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

SUBMISSIONS OF ANTHONY LATZ

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Part I: Internet publication

1. The respondent in A8 of 2018 and the appellant in A7 of 2018 ("Mr Latz") certifies that this submission is in a form suitable for publication on the internet.

Part II: Statement of issues

2. Mr Latz is 70. He is dying from an asbestos related cancer, malignant pleural mesothelioma caused by Amaca's negligence. Upon his early death pecuniary benefits flowing from:

10 (a) his superannuation pension (pursuant to the *Superannuation Act 1988* (SA))[1]; and

(b) his age pension (pursuant to the *Social Security Act 1991* (Cth))[2];

will cease.

3. *A8 of 2018.* Is Mr Latz entitled to damages from Amaca for these pecuniary losses during his lost years? Amaca argues that *CSR v Eddy*[3] precludes it. It says that Mr Latz's financial losses do not fall within any of the "*categories*"[4] of recoverable loss "*exhaustively set out*"[5] therein. Mr Latz contends that Amaca's submission as to the effect of *CSR v Eddy* is erroneous. He submits that the fundamental principle underlying damages in tort, namely that they should as nearly as possible put an injured plaintiff in the position he or she would have been in had the injury not occurred, requires that he be
20 compensated for these losses, which are readily quantifiable.

4. *A7 of 2018.* Assuming that Mr Latz is entitled to recover damages for the loss of his superannuation pension, should any reversionary pension that might be payable to his partner, Ms Taplin, under the *Superannuation Act*, be brought to account in the assessment of his damages? Amaca submits that Ms Taplin's potential benefit "*is a component of the benefit that has accrued to Mr Latz*"[6] and should set off against his damages. Mr Latz contends that no deduction is legally warranted, that Ms Taplin's potential pension benefits are a statutory right conferred only upon her, that she and Mr Latz are separate legal entities and that it is impermissible to deduct collateral benefits payable to third parties from damages payable to an injured plaintiff.

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

5. No notice is required under s. 78B of the *Judiciary Act 1903* (Cth).

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[1] *Superannuation Act.*
[2] *Social Security Act.*
[3] (2005) 226 CLR 1.
[4] Amaca's submissions ("AS") at [3(c)].
[5] AS [3(a)].
[6] AS [4].

Part IV: Statement of material facts

6. The statement of material facts set out at AS [7] – [26] is not in dispute. The following important matters may be highlighted. At the time he contracted mesothelioma, Mr Latz's superannuation pension entitlement was $51,162 per annum. His age pension entitlement was $5,106 per year[7]. His expenditure on basic living expenses was $185 per week[8]. But for Amaca's negligence he would have continued to receive his superannuation and age pensions for the remainder of his pre-illness life expectancy of a further 17 years to 2034[9]. Both will cease upon his death due to mesothelioma. The superannuation pension is not payable to his estate[10]. He cannot now redeem its present value.[11] He cannot assign it.[12] The same applies to his age pension.[13] CAB 57 CAB 84 CAB 22, 17

Part V: Legislation

7. Mr. Latz accepts Amaca's statement of the relevant statutory provisions.

Part VI: Mr Latz's argument in respect of Amaca's appeal

Restitutio in integrum: "One principle that is absolutely firm, and which must control all else"[14]

8. 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. The classic formulation of the compensatory principle or *restitutio in integrum*, articulated by Lord Blackburn in *Livingstone v Rawyards Coal Co* in 1880[15] was to the effect that damages should as nearly as possible put the injured plaintiff in the position he would have been in had the injury not occurred. This principle has been reaffirmed by this Court on numerous occasions[16].

9. Mr Latz simply sought an assessment of damages for economic loss in the lost years. There is nothing novel or heterodox in doing so. Amaca's contention that damages for economic loss in the lost years are not available is inconsistent with *Skelton v Collins*[17].

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[7] FC [15].
[8] FC [122]-[124].
[9] TJ [95]. See also TJ [66]: "As for life expectancy, apart from hypertension and intermittent atrial fibrillation, both of which are controlled by medication, Mr Latz had no comorbidities. Prior to his mesothelioma he was a fit, active man. Given his family history of longevity and relatively good health he could have expected a long life".
[10] Because Mr Latz's employment will not be terminated by his death from mesothelioma, his Estate will not receive any payments: ss38(7), and 38(1)(d) of the *Superannuation Act 1988* (SA).
[11] 2001 Regulations, reg 19(1).
[12] Section 50(1) of the *Superannuation Act 1988* (SA).
[13] *Social Security Act*: ss83(1)(a), 91, 1223(1AB)(f) and *Social Security (Administration)* Act 1999 (Cth), s58.
[14] *Skelton v Collins* (1966) 115 CLR 94 at 129.4-9 per Windeyer J.
15 (1880) 5 App Cas 25 (HL) at 39.
[16] See eg *Cullen –v- Trappell* (1980) 146 CLR 1 at 11; [1980] HCA 10 at p 11, referring to *British Transport Commission –v- Gourley* [1956] AC 185 and the proposition that a plaintiff should have his damages assessed "*upon the basis of what he has really lost*"; *Haines –v- Bendall* (1991) 172 CLR 60; [1991] HCA 15; *Nominal Defendant –v- Gardikiotis* (1996) 186 CLR 49 at 54; [1996] HCA 53, per McHugh J quoting Gibbs CJ and Wilson J in *Todorovic –v- Waller* (1981) 150 CLR 402; *Husher v Husher* (1999) 197 CLR 138 at 142-3, [6] per Gleeson CJ, Gummow, Kirby and Hayne JJ.
[17] (1966) 115 CLR 94 at 104.9 (Kitto J), 121.6 (Taylor J), 127.2-6 (Menzies J), 129.4-9 (Windeyer J), 136.9-137.3 (Owen J).

Further, damages for loss of superannuation benefits have been recoverable for many years. They were the subject of *Todorovic v. Waller*[18] in 1981 and, as the proceedings leading to that decision demonstrate[19], the entitlement to such damages, as distinct from an element in their calculation, was not in issue.

10. Twenty years earlier, in *Paff v Speed,* members of the Court had worked on the assumption that loss of a police superannuation pension on retirement was recoverable as future economic loss[20].

11. Amaca's argument in relation to superannuation benefits in the lost years effectively involves overruling *Todorovic v Waller* and *Skelton v Collins* (at least in part)[21]. Numerous cases have applied those decisions and no doubt insurers, and superannuation fund managers have based contribution levels and types and timing of investments (and their maturity) upon the continued application of their approach. No principled basis has been demonstrated for departing from them.

12. The principles underlying Mr Latz's claims are well-established. As Gibbs CJ and Wilson J (Aickin J agreeing) said in *Todorovic –v- Waller*[22]:

> "...a plaintiff who has been injured by the negligence of the defendant should be awarded such a sum of money as will, as nearly as possible, put him in the same position as if he had not sustained the injuries."

