BARCLAY V PENBERTHY AND THE COLLAPSE OF THE HIGH COURT'S TORT JURISPRUDENCE

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I FACTS AND FINDINGS

Five employees of the plaintiff company were injured in a plane crash. Two died. The accident occurred because of a substandard part negligently designed by an engineer (the first defendant) that caused one of the plane's engines to fail and because the pilot (his employer being the second defendant) responded negligently to the emergency. The plaintiff brought suit against the defendants, attempting to recover *inter alia* for the loss to it caused by the injuries to its employees. By the time the case reached the High Court, the issues were whether the plaintiff could recover in an action *per quod servitum amisit* and for pure economic loss in the tort of negligence.[1]

The High Court unanimously held that an action *per quod* was in principle available with respect to both defendants. However, dissenting on this matter, Heydon J maintained that the action could not be brought for procedural reasons not relevant to this discussion.[2] The High Court also unanimously held that the plaintiff could recover only in respect of its losses suffered as the result of the injuries to the surviving employees;[3] the losses consequent upon the deaths of the deceased employees being barred by the rule laid down in *Baker v Bolton*,[4] read to mean "that the death of a person cannot constitute a cause of action giving rise to a claim for damages".[5]

Further, by a majority, Heydon J dissenting, the Court ruled that sufficient proximity existed between the plaintiff and the pilot such that a duty of care was owed to the plaintiff and the second defendant was therefore vicariously liable for the plaintiff's relevant economic losses. Again, however, the Court was unanimous that the plaintiff could recover only for the loss suffered in relation to the injuries to its surviving employees; losses consequent to death being barred by the rule in *Baker v Bolton*.

The decision in *Barclay v Penberthy*, therefore, stands for three important propositions.

1. That the action *per quod servitum amisit* exists and should continue to exist in Australian law.
2. That, statutory exceptions aside, recovery for loss cannot occur if the loss is the result of the death of a person.
3. That pure economic loss continues to be available in negligence as long as proximity exists as between the parties.

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1 As detailed by the majority in *Barclay v Penberthy* [2012] HCA 40; 291 ALR 608, [14]-[19], many other issues were brought to trial. This article, however, is concerned with these issues alone, the issues that were litigated before the High Court. Note also that my numbering of the defendants is not the same as the Court's.

2 Ibid at [89]-[97].

3 Of course, Heydon J held that this loss too was unrecoverable in this case because of the reason just mentioned.

4 (1808) 493 Camp, 170 ER 1033.

5 *Barclay v Penberthy* [2012] HCA 40; 291 ALR 608, [1].

All of these conclusions should be rejected. *Barclay v Penberthy* is wrong with respect to every important matter. What is more, these errors are the result of a fundamental mistake, a mistake that results from adopting an understanding of tort law quite inadequate to its subject matter. Consequently, *Barclay v Penberthy* is a landmark judgment, a landmark for revealing the collapse of the High Court's tort jurisprudence.

II TERMINOLOGY

The following terminology is used in different ways by different commentators. This is not the place to discuss the best use of the terms, but for the sake of clarity it is necessary to stipulate definitions. As defined here, a right *in rem* is a right to or over a *res*. Conversely, a right *in personam* is a right held directly against a person. On the other hand, a right is multital if it is held (perhaps in relation to a *res*) as against the world; paucital if it is held only as against one person or a small and defined number of persons. In general, rights *in rem* are multital and rights *in personam* are paucital, but the terms are not coextensive. For instance, in the sense used here, equitable interests can be *in rem* and paucital. Similarly, rights to the person such as the right to bodily integrity are multital and *in personam* (or, at least, cannot be *in rem* as they do not relate to a *res*). Nothing significant turns on this choice of terminology, but it is important to avoid possible confusion.

III THE ACTION PER QUOD: THE MAJORITY'S POSITION

The defendants in *Barclay v Penberthy* maintained that the action *per quod* ought to be "absorbed into" and "subsumed by" the law of negligence.[6] This, of course, is the overly-polite, lawyerly way of saying that the action should be abolished. The Court was well aware of this.[7] Despite that, the defendants' characterisation of the issue was most unfortunate. It meant that the Court was able to respond to the defendants' explicit position by demonstrating that it would be wrong to absorb the action *per quod* into the law of negligence and, by doing so, appear to justify the action itself.

