HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

Matter No A8/2018

AMACA PTY LIMITED (UNDER NSW ADMINISTERED WINDING UP) — APPELLANT

AND

ANTHONY LATZ — RESPONDENT

Matter No A7/2018

ANTHONY LATZ — APPELLANT

AND

AMACA PTY LIMITED (UNDER NSW ADMINISTERED WINDING UP) — RESPONDENT

Amaca Pty Limited v Latz
Latz v Amaca Pty Limited
[2018] HCA 22
Date of Order: 11 May 2018
Date of Publication of Reasons: 13 June 2018
A8/2018 & A7/2018

ORDER

Matter No A8/2018

1. *Appeal allowed in part, on the ground (Ground 3(a)) that the Full Court of the Supreme Court of South Australia erred in assessing damages by including an allowance for the loss of expectation of receiving an age pension during the "lost years".*

2. *Set aside order 3 of the Full Court made on 30 October 2017 and 20 November 2017 and, in its place, order that judgment be entered in an amount to be determined in accordance with Order 1.*

3. *Appeal otherwise dismissed.*

4. *The appellant pay the respondent's costs of the appeal.*

Matter No A7/2018

1. *Appeal dismissed.*

2. *The respondent pay the appellant's costs of the appeal.*

On appeal from the Supreme Court of South Australia

Representation

J T Gleeson SC with D F Villa and C G Winnett for the appellant in A8/2018 and the respondent in A7/2018 (instructed by Holman Webb)

D F Jackson QC with S Tzouganatos for the respondent in A8/2018 and the appellant in A7/2018 (instructed by Turner Freeman Lawyers)

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

CATCHWORDS

Amaca Pty Limited v Latz
Latz v Amaca Pty Limited

Negligence – Personal injury – Damages – Assessment of present value of future loss – Where claimant diagnosed with terminal malignant mesothelioma post-retirement – Where claimant's life expectancy reduced – Where claimant receiving superannuation pension under *Superannuation Act* 1988 (SA) and age pension under *Social Security Act* 1991 (Cth) – Whether superannuation pension entitlement which would have been received during remainder of pre-illness life expectancy compensable loss – Whether age pension entitlement which would have been received during remainder of pre-illness life expectancy compensable loss – Whether reversionary pension payable under s 38(1)(a) of *Superannuation Act* to partner on claimant's death should be deducted from damages award.

Words and phrases – "age pension", "capital asset", "compensable loss", "compensatory principle", "loss of earning capacity", "lost years", "net present value", "offsetting or collateral benefit", "pension", "pre-illness life expectancy", "reversionary pension", "superannuation pension".

Social Security Act 1991 (Cth), Pt 2.2.
Superannuation Act 1988 (SA), Pt 5.

1 KIEFEL CJ AND KEANE J. On 11 May 2018, the Court, by majority, made orders disposing of these appeals. We respectfully differ from the majority in that regard. We would have allowed Amaca's appeal and dismissed Mr Latz' appeal. We now set out our reasons.

2 Mr Anthony Latz is a retiree who is dying from malignant mesothelioma, caused by the negligence of Amaca Pty Ltd, as a result of Mr Latz inhaling asbestos dust and fibre in 1976 or 1977 while cutting and installing asbestos fencing manufactured by Amaca[1]. The mesothelioma became symptomatic in 2016; and Mr Latz' condition was diagnosed as terminal in October of that year[2]. At that time, he had been retired from his employment in the public service of South Australia for over nine years[3]. One of the effects of the mesothelioma was that Mr Latz' pre-illness life expectancy was reduced by just over 16 years[4].

3 Mr Latz receives the age pension under Pt 2.2 of the *Social Security Act* 1991 (Cth). The age pension will cease to be payable on his death.

4 Mr Latz also receives a superannuation pension under the *Superannuation Act* 1988 (SA). Mr Latz made contributions to the South Australian Superannuation Fund during the period of his employment. Upon his retirement at age 60, he became entitled to receive a fortnightly payment from the State by way of superannuation. Section 40 of the *Superannuation Act* conferred on Mr Latz, as a person entitled to a pension, the right to commute his superannuation entitlement so as to take its value in a lump sum. Mr Latz did not exercise that right.

5 Pursuant to s 38(1)(a) of the *Superannuation Act*, upon Mr Latz' death his "spouse" (a term defined so as to include his domestic partner, Ms Taplin) will become entitled (subject to presently irrelevant exceptions) to a lifetime pension equivalent to two-thirds of the notional pension to which Mr Latz would have been entitled.

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1 *Latz v Amaca Pty Ltd* [2017] SADC 56 at [7], [16], [19].

2 *Latz v Amaca Pty Ltd* [2017] SADC 56 at [30], [34].

3 *Latz v Amaca Pty Ltd* [2017] SADC 56 at [27].

4 *Amaca Pty Ltd v Latz* (2017) 129 SASR 61 at 69-70 [38].

6 In *CSR Ltd v Eddy*[5], Gleeson CJ, Gummow and Heydon JJ, with whom Callinan J agreed, described the heads of loss that were "traditionally seen" as compensable for negligently inflicted personal injury as:

(a) non-pecuniary loss, being loss of the amenities of life;

(b) loss of earning capacity; and

(c) actual financial loss, being outgoings incurred by reason of the injury.

7 In the present case, the Full Court of the Supreme Court of South Australia held by majority (Blue and Hinton JJ, Stanley J dissenting)[6] that the value of age pension and superannuation payments that could have been expected to be received by Mr Latz in the years between his retirement and death had his life expectancy not been reduced by his mesothelioma was a compensable loss even though it did not fall within the heads of loss described by the plurality in *CSR Ltd v Eddy*. The majority went on, however, to reduce the damages awarded to Mr Latz by the trial judge in order to take account of the benefits that Ms Taplin will receive under Mr Latz' superannuation entitlements upon his death[7].

8 Amaca submitted that the circumstance that Mr Latz will not receive age pension and superannuation payments by reason of his premature death is not the result of any diminution in Mr Latz' earning capacity, and is not otherwise a compensable financial loss as described in *CSR Ltd v Eddy*. This submission should be accepted.

9 The liability imposed by the decision of the Full Court is novel. It is a liability for economic loss not previously recognised by judicial decision in Australia. The expansion of liability in negligence for personal injury so as to include, as compensable economic loss, the loss of the opportunity to enjoy the benefits of financial resources accumulated at the end of the plaintiff's working life is not supported by analogy with previous decisions.

10 Mr Latz' imminent death means that he will not have the opportunity to receive the benefit of age pension and superannuation payments during the years that his retirement has been shortened by the effects of his mesothelioma. That

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5 (2005) 226 CLR 1 at 15-17 [28]-[31], 49 [122]; [2005] HCA 64.

6 *Amaca Pty Ltd v Latz* (2017) 129 SASR 61.

7 Stanley J would not have reduced the award by reference to Ms Taplin's entitlement: *Amaca Pty Ltd v Latz* (2017) 129 SASR 61 at 103 [184].

means that his enjoyment of those rights will be less than would otherwise have been the case; but the loss of the opportunity to enjoy the financial resources accumulated over one's working life has not been regarded in Australia as compensable as economic or financial loss. No basis in principle whereby the enjoyment of Mr Latz' age pension and superannuation entitlements might be distinguished from the enjoyment of other financial resources available to him was identified by the Full Court or in argument in this Court. Accordingly, Amaca's appeal should have been allowed.

11 Mr Latz brought his own appeal against the Full Court's reduction of the damages awarded to him by the trial judge in respect of his superannuation entitlements. Because, in our view, Amaca's appeal, insofar as it related to the superannuation payments, should have been allowed on the basis that the loss of the opportunity to receive those payments is not a compensable economic loss, we concluded that Mr Latz' appeal should have been dismissed.

The trial

12 At trial in the District Court of South Australia, Amaca conceded that if Mr Latz' evidence that he was exposed to asbestos that it had manufactured and sold was accepted, then it was liable in negligence[8]. The trial judge accepted Mr Latz' evidence[9]. Amaca does not contest this finding.

13 The trial judge, rejecting Amaca's contention that Mr Latz' claim for damages to compensate him for the loss of the value of payments under either the age pension or the superannuation scheme was a novel one unsupported by precedent[10], awarded Mr Latz damages in the sum of $1,062,000. Of that sum, $500,000 was in respect of the loss of the full net present value of age pension and superannuation payments for the years between Mr Latz' pre-illness life expectancy and his post-illness life expectancy, described compendiously as "future economic loss"[11].

14 The trial judge also concluded that there was no reason, "as a matter of fairness and policy"[12], to reduce Mr Latz' damages by reason of the circumstance

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8 *Latz v Amaca Pty Ltd* [2017] SADC 56 at [4].

