ECONOMIC INTERESTS IN CANADIAN TORT LAW

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a declaration of constructive trust over property the defendant acquired as a result of the wrong.[8]

The courts have introduced elements of flexibility into the choice of remedy so that a particular remedy is no longer as strictly linked to particular wrongs as was the case formerly. Now and then the courts have awarded a remedy in damages where there was neither a tort nor a breach of contract, but only the obtaining of a bargain by undue influence,[9] or unconscionable exploitation of a superior bargaining position,[10] or the making of a non-tortious, innocent misrepresentation.[11] In each of these cases the wrong was one that equity would usually remedy by rescinding the contract, but rescission was no longer possible. These are still, however, exceptions rather than the rule. It remains true that the distinction between common law and equitable wrongs is fundamental to determining what remedies the injured party may seek.[12]

II. COMPENSATORY AWARDS

(a) Damages

(i) Causation of Loss and Measure of Damages

1. Generally

The measure of damages[13] is a function of the rules of causation. The rules that determine what losses the defendant is taken to have caused also define how those losses are measured. The usual principle for determining causation in tort is to ask what the plaintiff's position would have been if the defendant had not committed the tort.[14] The plaintiff's loss is measured by comparing that position with the position the plaintiff actually occu-

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8 See below, in the section "Restitutionary Awards" under "Proprietary Remedies".

9 *Treadwell v. Martin*, [1976] N.B.J. No. 49, 67 D.L.R. (3d) 493 (N.B.C.A.).

10 *Rick v. Brandsema*, [2009] S.C.J. No. 10, 2009 SCC 10 (S.C.C.); *Dusik v. Newton (sub nom. Dusik v. Gooderham)*, [1995] B.C.J. No. 18, 62 B.C.L.R. 1 (B.C.C.A.).

11 *S-244 Holdings Ltd. v. Seymour Building Systems Ltd.*, [1994] B.C.J. No. 598, 93 B.C.L.R. (2d) 34 (B.C.C.A.). Such damages are also made possible by the *Misrepresentation Act 1967* (U.K.), 1967, c. 7, s. 2(1).

12 D. Capper, "Damages for Breach of the Equitable Duty of Confidence" (1994) 14 L.S. 313 at 315-17.

13 "Measure" is used here as distinct from "assessment". The measure of damages is the question of how a compensable loss is defined, whereas assessment is putting a monetary value on the loss as defined.

14 For alternatives to this "but for" standard, see below, under "Tests for Causation" – "Legal Causation – Physical Cause and Effect".

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pies. Like many principles, it is easy to state and often quite straightforward in its application, but it poses difficulties in application to some factual circumstances.

Determining "what the plaintiff's position would have been, but for the tort" is, of course, an exercise in hypothetical postulation. As a rule, that position can be delineated without much trouble, but the more the position could have been affected by events (including people's decisions) that might or might not have happened, the more speculative the exercise becomes. The other side of the calculation, "the position the plaintiff actually occupies", is usually fairly clear but even it can suffer from indeterminacy. That is because assessing the plaintiff's actual position may involve looking at the prospects that it will improve or deteriorate in future, which again is something that cannot be known but must be estimated.

As the Supreme Court of Canada pointed out in *Athey v. Leonati*,[15] issues of fact, meaning what has actually happened, must be proved on a balance of probabilities and, once proved, are taken as certain. Issues that turn on future events or hypothetical events are not susceptible of proof but only of estimation. For this reason, in appropriate cases, they may be handled by assessing the chance — whether more or less than 50 per cent — that the relevant event (if future) will actually happen, or (if hypothetical) would have happened if the breach had not occurred. Such estimates are sometimes factored in at what might be called the front end, where damages are based on the chance that a loss-defining event *will* occur (future event) or *might have* occurred (hypothetical event). ("Loss of a chance" cases, which will be discussed below,[16] are an instance of this technique.) Often they are factored in at the back end, as a "contingency" that lowers damages because of the chance that a loss-defining event will *not* occur (future event) or might *not* have occurred (hypothetical event).[17]

When it comes to future or hypothetical events, there are three sources of uncertainty. One is physical processes, such as how a personal injury will heal or would have healed, how land will be affected by pollution, and so forth. By definition, this plays little role in the economic torts. The second is financial developments: whether a business would have made money or not; whether the value of an asset would have gone up or down, *etc*. And the third is what a person — the plaintiff or a third person — would have done (in the case of hypothetical events) or will do

15 [1996] S.C.J. No. 102, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 at paras. 27-29 (S.C.C.).

16 See the discussion below, under "Tests for Causation" – "Contingencies, Foregone Opportunities and Lost Chances".

17 See below, under "Tests for Causation" – "Contingencies, Foregone Opportunities and Lost Chances". See *York v. Johnston*, [1997] B.C.J. No. 1377, 148 D.L.R. (4th) 225 (B.C.C.A.).

(in the case of future events). Whenever the assessment of the plaintiff's loss turns on any of these three, working out the damages can be difficult.

2. *Tests for Causation*

A. *Tort and Contract Measures*

In some economic tort cases, notably those involving misrepresentation, the tort measure of damages must be distinguished from the measure in contract. The fundamental difference between the assessment of damages in tort and in contract lies in the difference between a contract duty and a tort duty. In contract, the defendant's duty is to perform the obligations undertaken. In tort, the duty is not to injure. The question of what the plaintiff's position would have been if the defendant had not broken the duty therefore becomes, in contract: "What would the plaintiff's position have been if the defendant had performed the contract?" In tort, however, the question is: "What would the plaintiff's position have been if the defendant had not committed the tort?"[18]

From this flows the difference between the two measures of damages. Contract damages, in principle, compensate the plaintiff for the loss of an expected gain, namely, the profit that would have been made if the defendant had performed the contract. Tort damages compensate the plaintiff for the actual harm done by the defendant's tortious act or omission. This generalization does not always hold true. Sometimes, contract damages are based on actual loss and tort damages are based on lost expected gains. But these anomalies are apparent, not real. They are consistent with the ground rules that contract damages give the plaintiff the benefit that would have been obtained from performance, whereas tort damages make good the detriment caused by the tort. Giving the plaintiff the benefit of performance often requires that losses actually incurred be made good, and compensating the plaintiff for the injury caused by the tort sometimes requires that the award include profits that the tort prevented the plaintiff from earning.[19]

The ground rules in contract and tort are illustrated by the difference between a warranty that something is true and a representation that something is true. A warranty is a guarantee, whereas a misrepresentation is only a statement of fact.[20] If a warranty is not complied with, the injured

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18 *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] S.C.J. No. 1, [1993] 1 S.C.R. 12 at 37, 99 D.L.R. (4th) 577 at 591 (S.C.C.).

19 Discussed below, under "Contingencies, Foregone Opportunities and Lost Chances". See also Chapter 3, "Inducing Breach of Contract", in the section "Damages and Remedies".

20 Contract doctrine insists that a contract can only be rescinded for a misstatement of fact, although an incorrect statement of opinion can sometimes be treated as a false statement of

party should get contract damages that put her or him in the same position as if the warranted fact had been true. If a representation turns out to be false, there may be a tort claim in deceit or in negligence, but the goal of damages is not to achieve the same position as if the statement had been true. Rather, it is to put the plaintiff in the same position as if the defendant had not stated the false fact.

An example of this is *Wiebe v. Gunderson*.[21] The plaintiffs bought a ranch from the defendants for $750,000, relying on several representations about the property and its profitability that were found to have been fraudulent. One of the reasons why the land was much less productive than the defendants had said was that the irrigation well produced water with a high sodium content that degraded the soil. The plaintiffs took over the ranch and only gradually realized the untruth of what the defendants had told them, trying as they went along to adjust the crops they grew to the actual conditions. A year after they went into possession, the plaintiffs sued for damages in deceit.

The trial judge awarded damages under various heads, one of which was the difference between what the plaintiffs had paid for the ranch, $750,000, and its actual value, $310,000. He arrived at the actual value essentially by taking the $750,000 purchase price as normal market value and deducting the "up-front" cost of remediation, which required putting in a replacement water supply and treating the soil to neutralize the high sodium content from past use of the well water. The majority of the Court of Appeal held this approach was incorrect. Newbury J.A. said:

> The question was not what a buyer who wanted to do exactly what the Wiebes tried to do, would have paid, but what a hypothetical, willing but not anxious buyer, informed of the true picture, would have paid a willing but not anxious seller for the "package" of assets in a competitive market at the time.[22]

The court put the actual value of the land, on the evidence, at $400,000, thus reducing the trial judge's assessment of this head of damage by $90,000.

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fact, namely, the existence of a factual basis for the opinion. The position in tort, particularly in negligent misstatement, is not so strict because a negligently given opinion can be actionable as such if the plaintiff reasonably relies on it. Laywers' advice is an example. See Chapter 10, "Negligence" in the section "Elements of the Tort" under "Negligent Misstatement".

21 [2004] B.C.J. No. 1844, 243 D.L.R. (4th) 1 (B.C.C.A.).

22 *Ibid.*, at para. 24.

There was a time when it was thought that damages in deceit might follow the contractual measure,[23] but it is now clear beyond doubt that this is not so. Other cases affirm that damages in deceit are not to enable the plaintiff to correct the matter that was misrepresented, which would be a contractual measure, but to compensate the plaintiff for the actual detriment in its financial position.[24] The same principle applies, *a fortiori*, to negligent misstatement.[25]

B. Legal Causation — Physical Cause and Effect

Proof of causation begins with the hypothetical question, what would the plaintiff's position have been if the defendant had not committed the tort. If the plaintiff can satisfy the court that if the defendant had not committed the tort the plaintiff would not have suffered the loss in question, causation has been proved on a "but for" basis — but for the tort, there would have been no loss. The plaintiff is not always defeated if "but for" causation cannot be proved. Sometimes the criterion of "but for" causation is displaced by a less conclusive showing of a causal link. A less demanding standard is found in several contexts that are analytically different from each other.

In examining these contexts it is useful to distinguish between, on the one hand, issues of physical cause and effect, and, on the other hand, issues of causation linked to the inducement of, or failure to deter, someone's course of conduct. The latter will be discussed in the next section. For physical causation, the basic principle is the "but for" rule. The plaintiff must prove, on a balance of probabilities, that the physical harm would not have occurred but for the defendant's tortious conduct. Where the nature of the case is such that the plaintiff has only limited means of proof, the plaintiff is entitled to ask the court to infer causation from the circumstances. So, in *Snell v. Farrell*,[26] the judge was held to have inferred rightly that the eye surgeon's negligently continuing with an operation, despite signs of bleeding inside the eye, probably caused the subsequent injury to the optic nerve, even though there was no direct means of proving that the cause was the surgeon's negligence rather than

[23] H. McGregor, *McGregor on Damages*, 17th ed. (London: Sweet & Maxwell, 2003), ¶¶ 41-005 – 41-006.

[24] *Hepting v. Schaaf*, [1963] S.C.J. No. 75, [1964] S.C.R. 100 (S.C.C.); *Tree Island Steel Co. v. Treeter*, [1978] A.J. No. 835, 15 A.R. 266 (Alta. T.D.); *C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd.*, [1981] B.C.J. No. 1633, 33 B.C.L.R. 291 (B.C.C.A.); *Zorzi v. Barker*, [1957] B.C.J. No. 127, 8 D.L.R. (2d) 164 (B.C.C.A.); *Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd.*, [1997] A.C. 254, [1996] 3 W.L.R. 1051 (H.L.).

[25] See the discussion below, under "Legal Causation – Human Agency".

[26] [1990] S.C.J. No. 73, [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289 (S.C.C.).

a stroke in the eye, a non-culpable cause that could have produced the same injury. The evidence was consistent with either explanation, but the plaintiff had no means of proving which was right, and the reason for that inability was the surgeon's negligence, which altered the physical situation so as to make it impossible to reconstruct what happened. It was "not speculation but the application of common sense to draw such an inference where, as here, the circumstances, other than a positive medical opinion, permit".[27] The Supreme Court of Canada affirmed more recently that *Snell* stood for the proposition that the default test of causation is the "but for" test.[28]

Plaintiffs who could not prove, even by inference, that the defendant's tort physically caused the injury have nevertheless succeeded in two types of cases. One is where they showed that the tort materially contributed to the *cumulative* causation of the loss, but it is impossible to prove that the contribution was decisive. These are situations in which multiple factors combined to give rise to the risk that produced the injury, but, given the nature of the risk and the injury, it is pointless to ask whether hypothetically subtracting the defendant's tort from those factors would have led to a different outcome.

The leading example of such a case is the House of Lords' decision in *McGhee v. National Coal Board*.[29] A worker in a brick-making plant sued his employer for subjecting him to working conditions that caused him to develop dermatitis. It was clear that the dermatitis resulted from having brick dust on his skin. The problem of proof was that exposure to brick dust in the factory was not a breach of duty by the employer, but failure to provide showers so he could get the brick dust off before he travelled home was a breach of duty. The expert evidence was that the longer he had brick dust on his skin the more chance that he would develop dermatitis, but it was impossible to say that the extra contact with brick dust, owing to the lack of showers, made the difference between getting and not getting the disease. The House of Lords held that, not as a factual inference but as a modification of the legal test for causation,[30] the

27 *Ibid.*, at 336 S.C.R., 306 D.L.R.

28 *Resurfice Corp. v. Hanke*, [2007] S.C.J. No. 7, [2007] 1 S.C.R. 333, 278 D.L.R. (4th) 643, 2007 SCC 7 at para. 19 (S.C.C.).

29 [1973] 1 W.L.R. 1 (H.L.).

