DAMAGES FOR MISREPRESENTATION

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ABSTRACT

This thesis is an investigation of the law of damages for misrepresentation at common law and under the Misrepresentation Act, 1967. It makes three principal claims. First, the relationship that must exist between the making of a false statement and the claimant's reliance on it is one of necessity. In applying this test to individual cases, there is no rule of law that the non-breach position is *always* that the defendant would have said nothing or that he would have disclosed the truth: it simply depends on what a reasonable defendant would in fact have done.

Secondly, the scope of liability for negligent misrepresentation is governed by what this thesis describes as the 'falsity rule'. This is the rule that a loss must be a consequence not only of the making of a false statement but also of its falsity. The rule can be traced to the late nineteenth century and is the best explanation of the *SAAMCO* case. Contrary to the current orthodoxy, *SAAMCO* does not in fact endorse the risk theory of remoteness which, in any event, is flawed both as a description of the law and as a matter of principle.

Thirdly, the measure of damages under section 2(1) of the 1967 Act is the deceit measure and the measure under section 2(2) is the monetary equivalent of rescission. These provisions have given rise to difficulty principally because their legislative history has not been closely analysed. In truth, Parliament enacted section 2(1) in the mistaken belief that the common law distinguishes between deceit and negligence only for the purpose of actionability, not damages, but a mistake of this kind is conceptually distinct

from a mistake about the conventional meaning of words or syntax. For these reasons, it is argued that *Royscot* is correctly decided but that *William Sindall*, with respect, is not.

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INTRODUCTION

This thesis is an investigation of the law of damages for misrepresentation at common law and under the Misrepresentation Act 1967. Doctoral theses often begin by claiming that the topic in question has received insufficient attention in the literature. A thesis about the law of damages can make no such claim. At least in modern times, it has been the subject of intricate judicial and academic analysis.[1] But it is striking that some of the most intractable problems about damages—especially in relation to causation and scope of liability—have arisen in the field of misrepresentation. In relation to scope of liability for negligent misrepresentation, many of these came to a head in 1997 when the House of Lords decided the *SAAMCO* case.[2] That case has been the subject-matter of enormous controversy in the common law world. Indeed, eighteen years and a few hundred cases later, there are doubts about what exactly it decided: as Sir Bernard Rix has said, '*SAAMCO* is one of the most influential decisions of the last twenty years but it is easier to state its conclusion than to isolate its reasoning'.[3] Similarly, there are unresolved issues concerning causation, especially in the context of the relationship between the making of a false statement and the claimant's reliance on it.

[1] 'As recently as the 1960s, the law of damages was under-theorised…one could certainly not say that today': Andrew Burrows, 'Damages and Rights' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (2012) 276–77.

[2] *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 (HL).

[3] The Rt Hon Sir Bernard Rix, 'Duty, Causation and Remoteness: Tools or Tricks ' (Lecture to the London Common Law and Commercial Bar Association, 21 October 2013), available at http://www.lclcba.com/index.php/cpd (last visited 16 February 2014) 23:34. The editors of the leading specialist text in this field agree with this assessment: John Powell, *Jackson & Powell on Professional Liability* (7th edn, Sweet & Maxwell 2012) [10-120].

Three central claims are made in this thesis. First, the causal relationship that must be shown to exist between the making of a false statement and the claimant's act of reliance is one of necessity, whether the statement was made negligently or fraudulently. Secondly, the scope of liability for negligent misrepresentation is governed by the 'falsity rule'. This is the rule that a loss must be a consequence not only of the making of the false statement but also of the *falsity* of the statement. Properly understood, this is what (and all that) *SAAMCO* decides. Thirdly, the measure of damages under section 2(1) of the 1967 Act is the deceit measure and the measure under section 2(2) is the monetary equivalent of rescission.

The thesis consists of four Parts and ten chapters. **Part I**, titled 'Remedial Concepts', lays conceptual groundwork for the claims to be made in the rest of the thesis. It defends Hart and Honoré's view, now widely thought to be discredited, that there are deep differences between causal and non-causal grounds of liability. As will appear, this point is central to an accurate analysis of Lord Hoffmann's speech in *SAAMCO*.

Part II (Chapters II and III) is concerned with the causal relationship between the making of a false statement and the claimant's reliance on it. **Chapter II** argues that the best interpretation of the cases is that the relationship is one of necessity. **Chapter III** deals with a particular problem that arises in the application of this causal rule to misrepresentation: is the defendant assumed to have told the truth or to have said nothing? It argues, contrary to the current orthodoxy, that there is no rule of law that either 'truth' or 'silence' is *always* the correct non-breach position: it simply depends on

how a reasonable defendant is *likely* to have complied with his obligation to not make false statements.

Part III (Chapters IV–VIII) is concerned with scope of liability. **Chapter IV** undertakes a detailed analysis of *SAAMCO* to demonstrate that Hart and Honoré's 'causal relevance test' (described in Chapter I) does not explain the result in the case. **Chapter V** explains what the *SAAMCO* principle actually is. It argues that the best interpretation of the case is that it adopts the 'falsity rule'. **Chapter VI** deals with the distinction between information and advice which, intriguingly, appears to have been drawn from the tort of inducing breach of contract. It argues that the distinction is unnecessary because the so-called advice cases are merely instances of the application of the falsity rule to different kinds of misrepresentations. **Chapter VII** deals with the wider 'scope of duty' rule (the risk theory) which most scholars have (erroneously) taken *SAAMCO* to have adopted. It argues that the risk theory does not explain the falsity rule. That theory is also, contrary to the modern consensus, flawed more generally. **Chapter VIII** considers the theoretical justification for the falsity rule. It argues that *SAAMCO* was correctly decided because it is a sound *qualification* to the pursuit of corrective justice but it is not, as most scholars have thought, as an *element* in it.

Part IV (Chapters IX and X) is concerned with the scope of liability under the 1967 Act. It shows that sections 2(1) and 2(2) have been misinterpreted largely because their legislative history has not been closely analysed. It argues that Parliament enacted these provisions based on certain assumptions about the *common law* which were either false or have been subsequently falsified. This raises an important conceptual question

about interpretation: if Parliament enacts a law on a false basis, is that fact relevant to the *construction* of the law that it has enacted? It will be suggested that it is not, and that 'mistakes' of this kind should be distinguished from mistakes in the use of language or syntax. On this basis, **Chapter IX**, which deals with section 2(1), argues that *Royscot*[4] is correctly decided, though not for the reasons it gave and **Chapter X**, which deals with section 2(2), argues that *Sindall*[5] is, with respect, unsound.

[4] *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297 (CA).

[5] *William Sindall plc v Cambridgeshire County Council* [1994] 1 WLR 1016 (CA).

PART I

REMEDIAL CONCEPTS

CHAPTER I

CAUSAL AND NON-CAUSAL RULES IN THE LAW OF DAMAGES

One of the central problems in legal philosophy (and in the law of damages) is the attribution of outcomes to agents. As Professor John Gardner has recently said, this is the 'master-problem of which all those great legal problems of causation, remoteness, recoverability and quantification form part'.[1] In the 1950s, this problem was tackled by two of the most distinguished legal philosophers of the twentieth century: Professors HLA Hart and AM Honoré. One of the most important claims they make in their magisterial *Causation in the Law*[2] is that there is no great divide between causal judgments made in ordinary life and causal judgments made in the law.[3] This claim was, and remains, hugely controversial[4] and would require, for its defence, a thesis of its own. This is not that thesis, but there are two reasons why it is nevertheless important to discuss their theory in this chapter, if only in outline. First, as Chapter 4 will show, a particular causal test formulated by Hart and Honoré was central to Lord Hoffmann's reasoning in *SAAMCO*.[5] Secondly, Hart and Honoré's theory, with some qualifications,

[1] In a forthcoming book based on his Quain Lectures in Jurisprudence: see John Gardner, 'That's the Story of My Life' (draft, October 2014, quoted with permission) 4.

[2] HLA Hart and AM Honoré, *Causation in the Law* (Clarendon Press 1959); HLA Hart and AM Honoré, *Causation in the Law* (2nd edn, Clarendon Press 1985). The essence of their thesis was anticipated in a series of articles they published in 1956, though they came to change their mind in some respects, notably about the empirical generalisations instantiated by singular causal statements: HLA Hart and AM Honoré, 'Causation in the Law I - A Survey of Common-Sense Principles' (1956) 72 LQR 58 and 'Causation in the Law II - Factors Negativing Causal Connection' (1956) 72 LQR 260 (Part I), 398 (Part II).

[3] This, of course, resonates with the main theme of Gardner's lectures.

[4] It is fair to say that most scholars, notably Professor Stapleton, reject it today: see, in particular, Jane Stapleton, 'Unpacking Causation' in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré* (Hart 2001) 146 ('the law needs to embrace a special meaning for causation') and Jane Stapleton, 'Reflections on Common Sense Causation in Australia' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters 2011). Stapleton's views are considered in more detail in a subsequent section of this chapter and in chapter 7.

[5] *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 (HL) 213C.

contains the best analytical framework for an exposition of the law of damages for misrepresentation.

This Chapter begins with an explanation of three concepts that are central to Hart and Honoré's account of causation: the nature of singular causal statements, the relationship between singular causal statements and empirical generalisations, and the distinction between condition and cause. It then defends Hart and Honoré's claim that causal judgments made by the law should not be conflated with non-causal ones. It concludes by describing the causal test developed by Hart and Honoré that Lord Hoffmann attempted to apply in *SAAMCO* and distinguishes this from the 'scope of duty' rule.

A. Common Sense: Causal Recipes to Attributive Causal Statements

It has often been said that causation is a matter of 'common sense'. Well-known examples include the judgments of Glidewell LJ[6] in England and Mason CJ[7] in Australia. Although this proposition is not new, it has been subjected to powerful criticism in recent years, notably by Lord Hoffmann.[8] But Hart and Honoré's theory has sometimes suffered collateral damage because they are often taken to have developed the 'common sense'

[6] *Galoo v Bright Grahame Murray* [1994] 1 WLR 1360 (CA) 1375A.

[7] *March v E & MH Stramare Pty Ltd* [1991] HCA 12, (1991) 17 CLR 506, 515. See also *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 (NSWCA) 351D–F (McHugh JA).

[8] The most detailed account is in The Rt Hon Lord Hoffmann, 'Common Sense and Causing Loss' (Lecture to the Chancery Bar Association, 15 June 1999), but see also his 'Causation' (2005) 121 LQR 592 and 'Causation' in Richard Goldberg (ed), *Perspectives on Causation* (Hart 2011). As Edelman J put it, 'in difficult cases, the "sense" of an answer is rarely common amongst judges': *Agricultural Land Management Ltd v Jackson* [2014] WASC 102 [393].

approach. Hart and Honoré do claim that causal concepts can be derived from common sense. However, there is, in truth, little in common between Hart and Honoré's approach and that of Glidewell LJ beyond the use of the expression 'common sense'. Hart and Honoré use the term to reject the proposition that what philosophers should attempt to uncover is the 'true nature' of the relationship between events or acts rather than our *understanding* of those relationships.[9] There is, of course, a relationship between events or acts (for example poison and death) independently of our thoughts and this relationship would exist even if scientists had never discovered how poison works. However, as Gardner puts it, '*its being causation* is neither settled by nature nor amenable to empirical study. Its being causation is settled by the classificatory machinery of human thought and amenable only to philosophical … reflection'.[10] Hart and Honoré, in other words, do not use the expression 'common sense' to endorse case-by-case causal judgments:[11] they use it to indicate that they are concerned with our *concepts* of causation.

Concepts of causation used in ordinary life are shaped by the purposes for which they are used.[12] What are these purposes? Hart and Honoré identified three. The first is what they call a 'causal recipe', that is, a statement that describes how to *bring about* a desired change in an object. In the simplest case, a statement of this kind is more likely to

[9] See also John Gardner, 'Review: A Life of HLA Hart: The Nightmare and the Noble Dream' (2005) 121 LQR 329.

[10] Gardner (n 9) 331 (emphasis in original).

[11] Indeed, one of their main objectives was to respond to the so-called 'causal minimalists' who advocate this approach: see Hart and Honoré, *Causation in the Law* (n 2) 4 and David Howarth, 'Review' (1986) 96 Yale LJ 1389, 1391–94.

[12] As Professor Honoré puts it, causal concepts 'though not normative, [are] *functional*': AM Honoré, *Responsibility and Fault* (Hart 1999) 77.

deploy a transitive verb of action than causal language:[13] D 'broke', 'bent' or 'moved' the teacup, wire or book.[14] Causal language is likely to be used if there is more time or space between the bodily movement and the desired change in the object. In both cases, we tend to identify the bodily movement (an *intervention*) as the 'cause' because it is an 'interference in the natural course of events which makes a difference in the way these develop'.[15]

Causal recipes may seem far removed from the causal questions that arise in private law, but their importance is that they are (often implicitly) invoked as analogies[16] in making causal statements about more complex relationships. These more complex causal statements are usually either *explanatory* or *attributive*.[17] Hart and Honoré were able to show that the notion, prominent in causal recipes, that a cause is an intervention that makes a difference to the *normal* course of events, is also influential when we seek to explain, or attribute responsibility. An explanation is usually sought if some occurrence seems abnormal. For instance, in 2014 alone, (at least) seven books were published about what might have transpired on MH 370 on March 8, 2014: if it is eventually found (for example) that there was a mechanical failure, what is at first sight puzzling (planes do not

[13] This may strike some as a 'linguistic' point. Hart and Honoré are often said to have used linguistic analysis to derive their causal concepts and are criticised for it: see, eg, Jane Stapleton, 'Choosing What We Mean by "Causation" in the Law' (2008) 73 Missouri L Rev 433, 458 ('using the *then fashionable* tools of linguistic analysis…') and Howarth (n 11) 1402–07. However, this is not the case: their interest is in our thoughts about the relationship between events. Language is important only because it is likely to reflect these deeply embedded thoughts: it is not itself the object of investigation: see Hart and Honoré, *Causation in the Law* (n 2) 3 and Gardner, 'Review' (n 9) 331.

[14] Hart and Honoré, *Causation in the Law* (n 2) 28.

[15] Hart and Honoré, *Causation in the Law* (n 2) 29.

[16] They are only analogies though. There is no exact correspondence, as Collingwood thought, because it is legitimate to designate an event as the cause of an outcome even if we cannot produce or prevent that outcome: Hart and Honoré, *Causation in the Law* (n 2) 33.

[17] Hart and Honoré, *Causation in the Law* (n 2) 32–51.

normally drop out of the sky and disappear) is rendered intelligible (they do if they run out of fuel in a remote location). In making these explanatory statements, we distinguish, entirely independently of any legal system, between 'condition' and 'cause':[18] thus, the mechanical failure, rather than the fact that the plane took off that night from Kuala Lumpur, would be identified as the cause, even though both are 'necessary' in the same sense for the outcome. This point is denied by many scholars and is defended in more detail below.[19] For now, it is enough to say that, according to Hart and Honoré, two contrasts are prominent in distinguishing between condition and cause: the contrast between *normal* and *abnormal* natural events, and the contrast between voluntary human acts and all other conditions.[20]

The need for attributive, rather than explanatory, causal statements arises from the fact that there may be difficult causal judgments to make even if there is no mystery about why something happened.[21] For example, if D starts a fire and T stokes the dying and otherwise harmless embers, and C's house is destroyed, the question is not about what destroyed C's house but about the significance of T's act to the relationship between D's act and that outcome.[22] Hart and Honoré's claim, which is considered in more detail

[18] Hart and Honoré, *Causation in the Law* (n 2) 33–44.

[19] §B(4).

[20] A human act, even if not voluntary, can be abnormal and therefore be treated as the cause. This is how Hart and Honoré explain *Woods v Duncan* [1946] AC 401 (HL): see (n 2) 33, 183.

[21] See also Hart and Honoré, 'Causation - Part I' (n 2) 65–69.

[22] Another popular criticism of Hart and Honoré's theory is that the law is interested not in causation but in responsibility, which may be based on non-causal grounds: see, eg, Robert Stevens, 'Causation and Contribution' (Lecture to the Tort Law Research Group, Western Law, March 19, 2014). However, this objection would seem to misunderstand Hart and Honoré's claim, as they entirely accept that it is for the law to determine: **(i)** whether responsibility is based on conduct (the liability of an insurer, for instance, is not); **(ii)** where it is based on conduct, whether the conduct must be shown to have caused the harm or merely occasioned it or provided a reason for it; and **(iii)** between what facts or events a causal connection

below, was that the law, in making these judgments, *mirrors* causal judgments made in ordinary life, although it *also* relies on concepts that are specifically legal.[23]

B. Causal Generalisations and the Variety of Causal Concepts

The causal notion set out in the previous sub-section was described by Hart and Honoré as the 'central notion' of cause. But there are at least two other varieties of causal connection which, though analogous to the central notion, are distinct from it: these they call 'interpersonal transactions' and 'opportunities', respectively. This is one of Hart and Honoré's most important insights: the existence of more than one notion or variety of cause is not only descriptively but also morally significant.[24] Their analysis of interpersonal transactions, in particular, has influenced the law on damages for misrepresentation. This sub-section describes these three concepts. The next sub-section defends Hart and Honoré's analysis from a number of recent criticisms.

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in any of these forms must be shown to exist. Their analysis of causal concepts is relevant only if the law has first made these determinations: see Hart and Honoré, *Causation in the Law* (n 2) xlii–li.

[23] 'These restrictions colour *all* our thinking in causal terms; when we find them in the law we are not finding something invented by or peculiar to the law, though of course it is for the law to say when and how far it will use them': Hart and Honoré, *Causation in the Law* (n 2) 70 (emphasis in original).

[24] For searching discussion, see John Gardner, 'Complicity and Causality' in his *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007) esp 67–71 and, further, ch 8.

1. The Central Notion: Generalisations, Necessity and Sufficiency

Hart and Honoré's formulation of the central notion was influenced by the work of David Hume and John Stuart Mill,[25] especially in relation to the relationship between singular causal statements and empirical *generalisations*. Mill had argued that 'cause' is a special member of a previously identified set of conditions which are 'invariably and unconditionally' followed by the outcome.[26] This is to think of causation in terms of sufficiency. Hart and Honoré's principal criticism of Mill's model was that this standard of 'invariable and unconditional' sequence is not what we seek when we make causal judgments in ordinary life: for example, the dropping of a lighted cigarette is identified as the cause of the fire even though we cannot list[27] every other condition that must be present or absent for this act to *always* be followed by a fire.[28] The general element in singular causal statements, say Hart and Honoré, consists instead of more '*loosely* framed generalisations'[29] that are drawn from common-sense and scientific knowledge (eg punches–injuries/heat–fire). But it is this general connection, albeit more loosely framed

[25] See, in particular, Hart and Honoré, *Causation in the Law* (n 2) 10–24, 44–51.

[26] He distinguished between the 'scientific' and the 'common' notions of cause: the scientific notion identifies the set of conditions as a whole as the cause, while the common notion *selects* one of these: see Hart and Honoré, *Causation in the Law* (n 2) 18, citing JS Mill, *A System of Logic* Book III (7th edn 1868) ch v, § 3.

[27] Except, of course, in formal terms. Hart and Honoré accept that, in theory, there is an unspecified set of conditions (positive and negative) such that the dropping of a cigarette is invariably and unconditionally followed by fire. Their point is that it is not illegitimate to designate that act as the cause of the fire in the absence of knowledge of what the set contains.

[28] As Hart and Honoré say, we would not regard our initial identification of the dropping of the cigarette as the cause as strengthened even if we discover only *subsequently* that no fire can occur without oxygen: 'when we come to learn such further necessary conditions we do not treat our past statement of the cause, though made in ignorance of them, as one made without proper justification which has *luckily* turned out to be correct': Hart and Honoré, *Causation in the Law* (n 2) 48.

[29] Thus, a singular causal statement, though implicitly general, is like an inquest, not a prediction: Hart and Honoré, *Causation in the Law* (n 2) 46.

than Mill's own, that gives the cause *explanatory* force.[30] To put it differently, the instantiation in a given case of a universal law of nature is not merely evidence of the causal connection: it is part of what it *means* to say that there is a causal connection in that case.

This point about generalisations is the reason Hart and Honoré's theory of causation is one that combines necessity and sufficiency.[31] If a singular causal statement is made, the outcome, *ex hypothesi*, has occurred (eg it is known that a building has been destroyed by fire). If every event has a cause, this entails that at least one[32] set of conditions together *sufficient* to produce that outcome was present on this occasion. If any of these conditions is known to be generally connected with the outcome, it follows that it is either a necessary member of every set of conditions sufficient to produce that outcome (eg oxygen and fire) or a necessary member of one set, in the sense that it is needed to make *that* set sufficient (eg throwing a lighted cigarette on petrol).[33] Hart and Honoré describe such a condition as a causally *relevant* condition[34] of the outcome: thus, if a condition is causally relevant to an outcome, its relationship with that outcome must, by definition, instantiate empirical generalisations. This point, as we will see,[35] is central to an accurate analysis of Lord Hoffmann's speech in *SAAMCO*.

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[30] Hart and Honoré, *Causation in the Law* (n 2) 56.

[31] See also Howarth (n 11) 1395–98.

[32] These assumptions—that there are no uncaused events and the so-called doctrine of 'plurality of causes' (that every event has independent sets of sufficient conditions only one of which is present on a given occasion)—will not be defended in this chapter, but see Hart and Honoré, *Causation in the Law* (n 2) 112.

[33] Hart and Honoré, *Causation in the Law* (n 2) 112.

[34] Not every causally relevant condition is a cause: see below.

[35] Ch 4.

2. Interpersonal Transactions

The central notion of cause, in which causal statements are implicitly general, is concerned with the relationship between physical events or with the relationship between a single human act and physical events. But Hart and Honoré correctly saw that the same need to explain, or attribute responsibility, may arise in other contexts, notably where the relationship is between *two* human acts: for instance, where D persuades or induces C to break a contract with T, or bribes or lies to C. They call these relationships 'interpersonal transactions'.[36]

According to Hart and Honoré, the main difference between the central notion and an interpersonal transaction is that the latter is not implicitly general even in the looser sense in which they use the term. To say that poison is a necessary member of a set of conditions sufficient to cause death entails that death always follows if that set[37] is repeated. But to say that D induced C to ϕ by a threat, bribe or misrepresentation does not entail that people generally ϕ in response to the same threat, bribe or misrepresentation or even that C himself will ϕ on a future occasion.[38] In this sphere, generalisations—knowledge of how people usually react to common impulses—are only *evidence* of the causal relationship and do not constitute it. This seems correct.[39] However, Hart and Honoré go on to argue that what has explanatory force in an interpersonal transaction is a

[36] Hart and Honoré, *Causation in the Law* (n 2) 51–59.

[37] Though of course its constituents cannot be listed exhaustively.

[38] Hart and Honoré, *Causation in the Law* (n 2) 56.

[39] But see Roger Hancock, 'Interpersonal and Physical Causation' (1962) 71 The Philosophical Review 369, who argues that the assertion that interpersonal transactions do not entail generalisations can be neither proven nor disproven.

reason for action rather than a *cause* of an event.[40] This, it will be suggested in Chapter 2, is the false step—one which may also have influenced Lord Hoffmann in *SAAMCO*.[41] It need not detain us here.

3. Opportunities

Since they take a cause to be an interference in the *normal* course of events, Hart and Honoré have no difficulty[42] in accommodating omissions: the 'normal course of events' often includes expected or routine acts, so that a failure to act is itself abnormal. They give the example of a gardener who fails to water the flowers: it is true that the flowers would not have withered if someone else had watered them, but the gardener's omission would be cited as the cause because the failure of the man on the street to water them is not a departure from the ordinary course of events.[43]

An omission is sometimes cited as the cause in ordinary life even if it provides an opportunity for a later *voluntary* human act or *abnormal* natural event through which a causal connection ordinarily cannot be traced. A well-known example is *Stansbie v Troman*. Stansbie, a decorator, was at work alone in the claimant's house. He left the house to buy some supplies but negligently omitted to lock the door behind him. While he was away, a thief entered and stole the claimant's jewellery. Tucker LJ held that the thief's voluntary act did not negative the causal connection between the loss of the

[40] In contrast, Mackie, a necessity theorist, would apply the same test to interpersonal transactions: John Mackie, *The Cement of the Universe: A Study of Causation* (OUP 1980) 43.

[41] Ch 6.

[42] Compare Arno Becht and Frank Miller, *The Test of Factual Causation in Negligence and Strict Liability Cases* (Washington University 1961) 22.

[43] Hart and Honoré, *Causation in the Law* (n 2) 37.

jewellery and Stansbie's prior omission because 'the act of negligence consisted in the failure to guard against *the very thing* that happened'.[44] As Hart and Honoré observe, this does not mean that *any* abnormal or voluntary intervention can be attributed to the negligent omission: 'a subsequent intervention would fall within the scope of consequences if the likelihood of its occurring is one of the reasons for holding [D]'s omission to be negligent'.[45] Stansbie may not have been liable for the acts of a murderer who gained access in the same way.

The causal notion of opportunities differs both from the central notion of cause and from interpersonal transactions. It cannot be defended by generalisations, as a singular causal statement in the central notion can;[46] nor did Stansbie provide the thief with a *reason* for stealing: he merely made it easier for him to do so.[47] The importance of the concept is that it paves the way for the argument that scope of liability is simply a matter of asking whether the consequence which actually eventuated was one of the reasons that made the act negligent. This, on one view,[48] is the wider *SAAMCO* principle, and would cut across the distinction between normal and abnormal or voluntary

[44] *Stansbie v Troman* [1948] 2 KB 48 (CA) 52 (Tucker LJ). See also *Reeves v Metropolitan Police Commissioner* [2000] 1 AC 360 (HL) 368 (Lord Hoffmann) and *So v HSBC Bank plc* [2009] EWCA Civ 296, [2009] 1 CLC 503 [69] (Etherton LJ).

[45] Hart and Honoré, *Causation in the Law* (n 2) 81. See, further, ch 7.

[46] Hart and Honoré, *Causation in the Law* (n 2) 60.

[47] Mr Bagshaw disputes this. He argues that the act of leaving the door unlocked gives the thief a reason to steal rather than a reason to do something else: Roderick Bagshaw, 'Causing the Behaviour of Others and Other Causal Mixtures' in Richard Goldberg (ed), *Perspectives on Causation* (Hart 2011) fn 12. This may be doubted. First, the fact that the door is open is not itself a reason *to* walk through it, just as the fact that someone has been offered a job is not itself a reason to take it. Secondly, interpersonal transactions are, in any case, distinctive because the causal relationship is through the *mind* of the second actor: he acts or omits to act on the basis of some belief which has been induced by the first actor. But Stansbie did not induce the thief *to believe that* the door was open: he simply left it open. See, further, Hart and Honoré, *Causation in the Law* (n 2) 60.

[48] See ch 4.

conditions. It will be suggested in Chapter 7 that this wider principle (which *SAAMCO* in fact does not endorse) not only fails to explain the falsity rule but is also flawed more generally.

4. Distinguishing Condition and Cause and Responding to Objections

The neutral (and unavoidably lengthy) description of Hart and Honoré's theory in the previous section may have given the impression that the consensus is that it is correct. It is in fact fair to say that the dominant view in recent years has been that Hart and Honoré's theory is flawed.[49] Resolving this debate is not necessary for the success of the doctrinal claims that are made in Chapters 2 to 10. This section, however, responds to two major criticisms of Hart and Honoré's work, in part because this helps explain why it is important to distinguish between causal and non-causal principles of responsibility. These criticisms concern Hart and Honoré's claims that the distinction between condition and cause is not arbitrary and that both necessity and sufficiency (rather than only necessity) are constitutive of causal connection.

(i) Condition and Cause: Common Sense or Policy?

As explained above, Hart and Honoré's causal enquiry consists of two stages.[50] For a condition to be cited as the cause of an event, it must first be shown to be a causally *relevant* condition of that event.[51] It is causally relevant if its relationship with the

[49] See (n 4).

[50] There is then a non-causal third stage.

[51] AM Honoré, 'Necessary and Sufficient Conditions in Tort Law' in David Owen (ed), *The Philosophical Foundations of Tort Law* (Clarendon 1997) 364.

outcome instantiates empirical generalisations. This is the first stage. But not every causally relevant condition is a cause and generalisations do not themselves help distinguish condition from cause.[52] In identifying one rather than another causally relevant condition as the cause, what we invoke is the contrast between normal and abnormal events, and voluntary human acts and all other conditions:[53] so if a building is destroyed by fire, we would identify the act of the arsonist, rather than the presence of oxygen, as the cause, even though both are causally relevant in the same sense.[54] This is because to cite the oxygen as the cause is to tell us what must accompany *every* fire, whenever it occurs, not 'why *this* fire broke out where fire usually does not.'[55] The law, when it makes causal judgments, draws on the same concepts: it may make them more *determinate* but it does not thereby adopt some specially legal notion of cause.[56]

Many judges and scholars have robustly rejected this analysis. Andrews J (in)famously said that the distinction between condition and cause is a 'matter of practical politics';[57] closer to home, Viscount Simonds in *The Wagon Mound* deprecated the 'ugly and barely intelligible jargon' that features in any discussion of the 'never-

[52] Hart and Honoré, *Causation in the Law* (n 2) 72.

[53] For excellent discussion of the rationale for the voluntary act rule, see Sandy Steel, 'Causation in Tort Law and Criminal Law: Unity or Divergence?' in Matthew Dyson (ed), *Unravelling Tort and Crime* (CUP 2014) 246–51.

[54] Hart and Honoré, *Causation in the Law* (n 2) 37.

[55] Hart and Honoré, 'Causation - Part I' (n 2) 75. See also Alex Broadbent, 'The Difference between Cause and Condition' (2008) 108 Proceedings of the Aristotelian Society 355. This is why Justice Edelman's suggestion that even the plain man would identify the oxygen as the cause may be respectfully doubted: The Hon James Edelman, 'Unnecessary Causation' (Lecture to the Association of Anglo-Australian Lawyers, 25 June 2014) 14.

[56] 'The distinction between causes and mere conditions is not a peculiarity of the legal uses of causal notions…we make the distinction…whenever, for example, we select the bent rail as the cause of a railway accident and relegate the weight and speed of the train to the status of mere conditions': Hart and Honoré, 'Causation – Part I' (n 2) 69.

[57] *Palsgraf v Long Island Rly Co* 248 NY 339 (1928) 352.

ending and insoluble problems of causation'.[58] Similarly, Professor John Fleming, a distinguished torts scholar, declared that he would 'banish henceforth … such beguiling casuistry as the fancied distinction between conditions and … causes.[59]

These scholars are, of course, concerned with the causal judgments made in private law, not ordinary life. Whether causal principles used in ordinary life are, or should be, reflected in private law may for the moment be put to one side. Assuming that they are,[60] the difficulty for these scholars is that we do distinguish, in ordinary life, between condition and cause. Nor is the distinction arbitrary: the basis on which a condition is treated as the cause is its *explanatory force* in a particular context.[61] Explanatory force is not the same thing as fault. Hart and Honoré give many illuminating examples of this,[62] but a recent incident provides a simple illustration:

> **Example 1**: On 25 November 2014, Phillip Hughes, batting for South Australia, was struck by a bouncer at the SCG. Tragically, he died in hospital two days later. It was reported that he would not have died if the ball had struck him a millimetre on either side of the point of actual impact and that there are only 'one hundred recorded examples of the injury he suffered … in all of human experience, let alone cricket'.[63] The fatal bouncer was bowled by Sean Abbott, who plays for New South Wales.

[58] *The Wagon Mound* [1961] AC 388 (PC) 419.

[59] John Fleming, 'The Passing of Polemis' (1961) 39 Canadian Bar Rev 489, 509.

[60] This is defended below.

[61] For a recent philosophical defence of the distinction, see Broadbent (n 55).

[62] There are too many to list, but the following are particularly helpful: see Hart and Honoré, *Causation in the Law* (n 2) 12 (oxygen), 31 (signalman), 35–37 (the doctor and the parsnips), 40 (drought), 43 (arsenic and icy road), 49 (falling tile), 59 (leaving the door unlocked), 60 (pyromaniac), 71–73 (evening breeze), 77–78 (falling tree), 80 (tap on the head and rare disease), 81 (the murderer and the thief), 82 (shattered glass), 117–20 (unlicensed driver), 137 (being thrown into a pit), 152 (deliberately stoking the fire) and 167 (coincidence).

[63] Ed Smith, 'There will always be freak accidents in sport' *The Sunday Times* (London, 30 November 2014).

> Two years before the incident, Hughes had moved from New South Wales to South Australia.

Four points can be made about this example. First, it calls for a causal judgment entirely independently of any legal system. Secondly, there are innumerable conditions which satisfy the 'but-for' test in the same sense. Just by way of example, Phil Hughes would not have died if he had not moved to South Australia, or if the SCG groundsman had prepared the pitch with slightly less (or more) bounce, or if the breeze blowing across the SCG that morning had been slightly slower (or faster), or if Sean Abbott had not bowled a bouncer. Yet, it seems clear that the 'cause' of his death would be identified as the bouncer rather than any of these other 'but-for' conditions. Indeed, if someone had been asked by his friend 'why did Phil Hughes die', his answer is likely to have been 'because he was hit by a bouncer' and not 'because he moved to South Australia two years ago'. The word 'because' is the key: in identifying the cause in ordinary life, we tend to look for conditions that, in a particular context, have *explanatory force*.[64]

Thirdly, though this is not a point that can be explored in depth here, it is likely that Sean Abbott's feelings of regret are *qualitatively* distinct from those experienced by the SCG groundsman, people at the scene or indeed anyone else (including relatives[65]). Yet, this cannot be because he was at *fault* or in any way to blame: he plainly was not.[66] It is because Phil Hughes' death is regarded as the *outcome* of his act, even though he did

[64] It is true that there are borderline cases in which it is difficult to classify a particular condition or human act as abnormal or voluntary, but this does not make the concept itself specifically legal or a question of policy: see AM Honoré, 'Medical Non-Disclosure, Causation and Risk: Chappell v Hart' (1999) 7 Torts LJ 1.

[65] Who would grieve for their loss, not for having caused it.

[66] He was not at fault because his act was justified or, at worst, excused: for discussion, see John Gardner, 'Reply to Critics' in his *Offences and Defences* (n 24) 254–57 and, further, ch 8.

not intend or desire it. The outcome counts as 'his' simply because of the nature of the relationship between the events that led to it.[67] If there is no distinction between condition and cause, it is difficult to explain why an outcome (in ordinary life) is attributed in this way to some, but not other, interventions in the causal chain; and why the feelings (positive or negative) experienced by those to whom the outcome is attributed are qualitatively distinct from the feelings experienced by those to whom it is not.

Fourthly, those who prefer to confine 'cause' to 'but-for' would have to, and do, argue that the selection of the bouncer as the cause is actually influenced by non-causal considerations. However, imagine that this incident, for some reason, goes to the New South Wales courts, who are asked to make a causal judgment. If the court holds that the death was caused by the bouncer, it is making *exactly* the same causal judgment that the spectator at the SCG made when he answered his friend's question. One can dispute the *utility* of distinguishing between these considerations and specifically legal (non-causal) ones, but it seems clear that they are different.

Professor Stapleton, whose work has contributed many insights to this field, has made two further objections that merit consideration. First, she says that the law 'like any specialist discourse…can choose what a term will mean for its own purposes'.[68] The meaning that best serves its 'wide needs', she claims, is that of 'contribution' or 'historical involvement': if a factor (non-necessary and non-sufficient) was involved in this sense, it is a 'cause' and *any* other question relevant to liability 'should be exported

[67] AM Honore, 'Responsibility and Luck: The Moral Basis of Strict Liability' (1988) 104 LQR 530 and John Gardner, 'Obligations and Outcomes in the Law of Torts' in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré* (Hart 2001). See, further, ch 8.

[68] Jane Stapleton, 'Unnecessary Causes' (2013) 129 LQR 39, 41.

to another stage of the analysis', which is 'normative'.[69] Her second objection is, unsurprisingly, that the distinction between condition and cause that this chapter has defended is in fact an illegitimate attempt to turn a normative issue of this kind into a causal one.

These claims should be rejected. There is insufficient space to deal with each flaw individually,[70] but they are symptoms of a deeper flaw in Stapleton's theory: at bottom *her own* 'factual' test of involvement can be defended only by invoking causal notions outside the law. Stapleton argues that the fact that (for example) 'A pushed the car' is not normative because it is 'indisputable physical reality', whereas any other issue that bears on A's liability for the destruction of the car is normative.[71] It is true that the *application* of the historical involvement test is purely factual, but its *selection* by the legal system as the appropriate test of causation is not. But what distinctively legal reason is there for making 'indisputable physical reality' relevant to liability? There is none: the choice of test (as opposed to its application in a particular case) can be defended only by saying something like 'harm cannot be attributed to A unless there is (at least) historical involvement' and *there* 'attributed' can have no specially legal meaning. However, if non-legal notions are germane at this stage, why are they not germane at the subsequent stage of distinguishing *between* two historically involved factors by classifying one as condition and the other as cause? In denying this possibility, and yet accepting that there is an extra-legal notion of involvement, Stapleton appears to assume that any test without

[69] Stapleton, 'Common Sense Causation' (n 4) 473.

[70] See, however, for an excellent refutation, AM Honoré, 'Appreciations and Responses' in Peter Cane and John Gardner (eds), *Relating to Responsibility* (Hart 2001) 232–37.

[71] Stapleton, 'Unnecessary Causes' (n 68) 44.

an evaluative component in its application (eg historical involvement) is somehow intrinsically causal because it is objective, whereas any test with an evaluative component (eg voluntary, abnormal) is normative and therefore peculiar to a legal system. But this is a fallacy: as the Phil Hughes example illustrates, there are objective and evaluative elements in causal judgments *both* within and outside the law; Hart and Honoré's point is only that the common law's causal principles resemble causal principles (both objective and evaluative) used in ordinary life.

(ii) Necessity and Sufficiency: The Role of Generalisations

Distinguishing between condition and cause assumes that one is prepared to accept that there is more to causation than necessity. It is, therefore, not surprising that many scholars who reject that distinction also support the 'but-for' test in preference to Hart and Honoré's view that the necessity element in causal theory is only that the condition must be causally *relevant*.[72] Since any necessity theory entails the rejection of the distinction between condition and cause, it is vulnerable to the objections canvassed in the previous section. However, Professor Stevens[73] and Justice Edelman[74] have recently made powerful arguments in support of 'but-for' which require consideration.

[72] Only a few but-for theorists have recognised that even they implicitly rely on causal generalisations: one cannot, for example, have any confidence in the assertion that speeding caused *this* road accident if there is simply no relationship between excess speed, loss of control, and accidents. John Mackie dealt with the problem by saying that necessity is tested against a pre-existing 'causal field' which includes the other conditions: the composition of the causal field, he thought, is not itself a causal question: Mackie (n 40) 35.

[73] Stevens, 'Causation and Contribution' (n 22).

[74] Edelman (n 55).

In essence, their claim is that a sufficiency theory leads to counter-intuitive results. Professor Stevens argues for a distinction between 'causation' and 'contribution' in its place.[75] For example, in 2014, Douglas Carswell won the Clacton by-election by a margin of about 12,000 votes.[76] If C was one of those who voted for Mr Carswell, C, says Professor Stevens, 'contributed' to his victory but did not 'cause' it.[77] Hart and Honoré's thesis, on the other hand, is said to lead to the conclusion that every single vote for Mr Carswell was the 'cause' of his victory because each was a necessary member of a set of *sufficient* votes.[78]

There are two answers to this objection. First, the example chosen is not a causal relationship. It is true that Mr Carswell was 'elected' because he secured a certain number of votes but this consequence ('election') is not itself the result of a relationship between prior events: it is a non-causal characterisation of certain facts in the natural world (the number of votes). Secondly, and more importantly, the thesis cannot be saved by arguing that the *number of votes* Mr Carswell received was a causal relationship even if the election victory itself was not. This is because individual votes for Mr Carswell are not *themselves* causally related: it is true that C's vote and D's vote together constitute two votes for him, but there is no relationship capable of being described as causal *between* C's vote and D's vote. What the example may have overlooked is that Hart and Honoré's claims about sufficiency are relevant only to the central causal notion (physical events), in which the outcome is related to prior conditions by the laws of nature. Indeed,

[75] But it is not clear how 'contribution', in this model, can be defined independently of causal criteria.

[76] 12,404, to be precise.

[77] There are some variants in the example which are ignored here.

[78] Stevens, 'Causation and Contribution' (n 22).

where such a general connection is absent (as in interpersonal transactions), Hart and Honoré accept that a different causal notion is in play. One simply cannot assemble a set of sufficient conditions (even in theory) that are sufficient to cause an election victory or a certain number of votes to be cast.

Justice Edelman's example is more difficult but (it is submitted) ultimately open to the same objection. In the 2014 World Cup, Chile beat Australia 3-1. Chile's goals were scored by Sanchez, Valdivia and Beausejour. Justice Edelman argues that Hart and Honoré would be compelled to say that each goal was a necessary member of a set of goals sufficient to win the match. The correct analysis, it is said, is that 'none of these players, individually, caused Chile to win. They all, respectively, *contributed* to Chile's victory'.[79]

However, this is not an example of a causal relationship either. The outcome—a Chilean 'victory'—is dictated by the laws of football, just as Mr Carswell's 'victory' was dictated by the laws governing elections. Once again, the thesis cannot be saved by saying that the *goals* (the acts of, literally, putting the ball in the back of the net) constitute a causal relationship. There is, it is true, a causal relationship between the act of each goalscorer (eg Sanchez's bodily movement in the twelfth minute) and the goal that *he* scored, but there is no causal relationship *between* the goals: they are simply additional goals. The only reason this is more difficult than Professor Stevens' example is that it can be argued that the first goal would have induced the teams to play differently (eg one team more defensively), while C's vote for Mr Carswell would not normally have

[79] Edelman (n 55) 15.

had any bearing on D's vote for him. However, while there is a relationship between the first goal and the second goal in this way, it is not a *deterministic* one: one would not expect a similar goal scored at a similar time in another game to also lead to a second goal. It is analogous to John Mackie's famous example of the candy machine which always produces chocolate if a coin is inserted but may produce one even if it is not.[80] One cannot assemble a set of sufficient conditions for relationships of this kind and nothing that Hart and Honoré say about sufficiency in the central causal notion is intended to apply such relationships.[81]

5. Conclusion

The central point that emerges from Hart and Honoré's theory, at least for the purposes of this thesis, is that causal judgments made in ordinary life distinguish between condition and cause. The prime contrasts in making this distinction are between normal and abnormal events, and voluntary acts and all other conditions. Causal judgments are also made in relation to interpersonal transactions and opportunities. When, as Hart and Honoré say, people pass 'private moral judgment', the causal notions they invoke can take any of these three forms: the law often employs exactly the same causal notions in allocating outcomes to agents, but may, in addition, invoke specifically legal considerations that are 'foreign to private moral judgment'.[82]

[80] Mackie (n 40) 40–44.

[81] Honoré, 'NESS' (n 51) 116.

[82] Hart and Honoré, *Causation in the Law* (n 2) 66.

C. Why Does the Distinction Matter?

In recent years, it has become fashionable to distinguish between 'factual causation' and 'legal causation'.[83] This cuts across what it is submitted is the more important distinction between causal and non-causal principles of responsibility. The previous section has given some examples of causal principles, that is, principles used in ordinary life when people pass what Hart and Honoré describe as 'private moral judgment'.[84] This section explains why it is important to distinguish the law's use of these principles from its use of distinctively legal ones.

1. The Justifications are Likely to be Different

It is sometimes suggested that the law's use of causal principles (especially those which are said to be 'factual') is *conceptually* inevitable: as Lord Hoffmann has pointed out, this is not true, because it is for the law to decide whether and when to use causal notions as grounds of (legal) responsibility.[85] But the reason it is nevertheless important to distinguish between the two is that the law's use of causal principles as grounds of responsibility is likely to call for different *kinds* of justifications from its use of specifically legal ones.[86]

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[83] A distinction the Supreme Court endorsed: *R v Hughes* [2013] UKSC 56 [23] (Lord Hughes and Lord Toulson). For criticism of the distinction, see Lord Hoffmann, 'Perspectives on Causation' (n 8) 3–5. It is not clear, however, if his Lordship would accept the proposition advanced here that the *justifications* for the law's use of causal and non-causal notions are distinct, as he suggests (at 4) that the task of interpretation is the same for any ingredient of a legal rule, be it intention, causation or (presumably) even remoteness.

[84] Hart and Honoré, *Causation in the Law* (n 2) 66.

[85] Lord Hoffmann, 'Perspectives on Causation' (n 8) 4.

[86] For a recent defence of this view, see Steel (n 53) 267–73.

Though they did not develop this thought, Hart and Honoré were conscious of it: in the Preface to their second edition, they argued that one justification for the common law's use of their causal principles (voluntary, abnormal etc) is that this accords with how we *individuate* actions in ordinary life.[87] That is, in ascribing some act to C and another to D, 'we take the world as it has been fashioned by prior natural events and prior human actions'.[88] To deny that human beings are responsible in this sense for the outcomes of their acts—'outcome responsibility'—is to deny human identity itself, for nobody would have any 'continuing history or character' (good or bad) if there is no outcome that they can call their own.[89] In other words, outcome responsibility, as Steel has said, seeks to answer the question 'whose *doing* was this outcome?' When the law asks the same question, it uses the same causal principles to find the answer.[90] This is one reason why it is important to distinguish these principles from distinctively legal considerations: they have nothing in common except that they both bear on the defendant's liability.

There are signs that the positive law has already recognised the significance of treating a particular rule as causal rather than non-causal, although this has not been explicitly articulated. A good example of this is the fact that causal rules appear to apply regardless of the nature of the defendant's wrongdoing,[91] while non-causal rules are sensitive to it. Thus, in a deceit claim, the loss need not have been foreseeable but must

[87] Hart and Honoré, *Causation in the Law* (n 2) lxxviii.

[88] Hart and Honoré, *Causation in the Law* (n 2) lxxxvii.

[89] Honoré, 'Responsibility and Luck' (n 67). See also Gardner, 'That's the Story of My Life' (n 1).

[90] Steel (n 53) 272.

[91] This is not inconsistent with the *substance* of Lord Hoffmann's well-known observation that the type of causal connection depends on the nature of the primary obligation. But Lord Hoffmann includes in his definition of 'causal connection' rules that are actually non-causal, such as the reason why the falsity rule applies to negligence but not to deceit: see, eg, 'Common Sense' (n 8) 11–13 and, further, ch 4.

have been caused by the claimant's reliance on the false statement.[92] Similarly, in *SCB*, Toulson J correctly rejected the submission that the claimant, in a deceit case, need not mitigate his loss, and said expressly that this is because mitigation is a causal rule.[93] The rule that the defendant is not normally liable for a coincidental loss is also causal, although many commentators have treated it as non-causal.[94] Again, although there is no authority on the point, this rule also applies to claims against deliberate wrongdoers.[95] This distinction—why some rules in the law of damages apply only to intentional wrongdoing while others apply across the board—is easily understood if causal and non-causal rules, and the respective justifications for their use, are separated out.

2. Other Reasons

Even if one rejects the idea that there are deep conceptual differences between causal and non-causal principles of responsibility, it is a helpful distinction to draw for the purposes of exposition.

The main criticism of the distinction is that elements of policy (or specifically legal considerations) intrude into causal concepts that are supposedly free from it, such as 'voluntary' and 'abnormal'.[96] One can concede this because, for the purposes of *this thesis*, it is merely a matter of terminology. Even if causal analysis requires policy

[92] As Lord Steyn put it, the most that (even) a 'morally reprehensible defendant' can be asked to pay is for 'the whole of the loss he has *caused*': *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL) 279.

[93] *Standard Chartered Bank v Pakistan National Shipping Corp* [1999] CLC 761 (QB) 772–77.

[94] See, eg, Jane Stapleton, 'Occam's Razor Reveals an Orthodox Basis for Chester v Afshar' (2006) 122 LQR 426, 438–42.

[95] Robert Stevens, 'An Opportunity to Reflect' (2005) 121 LQR 189, 192.

[96] See, eg, Stapleton, 'Chester' (n 94) 426.

judgment, it is plain that it is a *different kind* of policy from the ones underlying overtly non-causal rules. A simple example, given by Hart and Honoré, illustrates the difference. If T deliberately stokes the dying embers of a fire negligently lit by D, the reason the court would decline to order D to pay damages lies in its view of the relationship between the wrong (the negligence) and the consequence (the fire). It would be different if an 'evening breeze', rather than the deliberate act of a third party, had fanned the fire.[97] Contrast this with the New York rule Hart and Honoré cite to the effect that a defendant who negligently starts a fire is liable only for the destruction of the first house the fire consumes. Even if one concedes the terminology of policy, it seems clear that it is not the *same kind* of policy that is at work in these cases. In the first two, the policy concerns the kind of *relationship* between the wrongful act and the consequence that justifies the imposition of liability. In the third, the policy has nothing to do with the relationship between events: its justification, if any, must lie elsewhere. It is, with respect, difficult to see why one might wish to amalgamate these into a single enquiry as Professor Stapleton and Denning LJ[98] seek to do.[99] In any event, one must then recognise that there are distinct *kinds* of policy derived from distinct sources: thus, while this thesis adopts Hart and Honoré's account,[100] the arguments it makes about the positive law hold good even if one rejects it.

[97] Hart and Honoré, *Causation in the Law* (n 2) 71–74.

[98] *Roe v Minister of Health* [1954] 2 QB 66 (CA) 85.

[99] See also AM Honoré, 'Causation and Remoteness of Damage' in Andre Tunc (ed), *International Encyclopedia of Comparative Law* (JCB Mohr 1971) [7-97].

[100] Except in relation to interpersonal transactions, which it is argued require a different analysis: ch 2.

D. The Causal Relevance and Scope of Duty Tests

Chapter 4 of this thesis will show that Lord Hoffmann thought that the lender's case in *SAAMCO* failed because of the application of a certain causal test formulated by Hart and Honoré. This section briefly describes that test—which on Hart and Honoré's view is causal—and distinguishes it from the 'scope of duty' rule, which it is generally agreed is non-causal. The causal relevance test requires the claimant to demonstrate that the loss was a consequence of the *wrongful feature* of the defendant's act. The scope of duty rule is the proposition that certain kinds of loss are not recoverable, *howsoever caused*.

1. Scope of Duty

The scope of duty rule is relatively uncontroversial in relation to statutory duties. The leading case is *Gorris v Scott*.[101] An order made under the Contagious Diseases Animals Act 1869 required carriers to construct pens with footholds of certain dimensions. The purpose of this order, as its name suggests, was to prevent the entry into the UK of animals with contagious disease. Some sheep were thrown overboard when the defendant's ship, which was in breach of this order, encountered rough weather. Kelly CB[102] and Pigott B[103] accepted that the claim would have succeeded if the sheep had been lost by reason of having contracted contagious disease (eg by overcrowding) but held that other kinds of loss were not recoverable. This was not because the loss of the sheep by drowning was not caused by the wrong—it plainly was—but rather because

[101] *Gorris v Scott* (1874) LR 9 Ex 125, 2 Asp Mar Law Cas 282.

[102] *Gorris* (n 101) 129.

[103] *Gorris* (n 101) 130.

the scope of protection did not extend to that type of loss, *howsoever* caused. Thus, to say, as McHugh J did,[104] that there was 'no relevant *causal* connection' in *Gorris* is not, with respect, helpful.

Attempts have been made to apply this principle to the tort of negligence to show that particular duties have similarly limited purposes.[105] For now,[106] it is not necessary to consider whether this is correct. It suffices to say that it is non-causal: a judge who employs it is not making a determination about the relationship between events. The main difference between a scope rule of this kind and the causal relevance test (or indeed the distinction between condition and cause) is that the nature of the intervening event does not matter: for example, the scope rule may not distinguish, as a causal approach would, between a voluntary human act and other conditions. The wider principle in *SAAMCO* (not the falsity rule) is a rule of this kind.[107]

2. Causal Relevance

The origins of the causal relevance test that Lord Hoffmann attempted to apply in *SAAMCO* lie in Hart and Honoré's claim that singular causal statements are implicitly general. As explained above, a condition is 'causally relevant' only if there is a general connection (ie, independently of the particular occurrence) between that condition and the

[104] *Henville v Walker* [2001] HCA 52, (2001) 206 CLR 459 [102].

[105] See, eg, Nicholas McBride and Roderick Bagshaw, *Tort Law* (4th edn, Pearson 2012) 329.

[106] Ch 7.

[107] See ch 7.

outcome.[108] Though Hart and Honoré reject the proposition that necessity is constitutive of this connection, they accept that 'but-for' is often a useful *test* of it.[109] For example, if D is speeding and runs C over, and it is shown that C would not have been injured if D had not been speeding, it follows that the wrong is *also* causally relevant since there is a general connection between each stage of the causal process (eg excess speed–loss of control–impact–injury).

However, sometimes not every condition *sine qua non* is causally relevant, particularly if the defendant's act has more than one feature or characteristic of which only some are wrongful (eg 'the defendant carelessly drove a dangerous car without a licence' has at least three features). Hart and Honoré formulated what they called the 'causal relevance'[110] test to deal with this problem. The application of this test may show that the causally relevant feature was not wrongful and that the wrongful feature was not causally relevant.[111] It is important to emphasise that this test is part of the first stage of their causal framework, that is, the fact that the wrong is causally *relevant* does not mean that it is a *cause*, as the second stage (abnormal event etc) might show that it is not.

[108] To be more precise, the general connection must exist between each stage of the *causal process*, rather than between a particular stage of that process and the ultimate outcome: see Hart and Honoré, *Causation in the Law* (n 2) 82. As Chapter 7 explains, this is one reason why the risk theory is flawed.

[109] Honoré, *Responsibility and Fault* (n 51) 99.

[110] In 1985, Richard Wright developed his well-known 'NESS' test from causal relevance: see Richard Wright, 'Causation in Tort Law' (1985) 73 California L Rev 1735 and Honoré, *Responsibility and Fault* (n 51) 97.

[111] Hart and Honoré, *Causation in the Law* (n 2) 119.

This test has been applied in several American cases[112] from which, as Chapter 4 will demonstrate, a crucial step in Lord Hoffmann's reasoning in *SAAMCO* was derived. It can be illustrated by *Tingle v Chicago B & Q Ry Co*.[113] The defendant, a train company, operated a service on a Sunday in breach of a statutory prohibition. This train, which was being driven without any negligence, ran over a cow at a public crossing. The cow, as Day J noted, would not have died 'but for' the defendant having operated that service on that day, but the fact that it was operated on that day was not causally relevant to the accident: it could as well have happened on any other day.[114] Responding to Mackie's criticism,[115] Hart and Honoré accepted that the *event* or the act as a whole (the running of the train) is causally relevant in these cases, but correctly pointed out that what 'made the act wrongful'[116] (that it ran on a Sunday) is not. The expression 'made the act wrongful' is, in this context, a reference to the *constituents* of an act that made the act wrongful: it is a not a reference to the *reasons why* an act with those constituents was made wrongful. In the example given above, the constituents are that D drove 'carelessly' or 'without a licence' or 'on a Sunday'; but the reasons why an act with these constituents was made wrongful might include the risk of collisions, the collection of licence fees, that Sunday should be a day of rest, etc.[117]

[112] See, eg, Charles Carpenter, 'Workable Rules for Determining Proximate Cause' (1931) 20 California L Rev 396, 407–18.

[113] *Tingle v Chicago, B & Q Ry Co* 60 Iowa 333 (1882).

[114] *Tingle* (n 113) 334.

[115] Mackie (n 40) 129–30.

[116] A phrase that Lord Hoffmann was to use in the most important passage of his speech in *SAAMCO*: see ch 4.

[117] See, further, ch 4.

It is important to understand that the rationale for the causal relevance test, as pointed out above, is the requirement that an event can be described as a causally relevant condition only if it is a necessary element of a set of conditions *generally connected* with the outcome.[118] Thus, in the well-known example of the unlicensed driver who, while driving carefully, injures the claimant—an example that Lord Hoffmann used in *SAAMCO*[119]—there is no general connection between the *competent* driver's lack of a licence and an accident. Similarly, there is no general connection between driving (carefully) on a Sunday and an accident.

The law normally requires claimants to show that the wrongful feature of the defendant's act, and not merely the act as a whole, was causally relevant. In particular cases, it may prescribe that the defendant is liable if the loss would not have been sustained but for the defendant's act, provided one feature of it (whether causally relevant or not) was wrongful.[120] However, even in these cases, the law does not dispense with the requirement that the wrong must be causally relevant: it merely redefines the *facts* between which the causal connection must be shown to exist (eg driving–injury instead of *unlicensed* driving–injury). The choice of the facts or events between which a causal connection must exist is not itself a question of causation: it is a non-causal question that depends on, among other things, the purpose of the rule in question.[121]

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[118] Hart and Honoré, *Causation in the Law* (n 2) 118.

[119] *SAAMCO* (n 5) 212H.

[120] Hart and Honoré, *Causation in the Law* (n 2) 118.

[121] Honoré, *Responsibility and Fault* (n 11) 4. See also Jane Stapleton, 'An "Extended But-For" Test for the Causal Relation in the Law of Obligations' (2015) OJLS (forthcoming) 10.

The best known English authority on causal relevance—which was central to Lord Hoffmann's reasoning in *SAAMCO*—is the *Empire Jamaica*.[122] A Hong Kong ordinance provided that the first and second mates of any vessel with more than one mate had to be 'certificated officers'. The *Empire Jamaica*'s first mate, Sinon, was not certificated, and she collided with the *Garcot* because of his negligent navigation. The owners of the *Empire Jamaica* were entitled to limit their liability for a collision by reason of improper navigation only if it had taken place 'without their actual fault or privity'.[123] It was common ground that the accident would not have taken place had the Master been on the bridge instead of Sinon. Willmer J held that the wrong was therefore a 'causa sine qua non', but not causally relevant because Sinon was as competent as he would have been if he had obtained a certificate: the accident was a consequence of his negligence, not of the failure to ensure that he was certificated.[124]

It is submitted, with Hart and Honoré, that this test is causal, as it is designed to test for a general connection between the putative cause and the outcome. This claim, of course, is not uncontroversial either. It has been attacked by supporters of the risk theory,[125] who are able to reach the same result through a non-causal route. Once again, as this is not a thesis about the philosophy of causation, it is unnecessary to resolve this debate: as Chapter 4 will show, Lord Hoffmann in *SAAMCO* clearly accepted Hart and Honoré's version of causal relevance, not the risk theory.

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[122] *The Empire Jamaica* [1957] AC 386 (HL).

[123] Merchant Shipping Act 1894, s 503(1).

[124] Although some of Willmer J's views were disapproved in appeal, this conclusion survives.

[125] See ch 7.

3. Foreseeability is a 'Short Cut' to Causal Relevance

It is, subject to one qualification at the heart of *SAAMCO*, usually *unnecessary* to apply the causal relevance test in English law, because foreseeability incorporates it. That is, if a loss was a reasonably foreseeable consequence of the wrongful feature of the defendant's act, that feature *could not* have been causally irrelevant. Equally, if the wrongful feature of the defendant's act was causally irrelevant, it could not have been reasonably foreseeable. For example, it is not reasonably foreseeable that employing an *unlicensed* (but competent) first mate might lead to an accident: the accident is a reasonably foreseeable consequence only of the *carelessness* of the first mate, in which case the wrongful feature, by definition, is also causally relevant. Indeed, although Dean Keeton took this equivalence too far,[126] it follows that foreseeability is a 'short-cut'[127] to causal relevance.

The qualification is this. There is one factor common to all the well-known examples of causal irrelevance: the *only* loss sustained by the claimant is the 'causally irrelevant' loss. Thus, the only loss sustained by the person who collided with an unlicensed driver's car was the physical injury: that physical injury was not sustained *by reason* of and in addition to injury relevantly caused by the defendant's failure to obtain a licence. If it had been, the causal relevance test would, *ex hypothesi*, have been satisfied.

[126] He suggested that 'foreseeability' is *always* equivalent to causal relevance: see Robert Keeton, *Legal Cause in the Law of Torts* (OSUP 1963) 10. This is not true. Non-causal tests can lead to a no-liability result even when causal relevance (and causation) is satisfied, as *Gorris* (n 101) shows: see also Hart and Honoré, *Causation in the Law* (n 2) lxii and Richard Wright's criticism of Keeton's theory in his 'Causation in Tort Law' (n 110) 1763–64 and 'The Grounds and Extent of Legal Responsibility' (2003) 40 San Diego Law Review 1425, 1494–96. Professor Hamer also appears to have overlooked this point: David Hamer, 'Factual Causation and Scope of Liability: What's the Difference?' (2014) 77 MLR 155, 166–69.

[127] Hart and Honoré, *Causation in the Law* (n 2) 262.

To put it differently, the causal relevance test should not be applied to cases in which there is some 'primary loss' (the type of loss that is a foreseeable consequence of the wrong) *and* further loss as a *consequence* of that primary loss (whether foreseeable or not). Causal relevance cannot be applied separately to each loss because the secondary loss cannot occur unless the primary loss has occurred. In such cases, if other causal tests (voluntary human act, abnormal natural event, coincidence etc) are not satisfied with respect to the secondary loss, the defendant's liability for it can be limited only on *non-causal* grounds. Chapter 4 will show that *SAAMCO* was such a case.

PART II

THE NON-BREACH POSITION

OUTLINE

Two kinds of causal questions arise in any claim for damages for misrepresentation, whether negligent or fraudulent. The first concerns the nature of the relationship between the representation and the claimant's act of reliance; and the second the nature of the relationship between the claimant's act of reliance and further consequences (eg a falling market). This Part is devoted to the first of these questions, while Part III considers the second.

This Part makes three claims. First, that the best interpretation of the cases is that the claimant must show that the making of the false statement was a necessary condition of the act of reliance. Secondly, that a number of objections to this analysis are ultimately not persuasive. The most important of these is Hart and Honoré's objection that in interpersonal transactions one is concerned not with *causes* but with *reasons*. It is suggested that this argument, which was foreshadowed in chapter 1, fails to attend to an important asymmetry between reasons for action and reasons against action. Thirdly, that there is, contrary to the orthodox account, no rule of law that either 'silence' or 'truth' is always the correct non-breach position: it simply depends on how a reasonable defendant is *likely* to have complied with his obligation to not make false statements.

CHAPTER II

THE CAUSAL RELATIONSHIP OF INDUCEMENT

This Chapter argues that the claimant, in any claim for damages for misrepresentation, must show that he would not have done what he did if the defendant had acted non-wrongfully. At the outset, it is worth making an introductory point about terminology. As Brennan J has said, a causal relationship between a misrepresentation and some loss can exist only if the claimant relies on it:[1] a false statement may induce a *belief* on which the claimant may *act*. It is helpful to consider these questions separately: did the defendant 'cause' the claimant to hold the belief in question, and did the claimant do what he did *because* he held that belief? The former has been called 'reliance in belief' and the latter 'reliance in action'.[2] This Chapter adopts that terminology.

A. The Authorities on 'But-For' Causation

The compensatory principle famously articulated by Lord Blackburn in *Livingstone v Rawyards Coal Co*[3] tends to be the starting-point of any analysis of a damages problem.[4] By aiming to put the claimant in the position it would have been in 'if it had not sustained the wrong', it entails a *comparison* of the 'breach position' (what actually happened?)

[1] *San Sebastian Pty Ltd v Minister Administering Environmental Planning & Assessment Act 1979 (NSW)* [1986] HCA 68, (1986) 162 CLR 340, 366. See also *Hayward v Zurich Insurance Co plc* [2015] EWCA Civ 327 [28] (Briggs LJ) and John Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (3rd edn, Sweet & Maxwell 2012) [3-51].

[2] The (modified) terminology comes from Elizabeth Cooke, *The Modern Law of Estoppel* (OUP 2000) 88–96. See also Ben McFarlane, *The Law of Proprietary Estoppel* (OUP 2014) 124. Hart and Honoré recognise that interpersonal transactions are distinctive only because of reliance-in-action: HLA Hart and AM Honoré, *Causation in the Law* (2nd edn, Clarendon Press 1985) 53, fn 23.

