

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

OUTLINE OF ORAL ARGUMENT OF AMACA PTY LTD

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

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

Part II: Outline of propositions to be advanced in oral argument

2. **Summary:** In his negligence action against Amaca, Mr Latz claims the pecuniary value of two financial benefits which otherwise would have accrued to him in the “lost years” – the years of his pre-injury life expectancy during which he will not survive due to Amaca’s negligence:
 - a. **Age pension**, payable under the *Social Security Act 1991* (Cth) to persons who live past a certain age, satisfy residency requirements and are of defined limited means.
 - 10 b. **State pension**, a pension under a contributory scheme continued by the *Superannuation Act 1988* (SA) (**1988 Act**) – two thirds of the value of which will be payable to Mr Latz’s spouse after his death (**reversionary pension**).
3. Mr Latz’s claim should fail, for any or all of the following reasons.
4. *First:* Mr Latz seeks recovery for foregone economic gains, unconnected with any impairment of his earning capacity. Such gains fall outside the scope of compensable loss in actions for negligently-inflicted personal injury.
5. *Second:* foregone economic gains of this kind in the “lost years” represent no loss to the injured plaintiff. Any loss is suffered by the plaintiff’s dependants after his or her death.
6. *Third:* an injured plaintiff’s failure to survive into the “lost years” of itself has never been
20 recognised as compensable in negligence. To determine a pecuniary loss claim in respect of a foregone economic gain in the “lost years”, the court would need to place a monetary value on *all* the benefits and burdens of a period of non-existence– the effect of which is to treat death as the compensable injury. The common law should not be so extended.
7. *Fourth:* having regard to the character of the particular rights conferred by the respective statutory schemes, there are good reasons not to treat Mr Latz’s failure to receive the age pension and State pension as recoverable economic loss.
8. Alternatively, if Mr Latz may recover damages for the value of his State pension during the “lost years”, the reversionary pension should be brought to bear in measuring his loss.
9. **Core matters:** The facts concerning the assessment of damages will be reviewed;
30 likewise the terms of the two key statutes.
10. **General principles:** The issues arising for this Court’s determination should be approached against the backdrop of five general principles.
11. *First*, the aim of compensation in tort is backward-looking: to put the plaintiff back in the position he or she would have been in had the wrong not been committed. (AS [29])

12. *Second*, the process of identifying and assessing compensable loss in tort is informed by the rationale for the particular tort, its elements and the interests it protects (AS [30]).
13. *Third*, in determining whether and what a plaintiff may recover in damages for a wrong, it is helpful to separate out three sequential enquiries:
 - a. Identification of loss: What has been lost, and does the law afford compensation for it?
 - b. Method: How does the law compensate for the loss – eg under general damages or as a head of special damage?
 - c. Measure: What is the appropriate assessment of the quantum of the loss? (AS [31])
- 10 14. *Fourth*, whilst the “compensatory principle” plays a foundational role, it is *not* a tool for answering the “identification of loss” or “method” enquiries. It shapes the last enquiry: measurement. See *Harriton v Stephens* (2006) 226 CLR 52 at [270]. (AS [32]-[33]; R[7])
15. *Fifth*, tort law compensates injured plaintiffs for the losses *they* suffer – not for losses that their dependants may suffer indirectly by reason of the injury. (AS [29])
16. **CSR v Eddy**: In *CSR Ltd v Eddy* (2005) 226 CLR 1, the plurality exhaustively stated the categories of recoverable loss in claims for negligently-inflicted personal injury: at [28]-[31]; see also at [122] and *Teubner v Humble* (1963) 108 CLR 491 at 505. Putting aside the “undesirable” anomaly of *Griffiths v Kerkemeyer*, those categories are:
 - a. Non-pecuniary losses, including pain and suffering, and loss of capacity to engage in certain activities: at [29].
 - 20 b. Loss of earning capacity – which requires consideration of “what moneys could have been produced by the exercise of the [plaintiff’s] former earning capacity”, such that “financial loss” will ensue: at [30].
 - c. Actual financial loss, being costs/ charges that necessarily “will be incurred”: at [31].
17. It follows that an injured plaintiff’s lost expectation of receiving future financial benefits, where those benefits are unconnected with any impairment of his/her earning capacity, is not a recoverable head of pecuniary loss within the *CSR v Eddy* categories. (AS[34]-[37])
18. **Skelton, Todorovic and Fitch**: None of these cases is inconsistent with, or throws doubt upon, the propositions at [16]-[17] above. (AS [38], [57]; R [3]-[4])
19. **Application**: The losses Mr Latz claims in respect of his pensions are not non-pecuniary losses. They are not attributable to impairment of earning capacity – ie of “the personal capacity to earn money from the use of personal skills”: *GIO v Johnson* [1981] 2 NSWLR 617 at 627. This is so even for the State pension, as Mr Latz’s *capacity* to earn was long exhausted; and in any event, given that the scheme guarantees no fixed return for previous work, his pension payments are not deferred income. These losses are not
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actual financial losses, in the sense of costs or expenses that Mr Latz will incur. They are something different: foregone economic gains. (AS [39]-[44]; R [9])

20. *The CSR v Eddy categories should not be expanded in this case:* (AS [45]-[63])

21. *First:* no principled line can be drawn between the foregone economic gains claimed by Mr Latz and myriad other future income streams. The law of negligence does not protect a personal injury plaintiff from every possible economic consequence of a wrong. Allowing Mr Latz to recover will significantly expand the scope of recoverable loss in personal injury awards, beyond what is truly compensatory: see *Pickett v British Rail Engineering Ltd* [1980] AC 136 at 165 (Lord Russell, dissenting). (AS [54]; R [11])

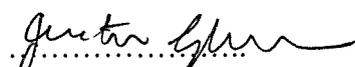
10 22. *Second:* non-receipt of the age pension and the State pension during the “lost years” is not Mr Latz’s loss; it is a loss that will be felt by his family members after his death. Such persons can be compensated by other statutory or contractual mechanisms: eg, the *Civil Liability Act 1936* (SA), ss 23-25, and the reversionary pension. Conversely, “the law of tort concentrates on compensating injured plaintiffs”: *CSR v Eddy* at [42]. (AS [46]-[48])

23. *Third:* the common law recognises that death is not a compensable injury: *Barclay v Penberthy* (2012) 246 CLR 258. It is not possible to isolate and compensate for one foregone economic gain in the “lost years” without embracing a larger question: the total monetary value of Mr Latz’s non-existence, versus the counterfactual of his existence, during the “lost years”. The common law does not condone this exercise. (AS [55]-[56])

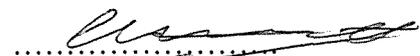
20 24. *Fourth:* understood in their proper statutory setting, Mr Latz’s claimed pension losses represent no *loss* of the rights that he has hitherto enjoyed. The age pension is a welfare stipend supporting older persons of limited means for the remainder of their lives, however long that might be. Non-payment of this pension during the “lost years” is the cessation of an allowance for which there is no further need. The benefit purchased by Mr Latz under the 1988 Act and its predecessor statute consists of security during Mr Latz’s retirement and financial support for his spouse/ dependants after he dies. He has received what he bargained for. Amaca’s tort has changed the *form* of the benefit during the “lost years”, but has not impaired its *character*. (AS [49]-[53])

30 25. *Reversionary pension:* Alternatively, if Mr Latz may recover damages for the economic value of the State pension, the loss he has suffered is a one third diminution in the value of a composite benefit under the 1988 Act. (AS [64]-[68]; R [13]-[16])

Dated: 17 April 2018


Justin Gleeson SC


Dominic Villa


Celia Winnett