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

SUBMISSIONS OF AMACA PTY LIMITED

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Part I: Internet publication

1. Amaca Pty Limited (**Amaca**) certifies that this submission is in a form suitable for publication on the internet.

Part II: Concise statement of issues

2. Mr Latz, a 70-year-old retiree, claims damages from Amaca in respect of a negligently-inflicted personal injury which has reduced his life expectancy. Relevantly, he seeks compensation for the value of his expectation of receiving two future income streams in the "lost years":
   a. age pension under the *Social Security Act 1991* (Cth) (**age pension**); and
   b. benefits payable pursuant to the contributory pension scheme continued by the *Superannuation Act 1988* (SA) (**State pension**).
3. Can Mr Latz recover damages from Amaca for those losses? The answer, Amaca submits, is "no". This is for the following reasons:
   a. In *CSR Ltd v Eddy*[1] (at [28]-[31]), this Court exhaustively set out the types of loss for which a plaintiff may recover damages in a personal injury claim.
   b. Loss of Mr Latz's expectation of receiving the age pension and the State pension does not fall within any of the *CSR v Eddy* categories.
   c. There is no good reason for expanding the *CSR v Eddy* categories to permit recovery of damages for lost pension benefits that are unconnected with any impairment of the injured plaintiff's capacity to earn income.
4. If, contrary to Amaca's primary submission, this Court holds that Mr Latz may recover damages for the value of his State pension, Amaca contends that the reversionary pension payable to Mr Latz's spouse under the statutory scheme is a component of the benefit that has accrued to Mr Latz. As such, it should be taken into account in determining the quantum of Mr Latz's loss.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

5. Amaca considers that no notice need be given in compliance with this provision.

Part IV: Reasons for judgment of primary and intermediate court

6. The judgment of the primary judge is reported as *Latz v Amaca Pty Ltd (formerly James Hardie & Co Pty Ltd)* [2017] SADC 56 (**TJ**). The judgment of the Full Court of the Supreme Court of South Australia (**Full Court**) is reported as *Amaca Pty Ltd v Latz* [2017] SASCFC 145 (**FC**). CAB 4 CAB 51

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[1] (2005) 226 CLR 1 (***CSR v Eddy***).

Part V: Facts

7. Mr Latz is 70 years old (**TJ [27]; FC [8]**). He has lived with his de facto partner, Ms Taplin, for some 17 years (**TJ [27]; FC [12]**). In 1976 or 1977, whilst cutting and installing asbestos fencing for building works on a block of land he owned, he contracted mesothelioma as a result of inhaling asbestos dust and fibre (**TJ [19]-[20]; FC [2], [9]**). After first displaying symptoms of the disease in about July 2016 (**TJ [30]**), he was diagnosed with terminal malignant mesothelioma in October 2016 (**TJ [34]**). By that point, he had been retired from his employment with the State public service for over 9 years (**TJ [27]; FC [13]**). CAB 10, 56 CAB 9, 55, 56 CAB 11 CAB 10, 56

8. On 26 October 2016, Mr Latz brought proceedings in negligence against Amaca, the manufacturer of the asbestos fencing (**TJ [19]; FC [2], [15]**). He established liability at trial (**TJ [21]; FC [3]**). Amaca did not dispute liability on appeal. CAB 9, 55, 57 CAB 10, 55

9. At the time Mr Latz began suffering from mesothelioma symptoms, he was relevantly in receipt of two pensions – which can conveniently be described as the **State pension** and the **age pension**.[2] Key aspects of those pensions are summarised below.

The State pension

10. When Mr Latz retired from his State government employment on 26 April 2007, he became entitled to a CPI indexed pension under the *Superannuation Act 1988* (SA) (**1988 Act**) (**FC [13]**). That statute replaced the *Superannuation Act 1974* (SA) (**1974 Act**), but provided for the continuation of contributions by persons who had been accepted as contributors to the South Australian Superannuation Fund (**Fund**) under earlier legislation on or before 31 May 1986 ("old scheme contributors").[3] CAB 56

11. In 1977, shortly before his 30th birthday, Mr Latz had applied to become a contributor to the Fund pursuant to s 43 of the 1974 Act (**FC [10]**). He was accepted, and made fortnightly contributions to the Fund of six per cent of his salary for the next 30 years thereafter (**FC [10]-[11], [22]**). By application of s 34(1) of the 1988 Act,[4] upon Mr Latz's retirement at age 60, that contribution history entitled him to a fortnightly pension equivalent to two thirds of his fortnightly pre-retirement salary (**FC [22]**). At the date of the Full Court appeal, his State pension was $51,162 per year (**FC [38]**). CAB 56 CAB 56, 58 CAB 58, 61

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[2] Mr Latz also received an "income stream pension from Super SA" (**TJ [27]**). However, he made no damages claim against Amaca in respect of that income stream: see **FC [13] n 2.**

[3] See ss 4(1) ("contributor" and "old scheme contributor"), 17(6)(a)(iv), 20A, 23, Sch 1 items 1, 5.

[4] See also s 4(1), definition of "age of retirement"; 1974 Act, s 4, definition of "age of retirement".

12. A right to a pension under the 1988 Act is not assignable (s 50(1)). However, once an old scheme contributor dies, s 38 of the 1988 Act provides for the payment of benefits to the contributor's spouse, dependants or estate in the following circumstances. If the contributor is survived by a spouse, the spouse is "entitled to a pension equal to two-thirds of the deceased contributor's notional pension" (s 38(1)(a)). If the contributor is survived by an "eligible child" (defined in s 4(1)), that child is entitled to a pension equal to a percentage of the deceased's notional pension, calculated by reference to whether a pension is also payable to a spouse or to other eligible children (ss 38(1)(b)-(c), 38(2)). If the contributor's employment is terminated by the contributor's death and the contributor is not survived by a spouse or an eligible child, the contributor's estate is entitled to a lump sum calculated under s 38(7) (s 38(1)(d)).

The age pension

13. Once Mr Latz reached 65 years of age and had 10 years of "qualifying Australian residence", he became qualified for an age pension under s 43(1) of the *Social Security Act 1991* (Cth).[5] No further preconditions applied. In particular, there was no requirement to make contributions, through taxation or otherwise, to ground his pension entitlement.