They spoke[23] of the assessment as being for "*future pecuniary* loss" and[24] "*for financial loss*" likely to result from personal injury. Stephen J (Murphy J relevantly agreeing), used similar language saying:

> "...the cardinal principle of such compensation: that a plaintiff is entitled to such compensation as will, as nearly as may be, make good the *financial loss which he has suffered and will probably suffer in the future.* Once liability has been established and the facts relevant to damages have been found *it is then for the courts to give effect to that principle in their assessment of damages for economic loss.* While there may be no one exclusive method of assessment appropriate to every circumstance, *there is but one criterion by which the adequacy of any particular method may be judged; it is whether or not the result of the assessment fairly makes good the financial loss incurred.*"[25] [Emphasis added]

Brennan J considered that[26]:

> "The principle of law is undoubted and uniform: ... The principle requires that the Courts award an injured plaintiff "such a sum as will, so far as possible, *make good to him the financial loss which he has suffered and will probably suffer as a result of the wrong done to him for which the defendant*

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[18] *Todorovic v Waller* [1981] 150 CLR 402.
[19] *Todorovic v Waller* [1981] 1 NSWLR 97, particularly at 104C-105A.
[20] *Paff v Speed [1961]* 105 CLR 549 at 556.8-557.3 (McTiernan J.); at 559.9-560.9 (Fullagar J.); at 556.8-557.3 (Windeyer J.).
[21] It also involves treating as erroneous the reasoning of Mason J in *Fitch v Hyde-Cates* [1982] 150 CLR 482 at 491 and 495, agreed in by the other members of the Court. See below at paragraphs 31, 32, 41, 42, 44.
[22] (1981) 150 CLR 402 at 412; [1981] HCA 72.
[23] At 412.
[24] At 413.
[25] At 427.
[26] At 463.

> *is responsible" (per Lord Reid in British Transport Commission v Gourley).*" [Emphasis added]

13. The language used in these passages – "future pecuniary loss", "damages for financial loss", "the financial loss incurred" does not support the narrow view of Mr Latz's entitlements advanced by Amaca. Nor does the statement by the Court in *Haines v Bendall*[27], that:

> "The settled principle governing the assessment of compensatory damages, whether in actions of tort or contract, is that the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed. Compensation is the cardinal concept. It is the "*one principle that is absolutely firm, and which must control all else*": *Skelton v Collins* per Windeyer J".

14. In *National Insurance Co of New Zealand Ltd –v- Espagne*[28], Windeyer J said that a common law action for damages for personal injury is a claim to have a pecuniary compensation for all the consequences of physical injury. See too *Pickett v British Rail Engineering Ltd* per Lord Scarman: "[W]hen a judge is assessing damages for pecuniary loss, the principle of full compensation can properly be applied. Indeed, anything else would be inconsistent with the general rule which Lord Blackburn has formulated…" [29].

15. Amaca's exegesis – AS [27]-[29] – of the differences in the "*aim of compensatory damages*" in tort and contract, overstates the position. The aim of compensation in tort and contract is the same: to arrive at "*that sum of money which will put the party who has been injured ... in the same position as he [or she] would have been in if he [or she] had not sustained the wrong for which he [or she] is now getting his [or her] compensation or reparation*"[30]. Of course, the approach in applying or giving effect to the compensatory principle, may differ depending on the loss being compensated[31]. In contract, this will depend on the nature of the contract and the breach.[32] In tort, the application of the principle including the measure and calculation of damages, may differ depending on the nature of the loss, the extent to which the loss was caused by the defendant's negligence and whether or not it is capable of calculation in money terms.

16. Amaca is correct in its assertion[33] - at AS [30] – that "*the law of negligence in practice imposes significant constraints on the operation of the compensatory principle*". However, such constraints have nothing to do with a rigid or mechanistic application of categories or heads of damage. As the Court said in *Harriton v Stephens*[34]:

> "The principles of negligence are designed to set boundaries in respect of liability. The analytical tools therefore, such as duty of care, causation, breach of duty, foreseeability and remoteness, all depend for their employment on damage capable of being apprehended and evaluated."

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[27] (1991) 172 CLR 60; [1991] HCA 15.
[28] [1961] 105 CLR 569 at p 588.
[29] [1980] AC 136 at 168B per Lord Scarman.
[30] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39; *Haines v Bendall* [1991] 172 CLR 60 at 63.
[31] *Clarke v Macourt* [2013] HCA 56, [2013] 253 CLR 1 at 7, [8] per Hayne J at [8],
[32] Ibid, per Crennan and Bell JJ at 11, [26].
[33] AS [30].
[34] (2006) 226 CLR 52 at [257] per Crennan J with whom Gleeson CJ, Gummow and Heydon JJ agreed).

Once the boundaries of liability have been identified and "*actual damage suffered*"[35] capable of being "*apprehended and evaluated*" has been proved, the compensatory principle should be applied in order to compensate the injured person for all pecuniary and non-pecuniary losses so far as money can do it. "*Providing compensation if liability is established is the main function of tort law*; compensation is "[t]he one principle that is absolutely firm, and which must control all else"; if the principle cannot be applied the damage claimed cannot be actionable".[36] In the present case where there is no doubt about Mr Latz's loss, who caused it and how to calculate it the compensatory principle should be applied.

17. The questions posed by Amaca at AS [31] overcomplicate the matter. The inquiries necessary to give effect to the compensatory principle may be seen to be: (a) what has the plaintiff lost and/or what will the plaintiff lose because of the defendant's tort? (b) what method of quantification fairly makes good the loss incurred or to be incurred? (c) is this loss capable of being quantified in money terms? In Mr Latz's case, there is no difficulty in answering any of these questions. Upon his death, he will lose the financial benefit of 17 years of superannuation and age pensions. The parameters of his losses are known. The loss is capable of being quantified. The method of quantification is a straightforward mathematical exercise.

18. Amaca's reliance at AS [32] upon the statement of Lord Hoffmann in *Banque Bruxelles SA v Eagle Star*[37] is, with respect, surprising. Lord Hoffmann did not make any general pronouncement about the compensatory principle. He did not characterise it as a "*rule concerning the measure of loss*"[38]. Nor did he suggest that the scope of its application was limited to specific "*types* [or heads] *of damage recognized at law*"[39]. Rather, his Lordship made clear[40] his view that the compensatory principle was the wrong place to begin when searching for the answer to the question:

> "What is the extent of the liability of a valuer who has provided a lender with a negligent overvaluation of the property offered as security for the loan? [in circumstances where] ... if the lender had known the true value of the property, he would not have lent ... [and] ... a fall in the property market after the date of the valuation greatly increased the loss which the lender eventually suffered".

19. In the result, Lord Hoffmann considered that the negligent property valuer was not liable to pay damages which included the losses consequent upon the fall in the property market because the "...consequences which, though in general terms foreseeable, do not appear to have a sufficient causal connection with the subject matter of the duty".