9 *Latz v Amaca Pty Ltd* [2017] SADC 56 at [16].

10 *Latz v Amaca Pty Ltd* [2017] SADC 56 at [117].

11 *Latz v Amaca Pty Ltd* [2017] SADC 56 at [118]-[119].

12 *Latz v Amaca Pty Ltd* [2017] SADC 56 at [112].

that Ms Taplin will receive two-thirds of his superannuation pension upon his death. Rather, Mr Latz was entitled to be compensated fully for the loss of the superannuation pension in respect of the lost years[13].

The Full Court

15 Amaca appealed to the Full Court in respect of the award of damages for economic loss[14], contending that the trial judge had erred in:

(a) awarding damages for the lost years in respect of the age pension and superannuation payments; and

(b) not reducing the award of damages in respect of the lost years for the superannuation pension by reference to Ms Taplin's reversionary entitlement.

The majority view

16 By majority, the Full Court held that the trial judge had not erred in relation to issue (a) but had erred in relation to issue (b)[15]. Consequently, the Full Court reduced the damages awarded by the trial judge by reference to the value of Ms Taplin's reversionary entitlement, and substituted a judgment in Mr Latz' favour in the sum of $864,174.

17 As to issue (a), Blue J concluded that there was no reason to distinguish between wages and income derived from the age pension or the superannuation scheme. Blue J treated as the governing consideration the compensatory principle stated by Lord Blackburn in *Livingstone v Rawyards Coal Co*[16]:

> "[W]here any injury is to be compensated by damages, in settling the sum of money to be given for … damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation".

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13 *Latz v Amaca Pty Ltd* [2017] SADC 56 at [115].

14 Mr Latz cross-appealed on grounds that are not presently relevant.

15 *Amaca Pty Ltd v Latz* (2017) 129 SASR 61 at 89 [125]-[126], 117 [253], 120 [261]-[262].

16 (1880) 5 App Cas 25 at 39.

18 Blue J considered that awarding Mr Latz compensation for the age pension and superannuation pension was consistent with the compensatory principle[17]; and rejected the distinction suggested by Amaca between income actively earned and income passively received[18].

19 Hinton J also held that the compensatory principle required that Mr Latz be permitted to recover damages by way of compensation for the losses comprising the non-receipt during the lost years of superannuation payments and the age pension[19].

20 In relation to issue (b), Blue J held that Mr Latz' damages referable to the superannuation pension should be reduced by two-thirds by reference to the value of Ms Taplin's reversionary entitlement. Blue J concluded that, given that Ms Taplin's entitlement was premised on Mr Latz' entitlement to the pension, Mr Latz' pension and Ms Taplin's reversionary pension should be regarded as a "composite benefit"[20], so that "as a matter of practical reality" the only loss that Mr Latz suffered was the remaining one-third of the pension that Ms Taplin was not entitled to receive under the *Superannuation Act*[21].

21 Hinton J considered that the effect of the superannuation scheme was that "[i]t is as if the pension to which the primary beneficiary was entitled switched to the secondary beneficiary, albeit in a reduced amount, upon the death of the primary beneficiary"[22]. Because Mr Latz would, through Ms Taplin, notionally continue to receive the superannuation pension after his death, Hinton J agreed with Blue J that Mr Latz' damages award should be reduced by reference to Ms Taplin's entitlement[23].

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17 *Amaca Pty Ltd v Latz* (2017) 129 SASR 61 at 85 [97]-[98].

18 *Amaca Pty Ltd v Latz* (2017) 129 SASR 61 at 85-86 [100]-[104].

19 *Amaca Pty Ltd v Latz* (2017) 129 SASR 61 at 116-117 [250]-[253].

20 *Amaca Pty Ltd v Latz* (2017) 129 SASR 61 at 86 [107].

21 *Amaca Pty Ltd v Latz* (2017) 129 SASR 61 at 88 [115].

22 *Amaca Pty Ltd v Latz* (2017) 129 SASR 61 at 120 [261].

23 *Amaca Pty Ltd v Latz* (2017) 129 SASR 61 at 120 [262].

The dissenting view

22 Stanley J would have held that Mr Latz was not entitled to be compensated in respect of either the age pension or superannuation payments. His Honour regarded the plurality judgment in *CSR Ltd v Eddy* as an exhaustive statement of the heads of compensable damage for personal injury cases[24], and concluded that there was no support for the view that damages could be awarded on some wider basis[25]. Stanley J held that the benefits under the age pension and the superannuation scheme did not fall within the identified categories of compensable economic or financial loss. Mr Latz' loss did not arise through the diminution of his earning capacity[26]; and the non-receipt of the benefits did not constitute actual financial loss, that head of loss being limited to "damages for the loss resulting from expenses incurred meeting the needs of the plaintiff by reason of his or her injuries."[27]

23 On the other hand, Stanley J concluded that, if the value of the age pension and superannuation payments that Mr Latz will not receive by reason of his early death were held to be a compensable economic or financial loss, the damages to be awarded to Mr Latz in respect of the loss of superannuation benefits should not be reduced by reference to Ms Taplin's reversionary entitlement. In his Honour's view, there was no reason to reduce the damages properly to be awarded to Mr Latz in order to avoid double compensation for the same loss. That Mr Latz would not be granted double compensation was demonstrated, his Honour said, by considering the hypothesis that Mr Latz had no spouse. On that hypothesis, on his death, no third party would enjoy a reversionary entitlement under the *Superannuation Act*; any compensable loss would be suffered exclusively by Mr Latz[28].

The appeals to this Court

24 Amaca and Mr Latz both appealed, pursuant to grants of special leave, against the orders of the Full Court.

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24 *Amaca Pty Ltd v Latz* (2017) 129 SASR 61 at 98 [165].

25 *Amaca Pty Ltd v Latz* (2017) 129 SASR 61 at 98-100 [166]-[170].

26 *Amaca Pty Ltd v Latz* (2017) 129 SASR 61 at 97 [162].

27 *Amaca Pty Ltd v Latz* (2017) 129 SASR 61 at 98 [164].

28 *Amaca Pty Ltd v Latz* (2017) 129 SASR 61 at 102-103 [180]-[182].

Damages for the non-receipt of the superannuation pension and the age pension

25 Amaca submitted that Mr Latz may not recover damages in respect of either the superannuation pension or the age pension.

26 Mr Latz submitted that he is entitled to recover the full net present value of the superannuation pension, and that the Full Court erred in reducing the award of damages by reference to Ms Taplin's reversionary entitlement under the *Superannuation Act*.

27 Amaca argued that the loss of the value of age pension payments and superannuation benefits that will not be received by Mr Latz is not a loss of earning capacity. The age pension was said to be a "gratuitous statutory benefit", while the entitlement to superannuation benefits had been "earned" before Mr Latz' earning capacity was adversely affected by Amaca's negligence. Nor was the loss of either benefit a financial loss in the sense of an actual outgoing incurred by reason of the injury. Amaca argued that this Court should not extend the heads of compensable damage beyond those described in *CSR Ltd v Eddy*.

28 Amaca argued that there is no distinction in principle between the losses for which Mr Latz sought compensation and the non-receipt of other passive income streams.

29 Amaca argued that the decisions of this Court in *Skelton v Collins*[29], *Todorovic v Waller*[30] and *Fitch v Hyde-Cates*[31] do not support the extension of liability for economic loss. *Skelton* and *Todorovic* were, it was said, concerned with the compensability of loss of earning capacity rather than non-receipt of income. *Fitch* did not support the view that the non-receipt of a pension was compensable loss in that it too was concerned with the effects of the loss of earning capacity, whereas in the present case Mr Latz' earning capacity – that is, his "ability to accumulate wages through the deployment of his labour and skill" – had not been diminished by his injury.

30 Mr Latz submitted that his claims to recover the net present value of the age pension and the superannuation payments as items of economic loss fit squarely within the compensatory principle, as articulated by Lord Blackburn in *Livingstone v Rawyards Coal Co*.

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29 (1966) 115 CLR 94; [1966] HCA 14.

30 (1981) 150 CLR 402; [1981] HCA 72.

31 (1982) 150 CLR 482; [1982] HCA 11.

31 Mr Latz argued that Amaca's reading of the plurality judgment in *CSR Ltd v Eddy* was too narrow, in that their Honours were not purporting to provide an exhaustive list of the compensable heads of damage, as was evident in the statement that the three types of loss mentioned were those "traditionally seen"[32] as recoverable. Mr Latz' argument referred to the view of Windeyer J in *Teubner v Humble* that the so-called heads of loss are not to be treated "as if they were distinct items in a balance sheet"[33].

