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

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

NAUTRONIX'S FURTHER SUBMISSIONS

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Part I: Internet Certification

1 The third respondents in P55 of 2011 and second respondents in P57 of 2011 (**Nautronix**) certify that these submissions are in a form suitable for publication on the internet.

Part II: Further Submissions: measure of damages - *per quod servitium amisit*

2 The 13th edition of *McGregor on Damages* states in relation to the measure of damages in an action *per quod servitium amisit* (***per quod* action**) that:[1]

> ... the basic measure today should be the market value of the services which will generally be calculated by the price of a substitute less the wages which the master is no longer required to pay the injured servant.

3 For the reasons set out below, the above statement does not reflect the measure of damages allowable in a *per quod* action.

General principles as to assessment of damages in the *per quod* action

4 The gist of the *per quod* action is the loss of service of the employee,[2] that is, the effect which the wrongful injury has on the employer; this is therefore the touchstone for assessment of damages. It follows that, as the authorities confirm,[3] the damages recoverable in a *per quod* action are to be measured by the loss suffered by the employer as a result of the loss of the employee's services, including expenditure incurred in consequence of the employee's injury.[4]

5 Specifically, the plaintiff is entitled to compensation in respect of damage which is a "direct consequence" of the loss of services.[5] The cases do not articulate any

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[1] McGregor H, *McGregor on Damages* (13th edition), Sweet & Maxwell, London. 1972 at [1167].

[2] Eg, *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 452 per Windeyer J; *Commonwealth v Quince* (1944) 68 CLR 227 at 247-8 per McTiernan J, 252 per Williams J; *Curran v Young* (1965) 112 CLR 99 at 105 per Kitto J, 109 per Taylor J (Owen J agreeing); *Wright v Cedzich* (1930) 43 CLR 493 at 514 per Isaacs J; *Admiralty Commissioners v SS Amerika* [1917] AC 38 at 55 per Lord Sumner; *Hall v Hollander* (1825) 4 B & C 660; 107 ER 1206 (where the *per quod* action failed because the two year old victim of the underlying tort was not, at the time of injury, capable of performing services although had been expected to do so in the future); *Grinnell v Wells* (1844) 7 Man & G 1033 at 1041-1042; 135 ER 419 at 423; *Martinez v Gerber* (1841) 3 Man & G 88; 133 ER 1069; *Evans v Walton* (1967) 2 LR CP 615 at 621 per Bovill CJ, 622 per Willes J, 623 per Montague-Smith J.

[3] See, eg, *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 408 per Fullagar J; at 462 per Windeyer J; *Mercantile Mutual Insurance Company Ltd v Argent Pty Ltd* (1972) 46 ALJR 432 at 434 per Menzies J (Barwick CJ agreeing); at 435 per Walsh J; *Attorney-General (NSW) v The Perpetual Trustee Company Ltd* (1952) 85 CLR 237 at 289-290 per Fullagar J; *Marinovski v Zutti Pty Ltd* [1984] 2 NSWLR 571 at 574-5 per Hutley JA; at 585 per Glass and Samuels JJA; *Nominal Defendant (NSW) v Cortrip Investments Pty Ltd* (1989) 10 MVR 511 at 524 per Meagher JA (Samuels JA agreeing); *Attorney-General v Wilson and Horton Ltd* [1973] NZLR 238 at 250 per Turner P; 256-257 per Richmond J; 261 per Speight J; *Attorney-General v Valle-Jones* [1935] 2 KB 209 at 216-217, 219-220 per MacKinnon J; *Hodsoll v Stallebrass* (1840) 11 A & E 301, 113 ER 429; *Mankin v Scala Theodrome Co Ltd* [1947] KB 257 per Stable J; *John Holland (Constructions) Pty Ltd v Jordin (No 2)* (1985) 36 NTR 1 at 13-16 per Nader J; *R v Richardson* [1948] SCR 57 at [18]-[19] per Rand J; [29], [34] per Kellock J; [64]-[65], [70]-[71] per Estey J.

