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 FURTHER SUBMISSIONS

PART I: INTERNET CERTIFICATION

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

PART II: ARGUMENT

2. The parties have been asked to address two questions:

   (a) What is the measure of damages that would be allowed in an action for a wrongful act *per quod servitium amisit*?

   (b) Which (if any) of the consequential losses allegedly suffered by Nautronix may be recovered in such an action?

The measure of damages

3. The third respondent (**Nautronix**) submits that damages should be measured by the loss suffered by an employer as a result of the loss of an employee's services[1]. This is broadly consistent with what Fullagar J said in *Commissioner for Railways (NSW) v Scott*[2] (**Scott**), and with what Asprey JA said in *Sydney City Council v Bosnich*[3] (**Bosnich**). Both judges agreed that the measure of damages is "the pecuniary loss actually sustained through the loss of the services of the servant [or employee]"[4].

4. But as the decisions of Fullagar J in *Scott* and Asprey JA in *Bosnich* reveal, there are conflicting views about what this general statement means and how it applies on the facts of a particular case. Whereas Fullagar J considered that wages paid to an incapacitated servant under an obligation imposed by contract or statute were not even prima facie evidence of a master's loss[5], Asprey JA decided that an employer was entitled to damages reflecting the very sum paid (as "accident pay") to an injured employee pursuant to an obligation imposed by the terms of an award[6].

5. What these and the decisions referred to in the balance of these submissions demonstrate, is that a clear test has not emerged from the cases about how damages should be assessed in an action for loss of services.

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[1] At [4] of Nautronix's submissions.
[2] (1959) 102 CLR 392.
[3] [1968] 3 NSWR 725.
[4] (1959) 102 CLR 392 at 408-9; [1968] 3 NSWR 725 at 729 (line 6).
[5] (1959) 102 CLR 392 at 408-9.
[6] [1968] 3 NSWR 725 at 729.

6. Caution must therefore be exercised in relying on individual cases to determine what damages (if any) are recoverable in any other action for loss of services. In addition, when undertaking a review of the authorities, a distinction needs to be drawn between those cases in which damages for loss of services have been awarded (or refused), and those cases in which the question of damages is referred to but the discussion is not part of the *ratio decidendi*.

7. Turning first to the "costs of mitigation" (as so described by Nautronix[7]), the appellant is aware of only two Australian cases[8], and two Canadian cases[9] in which wages paid to a substitute employee have been recovered as damages, and two English cases – *Hodsoll v Stallebrass*[10] and *Martinez v Gerber*[11] – decided in 1840 and 1841 respectively, in which such damages may have been awarded. Some difficulty attends both of the English cases, however.

8. In *Hodsoll v Stallebrass*, the report does not reveal which facts the jury relied on in deciding that the plaintiff watchmaker was entitled to 30*l.* damages for the loss of his apprentice's services. The report only recites the plaintiff's declaration, which stated that the plaintiff was required to provide his apprentice with "competent and sufficient meat, drink, and apparel" during the entire nine years of his apprenticeship (six years of which were still to run following the apprentice's injury), and also that the plaintiff "was obliged to pay money" in the hiring of another person to serve him (after the apprentice's injury). Thus, it is unclear from the report what account, if any, the jury took of the cost to the plaintiff of replacing the injured apprentice.

9. In *Martinez v Gerber*, the plaintiffs' declaration stated that the plaintiffs' lost the services of their "servant and traveller" (as a result of his injuries) and "all advantage that would have accrued to them from such service". The declaration further stated that the plaintiffs employed a replacement "traveller and servant", at a cost of *200l.* (in expenses and wages). The plaintiffs succeeded, but were awarded damages in the amount of only 63*l.* The report does not reveal how these damages were assessed, and what if any part of that sum was attributable to the cost of employing the substitute servant.

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[7] At [10(c)] and [17] to [19] of Nautronix's submissions.
[8] *Tippet v Fraser* (1999) 74 SASR 522; *McElwee v Ansett Transport Industries (Operations)* (1997) 140 IR 14.
[9] *Kneeshaw and Spawton's Crumpet Co v Latendorff* (1965) 54 DLR (2d) 84 at 89-90; *Genereux v Peterson Howell & Heather (Canada) Ltd* (1972) 34 DLR (3d) 614 at 629. (The appellant has not undertaken an exhaustive review of all Canadian cases in which damages have been awarded in an action *per quod servitium amisit*.)
[10] (1840) 11 A&E 301 [113 ER 429 at 431].
[11] (1841) 3 M&G 88 [133 ER 1069].

