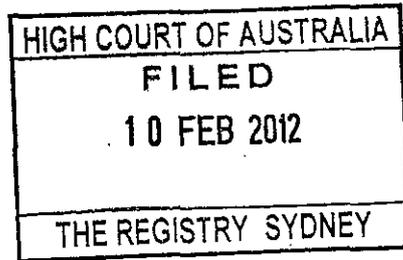


5 BETWEEN:



STATE OF NEW SOUTH WALES
Appellant

and

JAYSON WILLIAMSON
Respondent

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RESPONDENT'S SUBMISSIONS

Part I:

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

Part II:

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1. The respondent accepts that the principle issues presented by this appeal are the threefold issues of statutory construction as set out in the appellant's submissions.

Part III:

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1. It is certified that the respondent has considered whether any notice should be given in compliance with section 78B of the Judiciary Act 1903. The Respondent does not consider that notices under that section are required.

Part IV:

1. The material facts set out in the appellant's narrative of facts and chronology are not contested.

Part V:

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1. The respondent accepts that the applicable statutes set out in the appellant's submissions are correct; although the respondent in these submissions has made reference to one further statutory provision, namely s364 of the *Legal Profession Act 2004*, which is set out in an annexure to these submissions.

Part VI:

Is the claim for damages for false imprisonment a “claim for personal injury damages?”

- 5 1. Campbell JA correctly stated the law when he held at [57] that damages for false imprisonment may be awarded as a vindication of the fact that a right of the plaintiff has been infringed without proof of loss; and further at [61] that a court may compensate for the *loss of dignity*, the focus of which being how the plaintiff is objectively held in the eyes of others as a result of being subjected to the false imprisonment, whilst the focus of *injured feelings* is on the plaintiff's subjective reaction to the false imprisonment.
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2. The decision of the Court of Appeal below makes clear that there are separate and distinct bases for awarding damages in a cause of action founded on false imprisonment, the effect of which is that the damages that may be awarded are not alternative but cumulative.
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3. In s11 of the *Civil Liability Act 2002* Parliament has used words of general import and the definitions are of a rather comprehensive description.
4. If Campbell JA (at [57] and [61]) has correctly stated the law, it follows that conclusion reached by the Court of Appeal in *Williamson* (Hodgson JA at [2] and Campbell JA at [57]-[67]), that the claim for damages for false imprisonment, at least insofar as it extended to a claim for damages for derivation of liberty and loss of dignity, was not a claim that related to death or injury as defined in the *Civil Liability Act 2002* was plainly correct.
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5. To this must be added the claim for exemplary damages, damages which are awarded to punish and deter.
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6. Had the respondent's claim been limited to a cause of action for false imprisonment without allegation of personal injury, the appellant's argument on this discrete point, and overall, would fall away.
7. If the appellant's submission on this discrete question (and overall) were to be accepted it would lead to absurd anomalies. It would mean that an injured plaintiff's entitlement to costs would be capped, whereas a non-injured plaintiff's entitlement to costs would not.
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8. Reliance on the decisions of *State of New South Wales v Corby* (2010) 76 NSWLR 439 and *New South Wales v Radford* [2010] NSWCA 276 is misplaced. There is no tension between those two decisions and the decision of the Court of Appeal below.
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9. In *Corby*, the decision was premised on a cause of action for assault. The focus of attention by the Court of Appeal was on damages flowing from the assault as opposed to false imprisonment and resultant damages for vindication of the fact that a right of the plaintiff being infringed, or, for the loss of dignity.

10. So too in *Radford*, whilst the plaintiff's claim included causes of action for false imprisonment and assault, the decision of Sackville JA focused on the action for assault in which aggravated damages for injury to feelings was claimed (per [84] and [105]). Indeed it may be observed that Sackville JA at [78] appears to express the view that an action for false imprisonment does not necessarily involve a claim for damages for personal injuries.

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

1. The second question posed by the appellant suggests that the finding at issue in the decision in the Court of Appeal in *Williamson* is that at [56] where Campbell JA held that the inclusion of a cause of action for false imprisonment had the consequence that the *claim as a whole* was not one for *personal injury damages*.

2. In its submissions at paragraph 20 the appellant appears to suggest that it is a question of degree.

3. The appellant has misconstrued the word "*claim*" as it appears in s337 of the *Legal Profession Act 2004*.

4. In ordinary usage the word "*claim*" is protean. It is not defined anywhere in the *Legal Profession Act, 2004* and is not an expression used in the *Civil Liability Act 2002*.

5. In the context of civil liability, the word '*claim*' denotes an assertion of a right or entitlement by one party to obtain relief or a remedy against another party, such as damages for injury to the person and / or as the case may be, damages in vindication of an infringed right and / or for loss of dignity etc.

6. The respondent's Statement of Claim alleges independent causes of action for false imprisonment and assault / battery; and as set out above, claims for damages on several bases. In its Defence the appellant traversed the allegations of fact denying false imprisonment and assault / battery as well as injury, loss and damage.

7. The causes of action pleaded are not alternative methods of claiming the same relief or remedy (such as in the case of negligence and breach of statutory duty) and it follows, again, that the appellant's liability for damages

based on those causes of action was cumulative not alternative, that is, separate relief was claimed and capable of being recovered for each cause of action.

