

HIGH COURT OF AUSTRALIA

FRENCH CJ,
CRENNAN, BELL, GAGELER AND KEANE JJ

SUSAN JOY TAYLOR IN HER OWN CAPACITY
AND FOR AND ON BEHALF OF THE
DEPENDANTS OF THE LATE CRAIG TAYLOR APPELLANT

AND

THE OWNERS – STRATA PLAN NO 11564 & ORS RESPONDENTS

Taylor v The Owners – Strata Plan No 11564
[2014] HCA 9
2 April 2014
S179/2013

ORDER

1. *Appeal allowed.*
2. *Set aside orders 3 and 4 of the Court of Appeal of the Supreme Court of New South Wales made on 18 March 2013, and orders 1 and 2 of that Court made on 5 June 2013, and, in their place, order that:*
 - (a) *the appeal be allowed;*
 - (b) *the orders of the Supreme Court of New South Wales made on 27 July 2012 be set aside and, in their place, order that:*
 - (i) *the separate question:*

"Insofar as the plaintiffs claim damages pursuant to ss 3 and 4 of the Compensation to Relatives Act 1897, is any award of damages limited by the operation of s 12(2) of the Civil Liability Act 2002?"

2.

be answered:

"No, the operation of s 12(2) of the Civil Liability Act 2002 (NSW) does not limit the first plaintiff's claim for damages pursuant to ss 3 and 4 of the Compensation to Relatives Act 1897 (NSW) as pleaded on behalf of herself and any other entitled relatives of the late Mr Craig Taylor in that it does not require the court to disregard the amount by which the gross weekly earnings of Mr Craig Taylor would, but for his death, have exceeded an amount that is three times the average weekly earnings at the date of the award"; and

(ii) the first to sixth defendants pay the first and second plaintiffs' costs of the separate question; and

(c) the first to fourth and sixth respondents pay the appellant's costs of the appeal.

3. *The first to fourth and sixth respondents pay the appellant's costs in this Court.*

On appeal from the Supreme Court of New South Wales

Representation

J Poulos QC with V M Heath for the appellant (instructed by Craddock Murray Neumann)

P W Taylor SC with A C Scotting for the first to fourth respondents (instructed by Meridian Lawyers)

S R Donaldson SC with S P W Glascott for the sixth respondent (instructed by DLA Piper Australia)

Submitting appearances for the fifth and seventh to tenth respondents

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Taylor v The Owners – Strata Plan No 11564

Statutes – Statutory construction – Whether Court of Appeal erred in construction of *Civil Liability Act* 2002 (NSW), s 12(2) – Whether *Civil Liability Act* 2002 (NSW), s 12(2) limits awards of damages under *Compensation to Relatives Act* 1897 (NSW), ss 3, 4 – Whether s 12(2) limitation applies to deceased's gross weekly earnings.

Words and phrases – "claimant", "deceased", "gross weekly earnings", "loss of expectation of financial support".

Civil Liability Act 2002 (NSW), ss 12(1), 12(2).

Compensation to Relatives Act 1897 (NSW), ss 3, 4.

1 FRENCH CJ, CRENNAN AND BELL JJ. Section 12(2) of the *Civil Liability Act* 2002 (NSW) ("the Liability Act") directs a court, when awarding damages relating to the death of or injury to a person, to disregard the amounts (if any) by which *the claimant's* gross weekly earnings would, but for the injury or death, have exceeded three times the amount of average weekly earnings at the date of the award ("the s 12(2) limitation"). The s 12(2) limitation applies to awards of damages for past and future economic loss due to the deprivation or impairment of earning capacity, for past economic loss due to loss of earnings, and for "the loss of expectation of financial support"¹. The latter expression is apt to describe an award of damages under the *Compensation to Relatives Act* 1897 (NSW) ("the Relatives Act"). The issue presented by the appeal is whether, in the case of an award of damages for the loss of expectation of financial support, the s 12(2) limitation is to be construed as applying to *the deceased's* gross weekly earnings.

Background

2 The appellant is the widow of the late Mr Craig Taylor. Mr Taylor was killed when an awning outside a shop collapsed on him. The appellant commenced proceedings in the Supreme Court of New South Wales against the first to sixth respondents claiming damages under ss 3 and 4 of the Relatives Act. The action is a representative proceeding brought for the benefit of the appellant and any entitled children of the deceased².

3 The deceased was a land surveyor in private practice. It was accepted for the purpose of present proceedings that had the deceased lived he would have earned income substantially in excess of three times the amount of average weekly earnings. The appellant claims damages for the loss of benefits that she and the children expected to receive had the deceased lived, derived from his personal exertion, investment, creation and maintenance of capital assets and services. No component of the damages claimed is based upon any loss of the appellant's, or the children's, earnings.

4 The trial of the appellant's representative action is yet to take place. With the consent of the parties, the primary judge (Garling J) agreed to the separate determination of one question³:

1 *Civil Liability Act* 2002 (NSW), s 12(1).

2 *Compensation to Relatives Act* 1897 (NSW), ss 4(1), 5, 6B(2).

3 Uniform Civil Procedure Rules 2005 (NSW), r 28.2.

2.

"Insofar as the [appellant] claim[s] damages pursuant to ss 3 and 4 of the *Compensation to Relatives Act* 1897, is any award of damages limited by the operation of s 12(2) of the *Civil Liability Act* 2002?"⁴

5 Garling J answered the separate question adversely to the interests of the appellant, holding that insofar as the damages claimed include damages for the loss of an expectation of financial support provided by the deceased, the court is to disregard the amount (if any) by which the deceased's gross weekly earnings would (but for his death) have exceeded an amount that is three times the amount of average weekly earnings at the date of the award⁵.

6 The appellant appealed by leave to the Court of Appeal of the Supreme Court of New South Wales (McColl, Basten and Hoeben JJA). By majority (McColl JA, Hoeben JA agreeing) the appeal was dismissed. On 6 September 2013 the appellant was granted special leave to appeal. For the reasons to be given, the appeal should be allowed and the separate question answered in the negative.

The statutory scheme

7 Section 12 of the Liability Act, relevantly, provides:

"(1) This section applies to an award of damages:

- (a) for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity, or
- (b) for future economic loss due to the deprivation or impairment of earning capacity, or
- (c) for the loss of expectation of financial support.

(2) In the case of any such award, the court is to disregard the amount (if any) by which the claimant's gross weekly earnings would (but for the injury or death) have exceeded an amount that is 3 times the amount of average weekly earnings at the date of the award."

