HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

Matter No P55/2011

AARON BARCLAY — APPELLANT

AND

ALEC PENBERTHY & ORS — RESPONDENTS

Matter No P57/2011

ALEC PENBERTHY & ANOR — APPELLANTS

AND

AARON BARCLAY & ORS — RESPONDENTS

Barclay v Penberthy
Penberthy v Barclay
[2012] HCA 40
2 October 2012
P55/2011 & P57/2011

ORDER

In Matter No P55/2011

1. *Subject to orders 4 and 5, appeal dismissed.*

2. *Special leave be granted to the third respondents to cross-appeal, the cross-appeal be treated as instituted and heard instanter and dismissed.*

3. *The appellant pay the costs of the third respondents of the appeal, and the third respondents pay the costs of the appellant of the cross-appeal, the costs to be set-off.*

4. *The appellant and the first and second respondents, and the third respondents have leave, within 21 days of the date of these orders, to bring in agreed draft orders finally disposing of the appeal, including consequential orders dealing with the orders made in the Court of Appeal and with the further conduct of the trial in the Supreme Court.*

5. *In the absence of agreed draft orders as provided in order 4, the appellant and the first and second respondents, and the third respondents have leave, within 28 days of the date of these orders, to file written submissions as to the appropriate orders finally disposing of the appeal as indicated in order 4.*

In Matter No P57/2011

1. *Subject to orders 4 and 5, appeal dismissed.*

2. *Special leave be granted to the second respondents to cross-appeal, the cross-appeal be treated as instituted and heard instanter and dismissed.*

3. *The appellants pay the costs of the second respondents of the appeal, and the second respondents pay the costs of the appellants of the cross-appeal, the costs to be set-off.*

4. *The appellants and the first respondent, and the second respondents have leave, within 21 days of the date of these orders, to bring in agreed draft orders finally disposing of the appeal, including consequential orders dealing with the orders made in the Court of Appeal and with the further conduct of the trial in the Supreme Court.*

5. *In the absence of agreed draft orders as provided in order 4, the appellants and the first respondent, and the second respondents have leave, within 28 days of the date of these orders, to file written submissions as to the appropriate orders finally disposing of the appeal as indicated in order 4.*

On appeal from the Supreme Court of Western Australia

Representation

B W Walker QC with H J Langmead SC and M D Rush for the appellant in P55/2011 and the first respondent in P57/2011 (instructed by DLA Piper Australia)

D J Fagan SC with S A Richards for the first and second respondents in P55/2011 and the appellants in P57/2011 (instructed by SRB Legal)

W A Harris SC with A Golem for the third respondents in P55/2011 and the second respondents in P57/2011 (instructed by Herbert Smith Freehills)

Submitting appearance for the fourth to eighth respondents in P55/2011

Submitting appearance for the third to seventh respondents in P57/2011

CATCHWORDS

Barclay v Penberthy
Penberthy v Barclay

Negligence – Pure economic loss – Plane crash caused by engine failure and negligent response of pilot – Whether damages recoverable for pure economic loss suffered by employer due to injury to employees.

Tort – Action *per quod servitium amisit* – Whether absorbed into tort of negligence – Whether action *per quod servitium amisit* exists under common law of Australia.

Tort – Action *per quod servitium amisit* – Measure of damages – Remoteness – Whether damages recoverable calculated by price of substitute less wages no longer paid to injured employee.

Tort – Rule in *Baker v Bolton* – Whether employer can recover for death of employee.

Words and phrases – "*per quod servitium amisit*", "pure economic loss", "vulnerability".

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN AND BELL JJ. These appeals from the Court of Appeal of the Supreme Court of Western Australia[1] were heard together. They arise from litigation instituted in the Supreme Court in 2008 after the crash of an aircraft in 2003. The issues in this Court turn upon liability in negligence for "pure economic loss", the action *per quod servitium amisit* ("*per quod*") and the retention of what is known as the rule in *Baker v Bolton*[2], namely that the death of a person cannot constitute a cause of action giving rise to a claim for damages[3].

2 Something first should be said respecting the circumstances giving rise to the litigation.

The facts

3 Fugro Spatial Solutions Pty Ltd ("Fugro") was the holder of an Air Operator's Certificate issued by the Civil Aviation Safety Authority ("CASA") pursuant to the *Civil Aviation Act* 1988 (Cth) ("the Act") in respect of a Cessna 404 Titan Twin Engine Aircraft with the registration number VH-ANV ("the Plane"). The certificate authorised the conduct of activities including aerial survey work. There has been no issue as to whether the flight in which the Plane crashed was authorised by that certificate.

4 Fugro was a member of an international corporate group and was ultimately owned by a company in the Netherlands. Fugro carried on the business of providing air charter services for commercial purposes, including the testing and development of technology, from premises it occupied at Jandakot Airport, near Perth. Mr Alec Penberthy was employed by Fugro as a commercial pilot.

5 Mr Aaron Barclay was an aeronautical engineer employed by Aeronautical Engineers Australia Pty Ltd ("AEA") and was an authorised person, within the meaning of the Civil Aviation Regulations 1988 made under the Act,

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1 *Fugro Spatial Solutions Pty Ltd v Cifuentes* (2011) Aust Torts Reports ¶82-087 (Martin CJ, McLure P and Mazza J).

2 (1808) 1 Camp 493 [170 ER 1033].

3 *Crotty v Woolworths Ltd* (1942) 43 SR (NSW) 133 at 135 per Jordan CJ; affd *Woolworths Ltd v Crotty* (1942) 66 CLR 603; [1942] HCA 35; *Swan v Williams (Demolition) Pty Ltd* (1987) 9 NSWLR 172 at 191 per Priestley JA.

to approve the design for a modification to or repair of an aircraft component. In July 2000, AEA was engaged to advise whether a sleeve bearing within an engine driven fuel pump in the Plane could be replaced locally. Mr Barclay advised that this could be done and he drafted the design drawing for the local manufacturer of the sleeve bearing, using an aluminium bronze alloy. The bearing was then manufactured and on 18 October 2000 was installed in the right engine of the Plane. The Plane then went back into service.

6 Nautronix (Holdings) Pty Ltd ("Nautronix Holdings") held the whole of the issued share capital of Nautronix Limited ("Nautronix")[4]. These companies have related corporations in the United States. By assignment from Nautronix made in July 2006, Nautronix Holdings sued in the Supreme Court upon relevant claims of Nautronix.

7 In 2003, Nautronix carried on the business of researching and developing marine technology, in particular, acoustic technology for subsea communications used in defence, oil and gas, and related industries. At its premises on Marine Terrace in Fremantle, Nautronix had about 100 employees. These included the Engineering Director, Mr Harry Protoolis; the Project Manager, Mr Steven Warriner; the software team leader, Mr Malcolm Cifuentes; the Project Manager, Mr Michael Knubley; and Mr Ozan Perincek, who was the Systems Engineer. Mr Protoolis was killed instantly in the crash and Mr Warriner died several months thereafter from his injuries. Messrs Cifuentes, Knubley and Perincek were on the flight and were injured but, with the pilot, Mr Penberthy, they survived.

8 Nautronix was testing equipment of its design which was intended to indicate from aircraft the position of submarines and to provide communications with them. This was being done with a view to Nautronix selling the equipment to the Royal Australian Navy and the United States Navy. The testing involved flying the Plane, as modified by Fugro to accommodate the equipment and its operation, to a destination in the Indian Ocean west of Rottnest Island where there was a naval support surface vessel. Nautronix understood that there also was a submarine on the flight path of the Plane.

9 On Thursday 7 August 2003, Mr Warriner as Project Manager for Nautronix sent an e-mail to two officers of Fugro confirming, "Following discussions this morning", what were "the following requirements":

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4 Now named L-3 Communications Nautronix Limited.

"1. Aircraft Mobilisation 10:00 – 15:00 Friday 8th August 2003

2. Participation in Pre-flight briefing HMAS Stirling 10th August 2003 15:00 (we are currently seeing if they can pickup there passes on Sunday vs Friday)

   a. Pilots are to go to the Submarine Training Centre (Theater)

3. Acoustic Telemetry trial – VH-ANV 15:00 - 19:00 11th August 2003

4. Antisubmarine warfare activity with RAAF 0700 – 14:00 13th August 2003

5. Antisubmarine [warfare] activity with RAAF 17:00–24:00 13th August, 2003

6. Demobilization aircraft 09:00–11:00 14th Aug 2003".

10 Earlier, on 4 February 2003, Mr Penberthy had signed a document headed "Undertaking of Security by a Consultant" which had been required by the Defence Security Authority for him to be engaged as a pilot on these activities.

11 As indicated in point 1 of the e-mail, on Friday 8 August modifications to mobilise the Plane were carried out by Fugro at the hangar at Jandakot Airport. The modifications included the provision of a sonobuoy launching chute or tube, the installation of two antennae, and the addition of boxes for attachment inside of the Plane to hold the Nautronix equipment which was to be in operation during the flight.

12 At about 3.30pm on Monday 11 August 2003 the Plane took off, piloted by Mr Penberthy with the five passengers, Mr Protoolis, Mr Warriner, Mr Cifuentes, Mr Knubley and Mr Perincek. About two minutes after take-off the Plane crashed near the airport and was immediately engulfed in fire. As noted above, the result was the death of Mr Protoolis and, later, Mr Warriner; the other three passengers and the pilot were injured but survived. The equipment of Nautronix was damaged or destroyed.

13 The accident was caused by the failure of the right-hand engine during take-off and by the negligent handling of the aircraft by Mr Penberthy in response to that engine failure. The ultimate source of the loss of power to the right-hand engine was the failure of the substitute sleeve bearing which had been designed by Mr Barclay with the specification of an unsuitable aluminium bronze

alloy. The bearing failed after 1353 flying hours; it should have had a minimum operation of 1600 hours.

The trial

14 In the Supreme Court, proceedings CIV 1312/08 were commenced by the two Nautronix companies, the three surviving passengers and the spouses of the passengers who had died. The claims of the spouses were brought under s 4(1) of the *Fatal Accidents Act* 1959 (WA), the descendant in Western Australia of *Lord Campbell's Act*[5]. At a trial before Murray J, which it should be emphasised was limited to issues of liability, all the plaintiffs, including Nautronix, succeeded in their claim for negligence against Mr Penberthy. Fugro was held to be vicariously liable for the negligence of Mr Penberthy. The claims against Mr Barclay of the other plaintiffs succeeded but that by Nautronix against Mr Barclay was dismissed[6]. The success of the claims in negligence by the employees against Mr Penberthy and against Mr Barclay is important in considering any action against them by Nautronix for loss of the services of its employees.

15 For its part, Fugro also sued Mr Barclay, in proceedings CIV 2279/09, among other things, for an indemnity for the loss suffered by the plaintiffs in CIV 1312/08. The issues of liability in this proceeding were tried together with those in the other action. Murray J ordered that Mr Barclay pay Fugro one-third of the damages to be assessed against Fugro in the action for pure economic loss against Fugro by Nautronix. Proceedings CIV 2279/09 also included a claim by Fugro against CASA in negligence, but that claim was not before Murray J and appears to have been stood over.

16 In dealing with the issues as to whether Nautronix should succeed against the designer and the pilot, Messrs Barclay and Penberthy respectively, Murray J emphasised that the replacement sleeve had been designed some three years before the date of the accident and that there was no evidence suggesting that Mr Barclay had known of the use by Nautronix of the Plane for its highly specialised work[7]. In contrast, his Honour emphasised that Mr Penberthy knew

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5 *Fatal Accidents Act* 1846 (UK) (9 & 10 Vict c 93).

6 *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [433].

7 [2009] WASC 316 at [349]-[351].

of the purpose of the flight, that it was for a commercial purpose and that the passengers were Nautronix employees[8].

The Court of Appeal

17 On the appeal by Fugro and Mr Penberthy, and cross-appeals by Mr Barclay and Nautronix, the issues included not only whether Murray J had erred in finding in favour of Nautronix on its negligence claim against Mr Penberthy and Fugro, but also whether his Honour had erred in holding that Mr Barclay owed no duty of care to Nautronix for pure economic loss. The Court of Appeal held that both Mr Penberthy and Mr Barclay had owed Nautronix a duty to exercise reasonable care and were liable in negligence for any economic loss suffered as a result of the deprivation to Nautronix of the services of the three injured employees. But the Court of Appeal held that Nautronix could not base any claim upon the loss of services suffered as a result of the deaths of the two employees. This was because "[t]he rule in *Baker v Bolton* applies to both an action for loss of services and an action in negligence"[9].

18 As regards the claim by Nautronix in respect of its injured employees, McLure P, who gave the principal reasons, said[10]:

> "[T]he existence of this common law action [for *per quod*] is directly relevant to whether it is reasonable to impose a duty of care in negligence. 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."

Significantly, her Honour added that "[b]ut for the existence of the common law [*per quod* action] and the significance there attached to the employer/employee relationship" she "would have concluded that neither Mr Penberthy nor

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8 [2009] WASC 316 at [346].

9 (2011) Aust Torts Reports ¶82-087 at 64,884 [112].

10 (2011) Aust Torts Reports ¶82-087 at 64,884 [110].

Mr Barclay owed Nautronix a duty of care to avoid the pure economic loss the subject of the claim"[11].

The issues in this Court

19 There are appeals by Mr Barclay and by Mr Penberthy and Fugro. The appeals are resisted by Nautronix, which also seeks special leave to cross-appeal on the issue concerning the rule in *Baker v Bolton*.

20 In this Court, Nautronix does not seek to support the reasoning of the Court of Appeal which founded its success against both Mr Penberthy and Mr Barclay on the claims of negligently inflicted economic loss upon the significance of the action *per quod*. Rather, as against Mr Penberthy, Nautronix seeks to base its case upon the reasoning of Murray J on the negligence claims, and also upon the action *per quod* in respect of the employees who had been passengers on the plane and had been killed or injured by the negligence of Mr Penberthy. As against Mr Barclay, Nautronix bases its case in this Court upon the action *per quod* alone. Nautronix challenges the holding in the Court of Appeal that the rule in *Baker v Bolton* denied any action in respect of the loss of services of the two deceased employees.

21 The issues argued before this Court fall under six heads as follows:

1. Does the rule in *Baker v Bolton* no longer form part of the common law of Australia so that it cannot prevent recovery by Nautronix in respect of the deaths of its two employees? This should be answered to the effect that the rule does form part of the common law of Australia.

2. Does the action *per quod* exist under the common law of Australia? This should be answered in the affirmative.

3. Irrespective of the reliance by the Court of Appeal on the action *per quod*, did Mr Penberthy owe Nautronix a duty of care at common law to avoid "pure economic loss" to Nautronix flowing from loss of services of its injured employees? This should be answered in the affirmative.

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11 (2011) Aust Torts Reports ¶82-087 at 64,885 [125].

4. If "yes" to 2, having regard to the pleadings and the conduct of the litigation, is it open to Nautronix in this Court to rely upon an action *per quod*? This should be answered in the affirmative.

5. If "yes" to 4, were Mr Barclay and Mr Penberthy liable to Nautronix on such an action? This also should be answered "yes".

6. If "yes" to 5, what is the measure of damages in such an action? The measure of damages is that which compensates for the interference with the right to the services of the employee. The assessment of the quantum of damages in this case will depend upon the evidence received at the further conduct of the trial.

