IN THE HIGH COURT OF AUSTRALIA

SYDNEY 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

**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

**Manly Council**

Sixth Respondent

**Ryan Winton Taylor**

Seventh Respondent

**Lisa Jane Taylor**

Eighth Respondent



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Ninth Respondent
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Tenth Respondent

## SIXTH RESPONDENT'S SUBMISSIONS

### Part I: Certification for publication

1. The Sixth Respondent certifies that this submission is in a form suitable for publication on the internet.

### Part II Issues

2. While the issues numbered (2) to (5) may emerge from the way in which the appellant presents her argument, in the Sixth Respondent's submission, there are issues requiring determination which are anterior to issue (3), namely;

> (2A) If the expression "claimant" does not mean or include "deceased", does subsection 12(2) of the Civil Liability Act (the "Act") have any scope for operation in connection with claims of the kind referred to in subsection 12(1)(c) (damages for loss of expectation of financial support), as distinct from claims of the kind referred to in subsection 12(1)(b) (future economic loss due to deprivation or impairment of earning capacity)? If not;
>
> (a) Is that an adequate basis for finding drafting error; and
> (b) If so, is it sufficiently evident that parliament intended to introduce a modification or restriction on the calculation of awards of damages for loss of expectation of financial support by reference to the gross weekly earnings of the deceased provider of such support to warrant a construction of subsection 12(2) to the effect set out in issue (2).

## Part III Section 78B Judiciary Act 1902 (C'lth)

3. The Sixth Respondent considers notice is not required pursuant to s. 78B of the Judiciary Act 1902 (Cth).

## Part IV Material facts

4. The Sixth Respondent accepts the statement of relevant facts as stated by the Appellant.

## Part V Applicable statutes and regulations

5. The Sixth Respondent accepts the Appellant's statement of the applicable provision (section 12 of the *Civil Liability Act 2002 (NSW)*) at paragraph 80 as being still in force at the date of these submissions.

## Part VI Sixth Respondent's argument

6. The appellant now accepts that Part 2 of the *Civil Liability Act 2002 (NSW)("the Liability Act")*, both as originally enacted and as amended (the "*Act*"), applies to claims under the *Compensation to Relatives Act* 1987 (NSW) (the "*Relatives Act")*. That represents a change from her position before the first instance judge ([51] and [54] in Garling J's judgment) and the court below ([paragraph [12] in McColl JA's judgment).

7. Accordingly, the appeal is confined to the meaning of subs. 12(2) in its application to awards of damages under the *Relatives Act*. The Sixth Respondent accepts the finding of the court below that a "literal meaning of s.12(2) does not permit a limitation on an award under that Act based on the *deceased's* gross weekly earnings" ([65] Basten JA; [24] McColl JA and [98] Hoeben JJA agreeing). The "claimant" in the context of a claim for an award of damages for the loss of expectation of financial support under the *Relatives Act* claim is the executor or administrator of the estate of the deceased, except in the case of a claim brought under s. 6B of the *Relatives Act,* by one of the potential beneficiaries of an award.

In either case the action is brought "*on behalf of the potential beneficiaries identified in the* [Relatives Act], *who may not be entitled to any share in the estate; they obtain any available benefit by reason of their relationship to the deceased and not by reason of their entitlement to any part of his or her estate*" ([65] per Basten JA.

8. In summary, The Sixth Respondent's position is that:

a. It is clear that parliament intended to modify the common law approach to the calculation of awards of damages for loss of expectation of financial support under the *Relatives Act*;

b. The mechanism for modifying the calculation is purportedly prescribed in subsection 12(2); but if given a literal interpretation, it has been expressed in a way which is completely ineffectual to the achievement of that purpose, as the claimant's gross weekly earnings do not play any part in the carrying out of that calculation;

c. Since only the gross weekly earnings of the deceased and no other earnings are material to the calculation of an award of damages for loss of financial support under the *Relatives Act*, the reform which the parliament intended to introduce is clear; that is, a modification (in the nature of a cap) to that integer of the damages calculation to the effect described in subsection (2); and

d. The Court of Appeal did not err in finding that, in those circumstances, it was incumbent upon the Court to give effect to the evident intent of the parliament by recognising the drafting error evident in subsection 12(2) and treating the reference to claimant as if it was followed by the words "or deceased".

