

HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL AND BELL JJ

Matter No S417/2011

CERTAIN LLOYD'S UNDERWRITERS
SUBSCRIBING TO CONTRACT NO IH00AAQS APPELLANT

AND

JOHN CROSS RESPONDENT

Matter No S418/2011

CERTAIN LLOYD'S UNDERWRITERS
SUBSCRIBING TO CONTRACT NO IH00AAQS APPELLANT

AND

MARK GEORGE THELANDER RESPONDENT

Matter No S419/2011

CERTAIN LLOYD'S UNDERWRITERS
SUBSCRIBING TO CONTRACT NO IH00AAQS APPELLANT

AND

JILL MARIA THELANDER RESPONDENT

*Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v
Cross*

*Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v
Thelander*

*Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v
Thelander*

[2012] HCA 56
12 December 2012
S417/2011 to S419/2011

ORDER

In each appeal:

1. *Appeal allowed.*
2. *Set aside paragraphs 4 and 5 of the order of the Court of Appeal of the Supreme Court of New South Wales made on 1 June 2011, and, in their place, order that the appeal to that Court be dismissed.*
3. *Appellants to pay the respondent's costs of the appeal to this Court.*

On appeal from the Supreme Court of New South Wales

Representation

R J H Darke SC with M J Stevens for the appellant in all matters (instructed by Riley Gray-Spencer Lawyers)

R T McKeand SC with A C Casselden for the respondents in all matters (instructed by G H Healey & Co Lawyers)

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CATCHWORDS

Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross

Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Thelander

Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Thelander

Costs – Limit on maximum costs in connection with claim for "personal injury damages" – *Legal Profession Act* 1987 (NSW), ss 198C and 198D – Where "personal injury damages" defined to have same meaning as in *Civil Liability Act* 2002 (NSW) – Whether maximum costs limitation applies to claims for personal injury damages resulting from intentional acts.

Statutory interpretation – Principles – Reading provision in context – Whether, when operative statute adopts term in source statute, account must be taken of operation of term in source statute – Effect of amendments to statute.

Words and phrases – "award of personal injury damages", "claim for personal injury damages", "maximum costs", "personal injury damages", "same meaning".

Civil Liability Act 2002 (NSW), Pt 2, ss 3, 9.

Legal Profession Act 1987 (NSW), Pt 11 Div 5B, ss 198C, 198D.

- 1 FRENCH CJ AND HAYNE J. These three appeals were heard together with *New South Wales v Williamson*¹. All four appeals concern the construction of provisions of New South Wales statutes that limit the costs that a court may order one party to pay another if the amount recovered on a claim for personal injury damages does not exceed a specified amount. The reasons in these appeals should be read with the reasons in *New South Wales v Williamson*.

The issue

- 2 New South Wales legislation regulated claims for "personal injury damages" and awards of "personal injury damages". The expression "personal injury damages" was defined to mean "damages that relate to the death of or injury to a person caused by the fault of another person". The respondents alleged that they had been assaulted by hotel security staff. They sued the appellants², as the insurers of the company that employed those staff, for trespass to the person claiming damages for personal injuries allegedly inflicted intentionally and with intent to injure. Were these claims for "personal injury damages" within the meaning of the relevant New South Wales Acts?

- 3 Answering this question requires consideration of Div 5B of Pt 11 (ss 198C-198I) of the *Legal Profession Act* 1987 (NSW) ("the 1987 Legal Profession Act") as inserted by the *Civil Liability Act* 2002 (NSW) ("the Liability Act")³. Later forms of the relevant legislation are discussed in *New South Wales v Williamson*.

The relevant provisions

- 4 Section 198D(1) of the 1987 Legal Profession Act fixed the maximum costs for legal services provided to a party in connection with "a claim for personal injury damages", "[i]f the amount recovered on [the claim] does not exceed \$100,000". A lawyer and client could contract out of this limitation⁴ by a "costs agreement" complying with Div 3 of Pt 11 of the 1987 Legal Profession Act. But s 198D(4)(b) provided that, subject to some exceptions which need not be considered, when the maximum costs for legal services provided to a party were fixed by Div 5B, "a court or tribunal cannot order the payment by another

1 [2012] HCA 57.

2 How and why the appellants were joined in the actions need not be examined.

3 s 8, Sched 2, item 2.2[2].

4 s 198E.

party to the claim of costs in respect of those legal services in an amount that exceeds that maximum".

5 Section 198C(2) of the 1987 Legal Profession Act provided that Div 5B did not apply to certain costs, namely, costs payable to an applicant for compensation under Pt 2 of the *Victims Support and Rehabilitation Act* 1996 (NSW) and costs for legal services provided in respect of certain other identified forms of statutory claim: claims under the *Motor Accidents Act* 1988 (NSW) or the *Motor Accidents Compensation Act* 1999 (NSW), claims for work injury damages as defined in the *Workplace Injury Management and Workers Compensation Act* 1998 (NSW) and claims for damages for dust diseases brought under the *Dust Diseases Tribunal Act* 1989 (NSW). The respondents' claims did not fall within any of these expressly excluded classes of claim.

6 Section 198C(1) defined terms used in Div 5B. In particular, it provided that "**personal injury damages** has the same meaning as in the *Civil Liability Act* 2002".

7 The Liability Act provided⁵ that, in *that Act*, "**personal injury damages** means damages that relate to the death of or injury to a person caused by the fault of another person". The Liability Act further provided⁶ that:

"**injury** means personal or bodily injury, and includes:

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

And it provided⁷ that "**fault** includes an act or omission".

8 Read together with the definitions of "injury" and "fault", the Liability Act's definition of "personal injury damages" can thus be expressed as follows. In the Liability Act:

5 s 3.

6 s 3.

7 s 3.

3.

"personal injury damages means damages that relate to the death of or personal or bodily injury (including pre-natal injury, psychological or psychiatric injury and disease) to a person caused by the fault (including an act or omission) of another person."

9 Section 198C and the other provisions of Div 5B of Pt 11 of the 1987 Legal Profession Act were introduced by the Liability Act as amendments connected with and consequential upon the enactment of the Liability Act. The two Acts did not, however, have identical areas of operation. The costs limiting provisions of Div 5B of Pt 11 of the 1987 Legal Profession Act applied to a "claim" for personal injury damages whereas Pt 2 of the Liability Act applied to an "award" of personal injury damages. And there were some similarities, but most importantly some differences, in the exclusions that were made from the operation of each Act.

10 Part 2 of the Liability Act regulated the amount recoverable as an "award of personal injury damages". As enacted, s 9(1) of the Liability Act provided that Pt 2 of the Act "applies to and in respect of an award of personal injury damages, except an award that is excluded from the operation of this Part". Section 9(2) excluded several kinds of awards of damages. The first of these exclusions⁸ was "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". Other exclusions included awards of damages for death or injury resulting from a motor accident to which either Pt 6 of the *Motor Accidents Act* 1988 (NSW) or Ch 5 of the *Motor Accidents Compensation Act* 1999 (NSW) applied⁹, awards of damages for death or injury to a worker to which Div 3 of Pt 5 of the *Workers Compensation Act* 1987 (NSW) applied¹⁰ and awards of damages for dust diseases brought under the *Dust Diseases Tribunal Act* 1989 (NSW)¹¹.

11 Some, but not all, of these excluded awards would be made following claims for personal injury damages that were expressly excluded from the operation of the costs limiting provisions of Div 5B of Pt 11 of the 1987 Legal Profession Act. Thus, particular kinds of award made under the *Motor Accidents Act* 1988, the *Motor Accidents Compensation Act* 1999 and the *Dust Diseases Tribunal Act* 1989 were excluded from the operation of Pt 2 of the Liability Act

8 s 9(2)(a).

9 s 9(2)(b).

10 s 9(2)(c).

11 s 9(2)(d).

and claims for those kinds of awards were excluded by s 198C(2) from the application of Div 5B of Pt 11 of the 1987 Legal Profession Act. Likewise, an "award comprising compensation under" the *Victims Support and Rehabilitation Act* 1996 (NSW) was excluded¹² from the operation of Pt 2 of the Liability Act and the costs payable to an applicant for compensation of that kind were excluded by s 198C(2)(a) from the operation of Div 5B of Pt 11 of the 1987 Legal Profession Act.

- 12 Although there was thus some similarity in the express exclusions that were contained in the 1987 Legal Profession Act and the Liability Act, there were also some differences between them. For example, the Liability Act also excluded¹³ from the operation of Pt 2 of that Act awards comprising compensation under certain Acts other than the *Victims Support and Rehabilitation Act* 1996, but none of those other Acts was mentioned in s 198C(2) of the 1987 Legal Profession Act. And, of greatest significance for the present appeals, the Liability Act excluded¹⁴ from the operation of Pt 2 "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" but there was no equivalent exclusion in Div 5B of Pt 11 of the 1987 Legal Profession Act.

The parties' arguments

- 13 The central point of difference between the parties in this Court was whether the definition of "personal injury damages" in the 1987 Legal Profession Act (it "has the same meaning as in" the Liability Act) was to be construed by reference only to the words of the definition of that expression in s 3 of the Liability Act or by reference to both the words of the definition and the limited operation which the Liability Act had in respect of awards of personal injury damages as a result of the exclusions in s 9(2) of the Liability Act.