Issue 1 – the rule in *Baker v Bolton*

22 Nautronix seeks special leave to cross-appeal from so much of the decision of the Court of Appeal as held that the rule in *Baker v Bolton* applies in Australia to causes of action in negligence and *per quod*. Nautronix points to the criticism of the rule expressed in the dictum that the rule makes it "cheaper to kill than to maim". In *Osborn v Gillett*, no less an authority than Bramwell B said[12] of *Baker v Bolton*:

> "This is only a nisi prius case, the plaintiff got 100£, and probably was content. No argument is stated, no authority cited, and I cannot set a high value on that case, great as is the weight of the considered and accurately reported opinions of Lord Ellenborough after argument."

23 However, in 1916, in *Admiralty Commissioners v SS Amerika*[13], the House of Lords declined to disturb the rule in *Baker v Bolton*, however anomalous, as Lord Parker of Waddington put it, "it may appear to the scientific jurist"[14]. For his part, Lord Sumner emphasised that it was abundantly plain that the rule had received statutory recognition; the preamble to s 1 of *Lord Campbell's Act*, passed in 1846, was a response to a particular defect in the existing law, namely the disadvantageous position of widows and children, not to any legislatively perceived defects in the limited rights of masters and employees. Speaking of

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12 *Osborn v Gillett* (1873) LR 8 Ex 88 at 96.

13 [1917] AC 38.

14 [1917] AC 38 at 50.

Osborn v Gillett, Lord Sumner referred to "Bramwell B's intrepid individualism"[15].

24 In these reasons reference has been made above[16] to the provenance in *Lord Campbell's Act* of the Western Australian legislation under which the claims of the spouses were brought in the present litigation. *Lord Campbell's Act* has been adopted in all other Australian jurisdictions[17]. However, in its other applications, particularly to the actions in negligence and *per quod* upon which Nautronix relies in respect of the deaths of Mr Protoolis and Mr Warriner, the rule in *Baker v Bolton* has remained unchanged. One qualification is found in s 58(1)(a) of the *Civil Liability Act* 2003 (Q), which appears to provide that damages (limited as provided in that section) may be awarded for loss of servitium if "the injured person died as a result of injuries suffered".

25 In *Swan v Williams (Demolition) Pty Ltd*[18] Samuels JA observed that the only continuing influence of the rule in *Baker v Bolton* in New South Wales was to exclude actions at the suit of an employer for damages for loss of services occasioned by the death of an employee. In New South Wales, the *Law Reform (Marital Consortium) Act* 1984 (NSW) had abolished liability in tort for loss or impairment of consortium, an action that, at common law in any event, had been denied for loss of consortium to a wife.

26 The pattern of Australian legislation is a pointer towards the continued existence of the rule in *Baker v Bolton* as a matter of common law[19]. In *Swan*[20], the New South Wales Court of Appeal rejected submissions that the rule in *Baker v Bolton* should be discarded. Their Honours did say that the decision of this

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15 [1917] AC 38 at 51.

16 At [14].

17 *Compensation to Relatives Act* 1897 (NSW); *Common Law Practice Act* 1867 (Q); *Fatal Accidents Act* 1934 (Tas); *Wrongs Act* 1936 (SA); *Wrongs Act* 1958 (Vic); *Compensation (Fatal Injuries) Act* 1968 (ACT); *Compensation (Fatal Injuries) Act* 1974 (NT).

18 (1987) 9 NSWLR 172 at 176-177.

19 *CSR Ltd v Eddy* (2005) 226 CLR 1 at 25 [51], 27 [54]; [2005] HCA 64.

20 (1987) 9 NSWLR 172 at 190.

Court in *Woolworths Ltd v Crotty*[21] was authority for the proposition that the rule in *Baker v Bolton* remained part of the common law in Australia. The better understanding is that the assumption made by both parties in *Crotty* was that the rule did apply unless the term "wrongful act" in *Lord Campbell's Act*, as was held to be the case, included contractual as well as tortious wrongs.

27 Any further contraction in the scope of the rule in *Baker v Bolton* is a matter for Australian legislatures.

Issue 2 – the action *per quod* in Australia

28 The appellants submitted that the action *per quod* upon which Nautronix relies should be accepted no longer as part of the common law in Australia. It was said, (a) that the action should now be regarded as "absorbed into" and "subsumed by" the tort of negligence, which had so developed as to have "overtaken the subject matter which gave rise to the old cause of action", and (b) that there was no basis to rationalise the action *per quod* "in the setting of modern social and economic relations".

29 These submissions call for attention first to some general considerations respecting the action *per quod*.

30 As Professor Fridman has emphasised[22], the "essential idea" behind this action is that to cause loss to the master of a servant by rendering his servant incapable of performing the services for which the servant was engaged or hired is an actionable wrong, as long as the defendant either intentionally or negligently acted in such a way as to bring about the deprivation of the services.

31 Professor Fridman and other writers also make the point that it no longer can be said that the master has any "property" in a servant, the master now having "only contractual rights"[23]. Thus it may be said that the development in England of this action marched with the progression of the master-servant relationship from a matter of status to one of modern contract. However, in

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21 (1942) 66 CLR 603.

22 *The Law of Torts in Canada*, 2nd ed (2002) at 733.

23 *The Law of Torts in Canada*, 2nd ed (2002) at 734; Balkin and Davis, *Law of Torts*, 4th ed (2009) at [20.22].

Commissioner for Railways (NSW) v Scott[24], Windeyer J made three relevant observations. These were that times change and with them the meanings of words, that the Middle Ages were not a time when society or law were static, and that, as a consequence, it is necessary to exercise care "in leapfrogging through the centuries" when seeking to discover the remote antecedents of a rule of contemporary common law. Also in *Scott*, Dixon CJ remarked that to him it seemed far from the truth that the action *per quod* was to be condemned as being "out of keeping with modern social ideas and incongruous with the principles of our law as now understood"[25].

32 The relationship between the tort of negligence and the action *per quod*, as these appeals demonstrate, gives rise to particular conceptual difficulties. In a passage subsequently approved by Fullagar J in *Attorney-General for NSW v Perpetual Trustee Co (Ltd)*[26] as "very important and obviously very carefully considered", Rich J in *The Commonwealth v Quince*[27] said:

> "As a general rule, a person is liable for damage caused to another by his carelessness only when it amounts to negligence, that is, when he owed a duty to the other to be careful and the damage was the proximate result of failure to perform the duty; and the mere fact that the injury prevents a third party from getting a benefit from the person injured which, but for the injury, he would have obtained does not invest the third party with a right of action against the wrongdoer (*La Société Anonyme de Remorquage à Hélice v Bennetts*[28]; *Admiralty Commissioners v SS Amerika*[29]; *Wright v Cedzich*[30]). *But to the latter rule there is an exception*." (emphasis added)

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24 (1959) 102 CLR 392 at 447-448; [1959] HCA 29.

25 (1959) 102 CLR 392 at 403.

26 (1952) 85 CLR 237 at 275-276; [1952] HCA 2.

27 (1944) 68 CLR 227 at 240-241; [1944] HCA 1.

28 [1911] 1 KB 243.

29 [1917] AC 38 at 43, 45.

30 (1930) 43 CLR 493; [1930] HCA 4.

His Honour then explained the "exception" 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 is of great antiquity in English law. It became established at a time when the head of a household was regarded as having a quasi-proprietary interest in the members of his family, his apprentices, his hired servants, and their services".

33 There are, however, several difficulties with the treatment of the action *per quod* as an "exception" to the subsequently developed tort of negligence. They were explained by Kitto J in *Perpetual*, in a passage later adopted by Menzies J in *Scott*[31]. Kitto J[32], without in terms identifying what had been said in *Quince*, observed:

> "The principle [of the action *per quod*] has sometimes been referred to as if it formed an exception to the rule that no liability arises for breach of a duty of care unless damage to the person to whom the duty was owed is the proximate result of the breach; but it is not a principle which is directed to questions of proximity or remoteness of damage resulting from breach of a duty of care. It 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."

Rather, Kitto J went on to explain, with the action *per quod*[33]:

> "the law has perpetuated a notion which originally was a corollary of the ancient conception of the relationship of master and servant as one of status (*Mankin v Scala Theodrome Co Ltd*[34]). That conception has gone,

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31 (1959) 102 CLR 392 at 434-435.

32 (1952) 85 CLR 237 at 294.

33 (1952) 85 CLR 237 at 295.

34 [1947] KB 257.

> but the notion of a right in the master, as a species of property, that others shall not, by their wrongful acts, deprive him of the benefit of the relation between himself and his servant has not been abandoned. An infringement of that right entitles the master to recover damages."

If that right be invaded by a wrongful injury to the servant which disables him from providing his due service, then, as Kitto J put it, "the *injuria* to the master is collateral to, and not consequent upon, the *injuria* to the servant"[35].

34 The injury to the servant 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*.

35 Once it is observed that the action *per quod* depends upon demonstration of a wrong having been done to the servant (as a result of which the master is deprived of the service of the servant) and that the wrongful injury to the servant may be either intentional or negligent, it is evident that the action *per quod* does *not* constitute any exception to or variation of the law of negligence. The action *per quod* will lie where the wrongdoer's conduct towards the servant was not negligent but was intentional. It does not depend on demonstrating any breach of a duty of care owed by the wrongdoer to the master.

36 From the appreciation that the action *per quod* is not directed to the consequences of breach of a duty of care owed by the wrongdoer to the master, four consequences follow for these appeals. The first is that McLure P erred in the passage set out above[36] when treating the existence of a claim against a defendant on the action *per quod* as indicative of an action for negligently inflicted economic loss against that defendant. In this Court Nautronix is correct not to rely upon that reasoning.

37 The second consequence is that it would be wrong to have this Court conclude, as the appellants propose, that the action *per quod*, like the special rules once concerning the duties of occupiers to categories of entrants[37], is

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35 (1952) 85 CLR 237 at 295.

36 At [18].

37 cf *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 547-550; [1994] HCA 13.

readily "absorbed" into the modern tort of negligence by removal of what is no more than an "exception" to principles of proximity and remoteness. The "absorption" would be the destruction of a distinct cause of action, an activity best left to legislatures. In that regard, it should be noted that legislative modifications have been made in several States[38] although none were indicated in Western Australia.

38 The third consequence concerns the further arguments by the appellants that the action *per quod* is outmoded because rooted in notions of status and proprietary interest, from which the modern law of contract, including contracts of employment, has escaped. The doctrinal position is more complex, and to this we now turn.

39 *Zhu v Treasurer of New South Wales*[39] concerned the action for wrongful interference with a contract of which the defendant has knowledge, or has knowledge at least of the facts from which it arises, with particular reference to the alleged justification of a superior legal right. Detailed reference[40] was made in the joint reasons of Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ to what had been said by Kitto J in *Perpetual* with respect to the action for loss of services and to his use there[41] of the term "quasi-proprietary" to describe contractual rights against tortious interference by third parties, being rights of a different order to those between the contracting parties themselves. In *Zhu*[42], the Court referred to the reasons of Erle J in the landmark decision of *Lumley v Gye*[43] as significant support for what had been said by Kitto J in *Perpetual*. Erle J considered that the procurement of the violation of a right is a cause of action in

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38 *Employees Liability Act* 1991 (NSW), s 4; *Motor Accidents Compensation Act* 1999 (NSW), s 142; *Civil Liability Act* 2003 (Q), s 58. See, further, *Scott v Bowyer* [1998] 1 VR 207 at 219, Balkin and Davis, *Law of Torts*, 4th ed (2009) at [20.10] with respect to road and industrial accident legislation in Victoria and the Northern Territory.

39 (2004) 218 CLR 530; [2004] HCA 56.

40 (2004) 218 CLR 530 at 572-577 [123]-[134].

41 (1952) 85 CLR 237 at 294.

42 (2004) 218 CLR 530 at 573-574 [126].

43 (1853) 2 El & Bl 216 at 232 [118 ER 749 at 755].

all instances where the violation is an actionable wrong, "as in violations of a right to property, whether real or personal". This Court in *Zhu* remarked[44]:

> "The distinction seems to rest on the view that proprietary rights are stronger than quasi-proprietary rights in that while the former are marked by a combination of characteristics like alienability of benefit and burden and a right to exclusive possession or use enforceable against the world (for example, the rights of the owner of land in fee simple absolute in possession, or of the absolute owner of a chattel or a share or a patent), quasi-proprietary rights do not have the totality of those characteristics. Their principal, but not always sole, characteristic is that they are protected from third party interference."

To this it may be added that while the benefit of a contract involving personal skill or confidence may not be assigned[45], assignability is not in all circumstances an essential characteristic of a proprietary right[46]. It also should be noted that since *Lumley v Gye* decisions in the United States have emphasised the existence of a contract "as something in the nature of a property interest in the plaintiff"[47].

40 The upshot is that the present understanding of the tort for loss of services as an action protective of contractual interests differentiates it from its origins. The present case thereby is marked off from those cases, such as *PGA v The Queen*[48], in which a rule of the common law has become a legal fiction because it depends upon another rule which is no longer maintained.

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44 (2004) 218 CLR 530 at 573 [125]; see also at 577 [135].

45 *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014.

46 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 311-312; [1994] HCA 6.

47 *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 981. See also Cunnington, "Contract Rights as Property Rights", in Robertson (ed), *The Law of Obligations: Connections and Boundaries*, (2004) 169 at 182-184.

48 (2012) 86 ALJR 641 at 651-652 [29]-[32]; 287 ALR 599 at 607-608; [2012] HCA 21.

41 A further consequence of an understanding of the distinction between the action in negligence and that *per quod* concerns the measure of damages for the injury, being the loss of services. This is the subject of Issue 6.

Issue 3 – did Mr Penberthy owe Nautronix a duty of care to avoid the "pure economic loss" Nautronix sought to recover?

42 The relevant principles were most recently considered in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[49] and are not in dispute.

43 The facts outlined earlier in these reasons[50], particularly the e-mail of Thursday 7 August 2003, show an awareness by Fugro of the special nature of the charter services to be supplied to Nautronix by use of the Plane, identified therein by its registration number VH-ANV, for the "Acoustic Telemetry trial" to begin at 1500 hours on the following Monday. In pre-flight preparations, the Plane was to be modified and the pilots were to attend the Submarine Training Centre. Mr Penberthy had been required to have a security clearance.

44 These considerations strengthen the findings made by Murray J in the following terms[51]:

> "[Mr Penberthy] knew the purpose of the flight. He knew that it was a commercial purpose. He knew that the company who employed his passengers was Nautronix. Mr Penberthy knew, therefore, not only that Nautronix was a member of an ascertainable class of commercial users of the aircraft, but that Nautronix was the particular commercial entity which depended upon the exercise of his professional skill as a pilot for the successful performance of the service for which the aircraft was chartered. Of course, it was the case that if Penberthy failed, as he did, to discharge that duty of care, Nautronix was vulnerable in the sense that they were unable to protect themselves from the foreseeable harm of an economic nature caused, in part, by Penberthy's negligence. There are no other circumstances specially affecting the existence of a duty of care owed by Penberthy, and vicariously by [Fugro], to Nautronix in relation to economic loss suffered by that plaintiff."

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49 (2004) 216 CLR 515 at 529-531 [19]-[24], 547-550 [74]-[87]; [2004] HCA 16.

50 At [3]-[13].

51 [2009] WASC 316 at [346].

45 Counsel for Fugro and Mr Penberthy submitted that the conclusion of the Court of Appeal that, without the assistance it derived from the action *per quod*, Murray J's conclusions were not to be supported, did not warrant intervention by this Court.

