Lost services and vulnerability

Hilbert Chiu reports on *Barclay v Penberthy* [2012] HCA 40

The *actio per quod servitium amisit* and the rule in *Baker v Bolton*[1] are of considerable antiquity in the common law. Their precise origins are unclear and have been the subject of some debate.[2]

The idea behind the *per quod servitium* is that 'to cause loss to the master of a servant by rendering his servant incapable of performing the services for which the servant was engaged or hired is an actionable wrong, as long as the defendant either intentionally or negligently acted in such a way as to bring about the deprivation of the services.'[3] The action is in essence one for trespass upon the employer's proprietary right over those services.[4]

The rule in *Baker v Bolton* prohibits in general any recovery in tort for the death of another. Perhaps because of the restrictive nature of that broad rule, close family members of the deceased were given a statutory right of action under the *Fatal Accidents Act* 1846 (in NSW now the *Compensation to Relatives Act* 1897) to recover for loss of expected economic benefit.[5]

Both the action *per quod servitium* and the rule in *Baker v Bolton* survived challenge in the High Court in *Barclay v Penberthy*.

The factual and procedural background of the case is complex, but facts relevant to the issues before the court were simple. Heydon J set them out as follows[6]:

> A plane took off. It had been chartered by Nautronix from Fugro. The purpose of the flight was that Naturonix personnel should test technology and systems which Nautronix hoped to develop commercially. The plane crashed [due to the negligence of the defendants]. Two Nautronix personnel were killed. Three were badly injured.

Nautronix sought to recover damages for economic loss arising from the loss of services from its dead and injured personnel.

The action per quod servitium amisit

The argument against survival of the action *per quod servitium* was that in light of modern social and economic relations, the old action has now been subsumed by the general principles applicable to the tort of negligence. In essence this was the same argument successfully deployed against retention of the old occupier duties in *Australian Safeway Stores v Zaluzna* (1986) 162 CLR 479, and of the *ignis suus* rule in *Burnie Port Authority v General Jones Pty Limited* (1992) 179 CLR 520.

The plurality, and the separate reasons of Heydon J and Kiefel J respectively, rejected this argument because, unlike an action in negligence brought by an employer for economic loss arising from deprivation of the services of an employee, the action *per quod servitium* does not depend upon the existence of a duty of care owed by the tortfeasor to the employer. Rather, it is actionable upon any wrongful intrusion upon those services, intentional or negligent, whatever the relationship between the tortfeasor and the employer.[7]

As the plurality noted:

> Once it is observed that the action per quod depends upon demonstration of a wrong having been done to the servant (as a result of which the master is deprived of the service of the servant) and that the wrongful injury to the servant may be either intentional or negligent, it is evident that the action per quod does not constitute any exception to or variation of the law of negligence. The action per quod will lie where the wrongdoer's conduct towards the servant was not negligent but was intentional. It does not depend on demonstrating any breach of a duty of care owed by the wrongdoer to the master.[8]

Heydon J and Kiefel J each noted that the action has been affirmed in previous High Court authority[9] and its existence has been assumed in legislation which modified its application without abolishing it.[10] It retains utility for plaintiffs in a variety of practical circumstances.[11]

The rule in *Baker v Bolton*

The same enthusiasm did not accompany the retention of the rule in *Baker v Bolton*, which in effect, means that in so far as liability to employers goes, it is cheaper for a tortfeasor to kill than to maim.

Despite the uncertainty as to whether the rule as stated by Lord Ellenborough was correct at that time *Baker v Bolton* was decided, and the subsequent judicial and extra-judicial attacks on the rule[12], the court unanimously held that the rule could only be abolished by legislative intervention.

Action in negligence for pure economic loss

The court, and in particular Kiefel J, provided some comments on the role of reliance and vulnerability in founding a duty of care to avoid pure economic

loss, following on from the court's decisions in *Perre v Apand Pty Ltd* (1999) 198 CLR 180 and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.

