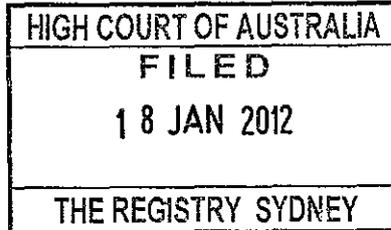


BETWEEN: Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS
Appellant



and

John Cross
Respondent

No. S 257 of 2011

BETWEEN: Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS
Appellant

and

20 Mark George Thelander
Respondent

No. S 258 of 2011

BETWEEN: Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS
Appellant

30 and

Jill Maria Thelander
Respondent

APPELLANTS' SUBMISSIONS

Part I:

40 1. This submission is in a form suitable for publication on the internet.

Part II:

1. The principal issue presented by the appeal is one of statutory construction, namely, whether a claim for damages in respect of injuries suffered as a result of an assault, is a claim for "personal injury damages" within the

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meaning of the costs limiting provisions of either section 198D of the *Legal Profession Act 1987* (NSW) ("the 1987 Act") or section 338 of the *Legal Profession Act 2004* (NSW) ("the 2004 Act"). These limitations upon recoverable costs arise when the amount recovered on a claim for personal injury damages does not exceed \$100,000. The costs are then limited to 20% of the amount recovered or \$10,000, whichever is greater.¹

2. The expression "personal injury damages" was relevantly defined in the 1987 Act until 6 December 2002 to have "the same meaning as in the *Civil Liability Act 2002*", and from 6 December 2002 was relevantly defined in the 1987 Act to have the same meaning "as in Part 2 of the *Civil Liability Act 2002*". Similarly, the expression "personal injury damages" in the 2004 Act is relevantly defined to have the same meaning "as in Part 2 of the *Civil Liability Act 2002*".
3. Until 6 December 2002 "personal injury damages" was defined to mean in the *Civil Liability Act* "damages that relate to the death of or injury to a person caused by the fault of another person". From 6 December 2002 "personal injury damages" was defined to mean in Part 2 of the *Civil Liability Act* "damages that relate to the death of or injury to a person".
4. The central question is whether the expression "personal injury damages" found within either section 198D of the 1987 Act or section 338 of the 2004 Act, is given its meaning by the definition of "personal injury damages" contained in the *Civil Liability Act*. The Appellant contends that the *Civil Liability Act* definition provides the meaning of the expression as found in the applicable *Legal Profession Act*, and that the Respondent's claim is plainly a claim which falls within the definition. However, the Court below held that the Respondent's claim was not a claim within the meaning of the expression because the provisions of Part 2 of the *Civil Liability Act* do not

¹ The limitations apply subject to sections 198E to 198G of the 1987 Act, and sections 339 to 341 of the 2004 Act. So, for example, the limitations do not apply to costs to the extent that recovery of costs from a client is provided for by a costs agreement (see section 198E(1) of the 1987 Act, and section 339(1) of the 2004 Act).

operate or apply in respect of claims for damages based on intentional acts done with intent to cause injury.

5. A related issue also arises as to whether the costs limiting provisions of the 1987 Act, or the costs limiting provisions of the 2004 Act, are applicable in respect of the Respondent's costs.

Part III:

- 10 1. The Appellant has considered the operation of section 78B of the *Judiciary Act 1903*, and does not believe that the appeal involves any matter arising under the Constitution or any matter involving its interpretation, and therefore does not think that any notices need to be given in compliance with section 78B.

Part IV:

- 20 1. The judgment in the Court below has not been reported in the authorized reports, or otherwise. The decision may be cited as: ***Cross v Certain Lloyds Underwriters; Thelander v Certain Lloyds Underwriters*** [2011] NSWCA 136.
2. The judgment at first instance of Garling DCJ in the District Court of New South Wales (delivered on 22 April 2010) has not been reported, and there is no internet citation available.

Part V:

1. In January 2001 the Respondent was assaulted by security guards at a hotel (Judgment of the Court below at [4]).
- 30 2. In April 2002 the Respondent commenced proceedings against parties other than Australian Venue Security Services Pty Limited ("AVS"), the security company which employed the guards (Judgment on costs at first instance at page 1).

