Equitable compensation and remoteness: not so remote from the common law after all

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This article focuses on the rules governing equitable compensation for losses arising from breach of fiduciary duty and breach of trust. Although it has long been argued that the remoteness limitations on equitable compensation are entirely different from common law, I argue that courts should, and sometimes do, draw on known models of compensation derived from common law and statutory causes of action, including negligence, deceit, misleading or deceptive conduct and breach of contract. The precise model depends upon the nature of the breach of fiduciary duty or breach of trust concerned. The principles which limit liability in equity and common law are not so remote from one another after all.

I INTRODUCTION

It is often said that awards of equitable compensation are not subject to strict causal or remoteness restrictions, and that all consequential losses flowing from the breach of an equitable obligation are recoverable.[1] By contrast, compensatory damages for breach of contract and for most torts are said to be subject to causal and remoteness restrictions which limit the liability of a defendant.[2] Courts across the common law world have asserted that this difference arises because equity and common law are fundamentally different.[3] Common law is said to have self-interest at its heart, whereas equity is said to have the interests of others at its

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1 *Re Dawson* [1966] 2 NSWR 211; *Hodgkinson v Simms* [1994] 3 SCR 377; *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 (‘*Youyang*’). But cf *Target Holdings Ltd v Redferns* [1996] AC 421 (‘*Target Holdings*’).

2 Contract: *Hadley v Baxendale* (1854) 9 Exch 341, 354; 156 ER 145, 151; *Victoria Laundry (Windsor) Ltd v Newman Industries* [1949] 2 KB 529 (‘*Victoria Laundry*’). Negligence: *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound (No. 1))* [1961] AC 388; *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd (The Wagon Mound (No. 2))* [1967] 1 AC 617.

3 *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534, 543 (McLachlin J) (‘*Canson*’); *Bristol and West Building Society v Mothew* [1998] Ch 1, 17 (Millett LJ) (‘*Mothew*’); *Youyang* (2003) 212 CLR 484, 500; Peter Millett, ‘Equity’s Place in the Law of Commerce’ (1998) 114 *Law Quarterly Review* 214, 225.

heart. However, the principles governing common law and equitable recovery are not as different as the courts claim. In some instances, the rules causation and remoteness rules in equity are interpreted in light of existing common law models of compensation. In other instances, it is suggested that while courts do not presently draw on existing common law and statutory models of compensation in order to ascertain fair limits for equitable compensation, they *should* do so. Thus, this article makes a descriptive claim in relation to some awards of equitable compensation and a normative claim in relation to others.

This article will be laid out in four parts. Part 2 considers the rationales behind remoteness limitations, including the defendant's personal responsibility for damage, assumption of responsibility, culpability, concern about unjust and unreasonable burdens, social utility and statutory policy. Parts 3 and 4A lay out the descriptive claim that some instances of equitable compensation draw on existing models of common law compensation.[4] In Part 3, it is suggested that the limiting rules which operate in respect of compensation for breach of equitable duty of care draw on the model used for negligence at common law, because, among other things, courts are concerned to ensure that defendants who negligently cause economic loss are not liable for widespread and indeterminate losses. In Part 4A, it is suggested that the remoteness rules which operate in respect of conflicts of duty and interest draw on the model which governs recovery for the common law tort of deceit, because such conduct is regarded as morally culpable and lacking in social utility, so that defendants are not entitled to have their liability curtailed by remoteness limitations. These are both instances of 'fusion by analogy'[5]: courts have drawn on common law models of liability incrementally and naturally because of the similarities between common law and equitable causes of action. Parts 4B, 4C and 5 lay out the normative claim that courts should interpret equitable compensation in the light of existing statutory and common law models of compensation to a greater degree in order to ascertain fair limits for when a defendant should be liable. In Part 4B, it is argued that further guidance for liability for conflicts of duty can be gained by drawing on the model used by the Australian courts when awarding compensatory damages for breach of the misleading or deceptive conduct provisions of the *Australian Consumer Law*.[6] There are similar interpersonal justice considerations (a desire to compensate vulnerable claimants who lack full information) and similar community welfare concerns about the way in which people should deal with one other. While the Australian Consumer Law is a peculiarly Australian innovation, there is no reason why other common law countries cannot use and adapt the model Australian courts have developed in an equitable context. In Part 4C it is argued the *Brickenden* rule of causation should be abandoned by equity, and that a test similar to that applied for common law causes of action should be adopted. In Part 5, it is argued that the rules which

4 Cf *Youyang* (2003) 212 CLR 484, 500.
5 James Edelman, 'A 'Fusion Fallacy' Fallacy?' (2003) 119 *Law Quarterly Review* 375, 377.
6 Schedule 2 to the *Competition and Consumer Act 2010* (Cth) ('ACL').

apply to equitable compensation for misapplication of trust assets[7] should be interpreted in light of the model used to govern liability for damages for breach of contract in some respects. This is a controversial proposition,[8] but it is important, particularly in the case of 'one off' trusts to place some limit on a defendant's liability notwithstanding his fiduciary status.

It *matters* that we do one thing at common law but another thing in equity, to answer Burrows' famous question.[9] As he has explained,[10] coherence is important in the law, and if some common law and equitable causes of action share similar rationales for imposing liability, then the principles governing recovery of compensatory damages should also be similar. The simple assertion that 'equity is different' can lead courts to fail to interrogate whether the defendant should, as a matter of policy and fairness, be liable for the claimant's losses. Under the principles suggested by the High Court of Australia in *Youyang*, a defendant fiduciary will provide a claimant beneficiary with a complete indemnity for all loss resulting from a particular breach, however improbable or unpredictable.[11] Often the claimant's loss is more closely connected to another event: a downturn in the property market,[12] fraud of third parties,[13] negligence by third parties,[14] a failed speculative investment,[15] or the refusal of a third party to issue finance.[16] Because the claimant cannot recover from the more closely responsible party (or cannot recover to the same degree) she identifies a breach of fiduciary duty or trust in order to receive full indemnity for those losses from the fiduciary or trustee. It may be appropriate to make a fiduciary or trustee liable for all losses flowing from a breach. However, in other circumstances this may produce an unjust result, particularly if the loss arises long after the trustee's or fiduciary's relationship with the beneficiary has ceased, and/or the losses are only connected to the breach in the loosest sense. It is argued that insufficient attention to causal and remoteness principles in these situations could render equitable compensation unduly harsh and potentially punitive,[17] and that drawing upon common law

7 This also includes other custodial fiduciaries, such as directors who misuse company property.

8 Cf *Mothew* [1998] Ch 1, 18 (Millett LJ); Millett, above n 3, 225.

9 Andrew Burrows, 'We Do This At Common Law But That In Equity' (2002) 22 *Oxford Journal of Legal Studies* 1.

10 Andrew Burrows, 'Remedial Coherence and Punitive Damages in Equity' in Simone Degeling and James Edelman, *Equity in Commercial Law* (Lawbook Co, 2005) 382.

11 This phraseology is borrowed from *Victoria Laundry* [1949] 2 KB 529, 539 (Asquith LJ).

12 *Hodgkinson v Simms* [1994] 3 SCR 377.

13 *Re Dawson* [1966] 2 NSWR 211; *Target Holdings* [1996] AC 421; *Collins v Brebner* [2000] Lloyd's Rep PN 587.

14 *Canson* [1991] 3 SCR 534.

15 *Youyang* (2003) 212 CLR 484.

16 *Swindle v Harrison* [1997] 4 All ER 705.

17 I have no objection in principle to punitive damages in equity, but such damages should be awarded only exceptionally and explicitly as punitive damages, not under cover of compensation. Cf *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10, (2003) 56 NSWLR 298, 311–12 (Spigelman CJ), 422 (Heydon JA) which disapproved punitive damages for breach of fiduciary duty in Australia. Cf *Cook v Evatt (No 2)* [1992] 1 NZLR 676;

models of compensation could be helpful in resolving the issue.

In an Australian context, but not so much in other common law countries, an objection may arise that this argument represents 'fusion fallacy.'[18] In other words, it could be said that this article undertakes a historically inaccurate and inappropriate comparison between common law damages and equitable compensation. The proper response is that courts should not be prevented from learning from other areas of private law, and from borrowing appropriate concepts in a careful manner. Indeed, in some areas, 'fusion by analogy' has already happened. The common law has had a greater length of time to refine limitations on compensation, as well as a greater level of experience with compensatory remedies, and it makes sense to learn from the common law rather than to develop a parallel jurisprudence in equity.[19] The common law has a variety of compensatory models which can be used and adapted in equity. Burrows argues that the principles governing equitable compensation should be made more similar to those governing common law compensatory damages.[20] Messrs Meagher, Heydon and Leeming accuse Burrows of 'fusion fallacy' and describe him as saying that 'in all respects common law damages are the same as equitable compensation, the same principles apply to each, and such concepts as remoteness, intervening causes, [and] contributory negligence...apply indifferently to each concept.'[21] Leaving aside the question of whether this is an accurate characterisation of Burrows' argument, this article does not posit that common law damages are the same as equitable compensation in all respects. My argument is more nuanced. While common law models of compensation may be used as a guide, there are also important differences between equitable and common law compensation which should be retained.

II REMOTENESS

As Charles Mitchell has observed, 'some losses can have multiple causes, and some wrongs can have ripple effects and far-reaching consequences.'[22] Principles of remoteness seek to delineate when a defendant is no longer liable to compensate for loss which he caused to the claimant, particularly when the loss was an unusual or distant consequence of the wrong, or when the loss was more closely caused by an intervening event. Remoteness is sometimes known as 'scope of liability' to distinguish it from questions of causation and to make clear that it is grounded

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Aquaculture Corp v New Zealand Green Mussel Co Ltd [1990] 3 NZLR 299; *Norberg v Wynrib* [1992] 2 SCR 226.

18 RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity: Doctrine and Remedies* (LexisNexis, 4th ed, 2002) 54, 57.

19 Steven Elliott, 'Remoteness Criteria in Equity' (2002) 65 *Modern Law Review* 588, 594; Jeffery Berryman, 'Equitable Compensation for Breach by Fact-Based Fiduciaries: Tentative Thoughts on Clarifying Remedial Goals' (1999) 37 *Alberta Law Review* 95, 112.

20 Burrows, 'We Do This At Common Law', above n 9.

21 Meagher, Heydon and Leeming, above n 18, 840.

22 Charles Mitchell, 'Causation, Remoteness, and Fiduciary Gains' (2006) 17 *Kings College Law Journal* 325, 327.

in reasons of public policy, not 'cause in fact'.[23] Robertson has argued that the concerns underlying imposition of liability for negligence can be divided into two categories: those which deal with interpersonal justice between claimant and defendant, and those which deal with the broader community welfare effects of imposing liability.[24] This division will be adopted when discussing the courts' reasons for imposing liability in private law more generally.