- 14 The appellants submitted that s 198C(1) of the 1987 Legal Profession Act required reference only to the definition given in the Liability Act and that, as there defined, personal injury damages extended to any and every form of damages that relate to the death of or personal or bodily injury to a person caused by the fault of another person. In particular, the appellants submitted that "personal injury damages" included damages for trespass to the person and that, in the District Court, Garling DCJ had been right to declare, in effect, that s 198D of the 1987 Legal Profession Act was engaged.

12 s 9(2)(e).

13 s 9(2)(e).

14 s 9(2)(a).

5.

15 The respondents submitted that the costs limiting provisions of Div 5B of Pt 11 of the 1987 Legal Profession Act applied only to those claims for personal injury damages where the award of damages was regulated by Pt 2 of the Liability Act. They submitted that it follows that awards of the kind in issue in these appeals – "where the fault concerned is an intentional act that is done with intent to cause injury"¹⁵ – were not awards of personal injury damages because awards of damages resulting from an intentional act were not regulated by the Liability Act. On its face, that submission ignored the differences that have been noted between the provisions which each Act made for its own area of application. The Liability Act expressly excluded intentional torts. The 1987 Legal Profession Act did not. And yet, on the respondents' construction, the costs limiting provisions of the 1987 Legal Profession Act were not to apply to claims for personal injury damages for an intentional tort.

16 The respondents sought to surmount the obstacle of this textual difference, and thus justify their preferred construction, by reference to notions of "context" and "purpose". The respondents submitted that it is necessary to look not only to the words of the definition of "personal injury damages" in the Liability Act but also to the "context" provided by the other provisions of the Liability Act that define the scope of that Act's application to an "award of personal injury damages". This was said to follow, in particular, from the words "meaning" and "as in" in the definition of "personal injury damages" in s 198C(1) of the 1987 Legal Profession Act (it "has the same meaning as in" the Liability Act). And they submitted that the two Acts were intended to have the same sphere of operation because the relevant provisions were made at a time when there was concern about the costs associated with claims for damages for personal injuries caused by negligence.

The appeals to the Court of Appeal and this Court

17 The Court of Appeal (Hodgson and Basten JJA and Sackville AJA) held¹⁶ unanimously that the present respondents' construction should be adopted. Sackville AJA described¹⁷ the preferred construction as being that the definition of "personal injury damages" in s 198C(1) of the 1987 Legal Profession Act "meant personal injury damages *of the kind to which Part 2 of [the Liability Act] applied*" (emphasis added). Basten JA, who gave the principal reasons of the Court, concluded¹⁸ that there was "no basis", either in extrinsic material or "in

15 s 9(2)(a).

16 *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136.

17 [2011] NSWCA 136 at [71].

18 [2011] NSWCA 136 at [49].

terms of the policy underlying the legislation, to impose the cost-capping regime on all claims for personal injury damages, however they might arise, without reference to the carefully crafted exclusions in s 9(2)" of the Liability Act. Accordingly, Basten JA decided¹⁹ that the definition of "personal injury damages" in the relevant costs limiting provisions should be construed by "reference not merely to the definition of that expression in the source statute, but also to the scope of its application in the specified Part" of the Liability Act.

- 18 By special leave, the appellants appeal to this Court. These reasons will show that the appellants' construction of the costs limiting provisions should be adopted, not the construction favoured by the Court of Appeal.

Which costs limiting legislation?

- 19 The costs limiting provisions of the 1987 Legal Profession Act were repealed, with effect from 1 October 2005, by the *Legal Profession Act* 2004 (NSW) ("the 2004 Legal Profession Act"). The 2004 Legal Profession Act contained²⁰ costs limiting provisions in generally similar, but not identical, terms to those in the 1987 Legal Profession Act. Whether the earlier or the later provisions applied to the present cases depended upon the application of transitional provisions made by the 2004 Legal Profession Act. Those transitional provisions²¹ provided, in effect, that the new Act applied only to "a matter" in which the client had first given instructions on or after 1 October 2005.

- 20 In the Court of Appeal, some consideration was given²² to what was the relevant "matter" in these cases. Much of the reasons of Basten JA proceeded by reference to the costs limiting provisions of the 2004 Legal Profession Act rather than the 1987 Legal Profession Act because he concluded²³ that the relevant "matter" was the respondents' claim for costs, not their claim for damages.

- 21 There was limited argument on this issue in this Court. The appellants submitted that the relevant "matter" was the claim for damages, not the claim for costs, and that the respondents first gave instructions in that matter before

19 [2011] NSWCA 136 at [59]; see also at [1] per Hodgson JA, [79] per Sackville AJA.

20 Pt 3.2 Div 9.

21 s 737, Sched 9, cll 3 and 18.

22 [2011] NSWCA 136 at [2], [13]-[23].

23 [2011] NSWCA 136 at [23].

1 October 2005. The respondents submitted that the "matter" was the claim for costs. But the respondents' submissions noted that "[i]t is agreed that the question of whether the provisions of the [earlier] or the [later Act applies] does not affect the determination of the principal issue in the appeal[s]".

22 The reasons in *New South Wales v Williamson* examine the differences between the costs limiting provisions of the two Acts and the amendments that had been made to the Liability Act by the time the 2004 Legal Profession Act was enacted. As those reasons show, the same answers should be given to the questions which arise about the construction of the later provisions as the answers to be given about the construction of the earlier provisions. Because no different answer should be given, the application of the transitional provisions need not be examined. Attention can and should be confined in these appeals to the resolution of the issue of construction of the 1987 Legal Profession Act that has been identified.

Some basic principles

23 It is as well to begin consideration of this issue by re-stating some basic principles. It is convenient to do that by reference to the reasons of the plurality in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*²⁴:

"This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself²⁵. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text²⁶. The language which has actually been

24 (2009) 239 CLR 27 at 46-47 [47]; [2009] HCA 41.

25 *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 77 [9] per Gaudron, Gummow, Hayne and Callinan JJ, 89 [46] per Kirby J; [2001] HCA 49; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at 206 [30] per Gleeson CJ, Gummow, Hayne and Heydon JJ, 240-241 [167]-[168] per Kirby J; [2005] HCA 58; *Carr v Western Australia* (2007) 232 CLR 138 at 143 [6] per Gleeson CJ; [2007] HCA 47; *Director of Public Prosecutions (Vic) v Le* (2007) 232 CLR 562 at 586 [85] per Kirby and Crennan JJ; [2007] HCA 52; *Northern Territory v Collins* (2008) 235 CLR 619 at 642 [99] per Crennan J; [2008] HCA 49.

26 *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529 at 538 [22] per Gleeson CJ, Gummow, Hayne and Heydon JJ, 555-556 [82]-[84] per Kirby J; [2006] HCA 11. See also *Combet v The Commonwealth* (2005) 224 CLR 494 at 567 [135] per Gummow, Hayne, Callinan and Heydon JJ; [2005] HCA 61; *Northern Territory v Collins* (2008) 235 CLR 619 at 642 [99] per Crennan J.

employed in the text of legislation is the surest guide to legislative intention²⁷. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision²⁸, in particular the mischief²⁹ it is seeking to remedy."

24 The context and purpose of a provision are important to its proper construction because, as the plurality said in *Project Blue Sky Inc v Australian Broadcasting Authority*³⁰, "[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute³¹" (emphasis added). That is, statutory construction requires deciding what is the legal meaning of the relevant provision "by reference to the language of the instrument viewed as a whole"³², and "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed"³³.

25 Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose of a statute resides in its text and structure³⁴. Determination of a statutory purpose neither permits nor requires some search for

27 *Hilder v Dexter* [1902] AC 474 at 477-478 per Earl of Halsbury LC.

28 *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 per Dixon CJ; [1955] HCA 27, quoted with approval in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28.

29 *Heydon's Case* (1584) 3 Co Rep 7a at 7b [76 ER 637 at 638].

30 (1998) 194 CLR 355 at 381 [69].

31 See *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 213 per Barwick CJ; [1976] HCA 36.

32 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320; [1981] HCA 26; *Project Blue Sky* (1998) 194 CLR 355 at 381 [69].

33 *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 per Dixon CJ; *Project Blue Sky* (1998) 194 CLR 355 at 381 [69].

34 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 592 [44]; [2011] HCA 10.

what those who promoted or passed the legislation may have had in mind when it was enacted. It is important in this respect, as in others³⁵, to recognise that to speak of legislative "intention" is to use a metaphor. Use of that metaphor must not mislead. "[T]he duty of a court is to give the words of a statutory provision the meaning that the legislature *is taken to have intended* them to have"³⁶ (emphasis added). And as the plurality went on to say³⁷ in *Project Blue Sky*:

"Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction³⁸ may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."

To similar effect, the majority in *Lacey v Attorney-General (Qld)*³⁹ said:

"Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts." (footnote omitted)

The search for legal meaning involves application of the processes of statutory construction. The identification of statutory purpose and legislative intention is the product of those processes, not the discovery of some subjective purpose or intention.

26 A second and not unrelated danger that must be avoided in identifying a statute's purpose is the making of some a priori assumption about its purpose. The purpose of legislation must be derived from what the legislation says, and

35 *Zheng v Cai* (2009) 239 CLR 446 at 455 [28]; [2009] HCA 52; *Momcilovic v The Queen* (2011) 85 ALJR 957 at 1009 [146(v)], 1028 [258], 1039 [315], 1040 [321]; 280 ALR 221 at 274, 299, 315-316; [2011] HCA 34.

