Assessing Commercial Losses

in Private Trade Practices Litigation

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Summary of Contents

The thesis of this article is that, damages for dashed expectations are available under §§82 and 87 of the *Trade Practices Act* 1974 but in a different way to the traditional contract remedy for dashed contractual expectations. Synthesising the High Court's recent decisions (and indeed some recent Federal Court decisions) in relation to damages and compensation under the *Trade Practices Act* 1974, this article argues that it is possible to identify the unique *sui generis* measure referred to in *Marks v GIO Australia Holdings Pty Ltd*.

The law now reflects that business choices are constantly being made between differing opportunities, and remedies are being fashioned to compensate for opportunities that are forgone because of violations of the *Trade Practices Act* 1974. Damages for dashed expectations are available under the §§82 and 87, but in a different way to traditional contract remedy for dashed contractual expectations.

Where there is no such lost opportunity, the High Court has indicated what its *sui generis* approach will be in its recent decision in Henville v Walker [2001] HCA 52, and the utility of foreseeability and remoteness tests in Trade Practices cases has been substantially refined.

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Assessing Commercial Losses in Private Trade Practices Litigation

David D Knoll[*]

Introduction

Identifying the right evidence to gather in relation to private Trade Practices litigation and advising of quantum of loss has been a moveable feast for some years. This is particularly so where a private litigant seeks damages or compensation in respect of a breach of Parts IVA and V of the Trade Practices Act, and its equivalent provisions in other legislation such as the various state Fair Trading Acts and, in respect of financial products, the Australian Securities and Investments Commission Act 1989.

While the Trade Practices Act protects victims of misrepresentation and unconscionable conduct, the business value of the protection is much less well understood. This article seeks to address the business value of what the law protects, and to assist lawyers to prepare their cases accordingly.

The conventional wisdom as to damages

Until 1998 the conventional wisdom was that the High Court's decision in the case of *Gates v City Mutual Life Assurance Society Ltd*[1] meant that the tort measure of damages was to be applied in assessing damages under §82 of the *Trade Practices Act* 1974. The joint judgment of Mason, Wilson and Dawson JJ held:

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1 (1986) 160 CLR 1; *Kizbeau Pty Ltd v WG and B Pty Ltd* (1995) 69 ALJR 787.

> *[There was] much to be said for the view that the measure of damages in tort is appropriate in most, if not all, Pt V cases, especially those involving misleading or deceptive conduct and the making of false statements".[2] Their Honours added that "[s]uch conduct is similar both in character and effect to tortious conduct, particularly fraudulent misrepresentation and negligent misstatement.[3]*

But the High Court's subsequent decisions in the cases of *Poseidon Ltd & Sellars v Adelaide Petroleum NL*[4], *Marks v GIO Australia Holdings Pty Ltd*[5] *Kenny & Good Pty Ltd v MGICA (1992) Ltd*[6] and Henville v Walker[7] have clarified that damages under §82, or indeed compensation amounts under §87, of the *Trade Practices Act* 1974 are to be assessed using a unique or *sui generis* measure.

Synthesising the High Court's recent decisions (and indeed some recent Federal Court decisions), it is possible to identify what the unique measure is. Damages for dashed expectations are available under the §§82 and 87, but in a different way to traditional contract remedy for dashed contractual expectations.

In a business context, choices are constantly being made between differing opportunities. Each opportunity attracts different expectations. When the choice among opportunities is made in reliance upon a particular representation and the representation turns out to be misleading, compensation will be measured by reference to the opportunity or expectations forgone. It is not the expectations generated by the misleading representation that are

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2 Id. at 14.

3 Ibid.

4 (1994) 179 CLR 332.

5 (1998) 196 CLR 494; (1998) ATPR 41-665.

6 (1999) 163 ALR 611; (1999) 73 ALJR 901.

7 [2001] HCA 52.

protected, but rather the expectations that would have been generated had the representation not been misleading.

From an economic perspective this makes sense too. For markets to behave rationally and deliver sound economic outcomes, decisions must be based on accurate information.[8]

Compensating different types of business loss

In a business context, the victim of a tortious misrepresentation will usually have expended money in reliance upon the misrepresentation and will want that money back. The victim is put back in the position that the victim *should have* been in.

Reasonable foreseeability marks the limits beyond which the wrongdoer will not be held responsible by the common law for damage resulting from the wrongful act. The reasonable foreseeability is tested at the time the wrong is perpetrated. If, however, the type of loss suffered by the victim was not the reasonably foreseeable consequence of the wrongdoer's negligent act or omission, the wrongdoer is not liable to the victim. If the victim suffers both foreseeable and unforeseeable types of loss, recovery is available only for the foreseeable types of loss.[9]

Damages for breach of contract are designed to put the victim of a breach of contract in the position the victim would have been in had the contract been fulfilled. To properly award contractual damages, a court must necessarily be a prophet because it must determine what

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8 This article is not about the fineries of proof of causation, and it is not proposed to address the doctrinal differences among the members of the High Court that came to the fore in *March v. Stramere* (1991) 171 CLR 506; Hamer, 'Chance would be a fine thing': Proof of Causation and Quantum in an Unpredictable World, (1999) 23 Melb U. L. Rev. 557.

9 *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 163 ALR 611; (1999) 73 ALJR 901 at [108] per Kirby and Callinan JJ.

would have happened.[10] There are a myriad of complications both in expressing the measure of damages, and in calculating them.[11]

The foreseeability test in contract is not applied at the date the wrong occurred, but rather as at the date of contract formation. For it is the expectations in existence at the date of contract formation that contractual damages protect.[12] So in contract, foreseeability is measured not at the time the wrong occurred but at the earlier time when the contract was formed, even though damages are measured at the date of the wrong.

This intertemporal dichotomy affects outcomes and influences the way cases are argued. In developing the *sui generis* measure that the High Court has identified is to be applied in *Trade Practices Act* 1974 cases, an effort has been made to avoid such an intertemporal dichotomy. Put oversimply, tortious damages compensate for what *should have* been, whereas contractual damages compensate for what *would have* been.[13]

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10 Colvin, *Tales of the Unexpected: Damages for Lost Expectations*, (1997) 5 TPLJ 17.

11 Good contract draftspersons carefully separate clauses that contain representations from clauses that contain undertakings. A representation is only good at the point of time when it is made. That is usually the date of contract formation. An undertaking is usually good throughout the life of the contract. Sometimes there is an undertaking that the representation will remain good throughout the life of the contract. But if there is no such undertaking, and the representation becomes false at a point of time later than the date when it is made, there may be no breach of the representation because there is no promise or prediction that the representation will remain true throughout the life of the contract.

12 In *C. Czarnikow Ltd v Koufos* [1969] 1 AC 350 at 385-86, Lord Reid elaborated on this principle when he said: "*The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation*."

13 *Gates* supra note 1, 160 CLR 1 at 11, per Mason, Wilson and Dawson JJ, at 6-7, per Gibbs CJ. See also *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80-81, per Mason CJ and Dawson J; at 104, per Brennan J; at 134, per Toohey J. The complexities that surround the granting of equitable damages are beyond the scope of this paper.

To do equity may mean neither of these two tests operate in particular circumstances. That the remedy under the Trade Practices Act can operate quite differently was reaffirmed just over a year ago by French J. in *Tenji and Another v Henneberry & Associates Pty Ltd*:

> *… There are cases in which a party, who enters a contract as a result of misleading or deceptive conduct, may be compensated in a pecuniary sense by an award of monetary damages, but is left nonetheless with a continuing burden of unforeseen risk, a transaction soured by the events that surrounded it, and a property, once the repository of hope for the future, that is now an albatross around its neck.*[14]

The Trade Practices Act 1974 remedies provisions extend the common law.

