LOSS OF RECEIPT OF THE AGE PENSION

114. The plaintiff retired at age 73 in 2011. Since that time he has received an age pension from Centrelink. The claim for future economic loss is a claim that, because the plaintiff will die early from mesothelioma, he has lost the receipt of the age pension during the years he would have survived, if he had not contracted his disease.

115. I was taken to a large number of authorities by both parties. I will review the Australian authorities in detail. I will also deal with the English authorities, although given the divergence in approach between England and Australia, I did not find much assistance in the English authorities.

116. The starting point is the decision of the High Court of Australia in *The National Insurance Company of New Zealand Limited v Espagne* 105 CLR 569. That case concerned whether an invalid pension was to be disregarded in assessing the damages to be awarded in an action for personal injuries caused by negligence. Justice Windeyer discussed the nature of such a pension, both in a compensation to relatives action, and in a damages claim brought by an injured plaintiff. He said:

"In actions under Lord Campbell's Act the amount received as a pension consequent upon death, and the value of the prospect, or probability, of continuance of a pension must – in the absence of any statutory provision displacing the general rule – be taken into account in assessing damages.

…

But damages under Lord Campbell's Act are for the loss of pecuniary benefits consequent upon death. A common law action for damages for personal injury, on the other hand, is not a claim to have a pecuniary loss made good, but to have a pecuniary compensation for all the consequences of physical injury. The distinction becomes thin when the element in general damages that is commonly called economic loss is separately considered: and I confess that there is much in the reasoning in the judgments concerning damages for the pecuniary consequences of death that seems to me logically applicable to the purely economic consequences of physical and mental incapacity. A pension diminishes the pecuniary loss that results when the death of the father deprives the family of the contribution he made to their support. Why, it may be asked, does not a disability pension similarly diminish the monetary loss a man himself suffers by being unable to work? But the same question could be asked about the proceeds of an insurance policy. And there law rather than logic gives the answer."

117. In *Graham v Baker* 106 CLR 340 the High Court held that in assessing damages for personal injuries to a plaintiff who was compulsorily retired because of such injuries, no account should be taken of pension payments which accrued to and were paid to the plaintiff between the date of such

compulsory retirement and the date on which he would have retired in the ordinary course of events.

118. In the joint judgment of Dixon CJ, Kitto J and Taylor J, it was said that:

"An injured plaintiff recovers not merely because his earning capacity has been diminished but because the diminution of his earning capacity is or may be productive of financial loss." – at 347

119. In *Teubner v Humble* 108 CLR 491 the High Court considered, inter alia, the view that in assessing damages for loss of earnings the years of life of which the injured man had been deprived by the injury were to be disregard. This was the view in England according to *Oliver v Ashman* [1962] 2 QB 210. In considering this issue Justice Windeyer said [at 505]:

"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." [Emphasis added]

120. His Honour also said [at 509] that he doubted the correctness of the decision in *Oliver v Ashman*. He said:

"And I am inclined, on more general grounds, to doubt the correctness of the decision of the Court of Appeal on this point. It seems to me that the monetary measure of the destruction of the skill and capacity to earn, which the appellant formerly had and had exercised, is not diminished by showing that, in addition to being deprived of his capacity to earn while alive, he has been deprived of part of his expected span of useful earning life."

121. In *Skelton v Collins* 115 CLR 94 the High Court held that in assessing damages for loss of earning capacity where a plaintiff's expectation of life has been shortened as a result of his injuries, regard should be had to the probable length of his working life had he not been injured and not merely to the probable period left to him as a result of his injuries. The High Court declined to follow *Oliver v Ashman*.

122. Justice Windeyer said [at 128]:

"The one principle that is absolutely firm, and which must control all else, is that damages for the consequences of mere negligence are compensatory. They are not punitive. They are given to compensate the injured person for what he has suffered and will suffer in mind, body or estate. Only so far as they can do so is he entitled to have them."

123. Justice Windeyer also said [at 129]:

"The general principle that damages are compensatory yields what seems to me to be some equally sure, but more particular, doctrines. The first is that a plaintiff is entitled to be recompensed for expenses, such as for medical and nursing attention, that he incurs, or that are incurred on his behalf, as a consequence of his injury.

