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# COMPENSATION FOR THE LOSS OF FINANCIAL BENEFITS AS A RESULT OF A SHORTENING OF LIFE

SIRKO HARDER\*

*Personal injury resulting from a civil wrong may reduce the injured person's life expectation. An injured person who would have worked during the lost years has lost earning capacity, which is compensable if judgment is obtained in the injured person's lifetime. An injured person who would not have worked during the lost years (in particular a retiree) has not lost remuneration for work done during the lost years but may have lost other income that would have been received during the lost years, for example a pension. This article investigates whether the loss of such other income should be compensable if judgment is obtained in the injured person's lifetime. The focus is on the loss of pension payments, which was considered by the High Court of Australia in *Amaca Pty Ltd v Latz* (2018) 356 ALR 1.*

## I INTRODUCTION

Personal injury resulting from a civil wrong may reduce the injured person's life expectation. A shortening of life causes pecuniary loss where, in the period in which the injured person would have lived if uninjured but will now not live (hereafter the 'lost years'), the injured person would have obtained pecuniary benefits of a value exceeding the amount the injured person would have spent on his or her maintenance.

In the past, the average life expectation of people in Australia and many other countries did not exceed the pension age by much if at all.<sup>1</sup> Thus, the shortening of life as a result of personal injury usually meant the shortening of the injured person's working life. An injured person who would have worked in the lost years suffers loss of earnings or, more precisely, loss of earning capacity. Once a significant number of people had started to earn more than what they needed

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1 In 1920–22, the life expectancy at birth in Australia was 59.2 for males and 63.3 for females: Australian Bureau of Statistics, *Australian Historical Population Statistics* (Catalogue No 3105.0.65.001, 18 September 2014) Table 6.1. The pension age in Australia has never been below 60.

for their basic maintenance, claims for loss of earning capacity in the lost years emerged. It has long been recognised in Australia that such loss is compensable,<sup>2</sup> although statutes in all Australian jurisdictions now exclude recovery where the claim is brought not in the injured person's lifetime but after the injured person's death on behalf of the estate.<sup>3</sup>

In Australia and many other countries, the average life expectation of people has risen significantly in recent decades,<sup>4</sup> and even though the pension age has been raised,<sup>5</sup> people are now expected to live on average a number of years after reaching the pension age. On reaching the pension age, people usually wind down their engagement in remunerative work, and many retirees do not work for a number of years before their death. Where an injury shortens the period that the injured person is expected to spend in retirement (without working) but does not shorten the injured person's working life, the injured person has not lost remuneration for work done during the lost years.<sup>6</sup> But the injured person may well have lost other income (hereafter 'non-remuneration income') in the lost years.<sup>7</sup> Most retirees do have non-remuneration income. In Australia, the most prevalent sources of income for retirees are the superannuation pension and the means-tested age pension.<sup>8</sup>

Cases in which a person lost a superannuation pension and/or an age pension because of the shortening of life have come before Australian courts since the early 2000s. They have all involved mesothelioma, which is caused by exposure to asbestos but occurs only years, sometimes decades, after the exposure took place.<sup>9</sup> People who were exposed to asbestos at work often develop mesothelioma only shortly before or even after reaching retirement age. The first cases of this type were finally decided by the New South Wales Dust Diseases Tribunal, which

2 The High Court recognised it in *Skelton v Collins* (1966) 115 CLR 94 ('*Skelton*').

3 The provisions are discussed below at Part III(B).

4 In 2015–17, the life expectancy at birth in Australia was 80.5 for males and 84.6 for females: Australian Bureau of Statistics, *Life Tables, States, Territories and Australia, 2015–2017* (Catalogue No 3302.0.55.001, 30 October 2018) Table 1.9.

5 The age at which an eligible Australian resident may claim the age pension depends upon gender and date of birth. It is 67 years for all persons born on or after 1 January 1957: *Social Security Act 1991* (Cth) ss 23(5A)–(5D).

6 In this article, 'remuneration for work' denotes the salary or wages of an employee and the profit or profit share obtained by the owner or co-owner of a business in return for his or her labour.

7 In this article, 'non-remuneration income' denotes any income other than remuneration for work done during the lost years.

8 In 2016–17, over 2 million people received the age pension, and about 870,000 retirees in Australia had a superannuation pension as their main source of personal income at retirement: Australian Bureau of Statistics, *Retirement and Retirement Intentions, Australia, July 2016 to June 2017* (Catalogue No 6238.0, 18 December 2017) Tables 6.1, 7.1. The key features of the two types of pension are outlined below at Part II. For the history of the two pension systems in Australia, see Terry Carney, 'The Future of Welfare Law in a Changing World: Lessons from Australia and Singapore' [2010] (July) *Singapore Journal of Legal Studies* 22, 26–9.

9 The number of new reported cases of mesothelioma in Australia has steadily increased since 1982. It was 710 in 2017: Australian Institute of Health and Welfare, 'Mesothelioma in Australia 2017' (Media Release CAN 121, 13 November 2018) 2.

held that the loss of a superannuation pension as a result of a shortening of life is compensable,<sup>10</sup> but the loss of the age pension is not.<sup>11</sup> The question of whether the loss of either pension is compensable came before the High Court of Australia in *Amaca Pty Ltd v Latz* ('Latz (HCA)').<sup>12</sup>

Mr Latz contracted terminal malignant mesothelioma, which had been caused by his exposure to asbestos produced by the defendant's predecessor. The defendant was found liable. When the mesothelioma was diagnosed, Mr Latz was 69 years old. He was retired and in receipt of a partial age pension and — as a former employee of the State of South Australia — a superannuation pension to be paid by that State pursuant to pt 5 of the *Superannuation Act 1988* (SA). On his death, both pensions were to cease, and his domestic partner, Ms Taplin, was to receive from his superannuation fund a reversionary pension equal to two thirds of his superannuation pension.<sup>13</sup> The mesothelioma had reduced Mr Latz's life expectation by 16 years, and he claimed (among others) damages for the loss of the two pensions in the lost years. The trial judge awarded damages for the loss of both pensions; his Honour deducted the amount of basic living expenses that Mr Latz would have incurred in the lost years, but did not make a deduction on account of Ms Taplin's reversionary pension.<sup>14</sup>

In the Full Court of the Supreme Court of South Australia, Blue J and Hinton J held that Mr Latz could recover for the loss of both pensions, but that Ms Taplin's reversionary pension should be deducted.<sup>15</sup> Stanley J, dissenting, took the view that the loss of neither pension was compensable, but that, if the loss of the superannuation pension was compensable, Ms Taplin's reversionary pension should not be deducted.<sup>16</sup>

In the High Court, proceedings were expedited in order that a decision be given in Mr Latz's lifetime. The orders were made first, and reasons published a month later.<sup>17</sup> It was a split decision. The majority (Bell, Gageler, Nettle, Gordon and Edelman JJ) held that the loss of the superannuation pension was compensable, that Ms Taplin's reversionary pension was to be deducted, and that the loss of the age pension was not compensable. On the last two issues, their Honours' reasons are rather short and do not fully explain the basis of their decision, which may be

10 *Lynch v Amaca Pty Ltd* [2004] NSWDDT 1, [8]–[16] (Curtis J) ('Lynch'). See also *Roberts v Amaca Pty Ltd* [2009] NSWDDT 28, [64]–[72] (Curtis J): loss of United Kingdom superannuation pension is compensable.

11 *Dib v Amaca Pty Ltd* [2017] NSWDDT 6, [166]–[170] (Russell J).

12 (2018) 356 ALR 1 ('Latz (HCA)').

13 *Superannuation Act 1988* (SA) s 38(1)(a). Ms Taplin was Mr Latz's 'putative spouse' as defined in s 4A.

14 *Latz v Amaca Pty Ltd* [2017] SADC 56, [95]–[118] (Gilchrist J) ('Latz (SADC)').

15 *Amaca Pty Ltd v Latz* (2017) 129 SASR 61, 85–8 [97]–[117] (Blue J), 116–20 [248]–[262] (Hinton J) ('Latz (SASCFC)').

16 *Ibid* 93–103 [154]–[183].

17 The reasons were published on 13 June 2018. Mr Latz died on 29 June 2018: 'LATZ, Anthony Carl', *The Advertiser* (online, 3 July 2018) <tributes.adelaidenow.com.au/notice/6438146950561792/view>.

due to the expedited nature of the proceedings. The minority (Kiefel CJ and Keane J), who provided more extensive reasons, took the view that the loss of neither pension was compensable. Their Honours did not address the deductibility of Ms Taplin's reversionary question, calling for a legislative solution.<sup>18</sup>

This article discusses the issues that arose in *Latz* and are bound to arise in similar cases in the future. It will scrutinise the reasons provided by the various judges in the High Court and the lower courts in *Latz*. Part II discusses whether a pension is intrinsically connected to earning capacity, for if it was, it would be uncontroversial that the loss of pension payments is compensable. Part III discusses whether all pecuniary losses resulting from a shortening of life should be compensable, or whether only loss of earning capacity should be compensable. Part IV discusses whether the reversionary pension that a dependant of the contributor is expected to obtain on the latter's death should be deducted from the damages for the loss of the contributor's superannuation pension. Part V contains a conclusion.

## II IS A PENSION INTRINSICALLY LINKED TO EARNING CAPACITY?

As mentioned before, loss of earning capacity in the lost years is compensable if judgment is obtained in the injured person's lifetime. Thus, if judgment is obtained in the injured person's lifetime, the loss of pension payments in the lost years is compensable if the pension is intrinsically connected to earning capacity.

The Australian age pension is not intrinsically connected to earning capacity. This view was taken in *Latz* by Stanley J in the South Australian Full Court,<sup>19</sup> and by both the minority<sup>20</sup> and the majority<sup>21</sup> in the High Court. The age pension can be claimed by every person who has reached pension age, has been resident in Australia for a certain period (usually 10 years)<sup>22</sup> and does not have assets or income above certain thresholds.<sup>23</sup> It is irrelevant whether the person has ever had earning capacity or has ever exercised earning capacity in Australia.

Before discussing the superannuation pension, it may be useful to outline the key features of the Australian superannuation system. Employers in Australia are generally obliged to pay a certain percentage of an employee's gross salary (9.5%

18 *Latz* (HCA) (n 12) 9 [40].

19 *Latz* (SASCFC) (n 15) 97 [162].

20 *Latz* (HCA) (n 12) 17 [74] (Kiefel CJ and Keane J).

21 *Ibid* 24 [115] (Bell, Gageler, Nettle, Gordon and Edelman JJ).

22 The period is shorter in certain circumstances and not required for refugees: *Social Security Act 1991* (Cth) ss 7, 43.