20. That decision was not followed by this Court in *Kenny & Good Pty Ltd v. MGICA (1992) Ltd*[41]. Two members of the Court specifically rejected Lord Hoffmann's approach[42]. A third, McHugh J, if the facts had been different, might have arrived at a conclusion

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[35] Ibid at [270].
[36] Ibid.
[37] [1997] AC 191 at 211A.
[38] AS [32].
[39] Ibid.
[40] [1997] AC 191 at 211A.
[41] (1999) 199 CLR 413.
[42] At 428, [28] (Gaudron J), 445, [77]-[79] (Gummow J).

similar to that of Lord Hoffmann, but not for Lord Hoffmann's reasons[43]. Kirby and Callinan JJ found no need to attempt to formulate general principles of the kind referred to in *Banque Bruxelles*[44].

21. Further, contrary to the last sentence of AS [32], nothing in *Harriton*, limits the compensatory principle in the manner suggested by Amaca. In *Harriton*, the Court decided that the compensatory principle had no application because the type of damage claimed was not amenable to being "apprehended and evaluated"[45].

22. The criticisms at AS [33] are without foundation. Where there was no dispute regarding the identification of Mr Latz's financial loss, that Amaca's negligence caused it, and the manner by which it could be quantified, there was no warrant for limiting the application of the principle.

CSR v Eddy did not purport to cover the field of available "heads" of damage

23. Amaca's analysis of *Eddy* – AS [34]-[37] – is flawed. It is perfectly apparent, it is submitted, that the Court in *Eddy* was not attempting to "cover the field" of recoverable losses. Rather, it was dealing with a very particular issue, one which does not arise in the present case. The passage selected by Amaca from Windeyer J in *Teubner v Humble*[46], does not, when read in context, support its submission that *Eddy* is authority for a tripartite classification of the available heads of damage. First, Amaca has omitted Windeyer J's introductory words "*Broadly speaking*" from the sentence it has reproduced. Secondly and more importantly, the argument ignores the immediate preceding paragraph in Windeyer J's judgment where he said:

> "So-called principles of assessment of damages for personal injuries can be made the subject of almost endless discussion. The consequences of such injuries are not all susceptible of evaluation in money, and seeming logic can be pushed too far. Some "principles" are much a matter of an individual approach to a particular case. *The conventional headings, economic loss, deprivation of amenities, and pain and suffering, provide a convenient reminder of matters that ought not to be forgotten. But it is not always appropriate, I think, to consider them as if they were distinct items in a balance sheet; for one may overlap and impinge upon another.*"[47] [Emphasis added]

24. Windeyer's J's use in *Teubner* of "Broadly speaking" is consistent with the Court's use of the phrase "traditionally seen" in *Eddy*. On a fair reading of each, both cases are contrary to Amaca's contentions. Rather, the various kinds of damage which are, or are not, recoverable must be determined by the application of the settled principle *and* their assessment must be measured against it. As Windeyer J said in *Skelton* at p128, it is the "*absolutely firm principle*" which "*must control all else*", including the categorisation of the loss.

25. In *Eddy*, the Court referred to the "*usual rule that damages, other than damages payable for loss not measurable in money, are not recoverable for an injury unless the injury*

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[43] At 428, [56]-[57].
[44] At 458, [122].
[45] (2006) 226 CLR 52 at [257], [270] and [276] per Crennan J with whom Gleeson CJ, Gummow and Heydon JJ agreed).
[46] (1963) 108 CLR 491 at 505.
[47] Ibid.

produces actual financial loss"[48]. In this sentence, the joint judgment refers to the two broad kinds of damage which are compensable, namely pecuniary and non-pecuniary loss. The former comprises all financial and material loss such as loss of profits or income or expenses for medical treatment. The latter comprises losses of a non-financial or non-material kind, which are not readily measurable in money such as physical pain or loss of amenities.[49]

26. In this regard Blue J's analysis should be accepted.[50] As his Honour said the principal distinction drawn in *Eddy* at [27], was between damages for "*financial loss*" (pecuniary loss) and for "*loss not measurable in money*" (non-pecuniary loss). "The proposition articulated in that paragraph is that normally damages for loss measurable in money (i.e. not non-financial loss) are only recoverable for "actual" financial loss. *Griffiths v Kerkemeyer* damages are an exception to that proposition, and thereby anomalous, because they are damages recoverable for loss measurable in money but involve no actual financial loss".[51] CAB 73 - 7 CAB 75

27. Further, it is submitted that his Honour was correct in saying of *Eddy* at FC [83]: CAB 75

> "In paragraph [29], the plurality referred to non-pecuniary (i.e. non-financial) losses and gave examples in words ("such as") plainly conveying that they were not intended to be exhaustive. In paragraphs [30] and [31], the plurality referred to two types of loss measurable in money and emphasised that both types involve actual financial loss. The first type was loss of earning capacity resulting in actual financial loss. The second type was actual financial loss of which the plurality gave examples in words ("for example") plainly conveying that they were not intended to be exhaustive. Although each example involved loss by way of expenses incurred rather than income not received, the examples were introduced by the generic description "actual financial losses" rather than a limited description "actual financial expenses". Paragraphs [29] to [31] were introduced by paragraph [28] making reference to a plaintiff being traditionally seen as able to recover three types of loss. This stands in contrast with a statement that a plaintiff can only recover those three types of loss."

28. And, it is submitted that Blue J. was also correct when he said at FC [85] that in *Eddy* the Court: CAB 75

> "was addressing a claim for damages for loss of the ability to provide gratuitous domestic services for another as a result of personal injury...this loss did not involve any actual financial loss and the Court went on to hold that the loss of that ability was to be encompassed in general damages awarded for non-financial loss. The Court was not called on to consider the recoverability of damages for an actual financial loss such as loss of a pension, nor was it called on to attempt to identify exhaustively different forms of actual financial loss that are recoverable".

29. The plurality in *Eddy* was referring to three types of loss which have been "*traditionally*" recovered in personal injury claims. It did not say that the examples identified were the only compensable species of the two broader *genera*, namely pecuniary and non-pecuniary loss. [52] It did not restrict or curtail the applicability of the compensatory principle. As Blue J said at FC [88]: CAB 76

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[48] *Eddy* at [27].
[49] McGregor on Damages, 18th edition [13] at 1-021.
[50] FC [78]-[89]. See also Hinton J at FC [250].
[51] FC [82].
[52] *Eddy* at [27].

> "In the passage relied upon by Amaca, the plurality did not address the role of the compensatory principle. Nor did the plurality suggest that the statement by Mason J (with whom Gibbs CJ, Stephen, Aickin and Brennan JJ agreed) about the recoverability of a lost annuity in the passage extracted at [77] was wrong. The plurality simply was not addressing this question".

