IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P55 of 2011

BETWEEN:

AARON BARCLAY

Appellant

and

ALEC PENBERTHY

First Respondent

and

FUGRO SPATIAL SOLUTIONS PTY LTD

Second Respondent

and

NAUTRONIX (HOLDINGS) PTY LTD

L 3 COMMUNICATIONS NAUTRONIX LTD

Third Respondents

and

MALCOLM ANTHONY CIFUENTES

Fourth Respondent

and

MICHAEL BRIAN KNUBLEY

Fifth Respondent

and

JULIE ANNE WARRINER

Sixth Respondent

and

JANET GRAHAM

Seventh Respondent

and

OZAN PERINCEK

Eighth Respondent

THIRD RESPONDENTS' SUBMISSIONS

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Filed on behalf of the Third Respondents by
Freehills
QV.1 Building, 250 St Georges Terrace
PERTH WA 6000
Freehills I\12950222

DX 104 Perth
Tel +61 8 9211 7777
Fax +61 8 9211 7878
Ref Ante Golem (81043799)

Part I: Internet Certification

1 The third respondents (**Nautronix**) certify that these submissions are in a form suitable for publication on the internet.

Part II: Issues

2 The appeal presents the following issues:

(a) does the *actio per quod servitium amisit* (**per quod action**) require or justify the imposition of duty of care with respect to a claim in negligence for pure economic loss, where otherwise no duty of care would be owed?[1]

(b) if the answer to (a) is no, is the per quod action established in the present case in any event?[2]

(c) is the rule in *Baker v Bolton* (1808) 1 Camp 493 part of the common law of Australia, and if so, does it apply to the per quod action or to a cause of action in negligence?[3]

Part III: Section 78B Notice Certification

3 Nautronix certifies that there is no reason for notice to be given to Attorneys-General pursuant to section 78B of the *Judiciary Act 1903* (Cth).

Part IV: Contested Material Facts

4 Nautronix does not contest the appellant's (**Barclay**) narrative of facts or chronology.

Part V: Applicable Legislative Provisions

5 Nautronix accepts Barclay's statement of the applicable legislative provisions.

Part VI: Argument in Answer to the appellant

6 Nautronix submits that that the Court of Appeal was correct in concluding that:[4]

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[1] Paragraphs [2] to [4] of the appellant's Notice of Appeal dated 20 December 2011.

[2] Ground 1 of Nautronix' Notice of Contention dated 23 December 2011.

[3] Nautronix' Notice of Cross-Appeal dated 23 December 2011.

(a) negligence and the per quod action are closely related common law actions; and

(b) consistency in the application of the per quod action and negligence is a legitimate expectation.

'Closely related'

7 The per quod action, as an action in trespass,[5] and an action in negligence are both tortious claims at common law. In this regard they are related. They are also related to the claim of interference in contractual relations.[6] The degree of relation and closeness of the two actions appears from a consideration of the elements required to establish each action.

8 As confirmed in *Commissioner for Railways (NSW) v Scott* there are three elements that must be established for a per quod action, which when compared against the elements required to be established for a claim in negligence, display a general correlation with each other:

	Negligence elements	Per quod action elements
(a)	A owes B a duty of care	Relationship where C provides services to B (which A may be presumed to foresee)
(b)	A breaches the duty	Tortious injury is caused by A to C
(c)	The breach by A results in B suffering actionable damage	B suffers loss due to A being unable to provide services to B as a result of the tortious injury suffered by C (caused by A)

9 Whilst over time there have been differing views taken as to the nature of the services in relation to the per quod action at (a) above, the settled position in Australia, as set out in paragraphs 4.4 and 7 to 9.4 of the schedule to the submissions of the first and second appellants in P57 of 2011 (**Penberthy and Fugro**), is that the relationship need only involve the de facto provision of services by one person to another, rather than a de jure contract of service.[7]

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[4] *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] WASCA 102 (**Court of Appeal Reasons for Decision**) at [110] per McLure P; at [1(b)] per Martin CJ and [161(c)] per Mazza J.

[5] *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 and 399 – 400 per Dixon CJ.

[6] This cause of action may also be seen as related to negligence and the per quod action when all these torts are viewed together. In this regard it should be recalled that negligence is a relatively new tortious action. Similarly, the elements of interference in contractual relations demonstrate that the same or similar facts can apply across all three actions: intentional conduct by party A; such conduct resulting in party B breaching its obligations under B's contract with party C; and party C suffering loss therefrom; see *Lumley v Gye* [1843-60] All ER Rep 208; (1853) 2 El & Bl 216; (1853) 118 ER 749; *Zhu v Treasurer of the State of New South Wales* (2004) 218 CLR 530.

