IN THE HIGH COURT OF AUSTRALIA
PERTH OFFICE OF THE REGISTRY

No. P55 of 2011

BETWEEN:

AARON BARCLAY
Appellant

and

ALEC PENBERTHY
First Respondent

and

FUGRO SPATIAL SOLUTIONS PTY LTD (ACN 008 673 916)
Second Respondent

and

NAUTRONIX (HOLDINGS) PTY LTD (ACN 009 067 099)
L-3 COMMUNICATIONS NAUTRONIX LTD (ACN 009 019 603)
Third Respondents

and

MALCOLM ANTHONY CIFUENTES
Fourth Respondent

and

MICHAEL BRIAN KNUBLEY
Fifth Respondent

and

JUILIE ANNE WARRINER
Sixth Respondent

and

JANET GRAHAM
Seventh Respondent

and

OZAN PERINCEK
Eighth Respondent

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APPELLANT'S SUBMISSIONS

PART I: INTERNET CERTIFICATION

1. The appellant certifies that these submissions are in a form suitable for publication on the Internet.

PART II: ISSUES

2. Does the action for loss of services (*actio per quod servitium amisit*) require or justify the imposition of a duty of care in respect of a claim for pure economic loss, where otherwise no such duty of care would be owed?

3. Did the third respondents rely upon the action for loss of services (*actio per quod servitium amisit*) at the trial of this proceeding?

4. If yes, should the action for loss of services (*actio per quod servitium amisit*) be:

   (a) absorbed into the general law of negligence; or

   (b) restricted to instances of menial or domestic servants?

PART III: SECTION 78B NOTICES

5. The appellant certifies that there is no reason for notice to be given to Attorneys-General in compliance with s 78B of the *Judiciary Act* 1903 (Cth).

PART IV: DECISIONS BELOW

6. The decisions of the trial judge and the Court of Appeal are yet to be reported. The media neutral citation of each is:

   (a) *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 (11 November 2009; supplementary decision on 4 December 2009).

   (b) *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] WASCA 102 (20 April 2011; supplementary decision on 10 June 2011).

PART V: FACTS

7. On 11 August 2003, two minutes after take-off, a twin-engine aircraft crashed near the Jandakot airport in Perth, Western Australia. Of the five passengers on board, three were injured and two died. The pilot, Penberthy (the first respondent), was injured in the crash, but survived.

8. Penberthy was an employee of the second respondent, "Fugro", which owned the aircraft and carried on a commercial air charter business from Jandakot airport.

9. The third respondents, "Nautronix", had chartered the flight from Fugro to conduct surveillance and aerial work operations west of Rottnest Island to test marine technology and underwater communication systems (which it intended to exploit commercially in the defence, oil and gas, and related industries).

10. The trial judge (Murray J) held that the accident was caused by the failure of the right-hand engine during take-off, and Penberthy's negligent handling of the aircraft in response to the engine failure.

11. The ultimate source of the loss of power to the right-hand engine was the failure of a sleeve bearing in an engine-driven fuel pump. The sleeve bearing which failed was not the original sleeve bearing, but a substitute negligently designed by the applicant, Barclay, an aeronautical engineer.

12. Proceedings were commenced by Nautronix, the three surviving passengers (the fourth, fifth and eighth respondents), and the spouses of the two deceased passengers (the sixth and seventh respondents)[1]. This appeal concerns just one aspect of those claims: whether Barclay (and Penberthy) is liable to Nautronix for any pure economic loss Nautronix might have suffered as a result of the accident.

13. Murray J characterised Nautronix's claim for pure economic loss as the harm it suffered in the pursuit of its commercial interests, resulting from the death and injury of its employees[2]. They were said to have contributed substantially to the intellectual property in the technology in question, "with control of the advancement of the project to develop the technology to the point of sale or other contractual exploitation."[3] Murray J accepted, in general terms, that the injury or death of Nautronix's employees inhibited its capacity to develop and commercially exploit the technology[4].

14. Turning to the question of whether Barclay and/or Penberthy owed Nautronix a duty to exercise reasonable care in respect of its claim for pure economic loss, Murray J noted that:

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[1] See appendix 1. The surviving passengers, and the spouses of the deceased passengers, succeeded at trial in their claims in negligence against Penberthy (for whom Fugro was held to be vicariously liable) and Barclay. The claims of the spouses of the deceased passengers were brought under s 4(1) of the *Fatal Accidents Act* 1959 (WA). The trial judge apportioned liability as to two-thirds Penberthy and one-third Barclay.

