Case Note

Barclay v Penberthy: Polishing the Antiques of Australian Tort Law

Dan Flanagan*

Abstract

In *Barclay v Penberthy*, the High Court of Australia made three unanimous findings of significance to the development of Australian tort law. First, it found a tortfeasor liable to an employer in negligence for pure economic loss consequent on injuries to its employees. Second, it confirmed that the action for loss of services remains part of the common law, meaning that an employer can seek damages directly from a tortfeasor regarding the loss of an employee's services. There is now a significant overlap in the type of damage that may be compensated under this action and under an action in negligence. The preferable course is for the action for loss of services to be abolished, and for liability to be determined solely by reference to the law of negligence. Finally, the Court affirmed the rule in *Baker v Bolton*, meaning that a plaintiff remains unable to bring an action if the wrong complained of is the death of another person. This is regrettable because the rule is problematic from a policy perspective, and has an uncertain legal foundation.

I Introduction

Tort law is littered with principles that were developed to meet the peculiar circumstances and social conditions that confronted the common law courts over hundreds of years. These artefacts of history sometimes sit uncomfortably alongside contemporary principles. This tension is illustrated in *Barclay v Penberthy* where, among other things, the High Court of Australia unanimously affirmed two antique principles of tort law.[1] It held that the *actio per quod servitium amisit* ('the action for loss of services') continues to enable an employer to bring a claim against a tortfeasor who has intentionally or negligently injured his or her employee, and to recover damages in respect of that employee's services. It also held that the rule in *Baker v Bolton*[2] continues to prevent a third party from bringing an action to recover damages where the wrong complained of is the death of another person. In affirming these two principles, the High Court overlooked the many criticisms that may be levelled against them on matters of policy and law, and instead upheld them on the basis of their longstanding authority.

* Final year student, Juris Doctor, Sydney Law School. I thank Mr Ross Anderson for his valuable guidance and assistance with this case note. All errors and opinions remain my own.

1 *Barclay v Penberthy* (2012) 246 CLR 258.

2 (1808) 1 Camp 493; 170 ER 1033 (Ellenborough LJ).

This case note is divided into five parts. Part II outlines the factual background to *Barclay v Penberthy* and provides an overview of the broader litigation. Part III discusses the High Court's finding that a tortfeasor was liable in negligence to an employer for pure economic losses consequent to injuries to its employees. Part IV will examine the arguments against the continued existence of the action for loss of services and analyse the High Court's pronouncements on the heads of damage that can potentially be claimed under this action. It is proposed that there is now a significant overlap between the type of damage that can be compensated under this action and under an action for negligently caused pure economic loss, and that their co-existence is problematic because the elements required to establish liability under the two actions are fundamentally different. Part V will outline the rule in *Baker v Bolton* and the rejected arguments against maintaining this rule.

II Background

A *Relevant Facts*[3]

The facts are simple. Fugro Spatial Solutions Pty Ltd ('Fugro') entered an agreement to provide a commercial air charter service to Nautronix Ltd ('Nautronix')[4] to enable Nautronix to test a submarine communication technology that it proposed to sell to the defence and petroleum industries. On 11 August 2003, the chartered aircraft took off with five passengers from a Western Australian airport, only to crash a few minutes later after the right-hand engine shut down.

Two incidents of negligence were identified as causing the crash. First, a component of the aircraft's right-hand engine malfunctioned. That component had been negligently designed three years earlier by an aeronautical engineer, Mr Aaron Barclay. The design was flawed because it specified the use of an alloy and finish that would inevitably cause the fuel pump to fail prematurely. Second, the pilot, Mr Alec Penberthy, an employee of Fugro for whom it was vicariously liable, responded negligently to the engine failure by performing a series of left-hand turns that caused the aircraft to lose airspeed and altitude.

All five passengers on board the flight were specialist employees of Nautronix: a computer software consultant, Mr Malcolm Cifuentes; the manager of the project, Mr Michael Knubley; a project manager with military experience, Mr Steven Warriner; an engineering director, Mr Harry Protoolis; and an electronics engineer, Mr Ozan Perineck. Warriner and Protoolis were killed as a result of the crash, and the other three men were seriously injured.

---

[3] This summary draws from the trial judgment of Murray J, where the relevant factual findings were given their clearest and most comprehensive exposition: *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 (11 November 2009) [1]–[243] ('*Cifuentes*').

[4] At the time of proceedings, Nautronix Ltd was a wholly-owned subsidiary of Nautronix (Holdings) Ltd. Nautronix Ltd had assigned its right to sue to Nautronix (Holdings) Ltd in June 2006. For present purposes, it is convenient to refer to both corporations as 'Nautronix'.

B *Overview of the Litigation*

The procedural history of the matter is complex, so this section is intended to give a mere overview of the litigation. More detail on the procedural history for the issues relevant to the High Court proceedings is given in the sections that follow.