The remedies provisions (including the amendments for conduct engaged in on or after 26 July 2001) relevant to the following discussion are §§82 and 87. [15]

In particular, there is valuable contrast between the focus in §82 on recovery of "*the amount of the loss or damage"* as against the §87(1A) formula. The §87(1A) formula also takes into account loss that the victim of a statutory breach or *is likely to suffer* and permits the Court to make orders to "*compensate … in whole or in part for the loss or damage"*, or to "*prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person."*

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14 (2000) 98 FCR 324, 333.

15 The provisions have been amended since the date of the decision in Marks, but the amendments are not of any moment for the purposes of the discussion in this article. Note should also be made of a new Federal Magistrate's Court which has a jurisdiction of up to $200,000. A new section 86AA has been inserted into the *Trade Practices Act* 1974 as follows:

> If proceedings are instituted in the Federal Magistrates Court under section 82, the Federal Magistrates Court does not have jurisdiction to award an amount for loss or damage that exceeds:
>
> (a) $200,000; or
>
> (b) if another amount is specified in the regulations — that other amount.
>
> Note: For transfers from the Federal Magistrates Court to the Federal Court, see section 39 of the *Federal Magistrates Act* 1999.

McHugh, Hayne and Callinan JJ delivered a joint judgment. Their Honours were impressed by a simple practical point.

> *The GIO loan, even with the margin increased by 1 per cent to 2.25 per cent, was more beneficial to the borrowers than any other loan that was available.*[18]

In an attempt to avoid semantic discussion, their Honours observed that §§82 and 87 may be applied to widely differing contraventions of the Act. Some contraventions bore a similarity to torts, in particular the tort of deceit, some to equity and some to neither common law nor equity, and so their Honours opted for a unique or *sui generis* approach to monetary compensation under the *Trade Practices Act 1974*.[19] Their Honours did not however make clear the process by which they would draw the necessary distinctions and apply the appropriate measures.

Their Honours were nevertheless prepared to compensate for loss or damage that is likely to be suffered, even if, by the time of the hearing, the likely loss was not suffered. On one view, that term "*likely loss*" simply picks up a loss which is difficult to prove, for example, because the loss is a continuing one and some of it has not yet been incurred at the time of the hearing. It is an application of the power in §87(1A) (as it now stands) to provide a remedy in order to "*prevent or reduce the loss or damage*".

Section 87(1A) permits the court to provide a remedy in order to "*prevent or reduce the loss or damage suffered, or likely to be suffered, by a person who has suffered, or is likely to*

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18 Id. at 507.

19 Id. at 510. Intriguingly, excluded from the list of contraventions and similarities was a similarity to breach of contract. Accord, *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453. There, the bank was held accountable in the same sum to its customers for breach of a duty of care, breach of fiduciary duty and for misleading or deceptive conduct. As Gummow J. (while on the Federal Court bench) noted in *Demagogue Pty Ltd v Ramensky* (1992) 9 FCR 31, 42: "Section 82 provides for the recovery in an action of the amount of loss or damage. On the other hand, the powers of the court under s 87(1A) are expressed in terms that are permissive rather than mandatory."

suffer, loss or damage by conduct of another person". The court can step in, not only to prevent an actual loss from continuing, but also to prevent or reduce a loss which does not exist but which is considered likely to exist. A loss that does not yet exist cannot be proven. It is fundamentally different to an existing loss that cannot be fully quantified because damages continue to accrue. This difference is not closely analysed in the judgement. What is not openly conceded in the joint judgment is that a loss which is likely to exist, but which cannot yet be identified as having come into existence, is a loss which is expected. This choice of words is deliberate, and as will be seen from the analysis of the companion High Court decisions below, quite apt.

Their Honours make a simple observation that: "*The bare fact that a contract has been made which confers rights or imposes obligations that are different from what one party represented to be the case, does not demonstrate that the party that was misled has suffered loss or damage*."[20] Until contractual performance occurs which is inconsistent with the representation, and which demonstrates that the representation was indeed a misrepresentation, no loss or damage can result. Their Honours go on to demonstrate that the entry into a contract, which is less beneficial to the promisee than the contract which was the subject matter of the representation, will only cause loss or damage to the promisee if the promisee could have entered into a better bargain than the one actually entered into. Their Honours were prepared to overrule Demagogue Pty Ltd v Ramensky[21] to the extent that that decision opened up the alternative that the dashed expectation could be compensated for using a contractual measure of damages. In the view of this author, as set out below, there was no need to overrule Demagogue Pty Ltd v Ramensky.

Justice Gaudron took a different tack, and held that there are not different types of damages, only different types of loss. Her Honour ruled that:

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20 Id. at 514.

21 (1992) 39 FCR 31.

> *… it is irrelevant to inquire as to the appropriate measure of damages for the purposes of §§82 and 87 of the Act. Rather, the task is simply to identify the loss or damage suffered or likely to be suffered and, then, to make orders for recovery of that amount under s 82 or to compensate for or prevent or reduce that loss or damage under s 87 of the Act.*[22]

Her Honour determined that the only dashed expectations for which the law will provide compensation are contractual expectations.[23] Here the expectations that were dashed were not embedded in the contract, and dashed expectations were not to be had.

Her Honour *was* prepared to extend the magic a little, albeit this part of her judgment is *obiter dicta*. Gaudron J. was prepared to go so far as to say that, whereas misrepresentation causes the victim not to enter into a contract, damages will be the same as if the representation had been contractual.[24] This *dicta* has been recently followed by Branson J. in Murphy v Overton Investments Pty Limited.[25] The case concerned entry in to a retirement village lease because of a misrepresentation as to the ongoing costs to Mr and Mrs Murphy that they would have to pay once they took up the lease. Her honour expressly held as follows:

> *Since it was known what Mr and Mrs Murphy would have done had Overton not engaged in conduct in contravention of s 52 of the TPA, the question of whether Mr and Mrs Murphy had suffered, or were likely to suffer, loss or damage by reason of Overton's conduct was susceptible of relatively simple determination. It principally called for a comparison, at a relevant time or times, between Mr and Mrs Murphy's actual position under the Lease and the position that they would have been in had they proceeded with their alternative plan to enter the John Paul Retirement Village*

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22 (1998) 196 CLR 494, 503.

23 Ibid.

24 Id. at 504; *Collings Construction Co Pty Ltd v Australian Competition and Consumer Commission* (1998) 43 NSWLR 131.

25 [2001] FCA 500 at [32-33, 40] (special leave applied for)

The real problem for the plaintiff was lack of evidence led by their lawyers at trial. They did indicate that they would have entered into a lease at another retirement village but apparently failed to establish what would have been their financial Murphy's position had they not entered into the impugned Lease but rather had gone to the alternative retirement village.In the context of Part IVA, this author has argued elsewhere that just such an outcome should arise when unconscionable business conduct causes someone to not enter into a contract which otherwise would have been entered into.[26]

And Her Honour Gaudron J. has held that where the misrepresentation causes the victim to enter into a contract that the victim would not have entered into bar the misrepresentation, contractual damages also might be appropriate.[27] But if the correction of the wrong is to remove the contract, then it is difficult to see what contractual expectations are being protected. There is a doctrinal inconsistency here in Her Honour's reasoning. The problem for the plaintiffs, in Her Honour's view, was that the contract permitted the variation in the margin, and so there was no breach of contract, and no dashed contractual expectations.

Her Honour gave no consideration to the proposition that the defendant might be equitably estopped from relying upon the contractual right to vary the margin. The argument, which was not put in the following terms, is that where a contract is induced by a misrepresentation that is actionable under the *Trade Practices Act* 1974, and the misrepresentation contradicts a term of the contract, the party that seeks to rely upon the contractual term will be hoist by its misrepresentation and estopped from relying upon the contractual term. That of course did not happen in *Marks*. Were there to have been such an estoppel, it would not automatically mean that, having acted in accordance with the explicit terms of the contract, the defendant would be found in breach. Rather, if the only expectations that attract contractual damages are

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26 Knoll, *Protection against unconscionable business conduct – some possible applications for Section 51AC of the Trade Practices Act 1974*, 7 Competition and Consumer Law Journal 54 (August, 1999).