[2] *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [246]. The allegation that the five passengers were employees of Nautronix (at [21] of the substituted statement of claim) was admitted by Penberthy and Fugro in their substituted defence (at [10.3]) and Barclay in his substituted defence (at [21(b)]).

[3] *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [325].

[4] *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [325], [330], [348].

(a) Barclay's involvement with the design of the replacement sleeve took place some three years prior to the date of the accident[5];

(b) there was no allegation made, or relevant evidence adduced, which suggested that Barclay knew of the use by Nautronix of the Fugro aircraft, or of the highly specialised work of Nautronix and its employees[6];

(c) by contrast, Penberthy knew the purpose of the flight, that it was for a commercial purpose, and that the passengers were Nautronix employees[7];

(d) Penberthy (and Fugro) admitted that any failure to exercise reasonable care in the piloting of the plane was likely to result in death or injury to Nautronix's employees, with resultant economic loss to Nautronix[8].

15. After considering the relevant authorities in light of these facts[9], Murray J held that Penberthy, but not Barclay, owed Nautronix a duty to exercise reasonable care to prevent it suffering pure economic loss (with Fugro vicariously liable for Penberthy's negligence)[10].

16. Penberthy (and Fugro) appealed. Relevantly, Penberthy (and Fugro) contended that Murrary J erred in holding that:

(a) Penberthy owed Nautronix a duty to exercise reasonable care to prevent it suffering pure economic loss (the third ground of appeal); and

(b) Barclay did not owe Nautronix a duty to exercise reasonable care to prevent it suffering pure economic loss (the fourth ground of appeal).

(If successful on the third ground of appeal, Penberthy would have avoided any liability to Nautronix for its pure economic loss. If successful only on the fourth ground of appeal, Penberthy's liability would have been reduced by the amount for which Barclay was jointly responsible for Nautronix's pure economic loss.)

17. The Court of Appeal upheld Penberthy's third ground of appeal in part, and upheld the fourth ground of appeal in full. As a result, Penberthy and Barclay were both found to have owed Nautronix a duty to exercise reasonable care, and were liable for any economic loss suffered as a result of Nautronix being deprived of the services of

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[5] *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [349].
[6] *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [351].
[7] See the admissions in paragraphs 11 and 15 of Penberthy's and Fugro's substituted defence (21 July 2009) and *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [346].
[8] Paragraph 23 of the substituted statement of claim (21 July 2009) and paragraph 11 of Penberthy's and Fugro's substituted defence (21 July 2009). See also *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [326].
[9] Murray J referred to *Caltex Oil (Aust) Pty Ltd v The Dredge 'Willemsted'* (1976) 136 CLR 529; *Perre v Apand Pty Ltd* (1999) 198 CLR 180; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.
[10] *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [330]-[355].

its injured (but not deceased) employees[11]. Liability was apportioned fourth-fifths as to Barclay and one-fifth as to Penberthy[12].

18. In support of the Court of Appeal's conclusion in relation to Nautronix's claim concerning its injured employees, McLure P reasoned that because "the action for loss of services [*actio per quod servitium amisit*] remains part of the law of Australia"[13], and that because "consistency between closely related common law actions is a legitimate expectation"[14], "Mr Penberthy and Mr Barclay owed a duty to Nautronix to take reasonable care to avoid pure economic loss caused by injury to its employees."[15] McLure P also held that, but for the existence of the action for loss of services, she would have decided that neither Barclay nor Penberthy owed Nautronix a duty of care to avoid pure economic loss[16].

19. McLure P also held that "the rule in *Baker v Bolton* applie[d] to both an action for loss of services and an action in negligence"[17]. She concluded that, in consequence, Nautronix could not claim for pure economic loss suffered as a result of the deaths of its two employees[18].

20. At no stage did any party rely on the action *per quod servitium amisit* in support of a submission that Barclay (or Penberthy) owed Nautronix a duty to exercise reasonable care in respect of its claim for pure economic loss.