3. In July 2005 AVS was joined as a defendant to the proceedings (Judgment of the Court below at [8]).
4. In February 2007 AVS went into liquidation. The Respondent did not seek leave to proceed against AVS but instead, in about May 2008, the Appellants as the insurers of AVS were joined as defendants to the proceedings (Judgment on costs at first instance at pages 1 and 2).
5. On 27 November 2009 the District Court of NSW (Garling DCJ):
 - 10 (a) concluded that the Respondent had suffered personal injuries as a result of an assault committed by employees of AVS;
 - (b) concluded that any verdict for assault resulting in personal injury was covered by the policy of insurance issued by the Appellants to AVS;
 - (c) entered a verdict for damages in an amount less than \$100,000 against the Appellants; and
 - (d) reserved all questions of costs (Judgment on liability at first instance at pages 1, 5 & 28).
6. On 22 April 2010 Garling DCJ made orders that:
 - 20 (a) the Appellants pay the Respondent's costs as from 12 July 2005 (when leave was granted to the Respondent to add AVS as a defendant) (Judgment on costs at first instance at page 5); and
 - (b) that those legal costs are subject to section 198D of the Legal Profession Act 1987 (Judgment on costs at first instance page 7).
7. On 1 June 2011 the NSW Court of Appeal set aside order (b) made by Garling DCJ in respect of section 198D, and made a declaration to the effect that the legal costs incurred by the Respondent were not subject to either section 198D of the *Legal Profession Act 1987* or section 338 of the *Legal Profession Act 2004* (Judgment of the Court below at [67(5)]).
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Part VI:

1. The central issue in this case is whether the Respondent's claim is a claim "for personal injury damages" within the meaning of either section 198D of the 1987 Act or section 338 of the 2004 Act. If it is such a claim, then because damages were recovered in an amount less than \$100,000, the legal costs which may be recovered in connection with the claim are limited under the costs limiting provisions of one or other of those Acts.

- 10 2. If the Respondent first instructed its lawyers in relation to the matter prior to the commencement of the 2004 Act on 1 October 2005, Part 11 of the 1987 Act continues to apply to the matter (see clause 18 of Schedule 9 to the 2004 Act, which is reproduced at [16] of the Judgment of the Court below). The relevant "matter" should be understood as the Respondent's claim for damages against AVS for the injuries suffered due to the assault.² As lawyers were first instructed in that matter before October 2005, Part 11 of the 1987 Act continues to apply to it.

- 20 3. Relevantly, Division 5B of Part 11 of the 1987 Act, which contains sections 198C to 198I, was introduced by Schedule 2 to the *Civil Liability Act 2002*. The costs limiting provisions were backdated to commence in respect of legal services provided on or after 7 May 2002 (Judgment of the Court below at [50]).

- 30 4. By s 198D a restriction upon legal costs applied if the amount recovered on a claim for personal injury damages does not exceed \$100,000. By section 198C "personal injury damages" was defined to have "the same meaning as in the *Civil Liability Act 2002*". Sub-section 198C(2) provided that the Division did not apply to certain categories of costs, none of which are relevant to this case.

5. The *Civil Liability Act*, which commenced (with retrospective operation) on 20 March 2002, contained a definition of "personal injury damages" in s 3.

² See the view expressed by Hodgson JA in the Court below at [2]; compare Basten JA at [23].

The expression was defined "in this Act" to mean "damages that relate to the death of or injury to a person caused by the fault of another person". ("Fault" was defined to include an act or omission.)

- 10
6. The clear words of s 198C of the 1987 Act had the effect that "personal injury damages" in Division 5B had the same meaning as that expression had in the *Civil Liability Act*. By section 3 of that Act, the meaning "in this Act" was "damages that relate to the death of or injury to a person....". It follows that (subject to sections 198E to 198G, none of which are relevant to this case) the costs limitations imposed by section 198D applied where the amount recovered on a claim for such damages did not exceed \$100,000, unless such costs fell within the categories specifically identified in section 198C(2). The view of Campbell JA in ***State of NSW v Williamson*** [2011] NSWCA 183 at [83] to this effect is correct.
- 20
7. It is not to the point that certain awards of personal injury damages (including awards where the fault concerned is an intentional act done with intent to cause injury) were excluded from the operation of Part 2 of the *Civil Liability Act*. The meaning of the expression "personal injury damages" is not affected by that circumstance. Part 2 dealt with the manner in which damages were to be assessed (see section 9(2) of the *Civil Liability Act*). As Campbell and Macfarlan JJA noted in ***State of NSW v Williamson*** (supra) at [32],[34],[38],[103]-[104] & [118], the scope of application of a concept is not the same as the meaning of a concept. This is particularly so when the concept is the subject of a specific definition. It is the definition which provides the meaning.
- 30
8. This position was not affected by amendments later made to the *Civil Liability Act*, including those introduced in December 2002 by the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW). The concept of "personal injury damages" was henceforth defined "in this Part" (i.e. Part 2) to mean "damages that relate to the death of or injury to a person" (see s 11). At the time these amendments were made the definition

