Brendon Daniel Giles

The Fair Trading Act Damages Dispute

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I INTRODUCTION

The recent decision of the New Zealand Court of Appeal in *Cox & Coxon Ltd v Leipst*[1] has favoured remedial coherence and has adhered to suggestions that the traditional approach should not be lightly disregarded.[2] By the majority of 3:2, the Court of Appeal has decided that expectation losses are not recoverable under the Fair Trading Act 1986 for losses incurred through misleading conduct amounting to misrepresentation and inducing entry into a contract.[3] The decision has achieved consistency with Australian jurisprudence[4] and does not "jettison hard-earned intellectual capital carefully evolved by judges over several centuries".[5] A major point of law has been settled, but split 3:2,[6] the decision has not had the commanding authority some might have expected. Referred to as a "complete reversal"[7] and a "major change in approach",[8] the decision has been reluctantly accepted by some legal commentators.

In this article I focus on whether expectation damages should be available for a misrepresentation under the Fair Trading Act 1986 by undertaking a critical examination of New Zealand's leading authority, *Cox & Coxon Ltd.* Part II describes the conceptual distinction between tortious and contractual damages, a distinction fundamental to the reasoning of the majority. With particular reference to Australian legislation and authority,

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[1] *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15; (1998) 8 TCLR 516 *[Cox & Coxon Ltd].*

[2] *Crump v Wala* [1994] 2 NZLR 331, 343; 4 NZBLC 103,383; (1994) 6 TCLR 40 *[Crump v Wala].* In *Crump v Wala,* the seller made misrepresentations as to the quality of the jeans which the plaintiff subsequently purchased. The High Court awarded the expected profit on the sale of the jeans after a breach of s9 of the Fair Trading Act. In a curious result, Hammond J expressed agreement with the view in *Gates,* although proceeded to award expectation damages and denied the plaintiff reliance damages.

[3] *Cox & Coxon Ltd v Leipst* noted in (1999) 8 BCB 113.

[4] See *Marks v GIO Australia Holdings Ltd* (1998) 158 ALR 333; 73 ALJR 12; *Gates v The City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1; 63 ALR 600; ATPR 40-666; *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281; 131 ALR 363; *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514; 109 ALR 247 and *Sellars v Adelaide Petroleum NL* (1994) 120 ALR 16.

[5] *Crump v Wala,* above n2, 343. Hammond J also believed that the warning of Lord Simmonds LC in *Chapman v Chapman* [1954] AC 429, 444, that "it is even possible that we are not wiser than our ancestors" had to be borne in mind.

[6] Or 3:3 if Thomas J's extra-judicial preferrence for the minority is considered. See E W Thomas "An Endorsement of a More Flexible Law of Civil Remedies" in New Zealand Law Conference Civil Remedies Papers, April 1999, 9n.

[7] A Beck "Fair Trading Act Remedies" (1999) NZLJ 97 [Beck].

[8] Beck, above n7, 99.

Part II will also describe the legislative background of section 43(2)(d) of the Fair Trading Act, prior to, and following the decision in *Cox & Coxon Ltd.* Part III will describe and critically assess the decision made, expressing a clear preference for the view of the majority. Part IV introduces a law and economics approach to misrepresentation and applies this to the facts of *Cox & Coxon Ltd,* concluding that under this approach the view of the majority is to be preferred. And finally, Part V concludes with the implications from the decision.

II THE FRAMEWORK

A The Issue

The issue decided in *Cox & Coxon Ltd* was whether, under the Fair Trading Act, the remedy available to the purchasers could include recovery of future profits, or expectation losses, from misrepresentation. As mentioned, the decision held by a majority of 3:2 that expectation losses were not, restricting the measure of damages under section 43(2)(d) of the Fair Trading Act to the tortious amount. Although the Fair Trading Act does not import any limitations except for those expressed or inherent in the statutory provisions themselves, the conceptual difference between the tortious and contractual measures of damages is fundamental to the decision of the majority.

1 The distinction between contractual and tortious measures of damages.

The general rule of damages is that the plaintiff is entitled to be put into the same position, as far as money can do it, as he would have been in had the wrong not been committed.[9] This formulation is wide enough to include both the tortious and contractual measures of damages, however, the difference is explained clearly in *Gates v The City Mutual Life*

[9] H McGregor *McGregor on Damages* (16 ed, Sweet & Maxwell, London, 1997), para 810. See Lord Blackburn's widely accepted statement in *Livingstone v Rawyards Coal Co* (1880) 5 App.Cas. 25, 39; See also *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, 539 per Asquith LJ and *Rainbow Industrial Caterers Ltd v C.N.R. Co.* (1991) 84 D.L.R. 291, 297 per Sopinka J.

Assurance Society Ltd[10] by the joint judgement of Mason, Wilson and Dawson JJ using Lon Fuller's classic distinctions;[11]

> In contract, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the contract been performed - he is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred, in reliance on the contract (reliance loss). In tort, on the other hand, damages are awarded with the object of placing the plaintiff in the position he would have been had the tort not been committed (similiar to reliance loss).

This distinction is explained further in *Marks v GIO Holdings Limited*[12] by Gauldron J who remarked that expectation damages are not to be considered as payable simply for thwarted expectations but that damages are payable for the loss involved in non-performance of the contract or, in other words, the loss of a contractual promise. Therefore in contract, damages for loss of bargain and consequential loss, or loss incurred in reliance on the contract, are recoverable.

In tort, however, the loss represents a failure to leave one alone and the object of tortious damages is to place the plaintiff in the position had the tort not been committed, or as if the misrepresentation had not been made. Therefore, the plaintiff is entitled to out of

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[10] *Gates v The City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1; 60 ALJR 239; 63 ALR 600; ATPR 40-666 *[Gates]*. In this case the applicant had been misled about the extent of disability cover under an insurance policy. Once liability was found, the Australian High Court had to determine the appropriate measure of damages for cases involving misleading or deceptive conduct under s82(1) of the Trade Practices Act. The Court held that the question to be asked is "how much worse off the plaintiff is as a result of entering into the transaction which the representation induced him to enter than he would have been had the transaction not taken place"(at p12). Therefore, the Court allowed recovery of reliance loss, not expectation loss.

[11] *Gates,* above n10, 11-12. See Fuller and Perdue "The Reliance Interest in Contract Damages" (1936) 46 Yale LJ 52. Lon Fuller's famous conceptual categorisation of expectancy, reliance, and restitution interests were accepted in New Zealand by *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68 and *Thompson v Rankin* [1993] 1 NZLR 408.