30 This is the interpretation of *McGhee* by the majority in *Fairchild v. Glenhaven Funeral Services Ltd.*, [2003] 1 A.C. 32, [2002] UKHL 22 (H.L.) at paras. 21 *per* Lord Bingham, 44 (*per* Lord Nicholls), 67 (*per* Lord Hoffmann), 154 (*per* Lord Rodger). Lord Hutton, at para. 109, saw it as a question of law but preferred to see the rule as laying down a means for drawing of a "factual or legal inference" rather than a novel test for proving causation. In so holding the House of Lords altered the view it took of *McGhee* in *Wilsher v. Essex Area Health Authority*, [1988] A.C. 1074 (H.L.), which was adopted in *Snell v. Farrell*, [1990] S.C.J. No. 73, [1990] 2 S.C.R. 311 at 326, 72 D.L.R. (4th) 289 at 298 (S.C.C.).

proof that the defendant had materially increased the risk that the employee would contract dermatitis was sufficient. Because the medical evidence did not permit the finder of fact to draw an inference that the dermatitis would not have occurred, but for the employer's negligence, a "less stringent causal connection was regarded as sufficient. It was enough that the employer had materially increased the risk of harm to the employee."[31]

This standard of proving causation can be called a "material contribution" standard because it is clear that the defendant's wrong formed part of a complex of factors that cumulatively created a risk that caused the injury. The plaintiff in these types of cases cannot be required to prove just how much the defendant contributed to the overall risk because there is no rational means, given the current state of knowledge, of separating out that contribution from the other factors that contributed to the risk. "But for" proof of causation is impossible in such a case. "Impossibility" is the criterion the Supreme Court of Canada has laid down for when it is permissible to substitute the "material contribution" test for the "but for" test.[32]

The other type of case in which causation has been established on a lower than "but for" standard is that of *alternative* causation of the loss. Two or more parties have each created a risk that could have caused the injury. The circumstances are such that the injury could have resulted from the risk created by A, or that created by B, or that created by C, each to the exclusion of the others. The classic example of this situation is *Cook v. Lewis*,[33] in which (on the assumed facts) two hunters each negligently shot in the plaintiff's general direction but only one of their shots hit him and the plaintiff could not prove whose shot it was. On that basis both hunters were held to be liable unless either could establish that it was the other who was responsible. The House of Lords has used the same logic to hold liable multiple defendants, where each of them exposed the victim to asbestos fibres, but the victim's mesothelioma could not be traced to the asbestos at any particular defendant's premises. All that could be shown was that the injury had to have been caused by exposure to asbestos somewhere — not necessarily cumulative exposure, because a single exposure could have caused the disease.[34] The Supreme Court of

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31 *Fairchild, ibid.*, at para. 44 (Lord Nicholls).

32 *Resurfice Corp. v. Hanke*, [2007] S.C.J. No. 7, [2007] 1 S.C.R. 333, 278 D.L.R. (4th) 643, 2007 SCC 7 at para. 25 (S.C.C.).

33 [1951] S.C.J. No. 28, [1951] S.C.R. 830, [1952] 1 D.L.R. 1 (S.C.C.).

34 *Fairchild v. Glenhaven Funeral Services Ltd.*, [2003] 1 A.C. 32, [2002] UKHL 22 (H.L.). Liability among the defendants was subsequently held to be several, not joint, each defendant's share of the liability being based on the duration and intensity of the exposure to asbestos for which it was responsible: *Barker v. Corus UK Ltd.*, [2006] 2 A.C. 572, [2006] UKHL 20 (H.L.). This was based on the view that proof that each defendant increased the

Canada has described the *Cook v. Lewis* approach as a "material contribution" test of causation, although the label is not entirely apposite in this context.[35]

Economic loss cases seldom involve questions of physical causation, but the law just discussed is relevant to the second type of causation mentioned earlier, that which turns on the defendant's wrong having caused someone (the plaintiff or a third party) to make a decision that caused the plaintiff economic loss.

C. Legal Causation — Human Agency

The distinction between the "but for" and "material contribution" tests for causation also makes itself felt in cases in which the causal chain involves human decisions. Motivating factors[36] are to loss-creating decisions what physical processes are to loss-creating physical events. Similarly to what was just observed with respect to physical causation, a tortiously caused motivating factor often will be bound up with other motivating factors. That means it may or may not be possible to attribute the decision on a "but for" basis to the tortiously created factor.

"But for" causation is provable if the evidence permits a finding to be made as to what the person's decision would have been, but for the tort. The person involved can testify to what he or she would have decided if the factor in question had not been present. That person's assertion does not have to be accepted as conclusive. A court may decide in the light of other circumstances that the person's decision would probably have been other than what he or she now, with the benefit of hindsight, says it would have been.[37] An example is *BG Checo International Ltd. v. British*

risk that the victim would develop the disease was not the same thing as proving that they caused the disease; it was only proof that they might have caused it. Apportioning liability on a probabilistic basis was therefore fair. Parliament acted quickly to restore joint liability, confining the legislation to mesothelioma cases: *Compensation Act 2006* (U.K.), 2006, c. 29, s. 3.

35 *Resurfice Corp. v. Hanke*, [2007] S.C.J. No. 7, [2007] 1 S.C.R. 333, 278 D.L.R. (4th) 643, 2007 SCC 7 at para. 27 (S.C.C.). The label is arguably misleading because it is clear that of the two hunters who would be liable, one contributed 100 per cent to the injury whilst the other contributed zero. Even if one describes what they did as material contribution to the *risk*, it is inaccurate because the risk that actually produced the injury was exclusively contributed to by one hunter and not the other. What each hunter did was not so much a material contribution to the risk as the contribution of one risk among multiple alternative risks, a different thing.

36 Torts may create motivating factors, *i.e.*, inducements to act, but they may also fail to deter (de-motivate) someone from acting. References to tortiously created "motivating factors" are meant to include both situations.

37 Compare the rule for physicians' negligent failure to warn of the risks of medical procedures, where the causal test is not what the actual plaintiff would hypothetically have

Columbia Hydro & Power Authority.[38] The plaintiff contractor claimed damages for losses it had suffered by having to clear a right of way before it built a power line. The plaintiff showed that the power authority for which it was building the line had negligently misrepresented that the line would be cleared by others and the plaintiff said that, had this misstatement not been made, it would not have entered into the contract.[39] On that basis it claimed all the losses it had incurred on the contract. The Supreme Court of Canada, like the court below, did not accept the plaintiff's assertion of what it would hypothetically have done. The courts held that if the plaintiff had not been negligently misled it would still have bid on the contract, raising its price by the estimated cost of doing the clearing plus a profit margin. Therefore the plaintiff had lost only the amount by which it would have raised its bid price.[40]

Most negligent misstatement cases turn on "but for" causation of the plaintiff's decision. Examples are where the plaintiff would not have taken the lease of a gasoline station but for the lessor's negligent estimate of what the projected volume of sales would be;[41] where a meal caterer would not have entered into a contract to supply railway work crews but for the railway's negligent misrepresentation of the estimated volume of meals;[42] where partners leaving a law firm would have insisted on more tax-efficient terms for their departure, but for the negligent advice of their tax lawyers;[43] where a senior employee would not have left his previous job, but for the new employer's negligent misstatement about the security of his new position;[44] where an employee would not have retired early, but

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decided, but a "modified objective" test that asks what a reasonable person in the plaintiff's position would have decided: *Arndt v. Smith*, [1997] S.C.J. No. 65, [1997] 2 S.C.R. 539, 148 D.L.R. (4th) 48 (S.C.C.), confirming *Reibl v. Hughes*, [1980] S.C.J. No. 105, [1980] 2 S.C.R. 880, 114 D.L.R. (3d) 1 (S.C.C.).

38 [1993] S.C.J. No. 1, [1993] 1 S.C.R. 12, 99 D.L.R. (4th) 577 (S.C.C.).

39 An argument that succeeded in the similar case of *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] S.C.J. No. 67, [1991] 3 S.C.R. 3, 84 D.L.R. (4th) 291 (S.C.C.).

40 The hypothetical scenario implicitly assumed, as it had to, that the other bidders would have raised their bids by an equal sum. Checo also succeeded in breach of contract, but the damages in contract were just the additional cost of clearing, with no profit margin, because Checo would not have had to bear that cost if Hydro had fully performed its part of the bargain. Another example of damages based on the hypothesis that the plaintiff would have entered into the same contract, but on better terms, is *Clef Aquitaine S.A.R.L. v. Laporte Materials (Barrow) Ltd.*, [2001] Q.B. 488 (C.A.) (deceit).

41 *Esso Petroleum Co. v. Mardon*, [1976] Q.B. 801, [1976] 2 W.L.R. 583 (C.A.).

42 *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] S.C.J. No. 67, [1991] 3 S.C.R. 3, 84 D.L.R. (4th) 291 (S.C.C.).

43 *Webster v. Ernst & Young*, [2003] B.C.J. No. 349, 222 D.L.R. (4th) 193 (B.C.C.A.).

44 *Queen v. Cognos Inc.*, [1993] S.C.J. No. 3, [1993] 1 S.C.R. 87, 99 D.L.R. (4th) 626 (S.C.C.).

for the employer's misrepresentation of his pension rights if he did so;[45] where the purchaser would not have acquired a business but for negligent misstatements in the financial statements;[46] and where the purchaser would not have bought property but for the municipality's negligent statement that water service would be available.[47] In each case the damages were, accordingly, based on the difference between the plaintiff's actual financial position, having entered into the transaction, and what his or her position would have been if he or she had not entered into the transaction.

Although "but for" causation is the usual test in negligent misstatement cases, there is clear authority that the test in deceit cases is an analogue of "material contribution". The plaintiff is entitled to succeed if the fraudulent statement formed one element in the cumulative motivation for the loss-creating decision, even if that element cannot be shown to have tipped the scales in favour of the decision.

> [I]n this field the Court does not allow an examination into the relative importance of contributory causes. "Once make out that there has been anything like deception, and no contract resting in any degree on that foundation can stand."[48]

For this reason it is no answer to a claim in deceit that the plaintiff's decision was also based on a belief in other, unrelated facts that might well have been enough to cause the plaintiff to make the same decision even if the fraudulent statement had not been made. Such a "co-inducing belief" does not impair the tort claim. Thus the plaintiff does not have to prove that he or she would not have entered into the transaction but for the misrepresentation, and is entitled to recover the whole loss from entering into the transaction that the representation, in whatever degree, induced.[49] The defendant's liability is unaffected even if the defendant can show that

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45 *Gauthier v. Canada (Attorney General)*, [2000] N.B.J. No. 143, 185 D.L.R. (4th) 650 (N.B.C.A.).

46 *1874000 Nova Scotia Ltd. v. Adams*, [1997] N.S.J. No. 172, 146 D.L.R. (4th) 466 (N.S.C.A.).

47 *Black v. Lakefield (Village)*, [1998] O.J. No. 4060, 166 D.L.R. (4th) 96 (Ont. C.A.).

48 *Barton v. Armstrong*, [1976] A.C. 104 at 118, [1973] U.K.P.C. 2 (P.C.), quoting from *Reynell v. Sprye* (1852), 1 De G.M. & G. 660 at 708, 42 E.R. 710 at 728, *per* Lord Cranworth L.J..

49 *Sidhu Estate v. Bains*, [1996] B.C.J. No. 1246, [1996] 10 W.W.R. 590 at paras. 35-36 (B.C.C.A.), leave to appeal refused [1996] S.C.C.A. No. 403, [1997] 1 S.C.R. v (note) (S.C.C.); *Parallels Restaurant Ltd. v. Yeung's Enterprises Ltd.*, [1990] B.C.J. No. 1861, 49 B.L.R. 237 (B.C.C.A.); *Smith v. Chadwick* (1884), 9 A.C. 187 at 196 (H.L.); *Downs v. Chappell*, [1997] 1 W.L.R. 426 at 433 (C.A.); *Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459 (C.A.); *Arnison v. Smith* (1889), 41 Ch. D. 348 at 369 (Ch. D.).

the plaintiff was negligent in holding the co-inducing belief. Damages in deceit are not subject to reduction for contributory fault.[50]

There is Canadian authority that applies this principle to a claim for damages for negligent misstatement. Investors who had bought debentures relying on a negligently prepared auditors' report did not have to prove that they would not have acquired the debentures, but for the defendants' negligent omission to state certain factors in the report. Reliance on the misstatement did not have to be the only factor that induced the plaintiffs to act; it sufficed if it was one of several factors. The court could "see no reason why the burden of proving reliance by the plaintiff, and the drawing of inferences with respect to the plaintiff's state of mind, should be any different in cases of negligent misrepresentation than it is in cases of fraud".[51] English authority, by contrast, is equivocal on this point.[52]

The Supreme Court of Canada has explicitly approved using the "material contribution" approach where the question is not what the plaintiff would have done, but what a third party would have done if the defendant had not been negligent. The plaintiff in *Walker Estate v. York-Finch General Hospital*[53] was a woman who had received a transfusion of infected blood, and who could prove that the blood collection agency had been negligent in failing to screen adequately for donors whose blood might be infected.[54] The defendant agency argued that she had to prove causation by showing that if the defendant had given an appropriate warning to would-be donors who posed a risk, the particular donor whose blood was the source of her transfusion would have been deterred from giving blood. The court held that she need not meet this standard; it was sufficient to persuade the court that the defendant's negligence "materially

50 *Standard Chartered Bank v. Pakistan National Shipping Corp.*, [2003] 1 A.C. 959, [2002] UKHL 43 (H.L.).