27 (1998) 196 CLR 494, 504.

those contained in the terms of a contract, and the estoppel is not a contract term, the plaintiffs would be entitled to be put back into the position they were in before the defendant acted in accordance with the contract and varied the margin. The defendant, by its notice allowing the plaintiffs to exit without penalty, offered to put the plaintiffs in the position they were in before the variation of margin was effected. The defendant did not insist that it was entitled to keep the plaintiffs in the contract, and did not insist on the exit penalty, even though the contract permitted either of those two courses of action. In effect, the defendant was admitting that it made a misrepresentation, but it took action to correct the wrong. Thus, for the plaintiffs, there was no value in the estoppel.

Gummow J. was a member of the full Federal Court bench in *Demagogue Pty Ltd v Ramensky*, and in that case carefully distinguished between the two statutory remedies, in a way which the joint judgment simply bypassed and overruled. It is important to set out the distinction that Gummow J. then drew:

> *One significant distinction between §§82 and 87 is the* quia timet *operation of §87. On the appeal to the High Court in* Wardley Australia Ltd v Western Australia *(1992) 175 CLR 514 at 527:*
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> > *The Act draws a clear distinction in Pt VI between loss or damage which may be recovered under s82 and the likelihood of loss or damage which may be prevented, or, if not prevented, reduced by one of the remedies under s87.*
>
> *Deane J said (at 850) that the statute in s87 expressly distinguishes between the actual suffering of loss or damage and the likelihood (or contingency) that loss or damage will be suffered in the future. This emphasises that the phrase "the loss or damage", at least in s87, may be concerned with more than pecuniary recovery as understood in the law of damages in tort; tort law postulates the commission,*

already accomplished, of a wrong: Leeds Industrial Co-operative Society Ltd v Slack *[1924] AC 851 at 859, 868-869.*[28]

His Honour went on to point out that the remedy sought in that case was rescission. The purchaser, under a contract for the sale of land, complained that an important matter had been omitted from the contract, and the omission caused the purchaser to be misled into entry into a contract that the purchaser otherwise would not have entered into.

There were no reliance damages other than expenses incurred, and the contract was not financially disadvantageous to the purchaser. The likely loss or damage arose from keeping the purchaser in the contract. The purchaser was facing having to pay the contracted for price of the land pursuant to an order for specific performance that the vendor was seeking, and the value of the land had fallen since the date the contract was formed. Indeed, the vendor was seeking specific performance. The *risk* of contractual damages being ordered against the purchaser was accepted by His Honour as falling within the rubric of likely loss or damage.[29] His Honour held that: "*there was sufficient likelihood of the suffering of loss or damage by the administration of the common law and equitable remedies on the contract sought against the respondents by the appellant [purchaser].*"[30]

However, in this context, what was being measured for the purpose of compensating the victim of the misrepresentation was not a loss resulting from expectations being dashed, but rather a loss resulting from expectations being fulfilled. In such circumstances, equity can step in to relieve the burdens imposed by the common law. *Demagogue Pty Ltd v Ramensky* thus was not about expectation damages being awarded under the *Trade Practices Act* 1974, but rather, it was about compensation being awarded in a manner analogous to equity stepping in to remedy an inappropriate common law burden. There is thus nothing inconsistent

28 Id. at 43.

29 Id. at 45.

30 Ibid.

between the judgment in *Demagogue Pty Ltd v Ramensky* and the joint judgment in Marks of McHugh, Hayne and Callinan JJ. Neither judgment is authority for the proposition that expectation damages can (or cannot) be awarded under the *Trade Practices Act* 1974.

In *Marks*, the full Federal Court squarely acknowledged the problem of achieving the policy behind the *Trade Practices Act* 1974.[31] It is a truth in business law. McHugh J. in Henville v Walker[32] has taken up this theme. If expectations can be dashed at low monetary risk, then the rational corporation will take the risk of dashing expectations. Wilcox and Tamberlin JJ regarded that outcome "*as allowing corporations sometimes to avoid being obliged to match their performance to their marketing*".[33] Foster J said as follows:

> *If it be accepted that a major underlying purpose of the TP Act and the [Fair Trading] Act is the maintenance of appropriate levels of commercial propriety then it would appear to be consonant with that purpose that in cases of this kind the representor be held to the representation as though it were, in fact, a binding contractual term.*[34]

Kirby J, dissenting in the High Court, commented on the full Federal Court's *obiter* as follows:

> *It is some time since I have read so many utterances of reluctant judicial obedience to conceived authority as appear in the treatment by the Federal Court of this Court's decision in* Gates *(1986) 160 CLR 1 and how the Federal Court understood that decision to require a conclusion viewed as both uncongenial and unjust. Another example may be the* cri de coeur *in* Warburton v Whiteley *[1989]*

31 70 FCR 559

32 [2001] HCA 52 discussed below at [ ].

33 70 FCR 559 at 561.

34 70 FCR 559 at 584.

> *NSW Conv R ¶55-453 at 58,286. See also* Garcia v National Australia Bank Ltd *(1998) 194 CLR 395.*[35]

Gummow J. however rejected the concerns of the Federal Court justices. The concern of equity is to compensate and not to deter. Inherent in His Honour's view is the proposition that when GIO made the offer to its borrowers to allow them to withdraw without penalty, GIO had behaved equitably. This point, that GIO had behaved equitably, is ready the key to the entire case. The inquiry became an inquiry as to whether the offer made by GIO fully compensated for the loss, or likely loss, of the borrowers. His Honour noted that:

> *… s87(2), including par(b), upon which the (borrowers) place primary reliance, create new remedies which have an affinity to the equitable remedies of rescission and rectification. Orders under provisions of s87(2) which vary the contracts or declare them void* ab initio *may be granted on terms.* ASX Operations Pty Ltd v Pont Data Australia Pty Ltd *[No 2] (1991) 27 FCR 492 at 498-507. Such remedies, like their equitable analogues, are not directed to providing a measure of damages by way of monetary compensation.*[36]

It was by way of an analogy with equity that Gummow J. decided not to grant the borrowers the relief that they sought. His Honour ruled as follows:

> *GIO* did not, in Sir George Jessel's words, "seek to take advantage of [its] own false statements*" nor, having obtained the contracts by misleading and deceptive conduct, did GIO insist upon keeping the borrowers to those contracts. Moreover, even with the increase in the margin, the AAA facility was more beneficial to the borrowers than any other available loan facility.*

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35 196 CLR at 543.

36 196 CLR at 535.

> *[119] In those circumstances, in respect of borrowers who declined the GIO offer, an order adding a term to their AAA facilities to the effect that the margin was fixed at 1.25 per cent for the life thereof would not be a proper exercise of the discretion conferred upon the court by s 87(1A).*

In summary then, in *Marks* there were three justices who decided that the correct measure of damages, or indeed compensation under the *Trade Practices Act* 1974 is the reliance or tortious measure, rather than the contractual or expectation measure, and there were three justices not prepared to so hold. Of the latter three, two of them, Gaudron and Gummow JJ, declined to confine the *Trade Practices Act* 1974 measure, and decided that the court should not exercise its discretion to compensate the borrowers in that case, while Kirby J., in dissent, would have liked the compensation to be granted.

- ***Kenny & Good Pty Ltd v MGICA (1992) Ltd***

A little over 6 months after the decision in *Marks*, the High Court again faced the problem of how to measure *Trade Practices Act* 1974 damages. In *Kenny & Good Pty Ltd v MGICA (1992) Ltd*[37] real estate valuers provided a bank and a trustee company and its credit insurer with a residential property valuation. The valuation was done while building work was still in progress. The valuers assessed the value of the property as it stood on 18 April 1990 at $5.35 million, and at $5.5 million on completion. The loan was made in May 1990, and insured at 65% of valuation, but it turned out that even at April 1990, the true value of the property on an "as completed" basis was of the order of $3.9 million to $4 million.