of “personal injury damages” in section 198C of the 1987 Act was amended so that the expression had “the same meaning as in Part 2 of the *Civil Liability Act 2002*”. (A definition in the same terms was later found in s 337(1) of the 2004 Act.) This consequential amendment of the 1987 Act merely reflects the circumstance that the definition of “personal injury damages” in the *Civil Liability Act* now gave the concept a meaning in Part 2 of the Act rather than a meaning in the Act generally. There is no reason to think that Parliament intended, by these changes, to alter the costs provisions of the 1987 Act. (The justices in the Court below did not discern any such intention: see Judgment of the Court below at [54],[59]-[60] & [80]).³

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9. Regardless of whether the 1987 Act or the 2004 Act was applicable, the Court below should have held that the relevant costs limitations applied to the Respondent’s claim, which was a claim for damages that relate to injury to a person. (“Injury” has at all times been defined in the *Civil Liability Act* to include “impairment of a person’s physical or mental condition”). Such a claim falls within the definition of “personal injury damages” in the *Civil Liability Act*, whether the section 3 definition prior to 6 December 2002, or the s 11 definition from 6 December 2002, and hence is a claim for personal injury damages within the meaning of section 198D of the 1987 Act, and section 338 of the 2004 Act. As the costs of the Respondent’s claim do not fall within any of the categories excluded from the costs limitations regime (by section 198C(2) of the 1987 Act, or by section 337(2) of the 2004 Act), and as the amount recovered was less than \$100,000, those limitations apply.

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10. Basten JA (with whom Hodgson JA agreed) in the Court below concluded at [49] that the preferable view of the definition of “personal injury damages” in section 198C is that it took into account “the meaning of the term, not merely in the definition, but also by reference to the application section, of the *Civil Liability Act*” (see also Basten JA at [35] & Sackville AJA at [71]).

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³ See also Campbell JA in *State of NSW v Williamson* (supra) at [101].

11. However, the “application section” of the Act does not serve to provide the meaning of the term; it serves to define an area of operation for the term, whose meaning is specifically defined elsewhere in the Act.

12. ***Producers’ Co-operative Distributing Society Limited v Commissioner of Taxation (NSW)*** (1944) 69 CLR 523, (1947) 75 CLR 134 is of limited assistance in the present case. The required task here is the ascertainment of the meaning which “personal injury damages” has in the *Civil Liability Act* (or in Part 2 of the *Civil Liability Act*). The context in which the definition of the expression appears in that Act does not provide any basis to interpret the meaning of the expression as anything other than that which arises from the ordinary meaning of the words of the definition itself. This case is not like ***Henry v Motor Accidents Insurance Board*** [2005] TASSC 62 where the words “in any practice” in the definition of “motor vehicle race” were given a meaning by reference to the purposes of the statute in which the definition appeared. The approach taken in ***Henry*** (supra) does not justify using the scope of operation of the expression “personal injury damages” to ascertain the meaning of the expression.

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13. Basten JA also supported his conclusion on the basis that the specific exclusions from the costs restrictions set forth in section 198C (2) were directed to separate costs-capping regimes and were probably included merely out of an abundance of caution (see at [58] & [59]). In fact, some of those exceptions were not the subject of separate costs-capping regimes (eg claims under the *Motor Accidents Act 1988*, or claims as referred to in the *Dust Diseases Tribunal Act 1989*). In any event, as Sackville AJA recognised at [78], even if the specific exclusions were inserted out of an abundance of caution, it is curious that section 198C (2) (which was inserted by the *Civil Liability Act* itself) made no reference to claims founded on an intentional act even when such claims were expressly referred to in section 9(2)(a) of the *Civil Liability Act* itself.

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14. The approach of the Court below effectively treated the express exceptions to the costs regime as otiose. The provisions of section 198C (2) (and later section 337(2) of the 2004 Act) should instead have been construed as having work to do in specifying the exceptions to the costs regime.

