

# **BARCLAY v PENBERTHY, THE RULE IN BAKER v BOLTON AND THE ACTION FOR LOSS OF SERVICES: A NEW RECIPE REQUIRED**

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## **I INTRODUCTION**

In the recent decision of *Barclay v Penberthy*,<sup>1</sup> the High Court of Australia considered the continuing applicability of two venerable rules of the common law. The first allowed a claim by an employer against a third party for loss of services following an *injury* to one of their employees ('loss of services claim'); the second barring a claim by an employer against a third party for loss of services following the *death* of one of their employees ('death of employee claim'). The High Court answered both questions by confirming the status quo position; refusing to subsume the first principle into another, broader principle of the law of obligations; and refusing to overrule past cases which barred claims by an employer with respect to the death of one of their employees. In this case note, issue will be taken with both of those answers.

Part II of this case note summarises the facts and decision in *Barclay* and its relation with previous authorities in this area. The case note then considers two main issues that emerge from the decision in more depth. Part III considers the rule with respect to loss of services claims, and whether the Court was right to maintain the status quo. Specifically, the Part considers whether, in order that the loss of services claim should be successful, the defendant must be shown to have committed a 'wrong'; and if so, whether that 'wrong' must have been done to the employee, employer or both. Finally, it considers whether the action for loss of services should be reconceptualised to fit better with general tort law principles, and to remove it from its anachronistic proprietary roots.

Part IV considers in more detail the rule with respect to death of employee claims, and whether the Court was right to maintain the status quo. Specifically, it questions the reasoning by which the High Court declined to overturn old precedent, and considers the decision in *Baker v Bolton*<sup>2</sup> on its merits. This Part seeks to understand the true historical basis for the rule, argues that it is based on confused reasoning and principles that have long since been abolished, and finds that the *Baker* decision is so discredited so as to require its abandonment. In so doing, the tests provided by the High Court for the abandonment of precedent, specifically in the area of tort law, will be applied.

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1 (2012) 246 CLR 258 ('*Barclay*').

2 (1808) 170 ER 1033 ('*Baker*').

## II DECISION IN *BARCLAY v PENBERTHY*

The case concerned the crash of an aircraft owned by Fugro (F) and hired to a company named Nautronix (N). Five of N's employees were on the plane which crashed; two of them were killed, and three of them were injured. It was claimed that the crash was caused by both the negligent design of a component of the aircraft by Barclay (B), and the negligent operation of the aircraft by Penberthy (P), a pilot retained by F. At first instance the claims against F vicariously for the actions of P were successful.<sup>3</sup> To the extent that the claim involved a claim for pure economic loss, P was aware of the purpose of the flight and that the passengers were N's employees. F was successful in seeking an indemnity from B for part of that claim. B was held liable to some plaintiffs but not to N. Relevantly to the claim for pure economic loss, this was partly because of a finding that B was not aware of the specific purpose for which N required the aircraft.

On appeal, the findings against P and F were confirmed, but the Court found that B was liable for the economic loss caused to N.<sup>4</sup> However, it applied the rule in *Baker v Bolton* to deny a claim based on the death of the two employees. Regarding the injured employees, the Court of Appeal confirmed that a claim was available for loss of services, and used the availability of the loss of services claim to justify the viability of the claim for economic loss — linking the existence of the former to establishment of the latter.<sup>5</sup>

The first issue the High Court was required to consider was the rule in *Baker v Bolton*, an 1807 English decision to the effect that no action lies against a third party who has caused the death of another to whom the claimant has some link. In the words of Heydon J, 'the death of a human being cannot be complained of as an injury'.<sup>6</sup> This rule applied both to loss of services claims that might otherwise be available, and to claims on other bases, for example, negligence. That part of the rule that had denied the right of family members of the deceased to claim against the third party has been abrogated by statute (legislation known as *Lord Campbell's Act*<sup>7</sup> and its progeny) throughout the common law world. However, that part of the rule that denied the right of an employer to claim compensation

3 *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316 (11 November 2009).

4 *Fugro Spatial Solutions Pty Ltd v Cifuentes* (2011) Aust Torts Reports ¶82-087 ('*Fugro*').

5 Ibid 64 885 [125]. McLure P noted '[b]ut for the existence of the common law action for loss of services and the significance there attached to the employer/employee relationship, I would have concluded that neither Mr Penberthy nor Mr Barclay owed Nautronix a duty of care to avoid the pure economic loss the subject of the claim'.

6 *Barclay* (2012) 246 CLR 258, 291.

7 *Fatal Accidents Act 1846*, 9 & 10 Vict, c 93. This is a reference to legislation permitting dependents of a deceased to bring a claim against the person alleged to have caused the death of the deceased: *Civil Law (Wrongs) Act 2002* (ACT) s 15; *Compensation to Relatives Act 1897* (NSW) s 3; *Compensation (Fatal Injuries) Act 1974* (NT) s 7; *Succession Act 1981* (Qld) s 66; *Civil Liability Act 1936* (SA) s 23; *Fatal Accidents Act 1934* (Tas) s 4; *Wrongs Act 1958* (Vic) s 16; *Fatal Accidents Act 1959* (WA) s 4. Interestingly, Lord Campbell reported the decision in *Baker* in the law reports, and had a 'lifelong commitment' to its reform though the legislation which bears his name: Peter Handford, 'Lord Campbell and the *Fatal Accidents Act*' (2013) 129 *Law Quarterly Review* 420, 449.

against a third party who caused the death of an employee has not been abrogated by *Lord Campbell's Act*, and continues to reflect the common law position.<sup>8</sup>

The High Court briefly considered this issue, concluding that the rule should not be disturbed. The reasons evident in the judgment include that the House of Lords refused to overturn the rule in 1916,<sup>9</sup> and that the New South Wales Court of Appeal had refused to overturn the rule,<sup>10</sup> based on an earlier High Court decision apparently confirming the rule.<sup>11</sup> The joint reasons concluded that '[t]he pattern of Australian legislation', whereby parts of the application of the rule in *Baker v Bolton* had been abolished or modified, '[pointed] to the continued existence of the rule'.<sup>12</sup> Heydon J claimed that any significant change to the rule in *Baker v Bolton* would be a legislative act for parliament.<sup>13</sup>

The second issue the High Court was required to consider was the continuing applicability of the loss of services action. The appellants had argued that the action should be absorbed by or subsumed into the law of negligence. The High Court briefly acknowledged the historical basis of the loss of services action as reflecting a view that a master had a proprietary or quasi-proprietary interest in the services of their servants.<sup>14</sup> At the time of the development of this doctrine, servants typically lived in the house of the master. The action for loss of services had links with the law of trespass.<sup>15</sup> With the development of the law of contract, the master-servant relationship evolved into one seen as having a contractual rather than a proprietary basis. Thus, although the original basis of the rule disappeared, it became justifiable on another basis.<sup>16</sup>

The Court rejected arguments that the loss of services action should be subsumed into general negligence principles.<sup>17</sup> The joint reasons stated the loss of services action was independent of a finding that the 'wrongdoer' owed the master a duty of care. They stated that it was based on the idea that a wrong had been done to the victim. They concluded: 'The injury to the servant must be wrongful. It may be wrongful because it was inflicted intentionally or because it was inflicted in breach of a duty of care that the wrongdoer owed the servant.'<sup>18</sup>

8 One jurisdiction has abolished or modified the rule by legislation: see *Civil Liability Act 2003* (Qld) s 58(1)(a). But generally in all other jurisdictions this claim is limited to family members of the deceased: *Civil Law (Wrongs) Act 2002* (ACT) ss 25, 100; *Compensation to Relatives Act 1897* (NSW) s 4; *Compensation (Fatal Injuries) Act 1974* (NT) s 8; *Civil Liability Act 1936* (SA) s 24; *Fatal Accidents Act 1934* (Tas) s 5; *Wrongs Act 1958* (Vic) s 17; *Fatal Accidents Act 1959* (WA) s 6(1A).

9 *Barclay* (2012) 246 CLR 258, 278 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ). Heydon J agreed, citing *Admiralty Commissioners v SS Amerika* [1917] AC 38 ('*SS Amerika*'): at 292–3. Kiefel J also agreed with the majority: at 321–2 [78].