36 *Project Blue Sky* (1998) 194 CLR 355 at 384 [78].

37 (1998) 194 CLR 355 at 384 [78].

38 For example, the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities: *Coco v The Queen* (1994) 179 CLR 427 at 437; [1994] HCA 15.

39 (2011) 242 CLR 573 at 592 [43].

not from any assumption about the desired or desirable reach or operation of the relevant provisions⁴⁰. As Spigelman CJ, writing extra-curially, correctly said⁴¹:

"Real issues of judicial legitimacy can be raised by judges determining the purpose or purposes of Parliamentary legislation. *It is all too easy for the identification of purpose to be driven by what the particular judge regards as the desirable result in a specific case.*" (emphasis added)

And as the plurality said in *Australian Education Union v Department of Education and Children's Services*⁴²:

"In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose." (footnote omitted)

Context

27 Because "context" loomed large in argument in this Court, particularly in the submissions of the respondents in these appeals, it is necessary to say something more about the use of "context" in statutory interpretation.

28 It is not to be doubted⁴³ that the relevant provisions must be construed in context, and the contrary was not suggested in argument. But there was some debate about what use could be made of provisions of the Liability Act in construing the definition of "personal injury damages" in the 1987 Legal Profession Act.

29 In construing the definition of "personal injury damages" contained⁴⁴ in the Liability Act ("damages that relate to the death of or injury to a person caused by the fault of another person") it is no doubt necessary to have regard not only

40 See *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 262 [28]; [2005] HCA 28; *Byrnes v Kendle* (2011) 243 CLR 253 at 283 [97]; [2011] HCA 26.

41 Spigelman, "The intolerable wrestle: Developments in statutory interpretation", (2010) 84 *Australian Law Journal* 822 at 826.

42 (2012) 86 ALJR 217 at 224 [28]; 285 ALR 27 at 35; [2012] HCA 3. See also *Miller v Miller* (2011) 242 CLR 446 at 459 [29]; [2011] HCA 9.

43 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2.

44 s 3.

to the words of the definition but also to the context in which the definition was set. So much follows from what has been said about statutory construction in the cases to which reference has been made.

30 Nothing said in *The Producers' Co-operative Distributing Society Ltd v Commissioner of Taxation (NSW)*⁴⁵ in this Court or on appeal to the Privy Council⁴⁶ denies the general proposition that regard must be had to context, or requires that a definition which is picked up from one statute (the source Act) and applied in another be construed by reference only to its words without regard to the context provided by the source Act. Indeed, in the *Producers' Co-operative Case*, Dixon J expressly acknowledged⁴⁷ the need to consider the context provided by the other provisions of the source Act when considering a definition provided for in that Act and picked up and applied by another.

31 It may be accepted that there are some limitations to the use that can properly be made of other provisions of the source Act when construing a definition in the source Act that is picked up and applied by another Act. As both Latham CJ⁴⁸ and the Privy Council pointed out⁴⁹ in the *Producers' Co-operative Case*, if the definition that is picked up is to be applied in the source Act only "unless the context or subject-matter otherwise indicates or requires", the particular meaning that the term in question may have in any particular provision of the source Act will not elucidate the meaning of the general definition of the term. But it by no means follows from this observation that a definition should be construed without regard to its context. That is why the Privy Council in the *Producers' Co-operative Case* treated⁵⁰ the activities which the source Act in question permitted as explaining "the general meaning and application of the definition" in question.

32 Resolution of these appeals ultimately does not depend upon examining when or to what extent it is necessary to consider the context of the definition of "personal injury damages" in the Liability Act in construing that expression in

45 (1944) 69 CLR 523 at 531-532 per Latham CJ, 536 per Dixon J; [1944] HCA 39.

46 *Producers' Co-Operative Distributing Society Ltd v Commissioner of Taxation (NSW)* (1947) 75 CLR 134 at 137; [1948] AC 210 at 213.

47 (1944) 69 CLR 523 at 536.

48 (1944) 69 CLR 523 at 531-532.

49 (1947) 75 CLR 134 at 137; [1948] AC 210 at 213.

50 (1947) 75 CLR 134 at 137; [1948] AC 210 at 213.

the 1987 Legal Profession Act. Although the respondents' arguments were couched in terms of "context", upon analysis they sought to go further than elucidate the meaning of the expression "personal injury damages" as it was used in the 1987 Legal Profession Act by consideration of its statutory context in the Liability Act. Rather, they sought to treat s 198C(1) of the 1987 Legal Profession Act as providing that "personal injury damages" means personal injury damages of the kind to which Pt 2 of the Liability Act applied. It is more useful to focus attention on that proposed construction than to investigate, in the abstract, the use of "context" in statutory interpretation.

Construing s 198C(1)

33 The construction favoured by the Court of Appeal and supported in this Court by the respondents must be rejected. The text of the provisions at issue in these appeals readily yields the construction which the appellants urged: that the expression "personal injury damages" when used in the costs limiting provisions of Div 5B of Pt 11 of the 1987 Legal Profession Act extended to any and every form of damages that relate to the death of or personal or bodily injury to a person caused by the fault of another person. In its terms, the definition of "personal injury damages" contained in the Liability Act and picked up by the 1987 Legal Profession Act neither required nor permitted any different application according to whether the "fault" which founded the claim was a failure to take reasonable care or the commission of an intentional act with intent to injure. And s 198C(1) of the 1987 Legal Profession Act, by providing that "personal injury damages" has the same *meaning* as in the Liability Act, naturally and immediately directed attention to the definition of that expression in the Liability Act, which used the cognate word "means": "personal injury damages *means* ..." (emphasis added). It did not refer to the operation or application of the Liability Act. It did not direct attention to whatever was identified as being the legal effect or consequence which the Liability Act produced by using that defined expression in its various provisions.

34 At least in this Court, if not also in the courts below, the respondents' argument for confining the application of the costs limiting provisions by reference to the operation or application of the Liability Act depended upon a false premise. The respondents focused attention on the expression "personal injury damages" as if that expression was the hinge on which both the 1987 Legal Profession Act and the Liability Act turned. Hence, their argument was that "personal injury damages" in the 1987 Legal Profession Act is to be confined to those "personal injury damages" regulated by the Liability Act.

35 The premise underlying this argument is not sound. Each Act used the defined expression "personal injury damages" as part of a larger composite phrase: "*award* of personal injury damages" in the Liability Act and "*claim* for personal injury damages" in the 1987 Legal Profession Act (emphasis added).

The hinge on which the relevant operation of each Act turned was the larger composite phrase and not the defined expression "personal injury damages". None of the statutory provisions that depended on the composite expressions "claim for personal injury damages" or "award of personal injury damages" affected the sense in which the defined expression "personal injury damages" was used in the relevant Acts. There is no textual reason to limit the expression "personal injury damages" in the 1987 Legal Profession Act to those *claims* for personal injury damages the award of which was regulated by the Liability Act.

36 There is an additional problem with the respondents' argument. It assumed that the costs limiting provisions of the 1987 Legal Profession Act and the Liability Act were to have coextensive operation. For example, the respondents submitted that "the *Civil Liability Act* and the costs limitation provisions of the Legal Profession Act were introduced as a single package of reforms in the *Civil Liability Act* and were clearly intended to work in harmony". From this premise, the argument continued that because the Liability Act regulated some but not all forms of *awards* of "personal injury damages", the only *claims* for "personal injury damages" to which the costs limiting provisions of the 1987 Legal Profession Act applied were those claims for personal injury damages the award of which was regulated by the Liability Act. Again, the premise underpinning this argument is not right.

37 The use of the defined expression "personal injury damages" in both composite phrases provides no *textual* basis for reading the defined expression (when it is used in the 1987 Legal Profession Act) as confined by reference to the Liability Act's field of operation once due regard is paid to the wider, and different, composite expressions that are central to the relevant provisions of each Act. Further, as has already been noted, the two Acts expressly identified circumstances in which their respective provisions were not to apply, some of which were the same but some of which were different. In their very terms the relevant provisions of the two Acts demonstrate that each had, and was intended to have, a different area of operation.

38 Considerations of context do not support the conclusion that the two Acts are to be read as having coextensive fields of operation. The Liability Act's exclusion of intentional torts done with intent to injure from the application of its operative provisions (all of which were originally to be found in Pt 2 of the Act) demonstrates that the mischiefs to which *that* Act was directed were identified as arising in connection with claims for damages for personal injury *other* than claims in respect of intentional torts. It by no means follows, however, that the mischiefs to which Div 5B of Pt 11 of the 1987 Legal Profession Act was directed were confined to mischiefs arising in respect of only those classes of claims for personal injury damages the award of which was regulated by the Liability Act. Particularly is that so when intentional torts were not expressly excluded from the operation of Div 5B, as they might so easily have been.

39 The only circumstance which can be identified as suggesting that the "purpose" or "intention" of Div 5B should be read as confined in the manner described is that it was the Liability Act which introduced the relevant provisions into the 1987 Legal Profession Act. But when it is observed that the provisions of the two Acts were not connected, as they might so easily have been, by express reference in the 1987 Legal Profession Act to the *operation* of the Liability Act, it is apparent that the supposed limitation by reference to "purpose" or "intention" is not soundly based. The text of the relevant provisions provides no support for confining Div 5B to those claims for personal injury damages the award of which was regulated by Pt 2 of the Liability Act. The statutory text reveals no "intention" so to confine Div 5B.

