory restriction on negligence actions involving injury by way of mental harm that is set out in section 32 of the Act.
- The restriction appears in civil liability legislation in jurisdictions across the country². The key questions of knowledge and foreseeability will always depend on the facts of a particular case but the processes by which these issues are analysed are important and it

is only in understanding those processes that parties might begin to gauge the likelihood of a dispute being determined in their favour.

- The decision is also a useful demonstration of the way the courts approach the Modbury principle, which is limited to situations where the criminal act is not within the control of the occupier.

¹ Modbury Triangle Shopping Centre Pty v Anzil [2000] HCA 61

² Civil Law (Wrongs) Act 2002 (ACT) – s 34; Civil Liability Act 2002 (TAS) – s 34; Civil Liability Act 2002 (WA) – s 5S; Civil Liability Act 1936 (SA) – s 33; Wrongs Act 1958 (VIC) – s35

For more information, please contact:



Roger Walter

Partner

T: 02 8257 5736

M: 0419 996 722

roger.walter@turkslegal.com.au



Courtney Rothall

Senior Associate

T: 03 8600 5054

M: 0433 278 245

courtney.rothall@turkslegal.com.au