51 *Kripps v. Touche Ross & Co.*, [1997] B.C.J. No. 968, [1997] 6 W.W.R. 421 at para. 102 (B.C.C.A.), *per* Finch J.A., leave to appeal refused [1997] S.C.C.A. No. 380, [1997] 3 S.C.R. xv (note) (S.C.C.). On proving reliance by inference from materiality of the statement combined with the plaintiff, subsequent conduct, see Chapter 10, "Negligence" in the section "Elements of the Tort" under "Negligent Misstatement" – "Reliance in Fact".

52 The question of the causal test is treated as open in *Swindle v. Harrison*, [1997] 4 All E.R. 705 at 718, [1997] EWCA Civ 1339 (C.A.). See also *Downs v. Chappell*, [1997] 1 W.L.R. 426 (C.A.); *Bristol & West Building Society v. Mothew* (1996), [1998] Ch. 1 (C.A.). The latter interprets the former as saying that a plaintiff who acts on negligent advice or information of a solicitor need only prove "that he would not have acted as he did if he had not been given such advice or information". This is distinguished from having to prove "that he would not have acted as he did if he had been given the proper advice or the correct information" (at 11). These seem both to be "but for" tests, albeit using different hypotheses.

53 [2001] S.C.J. No. 24, [2001] 1 S.C.R. 647, 198 D.L.R. (4th) 193, 2001 SCC 23 (S.C.C.).

54 In 1983, when the donation took place, there was not yet a reliable means of testing the blood for the presence of the particular infection (HIV), so screening donors was the only means of reducing the risk.

contributed" to the occurrence of the injury. The rationale for departing from the "but for" criterion was that it might be "difficult or impossible to prove hypothetically what the donor would have done had he or she been properly screened".[55] This meant that "the but-for test could operate unfairly, highlighting the possibility of leaving legitimate plaintiffs uncompensated".[56] It is not clear how far this principle goes. The rationale would presumably not apply to cases like the negligent misstatement cases that turn on what the plaintiff would have done if the defendant had not been negligent, because the plaintiff would generally be able to give evidence on that issue. It is not even clear whether the *Walker* "material contribution" standard applies to all third-party cases, or only to those in which, as in *Walker*, the third party is not available to testify.

The Supreme Court's latest examination of the standard by which causation must be proved also involved a human decision as part of the causal chain. *Resurfice Corp. v. Hanke*[57] arose out of an accident when the operator of an ice-resurfacing machine either put, or failed to see that someone else had put, the hot-water hose into the intake for the gasoline tank instead of the hot water tank, creating gasoline vapour that then ignited. The plaintiff, the badly injured operator of the machine, sought damages from the machine's manufacturer on the basis that it had negligently designed the intakes for the two tanks so that it was easy to confuse the two. The trial judge found that the plaintiff knew which was which, so there was no causal link between the alleged design fault and the accident; the only cause was his own mistake. The Supreme Court upheld this conclusion as a correct application of "but for" causation. There was no room to argue that the design "materially contributed" to the accident. This was not a case in which the "material contribution" test was appropriate. Such cases required that it be "impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the 'but for' test", and the "impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge".[58] "[T]he basic test for causation remains the 'but for' test."[59] In this case, the court implied, it was not "impossible" for the plaintiff to prove what he would have done, but for the alleged design flaw. His

55 *Walker Estate v. York-Finch General Hospital*, [2001] S.C.J. No. 24, [2001] 1 S.C.R. 647, 198 D.L.R. (4th) 193, 2001 SCC 23 at para. 88 (S.C.C.). In the actual case the trial judge, according to the Supreme Court's interpretation, was able to make a finding on a "but for" basis as to what the donor (since deceased) would have done.

56 *Ibid.*

57 [2007] S.C.J. No. 7, [2007] 1 S.C.R. 333, 278 D.L.R. (4th) 643, 2007 SCC 7 (S.C.C.).

58 *Ibid.*, at para. 25.

59 *Ibid.*, at para. 29.

action failed because he could not link his mistake with any design flaw in the first place.[60]

D. *Contingencies, Foregone Opportunities and Lost Chances*

Irrespective of whether the defendant's tort is shown to have caused the plaintiff's loss on a "but for" or on a "material contribution" basis, it is taken to have caused the whole loss.[61] Putting a value on that loss, however, may involve further issues of post-tort or future or hypothetical fact.

Recall that the plaintiff's loss is assessed by comparing the plaintiff's actual position with the position the plaintiff would have been in if the defendant had not committed the tort. Taking first the plaintiff's actual position, it may have been affected positively or negatively by the happening of some extraneous event between the time of the tort and the time damages are assessed, what might be called a realized contingency. If it is unrelated to the harm caused by the tort, as when the plaintiff wins a lottery that makes good all the losses caused by the defendant, it is simply ignored. If the event affects the harm caused by the tort it must be taken into account. What was a contingency at the time of the tort is now a certainty. An example is furnished by an Australian case in which damages were sought for the negligent valuation of a property. The defendant had failed to take into account the risk that the property's value would be reduced by future competition from a nearby business, and so the plaintiff had paid too much for it. By the time damages were assessed, this risk had materialized and the actual loss in value was known. The High Court held that the plaintiff's loss, that is, the amount of its overpayment, was to be assessed on the basis of the actual lowering of the

60 Arguably, the question was not of causation but of standard of care: would a reasonable manufacturer have anticipated inadvertence by the operator and designed the machine so as to inhibit a lapse such as the plaintiff's? If the answer was "yes", "but for" causation would follow as a matter of course. However, the trial judge pretty clearly thought the answer was "no": *Hanke v. Resurfice Corp.*, [2003] A.J. No. 946, 333 A.R. 371, 2003 ABQB 616 at paras. 65-66 (Alta. Q.B.).

61 Except where multiple alternative tortfeasors are held severally liable in proportion to their fault, as in asbestos for which it was responsible: *Barker v. Corus UK Ltd.*, [2006] 2 A.C. 572, [2006] UKHL 20 (H.L.). This was based on the view that proof that each defendant increased the risk that the victim would develop mesothelisma was not the same thing as proving that they caused the disease; it was only proof that they might have caused it. Apportioning liability on a probabilistic basis was therefore fair. Parliament acted quickly to restore joint liability, confining the legislation to mesothelioma cases: *Compensation Act 2006* (U.K.), 2006, c. 29, s. 3.

property's value, not the risk of lowered value that would have been estimated at the time the plaintiff bought the property.[62]

Although it is the plaintiff's current, actual financial position that is used for assessing damages, evaluating that position must take into account future events that are relevant to the loss caused by the defendant. If the plaintiff is claiming, for example, that it was tortiously induced to pay too much for a business that it continues to operate,[63] the actual, current value of the business in the plaintiff's hands is essentially the discounted value of the business's future profits, and so all the contingencies that might affect those profits have to be taken into account, in one way or another, in putting a value on the business as a going concern.

Take now the other side of the equation, the hypothetical position the plaintiff would have been in if the tort had not been committed. This by definition cannot be proved, only estimated. The estimation again involves contingencies, in relation both to events that would have happened in the past (that is, before the assessment of damages takes place) if the tort had not intervened, and to events that would have happened, or may still happen, in the future. This is often an issue in cases involving tortious interference with business. For example, to take one case, what profits would the plaintiff have made from a uniquely designed boat if sales had not been affected by the defendant's copying the design and so passing off its competing boat as the plaintiff's?[64]

In many tort cases, economic loss arises from having entered into a transaction. The plaintiff claims damages based on the hypothesis that, but for the tort, it would not have entered into the transaction at all, or would have entered into it on different terms.[65] If the basis for damages is that the plaintiff would have made the same contract, but on better terms, the question is how much extra the plaintiff would have earned under the more favourable terms.[66] If the assumption is that the plaintiff would not have made the contract at all, the damages are typically the amount lost on the contract. Usually the court is not called upon to make a finding about what the plaintiff would have done with its resources if it had not committed them to the losing transaction; it is simply assumed that the resources would not have been lost. Sometimes, however, a plaintiff adduces

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[62] *HTW Valuers (Central Queensland) Pty. Ltd. v. Astonland Pty. Ltd.* (2004), 79 A.L.J.R. 190, [2004] HCA 54 (Aust. H.C.). Realized contingencies are more common in physical injury cases, as where a post-tort event would have caused the same injury anyway: *Jobling v. Associated Dairies Ltd.*, [1982] A.C. 794, [1981] 3 W.L.R. 155 (H.L.).

[63] This assumes that continuing to operate the business is not an unreasonable failure to mitigate.

[64] *Atkinson & Yates Boatbuilders Ltd. v. Hanlon*, [2003] N.J. No. 186, 229 Nfld. & P.E.I.R. 166, 2003 NLSCTD 112 (N.L.T.D.).

[65] See above, under "Legal Causation – Human Agency".

[66] *Ibid.*

evidence that if it had not been engaged in the bad transaction produced by the tort, it would have put its resources — time, money — to an alternative use that would have yielded the plaintiff an overall gain. Courts have accepted such claims when the gains foregone have been adequately proved.[67] Contractors have been awarded profits they would have made on other projects if they had not been induced by fraudulent or negligent misstatements to take on the job on which they suffered a loss. Their damages thus comprised both the actual loss on the work they did do and the foregone profit on other work they would have done.[68]

In *Wiebe v. Gunderson*,[69] a couple who were fraudulently induced to buy a ranch claimed not only their loss on that purchase, but also the foregone income that the husband would have earned as a truck driver, and they would have earned by banking the capital. The court held that both elements could be factored into the damages. However, it noted that there could be an element of double counting, because the damages for the amount by which the plaintiffs paid too much for the ranch — the "actual loss" part of the damages — already compensated the plaintiffs for added revenues they thought they would earn with the ranch, since those added revenues were presumably the basis for the amount by which the plaintiffs overpaid.[70] It is submitted with respect that this concern about double counting overlooks the difference between compensating people for profits they did not make, and compensating them for *money they paid* for profits they did not make. The damages for diminution in value of the property merely compensated the plaintiffs for money they had actually spent and for which they got no value in return; the damages were in no sense a substitute for the earnings that did not materialize.[71]

The question of what the plaintiff would have done with its resources, had it not committed them to the tortiously induced transaction, arguably also lies behind a particular question that has arisen in Canada in fiduciary duty cases [72] and in England in several negligent misstatement cases. The question arises when the induced transaction was an investment in property, the market price for which fell between the time the plaintiff bought it and the time it parted with it. How much of the loss on

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67 As they were not in *K.R.M. Construction Ltd. v. British Columbia Railway Co.*, [1982] B.C.J. No. 2049, 40 B.C.L.R. 1 (B.C.C.A.).

68 *V.K. Mason Construction Ltd. v. Bank of Nova Scotia*, [1985] S.C.J. No. 12, [1985] 1 S.C.R. 271, 16 D.L.R. (4th) 598 (S.C.C.).

69 [2004] B.C.J. No. 1844, 243 D.L.R. (4th) 1, 2004 BCCA 456 (B.C.C.A.).

70 *Ibid.*, at para. 31.

71 To compensate for the earnings a plaintiff would have earned if the false statements had been true, would be to adopt the contractual measure of damages, which is incorrect in a tort case: see above, under "Tort and Contract Measures".

72 In connection with assessing equitable compensation; see below, in the section "Compensatory Awards" under "Equitable Damages and Equitable Compensation" – "Differences Between Equitable Monetary Awards and Damages" – "Causation – Breach of Fiduciary Duty".

the transaction should be regarded as caused by the tort, and how much by general market conditions? In two of the English cases, lenders claimed for losses they had incurred by financing a purchase of property that was negligently overvalued by defendant valuers. The House of Lords distinguished the losses attributable to the overvaluation of the property from the losses attributable to falls in the market for property generally, and held that only the former were recoverable. This meant the damages could not exceed the amount by which the defendants had overvalued the property.[73] This "*SAAMCO* principle"[74] was said not to involve any question of factual causation because the question arose "subsequent to the ascertainment of the lender's basic loss arising from the valuer's breach of duty".[75] It was a matter of the scope of the duty of care, a quantification issue that could be seen as of the same order as remoteness of damage.[76]

Arguably, however, it is really a matter of what the plaintiff would have done with its money, had the tort not been committed — which is in a sense a causation question. The decisions can be seen as resting on an implicit assumption that, had the plaintiff not invested its funds in the overly generous loan, it would still have invested them in other loans in the same property market and so would have been subject to the same market-related risk.[77] The loss attributable to that risk, as distinct from the overvaluation, should therefore be excluded from the damages on the hypothesis that the plaintiff would have suffered that part of the loss even if it had not been tortiously misled.[78] So viewed, the *SAAMCO* principle

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73 *Platform Home Loans Ltd. v. Oyston Shipways Ltd.*, [2000] 2 A.C. 190 (H.L.); *Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co.*, [1997] A.C. 191 (H.L.).

74 Named after the acronym of one of the plaintiffs in the *Banque Bruxelles* case.

75 *Platform Home Loans Ltd. v. Oyston Shipways Ltd.*, [2000] 2 A.C. 190, at 208 (H.L.), *per* Lord Hobhouse.

76 *Ibid.*, at 208-10. The characterization of the principle mattered in the *Platform* case because it formed the basis for the conclusion that the "cap" on recovery was not itself reduced on account of contributory negligence. Only the claimant's total loss on the loan was apportioned and the (unadjusted) "cap" was then applied. Had the principle been one of causation, *i.e.*, defining rather than quantifying the loss for which the defendant was liable, there would have been an argument for regarding the maximum recovery, not as the amount of the actual overvaluation, but as the amount of the overvaluation discounted for the plaintiff's own fault.