[4] As opposed to the *value* of those services, which might, in a given case, be quite a different sum: see, eg, *Attorney-General v Wilson and Horton Ltd* [1973] NZLR 238 at 250 per Turner P; 257&ff per Richmond J; cf: *Genereux v Peterson Howell & Heather (Canada) Ltd* [1973] 2 O.R. 558 (CA) at 571; 34 D.L.R. (3d) 614 at 627 per Kelly JA. See further Irvine J, "*The Action per Quod Servitium Amisit in Canada*" (1980) 11 CCLR-ART 241.

[5] *Mankin v Scala Theodrome Co Ltd* [1947] KB 257 at 262; *Mercantile Mutual Insurance Company Ltd v Argent Pty Ltd* (1972) 46 ALJR 432 at 435 per Walsh J (who referred to the lost profits being a "consequence" and a "result" of the loss of services of Mr Box, and therefore recoverable); see also at 434 per Menzies J (Barwick CJ agreeing); *Marinovski v Zutti Pty Ltd* at 574-5 per Hutley JA; at 585 per Glass and Samuels JJA;

separate limitation in terms of remoteness: as Windeyer J pointed out in *Scott*,[6] having referred to the recoverability of damages "consequential" upon the loss of *servitium*, "[i]t is of course immaterial that they might not have been foreseen by the wrongdoer".[7]

6 This is consistent with the origins of the *per quod* action in trespass,[8] and the fact that the action does not depend upon the establishment of a duty on the part of the wrongdoer toward the plaintiff employer. It is also consistent with the approach taken in the context of other economic torts not founded on duty, such as injurious falsehood.[9]

7 In this regard, the approach to damages in the context of the *per quod* action bears a close resemblance to that taken in the related action[10] of inducing breach of contract,[11] each of which has been said to arise out of the 'quasi-proprietary' nature of the rights enjoyed by the employer to its employee's services.[12]

Heads of loss

8 The trial in this matter, before Murray J, concerned only questions of liability.[13] However, Murray J found that it was "undoubted"[14] that Nautronix had suffered economic loss of the kind articulated in the statement of claim,[15] arising out of the injuries to, and deaths of, the key employees who had been involved in the development of the marine technology and underwater communications systems which Nautronix was testing on the day of the flight, for the purposes of commercial exploitation.[16]

Attorney-General (NSW) v The Perpetual Trustee Company Ltd (1952) 85 CLR 237 at 290 per Fullagar J; *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 408 per Fullagar J; 462 per Windeyer J; *Commonwealth v Quince* (1944) 68 CLR 227 at 259 per Williams J.

[6] *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 462 per Windeyer J.

[7] While it is unnecessary to establish foreseeability of harm in order to found a *per quod* action, it is as a practical matter readily foreseeable by a tortfeasor that a person injured by his or her wrong may be employed and the employer may suffer loss if the employee is unable to perform his or her role; as Scrutton LJ pointed out in *The Arpad* [1934] P 189 at 202-3, it is not relevant that the extent of damage may not be foreseeable.

[8] See, eg, *Commissioner for Railways (NSW) v Scott* at 399, 400, 401, 403, 404 per Dixon CJ; 422 per Taylor J; 449, 451, 454, 460 per Windeyer J.

[9] See the discussion by Gummow J in *Palmer Bruyn & Parker v Parsons* (2001) 208 CLR 388 at 407 [63] &ff.

[10] The relationship between the tort of inducing breach of contract, which has its origins in the 19th century case of *Lumley v Gye* (1853) 2 E&B 216; 118 ER 749, and the *per quod* action, as part of the wider body of law pertaining to the master-servant relationship is discussed, for example, in *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 428-429 per Menzies J, 453-454 per Windeyer J; and by Kitto J in *Attorney-General (NSW) v The Perpetual Trustee Company Ltd* (1952) 85 CLR 237 at 296-297.