46 The Court of Appeal proceeded on the footing that Nautronix could have protected itself from the pure economic loss, which it suffered from the injury to its employees, by appropriate terms in its charter contract with Fugro[52]. An express term presumably would have gone further than an implied term in the charter contract that Fugro would exercise reasonable care and skill in the performance of the charter contract, and would have required Fugro to accept liability to Nautronix for pure economic loss suffered by Nautronix from injury to its employees.

47 In response, counsel for Nautronix pointed to the absence of evidence that it could have negotiated successfully for the inclusion of such a term in the charter agreement. Further, in order to establish the existence of a duty of care owed to Nautronix for which Fugro was vicariously liable, it was not incumbent upon Nautronix to establish that it could not have bargained with Fugro for a particular contractual provision. The presence or absence of a claim in contract would not be determinative of a claim in tort[53].

48 McLure P also considered that the claim by Nautronix depended upon Mr Penberthy having known, or it having been reasonable that he ought to have known, of the risk that Nautronix would suffer economic loss were its employees to be injured by a crash of the Plane[54]. But given the highly specialised nature of the testing program in which they were engaged, that appreciation of the risk may readily be inferred.

49 The result is that the Court of Appeal erred in displacing the reasoning on this issue of the trial judge.

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52 (2011) Aust Torts Reports ¶82-087 at 64,885 [118].

53 *Astley v Austrust Ltd* (1999) 197 CLR 1 at 20-23 [44]-[48]; [1999] HCA 6; *Fleming's The Law of Torts*, 10th ed (2011) at [8.350].

54 (2011) Aust Torts Reports ¶82-087 at 64,885 [121].

Issue 4 – reliance by Nautronix on the action *per quod*

50 It follows from what has been said when dealing with Issues 1 and 2 that the action *per quod* against Mr Penberthy and Mr Barclay existed in respect of the three injured employees. However, counsel for Mr Barclay submitted that at trial the claim by Nautronix against his client was pleaded and conducted solely on a claim in negligence.

51 Notwithstanding this submission, as is apparent from the reasoning of McLure P, the Court of Appeal appears to have treated the existence of the action *per quod* and its attraction by the facts of the case as presenting live, albeit subsidiary, issues. Further, in this Court counsel properly accepted that there was difficulty in seeing factual matters which would have received treatment at trial which was materially different had there been a direct case on a *per quod* claim[55]. Nor was counsel able to point to any specific injustice in the matter being ventilated in this Court[56].

52 There is no sufficient objection to Nautronix now relying on the action *per quod* to found liability against both Mr Barclay and Mr Penberthy.

Issue 5 – were Mr Barclay and Mr Penberthy liable to Nautronix on an action *per quod*?

53 It follows from what has been said above that this action lay against the appellants in respect of the three injured Nautronix employees. But the measure of damages will be a matter for the trial of the remaining issues in the litigation. So also will be the measure of damages in the negligence action by Nautronix against Mr Penberthy and any questions of election to avoid double recovery by Nautronix.

Issue 6 – the measure of damages in the action *per quod*

54 Nautronix alleged interruptions and delays in the development and testing of its marine technology and testing system and the loss of intellectual property and corporate knowledge. But so far Nautronix has provided no more specific

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55 cf *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 437-438; [1950] HCA 35.

56 cf *Coulton v Holcombe* (1986) 162 CLR 1 at 7-9; [1986] HCA 33; *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 666; [1996] HCA 58.

particulars of loss and damage sustained as a result of the injuries to Messrs Cifuentes (software team leader), Knubley (Project Manager) and Perincek (Systems Engineer).

55 The assessment of damages in the *per quod* action will fall for determination at the trial of remaining issues in the litigation. That assessment should be guided by the governing principles considered below.

56 The basic proposition is that stated in *Attorney-General v Wilson and Horton Ltd*[57]. After a full consideration of *Quince*, *Perpetual* and *Scott*, Richmond J said that "as the wrong done to the master is [an] interference with his right to the services of his servant, the damages recoverable should be measured exclusively by the consequences which follow from that interference", and "should not be widened to include all consequences which follow merely from the fact that the servant was injured".

57 In the last edition of *McGregor on Damages* to deal with the matter[58] it was said that the basic measure of damages "should be the market value of the services, which will *generally* be calculated by the price of a substitute less the wages which the master is no longer required to pay to the injured servant" (emphasis added). In its written submissions, Nautronix challenges that statement, but, subject to what appears below, it should be accepted.

58 If the employer employs numerous staff which can take up the duties of the injured employee, the prima facie measure of the employer's loss may be any extra payments by way of overtime and the like which the employer has to make to secure the performance of these additional duties[59]. Where a replacement employee has to be engaged, but this is achieved on terms more favourable to the employer, no loss will have been suffered. If it were possible to engage a substitute, at or as near as practicable to the level of skill of the injured employee, but this is not done by the employer, then the employer fails to mitigate the loss. The essential point is that like any plaintiff the employer is obliged to take

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57 [1973] 2 NZLR 238 at 256.

58 13th ed (1972) at [1167].

59 *Attorney-General v Wilson and Horton Ltd* [1973] 2 NZLR 238 at 258.

reasonable steps to mitigate the loss occasioned by the defendant's interference with the provision of services by the injured employee[60].

59 If by statute, industrial award, or the terms of employment, the employer is required to pay to the injured employee sick pay or medical expenses, these outgoings should be ascribed to that anterior obligation of the employer. They are not consequences which flow merely from the injury to the servant and should not be ascribed to the tortfeasor. In *Perpetual*, Fullagar J considered that pensions constituted deferred payments for services already rendered[61], and reserved the question whether the recovery of medical expenses paid by the employer was too remote[62]. Fullagar J went on to emphasise in *Scott*[63]:

> "wages paid to the injured person himself are paid not because of the injury to the servant but because of the antecedent obligation to pay them. The same considerations apply, of course, to sick pay and pensions."

60 In *Genereux v Peterson Howell & Heather (Canada) Ltd*[64], the Ontario Court of Appeal considered the measure of damages to be awarded to a solicitor, a sole practitioner, for the loss of the services of a law clerk injured as a result of the negligent operation of a motor vehicle for which the defendants were liable. The law clerk was the wife of the solicitor and received no remuneration for her work in the office. The law clerk had attended to conveyancing and estate matters and the solicitor had attended mainly to litigious matters. After the injury to the law clerk, the solicitor engaged staff to perform her duties but referred some litigious matters to other firms. The solicitor recovered the wages of the substitute employees but not the loss of profit on matters he had referred on to other firms. Kelly JA said[65]:

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60 *Marinovski v Zutti Pty Ltd* [1984] 2 NSWLR 571 at 582.

61 (1952) 85 CLR 237 at 293.

62 (1952) 85 CLR 237 at 291. In *Scott*, Dixon CJ appears to have approved these reasons of Fullagar J: (1959) 102 CLR 392 at 403; cf at 462-463 per Windeyer J.

63 (1959) 102 CLR 392 at 409.

64 [1973] 2 OR 558.

65 [1973] 2 OR 558 at 571. See also *McElwee v Ansett Transport Industries (Operations) Pty Ltd* (1997) 140 IR 14 at 26 per Williams J.

> "My conclusion is that while the Canadian cases have extended the action *per quod* to situations other than that of the loss of service of a domestic or menial servant, they have observed caution in dealing with the scope of the recoverable damages and have disapproved any extension of the basis of assessing the amount recoverable beyond the actual value of the services lost."

That passage should be accepted as applicable in Australia.

61 Particular difficulties may arise where the plaintiff is a "one-man company", controlled by the injured party. The better view is that, even here, the measure of damages does not include a loss of profits suffered by the company. This is so unless the plaintiff satisfies the court that the loss is attributable to the loss of services and no other likely cause has been identified[66].

62 Such a case was *Argent Pty Ltd v Huxley*[67], where the findings of fact by Hoare J survived appeal to this Court: *Mercantile Mutual Insurance Co Ltd v Argent Pty Ltd*[68]. Mr Arthur Box, who had been injured by a car driven by the defendant, was the operative force in the conduct by a group of family companies of the business of manufacturing and selling footwear. Hoare J found that it was necessary to have as manager "a man of both experience and considerable acumen", and that it had been necessary for his family to dispose of the business following his injuries; but the business was sold without the benefit of an efficient manager and this had depressed the price obtained[69]. Hoare J assessed damages by reference to the probable time Mr Box would have continued in the business had it not been for his injuries.

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66 See *Tippett v Fraser* (1999) 74 SASR 522 at 533; *Kneeshaw and Spawton's Crumpet Co Ltd v Latendorff* (1965) 54 DLR (2d) 84 at 89-90.

67 [1971] Qd R 331.

68 (1972) 46 ALJR 432.

69 [1971] Qd R 331 at 337.

63 His Honour said[70]:

> "In my opinion if these companies can establish that their earnings have diminished to the extent of $X due to their having lost the services of the plaintiff Box, then subject to the limitations of foreseeability[71] prima facie they are entitled to damages for that amount. It does not appear to me that the principle of foreseeability prevents recovery of proved damage in these circumstances."

64 With respect to the prospect of mitigation Hoare J said[72]:

> "As some 29 footwear businesses have closed in New South Wales in more recent times, it is possible that it would not be quite as difficult to obtain a manager today as it would have been at the time Box decided to dispose of his business but even so the problem of finding a suitable manager would be most formidable. I am well satisfied that while ordinary business experience may well be sufficient to enable a capable man to manage many types of businesses this would not be the case in one such as that under consideration."

65 In dismissing the appeal, Walsh J rejected a challenge to these findings[73] and added[74]:

> "If a finding could properly be made that as a matter of fact [the companies] would have probably made from the carrying on of the business greater profits, during a period of some years, than they did make or could reasonably have made from the use of the proceeds of sale received by them and that they could have obtained after that period from the sale of the assets a capital return no less than that which they obtained from the earlier sale, this being found to be a consequence of the loss of the services of Mr Box, there is no principle by which the companies must

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70 [1971] Qd R 331 at 339.

71 *The Wagon Mound* [1961] AC 388.

72 [1971] Qd R 331 at 337.

73 (1972) 46 ALJR 432 at 434.

74 (1972) 46 ALJR 432 at 435.

> be held disentitled to receive as compensation a sum assessed by reference to their diminished profits during that period. In my opinion, the learned judge was not obliged to reject a claim for damages upon that basis, either for the reason that the price obtained from the business as conducted by the companies when it was sold 'without the benefit of an efficient manager' was, as his Honour found, 'the full market value at the time', or for the reason that such damages ought to have been regarded as too remote."

66 The result in *Argent* may be compared with that of the trial in *Vaccaro v Giruzzi*[75]. A company sought to recover damages for loss of services when its sole shareholder was injured in an automobile accident occasioned by the negligence of the defendant. As a result of the accident, the sole shareholder had required the services of an employee of the company, Mr Cava, for a period of three months to act as driver and assistant. Potts J rejected the submission that because this was a one-man company, the measure of damages included a loss of profits suffered by the company. Potts J held that this circumstance did not qualify the general rule which denied recovery of loss of profits as too remote, and added[76]:

> "If great profits were to be made because of the servant's services, the loss could have been avoided by the employment of a substitute (as was the case here, where Mr Cava was employed). If it is argued that the services of the injured servant were so specialized (and this, I assume, is the basis of counsel for the plaintiff's emphasis on a one-man company) that no substitute would have sufficed (which is not the case here), then the loss is too remote, as *Genereux* makes clear."

The result in *Vaccaro* was that in the action by the company for damages for loss of services it was entitled to recover the amount of wages paid to the employee for the services over the period of three months but was not entitled to damages for loss of profits.

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75 (1992) 93 DLR (4th) 180.

76 (1992) 93 DLR (4th) 180 at 186.

Conclusions and orders

67 Special leave should be granted to Nautronix to cross-appeal in each appeal against the holding of the Court of Appeal respecting the rule in *Baker v Bolton*. But each cross-appeal should be dismissed with costs.

68 The result in this Court is that Mr Penberthy and Fugro remain liable in negligence to Nautronix and are liable also in the action *per quod*. Mr Barclay succeeds, without opposition, in displacing the holding against him on the negligence claim, but is liable on the *per quod* action.

69 The appellants should pay the costs of Nautronix of the appeals in this Court, to be set-off against the orders on the cross-appeals.

70 This outcome requires some complexity in the further orders to be made on the appeals.

71 The appropriate parties should have 21 days within which to agree and bring in draft orders fully disposing of the appeals, including consequential orders dealing with the orders made in the Court of Appeal and with the further conduct of the trial in the Supreme Court. In the absence of agreement, written submissions as to the appropriate orders should be filed within 28 days.

72 In each appeal, the orders now to be made should be as follows:

In appeal No P55 of 2011

(1) Subject to orders 4 and 5, appeal dismissed.

(2) Special leave be granted to the third respondents to cross-appeal, the cross-appeal be treated as instituted and heard instanter and dismissed.

(3) The appellant pay the costs of the third respondents of the appeal, and the third respondents pay the costs of the appellant of the cross-appeal, the costs to be set-off.

(4) The appellant and the first and second respondents, and the third respondents have leave, within 21 days of the date of these orders, to bring in agreed draft orders finally disposing of the appeal, including consequential orders dealing with the orders made in the Court of Appeal and with the further conduct of the trial in the Supreme Court.

(5) In the absence of agreed draft orders as provided in order 4, the appellant and the first and second respondents, and the third respondents have leave, within 28 days of the date of these orders, to file written submissions as to the appropriate orders finally disposing of the appeal as indicated in order 4.

In appeal No P57 of 2011

(1) Subject to orders 4 and 5, appeal dismissed.

(2) Special leave be granted to the second respondents to cross-appeal, the cross-appeal be treated as instituted and heard instanter and dismissed.

(3) The appellants pay the costs of the second respondents of the appeal, and the second respondents pay the costs of the appellants of the cross-appeal, the costs to be set-off.

(4) The appellants and the first respondent, and the second respondents have leave, within 21 days of the date of these orders, to bring in agreed draft orders finally disposing of the appeal, including consequential orders dealing with the orders made in the Court of Appeal and with the further conduct of the trial in the Supreme Court.

(5) In the absence of agreed draft orders as provided in order 4, the appellants and the first respondent, and the second respondents have leave, within 28 days of the date of these orders, to file written submissions as to the appropriate orders finally disposing of the appeal as indicated in order 4.

73 HEYDON J. It is convenient to adopt the statement of facts and procedural background in the plurality judgment, as well as its abbreviations of personal and corporate names[77].

The structure of the appeals

74 It is not always easy to keep clearly in mind what issues are raised by the parties' appeals, applications for special leave to cross-appeal, notices of contention and failures to support aspects of the Court of Appeal's reasoning.

75 The factual position so far as is relevant to these appeals is simple. A plane took off. It had been chartered by Nautronix from Fugro. The purpose of the flight was that Nautronix personnel should test technology and systems which Nautronix hoped to develop commercially. The plane crashed. Two Nautronix personnel were killed. Three were badly injured.

76 Two possible causes of action remain alive in this Court. Nautronix sues the pilot, Mr Penberthy (and hence his employer, Fugro), on two causes of action. It sues the designer of an engine part, Mr Barclay, on one of those causes of action.

77 The first cause of action seeks to recover for negligently caused "pure economic loss" to Nautronix's business suffered in consequence of the deaths and injuries. In relation to this cause of action Mr Penberthy seeks to raise two bars to recovery. One bar is that the action so far as the two deceased personnel are concerned is forestalled by the rule in *Baker v Bolton*[78]. That rule holds that in a civil court the death of a human being cannot be complained of as an injury. Nautronix's riposte is that that rule should be abolished by this Court. The second bar to Nautronix's recovery which Mr Penberthy seeks to raise is non-compliance with the rules for recovery of negligently caused pure economic loss, particularly the requirement that Nautronix be "vulnerable".