77 Compare the distinction drawn in some U.S. securities fraud causation between "transaction causation" and "loss causation", the latter confining the plaintiff's damages to the loss "proximately caused" by the misrepresentation, lest the defendant become an insurer of the cost of the plaintiff's investment; see *Hodgkinson v. Simms*, [1994] S.C.J. No. 84, [1994] 3 S.C.R. 377 at 449-50, 117 D.L.R. (4th) 161 at 205-206 (S.C.C.).

78 The decision in *Platform* is still right, even on this view, because it would be unfair to assume that the plaintiffs' hypothetical alternative loans would have been affected by contributory negligence as the actual one was. Therefore the *SAAMCO* "cap" should indeed be based on the actual, non-discounted overvaluation, since that permits recovery up to the amount that the plaintiff would have retained if (on the unspoken assumption referred to in the text) it had used the same funds, without contributory negligence, on other loans.

can be seen as the converse of the rule that a plaintiff is entitled to recover *more* than its actual loss on the induced transaction if the plaintiff can show that, had it not been induced into the losing transaction, it would have employed its resources in alternative, profitable activities.

It should be noted that the House of Lords drew a clear distinction between fraudulent and negligent inducement from the point of view of the "*SAAMCO* principle." In deceit the plaintiff is entitled to recover all the loss directly flowing from the induced *transaction*, whereas in negligence the loss does not extend beyond the consequences flowing from the negligent *misrepresentation*, that is, the *SAAMCO* principle applies.[79]

In "loss of a chance" cases the contingent nature of the position the plaintiff would have been in, but for the tort, is explicitly recognized. The plaintiff claims it was deprived of an opportunity to realize a gain and, if successful, recovers a portion of the gain based on the probability that it would have been realized (or, which amounts to the same thing, discounted for the contingency that it would not have been realized). In principle, damages can be awarded for loss of the chance of a gain, even a less than 50 per cent chance, as long as that chance is "a real and substantial possibility and not mere speculation".[80]

So far as financial loss is concerned,[81] "loss of a chance" is a more prominent feature in contract,[82] but it arises in tort, especially in cases of

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79 *Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd.*, [1997] A.C. 254 at 283 (H.L.); *Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co. (sub nom. South Australia Asset Management Corp. v. York Montague Ltd.)*, [1997] A.C. 191 at 215-16 (H.L.).

80 *Athey v. Leonati*, [1996] S.C.J. No. 102, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 at para. 27 (S.C.C.).

81 Loss of a chance is a frequent and intractable issue in medical malpractice cases, because a plaintiff often cannot prove that non-negligent treatment would have ameliorated his or her illness. Patients have accordingly framed their claims as loss of a chance of getting better. Not only are the variables extremely imponderable, but in many cases nobody, including the expert witnesses, can disentangle the hypothetical question, what the course of the patient's recovery would have been, from the factual question, whether at the time of the doctor's negligence the patient's body had already deteriorated to the point that treatment would have been useless. In the face of these problems, even at the risk of being illogical, the courts in both Canada (*Laferrière v. Lawson*, [1991] S.C.J. No. 18, [1991] 1 S.C.R. 541, 78 D.L.R. (4th) 609 (S.C.C.); *St-Jean v. Mercier*, [2002] S.C.J. No. 17, [2002] 1 S.C.R. 491, 209 D.L.R. (4th) 513 (S.C.C.); *Cottrelle v. Gerrard*, [2003] O.J. No. 4194, 233 D.L.R. (4th) 45 (Ont. C.A.), leave to appeal refused [2003] S.C.C.A. No. 549, [2004] 1 S.C.R. vii (note) (S.C.C.)) and England (*Gregg v. Scott*, [2005] 2 A.C. 176, [2005] 2 W.L.R. 268, [2005] UKHL 2 (H.L.); *Hotson v. East Berkshire Health Authority*, [1987] A.C. 750, [1987] 3 W.L.R. 232 (H.L.)) have refused to award damages for loss of a chance of recovery when on the evidence that chance was less than 50 per cent.

82 As in *Chaplin v. Hicks*, [1911] 2 K.B. 786 (K.B.D.), the loss of a chance to win a beauty contest.

negligent professional advice.[83] So, in a case in which a realtor acting for the purchaser negligently failed to try to get security for the vendor's warranty, the damages were based on a 20 per cent chance that the vendor would have given such a warranty.[84] Where accountants gave negligent tax advice about the terms on which members of a law firm should leave the partnership, damages had to be based on a scenario as to what the departing partners would have been able to negotiate if they had been given non-negligent tax advice. Contingencies, such as the firm's ability to make certain financial commitments, had to be taken into account if they were material, not merely speculative.[85] And, of course, whenever a lawyer negligently misses a limitation period, the client's loss depends upon estimating the chance that the lawsuit would have been successful.[86]

3. *Mitigation and Issues of Timing*

A plaintiff who becomes aware of the defendant's wrong must act reasonably to mitigate his or her damages, that is, cut his or her losses. The defendant has the onus of showing that the plaintiff has failed to do this.[87] If the plaintiff has failed to mitigate his or her losses, the damages will be reduced to the extent that the plaintiff, acting reasonably, could have prevented or made good the loss. The mitigation principle closely resembles that of contributory fault, but the two are analytically distinct. Contributory fault is a defence (at common law, a complete defence) to liability based on the plaintiff's fault being a cause of the damage. Mitigation is an issue of quantification that arises after the damage is done, based on the idea that the defendant's responsibility for the loss ends at the point where the plaintiff could reasonably have prevented further loss.[88] Contributory negligence is not a defence to certain wrongs,

83 For a personal injury case, see *Smith v. Knudsen*, [2004] B.C.J. No. 2509, 247 D.L.R. (4th) 256 (B.C.C.A.) (loss of a chance to bid on a government contract).

84 *Wong v. 407527 Ontario Ltd.*, [1999] O.J. No. 3377, 179 D.L.R. (4th) 38 (Ont. C.A.).

85 *Webster v. Ernst & Young*, [2000] B.C.J. No. 701, 184 D.L.R. (4th) 619 at para. 22 (B.C.C.A.), leave to appeal refused [2000] S.C.C.A. No. 263 (S.C.C.). The case came back to the Court of Appeal on quantification: [2003] B.C.J. No. 349, 222 D.L.R. (4th) 193 (B.C.C.A.).

86 For example, *Valness v. MacLowich*, [1997] S.J. No. 321, [1997] 3 W.W.R. 754 (Sask. Q.B.), affd [1998] S.J. No. 317 (Sask. C.A.) (chance of success 100 per cent).

87 S.M. Waddams, *The Law of Damages*, 4th ed. (Toronto: Canada Law Book, 2004) at ¶ 15.140; J. Cassels & E. Adjin-Tettey, *Remedies: The Law of Damages*, 2d ed. (Toronto: Irwin Law, 2008) at 375-84; C.-M. O'Hagan, "Remedies", in L.D. Rainaldi, ed., *Remedies in Tort*, looseleaf (Toronto: Thomson Carswell, 1987), Chapter 27 at § 150.1; H. McGregor, *McGregor on Damages*, 17th ed. (London: Sweet & Maxwell, 2003) at ¶ 7-019.

88 Waddams, *ibid.*, at ¶ 15.20. Consistently with this analytical distinction, contributory negligence is discussed in the chapters dealing with the individual wrongs.

most notably deceit,[89] but the obligation to mitigate exists irrespective of the nature of the wrong.[90]

What the plaintiff is reasonably required to do by way of mitigation depends on all the circumstances. After some uncertainty, it is now fairly clear that those circumstances include the resources, monetary and otherwise, available to the plaintiff. Steps that are reasonable to ask of a well-financed plaintiff may be unreasonable to ask of a cash-strapped plaintiff. For a time *The "Liesbosch"* case[91] stood for the proposition, never clearly defined, that lack of funds could not be used by the plaintiff as a reason for failing to mitigate, because losses attributable to that factor were regarded as too remote.[92] The House of Lords has now laid *The "Liesbosch"* to rest in England, by holding that it was just decided on its facts and there is no special rule that losses caused by the plaintiff's impecuniosity are automatically considered to be too remote. The rule that the wrongdoer must take his victim as he finds him "applies to the economic state of the victim in the same way as it applies to his physical and mental vulnerability".[93] The Alberta Court of Appeal, without adverting to *The "Liesbosch"*, has upheld an award of damages in a products liability case for profits that the plaintiff companies would have made in the five following years, had they not been forced out of business as a result of the defendant's negligence in supplying them with a defective product.[94]

If a plaintiff has in fact recouped the losses caused by the wrong, the damages may still be recoverable if the recoupment was causally unrelated to the wrong. Some cases are obvious, like winning a lottery the day after the loss occurs. Others are less clear. In *1874000 Nova Scotia Ltd. v. Adams*,[95] the plaintiff bought a company on the strength of the defendant's advice, which indicated the company's business was healthy. The business was actually not viable and failed. The plaintiff used the corporation as a vehicle for an entirely new business, which proved profitable.

89 See Chapter 2, "Deliberate Misrepresentation" in the section "Deceit" under "Defences" – "Contributory Fault".

90 See the deceit case of *Wiebe v. Gunderson*, [2004] B.C.J. No. 1844, 243 D.L.R. (4th) 1 (B.C.C.A.).

91 *The "Liesbosch" v. The "Edison"*, [1933] A.C. 449 (H.L.).

92 See *Amar Cloth House Ltd. v. La Van & Co.*, [1997] B.C.J. No. 1048, [1997] 6 W.W.R. 382, 33 B.C.L.R. (3d) 312 (B.C.S.C.), in which Huddart J. analyzes the messy case law that surrounds the *Liesbosch* case. See also *Alcoa Minerals of Jamaica Ltd. v. Broderick*, [2000] 3 W.L.R. 23 (P.C.).

93 *Lagden v. O'Connor*, [2004] 1 A.C. 1067, [2003] UKHL 64 at para. 61 (H.L.).

94 *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, [2004] A.J. No. 1098, 245 D.L.R. (4th) 650, 2004 ABCA 309 at paras. 140-45 (Alta. C.A.), leave to appeal refused [2004] S.C.C.A. No. 542, [2005] 1 S.C.R. ix (note) (S.C.C.).

95 [1997] N.S.J. No. 172, 146 D.L.R. (4th) 466 (N.S.C.A.).

The court held that the plaintiff should nevertheless recover the difference between what he paid for the shares in the company and what they were actually worth at the time he bought them. The subsequent turnaround in their value was not mitigation but an extrinsic event, unrelated to the consequences of the defendant's negligence.

The obligation to mitigate is linked to the issue of the time as of which damages are measured. If the plaintiff's loss relates to the value of an asset that, for instance, the plaintiff was tortiously induced to buy for too high a price, the damages will be based on the market value of that asset as of the time when, bearing in mind the obligation to mitigate, the plaintiff could reasonably have been expected to sell it. That time may be fairly promptly after the tort is discovered,[96] but it may be later if one of the consequences of the tort is that the plaintiff is "locked in" to holding onto the property for a time.[97] A leading Canadian case on this point is *Asamera Oil Corp. v. Sea Oil & General Corp.*,[98] a conversion case (as well as a breach of contract case) involving the failure to return borrowed shares whose market value fluctuated greatly after the tort was committed. For some years the plaintiff had maintained, without litigating, a claim for the actual return of the shares. The court held this was initially a reasonable stance and so there was no obligation during that period to buy replacement shares. But eventually, according to the court, things had got to the point that the plaintiff should have taken legal steps to resolve that claim, and its inaction from that point on therefore amounted to a failure to mitigate. Damages were assessed on the basis of the market price of the shares as of that date, because it was then that the plaintiff ought to have acquired replacement shares.

(ii) Non-pecuniary Loss

Claims for non-pecuniary losses are rare among the economic torts cases, but they can occur. The most important case to this point is *Young v. Bella.*[99] A university professor and the head of the professor's department informed child protection authorities that there were indications that one of their students, the plaintiff, had been guilty of abusing children. They were negligent in doing so because the grounds for the report were wholly inadequate. The plaintiff sued the faculty members and the

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96 *Wiebe v. Gunderson*, [2004] B.C.J. No. 1844, 243 D.L.R. (4th) 1 (B.C.C.A.); *Allan v. McLennan*, [1916] B.C.J. No. 113, 31 D.L.R. 617 (B.C.C.A.).

97 *Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd.*, [1997] A.C. 254 at 265-67 (H.L.).

98 [1978] S.C.J. No. 106, [1979] 1 S.C.R. 633, 89 D.L.R. (3d) 1 (S.C.C.).

99 [2006] S.C.J. No. 2, [2006] 1 S.C.R. 108, 261 D.L.R. (4th) 516, 2006 SCC 3 (S.C.C.).

university for the economic loss she suffered because the false imputations had destroyed her potential career in social work. The Supreme Court of Canada upheld a jury award for $409,000 for lost income and cost of future care, and $430,000 in non-pecuniary damages. The non-pecuniary losses were foreseeable,[100] and there was no reason to apply in this context the "cap" on non-pecuniary awards in personal injury cases.[101] Unlike in those cases, there was no evidence that the size of awards posed a threat of an escalation of insurance premiums or unacceptable disparities between recovery in different cases.[102]

In order to be recoverable in negligence,[103] emotional injury or some other form of intangible loss, such as inconvenience and dislocation,[104] must be a foreseeable result of the tort. This can occur, for example, if a negligent misstatement induces the plaintiff to embark on a transaction that has a personal as well as a financial component, since it is readily foreseeable that the failure of the transaction can lead to emotional loss. This has been applied to advice that led to the loss of workers' compensation benefits,[105] and the negligent handling of a criminal defence so as to cause the client to become depressed.[106] As far as the seriousness of the emotional injury is concerned, the courts have tended to insist on a "recognizable psychiatric illness" where the emotional injury is the only injury complained of.[107] However, the test seems to be somewhat more accommodating where there is no doubt that the plaintiff has suffered compensable injury and the issue is whether emotional loss should be regarded as foreseeably accompanying that injury. Emotional loss has been held recoverable as a head of damage in contract as long as it is of a

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100 *Ibid.*, at para. 60.