14. The amount of a person's age pension is calculated by reference to the "age pension rate" prescribed in s 55, and Pension Rate Calculator A at the end of s 1064, of the Social Security Act. In broad terms, that rate calculator provides for the assessment of a maximum payment rate, with deductions made by reference to the person's income and assets. No age pension is payable if the person's age pension rate would be nil (s 44(1)), or if the person is already receiving certain other Commonwealth entitlements such as a service pension (ss 47, 47A). At the date of the Full Court appeal, Mr Latz's age pension was $5,106 per year (**FC [38]**). CAB 62

15. When a person receiving the age pension dies and is not survived by a partner receiving a social security benefit, the Secretary must pay to "such person as the Secretary considers appropriate" the amount that would have been payable to the deceased person on the payday after the person's death.[6] If the deceased person has a partner who also receives the age pension, the partner may be entitled to bereavement payments for a prescribed period in an amount equalling the person's pension payments.[7] The Secretary also has a discretion to pay an amount payable as the person's age pension to another person who

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[5] **(Social Security Act)**. See ss 23(5A), 7(5).
[6] Social Security Act, s 91(1).
[7] Social Security Act, ss 82-83.

applies to receive it.[8] Subject to those matters, the person's statutory entitlement to receive the age pension ceases upon his or her death[9] and does not vest in anyone else.

The primary judge's findings

16. At trial, Mr Latz relevantly sought damages for "future economic loss in connection with his pension entitlements that will cease on his death" (**TJ [23]**). The accounting evidence established that the average life expectancy of a 70-year-old male was 16.71 years, whereas Mr Latz's reduced life expectancy as a result of developing mesothelioma was 6 months (**TJ [95]; FC [38]**). Thus, Mr Latz's claim for the value of lost pension entitlements covered a period of 16.21 "lost years" (**FC [38]**). CAB 10 CAB 22, 62

17. Judge Gilchrist awarded damages for the loss of both pensions (**TJ [118]-[119]**). Regarding the State pension, his Honour reasoned that the "fundamental purpose" of a damages award in tort is to place the victim, "so far as money can achieve it, into the position that he or she would have been in but for the tort"; that, but for the tort, Mr Latz "would have continued to receive his State pension for the rest of his expected life"; and that Mr Latz was therefore "entitled to be compensated for the loss of the pension in the lost years" (**TJ [98]-[99]**). CAB 26 CAB 22

18. His Honour also rejected Amaca's argument that any entitlement of Ms Taplin to pension payments after Mr Latz's death should be taken into account in assessing Mr Latz's loss (**TJ [101], [115]**). In the primary judge's view, that entitlement had the character of "life insurance" paid for by Mr Latz through his contributions to the pension scheme, and should not reduce Mr Latz's entitlement to damages "[a]s a matter of fairness and policy" (**TJ [112]-[113]**). CAB 23, 25 CAB 25

19. As for the age pension, Judge Gilchrist saw no reason why it should be treated any differently in the analysis (**TJ [117]**) – although his Honour ultimately exercised "some caution" in assessing its value, to reflect the fact that Mr Latz's entitlement to this statutory benefit was "inextricably linked to his personal circumstances ... and the policies of the Government" (**TJ [117]**). In the result, his Honour awarded Mr Latz the global sum of $500,000 to reflect the loss of both pensions (**TJ [119]**). CAB 25 CAB 26

The appeal to the Full Court

20. On appeal, Amaca contended that the future loss of Mr Latz's two pensions was not a recoverable head of loss. In support of that argument, it relied on the tripartite

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[8] *Social Security (Administration) Act 1999* (Cth), s 58(1).

[9] So much is implicit from Social Security Act, ss 83(1)(a), 91 and 1223(1AB)(f) and *Social Security (Administration) Act 1999* (Cth), s 58.

classification of compensable loss in personal injury claims articulated by the plurality in *CSR v Eddy*.[10] Alternatively, Amaca submitted that Judge Gilchrist should have made a deduction from the damages award to account for the pension that will be payable to Ms Taplin on Mr Latz's death (**FC [6]**). It was common ground on the appeal (**FC [176]**) that, should Ms Taplin survive Mr Latz, she will be entitled under the 1988 Act to a reversionary pension equivalent to two thirds of the pension that otherwise would have been payable to him (**reversionary pension**). CAB 55, 98

21. By majority (Blue and Hinton JJ, Stanley J dissenting), the Full Court held that the primary judge did not err in awarding damages for loss of the pensions (**FC [105], [253]**), but that his Honour should have deducted the net present value of the reversionary pension from the final award (**FC [116], [262]**). CAB 26, 116 CAB 83, 119

Majority reasoning (Blue and Hinton JJ writing separately)

22. In Blue J's reasons, his Honour stated that the "existence of particular rules and practices should not be allowed to obscure" the "compensatory principle" that is "fundamental" to tort law (**FC [68]**). Blue J held that the heads of compensable loss for tortiously-inflicted personal injury were not confined to the categories described in *CSR v Eddy*, stating that the plurality did not intend to be "exhaustive" in its analysis (**FC [82]-[85], [87]**). Further, his Honour held, the loss of a pension caused by an actionable wrong comprised an "actual financial loss" within the plurality's taxonomy (**FC [87], [100]**). Justice Hinton reasoned to similar effect (**FC [250]-[252]**). CAB 69 CAB 75, 76 CAB 76, 79 CAB 115, 116

23. Justice Blue considered that the recovery of lost pension entitlements was analogous to an award for "financial loss of income by way of wages" (**FC [97]**), was consistent with the compensatory principle (**FC [98]**), aligned with the principles governing the assessment of damages for economic torts (**FC [99]**), and accorded with (inter alia) this Court's decision in *Fitch v Hyde-Cates*[11] (**FC [104]**). Similarly, Hinton J held that such loss was "merely a financial loss of a different species, loss of earning capacity being another species of the genus financial loss" (**FC [252]**). CAB 79, 80 CAB 116

24. Regarding the reversionary pension, Blue J held that it formed part of the "composite benefit" Mr Latz received in return for his contributions to the Fund (**FC [107]-[109]**). In Hinton J's words, under the statutory scheme, "[i]t is as if the pension to which the primary beneficiary was entitled switched to the second beneficiary, albeit in a reduced amount, upon the death of the primary beneficiary" (**[FC [261]**). Thus, Mr Latz would CAB 81 CAB 119

[10] At [28]-[31] (Gleeson CJ, Gummow and Heydon JJ, Callinan J agreeing at [122]).
[11] (1982) 150 CLR 482 (*Fitch*).

notionally continue after death to realise his superannuation benefits through the benefits accruing to his dependants, and his loss due to Amaca's negligence was the value of his entitlements during the "lost years" net of the reversionary pension (**FC [115], [262]**). CAB 83, 119