<u>There was a clear intent to modify the law relating to the calculation of awards under the *Relatives Act*</u>

9. It is not tenable to interpret subs.12(1)(c), in its application to an award of damages "*for the loss of expectation of financial support*", as referring to

damages other than as awarded in a *Relatives Act* claim. That terminology is redolent of the common law in respect of damages recovered in such actions (see majority judgment in court below at [7] referring to *De Sales v Ingrilli* (2002) 212 CLR 338 at [91] per McHugh J; *Ruby v Marsh* (1975) 132 CLR 642 at p. 651 per Barwick CJ). In *De Sales*, McHugh J said of the nature of the damages recoverable in a *Relatives Act* claim at [91]: "*...But from the beginning the term "injury" was read as confined to pecuniary loss. And justices of this Court have accepted that that is so. In Davies v Taylor, Lord Reid said that the "injury" "must be of a financial character" and that it meant the "loss of a chance". That is to say, damages are awarded under Lord Campbell's Act for the chance that the deceased would have provided the relative with financial support or its equivalent in the future. The damages are "for the loss of the expectation of financial support by the deceased..."*(emphasis supplied).

10. In *Ruby v Marsh* (1975) 132 CLR 642 at p.651Barwick CJ stated: "*damages to be awarded under the Wrongs Act are not given for the loss of earning capacity which has been destroyed by death, but for the loss of the expectation of financial support by the deceased. That case* [Philpott v Glen] *had been largely concerned with the earning capacity of the deceased as an element in determining the extent of the likely support of the dependants by him..."* (emphasis supplied).

11. The minority in the court below (Basten JA) suggested that *the reference to injury "or death" in s12(2) could have work to do in relation to a cause of action which survives death and endures for the benefit of the deceased's estate. It does not necessarily refer to a fatal accident claim"* (CA [70]).

12. With respect to his Honour, the scope for operation of the provision in those circumstances does not explain the presence of the reference to "or death' in subsection 12(2). A fatal accident claim which survives death and endures to the benefit of the deceased's estate is an action brought by the legal representative of the estate in respect of *injury* to the deceased, not

the *death* of that person. The action in New South Wales is preserved by s. 2(1) of the *Law Reform (Miscellaneous Provisions) Act 1944 (NSW)*. Subsection 2(2) provides that the recoverable damages for the benefit of the estate exclude any amount for lost future probable earnings after the person's death (s. 12(2)(a)(ii)) and are calculated "*without reference to any loss or gain to the person's estate consequent on the person's death*" (s.2(2)(c)) and shall not include damages for, inter alia, "*the curtailment of the person's expectation of life*"(s.2(2)(d)).

13. Further, on a literal interpretation of "*claimant*", subs 12(2) would have no work to do in respect of such a claim as the claimant would be the legal representative of the deceased estate, and that person's gross weekly earnings are irrelevant to the award of damages which is regulated by statute.

14. In any event, the suggestion that the reference to "*death*" in subsection 12(2) can be explained by reference to awards of the kind referred to in subsection 12(1)(b) does not answer in any way the principal difficulty arising from a literal interpretation of the section, that is, that it renders subsection 12(1)(c) otiose.

<u>The intention was thwarted by a drafting error</u>

15. The dissenting judgment in the Court of Appeal and much of the appellant's argument proceed on the basis that, on a literal interpretation of subsection 12(2), subsection 12(1)(c) operates to place a limit on the calculation of an award of damages in claims of the kind referred to in *Nguyen v Nguyen* [(1990)169 CLR 245 and *Roads and Traffic Authority v Jelfs* [2000] Aust Torts Reports (81-583) 64,267;[1999] NSWCA 179; that is, claims for recovery of the claimant's lost earnings arising from the loss of services formerly provided by the deceased.

16. Services of that kind do not fall within the scope of the description "financial support". On the contrary, such a claim is based upon the loss of other types of "support", the impact of which may deprive the claimant of

earnings or the exercise of his or her earning capacity. While it is likely that such claims may properly be treated as claims for loss ("deprivation") of earning capacity within the scope of subsection 12(1)(b), they do not fall within the scope of subsection 12(1)(c). Accordingly, on a literal interpretation of subsection 12(2), subsection 12(1)(c) is otiose notwithstanding that such claims may enjoy a degree of recognition. As it can be assumed that parliament intended that the inclusion of subsection 12(1)(c) serve a purpose, there has clearly been a drafting error.

The precise intent of the legislation is clear

17. In the circumstances of this case, the identification of precise intention presents little difficulty. Subsection 12(1)(c) was included in the Act for the purpose of modifying the calculation of awards of damages for loss of financial support under the *Relatives Act* for loss of financial support. Subsection 12(1)(b) was included in the Act for the purpose of modifying the calculation of awards of damages for loss of earning capacity.