[7] *Attorney General v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 at 245-246 per Dixon J; at 268 per Williams J; at 276 and 286 per Fullager J; *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 409-410 per Fullager; at 413 per Kitto J and at 422 per Taylor J.

10 Notwithstanding some correlation between the elements of a per quod action and a claim in negligence, the former includes some distinctive elements. For example, it may be said that the per quod action:

(a) has no requirement of reasonable foreseeability. However, in establishing liability under the per quod action, it is necessary that the plaintiff is the employer/master/receiver of service from the person injured. Accordingly, it may be said that in such circumstances a reasonable person in the defendant's position would have foreseen the possibility of harm to the plaintiff (i.e. the employer) given the closeness of the relationship between the plaintiff and the person injured (i.e. the employee) by the conduct of the defendant; and

(b) does not depend on the proof that the defendant breached a legal duty to the plaintiff. The absence of this requirement may be explained on the basis that the per quod action relies on there having been established that the third party caused tortious injury to the employee. Implicit in the per quod action is that the third party has a duty not to cause such damage.

11 Approached in this way it can be seen that even though there is divergence in the elements required to establish a per quod action and a claim in negligence, such differences do not disturb the conclusion that the two causes of actions are closely related.

Consistency

12 McLure P found that "[c]onsistency between closely related common law actions is a legitimate expectation."[8]

13 This conclusion follows her Honour's justified finding that a per quod action and a claim in negligence are "closely related".

14 In those circumstances, it is reasonable to impose a duty of care on the appellant to take reasonable care to avoid causing Nautronix pure economic loss by injuring its employees for the reasons set out below.

15 The development of tortious liability must only proceed on principled grounds.[9] The development of the law of negligence occurs by identifying the relevant characteristics that are common to the kinds of conduct and relationships between the parties which are involved in the case and the kinds of conduct and relationship which have been held in previous decisions of the courts to give rise to a duty of care.[10]

16 The per quod action has existed for centuries and indeed predates the recognition of a claim in negligence, let alone a claim in negligence for pure economic loss.

17 The imposition in negligence of a duty of care owed by a defendant to an employer to take reasonable care to avoid causing pure economic loss by injury to its employee(s) is consistent with the principles expressed by this

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[8] Court of Appeal Reasons for Decision at [110].

[9] *Sullivan v Moody* (2001) 207 CLR 562 at [49].

[10] *Sullivan v Moody* at [51].

court as set out above and can hardly be regarded as an expansion of the law of negligence.[11]

18 Furthermore, the requirements of coherence, i.e. that there not be a legal incoherence with the imposition of a duty of care, is a consideration supported by this court.[12] This operates in a number of ways here:

(a) the finding of a duty of care, as found by the Court of Appeal, is not inconsistent or incoherent with any other tortious or other duties;

(b) the finding of the duty of care is consistent and coherent with the finding of a duty of care owed by the appellant to the employees of the second respondent; and

(c) a finding that no duty of care existed, whilst not incoherent, would not be consistent with the existence of the per quod action, which would create a perverse result.

Application

19 As negligence and the per quod action share similar qualities, to impose a duty of care with respect to a claim in negligence for pure economic loss, based on a legitimate expectation that there should be consistency with the per quod action, is an incremental extension of the cases in which a duty of care will be found.

20 20 On this basis, the finding of the Court of Appeal that there existed a duty of care owed by the appellant and Penberthy to Nautronix for pure economic loss should be upheld.

Part VII: Argument on Notice of Contention and Cross-Appeal

21 If Barclay is successful in his appeal, the decision of the Court of Appeal should be upheld on the ground that the per quod action still exists at common law in Australia and is established in the present circumstances.

Acceptance in Australia

22 Barclay contends that the per quod action should be absorbed into and form part of the general law of negligence or be "limited to cases of menial or domestic servants."[13] However, the action is entrenched as part of the common law of Australia.

23 As recently as 2010, intermediate appellate courts have applied the per quod action.[14] This court confirmed its existence in *Commissioner for Railways (NSW) v Scott.*[15] Further, the existence of the per quod action at common law

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[11] See paragraphs [22] to [31] below.

[12] *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390 at [39]-[40].

