

## Some causation and other questions in misrepresentation

*Brownlie v Campbell* (1880) 5 App Cas 925, 950, although a Scots appeal, has been treated as deciding that a representor who discovers, before his statement is acted upon, that it was and remains false, is guilty of fraud unless he corrects it in the clearest terms. However, until this year there was some doubt about the position where a statement, which was true when made, became false to the knowledge of the representor before it was acted upon. Statements in rescission cases that it was the duty of the representee to correct his statement suggested that a mere breach of this duty could not constitute fraud. These doubts have now been resolved by the decision of the Supreme Court in *Cramass LLP v Ogilvie Grant* [2014] 2 WLR 317, another Scots appeal, which has settled the issue. I had previously thought that principle and authority supported this position but there was a troublesome dictum of Lord Wright MR in *With v O'Flanagan* [1936] Ch 575, 584 :

“...nowadays the Court is more reluctant to use the word ‘fraud’ and would not...use the word ‘fraud’ ...because the failure to disclose, although wrong and a breach of duty, may be due to inadvertence or a failure to realize that the duty rests upon the party who has made the representation not to leave the other party under an error when the representation has become falsified by a change of circumstances.”

In the recent case Lord Reed, giving the judgment of the Supreme Court, said at 324:

“ The continuing effect of a pre-contractual representation is reflected in a continuing responsibility of the representor for its accuracy. Thus a person who subsequently discovers the falsity of facts which he has innocently misrepresented may be liable in damages if he fails to disclose the inaccuracy of his earlier representation...The same continuing responsibility can be seen in the treatment of representations which are true when made, but which become false by the time the contract is entered into...The law is thus capable...of imposing a continuing responsibility on the maker of a pre-contractual representation...where there is an interval of time between the making of the representation and the conclusion of a contract in reliance on it, on the basis that, where the representation has a continuing effect, the representor has a continuing responsibility in respect of its accuracy.”

The decision is a clear illustration of the importance and causative potency of continuing representations which the law considers are repeated day by day until acted upon, amended or withdrawn. Lord Reed quoted with approval (at 324) from the judgment of Smith J in *Jones v Dumbrell* [1981] VR 199,203 :

“When a man makes a representation with the object of inducing another to enter into a contract with him, that other will ordinarily understand the representor, by his conduct in continuing the negotiations and concluding the contract, to be asserting, throughout, that the facts remain as they were originally represented to be. And the representor will ordinarily be well aware that his representation is still operating in this way, or at least will continue to desire that it shall do so. Commonly therefore, an inducing representation is a continuing representation in reality and not merely by construction of law.”

Causation questions arise more than once in misrepresentation cases. The

representee must always prove that the representation induced, or contributed to inducing, him or her to change their position. Inducement in this context refers to the causative effect of the misrepresentation on the mind of the representee. This state of mind will not support a cause of action unless in turn it causes the representee to change his or her position by acting or refrain from acting. These causation questions arise in every misrepresentation case, but a further causation question arises if there is a claim for damages.

Although the representation must be an inducing cause, it need not be the sole, or even the dominant cause. In *Reynell v Spyre* (1852) 1 De G M & G 660, 708 Cranworth LJ said:

“...it may well be that he would not have acted as he did;- perhaps he might, perhaps he might not. But this is a matter on which I do not feel called upon or indeed at liberty to speculate. Once make out that there has been anything like deception, and no contract resting in any degree on that foundation can stand. It is impossible so to analyze the operation of the human mind as to be able to say how far any particular representation may have led to the formation of any particular resolution, or the adoption of any particular line of conduct...[I]t is impossible to say of any...representation...that even if it had not been made, the same resolution would have been taken, or the same conduct followed...Who can say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed?”

