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IN THE HIGH COURT OF AUSTRALIA

No: S179 of 2013

SYDNEY REGISTRY

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BETWEEN:



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Susan Joy Taylor

*In her own capacity and for an 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

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Fourth Respondent

Duncan Rae

Fifth Respondent

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Manly Council

Sixth Respondent

Ryan Winton Taylor

Seventh Respondent

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Lisa Jane Taylor

Eighth Respondent

Mitchell Alan Taylor

Ninth Respondent

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Zara Zoe Taylor

Tenth Respondent

First to Fourth Respondent's Submissions

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Part I: Certification for publication

1. This Submission is in a form suitable for internet publication.

Part II: Issues presented by the Appeal

2. Respondents 1 to 4 submit the issues identified by the Appellant do not reflect the actual text of s 12 of the *Civil Liability Act 2002 (NSW)* ("CLA").

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Respondents 1 to 4 submit that the relevant issues are best formulated as raising the following questions:

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2.1. Whether, in its application to an award of damages “for the loss of expectation of financial support”, the term “claimant” in CLA s 12(2) refers to the person who was injured, and requires a court to disregard the amount by which that person’s expected earnings would have exceeded 3 times average weekly earnings.

2.2. whether a statutory text must be given its apparently literal meaning, where another meaning is reasonably consistent with the statutory context and more consistent with the apparent statutory purpose

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2.3. whether construing a statutory text in a manner consistent with its apparent purpose, and reasonably available meaning, involves “reading in” words to the statutory text and, if so, whether the clear identification of drafting error is a necessary pre-condition to such a construction.

Part III: Section 78B Judiciary Act 1902 (Cth)

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3. Respondents 1 to 4 do not consider that Judiciary Act 1903 s 78B requires any notice to be given.

Part IV: Material facts

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4. Respondents 1 to 4 accept the factual and procedural background stated in Part V of the Appellant’s Submissions.

Part V: Legislative materials

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5. Respondents 1 to 4 submit the Appellant’s statement of legislative materials is incomplete – by not including

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5.1. *Civil Liability Act 2002 (NSW)* – s 11A (as at 7 December 2007 – not subsequently amended)

11A Application of Part

(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.*

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(2) *This Part applies regardless of whether the claim for the damages is brought in tort, in contract, under statute or otherwise.*

(3) *A court cannot award damages, or interest on damages, contrary to this Part.*

(4) *In the case of an award of damages to which Part 2A (Special provisions for offenders in custody) applies, this Part applies subject to Part 2A.*

5.2. *Compensation to Relatives Act 1897 (NSW)* – ss 3(1), 4(1) & 6B (as at 7 December 2007 – not subsequently amended).

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3 An action to be maintainable against any person causing death through neglect despite the death of the person injured

(1) *Whensoever the death of a person is caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to a serious indictable offence.*

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4 By whom and for whom action may be brought

(1) *Every such action shall be for the benefit of the spouse, brother, sister, half-brother, half-sister, parent, and child of the person whose death has been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased, and in every such action 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, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict find and direct.*

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6B Alternative action

(1) *Where there is no executor or administrator of the person deceased, or where the person's executor or administrator does not bring an action under this Act within six months after the death of the person deceased, the person or any one or more of the persons for whose benefit the action might be brought by such an executor or administrator may bring the action.*

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1 (2) Any action so brought shall be for the benefit of the same person or persons and shall be subject to the same provisions and procedure, as nearly as may be, as if it were brought by such an executor or administrator.

Part VI: Summary of Argument

- 10 6. The Appellant's Submissions make five main points
- 6.1. **Literal meaning:** the literal meaning of the word "claimant" in CLA s 12(2), in its application to an award of damages for the loss of expectation of financial support, "cannot" be "the deceased" whose expected financial support has been lost: *Appellant's Submissions* ¶19, 25
- 20 6.2. **No instructive purpose:** the general purpose of the CLA provisions (to limit the award of personal injury damages), and the more explicitly stated purpose of apparently similar legislation (to limit any award of damages for loss of expectation of support by reference to the injured person's affected earnings) does not relevantly inform the proper interpretation of CLA s 12(2): *Appellant's Submissions* ¶17, 19, 28(1)&(3), 29 to 33, 39, 42, 48
- 30 6.3. **Limited scope:** the CLA s 12(2) limitation applies only to those awards where a relative's earnings are in fact relevant to the assessment, and does not apply to all awards of damages for loss of expectation of financial support: *Appellant's Submissions* ¶21 & 43,
- 40 6.4. **Application to lost income claims:** CLA s 12(2) is capable of applying to "relatives' lost income" claims, in proceedings for damages under the *Compensation to Relatives Act 1897 (NSW)* ("Comp to Rel Act"), and this precludes interpreting "claimant" to mean the "injured person" (ie including "the deceased") whose excess "but for" earnings must be disregarded: *Appellant's Submissions* ¶20, 28(5), 49 to 52, 57, and
- 50 6.5. **No statutory interpretation to contradict available meaning:** it is impermissible to construe "claimant" as meaning the "injured person" (including "the deceased") because doing so involves either applying a wrong principle, or inaccurately