40 The reasons of the Court of Appeal illustrate the dangers of reasoning from legislative "intention" that is not based, as it must be, in the text of the relevant legislation. The Court of Appeal stated⁵¹ that there was "no basis" in "the policy underlying the legislation" (presumably both the provisions of the Liability Act and the provisions which it introduced into the 1987 Legal Profession Act) for imposing the costs limiting provisions of the latter Act "without reference to the carefully crafted exclusions in s 9(2)" of the Liability Act. No foundation for making such an assumption about "the policy underlying the legislation" was identified, whether in the reasons of the Court of Appeal or in argument in this Court. Neither the paragraphs from extrinsic material quoted⁵² by the Court of Appeal nor the Court of Appeal's earlier decision in *Newcastle City Council v McShane (No 3)*⁵³ founded the asserted assumption. To say, as the Court of Appeal did⁵⁴, that there was "no basis" in extrinsic material or "in terms of the policy underlying the legislation" for imposing the costs limiting provisions on all claims for personal injury damages is to assume the answer to the question of construction and then ask whether the assumed answer is falsified.

41 It is not legitimate to identify a legislative purpose not apparent from the text of the relevant provisions (or in this case even expressed in some extrinsic material), to examine extrinsic material and notice that there is nothing positively inconsistent with the identified purpose, and then to answer the question of construction by reference to the purpose that was initially assumed. That reasoning is not sound. It is reasoning of the kind of which Spigelman CJ rightly

51 [2011] NSWCA 136 at [49].

52 [2011] NSWCA 136 at [41]-[48].

53 (2005) 65 NSWLR 155, referred to at [2011] NSWCA 136 at [39]-[40].

54 [2011] NSWCA 136 at [49].

disapproved in the extra-curial writing set out earlier in these reasons. Statutory "purpose" and "intention" are to be identified according to the principles that were described earlier under the heading "Some basic principles". Once that is done, it becomes apparent that the text and context of the relevant provisions point towards the construction supported by the appellants in these appeals: a claim for personal injury damages includes any and every form of claim for damages that relate to the death of or personal or bodily injury to a person caused by the fault of another person whether it be a failure to take reasonable care or the commission of an intentional act with intent to injure.

Conclusion and orders

42 The claims which the respondents made were claims for damages that related to personal or bodily injury suffered by them. Contrary to the conclusions reached by the Court of Appeal in each matter, the claims that each respondent made were "claims for personal injury damages" within the meaning of s 198D(1) of the 1987 Legal Profession Act.

43 Each appeal should be allowed. In each appeal pars (4) and (5) of the orders of the Court of Appeal made on 1 June 2011 should be set aside and in their place there should be orders that the appeal to that Court is dismissed. In accordance with the appellants' undertaking proffered and accepted when special leave to appeal was granted, the appellants should in each case pay the respondent's costs of the appeal to this Court.

- 44 CRENNAN AND BELL JJ. In New South Wales, the statute that regulates the legal profession imposes a restriction on the maximum costs that one party may recover from another in connection with a claim for personal injury damages in which the amount recovered on the claim does not exceed \$100,000 ("small claims"). The scheme was introduced as Div 5B of Pt 11 of the *Legal Profession Act* 1987 (NSW) ("the 1987 LP Act") in a Schedule to the *Civil Liability Act* 2002 (NSW) ("the Liability Act"). The 1987 LP Act was repealed by the *Legal Profession Act* 2004 (NSW) ("the 2004 LP Act") and the costs restrictions are now found in Ch 3, Pt 3.2, Div 9 of that Act. The question raised by these appeals is whether the restrictions apply to a small claim for damages for personal injury suffered as the result of an act done with intent to cause injury or death. The answer turns on the meaning of the words "personal injury damages" contained in s 198C(1) of the 1987 LP Act (now s 337(1) of the 2004 LP Act).

Factual background

- 45 The respondents were assaulted at the Narrabeen Sands Hotel by security guards who had been engaged to provide security services at the hotel. The respondents brought proceedings in the District Court of New South Wales claiming damages for the injuries suffered by them in the assaults. In July 2005, AVS Australian Venue Security Services Pty Ltd ("AVS"), the employer of the security guards, was joined as a defendant to the proceedings. AVS later went into liquidation and the appellants, AVS's insurers, were joined as defendants to the proceedings. Following a trial lasting in the order of 22 days, judgment was entered for the respondents. The damages awarded in each case were for an amount less than \$100,000. On 22 April 2010, Garling DCJ ordered that the appellants were to pay the respondents' costs. His Honour made a declaration that the costs were subject to s 198D of the 1987 LP Act.

Division 5B of Pt 11 of the 1987 LP Act

- 46 Section 198D⁵⁵ is the central provision in Div 5B. Section 198D(1)(a) provides that 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 plaintiff are fixed at 20% of the amount recovered or \$10,000, whichever is greater. Sections 198E and 198F provide exceptions to the cap in the case of solicitor and own client costs that are the subject of an agreement that complies with the statute, and costs incurred after the date of a reasonable offer of compromise that is not accepted by the other party. Section 198G permits the court to exclude from the cap costs for legal services provided in response to

⁵⁵ Section 338 of the 2004 LP Act makes provision in substantially the same terms as s 198D of the 1987 LP Act.

actions taken by the other party that were not reasonably necessary for the advancement of that party's case. As noted, Div 5B is a scheme that restricts the recovery of costs in connection with claims for "personal injury damages". That expression is described for the purposes of Div 5B in s 198C(1) as follows: "*personal injury damages* has the same meaning as in Part 2 of the [Liability Act]."

47 The Liability Act defines "personal injury damages" for the purposes of Pt 2 in s 11:

"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."

48 The heading of Pt 2 is "Personal injury damages". Part 2 applies in respect of awards of personal injury damages except those that are excluded from its operation by s 3B⁵⁶. Section 3B(1)(a) in Pt 1 of the Liability Act states that the provisions of the Liability Act "do not apply to or in respect of civil liability (and awards of damages in those proceedings)" in the case of liability for an intentional act done by a person with intent to cause injury or death or with respect to a sexual assault or other sexual misconduct. This is one of a number of exclusions for which s 3B(1) provides.

Procedural history

49 Garling DCJ reasoned that the respondents' claims were for "personal injury damages" for the purposes of s 198D because each was a claim for damages relating to injury to a person within the meaning of s 11 of the Liability Act, as picked up by s 198C(1).

50 The New South Wales Court of Appeal (Hodgson and Basten JJA and Sackville AJA) allowed the respondents' appeals against that part of the costs orders which declared that the costs were subject to s 198D. The Court of

⁵⁶ Liability Act, s 11A(1).

Appeal interpreted the words "has the same meaning as in Part 2 of the [Liability Act]" as applying the words of the definition in s 11 by reference to their application in Pt 2 of the Liability Act⁵⁷. The Court of Appeal made a declaration that the legal costs incurred by the respondents were not subject to s 198D of the 1987 LP Act, nor to s 338 of the 2004 LP Act.

51 On 9 December 2011, the appellants were given special leave to appeal from the order of the Court of Appeal. Their appeals were heard together with the appeal in *New South Wales v Williamson*⁵⁸, which raised the same constructional question. These reasons should be read with those in *Williamson*.

52 For the reasons that follow, we would dismiss the appeal.

The 1987 LP Act or the 2004 LP Act?

53 The costs orders were made by Garling DCJ on 22 April 2010. The 1987 LP Act was repealed by the 2004 LP Act, which commenced on 1 October 2005. Transitional provisions provided for the continued application of Div 5B of Pt 11 of the 1987 LP Act to a matter if the client first instructed the law practice in the matter before 1 October 2005⁵⁹. Garling DCJ applied the 1987 LP Act. The appellants submitted that his Honour was correct to do so. This had been a common position below. Basten JA thought that the "matter" under the transitional provisions was the claim for party and party costs and that the 2004 LP Act applied. The respondents adopted Basten JA's analysis and in their written submissions asserted that the question should be determined by reference to the 2004 LP Act. The operative provisions of the two Acts are identical in their application to the appeals. Little attention was devoted to the operation of the transitional provisions on the hearing of the appeals. There are differences between the two schemes that are not raised by these appeals⁶⁰, which make it appropriate to leave consideration of the effect of the transitional provisions to an occasion when it is in point.

57 *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [49] per Basten JA (Hodgson JA agreeing at [1]), [71] per Sackville AJA.

58 [2012] HCA 57.

59 2004 LP Act, Sched 9, cl 18(1).

60 Under s 338A of the 2004 LP Act, there is provision for the maximum costs fixed under Div 9 of Pt 3.2 to be increased in the case of certain claims heard in the District Court. No equivalent provision was made under Div 5B of Pt 11 of the 1987 LP Act.

54 The appellants' submissions were based on Div 5B of Pt 11 of the 1987 LP Act and the Liability Act as enacted. In their submission, the meaning of the expression "personal injury damages" had not been affected by later amendments including those introduced in December 2002 by the *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW) ("the Personal Responsibility Act"). There is no reason to consider that the meaning of "personal injury damages" has changed as the result of any of the amendments that have been made to the Liability Act, although the relationship between the two Acts may be clearer as a result of the amendments.