[12] *Marks v GIO Holdings Limited* (1998) 158 ALR 333; 73 ALJR 12 *[Marks]*. In this case the borrowers believed the loan agreement had a fixed interest rate, however in reality the agreement entitled the lenders to vary the rate. The High Court of Australia (Kirby J dissenting) declined to award relief under s87 of the Trade Practices Act for the misrepresentation on the basis that the applicants had only suffered an

pocket loss, or loss which is an immediate result of the misrepresentation, and consequential loss, or loss which occurs as a result of reliance on the misrepresentation. This reliance loss includes not only trading losses of a business acquired under the contract but extends to lost opportunities[13] as explained by the joint judgement in *Gates;*[14]

> Because the object of damages in tort is to place the plaintiff in the position in which he would have been but for the commission of the tort, it is necessary to determine what the plaintiff would have done had he not relied on the misrepresentation. If that reliance has deprived him of the opportunity of entering into a different contract ... on which he would have made a profit then he may recover that profit on the footing that it is part of the loss which he has suffered in consequence of altering his position under the inducement of the misrepresentation. ... The lost benefit is referable to opportunities forgone by reason of reliance on the misrepresentation.

In *Cox & Coxon Ltd* Henry and Blanchard JJ held that other consequential losses which might be compensable in appropriate circumstances could include loss of opportunity to obtain an alternative asset, loss of opportunity to obtain the asset in question at a lesser price, wasted expenditure, and trading losses.[15] This was illustrated by the Australian authority *Sellars v Adelaide Petroleum NL*[16] where the court assessed the damages on the basis that the respondents loss was the loss of the benefits from the agreement it would have entered into with a third party, were it not for the misrepresentation.

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expectation loss. The High Court affirmed the decision in *Gates* and held that no loss had been suffered as the interest rate under the agreement was lower than the market rate.

[13] L Trotman *Misrepresentation and the Fair Trading Act* (The Dunmore Press, Palmerston North, 1988) 53.

[14] *Gates,* above n10, 13.

[15] *Cox & Coxon Ltd,* above n1, 28.

[16] *Sellars v Adelaide Petroleum NL* (1994) 120 ALR 16; 179 CLR 332. The reasoning in *Gates* and *Sellars* was applied in *Jospin Pty Ltd v Copulos Venture Capital Pty Ltd* (1994) ATPR 41-295. See also *Takaro Properties Ltd v Rowling* [1986] 1 NZLR 22; *Craig v East Coast Bays CC* [1986] 1 NZLR 99; *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, 820-821; *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, 167.

In this context, the "artificial distinction"[17] between tort and contract remedies seems blurred,[18] with Mason, Wilson and Dawson JJ commenting that "in this respect the measure of damages in tort begins to resemble the expectation element in the measure of damages in contract".[19] Gauldron J in *Marks* added;[20]

> That if an applicant can establish that, but for the misleading or deceptive conduct, he or she would have entered into a contract that would have returned the very benefit that was represented, damages will be the same as if the representation had been contractual.

Gauldron J concluded that "it is possible ... [that] the loss will be the same in money terms as it would have been if the representation had been contractual".[21] And lastly, *Gates*[22] confirmed that the burden is on the plaintiff to establish that he could and would have entered into another contract, and that the plaintiff must prove that loss was in fact suffered.

B The Fair Trading Act

Critics have described its effect as "cancerous"[23] and that the statute floats "like oil across water",[24] but the Fair Trading Act, introduced in 1986, has an important economic and social role in New Zealands legislative landscape. The purpose of the Act is primarily consumer protection[25] with the intention "to prohibit certain conduct and practices in

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[17] D W McLauchlan "Assessment of Damages for Misrepresentations Inducing Contracts" (1987) 6 Otago LR 370.

[18] In *Elna Australia Pty Ltd v International Computers Australia Pty Ltd* (1987) ATPR 40-795, 48,678, Gummow J commented, in a case of misleading or deceptive conduct, that "tort and contract today are separated by less than clear bright lines".

[19] *Gates,* above n10, 13.

[20] *Marks,* above n12, para 19.

[21] *Marks,* above n12, para 20.

[22] *Gates,* above n10, 13.

[23] *Crump v Wala,* above n2, 343.

[24] *Crump v Wala,* above n 2, 341. Hammond J continued to mention that "the water ... is turning out to be practically the whole spectrum of commercial law".

[25] The Court of Appeal in *Trustbank Auckland Ltd v ASB Bank Ltd* (1989) 2 NZBLC 103,558, 103,563; [1989] 3 NZBLR 385, 390, stated that "consumer protection is a main object of the Act".

trade, to provide for the disclosure of consumer information in relation to the supply of goods and services, and to promote product safety".[26]

Initiated by the Fourth Labour Government to implement its 1984 election policy for "consumer law reform",[27] the Act was also introduced as a means of facilitating free trade between New Zealand and Australia and a significant step towards the harmonisation of business law under the CER Agreement.[28] Therefore, the Act is modelled closely on Part V of the Trade Pratices Act 1974 (Aust) and many of its provisions have been taken directly from, or are identical to, Australian legislation. Because of this, the New Zealand Court of Appeal commented that as far as reasonably practicable, consistency in the application of the Australian and New Zealand Acts should be aimed at.[29]

1 Comparison between the Australian and New Zealand legislation

Section 43 of the Fair Trading Act allows the Court to make a remedial orders if it finds that any person has suffered, or is likely to suffer, loss or damage because of anothers conduct. Within this "big basket"[30] of remedies available lies section 43(2)(d) which allows the payment for damage or loss suffered, following a misrepresentation.

New Zealand had adopted both Australian damages provisions, section 82 and section 87, although it was section 43 (similiar to section 87) which survived the legislative process but its equivalent (similiar to section 82) did not. There was little explanation for the deletion[31] and the divergence from the Australian sections from which the Act is based.

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[26] The Fair Trading Act 1986, the Long Title.
[27] The Fair Trading Act 1986: Explanatory Booklet (Wellington, Department of Trade and Industry) 5; [1985] NZPD 7885 (intro); [1986] NZPD 3286 (2r).
[28] Y van Roy *Competition Laws* (CCH New Zealand Ltd, Auckland, 1991) 351.
[29] *Taylor Bros Ltd v Taylors Textile Services Auckland Ltd* [1988] 2 NZLR 1; (1988) 2 TCLR 447; [1988] 2 NZBLC 103,032.
[30] R Asher "The Vile Intrusion/Magnificent Intervention of the Fair Trading Act into Contracts" 3 NZLJ 85.
[31] Chairman of the Commerce and Marketing Select Committee, Mr P Neilson, stated in the Report on the Bill that "Clause 36 [Australian equivalent s82], which related to damages, has been deleted in favour of including damages as one of the list of possible orders available to the courts and small claims tribunals

The best justification for the deletion of the Australian section 82 would appear to be the removal of an undoubted overlap that existed between sections 82 and 87.[32] Following a consequent amendment, the resulting section is an amalgam of both these Australian sections, neither of which compel any measure of damage or any limitations in its application.[33] This was reaffirmed by the decision in *Marks*, that the measure of damages under the Trade Practices Act is not confined by analogy to common law principles.[34]

2 Specific differences:

(a) New Zealand section 43(2)(d) and Australian section 82(1)

In *Cox & Coxon Ltd,* Gault J stated that the New Zealand provision had the inherent limitation that "its terms [do] not extend to an order to pay the amount of loss or damage likely to be suffered in the future".[35] His Honour continued to mention the statutory scheme of the Fair Trading Act where other provisions seemed "more apt to address likely future loss". Tipping J disagreed, believing that section 43(2)(d) "must include loss or damage likely to be suffered by the plaintiff",[36] and that the discretion should be flexible, both as to measure and amount, after citing *Goldsbro v Walker.*[37]

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under clause 38". This is a very unhelpful statement and none of the 58 submissions presented to the select committee offered any assistance.

