The forgotten actions – loss of consortium and loss of servitium

Authors:

Hugh Powell – Senior Associate, Travis Schultz & Partners

Jemma Barnard – Associate, Travis Schultz & Partners

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At common law, the “compensation principle” aims to restore a plaintiff to the position that they would have been in but for the negligent conduct causing injury. As compensation lawyers, it is critical that we thoroughly investigate, and assess all causes of action and available heads of damage when providing advice. In Queensland, the availability and associated quantum of the common law p*er quod* actions are rather limited. As such, the *per quod* cause of action is often overlooked by practitioners.

This paper will consider two often forgotten causes of action – *per quod consortium amisit and per quod servitium amisit*, otherwise referred to as loss of consortium and loss of servitium. This paper will outline the scope of both actions with reference to case law developments over recent decades, the statutory modifications in Queensland, the scope of damages that may flow from such claims and the practical challenges that practitioners face in successfully pursuing the causes of action.

Per quod consortium amisit – loss of consortium

Historical context

The common law action of *per quod consortium amisit* (known as loss of consortium*)* has a rather controversial history. Literally translated, consortium means "sharing, partnership and fellowship",[1] and Roman law considered consortium to be “the essence of the marriage”.[2]

Closely related to *per quod servitium amisit*, an action for loss of consortium could be brought by a husband with respect to injury caused to his wife which wholly or partially deprived him of his wife’s “consortium”. Central to an action for loss of consortium at that time was the concept that wives owed particular services to their husbands such as domestic and child-rearing duties, sexual relations, comfort and companionship. The common law recognised a husband’s quasi-proprietary interest in those services and accepted that if his interest were to be damaged as a consequence of tortious conduct resulting in impairment to his wife’s function, he had a right to sue the tortfeasor for his loss of consortium.

One of the very earliest decisions dealing with interference to consortium within a marriage was *Guy v Livesey*.[3] Guy had commenced proceedings against Livesey for injuring his wife.

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[1] James Robert Vernam Marchant and Joseph Fletcher Charles, *Cassell’s Latin Dictionary* (Funk & Wagnalls Company, 1958).
[2] Bill Leaphart and Richard E. Mccann, ‘Consortium: An Action for the Wife’ (1973) 34(1) *Montana Law Review* 76.
[3] *Guy v Livesey* (1618) 79 ER 428.

In that case, the court considered that the action was brought "for the particular loss of the husband, for which he shall have this action, as the master shall have for the loss of his servant's service".[4]

For centuries, the common law permitted only a husband to bring an action in loss of consortium which meant that women, same-sex and de facto couples were denied a remedy for tortious injury to their spouse. In Queensland, the law remained somewhat the same until, in the late-60s, the *Law Reform (Husband and Wife) Act 1968* modified the common law and afforded a wife a remedy for loss or impairment of consortium.[5] The provision has now been relocated and expanded upon in section 13 of the *Law Reform Act 1995* to now entitle de facto spouses and civil partners.

What does a *per quod consortium amisit* claim look like today?

In more recent times, the loss of consortium action is rather unique having been abolished in all Australian jurisdictions except for South Australia and Queensland. Whilst the cause of action remains part of the common law, in circumstances where the *Civil Liability Act* ("CLA") or the *Workers Compensation and Rehabilitation Act* ("WCRA") apply, it is not commonly pursued as a result of significant statutory restriction and the particularly conservative approach of the courts in assessing damages.

Unlike a dependency claim or *Griffiths v Kerkemeyer*[6] damages ("*G v K"* damages), a *per quod* action for loss of consortium is independent from, and of a different nature to, any personal injury claim brought by the injured spouse. Despite the tortious act being the same, the damage is to be treated entirely separately[7].

In Australia and more specifically in Queensland, the scope of a loss of consortium claim has slowly narrowed overtime. The High Court decision of *Toohey v Hollier*,[8] determined that consortium itself is not indivisible and that a remedy did exist for total or partial impairment to consortium.[9] The High Court gave further clarity to what type of impairment to a marital relationship was compensable holding that only "actual, temporal loss, the deprivation of some

[4] Ibid 428.
[5] *Law Reform (Husband and Wife) Act 1968* (Qld) s 3.
[6] *Griffiths v Kerkemeyer* (1977) 139 CLR 161.
[7] Curran v Young (1965) 112 CLR 99.
[8] *Toohey v Hollier* (1955) 92 CLR 618.
[9] Ibid 627.

material temporal advantage capable of estimation in money" will sound in damages, which ultimately excluded recoverability of any spiritual or emotional loss.