This is an undemanding test for causation, and modern statements of high authority have endorsed it. In *Barton v Armstrong* [1976] AC 114, 118-9 Lord Cross, delivering the majority judgment of the Privy Council in a case involving duress by threats of physical violence, invoked, as an appropriate analogy, the treatment of contributing causes in fraud cases. He said:

“If it were established that B(arton) did not allow the representation to affect his judgment he could not make it a ground for relief...If on the other hand B relied on the misrepresentation A(rmstrong) could not have defeated his claim for relief by showing that there were other and more weighty causes which contributed to his decision...for in this field the Court does not allow an examination into the relative importance of contributing causes...Their Lordships think that the same rule should apply in cases of duress and that if A’s threats were ‘a’ reason for B ‘s executing the deed he is entitled to relief even though he might well have entered into the contract if A had uttered no threats to induce him to do so.”

The same point was made by Lord Hoffmann in *Standard Chartered Bank Ltd v Pakistan National Shipping Corporation Ltd* [2003] 1 AC 959, 967:

“...if a fraudulent representation is relied upon, in the sense that the claimant would not have parted with his money if he had known that it was false, it does not matter that he also had some negligent or irrational belief about another matter, and but for that belief, would not have parted with his money either. The law simply ignores the other reasons why he paid...[I]n this field the law does not allow an examination into the relative importance of contributing causes.”

The point is settled law in Australia. In *Gould v Vaggelas* (1985) 157 CLR 215, 236 Wilson J said:

“A representation need not be the sole inducement in sustaining the loss. If it plays some part, even if only a minor part, in contributing to the course of action taken a

causal connection will exist.”

This is sound in principle because a misrepresentation will almost always be only one of a number of inducing factors operating on the mind of the representee and causing him to change his position the way he did. A prospectus, or if you will, listing particulars, may contain a mass of truthful information calculated to induce a subscription, but an investor who relied on a fraudulent misrepresentation should have, and does have, a cause of action. In *Gould v Vaggelas* (above) the purchaser of a tourist establishment in the Queensland tropics recovered damages for fraud although he had inspected the property. That and no doubt many other factors apart from the fraud must have operated on his mind to induce him to commit to the purchase. Any other rule would be a rogue’s charter. Contributing causes, even if later in time, are not a novus actus interveniens, nor is the conscious decision of the representee to change his position. As Lord Lindley said in *Quinn v Leatham* [1901] AC 495, 537 “The intention to injure the plaintiff...disposes of any question of remoteness.”

We have dealt so far with the irrelevance of other contributing causes, and now must examine the principles which should be applied in deciding whether the misrepresentation was a contributing cause in the first place. The effect of a lie must be assessed by comparing it with the truth, and not with silence. This is a historical fact. The effect on the representee of silence on the topic raises a hypothetical and speculative question which he did not have to consider at the time.

In *Edgington v Fitzmaurice* (1885) 29 ChD 459, 483 Bowen LJ said:

“...the plaintiff admits that he would not have taken the debentures unless he had thought [mistakenly] that they would give him a charge...But [the] misstatement was material if it was actively present to his mind when he decided to advance his money...[I]f his mind was disturbed by the misstatement... and if such disturbance was in part the cause of what he did the mere fact of his also making a mistake himself would make no difference.”

The important point in this passage is Bowen LJ’s reference to the misstatement being “actively present to his mind.” This excludes only those misrepresentations which have been forgotten or ignored as irrelevant or immaterial. The question was considered in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501 where Lord Goff said (at 517) that inducement was established if the misrepresentation had “an effect on the mind” of the insurer or an “influence on [his] judgment”. Lord Mustill said that inducement was not established where the misrepresentation (at 545) “did not influence the judgment”, (at 546) “did not influence the mind”, or (at 551) “had no effect on the decision”. These are negative tests for excluding the prima facie causative effect of a material misrepresentation. Lord Lloyd said (at 573) that the test was whether the misrepresentation “might well have influenced the underwriter.”

