



HIGH COURT OF AUSTRALIA

2 October 2012

AARON BARCLAY v ALEC PENBERTHY & ORS

ALEC PENBERTHY & ANOR v AARON BARCLAY & ORS

[2012] HCA 40

Today the High Court held, by majority, that a pilot, his employer and an aeronautical engineer were liable to Nautronix (Holdings) Pty Ltd ("Nautronix") for the crash of a plane which a company related to Nautronix had chartered. The pilot, his employer and the engineer were liable in the action *per quod servitium amisit* ("*per quod*") for wrongfully depriving Nautronix of the service of its employees injured in the crash, and the pilot and his employer were also liable to Nautronix in negligence.

In 2003, a company related to Nautronix chartered an aircraft from Fugro Spatial Solutions Pty Ltd ("Fugro") to test technology Nautronix had developed. Mr Penberthy, an employee of Fugro, flew the aircraft with five passengers on board. Each of the passengers was an employee of Nautronix. The plane crashed, killing two passengers and injuring all others. The accident was caused by an engine failure and Mr Penberthy's negligent handling in response to that engine failure. Mr Aaron Barclay, an aeronautical engineer, designed the engine component that ultimately caused the engine failure.

Nautronix, the surviving passengers and the spouses of the deceased passengers commenced proceedings in the Supreme Court of Western Australia against Mr Penberthy, Fugro and Mr Barclay. The primary judge found that each of Mr Penberthy, Fugro and Mr Barclay was liable to each of the surviving passengers and the spouses of the deceased passengers in negligence. The primary judge further found that Mr Penberthy and Fugro (but not Mr Barclay) were liable to Nautronix in negligence.

Some of the primary judge's conclusions were appealed and cross-appealed to the Court of Appeal. That Court concluded that Mr Penberthy, Fugro and Mr Barclay were liable in negligence for any economic loss suffered by Nautronix as a result of the loss of its three injured employees. It further held that Nautronix could not claim for damages resulting from the loss of its two deceased employees due to the rule established in *Baker v Bolton* that a person cannot recover damages for the death of another.

Mr Penberthy, Fugro and Mr Barclay appealed to the High Court and Nautronix sought special leave to cross-appeal. In the High Court, Nautronix did not support the conclusion of the Court of Appeal that Mr Barclay was liable to it in negligence. The proceedings in the High Court raised three broad issues.

The first issue was the status of the rule in *Baker v Bolton*. The High Court unanimously held that this rule formed part of the common law of Australia and that it prevented Nautronix from recovering damages for the loss of its two deceased employees.

The second issue was the liability of Mr Penberthy and Fugro to Nautronix in negligence. A majority of the Court held that Mr Penberthy and Fugro owed Nautronix a duty to take care not to cause it economic loss.

The third set of issues concerned the *per quod* action, which enables an employer to recover damages for wrongful loss of an employee's services. The Court unanimously held that this action was a part of the common law of Australia and that, if it were permissible for Nautronix to raise the claim in the High Court, Mr Penberthy, Fugro and Mr Barclay would be liable to Nautronix for the wrongful loss of the services of its injured employees. A majority of the Court held that it was open to Nautronix to raise this claim, and the majority therefore held that each of Mr Penberthy, Fugro and Mr Barclay was thus liable to Nautronix in this action. The majority further concluded that the amount of damages in this action was to be measured by reference to the market value of the services lost. That market value was generally to be calculated by reference to the price of employing a substitute less the wages no longer payable to the injured employee.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*