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applying correct principles of statutory interpretation: *Appellant's Submissions*
¶28(6) & (7)

7. **Literal meaning:** The Appellant's concept of "literal" meaning is unacceptably
simplistic.

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8. Proper statutory interpretation requires regard to legislative purpose and intention.
That purpose and intention are determined by language and context, and on the basis of
the probably intended meaning. The search for the intended meaning is satisfied
neither by mere deference to apparently literal meaning, nor by mere speculation about
the conceivable purpose of the words used:

Cooper Brookes (Wollongong) Pty Ltd v FCT (1980-1981) 147 CLR 297 at 304
& 319 to 321

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Commissioner for Railways v Agalianos (1955) 92 CLR 390 at 397 - Blue 10
[32]

Minister for Immigration and Multicultural Affairs v SZJGV (2009) 238 CLR 642
at [9] per French CJ & Bell J and [62] per Crennan & Kiefel JJ (referring to
"preferable" and "probable" interpretation and citing *CIC Insurance Ltd v*
Bankstown Football Club Ltd (1977) 187 CLR 384 at 408 - which in turn cited
Cooper Brookes per Mason and Wilson JJ at 320-321 referring to the relevance
of inconvenience or improbability of result), and

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Certain Lloyd's Underwriters (2012) 293 ALR 412 at [25] & [26], [40]

9. General principles stating the necessity for the courts to begin and end the task of
statutory construction with consideration of the statutory text (*Commissioner of*
Taxation v Consolidated Media Holdings Ltd (2012) 294 ALR 257 at [39] - citing
Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27
at [47] and not to engage in "judicial legislation" (*Minister for Immigration and*
Multicultural Affairs v SZJGV (2009) 238 CLR 642 at [9]) emphasise the significance
that must be accorded to the words used. They do not command deference to literal
meaning (the postulated deference being subject to the limiting proviso that no
deference is required for a meaning that is irrational and absurd). Meaning always
depends on the combination of text, context, purpose and policy: see *Alcan* at 239 CLR
[47]; *Certain Lloyd's Underwriters* (2012) 293 ALR 412 at [23] - [26]; *Kammins*

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Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850 per Lord Diplock at 881F.

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10. The permission to supply, omit or correct words where “it is clearly necessary ... to avoid absurdity or inconsistency”: (*Fitzgerald v Masters* (1956) 95 CLR 420 - cited in *DPP v Leys* (2012) 296 ALR 96; [2012] VSCA 304) cannot, consistently with *Cooper Brookes*, be construed to exclude “improbability and inconvenience” as relevantly informative about the material statutory intention: see *DPP v Leys* at [52].

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11. CLA s 12(2) uses the "claimant" to apply to all three of the awards of damages identified in CLA s 12(1) – namely

11.1. past loss of earnings, or loss of earning capacity

11.2. future loss of earnings, or loss of earning capacity, and

11.3. loss of expectation of financial support.

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12. The relevant interpretation question is whether, in the application of CLA s 12(2) to a relatives' claim “for loss of expectation of financial support”, the term “claimant” is intended to refer to

12.1. the person who is the moving party in the proceedings

12.2. the relatives for whose benefit the statutory cause of action exists, or

12.3. the "injured person" who is “the deceased”.

13. The answer to that question lies in the nature of the awards of damages to which CLA s 12 applies.

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14. Damages for loss of earnings, or loss of earning capacity, are claimable only by the person who suffers the loss – necessarily the “injured person”. That person is the only person entitled to claim an award of damages of those kinds. Consequently, in its application to those kinds of awards, the term “claimant” necessarily refers to the “injured person”. In the statutory context of CLA 12(2) and 12(1)(a)&(b), the terms “claimant” and “injured person” are synonymous expressions.