The borrower defaulted in June 1991, and in July the bank went into possession. On 6 January 1992, the property was sold for $2.65 million. The mortgagee lost $1,977,513.67.

37 (1999) 163 ALR 611; (1999) 73 ALJR 901.

At trial, Lindgren J held that MGICA, the credit insurer, provided insurance in reliance upon the valuation, and would not have insured [the loan] at all had the "as completed" valuation been less than $4.5 million. This was a critical finding.

The valuers argued that damages should be limited to $1.5 million or $1.6 million, that being the difference between the valuation and the true value of the property. They relied on *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*[38] which firmly supported that proposition by way of an assessment of tortious / reliance damages.

So here was a chance for the High Court to firmly follow the McHugh, Hayne and Callinan JJ line in Marks, and rule for the valuers.

Gaudron J. declined this invitation and held as follows:

> *The interest that a mortgage lender seeks to protect by obtaining a valuation of the proposed security is not simply an interest in having a margin of security over and above the mortgage debt. Rather, it is that, in the event of default, it should be able to recoup, by sale of the property, the amount owing under the mortgage. And that is also the interest of a mortgage insurer. It is the risk that recoupment might not be possible that calls the valuer's duty of care into existence.*[39]

Her Honour delineated the valuers' duty of care as extending to a foreseeable risk that, in the event of default, the mortgagees might not recoup the principal and interest then owing. A significant factor contributing to that risk – if not the most significant factor – was the foreseeable possibility of a decline in market value.[40] Allowance was to be made only if some part of the mortgagee's (and therefore the credit insurer's) loss would have been suffered even if the valuation were correct. Then, almost as an afterthought, Her Honour said: " *It is*

38 [1997] AC 191.

39 163 ALR at 618.

40 163 ALR at 621.

possible that liability under s52 of the Act is limited neither by foreseeability nor remoteness."[41] Gaudron J has now rejected the applicability of foreseeability concepts in Trade Practices Act cases.[42]

But causation must be demonstrated on the evidence. In Blacker v National Australia Bank Ltd[43] a Full Federal Court (Whitlam, Tamberlin & Sackville JJ) criticised the approach of an applicant (appellant) to evidencing damages because he did not demonstrate how the claimed loss of a capital investment in a dairy business flowed from the proven misleading conduct by the defendant bank. The Court's ruling is instructive.

> *92 In addressing the appellants' contentions, we assume that the principles governing the assessment of damages for breach of duty are not materially different from those applicable to a claim founded on deceit. This assumption, if anything, is favourable to the appellants.*
>
> *93 On this assumption, there is a basic difficulty with the way in which the damages case was put to the primary Judge. It was never part of the appellants' case that the dairy farm was worth less than they paid for it. Mr McGovern accepted that there was no evidence to this effect. Rather, the appellants seem to have proceeded on the basis that it was sufficient for them to show that the misleading conduct or negligence of the Bank had caused them to purchase the dairy business and that they had thereafter suffered losses in conducting the business.*

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41 163 ALR at 622-23.

42 Henville v Walker [2001] HCA 52 at [66] ("Once that is accepted, it follows, in my view, that considerations of foreseeability and contributory negligence are irrelevant to the exercise required by s 82(1).")

43 [2001] FCA 254

Similarly in *Netaf Pty Ltd v Bikane Pty Ltd*[44] the Federal court, Sheppard and Pincus JJ, commented that:

> *It is not the law that in every such case the party held to have been engaged in misleading conduct (who may have acted quite innocently) becomes the insurer of the other's success and prima facie liable to indemnify him against the consequences of the purchase.*[45]

Unlike the borrowers in *Marks*, who would have entered into the GIO loan facilities even if the misrepresentation had not been made (because it was the best deal on offer regardless), MGICA would not have provided its insurance if the valuation had been any less. It would not have provided less insurance; it would have provided none. That really, in this author's view, is the key difference between the two cases.

McHugh J. in dissenting in *MGICA* went so far as to suggest that:

> *"The aggrieved party's damages are confined to the difference between the price paid for the property and the price that would have been paid on the basis of a true valuation together with such expenses and other losses that were sufficiently likely to result from the breach of duty to make it proper to hold that they flowed naturally from the breach of duty or that they were within the reasonable contemplation of the parties to the valuation contract or arrangement. In the case of money lent on a valuation, the damages are confined to the difference between what was lent and what would have been lent on the true value of the property together with such expenses and other losses that were sufficiently likely to result from the breach of duty to make it proper to hold that they flowed naturally from the breach of duty or that they were within the reasonable contemplation of the*

44 (1990) 26 FCR 305

45 [2001] FCA 254 at ¶308.

parties to the contract or arrangement. In either case, losses do not include the consequences of subsequent market declines."[46]

Where McHugh J. differs with the majority, is the extent to which the parties to the valuation contract would have expected loss to flow from a negligently computed valuation. The representation or valuation in this case is made at the date of contract formation. If it was wrong on that date, then the breach, as well as contract formation, occurred right there and then.

Was it foreseeable that the affected lender and credit insurer would wait until the loan went into default before crystallising the loss? Is such a crystallised loss foreseeable in the contractual sense? McHugh J. did not explicitly resolve those two questions. That was because His Honour went on to find that the representation was not a representation in the strict sense, but rather an undertaking. The promise was that the valuation would hold for a period of five years. Since the valuation did not hold for the period of five years, foreseeable loss could be calculated at whatever point during that five years the valuation ceased to hold good.[47]

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46 163 ALR at 62-25. McHugh J. even purported to extend the contractual measure of damages to third party beneficiaries of the valuation contract, an extension quite common in American common law, but still quite limited outside the insurance context in Australia. *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107; Stewart, *Why Place Trust in a Promise?: Privity of Contract*, (1999) 73(5) ALJ 354; Kincaid, *Privity and Private Justice in Contract,* (1997) 12 JCL 47. His Honour specifically held as follows:

> *The valuation in the present case is the product of a contract between the valuer and the Bank. MGICA was not a party to that contract. However, the scope of the duty of care which the appellant owed to MGICA is identical with the contractual duty which the appellant owed to the Bank and which is to be deduced from the terms of the contractual arrangement entered into by those parties. That is because the contract specifically contemplated MGICA as a party which was entitled to rely on the valuation 163 ALR at 629-30.*

47 163 ALR at 630.

Gummow J. did not entertain the same reasoning hurdles as McHugh J. Gummow J. found as follows:

> *MGICA sustained an economic loss arising from the fall in the property market as a result of the valuation because the value of the property had been negligently overstated in circumstances where MGICA would not have entered into the transaction but for the valuation. The "loss" which is recoverable was sustained at the time of default and not at the time of entering into the transaction.*[48]

Kirby and Callinan JJ. applied the tortious foreseeability test, and *obiter*, commented on the impact of *Marks* on their reasoning. That impact was modest. As their Honours pointed out:

> *This was a case in which the conduct, the submission of the valuation in the language which was used and in the context of the instructions which procured it, constituted both negligent conduct and a contravention of s52. It was productive of the same loss or damage under either characterisation. The result is, therefore, the same whether the common law remedy of negligence is relied on or relief is sought under the applicable statutes.*[49]

Yet their Honours commented that the purpose of the valuation (clearly conveyed by the instructions) was not simply to give a valuation in order to enable the lender to decide how much to lend, but to decide whether to lend at all.[50] The insurer similarly had to decide whether to insure at all. The insurer's right to sue accrued only once there had been a default, and there was a consequent claim under the insurance policy. It was, to their Honours, inherently inappropriate to measure damages at the date of the wrong, namely, the date the

48 163 ALR at 631.