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. It can be measured by having regard to the money that he might have been able to earn had the capacity not been destroyed or diminished. Of course, the monetary equivalent of the loss of capacity is not ascertainable with precision by a simple arithmetical calculation: assumptions and adjustments must be made. But what is to be compensated for is the destruction or diminution of something having a monetary equivalent. The plaintiff could, if he had not been injured, have sold his labour and his skill or the fruits of his labour and his skill. I cannot see that damages that flow from the destruction or diminution of his capacity to do so are any less when the during which the capacity might have been exercised is curtailed because the tort cut short his expected span of life. We should not, I think, follow the English decisions in which in assessing loss of earnings the 'lost years' are not taken into account. I agree with what my brother Taylor has said about those cases and with his conclusion on this aspect." [Underlining added]

124. The submission made in the present case for the plaintiff focusses upon the underlined part of the judgment of Justice Windeyer where he said that what flows from the compensatory principle is "that anything having a money value which the plaintiff has lost should be made good in money".

125. I pause to point out that the sentences immediately after this quote refer in terms to a claim for loss of earning capacity rather than any other kind of claim for economic loss.

126. If the compensatory principle as set out by Justice Windeyer demands that loss of a future age pension be compensated, one would expect to find cases, since *Skelton v Collins* was decided in 1966, where such a loss was awarded. According to the researches of counsel, and my own researches, such a loss has never been awarded in this Tribunal, or in any of the courts of this state, or until recently, in any Australian courts.

127. I will come back to the recent development in due course.

128. In *Sharman v Evans* 138 CLR 653 the High Court was primarily concerned with the principles to be applied by appeal courts in reviewing damages awarded by the trial judge. At page 579 in the judgment of Gibbs J and Stephen J, the following was said:

"As to 'lost years', 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."

129. The High Court returned to consider the compensatory principle in *Todorovic v Waller* 150 CLR 402. The joint judgment of Gibbs CJ and Wilson J said [at 412]:

"Certain fundamental principles are so well established that it is unnecessary to cite authorities in support of them. In the first place, a plaintiff who has been injured by the negligence of the defendant should be awarded such a sum of money as will, as nearly as possible, put him in the same position as if he had not sustained the injuries. Secondly, damages for one cause of action must be recovered once and forever, and (in the absence of any statutory exception) must be awarded as a lump sum; the court cannot order a defendant to make periodic payments to the plaintiff. Thirdly, the court has no concern with the manner in which the plaintiff uses the sum awarded to him; the plaintiff is free to do what he likes with it. Fourthly, the burden lies on the plaintiff to prove the injury or loss for which he seeks damages."

130. Justice Brennan said [at 465]:

"The assessment of damages for future financial loss occasioned by diminution in earning capacity requires a comparison between the plaintiff's position as a person employing his capacity to earn with his position as an investor of a fund."

131. At around the same time as *Todorovic v Waller*, the High Court delivered its decision in *Fitch v Hyde-Cates* 150 CLR 482. While that case primarily concerned the deductions which should be made for likely living expenses in a claim for the "lost years", it did proceed on the basis that where the deceased had his life shortened as a result of negligence, damages were recoverable for loss of earning capacity in the "lost years".

132. The High Court reaffirmed the principle governing the assessment of compensatory damages in *Haines v Bendall* 172 CLR 60, saying [at 63] that:

"The injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed."

133. The case concerned the need to take into account the use and enjoyment of monies paid by way of workers compensation upon the calculation of interest on pre-judgment non-economic loss.

134. In *Medlin v The State Government Insurance Commission* 182 CLR 1 the High Court considered a case involving damages for loss of earning capacity where the injured plaintiff was a university professor who could no longer work to his own previous high intellectual standards. The joint judgment of Deane J, Dawson J, Toohey J and Gaudron J said [at 4] that in an action in negligence an injured plaintiff recovers damages for loss or impairment of earning capacity as distinct from the direct recovery of past or future lost earnings. Justice McHugh made a statement to the same effect [at 16]. His Honour went on to say:

"In Australia, a plaintiff is compensated for loss of earning capacity, not loss of earnings. In practice, there is usually little difference in result irrespective of whether the damages are assessed by reference to loss of earning capacity or by reference to loss of earnings. That is

because ‘an injured plaintiff recovers not merely because his earning capacity has been diminished but because the diminution of his earning capacity is or may be productive of financial loss’. Nevertheless, there is a difference between the two approaches, and the loss of earning capacity principle more accurately compensates a plaintiff for the effect of an accident on the plaintiff’s ability to earn income. Earning capacity is an intangible asset. Its value depends on what it is capable of producing. Earnings are evidence of the value of earning capacity but they are not synonymous with its value. When loss of earnings rather than loss of capacity to earn is the criterion, the natural tendency is to compare the plaintiff’s pre-accident and post-accident earnings. This sometimes means that no attention is paid to that part of the plaintiff’s capacity to earn that was not exploited before the accident. Further, there is a tendency to assume that if pre-accident and post-accident incomes are comparable, no loss has occurred.”