10 *Barclay* (2012) 246 CLR 258, 279 [25]–[26] (French CJ Gummow Hayne Crennan and Bell JJ), citing *Swan v Williams (Demolition) Pty Ltd* (1987) 9 NSWLR 172, 190.

11 *Woolworths Ltd v Crotty* (1942) 66 CLR 603 ('*Woolworths*'), cited in *Swan v Williams (Demolition) Pty Ltd* (1987) 9 NSWLR 172, 183.

12 *Barclay* (2012) 246 CLR 258, 279 [26] (French CJ Gummow Hayne Crennan and Bell JJ). Heydon J agreed with the majority: at 293–4. Kiefel J likewise concurred: at 321.

13 *Ibid* 292 [80].

14 *Ibid* 306–7 (Kiefel J).

15 *Ibid*.

16 *Ibid* 280 (French CJ, Gummow, Hayne, Crennan and Bell JJ).

17 *Ibid* 282 [37] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

18 *Ibid* 281–2 [34].

As a result, it was wrong for the Court of Appeal to base its determination that a claim for pure economic loss was viable on the existence of a claim for loss of services.<sup>19</sup> The loss of services claim could not be soundly ‘absorbed’ into the law of negligence, because the result ‘would be the destruction of a distinct cause of action, an activity best left to legislatures’.<sup>20</sup>

Kiefel J agreed that because the action was of long standing, was well-settled and had been applied by the courts over many years, the court should not now refuse to recognise it.<sup>21</sup> Her Honour differed from the joint reasons in rejecting the suggestion that the loss of services action was based on a wrong:

The action *per quod servitium amisit* was not based upon a wrong having been committed. It was the consequences of the employee’s injury for the employer, the loss of services, for which an action in trespass lay. For the purposes of the action it did not matter how the injury was caused, whether by assault, battery, negligence or otherwise.<sup>22</sup>

The Court was also required to consider other issues, but since the main two issues are considered to be the loss of services claim and the death of employee claim, these will be the focus of this case note, and the other issues are not elaborated upon further.<sup>23</sup>

### III ACTION FOR LOSS OF SERVICES

As with many rules of ancient lineage, it is important to consider the historical roots of the doctrine allowing an action for loss of service, *per quod servitium amisit*. Its development must be seen in the light of its history, rationale and purpose. That context gives us a deeper understanding of the doctrine, and allows us to properly consider whether the existing principles should be retained as is, or whether their modification, reconceptualisation or abandonment would be sensible.

There is little doubt that at the time of its instigation, the doctrine applied to the situation of a household. Other loss of service claims at that time arose in the context of a husband and wife situation, or involved the loss of services that a child might provide to a household. As Lord Parker recognised: ‘all these writs arose out of status at a time when the servant or apprentice, as well as the wife and child, was a member of the family, and the relation between him and the head of the family had not yet come to be looked upon as resting upon contract’.<sup>24</sup>

19 Ibid 282 [37] (French CJ, Gummow, Hayne, Crennan and Bell JJ). Kiefel J agreed that any suggested analogy between claims for loss of services and negligence was false: at 311.

20 Ibid 282 [37] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also Heydon J at 298 [101].

21 Ibid 314.

22 Ibid 307 [132] (citations omitted).

23 Other issues in the case included whether P owed a duty of care to N with respect to pure economic loss, and how to assess the damages payable in the case.

24 *SS Amerika* [1917] AC 38, 45.

The master was considered to have a proprietary or quasi-proprietary interest in their servant.<sup>25</sup> In the absence of a law of contract, and in the absence of a law of negligence, it followed that the claim was based on trespass. There are some parallels here with the development of the law of vicarious liability, which at its inception spoke of a time when the ‘workers’ were living in the household of the ‘employer’ as either ‘serfs’ or free individuals.<sup>26</sup> The challenge for the law, in such cases, has been to adapt principles conceived in a very different era to modern conditions. Obviously, it is now unacceptable to consider one individual to be the property of another, and slavery is prohibited.<sup>27</sup> Enterprise has now also grown well beyond the boundaries of a household in the vast majority of circumstances.

In the case of the loss of services action, it survived by adapting. It moved away from its trespass/proprietary roots, and towards an acceptable basis in contract. Its origins were not altogether forgotten, however, and this explains the (unresolved) confusion in the courts regarding whether the doctrine applies only to the loss of services of ‘menial’ servants (who might be connected more closely with the ‘household’), or whether it applied to all categories of employee, regardless of rank,<sup>28</sup> as well as its application to servants of the Crown, including members of the armed forces,<sup>29</sup> or public/civil servants.<sup>30</sup> The High Court did not appear willing in *Barclay* to remove the ‘quasi-proprietary’ description of the claim,<sup>31</sup> an unwillingness which has been criticised elsewhere.<sup>32</sup>

Some judges believed that it was not possible, or desirable, to attempt to reconceptualise the action from one based on trespass, to one based on breach of contract. Many argued that the action should be abandoned altogether. The action has been criticised on the basis it is ‘intrinsically illogical and unreasonable’,<sup>33</sup>

25 *Commonwealth v Quince* (1944) 68 CLR 227, 237 (Latham CJ) (‘*Quince*’); *A-G (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237, 256 (McTiernan J), 272 (Webb J), 287 (Fullagar J), 295 (Kitto J) (‘*Perpetual Trustee*’); *A-G (NSW) v Perpetual Trustee Co Ltd* (1955) 92 CLR 113, 123 (Viscount Simonds); *Commissioner of Railways (NSW) v Scott* (1959) 102 CLR 392, 309 (Dixon CJ), 406 (Fullagar J), 416 (Kitto J), 422 (Taylor J), 432 (Menziez J), 450 (Windeyer J) (‘*Scott*’).

26 John H Wigmore, ‘Responsibility for Tortious Acts: Its History’ (1894) 7 *Harvard Law Review* 315, 331–2; O W Holmes Jr, ‘Agency’ (1891) 4 *Harvard Law Review* 345, 351–2, 357.

27 In *Perpetual Trustee* (1952) 85 CLR 237, 287, Fullagar J stated that the claim for loss of services would find ... its complete and absolute theoretical justification in a society in which slavery was a recognized institution ... And it seems to be agreed that, in English law, its theoretical justification is to be found in the idea that a master had ... a proprietary right in the services of his servant or a quasi-proprietary right in the servant itself.

28 *A-G (NSW) v Perpetual Trustee Co Ltd* (1955) 92 CLR 113; *Scott* (1959) 102 CLR 392.

29 *Quince* (1944) 68 CLR 227.

30 *Scott* (1959) 102 CLR 392.

31 (2012) 246 CLR 258, 281 [33] (French CJ, Gummow, Hayne, Crennan and Bell JJ), quoting *Perpetual Trustee* (1952) 85 CLR 237, 295 (Kitto J), who in turn referred to the quasi-proprietary nature of the claim.

32 Allan Beever, ‘*Barclay v Penberthy* and the Collapse of the High Court’s Tort Jurisprudence’ (2012) 31 *University of Queensland Law Journal* 307, 313.

33 *Perpetual Trustee* (1952) 85 CLR 237, 288 (Fullagar J).

‘anomalous’,<sup>34</sup> ‘artificial’,<sup>35</sup> and anachronistic.<sup>36</sup> The identity of the judges calling for abandonment of the claim is important; they include some of the most highly regarded Justices — Dixon CJ and Fullagar J. Their remarks are of course entitled to significant weight — judges of this calibre do not make explicit calls for law reform lightly.

The author agrees with the view expressed by all members of the High Court in *Barclay* that it is not correct to analogise the claim for loss of services to a claim in negligence, since the claim has never depended on proof that the person being sued owed a duty of care to the employer. However, the decision in *Barclay* does raise some difficult issues in relation to the action for loss of services. The first is whether it requires a wrong to be done. The second is whether it requires a wrong to be done to the employee, or the employer. This raises a third question, whether the action, if it should continue, is best reconceptualised in another way. It is to these issues that the paper now turns.