30. Hinton J. was also correct in observing, at FC [250]: CAB 115

> "I do not understand the joint reasons in *CSR Ltd v Eddy* to modify the settled principle governing the assessment of compensatory damages – the compensatory principle – ...The discussion in the joint reasons of the types of loss that are compensable ... *is not, ... intended as an exhaustive statement,* hence the topic is qualified when introduced by the non-exclusive descriptor of what is to follow as what a plaintiff is "traditionally seen as able to recover". *If the contrary were true, the compensatory principle would cease to be controlling.*" [Emphasis added]

31. The reference by Blue J at FC [88] to "the statement of Mason J." is important. It is a CAB 76 reference to the adoption by the Court in *Fitch v. Hyde-Cates*[53] of the view that damages were recoverable for loss of an annuity in the lost years. As that passage indicates, economic or financial loss was not limited to loss of earning capacity. It is difficult to see that any principled distinction can be drawn between an annuity and the entitlement to superannuation payments. It may also be noted that in *Fitch v Hyde-Cates* Mason J stated that damages for loss of earning capacity "are to be classified under the heading of economic loss"[54].

32. As submitted earlier, acceptance of Amaca's contention would effectively involve the Court departing from the unanimous decision in *Fitch v Hyde-Cates.* No good reason has been demonstrated for so doing. The best that Amaca can muster in that regard is at AS [57]. But the argument in *Fitch v Hyde-Cates*[55] had been based on reliance on *Gammell v Wilson* and the Court, per Mason J, was correct in taking the view that loss of an annuity during the lost years was to be treated as similar to loss of earnings during the lost years.

33. It should also be borne in mind that unlike Amaca's present attempt to deny Mr Latz's ability to receive *any* compensation for the loss of his superannuation and age pensions, in *Eddy* the Court accepted that the loss of capacity to provide gratuitous care and services to the plaintiff's family *was* a compensable loss. However, because he had not suffered *actual financial loss*, his loss was to be compensated as a component of general damages rather than on the basis of commercial rates.

34. Unlike the injured plaintiff in *Eddy*, Mr Latz is not required to resort to "policy"[56] arguments in support if his claim for economic loss. The loss of his superannuation and age pensions will undoubtedly result in him suffering actual financial loss which is readily capable of being mathematically quantified. There is no good reason not to assess it in this way. It is the mode of assessment which most "*fairly makes good the financial loss incurred.*"[57]

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[53] (1982) 150 CLR 482 at 491.
[54] Ibid at 495.
[55] Ibid at 483.
[56] AS [37].
[57] *Todorovic –v- Waller* (1981) 150 CLR 482 at 427; [1981] HCA 72.

35. Amaca's analysis at AS [38] of *Skelton*, as in some way confining the operation of the compensatory principle to "orthodox head[s] of damage" is without foundation. In *Skelton* the Court declined to follow *Oliver v. Ashman*[58] and awarded damages for economic loss in the lost years. Although the form of economic loss being considered in *Skelton* was a diminution of earning capacity, a fair reading of the reasons reveals that the principle enunciated by the Court applies generally to economic loss. As Windeyer J said: "What is to be compensated for is the destruction or diminution of *something* having a monetary equivalent".[59] [emphasis added] There is no principled distinction to be drawn between a claim for damages for economic loss resulting from diminished earning capacity in the lost years and a claim for economic loss resulting from the destruction of the capacity to continue to receive superannuation or other pecuniary benefits in the lost years[60].

36. It is submitted that Blue J was correct at FC [97]-[98] in saying: CAB 79

> "Considered from first principles, there is no reason to distinguish between a financial loss of income by way of wages or from a profession or business carried on by the plaintiff due to premature death caused by a defendant's negligence and a financial loss of income by way of a superannuation or age pension due to premature death caused by a defendant's negligence.
>
> In both cases, the compensation principle applies and the loss is recoverable in order to put the plaintiff in the same position as he or she would have been in if the tort had not been committed."

37. In any event the correctness of Amaca's contention that Mr Latz's pension losses do not fall within any of the categories "recognised" by the Court in *Eddy*, is itself doubtful. In particular, Amaca recognises[61] that his losses are not of the non-pecuniary kind, but its contention[62] that the loss of the superannuation pension is not a reflection of loss of earning capacity, or akin to the same, should not be accepted. "Earning" might be defined as the provision of labour and/or services in return for receipt of money. As Lord Reid said in *Parry v Cleaver*[63] *"The products of the sums paid into the pension fund are in fact delayed remuneration for ...current work. That is why pensions are regarded as earned income"*. Further, Mr Latz's superannuation pension undoubtedly constitutes the "financial rewards from work"[64]. It may accurately be characterised as deferred earnings for labour and services previously performed. Amaca's tort will have the effect of destroying an integral part of his earning capacity, his capacity to receive (deferred) earnings.

38. Mr Latz's loss of superannuation and age pension entitlements may also be fairly described as a pecuniary consequence of a loss of *capacity*. The law recognises various kinds of capacities which may be lost, or diminished, by reason of personal injury, to which the fundamental compensatory principle must be applied. Loss of earning

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[58] (1962) 2 QB 210.
[59] Skelton at 129.7 per Windeyer J.
[60] (1966) 115 CLR 94 at 104.9 (Kitto J), 121.6 (Taylor J), 127.2-6 (Menzies J), 129.4-9 (Windeyer J), 136.9-137.3 (Owen J). See also Mason J's discussion of *Skelton in Fitch v Hyde Cates* (1982) 150 CLR 182 at 495.
[61] AS [40].
[62] AS [41]-[42].
[63] (1970) AC 1 at 3.
[64] *Husher v Husher* (1999) 197 CLR 138 at 147, [18] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

capacity, to the extent that it is or may be productive of financial loss, is one such loss of capacity. Another is the loss, or impairment of, a faculty or capacity for enjoyment of activities, which is commonly referred to as a "*loss of amenities*". This results from the destruction or impairment of a faculty, just as does "*loss of wages*"[65]. A loss of amenities, not being readily calculable in money, is compensated as non-economic loss or general damages. No problem of calculation arises, however, in the case of Mr Latz's claims.

39. Contrary to AS [43], when his superannuation and age pensions cease Mr Latz will undoubtedly suffer "*actual financial loss*". Amaca's argument that the concept of "actual financial loss" encompasses only monies which will be *spent* by an injured plaintiff is not supported by a fair reading of *Eddy*. It is also contrary to the ordinary understanding of "actual financial loss" which may be as much derived from an inability to receive monies as from a negligently caused need to outlay monies.