135. In *Husher v Husher* 197 CLR 138 the High Court said [at 143]:

“Since at least *Graham v Baker* it has been recognised that it is convenient to assess an injured plaintiff’s economic loss ‘by reference to the actual loss of wages which occurs up to the time of trial and which can be more or less precisely ascertained and then, having regard to the plaintiff’s proved condition at the time of trial, to attempt some assessment of his future loss’. But damages for both past loss and future loss are allowed to an injured plaintiff ‘because diminution of his earning capacity is or may be productive of financial loss’. Both elements are important. It is necessary to identify both what capacity has been lost and what economic consequences will probably flow from that loss. Only then will it be possible to assess what sum will put the plaintiff in the same position as he or she would have been in if injury had not been sustained.”

136. Finally, the High Court considered claims for future economic loss in *CSR Limited v Eddy* 226 CLR 1. The judgment of Gleeson CJ, Gummow J and Heydon J said [at 15-16]:

“**A plaintiff who has suffered negligently caused personal injury is traditionally seen as able to recover three types of loss**.

The first covers non-pecuniary losses such as pain and suffering, disfigurement, loss of limbs or organs, loss of the senses – sight, taste, hearing, smell and touch; and loss of the capacity to engage in hobbies, sport, work, marriage and child-bearing. Damages can be recovered in relation to these losses even if no actual financial loss is caused and even if the damage caused by them cannot be measured in money. **The second type of loss is loss of earning capacity both before the trial and after it**. Although the damages recoverable in relation to reduced or future income are damages for loss of earning capacity, not damages for loss of earnings simpliciter, those damages are awardable only to the extent that the loss has been or may be productive of financial loss. **Hence ‘the valuation of the loss of earning capacity involves the consideration of what monies could have been produced by the exercise of the former earning capacity’**.

The third type of recoverable loss is actual financial loss, for example, ambulance charges; charges for medical, hospital and professional nursing services; travel and accommodation expenses incurred in obtaining those services; the costs of rehabilitation needs, special clothing and special equipment; the costs of modifying houses; the costs of funds management; and the costs of professionally supplied home maintenance services.” [Emphasis added]

137. That completes the review of the relevant High Court authorities. I turn to consider authorities of the courts in New South Wales.

138. In *James Hardie & Coy Pty Limited v Roberts* (1999) 47 NSWLR 425 the New South Wales Court of Appeal was dealing with the quantification of damages for the lost years in a mesothelioma case. Spigelman CJ agreed with Sheller JA. Justice Sheller commenced his discussion of loss of earning capacity [at 437] by reference to *Teubner v Humble* and *Medlin v State Government Insurance Commission*. He said that where personal injury affects the receipt of earnings from employment or self-employment, damages are awarded for the destruction or diminution in earning capacity. He regarded this principle as "well established".

139. Counsel for the defendant referred the Tribunal to the decision of the New South Wales Court of Appeal in *CGU Workers Compensation (NSW) Limited v Garcia* (2007) 69 NSWLR 680. In that case a trial judge had found a tortious duty to act in good faith, and a contractually implied duty of good faith, to exist in relation to a prescribed policy of insurance under the *Workers Compensation Act 1987*. At paragraph [61] the Court of Appeal said:

"The High Court has recently issued stern warnings against intermediate courts of appeal stepping beyond long established authority derived from English precedents or considered dicta of the High Court itself (Farah Constructions Pty Limited v Say-Dee Pty Limited)."

140. Of course the Court of Appeal was there speaking of the discovery by trial judge of a new species of tort, whereas the present case, in my view, requires the Tribunal to discern a new head of damages. As Justice Santow said in that same case, the common law moves incrementally and in principled fashion, not by sudden leaps – at [167].

141. Finally, in *Kallouf v Midis* [2008] NSWCA 61 at [44]-[61], the New South Wales Court of Appeal said that damages for past and future loss of income are allowed because diminution of earning capacity is or may be production of financial loss – *Graham v Baker*. An alternative way of expressing the principle is that the plaintiff is compensated for the effect of an accident on the plaintiff's ability to earn income – *Medlin v The State Government Insurance Commission*. The court said, in summary, that damages for lost income, past and present, are awarded by answering three questions:

1. What was the plaintiff's income earning capacity at the time of injury?
2. To what extent was it impaired by the injury?
3. To what extent was the impairment productive of income loss?

142. It can be seen that the focus of all of the High Court decisions, and the New South Wales Court of Appeal decisions, reviewed above, is that there is a recognised head of damage for interference with earning capacity. To this date there is no authority in either the High Court or the New South Wales Court of Appeal for damages for the loss of the ability to receive the age pension.