21. Whether Nautronix relied on the action *per quod servitium amisit* at trial[19] is considered in paragraphs 39 to 42 below.

PART VI: ARGUMENT

22. Two critical errors underpin the Court of Appeal's conclusion that Barclay owed Nautronix a duty of care to avoid it suffering pure economic loss. First, the assumption that negligence, and the action *per quod servitium amisit*, are "closely related common law actions". And secondly, the idea that "consistency between closely related common law actions is a legitimate expectation", which here

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[11] *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] WASCA 102 at [21] per Martin CJ, at [126] per McLure P and at [161(1)(c)] per Mazza J.
[12] *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] WASCA 102 at [79] per McLure P and at [201] per Mazza J; cf [2] and [21] per Martin CJ. See also *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] WASCA 102 (S) at [14(6)].
[13] *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] WASCA 102 at [110].
[14] *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] WASCA 102 at [110].
[15] *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] WASCA 102 at [115].
[16] *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] WASCA 102 at [125].
[17] *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] WASCA 102 at [112].
[18] *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] WASCA 102 at [113].
[19] See references to the action in Barclay's substituted defence at [44]; T980 L13-16; Barclay's final written submissions at [110]; Nautronix's final written submissions at [172], [211]-[217].

necessitated the imposition of a duty of care (where no such a duty would otherwise have been owed). Each of these errors is considered in turn.

Negligence and *per quod servitium amisit*: not closely related actions

23. The first premise of the Court of Appeal's conclusion is located in paragraph 110 of McLure P's reasons. An unexplained link is here drawn between the actions *per quod servitium amisit* and negligence. McLure P considered the "existence" of the action *per quod servitium amisit* to be "directly relevant to whether it is reasonable to impose a duty of care in negligence." The reason for its relevance was said to be the "legitimate expectation" for "[c]onsistency between closely related common law actions".

24. In none of the judgments of the Court of Appeal is it explained how or why actions in negligence and *per quod servitium amisit* are "closely related". Upon analysis, it appears that the primary respect in which the Court of Appeal might have considered the two actions to be "closely related" was that the same facts, in a given case, may support a claim for damages based on either action. This, however, does not provide a sufficient basis upon which a duty of care (particularly in the circumstances of this case) might be erected.

25. A review of the history and nature of the action *per quod servitium amisit* reveals that it is not "closely related" to negligence in any relevant sense. The action for loss of services has its origins in feudal times, being based upon the relationship of a master and servant as one of status, not contract[20]. The servant, for the purposes of the action, "was treated as a chattel, so that an injury to the servant was an actionable wrong to the master as he was thereby deprived of the use and services of the injured servant, just as if the injury had been to his horse or cart."[21] A writ of trespass would issue to protect the legal right of a master to the services of his servant[22].

26. The action survived the transition from feudal society to modern times by "crediting the master with a proprietary interest, no longer in the servant as such, but rather in the servant's services."[23] However, during the latter half of the twentieth century the action's continued existence was questioned by judges and commentators across the common law world. In *Commissioner for Railways (NSW) v Scott*[24], Fullager J

[20] *Admiralty Commissioners v SS Amerika* [1917] AC 38 at 44-5 per Lord Parker; at 60 per Lord Sumner.
[21] P L Beck 'The action per quod servitium amisit' (1959) 17 *Faculty Law Review* 132 at 133, referring to *Everard v Hopkins* (1614) 2 Bulst 332 [80 ER 1164]; *Martinez v Gerber* (1841) 3 M&G 689 [133 ER 1069].
[22] *Admiralty Commissioners v SS Amerika* [1917] AC 38 at 44-5 per Lord Parker.
[23] C Sappideen and P Vines *Fleming's The Law of Torts* 11th edn (Lawbook Co Sydney 2011) p 770. See also the UK Law Commission's "Report on Personal Injury Litigation – Assessment of Damages" (Law Com. 56, 1973) at 32 [117].
[24] (1959) 102 CLR 392.

declared it be "so anomalous and so inappropriate to present-day conditions that the best course would be to reject it altogether."[25] Professor Seavey considered the action to be "obsolescent; and that there [was] no valid reason for reviving it."[26] The UK Law Commission described it as "archaic" and "anamolous", noting that its "abolition would leave no important loss uncompensated"[27]. And in *AG v Wilson & Horton*, Turner P referred to it as "anomalous in the extreme"[28].