[3] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (HL) 39. The contract counterpart is *Robinson v Harman* (1848) 1 Exch 850, 154 ER 363, 365 (Parke B).

[4] Lord Hoffmann has said that it is the wrong starting-point but see, further, ch 4.

and the 'non-breach position' (what would have happened?):[5] as Adam Kramer has said, 'but-for' causation is thus a 'built-in rule' in the application of the compensatory principle.[6]

Outside the law of misrepresentation, there is consensus that the claimant must generally satisfy this principle.[7] In 2010, after a careful review of the authorities, Christopher Clarke J held that the same rule applies to misrepresentation.[8] Yet the dominant view today is that the learned judge was wrong: some take issue with his analysis of the cases[9] and others claim that his conclusion is wrong in principle.[10] This section tackles the first of those criticisms. It argues that Christopher Clarke J, subject to two qualifications,[11] was correct: as a matter of positive law (whatever its merits), English law does require the claimant to show that it would not have suffered the loss for which it seeks damages if the defendant had not made the false statement.

[5] Andrew Dyson and Adam Kramer, 'There is No Breach Date Rule: Mitigation, Difference in Value and Date of Assessment' (2014) 130 LQR 259, 261.

[6] Adam Kramer, *The Law of Contract Damages* (Hart 2014) 14–16.

[7] It was recently described by Lord Sumption as 'the fundamental principle of the common law of damages': *Bunge SA v Nidera BV* [2015] UKSC 43 [14].

[8] *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123 [153]–[173].

[9] Recently, KR Handley, 'Causation in Misrepresentation' (2015) 131 LQR 275, 278–82. See also KR Handley, *Spencer Bower & Handley: Actionable Misrepresentation* (5th edn, LexisNexis 2014) 73–76.

[10] See, eg, Cartwright (n 1) [3-54] and Elise Bant, 'Causation and Scope of Liability ' [2009] RLR 60, 61–68.

[11] First, Christopher Clarke J said that there are 'sound reasons of policy' to adopt a different test for deceit: *Raiffeisen* (n 8) [198]. It will be suggested that there are not: see §D. Second, the learned judge said that the question 'what if the truth had been told' is generally irrelevant. This is not quite accurate: see ch 3.

First, there has always been considerable doctrinal support for the use of 'but-for',[12] at least in relation to non-fraudulent misrepresentation. Secondly, in analysing the cases that are said to have endorsed the contrary view, it is important to bear two distinctions in mind: **(i)** between a 'sole cause' requirement and a necessity requirement; and **(ii)** between necessity and contributory negligence. It will be shown that most of the dicta which have been taken to have rejected the 'but-for' test are in fact concerned with one or both of these issues. Once it is understood that these cases are concerned with a different issue, it is clear that the weight of authority favours 'but-for'.[13]

1. 'Sole Cause' and 'Necessary Cause'

As this Chapter will subsequently explain, the difference between the causation of a physical sequence of events and the causation of human action has given rise to many doctrinal controversies in the law of damages for misrepresentation. But there is one similarity: it may be doubted whether a single condition is ever, on its own, a *sufficient* cause of either a physical sequence or a human action. To describe a condition as sufficient in this sense is to deny that any other condition is necessary. In relation to

[12] See, eg, *Standard Chartered Bank v Pakistan National Shipping Corp (Nos 2 and 4)* [2002] UKHL 43, [2003] 1 AC 959 [15] (Lord Hoffmann); *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642, [2003] 2 CLC 242 [79] (Clarke LJ) [187] (Sir Christopher Staughton); *Fuji Seal Europe Limited v Catalytic Combustion Corporation* [2005] EWHC 1659 (TCC) [190] (Jackson J); *Grosvenor Casinos Ltd v National Bank of Abu Dhabi* [2008] EWHC 511 (Comm), [2008] 2 All ER (Comm) 112 [143] (Flaux J); *Raiffeisen* (n 8) [153]–[173] (Christopher Clarke J); *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) [552] (Hamblen J); *Kingspan Environmental Ltd v Borealis A/S* [2012] EWHC 1147 (Comm) [425] (Christopher Clarke J); *Bonham-Carter v SITU Ventures Ltd* [2012] EWHC 3589 (Ch) [124]–[125] (Asplin J); *Excalibur Ventures LLC v Texas Keystone Inc* [2013] EWHC 2767 (Comm) [598] (Christopher Clarke LJ); *Khambay v Nijhar* [2015] EWHC 190 (QB) [90] (Picken QC) ('if they would have done what they did regardless of the alleged statements … then inducement is not made out'); *Taberna Europe CDO II plc v Selskabet* [2015] EWHC 871 (Comm) [100], [153] (Eder J); *Axa Verischerung AG v Arab Insurance Group (BSC)* [2015] EWHC 1939 (Comm) [118], [153] (Males J) and *Thorp v Abbotts* [2015] EWHC 2142 (Ch) [75] (HHJ Cooke).

[13] ibid.

physical events, a *set* of conditions—and not individual members of the set—may be sufficient; in relation to human action, even the possibility of joint sufficiency has been doubted.[14] However, a judge who rejects the submission that the claimant must have been induced 'solely' by the defendant's false statement is rejecting a test of sufficiency (whether conceptually coherent or not), not of necessity. Thus, the proposition that the false statement need not be the 'sole cause' does not entail the proposition that the claimant need not show that it would have acted differently if the false statement had not been made. It is the failure to notice this point that has led many to posit that the English law of misrepresentation does not require the claimant to show that the making of the false statement was a necessary condition of his action.

The two most influential authorities are *Edgington v Fitzmaurice*[15] and *JEB Fasteners*.[16] Both cases are, on analysis, in fact consistent with a necessity requirement. In *Edgington,* the prospectus falsely stated that the company intended to use the money raised by issuing certain debentures to develop the business. It actually intended to pay off existing liabilities.[17] The Reverend Edgington, the claimant, also thought that the debentures were secured,[18] which they were not. In his evidence, he said that he would not have taken the debentures had he known that they were unsecured but also that he would not have taken them had he known that the money was not going to be used to

[14] See ch 1.

[15] *Edgington v Fitzmaurice* (1885) LR 29 Ch D 459 (CA). See also *Attwood v Small* (1838) 6 C&F 232, 7 ER 684 (HL).

[16] *JEB Fasteners Ltd v Marks Bloom & Co* [1983] 1 All ER 583 (CA).

[17] *Edgington* (n 15) 468 (Denman J).

[18] Because he was told this by Hunt, the company secretary. That statement was not actionable because Hunt was not authorised to make it.

develop the business.[19] The case could therefore have been disposed of on the simple ground that the false statement was a, though not the only, necessary[20] cause of his action. This is precisely what two of the Lords Justices held. Cotton LJ said that 'it is not necessary to shew that the misstatement was the sole cause of his acting as he did'[21] and Fry LJ said that the 'the plaintiff had two inducements, one [his] own mistake, the other the false statement of the defendants'.[22] Though this point is often misunderstood,[23] the test adopted by Cotton LJ and Fry LJ is not inconsistent with 'but-for', as it only rejects a sufficiency requirement.

It is possible that *Edgington* has been misunderstood in this way because it often tends to be associated with the third judgment in the case—that of Bowen LJ—which does reject 'but-for'.[24] Bowen LJ began by observing that a false statement must be 'either the sole cause…or materially contribute'[25] to the claimant's act. On its own, this is

[19] *Edgington* (n 15) 462, 471.

[20] It could hardly have been a sufficient cause: one does not buy worthless property simply because it is secured.

[21] *Edgington* (n 15) 481.

[22] *Edgington* (n 15) 485.

[23] See, eg, Bant (n 10) 64, who argues that the claimant in *Edgington* 'frankly admitted that, but for the defendant's fraudulent misrepresentation, he would still have purchased the shares in the company because of his own, independent mistake'. He did not: what he admitted was that his independent mistake was *also* a 'but-for' cause, not that the false statement was not. See also Michael Bridge, 'Innocent Misrepresentation in Contract' [2004] CLP 277, 282, who calls this the 'partial inducement' rule.

[24] Justice Edelman, for example, cites only Bowen LJ's judgment in concluding that 'the Court of Appeal was not concerned with whether the plaintiff would nevertheless have lent the money but for the deceit': The Hon James Edelman, 'Unnecessary Causation' (Lecture to the Association of Anglo-Australian Lawyers, 25 June 2014) 19.

[25] *Edgington* (n 15) 482.

not inconsistent with 'but for', but Bowen LJ then proceeded, in a widely-cited passage, to define 'material contribution' in this way:[26]

> …such misstatement was material if it was *actively present to his mind* when he decided to advance his money. The real question is, what was the state of the Plaintiff's mind, and if his *mind was disturbed* by the misstatement of the Defendants.

Mr Justice Handley has recently called this passage the 'Bowen test'.[27] The phrases 'actively present' and 'mind was disturbed' do appear to reject necessity in favour of asking what effect the statement *actually* had on the claimant's mind,[28] but the majority did not endorse this test.

JEB Fasteners can be similarly explained. JEB, a family company, decided to buy BG Fasteners. Mr Bufton, the owner of JEB, was shown a copy of BG's accounts. He suspected that the accounts were inaccurate but proceeded anyway because he thought that JEB would benefit from acquiring the services of a well-regarded BG director.[29] The business failed. JEB brought an action against BG's auditors for negligence in the preparation of the accounts.

Woolf J found that Mr Bufton had 'relied' on the accounts ('**Finding 2**') but would have decided to proceed even if the correct accounts had been provided ('**Finding 4**').[30] In the Court of Appeal, JEB argued that Finding 4 was inconsistent with Finding 2

[26] *Edgington* (n 15) 483 (emphasis added).

[27] Handley, 'Causation' (n 9) 278.

[28] A historical rather than counterfactual test: see, further, §B(2) below.

[29] *JEB Fasteners Ltd v Marks, Bloom & Co* [1981] 3 All ER 289 (QB) 301 (Woolf J).

[30] *JEB Fasteners* (n 29) 305.

because the judge was 'logically precluded from negativing causation'[31] once he had found reliance. On Bowen LJ's analysis of the causal rule, this was not an implausible suggestion: Finding 2, after all, meant that the misrepresentation had 'disturbed the mind of the claimant'. But Donaldson LJ explained[32] that Finding 2, though correct as a matter of fact, was irrelevant as a matter of law: the claimant must show that the 'but-for' test is satisfied, which, given Finding 4, it could not. Sir Sebag Shaw thought that Finding 2 was not correct even as a matter of fact ('it did not *in any material degree* affect their judgment'[33]) but did not say in terms that the claimant would have succeeded if it had been. Thus, neither judgment rejects 'but-for' as a causal rule. However, Stephenson LJ's judgment, like that of Bowen LJ,[34] appears to do so. Having observed that the question is simply whether the accounts had a 'real or substantial'[35] effect on the claimant's mind, Stephenson LJ went on to say:[36]

> Nor would it necessarily follow from his finding that the plaintiffs *would have taken over* the company without having false accounts to consider, that the judge's conclusion was right: he had to decide what *in fact caused* the plaintiffs to take over the company when they did have the false accounts before them.

Many of the later cases,[37] influenced by the dicta of Bowen LJ and Stephenson LJ, treat *Edgington* and *JEB Fasteners* as having decided that the causal enquiry in

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[31] *JEB Fasteners* (n 16) 585 (Sir Sebag Shaw).

[32] *JEB Fasteners* (n 16) 588.

[33] *JEB Fasteners* (n 16) 587.

[34] *Edgington* (n 15).

[35] *JEB Fasteners* (n 16) 589. The problem with this, as Professor McFarlane has put it, is that 'it is very difficult to test reliably for the presence of adjectives': McFarlane (n 2) [3.170].

[36] *JEB Fasteners* (n 16) 589 (emphasis added).

[37] See, eg, *Assicurazioni* (n 12) [215]–[218] (Ward LJ, dissenting); *Hagen v ICI Chemicals and Polymers Ltd* [2002] IRLR 31 (QB) [108] (Elias J) ('it is not necessary for the claimant to show that he would have

misrepresentation is not a counterfactual one. This Chapter argues in a subsequent section that the dicta are, with respect, questionable as a matter of principle.[38] It suffices here to say that, in any event, neither case actually supports that conclusion as matter of precedent, because the only test that the majority reject is 'sole cause'.

2. Necessary Cause and Contributory Negligence

As Donaldson LJ put it in *JEB Fasteners*, people make decisions in ordinary life 'on the basis of a complex of assumptions of fact'.[39] One or more of these assumptions or beliefs may have been induced by a misrepresentation. In a claim for damages for that misrepresentation, it is an established rule that the negligence of the claimant in relying *on the representation* is irrelevant.[40] What this means is that reliance *in belief* (thinking the statement to be true) is not negatived by proof of carelessness. But if the claimant's reliance *in action* is careless—if, for example, he irrationally thinks that some other necessary condition of his action is satisfied when it is not—there may be a defence of contributory negligence.[41] This does not mean that the belief induced by the misrepresentation is not a necessary cause: it means that another erroneous belief was

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acted differently had there been no negligent representation'); *Waltham Forest LBC v Roberts* [2004] EWCA Civ 940, [2005] HLR 2 [41] (Newman J); *Ross River Ltd v Cambridge City Football Club* [2007] EWHC 2115 (Ch), [2008] 1 All ER 1004 [202] (Briggs J) (confined to fraud) and *Parabola Investments Ltd v Browallia Cal Ltd* [2009] EWHC 901 (Comm) [106] (Flaux J) affd (without reference to this point) in [2010] EWCA Civ 486.

[38] §D.

[39] *JEB Fasteners* (n 16) 588.

[40] *Redgrave v Hurd* (1881) 20 Ch D 1 (CA) 14 (Jessel MR).

[41] It has been recently suggested that the rule in *Redgrave v Hurd* is difficult to reconcile with the availability of the defence of contributory negligence: *Taberna* (n 12) [181] (Eder J). However, the learned judge does not appear to have distinguished between reliance-in-belief and reliance-in-action: as the rule in *Redgrave v Hurd* goes to the former, there is no inconsistency in saying that the claimant's carelessness as to the latter can engage the defence.

also a necessary cause. It follows that a court that holds that the defendant, in certain circumstances, may not invoke the defence is not thereby rejecting the proposition that the causal rule is 'but-for'.

This is why the claim that the leading case on this point—*Standard Chartered Bank*[42]—rejects 'but-for' is incorrect. PNS, the ship owner, falsely antedated a bill of lading in collusion with Oakprime, the beneficiary of the letter of credit. Oakprime presented the documents to SCB after the last date for presentation. At this point, SCB could have refused payment on three grounds: late presentation (which it knew about), the false bill of lading (which it did not know about) and discrepancies in the documents (which it should have known about but carelessly overlooked). As it decided to waive late presentation (without obtaining the prior authority of Incombank, the issuing bank), it made payment. It then sought reimbursement from Incombank, falsely representing that the documents had been presented on time. Incombank refused reimbursement on the (distinct) ground that there were discrepancies in the documents. SCB brought an action against PNS for damages for deceit.

If, as this Chapter argues, the 'but-for' test must be satisfied, the question is what SCB would have done if PNS had acted non-wrongfully (ie had not antedated the bill of lading). It was common ground that it would not have paid.[43] It is also true that SCB would not have paid if it had not decided to waive late presentation or had noticed the discrepancies in the document. In cases of this kind, an attempt to identify 'the' reason

[42] *SCB* (n 12).

[43] *SCB* (n 12) [2] (Lord Hoffmann).

for the payment is apt to mislead, as it distracts attention from the fact that the false statement was a necessary cause. This, however, was Ward LJ's approach in the Court of Appeal.[44] It was rejected in the House of Lords, where Lord Hoffmann pointed out that, while contributory negligence is not a defence to fraud, the claimant must establish that the 'but-for' test is satisfied:[45]

> This case[46] seems to me to show that if a fraudulent representation is relied upon, *in the sense that the claimant would not have parted* with his money if he had known it was false, it does not matter that he also held some other negligent or irrational belief about another matter and, but for that belief, would not have parted with his money either. The law simply ignores the other reasons why he paid.

This passage has, with respect, been misinterpreted by some commentators[47] who take Lord Hoffmann to have adopted Bowen LJ's 'active presence' test: on the contrary, his Lordship says expressly that the claimant must show that he 'would not have parted with his money if he had known it was false'. That is a test of necessity. What Lord Hoffmann is rejecting is the proposition that the claimant's carelessness with respect to matters *other* than the false statement (late presentation etc) is a defence.[48] It is unnecessary for this thesis to consider whether this rule is justified by the fact that the statement was

[44] *Standard Chartered Bank v Pakistan National Shipping Corporation (No 4)* [2001] QB 167 (CA) [111].

[45] *SCB* (n 12) [15] (emphasis added).

[46] The reference is to *Edgington* (n 15).

[47] See, eg, Handley, 'Causation' (n 9) 277–80; Handley, *Actionable Misrepresentation* (n 9) 73; McFarlane (n 2) [3.142] and Edelman (n 24) 20 (where Lord Hoffmann is taken to have 'offered an explanation for why *causal rules* appear not to be applied in cases of misrepresentation').

[48] See also PM Eggers, *Deceit: The Lie of the Law* (Informa 2009) 171.

made fraudulently,[49] as it is clear that it applies only *after* it is shown that the false statement was causative. *SCB,* in short, is not inconsistent with 'but-for'.

3. 'Persevering in a Decision Already Made': Causing Omissions

Most of the misrepresentation cases which are said to have rejected 'but-for' in fact fall within one of the two groups considered above, that is, they reject 'sole cause' or 'contributory negligence', not 'but-for'. Once these cases are excluded from the analysis, it is clear that the courts nearly uniformly require 'but-for',[50] particularly where the misrepresentation is not fraudulent. But one group of cases, dealing with false statements that induce *omissions*, warrants discussion, as it appears at first blush to reject 'but-for'.

In principle, there is no reason why a false statement cannot induce an omission. If, for example, a drowning man is falsely told that rescue is imminent, he may omit to save himself.[51] This is not inconsistent with 'but-for' or necessity: had the defendant not acted wrongfully, the claimant would have 'not omitted' to act (ie, would have saved himself or tried to do so). Some cases that deal with a false statement causing the claimant to 'persevere in a decision already made' overlook this key point.

The origin of the expression 'persevere in a decision already made' is the first edition of *Causation in the Law*.[52] Having posed the question 'whether inducement can

[49] Lord Hoffmann said that the rule is 'probably' confined to fraud: *SCB* (n 12) [17].

[50] See references at (n 12).

[51] It is sometimes said that this is a false distinction because any act has a corresponding negative description. This objection is misconceived: see AM Honoré, *Responsibility and Fault* (Hart 1999) 48–53 and in particular the car example at 51.

[52] HLA Hart and AM Honoré, *Causation in the Law* (Clarendon Press 1959) 177.

be shown if the party induced would have entered into the contract or acted as he did irrespective of the false statement', Hart and Honoré say this:[53]

> Probably the opposing views can be reconciled in the following way. If the representee has *already made up his mind* to act before the representation is made, the latter cannot be said to have induced him to act, and in this sense the representation must be a sine qua non of the representee's decision. Even in this case, however, there may be liability based on the representation having induced the representee to *persevere in a decision already reached*.

Although Hart and Honoré do not say so expressly, their formulation 'reconciles the opposing views' only on the assumption that the representee would *not* have persevered 'in [the] decision already reached' had the defendant acted non-wrongfully. A court applying their test must therefore first make this finding of fact. That is what the New South Wales Court of Appeal did in *Corben*,[54] which was perhaps the first Commonwealth case to adopt Hart and Honoré's test. The defendant[55] wanted to buy some property belonging to the Corben brothers. *After* deciding to sell and at what price he would sell, SR Corben (who was not negotiating directly) told his brother to find out who the purchaser was. The judge found that the reason for this was that the 'identity of the purchaser would encourage him to fix the best price that he thought he could get'.[56] The defendant's estate agent, Cavanagh, falsely represented that he was acting for a 'doctor' knowing that the claimants took this to mean 'doctor of medicine'.[57] The defendant argued that this false statement was not causative because SR Corben had

[53] Hart and Honoré, *Causation in the Law* (n 2) 193 (emphases added).

[54] *Australian Steel & Mining Corp v Corben* [1974] 2 NSWLR 202 (NSWCA).

[55] The labels have been switched: Australian Steel (the representor) was the claimant (it sought specific performance) and the Corbens (the representee) were the defendants.

[56] *Corben* (n 54) 205F.

[57] The 'doctor' Cavanagh was acting for, Dr Bissig, was the director of a large consortium.

already decided at what price he would sell. Hutley JA gave two reasons for rejecting this argument. The first was that there is a special rule for deceit. That may be ignored for present purposes.[58] The second was that Cavanagh's statement, though made after Mr Corben had decided what to do, caused him to 'persevere in that decision':

> [W]hen he fixed the price, S.R. Corben had not made an *irrevocable* decision. The identity of the purchaser bore on questions of price… Assuming his decision was absolute,[59] I have not been able to find any decision directly in point, but in *Hart and Honore on Causation in the Law*, the following passage appears... In the last sentence, the very question which arises here is posed and, in my opinion, should be answered in the affirmative.

On the assumption that Mr Corben would have asked for a higher price if he had known that the purchaser was a large consortium rather than a 'Pitt Street farmer', the case is correctly decided, and consistent with 'but-for'.

The English courts applying the statement of principle in *Corben* have overlooked the fact that it applies only if the *omission* satisfies the 'but-for' test. This is odd, because it has been accepted, in other contexts, that a misrepresentation that 'merely serves to confirm or perhaps encourage the wisdom of a course of action already determined'[60] is *not* causative. The leading case on the *Corben* rule is *Barton v County NatWest*, in which Morritt LJ said that 'the principle stated by Hutley JA represents the law of England'.[61] A

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[58] See §D.

[59] The word 'absolute' is ambiguous. If Hutley JA meant 'irrevocable', *Corben* is inconsistent with 'but-for'. But Hutley JA cannot have meant this: for one thing, Mr Corben's decision was obviously not irrevocable and secondly Hutley JA himself pointed this out in the previous passage.

[60] *Hagen* (n 37) [130] (Elias J). See also *Slough Estates plc v Welwyn Hatfield District Council* [1996] 2 EGLR 219 (QB) 239 (May J) ('a representation cannot properly be said to induce a course of action if the other party has already firmly decided to embark on it before the representation is made').

[61] *Barton v County NatWest Ltd* [1999] All ER (D) 782 (CA) [59] (Morritt LJ).

loan to a company was to be secured by three properties and personal guarantees given by, among others, Mr Barton. The Bank's manager fraudulently represented to Mr Barton that the three properties had been valued at £3.5m. HHJ Weeks QC found that this was not causative because they would have proceeded, regardless of the valuation, 'with what they saw as an advantageous transaction with great benefits'.[62] In the Court of Appeal, Morritt LJ, *without* disturbing this finding of primary fact, allowed the appeal on the basis of the *Corben* rule. His Lordship began by saying that since the presumption of inducement applies, the only question is what the defendant must prove to rebut it. What the defendant must prove is presumably that the claimant would have entered into the transaction anyway, or—where *Corben* applies—that the claimant would *not* have 'persevered' with the decision he had previously made. Instead, Morritt LJ appears to have thought that *Corben* dispenses with proof of necessity:[63]

> The judge … rejected the evidence … that they would not have proceeded with the purchase if they had known [the truth]. It is necessary to appreciate that the evidence of the Guarantors was *necessarily hypothetical*. Its rejection leaves the presumption [of inducement] in operation unless it can be affirmatively established by the Bank that the representation was not an inducement**.**

It is difficult to support this reasoning: *Corben* does not decide[64] that 'but-for' is not needed: it decides that it is satisfied by proving that an *omission* was induced.

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[62] *County Natwest* (n 61) [29].

[63] *County Natwest* (n 61) [61].

[64] Ironically, the first ground of Hutley JA's decision—his interpretation of *Barton v Armstrong* [1976] AC 104 (PC)—may be inconsistent with 'but-for' (see *Corben* (n 54) 207D, 208E and 210B) but the second ground, which is what Morritt LJ relies on, is not.

Since 1999, few cases have cited or followed *Barton*,[65] but its analysis of the *Corben* rule is of importance in understanding the problem to be considered at the very end of this Part: the effect of a misrepresentation on the claimant's pre-existing assumption. For now, it is enough to say that *Corben* is not inconsistent with 'but-for' provided it is confined to cases[66] where the claimant would not have 'omitted' to act in the absence of wrongful conduct.

B. Objections to 'But-For'

The previous section has argued that the causal rule for misrepresentation (as a matter of positive law) is necessity. This section considers five objections to the use of this test and concludes that they are ultimately not persuasive.

1. Physical Events and Interpersonal Transactions[67]

The first, and certainly the most formidable, objection is that necessity has no causal significance in relation to interpersonal transactions. The main proponent of this view is Professor Honoré. As Chapter 1 explained, Hart and Honoré sought to derive the proposition that necessity has no role to play from their claim that singular causal statements about interpersonal transactions are not implicitly general, in contrast to singular causal statements about physical sequences. This distinction thus rests on two

[65] Warren J thought it was simply an application of the presumption of inducement: *Dadourian Group International Inc v Simms* [2006] EWHC 2973 (Ch) [545].

[66] This is how Christopher Clarke J interpreted it, although the learned judge said that a different rule might apply to fraud: see *Raiffeisen* (n 8) [199].

[67] Thanks are owed to Fred Wilmot-Smith for helpful discussion of the arguments made in this section.

claims: first, that a singular causal statement about a physical sequence of events entails a nomological statement about events of that type—that this is part of what it *means* to make a singular causal statement of this kind; and secondly, that a statement about why a human being acted in a certain way does not entail any claim that that person, or any other person, would generally act in the same way under the same conditions. This leads Hart and Honoré to argue that human action, unlike physical events, is explained by the *reasons* why an agent acts,[68] and that something need not be *necessary* for a given action in order to constitute a reason for it. Whether reasons for action are causes is contested in the philosophical literature.[69] However, it is not necessary to attempt to resolve this debate because it is doubtful whether Hart and Honoré's claims about necessity are correct even assuming that reasons can be causal.

To explain why, Hart and Honoré's argument must first be set out as clearly as possible. They identify three categories of interpersonal transactions. In all three, the second actor (D) has by words or conduct influenced some decision that the first actor (C) made. The first category is an offer of a reward by D, or a threat, if C embarks on a certain course of action ('**inducement by threats/rewards**'). The second is a false statement by D following which C embarks on a certain course of action (**'inducement by false statements**'). The third is what Hart and Honoré call 'mere advice': here D draws C's attention to the pros and cons of a certain course of action without making any recommendation ('**mere advice**'). According to Hart and Honoré, D, in all three cases, provides C with a 'reason for action' and, *in the first two*, the reason is of a 'special kind,

[68] Hart and Honoré, *Causation in the Law* (n 2) 54.

[69] See below.

for it entails that [D] should by his words or deeds have done something to render some course of action more *eligible* in the eyes of [C] than it would otherwise have been'.[70] With threats and rewards, the action is rendered 'more eligible' because D's conduct gives C 'an extra *reason* for doing the action, in addition to any reason he might have had independently of D'.[71] With false statements, the action is rendered more eligible because '[C] is led to believe that he will gain in a way which he had not thought of'.[72] Hart and Honoré argue that a consideration need not be *necessary* for a course of action in order to make that course of action 'more eligible' in this way: 'there seems nothing intrinsically absurd in the statement that a person who decided to do something for two independent reasons, both present to his mind, would also have done the same thing for either of those reasons alone'.[73] In other words, the 'but-for' test that the previous section has argued for is the wrong test. Professor Honoré gives the following example about misrepresentation:[74]

> A potential investor may be influenced by a false statement in a prospectus and by advice from his stockbroker. Suppose that for these two reasons he makes an ill-fated investment in Eldorado Mines. Nothing turns, it seems to me, on whether each reason was necessary or sufficient to persuade him to invest, or to dissuade him from changing his mind…*It is no part of the meaning of 'cause', 'induce' etc in interpersonal transactions* that the person concerned would not have acted as he did, apart from the conduct of the person who is said to have induced him to act.

This claim should, with respect, be rejected for the following three reasons.

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[70] Hart and Honoré, *Causation in the Law* (n 2) 54 (emphasis in original).

[71] Hart and Honoré, *Causation in the Law* (n 2) 54.

[72] Hart and Honoré, *Causation in the Law* (n 2) 54.

[73] Hart and Honoré, *Causation in the Law* (n 2) 126.

[74] Honoré, *Responsibility and Fault* (n 51) 118–19.

(i) Reasons: Normative or Motivating?

The first difficulty with Hart and Honoré's thesis is that it is not clear what they mean by 'reason'. They do not define the word, but there are (at least) two possibilities: as Joseph Raz explains,[75] a reason for action can be either guiding or explanatory. Others mark the same distinction with perhaps more familiar terminology: normative reasons and motivating reasons.[76] A guiding or normative reason is a consideration that counts in favour of a course of action and potentially[77] renders it rational for an agent to embark upon it. An explanatory or motivating reason is the reason for which the agent actually embarks upon it in a particular case: this may, but need not, correspond to a normative reason.[78]

It is possible[79] that Hart and Honoré are referring to normative reasons because their main concern is with the first interpersonal category that they identify—threats or rewards—in which D's conduct (eg a bribe or a threat) typically *does* constitute a

[75] Joseph Raz, *Practical Reason and Norms* (OUP 1999) 18–19; see also John Gardner, 'Justifications and Reasons' in *his Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007) 91–92.

[76] See, eg, Robert Audi, 'Acting for Reasons' in Alfred Mele (ed), *The Philosophy of Action* (OUP 2003) 76–78 and Timothy O'Connor, 'Reasons and Causes' in Timothy O'Connor and Constantine Sandis (eds), *A Companion to the Philosophy of Action* (Wiley-Blackwell 2010) 129. For the origins of the distinction, see Jonathan Dancy, *Practical Reality* (OUP 2000) 6–8, 20–25. See also John Gardner and Timothy Macklem, 'Reasons' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) fn 5, who endorse the distinction but avoid the terminology of motivating and normative reasons.

[77] To cater for the possibility that it might be defeated by (stronger) reasons to not embark upon it.

[78] Dancy (n 76) 2.

[79] Though the better view is that they are referring to motivating reasons: see below. That sub-section explains that their conclusion does not follow even on that hypothesis.

normative reason for the course of action that C is to embark upon.[80] If this is what they mean, their assertion that the (normative) reason need not be 'necessary' seems correct: if C is currently paid £50,000 and is offered £60,000 by another company, the higher salary is a (normative) reason to take the new job even if C would have taken it for £50,000.

However, normative reasons are not causal: they are concerned with whether C's act is (or is not) *rational*,[81] not *why* C acted. Indeed, the contrary has rarely been argued: in the philosophical literature, the claim made by the so-called causalists is that *motivating* reasons are causal. For example, in 1963, Donald Davidson published an influential essay titled 'Actions, Reasons and Causes' in which he argued that an action is explained by a combination of a 'pro-attitude' (desires, wants etc) towards actions of a certain kind and a 'belief' that a given action, under a certain description, is an action of that kind. This combination (pro-attitude and belief) is the 'primary reason' for that action and is also a *causal* explanation of it. This claim about the causal potency of reasons is controversial,[82] but nobody has suggested that it is a claim about *normative* reasons.

In short, that some fact can constitute a reason for a certain action even if it is not necessary for it in a given case does not mean that it is a causal explanation of that action.

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[80] Crucially, as the following sub-section explains in more detail, this is *not* the case if the inducement takes the form of false statements.

[81] This can be tested by asking if an irrational act can have a cause. Assume that C has only £10,000 left and that he needs this to pay for essential private medical treatment. D falsely tells him that some company has struck oil. C buys shares of that company worth £10,000: this is irrational because he has stronger reasons to spend the money on treatment. But D's lie still *explains* why he bought the shares if he would not have bought them had he not been lied to. A claim for damages for misrepresentation would succeed.

[82] For a number of reasons: motivating reasons are not related to the act as an instantiation of empirical generalisations; the cause is actually a 'subvening' physical or neurological event that accompanies every act, etc. It is unnecessary to attend to these complications here, but see O'Connor (n 76) 132–33.

(ii) Not All False Statements are Motivating Reasons

Can Hart and Honoré's thesis be rescued by reading their language of 'reasons' as motivating reasons? Though the point is not beyond doubt, the better view is that this is what they meant because they argue that whether C acted for a given reason on a given occasion 'is primarily a question as to the way in which [C] reaches his decision to do the act in question: whether the thought of a given reason *weighed with him* as he made up his mind…'[83] This suggests that they are dealing with the reasons *for which* C acted and not merely the reasons *for* his action. On this reading, their claim is that interpersonal transactions are cases in which the defendant provides the claimant with a motivating reason for his action and that it does not cease to be a motivating reason merely because it was not necessary.

Is this argument sound? For it to succeed, Hart and Honoré would have to establish that what makes it legitimate to describe C's act as a consequence of D's conduct is *the fact that* D provided C with a motivating reason. It is at this step that the argument founders, perhaps because Hart and Honoré do not distinguish between inducement by threats/rewards and inducement by false statements. False statements, unlike threats or rewards, can be causal *even if* they do not provide C with a motivating reason for the act that is said to be induced.

A false statement does not provide a motivating reason if its subject-matter concerns a *condition* of action rather than a *reason* for it, or if it concerns a reason to *not*

[83] Hart and Honoré, *Causation in the Law* (n 2) 56.

act rather than a reason *to* act.[84] To explain this point, it is helpful to adapt an example given by Professor Honoré himself. Sam is currently employed in Oxford. He is offered a post in London at an increased salary. His wife has many friends in London and wishes to move there. Sam currently receives affordable private medical care in Oxford for a serious long-term ailment, but will have access to equally inexpensive care in London. The increased salary and his wife's wishes—as Professor Honoré accepts[85]—are normative reasons for Sam to move to London. They are also motivating reasons if he moves for those reasons. In contrast, the fact that London has an equally inexpensive hospital is neither, even though he would not have moved had it not: its absence is a reason to *not* move but its presence is not a reason *to* move. Put differently, access to the hospital is a *condition* of Sam's moving to London but not a reason for it: it is not a reason for it because, so far as the hospital is concerned, he might as well remain in Oxford (or move to Manchester, if it has one, and if he has sufficient reason *to* do so). John Gardner has described this contrast between a reason to act and a reason to not act as 'one of the most striking asymmetries in all human thought and experience'.[86]

For the purposes of evaluating the causal potency of a false statement made to Sam, nothing turns on whether it concerned a reason to act or a reason to not act or a

[84] For helpful discussion of the distinction between conditions and reasons, see Gregory Klass, 'A Conditional Intent to Perform' (2009) 15 LT 107, 113–16; John Gardner, 'What is Tort Law For? Part 1: The Place of Corrective Justice' (2011) 30 Law and Philosophy 1, 7 and Frederick Wilmot-Smith, 'Failure of Condition' (DPhil thesis, University of Oxford 2014) 68–69.

[85] Honoré, *Responsibility and Fault* (n 51) 119.

[86] Gardner, 'Justifications and Reasons' (n 75) 97. He has made a similar point about Hart's analysis of the relevance of guilt to the practice of punishment in criminal law: 'under Hart's rule the guilt of the guilty does not count in favour of punishing them; it merely eliminates an objection to punishing them': see John Gardner, 'Introduction' in HLA Hart, *Punishment and Responsibility* (2nd edn, OUP 2008) xxv. There are, of course, difficulties with Hart's claims about punishment but these need not trouble us here, for the point made in the text is a conceptual one about what constitutes a reason for action. See also Gardner, 'Corrective Justice' (n 84) 7–8.

condition of the action that is not a reason.[87] Suppose that Sam's employer tells him during negotiations that medical care is no more expensive in London than it is in Oxford. Sam believes this statement, moves to London, and ends up paying £20,000 more for care than he would have done in Oxford. In ordinary life (ie outside the law), it would be natural to say that the extra expenditure that Sam incurred was a consequence of the employer's false statement because that induced him to move to London. It would be natural to say this *not* because the employer's false statement provided Sam with a motivating reason to move to London (it did not) but simply because Sam would not have moved to London if his employer had not misled him. The legal system would reach the same conclusion: it is clear law that Sam, if the statement had been made fraudulently,[88] would be able to recover the £20,000 from his employer.

What the example illustrates is that the causal potency of a false statement is not derived from the normative strength of the content of the statement or from the fact that it was a motivating reason: it need not be a reason at all. Its causal potency is derived from the importance of the belief it induces—whether of a reason for or against action or condition or background assumption—and from the fact that the belief was false. Indeed, Professor Honoré seems to concede that the presence of the hospital is a condition, not a reason: 'but-for reasons are often not reasons *for* taking a decision or acting on it but reasons *against*[89] taking it … and do *not* cause, lead, induce or prompt Sam to move'.[90]

[87] In contrast, the threat or reward in the tort of inducing breach will *always* be a reason to act. This may be why Hart and Honoré are misled into unifying *all* interpersonal transactions in this way.

[88] Or is otherwise actionable, perhaps under section 2(1) of the 1967 Act: the nature of the cause of action does not matter in this context.

[89] The text reads 'against *not* taking it': I take the 'not' to be a misprint.

[90] Honoré, *Responsibility and Fault* (n 51) 119.

Given that he accepts that false statements of this kind are concerned with 'but-for reasons', it is not clear why he rejects the 'but-for' test for false statements or for interpersonal transactions more generally.

(iii) Not all Reasons for Action are Motivating Reasons

The previous sub-section has shown that false statements about reasons to not act and conditions of action can be causal even though they do not provide motivating reasons. This sub-section shows that the converse is also true: even a false statement that provides a reason *to* act is not, as Hart and Honoré assume, always a motivating reason or causal.

Hart and Honoré say that a false statement provides a motivating reason if the course of action is 'rendered *more eligible* in the eyes of C [who] is led to believe that he will gain in a way which he had not thought of'.[91] However, even in cases where this is true (ie where it concerns a reason for, not against, action), it is an epiphenomenon: the fact that it rendered the course of action more eligible is not what allows it to be cited as the cause. For example, suppose that Kevin Pietersen is currently earning £500,000 a year at Surrey. Midway through the Ashes, he is dramatically offered a central contract by the ECB worth £600,000 a year but is required to give up his Surrey contract. The higher salary is undoubtedly a normative reason to accept this offer and presumably also makes the transaction—playing for England instead of Surrey—'more eligible' in Pietersen's eyes. However, it is difficult to see how this has any explanatory force if it is shown that Pietersen would have agreed to play for England even if he had been offered only

[91] Hart and Honoré, *Causation in the Law* (n 2) 54.

£500,000. In such a case, the fact that he was actually offered an extra £100,000 cannot constitute an answer to the question '*why* did Pietersen enter into this contract with the ECB', even if he regarded the offer of extra money as a benefit and welcomed it. Thus, if he had been negligently told by his solicitor that the new contract was worth £700,000, a claim for damages for misrepresentation would fail even though the statement made the transaction more eligible: it does not explain why Pietersen entered into *this* contract on *this* occasion. In these cases, what allows a statement to be cited as a cause is the fact that the belief it induced was a necessary condition of the claimant's action *and* false: both elements combine to explain the claimant's action.

(iv) Conclusion

In the end, there is always a question of law that is logically prior to the use of ordinary causal concepts (as Hart and Honoré accept):[92] between which *facts*[93] and in what *form*[94] is a causal connection required? This is not a causal question. In relation to the tort of inducing breach of contract—the principal interpersonal transaction with which Hart and Honoré are concerned[95]—the facts between which a causal connection is required are the breach of contract and the threat or reward (and not the *communication* of the threat or offer of reward).[96] The threat or reward will usually also be a normative *and* motivating 'reason' for the contract-breaker's action: Mr Gye's promise to pay Johanna Wagner

[92] Hart and Honoré, *Causation in the Law* (n 2) Preface; Honoré, *Responsibility and Fault* (n 51) 4.

[93] For example, must the claimant's injury have been caused by *driving* or by *unlicensed* driving?

[94] For example, must the defendant's conduct have caused harm or merely occasioned it?

[95] Hart and Honoré, *Causation in the Law* (n 2) 187–92.

[96] Hoffmann LJ made this point powerfully in *Middlebrook*: *Middlebrook Mushrooms Ltd v Transport and General Workers' Union* [1993] ICR 612 (CA) 625–26. This part of the case remains good law after *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1.

more than Mr Lumley was going to pay her undoubtedly 'made the course of action more eligible in the eyes of the second actor'.[97] This may have misled Hart and Honoré into asking whether a false statement also provides the second actor with a reason for action. This has no causal significance. A misrepresentation is causative only if the belief it induces is causative; and the belief, whether of a reason for or against action or of a condition of action, is causative only if the claimant would not have acted had he not held that belief.[98] In this context, mistake and misrepresentation align and Hart and Honoré's thesis should, with respect, be rejected.

2. A Non-Counterfactual Model of Causation

The most recent edition of *Spencer Bower* argues[99] that *Assicurazioni*[100] and *Raiffeisen*[101] are wrongly decided because the use of 'but-for' is inconsistent with *Edgington*.[102] This Chapter has already shown that *Edgington*, properly analysed, is not inconsistent with 'but for'. *Spencer Bower* further argues, however, that 'but for' is in any case inappropriate because causation, in misrepresentation cases, should not be understood in

[97] Hart and Honoré, *Causation in the Law* (n 2) 54.

[98] This can be tested by eliminating the misrepresentation from the story. Suppose Sam had moved under a self-induced mistake that London had a hospital. It would be natural to say that he is now paying £20,000 more because of that mistake. Indeed, in the law of unjust enrichment, the causal rule for mistaken payments more generally is 'but-for': Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) §10(2) and commentary. Misrepresentation is identical except that reliance-in-belief is induced: the reliance-in-action is precisely the same. Professor Burrows suggests that a different rule applies in unjust enrichment if the mistake was induced by a fraudulent misrepresentation (§10(2)(b)(ii)) but that is founded on the assumption that *Edgington* (n 15) dispenses with but-for.

[99] Handley, *Actionable Misrepresentation* (n 9) 77–79.

[100] *Assicurazioni* (n 12).

[101] *Raiffeisen* (n 8).

[102] *Edgington* (n 15).

counterfactual terms: 'deception was practised and the court must determine its effect on the mind of the representee *at the time*. That is a question of *historical fact*.'[103]

There are two ways to understand this objection. If all it means is that it is impossible to determine what the claimant would have done in the absence of wrongful conduct, it is a version of the 'indeterminacy' objection which is addressed separately below. But if—as appears to be the case—the objection is that it is somehow *inappropriate* to adopt a counterfactual model of causation for misrepresentation, it is doubtful whether it is correct.[104] As Chapter 2 explained, the use of the counterfactual in the central causal notion does not entail that 'but-for' is constitutive of a causal connection: in relation to physical events, it is simply a useful *test* of whether a particular condition is causally relevant. It is true that interpersonal causal statements are not implicitly general. However, it does not follow that 'but-for' has no place in the causal enquiry: it is, again, a useful test of whether, *on this occasion* (and not generally) the belief the claimant formed was necessary to the set of beliefs that were jointly sufficient to persuade him to act as he did. It is the fact that it was necessary in this sense—and the fact that it was false—that gives the statement explanatory force in relation to the action it is said to have induced.

[103] Handley, *Actionable Misrepresentation* (n 9) 79.

[104] It can, of course, be argued that harm or loss should *always* be understood in historical rather than counterfactual terms: for a recent review of the literature, see Victor Tadros, 'What Might Have Been' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014), who defends the counterfactual approach. But the point made in the text is a narrower one: if, as the supporters of the Bowen test appear to accept, a counterfactual test can be used elsewhere in the law, there is nothing about *misrepresentation* that calls for a historical test.

3. Right to Make an Informed Choice

When *Derry v Peek* came to the Court of Appeal,[105] one of the defendant's arguments was that there was no causal connection since Sir Henry Peek had admitted in cross-examination that he would have taken the shares even if section 35 of the 1882 Act[106] had been set out in the prospectus. Sir James Hannen rejected this contention on the basis that Sir Henry's real complaint was that he 'had not the *opportunity* of exercising [his] judgment'.[107] The suggestion appears to be that the 'but-for' test is inappropriate because the claimant complains not of the choice he made in the belief that the statement was true but of the fact that he could not make a fully informed choice.[108]

There are two responses to this. First, granting the premise, it does not follow that the claimant is entitled to *no-transaction* damages. Long before *Chester v Afshar* came to the House of Lords,[109] Lord Hoffmann made this point. His Lordship said that if the *injury* is identified as the deprivation of the *ability* to make an informed decision, 'the damages would have to be assessed on a rather different basis…they would be more like damages for some insult or affront'.[110] One cannot dispense with the 'but-for' test on the ground that the injury is the loss of the *opportunity* to decide but award damages for the harm caused by the *decision*. Secondly, even assuming that *Chester* is correctly decided,

[105] *Peek v Derry* (1887) 37 Ch D 541 (CA).

[106] Plymouth, Devonport and District Tramways Act 1882.

[107] *Peek v Derry* (n 105) 584.

[108] Jacobs JA in his dissenting judgment in *Barton* adopted similar reasoning in the context of duress: *Barton v Armstrong* [1973] 2 NSWLR 598 (NSWCA) 608B. When the case went to the Privy Council, Lord Cross drew an analogy between duress and fraud: *Barton v Armstrong* (n 64) 118.

[109] *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134.

[110] The Rt Hon Lord Hoffmann, 'Common Sense and Causing Loss' (Lecture to the Chancery Bar Association, 15 June 1999) 18.

the Court of Appeal has held that it is confined to special contexts such as medical negligence. No general proposition about the propriety of the use of 'but-for' can be derived from it. This must be correct: as Arden LJ pointed out, *Chester* would otherwise have to be applied in virtually every professional negligence case.[111]

4. Indeterminacy

It is sometimes suggested that the 'but-for' test should not be used in misrepresentation cases because it is impossible for the claimant to prove what he would hypothetically have done in the absence of wrongful conduct. Cranworth LJ endorsed this view in a well-known passage in *Reynell v Sprye*[112] and it was the basis of Lord Millett's influential observations in *BP v Chevron*.[113] Professor Bant calls this the problem of 'endemic forensic uncertainty': '…to identify and assess the relative[114] importance of the factors, considerations or reasons that together prompt a person's decision to act is often impossible…'[115]

[111] *White v Paul Davidson & Taylor* [2004] EWCA Civ 1511, [2004] PNLR 245 [42].

[112] *Reynell v Sprye* (1852) 1 De GM & G 660, 42 ER 710, 728 (Cranworth LJ). See also *Peek v Derry* (n 105) 584 (Sir James Hannen); *Arnison v Smith* (1889) LR 41 Ch D 348 (CA) 369 (Lord Halsbury LC) and Bant (n 10).

[113] *BP Exploration Operating Co Ltd v Chevron Shipping Co* [2001] UKHL 50, [2003] 1 AC 197 [104]–[105]. The case is not the best authority for any general proposition about misrepresentation because it was concerned with the meaning of the words 'induced to refrain from making a relevant claim' in section 6(4) of the Prescription and Limitation (Scotland) Act 1973. It is, in any event, difficult to defend Lord Millett's conclusion as a matter of principle: see below.

[114] In fact a necessity test does not call for any assessment of *relative* importance.

[115] Bant (n 10) 67–68.

This may be doubted.[116] First, it seems to overstate the difficulty of analysing human action. It is true that human action is not implicitly general in the way that causal statements about physical events are, but generalisations can nevertheless be used as *evidence* of how people normally react to certain impulses. As Hart and Honoré observed, if D said that he 'left the room because Caesar died in 44 BC, we should not understand him'.[117] The evidence of the person who acted, if credible, also carries great weight.[118] This is why the courts readily infer that a statement that satisfies the materiality rule is causative.

Secondly, Professor Bant appears to assume that her 'endemic forensic uncertainty' is no longer a problem if the 'but-for' test is rejected. This is not true. The alternative generally favoured by these scholars is Bowen LJ's test: was the false statement 'actively present to [the claimant's] mind'? Unless this is taken to mean that a false statement that is heard and understood by the representee is *always* causative—and even Bowen LJ does not go that far—it is not easy to see why it is not vulnerable to exactly the same criticisms:[119] one cannot, after all, 'measure' or 'verify' active presence any more than test for 'but-for' causation.

[116] See also Edelman (n 24) 21, who doubts it.

[117] Hart and Honoré, *Causation in the Law* (n 2) 57.

[118] Hart and Honoré, *Causation in the Law* (n 2) 411.

[119] See also Eggers (n 48) 173.

5. Over-determination

Over-determination is a famous problem in the philosophy of causation of physical events.[120] It is sometimes suggested that overdetermination is 'rife in decision-making'[121] in contrast to physical events. This is not true. If two *different* false statements are made, both of which are necessary (ie 'but-for'), the representee's decision is not over-determined. It is overdetermined only if the *same* false statement is made by two different persons.[122] One of the few cases in which this happened is *Royal British Bank*.[123] As was not uncommon in that period,[124] Mr Nicol was given a prospectus containing many fraudulent misrepresentations. Mr Kennedy, an individual director of the company, fraudulently told Mr Nicol that the representations in the prospectus were true. So there were two representors who had made the same false representation. In his action against the company,[125] it was argued that Mr Nicol had to 'distinguish' the impact of the company's representation from that of Mr Kennedy's. The Lord Chancellor rejected this contention.[126] It is submitted that the Lord Chancellor was right to do so: overdetermination can be overcome by asking if the false statement was a necessary element of a set of conditions sufficient *on this occasion* (not generally) to induce the claimant to act. A more detailed explanation of this point can be found in Professor

[120] It is largely responsible for the emergence of the NESS test: see ch 1.

[121] Bant (n 10) 67.

[122] Even for physical events, overdetermination arises from a combination of independently sufficient, not necessary, sets of conditions.

[123] *Re The Royal British Bank* (1859) 3 De G & J 387, 44 ER 1317.

[124] See Michael Lobban, 'Nineteenth Century Frauds in Company Formation: Derry v Peek in Context' (1996) 112 LQR 287.

[125] It was not an action for damages. He sought to have his name removed from the list of contributories.

[126] *Nicol's Case* (n 123) 1331.

McFarlane's answer to a similar objection to the use of 'but-for' in estoppel cases.[127] It is of little importance in practice, especially for misrepresentation.

C. Consistency with the Compensatory Principle

The previous sub-section has argued that 'but-for', as a matter of positive law, is the causal rule that the courts use in misrepresentation claims and that the common objections to its use are not persuasive. There is, in addition, a positive argument for its use that that often tends to be overlooked: maintaining consistency with the basis on which the *quantum* of damages is calculated.

What is the aim of an award of damages for deceit or negligent misrepresentation? It is generally agreed that it is to put the claimant in the position it would have been in if the defendant had not made the false statement. This is what the application of the compensatory principle to misrepresentation entails. It is true, of course, that other legal rules, such as remoteness,[128] may *limit* the amount of damages the claimant is actually awarded to something less than what the application of the compensatory principle would dictate. But it is clear that—whatever one's conception of those legal rules—the goal of the damages award entails a comparison of the (counterfactually defined) non-breach position with the breach position.[129] If the *amount* of damages depends on a counterfactual test, it is difficult to see on what basis the so-called test of inducement can be historical: in the context of misrepresentation, the two

[127] McFarlane (n 2) 195–99.

[128] See chs 4–8.

[129] Dyson and Kramer (n 5) 261.

questions come to the same thing.[130] Curiously, those who support the 'Bowen test' or other non-counterfactual tests of inducement appear to nonetheless endorse the measure of damages formulated in cases like *Doyle*[131] and *Esso*.[132] To maintain consistency with their preferred test of inducement, they would in fact have to claim that the amount of damages should reflect the *extent* to which the defendant influenced the claimant. There is no trace of this in the English case law.[133]

In short, so long as the measure of damages remains no-transaction, the causal rule must as a matter of logic remain 'but-for'.

D. No Special Causal Rule for Deceit

It is often suggested, even by those who accept that the causal rule for misrepresentation generally is 'but-for', that there is a special rule for *fraudulent* misrepresentation.[134] This section argues that this is incorrect. It first demonstrates that the authorities do not support the suggestion. It then argues that there is in any event no justification in principle for any such rule: the case for it misunderstands the relationship between fault and the quantum of damages.

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[130] See also Eggers (n 48) 180.

[131] *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 (CA).

[132] *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 (CA).

[133] See also McFarlane (n 2) [3.141] (in relation to estoppel).

[134] See, eg, *Raiffeisen* (n 8) [191]; *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 CLC 701 (Hamblen J) [233] (*Raiffeisen* assumed to be correct); *Parabola* (n 37) [105] (Flaux J); *OMV Petrom SA v Glencore International AG* [2015] EWHC 666 (Comm) [15] (Flaux J); Cartwright (n 1) [3-54] and Robert Stevens, 'Causation and Contribution' (Lecture to the Tort Law Research Group, Western Law, March 19, 2014).

1. The Authorities on Causation for Deceit

The three cases most frequently cited[135] as having rejected 'but-for' for deceit are *Edgington v Fitzmaurice*,[136] *Smith v Kay*[137] and *Barton v Armstrong*.[138] The previous section has explained that *Edgington* is actually perfectly consistent with 'but-for'. *Smith v Kay* is a more difficult case but can also be seen on analysis to be consistent with 'but-for'. Sir John Romilly MR, who tried the case, did not reject 'but-for' as a matter of law: he held that it was not open to the defendant on the pleadings to take the point that Kay would have executed a bond in favour of Adams and Smith even if the truth had been told.[139] When the case went to the House of Lords, Lord Chelmsford LC and Lord Cranworth made some unnecessarily wide observations that are often said to have[140] rejected 'but-for'. But the better view is that their Lordships were of the same view as the Master of the Rolls: that it was not open to the defendant at this stage to make the case that the false statement was not '*dans locum contractui*', not that it was irrelevant as a matter of law.[141] The following sentence from Lord Chelmsford's speech is usually taken to be the ratio of *Smith v Kay*:[142]

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[135] See, eg, Handley, 'Causation' (n 9) 282.

[136] *Edgington* (n 15).

[137] *Smith v Kay* (1859) 7 HLC 750, 11 ER 299 (HL).

[138] *Barton v Armstrong* (n 64).

[139] *Kay v Smith* (1856) 21 Beav 522, 52 ER 961, 965–66.

[140] See, eg, *Raiffeisen* (n 8) [191] (Christopher Clarke J).

[141] It is also important to remember that the court in *Smith v Kay* exercised its jurisdiction to protect minors: see, eg, the reference (at 530) to the obligation to 'keep the minor fully informed'. Nor was the alternative claim a common law claim for damages. It is therefore unsafe to derive any general propositions about causation from *Smith v Kay* even if the analysis of the case presented here is rejected.

[142] *Smith v Kay* (n 137) 303.

> But can it be permitted to a party who has practised a deception, with a view to a particular end, which has been attained by it, to speculate upon what might have been the result if there had been a full communication of the truth?

But Lord Chelmsford immediately goes on to say this:[143]

> How is it *possible to say* in what manner the disclosure would have operated upon Kay's mind … For my part, I think that the Appellant takes too sanguine a view of probabilities when he assumes that the discovery that Johnston was, after all, the holder of the greater part of the bills, *would still have left Kay in the same mind to ratify the transaction*.

Lord Cranworth's speech can be similarly analysed.[144] Lord Kingsdown decided the case on other grounds and Lord Wensleydale, following *Attwood v Small*, *expressly* said that 'but-for' is required even in fraud cases.[145] It is submitted therefore that *Smith v Kay* does not involve any departure from the principle, established by other nineteenth-century cases,[146] that 'but-for' must be satisfied even if the statement is fraudulent.

Thus, before *Barton v Armstrong*, the authorities supported the view that the same causal rule applies to deceit and negligence. Three points can be made about that case. First, it appears that Lord Cross's comments about fraudulent misrepresentation are confined to rescission,[147] as his Lordship treated it as analogous to equity's jurisdiction to

[143] *Smith v Kay* (n 137) 303.

[144] *Smith v Kay* (n 137) 307.

[145] *Smith v Kay* (n 137) 309.

[146] See, eg, *Nicol's Case* (n 123).

[147] There are suggestions that there may be a different test of causation depending on whether the claimant seeks rescission or damages: see, eg, Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) [4.014]–[4.109] and Edwin Peel, *Treitel, The Law of Contract* (13th edn, Sweet & Maxwell 2011) [9-020]. It is unnecessary for this thesis to consider this, but it is worth pointing out that, if the distinction is right, it is hard to see why the special rule applies only for rescission for *fraud*.

set aside dispositions procured by the exercise of undue influence.[148] Secondly, it is not clear that Lord Cross actually rejected 'but-for': what his Lordship said was that the court does not, in the field of fraudulent misrepresentation, 'allow an examination into the relative importance of contributory causes'.[149] As this thesis has explained, this—the *Edgington* rule—is not inconsistent with 'but-for'. Thirdly, the closest Lord Cross comes to rejecting 'but-for' in terms is when he observes that Mr Barton was entitled to relief 'even though he *might well have* entered into the contract' anyway: this may simply mean that Mr Armstrong did not rebut the presumption (of fact) of inducement, not that 'but-for' is not required as a matter of law.[150]

In short, the weight of authority, at the level of the House of Lords,[151] supports the view that the same causal rule applies to deceit. In any event, it is submitted, for the following reasons, that 'but for' is the correct test in principle.

2. The Argument in Principle: No Special Causal Rule for Deceit

In *Raiffeisen*, Christopher Clarke J said that deceit has a different causal rule because there are 'sound reasons of policy' why 'those who set out to deceive' should be liable for loss that would have been suffered anyway.[152] It is submitted that this is not the case. This view, with respect, fails to properly distinguish between causal and non-causal limitations on liability.

[148] *Barton v Armstrong* (n 64) 119.

[149] *Barton v Armstrong* (n 64) 118.

[150] See also *Raiffeisen* (n 8) [198] (Christopher Clarke J).

[151] *SCB* (n 12).

[152] *Raiffeisen* (n 8) [198].

(i) Which Rules Apply Only on Proof of Intentional Wrongdoing?

There is consensus that damages for negligence are compensatory.[153] As Lord Diplock said:[154]

> The general rule in English law today as to the measure of damages recoverable for the invasion of a legal right, whether by breach of a contract or by commission of a tort, is that damages are compensatory. Their function is to put the person whose right has been invaded in the same position as if it had been respected.

Although deceit is an intentional wrong, damages remain compensatory, not exemplary. Lord Hoffmann makes this clear in an important passage in *SAAMCO* (hereinafter '**216C**'):[155]

> The defendant is clearly not liable for losses which the plaintiff would have suffered even if he *had not entered into the transaction*[156] or for losses which negative the causal effect of the [fraudulent] misrepresentation.

Yet there is no doubt that some rules in the law of damages apply only if the statement was made fraudulently. A well-known example is remoteness: it is settled law that the reasonable foreseeability limitation does not apply to deceit.[157] The falsity rule in *SAAMCO* itself, to be considered in detail in chs 4–7, also does not apply to deceit. What principle distinguishes rules of this kind, which appear to be dependent on proof of

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[153] Professor Stevens has argued that damages are substitutive, but it is unnecessary to engage with that claim in this context, because he accepts that causal rules apply to awards that purport to compensate (in his scheme, damages for consequential losses): Robert Stevens, *Torts and Rights* (OUP 2007) ch 4.

[154] *Albacruz v Albazero (The Albazero)* [1977] AC 774 (HL) 841.

[155] *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 (HL) 216C.

[156] This is not the same thing as 'but-for' but there is a very close, often overlooked, parallel: see below.

[157] *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL).

intentional wrongdoing, from rules like Lord Hoffmann's 216C, which appear to apply whether the wrong is intentional or not? This is an important problem which has received little attention in the cases or the literature.

It is convenient to begin by identifying limitations which, as a matter of positive law, apply even though the statement was made fraudulently. First, as the following sub-section explains, the claimant cannot recover damages for a loss that would have been sustained even if he had not entered into the transaction induced by the fraudulent statement, that is, if the successful or alternative transaction would have been just as disastrous. This goes to the non-breach position. Secondly, the claimant cannot recover damages for a loss that is attributable to an intervening cause. This goes to the breach position. That this rule applies alike to negligence and fraud emerges clearly from *Smith New Court*, where the House of Lords dispensed with foreseeability but retained causation.[158] Thirdly, the mitigation rule applies to deceit.[159]

It is submitted that the reason for this distinction is that these rules are causal, in contrast to rules such as foreseeability, which are non-causal. Causal rules apply whether the statement was made negligently or fraudulently because they are concerned with identifying the *outcome* of the defendant's acts. This depends not on the defendant's state of mind but, as Chapter 1 explained, on the nature of the relationship between his act and the chain of events culminating in a certain outcome. Non-causal rules, on the other hand, are not (or not necessarily) concerned with the relationship between events. Thus, a

[158] *Smith New Court* (n 157) 284–86 (Lord Steyn). There are some local difficulties with their Lordships' analysis of *novus actus*: see ch 5.

[159] *Smith New Court* (n 157) 285 (Lord Steyn).

remoteness or scope of duty rule can only (relative to the causal baseline[160]) *limit* liability: it cannot *expand* it to reach some outcome that was not caused by the wrongful act. In theory, one can imagine a legal system in which any loss wrongfully caused by the defendant is recoverable, even if it was unforeseeable. Such a system, whatever its merits, would not cease to be compensatory. This is why Lord Hoffmann, who has extra-judicially supported the 'no reasonable foreseeability for deceit' rule,[161] is able to say at 216C, consistently, that a fraudulent representor is not liable for a loss which would have been incurred even if the claimant had not entered into the transaction.

In short, Christopher Clarke J's observation that there are 'sound reasons of policy' must be qualified: such reasons (if sound) may be invoked only at a stage in the damages enquiry where policy is *relevant*.[162] The first stage[163]—the 'built-in rule' of causation—has nothing to do with policy.[164] The point is not whether the rule of policy is 'sound': that question will inevitably provoke disagreement. It is that a rule of policy,

[160] The so-called 'inclusionary' cases (eg *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7, [2010] 1 CLC 241) expand liability relative to the *remoteness* baseline.

[161] Lord Hoffmann, 'Common Sense' (n 110) 12. Hoffmann LJ was, of course, a member of the Court of Appeal whose judgment was reversed: *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1994] 1 WLR 1271 (CA), but the case in the Court of Appeal proceeded on an entirely different basis: see ch 7.

[162] It can be argued that policy is *never* relevant to a system of corrective justice: this thesis takes no position on this.

[163] The better view, as chapter 1 explained, is that *novus actus* is also not distinctively legal. But the argument made in the text to this footnote can succeed even if this further claim is flawed.

[164] See also Edwin Peel, 'SAAMCO Revisited' in Andrew Burrows and Edwin Peel (eds), *Commercial Remedies* (OUP 2003) 61. For a contrary view, see Jane Stapleton, 'Occam's Razor Reveals an Orthodox Basis for Chester v Afshar' (2006) 122 LQR 426 and further, ch 1.

even if sound, must remain consistent with the fact that the award of damages (even for deceit) purports to be compensatory.[165]

(ii) Lord Hoffmann's Key Insight at 216C

Lord Hoffmann's observation at 216C is not quite the same as the rule that the claimant must satisfy 'but-for' causation: his Lordship's point is that the claimant cannot recover damages for loss he would have suffered even if he had *not* entered into the transaction. But underlying this observation is an important truth about the inevitability of the 'but-for' test in deceit.

The principle articulated by Lord Hoffmann at 216C has been described by commentators as the 'doctrine of alternative cause'[166] or as the doctrine of 'loss in any event'.[167] According to this principle, the lenders in *SAAMCO* could not have recovered any damages from the valuer even for deceit if they would have made the same loan to a different borrower if the correct valuation had been provided.[168] There is also other authority supporting the application of the 'loss in any event' rule to deceit;[169] so, unlike the remoteness rules, it appears to be applicable regardless of the degree of wrongdoing.

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[165] This is why it is erroneous to justify *Smith New Court* on the basis that it 'penalises' fraud: see, eg, *Calvert v William Hill Credit Ltd* [2008] EWCA Civ 1427 [44] (Sir Anthony May P). There is no penal element in the measure: it dispenses with remoteness but remains compensatory.