A point of considerable significance was decided in *In re London & Leeds Bank Ltd* (1887) 56 LJ Ch 321, 324 where Stirling J held that it was not necessary for the plaintiff to prove that “if the statements were not there he would not have taken the shares”. This is confirmed by decisions in estoppel cases. Estoppel by representation is part of the law of misrepresentation. In *Lynch v Stiff* (1943) 68 CLR 428, 435 the court in a joint judgment said that a plaintiff relying on an estoppel by representation can show that he acted on it “though it is not proved that in the absence of the representation he would not have so

acted". This decision was followed by the Court of Appeal in *Nationwide Building Society v Lewis* [1998] Ch 482, 488.

Thus a representee does not have to show that the misrepresentation was a sufficient or even a necessary cause. That is he does not have to prove "but for" causation. Any enquiry into whether the misrepresentation was a necessary cause of his change of position would involve a comparison between the causative potency of the matters considered by the representee, including the misrepresentation, and the causative potency of those matters without the misrepresentation. This is the very thing: "an examination of the relative importance of contributing causes", that Lord Cross and Lord Hoffmann said should not be undertaken. A relevant Australian decision is *Australian Steel and Mining Ltd v Corben* [1974] 2 NSWLR 202, 208, 210 where Hutley JA said:

"The law has permitted proof that the deception was not a factor in the ultimate decision, but the task of the deceiver is heavy...He can of course discharge it by proving that the misrepresentation had absolutely nothing to do with the result...The fact that the representations were without effect can rarely be established."

The plaintiff, who had decided to sell a rural property, and had agreed a price but not signed a contract, sought information about the purchaser. He was told that it was a doctor who wanted a hobby farm, but it was an industrial company. The vendor succeeded in rescission proceedings because the inducement to persevere in a provisional decision was sufficient (at 209). This decision was approved on this point by the Court of Appeal in *County NatWest Bank Ltd v Barton* [2002] 4 All ER 494. In *Pan Atlantic* (above) Lord Mustill also referred to the presumption of inducement when he said (at 551) that the representor:

"...will have an uphill task in persuading the court that the...misstatement...has made no difference...[T]here is a presumption in favour of a causative effect."

The legal onus of proving inducement remains on the representee throughout, and the presumption referred to is, as Lord Blackburn said in *Smith v Chadwick* (1884) 9 App Cas 187,196, only "a fair inference of fact". The point was made in greater detail by Wilson J in *Gould v Vaggelas* (1985) 157 CLR 215, 236, 238:

"If a material misrepresentation is made which is calculated to induce the representor to enter into a contract and that person enters into that contract there arises a fair inference of fact that he was induced to do so by the representation...In the general experience of mankind the facts speak for themselves...[I]t is entirely accurate to speak of an onus resting on the defendant...to show that the inference of the fact of inducement which would ordinarily be drawn...should not be drawn. But it is no more than an evidentiary onus."

The High Court of Australia reaffirmed these principles in *Sidhu v Van Dyke* (2014) 88 ALJR 640. Thus the representee can discharge his onus by showing that the false statement was "actively present in his mind at the time", and will only fail if he "did not allow the representation to affect his judgment" so that it "had absolutely nothing to do with the result." This is the position in Canada following the decision of its Supreme Court in *Sherbern Holding Inc v Vancouver Airport Centre Ltd* [2011] 2 SCR 175, 210; and was in Singapore where the Court of Appeal held in *Jurong Town Council v Wishing Star Ltd*

(No2) [2005] 3 SLR 2, 83 that presumptive inducement is not excluded unless the representee did not rely on the representation. However in *Wee v Ng* [2013] SCGA 36 [94], influenced by recent English authority to be considered next, Andrew Leong JA said that the representation had to play “a real and substantial part”.