8 Section 12 is in Pt 2 of the Liability Act, which governs the award of "Personal injury damages". That phrase is defined to mean damages that relate to

4 *Taylor v The Owners – Strata Plan No 11564* [2012] NSWSC 842 at [1].

5 *Taylor v The Owners – Strata Plan No 11564* [2012] NSWSC 842 at [83].

3.

the death of or injury to a person⁶. Part 2 applies to the award of personal injury damages regardless of whether the claim is brought in tort, in contract, under statute or otherwise⁷. Damages awarded under the Relatives Act for the injury occasioned by the death of the deceased are personal injury damages to which Pt 2 applies. A court cannot award damages contrary to Pt 2⁸.

- 9 "Claimant" is not defined in the Liability Act⁹. As enacted, s 3 in Pt 1 of the Liability Act defined a number of terms used in Pt 2. These included "claimant", which was defined to mean "a person who makes or is entitled to make a claim for personal injury damages". Section 10 in Pt 2 of the Liability Act as enacted precluded a court from awarding damages to a claimant contrary to Pt 2. The *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) effected extensive amendments to the Liability Act, inserting Parts dealing with negligence, mental harm, proportionate liability, the liability of public and other authorities, intoxication, self-defence and recovery by criminals, good samaritans, volunteers, and apologies. New sections were inserted in Pt 2 dealing with damages for loss of superannuation entitlements, tariffs for damages for non-economic loss, and structured settlements. Defined terms relating to personal injury damages were removed from Pt 1 and some were inserted in s 11 in Pt 2¹⁰. The word "claimant" then also appeared in Pt 5, which dealt with the liability of public authorities¹¹. The definition of "claimant", which it will be recalled was confined to persons making, or who were entitled to make, a claim for personal injury damages, was repealed¹². Section 10, which precluded the award of damages to a claimant otherwise than in accordance with Pt 2, was also

6 *Civil Liability Act 2002* (NSW), s 11.

7 *Civil Liability Act 2002* (NSW), s 11A(2).

8 *Civil Liability Act 2002* (NSW), s 11A(3).

9 Section 26BA of the Liability Act, however, refers to "claimant" as a person "who makes or is entitled to make a claim". This provision came into effect on 12 November 2008.

10 *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW), Sched 2 [2] and [5].

11 *Civil Liability Act 2002* (NSW), s 44(1). The word "plaintiff" is currently used in s 44.

12 *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW), Sched 2 [2].

repealed¹³. Section 11A(3) was inserted in Pt 2 and precluded the court from awarding damages contrary to the Part¹⁴. Nothing in the structure of the Act or the legislative history suggests that the repeal of the definition was intended to alter the meaning of "claimant" in s 12(2) from its ordinary meaning of a person who makes or is entitled to make a claim.

Loss of expectation of financial support

10 The only personal injury damages that may be characterised as compensation for the loss of expectation of financial support within the meaning of s 12(1)(c) are damages under the Relatives Act.

11 The Relatives Act is a derivative of the *Fatal Accidents Act* 1846 (UK) (9 & 10 Vict c 93), commonly referred to by the name of its proponent as *Lord Campbell's Act*. The Relatives Act gives a right of action against a person whose wrongful act, neglect or default caused the death of another in such circumstances as would have entitled the deceased to maintain an action and recover damages¹⁵. The action is brought by and in the name of the executor or administrator and is for the benefit of specified classes of relatives of the deceased¹⁶. Where there is no executor or administrator or where the executor or administrator does not bring an action under the Relatives Act within six months of the death, the action may be brought by any of the relatives entitled to benefit by the proceedings¹⁷.

12 In a Relatives Act action the jury, or, where the action is tried without a jury, the judge¹⁸, is to assess damages "proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action is brought"¹⁹. This somewhat imprecise statutory formulation has acquired a well-settled meaning as the result of judicial exegesis. From shortly after the

13 *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW), Sched 2 [5].

14 *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW), Sched 2 [5].

15 *Compensation to Relatives Act* 1897 (NSW), s 3(1).

16 *Compensation to Relatives Act* 1897 (NSW), s 4(1).

17 *Compensation to Relatives Act* 1897 (NSW), s 6B.

18 *Compensation to Relatives Act* 1897 (NSW), s 6D.

19 *Compensation to Relatives Act* 1897 (NSW), s 4(1).

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enactment of *Lord Campbell's Act* it was determined that no component of damages in the statutory action was to be awarded by way of solatium for injury to the feelings of the relatives²⁰. Damages are compensation for pecuniary loss²¹, the assessment being "a hard matter of pounds, shillings and pence"²². Barwick CJ explained the principle in contemporary language in *Ruby v Marsh*²³:

"[Q]uite clearly, the damages, the right to which the statute gives, are to *compensate for the loss by death of the financial support reasonably expected to have been given by the deceased*, had he continued to live. Thus the situation in relation to that financial support, or to its expectation as at the date of death, will be definitive of the loss which has been suffered." (emphasis added)

13

It is the loss of the chance of obtaining a financial benefit from the continuance of the life of the deceased that is the subject of the action²⁴. The money value of the injury occasioned by the death is the product of the loss of the expectation of material benefits less any gains accruing from the death²⁵. The assessment of the former takes into account not only the expectation of support derived from the deceased's income and capital but also the value of any services that the deceased would have provided had life continued. A surviving spouse (or other eligible relative) may reasonably choose to give up or alter his or her employment in order to provide the services that were formerly provided by the deceased. One means of valuing the loss of the expectation of the services in such a case is to have regard to the claimant's lost earnings²⁶. In some cases the

20 *Blake v Midland Railway Co* (1852) 18 QB 93 [118 ER 35].

21 *Taff Vale Railway v Jenkins* [1913] AC 1 at 4 per Viscount Haldane LC.

22 *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at 617 per Lord Wright.

23 (1975) 132 CLR 642 at 647; [1975] HCA 32.

24 *De Sales v Ingrilli* (2002) 212 CLR 338 at 371 [91] per McHugh J; [2002] HCA 52 citing *Davies v Taylor* [1974] AC 207 at 213 per Lord Reid.

25 *Public Trustee v Zoanetti* (1945) 70 CLR 266 at 279 per Dixon J; [1945] HCA 26.

26 *Mehmet v Perry* [1977] 2 All ER 529 at 533 per Brian Neill QC; *Croker v Wright* unreported, New South Wales Court of Appeal, 12 June 1980 at 6 per Samuels JA; *Nguyen v Nguyen* (1990) 169 CLR 245 at 263-264 per Dawson, Toohey and McHugh JJ; [1990] HCA 9; *Roads & Traffic Authority v Jelfs* (2000) Aust Torts (Footnote continues on next page)

deceased's services may have generated income directly in the hands of a Relatives Act claimant and the loss of that income may be taken into account in estimating the pecuniary injury resulting from the death²⁷.