[11] The measure of damage in an action for inducing breach of contract has been expressed in terms of damage that resulted "in the ordinary course of business" (*Goldsoll v Goldman* [1914] 2 Ch 603 at 615): see the discussion by Gummow J in *Palmer Bruyn & Parker v Parsons* (2001) 208 CLR 388 at 407 [63] &ff, especially at 412 [76]; and see further McGregor H, *McGregor on Damages* (18th edition), Sweet & Maxwell, London. 2009 at [40-005]-[40-008].

[12] In *Zhu v Treasurers of NSW* (2004) 218 CLR 530 at 572-577 [123]-[134], the High Court discussed and unanimously accepted as correct the analysis by Kitto J in *Attorney-General (NSW) v The Perpetual Trustee Company Ltd* (1952) 85 CLR 237 at 294-297 as to the existence of a 'quasi-proprietary' right or interest founding both the *per quod* action and the tort of inducing breach of contract, originating with *Lumley v Gye*.

[13] *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [322] (see AB 302).

[14] *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [323]; see also at [325] (see AB 302 and 303).

[15] At paragraphs 22.4, 23.2, 26, 41-43 of the substituted statement of claim (see AB 10, 11 and 21-22).

[16] See, eg, *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 at [324]-[325] (see AB 302-303).

9 Such loss could, in the present case, include (for example) some or all of direct labour costs (such as sick pay, overtime paid to other employees, costs of recruiting replacement employees), cost overruns arising from project delays, losses of profits on contracts lost due to delays in development of the technology and increased workers' compensation insurance premiums. These are losses of a kind which are both consequent upon the loss of services, in the relevant sense, and have been recoverable in *per quod* actions brought in Australia and elsewhere.

10 Examples of the heads of damages that have been recognised by courts in Australia, New Zealand, the UK and Canada in the context of *per quod* actions include the following:

(a) sick pay paid to the injured employee;[17]

(b) overtime paid to other employees required to cover for the injured employee;[18]

(c) the cost and inconvenience of replacing the injured employee;[19]

(d) medical expenses;[20]

(e) other expenditure reasonably incurred by the employer by reason of the loss of services;[21] and

(f) loss of profits.[22]

11 Each of the items of damage must be referable to the pecuniary loss actually sustained by the employer as a result of the loss of services of the employee.[23] Where the categories identified above contain a degree of overlap they are not cumulative.[24] Examples of heads of loss found to be compensable in *per quod* actions are set out in the schedule to these submissions.

12 The above categories of loss can be usefully dealt with under the following three broad heads:

(a) loss of profits;

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[17] Eg, *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392; *Attorney-General v Valle-Jones* [1935] 2 KB 209; *R v Richardson* [1948] SCR 57; *Commonwealth v Quince* (1944) 68 CLR 227 at 239 per Latham CJ; 246 per Starke J; 259 per Williams J; *Mankin v Scala Theodrome Co Ltd* [1947] KB 257; *Hodsoll v Stallebrass* (1840) 11 A & E 301,113 ER 429.

[18] Eg, *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 462 per Windeyer J; *Attorney-General v Wilson and Horton Ltd* [1973] NZLR 238 at 258 per Richmond J.

[19] Eg, *John Holland (Constructions) Pty Ltd v Jordin (No. 2)* (1985) 36 NTR 1 at 16.

[20] Eg, *Bradford Corporations v Webster* [1920] 2 KB 135; *R v Richardson* [1948] SCR 57 at [18] per Rand J; [35] per Kellock J; [64] per Estey J; *Attorney-General v Valle-Jones* [1935] 2 KB 209; *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392.

[21] *Marinovski v Zutti Pty Ltd* [1984] 2 NSWLR 571 at 587 per Glass and Samuels JJA (referring to the loss suffered by the plaintiff company as a result of it continuing to pay to the injured employees their pre-accident earnings "when the value of their services to it was considerably diminished"); see also at 582 per Hutley JA.