32 Mr Latz argued that the circumstance that the age pension was an income stream that was conferred pursuant to statute did not affect the question whether he ought to be compensated for the loss of the benefit: the age pension had a monetary value that, because of Amaca's negligence, he would not receive; and he was therefore entitled to be compensated in respect of that loss.

33 Mr Latz argued that to accept Amaca's argument in relation to superannuation benefits would require the Court to overrule its earlier decisions in *Skelton*, *Todorovic* and *Fitch*; and that there was no reason in principle to do so.

34 In addition, Mr Latz contended that in *Fitch* Mason J suggested[34] that damages could be recovered for the loss of the benefit of an annuity. It was argued that there is no material distinction between an annuity and Mr Latz' entitlement to superannuation payments.

35 Mr Latz argued that English case law supported the view that both pension entitlements were recoverable. In particular, in *Pickett v British Rail Engineering Ltd*, Lord Scarman said in obiter that a plaintiff could recover damages for lost financial expectations during the lost years[35]. Mr Latz also submitted that several English decisions since *Pickett* have awarded damages for lost pension benefits and that Canadian law also allows for recovery of superannuation pension entitlements.

36 It was submitted that even if the categories outlined by the plurality in *CSR Ltd v Eddy* were properly regarded as an exhaustive statement of the categories of compensable loss, the loss of Mr Latz' superannuation entitlement represented a loss of earning capacity and therefore fell within the second

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32 (2005) 226 CLR 1 at 15 [28].

33 (1963) 108 CLR 491 at 505; [1963] HCA 11.

34 (1982) 150 CLR 482 at 491.

35 [1980] AC 136 at 170.

category. This was said to be because the entitlement arose from his provision of labour in return for money, which money was reflected in the value of his entitlement. He also argued that the loss of the superannuation pension and the age pension could each be characterised as a pecuniary consequence of the loss of capacity that was occasioned by the injury, thereby coming within the third *CSR Ltd v Eddy* category.

The reduction of Mr Latz' damages by reference to Ms Taplin's reversionary pension

37 Although, as noted above, the issue raised by Mr Latz' appeal falls away with the resolution of Amaca's appeal in its favour, the arguments advanced in relation to Mr Latz' appeal are not without interest in that the absence of a solution in precedent to the difficulties raised by the parties serves to highlight the novelty of the decision of the majority of the Full Court on the issue in Amaca's appeal.

38 Mr Latz submitted that the majority of the Full Court erred in treating as relevant the concern that pecuniary benefits available to a third party may be relevant to the quantification of damages available to a plaintiff[36]. Mr Latz argued that the *Superannuation Act* created two distinct statutory entitlements that were receivable by different persons; and that, by conflating the entitlements of Mr Latz and Ms Taplin, the majority of the Full Court failed to compensate Mr Latz for the loss that *he* had suffered by reason of Amaca's negligence. Mr Latz argued that Stanley J was correct in his appreciation of the anomalies that resulted from the majority's approach because, on the majority's approach, plaintiffs who had dependants would be treated differently from those who did not.

39 Amaca characterised Mr Latz' superannuation entitlement as an inchoate right that might, as events played out, be payable to one of several different people. The benefit conferred under the *Superannuation Act* was thus a composite benefit, but one conferred on Mr Latz alone until his death. This characterisation was said to be supported by the circumstance that the *Superannuation Act* treats Mr Latz' superannuation entitlement and Ms Taplin's entitlement as sequential, in the sense that the latter becomes available only upon the termination of the former. The circumstance that Ms Taplin will receive payments upon Mr Latz' death does not mean that the payments she will receive are not an aspect of Mr Latz', rather than Ms Taplin's, statutory entitlement.

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36 Cf *The National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569; [1961] HCA 15.

40 It is not necessary to resolve these competing arguments. It is sufficient to observe that the difficulties raised by them cry out for a legislative solution. It is surely a matter for the legislature to determine whether, and the extent to which, it would be an unacceptable windfall to the beneficiaries of the estate of a deceased person to enjoy a measure of damages unaffected by associated benefits received by those beneficiaries upon the death of the deceased, especially when the damages so recovered would, in some cases, be paid for from compulsory insurance schemes funded by members of the general public. That the need for a legislative solution to these difficulties would arise if the decision of the majority of the Full Court in Mr Latz' favour were upheld is a reason for circumspection in that regard.

The compensatory principle and compensable loss

41 The compensatory principle that "a plaintiff who has been injured by the negligence of the defendant should be awarded such a sum of money as will, as nearly as possible, put him in the same position as if he had not sustained the injuries"[37] is well-established[38]. But the compensatory principle is concerned with the measure of damages required to remedy compensable damage[39]. In applying the principle, it is necessary first to establish whether the loss claimed is compensable as an aspect of the injury suffered by the plaintiff[40]. It is important to bear in mind the distinction between damage, in the sense of a loss to the interests of a plaintiff by the act of negligence, and damages, which are assessed and awarded on the basis that, so far as possible, they will reflect that loss. The two concepts should not be confused. The compensatory principle informs the latter but not the former. One cannot invoke the compensatory principle to identify whether a particular head of damage is compensable. Further, it is of particular importance in the present case to recognise that the compensatory principle affords no assistance in determining whether a given loss is compensable as economic loss or as a loss of the amenities of life. The majority

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37 *Todorovic v Waller* (1981) 150 CLR 402 at 412. See also at 427-428, 442, 463.

38 *Haines v Bendall* (1991) 172 CLR 60 at 63; [1991] HCA 15.

39 For a discussion of the distinction between "damage" and "damages", see *Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd* (1975) 132 CLR 323 at 327-328, 328-329, 330; [1975] HCA 23; *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 at 527; [1985] HCA 37.

40 *Harriton v Stephens* (2006) 226 CLR 52 at 132 [270]; [2006] HCA 15. See also *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 210-211; *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 424 [14]-[15]; [1999] HCA 25.

of the Full Court erred in treating the compensatory principle as obviating the need to first determine whether a particular head of damage is compensable and on what basis.

The categories of compensable loss

42 Amaca was correct to contend that the heads of loss compensable for personal injury are as stated by the plurality in *CSR Ltd v Eddy*, and Mr Latz was not correct to argue that the reference by the plurality in *CSR Ltd v Eddy* to loss of earning capacity is but an illustration of a broader range of compensable economic loss.

CSR Ltd v Eddy

43 As noted above, Mr Latz' argument emphasised that the plurality in *CSR Ltd v Eddy*[41] introduced their summary of the "three types of loss" that are compensable by damages by referring to the three categories as those "traditionally seen" as recoverable. But this reference by their Honours was not concerned to limit the generality of their statement; rather, their Honours were concerned to contrast the orthodox nature of these three heads of loss with the anomalous character of the earlier decision in *Griffiths v Kerkemeyer*[42], and to make the point that it was a departure "from the usual rule that damages other than damages payable for loss not measurable in money are not recoverable for an injury unless the injury produces actual financial loss"[43]. As McHugh J said in *CSR Ltd v Eddy*[44], "[a]s a matter of principle, *Griffiths v Kerkemeyer* damages are an anomaly."

44 In *CSR Ltd v Eddy*, this Court overruled the decision of the New South Wales Court of Appeal in *Sullivan v Gordon*[45], which had upheld a claim that a plaintiff's loss of capacity to care for a disabled relative was compensable as a form of financial loss in terms of the cost of obtaining care for the disabled relative from professional carers. The point being made in *CSR Ltd v Eddy* was that, just as recovery of *Griffiths v Kerkemeyer* damages could not be justified as

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41 (2005) 226 CLR 1 at 15 [28].

42 (1977) 139 CLR 161; [1977] HCA 45.

43 (2005) 226 CLR 1 at 15 [27].

44 (2005) 226 CLR 1 at 39 [91].

45 (1999) 47 NSWLR 319.

an orthodox development of principle, so recovery of *Sullivan v Gordon* damages could not be justified as an analogical extension of *Griffiths v Kerkemeyer*.

45 The express identification in *CSR Ltd v Eddy* of loss of earning capacity as *the* relevant head of compensable economic loss resulting from personal injury accords with the settled course of authority in Australia.

46 In *Teubner v Humble*[46], Windeyer J, with whom McTiernan J agreed, said:

> "Broadly speaking there are, it seems to me, three ways in which a personal injury can give rise to damage: First, it may destroy or diminish, permanently or for a time, an existing capacity, mental or physical: Secondly, it may create needs that would not otherwise exist: Thirdly, it may produce physical pain and suffering."