In the Supreme Court of Western Australia, Murray J heard a web of claims and made the following findings on liability:[5]

- Barclay and Penberthy/Fugro were liable to Cifuentes, Knubley and Perineck ('the surviving employees') in negligence for their personal injuries.[6] They were also liable to the widows of Warriner and Protoolis ('the deceased employees') in representative actions brought under the *Fatal Accidents Act 1959* (WA).[7]
- Barclay and Penberthy/Fugro were liable to Nautronix in negligence for the damage caused to its property in the crash.[8]
- Penberthy/Fugro was liable to Nautronix in negligence for any pure economic losses that were consequent on the deaths and injuries to its employees.[9] Barclay was not liable under a similar action.[10]
- Barclay was liable to Fugro in negligence for the damages caused to its aircraft in the crash.[11]
- Barclay was liable to Penberthy/Fugro in a claim for a contribution brought under s 7(1)(c) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA).[12]
- Fugro was not liable to Nautronix under an action for breach of contract.[13]

In the Western Australian Court of Appeal, appeals and cross-appeals were upheld by McLure P (with whom Martin CJ and Mazza J agreed) on three grounds.[14] First, her Honour held that Barclay and Penberthy/Fugro were *both* liable to Nautronix for negligently caused pure economic losses consequent on the injuries to its employees.[15] Second, her Honour held that the rule in *Baker v Bolton* precluded Nautronix from bringing claims in respect of its deceased employees.[16] Finally, her Honour made an adjustment to liability under the contribution claim by

---

5 *Cifuentes* [2009] WASC 316 (11 November 2009).
6 Ibid [289]–[296], [304]–[307].
7 Ibid.
8 Ibid.
9 Ibid [346].
10 Ibid [353].
11 Ibid [289]–[296].
12 Ibid [360]–[366].
13 Ibid [367]–[432].
14 *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] Aust Torts Reports 82-087 ('*Fugro*').
15 Ibid [114]–[126].
16 Ibid [113].

apportioning liability as 80 per cent against Barclay and 20 per cent against Penberthy/Fugro.[17]

In the High Court, two appeals and an application for special leave to cross-appeal were heard together by French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.[18] As Heydon J observed, '[i]t 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'.[19] In view of that concession, it is appropriate merely to distil the three main issues that fell for decision:

1. Did Penberthy owe a duty to Nautronix to take reasonable care to avoid causing it pure economic loss?
2. Does the action for loss of services remain as part of the common law of Australia? If so, are Barclay and Penberthy/Fugro liable to Nautronix under that action?
3. Does the rule in *Baker v Bolton* remain as part of the common law of Australia? If so, does that rule preclude Nautronix from bringing actions in respect of its deceased employees?

The Court answered each of these questions in the affirmative. French CJ, Gummow, Hayne, Crennan and Bell JJ delivered the majority judgment, and Heydon and Kiefel JJ largely concurred in separate judgments.

III Action for Pure Economic Loss

Nautronix brought actions in negligence for pure economic losses resulting from a delay to the development and exploitation of the technology that it had been testing. As that technology had been developed by the five employees on board the chartered flight, it was claimed that their injuries and deaths had inhibited its continued development.[20]

A *Procedural History of the Issue*

The principal issue throughout the proceedings was whether either Barclay or Penberthy owed Nautronix a duty to avoid causing it pure economic loss. In the Supreme Court, Murray J found that such a duty was not owed by Barclay,[21] but was owed by Penberthy.[22]

In the Court of Appeal, Penberthy/Fugro argued not only against the existence of his duty, but also against Barclay's lack of duty. McLure P accepted

---

17 Ibid [73]–[79].
18 *Barclay v Penberthy* (2012) 246 CLR 258.
19 Ibid 291 (Heydon J).
20 *Cifuentes* [2009] WASC 316 (11 November 2009) [325] (Murray J).
21 Ibid [353].
22 Ibid [346].

only the latter argument, and held that they both owed a duty to Nautronix.[23] Her Honour based that finding entirely upon the action for loss of services, concluding that its continued existence meant 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'.[24] As will become apparent, this was an erroneous conflation of two distinct bodies of law.

In the High Court, Nautronix conceded that the reasoning of McLure P could not be supported, and argued that Penberthy owed it a duty to avoid causing pure economic loss regardless of the existence of the action for loss of services.[25] Although Nautronix abandoned the claim against him,[26] Barclay's position provides a useful factual contrast and will therefore be referred to in this case note.

