# Planes, trains, automobiles and the action per quod servitium amisit

## *Barclay v Penberthy* (2012) 246 CLR 258; [2012] HCA 40, High Court of Australia, 2 October 2012

By Tracey Carver

The action per quod servitium amisit compensates an employer for the loss of an employee's services, where such loss is caused due to the commission of a tort by a third party which injures the employee.

Although not commonly pleaded, such actions often arise when employees are harmed due to transportation accidents. For example, where allowed,[1] physical injury caused by the negligent driving of automobiles,[2] and the psychiatric injury suffered by an engine driver upon averting a collision with a motorcyclist crossing before an oncoming train.[3]

In *Barclay v Penberthy*, the High Court considered the action in the context of the loss of the services of employees injured or killed in a plane crash. Accordingly, the case confirms that 'the action per quod servitium amisit is not drifting into desuetude' but 'retains utility for plaintiffs in a variety of practical circumstances'.[4] In particular, it provides employers with an avenue of civil compensation which remains as a separate and potentially valuable alternative to a possible action in negligence for pure economic loss against the third party for the breach of a duty of care owed directly to the employer.

### FACTS

Nautronix carried on a marine technology research and development business. In August 2003, it contracted with Fugro Spatial Solutions Pty Ltd (Fugro) to provide a commercial air charter service for the purpose of testing equipment designed by Nautronix, which would allow aircraft to locate and communicate with submarines. A plane was provided and modified by Fugro for this purpose. It was piloted by Fugro's employee, Mr Penberthy, and carried five senior Nautronix employees including the team's engineering director, project managers, software team leader and systems engineer. The plane crashed shortly after take-off – killing two of Nautronix's employees, and injuring another three as well as the pilot. The accident was due to failure of the right-hand engine and Mr Penberthy's negligent response to that failure. The cause of the engine failure was the negligent design, three years previously, of a replacement fuel pump sleeve bearing by Mr Barclay, an aeronautical engineer.[5]

At first instance,[6] wrongful death (or fatal accident) claims were brought by the spouses of the deceased employees under the *Fatal Accidents Act* 1959 (WA), while the injured employees successfully sued Messers Penberthy and Barclay in negligence. Fugro was held vicariously liable for Mr Penberthy's negligence. In the High Court, however, the only issues that arose for consideration concerned Penberthy's and Fugro's liability to Nautronix in negligence and whether Penberthy, Fugro and Barclay were also liable to Nautronix in an action *per quod*.

### HIGH COURT'S DECISION

The specific issues on appeal[7] were then dealt with as follows:

#### The rule in *Baker v Bolton*

The first issue was whether Nautronix was prevented from recovering, via a negligence action or otherwise, any economic loss suffered by it as a result of the *deaths* of its two employees. This required a consideration of the rule in *Baker v Bolton*. Namely, that '[i]n a civil court, the death of a human being could not be complained of as an injury'.[8]

The rule has been the subject of statutory recognition or qualification. For example, its presence necessitated the enactment of the *Fatal Accidents* legislation to provide a cause of action against wrongdoers for the benefit of a deceased's statutorily defined family, and to compensate them for the loss of pecuniary support that would have been provided by the deceased.[9] In addition, s58(1)(a) of the *Civil Liability*

*Act* 2003 (Qld) specifically allows an award of damages for loss of servitium if 'the injured person died as a result of the injuries suffered'.[10]

The High Court therefore held that '[t]he pattern of Australian legislation [was] a pointer towards the continued existence of the rule in *Baker v Bolton* as a matter of common law',[11] and that any further refinement of its scope was a matter for the legislature.[12] Consequently, a continued application of the rule in this context meant that Nautronix could not recover the pure economic loss flowing from the death of its two employees in either a negligence or a *per quod* action.