Properly understood the decision in *J E B Fasteners Ltd v Marks Bloom & Co* [1983] 1 All ER 583 CA is consistent with orthodox authority, and it is only dicta in that case that are out of line. The trial judge found that : “the plaintiffs would not have acted differently if they had known the true position as to the accounts.” Sir Sebag Shaw, who gave the principal judgment, said (at 587) that what the trial judge really meant was that “while the content of the accounts was observed and considered it did not in any material degree affect [the plaintiffs’] judgment.” Donaldson LJ agreed (at 588) but added that inducement was not established where the misrepresentation related to “subsidiary factors which support or encourage the taking of the decision.” If these were false the validity of the decision would not be affected because “if the truth had been known or suspected the same decision would still have been made”. Stephenson LJ, who agreed with Sir Sebag Shaw, but not Donaldson LJ, added (at 589) that “as long as a misrepresentation plays a real and substantial part, although not by itself a decisive part, in inducing a plaintiff to act it is a cause of his loss”. Although Sir Sebag Shaw’s judgment contains the ratio, the unorthodox dicta of the other judges proved to be influential. The decision was rescued from obscurity by Rix J in *Avon Insurance plc v Swire Fraser Ltd* [2000] Lloyds R & I 535, 540 who said that it decided that there is a:

“...distinction between a factor which is observed or considered by a plaintiff, or even supports or encourages his decision, and a factor which is...a real and substantial part of what induced him to enter into the transaction.”

Then in *Assicurazioni Generali Spa v Arab Insurance Group* [2003] Lloyds I & R 130, 148-50 Clarke LJ said:

“If the insurer would have entered into the contract... in any event the representation...will not...be an effective cause of the making of the contract...[I]n this context...causation cannot exist when even the ‘but for’ test is not satisfied...He must...show at least that, but for the ...misrepresentation, he would not have entered into the contract...”

The dictum of Rix J was applied in *Dadourian Group International Inc v Simms* [2009] 1 Lloyds Rep 601, 618 CA where the Court said:

“...the presumption of inducement is rebutted by the representor showing that the misrepresentation did not play a real and substantial part in the representee’s decision to enter into the transaction, the representor does not have to go so far as to show that the misrepresentation played no part at all.”

These decisions were followed by Christopher Clarke J in *Raiffeisen Zentralbank Oesterreich AG v Royal Bank of Scotland plc* [2011] 1 Lloyds Rep 123. The “but for”, “a real and substantial cause”, and “only support and encourage” tests involve weighing contributory causes and should be rejected. The orthodox and sound principle is that offered by Cranworth LJ in *Reynall v Spyre* in 1852 (above) that no transaction resting “in any degree” on misrepresentation can stand. The principle reflects the familiar statement that a “straw can break a camel’s back”.

We have been considering the causative effect of what actually happened. It is now necessary to consider the causative effect of what did not happen, and the relevance or otherwise of hypothetical events in determining inducement. The orthodox principle is that the court does not speculate about the likely outcome if the truth had been told or if nothing had been said on the topic. In *Smith v Kay* (1859) 7 HLC 750, 759 Lord Chelmsford LC said, in a rescission case:

“Can it be permitted to a party who has practised a deception with a view to a particular end which has been attained by it, to speculate on what might have been the result if there had been a full communication of the facts?”

Then in *Re Imperial Mercantile Credit Association* (1869) LR 9 Eq 225n, 226n, another rescission case, James VC said:

“I do not think that a Court of Equity is in the habit of considering that a falsehood is not to be looked at because, if the truth had been told, the same thing might have resulted.”

However, in a damages case, *Drincqbier v Wood* [1899] 1 Ch 393, 404 Byrne J said:

“Would you have taken the shares if something had been left out, and something else put in? is an extremely difficult question to answer, which the representor is not entitled to ask, and to which the representee can answer ‘I cannot say; I have never seen such a prospectus’.”

The difficulty referred to was emphasised by Collins MR in *Broome v Speak* [1903] 1 Ch 586, 621, another damages case:

“...it is really demanding impossibilities of the Court to ask it to find, as a fact, that a person would have been influenced in a particular way if a contract which he has never seen, and of which he knew nothing, had been disclosed at the time. That is a problem too complicated for solution by any one. What the attitude of the intending investor would have been had the contract been known to him becomes a matter of mere speculation.”

