IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P57 of 2011

BETWEEN:

ALEC PENBERTHY

First Appellant

and

FUGRO SPATIAL SOLUTIONS PTY LTD

Second Appellant

and

AARON BARCLAY

First Respondent

and

NAUTRONIX (HOLDINGS) PTY LTD

L 3 COMMUNICATIONS NAUTRONIX LTD

Second Respondents

and

MALCOLM ANTHONY CIFUENTES

Third Respondent

and

MICHAEL BRIAN KNUBLEY

Fourth Respondent

and

JULIE ANNE WARRINER

Fifth Respondent

and

JANET GRAHAM

Sixth Respondent

and

OZAN PERINCEK

Seventh Respondent

SECOND RESPONDENTS' SUBMISSIONS

Date of Document: 26 January 2012
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Part I: Internet Certification

1 The second 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) if the answer to (a) and (b) is no, did the first appellant (**Penberthy**) in any event owe a duty of care at common law to avoid causing pure economic loss to Nautronix?[3]

(d) 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?[4]

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 Penberthy's and the second appellant's (**Fugro**) (together the **appellants**) narrative of facts or chronology.

Part V: Applicable Legislative Provisions

5 Nautronix accepts the appellants' statement of the applicable legislative provisions.

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[1] Paragraphs [2] to [4] of the first and second appellants' Notice of Appeal dated 21 December 2011.

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

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

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

Part VI: Argument in Answer to the appellants

6 Nautronix submits that that the Court of Appeal was correct in concluding that:[5]

(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,[6] 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.[7] 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 appellants' submissions, is that the relationship need only involve the de facto

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[5] *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.

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

[7] 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.

provision of services by one person to another, rather than a de jure contract of service.[8]

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."[9]

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 Penberthy 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.[10] 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.[11]

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[8] *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.

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

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

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

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 court as set out above and can hardly be regarded as an expansion of the law of negligence.[12]

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.[13] 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 appellants 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 Further, in so far as the appellants contend in support of their appeal that the per quod action should be considered as absorbed into the law of negligence, Nautronix refers to and adopts its submissions at paragraphs [35] to [39] below.

21 On this basis, the finding of the Court of Appeal that there existed a duty of care owed by the appellants' and the first respondent (**Barclay**) to Nautronix for pure economic loss should be upheld.

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[12] See paragraphs [23] to [32] below.

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

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

22 If the appellants are successful in their appeal, the decision of the Court of Appeal should be upheld on the alternative grounds that:

(a) the per quod action still exists at common law in Australia and is established in the present circumstances; or

(b) Penberthy owed a duty of care to Nautronix to avoid causing pure economic loss irrespective of the existence of the per quod action.

The Per quod action

Acceptance in Australia

23 The appellants contend euphemistically that the per quod action should be "absorbed" into the law of negligence (that is, abolished).[14] However, the action is entrenched as part of the common law of Australia.

24 As recently as 2010, intermediate appellate courts have applied the per quod action.[15] This court confirmed its existence in *Commissioner for Railways (NSW) v Scott.*[16] Further, the existence of the per quod action at common law 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.[17] Indeed, it has been held that in some instances such legislation has not entirely extinguished the per quod action.[18] Put simply, any further refinement or alteration to the per quod action in this country is a matter for the legislature not the courts.

25 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.[19]

26 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.[20] In *Woolcock*, McHugh J and in *NT v Mengel*

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[14] Fugro/Penberthy submissions dated 5 January 2012 at [21].

[15] *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.

[16] (1959) 102 CLR 392.

[17] 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.

[18] 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.

[19] *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.

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

Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ also referenced the action without suggesting it was an endangered species.[21]

27 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.[22] 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.

28 *Scott* clarified that the per quod action is not confined to menial or domestic servants,[23] but instead embraces all relationships of employment, including employment by the Crown.[24] While the appellants contend 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)*,[25] 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"[26] demonstrate a renovated understanding of the relationship.

29 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.[27] 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.

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

[22] *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.

[23] 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.

[24] *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.

[25] [1955] AC 457; (1955) 92 CLR 113.

[26] *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.

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

30 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.

31 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.

32 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.[28]

Per quod action as an economic tort

33 The appellants and Barclay 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 interfering in or preventing a party from performing its contractual obligations to another,[29] 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.

34 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

35 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.

36 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.

37 While the appellants[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

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

[29] *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.

