10 IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S179 of 2013

BETWEEN

Susan Joy Taylor
in her own capacity and
for and on behalf of the
dependants of the late Craig Taylor
Appellant

and

20 **The Owners – Strata Plan No 11564**
First Respondent

Alison Margaret Lamond
Second Respondent

Gordon Sunn
Third Respondent

Clifford Sunn
Fourth Respondent

Duncan Rae
Fifth Respondent

30 **Manly Council**
Sixth Respondent

Ryan Winton Taylor
Seventh Respondent

Lisa Jane Taylor
Eighth Respondent

Mitchell Alan Taylor
Ninth Respondent

Zara Zoe Taylor
Tenth Respondent

40 APPELLANT'S REPLY

Part I: Certification for publication

1. We certify this submission is in a form suitable for publication on the internet.

Part II: Submission

Loss of expectation of financial support not limited to direct money contribution

1. As is now common ground, s 12(1)(c) refers to *Relatives Act* damages by a phrase drawn from cases on the text of that Act (*R1-4 [38]; R6 [9]*). The respondents' argument that s 12(1)(c) refers only to claims for the loss of direct cash payments (*R1-4 [32], [37] – [41], [43], [44]; R6 [16]*) is wrong for the following reasons.

25 November 2013

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2. The phrase "damages for the loss of expectation of financial support" expresses the traditional reading down of the wide remedy in s 4(1) *Relatives Act* to exclude *solatium*. The phrase refers to a loss of a chance of "material" benefit "as distinct from emotional or non-material benefit such as love or companionship" (*Nguyen v Nguyen* (1990) 169 CLR 245 at 253-254 per Deane J). This is the sense in which it is used in s 12(1)(c) *Liability Act* (cf presumption discussed *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309 at [7] per Gleeson CJ).

3. The description of the compensable injury as "pecuniary" loss is not used in any narrow or technical sense (*Nguyen* at 253-4 per Deane J): it includes valuable non-money benefits, such as the loss of services (*Nguyen* at 263-265, 247).

4. "Financial support" as used in the cases and s 12(1)(c) describes the *result* of the prospective benefit (that the relatives' financial positions would have been maintained or provided for) not the means by which the benefit would have been delivered.

5. The first to fourth respondents' argument in favour of implication (*R1—4 [23], [25], [26.2], [35]*) fails if the phrase in s 12(1)(c) bears its usual and accepted meaning: there being various *Relatives Act* claims the assessment of which does not depend on earnings of the deceased and to which s 12(2) would apply no restraint, even if read as the respondents contend.

Relatives Act claims are not limited to the earnings of the deceased

6. The submission (*R1-4 [16], [20], [21], [32], [35], [53]; R6 [8b], [8c], [21], [33], [40]*) that "only" the earnings of the deceased are relevant to *Relatives Act* claims is incorrect for the reasons submitted in chief (at [51]-[52]). Also, Brennan J recognised in *Nguyen* (at 250) that damages for loss of support by the provision of services may be proved by reference to the widower's "own loss of earnings" (cf *Nguyen v Nguyen (No 2)* (1992) 1 Qd R 405 at 412, 415; *Hay v Hughes* [1975] 1 QB 790 at 803C-D). It is artificial (*R1-4 [46]*) to try to characterise the relatives' loss as either only the loss of the deceased's earnings or of their own: family financial arrangements are infinitely varied and the real loss, compensable by the wide terms of s 4(1) *Relatives Act*, is the net detriment to the relatives' financial prospects caused by the death.

Relatives' own lost income claims are not, or are not only, s 12(1(b) claims

7. The sixth respondent's main submission is that, if s 12(2) is given its ordinary meaning, s 12(1)(c) has no work to do because relatives' lost income claims properly fall within s 12(1)(b), leaving s 12(1)(c) otiose (*R6 [14], [16], [33], [40], [42], [43]; cf R1-4 [26.1], [32], [43]*). However, relatives' own lost income claims under the *Relatives Act* are not, or are not only, claims for impairment of earning capacity.

8. Generally such claims involve no impairment of capacity *per se*. Capacity to earn is distinct from receipt of income. Impairment of earning capacity usually means some

physical or mental harm destroying or reducing an ability to undertake gainful work in the labour market. The *value* of the capacity depends on external circumstances. Attribution of circumstances to capacity depends on the facts of each case (*Husher v Husher* (1999) 197 CLR 138 at [17] – [23]). Examples of relatives' claims were given in chief at [52]; such claims may also be analysed as:

(1) claims for lost services that were generating income or would have generated income directly in the hands of the relative (such as, *Cookson v Knowles* [1977] 1 QB 913 and *Franklin v The South Eastern Railway Company* [1858] 3 H & N 211 p 448). Such a claim is not for impairment of, or of only, the relative's own capacity to work. Whether such a claim involves the relative's *earnings* or only *income* depends on the particular facts: in *Cookson* it did but in *Franklin* it did not.

