IN THE HIGH COURT OF AUSTRALIA
PERTH OFFICE OF THE REGISTRY

No. P55 of 2011

BETWEEN:

AARON BARCLAY
Appellant

and

ALEC PENBERTHY
First Respondent

and

FUGRO SPATIAL SOLUTIONS PTY LTD (ACN 008 673 916)
Second Respondent

and

NAUTRONIX (HOLDINGS) PTY LTD (ACN 009 067 099)
L-3 COMMUNICATIONS NAUTRONIX LTD (ACN 009 019 603)
Third Respondents

and

MALCOLM ANTHONY CIFUENTES
Fourth Respondent

and

MICHAEL BRIAN KNUBLEY
Fifth Respondent

and

JUILIE ANNE WARRINER
Sixth Respondent

and

JANET GRAHAM
Seventh Respondent

and

OZAN PERINCEK
Eighth Respondent

Filed on behalf of the Appellant
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APPELLANT'S REPLY

PART I: INTERNET CERTIFICATION

1. The appellant (**Barclay**) certifies that these submissions are in a form suitable for publication on the Internet.

PART II: ARGUMENT

2. The submissions of the third respondents (**Nautronix**) raise three issues.

Issue 1: Is Barclay liable in negligence to Nautronix?

3. Only one reason was given by the Court of Appeal to support its finding that Barclay owed Nautronix a duty of care: because negligence and the action *per quod servitium amisit* are "closely related", there is a "legitimate expectation" of "consistency" between them. Neither the Court of Appeal, nor Nautronix in its submissions, explain what each of these propositions means, nor why they are correct as a matter of principle. Thus, the criteria for deciding whether two actions are "closely related", how and when "consistency" between them should be achieved, and the basis and content of any "legitimate expectation", are all left unstated. Furthermore, no reason is provided by Nautronix as to why it would be "a perverse result"[1] if, on the same facts, a defendant were liable in an action for loss of services but not in negligence.

4. Barclay's primary submission is that there is nothing illogical or surprising in the proposition that two common law torts, with distinct historical and doctrinal underpinnings, may respond differently to a given set of facts. Equally, it is conceivable that a duty of care may be imposed based on facts which also support an action *per quod servitium amisit*. But this is not such a case. The mere "existence"[2] of the common law action for loss of services provides no basis for the contrary conclusion.

5. If, however, this Court were persuaded that the two causes of action, negligence and *per quod servitium amisit*, should no longer stand apart, the appropriate course would be to absorb the latter action into the former, and not to extend negligence to cover all cases where the action for loss of services may be available. In this way, *per quod servitium amisit* is rendered obsolete, but the ability of a plaintiff to recover for the loss of an employee's services remains available through the application of

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[1] At [18(c)] of Nautronix's submissions.
[2] *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] WASCA 102 at [125] per McLure P.

orthodox principles governing the imposition of a duty of care in cases of pure economic loss.

Question 2: Is Barclay liable based on an action *per quod servitium amisit*?

6. Nautronix's alternative submission is that its claim for damages should be upheld in any event, based solely on the action *per quod servitium amisit.* This raises a threshold question: did Nautronix rely on the action at trial? The answer, is 'no'.

7. Nautronix now point to isolated aspects of the pleadings, and statements and findings of the trial judge, to support a submission that the action *per quod servitium amisit* was part of its case at trial and provides an independent basis upon which to impose a liability on Barclay.

8. Barclay accepts that "it is not necessary for the pleader to set out or to limit himself to a cause or causes of action which he asserts as a basis for the relief he claims" or "to specify a cause of action"[3]. But this says nothing of the case where the pleader does limit himself or herself to a cause or causes of action in a statement of claim. And in this case, Nautronix went out of its way to do so. Allegations concerning Barclay commence with the heading: "The claim by the first to sixth plaintiffs against Barclay for negligence"[4] (our emphasis). Similarly, Nautronix's loss and damage is alleged to have been "caused by the negligence of the Defendants"[5] (our emphasis).

9. There is nothing in Nautronix's substituted statement of claim which displaces the fact that its claim against Barclay was framed in negligence only. The five passengers, for example, are introduced in the pleading by reference to their occupation, not their employment relationship with Nautronix[6]. They are referred to for the first time as employees at paragraph 21.2, and then only in passing. Elsewhere they are described as "personnel"[7]. Thus, any admission by Barclay that the passengers were "employees" must be seen in this broader context.

10. Nautronix did nothing at trial, nor said anything in submissions, to suggest that it had chosen to disregard the pleadings, or that the pleadings should be read and understood in a different light[8]. As already submitted, the contrary was in fact the case[9].