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15. On the other hand, a claim for an award of damages to which CLA 12(1)(c) applies – an award for “the loss of expectation of financial support” - can only be made where

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the “injured person” has died. The “injured person” cannot, therefore, be the “claimant” in the proceedings. The ordinary permitted “claimant” in proceedings for an award of damages for the loss of expectation of financial support is the executor or administrator of the estate of the injured person.

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16. Nevertheless, the financial means of the injured person who has died, including their earnings and earning capacity, are the principal considerations in the award damages for a relative’s “loss of expectation of financial support” under CLA s 12(2). The financial means of the procedural claimant (the deceased person's executor or administrator) are irrelevant to such an award of damages.

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17. The Appellant’s Submissions appear to accept that proposition, and eschew an interpretation of the term "claimant" as meaning the person who actually brings the proceedings claiming damages “for loss of expectation of financial support”. The Appellant submits instead (at least implicitly) that “claimant” means any relative for whose benefit such an award of damages could be made: see *Appellant’s Submissions* ¶17 & 52. The Appellant submits that interpretation despite the fact that

17.1. the literal meaning of “claimant” is the person making the claim, rather than the person for whose benefit the claim is made

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17.2. elsewhere the CLA has specifically differentiated between a "claimant" and "dependants" (see CLA ss 15B & 18(1)(c)), and

17.3. in the application of CLA s 12(2) to awards of damages for loss of earnings or loss of earning capacity, the term "claimant" certainly means “the injured person”.

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18. The original definition of “claimant” in CLA s 3 was a “person who makes or is entitled to make a claim for personal injury damages”. The removal of the CLA s 3 definition of “claimant” (by the Civil Liability Amendment (Personal Responsibility) Act 2002) “did not affect the meaning of the word” as it was intended to be applied in construing CLA s 12(2): see the minority judge at [2013] NSWCA 55 at [64]. In this original definition, and in the continued wording of the CLA, the term “claimant” simply means “the injured person” – and necessarily includes an injured person who has died.

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19. Construing “claimant” in CLA s 12(2) as meaning “the injured person” reflects the conceptual basis for all three of the awards of damage to which CLA s 12(1) applies. It

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is also consistent with s 3(1) of the Comp to Rel Act - which itself refers to the person deceased as both “the person injured” and “the party injured”. The statutory cause of action created by Comp to Rel Act s 3(1) is premised on the deceased (as “the party injured”) having “rights of action that were vested in a deceased person immediately before their death”: at [2013] NSWCA 55 at [20] per McColl JA.

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20. The CLA s 12(2) reference to “injury or death” as the relevant, and alternative, earnings contingencies, is a forceful indicator that the CLA s 12(2) use of the term “claimant” is a reference to the person injured. It is the injured person who has died whose affected earnings provide the basis for the expected “loss of financial support”. The actual entitlement of a relative to obtain damages “for the loss of expectation of financial support” can only arise from the death of the injured person.

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21. This wording of both the CLA and the Comp to Rel Act, provides a persuasive context for concluding that in CLA s 12(2) the expression “claimant” denotes “the injured person”, and includes an injured person who has died from their otherwise actionable injuries. That “person injured” / “party injured” (to use the expressions in Comp to Rel Act s 3) is “the relevant injured person” for the purposes of CLA s 12(2). It is only that person’s earnings that both (i) are directly relevant to the assessment of damages “for loss of expectation of financial support”, and (ii) would have been available “but for” the injury or death.

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22. The relevant principles of statutory construction neither require nor permit the word “claimant” in CLA s 12(2) to be read narrowly, and as denoting only the plaintiff in the proceedings for damages. Requiring courts to disregard the injured person’s “excess” gross weekly earnings gives CLA s12(2) the meaning “the legislature is taken to have intended”: see *Certain Lloyd’s Underwriters Subscribing to Contract No 1H00AAQS v Thelander* (2012) 293 ALR 412 at [25]; and Mc Coll JA in the court below at [44].

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23. The view contended for by the Appellant, that CLA s 12(1)(c) and 12(2) only apply to relatives claims for “lost income” does not give due weight to the legislative intention emphatically stated in CLA s 12(1)(c) - that the CLA s 12(2) limitation should apply to all three of the awards of damages specified in CLA s 12(1), including damages for “loss of expectation of financial support”.