23 See *ibid* ss 1064–5.

at the time of writing)<sup>24</sup> into the employee's superannuation fund.<sup>25</sup> On reaching a certain age<sup>26</sup> (but not generally before), the employee ('the contributor') may claim superannuation benefits and usually has a choice between obtaining a lump sum and obtaining a periodical payment (a 'superannuation pension') ceasing on death.<sup>27</sup> A retired contributor who has obtained the entire superannuation benefit in a lump sum can no longer lose any superannuation benefit as a result of premature death. In the case of a superannuation pension ceasing on death, the premature death of the retired contributor causes the loss of pension payments,<sup>28</sup> although certain dependants may acquire a reversionary pension.<sup>29</sup>

In *Latz* (HCA), the majority regarded the superannuation pension as being intrinsically connected to earning capacity.<sup>30</sup> Their Honours' chain of reasoning is represented by the following statements:

1. 'The loss of earning capacity has been described as a capital asset — the capacity to earn money from the use of personal skills.'<sup>31</sup>
2. 'Superannuation benefits, like wages, are the product of the exploitation of the claimant's capital asset.'<sup>32</sup>
3. 'In general terms, where a claimant is injured *during* their working life, what is awarded in relation to superannuation benefits is the net present value of the court's best estimate of the fund that the claimant would have had at the date of retirement but for the injury'.<sup>33</sup>
4. 'Mr Latz's rights under Pt 5 of the Superannuation Act can be conceptualised, as Mr Latz submitted, as delayed remuneration for work that Mr Latz has carried out. This asset is intrinsically connected to earning capacity, representing, as it does, a species of remuneration — financial rewards from

24 At the time of writing, the percentage is due to increase to 12% by 2025: *Superannuation Guarantee (Administration) Act 1992* (Cth) s 19(2) ('SGAA').

25 *Ibid* pt 3. A higher percentage can be contributed, which may generate tax advantages for the employee. The details are complex and not relevant for present purposes.

26 The age depends upon the contributor's date of birth. It is 60 years for persons born after 30 June 1964: see *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01(2) (definition of 'preservation age') ('SIS Regulations').

27 See generally *SIS Regulations* (n 26).

28 Unless an amount equal to the lost pension payments becomes payable to the contributor's estate in excess of the amount (if any) that would have been payable to the contributor's estate in the absence of the life-shortening injury.

29 The impact of a reversionary pension on the recovery of the loss of the contributor's own pension is discussed below at Part IV.

30 *Latz* (HCA) (n 12) 19–20 [89], 23 [109] (Bell, Gageler, Nettle, Gordon and Edelman JJ).

31 *Ibid* 19 [89], citing *Government Insurance Office v Johnson* [1981] 2 NSWLR 617, 627 (Hutley JA) ('GIO (NSWCA)').

32 *Latz* (HCA) (n 12) 21 [94] (Bell, Gageler, Nettle, Gordon and Edelman JJ).

33 *Ibid* 21 [97] (emphasis in original) (citations omitted).

work.<sup>34</sup>

5. ‘There is no principled basis for denying Mr Latz compensation for his lost superannuation benefit just because the injury or illness which occasioned that loss became apparent only after he commenced retirement.’<sup>35</sup>

The first three propositions are uncontroversial. Considering the context in which it is used, the phrase ‘superannuation benefits’ in points 2 and 3 denotes the benefit of the superannuation fund increasing as a result of employer contributions (‘pay-in benefits’). It is uncontroversial that compensation for an employee’s loss of earning capacity includes compensation not only for the loss of take-home pay but also for the shortfall in the superannuation fund.<sup>36</sup>

The proposition in point 5 may also be accepted. Here, the phrase ‘superannuation benefit’ is used to denote the benefit of receiving money from the superannuation fund. The majority was right in saying that the entitlement to recover for the loss of superannuation payouts should not depend on whether the injury causing the loss became apparent before or after retirement. Nor should it depend upon whether the injury occurred before or after retirement. But the issue in *Latz* was not the time at which the injury occurred or became apparent. The issue was whether the loss of superannuation payouts should be recoverable at all, even where the injury occurred and became apparent before retirement. This was concealed by the imprecise use of the phrase ‘superannuation benefit(s)’ for both pay-in benefits and payout benefits.

The key step in the majority’s reasoning is point 4. What their Honours were saying there is that superannuation payouts are intrinsically connected to earning capacity because they constitute ‘delayed remuneration for work’. Their Honours, and Mr Latz in his submission, took that phrase from Lord Reid’s speech in *Parry v Cleaver*.<sup>37</sup> Lord Reid was discussing the effect of injury on an employee and was simply stating that pensionable employment is more valuable to an employee than the amount of the take-home pay. His Lordship was concerned with pay-in benefits, not payout benefits.

Superannuation payouts can loosely be described as delayed remuneration for work because they are the product of the exploitation of earning capacity. However, once the entitlement to payments into the superannuation fund has been earned (through the provision of labour), earning capacity has been exercised, and any

34 Ibid 22 [104] (citations omitted).

35 Ibid 22 [105].

36 Damages for a shortfall in the superannuation fund are usually calculated by reference to a certain percentage of the amount awarded for the loss of take-home pay: see Harold Luntz and Sirko Harder, *Assessment of Damages for Personal Injury and Death* (LexisNexis, 5<sup>th</sup> ed, forthcoming) [6.3.7]–[6.3.8].

37 [1970] AC 1, 16 (‘*Parry*’).

subsequent event can no longer affect earning capacity,<sup>38</sup> but only the ability to obtain the fruits of the past exercise of earning capacity.<sup>39</sup>

The logical consequence of the majority's view in *Latz* (HCA) is that loss of earning capacity is present whenever a wrong deprives the plaintiff of some or all of the fruits of the previous exercise of earning capacity. Loss of earning capacity would be present, for example, where an employer wrongfully fails to pay the required amount into the employee's superannuation fund, where the managers of a superannuation fund wrongfully diminish the fund assets, or where property bought out of remuneration for work is wrongfully damaged. It would be a remarkable step to give the concept of loss of earning capacity such a wide meaning.

In conclusion, neither the age pension nor the superannuation pension can properly be categorised as being intrinsically connected to earning capacity. It does not necessarily follow that the loss of pension payments cannot be compensable. That would be the consequence only if loss of earning capacity was the only type of pecuniary loss resulting from a shortening of life that is and should be compensable. Whether this is the case will be discussed next.

### **III SHOULD LOSS OF EARNING CAPACITY BE THE ONLY COMPENSABLE LOSS RESULTING FROM A SHORTENING OF LIFE?**

#### **A *Compensability of Non-Remuneration Income as Default Position***

The key question addressed in this article is whether the loss of non-remuneration income as a result of a shortening of life should be regarded as a compensable head of loss.<sup>40</sup> In *Amaca Pty Ltd v Latz* ('*Latz* (SASCFC)'), the majority took the view that the compensability of the loss of non-remuneration income followed from the principle that the victim of a tort or breach of contract should receive compensation in the sum which, so far as money can do, will place that party in the same position as if the wrong had not occurred.<sup>41</sup> That principle is well-

38 *Latz* (SASCFC) (n 15) 97 [162] (Stanley J).

39 *Latz* (HCA) (n 12) 17 [74] (Kiefel CJ and Keane J). See *Parry* (n 37) 16 (Lord Reid): 'a pension is the fruit, through insurance, of all the money which was set aside in the past in respect of ... past work'.

40 The loss of non-remuneration income will usually be foreseeable, not be too remote and — under the civil liability statutes — fall within the scope of the defendant's liability. For the scope of liability as part of the causation inquiry, see Katy Barnett and Sirko Harder, *Remedies in Australian Private Law* (Cambridge University Press, 2<sup>nd</sup> ed, 2018) 74–8 [3.4]–[3.17].

41 *Latz* (SASCFC) (n 15) 76 [68], 85 [100] (Blue J), 116 [250] (Hinton J).



established.<sup>42</sup> However, the minority in the High Court took the view that the compensability of a head of loss is an anterior question: ‘One cannot invoke the compensatory principle to identify whether a particular head of damage is compensable’.<sup>43</sup> For the minority, the compensatory principle was irrelevant to the question of compensability, and non-remuneration income could be regarded as compensable only if there was a positive reason (such as specific precedent) for it.

The minority was correct to say that the compensatory principle is not conclusive as to the compensability of a head of loss. If it was, any loss would be compensable. Yet some heads of loss are not compensable, although in the tort of negligence this is usually framed as the absence of a duty of care.<sup>44</sup> For example, in Australian law there is no liability in negligence for pure mental harm short of a recognisable psychiatric illness.<sup>45</sup>

However, loss of non-remuneration income is not a novel head of loss. It has been compensated outside the context of personal injury. For example, landlords may recover damages for the loss of rent resulting from a wrong of the tenant<sup>46</sup> or a third party,<sup>47</sup> and a person entitled to payments out of a trust fund may recover compensation for the loss of those payments resulting from a breach of trust by the trustee.<sup>48</sup> The compensability of the loss of non-remuneration income has been recognised in principle, and there needs to be a good reason for making an exception in the context of personal injury. The following sections discuss whether such a reason may be found in legislation (B), in precedent (C) or in policy considerations (D and F). A comparison with the position in English law is added (E).

## B The Impact of Legislation

There is no legislation in Australia which expressly or by clear implication excludes the right of an injured person whose life expectation has been shortened

42 *Haines v Bendall* (1991) 172 CLR 60, 63 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Manser v Spry* (1994) 181 CLR 428, 434 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ) (*‘Manser’*); *Clark v Macourt* (2013) 253 CLR 1, 18–19 [59] (Gageler J). See also *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185, 191 (Taylor and Owen JJ); *Todorovic v Waller* (1981) 150 CLR 402, 412 (Gibbs CJ and Wilson J) (*‘Todorovic’*); *Redding v Lee* (1983) 151 CLR 117, 133 (Mason and Dawson JJ) (*‘Redding’*); *Johnson v Perez* (1988) 166 CLR 351, 355 (Mason CJ), 386 (Dawson J); *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 116 (Deane J); *Harriton v Stephens* (2006) 226 CLR 52, 78–9 [81] (Kirby J), 130 [264] (Crennan J).

43 *Latz* (HCA) (n 12) 10 [41] (Kiefel CJ and Keane J).

44 See Donal Nolan, ‘Damage in the English Law of Negligence’ (2013) 4(3) *Journal of European Tort Law* 259, 264.

45 *Tame v New South Wales* (2002) 211 CLR 317, 381–2 [193] (Gummow and Kirby JJ), 414 [285] (Hayne J).

46 *The Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17, 55–6 (Deane J).

47 *Gagner Pty Ltd v Canturi Corporation Pty Ltd* (2009) 262 ALR 691, 719 [129] (Campbell JA).

48 *Re Murdoch and Federal Commissioner of Taxation* (2007) 68 ATR 317, 324 [22] (Downes J).

to recover for the loss of non-remuneration income in the lost years.<sup>49</sup> But there are two sets of statutory provisions that might be said to conflict with a right to recover for such loss: the provisions in the civil liability statutes that regulate damages for personal injury and the provisions in the survival statutes that prevent the estate of a wrongfully killed person from recovering for loss of earning capacity or earnings in the lost years.

As a result of the civil liability reform in 2002–04,<sup>50</sup> all Australian jurisdictions (including the Commonwealth) have provisions limiting the amount of damages which in certain cases of personal injury may be awarded for loss of earning capacity, loss of earnings or (in an action brought by the dependants of a wrongfully killed person) loss of financial support.<sup>51</sup> All jurisdictions except the Australian Capital Territory have provisions that restrict (in availability and amount)<sup>52</sup> or completely exclude<sup>53</sup> *Griffiths v Kerkemeyer* damages<sup>54</sup> (damages in respect of gratuitous services provided to the injured person) in certain circumstances. All jurisdictions except the Australian Capital Territory also have provisions which increase the discount rate applied in relation to future pecuniary loss from the

49 In certain cases, the overall amount of damages that can be recovered for any loss, or any pecuniary loss, is capped: see, eg, *Civil Aviation (Carriers' Liability) Act 1959* (Cth) s 31; *Transport Accident Act 1986* (Vic) s 93(7)(a) ('*Transport Accident Act* (Vic)'); *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 340(a) ('*WIRC Act* (Vic)'); *Workers' Compensation and Injury Management Act 1981* (WA) ss 93F(1), 93K(5). Such an overall cap would limit recovery for the loss of non-remuneration income.