In this regard, the crux of the majority's argument is found in quotations from judgments in which past courts defined the action *per quod* in a way that does not mesh with the law of negligence. This allowed their Honours to conclude that the action has an entirely different normative structure to the action for negligence.[8] As we will see, that argument is successful. But there are two serious problems. First, these arguments do not answer the defendants' real submission: that the action should be abolished. Secondly, the very arguments used to demonstrate that the action *per quod* does not mesh with negligence show that the action *per quod* should be abolished.

Thus, the majority quoted Rich J in *The Commonwealth v Quince* as follows:

> If a person is in fact rendering service to another of a kind that is performed under a contract of service, and sustains injury, through the negligence of a third party, which prevents him from continuing to render the service, the person whom he was serving may recover from the wrongdoer compensation for the damage which he has sustained through the loss of service. … The exception [ie this rule] is of great antiquity in English law. It became established at a time when the head of a household was

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[6] Ibid at [28].

[7] E.g. ibid at [78], [101].

[8] Ibid at [32]-[34].

> regarded as having a quasi-proprietary interest in the members of his family, his apprentices, his hired servants, and their services.[9]

Similarly, the majority quoted Kitto J in *AG for NSW v Perpetual Trustee Co (Ltd)* as saying that the action "provides a remedy for the wrongful invasion of a quasi-proprietary right which a master is considered to possess in respect of the services which his servant is under an obligation to render him".[10] This allowed the majority to distinguish the action *per quod* from negligence. But it must be clear that, as justifications of the action *per quod*, these arguments are inadequate.

If the plaintiff had a property right – ie a (legal) right *in rem* – in the employees, then the existence of that right would have justified recovery. This is because such rights are multital and so would have been binding on the defendants. Thus, had the plaintiff been in possession of such a right, the justification of liability would have been simple: the defendants would have been liable to the plaintiff because they violated the plaintiff's property rights in the employees. But this is not what we are told. It is not said that the plaintiff had a property right in the employees. It is said rather that the plaintiff possessed a *quasi*-proprietary right. This is intended to suggest that, though the plaintiff did not possess property rights in the employees, the plaintiff nevertheless possessed a right that generated similar consequences to a property right. But no analysis whatsoever of that right is provided. In particular, we are given no reason to think that the plaintiff possessed a multital right, or any right, that the plaintiff held against the defendant in relation to the employees.

As such, being told that the plaintiff possessed quasi-propriety rights is no better than being told that the defendant committed a quasi-tort or acted quasi-illegally. There is no justification here. And it is worth reflecting on how out of character with the law generally this reasoning is. Who would argue that a defendant should be held criminally liable because he committed a quasi-crime or that a defendant in contract should be liable because he quasi-breached? Why, then, do we allow this loose reasoning in tort? And we must be clear as to the precise nature of this looseness: it is the failure properly to attend to and analyse the parties' rights.

Let us return to the quoted passage from Rich J's judgment in *Commonwealth v Quince*. Importantly, this very passage, though distinguishing the action *per quod* from the action in negligence, demonstrates why the former should be abolished. As we have seen, if the plaintiff had property rights in the employees, then it would have followed that those rights would have been multital and thus would have bound and been violated by the defendants. Similarly, if the plaintiff had something like property rights in the employees, then that would suggest (though not show) that those rights were multital, bound and were violated by the defendants. But Rich J's position tells us that the right in the plaintiff in relation to the employees is non-proprietary and no longer even quasi-proprietary. It is contractual.[11] Now, in some contexts, the common law treats contractual rights as proprietary, but that does not mean that it treats them as multital. On the contrary, the rights remain paucital. And because they are paucital, they cannot be used to justify recovery. In this case, the plaintiff's right to the employees is generated by their employment contracts. But those contracts did not bind

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9 Ibid at [32], quoting *The Commonwealth v Quince* (1944) 68 CLR 227 (HCA), 240-241. See also *AG for NSW v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 (HCA), 275-276.

10 *Barclay v Penberthy* [2012] HCA 40; 291 ALR 608, [33], quoting *AG for NSW v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 (HCA), 294. See also *Commonwealth Railways v Scott* (1959) 102 CLR 392 (HCA), 434-435.