B *Duty of Care to Avoid Causing Pure Economic Loss*

The relevant principles were not in dispute. An action in negligence can be maintained in respect of pure economic loss (that is, loss that is not consequent on an injury to the plaintiff's person or property), but the courts have been reluctant to impose liability for such loss. This judicial reluctance is grounded in reasons of policy;[27] in particular, by the prospect of exposing a defendant to indeterminate liability to an indeterminate class.[28] As a result, additional control factors have been recognised as relevant to determining whether a defendant owed a duty to avoid causing pure economic loss.[29] Two control factors were regarded as particularly relevant to this case. First, whether the plaintiff was vulnerable in the sense that it was unable to protect itself from the consequences of defendant's lack of reasonable care.[30] Second, whether the defendant had actual or constructive knowledge of the plaintiff, either as an individual or as a member of an ascertainable class of persons, as someone who was at risk of foreseeable harm.[31]

In view of those general principles, the majority held that Penberthy owed a duty of care to Nautronix to avoid causing it pure economic loss and affirmed the reasoning of Murray J at first instance.[32] According to Murray J, Penberthy owed a duty because Nautronix was vulnerable in that it was unable to protect itself from the consequences of Penberthy's negligent piloting.[33] In addition, Penberthy had

---

23 *Fugro* [2011] Aust Torts Reports 82-087 [114]–[126].

24 Ibid [110].

25 Nautronix (Holdings) Pty Ltd, 'Second Respondent's Submissions', Submission in *Penberthy v Barclay*, P57/2011, 27 January 2012, 11.

26 It will be recalled that Barclay's liability, in this respect, was only ever established because Penberthy had put it in issue before the Court of Appeal.

27 See generally R P Balkin and J L R Davis, *The Law of Torts* (LexisNexis, 4th ed, 2009) 414–18.

28 *Ultramares Corp v Touche, Niven & Co*, 174 NE 441 (1931), 444 (Cardozo CJ); *The Willemstad* (1976) 136 CLR 526, 551 (Gibbs J).

29 See, eg, *The Willemstad* (1976) 136 CLR 526, 576–7 (Stephen J); *Perre v Apand* (1999) 198 CLR 180, 219–20 (McHugh J).

30 *Perre v Apand* (1999) 198 CLR 180, 194 (Gleeson CJ); *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 529–31 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

31 Ibid.

32 *Barclay v Penberthy* (2012) 246 CLR 258, 284–5.

33 *Cifuentes* [2009] WASC 316 (11 November 2009) [346].

knowledge of Nautronix and of the commercial purpose of the flight, so it was reasonably foreseeable to him that it would suffer economic loss if he were to fly the aircraft negligently.[34] This is in contrast to the position of Barclay. It was reasonably foreseeable that economic loss might result if the engine component were to malfunction, but Barclay did not have the requisite knowledge of Nautronix as an individual or as a member of an ascertainable class at risk of that foreseeable harm.[35] Instead, Nautronix was a member of an essentially indeterminate class: 'any user of the aircraft under any type of arrangement who might suffer loss of a purely financial kind, in whatever manner it might be incurred, if the aircraft crashed'.[36]

This is an important and potentially far-reaching development in the law. A tortfeasor may now be liable to an employer in negligence for pure economic loss consequent on an injury to its employee if it is shown that the tortfeasor owed a duty directly to the employer to avoid causing such loss. However, as Kiefel J noted,[37] and as the facts of this case demonstrate, the circumstances in which such a duty will be owed are deliberately limited.

III Action for Loss of Services

Nautronix brought actions for loss of services against Barclay and Penberthy/Fugro claiming damages in respect of its five employees; in particular, for additional labour costs and for lost profits resulting from delays to the development of its technology.[38] Barclay and Penberthy/Fugro responded by inviting the High Court to abolish the action for loss of services, thereby overturning its earlier decision in *Commissioner for Railways (NSW) v Scott*.[39] The High Court unanimously rejected that invitation because it regarded the legislature as the appropriate organ to effect any such change.[40] As a result, Nautronix was permitted to claim under the action but, as will be seen, the appropriate measure of damages remains uncertain.

A *Procedural History of the Issue*

The presence of the action for loss of services in this litigation is itself a peculiarity. In the Supreme Court, the action did not form part of Nautronix's claim, but was instead raised pre-emptively by Barclay, and ultimately did not need to be decided.[41] In the Court of Appeal, the action re-emerged in the

---

34 Ibid.
35 Ibid [353].
36 Ibid.
37 *Barclay v Penberthy* (2012) 246 CLR 258, 311 (Kiefel J).
38 Nautronix (Holdings) Pty Ltd, 'Nautronix's Further Submissions', Submission in *Barclay v Penberthy*, P55/2011, 17 May 2012, 4–6.
39 Aaron Barclay, 'Appellant's Submissions', Submission in *Barclay v Penberthy*, P55/2011, 4 January 2012, 13; Alec Penberthy and Fugro Spatial Solutions Pty Ltd, 'Appellant's Submissions', Submissions in *Penberthy v Barclay*, P57/2011, 5 January 2012, 5–8; *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 ('*Scott*').
40 *Barclay v Penberthy* (2012) 246 CLR 258, 282 (French CJ, Gummow, Hayne, Crennan and Bell JJ), 298 (Heydon J), 313–14 (Kiefel J).
41 *Cifuentes* [2009] WASC 316 (11 November 2009) [359].

erroneous reasoning of McLure P as the basis for imposing a duty to avoid causing pure economic loss.

