IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A8 of 2018

BETWEEN:

AMACA PTY LMITED
(UNDER NSW ADMINISTERED WINDING UP)
Appellant

and

ANTHONY LATZ
Respondent

No. A7 of 2018

BETWEEN:

ANTHONY LATZ
Appellant

And

AMACA PTY LIMITED (UNDER NSW ADMINISTERED WINDING UP)
Respondent

OUTLINE OF ORAL ARGUMENT OF ANTHONY LATZ

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Part I:

1. Anthony Latz ("Mr Latz") certifies that this outline is in a form suitable for publication on the internet.

Part II:

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2. Two preliminary points may be made: first, this is not a case where there is any difficulty in the quantification of the amounts in question. The length of time during which the life has been shortened is established: see the passages from the trial Judge quoted at RS[6], particularly fn 9. They are at CAB 17 and 25. Again, the amounts of superannuation, age pension and living expenses during those years were established. See again RS[6]. Secondly, the nature of the loss is economic loss, actual economic loss.

3. An award for economic loss for superannuation benefits is not novel. Such damages have been awarded for decades. See *Paff v. Speed* (1961) 105 CLR 549 (3 Authorities 29), which demonstrates that at least since 1961 – 57 years ago - damages have been awarded for loss of superannuation benefits.

4. *Paff v. Speed* illustrates that this type of loss, i.e. economic loss – which may be related to employment but is not *itself* loss of earning capacity – was regarded as an appropriate head of damage.

5. Then in *Skelton v. Collins* (1966) 115 CLR 94, (3 Authorities 35) the Court held unanimously that damages were available for economic loss, not merely for the years remaining in consequence of the injury, but also for the years – "the lost years" – by which a plaintiff's life had been shortened as a result of the tort. *Skelton* was followed by the House of Lords, in *Pickett v. British Rail Engineering Ltd* [1980] AC 136.

6. *Skelton* was concerned with loss of earning capacity. It should be noted, however, that Taylor J. – at 121.5 – used the expression "*economic loss* resulting from his diminished earning capacity". The use of that phrase suggests that "diminished earning capacity" was the species; and "economic loss" the genus.

7. And that view is supported by the observations of Windeyer J. at 128.8 (that damages are given to compensate for what the injured person has suffered and will suffer "in mind, body *or estate*"), 129.2 (the need to concentrate "upon the claim" of the plaintiff to "compensation"), 129.3 (the principle "yields...more particular doctrines", at 129.6 (what is to be compensated for "is the destruction or diminution of something having a monetary equivalent"), and 129.7 (selling not just labour or skills, but also *the products* of labour and skill).

8. Why, in light of *Skelton*, is economic loss in the lost years to be treated as *limited* to loss of earning capacity, and as excluding loss of superannuation benefits. After all the period when superannuation type pensions are most likely to be an issue is later in life rather than earlier.

9. In 1981, in *Todorovic v. Waller* (1981) 150 CLR 402 (3 Authorities 37) the Court held that superannuation benefits – again under a government type scheme – were recoverable. This has given rise to a course of decisions over a long period on which many people have based their activities: see RS[11].

10. In *Fitch v. Hyde-Cates* (1982) 150 CLR 491 (2 Authorities 19) the Court considered the limitations on damages sought to be imposed by s. 2(2) of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW). The issue is stated by Mason J. at 486.3. The terms of the provision are set out at 489.9. As can be seen from its opening words s. 2(2) deals with survival actions, not *Lord Campbell's Act* claims. The provisions in question were ss. 2(2)(c) and (d). In dealing with s. 2(2)(c), Mason J. said at 491.1-3 that the provision did not apply to lost earning capacity or lost wages in the lost years. And, at 491.4, that it applied to losses or gains *consequential* upon death.