[22] Eg, *Mercantile Mutual Insurance Company Ltd v Argent Pty Ltd* (1972) 46 ALJR 432 at 434 per Menzies J (Barwick J agreeing), 435 per Walsh J; *Marinovski v Zutti Pty Ltd* [1984] 2 NSWLR 571; *Mankin v Scala Theodrome Co Ltd* [1947] KB 257; see further the cases referred to in Irvine J, "*The Action per Quod Servitium Amisit in Canada*" (1980) 11 CCLR-ART 241, especially at footnotes 21 to 27.

[23] Eg, *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 408 per Fullagar J; *Attorney-General v Wilson and Horton Ltd* 1973] NZLR 238 at 255 per Richmond J; *John Holland (Constructions) Pty Ltd v Jordin (No. 2)* (1985) 36 NTR 1 at 14-15 per Nader J.

[24] Luntz H, *Assessment of Damages for Personal Injury and Death* (4th ed), Butterworths, Sydney. 2002 at [10.3.1].

(b) reasonably incurred expenditure; and

(c) costs of mitigation.

Loss of profits

13 Where by reason of some special skill or talent, or in the case of a 'one person company', the injured employee cannot easily be replaced, loss of profits (which can be identified separately to the heads of loss discussed below) are likely to arise and are recoverable.[25] Further, where certain revenue of the employer depends upon the work performed by the injured employee (or a team of which they are a part) and such revenue is foregone or diminished by the loss of the employee, such net losses may be recovered by the employer.[26]

14 As Hutley JA said in *Marinovski v Zutti Pty Ltd* [1984] 2 NSWLR 571 at 575:

> "It must follow that where an employee of unique capacity is lost and replaced by an inferior employee, damages resulting from the proved loss will be recoverable. For example, a leader in a new field such as biotechnology, may be literally irreplaceable and his injury destroy the company. There is no single test for the measure of damages recoverable by an employer for the loss of an employee. In the case of an ordinary employee, the measure of damages is the cost of replacement of the employee, plus any expenses properly incurred in mitigation of the loss, which could include medical, hospital and other expenses incurred in his rehabilitation. There may also be losses incurred between the commencement of the loss of services and acquisition of the replacement."

Reasonably incurred expenditure

15 As recognised in the foregoing passage and the cases to which reference was earlier made,[27] damages recoverable by an employer are not limited to the losses suffered but include expenditure reasonably incurred by the employer, including payments the employer is required to make to the employee pursuant to statute, award or contract.[28]

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[25] Eg, *H E Round Pty Ltd v Abbott* (1927) 1 ALJ 20 at 23 reporting on a decision of the Chief Justice of Tasmania, awarding damages to an employer in *per quod* action for lost profits arising out of the five week absence of a key employee; *Mercantile Mutual Insurance Co Ltd v Argent Pty Ltd* (1972) 46 ALJR 432 at 434 per Menzies J (Barwick CJ agreeing); 435 per Walsh J (in that case, the employer companies recovered loss of profits suffered by their businesses as a result of the loss of their managing director); *Chorlton v Walker* (1983) 35 SASR 47 (damages recovered for loss of profitability in the plaintiff's accountancy practice as a result of the injury to his wife, who was employed in the management of the practice).

[26] See, eg, *Mankin v Scala Theodrome Co Ltd* [1947] KB 257 where the injured employee formed part of a "music hall turn" with his employer, whose revenues suffered while the employee was incapacitated and the team was unable to perform their entire routine.

[27] See footnote 4 above.