In *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 355, a damages for loss of a chance case, the plurality referred to the “peculiar difficulties associated with the proof and evaluation of future possibilities and past hypothetical fact situations, as contrasted with proof of historical facts.” In *Downs v Chappell* [1997] 1 WLR 426, 433, 441 Hobhouse LJ said in a damages case:

“The Judge was wrong to ask how they would have acted if they had been told the truth. They were never told the truth. They were told lies...to induce them to enter into the contract. The lies were material and successful....The judge should have concluded that the plaintiffs had proved their case on causation...”

If these decisions did not settle the point *The Chevron North America* [2002] 1 Lloyd's Rep 77, 103-4 should have done so. The House of Lords considered whether an innocent misrepresentation had postponed a time bar under Scots legislation. The question was

whether a claimant had to prove what it would have done but for the defendant's misrepresentation. Lord Millett, who delivered the principal speech, said:

"Is it sufficient for the [claimant] to identify the period during which he was induced...to refrain from making the claim, or must he go further and identify the date on which he would have made the claim...? I am satisfied that he need not take the further steps which involve a hypothetical inquiry which can never be answered precisely and may sometimes be incapable of being answered at all. A representee can say why he acted as he did...But he can only speculate on what he would have done if the representation had not been made. As a matter of English law a representee must always be prepared to prove that the representation had an effect on his mind...Whether, if a full disclosure of the truth had been made he would, or would not have acted differently is a question to which English law does not require an answer, it is sufficient that he might have done so."

Unfortunately dicta in recent decisions have endorsed the speculative enquiries forbidden by the line of authority. In *Dadourian* [2009] 1 Lloyd's Rep 601, 620 CA the court said:

"[I]f it could be affirmatively shown that [the claimant] definitely would have entered into the...agreement even if he had known [the truth] then it would be very difficult for [it] to argue that it was induced...in reliance upon...the representation."

The representee's reaction to the truth may show that he took no notice of the lie, but that is an historical enquiry, not a speculative one. A different approach was proposed in *Raiffeisen* [2011] 1 Lloyd's Rep 123,154 where Christopher Clarke J tested inducement against silence saying:

" If he would have entered into the...contract even if the representation had not been made, he has no valid complaint...[I]t will be relevant to ask him what he would have done if no representation had been made...since the answer...is likely to determine whether the representation was a cause of his contracting or only an encouragement...to do so."

In order to reach this position the judge distinguished *Barton v Armstrong* and other fraud cases because he was dealing with a case under the 1967 Act, a point to which we will return. He also distinguished *The Chevron North America* as a Scots case and treated Lord Millett's statement of the position under English law as dicta and in substance wrong. These were courageous steps which in my view involved error. There was a further error in holding that an "encouragement" to change one's position is not an inducement to do so.

The "if he had been told the truth" test assumes that the court would find that the representee was in fact induced by the bundle of causes, including the misrepresentation, which operated on his mind at the time. This is a finding of historical fact. It then proposes a further enquiry into the likely effect, as an inducement, of the same causes without the misrepresentation, a hypothetical and speculative enquiry which involves the weighing of contributing causes. A misrepresentation is only actionable if the representor made it with the intention of inducing the representee to act in the way he did. The representor must have decided to make the fraudulent misrepresentation because he judged that the truth or silence would not, or might not, serve his purposes or serve them so well. In doing so he fashioned an evidentiary weapon against himself, and the court should act on it and not

subject his victim to a 'what if' enquiry which the representor was not prepared to risk. The "if he had been told nothing" test for innocent misrepresentation suffers from the same problems. Moreover the earlier case law establishes that cross examination of the representee in an attempt to meet these tests is not admissible and should be disallowed.