11 Kiefel J's contrary view is examined below.

the defendants. Therefore, they cannot ground the defendants' liability to the plaintiff.[12]

On one level this seems to be the majority's own conclusion. In summarising the distinction between negligence and the action *per quod*, their Honours note that while a plaintiff can recover in negligence only if she was wronged by the defendant, in the action *per quod*, it is:

> The injury to the servant [that] must be wrongful. It may be wrongful because it was inflicted intentionally or because it was inflicted in breach of a duty of care that the wrongdoer owed the servant. What is presently important is that the injury is "wrongful" because it is a wrong done to the *servant* not because there was any breach of a duty of care owed to the *master*.[13]

It is in this way that the normative structures of negligence and the action *per quod* differ. In negligence, a defendant is liable only if he wrongs the plaintiff. In the action *per quod*, however, a defendant does not wrong the plaintiff but only the plaintiff's servant. This distinguishes these actions, but at the cost of being able to justify the action *per quod*. If in an action *per quod* a defendant does not wrong the plaintiff, then why is he held liable to the plaintiff? Why does the defendant have to compensate someone he did not wrong, whose rights he did not violate?

The majority's only even apparent answer to this question is to maintain that the defendant's wrongdoing to the servant can cause loss to the master – ie recovery is justified because it protects the plaintiff from loss.[14] This, as we will see, is the source of all of the confusion. But for now the main points are that it is a truism that loss is never sufficient for liability and, moreover, this answer is inconsistent with the Court's finding that the plaintiff cannot recover for its losses in respect of the deceased employees, which losses are as real as any other. This prompts an investigation of the Court's reliance on the supposed rule in *Baker v Bolton* and the interpretation of that rule in *Admiralty Commissioners v SS Amerika*,[15] upon which the Court in *Barclay v Penberthy* placed much emphasis.

IV THE RULE IN *BAKER V BOLTON*

In *Baker v Bolton*, the plaintiff's wife was killed by the defendant's negligence. The plaintiff sued for the loss of his wife's "comfort, fellowship, and assistance":[16] *per quod consortium amisit*. According to the reporter, Lord Ellenborough held that the plaintiff could recover only for:

> [T]he loss of his wife's society, and the distress of mind he had suffered on her account, from the time of the accident till the moment of her dissolution. In a civil Court, the death of a human being could not be complained of as an injury; and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence.[17]

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[12] The analogy drawn by the majority and Kiefel J to inducing breach of contract is examined below.

[13] *Barclay v Penberthy* [2012] HCA 40; 291 ALR 608, [34].

[14] Ibid at [31]. See also [101] per Heydon J and [134] (Kiefel J).

[15] [1917] AC 38 (HL).

[16] *Baker v Bolton* (1808) 493 Camp, 170 ER 1033, 1033.

[17] Ibid.

The proposition contained in the last sentence of that passage is so sweeping that it would be rash to take it entirely at face value. That is made yet clearer when one remembers that it was written, not by the judge, but by the reporter. In particular, it is possible to think that the case was intended to establish only that a plaintiff cannot recover *per quod consortium amisit* (and probably, at least by implication, also *per quod servitum amisit*) if the person of whom the plaintiff is deprived is dead.

In that light, the High Court's appeal to *Admiralty Commissioners v SS Amerika* in support of their reading of the rule in *Baker v Bolton* is highly significant. In that case, the Admiralty sued for the loss caused to it by the death of its sailors suffered as a result of the defendant's employees' negligence. In line with *Baker v Bolton*, the Court ruled that such recovery was impossible. But why?

Lord Sumer approached this issue by asking "What is the right in the master which the tortfeasor infringes, or the duty towards him which he disregards?"[18] This is his Lordship's answer: "It is the invasion of the legal right of the master to the services of his servant".[19] Thus, "where there is no capacity for service … the … action *per quod servitium amisit* will not lie".[20] In short, when the servant is dead, the plaintiff no longer has a right to the servant's service. Thus, that right can no longer be being violated by the defendant. "It is the loss of service which is the gist of the action, and loss of service depends upon a right to the service, and that depends on the contract between the master and the servant. The contract of service being purely personal determines with the servant's death".[21]

Thus Lord Sumner explained *Baker v Bolton* as follows. The plaintiff in that case was not entitled to recover *per quod consortium amisit* after his wife's death, because his right "is not in the life but in the service or consortium during life".[22] The plaintiff's right died with his wife.