### **A Whether the Defendant Must Have Committed a ‘Wrong’**

The question of whether a ‘wrong’ must be shown to have been committed, in order that the employer should have a claim against the wrongdoer, divided the High Court in *Barclay*. The joint reasons included a statement that ‘[t]he injury to the servant must be wrongful’.<sup>37</sup> In contrast, Kiefel J was equally adamant that the opposite was the correct position, stating that ‘[t]he action *per quod servitium amisit* was not based on a wrong having been committed’.<sup>38</sup>

This difference of opinion did not matter in *Barclay*, because there was a finding of wrongdoing against both Barclay and Penberthy. Yet cases can readily be conjured where the actions of the defendant *did* cause the employee (and, as a result, the employer) injury, yet were not ‘wrongful’ in the sense they were not intentional, or were not such as to amount to negligence. Such cases would require us to settle the question of the extent to which a wrong is necessary in order for the action for loss of services to run. Which of the positions reached on this point in *Barclay* is correct, according to past precedent, and according to principle?

There is historical support for both of the positions taken on this issue in *Barclay*. In support of the view taken by the joint reasons — that the injury to the servant must be wrongful — there are numerous references to the words ‘wrong’ and ‘wrongdoer’ in describing the nature of the action for loss of services. Within these references there is disagreement regarding whether the wrong must be a

34 *SS Amerika* [1917] AC 38, 60, quoted in *A-G (NSW) v Perpetual Trustee Co Ltd* (1955) 92 CLR 113, 124 (Viscount Simonds); *Quince* (1944) 68 CLR 227, 246 (Starke J); *Scott* (1959) 102 CLR 392, 406 (Fullagar J).

35 *Quince* (1944) 68 CLR 227, 250 (McTiernan J), quoting *Fisher v Oldham Corporation* (1930) 2 KB 364, 375.

36 *Scott* (1959) 102 CLR 392. Dixon CJ felt it ‘belongs to a state of society that has passed and possesses no relevance to our times’: at 399. Fullagar J considered the rule ‘so inappropriate to present-day conditions that the best course would be to reject it altogether’: at 406.

37 *Barclay* (2012) 246 CLR 258, 281 [34] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

38 *Ibid* 307 [132].

negligent act, or whether it can be a wrong of another kind.<sup>39</sup> Examples are found in *Quince*,<sup>40</sup> *A-G (NSW) v Perpetual Trustee Co Ltd* (in both the High Court<sup>41</sup> and Privy Council<sup>42</sup>), and *Scott*.<sup>43</sup> Each of these cases concerned accidents involving motor vehicles or other modes of transport in circumstances where there was clearly negligence on the part of the defendant.

However, there is also historical support in the case law for the assertion of Kiefel J in *Barclay* that the action for loss of services was not based on a wrong.<sup>44</sup> This sometimes appears in assertions that the action of the master in such cases is based, at least now, *exclusively* on the loss of services they experience: 'It is the invasion of the legal right of the master to the services of his servant, that gives him the right of action for beating his servant; and it is the invasion of the same legal right, *and no other*, which gives the father the right of action against the seducer of his daughter.'<sup>45</sup>

- 39 Fullagar J uses the word 'negligence' to describe the kind of conduct by a third party that would allow the employer of the employee affected by the conduct to sue for loss of services: *Perpetual Trustee* (1952) 85 CLR 237, 276. The joint reasons in *Barclay* (2012) 246 CLR 258 took a different position, allowing the 'wrong' committed by the wrongdoer to be intentional or negligent.
- 40 (1944) 68 CLR 227. The judgment refers to 'wrong' and 'wrongdoer' in describing the action for loss of services: at 240. See also references to 'intentionally or by neglect of some duty existing independently of contract': at 244; 'the wrong which is the subject of the action approximates to a wrong to property': at 250; 'action for loss of services by the *tortious* act of a third party': at 259 (emphasis added).
- 41 (1952) 85 CLR 237, 259 (McTiernan J), quoting *A-G v Valle-Jones* (1935) 2 KB 209, 213: 'action for loss of services of a servant by the *tortious* act of a third party' (emphasis added). See also references to the action for loss of services: 'one aspect of that branch of the law which gave a master a right to action where he was deprived of the services of his servant by that servant being knowingly enticed away, or harboured, or where that servant was seduced or injured by the *wrongful act or omission* of the defendant': at 270 (Williams J) (emphasis added); where the worker 'sustains injury, through the *negligence* of a third party': at 276 (Fullagar J) (emphasis added); '*wrongful* invasion of a quasi-proprietary right ... *wrongful* injury': at 294–5 (emphasis added) (Kitto J).
- 42 (1955) 92 CLR 113, 122 (Viscount Simonds) (emphasis added): 'a master could maintain an action against a *wrongdoer*'.
- 43 (1959) 102 CLR 392, 398 (Dixon CJ), quoting Lord Simonds (ed), *Halsbury's Laws of England* (Butterworth & Co, 3<sup>rd</sup> ed, 1952) vol 25, 558: 'A master may recover damages in an action ... for loss of services attributable to personal injuries occasioned by the wrongful act of a third party.' Fullagar J also made reference to the judgment of Rich J in *Quince* (1944) 68 CLR 227 which refers to 'wrongdoer': at 407. Kitto J noted the 'action is in the *services* which [the master] would have received but for the defendant's wrongdoing': at 417 (emphasis in original). Taylor J identified the issue as 'whether action for damages will lie at the suit of an employer when he has been deprived of the services of his employee by some tortious act on the part of a third party': at 420. See also Menzies J who observed that 'a master has a remedy when, by the wrongful act of another, a servant has been taken away or injured': at 430.
- 44 (2012) 246 CLR 258, 307: 'The action *per quod servitium amisit* was not based upon a wrong having been committed.' Her Honour's choice of words 'was not' presumably also means 'is not', given that Kiefel J did not argue that the position had changed from earlier times.
- 45 *Grinnell v Wells* (1844) 135 ER 419, 423 (Tindal CJ) (emphasis added). Earlier in that passage, Tindal CJ claimed that '[t]he foundation of the action by a father to recover damages against the wrongdoer for the seduction of his daughter has been uniformly placed, from the earliest times hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service to the daughter': at 423, citing *Russell v Corn* (1794) 87 ER 884; *Gray v Jefferies* (1653) 78 ER 316. These passages are cited with evident approval by McTiernan J in *Quince* (1944) 68 CLR 227, 249. In that case, Williams J agreed that the relevant 'damage, which is the gist of the action, is the loss by the master of services': at 252. This statement is more equivocal regarding whether it is necessary to show that a 'wrong' occurred. Clearly, damage is the gist of the action in the tort of negligence, however that tort clearly requires that a wrong (breach of duty of care) has been committed. Clearly then, a statement that 'damage is the gist of the action' does not necessarily imply that a 'wrong' need not have occurred in order that the claim can be successfully brought.

In *Perpetual Trustee*, Dixon J quotes Dicey on civil procedure to the following effect: '[I]t does not matter as regards the master's right to sue, how the injury is caused to the person of his servant, whether by an assault, by battery, by negligence or otherwise. The *loss of service* is, on the other hand, essential'.<sup>46</sup>

Having acknowledged support for both positions taken in *Barclay* on this point, the author expresses preference for the view in the joint reasons. It should be necessary that a 'wrong' occur, in order that the action for loss of services exist. As indicated, initially the claim was based on trespass to property, which was obviously a wrong. There have been no successful claims for loss of services where the defendant has not committed a wrong. Liability in the absence of wrongdoing raises the spectre of strict liability, a spectre that would present an unwelcome regression to the past, at least in Australia.<sup>47</sup> Precedent and principle favour the view of the joint reasons on this issue. The nature of the wrong that is, or should be, required is considered below.

### **B Whether the 'Wrong' Must Have Been Done to the Employee or the Employer (or Both)**

If it is accepted that the action depends on a 'wrong' having been committed, the next question is to whom the wrong must have been done. Is it based on a wrong to the employee? Is it based on a wrong to the employer? Or is it an amalgam of the two?