- 14 The paradigm Relatives Act claim, styled a "dependency" claim, has been said to be one brought on behalf of the wife for the loss occasioned by the death of her husband, the breadwinner. In *De Sales v Ingrilli*, Gleeson CJ noted that it is now common for both parties to a legal or de facto marriage to have income-producing occupations and for each to have an expectation of obtaining financial advantage from the other²⁸. In a marriage in which each partner is in paid employment the provision of household services and the responsibility for raising children will often be shared. The injury occasioned by the wrongful death of either spouse in such a marriage is likely to include the loss of his or her services. That loss may come more frequently to be estimated by reference to a reduction in the claimant spouse's income occasioned by the reasonable need to assume increased parenting responsibilities.

The constructions at first instance and in the Court of Appeal

- 15 The primary judge identified the purpose of s 12 of the Liability Act as being "to limit claims for tortiously caused damage, and to restrict financial loss claims for high earning individuals"²⁹. His Honour considered that the typical or paradigm Relatives Act claim is one arising out of the death of the principal income earner³⁰. His Honour acknowledged that there may be cases in which the income of the claimant is relevant to the assessment but he considered such cases to be "very rare indeed"³¹. His Honour determined that it is consonant with the purpose of the scheme to apply the s 12(2) limitation to the deceased's income. He held that in order to give the provision operative effect in the case of an award

Reports ¶81-583 at 64,271-64,272 [24] per Mason P; *Dwight v Bouchier* (2003) 37 MVR 550 at 561 [78] per Stein JA.

27 *Franklin v The South Eastern Railway Company* (1858) 3 H & N 211 at 214-215 per Pollock CB [157 ER 448 at 449]; *Cookson v Knowles* [1977] QB 913 at 922 per Lord Denning MR.

28 (2002) 212 CLR 338 at 347 [12].

29 *Taylor v The Owners – Strata Plan No 11564* [2012] NSWSC 842 at [59].

30 *Taylor v The Owners – Strata Plan No 11564* [2012] NSWSC 842 at [57].

31 *Taylor v The Owners – Strata Plan No 11564* [2012] NSWSC 842 at [58].

7.

for the loss of expectation of financial support, "claimant" in s 12(2) is to be construed as meaning "the deceased upon whose earnings the claim depends"³².

16 The primary judge's construction reads s 12(2) as if it provided³³:

"In the case of any such award, the court is to disregard the amount (if any) by which:

(a) in the case of an injury, the claimant's; or

(b) in the case of death, the deceased's

gross weekly earnings would (but for the injury or death) have exceeded an amount ..."

17 In the Court of Appeal McColl JA, writing for the majority, said that the ordinary meaning of "claimant" is "someone who makes a claim"³⁴ or "[o]ne who makes or enters a claim; one who has a claim upon anything"³⁵. Her Honour observed that the person killed by the defendant's wrongful conduct giving rise to a Relatives Act claim is neither the person who makes the claim nor the person who is entitled to do so. The Court of Appeal was unanimous in concluding that the literal meaning of s 12(2) does not apply the limitation to the gross weekly earnings of the deceased³⁶.

18 McColl JA considered that the primary judge was right to find that a literal construction of s 12(2) produces a result that is inconsistent with the provision's purpose³⁷. Her Honour proceeded to consider the circumstances in which a court may construe a provision as if the provision contains additional

32 *Taylor v The Owners – Strata Plan No 11564* [2012] NSWSC 842 at [60].

33 *Taylor v The Owners – Strata Plan No 11564* [2012] NSWSC 842 at [75].

34 *Taylor v The Owners – Strata Plan No 11564* (2013) 83 NSWLR 1 at 8 [27] citing *Macquarie Dictionary*, 5th ed (2009).

35 *Taylor v The Owners – Strata Plan No 11564* (2013) 83 NSWLR 1 at 8 [27] citing the Oxford English Dictionary Online.

36 *Taylor v The Owners – Strata Plan No 11564* (2013) 83 NSWLR 1 at 7 [24] per McColl JA, 15 [65] per Basten JA, 22 [98] per Hoeben JA.

37 *Taylor v The Owners – Strata Plan No 11564* (2013) 83 NSWLR 1 at 9 [34].

words to give effect to its evident purpose. Her Honour concluded that the court may only do so if three conditions stated by Lord Diplock in *Wentworth Securities Ltd v Jones*³⁸ and an additional condition³⁹ are satisfied. Her Honour was satisfied that all four conditions are met in the case of s 12(2) of the Liability Act⁴⁰. Her Honour's conclusion took into account three other statutory schemes that impose a limitation on the award of damages for injury or death calculated by reference to earnings: s 9 of the *Health Care Liability Act* 2001 (NSW) ("the HCL Act"); s 151I of the *Workers Compensation Act* 1987 (NSW) ("the WC Act"); and s 125 of the *Motor Accidents Compensation Act* 1999 (NSW) ("the MAC Act").

19 Section 151I(1) of the WC Act, which is contained in Div 3 of Pt 5, dealing with modified common law damages, directs the court in awarding damages to "disregard the amount (if any) by which the injured *or deceased worker's* net weekly earnings would (but for the injury or death) have exceeded" a specified amount (emphasis added). The section applies to awards of damages including for the loss of expectation of financial support⁴¹.

20 Section 125 of the MAC Act applies to an award for past or future economic loss due to loss of earnings, or the deprivation or impairment of earning capacity, or for the loss of expectation of financial support. Section 125(2) of the MAC Act provides that "[i]n the case of any such award, the court is to disregard the amount (if any) by which the injured *or deceased person's* net weekly earnings would (but for the injury or death) have exceeded \$2,500" (emphasis added).

21 Section 9 was in Pt 2 of the HCL Act, which governed the award of damages in health care claims. Part 2 of the HCL Act was repealed by the Liability Act⁴². McColl JA observed that s 12 of the Liability Act appears to

38 [1980] AC 74 at 105.

39 *Mills v Meeking* (1990) 169 CLR 214 at 235 per Dawson J; [1990] HCA 6; *Director of Public Prosecutions v Leys* (2012) 296 ALR 96 at 126-127 [97].

40 *Taylor v The Owners – Strata Plan No 11564* (2013) 83 NSWLR 1 at 10 [41].

41 See *Workers Compensation Act* 1987 (NSW), ss 151E(1), 151E(3), 151G(2), 151IA.

42 *Civil Liability Act* 2002 (NSW), Sched 2.1 [1].