There is no general rule "that the death of a person cannot constitute a cause of action giving rise to a claim for damages"[23] in *Baker v Bolton* or *Admiralty Commissioners v SS Amerika*. These cases do not support the High Court's position.

What is more, *Admiralty Commissioners v SS Amerika* presents even greater problems. As Lord Sumner observed, the actions *per quod servitum amisit* and *per quod consortium amisit* were conceptually very close to trespass to property.[24] The actions *per quod* were based on the idea that the master had a proprietary interest in his servant and a man had a proprietary interest in his wife. So, just as I could sue you for my loss of amenity if you damaged my car on the basis of my (multital) property right in the car, I could sue you for the loss of service etc if you deprived me of the services of my servant or wife because of my (multital) property in my servant, wife or their services. The problem is that, as Lord Parker clearly appreciated in 1916, this can no longer be said to represent the facts.

His Lordship started by admitting that:

> In a society based so largely as our own is at the present day upon contractual obligations, it does not appear why the wrongful injury of A. whereby he is prevented from fulfilling his contractual obligations to B. should confer on B. a right of action only where these obligations are those arising out of the relationship of master and

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18 *Admiralty Commissioners v SS Amerika* [1917] AC 38 (HL), 54.

19 Ibid.

20 Ibid at 55.

21 Ibid.

22 Ibid.

23 *Barclay v Penberthy* [2012] HCA 40; 291 ALR 608, [1].

24 *Admiralty Commissioners v SS Amerika* [1917] AC 38 (HL), 54.

> servant, or, indeed, why the right should not be extended so as to cover all loss, whether arising out of inability to perform a contract or otherwise.[25]

The problem is this. We have a rule according to which a plaintiff can recover from a defendant who prevents a third party from meeting his contractual obligations to the plaintiff only if the contract is of a certain kind when it is quite unclear why the contract must be of that kind. Lord Parker's response to this problem is to argue that the recovery is not grounded on the contract at all. Rather, it is based on the older notion that contracts of the relevant kind generate proprietary rights in the plaintiff that are multital and so bind the defendant.[26] In just the same way, if you damage a car that I have purchased from a dealer, the ground of my recovery is my property right in the car not the contract of sale with the dealer, despite the fact that my property right exists only because of the contract.[27] Thus, Lord Parker concludes:

> This would appear to me to account for the fact that, except in the case of master and servant, the loss of A. arising out of an injury whereby B. is unable to perform his contract is not actionable. It is only in a society based on contractual obligation that the existence of such an action in the case of master and servant and in no other case can appear illogical.[28]

In other words, now that the relevant contracts do not generate property rights, the rule seems "illogical". But when one realises that the contracts used to generate such rights, one can see the basis of the rule.

Of course, however, that basis is historical only, as Lord Parker clearly saw.[29] Thus, we are provided with an historical explanation for the existence of the rule. But that is not a justification, also a point of which Lord Parker was well aware. Thus, *Admiralty Commissioners v SS Amerika* is a step on the road the to the abolition of the action *per quod*. It reveals that the action is "antiquated", not merely in the sense that it is old and has fallen into relative disuse,[30] but because its legal basis no longer obtains. It is an action that permits recovery for the violation of a property right that no longer exists. Legal history explains the action *per quod* by rendering it intelligible, but that rendering also shows why the action should be abolished.

V The Action Per Quod: Kiefel J's Position

In response, one might argue that Australian law has simply not come as far as English law in the following regard. As the famous formulation has it, English law has moved from status to contract.[31] Perhaps Australian law has not, or at least has not moved as far. Consequently, in this jurisdiction, contracts of the relevant kind still generate property rights, or at least quasi-property rights, which can be used to ground an action *per quod*. Clearly, that property right cannot be to the employee (or spouse) *per se*. Rather, it must be to that person's service. This view is most clearly represented in *Barclay v Penberthy* in the judgment of Kiefel J.