The legislative history

55 Division 5B of Pt 11 was inserted into the 1987 LP Act by Sched 2 to the Liability Act. As enacted, s 198C(1) provided that "***personal injury damages*** has the same meaning as in the [Liability Act]." At the time, the Liability Act consisted of two Parts. Part 1 was headed "Preliminary" and contained a definition section. Part 2 was headed "Personal injury damages" and contained provisions imposing restrictions of various kinds on the award of damages in claims for personal injury damages whether the claim was in tort, contract or otherwise. The expression "personal injury damages" was defined in s 3 to mean "damages that relate to the death of or injury to a person caused by the fault of another person." "Fault" was defined to include an act or omission. "Injury" was defined to mean "personal or bodily injury" and to include "pre-natal injury", "psychological or psychiatric injury" and "disease". Under s 9(2), statutory schemes governing compensation for motor accidents, work injuries, dust diseases, victims support and rehabilitation, discrimination and sporting injuries, together with sums paid under superannuation schemes or insurance policies or under the *Industrial Relations Act* 1996 (NSW), were excluded from the operation of Pt 2 of the Liability Act. Importantly, s 9(2)(a) excluded from the operation of Pt 2:

"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".

56 The Liability Act was assented to on 18 June 2002. It operated with retrospective effect from 20 March 2002⁶¹. This was the date on which the Premier of New South Wales released a Ministerial statement, titled "Public liability insurance", announcing the measures to be enacted in the proposed civil liability legislation. An extract from the statement is set out in Basten JA's reasons. The Premier referred in the statement to "the number of small claims

61 Liability Act, s 2.

that are argued in a way that drives up legal costs and makes insurance more expensive." One way to address that problem was said to be "to cap legal costs for small claims to a proportion of the claim."⁶²

57 The restrictions on the recovery of party and party costs inserted into the 1987 LP Act by the Liability Act also operated with retrospective effect. They applied to legal services provided on or after 7 May 2002. On that date, the Premier announced the release of the draft Civil Liability Bill 2002⁶³ ("the Liability Bill").

58 In his second reading speech for the Liability Bill, the Premier described it as implementing "stage one of the Government's tort law reforms." The need for reform was said to be "vital to the survival of our community" in light of "the damage that the public liability crisis is doing to our sporting and cultural activities, small businesses and tourism operators, and our local communities." The second stage of the tort law reform program was proposed to be introduced in the next session of the Parliament and to address "broad-ranging reforms to the law of negligence."⁶⁴ Reference was made to the "cap on fees" under the amendments to the 1987 LP Act. This, it was said, would "promote efficiency on the part of the legal profession and help to contain claims costs."⁶⁵ In conclusion, the Liability Bill was said to "build[] on the Government's work with the insurance industry and other jurisdictions to find solutions for people affected by the public liability crisis."⁶⁶

59 The second stage of the reforms initiated by the Liability Act was effected by the Personal Responsibility Act⁶⁷. It was enacted not long after the Final

62 *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [41].

63 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 May 2002 at 2085.

64 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 May 2002 at 2085.

65 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 May 2002 at 2087.

66 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 May 2002 at 2088.

67 The relevant provisions of the Personal Responsibility Act commenced on 6 December 2002.

Report of the Commonwealth committee chaired by Justice Ipp was published⁶⁸. The amendments introduced by the Personal Responsibility Act included Pt 1A, which contains a statement of the principles governing the determination of civil liability for the negligent infliction of harm. Provisions were also introduced dealing with mental harm⁶⁹, proportionate liability⁷⁰, the liability of public and other authorities⁷¹, intoxication⁷², self-defence and recovery by criminals⁷³, good Samaritans⁷⁴, volunteers⁷⁵ and apologies⁷⁶. These provisions were not confined to civil liability for personal injury or death. The award of "personal injury damages" continued to be governed by Pt 2. The definitions of "personal injury damages" and "injury" were removed from Pt 1 and inserted into Pt 2 in s 11. The definition of "personal injury damages" no longer contained reference to fault. "Personal injury damages" was now defined to mean "damages that relate to the death of or injury to a person."

60 The Personal Responsibility Act effected a consequential amendment to the 1987 LP Act⁷⁷. The description of "personal injury damages" in s 198C(1) was omitted and a new description was inserted. Section 198C(1) now provided "**personal injury damages** has the same meaning as in Part 2 of the [Liability Act]." Section 9 of the Liability Act was repealed. In its place, s 3B was inserted into Pt 1. Section 3B excluded the provisions of the Liability Act from applying to or in respect of civil liability under statutory schemes for compensation which largely corresponded to the exclusions under the former s 9. Relevantly, s 3B(1)(a) excluded from the provisions of the Liability Act the civil

68 *Review of the Law of Negligence: Final Report*, (2002).

69 Liability Act, Pt 3.

70 Liability Act, Pt 4.

71 Liability Act, Pt 5.

72 Liability Act, Pt 6.

73 Liability Act, Pt 7.

74 Liability Act, Pt 8.

75 Liability Act, Pt 9.

76 Liability Act, Pt 10.

77 Personal Responsibility Act, Sched 4, cl 4.5.

liability of a person "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".

61 The Liability Act has been further amended in respects to which it is not necessary to refer, save to note the insertion in Pt 2 of s 15B and the amendment to s 18(1) in 2006⁷⁸. Section 15B makes provision for the award of damages for the loss of capacity to provide domestic services. The amendments made to s 18(1) were to preclude the award of interest on damages under s 15B. The exclusion of the provisions of the Liability Act with respect to the civil liability of a person for an intentional act done with intent to cause injury or death under s 3B(1)(a) was now subject to an exception in the case of s 15B and s 18(1) (in its application to the award of s 15B damages)⁷⁹. The effect of the 2006 amendments is that Pt 2 now applies to the award of damages with respect to the loss of capacity to provide domestic services that relate to the death of or injury to a person arising from an intentional act done with intent to cause injury or death.

The Court of Appeal

62 Basten JA gave the leading judgment in the New South Wales Court of Appeal, with which Hodgson JA agreed. His Honour considered that the words in s 198C(1) "**personal injury damages** has the same meaning as in Part 2 of the [Liability Act]" admitted of a "broader inquiry" than if the provision read "personal injury damages as defined in"⁸⁰. In ascertaining that meaning, his Honour took into account the context of the definition in the source statute⁸¹ and that "the cost-capping provisions were seen as part of a single package, having the same justification as the controls being imposed on awards of damages."⁸² The incorporation of the meaning of "personal injury damages" in the Liability Act indicated a legislative intention that the scope and operation of the expression derive from the source statute⁸³. His Honour concluded that the description of "personal injury damages" in s 198C(1) of the 1987 LP Act picks

78 *Civil Liability Amendment Act 2006* (NSW).

79 *Civil Liability Amendment Act 2006* (NSW), Sched 1 [1]-[4].

80 *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [35].

81 *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [32]-[33] citing *Producers' Co-Operative Distributing Society Ltd v Commissioner of Taxation* (NSW) (1947) 75 CLR 134 at 137; [1948] AC 210 at 213.

82 *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [49].

83 *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [59].

up the words of the definition in the Liability Act in their application under that Act⁸⁴ with the result that a party injured by intentional tortious conduct is not subject to the costs cap⁸⁵.

63 Sackville AJA also concluded that the description of "personal injury damages" in s 198C(1) means personal injury damages of the kind to which Pt 2 of the Liability Act applied⁸⁶. His Honour, too, took into account that Div 5B of Pt 11 of the 1987 LP Act was enacted as "part of a broader statutory scheme for limiting the costs of personal injury claims" and that the scheme did not apply to awards of damages for personal injuries caused by intentional acts⁸⁷. His Honour characterised claims in negligence for personal injury as "high volume litigation conducted or capable of being conducted along largely standardised lines", and which are usually brought against insured defendants⁸⁸. This was by way of contrast with claims arising from the intentional infliction of injury⁸⁹. This contrast highlights a rationale for capping costs in claims in negligence for personal injury which does not readily apply to claims arising from intentional torts.

64 Five weeks after judgment was delivered in these appeals, a differently constituted New South Wales Court of Appeal (Hodgson, Campbell and Macfarlan JJA) gave judgment in *State of New South Wales v Williamson*⁹⁰. The claim in *Williamson* was for damages for personal injury sustained in an assault and damages for false imprisonment. The latter included claims for the loss of liberty, loss of dignity and exemplary damages. The claim was settled and judgment entered for the plaintiff by consent for an undifferentiated sum. Costs were to be assessed or agreed⁹¹. Resolution of the present question was not determinative on the view that any of the judges took in *Williamson*. However, Campbell and Macfarlan JJA both doubted the correctness of the construction

84 *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [49].

85 *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [59].

86 *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [71].

87 *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [73].

88 *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [74].

89 *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [75].

90 [2011] NSWCA 183.

91 *State of New South Wales v Williamson* [2011] NSWCA 183 at [16].

adopted by the Court of Appeal in these proceedings. Hodgson JA, who sat on each appeal, adhered to his earlier agreement with Basten JA⁹² and gave additional reasons for that conclusion. His Honour took into account that s 198C was introduced into the 1987 LP Act as part of "a single package, addressing a perceived crisis in public liability insurance". He considered that the phrase "the same meaning as in the [Liability Act]" ... could be understood as directing attention to the meaning *effectually* given in the [Liability Act], and thus as incorporating the limitations" on its application⁹³.