101 Non-pecuniary damages arising from even the most catastrophic personal injury must not exceed $100,000, adjusted for inflation since the "cap" was introduced in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] S.C.J. No. 6, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452 (S.C.C.); *Thornton v. Prince George School District No. 37*, [1978] S.C.J. No. 7, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480 (S.C.C.); and *Arnold v. Teno*, [1978] S.C.J. No. 8, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609 (S.C.C.). At the time of trial in *Young v. Bella* the inflation-adjusted "cap" would have been about $270,000.

102 *Young v. Bella*, [2006] S.C.J. No. 2, [2006] 1 S.C.R. 108, 261 D.L.R. (4th) 516, 2006 SCC 3 at para. 65 (S.C.C.). The court had earlier refused to apply the "cap" in a defamation case: *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129 at paras. 170-76 (S.C.C.).

103 Damages in at least some intentional torts, notably deceit, are not subject to a forseeability requirement: see below, under "Remoteness".

104 *1874000 Nova Scotia Ltd. v. Adams*, [1997] N.S.J. No. 172, 146 D.L.R. (4th) 466 (N.S.C.A.).

105 *West v. Eisner*, [1999] O.J. No. 4705, 41 C.P.C. (4th) 378 (Ont. S.C.J.).

106 *Boudreau v. Benaiah*, [2000] O.J. No. 278, 182 D.L.R. (4th) 569 (Ont. C.A.).

107 *Vanek v. Great Atlantic & Pacific Co. of Canada*, [1999] O.J. No. 4599, 48 O.R. (3d) 228 (Ont. C.A.), leave to appeal refused [2000] S.C.C.A. No. 50 (S.C.C.); *Anderson v. Excel Collection Services Ltd.*, [2005] O.J. No. 4195, 260 D.L.R. (4th) 367 (Ont. Div. Ct.).

"degree sufficient to warrant compensation",[108] and there is no reason to think the standard ought to be different in tort.[109] The non-pecuniary losses for which the student was compensated in *Young v. Bella* encompassed "anxiety, embarrassment, insomnia, paranoia and depression".[110]

(iii) Remoteness

The rules for determining whether a particular kind of damage is too remote are no different in economic loss cases from any other tort cases. However, the issue seldom arises. In negligence claims for pure economic loss the foreseeability specifically of economic loss is an integral part of the test for the existence of the duty of care.[111] For many of the torts other than negligence, such as interference with economic relations, conspiracy and causing loss by unlawful means, the intention to bring about the loss is likewise an element in the tort itself. In deceit, it seems clear that damages are not limited to foreseeable losses; they extend to "all the actual damages directly flowing from the fraudulent inducement", and "it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen".[112] Even so, no case actually offers an example of a claim in deceit for a loss that was actually unforeseeable; the consequences of a fraud are usually easy to foresee.[113]

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[108] *Fidler v. Sun Life Assurance Co. of Canada*, [2006] S.C.J. No. 30, [2006] 2 S.C.R. 3, 271 D.L.R. (4th) 1, 2006 SCC 30 at para. 47 (S.C.C.).

[109] See *Mustapha v. Culligan of Canada Ltd.*, [2008] S.C.J. No. 27, [2008] 2 S.C.R. 114, 293 D.L.R. (4th) 29, 2008 SCC 27, at para. 9 (S.C.C.), to the effect that emotional injury is recoverable in negligence as long as it is "serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept".

[110] [2006] S.C.J. No. 2, [2006] 1 S.C.R. 108, 261 D.L.R. (4th) 516, 2006 SCC 3 at para. 22 (S.C.C.).

[111] See Chapter 10, "Negligence".

[112] *Doyle v. Olby (Ironmongers) Ltd.*, [1969] 2 Q.B. 158 at 167 (C.A.), *per* Lord Denning M.R., approved in *Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd.*, [1997] A.C. 254 at 264-65 (H.L.), and in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] S.C.J. No. 91, [1991] 3 S.C.R. 534 at 565, 85 D.L.R. (4th) 129 at 161 (S.C.C.).

[113] As in *C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd.*, [1981] B.C.J. No. 1633, 33 B.C.L.R. 291 (B.C.C.A.), and, indeed, in *Doyle v. Olby (Ironmongers) Ltd.*, *ibid.*, itself.

(b) Equitable Damages and Equitable Compensation

(i) Monetary Awards in Equity

The distinction between common law and equitable causes of action still looms large in determining the issue of remedy. The fusion of law and equity has not led to the wholesale association of equitable remedies with common law causes of action in tort.[114] There has, however, been considerable growth in the other direction, that is, in awarding damages along common law lines as a remedy for equitable wrongs. To clarify this statement, some background to monetary compensation in equity is required. The monetary orders made by courts exercising equity jurisdiction can be divided into three categories: equitable damages, equitable compensation, and an account of profits.

To take equitable damages first, the jurisdiction to award them essentially dates, in England, from 1858, when Lord Cairns' Act[115] gave the Chancery courts jurisdiction to award damages in lieu of an injunction or an order of specific performance.[116] The statute is part of the law of most Canadian common law jurisdictions, either by acceptance of English law after the date of its enactment or by colonial or provincial enactment of corresponding provisions.[117] The "in lieu" nature of the jurisdiction meant that damages could be awarded under the statute only if an injunction or specific performance was in principle available to the plaintiff either at the commencement of the proceeding or at the time of the hearing.[118] On occasion the courts have moved beyond the framework of Lord Cairns' Act by, for example, awarding equitable damages for unconscionable bargain[119] and non-tortious innocent misrepresentation[120] where rescission of the contract was impossible.

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114 Injunctions are a long-standing exception. Equity has concerned itself more pervasively with contracts. Courts of equity could order specific performance, issue an injunction against a breach, and set aside a contract if the contract was entered into as a result of a misrepresentation, undue influence, or unconscionable bargain.

115 *Chancery Amendment Act, 1858* (U.K.), 21 & 22 Vict., c. 27.

116 Chancery courts had jurisdiction to award damages before, but exercised it only in isolated instances: P.M. McDermott, *Equitable Damages* (Sydney: Butterworths, 1994), at 5-26; I.C.F. Spry, *The Principles of Equitable Remedies*, 5th ed. (Scarborough, ON: Carswell, 1997) at 623-25.

117 British Columbia accepted English law as of November 19, 1858, 18 days after Lord Cairns' Act became law. The Canadian jurisdictions are surveyed in McDermott, *ibid.*, at 257-68, and J. Berryman, *The Law of Equitable Remedies* (Toronto: Irwin Law, 2000) at 301-302.

118 *Dobson v. Winton & Robins Ltd.*, [1959] S.C.J. No. 58, [1959] S.C.R. 775 at 780, 20 D.L.R. (2d) 164 at 167 (S.C.C.); Berryman, *ibid.*, at 302-303.

119 *Rick v. Brandsema*, [2009] S.C.J. No. 10, 2009 SCC 10 (S.C.C.); *Dusik v. Newton*, [1985] B.C.J. No. 18, 62 B.C.L.R. 1 (B.C.C.A.).

Because an injunction or specific performance was sometimes available when no harm had been suffered that the common law would compensate, equitable damages could sometimes be claimed where common law damages could not. This was the case, for instance, when a *quia timet* injunction could be sought because of expected future wrongs; occasionally a court would award equitable damages in lieu of the injunction.[121]

Equitable damages are for some purposes distinct from equitable compensation. The latter refers to compensation for breach of a purely equitable obligation, notably breach of fiduciary duty. The solicitor in *Nocton v. Ashburton*,[122] who caused his client to lose the security on a mortgage loan by giving advice that favoured the solicitor's own financial interest, had to compensate the client for the amount of the loss. Compensation to the beneficiary for the loss caused by a fiduciary's breach is analogous to the obligation on the part of a trustee who has committed a breach of trust to make good any resulting loss to the trust estate. The distinction between equitable damages and equitable compensation is that the former are awarded in addition to or in substitution for an equitable remedy, whereas the latter is awarded for breach of a substantive equitable right.[123]

The Supreme Court of Canada, in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*,[124] appeared to classify a monetary award for breach of confidence as equitable compensation rather than equitable damages. Certainly the court refused to be constrained by the statutory limitations on equitable damages when awarding compensation for breach of confidence. Binnie J. noted that under Lord Cairns' Act there was doubt as to the jurisdiction to award damages in lieu of an injunction if the plaintiff was disentitled to an injunction or there was no future conduct to enjoin.[125] But Lord Cairns' Act was not the exclusive foundation of the court's power to make a monetary award for breach of confidence. Canadian cases had "based an award of financial compensation for breach

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120 *S-244 Holdings Ltd. v. Seymour Building Systems Ltd.*, [1994] B.C.J. No. 598, 93 B.C.L.R. (2d) 34 (B.C.C.A.).

121 J. Berryman, *The Law of Equitable Remedies* (Toronto: Irwin Law, 2000) at 304-306, discussing also two other situations, breach of a restrictive covenant affecting land, and enforcing, under the equitable doctrine of part performance, a contract unenforceable at common law because it was not evidenced in writing.

122 [1914] A.C. 932 (H.L.); Berryman, *ibid.*, at 320-21.

123 Berryman, *ibid.*, at 307. For a case where both were independently considered and the same damages (in that case, for mental distress caused by a breach of confidence) were held recoverable under either head, see *Giller v. Procopets*, [2008] VSCA 236 at paras. 408-31 (V.S.C.A.).

124 [1999] S.C.J. No. 6, [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577 (S.C.C.).

125 *Ibid.*, at para. 57.

of confidence without trying to find a fiduciary duty or worrying about the restrictions buried in the modern successors of Lord Cairns' Act".[126] Binnie J. concluded:

> Equity, like the common law, is capable of ongoing growth and development. ...[127] In my view, therefore, having regard to the evolution of equitable principles apparent in the case law, we should clearly affirm that, in this country, the authority to award financial compensation for breach of confidence is inherent in the exercise of general equitable jurisdiction and does not depend on the niceties of Lord Cairns' Act or its statutory successors. This conclusion is fed, as well, by the *sui generis* nature of the action.[128]

No systematic distinction is drawn between equitable damages and equitable compensation as far as the principles of their assessment are concerned, and they are discussed together in this section. Courts often refer indiscriminately to them as "damages" and apply principles drawn from the common law as well as fiduciary duty and equity.[129] Broadly speaking, equitable damages are assessed along common law lines because the substantive right being vindicated is usually a common law right in contract or tort.[130] Equitable compensation, which is concerned purely with equitable rights, sometimes hews to the line of common law damages but at other times departs markedly from it, depending on the nature of the wrong and on other circumstances.[131]

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126 *Ibid.*, at para. 60, citing *Apotex Fermentation Inc. v. Novopharm Ltd.*, [1998] M.J. No. 297, 162 D.L.R. (4th) 111 (Man. C.A.); *Recovery Production Equipment Ltd. v. McKinney Machine Co.*, [1998] A.J. No. 801, 223 A.R. 24, 1998 ABCA 239 (Alta. C.A.); *Treadwell v. Martin*, [1976] N.B.J. No. 49, 67 D.L.R. (3d) 493 (N.B.C.A.); *Planon Systems Inc. v. Norman Wade Co.*, [1998] O.J. No. 3547, 74 O.T.C. 1 (Ont. Gen. Div.); *Z Mark International Inc. v. Leng Novak Blais Inc.*, [1996] O.J. No. 2953, 12 O.T.C. 33 (Ont. Gen. Div.), affd [1999] O.J. No. 2014, 122 O.A.C. 341 (Ont. C.A.); and L. Tsaknis, "The Jurisdictional Basis, Elements, and Remedies in the Action for Breach of Confidence: Uncertainty Abounds" (1993) 5 Bond L. Rev. 18 at 46-47.

127 *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] S.C.J. No. 91, [1991] 3 S.C.R. 534, 85 D.L.R. (4th) 129 at 580 (S.C.C.), *per* La Forest J.; *United Scientific Holdings Ltd. v. Burnley Borough Council*, [1978] A.C. 904 at 926 (H.L.), *per* Lord Diplock (citation in the original).

128 *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] S.C.J. No. 6, [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577 at para. 61 (S.C.C.). On the *sui generis* nature of the action, see Chapter 7, "Breach of Confidence".

129 J. Berryman, *The Law of Equitable Remedies* (Toronto: Irwin Law, 2000) at 321.

130 Berryman, *ibid.*, at 312-16; P.M. McDermott, *Equitable Damages* (Sydney: Butterworths, 1994) at 225-28.

131 McDermott, *ibid.*, at 217 cites *Jenkins v. Parkinson* (1833), 2 My. & K. 5, 39 E.R. 846 (L.C.), in which Lord Brougham "remarked that the term 'compensation' had a 'less legal and more equitable aspect' than the term 'damages'". For the lines along which the courts have used this flexibility in assessing compensation, see the next section.