27. But it is not just matters of history which set negligence and *per quod servitium amisit* apart:

(a) Unlike negligence[29], the action *per quod servitium amisit* has no requirement of foreseeability. The plaintiff (employer) need only prove damage caused by the loss of an employee's services. The defendant need not "have foreseen the possibility of harm to the plaintiff and consequently the relationship between the injured [employee] and the plaintiff."[30]

(b) The action for loss of services does not depend upon proof that the defendant breached a legal duty owed to the plaintiff, or that there has been an infringement of any "rights of property or rights of personal safety, personal freedom and personal reputation."[31] It suffices that an employer has been deprived of a personal right to the services of an employee.

(c) The class of persons able to rely on the action *per quod servitium amisit*, and the class of persons in respect of whom an action may be brought, is limited to claims made by "employers" in respect of damage suffered from the loss of an "employee's" services. Thus, an employee cannot "recover in the converse case of the employer being disabled, by proceeding against the tortfeasor for loss of employment."[32] No such restriction exists in an action in negligence.

(d) Although an employee's contributory negligence reduces a defendant's liability in negligence (if a claim were brought by the injured employee),

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[25] (1959) 102 CLR 392 at 406.
[26] W A Seavey 'Liability to Master for Negligent Harm to Servant' (1956) *Washington University Law Quarterly* 309 at 313.
[27] UK Law Commission's "Report on Personal Injury Litigation – Assessment of Damages" (Law Com. 56, 1973) at 33 [121].
[28] [1973] 2 NZLR 238 at 248.
[29] *Crimmins v Stevedoring Industry Financing Committee* (1999) 200 CLR 1 at 39 [93]; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 555 [9] per Gleeson CJ; *Kuhl v Zurich Financial Services Australia Ltd* (2011) 276 ALR 375 at [20] per French CJ and Gummow J.
[30] P L Beck 'The action per quod servitium amisit' (1959) 17 *Faculty Law Review* 132 at 134.
[31] *Admiralty Commissioners v SS Amerika* [1917] AC 38 at 54 per Lord Sumner.
[32] C Sappideen and P Vines *Fleming's The Law of Torts* 11th edn (Lawbook Co Sydney 2011) p 770.

damages recoverable by an employer in an action for loss of services are not so affected[33].

28. Rights of action in negligence and *per quod servitium amisit* are therefore not "closely related" in any relevant sense. Just because the same set of facts may provide a bases for pleading both claims, this does not provide a sufficient premise for the Court of Appeal's ultimate conclusion that "Barclay owed a duty to Nautronix to take reasonable care to avoid pure economic loss caused by injury to its employees"[34].

"Consistency" between negligence and *per quod servitium amisit* not required

29. Having decided that the actions in negligence and *per quod servitium amisit* were "closely related", McLure P then took the further step of concluding (at [110]) that "consistency between [these] closely related common law actions is a legitimate expectation". Her reasons do not reveal the basis, or content, of this "legitimate expectation", but it was on this footing that she decided (at [115]), and Martin CJ and Mazza J agreed, that Barclay owed Nautronix a duty of care.

30. If McLure P's reference to "consistency" was intended to be an allusion to the need for "coherence" in the common law, such a proposition – on the facts of this case – finds no support in the relevant authorities. Cases such as *Sullivan v Moody*[35] and *CAL No 14 Pty Ltd v Motor Accidents Insurance Board*[36], where "coherence" was in issue, were concerned with whether the imposition of a duty of care would be incompatible with countervailing statutory or tortious obligations. These cases concerned different questions of principle. No question of incoherence arises merely because negligence and *per quod servitium amisit* may respond in different ways to the same set of facts. The two actions' distinct historical and doctrinal underpinnings reveal why this is so.