[166] Hart and Honoré, *Causation in the Law* (n 2) 249–53.

[167] Mark Stiggelbout, 'The Case of "Losses in Any Event": A Question of Duty, Cause or Damages?' (2010) 30 LS 558. See also, in relation to property damage, Samuel Beswick, '"Loss in Any Event" in the Case of Damage to Property' (2015) OJLS (forthcoming).

[168] *SAAMCO* (n 2) 216C.

[169] See, eg, *BHP Billiton Petroleum Ltd v Dalmine SpA* [2003] EWCA Civ 170 [32] (Rix LJ).

What is the rationale for the rule generally? An instinctive response is that it is causal, for it seems to be concerned with the relationship between the defendant's act and some event. In an illuminating analysis of the problem, Mark Stiggelbout rejects this view. He argues that 'loss in any event' goes to *damage* and not to *injury*: thus, in *Performance Cars*,[170] the defendant caused 'injury to the claimant's car but ... not ... damage'.[171] This is true, but it does not undermine the claim that 'loss in any event' is a causal rule because the basis for not imposing liability in such cases is that the *consequences* of the injury (damage, in Stiggelbout's terminology) were not *attributable* to his act, though the injury itself was. Stiggelbout's terminology, in other words, is useful in highlighting that the doctrine of alternative causation is distinct from the doctrine of causal relevance (although it is often confused with it[172]) but the two doctrines share a common rationale in the law of damages. In *Performance Cars*, for instance, the negligent act was causally relevant to the injury to the car because there was a general connection (in Hart and Honoré's language) between that act and the injury; it was also the cause of the injury because it was abnormal in that context. However, the economic consequences for which the claimant sought damages were not caused by *that* injury and so the defendant was not liable.[173]

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[170] *Performance Cars v Abrahams* [1962] 1 QB 33 (CA).

[171] Stiggelbout, 'Loss in Any Event' (n 167) 564.

[172] To say that a wrong is causally irrelevant is to deny that it was an instantiation of an empirical generalisation (eg the *Empire Jamaica* or the unlicensed driver). To cite an alternative cause, on the other hand, is to accept that there was such a generalisation but to deny that the injury with which the wrong was generally connected caused any adverse economic consequences for the claimant. Problems arise where the injury is wholly constituted by economic consequences but a similar analysis is possible: for discussion, see Hart and Honoré, *Causation in the Law* (n 2) 250.

[173] For a recent example, see *Davies v Countess of Chester Hospital NHS Foundation Trust* [2014] EWHC 4294 (QB) [43] (Kenneth Parker J) (death caused by magnesium administered in breach of duty but the claimant would have died soon even if it had not been).

'Loss in any event' matters in the present context because it would be inconsistent to apply that rule to deceit on the one hand but reject 'but-for' as the test of inducement on the other. In a deceit claim (and negligent misrepresentation), it will be recalled that the causal relationship between the defendant's act and the ultimate loss consists of three stages which differ in important ways:[174] **(i)** the relationship between the making of the statement and the claimant's belief; **(ii)** the relationship between the claimant's belief and his act of reliance; and **(iii)** the relationship between the act of reliance and further consequences (eg lost money, a second car accident etc). The reason it is inconsistent to apply 'loss in any event' but not 'but-for' is that they are both causal rules that exist for the same or similar reasons: the only difference is that they respond to different stages of this causal relationship. 'Loss in any event' is concerned with **(iii)**, while 'but-for' is concerned with **(i)** (reliance-in-belief) or **(ii)** (reliance-in-action). But an affirmative answer to *either* shows that the non-breach position is, to that extent, no worse than the breach position.

The inconsistency can be illustrated in the context of misrepresentation by two examples adapted from the Privy Council case of *Kerry v England*.[175] In both, C is terminally ill with influenza and has been given a prescription of bismuth by her doctor. D is a chemist.

> **Case 1:** C asks D to supply bismuth on the 11th of February. D, because he does not like C, supplies antimony capsules but fraudulently represents that they are bismuth. C believes him, consumes them and dies from antimony poisoning on the 12th. C would not have consumed the drugs had

[174] Hart and Honoré, *Causation in the Law* (n 2) 54.

[175] *Kerry v England* [1898] AC 742 (PC).

she known they were antimony. She would have died because of the influenza on the 12th in any event,[176] whether she had consumed bismuth, antimony or nothing at all.

Case 2: C asks D to supply bismuth on the 11th of February. D, because he does not like C, supplies antimony capsules but fraudulently represents that they are bismuth. C believes him, consumes them and dies from antimony poisoning on the 12th. Because she was desperate for a cure, she would have consumed the drugs even if she had known that they were antimony. But if she had not consumed the antimony, she would not have died on the 12th.

Case 1 corresponds to Lord Hoffmann's rule at 216C: 'but-for' causation *is* satisfied (C would not have consumed the drugs had she known they were antimony), but Lord Hoffmann suggests that she has no claim because she would have died even if 'she had not entered into the transaction' (ie 'had not consumed the wrong drugs').[177] Case 2 is the concern of this Chapter: the claimant has done what the fraudster intended her to do but she would have done the same thing even if he had not lied to her. Is it possible to consistently refuse to award damages in Case 1 but to do so in Case 2?

It is not. In both Case 1 and Case 2, the non-breach position is the same (death) but death (in the non-breach position) would have been the result of influenza in Case 1 and antimony poisoning in Case 2. In both cases the consumption of antimony is causally relevant to the outcome in the breach position (death) and abnormal in the context. So the only conceivable justification for not awarding damages in Case 1 is that the claimant was not worse off *by reason of* the defendant's act: the economic *consequences* of death were hers (her estate's) to bear even though the act induced by the defendant (the

[176] This detail has been inserted to avoid argument about whether the wrong has accelerated death.

[177] One weakness in Professor Stevens' theory of causation is that it seems to be unable to accommodate these cases: Stevens, *Torts and Rights* (n 153) 134 (see in particular his dead dog example).

consumption of the antimony) was a necessary element of a set of conditions jointly sufficient to cause death. Case 2 is identical, except that the causal relationship is negatived at stage **(ii)** rather than stage **(iii)**: this time the economic consequences of death *were* caused by the consumption of antimony (because she would not have died), but the *consumption* of antimony was not caused by the making of the false statement. One would expect the claimant's entitlement to recover damages to be the same in both cases.

If this is right, it follows that it is conceptually unsound to reject 'but-for' but maintain Lord Hoffmann's rule at 216C. This is another reason why it is important to distinguish between causal rules that attempt to identify the outcome that is attributable to the defendant's acts and non-causal ones that may have been devised for purposes that have nothing to do with the relationship between events or the attribution of outcomes. The latter can arguably be modified for 'sound reasons of policy' but the former can be modified only by changing the basis of liability (for example by redefining the constituents of the wrong). Thus, Lord Hoffmann's brief observations at 216C, although not fully developed, are clearly correct, and show why there is a strong case for retaining 'but-for' as the causal rule for deceit and negligent misrepresentation alike.

CHAPTER III

'BUT-FOR WHAT?': THE NON-BREACH POSITION

The previous Chapter sought to establish that the claimant cannot recover damages for misrepresentation unless the 'but-for' test is satisfied. The application of this test does not normally raise any issue of principle: one simply asks what would have happened if the defendant had not acted wrongfully. But where the wrong in question is deceit or negligent misrepresentation, the meaning of 'not acting wrongfully' is not obvious: is the defendant assumed to have said *nothing* to the claimant or to have told him the *truth*?

It is worth making two introductory points. First, this issue need not be resolved in cases where it is shown affirmatively that the claimant would have entered into the same transaction even if he had known the truth. In such a case, the false statement could not have featured in the calculus of reasons that persuaded the claimant to do what he did.[178] Secondly, the converse is not true: these are the cases in which it is necessary to decide the point of law. The celebrity neighbour example given by Christopher Clarke J[179] illustrates this well, although this chapter concludes ultimately that it is wrong: D, who is negotiating the sale of his house to C, tells him that his neighbour is a particular celebrity. C had not previously addressed his mind to the identity of D's neighbour. The neighbour is actually Z, of whom C would never be a neighbour. If D had said nothing to C, C would have bought the house. If D had told him the truth about the neighbour's identity, C would not have bought the house. To resolve

[178] *Raiffeisen* (n 8) [185] (Christopher Clarke J).

[179] *Raiffeisen* (n 8) [178].

cases of this kind,[180] it is necessary to formulate principles that govern the construction of the non-breach position. That is the task of this chapter.

Because the law on this point is in a state of some confusion, it is proposed to first explain that this debate is only one instance of a more general controversy about the construction of the non-breach position. It will then be shown that a clear analysis of non-breach can explain these particular problems in the law of misrepresentation. That sets the scene for the final section of this chapter, which concerns a difficult group of cases concerning the effect of a misrepresentation on a pre-existing assumption.

A. The Non-Breach Position: Elimination and Substitution

The causal enquiry in any claim for damages for tort or breach of contract involves the construction of what has been called the 'breach position' (what happened?) and the 'non-breach position' (what would have happened).[181] The non-breach position begins with the assumption, contrary to fact, that the event[182] which constitutes the wrong did not occur. In many cases it is not necessary to go any further. For example, if D has unlawfully shot and killed C, the non-breach position, as Corbett JA explains,[183] can be formulated (in practice) simply by 'eliminating' the unlawful conduct, that is, by

[180] Steel calls these 'specification problems' in the application of the but-for test: Sandy Steel, 'Causation in Tort Law and Criminal Law: Unity or Divergence?' in Matthew Dyson (ed), *Unravelling Tort and Crime* (CUP 2014) 242.

[181] Dyson and Kramer (n 5) 261.

[182] To be more precise, it is necessary to distinguish between 'events' and 'facts'. The formulation in the text does not do so because it does not matter in this context. But see Hart and Honoré, *Causation in the Law* (n 2) xxxvi–xxxix.

[183] *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* [1984] 1 All SA 87 (A) (SCSA AD) 105 (Corbett JA).

assuming that D did not shoot C. Some writers believe that it is not just unnecessary but illegitimate as a matter of principle to go any further than this.[184]

This is a mistake. In these cases, it *looks* like all that needs to be done is the elimination of the wrongful conduct only because it is obvious from experience and known causal generalisations that whatever else would have happened could not have caused the harm for which the claimant seeks damages. If D had not shot C, nothing else causally relevant to C's death would have occurred. So elimination is a subordinate aspect of a more general principle that is central to a proper understanding of the non-breach position: what would *actually* have happened and would this have been sufficient to cause the same harm?[185] In other words, one does not only 'eliminate' wrongful conduct: one 'substitutes'[186] what is likely to have happened in the circumstances and evaluates its causal significance.

Professor Honoré gives an example that shows why substitution is preferable to elimination. Suppose that the causal enquiry is seeking to answer the question 'was Churchill responsible for keeping Britain in the War in 1940?' This is done first by assuming, contrary to fact, that Mr Churchill was not the Prime Minister, but one does not stop there, because a world in which Britain has *no* Prime Minister is not one that can be compared with the world as it is. One must ask who the Prime Minister *would* have been and whether he would also have kept Britain in the War. Ascertaining what would

[184] See, eg, Glanville Williams, 'Causation in the Law' [1961] CLJ 62, 72.

[185] Honoré, *Responsibility and Fault* (n 51) 103–04.

[186] Hart and Honoré, *Causation in the Law* (n 2) lix–lxi.

have happened can be difficult at the margins[187] but this does not make it a question of policy: one is asking what is *likely* to, or would *probably* have, happened if one link in a chain of events is replaced with another.

The important point about substitution, as opposed to elimination, is that there is no general rule either way: sometimes (as in the shooting case) nothing else that would have happened is causally relevant to the issues before the court and is implicitly ignored. Sometimes what would have happened is causally relevant. As the next sub-section shows, it is the failure to appreciate this point—that there is no general rule either way—that has caused confusion in the misrepresentation cases, because the courts have assumed that either truth or silence must *always* be the appropriate counterfactual. That said, the *result* reached by the courts—both within and outside the law of misrepresentation—is consistent with the substitution analysis advanced here. Take for example *Capital & Counties*.[188] A fire broke out in Block A of a building in Basingstoke. It triggered the automatic sprinkler system, but Officer Mitchell, who was in charge of the fire-fighting team, 'made a bad blunder'[189] in ordering his men to turn it off. Without the sprinklers, the fire spread uncontrollably and destroyed Blocks B and C as well. In the Court of Appeal, Mr Munby QC for the Council argued that the loss was not caused by Officer Mitchell's negligence because the building would have been destroyed even if the fire brigade had not turned up at all. This, it is true, is one way of not fighting a fire negligently but it is not what is *likely* to have happened, just as it is not likely, though

[187] *The Empire Jamaica* [1957] AC 386 (HL) is an example.

[188] *Capital & Counties plc v Hampshire CC* [1997] 3 WLR 331 (CA).

[189] *Capital & Counties plc v Hampshire CC* [1996] 1 WLR 1553 (QB) 1557 (HHJ Havery QC).

theoretically possible, that Britain would have had no Prime Minister in 1940. Unfortunately, Stuart-Smith LJ rejected the contention not for this reason but on the ground that Mr Munby was comparing 'two hypothetical situations… rather than one hypothetical situation with one real eventuality'.[190] This is, of course, incorrect:[191] Mr Munby *was* comparing 'one real eventuality' (fire-brigade led by Officer Mitchell) with his hypothetical situation (fire-brigade not turning up). The point is that that is the wrong hypothetical.

Before explaining how this principle of substitution should be applied to misrepresentation, it is necessary to deal briefly with the so-called 'minimum obligation rule' which, it may be suggested, undermines the claim made here that non-breach depends simply on what is likely to have happened. This is the rule that damages (usually for breach of contract) will be assessed on the basis of the means of performance most favourable to the defendant. It is actually not a single principle: in one form, it is the principle that damages for breach of a contract with alternative modes of performance will be assessed on the assumption that the defendant would have chosen the cheapest mode of performance. This has its origins in *Cockburn v Alexander*.[192] Another form of the principle is that the claimant is not entitled to damages for an 'extra-contractual expectation' even if, as a matter of fact, he would have received this benefit from the defendant had there been no breach of contract.[193]

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[190] *Capital & Counties* (n 188) 1034.

[191] For a contrary view, see Stevens, *Torts and Rights* (n 153) 13.

[192] *Cockburn v Alexander* (1848) 6 CB 791, 136 ER 1459.

[193] See, eg, *Lavarack v Woods of Colchester* [1967] 1 QB 278 (CA).

It is submitted that, far from undermining this thesis, the minimum obligation rule is actually a good illustration of the claim that non-breach depends on probability and not on legal rules. A full exposition is not possible, but this much is clear: once Scrutton LJ's observations in *Abrahams* are rejected,[194] as the Court of Appeal has recently done,[195] the 'minimum obligation' rule is simply a presumption about how defendants would actually have acted in the absence of breach. The presumption is usually accurate because defendants usually act commercially in their own interest. If an employer has an employee he does not want, he is not likely to exercise an option to renew his contract or enter into a new one or pay him a wholly discretionary bonus. If, before the existing contract ends, he unlawfully dismisses the employee, the assumption that he would not have conferred this 'extra-contractual benefit' is consistent with what he would actually have done if he had not dismissed him. In these cases, it is important to remember that lawful conduct is substituted in place only of the wrongful *conduct*: the reasons *giving rise* to the desire to breach (eg higher costs, unsatisfactory employee) are not ignored and will be taken into account in working out what the defendant is likely to have (lawfully) done. Atkin LJ's masterly judgment in *Abrahams* contains a particularly clear explanation of this process: every commercial consideration normally taken into account by the publisher in deciding how many copies to publish is relevant, including its assessment of the public taste for the kind of literature the authors had produced.[196] If this is right, the so-called exception to the minimum obligation rule—that the defendant

[194] *Abrahams v Herbert Reiach Ltd* [1922] 1 KB 477 (CA) 481–82.

[195] *Durham Tees Valley Airport Ltd v BMI Baby Ltd* [2010] EWCA Civ 485, [2011] 1 All ER (Comm) 731.

[196] For example if the publisher had committed the repudiatory breach because he thought the authors had written a terrible book, that opinion is not eliminated by the substitution of lawful conduct.

would not have 'cut off his nose to spite his face'[197]—is only a graphic expression of the general rule that the defendant would have acted commercially, not an exception to it. The defendant's decision to act in his own commercial interest, to the extent he is lawfully able to, sometimes increases the damages payable (as in a contract to be paid a percentage of the defendant's business profits) and sometimes does not (as in a contract of employment renewable at the defendant's option). The minimum obligation rule is no more than this: put differently, there is no minimum obligation rule.

This account of substitution can, as the following sub-section shows, provide a simple answer to the question 'but-for what?' in misrepresentation cases.

B. The Non-Breach Position in Misrepresentation

If this analysis of substitution is correct, the question to be asked in a misrepresentation case is simple: is the defendant *likely* to have complied with his obligation to not lie by remaining silent, or by disclosing the truth? There is usually—as explained below—a clear and easily recognisable answer to this question. But the important point is that there is no 'general rule' that the non-breach position is 'silence', to be exceptionally supplanted by 'disclosure', or vice versa.[198] Much confusion in the cases is the result of framing the non-breach position either in rule/exception terms[199] or in 'minimum obligation' terms.[200]

[197] *Lavarack* (n 193) 691 (Diplock LJ).

[198] Nor does it turn on whether the statement was made fraudulently or only negligently.

[199] See, eg, *Hagen* (n 37) [130] (Elias J) ('only in those exceptional circumstances [is] it appropriate to ask whether the plaintiff would have entered into the transaction even if the information had not been

One of the best illustrations of the correct approach is the dissenting[201] judgment of Corbett JA in *Siman v Barclays*.[202] On 19 September 1975 (a Friday), Siman heard through the grapevine that the rand would be devalued over the weekend. It urgently wanted to buy forward cover. The South African exchange market would close at 3 pm. At 220 pm, Siman's financial controller had a conversation with Muir, the manager of the only branch of the only bank from which Siman was permitted to buy forward cover. Mr Muir wrongly told Siman that it was too late to buy forward cover: this was because he thought, remarkably,[203] that it was already past 3 pm or that there was not enough time to do the paperwork. Corbett JA rejected the contention that the non-breach position was 'no statement':[204] he said that 'in order to apply the but-for test one would have to *substitute* a *hypothetical positive course of conduct* for the actual positive course of [mis]conduct'.[205] The only way Mr Muir could—and would likely—have complied with his obligation to not make a false statement was by telling Siman that it was not too late to buy cover. If he had done this, Siman would have bought cover because he would have sold it to them. This is exactly the approach that is advocated here.

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forthcoming at all…'); *Ross River* (n 37) [243] (Briggs J) (favouring truth) affd [2008] EWCA Civ 772 [14] (Lloyd LJ); *Raiffeisen* (n 8) [180] (Christopher Clarke J) (generally favouring silence); *Involnert Management Inc v Aprilgrange Ltd* [2015] EWHC 2225 (Comm) [212]–[215] (Leggatt J) (favouring silence); Handley, *Actionable Misrepresentation* (n 9) 77–79 (favouring truth); Eggers (n 48) 181 (favouring silence) and MA Jones, *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014) [18-34] (favouring silence).

[200] See, eg, Nicholas McBride and Roderick Bagshaw, *Tort Law* (4th edn, Pearson 2012) 277.

[201] The court was divided on the facts, not the law: the majority treated Mr Muir as having refused to sell forward cover regardless of the reason he gave for his refusal. The minority thought that Mr Muir would have sold forward cover had he known that it was not too late.

[202] *Siman* (n 183).

[203] But honestly.

[204] The correct question was said to be 'what advice Muir, if he had acted with reasonable skill and care, *would probably have given*': *Siman* (n 183) 109.

[205] *Siman* (n 183) 106.

There is likely to be a clear answer to this substitution question ('what is the representor likely to have done') because a number of considerations, such as legal obligation,[206] the nature of a transaction and the content of the representation, will point to either silence or the truth. With the disclaimer that these are not exhaustive, it is helpful to isolate two factors that often make the non-breach position obvious: legal obligation and whether the statement was *volunteered* or elicited.

1. Legal Obligation: *Downs* and *Mothew*

A very large number of misrepresentation cases concern professional negligence. There is usually a contract with the professional by which he undertakes to provide advice. Whether the obligation to give careful advice should be treated as tortious or contractual is not important for present purposes because the point is not that the professional must be careful, but that he is under an enforceable obligation to give advice. That is, it would constitute a (usually repudiatory) breach of contract for the professional to simply refuse to provide the valuation or the certificate of title or whatever else he has agreed to provide. This, as Gloster J has noted,[207] means that 'saying nothing' is not a lawful way of complying with the obligation to not make a false statement. The same reasoning holds good even if there is no contract, for example because the professional lacks privity with

[206] For example, a solicitor's duty of confidentiality to his client means that he could have complied with his duty to not make false statements to third parties only by saying nothing: see *Goose v Wilson Sandford & Co* [2001] 1 Lloyd's Rep PN 189 (CA).

[207] *Petromec Inc v Petroleo Brasiliero SA Petrobras* [2006] EWHC 1443 (Comm) [95]. A well-known authority on this point is *Bolitho v City and Hackney Health Authority* [1998] AC 232 (HL) 240 (Lord Browne-Wilkinson). See also *Robbins v Bexley* [2013] EWCA Civ 1233 noted by Sandy Steel, 'Defining Causal Counterfactuals in Negligence' (2014) 130 LQR 564, who supports substitution only on evidentiary grounds.

the representee: one simply asks 'what is the professional *likely* to have done?' The answer is almost always that he would have provided careful advice, not no advice.

However, since 1997, a long (and growing) line of professional negligence cases has grappled with this issue without isolating the underlying principle of substitution. The first case of importance, which is in fact (probably) correctly decided, is *Downs v Chappell*.[208] The Downses were looking to buy a small business to provide for their retirement. Mr Chappell, the owner of a bookstore in King's Lynn, made fraudulent representations about the turnover and gross profit for the year ended 30 September 1987. His accountants negligently confirmed these figures though the accounts for that year did not even exist at the time. The judge found that the Downses would not have bought the shop had the accountants not *made* this false statement but that they would have done so if the 'correct'[209] accounts (which became available only 16 months after the event) had been provided. Hobhouse LJ said that the judge was wrong to have asked this latter question. Although some of his observations on this point are too wide,[210] the case can be explained on the simple ground that, since the accounts for 1987 were unavailable, the only way the accountants could have acted non-wrongfully was by saying nothing, not by

[208] *Downs v Chappell* [1997] 1 WLR 426 (CA).

[209] This is a puzzling finding. Unfortunately, the judge's judgment is not reported: if, notwithstanding their unavailability, the judge found that the Downses simply did not care about the gross profit figures, the case should perhaps have been decided differently. See, further, Geoffrey Vos, 'Linking Chains of Causation: An Examination of the New Approaches to Causation in Equity and the Common Law' (2001) 60 CLJ 337, 347.

[210] Notably the observation that asking what the claimant would have done if the truth had been told (ie, the alternative transaction) is 'irrelevant speculation': *Downs* (n 208) 441. This suggestion was based on a misinterpretation of *United Motor Finance Co v Addison & Co Ltd* [1937] 1 All ER 425 (PC) but doggedly persists today: see, eg, *Naughton v O'Callaghan* [1990] 3 All ER 191 (QB) 198 (Waller J) (the £9820 claim); *UCB Corporate Services Ltd v Thomason* [2004] EWHC 1164 (Ch) [47] (Pumfrey J); *Bottin International Investments Limited v Venson Group plc* [2006] EWHC 3112 (Ch) [301] (Blackburne J); *Murphy v Rayner* [2011] EWHC 1 (Ch) [298] (Cousins QC) and, recently, *Otkritie International Investment Management Ltd v Urumov* [2014] EWHC 191 (Comm) [62] (Eder J).

providing the 'correct' accounts (as there was no such thing). This is probably what Hobhouse LJ meant,[211] as he has himself subsequently confirmed.[212]

However, soon after *Downs* was decided, this essentially factual conclusion was elevated into a rule of law by the most influential case in this area, *Mothew*.[213] This case is responsible for the erroneous analysis of non-breach in rule/exception terms. The defendant solicitor's instructions required him to confirm, before funds would be released to the borrowers, that they had paid their portion of the purchase price from their own resources, without further borrowing. He certified that 'to the best of his knowledge'[214] there was no other borrowing, negligently overlooking a small debt that was to be secured by a second mortgage. Following the property market collapse, the lender sought to recover damages from him.

Millett LJ, relying on *Downs*, said that there are two tests of causation: first, where the complaint is that the solicitor negligently *failed* to give proper advice, the test is 'what would have happened if he had given careful advice', but second, where the complaint is that the solicitor negligently *gave* wrong advice, the test is 'what would have happened if he had given *no* advice'.[215] Here Millett LJ seems to distinguish between giving wrong advice and failing to give correct advice. This is similar to the distinction

[211] 'The only answer that the second defendants could have properly given was that they did not know': *Downs* (n 208) 433 (Hobhouse LJ).

[212] *Swindle v Harrison* [1997] 4 All ER 705 (CA) 728 (Hobhouse LJ). See also *Kenyon-Brown v Desmond Banks & Co* [2000] PNLR 266 (CA) [7] (Mance LJ) (revd on another point in *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 (HL)).

[213] *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA).

[214] *Mothew* (n 213) 25.

[215] *Mothew* (n 213) 10.

Becht and Miller draw between a 'simple cause' (a wrongful act) and a 'hypothetical cause' (a wrongful omission).[216] Arden LJ has extra-judicially defended *Mothew* on the same basis: the test of causation is said to be a matter of 'historical fact' if wrong advice was given but counterfactual if no advice was given.[217] This is, with respect, difficult to accept because causal analysis, whether of an act or an omission, always involves 'counterfactual speculation'[218] and the correct counterfactual is, as explained above, what the defendant would *likely* have done (or omitted to do) lawfully had he not acted (or omitted to act) unlawfully. In this context, there is nothing special about omissions except that they can make the job of the trial judge more difficult.

Mothew has been criticised[219] but largely followed,[220] occasionally even with enthusiasm.[221] It can lead (and has led) to anomalous results. Two features of the post-*Mothew* case law are especially striking. First, the same wrong produces different results depending on its form. Suppose that the defendant is instructed to inform the lender in case there is a discrepancy in the purchase price of the property to be purchased by the

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[216] Arno Becht and Frank Miller, *The Test of Factual Causation in Negligence and Strict Liability Cases* (Washington University 1961) 22. They say that counterfactual analysis is inappropriate for simple causes. Even Millett LJ does not go this far. Hart and Honoré's criticism of the Becht and Miller thesis is unanswerable: *Causation in the Law* (n 2) lvi. Corbett JA also rejected the *Mothew* distinction: *Siman* (n 183) 97.

[217] The Rt Hon Lady Justice Arden, 'Duty, Causal Contribution and the Scope of Responsibility: Does the Law of Negligence Impose Rational Limits' (Peter Taylor Memorial Lecture, 12 April 2005) 23.

[218] Hart and Honoré, *Causation in the Law* (n 2) lvii.

[219] *Swindle* (n 212) 728 (Hobhouse LJ); *Hagen* (n 37) [115] (Elias J); *Thomas v Albutt* [2015] EWHC 2187 (Ch) [429]–[435] (Morgan J); Janet O'Sullivan, 'Acts, Omissions and Negligent Professionals: Confusion over Counterfactuals' (2001) 17 PN 272; Vos (n 209) 347; Clerk & Lindsell (n 199) [2-20] (though they support a special rule for fraud).

[220] *Dadourian* (n 65) [546] (Warren J) (though he notes it is of assistance in proving inducement) affd in *Dadourian Group International v Simms* [2009] EWCA Civ 169, [2009] 1 Lloyd's Rep 60 [107] (Arden LJ); *Paul Davidson & Taylor* (n 111) [25] (Ward LJ).

[221] *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama AS* [2009] EWHC 1276 (Ch) [1005] (Briggs J).

borrower. The result of the causal enquiry seems to depend on whether the negligent defendant *failed* to tell the lender about the discrepancy (an omission) or signed a certificate saying that all his instructions had been complied with (a positive misrepresentation).[222] This distinction does not seem to be based on any principle.[223] Secondly, applying *Mothew* can lead to a finding that a misrepresentation caused loss when it did not. As Christopher Clarke J rightly pointed out, '[t]here is an inherent contradiction in someone saying that a representation was an inducing cause and accepting that, if the truth had been told, he would have contracted on the same terms anyway'.[224] Yet, unless the negligence was the defendant's *failure* to provide some information, the court is apparently prohibited from asking the question that Christopher Clarke J poses in this passage.

For these reasons, it is respectfully submitted that *Mothew* should be overruled on this point. More generally, if the non-breach position is properly analysed in terms of the principle of substitution, contractual misrepresentations are likely to be relatively simple and uncontroversial: silence will rarely be the appropriate counterfactual.

2. Volunteered and Elicited Misrepresentations

If the representor was not under a contractual obligation to provide advice or information, the choice of counterfactual will often turn on whether the misrepresentation was gratuitously made or elicited by the representee. The reason for this is simple. If the

[222] See, eg, *Keith v Davidson Chalmers* [2003] PNLR 10 (OH) [42] (Lord Macfayden).

[223] Elias J could not 'see much logic in such an arbitrary distinction': *Hagen* (n 37) [115].

[224] *Raiffeisen* (n 8) [185].

(mis)representation was made in response to a question asked by the representee, the question is retained in the substitution of hypothetical lawful conduct, in which case the defendant could not have[225] said nothing. For example, suppose that D is negotiating the sale of land to C. If C *asks* D about some important matter (say third party interests), and D makes a false statement, the substitution of lawful conduct retains C's question, which D would (hypothetically) have to either refuse to answer or answer truthfully. In either case C is likely to have acted differently and inducement is established. But if D had *gratuitously* told C that there were no third party interests (ie C not having asked), the choice between silence and truth is less clear-cut: depending on the facts, it may be that D would probably have acted non-wrongfully by simply not volunteering a false statement.[226]

Hagen v ICI illustrates these distinctions.[227] ICI negligently told its employees that they would receive roughly the same pension on the statutory transfer of their contracts of employment to a third party which was buying a part of ICI's business. Unlike the contract cases considered in the previous section, ICI was not under any legal obligation to provide the workers with information about their pension: in theory, 'saying nothing' was an available method of complying with its duty to not make false statements. But Elias J rightly held that this is not what ICI is *likely* to have done because

[225] The defendant could theoretically have simply refused to answer the question. But that would have alerted the claimant that all was not well and he would have pulled out of the transaction, so it would be no-transaction on either approach: see, further, below.

[226] There is a complication if C had not previously addressed his mind to the subject-matter of D's gratuitous representation. This is the situation envisaged in the pig farm and celebrity neighbour examples: see *Dadourian* (n 65) [548]–[552] and *Raiffeisen* (n 8) [191]. This is addressed separately below.

[227] *Hagen* (n 37).

it would have been *asked* by the workers about their pension and could not, in practice, have simply refused to tell them:

> I should add that if, contrary to my view of the applicable legal principles, I had been obliged to ask what would have happened if there had been no representation about the pensions payable to individuals, I would have concluded that the employees would have refused to move. They would have insisted upon knowing the position before accepting a transfer. *In reality, of course, they would have been told the position*. It is inconceivable that ICI would just have remained silent in the face of the reasonable demands for information.[228]

It is submitted that Elias J is correct. The principle that unifies all of these cases is the question asked in this passage: how would the defendant have actually acted non-wrongfully? Sometimes 'disclosure' is the answer and sometimes it is not. This is no inconsistency: it reflects differences in the roles that representors occupy in particular business transactions, the extent of their influence on the representee and the degree to which the particular representee chose to protect himself (by asking, instead of waiting to be told, etc).

C. The Pig Farm and the Celebrity Neighbour: Pre-Existing Assumptions

The most difficult, and as yet unresolved, question concerning the non-breach position in the law of damages for misrepresentation is about the effect of a misrepresentation on a pre-existing assumption. It is of considerable importance in practice because, as will be apparent from what follows, many mis-selling claims raise this issue. It has not yet

[228] *Hagen* (n 37) [317].

directly[229] arisen in the English courts, but two examples given by Warren J[230] and Christopher Clarke J[231] contain a provisional answer to the problem. This section argues, with respect, that the answer is wrong.

As the argument is somewhat complex, it is made in two parts. The first part explains that this issue goes to reliance-in-belief, not reliance-in action. The second part argues that all that one has to do is apply the *Corben*-rule to reliance-in-*belief*: 'did the statement cause the claimant to persevere in a *belief* already held?'

1. Two Conceptual Clarifications

Although the introduction to this Part has already made this point, it is worth reiterating the distinction between reliance-in-belief and reliance-in-action. If the 'but-for' test is to be applied, as Chapter 2 has argued it should, every representee must prove that he would have acted differently if the defendant had acted non-wrongfully. The claimant will always have acted because of some belief or assumption. So what the claimant has to prove is that: **(i)** the defendant caused him to hold that belief or make that assumption (**'reliance-in-belief**') and **(ii)** holding this belief or making this assumption caused him to do what he did (**'reliance-in-action**'). This distinction is vital to an accurate analysis of the pig farm and celebrity neighbour examples.

[229] It would have done in *Dadourian* if the appellants had not abandoned in the Court of Appeal the argument that they unsuccessfully made before Warren J: see below.

[230] *Dadourian* (n 65) [548].

[231] *Raiffeisen* (n 8) [191].

The second conceptual clarification to be made is more complex but no less important: there is a difference between a 'condition' and a 'background assumption'.[232] It can be illustrated by modifying an example given by Gregory Klass.[233] Suppose that C, who runs a Starbucks store as a franchisee, decides to open another store near a site on which TFL has decided to build a new Tube station. That TFL has decided to do this is a condition of his intention to open the store: he will not proceed if this is not the case because he thinks he needs the commuter traffic in the area to run it profitably. But suppose that Starbucks USA is on the verge of insolvency and terminates all UK franchise arrangements a month before he can open the store. Again, C will not proceed but the validity of his franchise licence, unlike TFL's decision to build the Tube station, was not a *condition*: he simply *assumed* that the licence would remain valid. The difference between a condition and an assumption is important to the law of unjust enrichment and to the law of contract for classificatory purposes,[234] but is irrelevant to the law of misrepresentation: if C had been told *either* that a condition had failed *or* that an assumption was false, he would not have entered into the transaction. In this example, C has a claim for damages if, before he entered into a contract to lease the premises on which the new store was to open, he had been told, falsely, *either* that TFL had decided to build a new station *or* that Starbucks USA was nowhere near insolvency. It makes no difference to his entitlement to damages that the first representation concerned a condition while the second concerned a background assumption.

[232] Only a summary account is possible here but see, for an illuminating recent analysis, Wilmot-Smith (n 84) ch 2. This chapter also adopts his terminology (background assumptions, reasons and conditions).

[233] Klass (n 84) 112. The example has been modified to avoid argument about whether the assumption in Klass' example (the opening of a rival shop) was actually a condition.

[234] Because common mistake and frustration are structurally similar to failure of condition, except that they concern assumptions rather than conditions: Wilmot-Smith (n 84) chs 2, 7.

2. The *Corben* Rule Applied to Reliance-in-Belief

The previous chapter has shown that the only difference between the normal 'but-for' test and the *Corben* rule is that one tests an act (would he have *made* a decision) while the other tests an omission (would he have *persevered with*—ie failed to reverse—a decision already made). This is why the *Corben* rule is sound. But it relates to reliance-in-*action*, that is, it seeks to determine whether the claimant would have made the same *decision* had he known the truth.

It is submitted that precisely the same analysis applies to reliance-in-belief. The question 'did the defendant cause the claimant to hold a belief or make an assumption' will yield an affirmative answer if: **(i)** the claimant did not hold that belief[235] before the statement was made, and believed the statement; or **(ii)** the claimant already held that belief, but would in due course have *ceased to hold it* had the statement not been made. Most reliance-in-belief cases fall in category **(i)**. But **(ii)** is causative in the same way: just as the false statement can cause the claimant to 'persevere in a decision already made' (*Corben*) so it can cause him to 'persevere in a *belief* already held', in each case provided the decision or belief would *not* have been made or held but for the statement. So understood, both branches of the *Corben* rule are simply instances of the application of the 'but-for' test to omissions, but at different stages of the causal analysis.

[235] For convenience 'make that assumption' is omitted except where it matters but all references in this chapter to 'belief' are intended to include assumptions except where the contrary is stated.

This explains why *Assicurazioni*[236] is correct and why the pig farm and celebrity neighbour examples are wrong. It is necessary to examine all three cases closely. The pig farm example, in Warren J's own words, is this:[237]

> Suppose that D is negotiating the sale to C of a quiet country residence belonging to him... C, after deliberation, *has decided on balance to go ahead* with a purchase. D then volunteers some information which he knows to be untrue in order to show C the wisdom of his decision to purchase. For instance, he explains how the neighbouring farmer is intending to create a wildlife haven in some adjoining woodland when he know that it is about to be chopped down and turned into a pig farm. C sues D, saying that he would never have purchased had he known the true position. D is forced to admit that he made a fraudulent misrepresentation but persuades the judge that, if he had not volunteered the untrue information, *it would not have occurred to C* to check out the farmer's intentions and that his purchase would have gone ahead in any case.

Before applying the two-stage causation test outlined in this Chapter to this example, it is necessary to define the relevant 'belief'[238]: it is not 'D's neighbour has decided to create a wildlife haven' (this does not matter to C) but 'D's neighbour has *not* decided to run a pig farm'. Thereafter two questions arise: **(i)** did D induce C to believe that his neighbour has not decided to run a pig farm and **(ii)** did C's belief that D's neighbour has not decided to run a pig farm induce him to buy D's property? Only if both questions are answered in the affirmative does C have a claim, whether D made the statement negligently or fraudulently.

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[236] *Assicurazioni* (n 12).

[237] *Dadourian* (n 65) [548] (emphasis added). Warren J's labels 'P' and 'S' have been replaced with 'C' and 'D'.

[238] The word 'belief' is used but C has actually *assumed* that there is no pig farm. As the text explains, this is why Warren J's conclusion is, with respect, erroneous.

What was C's state of mind *before* D made his statement? It is tempting to conclude—as Warren J does—that D's neighbour's intentions simply 'did not enter C's mind'.[239] But this is incorrect, because it fails to see that every decision is made not only on the basis of explicitly or implicitly formulated conditions but also (tacit but real) background assumptions. In 'deciding on balance to go ahead with the purchase',[240] C *has assumed* that D's neighbour does not run a pig farm. D's statement can still be causative of C's belief, but *only if* it satisfies *the Corben test*, that is, if D had said nothing, would C have disabused himself of this assumption? For example, C may be able to show—although he had obviously not addressed his mind to the possibility of a pig farm—that he would, but for D's statement, have asked his solicitor to make general enquiries about the neighbour's intentions, which would have revealed the truth. D's statement has then caused him to 'persevere in an *assumption* already made', just as Mr Cavanagh's deceit caused the Corbens to persevere in the *decision* they had already made. But this analysis, said Warren J,

> is not an answer to C's claim. By making the representation, D in fact *brought into C's mind a factor* which then became material to his decision and in relation to which the misrepresentation has misled him. It seems to me that D would need to go further and would need to show, at least, *the possible use of the woodland having been brought to his attention*, that C would not have made enquiries to establish the true position but would have gone ahead anyway.[241]

[239] *Dadourian* (n 65) [548].

[240] *Dadourian* (n 65) [548].

[241] *Dadourian* (n 65) [548].

With respect, it is submitted that this reasoning is incorrect for two reasons. First, the observation that 'D in fact brought into C's mind[242] a factor which then became material' is correct in the sense that what D said concerned a background assumption rather than a condition,[243] but this, as explained above, is irrelevant in the law of *misrepresentation*. C's entitlement to damages does not depend on whether the misrepresentation that D made was about a condition of C's intention to buy the house or about a background assumption against which C formed the intention to buy the house. This is why it was argued that Professor Honoré's criticism of the 'but-for' test, based on the Sam/London example, is mistaken: there too it is assumed that the law is interested in whether the misrepresentation was about a 'reason'. It is not. If this is right, it is easy to see why the question that Warren J asked is the wrong question. One must ask not whether D's statement transformed an assumption into a condition (for which there is no liability) but whether, in the absence of D's statement,[244] C would have disabused himself of his belief (whether of an assumption or a condition). This will often be the case, particularly if the false statement had been elicited rather than volunteered, as explained in the previous section. But if it is not, the correct conclusion is that D's statement did not cause C to hold the assumption, although the (self-induced) assumption caused C to enter into the transaction.

[242] See also *Kingspan* (n 12) [425] (Christopher Clarke J).

[243] Contrast a misrepresentation by D that his own house—the property intended to be purchased—was not affected by subsidence. This would obviously be a condition, not a background assumption: C intends to pay for a *habitable* country house. But nothing turns on this in the law of misrepresentation.

[244] 'In the absence of' can mean either 'truth' or 'silence': this is governed by the principles discussed in Chapter 2. Nothing in the pig farm example affects that part of the causal enquiry.

The second flaw is a consequence of the first. By requiring the defendant to show that the claimant would not have made enquiries even if 'the possible use of the woodland [had] been brought to his attention', Warren J is effectively imposing liability for *non-disclosure* even though there is no duty to disclose. To put it differently, the correct non-breach position in these cases might sometimes be 'the defendant would have disclosed' (for example, if the lie had been elicited rather than volunteered). But Warren J's test is not confined to such cases: it applies even if, as in the pig farm example itself, the correct non-breach position is that the defendant would have said nothing.

There is, in this respect, a close analogy between Warren J's test and the so-called '*Wayling* test'[245] that has been used to establish causation in some proprietary estoppel cases. That test was succinctly formulated by Hoffmann LJ in *Walton*:[246] '…one does not test reliance by asking what [C] would have done if [the promise] had never been made. One asks what [C] would have done, if the promise having been made, he *had been told* that it would not be kept'. As Professor McFarlane has shown, the error in the test, just as in Warren J's test, is that it does not compare what actually happened with what would have happened 'in the absence of the events constituting *the cause of action*'.[247]

The celebrity neighbour example need not be analysed at length because it is identical, as is Christopher Clarke J's conclusion: '[i]n such circumstances, as it seems to me, it would no longer be relevant simply to inquire what would have happened if,

[245] *Wayling v Jones* (1993) 69 P&CR 170 (CA).

[246] *Walton v Walton* (CA, 14 April 1994) cited from McFarlane (n 2) [3.118].

[247] McFarlane (n 2) [3.120]. See, further, Ben McFarlane, 'Proprietary Estoppel: The Importance of Looking Back' in PS Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart 2015) 341–43.

originally, there had been no mention of the celebrity'.[248] For the same reasons, it is respectfully submitted that it is wrong.

The practical importance of this issue is considerable. The best example of this is the *Dadourian* case itself which, but for a tactical decision to abandon this point in the Court of Appeal, may have been wrongly decided. There was a bitter feud between two branches of the Dadourian family (Alex/Haig and Jack/Helga). DGI, a company controlled by the Alex/Haig branch, entered into a contract with a company called Charlton. It said that it was induced to enter into this contract by an implied[249] representation made fraudulently by Jack and Mr Simms (a solicitor) that Jack was only an 'intermediary' between DGI and Charlton ('the intermediary representation'). In reality, Charlton was 'a façade for Jack and Helga'.[250] If DGI had known this, it would not have entered into the contract.[251] Jack had made the false representation gratuitously, that is, not in response to any question by DGI or Alex/Haig as to his interest in Charlton.[252]

The pig farm example was relevant because, well before Jack made any false statement, DGI, Alex and Haig had simply assumed that Charlton was not controlled by Jack or Helga. If the argument advanced above is correct, the intermediary representation could have caused DGI's belief that Jack was not an intermediary only if, in its

[248] *Raiffeisen* (n 8) [178], [191].

[249] *Dadourian* (n 65) [539].

[250] *Dadourian* (n 65) [2].

[251] *Dadourian* (n 65) [549].

[252] This is relevant because it means that the non-breach position is that Jack said nothing, not that he disclosed his interest in Charlton.

absence,[253] DGI would have checked whether Jack had any interest in Charlton (by asking Jack, a solicitor etc). Remarkably, Warren J made an explicit finding that they *would not* have done this:[254]

> This brings me back to the point arising from the example which I gave in [paragraph 551][255] above. Is it a defence to the claim against Jack that, if he had not made the representations which he did, then Alex and Haig would never have thought to ask whether he (with or without Helga) was interested in the transaction? … I think it more likely than not that ***it would not have occurred to Alex and Haig to obtain confirmation from Mr Simms*** that Jack had no interest in the transaction – there would have been no reason for them to think that he did.

Unsurprisingly, given his analysis of the law, Warren J did not think that this finding was fatal to the claim, as it should have been. The learned judge held that causation was proved unless Jack and Helga could show that Alex/Haig/DGI had not understood the message to have contained the intermediary representation (which they clearly had). For the reasons already given, this is questionable: the conclusion that the statement was not causative was inescapable given Warren J's finding of primary fact at [551].

What is curious about *Dadourian* is that the defendants did not challenge Warren J's legal analysis when the case went to the Court of Appeal, despite this finding of fact. Instead, they argued that Warren J should have found that they had rebutted the presumption of inducement as a matter of fact—that is, that DGI would have entered into the contract *even if it had known* (and not 'if nothing had been said') that Jack and Helga controlled Charlton. Arden LJ unsurprisingly held that this was a matter for the judge, not

[253] Because, as pointed out above, 'truth' is not the correct non-breach position on these facts.

[254] *Dadourian* (n 65) [551].

[255] This seems to be a misprint for [548].

the Court of Appeal.[256] The presumption of inducement was in truth irrelevant because it relates to reliance in *action*: the claim should have failed at the logically prior hurdle of reliance-in-belief. The result of this tactical decision is that the flawed pig farm example, though not endorsed by the Court of Appeal, remains the law.

A practical explanation of why Warren J and Christopher Clarke J reached the conclusion that they did may be that both examples assume the defendant to have made the statement *fraudulently*: it seems unattractive to allow the fraudster to argue that all he did was confirm a pre-existing belief which the claimant would anyway have not checked. But the fallacy in attaching significance to the element of fraud can be demonstrated by supposing Jack or Mr Simms to have made the same representation negligently: the loss caused by the representation is precisely the same. The point is ultimately this: even if a defendant is fraudulent, the *ceiling* on his liability is the loss of which his fraud was a necessary cause.[257] As this Chapter has explained, it is (conceptually) legitimate to use special rules about the quantum of damages (for example remoteness) to distinguish, *within this ceiling*, between fraud and negligence. But the construction of the non-breach position is concerned with where the ceiling is: in *Dadourian*, the defendant incurred liability for the consequences of a belief the claimant would have held even if he had acted lawfully. To put it differently, this is just the mirror image of *Corben*: if it is not right to impose liability for a *decision* the claimant would have made even if he had *not* held the belief the defendant caused him to hold, it is not

[256] *Dadourian CA* (n 220) [107].

[257] Which is not to say that there is some conceptual reason why non-compensatory (eg exemplary) damages cannot be awarded for fraud. But an award that *purports* to compensate must be pegged to a compensatory (ie causal) baseline.

any the less inappropriate to hold the defendant liable for a *belief* he has not caused him to hold, even if the belief did cause the decision. In neither case is causation satisfied, albeit at the stage of reliance-in-action in the first case and reliance-in-belief in the second.

In *Assicurazioni*[258]—perhaps the only reported case in which the problem of pre-existing assumptions arose in the context of non-fraudulent misrepresentation—the Court of Appeal found for the defendant, again suggesting that the fraud element coloured the analysis of causation in *Dadourian*. Generali, an Italian reinsurer, offered to retrocede to ARIG a package of risk that had two sections, A and B. ARIG held a self-induced belief that Munich Re, a well-known German retrocessionaire which had also agreed to participate, was taking both Section A and Section B. In truth, Munich Re was participating only in Section A, as Section B was risky. *After* ARIG had formed this belief, Generali negligently represented that Munich Re was participating in Section B as well. But this representation was gratuitous, ie, ARIG had not asked Generali whether Munich Re was participating in Section B.[259]

This is indistinguishable from the pig-farm example. The *Corben* question should therefore have been asked: would ARIG have held the belief that Munich Re was participating in Section B even if Generali had not made the misrepresentation? Plainly it would have—it held this belief before the misrepresentation was made—and it was not shown that it would have verified the belief but for the misrepresentation. Clarke LJ and

[258] *Assicurazioni* (n 12).

[259] So the non-breach position is that Generali said nothing, not that it disclosed that Munich Re was participating only in Section A.

Sir Christopher Staughton thus correctly held that the misrepresentation was not causative, but not on this basis. They thought that ARIG had held *no* belief at all (tacit or otherwise) about Munich Re's participation until Generali made the false statement. Given this assumption, and the fact that the non-breach position was 'what if nothing had been said about Munich Re's participation', the finding that the representation was not causative was inevitable: Mr Anderberg of ARIG had admitted in cross-examination[260] that he would have entered into the contract if nothing had been said about Munich Re. The reasoning in *Assicurazioni* cannot, therefore, be cited as authority in support of this Chapter's criticism of the pig farm example, but the result in the case is consistent with it.

It only remains to consider two objections to this argument. First, it may be said that Robert Goff J's judgment in *Amalgamated* is contrary to this analysis.[261] It is true that Robert Goff J impliedly rejects[262] the 'but-for' test in that case, but the learned judge was concerned with estoppel, not misrepresentation.[263] Secondly, it may be said that, on this view, much depends on the adventitious circumstance of whether the misrepresentation was made before or after the claimant formed his belief. This may also be conceded but the circumstance is not, it is submitted, adventitious: there is a real difference of substance between the defendant telling the claimant something he already thinks and his making the claimant think something. Indeed, the word 'making'—the

[260] *Assicurazioni* (n 12) 74.

[261] *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 (QB).

[262] See, in particular, *Amalgamated* (n 261) 104–05.

[263] For criticism of Robert Goff J's test even in relation to estoppel, see McFarlane (n 2) [3.141]–[3.151].

essence of ‘cause’—is not as a matter of language capable of describing the former situation.

To summarise: **(i)** pre-existing assumption cases are concerned solely with reliance in belief, not reliance in action; **(ii)** nothing about the choice of non-breach position turns on the fact that the misrepresentation concerned a pre-existing assumption; the non-breach position is either ‘if nothing had been said’ or ‘if the truth had been told’ depending on the principle of substitution explained above; **(iii)** if the claimant already held the belief when the misrepresentation was made, it is not causative unless the misrepresentation induced the claimant to *persevere* in the belief; **(iv)** this is tested by asking whether the claimant would have taken steps to verify the accuracy of his belief but for the defendant’s interposition into the chain of events; **(v)** but if he would not have taken these steps, the statement is not causative; and **(vi)** the reasoning in the pig farm example and *Dadourian* are erroneous because it is clear that the claimant would not have disabused himself of his belief even if there had been no misrepresentation.

PART III

SCOPE OF LIABILITY

OUTLINE

Part II of this thesis considered the relationship that must be shown to exist between the false statement and the claimant's act. It argued that the claimant must show that it would not have acted as it did if the defendant had acted non-wrongfully. If the claimant is able to establish this, a further question arises: for what *consequences* of the claimant's reliance on the false statement is the defendant responsible? That is the subject-matter of this Part.

In English law, the scope of liability for negligent misrepresentation is governed by the '*SAAMCO* principle'.[1] This Part argues that *SAAMCO* contains two entirely distinct principles. It calls these the 'scope of duty rule' and the 'falsity rule', respectively. What *SAAMCO* decides is that *every* claim for negligent misrepresentation, whether in tort or for breach of an implied term of a contract, must satisfy the falsity rule. The falsity rule is the rule that a loss must be a consequence not only of the *making* of a false statement but also of the *falsity* of the statement. Although the origins of this principle can be traced to the late nineteenth century, it was not, contrary to what Lord Hoffmann himself said, the 'normal rule of civil liability'[2] before *SAAMCO*. Once the rule is properly understood, it is apparent that it is a *non-causal* rule and that there is no distinction between 'information' and 'advice': the 'advice' cases are simply instances of the falsity rule applied to defendants who make wider misrepresentations. The falsity rule can be justified as a *qualification* to the pursuit of corrective justice but it is not, as most scholars have supposed, an *element* in it.

[1] *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 (HL).

[2] *SAAMCO* (n 1) 213A.

The wider ‘scope of duty’ rule in *SAAMCO*—with which the case is more commonly, though erroneously, associated—is the proposition that the defendant is liable only for the materialisation of one or more of the risks that made his act wrongful. This proposition does not justify the use of the falsity rule in a claim for damages for negligent misrepresentation. Contrary to the orthodox account, the soundness of the wider rule is also questionable outside the context of misrepresentation: in particular, while it can *extend* liability, it cannot *limit* it.

CHAPTER IV

LORD HOFFMANN'S SPEECH IN *SAAMCO*

The liability of valuers for loss increased by a falling market was, in some ways, the perfect test case for working out the relationship between the common law's causal and non-causal limitations on responsibility. The point is often moot because, as Lord Hoffmann pointed out,[3] an event that is treated as a *novus actus* by applying ordinary causal principles is often also unforeseeable. But a market fall is by definition foreseeable. Nor can it be treated as a *novus actus*, because it is not an abnormal natural event or a coincidence.[4]

This Chapter begins by explaining what the law on this point was before *SAAMCO* came to the House of Lords, because this illustrates the difference between a causal and non-causal approach to the same problem. It then undertakes a detailed analysis of Lord Hoffmann's speech to demonstrate that Hart and Honoré's causal relevance test, exemplified by the *Empire Jamaica*,[5] was not correctly applied. It concludes by showing that this has led to considerable doubt about the underlying principle in *SAAMCO*. It should also be said at the outset that this Chapter assumes throughout that one is dealing with a no-transaction case, that is, that the lender would not have made any loan if a careful valuation had been provided.[6]

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[3] *SAAMCO* (n 1) 215D.

[4] See, eg, *Rubenstein v HSBC Bank* [2012] EWCA Civ 1184 [117] (Rix LJ) and *John Grimes Partnership Ltd v Gubbins* [2013] EWCA Civ 37, [2013] PNLR 17 [27] (Sir David Keene).

[5] *The Empire Jamaica* [1957] AC 386 (HL).

[6] Lord Hoffmann said in *SAAMCO* that the terminology of no-transaction, successful transaction and alternative transaction should be abandoned. It is used here not to suggest that anything substantive turns on

A. Valuer's Liability Before *SAAMCO*: 'All-or-Nothing'

In theory, there are two fundamentally different approaches to the liability of a valuer for a negligent valuation where the lender's loss is increased by subsequent events. The first, a causal approach, is to make liability depend on the *nature* of the intervening event: thus, it might be said that a loss that is increased by the deliberate destruction of the security by an unknown criminal is not a consequence of the negligent valuation while a loss increased by its ordinary physical deterioration is.[7] In such cases, the main question is whether the subsequent event in question is to be treated, on ordinary causal principles, as the cause (eg deliberate destruction) or as a condition (eg physical deterioration). For this approach to lead to the conclusion that the valuer is not liable for any loss that is occasioned by a falling market, one would have to assert that a falling market is a *novus actus* which, of course, it is not.[8] However, a court that *does* reach this conclusion (correctly or otherwise) is adopting a causal approach: it treats the falling market as a new cause in the same way that it treats the deliberate destruction of the security as a new cause. The second approach is a non-causal approach to which this Chapter will return: the key point there is that the court is *not* concerned with the nature of the intervening event.

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the terminology but only because it is convenient. 'No-transaction' simply means that the claimant would not have entered into the *same* or a *similar* transaction if the defendant had acted non-wrongfully.

[7] Ch 7.

[8] See (n 4).

The leading pre-*SAAMCO* Commonwealth authority on the liability of valuers—*Lowenburg, Harris & Co v Woolley* ('**Lowenburg**')[9]—adopted a causal approach, although this has often been overlooked both in Canada and in England. NP Snowden, a real estate agent, recommended[10] to the claimant that it lend $5500 to a creditworthy[11] borrower against 'gilt edged and first class'[12] security valued[13] at $7000. The loan was made in October 1890, when the actual value of the security was $4700.[14] The borrower defaulted. The claimant could not realise the security, which was worth substantially less at the time of trial. The trial judge awarded the claimant the amount due under the mortgage plus interest and ordered it to assign the security to the valuer. This award was upheld by a majority[15] of the British Columbia Supreme Court essentially on the basis of the rule in *Burrowes v Lock*.[16] McCreight J dissented, holding that the lender's damages should be reduced by the amount the property would have fetched *in October 1890*.[17] He did not explain why, but must have either applied the breach-date rule or thought that the *entire* market loss must be excluded. In either case, the reasoning (whether correct or not)

[9] *Lowenburg, Harris & Co v Wolley* (1895) 25 Can SCR 51 (SCC).

[10] It is apparent, from the admissions Mr Snowden made in cross-examination, that he was far from the disinterested 'information provider' who was to feature in Lord Hoffmann's speech almost exactly a century later: *Lowenburg* (n 9) 53.

[11] *Lowenberg, Harris & Co v Wolley* (1894) 3 BCR 416 (BCSC) [7] (Crease J).

[12] *Lowenburg* (n 9) 51. Needless to say, it was neither gilt edged nor first class.

[13] The borrower had provided a valuation signed by two persons. They were, respectively, a druggist and a grain dealer.

[14] *Lowenburg* (n 9) 55.

[15] *Lowenburg BCSC* (n 11) [8] (Crease J) [22] (Drake J).

[16] *Burrowes v Lock* (1805) 10 Ves 470, 32 ER 927. This rule, equitable in origin, compels the defendant to 'make good his representation' and is today rationalised as estoppel.

[17] *Lowenburg BCSC* (n 11) [12].

is causal.[18] In the Supreme Court of Canada, Sir Henry Strong CJ gave the majority judgment on this point. In a widely quoted passage that has also influenced the English case law on this point, the Chief Justice said:[19]

> I am of opinion that this was not a correct disposition of the case. The effect of this judgment would be to make the appellants not only responsible for such damages as *were caused by the negligent performance* of their duty as the respondent's agents, in over-valuing the mortgaged property, but also for *any* depreciation (if any there has been) in the actual value of the property subsequent to the loan. It is manifest that any loss in this respect should be borne by the respondent himself inasmuch *as it cannot be attributed to the neglect* of the appellants. All that the appellants can possibly be liable for is the loss occasioned by the over-valuation adopted and acted on by them.

It is submitted that Sir Henry Strong CJ also adopted causal grounds and held that *all* of the market loss should be excluded. It is true that he used the words 'loss occasioned by the overvaluation…' which Lord Hoffmann cited in *SAAMCO*[20] in support of his own view, which was *not* that all of the market loss should be excluded. However, with respect, Lord Hoffmann may have misinterpreted the case. First, the Chief Justice expressed general agreement[21] with the dissent of McCreight J who, as argued above, adopted causal reasoning to exclude all the market loss. Second, the Chief Justice's own explanation was that the market loss was not '*caused* by the negligent performance…' of Mr Snowden's duty. Third, if the Chief Justice had thought that the recoverable damages were in fact all the loss *not exceeding* the amount of the overvaluation, it is hard to see

[18] On why the so-called breach-date rule is a causal problem, see Andrew Dyson and Adam Kramer, 'There is No Breach Date Rule: Mitigation, Difference in Value and Date of Assessment' (2014) 130 LQR 259.

[19] *Lowenburg* (n 9) 56, 57 (emphases added).

[20] *SAAMCO* (n 1) 217E.

[21] 'This was the view of Mr Justice McCreight and I concur in his conclusion': *Lowenburg* (n 9) 57.

why he remitted the case for an assessment, as these figures were before the Court.[22] One may (or may not) think that the Chief Justice fell into error in treating a falling market as 'not caused' by the valuer's negligence but it is fairly clear that the reasoning is causal.

The point is significant for two reasons. First, since the *Lowenburg* approach is causal, it must necessarily exclude all of the market loss.[23] It cannot, as *SAAMCO* does, allow the lender to recover *some* of the market loss. This is because the reason for *any* exclusion in *Lowenburg* is the finding that a falling market is a new cause just like a voluntary act or an abnormal event. If a falling market is a new cause in this sense, it is ignored or, as Adam Kramer has recently said,[24] deemed to have not occurred. On the other hand, if it is *not* a new cause, *all* of the market loss is taken to have been caused by the defendant's act. Put differently, a causal approach to the liability of valuers is an 'all-or-nothing' exercise: the market (or any other) loss is either included or excluded in its entirety depending only on the view the court takes of the nature of *that* intervening event. Secondly, a court that commits itself to a causal approach to the liability of a valuer must, logically, exclude[25] the market loss even if the negligent advice is given by some other professional, for example an accountant or a solicitor, although the breach

[22] This point is not unanswerable, as the Chief Justice may have thought that the actual loss cannot be ascertained until the security is sold or valued. McCreight J would also have ordered an assessment.

[23] It bears repetition that all of this assumes that it is a no-transaction case: if not, a causal approach would take into account the alternative loan the claimant would have made. The point made in the text is merely that, in a no-transaction case, a causal approach dictates that the market loss is either included or excluded in its *entirety*.

[24] Adam Kramer, *The Law of Contract Damages* (Hart 2014) 344.

[25] Or include.

and the nature of the primary obligation are likely to be different.[26] In *Morris Burk*,[27] Holland J was told by counsel that he was therefore bound by *Lowenburg* to exclude market loss in assessing damages for an investor misled by an accountant's negligence into investing in a doomed business. While one can sympathise with the learned judge's conclusion that the argument was wrong, it is difficult to see how the reason given—that the accountant advised about the financial health of the company while the valuer did not—is relevant on *Lowenburg*'s causal approach. Contrast this with Arden J's observation in *Bowerman*[28] that

> it would be extraordinary if, in the same action, valuers and solicitors were both sued and the valuers were not liable for loss attributable to the fall in market value but the solicitors were.

On the causal approach her Ladyship[29] adopted, it would indeed have been extraordinary.

Lowenburg, with respect, has been misunderstood by the English courts.[30] In *Baxter*,[31] MacKinnon LJ thought that it was consistent with the measure he adopted, which was to affirm an award of the amount due under a mortgage, including[32] an

[26] To dispute this, one might invoke Lord Hoffmann's widely cited observation that 'the type of causal connection' required depends on the nature of the duty. But this question is not itself a causal one: see, further, ch 7.

[27] *Federal Business Development Bank v Morris, Burk, Luborsky, David & Kale* (1988) 38 BLR 1 (Ont HC) [52].

[28] *Mortgage Express Ltd v Bowerman* [1994] 2 EGLR 156 (Ch) 163D.

[29] Why her Ladyship's approach, as that of Phillips J, was causal, is explained below.

[30] And, as the above summary shows, perhaps also by the Canadian courts.

[31] *Baxter v FW Gapp & Co* [1939] 2 KB 271 (CA) 274.

[32] It is sometimes asserted that there was no finding in *Baxter* that the market had fallen. This is how Arden J distinguished the case in *Bowerman* (n 28) 162M. It is true that there was no explicit finding. However, Goddard LJ, who tried the case, records that the actual value at the time of valuation was between £1150 and £1600 and the sale price (in June 1938) £850: *Baxter v FW Gapp & Co Ltd* [1938] 4 All ER 457 (KB) 458, 463. So, contrary to Arden J's view, the market must have fallen. Lord Hoffmann

element attributable to market loss. This is clearly not[33] what *Lowenburg* held. Another early case, *Scholes v Brook*,[34] also compensated a lender for market loss, although it is sometimes incorrectly suggested[35] that it did not.[36] On appeal, the Court of Appeal in that case rejected the submission[37] that was to eventually prevail in *SAAMCO*, once it was satisfied that the lender had acted reasonably in mitigating its loss. Again, this is a causal question[38] and suggests that the English courts, before *SAAMCO*, thought that: **(a)** there was no non-causal limitation on the liability of a valuer beyond foreseeability; and **(b)** in the absence of such a non-causal limitation, the valuer was liable for all the market loss. The key point is that this divergence between the Canadian and the English views was one of fact, not law: Sir Henry Strong CJ considered that a falling market was a *novus actus* while the English courts considered that it was not. But they were at one in regarding *this* question as decisive of the liability of a valuer: both jurisdictions, in other words, adopted the all-or-nothing (causal) approach.