47 Windeyer J went on to discuss the economic loss that the destruction or diminution of earning capacity causes. His Honour said that[47]:

> "the damage arises really from the destruction of a faculty or skill, and that this is the best way in which to consider its assessment. The sum that might have been earned by the exercise of a faculty or skill then becomes the measure of the economic value to the individual of the faculty or skill in respect of which he has been damaged."

48 In *Arthur Robinson (Grafton) Pty Ltd v Carter*[48], in a passage cited with approval by the plurality in *CSR Ltd v Eddy*[49], Barwick CJ explained that loss of earning capacity is not merely a shorthand for a broader range of economic loss. In a passage that deserves to be quoted at length, Barwick CJ explained[50] that an injured plaintiff:

> "is not to be compensated for loss of earnings but for loss of earning capacity. However much the valuation of the loss of earning capacity involves the consideration of what moneys could have been produced by the exercise of the respondent's former earning capacity, it is the loss of

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46 (1963) 108 CLR 491 at 505.

47 (1963) 108 CLR 491 at 506.

48 (1968) 122 CLR 649; [1968] HCA 9.

49 (2005) 226 CLR 1 at 16 [30].

50 (1968) 122 CLR 649 at 658.

that capacity, and not the failure to receive wages for the future, which is to be the subject of fair compensation. In so saying, I realize that many statements may be found in the reported cases where loss of earnings has been the description of this element in special damages. But I do not find that in these it was necessary to consider or draw the distinction between the loss of earnings and the loss of earning capacity. But where in Australia attention has been drawn to the distinction, authoritative expressions with which I respectfully agree have indicated that it is loss of earning capacity and not loss of earnings that is to be the subject of compensation."

49 The focus upon loss of earning capacity, rather than lost earnings or income, as *the* head of compensable economic loss was not a casual slip of the pen: it is maintained throughout the Australian cases[51]. The distinction made by this focus aligns with the distinction observed in the authorities between loss of amenities of life and economic loss resulting from the personal injury. It serves to maintain the distinction between economic loss which is compensable as such and that which is not. The distinction is between the effect of the injury upon an individual's ability to provide for himself or herself and his or her dependants, and the loss of the capacity to enjoy that which has been provided.

50 To put this point another way, the adverse effect of personal injury upon a plaintiff's earning capacity has been accepted as being sufficiently related to the personal injury caused by the defendant's negligence to be compensable; whereas other economic effects having a less direct or immediate connection with the personal injury suffered by the plaintiff have not. The importance of the direct connection between a personal injury and its effect upon the earning capacity of the victim as the compensable head of damage is fundamental[52].

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51 *Skelton v Collins* (1966) 115 CLR 94 at 129; *O'Brien v McKean* (1968) 118 CLR 540 at 546-548; [1968] HCA 58; *Sharman v Evans* (1977) 138 CLR 563 at 579; [1977] HCA 8; *Fitch v Hyde-Cates* (1982) 150 CLR 482 at 498; *Nguyen v Nguyen* (1990) 169 CLR 245 at 248; [1990] HCA 9.

52 In *The Wealth of Nations*, Adam Smith wrote:

> "The property which every man has in his own labour, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of a poor man lies in the strength and dexterity of his hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper without injury to his neighbour, is a plain violation of this most sacred property."

(Footnote continues on next page)

51 As will be seen in the discussion of *Skelton* later in these reasons, more remote economic effects of personal injury have been compensated as an aspect of the loss of amenities of life. For the present, it is sufficient to say that to abandon the focus upon loss of earning capacity would open the way, in principle, for the recovery of loss of the enjoyment of economic benefits by reason of the accident as compensable economic loss. In this regard, the recovery of damages for the loss of the opportunity to receive payments of income derived from accumulated wealth has not been accepted in Australia as a form of compensable economic loss. In *Government Insurance Office v Johnson*[53], Hutley JA observed, correctly, that in *Gammell v Wilson*[54] the House of Lords had, incorrectly, described the damages for the lost years as for lost earnings rather than for lost earning capacity. Hutley JA recognised, correctly, that the House of Lords in *Gammell v Wilson*[55] had departed from a focus upon loss of earning capacity as opposed to lost earnings as the basis for holding the defendant liable for the loss of earnings in the lost years. Hutley JA went on to say[56]:

> "Loss of earning capacity is the capital asset consisting of the personal capacity to earn money from the use of personal skills. This is not the same as earnings where the person concerned has capital. If a millionaire rentier is killed, under circumstances giving rise to an action for damages, his loss of earning capacity is not the value of the interest he collects. Examples can be indefinitely multiplied. Where a person has capital employed in a business, it is necessary to split his earning capacity from his income. In this case, the basis of the assessment of the earning capacity of the deceased is that the whole of the income of a saw mill which [he] was to acquire without cost to himself from his father was the measure of his earning capacity. The good fortune of a young man to have a generous father with the capacity to make valuable gifts is not part of his earning capacity."

52 In giving their reasons for revoking a grant of special leave to appeal to the High Court in *GIO v Johnson*, Mason ACJ, Wilson and Deane JJ expressed

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See Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 2nd ed (1778), vol 1 at 151.

53 [1981] 2 NSWLR 617 at 627.

54 [1982] AC 27 at 78.

55 [1982] AC 27 at 65, 71, 72, 78.

56 [1981] 2 NSWLR 617 at 627.

their agreement with the views of Hutley JA[57]. To accept the contrary view would be to accept that differences in wealth make the opportunity to enjoy what life has to offer more valuable to the rich than to the poor, a proposition which the common law of Australia has not accepted[58]. Indeed, in *GIO v Johnson*[59] Murphy J, agreeing with the view of the plurality, went on to describe a claim to the effect of that rejected by Hutley JA as "socially indefensible."

53 It may be noted that in the English case of *Adsett v West*[60] damages were allowed for loss of income arising from the loss of the prospect of an inheritance by reason of premature death. McCullough J saw no material difference between the loss of the opportunity to earn income by working and the loss of the opportunity to receive income from interest on an inheritance[61]. The approach of McCullough J is distinctly at odds with the views expressed by Hutley JA and the plurality in the High Court in *GIO v Johnson*.

54 A consideration of this Court's decisions in *Skelton*, *Todorovic* and *Fitch* tends to confirm, rather than to deny, the conclusion that the loss of the opportunity to receive age pension and superannuation payments is not compensable as economic loss.

Skelton

55 Contrary to the argument for Mr Latz, it is not necessary to overrule *Skelton* in order to accept Amaca's submissions. Rather, in order to accept Mr Latz' submissions it would be necessary to disregard a central aspect of the Court's reasoning in that case.

56 *Skelton* upheld the right of an injured plaintiff "to recover damages for economic loss resulting from his diminished earning capacity"[62]. Consistently with the focus upon loss of earning capacity as compensable economic loss, this Court held that in assessing damages for loss of earning capacity where a plaintiff's expectation of life has been shortened by his or her injuries, the court

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57 Transcript of Proceedings, 22 October 1982 at 76.

58 *Skelton v Collins* (1966) 115 CLR 94 at 97-99, 117.

59 Transcript of Proceedings, 22 October 1982 at 81.

60 [1983] QB 826.

61 [1983] QB 826 at 848. See also *West v Versil Ltd* [1996] TLR 526.

62 (1966) 115 CLR 94 at 121. See also at 95-96, 127, 129.

must have regard to the probable length of his or her working life had he or she not been injured, and not merely to the probable period left to him or her to live as a result of the injury[63].

57 Insofar as the members of the Court in *Skelton* spoke of lost earnings, it is clear that they were speaking of the consequences of a diminution of earning capacity during the lost years rather than the non-receipt of income from income-producing assets owned by the plaintiff[64]. One may note, in particular, that Windeyer J[65], after referring to "[t]he general principle that damages are compensatory", went on to refer to the particular rule flowing from "the principle of compensation ... that anything having a money value which the plaintiff has lost should be made good in money" and to observe that this rule:

> "applies to that element in damages for personal injuries which is commonly called 'loss of earnings'. The destruction or diminution of a man's capacity to earn money can be made good in money. ... [W]hat is to be compensated for is the destruction or diminution of something having a monetary equivalent."

58 It may be said to be not entirely satisfactory that under the reasoning in *Skelton* an injured plaintiff whose injuries cause his or her death while he or she is still at work may recover damages for the loss of his or her earning capacity calculated by reference to the present value of his or her prospective earnings over the balance of his or her working life, while an injured plaintiff whose injuries do not affect his or her earning capacity until after it is exhausted and who dies thereafter may recover nothing by way of economic loss. But this result follows from observance of the boundary drawn between loss of earning capacity and loss of the amenities of life. The decision in *Skelton* cannot be regarded as a signpost pointing the way towards recognition of a more extensive liability for economic loss than that which it upheld.