[32] Trotman, above n13, 11. See also D W McLauchlan "Review of L Trotman, *Misrepresentation and the Fair Trading Act"* (1989) 19 VUWLR 93, where McLauchlan suggests it was an unintentional mistake by the Department officials in a misguided attempt to simplify the Bill.

[33] *Frith v Gold Coast Mineral Springs Pty Ltd* (1983) 65 FLR 213, 232.

[34] For a New Zealand authority, Thorp J noted in *Quick Snax Ltd v Uncles Group (NZ) Ltd* (19 June 1998, Thorp J, HC Auckland, CP 1137/92), after referring to *Goldsbro,* that section 43 provided the court with a wide range of discretionary powers, "a special package of remedies" which supercede conventional common law rules.

[35] *Cox & Coxon Ltd,* above n1, 22.

[36] *Cox & Coxon Ltd,* above n1, 37.

[37] *Goldsbro v Walker* [1993] 1 NZLR 394. In *Goldsbro,* fraudulent misrepresentations were made during the acquisition of a property by the purchaser and lawyers involved. Both parties were held liable by the New Zealand Court of Appeal under s9, while also holding that section 43(2)(d) did not import the common law rule where a tortfeaser whose wrongful conduct contributed to cause damage was liable for the whole damage to the plaintiff. Therefore in keeping to the spirit and intent of the Act, the Court of Appeal held that s43(2)(d) was discretionary as to amount in order to ensure justice between parties of the case.

The New Zealand Court of Appeal in *Goldsbro* decided that the power to award payment of the full loss of damage encompassed the power to order part of the amount, and thus illustrated the discretionary nature of section 43(2)(d). Therefore in this regard, *Goldsbro* is not authority for the proposition that the court has an untrammelled discretion, both as to measure and amount in awarding damages, but that section 43(2)(d) is discretionary in nature.

In *Goldsbro,* Cooke P commented on section 82(1) of the Australian provisions;[38]

> A monetary award is but one of an extensive list of alternative or cumulative remedies the court "may" grant under the New Zealand Act. In this respect the New Zealand Act differs from [section] 82(1) of the Trade Practices Act 1974 of the Commonwealth of Australia, which takes the form that a person suffering loss or damage "may recover" the amount: words which seem to confer a right of action. Our [section] 43 is of a different structure and I think that the difference is significant. As to a monetary award, no right of action is conferred. It is one of a range of discretionary remedies.

Hence, Cooke P is articulating the difference between a statutory and discretionary remedy, as in section 43 (also section 87 of the Australian Act), and a merely statutory remedy which confers a "right to recover the loss or damage",[39] (section 82(1) of the Australian Act).

However, section 43 is confined by its terms to damage "suffered" and section 82 suggests a statutory cause of action for a specific amount, rather than a discretionary remedy for a discretionary amount. In this regard, sections 82 and 43 are identical addressing the actual loss or damage incurred, as distinct from potential or likely damage.[40] Because of these

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[38] *Goldsbro v Walker,* above n37, 399.
[39] *State of Western Australia v Wardley Australia Ltd* (1991) 30 FCR 245, 259 per Spender, Gummow, and Lee JJ.
[40] *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514; 109 ALR 247, 254 per Mason CJ who referenced *Swingcastle Ltd v Gibson* [1990] 1 WLR 1223, 1236 per Sir John Megaw; see also [1991] 2 AC 223, 232, per Lord Lowry, referring to the words of Sir John Megaw on the appeal to the House of Lords.

similiarities, section 82 authority has been applied in New Zealand because of the absence of material differences between these sections.[41]

(b) New Zealand section 43(2)(d) and Australian sections 82(1), 87

Section 87(2)(d) of the Australian Act has very similiar wording to section 43(2)(d), and it is generally accepted that both are discretionary in nature. Section 87 refers to "likely loss or damage", a suggestion of a wider ambit of compensation than section 82 in order to prevent or reduce the loss or damage. This is the interpretation favoured by Tipping J after reliance on the Australian authorities *Demagogue Pty Ltd v Ramensky,*[42] *Akron Securities v Illiffe*[43] and *Collings Construction Co Pty Ltd v The Australian Competition and Consumer Commission.*[44] These authorities preferred the broader interpretation of relief under section 87 and therefore included expectation damages. Tipping J concluded that there were no material differences between sections 87 and 43,[45] in order to establish comparability with this Australian case law. If this were established, as Tipping J attempts to do, the availability of expectation damages would seem to follow as a natural consequence. However, this contradicts the weight of case law and opinion where it has been held that section 43 is restricted to damage or loss suffered. Therefore, the relevance of section 87 jurisprudence relating to the equivalent New Zealand measure of damages under this rationale is highly questionable, if not irrelevant.

A recent topic of debate is the legislative intention of section 87, Tipping J of the opinion that the scheme of the Act suggests different purpose to that of section 82. However in *TPC v Queensland Aggregates Pty Ltd*[46] Franki J suggested that the measure of damages under section 82 and the amount which may be awarded under section 87(2)(d) does not

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[41] Trotman, above n13, 12.
[42] (1992) 110 FLR 608.
[43] (1997) 143 ALR 457.
[44] (1998) 43 NSWLR 131; [1998] NSWSC 32.
[45] *Cox & Coxon Ltd,* above n1, 37.
[46] (1981) 6 TPC 689, 874.

differ.[47] Tipping J attempted to distinguish *Gates*, as the decision was concerned only with section 82(1), however statements made were not limited to this rigid approach. The majority, Mason, Wilson and Dawson JJ state;[48]

> The [Trade Practices] Act does not prescribe the measure of damages recoverable by a plaintiff for contravention of the provisions of Pts IV and V. Accordingly, it is for the courts to determine what is the appropriate measure of damages recoverable by a plaintiff who suffers loss or damage by conduct done in contravention of the relevant provisions.

In *Marks,* Gauldron J remarked that the established measures of damages "signify different kinds of loss and not different methods by which loss is measured",[49] and that once this is understood;

> It is irrelevant to inquire as to the appropriate measure of damages for the purposes of sections 82 and 87 of the Act. Rather, the task is simply to identify the loss or damage suffered or likely to be suffered and, then, to make orders for recovery of that amount under section 82 or to compensate for or prevent or reduce that loss or damage under section 87 of the Act.

The view of McHugh, Hayne and Callinan JJ accord with those of Gauldron J by holding that: [50]

> The central inquiry is what consequence has the contravention of the Act had on the party in question. That requires comparison between the position in fact of the party which alleges loss and the position that would have been obtained had there been no contravention.

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[47] This corresponds to the opinion of B G Donald and J D Heydon *Trade Practices Law* (Volumes 1 and 2, The Law Book Company, Sydney, 1978) 853, where it is stated that there is no "relevant distinction" between the two Australian provisions save for the limitation period and "the same considerations apparently arise as to the amount of damages recoverable" under both sections.

