

LEVEL

TWENTY
SEVEN

C H A M B E R S

**Damages in unusual circumstances:
Special loss arising from a defamation
Damages for disappointment and distress
Loss of dependency damages for statutory claims**

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>> Introduction

- > Actor Geoffrey Rush and barrister Lloyd Rayney awarded damages for economic loss after being defamed: *Nationwide News Pty Ltd v Rush, Rayney v Western Australia, Wilson v Bauer Media*
- > Consumers, Mr and Mrs Moore, awarded damages for disappointment and distress for a ruined holiday: *Moore v Scenic Tours Pty Ltd*
- > Dependants of a deceased seek to recover financial loss arising from the death; can they rely on statutory causes of action to do so? *Barclay v Penberthy*



- > *Nationwide News Pty Limited v Rush* [2020] FCAFC 115
- > *Rayney v The State of Western Australia* [2017] WASC 367
- > *Bauer Media v Wilson* [2018] VSCA 154
- > *Moore v Scenic Tours Pty Ltd* [2020] HCA 17
- > *Andrews v John Fairfax* [1980] 2 NSWLR 225
- > *Baltic Shipping v Dillon* (1993) 176 CLR 334



Loss of dependency damages for statutory claims

>> The rule in *Baker v Bolton*

> Death cannot be complained of as an injury even if caused by criminal or civil wrong: *Baker v Bolton* (1808) 1 Camp 493; 180 ER 1033

- Tortfeasor better off if commission of the tort caused death

> Abrogated by enactment of the Lord Campbell's Act (*Fatal Accidents Act 1846* (9 & 10 Vict. c.93))

> Effect of Lord Campbell's Act: statutory cause of action separate to and distinct from any action the deceased may have had: *Kupke v Corporation of Sisters of Mercy* [1996] 1 Qd R 300 at 307-8

>> Present iteration of *Lord Campbell's Act*

Civil Proceedings Act 2011 (Qld) s 64 'Liability for a death'

(1) This section applies if—

- (a) a death is caused by a wrongful act or omission, whether or not an offence; and
- (b) the act or omission would, if death had not resulted, have entitled the deceased person to recover damages in a proceeding for personal injury.

(2) The person who would have been liable if the death had not resulted is liable for damages despite the death and whether or not the death was caused by circumstances that were an offence.

(3) In a proceeding under this part, a court may award to the members of the deceased person's family the damages it considers to be proportional to the damage to them resulting from the death.

(4) The amount of damages awarded to a person under a legal incapacity may include an amount for management fees relating to the amount awarded to the person.

>> Wrongful act or omission

> Established 'wrongful acts or omissions':

- Negligence causing death
- Battery causing death
- Breach of contractual provision to exercise reasonable care and skill causing death

>> Effect of a dependency claim

Nguyen v Nguyen (1990) 169 CLR 245

- Pecuniary loss of dependency – a deceased's notional income
- Non-pecuniary loss of dependency – loss of deceased's services

Horton v Byrne [1957] St R Qd 1 at 8-9
Public Trustee v Zoantti (1945) 70 CLR 266 at 276-7

- Deduction: pecuniary gains which accrue to relatives from death

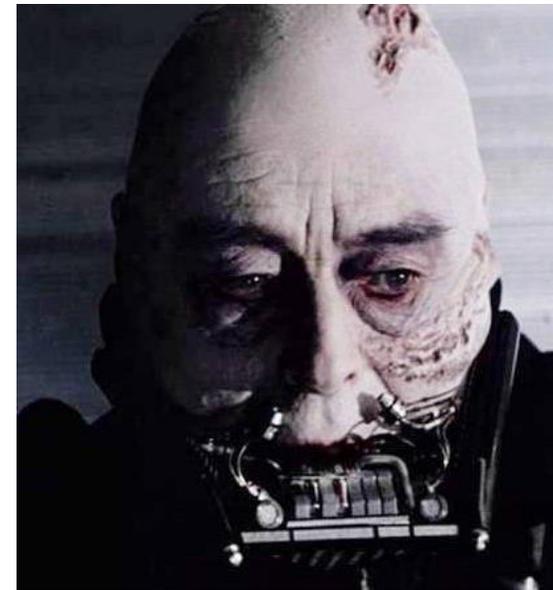
British Electric Railway Company Ltd v Gentile [1914] AC 1034

- Effect of valid exclusion clause binding deceased?

>> The survival of the rule in *Baker v Bolton*

> Notwithstanding the enactment of Lord Campbell's Act the rule in *Baker v Bolton* remains part of the common law of Australia: *Barclay v Penberthy* (2012) 246 CLR 258

> Subject only to inroads made by Australian legislatures



>> *Barclay v Penberthy* (2012) 246 CLR 258

EVENT	CAUSE	ISSUES for High Court
Five employees of plaintiff company injured in plane crash. Two died.	<ol style="list-style-type: none">1. Aircraft part negligently designed by engineer (1st defendant) which caused aircraft engines to fail2. Pilot responding negligently to the emergency thereby created (2nd defendant – pilot's employer)	<p>Whether plaintiff company could recover:</p> <ol style="list-style-type: none">1. in an action <i>per quod servitum amisit</i>2. pure economic loss in tort of negligence

>> ***Barclay v Penberthy* (2012) 246 CLR 258**

> HELD:

- action *per quod* in principle available
- action for pure economic loss available in circumstances
- actions **only** maintainable for the three employees who **survived**
- losses consequent upon deaths of deceased employees barred by reason of rule in *Baker v Bolton*

> **EFFECT:** if claim is a common law or equitable claim where claimant is **not** a member of deceased person's family then recovery likely prohibited

>> ***Barclay v Penberthy* (2012) 246 CLR 258**

[26] The pattern of Australian legislation is a pointer towards the continued existence of the rule in *Baker v Bolton* as a matter of common law. In *Swan*, the New South Wales Court of Appeal rejected submissions that the rule in *Baker v Bolton* should be discarded. Their Honours did say that the decision of this Court in *Woolworths Ltd v Crotty* was authority for the proposition that the rule in *Baker v Bolton* remained part of the common law in Australia. The better understanding is that the assumption made by both parties in *Crotty* was that the rule did apply unless the term "wrongful act" in *Lord Campbell's Act*, as was held to be the case, included contractual as well as tortious wrongs.

