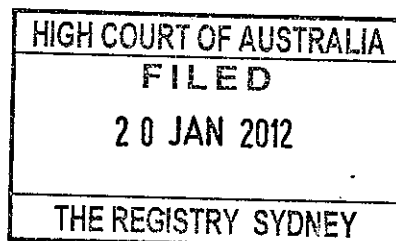


BETWEEN:



STATE OF NEW SOUTH WALES
Appellant

and

JAYSON WILLIAMSON
Respondent

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APPELLANT'S SUBMISSIONS

Part I:

1. It is certified that these submissions are in a form suitable for publication on the internet.

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Part II:

1. The principal issues presented by this appeal are issues of statutory construction, namely:
- a. Whether the deprivation of liberty and loss of dignity consequent upon a false imprisonment is "personal injury", and in particular whether it is "an impairment of a person's physical or mental condition" within the meaning of section 11 of the *Civil Liability Act 2002* (NSW);
 - b. Whether a claim for damages that includes both a claim for damages for false imprisonment and a claim for damages for physical and mental injury consequent upon a battery is a "claim for personal injury damages" within the meaning of section 338 of the *Legal Profession Act 2004* (NSW);
 - c. Whether section 11A qualifies the meaning of "personal injury damages" in section 11 of the *Civil Liability Act 2002* with the effect that a claim for personal injury damages in proceedings to which Part 2 of the *Civil Liability Act 2002* does not apply by virtue of section 11A is not a claim for personal injury damages within the meaning of section 38 of the *Legal Profession Act 2004*.

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Part III:

1. It is certified that the Appellant has considered the operation of section 78B of the *Judiciary Act 1903*. The Appellant does not consider that notices under that section are required.

Part IV:

- 10 1. The judgment of the NSW Court of Appeal has not been reported in the authorised reports, or otherwise. The internet citation is: *State of New South Wales v Williamson* [2011] NSWCA 183.
2. The judgment of the NSW Supreme Court has not been reported in the authorised reports, or otherwise. The internet citation is: *Williamson v State of New South Wales* [2010] NSWSC 229.

Part V:

- 20 1. The Respondent commenced proceedings against the Appellant in the District Court of NSW (numbered 3084 of 2007) on 19 July 2007, in relation to certain events that occurred on 26 August 2006 when the Respondent was detained by members of the NSW Police Force.
2. The Statement of Claim pleaded facts material to what were described in the pleading as the torts of "unlawful arrest", "assault" and "false imprisonment", but which are to be properly understood as causes of action in trespass to the person constituting battery, and trespass to the person constituting false imprisonment.
- 30 3. By paragraph 11 of the Statement of Claim the Respondent alleged that he had "suffered personal injury and loss, and damage, particulars of which are set out in the accompanying Part 15 Statement of Particulars." It then went on to claim damages, aggravated damages (the particulars of which were said to be "humiliation, loss of dignity, and injured feelings, including trauma"), and exemplary damages (the particulars of which included "that assaults were committed by the police officers with ... reckless indifference to the plaintiff's health and safety").
- 40 4. The "Part 15 Statement of Particulars" (a reference to Rule 15.12 of the *Uniform Civil Procedure Rules 2005*) referred to in paragraph 11 of the Statement of Claim included, under the heading "Particulars of Injuries", allegations that the Respondent suffered concussion, various contusions and abrasions, and various muscular strain injuries.
5. The Respondent served a report by Dr Selwyn Smith dated 21 August 2008 in which Dr Smith opined that the incident on 26 August 2006 had resulted in "physical and psychological symptomatology", the physical being described as "of a soft tissue kind" and the psychological being symptoms diagnostic of "Chronic Adjustment Disorder with Depressed and Anxious Mood."