Dissenting reasons (Stanley J)

25. In dissent, Stanley J emphasised that the compensatory principle only applied where a plaintiff "has suffered loss for which the law affords a remedy" (**FC [158]**). Applying the *CSR v Eddy* categories, his Honour held that the loss of pension benefits did not constitute a loss of earning capacity: Mr Latz's loss was "the result of his premature death depriving him of the receipt of pension benefits", the entitlement to which either arose independently of earning capacity (in the case of the age pension) or had already been "earned" at a time before Mr Latz suffered from any loss of capacity (in the case of the State pension) (**FC [162]**). Nor was it "actual financial loss", in the sense of new needs requiring monetary expenditure (**FC [164]**). Nor was it open for the Full Court to extend the types of loss recognised in *CSR v Eddy* in the absence of High Court authority supporting that development (**FC [165], [172]**). CAB 90 CAB 93, 94 CAB 94, 97

26. His Honour held in obiter that any damages award for the loss of Mr Latz's State pension should not be reduced to account for payments that might accrue to Ms Taplin under the reversionary pension (**FC [179]**). The latter amounted to an independent statutory benefit payable to Ms Taplin, not to Mr Latz, and as such, the "rule against double compensation" did not apply (**FC [180]-[182]**). CAB 98 CAB 98, 99, 100

Part VI: Argument

Damages recoverable for personal injury: general principles

27. In awarding damages for loss of Mr Latz's two pensions during the "lost years", the courts below relied upon the "compensatory principle". However, the nature and limits of that principle must be understood against the backdrop of two broader propositions.

28. *First*, the aim of compensatory damages in tort differs from that applicable in contract in important ways.[12] The "ruling principle" for contractual damages is that a party sustaining loss by reason of breach of contract is entitled to be "placed in the same situation, with respect to damages, as if the contract had been performed".[13] Thus, compensation "reflects a normative order in which contracts must be performed".[14] The

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[12] See Burrows, *Remedies for Torts and Breach of Contract* (3rd ed, 2004) at 6.
[13] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [13] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ), approving *Robinson v Harman* (1848) 1 Exch 850 at 855.
[14] *Clark v Macourt* (2013) 253 CLR 1 at [11] (Hayne J).

touchstone is the position of the wronged party at the end of the executed bargain. Writing extracurially, Edelman J has identified various contract cases where compensation was awarded "in circumstances in which the breach caused no actual loss", and suggests their rationale might be that the party in breach must "pay the money equivalent of performance" "[q]uite separately from a claim for loss".[15]

29. By contrast, the object of compensation in tort is to "plac[e] the plaintiff in the position in which he would have been had the tort not been committed".[16] In a personal injury claim, the touchstone is the position of the injured plaintiff as if no negligence had occurred. Compensation is awarded to remedy actual detriment flowing from the injury itself. Further, that detriment must be a detriment to *the plaintiff*. So, for example, *Griffiths v Kerkemeyer* damages compensate not for "'accident-created need[s]' in the abstract", but for the costs of services that injured plaintiffs cannot render to themselves.[17]

30. *Secondly*, the law of negligence in practice imposes significant constraints on the operation of the compensatory principle. These are informed by the tort's rationale, elements and the interests it has evolved to protect – and, for this reason, may not entirely align with the assessment rules applicable for other torts (cf **FC [99]**). In most cases, these constraints result in a plaintiff recovering *less* than what might be understood as his or her actual loss. Thus, a plaintiff cannot recover damages for loss that ought to have been avoided. Sometimes, however, those constraints result in a plaintiff recovering damages *exceeding* his or her actual loss. For example, certain benefits payable in respect of a plaintiff's injury are not accounted for in assessing the plaintiff's damages.[18] CAB 79

31. As such, the task of turning the broad objective of compensation in tort into a framework capable of application will regularly involve several discrete inquiries: (a) has the plaintiff lost something of real value, consequent upon the tort, such that there is a loss which *should* be compensable; (b) if "yes" to (a), what will be the law's *method* for effecting that compensation – for example, will it be compensable under the head of general damages or will it be treated as special damage; and (c) if the law identifies a loss as compensable and identifies its recovery under a particular head of damages, what will be the appropriate *measure* of that head of damages? In answering each of these questions, the law makes a series of reasoned choices.

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[15] Edelman, 'Unnecessary Causation' (2015) 89 *Australian Law Journal* 20 at 29.
[16] *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 12 (Mason, Wilson and Dawson JJ).
[17] *CSR v Eddy* at [20]-[21] (Gleeson CJ, Gummow and Heydon JJ).
[18] See, eg, *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569.

32. The result, as Lord Hoffmann correctly identified in *Banque Bruxelles SA v Eagle Star*,[19] is that the "compensatory principle" is "the wrong place to begin" in identifying the losses for which a plaintiff may recover in a negligence action. "Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation". This understanding of the "compensatory principle" as a rule concerning the measure of loss, rather than the types of damage recognised at law, is consistent with the authorities quoted by Blue J at **FC [58]-[61]** – each of which stated the principle by reference to the "sum" of money,[20] or "measure",[21] required to make good the plaintiff's losses. More recently, it was endorsed by this Court the year after *CSR v Eddy* in *Harriton v Stephens*.[22] CAB 66, 67

33. The Full Court (**FC [98], [250]**) erroneously conflated these inquiries. It treated the "compensatory principle" as a tool for identifying recoverable loss. Consequently, it viewed this Court's statements of principle in *CSR v Eddy* through an incorrect prism. CAB 79, 115

The CSR v Eddy categories

34. In *CSR v Eddy*, this Court considered whether an injured plaintiff could be awarded damages for the commercial cost of providing gratuitous personal or domestic services to another person (*Sullivan v Gordon* damages). One of the respondent's arguments was that such damages could be awarded by analogy from *Griffiths v Kerkemeyer* damages. The plurality stated that *Griffiths v Kerkemeyer* damages were "anomalous in departing from the usual rule" that damages other than for non-pecuniary loss were not recoverable for an injury "unless the injury produces actual financial loss" (at [27]). In their Honours' view, this anomaly was "undesirable", and *Griffiths v Kerkemeyer* "should not be applied to 'any class of case where its use [is] not covered by authority'" (at [35], footnote omitted).