[30] Fugro/Penberthy submissions dated 5 January 2012 at [28.5]. See also Barclay's submissions dated 4 January 2012 at [31].

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]

38 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.

39 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.

Per Quod Claim by Nautronix

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

41 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 Penberthy resulted in injury to the third, fourth and seventh respondents and the death of the husbands of the fifth and sixth respondents;[35] and

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[31] *Woolcock* at [18].

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

[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 42 of these submissions.

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

42 These findings of fact accorded with those pleaded by Nautronix at trial that the and the employment relationship was admitted by the appellants on their pleadings.[37]

43 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]

44 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]

45 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]

46 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]

47 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]

48 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.

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[35] Trial Judge's Reasons for Decision at [307] and [321] and Court of Appeal Reasons for Decision at [1] and [72].

[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 Fugro's & Penberthy's substituted defence at [1], [10.3], [11] and [15].

[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].

[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.

Duty of care owed by Penberthy irrespective of per quod action

49 Alternatively, the finding of the Court of Appeal should be upheld for the reason that Penberthy owed Nautronix a duty of care at common law to avoid causing pure economic loss by injuring its employees irrespective of the per quod action.[43]

Principles

50 This court has identified a number of eligible factors relevant for ascertaining whether a duty of care to avoid causing pure economic loss should be found to exist.[44]

51 They include:

(a) the reasonable foreseeability of the harm suffered (which of itself is insufficient to render a defendant liable for negligently inflicted economic loss);[45]

(b) the defendant's knowledge, or means of knowledge of an ascertainable, determinate class of persons who are at risk of foreseeable harm;[46]

(c) the plaintiff's vulnerability or whether they are able to protect themselves from the foreseeable harm.[47] In many cases, there will be no sound reason for imposing a duty on the defendant to protect the plaintiff from economic loss where it was reasonably open to the plaintiff to take steps to protect itself.[48] Whether the securing of an alternative remedy in contract was really open to a plaintiff who suffered economic loss depends upon the current market conditions and practices;[49]

(d) whether the implication of a duty would impair the defendant's legitimate pursuit of autonomous commercial interests, including the existence of contracts between the plaintiff and the defendant;[50]

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[43] Court of Appeal Reasons for Decision at [116] – [124]. Nautronix contends that the *obiter* consideration of this matter by McLure P was in error.

[44] *Caltex Oil (Australia) v The Dredge 'Willemstad'* (1976) 136 CLR 529 at 576 – 577 per Stephen J; *Perre v Apand* (1999) 198 CLR 180 at 220 [105] per McHugh J.

[45] *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 530 [21] per Gleeson CJ, Gummow, Hayne and Heydon JJ; *Perre* at 198 [27] per Gaudron J, at 208 [70] per McHugh J and at 299 [329] per Hayne J.

[46] *Perre* at 222 –223, 230 per McHugh J and at 303 – 305 per Hayne J.

[47] *Perre* at 220, 225 per McHugh J; *Woolcock* at 530 per Gleeson CJ, Gummow, Hayne and Heydon JJ. See the application of the vulnerability factor by Allsop P *Precision Products (NSW) Pty Ltd v Hawkesbury City Council* [2008] NSWCA 278 at [106] where his Honour considers:

(a) reliance on the defendant for protection, assistance or skill;

(b) assumption of responsibility to act in the interests and for the benefit of the plaintiff; and

(c) an inability of the plaintiff to protect itself form the consequences of the negligence of the defendant.

[48] *Perre* at [118].

[49] *Woolcock* at [95].

[50] *Perre* at 200 per Gaudron J; at 258 per Gummow J (Gleeson CJ agreeing); at 303 per Hayne J.

(e) whether the damage flowed from the occurrence of activities within the defendant's control;[51]

(f) the closeness of the relationship between the parties;[52] and

(g) the existence of any other special circumstances justifying compensation.[53]

52 Not all of those features will be relevant in every case, and not all of them will warrant the same degree of weight depending on the circumstances.[54]

53 Thus, vulnerability is not conclusive of whether a duty of care is owed.[55] Vulnerability is to be understood:

> "...as a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequence of loss on the defendant."[56]

54 The degree and nature of vulnerability sufficient to found a duty of care will vary from category to category and from case to case and the defendant's control of the plaintiff's right, interest or expectation will be an important test of vulnerability.[57]

55 Courts should be reluctant to assume that a commercial entity lacked vulnerability simply because of its commercial character.[58]

56 Where a contract exists, the concepts of assumption of responsibility and reliance may create a duty of care in tort.[59]

Findings at trial

57 The primary judge found that Penberthy was negligent in his failure to take advantage of the aircraft's residual capacity to climb and gain speed.[60]

58 Relevantly, the primary judge also found that:[61]

(a) Penberthy knew:

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[51] *Perre* at 326 per Callinan J.