6. On 22 December 2008 the proceedings were settled, with the District Court making orders, "By consent and without admission as to liability", for "judgment for the plaintiff in the sum of \$80,000 plus costs of these proceedings as agreed or assessed."
7. The judgment amount being less than \$100,000, a dispute emerged between the solicitors for the Appellant and the Respondent as to whether or not the costs of the proceedings in the District Court were regulated by section 338 of the *Legal Profession Act 2004* (NSW) ("*Legal Profession Act 2004*").
- 10 8. The Respondent commenced proceedings in the Supreme Court of NSW by way of summons, seeking a declaration to the effect that the costs of the proceedings in the District Court were not regulated by section 338 of the *Legal Profession Act 2004*. A declaration to that effect was made by Hall J on 30 March 2010.
9. The Appellant sought leave to appeal which application was heard, at the same time as the substantive appeal, on 17 February 2011.
10. During the hearing of that appeal, it was indicated that arrangements would be made for the same judges hearing the appeal (Hodgson, Campbell and Macfarlan JJA) to also hear an appeal raising similar issues of the application of the cost-capping provisions (the appeal in *Cross v Certain Lloyds Underwriters*). Instead, a differently-constituted bench (Hodgson and Basten JJA, and Sackville AJA) heard the appeal in *Cross* on 3 May 2011 and delivered judgment on 1 June 2011 (see *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136).
- 20 11. The judgment the subject of the present appeal was on 5 July 2011, after the delivery of judgment in *Cross*. In that judgment Campbell and Macfarlan JJA disagreed with the construction of the relevant statutory provisions arrived at by the Court of Appeal in *Cross*, but considered themselves bound to follow it. Hodgson JA adhered to the view his Honour had expressed in *Cross*.
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Part VI:

1. In essence, the Appellant failed in its appeal to the NSW Court of Appeal for two reasons. Firstly, it was held that as the claim for damages by the Respondent included a claim for damages other than "personal injury damages", and that part was incapable of severance from the claim for "personal injury damages", the claim as a whole could not be characterised as a claim "for personal injury damages" for the purposes of section 38 of the *Legal Profession Act 2004*. Secondly, it was held that the Court ought to follow its earlier decision in *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 because the Court did not consider that decision to be plainly wrong.
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Is a claim for damages for false imprisonment a "claim for personal injury damages?"

2. In the NSW Court of Appeal in the present case Hodgson JA expressly agreed (at [2]) with Campbell JA's conclusion that a claim for damages for false imprisonment, at least insofar as it extends to a claim for damages for deprivation of liberty and loss of dignity, was not a claim for damages that relate to death or injury.
3. Campbell JA held (at [56]) that a claim for false imprisonment was not one for "personal injury damages". Damages might be awarded as a vindication of the right infringed ([57]). Loss of dignity arose from the change in others' perception ([61]).
4. Campbell JA relied (at [62]) upon Spigelman CJ's observations in *State of New South Wales v Ibbett* (2005) 65 NSWLR 168 at [21] that deprivation of liberty, loss of dignity and hurt feelings were not damages for personal injury as ordinarily understood. However, Spigelman CJ at [22] in *Ibbett* left open the question of whether or not the emotional reaction, often called "injured feelings", arising from the apprehension of physical violence and the accompanying sense of outrage or indignation was an "impairment of a mental condition" and therefore an "injury" as defined by section 11. Spigelman CJ at [22] was inclined to the view that it was not such an impairment, a conclusion that is arguably at odds with the Chief Justice's approval at [11] in *Ibbett* of the judgment of Cooper AJ in *Houda v New South Wales* [2005] NSWSC 1053. In that case Cooper AJ held at 336]-[347] that depriving the plaintiff in that case of his freedom, forcibly restraining his mobility, causing him humiliation, damaging his reputation, causing him the emotional upset of undergoing these experiences, having the criminal charge hanging over his head, and the costs and trauma of contesting the charge all amounted to injury for the purposes of section 3B(1)(a). In any event, it is difficult to justify Spigelman CJ's conclusion that the "injured feelings" emotional reaction is not an "injury" in light of the discussion by Ipp JA at [125] and Basten JA at [216].
5. Campbell JA rejected (at [66]) the submission that a claimed effect on mental state made a claim for false imprisonment a claim for personal injury damages, although noting (at [67]) that it was arguable that aspects constituting mental impairment (such as anxiety or stress) could have the effect that the claim became one for personal injury damages. It was enough, however, that the claim made in the subject case included the elements of wrongful deprivation of liberty and loss of dignity (at [67]).
6. This process of reasoning and conclusion is inconsistent with two other decisions of the NSW Court of Appeal which have considered relevantly indistinguishable language: *State of New South Wales v Corby* (2010) 76 NSWLR 439 which considered section 26C of the *Civil Liability Act 2002*, and *State of New South Wales v Radford* [2010] NSWCA 276 which considered section 18A of the *Limitation Act 1969*.
7. In *Corby* it was argued that section 26C of the *Civil Liability Act 2002* (containing a 15% impairment requirement as a result of "injury") did not