According to her Honour, the action:

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25 Ibid at 43.
26 Ibid at 43-45.
27 To make this clear, we can imagine that the car is ascertained but not yet delivered.
28 *Admiralty Commissioners v SS Amerika* [1917] AC 38 (HL), 45.
29 Ibid at 50.
30 Contra *Barclay v Penberthy* [2012] HCA 40; 291 ALR 608, [28], [100], [153].
31 Henry S. Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (J. Murray, 10th ed, 1920) 26.

> [W]as based upon the master having an interest which has been described as quasi-proprietary. This might suggest an analogy with the property a master formerly had in a slave. However, it has been pointed out that both Sir William Holdsworth and Sir William Blackstone refer, not to the master having a proprietary interest in the servant, but rather in his or her services. It was the loss of services for which a remedy was provided by way of the action. The loss of the employee's services was regarded as the gist of the action.[32]

Thankfully, this allows Kiefel J, unlike the majority, to say that in an action *per quod* the defendant wrongs the plaintiff.[33] But there remain three serious problems with this view.

The first we have already discussed. In order to justify recovery, it must be possible to show that the employer had a right that it held as against the defendant that the defendant violated. And if the employer had a property right in the employee, that would give us reason to think that the employer possessed such a right. But that conclusion is not supported by saying that the employer has a *quasi*-proprietary right. The use of "quasi" here is obscurantist.

We have seen the second also. Why are property rights being invoked in this context at all? Why not ground the claim on the existence of the employment contract between the employer and the employee, which gives the employer a right to the employee's service? The answer is that, being paucital, that contract generates rights and obligations only as between the employer and the employee. It does not generate a right to service in the employer that binds the defendant. Hence, the appeal to property is an attempt to overcome this problem by suggesting that the employer has a right that is not merely paucital. In fact, property rights being characteristically multital, the reference to property suggests the existence of such a right, a right sufficient to ground the action. The problem is that this right seems invented for the sole reason of attempting to appear to ground the action *per quod*. In no other context do we think that such a right exists.

Thirdly, it is hard to see what sense can be made of the idea that an employer has a (multital) property right to its employee's service. I owe the University of South Australia a contractual obligation to present lectures. In what sense could the University own not me or a part of me but *my* service to perform the lectures? The common law prides itself on being practical, but Australian law has landed itself with a metaphysical paradox. Again, we must conclude that the notion of a proprietary right to a service is obscurantist.

VI THE ANALOGY TO INDUCING BREACH OF CONTRACT

Both the majority and Kiefel J maintained that the action *per quod* was supported by analogy with the tort of inducing breach of contract.[34] It is hard to see how this could be the case, however. While that tort is difficult to explain,[35] it is clear that it is committed only if the defendant deliberately targets the plaintiff's contractual rights in

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[32] *Barclay v Penberthy* [2012] HCA 40; 291 ALR 608, [131] (citations omitted).

[33] Ibid at [144].

[34] *Barclay v Penberthy* [2012] HCA 40; 291 ALR 608, [39], [142].

[35] For some attempts, see Peter Benson, 'The Basis for Excluding Liability for Economic Loss in Tort Law' in David Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press, 1995) 427, 455-457; Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 275-281.

the sense that the defendant must intentionally procure the breach of contract.[36] There is no tort of negligently inducing breach of contract, for example. As such, as the action *per quod* does not require targeting, there is no analogy between it and the tort of inducing breach of contract.

VII Pure Economic Loss in Negligence

As noted above, the High Court, Heydon J dissenting, held that the plaintiff could recover for pure economic loss from the second defendant in negligence. Heydon J dissented because he held that, as the plaintiff was not sufficiently vulnerable, proximity did not obtain as between the parties.[37] Though I cannot think it appropriate to determine liability in this fashion,[38] I focus here on a different problem.

The Court was unanimous that the plaintiff suffered pure economic loss and that, had there been proximity between the parties, that loss was recoverable in the law of negligence. The problem is that it is impossible to square this with the claims made concerning the action *per quod*. There are two issues here that I take in turn.

A The Nature of the Loss

What does it mean to say that a loss is purely economic? Though, like many terms in law, this one is used in different ways, it means at least that the loss was not suffered as a consequence of a violation of the plaintiff's rights to the person or property. Accordingly, an inability to work that results from actionable personal injury is not pure economic loss. It is rather consequential loss, ie loss suffered consequent to personal injury or property damage.