There is a further problem with both tests. A representee may be induced to change his position by a bundle of causes which include the misrepresentation. He may make that decision easily and quickly, giving significant weight to the misrepresentation and not bothering to weigh some of the other factors. The misrepresentation may have been relied on, although it was unnecessary. In such a case the misrepresentation would undoubtedly be causative. The same bundle less the misrepresentation or with the truth may have produced the same result, perhaps only after hesitation and delay. A finding of hypothetical causation in the second case would not invalidate a finding of historical causation in the first. That is why Briggs J was correct when he said in *Ross River Ltd v Cambridge City Football Club Ltd* [2008] 1 All ER 1004, 1048 :

"It is not enough for the representor to show that the representee would, even if the representation had not been made, still have entered into the contract. It is sufficient to show that the misrepresentation 'was actively present to his mind'."

At first glance this is surprising, but orthodox principles, and the analysis offered above, shows that it is correct.

Further causation questions arise when assessing damages for misrepresentation fraudulent or otherwise. One such question is whether damages are intended to compensate for the loss flowing directly from the transaction, or those flowing directly from the inducement. In many, perhaps most, cases, the result of applying the tests will be the same, but in some the result will be different. In *Clark v Urquhart* [1930] AC 28, 67-8 Lord Atkin said:

"...in principle the measure of damages...would be based on the actual damage flowing from the fraudulent inducement" (the Atkin test).

This test was applied in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158,167,168,171 CA; and was applied by the High Court of Australia in *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1(*Gates*). In *Chappell v Downes* [1997] 1 WLR 426, 444 Hobhouse LJ said:

"...it may still be necessary to consider whether it can fairly and properly be said that all the losses flowing from...entry into the transaction...were caused by the tort...If one does not ask this additional question there is a risk that the plaintiffs will be over-compensated ...by avoiding a loss which they would probably have suffered even if no tort had been committed."

This part of the decision was not disapproved in *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254, 267, 283 where *Doyle* was specifically approved (at 263, 281). However Lord Browne-Wilkinson (at 266) and Lord Steyn (at 281) said that a defendant is bound to make reparation for all the damage flowing directly from the transaction. However Lord Steyn also said (at p 280) that the fraudster is required "to bear the risk of misfortune

directly caused by his fraud”, and (at p 284) that the plaintiff was entitled to recover “the financial loss flowing directly from his alteration of position under the inducement of the fraudulent misrepresentation.” Since the House did not have to choose between the two tests the Court of Appeal should be free to choose the Atkin test which focusses on the damage flowing from the tort.

In the following year the question arose for decision in *Copping v ANZ McCaughan Ltd* (1997) 67 SASR 525 in the Full Court of South Australia. The plaintiff, a farmer, was having difficulty meeting his interest payments on a loan of \$A725,000 because of high domestic interest rates. He did not want to sell land to reduce his debt, and his only alternative was to borrow Swiss francs at a lower interest rate, but with an exchange risk. He incurred substantial losses when the Australian dollar fell sharply against the Swiss franc, The court found that “what was induced by the representation was not...a borrowing [in Swiss francs] but the entry into a particular transaction for [that] purpose.” After reference to Smith New Court Doyle CJ concluded (at539):

“It is sufficient if the relevant loss can be said to be caused by the representation, and it is not necessary...that the loss is attributable to that which made the representation wrongful...But there is still the requirement that the loss flow from the representation and it seems to me impossible to conclude that it does...if...quite apart from the representation the appellant would have entered into a transaction bringing with it the very risk which eventuated.”

This reflects the principle applied by the Supreme Court of Canada : *B G Checo International Ltd v British Columbia Hydro and Power Authority* [1993] 99 DLR( 4th) 577, 593. A court which treated the Atkin test as dominant and the transaction test as subordinate would reach the same result, and this has the support of Lord Hoffmann who said in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191, 216:

“...even if the maker of the fraudulent representation is liable for all the consequences of the plaintiff entering into the transaction, the identification of those consequences may involve difficult questions of causation. The defendant is clearly not liable for losses which the plaintiff would have suffered even if he had not entered into the transaction or to losses which negate the causal effect of the misrepresentation.