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24. **General purpose:** Respondents 1 to 4 accept that the general purpose commonly ascribed to the CLA – to limit the amount of awards of damages, particularly in personal injury matters – is of limited utility in determining the proper interpretation of CLA s 12(2).

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25. However, the context of CLA s 12 expressly declares an intention to limit any award of damages for loss of earnings, loss of earning capacity and loss of financial support expectation. The Appellant’s Submissions concede that limiting purpose. The only dispute is the description of the limiting criterion, and the circumstances in which it applies: see *Appellant’s Submissions* ¶17.

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26. The Appellant contends the limiting criterion only applies where a relative suffers a loss of earnings as a result of the injured person’s death. This contention

26.1. incorrectly assumes that a relative’s claim for loss of earnings is a claim for “the loss of expectation of financial support”, and

26.2. is inconsistent with the explicit statutory intention that CLA s 12 should apply to “an” / “any such” award for “the loss of expectation of financial support”

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27. The Appellant submits that its proffered interpretation is supported by the contrast between CLA s 12(2) wording, and the terms of similar provisions in s 125 of the *Motor Accidents Compensation Act 1999* (“MACA”) and s 151I of the *Workers Compensation Act 1987* (“WCA”). Both of these latter provisions use the expression “the injured or deceased” instead of “claimant”.

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28. Differences from, or similarities with, other legislation are an imprecise, and therefore unreliable, basis for attempting to infer the operative statutory intention. Such an inference is problematical where there is no evidence of legislative advertence to the other provisions, or to their significance, in the adoption of the contentious wording. Nevertheless, comparison with other similar legislation may focus analytical enquiry in determining whether particular variations in statutory wording betoken materially different intentions about the intended statutory purpose.

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29. In the present case the enquiry is whether the difference between the words “injured or deceased person / worker” (in MACA s 125(2) & WCA s 151I) and the words “the claimant’s” (in CLA s 12(2)) evidences a significantly different policy. The Appellant

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contends it does, and that in the case of damages “for the loss of expectation of financial support” the award under the CLA, but not under MACA or WCA, must disregard the affected earnings of the supported person, rather than the lost earnings of the injured person who has died: *Appellant’s Submissions* ¶ 30 to 33.

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30. The fact that all of the legislation applies to precisely the same kinds of awards of damages (ie “for loss of expectation of financial support”), and is otherwise cast in very similar terms, suggests the need for a proper basis before arriving at any conclusion that the CLA s 12(2) wording indicates a dramatically different statutory purpose.

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31. The Appellant’s Submissions assume that the choice between characterising the different legislative wordings as “drafting choice” rather than “drafting error” identifies the relevant statutory purpose. *Appellant’s Submissions* ¶34 to 40. The Appellant further submits that the “drafting choice” evident in CLA s 12(2) evidences a statutory purpose and operation for CLA s 12 that is very different from the MACA and WCA provisions.

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32. This reasoning is problematic and unreliable. There are really only two differences in the statutory wordings - (i) in the description of the operative monetary limit, and (ii) the use of the expression “the claimant” instead of “the injured or deceased person / worker”). Neither of these differences is particularly, or indeed at all informative, of the statutory purpose. Both wordings have precisely the same application to claims made by the injured person. Both wordings are expressed to apply to any (meaning all) awards of damages for loss of expectation of financial support. But, in contrast to that contemplation, neither wording, if it is given its literal meaning, applies to the typical award of damages for “loss of expectation of financial support” – because (i) the typical “claimant” for such an award will be the executor or administrator of the injured person’s estate, (ii) typically relatives seeking damages for loss of expectation of financial support, will not be seeking damages for their own loss of earnings or earning capacity, and (iii) a relative’s claim for their own loss of earnings or earning capacity cannot, in any event, properly be characterised as a claim for “loss of expectation of financial support”.

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33. It follows that the Appellant’s suggested “purpose” in the drafting of CLA s 12 is no more than a speculative hypothesis, and one of doubtful consistency with the statutory context.

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34. **Purposive application to Comp to Rel Act claims:** The Appellant’s key proposition is that it is wrong to assume that the CLA s 12 purpose was to reach all awards of damages listed in CLA s 12(1). The Appellant contends the evident statutory intention is “to restrain only those awards under s 12(1) which also engage the proscription in s 12(2)”: *Appellant’s Submissions* ¶43.