31. If there were a "legitimate expectation" which required the consistent development of these two causes of action, the more appropriate course would be for the action *per quod servitium amisit* to be absorbed back into the law of negligence, not the other way around. This would be consistent with the approach taken by this Court in *Burnie Port Authority v General Jones Pty Ltd*[37], in which the rule in *Rylands v Fletcher* was absorbed into, and qualified by, the general rules of negligence. It would also be

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[33] *Curran v Young* (1965) 112 CLR 99 (in relation to the action *per quod consortium amisit*); *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 408 per Fullager J. See also the 11th Report of the Law Reform Committee "Loss of Services, etc" (Cmnd 2017, 1963) at 6 [10].
[34] *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] WASCA 102 at [115].
[35] (2001) 207 CLR 562 at 581 [55] and 582 [62] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.
[36] (2009) 239 CLR 390 at [39]-[40] per Gummow, Heydon and Crennan JJ, with whom French CJ and Hayne J agreed.
[37] (1994) 179 CLR 520.

consistent with law's movement away from the differentiation of liability between classes of defendants in negligence (such as occupiers[38] and highway authorities[39]).

32. The proposition that "consistency" requires the action *per quod servitium amisit* to, in effect, be grafted onto the law of negligence, extends the circumstances in which a duty of care might be owed where it otherwise would not have been (such as in this case). Such a proposition is not only wrong in principle, but also sits uneasily with the partial statutory abrogation of *per quod servitium amisit* in some Australian states[40]. Rather than limiting the circumstances in which the action for loss of services may be brought (as certain Parliaments intended), the effect of the Court of Appeal's decision may be to allow or encourage the pursuit of such claims, so long as they are framed as actions in negligence rather than *per quod servitium amisit*.

33. The Court of Appeal erred in failing to apply "the accepted approach in this country"[41], identified by Brennan J in *Sutherland Shire Council v Heyman*[42], that "the law should develop novel categories of negligence incrementally and by analogy with established categories". Instead, the Court of Appeal extended the law of negligence by reference to the action *per quod servitium amisit* – an action shown to be historically and conceptually distinct from negligence.

No duty of care (for pure economic loss) owed by Barclay

34. In determining whether Barclay owed Nautronix a duty of care to prevent it suffering pure economic loss, the Court of Appeal should have applied the facts of this case to the principles established in cases including *Caltex Oil (Aust) Pty Ltd v The Dredge 'Willemsted'*[43], *Perre v Apand Pty Ltd*[44] and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[45]. As McLure P observed[46], had the Court of Appeal taken this approach, it would not have imposed on Barclay a duty to exercise reasonable care.

35. Facts relevant to whether Barclay owed Nautronix a duty of care to prevent it suffering pure economic loss were that:

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[38] *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.
[39] *Brodie v Singleton Shire Council* (2001) 206 CLR 512.
[40] Section 4 of the *Employees Liability Act* 1991 (NSW); s 93A of the *Transport Accident Act* 1986 (Vic); s 306M of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld); s 58 of the *Civil Liability Act* 2003 (Qld). The action has also been abolished in the UK (s 2(c)(i) of the *Administration of Justice Act* 1982 (UK)) and New Zealand (s 5(2) of the *Accident Compensation Act* 1972 (NZ)).
[41] *Cattanach v Melchior* (2005) 215 CLR 1 at 24 [39] per Gleeson CJ.
[42] (1985) 157 CLR 424 at 481. See also *Hawkins v Clayton* (1988) 164 CLR 539 at 556 per Brennan J.
[43] (1976) 136 CLR 529.
[44] (1999) 198 CLR 180.
[45] (2004) 216 CLR 515.
[46] *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] WASCA 102 at [125].

(a) Barclay had no direct commercial relationship with Nautronix, but provided his services on behalf of a company which had a contract of service with Fugro[47];

(b) Barclay's work in designing the replacement sleeve bearing took place some three years before the accident at Jandakot[48];

(c) there was no finding that Barclay had any knowledge of the particular flight, or of its purpose, its passengers or their employer[49];

(d) Barclay had no knowledge of the highly specialised work of Nautronix and its employees, the nature of the economic loss that Nautronix might suffer if deprived of such employees, or that its employees could not be replaced within a reasonable time or at all[50];

(e) Fugro and Nautronix had entered into a charter contract, which could have provided (but did not) that Nautronix was entitled to recover any loss it suffered if Fugro failed to deliver the services it had agreed to provide[51].

36. These facts reveal that Nautronix was not vulnerable – in the relevant legal sense[52] – to any want of reasonable care by Barclay; that the pure economic loss alleged to have been suffered by Nautronix was not reasonably foreseeable by Barclay; and that, on the facts of this case, Barclay did not have the means of ascertaining a determinate class of persons or entities to whom a duty to exercise reasonable care, in relation to a claim for pure economic loss, might be owed.

