

**CERTAIN LLOYD'S UNDERWRITERS SUBSCRIBING TO CONTRACT  
NO. IH00AAQS v CROSS (S417/2011)**

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NO. IH00AAQS v THELANDER (S419/2011)**

Court appealed from: New South Wales Court of Appeal  
[2011] NSWCA 136

Date of judgments: 1 June 2011

Special leave granted: 9 December 2011

These matters concern the interpretation of legislation that limits legal costs payable by one party to the other in personal injury matters.

Mr John Cross, Mr Mark Thelander and Ms Jill Thelander ("the Respondents") were assaulted by hotel security officers. In the District Court of New South Wales, Judge Garling awarded each of them less than \$100,000 in damages for personal injury. On 22 April 2010 his Honour concluded that the legal costs to be awarded to each Respondent would be limited by section 198D of the *Legal Profession Act 1987* (NSW) ("the 1987 Act") to the greater of \$10,000 or 20% of damages.

The phrase "personal injury damages" is defined in both the 1987 Act and the *Legal Profession Act 2004* (NSW) ("the 2004 Act") as having "the same meaning as in Part 2 of the *Civil Liability Act 2002* (NSW)" ("the CLA"). Relevantly, section 11 of the CLA defines that phrase as meaning "damages that relate to the death of or injury to a person."

On 1 June 2011 the Court of Appeal (Hodgson & Basten JJA, Sackville AJA) ("the Court") unanimously allowed the Appellant Insurers' appeal. Their Honours found that the Respondents' legal costs were not limited by section 198D of the 1987 Act, or by section 338 of the 2004 Act. They held that the meaning of "personal injury damages" must be construed in accordance with Part 2 of the CLA. They noted that awards of damages where injury resulted from an intentional act (rather than negligence) are largely excluded from the operation of Part 2. The Court found it significant that the definition of "personal injury damages" in both the 1987 Act and the 2004 Act did not refer to the definition in section 11 of the CLA but to Part 2 generally. Their Honours held that such an interpretation was in accordance with the purpose of the CLA, which was the limitation of costs of compulsory insurance for negligence claims.

The grounds of appeal (in each matter) include:

- The Court erred in concluding (at [1], [59], [67] & [79] – [81]) that the Respondent's claim for damages in respect of certain assaults was not a claim for "personal injury damages" within the meaning of either section

198D of the 1987 Act or section 338 of the 2004 Act, and was thus not subject to the costs restrictions contained in those provisions.

- The Court erred in failing to conclude that the expression “personal injury damages” within the relevant provisions of the *Legal Profession Acts* had the same meaning as it has in the CLA, being the meaning given by the definition of the expression contained in that Act.