This was the state of the law when, triggered by the calamitous property market crash of the late 80s, the *SAAMCO* litigation commenced. It is no coincidence that

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offers a better rationalisation of *Baxter* (see *SAAMCO* (n 1) 217C) but the case is best regarded as largely irrelevant since the market loss point was not considered. It was partly overruled in *Swingcastle Ltd v Alastair Gibson* [1991] 2 AC 223 (HL).

[33] Phillips J and the Court of Appeal recognised that MacKinnon LJ had misunderstood *Lowenburg*: *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769 (QB) 813g and *London and South of England Building Society v Stone* [1983] 1 WLR 1242 (CA) 1255G (O'Connor LJ).

[34] *Scholes v Brook* (1891) 64 LT 674 (CA).

[35] Phillips J said that the 'material facts … cannot be deduced': *BBL* (n 33) 812j, 813a.

[36] It is incorrect because the actual value at the time of valuation was £722 (TLR, 214) and the headnote to that report records that the security was 'practically worthless' when it was realised.

[37] *Scholes* (n 34) 674 (Lindley LJ). But it was posited as the *measure*, rather than a cap.

[38] Dyson and Kramer (n 18).

Lowenburg was the fulcrum of Mr Sumption QC's argument[39] in the House of Lords that all of the market loss (and not merely the market loss in excess of the overvaluation) should be excluded: that result could be only achieved by causal means, and nothing less would have won the South Australia appeal, because the valuation was so inaccurate that the amount of the overvaluation exceeded the lender's total loss.

This submission had, in effect,[40] been accepted by Phillips J[41] and Arden J[42] at first instance, for there the market loss was simply reduced from the basic loss to arrive at the legally recoverable loss. The submission (whether correct or not) was undoubtedly causal, though Mr Sumption in the House of Lords sought to resist this characterisation by suggesting that 'diminution in value'[43] is a distinct head of loss: it was conceded[44] that the court could look at post-breach events affecting the covenant (because this was the 'very thing' the lender wanted the valuation for) but it was said that it could not look at those affecting the security.

In rejecting Mr Sumption's argument, Lord Hoffmann correctly recognised that diminution in value is not a distinct measure but only a 'prima facie rule of *causation*'.[45]

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[39] Parliamentary Archives HL/PO/JU/4/3/1939, HL/PO/JU/4/3/1940, *Printed Case of Jonathan Sumption QC and Marion Egan* [7], [15].

[40] Not for the same reasons. Phillips J's reasoning was actually similar to Lord Hoffmann's, but he excluded all of the market loss, rather than the market loss in excess of the overvaluation.

[41] *BBL* (n 33).

[42] *Bowerman* (n 28).

[43] The 'value' the lender was said to have received was the value of the security on the date of the valuation (or loan) and the value of the borrower's covenant. Mr Sumption said that this was analogous to the purchase cases: see Sumption (n 39) [7] and, on why diminution in value is not a distinct measure, Dyson and Kramer (n 18).

[44] Sumption (n 39) [11].

[45] *SAAMCO* (n 1) 220B–F, 221C.

As it was 'impossible to say that the loss was caused'[46] by the lender's failure to mitigate, it should have followed that only non-causal grounds could limit the valuer's liability. Unfortunately, as the following sub-section shows, Lord Hoffmann formulated his own rule in causal terms, by invoking Hart and Honoré's causal relevance test to answer this non-causal question. To demonstrate that this is the reason *SAAMCO* is such a difficult case to understand, it is necessary to carefully analyse Lord Hoffmann's speech.

B. Lord Hoffmann's Speech

Lord Blackburn's compensatory principle, said Lord Hoffmann,[47] is the wrong place to begin. Before applying the compensatory principle, 'it is necessary to decide for what kind of loss the claimant is entitled to compensation'.[48] This proposition is the wider 'scope of duty' principle described in Chapter 1. It is worth reiterating that—whatever its merits—it is a non-causal rule.

1. Lord Hoffmann's 'Normal Rule' at 213C

How does one ascertain 'for what kind of loss the claimant is entitled to compensation'? By, said Lord Hoffmann,[49] construing the 'purpose of the [statutory] duty … or the purpose of the rule imposing the [tort] duty.'[50]

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[46] *SAAMCO* (n 1) 221D.

[47] *SAAMCO* (n 1) 211A.

[48] *SAAMCO* (n 1) 211A–B.

[49] *SAAMCO* (n 1) 212D–F.

[50] This is the wider 'scope of duty' rule. It will be shown that this is distinct from the falsity rule: ch 5.

How does Lord Hoffmann apply this principle to valuers? His Lordship begins by distinguishing between the approach of Sir Thomas Bingham MR in the Court of Appeal[51] and what he describes as the 'normal rule' of liability for a wrong. The Court of Appeal's approach, according to Lord Hoffmann, 'shift[s] on to the wrongdoer the whole risk of consequences which would not have happened but for his act'.[52] Lord Hoffmann then says this at 213C, which I believe is the crucial passage in his speech:[53]

> Rules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy. Normally the law limits liability to those consequences which are attributable to *that which made the act wrongful*. In the case of liability in negligence for providing inaccurate information, this would mean liability for the consequences of the information *being inaccurate*.

2. Applying the 'Normal Rule' to Valuers: The Causal Relevance Test

By 'that which made the act wrongful', Lord Hoffmann was referring[54] to the *wrongful aspect* of the valuer's act, invoking the principle that the defendant is normally not responsible for a consequence if the wrongful aspect of his act is causally irrelevant to that consequence. This is Hart and Honoré's causal relevance test,[55] which was analysed in Chapter 1. But why did his Lordship think it necessary to apply it, given that foreseeability, as that Chapter explained, is a 'short cut' to causal relevance? This question is the key to *SAAMCO*. The answer is that Lord Hoffmann, unfortunately, did not distinguish between cases where the *only* loss the claimant suffers is the 'irrelevant'

[51] *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375 (CA).

[52] *SAAMCO* (n 1) 212G–H.

[53] *SAAMCO* (n 1) 213C (emphasis added).

[54] There is little doubt that this was the test his Lordship was applying: see §B(3) below.

[55] HLA Hart and AM Honoré, *Causation in the Law* (2nd edn, Clarendon Press 1985) 120.

or ‘secondary loss’ and those where that secondary loss is itself a causally dependent consequence of the primary loss. In *SAAMCO*, the secondary loss—the market fall—would not have affected the lender had it not made the loan. As Chapter 1 has explained, the causal relevance test is *ex hypothesi* satisfied in such cases, because the primary loss cannot occur unless the wrong is causally relevant, and the secondary loss cannot occur unless the primary loss occurs: for instance, if a ball rolled down a bowling alley by D makes contact with three pins which in turn knock over three other pins, the causal relevance of D’s act cannot be tested separately for each set of pins, because the second event was not causally independent.[56]

The use of the test, though unnecessary, would have proved to be inconsequential if Lord Hoffmann had used it with the correct counterfactual: that is, if his Lordship had asked whether the lender would have sustained the same loss if the wrongful feature of the valuer’s conduct (the careless valuation) is eliminated (no valuation) or substituted[57] with lawful conduct (careful valuation). The answer would have been in the negative, as it was common ground that the lender would not have lent.

This was not to be. How was the causal relevance test formulated at 213C actually applied to the valuer? It is best to set this out in Lord Hoffmann’s own words:

> …On what I have suggested is the more usual principle,[58] the [defendant][59] is not liable. The injury has not been *caused* by the … bad

[56] Hart and Honoré, *Causation in the Law* (n 55) 176 (the skittles example).

[57] On the choice between these counterfactuals, see Part II.

[58] That is, the causal relevance test at 213C.

[59] The omitted reference is to the mountaineer’s doctor, which is considered separately in ch 6.

> advice because it would have occurred *even if the advice had been correct*.[60]
>
> …He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information *which he gave had been correct* is not in my view fair and reasonable as between the parties.[61]

These three passages have caused confusion[62] in subsequent cases, where it has been assumed that Lord Hoffmann was asking 'what if the correct advice had been given'. Of course, Lord Hoffmann was not asking that question, although the causal relevance test which his Lordship was attempting to apply asks precisely that. The best description of the counterfactual that Lord Hoffmann actually used is to be found in paragraph 12 of Mr Sumption QC's Printed Case[63] in *Aneco Reinsurance*:

> …as Your Lordships pointed out in *South Australia Asset Management*, the question is not what would have happened if a correct report had been made, but what would have happened if the report actually made had been correct.

Lord Lloyd of Berwick rejected this proposition[64] but it is respectfully submitted that Mr Sumption was right. In any case, Lord Lloyd did not say that this is an inaccurate description of *SAAMCO* but only that it does not apply to a defendant that *SAAMCO* treats as an 'advisor'. For present purposes,[65] that does not matter. Clearly, therefore, *SAAMCO* contemplates a counterfactual enquiry, and the counterfactual is *not*, it bears

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[60] *SAAMCO* (n 1) 213F.

[61] *SAAMCO* (n 1) 214C–D.

[62] See §C.

[63] Parliamentary Archives HL/PO/JU/4/3/2120, *Printed Case of Jonathan Sumption QC and Richard Southern* [12].

[64] *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins* [2001] UKHL 51, [2002] CLC 181, 184F.

[65] See ch 6.

repetition, that the defendant had given the correct information: it is that the information the defendant actually gave had been correct. The remainder of this thesis will, for convenience, call this the '**213C counterfactual**', though it should be noted that it was formulated across 213C, 213F and 214D. '213C' is intended in this thesis to include all three references.

3. Did Lord Hoffmann Actually Not Apply the Causal Relevance Test?

The choice of language in 213C—'that which *made the act* wrongful'—was clearly deliberate. It cannot have simply meant 'but for' or 'foreseeable' because Lord Hoffmann was in that passage trying to *distinguish* between a foreseeable loss that would not have been sustained 'but-for' the wrong (which his Lordship said was the approach of Sir Thomas Bingham MR) and such a loss that is also 'attributable' to the wrong. The test that Lord Hoffmann chose, whether correct or not, was attempting to isolate certain foreseeable 'but-for' consequences which he thought were (unlike other foreseeable 'but-for' consequences) not attributable to the wrong. What test was this?

There are two possible views. The first, and it is submitted the correct, view is that it was an attempt to apply Hart and Honoré's causal relevance test. The words 'that which made the act wrongful' are thus a reference to the *constituents* of the wrong and the 213C counterfactual was intended to test for a general connection (as the causal relevance test does) between these constituents and the loss for which the claimant was seeking damages. It has been suggested above that the test was misapplied. But some judges and scholars have interpreted 213C differently: 'that which made the act

wrongful', they say, was a reference to the *reasons* why the act was wrongful and not to the *constituents* of the wrong. This proposition is sometimes called the 'risk theory' and its (flawed[66]) origins lie largely in America. The American Restatement, unsurprisingly, cites 213C for the proposition that the risk theory is English law,[67] but it has also attracted support here. For example, in a recent article, Tamsyn Clark and Donal Nolan cite 213C and then say this:[68]

> In negligence, what makes the defendant's act wrongful is the fact that it *creates unreasonable risks*,[69] and it follows that in general negligence liability is imposed only where the consequence in question was the materialization of one of the risks that made the defendant's conduct negligent in the first place.

This proposition—that liability is imposed only for the materialisation of one of the risks that made the act negligent—is the wider 'scope of duty' rule in *SAAMCO* which will be analysed in Chapter 7. That Chapter makes the case against the risk theory: for now, all that I wish to demonstrate is that Lord Hoffmann was attempting to apply the causal relevance test, not the risk theory. If that is right, *SAAMCO*, properly understood, is not authority in support of the risk theory.

The first point to make is that there is, as Chapter 1 explained, a distinction between the constituents of a wrong and the reasons why a wrong has those

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[66] See ch 7. Lord Wright once famously described the risk theory 'as more plausible than sound': Lord Wright, 'Re Polemis' (1951) 14 MLR 393, 408. Mr RA Wright KC was leading counsel for the charterers in *Polemis*.

[67] *Restatement (Third) of Torts: Liability for Physical Harm* (Proposed Final Draft, 2005) 612.

[68] Tamsyn Clark and Donal Nolan, 'A Critique of *Chester v Afshar*' (2014) 34 OJLS 1, 6 (emphasis added). See also Mark Stiggelbout, 'Contractual Remoteness, Scope of Duty and Intention' [2012] LMCLQ 97, 115.

[69] The italicised words show that they read 'that which made the act wrongful' as a reference to the reasons why an act with certain constituents is wrongful rather than as a reference to the constituents themselves.

constituents.[70] For example, one constituent[71] of the wrong of driving at 100 mph on Cowley Road is precisely that: driving at an unsafe speed. But the *reason* why it has this constituent is the risk of injury to road-users, property, etc. It is true that Lord Hoffmann's phrase 'that which made the act wrongful' is linguistically capable of referring either to the reasons[72] or to the constituents[73]: this is no doubt why most commentators have assumed that 213C is the risk theory. That theory is well-known and, despite its (many) flaws,[74] has attracted a large body of support over the years: causal relevance and causal generalisations, on the other hand, have received rather less attention in the literature. But the context in which Lord Hoffmann made these remarks shows (clearly) that his Lordship was not thinking of the risk theory.

First, Lord Hoffmann derived his 213C statement of principle from one example and one case that strongly suggest that his Lordship was attempting to apply the causal relevance test. The example was that of holding an unlicensed driver liable 'for all the consequences of his having driven, even if they were unconnected with his not having a licence', which Lord Hoffmann said is not the 'normal rule'.[75] This is, of course, a famous example of causal relevance and was taken from page 120 of *Causation in the Law*, which appears in the section in which Hart and Honoré formulate their causal relevance test. Lord Hoffmann's own explanation of the result—'even if they were

[70] John Gardner has formulated this distinction (in a different context) with great clarity: see John Gardner, 'What is Tort Law For? Part 1: The Place of Corrective Justice' (2011) 30 Law and Philosophy 1, 41.

[71] Among others, because the tort of negligence is part-constituted by the outcome: see ch 8.

[72] As Sedley LJ thought: *Cossey v Lonnkvist* [2000] Lloyd's Rep PN 885 (CA) 896.

[73] As Roch LJ thought: *Long v Tolchard & Sons Ltd* [2001] PIQR P2 (CA) [49].

[74] Ch 7.

[75] *SAAMCO* (n 1) 212D, 213A.

unconnected…' also suggests he was referring to the *constituents* of the wrong, not to the reasons why it has those constituents. His Lordship did not, for example, say that the unlicensed driver is not liable because the purpose of requiring him to obtain a licence is only to ensure that he drives competently.[76]

The case is the *Empire Jamaica*,[77] discussed in Chapter 1. It is perhaps the most widely cited authority in the causal relevance literature. The counterfactual used in that case to test for causal relevance was 'what if the defendant had acted lawfully' (by requiring Sinon to either become certificated or obtain an exemption[78]). As the loss would still have occurred, the wrongful feature of the defendant's act was causally irrelevant. The equivalent in *SAAMCO* was not the 213C counterfactual (which immediately follows the reference to the *Empire Jamaica*) but 'what if the valuer had given a careful valuation'. As no loss would have been sustained, the wrong *was* causally relevant. This, of course, means that the *Empire Jamaica* was misinterpreted in *SAAMCO*, but the reference to it shows that this, and not the risk theory, was the principle Lord Hoffmann was attempting to apply.

Secondly, although 213C is the crucial passage, other passages also have causal overtones.[79] Notably, why is the doctor not liable to the mountaineer? 'The injury has not

[76] Which is how risk theorists explain this example: see, eg, Fleming James and Roger Perry, 'Legal Cause' (1951) 60 Yale LJ 761, 772.

[77] *The Empire Jamaica* (n 5).

[78] *The Empire Jamaica* (n 5) 396 (Lord Morton).

[79] See, eg, *SAAMCO* (n 1) 216D–F.

been *caused* by the doctor's bad advice because it would have occurred *even if the advice had been correct*.'[80]

In short, it seems clear that the statement of principle in *SAAMCO* was thought to follow from ordinary *causal* principles which were said to be applicable in the absence of 'some special policy'.[81] Put differently, the 'scope of the duty' of the valuer was derived from these principles.

C. The 213C Counterfactual: Consequences

If the arguments made in the previous section are correct, it follows that the reasons given in *SAAMCO* do not justify the use of the 213C counterfactual. That does not, of course, mean that it is *wrong*: indeed, it will be suggested that it should be interpreted as an attempt to articulate a quite different rule with a different history and justification.[82] But the formulation of it in *SAAMCO* has caused some difficulties, which are the subject-matter of this section. As space does not permit an analysis of all the leading cases, a few have been chosen from each category, with additional references in the footnotes.

[80] *SAAMCO* (n 1) 213F. For further analysis of the mountaineer example, see ch 6.

[81] *SAAMCO* (n 1) 213C.

[82] Ch 5.

1. Confusion of 213C with 'if the correct information had been given'

In a surprisingly large number of cases,[83] 213C has been confused with 'what would have happened if the correct information had been given'. The counterfactual that it actually uses is, of course, 'what would have happened if the information given had been correct'. The assumption that 213C uses the conventional 'non-breach' counterfactual (as the causal relevance test would have required) may have contributed to this error. A well-known example of this, although it pre-dates *SAAMCO*, is *Rainbow*,[84] where Sopinka J thought that the defendant's *SAAMCO* argument ('what if the information given had been correct') failed automatically once the 'no-transaction' argument ('what if the correct information had been given') was rejected. But the same assumption is evident in a number of English[85] and Scottish authorities[86] that purport to specifically apply 213C, and in academic literature.[87] This will result in an inaccurate application of *SAAMCO* unless the case (independently) happens to be a successful transaction case.

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[83] See, eg, *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL) 283F–G (Lord Steyn); *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* [2000] 1 All ER (Comm) 129 (CA) [24] (Evans LJ); *Nationwide BS v Balmer Radmore* [1999] Lloyd's Rep PN 241 (Ch) 274 (Blackburne J); *Boyd Knight v Purdue* [1999] 2 NZLR 278 (NZCA) [56] (Gault J); *Lloyds Bank plc v Burd Pearse* [2000] PNLR 71 (Ch) 85 (Evans-Lombe J); *Green v Alexander Johnson* [2004] EWHC 1205 [30] (Peter Smith J) cf *Green v Alexander Johnson* [2005] EWCA Civ 775 [28] (Carnwath LJ); *Keydon Estates Ltd v Eversheds LLP* [2005] EWHC 972 (Ch) [20] (Evans-Lombe J); *Haugesund Kommune v Depfa ACS Bank (No 2)* [2010] EWHC 227 (Comm), [2010] PNLR 21 [31] (Tomlinson J) revd [2011] EWCA Civ 33; *Morkot v Watson* [2014] EWHC 3439 (QB) [63] (HHJ Behrens) and *Playboy Club London Ltd v Banca Nazionale Del Lavoro SPA* [2014] EWHC 2613 (QB) [62] (HHJ Mackie QC).

[84] *Rainbow Industrial Caterers v Canadian National Railway* [1991] 3 SCR 3 (SCC) [27]–[28].

[85] See (n 83).

[86] See, eg, *Leeds & Holbeck Building Society v Alex Morison & Co (No 2)* [2001] PNLR 13 (OH) [46] (Lady Paton) and *Watts v Bell* [2007] CSOH 108, 2007 SLT 665 [92] (Macaulay QC).

[87] See (n 91).

2. Doubts about the underlying principle

If *SAAMCO* is taken to have endorsed the (non-causal) falsity rule, as Chapter 5 argues it should be, the underlying principle, whatever its merits, should be quite clear. On the other hand, one consequence of the 213C counterfactual is that the nature of the *SAAMCO* principle remains somewhat obscure. One can discern from the case law at least three different formulations.

First, many judges and scholars have treated either 213C or the wider 'scope of duty rule' (or both) as causal rules. For example, Rix LJ said that the reason the doctor is not liable is that he did not *cause* the mountaineer's injury.[88] This seems, with respect, inconsistent with ordinary causal principles about coincidental loss. Similarly, Lowry J said that both *SAAMCO* and *Lowenburg* decide that market losses cannot be recovered as the decline has 'an insufficient causal connection…with the duty'.[89] This is an accurate description of *Lowenburg* but not of *SAAMCO*. Eminent scholars have also been misled by 213C: the leading textbook on rescission treats *SAAMCO* as a causation case,[90] as does Mr Vos QC (as he then was), the latter in the belief that the 213C counterfactual is 'what if the correct information had been given'.[91]

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[88] *Rubenstein* (n 4) [102]. See also *MGICA v Kenny & Good Pty Ltd* (1996) 140 ALR 313 (FC) 374 (Lindgren J) and *HOK Sport Ltd v Aintree Racecourse Co Ltd* [2002] EWHC 3094 (TCC).

[89] *Kripps v Touche Ross & Co* [1999] 3 WWR 629 (BCSC) [24].

[90] Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) 33.

[91] Geoffrey Vos, 'Linking Chains of Causation: An Examination of the New Approaches to Causation in Equity and the Common Law' (2001) 60 CLJ 337, 342, 49. See also, for the same error, Michael Bridge, 'Innocent Misrepresentation in Contract' [2004] CLP 277, 300.

In contrast to this causal explanation of *SAAMCO*, some cases[92] treat it as having entirely replaced causation *and* remoteness: the result is not dissimilar to Denning LJ's dictum in *Roe* that everything beyond 'but-for' is simply a question of the scope of the duty.[93] This is clearly not what *SAAMCO* decided but its popularity is an understandable consequence of the obscurity surrounding the principle.

Third, it has been said that *SAAMCO* is 'indistinguishable' from remoteness but applicable to the quantification, rather than the type, of loss.[94] However, their Lordships in *SAAMCO* did not see the problem as one of quantification, particularly in view of the 'starting point' that Lord Hoffmann recommended ('for what *kind* of loss'…).

It seems clear even from this summary account of the attempt to apply the *SAAMCO* principle that the courts have found it difficult to formulate precisely what it is.

3. Applying 213C to omissions

As Chapter 2 has explained, reliance is an essential element of any claim for damages for misrepresentation. Often the claimant would have relied on the misrepresentation by *positively* acting (eg making a loan or buying a house). The 'breach position'[95] is this act and the non-breach position is, in a no-transaction case, that the claimant would not have

[92] See, eg, *Aneco CA* (n 83) [20] (Evans LJ) and *Johnson v Gore Wood & Co* [2003] EWCA Civ 1728 [91] (Arden LJ).

[93] *Roe v Minister of Health* [1954] 2 QB 66 (CA) 85 (Denning LJ).

[94] *Aneco* (n 64) [11] (Lord Lloyd); *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 AC 190 (HL) 209G (Lord Hobhouse).

[95] The terminology is taken from Dyson and Kramer (n 18) 261.

made the loan or bought a house.[96] But sometimes the breach position is a *failure* to act, rather than an act. In such cases, applying the 213C counterfactual as a causal rule leads to the conclusion that no damages are recoverable because, if the information given *had been correct*, the claimant would still have failed to act.

An example may assist.[97] In *Hartle*,[98] Mr Sloggett had failed to register a restrictive covenant as a land charge. The defendant solicitor negligently told the claimant that he needed a release from Mr Sloggett in order to sell the land to a third party. Mr Sloggett, who registered the charge within hours of being contacted, demanded a ransom price for a release, and the sale was lost, at a time when the market was falling. If the correct information had been given, the claimant would have been able to sell the land. But if the information given had been correct, the sale would still have been lost. In concluding that the claimant was entitled to damages, the Court of Appeal simply ignored 213C. There are other examples,[99] but the point is clear, and a telling indication that 213C cannot be a causal rule.

4. 213C, Breach-Date and Mitigation

If the argument made here that *SAAMCO* treats a non-causal question as a causal one is correct, it was perhaps inevitable that its interaction with mitigation and the so-called breach date rule would cause difficulty. The point has arisen mainly in claims brought to

[96] And thus would have kept his money in the bank, entered into some alternative transaction, etc.

[97] See also Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 119 and *Green v Turner* [1999] PNLR 28 (Ch).

[98] *Hartle v Laceys* [1999] Lloyd's Rep PN 316 (CA).

[99] Edward Davidson, 'BBL and Damages: Some Problems in Applying the Ratio Decidendi' (1997) 13 PN 89 and Hugh Evans, 'The Scope of the Duty Revisited' (2001) 17 PN 146, 155, example 8.

recover market losses caused by the failure to obtain title on account of the negligence of a professional. These losses inevitably satisfy the falsity rule[100] *and* the wider scope of duty rule,[101] as Lord Hoffmann recognised in citing *McElroy Milne*[102] with approval.[103] The defendant can have a legitimate complaint in these cases only if the claimant has unreasonably delayed exiting a falling market or some disastrous transaction. That raises a (causal[104]) mitigation issue and has nothing to do with *SAAMCO*. However, *SAAMCO*, not mitigation, has repeatedly been invoked in support of the suggestion that this increased market loss is not recoverable, one author going so far as to suggest that *SAAMCO* 'will effectively destroy [the] diminution in value measure of loss and its exceptions'.[105]

By understanding *SAAMCO* in causal terms, as a case about falling markets, the courts have struggled to explain why the claimant has been allowed to recover market loss where it *did* act reasonably in mitigating. Usually this is done by artificially characterising the defendant as an 'advisor',[106] or by admitting that the defendant is an 'information provider' (as he clearly is) but then invoking[107] Bingham LJ's well-known

[100] Which, it will be recalled, is that a loss must be a consequence *both* of the making of the false statement *and* of the falsity of the statement: see chs 5–6.

[101] That the defendant is liable only for the materialisation of one of the risks which made his act wrongful: see chs 7–8.

[102] *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (NZCA).

[103] *SAAMCO* (n 1) 219B.

[104] Dyson and Kramer (n 18). Cf Burrows (n 97) 122.

[105] Evans (n 99) 164.

[106] See, eg, *Carter v TG Baynes & Sons* [1998] EGCS 109 and *Gregory v Shepherds* [1999] Lloyd's Rep PN 720 (Ch).

[107] See, eg, *Patel v Daybells* [2000] Lloyd's Rep PN 844 (QB) [66] (Gray J) affd on a different point in [2002] PNLR 6 (CA). In *Blue Circle Industries v Ministry of Defence* [1999] Ch 289 (CA) 301 (Aldous LJ), the Court of Appeal correctly noted that this raises a mitigation, not *SAAMCO*, issue.

observation[108] that the breach date rule should not be applied 'mechanistically'. In truth, to invoke *SAAMCO* in these cases is neither here nor there: the claimant either acted reasonably in mitigating, or not.

D. Conclusion: The Scope of Duty and Falsity Rules Distinguished

This Chapter has argued that there are two distinct approaches to the liability of a valuer. The *Lowenburg* approach, which is causal, makes liability depend on the nature of the intervening event, and is identical to the approach adopted by Phillips J, Arden J and Sir Thomas Bingham MR in *SAAMCO*: the difference of opinion between them was only about the nature of the particular intervening event (a falling market). The approach of the House of Lords in *SAAMCO*, on the other hand, is not causal because it has nothing to do with the nature of the intervening event.[109] This has been obscured by the language of scope of duty and the misapplication of Hart and Honoré's causal relevance test.

The remainder of this Part is devoted to an analysis of the two distinct rules which it will be argued are to be found in *SAAMCO*. The first is the 'falsity rule': this, Chapter 5 will suggest, is what the 213C counterfactual was trying to articulate. It is distinct from the wider principle that is often (imprecisely) called the 'scope of duty' rule. That rule is that the claimant can recover damages only for the materialisation of a loss the risk of

[108] *County Personnel (Employment Agency) Ltd v Alan R Pulver & Co* [1987] 1 WLR 916 (CA) 926A.

[109] Which is why it would equally exclude any other loss (eg cost of funding) that is not a consequence of the falsity of the information. The Court of Appeal may have overlooked this in *Mortgage Agency Services Number One Ltd v Edward Symmons LLP* [2013] EWCA Civ 1590 (though it only held that summary judgment is not appropriate).

which made the act wrongful: in *this* context, 'that which made the act wrongful' is a reference not to the constituents of the wrong but to the reasons why it has those constituents. It is important to distinguish the falsity rule from this wider scope of duty rule for two reasons. First, the scope of duty rule does not explain or justify the falsity rule.[110] Secondly, the scope of duty rule is itself flawed, at least insofar as it purports to limit rather than extend liability.[111] Since these rules are distinct, it *does not follow* that the falsity rule is flawed or that *SAAMCO* was wrongly decided: indeed, it will be argued that Lord Hoffmann's conclusion that the falsity rule should apply to negligent misrepresentation was correct.[112] The next two chapters are concerned with the falsity rule and the two following with the scope of duty rule.

[110] Ch 7.

[111] Ch 7.

[112] Ch 8.

CHAPTER V

WHAT IS THE *SAAMCO* PRINCIPLE? THE FALSITY RULE

The falsity rule is the rule that a loss must be a consequence of the making of a false statement *and* of the falsity of the statement. This and the next chapter have two objectives. First, to show that the falsity rule is the best interpretation of 213C and that the ratio of *SAAMCO* is that the falsity rule applies to negligent misrepresentation.[113] That claim is the subject-matter of this Chapter. Secondly, if the ratio of *SAAMCO* is that the falsity rule applies to negligent misrepresentation, there is no distinction between information and advice. That is the task of the next chapter.

This Chapter begins with a relatively detailed account of the origins of the falsity rule in the common law, because it has been largely neglected in the literature: the few scholars who have addressed it in passing have usually treated it as a causal issue.[114] It then explains that this is the best interpretation of Lord Hoffmann's speech in *SAAMCO*. It concludes by demonstrating that the falsity rule is *not* the same as the measure of damages for breach of warranty, as this appears to have recently led the Court of Appeal astray.[115]

[113] Except in the 'omission cases': see below and ch 8.

[114] The best treatment is in DW McLauchlan, 'Assessment of Damages for Misrepresentations Inducing Contracts' (1985) 6 Otago L Rev 370, 410–18. See also FC Moncreiff, *A Treatise on the Law Relating to Fraud and Misrepresentation* (Stevens and Sons 1891) 188 and, recently, Katy Barnett and Sirko Harder, *Remedies in Australian Private Law* (CUP 2015) 197–99.

[115] *Scullion v Bank of Scotland* [2011] EWCA Civ 693, [2011] 1 WLR 3212.

Two clarifications should be made at the outset. First, this Chapter says nothing about whether the falsity rule is *justified*:[116] its task to show what the rule is and that it is part of the ratio of *SAAMCO*. This must precede any attempt to justify or criticise it. Secondly, it also says nothing about the wider 'scope of duty' rule in *SAAMCO* except that it is distinct from the falsity rule: it will be argued subsequently that the wider rule is not only incapable of justifying the falsity rule but may itself be flawed in important respects.[117]

A. The Origins of the Falsity Rule in the Common Law

1. The Causal Mechanism of Misrepresentation

As Chapter 1 explained, interpersonal transactions are causally distinctive because the relationship between the defendant's act and the claimant's loss involves the claimant's mind. When the claimant relies on a representation, he calculates that he will be better off by doing or omitting to do something on the assumption that the representation is true. The claimant will have suffered a loss if this act of reliance produced a loss.[118] But the fact that the act of reliance produced a loss only proves that the loss was a consequence of the *making* of the false statement: it does not prove that it was a consequence of the *falsity* of the statement. The two may not coincide (though they often do) if, for instance, the transaction was in any case a bad bargain or if post-breach events unrelated to the

[116] See, for an outline, ch 8.

[117] Ch 7.

[118] Taking alternative transactions into account: see, eg, *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd* [2001] QB 488 (CA).

subject-matter of the misrepresentation increased the claimant's loss. In such cases, the loss caused by reliance on the false statement is not co-extensive with the loss attributable to the falsity of the statement.

However, on a *causal* analysis, the fact that some loss was unrelated to the subject-matter of the misrepresentation is irrelevant. One would instead ask, as Sir Henry Strong CJ did, whether a *particular intervening event* negatives the causal connection between the loss and the act of reliance. Thus, it might be said that the making of a false statement is causally connected with a loss increased by a falling market but not with a loss increased by the deliberate intervention of a third party, even though the claimant would not have suffered either loss if the false statement had not been made. This depends on the familiar distinction between normal and abnormal events and between voluntary acts and other conditions.[119]

On the other hand, if the claimant is required to prove that the loss is a consequence of the falsity of the statement, the nature of the intervening event will be irrelevant. This is because the falsity rule simply asks whether the intervening event (whether abnormal or not, whether voluntary or not) was related to the *subject-matter* of the misrepresentation. The fact that the nature of the intervening event is irrelevant is, of course, the most important difference between the *Lowenburg* approach and the *SAAMCO* approach and, more generally, between a causal and non-causal analysis of the scope of liability for post-breach events.

[119] Even if one rejects the distinction between condition and cause that was defended in chapter 1, there is a difference between a principle based on the nature of the intervening event (whatever that principle) and a principle that is independent of the nature of the intervening event.

The intuitive appeal of the falsity rule is that it effectively allows the defendant to 'make good' the representation, even though it was false on the date it was made. To put it differently, the claimant gets from the defendant what he thought he was getting, though that turns out to be a loss for him because he miscalculated in some other respect. In *Yam Seng*,[120] for example, Mr Tuli of ITC persuaded Yam Seng to enter into an exclusive licence arrangement by representing, falsely, that it had 'recently signed' an agreement with Manchester United to distribute its fragrances. Yam Seng would not have entered into the contract if it had known that ITC did not have this licence. However, ITC acquired the licence soon after the contract was made and Yam Seng suffered no prejudice *by reason of* the lack of a licence,[121] though the contract turned out to be loss-making for other reasons. It is thus an example of a case in which reliance on a false statement produces a loss that is not co-extensive with the loss attributable to the falsity of that statement. On a causal analysis, one would ask only whether whatever it was that produced the loss was abnormal or voluntary; if not, the claimant would, subject to non-causal rules, be entitled to recover damages in full. Yet, this seems to allow the claimant to require the defendant to bear a loss which, had the statement *been true*, the claimant would have been willing to bear.

The common law has never reached a clear position about whether the claimant should be required to prove that the loss was a consequence of the falsity of the statement. But attempts to canvass the falsity rule in the common law world can be traced to at least the late nineteenth century. It is instructive to examine the development of the

[120] *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB).

[121] The falsity rule was not applied because the claim was under s 2(1) of the 1967 Act. On this aspect of the case, see ch 9. See also *Avon Insurance plc v Swire Fraser Ltd* [2000] Lloyd's Rep IR 535 (QB).

rule closely, as it eventually culminates in *SAAMCO*: what is striking is the frequent assertion that the rule is causal.

2. The First Answer: The Early Deceit Cases

For a long time, the measure of damages for misrepresentation was not treated as a question of law. In the early history,[122] which mostly relates to the action on the case for deceit by false warranty,[123] the amount of damages was a matter for the jury. Notwithstanding the language of warranty, one can infer that the substance of the action was that the claimant was *misled*.[124] This was partly for procedural reasons: buyers resorted to the action on the case because a rule had emerged by the 14th century that covenant would not lie for contracts not under seal,[125] and one way of doing this was to plead the inducement, rather than the failure to perform the promise. The declaration would, it is true, routinely allege an express warranty ('*warrantizando*'), '*falso et fraudulenter vendidit*' (falsely and fraudulently sold) and the seller's knowledge of the defect. But, as Professor Milsom has shown, the allegation about the seller's knowledge of the defect was a fiction and never traversed.[126] Substantive rules of law consistent with the theory that the gist of the action was inducement also began to emerge: for example,

[122] The history of misrepresentation is complex. A detailed account is not necessary for the purposes of this thesis. See, however, AKR Kiralfy, *The Action on the Case* (Sweet & Maxwell 1951) 41ff, 71–90; DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 2001) 84–88; SFC Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) 321ff; JH Baker, *An Introduction to English Legal History* (4th edn, OUP 2007) 332–355 and JH Baker, 'Bezoar Stones, Gall Stones and Gemstones: A Chapter in the History of the Tort of Deceit' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006).

[123] See, eg, Baker, 'Bezoar Stones' (n 122) 556–59.

[124] Ibbetson (n 122) 84–85; Baker, *An Introduction to English Legal History* (n 122) 332.

[125] Ibbetson (n 122) 26–28.

[126] Milsom (n 122) 321.

the action would not lie if the claimant knew or ought to have known that the so-called warranty was false,[127] or if it was a statement of opinion or related to the future.[128] Warranties were re-analysed as contractual (thus making inducement irrelevant) only in or around 1750 when they were more or less shifted from case to assumpsit: this was done to enable litigants to join alternative counts for money had and received.[129] However, at this time parallel actions based on the claimant's inducement began to emerge both at law and in equity. In equity, it is to be found in the cases dealing with 'making good' a representation, notably *Burrowes v Lock*,[130] which are today rationalised as estoppel.[131] At law—and it is in this action that the common law's measure of damages first received explicit consideration—*Pasley v Freeman*[132] marked the emergence of the tort of deceit.

It was clear at an early stage[133] in the development of this action that what was protected was reliance, not expectation, though there were local disputes about what the reliance measure entailed.[134] The falsity rule was first considered in one of the most

[127] As Hankford J put it, '[i]f a man sells me a blind horse and warrants it sound in all its parts, I shall not have an action of deceit against him afterwards, because I could have looked at it': *Drew Barantine's Case* (1411) YB Mich 13 Hen IV, fo 1, pl 4.

[128] As Choke J put it, a warranty that 'the seed will grow… is in the power of God', not the seller: *Anon* (1471) YB Trin 11 Edw IV, fo 6, pl 10.

[129] *Stuart v Wilkins* (1778) 1 Douglas 18, 99 ER 15 is said to be the first reported case, but Buller J and Ashurst J both remarked that assumpsit had been used for some years. See also Baker, *An Introduction to English Legal History* (n 122) 356.

[130] *Burrowes v Lock* (n 16).

[131] *Low v Bouverie* [1891] 3 Ch 82 (CA) 93 (Lindley LJ).

[132] *Pasley v Freeman* (1789) 3 TR 51, 100 ER 450.

[133] See, eg, *Pearson v Wheeler* (1825) Ry & M 303, 171 ER 1028, 1029 (Abbott LCJ).

[134] The main dispute was about the date of assessment: see (n 150) below.

influential deceit cases of this period, *Twycross v Grant*.[135] The prospectus of a company stated that a contractor which it had engaged to build a railway line would be paid £309,000. In reality, the contractor had agreed to repay a significant part of this sum to the promoters of the company, and these private contracts were not disclosed in the prospectus. The claimant paid £700 for his shares and lost the entire sum when the company was liquidated after working the line at a loss for 22 months. The promoters argued that damages could not *exceed* 'the difference between the value of the thing that he intended to buy and that of the thing which he actually got':[136] in other words, the cap was what the shares would have been worth if the statement that the contractors had been paid £309,000 had been true. This is an attempt to apply the falsity rule because it seeks to strip out those consequences of the act of reliance which are unrelated to the subject-matter of the misrepresentation.

The argument was robustly rejected. In the Divisional Court, Lord Coleridge CJ said this:[137]

> But, in our opinion, the defendants are not entitled to avail themselves of the fact that the plaintiff intended to take shares in such a company as that described in the prospectus, or in the company unaffected by the concealed contracts. That intention was itself the *result of the wrongful act of the defendants*; and, as between the plaintiff and them, he is entitled to repudiate any intention of his own based on their fraudulent concealment. He is entitled to say that, but for their fraud, he would never have parted with his money.

[135] *Twycross v Grant* (1877) 2 CPD 469 (CA).

[136] *Twycross* (n 135) 481.

[137] *Twycross* (n 135) 490–91 (emphasis added).

Cockburn CJ made the same point in the Court of Appeal.[138] Significantly, there was no suggestion that falsity is the 'normal rule'[139] which is *disapplied* because of fraud: on the contrary, the *Twycross* rule *was* thought to be the normal rule.[140] Writing in 1893, Moncreiff also said that the justification for not applying the falsity rule was simply that all of the loss, whether related to the subject-matter of the misrepresentation or not, was caused by it.[141]

This was followed[142] by Dixon J in *Toteff v Antonas*[143] and by Sir Richard Henn-Collins MR in *McConnel v Wright*.[144] In *Toteff,* the claimant bought a fish café in South Australia for £2250, of which £200 was apportioned to goodwill and the remainder to plant and stock. The defendant had made false statements about the profits of the café. The claimant eventually sold the business for £900, which Mayo J accepted was the real value of the business. But the judge awarded only £200 as damages, on the ground that the misrepresentation (about profits) related only to goodwill, not to the other assets which the claimant acquired. This, again, is an application of the falsity rule. In the High Court of Australia, Dixon J explained that this was wrong because the claimant is entitled to recover damages 'representing the prejudice or disadvantage he has suffered in consequence of *altering his position*'.[145] In other words, the claimant may recover any

[138] *Twycross* (n 135) 543.

[139] Compare *SAAMCO* (n 1) 213A.

[140] See also *Canavan v Wright* [1957] NZLR 790 (NZCA) 802 (Adams J).

[141] Moncreiff (n 114) 188.

[142] Some doubts (rightly) were expressed about the analysis of intervening cause in the 19th century cases but nothing turns on this in relation to the falsity rule.

[143] *Toteff v Antonas* [1952] HCA 16, (1952) 87 CLR 647.

[144] *McConnel v Wright* [1903] 1 Ch 546 (CA).

[145] *Toteff* (n 143) 650.

loss caused by the making of the false statement, irrespective of whether the loss is related to the subject-matter of the misrepresentation. Once again, there is no suggestion that this is because deceit warrants special treatment.

McConnel, which is considered in detail in Chapter 9, can be analysed in the same way. The prospectus contained a false statement that the company owned certain shares which would be used to pay dividend, but this was effectively 'made good' a week after the claimant invested when the company bought those shares. Again, the attempt to invoke the falsity rule was rejected: the only difficulty is that Sir Richard Henn-Collins MR's reasoning was that damages could hypothetically have been measured on the date of allotment, at which point the representation had not been made good.[146] Notwithstanding that wrinkle, it was clear after *McConnel* that the starting-point in any claim for damages for deceit *was* Lord Blackburn's compensatory principle:[147] the subject-matter of compensation was the claimant's detriment, and he was not required to show that the detriment was attributable to the falsity of the statement.

Four conclusions can be drawn from the early deceit cases. First, the proposition that the claimant need only show that the loss was a consequence of the *making* of the false statement was well-established in both England and Australia: whether particular components of this loss were connected to the subject-matter of the misrepresentation was irrelevant. Secondly, on a causal approach, this is correct, for one simply asks what *effect* a misrepresentation had on the claimant, not what the *content* of the

[146] *McConnel* (n 144) 553. The use of the falsity rule does not depend on the breach-date rule, even if there is one.

[147] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (HL) 39.

misrepresentation was. Thirdly, this rejection of the falsity rule was not influenced by considerations that are special to deceit: the view of both the English and the Australian courts was that the falsity rule is simply inconsistent with the normal reliance measure of damages. Fourthly, the scope of the defendant's liability was therefore limited *only* by the nature of the intervening event. For example, in *Twycross* itself,[148] and a number of companion 19th century cases, such as *Waddell v Blockey*,[149] it was said that *any* causally independent post-breach event (and not merely abnormal events or voluntary acts) negatives causation.[150] This is not dissimilar to the approach of Sir Henry Strong CJ in *Lowenburg* which, of course, was not a deceit case. It is not necessary to consider whether this analysis of post-breach events is correct—clearly it is not[151]—for the point is only that on a causal approach it is not surprising that liability should depend on the nature of the intervening event.

This consensus[152] that the falsity rule does not apply to deceit was disturbed only by *Downs v Chappell*,[153] which is considered in more detail below. But judges found it more difficult to decide whether the falsity rule should apply to claims for *negligent* misrepresentation.

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[148] *Twycross* (n 135).

[149] *Waddell v Blockey* (1879) 4 QBD 678 (CA).

[150] That these cases did not distinguish between normal and abnormal post-breach events is clear from Cockburn CJ's example of the horse that dies of a disease contracted after the date of the transaction. This (erroneous) proposition has caused confusion in subsequent cases as well: see, eg, *Naughton v O'Callaghan* [1990] 3 All ER 191 (QB) 198 (Waller J); *Smith New Court* (n 83) 267G (Lord Browne-Wilkinson) 279 (Lord Steyn) and *Man Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm) [228] (Moore-Bick LJ).

[151] See Hart and Honoré, *Causation in the Law* (n 55) 71–73 and, further, ch 1 above.

[152] See also *Standard Chartered Bank v Pakistan National Shipping Corp* [1999] CLC 761 (QB) 781–83 (Toulson J).

[153] *Downs v Chappell* [1997] 1 WLR 426 (CA).

3. Falsity and Negligent Misrepresentation before *SAAMCO*

Negligent misrepresentation became a cause of action in English law only in 1963.[154] For a number of reasons, the question of whether the falsity rule applies to such a claim did not arise for many years. For one thing, as this thesis explains elsewhere,[155] it was assumed in the mid-1960s that the measure of damages for negligent misrepresentation was identical to the measure of damages for deceit: on that view, the falsity rule would, of course, not apply.[156] Secondly, Parliament enacted the Misrepresentation Act in 1967. This made it unnecessary to invoke *Hedley Byrne* in any case in which the act of reliance was entry into a contract with the representor. Thirdly, the point about the falsity rule was moot in the few early cases to which either *McConnel* or the 1967 Act did not apply because it was clear that the loss was in fact a consequence both of the making of the false statement and of its falsity.[157]

When the point finally arose, there was considerable disagreement about the answer, in contrast to the near unanimous rejection of the falsity rule in the early *deceit* cases. Thus, the falsity rule was adopted in some English cases[158] but rejected in

[154] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

[155] Ch 9.

[156] Following *Twycross* (n 135) and *McConnel* (n 144).

[157] *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 (CA) and *Box v Midland Bank Ltd* [1979] 2 Lloyd's Rep 391 (QB).

[158] *Swingcastle Ltd v Alastair Gibson* [1990] 1 WLR 1223 (CA) 1236E (Sir John Megaw, dissenting) revd on another point in [1991] 2 AC 223 (HL); *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1991] 2 AC 249 (HL) 279B (Lord Templeman) and *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] 2 WLR 867 (Ch).

others,[159] rejected in Canada over a powerful dissent,[160] rejected at first instance in New Zealand[161] but accepted in *obiter* in the Court of Appeal,[162] and rejected in Australia by a bare majority.[163] These cases can be divided into two groups. The first adopted the falsity rule on the supposition that it is *causal*. The second correctly pointed out that the falsity rule is not causal but thought that it followed automatically that its use cannot be justified.

The most well-known cases in the first group are *Swingcastle*[164] and *Gran Gelato*.[165] In *Swingcastle,* the question was whether the lender could recover interest from a negligent valuer at the contractual rate payable by the *borrower* who had defaulted. Neill and Farquharson LJJ in the Court of Appeal said that they were bound by authority[166] to hold that it could. Sir John Megaw dissented. The question of interest is considered elsewhere in the light of the analysis of *SAAMCO* presented in this thesis.[167] The reason the point matters in this context is that Sir John Megaw adopted the falsity

[159] *Winter v Boynton* (CA, 1 February 1991, unreported) (Dillon LJ) and *Bridgegrove Ltd v Smith* [1997] 2 EGLR 40 (CA) (Mummery LJ). Similarly, after *SAAMCO* was decided: *Eurovideo Bildprogramm GmbH v Pulse Entertainment Ltd* [2002] EWCA Civ 1235 (CA) (Rix LJ) (*SAAMCO* not cited) and *Forrest International Gaskets Ltd v Fosters Marketing Ltd* [2005] EWCA Civ 700 [11] (Tuckey LJ) (*SAAMCO* distinguished, with respect unconvincingly).

[160] *Rainbow Industrial Caterers Ltd v Canadian National Railway* [1990] 3 WWR 413 (BCCA) [42] (Lambert JA) affd in *Rainbow* (n 84).

[161] *Capital Motors Ltd v Beecham* [1975] 1 NZLR 576 (SC) 581 (Cooke J).

[162] *Dimond Manufacturing Co Ltd v Hamilton* [1969] NZLR 609 (NZCA) 638 (Turner J).

[163] *Henville v Walker* [2001] HCA 52, (2001) 206 CLR 459. This was decided after *SAAMCO* but, along with *Copping v ANZ McCaughan Ltd* (1997) 67 SASR 525 (SASC), is perhaps the most important Australian authority on the falsity rule.

[164] *Swingcastle CA* (n 158).

[165] *Gran Gelato* (n 158).

[166] *Baxter* (n 31), which was overruled on this point when *Swingcastle* went to the House of Lords.

[167] Ch 7.

rule, but on the basis that any loss in excess of the overvaluation is not *caused* by the valuer's negligence:[168]

> There is one important qualification. The valuer should not be liable for a greater amount than the amount of his original overestimate of the value compared with the true market value as at the date of the valuation. Any shortfall in the proceeds of the realisation above that amount should not be regarded *as being caused by the negligent valuation*.

In *Gran Gelato*, the claimants, who intended to set up an Italian gelateria in London, were negotiating for a lease. The lessor negligently told them that the headlease did not, to the best of his knowledge, contain any covenants inhibiting their enjoyment of the land. In fact it contained a redevelopment break clause exercisable with 12 months' notice. Significantly, the break clause was never actually exercised, but the business made substantial losses for unrelated reasons and the lease was disposed of at a price depressed by the eventual discovery of the break clause. Sir Donald Nicholls V-C held that trading loss and shop-fitting expenses[169] were not recoverable because Gran Gelato 'stopped trading for reasons wholly unconnected with the misrepresentation'.[170] The learned judge said that this demonstrated that there was 'no *causal connection* between the misrepresentation and this loss',[171] even though the loss would have been avoided if the misrepresentation had not been made.

In contrast, the second group of cases (correctly) perceived that the falsity rule, whatever its origins and merits, cannot be causal. The most important of these are *Winter*

[168] *Swingcastle CA* (n 158) 1236E.

[169] These expenses were incurred before the existence of the break clause came to light.

[170] *Gran Gelato* (n 158) 577.

[171] It was a claim under s 2(1) of the 1967 Act; so the falsity rule could only apply if it was thought to be causal.

v Boynton[172] and *Bridgegrove v Smith*.[173] *Winter* was virtually identical to *Toteff*: the claimant overpaid for a business relying on misrepresentations about its turnover and the defendant argued that damages should be given only for loss that was attributable to deficiency in turnover. Dillon LJ said this:[174]

> If they have incurred a loss through entering into the contract, it is *not necessary that the loss should itself be directly referable to the misrepresentation*—that is, should be a loss caused by the deficiency in turnover and nothing else.

Bridgegrove can be similarly analysed. Mummery LJ rejected the defendant's argument that the falsity rule should apply, reasoning (in striking contrast to the views expressed in *Swingcastle* and *Gran Gelato*) that it was sufficient for the claimant to show that all 'the losses suffered flowed from the misrepresentations…on which [the claimants] *acted*.'[175]

It is submitted that the analysis in *Winter* and *Bridgegrove* is correct.[176] The difficulty with the first group of cases is that it infers from the fact that a particular loss is unrelated to the *subject-matter* of the misrepresentation that it was not *caused* by it. As explained above,[177] this does not follow, because the *content* of a representation (as opposed to its *making*) has no causal significance. The causal significance of a representation arises from the impact it has on the claimant's mind and from the

[172] *Winter* (n 159).

[173] *Bridgegrove* (n 159).

[174] *Winter* (n 159) 8H (emphasis added).

[175] *Bridgegrove* (n 159) 43.

[176] See also, recently, *Thorp v Abbotts* [2015] EWHC 2142 (Ch) [75] (HHJ Cooke) ('the difference [in value] is in principle recoverable, even if it is not related to (or not entirely related to) the misrepresentation').

[177] Ch 4.

relationship between what the claimant does (eg make a loan, buy land) and subsequent events (eg deliberate destruction/accidental damage). But the second group, though right about this, appears to have assumed that there is no independent (non-causal) justification for the use of the falsity rule.

It is now easy to see why the falsity rule was so obscure before, and perhaps even after, *SAAMCO*: its conceptual foundations have never been articulated. It was assumed either that it was justified on causal grounds or that it was automatically inapplicable since it was not. It will be argued in the next sub-section that the best interpretation of *SAAMCO* is that it adopts the falsity rule, but that it should be treated as a *non-causal* rule that requires (and has) independent justification.[178] Before doing so, however, it is important to consider the two most influential pre-*SAAMCO* cases on the falsity rule.

4. *Skandia* and *Downs v Chappell*

Leaving *SAAMCO* aside, the two most important cases about the falsity rule are, without doubt, *Skandia*[179] and *Downs*.[180] Indeed, in *SAAMCO*, Lord Hoffmann thought that the 'underlying principle [in *Skandia*] was right and it is decisive of this case'.[181] Both cases require close analysis. In both, it will be argued, the falsity rule was erroneously characterised as a causal rule, which may help explain why the principle was formulated as it was in *SAAMCO* itself.

[178] Ch 8.

[179] *Skandia* (n 158).

[180] *Downs* (n 153).

[181] *SAAMCO* (n 1) 215C.

It is convenient to begin with *Skandia*. The facts, though complex, are important. A consortium of banks lent a large sum of money to companies controlled by one Ballestero who, said Steyn J, was entitled to 'a high place in the pantheon of international fraudsters'.[182] The security was to be jewellery, which turned out to be worthless, and some credit insurance policies. There were two distinct misrepresentations in the story. The first was by Lee, an employee of Notcutts, the banks' brokers, who fraudulently told the banks that the insurance policies had been issued before they made the disbursement to Ballestero. These policies were in fact subsequently issued, but the insurers were able to invoke a fraud exception (because of *Ballestero*'s fraud, not Lee's fraud). So the banks lost the entire sum. The second misrepresentation was by Dungate, an employee of the insurance company, who failed to tell the banks that he had discovered that Lee had lied to them. If either misrepresentation[183] had not been made, the banks would not have made the loan to Ballestero. Mr Sumption QC, who appeared for the banks, argued that the relevant question as a matter of law was what would have happened if they had been told that there was no insurance, not what would have happened if the statement that there was insurance had been true. This argument succeeded below but failed in the House of Lords. Lord Templeman said that this was because it 'confused the cause of the advance with the cause of the loss of the advance'.[184] His Lordship thought that the consequence of Lee's fraud was the fact that the advance was *uninsured*, rather than the fact that the advance was *made* (whether with or without insurance).

[182] *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1987] 1 Lloyd's Rep 69 (QB) 74.

[183] The claim against Notcutts settled.

[184] *Skandia* (n 158) 279B (Lord Templeman).

The difficulty with Lord Templeman's analysis is that it purports to be causal. There is no *causal* distinction between the 'cause of the advance' and the 'cause of the loss of the advance' unless the reason why the advance was lost was an abnormal natural event or a voluntary human act. In *Skandia*, of course, there *was* a voluntary human act—Ballestero's fraud—and so the *result* can be explained on ordinary causal principles, as indeed Sir Thomas Bingham MR did in the Court of Appeal in *SAAMCO*.[185] But Lord Templeman's reasoning was concerned with the relationship between the ultimate loss and the *subject-matter* of the representation, not with the *nature* of the intervening event. Lord Hoffmann in *SAAMCO* was, therefore, correct in pointing out that the principle Lord Templeman applied (whatever it was) did not depend on Ballestero's fraud.[186] That principle is, of course, the falsity rule, which, for the reasons given above, is *not* causal. Lord Hoffmann, however, went on to explain *Skandia* in this way, consistently with his own causal formulation of the falsity rule at 213C:[187]

> Lord Templeman's speech puts the matter firmly *on the ground of causation* and the analysis makes sense only on the footing that he was concerned with the consequences to the lenders of having lent without knowing the true facts rather than with what would have been the consequences of disclosure.

Downs, the facts of which have been set out in Chapter 2, is also a difficult case. Hobhouse LJ's starting-point, *unlike* Lord Hoffmann's, was the compensatory principle in *Livingstone*.[188] This led him to the conclusion that the Downses were, in principle,

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[185] *Banque Bruxelles Lambert* (n 51) 413E; see also FA Trindade, 'The Skandia Case in the House of Lords' (1991) 107 LQR 24, 27–28.

[186] *SAAMCO* (n 1) 215C.

[187] *SAAMCO* (n 1) 215D–E.

[188] *Downs* (n 153) 438.

entitled to be restored to the position in which they would have been if the false statement had not been made. He then pointed out that the cases applying this principle to misrepresentation 'do not, however, discuss whether there is any question of *causation* beyond the no-transaction test' and proposed what he described as a 'qualification' to address this question. The qualification was that the claimant should not be better off than 'if the represented, or supposed, state of affairs [had] actually existed'.[189]

There are two (possibly three) interpretations of why Hobhouse LJ proposed this qualification. The first is that it was used as a *proxy* to strip out loss that would have been suffered anyway, on the basis that the claimant would have *entered into* the same or a similar transaction even if the false statement had not been made. It is important to remember that Hobhouse LJ's qualification was a response to Mr Chappell's argument that the Downses should not be compensated for a 'general fall in the market' because they would in any case have bought some property with the money they spent on this deal. Hobhouse LJ described this as a 'legitimate concern'.[190] If this is what Hobhouse LJ meant, it was quite unnecessary to invoke the falsity rule, because the alternative transaction the claimant would have entered into if the defendant had acted non-wrongfully should in any case be taken into account. But this is not fatal to the first interpretation because Hobhouse LJ thought, correctly or otherwise,[191] that asking what the claimant would have done if the truth had been told is 'irrelevant speculation'.[192] It

[189] *Downs* (n 153) 444.

[190] *Downs* (n 153) 444.

[191] Or otherwise, as ch 2 suggested.

[192] *Downs* (n 153) 441.

may be that the qualification was designed to indirectly replicate the result of asking this causal question: if so, *Downs* is not a case about the falsity rule.

The second interpretation of what Hobhouse LJ said is that he intended the qualification to apply even to no-transaction cases. On this view, it *is* an example of the falsity rule. However, the justification given by Hobhouse LJ for its use is, like Lord Templeman's justification, causal:[193] 'its purpose is to test the acceptability of the factual conclusion that the assessed consequential loss was *truly consequential upon the fault* for which the other party is liable'.[194] Indeed, in *Smith New Court*, counsel for the defendant (also Mr Sumption QC) expressly argued that Lord Templeman, in rejecting his own submission in *Skandia*, had adopted a causal rule, as had Hobhouse LJ in *Downs*: 'they analysed the difference in terms of causation, not foreseeability'.[195]

Unfortunately, there is a *third* interpretation of what Hobhouse LJ meant. In *Smith New Court*, Lord Steyn thought that the qualification involved asking what the claimant would have done if the truth had been told. With respect, one can demonstrate that this was a misreading of Hobhouse LJ by simply setting out the two passages:

[193] That the *Skandia*/*Downs* rule cannot be causal is implicit in May J's illuminating judgment in *Slough Estates plc v Welwyn Hatfield District Council* [1996] 2 EGLR 219 (QB) 245–47.

[194] *Downs* (n 153) 444.

[195] Parliamentary Archives, HL/PO/JU/4/3/1938, *Printed Case of Jonathan Sumption QC and Anthony Mann QC* [33], fn 3.

Hobhouse LJ[196]	**Lord Steyn on Hobhouse LJ**[197]
I consider that the appropriate way to give effect to these legitimate concerns is to compare the loss consequent upon entering into the transaction with what would have been the position had the represented, or supposed, state of affairs *actually existed*. Assume that there had been no tort because the represented, or supposed, *facts were true*.	In other words, it is not necessary in an action for deceit for the judge, after he had ascertained the loss directly flowing from the victim having entered into the transaction, to embark on a hypothetical reconstruction of what the parties would have agreed *had the deceit not occurred*… I would hold that on this point Downs v Chappell was wrongly decided.

If the falsity rule is treated as a non-causal rule (much like the *Wagon Mound* remoteness rule), there may be good reasons for applying it to negligence but not to deceit. However, Lord Steyn does not get to this stage of the analysis because his Lordship reads Hobhouse LJ's qualification as 'what would have happened *if the correct information* had been given'. Thus, an opportunity to clarify quite what the falsity rule is, and precisely *why* it does not apply to deceit, was missed.

B. The Falsity Rule and 213C

As Chapter 4 has shown, there remains considerable doubt about what *SAAMCO* decided and the principle underlying it. It is submitted that the best interpretation of the case, and of 213C in particular, is that it adopts the falsity rule described above.[198] The reason this

[196] *Downs* (n 153) 444.

[197] *Smith New Court* (n 83) 283F–G. This dictum has caused confusion because it suggests, on its face, not that the falsity rule need not be satisfied, but that *alternative transactions* are irrelevant: see, eg, Hugh Beale, *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012) [6-064].

[198] As Phillips LJ put it, *SAAMCO* decides that the claimant must 'prove that he has suffered loss because of the absence of those attributes upon which he had relied in entering into the transaction': *Western Trust & Savings Ltd v Clive Travers & Co* [1997] PNLR 295 (CA) 301.

is not clear from Lord Hoffmann's speech is two-fold. First, the falsity rule has itself never been properly understood, as the account of its history in the previous sub-section shows. Secondly, Lord Hoffmann purported to derive his statement of principle from the *Empire Jamaica* on the one hand and *Skandia* on the other. The principle was therefore presented and justified in causal language, as indeed was its application to the mountaineer example. But if Lord Hoffmann's statement of principle is treated as non-causal, the most natural interpretation of it is that it is the falsity rule: the 213C counterfactual is, in substance, indistinguishable from the measure of damages canvassed (whether successfully or otherwise) in the cases discussed in the previous section.

It has been argued that this cannot be the ratio of *SAAMCO* on the basis that the falsity rule cannot accommodate representations unrelated to *value*.[199] Gleeson CJ gave a good example[200] of such a representation in the argument in *Henville*:[201] D misrepresents to C that D has no criminal record; C enters into a contract with D which he would not have done had he known the truth, and then suffers a loss for unrelated commercial reasons. However, there is usually an underlying assertion of some kind in these statements: for example, that D, because he has no criminal record, is an honest or reliable counterparty (this is the reason C wants the information). The falsity rule is then applied by asking if C would have suffered the same loss if D had been *honest* or *reliable*: if not (say D acted with propriety but the market fell), C cannot recover damages. If the representation in *Smith New Court* had been made negligently rather than

[199] DW McLauchlan, 'A Damages Dilemma' (1997) 12 J Contract L 114, 126; see also *Clack v Wrigleys Solicitors LLP* [2013] EWHC 413 (Ch) [126] (Strauss QC).

[200] See also *Potts v Miller* (1940) 64 CLR 282 (HCA).

[201] The entire argument repays study, as it contains a detailed analysis of the falsity rule: see *Henville v Walker* (High Court of Australia, Transcript of Proceedings, 13 February 2001).

fraudulently, this issue would have arisen, because the representation that there were two other bidders for the Ferranti shares was unrelated to the value of the Ferranti shares. In contrast to Gleeson CJ's example, the loss following the discovery of the Guerin fraud would not have been a consequence of the falsity of any underlying assertion about Ferranti. The claim would therefore have failed. Thus, the fact that some representations may be unrelated to value does not undermine the falsity rule.

C. A Potential Objection: The Disposition of the *SAAMCO* Appeals

It may be objected that the actual disposition of the individual appeals in *SAAMCO* is inconsistent with the argument that the case applied the falsity rule. To apply the falsity rule, Lord Hoffmann would have had to ask whether the loss for which the lenders were claiming damages was a consequence not only of the making of the negligent valuation but also of the inaccuracy of the valuation. His Lordship began this part of his speech by instead investigating the *purpose* of requiring the valuer to provide a careful valuation: this is the wider 'scope of duty' rule which, it will be suggested,[202] is not helpful in this context. However, Lord Hoffmann then *did* go on to apply the falsity rule (though it was articulated in causal language) through his 213C counterfactual. But a curious feature of the actual application of the counterfactual to the facts of *SAAMCO* requires explanation.