[48] *Gates,* above n10, 11.

[49] *Marks,* above n12, para 15.

[50] *Marks,* above n12, para 53.

The majority continue to add that "actual loss need not be suffered before an order is made"[51] under section 87 which is in harmony with the wording of section 87, "likely loss or damage". This opinion is consistent with the leading Australian case, *Gates*, and the recent New Zealand authority *Cox & Coxon Ltd,* who were in agreement that expectation losses were not recoverable for misrepresentations, and that "the measure of damages in tort is appropriate in most, if not all, ... cases".[52] They also commented that they would not be restrained by the historical amount recoverable under an action in deceit or other common law analogies, and thus believed, concurring with *Marks,* that "no narrow construction of the Act should be adopted".[53] However, *Marks* warned that "the words of the Act should not be stretched beyond their limit",[54] in order to award damages for conceptually different contravention, like the opinion of Tipping J.

Therefore, there is considerable judicial opinion to establish that expectation losses are not recoverable under sections 82(1) and 87 of the Australian Act, or section 43(2)(d) of the New Zealand Act. If that were not to be held to be so, the applicability and comparability of Australian section 87 to New Zealand's section 43(2)(d) should be distinguished due to the difference in terms and legislative purpose. The underlying conceptual basis for the awarding of damages under section 87 would therefore be inconsistent with the narrower New Zealand interpretation for misrepresentations and should not be adopted or used as relevant authority.

III COX & COXON LTD v LEIPST

A The Facts

In 1995 the real estate agents, Cox & Coxon Ltd, misrepresented to the purchasers, Leipst, that the property had yielded 58 bins of pears which were sold to Watties for $12,000. The statement was subsequently included as an appendix to the agreement. In

[51] *Marks,* above n12, para 45.
[52] *Gates,* above n10, 14.
[53] *Marks,* above n12, para 56.
[54] *Marks,* above n12, para 56.

fact, the pears were sold for $8,801.16. The action was successful against the vendor under the Contractual Remedies Act, and now sought to claim under the Fair Trading Act against the agent. In an agreement between the parties, if liability were established, the quantum of the loss was $16,000. The damages were calculated as the loss of income suffered over a period of twenty years, and therefore, represented an expectation loss.

The District Court held that the representation was essentially one as to the volume of production, not the price, and that the inclusion of the figure had not caused any loss to the plaintiffs. The High Court disagreed, awarding the agreed damages of $16,000. Therefore, the issue confronting the Court of Appeal, is whether expectation losses should be available under the Fair Trading Act 1986.

B The Majority - Henry and Blanchard JJ, and Gault J

The majority delivered two judgements, by Henry and Blanchard JJ (written by Henry J), and Gault J, deciding that expectation losses were not recoverable under the Fair Trading Act 1986 for losses incurred through misleading conduct inducing entry into contract. The following analysis will outline the reasons and merits of their decision and will attempt to assess the judicial quality of this decision.

1 The Conceptual Argument

In order to give a remedy, they argued a promise must be more than merely promissory, but it must be enforceable at law. Conceptually, the loss of bargain or of expected future return flows not from the conduct that is wrongful, but from the failure to implement a promise. Since no contract existed between the agent (Cox & Coxon Ltd) and the purchasers (Leipst), there was no promise which failure to implement derived the other party of expected benefits. Their Honours said:[55]

[55] *Cox & Coxon Ltd*, above n1, 26.

> The only duty which can give rise to a claim for lost benefit or loss of expectation is one which imposes an obligation to perform the representation. ... [therefore] the promise must be enforceable at law if it is to give rise to a remedy. ... To hold that misrepresentation inducing a contract can give rise to a claim for expectation losses under [section] 43(2)(d) is to turn on its head the whole rationale of the damages for a civil wrong.

This rationale is the conceptual difference between the tortious and contractual measures of damages. In the common law, as under the English Misrepresentation Act 1967, the tort measure of damages applies for an action in deceit. As *McGregor* comments, it would seem;[56]

> Highly improbable that all this learning should be overthrown ... by allowing the generally more generous contractual measure of damages to rule where the new statutory liability was involved. And, more importantly, it would be very odd that this contractual measure should be available to a plaintiff complaining of an innocent, though admittedly negligent, misrepresentation when it was clear that for a fraudulent misrepresentation he was undoubtedly limited to the tortious measure.

However, it was accepted by all judges in *Cox & Coxon Ltd* that the remedy under the Fair Trading Act is both statutory and discretionary, and that nothing in the language of the Act imported notions of contract or tort in assessing damages. Nevertheless, Henry and Blanchard JJ believed that "the rationale behind the two concepts may well be relevant when considering a particular set of circumstances".[57] This view is consistent with the majority in *Gates* where it was said;[58]

> The courts are not bound to make a definitive choice between the two measures of damages so that one applies to all contraventions to the exclusion of the other. However, there is much to be said for the view that the measure of damage in tort is appropriate in most, if not all, Pt V cases, especially those involving misleading or deceptive conduct and the making of false statements. Such conduct is similiar both

[56] McGregor, above n9, para 1998.
[57] *Cox & Coxon Ltd,* above n1, 25.

in character and effect to tortious conduct, particularly fraudulent misrepresentation and negligent misstatement.

Gault J believed the task was to identify the loss caused by the misleading or deceptive conduct which is similiar to the majority in *Marks*, who emphasised the focus should be on the damage or loss that has been caused as a result of the conduct contravening the Act. Therefore, the emphasis lies on the loss or damage from the contravention, not the measure of damages, and despite the fundamental rationale remaining relevant, the question that should be asked is, what position would the plaintiff have enjoyed had there been no misrepresentation?

The majority held there was no justifiable basis for construing section 43 in such a way as to give the representee a right to enforce a representation which is misleading. Absent such a right, entitlement to damages for non-performance of the representation, or loss of benefit, cannot lie. This, they believed, is the inherent logical fallacy in the argument for expectation damages, for, as the majority explains, "had there been no misrepresentation, that is no breach of duty, there is no logical basis for asserting the purchasers here would have obtained the benefit now claimed".[59] Hence, the fundamental rationale underlying the tort measure of damages still applies to the Fair Trading Act, despite the source of relief shifting from common law to statute.

2 The Statutory Scheme / Shift in Legal Responsibility

The majority argued that section 9 created a duty not to mislead and that failing to make good a misleading statement did not constitute a breach of the Act. Section 9, they continued, did not create a duty to perform obligations which amount to contractual promises, but it was section 6 of the Contractual Remedies Act 1979 in New Zealand that had this effect. "Section 43(2)(d) does not purport to make a representation enforceable

[58] *Gates*, above n10, 14.
[59] *Cox & Coxon Ltd*, above n1, 26.

against a representor. It says there is liability for loss or damage resulting from the representation. The difference is real and substantive."[60]

They argued that the adoption of Tipping J's view, that expectation damages should be available, would be to make the representation a term of the contract, which they added, is something expressly achieved by the 1979 Act. If it were to do the same as the Contractual Remedies Act it would make an agent acting in the course of trade potentially liable for performance of the principal's contract as though a contracting party, or effectively, the agent becomes the promisor.