18. The modification introduced in subsection 12(2) operates in connection with subsection 12(1)(b) claims by imposing a cap on the principal integer in the calculation of damages for loss of earning capacity, namely, the injured party's pre-injury earnings.

19. The conclusion that an identical cap on the principal integer in the calculation of *Relatives Act* claims for loss of financial support, namely, the deceased's pre-injury earnings, is virtually inescapable. The conclusion can be reached comfortably by reference to the text and structure of section 12 viewed in the context of the law as it stood at the time the reform was passed, and without reference to any other extrinsic material. The conclusion is fortified by, but by no means dependent upon, the recognition of an identical approach to reforms introduced to the calculation of damages for loss of financial support and earning capacity through motor vehicle accidents as identified by the majority judgment in the Court of Appeal (CA [32]).

The circumstances required departure from the literal interpretation

20. The Appellant's review of the authorities in connection with the question whether the omission or substitution of words in legislation is a permissible exercise of statutory construction ultimately produces the conclusion (at [73]) that a court may not do so where the addition or substitution is "*merely consistent with the court's intuitive view of the purpose of the statute overall…*". That conclusion is uncontroversial, but it does not accurately describe the outcome in the court below.

21. The Court of Appeal did not act on the basis of an intuitive view of the overall purpose of the legislation; but rather, a well grounded conclusion that the purpose of subsections 12(1)(c) and 12(2), evident from the terms of the Act itself, was not achieved on a literal interpretation of subsection 12(2). A conclusion to that effect is readily arrived at where, as here, on a literal interpretation the words used fail to achieve any purpose. With respect, the majority aptly observed that, in those circumstances, its duty was to see that the legislative purpose was hit; not merely record that it had been missed (at [35]).

22. However, the Appellant's review of the authorities raise the further issue of the extent, if any, to which the qualifications on the application of Lord Diplock's *Wentworth Securities* test proposed by Spigelman CJ in *R v Young* (1999) 46 NSWLR 681 can be relied upon as demonstrating error in the court below.

23. The first observation to be made in that context is that it is important to identify precisely what is proposed by way of "reading in" additional words. The object to be served by the rules enunciated in *Wentworth Securities Ltd v Jones (on appeal from Jones v Wrotham Park Settled Estates)* [1980] AC 74 and qualified by Spigelman CJ in *R v Young* is to identify the boundary between giving effect to the terms of an enactment and judicial legislation. It is significant in that context to recognise that correction of an error in expression and expanding the operation of legislation to deal with a circumstance that has not been addressed in an Act (apparently

inadvertently) are potentially quite different exercises. In suggesting that words should only be "read in" where that can be achieved by a recognised process of statutory construction, Spigelman CJ was dealing with the latter situation and should not be taken to be suggesting a restriction applicable to the former. The difficulty associated with doing so can be illustrated by way of an example very close to the circumstances of this case. Had subsection 12(2) referred only to the "*deceased*" in lieu of the "*claimant*", *it would be clear that parliament's intention to modify the calculation of damages aw*ards for future economic loss due to impairment *of an i*njured person's earning capacity had been defeated by a drafting error. While the insertion of the words "claimant or" could not be supported by "*a recognised process of statutory construction"* the correction of such an obvious drafting error could scarcely be regarded as judicial legislation. The erection of obstacles to the amelioration of the impact of the errors of that kind by placing additional qualifications on the *Wentworth Securities* test is not necessary in order to preserve the constitutional boundaries of the exercise of the Court's powers, and it can safely be concluded that it was not within the contemplation of the Chief Justice.

24. While the *Wentworth Securities* test facilitates "reading in" to fill a gap in the nature of "*an eventuality that required to be dealt with*", not every *exercis*e in the nature *of error* correction carries with it the danger of judicial legislation involved in a problem of that kind. As the decision in the court below involved mere error correction of a quite different kind, it is unnecessary to determine whether the additional qualifications proposed by the Chief Justice *accurately reflect the current state of the law*.

25. The situation dealt with in *Inco Europe v First Choice Distribution* [2000] 1 WLR 586 more closely resembled the problem in the Court below, and the decision provides more precise guidance as to the proper approach in cases of co*rrection of plain draft*ing mistakes.

26. While in *R v PLV* (2001) 51 NSWLR 736, subsequent to the *Inco Europe* decision, Spigelman CJ (with whom Simpson J and Smart AJA agreed)

repeated his views regarding the appropriate limits on circumstances in which a court should read in words to fill perceived gaps in an enactment, the Court was once again dealing with a case in which there was nothing in the nature of an obvious drafting error. Indeed, the Court could not be satisfied that parliament had intended the result for which the appellant contended.