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35. The Appellant’s Submissions reverse the plain meaning of CLA s 12. CLA s 12(1) declares its application to 3 kinds of awards of damages. CLA s 12(2) mandates compliance with its terms “in the case of any such award”. The necessary implication is that CLA s 12(2) is intended to be applied “in the case of any such award”. That implication can only be given effect by interpreting the term “claimant” to mean the injured person – including the injured person who has died. The nature of the CLA s 12(1)(c) award of damages is “for the loss of expectation of financial support”. The assessment of an award of damages for that kind of loss is concerned with the affected earnings of only the injured person who has died.

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36. The Appellant contends that consideration of the other kinds of damages limitations in CLA Part 2, Division 2 (ss 13 to 15C) shows that any damages restraint intended by CLA s 12(1)(c) & 12(2), in their application to claims under the Comp to Rel Act was of a very limited kind. But the wording of CLA s 12 makes it unnecessary, and actually unhelpful, to consider the extent to which CLA ss 13 to 15C might apply to restrict other kinds of potential Comp to Rel Act damages. The plain terms of CLA s 12 apply the CLA s 12(2) limitation to “any such award” – that is to “any” award of damages “for the loss of expectation of financial support”. The absence of similar wording in CLA ss 13, 14 and 15 may convey a statutory intention not to limit the assessment of other categories of loss that are recoverable in Comp to Rel Act actions. But that contrast re-inforces, rather than detracts from, the significance of the explicit declaration of intention in CLA s 12(1).

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37. CLA s 12(1) is not expressed to apply specifically to all awards of damages for claims under the Comp to Rel Act provisions. It is confined to “any” award of damages “for the loss of expectation of financial support”. This specificity is a clear indication that

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CLA s 12(2) was intended quantify the damages by reference to the affected earnings, and earning capacity, of the injured person who has died.

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38. An award of damages “for the loss of expectation of financial support” is but one of the aspects of the damages that may be awarded in an action under the Comp to Rel Act. The measure of damages recoverable under the statutory cause of action has been consistently recognised since at least 1858 as extending to any pecuniary benefit *Franklin v South Eastern Railway Co* (1858) 3 H & N 211; 157 ER 448. Lord Wright in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at 611-612 described the damages as compensation for the loss of the “reasonable expectation of a pecuniary benefit or benefit reducible to money value”. That description was cited by Fullagar and Kitto JJ in *Lincoln v Gravit* (1954) 94 CLR 430 at 441, and taken up by the Victorian Full Court in *East v Breen* [1975] VR 19 at 22 citing *Public Trustee v Zoanetti* (1945) 70 CLR 266 at 279 per Dixon J. It is entirely consistent with *Horton v Byrne* (1957) 30 ALJ 583 at 585, where Dixon CJ, McTiernan, Webb & Taylor JJ described the compensable loss as one requiring “all reasonable expectations of material advantage ... to be taken into account”.

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39. The reasoning in *East v Breen* was itself extensively relied on in *Ruby v Marsh* (1975) 132 CLR 642. The judgments in that case contain various synonymous expressions describing the recoverable damages in a fatal accident claim

39.1. “damages ... for the loss of a reasonable expectation of pecuniary benefits consequent upon death”: Barwick CJ: 132 CLR at 646

39.2. damages “calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life”: Gibbs J: 132 CLR at 657, and

39.3. the “sum proper to compensate the dependant or dependants of a deceased for the pecuniary benefits lost to them by the death”: Jacobs J: 132 CLR at 666.

40. In *De Sales v Ingrilli* (2002) 212 CLR 338 at 347 [13] Gleeson CJ noted that “loss of an expected benefit is not restricted to loss of direct financial support”. In the same case McHugh J described the damages as being awarded for the loss of “financial support or its equivalent”: *De Sales v Ingrilli* (2002) 212 CLR 338 at 371 [91]. His Honour clearly contemplated that compensation for lost services was additional to the

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1 element of loss attributable to the lost income of the deceased: see 212 CLR 338 at 373.

41. Furthermore, as in *Rouse v Shepherd* (1994) 35 NSWLR 250 at 258A, Badgery-Parker JA correctly said that it involved a conceptual error for a Comp to Rel Act claimant / relative to formulate their claim as one for loss of earnings, as distinct from a loss of
10 expectation of financial support.