Henry and Blanchard JJ descride this outcome as "far-reaching ... [resulting] in a dramatic shift in legal responsibility".[61] Gault J gives the example of the previous operator of the orchard if, when giving information to the real estate agent, he had known it would be passed on to prospective purchasers would have been liable for the purchasers loss of future profits. He asks the question, which the majority reply in the negative, "is that broad construction to be given in furtherance of the consumer protection objectives generally ascribed to the Act?[62] It is axiomatic that the intention of the Act was of consumer protection, not the enforcement of pre-contractual promises. Any contrary interpretation, they stated, required "an implication which does not sit comfortably with the words of the statute".[63]

Tipping J, however, believed that it was "both conceptually reasonable and in accordance with the policy of the Act",[64] to allow the court to require the non-contracting agent to pay a sum of money to honour the promise inherent in the representation. He maintained that the majorities view was based on the historical limitation of privity of contract, and that it was inherent in section 43 that the vendor and the agent could be liable for the same loss. This, he continued, was an inconsistency and that the distinction drawn between

[60] *Cox & Coxon Ltd,* above n1, 26.
[61] *Cox & Coxon Ltd,* above n1, 28.
[62] *Cox & Coxon Ltd,* above n1, 19.
[63] *Cox & Coxon Ltd,* above n1, 28.

contractual and tortious damages created an anomalous result, because the agent and vendor would be liable for different amounts, despite the same loss being incurred. He continued to justify his position by adding;[65]

> If the vendor is insolvent, the risk of that insolvency should fall on the agent rather than on the purchasers. It is the agent who is responsible for the misleading conduct, not the purchasers, who would otherwise suffer on account of the failure of the vendor. The agent can always tailor what is said so as to exclude personal liability by making it clear that the agent is not vouching for the accuracy of the information conveyed.

While this view has some moral justification, it neglects the importance of a contractual right and that the mislead purchasers could recover against an agent an amount similiar, if not the same, as the contractual measure existing in the current law. The adoption of Tipping J's opinion will extend separate liability to any person who is "in any way directly or indirectly knowingly concerned in, or party to, the contravention"[66] as a guarantor of the contracting party's obligation. This would undermine contractual and commercial certainty and would stretch the words of the Act beyond their limit, and thus, would not adher to the warning given by *Marks*, or the view expressed by the *Cox & Coxon Ltd* majority.

The minority view is essentially based on a general statement of principle; that an agent ought to be held accountable for representations which are misleading or deceptive.[67] Accepted as a principle of law by the majority, they hold that where loss has occured the the tortious measure is sufficient to compensate for a non-contracting party, and where no loss occurs, other sanctions are available in the scope of the Act. The policy of the Act, contrary to what Tipping J may advocate, is to provide consumer protection and does not

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[64] *Cox & Coxon Ltd,* above n1, 38.
[65] *Cox & Coxon Ltd,* above n1, 40.
[66] The Fair Trading Act 1986, s 43(1)(d).
[67] *Cox & Coxon Ltd,* above n1, 30.

extend to include the enforcement of contractual promisor the performance of non-contracting party's representations.

Conceptually, it is consistent and reasonable to allow loss of bargain or expectation losses in the case of promises made by contracting party's, but it is unreasonable to hold a non-contracting party liable for contractual expectations, legitimately formed by anothers conduct. For as mentioned, the loss of bargain or of expected future returns flows not from the conduct that is wrongful, but from the failure to implement a promise.

C The Minority - Richardson P and Tipping J

The minority judgement was delivered by Tipping J, with Richardson P merely concurring. Tipping J took the view that pre-contractual representations contained "promissory connotations"[68] and "it may be perfectly reasonable to take the view that the representor is at least implicitly promising the representee that the facts stated are true and the representee may act accordingly".[69] He continued to add that;[70]

> If there is a promise directly or indirectly inherent in the misrepresentation, it is a relatively short step to require the person who made the representation to compensate the other party for the failure of the facts to fulfil the promise. It can fairly be said that the representee's expectations, having been legitimately formed as a result of the representation and not fulfilled, must now be made good by a sum of money.

Tipping J maintained that an unduly rigid approach was unnecessary[71] and found two measures of appropriate measure of loss.[72] The first is a similiar restatement of the tortious measure, the "notional resale", which measures the difference between the price paid and a price notionally obtainable, including the incidental expenses of the sale. The second

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[68] *Cox & Coxon Ltd*, above n1, 30.
[69] *Cox & Coxon Ltd*, above n1, 41.
[70] *Cox & Coxon Ltd*, above n1, 30.
[71] Tipping J cited *New Zealand Land Development Co Ltd v Porter* [1992] 2 NZLR 362 as authority for this proposition.

approach was to establish the present value of the future losses based upon what the position would have been had the misrepresentation been accurate. This measure imports the prospect of recovering expectation losses as opposed to reliance losses.[73] The measure applied would depend on the substitutability of a purchase, for if it were reasonable to sell, the notional resale method would be more appropriate, and if it were reasonable to retain, the "future present value" method would apply. Therefore, under this flexible approach, the court would need to determine which measure would be more appropriate in a given situation, allowing the court to avoid injustices to consumers who have been the victims of misleading conduct.[74]

This approach has distanced itself from common law analogies, where the majority has, under Tipping J's rationale, wrongly constrained themselves by reliance on former law which the Fair Trading Act was designed to ameliorate. As Keene[75] argues, if the starting point for the analysis is the basic rationale for expectation damages, like the majority, then a result which did not allow expectation losses would follow as a natural consequence. If, however, the decision was not tainted by by previous conceptual frameworks, such as Tipping J's, the ensuing outcome can be more easily understood. The argument would then become one of statutory purpose; whether the Act was designed to signal a completely new direction or whether the Act is to be viewed as part of, or contributing to, the overall body of knowledge. Tipping J's approach, as Beck argues,[76] is more consistent with the consumer protection objective in the Act, which is supported by Keene, who believed that the majority negated the wider purposes of the remedial legislation. However, this 'substitutability' approach would result in financial inconsistencies in the application of the consumer protection objectives, clearly inconsistent with the policy of

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[72] *Cox & Coxon Ltd,* above n1, 29-31 per Tipping J.
[73] B Keene "Fair Trading Act Damage: A Statutory Test" [1999] 4 NZLJ 107.
[74] Beck, above n7, 99.
[75] Keene, above n73, 108.
[76] A Beck "Contract" (1991) 1 NZ Law Rev 51, 54.

the Act.[77] It would also be for the court to decide what is, and what is not substitutable, surely more appropriately decided by the plaintiffs.