## The action per quod servitium amisit

Arguing for the action's abolition, the defendants claimed that the per quod 'action should no longer be permitted to stand apart from the law of negligence and should be treated as absorbed into it' and the law regulating the recovery of pure economic loss.[13] However, according to the High Court, there were several difficulties with this proposition:

1. In a per quod action, the tort committed must be a 'wrong done to the servant'.[14] An employee's injury may be wrongfully caused because it was inflicted intentionally or in breach of a duty of care owed to the employee. Consequently, the action did not 'depend on demonstrating any breach of a duty of care owed by the wrongdoer' to the employer.[15] As such, the action could not be considered as subsumed by the law of negligence. Rather, it was based upon an employer's interest (or quasi-proprietary right) in the services of the employee (and not in the employee themselves).[16]
2. There was no reason to view the action as inappropriate, such as incoherency or it working 'unsatisfactorily in conjunction with other legal principles'.[17]
3. The history of the per quod action 'was connected to the idea of the status of a servant',[18] which although 'adapted somewhat to modern conceptions of the relationship of employer and employee, set it apart from [other] actions in tort'.[19]
4. As the recovery of negligently inflicted pure economic loss is still considered to be a novel category,[20] the existence of a duty of care owed directly to the employer remains to be determined on the facts of each individual case. Consequently, '[m] any employers would not be able to establish that a duty of care was owed to them'.[21]
5. Being modified already by statute in several states,[22] the action per quod servitium amisit could be presumed to still exist at common law, such that its abolition or modification,[23] as a distinct cause of action, was again 'an activity best left to legislatures'.[24]

Consequently, the availability, or otherwise, of an action per quod (in relation to an employer's loss of an employee's services) was held irrelevant to whether (as discussed below) a separate duty of care was owed by the third party directly to the employer.[25] This was in contrast to statements made by McLure P in the Western Australian Court of Appeal that:

> 'Consistency between closely related common law actions is a legitimate expectation. Whilst the action for loss of services remains part of the common law of Australia, it is difficult to avoid the conclusion that a negligent defendant must owe to an employer a common law duty to take reasonable care to avoid causing pure economic loss by injuring its employees. That conclusion is applicable to both Mr Penberthy and Mr Barclay.'[26]

Another consequence of maintaining the distinct actions concerned the unavailability of contributory negligence as a defence in the per quod action,[27] and the remedy awarded.[28] In per quod, the 'principle underlying the action is liability for the employer's loss of services, not the employer's economic loss as such'.[29] Consequently, while Nautronix alleged, without further particulars, 'interruptions and delays in the development and testing of its marine technology and testing system and the loss of intellectual property and corporate knowledge',[30] the loss recoverable in an action per quod servitium amisit was limited to that flowing from depravation of the employee's services,[31] and did not extend to all foreseeable loss. The >>

High Court therefore considered that the damages awarded would reflect the cost of a substitute employee, or extra payments made to existing employees, less wages no longer paid to the injured employee.[32] Damage to business or loss of profit, 'unless attributable to the loss of services',[33] such as in the case of a particularly skilled and irreplaceable employee,[34] is generally not allowed.[35] According to Kiefel J, to permit broad recovery of the kind claimed by Nautronix for all profit lost:

> '...would be to transform an exceptional remedy for a particular type of loss into a substantial exception to the general principles which have developed concerning recovery of economic loss in tort. In terms of coherence of the law, that would be undesirable.'[36]

Mitigation, however, requires an employer to engage a substitute 'at or as near as practicable to the level of skill of the injured employee'.[37] The continued payment of wages or sick pay, under statute, industrial award, or contract, cannot be claimed, as the obligation arises not due to the employee's injury,[38] but as a deferred payment for services rendered.

All parties were therefore held liable to Nautronix, in respect of its three injured employees, in an action per quod and the measure of damages was remitted for trial.[39] As a result, unlike the majority, Heydon J refused to provide what his Honour described as an 'advisory opinion' on the measure of damages before evidence on that issue had been called.[40] Heydon J was also disinclined to allow the action on the basis that it had only been raised by Nautronix for the first time in the High Court and evidence could have been presented at trial 'which by any possibility could have prevented'[41] the action from succeeding. Such evidence was to the effect that the injured Nautronix personnel were not employees, but independent contractors.