Applying the 213C counterfactual, why did Lord Hoffmann assume that, 'if the information had been true', the security would have fetched the same amount *on*

[202] Ch 7.

realisation many years later? This point can be illustrated by modifying the facts of the South Australia appeal. The claimant lent £11m on a valuation of £15m (given in June 1990 and thus with £4m cushion). In August 1994, it recovered £2.5m by realising the security. Since the actual value in June 1990 was £5m, the amount attributable to the market decline was £2.5m. Ignoring contributory negligence, interest and payments by the borrower, the lender lost £8.5m. Since the entire loss was held to be recoverable, the sum the lender recovered included the £2.5m market loss. This is justified by Lord Hoffmann on the basis that what would have happened 'if the information had been true' exceeded the lender's total loss. However, the 'information' was that the property was worth £15m in June 1990—*not* August 1994.[203] The lender should have been, consistently with 213C and the falsity rule, awarded the difference between what it would have got by selling *in August 1994* a property which had been worth £15m in June 1990, and what it actually got on sale (£2.5m). The damages actually awarded to the lenders exceeded the damages they would have got for breach of warranty. As some commentators have said, 'the paradox remains'.[204]

Mr Hegan attempts to defend the disposition of the case by suggesting that Lord Hoffmann implicitly assumed that the correctly valued property would have suffered the same 'dollar decline' (as opposed to 'percentage decline') as the wrongly valued

[203] This is why Professor Stevens' interesting explanation of the case cannot be correct: Robert Stevens, *Torts and Rights* (OUP 2007) 168.

[204] DW McLauchlan, 'Negligent Valuer Liability: The Paradox Remains?' (1997) 113 LQR 421, 423–24. See also Simon Wilton, 'SAAMCO and Damages' (Lecture to the Professional Negligence Bar Association, 12 October 2013) 6 ('for all the conceptual ingenuity which informs the decision, it is…a rough-and-ready rule designed to limit the valuer's liability…by imposing a 'cap' referable to the position at the time of the original valuation').

property.[205] If this is right, the paradox is indeed eliminated, but it is difficult to see why Lord Hoffmann should have made, with respect, the curious assumption that property worth £15m would have declined by £2.5m because property worth £5m declined by that *amount*.

The better view is that the point did not arise, which may be because at the heart of counsel's case was an attempt to defend the *Lowenburg* measure as a causal rule: on that analysis, one simply deducts the actual value of the property from the amount of the loan, as the Phillips J and Arden J had done at first instance. It is also possible that Lord Hoffmann was influenced in this respect by the views of Professor AM Dugdale, the leading academic proponent of a non-causal approach to the liability of valuers before *SAAMCO*. In his Hardwicke Building Lecture,[206] which was influential in the argument in the House of Lords,[207] Professor Dugdale recognised that only non-causal reasoning can convincingly limit a valuer's liability but—for reasons that are not obvious—also used the date of valuation, rather than the date of realisation. This does not undermine the falsity rule as a matter of principle or outside the field of valuation.

D. Not Falsity *Alone*: Breach of Warranty Distinguished

The falsity rule described in this chapter is distinct from the measure of damages for breach of warranty because it is a cap on (reliance) damages, not itself the measure of it.

[205] Nick Hegan, '*SAAMCO*, The Scope of the Duty and Liability for Consequences' (2007) 38 VUWLR 465, 470. See also Nicholas McBride and Roderick Bagshaw, *Tort Law* (4th edn, Pearson 2012) 344.

[206] AM Dugdale, 'A Purposive Analysis of Professional Advice: Reflections on the BBL Decision' [1995] JBL 533.

[207] Parliamentary Archives HL/PO/JU/4/3/1939, HL/PO/JU/4/3/1940, *Printed Cases of Counsel*.

SAAMCO decides that a loss must be a consequence *both* of the making of a false statement *and* of its falsity, while in a breach of warranty claim it must be a consequence *only* of the falsity of the statement and *not* of its making.[208] This is why *SAAMCO* does not contain any warranty fallacy.[209] This point appears to have been overlooked by the Court of Appeal in *Scullion*.[210]

Mr Scullion was interested in what is known as a 'BTL' (buy-to-let) property acquisition. Colleys, the valuer instructed by the mortgagee, had no contractual relationship with him but were aware that the valuation was for a BTL. They valued the property at £353,000 with an expected rental of £2000 pcm. Mr Snowden QC, sitting as a deputy judge, held that a competent valuation would have been £300,000 (capital) and £1100 pcm (rent),[211] with the usual bracket. The expected mortgage cost was £1440 pcm. Since Mr Scullion was given a 15 percent 'gifted discount', the purchase price was approximately £300,000 (which was its actual value). But he could not find tenants willing to pay anywhere near £2000 pcm; he finally let the flat for a year at £1050, then made abortive attempts to sell it (during which period there was no tenant, since he wanted to sell with vacant possession), finally doing so for £270,000. As a result, he was out of pocket by substantial sums in financing the mortgage, which he sought to recover from Colleys.

[208] See also *Slough Estates* (n 193) 244 (May J).

[209] See also *Oates v Pitman* [1998] PNLR 683 (CA) 696 (Sir Brian Neill).

[210] *Scullion* (n 115).

[211] *Scullion v Bank of Scotland* [2010] EWHC 572 (Ch) [192], [244] (Snowden QC).

The deputy judge, applying *SAAMCO*, held that Mr Scullion had not suffered any loss as a consequence of the negligent capital valuation,[212] but that he was (broadly) entitled to recover the difference between the cost of the mortgage (plus other outgoings) and the rent *actually received*, because this loss was a 'consequence of the *rental* valuation being wrong'. The deputy judge's careful assessment of damages on this basis[213] repays study and is consistent with the argument advanced here: the consequence of the falsity of the information about the rent was that the borrower was *out-of-pocket*. Liability arose not because Colleys warranted that this rent would be received (they did not) but because, if Colleys had not given a careless rental valuation, Mr Scullion would not have incurred the cost of mortgage, which is the basic loss, from which the rent actually received must be deducted.

Mr Scullion lost in the Court of Appeal because he could not establish that Colleys owed him a duty of care in tort. Lord Neuberger MR, who gave the only reasoned judgment, nevertheless expressed his *obiter* views about damages because 'the judge's approach was not … wholly correct'.[214] His Lordship held that Mr Scullion was only entitled to recover the difference between the *stated valuation* and the rent actually received, except for the period when there would have been no tenant anyway. The approach of the deputy judge was said to be inconsistent with *SAAMCO* and 'close to treating the negligent misstatement as a warranty'. With respect, it is submitted that the opposite is true. The effect of Lord Neuberger MR's approach is that Mr Scullion

[212] This conclusion is, however, questionable. It is true that there was no capital loss on the date of purchase, but if the property had in fact been worth £353,000 then, Mr Scullion would have been able to eventually sell it at a higher price and thereby reduce his net capital loss.

[213] *Scullion v Bank of Scotland* [2010] EWHC 2253 (Ch), [2011] PNLR 5 [24] (Snowden QC).

[214] *Scullion* (n 115) [61].

recovered what he would have got if the statement *had been true* less what he actually got. This allows Mr Scullion not only to recoup his 'out of pocket' costs but also the *profit* he would have made if £2000 pcm had been received. This is not consistent with *SAAMCO* because it represents an award of damages *for* the falsity of the information, whereas the falsity rule is a cap on, rather than the measure of, damages. The approach of the deputy judge, on the other hand, ensures Mr Scullion is not worse off than if he had not entered into the transaction but does not give him the benefit of his bargain. It is submitted, with respect, that it is the incomplete analysis of the nature of the 213C counterfactual that may have led Lord Neuberger MR astray: his Lordship seems to have asked himself 'what would have happened if the information had been true' and deducted from it the money Mr Scullion had actually received.

Scullion also illustrates another point. In *SAAMCO*, Lord Hoffmann rejected the 'cap' theory proposed by the valuers on the basis that 'other kinds of loss may flow from the valuation being wrong'.[215] His Lordship was right to do so because this cap (if adjusted for the date) is an accurate reflection of the falsity rule only if the claim is for capital loss, as it usually is. Where, as in *Scullion*, the claim is for revenue loss, a different 'cap' is needed. However, the more important point, which some have doubted, is that there is *always* a cap:[216] applying the falsity rule to negligent misrepresentation dictates that a loss that is a consequence only of the making of the false statement is *never* recoverable. It also follows from the fact that the falsity rule is a cap that it can only *limit* the amount of damages; it cannot increase it.

[215] *SAAMCO* (n 1) 219H, 220A.

[216] See also Kramer (n 24) 312 but, further, ch 7.

E. Conclusion

This Chapter has made two claims. First, it has shown that attempts have been made for well over a hundred years to introduce into the common law the rule that a loss must not only be a consequence of the making of a false statement but also of the falsity of the statement. This is the falsity rule. It has argued that the reason the falsity rule is obscure is that its history and conceptual foundations have never been articulated: it has either been treated as a causal rule, which it is not, or as automatically inapplicable since it cannot be justified on causal grounds. Secondly, it has shown that the best interpretation of *SAAMCO*, and of 213C in particular, is that it introduces the falsity rule into English law. The reason this is not clear from the case itself is Lord Hoffmann's attempt to derive it from the *Empire Jamaica* and *Skandia*. The rule, which has a non-causal justification, is also distinct from breach of warranty because the loss attributable to the falsity of the statement is a cap on, and not the measure of, damages.

It is now possible to investigate what is perhaps the most important doctrinal controversy arising from *SAAMCO*: the (supposed) distinction between information and advice.

CHAPTER VI

THE DISTINCTION BETWEEN INFORMATION AND ADVICE

Part III has thus far considered what one might describe as the general rule in *SAAMCO*. It is commonly said that the general rule does not apply to a defendant who provides advice, rather than information. It is thought to follow that there are *two* measures of damages in *SAAMCO*: the 213C counterfactual, which applies in 'Category 1' cases, and the conventional no-transaction measure, which applies in 'Category 2' cases. This Chapter casts doubt on this claim. It argues that the so-called advice cases are merely instances of the falsity rule applied to defendants who make wider misrepresentations. The same principle explains both categories.

It begins by considering the origins of the distinction between information and advice, which appear to lie in the tort of inducing breach of contract. It then describes the two formulations of the distinction that have appeared in the case law since *SAAMCO* and argues that both are questionable because both assume that advice can be negligent overall independently of the inaccuracy of particular elements of the advice. Accordingly, the distinction is subsumed by the falsity rule analysed in Chapter 5 and is therefore unnecessary.

A. Where Does the Distinction Come From?

Most 'new' conceptual tools employed in case law originate from somewhere, usually a previous authority, academic work or oral argument. *SAAMCO* was argued by eminent

counsel, two of whom are current Supreme Court Justices[217] and one a Lord Justice of Appeal.[218] None of them appear to have invoked the distinction between information and advice formulated at 214E.[219] 214E *may*, however, have been inspired by a passage from page 54 of *Causation in the Law*, where Hart and Honoré deal with the third causal notion described in Chapter 1: interpersonal transactions. Hart and Honoré say that four conditions must be satisfied for the defendant's words or conduct to count as the 'cause' of another human being's act or omission. The second of these is that 'the [defendant's] words or deeds are at least part of the [claimant's] reasons for acting'. This has been considered elsewhere in this thesis.[220] But Hart and Honoré go on to say this:[221]

> This is to advise another *upon* or *about* some contemplated action. Mere advice may be a ground of legal liability, as for instance when a solicitor or doctor negligently gives a client or patient the wrong information, on which the latter acts; in this type of case there may also be liability for failing to provide correct information. To advise another *to do* an action, of course, goes beyond this discussion of the pros and cons. In saying 'I advise you to do this' the speaker personally commends the action, and his doing this may of itself render it eligible in the eyes of someone who trusts or respects him.

It is possible that this is the distinction that Lord Hoffmann tried to articulate at 214E. The difficulty is that it is concerned with a different issue. Hart and Honoré, in this passage, are dealing with whether the defendant, by his words, can become liable as an *accessory*, on the basis that his words constituted a *reason* for the claimant's action. As

[217] Lord Sumption and Lord Toulson.

[218] Lord Justice Briggs.

[219] Parliamentary Archives HL/PO/JU/4/3/1939, HL/PO/JU/4/3/1940, *Printed Cases of Counsel*. It is possible that the distinction was explored in argument (of which, of course, there is no transcript) though not in the Printed Cases.

[220] Ch 2.

[221] Hart and Honoré, *Causation in the Law* (n 55) 54.

Chapter 2 explained, this is irrelevant in a misrepresentation claim, as the question is simply whether the belief it induced was causative (whatever the content of the belief). In contrast, the point may matter in the tort of inducing breach of contract, which is the context in which Hart and Honoré distinguish between inducement and mere advice.[222] For example, in *Allen v Flood*, Lord Macnaghten said that Allen did not 'induce' the company to discharge Flood and Taylor because he had simply reported, without exaggeration or misrepresentation, what the iron-men had independently decided to do.[223] This is cited by Hart and Honoré as an example of a 'mere advice' case which does not attract accessory liability, in contrast to an 'inducement' case, which does. There is a controversy about whether the fact that the communication was disinterested negatives the actus element, as Lord Macnaghten seemed to think, or shows that D did not intend[224] to induce T to breach his contract with C. But the distinction between mere advice and inducement is irrelevant to misrepresentation on *either* view: indeed, when Hart and Honoré come to apply their general formulation to misrepresentation, they accept that 'here the main problem is *not* that of distinguishing advice from inducement'.[225]

Thus, if this is where the distinction was drawn from, its use in claims for damages for misrepresentation was always likely to mislead. Indeed, the courts have struggled to identify precisely what the distinction is. There are two formulations in the post-*SAAMCO* case law. The first, which focuses on the *form* of the communication,

[222] Hart and Honoré, *Causation in the Law* (n 55) 188.

[223] *Allen v Flood* [1898] AC 1 (HL) 149.

[224] See, eg, JD Heydon, 'The Defence of Justification in Cases of Intentionally Caused Economic Loss' (1970) 20 U Toronto LJ 139, fn 171.

[225] Hart and Honoré, *Causation in the Law* (n 55) 192.

takes 214E to be distinguishing between a person under a duty to give advice (or information) about particular points and one under a duty to give advice (or information) about *whether* to go ahead with a certain course of action. For example, in *Harrison*,[226] Neuberger J held that a statement by an accountant that the financial statements of a proposed target had 'no deal breaker' was advice, in contrast to a statement about the *substance* of the target's accounts, which was information. Some judges have said that the question is whether the communication was neutral or contained a value judgment: this is in substance the same point.[227]

The second formulation takes 214E to be concerned with the *relative* importance of the misrepresentation in the claimant's decision-making process: so, a statement about a 'less central' element of the transaction is likely to be treated as information rather than advice. It is important to understand that even a communication classified as 'information' on this basis is, *ex hypothesi*, causative (ie, it is a no-transaction case with respect to both): the concept is therefore designed to distinguish *one* causative representation from another on the basis of whether it was more or less important to the claimant than something else that he also took into account in making his decision. *Hagen v ICI* is an example.[228] A representation by an employer that it was 'in the interest' of employees to transfer their contracts of employment to a buyer was, said Elias J, advice, not information, in contrast to a representation that they would receive

[226] *Harrison v Bloom Camillin* [2000] Lloyd's Rep PN 89 (Ch) 117.

[227] *Intervention Board for Agricultural Produce v Leidig* [2000] Lloyd's Rep PN 144 (CA) 149 (Robert Walker LJ); *Rubenstein v HSBC Bank* [2011] EWHC 2304 (QB), [2011] 2 CLC 459, 506C (HHJ Havelock-Allan QC).

[228] *Hagen v ICI Chemicals and Polymers Ltd* [2002] IRLR 31 (QB).

roughly the same pension benefits, which was information, not advice.[229] What if only one of these representations was negligent? Then, said Elias J, the claimant can invoke the 'advice' rule only if the negligent representations 'themselves *effectively determine* the decision to be made'.[230]

It is submitted, for the reasons that follow, that both formulations misinterpret 214E because, once a representation is shown to be causative, nothing turns on whether it was more or less important than some other representation or condition which was causative in the same sense.

B. Reformulating the Distinction

Information or advice, in whatever form it is given, can be described as negligent only if it (or some element of it) was *inaccurate* because of the representor's carelessness: if an incompetent valuer luckily gets his valuation right, the lender has no claim.[231] Sometimes the content of the communication makes explicit the element of it that it later turns out was inaccurate; for instance, a valuer tells a lender 'this property is worth £15m' and it later turns out that it was worth only £5m. Sometimes the inaccurate element is *implicit*, particularly when the communication takes the form of a recommendation, but it is still the *inaccuracy* that makes the advice or recommendation negligent. For instance, in *Rubenstein*, the defendant recommended a product called the AIG Premier Bond EVRF.

[229] *Hagen* (n 228) [138]–[140].

[230] See also *Aintree* (n 88) [69] (information if 'an ingredient in, but not determinative of' the client's decision) and Evans (n 99) 167.

[231] *Craneheath Securities Ltd v York Montague Ltd* [2001] Lloyd's Rep PN 348 (CA) 350 (Balcombe LJ). As John Gardner has said, all negligence-based duties are actually 'hybrid' duties to not fail for want of trying, not merely duties to try: see, further, ch 8.

The claimant did not want any product which, unlike a cash deposit, was exposed to the secondary market. Now, the *advice* given to Mr Rubenstein—'EVRF is a suitable investment'—was undoubtedly negligent, but *only because* it was *not* akin to a cash deposit: if it had been, the advice would not have been either inaccurate or negligent.[232] The dominant view that the measure of damages applicable to an 'advisor' is the conventional no-transaction measure assumes that, in a case of this kind, it is irrelevant to ask whether the loss was a consequence of the EVRF *not being akin* to a cash deposit: in other words, that one simply does not apply the falsity rule, not that it is satisfied.

It is true that one sentence in Lord Hoffmann's speech is consistent with this assumption,[233] but the better view is that this is not what his Lordship meant. It will be recalled that the justification his Lordship gave for the application of the 213C counterfactual to the valuer (unambiguously an 'information provider') was that there is otherwise no connection between the *constituents* of the wrong and the loss for which the lender seeks damages.[234] 'That which made the act wrongful' was the valuer's carelessly inaccurate statement (explicit, but it need not have been) that the property was worth £15m. Lord Hoffmann said that a 'special policy' is required to depart from the 'normal rule'[235] that the valuer is not liable for a loss that is not a consequence of not having security worth £15m. An example he gave of such a 'special policy' is deceit. It is

[232] He was also told explicitly that the EVRF was the 'same as cash deposited in one of [HSBC's] accounts', which was inaccurate 'information': *Rubenstein QB* (n 227) 478D. The point the text is trying to make is that nothing turns on whether this is made explicit or not: in both cases, giving the advice/information is wrongful only because **(i)** EVRF is not akin to a cash deposit and **(ii)** this was carelessly overlooked.

[233] *SAAMCO* (n 1) 214E ('responsible for *all* the foreseeable loss…'). See also The Rt Hon Lord Hoffmann, 'The Achilleas: Custom and Practice or Foreseeability?' (2010) 14 Edinburgh L Rev 47, 58.

[234] *SAAMCO* (n 1) 212G–213C.

[235] It is not, of course, the normal rule but that does not matter in this context.

difficult to see why Lord Hoffmann would have thought that an honest *recommendation* is also a 'special policy' that entitles the claimant to recover damages for a loss that is a consequence of the giving of the advice, but *not* of the falsity of the *element* of the advice that made it inaccurate.

The better view is that Lord Hoffmann was thinking of cases in which the defendant, by virtue of making a wider representation, becomes liable for a wider range of losses, but *consistently* with the falsity rule. Thus, in *Rubenstein* itself, the loss which Mr Rubenstein suffered when Lehman Brothers collapsed *was* a consequence of the falsity of the element of the advice that made it inaccurate, because he would not have suffered that loss if the EVRF had in fact been akin to a cash deposit. In other words, the *entirety* of a market fall or any other intervening event can sometimes be a consequence of the falsity of a statement, even though it was not in *SAAMCO*. The perception that there are *two SAAMCO* measures is a result of analysing cases involving these wider representations as 'advice' cases although exactly the same principle is at work. It follows that the distinction between information and advice is unnecessary.[236] Indeed, this is why *SAAMCO*, properly understood, does not uniformly exclude or include market loss. The erroneous suggestion that it excludes it has led some to argue that the cases in

[236] In the lecture cited at (n 88), Sir Bernard Rix acknowledges (at 29:50) that the distinction is unsatisfactory but suggests that 'advice' must be taken to mean advice in the 'full-blown sense of advising the claimant to enter into the transaction'. But even 'full-blown advice' is negligent only because it is *inaccurate* in some respect for want of reasonable care.

which the claimant has been able to recover *all* the market loss from a professional are inconsistent with *SAAMCO*.[237]

This analysis is supported by Lord Millett's dissenting speech in *Aneco*,[238] which is discussed in more detail below. Lord Millett there said that Lord Hoffmann was distinguishing between 'a duty to provide information or advice on request' and a 'duty to advise generally when it is left to the adviser to decide what matters he should consider'. Significantly, Lord Millett did not think that the measure of damages even in the latter case is the conventional no-transaction measure, for he said that counsel's concession to that effect in the *Superhulls Cover Case*[239] would have been correct 'only if the broker had assumed responsibility for advising what action should be taken *in relation to the underlying insurance*'.[240] In other words, if the broker had given negligent 'advice' in relation to some other element of the transaction, the claimant could not have recovered damages even though it would not have entered into the transaction if the correct advice had been given.[241]

Another reason to interpret Lord Hoffmann's speech in this way is that the alternative view—that there are two distinct measures of damages—does not seem to be

[237] See, eg, *Edward Symmons* (n 109) [2] (Longmore LJ); Jane Stapleton, 'Cause in Fact and the Scope of Liability for Consequences' (2003) 119 LQR 388, 401; Tim Bullimore, 'Is it Better to be Wrong than Late?' (2013) 29 PN 128 and Rix (n 88).

[238] *Aneco* (n 64).

[239] *Youell v Bland Welch (The Superhulls Cover Case)* [1990] 2 Lloyd's Rep 431 (QB).

[240] *Aneco* (n 64) 196A.

[241] It is possible to read Lord Millett's speech differently: his Lordship may have been distinguishing not between elements of a single transaction but between two different transactions. The passage at [62] is linguistically consistent with both views but it is difficult to see why the latter distinction should be drawn if the former should not.

based on any principle. Consider two cases, both based on *Andrews*.[242] In the first, D, a pensions broker, says to C 'the Equitable Life with-profits annuity is protected by the Policyholders Protection Act 1975'. In fact it is not. In the second, D says to C 'the Equitable Life with-profits annuity is an excellent product and you would be well advised to buy it'. This would be true except for the fact that it is not protected by the Act (ie, it is otherwise an excellent investment). In both cases C has a claim *only because* D negligently overlooked the fact that the product is not protected by the Act. If C subsequently loses money for foreseeable but unrelated reasons, it is certainly open to the law to take the view that he should recover no-transaction damages in both cases, that is, that the falsity rule should not apply. This was the law before *SAAMCO*. However, *once* it decides that the falsity rule applies to Case 1, as *SAAMCO* does, there seems to be no reason to not apply it to Case 2, for it is exactly the same inaccuracy[243] that made the giving of the advice actionable. In short, the distinction between information and advice should be treated as one of fact, not principle: it simply reflects the fact that the falsity rule allows the claimant to recover market (or any other) loss[244] in full if it is a consequence of both the making and the falsity of the statement. If, however, it is not, the fact that the statement took the form of advice is irrelevant.

These points can be illustrated by applying the falsity rule to the cases that have been decided on the basis of the distinction between information and advice. There is a

[242] *Andrews v Barnett Waddingham* [2006] EWCA Civ 93, [2006] PNLR 24. The Court was able to classify this as an information case (because of the pleadings), so the situation envisaged in the text did not arise.

[243] About the applicability of the Act: this is the only inaccuracy in either statement. So the falsity rule gives the same answer in both Cases 1 and 2. But see *Various Claimants v Giambrone & Law* [2015] EWHC 1946 (QB) [350] (Foskett J).

[244] Even if abnormal or voluntary: the nature of the event is irrelevant.

large body of case law on this point: indeed, it is probably fair to say that it is the classification of a particular defendant as an 'information provider' or an 'advisor' that has generated the greatest disagreement since *SAAMCO*. In many cases, the claimant has been able to recover damages for market loss from a professional who has not made any recommendation; equally, in some he has been unable to recover such damages from professionals who *have* made recommendations. The courts have struggled to explain how either result is consistent with *SAAMCO*. It will be shown that the falsity rule provides a straightforward answer.

C. Applying the Falsity Rule to the Existing Case Law

Strikingly, the case law on the distinction between information and advice can be classified into the following:

(1) Cases in which a provider of information *is* responsible for all foreseeable no-transaction losses;

(2) Cases in which an advisor is *not* responsible for all foreseeable no-transaction losses; and

(3) Cases that wrongly classify an information provider as an advisor or (rarely) vice versa, and cases decided correctly without any reference to the distinction

1. Information provider liable for all no transaction losses*: Steggles Palmer* explained

The classic example of information providers being held liable for all the loss is *Steggles Palmer*, which is one of the most important (and difficult) post-*SAAMCO* authorities. It was tried by Chadwick J[245] in 1997 as part of a consolidated action brought by the Bristol & West Building Society against a number of solicitor firms involved either culpably or innocently in mortgage fraud. The negligent failure of these firms to detect signs of mortgage fraud led to large losses for lenders at a time when the markets were falling.[246]

Three of the individual cases tried in the action—*Fancy & Jackson*, *Colin Bishop* and *Steggles Palmer*—have proved to be extremely influential. It is crucial to remember that all three were no-transaction cases. In the first, *Fancy & Jackson*, Chadwick J held that the solicitors were liable to pay only nominal damages for failing to obtain a search certificate confirming title prior to completion, because the Society obtained title subsequently. In the second, *Colin Bishop*, the solicitors had failed to report a sub-sale to the Society and in the third, *Steggles Palmer*, the solicitors had failed to report not just this but also that the intermediate vendor was the borrower's employer, and that the borrower had not paid the margin out of his own resources.

Chadwick J held that Colin Bishop's liability was identical to the valuer's in *SAAMCO* but that Steggles Palmer's extended to all no-transaction losses, that is,

[245] *Bristol and West Building Society v Fancy & Jackson* [1997] 4 All ER 582 (Ch).

[246] The fallout of the fraud is considered in Nicholas Patten, 'The Solicitor's Liability for Failing to Spot Mortgage Fraud' (1995) 11 PN 1.

including *all* the losses attributable to the market fall. For those who favour a causal explanation of *SAAMCO* or the distinction between information and advice, this must seem inexplicable: indeed, Simon Wilton has recently said that it is a 'rather strange application of *SAAMCO*…it focuses upon what would have happened if the correct information had been provided when that was not the basis upon which *SAAMCO* was decided'.[247]

(i) The Rationale for Steggles Palmer

It is important to notice that Chadwick J's explanation of the difference between *Steggles Palmer* and *Colin Bishop* was *not* that the former was an advisor and the latter an information provider—if one wishes to use the classification, it is plain both defendants were information providers, as conveyancing solicitors do not give commercial advice or make recommendations. Instead, Chadwick J explained his decision in this way: [248]

> The position is different in the case of Steggles Palmer. The reason why the society would not have made the advance is, in my view, because the society would have been unwilling to lend to *that borrower in order to fund the purchase from that vendor* … I do not think it right to take the same view in the case of Colin Bishop. There was no evidence that they were connected with the intermediate vendor, Mr Slater. I think that the disclosure would have led the *Cheshunt society to doubt the valuation* that it had obtained for the property… The position seems to me indistinguishable from the valuer cases considered in SAAMCO itself.

On the approach favoured here, this reasoning is clearly correct and straightforward to explain. The misrepresentation made by the Steggles Palmer firm was, effectively, that

[247] Wilton (n 204) 18.

[248] *Fancy & Jackson* (n 245) 622.

there were no signs that the borrower was fraudulent.[249] The consequence of lending to a fraudulent borrower is (usually) that the borrower disappears with the money. In computing the quantum, the lender must give credit for whatever recovery is actually made not because of *SAAMCO* but because to that extent there is no loss. Importantly, the fact that the lender would have lost less if the market had not fallen is irrelevant, but also consistent with *SAAMCO*, because exposure to the market was *itself* (unlike in *SAAMCO*) a consequence of the falsity of the information given by the Steggles Palmer firm. In other words, just as the valuer is liable for the consequences of lending with insufficient security, so the solicitor is liable for the consequences of lending *to a fraudulent borrower*:[250] the loss of the money lent, in its entirety, is such a consequence in the latter case but not in the former.

Contrast this with the disposition of *Colin Bishop*. The misrepresentation made by that firm was, effectively, that it was not aware of any facts (a recent sub-sale at a lower price) which would give the lender reason to doubt the accuracy of the valuation that it had received.[251] The consequence of the falsity of that information was that the lender had less security than it would have had if, in fact, there had been no reason to doubt the accuracy of the valuation. *Ex hypothesi*, this solicitor's position must be indistinguishable

[249] Because this was why the lender wanted to know whether related parties were involved in the chain of transactions.

[250] Mr Kramer argues that 'all the consequences of lending' were within the scope of the Steggles Palmer's duty: Kramer (n 24) 326. With respect, they were not: as this chapter has explained, only the consequences of lending to a *fraudulent* borrower were, but the market loss (in its entirety, unlike in *SAAMCO*) was such a consequence.

[251] See also AM Dugdale, KM Stanton and JE Parkinson, *Professional Negligence* (3rd edn, Butterworth 1998) 428 and Alan Sprince, 'South Australia and Solicitors: Does the Umbrella Leak?' (2000) 16 PN 139, 148.

from that of the valuer. Chadwick J so held and it is respectfully submitted that the learned judge was right.

One should not think[252] that the finding in *Steggles Palmer* that the borrower was *fraudulent* meant that some special rule was applied: that fact was relevant only because it showed that the borrower was not creditworthy, and exposure to the market is a consequence of a lending to a borrower who is not creditworthy.[253] Therefore the entirety of the market loss satisfies the falsity rule. Mr Strauss QC, in an instructive judgment,[254] makes the point that, if this is right, there is a distinction between advice relating to the borrower and advice relating to the security, so that (for example) a negligent *credit reference* would invariably lead to market loss damages. This is true, but it is submitted that the distinction is justified, because the consequence of the falsity of the information in the former case is the making of a loan to a borrower *without means*, but in the latter the making of a loan with insufficient security. Post-*SAAMCO* cases[255] giving lenders market loss damages on this basis are, therefore, largely[256] correct, though not for the reasons they give (such as 'viability' and 'centrality' and 'fundamental' error).

It is important to notice that recovery of market loss is not automatic even in the Steggles Palmer or credit-reference cases. If the loss the claimant is attempting to recover

[252] As, for example, in *Credit & Mercantile plc v Nabarro* [2014] EWHC 2819 (Ch) [17] (Elleray QC).

[253] This was recognised in *Gabriel v Little* [2013] EWCA Civ 1513 [82] (Gloster LJ). See also *Broker House Insurance Services Ltd v OJS Law* [2010] EWHC 3816 (Ch), [2011] PNLR 23 [13] (Lewison J).

[254] *Clack* (n 199) [107] (Strauss QC).

[255] *Omega Trust Company Ltd v Wright Son & Pepper (No. 2)* [1998] PNLR 337 (QB); *Leeds & Holbeck* (n 86).

[256] With the exception of *Bristol & West Building Society v Rollo Steven & Bond* [1998] SLT 9 (OH) and *Preferred Mortgages Ltd v Shanks* [2008] CSOH 23, although the former was cited with approval by Lord Reed in *Newcastle BS v Paterson Robertson and Graham* 2001 SC 734 (OH) [23].

is not a consequence of the falsity of the information in question (eg of lending to a fraudulent or impecunious borrower), the defendant is not liable even though it is a no-transaction case. For example, it is theoretically open to the defendant[257] to show that an honest and prosperous borrower would also have defaulted, thereby exposing the lender to the falling market. In practice, it will often be impossible to prove this. However, Mr Strauss QC gave a practical example using his hypothetical credit reference agency: what if, he asked, the borrower defaults because he has lost his job as a result of illness, after the loan is made?[258] He did not provide the answer but it submitted that the defendant is not liable, because in such cases the loss is not a consequence of lack of *creditworthiness*. The *Haugesund* case,[259] discussed below, is similar to the example and supports this result. It shows that in reality the falsity rule applies to *all* defendants, with the scope of liability depending on how wide the representation is and what it concerns (eg borrower/security).

(ii) A Flawed Explanation of Steggles Palmer: Information and Advice

If the argument made here is correct, there is a simple explanation for the most difficult post-*SAAMCO* case. On the other hand, *Steggles Palmer* must be a puzzle to those who endorse the current formulation of the distinction between advice and information or a causal analysis of *SAAMCO*. Plainly the Steggles Palmer firm was not an advisor any more than was the Colin Bishop firm: the two transactions were virtually identical, as

[257] The burden of proof is on the defendant because the falsity rule, if this thesis is correct, is a defence, not a denial: see James Goudkamp, *Tort Law Defences* (Hart 2013) 12, 138. But the relationship between the classification of a rule as a defence and the burden of proof is controversial.

[258] *Clack* (n 199) [109].

[259] *Haugesund Kommune v Depfa ACS Bank (No 2)* [2011] EWCA Civ 33, [2012] Bus LR 230.

were the duties imposed on or assumed by the solicitors. What differed was the subject-matter of the misrepresentation. One firm's misrepresentation concerned the honesty of the borrower while the other's concerned the adequacy of the lender's security.

Notwithstanding this, it has sometimes been suggested that Chadwick J 'effectively' treated Steggles Palmer as an 'advisor'.[260] It is not clear what 'effectively' means, but it is in any case doubtful whether this is correct. For one thing, Chadwick J cited 214E but made no finding that Steggles Palmer was an advisor. The only explanation given for the difference was the passage set out above, which is concerned with the subject-matter of the misrepresentation rather than with whether the solicitor made a 'recommendation' or a 'value judgment'. This is, again, consistent with the argument made in this Chapter, but not with either formulation of the distinction between information and advice.

Secondly, there is unequivocal Court of Appeal authority confirming that *Steggles Palmer* is not an 'advice' case. In *Portman*, the solicitors, like Steggles Palmer, effectively represented to the lender that the borrower was honest and solvent. The lender's loss, when the borrower defaulted, was increased by a falling market. The solicitors said that the *SAAMCO* measure nevertheless applied. Otton LJ rejected this argument, expressly endorsed *Steggles Palmer* and, most importantly, said this:[261]

> On this analysis, I do not consider it necessary to consider whether BA gave advice rather than information.

[260] See, eg, *Gabriel* (n 253) [78] (Gloster LJ) and Shail Patel, 'The Consequences of Fraud' (Lecture to the Professional Negligence Bar Association, 14 November 2012) [13].

[261] *Portman Building Society v Bevan Ashford* [2000] 1 EGLR 81 (CA) 86.

Although Otton LJ's own explanation that *Steggles Palmer* applies whenever the non-breach position would have shown that the transaction was not 'viable' has been criticised,[262] it is submitted that this passage shows beyond doubt that *Steggles Palmer* is not an 'advice' case.

Unfortunately, two later Court of Appeal cases—*Burd Pearse* and *Gabriel*—overlooked this, leading to confusion about the basis of *Steggles Palmer*. In *Burd Pearse*—a difficult case—the lender's solicitor negligently failed to discover restrictive covenants and certified that the lender would obtain 'good and marketable title'. It was a no-transaction case. When the bank eventually realised its security, the sale price was depressed by the discovery of the covenants and a falling market. Evans-Lombe J held that the lenders could recover all their losses on the strength of *Steggles Palmer* but, with respect, misunderstood Chadwick J's decision.[263] In the Court of Appeal, Jonathan Parker LJ said that the 'crucial question is whether the instant case is a *Steggles Palmer* case or a *Colin Bishop* case'. His Lordship's reasons for treating it as a 'Colin Bishop case' are, with respect, difficult to follow.[264] More importantly, his Lordship said that Chadwick J

[262] *Haugesund* (n 260) [75] (Rix LJ) and Cyril Kinsky, 'SAAMCO 10 years on: Causation and Scope of Duty in Professional Negligence Cases' (2006) 22 PN 86, 94. This criticism is justified only because Otton LJ did not fully explain what 'viable' means. It is not unviability *per se* that justifies the measure adopted but the fact that unviability is a result of the borrower's *creditworthiness*.

[263] Evans-Lombe J thought that *any* no-transaction case is a *Steggles Palmer* case: *Burd Pearse* (n 83) 80. The same error is evident in the disposition of a number of individual appeals in a consolidated action tried by Blackburne J: see, in particular, *Balmer Radmore (Introductory Sections)* (n 83) 271; *Nationwide BS v Vanderpump & Sykes* [1999] Lloyd's Rep PN 422 (Ch) 442; *Nationwide BS v Archdeacons* [1999] Lloyd's Rep PN 549 (Ch) 556; *Nationwide BS v ATM Abdullah* [1999] Lloyd's Rep PN 616 (Ch) 623 and *Nationwide BS v Littlestone & Cowan* [1999] Lloyd's Rep PN 625 (Ch) 631. See also *Lloyds Bank v Parker Bullen* [2000] Lloyd's Rep PN 51 (Ch) 63 (Longmore J).

[264] Three reasons were given: see *Crosse & Crosse v Lloyds Bank plc* [2001] EWCA Civ 366 [103]. First, that the existence of the covenants did not render the security 'valueless'. This should not matter since it was anyway a no-transaction case. Second, that the bank might have lent a lower amount even if the existence of the covenants had been disclosed. If true, this made it a successful transaction case and it was unnecessary to invoke *SAAMCO*, much less *Steggles Palmer*. Third, that the borrower was not a person 'to

had 'in effect…equated the position of the solicitors in *Steggles Palmer* with the adviser whose duty it is to advise as to what course of action should be taken'.[265] This appears to be a misinterpretation of Chadwick J's judgment: a conveyancing solicitor surely does not advise a lender about 'what course of action should be taken'. It is also irreconcilable with *Portman*.

Gabriel followed *Burd Pearse*. It is unnecessary to analyse this case in detail because, given that Gloster LJ overturned certain findings the judge below had made,[266] the conclusion that the loss did not satisfy the falsity rule[267] was correct. Unfortunately, Gloster LJ did not take the opportunity to explain that this conclusion can be reached without resorting to the distinction between information and advice, as Gross LJ did in *Haugesund*:[268] on the contrary, her Ladyship endorsed[269] Jonathan Parker LJ's analysis of *Steggles Palmer*, notwithstanding *Portman*. For the reasons already given, it is respectfully submitted that in this respect her Ladyship fell into error.

In sum, if the explanation of *SAAMCO* advanced in this Part is accurate, it is possible to explain *Steggles Palmer*, and why defendants who only give specific

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whom the Bank was unwilling to lend'. This is correct but incomplete. The third reason meant that the loss was a consequence of the inadequacy of the security rather than of the unreliability of the borrower, as in *Steggles Palmer*. Only on this ground can the result in the case be defended, and that too only if one assumes that the covenant had no impact on the ability of the Bank to actually *realise* the security. If it did, arguably all the loss should have been recovered. For a contrary view, see Kramer (n 24) 324.

[265] *Lloyd's Bank* (n 264) [99].

[266] *Gabriel v Little* [2012] EWHC 1193 (Ch), [2013] 1 BCLC 750 [86] (HHJ Englehart QC).

[267] The Court of Appeal did not, of course, use the language of the 'falsity rule': the traditional terminology of scope of duty and information/advice was deployed.

[268] Discussed below.

[269] *Gabriel* (n 253) [78].

information are nevertheless liable for market losses, without resorting to the distinction between information and advice. I now turn to the converse case.

2. Advisors not responsible for all no-transaction losses

For the argument made in this chapter to succeed, it would, of course, have to be shown that a defendant is not liable for market loss if that loss does not satisfy the falsity rule, even though the case is treated as a 'Category 2' or 'advice' case. This sub-section shows that this is indeed the law, although the courts have found it difficult to justify it under the *SAAMCO* framework. This is because of the perception that an advisor is liable for no-transaction losses even if the loss-making element of the transaction was not a consequence of the falsity of *what it was* that made the advice inaccurate. A good example of why this cannot be correct is Lord Hoffmann's famous mountaineer. In *Rubenstein*,[270] Rix LJ distinguished it by saying that

> [t]he doctor did not advise, let alone recommend, his patient to go mountaineering: he merely told him that his knee was in good shape.[271]

At first sight, it is not easy to see why it should matter whether the doctor gratuitously told the patient to try alpine climbing in Mont Blanc or the patient elicited that statement from him with a pointed question. In either case, the loss is not a consequence of the only inaccuracy (the fitness of the knee) that made the doctor's statement negligent. There seems to be no 'special policy' of the kind that Lord Hoffmann said is needed to justify holding the doctor liable for a loss that is not related to

[270] *Rubenstein* (n 4) [103].

[271] See also Rix (n 88).

the subject-matter of his misrepresentation.[272] Rimer J was, therefore, correct in doubting whether the doctor is *ever* liable,[273] as these 'risks … had nothing to do with faulty knees'.[274] In both cases, the consequence of the falsity of the information (or advice), as Rimer J recognised, is the same.

It is respectfully submitted that Mr Kramer's defence of the information/advice distinction and of Rix LJ's analysis of the mountaineer example is flawed, because he applies the falsity rule not to the element of the advice that was inaccurate ('the knee is fit') but to the advice itself ('the expedition is safe').[275] This effectively asks what would have happened if the doctor had given a warranty about risks other than the gammy knee. No doubt the doctor is liable for such a risk (eg a landslide) if *in fact* he gives a warranty that an expedition is 'safe', but the *hypothetical* 'what if it had been true' test in *SAAMCO* is applied to the inaccuracy, not the overall advice. What made the doctor's advice inaccurate was the statement (whether expressly made or not) 'the knee is fit' and not the formal words 'the expedition is safe'. Consider this modification of the example: suppose that a doctor, negligently failing to realise that his patient has a weak heart, 'advises' him to run for an hour in London every morning in order to improve his fitness; applying the information/advice distinction, or the 213C counterfactual to the advice *as a*

[272] To clarify, the claim is not that a special policy is actually needed: as chapter 8 shows, it is the use of the falsity rule that requires special justification. The point here is merely that, if it applies, there is no basis for limiting it to 'information' cases.

[273] Absent fraud: see *Slough Estates* (n 193) 245 (May J) and The Rt Hon Lord Hoffmann, 'Common Sense and Causing Loss' (Lecture to the Chancery Bar Association, 15 June 1999) 19.

[274] *Michael Gerson Investments Ltd v Haines Watts* [2002] Lloyd's Rep PN 493 (Ch) 498.

[275] 'If a professional has advised that the course of action be taken then anything that goes wrong during the course of action would not have occurred if the advice given had been correct': Kramer (n 24) 317.

whole, leads to the conclusion that the doctor is liable if the patient is injured by a careless motorist during the run.

The proposition that the falsity rule simply does not apply to 'advice' cases leads to a number of other anomalies. These can be illustrated by two well-known cases from the Court of Appeal and the House of Lords respectively: *Haugesund*[276] and *Aneco Reinsurance*.[277] In *Haugesund*, Wikborg Rein, a law firm, negligently told Depfa that the Kommunes, a Norwegian local authority, had capacity under Norwegian law to enter into a swap. It also correctly told Depfa that it would be impossible to enforce a judgment against the Kommunes. So Depfa was aware that the Kommunes were effectively judgment-proof but evidently thought that this was an acceptable commercial risk. As it happened, the Kommunes later persuaded the English court that the swaps were void, a Pyrrhic victory as Depfa won its counterclaim for restitution. But the Pyrrhic victory would soon be Depfa's because it discovered that the Kommunes could not pay the English court's award: the loss, therefore, was not a consequence of the invalidity of the swaps (about which Wikborg had advised wrongly) but of the impecuniosity of the Kommunes (about which Wikborg had advised correctly). Depfa nevertheless sought to recover all its loss from Wikborg, it being common ground that this was a no-transaction case. Before Tomlinson J, it succeeded but the learned judge appears to have fallen into the same counterfactual error that has bedevilled this area of the law.[278] In the Court of Appeal, the central question was whether this was a 'Category 1' (information) or a

[276] *Haugesund* (n 260). See also *Andrews* (n 242).

[277] *Aneco* (n 64).

[278] *Haugesund QB* (n 83) [31]. Rix LJ recognised that this was an error: *Haugesund* (n 260) [76].

'Category 2' (advice) case. Rix LJ concluded that it was a Category 1 case because 'Wikborg Rein…did not have a general retainer to report or notify problems about the proposed transactions'.[279]

No doubt this is true. But what if (implausibly) Depfa had given it such a retainer? Suppose that Wikborg, in discharge of such a retainer, had then said to Depfa 'there are no problems of any kind in the proposed transaction'. Assuming Depfa had previously been told about the unenforceability of English judgments (as it was), this statement would have been negligent only because of the *incapacity* of the Kommunes. The consequence of the falsity of advice about incapacity would have been Depfa's loss of an enforceable *swap*, not an enforceable English judgment, much less one against a prosperous counterparty. In his concurring judgment, Gross LJ said that it did not matter 'whether this is a "category 1" or "category 2" case' and it is respectfully submitted that his Lordship was right.

In these cases, the use of information/advice fortunately did not affect the outcome. It did so in *Aneco Reinsurance*, in which a majority of the House of Lords was persuaded that an 'advisor' is *always* liable for no-transaction losses, Lord Lloyd going so far as to suggest that that is the basic rule. Mr Forster of Johnson & Higgins offered Mr Crawley of Aneco a share of an excess of loss reinsurance treaty called the Bullen treaty. Mr Crawley agreed to buy three units provided retrocession could be obtained. Mr Forster represented to Mr Crawley that he had obtained retrocession. However, he had told the retrocessionaires that Bullen was a quota share treaty: it was actually a fac/oblig

[279] *Haugesund* (n 260) [74].

treaty, which was obviously less attractive[280] to them. This non-disclosure enabled the retrocessionaires in due course to avoid Aneco's claim. If the retrocession contracts had been enforceable, Aneco would have recouped $11m out of the $35m it paid out. It was a no-transaction case because retrocession could not have been obtained at any price if Mr Forster had told them that Bullen was fac/oblig. The House of Lords held that J&H were liable for the entire loss because they were to be treated as advisors, not information providers.[281]

One peculiar feature of *Aneco* is that it may not have been a misrepresentation case at all. The breach of duty which Aneco pleaded was J&H's misrepresentation *to the brokers* (not to Aneco) that Bullen was a quota share treaty. As in *Sharp*[282] and recently *Sebry*,[283] this was therefore a case in which the misrepresentation was acted upon not by the claimant but by a third party to the claimant's detriment. If that is right, the distinction between information and advice was a red herring because Aneco's claim was not founded on inducement. But all three members of the Court of Appeal,[284] and a majority

[280] For a detailed account of the facts and of the nature of excess of loss reinsurance treaties, see Ian Hunter, 'Mountaineers, Doctors and Insurance Professionals' (Lecture to the Professional Negligence Bar Association, 4 July 2002) [13]–[22]. Mr Hunter was leading counsel for Aneco.

[281] See the criticisms of the majority's reasoning in Edwin Peel, 'SAAMCO Revisited' in Andrew Burrows and Edwin Peel (eds), *Commercial Remedies* (OUP 2003). Compare Richard Butler, '*SAAMCO* in Practice' in Andrew Burrows and Edwin Peel (eds), *Commercial Remedies: Current Issues and Problems* (OUP 2003) and Hew Dundas, 'Scope of Duty of Care For Professional Advice' (2002) 68 Arbitration 177. At 183, Mr Dundas argues that *Aneco* is analogous to the mountaineer's 'knee giv[ing] way with the consequence that he falls and suffers further injury'. But since their Lordships said that an advisor is liable for *all* the foreseeable consequences, the correct analogy is the doctor being held liable on the ground that he was an advisor even though the knee did not give way.

[282] *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223 (CA).

[283] *Sebry v Companies House* [2015] EWHC 115 (QB) [88] (Edis J).

[284] *Aneco CA* (n 83) 154 (Evans LJ) 159–60 (Aldous LJ, dissenting) 164 (Ward LJ).

of their Lordships,[285] analysed the facts differently: they took the breach (although apparently not pleaded) to be J&H's negligent representation *to Aneco* that retrocession had been obtained.

On this analysis, *Aneco* (as the House recognised) was indistinguishable from the *Superhulls Cover Case*. There the broker negligently represented to Youell that the terms of the reinsurance that it had obtained on Youell's behalf were 'as original', that is, the same as the terms of the original insurance policies that Youell had written. In reality cover under the reinsurance policies terminated 48 months after the construction of the insured vessels, though there was no such limitation under the main policies. The breach, unlike in *Aneco*, was the negligent representation *to* Youell that reinsurance was in place.[286] It should have followed that Youell could not recover for a loss that it would have incurred even if the reinsurance had been in place, that is, for a loss that did not satisfy the falsity rule. However, *SAAMCO* and *Skandia* were yet to be decided and counsel for the brokers conceded that the conventional no-transaction measure was the correct measure.[287]

It is, with respect, plain that the *Superhulls Cover Case* cannot survive *SAAMCO*. The reason the majority of the House of Lords in *Aneco* thought that it could is its assumption that the falsity rule simply does not apply to a case that is classified by *SAAMCO* as 'advice' rather than 'information'. Thus, Lord Lloyd said that the 'basic rule' was Sir Thomas Bingham MR's measure, from which judges exceptionally departed

[285] *Aneco* (n 64) [2] (Lord Slynn) [8] (Lord Lloyd). Lord Browne-Wilkinson agreed with Lord Lloyd.

[286] *The Superhulls Cover Case* (n 239) 446–48 (Phillips J).

[287] *The Superhulls Cover Case* (n 239) 463.

in the case of defendants who merely provided information;[288] Lord Steyn thought likewise.[289] This assumption—that there are two measures of damages in *SAAMCO*—is, with respect, erroneous: if, as this chapter has argued, there is in fact only one measure, the question was simply whether Aneco could show that its loss satisfied the falsity rule. It was common ground that it could not.

I can leave this topic by highlighting what is perhaps the most curious implication of the 'advice' reasoning in *Aneco*: Johnson & Higgins would have been liable to pay $24m *even if* the retrocessionaires had chosen not to avoid the contract.[290]

3. Wrong Classification of Defendants and Cases Decided Independently of the Distinction

This can be dealt with briefly because the principal contention of this chapter is that the distinction is unnecessary. The difficulty in its use has been compounded by the fact that the courts have sometimes adopted artificial classifications, mainly in treating information providers as advisors. A well-known example is the classification of conveyancing solicitors as advisors.[291] There are also a number of cases in which the courts have implicitly accepted the approach proposed here, by asking whether the particular loss was also a consequence of the falsity of the information. Many of these

[288] *Aneco* (n 64) [12].

[289] *Aneco* (n 64) [40].

[290] See also Sumption (n 63) [16].

[291] See, eg, *Carter* (n 106); *Shanks* (n 256) and *Rollo* (n 256).

clearly reach the right conclusion and yet either do not at all refer to information/advice or simply pay lip service to it.[292]

D. Conclusion

This Chapter has argued that there is no distinction between information and advice. The advice cases are simply illustrations of how the falsity rule works if the defendant has made a wider representation or a representation about a different kind of risk. The significance of this point is that there is only one measure of damages in *SAAMCO*: the falsity rule. Important questions, of course, remain: notably, what is the *justification* for applying the falsity rule in the first place, if (as this thesis has argued) it is not causal? Some of these are dealt with in the last two chapters of this Part but, whatever the answers, the ratio of *SAAMCO* should now be clear: in *every* claim for damages for negligent misrepresentation, the claimant can recover damages *only* for a loss that was a consequence of the making of the false statement *and* of the falsity of the statement.

[292] See, eg, *Ball v Banner* [2000] Lloyd's Rep PN 569 (Ch) [10.7] (Hart J) revd on liability (30 June 2000, CA); *BDG Roof-Bond Ltd v Douglas* [2000] PNLR 396 (Ch) 425 (Park J); *Petersen v Rivlin* [2002] EWCA Civ 194 [29] (May LJ); *Benton v Miller & Poulgrain* [2005] 1 NZLR 66 (NZCA) [102] (Hammond J); *Weston v Gribben* [2005] EWHC 2953 (Ch) [44] (Peter Smith J) and *Torre Asset Funding Ltd v Royal Bank of Scotland* [2013] EWHC 2670 (Ch) [211] (Sales J).

CHAPTER VII

THE WIDER SCOPE OF DUTY RULE AND RIVAL EXPLANATIONS OF *SAAMCO*

The first three chapters of this Part have investigated the narrower falsity rule which, it was argued, constitutes the ratio of *SAAMCO*. This chapter is concerned with the wider 'scope of duty' rule. Many judges and scholars associate *SAAMCO* with the wide rather than the narrow rule: this is usually because they take the narrow rule to be no more than an instance of the wider rule.

This Chapter makes three claims. First, the wider scope of duty rule cannot explain or justify the falsity rule as applied to valuers in particular or to misrepresentation more generally. Secondly, the wider rule is in any event flawed, at least insofar as it purports to *limit* liability, though it can (arguably) *extend* it. Thirdly, two other explanations of *SAAMCO*—Professor Stapleton's 'normative reasons' theory and the 'contract remoteness' theory—are, with respect, also flawed.

A. The Scope of Duty Rule Cannot Explain the Falsity Rule

The wider scope of duty rule, to be clear, is the rule that the defendant is liable for some loss only if the reason for, or purpose of, requiring him to take reasonable care was the risk that *this* loss would materialise: the fact that some other loss was *caused* by the wrongful act is said to be irrelevant. This is often described as the 'risk theory' and many

commentators have taken *SAAMCO* to have adopted it.[293] The soundness of the risk theory is examined in the next sub-section. For now, it can be assumed to be sound. But for it to rationalise *SAAMCO* it would also have to be capable of explaining the result in the case. It can do this only if it is the case that the ordinary consequences of the act of reliance ***per se*** (eg whether to lend, whether to buy) are not among the reasons for requiring defendants to take reasonable care in making statements. Applied to valuers, it would have to be shown that the reason why a valuer is required to provide a careful valuation is not the risk of the lender making an unwanted loan but (only) the risk that the loan, once made, will be insufficiently *secured*.

This should be rejected for three reasons. First, it is inconsistent with Lord Hoffmann's own analysis of the lender-valuer relationship in *SAAMCO*. His Lordship pointed out that the 'purpose for which the [valuation] is provided' is to allow the lender to 'decide ***whether***, and if so how much, he would lend'.[294] In other words, the valuer is required to be careful because he is more likely to produce an accurate valuation if he is careful; and the purpose of requiring an accurate valuation is to allow the lender to decide *whether* to lend and, *if* he decides to lend, to ensure that he has the security that he thinks he has. The fact that the latter is one of the benefits of having an accurate valuation does not mean that the former is not.

[293] Because they read 'that which made the act wrongful' in 213C as a reference to the *reasons why* the wrong has certain constituents rather than as a reference to the constituents themselves: see, eg, Marc Stauch, 'Risk and Remoteness of Damage in Negligence' (2001) 64 MLR 191, 197–98; Allan Beever, *Rediscovering the Law of Negligence* (Hart 2007) 144; Stiggelbout, 'Remoteness' (n 68) 115 and Clark and Nolan (n 68) 6. This interpretation of 213C is assumed to be correct in this chapter although, of course, it is not: see ch 4.

[294] *SAAMCO* (n 1) 211D.

Secondly, the proposition that (at least) the intended act of reliance *per se* is one of the reasons for requiring the defendant to be reasonably careful can be tested by the converse valuation case: negligent *undervaluation*. Suppose that D negligently tells C that his house is worth £1m when in fact it is worth £3m. As a result, C decides not to sell it. He discovers the true value three months later and puts the house on the market. Before it can be sold, some contingency intervenes: for example, there is a general fall in the property market. It seems plain that in this case the reason D was required to take reasonable care was the risk that C would fail to sell a house that he would otherwise have sold. In other words, the 'purpose' of providing a careful valuation is *not* confined to the sufficiency of the security: D would be liable notwithstanding that C's loss would have been suffered even if the information *had been true*. Indeed, in a case that is similar to this hypothetical, Langley J said that the purpose of requiring the valuer to be careful was 'to enable the [claimant] to decide *whether* and if so at what value to dispose of the ground and … [the valuer] knew or at least should have known that [the seller] would rely upon it for that purpose.'[295] If allowing the claimant to decide whether to sell is one of the purposes of requiring the valuer to be careful in an undervaluation case, it is difficult to see why allowing him to decide whether to lend or buy is not, in an overvaluation case. That is not to say that the lender or buyer must, as a matter of logic, be able to recover no-transaction *damages*, but only that any limitation on his right to do so cannot be derived from the *instrumentality* of the primary obligation. In other words, heretical as this may sound, the language of 'scope of duty' was largely a red herring in

[295] *Trustees of Wasps Football Club v Lambert Smith Hampton Group Ltd* [2004] EWHC 938 (Comm) [204], [226].

SAAMCO because it does not explain the result in the case. What does explain it is the falsity rule, but that rule is independent of the instrumentality of the primary obligation.

Thirdly, those who read *SAAMCO* as a case about the 'purpose' of the duty often rely on *Caparo*[296] and related cases dealing with when a misrepresentation is actionable. Indeed, Lord Hoffmann himself in *SAAMCO* turned to *Caparo* to justify the proposition that the risk of an unwanted loan *per se* is not one of the purposes of requiring the valuer to be careful.[297] But all of these cases are concerned with identifying the intended[298] act of reliance, in order to *connect* the claimant and the defendant: they are not cases about scope of liability or remoteness. The intended act of reliance is important because there is no *causal* relationship between a statement and the loss for which damages are claimed if the statement was not intended to be relied upon. As Hart and Honoré explain, this is a distinctive feature of interpersonal transactions.[299] The courts have recognised the existence of this causal requirement from an early stage in the development of liability for misrepresentation, both fraudulent and negligent.[300] It is well illustrated by a hypothetical example given by Lord Cairns. D knowingly makes a false statement about the condition of his house to C, a prospective buyer. C does not proceed with the transaction. Subsequently, T offers to buy the same house from D and approaches C for a loan. C makes the loan thinking that the house is good security. C, said Lord Cairns, has

[296] *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL).

[297] *SAAMCO* (n 1) 212B.

[298] Intended or foreseeable as very likely.

[299] Ch 2 above.

[300] See, eg, *Pilmore v Hood* (1838) 5 Bing NC 97, 132 ER 1042, 1045 (Tindal CJ); *Barry v Croskey* (1861) 2 J&H 1, 70 ER 945, 946 (Page-Wood VC); *Gross v Lewis Hillman Ltd* [1970] Ch 445 (CA) 465 (Cross LJ) and, recently, *OMV Petrom SA v Glencore International AG* [2015] EWHC 666 (Comm) [139] (Flaux J) and *Taberna Europe CDO II plc v Selskabet* [2015] EWHC 871 (Comm) [105] (Eder J).

no claim against D if the security is worthless even though the false statement was made directly to him and even though D knew it to be false, because he was not intended to rely on the statement for the purpose of deciding whether to make a loan.[301] In these cases, it is necessary to investigate the 'purpose' of a statement only to ascertain what *decision* (act/omission) the claimant was intended to make based on the statement: it throws no light on the representor's *scope of liability* for the consequences of that act or omission.

This is all that *Caparo* holds. Lord Bridge, who gave the leading speech, said that one of the 'salient features' of the misrepresentation cases was that the defendant could be 'expected…specifically to anticipate that the plaintiff would rely on the advice or information…for the very *purpose* for which he did in the event rely on it'.[302] Here what 'purpose' means is that the defendant should intend or know that the claimant is likely to use the information to decide whether to proceed with some identifiable *act or omission*: in *Caparo* itself, buying shares, rather than exercising the statutory rights available to shareholders. This is a causal (not scope of liability) problem and it is in *this* context that Lord Bridge made the widely quoted observation[303] that

> [i]t is never sufficient to ask simply whether D owed C a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless.[304]

[301] *Peek v Gurney* (1873) LR 6 HL 377 (HL) 411–12.

[302] *Caparo* (n 296) 621 (Lord Bridge).

[303] Including by Lord Hoffmann: *SAAMCO* (n 1) 212B.

[304] *Caparo* (n 296) 627.

Lord Oliver's speech also uses 'purpose' to identify the intended act of reliance (to connect C and D), rather than the scope of D's liability for the consequences of that act. This does not mean that some consequences are conceptually incapable of being excluded from the scope of protection, but only that the *purpose* of requiring the defendant to be careful (the wider *SAAMCO* principle) cannot explain why they are excluded, at least in relation to misrepresentation. The justification for excluding liability for certain consequences of the act of reliance (eg market loss in excess of the overvaluation) must therefore lie elsewhere. Put differently, the purpose of requiring the auditors in *Caparo* to be careful demonstrated that there was no causal relationship between their statement and the claimant's act of reliance (buying shares); but even if there had been (say the report had been commissioned by individual claimants), the purpose of requiring them to be careful would have thrown no light on whether they were or were not liable for particular *consequences* of the claimant's decision to buy shares (eg a falling stock market).[305]

Mr Kramer rejects this analysis. He argues that reliance on a statement is '*per se* indirect' but that the claimant may rely on it for the 'purpose' for which it was made:[306] thus, *SAAMCO* is, after all, a case about the purpose of the duty. However, the proposition that reliance on a statement is '*per se* indirect' may be respectfully doubted. If it is, why is the claimant able to recover damages for deceit? Mr Kramer's answer is that an 'intended consequence is never too remote'.[307] But if the dividing line is intention, one would expect to find that the *SAAMCO* limitation does not apply even if the

[305] See also *Henville* (n 163) [103] (McHugh J).

[306] Adam Kramer, 'Proximity as Principles: Directness, Community Norms and the Tort of Negligence' (2003) 11 Tort L Rev 70, 95.

[307] Kramer, 'Proximity' (n 306) fn 44.

defendant makes a *non-fraudulent* statement with the intention of inducing some act or omission (for example a negligent misrepresentation about the quality of his goods made by a seller with the intention of persuading the claimant to buy). The fact that this is not the law shows that intended reliance goes to causation rather than to remoteness. In addition, the maxim 'intended consequences are never too remote' is actually misleading.[308] If D attacks C with the intention of killing him, but only lands a glancing blow, and C dies on the way to hospital when his ambulance is struck by a falling tree, D's act would not be cited as the cause of C's death even though death was intended and even though it would not have occurred but for D's act. The maxim only explains why what would *otherwise* be treated as a coincidence is not so treated if the unusual conjunction of events was intended: it does not explain why the defendant is, or is not, liable for an outcome that is, as in *SAAMCO*, *in any case* not coincidental.[309]

For these reasons, it is submitted that the wider scope of duty rule in *SAAMCO* (the purpose of requiring the valuer to be careful) cannot, whatever its merits in principle, explain the result in the case or the falsity rule more generally.

B. The Wider Scope of Duty Rule is Flawed

This section assumes, contrary to the arguments advanced in the previous section, that the reason for requiring the valuer to be careful is only the risk of the lender making an

[308] See Hart and Honoré, *Causation in the Law* (n 55) 170–72.

[309] The importance of the maxim 'is not…that it negatives causal connection between two other contingencies but that it excludes the classification of an abnormal conjunction of events as a coincidence': HLA Hart and AM Honoré, 'Causation in the Law II - Factors Negativing Causal Connection' (1956) 72 LQR 398, 405.

insufficiently secured loan, not the risk of his making a loan *per se*. On this hypothesis, the question of law left open in the previous section has to be answered: is there a general principle in the common law that the defendant is liable only for the materialisation of a risk which was among the reasons for requiring him to be careful, even if his act caused some additional loss? Risk theorists assert that there is. As Prosser puts it,[310]

> the risk which determines the existence of negligence in the first instance limits the recovery for it, and … the same factors which characterize the conduct as wrongful define the scope of liability for its consequences.