In *Goldsbro*, both Cooke P and Richardson J emphasize that the governing principle is to impose a remedy which "gives effect to the policy of the Act"[78] and that it is ultimately justice that must be done in the circumstances of the particular case.[79] In *Cox & Coxon Ltd* the majority prefer to limit the general words of *Goldsbro* to a discretion as to amount and not a discretion as to measure, and therefore insisting on giving proper effect to the words of the statute. Tipping J, however, relied on *Goldsbro* as authority to assert that there should be a discretion both as to measure and amount, much like Thomas J, in *Smythe v Bayleys Real Estate Ltd,*[80] who wrongly cited *Goldsbro* as authority for not adhering to the tort measure and thus awarding rental income for the remaining term of the lease. Henry and Blanchard JJ, however, maintain that *Smythe* is only correct if considered as a loss of opportunity case, and if viewed as a expectation loss case, they would not follow it.

It can be asserted that Tipping J's opinion has been founded on an incorrect interpretation of the decision in *Goldsbro* and is a result of a conceptual misunderstanding of the tortious measure of damages. Tipping J cited *Gates* and held, after wrongly interpreting Gibbs CJ judgement, that it was "the difference in value ... as represented and as written".[81] This is clearly untrue, for it is the value between price paid and the actual value which amounts to, in Tipping J's words, "the classic tort measure".[82] Tipping J added that the inclusion of foreseeable consequential loss was an extension of the ordinary tort measure, which again

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[77] For example, if the subject matter is not readily substitutable the contractual measure applies, whereas if the subject matter is readily substitutable the tortious measure applies.
[78] *Goldsbro v Walker,* above n37, 399.
[79] Asher, above n30, 87.
[80] (1993) 5 TCLR 544. Thomas J in the High Court held the defendants, including the agent, liable under s9 for false representations regarding an investment. by the plaintiff. Thomas J awarded lost income in order to give effect to the policy of the Act and achieve justice between the parties. See also *Quick Snax Ltd v Uncles Group (NZ) Ltd* (19 June 1998, Thorp J, HC Auckland, CP 1137/92); *Gloken Holdings Ltd v The CDE Company Ltd* (1997) 6 NZBLC 102,272.
[81] *Cox & Coxon Ltd,* above n1, 33.
[82] *Cox & Coxon Ltd,* above n1, 33.

is plainly incorrect, as foreseeable consequential loss including loss of opportunity, are ordinarily a part of the tort measure.

This, and the citing of *Sellars* as authority, illustrates Tipping J's misunderstanding or disregard for the fundamental underlying rationale of tortious damages. For, as he continues, "such loss (in reality being deprived of a future benefit) is essentially an expectation loss."[83] This misinterpretation of the tortious measure would not allow Tipping J to appreciate the words of the majority, that expectation damages flow not from wrongful conduct but the failure to implement a promise. The lost opportunity the plaintiff claims is due to the failure to leave them alone and constitutes part of the tortious measure, and is not, "essentially an expectation loss".

Tipping J, whether intentionally or not, has misinterpreted the tortious measure of damages to show the blurred distinction between the two measures of damages. Once established, Tipping J could argue that the arbitrary distinctions should no longer apply in favour of an overall discretion, in order "to tailor the remedy to the particular facts so as to do justice in the individual case."[84] Conversely, however, this strengthens the majorities viewpoint, that the tortious measure of damages provide flexibility in order to compensate in similiar, if not the same, money terms whilst remaining conceptually consistent. Under this interpretation, the decision in *Cox & Coxon Ltd* provides a rational solution to the issue in debate.

D The Issue of Loss or Damage

Another issue to be determined was whether loss or damage had been proven to satisfy the requirements of section 43(2)(d). Because the majority concluded that expectation losses were not available and that the only loss claimed was that of expectation loss, the logical conclusion was that no loss or damage had in fact occured. Tipping J, on the other hand, held that the diminished profitability was attributable to the misrepresentation, and using

[83] *Cox & Coxon Ltd*, above n1, 34.

his formulation concluded it was reasonable not to sell, and therefore calculated the damages by the present value of future losses. There are two difficulties with this reasoning. Firstly, the statement was as to a past fact and it would be wrong to assume any future profitability from this information. Tipping J, in effect, predicts future revenue by awarding future profit to the purchasers. Secondly, this result originates from an incorrect premise: that because the misrepresentation induced the purchase, the purchasers paid more than they would otherwise have paid for the property.[85] This is not correct. Because a misrepresentation is present it is wrong to infer that the purchasers had paid more for the property than they otherwise would. In *Marks* the majority stated;[86]

> The bare fact that a contract has been made which confers rights and or imposes obligations that are different from what one party represented to be the case does not demonstrate that the party that was misled has suffered loss or damage.

The point is illustrated by the majority in *Marks,* for;[87]

> If a person agrees to pay $50,000 for goods which the vendor falsely represents are worth $100,000 but which are, in fact, worth $50,000, what loss has the purchaser who is misled suffered by agreeing to buy (assuming no more is known)?

The only loss would be a lost opportunity, or the alternative uses for the money bound by the misrepresentation, which is recoverable under the tortious measure of damages. Beck argues that this is a "harsh result"[88] as the court has moved away from the "conventional understanding of the law."[89] Alternatively, it would be 'harsh' to compel an agent to compensate where no loss has been caused, a result which is both historically and conceptually consistent.

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[84] *Cox & Coxon Ltd*, above n1, 34.
[85] Beck, above n7, 98-99.
[86] *Marks,* above n12, para 47. The contrary view, adopted by the Full Court of the Federal Court in *Jobbins v Capel Court Corp Ltd* (1989) 25 FCR 226 was rejected by the majority in *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514, 527 per Mason CJ, Dawson, Gaudron and McHugh JJ.
[87] *Marks,* above n12, para 50. For more discussion see McLauchlan, above n17, at p 379.
[88] Beck, above n7, 99.
[89] Beck, above n7, 99.

IV AN ECONOMIC PERSPECTIVE

In order to assess the outcome of *Cox & Coxon Ltd* a broader policy analysis should be applied to the issue of whether expectation damages should be available for a misrepresentation under the Fair Trading Act. The following section will outline the underlying economic rationale behind contractual and tortious damages and apply these concepts to misrepresentation and the facts of *Cox & Coxon Ltd.* It is important to consider whether it will be able to determine if, under economic rationale, the majority, or minority, are correct.

Law and economics co-exist together, for the Fair Trading Act was conceived after the economic free-market theory of 'caveat emptor' (let the buyer beware) had failed, and the unequal bargaining power of consumers had to be protected. Therefore, because economics underpins commercial law it is essential to assess the economic perspective on the issue, as a law and economics approach would be extremely relevant. It is also important to note that many judges have commented for the need for an economic analysis, including Richardson J, who remarked that "the Court should be furnished with arguments and available analytical materials so that the proposed policy alternatives are considered in an informed way, rather than resting on instinctive responses supported by generalised reasons".[90]

A Contractual Damages

From an economic viewpoint the primary function of contract law is to maintain incentives toward, and to facilitate the conclusion of, exchanges that move resources from less to more valuable resources[91]. Trebilcock[92] divides this overriding aim into four main

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[90] *Williams v Attorney General* [1990] 1 NZLR 646, 681. See also *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282, 305 per Richardson J; *Day v Mead* [1987] 2 NZLR 431, 458 per Somers J; *Canadian National Railway Co v Norsk Pacific Steamship Co ("Jervis Crown")* (1992) 91 DLR (4th) 289, 360 per McLachlin J; and *Morgan Crucible Co Plc v Hill Samuel Bank Ltd* [1990] 3 All ER 330, 335 per Hoffman J; overruled [1991] 1 All ER 148 (CA).