As for an account of profits, this remedy is discussed below with other restitutionary remedies.[132]

(ii) Differences Between Equitable Monetary Awards and Damages

The New Zealand Court of Appeal has summarized the general nature of the distinction between equitable compensation and common law damages as follows:

> First, there is an immediate distinction in point of principle: since "compensation" is an equitable remedy, its availability and assessment must be subject to the normal equitable discretionary considerations. Hence (as Somers J put it in *Day v. Mead*[133] at 462) this remedy will be barred by considerations of "conscience, fairness and hardship and other features such as laches and acquiescence". Secondly, because of the more absolute nature of some equitable obligations — and the fiduciary obligation is a good example — an award of compensation may be appropriately assessed in a manner in which it would not most usually be assessed at common law.[134]

The two wrongs that are particularly linked to equitable compensation awards are breach of confidence and breach of fiduciary duty. Each of them can give rise to a claim for an account of profits (to be discussed below[135]) as an alternative to equitable compensation. And, in relation to each of them, when equitable compensation has been awarded the courts have indeed felt free, when the circumstances warranted it, to depart from the rules by which common law damages are assessed. The departures have mainly concerned issues of causation. It is convenient to consider these two wrongs in turn.

1. Compensation for Breach of Confidence

The leading Canadian case is *Cadbury Schweppes Inc. v. FBI Foods Inc.*,[136] already mentioned as having classified the basis of equitable compensation for breach of confidence as being independent of Lord Cairns' Act.[137] The claim was for a licensee's use of a manufacturing formula for "Clamato juice" after its licence came to an end. The licensee had, without right, used the formula to develop its own competing, though

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[132] Below, in the section "Restitutionary Awards" under "Account of Profits".
[133] [1987] 2 N.Z.L.R. 443 (N.Z.C.A.).
[134] *Chirnside v. Fay*, [2004] 3 N.Z.L.R. 637, [2004] NZCA 111 at para. 66 (N.Z.C.A.), vard as to the remedy [2007] 1 N.Z.L.R. 433, [2006] NZSC 68 (N.Z.S.C.).
[135] Below, in the section "Restitutionary Awards" under "Account of Profits".
[136] [1999] S.C.J. No. 6, [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577 (S.C.C.).
[137] See above, under "Monetary awards in Equity".

not identical, product called Caesar Cocktail, which it brought to market immediately after the licence agreement expired. The licensor initially believed it had no right to complain of a breach of the licence agreement, since the two products were different. Several years later, however, the plaintiff licensor brought an action against the defendant former licensee for breach of confidence on the ground that the defendant had been enabled to make its product by using the plaintiff's formula. The plaintiff waived its right to an accounting of the defendant's profits but sought a permanent injunction or, in the alternative, compensation.

The trial judge[138] denied the plaintiff licensor an injunction. She further held that the plaintiff had not proved any loss as a result of the defendant's bringing Ceasar Cocktail to market. The defendant had, however, been enabled by its wrong to bring its product to market immediately instead of having to develop the recipe from scratch, a process that the judge held would have taken no more than 12 months, given that the plaintiff's secret formula was nothing very special and could have been replicated by anyone skilled in making such products. She awarded the plaintiff compensation for the value of the knowledge that the defendant had misused, assessed as the cost of having an outside consultant develop the same knowledge. The British Columbia Court of Appeal held[139] that the plaintiff was entitled to a permanent injunction against further breaches of confidence, and to damages. It differed from the trial judge as to the measure of damages, which it held should equal the profit that the plaintiff would have made if it (the plaintiff) had made sales of Clamato juice equal to the defendant's sales of Caesar Cocktail during the 12 months' "head start" the defendant had secured by using the plaintiff's formula.

The Supreme Court of Canada denied an injunction, holding that to stop the defendant from selling its product after, by then, 11 years on the market would inflict competitive damage on the defendant far beyond what was necessary to restore the plaintiff to the competitive position it would have enjoyed if the breach of confidence had not taken place. The plaintiff was entitled to compensation for the loss that the defendant's wrongfully obtained "head start" had caused it. The Supreme Court disagreed with both measures of damage used in the lower courts. The trial judge's award of the putative cost of acquiring the formula was inappropriate because the formula was not for sale.[140] On the other hand, the Court of Appeal's assumption that if the defendant's product had been

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138 *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1994] B.C.J. No. 1191, [1994] 8 W.W.R. 727 (B.C.S.C.).

139 [1996] B.C.J. No. 1813, 138 D.L.R. (4th) 682 (B.C.C.A.).

140 *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1997] S.C.J. No. 6, [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577 at paras. 70, 90 (S.C.C.).

kept off the market for 12 months, the plaintiff's sales of Clamato would have filled the void, was unjustified. There had to be "evidence that the sales of Clamato juice were affected by the marketing of Caesar Cocktail, and if so to what extent".[141]

The court canvassed a number of factors that the referee charged with assessing damages could take into account. One was the drop in the plaintiff's market share and the share picked up by the defendant in the 12-month period.[142] Another was the fact that the defendant was perfectly entitled to use marketing contacts and expertise built up during its tenure of the Clamato licence, a form of infrastructure to which the plaintiff denied itself access when it terminated the licence.[143] The referee was also entitled to take into consideration the royalties payable under the licence, which it might be fair to include in whole or in part in the plaintiff's loss, the royalties being the parties' own evaluation of an income stream attributable to a licensing business that the defendant in effect precluded the plaintiff from terminating as it wished to do. The objective, said Binnie J., was a "broadly equitable result" rather than an unattainable "mathematical exactitude".[144]

The court's treatment of equitable compensation in the *Cadbury Schweppes* case was along the lines of common law damages in tort.[145] The assessment had to reflect as fairly as possible the loss caused by the wrong. That was the difference between the plaintiff's actual profits, affected by the breach of confidence, and the profits the plaintiff would have made "but for" the wrong — that is, if the breach of confidence had not given the defendant a 12-month "head start" on bringing Caesar Cocktail to market.

In aligning the assessment of equitable compensation in *Cadbury Schweppes* with tort principles, the court distinguished its earlier decision in *Lac Minerals Ltd. v. International Corona Resources Ltd.*,[146] in which the breach of confidence enabled the defendant to stake what turned out to

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141 *Ibid.*, at para. 92.

142 The 12-month period ran from the end of the defendant's licence. The court was not prepared to assume in the defendant's favour that it would hypothetically have started work on its rival product as soon as it received 1 year's notice of termination of the licence, when in fact it had taken no steps to produce a product that complied: *ibid.*, at para. 96.

143 *Ibid.*, at para. 97.

144 *Ibid.*, at para. 99.

145 It must be remembered, however, that a claim for an account of profits might have been available as an alternative, had the plaintiff not waived such a claim at trial. (An application to revive the claim was rejected by the Court of Appeal; see *ibid.*, at para. 15.) The claim would have depended not only on proving how much of the defendant's profit was attributable to the misuse of the formula, but also on the effect in equity of the plaintiff's having refrained from seeking an injunction at the time it learned of the breach.

146 [1989] S.C.J. No. 83, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 (S.C.C.).

be an enormously valuable gold mining property, and the court awarded the plaintiff a constructive trust over the defendant's mine. The court said, in effect, that not all breaches of confidence are alike. "Whether a breach of confidence in a particular case has a contractual, tortious, proprietary or trust flavour goes to the *appropriateness* of a particular equitable remedy but does not limit the court's *jurisdiction* to grant it."[147] The proprietary remedy was appropriate in *Lac Minerals*, not because confidential information is a species of property — which the court in *Cadbury* specifically denied[148] — but because the plaintiff in *Lac* had proved that, but for the defendant's wrong, it would have staked the mining property itself.[149]

By contrast, the breach of confidence in the *Cadbury* case had only enabled the defendant to compete with the plaintiff 12 months earlier than it could otherwise have done, and so had deprived the plaintiff of an opportunity to make profits.[150] If the plaintiff's business had included selling the formula, the market value of the information that the defendant misused might have been an appropriate measure of its loss. But, given that the plaintiff made its money from producing Clamato juice, the compensation should reflect the value the plaintiff lost by being deprived of the opportunity of marketing Clamato free of competition for 12 months, "and not be diverted to a valuation of the confidential information itself".[151]

Although, in *Cadbury*, "the policy objectives in both equity and tort would support restoration of the plaintiff to the position it would have occupied 'but for' the breach",[152] it was "well established that equitable rules may produce a more generous level of compensation than their counterparts in tort".[153] In this connection the court referred to cases on breach of fiduciary duty, to be discussed below,[154] in which equitable compensation had been awarded for losses that, in tort, would be irrecoverable on the grounds of remoteness, lack of causation or contributory negligence. Such issues had no relevance in the present case, so that the

[147] *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] S.C.J. No. 6, [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577 at para. 26 (S.C.C.) (emphasis in the original).

[148] See Chapter 7, "Breach of Confidence".

[149] *Ibid.*, at para. 48.

[150] *Ibid.*, at para. 64.

[151] *Ibid.*, at para. 71.

[152] *Ibid.*, at para. 51.

[153] *Ibid.*, at para. 50.

[154] The court referred to *Guerin v. Canada*, [1984] S.C.J. No. 45, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 (S.C.C.); *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] S.C.J. No. 91, [1991] 3 S.C.R. 534, 85 D.L.R. (4th) 129 (S.C.C.) and *Hodgkinson v. Simms*, [1994] S.C.J. No. 84, [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161 (S.C.C.), all discussed in the next section.

loss measured according to common law principles would produce the same result as the loss measured in equity.[155]

It is probably accurate to say that in breach of confidence cases generally, where the plaintiff is not entitled to, or elects not to pursue, a disgorgement of profits or a proprietary remedy, the monetary compensation will be assessed on the basis of what the plaintiff's financial position[156] would have been, but for the breach. If a former employee misuses trade secrets or customer information in order to compete with the former employer, the latter is entitled to be compensated for the profits it lost on account of the breach.[157] Similarly, where confidential information about the plaintiff's suppliers was disclosed to the plaintiff's customer, who promptly began buying directly from the supplier, damages were based on the value of the plaintiff's lost opportunity to continue dealing with that customer.[158]

Even if the plaintiff obtains an injunction against use or disclosure of confidential information, the plaintiff is entitled to compensation for losses not prevented by the injunction. A good example is *Apotex Fermentation Inc. v. Novopharm Ltd.*[159] A research scientist had taken knowledge of a confidential pharmaceutical manufacturing process with him to a new employer, the defendant, and used it to develop the same process for the latter's benefit. The plaintiff, the scientist's former employer, succeeded in obtaining an injunction against the defendant's marketing the product for the duration of the "springboard" period, that is, the period during which the defendant could have developed the process itself, had it not had the benefit of the confidential information. In the meantime, however, the defendant had applied to patent the process and the patent application

155 [1999] S.C.J. No. 6, [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577 at para. 51 (S.C.C.).

156 Compensation for breach of confidence has not been limited to financial losses. Where the confidential information was personal in nature, damages for the emotional distress caused by the breach have been awarded: *Campbell v. MGN Ltd.*, [2004] 2 A.C. 457, [2004] UKHL 22 (H.L.); *Douglas v. Hello! Ltd. (No. 3)*, decided as part of *OBG Ltd. v. Allan*, [2008] 1 A.C. 1, [2007] UKHL 21; *Giller v. Procopets*, [2008] VSCA 236 (V.S.C.A.).

157 *Franklin Supply Co. v. Midco Supply Co.*, [1995] A.J. No. 765, 33 Alta. L.R. (3d) 362 (Alta. Q.B.); *Macri v. Miskiewicz*, [1993] B.C.J. No. 1408, [1993] 8 W.W.R. 46 (B.C.C.A.); *Mark James Ltd. v. Collins*, [1994] B.C.J. No. 1968, 96 B.C.L.R. (2d) 87 (B.C.S.C.); *Tasco Telephone Answering Exchange Ltd. v. Ellerbeck*, [1966] B.C.J. No. 107, 48 C.P.R. 160 (B.C.S.C.); *Chaleur Silica Inc. v. Lockhart*, [1990] N.B.J. No. 604, 108 N.B.R. (2d) 366 (N.B.Q.B.); *Sweet Factory Inc. v. Hudson's Bay Co.*, [1998] O.J. No. 5755, 85 C.P.R. (3d) 417 (Ont. Gen. Div.), further reasons on damages, [1999] O.J. No. 302, 86 C.P.R. (3d) 417 (Ont. Gen. Div.); *Quantum Management Services Ltd. v. Hann*, [1989] O.J. No. 542, 69 O.R. (2d) 26 (Ont. H.C.J.), affd [1992] O.J. No. 2393, 11 O.R. (3d) 639 (Ont. C.A.); *Schauenburg Industries Ltd. v. Borowski*, [1979] O.J. No. 4349, 101 D.L.R. (3d) 701 (Ont. H.C.J.).

158 *Jackson (t/a Samson Lancastrian) v. Royal Bank of Scotland*, [2000] EWCA Civ 203 (C.A.).

159 [1998] M.J. No. 297, 162 D.L.R. (4th) 111 at para. 211 (Man. C.A.).