42. **Relevance of “relatives” affected earnings in Comp to Rel Act claims:** The Appellant postulates that CLA s 12(2), interpreted so as to operate by reference to relatives’ affected earnings, could operate in four different situations: *Appellant’s Submissions* ¶52

42.1. **Income forgone to provide substitute services:** a relative’s loss of income – as a
20 consequence of a decision to forego employment in order to replace services previously provided by the deceased

42.2. **Loss of income facilitating services:** a relative’s loss of income – as a consequence of the unavailability of services or facilities previously provided by the deceased

42.3. **Loss of “synergy”:** a relative’s loss of income – as a consequence of the loss of the “synergistic” contribution previously made by the deceased, and

30 42.4. **Loss of opportunity caused by absence of financial accommodation:** a relative’s loss of opportunity – as a consequence of the unavailability of financial support in the form of “loan, guarantee or other financial accommodation”.

43. **Loss of services & equipment:** Damages for loss of income, attributable to loss of services or equipment provided by the deceased, are not claims for loss of the expectation of financial support.

40 44. The expression “loss of expectation of financial support” describes a subset of the available damages authorised by the Comp to Rel Act. Those potential damages extend to any pecuniary benefit and any benefit that is capable of monetary valuation: *see paragraph 38 above*. They are not limited to damages for loss of financial support. That description applies most readily to direct financial contributions by the deceased. The provision of services is not within the ordinary meaning of “financial support”.

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45. The Appellant herself submits that the services compensation restrictions imposed by CLA s 15 & 15B do not apply to claims for loss of services made in actions claiming damages under the Comp to Rel Act provisions. Equally, those kinds of losses do not fall within the CLA s 12(1)(c) & 12(2) restriction.

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46. A loss of income, where a relative foregoes income in order to replace services previously provided by the deceased, is only one of the possible bases for valuing those services. Courts may accept that the income foregone is a reasonable measure of the value of the services. But the point of principle remains that the damages are compensation for the loss of the value of the services, not for the loss of income: see McColl JA [2013] NSWCA 55 at [8]; *Nguyen v Nguyen* (1989-1990) 169 CLR 245 at 249 per Brennan J; see *Roads and Traffic Authority v Jeffs* [1999] NSWCA 179 at [74]-[77] per Handley JA.

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47. However, if the evidence satisfied the court that the true compensable value of the deceased's lost services exceeded 3 times average weekly earnings, nothing in CLA s 12(1)(c) and 12(2) would limit the amount of the award of damages for loss of those services.

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48. **Loss of "synergistic" income:** No evidence suggests a statutory purpose relating to this concept. It is inherently likely to be a mere forensic construct, rather than a factual reality that was the actual object of legislative intention. Even if the concept is not dismissed entirely as fanciful, the potential complications in its application suggest the extreme unlikelihood that the wording of CLA s 12 was intended to apply to it. The potential complications would include differentiation between the suppositious loss of "synergistic" income and

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48.1. the effect of the loss of services and facilities provided by the injured person who has died: see *Welsh Ambulance Services NHS Trust v Williams* [2008] EWCA Civ 81. (The distinction would be important – because any loss of services and equipment would be separately compensable, and without attracting the CLA s12(2) limit. Conversely, in the absence of specific evidence of contribution, it will typically be merely suppositious (as it was in *Dwight v Bouchier* [2003] NSWCA 3 [80]-[82]) as to whether an eligible person has suffered any relevant loss of income, or lessening of earning capacity.)

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48.2. the extent to which the suppositious loss of income was in reality the loss of direct financial support: see *Malyon v Plummer* [1964] 1 QB 330, and

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48.3. the extent to which the hypothesised income loss was attributable to the relationship with the deceased, rather than to the commercial aspects of the relationship – (the former being compensable and the latter not: see *Burgess v Florence Nightingale Hospital for Gentlewomen* [1955] 1 QB 349 at 361; *Henry v Perry* [1964] VR 174;).

49. But even if a relative in Comp to Rel Act proceedings could substantiate a loss of “synergistic” income attributable to the death of the injured person, that loss of income could not be characterised as a loss of the expectation of “financial support”.

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50. ***Loss of opportunity attributable to the absence of financial accommodation:*** A “loss of business opportunity” (see *Appellant’s Submissions* ¶52) is not a loss of “the expectation of financial support” and is irrelevant to the application of CLA s 12(2).