15. The approach of the Court below gave insufficient weight to the statutory language, the ordinary meaning of which plainly indicated that the *Legal Profession Acts* were employing the meaning of an expression found (and clearly defined) in another Act. In these circumstances, there was an over-readiness on the part of the Court below to resort to extrinsic materials in an effort to discern an intended meaning other than the ordinary meaning conveyed by the statutory language (see *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252 at [33]-[34]).

16. In any event, the policy reasons cited in the Court below (eg at [49] & [73]) are somewhat vague, and are not a firm basis upon which to conclude that a meaning other than that given by the definition in the *Civil Liability Act* was intended. Indeed, in so far as any underlying statutory purpose can be identified from the extrinsic materials,⁴ there is nothing inconsistent with the construction favoured by the Appellants.

17. The Second Reading speech given by the Premier on 28 May 2002 in relation to the Civil Liability Bill (parts of which are referred to by Basten JA in the Court below at [46]-[48]) establishes that the Bill was to implement “stage one of the Government’s tort law reform programme”, with stage two (which would introduce broad-ranging reforms to the law of negligence) to be dealt with in the next session of the Parliament. The Premier referred specifically to the exclusion of awards of damages with respect to intentional acts done with intent to cause injury. He stated that such exclusion “ensures that the compensation for injuries arising from serious criminal acts is not limited by the Bill”.

⁴ See *Newcastle City Council v McShane* (2005) 65 NSWLR 155 at [20]-[33] for a discussion of the extrinsic materials. At [23] Mason P noted the difficulty involved in identifying particular purposes of legislation as wide ranging as the Civil Liability Act.

18. In relation to the amendments to the *Legal Profession Act*, the Premier referred to "the cap on plaintiff lawyers' costs" and the fact that the cap had "been extended to defendant lawyers' costs". It was asserted that the cap on fees "will promote efficiency on the part of the legal profession and help to contain claims costs". Further, after describing a power to regulate lawyers' fees as a "consumer protection measure"⁵ the Premier stated that: "These provisions in the bill will contain legal costs, while protecting clients".

10 19. There is no inconsistency between a policy of not limiting compensation to persons who are injured by intentional acts, and a policy of limiting legal costs in small injury claims. Both policies can be seen as broadly beneficial to the victims of intentional torts such as assaults, and to the public generally.

20 20. The *Civil Liability Act*, as originally enacted in 2002, was intended to implement stage one of the Government's tort law reforms. Provision was made (in the *Civil Liability Act* itself) in relation to certain awards of personal injury damages; provision was also made (through the insertion of new provisions in the *Legal Profession Act*) in relation to legal costs in certain personal injury damages claims. These provisions, located in different statutes, served different purposes, but in each case utilised the very same concept, namely, "personal injury damages", as a basis for their operation.

21. The concept is employed in Part 2 of the *Civil Liability Act* to identify awards of damages which are, subject to the exceptions which are identified,⁶ subject to the damages regime contained in Part 2.

30 22. The concept is employed in the *Legal Profession Acts* to identify claims the costs of which are, subject to the exceptions which are specified,⁷ subject to the costs limiting regime contained in those Acts.⁸

⁵ It was envisaged that it may become necessary to place restrictions upon the fees which lawyers could recover from clients even where the costs were the subject of a costs agreement.

⁶ Initially by s 9(2), and from 6 December 2002 by ss 11A(1) and 3B(1).

Part VII:

1. A: Prior to 6 December 2002: Division 5B of Part 11 of the *Legal Profession Act 1987* ("the 1987 Act"), consisting of sections 198C to 198I, was inserted by Schedule 2 to the *Civil Liability Act 2002*. Although the *Civil Liability Act* commenced with retrospective effect on 20 March 2002, Division 5B of the 1987 Act did not apply in respect of legal services provided before 7 May 2002.

- 10 2. Section 198C (2) provided: "This Division does not apply to the following costs...".

3. Section 198D(1) provided: "If the amount recovered on a claim for personal injury damages does not exceed \$100,000, the maximum costs for legal services provided to a party in connection with the claim are fixed as follows:...".

4. Section 198C(1) contained a definition of "personal injury damages", viz, "In this Division:... personal injury damages has the same meaning as in the
20 *Civil Liability Act 2002*."

5. Section 3 of the *Civil Liability Act* contained a definition of "personal injury damages", viz, "In this Act:... personal injury damages means damages that relate to the death of or injury to a person caused by the fault of another person."