(2) claims for opportunities to earn forgone because of the need to provide substitute services to the family (*Mehmet v Perry* [1977] 2 All ER 529; *Roads and Traffic Authority v Jelfs* [1999] NSWCA 179; (2000) Aust Torts Reports ¶81-583 per Handley JA at [67] – [68], [76] – [78]; *Nguyen* at 250 per Brennan J; *Dwight v Bouchier* (2003) 37 MVR 550; [2003] NSWCA 3 per Stein JA at [78]; *Nguyen (No 2)* at 412, 415). Such a claim is not for impairment of a relative's capacity for paid work but for loss by a choice not to exercise it, being a reasonable choice in the circumstances to mitigate another loss to the family caused by the death. That relative's earnings but for the death are the relevant comparator to value the loss.

(3) claims for sinecures (such as *Malyon v Plummer* [1964] 1 QB 330 at 342, 343, 346, 351-354). Some may also be analysed as a claim for the lost expectation of an indirect distribution of the deceased's earnings (cf *Kaplantzi v* Pascoe [2003] NSWCA 386; (2003) 40 MVR 146). But sinecures may depend on the continuation of the life of the deceased for reasons unrelated to his or her earnings. De-valuation of the relatives' earning capacity might, perhaps, be described a 'loss' of capacity but does not fit well with the claims usually within s 12(1)(b). Unless better attributed to earnings of the deceased, such income would normally be regarded as earnings of the relative, albeit at an over-value.

(4) claims for the loss of the value of the synergistic contribution of the deceased. Again, the relatives' capacity for work is undiminished but its value or opportunity for exercise has been reduced. This is not a forensic construct (*R1-4 [48]*): *Burgess v Florence Nightingale Hospital for Gentlewomen* [1955] 1 QB 349 is such a claim, the facts in *Sykes v North-Eastern Railway Company* [1875] 32 LT 199 and *Cookson v Knowles* [1977] 1 QB 913 might have been understood that way. The relatives' earnings but for the death are the relevant comparator to value this loss.

9. That s 12(1)(b) and s 12(1)(c) might overlap does not mean either fail to operate. Uncertainty of description may be a reason for parliament to have provided both.

No drafting error or, if there is, Inco / Spigelman principles prevent reading in

10. "[E]rror of expression" (*R6 [23] – [25]*), like "mere error correction", is in the eye of the beholder. There is no clear boundary between such error and omitted cases: it is a false dichotomy. There is no malapropism in s 12(2). The draftsman has chosen language sufficient for the purpose the appellant offers but insufficient for that 'discerned' by the majority below. That purpose was an omitted case. Describing the reading in of words by the majority below as "mere error correction" (*R6 [24]*) does not avoid a conclusion their Honours overstepped the legitimate bounds of construction.

11. Even if the section does not have the work the appellant submits, for the reasons given by Basten JA it does not follow this is due to a drafting error or that any such error may be fixed by the court. The pervasive doubt identified by Basten JA (CA [80] – [84], [94], [95]) is reinforced by the division in the respondents' submissions (*R1-4 [60]. [61]; R6 [8d], [32]*).

"Relevant injured party" is not statutory language and does not resolve the controversy

12. The respondents argue from an analogy they seek to draw between the subparagraphs of s 12(1) that if s 12(2) is read with its ordinary meaning s 12(1)(c) fails because the claimant is not the "relevant" injured person. (*R1-4 [12], [14], [15], [17.3], [18] – [21], [29], [35], [37], [60], [62], [64], [65]; R6 [18], [19]*). The respondents' argument from analogy is unsound for the following reasons.

13. We agree s 12(1)(a) and (b) only apply to losses sustained by personal injury (*R1-4 [14]*) because their text refers to concepts drawn from case law that are only apt to describe such injury. But it is wrong to conflate *the circumstance of loss* in s 12(1)(a) or (b) with the meaning of "claimant" in s 12(2).

14. It follows from the holding of the court below as to the application of Part 2, *Liability Act* that s 12 is not limited to damages for the "injury" defined in s 11 but extends to "personal injury damages", also defined in s 11. The respondents have not given notice they contend otherwise. The difference between the defined terms in s 11 means "claimant" and "injured person" are not synonymous expressions and "claimant" does not "simply mean" "the injured person" (*R1-4 [18]*). The expression "injured person" or "injured party" does not appear in Part 2, *Liability Act.* It has no role in the construction of s 12.

15. The first to fourth respondent (*R1-4 [19]*) would substitute "the injured person" or "the relevant injured person" for "claimant" in s 12(2) by reference to s 3(1) *Relatives Act*. However, s 12 does not adopt the text of the *Relatives Act*. The respondents' reference to the deceased as "the person injured" overlooks its use in s 3(1) to engage a hypothetical (if had death not ensued). The substitution also overlooks the use in s 4(1) of "injury" to mean the *legal or economic* injury sustained by the relatives.