apply to limit a claim for aggravated damages arising from an alleged police assault as these were not compensatory. Basten JA (who delivered the principal judgment, with which Beazley and Tobias JJA concurred) noted that section 26A defined injury for the purposes of section 26C as including "impairment of a person's physical or mental condition" (similarly to section 11). Basten JA regarded the question raised by the appeal as being whether the concept of "injury" should be understood as limited to "that which gives rise to compensable damages under the general law, where the primary claim is for psychological harm" (at [24]). His Honour noted (at [38]) that the definition of "injury" in section 26A was not materially different from that in section 11. Basten JA concluded that the definition of "injury" must include matters such as humiliation and injury to feelings (at [47]). Accordingly, there was no basis for excluding aggravated damages.

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8. In *Radford* it was argued that the claim of assault and false imprisonment causing emotional upset, anxiety, distress and humiliation as aggravated damages was statute barred by s 18A(2) of the *Limitation Act* 1969 (NSW). Sackville AJA (who delivered the principal judgment, with which Beazley and Macfarlan JJA concurred) was of the opinion that the action for false imprisonment was within the section if the claim was one "for damages for personal injury": at [78]. After noting that the term "personal injury" was defined to include "any impairment of the physical or mental condition of a person" (at [84]), and that there was a 'close relationship' between compensatory damages for injury to feelings and an award of aggravated damages (at [97]), his Honour observed that the section only applied where the claim was "for" damages for personal injury with the consequence that it did not apply if the damages were "merely related or connected" with personal injury (at [101]). Although recognizing that 'the authorities do not speak with one voice', Sackville AJA concluded that an action based on assault in which aggravated damages for injury to feelings was claimed was an action "for damages for personal injury" (at [105]). In doing so he attempted to distinguish the observations of Spigelman CJ in *Ibbett*, by regarding the observations as explained by the fact the *Civil Liability Act 2002* was confined to "actions founded on negligence": (at [109]-[110]), so that it was permissible to construe section 18A of the *Limitation Act* as extending to damages for feelings of humiliation, indignity, distress and anxiety caused by an intentional tort. Sackville AJA noted (at [112]-[115]) what had been said by Basten JA in *Corby* with reference to the definition of "injury" in the *Civil Liability Act 2002*. Accordingly, his Honour held that the impairment complained of, being an impairment of mental condition, was personal injury [at [116]].

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9. In summary:-

- a. In *Corby* it was held (for the purposes of the *Limitation Act*) that the definition of "injury" included matters such as humiliation and injury to feelings;
- b. In *Radford* it was held (for the purposes of the *Civil Liability Act 2002*) that definition of "injury" included feelings of humiliation, indignity, distress and anxiety;

- c. In *Williamson* it was held (for the purposes of the *Civil Liability Act 2002*) that the definition did not include wrongful deprivation of liberty and loss of dignity, even if it included anxiety or stress.
10. The definitions in the *Limitation Act 1969* and the *Civil Liability Act 2002* are, relevantly, indistinguishable. Both *Radford* and *Williamson* concerned claims for false imprisonment. In *Radford*, the claim was barred because it was a claim for damages for personal injury. In *Williamson*, the costs of the claim were not capped because the claim was not one for damages for personal injury.
- 10 11. The inclusion within such a claim of complaints for vindication or loss of dignity do not preclude its proper characterization as being a claim “for” personal injury damages: see *State Government Insurance Office (Qld) v. Crittenden* (1966) 117 CLR 412; *Radford* at [99]-[100]; *Roystrom v. McCallum* [2007] 1 Qd R 361; *Zurich Australian Insurance Limited v. Regal Pearl Pty Limited* (2007) 14 ANZ Ins Cas 61-715; [2006] NSWCA 328.
12. The reasoning in *Williamson* is inconsistent with both *Corby* and *Radford*, (and *Crittenden*) and ought to be rejected

20 *Was the Respondent's claim in fact a claim for damages for personal injury damages?*

13. Irrespective of whether or not the claim for damages also included a cause of action for false imprisonment (in which damages in theory might be limited to damages for deprivation of liberty only), the Respondent's claim as pleaded and pursued, including by the service of evidence relevant only to proving physical and mental harm, was in the circumstances properly characterised as a claim “for” damages for actual physical injury and actual mental harm, and therefore plainly fell within the scope of section 338 of the *Legal Profession Act 2004* and the Court of Appeal was incorrect to hold otherwise.

