

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 to be 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 underlying 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 NSW 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

'Luke' in 2000. In 2004 he released his first album entitled *M.I.A.M.I.* which achieved 'Gold' status in the USA. He released an album of re-mixes from that album entitled *M.I.A.M.I. Still* in 2005.

In 2007 Pitbull came to Australia as part of a touring music festival known as 'Roc Tha Block'. In 2007, Roc Tha Block toured Sydney, Melbourne, Adelaide, Perth and Auckland. The concerts were held in indoor arena style venues such as Sydney Entertainment Centre. There were a number of 'urban' music performers. Pitbull was in the 'fourth bill' position out of five. This meant that he was second to appear. The headlining act is usually last to appear.

In 2007 Pitbull released a further album. As I have stated he was scheduled to tour Australia late in 2008. Prior to then he toured venues in the USA on his 'House of Blues' tour and regularly filled venues with a capacity of between 1,000 and 2,500 patrons.

Since 2008 Pitbull's career has flourished. In 2009 he released the album *Rebellion* which included two USA top ten hits, 'I Know You Want Me' and 'Hotel Room Service'. By February 2011 this album and the singles had sold a combined 7.5million copies by means of digital downloads. He has released a further album and is paid to endorse some well known products.

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Verbatim

The following is an extract from a speech given by the Hon Justice Kiefel on 3 March 2012 at the Bar Association of Queensland's annual conference.

The appointment of silks is in question again. On this subject it may also be timely for the bars in Australia to consider what the appointment means – not for the individual – but for the bar. This may be especially important if the bar is to continue to seek a role for the judiciary in the process of appointment.

The appointment of senior counsel is not just an acknowledgement of a person's ability. It is an acknowledgement by the bar and judiciary that a person has qualities of leadership. A senior counsel is intended to lead others in court, and to be a leader by example at the bar – by participation in matters affecting the bar, and by their encouragement and advice to the very junior at the bar.

The two counsel rule was useful to define the role of a senior counsel as a leader. It was accepted that a person appointed as senior counsel would ordinarily only appear in matters which warranted two counsel. The abolition of the rule permitted a senior counsel to appear alone, in a case where a senior counsel was, but a junior counsel was not, essential. But this could not alter the expectation, arising from the history of the institution of senior counsel, that they would not appear alone. To do so regularly would diminish the perception of that person as a leader.

There is emerging in Australia, but I believe less so in

Queensland, a practice of senior counsel appearing together. This may present a contradiction, at least for the one who is being 'led' by another, usually more senior, senior counsel.

It must of course be acknowledged that there have always been cases which are so large and complex as to require more than one senior counsel. In such cases labours are often divided by reference to discrete issues. There may be occasions where a newly appointed senior counsel may feel obliged to conclude a matter which he or she commenced as a junior. But I am not talking here of such cases. The current practice extends well beyond these. The practice would seem to diminish the basis for appointments to a mere recognition of a level of ability. If that be so, the question is, whether that is sufficient for its retention.

The role which senior counsel can have for junior members of the bar was evident when so many women senior counsel were lost to the bar on their appointment to the Bench soon after they took silk. The acceptance of an appointment is not the issue. It is difficult to decline such an appointment. Those appointing do not, however, have the welfare of the bar in mind. The result was to deny to younger women and men at the bar the benefit of the presence and models of senior women barristers