59 In the discussion in *Skelton* of the unsatisfactory state of the authorities in the United Kingdom, Taylor J (with whom Kitto, Menzies, Windeyer and Owen JJ relevantly agreed) fixed upon the extent to which economic loss results from "destroyed earning capacity" to draw the line between compensable economic loss and the loss of "a measure of prospective happiness", including the loss of the enjoyment of one's assets, which was compensable by the award of

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63 (1966) 115 CLR 94 at 95-96, 121, 127, 129.

64 (1966) 115 CLR 94 at 96, 113-114, 126-127, 129, 137.

65 (1966) 115 CLR 94 at 129.

a conventional sum only as an aspect of the loss of the amenities of life[66]. A plaintiff denied the opportunity to enjoy an income derived from sources other than his or her capacity to earn is entitled to recover for the loss of that enjoyment by his or her untimely death, not as compensable economic loss, but, if at all, as an aspect of the loss of the amenities of life. For that loss only a modest conventional allowance has ever been made[67].

60 It is convenient to note here that in *Pickett*[68], Lord Scarman agreed with the view of the Law Commission of England and Wales[69] that:

> "There seems to be no justification in principle for discrimination between deprivation of earning capacity and deprivation of the capacity otherwise to receive economic benefits. … [I]t is a loss caused by the tort even though it relates to moneys which the injured person will not receive because of his premature death. No question of the remoteness of damage arises other than the application of the ordinary foreseeability test."

61 On that basis, Lord Scarman went on to say that, although the point did not arise for decision and had not been argued, he "would allow a plaintiff to recover damages for the loss of his financial expectations during the lost years provided always the loss was not too remote."[70]

62 It is to be noted that the other members of the majority of the House of Lords in *Pickett* decided the case expressly on the footing that damages were available for loss of earning capacity of a man in employment at the time he was disabled from working for the balance of his pre-morbid working life up to

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66 (1966) 115 CLR 94 at 115-117, 120-121. See also *Sharman v Evans* (1977) 138 CLR 563 at 584, 586, 590.

67 *Rose v Ford* [1937] AC 826 at 838, 842, 852, 861; *Benham v Gambling* [1941] AC 157; *H West & Son Ltd v Shephard* [1964] AC 326; *Skelton v Collins* (1966) 115 CLR 94 at 97-99, 116-117, 119-120; *Gannon v Gray* [1973] Qd R 411 at 427-428.

68 [1980] AC 136 at 170.

69 Law Commission, *Report on Personal Injury Litigation – Assessment of Damages*, Law Com No 56, (1973) at 24 [90].

70 [1980] AC 136 at 170.

retiring age[71]. In this respect, the decision in *Pickett* went no further than *Skelton*.

63 It may also be noted that the Law Commission report to which Lord Scarman referred concluded that "other kinds of economic loss referable to the lost period" should be compensable "in line with the reasoning of the Australian High Court in *Skelton v Collins*"[72]. With all respect, that understanding of the reasoning in *Skelton* fails to recognise the significance of its explicit focus upon loss of earning capacity, as distinct from lost earnings, as the compensable species of economic loss.

Todorovic

64 In *Todorovic*, the plaintiff had been rendered "virtually unemployable"[73] by the personal injuries suffered as a result of the defendants' negligence. His damages included a component representing the loss of superannuation benefits[74] that he would have enjoyed had his capacity to earn those benefits not been diminished by his injuries.

65 The decision in *Todorovic* does not support the decision of the Full Court in this case. The diminution of the plaintiff's earning capacity was taken into account as showing that the value of his superannuation rights after retirement from work was less than it would have been but for the personal injury the plaintiff had suffered, the amount of the difference being compensable as a reflection of the diminution of his earning capacity[75].

Fitch

66 In *Fitch*[76], the administratrix of the estate of Mr Hyde-Cates brought proceedings pursuant to s 2(1) of the *Law Reform (Miscellaneous Provisions) Act*

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71 [1980] AC 136 at 145-146, 151-152, 159, 163. See also *Gammell v Wilson* [1982] AC 27 at 65.

72 Law Commission, *Report on Personal Injury Litigation – Assessment of Damages*, Law Com No 56, (1973) at 24 [90], 89.

73 (1981) 150 CLR 402 at 403.

74 (1981) 150 CLR 402 at 403.

75 (1981) 150 CLR 402 at 426-427. See also at 451, 460, 481.

76 (1982) 150 CLR 482.

1944 (NSW) for damages in respect of his death as a result of injuries suffered in a motor vehicle accident. Section 2(1) provided that all causes of action vested in a person shall survive on his death for the benefit of his estate. The trial judge awarded $20,000 for future lost earnings. The Court of Appeal increased that award.

67 On appeal to the High Court, one issue concerned the proper construction of s 2(2)(c), which provided relevantly that the damages recoverable by the estate "shall be calculated without reference to any loss or gain to his estate consequent on his death". Mason J, with whom Gibbs CJ, Stephen, Aickin and Brennan JJ agreed, held that the language of s 2(2)(c) was "hardly apposite to exclude the deceased's loss of earning capacity in the years of life of which he has been deprived."[77] In addition, Mason J observed that[78]:

> "At no time does the estate of a deceased person have an entitlement either to his earning capacity or to the future wages he might have earned but for his death. The loss of them is a loss of the deceased, not of his estate."

68 This reasoning does not deviate from the focus upon loss of earning capacity as the compensable loss of the injured plaintiff.

69 A further issue in *Fitch* arose because s 2(2)(d) provided relevantly that the damages recoverable by the estate "shall not include any damages … for the curtailment of his expectation of life." In this regard, Mason J observed that this language was "scarcely apposite to cover damages for lost earning capacity in the years of life of which the deceased has been deprived."[79]

70 The point to be made here is that, as Mr Latz has suffered no loss of earning capacity in the years of life of which he will have been deprived, *Fitch* does not assist his claim. The case was not concerned with whether the earning capacity of the deceased had ceased to be exercisable prior to and quite apart from the tortious injury that resulted in his death. And so the decision is distinguishable in that it was concerned with loss resulting from the loss of earning capacity during the lost years[80].

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77 (1982) 150 CLR 482 at 491.

78 (1982) 150 CLR 482 at 491.

79 (1982) 150 CLR 482 at 492.

80 (1982) 150 CLR 482 at 494-495.

71 That having been said, the argument advanced for Mr Latz drew particular attention to the circumstance that Mason J, in the course of his discussion of s 2(2)(c), approved[81] Lord Scarman's observation in *Gammell v Wilson*[82] that "annuities ceasing on death" were "not a good example" as that loss was "part of the cause of action which vested in the deceased before his death." This remark by Mason J was made in the course of the discussion by his Honour as to whether the loss of future receipts was compensable at the suit of the estate of the deceased rather than exclusively at the suit of the deceased; and so Mason J was not directly addressing the issue whether the loss of an annuity should properly be characterised as a loss of earning capacity. More significantly for present purposes, it is difficult to regard Mason J as expressing a view in support of a claim of the kind made by Mr Latz, given his Honour's concurrence, a little over six months later, in reasons approving the view of Hutley JA in *GIO v Johnson*.

72 Nothing in the case law in the United Kingdom – apart from the decision in *Adsett v West*[83], which is unsatisfactory in light of *GIO v Johnson* – provides a basis in principle for expanding liability for economic loss for personal injury beyond that established by *Skelton*. Neither side was able to point to a decision from the United Kingdom or Canada which offered a reasoned solution to the actual problem at hand[84]. Suggestions in the English cases cited by the parties, to the effect that lost pension benefits are recoverable, can readily be understood on the basis that they involved a diminution of pension benefits that reflected the loss of earning capacity. And to observe that the Ontario Law Reform Commission has acknowledged that the law in Canada appears to allow for the recovery of the loss of superannuation pension entitlements or "pension earning capacity"[85] is to take the issue no further than this Court's decision in *Todorovic*.

Expanding the notion of loss of earning capacity?

73 The principal argument for Mr Latz was presented on the basis that the decision of the majority of the Full Court was no more than an orthodox

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81 (1982) 150 CLR 482 at 491.

82 [1982] AC 27 at 77. The same point was made by Lord Wright in *Rose v Ford* [1937] AC 826 at 842.

83 [1983] QB 826.

84 Cf *Auty v National Coal Board* [1985] 1 WLR 784 at 787, 792-793, 803; *Phipps v Brooks Dry Cleaning Service Ltd* [1996] PIQR Q100.