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Is the decision in Cross wrong?

14. Section 338(1) of the *Legal Profession Act 2004* regulates the maximum costs for legal services if the amount recovered on a “claim for personal injury damages” does not exceed \$100,000.
15. The Respondent's claim for damages was plainly a claim for damages that included a claim for damages for actual physical injury and actual mental impairment. It was therefore plainly a “claim for personal injury damages” as that phrase would ordinarily be understood. However, the critical question for determination is whether the Respondent's claim was claim for personal injury damages within the statutory definition provided by section 337 of the *Legal Profession Act 2004*.
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16. Section 337 of the Act provided that “personal injury damages has the same meaning as in Part 2 of the *Civil Liability Act 2002*”.

17. In Part 2 of the *Civil Liability Act 2002*, section 11 provided that “personal injury damages means damages that relate to the death of or injury to a person.”
18. By reason of section 3B(1)(a) of the *Civil Liability Act 2002*, Part 2 of the *Civil Liability Act 2002* did not apply to the Appellant’s liability because (as was found by Hall J and upheld in the Court of Appeal) it was a liability in respect of an intentional act that is done with intent to cause injury.
19. The question therefore arose whether the limitation on the application of Part 2 of the *Civil Liability Act 2002* by reference to the subject matter of the proceedings had the effect that the application of section 338 of the *Legal Profession Act 2004* was similarly limited by reference to that subject matter.
20. In answering this question it is crucial to have regard to the legislative history of the relevant provision. Sections 337 and 338 of the *Legal Profession Act 2004* are re-enactments of sections 198C and 198D of the *Legal Profession Act 1987* (NSW).
21. Section 198C of the 1987 *Legal Profession Act 2004* was inserted in June 2002 by Schedule 2.2[2] of the *Civil Liability Act 2002* and originally provided that “personal injury damages has the same meaning as in the *Civil Liability Act 2002*”.
22. At that time, the *Civil Liability Act 2002* consisted of two parts only: Part 1 (sections 1-8) contained “Preliminary” provisions and Part 2 (sections 9 to 22) which regulated the award of certain heads of damages in personal injury proceedings. As originally enacted, the definition of “personal injury damages” was contained in section 3 of the *Civil Liability Act 2002*, and although expressed to apply to the whole of the Act, the “whole of the Act” was in substance Part 2 only. As originally enacted, Part 2 of the *Civil Liability Act 2002* also did not apply to certain awards of damages including “an award where the fault concerned is an intentional act that is done with intent to cause injury”: section 9(2)(a) (which appeared in Part 2, but was subsequently repealed and re-enacted in Part 1 as section 3B(1)(a)).
23. The amendments to the *Civil Liability Act 2002* in December 2002 by the *Civil Liability Amendment (Personal Responsibility) Act 2002* altered the structure of the *Civil Liability Act 2002*, so that in addition to the substantive provisions originally enacted in Part 2, substantive provisions were also inserted in a new Part 1A, and new Parts 2 to 10. To accommodate this change in structure:
 - a. Definitions relevant to the award of personal injury damages were removed from Part 1 (where they previously applied to the whole of the Act) and inserted into section 11 (where they applied only to Part 2)
 - b. The categories of claim to which the *Civil Liability Act 2002* did not apply (or applied in only a limited way) were removed from section 9 (where they would have limited only the recovery of personal injury damages) and re-enacted in section 3B (where, being in Part 1, they

had potential application to the whole of the Act in accordance with their terms).

