LOSS OF A CHANCE AND BREACH OF FIDUCIARY DUTY

The Requirement of Certainty of Loss

Equity necessarily requires that the plaintiff's losses be made certain when awarding equitable compensation for losses flowing from breach of equity's proscriptive duties against unauthorised conflict and unauthorised profit. This article suggests that the method of making certain these losses must be consistent with equity's normative commitments in relation to the fiduciary's obligation of undivided loyalty. Two approaches are discussed: the first according to a method of probabilistic reasoning; and the second explicitly by reference to equitable discretion and according to equity's presumed standards of conduct expected of the fiduciary.

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1 "Certainty of loss" refers to the requirement that the plaintiff satisfy the court as to the fact of damage and its amount.[1] At law, whether, for example, in an action for breach of contract or pursuant to the tort of negligence, the plaintiff bears the legal burden of proving her claim for damages on the balance of probabilities. As Tilbury explains, this may be taken to imply an obligation on the plaintiff to establish the nature and extent of her losses.[2] In many cases, this requirement will pose no factual difficulty since precise evidence will be capable of being adduced by the plaintiff to establish these matters. However, other losses are inherently uncertain: for example, the plaintiff's future pecuniary losses and non-pecuniary losses. A particular subset of uncertain losses includes the plaintiff's future lost opportunities or past hypothetical lost chances. In compensating for these losses, courts must grapple with the comparison of the plaintiff's position at trial and the position the

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1 Harvey McGregor, *McGregor On Damages* (Sweet & Maxwell, 19th Ed, 2014) at para 10-001.

2 Michael Tilbury, *Civil Remedies: Principles of Civil Remedies* vol 1 (Sydney: Butterworths, 1990) at p 149.

plaintiff would have been in without the defendant's breach. This latter situation necessarily involves some judgment about uncertain facts, which may or may not be able presently to be established at trial according to the civil standard of proof.

2 The limited purpose of this article is to suggest that distinct from any requirement of causation of loss arising from breach of fiduciary duty, equity necessarily requires that the plaintiff's losses be made certain when awarding reparative equitable compensation.[3] An equity for relief exists for breach of the proscriptive fiduciary duties against unauthorised profit and conflict without proof of the plaintiff's loss. In contradistinction, for example, to the tort of negligence where the plaintiff must prove loss according to the civil standard, the equitable liability exists merely on breach of fiduciary duty.[4] The

3 The label "substitutive equitable compensation" ("substitutive compensation") is based on the common account and refers to orders calculated by reference to the substituted value of assets dissipated without authority. It thus requires that the trustee or custodial fiduciary obey their duty to maintain the fund. Reparative equitable compensation ("reparative compensation") refers to orders which make good a loss caused by the defendant's breach of trust. These terms are associated with the work of Steven Elliott. See *Agricultural Land Management v Jackson (No 2)* [2014] WASC 102 at [348]–[349], *per* Edelman J; *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 at [53]–[54], *per* Lord Toulson; Steven Elliott & Charles Mitchell, "Remedies for Dishonest Assistance" (2004) 67 MLR 16; and Charles Mitchell, "Equitable Compensation for Breach of Fiduciary Duty" (2013) 66 CLP 307 at 322. The adoption of the labels "substitutive" and "reparative" has not been without criticism. J D Heydon, M J Leeming and P G Turner, *Meagher Gummow and Lehane's Equity Doctrines and Remedies* (Sydney: LexisNexis Butterworths, 2015) at paras 23-610–23-615 eschews their use and Matthew Conaglen, "Equitable Compensation for Breach of Trust: Off *Target*" (2016) MULR (advance), text to fn 146, is of the view that the: "new labels add little to a clear understanding of the principles". Irrespective of any debate which surrounds the use of the categories substitutive and reparative compensation, this article concerns only reparative compensation in respect of which a causation element is not controversial.

4 There is a debate as to the true nature of this equitable liability, and whether in substance all breaches amount to "wrongdoing". For example, Lionel Smith in "Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another" (2014) 130 LQR 608 argues (at 625) that the no-conflict rules "tell a fiduciary when judgment cannot be safely exercised in relation to a fiduciary power" and breach renders transaction, *inter alia*, voidable by the principal. Smith views (at 628) the no-profit rule as a rule of primary attribution pursuant to which profit obtained in breach of duty is attributed to the principal from the moment of acquisition. The no-conflict rule is thus about the vitiation of the principal's consent and the no-profit rule about the carrying out or enforcement of the principal's primary right to the profit. On Smith's view, therefore, the no-profit rule does not attract the label "wrongdoing". See also James Penner, "Is Loyalty a Virtue, and Even if It Is, Does It Really Help Explain Fiduciary Liability" in *Philosophical Foundations of Fiduciary Law* (Andrew Gold & Paul Miller eds) (Oxford: Oxford University Press, 2014) at p 171:

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existence of loss is not a prerequisite to establishing fiduciary liability. However, notwithstanding that the plaintiff need not establish loss in order to claim equitable relief, where the remedy of reparative equitable compensation is in view, the discussion below will show that any loss must be made certain. Further, it will be argued that the method of making certain the principal's loss must be consistent with equity's normative commitments in relation to the fiduciary's obligations of undivided loyalty.