(a) Interpersonal justice concerns

Robertson argues that remoteness rules at the duty stage in negligence reflect principles of interpersonal fairness to ensure that defendants are not liable where it would be unreasonable for defendants to have had the possibility of harm to the claimant in mind.[25] A similar concern informs liability in other areas of private law. A defendant is held to be responsible for damage because it was a direct consequence of the act, as with intentional torts, or because the loss in question was a consequence which the defendant should reasonably have had in mind, as for negligence and contract. Some decisions reflect a concern that defendants should only be held responsible for events over which they had control. This is related to personal responsibility: if you choose to take a wrongful course of action, it is easier for a court to conclude that you should be held to be responsible for the consequences. Where liability arises from a consensual agreement between the claimant and the defendant, it has been suggested that courts exclude liability for events for which the defendant did not voluntarily assume the risk,[26] although this argument is contentious, and others have argued that remoteness rules in contract are better seen as 'gap-filling' rules.[27] For some torts and perhaps some

23 See eg, Jane Stapleton, 'Cause-in-Fact and the Scope of Liability for Consequences' (2003) 119 *Law Quarterly Review* 388.

24 Andrew Robertson, 'Rights, Pluralism and the Duty of Care' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012) 435; Andrew Robertson, 'On the Function of the Law of Negligence' (2012) 33 *Oxford Journal of Legal Studies* 31; Andrew Robertson, 'Policy-based reasoning in duty of care cases' (2013) 33 *Legal Studies* 119.

25 Robertson, 'On the Function', ibid, 33; Robertson, 'Policy-based reasoning', ibid, 122.

26 John Cartwright, 'Remoteness of Damage in Contract and Tort: A Reconsideration' (1996) 55 *Cambridge Law Journal* 488; David Harris, David Campbell and Roger Halson, *Remedies in Contract & Tort* (Cambridge University Press, 2nd ed, 2005) 88–97; Hugh Collins, *The Law of Contract* (LexisNexis, 4th ed, 2003) 413; David Campbell and Hugh Collins, 'Discovering the implicit dimensions of contracts' in David Campbell, Hugh Collins and John Wightman (eds), *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts*, (Hart Publishing, 2003) 25, 45; Adam Kramer, 'An agreement-centred approach to remoteness and contract damages' in Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart Publishing, 2005) 249; Andrew Tettenborn, 'Hadley v Baxendale Foreseeability: a Principle Beyond Its Sell-by Date?' (2007) 23 *Journal of Contract Law* 120; *Transfield Shipping v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48; [2009] 1 AC 61, 67–71. Cf *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2010] SGCA 36; [2011] 1 SLR 150.

27 Andrew Robertson, 'The basis of the remoteness rule in contract' (2008) 28 *Legal Studies* 172; Mark Stiggelbout, 'Contractual remoteness, "scope of duty" and intention" [2012] *Lloyds' Maritime and Commercial Law Quarterly* 97; KW Lawson, 'The Remoteness

breaches of contract, the defendant's deliberate wrongdoing may affect the court's assessment of whether damage is too remote or not.[28] Liability may also reflect the moral culpability of the defendant's action, particularly in tort, where loss flowing from a deliberate and dishonest action is less likely to be subject to remoteness limitations. Another interpersonal justice concern is that the defendant should not be subjected to an unreasonable burden by reason of a compensatory damages award, particularly if there is a disproportion between the breach and the loss which arose.[29]

(b) Community welfare concerns

Robertson also argues that community welfare considerations affect a court's decision to impose liability in negligence.[30] Again, this is true of private law more broadly, where the community welfare considerations which may be taken into account include the lack or presence of social utility of certain conduct, deterrence of wrongdoing, and a desire to protect vulnerable people or those who do not have full information. Sometimes compensatory damages will not be awarded even when the defendant's conduct leads to loss because the benefits to society of the conduct outweigh the detriment to the individual concerned.[31] Conversely, sometimes courts make a defendant liable for all losses arising from his conduct because of a lack of social utility in the conduct. Deterrence may lead courts to impose liability without remoteness limitations: courts wish to deter defendants from conduct which is socially deleterious, and do not wish to give them the benefit of any limiting factors which may reduce liability. Finally, statutory policy is used to shape and inform remoteness concerns where statute is concerned. The concern behind misleading and deceptive conduct rules pursuant to the *ACL*, for example, is to protect consumers who are generally in a position lacking power and information. Those who contravene the statute are held be liable for all or most losses flowing from the breach because this reflects the rationale of the statutory regime where the protection of consumers is paramount.

(c) Breach of equitable duty of care and skill

The obligation to exercise an equitable duty of care and skill applies to many fiduciaries, not just trustees, or custodial fiduciaries. Negligent breaches of trust (including failures in management which do not result in loss of trust property) also fall under this head.[32] Although remoteness is said not to operate as a

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Rules in Contract: Holmes, Hoffmann, and Ships that Pass in the Night' (2012) 23 *Kings Law Journal* 1.

28 Cartwright, above n 26. 489; Robertson, 'The basis of the remoteness rule in contract' ibid, 192–93.

29 Robertson, ibid, 193–94; Robertson, 'On the Function', above n 24, 34–35.

30 Robertson, 'On the Function', above n 24, 35–37.

31 B McDowell, 'Foreseeability in Contract and Tort: The Problems of Responsibility and Remoteness' (1985) 36 *Case Western Reserve Law Review* 286, 297.

32 See Peter Birks, 'Equity in the Modern Law: an Exercise in Taxonomy' (1996) 26 *University*

limitation on awards of equitable compensation, breaches of equitable duty of care and skill are often said to be the exception to the rule.[33] It is suggested that courts have interpreted compensation for breach of the equitable duty of care and skill in light of the model of compensation which applies in negligence.

The tort of negligence occurs when the defendant owes the claimant a duty to take care, the defendant breaches that duty by failing to meet the standard of care expected of a reasonable person, and the breach causes harm that is not too remote. Liability is also subject to a number of defences.[34] Because negligence can occur without any intention of the part of the defendant to cause harm, remoteness rules prevent the defendant from being liable for harm which is difficult to predict. The remoteness test in negligence is whether the kind of damage suffered by the claimant was foreseeable as a possible outcome of the kind of carelessness committed by the defendant.[35] It is unnecessary to foresee the precise chain of events which occurred. Where personal injury is concerned, a broad range of injuries have been held to be not too remote,[36] including injuries resulting from motor vehicle accidents[37] and hazardous activities,[38] perhaps because the possibility of injury from such activities is predictable. However, courts impose stricter remoteness rules where negligence causes 'pure economic loss.'[39] This is partly because the loss is potentially more unpredictable, and courts are concerned to prevent disproportionate and widespread liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'.[40] Community welfare considerations which militate against allowing extensive liability for pure economic loss include a desire not to undermine contractual liability,[41] and a concern that socially useful conduct should not be deterred.[42]

There is a clear kinship between the tort of negligence and the equitable duty of care and skill. As with negligence, the breach of an equitable duty of care and

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of Western Australia Law Review 1, 46–47; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 213, 246–47 (Fisher J) (aff'd [1999] 1 NZLR 664).

33 *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187 ('*Wheeler*'); *Mothew* [1998] Ch 1, 17 (Millett LJ); *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 680 (Gault J); 687 (Tipping J).

34 See *Jaensch v Coffey* (1984) 155 CLR 549, 585–86 (Deane J).

35 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound (No. 1))* [1961] AC 388; *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd (The Wagon Mound (No. 2))* [1967] 1 AC 617. These cases overruled *Re Polemis & Furness, Withy & Co Ltd* [1921] 3 QB 560.

36 See eg, *Nader v Urban Transit Authority of NSW* (1985) 2 NSWLR 501; *Kavanagh v Akhtar* (1998) 45 NSWLR 588.

37 See eg, *Chapman v Hearse* (1961) 106 CLR 112.

38 See eg, *Hughes v Lord Advocate* [1963] AC 837; *Stephenson v Waite Tileman Ltd* [1973] NZLR 152.

39 Cartwright, above n 26, 500–07.

40 *Ultramares Corp v Touche*, 255 NY Rep 170 (1931), 179–80 (Cardozo CJ). See also *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453, 457.

41 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, 107 (Lord Scarman); *Hill v Van Erp* (1997) 188 CLR 159, 179 (Gummow J).

42 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 503 (Deane J).

skill can occur without any intention of the defendant to cause harm, and the consequences of that harm may well be far-reaching and hard to predict. There is nothing 'special' about the duties of care and skill owed by a fiduciary which requires them to be treated more generously than common law duties of care and skill.[43] Indeed, in *Medforth v Blake*,[44] the English Court of Appeal opined that the content of an equitable duty of care and skill and a common law duty of care and skill in relation to receivers managing mortgaged property was identical for the purposes of that case.[45] While the content of equitable and common law duties may vary somewhat,[46] courts have the same concerns to prevent defendant being liable for unpredictable and disproportionate pure economic loss, and hence many courts interpret equitable compensation as operating in a similar way to remoteness in negligence law.[47]

In *Wheeler*, the defendant was alleged to have breached his equitable duty to exercise a reasonable degree of care and skill as a director towards the claimant company by allowing a certain transaction with an improper purpose to go forward. Ipp J said:

> There is a fundamental distinction between breaches of fiduciary obligations which involve dishonesty and abuse of the trustee's advantages and the vulnerable position of beneficiaries, on the one hand, and, honest but careless dealings which breach mere equitable obligations, on the other. There is ample justification on policy grounds for more stringent rules in the case of breaches of fiduciary obligations, but not where there has been honest but careless dealings.[48]

The remoteness rules from negligence were said to apply to breaches of equitable duties of care and skill because breaches of care and skill did not involve 'dishonesty', unlike breaches of core fiduciary obligations.[49] Perhaps the court also had in mind the division in tort law between intentional and non-intentional wrongs as being appropriate for equity. The equitable duty of care and skill does not require intentional conduct. For intentional torts, remoteness is ascertained according to a criterion of directness, but for non-intentional torts, remoteness

43 Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties*, Hart Publishing, 2010) 35–39. See also *Girardet v Crease & Co* (1987) 11 BCLR (2d) 361, 362 (Southin J).

44 [2000] Ch 87. See Sandra Frisby, 'Making a Silk Purse out of a Pig's Ear – *Medforth v Blake & Ors*' (2000) 63 *Modern Law Review* 413.

45 [2000] Ch 87, 102 (Sir Richard Scott V-C).

46 *Mothew* [1998] Ch 1, 16 (Millett LJ). Conaglen, above n 43, 15, 36.

47 See *Wheeler* (1994) 11 WAR 187; *Mothew* [1998] Ch 1, 17 (Millett LJ); *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 680 (Gault J); 687 (Tipping J).

48 *Wheeler* (1994) 11 WAR 187, 247 (Ipp J).

49 In *Wheeler* the claimant failed at the causation stage on the basis that a reasonable director would not have voted against the impugned transaction.

is ascertained according to a criterion of foreseeability.[50] The need to establish culpability may effectively act as a remoteness limitation for intentional torts.