85 Ontario Law Reform Commission, *Report on Compensation for Personal Injuries and Death*, (1987) at 43.

application of the position settled by *Skelton*, *Todorovic* and *Fitch*. An attempt was made to present an alternative argument to the effect that Mr Latz' superannuation entitlement could be regarded as "delayed remuneration for ... current work"[86].

74 In this regard, Mr Latz' argument did not explain how it can be said that the loss of the opportunity to enjoy payments under the age pension or superannuation entitlement is a result of the diminution or destruction of earning capacity. As to the age pension, that entitlement accrues without any payment on behalf of the pensioner; the accrual of the entitlement has nothing to do with the exercise of or inability to exercise earning capacity. And to characterise superannuation payments as deferred earnings for labour and services previously performed is merely to recognise that the entitlement to the payments has accrued by the actual exercise, *in the past*, of the individual's earning capacity; it is not to explain the basis on which the accrued entitlement to superannuation is itself a species of earning capacity which has been compromised by personal injury.

75 In addition, the argument put for Mr Latz did not explain whether, or how, defined benefit schemes like Mr Latz' superannuation scheme should be differentiated from simple accumulation schemes. Nor did the argument explain how superannuation schemes in general should be distinguished from other forms of accumulated wealth from which retired persons may expect to derive post-retirement income. If an entitlement to superannuation is regarded as an extension or prolongation of the "capital asset" that is earning capacity, then how is it said that this asset has been destroyed or diminished by the negligence of the defendant? One may ask whether the position would be different if Mr Latz had exercised his right under s 40 of the *Superannuation Act* to take his superannuation entitlement in a lump sum. If so, on what basis in principle should the defendant's liability differ because of that choice? And no attempt was made to explain how the failure to receive age pension or superannuation entitlements might be conceptualised as a form of economic loss distinct from the non-receipt of other forms of benefit such as legacies under a will or distributions under a discretionary trust that would have been received had the proposed recipient lived to a certain age.

76 The failure to come to grips with these issues highlights the difficulty which confronts the invitation to expand the liability for economic loss for personal injury beyond the consequences of the loss of earning capacity as that concept is currently understood. In the absence of satisfactory answers to these issues, this Court has no sufficient ground to accept that invitation because it is

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86 *Parry v Cleaver* [1970] AC 1 at 16.

left unable to resolve the uncertainty in the law that would be engendered as a result.

Conclusion

77 As Mr Latz' counsel put it on his behalf, Mr Latz will lose the capacity to receive the payments during those years lost to him because of the consequences of his injury. Such a claim might be seen as a claim for the loss of the amenities of life, for which only a modest conventional amount may be awarded under the first head of compensable loss identified in *CSR Ltd v Eddy*, but Mr Latz' claim was not advanced on that basis.

78 One may sympathise deeply with Mr Latz' plight, but it cannot be denied that the liability which the decision of the majority of the Full Court upheld is novel. That decision cannot be supported as an incremental extension of previous decisions in this country. True it is that cases of mesothelioma present an unusual challenge because of the potentially long intervals between infection and the onset of serious disability. But the possibility, or even the reality, of such long intervals does not alter the nature of the loss when it has been sustained and when a court is required to determine whether, and on what basis, that loss is compensable.

79 The common law of this country has not accepted that the loss of the opportunity to enjoy one's financial resources by reason of premature death is a form of economic loss compensable as such. To accept that proposition now would be to accept that the loss of the capacity to enjoy one's financial resources may be given a different value depending upon the value of the resources available to the plaintiff from whatever sources those resources may have been derived. That would be a departure from a position grounded in notions of equality before the law. A satisfactory basis for that departure has not been demonstrated.

80 BELL, GAGELER, NETTLE, GORDON AND EDELMAN JJ. Mr Latz is 71 years old. In October 2016, Mr Latz was diagnosed with terminal malignant mesothelioma. At that time, Mr Latz had retired from the public service and was receiving a superannuation pension entitlement of $51,162 per annum under Pt 5 of the *Superannuation Act* 1988 (SA) ("the superannuation pension") and an age pension entitlement of $5,106 per annum under Pt 2.2 of the *Social Security Act* 1991 (Cth) ("the age pension").

81 In October 2016, Mr Latz commenced proceedings against Amaca Pty Limited (under NSW administered winding up) ("Amaca"), the manufacturer of asbestos fencing he had cut and installed some 40 years earlier. Amaca did not dispute liability on appeal to the Full Court of the Supreme Court of South Australia, or before this Court. Mr Latz contended that, but for the negligence of Amaca, he would have continued to receive both the superannuation pension and the age pension for the remainder of his pre-illness life expectancy – around a further 16 years beyond his post-illness life expectancy[87].

82 The Full Court of the Supreme Court of South Australia held, by majority (Blue J and Hinton J, Stanley J dissenting)[88], that the value of the superannuation pension and that of the age pension were compensable loss. The majority then reduced the damages awarded to Mr Latz to take into account the reversionary pension that Mr Latz's partner will receive on his death under s 38(1)(a) of the Superannuation Act. Amaca appeals the findings of compensable loss in relation to both the superannuation pension and the age pension. Mr Latz appeals the finding that the reversionary pension is to be deducted from any award of damages.

83 These two appeals required the Court to consider whether Mr Latz is entitled to damages from Amaca for the loss of his superannuation pension and of his age pension for those 16 years beyond his post-illness life expectancy and,

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87 The Full Court observed that the average life expectancy of a 70 year old male was around 16.71 years, whereas after developing mesothelioma Mr Latz's life expectancy was unlikely to extend beyond 31 October 2017. Accordingly, the Full Court calculated the period of lost superannuation to be 16.21 years (the period of his pre-illness life expectancy less the period of his post-illness life expectancy). The approximation adopted by the Full Court will be used in these reasons.

88 *Amaca Pty Ltd v Latz* (2017) 129 SASR 61.

if so, whether any reversionary pension that might be payable to his partner under s 38(1)(a) of the Superannuation Act should be taken into account in the assessment of his damages. Those questions are to be resolved by the application of fundamental principles governing the assessment of damages for negligently caused personal injuries.

84 First, it is necessary to identify Mr Latz's loss. If a loss is identified then, as Lord Wilberforce stated in *Pickett v British Rail Engineering Ltd*[89], the law has to answer a question: is that loss the loss of "something for which the claimant should and reasonably can be compensated?"[90]

85 At the outset, it is important to recognise the obvious point that the claimant claims *compensation* for negligently caused personal injury[91]. That claim focuses attention upon the interests of the victim[92]. Those interests are addressed by awarding damages as *compensation* for *actual* loss (either loss already suffered or loss that will probably be suffered)[93] – an award guided by the compensatory principle.

86 There are inherent difficulties in the assessment of damages[94] and, as Windeyer J wrote more than once[95]:

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89 [1980] AC 136.

90 [1980] AC 136 at 149.

91 *Skelton v Collins* (1966) 115 CLR 94 at 129; [1966] HCA 14.

92 *Pickett* [1980] AC 136 at 149.

93 *Skelton* (1966) 115 CLR 94 at 108, 128; *Todorovic v Waller* (1981) 150 CLR 402 at 427; [1981] HCA 72. See also *Harriton v Stephens* (2006) 226 CLR 52 at 126 [251]; [2006] HCA 15.

94 *Todorovic* (1981) 150 CLR 402 at 412-413 citing *Paul v Rendell* (1981) 55 ALJR 371 at 372; 34 ALR 569 at 571. See also *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174 at 182-183. See generally the observations on damages in the Ipp Report: Commonwealth of Australia, *Review of the Law of Negligence: Final Report*, (2002), Ch 13.

95 *Teubner v Humble* (1963) 108 CLR 491 at 505; [1963] HCA 11; *Skelton* (1966) 115 CLR 94 at 128.

"So-called principles of assessment of damages for personal injuries can be made the subject of almost endless discussion. The consequences of such injuries are not all susceptible of evaluation in money, and seeming logic can be pushed too far".

87 As a result, the compensatory principle has yielded, or resulted in, the development of a number of principles[96], some of which should be restated.

88 A claimant who has suffered negligently caused personal injury has traditionally[97] been seen to recover damages calculated under three heads or types of loss: (1) certain non-pecuniary losses (even if no actual financial loss is caused and the damage caused by the defendant cannot be measured in money); (2) loss of earning capacity; and (3) actual financial loss.

89 It is necessary to say something further about the second type of loss – the element described as a "loss of earning capacity". The loss of earning capacity has been described as a capital asset – the capacity to earn money from the use of personal skills[98]. A claimant is to be compensated in respect of lost earning capacity "during those years by which [their] life expectancy has been shortened, at least to the extent that they are years when [they] would otherwise have been earning income"[99]. "[D]amages … are not recoverable for an injury *unless* the injury produces actual financial loss"[100] (emphasis added).