[13] Barclay's submissions dated 4 January 2012 at [44].

[14] *Doughty v Martino Developments Pty Ltd* (2010) 27 VR 499, see also *GIO v Robson* (1997) 42 NSWLR 429 and *Marinovski v Zutti* (1984) 2 NSWLR 571.

[15] (1959) 102 CLR 392.

is confirmed by the decisions of some legislatures to extinguish the per quod action in defined circumstances, which legislation rests on the premise that the action persists at common law.[16] Indeed, it has been held that in some instances such legislation has not entirely extinguished the per quod action.[17] Put simply, any further refinement or alteration to the per quod action in this country is a matter for the legislature not the courts.

24 Although since *Scott* this court has not revisited the per quod action, reference has been made to the action in two recent decisions of this court.[18]

25 In *CSR v Eddy* Gleeson CJ, Gummow and Heydon JJ acknowledged that the action was sometimes seen as "antique", but there was no indication that they disapproved of the action.[19] In *Woolcock*, McHugh J and in *NT v Mengel* Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ also referenced the action without suggesting it was an endangered species.[20]

26 In *Scott*, the per quod action in Australia was reformulated for the modern era, in particular in relation to its legal basis and scope. Whilst historically the action was thought to rest on the basis of a "proprietary" interest that a master had in a servant which some found offensive, it is now founded upon the legitimate interest an employer has in the services provided by its employee.[21] This means that the damages that may be claimed relate to loss caused to an employer through "loss of services", to be distinguished from merely the lost value of those services.

27 *Scott* clarified that the per quod action is not confined to menial or domestic servants,[22] but instead embraces all relationships of employment, including

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[16] Most notably, the action has been extinguished in the case of traffic accidents in Victoria, New South Wales and the Northern Territory: *Transport Accident Act 1986* (Vic), s 93(1), (2), 93A; *Motor Accidents Compensation Act 1999* (NSW), s 142; *Motor Accidents (Compensation) Act* (NT), s 5; see, also, *Doughty v Martino Developments Pty Ltd* (2010) 27 VR 499. In *CSR v Eddy* (2005) 226 CLR 1, Gleeson CJ, Gummow and Heydon JJ expressed a view (at 23) that the action has been 'abolished ... in large measure in Victoria and the Northern Territory' due to the operation of the *Transport Accident Act 1986* in Victoria and the *Motor Accidents (Compensation) Act* and *Work Health Act* in the Northern Territory.

[17] For example, in *Matthew Chaina v Presbyterian Church (NSW) Property Trust* (2008) 69 NSWLR 533, the New South Wales Supreme Court adjudged that the per quod action was regulated, and not implicitly extinguished, by the enacting of the *Civil Liability Act 2002 (NSW)*. See, also Sappideen et al, *Macken's Law of Employment* (7th ed), 490.

[18] *CSR Ltd v Eddy* (2005) 226 CLR 1 at 22–23 and *Woolcock Street Investments Pty Ltd v CDG* (2004) 216 CLR 515 at 537; see also *Northern Territory of Australia v Mengel* (1995) 185 CLR 307 at 342.

[19] *CSR Ltd v Eddy* at 22.

[20] *Woolcock Street Investments Pty Ltd v CDG* (2004) 216 CLR 515 at 537; *NT of Australia v Mengel* at 342.

[21] *Scott* at 417 (Kitto J) and 408 (Fullagar J). See, also, the statement of Lord Sumner in *Admiralty Commissioner v S S Amerika* that: 'It is the loss of service which is the gist of the action, and the loss of service depends upon the right to the service, and that depends on the contract between the master and the servant'. This statement was cited with approval by McTiernan J in *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 at 257.

[22] As was the English position taken in *IRC v Hambrook* [1956] 2 QB 641. However, other sources suggest that the action was historically never limited in this way: Sappideen and Vines, *Fleming's The Law of Torts* (10th ed), 771.

employment by the Crown.[23] While Barclay contends that this is an anomalously constrained set of relations based on the decision of the Privy Council in *Attorney-General for New South Wales v Perpetual Trustee Co (Limited)*,[24] the position as expressed in that case has been revised in *Scott*. Further, the decisions in *Marinovski* and *GIO v Robson*, which considered the per quod action in relation to employees of "unique capacity"[25] demonstrate a renovated understanding of the relationship.