The approach taken in *Wheeler* has cited approvingly by Millett LJ (as he then was) in *Mothew*,[51] and a similar approach has been taken in other cases.[52] However, the High Court of Australia has criticised Millett LJ's adoption of *Wheeler* in *obiter* in *Youyang*, saying:

> …there must be a real question whether the unique foundation and goals of equity, which has the institution of the trust at its heart, warrant any assimilation even in this limited with the measure of compensatory damages in tort and contract. It may be thought strange to decide that the precept that trustees are to be kept by courts of equity up to their duty has an application limited to the observance by trustees of some only of their duties to beneficiaries in dealing with trust funds.[53]

The High Court argues that remoteness does not limit liability for any equitable breaches of duty because trustees should be held to a strict standard in respect of all duties. The High Court then quotes McLachlin J in *Canson*, where she argues that the claimant should be favoured in these cases because the fiduciary has undertaken to act in the claimant's best interests.[54] While the obligation of care and skill is owed by a fiduciary, it should not be conceived of as a fiduciary obligation per se,[55] and the prophylactic considerations which apply to breaches of the core fiduciary duties do not apply to breaches of care and skill.

It is appropriate to have remoteness considerations drawn from negligence law in equity for a number of reasons. The same interpersonal justice considerations apply in negligence and equity because there is no need for a defendant to be deliberate to be liable for an equitable breach of care and skill, and there is a lower level of moral culpability. The losses may be widespread and unpredictable. To award damages for breach of an equitable duty of care and skill without remoteness limitations could render such damages punitive rather than compensatory.[56] If one

50 Elliott, above n 19, 589.

51 *Mothew* [1998] Ch 1, 17 (Millett LJ). Cf Meagher, Heydon and Leeming, above n 18, 840 who argue strongly against this passage of Millett LJ's judgment.

52 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 205 (Lord Browne-Wilkinson); *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 680 (Gault J); 687 (Tipping J); *Youyang Pty Ltd v Minter Ellison* [2001] NSWCA 198 (8 October 2001) [54] (Young CJ in Eq) ('*Youyang NSWCA*'). Cf *Youyang* (2003) 212 CLR 484, 500; JD Heydon, Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005) 185; Joshua Getzler, 'Am I my Beneficiary's Keeper? Fusion and Loss-Based Fiduciary Remedies' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005) 239.

53 *Youyang* (2003) 212 CLR 484, 500.

54 *Canson* [1991] 3 SCR 534, 543 (McLachlin J).

55 Conaglen, above n 43, 35–39.

56 I have argued that Equity has a punitive aspect (see *** 32–46) but if punitive remedies

takes the view that negligence in pure economic loss cases often arises out of a voluntary undertaking to act in the interests of the claimant, there is an argument that damages should be confined according to whether the defendant assumed those risks.[57] Finally, to apply different remoteness standards would create inconsistency in the law because the duties in equity and tort are often identical. It seems problematic that a claimant can recover all losses from a defendant who happens to be a fiduciary, but not from one who is not. Consequently, it is suggested that the approach in *Wheeler* and *Mothew* is preferable.

(d) Undisclosed conflicts of duty and interest

A fiduciary must not place himself in a position of conflict with a beneficiary,[58] but there is not a fiduciary duty to disclose *per se*.[59] Claims for equitable compensation arising from a failure to disclose a conflict of interest often arise against professional advisers (particularly solicitors).[60] While a causal link must be established between the loss and the failure to disclose the conflict, defendants are often held liable for all losses flowing from the failure to disclose, notwithstanding that the losses may have some more proximate cause. Indeed, as will be considered in Part 4C below, it is said that the defendant cannot argue that the claimant would still have proceeded with the course of action had disclosure of the conflict been made. It will be suggested that this rule is inappropriate, and that a similar rule should be applied to that used for common law deceit and negligent misrepresentation.

As a consequence of the relaxed causation and remoteness rules, claimants prefer to pursue solicitors and other advisers in equity because equitable compensation is potentially more generous than common law compensation for negligence.[61]

are awarded, they should be overt, rather than punitive under cover of compensation, for reasons of transparency.

57 Cartwright, above n 26, mentioning *Spring v Guardian Assurance plc* [1995] 2 AC 296; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145; *White v Jones* [1995] 2 AC 207.

58 *Mothew* [1998] Ch 1, 18 (Millett LJ); *Chan v Zacharia* (1984) 154 CLR 178 (HCA) 199 (Deane J).

59 Disclosure of a conflict is a defence to an allegation of conflict of interest if the claimant then consents to the conflict: see Matthew Harding, 'Two Fiduciary Fallacies' (2007) 2 *Journal of Equity* 1; Jamie Glister, 'Equitable Compensation' in Pauline Ridge and Jamie Glister (eds), *Fault Lines in Equity* (Hart Publishing, 2012) 143, 158–60. Trustees may be subject to the trustees' duty to provide information to a beneficiary: see Robert Chambers, 'Liability' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing, 2002). However Canadian law which seems to suggest that there is a 'fiduciary' duty to disclose: *Canson* [1991] 3 SCR 534. Also cf *Item Software UK Ltd v Fassihi* [2004] EWCA (Vic) 1244, [2005] 2 BCLC 91 (positive duty to disclose misconduct).

60 WMC Gummow, 'Compensation for Breach of Fiduciary Duty' in T G Youdan, *Equity, Fiduciaries and Trusts* (Carswell, 1989) 57, 61.

61 Andrew Burrows, *Remedies for Torts and Breach of Contract* (Oxford University Press, 3rd ed, 2004) 601. See eg, *Canson* [1991] 3 SCR 534 (unsuccessful claim against solicitor); *Hodgkinson v Simms* [1994] 3 SCR 377 (successful claim against financial adviser); *Swindle v Harrison* [1997] 4 All ER 705 (unsuccessful claim against solicitor); *Collins v Brebner* [2000] Lloyd's Rep PN 587 (unsuccessful claim against solicitor).

The solicitor or other adviser can be an attractive target because he will effectively act as an indemnifier of the claimant's loss howsoever caused.

It is suggested that courts have interpreted compensation for conflict of interest in light of the model of compensation which applies in the tort of deceit.[62] This is in some ways apt. Deceit and conflicts of duty and interest are both regarded as morally culpable as a matter of interpersonal justice, as they involve defendants misleading claimants by failing to supply full and frank information before the claimant entered into a transaction. Both breaches also lack social utility in the broader community welfare sense. However, deceit and conflicts of duty and interest are also unalike, because equity will allow recovery where there is no dishonesty (except in the sense of 'equitable fraud') whereas common law deceit requires actual dishonesty. Because actual dishonesty is unnecessary for the imposition of liability for equitable compensation for conflicts of duty and interest, it is suggested that common law courts in all jurisdictions can learn from the model of liability which Australian courts have adopted when awarding damages for breach of s 18 of the *ACL* and its predecessor.[63] Section 18 of the *ACL* simply requires 'misleading or deceptive conduct' on the part of a defendant and s 236 allows a claimant to recover compensatory damages for losses flowing from that conduct.

III DECEIT: SIMILARITIES AND DIFFERENCES

The common law tort of deceit is committed where the defendant knowingly or recklessly makes a false representation intending that the claimant relies upon it, and the claimant does so. The claimant must establish that the defendant was fraudulent. It is not enough to show that the defendant did not have reasonable grounds for his belief; it must be shown that the defendant genuinely did not hold the belief.[64] The misrepresentation must be 'a factor' in the claimant's decision to act.[65] Damages for deceit are not limited by remoteness considerations and causation is established simply by showing that the harm was a 'direct consequence' of the deceit.[66] Once deceit is established, the claimant is compensated for *all*

62 See eg, *Canson* [1991] 3 SCR 534 570–71 (La Forest J); *Swindle v Harrison* [1997] 4 All ER 705, 715 (Evans LJ), 727–78 (Hobhouse LJ); *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 213, 241 (Fisher J) (aff'd *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664; *Collins v Brebner* [2000] Lloyd's Rep PN 587, 590 (Tuckey LJ); *Murad v Al-Saraj* [2005] EWCA Civ 959 [4], [74]; *Digital Pulse v Harris* (2002) 166 FLR 421, 448 (Palmer J) (overturned in *Harris v Digital Pulse Pty Ltd* (n 17)). See also *Hodgkinson v Simms* [1994] 3 SCR 377, 445–46 (comparison between failure to disclose and negligent misstatement) (La Forest J).

63 Schedule 2 of the *Competition and Consumer Act 2010* (Cth), ss 18 and 236, preceded by *Trade Practices Act 1974* (Cth), ss 52 and 87.

64 *Derry v Peek* (1889) 14 App Cas 337.

65 *Edgington v Fitzmaurice* (1885) 29 Ch 459.

66 Burrows, *Remedies for Torts and Breach of Contract,* above n 61, 81; *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, 167 (*'Doyle'*) (Lord Denning MR); *Smith New Court Securities v Citibank N.A.* [1997] AC 254, 265 (Lord Browne-Wilkinson); 282 (Lord Steyn).

losses arising from her reliance on the defendant's fraudulent misrepresentation, as it is assumed that the claimant would not have entered into the transaction at all but for the misrepresentation.[67] If, for example, the claimant has been induced to purchase a business by the defendant's fraudulent misrepresentation, damages will be measured by the difference in value of the business at the time of acquisition and the price received from the later sale of the business.[68] There are a variety of reasons for the lack of remoteness limitations. First, there is a clear concern that deceitful conduct is immoral and interpersonal justice considerations require the defendant to compensate for all or most losses.[69] Indeed, damages for deceit have a punitive aspect.[70] Unlimited liability may also be imposed on a community welfare basis because there is no social utility in allowing deceitful conduct, and thus no reason to limit damages. However, it is perhaps more difficult to find a deterrent rationale behind deceit damages.[71] Despite the foregoing, the claimant is under a duty to minimise loss,[72] and it has been suggested that losses will be too remote where the claimant is 'the author of his own misfortune'.[73]

Failures to disclose a conflict of interest share certain characteristics with deceit which indicate that it may be appropriate to interpret equitable compensation in light of the deceit damages model. It is axiomatic that a fiduciary should not put himself in a position where his interests conflict with those of the beneficiary. If the fiduciary fails to disclose a conflict when advising the beneficiary and the beneficiary relies on the conflicted advice to her detriment, it is similar to cases of deceit where one party enters into a bad bargain on the basis of deceitful information.

The casual requirement for liability for damages for undisclosed conflicts of interest by a fiduciary is apparently similar to that of deceit (a 'direct consequence' requirement). In *Canson* a majority of the Canadian Supreme Court held that a fiduciary was not liable for the collapse of the foundations of a warehouse which the claimants had purchased. The defendant had failed to disclose a conflict of interest when the purchase occurred, but the more direct cause of the collapse was negligence by drillers. The majority interpreted the applicable principles as being similar to deceit. While was not necessary that the harm be reasonably foreseeable, it was still necessary to show that the harm was a 'direct consequence' of the failure to disclose. Stevenson J said that the losses were 'so unrelated and

67 *Doyle* [1969] 2 QB 158; *Gould v Vaggelas* (1985) 157 CLR 215; *Smith New Court Securities v Citibank N.A.* [1997] AC 254, 265.