- 5 8. The substantive litigation came to an end by the payment of a single lump sum in satisfaction of all claims and causes of action.
- 10 9. In view of these matters, for the purposes of the assessment of costs ordered by the court under s364 of the *Legal Profession Act 2004*, the damages recovered by the respondent in so far as they may relate to an '*impairment of a person's physical or mental condition*' cannot fairly and reasonably be severed from damages (both compensatory and exemplary) recovered (without proof of actual damage) as a vindication of the infringed right, for the loss of dignity and as a punishment and deterrent.

15 *Is the decision in Cross wrong?*

- 15 1. The answer to the third question posed is no.
- 20 2. All members of the Court of Appeal in *Cross* and *Williamson*, perhaps with the exception of Campbell JA, recognised that that there were factors in favour of one conclusion or the other: see Basten JA in *Cross* at [59], Sackville JA in *Cross* at [118] Hodgson JA in *Williamson* at [4], Macfarlan JA in *Williamson* at [118].
- 25 3. In *Williamson*, Campbell JA, at [29], was "*inclined to the view that the words of the statute are sufficiently clear and that it is not possible to identify a purpose that can restrict the meaning of the words of that statute*", notwithstanding that his Honour "*recognised that it is difficult to see why the mischief at which the Civil Liability Act was principally aimed required there to be a cap on costs for claims for assault*" and was "*puzzled about why Parliament would want to restrict the costs recoverable in assault actions*".
- 30 4. The problem with the reasoning of Campbell JA in *Williamson* is that His Honour did not properly consider and evaluate the legislative text itself.
- 35 5. Campbell JA places too much emphasis on a consideration of the legislative history (noting the powerful view to the contrary taken by Basten JA in *Cross* at [60], and Hodgson JA in *Williamson* at [4]) at the expense of context and purpose.
- 40 6. Whilst the propriety of a court considering prior statutory provisions dealing with the same subject matter in order to enable them to interpret a current statute is not questioned, prior statutory provisions must be treated with

caution. The possibility must be considered that a statutory provision under consideration has been substituted for a provision that was interpreted as to produce an unsatisfactory result: *Statutory Interpretation of Australia*, 6th Ed, D C Pearce and R S Geddes at [3.31].

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7. Campbell's JA pronouncement at [29] (and to a lesser extent MacFarlan JA at [119]) that "*While those words are to be construed in their context (which includes the objective of the legislation in question), clear words will prevail*" is irreconcilable with modern approach to statutory construction which provides that the grammatical and ordinary sense of the words in a statute are determined by the context in which they appear and in particular their relationship with each other. This is particularly true of terms defined in statutes.

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8. Both the linguistic and situational context in which the definitions in s11 of the *Civil Liability Act 2002* appear is important. The following factors influence the meaning of the terms defined in s11:

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a. Like many terms defined in statutes the word '*injury*' in s11 is not descriptive of the general use meaning. The definition of '*injury*' is a precisising definition in that it extends the ordinary lexical definition of the term for a specify purpose by including additional criteria that narrow down the set of things meeting the definition. The term '*personal injury damages*' is itself a term of art.

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b. Both definitions are also stipulative in nature in that they specify the drafter's direct and deliberate meaning. In other words Parliament's express intention affects the meaning.

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c. Consideration must be had of the introductory words "*In this Part...*" These words limit the circumstances or situations in which the words are defined. That is, they limit their application.

d. The necessary result is that Parliament intended that the defined terms only to operate and apply for the purposes of Part 2.

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9. In *Williamson*, Campbell JA at [35] agreed with the statement of Basten JA in *Cross* at [33] that:

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"even where the operative statute adopt the phrase 'as defined in' the source statute, it is not sufficient just to take the words of the definition from the source statute and apply them as they stand, without any regard for their context in the source statute".

Campbell JA went on to state:

"However that does not mean that all ways in which one might use such context are legitimate".

10. It follows from the above that it is a legitimate exercise in statutory construction to consider the purposes of Part 2 when considering the meaning of the phrase "*personal injury damages*" in s337 of the *Legal Profession Act* 2004.

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11. A consideration of the purposes of Part 2 necessarily includes a consideration of the scope of its operation.

12. When the purposes of Part 2 are considered, the result is that the phrase "*personal injury damages*" in s337 of the *Legal Profession Act* 2004 should be read down so as not to apply to intentional tort actions excluded by operation of s11A.

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13. This construction is strengthened by the legitimate consideration of the fact that a contrary construction would produce absurd results in circumstances where a plaintiff in an action based on an intentional tort does not allege personal injury as defined in s11.

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Dated 10 February 2012

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ANNEXURE**PART IV (APPLICABLE STATUTE):**

- 5 1. The only additional applicable statute is section 364 of the Legal Profession Act 2004 which presently provides:
- (1) In conducting an assessment of legal costs payable as a result of an order made by a court or tribunal, the costs assessor must consider:
- 10 (a) whether or not it was reasonable to carry out the work to which the costs relate, and
- (b) whether or not the work was carried out in a reasonable manner, and
- (c) what is a fair and reasonable amount of costs for the work concerned.
- (2) In considering what is a fair and reasonable amount of legal costs, a costs assessor may have regard to any or all of the following matters:
- 15 (a) the skill, labour and responsibility displayed on the part of the Australian legal practitioner or Australian-registered foreign lawyer responsible for the matter,
- (b) the complexity, novelty or difficulty of the matter,
- 20 (c) the quality of the work done and whether the level of expertise was appropriate to the nature of the work done,
- (d) the place where and circumstances in which the legal services were provided,
- (e) the time within which the work was required to be done,
- (f) the outcome of the matter.
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