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have been transposed from s 9 of the HCL Act⁴³. Her Honour considered that the omission of a reference to the deceased's gross weekly earnings in s 12 of the Liability Act was a clear drafting error⁴⁴.

22

The first of Lord Diplock's conditions requires the identification of the precise purpose of the provision. McColl JA said that s 12 of the Liability Act and s 125 of the MAC Act evince the same legislative purpose. Her Honour adopted Hodgson JA's description of the latter as demonstrating⁴⁵:

"a clear legislative intention that there be an effective limit put on claims by dependants of persons whose efforts would have produced very high financial benefits to those dependants".

43 *Taylor v The Owners – Strata Plan No 11564* (2013) 83 NSWLR 1 at 10 [42]. Section 9 of the *Health Care Liability Act* 2001 (NSW) provided:

- "(1) This section applies to an award of damages:
- (a) for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity, or
 - (b) for future economic loss due to the deprivation or impairment of earning capacity, or
 - (c) for the loss of expectation of financial support.
- (2) In the case of any such award, the court is to disregard the amount (if any) by which the claimant's net weekly earnings would (but for the injury or death) have exceeded \$2,603.
- (3) The annual adjustment under section 146 of the *Motor Accidents Compensation Act* 1999 of the amount applying under section 125 of that Act applies to and in respect of the amount referred to in subsection (2). Accordingly, an amount declared for the time being under section 146 of the *Motor Accidents Compensation Act* 1999 applies to the exclusion of the amount referred to in subsection (2)."

44 *Taylor v The Owners – Strata Plan No 11564* (2013) 83 NSWLR 1 at 9 [34], 10 [42].

45 *Taylor v The Owners – Strata Plan No 11564* (2013) 83 NSWLR 1 at 9 [33] citing *Kaplantzi v Pascoe* (2003) 40 MVR 146 at 152 [32].

23 The second of Lord Diplock's conditions requires satisfaction that the drafter and the Parliament inadvertently overlooked an eventuality that must be dealt with if the provision is to achieve its purpose. McColl JA considered it plain the drafter of s 9 of the HCL Act had failed to appreciate the irrelevance of the claimant's earnings to a damages award falling within the equivalent to s 12(1)(c) and that this omission had been carried over to s 12(2)⁴⁶.

24 The third of Lord Diplock's conditions requires the court to identify the words that the legislature would have included in the provision had the deficiency been detected before its enactment. McColl JA was satisfied that had the deficiency been identified the legislature would have included the words "or deceased person's" after the word "claimant's" consistently with the drafting of s 125 of the MAC Act and s 151I of the WC Act⁴⁷.

25 The fourth condition which McColl JA held to be necessary of fulfilment before a court is justified in reading words into a provision is taken from Dawson J's statement of the principles (dissenting in the result) in *Mills v Meeking*. His Honour said that the modification "must be consistent with the wording otherwise adopted by the draftsman"⁴⁸.

26 McColl JA's construction reads s 12(2) as if it provided⁴⁹:

"(2) In the case of any such award, the court is to disregard the amount (if any) by which the claimant's *or deceased person's* gross weekly earnings would (but for the injury or death) have exceeded an amount that is 3 times the amount of average weekly earnings at the date of the award." (emphasis of McColl JA)

27 Before the primary judge and the Court of Appeal there was an issue as to whether damages awarded in a Relatives Act action are personal injury damages within Pt 2 of the Liability Act. The appellant submitted that the damages in such a claim are not damages that relate to personal injury or death. That issue was correctly decided against her and is not challenged on the appeal. The first

46 *Taylor v The Owners – Strata Plan No 11564* (2013) 83 NSWLR 1 at 10 [42].

47 *Taylor v The Owners – Strata Plan No 11564* (2013) 83 NSWLR 1 at 11 [43].

48 *Taylor v The Owners – Strata Plan No 11564* (2013) 83 NSWLR 1 at 10 [40] citing *Mills v Meeking* (1990) 169 CLR 214 at 235 per Dawson J and *Director of Public Prosecutions v Leys* (2012) 296 ALR 96 at 126-127 [97].

49 *Taylor v The Owners – Strata Plan No 11564* (2013) 83 NSWLR 1 at 11 [43].

11.

to fourth and sixth respondents' contention below was that the phrase "loss of expectation of financial support" in s 12(1)(c) refers to damages awarded in a Relatives Act action.

28 The primary judge and the Court of Appeal proceeded upon the correctness of that assumption⁵⁰. The primary judge and McColl JA each adopted a purposive construction requiring that s 12(2) be read as if it contained additional words. Their Honours differed with respect to the words to be added with the result that they gave differing operation to the s 12(2) limitation. McColl JA did not explain the basis of her satisfaction that the addition of the words "or deceased person's" after "claimant's" in s 12(2) is consistent with the language otherwise used by the drafter. However, it will be observed that unlike the construction proposed by the primary judge, her Honour's construction does not result in the s 12(2) limitation having no application to the claimant's gross weekly earnings in a Relatives Act action in which the court has regard to those earnings.

The submissions

29 The appellant submits that McColl JA erred by not giving s 12(2) its ordinary grammatical meaning. She submits that her Honour exceeded the proper limits of statutory implication by re-writing s 12(2). The submission is supported by reference to Spigelman CJ's analysis of the principles in *R v Young*⁵¹ and *R v PLV*⁵². Aspects of his Honour's analysis were rejected by the Victorian Court of Appeal in *Director of Public Prosecutions v Leys*⁵³. The appellant submits that McColl JA erred in following *Leys*.

30 The first to fourth respondents and the sixth respondent, the active respondents to the appeal, submit that consideration of the principles stated in *Wentworth Securities* and the more recent discussion of those principles in *Young* and *Leys* is a distraction. In the first to fourth respondents' submission, the *Wentworth Securities* restrictions on "reading in" words to a statutory text apply in a case in which the court is asked "to add words that are quite beyond any tenable view of the contextual meaning". They contend that "claimant" in

50 *Taylor v The Owners – Strata Plan No 11564* [2012] NSWSC 842 at [60]; *Taylor v The Owners – Strata Plan No 11564* (2013) 83 NSWLR 1 at 7 [22].

51 (1999) 46 NSWLR 681 at 686-691 [5]-[35].

52 (2001) 51 NSWLR 736 at 742-744 [80]-[90].

53 (2012) 296 ALR 96 at 124-127 [92]-[98].

s 12(2) has the contextual meaning of "the impaired person": an expression that accords with the conceptual basis of the three awards that are the subject of the s 12(2) limitation.

31 The sixth respondent in written submissions supported McColl JA's construction of s 12(2), contending that the addition of the words "or deceased person's" after "claimant's" is the correction of an obvious drafting error of a kind that does not invoke Lord Diplock's conditions.