28 The per quod action first rose to prominence during the 14th century, when the particular economic climate brought on by the black plague meant that the loss of a servant had significant consequences for the master.[26] In other economic conditions, the loss of the services of a servant might be thought to be less critical. Wherever an economy possesses an abundant supply of labour it has been said that the per quod action becomes unnecessary; an injured worker may be replaced and the employer does not suffer from a lack of their services. As such, it is arguable that modern economic conditions, with mass industrialisation, have reduced the importance of the per quod action.

29 However, this view of the modern economy has been rejected in such decisions as *Marinovski* and *GIO v Robson*. Aspects of the modern economy tend towards highly sophisticated employment, with employees often being extremely difficult to replace. This renders the fiction of "fungible" employees ill-suited to modern conditions, and buttresses the argument that the per quod action is as relevant to today's economy as it was in earlier times.

30 Whilst changing economic times and labour markets may result in a fluctuation in the degree to which the per quod action is called upon, such changes ought not cause the very existence of the cause of action to be called into question.

31 In any event, where the law has been declared by a court of high authority, this court, if it agrees that the declaration was correct when made, cannot alter the common law because changes in society make or tend to make that declaration of the common law inappropriate to the times.[27]

Per quod action as an economic tort

32 Barclay, Penberthy and Fugro have omitted consideration of other economic torts, such as an action for interference with contractual relations, which is another tortious cause of action analogous to the per quod action. When viewed in the light of the existence of such a tort, being for intentionally

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[23] *Scott* concerned a train driver; *Marinovski* concerned a company director. In *Sydney City Council v Bosnich* [1968] 3 NSWR 725 the action was upheld in relation to money paid by a council to an employee. Note that Sappideen and Vines, *Fleming's The Law of Torts* (10th ed), 771 suggests that the action does not cover the relationship between the Crown and the holder of a public office, but does not clarify how 'public office' might be distinguished from employment.

[24] [1955] AC 457; (1955) 92 CLR 113.

[25] *Marinovski v Zutti* [1984] 2 NSWLR 571: the employee of 'unique capacity' was a managing director. See, also, *GIO v Robson* (1997) 42 NSWLR 429, where the employee was the co-owner and director of a business.

[26] *Martino Developments Pty Ltd v Doughty* [2008] VSC 517 at [43]. See also Dixon CJ in *Scott* at 404.

[27] *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 623.

interfering in or preventing a party from performing its contractual obligations to another,[28] the per quod action can also be seen as an action allowing for claims of damage for negligence (not intentional) interference in a contract but only where the contract is a contract of service.

33 In this regard, the per quod action may be interpreted as conveniently filling an otherwise present gap in potential tortious liability and also as demonstrating a continuum and consistency across the torts of negligence and trespass.

Per Quod not subsumed into negligence

34 The per quod action is not confined to negligence but extends to tortious wrongs generally. Thus, a per quod action could be made out not due to negligent injury caused to an employee but instead due to some form of trespass against the employee, for example trespass against the person such as assault, battery or false imprisonment. Accordingly, it is not possible for the action to be subsumed into negligence.

35 Moreover, it would be inconsistent with the continued existence of other economic torts, such as interference with contractual relations, for the per quod action to be absorbed by negligence when such other economic torts retain their discrete identity.

36 While Barclay[29] and Fugro/Penberthy[30] press a contention that the common law in Australia is moving towards the establishment of unifying principles of liability that encompass previously historical classifications, such unifying principles of liability are generally within one or other area of tortious liability, such as negligence,[31] as opposed to an invasion of other areas such as trespass. Further, as this court has acknowledged, developments in the law of negligence demonstrate the difficulty in identifying such unifying principles.[32]

37 It should be noted however, that the desirability of identifying unifying principles does find full expression in the view of the Court of Appeal that consistency between closely related common law actions is a legitimate expectation and therefore desirable. The Court of Appeal was not saying that the per quod action is subsumed into the claim of negligence. Indeed, to do so is not properly available to it in considering a trespass and negligence.

38 However, the finding of the Court of Appeal that consistency between closely related common law actions is desirable is compatible conceptually with the desire to identify unifying principles generally, though without subsuming the trespass of the per quod action into negligence.

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[28] *Lumley v Gye* [1843-60] All ER Rep 208; *Northern Territory v Mengel* (1995) 185 CLR 307; *Zhu v Treasurer of the State of New South Wales* (2004) 218 CLR 530; *Qantas Airways Ltd v Transport Workers' Union of Australia* (2011) 280 ALR 503.