In the High Court, therefore, a preliminary issue was whether it was now open to Nautronix to pursue the claim for the first time. The settled rule is that an appellate court must refuse to entertain a point not raised in a court below if 'evidence could have been given there which by any possibility could have prevented the point from succeeding'.[42] The majority concluded that no such possibility existed, so Nautronix was permitted to pursue the action.[43] In dissent on this issue, Heydon J observed that the litigation had been conducted on the assumption that the five passengers were employees of Nautronix, but there was a possibility that they had in fact been retained as subcontractors.[44] Therefore, if the action had been put in issue earlier, then evidence might have been adduced as to their true legal relationship, and that could possibly have prevented the action from succeeding.

B *Arguments against Retaining the Action for Loss of Services*

Two arguments were made against retaining the action for loss of services. First, it was submitted that the action is 'archaic' and 'a product of another age'.[45] Second, it was submitted that the action is legally anomalous and ought to be 'absorbed into the law of negligence'.[46]

'A product of another age'

The High Court rejected an argument that the action for loss of services ought to be abandoned as a historical anomaly, concluding that it had evolved from its early origins and that it had ongoing utility as a protection for contractual and commercial interests.[47] To understand both the submission and the conclusion, it is first necessary to review the history and development of the action for loss of services.[48]

The action originated in 13th- or 14th-century England. During that period, '[t]he basis of society was still status rather than contract',[49] and the relations between master/servant, husband/wife and parent/child produced peculiar legal

---

42 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418, 438 (Latham CJ, Williams and Fullagar JJ).

43 Ibid 285 (French CJ, Gummow, Hayne, Crennan and Bell JJ).

44 *Barclay v Penberthy* (2012) 246 CLR 258, 295–7 (Heydon J).

45 Aaron Barclay, 'Appellant's Submissions', Submission in *Barclay v Penberthy*, P55/2011, 4 January 2012, 13; Alec Penberthy and Fugro Spatial Solutions Pty Ltd, 'Appellant's Submissions', Submissions in *Penberthy v Barclay*, P57/2011, 5 January 2012, 5–8.

46 Ibid.

47 *Barclay v Penberthy* (2012) 246 CLR 258, 282–3 (French CJ, Gummow, Hayne, Crennan and Bell JJ), 298–9 (Heydon J), 313 (Kiefel J).

48 For a more detailed and comprehensive historical analysis, see *Inland Revenue Commissioners v Hambrook* [1956] 2 QB 641, 661–5 (Denning LJ) ('*Hambrook*').

49 *Admiralty Commissioners v Owners of the Steamship Amerika* [1917] AC 38, 44 (Lord Parker) ('*Admiralty Commissioners*').

rights and obligations.[50] In particular, writs of trespass were available to the master of a household against third parties to protect the services provided by his servants (for example, action for loss of services), wife (for example, action for loss of consortium) and children (for example, action for loss of services, action for seduction).[51] Such actions arguably arose from a view that the master had a proprietary interest *in his servants and family*, akin to an interest in a chattel.[52] With the passage of time, however, the action for loss of services came to be explained as arising from the master's quasi-proprietary interest *in the services* that his servants were obliged to supply.[53] If such services were interrupted by a tortious act against the servant, then there would also be a tortious interference with the master's interest in the services that were due, entitling him to an independent action against the tortfeasor.

In *Scott*, the High Court not only confirmed that the action for loss of services formed part of the common law of Australia, but also held that it was of wider application than in the United Kingdom.[54] In the earlier case of *Hambrook*, the England and Wales Court of Appeal had considered the action to be confined 'to the realm of domestic relations where a member of the master's household is injured'.[55] This limitation was rejected by a bare majority of the High Court, and the action was held to apply to employer/employee relations more generally.[56] Therefore, an action that was developed to meet the social needs of medieval and feudal England came to have a much more expansive application in industrial Australia.

The High Court's unanimity in *Barclay v Penberthy* suggests that the changed understanding of the nature of the action for loss of services has hardened judicial opinion in its favour. The origins of the action in the notion of a master having a propriety interest *in his servants* had caused earlier courts to question its continued existence. For example, Denning LJ considered the action an anomaly and observed that: '[a] servant has long ceased to be regarded as a slave. It is time he ceased to be looked upon as a chattel. He should be looked upon as a free human being.'[57] Similarly, Fullagar J expressed the view that the action was 'so anomalous and so inappropriate to present-day conditions that the best course

---

50 See generally William Blackstone, *Commentaries on the Laws of England* (J B Lippincott Company, 1900) 364–414; William Holdsworth, *A History of English Law: Volume VIII* (Methuen & Co Ltd, 2nd ed, 1937) 427–30.