50 The key purpose of the reform was to lower premiums for public liability insurance: see, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 May 2002, 2085–6 (Robert Carr, Premier); Explanatory Notes, *Civil Liability Bill 2003* (Qld) 1–2.

51 *Competition and Consumer Act 2010* (Cth) s 87U ('*CCA*'); *Civil Law (Wrongs) Act 2002* (ACT) s 98 ('*CLA* (ACT)'); *Civil Liability Act 2002* (NSW) s 12 ('*CLA* (NSW)'); *Motor Accident Injuries Act 2017* (NSW) s 4.6 ('*MAI Act* (NSW)'); *Workers Compensation Act 1987* (NSW) s 151I ('*Workers Compensation Act* (NSW)'); *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 20 ('*Personal Injuries Act* (NT)'); *Civil Liability Act 2003* (Qld) s 54 ('*CLA* (Qld)'); *Civil Liability Act 1936* (SA) ss 54(2)–(3) ('*CLA* (SA)'); *Civil Liability Act 2002* (Tas) s 26(1) ('*CLA* (Tas)'); *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas) s 22(5) ('*Motor Accidents Act* (Tas)'); *Wrongs Act 1958* (Vic) s 28F ('*Wrongs Act* (Vic)'); *Civil Liability Act 2002* (WA) s 11 ('*CLA* (WA)').

52 *CCA* (n 51) s 87W; *CLA* (NSW) (n 51) ss 15–15A; *Personal Injuries Act* (NT) (n 51) s 23; *CLA* (Qld) (n 51) s 59; *CLA* (SA) (n 51) s 58; *CLA* (Tas) (n 51) s 28B; *Wrongs Act* (Vic) (n 51) ss 28IA–28IB; *CLA* (WA) (n 51) s 12; *Motor Vehicle (Third Party Insurance) Act 1943* (WA) s 3D.

53 *MAI Act* (NSW) (n 51) ss 4.3(1)(a), 4.5; *Workers Compensation Act* (NSW) (n 51) s 151G; *Workers' Compensation and Rehabilitation Act 2003* (Qld) ss 306E–306H; *CLA* (Tas) (n 51) s 28C; *Transport Accident Act* (Vic) (n 49) s 93(10)(c); *WIRC Act* (Vic) (n 49) s 342(b). In addition, damages for 'attendant care services' are in all jurisdictions excluded for participants in the special statutory compensation schemes for certain cases of catastrophic injury: *Lifetime Care and Support (Catastrophic Injuries) Act 2014* (ACT) s 9, Dictionary; *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW) ss 3(1), 5A; *Motor Accidents (Compensation) Act 1979* (NT) s 4D; *National Injury Insurance Scheme (Queensland) Act 2016* (Qld) s 8, sch 1; *Motor Vehicle Accidents (Lifetime Support Scheme) Act 2013* (SA) ss 3(1), 4; *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas) s 27A; *Transport Accident Act* (Vic) (n 49) s 3(1) (definition of 'disability service'); *Motor Vehicle (Catastrophic Injuries) Act 2016* (WA) s 6; *CLA* (WA) (n 51) s 13A.

54 Named after the case in which they were recognised: *Griffiths v Kerkemeyer* (1977) 139 CLR 161.

3% that applies at common law<sup>55</sup> to either 5%<sup>56</sup> or 6%,<sup>57</sup> thus reducing damages awards. Some of these provisions apply only to the loss of earning capacity or loss of financial support,<sup>58</sup> or apply only to the loss of earning capacity and the liability to incur expenditure.<sup>59</sup>

The omission from all those provisions of the loss of non-remuneration income might be said to indicate that the legislatures did not regard such loss as recoverable. However, even if that was the case (and there is no indication that it is), the view of a legislature as to the position of the common law does not bind the courts in determining that position. For example, after some courts had held that an injured person's loss of the capacity to provide gratuitous services to others can at common law be compensated as a separate item of pecuniary loss,<sup>60</sup> some jurisdictions enacted provisions limiting the availability and amount of damages for such loss.<sup>61</sup> The enactment of those provisions did not prevent the High Court from subsequently holding that an injured person's loss of the capacity to provide gratuitous services to others cannot at common law be compensated as a separate item of pecuniary loss.<sup>62</sup> Gleeson CJ, Gummow and Heydon JJ quoted Lord Reid's statement that 'the mere fact that an enactment shows that Parliament must have thought that the law was one thing does not preclude the courts from deciding that the law was in fact something different'.<sup>63</sup> The provisions in question became obsolete.<sup>64</sup>

The second set of statutory provisions that might be said to conflict with an injured person's right to recover for loss of non-remuneration income in the lost years are the provisions in the Australian survival statutes that exclude recovery by the estate of a wrongfully killed person for loss of earning capacity or earnings in the

55 *Todorovic* (n 42). The common law rate continues to apply in personal injury cases not governed by legislation: *Raper v Bowden* (2016) 76 MVR 369, 396–9 [103]–[106] (Estcourt J).

56 *CCA* (n 51) s 87Y; *CLA* (NSW) (n 51) s 14; *MAI Act* (NSW) (n 51) s 4.9; *Workers Compensation Act* (NSW) (n 51) s 151J; *Personal Injuries Act* (NT) (n 51) s 22; *CLA* (Qld) (n 51) s 57; *Civil Proceedings Act 2011* (Qld) s 61 ('*CPA* (Qld)'); *CLA* (SA) (n 51) s 55; *CLA* (Tas) (n 51) s 28A; *Wrongs Act* (Vic) (n 51) s 28I. All these provisions permit a different discount rate to be prescribed by regulations, but no such regulations have been made.

57 *Transport Accident Act* (Vic) (n 49) s 93(13); *WIRC Act* (Vic) (n 49) s 345; *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 5 ('*Law Reform Act* (WA)').

58 *MAI Act* (NSW) (n 51) s 4.9.

59 *CPA* (Qld) (n 56) s 61; *Transport Accident Act* (Vic) (n 49) s 93(13); *WIRC Act* (Vic) (n 49) s 345; *Law Reform Act* (WA) (n 57) s 5.

60 In particular *Sullivan v Gordon* (1999) 47 NSWLR 319 ('*Sullivan v Gordon*'). Damages for such loss are therefore called *Sullivan v Gordon* damages.

61 *Trade Practices Act 1974* (Cth) s 87X (now *CCA* (n 51) s 87X); *CLA* (Qld) (n 51) s 59(3), as enacted; *Wrongs Act* (Vic) (n 51) s 28ID, as enacted.

62 *CSR Ltd v Eddy* (2005) 226 CLR 1 ('*CSR*').

63 *Ibid* 25 [51], quoting *Birmingham Corporation v West Midland Baptist (Trust) Association (Inc)* [1970] AC 874, 898.

64 They could not be construed as providing for the availability of *Sullivan v Gordon* damages independently of the common law: *Kriz v King* [2007] 1 Qd R 327, 331 [12] (McMurdo P). The provisions in Queensland and Victoria have since been amended so as to provide for the availability of *Sullivan v Gordon* damages in certain circumstances.

lost years.<sup>65</sup> The purpose of these provisions is to avoid double recovery where the deceased has dependants who are able to obtain damages from the wrongdoer under legislation based on the *Fatal Accidents Act 1846* ('*Lord Campbell's Act*').<sup>66</sup> Where no claim was brought in the injured person's lifetime, the dependants can claim damages for (among others) the loss of financial support that they would have obtained from the deceased in the lost years, and it is thought that this would overlap with a claim by the estate for the deceased's loss of income in the lost years.<sup>67</sup> If the loss of non-remuneration income in the lost years is compensable, the overlap described will exist, as the statutory provisions that exclude the estate's claim refer only to loss of earning capacity or earnings.<sup>68</sup>

Three observations must be made. First, where the deceased would have received non-remuneration income in the lost years, double liability could be avoided by deducting, in the estate's claim, not only the amount the deceased would have spent on his or her own maintenance but also the amount the deceased would have spent on dependants. Indeed, where the income the deceased would have obtained in the lost years is remuneration for work, a deduction of probable expenditure on dependants<sup>69</sup> would be preferable to the current blanket exclusion of a claim by the estate, as the blanket exclusion deprives the estate even of the surplus income that the deceased would have been left with after making provision for his or her own maintenance and for dependants, and applies even where there are no dependants with a claim under an equivalent of *Lord Campbell's Act*.<sup>70</sup>

Secondly, even if it is the case that the legislatures, when enacting the provisions mentioned, assumed that the estate of a wrongfully killed person can claim

65 *CLA* (ACT) (n 51) s 16(3)(b)(ii); *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(2)(a)(ii) ('*Law Reform Act* (NSW)'); *Law Reform (Miscellaneous Provisions) Act 1956* (NT) s 6(1)(c)(iii) ('*Law Reform Act* (NT)'); *Succession Act 1981* (Qld) s 66(2)(d)(ii) ('*Succession Act* (Qld)'); *Survival of Causes of Action Act 1940* (SA) s 3(1)(a)(iv) ('*Survival of Causes of Action Act* (SA)'); *Administration and Probate Act 1935* (Tas) s 27(3)(c)(iii) ('*APA* (Tas)'); *Administration and Probate Act 1958* (Vic) s 29(2)(c)(iii) ('*APA* (Vic)'); *Law Reform Act* (WA) (n 57) s 4(2)(e).

66 9 & 10 Vict, c 93. The Australian equivalents of *Lord Campbell's Act* are: *CLA* (ACT) (n 51) pt 3.1; *Compensation to Relatives Act 1897* (NSW); *Compensation (Fatal Injuries) Act 1974* (NT); *CPA* (Qld) (n 56) pt 10; *CLA* (SA) (n 51) pt 5; *Fatal Accidents Act 1934* (Tas); *Wrongs Act* (Vic) (n 51) pt III; *Fatal Accidents Act 1959* (WA).

67 Law Commission, *Report on Personal Injury Litigation: Assessment of Damages* (Law Com No 56, 24 July 1973) 28–9 [105] ('*Report on Personal Injury*'); Prue Vines, 'Domestic Relations' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook, 10<sup>th</sup> ed, 2011) 737, 761 [29.200].

68 The survival statutes also provide that the damages recoverable by the estate of a wrongfully killed person shall be calculated without reference to any loss or gain to the estate consequent on the death, except for funeral expenses: *CLA* (ACT) (n 51) s 16(3)(b)(i); *Law Reform Act* (NSW) (n 65) s 2(2)(c); *Law Reform Act* (NT) (n 65) s 6(1)(c)(i); *Succession Act* (Qld) (n 65) s 66(2)(d)(i); *Survival of Causes of Action Act* (SA) (n 65) s 3(1)(d); *APA* (Tas) (n 65) s 27(3)(c)(i); *APA* (Vic) (n 65) s 29(2)(c)(i); *Law Reform Act* (WA) (n 57) s 4(2)(c). This type of provision does not exclude damages for the loss of income in the lost years. If it did, the provision specifically excluding recovery for the loss of earning capacity or earning in the lost years, which was enacted later, would be obsolete.