35. That anomaly aside, the plurality stated that "[a] plaintiff who has suffered negligently caused personal injury is traditionally seen as able to recover three types of losses" (at [28]). The first type "covers non-pecuniary losses" such as (inter alia) pain and suffering

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[19] [1997] AC 191 at 211A.

[20] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39; *Butler v Egg & Egg Pulp Marketing Board* (1966) 114 CLR 185 at 191 (Taylor and Owen JJ); *Todorovic v Waller* (1981) 150 CLR 402 (*Todorovic*) at 412 (Gibbs CJ and Wilson J), 442 (Mason J), 462 (Brennan J); *Haines v Bendall* (1991) 172 CLR 60 at 63 (Mason CJ, Dawson, Toohey and Gaudron JJ).

[21] *Todorovic* at 428 (Stephen J).

[22] (2006) 226 CLR 52 at [270] (Crennan J, with whom Gleeson CJ, Gummow and Heydon JJ agreed, describing the compensatory principle as "[t]he analytical tool for measuring damages").

and loss of capacity to engage in hobbies (at [29]). The second type is "loss of earning capacity both before the trial and after it" – which, in respect of future economic loss, requires consideration of "what moneys could have been produced by the exercise of [the plaintiff's] former earning capacity" (at [30][23]). The third type is "actual financial loss", being "costs" that necessarily "will be incurred" – "for example, ambulance charges" and "charges for medical, hospital and professional nursing services" (at [31]). These heads of loss align with Windeyer J's description in *Teubner v Humble*[24] of the 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".

36. Contrary to the Full Court's findings (**FC [81]-[87], [250]**), the plurality in *CSR v Eddy* exhaustively stated the categories of recoverable loss that the common law recognises in claims for negligently-inflicted personal injury (with the exception of the "undesirable" anomaly of *Griffiths v Kerkemeyer* damages). By describing three types of loss that are "traditionally seen" as recoverable, the Court did not purport to preserve some additional category of damages that might be awarded on an application of the "compensatory principle": the better view is that their Honours were simply contrasting *Griffiths v Kerkemeyer* damages with the accepted categories. CAB 75, 76, 115

37. This reading is consistent with the outcome of the case. Notwithstanding the respondent's "policy" arguments invoking Windeyer J's statement in *Skelton v Collins*[25] that "anything having a money value which the plaintiff has lost should be made good in money", the Court held that the common law did not recognise *Sullivan v Gordon* damages as a component of an injured plaintiff's economic loss (at [68]). Whilst the injured plaintiff who becomes incapable of caring for a disabled relative loses something of value, and may incur actual financial loss by having that care provided commercially, the common law (absent parliamentary intervention) chooses to compensate for that loss under the head of general damages for loss of amenity. Thus, it does not compensate for all aspects of that lost capacity, nor measure that loss by reference to commercial rates for obtaining the care (at [16]).

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[23] Quoting from *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649 at 658 (Barwick CJ).
[24] (1963) 108 CLR 491 (***Teubner***) at 505, cited with approval in (eg) *Nguyen v Nguyen* (1990) 169 CLR 245 (***Nguyen***) at 248 (Brennan J). See also *O'Brien v McKean* (1968) 118 CLR 540 at 544, 546, 548 (Barwick CJ).
[25] (1966) 115 CLR 94 (***Skelton***) at 129, cited by Blue J at **FC [73]**.

38. No different analysis is required by this Court's decision in *Skelton*. In that case, five judges held that an injured plaintiff seeking damages for lost earning capacity may recover compensation in respect of "the probable period of the plaintiff's working life immediately before he sustained his injuries".[26] No question arose regarding recovery for any pecuniary loss extending beyond this orthodox head of damages, which the Court treated as compensation for loss of a capital asset.[27] Applying the analytical framework described at [31] above, the case concerned the *measure* of damages – the appropriate cut-off point for the time span over which a recognised loss should be calculated – and not the scope of compensable loss in personal injury claims. So much is recognised in Windeyer J's judgment (at 128) shortly before the passages quoted by Blue J at **FC [73]**. CAB 70, 71

Mr Latz's claimed losses do not fall within the CSR v Eddy categories

39. Amaca submits that the loss of the age pension and the State pension do not fall within any of the types of loss recognised by the Court in *CSR v Eddy*.

40. *First,* they are evidently not non-pecuniary loss.

41. *Secondly*, they reflect no loss of earning capacity. Properly understood, lost earning capacity is loss of the "capital asset consisting of the personal capacity to earn money from the use of personal skills".[28] It is a loss of "financial rewards from work".[29] Regarding the age pension: in no sense is this "earned" by an exercise of Mr Latz's capacity to earn income. It is a gratuitous statutory benefit of an entirely different character to wages or sick pay received under an employment contract.[30] Indeed, to the extent that age pension eligibility hinges upon satisfying an income test, this benefit accrues by design to persons whose earning capacity is reduced or non-existent.

42. As for the State pension: at the time Mr Latz's mesothelioma became symptomatic, his State government employment, and his fortnightly payments of six percent of his salary to his superannuation, had long ceased. His entitlements under the 1988 Act "had already been 'earned' at a time when there had not been any loss of capacity … resulting from [Amaca's] breach of duty" (**FC [162]**). Accordingly, any loss of pension payments during Mr Latz's "lost years" will not flow from any impairment of his ability to earn. This differs from situations where a plaintiff's injury prevents her from working and thus from CAB 93

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[26] *Skelton* at 107 (Taylor J).
[27] See *Skelton v Collins* at 105 (Taylor J), 129 (Windeyer J).
[28] *GIO v Johnson* [1981] 2 NSWLR 617 at 627 (Hutley JA). Revoking special leave to appeal, this Court "[g]enerally … agree[d]" with Hutley JA's reasoning on this issue: 22 October 1982, 3(19) Leg Rep 6.
[29] *Husher v Husher* (1999) 197 CLR 138 at [18] (Gleeson CJ, Gummow, Kirby and Hayne JJ).
[30] Cf *Graham v Baker* (1961) 106 CLR 340 at 346-347, 349-350 (Dixon CJ, Kitto and Taylor JJ).

making (or receiving from her employer) superannuation contributions during those working years. That plaintiff has been deprived of the opportunity to "swell the ultimate product" of her superannuation benefit through her employment.[31] Part of her lost earning capacity manifests in the difference between the superannuation she will receive and the benefits she would have received had contributions referable to her employment continued to be paid into her superannuation fund.[32]

43. *Thirdly,* and contrary to the Full Court's analysis (**FC [87], [252]**), these losses cannot be described as "actual financial loss". They are not costs or expenses that Mr Latz had incurred or would incur,[33] arising out of new needs that did not previously exist.[34] This contrasts with *Dabinett v Whittaker*[35] and *Neal v Bingle*[36] (cf **FC [91]-[92], [104]**), where the respective statutory schemes required the injured plaintiffs to repay (either directly or via a deduction from their compensation award) their pre-trial social security benefits upon success in their personal injury actions, and the courts awarded damages to compensate for the likely amounts of those repayments. CAB 76, 116 CAB 77, 80

44. Accordingly, current authority precludes Mr Latz from receiving damages in respect of his age pension and State pension.