68 See eg, *Toteff v Antonas* (1952) 97 CLR 647; *Doyle* [1969] 2 QB 158.

69 *Doyle* [1969] 2 QB 158, 167 (Lord Denning MR); 168–69 (Winn LJ); 171 (Sachs LJ).

70 Berryman, above n 5, 103. See eg, *Doyle* [1969] 2 QB 158, 167 (Lord Denning MR).

71 Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 162. Cf *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 279–80 (Lord Steyn); Jane Stapleton, 'Occam's Razor Reveals an Orthodox Basis for *Chester v Afshar*' (2006) 122 *Law Quarterly Review* 426, 440.

72 To be contrasted with the rules regarding equitable compensation, although note *Canson* [1991] 3 SCR 534, 554 (McLauchlin J).

73 *Doyle* [1969] 2 QB 158, 168 (Winn LJ).

independent [of the breach] that they should not, in fairness, be attributed to the defendant's breach of duty.'[74] The defendant's fiduciary duty was not designed to protect the claimant from the risks of shoddy construction.[75] The minority in *Canson* found that there was no fiduciary obligation, and treated the case like one of breach of contract,[76] but deceit would have been a more appropriate analogue. However, breach of a fiduciary obligation not to conflict is also dissimilar to deceit. It is generally thought to be unnecessary to show that the fiduciary was fraudulent, or even that the fiduciary was a wrongdoer in order to make a defendant liable for equitable compensation for breach of a fiduciary obligation not to conflict. A *potential* conflict of interest is enough to found fiduciary liability.[77] Although Southin J said in *Girardet v Crease & Co* that 'an allegation of breach of fiduciary duty carries with it the stench of dishonesty – if not of deceit, then of constructive fraud,'[78] the qualification of the word 'constructive' is important. It indicates that the defendant has not necessarily been fraudulent, but the court is going to treat him as if he was. In *Wheeler,* Ipp J said that there was a distinction between honest but careless dealings (as for equitable duties of care and skill) and 'breaches of fiduciary obligations which involve dishonesty *and abuse of the trustee's advantages and the vulnerable position of the beneficiaries*' (as for conflict of duty and interest and misapplication of trust funds).[79] Again, the concern is not simply whether or not the fiduciary is dishonest, but Ipp J also considers the abuse of power and the beneficiary's vulnerability.

It has been suggested that a fault requirement in equity should be imported in the breach of obligation not to conflict cases. Evans LJ in *Swindle v Harrison* suggests that equitable compensation on a measure akin to deceit should not be awarded 'unless the breach can properly be regarded as the equivalent of fraud'.[80] Dr Elliott suggests that equitable compensation for conflict of duty and interest should be awarded where the claim arises from intentional disloyalty.[81] It should also be noted that allowances for skill and effort do not reduce the amount of equitable compensation payable, and despite the extra-judicial suggestions of Gummow J,[82] it is not clear how or whether the usual equitable bars to relief operate. Thus, there is a risk that equitable compensation for conflict of duty and interest may place an unfair burden on fiduciaries.[83] Nonetheless, the law remains that there is no

74 *Canson* [1991] 3 SCR 534, 590 (Stevenson J).

75 Michael O'Meara, 'Causation, remoteness and equitable compensation' (2005) 26 *Australian Bar Review* 51, 64.

76 *Hodgkinson v Simms* [1994] 3 SCR 377, 455–80 (Sopinka and McLachlin JJ with whom Major J agreed, dissenting).

77 See eg, *Boardman v Phipps* [1967] 2 AC 46, 103 (Lord Cohen); 111 (Lord Hodson). Cf Lord Upjohn's dissent in *Boardman v Phipps* [1967] 2 AC 46, 124 where he said 'a real sensible possibility of conflict' was required.

78 (1987) 11 BCLR (2d) 361, 362.

79 *Wheeler* (1994) 11 WAR 187, 247 (Ipp J).

80 *Swindle v Harrison* [1997] 4 All ER 705, 717 (Evans LJ).

81 Elliott, above n 19, 597.

82 Gummow, above n 60, 75.

83 See also Chambers, above n 59, 35.

requirement to show fraud or wrongdoing in order to gain equitable compensation from a fiduciary for a failure to disclose a conflict of interest. This is because the court emphasises also the broader community welfare considerations to a greater degree where fiduciary duties are concerned. This difference between common law and equity is generally appropriate. Unlike the equitable duty of care and skill, a fiduciary obligation not to conflict is one of the core fiduciary obligations and has a prophylactic character.[84] Perhaps courts can draw instead from the model presented in the Australian cases involving statutory liability for 'misleading or deceptive conduct'. This may seem strange to a non-Australian audience, but it is suggested that Australian courts have adapted the deceit model in a way which is useful, and that this model can be adapted for use in equity regardless of whether the local jurisdiction has a similar legislative scheme.

IV MISLEADING AND DECEPTIVE CONDUCT: SIMILARITIES AND DIFFERENCES

The policy behind liability for a failure to disclose a conflict of interest is similar to Australian cases involving s 18 of the *Australian Consumer Law* (formerly s 52 of the *Trade Practices Act*).[85] Section 18 provides that 'a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.' The simple fact that the conduct is misleading and deceptive is enough. As with equitable compensation for undisclosed conflicts of interest, there is no need to prove fraud or intention for breaches of s 18. The provisions are intended to achieve interpersonal justice and to ensure that claimants who are misled have recourse, and in that sense they are similar to deceit. However, there is also an emphasis on community welfare, so that French J (as he then was) said in extra-judicial comments that 'misleading or deceptive conduct' case law indicated 'a public interest jurisprudence which is not concerned with particular transactions so much as the setting of standards for the conduct of public debate in trade or commerce.'[86] The concern is to ensure that information asymmetries between parties do not lead to commercial exploitation, and to set a normative standard for commercial dealings. Section 236 of the ACL allows a court to award a claimant compensation for any 'loss or damage' suffered as a result of the breach. This is similar to equity's desire to protect beneficiaries from being misled by a failure to disclose on the part of the fiduciary. The courts' concerns with fiduciary breaches of conflict of interest not only include ensuring interpersonal justice between that particular fiduciary and beneficiary, but also include establishing a broader normative standard where fiduciaries are required to provide information

84 By contrast the duty of care and skill is *not* a fiduciary obligation: Conaglen, above n 43 35–39.

85 See above n 63.

86 Robert French, 'A Lawyer's Guide to Misleading or Deceptive Conduct' (1989) 63 *Australian Law Journal* 250, 250. See also at 251: 'Indeed it might be argued that s 52 [now s 18] was necessary to establish minimum absolute standards of commercial probity in a way which the developmental processes of the common law of the common law could not accommodate.'

to beneficiaries. As Ipp J observed in *Wheeler*, beneficiaries are vulnerable to exploitation,[87] and there is usually an information asymmetry between fiduciaries and beneficiaries which means that the beneficiary is less well informed than the fiduciary.[88] Getzler has suggested Australia deals with misleading or deceptive conduct through consumer legislation but Canada has expanded fiduciary responsibility to deal with the same problem.[89]

Australian courts often measure the damage caused by a contravention of s 18 of the *ACL* or its predecessor according to what would have been allowed at common law for deceit or negligent misstatement.[90] In *Henville v Walker*, a case involving misleading or deceptive representations by a real estate agent to an architect who was planning to build and sell apartments for profit, McHugh J said that if the claimant architect had established deceit at common law, all loss would have been recoverable, and that a similar approach should be taken in cases of misleading or deceptive conduct. He continued:

> The purposes of the Act include promoting fair trading and protecting consumers from contraventions of the Act. Those purposes are more readily achieved by ensuring that consumers recover the actual losses they have suffered as the result of contraventions of the Act. Where a person contravenes the Act and induces a person to enter upon a course of conduct that results in loss or damage, an award of damages that compensates for the actual losses incurred in embarking on that course of conduct best serves the purposes of the Act and should ordinarily be awarded.[91]

The complicating factor in *Henville v Walker* was that the losses had been caused partly by the misleading representation, but partly by the claimant's own failure to correctly estimate costs of the project. Given the claimant's contribution to his loss, the minority preferred to award damages on an expectation basis, saying that the full measure of the claimant's losses was too remote.[92] The minority was concerned that the claimant would recover a disproportionate amount given his own contribution to his loss. By contrast, the majority awarded damages for all losses flowing from the breach, including those arising from claimant's conduct, and justified this by citing the community welfare concerns of the Act to protect

87 *Wheeler* (1994) 11 WAR 187, 247 (Ipp J).

88 Robert Cooter and Bradley Freedman, 'The Fiduciary Relationship: its Economic Character and Legal Consequences' (1991) 66 *New York University Law Review* 1045, 1051.

89 Joshua Getzler, 'Equitable Compensation and the Regulation of Fiduciary Relationships' in Peter Birks and Francis Rose (eds), *Restitution & Equity Volume 1: Resulting Trusts and Equitable Compensation* (Mansfield Press, 2000) 235, 247.

90 See eg, *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 11–12 (Mason, Wilson and Dawson JJ); *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494; *Henville v Walker* (2001) 206 CLR 459, [133]–[140] (McHugh J) (with whom Gummow and Hayne JJ agreed). But cf *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388.

91 *Henville v Walker* (2001) 206 CLR 459, [135] (McHugh J).

92 *Henville v Walker* (2001) 206 CLR 459, [43]–[44] (Gleeson CJ); [70]–[72] (Gaudron J).

consumers and to deter defendants (specifically and generally).

Similarly, the generous measure of damages in the fiduciary context can be—and has been—justified according to the prophylactic policy of fiduciary law.[93] In *Hodgkinson v Simms*,[94] the defendant accountant advised the claimant to invest in certain apartments. The defendant received undisclosed commissions from the builder for successful referrals. The claimant successfully minimised his tax liability, but the investment was disastrous because of a huge decline in the local property market. The defendant was held to owe the claimant a fiduciary duty in respect of the investment advice, which he had breached by failing to disclose his conflict of interest. A majority of the Canadian Supreme Court held that the defendant was liable for *all* losses suffered by the claimant as a result of his reliance on the defendant's advice, including those which arose from the decline of the property market, but the tax advantages the claimant had gained were deducted from the award.[95] The generous measure of damages was justified on the basis that it 'vindicated the core duties immanent in the relationship' between the parties,[96] indicating a concern to ensure that interpersonal justice was met. However, La Forest J said that it would be relevant if the damages were 'out of all proportion to…[the fiduciary's] actual behaviour.'[97] The corollary of this seems to be that in this case, allowing the beneficiary to recover all losses was proportionate to the fiduciary's behaviour, but that in some cases it might not be. The judgments also disclose concerns about broader community welfare aspects of fiduciary obligations imposed upon those who give advice,[98] including protecting beneficiaries as a class and deterring fiduciaries (specifically and generally).