78 The second cause of action is the *actio per quod servitium amisit*. Nautronix alleges that the negligence of Mr Penberthy and Mr Barclay towards personnel said to be its employees has caused it to lose the services those employees would have rendered under their contracts of employment. To this cause of action Mr Penberthy and Mr Barclay seek to raise five bars to recovery. The first bar is that the *actio per quod servitium amisit* was not pleaded and that it is not open to Nautronix to raise it belatedly in this Court. The second bar is that the *actio per quod servitium amisit* should be abolished by this Court. The third bar is that even if the *actio per quod servitium amisit* is not abolished and is

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77 See above at [1]-[13].

78 (1808) 1 Camp 493 [170 ER 1033].

available in this Court, Mr Penberthy and Mr Barclay are not liable under it. The fourth bar is that even if Mr Penberthy and Mr Barclay are liable in relation to the injured employees, they are not liable in relation to the deceased employees because of the rule in *Baker v Bolton*. The fifth bar is a partial bar only, relating to the quantum of damages.

79 It is convenient to deal first with the two issues in relation to the "pure economic loss" claim, and then to deal with the five issues in relation to the *actio per quod servitium amisit*.

First issue: should the rule in *Baker v Bolton* continue to form part of the common law of Australia?

80 Some consider that *Baker v Bolton*[79] should be overruled on the ground that Lord Ellenborough's statement of the rule in that case was not a correct statement of the law at the time the case was decided. Others think that changed conditions justify its overruling. Nautronix's preferred course was the latter one. To take either step would effect a significant change to the law of tort. It would be an act in the nature of legislation. Changes to the common law in the nature of legislation should not be made by the courts, only by the legislature[80]. Earl Loreburn said that to disturb the rule in *Baker v Bolton* "would be legislation pure and simple"[81]. He said that when the House of Lords, consisting of himself, Lord Parker of Waddington and Lord Sumner, unanimously and emphatically approved *Baker v Bolton* in *Admiralty Commissioners v S S Amerika*[82]. That case was decided after and in the face of W S Holdsworth's trenchant attack on the reasoning in *Baker v Bolton*[83]. Although, in accordance with the customs of the time, the report does not point to that attack as having been referred to in oral argument or in the speeches, Lord Sumner alluded to it and quoted it, albeit inaccurately[84]. As Lord Sumner added: "[A]n established rule does not become

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79 (1808) 1 Camp 493 [170 ER 1033].

80 *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 623, 628-629 and 633-634; [1979] HCA 40.

81 *Admiralty Commissioners v S S Amerika* [1917] AC 38 at 41.

82 [1917] AC 38 at 41 per Earl Loreburn, 42-50 per Lord Parker of Waddington and 50-60 per Lord Sumner.

83 "The Origin of the Rule in *Baker v Bolton*", (1916) 32 *Law Quarterly Review* 431.

84 *Admiralty Commissioners v S S Amerika* [1917] AC 38 at 53, where Lord Sumner said: "It has been even suggested that Lord Ellenborough was 'the victim of a confusion of ideas'." That a confusion of ideas of the kind Lord Sumner referred to

(Footnote continues on next page)

questionable merely because different conjectural justifications of it have been offered, or because none is forthcoming that is not fanciful."[85] Both Lord Parker of Waddington and Lord Sumner referred to a considerable amount of English, Canadian and United States authority in support of the rule in *Baker v Bolton*[86].

81 The correctness of *Baker v Bolton* has been assumed in the House of Lords subsequently[87]. There are statutes resting on an assumption that the rule in *Baker v Bolton* exists[88].

82 Further, it would be a serious step to overrule *Baker v Bolton* in view of this Court's decision in *Woolworths Ltd v Crotty*[89]. It is true that in that case the parties were not at issue about whether *Baker v Bolton* was good law. That in itself is not without some significance given that the appellant was represented by R G Menzies KC and the respondent by G E J Barwick KC. More significantly, Latham CJ and McTiernan J, making up a majority of the Court, were plainly of the undoubted view that the rule in *Baker v Bolton* existed. It is not necessary to consider whether that view was part of the ratio decidendi. Latham CJ uttered what is at least a strong dictum to the effect that the rule "must now be taken to be thoroughly established"[90]. And McTiernan J uttered what is at least another strong dictum in stating the rule without casting any doubt on it[91].

83 In these circumstances, there is no point in analysing the criticisms of *Baker v Bolton* or the defences which have been made of it as a decision which

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had taken place is Holdsworth's thesis in (1916) 32 *Law Quarterly Review* 431, and after describing it he said (at 435) that Lord Ellenborough "was the victim of the same confusion of ideas."

85 *Admiralty Commissioners v S S Amerika* [1917] AC 38 at 56.

86 *Admiralty Commissioners v S S Amerika* [1917] AC 38 at 47-50 and 51-53.

87 *Rose v Ford* [1937] AC 826 at 833, 839 and 850-852.

88 For example, *Fatal Accidents Act* 1846 (UK) (commonly known as *Lord Campbell's Act* 1846) and its Australian equivalents, as well as *Civil Liability Act* 2003 (Q), s 58(1)(a).

89 (1942) 66 CLR 603; [1942] HCA 35.

90 (1942) 66 CLR 603 at 615.

91 (1942) 66 CLR 603 at 621-622.

correctly reflected the contemporary common law[92]. It would not be right to hold either that *Baker v Bolton* was incorrectly decided at the time or that, though correctly decided originally, it has been superseded by changing conditions.

84 It follows that even if Mr Penberthy is liable for negligently causing pure economic loss, his liability does not extend to loss flowing from the loss of the two deceased employees' services.

Second issue: did Mr Penberthy owe Nautronix a common law duty of care to avoid causing "pure economic loss" to Nautronix flowing from loss of the services of its injured employees?

85 It is true that some of the criteria to be satisfied for Nautronix to recover from Mr Penberthy for negligently caused pure economic loss were satisfied[93].

86 The pleadings contain admissions that Mr Penberthy knew or ought to have known that the flight had a commercial purpose; that the passengers were Nautronix employees; that Nautronix equipment was to be on board; that Nautronix's purpose in engaging Fugro to provide the plane was to enable it, by its employees, to undertake surveillance, survey and aerial work operations west of Rottnest Island in order to test, research and develop marine technology and communications systems for the purpose of commercial exploitation and/or sale to users of such technology in the defence, and oil and gas industries, and related enterprises; that failure to exercise reasonable care in flying the plane was likely to result in injury, perhaps fatal injury, to those employees; and that an employee's death or injury would cause Nautronix economic loss. The trial judge found that Mr Penberthy knew of Nautronix's purpose in broad terms. The flight involved the use of sonar buoys. It also involved liaison with a naval support surface vessel and a submarine. For that reason, Mr Penberthy had to receive a security clearance. To that end, he signed a security undertaking. At the request of Nautronix, the plane was modified to accommodate special Nautronix equipment to be used during the flight. Thus Mr Penberthy's potential liability was not indeterminate. Imposition of a duty on Mr Penberthy to avoid economic loss to Nautronix would not have impaired Mr Penberthy in the legitimate pursuit

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92 For example, Finkelstein, "The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty", (1973) 46 *Temple Law Quarterly* 169 at 178-196. At 196, the author said that Lord Ellenborough "created no new precedent, nor was he the victim of any confusion."

93 See *Caltex Oil (Aust) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529; [1976] HCA 65; *Perre v Apand Pty Ltd* (1999) 198 CLR 180; [1999] HCA 36; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; [2004] HCA 16.

of his interests unreasonably[94] since he already owed a duty of care to the individual passengers.

87 However, this is a case in which it was necessary for Nautronix to prove that it was "vulnerable" – unable to protect itself from the consequences of the defendants' want of reasonable care, either entirely or in a way which would cast the consequences of loss on the defendants[95]. The sole submission of Mr Penberthy was that Nautronix had failed to establish "what could have been negotiated in terms of a distribution of risk as between Nautronix and Fugro in undertaking the air charter." The sole answer of Nautronix was that there was no evidence that it could have negotiated for itself "a watertight contractual warranty" from Fugro. But that impermissibly reverses the burden of proof. The correct question was: was there evidence that it could *not* have negotiated a warranty? On that question the evidence was silent. Fugro had standard terms excluding liability. But there was no evidence about whether they were open to change after negotiation. The case resembles *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[96] in its paucity of factual material.

88 The consequence is that Mr Penberthy is not liable for the tort of negligently causing pure economic loss to Nautronix.

Third issue: was it open to Nautronix to rely in this Court on the *actio per quod servitium amisit*?

89 Counsel for Mr Barclay accepted that the facts which might make out the ingredients of the *actio per quod servitium amisit* had been pleaded. But he pointed out that the headings and text of the substituted statement of claim contained expressions descriptive of particular causes of action – for example, "damages for negligence" and "contract claim". This language negated the idea that the *actio per quod servitium amisit* was being pleaded. Thus the substituted statement of claim pleaded not only material facts, but legal conclusions. Nautronix was bound to plead material facts. It was not bound to plead legal conclusions. It was not foreclosed from pleading legal conclusions. But once it had decided to plead some legal conclusions, its failure to plead the legal conclusion that the *actio per quod servitium amisit* lay had the result of impliedly excluding that plea.

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94 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 258 [211].

95 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 530-531 [23] and 533 [31]. See also *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 225-226 [118]-[120].

96 (2003) 216 CLR 515 at 533 [31] and 550 [84].

90 In answer to this argument, Nautronix relied on par 44 of Mr Barclay's defence. It read:

> "To the extent that [Nautronix] in sub-paragraph 23.2, paragraph 42 or elsewhere seek[s] to rely on the action *per quod servitium amisit* in respect of the consequences of the [deaths of the deceased personnel], such claim is not available at common law and is misconceived."

Neither par 23.2 nor par 42 of the substituted statement of claim in terms relied on the *actio per quod servitium amisit*. Nor did any part of the substituted statement of claim. Paragraph 44 appears to be attempting to deal with a possible argument by Nautronix that while the rule in *Baker v Bolton* might debar recovery in respect of the deceased personnel in relation to negligently caused pure economic loss, there could be recovery in the *actio per quod servitium amisit*. Paragraph 44 seeks to rebut that possible Nautronix argument by saying that the rule in *Baker v Bolton* would debar the claim in relation to those two deceased personnel even if it were founded on the *actio per quod servitium amisit*. Paragraph 44 does not establish that there was a plea in the substituted statement of claim based on the *actio per quod servitium amisit*. It establishes that the substituted statement of claim, perhaps, was vexatious and embarrassing because it raised an unresolved doubt on that issue.

91 In its closing written submissions to the trial judge, Nautronix submitted that "one or more of the defendants … are liable, by reason of negligence, breach of contract or breach of implied statutory warranties, to compensate [Nautronix]". Nautronix did not say that any defendant was liable in the *actio per quod servitium amisit*. Indeed, those submissions said that it was "not necessary … to resolve the arguments raised by the defendants, namely that … part of [the Nautronix] damages claim would be defeated by the common law principles relating to the action '*per quod servitium amisit*'." The next paragraph of the written submissions said: "Nevertheless, out of an abundance of caution, these submissions will address those questions." Under the heading "'Per Quod Servitium Amisit'" the written submissions purported to deal with par 44 of Mr Barclay's defence. In fact they dealt with the rule in *Baker v Bolton* in its application to the negligently caused pure economic loss claim. They said: "the *defendants breached their duty of care* to Nautronix" (emphasis added). The *actio per quod servitium amisit* does not depend on a breach by the defendant of a duty of care to the plaintiff, but on breach by the defendant of a duty to the plaintiff's employees.

92 The trial judge did not deal with the *actio per quod servitium amisit*. It may be inferred that it had not been run at the trial. The trial judge's discussion of par 44 of Mr Barclay's defence centred on the rule in *Baker v Bolton* in relation to the negligently caused pure economic loss claim against Mr Barclay (which he rejected).

93 Nautronix did not agitate any claim based on the *actio per quod servitium amisit* in the Court of Appeal, whether by way of notice of contention, cross-appeal or argument.

94 Counsel for Nautronix in this Court accepted that neither at the trial nor in the Court of Appeal was the case run as a claim based on the *actio per quod servitium amisit*. She also accepted that the trial judge did not understand the case as being so put.

95 The case involved numerous parties, complicated causes of action and potentially large sums of damages. In those circumstances, there was a need for some clarity in the pleadings if they were to be viewed as raising particular causes of action.

96 This messy background supports the contention that the application of the *actio per quod servitium amisit* was distinctly raised for the first time only in this Court. Can it be raised legitimately in this Court? That depends on whether "evidence could have been given [at the trial] which by any possibility could have prevented" the *actio per quod servitium amisit* from succeeding there[97]. Counsel for Mr Barclay pointed to a fragment of evidence given by Mr Cifuentes in answer to the third question in chief, a leading question, that he was "working on a subcontract basis". This was strictly irrelevant, since Mr Barclay and Mr Penberthy had each admitted on the pleadings that Mr Cifuentes and the other Nautronix personnel were employees. Counsel suggested that the *actio per quod servitium amisit* might not apply in relation to subcontracting. The authorities discuss it in terms of master and servant and contracts of service, not principal and independent contractor or subcontractor. Indeed, Fullagar J expressly denied that the *actio per quod servitium amisit* applied in relation to independent contractors[98]. The courts might well be disinclined to widen the tort to extend to independent contractors or subcontractors. It would be desirable that any attempt to widen it should take place against the background of a full examination of what sort of subcontract basis applied to Mr Cifuentes and his colleagues.

97 Counsel for Mr Barclay submitted that had Nautronix distinctly indicated in the pleadings that it was relying on the *actio per quod servitium amisit*, it would have been open to Mr Barclay to apply for leave to withdraw the admission of employment, examine what precisely the relationship was between Nautronix personnel and Nautronix, and perhaps defeat the *actio per quod servitium amisit* in that way. Counsel for Mr Penberthy allied himself with that submission. There is force in counsel's submission. Evidence could have been

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97 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; [1950] HCA 35.

98 *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 407; [1959] HCA 29.

given at the trial which could possibly have prevented the *actio per quod servitium amisit* from succeeding there. Nautronix is thus debarred from relying on the *actio per quod servitium amisit* in this Court.

Fourth issue: does the *actio per quod servitium amisit* exist under the common law of Australia?

98 Strictly speaking this question does not arise, but in deference to the parties' submissions it should be dealt with briefly.

99 The rule in *Baker v Bolton* is in a somewhat different position from the *actio per quod servitium amisit*. It could not be and was not submitted that the *actio per quod servitium amisit* had been erroneously devised from its inception. Its origins are too obscure for that. As Lord Sumner said[99]:

> "I do not know, and doubt if it can now be ascertained, when or pursuant to what theory this special right of the master in relation to his servant was first established. The inquiry belongs to history rather than to positive law."

100 But Mr Barclay argued that the *actio per quod servitium amisit* was "the product of an earlier age" and "should no longer stand apart from, but rather be absorbed into and form part of, the general law of negligence." Mr Barclay said that for this Court the "appropriate response is for the action to [be] absorbed back into the general law of negligence." Mr Penberthy put it somewhat differently. He pointed out that this Court had affirmed the *actio per quod servitium amisit* in *Commissioner for Railways (NSW) v Scott* in 1959[100]. He submitted that since then there had been a widening of recovery for pure economic loss. The widening had been accompanied by the devising of control mechanisms against unduly extensive recovery. He submitted that that widening was "inconsistent" with the *actio per quod servitium amisit*. It should therefore be "extinguished". Mr Penberthy accepted that this argument left standing the *actio per quod servitium amisit* so far as non-negligent torts committed against employees of the plaintiff were concerned. But he submitted that that "remnant of an historical remnant" should go as well.