Many scholars have taken *SAAMCO* to have endorsed the risk theory.[311] The main difference between this theory and the causal principles considered in Chapter 1 is that the nature of the intervening event is irrelevant. The risk theory does not distinguish between voluntary acts and other conditions or between normal and abnormal natural events. It simply asks whether the risk of the intervening event[312] (whether normal, voluntary or otherwise) was one of the risks which led to the designation of the act as wrongful in the first place. The foreseeability theory endorsed by the *Wagon Mound*[313] is one version of the risk theory, because it limits liability for consequences by using (it is said) the same criterion which made the act or omission negligent in the first place: was *this* type of harm to *this* type of claimant foreseeable? Some theorists favour what is

[310] William Prosser, *Selected Topics on the Law of Torts* (University of Michigan Law School 1953) 216; see also Warren Seavey, *Cogitations on Torts* (University of Nebraska Press 1954) 32 and Henry Foster, 'The Risk Theory and Proximate Cause' (1952-1953) 32 Neb L Rev 72, 101.

[311] See (n 293).

[312] Or the ultimate harm: Hart and Honoré, *Causation in the Law* (n 55) 200.

[313] *The Wagon Mound* [1961] AC 388 (PC).

known as the 'claimant within the risk'[314] theory (the claimant must be within the risk but the harm caused need not be) but most favour what is known as the 'harm within the risk'[315] theory (both the harm caused and the claimant must be within the risk).

The dominant view today is that the risk theory is English law. Though *SAAMCO* is not the best authority for this,[316] Lord Hoffmann has himself said elsewhere that scope of liability depends on 'the reasons why liability for that conduct in question exists in the first place'.[317] Similarly, the High Court of Australia recently discerned a general 'limiting principle of the common law … that the scope of liability in negligence normally does not extend beyond liability for the occurrence of such harm the risk of which it was the duty of the negligent party to exercise reasonable care and skill to avoid.'[318] Corrective justice theorists, such as Weinrib, Ripstein and Beever, have made the risk theory a central plank of their project to show that tort and contract law are institutions of (and only of) corrective justice: the causal theory, suggests Professor

[314] Moore calls this the 'partially relational' risk theory: Michael Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (OUP 2009) 158.

[315] The 'fully relational' risk theory: Moore (n 314) 158. As Goodhart (himself a risk theorist) accepted, the logic of the theory dictates that it must be fully relational: AL Goodhart, 'The Unforeseeable Consequences of a Negligent Act' (1929) 39 Yale LJ 449, 465.

[316] See ch 4.

[317] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32 [56]. See also *Eva v Reeves* [1938] 2 KB 393 (CA) 410–11 (Scott LJ) 413 (MacKinnon LJ); *Cossey* (n 72) 896 (Sedley LJ) (treating, however, 213C as the risk theory) and *Sam v Atkins* [2005] EWCA Civ 1452 [14]–[17] (May LJ).

[318] *Wallace v Kam* [2013] HCA 19 [24].

Weinrib,[319] 'fails to maintain the *correlativity* of right and duty and thereby leaves us without a reason for holding this particular doer liable to this particular sufferer'.[320]

It will be argued in this section that this view is, with respect, mistaken. Once the cases are closely analysed, it is clear that the risk theory is not English law as a matter of authority. It is also flawed in principle, at least insofar as it purports to limit rather than extend liability.

1. The Origins of the Risk Theory: From *Smith* to *the Wagon Mound*

The risk theory is often traced to the remarks of Pollock CB in *Rigby*[321] and *Greenland*[322] but early English authority in fact rejected it. The most well-known case of this period is *Smith v LSW Rly Co*. The defendant kept trimmings of grass in heaps near a railway line that it owned. A passing train emitted a spark which ignited the trimmings; the fire consumed an adjoining hedge and a stubble-field and was carried by a high wind to the claimant's cottage. The defendant was held liable even though it could not have foreseen that a fire would damage a cottage 200 yards away from the line. As Channell B[323] and Blackburn J[324] put it, this was because foreseeability was relevant only in establishing

[319] Ernest Weinrib, *The Idea of Private Law* (rev, OUP 2012) 157.

[320] See also Ernest Weinrib, 'The Disintegration of Duty' in S Madden (ed), *Exploring Tort Law* (CUP 2007); Ernest Weinrib, 'Two Conceptions of Remedies' in CEF Rickett (ed), *Justifying Private Law Remedies* (Hart 2008) and Ernest Weinrib, 'Civil Recourse and Corrective Justice' (2011) 39 Florida State U L Rev 272, 294 (where the risk theory is said to have replaced the 'now discredited' remoteness rule in *Polemis*).

[321] *Rigby v Hewitt* (1850) 5 Exch 240, 155 ER 103, 104.

[322] *Greenland v Chaplin* (1850) 5 Exch 243, 155 ER 104, 106.

[323] *Smith v LSW Rly Co* (1865) LR 6 CP 14, 21.

[324] *Smith v LSW Rly Co* (n 323) 22.

that the defendant's *act* was unreasonable: if it was, the defendant was liable for any harm caused by that act (ie, without the intervention of abnormal events or voluntary acts). Since the stubble-field was not owned by the claimant, it follows that *Smith*, unlike *Polemis*, is a case in which no harm of any kind *to the claimant* was foreseeable:[325] it therefore impliedly rejects both versions of the risk theory, as ultimately even Professor Goodhart came to accept.[326]

The real impetus for the risk theory in English law came from America.[327] In the early 1900s, Joseph Bingham published two influential articles on remoteness ('proximate cause', as they say in America) in which he argued that the language of proximate cause is simply another way of asking whether it was the purpose of the duty to protect the claimant from the kind of loss that occurred in the manner in which it occurred.[328] The difficulty with Bingham's analysis is that it cuts across the distinction between causal and non-causal principles. Indeed, the identification of the 'purpose' of any duty is in his scheme ultimately parasitic on causal criteria, because most of the cases he cites are explicable (only) on the basis of well-known causal rules such as causal relevance,[329] coincidence[330] or the distinction between normal and abnormal events[331] or

[325] As noted in Glanville Williams, 'The Risk Principle' (1961) 77 LQR 179, 185.

[326] AL Goodhart, 'Liability and Compensation' (1960) 76 LQR 567.

[327] For a detailed account of the history, see Moore (n 314) 161–69 and Prosser (n 310) 196.

[328] Joseph Bingham, 'Some Suggestions Concerning Legal Cause at Common Law' (1909) 9 Col L Rev 16 and 'Some Suggestions Concerning Legal Cause at Common Law - II' (1909) 9 Col L Rev 136.

[329] *Glover v LSW Ry Co* (1867) LR 3 QB 25, cited by Bingham in 'Part I' (n 328) 32.

[330] *Denny v NYCRR Co* 13 Gray 481 (Mass 1859) and *Fox v Boston & Maine RR Co* 148 Mass 220 (1889), cited by Bingham in 'Part I' (n 328) 27. His hypothetical example about the two houses (26–27) can also be explained on this basis.

[331] *Kennedy v The Mayor* 73 NY 365 (1878), cited by Bingham in 'Part I' (n 328) 28 (an unmanageable horse is not abnormal).

voluntary acts and other conditions.[332] 'Purpose' seems to do no explanatory work of its own. But Bingham's theory was adopted by Francis Bohlen, who happened at the time to be the American Law Institute's Reporter for the upcoming Tort Restatement. Unsurprisingly, the draft of what eventually became §281 of the Restatement contained the (fully relational) risk theory. When the Reporters met in New York in 1926 to discuss this draft, one of those invited to attend happened to be Benjamin Cardozo. It is said[333] that one of the cases discussed at that meeting was *Palsgraf v Long Island Rly Co*,[334] which at the time was on its way to the New York Court of Appeals.

The facts of *Palsgraf* are well-known. A passenger carrying an apparently innocuous package was attempting to board a train that was about to depart. The Long Island Rly Co's servant negligently jostled him while trying to push him into the train. The package, which actually contained fireworks, was dislodged and the fireworks exploded. This caused some scales at the other end of the platform to fall, injuring Helen Palsgraf, who happened to be standing there. The New York Court of Appeals held, Andrews J dissenting, that the defendant was not liable to Mrs Palsgraf. The fulcrum of Cardozo CJ's analysis was the proposition that there is simply no tort unless some harm *to the claimant* is foreseeable: this is the 'claimant within the risk' theory. The learned judge noticed, but left open, the question whether the harm should also be within the risk: if it should, the passenger himself may not have been able to recover if the explosion had injured him, even though *some harm* to him was foreseeable. Although Cardozo CJ's

[332] *Burrows v The March Gas and Coke Company* (1865) LR 7 Exch 96 (not a voluntary act), *Sheridan v Brooklyn & Newtown RR* 36 NY 39 (1867) (jostling not abnormal) and *Quigley v D&H Canal Co* 142 Pa St 338 (Penn 1891) (extrication not abnormal), all cited by Bingham in 'Part I' (n 328) 30–33.

[333] Prosser (n 310) 196.

[334] *Palsgraf v Long Island Rly Co* 248 NY 339 (1928).

judgment in the case is celebrated,[335] this reasoning does not, with respect, withstand scrutiny.[336] But it is fair to say that it was to prove the catalyst for the eventual reception of the risk theory into English law.

In *Polemis*,[337] a strong English Court of Appeal[338] had effectively rejected the risk theory that Cardozo CJ was to adopt in *Palsgraf* seven years later. The main difference between *Polemis* and *Palsgraf* is that the former was only a 'harm within the risk' case, because some damage *to the* ship was foreseeable, just not damage by fire. If the 'claimant within the risk' theory had been good law then, it seems to follow that a seaman killed by the explosion, or the (different) owners of an adjoining ship destroyed by the explosion, could not have recovered damages. The Court of Appeal did not need to decide this point, but it is clear from its reasoning that at least the 'harm within the risk' theory was not thought to be good law. Foreseeability, according to Scrutton LJ, was relevant 'only to determine *whether* an act is negligent': if it was, the defendant was taken to be responsible for its consequences unless attributable to a *novus actus*.[339] Despite this, and the judgment of the Court of Appeal in *Thorogood*,[340] the writing was on the wall: *Polemis* was fiercely attacked by many distinguished scholars,[341] especially

[335] Allan Beever claims that 'it vies with Lord Atkin's judgment in *Donoghue v Stevenson* for the greatest single judgment in the history of the law of negligence': Beever (n 293) 125.

[336] See below.

[337] *In re an Arbitration between Polemis and Furness, Withy and Co Ltd* [1921] 3 KB 560 (CA).

[338] Bankes, Warrington and Scrutton LJJ.

[339] *Polemis* (n 337) 577.

[340] *Thorogood v Van Den Berghs and Jurgens Ltd* [1951] 1 All ER 682 (CA) 690 (Asquith LJ) noted (and criticised) in AL Goodhart, 'The Imaginary Necktie and the Rule in *Re Polemis*' (1952) 68 LQR 514.

[341] Most prominently (in this country) Goodhart and Williams: see above.

after *Palsgraf* was decided, and it seemed only a matter of time before it would be overruled.

That moment finally arrived in 1961,[342] though it is said that the Judicial Committee actually split 3-2 in overruling it.[343] The *Wagon Mound (No 1)*, like *Polemis* and unlike *Palsgraf*, was a 'harm within the risk' case, and it is important to understand precisely why. The defendant's act (spilling furnace oil) gave rise to *two* risks, one of which was foreseeable while the other was not. The first was the risk that the oil would foul the slipways of the claimant's wharf. At first instance, Kinsella J found expressly that this risk was foreseeable.[344] The second was the risk of fire, which was not foreseeable. Both risks materialised, but the claimant abandoned the claim for the slipway damage at trial.[345]

On these facts, there were two reasons the Judicial Committee could have given for holding that the defendant was not liable. The first, a causal one, was to treat the unusual combination of circumstances—molten metal happening to fall on a cotton wick which was floating on a piece of debris that functioned as a raft[346]—as a new cause, just as abnormal natural events have often been treated as new causes in other cases.[347] The second—the solution the Judicial Committee adopted—was to exonerate the defendant

[342] *The Wagon Mound* (n 313).

[343] See Gerald Dworkin, 'The Wagon Mound' in *The Foresight Saga: Symposium on the Wagon Mound* (The Haldane Society 1962) 36 (and Lord Chorley QC's comments at 3).

[344] *The Wagon Mound* [1958] 1 Lloyd's Rep 575 (NSWSC) 581, 83–84.

[345] *The Wagon Mound NSWSC* (n 344) 584.

[346] AM Honoré, 'The Wagon Mound' (1961) 39 Canadian Bar Rev 267, 274–75. The only difficulty with this analysis is that the cotton wick and the raft were pre-existing circumstances—like the benzene in the hold of the *Thrasyvoulos*—rather than subsequent events.

[347] Ch 1.

on the ground that fire was not a *foreseeable* consequence: on this view, the nature of the causal process that led to it (normal/abnormal etc) was irrelevant.[348] But why should the fact that fire was unforeseeable matter? Viscount Simonds gave two reasons. The first concerned the analysis in *Polemis* of the earlier authorities. This no longer matters. The second was the assertion, which also appealed to Cardozo CJ, that there is no 'negligence in the air': the defendant can only be liable for the materialisation of one of the risks that made his act negligent. In other words, Viscount Simonds thought that it is conceptually impossible for 'culpability and compensation'[349] to be governed by different criteria. This is the risk theory and the wider 'scope of duty' rule in *SAAMCO*.

2. The Risk Theory Cannot Explain the Positive Law

Ever since the *Wagon Mound* was decided, it has been widely assumed that the risk theory has replaced the causal theory as a matter of positive law.[350] If this were true, it ought to follow that defendants are liable only for the materialisation of one or more of the risks that required them to be careful in the first place. However, two groups of cases show that this is in fact not the case. The first is concerned with liability for the materialisation of unforeseeable risks: here the positive law is that the defendant is not liable, but it is clear from the reasoning in these cases that culpability and compensation are *not* governed by the same criteria. The second is concerned with liability for the

[348] The causal process is, of course, indirectly relevant because it may show that the outcome was foreseeable *ex ante* (or not). This is why the causal and risk theories often produce the same result. But they diverge if the causal process, though natural, was unknown, as in *Polemis* and in the thin skull cases.

[349] This terminology comes from a well-known dictum of Lord Sumner: *Weld-Blundell v Stephens* [1920] AC 956 (HL) 984. Viscount Simonds said that 'this proposition is fundamentally false': *The Wagon Mound* (n 313) 425, but Lord Sumner and Scrutton LJ were right: see below and ch 8.

[350] See (n 293).

materialisation of contingent risks, that is, risks that can materialise *only if* some other independently negligent act is committed. Here the positive law (eg ulterior harm, thin skull, psychiatric injury and parasitic loss) is that the defendant is liable, though the application of the risk theory would dictate, as even some risk theorists have conceded, that he should not be.

(i) Unforeseeable Risks: The Meaning of Foreseeability

The precise role that foreseeability of harm plays in the tort of negligence is surprisingly complex.[351] In Chapter 8 it is suggested that it is relevant, at the culpability stage, as an element in practical reasoning, because it can provide the defendant with an excuse (*not* a justification) for the rational non-conformity that would otherwise make his act tortious. As that chapter shows, this point alone is enough to falsify the claim made by the risk theorists that culpability and compensation are governed by the same criteria. That claim can, however, be shown to be false in a simpler way: it is, as this section explains, inconsistent with the doctrinal law about the relevance of foreseeability.

The cases recognise that while foreseeability is not sufficient to make conduct actionable, it is necessary: the defendant is not liable if no harm of any kind to anyone was foreseeable.[352] However, 'foreseeability' in this context is not a reference to the risk of harm in the abstract: it is a reference to such a risk of harm as would, in Hart and

[351] The best account is John Gardner, 'The Mysterious Case of the Reasonable Person' (2001) 51 U Toronto LJ 273. See also The Rt Hon Lord Hoffmann, 'Anthropomorphic Justice: The Reasonable Man and his Friends' (1999) 29 The Law Teacher 127 and further, ch 8.

[352] As Gardner puts it, the defendant's primary obligation is always justified by the 'interest of the person wronged': 'Corrective Justice' (n 70) 45.

Honoré's words, '*influence the conduct* of a prudent man'.[353] This is clear from *Bolton v Stone*,[354] where the question was whether a small risk of a cricket ball striking users of the road just outside the stadium made it negligent on the part of the stadium owners to continue to organise games of cricket there. Lord Reid accepted that the owners would have been liable if the test is merely foreseeability of harm, but said that it is not: the question is whether a reasonable man would have *chosen* to take precautions to prevent this risk from materialising. If the risk is small, the reasonable man may be justified in ignoring it.[355]

What the case shows is that foreseeability at Lord Sumner's 'culpability stage' means 'foreseeability of such a risk as would influence the conduct of a reasonable man' and not 'foreseeability of such a risk *per se*': foreseeability is not the same thing as mere pre-vision.[356] In contrast, although this is often overlooked, the courts do not use foreseeability in the same sense at the *compensation* stage, even after the *Wagon Mound*: they instead ask whether some particular consequence was foreseeable *in the light* of the negligent act.[357] Put differently, at the culpability stage foreseeability is used as an element in practical reasoning; at the compensation stage, it is used as a rough-and-ready way of distinguishing between normal and abnormal events (as the causal theory would dictate), but without taking into account (as the causal theory would) pre-existing

[353] Hart and Honoré, *Causation in the Law* (n 55) 263.

[354] *Bolton v Stone* [1951] AC 850 (HL).

[355] 'An ordinarily careful man does not take precautions against every foreseeable risk': *Bolton v Stone* (n 354) 863 (Lord Oaksey).

[356] See also WHB Dean, 'Culpability or Remoteness' (1974) 91 South African LJ 47, 50. But Professor Dean ends up supporting the risk theory, using arguments that are considered below.

[357] Hart and Honoré, *Causation in the Law* (n 55) 262–64.

dangers, such as the benzene in the *Thrasyvoulos* or the smouldering cotton wick in Sydney Harbour.[358]

This, with respect, is the point that Viscount Simonds overlooked in the *Wagon Mound (No 1)*: if foreseeability is used in two different senses, the criteria governing culpability and compensation turn out to *not* be the same, and the central plank of the Judicial Committee's reasoning disappears.[359] One then needs an independent justification for limiting the defendant's liability to foreseeable losses, which the Judicial Committee did not provide, because it was persuaded by the risk theory that the question did not arise.

(ii) Ulterior Harm: Rescuers and Improper Medical Treatment

A system committed to the risk theory cannot hold defendants liable to rescuers because injury to them, unlike injury to the primary victim they attempt to rescue, is never foreseeable in the practical sense. This sense of 'foreseeable' is not satisfied in the case of rescuers because the defendant is *already* required to take reasonable steps to not injure the primary victim: the risk to the rescuer is contingent on injury or apprehended injury to the primary victim which is itself a result of the defendant's failure to take those steps.[360]

[358] Williams conceded this: see (n 325) 200.

[359] See also Hart and Honoré, *Causation in the Law* (n 55) 262–66.

[360] Hart and Honoré, *Causation in the Law* (n 55) 268.

Yet, English law does hold defendants liable to rescuers. While some of the cases use the language of foreseeability,[361] it is clear that they do so in the theoretical sense, and Hart and Honoré appear to be correct in arguing that the basis of liability is that the rescuer's intervention is neither an abnormal event nor a voluntary act.[362] For example, in *Chapman v Hearse*,[363] Chapman negligently collided with another car. Dr Cherry, who happened to be at the scene, came to his aid but was himself injured by another driver, Hearse, while he was treating Chapman. The question was whether *Chapman* was liable to Dr Cherry's estate for the injury inflicted by Hearse.[364] The High Court of Australia held that he was. Yet, it seems plain that the risk of injury to a passer-by is not the reason why Chapman was required to drive carefully: he was required to drive carefully because of the (foreseeable) risk that he might collide with someone, as he in fact did. The High Court of Australia did say that 'subsequent injury by passing traffic to those rendering aid after a collision on the highway' was reasonably foreseeable,[365] but this is to use foreseeability in its theoretical rather than in its *Bolton v Stone* sense.

On a causal analysis, on the other hand, there is no difficulty in accommodating these cases: Dr Cherry's intervention, as the High Court itself recognised, was neither a voluntary act nor an abnormal event.[366] But it is a result that the risk theory cannot explain. The only reason this is not widely recognised is that the courts have not

[361] See, eg, *Haynes v Harwood* [1935] 1 KB 146 (CA) and *The Ogopogo* [1971] 2 Lloyd's Rep 410 (SCC).

[362] Hart and Honoré, *Causation in the Law* (n 55) 264.

[363] *Chapman v Hearse* (1961) 106 CLR 112 (HCA).

[364] This question arose because Hearse claimed contribution from Chapman.

[365] *Chapman* (n 363) 121.

[366] In contrast, if Dr Cherry had been struck by a bolt of lightning or killed by some criminal while treating Chapman, Chapman would not have been liable on causal principles.

distinguished between the two senses in which they use the word 'foreseeable' in the rescuer cases. It is this ambiguity that may have misled Lord Hoffmann in *White*.[367] His Lordship began by observing that the intervention of a rescuer (like Dr Cherry) is not a *novus actus* because it is not a voluntary human act and correctly invoked the principle in the *Oropesa*[368] as an analogy. However, his Lordship went on to say that[369]

> [t]here is usually no difficulty in holding that if it was foreseeable that someone would be put in danger, it was also foreseeable that someone would go to look for him or try to rescue him or otherwise help him in his distress.

No doubt this is true, but this belies Viscount Simonds' conclusion that the *same* criterion determines culpability and compensation.[370] Many scholars who favour the risk theory,[371] including Professor Goodhart,[372] also overlook this problem. Some have tried to accommodate it by using foreseeability at the point of *injury* to the primary victim or a 'threshold tort' doctrine (ironically this is the same as parasitic loss[373]) but as Hart and Honoré observe this is to abandon the rationale for the theory in order to make it fit the cases.[374] The few risk theorists who recognised that the same criterion was not being used

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[367] *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 (HL).

[368] *The Oropesa* [1943] P 32 (CA).

[369] *White* (n 367) 508.

[370] It is also not obvious *why* it is necessary to ask whether the rescuer's intervention is foreseeable or not, given that what brings the rescuer to the scene is a danger caused by an act that is independently negligent.

[371] See, eg, LP Wilson, 'Some Thoughts About Negligence' (1949) 2 Oklahoma Law Review 275, 284; Richard Buxton, 'The Negligent Nuisance' (1966) 8 Malaya L Rev 1, 19–20; GE Glos, 'Directness or Foreseeability to Prevail in Remoteness?' (1962) 79 South African LJ 56, 65; DR Stuart, 'More Wood for the Remoteness Fire' (1967) 84 South African LJ 76, 82 and Arthur Ripstein, 'Philosophy of Tort Law' in Jules Coleman, Kenneth Himma and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 669–70.

[372] Goodhart (n 326) 577.

[373] See §B(2)(iv) below.

[374] Hart and Honoré, *Causation in the Law* (n 55) 270.

preferred to treat rescuers as an 'exception' to the risk theory.[375] But it is not easy to see why an exception is made just for rescuers (why not for unforeseeable injury to a primary victim as well?).

The cases dealing with liability for improper medical treatment raise exactly the same problem. If D runs C over while driving carelessly, and C's injuries are then aggravated by negligent treatment by a doctor, D is sometimes held liable for the entire loss: recovering contribution from the doctor is a matter for him, not C.[376] This is inconsistent with the risk theory. The reason why (in the sense in which risk theorists use the word) D is required to drive carefully is the risk of causing injury to persons (like C) or property, *not* the risk of a doctor aggravating those injuries.[377] The risk theory would dictate, contrary to what the law actually is, that D should be liable only for the injury that he inflicted. Again, there is no difficulty on a causal analysis, because liability would depend on whether the doctor's treatment was merely negligent, or so negligent that it can be described as 'abnormal'. In saying that 'gross negligence' exempts the original tortfeasor but that 'mere negligence' does not, the courts are searching for exactly the same (causal) idea.

[375] Williams (n 325) 185. See also Douglas Payne, 'Foresight and Remoteness of Damage in Negligence' (1962) 25 MLR 1, 12–15.

[376] See, eg, *Webb v Barclays Bank* [2001] EWCA Civ 1141, [2001] Lloyd's Rep Med 500; Tony Weir, 'The Maddening Effect of Consecutive Torts' (2001) 60 CLJ 237 and Andrew Post, 'Legal Causation: The Neglected Sibling' (2007) 1 Journal of Personal Injury Law 15.

[377] The claim is not that a contingent risk can conceptually never constitute a reason for action: it is that risk theorists cannot be using 'reason' in this sense (as that would mean that D should be liable for unforeseeable losses as well).

(iii) The Thin Skull Rule

Kennedy J's dictum in *Dulieu v White* that it is no answer to a claim for damages that the victim had an 'unusually thin skull or an unusually weak heart' is familiar.[378] It is often regarded as something of an anomaly,[379] but the principle underlying it can be generalised. It is that lack of knowledge of the state of the world in which the defendant intervenes is irrelevant, if the intervention was independently wrongful. On the causal principles analysed in Chapter 1, there is a powerful justification for this. Since 'cause' is regarded as an *interference* in the normal course of events, the world as it exists (whether known or not) is taken as 'the setting of the stage before the actor comes on the scene'.[380] This is because the explanatory force of the empirical generalisations instantiated by the conditions present in a particular case does not depend on the agent's *knowledge* of those conditions or on the foreseeability of the outcome.[381] Thus, the thin skull rule implicitly distinguishes between *co-existing* and *subsequent* conditions: if C is run over by D and then struck by a bolt of lightning on the way to hospital, the later injury is coincidental, but if he had been struck by the bolt of lightning an instant *before* he was fatally run over, D is taken to have caused C's death even though C would not have died from the collision had he not been weakened by the pre-existing lightning injury.[382]

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[378] *Dulieu v White* [1901] 2 KB 669 (DC) 679.

[379] Beever (a risk theorist) concedes that it is inconsistent with the risk theory and argues that it should be abolished: see (n 293) 166.

[380] Hart and Honoré, *Causation in the Law* (n 55) 172.

[381] HLA Hart and AM Honoré, 'Causation in the Law I - A Survey of Common-Sense Principles' (1956) 72 LQR 58, 83.

[382] Hart and Honoré, *Causation in the Law* (n 55) 172.

The risk theory, on the other hand, cannot explain why the thin skull rule exists. Consider first its application to personal injuries, which is more straightforward than property damage. In *Smith v Leech Brain*, the leading case on the point, the claimant's employer negligently failed to offer him adequate protection from the 'spitting' of the molten metal with which he was working. It was foreseeable that spitting metal would cause burns, as it did when one piece struck the claimant on his lip. Because of a pre-existing malignant condition, the burn became the promoting agency of cancer, from which the claimant died. The defendant argued that the *Wagon Mound* must be taken to have impliedly overturned the thin skull rule. Lord Parker CJ rejected this contention on the ground that the *Wagon Mound* only required the 'type' of injury to be foreseeable which, if defined as 'physical injury', it was.[383]

It is doubtful whether this is correct.[384] In the *Wagon Mound (No 1),* the ultimate harm resulting from the foreseeable and unforeseeable causal processes was the same: damage to the claimant's wharf. So what must have been decisive is the fact that the causal *process* which actually resulted in that ultimate harm (fire) was different from the causal process that could have been foreseen (fouling the slipways). Applying this to *Smith,* the question should have been whether the *causal process* (malignancy) that resulted in the claimant's death was foreseeable: it was common ground that it was not. That is not to say that the result in *Smith* is wrong—it is clearly correct in principle—but only that it is inconsistent with the risk theory and indeed with the *Wagon Mound* itself.

[383] *Smith v Leech, Brain & Co* [1962] 2 QB 405 (QB) 415 (Lord Parker CJ).

[384] See also Stevens (n 203) 159.

The risk theory also cannot explain why the thin skull rule does not appear to apply to cases involving property damage. To apply thin skull here would, of course, rationalise the result in the one case that all risk theorists claim is indefensible: *Polemis*. Glanville Williams (a risk theorist) recognised this when he famously observed that 'it does not seem unreasonable to liken a ship full of petrol vapour to a man with a fatty heart'.[385] But no reason has been given for why the law should distinguish between personal injury and property in this way.[386] Some have said that thin skulls are foreseeable,[387] but this would appear to misunderstand the sense in which 'foreseeability' is used in English law.[388] In any case, thin hulls are presumably foreseeable as well. Others have conceded that the risk theory cannot explain the thin skull rule and say that it should be treated as (yet another) 'exception' to it.[389] As Mr Payne has said, the obvious need for these exceptions makes one wonder why the risk theory 'should command such support as a universal solvent of remoteness problems'.[390]

(iv) Liability for Nervous Shock

As explained above, foreseeability, at the culpability stage, is simply one element in the rational (non-legal) evaluation of the act or omission. In cases involving nervous shock,

[385] Williams (n 293) 194.

[386] It is, of course, true that the causal approach also cannot explain this but it has never claimed that there is any difference: on the causal approach, *Polemis* is correctly decided. The *Wagon Mound* can be justified only on non-causal grounds, if at all: ch 8.

[387] AL Goodhart, 'The Brief Life Story of the Direct Consequence Rule in English Tort Law' (1967) 53 Virginia Law Review 857, fn 15 ('everyone knows that people may have these physical defects').

[388] See also RG McKernon, 'Foreseeability is All: A Critical Note on the Wagon Mound' (1961) 78 South African LJ 282, 290 and JC Smith, 'The Mystery of Duty' in Lewis Klar (ed), *Studies in Canadian Tort Law* (Butterworths 1977) 30.

[389] Williams (n 293) 194–95; Stauch (n 293) 208.

[390] Payne (n 375) 6.

there will usually be little point in asking whether nervous shock was foreseeable *in this sense*, because nervous shock is invariably triggered by witnessing an actual or apprehended injury that is *itself* negligently caused.[391] That is not to say that claims for damages for nervous shock should automatically succeed once it is shown that the initial act was negligent: the point is rather that limitations on the ability to recover such damages have nothing whatever to do with foreseeability.

For the most part, the courts have not noticed that they have used 'foreseeability' in two different senses in relation to nervous shock. This has given rise distinctions that are difficult to defend. For example, in one of the early cases, *Hambrook*,[392] the claimant accompanied her three children for part of the way to school. Shortly after they parted, she saw a runaway lorry come rapidly towards her, having just crossed the point her children would have reached, and suffered nervous shock thinking that her children had been injured. It is not easy to see why anything should turn on whether nervous shock was itself a foreseeable consequence of allowing a lorry to career out of control on a narrow road: like the defendant in the *Wagon Mound (No 2)*, the possibility of physical injury would itself have induced the reasonable man[393] to take steps to control the lorry. Atkin LJ correctly pointed out that foreseeability is irrelevant at the compensation stage but did not entirely accept this reasoning: he thought that *liability* arose because Mrs Hambrook was a 'bystander', that is, in the lorry's path and potentially herself at risk of

[391] Smith (n 388) 27.

[392] *Hambrook v Stokes Brothers* [1925] 1 KB 141 (CA).

[393] It is in fact unhelpful to talk of what the (hypothetical) reasonable man 'would have done': it is put in those terms here because that usage is widespread in the cases. As chapter 8 explains, 'reasonable' simply means 'justified'.

being hit by it.[394] This suggests that the result would have been different if Mrs Hambrook had witnessed the *same* accident from the balcony in her house. Indeed, in two subsequent Court of Appeal cases—*King v Phillips*[395] and *Boardman v Sanderson*[396]—this is exactly what happened: both claimants suffered nervous shock on witnessing an accident, but the claimant in *King* lost because she was in the balcony while the claimant in *Boardman* won because he was in the vicinity. In truth, foreseeability of nervous shock could not have had any impact on the conduct of a reasonable man in *any* of these cases: he would have concluded that it was negligent to allow a lorry to career out of control or back a cab into an infant simply because of the risk of physical injury.

Unfortunately, the foreseeability theory was adopted by the House of Lords in *Bourhill v Young*. A cyclist, John Young, negligently collided with an oncoming car and died. The claimant had just alighted from a tramcar on the other side. She heard the collision, witnessed its aftermath, and suffered nervous shock. Her presence could not have been foreseen by Young. Lord Russell thought that the question was whether Young 'could reasonably anticipate that, if he came into collision with a vehicle coming across the tramcar … the resultant noise would cause physical injury by shock to a person standing behind the tramcar.'[397] Again, this is to put to a reasonable man in Young's position a question he cannot answer,[398] for he would have cycled with reasonable care simply to avoid a collision. Foreseeability is therefore used in the purely theoretical sense

[394] *Hambrook* (n 392) 156.

[395] *King v Phillips* [1953] 1 QB 429 (CA).

[396] *Boardman v Sanderson* [1964] 1 WLR 1317 (CA).

[397] *Bourhill v Young* [1943] AC 92 (HL) 102 (Lord Russell) 104 (Lord Macmillan) 108–9 (Lord Wright) 118 (Lord Porter).

[398] Hart and Honoré, *Causation in the Law* (n 55) 264.

of ‘pre-vision’, rather than in the *Bolton v Stone* sense of a risk that is relevant to practical reasoning.

The difficulty has been compounded in subsequent cases by the ambiguity about what foreseeability means. In *Page v Smith*, Lord Hoffmann (then Hoffmann LJ) correctly pointed out that ‘the question of whether damage caused by mental trauma was foreseeable is asked with *hindsight*, in the light of the accident as it actually happened’.[399] Similarly, in *White*, Lord Hoffmann suggested that cases in which rescuers have been allowed to recover for nervous shock, such as *Chadwick*,[400] are best explained on the ground that either physical injury or nervous shock *to the rescuer* was foreseeable.[401] In both formulations it is plain that the risk of harm is being used not to distinguish reasonable (ie justified) from unreasonable (unjustified) conduct, as is the case at the culpability stage, but in the sense of pre-vision or as a rough-and-ready test of ‘normality’. Yet many cases continue to justify the use of the test on the basis that foreseeability of nervous shock would ‘affect [a reasonable man] *when he directs his mind* to the acts or omissions which are called into question’.[402]

It is fair to say that the use of the concept of foreseeability has left the English law of nervous shock in an unsatisfactory state: indeed, Lord Hoffmann has said that ‘no one can pretend that the existing law…is founded upon principle’.[403] It is not for this thesis to investigate the problem; however, it is clear, notwithstanding the language of

[399] *Page v Smith* [1995] PIQR P58 (CA) 85.

[400] *Chadwick v British Transport Commission* [1967] 2 All ER 945 (QB).

[401] *White* (n 367) 510.

[402] See, eg, *Attia v British Gas plc* [1988] QB 304 (CA) 329 (Bingham LJ).

[403] *White* (n 367) 510.

foreseeability, that liability (what makes D's conduct actionable) is not governed by the same criterion as compensation (when is nervous shock caused by that conduct recoverable). This, too, is a result that the risk theory cannot explain, although ironically it is the attempt to apply the theory that has generated this case law.

(v) The Doctrine of Parasitic Loss

The doctrine of 'parasitic loss' is, in one sense, the antithesis of the risk theory. It is the proposition that loss that would ordinarily not be recoverable can be recovered if it is a consequence of, and added to, recoverable loss. The term 'parasitic loss' seems to have been coined by Professor Street in 1906[404] but the concept itself has been recognised in England from at least 1864.[405] The high-water mark of the doctrine is probably the judgment of Lord Esher MR in the *Tilbury* case.[406] That in turn was the basis of Buckley LJ's well-known dictum in *Colwyn Bay*:[407]

> The legal proposition involved in the *Tilbury Case*, I think, is that if an actionable wrong has been done to the claimant he is entitled to recover all the damage resulting from that wrong, *and none the less because he would have had no right of action* for some part of the damage if the wrong had not also created a damage which was actionable.

If this proposition is correct, it seems clear that the risk theory must fall, at least as a matter of positive law. There is, of course, a question about the scope of the principle:

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[404] TA Street, *The Foundations of Legal Liability* (Edward Thompson Co 1906) 461.

[405] *Re the Stockport, Timperley and Altringham Railway Co* (1864) LJQB 251.

[406] *Re an Arbitration Between the London, Tilbury and Southend Railway Company, and the Trustees of the Gower's Walk Schools* (1889) 24 QBD 326 (CA).

[407] *Horton v Colwyn Bay and Colwyn Urban District Council* [1908] 1 KB 327 (CA). This passage is criticised in Harvey McGregor, *McGregor on Damages* (19th edn, Sweet & Maxwell 2014) [8-120] but only on the ground that it is not a universal rule.

when can parasitic loss be recovered? But whatever the answer to that question (if there is a unifying principle),[408] it seems clear that it could *never* have been recovered if English law had really adopted the risk theory that it is said the *Wagon Mound* foreshadowed.

3. Responding to Objections

Chapter 8 explains why the risk theory is flawed not only as an explanation of the law but also conceptually. But it is worth addressing some common objections that have been made by risk theorists to this section's analysis of the cases. The first is that any theory of a private law remedy must explain the 'correlativity' of the remedy,[409] that is, the fact that *this* defendant (and not, for instance, the State) is liable to pay damages to *this* claimant (and not to some central fund to which the claimant is given recourse). Some scholars, notably Weinrib and Beever, have assumed that this *entails* the risk theory. However, there is no reason why correlativity cannot be preserved by the doctrinal requirement that the defendant's conduct must be shown to have *caused* the claimant's loss.

Professor Weinrib is, of course, alive to the causal explanation. He rejects it on the ground that the wrongdoing is only a 'historically causal antecedent of the plaintiff's injury' and that there is no principle that explains why the claimant 'is entitled to single out the defendant's negligence from among the numerous other historically causal antecedents, whether innocent or culpable, of that injury'.[410] This takes 'cause' to be 'but-

[408] It remains recoverable in English law in a wide range of cases: see McGregor (n 407) [8-120]–[8-129].

[409] Ch 8.

[410] Weinrib (n 319) 163.

for': if that is the case, it is indeed difficult to explain why one necessary condition is chosen over another equally necessary condition as the 'cause'. However, as Chapter 1 has shown, the common law does distinguish between condition and cause, on the basis of the explanatory force of the condition in a particular context. In a claim for damages, that will usually be the defendant's wrong.

Secondly, it is often said that there is no 'negligence in the air'.[411] It is difficult to know precisely what this means. One reading of it is that there is no infringement of the claimant's right if the risk that made the defendant's act wrongful was the risk of injury to someone else (as in *Palsgraf*) or the risk of a different kind of injury to the claimant (as in *Polemis* and the *Wagon Mound*). If this is the claim, it is doubtful whether it is correct. On one view of the tort of negligence, its moral essence is the causation of (legally recognised) harm, not fault.[412] Fault merely gives a reason (not sufficient or conclusive) for holding the defendant liable for something that is independently regarded as the outcome of his act: that he acted unreasonably or was engaged in a dangerous activity.[413] However, that he was unreasonable *in relation* to the claimant himself, rather than in relation to someone else, does not give the law a better or worse reason to impose liability: the act remains unjustified and, indeed, unexcused.[414] So the rule that liability is limited to foreseeable consequences cannot be derived from the primary obligation, as the risk theory seeks to do: it requires independent justification.

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[411] See, eg, *The Wagon Mound* (n 313) 425.

[412] See, notably, AM Honore, 'Responsibility and Luck: The Moral Basis of Strict Liability' (1988) 104 LQR 530 and John Gardner, 'Obligations and Outcomes in the Law of Torts' in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré* (Hart 2001).

[413] So fault merely addresses what Gardner has called the 'institutional fairness' objection of holding someone liable: 'Obligations and Outcomes' (n 412) 21.

[414] See ch 8.

Thirdly, it is sometimes said that only the risk theory is consistent with a rights-based conception of the law of torts. Professor Stevens, for example, accepts that the risk theory is otherwise flawed,[415] but suggests that no right of the claimant is infringed unless the defendant's act was careless in relation to that right. On his view, *Polemis* was correctly decided because the negligence of the stevedores infringed the owners' right to the *Thrasyvoulos* but a seaman killed by the same explosion could not have recovered damages because no right of his was infringed. It is not clear from his work *why* he thinks that rights are relational. However, the argument for such a limitation cannot be a *conceptual* one, for there is no conceptual reason why Mrs Palsgraf, for example, cannot have a claim-right that no person may infringe her bodily integrity carelessly (whatever the reason for treating the act as careless). This is, therefore, a disagreement about the content of rights, not about whether damages can, in principle, be awarded for a loss that is not a consequence of the infringement of a right.

For these reasons, it is submitted that the risk theory is not part of English law as a matter of authority.[416] This is why the wider 'scope of duty' rule in *SAAMCO* cannot explain the result in the case even assuming that the purpose of requiring the valuer to be careful is only the risk of an insufficiently secured loan: there is no general principle in the common law that the defendant is liable only for the materialisation of a risk that made his act wrongful.

[415] Stevens (n 203) 158.

[416] There are also deeper flaws: ch 8.

4. The Risk Theory can expand liability but not limit it

A difficult question that has arisen recently is whether a valuer is liable for a loss that is increased by the *deliberate* act of a third party. The answer depends on whether the risk theory, or the wider 'scope of duty' rule in *SAAMCO*, can *extend* liability though it has been argued that it cannot limit it.

The starting-point is the principle that a voluntary act of a third party is generally treated as a *novus actus*, even if it is foreseeable.[417] Many distinguished judges have accepted that this (causal) principle is part of the common law.[418] Despite this general principle, liability is sometimes imposed for a voluntary intervention, usually if the risk of the intervention was the *very* reason, or one of the reasons, why the defendant's omission is characterised as negligent. But *mere* foreseeability of the intervention is not enough: thus, in English law at least, if a thief steals money from a claimant who was negligently knocked unconscious by the defendant, the defendant is not liable for the loss of the money even though theft is foreseeable.[419] As Chapter 1 explained, these are the cases that Hart and Honoré's third causal notion ('opportunities') deals with. The result in these cases can be explained by the risk theory[420] because the reason for ignoring the deliberate intervention is traceable to the *purpose* of requiring the defendant to take

[417] Ch 1.

[418] The most well-known example is *McKew v Holland & Hannen & Cubitts (Scotland) Ltd* [1969] 3 All ER 1621 (HL) 1623 (Lord Reid). See also *Smith v Littlewoods Organisation Ltd* [1987] AC 241 (HL) 270 (Lord Goff); *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 (HL) 30H (Lord Hoffmann) and Erle CJ's observations during the argument in one of the early deceit cases: *Mullett v Mason* (1865-66) LR 1 CP 559, 562–63. The same principle applies in criminal law: *R v Pagett* (1983) 76 Cr App R 279 (CA) 288–89 (Robert Goff LJ).

[419] Hart and Honoré, *Causation in the Law* (n 55) 281.

[420] AM Honoré, 'Causation and Remoteness of Damage' in Andre Tunc (ed), *International Encyclopedia of Comparative Law* (JCB Mohr 1971) [7-35].

reasonable care. So it is said that the risk theory can (sometimes) extend, though not limit,[421] liability. Well-known cases in which the risk theory has extended liability in this way include *Stansbie* and *Reeves*.[422]

In the context of valuation, the problem has arisen in cases in which the lender would not have made any loan if the correct valuation had been provided, and the security is then destroyed or damaged *deliberately*. The only clear authority on the point is *Hay Property*.[423] The defendant negligently valued property worth $575,000 at $800,000. The claimant lent $520,000 on the strength of this valuation. Some years later, just after the borrowers had defaulted, the security was deliberately damaged by an unknown criminal. Its value diminished by $215,000 and it was sold for $380,000. If the correct valuation had been given, the lender would not have made the loan. If the valuation given had been correct, the lender would not have made any loss, because the property's value, after the criminal act, would have decreased *from* $800,000 rather than from $575,000. Thus it is plain that the loss for which the lender sought damages satisfied the falsity rule. The only question was whether the fact that there was a voluntary intervention should nevertheless exempt the valuer.

Neave JA held that it should. She pointed out, correctly, that the common law imposes liability for the deliberate acts of third parties only if this was the very purpose,

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[421] This asymmetry is not as startling as it might first seem. In the extension cases, liability is actually not based on the causation of harm at all: it is based on the provision of an opportunity for someone or something to do harm. But if the risk theory is used to limit liability, one is *ex hypothesi* dealing with a case where the basis of liability is the causation of harm.

[422] *Stansbie v Troman* [1948] 2 KB 48 (CA); *Reeves v Metropolitan Police Commissioner* [2000] 1 AC 360 (HL).

[423] *Hay Property Consultants Pty Ltd v Victorian Securities Corporation Ltd* (2010) 29 VR 503 (Vic CA).

or one of the purposes, of requiring the defendant to be careful. It is the next step of the analysis that is more difficult: Neave JA said that the possibility of criminal damage by third parties is not one of the reasons for requiring the valuer to be careful.[424] This is a possible view: indeed, although the point did not arise there, Lord Hoffmann in *SAAMCO* said that one of the things a valuation tells a lender is how much margin he has for *accidental* damage to the security.[425] So it can be argued that the valuer is required to be careful because, if he is, the lender can decide whether to lend or not, not because the lender will have more valuable security after a criminal damages it.[426]

The only reason to doubt Neave JA's conclusion is that it leads to a counter-intuitive result if the deliberate act is that of the *borrower* rather than that of a third party. If a borrower deliberately refuses to repay a loan which the lender would not have made if the correct valuation had been provided, it is surely not open to the valuer to say that he is not liable to pay damages *even to the extent* of the overvaluation: this, after all, is precisely why the lender wanted security. Yet, if the borrower's voluntary act does not negative the causal connection between the negligent valuation and the loss of the money advanced, one might ask why the criminal's should.[427] The answer is probably that a

[424] *Hay Property* (n 423) [92].

[425] *SAAMCO* (n 1) 211E.

[426] It is otherwise if the valuer has given a warranty only because then he has effectively promised to protect the lender from any intervention which *having security* of that amount would have protected it from: the nature of the intervention (abnormal/voluntary) is irrelevant.

[427] Given that *both* satisfy the falsity rule.

potential default by the borrower is the 'very thing' that requires the valuer to be careful, while criminal damage is not.[428]

Although the view preferred here is that Neave JA is correct, this dispute is local to the field of valuation: the more important point is that the risk theory, even in these cases, can (at best) expand liability, not limit it. The wider 'scope of duty' rule in *SAAMCO*, therefore, neither justifies the falsity rule generally nor explains cases, such as *SAAMCO* itself, in which liability is limited rather than extended.

C. Two Other Flawed Explanations of *SAAMCO*

Even if this thesis is correct in rejecting the wider 'scope of duty' rule as an explanation of *SAAMCO*, there are two other theories that require consideration: Professor Stapleton's explanation of the case and the (increasingly popular) 'contract remoteness' explanation.

1. The 'Normative Reasons' Explanation

In a powerful note on *Chester*,[429] Professor Stapleton argues that *SAAMCO* is actually concerned with a normative issue that is dressed up in the language of scope of duty. This is in keeping with her more general approach to causation.[430] Accordingly, the answer, she says, turns on whether there is a 'normative reason' in the second stage of her causal inquiry to justify not holding the valuer liable. She finds it in the fact that the loss the

[428] For instance, compare *Stansbie* and *Reeves*, where liability was imposed, with *Weld-Blundell* (n 349) 986 (Lord Sumner), where it was not. See, further, Hart and Honoré, 'Causation - Part II' (n 309) 415 and McGregor (n 407) [8-143].

[429] Jane Stapleton, 'Occam's Razor Reveals an Orthodox Basis for Chester v Afshar' (2006) 122 LQR 426.

[430] See ch 1.

lender tried to recover was not the 'the very outcome about which a warning was required by the content of the duty in the particular circumstances'. But why is this (in her framework) 'normatively significant'? Having described the normative contest as 'sound but not unanswerable', she argues that it is significant because:[431]

> …a reasonable person would not have warned of *that* risk because, for example, [it] seemed such a remote possibility and warning of all risks would be counter-productive because it would undermine the force of warnings of much more serious risks such as the risk about which the law imposes a duty to warn.

This cannot explain *SAAMCO*. First, if Professor Stapleton is right, one would expect to find that the valuer is not liable for *any* part of the market loss (and not merely market loss in excess of the overvaluation), which is the view of the Supreme Court of Canada but not that of the House of Lords. Secondly, Professor Stapleton seems to assume implicitly[432] that the valuer would have been liable for the *entire* loss if he had failed to warn the lender that the market might fall and a reasonable valuer would have done so. But this is incorrect: the valuer would still not be liable for market (or any other) loss in excess of the amount of the overvaluation, because such a loss is not a consequence of the information being wrong. That shows that the basis of *SAAMCO* was not that the valuer did or did not warn the lender about a market fall, but simply that the application of the falsity rule happened to exclude a part of the market loss. But the same rule would

[431] Stapleton, 'Chester' (n 429) 446.

[432] That she *does* make this assumption is evident in her explanation (at 444) of why the doctor is not liable—'[i]t seems critical that it was not a failure to warn about the risk of avalanche that constituted the defendant's breach.'

have excluded any other loss (such as cost of funds[433]) that was a consequence of the falsity of the statement.

2. The 'Contract Remoteness' Explanation

In *SAAMCO*, the lender's cause of action[434] was that the valuer was in breach of an implied term of its contract to provide a careful valuation, which was also concurrently actionable in tort.[435] Many judges and scholars,[436] including Lord Hoffmann himself,[437] have said that the *SAAMCO* principle should now be understood simply as an application of the remoteness test formulated in the *Achilleas*.[438] Professor Burrows calls this the 'assimilation thesis':[439] if a wrongful act is actionable concurrently in tort and contract, remoteness is governed by the contract rather than the tort rules.[440]

This section will argue that the opposite is true: in *misrepresentation* and *misperformance* claims, the default remoteness rules are imposed by law, whether the cause of action is the breach of an implied contractual term or the tort of negligence. This does not mean that the *Achilleas* is unsound: indeed, the better view is that it is correctly

[433] See (n 109).

[434] *SAAMCO* (n 1) 211B.

[435] Pursuant to *Henderson v Merrett Syndicates* [1995] 2 AC 145 (HL).

[436] See, eg, Kramer (n 24) §14.5B(iii); Andrew Burrows, 'Comparing Compensatory Damages in Tort and Contract: Some Problematic Issues' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Law Book Co 2011) and Andrew Burrows, 'Lord Hoffmann and Remoteness in Contract' in PS Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart 2015).

[437] Lord Hoffmann, 'Achilleas' (n 233) 58.

[438] *The Achilleas* [2008] UKHL 48, [2009] 1 AC 61.

[439] Burrows, 'Comparing Compensatory Damages' (n 436) 374; see also Burrows, 'Remoteness' (n 436) 15.

[440] See also *Wellesley Partners LLP v Withers LLP* [2014] EWHC 556 (Ch) [214] (Nugee J).

decided, though that suggestion need not be defended in this chapter.[441] The claim made here is a narrower one: that the principle in the *Achilleas* (whether sound or not) is distinct from the *SAAMCO* principle. In particular, it is suggested that the assimilation thesis is flawed for four reasons. First, it appears to misunderstand the basis of *Hedley Byrne*: what is undertaken is not the obligation but some antecedent activity that gives rise to an imposed obligation. Secondly, the *SAAMCO* principle is incapable of explaining the results the courts have reached by applying the traditional (or modern) contract remoteness rules. Thirdly, the principle in the *Achilleas* is incapable of explaining the results the courts have reached by applying the *SAAMCO* principle. Finally, there is a sub-rule in the law of contract remoteness which cannot be accommodated if the *Achilleas* and *SAAMCO* are assimilated.

(i) What is Voluntarily Undertaken? The Basis of Hedley Byrne

It is not suggested, for example, that the scope of liability for putting into circulation a bottle of ginger beer containing snails or for spilling oil in Sydney Harbour depends on what the defendant has objectively undertaken responsibility for. What is said to make misrepresentation different is that liability is itself based on a voluntary undertaking or an 'assumption of responsibility', as it is often described. One difficulty is that these phrases have no stable meaning:[442] thus, the first question is what, precisely, is said to be

[441] The *Achilleas* is best defended by showing that there are implied terms not only about what is to be done but also about what is to happen if something is not done. However, there are important differences between remoteness, on the one hand, and other doctrines also concerned with the construction of the agreement, such as common mistake and frustration. A full explanation is beyond the scope of this thesis.

[442] See Kit Barker, 'Unreliable Assumptions in the Modern Law of Negligence' (1993) 109 LQR 461 and *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181 [35] (Lord Hoffmann).

voluntarily undertaken. There are two possibilities: does the defendant voluntarily undertake a *task or activity* which then generates a legal obligation to be careful, or does the defendant voluntarily undertake *to be careful*?

Professor Stevens has powerfully argued that the second answer—voluntary undertaking to be careful—is the 'only doctrinally satisfactory way of explaining the result' in *Hedley Byrne*.[443] There is certainly some support for this view: it has deep roots in the history of the common law,[444] and is consistent notably with the speeches of Lord Devlin[445] and Lord Pearce[446] in *Hedley Byrne* itself, and with those of Lord Goff in subsequent cases.[447]

However, it is submitted that this explanation should be rejected for two reasons. First, the weight of authority is inconsistent with it. In *Hedley Byrne* itself, Lord Reid,[448] Lord Morris[449] and Lord Hodson[450] thought that liability arose because the law imposed it once the Bank chose to undertake the *activity* in question (provide a reference). Lord Reid and Lord Morris expressly drew an analogy with *George v Skivington*,[451] a product liability case: the idea was that putting defective hairwash into circulation is not unlike

[443] Stevens (n 203) 36; see also James Edelman, 'When do Fiduciary Duties Arise?' (2010) 126 LQR 302, 309.

[444] See Paul Mitchell, 'Hedley Byrne & Co v Heller & Partners Ltd (1961)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Tort* (Hart 2010).

[445] *Hedley Byrne* (n 154) 514.

[446] *Hedley Byrne* (n 154) 540.

[447] *Henderson* (n 435); *White v Jones* [1995] 2 AC 207 (HL) 268 and *Spring v Guardian Assurance plc* [1995] 2 AC 296 (HL) 316.

[448] *Hedley Byrne* (n 154) 486–87.

[449] *Hedley Byrne* (n 154) 497, 99.

[450] *Hedley Byrne* (n 154) 508–09.

[451] *George v Skivington* (1869) LR 5 Ex 1.

putting a negligently made statement into circulation.[452] This analogy with product liability was also influential in some of the early misrepresentation cases which were resuscitated by *Hedley Byrne*, such as *Cann v Willson*[453] and *Candler v Crane*.[454] Yet the constituents of a manufacturer's obligation—to not put such a product into circulation—are surely imposed by law, not (or not only) voluntarily undertaken: the voluntary element is only the decision to engage in some antecedent activity (manufacture, provide a reference, etc). To put it differently, *Hedley Byrne* stands to *Derry v Peek* as *Donoghue v Stevenson* stands to *Langridge v Levy*:[455] in both categories, putting something deceptive into circulation, which was previously actionable only if the defendant *knew* that it was deceptive (*Langridge/Derry*), became actionable if he *ought* to have known it (*Donoghue*/*Hedley Byrne*).[456]

Many cases subsequent to *Hedley Byrne* can be analysed in the same way.[457] The most important of these is Lord Hoffmann's speech in *Barclays Bank*. His Lordship there (with respect, correctly) cast doubt on Lord Goff's use of the concept of assumption of responsibility in *Henderson*,[458] pointing out that in misperformance cases what gives rise

[452] See Kramer, 'Proximity' (n 306) for analysis of the relationship between product liability and misrepresentation.

[453] *Cann v Willson* (1888) 39 Ch D 39 (Ch) 43 (Chitty J).

[454] *Candler v Crane, Christmas & Co* [1951] 2 KB 164 (CA) 182 (Denning LJ).

[455] *Langridge v Levy* (1837) 2 M&W 519, 150 ER 863.

[456] It should follow that the claimant has no claim if he consumes ginger beer despite knowing that it contains a snail, or if the defendant has disclaimed any representation on his part that it does not. But see AM Honoré, 'Hedley Byrne & Co v Heller & Partners' (1964) 8 Journal of Society of Public Teachers of Law 284, 292.

[457] See, eg, *Smith v Bush* [1990] 1 AC 831 (HL) 862 (Lord Griffiths); *Caparo* (n 296) 628 (Lord Roskill) 637, 641 (Lord Oliver) and *Barclays Bank* (n 442) [49]–[52] (Lord Rodger).

[458] *Henderson* (n 435).

to the legal obligation is the undertaking to *do something*, rather than any undertaking of the obligation itself.[459]

Secondly, it is, of course, true that the defendant may have *also* objectively undertaken *to be careful*: indeed, under the modern approach to the implication of terms,[460] this is likely to be the case in any direct dealing with a professional, with or without consideration. But *it does not follow* that an (identical) obligation is not *also* imposed by law. This is why this analysis of *Hedley Byrne* is not inconsistent with a rights-based model of tort law: it would simply add 'the right to not be misled negligently' to the list of claim-rights that people have, just like 'the right to not be misled deliberately', which is already a part of that list. This claim-right exists *in addition* to any claim-right arising out of the defendant's (objective) undertaking to be careful. This co-existence of imposed and assumed obligations is no anomaly. It is easily illustrated by the tort of deceit. As Professor Stevens himself accepts,[461] the right to not be deliberately lied to is a claim-right that is good against the world: it does not require any undertaking by the defendant. However, if a party to a contract commits the tort of deceit (eg a valuation or legal advice known to be false), it is also in breach of its implied undertaking of honesty.[462]

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[459] *Barclays Bank* (n 442) [37]–[38]. Lord Hoffmann did think that the concept serves a useful function for misrepresentation but in truth his remarks about misperformance apply equally to misrepresentation.

[460] *A-G of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 (PC).

[461] Stevens (n 203) 35.

[462] If authority is needed to support the existence of such an implied term, it is to be found in *Yam Seng* (n 120) [135] (Leggatt J).

Professor Stevens is conscious that this is a possible analysis of *Hedley Byrne* ('right to not be misled carelessly') but rejects it on the ground that it is inconsistent with the speeches in the case. This objection has been addressed above. He also suggests that 'it makes no sense for the law to conclude that there are two wrongs when only one right has been infringed':[463] here the argument seems to be that if the source of the claim-right is an undertaking, it cannot generate two wrongs, one contractual and the other tortious. No doubt this is true, but the claim-right to not be misled carelessly does not *arise* from an undertaking, even though there is usually *also* an undertaking to that effect. Put differently, an undertaking is sufficient but not necessary for the claim-right to not be carelessly misled to arise.

It may be objected that this analysis cannot explain why a disclaimer prevents liability from arising for negligence but not for deceit. On Professor Stevens' approach, this is easily explained: the disclaimer negatives any assumption of responsibility, which, it follows, must be necessary, not merely sufficient, for liability for negligent misrepresentation. On the other hand the right not to be deliberately lied to need not be acquired; the disclaimer is therefore ineffective. This allows him to reconcile *Williams*[464] (a negligence claim which failed) with *SCB*[465] (a deceit claim which succeeded). However, an alternative analysis is possible. As Chapter 2 demonstrated, there is no *causal* relationship between the making of a false statement and loss caused by relying on it unless reliance was *intended*. A disclaimer (appropriately worded) can show that the

[463] Stevens (n 203) 203.

[464] *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 (HL) 835 (Lord Steyn).

[465] *Standard Chartered Bank v Pakistan National Shipping Corp (Nos 2 and 4)* [2002] UKHL 43, [2003] 1 AC 959 [22] (Lord Hoffmann).

claimant was not intended to rely on the statement. Suppose that C describes some symptoms to D, a doctor, at a party. D, out of politeness, provides a provisional diagnosis but adds 'I assume no responsibility for this, you should check with your GP'. If C nevertheless relies on this statement, there is no causal relationship between the statement and C's reliance even if the statement was made carelessly. If intended reliance is a causal rule of this kind, it should follow that it applies equally to negligent and fraudulent misrepresentation. Although this is often overlooked, that is indeed the law. The only complication is that, in a deceit case, D's knowledge that the statement was false would itself normally show that C was intended to rely upon the statement notwithstanding any disclaimer: for instance, if the doctor had *deliberately* misdiagnosed C at the party, the intended act of reliance must have been either a desired end or a means to a desired end.[466] But that this causal rule exists in principle even in the tort of deceit is clear from the cases about fraudulent misrepresentations made to third parties. For instance, if D deliberately makes a false statement to T, and is *overheard* by C, who relies on it to his detriment, C has no claim against D for deceit even though D knew that the statement was false. Thus, in *Swift*, where a false credit reference was provided to a bank acting on behalf of one of its customers, Quain J said that the defendant would not have been liable if the bank had passed on the reference to some *other* customer.[467] This can be explained only on the ground that a statement, whether negligent or fraudulent, must be intended to be relied upon. In short, the reason for the difference in the treatment of disclaimers in negligence and deceit is not that the duty is founded on a voluntary undertaking in the

[466] Lord Hoffmann analysed intention in these terms (ends, means and foreseeable consequences) in *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 [42].

[467] *Swift v Winterbotham* (1872-73) LR 8 QB 244, 254.

former, but that knowledge of the falsity of the representation is itself proof that the statement *was* intended to be relied upon, thus making the disclaimer (which would normally disprove it) ineffective.[468]

One might ask what turns on this. If, in most cases, the defendant would have objectively undertaken to be careful, why does it matter whether the law also imposes an identical obligation? It matters because, if the law imposes an obligation (whether concurrently with an assumed obligation or not), it is for the law to determine the scope of liability for the breach of *that* obligation.[469] In such cases, the better view is that those are the *default* remoteness rules even if the claimant chooses to sue for the breach of the (identical) assumed obligation. This does not mean that the parties cannot agree to something different: it only means that in the standard case (like *SAAMCO*) the scope of liability cannot be explained by what they have (even tacitly) agreed.[470] The justification for the falsity rule (if any) must therefore be located in the *law* of misrepresentation, not the agreement of the parties.

This is, of course, an abbreviated account of an argument that would require, for its defence, more space than is available here. However, there are three narrower reasons to reject the assimilation thesis: common to all is that it cannot explain the law as we find it.

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[468] This may be the best explanation of *Commercial Banking Co of Sydney Ltd v RH Brown & Co* (1972) 126 CLR 337 (HCA).

[469] It can, of course, be argued that it is for the law to determine the scope of liability *even if* the obligation is assumed. But I put the case in favour of the assimilation thesis at its highest: the goal is to show that the *Achilleas* cannot explain *SAAMCO* even if the *Achilleas* is itself sound in relation to genuinely consensual obligations.

[470] See also *Greenway v Johnson Mathey plc* [2014] EWHC 3957 (QB).

(ii) SAAMCO cannot explain Contract Remoteness

Many scholars who assimilate *SAAMCO* and *Achilleas* assume that the result in *SAAMCO* can be derived from the *instrumentality* of the primary obligation. This is to invoke the wider 'scope of duty' rule described above, which claims that the result in *SAAMCO* follows from the purpose of requiring the valuer to be reasonably careful. For example, in an influential article, Andrew Tettenborn argued that:[471]

> The ulterior benefit emanating from a promise to value properly—the reason why a lender should buy it in the first place—is (it is suggested) freedom from the hazards connected with the security being inadequate at that time… [in contrast, in advice cases] the object of contracting for information useful for making decisions whether to go ahead at all is a more general protection against the risk of the plaintiff contracting as a result of being misadvised.

Similarly, Lord Hoffmann, writing extra-judicially, said that the 'causal relationship with the contractual objective'[472] can both expand and limit liability, and cited *SAAMCO* as an example of the latter.

This Chapter has already shown that the result in *SAAMCO* cannot be explained by the purpose for which a careful valuation is required, because that includes protecting the lender from the ordinary consequences of making the loan *per se*. But it can be assumed for now that that is wrong, because it is submitted that the assimilation thesis cannot explain the cases *even if* the *SAAMCO* principle is based on the instrumentality of

[471] Andrew Tettenborn, 'Hadley v Baxendale Foreseeability: A Principle Beyond Its Sell-by Date?' (2007) 23 J Contract L 120, 137.

[472] Lord Hoffmann, 'Achilleas' (n 233) 58.

the primary obligation. In particular, it can explain the contract remoteness cases in which liability is *extended,* but not those in which it is *limited*.