[52] *Perre* at 254 per Gummow J.

[53] *Perre* at 326 per Callinan J.

[54] See for example *Woolcock* at [87] per McHugh J in relation to the "significance of the defendant's knowledge of the risk of loss and its magnitude" being dependant on the facts of the case.

[55] *Perre* at [120] per McHugh J; *Woolcock* at [23] per Gleeson CJ, Hayne and Heydon JJ, at [80] per McHugh J; at [169] per Kirby J and at [224] per Callinan J.

[56] *Woolcock* at 530 [23].

[57] *Perre* at [129].

[58] *Woolcock* at [169].

[59] *Woolcock* at 535 and 559; *Precision Products (NSW) Pty Ltd v Hawkesbury City Council* [2008] NSWCA 278 at [106] per Allsop P.

[60] Trial Judge's Reasons for Decision at [306]; Court of Appeal Reasons for Decision at [38] – [39] and [71].

[61] Trial Judge's Reasons for Decision at [346]. The appellants admitted in their Substituted Defence filed on 21 July 2009 that they knew, or ought to have known, the purpose of the charter contract: see the appellants' Defence at [15].

(1) the purpose of the flight;

(2) that it was a commercial purpose;

(3) that the company who employed his passengers was Nautronix;

(4) 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; and

(b) that Nautronix was vulnerable as it was unable to protect itself from the foreseeable harm of an economic nature caused by negligence on the part of Penberthy.

59 This led to a conclusion that Penberthy owed a duty of case not to cause economic loss to Nautronix, and he breached that duty.[62]

Position before the Court of Appeal

60 McLure P was of the view that Nautronix was not vulnerable in the same way as the plaintiffs in either *Caltex* or *Perre*.[63]

61 Nautronix contends that it was vulnerable and, even if that was not the case, the absence of vulnerability, in the circumstances, was not a reason to exclude a duty of care on the part of Penberthy.[64]

62 The primary judge was correct in his finding of vulnerability resulting in a duty of care as:

(a) Nautronix relied on the skill of Penberthy as a trained and licensed commercial pilot;

(b) Penberthy assumed responsibility by performing his role as pilot to act in the interests and for the benefit of Nautronix, in circumstances where he had knowledge of the commercial purpose of the flight, as:

(1) the primary judge found that Penberthy knew the purpose of the flight in broad terms;[65]

(2) Penberthy had re-instated his Department of Defence clearance for the purposes of the flights for Nautronix in 2003;[66] and

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[62] Trial Judge's Reasons for Decision at [346]. His Honour set out his consideration of the authorities on pure economic loss at [331] – [344].

[63] Court of Appeal Reasons for Decision at [118]. Before the Court of Appeal the appellants contended that the primary judge erred in the manner in which he applied the test of vulnerability to the relationship between Mr Penberthy and Nautronix, claiming that Nautronix was in a position to protect itself in advance of any negligence or damage occurring by making suitable commercial arrangements in the charter contract with Fugro: see Court of Appeal Reasons for Decision at [95].

[64] See [52] – [54] above.

[65] Trial Judge's Reasons for Decision at [325].

[66] Nautronix' Substituted Statement of Claim at [32.7]. See exhibits 61, 63 and 65. Penberthy had piloted the plane for Nautronix some 14 times between April 2001 – May 2003: see exhibit 29.