65 Campbell JA made much the same point as Sackville AJA in these appeals respecting the distinction between small claims in negligence, which fit a "fairly common pattern", and small claims for damages for assault, which do not⁹⁴. His Honour viewed the enactment of the costs restrictions as part of a single scheme and remarked that the imposition of a cap on costs in claims for assault did not appear to come within the mischief to which the Liability Act was principally aimed⁹⁵, which he identified as the increasing costs of insurance premiums. He noted that insurance for intentional torts will usually be unprocurable⁹⁶. His Honour went on to say this⁹⁷:

"However, it is the words of the statute that are the starting point in statutory construction. While those words are to be construed in their context (which includes the objective of the legislation in question), clear words in the statute will prevail."

66 Macfarlan JA agreed with Campbell JA. His Honour recognised the "contextual and policy arguments" favouring the views expressed by the Court of Appeal in the present case but considered the text of the 2004 LP Act to be clear. His Honour said that the meaning of "personal injury damages" is found in the

92 *State of New South Wales v Williamson* [2011] NSWCA 183 at [3].

93 *State of New South Wales v Williamson* [2011] NSWCA 183 at [4] (emphasis in original).

94 *State of New South Wales v Williamson* [2011] NSWCA 183 at [29].

95 *State of New South Wales v Williamson* [2011] NSWCA 183 at [29], [79].

96 *State of New South Wales v Williamson* [2011] NSWCA 183 at [29].

97 *State of New South Wales v Williamson* [2011] NSWCA 183 at [29].

definition, but the scope of the application of the expression is a separate question⁹⁸. His Honour considered that⁹⁹:

"the literal meaning of the text of a statutory provision must prevail unless it can be disregarded upon the ground that that literal meaning gives rise to an absurdity or the text is sufficiently tractable to accommodate the meaning suggested by contextual or policy considerations".

The submissions

67 The parties' submissions mirrored the differing views of the members of the Court of Appeal in these appeals and in *Williamson*. The appellants contended that "the ordinary meaning of [the statutory language] plainly indicated that the *Legal Profession Acts* were employing the meaning of an expression found (and clearly defined) in another Act." The appellants were critical of the Court of Appeal's recourse to extrinsic materials "to discern an intended meaning other than the ordinary meaning conveyed by the statutory language". The respondents contended that the Court of Appeal was correct to take into account that Div 5B of Pt 11 of the 1987 LP Act had been enacted as part of a scheme with the Liability Act and to give a purposive construction to the provision.

Construing s 198C(1)

68 Statutory construction involves the identification of the purpose of a statute or a statutory provision. A court undertaking that task is concerned with the assignment of the legal meaning to the words of the text, a task that will usually, but not always, correspond with the ordinary grammatical meaning of the text. In the joint reasons in *Project Blue Sky Inc v Australian Broadcasting Authority*¹⁰⁰, it was said:

"However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond

98 *State of New South Wales v Williamson* [2011] NSWCA 183 at [118].

99 *State of New South Wales v Williamson* [2011] NSWCA 183 at [119] citing *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 263-265 [27]-[33]; [2010] HCA 23; *Catlow v Accident Compensation Commission* (1989) 167 CLR 543 at 550; [1989] HCA 43.

100 (1998) 194 CLR 355 at 384 [78] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28 (footnote omitted).

with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."

69 In the last-mentioned respect, their Honours referred with approval to the statement in Mr Bennion's text¹⁰¹:

"Furthermore there needs to be brought to the grammatical meaning of an enactment due consideration of the relevant matters drawn from the context (using that term in its widest sense). Consideration of the enactment in its context may raise factors that pull in different ways. For example the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that Parliament intended to deal with."

70 Whilst consideration of extrinsic materials should not displace the clear meaning of the text of a provision¹⁰², the purpose of a provision may be elucidated by appropriate reference to them¹⁰³. It has often been said that the clear meaning of the text of a statute or a statutory provision is the surest guide to the meaning of "the intention of the legislature"¹⁰⁴, an expression used

101 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78] per McHugh, Gummow, Kirby and Hayne JJ citing Bennion, *Statutory Interpretation*, 3rd ed (1997) at 343-344 (footnotes omitted).

102 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 265-266 [33]-[34] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ. See also *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 per Mason CJ, Wilson and Dawson JJ; [1987] HCA 12.

103 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 592 [44] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 10.

104 *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405 per Kitto J; [1967] HCA 31; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459 per McHugh and Gummow JJ; [1995] HCA 24; *Purvis v New South Wales* (2003) 217 CLR 92 at 122-123 [92] per McHugh and Kirby JJ; [2003] HCA 62; *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1 at 6 [10] per McHugh J; [2003] HCA 69; *Singh v The Commonwealth* (2004) 222 CLR 322 at 335-336 [19]-[20] per Gleeson CJ; [2004] HCA 43; *Director of Public Prosecutions (Vic) v Le* (2007) 232 CLR 562 at 573 [29] per Gummow and Hayne JJ; [2007] HCA 52; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41.

metaphorically¹⁰⁵. Nevertheless, it is uncontroversial that in determining the meaning of the text of a statute or provision a court may take into account the general purpose and policy of a provision and, in particular, the mischief that it is intended to remedy¹⁰⁶. It was for the latter purpose that the Court of Appeal had recourse to the extrinsic materials. This did not involve error¹⁰⁷. The extrinsic materials indicated that the Liability Act was enacted to deal with a perceived problem involving the high cost of *negligence* claims and the impact of such claims on the cost of insurance. This conclusion is uncontroversial¹⁰⁸. Was it right to conclude that Div 5B of Pt 11 of the 1987 LP Act was enacted to remedy the same problem? The extrinsic materials suggest that it was. So does the retrospective operation of the Division. The latter is a strong indication that the scheme was enacted as part of the legislative response to the perceived crisis involving negligence claims. The enactment of Div 5B in a Schedule to the Liability Act and the choice to describe "personal injury damages" by reference to the meaning of the expression in the Liability Act support that conclusion. The definition of "personal injury damages" in the Liability Act is not elaborate and the scope and operation of the Liability Act is clearly stated in s 3B. Something more than economy may be discerned in the choice to incorporate the meaning of the expression in the Liability Act into Div 5B.

105 *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28]; [2009] HCA 52.

106 *Heydon's Case* (1584) 3 Co Rep 7a at 7b [76 ER 637 at 638]; *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 per Dixon CJ; [1955] HCA 27; *Bropho v Western Australia* (1990) 171 CLR 1 at 20 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1990] HCA 24; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; [1997] HCA 2; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47 [47] per Hayne, Heydon, Crennan and Kiefel JJ.

107 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ referring, inter alia, to s 15AB of the *Acts Interpretation Act* 1901 (Cth) and the equivalent provision under s 19 of the *Interpretation Act* 1984 (WA). The equivalent provision in New South Wales is s 34 of the *Interpretation Act* 1987 (NSW). See also *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 99 per Toohey, Gaudron and Gummow JJ; [1997] HCA 53.

108 *Harriton v Stephens* (2006) 226 CLR 52 at 93-94 [134]-[135] per Kirby J; [2006] HCA 15; *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330 at 402-403 [265] per Callinan J; [2007] HCA 42; *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149 at 155 [14]; [2011] HCA 16.

71 The Liability Act deals with the award of personal injury damages by courts and tribunals and Div 5B of Pt 11 of the 1987 LP Act deals with claims for personal injury damages. Observing this circumstance does not suggest a reason for concluding that each is not directed to addressing the same problem involving the reduction of the cost of negligence claims. There are features of the conduct of personal injury negligence claims which provide a rationale for the imposition of a cap on legal costs in such claims. They are the features noted by Sackville AJA and Campbell JA to which reference has been made earlier in these reasons. These features are also noted by Mason P in *Newcastle City Council v McShane (No 3)* with particular reference to the conduct of personal injury litigation by specialist members of the profession in New South Wales¹⁰⁹.

72 If, as urged by the appellants, the presumed legislative intent of Div 5B is the achievement of some wider purpose than restricting recovery of costs in small negligence claims, what sensible reason could be advanced for confining the scheme to small claims in which damages for personal injury are sought? The facts in *Williamson* highlight the irrationality of a cap that applies to an action based on an intentional tort in which a claim is made for personal injury but not to the same action when no such claim is made.

73 Consideration of the mischief with which Div 5B was intended to deal and the express language of s 198C(1) weighs against interpreting that provision as merely picking up the words of the definition in s 11 of the Liability Act. The appellants' construction requires that s 198C(1) be read as if it provided "personal injury damages means 'personal injury damages' as defined in s 11 of the Liability Act". That method of expressly incorporating a definition from another Act is used in s 198C(2)(c), which provides that "work injury damages" is "as defined" in the *Workplace Injury Management and Workers Compensation Act* 1998 (NSW). A different formulation is employed in the same section with respect to the expression "personal injury damages". It is a formulation that expressly directs attention to the meaning of the expression as in Pt 2 of the Liability Act. In its terms, the definition in s 11 applies to Pt 2. The meaning of the expression "personal injury damages" in Pt 2 is plainly circumscribed by s 3B of the Liability Act. The clear purpose of s 198C(1), so expressed, is to confine "personal injury damages" to damages relating to the death of or injury to a person (in the extended way injury is defined) to which Pt 2 of the Liability Act applies. The rationale for such confinement has already been explained. This construction of s 198C(1) reflects the evident purpose for which Div 5B was enacted, gives full effect to the statutory language of s 198C(1) and avoids unintended, if not potentially capricious, results.