49 163 ALR at 647.

50 163 ALR at 643.

wrong representation was given. Following the decision in *Gould v Vaggelas*[51], where the Court allowed as damages trading losses incurred some time after the giving of a false inducement, the court allowed as damages loss due to property value fluctuations occurring after the negligent valuation was provided. The credit insurer's dashed expectations were compensated.

- ***Henville v Walker***[52]

The fast of *Henville v Walker* are relatively unremarkable, but worth relating, because they raise a set of intriguing judicial policy choices.

Mr Henville bought a property in Albany, Western Australia, for $190,000 and constructed three home units upon it. Before the purchase happened, Mr Walker told Mr Henville that there was a market for "luxury top of the range units" in Albany and that if three units were to be built on the land which Mr Henville eventually purchased they would sell for between $250,000 and $280,000 each. The units did not sell for the anticipated price. Rather, they were sold for prices which in the aggregate amounted to $545,000. Thus, Mr Henville expected gross revenue of at least $750,000 on sale of the units and found himself $205,000, in gross revenue terms, behind that expectation.

After taking into account project costs Mr Henville sustained a loss on the project which he quantified at $319,846.51.

Mr Henville had prepared a feasibility study in which he estimated that the total cost of the project would be $551,900, of which $315,000 was referable to the cost of construction and $12,000 was referable to interest payments.

The following table infers what Mr Henville expected as against what actually happened.

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51 (1985) 157 CLR 215.

52 [2001] HCA 52

ITEM	EXPECTED	ACTUAL	DIFFERENCE
Gross revenue	$ 750,000.00	$ 545,000.00	$205,000.00
Less sales commission	-$ 66,000.00	-$ 66,000.00	
Net revenue	$ 684,000.00	$ 479,000.00	$205,000.00
Less projected construction costs	-$ 315,000.00	-$ 461,170.00	
Less projected interest costs	-$ 12,000.00	-$ 160,000.00	
Less projected other costs	-$ 224,900.00	-$ 177,676.51	
Net expected profit	$ 132,100.00	-$ 319,846.51	$451,946.51

The trial judge, Anderson J. found that there had been misrepresentations as to the revenue, but no representations as to profit. That was a critical finding. Mr Henville thus was awarded $205,000 (plus interest) being the difference between $750,000 (being three times $250,000) and the aggregate sale prices achieved at auction; ie, $545,000.

The defendant successfully appealed to the Full Court of the Supreme Court of Western Australia and Mr Henville successfully appealed to the High Court of Australia.

The Full Court of the Supreme Court of Western Australia concluded that Mr Henville suffered loss because, as the Full Court noted, "*he relied on the feasibility study, as well as on Mr Walker's misleading conduct*."[53] But the Full Court in effect saw the feasibility study as a *novus actus interveniens*, and denied Mr Henville any recovery.

To the High Court it was sufficient that Mr Walker's misrepresentations materially contributed to the loss sustained by Mr Henville and, thus, caused his loss.[54] The Chief Justice intriguingly remarked:

53 [2001] HCA at [58] per Gaudron J.

54 [2001] HCA at [44] per Gleeson CJ, [62] per Gaudron J.,

> *Although he did not put his reasoning on this basis, the result produced by Anderson J appears to be the same as if he had set out to award expectation rather than reliance damages. What he was seeking to do was to measure the causative effect of the misleading representation made by the respondents; and the method he employed, in practical effect, bound the respondents to make good those representations by awarding the appellants the difference between what the units would have sold for if the representations were true and the amount for which the units were actually sold.*[55]

The profit estimates were Mr Henville's alone. The Full Court had said that profit – and not revenue - was "the paramount factor" that led Mr Henville to embark upon the construction of the units. The profit deficiency was $451,946.51, but it arose because of the defective feasibility study, not the faulty price estimate by Mr Walker.

The High Court reversed, and held that even if Mr Henville had been more careful he would still not have realised the falsity of Mr Walker's representations,[56] and so Mr Henville could recover. His expectations were dashed. But for what loss could he recover?[57]

Anderson J. assessed the "loss" as if the claim was one for breach of warranty. Gleeson CJ agreed.[58] McHugh J (Gummow and Hayne JJ concurring) did not. McHugh J. would have increased the award but decided that there was not enough before the court to so calculate particularly given Anderson J's finding that there had been no misrepresentations as to profit.[59]. His Honour decided to restore Anderson J's award.

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55 [2001] HCA at [43.]

56 [2001] HCA at [128] per McHugh J.

57 No loss of alternate commercial opportunity was pleaded.

58 [2001] HCA at [42-45] per Gleeson CJ

59 His Honour clearly was not prepared to rely on Mr Henville's figures and award $451,946.51.

His Honour entered into a lengthy and helpful analysis of causation that will guide the argument in commercial cases for some time to come, and ruled as follows.

> *If the defendant's breach has "materially contributed"[60] to the loss or damage suffered, it will be regarded as a cause of the loss or damage, despite other factors or conditions having played an even more significant role in producing the loss or damage.* [61]

McHugh J. took a positive purposive approach and ruled as follows.

> *… the objects of the Act indicate that a court should strive to apply s 82 in a way that promotes competition and fair trading and protects consumers[62]. The width of the potential application of s 82 and the objects of the Act tell against a narrow, inflexible construction of the section[63].*

Yet His Honour was willing to limit damages under §82 by reference to the concept of remoteness, despite this apparent rejection of both tort and contract foreseeability tests.[64]

Remoteness issues did not come to the fore in the reasoning of Gaudron J. but Her Honour also ruled that recovery could extend to any loss to which the statutory breach materially

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60 *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 at 620 per Lord Reid.

61 [2001] HCA at [106] per McHugh J.

62 Section 2 of the Act states that the objective of the Act is "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".

63 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 515 [56] per McHugh, Hayne and Callinan JJ, 528-529 [101] per Gummow J, where his Honour referred to statements of Lockhart J in *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526 at 529-530, to the effect that there was a need for flexibility in the rules laid down regarding s 82.

64 [2001] HCA at [136] per McHugh J.

contributed . Her Honour dealt with the *novus actus interveniens* argument by deciding that the burden of proof lay with the defendant and that the burden had not been discharged. [65]

Her Honour's approach has some real practical appeal, but for now lawyers ought to proceed on the basis that the trend in the law is as stated by McHugh J. The test is one of "material contribution", and revenue expectations can be protected even though the bottom-line business loss was not the outcome of any misrepresentations.

Protecting lost opportunities for non-contracting parties

The question of whether expectation damages or reliance damages ought to be granted in *a Trade Practices Act* 1974 case was not an issue that *Kenny and Good* or indeed *Henville v Walker* resolved.

In American contract law cases victims for whom the tortious measure of damages would result in an inadequate amount of compensation, can attract the contractual measure of damages by claiming that they were intended third party beneficiaries of a contract, and they point to a breach of contract as the genesis of the wrong which they have suffered. Despite not being a contract signatory, their dashed expectations attract compensation.

But where there is no contract to point to, or where a contract is not entered into because of a misrepresentation that contravenes the *Trade Practices Act* 1974, the victim of the wrongdoing cannot utilise a ruse such as the third party beneficiary rule. The victim must claim that the nature of the damage suffered is a lost opportunity. The claim will be that an expectation – the opportunity – was given up in reliance upon what turned out to be a misrepresentation. In a lost opportunity case, in the guise of reliance damages, compensation is awarded in respect of the expectation dashed by the misrepresentation.

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65 [2001] HCA at [70] per Gaudron J.

Not only is the victim restored to the position that the victim should have been in at the time the wrong occurred, but compensation is available for the expectations that were forgone at that time as a consequence of having been misled.