(3) such knowledge was implicit from the nature of Penberthy's work as a charter pilot flying an aircraft modified for Nautronix; and

(c) it is artificial to suppose that Nautronix was in a position to take steps to protect itself from the consequences of the negligence of Penberthy, by stipulating a term in its contract with Fugro that Fugro would be liable for all loss and damage to its business, if Nautronix personnel were disabled as a result of the negligent conduct of Fugro's pilot.[67] There was evidence at the trial of Fugro's standard terms and conditions, which excluded liability for loss and damage.[68] This yields an inference that any attempt by Nautronix to stipulate a term imposing such liability on Fugro for the events in question would have been resisted.[69]

63 Nautronix submits that:

(a) the losses suffered by Nautronix were a reasonably foreseeable consequence of Penberthy's conduct in causing, in part, the plane to crash. As the primary judge found, Penberthy knew the commercial purpose of the flight.[70] It was inherently likely that injury to the employees of Nautronix would also cause economic loss;[71]

(b) Nautronix was a member of a very limited class comprising those utilising the services of the aircraft;

(c) Nautronix relied on the skill of Penberthy as a trained and licensed commercial pilot;[72]

(d) the duty does not expose him in indeterminate liability, though the liability may be significant;

(e) the duty does not unreasonably interfere with Penberthy's commercial freedom as he was already under a duty to the passengers of the flight to take reasonable care; and

(f) Penberthy knew of the risk to a charterer of the flight and the consequences of that risk occurring.

64 The decision of the Court of Appeal should be upheld on the basis that Penberthy owed Nautronix a duty of care at common law to avoid causing pure economic loss by injuring its employees irrespective of the per quod action.

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[67] See the approach in *Fortuna Seafoods Pty Ltd v Ship 'Eternal Wind'* [2005] QSC 004 at [27] per Douglas J, affirmed on appeal *Fortuna Seafoods Pty Ltd v Ship 'Eternal Wind'* (2008) 1 Qd R 429 at [23] per McMurdo P.

[68] See exhibit 130. In relation to the contract claim, the trial judge ultimately found that neither the Nautronix nor the Fugro standard terms and conditions were incorporated into the charter contract: Trial Judge's Reasons for Decision at [430] and see discussion of the background facts to the contract claim at Trial Judge's Reasons for Decision at [380] – [393].

[69] Compare the approach of Douglas J in *Fortuna* where there was no pleading putting vulnerability in issue or evidence dealing with the possibility that Fortuna Seafoods could have obtained an indemnity from Fortuna Fishing: *Fortuna Seafoods Pty Ltd v Ship 'Eternal Wind'* at [27]. See also on appeal McMurdo P at [23].

[70] Compare the approach of McLure P: see Court of Appeal Reasons for Decision at [120] – [121].

[71] See the approach in *Caltex* at 576.

[72] As to what was expected of Mr Penberthy see Court of Appeal Reasons for Decision at [72].

Application of *Baker v Bolton*

65 Nautronix cross-appeals from the decision of the Court of Appeal that the rule in *Baker v Bolton*[73] 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.

66 In *Swan v Williams (Demolition) Pty Ltd*,[74] 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."

67 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*.[75]

68 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'*.[76]

69 In *Amerika*, the House of Lords approved of *Baker v Bolton* as it had been adopted in *Osborn v Gillett*,[77] 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."[78]

70 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.[79] This position was not reversed until after the issuance of the

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[73] (1808) 1 Camp 493; 170 ER 1033.

[74] (1987) 9 NSWLR 172 at 175-184.

[75] (1942) 66 CLR 603.

[76] [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).

[77] (1872-73) L.R. 8 Ex. 88.

[78] *Osborn* at 97.

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

Practice Statement of 1966, which enabled the House of Lords to adapt English law to meet changing social conditions.[80]

71 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.[81]

72 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.[82]

73 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.[83]

74 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:

(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).[84]

75 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).[85]

76 The drowning of such tortious actions no longer prevails.

77 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*,[86] the High Court held that

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

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

[82] [1917] AC 38, esp. at 51-52.

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

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

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

[86] (1943) 68 CLR 313.

the courts of Australia including the High Court should follow the decisions of the House of Lords upon matters of general legal principle.[87]

78 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.

79 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.

80 Later cases of this court that cite *Woolworths* do so in the context of the calculation of compensation (*Nguyen v Nguyen*)[88] or in passing reference to claims based in statute (*Agtrack (NT) Pty Ltd v Hatfield*)[89] and (*Workcover Queensland v Amaca Pty Ltd*).[90]

81 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 employer cannot establish any breach of duty to himself,[91] is no longer applicable and should not be held as binding upon this court.

82 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.

83 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.[92]

84 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

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[87] 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.

[88] (1989-90) 169 CLR 245.

[89] (2005) 223 CLR 251.

[90] (2010) 241 CLR 420.

[91] *Woolworths* at 616.

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

had adopted the position in *Baker v Bolton*,[93] this position has subsequently been reversed.[94]

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

[94] *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.