Temporal or material loss remain the central factor in a loss of consortium action, and this can be split into two categories. Firstly, the loss of services; domestic work, child rearing and other household services, and secondly the loss of comfort and society, but only in so far as their deprivation brings about a "material and temporal" loss, as opposed to "spiritual or emotional" loss. Emotional consequences such as grief, diminished happiness or a loss of love that might taint a marital relationship after injury are not to be considered.[10]

Whilst it is not immediately obvious what temporal or material loss stems from a spouse's loss of comfort and society, there is some authority that a decrease in quantity or quality of sexual intercourse is a factor capable of being compensable in this sense.[11] Similarly, damages have been awarded in a loss of consortium action where a couple's social life has been dramatically impacted,[12] and where the injured spouse finds that they must retire to bed very early so as to reduce the time enjoyed with their partner.[13]

As to the loss of services component, only the value of the loss of services which the injured person previously provided to the spouse may be recovered in a loss of consortium action. Courts will be particularly cautious to avoid the risk of awarding damages for the same services both in the personal injury claim as well as the loss of consortium claim. It is important to therefore place emphasis on the critical differences between the nature of a claim made to *G v K* damages as opposed to a claim for loss of services in a loss of consortium action.

The true basis of a claim to *G v K* damages, is the injury-generated *need* of the plaintiff for services to be provided to him or her,[14] whereas in a loss of consortium action, the spouse makes a claim to the value of the *loss* of services which were previously provided to them by the injured person. This is to be assessed at the market value of the services.

The threat of duplicating *G v K* damages with a claim for loss of services was considered in some depth by the Supreme Court in *Thorne v Strohfeld*.[15] The decision dealt with an appeal by a defendant against the quantum of damages awarded to a plaintiff in her action for damages for loss of the consortium of her husband. The appellant contended that with respect to the damages awarded for the loss of services, there was not a sufficient identification of

[10] *Talbot v Lusby* [1955] QSC 143.
[11] Ibid.
[12] Ibid.
[13] *McMillan v Pritchard* [1997] QDC 269.
[14] See for example *Van Gervan v Fenton* (1992) 175 CLR 327 per Mason CJ, Toohey and McHugh JJ. See also *Kars v Kars* (1996) 187 CLR 354.
[15] *Thorne v Strohfeld* [1997] 1 Qd R 540.

services lost to support the award which could only be explained on the evidence upon the assumption that there had been some "duplication of damages" already recovered by her husband in the compromise of his personal injuries claim against the appellant.

In that case, the Pincus JA and Helman J in their joint judgment (Ambrose J dissenting), allowed the appeal and removed the award made by the trial judge of $80,000 for loss of services, as they considered that the wife's claim for loss of services related to the same matters as were claimed in the husband's personal injuries claim. Their Honours held:

> It may be that in some cases a flexible approach will be necessary, to ensure that what is merely a theoretical duplication does not deprive the plaintiff in the second case of his or her rights. But flexibility cannot avail the second plaintiff where (as here) there is at bottom no ground of complaint about the first award except for the possibility that, if the *G v K* loss had been separately agreed, it might have been less than would have been obtained by pursuing the suit to trial.[16]

The central issue was that within the husband's statement of claim there was an allegation that he could not live without assistance and that he required domestic and nursing services and could no longer perform household repairs and maintenance. Those allegations formed the basis of the claim to *G v K* damages, being the value of domestic and nursing work as well as the value of household repairs and maintenance.

The majority considered that the basis on which the wife's claim for loss of services was advanced was that the amount of the husband's settlement did not adequately reflect the relevant losses. Their Honours refused to consider counsel's opinion as to basis on which the offer in the husband's claim was accepted, and held that "settlement of the husband's claim, including certain pleaded components, is at least prima facie evidence that those claims have been, not partly, but fully, satisfied."[17]

In a dissenting judgment, Ambrose J considered that:

> The avoidance of duplication of damages does not require that damages which the respondent proved she sustained by reason of the physical injury inflicted on her husband and for which neither she nor her husband has been compensated be disregarded or reduced by paying regard solely to the terms of the compromise of her husband's action construed only in the light of the pleadings in that action to which of course she was not a party.[18]

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[16] *Thorne v Strohfeld* [1997] 1 Qd R 540, 5.
[17] Ibid 9.
[18] Ibid 6 (Ambrose J).