## The action for negligently inflicted pure economic loss

A majority of the High Court (French CJ, Gummow, Hayne, Crennan and Bell JJ; Kiefel J delivering a separate judgment)[42] also found Mr Penberthy and Fugro liable to Nautronix in negligence. On the basis of principles espoused in cases such as *Caltex Oil (Aust) Pty Ltd v The Dredge Willemstad*,[43] *Perre v Apand Pty Ltd*[44] and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*,[45] a duty of care was owed in relation to Nautronix's pure economic loss, predominantly due to:

- The defendants' 'knowledge of Nautronix's project, its commercial purposes and the importance of the employees to the achievement of those purposes',[46] such that injury to them would be likely to produce economic loss.
- Nautronix's vulnerability, or inability to protect itself from the consequences of the defendant's want of reasonable care.[47] In this respect, the High Court rejected an argument that Nautronix could have protected itself by negotiating a warranty that Fugro accept liability for loss arising from negligence in hiring its employees, stating that '[a] conclusion that Fugro would have agreed to such a term is not open'[48] and that '[t]he presence or absence of a claim in contract would not be determinative of a claim in tort'.[49]

Justice Heydon dissented, attaching significance to the fact that the onus was on Nautronix (as the claimant) to show that it was vulnerable in order for a duty of care to be owed.[50] As there was no evidence, for example, as to whether Fugro's standard terms excluding liability were open to change, there was no duty.

Consequently, while Heydon J's judgment serves as an important reminder to claimants to ensure that they plead specific evidence of their vulnerability in order to support a duty of care for pure economic loss, it may be subject to the same criticism as similar findings made by a majority of the High Court in *Woolcock Street Investments*.[51] Namely, that one 'errs in assuming that the provision of warranties ... is either commonly sought or given. Yet substantially on the basis of that possibility, Nautronix was] put out of court.'[52] Nevertheless, it must also be remembered that 'unless and until the principles respecting recovery of economic loss in tort are further extended'[53] many employers will be unable to establish a duty of care, whether due to an absence of knowledge, vulnerability or other relevant factor (such as determinate liability). Realistically, therefore, the action per quod servitium amisit may often be the only means available to recover damages consequent upon the loss of an employee's services. ■