40. Mr Latz's pension loss is as readily calculable as the expenditure on palliative care and pain killers which he is likely to incur in the future. As Hinton J said: "*It is merely a financial loss of a different species, loss of earning capacity being another species of the genus financial loss.*"[66] Another species of actual financial loss is lost social security benefits in circumstances where as a result of a tort, a plaintiff who was previously receiving one kind of benefit which was not repayable out of his damages for the tort, subsequently began to receive another kind of benefit which was[67]. In *Dabinett –v- Whittaker*, de Jersey J (as he then was) said, in *obiter dicta*: CAB 116

> "If it were shown that the loss of the unemployment benefit was in a particular case the inevitable and automatic consequence of the particular injury resulting from the negligence, then one could regard that as a loss sounding in damages."[68]

41. Amaca's contention – AS [45] – that the Full Court proceeded to "*identify and develop new heads of damage outside the categories identified in CSR v Eddy*", is not correct. Rather, the majority applied the compensatory principle in an orthodox manner in circumstances where the boundaries of liability were not in doubt. And to describe the award of damages for loss of superannuation benefits as a "new head of damage" in circumstances where *Todorovic v Waller* was decided in *this* Court in 1981, seems an unusual use of language.

42. Amaca's submission – AS [46]-[47] – that the loss of Mr Latz's superannuation and age pensions is "*not his loss*"[69] but his family's, is also erroneous. This approach is contrary to the statement by Mason J in *Fitch v Hyde-Cates*[70] where his Honour said "...it is inappropriate to speak of the deceased's loss, either of future earning capacity or of future wages as a "loss . . . to his estate consequent on his death". At no time does the estate of a deceased person have an entitlement either to his earning capacity or to the future wages he might have earned but for his death. *The loss of them is a loss of the deceased, not of*

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[65] *Teubner –v- Humble* (1963) 108 CLR 491; [1963] HCA 11 per Windeyer J at p 506.
[66] FC [252]
[67] See *Dabinett –v- Whittaker* (1989) 2 Qd.R. 228; *Renehan v Leeuwin Ocean Adventure Foundation Ltd & Anor* [2006] NTSC 4; *Neal v Bingle* [1998] QB 466.
[68] *Dabinett* at p 234.30-35.
[69] AS [46] – [47].
[70] (1982) 150 CLR 482. The other members of the Court agreed with Mason J.

his estate". [emphasis added] *A fortiori* where as in Mr Latz's case, the plaintiff's family never had such an entitlement.

43. Further, the analogy Amaca attempts to draw[71] between the loss sustained in *Eddy* and that which will befall Mr Latz when the mesothelioma takes his life, is inapt. Unlike in *Eddy*, not only will Mr Latz suffer actual financial loss but such a loss is entirely conventional, it being a form of economic or pecuniary loss.

44. Amaca's contentions at AS [47]-[48] are entirely contrary to *Fitch v Hyde-Cates*[72] where the Court held that damages for economic loss in the lost years were recoverable by the deceased's estate in a survival action[73]. The nature of a survival action is such that the damages in question would relevantly have been recoverable by the deceased, had the deceased not died. Whether such damages are, or are not, recoverable in a Lord Campbell's Act type claim will depend on the terms of the legislation providing for such claims.

45. Amaca's submission at AS [49] that "*the non payment of* [the superannuation and age pensions] *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*", is, with respect, extraordinary. It overlooks the grim reality that absent Amaca's negligence Mr Latz would, on the unchallenged facts, have lived a further 17 years. In no relevant sense will his untimely demise be the result of bad luck or the vicissitudes of life. The vicissitudes that Mr Latz or SuperSA might reasonably have been expected to be aware, when Mr Latz made his salary contributions, when he decided upon his retirement to receive a fortnightly pension instead of a lump sum, and when he elected to receive the age pension upon turning 65, did not include the lethal effect of asbestos fibres lodged in his pleura as a result of Amaca's negligence.

46. Equally misplaced are the submissions at AS [50] which refer to the nature and character of the age pension as "welfare" and a "minimum level of support" as reasons why the loss of such benefits ought not sound in damages for economic loss. Amaca submits that when Mr Latz dies he will no longer need this type of welfare support. It is, of course, the fact that upon his death Mr Latz will have lost $5,106 per year[74] for the next 17 years. CAB 57

47. The source of the age pension should not affect its recoverability. It was an income stream which he was entitled to receive pursuant to statute and which he will not receive because of Amaca's negligence. The source of money or income lost should not be relevant to the assessment of damages in respect of such loss. The assessment requires simply satisfaction that the tort has caused the loss and that such loss is capable of being made good in money terms. There can be no doubt that the age pension has "a money value", which is readily capable of being "made good in money".[75]

48. None of the personal or family choices referred to at AS [51]-[52] change the character of the loss of Mr Latz's superannuation pension as actual financial or economic loss suffered by *him*. His decision to join the superannuation scheme and make contributions

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[71] AS [46].
[72] (1982) 150 CLR 482.
[73] At 487.9-488.3, 490.9-491.4.
[74] FC [15].
[75] *Skelton v Collins*, per Windeyer J at 129.

to it, his decision to marry, and his enjoyment of the comfort of knowing that should he die, his wife and any dependent children may acquire a statutory entitlement to the reversionary pension, does not alter its nature as a pecuniary benefit.

49. Absent Amaca's tort Mr Latz would have had the use of 17 years of economic benefits from the superannuation and age pensions with which he could choose to do whatever he wanted. As Lord Scarman said in *Pickett*[76], when rejecting a similar submission, "...in an action for damages *account must be taken, of the interests of the victim.* Future earnings are of value to him in order that he may satisfy legitimate desires, but these may not correspond with the allocation which the law makes of money recovered by dependents on account of his loss. He may wish to benefit some dependents more than, or to the exclusion of others...he is entitled to do. He may not have dependents, but he may have others, or causes, whom he would wish to benefit, for whom he might even regard himself as working. One cannot make a distinction, for the purposes of assessing damages, between men in different family situations". [Emphasis added] Mr Latz had no dependent children. If Amaca's negligence had not intervened his spouse may have predeceased him and not received any statutory entitlement to a reversionary pension. Why should his inability to receive a pecuniary benefit for the next 17 years be regarded as anything other than his loss?

50. Further, the matters of choice referred to at AS [52] do not alter the nature of the superannuation pension. Each such factor would have been applicable had he chosen to procure a permanent disability or death insurance policy instead of joining the State Superannuation fund[77]. Hinton J's observation that "*what he gets back depends on how things turn out*" should not assist Amaca. It is not chance, "*events that have transpired*", "*one of many possibilities*", "*just the way things have turned out*"[78], that will result in the destruction of 17 years' of future superannuation (and age) pension payments when Mr Latz dies. Amaca's negligence has been the only factor which has determined that things have turned out rather badly for Mr Latz. It is difficult to understand why, as a matter of law, the compensatory principle does not operate in the assessment of damages for this type of future economic loss. CAB 115

51. Amaca's assertion – AS [54] – that "no principled line can be drawn between the heads of loss for which Mr Latz contends and myriad other future income streams", ignores the development of many years of negligence principles (duty of care, causation, breach of duty, foreseeability, remoteness, mitigation of loss, and contributory negligence) which delineate the boundaries of liability and recoverability in each case. Amaca also ignores the overarching operation of the compensatory principle in circumstances where liability has been established. This principle identifies the losses to be compensated and provides the yardstick by which the assessment of damages is to be undertaken. The nature of an injured plaintiff's lost benefit, whether the loss was a foreseeable consequence of the tortfeasor's negligence, the assessment of the prospect that the plaintiff would, absent the tort, have received it or continued to receive it in the future, and the effect of the ordinary

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[76] [1980] 1 AC at 149.