Again, different answers to this question are evident in *Barclay*. The joint reasons seem to suggest that the action is based on a wrong done *to the employee*: 'What is presently important is that the injury is "wrongful" because it is a wrong done to the *servant* not because there was any breach of a duty of care owed to the *master*'.<sup>48</sup>

On the other hand, Kiefel J took a very different view. As indicated, she did not think that the action required a wrong to have been committed. Her view of the action was based on the implications of the events for the employer: 'The action *per quod servitium amisit* was not based upon a wrong having been committed. *It was the consequences of the employee's injury for the employer, the loss of service, for which an action in trespass lay*'.<sup>49</sup>

46 (1952) 85 CLR 237, 246, quoting A V Dicey, *A Treatise on the Rule for the Selection of the Parties to an Action* (William Maxwell & Son, 1870) 326 (emphasis in original). This passage is concededly ambiguous. It could mean at least two things: (a) that no wrong is necessary, or (b) that a wrong is necessary, but it does not matter what kind of wrong it is. The author leans to the first interpretation — if Dicey had intended to say that a wrong was necessary, but it did not matter what type of wrong, it would have been easy to say so. Kiefel J cited this part of Dixon CJ's judgment for her Honour's statement in *Barclay* (2012) 246 CLR 258, 307 that in the action for loss of services 'it did not matter how the injury was caused, whether by assault, battery, negligence or otherwise'.

47 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 556 ('Burnie').

48 *Barclay* (2012) 246 CLR 258, 281–2 [34] (emphasis in original).

49 *Ibid* 307 [132] (emphasis added).

It is submitted that the view of Kiefel J is correct. It has significant historical support. Recalling the trespass-based origins of the action, it was the interference with the plaintiff's property right that was the gist of the action, not the injury to the employee. For instance, Tindal CJ in *Grinnell v Wells*, speaking about the father's right to claim on the tort of seduction, but in terms equally applicable to the action for loss of an employee's services given their common 'household' connections, stated:

The foundation of the action by a father to recover damages against the wrongdoer for the seduction of his daughter, has been uniformly placed, from the earliest times, hitherto, *not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter*, in which service he is supposed to have a legal right or interest ... *It is the invasion of the legal right of the master to the services of his servant that gives him the right of action for beating his servant*, and it is the invasion of the same legal right, and no other, which gives the father the right of action against the seducer of his daughter.<sup>50</sup>

Accepting these comments, Lord Sumner in *SS Amerika* confirmed that the employer's right to sue for loss of services depended on 'the right to the service', and where service was not possible, the action would not lie.<sup>51</sup> Clearly, this is contrary to the view of the joint reasons in *Barclay* where the employer's action was based on the employee's injury, rather than the employer's right to service.

The view of Kiefel J is consistent with earlier High Court authority on the action for loss of services. In cases such as *Quince*<sup>52</sup> and *Perpetual Trustee*,<sup>53</sup> there is an acknowledgment that the claim is based on the loss of a right belonging to the plaintiff.

The finding of the joint reasons in *Barclay* that a wrong to the employee is a precondition to a right of action by the employer also seems anomalous in the law of obligations. In this area of law, generally it is the person or organisation that has been wronged that has the action against the wrongdoer.<sup>54</sup>

50 *Grinnell v Wells* (1844) 135 ER 419, 423 (emphasis added).

51 *SS America* [1917] AC 38, 55.

52 (1944) 68 CLR 227. See Latham CJ who stated 'the action lies when one person has the right to the services of another': at 238. Starke J analogised to the tort of inducing breach of contract: at 246. McTiernan J quoted *Grinnell v Wells* (1844) 135 ER 423 where Tindal CJ stated '[i]t is the invasion of the legal right of the master to the services of his servant that gives him the right of action': at 249. Williams J also stated that '[t]he damage, which is the gist of the action, is the loss by the master of these services, in which he is supposed to have a legal right': at 252.

53 (1952) 85 CLR 237. See Dixon J, quoting Dicey, above n 46, 326: 'The *loss of service* is, on the other hand, essential': at 246 (emphasis in original). See also at 257 (McTiernan J), 267 (Williams J), 285 (Fullager J), 295 (Kitto J). See also *Scott* (1959) 102 CLR 392, 450 (Windeyer J), quoting *Robert Mary's Case* (1612) 77 ER 893, 898–9.

54 Allan Beever is critical of the joint reasons on this point: Beever, above n 32, 310. He clearly prefers the view of Kiefel J on point: 'Thankfully, this allows Kiefel J, unlike the majority (sic) to say that in an action *per quod* the defendant wrongs the *plaintiff*': at 313 (emphasis added).

Accordingly, the better view is that the loss of services action requires a wrong to be done to the employer. The nature of that wrong will now be considered in more detail.

### **C Whether the Action, If It Should Continue to Exist, Is Best Reconceptualised**

Firstly, it has been acknowledged above that some judges of very high calibre have in the past called for the action to be abolished as an historical anachronism. One can see the evident force in such a suggestion, given the historical links with ideas of one person being owned by another. On the other hand, if an employer suffers a loss because of the wrongdoing of a third party, there is continuing sense in the law recognising this as a wrong, and providing appropriate compensation. This leads to the conclusion that this type of action should remain, but that it is worth considering whether the action can be reconceptualised. This is to allow it to ‘fit’ better with other members of the tort ‘family’, rather than sitting awkwardly as an isolated cause of action. Another advantage of this approach is that it would take the doctrine well away from that part of its historical roots which is clearly unacceptable today.

One possible solution to this conceptual difficulty is to reconceptualise the action for loss of services as an action for (a) interference with contractual relations, or (b) an action for ‘inducing breach of contract’. Whilst at one time it was thought that these actions were conceptually very similar, the House of Lords in 2008 stated that their conceptual differences should be borne in mind, particularly the fact that the former was a head of primary liability, while the latter was a form of accessorial liability, coextensive with the liability of the party who breached the contract.<sup>55</sup> Whilst this appears to be a very sensible move, it is noteworthy that the High Court (prior to the *OBG Ltd v Allan* decision) declined to decide ‘whether a tort of interference with trade or business interests ... should be recognised in Australia’.<sup>56</sup>

Of the two, (a) — ‘interference with contractual relations’ — is the one that is potentially relevant here. Regarding (b) — it cannot be sensibly argued that an employee who is injured, at least injured through no fault of their own, has breached their contract with the employer.<sup>57</sup> As a result, this case note will not continue to refer to the ‘inducing breach of contract’ line of cases as a possible analogy with the loss of services action.

55 *OBG Ltd v Allan* [2008] 1 AC 1, 40 [86] (Lord Hoffmann), 59 [172] (Lord Nicholls). This decision was applied by all members of the Full Federal Court in *LED Technologies Pty Ltd v Roadvision Pty Ltd* (2012) 199 FCR 204.

56 *Sanders v Snell* (1998) 196 CLR 329, 341 [30] (Gleeson CJ Gaudron Kirby and Hayne JJ). Lower Australian courts have accepted the existence of the action: Francesco Bonollo, ‘Seeds, Weeds and Unlawful Means: Negligent Infliction of Economic Loss and Interference with Trade and Business’ (2005) 31 *Monash University Law Review* 322, 356–61.

57 This head is obviously suited to a situation where an employee has voluntarily breached their contract in association with another: see the *Lumley v Gye* (1853) 118 ER 749 line of cases.

None of the judges in *Barclay* actually suggested assimilation of the loss of services action and the interference with contractual relations line of cases. The nearest suggestion was the observation of Kiefel J that there was a ‘closer analogy’ between the action for loss of services and an action for interference with contractual relations, than between the action for loss of services and a claim in negligence.<sup>58</sup> There are some examples in the previous case law in this area of suggestions by judges that the action for loss of services might be reconceptualised, or subsumed, into the tort of interference with contractual relations. Starke J in *Quince* quoted Winfield to the effect that the action for loss of services was ‘merely a species of the more general tort of interfering with the relations of master and servant’.<sup>59</sup> The Court in *Grinnell v Wells* referred to the employer having a right to sue a person who had beaten the employer’s servant on the basis that ‘[i]t is the invasion of the legal right of the master to the services of his servant that gives him the right of action’.<sup>60</sup> Several judges note the proprietary nature of the employer’s interest in the services,<sup>61</sup> and Kitto J said the action was based on the ‘services which he would have received but for the defendant’s wrongdoing’.<sup>62</sup> As the Privy Council noted, ‘where the relation of master and servant lay in contract, it was an easy development to found an action [for loss of services] ... on the fact that the defendant had induced the servant to break his contract and enticed him from his master’s services’.<sup>63</sup>

One difficulty with reconceptualising the claim as an example of the tort of interference with contractual relations is the requirement, in order that this tort be established, that the defendant acted *intentionally* to break the contract between the plaintiff and another.<sup>64</sup> This means that the doctrine of interference with contractual relations cannot, at least by itself, effectively subsume the action for loss of services. In many of the cases in which that action operates, the interference with contractual relations is not shown to be intentional.