37. The contrast between this case and *Caltex Oil* and *Perre v Apand*, is immediately apparent. In *Caltex Oil*, the defendant knew that damage to the pipeline was inherently likely to produce economic loss[53]. In *Perre v Apand*, the defendant's internal communications acknowledged the need to be careful so as not to damage the interests of those involved in potato growing on land within 20km of a farm that may be infected by bacterial wilt[54]. Thus, unlike here, there was "actual foresight of the likelihood of harm, and knowledge of an ascertainable class of vulnerable persons"[55].

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[47] *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [178].
[48] *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [349].
[49] *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [280]-[282].
[50] *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [350]-[351].
[51] *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [354]-[355].
[52] See for example *Perre v Apand* at 225 [118] per McHugh J; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 530 [23] and 533 [31] per Gleeson CJ, Gummow, Hayne and Heydon JJ.
[53] (1976) 136 CLR 529 at 576 per Stephen J; *Woolcock Street Investments* at 530 [22] per Gleeson CJ, Gummow, Hayne and Heydon JJ.
[54] At 194-5 [13] per Gleeson CJ; 202 [41] per Gaudron J; 233 [141] per McHugh J.
[55] *Perre v Apand* at 195 [13] per Gleeson CJ.

38. In light of these matters, the Court of Appeal should have affirmed the decision of the trial judge, Murray J, that Barclay did not owe Nautronix a duty to exercise reasonable care. Instead, it did the opposite, thereby bringing "pure economic loss largely into line with physical injury to person or property"[56].

The action per quod servitium amisit

39. Nautronix has filed a notice of contention in which it contends that the Court of Appeal should have upheld its claim for pure economic loss against Barclay and Penberthy based upon the action *per quod servitium amisit*. This should be rejected. The trial was not conducted on the basis that Nautronix relied on the action *per quod servitium amisit.*

40. Nautronix's substituted statement of claim fastened upon, and consistently referred only to, its claims in "negligence"[57] and in "contract"[58]. In so doing, Nautronix chose to plead not just allegations of material fact, but also legal conclusions. It was incumbent on Nautronix in these circumstances to make it plain that it also relied on the action *per quod servitium amisit*. At no stage did it do so. In fact, in its written closing submissions, Nautronix sought not to embrace the action *per quod servitium amisit*, but to avoid it, including any effect the action's "principles" may have had in defeating Nautronix's claim for damages[59]. Hence, Nautronix submitted that *Swan v Williams (Demolition) Pty Ltd*[60] (in which it was held that an action for loss of services did not lie in respect of a deceased employee) did not affect its claim because "the defendants breached their duty of care to Nautronix"[61] (our emphasis).

41. The manner in which Nautronix ran its case at trial is reflected in the judgment of Murray J, who made no finding about Nautronix's purported claim for loss of services based on an action *per quod servitium amisit*[62].

42. Nautronix's approach in the Court of Appeal is also telling. At no stage did Nautronix suggest that Penberthy's appeal in relation to Murray J's finding of negligence was "academic" because Nautronix could still rely on the action *per quod servitium amisit.* Further, Nautronix never filed a notice of contention or cross appeal in the Court of Appeal in relation to this aspect of the case. And that explains the Court of Appeal's

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[56] *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] WASCA 102 at [124].
[57] See the headings at paragraph 23 ("the claim ... for damages for negligence), paragraph 28 ("the claim ... against Barclay for damages for negligence). See also the references to "negligence" and "duty" in paragraphs 24, 25, 26, 27, 30, 31 and 41.
[58] See the heading paragraph 32 and following.
[59] See paragraph 172 of Nautronix's closing written submissions.
[60] (1987) 9 NSWLR 172 (NSWCA).
[61] Paragraph 216 of Nautronix's closing written submissions.
[62] See the discussion in *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 from [356], and in particular at [359].

novel (and erroneous) approach in extending the law of negligence for pure economic loss, despite being informed by counsel for Penberthy "that the case ha[d] not been conducted, either below or in [the Court of Appeal], on the basis [of] an exception... to the general considerations of when a duty with respect to economic loss will arise"[63].