Evidently, courts are not always comfortable with holding the defendant liable for all losses, whether in the area of misleading or deceptive conduct or a failure to disclose a conflict. In *Henville v Walker*, the minority preferred to limit the claimant's recovery to an expectation measure rather than a reliance measure. And, as mentioned earlier, courts and academics are sometimes uncomfortable with holding fiduciaries liable for all losses flowing from a failure to disclose a conflict of interest in the absence of fraud or intentional conduct.[99] This may be particularly so where there is a perception that the claimant obtains more generous damages from the serendipitous fact that the defendant was a fiduciary.[100] The techniques of the minority judgment in *Henville v Walker* could be employed in the context of equitable compensation to ensure that damages do not constitute

93 *Canson* [1991] 3 SCR 534, 543–47 (McLachlin J); *Hodgkinson v Simms* [1994] 3 SCR 377, 453–54 (La Forest J); *Mothew* [1998] Ch 1, 18 (Millett LJ); *Youyang* (2003) 212 CLR 484, 500; Millett, above n 3, 225.

94 *Canson* [1991] 3 SCR 534.

95 *Canson* [1991] 3 SCR 534 (La Forest J, with whom L'Heureux-Dubé and Gonthier agreed, and Iacobucci J).

96 *Hodgkinson v Simms* [1994] 3 SCR 377, 394–95 (La Forest J).

97 *Hodgkinson v Simms* [1994] 3 SCR 377, 444.

98 *Hodgkinson v Simms* [1994] 3 SCR 377, 410–11 (La Forest J).

99 *Swindle v Harrison* [1997] 4 All ER 705, 717 (Evans LJ); Elliott, above n 18, 597.

100 *Swindle v Harrison* [1997] 4 All ER 705 was arguably such a case.

an unfair burden. Some account could be taken of proportion between the breach and the harm caused.

V THE '*BRICKENDEN* RULE': A DIFFERENCE IN EQUITY WHICH SHOULD BE ABOLISHED

Before moving on to misapplication of trust funds, it is necessary to deal with a difference between common law deceit and equitable liability for undisclosed conflicts of interest which has an impact on causation and recoverability. It has been noted that damages for deceit are measured on the presumption that the claimant would not have entered into the transaction 'but for' the defendant's fraudulent misrepresentation.[101] Equity goes a step further with the '*Brickenden* rule', which prevents the defendant from arguing that the claimant would have entered the transaction even if the conflict had been disclosed. It is said to operate in favour of claimants seeking equitable compensation for breach of fiduciary duty, and is particularly problematic where there is an undisclosed conflict of interest, but is also relevant for misapplication of trust funds. The Privy Council in *Brickenden v London Loan & Savings Bank Co* explained the rule as follows:

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor… Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.[102]

In its strict form, it means that a defendant fiduciary cannot argue that that a claimant beneficiary would have lost money anyway even if the breach had not occurred i.e. disclosure had been made. It creates an irrebuttable presumption that disclosure would have caused the claimant not to enter the transaction.[103] Heydon QC (as he then was) has noted that the curious history of the *Brickenden* rule, and observes that the key statements reproduced above appear to be *obiter dicta*.[104] It is suggested that this particular difference between common law and equity is one which should be eliminated because it operates unfairly and harshly on defendants.

Heydon QC has argued that the *Brickenden* rule has utility where a fiduciary is stripped of his profits made in conflict of interest, but continues 'it is one

101 *Doyle* [1969] 2 QB 158, 167 (Lord Denning MR).
102 [1934] 3 DLR 465, 469 ('*Brickenden*').
103 Sirko Harder, 'Equitable compensation for a fiduciary's non-disclosure and hypothetical courses of events' (2011) 5 *Journal of Equity* 22, 24.
104 JD Heydon, 'Causal Relationships between a Fiduciary's Default and the Principal's Loss' (1994) 110 *Law Quarterly Review* 328, 331.

thing to strip a fiduciary of profit without much inquiry; it is another to hold him accountable for all loss without inquiry into relative causes.'[105] Similarly, Berryman has criticised the 'strict application' of the *Brickenden* rule,[106] and argues that Canadian courts have read the test down to a presumption which shifts the onus of proof to the defendant to prove that the claimant would have proceeded with the transaction regardless of the failure to disclose the conflict.[107] Dr Harder has argued that a strict application of the *Brickenden* rule carries the risk of being punitive, and if punitive sanctions are awarded in equity, they should be done openly rather than under cloak of equitable compensation.[108]

Commonwealth courts are reluctant to apply the *Brickenden* rule in its strict form, and often read it down to a rebuttable presumption which places the burden of proof on the defendant fiduciary to show that the claimant would not have entered into the transaction.[109] *Target Holdings* suggests that it is unlikely to apply in England and Wales. *Swindle v Harrison* suggests that the *beneficiary* must prove that she would not have entered into the transaction had the fiduciary made full disclosure.[110] The position is unclear in Australia, but *Brickenden* appears to have been implicitly accepted by the High Court in *Youyang*[111] and *Maguire v Makaronis*,[112] and has been applied by the Federal Court in *Commonwealth Bank v Smith*.[113] As noted earlier, Canadian law has a rebuttable presumption where a fiduciary may to prove that the beneficiary would have suffered the loss in any case.[114] Glister suggests that the stricter version of *Brickenden* has been abandoned in Australia, Canada and England and Wales, but argues that New Zealand maintains a stricter approach, placing a higher standard of proof on the fiduciary to show that the beneficiary would have suffered the loss than other jurisdictions do.[115]

Equity should remove the 'strict version' of the *Brickenden* rule whereby a defendant cannot be heard to argue that the disclosure would not have altered the transaction. The rule operates unduly harshly and courts are reluctant to follow *Brickenden* for this reason. Instead, breaches of fiduciary duty should be treated

105 Ibid, 332. Cf Gummow, above n 60, 90–91.
106 Berryman, above n 19, 105–08. See also Harder, above n 103, 26–28.
107 Berryman, ibid, 108.
108 Harder, above n 103, 30.
109 Harder ibid 26–28.
110 *Swindle v Harrison* [1997] 4 All ER 705. Harder suggests that *Gwembe Valley Development Co Ltd v Koshy* [2002] BCLC 478 (Ch); [2003] EWCA Civ 1048 contains a tacit approval of the approach in *Swindle*: Harder ibid 29.
111 *Youyang* (2003) 212 CLR 484.
112 (1997) 188 CLR 449.
113 (1991) 102 ALR 453. See also *Wan v McDonald* (1992) 33 FCR 491.
114 *Commerce Capital Trust Co v Berk* (1989) 57 DLR (4th) 759 [13].
115 Glister, above n 59, 162–67. See *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 687 (Tipping J); *Amaltal Corporation Ltd v Maruha Corporation* [2007] 3 NZLR 192 [30]; *Premium Real Estate v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384. See also Jamie Glister, 'Breach of fiduciary duty: *Brickenden* lives on (*Premium Real Estate v Stevens*) (2011) 5 *Journal of Equity* 59.

like deceit and negligent misrepresentation, with the burden of proof being placed on the defendant to show that the claimant would still have proceeded with the investment had disclosure of the conflict been made.[116]

VI MISAPPLICATION OF TRUST ASSETS

It is typically said that remoteness does not operate in relation to misapplication of trust assets, or misapplication of assets held by a custodial fiduciary,[117] and all losses flowing from the breach are said to be recoverable, so that the defendant must entirely restore the trust assets.[118] The position of a trustee is different to that of other fiduciaries. Partly this is because the conduct of trustees attracts the greatest scrutiny,[119] but also because a trust is imposed over particular property, whereas other fiduciary relationships can (and often do) arise without a custodial obligation in regard to particular property.[120] The equitable compensation which is awarded upon misapplication of trust assets is restorative. The unique nature of the trustee and the historical origins of the trustee's obligation to account are often emphasised in this context. However, cases such as *Re Dawson* are used by courts to deny the applicability of remoteness to *all* instances of equitable compensation, regardless of whether the fiduciaries are custodial or non-custodial. This is unfortunate, and these principles should be confined to misapplication of trust assets or misapplication of assets held by a custodial fiduciary.[121]

It is argued that the rules should be interpreted in light of those used in contract, as the similarities and the differences are illuminating. This is particularly true of cases involving 'one-off' trusts where trustees have been held liable for losses occurring as a result of the actions of third parties after the end of the trust. This argument faces the difficulty that Lord Millett has said in extra judicial writings that it is 'misleading' to speak of breach of trust as if it were equivalent to breach of contract.[122] He says that liability of breach of trust is necessarily strict and that account must be taken to the date of judgment. It is correct to say that equitable compensation for misapplication of trust funds is necessarily taken up to the date of judgment, but it is nonetheless helpful to consider breach of trust in light of damages for breach of contract.

116 See eg *Watson v Ebsworth & Ebsworth (a firm)* [2008] VSC 510 [136]. See also *Commerce Capital Trust Co v Berk* (1989) 57 DLR (4th) 759 [13] and Harder, above n 103, 30.

117 'Custodial fiduciary' was coined by Steven Elliott: see CEF Rickett, 'Equitable Compensation: Towards a Blueprint?' (2003) 25 *Sydney Law Review* 31, 32 fn 4. For an example of a case, see *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 (company director).

118 *Re Dawson* [1966] 2 NSWR 211; *Hill v Rose* [1990] VR 129 (VSC) 144; *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, 277 (Spigelman CJ); *Youyang* (2003) 212 CLR 484. Cf *Target Holdings* [1996] AC 421.

119 Peter Devonshire, 'Accounts of Profits for Breach of Fiduciary Duty' (2010) 32 *Sydney Law Review* 389, 394.

120 P W Young, C Croft, ML Smith, *On Equity* (Lawbook Co, 2009) [6.1060].

121 See Elliott, above n 19, 591; Glister, above n 59, 144–45, 156; C Mitchell, 'Equitable Compensation for Breach of Fiduciary Duty'(2013) 66 *Current Legal Problems* 307, 309.

122 Millett, above n 3, 225.

VII CONTRACT: SIMILARITIES AND DIFFERENCES

Compensation awarded for misapplication of trust assets can be interpreted in light of the cases where courts award damages to rectify defective performance in contract, especially cases involving restoration of land or rectification of defective buildings.[123] Like contractual damages, the aim of equitable compensation for misapplication of trust funds is to place the claimant in a position as if the trust had been performed, and the best way to do this is to rectify any defect.[124] The settlor is entitled to expect that the trustee will not misapply trust moneys and the courts endeavour to fulfil the settlor's expectation. There is generally no question of such damage being too remote.

Contractual remoteness principles operate such that a defendant will be liable for losses created by his breach of contract if the loss falls within one of the two limbs of *Hadley v Baxendale*:

1. If the loss is one which arises 'naturally' or 'according to the usual course of things', knowledge of this loss will be imputed to the defendant as a 'reasonable person';
2. If the loss is one that 'may reasonably have been supposed to have been in the contemplation of the parties', the defendant will only have this loss in his contemplation if it is in his actual knowledge.[125]

Generally all direct losses flowing from the breach of contract are recoverable under the first limb. Unexpected or consequential losses flowing from the breach are more likely to fall under the second limb. For present purposes it will be assumed that the primary test in most common law countries remains that in *Hadley v Baxendale*, subject to an *Achilleas* gloss in England and Wales.[126]

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123 See, eg *Groves v John Wunder Company*, 286 NW 235 (Minn 1939); *Bellgrove v Eldridge* (1954) 90 CLR 613; *Radford v De Froberville* [1977] 1 WLR 1262; *Dean v Ainley* [1987] 1 WLR 1729; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272. See recently *Clark v Macourt* [2013] HCA 56 (goods case involving rectification measure). There are also tort cases which involve damages on the rectification measure: see eg, *Evans v Balog* [1976] 1 NSWLR 36 but cf *Pantalone v Alaouie* (1989) 18 NSWLR 119. However, the better analogy is with contract.