The problem in *Marks* was that there were no opportunities or expectations lost because of a misrepresentation made by the GIO. In *Kenny and Good* the opportunity to reject the giving of the loan and the providing of credit insurance were lost because the valuation misrepresented the true value of the property that was to become the subject of the mortgage. It is acknowledged that the foregoing is not the traditional formulation of the ratio, or indeed the outcome in *Kenny and Good.*

But in a business context, choices are constantly being made between differing opportunities, to which are attached differing expectations. When the choice is made in reliance upon a particular representation, and the representation turns out to be misleading, compensation will be measured by reference to the opportunity or expectations forgone. The key High Court decision continues to be *Poseidon Ltd & Sellars v Adelaide Petroleum NL.*[66] It is not the expectations generated by the misleading representation that are protected, but rather the expectations that would have been generated had the representation not been misleading. And where there are multiple misrepresentations, the combined effect of them is taken into account.

- ***Poseidon Ltd & Sellars v Adelaide Petroleum NL***

The willingness of the High Court to compensate for dashed expectations thus continues to have its source in *Sellars*. The facts are as follows. Early in 1988 the directors of Adelaide Petroleum NL ("Adelaide") entered into parallel negotiations with two companies, Poseidon Ltd ("Poseidon") and Pagini Resources NL ("Pagini"), with the object of persuading one of them to acquire the directors' shareholdings in Adelaide as part of a reconstruction arrangement. First Pagini put a proposal to Adelaide. But Poseidon made what looked like a

66 (1994) 179 CLR 332.

better offer, and in June 1988 Adelaide's directors decided not to pursue the negotiations with Pagini but instead to enter into an agreement with Poseidon. Heads of Agreement were executed, but shortly after the Heads were signed, Poseidon notified Adelaide that the executive who prepared and procured the execution of the document, Mark Sellars, had exceeded his authority and that the document did not reflect the transaction authorized by Poseidon's board. Adelaide treated this intimation as a repudiation of the agreement, and accepted it. Adelaide then resumed negotiations with Pagini, which resulted in an agreement which, according to Adelaide, was less favourable to it than the agreement that would have resulted if the initial Pagini negotiations had been pursued to a conclusion. Adelaide, its directors and certain associated companies commenced actions against Poseidon and Sellars in the Federal Court alleging contraventions of §52 of the *Trade Practices Act* 1974 (C'th) and claiming damages under §82.

The loss and damage alleged to have resulted from the contraventions was that the applicants lost the benefit of the agreement that they would have entered into with Pagini if Poseidon and Sellars had not engaged in misleading and deceptive conduct. French J found that Poseidon had contravened §52 and that Sellars was involved in the contravention. He awarded the applicants $1,212,193 damages for the lost commercial opportunity.[67] It was accepted that the Pagini transaction had a 40% chance of completion. Poseidon's position was that a 40% chance meant it was less than probable that damage would be suffered, and so it could not be demonstrated that its conduct caused Adelaide's loss.[68] Thus, the Respondent' appealed to the Full Court of the Federal Court, but Sheppard, Burchett and Lee JJ dismissed the appeal.[69]

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67 (1990) 98 ALR 432

68 Accord, *Hotson v East Berkshire Area Health Authority,* [1987] AC 750.

69 (1991) 105 ALR 25

The High Court split on doctrinal differences and on the strength of *Commonwealth v Amann Aviation Pty Ltd*[70] the majority (Mason CJ, Dawson, Toohey and Gaudron JJ) concluded that a lost commercial advantage or opportunity was a compensable loss, even though there was a less than 50% likelihood that the commercial advantage would be realised.

> *In the realm of contract law, the loss of a chance to win a prize in a competition resulting from breach of a contract to provide the chance is compensable, notwithstanding that, on the balance of probabilities, it is more likely than not that the plaintiff would not win the competition.* Chaplin v Hicks*, [1911] 2 KB 786;* McRae v Commonwealth Disposals Commission *(1951), 84 CLR 377, at pp 411-412.*[71]

But then the majority turned its attention to the tort analogy, and referred to *Malec v J C Hutton Pty, Ltd* [72] as authority for the proposition that in the assessment of damages for personal injuries:

> *… proof of historical facts — what has happened — and, on the other hand, proof of future possibilities and past hypothetical situations. The civil standard of proof applies to the first category but not to the second, particularly when it is necessary to determine future possibilities and past hypothetical situations for the purpose of assessing damages.*[73]

But this did not deal with Poseidon's point, which was that the assessment of damages is not reached ***at all*** in tort if the threshold 'more probable than not' test is not passed at the

70 (1991) 174 CLR 64, Mason CJ and Dawson J at 92; Brennan J at 102-104 and Deane J at 118-119.

71 179 CLR at 349.

72 (1990) 169 CLR 638.

73 169 CLR at 639-640, per Brennan and Dawson JJ; at 642-643 per Deane, Gaudron and McHugh JJ.

causation stage of the judicial inquiry. Perhaps the answer to that concern lies in *Munchies Management Pty Ltd v Belperio*[74] where the full Federal Court (Fisher, Gummow and Lee JJ) ruled, in relation to s82, that: " *There is … an apparent telescoping of what to the common law would be concepts of causation, remoteness and measure of damages*."[75]

The Court then squarely faced the issue whether the availability of compensation for loss of opportunity in contract law could apply where the wrong is a contravention of §82 of the *Trade Practices Act* 1974,[76] and held that whether the claim is in contract, tort or under the *Trade Practices Act* 1974, damages "*should be ascertained by reference to the court's assessment of the prospects of success of that opportunity, had it been pursued*."[77]

The Court then engaged in some curious *obiter dicta* as follows:

> *The conclusion which we have reached on this question finds support in other considerations. The approach results in fair compensation whereas the all or nothing outcome produced by the civil standard of proof would result in the vast majority of cases in over-compensation or under-compensation to an applicant who has been deprived of a commercial opportunity.*[78]

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74 (1998) 84 ALR 700; 58 FCR 274.

75 Id. at 286. *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 2)* (1991) 27 FCR 492 involved agreements made for the supply of information concerning financial transactions on the Melbourne and Sydney Stock Exchanges. The agreements were held, on appeal, to involve contraventions of s46(1)(c) of the *Trade Practices Act*. The trial judge made orders under s87 varying the agreements. The Full Court, which upheld the trial judge's findings of a contravention of s46(1)(c), albeit allowed the appeal in other respects, and observed that the agreements were "the product of ... contravention of the statute ... and, in their very inception were tainted by it". The respondent could be compensated, at least partly, for its consequential loss and damage if the agreements were to be declared void *ab initio* on terms.

76 179 CLR at 350-51.

77 Id. at 355.

78 Ibid.

On other occasions there has been a routine distinction drawn between causation of actual loss and causation of likely loss even in non-TPA cases.[79] The questions to be distinguished are (i) did the actual loss happen, and (ii) was the wrongdoing more probable than not to have been the cause, in which case the loss is entirely compensable. But the respondents, Adelaide, argued before the High Court that *for likely loss* the question is, how probable is the loss; and even if it is less than 50% – in Sellars it was 40% – probable loss compensation can be awarded.[80]

If the loss that was predicted were to subsequently be incurred, the plaintiff would be under-compensated by receiving only a percentage of its actual loss, but if the loss were not to eventuate, the victim would have been overcompensated. The figure arrived at by the court cannot by definition be accurate as to the actual compensation which – in a certain world – the plaintiff ought to receive.[81] If anything, the eventual over or under compensation problem is not solved by the High Court's policy choice.

Probabilistic payments will be less troubling to risk-taking business people than to rule-oriented lawyers.[82] Courts dislike speculation.[83] There are real issues on how to establish the probabilities, but what is now clear at the High Court level at least is that these difficulties do not prevent a court from making findings.[84]

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79 *Commonwealth v. McLean* (1996) 41 NSWLR 389.

80 *Malec v J C Hutton Pty Ltd*. (1990), 169 CLR, at pp 639-640, 642-643; *The Commonwealth v Amann Aviation Pty Ltd* (1991), 174 CLR, at pp 121-123.