Ambrose J was critical of an approach which saw the question of duplication determined having regard only to the particulars of the compromised claim, and without having regard to evidence available on it or on the *per quod* action.

His Honour considered that where a personal injury claim has been compromised, and where a *per quod* action remains on foot, the consideration of any duplication issue "is a matter to be determined upon the whole of the evidence and not merely upon the content of pleadings in the compromised action."[19]

With respect, it would seem that the approach as suggested by Ambrose J ought to be preferred from a practical perspective. The critical issue however is that the premises of a loss of consortium action is quite different than a claim to *G v K* damages. A consortium action must be articulated on the basis of the loss of a spouse, not the injured person. If a spouse were to be awarded an amount for which the injured person could have been awarded under *G v K* damages, it would then follow that the spouse is simply not being compensated for something which is their true loss.

In any event, there is clear authority for the proposition that any claim for *G v K* damages does not 'water-down' a spouse's action for loss of consortium,[20] but there must be no duplication and as such, both claims must be articulated with caution.

Historically, restriction applied to a loss of consortium action where the injured spouse dies or where their lifespan is significantly reduced – known as the rule in *Baker v Bolton*.[21]

In *Baker v Bolton*, Mr Baker's wife had been killed in a stagecoach accident. He sued the defendants for the loss of his wife's comfort, fellowship, and assistance *per quod consortium amisit*. In that case, Lord Ellenborough held that the death of a human being could not be complained of as an injury, and as such, the damages, as to the plaintiff's wife, must stop with the period of her existence.

Later in 1917, in applying the rule in *Baker v Bolton*, Lord Sumner explained that a plaintiff could not recover *per quod consortium amisit* after his wife's death, because his right was "not in the life but in the service or consortium during life".[22] The rule in *Baker v Bolton* and its applicability in Queensland will be further discussed.

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[19] Ibid 7 (Ambrose J).
[20] See for example *Norman v Sutton* (1989) 9 MVR 525 and *Johnson v Nationwide Field Catering Pty Limited* (1992) 7 QdR 494.
[21] *Baker v Bolton* (1808) 170 ER 1033.
[22] *Admiralty Commissioners v SS Amerika* [1917] AC 38, 41.

In a similar vein, where a relationship ceases after the tortious incident or where there is some suggestion that the relationship was to dissolve soon after, a loss of consortium claim will be limited to the period between the date of the accident and the date or likely date of separation.

It is important to note that any findings of contributory negligence with respect to the injured spouse will have no bearing on a *per quod* claim.[23]

Assessing the damages

Unfortunately, the quantum in a loss of consortium action is usually modest at best. Queensland's courts have been incredibly conversative in their assessment over the last few decades. A short summary of several of the more recent quantum decisions is provided below:

In *Harrington v Queensland Corrective Services Commission*,[24] the Supreme Court awarded the wife of a 37-year-old trade instructor $30,000 for loss of consortium as well as $29,000 for loss of services.

In *Livingston & Anor v Sharpe*, the Supreme Court awarded the wife of a pilot who had suffered severe spinal injuries an amount of $25,000 for loss of consortium.[25]

In *Corkery v Kingfisherbay Resort,*[26] the Supreme Court awarded $12,000 for loss of consortium and loss of services following spinal injuries which impaired sexual function.

In *Martin & Anor v Nursing Staff Pty Ltd*,[27] the District Court awarded a husband a global sum of $15,000 for loss of consortium consequent upon his wife suffering a moderately severe back injury.

In *Hill v Oxlade & Anor*, the Magistrates Court awarded a wife a sum of $2,000 for loss of consortium and $500 for loss of services consequent upon her husband sustaining moderately severe wrist and knee injuries.

Perhaps one of the most striking decisions in this area, however, is *Lebon v Lake Placid Resort Pty Ltd*,[28] where the Supreme Court awarded the husband of a 25-year-old who had been rendered substantially tetraplegic, an amount of just $4,000 for loss of consortium. In circumstances where the injured wife had only some use of her upper limbs and was reliant

[23] *Curran v Young* (1965) 112 CLR 99.
[24] *Harrington & Anor v Queensland Corrective Services* Commission [1994] QSC 210.
[25] Unreported – Supreme Court, Townsville – plaint No 40 of 1992 – Kneipp J – November 1992.
[26] *Corkery & Ors v Kingfisher Bay Resort Village Pty Ltd & Anor* [2010] QSC 161.
[27] Unreported – District Court, Brisbane – plaint No 3468 of 1991 - Boulton DCJ – January 1993.
[28] *Lebon & Lebon v Lake Placid Resort Pty Ltd & Ors* [2000] QSC 49.

on an electric wheelchair for mobility, it is difficult to imagine how much more of a temporal or material impact could be had on a relationship.