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had, as the law required, been made available to the public. The plaintiff's process was therefore no longer a trade secret. Both sides, for different reasons, agreed that there was no reasonable way to estimate the revenue or sales that the plaintiff had lost as a result of the defendants' misuse of the information. The court held that the best measure of the plaintiff's loss was the research and development costs of a process that it had hoped would give it a period of exclusive competitive advantage. "Where injury has been suffered in a complex commercial setting, a 'flexible and imaginative approach' to the assessment of the damages may be required."[160] Here a measure based on recovery of the plaintiff's investment in the technology was appropriate, considering the commercial setting of the plaintiff's loss of the technology, the likely future consequences of the misappropriation, and the nature and extent of the use to which the defendant put the trade secrets after the misappropriation.[161]

2. *Causation — Breach of Fiduciary Duty*[162]

As the Supreme Court of Canada noted in the *Cadbury* case,[163] the points on which equitable compensation for breach of fiduciary duty has differed from tort damages have been issues of remoteness, causation and contributory negligence. Contributory negligence is properly regarded as a defence rather than as a damages issue, and so is dealt with in the chapter on breach of fiduciary duty.[164] As for remoteness and causation, the inherent flexibility of its approach to remedies undoubtedly allows a court exercising equitable jurisdiction to award compensation for a loss that, according to common law damages principles, would be too remote or regarded as not legally caused by the wrong. Whether such a loss will be compensated depends on whether it will be seen as justified by the nature of the breach of duty and the other circumstances of the case.

Fiduciary duty cases are unlikely to involve problems of remoteness in the sense of the breach causing a *type* of damage that could not reasonably have been contemplated at the time of the wrong. The damage in most cases is simply financial. Where remoteness problems can crop up

[160] *Ibid.*, at para. 210.

[161] *Ibid.*, at para. 211. In another case in which there was a clear injury from the disclosure of confidential manufacturing technology, but it could not be proved what the plaintiff had actually lost in terms of sales, the court awarded the plaintiff half the costs of developing the technology: *Z Mark International Inc. v. Leng Novak Blais Inc.*, [1996] O.J. No. 2953, 12 O.T.C. 33 (Ont. Gen. Div.), affd [1999] O.J. No. 2014, 122 O.A.C. 341 (Ont. C.A.).

[162] C. Mitchell, "Causation, Remoteness, and Fiduciary Gains" (2006) 17 K.C.L.J. 325.

[163] *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] S.C.J. No. 6, [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577 at para. 51 (S.C.C.).

[164] See above, Chapter 9, "Breach of Fiduciary Duty" in the section "Defences" under "Contributory Negligence".

is that the wrongdoer could not reasonably have contemplated the *chain of events* leading to the particular item of loss that is claimed. The most important Canadian decision on this sort of case is *Guerin v. Canada*,[165] in which an Indian Band surrendered certain reserve lands to the Crown in return for the Crown's undertaking to lease the lands to a golf club, with the Band to receive the revenues. The Crown was held under a fiduciary obligation to the Band because it was in effect managing the Band's property on the Band's behalf. The fiduciary obligation was broken when the Crown agreed to lease the land on terms much less favourable to the Band than those contemplated when the land was surrendered. The Band was awarded compensation based upon the economic benefit it could have derived from the land, had the Crown not entered into the lease. The court drew an analogy with compensation for a breach of trust, the essence of which is to restore to the beneficiary's estate the economic benefit that the breach prevented the estate from realizing. The lost benefit — in *Guerin*, the lost opportunity for residential development — is measured at the time of restoration, not the time of the breach, and it is not limited by a requirement that the benefit have been foreseeable at the time of the breach.[166]

Issues of causation are especially intractable in certain fiduciary duty cases. As with common law damages, the starting point for computing the plaintiff's compensation is to compare the plaintiff's actual financial position with the hypothetical financial position the plaintiff would have been in if the breach of duty had not occurred. With common law damages this is also the end point of the assessment, but equitable compensation is not bound rigorously to this standard. Depending on the nature of the breach of duty, courts have found it fair to compensate a beneficiary for losses that, even if they might well have been suffered if the breach of duty had not occurred, were nevertheless sufficiently related to the breach to justify making the faithless fiduciary pay for them. Thus it has been held that, as with deceit,[167] the beneficiary need not prove causation of the loss on a "but for" basis. This means, for instance, that it is not open to a fiduciary adviser to argue that, but for his or her breach of duty in failing to disclose material information, the beneficiary would have gone ahead

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165 [1984] S.C.J. No. 45, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 (S.C.C.).

166 *Ibid.*, at 360-62 S.C.R., 365-66 D.L.R., following *Re Dawson*; *Union Fidelity Trustee Co. v. Perpetual Trustee Co.* (1966), 84 W.N. (Pt. 1) (N.S.W.) 399 at 404-406. See also *Iacolucci v. Nationwide Investment Funding Inc.*, [1996] O.J. No. 884, 1 R.P.R. (3d) 110 (Ont. Gen. Div.).

167 See above, under "Damages" – "Causation of Loss and Measure of Damages" – "Tests for Causation" – "Legal Causation – Human Agency".

with the transaction anyway. The fiduciary is liable as long as the non-disclosure was material; it need not be shown to have been critical.[168]

The Supreme Court of Canada has twice considered the causation question as it relates to causes that worsen the loss after the breach occurs. *Canson Enterprises Ltd. v. Boughton & Co.*[169] and *Hodgkinson v. Simms*[170] were both instances of real estate investments gone wrong. In *Canson* the investors sued their lawyer, who had failed to disclose to them that the land they bought for development was being bought, not from the owner whose name was on the title, but from an intermediate purchaser who had contracted to buy it from that owner and was "flipping" it to them. One of those who owned the intermediary was also a fellow investor with the plaintiffs in their project. The lawyer paid the intermediary its profit out of the purchase price, but did not tell the ultimate purchasers he was doing so, and he billed them, not the intermediary, for his services. *Hodgkinson* involved the purchase of residential condominium units to be held as a tax shelter. The plaintiff investor sued his financial advisor, a specialist in such tax shelter investments, for having failed to disclose that he, the advisor, was a consultant to the developer of the condominium building and derived fees when his clients purchased units in the building.

In both cases the investments had lost value for reasons that had nothing to do with the subject matter of the fiduciary's non-disclosure. The plaintiffs in *Canson* had built a warehouse on the property they bought, which had then proved structurally unsound due to the negligence of the soils engineer and the pile-driving firm involved in the construction. This was unrelated to the "flip" as such but the plaintiffs claimed to recover the whole loss from the lawyer who failed to tell them of the "flip", on the basis that they would not have bought the land had they known of it. In *Hodgkinson* the condominiums the plaintiff had bought lost value, not because of the advisor's connection with the developer, but because of a general slump in the market for that kind of property. Again the plaintiff sought to recover the full loss from the advisor on the basis that the plaintiff would not have bought the properties if the advisor had disclosed his interest in the project.

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168 *Brickenden v. London Loan & Savings Co.*, [1934] 3 D.L.R. 465 (P.C. (Ont.)). In Canada this presumption of causation has generally been treated as irrebuttable (*Ruxton v. Kelly, Peters & Associates Ltd.*, [1984] B.C.J. No. 46, 58 B.C.L.R. 317 at 325-26 (B.C.S.C.); *Howard v. Cunliffe*, [1973] B.C.J. No. 832, 36 D.L.R. (3d) 212 (B.C.C.A.); *Henfry & Co. v. A Law Firm*, [1983] B.C.J. No. 1934, 46 B.C.L.R. 226 (B.C.S.C.); *Raso v. Dionigi*, [1993] O.J. No. 670, 100 D.L.R. (4th) 459 (Ont. C.A.)), whereas in New Zealand the fiduciary is permitted to prove that disclosure would have had no effect on the beneficiary's course of action (*Stevens v. Premium Real Estate Ltd.*, [2009] NZSC 15 at paras. 38, 85 (N.Z.S.C.)).

169 [1991] S.C.J. No. 91, [1991] 3 S.C.R. 534, 85 D.L.R. (4th) 129 (S.C.C.).

170 [1994] S.C.J. No. 84, [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161 (S.C.C.).

In *Canson* the court denied recovery for the losses on the investment so far as they were attributable to the fault of the soils engineer and the pile-driving contractor. The majority saw a "sharp divide" between cases in which the fiduciary has control over the fiduciary's property and those in which the fiduciary merely fails to perform honestly and properly a duty assumed towards the beneficiary.[171] In the former case the beneficiary must be made whole, by receiving the value the beneficiary would have derived if the fiduciary had managed the property as he or she should. In the latter, however, "the concern of equity is to ascertain the loss resulting from the breach of the particular duty".[172] In such a case the objectives pursued by equity and the common law with respect to compensation were the same, and therefore it made sense to apply, by analogy, the common law standard of causation. "Where 'the measure of duty is the same', the same rule should apply."[173] The claim for the harm resulting from the acts of third parties could not "fairly be looked upon as falling within what is encompassed in restoration for the harm suffered from the breach".[174] In the result, equitable compensation should be assessed on the same principles as damages for deceit.[175] The compensation was for the difference between what the plaintiffs paid for the property and what it was worth, which was the amount of the secret profit by the intermediary, plus money spent on the warehouse project prior to the wrongful acts of the engineers and the pile-drivers.[176]

In a separate judgment McLachlin J. reached the same conclusion but did not approve of the "simple expedient of resorting to tort".[177] Rather, she preferred to apply directly the principles of equitable compensation:

> By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach, *i.e.*, the plaintiff's loss opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed

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171 [1991] S.C.J. No. 91, [1991] 3 S.C.R. 534 at 578, 85 D.L.R. (4th) 129 at 146 (S.C.C.), *per* La Forest J. A similar distinction was drawn by Millett L.J. in *Bristol & West Building Society v. Mothew*, [1998] Ch. 1 at 17 (C.A.).

172 *Canson*, *ibid.*, at 578 S.C.R., 146 D.L.R.

173 *Ibid.*, at 586 S.C.R., 152 D.L.R. The quoted phrase is from Somers J. in *Day v. Mead*, [1987] 2 N.Z.L.R. 443 at 457 (N.Z.H.C.), vard on other grounds, [1987] 2 N.Z.L.R. 443 (N.Z.C.A.).

174 *Canson*, *ibid.*, at 580 S.C.R., 147 D.L.R.

175 *Ibid.*, at 589 S.C.R., 153 D.L.R. Deceit might possibly go further and award the whole loss on the transaction, at least if the negligence of the third parties was not considered a *novus actus*: see above, under "Damages" – "Causation of Loss and Measure of Damages" – "Tests for Causation" – "Legal Causation – Human Agency". It was agreed that the plaintiff would not have bought the land, but for the lawyer's non-disclosure: *ibid.*, at 559 S.C.R., 133 D.L.R.

176 *Ibid.*, at 562 S.C.R., 135 D.L.R.

177 *Ibid.*, at 547 S.C.R., 157 D.L.R.

> with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach. The plaintiff will not be required to mitigate, as the term is used in law, but losses resulting from clearly unreasonable behaviour on the part of the plaintiff will be adjudged to flow from that behaviour, and not from the breach.[178]

The losses attributable to the fault of the engineers and the pile-drivers did not flow from the lawyer's breach of duty and thus must be excluded from the compensation.

In *Hodgkinson*, by contrast, the court held the advisor liable for the entire loss on the plaintiff's investments. In that case, there were no independent intervening causes like the soils engineer and the pile-driving firm in *Canson*. The defendant's argument, which was accepted by the dissenting judges,[179] was simply that the plaintiff's loss on his investments had nothing to do with the financial advisor's failure to disclose his interest in the investments; it was due to a fall in the market for that type of property. The majority, however, relied upon the finding at trial that the plaintiff would not have purchased the investments, had he known of the advisor's interest. It was true that market conditions were in one sense the cause of the loss, but in the majority's view the fiduciary should not avoid liability on that ground. "From a policy perspective it is simply unjust to place the risk of market fluctuations on a plaintiff who would not have entered into a given transaction but for the defendant's wrongful conduct."[180] The damages in this case could be compared to the monetary equivalent of rescission of the investment contracts, with the measure of the plaintiff's compensation reflecting the fact that he did not discover the breach until the market for the investments had fallen.[181]

Canson was distinguished in *Hodgkinson*. La Forest J., who gave the majority judgment in both cases, said that *Canson* did not "signal a retreat from the principle of full restitution; rather it recognizes the fact that a breach of fiduciary duty can take a variety of forms, and as such a variety of remedial considerations may be appropriate".[182] "[P]roperly understood *Canson* stands for the proposition that courts should strive to treat similar

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178 *Ibid.*, at 556 S.C.R., 163 D.L.R.

179 Sopinka and McLachlin JJ. (dissenting) held that the advisor's failure to disclose his own connection with the developers was a breach of contract but not a breach of fiduciary duty, whereas the majority held it was both. The dissenting judges also held that the loss on the investments was not recoverable in contract because the loss was not causally connected to the subject matter of the failure to disclose.

180 *Hodgkinson v. Simms*, [1994] S.C.J. No. 84, [1994] 3 S.C.R. 377 at 452, 117 D.L.R. (4th) 161 at 207 (S.C.C.).

181 *Ibid.*, at 452 S.C.R., 207-208 D.L.R.