This Court should not expand the CSR v Eddy categories in this case

45. It was not open to the Full Court below to identify and develop new heads of damage outside the categories identified in *CSR v Eddy*.[37] It is, of course, open to this Court. However, for the reasons set out below, this Court should not expand the *CSR v Eddy* categories to permit recovery of Mr Latz's claimed losses.

46. *First*, given that the non-payment of Mr Latz's pensions during the "lost years" cannot be viewed as an impairment of Mr Latz's capacity to earn, in truth it can only be a loss suffered by *Mr Latz's family* after his death. It is not *his* loss. Like the loss that was the subject of *Sullivan v Gordon* damages, such loss is "remote" from "conventional loss" in tort law, which "concentrates on compensating injured plaintiffs".[38]

47. It is true that Taylor J embraced a dependant-protective rationale in *Skelton* to justify a damages award for lost earning capacity during the "lost years". His Honour stated that

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[31] See *Parry v Cleaver* [1970] AC 1 (***Parry***) at 21 (Lord Reid).
[32] See *Todorovic* at 409, 411, 425-427 (Gibbs and Wilson JJ), 480-481 (Brennan J); *Todorovic v Waller* [1981] 1 NSWLR 97 at 98-99, 104 (per curiam); and note 66 below.
[33] *CSR v Eddy* at [31] (Gleeson CJ, Gummow and Heydon JJ).
[34] *Teubner* at 505 (Windeyer J).
[35] [1989] 2 Qd R 228 at 230 (Thomas J).
[36] [1998] QB 466 at 476 (Beldam LJ).
[37] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [134]-[135] (per curiam).
[38] *CSR v Eddy* at [42] (Gleeson CJ, Gummow and Heydon JJ).

recovery by a plaintiff of damages that "does not take into account his full economic loss will operate to prevent his dependants, in the event of his death, from recovering damages under" Lord Campbell's Act legislation.[39] However, this rationale is not compelling in circumstances where the loss complained of is not properly understood as the *plaintiff's* economic loss at all. Further, any suggestion that the damages recoverable by an injured plaintiff must necessarily align with those recoverable in actions under Lord Campbell's Act (relevantly, Pt 5 of the *Civil Liability Act 1936* (SA) (**CLA**)) ignores the distinct objectives of the latter claims.

48. In contrast to personal injury actions, which compensate for the *plaintiff's* loss resulting from the plaintiff's *injury*, s 24(2) of the CLA provides for damages to be awarded for harm resulting to the relevant *dependant(s)* from the plaintiff's *death*. The pecuniary loss recoverable consists of "the loss of material benefits or of the reasonable prospect of material benefits which depended on the continuance of the life of the deceased".[40] "In these circumstances, there is no warrant for confining the damages recoverable in a Lord Campbell's Act action within the limits of the measure of damages applicable in an action where the injured person has not died".[41] Nor is there any warrant for the converse approach. As demonstrated by *CSR v Eddy*, the mere fact that a head of damages (there, the loss of domestic services provided by the injured person) may be awarded in Lord Campbell's Act claims[42] does not mean it must also be recoverable by an injured plaintiff in his or her negligence claim.[43]

49. *Secondly*, given the character of the statutory entitlements underpinning Mr Latz's claimed loss, the better view is that the non-payment of those benefits after Mr Latz's death results in no "loss" at all: it is simply the working out of contingencies to which the rights were always subject.

50. The age pension's purpose is to "ensure that all Australians have access to a safety net of income throughout their retirement that is adequate to provide a reasonable minimum standard of living".[44] It represents a welfare decision made by successive governments to

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[39] *Skelton* at 121 (Taylor J).
[40] *Public Trustee v Zoanetti* (1945) 70 CLR 266 at 279 (Dixon J), quoted in *Nguyen* at 254 (Deane J), and see also at 263 (Dawson, Toohey and McHugh JJ).
[41] *Nguyen* at 252 (Deane J).
[42] See *Nguyen*.
[43] See *CSR v Eddy* at 5 (*arguendo*), [68] (Gleeson CJ, Gummow and Heydon JJ).
[44] Commonwealth of Australia, Australia's Future Taxation System Review Panel, "Australia's Future Tax System – The Retirement Income System: Report on Strategic Issues", May 2009 at 10, accessed at http://taxreview.treasury.gov.au/content/downloads/retirement_income_report_stategic_issues/retirement_income_report_20090515.pdf.

provide members of the community who satisfy certain qualifying criteria with a minimum level of support at a time in their life when their health may be failing and their earning capacity diminished or non-existent. When a tortiously-inflicted injury shortens a plaintiff's life, that plaintiff will no longer face the conditions of later-life existence which have called forth the need for the age pension. Further, the means-testing and assets-testing underpinning the pension's eligibility requirements, and the limited circumstances in which the Social Security Act extends a deceased pensioner's entitlements to other people, suggest that the pension is not intended to provide a surplus from which dependants may be supported. Properly understood, the entitlement conferred by the Social Security Act is a gratuitous allowance for the remainder of an age pensioner's life, however long that may be. Non-payment of Mr Latz's age pension after his death is not a *loss* he will sustain from his injury: rather, it is the cessation of a welfare benefit for which there is no longer any need.

51. As for the State pension: Mr Latz's 30 years of superannuation contributions "bought" him certain entitlements under the 1988 Act. However, those entitlements depend upon the contributor's choices and family status at any given time.