124 See Chambers, above n 59, 11:

> 'Since express trusts involve the performance of positive duties and not just the avoidance of harm (even a bare trust requires trustees to preserve the trust assets and transfer them on request), the loss caused by the breach is measured against the position that would have been attained if the trust had been performed properly (like damages for breach of contract).'

125 *Hadley v Baxendale* (1854) 9 Exch 341, 354; 156 ER 145, 151; *Victoria Laundry (Windsor) Ltd v Newman Industries* [1949] 2 KB 529.

126 See *The Achilleas* [2008] UKHL 48; [2009] 1 AC 61, 67–71. Treated as a gloss on *Hadley v Baxendale* in *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 542 (Comm); [2010] 1 CLC 470; *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7; [2010] 1 CLC 241; *ASM Shipping Ltd v TTMI Ltd ('The Amer Energy')* [2009] 1 Lloyd's Rep 293 (QB); *Classic Maritime v Lion Diversified Holdings* [2009] EWHC 1142 (Comm); [2010] 1 Lloyd's Rep 59; *John Grimes Partnership Limited*

When an award of compensatory damages is made to rectify a defective contractual performance, the court does not ask whether the loss is too remote. If you suffer a loss as a result of my failure to build your house according to specifications, this kind of loss is in my contemplation because it arises 'according to the usual course of things' pursuant to the first limb of *Hadley v Baxendale*. The question is how to measure that loss, and the courts generally consider whether it is 'reasonable' to require the promisor to restore the property or to simply compensate for the diminution in value. For defective goods, the measure is more likely to be diminution in value, but the aim of these damages is nonetheless to meet the claimant's expectation and allow her to purchase a substitute performance.[127] Because goods are likely to be available on the open market, diminution in value often provides the fairest rectification measure.[128] Remoteness is generally irrelevant when one is considering compensation for defective performance for breach of contract. The question is whether diminution-in-value damages are an adequate substitute for performance, or whether damages measured according to the cost of cure provide a better substitute for performance.[129] It is argued that trust principles are similar and that restoration is the measure of recovery. I see such contractual awards as intrinsically substitutive, and similarly I see awards for misapplication of trust funds as substitutive. [130]

Applying a contractual style analysis to a trust, the loss which occurs when trust assets are misapplied from an ongoing trust is the kind of loss which any reasonable trustee would expect to arise. It is *not* a remote loss. Like contract, the concern is to fulfil expectations, albeit of the third party settlor who created the trust. It is for this reason that we can draw guidance from the defective performance cases in contract. The trustee was supposed to carry out a particular action, but has done so

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v Gubbins [2013] EWCA Civ 37.

127 England and Wales: *Sale of Goods Act 1979* (UK), ss 50(3), 51(3), 53(3).
US: *Uniform Commercial Code* §§ 2-708(1), 2-713(1), 2-714(2).
Australia: *Sale of Goods Act 1954* (ACT), ss 53(3), 54(3), 56(3); *Sale of Goods Act 1923* (NSW), ss 52(3), 53(3), 54(3); *Sale of Goods Act* (NT), ss 51(3), 53(3), 54(3); *Sale of Goods Act 1896* (Qld), ss 52(3), 53(3), 54(3); *Sale of Goods Act 1895* (SA), ss 49(3), 50(3) and 52(3); *Sale of Goods Act 1896* (Tas), ss 54(3), 55(3), 57(3); *Goods Act 1958* (Vic), ss 56(3), 57(3), 59(3); *Sale of Goods Act 1895* (WA), ss 49(3), 50(3), 52(3);
New Zealand: *Sale of Goods Act 1903* (NZ), ss 51(3), 52(3), 54(3).

128 *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11 (CA). Cf *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87. Cf again *Clark v Macourt* [2013] HCA 56.

129 Robert Stevens would argue that damages under the first limb of *Hadley v Baxendale* are a substitute for the right to performance, but damages under the second limb of *Hadley v Baxendale* are based on losses suffered as a consequence of the breach and thus subject to remoteness considerations. See Stevens, *Torts and Rights*, above n 71, 59–61, 70–72; Robert Stevens, 'Damages and the Right to Performance: A *Golden Victory* or Not?' in Jason Neyers, Richard Bronagh and Stephen Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009) 171.

130 See also Mitchell, above n 121, 322; Steven Elliott and Charles Mitchell, 'Remedies for Dishonest Assitance'(2004) 67 *Modern Law Review* 16; Steven Elliott and James Edelman, 'Money Remedies against Trustees'(2004) 18 *Trust Law International* 116. Elliott's distinction between 'substitutive' and 'reparative' compensation is adopted by Edelman J in *Agricultural Land Management Ltd v Jackson (No. 2)* [2014] WASC 102.

defectively, and the court seeks to cause the trustee to repair that defect and meet the settlor's expectations. Accordingly, there is an obligation on the trustee to restore the full amount of the loss. In this sense, Street J's statement in *Re Dawson* is correct: 'causation, foreseeability and remoteness do not readily enter into the matter'[131] in cases of misapplication of trust assets. But this is not because equity is special or exceptional. Simply, this kind of loss is not remote even according to contract law principles. It would be in the contemplation of the reasonable trustee that if trust assets are misapplied by the trustee, then he should be obliged to restore them. And this is where the special nature of trusts is operative – because a trustee is the epitome of the fiduciary, it is difficult for him to argue that he did not contemplate the loss. Thus, if we use *Hadley v Baxendale* as a rough yardstick, it must operate differently and the number of cases which will fall within the first limb will be much larger than they would with contract, because this aligns with the underlying prophylactic policy of trust law.

It should be emphasised that a trust is not a contract, but parallels can be drawn because trusts are functionally similar to contracts in many aspects.[132] Nor is a breach of trust is on all fours with breach of contract, but breaches of trust involving the misapplication of trust assets are more similar to contractual breaches than to any other private law breaches of obligation. Arguably, when contractual breaches occur the court is concerned to fulfil expectations,[133] and the same could be said for trusts. The expectation in trust law is the *settlor's expectation* as to the trustee's conduct towards the beneficiaries, because settlement trusts are tripartite agreements where the settlor sets up an agreement for one person (the trustee) to manage and look after the affairs of another (the beneficiary).[134] Langbein observes that tripartite trusts which arise by settlement are more congenial to a contractarian analysis than trusts which arise by declaration (where a settlor declares himself a trustee).[135] Tripartite trusts are more likely to suffer from problems of misapplication of trust assets, because the trustee and the settlor are not the same person, so there is more likelihood that the trustee may not fulfil the settlor's expectations in relation to the treatment of the beneficiary. Chambers has noted:

> Most trusts are created for the purpose of managing assets over an extended period of time. Settlors choose to create trusts, rather than make gifts directly to the beneficiaries, for various reasons, such as the

131 *Re Dawson* [1966] 2 NSWR 211, 215.

132 Anthony Duggan, 'Contracts, fiduciaries and the primacy of the deal' in Elise Bant and Matthew Harding, *Exploring Private Law* (Cambridge University Press, 2010) 275, 280–81.

133 This is contentious, and some argue that the only duty which arises upon entry to a contract is to pay damages: see OW Holmes Jnr, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 462; OW Holmes Jnr, *The Common Law* (Little, Brown & Co, 1881) 301; Richard Posner, *Economic Analysis of Law* (Aspen Walters Kluwer, 8th ed, 2011) 149.

134 Duggan, above n 132, 280.

135 John Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 *Yale Law Journal* 625, 628, 672–75.

> prudent management of trust assets, the limitation of the beneficiaries' use of those assets, and the flexibility to provide for the changing needs of beneficiaries. The important fact is that the settlor chose not to make a gift directly to the beneficiaries, but to create a trust for their benefit.[136]

As Chambers explains, courts are willing to directly enforce trusts because damages to the beneficiary would not be an adequate substitute for performance of the trust itself.[137] Compensation for misapplication of trust assets is generally not paid to the beneficiaries directly, unless the trust is already at an end. It is paid into the trust fund so that the settlor's intentions can continue to be carried out. The reason why remoteness is generally not applicable to misapplication of trust funds also relates to the courts' desire to deter fiduciaries from breaching their duties. In *Re Dawson*,[138] Street J cites Eldon MR's statements in *Caffrey v Darby* to the effect that if a trustee has misapplied trust money and an intervening event occurs, trustees must still be responsible and they cannot avoid liability by citing the later intervening event.[139] In *Caffrey v Darby* itself, the trustees allowed the stepfather of the infant beneficiaries to lease the trust property rent-free for four years in breach of the trust deed. Eldon MR said that the trustees could not be allowed to argue that the loss was too remote because this 'would be an encouragement to bad motives; and it may be impossible to detect undue motives.'[140] This references the prophylactic nature of trustees' obligations. Thus there are broader community welfare motives at play in these cases which are not present to the same degree in contract.

It could be argued that the parallels between trust and contract are inappropriate, as the trustee has powers which do not emanate from the agreement: for example, as long as the trust deed does not preclude it, the trustee may invest trust property, even if the trust deed is otherwise silent.[141] Similarly, it may be pointed out that in some jurisdictions, courts have a power to vary the trust deed contrary to the expectations of the settlor,[142] and the trustees are obliged to comply with the

136 Chambers, above n 59, 4.

137 This is similar to cases where courts award specific performance of instalment contracts to supply goods over a long period of time – a complex contract cannot be replaced with an identical deal. See *Buxton v Lister* (1746) 3 Atk 383; 26 ER 1020; *Adderley v Dixon* (1824) 1 Sim & St 607, 610; 57 ER 239, 240; *Eastern Rolling Mill v Michlovitz* (1929) 157 Md 51; 145 A 378 (CA Maryland); *Thomas Borthwick v South Otago Freezing* [1978] 1 NZLR 538; *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 WLR 577. Cf *Fothergill v Rowland* (1873) LR 17 Eq 132, 140; *Laclede Gas Co v Amoco Oil Co*, 522 F 2d 33 (8th Cir, 1975); *Société des Industries Métallurgiques SA v Bronx Engineering Co Ltd* (*Bronx)* [1975] 1 Lloyd's Rep 465.

138 *Re Dawson* [1966] 2 NSWR 211, 214–15.

139 (1801) 6 Ves Jun 489, 496, 31 ER 1159, 1162.

140 (1801) 6 Ves Jun 489, 496, 31 ER 1159, 1162.

141 UK: *Trustee Act 2000* (UK), s 3. Australia: *Trustee Act 1925* (ACT), s 14; *Trustee Act 1980* (NT), s 5; *Trusts Act 1973* (Qld), s 21; *Trustee Act 1936* (SA), s 6; *Trustee Act 1958* (Vic), s 5; *Trustees Act 1962* (WA), s 17.