51 Ibid.

52 *Hambrook* [1956] 2 QB 641, 661–6.

53 Holdsworth, above n 50, 429; Gareth H Jones, 'Per Quod Servitium Amisit' (1958) 74 *Law Quarterly Review* 39, 50–3; *Admiralty Commissioners* [1917] AC 38, 55 (Lord Sumner). For a strong critique of the reliance on a 'quasi-proprietary' interest as the source of liability, see Allan Beaver, '*Barclay v Penberthy* and the Collapse of the High Court's Tort Jurisprudence' (2013) 13 *University of Queensland Law Journal* 307.

54 *Scott* (1959) 102 CLR 392.

55 *Hambrook* [1956] 2 QB 641, 666 (Denning LJ). This limitation was said to be justified from a legal, historical and policy perspective: at 661–6. Neither justification escaped criticism: see, eg, Jones, above n 53, 53–8.

56 *Scott* (1959) 102 CLR 392.

57 *Hambrook* [1956] 2 QB 641, 660, 666.

would be to reject it altogether'.[58] Any such reservation appears since to have been abandoned.

'Absorbed into the law of negligence'

The High Court also rejected an argument that the action ought to be 'absorbed into the law of negligence', and was not persuaded by the submission that its continued separate existence has the potential 'to undermine or circumvent [the court's] development of principles by which the occasions for recovery of pure economic loss are deliberately restricted'.[59]

To understand why that potential exists, it is useful first to consider the differences between the action for loss of services and the law of negligence. The action for loss of services does not depend on the tortfeasor owing a duty of care to an employer.[60] It is sufficient that there is a relationship of master and servant, and that the servant has been intentionally or negligently injured. This means that the control factors that limit liability for negligently caused pure economic loss do not operate.[61] In addition, the action for loss of services does not require the employer's losses to have been reasonably foreseeable to the tortfeasor, meaning that there is no limitation against damages that are too remote.[62]

As the High Court correctly concluded, any differences between the two causes of action are explained by the fact that the action for loss of services is historically and conceptually distinct from the law of negligence.[63] The action has its origins in a writ in trespass, whereas the modern law of negligence arose from the action on the case. It is therefore unsurprising that the earlier tort does not have the same limitations on liability as the latter.

In view of these distinct origins, the High Court did not consider that the action for loss of services could be 'absorbed' into the law of negligence because this would result in 'the destruction of a distinct cause of action', and any such destruction should be left to the legislature.[64] Although this analysis is sound, the outcome is nevertheless unsatisfactory. If the submission had been accepted then this would result in a coherent, unified basis for establishing liability: an employer would only be able to recover damages from the loss of an employee's services if it were shown that the defendant owed it a duty to avoid causing pure economic loss. Such a rationalisation would not be without precedent. In *Burnie Port Authority v*

---

58 *Scott* (1959) 102 CLR 392, 406.

59 Aaron Barclay, 'Appellant's Submissions', Submission in *Barclay v Penberthy*, P55/2011, 4 January 2012, 13; Alec Penberthy and Fugro Spatial Solutions Pty Ltd, 'Appellant's Submissions', Submissions in *Penberthy v Barclay*, P57/2011, 5 January 2012, 5–6.

60 Cf *Donoghue v Stevenson* [1932] AC 562, 618.

61 Cf *Perre v Apand* (1999) 198 CLR 180; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.

62 Cf *Overseas Tankship (UK) Ltd v Mort Docks and Engineering Co Ltd (Wagon Mound (No 1))* [1961] AC 388, 422–6.

63 *Barclay v Penberthy* (2012) 246 CLR 258, 281–2 (French CJ, Gummow, Hayne, Crennan and Bell JJ), 298 (Heydon J), 310–1 (Kiefel J).

64 Ibid.

General Jones Pty Ltd,[65] for example, the High Court held that the rule in *Rylands v Fletcher* had been 'absorbed by the principles of ordinary negligence',[66] notwithstanding that this rule was part of the law of nuisance and that it predated the modern law of negligence.[67]

Kiefel J alone addressed the substance of this submission, rejecting it on the basis that in many cases no duty would be owed directly to an employer, and that such an employer would therefore be left without a remedy.[68] While this is undoubtedly the case, the reasoning is self-fulfilling: the action should be retained because without it there would be no remedy.