I. Remedies for breach of fiduciary duty: Equitable compensation

3 Various remedial consequences may flow from a finding of breach of fiduciary duty, many of which do not depend on the existence of the plaintiff's loss. For example, the plaintiff may seek rescission[5] or, more controversially, exemplary damages.[6]

4 The parties may also fall into an accounting relationship such as trustee and beneficiary or custodial fiduciary and principal.[7] The heart of an accounting relationship is that a person (*eg*, the trustee or custodial fiduciary) "controls property that she must hold and apply for another person's (*eg* the beneficiary or principal's) benefit".[8] Assuming

> … the law of fiduciary accountability is akin to the law of unjust enrichment. Both are cases of *primary, remedial* duties. … a fiduciary has no duty not to act in conflict of interest, but when they do and acquire a gain thereby, they fall under a duty to account for the gain to their principal. [emphasis in original]

It is not necessary for the analysis in this article to resolve the debate as to the true nature of fiduciary obligations, consideration being limited merely to the requirement of certainty of the loss which may be claimed following breach of fiduciary duty.

5 *Tito v Waddell (No 2)* [1977] Ch 106 at 241, *per* Megarry V-C; *McKenzie v McDonald* [1927] VLR 134 at 146, *per* Dixon AJ.

6 Albeit that the current state of play (at least in New South Wales) is that exemplary damages are not available in equity for breach of fiduciary duty: *Harris v Digital Pulse* (2003) 56 NSWLR 298 at 312, *per* Spigelman CJ, and 442, *per* Heydon JA. There are, however, Canadian authorities which adopt the contrary position. See, *eg*, *M(K) v M(H)* [1992] 3 SCR 6. Note also that differing views have been expressed across the Commonwealth as to the availability of exemplary damages for breach of confidence, which suggest that equity may not have outright hostility to this remedy. See, *eg*, *Skids Programme Management Ltd v McNeill* [2013] 1 NZLR 1.

7 *Associated Alloys Ltd v ACN 001 452 106* (2000) 202 CLR 588 at [56], *per* Gaudron, McHugh, Gummow and Hayne JJ: "Before a party can be ordered to account, liability to account must be established." See also *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [167], *per* Lord Millett NPJ: "Trustees and most fiduciaries are accounting parties …".

8 Charles Mitchell, "Stewardship of Property and Liability to Account" [2014] 78(3) Conv 215 at 219.

that the parties are accounting parties, the victim of the breach of fiduciary duty may call for an account. As discussed below,[9] it is this ability to call for an account which is said to be the conceptual foundation of any subsequent obligation to pay equitable compensation.[10]

5 The taking of an account may disclose a deficit or a surplus in the position of the fiduciary *vis-à-vis* the principal. As explained by Austin J in *Glazier Holdings v Australian Men's Health*[11] ("*Glazier*"):[12]

> … [i]t is important to distinguish between two kinds of orders. One kind (… an order for account of administration) is made where the overall administration of a business enterprise or fund or other property is to be established or accounted for. Another kind (… an order for an account of profits) is made to provide a remedy for specific equitable wrongdoing.

This latter order relates to specified gains made by the defendant rather than any deficit to the plaintiff's ledger. However, the gain-based remedies of account of profits[13] and any proprietary analogue via a constructive trust[14] lie beyond the discussion in this article. An order for account (of administration) will allow the plaintiff victim to "identify and quantify any deficit in the … fund and seek the appropriate means