In light of this, one way for the action for loss of services to be more effectively subsumed within other legal doctrines is to provide that, in such cases, the

58 *Barclay* (2012) 246 CLR 258, 310 [142].

59 (1944) 68 CLR 227, 246, quoting P H Winfield, *A Textbook of the Law of Tort* (Sweet and Maxwell, 2<sup>nd</sup> ed, 1943) 257.

60 (1844) 135 ER 419, 423.

61 *Scott* (1959) 102 CLR 392, 450 (Windeyer J); *Perpetual Trustee* (1952) 85 CLR 237, 256 (McTiernan J), 287 (Fullagar J); *Quince* (1944) 68 CLR 227, 237 (Latham CJ), 252 (Williams J).

62 *Scott* (1959) 102 CLR 392, 417 (emphasis altered).

63 *A-G (NSW) v Perpetual Trustee Co Ltd* (1955) 92 CLR 113, 123 (Viscount Simonds).

64 See, eg, *D C Thomson and Co Ltd v Deakin* [1952] 1 Ch 646, 696 (Jenkins LJ); *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106, 138 (Lord Denning MR); *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd* (1995) 58 FCR 26, 43 (Lindgren J); *OBG Ltd v Allan* [2008] 1 AC 1, 29–31 (Lord Hoffmann), 53, 62 (Lord Nicholls), 86 (Baroness Hale), 91 (Lord Brown); *Zhu v Treasurer of NSW* (2004) 218 CLR 530, 576 (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ). In *LED Technologies Pty Ltd v Roadvision Pty Ltd* (2012) 199 FCR 204 the Full Federal Court applied *OBG Ltd v Allan* [2008] 1 AC 1, although Besanko J (with whom Mansfield and Flick JJ agreed) suggested that ‘reckless indifference’ may be sufficient: at 215–16. See also Chris Bailey, ‘Facilitation or Manipulation: What Conduct Gives Rise to Liability for Inducing or Procuring a Breach of Contract?’ (2014) 22 *Torts Law Review* 22; Peter Edmundson, ‘Sidestepping Limited Liability in Corporate Groups Using the Tort of Interference with Contract’ (2006) 30 *Melbourne University Law Review* 62, 71–2.

employer would have an action (a) for interference with contractual relations — in cases where the defendant’s actions were deliberate; *or* (b) for negligence — in cases where the defendant’s actions were non-deliberate, but negligent.<sup>65</sup> This reconceptualisation does not seem to involve a major change to the law. Past cases involving the action for loss of services can be rationalised on the basis of either a breach of a duty of care owed by the wrongdoer to the plaintiff employer, or (rarely) deliberate action by the wrongdoer, resulting in (contemplated) interference with the contractual relations between employer and employee.

In conclusion to Part III, and with some reservation, the action for loss of services should continue. The action is based, or should be based, on a ‘wrong’, and statements by Kiefel J in *Barclay* to the contrary ought not be accepted. It has been concluded that the wrong is one done to the employer, not the injured employee, in this respect siding with the comments of Kiefel J, and opposed to the joint reasons. In considering what the required ‘wrong’ is, it has been suggested that rather than the doctrine remaining something of an ‘outlier’, it should be absorbed into both of the existing mainstream torts of interference with contractual relations, and negligence. This would help to remove it from its dubious historical roots, while recognising the wrongfulness of what has occurred.

This case note will now turn to the second major issue dealt with in *Barclay*, namely the status of the so-called rule in *Baker v Bolton*.

#### IV RULE IN *BAKER v BOLTON*

In simple terms, the rule in *Baker v Bolton* is to the effect that the death of an individual cannot be complained of as an injury in tort law. This rule has been trenchantly criticised on a range of grounds by academics and judges.<sup>66</sup> Of course, this does not automatically mean that the decision should in fact be overturned. This might have justified at least careful consideration by the High Court of the desirability of the rule being overturned.

As indicated, the High Court in *Barclay* refused to overturn the rule in *Baker v Bolton*. This Part of the paper critically considers the High Court’s reasoning in this regard. It reviews the rule in *Baker v Bolton* itself, and attempts to place the

65 The possibility that negligence could be applied to intentional acts is considered at length in Peter Handford, ‘Intentional Negligence: A Contradiction in Terms?’ (2010) 32 *Sydney Law Review* 29.

66 Holdsworth dismissed it as based on a confusion and a misapplication of two different legal rules, favouring its abolition: W S Holdsworth, ‘The Origins of the Rule in *Baker v Bolton*’ (1916) 32 *Law Quarterly Review* 431, 436. See also *SS Amerika* [1917] AC 38, 43 (Lord Parker); *Rose v Ford* [1937] AC 826, 846 (Lord Wright); Carolyn Sappideen and Prue Vines (eds), *Fleming’s The Law of Torts* (Thomson Reuters, 10<sup>th</sup> ed, 2011) 747–8; *Fitch v Hyde-Cates* (1982) 150 CLR 482, 487 (Mason J); Harold Luntz et al, *Torts: Cases and Commentary* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2013) 552; Beever, above n 32, 311; Dan Flanagan, ‘*Barclay v Penberthy*: Polishing the Antiques of Australian Tort Law’ (2013) 34 *Sydney Law Review* 654, 669; Jeff Watters, ‘Better to Kill Than Maim: The Current State of Medical Malpractice Wrongful Death Cases in Texas’ (2008) 60 *Baylor Law Review* 749, 751; T A Smedley, ‘Wrongful Death — Bases of the Common Law Rules’ (1960) 13 *Vanderbilt Law Review* 605, 609; Andrew J McClurg, ‘Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages’ (2005) 85 *Boston University Law Review* 1, 19.

decision in its historical context by exploring doctrines not specifically discussed in the judgment. The historical relation between tort and crime is also useful in understanding the decision. The Part concludes with an application of the High Court's own jurisprudence regarding when a past precedent ought to be overturned.

### A High Court's Reasoning

With respect, the High Court did not address the issue of whether *Baker* should remain good law in much depth, with the joint reasons devoting less than two pages to this issue.<sup>67</sup> This is disappointing. As will be shown below, there was much to observe about the history of the rule. That being said, it must first be conceded that the High Court correctly stated that the House of Lords in 1917 in *SS Amerika* refused to overturn *Baker*.<sup>68</sup> However, a reading of the *SS Amerika* decision hardly leaves the reader with confidence that the decision in *Baker* has continuing applicability today, for reasons which are elaborated upon below.

The High Court also pointed out that the House of Lords decision in *SS Amerika* was accepted and applied as part of the common law of Australia in the 1942 High Court decision of *Woolworths*.<sup>69</sup> Whilst this is true, little should be made of this acceptance, given that the High Court considered itself to be bound by decisions of the House of Lords until 1963,<sup>70</sup> well after *Woolworths*. In this light, the fact the High Court accepted and applied an earlier House of Lords decision on point is hardly remarkable, and does not add weight to the earlier decision.

The High Court further pointed out that the *Woolworths* decision was applied by the New South Wales Court of Appeal in *Swan v Williams (Demolition) Pty Ltd*.<sup>71</sup> Again, application by a state appellate court of a decision of the High Court is hardly surprising and does not add any weight to the High Court decision. Further, in recent times, when state appellate courts have sought to be 'adventurous' in their development of the law in a manner different from judges at more senior levels, they have been sharply rebuked by members of the High Court.<sup>72</sup> Admittedly in another context, in the 2007 *Farah* decision, a unanimous High Court criticised the New South Wales Court of Appeal for abandoning long-established principles and acting contrary to High Court dicta.<sup>73</sup> There is no disagreement here with what the High Court said in that case, but it is questionable to subsequently give

67 *Barclay* (2012) 246 CLR 258, 278–9. Kiefel J expressed general agreement on this point: at 321.

