



MAXIMUM COSTS and INTENTIONAL TORTS in NSW

By Phillipa Alexander

Section 338 of the *Legal Profession Act 2004* (NSW) (LPA) sets out the maximum costs for legal services that apply in respect of a claim for personal injury damages where the amount recovered on the claim does not exceed \$100,000. Ever since the introduction of similar provisions in the former *Legal Profession Act 1987* (NSW), in 2002, there has been ongoing debate as to whether maximum costs apply to a claim for damages in respect of an intentional tort such as an assault, or whether such costs are unregulated. Over the years, a number of judgments have been delivered with decisions upholding both views.

The issue has importance to plaintiffs who may be entitled to recover only maximum party-party costs of \$10,000 to \$20,000, or unregulated costs which could be as high as several hundred thousand dollars. The issue is also of importance to solicitors in terms of their disclosure and contracting out of the maximum costs provisions under s339 of the LPA.

DEFINITION OF PERSONAL INJURY DAMAGES

The argument arises as a result of the definition of 'personal injury damages' in s337 of the LPA, which says that: 'personal injury damages has the same meaning as in Pt 2 of the *Civil Liability Act 2002*'.

The question is whether this definition adopts only the meaning of 'personal injury damages' in s11 of the *Civil Liability Act 2002* (CLA), as 'damages that relate to the death of or injury to a person'; or whether the definition also requires the scope of application of Pt 2 of the CLA to be taken into account. Section 11A states that Pt 2 of the CLA applies in respect of an award of personal injury damages, except an award that is excluded from the operation of the Part by s3B. Section 3B excludes from the provisions of the CLA, *inter alia*, the civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury or death. If the LPA definition of 'personal injury damages' includes the scope of application of Pt 2, then a claim for damages for an intentional act is not subject to the maximum costs provisions.

The question has finally been determined by the High Court, by a majority of one, in the recent decisions of *Certain Lloyds Underwriters Subscribing to Contract No. IH00AAQS v Cross*¹ and *New South Wales v Williamson*.²

In *Cross*, the three applicants had suffered injuries inflicted by security officers at the Narrabeen Sands Hotel. They each obtained an award of damages which was less than \$100,000

and obtained a costs order against the defendant insurers. At first instance,³ Garling DCJ considered the costs to be subject to the statutory limitation in the former *Legal Profession Act 1987*. On appeal,⁴ their Honours Basten JA, Hodgson JA and Sackville AJA agreeing, set aside the order made by the District Court and declared that the legal costs were not subject to the maximum costs provisions. The Court held that regard must be had to the context of the definition in Pt 2 of the CLA and that the proper construction of the phrase 'personal injury damages' must take account of the operation of that phrase in the CLA, and not merely the words of the definition.

In *Williamson*,⁵ the applicant sued the state for damages for trespass to the person and false imprisonment, claiming that the state was vicariously liable for action of police officers who had allegedly assaulted and restrained him. Judgment was entered in the District Court proceedings for the sum of \$80,000 plus the costs of the proceedings as agreed or assessed. The parties could not agree on costs, and Mr Williamson sought a declaration in the Supreme Court of NSW⁶ that intentional torts were excluded from the cost-capping provisions in s338 of the LPA. His Honour Hall J considered that the definition of 'personal injury damages' was to be construed 'as referring to the meaning of that phrase by reference and regard to the provisions of Pt 2 of the CLA and not merely by the provisions of s11 of that Pt'.⁷ The applicant obtained a declaration that the costs of the proceedings were not regulated by s338 of the LPA.

The state sought leave to appeal, which was granted by the Court of Appeal.⁸ The Court of Appeal had recently delivered its judgment in *Cross*,⁹ referred to above, holding that the cost-capping provisions did not apply to intentional torts.

In *Williamson*,¹⁰ their Honours Hodgson JA, Campbell JA and Macfarlan JA determined the issue on a different ground, holding that a claim for damages for false imprisonment,

where it includes a claim for damages for deprivation of liberty and loss of dignity, is not a claim for damages that relates to the death or injury to a person. When such a claim is included in a claim for damages, where it is not a severable part of that claim, and is not negligible, the claim for damages is not 'a claim for personal injury damages' within the meaning of s338 of the LPA. Campbell JA did, however, express a tentative view that the trial judge was mistaken in construing the LPA definition as invoking both s11 and s11A of the CLA and that the definition should be restricted to s11. Macfarlan JA agreed with Campbell JA and indicated that while the court should follow *Cross* (as it was a prior decision and not plainly wrong), his opinion was also contrary to the views expressed in *Cross*. Macfarlan JA considered that the literal meaning of the text must prevail and that the phrase 'has the same meaning' in the LPA definition should be interpreted as looking to the 'meaning' of the term in Pt 2 of the CLA provided by the definition, rather than the scope of the application of Pt 2.

