

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A8 of 2018

BETWEEN: **AMACA PTY LIMITED (under NSW administered winding up)**
Appellant

and

ANTHONY LATZ
Respondent

No. A7 of 2018

ANTHONY LATZ
Appellant

and

AMACA PTY LIMITED (under NSW administered winding up)

Respondent

REPLY OF AMACA PTY LIMITED



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Part I: Certification of Amaca Pty Ltd (Amaca) as to internet publication

1. This submission is in a form suitable for publication on the internet.

Part II: Reply to Mr Latz's submissions (LS)

2. Mr Latz states that his damages claim is "entirely conventional" (LS [43]). He contends that Amaca's case requires "overruling, for no very persuasive reason, decisions of long standing" (LS [53]). He suggests that any loss sustained by a negligently-injured plaintiff that is "capable of being mathematically quantified" should be recoverable in damages for economic loss (LS [17], [34]). He argues that his position is supported by foreign authorities (LS [56]ff). He claims that the mere fact that the reversionary pension will be payable to another person – Ms Taplin – means that it is irrelevant to the calculation of any loss he has suffered (LS [68], [74]). None of these contentions is correct.

Australian authorities

3. Contrary to Mr Latz's submissions (LS [9]-[13], [31]-[32], [35], [41], [42], [53], [55]), Amaca's contentions are not inconsistent with, and do not require the "overruling" of, *Skelton*, *Todorovic* or *Fitch*. Those cases are only authorities for what they decide, having regard to the particular issues in dispute. Assumptions proceeded upon without argument do not bind later courts.¹ And characterising submissions at a high level of generality or with loose language – eg by stating (incorrectly) that Amaca contends "damages for economic loss in the lost years are not available" (LS [9]) – tends to obscure analysis of what is being argued against the backdrop of what has been decided.

4. The recoverability of damages for non-payment of a public or contributory pension unrelated to any loss of earning capacity was not in issue in *Skelton*. Amaca's argument does not involve any overruling or departure from *Todorovic* (which, it should be recalled, was a case involving "test appeals on discount rates"²), or any other authority (including *Paff v Speed*³) that provides for damages to be awarded in respect of lost superannuation benefits consequent upon a plaintiff's lost capacity to earn. Amaca does not dispute that *if* Mr Latz's mesothelioma had reduced not only his natural life but also his working life *then* he could recover damages for any diminution in the value of his superannuation benefits resulting from the impairment of his working capacity (ie due to a reduction in contributions to be made by him or on his behalf, or premature retirement). Similarly, *Fitch* relevantly holds that damages for *loss of earning capacity* in "the lost

¹ See *CSR Ltd v Eddy* (2005) 226 CLR 1 (*CSR v Eddy*) at [13] (Gleeson CJ, Gummow and Heydon JJ).

² *Todorovic v Waller* (1981) 150 CLR 402 at 454 (Murphy J); 411 (Gibbs CJ and Wilson J), 439 (Mason J).

³ (1961) 105 CLR 549.

years” are recoverable in a survival of actions claim and are not excluded by s 2(2)(c) or (d) of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), a proposition that is not disputed by Amaca and is irrelevant to the determination of the present appeal.

5. Shorn of their declamatory indignation, Mr Latz’s submissions (LS [16]-[17], [34], [37], [40]) reduce to the argument that once a plaintiff establishes *some* damage, *all* detrimental consequences that are mathematically quantifiable are recoverable as economic loss. On any view, *CSR v Eddy* is directly inconsistent with this proposition, and it is Mr Latz whose submissions challenge the orthodoxy in this Court.
6. It is noteworthy that Mr Latz chose not to frame his case in respect of the two pensions as a loss of amenity claim, or otherwise as part of a general damages claim (cf LS [33], [38]). In a case where the facts supported it, that might be an acceptable manner, consistent with *CSR v Eddy*,⁴ to allow a modest recovery.

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The compensatory principle

7. In *Kenny & Good Pty Ltd v MGICA (1992) Ltd*,⁵ this Court disapproved of Lord Hoffmann’s formulation of the duty of care owed by a valuer to a lender taking security over the valued property. But nothing in that case casts any doubt upon the proposition that, before calculating damages for loss, it is necessary to identify the losses in respect of which a plaintiff may recover compensation in the first place – a proposition that itself recognises that some losses are *not* compensable, despite the fact that they are quantifiable and are a consequence of negligent conduct (cf LS [18]-[22]). The compensatory principle’s function is one of *measurement* (cf LS [21]-[22]). Just as that principle “depends for its utility and execution on proof of the actual damage suffered”,⁶ so it also depends on a prior determination of *which* losses are compensable.