9 See paras 5–10 below.

10 Note, however, that there is some evidence that equitable compensation may be available even outside traditional accounting relationships. See, *eg*, in relation to financial advisers, *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65 at [1084] and [1090]–[1098] in which equitable compensation for breach of fiduciary duty was held to be available. It was not clear on the facts that the adviser stood in a custodial fiduciary relationship to the advisee and this issue is not directly addressed by the court. See generally Julie Ward, "Equitable Compensation – An Overview" in *Equitable Compensation and Disgorgement of Profit* (Simone Degeling & Jason Varuhas eds) (Oxford: Hart Publishing, 2017) (forthcoming) ch 4, text to fnn 42–49, noting that since *Nocton v Lord Ashburton* [1914] AC 932 equitable compensation has been made available for breach of a variety of non-custodial fiduciary or equitable obligations including breach of the equitable obligation of confidence, for unconscionable conduct and for undue influence. Jessica Hudson, "Equitable Compensation for Equitable Estoppels" in *Equitable Compensation and Disgorgement of Profit* (Simone Degeling & Jason Varuhas eds) (Oxford: Hart Publishing, 2017) (forthcoming) ch 11 similarly notes that equitable compensation may be awarded as a remedial response to equitable estoppels. The equitable estoppels Hudson examines include proprietary and promissory estoppel, the remit of neither being limited to accounting relationships. Thus, the money award following these equitable estoppels is another site of equitable compensation beyond a breach of trust or custodial fiduciary obligation.

11 [2001] NSWSC 6.

12 *Glazier Holdings v Australian Men's Health* [2001] NSWSC 6 at [36].

13 *Warman v Dwyer* (1995) 182 CLR 544 at 556–557.

14 *Black v Freedman* (1910) 12 CLR 105 at 108–109, *per* Griffith J; *Chan v Zacharia* (1984) 154 CLR 178 at 180–181, *per* Gibbs CJ, 186, *per* Brennan J, and 199, *per* Deane J; *Grimaldi v Chameleon Mining NL* (2012) 200 FCR 296 at [583].

by which it may be made good".[15] It is through this process that a loss or deficit to the plaintiff may be revealed, thus grounding any subsequent obligation of the defendant to make a money payment to the plaintiff to make good the shortfall.

6 Accounts of administration are divided into an order in common form or for common account and an account taken on the basis of wilful default.[16] In common account, the court looks to what has actually been received and dissipated by the accounting party. The principal may challenge the fiduciary's record of these transactions on either the outgoing side, for example by asking for a disbursement to be disallowed or by alleging that less was paid out of the fund (falsification), or the incoming side, by arguing that more was received by the fiduciary (surcharge). Where the principal or beneficiary establishes that the fiduciary's record is defective, the accounts are amended to reflect the true position in conformity with the fiduciary's obligation to maintain the fund. The fiduciary may be ordered to make a monetary payment to restore any deficit in the factual holding of the fund so that real world balances align with the now corrected records. Crucially, when ordering an account in common form, the court is limited in its inquiry to amounts actually received by the accounting party. Even when considering a potential surcharge to the account, this is in respect of amounts actually received by the accounting party, albeit not (initially at least) recorded as being held in a fiduciary capacity. Since it concerns amounts actually received or paid away by the fiduciary, the risk of uncertainty of loss is therefore minimal when an account is taken in common form.[17] This discussion will not further consider accounts in common form.

7 An account taken on the basis of wilful default directs the court to examine not only amounts actually received and paid away by the accounting party but also what should have been received by that party had their duties been met. As such, an account on the basis of wilful default is a more searching inquiry, colourfully described by

15 *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [168], *per* Lord Millett NPJ.

16 *Glazier Holdings v Australian Men's Health* [2001] NSWSC 6 at [38]–[39], *per* Austin J.

17 Minimal but not removed entirely. For example, it is possible that in addition to the fiduciary's obligation to restore property to the fund via a common account, there is a consequential obligation on the fiduciary to restore any income that the property would generate for the fund between the date of misapplication and judgment. In valuing the lost income, there is an element of past hypothetical loss, which therefore also raises the conceptual difficulty of uncertainty of loss.

Brightman LJ as a "roving commission".[18] As stated by Austin J in *Glazier*:[19]

> … [t]he order is 'entirely grounded on misconduct', the defendant being required to account not only for what he or she has received, but also for what he or she might have received had it not been for the default.

The test asks "[whether] the past conduct of the trustees [is] such as to give rise to a reasonable *prima facie* inference that other breaches of trust not yet known to the plaintiff or the court have occurred?"[20] An order for account on the basis of wilful default may result in an order for what has been described as reparative equitable compensation by which the breaching fiduciary compensates losses suffered by the principal.[21]

8 Beyond this traditional approach which proceeds via an intermediate accounting process, modern equity has in some instances dispensed with the taking of formal accounts; instead, cases such as *Target Holdings Ltd v Redferns*[22] are argued and decided on "the liability of a trustee who commits a breach of trust to compensate beneficiaries for such a breach".[23] *AIB Group (UK) plc Ltd v Mark Redler & Co Solicitors*[24] adopts a similar method and the remedial orders of the court in these cases are thus not directed to any accounting procedure. When we speak about equitable compensation, therefore, the term is compendious and potentially includes the orders following a common account, account on the basis of wilful default and the "direct" claim for equitable compensation. It is a matter of debate the extent to which the existence of the direct claim for equitable compensation carries with it any differences in substantive principles applied by the court when assessing the money remedy.[25] However, for the analysis in this article,

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18 *Bartlett v Barclays Trust Co (No 2)* [1980] Ch 539 at 546. See also *Carantinos v Magafas* [2008] NSWCA 304 at [135], *per* Campbell JA who adopts the term "roving enquiry".