C *Lost Profits and the Appropriate Measure of Damages*

Nautronix's claim for loss of profits raised the important question of the appropriate measure of damages in an action for loss of services. The High Court sensibly decided to leave the actual assessment of damages to the Supreme Court pending receipt of further evidence, but the majority took the opportunity to lay down some 'governing principles'.[69]

The majority approved a formulation '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"'.[70] This is a very narrow basis for liability. For instance, if an employer is able to engage a replacement on equal or better terms, then there will be no loss on which to claim.[71] More importantly for present purposes, the formulation appears to exclude claims for loss of profits.

However, that general proposition was then undermined by the acknowledgment of an exception in circumstances where an employer is a 'one-man company' that is controlled by an injured employee:

> 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

---

65 (1994) 179 CLR 520.

66 Ibid 556.

67 Under the rule in *Rylands v Fletcher*, a person who brought something dangerous onto his or her land did so at his own peril, and was prima facie liable for all damage caused to his or her neighbour if that dangerous thing were to escape: (1868) LR 3 HL 330.

68 *Barclay v Penberthy* (2012) 246 CLR 258, 311 (Kiefel J).

69 Ibid 286–9 (French CJ, Gummow, Hayne, Crennan and Bell JJ), 315–7 (Kiefel J). Heydon J considered it inappropriate to give any guidance on the appropriate measure of damages, regarding Nautronix's submission as 'an invitation to deliver an advisory opinion'. His Honour considered that the case potentially raised significant questions of principle, and ought therefore to be decided in view of all the facts. His Honour asked '[w]hy should it be decided, for example, that Nautronix's claim to damages be limited to the actual value of the services lost without it having had a chance to establish what greater losses it may have suffered?': at 301–2.

70 *Barclay v Penberthy* (2012) 246 CLR 258, 286 (French CJ, Gummow, Hayne, Crennan and Bell JJ) (emphasis omitted), quoting Harvey McGregor, *McGregor on Damages* (Sweet and Maxwell, 13th ed, 1972) [1167].

71 *Barclay v Penberthy* (2012) 246 CLR 258, 286.

> the court that the loss is attributable to the loss of services and no other likely cause has been identified.[72]

The majority cited *Argent Pty Ltd v Huxley* as an instance where this exception was made out.[73] In that case, the managing director and 'operative force' behind two plaintiff companies was injured in a motor accident caused by the negligence of the defendant. The manager had been unable to continue working after the accident, so it became necessary for the companies to sell the business. Hoare J found that the price obtained under the sale was depressed because the business required a manager 'of both experience and considerable acumen', and the loss of the manager's services 'must dramatically reduce the number of potential buyers for such a business'.[74] Therefore, damages were awarded under an action for loss of services for the sum of the profits that the business would otherwise have generated for the plaintiffs while the manager continued to work, plus the additional purchase price that would have been realised on the sale of the business.[75]

This exception is problematic. First, it is unclear whether it is strictly limited to a 'one-man company', or whether it could apply more generally to circumstances where an employee has specialised skills that are crucial to the employer's business. In *Marinovski v Zutti Pty Ltd*, for instance, the New South Wales Court of Appeal held that *Argent* stood for the broader of these two applications, with Hutley JA giving the example of a leader in a new field who is 'irreplaceable' and whose injury would destroy the employer's business.[76] In view of the parallels to the claim made by Nautronix, it is curious that the majority neither discussed *Marinovski* nor addressed the point raised. If the exception does not cover such a circumstance, then the limitation drawn may be criticised as arbitrary because there is no difference in principle between the losses suffered by an employer in either case.

Second, the exception could expose a tortfeasor to liability for very significant economic losses suffered by an employer of whom he or she had no knowledge and owed no duty. To adopt the phrasing of Kiefel J, it would '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'.[77] It is for this reason that her Honour's preference to confine damages strictly to the cost of substitute labour is sensible.

IV Rule in *Baker v Bolton*

In *Baker v Bolton*, Lord Ellenborough laid down the rule that '[i]n a civil court, the death of a human being could not be complained of as an injury'.[78] Nautronix

---

72 Ibid 288.
73 [1971] Qd R 331, 337 ('*Argent*').
74 Ibid.
75 Ibid 337–9.
76 *Marinovski v Zutti Pty Ltd* [1984] 2 NSWLR 571, 575 ('*Marinovski*').
77 *Barclay v Penberthy* (2012) 246 CLR 258, 317.
78 *Baker v Bolton* (1808) 1 Camp 493; 170 ER 1033 (Ellenborough LJ).

invited the High Court to reconsider that rule in order to avoid being denied remedies in respect of its deceased employees.[79] The High Court unanimously rejected that invitation.[80] As a result, Nautronix was prevented from recovering damages in respect of its deceased employees under its actions both in negligence and for loss of services.