81 *Wardley Australia Ltd v. Western Australia* (1992) 175 CLR 514, 527 per Mason CJ, Dawson, Gaudron and McHugh JJ.; P S Atiyah, "Accidents, Compensation and the Law" (3rd ed. 1980) at 177.

82 Coote, *Chance and the Burden of Proof in Contract and Tort*, (1988) 62 ALJ 761, 772.

83 *Commonwealth v. Amman Aviation Pty Ltd* (1991) 174 CLR 64, 125-26 per Deane J; *McRae v. Commonwealth Disposal Commission* (1951) 84 CL 377, 411 per Dixon and Fullagar JJ.

84 *compare* Hon D Hodgson, "Scales of Justice: Probability and Proof in Legal Fact-finding" (1995) 69 ALJ 731.

This fear of speculation is more of a problem for trade practices lawyers in 'silence' cases, because the impact of an omission on expectations is inevitably somewhat speculative. The full Federal Court in *Demagogue Pty Ltd v Ramensky*[85] steered well way from these shoals. In the case of an omission, the plaintiff must demonstrate what it would have done, but for the omission. Courts are becoming more accepting, though, of evidence that the plaintiff would not have entered into the impugned transaction at all, and can claim the entirety of their resultant loss[86]. In a case of commission, as in *Kenny & Good Pty Ltd v MGICA (1992) Ltd*, the plaintiff need only demonstrate that it would not have done what it actually did.

In commerce, most misrepresentations contain elements of both omission and commission. The careful advocate separates the two in adducing evidence on damages.

Gates v City Mutual Life Assurance Society Ltd is not inconsistent with *Sellars*.[87] There was no evidence to show that there was a chance of making alternative arrangements for insurance in *Gates*. *Gates* and *Sellars*, read together, make clear that the opportunity claimed to have been lost must be identified, refined, and demonstrated to have been an alternative that would, in fact, have been taken up; but the wrongdoing before the court will entertain assessing what the appropriate level of compensation is to be. *Sellars*, of course, is a §82 case, and §82 only compensates for actual loss. In §87 terms, once the loss is likely, the right to compensation is demonstrated. The calculation of quantum is then subjected to a probabilistic analysis. The threshold for a right to compensation under §87 *a priori* must be lower than under §82.

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85 (1992) 39 FCR 31.

86 See e.g., Semrani v Manoun l2001] NSWCA 337; Pine River Pty Ltd v Scorda & Anor [2001] WASC 105.

87 160 CLR at 13; 179 CLR at 352.

In *Sellars*, Brennan J accepted that compensation for dashed expectations in the law of contract is the clearest example of loss of chance.[88] The majority did not differ on this point.[89] In §82 cases, Brennan J held that:

> *… the existence and causation of a compensable loss cannot be proved by reference to an antecedent promise to afford an opportunity. The plaintiff, who bears the onus of proving a loss suffered as the result of the defendant's contravening or tortious conduct, must prove the existence and causation of the alleged loss in some other way.*[90]

His Honour dealt with Poseidon's causation argument, somewhat more forthrightly than the majority, as follows:

> *As a matter of common experience, opportunities to acquire commercial benefits are frequently valuable in themselves, not only when they will probably fructify in a financial return but also when they offer a substantial prospect of a financial return.*[91]

But the point was not that Adelaide had to prove it would have achieved completion of the Pagini contract. It was that Adelaide had to prove it would have entered into it on terms where there was a substantial prospect of completion; and full value – being achieved,[92] and the issue of quantum, Brennan J held, was nothing more than "a matter of informed estimation".[93] Cold comfort to a disembowelled victim of a significant misrepresentation.

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88 179 CLR at 359, 364.

89 Id. at 355 per Mason CJ, Dawson, Toohey and Gaudron JJ.

90 Id at 359.

91 Id. at 364.

92 Id. at 367.

93 Accord, *Fink v Fink.* (1946) 74 CLR 127, 143, per Dixon and McTiernan JJ.

If there ever was a need to confirm that *Gates* is not authority against the proposition that damages for dashed expectations are not available in a *Trade Practices Act* 1974 case it was satisfied in *Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd*.[94] In that case the owner of a fishing vessel thought it had insurance against fire, but the policy contained a condition that the vessel have a current certificate of survey, and it was out of survey at the time of the fire. The owner sued a fisherman's co-operative for negligence, for not informing the owner of the condition. The owner claimed damages for the loss of opportunity to seek effective cover elsewhere, or to obtain a survey certificate. Critical to success was the fact that the owner could have obtained effective insurance elsewhere, or could have satisfied the condition.[95]

The owner's loss was not the claim money it had expected under the disavowed contract of insurance, as it might have been in a contractual action against the underwriters. The loss was the claim money it would have been paid under another contract of insurance, which it would have expected to enter into, but was misled into not pursuing. Still an expectation loss, but a different expectation loss.[96]

- ***Hayle Holdings Pty Ltd v Australian Technology Group Ltd***[97]

Hayle Holdings was a case about a number of alleged misrepresentations made by a venture capitalist in the course of lengthy negotiation over a capital injection. Hely J. rejected most of the allegations of misrepresentation that were pleaded, but accepted that the venture capitalist

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94 (1984) 157 CLR 149 at 172-173.

95 157 CLR at 162. *Hayle Holdings Pty Ltd v Australian Technology Group Ltd* [2000] FCA 1242 (Hely J.) and *Gore v Montague Mining Pty Ltd* [2000] FCA 1214 (Hill, Carr, Sundberg JJ.) are recent decisions accepting the principle but requiring the applicant to prove the causative link between the opportunity or expectation loss and the statutory violation by the respondent.

96 Mr Gates, by contrast, was unable to prove that he could and would have entered into policies of insurance containing a disability clause of the kind represented to him, and so, for want of proof rather than legal unavailability of a remedy, he failed to recover his loss.

97 [2000] FCA 1242.

expected the original business owner to inject his own money should the business run short of cash in circumstances where the original business owner had said repeatedly that he would not do so. The venture capitalist did not tell him about that expectation, but thought that the pressure of circumstances would achieve the desired result and the businessman "would not be silly".

Indeed when the "misunderstanding" was brought to light, the venture capitalist terminated the deal.[98]

Applying *Marks v GIO Australia Holdings Pty Ltd*, Hely J. looked to see what opportunity was forgone by the businessman, a Dr Browne.[99]

Hely J assessed damages under the telling heading: "**Damages – loss of expected benefits**". His Honour looked at Dr Browne's attempts to fund the business and their failure, and considered competing expert valuations of the business opportunities foregone.[100]

Relying on the judgments of McHugh, Kirby and Callinan JJ in Marks[101], Hely J. found that causation still had to be proven on a balance of probabilities, and that no matter what Dr Browne's prospects of financing the business – in this case, from the USA – were, either : (i) the withdrawal of the venture capitalist did not cause that loss, or (ii) alternative finance would not have been more available had Dr Browne broken off talks had he been told that he would have to inject capital is a shortfall situation.[102]

98 Id. at 419.

99 Similarly in *Cameron v Goldtek Australia Pty Ltd* (1996) ATPR par 41-513, the applicant sold a business and claimed he would have obtained a job were it not for the misrepresentation. Moore J awarded damages for wasted expenditure and trading losses but not for lost wages.

100 Id. at 437, 441.

101 Id. at 511.

102 Id. at 459, 465.

The telescoping of what to the common law would be concepts of causation, remoteness and measure of damages in *Munchies Management Pty Ltd v Belperio*[103] was not entertained by Hely J, and for that omission, the judgment is, in this author's view, missing a key analytical element . A consequence was that the loss of opportunity claim was less than fully appreciated. It is not apparent from the judgment whether *Belperio* was addressed in submissions. It was not analysed in the judgment.