24. It is plain that:

- a. Prior to the December 2002 amendments the provisions of section 198C and 198D of the 1987 *Legal Profession Act 2004* applied to a claim for personal injury damages in the case of an intentional tort (so much was held in *King v Greater Murray Area Health Service* [2007] NSWSC 914);
 - 10 b. There is nothing in the legislative history of the *Civil Liability Act 2002* and the *Legal Profession Act 2004*, and in particular nothing in the change of the structure of the *Civil Liability Act 2002*, that requires a construction different to that adopted in *King*;
 - c. The reference in section 337 of the *Legal Profession Act 2004* to personal injury damages having “the same meaning as” the *Civil Liability Act 2002* is to be construed as if the definition in section 11 of the *Civil Liability Act 2002* had been repeated in section 337 of the *Legal Profession Act 2004*;
 - d. Hall J and the Court of Appeal in *Cross* were in error in holding that having “the same meaning” means “has the same application as”¹.
- 20 25. The construction of the legislative provisions described in the Schedule to the judgment of Campbell JA in the Court of Appeal in the present case is plainly correct, for the reasons advanced by his Honour, and for that reason *Cross* is plainly wrong and ought not have been followed.

Part VII:

1. The applicable statutes are set out in an annexure to these submissions.

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¹ This form of reasoning also led Basten JA in *State of New South Wales v Bujdoso* (2007) 69 NSWLR 302 at [82] to conclude that an award of damages made in proceedings commenced prior to the deemed commencement of the *Civil Liability Act 2002* on 20 March 2002 was not an award of “personal injury damages” for the purposes of Part 2A of the Act, in which section 26A(2) as originally enacted provided that certain “expressions used in this Part have the same meanings as in Part 2.” The headnote in the authorised report is wrong when it suggests that Hodgson JA at [8] agreed with Basten JA on this issue.

Part VIII:

1. Appeal allowed.
2. Set aside order 3 of the NSW Court of appeal made on 5 July 2011 and in lieu thereof:
 - a) Appeal allowed.
 - b) Set aside orders 2 and 3 made by Hall J on 30 March 2010 and in lieu thereof:
 - 10 i) Declare that the proceedings 3084 of 2007 in the District Court of NSW are "personal injury proceedings" within the meaning of section 337 of the *Legal Profession Act 2004*;
 - ii) Declare that the costs of proceedings 3084 of 2007 in the District Court of NSW are regulated by Division 9 of Part 3.2 of the *Legal Profession Act 2004*.
3. The Appellant pay the Respondent's costs.

Dated 20 January 2012

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ANNEXURE

PART VII: APPLICABLE STATUTES

Prior to 6 December 2002

1. Part 1 of the *Civil Liability Act 2002* contained section 3 which relevantly provided:

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“In this Act:

claimant means a person who makes or is entitled to make a claim for personal injury damages.

...

damages includes any form of monetary compensation.

fault includes an act or omission.

injury means personal or bodily injury, and includes:

- (a) pre-natal injury, and
- (b) psychological or psychiatric injury, and
- (c) disease.

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...

personal injury damages means damages that relate to the death of or injury to a person caused by the fault of another person.”

2. Part 2 of the *Civil Liability Act 2002* contained subsections 9(1) and (2) which were in the following terms:

“(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.

(2) The following awards of damages are excluded from the operation of this Part:

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(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,

(b) an award to which Part 6 of the *Motor Accidents Act 1988* applies or to which Chapter 5 of the *Motor Accidents Compensation Act 1999* applies (including an award to and in respect of which that Chapter applies pursuant to section 121 (Application of common law damages for motor accidents to railway and other public transport accidents) of the *Transport Administration Act 1988*),

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(c) an award to which Division 3 of Part 5 of the *Workers Compensation Act 1987* applies,

(d) an award in proceedings of the kind referred to in section 11 (Claims for damages for dust diseases etc to be brought under this Act) of the *Dust Diseases Tribunal Act 1989*,

(e) an award comprising compensation under the *Workers Compensation Act 1987*, the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987*, the *Workers' Compensation (Dust Diseases) Act 1942*, the

Victims Support and Rehabilitation Act 1996 or the *Anti-Discrimination Act 1977* or a benefit payable under the *Sporting Injuries Insurance Act 1978*,

- (f) a sum required or authorised to be paid under an industrial instrument within the meaning of the *Industrial Relations Act 1996*,
- (g) a sum payable under a superannuation scheme or any life or other insurance policy,
- (h) an award of damages of a class that is excluded by the regulations from the operation of this Part.