10. The other cases referred to by Nautronix[12] provide either no support for the proposition that the costs of mitigation may be recoverable in an action *per quod servitium amisit*, or at best *obiter* comments that such costs may be recoverable.

11. *Leveridge v Witten*[13] is in the former category. In that case the company's only claim was a "consequential one for loss of profits"[14]. It was not a case "where a substitute was employed and trained"[15], and no view was expressed about whether such costs would have been recoverable. Similarly, in *Nominal Defendant (NSW) v Contrip Investments Pty Ltd*[16], the plaintiff company did not employ a substitute employee, and no question about the assessment of "replacement damages" arose.

12. Differing views have been expressed about the recoverability of actual amounts paid by an employer to an injured employee pursuant to statute, award or contract. On the one hand, for example, Fullagar J in *Scott* (in dissent), Nader J in *John Holland (Constructions) Pty Ltd v Jordin*[17], and Lord Sumner in *Admirality Commissioners v SS Amerika*[18], all considered that such payments were not recoverable based on the action *per quod servitium amisit*. Contrary conclusions have been reached in other cases, such as the *Cth v Quince*[19], Attorney-*General v Valle-Jones*[20], *R v Richardson*[21], and *Bosnich*[22].

13. On the question of loss of profits, a number of Australian cases have awarded damages of this nature in consequence of the loss of an employee's services[23]. A feature of those decisions is that the plaintiff company in each case was effectively controlled by the injured employee, who himself was either the sole or one of only a few employees. But a contrary view has been expressed in some Canadian decisions[24], where "loss of profits" has been denied.

14. The foregoing analysis reveals that in the relatively small number of cases in which damages for loss of services have been awarded, courts have not confined their assessment of damages to the market value of the injured employee's services, "calculated by the price of a substitute less the wages which the master is no longer

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[12] At fn 19, and fn 33 to 35.
[13] Unreported, New South Wales Court of Appeal, 14 September 1979.
[14] At 9.
[15] At 9.
[16] (1989) 10 MVR 511; BC8901418 at 32.
[17] 36 NTR 1 at 15-16.
[18] (1917) AC 38 at 61.
[19] (1944) 68 CLR 227 at 239 per Latham CJ, 246-7 per Starke J, and 259 per Williams J.
[20] [1935] 2 KB 209 at 217.
[21] [1948] SCR 57.
[22] See fn 6, above.
[23] *Mercantile Mutual Insurance Company Limited v Argent* (1972) 46 ALJR 432; *Leveridge v Witten* Unreported, New South Wales Court of Appeal, 14 September 1979; *Marinovski v Zutti Pty Ltd* [1984] 2 NSWLR 571; *Tippet v Fraser* (1999) 74 SASR 522.
[24] See for example *Genereux v Peterson Howell & Heather (Canada) Ltd* (1972) 34 DLR (3d) 614 at 627 and the cases collected in J Irvine 'The Action per Quod Servitium Amisit in Canada' (1980) 11 *CCLT* 241.

required to pay to the injured servant"[25]. This is most clearly evident in cases where amounts referable to "loss of profits" have been awarded.

Consequential losses claimed by Nautronix

15. The trial judge, Murray J, made only limited findings about the nature of the economic loss alleged to have been suffered by Nautronix. He accepted that there was some "loss arising from the disruption of its business activities"[26], and he considered that that provided a sufficient basis for imposing liability in negligence.

16. Nautronix did not provide any particulars of the loss and damage it allegedly sustained as a result of the deaths or injuries to its five employees. In its substituted statement of claim, Nautronix did no more than allege that it "would be occasioned interruptions and delays in the development and testing of the marine technology and communications systems"[27] and "the death and injury of its personnel would cause loss of intellectual property and corporate knowledge... and cause loss and damage to Nautronix Limited in the conduct of its business"[28].

17. In the absence of greater precision about what losses, if any, were allegedly sustained by Nautronix, and how such losses were caused by interruptions to and delays in the development and testing of its technologies, the appellant is not presently able to assist the Court further in identifying which consequential losses may be recovered in an action *per quod servitium amisit*.

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[25] H McGregor *McGregor on Damages* 13th edn (Sweet & Maxwell London 1972) at [1167].
[26] At [322]-[323], AB 302.
[27] At [42.3] of the substituted statement of claim (AB 21).
[28] At [42.4] of the substituted statement of claim (AB 21).