[77] See *Parry v Cleaver* (1970) AC 1 at 4 where Lord Reid said "...wages are a reward for contemporaneous work, but a pension is the fruit, *through insurance*, of all the money which was set aside in the past in respect of his past work". [emphasis added]

[78] AS [53].

vicissitudes of life are all factors which are brought to bear in the assessment of damages in each case.

52. These factors are as applicable to a claim for loss of earning capacity (including superannuation entitlements) in the lost years as they are to pensions, annuities and other future economic benefits including of the type referred to by Amaca at AS [54]. In the case of life annuities and statutory entitlements to future payments, such payments are legal rights which may be enforced; they are not "*contingent payments*". Why should an injured plaintiff who will lose, by way of example, a statutory right to a veterans' pension for war service not recover that pecuniary loss for the lost years? A chance, hope or bare expectation of receiving any kind of payment (including pensions) has always been insufficient to establish a compensable loss. The approach contended for by Mr Latz will not, as suggested by Amaca, result in an expansion of the scope of damages for future economic loss.

53. There is no risk that Mr Latz's recovery of damages for future economic loss will cause "incoherence in the common law"[79]. Any such incoherence is much more likely to be brought about by overruling, for no very persuasive reason, decisions of long standing much acted upon by plaintiffs, defendants, insurers and their legal advisers. In the present circumstances, the rule in *Baker v Bolton*[80] is irrelevant. It is not Mr Latz's death which sounds in damages, but rather the economic losses which he will suffer because Amaca's negligence has shortened his life expectancy. There is no analogy[81] between awards of damages for the loss of expectation of life and damages for future economic loss of the type claimed by Mr Latz.[82] The former involves an attempt to assess damages for the "*loss of a measure of prospective happiness*" and an "*attempt to equate incommensurables*". The latter, being an assessment of the loss of money, and more easily amendable to mathematical calculation, does not.

54. Amaca's reliance upon[83] the statements of Kitto[84] and Windeyer JJ[85] in *Skelton*, is misplaced. In making these statements their Honours were not speaking of pecuniary loss, but rather the assessment of damages for the loss of expectation of life, a component of general damages.

55. The distinction advanced by Amaca at AS [57] between a destruction of a capacity in the lost years to earn an income on the one hand, and to receive pension benefits or a stream of income, on the other, is unprincipled. The passages referred to above from *Skelton*, *Todorovic* and *Fitch* provide ample support for Mr Latz's claim for damages for economic loss flowing from the destruction of his capacity to receive superannuation and age pensions in the lost years. As Blue J said at FC [100] "[t]*here is no underlying rationale for making this distinction. In both cases the plaintiff suffers an actual financial loss caused by the defendant's wrong. In both cases the application of the compensatory* CAB 79

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[79] AS [55].
[80] (1808) 170 ER 1033.
[81] AS [55].
[82] *Fitch v Hyde Cates* (1982) 150 CLR 182 at 495 per Mason J.
[83] AS [56].
[84] *Skelton* at 98 (Kitto J).
[85] *Skelton* at 130 (Windeyer J).

principle results in recovery". And for the reasons stated at FC [101], the distinction between active and passive income is, in the modern world, unhelpful. CAB 79

56. Amaca's contention[86] that the English and Canadian cases are unsound in principle, is without foundation. In *Pickett –v- British Rail Engineering Ltd*[87] the House of Lords followed *Skelton* in ruling that a plaintiff whose life expectancy was shortened by a tort was entitled to recover damages for loss of earnings during the lost years. Lord Russell of Killoween, who dissented, raised the spectre that the lost financial benefits which might be claimed would extend beyond lost earnings in the lost years[88]. Lord Scarman who was in the majority did not consider that this was an objectionable consequence. He agreed with the United Kingdom Law Commission's reasoning[89] that there was no justification in principle for discriminating between deprivation of earning capacity and the deprivation of the capacity "*otherwise to receive economic benefits*".[90] In *obiter dicta* he said 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[91]. There is no suggestion that the loss in the present case is too remote.

57. In the United Kingdom, since *Pickett*, damages have been awarded for the loss of pension benefits[92] during the lost years: see e.g. *Auty and Others v National Coal Board* [1985] 1 WLR 78 at 787, 792 – 3, 803 (an estate claim brought by Mrs Popow, widow) and *Phipps v Brooks Dry Cleaning Service Ltd* [1996] P.I.Q.R. Q100. Although it would seem that the pension which was lost in *Auty* was related to the deceased's former employment, in *Phipps* that is not clear. In *Adsett –v- West*[93] damages, subject to certain deductions, were allowed for loss of income in the lost years arising from the loss of the prospect of inheritance. McCullough J distinguished between losses of capital which survive for the benefit of the estate, and losses of income, the latter only being compensable. However, he saw no fundamental difference between the loss of the opportunity to earn income by work in the lost years and the loss of the opportunity to receive income by way of interest on an inheritance expected in the lost years.[94]

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[86] AS [58].
[87] [1980] AC 136.
[88] *Pickett* at p 165B-D.
[89] The United Kingdom Law Commission in its report No. 56 on the Assessment of Damages in Personal Injury Litigation described the loss of an annuity in the lost years by reason of the shortening of a plaintiff's life due to negligence. It said: "90. We are of the opinion that, in line with the reasoning of the Australian High Court in Skelton v Collins, the plaintiff should be entitled to compensation for other kinds of economic loss referable to the lost period. A person entitled by will to receive an annuity for his life would, if his life were shortened by the defendant's fault, lose the *capacity to receive the annuity during the lost period, no less than he would lose his earning capacity.* There seems to be no justification in principle for discrimination between deprivation of earning capacity and deprivation of the *capacity* otherwise *to receive economic benefits.*"[89] [emphasis added]
[90] *Pickett* per Lord Scarman at p 170E-F.
[91] *Pickett* per Lord Scarman at p 170E-F.
[92] The author of a leading English text on damages for personal injury and death considers that the recoverable pecuniary loss in the lost years, is not confined to lost earnings and can include claims for loss of pension rights under a State or private scheme: Kemp: "Damages for Personal Injury and Death", 7th edition, (1999) [5.72] – [5.75].
[93] [1983] 1 QB 826.
[94] *Adsett* at p 848D-E. See also *West v Versil Ltd and Others, The Times*, 31 August 1996 at 526.

