

LATZ v AMACA PTY LIMITED (A7/2018)
AMACA PTY LIMITED v LATZ (A8/2018)

Court appealed from: Full Court of the Supreme Court of
South Australia [2017] SASCFC 145

Date of judgment: 30 October 2017

Date special leave granted: 16 February 2018

Mr Latz developed malignant mesothelioma in 2016 as a result of inhaling asbestos dust and fibre in 1976 when cutting and installing asbestos fencing manufactured by Amaca Pty Limited (“Amaca”). He sued Amaca in the District Court of South Australia for damages for negligence. The trial Judge (Judge Gilchrist) found that Amaca was negligent in failing to warn of the dangers of asbestos. He assessed damages at \$1,062,000 which included \$500,000 for future economic loss, for the loss of an employment-based superannuation pension and of the Centrelink age pension that would have been payable to Mr Latz were he not destined to die prematurely as a result of the mesothelioma. In calculating the present value of the future loss of the superannuation pension, the Judge made no deduction on account of the two thirds reversionary pension that would be payable to Mr Latz’s de facto spouse after his death.

In its appeal to the Full Court of the Supreme Court (Blue & Hinton JJ, Stanley J dissenting) against the award of \$500,000 for future economic loss, Amaca contended that loss of a pension was not a recoverable head of loss because it could not be brought within one of the types of loss identified by this Court in *CSR Ltd v Eddy* (2005) 226 CLR 1. Those types of loss are: non-pecuniary losses such as pain and suffering; loss of earning capacity both before the trial and after it; and actual financial loss, such as medical expenses. Amaca further contended, in the alternative, that the Judge should have made a deduction on account of the reversionary superannuation pension.

The majority of the Court found that the trial Judge did not err in awarding damages for loss of the pensions. They noted the settled principle governing the assessment of compensatory damages: that the injured party should receive compensation in a sum which will put that party in the same position as he or she would have been in if the tort had not been committed. The majority did not accept that the reasons in *CSR Ltd v Eddy* modified that settled principle in any way, or that the three types of loss identified in that case were intended to be exhaustive.

Even if *CSR Ltd v Eddy* did constrain damages recoverable for personal injury to the three identified types, the majority held that the loss of pension entitlements was an actual loss and thus fell within the third category. By reason of Amaca’s negligence, Mr Latz would be denied the pensions that he would otherwise receive for the remainder of his life. Subject to any statutory indication to the contrary, the denial of the pensions due to the negligence of Amaca amounted to an actual financial loss that sounded in damages.

The majority held, however, that the trial Judge erred in not deducting the net present value of the reversionary pension. They noted that the Judge relied on the principle referred to by this Court in *Redding v Lee* (1983) 151 CLR 117 that damages awarded against a tortfeasor for causing disability to a plaintiff are not reduced by the proceeds of an insurance policy insuring the plaintiff against disability. The present case could be distinguished, however, because it was the loss of the very pension payable by the Fund to Mr Latz that was the subject of his claim for economic loss. It could not have been the intention that Mr Latz could vicariously enjoy the pension payable by the Fund at the same time and in the same amount as damages payable by Amaca by reason of his loss of that very pension.

Stanley J (dissenting) considered that the decision in *CSR v Eddy* was an authoritative and exhaustive statement of the heads of damages for personal injury in Australian law, and in the absence of High Court authority supporting the existence of a new head of damage, it was not open to the Full Court to uphold the Judge's award of \$500,000. His Honour further held that the trial Judge did not err in not deducting the net present value of the reversionary pension. He noted that the pension was not payable to Mr Latz but to his partner. He found that the authorities relied on by Amaca were concerned with whether a statutory benefit received by a plaintiff should be deducted from the plaintiff's own claim for damages at common law, and it would be erroneous to take into account any benefit or loss to a third party, consequent upon Mr Latz's death, in assessing his own losses in an action by him brought and concluded in his lifetime.

The ground of the appeal in A7/2018 is:

- The Full Court erred in deducting from the appellant's damages for loss of superannuation payments, a benefit payable upon his death to his partner.

The grounds of the appeal in A8/2018 include:

- The Full Court erred in assessing damages for future economic loss during the "lost years".