Injury in s 4(1) *Relatives Act* bears its ordinary legal sense, not the special sense given by s 11 *Liability Act*. The relatives are actually 'the person(s) injured' in the ordinary sense. Confusing two different senses of a word which does not even appear in s 12 does not aid its construction.

16. Contrary to the submission at (*R1-4 [60] – [65]*), the "claimant" in s 12(2) is the claimant of the actual award referred to in that provision, being the award of damages referred to in s 12(1)(c), and not a hypothetical claim had death not ensued. The deceased never was and never could have been entitled to that award (*Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at 611 per Lord Wright. This is the difference between the application of s 12(1)(c) to *Relatives Act* claims and the application of s 12(1)(a) to survivor claims where the deceased is relevantly the claimant for s 12(2), even though his or her legal personal representative will be substituted as the named plaintiff.

No onus on appellant to show why purpose of s 125 MACA / s 151I WCA inapplicable

17. The first to fourth respondents submit there is some onus on the appellant to show a "proper basis" (*R1-4 [28] - [30]*) beyond the evident difference in language for the proposition that the purpose of s 12 *Liability Act* is different from s 125 MACA and s 151I WCA. If there is any relevant onus it is on the parties contending for departure from the ordinary meaning of the text of s 12(2) (*Carr v Western Australia* (2007) 232 CLR 138 per Gleeson CJ at 144).

Value of a presumption that clear words required

18. The presumption (*R6 [37] – [38]*) is an incident of the elementary consideration of fairness described in *Corporate Affairs Commission v Yuill* (1991) 172 CLR 319 at 340: its use here is not as a sword but as a shield against the implication of words quite different to the statutory text. Contrary to submission *R6 [36]*, *Relatives Act* claims are purely statutory (*Barclay v Penberthy* (2012) 246 CLR 258 at [26], [27]). The *context* to which the sixth respondent refers (*R6 [19], [38]*) should include at least the following: that

(1) the *Relatives Act* rights have stood largely unamended in Australia for more than 150 years (since their first UK enactment).

(2) relatives may have no other means of protection (infants and the infirm may be unable to contract for insurance; able parents and spouses may not have the means to do so or the deceased may have been an uninsurable risk).

(3) the rights are to a broad remedy but afforded to a very narrow class.

(4) the only other amendment made by the *Liability Act* to the *Relatives Act* remedy is to apply the proportionate defence of contributory negligence of the deceased (s 5T) and to disallow double-dipping on claims for lost expectation of services (a prospect only created by s 15B). Such modest limitations do not signal an intention to make

other large changes.
(5) the same parliament in other Acts previously used different and clear language to modify the rights in issue here (s 125 *MACA*, s 151I *WCA*).

Burgess should not be followed

19. The first to fourth respondents submit that relatives' own lost income due to 'commercial' aspects of a family relationship are not compensable due to the 'rule' in *Burgess* (*R1-4 [48.3], [50]*). The appellant's primary example of the work for s 12(2) to do with s 12(1)(c) (the *Mehmet v Perry* type claim) is not affected by this supposed rule. Moreover, the clear, wide words of s 4(1) *Relatives Act* should prevail and the 'rule' in *Burgess* should not be considered part of Australian law. The cases on which it relied were not authority for a 'rule' which draws an artificial line across family arrangements contrary to real life experience and the statutory text.

New arguments; no notices of contention

20. The respondents' submission that s 12(1)(c) does not apply to lost services is the opposite of their submission below: they resisted such an argument put by the appellant at first instance and the appellant conceded in the court below that s 12(1)(c) does refer to s 4(1) *Relatives Act* claims generally and the appeal was argued on that basis (*R6 submissions 30/4/12 [38]* adopted by R1-4 & R5 T1/5/12 22.28, 23.25; *R1-4 Response 28/9/12 [21]* adopted R6 14/11/12; T6/12/12 8.10-12, 9.25-26, 24.29). The submission that relatives' claims for lost earnings are only claims within s 12(1)(b) not s 12(1)(c) and the first to fourth respondents' submissions that the words "an" in s 12(1) and "any such award" in s 12(2) require the implication for which they contend and as to the 'rule' in *Burgess* were not made by the respondents below and were not considered by the court below. The first to fourth respondents have not filed a notice of contention to support their argument that there is no drafting error in s 12(2) and that the holding of the majority below to that effect may be ignored (*R1-4 [60] – [61]*). The appellant is able to argue these matters at the hearing but submits the respondents should not have the costs of any new issue or matter that should have been the subject of a notice of contention.

Dated: 25 November 2013

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