[28] *Commonwealth v Quince* (1944) 68 CLR 227 at 239 per Latham CJ; at 246-7 per Starke J; at 259 per Williams J (entitled to claim pay until servant dismissed but not pension paid thereafter); *Attorney-General (NSW) v The Perpetual Trustee Company Ltd* (1952) 85 CLR 237 at 290 per Fullagar J (expenditure necessarily incurred is recoverable); *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 423, 427 per Taylor J; at 461-2 per Windeyer J (money legally required to be paid is recoverable); *Sydney City Council v Bosnich* [1968] 2 NSWR 725 (CA) (accident pay while servant not working is recoverable); *Marinovski v Zutti Pty Ltd* [1984] 2 NSWLR 571 at 587 (reduced payment to director / servant during period of diminished capacity recoverable); *Evans v Port of Brisbane Authority* (1991) [1992] Aust Torts reps 81-169 (Qld SC) at 61-383 (statutorily required payments and make-up pay under Award recoverable but not voluntary additional payments); *Bradford Corporation v Webster* [1920] 2 KB 135 (wages until servant determined to be permanently incapacitated and then value of the employer's contribution portion of pension); *Admiralty Commissioners v SS Amerika* [1917] AC 38 (voluntary payments not recoverable); cf: *Attorney-General v Valle-Jones* [1935] 2 KB 209 (voluntary continuation of wages recoverable).

16 Such recoverable expenses also include medical and hospital treatment that an employer is bound to provide for an injured employee,[29] as well sick pay, which is an expense 'thrown away' because the employer receives no benefit from it. [30]

Costs of mitigation

17 As with all torts, the employer is obliged to act reasonably to mitigate the loss resulting from the loss of services due to the injury to the employee.[31] This can involve the employment of a substitute employee[32] or by paying other employees to perform additional work to cover the 'gap' created by the loss of the employee.[33] The costs so incurred are recoverable.

10 18 In the circumstances of injury to a 'fungible' employee (i.e., in circumstances where an equally skilled substitute is employed and earns the same wage, *and* nothing is paid to the injured employee) there may be no substantial loss to the employer, except for the expenses in advertising the position, temporary losses until a substitute is found, or where additional training is required.[34]

19 Further, where an alternative or substitute employee can only be found by the employer if the alternative or substitute employee is paid a higher wage or salary, the employer is entitled to the difference between the salary paid and the amount that would have been paid to the injured servant.[35]

20 Dated: 17 May 2012

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[29] *Attorney-General v Valle-Jones* [1935] 2 KB 209 at 216-7 and 219-20 per MacKinnon J (medical expenses recoverable); *Attorney-General (NSW) v The Perpetual Trustee Company Ltd* (1952) 85 CLR 237 at 290-1 per Fullagar J (medical expenses not recoverable where not under a legal duty to pay them); *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 461 per Windeyer J) (payments required under statute); *Sydney City Council v Bosnich* [1968] 2 NSWR 725 (CA) (payments required under statute); *Evans v Port of Brisbane Authority* (1991) [1992] Aust Torts reps 81-169 (Qld SC) at 61-383 (payments required under statute and not otherwise recoverable under relevant compensation scheme).

[30] See, eg, *Attorney-General v Valle-Jones* [1935] 2 KB 209 at 216. A useful analogy can be drawn from shipping cases, where a plaintiff can recover a crew's wages while a ship is 'out of action'. In such a case an "owner will be entitled to recover the running expenses in maintaining the vessel and paying the crew while they are no use to him": see *The Hebridean Coast* [1961] AC 545 (CA and HL) at 563, as well as at 558 (per Willmer LJ, referring to expenses 'thrown away'); *Nauru Local Government Council v Seamen's Industrial Union of Workers* [1986] 1 NSLR 466 (CA) at 473.

[31] *British Westinghouse Electric & Manufacturing Co. Ltd v Underground Electric Railways Co. of London Ltd* [1912] AC 673 at 688-9 per Viscount Haldane LC.

[32] *Hodsoll v Stallebrass* (1840) 113 ER 429 (recovery for substitute worker where employer still obliged to pay injured apprentice); *Leveridge v Witten* (NSW CA, 14 September 1979, unreported); *Nominal Def (NSW) v Contrip Investments Pty Ltd* (1989) 10 MVR 511 (NSW CA); *John Holland (Constructions) Pty Ltd v Jordin (No 2)* (1985) 36 NTR 1 at 16 per Nader J.

[33] *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 at 462 per Windeyer J; *Attorney-General v Wilson and Horton Ltd* [1973] NZLR 238 at 258 per Richmond J.