68 *Ibid* 278, citing *SS Amerika* [1917] AC 38, 50.

69 *Barclay* (2012) 246 CLR 258, 279, citing *Woolworths* (1942) 66 CLR 603, a case which applied *SS Amerika*.

70 *Parker v The Queen* (1963) 111 CLR 610.

71 *Barclay* (2012) 246 CLR 258, 268–9, citing *Swan v Williams (Demolition) Pty Ltd* (1987) 9 NSWLR 172.

72 *Farah Constructions Pty Ltd v Say Dee Pty Ltd* (2007) 230 CLR 89, 150–1 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) (*'Farah'*). Of these judges, Gummow and Crennan JJ participated in the joint reasons in *Barclay*, using the failure of the New South Wales Court of Appeal in *Swan v Williams (Demolition) Pty Ltd* (1987) 9 NSWLR 172 to overturn the rule in *Baker v Bolton*.

73 *Farah* (2007) 230 CLR 89, 150–1 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

weight, in *Barclay*, to the fact that the New South Wales Court of Appeal had refused to disturb the status quo in a 1987 case.<sup>74</sup> Presumably, if the sentiment in *Farah* were to be applied, the New South Wales Court would have been (politely) ‘rapped over the knuckles’ if they had.

So, let us assume it is right, as the High Court said in *Farah*, that the development of Australian law is at least primarily a function for the High Court, and that lower courts should not undertake this task. Logic would surely then dictate that the fact that a lower court in fact applied a High Court decision (as the High Court demands), and indirectly a House of Lords decision, cannot be used to justify the continuing correctness of that High Court decision, or a refusal to reconsider past decisions. Either the lower court has a right to abandon High Court precedent, or it does not. Surely, the High Court cannot have it both ways. With respect, it is specious reasoning (at best) to support a past High Court precedent on the basis that it was followed by a lower court.

Another reason given in the joint reasons for not disturbing the rule in *Baker v Bolton* is that ‘the pattern of Australian legislation is a pointer towards the continued existence of the rule’.<sup>75</sup> This is presumably a reference to the fact that most of the practical application of the rule has been negated by the passage in many common law jurisdictions of *Lord Campbell’s Act* equivalents with respect to relatives of the deceased.

It is interesting reasoning to suggest that because the legislature saw fit to modify the majority of the practical application of a particular common law rule, this is somehow an indicator that the common law rule should continue.<sup>76</sup> Of course, legislators decide on law reform in particular areas for many reasons. There was an obvious priority to alter the rule in *Baker v Bolton* to the extent that it denied dependents of a deceased access to compensation. The fact that legislatures responded does not mean that the rule should continue to operate in those areas which fall outside the scope of the new legislation. The state of the common law is, in the end, a matter for the courts. Parliament’s views on the common law are only relevant to the extent that it sees fit to modify the common law, not that

74 Of those judges participating in the joint judgment in *Barclay*, both Gummow and Crennan JJ were part of the unanimous judgment of *Farah*, where an attempt by an intermediate court to overturn established legal principle was sharply criticised.

75 *Barclay* (2012) 246 CLR 258, 279 [26].

76 See, eg, *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 594 [211], where Kirby J stated that ‘[w]here legislatures have failed to act, despite having weaknesses and injustices in the common law drawn to their notice, it cannot be expected that the courts will indefinitely ignore such weaknesses and injustices’. See also Beaver, above n 32, where it is said that ‘it does not follow from the fact that legislation assumes that the common law holds *x* that the common law should hold *x*’: at 316 (emphasis in original).

it sees fit not to modify the common law. Tacit parliamentary approval of the common law, even if it could be shown, is surely not relevant.<sup>77</sup>

The other reason given for declining to seriously consider overturning *Baker* is that that such a step is a matter for Parliament, rather than the courts.<sup>78</sup> Judicial reticence to overturn longstanding principles of tort law, on the basis that the obligation of law reform is a matter for the legislature, is certainly not unprecedented in Australia.<sup>79</sup> However, it is very difficult to conceptualise how a rule created by courts, even one that has been accepted for a long period of time, cannot subsequently be modified, or even abandoned, by courts. Surely if a court has the power to create such a rule, it has the power to later modify it, or even abandon it altogether.<sup>80</sup> The comments of Smedley are apposite here:

One of the oft-sung glories of the English common law is the vitality of its many rules which evolved originally from ancient custom, usage, tradition and experience. This truly amazing vitality has the virtue of imbuing the law with stability, of providing legal sanction for established commercial practices, of protecting vested property interests, and of furnishing some measure of predictability of decisions. Unfortunately, it also serves to perpetuate the force of some rules far beyond the period of their usefulness and to maintain their influence after the reason for their existence has been long forgotten.<sup>81</sup>

There have also been occasions in Australian tort law history where major reforms to common law rules were made by the High Court. Examples include the abandonment of the strict liability *Rylands v Fletcher*<sup>82</sup> principle,<sup>83</sup> the reconceptualisation of categories of entrant as being relevant to the standard owed rather than the duty itself,<sup>84</sup> the abandonment of the non-feasance immunity for those responsible for highways,<sup>85</sup> and the reconceptualisation of the approach to

77 The High Court in *Brodie v Singleton Shire Council* (2001) 206 CLR 512 abolished the past distinction between misfeasance and non-feasance with respect to highway authority liability, despite legislation having been passed apparently based on the old common law principle: at 572 [133], 602 [233]. On the relationship between the common law and statute law in tort generally, see Barbara McDonald, 'Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia' (2005) 27 *Sydney Law Review* 443, 454–7. See also *R v Reynhoudt* (1962) 107 CLR 381, 388 (Dixon CJ).

78 *Barclay* (2012) 246 CLR 258, 279, 282 (French CJ, Gummow, Hayne, Crennan, and Bell JJ), 321 (Kiefel J), 292 (Heydon J).

79 Perhaps the most memorable example is *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617, 633–4 (Mason J, with whom Barwick CJ, Gibbs, Stephen and Aickin JJ agreed), 649–62 (Murphy J dissenting in relation to the House of Lords decision in *Searle v Wallbank* [1947] AC 341).

80 Analogy can be drawn to a judgment (albeit in a very different, constitutional law, context) where members of the High Court, in discussing the Commonwealth's race power, said that if Parliament had the power to pass a law, they would by logic also have the power to repeal it: *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 356 (Brennan CJ and McHugh J).

81 Smedley, above n 66, 605.

82 (1865) 159 ER 737.

83 *Burnie* (1994) 179 CLR 520.

84 *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

85 *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

medical negligence cases.<sup>86</sup> These were reforms of far greater magnitude than the possible abandonment of the rule in *Baker v Bolton*, a rule which originally had large scope, but which has been substantially reduced over the years by legislative reform, clearly reflecting strong dissatisfaction with the rule. While there is no doubt that different judges have different conceptions of the judicial role, the High Court's timidity in *Barclay* regarding the question of law reform in this area of tort law is, in this author's view, very disappointing.<sup>87</sup>

On that basis, it is proposed that the rule in *Baker v Bolton* should be considered afresh.

## B Substantive Review

The *Baker* case involved simple facts. The defendants were owners of a stage coach business. They were carrying the plaintiff and his wife on a trip to London. The coach struck trouble en route, and the plaintiff suffered serious bruising. His wife sustained severe injuries and died a month later. The plaintiff sued the defendant. Ellenborough LJ, who sat as a single judge with a jury, found the plaintiff had no claim in relation to the death of his wife. He uttered the notorious statement that 'in a civil Court, the death of a human being could not be complained of as an injury',<sup>88</sup> but cited no precedent to support this conclusion, and did not elaborate or seek to justify his claim. As indicated above, the decision has attracted trenchant criticism. From the point of view of logic, and looking at the matter through modern eyes, it is difficult to accept that the plaintiff could recover for damage or loss he suffered with respect to his wife's injuries, but not for (presumably) the much greater loss associated with her death.<sup>89</sup>

Inevitably, others sought to fill the void the case left in terms of rationale and reasoning for the strict rule. Various explanations for the decision have been provided by other commentators such as Handford, Holdsworth and Smedley:

- (a) It was based on application (or misapplication) of the doctrine of *actio personalis moritur cum persona* (a personal action dies with the person).<sup>90</sup> As Lord Parker pointed out in *SS Amerika*, that doctrine should not have been the basis of the decision, since that doctrine applies to the right of

86 *Rogers v Whitaker* (1992) 175 CLR 472.