A good example of a case in which it seems appropriate to extend liability to a loss that would be judged too remote under the *Hadley v Baxendale*[473] test was given by Lord Pearce in the *Heron II*: if a contractor is employed to fix the ceiling in the RCJ but does it so negligently that it collapses on the heads of those in court, the contractor ought to be liable even though, given the odds, it was extremely unlikely that it would fall on them.[474] In this example, the purpose of the obligation assumed by the contractor is to provide the owner with a safe ceiling. Thus, if he is held liable even though the loss was not foreseeable, it is meaningful to say that this is because of the instrumentality of the primary obligation. This is what happened in *Supershields*,[475] where a contractor was held liable for defective work even though it was unlikely, given other measures of protection of which he was aware, that this would cause any damage.

But the purpose of the primary obligation does not seem to have any explanatory force in the contract remoteness cases in which the defendant is held *not* liable for foreseeable loss. The best example is the *Achilleas* itself.[476] The 'purpose' of a duty is, presumably, an expected benefit or disbenefit that the claimant is likely to receive or avoid if the defendant does what he has promised to do. In the *Achilleas*, what the charterer had promised to do was to re-deliver the vessel by May 2, 2004. It was common

[473] *Hadley v Baxendale* (1854) Ex 341.

[474] *Koufos v Czarnikow (The Heron II)* [1969] 1 AC 350 (HL) 417.

[475] *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7, [2010] 1 CLC 241. The issue arose in a Part 20 claim made by Siemens.

[476] *The Achilleas* (n 438).

ground that the charterer knew that one benefit to the owner of his complying with this duty was the opportunity to enter into a follow-on charter. If remoteness is a matter of construing the purpose of the duty, it seems to follow that the charterer should have been liable. This does not, of course, mean that the *Achilleas* is wrong; only that the result can be justified only by some principle other than the inherent purpose of the duty. But such a principle is, by definition, not the *SAAMCO* principle.[477] Indeed, Professor Tettenborn ultimately concedes that his *SAAMCO*-based 'instrumental promises' theory leads to the conclusion that *Hadley v Baxendale* is itself wrongly decided on its facts, which suggests that the principle cannot explain the cases which limit rather than expand liability.

(iii) The Achilleas cannot explain Misrepresentation Cases

Equally, the underlying principle in the *Achilleas* does not seem to be capable of explaining the results in the misrepresentation cases. There is some initial difficulty in identifying the underlying principle. There are at least three possibilities. First, the obligation to pay damages for breach of contract arises from the defendant's (objectively construed) undertaking to do so. This appears to be Lord Hoffmann's extra-judicial[478] and (possibly) judicial[479] view. Second, the obligation to pay damages for breach of contract is imposed by law, but the *Achilleas* shows that there can be an implied exclusion clause. This appears to be the most recent view of the Court of Appeal.[480]

[477] It may be said that *SAAMCO* decides that the valuer did not objectively undertake responsibility for any loss in excess of the overvaluation. This is addressed in the next sub-section: the goal here is to prove the converse case—that the inherent purpose of the duty does not explain the *Achilleas*.

[478] Lord Hoffmann, 'Achilleas' (n 233) 55.

[479] *Achilleas* (n 438) [12].

[480] *Gubbins* (n 4) [24] (Sir David Keene). See also Kramer (n 24) 293. Cf Paul CK Wee, 'Contractual Interpretation and Remoteness' [2010] LMCLQ 150.

Third, the obligation to pay damages for breach of contract is imposed by law, but is shaped by the 'internal allocation of responsibility': this was Adam Kramer's view in 2005.[481]

It is not necessary to take a position on which of these formulations, if any, is preferable because it can be shown that none of them can explain the results the courts have reached by applying the *SAAMCO* principle. The first two can be taken together. Common to both is the idea that the defendant impliedly undertook to pay damages only for particular kinds of loss: the disagreement is only about whether the reason this is effective is that there is simply no obligation to pay damages in the absence of such an undertaking or that the obligation is impliedly excluded by the undertaking. On either basis, those who favour the assimilation thesis must show that there was a limited undertaking of this kind in the cases that have applied the *SAAMCO* principle.

Although there is some support for the view that the valuer did not undertake responsibility for any loss in excess of the overvaluation,[482] it is doubtful whether it is correct. One factor that allowed Lord Hoffmann in the *Achilleas* to conclude that the charterer had not assumed responsibility was that this was the market's understanding of the position (whether correct or not). Before *SAAMCO* was decided, the market understanding about valuer's liability was the exact opposite: the Court of Appeal in 1939 had made the valuer liable for no-transaction losses[483] and this had been

[481] 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 2005) 267 (but compare his fn 10).

[482] See, eg, Lord Hoffmann, 'Achilleas' (n 233) 58; Stauch (n 293) 198.

[483] *Baxter* (n 31).

consistently followed.[484] Even though the recoverability of market loss had never been explicitly raised, it was plain that the valuer's liability was not confined to the amount of the overvaluation: in 1990, for example, the House of Lords had held that the valuer was liable for the lender's loss of the *use* of his money—a loss which would have been incurred even if the information had been true.[485] Nor was the valuer's liability 'completely unquantifiable', as the charterer's was: it is true that the valuer could not predict the extent of a market fall, but this has little significance because its liability could not have exceeded the amount the lender advanced.[486] In addition, the valuer was often expressly told that the lender would decide whether to make a loan or not based on its valuation. So there was no reason to think that the valuer would not (objectively) be taken to have assumed responsibility for (at least) the principal amount lent.[487]

It is significant that scholars who favour the assimilation thesis shift from 'consent' to 'contractual objective'[488] when they come to apply the theory to the facts of *SAAMCO*: this is to implicitly recognise that the first two justifications of the *Achilleas* (no obligation/implied exclusion clause) simply do not fit the contractual misrepresentation cases in which liability has been restricted. But the 'contractual

[484] Ch 4.

[485] *Swingcastle* (n 32).

[486] For capital loss, the amount of the loan is a built-in cap.

[487] In fact, clause 1 of the contract of valuation in one of the SAAMCO appeals (United Bank) expressly stated that the lender 'intends to rely upon the valuation report in deciding *whether* or not to grant a loan…based on this property as security': Parliamentary Archives HL/PO/JU/4/3/1939, HL/PO/JU/4/3/1940, *Terms of Reference for Valuer Dated 14 Sep 90 Issued by United Bank of Kuwait*, cl 1.

[488] See, eg, Tettenborn (n 471) and Lord Hoffmann, 'Achilleas' (n 233) 58.

objective' or 'instrumental promise' rationale, as demonstrated above, does not explain these cases either: it only explains why liability is *extended*, not limited.

None of this means that the parties cannot agree to something different: if, for instance, a particular valuer wishes to limit its liability to the amount of the overvaluation, there is no reason why it cannot do so, expressly or impliedly. The point is only that in the standard case there will be no reason to think that the valuer has done so. It follows that the objectively-ascertained agreement of the parties does not justify the use of the falsity rule in the standard case.

(iv) SAAMCO cannot accommodate the *Cory* Cap

Another reason to reject the assimilation thesis is that the *SAAMCO* principle cannot accommodate a sub-rule, commonly called the 'Cory cap', that has emerged in the contract remoteness cases.[489] It was established, as the name suggests, in *Cory v Thames Ironworks*.[490] The claimant, a coal merchant, had devised a novel way of unloading coal involving the use of iron buckets worked by powerful cranes. It agreed to buy a boom derrick from the defendant intending to use it for this purpose. The defendant, however, thought that the claimant was going to use it as a coal store, as most coal merchants at the time would have done. In breach of contract, the defendant delivered the boom derrick some nine months late. If the claimant had used it as a coal store, its loss would have been £420, but it claimed damages representing the far greater sum it had lost as a result

[489] This point was first made in Stiggelbout, 'Remoteness' (n 68) 99–102. But his conclusion that the *Achilleas* assimilates *SAAMCO* in relation to contract remoteness seems to overlook the distinction between the extension and the limitation of liability.

[490] *Cory v The Thames Ironworks and Shipbuilding Co Ltd* (1867-68) LR 3 QB 181.

of is inability to implement the new method. It was held that the claimant could recover damages *not exceeding* £420. As Cockburn CJ put it, if the loss the claimant has actually sustained is too remote under *Hadley v Baxendale*, he is nevertheless entitled recover damages 'to the extent to which the seller contemplated that, in the event of his not fulfilling his contract … profit … would be lost'.[491]

The rule in *Cory* is not the measure of damages: it is a cap. This can be tested by asking what would have happened if no loss of any kind had been sustained. For example, in *Victoria Laundry*, the claimant actually lost the opportunity of entering into (unforeseeably) lucrative dyeing contracts with the Ministry of Supply. It was awarded what Asquith LJ described as a 'conjectural sum for loss of business in respect of dyeing contracts to be reasonably expected'.[492] Suppose it had either never entered into the lucrative (or any other) contracts, or had managed to actually fulfil them despite the defendant's breach,[493] it is plain that it would not have been awarded any damages, including the conjectural sum. So *Cory* is only a cap. However, it is important to understand that *Cory*, though a cap, is a *monetary* cap: it limits damages by reference to the *value* of the non-remote loss though the claimant never incurred it. The *nature* of the remote opportunity that was actually lost is irrelevant: all that the loss of such an opportunity proves is that there was *some* loss.

If the *SAAMCO* principle is merely an instance of the principle in the *Achilleas*, one would expect to find a similar cap in operation in the *SAAMCO* cases. Indeed, Mr

[491] *Cory* (n 490) 190 (Cockburn CJ) 191 (Blackburn J).

[492] *Victoria Laundry (Windsor) LD v Newman Industries* [1949] 2 KB 528 (CA) 543 (Asquith LJ).

[493] Without incurring any extra costs.

Kramer has argued that the fact that the lender was able to recover losses not exceeding the overvaluation shows that there is such a cap.[494] However, this may be doubted for two reasons. First, the losses that are within the *SAAMCO* cap that Mr Kramer identifies are not *themselves* remote, in the way that the conjectural sum awarded in *Victoria Laundry* was *itself* lost by foregoing a remote opportunity. Secondly, the appearance of a cap in *SAAMCO* cases is purely accidental.[495] What looks like a cap is actually an attempt to identify those consequences of the making of a false statement that are also consequences of the falsity of the statement. Where *none* of the loss is a consequence of the falsity of the statement, the claimant is awarded nothing, not a notional sum equal to the loss that, if it had occurred, *would* have been a consequence of the falsity of the statement. For example, in *Haugesund*, all of the loss for which Depfa sought damages was a consequence of the impecuniosity of the Kommunes. So the entire loss was a consequence of the making of the false statement that the Kommunes had capacity, but none of it was a consequence of the falsity of that statement. Its claim failed.[496] Yet, if the *Cory* cap applies, Depfa should have been awarded damages representing the amount it would have lost if it had been unable to recover *by reason of* the incapacity of the Kommunes. The same point can be made about other well-known cases such as *Andrews*[497] and indeed the mountaineer example: the valuation cases look like they are different only because some, but not all, of the loss *happens* to be a consequence of the falsity of the statement.

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[494] Kramer (n 24) 312–13.

[495] See also *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama AS* [2009] EWHC 1276 (Ch) [1009] (Briggs J).

[496] *Haugesund* (n 260).

[497] *Andrews* (n 242).

In conclusion, it is submitted that it is premature to conclude that *SAAMCO* is merely an application of the rule in the *Achilleas*. They remain distinct rules. The falsity rule, in particular, is simply imposed by the law and requires independent justification.

CHAPTER VIII

JUSTIFYING THE FALSITY RULE: AN OUTLINE

The central argument of Part III of this thesis has been that the falsity rule applies to *every* claim for damages for negligent misrepresentation, whether it is characterised as an 'information' case or as an 'advice' case, and that this rule is distinct from the (flawed) scope of duty rule. It was argued that this is the only basis on which one can give a coherent account of the scope of liability for negligent misrepresentation in the common law today. In this context, however, 'coherent' only means 'internally coherent': in other words, if the doctrinal arguments made in this thesis are correct, like cases are treated alike and the distinctions drawn by the law are (unlike, for example, the current distinction between *Steggles Palmer* and *Colin Bishop* cases) internally consistent.[498] As Professor Stevens has said, 'coherence is not the only virtue the law can possess',[499] and so the question that remains is whether the falsity rule is a *sound* rule. What, if anything, is the theoretical justification for the rule if (as this thesis has shown) it is not causal and it is not to be derived from the scope of the primary obligation?

The answer to this question depends on the theoretical justification for the use of remoteness rules and, more generally, on why it is thought that wrongdoers should be required to pay damages in the first place. This topic is beyond the scope of this thesis, but there are two reasons why it may nevertheless be helpful to address, in outline, the theoretical justification of the falsity rule in this chapter. First, in the light of the doctrinal

[498] In other words, it made an interpretive rather than normative claim: see Sandy Steel, 'Private Law and Justice' (2013) 33 OJLS 607, 612.

[499] Robert Stevens, 'Conflict of Rights' in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart 2009) 141.

arguments made in Part III, it is possible to show in this chapter precisely *where* the gap lies and *why* existing theories that justify or criticise *SAAMCO* have not been successful. Secondly, and as a consequence, it can show what a theory that purports to justify it would need to establish.

It proceeds as follows. The first section contains an overview of (some of) the rival theories that attempt to explain why wrongdoers are required to pay damages, be it for tort or for breach of contract. The second section explains why remoteness, in contrast to causation, presents particular problems for these accounts. Finally, it is argued that the falsity rule, like other remoteness rules, should be understood not as an *element* in the pursuit of corrective justice but as a *qualification* to it.

A. Why Damages?

At the highest level of generality, theorists of private law fall into two camps. In the first camp are theorists who offer what Ernest Weinrib has described as 'functionalist'[500] accounts. These are accounts that seek to justify (say) tort law by goals that are valid independently of tort law: tort law is justified if (and because) it serves these goals well. A well-known example is the law and economics school, which argues that liability rules in tort law are designed to promote efficient resource allocation. But what makes such theories distinctive is not the kind of external goals to which they appeal, but the fact that

[500] Weinrib (n 319) 3.

the goals are external. Thus, an account of tort law as a loss-spreading institution or as an institution designed to deter careless conduct is equally functional.[501]

These theories have been subjected to criticism that is, for the most part, unanswerable.[502] It is unnecessary to set out these criticisms here: it suffices to say that the most significant defect of any functionalist account is its inability to explain why *this* claimant is entitled to recover damages from *this* defendant, as it is equally consistent with (for example) requiring all wrongdoers to pay damages to some central fund from which all victims of wrongs are compensated. In contrast, this 'bipolarity'[503] of the common law is at the heart of the theories advanced by scholars in the second camp. Two of the most influential theories of this kind are corrective justice and rights.

1. Corrective and Distributive Justice

All norms of justice are allocative norms: norms about 'who is to get how much of what and why'[504] or, as Hart put it, 'the adjustment of claims between a multiplicity of persons'.[505] Aristotle distinguished between two kinds of allocative norms, which are generally described as corrective and distributive norms. The contrast is not, in fact, as widely accepted as is commonly supposed,[506] but it is fair to say that a norm of corrective

[501] Weinrib (n 319) 3–5.

[502] See, eg, Stevens (n 203) ch 15 and Gardner, 'Corrective Justice' (n 70) 23–26.

[503] Weinrib (n 319) 73.

[504] John Gardner, 'The Virtue of Justice and the Character of Law' in his *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) 243. 'Why' means 'on what grounds'.

[505] HLA Hart, *Punishment and Responsibility* (2nd edn, OUP 2008) 21.

[506] See, eg, the 'Two Children and a Cake' problem and related discussion in John Gardner, 'Corrective Justice, Corrected' (2012) 12 Diritto & Questioni Pubbliche 9, 15–21.

justice is distinctive because it does not merely allocate; it allocates *back*, that is, it is a condition of, and reason for, reversing some transaction between two parties.[507] In the simplest case, if D takes £1000 from C without justification,[508] a norm of corrective justice would, if sound, require D to repay the £1000. A norm of distributive justice, on the other hand, *divides* some benefit or burden among the parties to the distribution according to some criterion (eg need, ability). Aristotle described this contrast in mathematical terms: corrective justice is 'arithmetical' or concerned with an 'equality of quantities', while distributive justice is 'geometric' or concerned with an 'equality of ratios'.[509]

It is important to understand two conceptual features of corrective justice before turning to its relationship with remoteness. First, the subject-matter of the allocation does not determine whether the allocation is corrective or distributive. Losses arising out of (for example) automobile accidents can be allocated either distributively, by requiring all wrongdoers to pay into a central fund and allowing all victims recourse to the fund, or correctively, by requiring each wrongdoer to compensate the victim that *he* has wronged.[510] As Weinrib observes, corrective and distributive justice 'differ in structure,

[507] Gardner, 'Corrective Justice' (n 70) 7.

[508] Some scholars would say 'wrongful' instead of 'without justification': for discussion, see AM Honoré, *Responsibility and Fault* (Hart 1999) 74.

[509] Weinrib (n 319) 62–63.

[510] Weinrib (n 319) 70.

not subject-matter…neither lays exclusive claim to a certain slice of the empirical world'.[511]

Secondly, corrective justice is concerned with the reversal of transactions, not (or not except incidentally) with the reversal of gains and losses.[512] This is why corrective justice is a 'relational principle':[513] the correction must be done by, or on behalf of, the wrongdoer. As Gardner puts it, 'if D inflicted some loss on C, then undoing the transaction is not merely a matter of undoing C's loss. It is a matter of undoing C's loss *at D's expense*'.[514]

2. How does Corrective Justice Justify Reparative Damages?

Theorists who invoke corrective justice to explain contract and tort law generally make one of two claims. The first is that corrective justice explains not only the remedy (in the language of the common law, 'the secondary obligation') but also why claimants have the rights that they have or (which is the same point) why defendants owe the duties that they owe (the 'primary obligation').[515] This may be doubted.[516] The more plausible claim is that the secondary obligation to pay damages, which is itself a (legal) norm of corrective justice, is justified by the moral norm of corrective justice. There are significant

[511] Weinrib (n 319) 70. This does not mean that norms of justice are merely formal in the sense that to allocate is itself to act justly: Gardner, 'Virtue of Justice' (n 504) 247–49.

[512] Gardner, 'Corrective Justice, Corrected' (n 506) 29.

[513] Honoré, *Responsibility and Fault* (n 508) 75.

[514] Gardner, 'Corrective Justice, Corrected' (n 506) 29. The labels have been replaced.

[515] See, eg, Weinrib (n 319).

[516] The primary obligation can arise for all sorts of reasons, including reasons of distributive justice and reasons that are not reasons of justice: see Stevens (n 203) 328 and Gardner, 'Corrective Justice' (n 70) 23–24.

differences between corrective justice scholars about precisely how the moral norm justifies the legal norm, but most appeal, in one form or another, to the *reasons* why the primary obligation existed.

One of the most influential accounts of the relationship in these terms is John Gardner's 'continuity thesis'.[517] This is based on what Joseph Raz described as the 'conformity principle':[518] if (outside the law) D has a reason to ϕ, but fails to conform to it, he then has reason to come as close as possible to ϕing, that is, to do the 'next-best thing'. It is not that he has an *independent* reason to do the next-best thing: the very fact that he had a reason to ϕ, to which he did not conform, means that he now has a reason to come as close as possible to ϕing.[519] If D has an *obligation* (moral or legal) to ϕ, the fact of the obligation is itself a reason to ϕ, independently of *why* D has that obligation.[520] If he breaches this obligation, he cannot thereafter perform the *same* obligation: it is too late to do so. This, argues Gardner, is because obligations, unlike reasons, are 'individuated by the act they make obligatory' (eg re-deliver the vessel on 2 May 2004).[521] However, he can still comply with the *reasons* that 'added up to make the act obligatory' (eg enable

[517] Gardner, 'Corrective Justice' (n 70) 26–50 and Gardner, 'The Way Things Used to be' (draft, October 2014) 21.

[518] Joseph Raz, 'Personal Practical Conflicts' in Peter Baumann and Monika Betzler (eds), *Practical Conflicts: New Philosophical Essays* (CUP 2004) 189–92.

[519] '[I]f I have reason to give you $10 and I can only give you $8, then that same reason is a reason to give you the $8': Raz (n 518) 190. One may be tempted to object that the recipient might have wanted to use the money to buy something that he could have for $10 or not at all. But this is a dispute about what counts as the next-best thing, not about its salience: the next-best thing might then involve the promisor doing what he can to ensure that the recipient gets that thing, whether by paying $8 or otherwise.

[520] Obligations are not 'mere summaries of what should be done according to the balance of underlying reasons…they are by their nature reasons for acting': John Gardner, 'Introduction' in HLA Hart, *Punishment and Responsibility* (2nd edn, OUP 2008) xxi.

[521] Gardner, 'Corrective Justice' (n 70) 29.

the owner to make a follow-on charter) and those reasons, by virtue of the conformity principle, are now reasons for him to do the next-best thing.[522] The next-best thing is often the payment of money which, in the law, takes the form of damages.

This explanation has considerable attractions. In particular, it shows why the risk theory of remoteness is fatally flawed and, more generally, why any remoteness rule (including the falsity rule) is a qualification to the pursuit of corrective justice rather than an element in it.

3. The Continuity Thesis, the Risk Theory and Remoteness[523]

To explain why the continuity thesis undermines the risk theory, it is necessary to first distinguish between justifications and excuses in practical reasoning and describe the relationship between these concepts and the common law tort of negligence.

(i) Mistaken Beliefs: Justified or Excused?

To act (or believe, feel etc) with justification is to act (or believe, feel etc)[524] for an undefeated reason. Gardner has argued that this means that three conditions must be satisfied:[525] **(i)** there must be one or more reasons *to* act (a reason to ϕ); **(ii)** these must

[522] Gardner, 'Corrective Justice' (n 70) 33.

[523] I am grateful to Fred Wilmot-Smith for helpful discussion of this issue.

[524] This is omitted in subsequent references to 'act', except where the distinction matters.

[525] Gardner, 'Mysterious Case' (n 351) 275. The third condition is controversial but can be ignored for now because nothing turns on it for the purposes of this chapter: see John Gardner, 'Justifications and Reasons' in *his Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007).

not be outweighed by reasons to *not* ϕ; and **(iii)** D must have acted *for* one of these undefeated reasons.

Does D's *belief* about his reasons for action have any bearing on justification? There are two views about this. The first, which is endorsed here, is that it does not, though it can provide D with an *excuse*.[526] For example, suppose that D decides to swim in a beach in New South Wales which nobody, including D, has reason to believe is shark-infested. Despite his ignorance, D has a strong reason to not swim (the presence of the sharks) which is undefeated by reasons to swim (the pleasure he will derive from swimming, etc). He therefore has no *justification* for swimming but he does have an *excuse* because there were (undefeated) reasons to *believe* that he had a reason to swim.[527] It is important to understand that two different things are evaluated by reason in this example: D's act and D's belief.[528] The former is unjustified but the latter is not, which (an unjustified action for a justified belief) is the classic case of excuse, though there are others.[529] Now assume that this beach was widely known to be shark-infested, but that D, a tourist, failed to notice prominent signs near the beach warning of the danger. In this example, D has no reason to swim and no reason to believe that he has a reason to swim: his act is neither justified nor excused.

[526] It is sometimes said that an excuse is a denial of responsibility, ie, the capacity for reasoning. This is misconceived: see John Gardner, 'The Gist of Excuses' in his *Offences and Defences* (n 525) 131.

[527] Joseph Raz, *Practical Reason and Norms* (OUP 1999) 18.

[528] John Gardner, 'The Logic of Excuses and the Rationality of Emotion' (2009) 43 Journal of Value Inquiry 315, 317.

[529] John Gardner and Timothy Macklem, 'Reasons' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 444.

Many scholars reject this view: they claim that a reasonable belief that an act is justified is itself a justification for the act.[530] It is not possible to respond to their criticisms individually here, but this attempt to 'upgrade excuses to justifications'[531] may be doubted. First, it cannot explain why D is exposed to certain normative consequences if he only has an excuse: for instance, it would be rational for D to feel regret or remorse or apologise for what he has done, though it is excused. James Goudkamp responds to this point by suggesting that persons who are justified may also regret their act.[532] This is true, but excuses seem to leave a *greater* rational remainder or a rational remainder of a *different* kind. Consider, for example, the case of Erick Gelhaus who, in 2014, shot Andy Lopez, a 13-year old boy in California, believing that the boy was carrying an assault rifle. One can agree with Dr Goudkamp that Officer Gelhaus may regret this even if it was justified. However, he would surely experience greater regret if—as it turned out—the boy had actually been carrying a toy gun: he would regret having fired the shot *and* the fact he did not have the reason he thought he had. Secondly, and for this reason, excuses are 'morally inferior' to justifications. This is not, as Dr Goudkamp appears to suggest,[533] because the reasons that give D the excuse were *outweighed* by the reasons that deprive him of justification: it is because justifications are concerned with the world as it is, while excuses are concerned with the world as he takes it to be.[534]

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[530] For a helpful survey, see Goudkamp (n 257) 90–97.

[531] Gardner, 'Mysterious Case' (n 351) 287.

[532] Goudkamp (n 257) 96. For an answer to this and other objections, see John Gardner, 'Reply to Critics' in his *Offences and Defences* (n 525) 258–60.

[533] Goudkamp (n 257) 86. Another formulation is also ambiguous on this point: James Goudkamp, 'Defences in Tort and Crime' in Matthew Dyson (ed), *Unravelling Tort and Crime* (CUP 2014) 221.

[534] Gardner, 'Justifications and Reasons' (n 525) 113.

(ii) Justifications, Excuses and the Tort of Negligence

Although some scholars deny this,[535] it is possible to act with justification and yet act wrongfully (ie, in breach of an obligation).[536] Though this claim is controversial, it is not necessary to resolve it here because scholars in both camps agree *some* wrongs can be *committed* only if D acts without justification or excuse, because this may be a part of the definition of these wrongs. John Gardner has argued that the tort of negligence—which he calls a 'fault-anticipating' or 'parasitic' wrong[537]—is a wrong of this kind because the commission of the wrong itself depends on the absence of certain justifications or excuses. As he puts it,[538]

> One commits [these wrongs] only if one lacks a justification or excuse for *something else* one does as part and parcel of committing them. In some cases, the 'something else' is not the violation of a mandatory norm at all, but merely the failure to conform to an ordinary reason.

It is important to understand precisely what this means. Gardner's claim is not that the *wrong* is justified or excused: it is that the *act* becomes a wrong if the fact that it did not conform to some non-obligatory reason is not justified or excused. For example, in *Bolton v Stone*,[539] the defendant had a reason to not injure Ms Bolton but did not commit the tort of negligence because it had a justification for not conforming to that reason. This

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[535] For a survey of the rival views, see Goudkamp (n 257) 76–80.

[536] For a detailed explanation, see Gardner, 'Justifications and Reasons' (n 525) 106 and Gardner, 'Corrective Justice' (n 70) ('Fourth Doubt').

[537] Set out most clearly in Gardner, 'Fletcher on Offences and Defences' in his *Offences and Defences* (n 525) 150–54 but see also John Gardner, 'In Defence of Defences' in his *Offences and Defences* (n 525) 85 and Gardner, 'Corrective Justice' (n 70) ('Third and Fourth Doubts').

[538] Gardner, 'Fletcher on Offences and Defences' (n 537) 152.

[539] *Bolton v Stone* (n 354).

is an important, and often overlooked,[540] insight, but can be formulated more precisely in this way: absence of justification is a necessary but not sufficient condition for the commission of the tort of negligence.

To understand this point, it is important to remember that the tort of negligence is a complex or 'hybrid' tort: it is constituted by **(i)** an outcome, **(ii)** an act or omission to which that outcome stands in a certain causal relationship[541] *and* **(iii)** the defendant's reasons for acting or omitting to act in that way.[542] For example, the tort committed by the stevedores in *Polemis* was constituted by the destruction of the *Thrasyvoulos* (the outcome) and by the fact that they dropped the plank into the hold (the act) carelessly (the reasons). In any negligence case, as in the shark case, there are thus *two* elements, not one, that answer to reason: the act itself, and D's belief or assessment (of the risk of harm, choice of precautionary steps etc). If D had no undefeated reason to not act as he did, as in *Bolton*, the act was not unjustified and the tort is not committed: absence of justification is therefore a necessary condition for committing the tort of negligence.

It is not, however, sufficient. If D had an undefeated reason to not act (say the probability of harm[543]), whether foreseeable or not, it follows that he was not justified in

[540] Perhaps because 'reasonable' is not generally interpreted simply as 'justified', as it should be: Gardner and Macklem (n 529) 474–75.

[541] This differs from Gardner's formulation, which distinguishes between results and consequences. There is insufficient space to deal with this (arguably flawed) distinction here, but see his 'Obligations and Outcomes' (n 412) fn 24 and text.

[542] It is this element that makes the wrong 'fault-anticipating' or 'parasitic'.

[543] There are two complications which are not addressed here. First, whether reasons come from the *probability* of some outcome or from whether it actually materialises or not. Secondly, even if probability is treated as reason-giving, whether it is distinct from foreseeability. The better view (and the view adopted in the text) is that it is. For discussion of both points, see Gardner, 'Mysterious Case' (n 351) 281–84, 86–89 and Gardner, 'Reply to Critics' (n 532) 258–61. Subsequent references in the text to probability proceed on these assumptions.

acting: as we have seen, his knowledge or lack of knowledge of the reasons that apply to him does not affect the force of those reasons. However, the fact that no harm was foreseeable means that D had reason to *believe* that he was justified in acting: in other words, the belief was justified and the act was excused. Thus, if the common law holds that D does not commit the tort of negligence in a case where *no* harm was foreseeable—as it does—this is because (among other reasons) D's act was excused, not because it was justified. That an act can be unjustified despite the unforeseeability of the risk is apparent from the fact that the unforeseeability (ie, the falsity of the belief that it was safe) would *itself* be a matter of *regret*, as with excuses generally:[544] the anaesthetist who injected contaminated nupercaine, for example, would not have been acting irrationally if he had apologised to Cecil Roe, even though, given the state of medical knowledge in 1947, no harm of any kind to him or anyone else was a foreseeable consequence of his act.[545]

Both points—that D acts without justification irrespective of foreseeability and that he has an excuse only if no harm *of any kind* was foreseeable—can be illustrated by three examples, all based on the *Wagon Mound*. These examples also show that the justification, if any, for the *Wagon Mound* (and the risk theory more generally) cannot be corrective justice.

> **Case 1:** It is both probable and foreseeable that spilling oil in Sydney Harbour will: **(a)** foul the slipways of C's wharf and **(b)** cause a fire. D takes no steps to avoid spilling oil; the slipways are fouled and a fire breaks out, damaging the wharf.

[544] Raz (n 518) 189.

[545] *Roe* (n 93).

> **Case 2:** It is probable but not foreseeable (because of lack of knowledge) that spilling oil in Sydney Harbour will: **(a)** foul the slipways and **(b)** cause a fire. D takes no steps to avoid spilling oil; the slipways are fouled and a fire breaks out, damaging the wharf.
>
> **Case 3:** It is probable but not foreseeable (because of lack of knowledge) that spilling oil will cause a fire. However, it is probable *and* foreseeable that spilling oil will foul the slipways. D takes no steps to avoid spilling oil; the slipways are fouled and a fire breaks out, damaging the wharf.

In Case 1, D's act of spilling oil was *both* unjustified and unexcused. This is like the second shark example. It was unjustified because he had two undefeated reasons to not spill oil (slipway and fire). It was unexcused because he had no undefeated reason to believe that spilling oil was justified. The moral basis for requiring him to pay damages is that, having not conformed to either reason to not spill oil, he now has a reason to do the next-best thing, which involves giving C a wharf with functioning slipways and a wharf undamaged by fire, so far as this can be done monetarily.

Case 2 is the converse case: no harm of any kind to the owner of the wharf—not even damage to the slipways—was foreseeable, though it was probable. D's act is then excused but *not* justified: it is like the *first* shark example in which D had reasons to not do what he did, though he was justified in thinking that he did not have them. If the common law holds that D has not committed the tort of negligence—as it does—this is because D has an excuse for the rational non-conformity, not because the act was justified.

Case 3 is the crucial example: here one risk is foreseeable and probable, while the other is only probable. This corresponds to the facts of the *Wagon Mound (No 1)*. It is important to understand that D's rational non-conformity, with respect to his *act*, is *the*

same in Cases 2 and 3, because the salient facts as to this (the probability or certainty of harm) are the same. D's act was excused in Case 2 because his belief (that *neither* risk exists) was justified. However, this move is not available to D in Case 3, because the (foreseeable) slipway risk was, *on its own*, a reason to believe that there was an undefeated reason to not spill oil. Any belief that there was could not, quite independently of the fire risk, have been a justified belief. Indeed, if the fire risk had also been foreseeable, the belief that there is no reason to spill oil would (if anything) have been strengthened, not weakened. But since there was already (sufficient) reason for that belief, the foreseeability of the fire risk is simply irrelevant to any rational evaluation of the belief.[546]

The Privy Council may have overlooked this point in the *Wagon Mound* litigation: there is, as a result, a curious anomaly in the disposition of *(No 2)*. Walsh J found, unlike Kinsella J in the first round, that the reasonable man would not have been prepared to 'affirm dogmatically that [fire] would not happen':[547] thus both the slipway risk and the fire risk were foreseeable, as in Case 1 above. But fire was foreseeable only as a remote possibility, just as in *Bolton v Stone* there was a foreseeable but small risk of the cricket ball landing on someone's head. Lord Reid held that the defendant could not invoke the principle in *Bolton v Stone* because a reasonable man would neglect even a small risk only 'if he had some valid reason for doing so, eg, that it would involve

[546] In claiming that 'a duty to avoid unforeseeable consequences cannot be imposed because it is impossible to comply with it', Arthur Ripstein appears to overlook this point. The rule of law objection, if that is what it is, therefore fails: see Ripstein (n 371) 663. See also *Essa v Laing Ltd* [2004] EWCA Civ 2, [2004] ICR 746 [38] (Pill LJ).

[547] *The Wagon Mound (No 2)* [1963] 1 Lloyd's Rep 402 (NSWSC) 410 (Walsh J).

considerable expense to eliminate the risk'.[548] What Lord Reid seems to be saying here is that the defendant in the *Wagon Mound (No 2)* was liable because, unlike the Cheetham Cricket Club, it had no *justification* for ignoring the (small) risk. However, this is also true of the defendant in the *Wagon Mound (No 1)*: the (foreseeable) slipway risk was also a risk that the defendant had neither justification nor excuse for ignoring.[549] From the point of view of whether the act of spilling oil was reasonable (ie justified or excused), nothing turns on the foreseeability of the fire.[550]

It is, of course, an entirely separate question whether this rational imperative to pay damages should be made *legally* enforceable. For one thing, the law could define even fault-anticipating wrongs to include non-conformity only with *certain* reasons;[551] and, having done so, there may be other justifications for not making rational non-conformity legally enforceable.[552] However, the moral argument rejecting the risk theory is significant because it shows, if it is sound, that the very theory to which risk theorists like Weinrib and Beever appeal—corrective justice—is the theory that undermines it.[553]

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[548] *The Wagon Mound (No 2)* [1967] 1 AC 617 (PC).

[549] Cf Stauch (n 293) 204.

[550] It is not clear if Gardner would endorse this claim: see, eg his 'Mysterious Case' (n 351) fn 37, 288 and 'Corrective Justice' (n 70) text to fn 65. However, he has accepted elsewhere that D's ignorance of the applicable reasons can, at best, produce an excuse, not a justification: 'In Defence of Defences' (n 537) 87.

[551] A filter of some kind is probably necessary: if unjustified/unexcused non-conformity that causes legally recognised harm is *always* tortious, D is presumably liable to C if, for example, he causes C unforeseeable physical injury by breaching a contractual obligation he owes *T*, because the act of harming C (which he had no reason to do) would be unexcused (since he had a contractual obligation, albeit to T). This would appear to be an inversion of Lord Abinger CB's error in *Winterbottom v Wright* (1842) 10 M&W 109, 115. However, see *Bhamra v Dubb* [2010] EWCA Civ 13, which seems to endorse this result.

[552] For example, that the kind of harm is not legally recognised as an infringement of C's rights, that tort law is not the appropriate institutional mechanism (see, eg, Lord Hoffmann's observations about the proposed solatium in *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134 [34]), etc. For discussion see Honoré, *Responsibility and Fault* (n 508) 70–73.

[553] For their theory of remoteness to succeed, they would have to show that the tort of negligence only regulates non-conformity with a reason to not cause harm of the kind that actually materialises. There is no

Their central claim—that causing unforeseeable harm is not *wrongful*[554]—is shown to be unsound even in relation to fault-anticipating wrongs. From the standpoint of the continuity thesis, the defendants in *Polemis*, *Palsgraf* and the *Wagon Mound* all failed to conform to the reasons they had to not drop the plank, push the passenger and spill the oil. These reasons now demand 'fallback conformity', which may involve the payment of money to mitigate the unforeseeable outcome. If the law refuses to impose liability for this outcome, it refuses not because corrective justice does not require it but despite the fact that it does.

B. Remoteness, the Falsity Rule and Corrective Justice

This should alert us to the possibility that there are rules in the law of damages that do not have a corrective rationale. These rules are problematic for some theorists because they appear to undermine the claim that corrective justice is not only necessary for explaining tort law but is itself a *complete* explanation of it. However, as Gardner has pointed out,[555] this claim rests on the erroneous assumption that the bipolar character of private law disputes *itself* rules out the use of non-corrective norms. If a non-corrective norm (for instance a norm of distributive justice) is invoked, one does of course need to explain why the norm is being applied only to the claimant and the defendant and not to some

conceptual reason why this cannot be the case, but it cannot be derived by entailment from the fact that absence of justification/excuse is *an* element of fault-anticipating wrongs: an independent argument is needed to establish that the absence of justification/excuse must relate to *certain* reasons rather than to others. There is no such argument in the work of the leading risk theorists (eg Goodhart, Weinrib, Beever, Ripstein and Zipursky).

[554] This is, by far, the most common justification given by risk theorists. Zipursky (a civil recourse theorist), for instance, claims that 'if an injury was not among those that it was negligent for the defendant to fail to guard against, then its occurring was not a *wrongful* injuring by the defendant…': Benjamin Zipursky, 'Foreseeability in Breach, Duty and Proximate Cause' (2009) 44 Wake Forest L Rev 1247, 1272.

[555] Gardner, 'Corrective Justice' (n 70) 12–13.

wider group. But this only means that an 'extraneous reason', as Gardner describes it—something other than the distributive norm being applied—must be found for 'localising' the allocation in this way: the *fact* that allocation is local is not intrinsically inconsistent with distributive allocation. The 'extraneous reason' he cites for adopting a localised institutional arrangement (tort litigation)—instead of 'socialising' the conflict through, for example, taxation—is that this supports the doing of corrective justice. If there is a reason for the law to do corrective justice—as the continuity thesis argues there is—that is also a reason why distributive justice, if relevant, is 'pre-localised' in the form of a 'bilateral zero-sum conflict' between the claimant and the defendant.[556] If non-corrective norms are germane to tort law, the only question that remains in relation to any remoteness rule is whether the particular non-corrective norm is sound or not; that is, does the legal system have reason to adopt it in preference to other norms, whether corrective or distributive or neither?

One of the few scholars to have recognised that the common law's remoteness rules lack a corrective rationale is Gardner. He argues that they are rules of *localised* distributive justice. Although this argument does not succeed, it warrants discussion because it points the way to a correct explanation. According to the distributive norm formulated by Gardner—he calls it the 'responsibility norm'—it is permissible to harm the wrongdoer if he has 'made it inevitable' that either he or someone else must be harmed.[557] Suppose that C and D, two amateur mountaineers, find themselves in difficulty at the edge of a cliff, and that the only way either of them can save his life is by

[556] John Gardner, 'What is Tort Law For? Part 2: The Place of Distributive Justice' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014)' 348–49.

[557] Gardner, 'Distributive Justice' (n 556) 347.

releasing the rope, allowing the other to fall to his death.[558] The responsibility norm holds that it is permissible for C to release the rope if D had wrongfully put them in this perilous situation, because D, by his wrongdoing, 'made it inevitable' that one of them must die. This is not a norm of corrective justice because there is nothing to allocate back or reverse yet. Gardner argues that the norm, if sound, can apply to tort litigation because the defendant, by wrongfully harming the claimant, has made it inevitable that one of them must emerge from the conflict (tort litigation) as a loser, since C's gain (through an award of damages) is D's loss, and vice versa. The difference between the responsibility norm (which is causal) and norms of corrective justice also based on causation is that the responsibility norm is not 'all-or-nothing':[559]

> [This] norm makes a distribution of costs turn on their causal attribution…[o]nce we are proposing to deal with the losses by an award of money damages – and we always are in the law of torts – the losses can be shared between Defendant and Plaintiff. Determining how to effect such sharing in particular cases, it seems to me, is the main function of several doctrines of the law of torts, notably those of mitigation and remoteness of damage, and the modernized law of contributory negligence. Interpreted as devices to effect loss-sharing, these doctrines lack a corrective justice rationale.

There are two problems with the norm as Gardner formulates it. First, of the three doctrines he identifies—remoteness, mitigation and contributory negligence—at least one has nothing to do with causal attribution.[560] Secondly, it cannot explain even causal doctrines such as mitigation. This is because a norm of justice (whether corrective or

[558] Something like this, tragically, happened recently at the Kettleness cliffs near Whitby: Tom Whipple, 'Friend cleared after climber falls to his death' *The Times* (London, 18 May 2015). See also Gardner, 'Distributive Justice' (n 556) 346 for the well-known 'Hunter and Prey' example.

[559] Gardner, 'Distributive Justice' (n 556) 347, 49.

[560] Remoteness: the responsibility norm cannot explain why D is not liable to pay damages for an unforeseeable loss that he has caused even though he has 'made it inevitable' that either he or C must bear it.

distributive or neither) is, as Gardner accepts, not merely a condition of allocation; it must also provide a *reason* for allocation.[561] The responsibility norm does not do this, because the fact that the loss was caused by the claimant's voluntary act is not a reason *to* allocate it to him; it is only a reason to *not* allocate it to the defendant. This is easier to grasp in relation to a voluntary act of a third party: the fact that the third party's act is voluntary can only be a reason to not allocate the loss to the defendant. It cannot be a reason *to* allocate it to the claimant: that is simply a consequence of not requiring the defendant to pay damages. But mitigation is an application of the same principle: the only difference is that the voluntary act is the claimant's own.[562] In both cases, the norm of corrective justice endorsed by Gardner (that the defendant, if he wrongfully causes damage, must do the next-best thing) itself rules out liability, on the ground that the defendant did not cause it.

Although the particular distributive norm formulated by Gardner does not seem to be sound, he is clearly right in thinking that the structure of private law disputes cannot, on its own, rule out the use of non-corrective norms. These norms—whether norms of distributive justice or not—are best understood as *qualifications* to the pursuit of corrective justice, which, to quote Hart,[563] is 'the general justifying aim' of requiring wrongdoers to pay damages to claimants. An important implication of this analysis is that it is a mistake to search for a single rationale for *all* remoteness rules: they may qualify the pursuit of corrective justice for a variety of reasons. For example, the rule that

[561] Gardner, 'Virtue of Justice' (n 504) 242.

[562] Dyson and Kramer (n 18).

[563] HLA Hart, 'Prolegomenon to the Principles of Punishment' in his *Punishment and Responsibility* (n 505) 4.

defendants are liable only for foreseeable losses is a way of mitigating the burden of being required to pay damages: as Honoré puts it,[564]

> To rule out recovery for unforeseeable harm…enables courts to limit the extent of the burden, though in a somewhat arbitrary way… and [preserve a] rough proportion between the degree of fault and the burden of the sanction.

Similarly, the falsity rule allows the extent of the burden to be limited by allocating to the claimant a loss that he would have been willing to bear:[565] Lord Hoffmann's important insight in *SAAMCO* is that the claimant's *hypothetical* willingness to bear some loss is a sound basis on which the defendant's liability can be limited. The justification for doing this is not that corrective justice requires it or that there is no rational remainder. There is, and it may well call for other reparative measures. For instance, in *Wallace*,[566] Dr Kam failed to disclose two risks of surgery: neurapraxia and paralysis. The claimant would have gone ahead with the surgery even if the neurapraxia risk had been disclosed but not if the paralysis risk had been disclosed. In the event the neurapraxia risk materialised but the paralysis risk did not. In these circumstances, it would not have been irrational for Dr Kam to have apologised to Mr Wallace for this outcome: by acting in breach of his obligation, he failed to conform not only to the reason given by the fact of the obligation but also to the reasons why he had it (to enable Mr Wallace to decide whether to have surgery or not). There is a rational remainder which is now a reason for him to do the

[564] Honoré, *Responsibility and Fault* (n 508) 89.

[565] This should not be confused with a quite different idea in cases like *The Mamola Challenger* [2010] EWHC 2026 (Comm), [2011] Bus LR 212. There the answer is relatively straightforward because the claimant's agreement or willingness to suffer a particular head of loss is real. With the falsity rule, it is hypothetical: the lender *would* have been willing to take the risk of any loss in excess of the cushion. It does not follow that he actually did: an independent argument is needed.

[566] *Wallace v Kam* (n 318). It is more difficult than *Chester* (n 552) because it is a no-transaction case. *Chester* was a successful transaction case.

next-best thing. If the next-best thing is the payment of money, as it is likely to be, corrective justice would in principle require him to pay damages for the materialisation of the neurapraxia risk even though Mr Wallace was willing to expose himself to it.[567]

The High Court of Australia's conclusion that Dr Kam was nevertheless not liable can, therefore, be supported only on the ground[568] that Mr Wallace's willingness to expose himself to this risk gives the law a reason to not make the moral obligation of corrective justice (to pay damages) *legally* enforceable. Put differently, the falsity rule, like the *Wagon Mound* rule, is a *qualification* to the pursuit of corrective justice, not an element in it: it relieves the defendant of the (legal) burden of paying damages for a loss which the claimant would have been willing to bear, even though, by virtue of the continuity thesis, the defendant has a reason to pay for it. Doing the next-best thing, as the continuity thesis would dictate, is generally a greater burden on the defendant than not breaching the obligation in the first place:[569] in the normal case, the burden is nevertheless imposed on him because, by breaching the obligation, he not only caused some loss: the claimant, additionally, did not wish to incur that loss (eg a broken leg). But where the claimant would have been willing to incur the very loss for which he claims damages, the law can decline to institutionalise the reasons the defendant has to pay damages for it, even though he has caused it. *SAAMCO* itself can be analysed in the same way: the defendant valuer had a reason to do the next-best thing by paying damages for

[567] Indeed, this was the law in Scotland before *SAAMCO*, though this has largely gone unnoticed in the literature: *Moyes v Lothian Health Board* [1990] SLT 444 (OH) 447–48 (Lord Caplan).

[568] The High Court, unfortunately, reached this conclusion by invoking the risk theory: ch 7.

[569] Honoré, *Responsibility and Fault* (n 508) 85.

the entire loss, but this was not made legally enforceable because the lender would have been willing to suffer any loss in excess of the cushion it thought it had.[570]

Finally, if the falsity rule is understood as a qualification to the pursuit of corrective justice, it is easy to see why it does not apply to intentional wrongs. It is not that there is a special rule for intentional wrongs, as some have posited: it is simply that the obligation to do corrective justice is made legally enforceable in the usual way and is not, because the defendant's wrong is intentional, trumped by the claimant's willingness to suffer loss. It is unnecessary to search for some special policy to justify this. However, the fact that the falsity rule does not apply to deceit is a puzzle for those who favour the risk theory or a corrective justice explanation of *SAAMCO*, or indeed of remoteness more generally. This may be contrasted with *novus actus interveniens*, which applies to negligence and fraud alike: this, again, is evidence that there are deep differences between causal and non-causal rules. Fashionable though it may be, it is premature to embrace causal minimalism.

[570] To clarify, the claim is not that the lender *was* willing to suffer any loss in excess of the cushion (this would be circular): it is that it *would have been* willing (which is true) and that this is the justification for requiring it do so.

PART IV

DAMAGES UNDER THE MISREPRESENTATION ACT, 1967

CHAPTER IX

LEGISLATIVE HISTORY AND DAMAGES UNDER SECTION 2(1)

Few would deny that the Misrepresentation Act 1967 ('**the 1967 Act**' or '**the Act**') represents one of Parliament's most important recent interventions in the law of obligations. But the consensus is that it muddied the waters: the Act has been trenchantly criticised as 'arcane and circuitous',[1] 'mysterious and incoherent',[2] 'quixotic',[3] 'tortuous'[4] and for its use of what is said to be a 'clumsy fiction'.[5] In recent years, there have been signs that the courts are sympathetic to this criticism: the House of Lords has pointedly declined to decide what the 'rather loose wording'[6] of section 2(1) of the Act means, and Hamblen J[7] and the Singapore Court of Appeal have said[8] that the leading English authority[9] on that provision—*Royscot v Rogerson* ('**Royscot**')—may have been wrongly decided.

This Chapter argues that much of this criticism stems, with respect, from an incomplete analysis of the legislative history of the 1967 Act and of Parliament's own

[1] Ian Brown and Adrian Chandler, 'Deceit, Damages and the Misrepresentation Act' [1994] LMCLQ 40.

[2] Michael Bridge, 'Innocent Misrepresentation in Contract' [2004] CLP 277, 299, 302 ('it is not unlike entering a building through a revolving door and going round the full 360 degrees').

[3] KR Handley, *Spencer Bower & Handley: Actionable Misrepresentation* (5th edn, LexisNexis 2014).

[4] PB Fairest, 'Misrepresentation and the Act of 1967' [1967] CLJ 239, 244.

[5] PS Atiyah and GH Treitel, 'Misrepresentation Act 1967' (1967) 30 MLR 369, 373.

[6] *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL) 283 (Lord Steyn).

[7] *Cheltenham Borough Council v Laird* [2009] EWHC 1253 (QB), [2009] IRLR 621 [524].

[8] *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2014] SGCA 62 [80]–[84] (Andrew Phang Boon Leong JA).

[9] *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297 (CA).

understanding of the common law rules with which the Act was to interact. It shows that *Royscot* is correct, albeit not for the reasons it gives.

There are two preliminary points to be made. First, this Chapter is concerned only with the *construction* of the 1967 Act: it does not consider whether Parliament should have done things differently. Secondly, the argument it makes is underpinned by a close analysis of the legislative history. To do this is not to fall into the trap of trying to identify the intention of a particular individual or individuals; as Lord Hoffmann has said, 'it is an essential part of the background that the legislators spoke at a given time and place' in a certain historical setting.[10] There are contentious questions about the scope and legitimacy of this exercise.[11] As this is not a thesis about statutory interpretation, no attempt will be made to answer them: the goal is merely to show that material which would be admissible[12] under the current rules governing statutory interpretation (whatever their merits) supports the doctrinal arguments made in this Part about sections 2(1) and 2(2).[13]

[10] Lord Hoffmann, 'The Intolerable Wrestle with Words and Meanings' (1997) 114 South African LJ 656, 663.

[11] For two recent (and contrasting) accounts, see JD Heydon, 'The Objective Approach to Statutory Construction' (Current Legal Issues Seminar Series, Supreme Court of Queensland, 8 May 2014) and Robert Stevens, 'Contract Interpretation: What it Says on the Tin' (Lecture to the Inner Temple, 6 October 2014) 23–25.

[12] The only real doubt is whether the third condition (statement by the Minister or material necessary to understand a statement by the Minister) is satisfied: *Pepper v Hart* [1993] AC 593 (HL). For most of the material this Part relies on, notably the remarks of Sir Eric Fletcher, it is.

[13] But this Part makes no attempt to segregate the admissible from the inadmissible because there is enough admissible material to support the doctrinal conclusions it reaches; the other material simply serves to confirm this.

A. Background and Incorporation by Reference

In 1954, Sir David Maxwell-Fyfe became the Lord Chancellor, as Viscount Kilmuir. Five years later, he invited a Law Reform Committee chaired by Lord Jenkins ('**the Jenkins Committee**') to review the law relating to remedies for innocent misrepresentation. This committee, whose members included Lord Pearce, Diplock LJ and Professor Goodhart, submitted its report in 1962.[14] In hindsight, it is easy to see that this was a momentous period in the history of the English law of tort, but things must have looked rather different then. *Candler v Crane*[15] would have been relatively fresh in the mind and neither *Hedley Byrne* nor the *Wagon Mound* had reached the House and the Judicial Committee, respectively. Nor was there even a hint at the time that the measure of damages might differ as between negligence and fraud.[16]

In this setting, it is no surprise that the Jenkins Committee's objectives—and terms of reference—were narrow: it was only asked to consider the state of the remedies available to a person induced by a misrepresentation to enter into a contract with the representor. Indeed, the fate of an early—and ultimately short-lived—proposal to make wider changes demonstrates this. In a draft report prepared in December 1961,[17] the Committee proposed to provide a monetary remedy against *any* person who induced the claimant to enter into a contract, whether with him or someone else. This had the support

[14] Law Reform Committee, *Tenth Report: Innocent Misrepresentation* (Cmnd 1782, 1962).

[15] *Candler v Crane, Christmas & Co* [1951] 2 KB 164 (CA).

[16] See also John Cartwright, 'Damages for Misrepresentation' [1987] Conveyancer and Property Lawyer 423, 433.

[17] The National Archives, *The Law Relating to Innocent Misrepresentation*, LCO 2/7369 [20].

of Professors Goodhart[18] and Wade.[19] Diplock LJ, however, thought that it was inconsistent with the majority view in *Candler*.[20] The Committee, of course, did not wish to depart from *Candler*: in its final report, it proposed to confine the remedy to representations made by a party to the contract, and that is what the Act does.

The first draft of what ultimately became the 1967 Act was prepared in November 1965. It was referred to a Second Reading Committee in the House of Commons on 10 December 1965 and to a Standing Committee in 1966. It was introduced and debated in the House of Lords later that year and enacted in early 1967. The *dramatis personae* in these developments—at least in relation to damages—were Sir Eric Fletcher, a Government Minister,[21] and three Conservative MPs: Percy Grieve QC, Charles Fletcher-Cooke QC and Sir John Hobson. This legislative history contains answers to many of the controversial questions in the courts today and is considered at length subsequently. For now, it suffices to make two broad points about Parliament's objectives and the drafting techniques that it employed in enacting the 1967 Act.

[18] The National Archives, 'Letter from AL Goodhart to DW Dobson dated 26 January 1962' in *Sub-Committee G: Innocent Misrepresentation—Memoranda Circulated*, LCO 2/7369.

[19] The National Archives, 'Note by Professor Wade' in *Sub-Committee G: Innocent Misrepresentation—Memoranda Circulated*, LCO 2/7369.

[20] The National Archives, 'Memorandum by Lord Justice Diplock' in *Sub-Committee G: Innocent Misrepresentation—Memoranda Circulated*, LCO 2/7369 [1]–[6].

[21] Minister without Portfolio: he introduced and was the Government Minister responsible for the Bill.

First, it is clear that Parliament's intention was to faithfully implement the recommendations of the Jenkins Committee.[22] The Committee's views are therefore of importance in construing the Act.

Secondly, the 1967 Act was never intended to be an exhaustive code: Parliament took the common law as it found it and simply superimposed upon it the remedies that the Jenkins Committee had recommended. It is important to understand that this did not involve any 'fiction'. An uncontroversial example of this is the law governing inducement. There is nothing in the text of section 2(1) to suggest that the claimant must show that it would not have entered into the contract if the misrepresentation had not been made—the causal requirement that Chapter 2 has argued is implicit in every common law claim for damages. In fact the word 'after'—'where a person has entered into a contract *after* a misrepresentation has been made to him'—rather suggests that there is no such requirement. But the reason Parliament did not write the causal rule into section 2(1) is actually the exact opposite: it did not wish to be taken to have *modified* the common law by attempting to spell it out in terms. Indeed, at the Committee stage, an amendment was introduced by Mr Fletcher-Cooke 'to make it quite clear—as I do not think the present wording does—that there is nothing in this Bill to change [the requirement] … that it induced him to enter into the contract'.[23] But it was withdrawn after Sir Eric Fletcher gave this explanation:[24]

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[22] See, eg, The National Archives, *Misrepresentation Bill: Correspondence from 29-10-1965 to 20-01-1996: Misrepresentation Bill*, LCO 2/ 7375, 5.

[23] SC Deb (G) 16 February 1966, col 4.

[24] SC Deb (G) 16 February 1966, col 7.

> It will be appreciated that in this Bill we have a somewhat limited objective, namely, to *alter the legal consequences* that flow from misrepresentation that has legal consequences...I think therefore, that it is abundantly clear that as the Clause stands we are doing everything possible to preserve the existing law, *whatever it may be*, with regard to the doctrine of inducement.

Parliament is here not 'equating' the statutory remedy with the remedies from which it borrows these rules: it simply borrows them by the use of the well-known technique of incorporation by reference. It was entirely for Parliament to decide which rules to borrow, and from which remedies to borrow them: the fact that it borrowed one carries no implication that other rules applicable to that remedy have also been borrowed.

For this reason, this Part will say nothing about inducement, intervening cause and mitigation: they fall to be resolved by applying the common law principles considered in Parts II and III. That leaves only three issues: damages under section 2(1), damages under section 2(2), and the scope of section 3. The third is not relevant to this thesis; the remainder of this Part is devoted to the first two.

B. The Measure of Damages Under Section 2(1)

Section 2(1) provides the claimant with a remedy if the defendant would have been 'liable to damages…had the misrepresentation been made fraudulently'. In *Royscot*,[25] the Court of Appeal held that the measure of damages is therefore the fraud measure. It is striking that both critics[26] and supporters[27] of *Royscot*—and the former are by far the

[25] *Royscot* (n 9).

[26] See, eg, Harvey McGregor, *McGregor on Damages* (19th edn, Sweet & Maxwell 2014) [47-053]; HG Beale, *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012) [6-075]; Edwin Peel, *Treitel, The Law of Contract* (13th edn, Sweet & Maxwell 2011) [9-066]; Andrew Phang and Yihan Goh, *Contract law in*

greater in number—begin from the same starting-point: to the latter, the language of the provision is regrettably 'intractable';[28] to the former, its 'rather loose wording'[29] allows the courts to reach the desired result. It is assumed, in other words, that the deceit measure can apply *only if* section 2(1) does contain what is widely called the 'fiction of fraud', that is, if it deems a non-fraudulent statement to have been made fraudulently. It will be argued that this assumption is, with respect, incorrect, and that section 2(1) contains the deceit measure not because of any fiction of fraud—there is none—but because Parliament consciously and deliberately chose to use it as the measure of damages for a claim made under the Act.

1. Contract or Tort?

Some early cases on section 2(1) took the view that the claimant was entitled to be placed in the position in which he would have been if the representation had been true.[30] This, of course, is distinct from the falsity rule in *SAAMCO* because it represents an award of damages *for* the falsity of the information (as opposed to a reliance award being capped by falsity). Legislative history apart,[31] there are two reasons why this cannot be correct.

Singapore (Wolters Kluwer 2012) 275–76 and Richard Hooley, 'Damages and the Misrepresentation Act 1967' (1991) 107 LQR 547.

[27] See, eg, Cartwright (n 16) 433 (but compare John Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (3rd edn, Sweet & Maxwell 2012) [7-33]) and Handley (n 3) [13.14].

[28] Handley (n 3) [13.14].

[29] *Smith New Court* (n 6) 283 (Lord Steyn).

[30] See, eg, *Jarvis v Swans Tours Ltd* [1973] QB 233 (CA) 237 (Lord Denning MR) 239 (Edmund Davies LJ); *Davis & Co (Wines) Ltd v Afa-Minerva (EMI) Ltd* [1974] 2 Lloyd's Rep 27 (QB); *Gosling v Anderson* [1972] EGD 709 (CA); *Watts v Spence* [1976] Ch 165 and *Grove v Deatker* (CA, 21 January 1980, unreported) (although it actually uses the tort measure while purporting to use the contractual one).

[31] See below.

First, the language of section 2(1) is inconsistent with it. There are three expressions in section 2(1) each of which refers back to the previous: 'as a result thereof',[32] 'in respect thereof'[33] and 'so liable'.[34] Reading these together, what section 2(1) provides is that the defendant is liable in damages in respect of 'the loss suffered…as a result [of] entering into a contract' induced by a misrepresentation. This shows that damages are given for the loss caused by *entering into* a contract—as opposed to the loss caused by the contract not being what it was promised to be.

Secondly, section 2(1) is based—as the Jenkins Committee expressly noted[35]—on section 43 of the Companies Act 1948 ('**CA 1948**'). Section 43 is in turn a descendant of section 3 of the Directors Liability Act 1890 ('**the 1890 Act**'). That Act, passed to partially reverse *Derry v Peek*,[36] provided that a director[37] named in a prospectus that contained false statements was 'liable to pay compensation…for the loss or damage [the subscriber] may have sustained by reason of any untrue statement'. It was established law that the measure of damages under this provision was tortious.[38]

It is not necessary to analyse the cases on this point in any detail. All that needs to be said is that a line of authorities supporting the use of the tortious measure emerged

[32] Shorthand for 'as a result of entering into a contract…'

[33] Shorthand for 'liable to damages in respect of the loss suffered as a result of entering…'

[34] Also shorthand for 'liable to damages in respect of the loss suffered as a result of entering…'

[35] Jenkins Committee (n 14) [18].

[36] It was enacted two years after *Derry v Peek* (1889) 14 App Cas 337 (HL) was decided and restored the decision of the Court of Appeal in the specific context of directors: for a contemporary account, see GS Bower, *The Directors Liability Act, 1890* (Butterworths 1890).

[37] And certain others, here omitted.

[38] *McConnel v Wright* [1903] 1 Ch 546 (CA) 550 (Collins MR) and *Clark v Urquhart* [1930] AC 28 (HL) 67 (Lord Atkin).

around the same time as the contract cases cited above;[39] these streams of authority came to a head in well-known cases such *Inntrepreneur*,[40] *Naughton*[41] and *Royscot*,[42] which decided that the measure is tortious. This is no longer controversial: the key question today is whether the measure is deceit or negligence.

2. Deceit or Negligence?

Perhaps the most significant difference between interpretation in ordinary life and interpretation in the law is that the law restricts the amount of background information that the interpreter may use.[43] This point is of particular importance in the present context, because it must be conceded that the deceit measure cannot be derived only from the text of section 2(1). However, the background—probably even if inadmissible background is excluded—shows clearly that this is what Parliament intended, and the reason the authorities on the subject are in an unsatisfactory state is that they purport to find the answer independently of this background.

(i) A Textual Analysis of Section 2(1)

It is tempting for those who favour the view that the appropriate measure is deceit to attempt to derive it from the express reference to fraud and the use of the words ‘so

[39] *F & B Entertainments Ltd v Leisure Enterprise Ltd* [1976] 2 EGLR 76 (Ch) 79 (Walton J); *McNally v Welltrade International Ltd* [1978] IRLR 497 and *Andre & Cie SA v Ets Michel Blanc & Fils* [1979] 2 Lloyd's Rep 427 (CA).

[40] *Inntrepreneur Pub Co v Sweeney* [2002] EWHC 1060 (Ch), [2003] ECC 17.

[41] *Naughton v O'Callaghan* [1990] 3 All ER 191 (QB).

[42] *Royscot* (n 9).

[43] For detailed analysis of the problem, see Lord Hoffmann (n 10) 661–69.

liable'. This is what Balcombe LJ did in *Royscot*[44] and this is the view *Spencer Bower* favours: '[w]ith diffidence in such company, it is suggested that the language of the section is intractable, and the measure in deceit applies.'[45]

However, this is, with respect, incorrect: indeed, the attempt to derive the deceit measure from the text alone has made *Royscot* an easy target for those who argue, correctly, that it is not (linguistically) 'incapable' of being a reference to the negligence measure.[46] The key point is that there is no reference to the measure of damages either way. To explain why this is the case, it is convenient to first divide section 2(1) into three components:

(1) Where a person has 'entered into a contract after a misrepresentation has been made to him…and *as a result thereof* he has suffered loss';

(2) then, 'if the person making the misrepresentation would be liable to damages *in respect thereof* had the misrepresentation been made fraudulently';

(3) 'that person shall be *so liable*…'

Once section 2(1) is dissected in this way, two points seem clear: first, that **(1)** identifies the claimant's detriment as its entry into the contract, and second, that **(2)** identifies *this detriment* ('in respect thereof') as the subject-matter of a hypothetical damages award if the representation had been made fraudulently. Now, by providing that the defendant,

[44] *Royscot* (n 9) 305.