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3. Schedule 2 of the *Civil Liability 2002* effected amendments to the *Legal Profession Act 1987*, including the insertion of Part 11, Div 5B of the *Legal Profession Act 1987* entitled "Maximum costs in personal injury damages matters" which applied in respect of legal services provided on or after 7 May 2002.

4. Section 198C of the *Legal Profession Act 1987* provided:

"(1) In this Division:

defendant means a person against whom a claim for personal injury damages is or may be made.

party means plaintiff or defendant.

personal injury damages has the same meaning as in the *Civil Liability Act 2002*.

plaintiff means a person who makes or is entitled to make a claim for personal injury damages.

(2) This Division does not apply to the following costs:

(a) costs payable to an applicant for compensation under Part 2 of the *Victims Support and Rehabilitation Act 1996* in respect of the application for compensation,

(b) costs for legal services provided in respect of a claim under the *Motor Accidents Act 1988* or *Motor Accidents Compensation Act 1999*,

(c) costs for legal services provided in respect of a claim for work injury damages (as defined in the *Workplace Injury Management and Workers Compensation Act 1998*),

(d) costs for legal services provided in respect of a claim for damages in proceedings of the kind referred to in section 11 (Claims for damages for dust diseases etc to be brought under this Act) of the *Dust Diseases Tribunal Act 1989*."

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5. Section 198D(1) then 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:

- (a) in the case of legal services provided to a plaintiff maximum costs are fixed at 20% of the amount recovered or \$10,000, whichever is greater,

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- (b) in the case of legal services provided to a defendant maximum costs are fixed at 20% of the amount sought to be recovered by the plaintiff or \$10,000, whichever is greater.”

From 6 December 2002

6. The *Civil Liability Amendment (Personal Responsibility) Act 2002* commenced on 6 December 2002. The following relevant amendments were effected by that Act.
- 10 7. The definitions of “claimant”, “fault”, “injury” and “personal injury damages” were omitted from section 3.
8. Section 9 was omitted.
9. A new section 3B was inserted, subsection (1) of which was in the following terms:
- “(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:
- 20 (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,
- (b) civil liability in proceedings of the kind referred to in section 11 (Claims for damages for dust diseases etc to be brought under this Act) of the *Dust Diseases Tribunal Act 1989*—the whole Act,
- (c) civil liability relating to an award of personal injury damages (within the meaning of Part 2) where the injury or death concerned resulted from smoking or other use of tobacco products—the whole Act,
- 30 (d) civil liability relating to an award to which Part 6 of the *Motor Accidents Act 1988* applies—the whole Act except the provisions that subsection (2) provides apply to motor accidents,
- (e) civil liability relating to an award to which Chapter 5 of the *Motor Accidents Compensation Act 1999* applies (including an award to and in respect of which that Chapter applies pursuant to section 121 (Application of common law damages for motor accidents to railway and other public transport accidents) of the *Transport Administration Act 1988*)—the whole Act except the provisions that subsection (2) provides apply to motor accidents,
- 40 (f) civil liability relating to an award to which Division 3 of Part 5 of the *Workers Compensation Act 1987* applies—the whole Act,

(g) civil liability for compensation under the *Workers Compensation Act 1987*, the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987*, the *Workers' Compensation (Dust Diseases) Act 1942*, the *Victims Support and Rehabilitation Act 1996* or the *Anti-Discrimination Act 1977* or a benefit payable under the *Sporting Injuries Insurance Act 1978*—the whole Act.”

10. A new section 11 was inserted in Part 2, which relevantly provided as follows:

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“In this Part:

injury means personal injury and includes the following:

- (a) pre-natal injury,
- (b) impairment of a person’s physical or mental condition,
- (c) disease.

personal injury damages means damages that relate to the death of or injury to a person.”

11. By Schedule 4 to the *Civil Liability Amendment (Personal Responsibility) Act 2002* the definition of “personal injury damages” in section 198C(1) of the *Legal Profession Act 1987* was replaced with the following definition:

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personal injury damages has the same meaning as in Part 2 of the *Civil Liability Act 2002*.”