43. However, if the Court were to accept that the action *per quod servitium amisit* was run at trial, and could now be relied on in this appeal[64], Barclay would seek leave to reopen *Commissioner for Railways (NSW) v Scott*[65] and, if necessary, *Mercantile Mutual Insurance Co Ltd v Argent Pty Ltd*[66].

10 44. In *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*[67], Brennan J stated that "[l]eave to reopen will be given from time to time not only to correct an error which has become manifest in an earlier decision but also to permit a review of doctrines which were the product of and suited to an earlier age but which work injustice or inconvenience in contemporary conditions." Although it is a jurisdiction to be used sparingly, this appeal presents the appropriate case. The action *per quod servitium amisit* is the product an earlier age. It should no longer stand apart from, but rather be absorbed into and form part of, the general law of negligence. Alternatively, the action should be limited to menial or domestic servants. These were the alternate positions accepted in *Scott* by Fullager J[68] on the one hand, and Dixon CJ[69] and
20 McTiernan J[70] on the other (each in dissent).

45. The criticisms made of the action *per quod servitium amisit*, referred to in paragraph 26 of these submissions, are justified numerous grounds. First, there is no reason in principle why the action enures only for the benefit of a limited class: the master (or employer) who is able to recover for the loss a servant's (or employee's) services. As Fullagar J stated in *Scott*[71]:

> If we are to allow the remedy in such a case, why should we deny it to a servant who has lost employment through injury to his master, or to an independent contractor with the injured person, or to a partner of the injured person, or to a company whose director is injured, or to an
30 insurer which has had to make payments under an accident policy to the injured person, or to a government which pays him an invalid pension,

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[63] See T 57 L4-21 (senior counsel for Penberthy and Fugro).
[64] See *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 526 and the reference in argument by Mason CJ to *NRMA Insurance Ltd v B&B Shipping & Marine Salvage Co Pty Ltd* (1947) 47 SR (NSW) 273.
[65] (1959) 102 CLR 392.
[66] (1972) 46 ALJR 432 per Barwick CJ, Menzies and Walsh JJ.
[67] (1988) 165 CLR 107 at 131.
[68] (1959) 102 CLR 392 at 406.
[69] (1959) 102 CLR 392 at 398.
[70] (1959) 102 CLR 392 at 405-6.
[71] (1959) 102 CLR 392 at 408.

> or to the Commissioner of Taxation who receives less income tax from him because his earnings are reduced? ... I am, of course, aware that there are anomalies in our law anyhow, but that is not to say that they are ornaments of the fabric, or that their number should be unnecessarily increased.

46. The reasons for these incongruities are rooted in history, and while they explain the form or scope of the action, they do not justify its retention.

47. A second and related difficulty with the action *per quod servitium amisit* is its restriction to the loss of an "employee's" services. This restriction perpetuates and highlights the anomalous features of the action. For example, in *Attorney-General for New South Wales v Perpetual Trustee Co (Limited)*[72], the Privy Council confirmed that because the powers of a police constable are exercised as a matter of original authority and not on behalf of the Crown[73], an action did not lie for the loss of services of a member of the New South Wales police force. The anomaly in such a case is particularly acute because a police officer will sometimes act as an agent of the Crown (for example, when employed as an examiner of firearms or in keeping records[74]) and sometimes exercise the powers of a constable as a matter of original authority (for example, when exercising powers of arrest or apprehension[75]). Thus, the availability of the action *per quod servitium amisit* will depend on the circumstances in which a police officer is injured, and more particularly whether at the time he or she was acting as an agent of the Crown or with original authority.

48. The answer to such difficulties lies not in extending the action *per quod servitium amisit* to accommodate these circumstances. Expanding the scope of the action would only create further unjustified exceptions to the general principles of negligence (as to when a duty of care will be imposed in respect of pure economic loss) and potentially create inconsistencies with settled areas of the law, such as the liability of the Crown for the actions of a police officer[76]. Rather, the appropriate response is for the action to absorbed back into the general law of negligence.

49. Further criticisms can be made about the action. The inability of a defendant to rely on an employee's contributory negligence is one example[77]. Confusion about the appropriate assessment of damages is another[78].