11. At 491.5 there is a reference to Lord Wright's observation in *Rose v. Ford* that (a) insurance moneys falling due on death; and (b) annuities ceasing on death, fell within the equivalent English provision. Relevantly for present purposes, the view was expressed that the reference to annuities ceasing on death was *not* a good example for the reasons there set out. An annuity is quite outside the concept of loss of earning capacity. It does, however, have significant similarities to the payment of periodical superannuation.

12. Importantly, in *Fitch*, Mason J's reasons when dealing with s. 2(2)(d), used the term "economic loss": at 492.5 to 495.6. It seems plain that again the genus was regarded as economic loss, of which loss of earning capacity was a species.

13. See too the language "future *pecuniary* loss" and *"financial loss"* referred to by Gibbs CJ and Wilson J. in *Todorovic v. Waller* 150 CLR (3 Authorities 37) at 412 and 413 and see RS[12] and [13].

14. Amaca's contention that *CSR v Eddy* (2005) 226 CLR 1 (2 Authorities 16) precludes recovery of damages for Mr Latz's loss of superannuation (and age) pensions should not be accepted. In *Eddy,* there was no claim for superannuation benefits. The point at issue related to the *Sullivan v. Gordon* damages. The issues involved did not require consideration of whether the statement of "heads of damage" at [28] to [31] was exhaustive. Such a question was never argued, either in written submissions or orally. Nor does the language of *Eddy* at [28] to [31] support Amaca's contention.

15. The judgments of both members of the majority in the Full Court on *this* issue reflect the better view. See Blue J. (CAB 70) at [72]-[77]; the discussion of *CSR v. Eddy* at CAB 75, [81]-[90] and Hinton J. at CAB 112, [241].

16. The six reasons (at CAB 90-91) of Stanley J. dissenting at [159] are unpersuasive.

17. With respect to the loss of the age pension, Amaca's characterisation of it as welfare payments is irrelevant. It is a statutorily guaranteed right to a future stream of income/financial benefits that will come to a premature end because of the tort.

18. There is no principled reason to distinguish this type of guaranteed income stream from any other, including future earnings. The fundamental principle underlying awards of compensation is that the damages to be recovered should be, in money terms, no more and no less than the plaintiff's actual loss: See RS[8], [12], [13], [14]. See also *Todorovic* at 412, per Gibbs CJ and Wilson J; *Espagne* at 588, per Windeyer J and in *Skelton* at 129 per Windeyer J.

19. Loss of the age pension is undoubtedly "*actual financial loss*" due to Mr Latz's imminent premature death. This is the way in which the UK Law Commission in its report No. 56 on the *Assessment of Damages in Personal Injury Litigation* (4 Authorities 42), described the loss of an annuity in the lost years by reason of the shortening of a plaintiff's life due to negligence.

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20. There is no legal basis upon which to bring to account in the assessment of Mr Latz's damages, superannuation benefits that may be payable to Ms Taplin upon his death: RS[60]-[62]

21. The views of Blue J. and Hinton J. really involve a blurring of the issues: Blue J. at FC[115] – "practical reality"; Blue J. at FC[114] – "vicariously enjoy"; Hinton J. at FC[261] – the pension "switches" and Mr Latz "notionally" continues to receive the benefit.

22. The reasons of Stanley J. at FC[174] ff (CAB 97) are more orthodox: RS[63]. See FC[180] (CAB 98). Stanley J. is correct, it is submitted, in his view at FC[182] that Ms Taplin's entitlement is a statutory entitlement *of her own*. See too RS[63]-[66].

23. See RS[67]-[70]. The trial Judge's views on this question, at CAB 23, deal shortly and clearly and, it is submitted, correctly with this question. See TJ[101]-[115]. Note particularly the points at TJ[109], [112], [113].

24. Further, as we have said at RS[72], the NSW Court of Appeal in *Dionysatos* (2 Authorities 18 printed back to front) supports our contention. And Lord Phillips of Worth Matravers, then Phillips L.J. – was entirely correct in his instinctive response in *West v. Versil Ltd* (3 Authorities 39).

Dated: 17 April 2018

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