Another and different causation question arises when assessing damages. In some cases the courts have treated hypothetical, alternative transactions as irrelevant, but there are decisions the other way. Where a motor dealer fraudulently inflated both the cash price for a car and the deposit paid by the hirer the Privy Council said in *United Motor Finance Co v Addison* [1937] 1 All ER 425, 429:

“...their Lordships cannot...modify the resulting damages on the footing that though in the absence of misrepresentation the plaintiff...would not have made the contract(s)...that it did...nevertheless...it would have entered into some other contract and thus lost money in any event.”

This passage was cited by Hobhouse LJ in *Downs v Chappell* [1997]1 WLR 426, 441 who said:

“In general it is irrelevant to inquire...what other transaction he might have

entered into if he had not entered into the transaction in question. Such matters are irrelevant speculations.”

It was once thought that damages for loss of profits were not recoverable in an action for misrepresentation, but a wider principle has become established. In *East v Maurer* [1991] 1 WLR 461,468 where plaintiffs who had been induced to buy a hairdressing business recovered for loss of profits on the tort measure. Mustill LJ said:

“The loss of profits awarded relates to the hypothetical profitable business in which the plaintiffs would have engaged but for buying the [subject] business... there is no error of principle here.”

The High Court of Australia reached a similar conclusion in *Gates* (1986) 160 CLR 1, 13:

“...it is necessary to determine what the plaintiff would have done had he not relied on the misrepresentation. If that reliance has deprived him of the opportunity of entering into a different contract...on which he would have made a profit then he may recover that profit on the footing that it was part of the loss suffered in consequence of altering his position under the inducement of the representation.”

In *Smith New Court* (at p 282) Lord Steyn endorsed *East v Maurer* and the recovery of such losses viewing them as classical consequential loss, but such recoveries are more readily explained by the Atkin principle than as a loss flowing directly from the actual transaction.

Subsequent decisions have endorsed recovery of additional profits that a trader would have earned but for the fraud: *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd* [2001] QB 488; for the loss of a capital gain: *4 Eng Ltd v Harper* [2009] Ch 91; and for profits the claimant would have made from share trading (this was before the global financial crisis) but for the loss of its working capital as a result of the fraud: *Parabola Investments Ltd v Browallia Cal Ltd* [2011] QB 477. All these cases involved hypothetical transactions, but appear sound in principle and require a fuller analysis. The claimant must prove his loss from the tort and this may include the loss of a chance of entering into another transaction or other transactions he had in contemplation at the time, specific or otherwise. This does not involve speculation. On the other hand the claimant may have been looking around without anything specific in mind. If so he cannot prove the loss of a real chance, and will be limited to his out-of-pocket loss and pre-judgment interest.

The Supreme Court of Canada held in *Rainbow Industrial Caterers Ltd v Canadian National Railway Co* [1991] 3 SCR 3 that a defendant who alleges that the plaintiff, but for the misrepresentation, would have entered into a different contract on different terms which would have resulted in loss, raises a hypothetical and speculative issue on which it has the onus of proof. The court said that it is usually impossible to adduce concrete evidence on such an issue. Leggatt J has independently come to the same conclusion. In *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 Lloyds Rep 526, 557 he said:

“There is no difference in principle between an alternative transaction which would have been more profitable and one which would have been less profitable...such that it can be relevant to take account of the former but not the latter...The evidential burden will be on the defendant...to

show that if the misrepresentation had not been made the claimant would have incurred a loss...Unless the defendant can demonstrate with a reasonable degree of certainty...both the fact that the claimant would probably have suffered a loss from entering into an alternative transaction and the amount of that loss, the damages will not be reduced...As it was the defendant...who wished to rely on such a loss the difficulty was insuperable...there was no quantifiable loss which could be taken into account.”

If the defendant attempts to rely on what the claimant would have done if there had been no misrepresentation, or if something else had been said, he is raising questions which the claimant did not consider at the time. In the loss of profits and loss of chance cases the claimant did consider the question at the time. The former is speculative, the latter historical. There is therefore no reason to think that any of the damages cases were wrongly decided. The masterful analysis of Leggatt J means that counterfactual arguments will seldom reduce the claimant’s damages. This may be a manifestation of the general mitigation principle, and if so, the legal onus would be on the defendant, as the Supreme Court of Canada held in the *Rainbow* case.