51. The suppositious provision by the deceased of a beneficial loan or a guarantee might be regarded as falling within the concept of “financial support”. But even so, the Appellant’s submission about the proper interpretation of CLA s 12(2) would not accord it any application to such a loss.

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52. The compensable value of the suppositious loan or guarantee would depend on its terms. If the terms were ordinary commercial terms, no related benefit would be compensable in a Comp to Rel Act claim: see *paragraph 48 above*. If the terms were uncommercial, the benefit would be compensable according to the value of the favourable terms. The relative’s suppositiously affected income might conceivably afford some information potentially relevant in assessing that value – but only as an impressionistic aid, in the same way as the values of lost services may be compensated. But if the court was otherwise satisfied about the amount of the actual benefit of the postulated loan or guarantee, the wording of CLA s 12(2) would not impose any damages limit.

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53. ***Conclusion on the “Relative’s Lost Income” hypothesis:*** Properly analysed, CLA s 12(2) applies to (i) a loss of expectation of financial support, (ii) such a loss as a consequence of the injured dead person’s diminished and lost earnings. Those criteria point to the earnings of the deceased as the only earnings relevant to the limitation

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imposed by CLA s 12(2). Properly analysed CLA s 12(2) has no work to do, except in relation to loss of expectation of financial support, by reference to the effect of the injury on the deceased person's "earning capacity".

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54. In the absence of an explicit statutory context it is improbable that the Parliament should be taken to have used essentially the same expression "claimant" to limit the economic loss damages awarded to an injured person and yet to resile from applying that limit where a claim was made for the benefit of the relatives of an injured person who had died. As Stephen J said in *Cooper Brookes*, it is unlikely that such a provision would be inserted by a "sidewind" with no meaningful contextual justification: see 147 CLR 297 at 312.

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55. **Principles of statutory interpretation:** The Appellant's Submissions summarise the general principles of statutory construction discussed in *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1980-1981) 147 CLR 297. Those principles are uncontentious: see paragraph 8 above.

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56. The essence of the Appellant's argument is the proposition that the CLA s 12 context does not provide a proper basis to construe "the claimant's ... earnings's" as referring to the earnings of the injured person who has died. The Appellant submits that reference can only be made by "reading in" words that do not appear in the CLA s 12(2) text.

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57. The Appellant does not dispute the legitimacy of interpreting words according to their inferred contextual meaning, even if that meaning departs from ordinary literal or grammatical meaning. The Appellant complains however, that "reading in" is impermissible, absent curial satisfaction of compliance with the three conditions in *Wentworth Securities Ltd v Jones* [1980] AC 74: *Appellant's Submissions* ¶63 & 66.

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58. The difference between the permissible interpretation of words according to their inferred contextual meaning, and the impermissible "reading in" of words that do not appear, is nuanced and impressionistic. *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1980-1981) 147 CLR 297, with its interpretation of the words "the company" as meaning "the subsidiary / interposed company" rather than "the holding company" (see 147 CLR at 306 per Gibbs CJ), illustrates the potential subtlety involved. So too does *MacAlister v The Queen* (1990) 169 CLR 324, where the words "on convicting that

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person of an offence” were construed to mean “on convicting that person of his or her offence”. Again, in *DPP v Leys* (2012) 296 ALR 96 ; [2012] VSCA 304, the Victorian Court of Appeal, confronted with arguably inconsistent transitional provisions in amending legislation construed the expression “on or after the commencement of that Act” to mean “on or after the commencement of s 21 of the amending Act”.

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Conversely, in *Parramore v Duggan* (1995) 183 CLR 633 (at 643) the High Court refused to construe the expression “an easement arising by implication or under a statute which would have given rise to a legal interest” as if it contained an additional disjunctive “... or under a statute OR which would have given rise to a legal interest ...”