69 Such a deduction is not made where the claim is brought in the injured person's lifetime: *Sharman v Evans* (1977) 138 CLR 563, 581–3 (Gibbs and Stephen JJ), 599 (Murphy J) ('*Sharman*'). But Taylor J favoured making the deduction in a claim by the estate: *Skelton* (n 2) 114.

70 See *Fitch v Hyde-Cates* [1980] 2 NSWLR 757, 773–4 (Glass JA).

damages only for loss of earnings, and not for loss of other income, in the lost years, this assumption would not bind the courts in determining the position at common law, as mentioned earlier.<sup>71</sup>

Finally, even if it is accepted that, in the light of the provisions mentioned, the estate of a wrongfully killed person should not recover for the loss of non-remuneration income in the lost years, this would only affect claims by estates. It would not affect claims brought by injured persons in their lifetime. It would not be anomalous to exclude estate claims for an item of loss for which injured persons can recover in their lifetime. This difference exists for loss of earning capacity in the lost years (as seen)<sup>72</sup> and in general also for non-pecuniary loss.<sup>73</sup>

In conclusion, there is no legislation that would conflict with a right of injured persons in their lifetime to recover for the loss of non-remuneration income in the lost years.

### C High Court Authority Prior to *Latz*

In *Latz* (HCA), the minority took the view that previous High Court authority had established that loss of earning capacity is the only financial loss resulting from personal injury (apart from expenses incurred and *Griffiths v Kerkemeyer* damages) that can be compensated in an action by the injured person.<sup>74</sup> The statements relied upon by their Honours and other statements in the High Court prior to *Latz* (HCA) will now be scrutinised.

In *Teubner v Humble*, Windeyer J made the following statement:

Broadly speaking there are, it seems to me, 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.<sup>75</sup>

In this statement, Windeyer J made no mention of the loss of non-remuneration income. Nor, however, did his Honour expressly exclude such loss from compensation. His Honour may not have contemplated such loss, in relation to which no claim was made in *Teubner v Humble* or a previous case.

71 See above nn 60–3 and accompanying text.

72 See above n 65 and accompanying text.

73 *CLA* (ACT) (n 51) s 16(3)(a); *Law Reform Act* (NSW) (n 65) s 2(2)(d); *Law Reform Act* (NT) (n 65) s 6(1)(c)(ii); *Succession Act* (Qld) (n 65) s 66(2)(a); *Survival of Causes of Action Act* (SA) (n 65) ss 3(1)(a)(i)–(iii); *APA* (Tas) (n 65) s 27(3)(c)(ii); *APA* (Vic) (n 65) s 29(2)(c)(ii); *Law Reform Act* (WA) (n 57) s 4(2)(d).

74 *Latz* (HCA) (n 12) 10–16 [43]–[70] (Kiefel CJ and Keane J).

75 (1963) 108 CLR 491, 505. The statement was approvingly quoted in *Nguyen v Nguyen* (1990) 169 CLR 245, 248 (Brennan J).

That Windeyer J would have recognised the loss of non-remuneration income as compensable loss may be gleaned from a statement of his in *Skelton*. After mentioning the compensability of expenses incurred and before dealing with non-pecuniary loss, Windeyer J said this:

The next rule that, as I see the matter, flows from the principle of compensation is that anything having a money value which the plaintiff has lost should be made good in money. This applies to that element in damages for personal injuries which is commonly called ‘loss of earnings’. The destruction or diminution of a man’s capacity to earn money can be made good in money.<sup>76</sup>

Windeyer J was not saying that loss of earning capacity is the only loss of benefits or income that can be compensated. His Honour was referring to ‘anything having a money value’. The Law Commission for England and Wales understood *Skelton* to support the recoverability of the loss of non-remuneration income such as the loss of an annuity for life.<sup>77</sup> By contrast, the minority in *Latz* (HCA) argued that ‘[t]he decision in *Skelton* cannot be regarded as a signpost pointing the way towards recognition of a more extensive liability for economic loss than that which it upheld’.<sup>78</sup> Even if this is accepted, it does not follow — contrary to what their Honours suggested<sup>79</sup> — that the decision in *Skelton*, or the statement by Windeyer J quoted above, exclude recovery for the loss of non-remuneration income. The fact that Windeyer J made no mention of such loss is best explained by the absence of claims for such loss in *Skelton* or any previous case.

In *Arthur Robinson (Grafton) Pty Ltd v Carter*, Barwick CJ said that ‘it is loss of earning capacity and not loss of earnings that is to be the subject of compensation’.<sup>80</sup> His Honour merely said that where an injury affects the injured person’s employment prospects, it is the loss of earning capacity that is compensated, and the lost earnings simply provide a measure for the loss of earning capacity. His Honour was not concerned with the loss of non-remuneration income, and his statement cannot be understood as impliedly excluding such loss from compensation.

In *O’Brien v McKean*, in the context of calculating the present value of future loss, Barwick CJ distinguished between loss of earning capacity and the need to expend money in the future, and failed to mention the loss of other future benefits.<sup>81</sup> But this can be explained by the fact that loss of earning capacity and future expenses were the only items of financial loss in respect of which a claim was made in that case.

76 *Skelton* (n 2) 129.

77 *Report on Personal Injury* (n 67) 24 [90].

78 *Latz* (HCA) (n 12) 14 [58] (Kiefel CJ and Keane J).

79 *Ibid* 11 [49] n 51.

80 (1968) 122 CLR 649, 658.

81 (1968) 118 CLR 540, 546–8.

In *Sharman v Evans* (*'Sharman'*), which involved a claim in relation to lost years, Gibbs and Stephen JJ said that 'the plaintiff is to be compensated in respect of lost earning capacity during those years by which her life expectancy has been shortened, at least to the extent that they are years when she would otherwise have been earning income'.<sup>82</sup> Their Honours recognised the possibility that the plaintiff would not be compensated for loss of earning capacity in respect of those lost years in which she would not have earned income had she lived. In the context, it is clear that by income their Honours meant remuneration for work done in the lost years. The denial of compensation for loss of earning capacity in respect of those lost years in which the plaintiff would not have exercised her earning capacity had she lived follows from the accepted principle that a diminution of earning capacity is compensated only to the extent to which it 'is or may be productive of financial loss'.<sup>83</sup> Their Honours were not concerned with the loss of non-remuneration income. The same is true for Mason J's statement in *Fitch v Hyde-Cates* (*'Fitch'*) that the estate of a wrongfully killed person recovers for loss of earning capacity, not for loss of wages.<sup>84</sup>

In *CSR Ltd v Eddy* (*'CSR'*), Gleeson CJ, Gummow and Heydon JJ listed (only) non-pecuniary loss, loss of earning capacity and expenses incurred as the three categories of loss that an injured person 'is traditionally seen as able to recover'.<sup>85</sup> The loss of non-remuneration income as a result of the shortening of life does not fall into any of the three categories.<sup>86</sup> Mr Latz attempted to diminish the significance of the statement by emphasising the word 'traditionally'. However, the meaning of that word must be gleaned from the context in which it was used. The question before the High Court in *CSR* was whether the loss of an injured person's capacity to provide gratuitous services to others can be compensated as a separate head of financial loss,<sup>87</sup> analogous to damages in respect of gratuitous services provided to an injured person, the availability of which had been recognised in 1977 in *Griffiths v Kerkemeyer*. In the course of denying the compensability of the loss of capacity to provide gratuitous services to others, Gleeson CJ, Gummow and Heydon JJ described *Griffiths v Kerkemeyer* damages as anomalous because they are awarded in the absence of actual financial loss.<sup>88</sup> It

82 *Sharman* (n 69) 579.

83 *Graham v Baker* (1961) 106 CLR 340, 347 (Dixon CJ, Kitto and Taylor JJ) (*'Graham'*). See also *Medlin v State Government Insurance Commission* (1995) 182 CLR 1, 3–5 (Deane, Dawson, Toohey and Gaudron JJ); *CSR* (n 62) 16 [30] (Gleeson CJ, Gummow and Heydon JJ).

84 (1982) 150 CLR 482, 498 (*'Fitch'*).

85 *CSR* (n 62) 15–16 [28]–[31].

86 It does not fall into the third category, contrary to the view expressed by Hinton J in *Latz* (SASCFC) (n 15) 117 [252]. Even though Gleeson CJ, Gummow and Heydon JJ in *CSR* (n 62) used the phrase 'actual financial loss', the examples given by their Honours make clear that they were only referring to expenditure incurred: at 16 [31].

87 As had been held in *Sullivan v Gordon* (n 60).

88 *CSR* (n 62) 15 [27]. The High Court in *CSR* (n 62) stopped short of abolishing *Griffiths v Kerkemeyer* damages. As mentioned above at Part III(B), statutes in all Australian jurisdictions regulate their availability and amount.

was in that context that their Honours listed the ‘traditional’ types of loss. Their point was that, with the exception of non-pecuniary loss, the ‘traditional’ types of loss all involve actual financial loss. So by ‘traditional’ they meant the types of loss recognised prior to *Griffiths v Kerkemeyer*.

Nevertheless, the statement by Gleeson CJ, Gummow and Heydon JJ in *CSR* does not support the view of the minority in *Latz* (HCA). The widest proposition that can be derived from the statement by Gleeson CJ, Gummow and Heydon JJ is that, leaving aside non-pecuniary loss, *Griffiths v Kerkemeyer* damages should remain the only type of damages awarded in the absence of actual financial loss. That proposition does not exclude compensation for the loss of non-remuneration income, as such loss constitutes actual financial loss.<sup>89</sup>

Crucially, Gleeson CJ, Gummow and Heydon JJ in *CSR* were not asked to, and did not, address the question of whether the loss of non-remuneration income is compensable.<sup>90</sup> Nor did their Honours say that, leaving aside *Griffiths v Kerkemeyer* damages, the ‘traditional’ types of loss (in other words, the types of loss recognised prior to 1977) were the only types of loss recoverable at the time of their judgment (2005) or would remain the only types in the future. In 2005, the three types of loss listed by their Honours were not the only types of loss recoverable, even apart from *Griffiths v Kerkemeyer* damages.<sup>91</sup> In 1981, in *Fox v Wood*,<sup>92</sup> the High Court of Australia recognised another type of recoverable loss. An injured worker who has obtained workers’ compensation for loss of earning capacity may have to repay the *gross* compensation out of a subsequent award of damages for loss of earning capacity, which are calculated by reference to lost *net* earnings.<sup>93</sup> *Fox v Wood* damages compensate the injured worker for the shortfall.<sup>94</sup> It might be argued that such damages are just a component of damages for loss of earning capacity. But the High Court in *Fox v Wood* saw it as a separate loss inflicted by tax law, and trial judges usually list *Fox v Wood* damages as an item separate from damages for loss of earning capacity.<sup>95</sup> Thus, even apart from *Griffiths v Kerkemeyer* damages, the three types of loss that Gleeson CJ, Gummow and Heydon JJ described as ‘traditionally’ recoverable were not a complete list of recoverable losses at the time of their Honours’ statement and may not have been meant to be one.

89 *Latz* (SASCFC) (n 15) 82–3 [87] (Blue J).

90 *Ibid* 83 [88].