The remaining causation questions arise under the 1967 Act. The right to damages for innocent misrepresentation is conferred by s 2(1) which relevantly provides:

“...if the person making the misrepresentation would be liable to damages ...had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently...”

In *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297, 305, 306-7, 309 Balcombe and Ralph Gibson LJ said that the wording of the subsection “was clear”. In *Smith New Court* Lords Browne-Wilkinson and Steyn reserved their opinions on whether the relevant measure was that in deceit or the less drastic measure in negligent misrepresentation. However in *Banque Bruxelles* Lord Hoffmann ([1997] AC at 216) equated liability under s 2(1) with that in fraud, and he had expressed the same view in *Sindell (William) plc v Cambridgeshire County Council* [1994] 1 WLR 1016, 1037.

With diffidence in such company it is suggested that the language of the sub-section is intractable. The pre-condition is: “if the person making the misrepresentation would be liable in damages...had the representation been made fraudulently.” The damages referred to can only be those in deceit. The sub-section continues: “that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently...”

The words “so liable “ must mean in damages, and those damages must be the measure in deceit. This construction is confirmed by the final words” “notwithstanding that the representation was not made fraudulently.”

The Directors’ Liability Act 1890, passed in the aftermath of *Derry v Peek*, and successor legislation made directors liable for misrepresentations in prospectuses unless they could prove that they believed on reasonable grounds that they were true. Their liability was to pay “compensation...for the loss or damage...sustained by reason of any untrue statement included therein.” In *Clark v Urquhart* [1930] AC at 67 Lord Atkin said:

“...the effect of the section...was merely to eliminate the element of

fraud...and to give the same remedy...for an innocent misrepresentation as for a fraudulent misrepresentation.”

The Law Reform Committee, whose 1962 report led to the 1967 Act, drew on this analogy and said that the measure of damages for the new tort would be that in deceit (para 18). This is supported by the text.

Two questions remain for consideration. In *Royscot* (above) a motor dealer misrepresented to the finance company the cash price of the vehicle and the deposit paid by the would-be hirer. In such cases the finance company enters into two contracts, one with the dealer for the purchase of the vehicle, the other with the hirer. Section 2(1) relevantly provides:

“ Where a person has entered into a contract after a misrepresentation has been made to him by the other party thereto and as a result he has suffered loss, then...”

The dealer did not take the point, but he might have argued that he was not a party to the hire-purchase agreement, and the finance company could only recover its loss under the contract of sale. The section applies where the representor enters into a contract with the representee, and this condition was satisfied in that case. There appears to be no further condition which would limit recovery to the damages from that contract alone. The dealer well knew that his misrepresentation, if successful, would lead to two contracts, and the damages suffered by the finance company from entry into the hire-purchase agreement satisfied the Atkin test because they flowed directly from the fraudulent inducement. The result is not so clear if the “transaction” test must be applied.

The latest suggestion for limiting the damages recoverable under s 2(1) came from Leggatt J in *Yam Seng* [2013] 1 Lloyd's Rep 526, 555. He said that it was arguable that there are two conditions in the section, and that the first: “and as a result thereof has suffered loss” required the loss to be foreseeable. This construction, despite the second condition, would deny recovery for the unforeseeable losses recoverable in deceit. However he acknowledged that he was bound by *Royscot*. This is an artificial construction which faces a number of difficulties. The phrase “and as a result...has suffered loss” would not appear to require anything more than causation in fact and foreseeability is not mentioned. Liability for innocent misrepresentation requires proof of an intention to induce as well as inducement in fact, and as Lord Lindley said in *Quinn v Leathem*, the representor's intention to induce disposes of any question of remoteness.

The Honourable K R Handley AO, QC.