27. In any event, the more robust approach to the correction of obvious errors evident in the decision in *Inco* has been endorsed by this Court in *Minister for Immigration and Citizenship v SZJGV; Minister for Immigration and Citizenship* v SZJXO (2009) 238 CLR 642, where French CJ and Bell J stated: "*A construction of s 91R(3) to avoid that result may properly encompass a departure from the literal or natural and ordinary meaning of the text.*[8] *If the language be so intractable that it requires a word or words to be given a meaning necessary to serve the evident purpose of the provision, then such a course may be permissible as a "realistic solution" to the difficulty.*[9] *In the 12th edition of Maxwell's On the Interpretation of Statutes the approaches which can be taken in dealing with statutory language whose ordinary meaning is plainly at odds with the statutory purpose were explained:*[10] *"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning."(footnote omitted) This approach is reflected in decisions of the Courts of the United Kingdom. In Inco Europe Ltd v First Choice Distribution,*[11] *Lord Nicholls of Birkenhead restated the need for the Court to correct obvious drafting errors. He referred to the third edition of Cross'*

*Statutory Interpretation:*[12] *"In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role."*

28. With specific reference to Lord Diplock's test, at [9], their Honours state: *"The limits of the judicial role, as pointed out by Lord Nicholls, require that the courts "abstain from any course which might have the appearance of judicial legislation."*[13] *Three matters of which the court must be sure before interpreting a statute in this way were the intended purpose of the statute, the failure of the draftsman and parliament by inadvertence to give effect to that purpose, and the substance of the provision parliament would have made. The third of these conditions was described as being of "crucial importance". Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation.*[14]"

Other matters canvassed in the Appellant's submissions

29. The assertion in paragraph 26 of the Appellant's submissions that the construction task in the court below started with a "search for purpose outside the statutory text" does not reflect a fair reading of the majority judgment. The purpose of subsection 12(2), and its intended application to claims under the *Relatives Act*, was plainly evident from the text of the legislation and was recognised by the Court.

30. Further there was no error associated with the Court's consideration of statutory provisions which impose a statutory restraint upon claims for "loss of expectation of financial support" in strikingly similar terms to s.12(2). There was no error associated with the observation by the majority that the intent of s. 125 of the MACA had been described in *Kaplantzi & Anor v Pascoe* (2003) MVR 146 at [32] (per Hodgson JA, McColIJA and Cripps AJA agreeing) nor in the conclusion," *I discern the*

*same purpose in s 12 of the Liability Act* ***both in its terms and read in its statutory context***" (CA [33]; emphasis added).

31. Contrary to paragraph 31 of the Appellant's submissions, McColl JA explicitly referred to similarities between s. 125 MACA and s.12 of the *Liability Act* at CA [29], and noted that subsection 9(1)(c) of the *Health Care Liability Act* was in identical terms to s 12(1)(c) of the Liability Act (CA [30]). Her Honour was conscious that the "*legislative purpose must be discerned from the statutory text, not from a priori assumptions*" (CA [32], [33]); the reference to 'a priori assumptions' clearly acknowledging that which was stated in *Certain Lloyd's Underwriters* at [26]. The majority analysed the terms of s. 12 contextually and with reference to s. 125 of the MACA. The majority did not commit the error of assuming from a generalised purpose of the *Liability Act*, that subsection 12(2) was intended to have the same or similar purpose to s. 125 of MACA without regard to the text.

32. The assertion in paragraph 29 of the Appellant's submissions that "the nub of the controversy" is linked to the relationship between section 125 of the MACA and section 12 of the *Liability Act* is a profound misstatement of the basis of the majority decision. The drafting error was plainly obvious from the text of the *Liability Act*, and was recognised as such.

33. The suggestion that the Court of Appeal wrongly assumed drafting error in lieu of drafting choice does not withstand scrutiny. It cannot be sensibly suggested that the parliament chose to specify in subsection 12(1)(c) that the reforms introduced through section 12 were to apply to *Relatives Act* claims for loss of financial support, but to create a modification to the method of calculating awards that could not be applied to such a claim. The clearly appropriate conclusion is not choice but rather error.

34. With respect to paragraph 42 of the Appellant's submissions, it is not relevant to the construction of s.12 to observe that Part 2, Division 2 the *Liability Act* does not restrain all awards of damages. There is no issue that s. 15B operates in its terms differently to the common law or that,

unlike the MACA 1999, the *Liability Act* does not abolish claims per quod servitium amisit. Nor is it relevant that s. 12(2) applies a restraint to damages assessed by reference to the concept of "earnings". Identifying potential limitations on the scope of the reform is no answer to the argument that it should be interpreted in a way that enables it to operate to the extent that was intended.