52. When Mr Latz retired in 2007, he could have made certain that he had a pool of money available to provide for himself and his dependants by taking a lump sum payment under s 40(1) of the 1988 Act.[45] Another available option, which Mr Latz ultimately chose, was to receive fortnightly pension payments for the rest of his life. However, the risk always attending that choice is that a pensioner might die prematurely and leave his family members without access to benefits of the quantum that he might otherwise have received. If the pensioner has a spouse or dependant child, the size of that risk is reduced by the provisions in s 38 for reversionary pensions and/ or benefits payable to the pensioner's estate. Conversely, if a retired pensioner dies with no spouse or dependants, s 38 confers no further entitlement on his or her estate.[46] Thus, as Hinton J held below (**FC [247]**), Mr Latz's contributions under the 1974 Act and then the 1988 Act did not CAB 115

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[45] A contributor commuting the pension at age 60 would receive $10.50 per dollar of annual pension commuted: see reg 20, *Superannuation Regulations 2001* (SA) (**2001 Regulations**) (repealed; now reg 19, *Superannuation Regulations 2016* (SA) (**2016 Regulations**)).

[46] See s 38(1)(d) (which only entitles the contributor's estate to a lump sum payment "if the contributor's employment is terminated by the contributor's death"). However, the contributor's estate may be entitled to a lump sum payment under s 48(2) if the contributor dies less than 4.5 years after first receiving the pension.

guarantee him any particular return: "what he gets back depends on how things turn out".[47]

53. In the events that have transpired, the stream of payments that Mr Latz will receive under s 34 during his lifetime will be less than, and the stream that Ms Taplin will receive under s 38 during her lifetime will be more than, what would have occurred had the injury not reduced Mr Latz's life expectancy. But this represents one of the many possibilities that was always contemplated by the statutory scheme. The coming home of that possibility is not a "loss" caused by Mr Latz's injury. In Lord Reid's words, it is just the way things have turned out.

54. *Thirdly*, no principled line can be drawn between the heads of loss for which Mr Latz contends and myriad other future income streams.[48] If future age pension and superannuation benefits unconnected with any impaired earning capacity are recoverable by an injured plaintiff, why should another injured plaintiff be denied recovery for loss of, say, a maternity payment that she stood to gain from her employer, or under social security legislation, had her pregnancy gone to term? Or a rent rebate to which she would become contractually entitled after living for a certain period in her rental property? Or a legacy under a will which would have granted her an inheritance provided she was alive when the testator died? Or a distribution under a discretionary trust that the trustee proposed to make if she reached a certain age? Further, given that negligence law commonly allows for the vicissitudes of life by discounting damages awards,[49] why should these recoverable income streams not also include contingent payments – to modify the last example, the chance (50%? 20%?) that the plaintiff would have received a distribution? Each of these "losses" extends far beyond the categories described by the plurality in *CSR v Eddy* (and by Windeyer J in *Teubner*), but cannot readily be distinguished from Mr Latz's loss. There is no justification for expanding the scope of future economic loss in personal injury cases to encompass all future income streams; and there is no "underlying principle justifying recovery"[50] in some cases but not others.

55. *Fourthly*, allowing recovery of Mr Latz's claimed pension rights could create incoherence in the common law. Negligence suits have historically been subject to two interrelated common law rules: *actio personalis moritur cum persona*, preventing

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[47] Quoting from *Parry v Cleaver* at 16 (Lord Reid).
[48] See, similarly, *CSR v Eddy* at [61] (Gleeson CJ, Gummow and Heydon JJ).
[49] See *Skelton* at 121-122 (Taylor J); *Todorovic* at 426 (Gibbs CJ and Wilson J).
[50] *CSR v Eddy* at [62] (Gleeson CJ, Gummow and Heydon JJ).

prosecution of a personal injury claim in tort where the wronged plaintiff has died, and the rule in *Baker v Bolton*,[51] providing that "in a civil court the death of a human being cannot be complained of as an injury".[52] These rules, whilst "outflank[ed]"[53] in significant respects by statutory causes of action, remain principles of the Australian common law.[54] The rule in *Baker v Bolton* has no direct application to the death of a plaintiff, "for the first maxim prevented his personal representatives from suing".[55] Nonetheless, the law has in practice accommodated this rule in the principles governing an injured plaintiff's capacity to recover damages for "loss of expectation of life". Such damages, reflecting the plaintiff's "loss of a measure of prospective happiness",[56] were said by Lord Wright to "involve an entirely different concept from the concept of the mere fact of death".[57] Further, they are a component of general damages for which only moderate sums are awarded[58] – reflecting the fact that "to put a money value on a prospective balance of future happiness is to attempt to equate incommensurables".[59]

56. Mr Latz's claim would ascribe a pecuniary value to two consequences of his death: the absence of two future income streams. But to make an accurate economic assessment of the "kind of total experience the future would have offered",[60] but will not offer, Mr Latz, one must weigh all the financial benefits and burdens that will be realised by his early death. In this exercise, death is the compensable injury, and "a man's life is a possession of his that can be valued in money".[61] The common law of negligence does not and should not go this far.

57. *Fifthly*, Mr Latz's damages claim is not supported by this Court's decisions in *Skelton* or *Fitch*. As to *Skelton*: there is no analogy between an injured retiree's non-receipt of pension during the "lost years" and a destruction of earning capacity manifesting in the plaintiff's inability to earn during (inter alia) the "lost years". The latter reflects

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[51] (1808) 1 Camp 493 [170 ER 1033].
[52] *Woolworths Ltd v Crotty* (1942) 66 CLR 603 (***Woolworths***) at 615 (Latham CJ), 621-622 (McTiernan J).
[53] *Swan v Williams (Demolition) Pty Ltd* (1987) 9 NSWLR 172 at 184 (Samuels JA); see also *Workcover Qld v Amaca Pty Ltd* (2010) 241 CLR 420 at [34], [38] (per curiam).
[54] *Barclay v Penberthy* (2012) 246 CLR 258 at [24]-[27] (French CJ, Gummow, Hayne, Crennan and Bell JJ), [80]-[83] (Heydon J), [178] (Kiefel J); *Woolworths* at 618 (Latham CJ), 621-622 (McTiernan J); *Calwell v Ipec Australia Ltd* (1975) 135 CLR 321 at 325-326 (Mason J).
[55] *Rose v Ford* [1937] AC 826 (***Rose***) at 833 (Lord Atkin); *Woolworths* at 615 (Latham CJ).
[56] *Sharman v Evans* (1977) 138 CLR 563 (***Sharman***) at 584 (Gibbs and Stephen JJ); *Skelton* at 98 (Kitto J), 120-121 (Taylor J).
[57] *Rose* at 852.
[58] *Sharman* at 568 (Barwick CJ), 584 (Gibbs and Stephen JJ); *Skelton* at 98-99 (Kitto J); Balkin and Davis, *Law of Torts* (5th ed, 2013) at [11.30].
[59] *Skelton* at 98 (Kitto J).
[60] *Skelton* at 98 (Kitto J).
[61] *Skelton* at 130 (Windeyer J).

impairment of a capital asset; the former does not. As to *Fitch*, that case considered the effect of s 2(2) of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) on an estate's ability to recover damages for the deceased's loss of earning capacity during the "lost years". Section 2(2)(c) provided for damages to be calculated "without reference to any loss or gain to [the deceased's] estate consequent on his death". In interpreting s 2(2)(c), Mason J (at 491) approved Lord Scarman's observation in *Gammell v Wilson*[62] 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". The Court was not asked to determine whether compensation for an annuity, or indeed a pension, could have been recovered by an injured plaintiff in negligence proceedings. This passage is a slender reed on which to hang an expansion of the *CSR v Eddy* categories.