142 UK: *Variation of Trusts Act 1958* (c 62) (UK), s 1. Australia: *Trusts Act 1973* (Qld), s 95; *Trustee Act 1936* (SA), s 59C; *Variation of Trusts Act 1994* (Tas), ss 13 and 14; *Trustee*

varied terms even if they are contrary to the expectations of the settlor. It is a statutory attempt to extend the principles of the rule in *Saunders v Vautier* to trusts where beneficiaries are incapable of consenting to the variation or winding up of a trust (perhaps because they are infants or unborn).[143] As with the rule in *Saunders v Vautier*, the statute applies regardless of the settlor's intention.[144] That being said, there are limits on the operation of the power to vary a trust deed and the doctrine 'does not confer jurisdiction to create an entirely new trust, as distinct from varying an existing one'.[145] Both these instances are akin to terms implied by law in contract.[146] The ability to invest and the concomitant legal duties arising from that are terms necessary for the efficacy of trust deeds which are implied into every trust deed even if such terms are absent in the deed. Similarly, the ability of the court to vary a trust is implied into the deed when the conditions indicate that it is necessary.

It may also be objected that it is not enough to say that contract and express trusts are similar, and the deeper question is whether remoteness in contract and remoteness in trust have the same rationale. In *Hadley v Baxendale*, Baron Alderson says that the defendant must have consequential losses in his contemplation because 'had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to damages in that case; and of this advantage it would be very unjust to deprive them.'[147] Because of the nature of contract itself, parties can agree to the liabilities they wish to assume, and defendants should be given an opportunity to contract out of certain liabilities of which they might not otherwise be aware. Thus a rationale of remoteness in contract is to limit responsibility in a way which fairly reflects the expectations of the parties, in a way that reflects the risks the parties chose to assume.[148] However, this is not the only rationale of contractual remoteness. There are also other rationales, including a concern about placing unreasonable and disproportionate burdens on a defendant. As Baron Alderson says, the defendant need only pay for those losses for which he ought 'fairly and reasonably' be liable.[149] This also reflects interpersonal justice concerns about proportionality of liability.

Act 1958 (Vic), s 63A; *Trustees Act 1962*, s 90 (WA). The statutes negate the effect of *Chapman v Chapman* [1954] AC 429.

143 Graham Virgo, *The Principles of Equity and Trusts* (Oxford University Press, 2012) 531.

144 *Goulding v James* [1997] 2 All ER 239.

145 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1707]. See *Allen v Distillers Co (Biochemicals) Ltd* [1974] QB 384, 394.

146 Arguably, for example, a term giving powers of investment meets the test of being appropriate to a class of particular agreements (namely express trusts) as required by *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, 307. It also meets the test of necessity: see *Liverpool City Council v Irwin* [1977] AC 239, 254–5; *Castlemaine Tooheys v Carlton & United Breweries Ltd* (1987) 10 NSWLR 468, 489–90; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 411, 452–53; *University of Western Australia v Gray* [2009] FCFCA 116. See Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (Lawbook Co, 4th ed, 2012) 338.

147 *Hadley v Baxendale* (1854) 9 Exch 341, 354; 156 ER 145, 151.

148 See above n 30.

149 *Hadley v Baxendale* (1854) 9 Exch 341, 354; 156 ER 145, 151.

There are differences between trust law and contract. In the kind of trusts we are considering here, the agreement is usually a tripartite agreement where the trustee might wish to be informed of a special circumstance by the settlor. Risks cannot be minimised in the same way with express trusts as with contracts, although they can still be minimised to an extent.[150] As *Armitage v Nurse* establishes, trustees can exclude liability for duties of skill and care and prudence and diligence, and the trustees in that case were not liable for negligence because they acted in good faith and in the honest belief that they were acting in the best interests of the beneficiary.[151] But liability for the 'irreducible core of obligations owed by trustees' cannot be excluded.[152] It appears from *Armitage v Nurse* that the losses which trustees can negotiate out of are those which arise from a breach of an equitable duty of care and skill, *not* those which arise from misapplication of trust assets or undisclosed conflicts of duty and interest, which are surely part of the irreducible core. It is no accident that the breaches of conflict of duty and interest and misapplication of trust assets are less likely to be subject to remoteness rules (as part of the irreducible core) whereas breaches of equitable duties care and skill (which can be excluded) are more likely to be subject to stricter remoteness limitations.

It follows that the High Court is correct to say in *Youyang* that important distinctions between trusts and contracts remain.[153] Remoteness in trust law[154] involves a different allocation of risk and responsibility to contract law because of the nature of the trustee and beneficiary relationship. It is clear that, generally speaking, trustees are expected to behave in the best interests of the beneficiary.[155] The trustee takes responsibility for the losses of the beneficiary and the trustee bears (many of) the risks; this is fundamental to the nature of the trust. This has ramifications for the way in which damages are calculated, including date of calculation and mitigation. An important way in which trust law differs from contract law is that loss is measured from date of judgment not from date of breach. It reflects the fact that beneficiary of a trust is not expected to mitigate her loss.[156] By measuring expectation damages from the date of breach, contract law builds in rules which provide incentives to mitigate loss,[157] but trust law does not require the beneficiary of a trust to mitigate her loss. The essence of the trust is that the beneficiary does not have to look after her own interests. Thus the restoration for misapplication of trust assets is more generous than that under contract.

150 Duggan, above n 127, 290–96; James Edelman, 'Four Fiduciary Puzzles' in Elise Bant and Matthew Harding, *Exploring Private Law* (Cambridge University Press, 2010) 298, 302–06.

151 *Armitage v Nurse* [1998] Ch 241, 250–51 (Millett LJ).

152 *Armitage v Nurse* [1998] Ch 241, 253 (Millett LJ). Cf *Reader v Fried* [2001] VSC 495.

153 *Youyang* (2003) 212 CLR 484, 501.

154 'Remoteness in trust law' is admittedly a neologism.

155 Meagher, Heydon and Leeming, above n 18, 840.

156 Although *cf Canson* [1991] 3 SCR 534, 554 (McLachlin J).

157 Harvey McGregor, 'The Role of Mitigation in the Assessment of Damages' in Ralph Cunnington and Djakhongir Saidov, *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 363.

Lionel Smith has argued that there are different rules for remoteness for restorative orders which vindicate the claimant's primary right as compared to orders whose primary aim is to compensate for loss, and that this is the reason why remoteness does not limit awards of equitable compensation are made.[158] Smith analogises awards of restorative equitable compensation to specific performance in contract and more particularly, to claims in debt, which are akin to monetarised specific performance. He cites *Ex parte Adamson*, which describes the award of equitable compensation for breach of trust as 'equitable debt or liability in the nature of debt.'[159] As restorative awards are concerned to vindicate the claimant's primary right, remoteness does not operate to limit awards, because the rationale is restoration rather than compensation for loss. Thus the common law and equity division does not determine the applicable remoteness rules. Smith says, '…the real distinction, which has nothing to do with the difference between common law and equity, is whether the claim was for loss caused by a breach, or was a claim to enforce a primary duty.'[160] The argument of this article is that the distinction is between direct losses which are in the contemplation of the trustee (and thus not subject to remoteness rules) as opposed to consequential losses (which may be subject to remoteness rules, particularly if the trust is a 'one-off' trust).

As Glister has noted, a difficult question with regard to a restorative analysis of damages for misapplication of trust funds arises from the fact that courts are willing to restore not only the trust money but also award interest that the trust money would have earned from the breach up until the date of judgment. Those who see such damages as returning the beneficiary to the position she would have been in before the breach occurred find this rule problematic. Glister suggests this may be resolved by treating the interest as disgorgement of a 'notional profit' made by the trustee.[161] However, if the loss is seen as a species of expectation loss, the award of interest is no longer problematic because it is a fulfilment of the settlor's expectation as to how the beneficiary should be treated. The additional interest is simply a fair calculation as to what is needed to rectify performance of the trust deed and put the beneficiary in the position as if the trust had been properly performed.

VIII 'ONE-OFF' TRUSTS

It is suggested that 'one-off' trusts which do not involve an ongoing custodial relationship should be subject to remoteness considerations so that a defendant will not always have to fully restore the trust in light of later events. Getzler has

158 Lionel Smith, 'The Measure of Compensation Claims Against Trustees and Fiduciaries' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 363, 363. The distinction between restorative awards and orders whose primary aim is to compensate for loss is difficult to draw, and often in a trust scenario the award could equally be conceived of as restorative or compensating for loss.

159 (1878) 8 Ch D 807, 819 (James and Bagallay LJJ).

160 Smith, above n 158, 373.

161 Glister, above n 59, 147–48.

argued that these trusts do not give rise to an 'accounting relationship' such as to merit equity's generous restorative compensation.[162] It is the custodial nature of the trust which is central to the special liability to restore, and without an ongoing custodial relationship, there seems to be less reason to adopt a restorative measure of equitable compensation because the trust has ceased. *Re Dawson*[163] and the two cases it relies upon, *Caffrey v Darby*[164] and *Clough v Bond*,[165] involve misapplication of assets held by ongoing family trusts. It is appropriate to make trustees in those cases liable for all losses flowing because of the prophylactic nature of the fiduciary obligations imposed upon trustees. However, these cases are quite different to *Target Holdings* and *Youyang*, the two cases to be considered below, both of which concerned 'one-off' trusts in a commercial context.

In *Target Holdings*, Lord Browne-Wilkinson distinguished between 'traditional trusts' and 'commercial trusts', but as Glister suggests, it may be better to ascertain whether there is an ongoing custodial trust relationship, or something less, as in the case of 'one-off' trusts.[166] Referring back to Chambers' quote above, 'one-off' trusts are *not* 'created for the purpose of managing assets over an extended period of time.'[167] Consequently, the substitutive concerns are not the same. It may not be appropriate to restore the trust money without question, because there is not the same need to replace a complex deal with an identical one. Moreover, contractual-type concerns about the extent to which the defendant implicitly assumed the risk for a far-fetched and distant event long after the trust has ended have more operation where a 'one-off' trust is concerned. There is a risk that trustees are unfairly required to indemnify the beneficiary for events which occur long after the breach and where other third parties are much more closely linked to the immediate loss.

In *Target Holdings,* the claimant mortgagee, Target, loaned the mortgagor £1.7m for the purchase of a property said to be valued at £2m. The moneys were held by the mortgagee's solicitors, Redferns, on bare trust. Redferns acted in breach of trust by releasing the money before the charges were executed and before receiving the title documents. However, the charges were subsequently executed and the property was conveyed to the mortgagor. The property was massively overvalued and third parties had participated in a fraud on the mortgagee. The mortgagee exercised its power of sale over the property, but only recovered £500,000. It sought to recover the remaining £1.2m loss from Redferns. Lord Browne-Wilkinson concluded that 'Target obtained exactly what it would have obtained had no breach occurred, i.e. a valid security for the sum advanced' and it was not entitled to compensation.[168] Lord Browne-Wilkinson's distinction

162 Getzler, above n 89, 250.
163 [1966] 2 NSWR 211.
164 See above n 138.
165 (1838) 3 My & Cr 491, 40 ER 1016.
166 Glister, above n 59, 156–57.
167 See quote to n 136 above.
168 *Target Holdings* [1996] AC 421, 436.

between 'traditional' and 'commercial' trusts has been criticised.[169] It is true that this distinction is problematic. The issue is not that a trust is 'commercial', but that there is a distinction between trusts involving ongoing custodial obligations (whether they are family or commercial trusts), and 'one-off' trusts.