Prior to examining the arguments made and conclusions reached, it is instructive first to outline the origins and scope of the rule in *Baker v Bolton*. The facts of that case can be stated simply. The plaintiff's wife was killed when the stage coach that they were travelling in overturned, and he brought an action against the proprietors of the vehicle for loss of consortium. After declaring the now famous rule, Lord Ellenborough concluded that the plaintiff was denied a remedy because any right to damages ceased upon the death of his wife.[81] The rule as stated could potentially apply to two distinct circumstances.[82] It could operate to prevent a third party from bringing an action to recover damages where the wrong complained of is the death of another person. Alternatively, it could operate to prevent a representative of a deceased person from suing in his or her representative capacity. As this latter situation was already prevented under the maxim *actio personalis moritur cum persona*,[83] which has since been tempered by legislation,[84] it has been accepted that it is to the former circumstance that the rule applies.[85] The rule is therefore peculiarly adapted as a bar to actions in the nature of an action for loss of services.

A *Arguments against Retaining the Rule*

The principal argument against retaining the rule in *Baker v Bolton* is that it has two undesirable policy consequences, both of which are illustrated by the facts in *Barclay v Penberthy*. Initially, a tortfeasor is placed in the invidious position that it is in its best interest for an injured party to die from his or her injuries. As Nautronix's counsel proposed in argument, the rule is 'antithetical to the policy of the law because it rewards the tortfeasor who manages to kill his victim rather than just injuring him'.[86] Furthermore, the rule has the illogical effect of denying a

---

79 Nautronix (Holdings) Pty Ltd, 'Third Respondents' Submissions', Submission in *Barclay v Penberthy*, P55/2011, 27 January 2012, 10.

80 *Barclay v Penberthy* (2012) 246 CLR 258, 278–9 (French CJ, Gummow, Hayne, Crennan and Bell JJ), 292–4 (Heydon J), 321–2 (Kiefel J).

81 *Baker v Bolton* (1808) 1 Camp 493; 170 ER 1033 (Ellenborough LJ).

82 W S Holdsworth, 'The Origin of the Rule in *Baker v Bolton*' (1916) 32 *Law Quarterly Review* 431, 432.

83 The maxim may roughly be translated as meaning 'the personal action dies with the person'. It operates such that 'no executor or administrator [can] sue, or be sued, for any tort committed against or by the deceased in his lifetime': *Benham v Gambling* [1941] 1 AC 157, 160 (Viscount Simon LC).

84 *Civil Law (Wrongs) Act 2002* (ACT) pt 2.4; *Law Reform (Miscellaneous Provisions) Act 1994* (NSW) pt 2; *Law Reform (Miscellaneous Provisions) Act 1956* (NT) pt 2; *Succession Act 1981* (Qld) s 66; *Survival of Causes of Action Act 1940* (SA); *Administration and Probate Act 1935* (Tas) s 27; *Administration and Probate Act 1958* (Vic) s 29; *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 4.

85 See, eg, *Rose v Ford* [1937] AC 826, 833; *Woolworths v Crotty* (1942) 66 CLR 603, 612–15 ('*Woolworths*').

86 Transcript of Proceedings, *Barclay v Penberthy* [2012] HCATrans 98 (1 May 2012) (W A Harris SC).

plaintiff a remedy by reason of the fact that a third party has died, whereas he or she would have had an action if that person had lived. For instance, Nautronix's loss in respect of its deceased employees is no less than that in respect of its surviving employees; indeed, the former loss is perhaps greater.

A further argument is that Lord Ellenborough's decision was based upon unsound legal reasoning. The report itself is extremely brief and fails to cite any argument or authority to justify the principle stated.[87] The vacuum left by those omissions has been filled by voluminous speculation as to his Lordship's rationale. The most persuasive and often cited analysis is that of Sir William Holdsworth,[88] who suggests that the decision was based in part upon a statement by Tamberlin J in the case of *Higgins v Butcher*:

> If a man beats the servant … so that he dies of the battery, the master shall not have an action against the other for the battery and the loss of service, because the servant dying of the extremity of battery, it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence and private wrong offered to the master before, and his action is thereby lost.[89]

That statement is the first reported instance of what may be termed the 'felony-merger doctrine'. Under that doctrine, which has since been superseded,[90] if a tort was found to disclose a felony then any civil action that a plaintiff might have had was *suspended* until the alleged wrongdoer was prosecuted.[91] Holdsworth speculates that Lord Ellenborough may have erred by misunderstanding the scope of the felony-merger doctrine, and by conflating it with the common law maxim *actio personalis moritur cum persona*.[92] That conflation would have been erroneous because the two principles occupied conceptually distinct areas. Whereas the maxim *actio personalis* prevented the personal representative of a deceased person from bringing an action on the deceased's behalf,[93] the felony-merger doctrine affected the ability of a plaintiff to bring an action where the injury complained of was the death of a third party.

Although Holdsworth's argument has received some judicial support,[94] no court has yet regarded the attack as sufficient to displace the rule. Instead, it has been concluded, as Lord Parker stated in *Admiralty Commissioners*, that 'however anomalous it may appear to the scientific jurist' the rule 'is almost certainly explicable on historical grounds'.[95] This is a precarious foundation for a rule with problematic policy implications.