[29] Barclay's submissions dated 4 January 2012 at [31].

[30] Fugro/Penberthy's submissions dated 5 January 2012 at [28.5].

[31] *Woolcock* at [18].

[32] *Sullivan v Moody* at [52].

Per Quod Claim by Nautronix

39 As mentioned, in order to establish a per quod action it is necessary to establish three elements.[33]

40 The facts founding these three elements were found by the primary judge and concurred with by the Court of Appeal being that:

(a) each of the third, fourth and seventh respondents and the husbands of the fifth and sixth respondents were employees of, or at least provided services to, Nautronix;[34]

(b) the negligence of Barclay resulted in injury to the third, fourth and seventh respondents and the death of the husbands of the fifth and sixth respondents;[35] and

(c) as result of such injuries and death Nautronix suffered loss.[36]

41 These findings of fact accorded with those pleaded by Nautronix at trial and the employment relationship was admitted by Barclay on his pleadings.[37]

42 Whilst Nautronix did not in final submissions appear to rely on the per quod action, it is not fatal if the facts as proved do entitle Nautronix to some relief within the jurisdiction of the court, such as under the per quod action.[38]

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[33] An example of the pleading of a per quod action is found in Benas, BB and Essenhigh RC, *A Compendium of Precedents of Pleading, Common Law and Chancery*, Sweet & Maxwell Ltd, London, 1924 p 280 in the form of *per quod servitium et consortium amisit*:

1 The plaintiff is a carriage and motor car proprietor carrying on business at _____, in the county of _____, and prior to or at the time of the events hereinafter complained of, he was assisted in his said business by his daughter and servant M.H.

2 The said M. H. attained the age of 18 years on 20th September, 1919, and her duties in connection with the plaintiff's said business included milking the cows, looking after poultry, driving horses and cabs, and keeping the books of the said business.

3 On or about 30th September, 1919, the defendant seduced and carnally knew the said M. H., whereby she became pregnang of a child, of which she was delivered on 20th July, 1920.

4 By reason of the premises the plaintiff was deprived of the services of the said M. H., and he has incurred expense in and about her confinement, and has suffered damage and loss.

Particulars of special damage: [state them]

And the plaintiff claims damages.

[34] *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 (**Trial Judge's Reasons for Decision**) at [2] and Court of Appeal Reasons for Decision at [24]; see also paragraph 41 of these submissions.

[35] Trial Judge's Reasons for Decision at 296] and [321] and Court of Appeal Reasons for Decision at [1] and [77].

[36] Trial Judge's Reasons for Decision at [323], [325] and [328] and Court of Appeal Reasons for Decision at [1], [83] and [160].

[37] Nautronix Substituted Statement of Claim at [1]-[5], [21.2], [23]-[27], [32], [36]-[42] and Barclay's substituted defence at [21(b)].

[38] *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 472 per Barwick CJ. The observations of Barwick CJ in *Philip Morris Inc* were repeated and approved in *Agar v Hyde* (2000) 201 CLR 552 at 577 - 578 per Gaudron, McHugh, Gummow and Hayne JJ as well as being emphasised again by Gummow J in *Scott v Davis* (2000) 204 CLR 333 at [266].

43 There is nothing unusual about a trial court, or an appellate court, adopting a view of the facts, or of the law, different from the views for which the parties to the litigation respectively contended.[39]

44 Nautronix was not bound to state the legal effect of the facts on which it relied. It was only bound to state the facts themselves.[40]

45 As mentioned, the facts for a per quod action were pleaded by Nautronix and found to be established by the primary judge. Nautronix was not required to put a 'legal label' to the facts which supported a per quod claim.[41]

46 Further, it is irrelevant whether Nautronix' legal advisers who settled the statement of claim and argued the case below were subjectively aware that they had pleaded a per quod action.[42]

47 In the present case the facts are not in dispute – they are as found by the primary judge and admitted on the pleadings – and Nautronix made no concessions at trial or in the Court of Appeal which would disentitle it from pursuing a claim under the per quod action.

Application of *Baker v Bolton*

48 Nautronix cross-appeals from the decision of the Court of Appeal that the rule in *Baker v Bolton*[43] applies in Australia, at least to the extent that the Court of Appeal found that it applied to the per quod action or a cause of action in negligence.