87 Although disappointing, it is perhaps not surprising in light of the comment by Chief Justice Robert French that '[l]aw reform is to be pursued outside the courts': Chief Justice Robert French, 'Judges and Academics: Dialogue of the Hard of Hearing' (2013) 87 *Australian Law Journal* 96, 102. Chief Justice Robert French's comments are to be contrasted with the High Court's major reform to the principle of 'penalties' in relation to contracts in *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205 in the same year as the *Barclay* decision: Anthony Gray, 'Contractual Penalties in Australian Law After *Andrews*: An Opportunity Missed' (2013) 18 *Deakin Law Review* 1.

88 *Baker* (1808) 170 ER 1033, 1033.

89 Wex S Malone, 'The Genesis of Wrongful Death' (1965) 17 *Stanford Law Review* 1043, 1053; Flanagan, above n 66, 666–7.

90 Handford, 'Lord Campbell and the *Fatal Accidents Act*', above n 7, 428–49; Holdsworth, above n 66, 434.

action of the deceased.<sup>91</sup> An action for loss of services is the action of the employer, not the deceased. As a result, this possible rationale will not be further considered.

- (b) It reflected the reluctance of the common law to place a value on life.<sup>92</sup> This is hard to square with past practice where a wrongdoer did in fact pay money to the Crown, or to the victim or their family, such practice being particularly prevalent during times in which the criminal law as such was unknown.<sup>93</sup>
- (c) The decision reflects the interaction between civil law (tort) and criminal law, and in particular the ‘felony-merger rule’.<sup>94</sup> This explanation is the most promising, and worthy of extended consideration.

## V TORT AND CRIME: HISTORY

There is a longstanding tradition of what we know today as tort law ‘filling the vacuum’ left by the absence of criminal law. Braslow writes that the Twelve Tables in Roman times (around 451 BC) identified many activities as delicts (only) that today we would identify as being crimes (as well as torts), including theft, robbery and assault. These activities were not crimes punishable by the state.<sup>95</sup>

These practices continued in medieval times. English law dealt with the fact that one person (A) had killed another (B) by requiring the payment by A of ‘wer and wite’ to someone else, including the monarch, the lord of B, or in some cases, B’s family.<sup>96</sup> Carson notes that ‘[t]he *wergild* was the price or value of the man killed, and must be paid to his kinsmen’.<sup>97</sup> Writing of the Anglo-Saxon period, he concluded that the consequences of almost all offences were pecuniary only, including killing: ‘The slighter crimes could always be compounded for money; some of the graver ones also, not excluding killing, except where especially aggravated’.<sup>98</sup>

91 [1917] AC 38, 43.

92 Smedley, above n 66, 617.

93 Hampton L Carson, ‘Sketch of the Early Development of English Criminal Law as Displayed in Anglo-Saxon Law’ (1916) 6 *Journal of Criminal Law and Criminology* 648, 656.

94 Handford, ‘Lord Campbell and the *Fatal Accidents Act*’, above n 7, 428–30.

95 Norman T Braslow, ‘The Recognition and Enforcement of Common Law Punitive Damages in a Civil Law System: Some Reflections on the Japanese Experience’ (1999) 16 *Arizona Journal of International and Comparative Law* 285, 316–19. See also Michael Rustad and Thomas Koenig, ‘The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers’ (1993) 42 *American University Law Review* 1269, 1286.

96 *SS America* [1917] AC 38, 57 (Lord Sumner).

97 Carson, above n 93, 656 (emphasis in original); Malone, above n 89, 1055.

98 Carson, above n 93, 652.

Every person had their price or value.<sup>99</sup> Eventually, a rule developed that ‘a felony could not be compounded’, or in other words, it was not sufficient to counteract the commission of a felony by the payment of a wergild. The matter would then proceed to court. If the felon was convicted, he or she was likely to be sentenced to death. At that point, all of the felon’s property was forfeited to the Crown, making a civil claim largely pointless.<sup>100</sup> It is tempting to see this felony-merger rule as one greatly favouring the Crown over the individual,<sup>101</sup> specifically to obtain the property of the wrongdoer, sidelining the past claims of the ‘kinsmen’ of the victim of the wrong in the process.<sup>102</sup>

Eventually, a system of criminal law administered by the state was created.<sup>103</sup> According to one version of this system, events that led to the death of a person generally became exclusively matters of criminal law.<sup>104</sup> For example, in the 1607 decision of *Higgins v Butcher* it was held that a wrongful cause of death amounted to a felony, for which no civil claim could be brought.<sup>105</sup> It was said that the civil wrong ‘merged’ with the felony, was ‘drowned’ by the felony,<sup>106</sup> or was ‘swallowed up’ by the felony.<sup>107</sup> This doctrine was subsequently extended beyond the realms of wrongful death. In another example in 1863, a plaintiff sought to recover damages for rape and the court found that the act complained of would be a felony if shown. Willes J indicated his belief that the action would fail on the basis that no civil action would lie for a felony; the plaintiff then non-suited.<sup>108</sup> Ellenborough LJ may have been influenced by this idea that the civil wrong was ‘drowned’ in the felony, in making the sweeping statement he did in *Baker* that a death could not be complained of as a civil wrong.

99 Ibid 656. Carson uses the terms ‘wergild’ to refer to payment to the kinsmen of the victim, ‘bote’ to describe ‘payment of compensation to the injured party for the wrong sustained’, and ‘wite’ for the penalty to be paid to the monarch for the public wrong: at 656.

100 Malone, above n 89, 1056; Watters, above n 66, 751; John Fabian Witt, ‘From Loss of Services to Loss of Support: The Wrongful Death Statutes, The Origins of Modern Tort Law and the Making of the Nineteenth Century Family’ (2000) 25 *Law and Social Inquiry* 717, 731; Jacob Finkelstein, ‘The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty’ (1973) 46 *Temple Law Quarterly* 169, 185.

101 Matthew Dyson, ‘The Timing of Tortious and Criminal Sanctions for the Same Wrong’ (2012) 71 *Cambridge Law Journal* 86, 88, 106; Holdsworth, above n 66, 433.

102 Some support for this supposition appears in the writings of Plunknett. Speaking of forfeiture of property laws more generally at the time, Plunknett observes the English kings ‘constantly straining the law of forfeiture’ to expand their property holdings: Theodore F T Plunknett, *A Concise History of the Common Law* (Butterworths, 5<sup>th</sup> ed, 1956) 474. This was also at the time of the deodand, where a fiction was applied that the thing which caused the death of a person was the wrongdoer. This thing was liable to forfeiture to the Crown: Matthew Hale, *History of the Pleas of the Crown* (1736) 419–21.

103 Historians note the development of a system of criminal law on the European mainland by the early 16<sup>th</sup> century: Braslow, above n 95, 323.

104 There is some conjecture regarding whether the civil claim was permanently stayed, or only temporarily stayed until the conclusion of the criminal process. There is also conjecture regarding whether the rule applies where what was alleged was a wrong less serious than a felony, and the extent to which the rule was based on public policy: see *SS America* [1917] AC 38, 48–50 (Lord Parker).

105 (1607) 80 ER 61.

106 Ibid; *SS America* [1917] AC 38, 47 (Lord Parker).

107 William Blackstone, *Commentaries on the Laws of England* (1765–69) 4, 6.

108 *Wellock v Constantine* (1863) 159 ER 61.