From 1 October 2005

12. The *Legal Profession Act 1987* was repealed and replaced by the *Legal Profession Act 2004*, which commenced on 1 October 2005.

13. Part 3.2, Division 9 of the *Legal Profession Act 2004* contained provisions substantially the same as Part 11, Division 5B of the *Legal Profession Act 1987*.

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14. Section 337 provided:

“(1) In this Division:

defendant means a person against whom a claim for personal injury damages is or may be made.

party means plaintiff or defendant.

personal injury damages has the same meaning as in Part 2 of the *Civil Liability Act 2002*.

plaintiff means a person who makes or is entitled to make a claim for personal injury damages.

(2) This Division does not apply to the following costs:

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- (a) costs payable to an applicant for compensation under Part 2 of the *Victims Support and Rehabilitation Act 1996* in respect of the application for compensation,
- (b) costs for legal services provided in respect of a claim under the *Motor Accidents Act 1988* or *Motor Accidents*

- Compensation Act 1999*,
- (c) costs for legal services provided in respect of a claim for work injury damages (as defined in the *Workplace Injury Management and Workers Compensation Act 1998*),
 - (d) costs for legal services provided in respect of a claim for damages in proceedings of the kind referred to in section 11 (Claims for damages for dust diseases etc to be brought under this Act) of the *Dust Diseases Tribunal Act 1989*.”

15. Section 338 then provided:

10 “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:

- (a) in the case of legal services provided to a plaintiff—maximum costs are fixed at 20% of the amount recovered or \$10,000, whichever is greater,
- (b) in the case of legal services provided to a defendant—maximum costs are fixed at 20% of the amount sought to be recovered by the plaintiff or \$10,000, whichever is greater.”

20 *From 20 June 2006*

16. Following amendments made by the *Civil Liability Amendment Act 2006*, (which introduced in section 15B a statutory form of what had previously been awarded as *Sullivan v Gordon* damages until the decision in *CSR Ltd v Eddy* (2005) 226 CLR 1) which commenced on 20 June 2006, section 3B(1) read as follows:

- 30 “(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:
 - (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,
 - (b) civil liability in proceedings of the kind referred to in section 11 (Claims for damages for dust diseases etc to be brought under this Act) of the *Dust Diseases Tribunal Act 1989*—the whole Act except sections 15A and 15B and section 18 (1) (in its application to damages for any loss of the kind referred to in section 18 (1) (c)),
 - (c) civil liability relating to an award of personal injury damages (within the meaning of Part 2) where the injury or death concerned resulted from smoking or other use of tobacco

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- products—the whole Act except section 15B and section 18 (1) (in its application to damages for any loss of the kind referred to in section 18 (1) (c)),
- 10 (d) civil liability relating to an award to which Part 6 of the *Motor Accidents Act 1988* applies—the whole Act except the provisions that subsection (2) provides apply to motor accidents,
- (e) civil liability relating to an award to which Chapter 5 of the *Motor Accidents Compensation Act 1999* applies (including an award to and in respect of which that Chapter applies pursuant to section 121 (Application of common law damages for motor accidents to railway and other public transport accidents) of the *Transport Administration Act 1988*)—the whole Act except the provisions that subsection (2) provides apply to motor accidents,
- (f) civil liability relating to an award to which Division 3 of Part 5 of the *Workers Compensation Act 1987* applies—the whole Act,
- 20 (g) civil liability for compensation under the *Workers Compensation Act 1987*, the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987*, the *Workers' Compensation (Dust Diseases) Act 1942*, the *Victims Support and Rehabilitation Act 1996* or the *Anti-Discrimination Act 1977* or a benefit payable under the *Sporting Injuries Insurance Act 1978*—the whole Act.”

From 29 November 2006

17. Following amendments made by Schedule 1 to the *Crimes and Courts Legislation Amendment Act 2006* section 3B(1)(a) read as follows:
- 30 “(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 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—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
- 40 (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.”

From 12 November 2008

18. Following amendments made by Schedule 1 to the *Civil Liability Legislation Amendment Act 2008* section 3B(1)(a) read as follows:

- “(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 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—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, and
 - (iii) Part 2A (Special provisions for offenders in custody),”