Thus the assertion that the plaintiff in *Barclay v Penberthy* suffered pure economic loss as a result of the injury to its employees is in tension with the claim that the plaintiff had quasi-proprietary rights in those persons. In fact, the suggestion that the plaintiff's losses were purely economic is a tacit admission that the plaintiff possessed no such rights. And in reality, the plaintiff's losses were indeed purely economic. They were not the result of anything like the violation of a property right in the plaintiff.

B The Nature of the Claim for Pure Economic Loss

We have seen that the majority in *Barclay v Penberthy* distinguished the action *per quod* from negligence by suggesting that only in the latter was it necessary for the defendant to have wronged the plaintiff. The problem now is that the (correct) characterisation of the plaintiff's loss as purely economic indicates that such a wrong cannot have occurred.

What were the plaintiff's losses? They were benefits that the plaintiff expected to receive on the basis of its employment contracts with the employees but did not receive. And here we have the problem again. These contracts generated in the plaintiff only paucital rights to the benefits as against the employees that in no way bound the defendants. Hence, the defendants cannot have wrongly deprived the plaintiff of those benefits. Simply, as against the defendants, in relation to those benefits the plaintiff

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36 E.g. *Sanders v Snell* (1998) 196 CLR 329.

37 *Barclay v Penberthy* [2012] HCA 40; 291 ALR 608, [87].

38 Beever, above n 32, 194-195.

had no right. Accordingly, although the defendants caused the plaintiff economic loss, it did not do so by wronging the plaintiff, by violating the plaintiff's rights.[39]

Note that this point has nothing to do with proximity (though it could, no doubt, be recast in that light as anything seemingly can be). The point concerns the rights of the parties. The defendant cannot have violated the plaintiff's rights as the plaintiff held no relevant right *vis-à-vis* the defendant.

Against this, one might argue that there is nothing to prevent a court creating a right of a kind that would in this case have been held by the plaintiff as against the defendant. But in respect of what would this right be held? It cannot be a right to the employee as such or a multital right to the employee's service for all the reasons we have noticed. Nor can it be the contractual right to that service because, that right being paucital, it does not bind the defendant. Vis-à-vis the defendant, that entitlement in the plaintiff is no entitlement at all. It is a mere expectation. Perhaps, however, one might argue that there could be a general right not to be caused loss, as the majority appear to suggest as noted above.[40] But it is plain that there is no such right at common law. Our actions cause people foreseeable loss all the time and yet are not even potential candidates for liability.[41]

VIII REFORM AND THE ROLE OF THE COURTS

In relation to the action *per quod*, the majority and Heydon J maintained that reform in this area is best left to the legislatures.[42] This argument came in two varieties. First, it was maintained that the abolition of the action would amount to a "significant change" that is more suited to the legislature. Secondly, it was alleged that it would be inappropriate for courts to abolish the action because legislation has been passed that assumes its existence. I deal with these claims in turn.

The first variation reflects the Court's commitment to incrementalism in the law of tort.[43] I have criticised this notion elsewhere and will not repeat my arguments here.[44] Suffice it to say the following. When incrementalism was introduced, it appeared that it was the sole alternative to an understanding of the law of negligence according to which any negligently caused loss was in principle recoverable, so that recovery could be kept within workable limits only on the basis of a never ending appeal to policy. In that light, the resort to incrementalism was sensible. What is more, for reasons that are too obvious and uncontroversial to require examination here, courts ought not, except in extraordinary circumstances, cause upheaval in the law. The

[39] For a full analysis of this point, see ibid at chs 6-8. See also Benson, above n 36, 427; Russell Brown, 'Still Crazy After All These Years: *Anns, Cooper v. Hobart* and Pure Economic Loss' (2003) 36 *University of British Columbia Law Review* 159, Russell Brown, 'Justifying the Impossibility of Recoverable Relational Economic Loss' (2004) 5 *Oxford University Commonwealth Law Journal* 155; Stevens, above n 36, 20-42.

[40] See, eg, NJ McBride, 'Rights and the Basis of Tort Law' in Andrew Robertson and Donal Nolan (eds), *Rights and Private Law* (2011) 331.