[91] E MacKaay *Economics of Information and Law* (Kluwer Nijhoff Publishing, Boston, 1982) 57.

purposes. Firstly, contractual damages function to provide an incentive to adher to the terms of the contract and facilitate exchange, as exchange would be considerably restrained without the possibilty of enforcement. Secondly, the law provides standard sets of implied terms[93] which save both parties transaction costs[94] in the bargaining process. Thirdly, contract law discourages carelessness in the exchange process, causing detrimental reliance. For example, in rules relating to mistake and promissory estoppel the law attempts to assign liability for negative outcomes from an exchange to the party who could have avoided the problem by taking cost-justified precautions. Fourthly, contract law has formulated a set of excuses for contract performance that permits the enforcement of efficient exchanges, but discourages the enforcement of inefficient exchanges that do not meet the criterion of Pareto efficiency.[95] For example, lack of voluntariness or duress and imperfect information such as non-disclosure should not be enforced as both parties do not percieve the exchange as mutually beneficial, and is thus not Pareto efficient.

The law and economics approach distinguishes between a complete contract, where all contingencies are planned for and responsibilities defined, and incomplete contracts, where the law fills in the "gaps" in the contract. A complete contract through cooperative bargaining will maximise both parties joint utility or benefit, and is therefore efficient. In reality, the complete contract is almost an economic construct as the increased transaction costs associated with the drafting and negotiation of a comprehensive contract for every concieved contingency is unimaginable. Therefore, the payment of damages for breach of contract can be seen to serve as an implicit substitute for contingent terms in an incomplete contract and will lead to behaviour similiar to that in complete contracts.

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[92] M J Trebilcock "Law and Economics" (1993) 16(2) Dalhousie L J, 369.

[93] For example the Sale of Goods Act 1908, the Partnership Act 1908 and the Consumer Guarantees Act 1993.

[94] Transaction costs are defined as costs incurred in the bargaining process. Transaction costs include the costs of identifying the parties with whom one has to bargain, the costs of getting together with them, the costs of the bargaining process itself, and the costs of enforcing any bargain reached. See generally A M Polinsky *An Introduction to Law and Economics* (2nd ed, Little Brown & Co, Boston, 1989).

[95] Broadly speaking economics refers to efficiency as the relationship between the aggregate benefits of a situation and the aggregate costs of the situation or as the "size of the pie". A sitution is said to be efficient when there is a net benefit to society. Pareto effiency is when there is no change from that situation that can make someone better off without making someone worse off (after Italian economist Vilfredo Pareto). See generally Polinsky, above n94.

Contractual damages therefore restrain opportunistic breaches of contract,[96] but many breaches are involuntary, where performance is impossible at a reasonable cost, or voluntary and efficient. As Holmes writes and Posner quotes[97];

> It is not the policy of the law to compel adherence to contracts but only to require each party to choose between performing in accordance with the contract and compensating the other party for any injury resulting from a failure to perform.

Therefore, in many situations it will be more efficient to breach the contract than to perform on its terms. Posner gives the following example.[98] Suppose I sign a contract with A to deliver 100,000 widgets at $0.10 each. After the signature B explains he needs 25,000 widgets quickly and is prepared to pay $0.15 each. If I accept B's offer and A, as a result of the delay suffers damages worth $1,000, the breach would still be value maximising as I will still be able to pay A damages and still have a positive net revenue. In Posners view, these breaches should be encouraged on the grounds that it brings resources to higher-valued uses than was initially foreseen and thus would improve welfare for society as a whole.[99] This would be regarded as an efficient breach of contract.

The expectation remedy is the only remedy that creates efficient incentives to breach a contract. This is because the expectation remedy forces the breaching party to pay in damages the value of the good to the breached-against party. This value represents the profit the breached-against party would receive from the contract, so is therefore indifferent to performance of the contract or the expectation remedy. If another buyer values the good more than this, then it is efficient for that buyer to have the good. Given the expectation measure of damages, the seller will have an incentive to breach in order to obtain the higher offer (see above example). If another buyer values the good less than the

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[96] Referred to by economists as a 'moral hazard'.
[97] R A Posner *Economic Analysis of Law* (4 ed, Little Brown & Co, Boston, 1992) 118, quoted from O L Holmes "The Path of the Law" (1897) 10 Harv L Rev 457, 462.
[98] Posner, above n97, 119. This example is also used by Mackaay, above n91, 58.
[99] MacKaay, above n91, 58.

original buyer, a breach is not efficient and the expectation remedy will appropriately discourage breaches. In other words, under the expectation measure a seller compares the cost of performance against the value to the buyer in deciding whether to commit a breach. If the cost of paying damages is higher than the cost of performing the contract, then the contract will be completed, but if the cost of performing the contract is higher than the cost of paying damages, then the seller will commit an efficient breach of contract.

However, under the reliance measure of damages sellers would breach contractual commitments more regularly as production costs would more often be less then the cost of performance. Buyers would also have little incentive to enter contractual commitments as the remedy consequent to a breach would only place the buyer in the position they would have enjoyed prior to the contract. Similiarly, specific performance would be to the sellers and societies detriment forcing the performance of inefficient contracts, and leading to excessive performance.

Therefore, the expectation remedy for breach of contract allows performance of incomplete contracts as optimal complete contracts, resulting in the greatest expected net value or efficiency. This suggets that both the buyer and seller would agree, prior to performance, to employ the expectation measure rather than any other remedy for breach.

B Tortious Damages

Oversimplified, the law and economics approach to tortious liability is the least-cost avioder test.[100] From a law and economics perspective the purpose of tortious liability is social efficiency and not merely compensation, for if it were so, then concepts such as negligence and fault would not be part of the law. Hence, the purpose of the law of torts is to deter uneconomical accidents, or in other words, to avoid those torts that could have

[100] See M J Trebilcock "The Future of Tort Law: Mapping the Contours of the Debate" (1989) 15 CBLJ 471, for a more comprehensive discussion.

been avoided at a cost lower than that of the accident.[101] In *United States v Carroll Towing*[102] Judge Learned Hand expressed this concept in his negligence standard:

> The defendant is guilty of negligence if the loss caused by the accident, multiplied by the probability of the accident's occuring, exceeds the burden of the precautions that the defendant might have taken to avert it.

Therefore, the rule is not intended to discourage all accidents, only to discourage the infliction of losses if its avoidance would be less costly. Cost minimisation and efficiency will occur if potential accident creators take those precautions that reduce expected accident losses by more than the cost of the precautions.[103] It is important to note that the Hand formula is too narrow, for the general rule also includes precautions taken by the victim or offender to reduce accident costs by more than their cost.[104]

For example, on the facts of *United States v Carroll Towing* Judge Learned Hand held that the probability of something going wrong was high in a busy port and the burden placed on the bargee to attend to the barge was not onerous but reasonable, and the bargee had breached his duty of care by leaving the barge unattended.