182 *Ibid.*, at 443 S.C.R., 201 D.L.R.

wrongs similarly, regardless of the particular cause or causes of action that may have been pleaded."[183] The lawyer's failure to disclose the "flip" in *Canson* was seen as only loosely related to the fiduciary relationship, which arose by operation of law and was "in many ways incidental to the particular wrong".[184] In *Hodgkinson*, by contrast, the duty broken by the advisor was "directly related to the risk that materialized and in fact caused the [plaintiff's] loss".[185] The duty was to advise on the suitability of the investments that the plaintiff bought, whereas in *Canson* the lawyer was not retained to advise on the pros and cons of the investment.[186] Compensation for the whole of the loss on a wrongfully induced investment was something that common law damages also strove to do, if the plaintiff can show that it would not have entered into the contract, but for the defendant's tortious misrepresentation.[187]

Despite the rationales given for distinguishing the two, it is not easy to see why the treatment of compensation was so different. The distinction seemed to turn on the perception that the wrong done in *Hodgkinson* was worse than the wrong in *Canson* and so justified putting the entire risk of the transaction, including market risk, on the advisor. It is true that the non-disclosure in *Canson* did not implicate the fiduciary's own financial interest, whereas that in *Hodgkinson* did, but the breach in *Canson* was hardly tangential to the fiduciary relationship; the problem arose out of the lawyer's conflicting duties. It was an agreed fact in *Canson*, as it was a found fact in *Hodgkinson*, that the plaintiffs would not have embarked on their investment, had the fiduciary made the proper disclosure.[188] *Canson* drew a "sharp divide" between cases where the fiduciary controls the beneficiary's property, and so must make the beneficiary entirely whole no matter how the loss arose from the breach, and those in which the fiduciary does not control the beneficiary's property and so must compensate the beneficiary on lines analogous to tort. *Hodgkinson* did not refer to this divide but, instead, preferred to draw distinctions based on other qualitative differences between fiduciary duties. As a consequence, *Hodgkinson* obscures, rather than clarifies, the relationship between equitable compensation and tort damages. At some points in *Hodgkinson*

[183] *Ibid.*, at 445 S.C.R., 202 D.L.R.
[184] *Ibid.*
[185] *Ibid.*
[186] *Ibid.* This, with respect, overlooks the fact that Mr. Hodgkinson's loss had nothing to do with the suitability of the investment.
[187] *Ibid.*, at 445-47 S.C.R., 203 D.L.R., referring to *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] S.C.J. No. 67, [1991] 3 S.C.R. 3, 84 D.L.R. (4th) 291 (S.C.C.) (negligence), and *K.R.M. Construction Ltd. v. British Columbia Railway Co.*, [1982] B.C.J. No. 2049, 40 B.C.L.R. 1 (B.C.C.A.) (deceit).
[188] *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] S.C.J. No. 91, [1991] 3 S.C.R. 534 at 559, 85 D.L.R. (4th) 129 at 133 (S.C.C.).

the court appears to stress how different fiduciary duties are from tort, as where it put forward a policy justification for a generous approach to damages, namely, "the need to put special pressure on those in positions of trust and power over others in situations of vulnerability".[189] At other points it stresses how making the plaintiff whole in a case like this is consistent with what is done in tort.[190]

The combined lesson of the two cases is that to uphold the policies of equity, including deterrence of misconduct by those in positions of trust, a court has the power to award compensation on a more liberal standard of causation than that employed for common law damages.[191] Whether the more liberal standard will be applied in a given case depends on all the circumstances, including whether the fiduciary's wrong related to management of the beneficiary's property (the point made in *Canson*), and on whether the nature of the breach calls for a greater measure of deterrence than compensation on a tort-like basis would provide (the point made in *Hodgkinson*).[192] The availability of a more generous standard of compensation is sometimes described by saying that damages for breach of fiduciary duty are "restitutionary".[193] The term is being used here, not in the sense that the damages are calculated by reference to the defendant's gain rather than the plaintiff's loss, but in the sense that "equity awards compensation in place of restitution *in specie*, by analogy for breach of fiduciary duty with the ideal of restoring to the estate that which was lost through the breach".[194] The standard of causation may differ in some

[189] *Hodgkinson v. Simms*, [1994] S.C.J. No. 84, [1994] 3 S.C.R. 377 at 452, 117 D.L.R. (4th) 161 at 208 (S.C.C.).

[190] *Ibid.*, at 445-47 S.C.R., 203 D.L.R. The court also held that the measure of Mr. Simms's damages was the same for his breach of contract as for his breach of fiduciary duty: *ibid.*, at 454 S.C.R., 209 D.L.R.

[191] Common law principles, it must be recalled, are not themselves uniform on standards of causation, with damages in deceit sometimes being based on a test analogous to "material contribution" rather than on a 'but for' basis: see above, under "Damages" – "Causation of Loss and Measure of Damages" – "Tests for Causation" – "Legal Causation – Human Agency". See *Huff v. Price*, [1990] B.C.J. No. 2692, 76 D.L.R. (4th) 138 at 149 (B.C.C.A.), equating the standard of causation in fraud and breach of fiduciary duty.

[192] The right to claim an account of profits, of course, provides an alternative means of deterrence in cases where (unlike in *Hodgkinson* and *Canson*) the fiduciary derived substantial financial gains from the breach. See below, in the section "Restitutionary Awards" under "Account of Profits".

[193] For example, in *Authorson (Litigation Administrator of) v. Canada (Attorney General)*, [2007] O.J. No. 2603, 283 D.L.R. (4th) 341, 2007 ONCA 501 at para. 160 (Ont. C.A.), leave to appeal refused [2007] S.C.C.A. No. 472, [2008] 1 S.C.R. v (note) (S.C.C.). The same term was used to describe damages for deceit in *Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co.* (*sub nom. South Australia Asset Management Corp. v. York Montague Ltd.*), [1997] A.C. 191 at 215 (H.L.), *per* Lord Hoffmann.

[194] *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] S.C.J. No. 91, [1991] 3 S.C.R. 534 at 547, 85 D.L.R. (4th) 129 at 157 (S.C.C.), *per* McLachlin J.

respects but causation there must be. This point was also made in the House of Lords:

> Under both systems [common law and equity] liability is fault-based: the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong. The detailed rules of equity as to causation and the quantification of loss differ, at least ostensibly, from those applicable at common law. But the principles underlying both systems are the same.[195]

3. *Mitigation and Issues of Timing in Equity*

Since compensation in equity is based on fairness and justice, there is no reason not to apply the principle of a duty to act reasonably to mitigate losses,[196] always remembering that the duty is only one to take reasonable steps, and in some situations it may not be reasonable to expect, say, a victim of breach of fiduciary duty to do anything to make good the harm caused by the fiduciary.[197] The plaintiff's circumstances, such as lack of funds or market conditions, may also make it reasonable to delay in taking mitigating steps, in which case compensation will be assessed on the basis of when the steps should have been taken.[198] Where the equitable wrong concerns the management of the plaintiff's property, compensation will be assessed as of the date the breach stops or, if the breach is a continuing one, as of the date of trial.[199]

4. *Non-pecuniary Loss in Equity*

It has been suggested that emotional loss or other non-pecuniary loss cannot form part of equitable compensation, on the principle that equity's intervention was restricted historically to pecuniary interests,[200] but this

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195 *Target Holdings Ltd. v. Redferns (a firm)*, [1996] 1 A.C. 421 at 432 (H.L.), *per* Lord Browne-Wilkinson. See also *ibid.*, at 438-39, citing with approval McLachlin J.'s comments quoted above in the section from *Canson*, *ibid.*, at 556 S.C.R., 163 D.L.R.

196 *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] S.C.J. No. 91, [1991] 3 S.C.R. 534 at 581, 85 D.L.R. (4th) 129 at 148 (S.C.C.) and cases cited there; *Vanderburgh v. ScotiaMcLeod Inc.*, [1992] A.J. No. 715, [1992] 6 W.W.R. 673 (Alta. Q.B.).

197 McLachlin J. in *Canson*, *ibid.*, at 554 S.C.R., 162 D.L.R. suggests that the link between the breach of duty and the harm should be taken as broken only when the beneficiary "fails to take the most obvious steps to alleviate his or her losses".

198 *Secord v. Global Securities Corp.*, [2003] B.C.J. No. 327, [2003] 3 W.W.R. 612 (B.C.C.A.); *Burke v. Cory*, [1959] O.J. No. 120, 19 D.L.R. (2d) 252 (Ont. C.A.).

199 *Guerin v. Canada*, [1984] S.C.J. No. 45, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 (S.C.C.).

200 *Giller v. Procopets*, [2004] VSC 113 (V.S.C.), revd [2008] VSCA 236 (V.S.C.A.). The plaintiff's boyfriend disclosed videos he had made of sexual encounters with the plaintiff.

view has not prevailed. It is difficult to maintain such a restriction in the face of the evolution of breach of confidence into a means of protecting not only pecuniary but also privacy interests.[201] Although the case law is sparse, what there is suggests that Canadian courts have no difficulty in awarding damages for the emotional distress caused by the wrongful disclosure of personal information. One case assumed the viability of a claim for the embarrassment caused by the disclosure of the plaintiff's negotiations with a potential new employer, to the prejudice of his relationship with his old employer.[202] As part of a matrimonial lawsuit a wife successfully claimed compensation for the distress caused to her by the husband's wrongfully disclosing that she had used drugs and had a sexually transmitted disease.[203] In England, too, it has been accepted that where a breach of confidence causes injury to feelings, the court has power to award general damages for that injury.[204]

5. *Remoteness in Equity*

There is little case law on the question of remoteness of damage in relation to equitable wrongs. A mortgage broker who failed to disclose to its client that one of its people had an interest in the transaction the client was financing was held liable for the client's whole loss on the transaction, the judge commenting that "considerations of foreseeability and remoteness do not apply" to breaches of fiduciary duty.[205] In *Canson Enterprises Ltd. v. Boughton & Co.*,[206] where the main issue was analyzed in terms of causation rather than remoteness,[207] McLachlin J. said in her concurring minority judgment that "while the loss must flow from the breach of fiduciary duty, it need not be reasonably foreseeable at the time of the breach".[208] La Forest J., for the majority, seemed unwilling to rule out the potential application of remoteness, which "might have developed from an equitable perspective" if the issue had not arisen so seldom in the equitable context.[209]

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201 See Chapter 7, "Breach of Confidence".

202 *Lysko v. Braley*, [2006] O.J. No. 1137, 79 O.R. (3d) 721 (Ont. C.A.).

203 *L. (M.S.) v. G. (H.R.)*, [2005] B.C.J. No. 788, [2005] 9 W.W.R. 97, 2005 BCSC 488 (B.C.S.C.).

204 *Cornelius v. De Taranto*, [2002] E.M.L.R. 6, [2001] EWCA Civ 1511 (C.A.); *Archer v. Williams*, [2003] EWHC 1670 at paras. 76-78 (Q.B.).

205 *Iacolucci v. Nationwide Investment Funding Inc.*, [1996] O.J. No. 884, 1 R.P.R. (3d) 110 at para. 49 (Ont. Gen. Div.).

206 [1991] S.C.J. No. 91, [1991] 3 S.C.R. 534, 85 D.L.R. (4th) 129 (S.C.C.).

207 See above, under "Causation – Breach of Fiduciary Duty".

208 [1991] S.C.J. No. 91, [1991] 3 S.C.R. 534 at 552, 85 D.L.R. (4th) 129 at 161 (S.C.C.).

209 *Ibid.*, at 580 S.C.R., 148 D.L.R.

Given that equitable compensation is always shaped by considerations of fairness, it may make sense to apply a remoteness test where losses are caused by an unintentional breach of fiduciary duty, such as omitting by oversight to disclose a conflict of interest, or by unintentionally disclosing confidential information. This possibility can be compared with the distinction drawn at common law between intentional wrongs, where the recovery of damages is not limited by a requirement of foreseeability, and negligence, where it is.[210]

III. RESTITUTIONARY AWARDS

(a) Damages on a Restitutionary Measure

Tort damages are based on a theory of compensating the plaintiff. This means that damages usually must not punish the defendant, or overcompensate the plaintiff, by imposing a liability greater than the money value of the plaintiff's loss. It is immaterial that the defendant has made more out of the breach of duty than the plaintiff lost; the defendant is entitled to keep the "profit" from the breach.[211] In some cases, punitive damages may operate — explicitly or incidentally — to deny the defendant the privilege of keeping the gains.[212]

Restitutionary remedies, which would strip the wrongdoer of any gain made, are traditionally unavailable for tort. This once-bright line is becoming less distinct. Courts, especially Canadian ones, are less inclined than formerly to keep remedies in watertight compartments with particular types of claim. In several contexts, they have said that once a violation of

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210 See above, under "Damages" – "Remoteness". See also *Kuwait Airways Corp. v. Iraqi Airways Co.*, [2002] 2 A.C. 883, [2002] UKHL 19 at paras. 100-104 (H.L.) (damages for deliberate as distinct from "innocent" conversion).

211 According to Oliver Wendell Holmes, Jr., damages for breach of contract should be seen, not as the consequence of wrongdoing, but as the price attached to a (more or less) calculated risk: *The Common Law*, M.deW. Howe, ed. (Cambridge, MA: Belknap Press, 1963) at 300-301. From an economic standpoint this supports the idea of "efficient breach", according to which the payment of damages, while it makes the injured party whole, also enables the contract-breaker to reallocate its resources to something more profitable than performance of the contract. In torts, too, one can speak of an "efficient tort", meaning a wrong that causes less harm to the plaintiff than the benefit it confers on the defendant, thus making possible their greater cumulative wealth even after damages are paid. Economic efficiency, however, is not everything. See McLachlin J.'s insistence on the "historical centrality of personal fault to our concept of negligence or 'delict'" in *Canadian National Railway Co. v. North Pacific Steamship Co.*, [1992] S.C.J. No. 40, [1992] 1 S.C.R. 1021 at 1159, 91 D.L.R. (4th) 289 at 374 (S.C.C.).

212 See *Whiten v. Pilot Insurance Co.*, [2002] S.C.J. No. 19, [2002] 1 S.C.R. 595, 209 D.L.R. (4th) 257, 2002 SCC 18 at para. 72 (S.C.C.).