[34] *John Holland (Constructions) Pty Ltd v Jordin (No 2)* (1985) 36 NTR 1 at 16 per Nader J; and generally Luntz H, *Assessment of Damages for Personal Injury and Death* (4th ed), Butterworths, Sydney. 2002 at [10.3.3].

[35] See, e.g., *Chorlton v Walker* (1983) 35 SASR 47.

Schedule – examples of heads of loss assessed in *per quod* actions

1. In ***Tippet v Fraser*** (1999) 74 SASR 522, Tippet and his wife were directors and principal shareholders of Daylite Industries Pty Ltd. Tippet was paid a nominal salary for his substantial services and was injured when, as a result of defendant's negligence, a bull escaped the sale ring pen on the defendant's property. Daylite Industries Pty Ltd successfully claimed for:
   - the loss in its gross annual sales, which had dropped after Tippet was injured before gradually returning to normal, and were attributed to Tippet's inability to actively obtain orders for the company's products (at 523-4);
   - costs of hiring three substitute workers (at 534-6); and
   - future economic loss the company would sustain by reason of having to continue to employ a substitute worker for the remainder or Tippet's working life (at 537).

   The Court indicated a claim in respect of interest and finance charges was open but there was insufficient evidence to sustain it in that case (at 536-7).

2. In ***McElwee & Anor v Ansett Transport Industries (Operations) Pty Ltd*** [1997] QSC 164; (1997) 140 IR 14, McElwee was a director of Mannin Pty Ltd (**Mannin**) and its primary decision maker. The Court found much of Mannin's considerable success was attributable to McElwee's reputation among Aboriginal community leaders in the Northern Territory. McElwee was injured and found it difficult to travel in trucks over rough roads. Mannin successfully claimed damages totally approximately $135,000 in respect of the cost of:
   - aircraft charters to destinations where it carried on business as McElwee could no longer drive there, discounted to take into account that by flying McElwee arrived sooner and could devote more time to his business (at 26-7);
   - hiring substitute employees, discounted to take account of the fact that by hiring additional workers, McElwee was able to spend more time working on other business for Mannin (at 27); and
   - hiring a car for McElwee to travel in as it was more comfortable than travelling by truck due to his injuries (at 27).

3. In ***Evans v Port of Brisbane Authority***, unreported decision of Qld Sup Crt, 20 December 1992, Evans was injured and his employer, Associated Steamships Pty Ltd, claimed damages from those found responsible for repayment of the wages and compensation paid by it to Evans pursuant to statute and the applicable Award. The Court found that the employer was entitled to recover payments made:
   - to the employee under the *Navigation Act* 1912;
   - to the employee under the relevant Award; and
   - under the *Seamen's Compensation Act* 1911 towards Evans' medical expenses.

   The Court found the employer was not entitled to recover other money paid on a voluntary basis or paid under the *Seamen's Compensation Act* that the plaintiff would be required to repay out of the judgment sum.

4. In ***Nominal Def (NSW) v Contrip Investments Pty Ltd*** (1989) 10 MVR 511, an employee was injured in motor accidents and unable to work. The employer, Contrip Investments Pty Ltd, claimed for wages paid to employee for the period after the accidents. On appeal, an order for damages in respect of wages was overturned, as the "proper measure of damages ... is the loss of profits ... not the

wages paid to the employee": at 524-5 per Meagher JA (Samuels JA agreeing). It was found that it would have been proper for the employer to mitigate its losses by sacking the employee and hiring a substitute and there was no explanation as to why this did not occur.