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[72] [1955] AC 457, affirming the decision of the High Court in *Attorney-General for New South Wales v Perpetual Trustee Co (Limited)* (1952) 85 CLR 237.
[73] *Enever v The King* (1906) 3 CLR 99; *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 65 [70] per McHugh, Gummow and Hayne JJ; at 81 [119] per Callinan J.
[74] *Kirkland-Veenstra v Stuart (No 2)* [2008] VSCA 211 at [32] per Nettle JA.
[75] *Kirkland-Veenstra v Stuart (No 2)* [2008] VSCA 211 at [32] per Nettle JA.
[76] *Enever v The King* (1906) 3 CLR 99 and s 123(2) of the *Police Regulation Act* 1958 (Vic). See also the comments of Kitto J in *Attorney-General (NSW) v Perpetual Trustee Co (Limited)* (1952) 85 CLR 237 at 301-2.
[77] See fn 32.

50. In *R v Buchinsky*[79], Dickson J stated that the "debate is not whether the original assumptions underlying the action can any longer be supported. That rationale is plainly offensive in today's society. The serious question is whether, despite its antiquated origins, the action can now find a different justification." His Honour went on to ask: "Does it serve a useful purpose that would not otherwise be met? Is it consistent with general principles of tort law concerning collateral benefits and recovery for economic loss? Do employers, simply because they are employers, merit a special cause of action? Should the action *per quod servitium amisit* be abandoned, maintained or expanded?"

10 51. For the reasons outlined above, and because "the original functions of the action *per quod* are being fulfilled by other means more consistent with the general principles of modern tort law"[80], the answer to the first three questions posed by Dickson J should be 'no'. It follows that the action should be abandoned or, alternatively, limited to cases of menial or domestic servants.

PART VII: APPLICABLE STATUTES

52. Save for the legislation referred to in footnote 40 of these submissions, there was no applicable statute at the relevant time.

20 **PART VIII: ORDERS SOUGHT**

1. Appeal allowed with costs.

2. Set aside paragraphs 2 and 3 of the orders of the Court of Appeal of the Supreme Court of Western Australia made on 10 June 2011 and, in their place, order that:

   (a) paragraphs 5 and 6 of the orders of Murray J in proceeding CIV 1223 of 2008 be set aside and, in the place, order that:

      (i) the first and third defendants pay the sixth plaintiffs' damages for pure economic loss occasioned by injuries to the first, second and fifth plaintiffs, such damages to be assessed;

      (ii) as between the first, second and third defendants, liability for
30 damages and costs payable to the first second, third, fourth, fifth and sixth plaintiffs be apportioned as to 20% to the first and third defendants and 80% to the second defendant, save for the sixth

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[78] See the discussion in *AG v Wilson & Horton* [1973] 2 NZLR 238 at 252-8 per Richmond J.
[79] [1983] 1 SCR 481 at 490 (SCC).
[80] Law Reform Commission of British Columbia *Report on the action per quod servitium amisit* (LRC 89, Nov 1986) p 12.

plaintiffs' claim for damages for pure economic loss for which the first and third defendants are solely liable.

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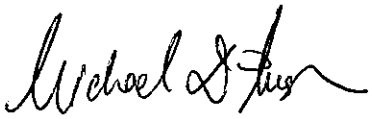

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Dated: 4 January 2012

Annexure 1 – The Parties

	High Court	Court of Appeal (appeal)	Supreme Court (trial)
Aaron Barclay	Appellant	Seventh Respondent	Second Defendant
Alec Penberthy	First Respondent	Second Appellant	Third Defendant
Fugro Spatial Solutions Pty Ltd	Second Respondent	First Appellant	First Defendant
Nautronix (Holdings) Pty Ltd & L-3 Communications Nautronix Ltd	Third Respondents	Sixth Respondents	Sixth Plaintiffs
Malcolm Cifuentes	Fourth Respondent	First Respondent	First Plaintiff
Michael Knubley	Fifth Respondent	Second Respondent	Second Plaintiff
Julie Warriner	Sixth Respondent	Third Respondent	Third Plaintiff
Janet Graham	Seventh Respondent	Fourth Respondent	Fourth Plaintiff
Ozan Perincek	Eighth Respondent	Fifth Respondent	Fifth Plaintiff