91 Indeed, their Honours’ list is not even complete for the time before 1977 because it does not include the loss of support from a marriage which was compensated at that time: see Luntz and Harder (n 36) [4.8.4].

92 (1981) 148 CLR 438.

93 *Cullen v Trappell* (1980) 146 CLR 1; *CPA* (Qld) (n 56) s 60; *Wrongs Act* (Vic) (n 51) s 28A.

94 For further details, see Luntz and Harder (n 36) [4.8.3].

95 See, eg, *Walker v Newlands Northern Underground Pty Ltd* [2019] QSC 96, [111] (Crow J); *Cootes v Concrete Panels (Qld) Pty Ltd* [2019] QSC 146, [131] (Crow J); *AEA Constructions Pty Ltd v Wharekawa* [2019] NSWCA 176, [107] (White JA). Section 4.5(1) of the *MAI Act* (NSW) (n 51) also lists separately damages for loss of earning capacity and *Fox v Wood* damages.



The final case that the minority in *Latz* (HCA) relied on is *Government Insurance Office of New South Wales v Johnson* ('GIO (HCA)').<sup>96</sup> In the action of the estate of a wrongfully killed person, the trial judge found that the deceased, had he not died, would have received a timber mill as a gift from his father and would have operated it for 20 years. The judge awarded (among others) damages for the loss of the income that the deceased would have derived from the operation of the mill in the lost years. The defendant appealed the judgment, but was not contesting that the value of the gift of which the deceased had been deprived was in principle recoverable. Nevertheless, Hutley JA in the New South Wales Court of Appeal expressed a view on this issue.<sup>97</sup> His Honour made two statements. First, he said: 'The good fortune of a young man to have a generous father with the capacity to make valuable gifts is not part of his earning capacity'.<sup>98</sup> That statement should be uncontroversial. Secondly, Hutley JA said: 'The damages which are recoverable are for loss of earning capacity'.<sup>99</sup> His Honour gave no further explanation and cited in support only the statement of Gibbs and Stephen JJ in *Sharman*<sup>100</sup> referred to earlier.<sup>101</sup> As mentioned,<sup>102</sup> their Honours were not saying that of all financial losses resulting from a shortening of life it is only loss of earning capacity that can be compensated.

*Government Insurance Office v Johnson* ('GIO (NSWCA)')<sup>103</sup> came before the High Court, where the defendant now did seek to challenge the award of damages for the loss of the gift from the deceased's father. The High Court revoked the grant of special leave to appeal against this aspect of the decision, on the ground that the defendant had not raised the issue at the trial.<sup>104</sup> Nevertheless, the High Court expressed a view on the matter. Mason ACJ, Wilson and Deane JJ, with whom Murphy J and Brennan J agreed, said that the trial judge had been wrong to award damages for the full amount of the share of the profits that the deceased would have obtained from the operation of the mill, and should instead have distinguished between a return on the capital employed in the business and a reflection of the earning capacity of the deceased as the manager of the business.<sup>105</sup> Murphy J said this:

The New South Wales' Parliament has legislated by the Law Reform

96 (High Court of Australia, Mason ACJ, Wilson, Deane, Murphy and Brennan JJ, 22 October 1982) ('GIO (HCA)').

97 *GIO* (NSWCA) (n 31). Glass JA, with whom Mahoney JA agreed, did not discuss this issue.

98 *Ibid* 627.

99 *Ibid*.

100 *Sharman* (n 69) 579.

101 See above n 82 and accompanying text.

102 See above the sentence preceding and the sentence following n 83.

103 *GIO* (NSWCA) (n 31).

104 *GIO* (HCA) (n 96). The High Court allowed the appeal against the failure of the New South Wales Court of Appeal to apply a discount rate of 3% to the award in respect of future loss.

105 *Ibid* 2–3.

(Miscellaneous Provisions) Amendment Act 1982 (No. 4) to prevent future claims such as this by estates of deceased persons for loss of earning capacity or earnings. The right to claim in this case lacked any social justification and is anomalous.<sup>106</sup>

What the High Court said in these statements is that the estate of a wrongfully killed person cannot recover for the loss of non-remuneration income. Nothing in the High Court's decision indicates an intention to say anything on claims brought by injured persons in their lifetime. Furthermore, these statements were obiter dicta in a decision to revoke the grant of special leave to appeal, and are not binding authority.<sup>107</sup>

In conclusion, prior to *Latz* (HCA) there had been no statement in the High Court, let alone a statement carrying binding force, that unequivocally rejected the right of an injured person whose life expectation has been shortened to recover for the loss of non-remuneration income in the lost years. On the contrary, as pointed out by Blue J in *Latz* (SASCFC),<sup>108</sup> there had been at least one judicial statement unequivocally endorsing the right to recover. In *Fitch*,<sup>109</sup> Mason J in the High Court approvingly quoted what Lord Scarman had said in *Gammell v Wilson* ('*Gammell*'),<sup>110</sup> namely that the cessation of an annuity upon death is not a loss that the estate of a wrongfully killed person suffers consequent on the death,<sup>111</sup> 'for that loss, like the loss of the earnings of the lost years, is to be attributed to the years lost by reason of the injury sustained and is, therefore, part of the cause of action which vested in the deceased before his death'.<sup>112</sup>

The minority in *Latz* (HCA) did not regard Mason J's statement as of particular relevance, for three reasons. First, their Honours said that the statement 'was made in the course of the discussion by his Honour as to whether the loss of future receipts was compensable at the suit of the estate of the deceased rather than exclusively at the suit of the deceased'.<sup>113</sup> It is true that Mason J was immediately

106 Ibid 1. The Act cited by his Honour amended the *Law Reform Act* (NSW) (n 65), by inserting the present s 2(2)(a)(ii), so as to exclude claims by estates of wrongfully killed persons for the loss of earning capacity in the lost years. The impact of this type of provision on the common law is discussed above at Part III(B).

107 Reasons for refusing special leave to appeal are not binding authority: *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 117 [52] (French CJ, Nettle and Gordon JJ), 133 [112] (Kiefel and Keane JJ), 134 [119] (Bell and Gageler JJ).

108 *Latz* (SASCFC) (n 15) 80 [77].

109 *Fitch* (n 84) 491.

110 [1982] AC 27 ('*Gammell*').

111 Section 2(2)(c) of the *Law Reform Act* (NSW) (n 65) provided that the damages recoverable by the estate of a wrongfully killed person 'shall be calculated without reference to any loss or gain to his estate consequent upon his death'. The High Court in *Fitch* (n 84) held that this provision did not preclude the estate from recovering for the deceased's loss of earning capacity in the lost years. The 1944 Act and the equivalent statutes in all other Australian jurisdictions have since been amended so as to expressly exclude estate claims for loss of earning capacity in the lost years: see above Part III(B).

112 *Gammell* (n 110) 77 (Lord Scarman). Lord Scarman was correcting what Lord Wright had said in *Rose v Ford* [1937] AC 826, 842.

113 *Latz* (HCA) (n 12) 16 [71] (Kiefel CJ and Keane J).

concerned with a claim by the estate. But the estate can have no claim for economic loss suffered in the lost years that the deceased could not have brought in his or her lifetime. By supporting a claim by the estate for the loss of annuities in the lost years, Mason J necessarily supported a claim by an injured person for such loss.

Secondly, the minority in *Latz* (HCA) said that ‘Mason J was not directly addressing the issue whether the loss of an annuity should properly be characterised as a loss of earning capacity’.<sup>114</sup> This is true, but beside the point. The point is that Mason J unequivocally supported a claim for the loss of annuities (as well as earning capacity) in the lost years.

Finally, the minority in *Latz* (HCA) said that ‘it is difficult to regard Mason J as expressing a view in support of a claim of the kind made by Mr Latz, given his Honour’s concurrence, a little over six months later, in reasons approving the view of Hutley JA in *GIO v Johnson*’.<sup>115</sup> However, as seen before,<sup>116</sup> Mason ACJ, Wilson and Deane JJ in *GIO* (HCA) expressed a view on claims by estates and their statement is thus not inconsistent with what Mason J in *Fitch* — by necessary implication — said on claims by injured persons in their lifetime.

Stanley J in *Latz* (SASCFC) brushed Mason J’s statement in *Fitch* aside on the following ground: ‘Mason J did not consider the basis upon which the loss of such an annuity upon death might sound in damages to an injured plaintiff during his or her lifetime’.<sup>117</sup> Two responses must be made. First, the basis of recovery should be obvious. It is the fact that the loss of non-remuneration income is generally compensable and that there is no reason for an exception in cases of personal injury. Secondly, whether or not Mason J considered the basis of recovery, the important point is that his Honour regarded the loss of an annuity upon death as compensable.

#### **D Policy Considerations Relating to the Loss of Non-Remuneration Income in General**

The remaining question is whether policy considerations militate against or in favour of recovery for the loss of non-remuneration income in the lost years. The term ‘policy considerations’ is used here in a broad sense, including ‘considerations of justice between the parties ... as well as considerations of

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> See above nn 105–7 and accompanying text.

<sup>117</sup> *Latz* (SASCFC) (n 15) 99 [166].

social welfare'.<sup>118</sup> This section discusses policy considerations relating to non-remuneration income in general and the superannuation pension in particular. Policy considerations relating specifically to the age pension and other income support will be discussed below at Part III(F).

One important policy consideration is coherence of the law.<sup>119</sup> In particular, the rules applied in one area of the law must be consistent with the rules applied in another area of the law.<sup>120</sup> This was accepted by all of the judges in *Latz* (HCA), but the majority and the minority differed as to whether compensation for the loss of superannuation payouts in the lost years would create inconsistencies in the law.

The minority rejected compensation for the loss of pension payments on the ground that

no attempt was made to explain how the failure to receive age pension or superannuation entitlements might be conceptualised as a form of economic loss distinct from the non-receipt of other forms of benefit such as legacies under a will or distributions under a discretionary trust ...<sup>121</sup>

Their Honours seem to have assumed that the loss of those other forms of benefit is not compensable. The majority did not contest that assumption, and justified the compensability of the loss of superannuation payouts by saying that such loss

is distinct in nature and source from the non-receipt of other forms of benefit, including legacies under a will or distributions under discretionary trusts. The superannuation pension, unlike the other forms of benefit, is a capital asset and intrinsically connected to earning capacity.<sup>122</sup>

Contrary to the majority's view, superannuation payouts cannot be distinguished from other benefits such as legacies or trust payments on the ground that superannuation payouts are intrinsically connected to earning capacity, because they are not.<sup>123</sup> Nor is any other reason for a different treatment obvious. However,

118 Stephen Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (Cambridge University Press, 2011) 14. Some arguments discussed in this section might properly belong to the realm of principle rather than policy. It is not necessary for present purposes to define the demarcation line between policy and principle. For a general discussion, see James Plunkett, 'Principle and Policy in Private Law Reasoning' (2016) 75(2) *Cambridge Law Journal* 366.

119 *Miller v Miller* (2011) 242 CLR 446, 454 [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Miller*'); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 513 [23], 518 [34] (French CJ, Crennan and Kiefel JJ).

120 *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, 406–10 [39]–[42] (Gummow, Heydon and Crennan JJ); *Miller* (n 119) 454 [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). For a general discussion of the coherence and the consistency of the law, see Andrew Fell, 'The Concept of Coherence in Australian Private Law' (2018) 41(3) *Melbourne University Law Review* 1160.