---

87 See *Osborn v Gillett* (1873) LR 8 Ex 88, 96 (Bramwell B).

88 Holdsworth, above n 82.

89 *Higgins v Butcher* (1607) Yel 90; 80 ER 61.

90 For a history of this rule and its subsequent development, see Matthew Dyson, 'The Timing of Tortious and Criminal Actions for the Same Wrong' (2012) 71 *Cambridge Law Journal* 86.

91 See, eg, *Wells v Abrahams* (1872) 7 QBD 554, 557 (Cockburn CJ); *Smith v Selwyn* [1914] 3 KB 98, 104–6.

92 Holdsworth, above n 82, 434–5.

93 *Benham v Gambling* [1941] 1 AC 157, 160 (Viscount Simon LC).

94 See, eg, *Admiralty Commissioners* [1917] AC 38, 43–50 (Lord Parker); *Swan v Williams Demolition Pty Ltd* (1987) 9 NSWLR 172, 178–80 (Samuels JA) ('*Swan*').

95 *Admiralty Commissioners* [1917] AC 38, 50; but see William Holdsworth, *A History of English Law: Volume III* (Methuen & Co Ltd, 2nd ed, 1937) 676–7.

B *The Decision to Affirm the Rule*

Notwithstanding the arguments that can be put against the rule in *Baker v Bolton*, the High Court unanimously upheld the rule as forming part of the common law of Australia. It was held that the rule was so well established that any change to it would properly and exclusively be within the province of the legislature.[96]

This outcome is unsurprising. In the leading case of *Admiralty Commissioners*, the House of Lords similarly upheld the rule in *Baker v Bolton* on the basis that there was a long line of authority that had since approved and applied it,[97] and found that no reason had been presented to 'disturb a rule of law which has been so long recognised in our courts'.[98] This decision was followed by the High Court in *Woolworths*, where Latham CJ was of the view that the rule 'must be taken to be thoroughly established'.[99] Finally, in *Swan*,[100] the New South Wales Court of Appeal was highly critical of the rule but ultimately felt bound by the authority of *Woolworths.* Samuels JA observed that:

> Very little has been said in its favour and as far as I can see that is because there is indeed very little to say, either as a matter of legal history or in terms of any policy understandable in present times at least … If this Court were in a position to overrule *Baker v Bolton* there would seem to me to be many reasons for doing so and few for refraining from doing so.[101]

Therefore, to borrow Holdsworth's phrasing, the rule 'has been upheld in all the reported cases, not by reasoning based on a discussion of its policy or impolicy, not by any sufficient technical or historical reasons, but by the assertion that it is a rule of the common law that must be followed'.[102]

V Conclusions

The High Court's decision in *Barclay v Penberthy* to affirm both the action for loss of services and the rule in *Baker v Bolton* is disappointing, but not unjustified. Although the two principles are anomalous and anachronistic, each has come to be supported by lines of authority of such longevity that any court would be brave to overturn them. Therefore, the High Court's preference to defer any such reform to the legislature must be recognised as a prudent one.

There are strong arguments that the two principles should be reformed. With respect to the action for loss of services, even if it is accepted that the underlying theory has adapted to contemporary social conditions, the action now sits uncomfortably alongside the law of negligence that dominates the legal

---

96 *Barclay v Penberthy* (2012) 246 CLR 258, 278–9 (French CJ, Gummow, Hayne, Crennan and Bell JJ), 292–4 (Heydon J), 321–2 (Kiefel J).

97 See, eg, *Osborn v Gillett* (1873) LR 8 Ex 88; *Clark v London General Omnibus Co* [1906] 2 KB 648; *Berry v Humm & Co* [1915] 1 KB 627.

98 *Admiralty Commissioners* [1917] AC 38, 50 (Lord Parker).

99 *Woolworths* (1942) 66 CLR 603, 615, 622.

100 (1987) 9 NSWLR 172.

101 Ibid 190.

102 Holdsworth, above n 82, 431.

landscape. The courts have carefully developed restrictions to control the circumstances in which personal liability flows in negligence. However, the action for loss of services is free of those restrictions, and could potentially be relied upon to expose a tortfeasor to substantial liability against an employer of whom he or she had no knowledge and owed no duty. As a result, the preferred course would be for the action to be abolished, leaving an employer to rely on any remedy that may be available under the law of negligence.

With respect to the rule in *Baker v Bolton*, not only is that rule of doubtful legal foundation, but it is also unjustifiable as a matter of policy. The rule rewards a tortfeasor who kills rather than injures, and denies a remedy to a plaintiff whose loss in the former circumstance is at least as great as in the latter. The rule should also be abolished.