32 Before addressing these submissions, it is necessary to refer to a contention, not agitated below, respecting the scope of s 12(1)(c). The active respondents contend that the words "expectation of financial support" in s 12(1)(c) refer to the expectation of benefit to be derived from the deceased's income or capital ("direct financial support") and not to the expectation of other pecuniary benefit in a Relatives Act award. On this analysis the s 12(2) limitation can have no application to an award of damages under s 12(1)(c) unless the words "claimant's gross weekly earnings" are given an extended, ungrammatical meaning.

33 On the hearing of the appeal the active respondents embraced a further construction of s 12(2) posited on acceptance of s 12(1)(c) as being confined to direct financial support. The phrase "the claimant's gross weekly earnings", they submit, is to be understood as meaning *the gross weekly earnings on which the claimant relies*.

34 The active respondents differ on the question of whether, in a Relatives Act award in which the court has regard to the claimant's earnings, the s 12(2) limitation applies. The sixth respondent submits that s 12(1)(b) would engage the s 12(2) limitation in such a case. The submission misconceives the basis of a claim for economic loss under s 12(1)(b). A claimant who reasonably chooses to give up, reduce or change his or her employment in order to perform the services previously performed by the deceased is not awarded damages for the deprivation or impairment of earning capacity. The first to fourth respondents are correct to acknowledge that, on the construction of s 12 for which they contend, the s 12(2) limitation has no application to an award under the Relatives Act in which a component of the loss is calculated by reference to the claimant's gross weekly earnings.

The principles

35 In *Young* Spigelman CJ suggested that the authorities do not warrant the court supplying words in a statute that have been "omitted" by inadvertence

per se⁵⁴. Construing the words actually used by the legislature in "their total context", Spigelman CJ suggested that the process of construction admits of reading down of general words or giving the words used an ambulatory operation⁵⁵. His Honour cited *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*⁵⁶ as an instance of the former and *Birmingham v Corrective Services Commission (NSW)*⁵⁷ as an instance of the latter⁵⁸. In *R v PLV* his Honour expanded on his analysis in *Young*, observing⁵⁹:

"The authorities which have expressed the process of construction in terms of 'introducing' words to an Act or 'adding' words have all, so far as I have been able to determine, been concerned to confine the sphere of operation of a statute more narrowly than the full scope of the dictionary definition of the words would suggest. I am unaware of any authority in which a court has 'introduced' words to or 'deleted' words from an Act, with the effect of *expanding* the sphere of operation that could be given to the words actually used. ... There are many cases in which words have been *read down*. I know of no case in which words have been *read up*." (emphasis in original)

36

In *Leys* the Victorian Court of Appeal was critical of Spigelman CJ's characterisation of purposive construction as a process of construing "*the words actually used*"⁶⁰ (emphasis in original). Their Honours said that the process requires the court to determine whether the modified construction is reasonably open in light of the statutory scheme and against a background of the satisfaction of Lord Diplock's three conditions⁶¹. Their Honours questioned the utility of the distinction between "reading up" and "reading down" and rejected the

54 (1999) 46 NSWLR 681 at 687 [14].

55 *R v Young* (1999) 46 NSWLR 681 at 688 [15]-[16].

56 (1981) 147 CLR 297; [1981] HCA 26.

57 (1988) 15 NSWLR 292.

58 *R v Young* (1999) 46 NSWLR 681 at 689 [22], 690 [30]-[31].

59 (2001) 51 NSWLR 736 at 743-744 [88].

60 *Director of Public Prosecutions v Leys* (2012) 296 ALR 96 at 124 [92].

61 *Director of Public Prosecutions v Leys* (2012) 296 ALR 96 at 126 [96].

proposition that a purposive construction may not result in an expanded operation of a provision⁶².

37 Consistently with this Court's rejection of the adoption of rigid rules in statutory construction⁶³, it should not be accepted that purposive construction may never allow of reading a provision as if it contained additional words (or omitted words) with the effect of expanding its field of operation. As the review of the authorities in *Leys* demonstrates, it is possible to point to decisions in which courts have adopted a purposive construction having that effect. And as their Honours observed by reference to the legislation considered in *Carr v Western Australia*⁶⁴, the question of whether a construction "reads up" a provision, giving it an extended operation, or "reads down" a provision, confining its operation, may be moot⁶⁵.

38 The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision⁶⁶. It is answered against a construction that fills "gaps disclosed in legislation"⁶⁷ or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature"⁶⁸.

62 *Director of Public Prosecutions v Leys* (2012) 296 ALR 96 at 130 [107], [109].

63 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 401 per Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ; [1996] HCA 36.

64 (2007) 232 CLR 138; [2007] HCA 47.

65 *Director of Public Prosecutions v Leys* (2012) 296 ALR 96 at 129-130 [105]-[107].

66 *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627 at 630 per Gibbs CJ, Murphy, Wilson, Deane and Dawson JJ; [1984] HCA 48; *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642 at 651-652 [9] per French CJ and Bell J; [2009] HCA 40.

67 *Marshall v Watson* (1972) 124 CLR 640 at 649 per Stephen J; [1972] HCA 27.

68 *Western Bank Ltd v Schindler* [1977] Ch 1 at 18 per Scarman LJ cited by Lord Nicholls of Birkenhead in *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 1 WLR 586 at 592; [2000] 2 All ER 109 at 115.

39 Lord Diplock's three conditions (as reformulated in *Inco Europe Ltd v First Choice Distribution (a firm)*⁶⁹) accord with the statements of principle in *Cooper Brookes*⁷⁰ and McColl JA was right to consider that satisfaction of each could be treated as a prerequisite to reading s 12(2) as if it contained additional words before her Honour required satisfaction of a fourth condition of consistency with the wording of the provision. However, it is unnecessary to decide whether Lord Diplock's three conditions are always, or even usually, necessary and sufficient. This is because the task remains the construction of the words the legislature has enacted. In this respect it may not be sufficient that "the modified construction is reasonably open having regard to the statutory scheme"⁷¹ because any modified meaning must be consistent with the language in fact used by the legislature. Lord Diplock never suggested otherwise. Sometimes, as McHugh J observed in *Newcastle City Council v GIO General Ltd*, the language of a provision will not admit of a remedial construction. Relevant for present purposes was his Honour's further observation, "[i]f the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances."⁷²

40 Lord Diplock's speech in *Wentworth Securities* laid emphasis on the task as construction and not judicial legislation⁷³. In *Inco Europe* Lord Nicholls of Birkenhead observed that even when Lord Diplock's conditions are met, the court may be inhibited from interpreting a provision in accordance with what it is satisfied was the underlying intention of Parliament: the alteration to the language of the provision in such a case may be "too far-reaching"⁷⁴. In Australian law the inhibition on the adoption of a purposive construction that

69 [2000] 1 WLR 586 at 592 per Lord Nicholls of Birkenhead; [2000] 2 All ER 109 at 115. The reformulation was of the third condition: the court must be abundantly sure of the substance, although not necessarily the precise words, the legislature would have enacted.