Both the state¹¹ and Certain Lloyds Underwriters¹² sought special leave to appeal to the High Court from the decisions of the Court of Appeal. The appeals were heard together, with their Honours French CJ, Hayne and Kiefel JJ finding that the maximum cost provisions in both the LPA 1987 and the LPA 2004 apply if the amount recovered on a claim for personal injury damages does not exceed \$100,000, whether that claim is framed in negligence or as an intentional tort. In *Williamson*, for clarity, the court also stated, 'contrary to the conclusion reached by the Court of Appeal, s338(1) should not be construed as confined in its operation to claims that might result in awards to which Pt 2 of the CLA would apply'.

Their Honours held that:

'... "personal injury damages" in the 2004 Legal Profession Act means any and every form of damages that relate to personal injury to a person whether that injury results from a failure to take reasonable care or the commission of an intentional act with intent to cause injury'.¹³

Even in the High Court, the issue proved to be divisive, with their Honours Crennan and Bell JJ dissenting on this point, holding that the expression does not include a claim for damages for personal injury occasioned by an act done with the intention of causing injury or death.

While in *Cross* the appeal was allowed, the appeal in *Williamson* was ultimately unsuccessful on the basis that the claim for false imprisonment with its attendant claim for damages on account of deprivation of liberty, loss of dignity and harm to reputation was not a claim for personal injury damages. Of importance was the fact that the District Court judgment did not identify how the damages were computed or on what account they were allowed. The High Court held that, on its face, the judgment was consistent with allowing damages only for the deprivation of liberty, with no allowance for any physical or mental impairment.¹⁴

IMPLICATIONS OF THE DECISIONS

Where a claim for personal injury damages involves an intentional act, practitioners will need to make disclosure

under s309(1)(a) of the LPA that a fixed costs provision will apply to the costs if the amount recovered on the claim does not exceed \$100,000. Practitioners are able to contract out of the maximum costs under s339 of the LPA by entering a costs agreement that complies with Division 5 of Part 3.2 of the LPA and making disclosure in accordance with Regulation 116 of the *Legal Profession Regulation 2005*.

Where quantum is unknown or may not exceed \$100,000, estimates of recoverable party:party costs under s309(1)(f) (i) of the LPA should be given on both a maximum costs basis and a deregulated basis, with quantum being the stated variable.

Where a claim for damages for an intentional act is made in conjunction with another claim – such as false imprisonment or malicious prosecution – which is not regarded as a claim for personal injury damages, party:party costs may be recoverable on both a regulated and deregulated basis for the personal injury claim and non-personal injury claims respectively. This may require careful record-keeping to ensure the plaintiff is able to recover the appropriate costs, particularly in relation to the deregulated claims. It is possible (given the outcome in *Williamson*) that a lump sum settlement which does not specify a breakdown of the damages for personal injuries and for other torts may remove the matter from the operation of the provisions altogether, on the basis that it cannot be classified as a claim for personal injury damages overall and there is no severable part of the matter that can be so classified.

APPEAL COSTS

As an aside, s338A of the LPA provides for an additional amount of costs where a decision of the District Court in respect of a claim is the subject of an appeal. The precursor to this provision was introduced as a result of the decision in *Newcastle City Council v Travis McShane (No. 3)*¹⁵ in which the Court of Appeal held that the cap on costs extended to costs in the Court of Appeal because the costs were incurred 'in connection with the claim'. However, s338A does not apply to appeals made from Supreme Court proceedings, leaving the plaintiff vulnerable to argument by the defendant that the appeal costs are covered by the maximum costs amount prescribed by s338 of the LPA. ■

Notes: **1** [2012] HCA 56 (12 December 2012). **2** *Ibid.* **3** (Unrep. DC 4658/2004; 4659/2004; 4660/2004; Garling DCJ, 2 September 2010). **4** *Cross v Certain Lloyds Underwriters; Thelander v Certain Lloyds Underwriters* [2011] NSWCA 136 (1 June 2011). **5** *Williamson v State of NSW* (unrep. DCNSW 3084 of 2007). **6** *Williamson v State of NSW* [2010] NSWSC 229. **7** *Ibid* at [65]. **8** *State of New South Wales v Williamson* [2011] NSWCA 183 (5 July 2011). **9** [2011] NSWCA 136 (1 June 2011). **10** *State of New South Wales v Williamson* [2011] NSWCA 183 (5 July 2011). **11** *New South Wales v Williamson* [2012] HCA 57 (12 December 2012). **12** *Certain Lloyds Underwriters Subscribing to Contract No. IH00AAQS v Cross* [2012] HCA 56 (12 December 2012). **13** *New South Wales v Williamson* [2012] HCA 57 (12 December 2012) at [18]. **14** *Ibid*, per French CJ and Hayne J, Kiefel J agreeing at [34] - [35]. **15** [2005] NSWCA 437 (9 December 2005).

Phillipa Alexander is a specialist in legal costs with *Costs Partners*.
PHONE (02) 9006 1033 **EMAIL** Phillipa@costspartners.com.au.