121 *Latz* (HCA) (n 12) 17 [75] (Kiefel CJ and Keane J).

122 *Ibid* 23 [109] (Bell, Gageler, Nettle, Gordon and Edelman JJ).

123 See above Part II.

this simply means that all these forms of benefit should be treated equally. It does not tell us whether the equal treatment should be achieved through the award or the denial of compensation. Compensating the loss of non-remuneration income in the context of personal injury would be consistent with its compensation in other contexts<sup>124</sup> and would thus ‘fit’ into the body of established rules.<sup>125</sup>

The minority in *Latz* (HCA) raised two further issues of potential incoherence of the law in relation to the loss of superannuation payouts. First, their Honours said that it had not been explained how defined benefit schemes should be differentiated from simple accumulation schemes.<sup>126</sup> It is not clear why such a differentiation is necessary. The only relevant question is whether any superannuation benefits have been lost as a result of the shortening of the contributor’s life. Secondly, their Honours asked on what basis in principle a defendant’s liability should differ where the injured retiree had chosen to receive the superannuation entitlement in a lump sum.<sup>127</sup> The answer is simple. A retired contributor who has obtained the entire superannuation benefit in a lump sum can no longer lose any superannuation benefit as a result of premature death.

Turning from coherence of the law to other policy considerations (in a broad sense), the majority in *Latz* (HCA) argued that justice demands the compensation of loss of superannuation payouts. Mr Latz, their Honours said, ‘will suffer an economic loss in respect of his superannuation pension. That loss is both certain and able to be measured ... He should be entitled to recover that loss’.<sup>128</sup> This argument is not peculiar to the loss of superannuation payouts but applies in principle to the loss of any type of non-remuneration income.

The minority in *Latz* (HCA) advanced a policy argument for excluding recovery for the loss of any type of non-remuneration income:

The common law of this country has not accepted that the loss of the opportunity to enjoy one’s financial resources by reason of premature death is a form of economic loss compensable as such. To accept that proposition now would be to accept that the loss of the capacity to enjoy one’s financial resources may be

124 See above Part III(A).

125 It has been said that ‘[a] rule which will not “fit” into the general body of the established law cannot be the subject of judge-made law’: *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 593 (McHugh J). A similar statement was made in *Breen v Williams* (1996) 186 CLR 71, 115 (Gaudron and McHugh JJ).

126 *Latz* (HCA) (n 12) 17 [75] (Kiefel CJ and Keane J). An accumulation scheme exists where the employer’s contributions are invested and the size of the superannuation fund on retirement depends upon how those investments have developed. A defined benefit scheme exists where the superannuation benefits on retirement depend upon a certain formula which includes the total period of employment and salary levels: see *SGAA* (n 24) s 6A. On 30 June 2018, about 3% of all Australian superannuation accounts were defined benefit accounts: Australian Prudential Regulation Authority, *Statistics* (Annual Superannuation Bulletin, June 2018) 20.

127 *Latz* (HCA) (n 12) 17 [75] (Kiefel CJ and Keane J).

128 *Ibid* 23 [109] (Bell, Gageler, Nettle, Gordon and Edelman JJ).

given a different value depending upon the value of the resources available to the plaintiff from whatever sources those resources may have been derived. That would be a departure from a position grounded in notions of equality before the law.<sup>129</sup>

It is difficult to accept that the principle of equality before the law would be violated if two persons with different amounts of non-remuneration income obtain proportionally different amounts of compensation for the loss of that income. Where the same wrongful conduct causes damage to two properties of different value, the owner of the more valuable property will receive a larger amount of damages than the owner of the less valuable property, everything else being equal. Nobody has argued that this violates the principle of equality before the law. It could in fact be argued that the principle of equality would be violated if both owners received the same amount of damages.<sup>130</sup>

A policy argument against the recovery for loss of non-remuneration income might be sought to be based on the fact that damages for personal injury are almost always paid out of public or insurance funds and that 'through these channels the burden of compensation is spread across the whole community through an intricate series of economic links'.<sup>131</sup> Where the amount people have to pay into the compensation fund does not depend upon wealth but the amount of payouts from the fund does, money is shifted from the less wealthy to the wealthier people in society. This is indeed a problem. But it is not confined to loss of non-remuneration income. It applies equally to loss of earning capacity.

Moreover, it is not for the common law to address this shift of wealth from the poorer to the richer by simply denying recovery for a particular type of loss, or placing an arbitrary cap on the amount recoverable.<sup>132</sup> It is for the legislatures to address the problem. As mentioned above at Part III(B), statutes in all Australian jurisdictions do place a cap (the amount of which varies between the jurisdictions) on the amount recoverable for loss of earning capacity in certain cases of personal injury.<sup>133</sup> While the introduction of the caps (and the other restrictions on personal injury damages) contained in the civil liability statutes was motivated by a desire to lessen the amount of insurance premiums, the caps do to some extent address the problem of funds being shifted from the less wealthy to the wealthier.

129 Ibid 18 [79] (Kiefel CJ and Keane J).

130 Corrective justice ignores the parties' relative wealth: Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press, rev ed, 2012) 76–80.

131 *Dimond v Lovell* [2002] 1 AC 384, 399 (Lord Hoffmann).

132 See, in a different context, Harold Luntz, 'The Use of Policy in Negligence Cases in the High Court of Australia' in Michael Bryan (ed), *Private Law in Theory and Practice* (Routledge-Cavendish, 2007) 55, 69.

133 *CCA* (n 51) s 87U; *CLA* (ACT) (n 51) s 98; *CLA* (NSW) (n 51) s 12; *MAI Act* (NSW) (n 51) s 4.6; *Workers Compensation Act* (NSW) (n 51) s 151I; *Personal Injuries Act* (NT) (n 51) s 20; *CLA* (Qld) (n 51) s 54; *CLA* (SA) (n 51) ss 54(2), (3); *CLA* (Tas) (n 51) s 26(1); *Motor Accidents Act* (Tas) (n 51) s 22(5); *Wrongs Act* (Vic) (n 51) s 28F; *CLA* (WA) (n 51) s 11.

In conclusion, policy considerations militate in favour of, rather than against, the general compensation of the loss of non-remuneration income in the lost years. The specific case of the age pension and other income support will be discussed below at Part III(F).

## **E Comparison with English Law**

The argument that the loss of non-remuneration income in the lost years should in principle be compensable in Australian law gains support from a comparison with English law. In *Oliver v Ashman*,<sup>134</sup> the Court of Appeal denied compensation for the loss of earning capacity in the lost years. This was overruled by the House of Lords in *Pickett v British Rail Engineering Ltd* ('*Pickett*').<sup>135</sup> The denial of compensation had been defended with the argument that if loss of earning capacity in the lost years were compensable, the loss of other financial benefits in the lost years would have to be compensable as well. Addressing that argument, Lord Russell and Lord Scarman in *Pickett* said that the loss of any income in the lost years was compensable, not just lost earnings.<sup>136</sup> Lord Russell mentioned payments out of a trust fund and an inheritance as examples.<sup>137</sup> Lord Scarman, who pointed out that the question did not arise for decision,<sup>138</sup> approvingly quoted what the Law Commission for England and Wales had said in 1973:

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. The loss must be regarded as a loss of the plaintiff; and it is a loss caused by the tort even though it relates to moneys which the injured person will not receive because of his premature death. No question of the remoteness of damage arises other than the application of the ordinary foreseeability test.<sup>139</sup>

Subsequently, in *Gammell*, Lord Scarman said in an obiter dictum that an injured person whose life expectation has been shortened can recover for the loss of an annuity ceasing on death.<sup>140</sup> In *Adsett v West*,<sup>141</sup> the estate of a wrongfully killed person recovered damages for the loss of an inheritance which the deceased, had he lived, was likely to have received. McCullough J said that he was unable 'to see any fundamental difference between the loss of the opportunity to earn

134 [1962] 2 QB 210.

135 [1980] AC 136 ('*Pickett*'). The action was brought by the injured person, who died during the proceedings before the Court of Appeal. The administratrix of the deceased's estate continued the proceedings.

136 *Ibid* 165 (Lord Russell), 170 (Lord Scarman).

137 *Ibid* 165.

138 *Ibid* 170.

139 *Ibid*, quoting *Report on Personal Injury* (n 67) 24 [90].

140 *Gammell* (n 110) 77.

141 [1983] 1 QB 826 ('*Adsett*').

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'.<sup>142</sup>

Parliament intervened and abrogated claims by estates for 'loss of income' in the lost years.<sup>143</sup> Damages for the loss of non-remuneration income have continued to be awarded in actions brought by injured persons in their lifetime. For example, in *Phipps v Brooks Dry Cleaning Service Ltd*,<sup>144</sup> a person who had suffered a life-shortening injury recovered for the loss of a retirement pension in the lost years. The Court of Appeal increased the award on the ground that the trial judge had made twice a discount for accelerated receipt. The recoverability of the loss of a retirement pension in the lost years was not contested.<sup>145</sup> The Court of Appeal has also held that the diminution of the value of a damages claim as a result of the shortening of life is compensable.<sup>146</sup>

## **F Policy Considerations Relating Specifically to the Loss of Income Support Payments**

As seen before, the High Court in *Latz* (HCA) was split as to the question of whether the loss of superannuation payouts in the lost years is compensable. But the High Court unanimously held that the loss of age pension payments in the lost years is not compensable. For the minority, this followed from their Honours' rejection of compensation for any pecuniary loss resulting from a shortening of life other than remuneration for work done in the lost years. The majority, which allowed compensation for the loss of superannuation payouts in the lost years, explained the different treatment of age pension payments in this way:

The age pension ... is not part of remuneration. It is not a capital asset. It is not a result of, or intrinsically connected to, a person's capacity to earn. Nor ... is it a future income stream to which [Mr Latz] has any present or future right or entitlement. It is not a form of property even within the extended meaning given

142 Ibid 848. His Lordship went on to say that it must be ignored as a coincidence that the person from whom the deceased was expected to inherit (the deceased's father) belonged to the deceased's heirs, who received the damages.

143 *Law Reform (Miscellaneous Provisions) Act 1934*, 24 & 25 Geo 5, c 41, s 1(2)(a)(ii), as inserted by *Administration of Justice Act 1982* (UK) s 4(2). In *Adsett* (n 141), McCullough J seems to have taken the view (in obiter dicta) that 'income' means remuneration for work. But there is no reason for deviating from the ordinary, wider meaning of 'income'.

144 [1996] PIQR Q100.

145 See also *A v Powys Local Health Board* [2007] EWHC 2996 (QB), [46] (Lloyd Jones J) (parties agreed on amount of damages for loss of pension in lost years); *R v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] 1 WLR 4847, 4855 [22], 4862 [38] (Davis J) (award for loss of pension in lost years). In Hong Kong, the loss of old age pension payments was compensated in a fatal accident claim in *Chan Yee Mei v Leung Chi Fei* [2007] HKCFI 93, [73]–[76] (Mutttrie DHCJ).