143. I turn now to a recent Australian authority where a loss of the kind presently claimed was awarded. That is the decision of the District Court of South Australia in *Latz v Amaca Pty Limited* [2017] SADC 56, a decision of Judge Gilchrist. The plaintiff in that case suffered from mesothelioma and had a shortened life expectancy. He made two claims for economic loss. The first was for loss of a superannuation entitlement. To my mind that raises different issues to the present claim. The second claim in the Latz case was for loss of entitlement to a partial age pension in the future.

144. The trial judge recited that the fundamental purpose of an award of damages in an action for tort is to place the victim of the tort, so far as money can achieve it, into the position that he or she would have been in but for the tort – at [98]. He said that but for the tort of James Hardie, Mr Latz would have continued to receive his age pension for the rest of his life. The trial judge said that conceptually he could see no reason why the plaintiff's entitlement to an age pension should be treated any differently to an entitlement to his state pension. I pause to remark that the claim for loss of the State pension raised different issues, in that it arguably related to loss of earning capacity, since the State pension was "earned" by the plaintiff through his years of employment services.

145. Without citing authority, and in particular without referring to what the plaintiff in the present case submits is the key decision of Justice Windeyer in *Skelton v Collins*, the trial judge allowed damages for loss of the receipt in future years of the age pension.

146. It is noted that the Latz decision is presently the subject of an appeal.

147. Senior Counsel for the plaintiff referred the Tribunal to two earlier decisions of the Dust Diseases Tribunal. In *Lynch v Amaca Pty Limited* [2004] NSWDDT 1, Judge Curtis awarded damages for loss of pension and superannuation entitlements. The plaintiff was prevented from working in future because of his dust disease. Besides a claim for loss of earnings, which

was agreed, he also claimed damages for loss of retirement benefits which were going to be paid to him pursuant to a pension payable upon retirement by his employer, based upon the number of years of service to the employer, and a percentage of his final salary. The evidence was that had the plaintiff survived until retirement age of 65 years, he would have been entitled to $48,627.57 per annum.

148. Without reference to any particular authority, the trial judge awarded the loss of pension and superannuation benefit. Such an award is unsurprising, given that the evidence was clearly that the plaintiff worked for a combination of weekly wages plus an entitlement to a pension paid by the employer upon retirement. It can be seen straight away that this is to be differentiated from receipt of an age pension. The economic loss in the case of *Lynch* was an interference with earning capacity, which is the recognised head of damages available for future loss of income.

149. The second decision of the Tribunal was the matter of *Roberts v Amaca Pty Limited* [2009] NSWDDT 28. The plaintiff had worked as a dentist in the United Kingdom. During his time there he made compulsory contributions to the National Health Superannuation Scheme of the United Kingdom. He was entitled to receive a pension when he retired in the future.

150. The loss was awarded. Judge Curtis referred to the decision of Justice Windeyer in *Skelton v Collins* and to the compensatory principle. He went on to refer to the fact that the compensatory principle applies so that anything having a money value which the plaintiff has lost should be made good in money.

151. Without further reference to authority the trial judge allowed the loss of the UK pension. Again, such a pension is to be distinguished from the age pension. The UK pension was payable in the future because of the plaintiff's earning capacity being diminished. Different considerations to my mind apply to such a pension, as opposed to an age pension, which is paid under the social security legislation simply because a person reaches a certain age and satisfies a means test.

152. I was referred to a number of English authorities which I have not found helpful, because of the differences in the law of damages between the United Kingdom and Australia. The high point of the plaintiff's submissions in relation to the English cases was the decision of the House of Lords in *Pickett v*

British Rail Engineering Limited [1980] AC 136. That case concerned a claim for loss of earning capacity. It did not concern loss of the receipt of unearned or passive income for the future.

153. The remarks in particular of Lord Russell were therefore obita dicta. At page 165 in the speech of Lord Russell, he considered the theoretical propositions involved if a person was to be the recipient of the income from a life tenancy. The early death of such a person would mean that he would not receive the income from the life tenancy. Similarly, if a person had an expectation of receiving a benefit under the will of rich relation, who would lose that if he died early through negligence. His Lordship said that in such cases an allowance in damages would need to be made for the loss.

154. To similar effect was the speech of Lord Scarman. His Lordship referred to the report of the Law Commission (the UK equivalent of our Law Reform Commission). In paragraph 90 of *Law Commission Report No. 56*, the following was said:

"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 monies 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."

155. While it was obita dicta, Lord Scarman said that he would allow a plaintiff to recover damages for the loss of financial expectations, and not just for loss of earning capacity.