Interestingly and by way of comparison, in *Elliot & Anor v Andrew*,[29] the District Court of South Australia awarded a wife $100,000 for loss of consortium consequent upon her husband being rendered a paraplegic in a motorbike accident.

Per quod servitium amisit – loss of servitium

Scope of the Action

Due the ancient roots of the action, a claim for loss of servitium lies in the employee/employer relationship. It is the nature of that relationship which forms the basis of the action. However, that is not to say that an employment contact is a required element of the action. Rather, it is sufficient if the employer has a reasonable expectation that the employee will perform the services. This is because the action lies in the fact of service and the deprivation of that service as opposed to the loss of performance under any contract. Though, of course, the existence of an employment contact is a relevant factor to determining whether an employee/employer relationship does exist. [30]

In *Attorney General for New South Wales v Perpetual Trustee Company (Ltd)*[31] a police officer was injured in a motor vehicle accident. The policer officer continued as a member of the police force and was paid his salary and allowances but the Crown was deprived of his services as a member of the police force. The Attorney General pursued a claim on behalf of the Crown to recover the salary and allowances paid, and to be reimbursed monies already paid, to the injured police officer. The Privy Counsel held there was a fundamental difference between the master/servant relationship in private employment compared to being an employee of the Crown. This is because police officers and other holders of public office are not “servants” in the requisite sense. While they are bound to serve the Crown, the services rendered to the Crown are different from those rendered in private employment such that the Crown is excluded from such a cause of action. [32]

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[29] *Elliot & Anor v Andrew* [2009] SADC 31.

[30] *Attorney General for New South Wales v Perpetual Trustee Company (Ltd)* [1955] 92 CLR 113 and *Attorney General for New South Wales v Perpetual Trustee Company (Ltd)* [1952] 85 CLR 237.

[31] [1995] 92 CLR 113.

[32] *Attorney General for New South Wales v Perpetual Trustee Co Ltd* [1955] AC 457 (PC).

A loss of servitium claim can extend to directors, managing directors and other employees who effectively control the employer. [33] The courts have expressed reluctance to extend the cause of action to independent contractors or subcontractors because of the differing nature of the relationship compared to that of master and servants.[34] In a dissenting judgment in *Commissioner for Railways (NSW) v Scott ,* [35] Fullagar J feared that extending the scope of action beyond the master/servant relationship to an independent contractor or subcontractor might cause difficulty reigning in the limit of the action.

A cause of action does not however lie upon death of an employee because of the common law rule in *Baker v Bolton*[36] which arguably remains good law.

Recent Case Law Developments

In *Barclay v Penberthy*[37] the High Court was required to consider the ongoing existence of the cause of action and the measure of damages available to an employer.

Fugro Spatial Solutions Pty Ltd conducted an air charter service business. Fugro engaged Barclay, an aeronautical engineer employed by a separate company, to design and repair an aircraft component, being a sleeve bearing. One of Fugro's clients was Nautronix which carried on the business of researching and developing marine technology. Nautronix engaged Fugro to fly a group of its employees off the Western Australian coast to enable it to test its equipment. The plane was flown by Penberthy, a pilot employed by Fugro. On 11 August 2003, during the course of the chartered flight, the plane crashed, injuring three employees of Nautronix and killing two of them. The cause of the crash was a failure of the sleeve bearing designed by Barclay, which caused an engine failure and Penberthy's negligent handling of the aircraft in response to that engine failure.

Nautronix brought a claim for pure economic loss that it suffered as a result of the alleged negligence.

There were six issues for determination before the High Court:-

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[33] See, for example, *Marinovski v Zutti Pty Ltd* [1984] 2 NSW LR 571 and *Gregory v Caltex Oil Pty Ltd* [1994] QSC 158 and *Tippett v Fraser* [1999] SASC 267.
[34] See *Barclay v Penberthy* [2012] HCA 40 at 96 and *Commissioner for Railways (NSW) v Scott* [1959] HCA 29.
[35] [1959] HCA 29.
[36] [1808] 170 ER 1033.
[37] [2012] HCA 40.