49 In *Swan v Williams (Demolition) Pty Ltd*,[44] Samuels JA set out the extensive legal and policy arguments that have been mounted against the application of the principle articulated by Lord Ellenborough CJ in *Baker v Bolton* that "[i]n a civil Court, the death of a human being could not be complained of as an injury."

50 Despite the prevailing suggestion in the reasons of Samuels JA and the cases referred to therein that *Baker v Bolton* and its application in Australia was open to doubt, the New South Wales Court of Appeal declined to do so, as it felt bound by this court's decision in *Woolworths Ltd v Crotty*.[45]

51 In *Woolworths*, this court stated that the rule in *Baker v Bolton* applied in Australia through its adoption of the principle previously adopted in *Commissioners for Executing the Office of Lord High Admiral of the United Kingdom v Owners of the Steamship 'Amerika'*.[46]

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[39] *Australian Communications Exchange Ltd v Deputy Commissioner of Taxation* (2003) 201 ALR 271 at [7] per Gleeson CJ and at [51] per Kirby J.

[40] *Wickstead v Browne* [1992] 30 NSWLR 1 at 15 – 16.

[41] *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 390; *Shaw v Shaw* [1954] 2 QB 429 at 441.

[42] *Wickstead v Browne* [1992] 30 NSWLR 1 at 15 – 16.

[43] (1808) 1 Camp 493; 170 ER 1033.

[44] (1987) 9 NSWLR 172 at 175-184.

[45] (1942) 66 CLR 603.

[46] [1917] AC 38. It should also be noted that this was a claim brought for bad navigation and sinking of a ship, not for the loss to a master of the services of his employee (at 50).

52 In *Amerika*, the House of Lords approved of *Baker v Bolton* as it had been adopted in *Osborn v Gillett*,[47] a decision of three judges in the Court of Exchequer. In that case the majority approved the *Baker v Bolton* principle on the basis that:

> "[i]t is admitted that no case can be found in the books where such an action as the present has been maintained. However, Bramwell B, set out at relative length his concerns with the adoption of such an unprincipled position by the Court on the basis of a report of a case from 65 years earlier that contained no explanation and for which none of the parties could provide an explanation. Bramwell B's view being that instead of the position expressed by the majority, the "general principle is in [the plaintiff's] favour, that injuria and damnum give a cause of action. It is for the defendant to show an exception to this rule when the injuria causes death."[48]

53 In the period between *Osborn v Gillett* and *Amerika,* the House of Lords had also opined that it was bound by its own prior decisions and that it was only for the Parliament through enactment for such decisions, even if wrong at law, to amend them.[49] This position was not reversed until after the issuance of the Practice Statement of 1966, which enabled the House of Lords to adapt English law to meet changing social conditions.[50]

54 Not long after, whilst acknowledging the existence of the rule in *Baker v Bolton*, the Kings Bench distinguished the decision by deciding that whilst it was stated to apply to all civil matters, the matter before the court at that time was one of contract, not negligence and further that as damage was not an element of breach of contract, that the principle did not apply to a breach of contract, where the damage, which may be caused by death, would merely be a category of the damages claimed, not an element of the cause of action.[51]

55 In deciding *Amerika,* the House of Lords, despite making some observations on the criticisms of *Baker v Bolton*, ultimately decided that given the history of the adoption of the principle in cases on the Court of Exchequer, Kings Bench and on appeal, that it must also follow such principle.[52]

56 However, as more consideration was given to the underlying basis for *Baker v Bolton* and the state of the law in the early 19th century, a fundamental error in the decision emerged.[53]

57 Whilst the rule in *Baker v Bolton* is, as enunciated by Lord Ellenborough, that "[i]n a civil court, the death of a human being could not be complained of as an injury," this was really a misleading summary of two established principles applying at the time to tortious causes, being:

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[47] (1872-73) L.R. 8 Ex. 88.

[48] *Osborn* at 97.

[49] *The London Street Tramways Company Ltd v The London County Council* [1898] AC 375.

[50] Practice Statement [1966] 3 All ER 77.

[51] *Jackson v Watson & Sons* [1909] 2 KB 193.

[52] [1917] AC 38, esp. at 51-52.

[53] Holdsworth, "The Origin of the Rule in Baker v Bolton" (1916) 32 LQR 431.