90 In *CSR Ltd v Eddy*, Gleeson CJ, Gummow and Heydon JJ stated that damages recoverable in relation to reduced future income are damages for loss of earning *capacity* and not damages for loss of earnings simpliciter, and that those damages are awardable "only to the extent that the loss has been or may be

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96 *Skelton* (1966) 115 CLR 94 at 129; *Todorovic* (1981) 150 CLR 402 at 412.

97 *CSR Ltd v Eddy* (2005) 226 CLR 1 at 15-17 [28]-[31]; [2005] HCA 64.

98 *Government Insurance Office v Johnson* [1981] 2 NSWLR 617 at 627. See also *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649 at 658; [1968] HCA 9; *Cullen v Trappell* (1980) 146 CLR 1 at 7; [1980] HCA 10; *Redding v Lee* (1983) 151 CLR 117 at 131; [1983] HCA 16.

99 *Sharman v Evans* (1977) 138 CLR 563 at 579; [1977] HCA 8 citing *Skelton* (1966) 115 CLR 94 at 121.

100 *CSR Ltd v Eddy* (2005) 226 CLR 1 at 15 [27].

productive of financial loss"[101]. That is, a claimant is compensated not merely because the capacity to earn has been diminished but because the diminution is or may be productive of financial loss[102]. If the diminution is productive of financial loss, it is compensable.

91 Most of the authorities are concerned with the methodology or methodologies adopted to value that capital asset. For the purposes of these appeals, it is unnecessary to address, or resolve, the different methodologies. It is, however, instructive to step through various matters of principle which underpin or underscore the methodologies.

92 If a claimant suffers a negligently caused personal injury *during* their working life and, as a result of that injury, suffers a reduction in one or more of their income and their life expectancy, then, as explained by this Court in *Todorovic v Waller*, there is one objective – to award a sum of money that will, as nearly as possible, put the claimant in the same position as if they had not sustained the injury[103]. Although the aim of the court in awarding damages is to make good to the claimant, so far as money can do, the loss suffered, it is impossible to assess damages by "a mere matter of mathematics"[104]. The process

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101 (2005) 226 CLR 1 at 16 [30] citing *Graham v Baker* (1961) 106 CLR 340 at 347; [1961] HCA 48 and *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 5, 18; [1995] HCA 5. See also *Arthur Robinson (Grafton)* (1968) 122 CLR 649 at 658.

102 *Graham* (1961) 106 CLR 340 at 347. See also *Skelton* (1966) 115 CLR 94 at 129.

103 (1981) 150 CLR 402 at 412. See also *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39; *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625 at 646; [1981] HCA 3 citing *Lim Poh Choo* [1980] AC 174 at 187; *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49 at 54; [1996] HCA 53. See generally *Registrar of Titles v Spencer* (1909) 9 CLR 641 at 645; [1909] HCA 69; *Johnson v Perez* (1988) 166 CLR 351 at 367, 371; [1988] HCA 64; *Harriton* (2006) 226 CLR 52 at 130 [264].

104 *Todorovic* (1981) 150 CLR 402 at 412. See also *Skelton* (1966) 115 CLR 94 at 129; *Arthur Robinson (Grafton)* (1968) 122 CLR 649 at 657.

must always be one of judgment, rather than calculation[105]. And the burden lies on the claimant to prove the injury or loss for which they seek damages[106].

93 Where a claimant suffers a negligently caused personal injury *during* their working life, the objective of putting the claimant in the same position as if they had not sustained the injury is met by an award of damages which may include compensation for loss of superannuation benefits[107]. The assessment of any such loss is specific to the claimant.

94 Superannuation benefits, like wages, are the product of the exploitation of the claimant's capital asset. As illustrated by the decision in *Todorovic*, not only does the loss of superannuation benefits form a part – sometimes a critical part – of the assessment of the value of loss of earning capacity but that loss is valued separately as a *subset* of this type of loss.

95 There are a number of reasons why that is the approach adopted. First, superannuation benefits are part of remuneration[108]. Second, those benefits are a capital asset constituted by the body of rights which a claimant has as a result of both national statutory superannuation requirements[109] and the

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105 *Todorovic* (1981) 150 CLR 402 at 413. See, eg, *Lee Transport Co Ltd v Watson* (1940) 64 CLR 1 at 13-14; [1940] HCA 27; *Pamment v Pawelski* (1949) 79 CLR 406 at 410-411; [1949] HCA 43; *O'Brien v McKean* (1968) 118 CLR 540 at 548-549; [1968] HCA 58; *Cattanach v Melchior* (2003) 215 CLR 1 at 42 [101]; [2003] HCA 38.

106 *Todorovic* (1981) 150 CLR 402 at 412.

107 *Todorovic* (1981) 150 CLR 402 at 425-427; *Jongen v CSR Ltd* (1992) Aust Torts Reports ¶81-192; *NSW Insurance Ministerial Corporation v Wynn* (1994) Aust Torts Reports ¶81-304 at 61,740; *Roads and Traffic Authority v Cremona* (2001) 35 MVR 190; *Ghunaim v Bart* (2004) Aust Torts Reports ¶81-731 at 65,449 [125]; *Zorom Enterprises Pty Ltd v Zabow* (2007) 71 NSWLR 354 at 368-369 [54]-[57], 370-371 [66]-[67].

108 See, eg, *Re Manufacturing Grocers' Employees Federation of Australia; Ex parte Australian Chamber of Manufactures* (1986) 160 CLR 341 at 355; [1986] HCA 23; *Austin v The Commonwealth* (2003) 215 CLR 185 at 265 [167]; [2003] HCA 3.

109 See *Superannuation Guarantee (Administration) Act* 1992 (Cth).

superannuation arrangements specific to that claimant. The way in which those rights are valued will have to take account of the content of those rights.

96 Third, in calculating damages for a claimant's lost earning capacity, the court has regard to the probable period of the claimant's working life immediately before the injury and not merely to the period of life which remained after the injury[110]. The objective, already identified, is apparent: to put the claimant in the same position as if they had not sustained the injury.

97 In general terms, where a claimant is injured *during* their working life, what is awarded in relation to superannuation benefits is the net present value of the court's best estimate of the fund that the claimant would have had at the date of retirement but for the injury[111]; namely, a fund which would have generated the "lost" superannuation benefits. The capital asset that is being valued (because it is lost) is the present value of the future rights[112]. The label attached to those future rights – be it an accumulation fund, a defined benefit scheme, a pension scheme or some other descriptor – is not determinative. The particular rights – the future superannuation benefits – are assessed as if they had been converted into or replaced by a new asset – a fund reflecting the best estimate of what those rights would have generated at retirement, because that is the basis for assessing what has been lost. The loss is not the loss of some opportunity to enjoy the asset. The loss is the diminution in value of the asset.

98 The awarding of damages for this aspect of earning capacity has, and achieves, other distinct and important objectives. Not only does the award seek to provide to the claimant an amount – a fund – that might have been sufficient to generate the expected superannuation benefits for a pre-illness life expectancy, the fund has other values and benefits to the claimant. As Lord Wilberforce explained in *Pickett*[113]:

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110 *Skelton* (1966) 115 CLR 94 at 121.

111 See, eg, *Villasevil v Pickering* (2001) 24 WAR 167 at 179-182 [51]-[68] citing *Jongen* (1992) Aust Torts Reports ¶81-192.

112 *Zorom* (2007) 71 NSWLR 354 at 368 [54], 369 [59], 370-371 [66]-[67]. See also *Wynn* (1994) Aust Torts Reports ¶81-304 at 61,740.

113 [1980] AC 136 at 149.

> "To the argument that 'they are of no value because you will not be there to enjoy them' can he not reply, 'yes they are: what is of value to me is not only my opportunity to spend them enjoyably, but to use such part of them as I do not need for my dependants, or for other persons or causes which I wish to support. If I cannot do this, I have been deprived of something on which a value – a present value – can be placed'?"

99 Put in different terms, at the date of judgment, the claimant receives, as an element of an award of damages, the net present value of a fund that the claimant prior to the injury would have expected to receive on retirement, subject to appropriate discounts. It is a loss that is measured and awarded – a loss of something for which the claimant should be, and reasonably can be, compensated[114]. And what the claimant then does with that fund is a matter for them.

100 However, Amaca contended that Mr Latz is in a different position and should not be compensated because not only is he retired but he is in receipt of a pension from a statutory superannuation scheme.

101 Amaca's argument that Mr Latz has not suffered a loss, because the loss is only a loss that can be suffered by his family after his death, and is therefore not *his* loss, must fail. Contrary to Amaca's argument, Mr Latz has *personally* suffered a loss, which has a present value, and which can be quantified. That last statement needs unpacking.