109 *Newcastle City Council v McShane (No 3)* (2005) 65 NSWLR 155 at 164 [28].

74 One further submission needs to be mentioned. Section 198C(2) of the 1987 LP Act provides that Div 5B does not apply with respect to costs under various statutory schemes: Pt 2 of the *Victims Support and Rehabilitation Act* 1996 (NSW); the *Motor Accidents Act* 1988 (NSW) or *Motor Accidents Compensation Act* 1999 (NSW); the *Workplace Injury Management and Workers Compensation Act* 1998 (NSW) and the *Dust Diseases Tribunal Act* 1989 (NSW). The exclusions in s 198C(2) overlap but are not co-extensive with those in s 3B(1) of the Liability Act. The appellants submit that had it been the intention to exclude small claims for personal injury damages resulting from acts done with intent to cause injury or death from the operation of Div 5B, it might be expected that an exclusion in the same terms as s 3B(1)(a) of the Liability Act would have been included in s 198C(2). The submission does not advance the argument either way. If the correct meaning of s 198C(1) is as the respondents contend, there was no occasion to expressly exclude claims involving intentional torts.

75 What function do the exclusions serve? Division 5B applies to the recovery of party and party costs where the amount recovered on the claim does not exceed the threshold, whether the amount is recovered following trial or by way of compromise. At the time it was enacted, s 198C(2) operated to exclude from the regime of Div 5B the recovery of costs under statutory schemes that make discrete provision for the recovery of party and party costs¹¹⁰. The *Motor Accidents Compensation Act* 1999 (NSW) made such provision, although it may be noted that its predecessor did not. Basten JA's conclusion that the exclusions were provided by way of abundant caution to meet any argument of implied repeal should be accepted¹¹¹. So should the Court of Appeal's conclusion that for the purposes of s 198C(1) of the 1987 LP Act (now s 337(1) of the 2004 LP Act) the meaning of "personal injury damages" in Pt 2 of the Liability Act was not

110 See s 35 of the *Victims Support and Rehabilitation Act* 1996 (NSW) and the Victims Support and Rehabilitation Rule 1997 (NSW); s 149 of the *Motor Accidents Compensation Act* 1999 (NSW) and the Motor Accidents Compensation Regulation (No 2) 1999 (NSW) (replaced in 2005 by the Motor Accidents Compensation Regulation 2005 (NSW)); s 337 of the *Workplace Injury Management and Workers Compensation Act* 1998 (NSW) and the Workers Compensation (General) Regulation 1995 (NSW) (now contained in the Workers Compensation Regulation 2010 (NSW)); s 29(2) of the *Dust Diseases Tribunal Act* 1989 (NSW) (s 29 was repealed in 2005 and the Act does not presently restrict the recovery of costs).

111 *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [59].

changed by a sidewind by the 2006 amendments to that Part respecting damages for the loss of capacity to provide personal services¹¹².

Orders

76 For the reasons given, the three appeals should be dismissed with costs.

112 *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [56] per Basten JA, [80] per Sackville AJA.

77 KIEFEL J. The facts, statutory materials and legislative history relevant to these appeals are comprehensively surveyed in the judgments of French CJ and Hayne J and of Crennan and Bell JJ and it is not necessary for me to repeat them all. Each of the respondents suffered injuries as a result of an assault. Each received an award of damages of less than \$100,000. An order for costs was made in favour of each respondent on 22 April 2010 in the District Court of New South Wales. The question posed by these appeals is whether the orders for costs are subject to the limitation imposed by s 198D of the *Legal Profession Act* 1987 (NSW) ("the *LP Act*"). That question turns upon the meaning to be given to the term "personal injury damages" for the purposes of the *LP Act*.

The legislation in summary

78 At the outset it is necessary to mention that the *LP Act* was repealed by the *Legal Profession Act* 2004 (NSW)¹¹³, which provides for restrictions on legal costs in terms similar to the *LP Act*. The determination of these appeals is properly conducted by reference to the *LP Act*, for the reasons given in the joint judgments¹¹⁴.

79 The *LP Act* dealt with a number of subjects affecting the conduct and the practice of legal practitioners. Part 11 dealt with legal fees and other costs. Upon its enactment¹¹⁵, the *Civil Liability Act* 2002 (NSW) ("the *Liability Act*") contained provisions concerning the assessment of damages in cases involving personal injuries. At the same time, the *Liability Act* inserted Div 5B, entitled "Maximum costs in personal injury damages matters", into Pt 11 of the *LP Act*¹¹⁶. By s 198C(2), the Division was not to apply to costs payable under or pursuant to certain specified legislation, to which reference will be made later in these reasons¹¹⁷.

80 Section 198D(1) in Div 5B fixed the maximum costs for legal services provided to a party in connection with a claim for personal injury damages where the amount recovered on the claim did not exceed \$100,000. The costs were fixed at 20 per cent of the amount recovered or \$10,000, whichever was greater.

113 *Legal Profession Act* 2004 (NSW), s 735 and Sched 1, as enacted.

114 Reasons of French CJ and Hayne J at [19]-[22], reasons of Crennan and Bell JJ at [53].

115 The *Civil Liability Act* 2002 (NSW) was assented to on 18 June 2002, but is taken to have commenced on 20 March 2002: s 2.

116 *Civil Liability Act* 2002, s 8, Sched 2, item 2.2 [2].

117 At [91].

Sub-section (4) provided that a legal practitioner was not entitled to be paid an amount for legal services in excess of the maximum stipulated, a court or tribunal could not order the payment of costs in an amount more than the maximum, and a costs assessor could not determine an amount in excess of the maximum.

81 By s 198E(1), Div 5B did not apply to the recovery of costs as between a solicitor or barrister and the solicitor or barrister's client, if recovery was provided for by a costs agreement which complied with Div 3 of Pt 11 of the *LP Act*. Section 198F(1) provided that Div 5B did not prevent an award, on an indemnity basis, of costs incurred after the date when a reasonable offer of compromise was made if the offer was not accepted. Section 198G allowed a court to order that legal services provided to a party be excluded from the operation of the Division, if they were provided in response to any action on the claim by the other party that was not reasonably necessary.

82 For the purposes of Div 5B, the term "personal injury damages" was defined in s 198C(1) of the *LP Act* to have "the same meaning as in the [*Liability Act*]". "Personal injury damages" was defined in s 3 in Pt 1 of the *Liability Act* to mean "damages that relate to the death of or injury to a person caused by the fault of another person". "Injury" was further defined, as were "damages" and "fault"¹¹⁸.

83 Part 2 of the *Liability Act* was entitled "Personal injury damages" and contained provisions regulating the assessment of damages associated with actions for personal injuries caused by negligence, including damages for economic and non-economic loss. By s 10, a court could not award damages, or interest on damages, to a claimant contrary to Pt 2. Section 9(1) had the effect that Pt 2 did not apply where an award of personal injury damages was excluded from the operation of the Part. The first of the eight classes of award excluded by s 9(2) was "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".

84 The *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) ("the *Personal Responsibility Act*") effected substantial amendment to the *Liability Act* by expanding the operation of the *Liability Act*, although not in such a way as to affect its terms or operation so far as is relevant to these appeals. The amendments retained Pt 2 as the Part dealing with personal injury damages. The definition of "personal injury damages" was moved into Pt 2 in s 11 and amended to read "personal injury damages means damages that relate to the death of or injury to a person". The reference to fault was excluded. The definition of "injury" changed, but not in any presently material respect. Section 11A applied

¹¹⁸ *Civil Liability Act 2002*, s 3.

Pt 2 to an award of personal injury damages, except where an award was excluded from the operation of Pt 2 by s 3B, which appeared in Pt 1. Section 3B(1)(a) excluded civil liability in respect of intentional acts and sexual assaults, in substantially the same terms as s 9(2)(a) had done. The *Personal Responsibility Act* also amended the definition of "personal injury damages" in s 198C(1) of the *LP Act* to read "personal injury damages has the same meaning as in Part 2 of the [*Liability Act*]".

The issue

85 Because the injuries suffered by the respondents were caused by intentional acts, a court's assessment of damages arising from the injuries is not subject to the *Liability Act*, by reason of the express exclusion in s 3B(1)(a). However, the *LP Act* did not expressly exclude from the application of Div 5B costs for legal services provided to a party in connection with a claim for personal injury damages in respect of intentional acts. The question is whether the *LP Act* may be taken, nevertheless, to have intended to exclude such costs because of its reference in the definition in s 198C(1) to personal injury damages as having "the same meaning as in" the *Liability Act* or, more particularly, Pt 2 thereof.

86 "Personal injury damages" as defined in the *Liability Act* were damages relating to the death of or injury to a person. Without more, Div 5B of Pt 11 of the *LP Act* would apply to the costs for the legal services provided to the respondents in connection with their claims. So much was conceded by Basten JA in the Court of Appeal¹¹⁹. However, if the words in s 198C(1) of the *LP Act*, "the same meaning as in", encompassed the application of the *Liability Act*, which is to say that the *Liability Act* did not apply to personal injuries caused by intentional acts, then it may be that Div 5B of Pt 11 of the *LP Act* would not apply to limit the costs that the respondents could recover.