(a) *action personalis moritur cum persona* – a personal action dies with the person, whether as plaintiff or defendant (which applies only to torts, not contract); and

(b) a tort amounting to a felony forbids any civil suit (at least until the felony be tried).[54]

58 The per quod action is a tort brought by a third party in its own capacity, not on behalf of the deceased and therefore does not attract the first limb above. However, at the time of *Baker v Bolton* to cause the death of another invariably constituted a felony, such that in case of death the per quod action was drowned by the felony (or at least suspended until the felony had been tried).[55]

59 The drowning of such tortious actions no longer prevails.

60 In *Woolworths* this court considered itself bound to follow the House of Lords in *Amerika*. A year later in *Piro v W Foster & Co Ltd*,[56] the High Court held that the courts of Australia including the High Court should follow the decisions of the House of Lords upon matters of general legal principle.[57]

61 Further, *Woolworths* was primarily based on the court's reading of the relevant statute, being the *Compensation to Relatives Act 1897-1928* (NSW) and argued on the application of the recitals contained in its predecessor *Lord Campbell's Act 1946* (NSW). The further basis for the decision of this court in *Woolworths* was determining whether there were rights to bring an action under contract (not tort) that were not available to the plaintiff, which this court agreed there was.

62 While this court did remark that *Baker v Bolton* prohibited claims in torts but not contract, this was not essential to the determination of the issues between the parties in *Woolworths*. Thus, *Woolworths* ought not be treated as binding authority for the application of *Amerika*, and hence *Baker v Bolton*, in this country.

63 Later cases of this court that cite *Woolworths* do so in the context of the calculation of compensation (*Nguyen v Nguyen*)[58] or in passing reference to claims based in statute (*Agtrack (NT) Pty Ltd v Hatfield*)[59] and (*Workcover Queensland v Amaca Pty Ltd*).[60]

64 Further, the adoption of *Baker v Bolton* in *Woolworths* predates the acceptance of a claim in negligence for pure economic loss and thus the further obiter on the application of such principles to derivative claims, that an

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[54] *Higgins v Butcher* (1606) Yelverton 89 at 90; 80 ER 61.

[55] *Smith v Selwyn* [1914] 3 KB 98 and *Swan v Williams (Demolition) Pty Ltd* (1989) 9 NSWLR 172 at 189-9.

[56] (1943) 68 CLR 313.

[57] This view then prevailed until the mid 1960s; see *Parker v The Queen* (1963) 111 CLR 610 and *Skelton v Collins* (1966) 115 CLR 94.

[58] (1989-90) 169 CLR 245.

[59] (2005) 223 CLR 251.

[60] (2010) 241 CLR 420.

employer cannot establish any breach of duty to himself,[61] is no longer applicable and should not be held as binding upon this court.

65 For these reasons it is submitted that this court should either pronounce that *Woolworths* is not binding authority for the application of *Baker v Bolton* in Australia, or alternatively, grant leave to reopen *Woolworths* and in light of the error of principle found in *Baker v Bolton*, hold that the rule in *Baker v Bolton* is not good law in Australia.

66 In so far as leave to reopen *Woolworths* may be required, it is submitted that by this court reconsidering *Woolworths*, it will be able to correct an error manifest in that decision and hence in much case law since.[62]

67 A rejection of the rule in *Baker v Bolton* would be consistent with the view now adopted in the United States of America. Where previously the United States had adopted the position in *Baker v Bolton*,[63] this position has subsequently been reversed.[64]

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P W Collinson
Tel: (03) 8600 1707
Fax: (03) 8600 1725
Email: collinson@chancery.com.au

A Golem
Tel: (03) 9288 1364
Fax: (03) 9288 1567
Email: ante.golem@freehills.com

[61] *Woolworths* at 616.

[62] See *Trident General Insurance Co. Ltd v McNiece Bros Pty Ltd* (1987-1988) 165 CLR 107 at 131.

[63] *The Corsair* (1892) 145 US 335.

[64] *Moragne v States Marine Lines Inc.* 398 US 375 (1970); see also; Smedley, T. A., *Wrongful Death--Bases of the Common Law Rules*,13 Vand. L. Rev. 605 (1959-1960); at 612-613; Hay, Gustavus Jr., *Death as a Civil Cause of Action in Massachusetts*, 7 Harv. L. Rev. 170 (1893-1894) at 175; Winfield, Percy H., *Death as Affecting Liability in Tort*, 29 Colum. L. Rev. 239 (1929); Voss, Helmuth Carlyle, *Recovery of Damages for Wrongful Death at Common Law, at Civil Law, and in Louisiana*, 6 Tul. L. Rev. 201 (1931-1932) at 205.