



# Damages in negligence for loss of expected superannuation benefits

Alexander Langshaw reports on *Amaca Pty Ltd v Latz* [2018] HCA 22

## Introduction

The High Court has held, by majority, that the loss of expected superannuation benefits by reason of a reduced life expectancy is compensable by damages in negligence. The loss of benefits under the aged pension during the lost years is not.

## Background

In 1976 or 1977, Mr Latz inhaled asbestos dust and fibre during the construction of his home and while cutting and installing asbestos fence sheets manufactured by James Hardie and Coy Pty Ltd, the successor to which is Amaca Pty Ltd (Amaca). In 2016,

after his retirement, Mr Latz was diagnosed with malignant mesothelioma. At that time, Mr Latz was receiving ongoing payment of two statutory benefits, namely a superannuation pension payable under the *Superannuation Act 1988* (SA) (super pension) and the aged pension payable under the *Social Security Act 1991* (Cth) (aged pension).

### Procedural history

Mr Latz commenced personal injury proceedings in the District Court of South Australia alleging that his illness was the result of Amaca's negligence. The District Court found Amaca was liable to Mr Latz in negligence and that his life expectancy had been reduced by 17 years by reason of his disease (the 'lost years'): *Latz v Amaca Pty Ltd* [2017] SADC 56 at [21], [95]. Mr Latz, relevantly, sought damages for his expected loss of benefits under the super pension and aged pension for the lost years. Amaca submitted that damages were not payable in respect of the loss of such benefits and that any damages awarded needed to be reduced to account for, relevantly, the fact Mr Latz's spouse would be entitled to benefits under a reversionary pension after Mr Latz's death equivalent to two thirds of his super pension benefits: [2017] SADC 56 at [95]-[97].

The District Court awarded Mr Latz \$500,000 in damages for his loss of his expected benefits under the super pension and aged pension for the lost years. The District Court held that Mr Latz would have received each of those pension payments for the rest of his life and that period would have included the lost years but for Amaca's negligence [2017] SADC 56 at [99], [117]. The court also declined to apply any discount to the amount of damages to account for the reversionary pension that would continue to be payable to Mr Latz's spouse after his death, given that pension was payable to a third party and was otherwise considered analogous to a life insurance benefit (which does not operate to reduce any damages award): [2017] SADC 56 at [112]-[115].

Amaca appealed to the Full Court of the Supreme Court of South Australia challenging the quantum of damages, repeating the arguments it had run below: *Amaca Pty Ltd v Latz* [2017] SASCFC 145 at [6].

The majority of the Full Court (Blue and Hinton JJ) saw no reason to distinguish between income from wages and income from pension benefits. Accordingly, the majority upheld the District Court's decision that

Mr Latz's loss of both the super pension and aged pension was compensable damages in negligence: [2017] SASCFC 145 at [97]-[105], [125], [249]-[253]. However, the majority held that the value of the entitlement of Mr Latz's spouse to a reversionary pension ought to have been deducted from the quantum of this head of damages. The majority considered the District Court's analogy with insurance benefits to be inapt because that reversionary pension was, in effect, the continued payment to Mr Latz's spouse of the very same super benefits whose loss formed the basis of Mr Latz's damages claim: [2017] SASCFC 145 at [114], [116], [126], [261]-[262].

### High Court's decision

Amaca was granted special leave to appeal to the High Court on the question of whether Mr Latz's loss of the super pension and aged pension during the lost years was a compensable head of damage in negligence. Mr Latz was granted special leave to cross-appeal on the question of whether any such damages were to be reduced by reference to his spouse's receipt of the reversionary pension after his death.

The High Court unanimously held that the aged pension was not remuneration or a capital asset which could be assessed as having any future value and was not linked to the exercise of any earning capacity. Mr Latz's loss of benefits under the aged pension during the lost years was not, therefore, compensable by damages in negligence: [2018] HCA 22, [74], [115].

The High Court, by majority (Bell, Gageler, Nettle, Gordon and Edelman JJ), held that Mr Latz's loss of benefits under the super pension for the lost years was, by contrast, compensable by damages in negligence: [2018] HCA 22 at [114]. The majority considered the benefits payable under the super pension were a subset of Mr Latz's loss of earning capacity because his entitlement to those benefits was, in effect, a capital asset with a present value and that was inextricably linked to Mr Latz's earning capacity. Mr Latz had therefore, by reason of his diminished life expectancy arising from Amaca's negligence, suffered an actual loss in the present value of that capital asset that was compensable by damages: [2018] HCA 22 at [94]-[97], [101]-[102], [109].

Importantly, the majority noted that persons still of working age were entitled to damages for loss of superannuation and

their Honours considered it would have been unjust if Mr Latz had been denied the same result solely because his disease became manifest only after his retirement: [2018] HCA 22 at [105], [113].

The majority also held that damages for Mr Latz's loss of benefits under the super pension were to be reduced to account for the offsetting or collateral benefit comprised by his spouse's receipt of the reversionary pension. That was because the value of the relevant capital asset – Mr Latz's entitlement to receive super pension benefits – was directly affected by his spouse's entitlement to receive benefits under the reversionary pension: [2018] HCA 22 at [112].

Kiefel CJ and Keane J, in dissent, indicated that Mr Latz's loss of super pension benefits for the lost years was not a loss compensable by damages in negligence. Their Honours indicated that damages for loss of earning capacity required a direct connection between the injury and its effect upon the earning capacity of the victim. Their Honours considered that no such direct connection present with respect to Mr Latz's loss of benefits under the super pension: [2018] HCA 22 at [50].

The minority considered that extending this head of damage to encompass the loss of super pension benefits would open the way to the awarding of damages for the non-receipt of other passive income streams, a result their Honours indicated to be at odds with longstanding common law principle and to place a higher value on the enjoyment of life by the rich than the poor: [2018] HCA 22 at [51]-[52].

Given the conclusion reached by Kiefel CJ and Keane J regarding this head of damages, their Honours did not consider whether damages for the loss of benefits payable under the super pension were to be reduced by reason of the continued payment of benefits under the reversionary pension: [2018] HCA 22, [40].