101 These arguments should not be accepted, for reasons similar but not identical to those which apply to the rule in *Baker v Bolton*. To speak of the *actio per quod servitium amisit* being "absorbed *back*" into negligence is a malapropism. It did not come from the much younger tort of negligence; it cannot go "back" into it. Further, "absorption" is a euphemism for abolition. In

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99 *Admiralty Commissioners v S S Amerika* [1917] AC 38 at 54.

100 (1959) 102 CLR 392.

this respect, Mr Penberthy's arguments were franker than Mr Barclay's. To abolish this cause of action would be a significant change to the law of tort. If the *actio per quod servitium amisit* is "anomalous"[101] or "inappropriate to present-day conditions"[102] or "plainly offensive in today's society"[103] or "antique"[104], any problems caused by these qualities are problems to be remedied by the legislature. They are not problems to be remedied by the courts. The submission that the *actio per quod servitium amisit* should be absorbed into the tort of negligence is based on the desire to remove what Lord Sumner called rules which are "insensible", "arbitrary" and "highly technical"[105]. He said correctly that it does not follow in common law legal systems "that a principle can be said to be truly a part of the law merely because it would be a more perfect expression of imperfect rules, which, though imperfect, are well established and well defined"[106]. There is, incidentally, reason to doubt the view that the *actio per quod servitium amisit* is "inappropriate". As Dixon CJ pointed out in *Commissioner for Railways (NSW) v Scott*[107], it is common for employers to be liable to keep paying their employees even though they cannot work, thus necessitating the engagement of new substitute employees or getting existing employees to work overtime, in each case at additional cost. That state of affairs has become even more common since 1959.

102 To abolish the *actio per quod servitium amisit* would involve overruling a decision of this Court, *Commissioner for Railways (NSW) v Scott*[108]. The correctness of that decision has been assumed in this Court, both as a matter of application[109] and as a matter of dictum[110]. The appellants contended that the

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101 *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 406 per Fullagar J.

102 *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 406 per Fullagar J.

103 *R v Buchinsky* [1983] 1 SCR 481 at 490 per Dickson J.

104 *Burnicle v Cutelli* [1982] 2 NSWLR 26 at 31 per Glass JA.

105 *Admiralty Commissioners v S S Amerika* [1917] AC 38 at 56.

106 *Admiralty Commissioners v S S Amerika* [1917] AC 38 at 56.

107 (1959) 102 CLR 392 at 403.

108 (1959) 102 CLR 392.

109 *Mercantile Mutual Insurance Co Ltd v Argent Pty Ltd* (1972) 46 ALJR 432.

Court could conduct, in Brennan J's words, "a review of doctrines which were the product of and suited to an earlier age but which work injustice or inconvenience in contemporary conditions."[111] Shortly after the passage just quoted, Brennan J said[112]:

> "Judicial preference for a more elegant or logically satisfying jurisprudence is insufficient to warrant a change in settled doctrine which works satisfactorily in conjunction with other legal principles."

The appellants did not point to any "injustice" or "inconvenience". They did not explain how the *actio per quod servitium amisit* works unsatisfactorily in conjunction with other legal principles. It happened to suit Mr Barclay's interests for his counsel to advocate "a more elegant or logically satisfying jurisprudence", but a search for that is not enough. Brennan J also said after the last sentence quoted[113]: "And if a change in settled doctrine is contemplated, a substitutionary doctrine sufficiently precise to admit of practical application must be at hand." Whatever else can be said of the tort of negligence, it is not precise.

103 It is true that the decision of this Court in *Commissioner for Railways (NSW) v Scott* to retain the *actio per quod servitium amisit* was arrived at by bare majority. But that does not affect its status as an authority. Its status as an authority is supported by the decision a few years earlier of the then ultimate court of appeal, the Privy Council, in *Attorney-General for New South Wales v Perpetual Trustee Co (Ltd)*[114]. In that decision it was assumed that the *actio per quod servitium amisit* existed. Nothing in *Cook v Cook*[115] undercuts the

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110 For example, *Northern Territory v Mengel* (1995) 185 CLR 307 at 342 n 237; [1995] HCA 65; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2003) 216 CLR 515 at 537 [47]; *CSR Ltd v Eddy* (2005) 226 CLR 1 at 22-23 [44]; [2005] HCA 64.

111 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 131; [1988] HCA 44.

112 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 131.

113 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 131.

114 (1955) 92 CLR 113; [1955] AC 457, dismissing an appeal from *Attorney-General for New South Wales v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237; [1952] HCA 2.

115 (1986) 162 CLR 376 at 389-390; [1986] HCA 73.

present status as authorities in Australian courts of Privy Council decisions before 1986, until they are overruled by this Court.

104 Further, it is necessary to reject submissions advanced by Mr Penberthy that the action is "little litigated", "is very, very rare", and "is in virtual disuse." The *actio per quod servitium amisit* has in fact been employed recently in many intermediate appellate and trial courts[116]. As a matter of precedent, this is of little moment in view of how the authorities in this Court stand. But it does reveal that the *actio per quod servitium amisit* is not drifting into desuetude. It retains utility for plaintiffs in a variety of practical circumstances.

105 Some legislatures have abolished[117] or significantly limited[118] the *actio per quod servitium amisit*. This legislation reveals an assumption that the *actio per quod servitium amisit* exists at common law. Other legislatures have assumed its existence while modifying its application without abolishing it[119]. Thus legislatures habitually amend the *actio per quod servitium amisit* while permitting it to survive to a larger or smaller extent. The *actio per quod servitium amisit* is a common law cause of action. The intervention of statute has caused it to operate in different ways in different jurisdictions. These phenomena make it difficult for courts administering the common law of Australia to abolish the common law *actio per quod servitium amisit*.

106 There are two further arguments against abolishing the *actio per quod servitium amisit* in these proceedings. One is that it is not open to Nautronix to rely on it[120], and hence to discuss its abolition is to deal with a hypothetical question. The other is that even if it were open to Nautronix to rely upon it, no evidence on damage has been called. It is difficult to deal in detail with Mr Penberthy's arguments that there are inconsistencies between it and the action

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116 For example, *Sydney City Council v Bosnich* [1968] 3 NSWR 725; *Marinovski v Zutti Pty Ltd* [1984] 2 NSWLR 571; *GIO Australia Ltd v Robson* (1997) 42 NSWLR 439.

117 *CSR Ltd v Eddy* (2005) 226 CLR 1 at 23 [44] n 167.

118 *CSR Ltd v Eddy* (2005) 226 CLR 1 at 23 [44] nn 168 and 169. See also *Motor Accidents Compensation Act* 1999 (NSW), s 142(1) and (on *Transport Accident Act* 1986 (Vic), s 93(1) and (2)) *Doughty v Martino Developments Pty Ltd* (2010) 27 VR 499.

119 For example, *Civil Liability Act* 2002 (NSW), s 12, discussed in *Chaina v The Presbyterian Church (NSW) Property Trust* (2007) 69 NSWLR 533; *Civil Liability Act* 2003 (Q), s 58.

120 See above at [89]-[97].

for negligently caused pure economic loss without it having been decided, in concrete circumstances, what the measure of damages in the *actio per quod servitium amisit* is[121].

Fifth issue: were Mr Barclay and Mr Penberthy liable to Nautronix on the *actio per quod servitium amisit*?

107 If the *actio per quod servitium amisit* can now be relied on in this Court in these proceedings, both Mr Barclay and Mr Penberthy were liable under it. The trial judge found that each was in breach of a duty of care towards Nautronix's injured employees, if that is what they were.

Sixth issue: if Mr Barclay and Mr Penberthy were liable to Nautronix in relation to the *actio per quod servitium amisit*, does that liability extend to the deceased employees?

108 The answer is "No". The rule in *Baker v Bolton* precludes an affirmative answer. For reasons given above[122], that rule should not be abolished.

Seventh issue: what is the measure of damages in the *actio per quod servitium amisit* against Mr Penberthy and Mr Barclay?

109 Since Nautronix is precluded from relying on the *actio per quod servitium amisit* in this Court, this issue does not arise. If it did, even in the light of the majority conclusions, it should not be dealt with.

110 The Nautronix case, so far, has been put very vaguely on this issue. By some means, the formal basis of which is not clear, the trial was conducted on separated issues. One of the issues which the learned trial judge did not have to decide was the amount of any economic loss which Nautronix may have suffered. That amount relates to the measure of damages in both Nautronix's claim against Mr Penberthy for pure economic loss as a result of negligence, and Nautronix's reliance on the *actio per quod servitium amisit*. The evidence on the issue of economic loss may therefore be very far from complete. Nautronix's substituted statement of claim alleged that "the … injury of its personnel would cause loss of intellectual property and corporate knowledge concerning the marine technology and communications systems being developed and tested, and cause loss and damage to Nautronix … in the conduct of its business." The particulars alleged that each of the injured personnel "was integral to, and had particular expertise in respect of, [Nautronix's] development of technology and services, in particular in projects known as the Nautronix Acoustic Sub-sea

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121 See further below at [109]-[114].

122 See above at [80]-[84].

Positioning and Navigation System … and the Acoustic Measurement Range". The particulars then alleged the position and responsibility of each of the injured personnel.

111 This matter only came under close attention late in the hearing. Counsel for Mr Barclay referred in a footnote of his written submissions to a New Zealand case about damages[123]. But no specific submission about damages was put in the initial written submissions, and little was said in oral argument. Further written submissions were filed after the close of oral argument.

112 Those further written submissions invite the Court to offer an opinion about the measure of damages in an appeal arising out of proceedings that did not concern the measure of damages. The opinion is requested with a view to assisting the parties in the conduct of future proceedings in which, for the first time, the measure of damages will be considered. That is a very unusual invitation. It is an invitation to deliver an advisory opinion. It should not be accepted on general grounds. Further, the invitation is particularly unattractive in view of the lack of detail in Nautronix's damages case and the lack of any evidence specifically directed to that case which has been called so far. Why should it be decided, for example, that Nautronix's claim to damages be limited to the actual value of the services lost without its having had a chance to establish what greater losses it may have suffered?

113 The measure of damages question raises, potentially, significant questions of principle. In general controversial questions of legal principle are resolved only in the context of concrete factual circumstances. That is why decisions on strike out applications, on demurrer, on agreed facts and on separate questions often produce unsatisfactory consequences. So far as the existing authorities are binding on the judge who is to conduct the balance of the trial, they are to be followed. So far as they are not binding, they need not be followed, but will have the force that the reasoning underpinning them intrinsically possesses. Those authorities were decided as a means of resolving actual controversies in the light of evidence which had been tendered and received. It is undesirable to fetter the judge at this stage with additional opinions about what should be done in the light of evidence before it has even been tendered.

114 The course of having a separate trial on some issues is often a dangerous one. It may have already caused difficulties in this litigation. To deal with one of these issues on appeal before any trial judge has spoken seems even more dangerous than usual. Further, there is no advantage in terms of saving trial time in giving preliminary advice on the measure of damages in relation to the *actio per quod servitium amisit*. Nautronix will be entitled to call evidence on

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123 *Attorney-General v Wilson and Horton Ltd* [1973] 2 NZLR 238 at 252-258.

economic loss arising from Mr Penberthy's negligence. That evidence may go further on that issue than it legitimately can in relation to the *actio per quod servitium amisit*. What the correct limits of the measure of damages for the latter cause of action are is better determined after the evidence is received, not before.

Orders

115 The appeals should be allowed with costs. The orders of the Court of Appeal should be set aside. In their place there should be orders that the appeals to that Court should be allowed with costs and that the proceedings brought by Nautronix against Mr Barclay, Mr Penberthy and Fugro be dismissed with costs so far as they relate to the negligently caused pure economic loss claim and the *actio per quod servitium amisit*. The applications for special leave to cross-appeal should be dismissed with costs.

116 KIEFEL J. On 11 August 2003, a twin-engine aircraft crashed near Jandakot Airport in Western Australia, killing two passengers, and injuring the pilot and the remaining three passengers. According to the pleadings at trial, all five passengers were employees of L-3 Communications Nautronix Limited (which was at the relevant time known as Nautronix Limited), which had chartered the aircraft from Fugro Spatial Solutions Pty Ltd ("Fugro"). Fugro employed the pilot, Mr Alec Penberthy. The flight was for the purpose of testing and developing marine technology and underwater communication systems which Nautronix Limited hoped to exploit commercially as valuable to the defence and oil and gas industries. The aircraft was specially adapted for this purpose. Nautronix Limited had contracted with Fugro for a program of flights to take place in the period 8 to 14 August 2003. The flight on 11 August 2003 was described as an "Acoustic Telemetry trial". The employees of Nautronix Limited who were passengers on the aircraft were directly involved in the creation of the technology, experts or specialists in fields necessary for its development, or managers of the project.

The proceedings below

117 Proceedings were brought in the Supreme Court of Western Australia by the three surviving passengers, the spouses of the deceased passengers, Nautronix (Holdings) Pty Ltd and Nautronix Limited. Nautronix (Holdings) Pty Ltd was the assignee of Nautronix Limited's right of action. In these reasons, I will refer to the Nautronix companies collectively as "Nautronix". The proceedings were brought against Fugro, Mr Penberthy and Mr Aaron Barclay, an aeronautical engineer who was responsible for the design of a replacement sleeve bearing in the fuel pump of the aircraft.

118 Nautronix' action was pleaded in both tort and contract and the loss claimed was in the nature of pure economic loss, "pure" because it did not follow upon any claim by Nautronix for damages to person or property. It was pleaded generally that Fugro and Mr Penberthy were aware, or should have been aware, that Nautronix would suffer economic loss as a result of the death of or injury to its employees who were passengers on the aircraft. Further detail of Fugro's alleged knowledge of Nautronix' project was provided in the claim for damages for breach of the aircraft charter agreement. Fugro and Mr Penberthy were said to have known that Nautronix would suffer interruption and delays in the development and testing of its systems and the commercial exploitation of them if its employees were killed or injured. The claim in negligence against Mr Barclay was framed somewhat differently, but it is not necessary presently to refer to it.

119 The cause of the failure of the right-hand fuel pump and resultant shut down of the right-hand engine, which was the direct cause of the crash, was the fracture of a drive pin in the sleeve bearing of the fuel pump. Murray J found that this had been caused or contributed to by Mr Barclay's negligent

specification of an unsuitable alloy for the sleeve bearing[124] and his negligent failure to specify a particular finish to the internal surface of the sleeve bearing[125]. His Honour found Mr Penberthy to have been negligent in the manner in which he dealt with the emergency that arose when the engine failed almost immediately after the aircraft became airborne[126].

120 Murray J took Fugro and Mr Penberthy to admit the existence of a duty of care towards Nautronix[127]. They had admitted knowledge of the potential economic loss which would be caused to Nautronix in the event of the death of or injury to its employees, and Mr Penberthy had admitted owing a duty to use reasonable care and skill in the piloting of the aircraft. Fugro was vicariously liable for Mr Penberthy's actions.