5. In ***John Holland (Constructions) Pty Ltd v Jordin*** (1985) 36 NTR 1, Cindric, the employee of the plaintiff was injured and brought an action for common law damages against the plaintiff and Simon Carves Australia Pty Ltd (**SC**), the operators of the crane which caused the injury and whose employee, Jordin, had been operating the crane. The action was settled and consent judgment entered against the plaintiff and SC. The plaintiff commenced the present action to recover the moneys it had paid or was obliged to pay to Mr Cindric on the basis that Jordin was a joint tortfeasor. When the action came to trial, the plaintiff sought to amend its statement of claim to add a claim for loss caused to it by the injury to Cindric. The court allowed the amendment to the statement of claim. Nader J noted that:

   - the measure of damages for a *per quod* claim is "subject to no single test" and that the ultimate criterion is that the head of damage "must be referrable to the fact that the master no longer has his servant's services" (at 15); and
   - the cost and inconvenience of replacing the injured person are recoverable as a direct consequence of the loss of the employee's service (at 16).

6. In ***Marinovski v Zutti Pty Ltd*** [1984] 2 NSWLR 571, Panizutti was a salaried employee of Zutti Pty Ltd (**Zutti**), working as its 'de facto managing director' and production supervisor. Zutti regarded Panizutti as irreplaceable. Prior to Panizutti's injury Zutti had been facing grave financial problems and by the time of the trial, a receiver had been appointed. Panizutti's injuries had a further negative effect on Zutti. Damages were awarded for:

   - loss in value of the company, as the company had assets in the form of Panizutti, an employee with special skill, and was to be compensated for the loss of that asset; however, without evidence of the difference in value of the company due to the loss of Panizutti's services, where the whole of the net assets of the company had been lost in circumstances to which the accident to Panizutti contributed, it was not extravagant to allow the proved net asset value of the company (as this was likely less than the value of Panizutti) (at 576);
   - a portion of other losses suffered by Zutti following the accident as other factors also contributed to such losses, though precise apportionment was impossible (at 581 per Hutley JA);
   - money paid to Panizutti while his working capacity was reduced as a result of the injury, as recovery of payment for no value (at 582 per Hutley JA).

   As no replacement workers were hired, there was no entitlement to such a claim. A duty to mitigate loss extends to a duty to replace (even partially) an injured worker, however this would have been beyond Zutti's resources. In such circumstances, where a company is in a potentially irretrievable financial situation, a company's duty to mitigate may extend to going into liquidation (at 582 per Hutley JA).

7. In ***Leveridge v Witten*** (NSW CA, 14 September 1979, unreported), Leveridge was employed as a carpenter by a family company that he managed and directed and of which he and his wife were primary shareholders. Leveridge had not drawn a consistent wage from the company but drew what he could and recorded this as

wages. For practical purposes, Leveridge was building on his own account, using the medium of the company as a contracting party. The proper approach was found to be that "damages should be limited to the loss proved to the company in respect of the period during which the company was obliged to pay money for the services it did not receive and for such time as the company suffers loss while seeking a suitable substitute employee" (at 10). The Court did not accept that the law would require a comparison between the effectiveness as a revenue producer of the injured employee and his substitute or successor. Damages were recoverable only for the losses up to the time that Leveridge sought and obtained work elsewhere and the company had no current commitments to build and had employed no substitute managing director.

8. ***Attorney-General v Wilson and Horton Ltd*** [1973] 2 NZLR 238 concerned a *per quod* action for the loss of the services of a New Zealand Government Railways Department employee, who was injured by the negligence of the respondent's servant. The claim for damages was for recovery of $733 paid by the Railways Department as "make-up" payments paid to its employee during periods when he was unable to work, "on top of [other amounts successfully claimed under other causes of action and not before the Court of Appeal] to bring [the employee's] total payments up to the sum which he would have received if there had been no accident". The Court held that a *per quod* action was open to the Crown and that:
   - the wages that the plaintiff has paid out for no return of services do not represent his loss, because had the accident not occurred the plaintiff would have had to make such payments under the contract of employment (at 250 per Turner P);
   - where the employer is required to continue paying the wages of the injured employee, the cost of employing a substitute employee to replace the injured employee might be thought to be a prima facie measure of damages, however, no substitute employee was employed as other existing employees merely took "up the slack" (at 250 per Turner P; at 258 per Richmond J).

   The Court of Appeal thereby concluded that the claim for "make-up payments" were not recoverable.