However, other authorities maintained that the running of a criminal proceeding did not mean the civil claim was completely ‘drowned’. The word ‘submerged’ might be a more appropriate euphemism, intending to convey that the civil claim was only temporarily, not permanently, barred. Examples of cases where this sentiment appears include *Lutterell v Reynell* in 1670,<sup>109</sup> *Crosby v Leng* in 1810,<sup>110</sup> and *Wells v Abrahams* in 1872.<sup>111</sup> Interestingly, Ellenborough CJ participated in the decision in *Crosby v Leng*, confirming that the private action was available following completion of the public (criminal) proceeding.<sup>112</sup> These comments are of course particularly relevant in understanding what *Baker* actually decided, given Ellenborough LJ was the only judge in that case.

These developments were succinctly summarised by Watkin Williams J in *Midland Insurance Company v Smith*:

The history of the question shows that it has at different times and by different authorities been resolved in three distinct ways. First, it has been considered that the private wrong and injury has been entirely merged and drowned in the public wrong, and therefore no cause of action ever arose or could arise. Secondly, it was thought that, although there was no actual merger, it was a condition precedent to the accruing of the cause of action that the public right should have been vindicated by the prosecution of the felon. Thirdly, it has been said that the true principle of the common law is that there is neither a merger of the civil right nor is it a strict condition precedent to such right that there shall have been a prosecution of the felon, but that there is a duty imposed upon the injured person, not to resort to the prosecution of his private suit to the neglect and exclusion of the vindication of the public law.<sup>113</sup>

Summarising these developments, leading English legal historian Holdsworth concludes that ‘the mere fact that a felonious tort to the person results in death should not debar a person, who has suffered loss by the death, from suing in tort for such damages as he can prove he has sustained, provided that the felony has been prosecuted’.<sup>114</sup>

Many authors explain the apparently anomalous rule in *Baker v Bolton* as reflecting the (now abandoned) idea that a civil wrong was ‘drowned’ by a felony.<sup>115</sup> Unfortunately, although the felony-merger rule was abandoned, and the

109 (1670) 86 ER 887.

110 (1810) 104 ER 160.

111 (1872) LR 7 QB 554. See also *Smith v Selwyn* [1914] 3 KB 98.

112 (1810) 104 ER 160, 161–2.

113 (1881) 6 QBD 561, 568.

114 Holdsworth, above n 66, 434. He suggests some judges may have become confused by the rule that any personal action available to a person dies with the person, and is not passed to their personal representative, wrongly conflating this with the right of action of a third party who has suffered loss or injury due to the death of another: at 434.

115 *Ibid* 432–3; Malone, above n 89, 1055; Dyson, above n 101, 91; Handford, ‘Lord Campbell and the *Fatal Accidents Act*’, above n 7, 429.

forfeiture of all of a felon's property to the Crown was abandoned, the precedent, which was clearly based on such rules, has survived.

This leaves the precedent of *Baker* hanging precariously. Again, in the absence of reasoning by the single judge in that case, we must speculate to some extent as to its reasoning. To the extent that it is based on the idea that a personal action dies with the person, this is an insecure foundation, since that doctrine would apply to bar a claim by the personal representative of the deceased, but not that of another person who claims to have suffered due to the death. To the extent that it is based on a reluctance to put a price on death, there is evidence that the law historically did so, and it continues to do so in other contexts. To the extent that it is based on an idea that a civil wrong claim is drowned in the felony, that may have been considered to be the case in England at one time, but it is clearly no longer the position today.<sup>116</sup> Further, the objective of that rule — to favour the Crown at the expense of aggrieved families, at a time when conviction of an individual meant forfeiture of all of their property to the Crown — looks anachronistic to today's eyes. There is little evidence of acceptance of the felony-merger rule in Australian law, and it certainly is not a current feature of Australian law.<sup>117</sup>

Smedley wrote that 'by the time suspension had fully replaced merger and the practice of forfeiture of property had been finally abandoned, the rule of law arising out of the existence of merger and forfeiture was so firmly entrenched that the courts generally felt unable to disturb it'.<sup>118</sup>

## VI THE POLICY OF THE HIGH COURT ON LAW REFORM

Given that this paper is suggesting the High Court ought to have reformed the rule in *Baker v Bolton*, it is sensible to consider statements of members of the Court themselves intended to guide consideration of when past precedents ought to be overturned, or not followed. Revisiting these statements facilitates an evaluation of whether the case for law reform here meets the guidelines provided by the Court itself.

The High Court has provided several criteria by which calls for law reform ought generally be assessed:

The first was that the earlier decisions did not rest upon a principle carefully worked out in a significant succession of cases. The second was a difference between the reasons of the justices constituting the majority of the earlier decisions. The third was that the earlier decisions had achieved no useful result but on the contrary had led to considerable inconvenience.

116 Handford, 'Lord Campbell and the *Fatal Accidents Act*', above n 7, 430.

117 On the interaction between tort and criminal law claims generally, see Jane Stapleton, 'Civil Prosecutions — Part I: Double Jeopardy and Abuse of Process' (1999) 7 *Torts Law Journal* 244; Jane Stapleton 'Civil Prosecutions — Part 2: Civil Claims for Killing or Rape' (2000) 8 *Torts Law Journal* 15.

118 Smedley, above n 66, 613.

The fourth was that the earlier decisions had not been independently acted on in a manner which militated against reconsideration.<sup>119</sup>

These criteria were cited with apparent approval by Gummow, Hayne and Kiefel JJ in the recent decision of *Imbree v McNeilly*.<sup>120</sup> These judges added that the need for certainty and predictability did not always trump the need for desirable change, ‘especially ... if the change is necessary to maintain a better connection with more fundamental doctrines and principles’.<sup>121</sup> Two of these judges were part of the Court in *Barclay*.

Applying these criteria, in terms of the first — it has been pointed out that the decision in *Baker* has come to be seen as anomalous, based on a confusion of principles and an incorrect application of them to the facts;<sup>122</sup> in terms of the second — it was a single judge decision; regarding the third — the fact that most jurisdictions in the common law world saw fit to abrogate the effects of the rule in the vast majority of circumstances in which it might apply, suggests that the decision has created ‘considerable inconvenience’;<sup>123</sup> and regarding the fourth — until *Barclay*, there is only one High Court decision squarely based on the principle. The author considers the rule as anomalous, inconsistent with statutory rules permitting recovery for dependents who suffer through the death of an individual, at odds with recognition in modern law that a value can be put on life, at odds with the acceptance of both civil and criminal liability for the same act, and at odds with general tort principles favouring recovery for loss wrongly caused by another.

In conclusion, the High Court should have abandoned the rule in *Baker v Bolton* in its decision in *Barclay*, for several reasons. *Baker* rests on either an incorrect confusion of principle, or a principle since abandoned in English law; there is only one High Court decision that directly applied that principle as accepted by the House of Lords prior to *Barclay*, and that at a time when House of Lords decisions were binding on the High Court; and a legal principle developed by a court can surely be discarded by a court.

119 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ), citing *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, 46–8. The Court also emphasised in *John* that there were no definite rules in this regard. Elsewhere the High Court has cited inappropriateness of old tort liability rules for modern life, difficulties in application of the old rules, and arbitrariness of outcomes as pointers to a need for law reform: *Burnie* (1994) 179 CLR 520, 534, 544, 548 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ). See also *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 535–7 (Gleeson CJ), 549–51 (Gaudron, McHugh and Gummow JJ), 591–7 (Kirby J).

120 (2008) 236 CLR 510, 526 [45].

121 *Ibid.*

122 See above n 66.

123 See, eg, *Fatal Accidents Act 1846*, 9 & 10 Vict, c 93 (‘*Lord Campbell’s Act*’). For the Australian state equivalents see above n 7.

## VII CONCLUSION

The High Court missed an opportunity to recast two fundamental principles of tort law in *Barclay*. The Court should have absorbed the old action for loss of services within both the action for the tort of interference with contractual relations, and the tort of negligence. It failed to do so because it misconceived the action as being one based on a wrong to the *employee*, rather than the *employer*, and because it insisted on maintaining the proprietary nature of the claim. By its own tests for departing from past precedent, the High Court should have abandoned *Baker* and departed from subsequent cases based on it. *Baker* is infected with confused reasoning, lacks historical support, and has been overtaken in any event by subsequent legal developments, leading to anomalous and arbitrary results. One wonders what else is necessary to have an old authority discarded.