6. In Part 2 of the *Civil Liability Act* section 9(1) provided: "This Part applies to and in respect of an award of personal injury damages, except an award that is excluded from the operation of this Part."
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7. Section 9(2) provided: "The following awards of damages are excluded from the operation of this Part:

⁷ By s 198C(2) of the 1987 Act, and by s 337(2) of the 2004 Act.

⁸ Contained in Division 5B of Part 11 of the 1987 Act; and Division 9 of Part 3.2 of the 2004 Act.

(a) an award where the fault concerned is an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct, ...”.

8. B: From 6 December 2002 until 1 October 2005: The *Civil Liability Amendment (Personal Responsibility) Act 2002* commenced on 6 December 2002. By Schedule 2, various consequential amendments were made to the *Civil Liability Act*.

10 9. Section 9 was omitted, and a new section 11A was inserted which provided, in sub-section (1): “This Part applies to and in respect of an award of personal injury damages, except an award that is excluded from the operation of this Part by section 3B.”

10.A new section 3B provided, in sub-section (1): “The provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings) as follows: (a) civil liability in respect of an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct – the whole Act except Part 7 (Self-defence and recovery by criminals) in respect of civil liability in respect of an intentional act that is done with intent to cause injury or death,....”.

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11.The definition of “personal injury damages” was omitted from section 3 and a new definition was inserted into the new section 11 (found in Part 2 of the Act), viz, “In this Part:... personal injury damages means damages that relate to the death of or injury to a person”.

12.With the exception of section 3B(1)(a), the provisions of the *Civil Liability Act* set out above remain in that form today. The amendment to section 3B(1)(a) is dealt with at D below.

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13. By Schedule 4 to the *Civil Liability Amendment (Personal Responsibility) Act*, the definition of “personal injury damages” in section 198C(1) of the

1987 Act was replaced with a new definition, viz, "personal injury damages has the same meaning as in Part 2 of the *Civil Liability Act 2002*."

14. C: From 1 October 2005: The 1987 Act was repealed by the *Legal Profession Act 2004* ("the 2004 Act") which commenced on 1 October 2005. Provisions substantially the same as those in Division 5B of Part 11 of the 1987 Act were included in Division 9 of Part 3.2 of the 2004 Act.

10 15. Section 337(2) provided: "This Division does not apply to the following costs:....".

16. Section 338(1) provided: "If the amount recovered on a claim for personal injury damages does not exceed \$100,000, the maximum costs for legal services provided to a party in connection with the claim are fixed as follows:....".

20 17. Section 337(1) contained a definition of "personal injury damages", viz, "In this Division:..... personal injury damages has the same meaning as in Part 2 of the *Civil Liability Act 2002*".

18. The provisions of the 2004 Act set out above remain in that form today.

19. The 2004 Act contained transitional provisions in Schedule 9. Relevantly, item 18(1) provided: "Subject to subclauses (2) and (3), Part 3.2 of this Act applies to a matter if the client first instructs the law practice on or after the commencement day, and Part 11 of the old Act continues to apply to a matter if the client first instructed the law practice in the matter before that day."

30 20. D. *Civil Liability Amendment Act 2006*: By Schedule 1 to this Act, which commenced on 20 June 2006, paragraph (a) of section 3B(1) of the *Civil Liability Act* was omitted and replaced with the following provision: " (a) civil liability in respect of an intentional act that is done with intent to cause injury

or death or that is sexual assault or other sexual misconduct – the whole Act except:

- (i) section 15B and section 18(1) (in its application to damages for any loss of the kind referred to in section 18(1)(c)), and
- (ii) Part 7 (Self-defence and recovery by criminals) in respect of civil liability in respect of an intentional act that is done with intent to cause injury or death,”.

10 21. Section 3B(1)(a) has since been amended by Schedule 1 to the *Crimes and Courts Legislation Amendment Act 2006*. The words before “the whole Act” have been replaced with: “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”. By Part 9 of Schedule 1 to the *Civil Liability Act*, the amendment to s 3B(1)(a) extended to civil liability arising before the commencement of the amendment (on 29 November 2006).

Part VIII:

- 20 1. In the event that the appeal is allowed, the Appellant seeks the following orders:
- (a) Appeal allowed;
 - (b) Order that orders (4) to (7) made by the Court of Appeal of the Supreme Court of New South Wales be set aside and in lieu thereof order that the appeal to the Court of Appeal of the Supreme Court of New South Wales be dismissed with costs.

Dated: 22 December 2011

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A handwritten signature in black ink, appearing to read 'MJ Stevens', written in a cursive style.

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