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59. In reality, however, the *Wentworth Securities* restrictions on “reading in” apply to situations where the courts have been asked to add words that are quite beyond any tenable view of the contextual meaning. Typically such request will be refused – as it was in

59.1. *Wentworth Securities Ltd v Jones* [1980] AC 74 - where the House of Lords refused to construe a provision declaring provisions of an agreement to be ineffective to affect a tenant’s rights as extending to invalidate the terms of an agreement to which the tenant was not a party

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59.2. *R v Young* (1994) 46 NSWLR 681 – where the NSW Court of Criminal Appeal refused to construe the prohibition “evidence is not to be adduced in a proceeding” as if it had the extended meaning that “evidence is not to be adduced in a proceeding or a document produced (in response to a subpoena)”

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59.3. *R v PLV* (2001) 51 NSWLR 735 – where the NSW Court of Criminal Appeal refused to construe the expression “unable to be aware of matters” as if it applied to matters which a person was merely “unable to recall”, and

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59.4. *Carr v Western Australia* (2007) 232 CLR 138 – where admissions were inadmissible unless videotaped, or there was a “reasonable excuse” for the absence of a recording, including the accused person’s refusal of consent to the recording. The High Court refused to construe the provision as prohibiting the tender of an admission that had been recorded by security cameras and microphones of whose operation the accused had been unaware.

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60. There is no need to read words into CLA s 12(2). The context of CLA s 12, properly understood, warrants the conclusion that “claimant” refers to the “injured person” – including the injured person who has died. The section specifically indicates that it applies to a “claimant” whose earnings may have been affected by either injury or death. That context necessarily conveys that the word “claimant” is used in CLA s 12(2) with the intended meaning of “the injured person”. Even the minority judge in the Court of Appeal said the term “claimant” had the “self-evident” meaning of “a person who made a claim (or was entitled to make a claim)”: [2013] NSWCA 55 at [64]. It is equally self-evident that a person who has died as a result of an actionable injury is “a person who was entitled to make a claim”.

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61. Although the majority in the Court of Appeal proceeded on the basis that CLA s 12(2) involved a “plain case of a drafting mistake”, that conclusion was a merely incidental step in reasoning that simply strove to give CLA s 12(2) the meaning that the context revealed the legislature must have intended it to have.

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62. CLA s 12(2) does not, despite the Appellant’s Submissions involve a situation where the term “claimant” had a “literal” meaning. There was always a need to consider, as a first step in the construction of CLA s 12(2), whether “claimant” was being used to refer to (i) the “plaintiff” in the relevant “action”, (ii) the persons entitled to benefit from such an action, or (iii) to the person whose injury gave rise to the entitlement to the “award of damages” to which CLA s 12(1)(a)-(c) are addressed.

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63. Against this background, it is unpersuasive for the Appellant to contend that the legislature must have intended that the word “claimant” as used in CLA s 12(2) only meant the person who actually brought the proceedings for an award of damages, and only required a disregard of that person’s “excess” earnings. It is equally unpersuasive to contend that “claimant” only meant one or other of the relatives for whose benefit an award of damages for “loss of expectation of financial support” might be claimed. Neither interpretation gives CLA s 12(2) a sensible application to awards of damages for “loss of expectation of financial support”. The Appellant’s contended for scope of the obligation to disregard “excess” earnings (i) could never apply in any action brought by an unrelated executor or administrator, (ii) could be readily avoided in almost every other case, merely by selection or substitution of the most favourably circumstanced person as the plaintiff in the proceedings or, alternatively, (iii) would, in any event, have no application to a relative’s loss of expectation of financial support.

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64. The total irrelevance of the earnings of the formal claimant in actions under the Comp to Rel Act, the substantial conceptual irrelevance of a relative's affected earnings, and the merely suppositious purpose of the "disregard" obligation in CLA s 12(2) for which the Appellant's contends, strongly contradict the likelihood that the proper construction of CLA s 12(2) requires the term "claimant" to be construed narrowly. In its context in CLA s 12, the term "claimant" refers, for some purposes, to the injured person and, in its application to CLA s 12(1)(c) is apt to include the injured person who has died and whose loss of support is the basis of the award of damages for loss of expectation of financial support.

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65. The deceased, identified in the Comp to Rel Act as the "person injured" / "party injured", falls within the description of a person who "was entitled to make a claim" and within the description of a person who had suffered an injury relevant to the proper assessment of the damages claimed in the action. That description is consistent with both the wording of CLA s 12 and s 3 of the Comp to Rel Act. It reflects the wording of CLA s 12 and conveys the meaning of the CLA s 12 wording that the legislature is likely to have intended.

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Part VIII: Oral argument

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66. The First to Fourth Respondents estimate that less than 1 hour is required for oral argument.

Dated: 8 November 2013

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