[45] Handley (n 3) [13.14].

[46] *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) [206] (Leggatt J).

under the new statutory cause of action, shall be 'so liable', all that **(3)** is doing is identify the same loss or detriment as the *ceiling* for the damages to be awarded under the new statutory remedy:[47] to put it differently, the word 'so' in **(3)** bears the same meaning as do the words 'in respect thereof' in **(2)**. So section 2(1) is saying no more than that a defendant who did not have reasonable grounds to believe that the representation was true is 'liable in respect of the loss caused to the claimant by entering into a contract after a misrepresentation was made to him'. If the loss was *not* caused by having entered into a contract,[48] section 2(1) tells the courts that it is not recoverable. But it says nothing whatever—either in **(2)** or in **(3)**—about what part of the loss that *is* caused by having entered into a contract is recoverable.

Spencer Bower rejects this analysis on the ground that the words 'so liable' refer not, as this chapter has argued, to 'in respect thereof' but 'to "damages…had the misrepresentation been made fraudulently"'.[49] At the risk of engaging in semantic debate, it can be said that this is mistaken, because the word 'so' serves to identify the *subject-matter* of the award of damages (the loss) and not the *reason* for its availability (the fraud). It may be that this is what is meant by those who suggest that the reference to fraud should be understood as going to liability rather than to remedy.[50] But even if that is correct, it is important to notice that it *does not follow* that the negligence measure of damages applies: all that the 'goes to liability' argument establishes is that the text does

[47] It is also apparent—although not germane to the point about the implausibility of a textual foundation for *Royscot*—that **(3)** does not involve any fiction that the defendant has committed fraud: it makes the defendant liable 'notwithstanding that the misrepresentation was *not* made fraudulently'.

[48] If the money would have been lost anyway, for example.

[49] Handley (n 3) [13.14].

[50] *Cheltenham BC* (n 8) [524] (Hamblen J); *Yam Seng* (n 46) [206] (Leggatt J).

not compel the use of the fraud measure—it does not positively establish that it compels the use of the negligence measure.

If one had to excise *all* background—the state of the law between 1959 and 1967, the Jenkins Committee's decision to use the 1890 Act as a model for section 2(1) etc—the problem would therefore be insoluble:[51] there would be no basis on which the courts could say that Parliament intended to use the deceit measure and not the negligence measure, or vice versa. Fortunately, as the law has not gone that far, it is possible to investigate why section 2(1) came to be drafted as it was.

(ii) The Legislative History of Section 2(1)

As will be apparent by now, this thesis favours the view that the measure of damages under section 2(1) is the deceit measure. In view of its importance and complexity, it postpones any analysis of an obvious question—why did Parliament not realise that it is anomalous to make innocent defendants liable to the same extent as fraudulent ones?—to the next sub-section. It is first necessary to demonstrate that Parliament *did* make this choice. There are three key indications that it did: the Jenkins Committee's analysis in 1962 of the relationship between the tort of deceit and the proposed statutory remedy; Amendment Nos 11 and 20 proposed by Charles Fletcher-Cooke in the Standing Committee; and the Notes on Clauses.

[51] Lord Hoffmann rightly makes the point that legislative history often throws no light on ambiguities of this kind, because the drafters would simply have not foreseen them: see (n 10) 672. However, the 1967 Act seems to be an exception.

The Jenkins Committee, having recommended that damages under what is now section 2(1) should be independent of the right to rescind, was fully conscious that the new remedy would be *as advantageous* for the claimant as the tort of deceit itself and, in particular, that the extent of liability would be the same. It was entirely content with this:

> We appreciate that the independent remedy in damages which we have recommended will be available in any case in which, under the present law, fraud has to be proved. The damages obtainable for misrepresentation will be no less extensive and the plaintiff's burden of proof very much lighter. It may be therefore that, so far as misrepresentations inducing a contract are concerned, actions for fraud will fall into disuse and be replaced by our proposed remedy. We see no harm in that.[52]

If the intention was to use a different, more defendant-friendly, measure of damages, it is hard to see why the Committee would have thought that the liability under section 2(1) would be 'no less extensive' or that claimants would have no incentive to institute an action for the tort of deceit. These observations are consistent only with the view—whatever its merits—that the measure of damages under section 2(1) is identical to the measure of damages in the tort of deceit.

Amendment Nos 11 and 20 put the matter beyond any doubt, and it is important to examine their progress closely. Although they were proposed in the Standing Committee, the topic first arose for discussion on 26 January 1966 in the Second Reading Committee. Sir John Hobson asked whether the measure of damages under section 2(1) was 'the loss from the representation not *being* accurate, or…the loss resulting from *entering into the contract* in reliance on it.'[53] This, of course, goes to whether the

[52] Jenkins Committee (n 14) [22].

[53] Second Reading Committee Deb 26 January 1966, col 27.

measure is tortious or contractual. In response, Sir Eric Fletcher explained[54] that section 2(1) was in fact based on *Mullett v Mason*[55] (a deceit case) and that the measure of damages was intended to be identical to the deceit measure:[56]

> Clause 2(1) … gives an independent claim to damages for a negligent misrepresentation. The intention is that the measure of damages applicable under clause 2(1) should be exactly the same as the measure of damages now available in action based on fraud or deceit.

This seems unambiguous. However, when the Bill was referred to the Standing Committee, Mr Fletcher-Cooke,[57] apparently not satisfied with Sir Eric's answer, proposed two sets of (alternative) amendments to remove any vestige of doubt: these were Amendment Nos 11 and 20 (tort), and 12 and 21 (contract). Amendment No 11 proposed to replace the words 'so liable' with 'equally liable in tort'[58] and Amendment No 20 proposed to insert a new provision after sub-section (1):

> **Amendment No 20**
>
> (2) The measure of damages under the preceding subsection for a misrepresentation shall be the same as for a fraudulent misrepresentation.

Mr Fletcher-Cooke explained that these amendments were designed to 'make it clear, where it was not previously clear'[59] that liability under section 2(1) was tortious, not

[54] See also The National Archives, *Notes on Clauses: Misrepresentation Bill*, LCO 2/7376, 19.

[55] *Mullett v Mason* (1865-66) LR 1 CP 559.

[56] Second Reading Committee Deb 26 January 1966, col 55.

[57] Supported by Sir John Hobson, Peter Thomas, Percy Grieve and John Talbot.

[58] The contract amendments similarly said expressly that the measure of damages was contractual and were proposed as an alternative to the tort amendments.

[59] SC Deb (G) 23 February 1966, col 52.

contractual, and identified six points of difference,[60] one of which was the measure of damages. In reply, Sir Eric Fletcher 'entirely agreed … that there should be no doubt whether the liability introduced into the law by the Clause is a liability in contract or a liability in tort', but felt that 'we have made it abundantly clear by the language used in the Clause that it is a liability in tort'.[61] The language Sir Eric had in mind was the reference to fraud:[62]

> Therefore, the test of the degree and nature of the liability is the liability that would have arisen if the misrepresentation had been made fraudulently. There cannot be any dispute that the liability for a fraudulent misrepresentation is a liability in tort and always has been, and the consequences that flow from a fraudulent misrepresentation are the consequences of an action in tort. Therefore, we thought that it was quite clear, by saying that the person shall be 'so liable' that we were equating the liability under the subsection with the existing liability in an action for the tort of deceit.

Thus, Sir Eric opposed this amendment not on the ground that it was wrong but because 'those words are not necessary and…not an improvement'.[63] There was then this crucial exchange between Sir Eric and Mr Fletcher-Cooke:[64]

> **Sir Eric Fletcher**: The hon and learned Member did not address himself to any great extent to Amendment No 20, which we are discussing with this Amendment. I do not know whether that is going to be pressed: it was not argued. The Amendment says: "*the measure of damages under the preceding sub-section for a misrepresentation shall be the same as for a fraudulent misrepresentation*".

[60] The other five were agency (discussed below), joint liability, assignment, the effect of illegality and priority in bankruptcy: SC Deb (G) 23 February 1966, cols 53–54.

[61] SC Deb (G) 23 February 1966, col 54.

[62] ibid.

[63] ibid.

[64] SC Deb (G) 23 February 1966, col 55.

> **Mr Fletcher-Cooke**: That must follow.
>
> **Sir Eric Fletcher**: I entirely agree that follows … that would follow without the addition of those words, and I again suggest that the Amendment is not necessary.

Mr Fletcher-Cooke then withdrew both amendments.[65] This episode leaves little room for any doubt about whether Parliament intended to use the deceit measure in section 2(1).[66]

This analysis is confirmed by the Notes on Amendments. After referring to *McConnel*,[67] it pointed out that the claimant is better off in tort if he has made a bad bargain and in contract if he has made a good one,[68] and that in either case he may recover consequential losses.[69] It said that this was because the measure of damages under section 2(1) is identical to the measure of damages under the 1890 Act, which is the deceit measure. There are many other statements in the legislative history to exactly the same effect.[70]

Why, then, is there so much resistance to the view that the measure of damages under section 2(1) is the deceit measure? There are probably two reasons. The first is that the authorities on the point purport to derive it without any reference to this background.

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[65] ibid.

[66] It might be said that this exchange only shows that Parliament intended to use the *tort* measure. This objection is misconceived: what is true is that Parliament intended to use the deceit measure *because* it thought that that is 'the' tort measure, but there is a conceptual distinction between what someone intends to say and the purpose for which he says it. Meaning is constituted by the former, not the latter: see below.

[67] *McConnel* (n 38).

[68] The National Archives, *Misrepresentation Act 1967: Notes on Clauses and Amendments*, BT 258/2382, 4.

[69] Citing *Mullet* (n 55).

[70] See, eg, The National Archives, 'Further Additional Note' in *Misrepresentation Act 1967: Notes on Clauses and Amendments*, BT 258/2382.

The second is that it is generally thought to be unattractive to impose on an innocent defendant liability designed to deter fraud. The following sub-sections consider these points in turn.

(iii) The Authorities on the Fiction of Fraud under Section 2(1)

At first sight, it is surprising that the point was not decided authoritatively for nearly 24 years after the 1967 Act was passed. There are two main reasons for this. First, as the previous section has explained, four of the early cases on the 1967 Act took the view that the measure of damages is contractual. On this view, the question of whether the measure is deceit or negligence did not arise. Secondly, it would have made no difference to the disposition of many of the cases which did recognise that the measure is not contractual, because the loss was in fact reasonably foreseeable,[71] or the point in issue was *novus actus*[72] or mitigation,[73] which apply to both negligence and deceit.

Ironically, as *Royscot* was also a case in which the claimant's loss was foreseeable, it was unnecessary to decide what the measure of damages is. Royscot was a finance company which operated a policy of not entering into any hire-purchase contract unless the buyer had paid at least 20 percent of the price. It required the dealer to confirm in advance that this was the case. The dealer falsely represented to Royscot that Rogerson, the buyer, had paid £1600 towards the purchase price of £8000. After a few months, Rogerson dishonestly disposed of the car in a private sale in circumstances that

[71] See, eg, *McNally* (n 39); *Grove v Deatker* (n 30) and *Walker v Boyle* [1982] 1 WLR 495 (Ch).

[72] *F&B Entertainments* (n 39).

[73] *Naughton* (n 41).

gave his buyer good title. In its claim against the dealer, Royscot said that its loss was the difference between what it had paid the dealer (£6400) and what it had received from Rogerson (£2774).

On these facts, there were potentially three arguments available to the dealer, only one of which turned on the measure of damages. First, Royscot had entered into *two* contracts—one with the dealer and another with the buyer—as a result of the false statement made by the dealer. It is sometimes suggested[74] that the fiction of fraud was the reason that Royscot was able to recover from the dealer damages for the loss arising out of the contract with the buyer. This is incorrect. The subject-matter of an award of damages under section 2(1) is the loss caused by having entered into a contract with the party who made the representation. But this is tested counterfactually, by asking whether any part of the claimant's loss would have been avoided if the false statement had not been made or (as appropriate) the truth had been told, that is, by comparing the breach position with the non-breach position. *Royscot* was a no-transaction case: so the claimant would not have entered into a contract with the dealer and (therefore) not with the buyer either.[75] Importantly, it was irrelevant for this purpose—at least when *Royscot* was decided[76]—whether the measure of damages was deceit or negligence, because in neither case was there any restriction about what *kinds* of no-transaction losses were recoverable.

[74] Joan Wadsley, 'Measures in Misrepresentation: Recent Steps in Awarding Damages' (1992) 55 MLR 698, 703.

[75] See also KR Handley, 'Causation in Misrepresentation' (2015) 131 LQR 275, 289–90, who suggests that this may turn on whether loss must be shown to be a consequence of the 'transaction' or the 'inducement'.

[76] As *SAAMCO*, which makes it necessary to ask this further question, was decided only in 1997.

The second argument was that Rogerson's wrongful disposal of the car was a *novus actus*. Balcombe LJ rejected this on the ground that wrongful disposals are *foreseeable*. This may be doubted—as Chapter 1 has explained, foreseeability is relevant only as an index of *abnormality* and a voluntary human act is usually abnormal in this sense—but it is unnecessary to discuss the point because this does not turn on the measure of damages either: it is clear law that the tort of deceit also requires the claimant to show that there was no *novus actus*.[77]

The third argument was in reality the only one that turned on whether section 2(1) uses the deceit measure: that the wrongful disposal, even if not a *novus actus*, was not reasonably foreseeable.[78] Balcombe LJ concluded that the academic commentary rejecting the fiction of fraud was inconsistent with the 'plain words' of section 2(1).[79]

It is needless to add that *Royscot* has been strongly criticised: indeed, in one case, Robert Walker LJ said that he was relieved that he did not have to consider whether it was wrong or even decided *per incuriam*.[80] Although it has been followed both in this country[81] and, until recently, in Singapore,[82] it is not difficult to see why it is generally thought to be an unsatisfactory authority: it decided a point that did not arise on the facts,

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[77] *Smith New Court* (n 6).

[78] *The Wagon Mound* [1961] AC 388 (PC).

[79] *Royscot* (n 9) 306–07.

[80] *Showan v Yapp* (CA, 3 November 1988, unreported).

[81] *The Siben (No 2)* [1996] 1 Lloyd's Rep 35 (QB) [63] (Clarke J); *Bridgegrove Ltd v Smith* [1997] 2 EGLR 40 (CA); *Spice Girls Ltd v Aprilia World Service BV (No. 2)* [2001] EMLR 8 (Ch) [14] (Arden J) and *Forest International Gaskets Limited v Fosters Marketing Limited* [2005] EWCA Civ 700.

[82] See, eg, *Ng Buay Hock v Tan Keng Huat* [1997] SGHC 58, [1997] 1 SLR(R) 507. The Singapore Court of Appeal has recently expressed the view that *Royscot* is wrong but left the point open: *Defu SGCA* (n 8) [80]–[85] (Andrew Phang Boon Leong JA). Section 2(1) of the Singapore Misrepresentation Act 1994 is identical to section 2(1) of the English Act.

and purported to derive the deceit rule from the text alone, without any reference to the background. Nevertheless, the ultimate conclusion it reached is, it is submitted, clearly correct in the light of what Parliament intended to accomplish.

But why did Parliament intend this?

3. Why Deceit? The Alligator and the Crocodile

In *Cheltenham BC*, Hamblen J observed that the considerations of morality and deterrence that Lord Steyn invoked to justify the remoteness rule for deceit 'do not apply, or at least do not apply to anything like the same degree, in cases of mere negligence.'[83] This seems obviously correct: the reasons given by Lord Steyn cannot apply to a person who, *ex hypothesi*, is not a fraudster. How did Parliament overlook this in choosing to use the deceit measure?

The answer is that it did not: it thought the problem did not arise. First, as the following sub-section explains, it proceeded on the assumption that the common law distinguishes between negligence and fraud only for the purposes of actionability, not quantum of damages. Secondly, this assumption was either false, or has since become false, but it is crucial to recognise that this is irrelevant to the construction of section 2(1): indeed, it actually strengthens the case for the use of the deceit measure.

[83] *Cheltenham BC* (n 8) [524].

(i) The Assumption Made by Parliament

It is sometimes said that the drafters of the 1967 Act did not give thought to whether it is right to treat fraudulent and negligent defendants in the same way because they simply used fraud as an analogy.[84] This is not true. One of the main objections made in the Second Reading Committee was that the Act removed any incentive for a claimant to institute an action for deceit, and that it was 'not wise for society to deny itself this weapon against the crook'.[85] The Government was even asked to consider amending the law to distinguish between fraud and negligence:[86]

> [W]e should be assured that…the Minister will give some consideration to the question of the measure of damages awarded against people who are so incomparably different in respect of the offences they commit…It is absolutely wrong in principle that those two people should be put in exactly the same position, as they will be by clause 2(1).

This objection did not prevail[87] because of a crucial assumption made by Parliament: that, at common law, the *amount* of damages (unlike actionability) does not vary according to the degree of wrongdoing. In other words, Parliament thought that if there had been a cause of action in the common law for negligent misrepresentation, the measure of damages would have been the same as that in the tort of deceit. This assumption is

[84] Brown and Chandler (n 1) 50.

[85] Second Reading Committee Deb 26 January 1966, col 35.

[86] Second Reading Committee Deb 26 January 1966, col 36.

[87] Indeed, some have criticised the Act for precisely this reason: 'fools are not knaves, and it might be thought proper that the law should encourage the branding of knaves as knaves'. See Fairest (n 4) 244.

evident in the Jenkins Committee's comments about why it was no objection to their proposal that the new remedy would virtually replace the tort of deceit:[88]

> It may be therefore that, so far as misrepresentations inducing a contract are concerned, actions for fraud will fall into disuse and be replaced by our proposed remedy. We see no harm in that. The fact that a person who has been led to enter into a contract on the strength of a statement which is untrue ought by itself to entitle him to compensation unless the representor can establish his innocence. If the statement has in fact been fraudulent, no doubt the victim's right to be compensated is even clearer, but it is not in general the function of the civil law to grade the damages which an injured person may recover in accordance with the moral guilt of the defendant.

These were not irrational assumptions to make in the mid-1960s. For one thing, as Holdsworth has pointed out, the common law of damages has historically 'look[ed] not at the extent of the demerits of the wrongdoer, but at the damage of the party injured'.[89] In addition, *Doyle*,[90] the first authoritative case to distinguish between deceit and negligence for the purposes of damages rather than actionability, was decided only in 1969.

Given Parliament's understanding of the common law, one can readily understand why it made the same measure of damages applicable to section 2(1): if 'moral guilt' is irrelevant to damages, incorporating the deceit measure had the advantage of making it clear that liability is tortious, not contractual; of obviating the need to amend the Act should the deceit rules *themselves* change in the future; and of allowing the courts to draw on an existing body of case law to decide disputes under the new Act.

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[88] Jenkins Committee (n 14) [22].

[89] Sir William Holdsworth, *A History of English Law* vol 8 (Sweet & Maxwell 1925) 464, who observes that this principle can be traced to Bacon and Hale.

[90] *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 (CA).

Does it matter that Parliament misunderstood the common law, or that the common law has changed? This is an important conceptual question about interpretation that requires close analysis. It will be argued that it does not: on the contrary, identifying this flawed understanding of the common law as Parliament's working assumption in enacting section 2(1) actually strengthens the case for the use of the deceit measure, because it explains *why* Parliament did *what* it did (but meaning is constituted by the 'what', not the 'why'). This 'mistake' is fundamentally different from mistakes about syntax, grammar or the conventional meaning of words.

(ii) The Alligator and the Crocodile: Words and the World

One of the finest accounts of the conceptual foundations of the modern approach to construction (not just of contracts) is the Oliver Schreiner Memorial Lecture delivered by Lord Hoffmann in 1997. In that lecture, Lord Hoffmann exposes the fallacy in the widely-held belief that words have *inherent* meaning: as his Lordship explains, interpretation is actually a matter of 'construing language against *background*',[91] and the conventional (not inherent) meaning of words is only one, though an important, part of this background. The background contains, in addition, underlying facts and 'a framework of mental assumptions'[92] all of which it is assumed the listener knows about. Indeed, it would probably be impossible to communicate entirely independently of background.[93] The conventional meaning of a word can be found in dictionaries and normally corresponds to the intended meaning only because people normally use a word

[91] Lord Hoffmann (n 10) 663 (emphasis added).

[92] Lord Hoffmann (n 10) 658.

[93] Lord Hoffmann (n 10) 658 (see especially 'Daddy, please buy me a Coke').

in its conventional sense.[94] But exactly the same principle of interpretation is at work when people do not, for whatever reason, do this: the background helps the listener ascertain which unconventional meaning was intended.

Consider, for example, the *Mannai* case.[95] A tenant had a single opportunity to terminate a ten-year lease by giving at least six months' notice of its intention to exercise a break clause. Clause 7(13) provided that the notice had to expire on the 'third anniversary of the term commencement date': as the lease had been made on 13 January 1992, this would have been 13 January 1995. The tenant unfortunately confused the first day of the third year with the last day of the second, and gave notice stated to expire on '12 January 1995'. The House, by a bare majority, held that the notice was effective. In a brilliant speech,[96] Lord Hoffmann explained that this is not because the House literally substituted '13' for '12', or because 'twelve' can *intrinsically* mean 'thirteen': what the tenant did was to successfully (and *unambiguously*) convey the intended meaning, although by using the 'wrong' words. This was because a recipient of this message *who was aware of the background* (ie, of clause 7(13)) would not have taken the tenant to have meant that he did not wish to terminate at all unless he could terminate on the 12th: the tenant would have been understood to wish to terminate on the 13th even though his

[94] And meaning *becomes* conventional. For instance, the word 'selfie' is now part of Oxford Dictionaries Online and is being considered for inclusion in OED. However, it does not convey the meaning that it conventionally conveys *because* it is in the dictionary: rather, it has entered the dictionary because a convention has been established as to the meaning conveyed by its use.

[95] *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 (HL). Lord Hoffmann's speech in this case contains the best exposition of the modern approach to construction for which other, more well-known, authorities are usually cited: see, eg, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) and *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900.

[96] Which, after eight or nine drafts, had initially come to the opposite conclusion: Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart 2014) 129–30.

message used a word that would not, *independently of this background*, convey that wish. Put differently, there is a 'distinction between the meaning of words…and the meaning which we understand to have been intended by a person who uses words'.[97]

Unfortunately, the myth that words have inherent meaning remains in the field of statutory interpretation.[98] But this ultimately does not matter for the purposes of this thesis, because it is submitted that *even the Mannai test* cannot 'correct' Parliament's mistaken understanding of the common law in relation to section 2(1). This is because there is an important conceptual distinction between a mistake about the conventional meaning of an utterance (as in *Mannai*) and a mistake about the *relationship* between an utterance and the world.[99]

Again, Lord Hoffmann illustrates this distinction with an illuminating example, one version of which also appears in his speech in *Mannai*.[100] When Mrs Malaprop says 'she is as obstinate as an *allegory* on the banks of the Nile', nobody has any difficulty in understanding that what she meant is 'alligator'.[101] If a court had to construe what Mrs Malaprop said, it would give the same answer, but not because it would literally substitute 'alligator' for 'allegory': it would ask how Mrs Malaprop's utterance would have been understood by a person who is aware of the background facts that there is a

[97] Lord Hoffmann (n 10) 658. Cf Stevens (n 11), who disputes the relevance of intention.

[98] And perhaps also in the way some judges draw the distinction between express and implied contractual terms: see, eg, *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm) [22] (Andrew Smith J). The proposition that terms implied by law can be excluded only by *express* terms in fact may also be based on this misunderstanding: *Liverpool City Council v Irwin* [1977] AC 239 (HL) 257–58 (Lord Cross).

[99] Lord Hoffmann (n 10) 658–60.

[100] *Mannai* (n 95) 774E–G.

[101] Lord Hoffmann (n 10) 659.

river called the Nile, that its banks are inhabited by scaly creatures conventionally called alligators and that these creatures are not, in general, agreeable. This process of interpretation is not radical at all:[102] indeed, it is not qualitatively different from how her utterance would have been construed if it had actually used the word 'alligator'.

But suppose that there are only crocodiles on the banks of the Nile (no alligators). There are now two mutually exclusive possibilities: first, that Mrs Malaprop does not know the difference between alligators and crocodiles and used the word 'allegory' as a reference to the large scaly creatures which are either the one or the other; or second, that she is an 'eccentric naturalist'[103] who believes that crocodiles are not obstinate while alligators are, and that the Nile has alligators but no crocodiles. As Lord Hoffmann says, one cannot choose between these possibilities without knowing something about Mrs Malaprop ('is she an eccentric naturalist') and something about the Nile ('does it contain alligators or crocodiles'). If this background information shows that the first meaning is correct, the court would give the same answer that it gave in the alligator case: that, by 'allegory', Mrs Malaprop meant 'crocodile', and this is, again, not radical at all—it simply takes the same process of interpretation one step further. But if the background shows that the second meaning is correct, the court *cannot correct* her beliefs about the disposition of crocodiles or the composition of the Nile—it would construe her utterance

[102] This is why the so-called 'corrective' process is simply irrelevant if the clause does not relate to the meaning of words in the first place—Lord Hoffmann's 'pink paper' example belongs in this category: see *Mannai* (n 95) 776B.

[103] Lord Hoffmann (n 10) 659.

to mean 'she is as obstinate as an alligator on the banks of the Nile', even though there are no alligators on the banks of the Nile:[104]

> This brings out a point I want to make about ordinary speech which becomes very important when we consider legal interpretation. If we suppose Mrs Malaprop to be an eccentric naturalist, she has used the word 'alligator' to mean exactly what it means in a dictionary, but she has made a mistake about the reason why she used it. She thought that there were alligators in the Nile when in fact there were not. There is therefore a vital difference between the meaning of an utterance and the reason or purpose for which the utterance was made. In the one case, the question is the meaning which the speaker intended to convey…in the other case, the speaker's mistake is not about language but about the relationship between his or her utterance and the world.

The reason why Hamblen J's criticism of *Royscot* is, with respect, misplaced, is that the mistake Parliament made in enacting section 2(1) falls on the other side of this line. If, for example, Parliament had added the word 'no' to the statutory excuse (ie, 'unless he proves that he had *no* reasonable ground to believe…'), the background might show that this was an inadvertent error, and the court, in construing section 2(1) as if this additional 'no' did not exist, would be doing no more than what it did in *Mannai*, or in reading 'allegory' as 'alligator'. The mistake would have been in Parliament's use of language. But the mistake Parliament actually made was its underlying assumption that the common law does not distinguish, for the purposes of damages, between negligence and fraud: that there is a *single* 'tort' measure of damages. This is not a mistake about *what* it intended to say ('the measure under section 2(1) is the deceit measure'): it is a mistake about *why* it intended to say it ('saying this will ensure that *the* tortious measure will be used by the courts').

[104] Lord Hoffmann (n 10) 659.

In other words, it is possible, even likely, that Parliament would have done things differently if it had been informed that it had got the common law wrong: it might, for instance, have said that the defendant under section 2(1) 'shall be liable for foreseeable loss'. But what Parliament *would* have done is irrelevant in construing what it has actually done: in the mistaken-language cases, in contrast, the court *is* construing what Parliament has defectively or unconventionally (but actually) done and not what it would have done. Indeed, that Parliament would have said something different had it been better informed is in fact good evidence of what it has actually said given that it was not.[105]

4. Implications: There is Actually No Fiction

A standard criticism of *Royscot* is that it is inconsistent with the courts' refusal to apply to section 2(1) certain other rules governing the tort of deceit. This is based on the assumption that *Royscot* can be justified only if there is a fiction of fraud in section 2(1), that is, only if section 2(1) deems the defendant to have committed the tort of deceit. If the foregoing analysis of the legislative history is correct, the truth is the exact opposite: Parliament actually incorporated the tort of deceit *only* for the purposes of defining the extent of liability of a person who commits the statutory tort. If that is right, there is no reason to apply any other deceit-rule unless it is shown that that rule was also borrowed by Parliament. Strikingly, the drafters themselves foresaw this possibility and expressly rejected the proposition that there is any fiction in relation to two other rules: limitation and agency. It is not necessary in a thesis about damages to discuss these rules in detail, but a brief account may be helpful to illustrate that there is no fiction.

[105] Lord Hoffmann (n 10) 660.

Section 26 of the Limitation Act 1939 (now section 32 of the 1980 Act) provides that the period of limitation for any action 'based upon the fraud of the defendant' does not begin to run until the claimant discovered or ought to have discovered the fraud. In the debate on the Misrepresentation Bill in the House of Lords, Lord Reid said that a claim under section 2(1) would attract this special rule because 'what you do is to write into the facts the charge of fraud and then you see whether an action lies';[106] he proposed an amendment to clarify that section 26 would not apply. No such amendment was made, because the drafters were clear that fraud was relevant only 'to ascertain whether there is liability under the sub-section' and that section 2(1) 'states expressly that the action is not founded on fraud and it follows inevitably that it does not come within section 26(a)'.[107] What is at work in section 2(1) is incorporation by reference, but incorporation only of the extent of a fraudster's liability, not of other rules governing the tort of deceit.[108]

A similar point can be made about agency. Before 1967, the question that had arisen was whether the ingredients of deceit could be 'combined' by adding the principal's knowledge to the agent's representation (or vice versa). In *Armstrong v Strain*,[109] the Court of Appeal held that it could not be: it had to be shown that either the principal or the agent was *severally* dishonest. The Jenkins Committee appeared to have this in mind when it said that there should be no liability under clause 2(1) if 'the

[106] HL Deb 17 May 1966, vol, col 936.

[107] The National Archives, 'Additional Note on Clause 2' in *Notes on Clauses: Misrepresentation Bill*, LCO 2/7376, 26 (emphasis in original).

[108] As Warby J recently pointed out, pleading fraud is in fact *inconsistent* with a claim under section 2(1): *Startwell Ltd v Energie Global Brand Management Ltd* [2015] EWHC 421 (QB) [72].

[109] *Armstrong v Strain* [1952] 1 KB 232 (CA).

principal (*or his agent*, if the representation was made by him) believed the representation to be true and had reasonable grounds for his belief'.[110]

The Committee's reference to the agent was omitted in the first draft of the Bill prepared in November 1965 and in every subsequent draft. The Law Commission, of which Professor Gower was at the time a member, thought that this was a mistake.[111] But it was not: the reference was omitted because the Lord Chancellor's Office, and then Parliament, thought it best to leave it to the courts to apply the *ordinary rules of agency* to clause 2(1).[112] Indeed, Sir John Hobson and Percy Grieve disagreed with this course, and proposed in the Standing Committee to insert in clause 2(1) the words 'or on his behalf'. This amendment was ultimately withdrawn after Sir Eric Fletcher explained that the intention was that the courts would apply the ordinary common law rules about agency to section 2(1).[113] Many of the difficulties in the agency cases under section 2(1) could have been avoided if the court's attention had been drawn to this legislative history.[114] Again, what this shows is that one can solve the agency problem without any fiction of fraud, and it seems clear from this episode that the suggestion that the '*Armstrong v Strain*' rule does not apply to section 2(1)—and *therefore* that the deceit measure of damages should also not apply—is misconceived. The principle underlying

[110] Jenkins Committee (n 14) [27(5)].

[111] The National Archives, '21 February 1966—Misrepresentation Bill: Section 2(1)' in *Law Reform (Misrepresentation) Bill 1965: Correspondence*, LCO 2/7382.

[112] See, eg, The National Archives, 'The Misrepresentation Bill' in *Misrepresentation Bill: Correspondence from 29-10-1965 to 20-01-1996: Misrepresentation Bill*, LCO 2/ 7375.

[113] SC Deb (G) 23 February 1966, cols 44–50.

[114] See, eg, *MCI Worldcom International Inc v Primus Telecommunications Inc* [2003] EWHC 2182 (Comm).

section 2(1) *is* the principle in *Armstrong v Strain*, but ‘severally dishonest’ is replaced by ‘severally careless’.

In short, the conclusion reached by the Court of Appeal in *Royscot* is correct, though not for the reasons it gave: Parliament clearly intended to use the deceit measure. If it is said that it is unsatisfactory to apply rules designed for fraudsters to defendants who are merely negligent, the answer is that that is a matter for Parliament, not the courts.

CHAPTER X

THE MEASURE OF DAMAGES UNDER SECTION 2(2)

Section 2(2) of the 1967 Act does not restrict the claimant's right to rescind a contract induced by a fraudulent misrepresentation, but allows the court to award damages in lieu of rescission if the misrepresentation was either negligent or innocent. Section 2(3) provides that any award made under section 2(2) must be taken into account in a claim made under section 2(1). These provisions have given rise principally to three issues: jurisdiction (can damages be awarded if rescission is barred), the measure of damages and the principles governing the exercise of the discretion to refuse rescission. Only the second question, which has also proved to be the most difficult, is relevant to this thesis.

This Chapter begins by explaining the nature of the so-called 'indemnity' that was available in equity following rescission, and distinguishes this from compensation for loss. It then briefly describes another statutory jurisdiction to award damages that was invoked by the drafters of section 2(2) as an analogy: section 2 of Lord Cairns' Act. Thirdly, it argues that the legislative history of section 2(2) shows clearly that the measure of damages was intended to be the monetary equivalent of rescission. Finally, it shows that the leading case on the point, *William Sindall*, is, with respect, unsound.[115]

[115] *William Sindall plc v Cambridgeshire County Council* [1994] 1 WLR 1016 (CA).

A. The Indemnity Following Rescission

It has been said that rescission is 'one of the most difficult remedies to analyse'.[116] This is principally because it is not easy to pinpoint to what extent it is a restitutionary remedy. It is not necessary to answer this question here: all that needs to be said is that the indemnity following rescission is *distinct* from compensation for loss.

The starting-point is (at least now) uncontroversial: rescission, unlike termination for breach, invalidates the contract retrospectively.[117] If the contract is wholly executory, the mechanics of rescission are straightforward: the rights and obligations of the parties are cancelled with retrospective effect and as neither has performed there is nothing to reverse. But if a contract has been wholly or partly executed, the logic of rescission demands that this must be undone. Often it can be undone *in specie*—the buyer returns the goods in the same or similar condition and the seller refunds the purchase price—but sometimes this is not possible because of the nature of the contract. For instance, in *Newbigging v Adam*,[118] Colonel Newbigging was induced by false representations to give up his commission in the Army and become a partner in a firm called Walter Townend & Co. He paid £9700 as capital contribution and a further £324 to discharge some liabilities of the partnership. It is obvious that the £9700 and the £324 had to be refunded to Colonel Newbigging, but that was not the only liability he had assumed under the contract: he was potentially liable to creditors of the firm for any debt that had arisen during his time as a partner. The 'indemnity' given by the courts of equity was designed

[116] Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 17.

[117] *Johnson v Agnew* [1980] AC 367 (HL) 393 (Lord Wilberforce).

[118] *Newbigging v Adam* (1886) 34 Ch D 582 (CA).

to undo partial performance of this kind, which could not be simply reversed in *specie*. This is fundamentally different from compensation for loss. Thus, though Cotton LJ and Bowen LJ differed about the scope of the indemnity, they agreed that Colonel Newbigging could not recover the loss arising from having given up his commission in the Army: such consequential loss, they held, can be claimed only in an action for damages at common law.[119]

The reason the indemnity does not cover consequential losses is that it simply 'unperforms'[120] an executed contract. That is, it asks 'what did the claimant give under this contract and what did he receive' and not (as a compensatory award does) 'what would the claimant have got if he had not entered into the contract'. This distinction between the indemnity and compensation is sometimes obscured by the fact that a part of the indemnity can overlap with the subject-matter of the award of damages. This is because one element of the counterfactual assessment of the claimant's loss is his 'net loss' *under* the contract and the indemnity and damages will produce the same figure if this is the *only* loss. But the difference in principle remains:[121] as Professor Birks put it, the indemnity is nothing but 'rescission translated into money'.[122]

[119] *Newbigging* (n 118). See also *Whittington v Seale-Hayne* (1900) 82 LT 49 (Ch).

[120] For this suggestion, see Steven Elliott, 'Compensation Claims Against Trustees' (DPhil thesis, University of Oxford 2002) 39–46 and especially his analysis of *Semelhago v Paramadevan* [1996] 2 SCR 415 (SCC).

[121] See Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) [17.23]–[17.31].

[122] Peter Birks, 'Unjust Factors and Wrongs: Pecuniary Rescission for Undue Influence' [1997] RLR 72.

B. Damages in Lieu of Specific Performance under Lord Cairns' Act

It was uncertain whether Chancery had the power to award damages before 1858.[123] So the Chancery Amendment Act ('**Lord Cairns' Act**') was enacted, providing in section 2 that the court may award damages 'either in addition to or in substitution for' an injunction or specific performance. The measure of damages was considered by the House of Lords in 1924 in *Slack*.[124] Viscount Finlay, who gave the leading speech, explained that damages under section 2 are *not* given for compensating loss, but as a 'monetary substitute' for the specific remedy to which the claimant would otherwise be entitled: 'an *equivalent* for what is lost by the refusal of the injunction'.[125]

Despite this, it is sometimes suggested that the measure of damages under section 2 is identical to the common law measure of damages for breach of contract: this is the basis on which Hoffmann LJ in *Sindall* said that Lord Cairns' Act was irrelevant to the construction of section 2(2).[126] The suggestion is based on Lord Wilberforce's comments about *Wroth v Tyler*[127] in *Johnson v Agnew*.[128] Lord Wilberforce did say that the measure of damages under section 2 is the same as that in common law, but was referring to the

[123] See JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th edn, LexisNexis Butterworths 2015) [24-020].

[124] *Leeds Industrial Co-Operative Society v Slack* [1924] AC 851 (HL).

[125] *Slack* (n 124) 859.

[126] *Sindall* (n 115) 1037.

[127] *Wroth v Tyler* [1974] Ch 30.

[128] *Johnson v Agnew* (n 117).

date of assessment, not to the underlying principle.[129] The measure of damages under the Act is the monetary equivalent of an injunction or order of specific performance.

C. The Measure of Damages under Section 2(2) is the Monetary Equivalent of Rescission

As with section 2(1), the legislative history of section 2(2)—to which the Court of Appeal in *Sindall* does not appear to have been referred—shows clearly that the measure of damages is the monetary equivalent of rescission. This was the Jenkins Committee's view. Having recommended that the courts should have the power to give damages in lieu of the 'drastic' remedy of rescission in appropriate cases, it said that the assessment of damages is governed by the *Slack* measure: what has the claimant lost by reason of the refusal of the remedy that he seeks and to which he would otherwise be entitled?[130]

The clearest indication that the intended measure was the monetary equivalent of rescission is in the discussion of Amendment No 29 in the Standing Committee. The amendment, proposed by Percy Grieve, sought to provide expressly that compensation is given under section 2(2) 'for the fact that the contract is to subsist'.[131] This would have made it clear that damages are given not for loss *per se* but for loss of the right to rescind.

[129] See also James Edelman, 'Money Awards of the Cost of Performance' (2010) 4 Journal of Equity 122.

[130] Jenkins Committee (n 14) [12].

[131] The National Archives, *Misrepresentation Act 1967: Notes on Clauses and Amendments*, BT 258/2382, 3.

The Notes on Amendments explain that this is *already what section 2(2) provides*. It may be worth setting out this passage in full in view of its importance:[132]

> The effect of the amendments would be that:
>
> **(a)** the measure of 'compensation' awarded to the representee would be his loss resulting *from the failure to obtain rescission*;
> **(b)** this loss would include any loss consequential on the inevitable delay before the hearing – eg a loss caused by a *fall in the market*;
> …
> As the Bill stands, *(a) and (b) are already covered*. In paragraph 12 of their Report, the Law Reform Committee referred to … the House of Lords' decision in **Slack**… where it was held that the proper measure of damages was the loss (including prospective loss) suffered by the plaintiff by reason of *his not obtaining the injunction* to which he would otherwise have been entitled. There seems no doubt that, under clause 2(2) as drafted, *the courts would follow this principle*…By the same reasoning, (b) above is also covered by clause 2(2) as it stands.

The Notes go on to point out that this is the case *even if the market* has fallen—the very problem in *Sindall*:

> Thus, in a simple case, where A had induced B to buy a car for £500, by misrepresenting its year of manufacture, the measure of damages would be the difference between £500 and the *actual value of the car, because, if rescission were ordered, A would get the car back and B would recover his £500*.
>
> In the example given above, by the time B's claim for rescission is tried there may have been a drop in the second-hand car market, so that the actual value of the car at that date has fallen by a further £100. If B could rescind, he would still have got his £500 back and *A would have to take in return the new depreciated car*. So what B has lost *by being held to his contract* is now the difference between the £500 he paid and the depreciated value of the car, less the value, if any, of the use he has made of it in the meantime.

[132] The National Archives, 'Notes on Amendment Nos 26 and 29' in *Misrepresentation Bill: Notes on Amendments [Commons] Committee Stage*, LCO 2/7378 (emphases added).

It is clear from this that section 2(2) was intended to put the claimant in the position in which he would have been if rescission had been granted.

One might say—as Hoffmann LJ does in *Sindall*—that it is irrational to limit the right to rescind on the ground that the defendant should not be deprived of the benefit of the bargain, but then assess damages in lieu in a way that has precisely this effect. This is, at first sight, a powerful objection but the next sub-section shows that it is misconceived, largely because it would seem to misunderstand why the Jenkins Committee and Parliament wished to limit the right to rescind in the first place.

D. Responding to Objections: *William Sindall*

Until *Sindall* was decided in 1994, there was virtually no authority on the measure of damages under section 2(2). It was generally assumed that it had to be either the contractual measure or the tortious measure.[133] *Sindall* must be analysed closely: it is perhaps an instance of the age-old maxim that hard cases make bad law.

Sindall was a building company. It 'fought like a tiger'[134] for the right to buy some land in Cambridge for £5.02 million in December 1988. It intended to build houses and had obtained outline planning permission. In hindsight, there could not have been a worse time (except perhaps late 2007) to enter the property market: by October 1990, the land was worth only £2m. Sindall then discovered that there was a nine-inch sewer buried under the land, contrary to representations allegedly made by the Council that the land

[133] It was left open in *The Lucy* [1983] 1 Lloyd's Rep 188 (QB).

[134] *Sindall* (n 115) 1019 (Hoffmann LJ).

was not affected by any easement. It would have cost about £18,000 and the loss of one house to divert the sewer, but Sindall, unsurprisingly, chose to rescind the contract for misrepresentation.

All three members of the Court of Appeal said that they would have[135] exercised their discretion under section 2(2) to award damages in lieu of rescission, but their reasoning is not uniform. Evans LJ rested his judgment on two alternative grounds: first, that Sindall could not have recovered the purchase price (less current value) even under section 2(1), because a market fall is an 'extraneous cause':[136] on this view, Sindall's claim would have failed whether the measure of damages under section 2(2) is tortious or contractual. But Evans LJ held in the alternative that the measure of damages is contractual, so that Sindall was only entitled to have the representation made good, at a cost of £18,000. Although Evans LJ's first ground has attracted some support,[137] it is difficult to support it because a falling market is neither unforeseeable nor a *novus actus*.[138] Hoffmann LJ did not rely on the first ground, but nor entirely on the second: he held that damages under section 2(2) can never *exceed* the contractual measure.[139] Thus Hoffmann LJ does not—at least on the face of it—commit himself to the proposition, as Evans LJ does, that the *measure* is contractual, preferring to treat it as a 'cap'. Russell LJ agreed with both judgments.

[135] It was not a live issue because of their findings on liability.

[136] *Sindall* (n 115) 1046.

[137] Hugh Beale, 'Damages in Lieu of Rescission for Misrepresentation' (1995) 111 LQR 60.

[138] See ch 4.

[139] *Sindall* (n 115) 1038.

The judgment of Hoffmann LJ in particular is closely reasoned and gives three powerful reasons in support of the measure that he favours. In order to demonstrate that it is ultimately not correct, it is proposed to first explain that Hoffmann LJ is actually committed, as a matter of logic, to using the contractual measure though he tries to refrain from doing so; secondly, highlight that there are two flaws in the use of that measure; then consider in turn the three reasons Hoffmann LJ gives, and finally explain why the market fall may have caused confusion in *Sindall*.

1. *SAAMCO* and *Sindall*: Hoffmann LJ is Committed to the Contractual Measure

Hoffmann LJ, of course, accepted that the measure of damages under section 2(1) is tortious,[140] but was careful not to say that the measure under section 2(2) is contractual:[141]

> [D]amages under section 2(2) *should never exceed* the sum which would have been awarded if the representation had been a warranty. It is *not necessary for present purposes* to discuss the circumstances in which they may be less.

It has been suggested that, by saying that damages cannot exceed the warranty measure, Hoffmann LJ was essentially applying the 213C counterfactual[142] in *SAAMCO* to section 2(2) of the 1967 Act. But there is one important difference between 213C (or the falsity rule) and *Sindall*: 213C is the rule that the claimant's loss must be a consequence *both* of

[140] *Sindall* (n 115) 1036.

[141] *Sindall* (n 115) 1038.

[142] See chs 4–5.

his having entered into the contract *and* of the information 'being wrong'. In contrast, Hoffmann LJ's own analysis of the language of section 2(2) shows that it can contain either one or the other but not both of these requirements:[143]

> Section 2(1) provides for damages to be awarded to a person who "has entered into a contract after a misrepresentation has been made to him by another party and as a result thereof"—sc. of having entered into the contract — "he has suffered loss." *In contrast, section 2(2) speaks of "the loss which would be caused by it"* — sc. the misrepresentation—"if the contract were upheld." In my view, section 2(1) is concerned with the damage flowing *from having entered into the contract*, while section 2(2) is concerned with damage caused by the property *not being what it was represented to be*.

The words on which Hoffmann LJ relies—'loss which would be caused by it'—can be interpreted in one of two ways (if those words contain the measure of damages[144]): as 'loss caused by having entered into the contract induced by the making of the false statement' or as 'loss caused by the falsity of the statement'. Hoffmann LJ prefers the second formulation on the basis that this is what distinguishes section 2(2) from section 2(1), which he (correctly) takes to contain the first formulation. However, it should then follow that the second formulation is the *measure* of damages under section 2(2) and not merely a *cap*, for there is nothing in the words that Hoffmann LJ quotes to show that it is only a cap. In other words, it is indistinguishable from the warranty measure which, in any case, was the majority view in *Sindall*.[145]

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[143] *Sindall* (n 115) 1037.

[144] It is argued below that they do not.

[145] Because Evans LJ said unambiguously that the measure is contractual. However, Russell LJ agreed with both judgments. This means either that there is no ratio in *Sindall* (since Evans LJ treated the warranty as the measure while Hoffmann LJ treated it as the cap) or that there is a majority for Evans LJ's view (since Hoffmann LJ did not positively *reject* the use of the warranty as the measure: it was left undecided).

2. Three Criticisms of the Contractual Measure Used in Sindall

It is respectfully submitted that *Sindall*'s use of the contractual measure is questionable for three reasons.

First, it is difficult to reconcile with the legislative history of section 2(2). As the previous section has explained, the drafters of section 2(2) intended that the measure should be the monetary equivalent of rescission, which is precisely the measure the Court of Appeal refused to adopt in *Sindall*.

Secondly, it leads to an anomaly if the claimant has made a good bargain. For example,[146] suppose that a vendor makes a wholly innocent misrepresentation but that, despite the misrepresentation, the purchase price (say £1000) is equal to or less than the market value of the goods. If the goods would have been worth £2000 if the representation had been true, the wholly innocent representor is now liable to pay the difference under section 2(2), even though he would not have been liable to pay *any* damages if he had made the same statement *fraudulently*.[147] This is difficult to justify.

Thirdly, the Court of Appeal's analysis effectively makes every wholly innocent representation a term of the contract: as explained above, this is what distinguishes the *Sindall* measure, which is the warranty measure strictly so-called, from the *SAAMCO* measure, in which the warranty is only a cap. But the representation will be treated as a

[146] See also Beale (n 137) 64.

[147] Because section 2(2) does not apply if the statement was made fraudulently and expectation damages are not available either under section 2(1) or in the common law tort of deceit. See also O'Sullivan, Elliott and Zakrewski (n 121) [28.18].

term *only if* rescission is not appropriate: so expectation damages will *become* available as if the representation had been a term but it cannot be ascertained whether it is a term or not until the court decides (or the parties are able to predict) whether rescission is appropriate in the circumstances of the case.

For these reasons, it is submitted that the use of the contractual measure cannot be correct: indeed, this may be why Hoffmann LJ tried to use it as a cap, which, however, his own analysis of the language of section 2(2) shows it cannot be.

Hoffmann LJ gave three further reasons which might be thought to undermine the claim that the measure of damages is the monetary equivalent of rescission. These require close consideration.

3. The Contrast in Language*:* Section 2(1) and 2(2)

The first reason Hoffmann LJ gave is the contrast in the language used in section 2(1) and section 2(2). The subject matter of a section 2(1) award, as Hoffmann LJ rightly said, is the loss caused by having entered into a contract ('as a result thereof'[148]). Section 2(2), in contrast, speaks of the 'loss that would be caused by [the misrepresentation] if the contract were upheld', which, as explained above, led Hoffmann LJ to the conclusion that it refers to expectation (albeit as a cap) rather than to reliance.

[148] See §D(1).

However, this inference does not follow even assuming that 'loss caused by it' should be interpreted as 'loss caused by the statement being wrong',[149] because that expression is not used to identify the measure of damages: it is listed as one of the matters that the court should take into account in deciding whether rescission is appropriate. The measure of damages—which is relevant only if the court first decides that rescission is not appropriate—is, on the face of it, at large: 'the court…may declare the contract subsisting and award damages in lieu of rescission'.[150] Hoffmann LJ's answer to this point is that it is implicit that the damages awarded under section 2(2) must compensate *for* 'the loss caused by [the misrepresentation] if the contract were upheld'.[151] This seems, with respect, a *non sequitur* because Parliament could have easily said 'damages for the loss caused by the misrepresentation' instead of 'damages in lieu of rescission'. The better view is that the text of section 2(2)—just as the text of section 2(1)—says nothing about the measure of damages one way or the other.[152] The answer emerges, in both cases, only from a consideration of the background and of Parliament's objectives in enacting these provisions.

[149] Though it should be noted that the identical expression in the 1890 Act was interpreted as 'loss caused by having entered into the contract induced by the making of the false statement': *McConnel* (n 38) 550 (Collins MR, during oral argument).

[150] See also O'Sullivan, Elliott and Zakrewski (n 121) [28.16].

[151] *Sindall* (n 115) 1036.

[152] See also Bridge (n 2) 301.

4. Section 2(3): The Relationship between Section 2(1) and Damages in Lieu

The second reason Hoffmann LJ gave for the use of the contractual measure was derived from section 2(3):[153]

> … section 2(3) contemplates that damages under section 2(2) may be less than damages under section 2(1) and should be taken into account when assessing damages under the latter subsection. This only makes sense if the measure of damages may be different.

There are two answers to this point. First, Hoffmann LJ is of course right to say that the measure of damages must be different, but this is not because section 2(1) is tortious while section 2(2) is *contractual*. It is because section 2(2)—the monetary equivalent of rescission—does not cover consequential losses while section 2(1)—damages for deceit—does. This is the point that the Notes on Amendment No 29 make.[154] To take an example that the drafters[155] themselves used, if C is sold a sick cow falsely represented to be sound, he is entitled to the difference between the price paid and the actual value of the cow under section 2(2), but (in addition) to the value of the other cows infected by the sick cow under section 2(1). The object of section 2(3) is to make it clear—if clarification was really needed—that the difference in value element should not be given twice, once under section 2(2) and again under section 2(1). At first sight, it may seem that the

[153] *Sindall* (n 115) 1037.

[154] See text to (n 131)–(n 132).

[155] In notes prepared for the Lord Chancellor's meeting with the Lords of Appeal in Ordinary: The National Archives, 'Note for the Lord Chancellor's Meeting with the Law Lords' in *Misrepresentation Bill: Correspondence from 19-05-1966 to Dec 1966*, LCO 2/7379 [6]. This would not, of course, be admissible under the *Pepper v Hart* rules.

drafters fell into the trap of assuming that difference in value is a distinct head of loss,[156] but they did not: they use difference in value as a *restitutionary* measure to identify the net benefit that the defendant has received under the rescinded contract. As the defendant's net benefit partially overlaps with the claimant's loss (which includes in addition consequential loss), they tried to make it clear that the claimant cannot recover it twice.

Secondly, legislative history apart, Hoffmann LJ's reasoning assumes that adopting the contractual measure under section 2(2) ensures that a section 2(1) award is always greater than a section 2(2) award. This is not true: if the claimant paid no more than what the goods were worth, notwithstanding the misrepresentation, the contractual measure produces a *higher* figure than the tort measure. As Dr McGregor observed, 'the reality of this should not be obscured by the fact that … the bargain [in *Sindall*] was a very bad one…'[157] Hoffmann LJ's answer might be, of course, that this is why he used the warranty as a *cap* rather than the measure but it has already been argued that there is no room for any such *tertium quid* in the language of section 2(2). So Hoffmann LJ's use of section 2(3) to construe section 2(2) might actually be thought to support the opposite conclusion: other than the flawed 'cap', the monetary equivalent of rescission is the only measure which ensures that an award under section 2(2) is *always* smaller than, or equal to, an award under section 2(1).

[156] For why it is not, see ch 4.

[157] McGregor (n 26) [47-074].

5. The 'Drastic' Character of the Remedy and the Term/Representation Distinction

Finally, and this may be Hoffmann LJ's best point,[158] his Lordship sought to derive support for the semi-contractual measure from the Jenkins Committee Report:

> [T]he Law Reform Committee report makes it clear that section 2(2) was enacted because it was thought that it might be a hardship to the representor to be deprived of the whole benefit of the bargain on account of a minor misrepresentation. It could not possibly have intended the damages in lieu to be assessed *on a principle which would invariably have the same effect*.[159]

> The Law Reform Committee drew attention to the anomaly which already existed by which a minor misrepresentation gave rise to a right of rescission whereas a warranty in the same terms would have grounded no more than a claim for modest damages. It said that this anomaly would be exaggerated if its recommendation for abolition of the bar on rescission after completion were to be implemented. *I think that section 2(2) was intended to give the court a power to eliminate this anomaly* by upholding the contract and compensating the plaintiff for the loss he has suffered on account of the property not having been what it was represented to be.[160]

It is submitted, with respect, that neither point is correct. First, the Jenkins Committee did think that rescission is a 'drastic' remedy but what it meant by this was that the *specific*, as distinguished from the *monetary*, unwinding of the transaction is drastic. One can question whether one is really more onerous than the other, but it is fairly clear that the Committee thought that it was. The best evidence of this—to which the Court of Appeal in *Sindall* does not seem to have been referred—is the distinction the Committee drew between executed and executory contracts: it thought that rescission is generally *not*

[158] See also O'Sullivan, Elliott and Zakrewski (n 121) [28.16].

[159] *Sindall* (n 115) 1037.

[160] *Sindall* (n 115) 1037.

'drastic' where the contract is wholly executory, and that it would in such a case rarely be appropriate to exercise the power under the proposed clause (2) to confine the claimant to damages:[161]

> We think that the discretionary power to award damages which we recommend as an alternative to rescission should, like rescission itself, be available before as well as after the contract is executed. *Although there may not be many occasions on which damages would be appropriate before execution*, it would be wrong not to give the courts power to do substantial justice…

Thus the Committee did not, contrary to Hoffmann LJ's analysis, think that depriving the defendant of the '*benefit* of the bargain' was drastic: its distinction between executory and executed contracts is consistent only with the view that what it thought undesirable was the *specific* unwinding of the contract. Indeed, if the contract in *Sindall* itself had been wholly executory at the time the sewer was discovered, Hoffmann LJ's reasoning would dictate that Sindall could still have recovered only £18,000 in lieu, but the Committee's would have allowed it to rescind.

The second point is flawed for similar reasons. The Committee did say that it is anomalous that a misrepresentation allows rescission even though it would not have allowed termination if it had become a term (ie it would have been treated as a warranty), but the anomaly it identified was the claimant's ability to require specific 'unperformance', not the fact that defendant is being deprived of the benefit of the bargain.[162]

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[161] Jenkins Committee (n 14) [13] (emphasis mine).

[162] Again, it distinguished between executory and executed contracts: see Jenkins Committee (n 14) [11].

Finally, the Committee also suggested that damages under section 2(2) would in practice replace the indemnity awarded in *Newbigging* and *Whittington*—it could not do this if Hoffmann LJ's construction of it is correct. It can only do this if the measure of damages is the monetary equivalent of rescission (as is the indemnity).

In short, what concerned the Committee was the claimant's unfettered ability to require specific 'unperformance': it was content to allow him to escape a bad bargain, provided this could be done through a monetary award. The Committee certainly did not wish to treat every wholly innocent misrepresentation as a warranty, which is what *Sindall* does, at least on Evans LJ's approach: in fact, a proposal to that effect was made at an early stage of its deliberations[163] but was ultimately rejected in March 1961 following opposition by Lord Jenkins, Professor Wade and Mr Megarry.[164]

6. A Flawed Rationalisation of Sindall: Falling Markets

One difficulty about *Sindall* is that it seems unattractive to allow a buyer to use a trivial defect, fortuitously discovered, to escape a bad bargain. This is why *Sindall* is a hard case, and even critics of Hoffmann LJ's reasoning attempt to rationalise the result on other grounds. For example, the authors of the *Law of Rescission*[165] argue that the measure of damages section 2(2) is actually the usual reliance measure, but that a loss exacerbated by a falling market is not recoverable because it is not caused by the *falsity*

[163] Based on American law: The National Archives, 'Note by Mr RJ Parker' in *Sub-Committee J: Innocent Misrepresentation—Memoranda Circulated*, LCO 2/7369 [11]–[15].

[164] The National Archives, 'Minutes of the Fifth Meeting held at the Royal Courts of Justice on Monday 13th March 1961' in *Sub-Committee J: Innocent Misrepresentation—Correspondence from 1-1-1961 to 29-09-1961*, LCO 2/7370, [3].

[165] O'Sullivan, Elliott and Zakrewski (n 121) [28.24].

of the representation. This is an attractive suggestion but is, with respect, incorrect for two reasons. First, it is inconsistent with the legislative history—in particular the Grieve Amendment—which points to the monetary equivalent of rescission as the measure. Secondly, they treat the falsity rule in *SAAMCO* as a 'conventional application of the reliance measure',[166] which allows them to argue that section 2(2) contains the reliance measure without having to say that the result in *Sindall* is wrong. However, as Part III has shown, *SAAMCO* is *not* a conventional application of the reliance measure: the falsity rule cannot be defended on causal grounds.

Dr McGregor—who favours the measure for which this thesis has argued—nevertheless reaches the same result by a different route: he suggests that rescission was itself barred in *Sindall* because of the substantial fall in the market value of the land, and therefore that damages in lieu were also barred.[167] This is, with respect, questionable: although Dr McGregor attempts to distinguish *Armstrong v Jackson*[168] as a case about breach of fiduciary duty, there is other clear authority for the proposition that a fall in the market value of the goods since the time of purchase does not defeat the buyer's right to rescind.[169]

For these reasons, it is submitted that *Sindall* was wrongly decided on its facts. If it is said that it is unattractive to allow a buyer to escape a bad bargain for reasons unconnected to the misrepresentation, the answer is that this, for better or worse, is what

[166] O'Sullivan, Elliott and Zakrewski (n 121) [28.24].

[167] McGregor (n 26) [47-076]; see also Birks, 'Pecuniary Rescission' (n 122) 75.

[168] *Armstrong v Jackson* [1917] 2 KB 822 (CA).

[169] *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1994] 1 WLR 1271 (CA) 1280 (Nourse LJ). This point did not arise in the House of Lords: see ch 7.

Parliament intended: indeed, in the example given in response to the Grieve amendment, it was expressly pointed out that the buyer of a car which has since depreciated in value is entitled to the monetary equivalent of rescission even though this shifts the market loss to the seller.[170]

[170] The National Archives, 'Notes on Amendment Nos 26 and 29' in *Misrepresentation Bill: Notes on Amendments [Commons] Committee Stage*, LCO 2/7378.

CONCLUSION

This thesis has made three central claims. Two of these concerned the common law. The first was that the causal relationship that must be shown to exist between the making of a false statement and the claimant's reliance on it is one of necessity. Chapter 2 argued that the mistaken notion that English law does not contain this causal requirement stems from the failure to distinguish between a 'sole cause' requirement (which has been rejected) and a 'necessary cause' requirement (which has not). Hart and Honoré's claim that necessity has no explanatory force was shown to be flawed since they do not distinguish between misrepresentation and other kinds of interpersonal transactions. In applying this causal rule to misrepresentation, there is, Chapter 3 argued, no rule of law that the non-breach position is *always* that the defendant told the truth or that he said nothing: it simply depends on what a reasonable defendant would in fact have done. This is a descriptive rather than normative problem. Once it is understood in descriptive terms, it follows that a false statement that merely confirms a pre-existing assumption that would not otherwise have been verified is not causative, contrary to the views of Warren J and Christopher Clarke J.

The second claim was that the claimant can recover damages only for a loss that is a consequence *both* of the making of the false statement *and* of its falsity. This is the falsity rule. It was argued in Chapters 4–8 that this is what *SAAMCO* really decides. It follows that the so-called 'advice' cases are no more than examples of the falsity rule being applied to wider misrepresentations. Lord Hoffmann's insight that there is a falsity rule in English law is an important one. The justification for the rule is that it exempts the

defendant from paying damages for a loss that he caused only to the extent that the claimant would have been willing to bear it. Like the *Wagon Mound* rule, this is a qualification to the pursuit of corrective justice rather than an element in it. It does not deny that the defendant caused this loss or (contrary to what most scholars have said) that causing it was wrongful: it limits liability notwithstanding this. On the other hand, the wider rule with which *SAAMCO* is commonly, though erroneously, associated—the risk theory—is flawed both as a description of the law and in principle. It is flawed descriptively because there are numerous pockets of the law in which liability and compensation are *not* governed by the same criteria: for instance, liability to rescuers, liability for improper medical treatment, the thin skull rule, liability for psychiatric injury and the doctrine of parasitic loss. It is flawed in principle because it does not attend to the distinction between justifications and excuses or to the relationship between that distinction and wrongdoing, especially in relation to 'fault-anticipating' or 'parasitic' wrongs. Since, however, the falsity rule can be independently justified, *SAAMCO* was correctly decided.

Underlying both claims about the common law is the broader claim that there are deep and pervasive differences between causal and non-causal grounds of liability. This claim is by no means new, though it has become unfashionable in modern times. This thesis demonstrated that the differences matter because the law's use of extra-legal causal notions calls for different kinds of justifications from its use of distinctively legal notions, such as remoteness.

The third claim that this thesis made concerned the 1967 Act. It argued that Parliament clearly intended that the measure of damages under section 2(1) is the deceit measure, though this was because of its erroneous assumption that the common law distinguishes between negligence and fraud only for the purposes of actionability, not damages. This error, however, is conceptually distinct from an error about the use of language or syntax: indeed, that one can say that Parliament would have done something different had it been better informed is itself evidence of what it has actually done given that it was not. *Royscot v Rogerson* is therefore correctly decided, though not for the reasons it gave. Similarly, the measure of damages under section 2(2) is the monetary equivalent of rescission. This does allow the claimant to escape a bad bargain but Parliament was perfectly content with this and indeed expressly envisaged that this would be possible. If the result is thought to be unsatisfactory—as it no doubt is, at least in relation to section 2(1)—that is a matter for Parliament, not the courts. It is, however, fair to say that the 1967 Act is yet another indication that the temptation to codify the law of obligations should generally be resisted.

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