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High Court clarifies the circumstances in which words may be read into a statute

In *Taylor v The Owners – Strata Plan No 11564* [2014] HCA 9, the High Court confirmed that the purposive construction of a statutory provision may, in some circumstances, involve reading the provision as if it contained additional words. The Court clarified that words read into a provision may operate to either reduce or expand the scope of operation of the provision so as to give effect to its apparent purpose. However, the task of construction is always to interpret the words that the legislature has enacted. Consistently with this, words cannot be read into legislation to achieve a purpose that the words enacted by the legislature do not admit.

The question of construction considered by the Court

The appellant 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) (CRA) arising out of the death of her husband. A preliminary question arose as to whether any such award of damages would be limited by s 12(2) of the *Civil Liability Act 2002* (NSW) (CLA). Section 12 states:

> (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.

The issue to be resolved was whether s 12(2) should be read as if it included a reference to a deceased person's earnings and so operated to limit s 12(1)(c).

The decisions at first instance and in the Court of Appeal

The primary judge (Garling J) identified the purpose of s 12 as being 'to limit claims for tortiously caused damage, and to restrict financial loss claims for high earning individuals'. His Honour determined that it is consonant with the purpose of the scheme to give s 12(2) operative effect in the case of an award for the loss of expectation of financial support (under s 12(1)(c)). Accordingly, his Honour held that s 12(2) should be read as if it provided:

> (2) In the case of any such award, the court is to disregard the amount (if any) by which:
>
> (a) in the case of 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.

The Court of Appeal (McColl and Hoeben JJA, Basten JA dissenting) upheld Garling J's conclusion that s 12(2) operated to limit the appellant's claim for damages but differed on the words to be added. The majority would simply have inserted the words 'or deceased person's' after 'claimant's'.

McColl JA, writing for the majority, concluded that a court could only construe a provision as if it contained additional words if 4 conditions were satisfied (the first 3 conditions being those stated by Lord Diplock in *Wentworth Securities Ltd v Jones* [1980] AC 74):

- First, it must be possible to determine the precise purpose of the provision.
- Secondly, it is apparent that the drafter and Parliament inadvertently overlooked an eventuality that must be dealt with if the provision is to achieve its purpose.
- Thirdly, it is possible to identify with certainty the words the legislature would have included in the provision had the deficiency been detected before its enactment.
- Fourthly, the modification must be consistent with the wording otherwise adopted by the drafter: *Mills v Meeking* (1990) 169 CLR 214 at 235 (Dawson J).

Her Honour was satisfied that all 4 conditions were met in the case of s 12(2) of the CLA. In coming to that view, her Honour was influenced by the analysis of Spigelman CJ in *R v Young* (1999) 46 NSWLR 681 at [14] and *R v PLV* (2001) 51 NSWLR 736 at [87]–[89], where it was held that words could be read into a statute only if that process reduces, and does not expand, the scope of operation of the provision.

The High Court's decision

The High Court by majority (French CJ, Crennan and Bell JJ) allowed the appeal, finding that s 12(2) of the CLA did not limit the appellant's claim for damages.

Notwithstanding this finding, the majority implicitly overruled *Young* and *PLV* to the extent that those decisions suggest that the purposive construction of legislation does not allow words that expand a provision's scope of operation to be read into a statute. Citing the Victorian Court of Appeal decision of *DPP v Leys* (2012) 296 ALR 96, the majority questioned the utility of Spigelman CJ's distinction in *Young* and *PLV* between 'reading up' and 'reading down'. The majority accepted that the purposive construction of a provision may allow reading the provision as if it contained words of extension.

Their Honours stated (at [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 provision. It is answered against a construction that fills 'gaps disclosed in legislation' or makes an insertion which is 'too big, or too much at variance with the language in fact used by the legislature'.

The majority did not decide whether the 3 conditions stated by Lord Diplock in *Wentworth Securities* are always, or even necessarily, sufficient. It explained that the constructional task is always to interpret the words the legislature has enacted and it may not be sufficient that 'the modified construction is reasonably open having regard to the statutory scheme' (compare *Leys* at [96]).

Notwithstanding its adoption of a more flexible approach to statutory construction than that espoused in *Young* and *PLV*, on s 12(2) the majority concluded that the reference to 'the claimant' could not embrace the deceased and that applying the limitation to the deceased's gross weekly earnings in the case of an award of damages under s 12(1)(c) could not be reconciled with the language enacted by the Parliament.

The majority held that the purpose of s 12 was to limit the component of the award that is assessed by reference to a claimant's high earnings in claims for personal injury damages brought on behalf of high-earning individuals; and the fact that occasions for the application of the s 12(2) limitation in claims under the CRA are rare 'is not a reason for identifying some different legislative purpose outside the terms of the statute'.

Gageler and Keane JJ disagreed with the majority's conclusion on the purpose of s 12(2). Their Honours would have dismissed the appeal. They considered that the structure of s 12 made it clear that the targets of the rule set out in s 12(2) are awards of damages within each of the 3 categories of personal injury damages identified in s 12(1). Consistent with that purpose, their Honours adopted a construction of s 12(2) that read 'the claimant's gross weekly earnings' as 'the gross weekly earnings on which the claimant relies'.

However, the minority agreed that the purposive construction of legislation sometimes involves reading statutory text as containing implicit words, which can be words of limitation or extension, but that the court should not attempt to 'divine unexpressed legislative intention or to remedy perceived legislative inattention'.

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