Take another example. A locomotive emits sparks causing potential damage to a farmers property of $375. The damage can be corrected by a spark arrester, $150, or the removal of the farmers property from the railroad for $250. Clearly the efficient solution is the purchase of the spark arrester by either party. If, in a tort action, the railroad company was found liable, it would compensate the farmer by the payment of his losses and the purchase of a spark arrester to prevent future losses. This was illustrated in *Bank of New Zealand v Greenwood*[105] where Hardie Boys J awarded the payment of blinds in order to avert the

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[101] MacKaay, above n91, 66.
[102] (1947) 159 F 2d 169.
[103] J Palmer "Liability for Negligently Performed Financial Services: An Economic Theory" (1996) 26 VUWLR 71, 74.
[104] MacKaay, above n91, 66. See generally A M Polinsky *An Introduction to Law and Economics* (2 ed, Little Brown & Co, Boston, 1989) 15-25.
[105] [1984] 1 NZLR 525.

reflection nuisance. Under economic rationale, the damages were awarded to the least-cost avoider and is, in economic terms, an efficient outcome as the removal of the reflective verandah would have cost $20,000. Therefore, as mentioned, the function of tort damages is to provide incentives for parties to find the least-cost solution in order to minimise total costs of accidents to society, rather than for a court to impose the least-cost solution on the offender. Under economic rationale, the focus is not compensation but on the incentives to prevent costly inefficient accidents to society, and the awarding of tortious damages provides this incentive.

C Misrepresentation and the Facts of Cox & Coxon Ltd

The question remains, under economic rationale should expectation damages be available for misrepresentation under the Fair Trading Act? From the law and economic efficiency perspective, misrepresentation is inefficient due to imperfect information and carelessness in the exchange process, and therefore both parties do not perceive the exchange as mutually beneficial and will not maximise joint utility. Therefore, the representee has suffered detrimental reliance as the transaction does not take the resource to the highest valued use or utility, and is not socially optimal or Pareto efficient.[106]

Analysing the problem from a contractual perspective it is absurd to impose expectation damages as an implicit term of a misrepresentation. This is clearly the wrong analysis, for the representor's obligations to the buyer do not derive from any consensually assumed obligation, but of an obligation to aviod unreasonable conduct that violates the autonomy of another.[107]

Under economic rationale, the carelessness in the exchange process on behalf of the representor should be discouraged by taking cost-justified precautions. For example,[108] a

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[106] This situation is not Pareto efficient because the representee can be made better off without making the representor worse off.

[107] M J Trebilcock *The Limits of Freedom of Contract* (Harvard University Press, Cambridge, Massachusetts, 1993) 105.

[108] Posner, above n97, 127. This example is also used by Mackaay, above n91, 63.

commercial photographer has his Himalayan expedition film misplaced by the developer. Posner asks, firstly, who is better to take precautions, and secondly, whether the developer should be liable for the entire cost of the Himalayan expedition. Both the representor, by verifying the information conveyed, and the photographer, by requesting special handling or using two films, are the least-cost avoiders to take inexpensive or cost-justified precautions against these contingencies. The burden of taking precautions is small, as opposed to the benefits or the costs associated with the loss of not taking precautions. Therefore, there is an incentive for the party with the knowledge of the risk to take precautions themselves, or make the risk known to the other party in order to prevent or insure the loss.

However, if the developer were to be held liable for the full costs of the expedition, there would be an incentive to self-insure for such a contingency in the future resulting in an increased prices. Similiarly, if the representor were to be held liable to the generally higher expectation measure of damages, an incentive would be created that would induce socially wasteful investments by potential victims or representors in avoidance precautions, such as disclaimers or indemnity clauses. This could result in correct information given in the exchange process, but is more likely to result in unverified information given with disclaimers or possibly no information at all. These preventitive measures would result in the cost of deterring an accident becoming higher than that of the accident itself, an inefficent result as the law of torts functions only to deter uneconomical accidents, not economical accidents. In other words, it would be inefficient to expend more to prevent the accident, than the actual cost of the accident itself.

The disincentives created by such a result would create such inefficiencies in the market that it would significantly impede the exchange process. It is clear that the view expressed by the majority is correct not only from a legal point of view, but an economic perspective as well.

V CONCLUSION

The Court of Appeal has made an authoritative statement that expectation damages are not available under the Fair Trading Act 1986, and has expressly disapproved statements to the contrary in *Smythe* and *Crump v Wala.*[109] The divided opinion in the Court shows that the issue is far from clear, although it is certain that *Cox & Coxon Ltd* will shape the future law of damages under the Act, unless a contrary view comes from a higher judicial authority.[110]

A The Implications of Cox & Coxon Ltd

Firstly, the blurred distinction between liability under the Fair Trading Act and the Contractual Remedies Act has been drawn to a sharp contrast. The purpose of the Fair Trading Act was to redress particular types of wrongs, not of imposing performance obligations, and can no longer be seen to make representations enforceable against a vendor than against an agent. Therefore, plaintiffs will have to take more care in distinguishing between causes of action under the Contractual Remedies Act and those under the Fair Trading Act.

Secondly, because the tortious measure of damages requires an assessment of damages had the misleading conduct not occured, it is necessary to plead the position the plaintiff would have been, had there been no wrong by the defendant. The plaintiff will need to plead precisely what loss has been suffered and show how this was caused by the offending conduct.[111] Therefore, the Fair Trading Act has been moved into the area of statutory torts.

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[109] *Crump v Wala* , above n2.
[110] Keene, above n73, 108.
[111] Beck, above n7, 99.

Thirdly, Beck argues, that the decision will "have the effect of stifling the flexible approach to remedies"[112] made possible by the Act, which contradicts the consumer protection objectives of the Act. This view negates the discretion given to judges by Henry and Blanchard JJ, who make it clear that awards can be made if evidence can be adduced to show that losses reflect a dimunition in the value of the bargain or other reliance losses of the plaintiff induced by the misleading conduct.[113]

Fourthly, although agents would welcome the outcome, the decision does not free agents from responsibility. It has been argued, originally directed toward *Gates*, that the person making a misleading statement has a vested interest in making it so misleading that the recipient makes no inquiries as to alternatives, and is unable to show that they could, and would, have entered into a different contract.[114] Equally however, the more misleading the conduct the less likely loss or damage will be suffered. In economic terms, no misleading or deceptive conduct is efficient in the market, but a decision contrary to *Cox & Coxon Ltd* would create such inefficiencies that information from agents would always be given with a disclaimer, or possibly, not at all. The *Cox & Coxon Ltd* decision will allow access of timely information and expertise whilst also providing a balance of redress for inaccurate information or misleading conduct.

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[112] Beck, above n7, 99.
[113] Keene, above n73, 108.
[114] *Brookers Gault on Commrecial Law* (Brookers, Wellington, 1999) 2-188(a).

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