121 His Honour found that Nautronix was vulnerable in the sense that it was unable to protect itself from foreseeable harm of an economic nature caused by Mr Penberthy's negligence[128], although his Honour appears also to have accepted a submission by Mr Barclay that Nautronix had the capacity to protect itself by the terms of its contract with Fugro[129].

122 His Honour did not consider that Mr Barclay could be said to have owed a duty of care to Nautronix. The "crucial difficulty" in this regard, his Honour held, was that the class of persons at risk of foreseeable harm from Mr Barclay's actions was an "essentially indeterminate" class of persons: any user of the aircraft who might suffer loss of a purely financial kind if the aircraft crashed[130]. Moreover, his Honour found that there was no evidence that Mr Barclay had known of the use to which the aircraft was to be put by Nautronix[131].

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124 *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [289].

125 *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [292].

126 *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [307], [365]-[366].

127 *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [272].

128 *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [346].

129 *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [354]-[355].

130 *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [351]-[353].

131 *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [349]-[351].

123 Murray J accepted that it was an implied term of the charter agreement that Fugro exercise reasonable care in the performance of the agreement, but did not consider that the evidence established that Fugro had breached that term[132]. This may seem an odd result, given the finding of negligence against Mr Penberthy. In any event, the claim in contract has not been pursued on appeal to this Court.

124 His Honour considered that an issue was joined by Mr Barclay in his defence as to whether an action per quod servitium amisit was available to Nautronix[133]. Such an action provides a remedy to an employer by way of compensation for the loss of services of an employee who is injured as a result of another's negligence. His Honour did not reach a conclusion as to the issue of liability under this head, seemingly because he took the view that the claim made by Nautronix went further and extended to all damage to its financial interests[134].

125 Only the question of liability was determined in the proceedings before Murray J. Liability was apportioned on the basis that Fugro was liable for two-thirds of Nautronix' damages and Mr Barclay one-third[135].

126 In the Court of Appeal, McLure P, with whom Martin CJ and Mazza J agreed, held that both Mr Barclay and Mr Penberthy owed a duty of care to Nautronix to take reasonable care to avoid pure economic loss by injuring its employees[136]. Her Honour observed that the common law continues to recognise the action per quod servitium amisit. Her Honour considered that that action was relevant to the enquiry whether a duty of care was owed to Nautronix. Whilst the action per quod servitium amisit remained part of the common law of Australia, it would be difficult to avoid the conclusion that a duty of care existed, because "[c]onsistency between closely related common law actions is a legitimate expectation"[137], her Honour held. Her Honour said that, had the common law action for loss of services not survived, she would not have concluded that Nautronix could succeed in its claim. No duty of care could have been said to

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132 *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [427]-[428].

133 *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [327], [356].

134 *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [359].

135 *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [366], [434].

136 *Fugro Spatial Solutions Pty Ltd v Cifuentes* (2011) Aust Torts Reports ¶82-087 at 64,869 [1], 64,885 [115], 64,890 [161].

137 *Fugro Spatial Solutions Pty Ltd v Cifuentes* (2011) Aust Torts Reports ¶82-087 at 64,884 [110], 64,885 [115].

have been owed to Nautronix by either defendant[138]. In her Honour's view[139], Nautronix was not vulnerable in the sense referred to in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*[140] and *Perre v Apand Pty Ltd*[141]. Mr Penberthy's knowledge of the commercial purpose of the flight and that his passengers were Nautronix employees was not sufficient to found a duty. Further, Nautronix was at no greater risk of harm from a crash than any other potential charterer of the aircraft[142].

127 McLure P confirmed that neither action, for breach of duty or per quod servitium amisit, was available in relation to the services lost by reason of the death of the two employees. This followed the rule, so-called, in *Baker v Bolton*[143] that "[i]n a civil Court, the death of a human being could not be complained of as an injury"[144].

The issues

128 The appeals by Mr Barclay, Fugro and Mr Penberthy, the cross-appeals by Nautronix and Nautronix' Notices of Contention raise the following issues:

(a) whether the action per quod servitium amisit remains part of the common law of Australia and if so:

(i) the measure of damages available under it;

(ii) the liability of Mr Barclay, Mr Penberthy and Fugro to Nautronix pursuant to it;

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138 *Fugro Spatial Solutions Pty Ltd v Cifuentes* (2011) Aust Torts Reports ¶82-087 at 64,885 [125].

139 *Fugro Spatial Solutions Pty Ltd v Cifuentes* (2011) Aust Torts Reports ¶82-087 at 64,885 [118].

140 (1976) 136 CLR 529; [1976] HCA 65.

141 (1999) 198 CLR 180; [1999] HCA 36.

142 *Fugro Spatial Solutions Pty Ltd v Cifuentes* (2011) Aust Torts Reports ¶82-087 at 64,885 [120]-[122].

143 (1808) 1 Camp 493 [170 ER 1033].

144 *Baker v Bolton* (1808) 1 Camp 493 at 493 [170 ER 1033 at 1033], cited in *Fugro Spatial Solutions Pty Ltd v Cifuentes* (2011) Aust Torts Reports ¶82-087 at 64,884 [111]-[114].

(b) if the action forms part of the common law of Australia, whether it informs the action for breach of duty of care in tort in cases which involve claims for pure economic loss;

(c) whether Mr Penberthy and Fugro owed Nautronix a duty to take reasonable care to avoid causing it economic loss; and

(d) whether the rule in *Baker v Bolton* remains part of the common law of Australia and prevents recovery by Nautronix of damages in tort arising from the deaths of its two employees.

129 So far as concerns the issue referred to in (b), Nautronix does not seek to support the reasoning of the Court of Appeal that the action per quod servitium amisit is relevant to a claim for breach of a duty of care. For their part Fugro, Mr Penberthy and Mr Barclay contend that that action should no longer be permitted to stand apart from the law of negligence and should be treated as absorbed into it.

130 It is necessary to explain (c) further. Mr Barclay's appeal includes a challenge to the finding that he owed Nautronix a duty to take reasonable care to avoid economic loss. Nautronix does not now seek to maintain that finding.

The action for negligence per quod servitium amisit

131 The availability of a writ in trespass (later in case) to a master for the loss of the services of a servant caused by the negligence of a defendant can be traced to medieval times[145]. It was connected to the idea of the status of a servant, which originated in laws relating to the status of a villein[146]. It was 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[147]. However, it has been pointed out[148] 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

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145 Holdsworth, *A History of English Law*, 2nd ed (1937), vol 8 at 427.

146 Holdsworth, *A History of English Law*, 2nd ed (1937), vol 8 at 429.

147 *Attorney-General for NSW v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 at 287 per Fullagar J; [1952] HCA 2. (Under Roman law and the Lex Aquilia, the master of a slave had an action for harm negligently caused to a slave: Mommsen, Krueger and Watson, *The Digest of Justinian*, (1985), vol 1, bk 9, title 2 at 277-278.)

148 *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 450 per Windeyer J; [1959] HCA 29.

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[149].

132 The action per quod servitium amisit was not based upon a wrong having been committed. It was the consequence of the employee's injury for the employer, the loss of services, for which an action in trespass lay[150]. For the purposes of the action it did not matter how the injury was caused, whether by assault, battery, negligence, or otherwise[151]. Nor did it depend on the breach of any contract of service; the action was not analysed in contractual terms[152]. The action extended to both unintentional and intentional acts of negligence. There was no limitation on the class of services for which an employer could sue. All that was required was that the relation of master and servant exist[153].

133 The interest of the master of the household, which the action protected, extended to the services of members of his family, apprentices and servants[154]. Analogous writs lay in trespass for taking away or injuring a wife, child or servant where the result was that their services were denied to the master[155].

134 The remedy provided by the action was clearly of some social importance at the time it was first made available. It has been observed[156] that, since that time, there may have been particular periods where the employer's loss could be regarded as real, actionable loss. In *Commissioner for Railways (NSW) v*

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149 *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 452 per Windeyer J.

150 Blackstone, *Commentaries on the Laws of England*, 5th ed (1773), bk 1 at 429, referred to by Dixon CJ in *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 401.

151 *Attorney-General for NSW v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 at 246 per Dixon J.

152 Jones, "Per Quod Servitium Amisit", (1958) 74 *Law Quarterly Review* 39 at 50-51.

153 *Attorney-General for NSW v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 at 248 per Dixon J.

154 *The Commonwealth v Quince* (1944) 68 CLR 227 at 241 per Rich J; [1944] HCA 1.

155 Holdsworth, *A History of English Law*, 2nd ed (1937), vol 8 at 428-430.

156 *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 402 per Dixon CJ.

Scott[157], decided in 1959, Dixon CJ and Windeyer J considered that the obligations then cast upon employers by statute meant that the action had once again assumed some economic importance. Many employers were required to make payments to injured workers and to pay for any medical expenses associated with their injuries, without receiving the benefit of their services.

135 Although the action per quod servitium amisit continued to be recognised by courts, questions arose as to the extent of its application. This Court considered whether the action lay at the suit of the Crown, where a member of the Royal Australian Air Force had been injured by another's negligent driving, in *The Commonwealth v Quince*[158], and held that it did not. That decision was applied in *Attorney-General for NSW v Perpetual Trustee Co (Ltd)*[159] where it was held that the Crown could not recover for the loss of the services of a member of the police force.

136 At around the same time, the courts in England were concerned to limit the action even further, in line with its origins. Viscount Simonds, giving the advice of the Privy Council on the dismissal of the appeal in *Attorney-General for New South Wales v Perpetual Trustee Company (Ltd)*, said, "this form of action should not be extended beyond the limits to which it has been carried by binding authority or at least by authority long recognized as stating the law."[160] Those limits were to be found in the fact that the action originated at a time when service was a status. That status lay "in the realm of domestic relations" and the action was to be limited accordingly[161]. The following year, in *Inland Revenue Commissioners v Hambrook*[162], the Court of Appeal held that the action lay only where a servant could be said to be a member of the master's domestic household.

137 *Commissioner for Railways (NSW) v Scott*[163] was decided by this Court three years later. A majority (Kitto, Taylor, Menzies and Windeyer JJ; Dixon CJ,

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157 (1959) 102 CLR 392 at 403 per Dixon CJ, 439-440 per Windeyer J.

158 (1944) 68 CLR 227.

159 (1952) 85 CLR 237.

160 *Attorney-General for New South Wales v Perpetual Trustee Company (Ltd)* (1955) 92 CLR 113 at 129-130; [1955] AC 457 at 490.

161 *Attorney-General for New South Wales v Perpetual Trustee Company (Ltd)* (1955) 92 CLR 113 at 130; [1955] AC 457 at 490.

162 [1956] 2 QB 641.

163 (1959) 102 CLR 392.

McTiernan and Fullagar JJ dissenting) declined to follow *Inland Revenue Commissioners v Hambrook*. But the decision in *Attorney-General for New South Wales v Perpetual Trustee Company (Ltd)* was a decision of the Privy Council, which then bound this Court. Dixon CJ considered himself to be bound to accept that the action per quod servitium amisit did not extend beyond domestic servants, although his Honour's preferred position was to allow the Commissioner, as employer, to recover damages, "appropriately measured", with respect to the loss of services of the injured employee[164]. Other members of the Court were inclined to think that the words "domestic relations", which had been used by Viscount Simonds in *Attorney-General for New South Wales v Perpetual Trustee Company (Ltd)*, were not so limited in their meaning as *Inland Revenue Commissioners v Hambrook* had held them to be[165], and distinguished the decision of the Privy Council on that basis.

138 Other actions analogous to that of per quod servitium amisit continued to be recognised at this time. McTiernan J, in *Attorney-General for NSW v Perpetual Trustee Co (Ltd)*, considered that the action for the loss of services of a daughter as a result of her seduction had utility[166]. The action for the loss of the services of a wife (per quod consortium amisit), through the negligent infliction of injury upon her, remained available to her husband[167]. No similar action was available to a wife[168]. However, by the time of the decision in *CSR Ltd v Eddy*[169], the observation could be made that the action per quod consortium amisit had been abolished[170] or radically limited[171] in most jurisdictions. The

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164 *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 397-398.

165 *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 413-418 per Kitto J, 424-425 per Taylor J, 434-437 per Menzies J, 439, 443 per Windeyer J.

166 *Attorney-General for NSW v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 at 256-257.

167 *Toohey v Hollier* (1955) 92 CLR 618; [1955] HCA 3; and see Brett, "Consortium and Servitium: A History and Some Proposals", (1955) 29 *Australian Law Journal* 321.

168 *Wright v Cedzich* (1930) 43 CLR 493, Isaacs J dissenting; [1930] HCA 4.

169 (2005) 226 CLR 1 at 23 [44]; [2005] HCA 64.

170 *Law Reform (Marital Consortium) Act* 1984 (NSW), s 3; *Common Law (Miscellaneous Actions) Act* 1986 (Tas), s 3; *Acts Amendment (Actions for Damages) Act* 1986 (WA), s 4; *Law Reform (Miscellaneous Provisions) (Amendment) Act (No 2)* 1991 (ACT), s 5; *Administration of Justice Act* 1982 (UK), s 2(a).

torts of seduction, enticement and harbouring had been abolished in South Australia, the Australian Capital Territory and England[172], and had not been relied upon for decades elsewhere.

139 The action per quod servitium amisit has been abolished in England[173] and in large measure in Victoria[174] and the Northern Territory[175]. Despite Fullagar J calling for its abolition in *Attorney-General for NSW v Perpetual Trustee Co (Ltd)*[176] and in *Commissioner for Railways (NSW) v Scott*[177] and references to the action as being "anomalous or anachronistic"[178] and antique[179], its existence and continued application have not otherwise been questioned.

Should the action per quod servitium amisit be retained?

140 The appellants' submission that the action per quod servitium amisit should be regarded as "absorbed" into the mainstream law of tort, relevant to recovery of economic loss, invites comparison between tort law and the character of the action.

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171 *Transport Accident Act* 1986 (Vic), s 93; *Motor Accidents (Compensation) Act* (NT), s 5; *Work Health Act* (NT), s 52. The exceptions are South Australia, where it has been extended – *Civil Liability Act* 1936 (SA), s 65 (formerly *Wrongs Act* 1936 (SA), s 33); and Queensland, where it has been modified – *Law Reform Act* 1995 (Q), s 13, and *Civil Liability Act* 2003 (Q), s 58.

172 *Civil Liability Act* 1936 (SA), s 68; *Civil Law (Wrongs) Act* 2002 (ACT), s 210; *Administration of Justice Act* 1982 (UK), s 2(c)(ii)-(iii).

173 *Administration of Justice Act* 1982 (UK), s 2(b), (c)(i).

174 *Transport Accident Act* 1986 (Vic), s 93A.

175 *Motor Accidents (Compensation) Act* (NT), s 5; *Workers Rehabilitation and Compensation Act* (NT), s 52.

176 (1952) 85 CLR 237 at 288.

177 (1959) 102 CLR 392 at 406-407.

178 *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 177; [1977] HCA 45, quoting *Donnelly v Joyce* [1974] QB 454 at 462.

179 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 245 [178] per Gummow J; *CSR Ltd v Eddy* (2005) 226 CLR 1 at 23 [44] per Gleeson CJ, Gummow and Heydon JJ.

141 Kitto J in *Attorney-General for NSW v Perpetual Trustee Co (Ltd)*[180] referred to the action per quod servitium amisit as an exception to the common law rule which operates such that "where A is prevented from fulfilling his obligations to B by reason of an injury wrongfully inflicted upon him by C, B has no right of action against C in respect of his loss". His Honour went on to explain[181] that the principle upon which the exception rested was that it provided a remedy for the wrongful invasion of a quasi-proprietary right which a master, or employer, is considered to possess in respect of an employee's services. The nature of the right has been discussed earlier in these reasons. It is the infringement of that right which entitles the employer to recover damages.