87 In the Court of Appeal, Basten JA, with whom Hodgson JA and Sackville AJA agreed¹²⁰, held that the definition in s 198C(1) extended beyond the definition of the expression "personal injury damages" in the *Liability Act* to the scope of its application in Pt 2¹²¹. The matter which appears to have been most influential to the conclusion reached by their Honours was that the costs limiting provisions of the *LP Act* were part of a "broader scheme"¹²² or a "single

¹¹⁹ *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [25].

¹²⁰ *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [1], [80].

¹²¹ *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [59].

¹²² *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [73] per Sackville AJA.

package"¹²³ in conjunction with the *Liability Act*, that scheme being directed to a perceived crisis in public liability insurance and being one from which awards of damages for personal injuries by intentional acts were excluded.

Approaches to statutory construction

88 The fundamental object of statutory construction is to ascertain legislative intention, understood as the intention that the courts will impute to the legislature by a process of construction, by reference to the language of the statute viewed as a whole¹²⁴. The starting point for this process of construction is the words of the provision in question read in the context of the statute. Context is also spoken of in a broader sense as including the general purpose and policy of the legislation, in particular the mischief to which the statute is directed and which the legislature intended to remedy¹²⁵.

89 It is legitimate to resort to materials outside the statute, but it is necessary to bear in mind the purpose of doing so and the process of construction to which it is directed. That purpose is, generally speaking, to identify the policy of the statute in order to better understand the language and intended operation of the statute. An understanding of legislative policy by these means does not provide a warrant for departing from the process of statutory construction and attributing a wider operation to a statute than its language and evident operation permit.

The *LP Act* – language, context and purpose

90 The reference in s 198C(1) of the *LP Act* to the term "personal injury damages" as having the same meaning as in the *Liability Act* obviously directs attention to the definition of that term in the *Liability Act*. The words "as in" may be read as "as given in". Section 198C(1) did not refer to the "meaning and effect" of the *Liability Act*¹²⁶, which may have encompassed the operation of that

123 *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [49] per Basten JA.

124 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304 per Gibbs CJ, 320 per Mason and Wilson JJ; [1981] HCA 26; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; [1998] HCA 28.

125 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47]; [2009] HCA 41.

126 See *State of New South Wales v Williamson* [2011] NSWCA 183 at [4(2)] per Hodgson JA, where his Honour understood the words of s 198C(1) to direct attention to the "meaning *effectually* given" in the *Civil Liability Act* 2002.

Act. Without more, the words in s 198C(1) conveyed that the term was to have the meaning given to it in the *Liability Act* by way of definition. A construction which is consistent with the ordinary meaning and grammatical sense of the words used in s 198C(1) has a strong advantage over other possible constructions¹²⁷.

91 The *LP Act* also identified the circumstances in which the fixing of maximum costs would not apply, as has been previously mentioned¹²⁸. Not all legal costs payable in connection with claims for personal injury damages were subject to Div 5B. Section 198C(2) of the *LP Act* specifically provided that Div 5B did not apply so as to limit the costs payable under certain statutes. There were four statutes identified, including the *Victims Support and Rehabilitation Act* 1996 (NSW) and the *Workplace Injury Management and Workers Compensation Act* 1998 (NSW).

92 The most likely explanation for the presence of the four exclusions in s 198C(2) is that they identified existing legislative costs regimes so as to avoid any doubt about whether those regimes would continue to have effect following the introduction of Div 5B¹²⁹. So understood, the exclusion of legal costs associated with claims arising from intentional acts is explicable. It remains the case, however, that legal costs charged in connection with such claims have not been excluded from the operation of Div 5B.

93 The evident purpose of the *LP Act* was to contain and limit the legal costs which may have been charged on recovered claims for personal injury damages. The limit imposed by Div 5B would have applied to orders for costs made by a court following upon an award of damages, but it was not limited to that circumstance. It would also have applied to legal costs associated with claims which had not been subjected to court processes. It applied to any legal costs charged for services in connection with a claim for personal injury damages where the amount recovered did not exceed \$100,000. In all these instances, the amount recovered was the essential criterion.

The *LP Act* – part of a broader scheme?

94 The evident purpose of the *Liability Act* is to control, in the sense of limit, the amount of damages which may be awarded in personal injury claims. So

¹²⁷ *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321.

¹²⁸ At [79].

¹²⁹ As Basten JA observed in the Court of Appeal: *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [59].

much was confirmed by the Second Reading Speech to the *Liability Act*¹³⁰, to which the Court of Appeal referred¹³¹. In the Second Reading Speech, it was also pointed out that awards for personal injuries caused by intentional acts, or acts involving sexual assault, were deliberately excluded from the purview of the *Liability Act* because compensation for injuries arising from serious criminal acts should not be subject to limitation¹³². So much may be inferred from the very fact of the exclusion.

95 The Second Reading Speech also identified a wider common purpose for the controls effected by the *Liability Act* and the limits placed on costs by the *LP Act*. The *Liability Act* was enacted, and the *LP Act* amended, in response to what was perceived to be a crisis in the affordability of public liability insurance¹³³, which was adversely affecting many bodies and small businesses in the community. The crisis had been brought about by substantial increases in premiums charged for insurance of that kind. Premiums are directly affected by the sums insurers are required to pay by way of indemnity for awards of damages and legal costs following upon claims for personal injuries caused by negligence.

96 The Court of Appeal clearly considered that the identification of a broader purpose meant that the two statutes formed part of a statutory scheme. In one sense that is correct, as they were both directed to that common purpose. The statutes were also connected by their terms. The drafting means chosen effected amendments to the *LP Act* via the medium of the *Liability Act*, and the *LP Act* referred to the *Liability Act* for the definition of "personal injury damages".

97 The scheme identified by the Court of Appeal contained the particular element of excluding awards of personal injury damages for injuries resulting from an intentional act. However, that element is found only in the *Liability Act*. For a scheme to be identified, it must involve two statutes not just having a wider common purpose and some connection, but operating together. If the operation of each statute could be said to depend upon the other, there would be a warrant for construing them together in this way¹³⁴. In that event, it might be said that the

130 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 May 2002 at 2086.

131 *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 at [46]-[48].

132 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 May 2002 at 2086.

133 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 May 2002 at 2085.

134 See, for example, *Sweeney v Fitzhardinge* (1906) 4 CLR 716 at 726; [1906] HCA 73.

definition in s 198C(1) of the *LP Act* should be read to encompass the operation of the *Liability Act*.

98 It does not follow from the identification of a broader purpose beyond the more immediate objects of each of the two statutes, nor from the limited connection between them, that they were interdependent in any meaningful way. It is necessary to consider each of the statutes and the means by which they are intended to achieve their respective objectives, in order to determine whether they form part of a single scheme. There are a number of indicia which tell against the *LP Act* and the *Liability Act* operating in this way.

99 When it is said that statutes form part of a legislative scheme such that they should be read together, the statutes usually deal with the same subject matter. Here the *LP Act* and the *Liability Act* each had its own sphere of operation by reference to different subject matter: the *Liability Act* was concerned with the calculation of awards of damages; the *LP Act*'s concern was with legal costs associated with all claims for personal injury damages where the sum recovered was no more than \$100,000.

100 The *LP Act* may have operated on orders for costs made following awards assessed in accordance with the *Liability Act*, but it was not limited in its operation to that circumstance. The size of the sum recovered was the only criterion identified by the *LP Act*, apart from the existence of a claim for personal injury damages and legal costs payable in connection with it, for the application of Div 5B. That criterion was not connected with any matter in the *Liability Act*.

101 Further, there was no symmetry between the exclusions effected by each of the statutes. There were many more statutes and types of awards excluded by s 3B of the *Liability Act* than there were statutes excluded from the costs regime of Div 5B of Pt 11 of the *LP Act*. In the *LP Act*, the evident intention was to exclude only costs provided under existing legislative costs regimes. No intention is evident to exclude costs in other areas or to align the exclusion of costs to the awards excluded by the *Liability Act*.

102 These indicia confirm that the two statutes operated independently of each other and provide no warrant for reading the *LP Act* by reference to the application of the *Liability Act*. Whether a claim resulted in an award of damages which was, or was not, calculated by reference to the *Liability Act* had no bearing upon the operation of Div 5B of Pt 11 of the *LP Act*. Division 5B was concerned with the proportion between the amount of the damages recovered and the legal costs associated with the claim that resulted in recovery. Division 5B operated universally with respect to legal costs where a claim resulted in recovery of damages of no more than \$100,000.

103 The operation of Div 5B read in this way is nevertheless consistent with the broader purpose of reducing the cost of public liability insurance.

Division 5B sought to achieve this purpose by means which differed from those employed by the *Liability Act*. Nevertheless, in so far as the two statutes were both directed to that purpose, it may be expected that they would not operate inconsistently with each other. Division 5B of Pt 11 of the *LP Act*, applied universally, was not inconsistent with the purpose underlying the exclusion of awards of damages for personal injuries resulting from intentional acts, namely that compensation for such damages not be limited. So far as concerns the costs of legal services in seeking an award, subject to the exceptions in Div 5B, a claimant's lawyer could not charge more than the maximum amount specified except by agreement with the claimant and the other party could not recover more than that amount in the event that the claimant was unsuccessful.

104 There is no basis for construing the term "personal injury damages" other
than by reference to the definition given in the *Liability Act*.

105 I agree with the orders proposed by French CJ and Hayne J.