58. *Sixthly,* English and Canadian authorities do not provide a sound basis for permitting recovery of Mr Latz's claimed losses in this case.

59. Regarding English authority: various decisions have permitted recovery of damages for lost pension benefits. However, to the extent that any reasoning is expressed for that course,[63] most decisions are of limited application because they concern plaintiffs who (i) were or (absent the injury) would be capable of paid employment, and (ii) claimed compensation both for impaired earning capacity and for loss of pension rights that otherwise would have increased in value by the exercise of that earning capacity. So, for example, in *Parry*, an injured policeman claimed damages for future economic loss across a number of periods. In the period following his probable date of retirement had the injury not occurred, the plaintiff had lost "the opportunity, by continuing to serve and to make [his pension] contribution, to obtain his full retirement pension".[64] The parties agreed, and the majority accepted, that the plaintiff's measure of loss in this period was the difference between the ill health pension he ultimately received under the Police Pension Regulations and the full pension he would have received under the regulations but for the injury.[65] In such cases, the pension award can be viewed as part of, or as closely related to, the plaintiff's lost capacity to earn.[66]

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[62] [1982] AC 27 at 77.
[63] Cf, eg, *West v Versil Ltd, The Times*, 31 August 1996, where Phillips LJ noted that "the Defendants have not challenged the Plaintiff's entitlement in principle to recover in respect of loss of income in the form of pension payments during the lost years", and that such a claim "would seem correct in principle".
[64] *Parry* at 20 (Lord Reid); see also at 21.
[65] *Parry* at 21-22 (Lord Reid), 33 (Lord Pearce), 42 (Lord Wilberforce).
[66] See, eg, *JR v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] EWHC 1245 (QB) at [18]-[19], [22]; *Auty v National Coal Board* [1985] 1 All ER 930 at 934-935 (Waller LJ); *Lim v Camden Health Authority*

60. The rationale of compensating losses attributable to an inability to work also underpins the decision in *Pickett v British Rail Engineering Ltd.*[67] There, the House of Lords relied on (inter alia) *Skelton* to hold that an injured plaintiff could receive compensation in respect of remuneration he otherwise would have earned in his employment during the "lost years". No issue apparently arose concerning the recoverability of pension benefits, and each of the majority judges spoke in terms of recovery of damages for lost "earnings" or "remuneration".[68] However, Lord Scarman made broader remarks in obiter, stating (at 170) that 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". For that analysis, his Honour relied on para 90 of a Law Commission report, which itself concluded that "other kinds of economic loss referable to the lost period" should be recoverable "in line with the reasoning of the Australian High Court in *Skelton v Collins*".[69] But this Court's reasoning in *Skelton* does not support a proposition of that breadth. As stated earlier, the decision relevantly concerned damages for destroyed earning capacity. In this light, Lord Scarman's reasoning arguably proceeded upon a false premise.

61. As to Canadian authority: although some cases and commentary support the proposition that damages are recoverable in tort claims for lost pension benefits, none apparently confronts the issue raised here: whether a plaintiff incapacitated during retirement can receive recompense for pension payments that would not flow from any impairment of the plaintiff's ability to earn. Professor Waddams categorises the loss of annual pension benefits as a component of lost earning capacity. Whilst noting that "[f]ew cases have expressly dealt with the point", he states that the value of a pension "ought, it would seem, to be included" in a damages award where "the plaintiff would have expected to retire on a pension funded in whole or in part by employer contributions".[70] Of the five authorities (all below Supreme Court level) cited for this proposition, none involved a

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[1980] AC 174 at 196-197; *Longden v British Coal Corporation* [1998] AC 653 at 659 (Lord Hope); *Dews v National Coal Board* [1988] 1 AC 1 at 14-16 (Lord Griffiths); *Larkham v Lynch* [1974] 2 Lloyd's Rep 544 at 554 (Brabin J).

[67] [1980] AC 136 (***Pickett***).

[68] See *Pickett* at 145, 148, 150 (Lord Wilberforce), 152 (Lord Salmon), 159, 162 (Lord Edmund-Davies), 169 (Lord Scarman).

[69] Law Commission, *Report on Personal Injury Litigation – Assessment of Damages* (Report No 56), 1973 at [90] and p89.

[70] Waddams, *The Law of Damages* (5th ed, 2012) (**Waddams**) at [3.900].

plaintiff who had retired from paid employment at the time of the incapacity.[71] These decisions appear to go no further than the *Todorovic*-type cases (see [42] and [59] above).

62. Similarly, whilst a 1987 report of the Ontario Law Reform Commission notes that "compensation is available for loss of pension earning capacity",[72] four of the decisions it cites were Lord Campbell's Act claims by dependants for (inter alia) their loss of financial support resulting from the deceased's death,[73] and the fifth case relevantly concerned the amount that should be deducted from the plaintiff's future economic loss award to account for pension payments she would receive.[74]

63. *Finally,* to the extent Mr Latz contends that denying recovery to him in this case would be unjust or out of step with modern conditions (cf **FC [86]**), that argument "rest[s] on policy reasoning which it is more appropriate for legislatures to weigh than for courts".[75] If damages of this kind are to be recognised by law, the correct route is that suggested in *CSR v Eddy* (at [67]): "to have the problem examined by an agency of law reform, and dealt with by the legislature if the legislature thinks fit". CAB 76

Alternatively, the reversionary pension must be brought to bear

64. If, contrary to Amaca's primary submission, this Court holds that Mr Latz may recover damages for the value of the State pension in the "lost years", Amaca submits that the reversionary pension payable to Ms Taplin under s 38 of the 1988 Act is a component of the benefit that has accrued to Mr Latz. Accordingly, it must be taken into account in determining what Mr Latz has lost as a result of the injury. The Full Court (at **FC [115], [262]**) was correct to do so. CAB 83, 119