142 The action per quod servitium amisit has nothing in common with an action for breach of duty of care in tort, save that an act of negligence may be involved. The tort of interfering with contractual rights[182] may be thought to provide a closer analogy; however, that action may owe more to the old action for wrongful procurement of the services of a servant, which was considered to be based in contract. The action per quod servitium amisit was not subjected to contractual analysis[183]. What these actions do have in common is that they developed by reference to proprietary, or quasi-proprietary, rights: the attribution of a quasi-proprietary right to the service due to the employer, in the action per quod servitium amisit; and in the treatment of contractual rights as analogous to property rights, in the action for wrongful interference with contractual rights[184].

143 Another distinction between the action per quod servitium amisit and that for breach of duty of care is in the damages which may be recovered. Further attention will be directed to the question of the measure of those damages later in these reasons. For present purposes it may be observed that the conceptual principle underlying the action is liability for the employer's loss of services, not the employer's economic loss as such[185]. This follows from the action being

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180 (1952) 85 CLR 237 at 294.

181 *Attorney-General for NSW v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 at 294, cited in *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 572 [123]; [2004] HCA 56.

182 *Lumley v Gye* (1853) 2 El & Bl 216 [118 ER 749].

183 Jones, "Per Quod Servitium Amisit", (1958) 74 *Law Quarterly Review* 39 at 50-51.

184 *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 574 [126].

185 Marshall, "Liability for Pure Economic Loss Negligently Caused – French and English Law Compared", (1975) 24 *International and Comparative Law Quarterly* 748 at 764.

based on a proprietary interest, or something analogous to it, in the victim's services.

144 The view that the action is for the invasion of an employer's right to services may also account for a defendant's inability to rely upon the employee's contributory negligence[186]. This inability serves to further distinguish the action from that for breach of duty of care.

145 The above discussion permits a conclusion that the action per quod servitium amisit has no affinity with an action for breach of duty of care. The historical origins of the action per quod servitium amisit, though adapted somewhat to modern conceptions of the relationship of employer and employee, set it apart from actions in tort. It follows that the Court of Appeal was wrong to suggest that this action could inform the question of whether a duty of care arose. It also follows that the action for breach of duty of care cannot "absorb" the action per quod servitium amisit, contrary to what was submitted by the appellants in each of the proceedings presently at hand.

146 This is not to say that an action for breach of duty of care against Fugro and Mr Penberthy is not open to Nautronix. As these reasons will show, the trial judge was correct to conclude that they are liable in damages on that account. The circumstances relating to these parties, and the knowledge that Fugro and Mr Penberthy had concerning Nautronix' project, permit such a conclusion. The position of Nautronix in this case vis-à-vis those parties cannot, however, be taken as descriptive of the position in which other employers will find themselves. It therefore does not follow that employers' claims for the loss of an employee's services should be left to be dealt with exclusively in an action for breach of a duty of care. Many employers would not be able to establish that a duty of care was owed to them by a tortfeasor. Unless and until the principles respecting recovery of economic loss in tort are further extended, the action per quod servitium amisit may be the only avenue for the recovery of damages for the loss of services for some employers.

147 The abolition of the action per quod servitium amisit in England followed upon a recommendation by the Law Reform Committee[187] that employers instead be given a right to recover from a tortfeasor wages paid to the employee, and medical and other expenses incurred by the employer on behalf of the injured

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186 The fact that contributory negligence affords no defence to an action per quod servitium amisit was cited by Fullagar J in *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 408 as a reason for confining the scope of the action.

187 Law Reform Committee, *Eleventh Report (Loss of Services, etc)*, (1963) Cmnd 2017 at 11 [24(1)].

employee, by way of subrogation[188]. A similar right of subrogation is available in some European countries, in aid of the recovery of wages paid to an injured employee[189].

148 The provision of such a right may be thought to recognise that employers should be afforded an avenue for compensation, which the action per quod servitium amisit would otherwise provide. It also brings into focus rights given under workers' compensation legislation in Australia[190] and the observation of Windeyer J in *Commissioner for Railways (NSW) v Scott*[191] that the Commissioner could have recovered in any event, had the engine driver concerned brought proceedings under the *Workers' Compensation Act* 1926-1954 (NSW) rather than the *Government Railways Act* 1912-1955 (NSW). The operation of the relevant workers' compensation legislation did not receive attention in *Commissioner for Railways (NSW) v Scott*, save for the abovementioned reference by Windeyer J. In that case, an engine driver in the employ of the Commissioner suffered a breakdown after a level crossing accident and was unable to work. The circumstances would appear to have come within the ambit of the *Workers' Compensation Act* 1926-1954 (NSW).

149 Under that legislation an employer was entitled to be indemnified, for the compensation paid to an injured employee, by a third party who was liable to pay damages to a worker in proceedings brought for the recovery of such damages[192]. This has the effect of vesting a statutory cause of action in the employer[193].

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188 See McGregor, *McGregor on Damages*, 13th ed (1972) at 783-784 [1156].

189 In Germany by the Pay Continuation Statute (Entgeltfortzahlungsgesetz (EFZG)) of 1994: see Markesinis and Unberath, *The German Law of Torts: A Comparative Treatise*, 4th ed (2002) at 910; in France by the Loi Badinter of 1985: see Bussani and Palmer, "The case studies", in Bussani and Palmer (eds), *Pure Economic Loss in Europe*, (2003) 171 at 222-223. Belgium, Italy and the Netherlands provide a similar right of recovery: Bussani and Palmer at 223-224, 233-234.

190 For example the *Workers' Compensation and Injury Management Act* 1981 (WA), s 93(5) and the *Workers' Compensation and Rehabilitation Act* 2003 (Q), s 207B(7)(b) provide the employer or the employer's insurer with a right of subrogation, as well as indemnity, although such a provision is not uniform in similar legislation throughout Australia.

191 (1959) 102 CLR 392 at 440.

192 *Workers' Compensation Act* 1926-1954 (NSW), s 64.

193 See also *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420 at 430 [19]; [2010] HCA 34, discussing s 207B(7) of the *Workers' Compensation and Rehabilitation Act* 2003 (Q).

A provision in the *Workers' Compensation and Injury Management Act* 1981 (WA)[194] expressly entitles an employer to bring proceedings in the name of the worker against a third party defendant.

150 Under workers' compensation legislation, the liability of an employer to pay compensation is generally limited to injury arising out of or in the course of a worker's employment[195]. But the obligation to continue to pay an injured worker might also arise pursuant to an industrial award or an agreement with the employee, which may not provide for reimbursement to an employer of monies paid or the means to achieve such reimbursement. The action per quod servitium amisit continues to have relevance to such situations.

151 The fact that the action per quod servitium amisit continues to have some utility to some employers answers in large part the more direct contention of the appellants that the action should no longer be permitted to continue.

152 It was submitted by the appellants that the action per quod servitium amisit is a product of another age, an historically based rule which can no longer be supported as an exception to the principles which have developed concerning recovery of economic loss. The submission brings to mind the criticism by Fullagar J of the action's continued recognition.

153 In *Attorney-General for NSW v Perpetual Trustee Co (Ltd)*[196] Fullagar J suggested that the action should be abolished as an "illogical and unreasonable" exception to the general rule that a person is liable for damage caused by his or her negligence only if he or she is found to owe a duty of care[197]. His Honour thought the action antiquated and attributable to perceptions which had no place in a modern society[198]. Kitto J, however, said that although conceptions of status had not survived, the notion of a right of a master to the benefit of his or her servant's services had not been abandoned[199]. Dixon J clearly considered the

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194 Section 93(5).

195 See, for example, *Workers' Compensation and Injury Management Act* 1981 (WA), ss 5(1) (definition of "injury"), 18, 19.

196 (1952) 85 CLR 237 at 288.

197 See also *The Commonwealth v Quince* (1944) 68 CLR 227 at 240-241 per Rich J.

198 *Attorney-General for NSW v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 at 287-288.

199 *Attorney-General for NSW v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 at 295.

action to have utility and observed that "[t]he remedy has followed the relation of master and servant unaffected by the changes that have taken place in the social and economic purposes for which the relation has been used."[200] His Honour did not consider that the essential character of the action had been altered by the extent to which employment was by then the result of free agreement.

154 In *PGA v The Queen*[201], it was pointed out that common law courts can decide to no longer maintain a rule of law which has become no more than a legal fiction because the reason or foundation for it no longer exists[202]. There, Australian statute law concerning marriage had removed any basis for accepting Hale's proposition that the immunity of a husband from a charge of rape formed part of the common law[203]. However, the courts will not readily depart from a settled rule of law[204]. So far as concerns the action per quod servitium amisit, it is a remedy which has been adapted, for the most part, in a manner consistent with its origins. It cannot be said of it that the present basis for it, the compensation of employers who have suffered loss but who may not have a right of recovery against the person who injured their employee, has been removed or that it no longer has any utility.

155 The action per quod servitium amisit has been referred to in numerous decisions of this Court[205] and has readily been applied in the sphere of employer

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200 *Attorney-General for NSW v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 at 248.

201 (2012) 86 ALJR 641 at 651 [30]; 287 ALR 599 at 607; [2012] HCA 21.

202 See also *R v L* (1991) 174 CLR 379 at 389-390, 405; [1991] HCA 48.

203 The proposition was stated in the extra-judicial writings of Sir Matthew Hale, Lord Chief Justice of the Court of King's Bench, published as *The History of the Pleas of the Crown*, (1736), vol 1, c 58 at 629.

204 *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 633-634; [1979] HCA 40.

205 *Treloar v Wickham* (1961) 105 CLR 102 at 122 per Menzies J; [1961] HCA 11; *Paff v Speed* (1961) 105 CLR 549 at 566 per Windeyer J; [1961] HCA 14; *R W Miller & Co Pty Ltd v Australian Oil Refining Pty Ltd* (1967) 117 CLR 288 at 297 per Windeyer J; [1967] HCA 50; *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 546-547 per Gibbs J, 598 per Jacobs J; *Groves v The Commonwealth* (1982) 150 CLR 113 at 124 per Stephen, Mason, Aickin and Wilson JJ; [1982] HCA 21; *Northern Territory v Mengel* (1995) 185 CLR 307 at 342 per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ; [1995] HCA 65; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 245 [178] per Gummow J; *Cattanach v Melchior* (2003) 215 CLR 1 at 32 [67] per McHugh and Gummow JJ;

(Footnote continues on next page)

and employee. In *Zhu v Treasurer of New South Wales*[206], Kitto J's analysis in *Attorney-General for NSW v Perpetual Trustee Co (Ltd)*[207] of an employer's rights in the services of a servant as quasi-proprietary was said to have "significant support". Most recently, in *CSR Ltd v Eddy*[208], the action was recognised as one of a very few limited, direct avenues of recovery available to those who have lost the benefit of an injured person's services. In consequence of this Court's continued acceptance of the existence of the action, the courts of the States and Territories have continued to award damages in such an action[209]. There is no basis shown for a refusal to continue to recognise it.

The measure of damages

156 It is the loss of an employee's services which is the gist of the action per quod servitium amisit[210]. It is that loss for which the remedy is provided and which is the employer's cause of action[211]. In *Attorney-General for NSW v Perpetual Trustee Co (Ltd)*, Fullagar J[212] said that damages are "strictly limited to pecuniary loss actually sustained through the loss of the services of the servant and … expenditure necessarily incurred in consequence of the injury to the servant." Dixon CJ[213] and Taylor J[214], in *Commissioner for Railways (NSW) v*

[2003] HCA 38; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 537 [47] per McHugh J; [2004] HCA 16; *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at 480 [29] per McHugh J; [2004] HCA 29; *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 572-573 [123]-[125] per Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ; *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 66 [70] per McHugh, Gummow and Hayne JJ; [2005] HCA 50; *CSR Ltd v Eddy* (2005) 226 CLR 1 at 22 [44] per Gleeson CJ, Gummow and Heydon JJ, 42-43 [102]-[103] per McHugh J.

206 (2004) 218 CLR 530 at 572-573 [123]-[125].

207 (1952) 85 CLR 237 at 294.

208 (2005) 226 CLR 1 at 22-23 [44].

209 *Sydney City Council v Bosnich* [1968] 3 NSWR 725; *Argent Pty Ltd v Huxley* [1971] Qd R 331; *John Holland (Constructions) Pty Ltd v Jordin* (1985) 36 NTR 1; *Evans v Port of Brisbane Authority* (1992) Aust Torts Reports ¶81-169.

210 *Admiralty Commissioners v SS Amerika* [1917] AC 38 at 55 per Lord Sumner.

211 Pollock, *The Law of Torts*, 13th ed (1929) at 233; Smith, *A Treatise on the Law of Master and Servant*, 8th ed (1931) at 107.

212 (1952) 85 CLR 237 at 289-290.

Scott, agreed with what his Honour had said on the subject of damages. As the wrong done to the employer is the interference with the right to the employee's services, it follows that the damages recoverable are to be measured by reference to the consequences of that interference. They do not extend to all consequences which flow from the fact that the employee has been injured[215].

157 The point of Fullagar J's reference to the measure of damages was to correct an assumption that wages paid to an employee during the employee's incapacity represented the loss suffered. His Honour said that this was not strictly correct, since an obligation to continue to pay might arise by reason of an antecedent obligation and not because of the injury to the employee[216]. Elsewhere it has been explained that the market value of the services lost will generally be calculated by reference to the price of substitute labour[217].

158 Questions such as this do not arise in the present case. I do not understand Nautronix to have as yet formulated a claim based upon recovery of the cost of replacement labour. Its claim is much broader than the value of the services lost and extends, so far as may presently be seen by reference to the pleadings, to claims arising from delay, which may encompass profits lost.

159 Nautronix claims that an employer is entitled to recover all damage which is a direct consequence of the loss of an employee's services. It relies in particular upon references in *Mercantile Mutual Insurance Co Ltd v Argent Pty Ltd*[218] to lost profits being a "consequence" and a "result" of the loss of services of a managing director of three companies[219], and upon the decision of the Court

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213 *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 403.

214 *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 427.

215 *Attorney-General v Wilson and Horton Ltd* [1973] 2 NZLR 238 at 256 per Richmond J, referring to Fullagar J in *Attorney-General for NSW v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 and *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392.

216 *Attorney-General for NSW v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 at 290; *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 408-409; hence the approach taken to the assessment of damages in *The Commonwealth v Quince* (1944) 68 CLR 227 was questionable.

217 McGregor, *McGregor on Damages*, 13th ed (1972) at 788 [1167].

218 (1972) 46 ALJR 432.

219 *Mercantile Mutual Insurance Co Ltd v Argent Pty Ltd* (1972) 46 ALJR 432 at 435 per Walsh J; see also at 434 per Menzies J, Barwick CJ agreeing.

of Appeal of the Supreme Court of New South Wales in *Marinovski v Zutti Pty Ltd*[220].

160 Reliance was also placed upon the approach taken to the recovery of damages in an action based upon the tort of inducing a breach of contract[221], which Nautronix described as closely related to the approach taken in an action per quod servitium amisit because both actions involve quasi-proprietary rights of an employer with respect to the services of an employee[222]. It is the loss resulting from invasion of the right which falls to be assessed. The quasi-proprietary nature of the right provides no warrant for economic loss of every kind being recoverable.