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[3] *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 472 per Barwick CJ.
[4] At [28] of the substituted statement of claim.
[5] At [41] of the substituted statement of claim.
[6] See paragraphs 1 to 6 of the substituted statement of claim.
[7] See, for example, paragraph 42.1.
[8] *Dare v Pulham* (1982) 148 CLR 658 at 664 per the Court.
[9] See paragraphs 40 to 42 of Barclay's submissions (4 January 2012).

11. In *Banque Commerciale SA en Liquidation v Akhill Holdings Limited*[10], Mason CJ and Gaudron J confirmed the well-accepted principle that "the function of pleadings is to state with sufficient clarity the case that must be met. In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision."[11] They also confirmed "the rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness."[12] Accordingly, in this case, Nautronix should be confined to the case revealed by its pleadings, viz. the action in negligence.

10 12. If this Court were to accept that it was open to Nautronix to now rely on the action *per quod servitium amisit*, then for the reasons already provided[13], the action should be restricted to cases of menial or domestic servants or absorbed into the general law of negligence. It is submitted that on either basis Barclay's appeal should be allowed.

Issue 3: The rule in *Baker v Bolton*

13. Nautronix, by its cross-appeal, contends that Barclay should be liable for any economic loss suffered by Nautronix arising from the death of Mr Protoolis and Mr Warriner. To succeed, Nautronix must establish not only that Barclay is liable in negligence (for pure economic loss) or on an action *per quod servitium amsit*, but also that the rule in *Baker v Bolton*[14] is no longer part of the common law of Australia
20 despite the decision in *Woolworths Limited v Crotty*[15]. It is submitted that Nautronix's cross-appeal should be dismissed on both bases.

14. Nautronix's principal justification for abandoning the rule in *Baker v Bolton* rests upon the thesis of Sir William Holdsworth that Lord Ellenborough's statement of the law resulted from a "confusion of ideas"[16] with the doctrines *actio personalis moritur cum persona* and felony-merger (that an action for civil damages arising from a wrong is drowned by the criminal prosecution of that wrong). Numerous difficulties attend this submission. First, Lord Ellenborough gave no reason in support of his declaration that "In a civil court, the death of a human being cannot be complained of as an injury". Thus, the error he is said to have committed cannot be found in the report of
30 the case itself. Secondly, in *Admiralty Commissioners v SS Amerika*[17], which was decided after the publication of Professor Holdsworth's article, the House of Lords

[10] (1990) 169 CLR 279.
[11] At 286.
[12] At 286.
[13] See paragraphs 43 to 51 of Barclay's submissions (4 January 2012).
[14] (1808) 1 Camp 493; 170 ER 1033.
[15] (1942) 66 CLR 603.
[16] See paragraphs 57 to 59 of Nautronix's submissions; W S Holdsworth 'The Origin of the Rule in *Baker v Bolton*' (1916) 32 *LQR* 431 at 435.
[17] [1917] AC 38.

unanimously confirmed that the rule in *Baker v Bolton* remained firmly part of English law. Thirdly, in *Woolworths Limited v Crotty*[18], this Court, having been referred to the relevant passages of Professor Holdsworth's *History of English Law*[19] (which developed his views in light of *SS Amerika*), also confirmed that the rule in *Baker v Bolton* "must now be taken to be thoroughly established"[20] as part of the law of Australia. And, for the reasons given by Samuels JA and Priestley JA in *Swan v Williams (Demolition) Pty Ltd*[21], this conclusion should be understood as both part of the *ratio* of *Woolworths Ltd v Crotty* and unaffected by the principle declared the following year in *Piro v W Foster & Co Ltd*[22]. Finally, later research has shown that Professor Holdsworth's thesis is, in any event and at the very least, not free from doubt[23].

15. If this Court is to overrule *Woolworths Limited v Crotty*, and dispose of the rule in *Baker v Bolton*, it should be satisfied both as a matter of principle and policy that this is an appropriate course on the facts of this case and generally. Nautronix's submissions provide no compelling reason for departing from the long and thoroughly established rule in *Baker v Bolton*, particularly having regard to the rule's limited application after the enactment of *Lord Campbell's Act*[24].

Dated: 3 February 2012

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[18] (1942) 66 CLR 603.
[19] (1942) 66 CLR 603 at 605 and 612; W S Holdsworth *History of English Law* 4th ed (1935) vol 3 p 336, 451, 676.
[20] At 615 per Latham CJ. See also 621-2 per McTiernan J.
[21] (1987) 9 NSWLR 172 at 183 per Samuels JA and at 190-1 per Priestley JA.
[22] (1943) 68 CLR 313: that where there is a clear conflict between a decision of the House of Lords and a decision of the High Court of Australia, the High Court and other courts in Australia should, as a general rule, follow the decision of the House of Lords upon matters of general legal principle.
[23] J J Finkelstein 'The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty' (1973) 46(2) *Temple Law Quarterly* 169 at 178-196.
[24] 9 & 10 Vict c 93.