1. Does the rule in *Baker v Bolton* continue to exist to prevent recovery by Nautronix in respect of the deaths of its two employees?

2. Does the common law action *per quod* continue to exist?

3. Did Penberthy owe Nautronix a duty of care at common law to avoid pure economic loss to Nautronix flowing from the loss of services of its injured employees?

4. If *per quod* remains in existence, can Nautronix rely upon it as a cause of action?

5. If so, were Barclay and Penberthy liable to Nautronix on a *per quod* action?

6. If so, what is the measure of damages for the *per quod* action?

The court found that the rule in *Baker v Bolton* continued to exist as a matter of common law. The enactment of legislature in various forms across Australia assumes its continued existence allowing it to survive to present day albeit subject to statutory restrictions, namely section 58(1)(a) of the CLA and section 306M of the WCRA. The court considered that any further restriction or modification of the scope of the *Baker v Bolton* rule was a matter for legislature.[38]

Heydon J was emphatic in his position that the rule in *Baker v Bolton* remained good law, finding that "it would not be right to hold either that *Baker v Bolton* was incorrectly decided at the time or that, though correctly decided originally, it has been superseded by changing conditions".[39] It naturally followed that the Nautronix was unable to recover the loss flowing from the loss of its two deceased employees services, only the employees who were injured as a result of the plane crash.

As to whether the action *per quod* continues to exist as part of the common law in Australia, the appellants argued that the action should now be regarded as having been absorbed into the tort of negligence and did not reflect current social and economic relations. In determining whether the action ought to be absorbed into the developed tort of negligence, the joint majority judgment held that it should not be; again noting that the destruction of a distinct cause of action is a task best left to the legislature:

[38] Ibid at 24-27.
[39] Ibid at 83.

> If that right [being a right in the master to the benefit of the services of its servant] be invaded by a wrongful injury to the servant which disables him and his due service, then, as Kitto J put it, "the injuria to the master is collateral to, and not consequent upon, the injuria to the servant.
>
> 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. What is presently important is that the injury is "wrongful" because it a wrong done to the servant not because there was any breach of duty of care owed to the master.
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> Once it is observed that the action *per quod* depends upon demonstration of a wrong having been done to the servant (as a result of which the master is deprived of the service of the servant) and that the wrongful injury to the servant may be either intentional or negligent, it is evident that the action *per quod* does not constitute any exception to or variation of the law of negligence. The action *per quod* will lie where the wrongdoer's conduct towards the servant was not negligent but was intentional. It does not depend on demonstrating any breach of a duty of care owed by the wrongdoer to the master.[40]

As to whether Penberthy owed Nautronix a duty of care to avoid pure economic loss, Fugro and Penberthy unsuccessfully argued that Nautronix could have protected itself from pure economic loss by negotiating the inclusion of an appropriate term in its charter contract. The court rejected this argument because the existence of claim in contract is not determinative of a claim in tort. There was clear evidence that Penberthy and Fugro knew of the highly specialised nature of the testing program that Nautronix was engaged in. The risk that Nautronix would suffer economic loss if its employees were injured as result of a plane crash ought to be readily inferred.

Assessing the damages

[40] Ibid at 33-35.

Given the High Court's findings in *Barclay v Penberthy*[41] that the action *per quod* remained good law, Nautronix was able to rely upon the action in respect of its three injured employees (but not its deceased employees). While the quantum of damages was not the subject of this decision, the High Court provided useful commentary about the measure of damages recoverable in a *per quod* action. The basic proposition to the assessment of damages is limited to the losses flowing directly from the interference with the master's right to the services of the servant and is not so broad as to encompass all consequences which flow from the servant being injured. [42]

Against this principle, the High Court rejected an argument of Nautronix that it should be entitled to recover damages for losses caused by interruptions and delays in the development of its testing technology and the loss of its intellectual property and corporate knowledge and consequential lost profits. Rather, the High Court found that the damages recoverable in a *per quod* action are limited to those expenses incurred in replacing the labour of the injured employees less the savings of the wages that do not have to be paid to the injured employees. The measure of damages ought to be calculated according to the market value of those services. [43] The High Court went on to explain:-