70 (1981) 147 CLR 297.

71 *Director of Public Prosecutions v Leys* (2012) 296 ALR 96 at 126 [96].

72 (1997) 191 CLR 85 at 113; [1997] HCA 53. See also *IW v City of Perth* (1997) 191 CLR 1 at 12 per Brennan CJ and McHugh J; [1997] HCA 30.

73 *Wentworth Securities Ltd v Jones* [1980] AC 74 at 105-106.

74 *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 1 WLR 586 at 592; [2000] 2 All ER 109 at 115.

departs too far from the statutory text has an added dimension because too great a departure may violate the separation of powers in the Constitution⁷⁵.

Conclusion

41 The primary judge's construction and that proposed by the active respondents on the appeal each require that the phrase "claimant's gross weekly earnings", in the case of an award of damages under s 12(1)(c), be read as referring to the gross weekly earnings of the deceased. On no view can the deceased be "the claimant". To read s 12, in the case of an award under s 12(1)(c), as applying the s 12(2) limitation to the deceased's gross weekly earnings cannot be reconciled with the language that the Parliament has enacted. The phrase "the claimant's gross weekly earnings" is incapable of identifying the gross weekly earnings of the deceased.

42 The phrase "loss of expectation of financial support" in s 12(1)(c) is susceptible of the construction proposed by the active respondents and that given to it by McColl JA. Her Honour described the phrase as a reflection of this Court's characterisation of Relatives Act damages⁷⁶. On this view "expectation of financial support" is apt to encompass any material benefit having a money value. Construed in this way s 12(1)(c) and s 12(2) operate harmoniously⁷⁷. It is a construction to be preferred to one that gives s 12(2) no work in the case of an award under s 12(1)(c)⁷⁸.

43 There is no warrant for the conclusion that the s 12(2) limitation has the same purpose as the limitation in s 125 of the MAC Act. Relatives Act claims arising from motor accidents, by reason of their number or otherwise, may have called for a different legislative response to Relatives Act claims arising from other wrongful acts. And as Basten JA observed⁷⁹, the circumstance that the

75 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 512-513 [102] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; [2003] HCA 2; *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28] per French CJ, Gummow, Crennan, Kiefel and Bell JJ; [2009] HCA 52.

76 *Taylor v The Owners – Strata Plan No 11564* (2013) 83 NSWLR 1 at 7 [22].

77 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [70]-[71] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28.

78 *Interpretation Act* 1987 (NSW), s 33.

79 *Taylor v The Owners – Strata Plan No 11564* (2013) 83 NSWLR 1 at 18 [83].

17.

legislature chose to depart from the language used in s 125 of the MAC Act (and s 151I of the WC Act) does not provide a foundation for the assumption that the different words enacted in s 12 of the Liability Act (and its predecessor, s 9 of the HCL Act) are directed to the achievement of the same object.

44 The purpose of s 12 may be identified as the limitation of the component of the award that is assessed by reference to a claimant's high earnings, in claims for personal injury damages brought by or on behalf of high-earning individuals. The fact that the occasions for the application of the s 12(2) limitation in Relatives Act awards may be infrequent is not a reason for identifying some different legislative purpose outside the terms of the statute⁸⁰.

45 For these reasons the following orders should be made:

1. Appeal allowed.
2. Set aside orders 3 and 4 of the Court of Appeal of the Supreme Court of New South Wales made on 18 March 2013, and orders 1 and 2 of that Court made on 5 June 2013, and, in their place, order that:
 - (a) the appeal be allowed;
 - (b) the orders of the Supreme Court of New South Wales made on 27 July 2012 be set aside and, in their place, order that:
 - (i) the separate question:

"Insofar as the plaintiffs claim damages pursuant to ss 3 and 4 of the *Compensation to Relatives Act* 1897, is any award of damages limited by the operation of s 12(2) of the *Civil Liability Act* 2002?"

be answered:

"No, the operation of s 12(2) of the *Civil Liability Act* 2002 (NSW) does not limit the first plaintiff's claim for damages pursuant to ss 3 and 4 of the

⁸⁰ *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; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389 [25] per French CJ and Hayne J; [2012] HCA 56.

18.

Compensation to Relatives Act 1897 (NSW) as pleaded on behalf of herself and any other entitled relatives of the late Mr Craig Taylor in that it does not require the court to disregard the amount by which the gross weekly earnings of Mr Craig Taylor would, but for his death, have exceeded an amount that is three times the average weekly earnings at the date of the award"; and

- (ii) the first to sixth defendants pay the first and second plaintiffs' costs of the separate question; and
 - (c) the first to fourth and sixth respondents pay the appellant's costs of the appeal.
3. The first to fourth and sixth respondents pay the appellant's costs in this Court.

GAGELER AND KEANE JJ.

Introduction

46 Mrs Susan Taylor commenced proceedings in the Supreme Court of New South Wales claiming damages under ss 3 and 4 of the *Compensation to Relatives Act* 1897 (NSW) ("the CRA") arising out of the death of her husband, Mr Craig Taylor. A preliminary question in those proceedings asked whether any such award of damages would be limited by s 12(2) of the *Civil Liability Act* 2002 (NSW) ("the CLA").

47 The primary judge (Garling J)⁸¹ gave an answer which was upheld by majority in the Court of Appeal (McColl and Hoeben JJA, Basten JA dissenting)⁸². The answer was that, "insofar as it includes damages for the loss of an expectation of the financial support provided by the late Mr Taylor", the claim is to be determined in accordance with s 12(2) of the CLA by the Supreme Court "disregarding the amount (if any) by which the late Mr Taylor's gross weekly earnings would (but for his death) have exceeded an amount that is three times the amount of average weekly earnings at the date of the award".

48 We agree with that answer. We would therefore dismiss Mrs Taylor's appeal from the judgment of the Court of Appeal. Our reasons differ slightly from those expressed in the reasons for judgment of the majority in the Court of Appeal. They are best explained by addressing the nature and potential scope of a claim for damages under ss 3 and 4 of the CRA before addressing the construction of s 12 of the CLA.