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The claimed loss is not Mr Latz’s loss

8. Mr Latz contends that the lost future income streams in issue in this case are *his* (“actual financial”) losses, and that the opposing view is “entirely contrary” to the decision and reasoning in *Fitch* (LS [42]-[44]). But *Fitch* provides no assistance. That case did not hold that *any and all* “damages for economic loss” are recoverable by an estate – or an injured plaintiff – in respect of the plaintiff’s lost years (cf LS [44]). As stated above, it solely concerned “damages for loss of earning capacity”.⁷ The destruction of *that*

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⁴ See at [16], [39], [72] (Gleeson CJ, Gummow and Heydon JJ), [114] (McHugh J).

⁵ (1999) 199 CLR 413.

⁶ *Harriton v Stephens* (2006) 226 CLR 52 at [270] (Crennan J).

⁷ *Fitch v Hyde-Cates* (1982) 150 CLR 482 at 486 (Mason J); see also at 491, 492, 498 (Mason J).

capacity is a loss “of the deceased” (at 491). The direct connection between such damages and the injured victim is evident from Mason J’s discussion of the expenses that must be deducted to reflect the “true measure of the deceased’s loss” (at 498). The deceased’s lost earning capacity is valued by taking the “amount of his future earnings less his probable living expenses”, which are “an essential condition of the exercise of his earning capacity” (at 498). In this way, the courts recognise that the injured person’s present capital asset has been impaired by the injury – the damage resulting from which is the unachieved potential of that asset over time minus “running costs”.

9. No such analysis can apply to Mr Latz’s claimed loss. His injury has not damaged his
10 ability to accumulate wages through the deployment of his labour and skill. The claimed
loss – the absence of future payments – will be felt only by Mr Latz’s family after his
death. “[I]n substance it is the family which benefits from the award of compensation for
the loss even though the ‘family’ is not the plaintiff”.⁸ The suggestion (LS [37]) that the
State pension constitutes deferred earnings, such that the tort destroyed part of Mr Latz’s
earning capacity, should be rejected. This analysis, which was not advanced below (see
FC [163]), ignores the fact that there is “no guarantee of a return” under the scheme: as CAB93
Hinton J stated, any return “depends on how things turn out” (FC [247]). Nor can the CAB115
claimed loss be described as “actual financial loss” that Mr Latz will suffer (LS [43]): it
is not an “expenditure which he must meet so that at the time the action is brought,
20 though he has not paid for it, he is in truth worse off by that amount”.⁹ In this respect, too,
it is far from accurate to describe Mr Latz’s claim as “conventional” (cf LS [43]).

English authorities

10. The cases relied on at LS [56]-[57] provide no persuasive support for Mr Latz’s position.
11. In *Pickett*, the only head of economic loss that was in issue was loss of earnings. The only
majority judge who considered the recoverability of other pecuniary benefits, Lord
Scarman, did so in a few short sentences whilst expressly recognising that “the point does
not arise for decision and has not been argued”.¹⁰ Lord Russell’s countervailing concern
(at 165) about the scope of such claims has force. Further, at least in Australia, the
proposition that there is no principled justification for distinguishing lost earning capacity
30 from lost capacity to receive other economic benefits¹¹ is too broad. As this Court

⁸ *CSR v Eddy* at [42] (Gleeson CJ, Gummow and Heydon JJ).

⁹ See *CSR v Eddy* at [31] (Gleeson CJ, Gummow and Heydon JJ).

¹⁰ *Pickett v British Rail Engineering Ltd* [1980] AC 136 (*Pickett*) at 170 (Lord Scarman).

¹¹ *Pickett* at 170 (Lord Scarman), quoting from the Law Commission (cf AS [60]).

accepted in *CSR v Eddy* (at [16]), not every “lost capacity” of an injured plaintiff can and should sound in compensation for the full market value of the loss. Like the lost ability to care for a disabled relative, the lost ability to provide for dependants through future pension payments should not be compensated as special damages. The single judge decision in *Adsett* can be criticised on similar grounds,¹² and the compensation relevantly awarded in that case – for an inheritance that the Court assumed would have flowed to the deceased “in about 10 years’ time”, although “[w]ho can say” what the testator’s “testamentary wishes [would] have been then” (at 851) – demonstrates the “potential scale of recovery”¹³ if all lost “financial expectations”¹⁴ may in principle be recovered.