146 *Haxton v Philips Electronics UK Ltd* [2014] 2 All ER 225. The defendant's negligence led to the death of the claimant's husband and the shortening of the claimant's life expectation. The claimant recovered for the additional amount of damages that she would have obtained in respect of her husband's death had her life expectation not been shortened.



to that concept in the application of s 51(xxxi) of the Constitution.<sup>147</sup>

Three observations will be made. First, it is true that the loss of age pension payments does not constitute loss of earning capacity. But, as seen before, there is no justification for confining recovery for pecuniary loss resulting from a shortening of life to loss of earning capacity. Secondly, it is not clear what their Honours meant by saying that Mr Latz did not have a present or future entitlement to the age pension. Any person who satisfies the eligibility criteria and the means test for the age pension is entitled to it. If their Honours meant to say that the age pension could in theory be abolished at any time, they failed to explain why this should be relevant. Finally, it is unclear why it should matter for the right to compensation whether the entitlement to an age pension is a form of property, whether for purposes of s 51(xxxi) of the *Constitution* or otherwise. The characterisation as property does not matter in contexts in which pure economic loss is recoverable.

Thus, neither the majority nor the minority in *Latz* (HCA) gave a satisfactory justification for denying recovery for the loss of age pension payments as a result of a shortening of life.

However, a justification may be found in the fact that the age pension, like other types of income support,<sup>148</sup> can be claimed by any person who satisfies the eligibility criteria and any means test, is not provided in return for any property or service provided by the beneficiary,<sup>149</sup> and is intended to provide beneficiaries with ‘a minimum adequate standard of living’.<sup>150</sup> Income support such as the age pension is intended to assist anyone who would otherwise fall into poverty, and is not intended to enhance the wealth of selected people. Any type of income support could be abolished at any time, subject only to constitutional restraints.

Every Australian resident enjoys the benefit of having a potential claim to income support should the eligibility criteria become satisfied at some stage. It is a general benefit flowing from the mere fact of being an Australian resident, such as the benefit of having roads and other infrastructure being provided, being protected by the army and the police, having access to a functioning court system, etc. An Australian resident whose life expectation is wrongfully shortened misses out on all these benefits in the lost years. But it has never been suggested that the loss of

147 *Latz* (HCA) (n 12) 24 [115] (Bell, Gageler, Nettle, Gordon and Edelman JJ) (citations omitted).

148 For example, Carers Payment, Disability Support Pension, Newstart Allowance, Parenting Payments, Veterans Affairs Pension, Youth Allowance.

149 See *Lincoln v Grivil* (1954) 94 CLR 430, 437–8 (Webb J):

I do not overlook the fact that thousands of recipients of the Commonwealth pension have in fact contributed heavily towards Commonwealth social services; and so it is understandable if they do not regard the pension as benevolence. But their claims to the pension are not based on their contributions; they would have the same claims if they had not paid a single penny in contributions.

150 *Australia's Future Tax System: Report to the Treasurer* (Report, December 2009) 485.

such general benefits as the protection provided by the police should be reflected in the compensation of the loss of expectation of life, a facet of non-pecuniary loss.

A possible objection to this argument is that an injured person who would have satisfied the eligibility criteria for income support during the lost years has been deprived of concrete payments of calculable amount, and not just of non-pecuniary benefits or abstract pecuniary benefits that cannot be measured. This is true. But it remains the fact that the injured person merely lost a benefit that is provided to everyone who satisfies the eligibility criteria and is only intended to alleviate poverty. There is thus some justification for the denial of recovery for the loss of age pension payments.

To be clear, the fact that income support is not paid in return for the provision of any goods or services by the beneficiary is not by itself decisive for the denial of compensation. Gifts, inheritances and distributions under discretionary trusts may also be obtained without the beneficiary providing anything in return. But these benefits are arranged (by the donor, testator, settlor or trustee) specifically for the beneficiary or for a selected group of people to which the beneficiary belongs. They are not potentially available to all Australian residents. The loss of such benefits as a result of a shortening of life should be compensable.

What the High Court in *Latz* (HCA) decided in relation to the age pension should apply to all types of income support. This will affect a claim by the dependants of a wrongfully killed person who would have received income support in the lost years. If income support in the lost years is disregarded in an action brought by the recipient himself or herself, it must equally be disregarded in determining the financial support that the dependants could expect in the lost years. Dependants who face poverty as a result of losing the deceased's support (and not obtaining damages for that loss) will have their own entitlement to some kind of income support. Furthermore, the circumstances described should be rare, as income support is meant to cover just the basic needs of the recipient, who will have little left to spend on dependants.

If compensation for the loss of income support is unavailable where the loss is caused by a shortening of life, it must be unavailable whenever the loss is caused by personal injury. This proposition is contrary to some pre-*Latz* (HCA) authority. In *Dabinett v Whittaker* ('*Dabinett*'),<sup>151</sup> the plaintiff was in receipt of unemployment benefits when he suffered the injury caused by the defendant. As a result of the injury, the plaintiff's benefit was changed to sickness benefits, the amount of which was repayable out of any damages he would obtain for loss of earning capacity. The Full Court of the Supreme Court of Queensland held that the plaintiff was entitled to damages for the loss of the non-repayable unemployment

151 [1989] 2 Qd R 228 (*Dabinett*).

benefits.<sup>152</sup> The decision was applied in *Renehan v Leeuwin Ocean Adventure Foundation Ltd* (*Renehan*),<sup>153</sup> where the plaintiff in consequence of her injury received partly repayable disability support payments instead of unemployment benefits which she had received prior to the injury. Mildren J awarded damages in the full amount of the lost unemployment benefits, not just the amount repayable. His Honour stated the following general principle:

[I]f the plaintiff was in receipt of income by way of social security benefits prior to the accident which was likely to continue into the future and in receipt of a benefit after the accident recoverable from damages for lost earning capacity and the plaintiff will suffer a loss if the value of the social security benefit is not taken into account, damages, if they are truly restitutory [sic], should take into account the value of that loss.<sup>154</sup>

It might be argued that this principle merely ensures that an injured person obtains full compensation for loss of earning capacity, since the amount of the income support obtained in consequence of the injury is deducted from the amount awarded for loss of earning capacity. However, the deduction is offset by the amount of the post-injury income support. The injured person obtains the same amount of damages that would have been awarded if no income support had been paid either before or after the injury. What the injured person has really lost is the continuation after the time of the injury of the type of income support obtained prior to the injury. The damages awarded in *Dabinett* and *Renehan* were not for loss of earning capacity, but for the loss of income support.

The award of such damages conflicts with the argument made before that the loss of income support, which is available to every Australian resident who satisfies the eligibility criteria and any means test, should not be compensable. Moreover, the principle applied in *Dabinett* and *Renehan* conflicts with the decision in *Latz* (HCA) that the loss of an age pension as a result of a shortening of life is not compensable. A distinction between cases in which the injured person's life expectation has been shortened and cases in which it has not would be formalistic and without merit.

#### IV DEDUCTION OF A DEPENDANT'S REVERSIONARY SUPERANNUATION PENSION

Under the Australian superannuation schemes, certain dependants of a contributor usually become entitled to certain benefits on the contributor's death. Where a contributor dies prematurely because of someone's wrong, the dependants will receive their benefits at an earlier time, and (where the benefit is a periodical

152 Ibid 229–31 (Thomas J, Andrews CJ agreeing at 228).

153 (2006) 17 NTLR 83 (*Renehan*).

154 Ibid 119 [206]. The English Court of Appeal has applied the same principle: *Neal v Bingle* [1998] QB 466.

payment for life) for a longer period, than without the wrong. The question arises whether this benefit must be taken into account in assessing the contributor's damages for the loss of superannuation payouts in the lost years. An affirmative answer was given by the majority in *Latz* (HCA) in respect of the reversionary superannuation pension that Ms Taplin expected to receive after Mr Latz's death (the minority did not address this issue). All that their Honours said in this regard is that the assessment of the loss of superannuation payouts suffered by a contributor to the superannuation scheme

must give credit for the value of the right which the contributor acquired when they became a contributor to that scheme and which remains after their death — a two-thirds pension to the spouse. It is an offsetting or collateral benefit.<sup>155</sup>

Two observations must be made. First, it is noteworthy that their Honours regarded the terms 'offsetting benefit' and 'collateral benefit' as synonyms. Previously, the term 'collateral benefit' had been used to denote either any benefit that the victim of a civil wrong obtains as a result of the wrong,<sup>156</sup> or only a benefit that is not taken into account in assessing the victim's damages (and thus is not offset).<sup>157</sup> The use of the term 'collateral benefit' to denote only a benefit that is taken into account seems to be novel and may create confusion. This is not to say that their Honours were wrong to apply the rules relating to the deductibility of benefits obtained as a result of a wrong.

Secondly, the passage quoted may be understood as saying that it is always the entire pension to be received by the contributor's dependant after the contributor's death which must be taken into account in assessing the loss suffered by the contributor. But this would only be appropriate (if at all) where, in the absence of the contributor's life-shortening injury, the dependant would not have received any pension because the contributor would have lived longer than the dependant. This was not the case in *Latz*, where the South Australian Full Court found that Ms Taplin was expected to survive Mr Latz by six years even if he had not contracted mesothelioma.<sup>158</sup> Where, as in *Latz*, the dependant would have survived the contributor and received a reversionary pension even in the absence of the contributor's injury, the defendant's wrong is not a factual cause of the dependant's receipt of a reversionary pension. All that the defendant's wrong did in those circumstances was to cause the dependant to receive the pension

155 *Latz* (HCA) (n 12) 24 [112] (Bell, Gageler, Nettle, Gordon and Edelman JJ) (citations omitted).

156 See, eg, *Federal Commissioner of Taxation v Scully* (2000) 201 CLR 148, 169 [33] (Gaudron ACJ, McHugh, Gummow and Callinan JJ); *James Hardie & Co Pty Ltd v Newton* (1997) 42 NSWLR 729, 734 (Stein JA); *Dionisatos v Acrow Formwork & Scaffolding Pty Ltd* (2015) 91 NSWLR 34, 74 [203] (Gleeson JA); *Bloomer v Ratch* [1990] 1 SCR 940.

157 See, eg, *Cade Pty Ltd v Simmons* (1998) 71 SASR 571, 579, 582–3 (Williams J); *Swynson Ltd v Lowick Rose llp (in liq)* [2018] AC 313, 322 [11], 322–3 [13] (Lord Sumption JSC), 349 [98] (Lord Neuberger PSC); *Tiuta International Ltd v De Villiers Surveyors Ltd* [2017] 1 WLR 4627, 4633–4 [11]–[13] (Lord Sumption JSC).

158 *Latz* (SASCFC) (n 15) 87 [111] (Blue J).

in the lost years, ie, from an earlier time and for a longer period. It is only this benefit which is caused by the defendant's wrong and can be taken into account in assessing the contributor's loss.

In accordance with those principles, the majority in the South Australian Full Court did not deduct the total amount of the reversionary pension that Ms Taplin was expected to receive in her lifetime, but only the amount of the pension that she was expected to receive in the 16 years in which Mr Latz was expected to have lived in the absence of the mesothelioma.<sup>159</sup> The majority in the High Court did not interfere with this aspect of the Full Court's decision, and either overlooked this aspect or was simply imprecise in the statement quoted above. Either way, the statement cannot be regarded as a considered dictum to the effect that it is always the entirety of the dependant's reversionary pension that must be taken into account.

Moreover, it is not every benefit resulting from a wrong that is taken into account in the assessment of damages. In the circumstances under discussion, it might be appropriate to ignore even the fact that the contributor's dependant is expected to receive the reversionary pension in the lost years. This question has two aspects, which should be considered separately. One is the fact that the benefit is not received by the person who suffers the loss. The other aspect is the type of the benefit in comparison with other types.