> If the employer employs numerous staff which can take up the duties of the injured employee, the *prima facie* measure of the employer's loss may be any extra payments by way of overtime and the like which the employer has to make to secure the performance of these additional duties. Where a replacement employee has to be engaged, but this is achieved on terms more favourable to the employer, no loss will have been suffered. If it were possible to engage a substitute, at or near as practicable to the level of skill of the injured employee, but this is not done by the employer, then the employer fails to mitigate the loss. The essential point is that like any Plaintiff the employer is obliged to take reasonable steps to mitigate the loss occasioned by the Defendant's interference with the provision of services by the injured employee. [44]

In a separate concurring judgment, Kiefel J, concluded that: -

> Consistency with the purpose and scope the action *per quod servitium amisit* requires that damages be limited to the cost of substitute labour. In *Cattanach v Melchior*[45], it was observed that the employer suffers damage only when it is forced to pay a salary

[41] Ibid.
[42] *Attorney General v Wilson and Horton Ltd* [1973] 2 NZLR 238 at 258.
[43] *Barclay v Penberthy* [2012] HCA 40 at 57.
[44] Ibid at 58.
[45] [2003] 215 CLR 1.

> or wages to its injured employee when it is, at the same time, deprived of the employee's services. To permit recovery on any wider basis, including for profits lost, would be to transform an exceptional remedy for a particular type of loss into a substantial exception to the general principles which have developed concerning recovery of economic loss in tort. In terms of the coherence of the law, that would be undesirable.[46]

The High Court went onto observe that any statutory payments made with respect to sick pay or medical expenses for the injured employee are not recoverable. [47]

While the measure of recoverable damages is limited to the cost of employing a substitute, arguably expenses associated with employing the substitute could be recoverable. These may include expenses related to recruiting the new employee, training them, upskilling them to the injured employee's level and the like. In assessing any future or ongoing loss, consideration needs to be given to whether, on the balance of probabilities, the injured employee would have continued to perform those services for the foreseeable future. That then invites investigation of any contractual obligation to perform those services for a specific period of time, whether they were subject to any probationary review, the likely ongoing availability of the work which the injured employee was to perform and similar inquires.

The High Court in *Barclay v Penberthy* was categorical in its finding that the measure of recoverable damages under a *per quod* action excludes loss of profits. However, the door was left ajar for one exceptional category where the injured employee is "irreplaceable". For example, in *Mercantile Mutual Insurance Co Ltd v Argent Pty Ltd* [48] Mr Box operated a group of family companies. He was injured and no suitable substitute could be found, causing the business to be sold at a reduced price given the absence of an efficient manager. There, Walsh J, held that lost profits could be recoverable in a *per quod* action if greater profits could have been generated, but were unable to be generated, as a direct consequence of the loss of services of Mr Box. Inevitably, even in situations where that exceptional category may be pursued it will naturally invite a corresponding argument that the employer failed to mitigate the loss by selling the business.

More recently, the Court of Appeal was required to consider a *per quod* action in *Petchell v Du Pradal.*[49] There, the plaintiff and his partner were the directors and shareholders of the second plaintiff, a women's fashion clothing business. The plaintiff alleged he was unable to

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[46] *Barclay v Penberthy* [2012] HCA 40 at 164.
[47] Ibid at 59.
[48] [1972] 46 ALJR 432.
[49] [2015] QCA 132.

return to any substantive business tasks after the accident. The second plaintiff claimed that it was financially unable to pay replacement labour for those tasks and consequently became less profitable. While the second plaintiff was entitled to bring a *per quod* action, no damages were recoverable because the cost of the replacement labour incurred by the second plaintiff was less than the wages that had been saved because of the plaintiff's injury and absence from the workplace.

***Per quod* actions – Statutory restrictions**

In Queensland, a plaintiff's ability to pursue a *per quod* action is subject to statutory restriction. In claims where either the CLA or the WCRA apply, courts are prevented from awarding damages for loss of consortium or loss of servitium unless general damages are assessed in excess of the prescribed amount under regulation.[50]

The restrictions imposed under the WCRA are peculiar given that section 10(3) provides that "the liability of an employer does not include a liability to pay damages for loss of consortium resulting from injury sustained by a worker". If such claims are not covered by Workcover's policy of insurance, it follows that any damages in a loss of consortium action are to be paid by the employer directly.