35. Contrary to paragraph 45, the majority gave careful consideration to the relevant principles of construction. The suggestion that their approach was not "text based" has already been dealt with.

36. With respect to the submissions at paragraph 47 regarding the interaction of the *Relatives Act* and the *Liability Act*, it is not accurate to describe the latter cutting down the "broad remedy" afforded by the former. Damages under the *Relatives Act* have developed under common law principles and are guided only by s. 4 which provides that the "*jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action is brought...*".

37. The *Liability Act* clearly operates to regulate aspects of such claims as s. 5T (formerly s.20 in the original Act) indicates. The *Relatives Act* is not specifically excluded by s. 3B of the Act, and the damages are regulated by Part 2. Moreover, it is no longer a correct rule of statutory interpretation "*that Parliament is presumed not to intend to change the common law, unless the legislation indicates that that was intended with "irresistible clearness"*". In *R v Janceski* [2005] NSWCCA 281, 64 NSWLR 10 the Chief Justice wrote: *61 Mr Smith SC submitted that the reasoning in Painter reflected the position at common law and relied on the principle of statutory interpretation, that Parliament is presumed not to intend to change the common law, unless the legislation indicates that that was intended with "irresistible clearness". Reliance was placed on the judgment of this Court in R v Downs (1985) 3 NSWLR 312 at 321-322 and on the judgment of the Court of Criminal Appeal of the Supreme Court of*

*South Australia in R v Khammash (2004) 147 A Crim R 129 at 148-150. 62 The principle of statutory interpretation relied on by the Crown is, in my opinion, now of minimal weight. It reflects an earlier era when judges approached legislation as some kind of foreign intrusion. The scope and frequency of legislative amendment of the common law, including the common law of criminal procedure, has over many decades been both wide ranging and fundamental. ...64 In Bropho, the Court concluded that the presumption that legislation did not intend to bind the Crown had been so modified. The presumption relied upon by the Crown in the present case has also, in my opinion, come to be modified or, at least, diminished in significance. The test of "irresistible clearness", or equivalent, to which some authorities refer is too stringent in contemporary circumstances".*

38. The principle has been stated to be "weak" ( *Harrison v Melham* [2008] NSWCA 67 at [5] per Spigelman CJ; [218] per Basten JA (citing McHugh J in *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] 214 CLR 269); and at [219] citing Gleeson CJ in *Electrolux Home Products Pty ltd v Australian Workers Union* 221 CLR 309 at [19]). In *Electrolux*, McHugh J stated the presumption "*varies according to its context*" and referred to His Honour's reasoning in *Gifford.*

39. Finally, the Appellant's submissions regarding the availability of relief under the *Relatives Act* in the nature of compensation for loss by an eligible relative of his or her own earnings have largely been dealt with above.

40. While it is accurate to say that the majority appear to have accepted that a claim of that kind is possible (though rare), there is nothing in the majority judgment to suggest that they accepted the further manifestly incorrect proposition that such a claim is a claim for "loss of expectation of financial support" within the meaning of subsection 12(1)(c).

41. The Appellant seeks to address that difficulty (at [52]) by resort to the creative suggestion that a claim for loss of the relative's income may be based upon a loss of anticipated financial support by way of a loan or

guarantee. That possibility was not raised below and the Appellant does not suggest that any such claim has ever been made or referred to in any reported decision.

42. While it must be conceded that a claim of that kind could accurately be described as a claim for loss of the expectation of financial support, it remains the case that it is also aptly described as a claim for future economic loss due to deprivation or impairment of earning capacity. It follows that, even if it could otherwise sensibly be suggested that the purpose of the of subsection 12(1)(c) was to introduce reforms to the method of calculation of damages for claims of that kind (which it cannot), subsection 12(1)(b) renders subsection 12(1)(c) unnecessary for the achievement of that purpose in any event.

43. It is pertinent in that context to have regard to the passage from *Project Blue Sky* at [71] upon which the Appellant places reliance: *"Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision*[52]*. In The Commonwealth v Baume*[53] *Griffith CJ cited R v Berchet*[54] *to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent*".

## Part VII Argument on Notice of Contention or Notice of Cross Appeal

44. The Sixth Respondent does not rely on a Notice of Contention or Notice of Cross Appeal.

## Part VIII Oral argument

45. The Sixth Respondent estimates 2 hours for the Respondent's oral argument (including the Sixth Respondent).

Dated: 8 November 2013

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