[41] This constitutes the correct response to ibid at 338 who maintains that, though the general outline of my thesis is correct, I fail to show in A Beever, *Rediscovering the Law of Negligenc*e (2007) that rights of this kind could not or should not exist. In fact, as I explained in that work, that was not my intention. I never suggested that such rights could or should not exist, deliberately avoiding such questions. I claimed only that such rights do not exist. The moral claims are to be made elsewhere.

[42] *Barclay v Penberthy* [2012] HCA 40; 291 ALR 608, [37], [101], [105].

[43] See e.g. *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 (HCA).

[44] Beever, above n 34, 182-194.

problem is that the insistence on incrementalism has replaced the search for principle.[45] As we discuss further in the final section of this article, that should not have happened.

The second variation of the argument is more compelling. However, it is drawn too broadly. Though there is a point of significance here, it does not follow from the fact that legislation assumes that the common law holds *x* that the common law should hold *x*. One example that is directly applicable to the circumstances in *Barclay v Penberthy* is sufficient to make this point.

Legislation is passed for many reasons. It may, for instance, be passed in order to cure a perceived defect in the common law. Such a law clearly assumes that the defect exists. But if, say, the legislation fails entirely to cure the defect, is a court to take the fact that the legislation assumes the existence of the defect necessarily to bar the possibility of reform in this area? Surely not.

Courts must respect the intentions of the legislatures. But abolishing an action assumed to exist in legislation does not necessarily violate that respect. The existence of this kind of legislative assumption is not itself sufficient to show that the common law should not be reformed. But no more convincing argument is found in *Barclay v Penberthy*.

In any case, when the action *per quod* is property understood, the Court's position in this regard is not consistent with its other jurisprudence. In *Barclay v Penberthy* itself, the majority recognised that they were prepared to reform the common law in "cases such as *PGA v The Queen*, in which a rule of the common law has become a legal fiction because it depends upon another rule which is no longer maintained".[46] Those are precisely the circumstances faced in respect of the action *per quod*. It is an action that rests on the existence of property rights that no longer exist.

XI RESURRECTING AUSTRALIAN TORT JURISPRUDENCE

This article has identified serious problems with *Barclay v Penberthy*. Many of these are found throughout the Court's tort jurisprudence. The problems all have the same source: the idea that tort law is most fundamentally about compensating for loss. This understanding of the law is a product of the middle and later years of the twentieth century. It was promoted in the belief that it would provide a utile starting point for developing a conceptually adequate understanding of the law of tort.[47] It must now be evident that it has failed. Since we have adopted it, the law has become steadily less clear and more arbitrary.

Barclay v Penberthy is a paradigm example of this. The High Court supported the continued existence of a form of recovery that has its basis in property rights that no longer exist. It declared itself attached to a rule that could be thought to be established by a line of cases only if the rights upon which those cases turned are ignored. The Court inconsistently characterised the plaintiff's loss as the result of the violation of a quasi-property right and as purely economic. And it permitted the plaintiff to recover in negligence on the basis that the second defendant wronged the plaintiff when the plaintiff's rights were not violated. All of this is the manifestation of the same problem: the obsession with loss and the disregarding of the parties' rights.

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[45] See also Robert Stevens, 'The Divergence of the Australian and English Law of Torts' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters, 2011) 37, 40.

[46] *Barclay v Penberthy* [2012] HCA 40; 291 ALR 608, [40]. See also [154] (Kiefel J).

[47] It reaches its zenith in, for example, great works such as John Fleming, *The Law of Torts* (Thomson Reuters, 9th ed, 1998).

This led to further problems, also found throughout the Court's tort jurisprudence. The most significant is that the Court's decision-making is driven on no more principled basis than an undirected incrementalism, the result being that reform or the refusal to reform can appear to be nothing but the result of an arbitrary choice. In fact, contrary to the aims of those who introduced the idea of incrementalism into Australian tort law, in the long run it has tended to promote rather than supress the slide to an arbitrary, unprincipled law.[48]

It is to be hoped that *Barclay v Penberthy* will come to represent at least the beginning of the end for the understanding of tort law that animates it. That understanding has failed. It is time to begin again. As this article has suggested, focusing on the rights of the parties would be a good place to start. That might well be described as a return to legal analysis.

48 See also Stevens, above n 44, 37, 40.