Lord Millett criticised *Target Holdings* on the basis that the same result could have been reached through an orthodox application of trust accounting principles. He argued that the unauthorised application of trust moneys entitled the claimant to falsify the account. At that time, the disbursement could have been disallowed, and the solicitor treated as liable for the disbursement. However, when Redferns received the charge and title it performed its primary duty. This was a notional restoration of the trust estate.[170] Lord Millett is correct to say that Redferns' performance of its primary duty is pivotal.

It is here argued that performance of the primary duty results in a fulfilment of expectations which negatives any need to compensate. Imagine a contract where a builder built a swimming pool one foot shallower than the depth the land owner had contracted for. At the date of completion, the pool was still too shallow.[171] However, there was evidence to suggest that the pool owner was prepared to pay the full price for the pool notwithstanding the defect, as long as it was later rectified. If the case came to court and, in the meantime, the builder had extended the swimming pool down to the required depth, the land owner's expectations would be fulfilled because the breach had been rectified. The court would not require the builder to pay rectification damages to restore the swimming pool to the stipulated depth because the restoration had already occurred. This is broadly analogous to *Target Holdings.* The terms of the agreement between Target and Redferns were that Redferns would not disburse the money until it had gained the charges and title documents in Target's favour. Redferns disbursed the moneys before it had gained the charges and title, but repaired the breach by later gaining possession of them in a way which was authorised by Target. It was found that Target would still have loaned the money had it known of the delay.

The High Court of Australia has taken a different approach to *Target Holdings* in *Youyang*. The facts bear repeating in some detail because the following analysis cannot be fully understood otherwise. The claimant, Youyang gave $500,000 to Minters, the defendant solicitors, to be used to purchase shares in a company called ECCCL. Minters acted for the promoters of the company. The money was

169 See eg, Millett, above n 3, 224–25; James Edelman, 'Money Awards of the Cost of Performance' (2010) 4 *Journal of Equity* 122, 127–28.

170 Millett, above n 3, 227. See also Birks, above n 28, 45–48; Elliott, above n 19, 590. Cf Edelman, ibid, 128 who argues this explanation is not adequate, and goes on to justify the decision according to principles of waiver, but cf in response to Edelman, Matthew Conaglen, 'Explaining *Target Holdings v Redferns*' (2010) 4 *Journal of Equity* 288, defending Lord Millett's approach.

171 A version of *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 with a happier ending, at least for the pool owner.

to be held in trust by Minters pending the completion of the share purchase. The $500,000 was to be disbursed as follows:

- $256,800.00 to be used to buy a Bearer Deposit Certificate;
- Once the Certificate was obtained, $21,641.44 to be used to pay expenses and commissions incurred by ECCCL relating to the subscription; and
- Once the Certificate was obtained and the subscription fee was deducted, $221,558.56 to be invested in various speculative agreements.

The Bearer Deposit Certificate was a negotiable instrument which effectively gave Youyang security, with $256,800 being deposited with a local bank for ten years. Youyang anticipated that it would at least recover the original sum of its investment when the Bearer Deposit Certificate matured. In breach of trust, Minters did not obtain a proper Bearer Deposit Certificate, but disbursed the other moneys.

Some years later, Youyang allowed ECCCL to remove the sum deposited with the local bank and place it in an overseas bank on the proviso that Youyang would be given a second Bearer Deposit Certificate identical to the first (non-existent) Certificate. Minters had no involvement with this transaction. The Certificate ECCCL obtained was not made out to Bearer, but to ECCCL, and provided no security for Youyang. ECCCL became insolvent and was wound up. Youyang sought to recover the loss of the Bearer Deposit Certificate and the loss of the investment moneys from Minters.

The High Court unanimously held that Minters was liable to restore the entire sum to Youyang, treating the case as analogous to *Re Dawson*. In other words, Minters made an unauthorised trust disposition, and although the trust no longer existed, Minters were obliged to restore the value of the trust money to the claimant. It was immaterial that the claimant would have lost the money even if the breach had not occurred. It was enough that the moneys had been misapplied *by reason of* the breach of trust. *Target Holdings* was distinguished on two bases: first, Youyang was not Minters's client, and secondly, the security was never provided. With respect, the first distinction is unconvincing. It is difficult to see how anything turns on the fact that Youyang was not the client of Minters while Target Holdings was the client of Redferns. If Redferns was subject to two simultaneous fiduciary duties (trustee-beneficiary and solicitor-client) surely this militates for stricter responses to its breach? However, the second distinction is all-important. *Youyang* can be distinguished from *Target*, because in *Target* the claimant's expectations were fulfilled (albeit later than they should have been), whereas in *Youyang* the claimant's expectations were never fulfilled.

It is suggested that the primary issue in *Youyang* is not remoteness of damage, but whether Minters' breach caused the consequential loss of the investment moneys. Looking at the trust in a contractual manner helps to better ascertain the relevant principles which should have been applied. The question is what Youyang's expectations were, and how the losses would be measured if the trust is seen as similar to a contract. First, Youyang expected to get a Bearer Deposit Certificate which would entitle them to a sum which would cover their original investment. Applying *Hadley v Baxendale*, the failure of Minters to obtain the first Bearer Deposit Certificate was a loss which arose naturally and according to the usual course of things and would have been in the contemplation of Minters as a reasonable trustee. Minters knew that the Bearer Deposit Certificate did not comply with the conditions set out in the Subscription Agreement.[172] Youyang's expectation with regard to the first Bearer Deposit was never met. Because of the trust relationship, Youyang was entitled to argue that this expectation should be met. Indeed, at first instance the trial judge held (in my view, correctly) that Youyang was entitled to equitable compensation for the failure to obtain a Bearer Deposit Certificate. Youyang had lost the opportunity to be paid according to the terms of the first non-existent Bearer Deposit Certificate.[173] The amount to which Youyang would have been entitled under the Bearer Deposit Certificate was later calculated at $414,009.[174]

Secondly, Youyang expected that its money would then be paid to ECCCL in a speculative investment. The loss of the investment moneys raised questions of causation. This requires an application of the less strict version of the *Brickenden* rule. Minters would need to establish on the balance of probabilities that those losses were not caused by its breach because its breach would not have made a difference to the outcome of the investment. In fact, at trial it was found that Youyang would still have invested had it known that the Bearer Deposit Certificate did not comply with the terms of the Subscription Agreement.[175] Thus Minters' breach in failing to obtain the Bearer Deposit Certificate *did not cause* Youyang's loss of its investment moneys and Youyang should not have been entitled to recover this loss. The High Court's view that equity has a fundamentally different concept of causation and remoteness to the common law led it to fail to look into causation deeply enough.[176]

At first instance, the case was argued in negligence as well as in breach of trust, and a question arises as to what the relevant principles would be if it had been argued that the breach was of an equitable duty of care and skill. According to *Wheeler*, in order to recover, the claimant would have had to resort to ordinary negligence principles of reasonable foreseeability. The trial judge decided that the losses flowing from the negligence of Minters were reasonably foreseeable,

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172 *Youyang v Alexander* [2000] NSWSC 698 [16].

173 *Youyang v Alexander* [2000] NSWSC 698 [27].

174 *Youyang NSWCA* [2001] NSWCA 198 [1] (Handley JA).

175 *Youyang v Alexander* (n 173) [24].

176 Despite quoting Mummery LJ in *Swindle v Harrison* [1997] 4 All ER 705, 733: 'there is no equitable by-pass of the need to establish causation'. See *Youyang* (2003) 212 CLR 484, 502.

but that the claimant had also been contributorily negligent.[177] The question is whether the damages would have been any different if Youyang had sued Minters on the basis of an equitable duty of care and skill. It seems hard to argue that all the losses flowing from Minters' breach of its equitable duty of care and skill were reasonably foreseeable. At the very least, it would seem that the losses flowing from ECCCL's eventual collapse were not of a kind which would be reasonably foreseen as flowing from the breach.

It is relevant that in both *Target* and *Youyang*, it was found that the beneficiaries would have continued with the transactions had they known of the breach of trust in question. One cannot help thinking of the dicta of Winn LJ in *Doyle*, where he said that remoteness may operate to limit liability for deceit where 'the person deceived has not himself behaved with reasonable prudence, reasonable common sense, or can in any true sense be said to have been the author of his own misfortune.'[178] While trustees have an obligation to act wholly in the interests of the beneficiary, it is surely relevant when 'one-off' trusts of this kind are considered that the beneficiary was prepared to 'accept' the breach at the time. The breach only became an issue once it became evident that the beneficiary had made losses because of the actions of some third party who could not be sued, whereupon the fiduciary became the most convenient source of recovery. This is not a liability which is fair or considered in the circumstances, and it is suggested that equity should be more cognisant of opportunistic use of its generous compensatory principles.

IX CONCLUSION

The principles guiding equitable compensation and remoteness have always been famously obscure. It is to be hoped that this article has lifted the veil. The principles governing remoteness for equitable compensation are not so remote from the common law after all. While there are still important differences between equitable causes of action and common law causes of action, in some of the classes of case where equitable compensation is awarded, courts use one of the various common law models. Indeed, the courts have already undertaken a kind of 'fusion by analogy' by comparing equitable compensation with compensatory damages for negligence and deceit in certain context. However, it is also suggested that the courts should further draw on other common law and statutory models of compensation such as breach of contract and misleading or deceptive conduct under the *ACL*. Much can be learned from the parallels which can be drawn between the causes of action. It is not that we do one thing in Equity and another thing in the common law. In fact, the common law and equity have been doing similar

177 *Youyang v Alexander* [2000] NSWSC 698 [31]-[38]. Note Young CJ in Eq's criticisms of this in *Youyang NSWCA* [2001] NSWCA 198, [79]–[82]. The claim in negligence was apparently dropped on appeal to the NSWCA: *Youyang NSWCA* [2001] NSWCA 198, [73] (Young CJ in Eq).

178 *Doyle* [1969] 2 QB 158, 168 (Winn LJ).

things since the beginning; but it is just that this has been obscured on a number of levels. Courts should not be chary of recognising this, and courts should draw from compensatory models used for common law and statutory causes of action more often. The process of comparison is also useful for illustrating important differences between common law and equitable compensation. Statements that equity is ‘different’ or ‘special’ obscure more than they explain. Once one enters into a detailed comparison of common law and equity, differences are exposed which give greater insight in why equity might have a different approach in some aspects and what concerns feed into the calculation of compensation in equity, common law and under statute.