161 In *Mercantile Mutual Insurance Co Ltd v Argent Pty Ltd*[223], the trial judge awarded damages to family companies arising from injuries to the family member who managed the companies. The damages allowed were for profits lost by reason of the sale of the companies at an earlier time than would have been the case had the manager not been incapacitated by his injuries. The issue before this Court was whether the awards were excessive. No attention was directed to the nature of the action per quod servitium amisit and whether it necessitated a restriction upon the measure of any damage. The decision cannot, therefore, be regarded as pronouncing upon the questions which arise in this case.

162 *Mercantile Mutual Insurance Co Ltd v Argent Pty Ltd* was followed in *Marinovski v Zutti Pty Ltd*[224], where damages were awarded for the loss of the service of the managing director of a company, the interests of which had been so seriously harmed by his absence due to injuries that, by the time of the appeal, a receiver had been appointed to it. Hutley JA said[225] that there is no single test for the measure of damages recoverable by an employer in an action per quod servitium amisit. In the case of an ordinary employee the measure would be the cost of replacing the employee, plus any expenses properly incurred in mitigation of the loss such as medical, hospital and other expenses. But in that case, the

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220 [1984] 2 NSWLR 571 at 574-575, 585-586.

221 *Lumley v Gye* (1853) 2 El & Bl 216 [118 ER 749].

222 Referring to *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 572-577 [124]-[134].

223 (1972) 46 ALJR 432.

224 [1984] 2 NSWLR 571.

225 *Marinovski v Zutti Pty Ltd* [1984] 2 NSWLR 571 at 575.

special feature was that the employee had unique skills necessary for the survival of the company.

163 Legal systems respond differently to claims of economic loss of this kind. French law permits recovery for all loss an enterprise suffers because a key employee is hurt[226]. In a well-known decision[227], a football club was held entitled to damages for economic loss consequent upon the death of one of its leading players. Such damages would not be recoverable in Germany[228]. And it has been pointed out in Canada that if a servant is particularly specialised, the damages may be regarded as too remote[229].

164 Consistency with the purpose and scope of the action per quod servitium amisit requires that damages be limited to the cost of substitute labour. In *Cattanach v Melchior*[230], it was observed that the employer suffers damage only when it is forced to pay a salary or wages to its injured employee when it is, at the same time, deprived of the employee's services. To permit recovery on any wider basis, including for profits 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 the coherence of the law, that would be undesirable.

Recovery of economic loss

165 Policy choices have featured strongly in the disinclination of the common law to allow recovery for pure economic loss in tort for breach of duty. As Gibbs J observed in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*[231], to allow such claims might expose a defendant guilty of an act of careless inadvertence to claims "unlimited in number and crippling in amount." Other legal systems have made similar decisions about where the line is to be drawn.

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226 Code Civil, Arts 1382-1383; Gordley, "Contract and Delict: Toward a Unified Law of Obligations", (1997) 1 *Edinburgh Law Review* 345 at 356.

227 *Football Club de Metz c Wiroth*, Cour d'appel de Colmar, 20 April 1955, D 1956.723, discussed in Markesinis and Unberath, *The German Law of Torts: A Comparative Treatise*, 4th ed (2002) at 248.

228 Markesinis and Unberath, *The German Law of Torts: A Comparative Treatise*, 4th ed (2002) at 56.

229 *Vaccaro v Giruzzi* (1992) 93 DLR (4th) 180 at 186.

230 (2003) 215 CLR 1 at 32 [67].

231 (1976) 136 CLR 529 at 551.

As was observed in *Perre v Apand Pty Ltd*[232], in this area German law displays an ideological affinity with the common law. In Germany it is said that the rule against recovery of economic loss is a guarantee of freedom in the market[233]. A similar imperative, encouraging competitive conduct, underlies the policy of the common law[234].

166 One difference between these systems lies in how control is effected upon claims for economic loss. In the common law, an abstract concept of duty of care is employed. The German Civil Code[235] ("the BGB") specifies which legal interests are to be the subject of protection. In German law, only the enumerated legal interests of life, body, health, freedom, property and "other right[s]" are protected[236]. Economic loss can be recovered only if one of these interests is interfered with[237]. A person's estate or a company's business undertaking is not an "other right".

167 Other, apparently liberal, systems such as France, Belgium, Greece, Italy and Spain, do not screen out economic loss[238]. Liability under the French Civil Code[239] is stated as being for all damage caused. However, it has been said[240] that the courts in these systems have a policy of restraining recovery for economic loss and of achieving such restraint by other means, such as requiring

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232 (1999) 198 CLR 180 at 249-250 [188] per Gummow J, referring to Markesinis, *A Comparative Introduction to the German Law of Torts*, 3rd ed (1994) at 43.

233 Markesinis and Unberath, *The German Law of Torts: A Comparative Treatise*, 4th ed (2002) at 53.

234 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 246 [181]-[182] per Gummow J.

235 Bürgerliches Gesetzbuch.

236 Bürgerliches Gesetzbuch, §823(1).

237 A similar approach is taken in Austria, Finland, Portugal and Sweden: Bussani and Palmer, "The liability regimes of Europe – their façades and interiors", in Bussani and Palmer (eds), *Pure Economic Loss in Europe*, (2003) 120 at 152-158.

238 Bussani and Palmer, "The liability regimes of Europe – their façades and interiors", in Bussani and Palmer (eds), *Pure Economic Loss in Europe*, (2003) 120 at 123.

239 Code Civil, Arts 1382-1383.

240 Zweigert and Kötz, *Introduction to Comparative Law*, 3rd ed (1998) at 627-628; Bussani and Palmer, "The liability regimes of Europe – their façades and interiors", in Bussani and Palmer (eds), *Pure Economic Loss in Europe*, (2003) 120 at 124.

that the harm be certain, immediate and direct, or refusing to qualify the defendant's conduct as "faute", that is, conduct a reasonable person would not engage in[241]. The style of judgments of the courts in these countries and the limited reasoning provided can make it difficult to discern the true grounds on which claims are accepted or rejected[242].

168 The German legal system, like the common law, has for a long time been under pressure to enlarge the areas where recovery for economic loss is available[243]. The response of its courts has been to accept a "right to an established and operative business" as coming within the term "other right" in BGB §823(1). The courts allow recovery for economic loss where that right is invaded, but recovery requires that the defendant's conduct be directed at the business as such[244], rather than merely affecting interests separable from the business. Analogous to the present case, a company would have no claim for loss arising from delay in performance of a contract because one of its staff was hospitalised with injuries caused by a defendant's bad driving[245].

169 The other avenue for relief in German law is contract law, which, together with tort, is regarded as a species of the law of obligations. Where a solution cannot be found in tort, German lawyers and the courts often cross over into contract[246]. For example, claims for negligent misstatement are dealt with in contract law[247], under which contracts do not require consideration. A party to a contract is considered to be under a general duty, not only to perform a contract

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241 Herbots, "Economic loss in the legal systems of the continent", in Furmston (ed), *The Law of Tort: Policies and Trends in Liability for Damage to Property and Economic Loss*, (1986) 137 at 138-139.

242 Zweigert and Kötz, *Introduction to Comparative Law*, 3rd ed (1998) at 627.

243 Kötz, "The Doctrine of Privity of Contract in the Context of Contracts Protecting the Interests of Third Parties", (1990) 10 *Tel Aviv University Studies in Law* 195 at 198.

244 Deutsch, "Compensation for Pure Economic Loss in German Law", in Banakas (ed), *Civil Liability for Pure Economic Loss*, (1996) 73 at 80.

245 Zweigert and Kötz, *Introduction to Comparative Law*, 3rd ed (1998) at 604.

246 Markesinis and Unberath, *The German Law of Torts: A Comparative Treatise*, 4th ed (2002) at 58.

247 Herbots, "Economic loss in the legal systems of the continent", in Furmston (ed), *The Law of Tort: Policies and Trends in Liability for Damage to Property and Economic Loss*, (1986) 137 at 150.

in a proper fashion, but also not to cause injury to persons or harm to property[248]. The courts in Germany extend that protection to a third party plaintiff if the promisee had a clear interest in bringing them within the ambit of the contractual protections and the defendant, the promisor, had some knowledge of the likelihood of harm to the plaintiff. Duty under a contract arises where there is a close relationship between the plaintiff and the promisee and the promisor could foresee that the plaintiff might suffer damage[249]. In the latter respect, this approach bears some similarity to the approach taken by the common law to identifying a duty of care. It has been pointed out, in the context of negligent misstatement, that German and English law both raise questions as to the identity of the plaintiff and how definite that identity was when the defendant prepared the statement[250].

170 In *Astley v Austrust Ltd*[251], this Court held that a contract for services contains an implied promise to exercise reasonable care and skill in the performance of those services. Liability is regarded as concurrent in contract and in tort[252] so that a plaintiff may select the most advantageous action. Where there is a direct relationship established between the parties, by reason of their agreement, it may not be necessary to resort to tort law in order to recover economic loss. It is difficult to conceive of a liability in tort, arising from the negligent provision of services, which would not also follow upon breach of the implied term. Moreover, the knowledge which may be attributed to a contracting party may permit recovery of losses in contract similar in extent to those recoverable in tort.

171 So far as concerns a person who is not a party to a contract, but who suffers loss as a result of its negligent performance, Australian law seeks a

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248 Kötz, "The Doctrine of Privity of Contract in the Context of Contracts Protecting the Interests of Third Parties", (1990) 10 *Tel Aviv University Studies in Law* 195 at 197.

249 Markesinis and Unberath, *The German Law of Torts: A Comparative Treatise*, 4th ed (2002) at 207.

250 Gordley, "Contract and Delict: Toward a Unified Law of Obligations", (1997) 1 *Edinburgh Law Review* 345 at 358.

251 (1999) 197 CLR 1 at 22 [47]; [1999] HCA 6, approving *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 and referring to Weir, "Complex Liabilities", in Tunc (ed), *International Encyclopedia of Comparative Law*, (1986), vol 11, Ch 12 at 35 [67].

252 *Astley v Austrust Ltd* (1999) 197 CLR 1 at 20 [44].

solution in tort law to the problem of recoverability[253]. This may be contrasted with the approach of the German law. That said, there is something of a connection between the two areas of contract and tort. By way of example, the terms of a contract between an original owner of a building and a builder who builds it negligently may be relevant to the duty owed by the builder to a subsequent owner[254]. The duty owed to a third party may be "equivalent to contract"[255].

172 Nautronix pleaded an alternative claim in contract based upon breach of an implied term such as that described. However, it chose not to pursue liability on that basis on appeal. Consideration of the liability of Mr Penberthy and Fugro is limited to the action in tort. Nevertheless, the contractual relationship between Fugro and Nautronix and the terms of the charter agreement, express and implied, are clearly relevant to the question whether a duty of care was owed to Nautronix.

Was a duty of care owed to Nautronix?

173 In *Perre v Apand Pty Ltd*[256], the defendant's knowledge of the risk associated with its activities and of the consequences for an individual, or a class of persons, was identified as being of importance to the question of whether a duty of care could be said to arise. In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[257], reference was made to one of the "salient features" identified by Stephen J in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*[258], namely, the defendant's knowledge that to damage the pipeline was inherently likely to produce economic loss. It was this feature which constituted the close relationship between plaintiff and defendant, sufficient to give rise to a duty of care in that case.

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253 *Hill v Van Erp* (1997) 188 CLR 159; [1997] HCA 9; see also *Scott v Davis* (2000) 204 CLR 333 at 423-424 [273]; [2000] HCA 52.

254 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 532 [28].

255 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 528-529; *Hill v Van Erp* (1997) 188 CLR 159 at 233; *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 434 [44], 446 [80]; [1999] HCA 25.

256 (1999) 198 CLR 180 at 230-231 [132], 236 [150]-[151].

257 (2004) 216 CLR 515 at 530 [22].

258 (1976) 136 CLR 529 at 576.

174 A tortfeasor may know that a person is reliant upon them. Such is usually the case in the giving of advice. As Gleeson CJ observed in *Perre v Apand Pty Ltd*[259], reliance and actual foresight are closely related. Knowledge of an individual who is reliant, and therefore vulnerable, is a significant factor in establishing a duty of care, although vulnerability can arise otherwise than by reliance[260]. In *Perre v Apand Pty Ltd*, the defendant's internal communications showed that it had actual foresight of harm and knowledge of a class of people who were vulnerable to the threat of harm[261].

175 Vulnerability was said in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[262] to have become an important requirement in cases where a duty of care has been found to have been owed. Vulnerability is not to be understood as meaning only that the plaintiff was likely to suffer damage if reasonable care was not taken, but rather as referring to the plaintiff's inability to protect itself from the consequence of a defendant's want of reasonable care, either entirely or at least in a way which would cast the burden of the loss upon the defendant.

176 In the present case, whilst Mr Barclay could not be said to have had knowledge of Nautronix and its interests, Fugro and Mr Penberthy clearly did. The contractual relationship between Fugro and Nautronix, and the part Mr Penberthy had in piloting the specially adapted charter flights, provided Fugro with knowledge of Nautronix' project, its commercial purposes and the importance of the employees to the achievement of those purposes. As Murray J observed[263], Fugro and Mr Penberthy largely admitted that any failure on their part to exercise reasonable care and skill in the piloting of the plane was likely to result in economic loss to Nautronix, consequent upon injury to its employees. Even without that admission, a duty to take care is evident not the least because the law would imply a term to that effect in the performance of the charter agreement.

177 On the view of the Court of Appeal, Nautronix could have gone further and negotiated terms with Fugro to protect itself from the effects of economic loss, and Nautronix could not, therefore, be said to be vulnerable[264]. Presumably

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259 (1999) 198 CLR 180 at 194 [10].

260 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 194 [11].

261 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 194-195 [13].

262 (2004) 216 CLR 515 at 530 [23].

263 *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [272].

264 *Fugro Spatial Solutions Pty Ltd v Cifuentes* (2011) Aust Torts Reports ¶82-087 at 64,885 [118].

the Court of Appeal had in mind Fugro accepting liability for such loss in the event of negligence. A conclusion that Fugro would have agreed to such a term is not open. In any event, Nautronix had the protection of the implied term to take reasonable care, which, combined with Fugro's knowledge, was sufficient to give rise to a duty of care.

The rule in *Baker v Bolton*

178 I agree with the joint reasons that no basis has been shown for the contention that the rule in *Baker v Bolton*[265] is no longer part of the common law of Australia or that it should be discarded. As the joint reasons explain[266], the rule remains applicable to an action for breach of duty and to an action per quod servitium amisit.

Conclusion and orders

179 In summary: the action per quod servitium amisit continues in existence as part of the common law of Australia and as a remedy for particular loss. Each of Mr Barclay, Mr Penberthy and Fugro is liable in that action. The damages to be assessed pursuant to such liability are limited to the value of the services lost and do not extend to claims of economic loss of the kind presently brought by Nautronix. Mr Penberthy and Fugro remain liable to Nautronix for breach of their respective duties of care on the findings of negligence made by the trial judge. Mr Barclay is not so liable.

180 I agree that Nautronix should be granted special leave to cross-appeal in each proceeding against the Court of Appeal's finding as to the rule in *Baker v Bolton*, but that each cross-appeal should be dismissed.

181 I agree with the joint reasons that, subject to the directions concerning the formulation of further orders, each appeal should be dismissed. I also agree with the orders for costs proposed in the joint reasons.

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265 (1808) 1 Camp 493 [170 ER 1033].

266 Reasons of French CJ, Gummow, Hayne, Crennan and Bell JJ at [22]-[27].