A table outlining the relevant prescribed amounts pursuant to the *Civil Liability Regulation 2014* and the *Workers' Compensation and Rehabilitation Regulation 2014* are set out below:'

Civil Liability Regulation 2014:

[50] See s 58(1) *Civil Liability Act* 2003 (Qld) and s 306M *Workers' Compensation and Rehabilitation Act 2003.*

Item	Period (dates inclusive)	Amount
1	2 December 2002 to 30 June 2010	$30,000
2	1 July 2010 to 30 June 2011	$35,340
3	1 July 2011 to 30 June 2012	$36,400
4	1 July 2012 to 30 June 2013	$38,390
5	1 July 2013 to 30 June 2014	$40,460
6	1 July 2014 to 30 June 2015	$41,990
7	1 July 2015 to 30 June 2017	$43,020
8	1 July 2017 to 30 June 2018	$44,070
9	1 July 2018 to 30 June 2019	$45,430
10	1 July 2019 to 30 June 2020	$46,800
11	1 July 2020 to 30 June 2021	$47,850
12	1 July 2021 and after	$48,030

Workers' Compensation and Rehabilitation Regulation 2014:

Item	Period (dates inclusive)	Amount
1	1 July 2010 to 30 June 2011	$35,340
2	1 July 2011 to 30 June 2012	$36,350
3	1 July 2012 to 30 June 2013	$38,290
4	1 July 2013 to 30 June 2014	$39,430
5	1 July 2014 to 30 June 2015	$40,920
6	1 July 2015 to 30 June 2017	$41,920
7	1 July 2017 to 30 June 2018	$42,650
8	1 July 2018 to 30 June 2019	$43,960
9	1 July 2019 to 30 June 2020	$45,290
10	1 July 2020 and after	28.78 times QOTE

Where it may be possible to avoid the limiting provisions of both the CLA and the WCRA,[51] it could certainly be argued that a *per quod* claim is not subject to any statutory restriction at all.

[51] Say for example claims for injuries for which worker's compensation benefits were payable, or claims involving strict torts, breaches of Australian Consumer Law, or claims brought pursuant to *Civil Aviation (Carriers Liability) Act 1964*.

A peculiarity lies within the restrictions under section 58(1)(a) of the CLA and section 306M(1)(a) of the WCRA in that the legislation seems to modify the old rule in *Baker v Bolton,* by providing those damages for loss of consortium or loss of servitium must not be awarded unless the injured person died as a result of injuries suffered.

The continuing applicability of the rule in *Baker v Bolton* in light of its apparent abolition within the CLA and the WCRA has not yet been subject to judicial scrutiny in Queensland. When consideration is had to the High Court's reasoning on a similar issue in *CSR Ltd v Eddy* however,[52] it could be said that an enactment passed by parliament under a mistaken belief that such damages were in fact available at common law, is probably unlikely to create an entitlement to damages in this sense.

[52] *CSR Ltd v Eddy* (2005) 226 CLR 1.

Conclusion

The availability of p*er quod* actions and the associated damages that are recoverable in such an action are extremely limited. As such, the *per quod* cause of action can often be overlooked by practitioners. It is particularly important however, that in circumstances where catastrophic injuries have been sustained, advice ought to be provided as to the availability of such a cause of action notwithstanding those other considerations must be contemplated as to both the benefit and the difficulty in advancing it.

The loss of consortium action, albeit heavily restricted and somewhat difficult to reconcile with the modern domestic and social landscape, still offers some small token of recognition of the impact of injury on a spouse. Only material or temporal loss will sound in damages however, and the statutory thresholds together with the conservative assessments as to quantum, are often going to mean that a loss of consortium action is simply commercially unviable to pursue.

Similarly, the measure of damages recoverable from a loss of servitium action are also heavily restricted. Recoverable damages are limited to claiming for the loss of services of injured employees, and those damages are calculated by reference to the price of a substitute employee, less wages which the employer no longer has to pay to injured employee.

The unfortunate reality is that in most instances a *per quod* action is not going to be viable to agitate due to significant statutory restriction. Given the burden imposed by these statutory restrictions, it is important to identify whether it may be possible to avoid the application of the CLA or the WCRA For example, whether the claim involves a strict tort, a breach of the Australian Consumer Law or a claim under *Civil Aviation (Carriers Liability) Act 1964.*

Against the current background, we are unlikely to see regular judicial consideration of *per quod* actions such that it is unlikely that they will evolve in any material way for the foreseeable future.

The High Court has made it clear that it is for the legislature to modify, further limit or abolish altogether (as many States already have) the *per quod* action. This pattern of statutory restriction and complete abolishment in various jurisdictions across Australia over time may not bode well for the future availability of these common law actions in Queensland in the future.