102 On his retirement, what Mr Latz had, as a result of the exploitation of his capital asset, was a superannuation pension under Pt 5 of the Superannuation Act – a fund with certain conditions. On retirement, Mr Latz had access to that fund and, but for his injury, would have continued to receive the superannuation pension from that fund for the whole of his pre-illness life expectancy[115]. Mr Latz will now not receive the superannuation pension for the full duration of his pre-illness life expectancy because of the negligence of Amaca. The value of the capital asset constituted by his rights under the Superannuation Act has been diminished by the injury caused by Amaca. But for the conduct of Amaca, Mr Latz's rights under the Superannuation Act would have been more valuable than they now will be.

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114 *Pickett* [1980] AC 136 at 149.

115 See s 34 of the Superannuation Act.

103 What he has lost is the net present value of the benefit of the converted capital asset for the remainder of his pre-illness life expectancy – a further 16 years.

104 The point is amplified when the *nature* of that converted capital asset is understood. Mr Latz's rights under Pt 5 of the Superannuation Act can be conceptualised, as Mr Latz submitted, as delayed remuneration for work that Mr Latz has carried out[116]. This asset is intrinsically connected to earning capacity, representing, as it does, a species of remuneration – financial rewards from work[117].

105 Had Mr Latz's illness presented itself before he retired, he would have been awarded the net present value of that capital asset. There is no principled basis for denying Mr Latz compensation for his lost superannuation benefit just because the injury or illness which occasioned that loss became apparent only after he commenced retirement. That does not appeal to a sense of justice. It does not accord with principle.

106 Further, the approach to assessment must take account of change to the quality of the medium of compensation. As Stephen J said in *Todorovic*[118]:

> "since the sole function of the process of assessment is to attain what the law has fixed as the proper measure of compensation, there can be no place in the process for fixed rules of law; instead the process must be capable of adjustment in the face of changes in the quality of the medium of compensation. The current acceptability at any time of a process of assessment will depend, and depend only, upon whether or not its outcome fairly corresponds to what the law has set as the proper measure of compensation."

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116 *Parry v Cleaver* [1970] AC 1 at 16. See also *Smoker v London Fire and Civil Defence Authority* [1991] 2 AC 502 at 523.

117 See *Husher v Husher* (1999) 197 CLR 138 at 147 [18]; [1999] HCA 47.

118 (1981) 150 CLR 402 at 428.

107 Over the last 30 years, significant changes have directly impacted the process of assessment: namely, the significance of superannuation in the context of an ageing population[119] and, as these appeals demonstrate, the late onset of diseases like mesothelioma[120].

108 And, as Lord Wilberforce said in *Pickett*[121]:

> "if there is a choice between taking a view of the law which mitigates a clear and recognised injustice in cases of normal occurrence, at the cost of the possibility in fewer cases of excess payments being made, or leaving the law as it is, I think that our duty is clear. We should carry the judicial process of seeking a just principle as far as we can, confident that a wise legislator will correct resultant anomalies."

109 In these appeals, there is a clear and recognised injustice. As a result of Mr Latz's injury, caused by Amaca, he will suffer an economic loss in respect of his superannuation pension. That loss is both certain and able to be measured by reference to the terms of the Superannuation Act – the net present value of the superannuation pension for the remainder of his pre-illness life expectancy, a further 16 years. He should be entitled to recover that loss. Moreover, this loss (which can and should be measured) is distinct in nature and source from the non-receipt of other forms of benefit, including legacies under a will or distributions under discretionary trusts. The superannuation pension, unlike the other forms of benefit, is a capital asset and intrinsically connected to earning capacity.

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119 *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254 at 271 [33]; [2010] HCA 36. See, eg, Australian Law Reform Commission, *Elder Abuse – A National Legal Response: Final Report*, Report No 131, (2017) at 231 [7.1].

120 See, eg, *Amaca Pty Ltd v Booth* (2011) 246 CLR 36 at 69-70 [93]; [2011] HCA 53; *Alcan Gove Pty Ltd v Zabic* (2015) 257 CLR 1 at 6 [5]-[6]; [2015] HCA 33.

121 [1980] AC 136 at 150.

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110 But what should be the amount of damages awarded for that damage or loss? On the death of the contributor, the statutory superannuation scheme provides a number of identified outcomes for the contributor's superannuation pension[122]. If the contributor's *employment* is terminated by the contributor's death and the contributor is not survived by a spouse or eligible child, the contributor's estate is entitled to a lump sum[123]. If the contributor is survived by a spouse, then the spouse will be entitled to a pension equal to two-thirds of the contributor's pension[124]. In both of those situations, a contributor's identified loss would be calculated to include a component sufficient to generate the future expected income stream from the pension that will be lost. The first calculation would take into account the lump sum[125], the second calculation would take into account the value of the spouse's pension[126]. Despite each of those amounts, in both situations there will be a loss which is compensable.

111 But what, then, is the position if the contributor under the statutory superannuation scheme has retired? If the contributor is not survived by a spouse or eligible child, then the estate is not entitled to a lump sum and the contributor's loss will be the net present value of the pension for the remainder of his pre-illness life expectancy[127], a further 16 years. As Lord Wilberforce asked rhetorically in *Pickett*[128], why should the claimant be deprived of something on which a value – a present value – can be placed and which he can enjoy now?

112 However, where the contributor to the statutory superannuation scheme does have a spouse[129], then valuing the loss just identified must give credit for the value of the right which the contributor acquired when they became a contributor

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122 s 38 of the Superannuation Act.

123 s 38(1)(d) of the Superannuation Act.

124 s 38(1)(a) of the Superannuation Act.

125 s 38(1)(d) of the Superannuation Act.

126 s 38(1)(a) of the Superannuation Act.

127 s 38(1)(d) of the Superannuation Act.

128 [1980] AC 136 at 149.

129 s 38(1)(a) of the Superannuation Act.

to that scheme and which remains after their death – a two-thirds pension to the spouse[130]. It is an offsetting or collateral benefit[131].

113 The position then is this: if you are of working age, a lump sum attributable to the superannuation pension is awarded which includes a component sufficient to generate the future expected income stream that has been lost, subject of course to the necessary deductions and discounts. If you are retired, then a similar calculation should be made. It would be incongruous and wrong not to do so.

114 The nature of the damage suffered in each case is identical: the loss of superannuation benefits that, but for the negligently caused injury, would have been received during the lost years. To reason that the results should be different because one victim suffers a reduction in working life while the other does not would be to decide the matter according to a distinction that is unproductive of relevant difference. Why should a tortfeasor whose negligence inflicts a loss of life expectancy on a victim and thereby deprives the victim of superannuation benefits that, but for the injury, would have been received during the lost years be permitted to shelter from liability behind the casuistry that the victim's income earning capacity is not thereby affected? A sum is to be allowed on account of the superannuation pension in the calculation of damages for Mr Latz's personal injuries.

115 The age pension stands in stark contrast. It is not part of remuneration. It is not a capital asset. It is not a result of, or intrinsically connected to, a person's capacity to earn. Nor, contrary to Mr Latz's submission, is it a future income stream to which he has any present or future right or entitlement. It is not a form of property even within the extended meaning given to that concept in the application of s 51(xxxi) of the Constitution[132]. No sum is to be allowed on

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130 cf *Dionisatos v Acrow Formwork & Scaffolding Pty Ltd* (2015) 91 NSWLR 34 at 74 [207]; see also at 38 [1], 44 [33].

131 *The National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569 at 599-600; [1961] HCA 15. See also *Redding* (1983) 151 CLR 117; *Manser v Spry* (1994) 181 CLR 428; [1994] HCA 50.

132 See, eg, *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349; [1948] HCA 7; *Cunningham v The Commonwealth* (2016) 259 CLR 536 at 555-556 [43]-[46]; [2016] HCA 39.

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account of the age pension in the calculation of damages for Mr Latz's personal injuries.

116 For those reasons, the following orders were made on 11 May 2018:

Matter No A8/2018

1. Appeal allowed in part, on the ground (Ground 3(a)) that the Full Court of the Supreme Court of South Australia erred in assessing damages by including an allowance for the loss of expectation of receiving an age pension during the "lost years".

2. Set aside order 3 of the Full Court made on 30 October 2017 and 20 November 2017 and, in its place, order that judgment be entered in an amount to be determined in accordance with Order 1.

3. Appeal otherwise dismissed.

4. The appellant pay the respondent's costs of the appeal.

Matter No A7/2018

1. Appeal dismissed.

2. The respondent pay the appellant's costs of the appeal.