58. As Amaca suggests[95], the law in Canada appears to allow for the recovery of damages for the loss of superannuation pension entitlements or "*pension earning capacity*"[96], in line with *Todorovic*.

59. There is no principled distinction to be drawn between future economic loss during the lost years stemming from an inability to work on the one hand, and an inability to receive income or other financial benefits, on the other. And for the reasons referred to above, Amaca's contention[97] to the contrary, should not be accepted.

Part VII: Mr Latz's argument on his appeal.

Ms Taplin's statutory entitlement to a pension is not deductible from Mr Latz's damages for economic loss

60. Blue J concluded at FC [115] that "as a matter of *practical reality* the economic loss suffered by Mr Latz as a result of Amaca's negligence does not represent the full pension that would otherwise be payable to Mr Latz but only the one third pension that will not be payable to Mr Latz's family". [emphasis added] The factors underpinning his Honour's conclusion were (i) that the payment of a pension to Mr Latz's immediate family upon his death was an integral part of the scheme, (ii) ensuring that his family was financially provided for as part of the scheme was of "direct benefit" to Mr Latz and was provided in direct return for his monetary and work contributions[98], and (iii) Mr Latz had it within his control to choose Ms Taplin as his spouse and accordingly that she will be entitled to the reversionary pension upon his death.[99] Further, Blue J reasoned that "it cannot have been the intention" – his Honour did not say whose – "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*".[100](emphasis added) CAB 83 CAB 81 CAB 81 CAB 82 - 8

61. Hinton J reached the same conclusion via a different path. He addressed the issue by reference to Windeyer J's opinion at 599 in *Espagne* and the indicia referred to in *Manser v Spry*[101], as being of assistance in determining whether there was a legislative intention that the reversionary pension was to be brought to account. His Honour held that there was nothing in the *Superannuation Act 1974* or the *Superannuation Act 1988* that expressly evinced such an intention[102], and that "the scheme … is a contributory scheme that operates as "a kind of insurance against misfortune", suggesting "that the benefit is to be enjoyed by a beneficiary who encounters the misfortune without reduction of the damages to which he or she is otherwise entitled"[103]. Hinton J also referred to *Graham v* CAB 118 CAB 118

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[95] AS [61]–[62].
[96] Ontario Law Reform Commission, Report on Compensation for Personal Injuries and Death (1987) at 43.
[97] AS [59].
[98] FC [108]. See also Blue J's reference at FC [109] to Ms Taplin's entitlement to a reversionary pension as a "composite benefit" to which Mr Latz was entitled in return for his contributions".
[99] FC [110].
[100] FC [114].
[101] [1994] HCA 50; (1994) 181 CLR 428 at 436 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ).
[102] FC [258].
[103] FC [259]. His Honour correctly observed that in *Harris v Commercial Minerals Ltd* [1996] HCA 49; (1996) 186 CLR 1 at 17 (Dawson, Toohey, Gaudron, McHugh and Gummow JJ), the Court described the presence of this indicium as providing "*strong ground for concluding that the legislature did not intend that the benefit should be deductible from an award of damages*" for the injury.

Baker, "a case in which the pension *payable to an injured plaintiff* upon compulsory retirement under the *Superannuation Act 1916-1957* (NSW), which created a contributory scheme, "was considered to fall within that class of benefit not deductible in a personal injury action".[104] [emphasis added] *Despite this analysis*, his Honour concluded that in CAB 118
Mr Latz's case "[i]t is as if the pension to which the primary beneficiary [the applicant] was entitled *switched* to the secondary beneficiary [Ms Taplin], albeit in a reduced amount, upon the death of the primary beneficiary. If this analysis is correct, then the primary beneficiary *notionally continues after death to realise a benefit* from the scheme in that his or her dependants or spouse receives a pension in consequence of his
10 membership and contribution...".[105] [emphasis added]. CAB 119

62. This approach of the majority introduces, it is submitted, a novel concept that, in the assessment of *a plaintiff's* damages for economic loss, it is permissible to deduct pecuniary benefits received by a third party consequent upon the plaintiff's death. The majority's reasoning creates a new and incongruous legal paradigm: a deceased plaintiff (as opposed to his or her estate) may "*as a matter of practical reality*" continue to "*notionally*" or "*vicariously*" realise a financial benefit through his or her surviving spouse or family.

63. Stanley J's dissenting opinion, is orthodox and is to be preferred. Upon his death Mr Latz's entitlement to the superannuation pension will be extinguished some 17 years
20 earlier than it would have been, absent Amaca's negligence. Mr Latz's estate will have no entitlement to receive his superannuation pension. His future superannuation entitlements are not an "asset" to him because he cannot redeem, assign or sell them. They die with him.

64. Amaca contends that as at his retirement at age 60 years, Mr Latz's superannuation benefits were "much like" the benefits considered in *Mancoun v Commissioner of Taxation*[106], an "inchoate right [which] could mature into one of a number of forms, payable to different people". However, irrespective of the choices[107] immediately available to Mr Latz upon his retirement, regarding the form and manner of payment of the superannuation benefits he had earned[108], the fact remains that he chose to receive
30 them as an indexed fortnightly pension for the rest of his life. At that point his rights to the pension entitlements accrued and vested in him. They were no longer "inchoate". They were fully developed. They belonged to him, and to no one else, for 10 years before the mesothelioma struck.

65. Amaca's characterisation of Mr Latz's right to superannuation benefits as a single "composite benefit"[109] or a single asset compromised of his pension and any reversionary pension consequent upon his death, is inappropriate. Section 38(1)(a) of the *Superannuation Act*, provides that, if she survives him, *Ms Taplin* will acquire a statutory right to the reversionary pension: "*...the spouse is entitled to a pension...*"

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[104] FC [260].
[105] FC [261].
[106] (2015) 257 CLR 519.
[107] AS [65(a)-(b)].
[108] Mr Latz could have commuted his rights into a lump sum within 3 months of his retirement (s40) in which case *no reversionary pension* would have vested in Ms Taplin upon his death (ss 38(1)(a) and 38(4)(a)).
[109] AS [66].

66. Reliance[110] upon the reference in the definition of "contributor" to "derivative rights", is of no assistance to Amaca. It is perfectly clear in this definition that the Act speaks of two or more separate rights belonging to different persons: the rights of the contributor on the one hand, and the derivate rights of others (spouses and/or dependents) on the other. Ms Taplin's "derivative" right to a pension, in the sense that the right emanates or derives from Mr Latz's demise and the extinguishment of his right, does not change the fact that the right or entitlement to the pension is hers, not his.