[27] Any further contraction in the scope of the rule in *Baker v Bolton* is a matter for Australian legislatures.

per French CJ, Gummow, Hayne, Crennan and Bell JJ

>> Questions post *Barclay v Penberthy*

1. Does a statutory cause of action permit a right of recovery to a deceased's dependants?
2. Is the conduct which gives rise to a statutory cause of action capable of constituting a 'wrongful act or omission' for the purposes of the *Lord Campbell's Act*?

>> Test:

- > A matter of statutory construction.
- > Question is whether the legislature intended that any right to relief be limited to the deceased (and that the right abated upon their death)
- > See, in context of s 66 *Succession Act 1966* (Qld): *CAG v Public Trustee of Queensland* [2008] 2 Qd R 419 at [17] (Keane JA)

>> Test: Examples

> Section 138(3) of the Australian Consumer Law

- If the individual dies because of the injuries [suffered due to a safety defect in goods supplied by a manufacturer], a law of a State or a Territory about liability in respect of the death of individuals applies as if:
 - the action were an action under the law of the State or Territory for damages in respect of the injuries;
and
 - the safety defect were the manufacturer's wrongful act, neglect or default.

> Sections 236 and 237 of the Australian Consumer Law

- Right of action if a 'person' suffers loss or damage because of the conduct of another person in contravention of Ch 2 or 3 ACL
- Sufficient breadth to encompass claim for loss of dependency: *Pritchard v Racecage Pty Ltd* (1997) 72 FCR 203 at 217-9

>> Example for review

1. Negligence causing death where valid exclusion clause denies recovery at common law
2. Existence of a statutory cause of action which denies recourse to an exclusion clause

Question: can the statutory cause of action be availed of?

>> Failure to meet a ‘consumer guarantee’: Australian Consumer Law

- > Consumer guarantees – base statutory norms of conduct.
 - services rendered with due care and skill (s 60);
 - services reasonably fit for purpose (s 61(1));
 - services will reasonably achieve intended result (s 61(2)).

- > No longer implied contractual conditions (i.e. persist outside of contract): *Scenic Tours Pty Ltd v Moore* (2018) 361 ALR 456 at [155], [160]; *Alameddine v Glenworth Valley Horse Riding Pty Ltd* (2015) 324 ALR 355 at [77]
 - Breach is not necessarily a ‘breach of contract’
 - May exist implied contractual conditions which mirror base statutory norms of conduct.

- > Cannot be excluded by contract: ACL s 64 (subject to exceptions in ACL s 64A and s 275; and CCA s 139A)

>> Right of recovery

> Statutory right of recovery:

- Sections 236 and 237 and section 267?
 - Failure to meet consumer guarantee a 'contravention' of the ACL?
 - Consumer protection purpose – remedial response
 - *Scenic Tours Pty Ltd v Moore* (2018) 339 FLR 244 at [130]
- Section 267 only?
 - Support of commentators;
 - Statutory construction;
 - *Alameddine v Glenworth Valley Horse Riding Pty Ltd*
 - *Let's Go Adventures Pty Ltd v Barrett* [2017] NSWCA 243 at [100].
 - *Moore v Scenic Tours Pty Ltd* [2020] HCA 17

>> Section 267 – relief for dependants?

Arguments Against

- Action conferred on consumer
- Action cannot be assigned
- Loss or damage extends to 'injury' (s 13) but not expressly death
- Purpose of s 267(4): consequential loss to the consumer
- Compare to s 138(3) ACL

Arguments For

- Trade Practices Act regime permitted recovery for breach of an implied term. Step backwards?
- Failure to exercise due care and skill imports common law negligence

>> Failure to meet consumer guarantee – wrongful act or omission?

> *Civil Proceedings Act 2011* (Qld) s 64: stand-alone statutory cause of action of Queensland

> ACL – Commonwealth Statute creating new cause of action and takes priority (s 109 Constitution)

> If ACL claim not available to dependants – attempt to rely on s 64 tantamount to use law of Queensland in a way inconsistent with law of Commonwealth: *Pritchard v Racecage Pty Ltd* (1997) 72 FCR 203 at 218-9

> Effect of ACL *also* taking effect as Queensland law? (*Fair Trading Act 1989* (Qld) s 16)

>> Failure to meet consumer guarantee – wrongful act or omission?

> ‘Wrongful’ not defined in *Civil Proceedings Act 2011* (Qld)

> Is a failure to meet a statutory imposed standard of conduct ‘wrongful’?

>> The survival of deceased's cause of action

- > Dependency claim different to the cause of action that the deceased would have had.
- > Common law: maxim *action personalis mortur cum persona* – cause of action dies upon death: *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420; [2010] HCA 34 at [34]
- > **Statutory abrogation:** *Succession Act 1981* (Qld) s 66
 - the action survives for benefit of the Estate;
 - in effect covers loss for period prior to death (past special damages and past loss of earnings);
 - pain and suffering; exemplary damages and future earnings not recoverable

WorkCover Queensland v Amaca Pty Ltd (2010) 241 CLR 420; [2010] HCA 34 at [41]-[47]

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