One particular issue of interest is the extent to which a party's inability to negotiate contractual protection against want of reasonable care gives rise to the requisite vulnerability. The court found that it was not, in the absence of evidence that it was possible for the plaintiff to have negotiated a term imposing liability for economic loss in the charter agreement, open to conclude that the plaintiff was not vulnerable. On the evidence before the court in *Barclay*, the plurality and Heydon J came to different conclusions about vulnerability. The plurality and Kiefel J held that an implied contractual duty to take reasonable care to avoid pure economic loss existed regardless of vulnerability, based on the defendant's knowledge of the commercial purposes for the charter flight and the importance of the employees to the achievement of those purposes.[13]

The concept of vulnerability seems is in the process of considerable development, especially in light of two recent decisions of McDougall J in *Owners Corporation SP 72535 v Brookfield*[14] and *Owners Corporation SP 61288 v Brookfield Multiplex*[15]), both of which measure vulnerability against the availability of statutory protections.

Endnotes

1. (1808) 1 Camp 493
2. The background is summarised in *Barclay* at [22]-[27], [30]-[39], [80]-[83], [99]-[105], [131]-[139]
3. Professor Fridman, *The Law of Torts in Canada* (2nd ed.) 2002 at 733; Barclay at [30]
4. *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 401 per Dixon CJ, referring to Blackstone, *Commentaries on the Laws of England* (5th ed.) 1773, bk 1 at 429; Barclay at [131]-[132]
5. On the origins of Lord Campbell's Act, see *De Sales v Ingrilli* (2002) 193 ALR 130 at [119]-[120] per Kirby J.
6. *Barclay* at [75].
7. Arguably the nature of the action per quod, in treating the services of an employee as a piece of property over which the employer enjoys rights as against the world, is analogous to the principle underling the action on the case for damages from pure economic loss, acknowledged to exist in *Northern Territory of Australia v Mengel* (1996) 185 CLR 307.
8. *Barclay* at [35], see also Kiefel J at [142]-[145].
9. *Barclay* at [102], citing *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392.
10. *Barclay* at [105], citing s 12 of *Civil Liability Act 2002* (NSW) and *Chaina v The Presbyterian Church (NSW) Property Trust* (2007) 69 NSWLR 533.
11. *Barclay* at [104], [146] and [151], citing *Sydney City Council v Bosnich* [1968] 3 NSWR 725, *Marinovski v Zutti Pty Ltd* [1984] 2 NSWLR 571, and *GIO Australia Ltd v Robson* (1997) 42 NSWLR 439. That utility is subject to the narrow range of damages recoverable under the action, as explained by the plurality at [54]-[66] and by Kiefel J at [156]-[164].
12. Summarised in *Barclay* at [22]-[23], [80], [83] – especially Bramwell B in *Osborn v Gillett* (1873) LR 8 Ex 88 at 96.
13. *Barclay* at [42]-[44], [47]-[49], [176]-[177] (Heydon J dissenting at [87]-[88]).
14. [2012] NSWSC 712 – 29 June 2012.
15. [2012] NSWSC 1219 – 10 October 2012.

Verbatim

Fernandez v Perez **[2012] NSWSC 1242**

Beech-Jones J

Pitbull

There is no settled view of the precise origins of what is now known as rap or hip hop music. At least one of the originating locations was the exotic multicultural mix that is the Bronx area of New York. Amongst the music-rich groups within that area are the African American, West Indian and Latino communities. Reflecting its inner city origins, this form of music is also often referred to as 'urban' music.

Mr Perez commenced performing professionally using the stage name 'Pitbull' in 2000. I use that name and his real name interchangeably. He is based in Miami Florida. He writes and performs in a Latino rap style which draws on his Cuban heritage. He writes and records music in Spanish and English.

Pitbull's first successful commercial recording was an appearance as an album of another artist known as