9. In ***Mercantile Mutual Insurance Company Ltd v Argent*** (1972) 46 ALJR 432, Box, the manager of three companies, Argent Pty Ltd, Charleston Pty Ltd and Paramount Footwear Distributors Pty Ltd, was injured by Huxley. The three companies sued for the loss of Box's services. The assets of the three companies were sold 9 months after the accident for fair market value. Relevantly the Court found that due to ailing health, Box would have only worked for another four years, that the assets of the three companies were sold earlier than they would otherwise would have, and they would not have then sold for any greater value had Box still been providing his services. Damages were awarded for loss of profits in the subsequent years that Argent Pty Ltd and Charleston Pty Ltd would have been trading but for Box's injuries and the businesses being sold, notwithstanding that market value was realised on the sale of assets.

10. In ***Sydney City Council v Bosnich*** [1968] 3 NSWR 725, concerned a council worker, who sustained injuries when a car negligently driven by the defendant collided with a water-wagon driven by the employee. Accident pay to an injured employee was recoverable by the Council, as "the employer can recover from such

third person the pecuniary loss actually sustained through the loss of services of the employee and that such sums as the employer in that event becomes by law liable to pay and does pay to the employee is prima facie evidence of such loss" (at 729 per Asprey JA, Hardie AJA and Sugerman AP agreeing).

11. In ***R v Richardson*** [1948] SCR 57, the Crown claimed for loss of service of a member of the armed forces. The Court of Appeal allowed damages for:
    - medical and hospital expenses (at [11] per Kerwin J, Taschereau J concurring; at [18] per Rand J; at [69] per Estley J); and
    - loss in the value of the serviceman's services, which could be determined with reference to the wages he was paid under the relevant Award (at [14] per Kerwin J, Taschereau J concurring; at [22] per Rand J; at [64] per Rand J).

    Kerwin J, with whom Taschereau J concurred, also stated that "in this class of case the damages have always been more or less at large" (at [11]).

12. In ***Mankin v Scala Theodrome Ltd*** [1947] KB 257, Mankin and Cochrane were performers of a two-person stage show, earning Cochrane £40/week. Mankin was employed by Cochrane for £10/week. Mankin was injured and was unable to perform for 4 weeks and only in a limited way for a further 6 weeks, whereby Cochrane earned £30/week and paid Mankin a reduced wage. Cochrane was awarded damages as loss of profits:
    - for the initial four weeks, the difference in earnings and wages paid (i.e. £30/week), less fares and expenses saved, the judge noting that it would have been detrimental to the act to perform alone;
    - for the subsequent six weeks, the portion of the reduce payment he bore himself during the period (£10/week less the reduced wages being paid to Mankin).

13. In ***Attorney-General v Valle-Jones*** [1935] 2 KB 209, two members of the Royal Air Force were negligently injured in a motor vehicle accident and claimed damages, in which no sum was included for loss of wages, rations or medical expenses as they were provided by the Crown. The Crown claimed the wages and medical expenses in a per quod action. Damages were awarded to the Crown for wages paid to injured serviceman and medical expenses. Despite the Crown not being obliged to pay these, if not paid by the Crown the amount of damage which the men as individuals could have claimed against the defendant would have increased. As such payment was reasonable; it was a loss for which the defendant was liable for to the Crown (at 218-20).

14. In ***Hodsoll v Stallebrass and Anor*** (1840) 11 A & E 301; 113 ER 429, the injured employee was indentured to the plaintiff as an apprentice from ages 13 to 21, whereby the plaintiff agreed to provide food, drink and clothing. As a result of injury the employee was permanently disabled and the plaintiff had to hire a new apprentice. He recovered damages for losses incurred in:
    - feeding and clothing the injured employee while the plaintiff received no benefit from doing so;
    - attempting to cure the injured apprentice; and
    - hiring a new apprentice.

    Further, the plaintiff was entitled to recover for damage suffered prior to trial as well as damage likely to be suffered subsequently (at 431 per Littledale J).