**Notes:** **1** See, for example, *Motor Accidents Compensation Act* 1999 (NSW), s142 (prevents a *per quod* action for loss of services caused by a motor accident); *Motor Accidents (Compensation) Act* 1979 (NT), s5 (prevents an action for damages in respect a person's death or injury from a motor accident). **2** See, for example, *Argent Pty Ltd v Huxley* [1971] Qd R 331. Although resulting from injuries sustained by an employee due to the negligent driving of a motor vehicle, as the action was brought by the Crown in relation to public sector employees, it was held not to be available in *The Commonwealth v Quince* (1944) 68 CLR 227 and *Attorney-General for New South Wales v The Perpetual Trustee Company (Limited)* (1952) 85 CLR 237. **3** *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392. **4** *Barclay v Penberthy* (2012) 246 CLR 258; [2012] HCA 40, [104] (Heydon J) ('*Barclay*'). **5** *Ibid* [5], [13], [119]. **6** *Ibid* [14]. See also *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316. **7** *Barclay*, above n4, [21] (French CJ, Gummow, Hayne, Crennan and Bell JJ), [76]-[78] (Heydon J), [128] (Kiefel J). **8** *Baker v Bolton* (1808) 1 Camp 493, cited in *Barclay*, above n4, [77], [127]. **9** See, for example, Carver, 'Through the Looking Glass: Wrongful Death, Remarriage and Australian Law Reform' (2005) 5(1) *QUT Law and Justice Journal* 1, 1-3. **10** *Barclay*, above n4, [24] (French CJ, Gummow, Hayne, Crennan and Bell JJ). **11** *Ibid* [26]. **12** *Ibid* [27] (French CJ, Gummow, Hayne, Crennan and Bell JJ), [80]-[84], [108] (Heydon J), [178] (Kiefel J). **13** *Ibid* [129] (Kiefel J). See also [28] (French CJ, Gummow, Hayne, Crennan and Bell JJ), [101] (Heydon J). **14** *Ibid* [34] (French CJ, Gummow, Hayne, Crennan and Bell JJ). **15** *Ibid* [35] (French CJ, Gummow, Hayne, Crennan and Bell JJ), [91] (Heydon J). **16** *Ibid* [33], [38]-[40] (French CJ, Gummow, Hayne, Crennan and Bell JJ), [131], [141]-[142], [155] (Kiefel J). The High Court's distinction of the *per quod* and negligence actions has been criticised as being insufficient to provide justification for the *per quod* action's retention, and ofgrounding the action upon the interference with a quasi-proprietary right: Beever, '*Barclay v Penberthy* and the Collapse of the High Court's Jurisprudence' (2012) 31(2) *University of Queensland Law Journal* 307. **17** *Barclay*, above n4, [102] (Heydon J). See also [101]. **18** *Ibid* [131] (Kiefel J). **19** *Ibid* [145]. **20** See, for example, *Perre v Apand Pty Ltd* (1999) 198 CLR 180. **21** *Barclay* , above n4, [146] (Kiefel J). See also [150]-[154]. **22** See, for example, *Employees Liability Act* 1991 (NSW), s4 (abolition of action against employee for loss of services of fellow employee); *Transport Accident Act* 1986 (Vic), s93 (prevents the recovery of damages in respect a person's death or injury in a transport accident); *Motor Accidents (Compensation) Act* 2011 (NT), s5; *Motor Accidents Compensation Act* 1999 (NSW), s142 (discussed at above n1 and accompanying text); *Civil Liability Act* 2003 (Qld), s58 (discussed at above n10 and accompanying text). **23** *Barclay*, above n4, [101], [105] (Heydon J). **24** *Ibid* [37] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also [105] (Heydon J). **25** *Ibid* [18], [37] (French CJ, Gummow, Hayne, Crennan and Bell JJ), [145] (Kiefel J). **26** *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] Aust Torts Reports ¶82-087 at 64,884. **27** *Barclay*, above n4, [144]. **28** *Ibid* [41]. See also [106]. **29** *Ibid* [143]. **30** *Ibid* [54]. See also [77], [110]-[114], [158]. **31** *Ibid* [56], [60] (French CJ, Gummow, Hayne, Crennan and Bell JJ), [124], [156], [160] (Kiefel J). See also *Attorney-General for New South Wales v The Perpetual Trustee Company (Limited)* (1952) 85 CLR 237. The amount recoverable is also limited by provisions such as the *Civil Liability Act 2003* (Qld), s 58(2), (3) (damages for loss of servitium limited to three times the average weekly earnings per week). **32** *Barclay* , above n4, [57]-[58] (French CJ, Gummow, Hayne, Crennan and Bell JJ). **33** *Ibid* [61]. **34** See, for example, *Argent Pty Ltd v Huxley* [1971] Qd R 331. **35** *Barclay*, above n4, [60]-[66] (French CJ, Gummow, Hayne, Crennan and Bell JJ), [162], [164] (Kiefel J). **36** *Ibid* [164]. See also [179]. **37** *Ibid* [58]. **38** *Ibid* [59]. Cf [150]. **39** *Ibid* [53], [68] (French CJ, Gummow, Hayne, Crennan and Bell JJ), [107] (Heydon J), [179] (Kiefel J). **40** *Ibid* [109]-[114]. **41** *Ibid* [96]-[97], [115]. **42** *Ibid* [68] (French CJ, Gummow, Hayne, Crennan and Bell JJ), [179] (Kiefel J). **43** (1976) 136 CLR 529. **44** (1999) 198 CLR 180. **45** (2004) 216 CLR 515. **46** *Barclay*, above n4, [176] (Kiefel J). See also [43]-[44], [48] (French CJ, Gummow, Hayne, Crennan and Bell JJ), [118] (Kiefel J). **47** See, for example, *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, [23], [31]. **48** *Barclay*, above n4, [177] (Kiefel J). **49** *Ibid* [47] (French CJ, Gummow, Hayne, Crennan and Bell JJ). **50** *Ibid* [87]-[88]. **51** (2004) 216 CLR 515, [31] (Gleeson CJ, Gummow, Hayne and Heydon JJ), [96] (McHugh J). **52** *Ibid* [178] (Kirby J). **53** *Barclay* , above n4, [146] (Kiefel J).

**Tracey Carver** *(B Bus(Accy) (Dist), LLB (Hons) (QUT); LLM (Cantab)) is a Senior Lecturer at the Faculty of Law, Queensland University of Technology.*

**PHONE** *(07) 3138 4341*

**EMAIL** *t.carver@qut.edu.au.*