The CRA

49 The CRA is in the familiar form of fatal accidents legislation deriving from *Lord Campbell's Act*⁸³, which created a novel and confined statutory cause of action "in an area where the common law conferred no right of action at all, namely, where [an] injured person had died"⁸⁴.

50 Section 3 is expressed to apply "[w]hensoever the death of a person is caused by a wrongful act ... such as would (if death had not ensued) have entitled

81 *Taylor v The Owners – Strata Plan No 11564* [2012] NSWSC 842.

82 *Taylor v The Owners – Strata Plan No 11564* (2013) 83 NSWLR 1.

83 *Fatal Accidents Act* 1846 (UK) (9 & 10 Vict c 93).

84 *Nguyen v Nguyen* (1990) 169 CLR 245 at 251; [1990] HCA 9.

the party injured to maintain an action and recover damages". It provides that "in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages".

51 Section 4, operating with later sections, specifies by whom and for the benefit of whom the statutory action for damages may be brought, and how the damages recoverable in the action are to be measured and divided. The action "shall be for the benefit of" relatives of the deceased comprising "the spouse, brother, sister, half-brother, half-sister, parent, and child". The action "shall be brought by and in the name of the executor or administrator" of the deceased but, if not brought by the executor or administrator within six months after the death of the deceased, may be brought by any one or more of the specified relatives⁸⁵. The damages recoverable are such damages as the jury (or judge trying the action without a jury⁸⁶) "may think proportioned to the injury resulting from such death to the parties respectively ... for whose benefit such action is brought" and "the amount so recovered ... shall be divided amongst the before-mentioned parties in such shares as the jury [or judge] ... find and direct".

52 The "injury" to the relatives resulting from the death of the deceased person, in respect of which damages are recoverable in the statutory action, "consists in the loss of material benefits or of the reasonable prospect of material benefits which depended on the continuance of the life of the deceased"⁸⁷. Accordingly, "[w]hat must be ascertained [in every case] is whether any and what loss has been sustained by the relatives of the deceased after comparing the material benefits depending upon his life with any material gains accruing from his death"⁸⁸.

53 The "paradigm case" of a *Lord Campbell's Act* action has historically been that of "a claim by a dependent wife [for the benefit of herself and her children] for damages arising from the death of her husband, who was the family breadwinner"⁸⁹. In that paradigm case, and in other cases where the material benefits which depended on the continuance of the life of the deceased comprise

85 Section 6B.

86 Section 6D.

87 *Public Trustee v Zoanetti* (1945) 70 CLR 266 at 279; [1945] HCA 26. See also *The National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569 at 588; [1961] HCA 15.

88 *Public Trustee v Zoanetti* (1945) 70 CLR 266 at 279.

89 *De Sales v Ingrilli* (2002) 212 CLR 338 at 347 [12]; [2002] HCA 52.

material benefits which the deceased would have provided to relatives out of his or her earnings, the damages recoverable have appropriately been described as "for the loss of the expectation of financial support"⁹⁰. The description of the damages in those terms emphasises that they are not "for the loss of earning capacity which has been destroyed by death"⁹¹.

54 Loss of material benefits recoverable as damages in a *Lord Campbell's Act* action is not, however, confined to loss of expectation of financial support⁹². A lost material benefit might comprise, for example, an activity which the deceased would have undertaken for the benefit of one or more relatives such as housekeeping⁹³, handyman services⁹⁴, child care⁹⁵ or aged care⁹⁶. In some cases, of which an example is *Nguyen v Nguyen*⁹⁷, damages proportioned to a loss of a material benefit of that nature might appropriately be measured by reference to the commercial value of the activity. In other cases, of which an example is *Croker v Wright*⁹⁸, damages proportioned to the loss of the material benefit might appropriately be measured by reference to earnings forgone by a specified relative who steps in to undertake the activity in place of the deceased.

90 *Ruby v Marsh* (1975) 132 CLR 642 at 651; [1975] HCA 32. See also *De Sales v Ingrilli* (2002) 212 CLR 338 at 371 [91].

91 *Ruby v Marsh* (1975) 132 CLR 642 at 651, referring to *East v Breen* [1975] VR 19 at 26.

92 *De Sales v Ingrilli* (2002) 212 CLR 338 at 347 [13].

93 *Eg Nguyen v Nguyen* (1990) 169 CLR 245; *Roads & Traffic Authority v Jelfs* (2000) Aust Torts Reports ¶81-583.

94 *Eg Dwight v Bouchier* (2003) 37 MVR 550 at 560 [75].

95 *Eg Croker v Wright* unreported, Court of Appeal of the Supreme Court of New South Wales, 12 June 1980.

96 *Eg De Sales v Ingrilli* (2002) 212 CLR 338 at 348 [13].

97 (1990) 169 CLR 245.

98 Unreported, Court of Appeal of the Supreme Court of New South Wales, 12 June 1980.

The CLA

55 The CLA was extensively amended soon after its original enactment⁹⁹. It applies in its current amended form and is therefore to be construed in that form¹⁰⁰. Legislative history is not irrelevant to its construction, but sheds no light on the present question. The extrinsic materials are at too high a level of generality to illuminate. Contrasting the language of s 12 with that of earlier provisions in other statutes having a similar statutory purpose¹⁰¹ highlights but does not resolve its ambiguity.

56 Part 2 is headed "Personal injury damages". "Personal injury damages" are defined for the purposes of the Part to mean "damages that relate to the death of or injury to a person"¹⁰². The Part is expressed to apply "to and in respect of an award of personal injury damages" except as specifically excluded¹⁰³. It is also expressed to apply "regardless of whether the claim for the damages is brought in tort, in contract, under statute or otherwise"¹⁰⁴. A "court" (defined "in relation to a claim for damages" to mean "any court or tribunal by or before which the claim falls to be determined"¹⁰⁵) "cannot award damages" (defined to include "any form of monetary compensation"¹⁰⁶) contrary to the Part¹⁰⁷.

57 Damages recoverable under the CRA are plainly "damages that relate to the death of ... a person" which are claimed under statute. Damages recoverable under the CRA are therefore plainly "personal injury damages" in respect of which Pt 2 of the CLA applies.

99 *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW).

100 *Commissioner of Police v Eaton* (2013) 87 ALJR 267 at 286 [97]; 294 ALR 608 at 631; [2013] HCA 2.

101 Section 151I of the *Workers Compensation Act 1987* (NSW) and s 125 of the *Motor Accidents Compensation Act 1999* (NSW).