His Honour disappointingly noted that putting a percentage of loss of chance was pure guesswork even with the aid of expert evidence.[104]

The damages award eventually reflected the trading losses arising directly from closing down the businesses operation in Sydney that would have arisen between the time of the misrepresentation and when the "misunderstanding" was brought to light. This was clearly an inadequate award from the plaintiff's perspective, and demonstrates the judicial discomfort with awarded compensation for" likely loss'. One can fairly however criticise the decision for its failure to grapple with those difficult quantification issues. Businessmen should be able to expect that in commercial causes a more thoroughgoing analysis of the quantification evidence will be undertaken, especially where the other matter s as here before the Court received major attention. Just because experts differ does not excuse the Court, whether judicially or through a court appointed expert, from sorting out the numbers.

Synthesising the developments in compensating for dashed expectations under the Trade Practices Act 1974

Sellars does set *Trade Practices Act* 1974 cases off from personal injury cases, although that was not the stated intent of the High Court. By contrast *Chappel v. Hart*[105] indicates that, in a personal injury context, compensation is not available for loss of chance, and the entitlement

103 (1998) 84 ALR 700; 58 FCR 274.

104 Id. at 463-464.

105 (1998) 156 ALR 517.

to compensation does not depend on proof of the opportunity that was lost.[106] The loss of any opportunity, say, to earn income, goes to quantum only. In that case, Kirby and Gaudron JJ each accepted that causation is analysed differently in different types of cases,[107] and so the special development of expectation/loss of opportunity damages in the *Trade Practices Act* 1974 context should not surprise.[108] Thus *Sellars* is to be limited to commercial cases, and commercial cases these days are *Trade Practices Act* 1974 cases.[109]

Sellars has been followed and applied by appellate courts.[110]

Nagy v Masters Dairy Ltd[111] is an omission case. The case is authority for the proposition that failure to communicate may constitute conduct which is misleading or deceptive because the person who ultimately may act to his or her detriment is entitled to infer from the silence that no danger or detriment existed. The respondent decided not to disclose to the applicants that a deadline had been reached for taking up a milk round, following the announcement of an industry restructure, and the applicants lost the opportunity to apply for the round. They had consistently secured a round in the past. The applicants then received a governmental payment for exiting the industry, and the respondents sought to have that payment set-off

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106 (1988) 156 ALR at 519 per Gaudron J, at 539 per Gummow J. at 560-61 per Hayne J.

107 Accord, *Naxakis v. Western General Hospital,* (1999) 162 ALR 540, per Callinan J.

108 Gummow, Kirby and Hayne JJ also referred to *Empress Car Co (Abertilley) Ltd v. National Rivers Authority* [1998] 1 All ER 481, 488 for the same proposition. See (1988) 156 ALR at 534 per Gummow J, 550-51 per Kirby J, 557 per Hayne J.

109 Loss of a commercial future can also result from a personal injury and the proper calculation of damages for that loss remains controversial. See *Wynn v. NSW Insurance Ministerial Corporation* (1995) 184 CLR 485; *Malec v J C Hutton Pty, Ltd* (1990) 169 CLR 638. Pre-existing conditions result in reduced compensation on the basis that a lesser amount of the loss is caused by the defendant's wrongdoing. We cannot be too far from the day that a plaintiff's lack of prior business success causes a deduction in a claim for lost profits.

110 E.g., *Nagy v Masters Dairy Ltd* (1998) 156 ALR 262;. *Daniels v Anderson* (1995) 13 ACLC 614 at 683; *Bailey v Namol Pty Ltd* (1994) 53 FCR 102 at 109.

111 (1997) 150 ALR 301; [1998] ATPR 40,540.

against the damages payable. The respondents arguments failed, both before Nicolson J. and on appeal.[112]

The report of the Nagy's expert calculated the value of the loss of future profits to the applicants, for not entering into an agreement for a round, at $449,677. The result was arrived at based on assessments of growth in sales and profits from the 1990-91 to 1994-95 years, although the 1992-93 year showed a negative growth. An NPV (Net Present Value) calculation was performed, and a discount rate of 18 per cent was used to value future cash flows. The result was reached on the following basis:

Year*	**Net Profit**	**Discount Rate/ Present Value**	**$**
1995/96	165,590	1.0000	165,590
1996/97	182,149	0.8200	149,362
1997/98	200,364	0.6724	134,725
Total			**449,677**

Ernst and Young, the respondent's expert, applied a comparable model, and reached a total loss NPV range of $117,713 and $168,971, less than a third of the applicant's estimate.

The Court reviewed the reasonableness of the assumptions in both models, and ordered a recalculation based on that review. That was done, but the dispute was far from resolved and the parties came to court to argue valuation issues. The first judgement was given on 13 December 1996. The second one was given on 12 December 1997.

One should not be under any misapprehension that the issue of valuation of a lost opportunity is straightforward in *Trade Practices Act* 1974 cases. The expert's reports went to 9 drafts. It

112 [1998] ATPR 41,231; c.f., *The National Insurance Company of New Zealand Ltd v Espagne* (1961) 105 CLR 569; *Redding v Lee* (1983) 151 CLR 117 at 135.

was clearly worth the respondents' effort because the final award was in the sum of $169,443.[113]

More recently, in *Garden State Packers v Lancken*[114], solicitors were sued for negligence and contravention of §52 of *the Trade Practices Act* 1974 by purchasers of land for whom they acted. There was a defect in a property or in title, and the solicitors did not tell the clients. The solicitors knew what use the purchasers had for the land, and it was a business purpose of producing first grade potatoes. There was a closed road that obstructed operation of the business. The plaintiff saved itself the expense of having an expert NPV calculation performed, and argued that this was not a loss of chance case, or alternatively, if it were a loss of chance case, it was a 'virtual certainty' that the closed road would have been got in, so that any discount was inappropriate.[115] Had the problem been known to the purchasers before exchange of contracts, they would have obtained title to the closed road as part of the purchase for no additional consideration. Windeyer J. adopted the second alternative approach, and arbitrarily assessed the chance percentage at 50%. After hearing experts from both sides as to the amount of the lost profits (not as to the probabilistic percentage), the Court applied the following calculation.

Loss of Profits:	$2,722,689
Cost of land	$45,000
Subtotal	$2,767,689
Calculated at 50% loss of chance	$1,383,844

113 Interest was then added on the authority of *Namol Pty Ltd v A W Baulderstone Pty Ltd* (1993) 47 FCR 388 at 389.

114 [2000] NSWSC 139.

115 Accord, *Vulic v Bilinsky* [1983] 2 NSWLR 472 at 485.

In conclusion: Could it be even simpler?

Jurisprudentially, the law restrains wrongful conduct. Where a restraint is disobeyed, the law steps in and reacts to the disobedience. Compensation is awarded as at the date of the disobedience. The disobedience can be a breach of the general law, a tort, or a breach of a specially made private law, a breach of contract. It is not entirely unorthodox to suggest that both in contract and in tort, the first step in establishing damages is to identify the date of the act of disobedience and measure the damages as that date.

Where there is no lost opportunity, the High Court has indicated what its *sui generis* approach will be in its recent decision in Henville v Walker [2001] HCA 52, and the test of "material contribution" to the loss has been firmly established albeit with the door left open to arguments about remoteness to reduce the compensation awarded.

Just as importantly, the law is beginning to reflect that business choices are constantly being made between differing opportunities, and remedies are being fashioned to compensate for opportunities that are forgone - not just the loss in dollars actually incurred - because of violations of the *Trade Practices Act* 1974.

The judicial reaction to the disobedience will be to ensure that the victim's dashed expectations in relation to the business opportunity that actually was lost, is compensated to the extent of that loss. In contract, the opportunity would have arisen arise under the contract that was breached. In *Trade Practices* cases, the opportunity would have arisen under a business opportunity forgone. Either way, it is, in the end, compensation for dashed expectations. The real devil is in the financial detail!

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