Can the reversionary pension be taken into account even though it is not received by the person who suffers the loss? Every type of benefit that had been deducted from damages for personal injury or death prior to *Latz* was a benefit obtained by the person who suffered the loss: the injured person or — in an action by the dependants of a wrongfully killed person — a dependant. The deduction of a benefit obtained by a third party is a novel step. In *Latz* (SASCFC), Stanley J was not prepared to take that novel step.<sup>160</sup>

Blue J in the Full Court justified the deduction on the ground that, 'as a matter of practical reality' due to 'the nature and longevity of Mr Latz' relationship with Ms Taplin', Mr Latz did not suffer a loss in the amount of Ms Taplin's reversionary pension.<sup>161</sup> What Blue J was saying, it seems, is that because Mr Latz and Ms Taplin would have continued to cohabit and pool their income in the lost years, it did not matter who the recipient of the pension was. While that argument worked for the circumstances in *Latz*, it would not work in cases in which the contributor and the dependant do not live together and do not pool their income. But the deductibility of the reversionary pension should not depend upon such coincidental matters.

159 Ibid 69–70 [38], 88 [117] n 98. The majority made no discount to reflect the chance that Mr Latz and Ms Taplin would have separated, regarding that chance as negligible on the facts: at 87 [112].

160 Ibid 103 [182]. The trial judge also placed some reliance on the fact that the recipient of the benefit was not identical with the person suffering the loss: *Latz* (SADC) (n 14) [112] (Gilchrist J).

161 *Latz* (SASCFC) (n 15) 88 [115].

A better way of overcoming the fact that the benefit is not received by the injured person is to conceptualise a contributor's entitlement against the superannuation fund as an entitlement to payouts to the contributor and/or the contributor's dependants in accordance with the rules of the superannuation scheme. The assessment of the loss suffered by a contributor as a result of a life-shortening injury then involves a determination of how the entitlement just described has been affected. An increase in the amount payable to a dependant would offset a decrease in the amount payable to the contributor. An argument to this effect was made by Hinton J in *Latz* (SASCFC):

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. The reversionary pension is a benefit to which the secondary beneficiary becomes entitled but it only accrues to them through the primary beneficiary. It is as if the pension to which the primary beneficiary was entitled switched to the secondary beneficiary, albeit in a reduced amount, upon the death of the primary beneficiary.<sup>162</sup>

Stanley J in *Latz* (SASCFC) opposed this analysis by comparing a contributor with a dependant to a contributor without a dependant:

It would be anomalous if, by bringing to account the benefit to which Ms Taplin may become entitled, [Mr Latz] has his damages for the loss of pension benefits during the 'lost years' reduced where a plaintiff without a spouse would recover that same loss in full.<sup>163</sup>

Awarding different amounts of damages to two persons with different sets of circumstances is anomalous only if the differences between the two sets of circumstances are not relevant to the assessment of damages. In the present context, it is difficult to see why it should not be relevant to the assessment of damages for the loss of a contributor's pension that this loss is partially or wholly offset by a reversionary pension obtained by a dependant of the contributor. What is important is that the law is consistent and that the approach of taking a dependant's reversionary pension into account in determining the value of the contributor's entitlement against the superannuation fund is applied not only in cases in which the contributor's own pension is lost but also in cases in which the dependant's pension is lost. For example, where a dependant of the contributor has lost the prospect of obtaining a reversionary pension after the contributor's death because the contributor has been wrongfully dismissed and has ceased to be an active member of the superannuation fund, the contributor should be entitled to damages for that loss from the employer.<sup>164</sup>

<sup>162</sup> Ibid 120 [261].

<sup>163</sup> Ibid 103 [182].

<sup>164</sup> This is the position in England: *Fox v British Airways plc* [2013] ICR 51.

There remains the second aspect of the question of deductibility, the type of the benefit. The deductibility of any benefit resulting from a civil wrong ultimately depends upon whether the plaintiff was intended to enjoy the benefit in addition to obtaining damages.<sup>165</sup> With regard to the reversionary superannuation pension of a contributor's dependants in the lost years, it must be asked whether the contributor was intended to enjoy the benefit of that reversionary pension being paid to the dependants in addition to obtaining damages for the loss of his or her own pension in the lost years. This will depend upon the individual superannuation scheme.

In *Latz*, the superannuation scheme had been set up by the *Superannuation Act 1988* (SA). Where statute confers a benefit resulting from a wrong, '[t]here are three possible indicia of a relevant legislative intention: the financial source of the benefit, the presence of a provision which requires repayment of a statutory benefit out of the damages awarded or paid and the nature of the benefit'.<sup>166</sup> As to the first indicium, the source of the reversionary pension is the same fund that benefits from the premature cessation of the contributor's pension, which suggests that an offset should occur. As to the second indicium, the 1988 Act does not require the repayment of superannuation payouts out of damages awarded,<sup>167</sup> which again suggests that an offset should occur.

As to the third indicium, the trial judge in *Latz v Amaca Pty Ltd* likened the reversionary pension to the payout from a life insurance policy<sup>168</sup> and, based on the principle that payments from a private insurance taken out by the injured person are ignored in assessing damages,<sup>169</sup> held that the reversionary pension was not to be deducted.<sup>170</sup> This is not convincing. As noted by the judge,<sup>171</sup> the non-deductibility of payouts from a private insurance has been justified on the ground that the defendant should not benefit from the plaintiff's thrift and foresight.<sup>172</sup> This argument, which is not without critics,<sup>173</sup> presupposes that it was the plaintiff's choice to take out the insurance. But it is compulsory for Australian employers to contribute to an employee's superannuation fund, and while the

165 *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569, 573 (Dixon CJ), 599–600 (Windeyer J) (*'National Insurance Co'*); *Redding* (n 42) 125 (Gibbs CJ), 137 (Mason and Dawson JJ), 162–3 (Brennan J); *Zheng v Cai* (2009) 239 CLR 446, 453–4 [19]–[20] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

166 *Manser* (n 42) 436 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ).

167 For Mr Latz's superannuation scheme, see *Latz* (SASCFC) (n 15) 119 [258] (Hinton J).

168 *Latz* (SADC) (n 14) [112]–[113] (Gilchrist J).

169 *National Insurance Co* (n 165); *Parry* (n 37); *Redding* (n 42).

170 *Latz* (SADC) (n 14) [107]–[109], [114]–[115] (Gilchrist J).

171 *Ibid* [114].

172 *Browning v War Office* [1963] 1 QB 750, 763 (Donovan LJ). See also *Redding* (n 42) 138 (Mason and Dawson JJ).

173 It has been objected that the defendant does benefit from the plaintiff's thrift and foresight where it prevents the occurrence of harm (eg, wearing a helmet): Ken Cooper-Stephenson, *Personal Injury Damages in Canada* (Carswell Thomson, 2<sup>nd</sup> ed, 1996) 579.

employee may have the choice between funds, there is generally no option to waive the dependants' benefits under a particular scheme (and there was no such option in *Latz*).

It is more convincing to liken the reversionary pension to 'sick pay', as done by Hinton J in *Latz* (SASCFC).<sup>174</sup> Under Australia's National Employment Standards, full-time employees other than casuals have an annual entitlement to a minimum of 10 days' paid personal leave, which includes sick leave and paid carer's leave.<sup>175</sup> It means that an Australian employee continues to receive ordinary wages during periods of absence from work due to illness, up to 10 days per year (or the longer period where agreed). For this reason, the High Court has held that 'sick pay' constitutes ordinary wages and that no loss of earning capacity is suffered in periods of sick leave.<sup>176</sup> If the amount of 'sick pay' were a certain proportion of ordinary wages, loss of earning capacity would be absent to the extent of that proportion. Similarly, the reversionary superannuation pension of the surviving dependant of a deceased contributor can be regarded as the continuation of the contributor's own pension, in a lower amount (where applicable).

All three indicia of legislative intention thus point to the deductibility of the reversionary pension under the *Superannuation Act 1988* (SA).<sup>177</sup> It may be different for other superannuation schemes set up by statute, and where the superannuation scheme was not set up by statute, it is the intention of the scheme, as expressed in its rules, that will be decisive.

## V CONCLUSION

In the past, few people had income other than remuneration for work, and the potential of personal injury to cause the loss of such other income in practice was low. The potential has increased significantly with the creation of superannuation schemes and a social security system in Australia. The increase in people's average life span means that a shortening of life as a result of personal injury may shorten the injured person's time in retirement but not in work. Such a person may lose pension payments in the lost years.

It was inevitable that a case involving the loss of non-remuneration income as a result of a shortening of life would come before the High Court, and it did in *Latz* (HCA). While the reasons of the majority are brief and not always convincing, the

<sup>174</sup> *Latz* (SASCFC) (n 15) 119–20 [260]–[261].

<sup>175</sup> *Fair Work Act 2009* (Cth) ss 95–9. Part-time employees have a pro rata entitlement. Agreements between trade unions and employers and individual employment contracts may, and often do, provide for a longer period of personal leave per year.

<sup>176</sup> *Graham* (n 83) 345–6 (Dixon CJ, Kitto and Taylor JJ).

<sup>177</sup> *Latz* (SASCFC) (n 15) 88 [114] (Blue J), 119–20 [258]–[261] (Hinton J). A different view was taken, without further explanation, in *Lynch* (n 10) [13]–[15] (Curtis J) for the superannuation scheme involved in that case.



outcome can be supported.

The majority regarded superannuation payouts as intrinsically linked to earning capacity. This is unconvincing, as superannuation payouts merely constitute the fruits of earning capacity exercised in the past. But the view that the loss of superannuation payouts as a result of a shortening of life should be compensable can be supported. Economic loss in general, and the loss of non-remuneration income in particular, has been compensated outside the context of personal injury, and there is no reason of principle or policy why the loss of non-remuneration income should not generally be compensable where it results from personal injury. It might be argued that this does not sit well with statutory provisions that exclude or limit damages for loss of earning capacity in certain circumstances and should (but do not) equally apply to the loss of non-remuneration income. But this is no justification for creating inconsistencies within the common law. If the legislatures overlooked the loss of non-remuneration income as a compensable head of loss, they can act and amend the statutes accordingly.

In addition to the loss of a superannuation pension, the loss of other types of non-remuneration income, such as legacies or trust payments, should in general also be compensable, for the same reasons. An exception should be made for the loss of an age pension or of any other type of income support, as these benefits are potentially available to any Australian resident and are merely intended to alleviate poverty. Dependants of the injured person who face poverty as a result of the denial of compensation will become entitled to income support in their own right. The denial of compensation for the loss of income support should apply not only where the loss is caused specifically by a shortening of life but whenever it is caused by personal injury.

In assessing damages for the loss of a contributor's superannuation pension in the lost years, account may have to be taken of a reversionary pension received by a dependant of the contributor in the same period. It is unusual to deduct from an injured person's damages benefits received by a third party. In the superannuation context, the deduction can be explained by conceptualising the contributor's entitlement against the superannuation fund as an entitlement to have payments made to the contributor and/or the dependants in accordance with the rules of the scheme. But there should be no deduction where the contributor was intended to enjoy the benefit of having a reversionary pension being paid to dependants in addition to obtaining damages for the loss of his or her own superannuation pension. Whether such an intention exists depends upon the individual superannuation scheme.