102 Section 11.

103 Section 11A(1).

104 Section 11A(2).

105 Section 3, "court".

106 Section 3, "damages".

107 Section 11A(3).

58 Section 12, which is within Pt 2, provides in part:

"(1) This section applies to an award of damages:

- (a) for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity, or
- (b) for future economic loss due to the deprivation or impairment of earning capacity, or
- (c) for the loss of expectation of financial support.

(2) In the case of any such award, the court is to disregard the amount (if any) by which the claimant's gross weekly earnings would (but for the injury or death) have exceeded an amount that is 3 times the amount of average weekly earnings at the date of the award."

59 The structure of s 12, within the context of Pt 2, is a significant guide to the construction of s 12(2). Section 12(1) identifies three categories of personal injury damages. Section 12(2) then sets out a rule which binds a court awarding personal injury damages within each of those categories: "[i]n the case of any such award".

60 That structure makes clear that the targets of the rule set out in s 12(2) are awards of damages within each of the three categories of personal injury damages identified in s 12(1). The express statutory identification of those targets leaves no room for the invocation of any presumption against statutory interference with the common law or statutory rights which would be vindicated by such awards of damages¹⁰⁸, even assuming that such a presumption might otherwise have scope for operation¹⁰⁹. "If the target of a legislative provision is clear, the court's duty is to ensure that it is hit rather than to record that it has been missed"¹¹⁰.

61 Unless s 12 is to miss one or more of its legislatively defined targets entirely, s 12(2) must be construed to allow the rule it sets out to operate in

108 *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082 at 1152 [313]; 302 ALR 363 at 452; [2013] HCA 39.

109 Cf *Daly v Thiering* (2013) 88 ALJR 67 at 72 [32]-[33]; 303 ALR 188 at 194-195; [2013] HCA 45.

110 *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 113; [1997] HCA 53.

respect of at least some awards of damages within each of the three categories of personal injury damages identified in s 12(1). The path to the construction of s 12(2) therefore has s 12(1) at its gate.

62 Section 12(1) identifies the categories of personal injury damages as at the time of the making of an award in respect of which s 12(2) is to operate. The category identified by par (a) is defined in terms apt at that time to encompass at least part of an award of damages under the CRA in so far as the paragraph refers to damages "for past economic loss due to loss of earnings". The category is inapt to encompass an award of damages under the CRA in so far as the paragraph refers to damages "for past economic loss due to ... deprivation or impairment of earning capacity". The category identified by par (b), being confined to damages "for future economic loss due to the deprivation or impairment of earning capacity", is inapt ever to encompass any award of damages under the CRA.

63 The category identified by par (c), in contrast, is defined in terms which are apt always to encompass an award of damages in an action under the CRA and only ever to encompass such an award of damages. Paragraph (c), however, cannot be read as encompassing all awards of damages in an action under the CRA. That is because the paragraph refers not to damages for the expectation of material benefits, but to the narrower subset of damages for the loss of expectation of financial support. Paragraph (c) as cast in those narrower terms is directed to the paradigm case, of which Mrs Taylor's claim is an example, in which the award of damages is for the loss of relatives' expectation of financial support by the deceased. Paragraph (c) does not encompass a case such as *Nguyen v Nguyen* or *Croker v Wright*, in which the award of damages is for the loss of expectation of a different material benefit.

64 The category of personal injury damages identified in par (c) of s 12(1) being limited to damages for the loss of the relatives' expectation of financial support by the deceased, the constructional challenge is then to determine whether, and if so how, s 12(2) can be construed to operate in respect of an award of damages within that limited category. The majority in the Court of Appeal sought to meet the challenge by construing the statutory text as implicitly containing additional words so as to refer to "the claimant's *or deceased person's* gross weekly earnings"¹¹¹.

65 Statutory construction involves attribution of legal meaning to statutory text, read in context. "Ordinarily, that meaning (the legal meaning) will

111 *Taylor v The Owners – Strata Plan No 11564* (2013) 83 NSWLR 1 at 11 [43].

correspond with the grammatical meaning ... But not always."¹¹² Context sometimes favours an ungrammatical legal meaning. Ungrammatical legal meaning sometimes involves reading statutory text as containing implicit words. Implicit words are sometimes words of limitation. They are sometimes words of extension. But they are always words of explanation¹¹³. The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair.

66 Context more often reveals statutory text to be capable of a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural. The choice between alternative meanings then turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies.

67 The construction of s 12(2) adopted by the majority in the Court of Appeal coheres with the statutory object of subjecting an award of damages of the kind identified in par (c) of s 12(1) to the rule set out in s 12(2). But it is a very strained construction.

68 The statutory object is equally achieved if "the claimant's gross weekly earnings" is read as meaning the gross weekly earnings on which the claimant relies, as "claimant", in making the claim for damages that is the subject of an award of damages. And the text of s 12(2) is less strained.

69 The word "claimant" is naturally understood to denote a person who makes (or is entitled to make) a claim. To read "the claimant's gross weekly earnings" as meaning the gross weekly earnings on which the person making the claim for damages relies gives the rule in s 12(2) work to do in respect of an award of damages falling within par (c) of s 12(1) in exactly the same way as it gives that rule work to do in respect of an award of damages falling within pars (a) and (b) of s 12(1). The claimant in relation to an award of damages falling within par (c) of s 12(1) may (but need not) be one of the relatives of the deceased for whose benefit the action is brought and may simply be the executor or administrator. To establish the claimed loss of expectation of financial

112 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78]; [1998] HCA 28.

113 Eg *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 310-311, 319-321; [1981] HCA 26; *MacAlister v The Queen* (1990) 169 CLR 324 at 330; [1990] HCA 15.

support which is the subject of the award, such a claimant relies on the gross weekly earnings of the deceased.

70 The construction of s 12(2) which we prefer is therefore that which we put to learned senior counsel for Mrs Taylor in the course of argument: it is to construe s 12(2)'s reference to "the claimant's gross weekly earnings" as a reference to the gross weekly earnings on which the claimant relies in the claim for damages that is the subject of an award of damages.

71 The alternative grammatical meaning, for which counsel for Mrs Taylor resolutely contended, involves reading "the claimant's gross weekly earnings" as meaning the gross weekly earnings of the person who happens to be the claimant. The problem with that meaning is that the gross weekly earnings of the claimant could then never bear on the loss of expectation of financial support to be quantified in an award of damages falling within par (c) of s 12(1). While it would leave s 12(2) with work to do in respect of awards of damages falling within pars (a) and (b) of s 12(1), the meaning would deprive s 12(2) of any work to do in respect of any award of damages falling within par (c) of s 12(1). Indeed, the meaning would render par (c) of s 12(1) a statutory curiosity: a target which could never be hit.

Orders

72 Mrs Taylor's appeal should be dismissed.