67. True it is that by reason of his employment in the public service Mr Latz has "*purchased*" the superannuation benefits. However, the benefits flowing to him before his death and possibly to Ms Taplin after it, are different benefits, received by different persons. The *Superannuation Act* creates two distinct statutory rights enforceable by different legal entities at different times. Contrary to Amaca's characterisation, it is not a single right or asset. Section 38(1)(a) provides Ms Taplin with an inchoate right to receive payments. This right is contingent upon (a) Mr Latz's death; (b) Ms Taplin's survival of Mr Latz; and (c) Ms Taplin continuing to be his spouse at the time of Mr Latz's death. That statutory right is enforceable only by her. It is of no economic or pecuniary value to Mr Latz or his Estate. In these circumstances, Mr Latz's loss of pension in the lost years, is not, as Amaca contends[111], limited to the value of the diminution the "composite benefit".

68. Amaca's contention[112] that the value of the "reversionary pension is a necessary integer in the mathematical process of valuing Mr Latz's loss arising from his diminished life expectancy" ignores the fundamental legal distinction between different entities: Mr Latz and his estate on the one hand, and Ms Taplin on the other. Mr Latz and Ms Taplin are not the same person. The statutory rights and economic consequences to Mr Latz (and his estate) should not be conflated with those of a third person, Ms Taplin. Why should losses incurred, and benefits enjoyed by, each of these separate entities be jointly accounted for? Such an approach is unorthodox and novel. It is contrary to the "cardinal" compensatory principle which requires the assessment of the injured plaintiff's own loss. The law's compensatory task it to attempt, so far as money can do it, to put Mr Latz in the position *he* would have been before the tort. The focus is *his loss*. It is that loss that is to be made good in money. In this case, upon his death Mr Latz (and his estate) will lose the value of 17 years of superannuation payments.

69. It is submitted that fundamental principles require that the reversionary pension payable to a third party, be ignored in the assessment of Mr Latz's damages. If Mr Latz were single, and with no life partner or dependent children then on his demise, no benefits would flow to any third party. There would be no question of any set off. Contrary to AS [67], it would be anomalous if, by taking into account a benefit to which Ms Taplin may become entitled (assuming she remains his partner and does not predecease him), Mr Latz has his loss of pecuniary benefit during the lost years reduced, yet a single plaintiff recovers that same loss in full.[113] Stanley J was correct at FC [182] in highlighting the significant anomaly which might arise between the law's treatment of plaintiffs with dependants and those without. CAB 99 - 1

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[110] Ibid.
[111] AS [67].
[112] Ibid.
[113] See Stanley J at FC [182].

70. As Stanley J said at FC [180] the cases in which this Court has dealt with the issue of whether collateral benefits[114] are to be deducted from a plaintiff's damages were all directed to benefits received or to be received by the plaintiff. Strictly speaking they are distinguishable from the present case. However, the principles derived therefrom are of assistance. As the trial judge observed at TJ [109], if the applicant had purchased (via an upfront payment or ongoing yearly contributions) permanent disability insurance which provided for a lump sum payment to him, upon the occurrence of a defined event, such as the diagnosis of terminal cancer, the entitlement to the insurance payment would not feature in the assessment of his damages. *A fortiori*, if the insurance policy provided for payment of the lump sum to his spouse or children. Why should Amaca receive the benefit of Mr Latz's foresight in purchasing through his work, a separate collateral benefit which may flow to Ms Taplin? CAB 98 – 9 CAB 24

71. Again, assume Mr Latz was claiming damages for the loss of 17 years of future loss of earning capacity. Assume also that he had privately purchased an income protection policy which entitled each of his estate and Ms Taplin to an income stream and/or a lump sum payment equivalent to a percentage of his probable earnings. In those circumstances, based on the principles enunciated by this Court on the treatment of collateral benefits, Amaca could not seriously suggest that in the assessment of Mr Latz's damages for future loss of earning capacity, the present value of the income stream and/or lump sum payments purchased by him should be brought to account in Amaca's favour.

72. In *Dionisatos –v- Acrow Formwork and Scaffolding Pty Limited*[115], the Court of Appeal of New South Wales considered whether the value of a widow's derivative statutory right to receive payments upon the death of her husband under the *Workers' Compensation (Dust Diseases) Act 1942* (NSW), was to be brought to account in the assessment of damages claimed by his estate. Gleeson JA decided that "*...it could not be said that the estate has enjoyed the statutory benefits received by Mrs Dionysatos*...The payments to Mrs Dionysatos under the Dust Diseases Act *cannot be treated as a substitute or partial substitute for compensatory damages* for the injury to Mr Dionysatos. Accordingly, enjoyment of the payments received by Mrs Dionysatos under the Dust Diseases Act *cannot be attributed to the enjoyment of damages by the estate for the injury to Mr Dionysatos*: cf Haines v Bendall (at 70-71)"[116]. [emphasis added] Further, Gleeson JA said, "His Honour erred by disregarding the fact that *the statutory benefits were awarded to Mrs Dionysatos, not the estate*"[117].

73. In *West v Versil Ltd and Others*[118], a case involving a claim by a plaintiff dying from asbestosis for the loss of pension entitlements in the lost years, Phillips LJ (as he then was) rejected Amaca's argument as "fallacious" and "could see no legal basis upon which the moneys that would be received by the plaintiff's widow after and in consequence of

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[114] *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569, *Redding v Lee* (1983) 151 CLR 117 and *Manser v Spry* (1994) 181 CLR 428.
[115] (2015) 91 NSWLR 34.
[116] Ibid at [207].
[117] Gleeson JA's approach was endorsed by Basten JA at [1] and Macfarlan JA at [33].
[118] *The Times*, 31 August 1996 at 526.

his death could properly be set against *loss that would be caused to the plaintiff* as a result of dying prematurely"[119]. [emphasis added].

74. In the assessment of damages, there is a distinction between the rights, losses and benefits flowing to different legal entities. Specifically, there is a line drawn between the rights of the injured plaintiff (and his or her estate) on the one hand and the rights of his or her spouse or beneficiaries, on the other. Benefits received by spouses or beneficiaries are not to be deducted or brought to account in the assessment of damages for the injured plaintiff.

Part VII: Orders sought

10 75. A8/2018: (a) Appeal dismissed; (b) Appellant to pay the respondent costs.

76. A7/2018: (a) Appeal allowed with costs; (b) Judgment and orders of the Full Court be set aside and in lieu thereof order that: (i) the respondent's appeal to that Court be dismissed; (ii) the appellant's cross appeal to that Court be allowed in part; (ii) the amount of the judgment sum in favour of the appellant be varied from $1,062,000 to $1,297,089; (iv) the respondent pay the appellant's costs of the proceedings before the Full Court on an indemnity basis; (v) orders of Gilchrist DCJ made on 24 August 2017 as to costs be reinstated.

Part VIII: Estimate of number of hours required for presentation of respondent's oral argument

20 77. 2 hours.

Dated: 28 March 2018

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[119] Ibid at 528.