156. These two expressions of opinion, not part of the ratio in the case of *Pickett*, have not found favour in Australia.

157. A reading of the *Law Commission Report No. 56* shows that the view expressed in paragraph 90 was thought by the Commission <u>not</u> to be part of the law of United Kingdom. In Appendix 4 to the report the Commission set out recommendations for reform where legislation was required. The Commission saw a need for legislation to overrule *Oliver v Ashman*, so that in the UK damages could be obtained for the lost years. Further, the Commission said (Appendix 4 paragraph 8(d)):

"In line with the reasoning of the Australia High Court in *Skelton v Collins* the plaintiff should be entitled to compensation not only for loss of earnings but for other kinds of economic loss eg. a life annuity referable to the lost period."

158. Having read *Skelton v Collins* carefully, I am of the view that the Commission overstated the effect of that decision of the High Court of Australia. Nowhere in *Skelton v Collins* is that said.

159. The inclusion of that in the appendix to the report caused me to look back to paragraphs of the report earlier than paragraph 90. The only other mention of *Skelton v Collins* is in paragraph 58 of the report, where the following is said:

"We expressed the provisional conclusion that the present rule in *Oliver v Ashman* should be reversed and suggested three possible alternative solutions for changing the law:

(a) the reversal by legislation of the rule in *Oliver v Ashman* and the adoption of the formula accepted in the Australian case of *Skelton v Collins* i.e. compensation for loss of earnings in the so-called 'lost years' should be based upon the amount of such earnings less what the plaintiff would have spent on his own maintenance."

160. That paragraph, in my opinion, correctly states the ratio of *Skelton v Collins*. The paragraph later in the report where legislation is proposed to overturn *Oliver v Ashman*, attributes a principle to *Skelton v Collins* which is simply not in the case.

161. I was referred to other English cases. I will deal with them briefly.

162. In *Adsett v West* [1983] 1 QB 826, the trial judge found that the loss of income in the lost years should be compensated, subject to certain deductions. The trial judge held that the prospect of inheritance in the lost years was a factor to be taken into account as the loss of the enjoyment of the income from that benefit was no different from that of income received from other sources. In support of this he quoted the report of the Law Commission, and the judgments of Lord Russell and Lord Salmon in *Pickett*. I have already indicated my view of the doubts which arise in relation to the force of those statements.

163. In *Gabriel v Nuclear Electric PLC* [1996] PIQR Q1 the English High Court was dealing with a mesothelioma claim. Part of the claim was that the plaintiff had lost the ability to perform home handyman work ("DIY benefits"). The judge allowed such a loss referring to the speeches of Lord Russell and Lord Scarman.

164. It seems to me that such a loss would be compensable in any event, because it is clearly a loss of capacity. A person may not be paid for DIY

work, but it has an economic value, and the interference with the capacity to exercise those skills sounds in damages.

165. In *Phipps v Brooks Dry Cleaning Services Limited* [1996] PIQR Q100, the English Court of Appeal was dealing with a mesothelioma claim. Part of the claim was for loss of a pension which would have been paid, but for the early death of the plaintiff. The pension was one paid by an employer, and again this case can be distinguished because different considerations, to my mind, arise where a claim for loss of a pension can be characterised as an interference with earning capacity, as opposed to a claim for loss of the ability to receive a payment which has no reference at all to an interference with earning capacity.

CONSIDERATION OF THE LOSS OF RECEIPT OF PENSION CLAIM

166. A common thread runs through all of the Australian decisions referred to above. A recognized head of damages where income has been lost as a result of a tort is that a claim can be made for diminution in earning capacity, where such diminution is or may be productive of financial loss.

167. There is no authority in Australia, binding upon this Tribunal, that loss of the ability to receive an age pension is a head of damages. The age pension is received without reference to the ability of a person to earn income, or without reference to whether there has been some interference with any ability to earn income.

168. While the compensatory principle applies, it applies to various heads of damage for which the law provides compensation. There are three categories of such loss, referred to in the earlier cases, and collected in *CSR v Eddy*. The categories are:

1. Pain and suffering and loss of enjoyment of life – what the common law calls general damages;
2. Out-of-pocket expenses – in a case such as the present the medical expenses incurred and the attendant care services provided;
3. Loss of or interference with earning capacity which is or may be productive of financial loss.

169. Damages are not awarded simply because the compensatory principle is satisfied. That overarching principle is the one which is to be applied in

assessing damages which are available as recognized heads of damage at common law.

170. In my view the claim for loss of a pension is not available as a matter of law and no damages are allowed for that claim.