BARCLAY v. PENBERTHY AND ORS (P55/2011),
PENBERTHY AND ANOR v. BARCLAY AND ORS (P57/2011)

Court appealed from:	Court of Appeal of the Supreme Court of Western Australia [2011] WASCA 102
Date of judgment:	10 June 2011
Date of grant of special leave:	9 December 2011

On 11 August 2003, an aircraft, owned by Fugro Spatial Solutions and piloted by its employee, Alec Penberthy, crashed. Two passengers died and three were injured. Each passenger was employed or engaged by Nautronix Holdings which had chartered the flight to conduct surveillance and aerial work in connection with the testing of certain marine technology it was developing. At trial, Murray J found that the accident was caused by the failure of an engine during takeoff and by the pilot's negligent handling of the aircraft in response. The engine failure was found to have been caused by a faulty sleeve bearing. The bearing was not the original but one which had been substituted. The substituted bearing was designed by Aaron Barclay, an aeronautical engineer.

These appeals concern the following question: whether Alec Penberthy and Aaron Barclay owed Nautronix Holdings a duty to exercise reasonable care to prevent it from suffering pure economic loss. The pure economic loss claim was advanced on the basis that the death/injury of Nautronix Holdings' employees led to the inhibition of its capacity to develop and commercially exploit the marine technology. Murray J held that Alec Penberthy, but not Aaron Barclay, owed Nautronix Holdings a duty to exercise reasonable care to prevent it suffering pure economic loss (with Fugro vicariously liable for Alec Penberthy's negligence).

Alec Penberthy and Fugro Spatial Solutions appealed. Part of their appeal involved them, in effect, seeking contribution from Aaron Barclay. In so doing, they submitted that Murray J erred in finding that Aaron Barclay did not owe Nautronix Holdings a duty of care in relation to its pure economic loss. The Court of Appeal agreed. McLure P, giving the judgment of the Court (Martin CJ, McLure P and Mazza J) on this ground, noted that a factor relevant in finding that the relevant duty was owed was that the common law had long recognised an action for loss of services which permitted a master/employer to recover damages from a negligent defendant for pure economic loss caused by an injury to a servant/employee. Her Honour found that whilst that action remained part of the common law of Australia, it was difficult to avoid the conclusion that a negligent defendant must owe to an employer a common law duty to take reasonable care to avoid causing pure economic loss by injuring its employees. The rule in *Baker v Bolton* [1808] 170 ER 1033 prevailed in relation to the deceased employees but not the injured ones.

However, her Honour noted that but for the existence of this common law action, she would have concluded that neither the applicant nor the pilot owed Nautronix Holdings a duty of care to avoid pure economic loss, the subject of the claim. Neither had a direct commercial relationship with Nautronix Holdings. Nautronix Holdings was not vulnerable in the relevant sense. Aaron Barclay had no knowledge relating to the particular flight. There was no finding or evidence to support it that the pilot knew or ought reasonably to have known of the risk that Nautronix Holdings would suffer economic loss of

the type claimed. Nor was there a finding or evidence that Nautronix Holdings was at any greater risk of harm from a crash than any other potential charterer of the aircraft. In the circumstances, to impose a duty of care to avoid pure economic loss was tantamount to bringing pure economic loss largely into line with physical injury to personal property.

The grounds of appeal for each appeal are materially identical and include:

(P55/2011):

- The Court of Appeal erred in holding that Aaron Barclay owed Nautronix Holdings a duty of care in respect of their claim for pure economic loss.

(P57/2011):

- The Court of Appeal erred in holding that the existence of the action for loss of services (*per quod servitium amisit*) was a relevant factor in deciding whether Alec Penberthy owed Nautronix Holdings a duty of care in respect of their claim for pure economic loss.

In each appeal Nautronix Holdings has filed a notice of cross-appeal and a notice of contention. Nautronix Holdings cross-appeals, subject to the grant of special leave, from that part of the judgment of the Court of Appeal as reflected by paragraph 2.2 of the orders made on 10 June 2011. The grounds of cross-appeal are materially identical for each appeal and include:

(P55/2011) & **(P57/2011):**

- The Court of Appeal erred in holding that the rule in *Baker v Bolton* (1808) 1 Camp 493 remains a part of the common law of Australia, or alternatively, that in so far as it remains a part of the common law of Australia, it applies to a cause of action in negligence or the action *per quod servitium amisit.*

The notice of contention filed by Nautronix Holdings in each appeal contends that the decision of the Court of Appeal should be affirmed on the following grounds in addition to those grounds relied on by the Court of Appeal:

(P55/2011):

- The Court of Appeal should have upheld Nautronix Holdings' claim for pure economic loss based upon the action *per quod servitium amisit* as against Aaron Barclay and Alec Penberthy.

(P57/2011):

- The Court of Appeal should have upheld Nautronix Holdings' claim for pure economic loss based upon the action *per quod servitium amisit* as against Aaron Barclay and Alec Penberthy.

- The Court of Appeal should have upheld Nautronix Holdings' claim that Aaron Barclay owed a duty of care at common law to avoid pure economic loss to Nautronix Holdings, irrespective of the existence or otherwise of the action *per quod servitium amisit*.