65. During his working life, Mr Latz diverted a portion of his income to "purchase" a statutory right to have benefits paid from the Fund in accordance with the 1974 Act and, subsequently, the 1988 Act. Given that Mr Latz did not resign before age 55 (1988 Act, s 39), leave his employment before age 60 pursuant to a voluntary separation package (s 39A), apply for a draw down benefit before his retirement (s 33A), become incapacitated for work (s 36) or have his employment terminated by retrenchment (s 35)

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[71] *Myshrall v Vu* (1994) 156 NBR (2d) 241; *Embleton v Wiseman* (1981) 128 DLR (3d) 183; *Boyles v Landry* (1981) 34 NBR (2d) 466; *Kiddell v Kulczycki* [1977] 3 WWR 216; *Smith v Canadian Pacific Railway Co* (1963) 41 DLR (2d) 249 (which, as stated at para [62] below, concerned the deduction of amounts for pension payments from a future economic loss award). Professor Waddams also cites the House of Lords decision in *Lim v Camden Health Authority* [1980] AC 174.

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

[73] *Lamont v Pederson* [1981] 2 WWR 24; *Lewis v Todd* [1980] 2 SCR 694; *Julian v Northern and Central Gas Corp Ltd* (1980) 118 DLR (3d) 458; *Keddy v Minshull* (1969) 5 DLR (3d) 156 (in which the deceased's widow also claimed under the *Survival of Actions Act* (NS) as executrix of the deceased's estate).

[74] *Smith v Canadian Pacific Railway Co* (1963) 41 DLR (2d) 249.

[75] *CSR v Eddy* at [66] (Gleeson CJ, Gummow and Hayne JJ).

or invalidity (s 37), his entitlement accrued upon his retirement at age 60 (s 34). At that point, much like the retirement benefit considered in *Macoun v Commissioner of Taxation*,[76] Mr Latz's "inchoate right could mature into one of a number of forms, payable to different people".[77] Relevantly:

a. It could become an entitlement to a fortnightly pension payable to Mr Latz at the rate of two thirds of his pre-retirement salary (s 34), and then transform again after his death into an entitlement by his spouse to a pension valued at two thirds of Mr Latz's "notional pension" (s 38(1)(a)). His spouse may then choose to convert all or part of her pension entitlement into a lump sum payment,[78] so long as the Board is satisfied that "no other spouse of the contributor is entitled to part of the pension commuted".[79] A reversionary pension is divided between a deceased contributor's "lawful spouse" and "putative spouse" (as defined in s 4A) "in a ratio determined by reference to the relative length of the periods for which each of them cohabited with the deceased as his or her spouse" (s 46(1)).

b. Alternatively, if Mr Latz had applied for a commutation within 3 months of becoming entitled to his pension,[80] his right could have matured into a lump sum payment (s 40). Had he commuted the full amount of his pension, no reversionary pension would have vested in his spouse upon his death (see ss 38(1)(a), 38(4)(a)).

66. In these circumstances, the statutory entitlement that vested in Mr Latz upon his retirement is best characterised as a "composite benefit" (**FC [107]**): payment of a full pension for his lifetime *and*, after his death, payment of two thirds of the value of that pension to Ms Taplin. "For his or her contributions the primary beneficiary not only gains a type of insurance for him or herself but for their dependants and spouse in the event of the primary beneficiary's death" (**FC [261]**). In other words, the reversionary pension to Ms Taplin was one of the benefits "provided in direct return for [Mr Latz's] monetary and work contributions" (**FC [108]**). This construction is supported by the sequential nature of the benefits conferred under ss 34 and 38(1)(a), as well as the definition of "contributor" in s 4(1) – which relevantly includes "a person who has ceased making contributions unless his or her rights in relation to superannuation have been exhausted *and no derivative rights exist in relation to that person under this Act*" (emphasis

CAB 81

CAB 119

CAB 81

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[76] (2015) 257 CLR 519 (***Macoun***).
[77] *Macoun* at [55] (per curiam).
[78] 2001 Regulations, reg 19(2); 2016 Regulations, reg 18(4).
[79] 2001 Regulations, reg 21(1); 2016 Regulations, reg 21(1).
[80] 2001 Regulations, reg 19(1).

added).[81] This language confirms that the reversionary pension is not an "independent statutory entitlement" to be enjoyed by Ms Taplin (cf **FC [182]**): it is a "derivative" right existing only as a function of, and "in relation to", Mr Latz. CAB 99, 100

67. Accordingly, the loss suffered by Mr Latz from the non-payment of benefits under the 1988 Act during the "lost years" is the diminution in value of the composite statutory entitlement consisting of his lifetime pension and Ms Taplin's reversionary pension. This is not an exercise in deducting third party benefits received upon the plaintiff's death from damages awarded with respect to loss of earning capacity.[82] Rather, the reversionary pension is a necessary integer in the mathematical process of valuing Mr Latz's loss arising from his diminished life expectancy. Nor is this an anomalous result vis-à-vis the benefits accruing to a single pensioner: a retired contributor who dies with no dependants has no derivative rights under s 38 to any reversionary pension or lump sum payment to his or her estate.

68. Due to Amaca's wrong, Mr Latz will not receive the full pension during the "lost years". However, Ms Taplin will receive two thirds of that pension for the same period. As such, the value of Mr Latz's composite statutory entitlement during the "lost years" has diminished only to the extent of one third. The Full Court correctly reduced Mr Latz's damages award at trial on this basis.

Part VII: Orders sought

69. *A8/2018*: (a) Appeal allowed; (b) Set aside Order 3 of the Full Court of the Supreme Court of South Australia made 30 October 2017, and in lieu thereof order that judgment be entered in an amount to be agreed; (c) Appellant to pay the respondent's costs.

70. *A7/2018*: (a) Appeal dismissed; (b) Respondent to pay the appellant's costs.

Part VIII: Estimated time for oral argument

71. Amaca estimates it will require two hours for oral argument.

Dated: 16 March 2018

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[81] See, similarly, ss 42A(4), 50A(3)(b).
[82] Cf *Dionisatos v Acrow Formwork & Scaffolding Pty Ltd* (2015) 91 NSWLR 34 at [201]-[208] (Gleeson JA); *National Insurance Co of New Zealand v Espagne* (1961) 105 CLR 569.