- 10 12. As for *Auty*, the lost pension claims upheld by the Court of Appeal either were Lord Campbell’s Act damages (see AS [48]) or flowed from the injured mineworkers’ “loss of earnings which would affect their earnings-related retirement pensions”.¹⁵ The recoverability of such damages as a matter of principle was not contested in that case, is not contested by Amaca, and raises issues readily distinguishable from Mr Latz’s claim (AS [48], [59]). Similarly, in *Phipps*, the Court of Appeal noted that it was “common ground that damages would include an element of lost pension”¹⁶ – and, in that light, it is difficult to discern the guidance that this Court may obtain from the decision.

The reversionary pension

- 20 13. The key error underpinning Mr Latz’s treatment of this issue is his conflation of two separate steps: (1) an assessment of what *loss* or *harm* the injured plaintiff has suffered; and (2) consideration of whether some pecuniary “advantage ... is to be regarded as mitigating that harm”.¹⁷ Amaca’s alternative case that the reversionary pension should be brought to bear in assessing loss is not a contention about step 2: that the reversionary pension is a “collateral benefit” (LS [70]), “deductible from Mr Latz’s damages” (LS [60] heading, [62], [74]). It is an argument about step 1: that what Mr Latz has *lost* due to the injury is a one third diminution in the quantum of a composite statutory benefit.
14. For this reason, *Dionisatos* – which in any event dealt with two entitlements created by two different statutes – is of no assistance (cf LS [72]).¹⁸ The hypothetical at LS [71],

¹² See *Adsett v West* [1983] 1 QB 826 at 847 (McCullough J).

¹³ *CSR v Eddy* at [65] (Gleeson CJ, Gummow and Heydon JJ).

¹⁴ *Pickett* at 170 (Lord Scarman).

¹⁵ *Auty v National Coal Board* [1985] 1 All ER 930 at 930 (headnote); 934-935 (Waller LJ), 942 (Oliver LJ).

¹⁶ *Phipps v Brooks Dry Cleaning Services* [1996] PIQR Q100 at Q108 (Stuart-Smith LJ). See similarly *West v Versil Ltd*, *The Times*, 31 August 1996, LexisNexis judgment transcript (*West*), cited at AS [59] fn 63.

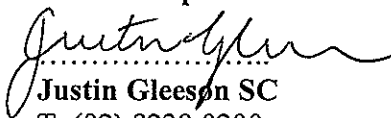
¹⁷ *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569 at 597 (Windeyer J).

¹⁸ See *Dionisatos v Acrow Formwork & Scaffolding Pty Ltd* (2015) 91 NSWLR 34 at [195]ff (Gleeson JA).

which similarly concerns two entirely separate rights (employment earnings and insurance payments), is also inapt.

15. The primary judge upheld Mr Latz’s claim for “the loss of the pension occasioned by his premature death” (TJ [95]). To identify the “pension” that has been “lost”, it is necessary to understand what the statutory scheme has conferred in return for Mr Latz’s contributions, and how that position is affected by his injury and diminished life expectancy. The answer is that, as quid pro quo for 30 years of a contributor’s fortnightly payments, the scheme grants a series of primary and derivative rights which do not overlap in time. The fact that his primary rights cease on his death corroborates this analysis (cf LS [63]). Mr Latz’s “inchoate right” matured upon his retirement into a fortnightly pension, but will mature again into a different form (the reversionary pension) when he dies (cf LS [64]). It is the difference between *that* form, and the form that would otherwise have subsisted absent the injury, which is his loss. In this context, Mr Latz’s appeal to the “fundamental legal distinction between different entities” (LS [68]) is unavailing: the reality that part of his pension will manifest in payments to Ms Taplin does not change the fact that those payments are a component of *his* statutory right.
16. *West* does not advance things for Mr Latz on this issue (cf LS [73]). In *West*, the wife’s future benefits could not be set off against the plaintiff’s loss because, after sustaining injury, the plaintiff “bought” his wife’s entitlement by opting to receive a lesser pension. Reducing his damages during the lost years to account for her pension would thus constitute a “double reduction in his damages for a single disbursement”.¹⁹ The Court recognised the relevance of the wife’s benefits to the plaintiff’s damages in a different way: by holding that he had no entitlement to compensation for his receipt of a lesser pension, as “to the extent of the diminution it is not lost to the Plaintiff but applied by his choice and on his behalf in the purchase of a reversionary pension for his widow”.²⁰

Dated: 6 April 2018

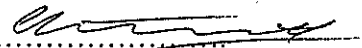

Justin Gleeson SC

T: (02) 8239 0200
justin.gleeson@banco.net.au



Dominic Villa

T: (02) 9151 2006
villa@newchambers.com.au



Celia Winnett

T: (02) 8915 2673
cwinnett@sixthfloor.com.au

¹⁹ At p6 of the judgment transcript (Millett LJ).

²⁰ *West* at p6 of the judgment transcript (Millett LJ).