19 *Glazier Holdings v Australian Men's Health* [2001] NSWSC 6 at [39], *per* Austin J.

20 *Glazier Holdings v Australian Men's Health* [2001] NSWSC 6 at [41].

21 See discussion at n 3 above.

22 [1996] AC 421.

23 *Target Holdings Ltd v Redferns* [1996] AC 421 at 428, *per* Lord Browne-Wilkinson.

24 [2015] AC 1503.

25 For example, the position in England and Wales after *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 ("*AIB*") is that, in the case of a commercial trust (at [73], *per* Lord Toulson JSC):

> … [m]onetary compensation, whether classified as restitutive or reparative, is intended to make good a loss. The basic equitable principle applicable to breach of trust … is that the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach of trust.

Similarly, see [136] and [140], *per* Lord Reed JSC. This raises a fundamental question about the applicability of a causation inquiry to what would have been an obligation to pay an equitable debt following a common account, and indeed the survival of that procedure and its associated mechanisms of falsification and

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the point is to realise that however it is labelled, the remedy which *in substance* addresses a reparative measure raises the conceptual difficulty of uncertain loss.

9 That there is a causation inquiry for awards of reparative equitable compensation is relatively uncontroversial. A "but for" test is applied such that "the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach".[26] The "but for" test is said to perform an exclusionary rule against a common sense view of causation,[27] so that the defendant is not made to pay for losses which would have been suffered even if the breach of duty had not occurred,[28] and logically "it is difficult to see how 'common sense' could be different in common law and equity".[29] As has been said, the object of an award taken on the basis of wilful default will be to take the account:[30]

> … as if the defendant had performed his duty and obtained [the property or investment] for the benefit of [the fund or trust]. Since *ex hypothesi* the property has not been acquired, the defendant will be ordered to make good the deficiency by the payment of money, and in this case the payment of 'equitable compensation' is akin to the payment of damages as compensation for loss.

Implicit in awards of equitable reparative compensation are therefore calculations which depend on contingencies, being concerned with past hypothetical losses and future losses. As observed by Ribeiro PJ in

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surcharge. Writing more generally about the phenomenon of direct claims for equitable compensation, Conaglen argues that:

> … if the claim for equitable compensation was simply a more direct and focused way of redressing a breach of trust without needing to go through the process of accounting because that was thought unnecessary in the instant case, the principles to be applied in determining the quantum of the remedy in such cases ought not to differ from those that would be applied in a full accounting.

See Matthew Conaglen, "Equitable Compensation for Breach of Trust: Off *Target*" (2016) MULR (advance), text to fn 140. Losses which would in any case have been captured in account on the basis of wilful default may nonetheless be reflected in any direct claim for equitable compensation. To this extent, the problem of certainty of loss thus arises irrespective of how the claim for equitable compensation is arrived at.

26 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at [46], quoting *Target Holdings Ltd v Redferns* [1996] AC 421 at 436, *per* Lord Browne-Wilkinson.

27 *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at 556, *per* McLachlin J; *Agricultural Land Management v Jackson (No 2)* [2014] WASC 102 at [394], *per* Edelman J.

28 *Agricultural Land Management v Jackson (No 2)* [2014] WASC 102 at [395], *per* Edelman J.

29 *Agricultural Land Management v Jackson (No 2)* [2014] WASC 102 at [396], *per* Edelman J.

30 *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [170], *per* Lord Millett NPJ.

Libertarian Investments Ltd v Hall[31] ("*Libertarian*"), "[t]he exercise of quantifying loss on a wilful default basis [is] necessarily hypothetical".[32] It turns out that many, if not all, cases of wilful default involve a claim for lost opportunities and lost chances. This is not simply a matter of coincidence: loss of a chance is structurally insinuated into the wilful default claim. This is because the very object of the award is to put the fund in the position "as if the defendant had performed his duty and obtained [the property or investment] for the benefit of [the fund or trust]"[33] which inquiry necessarily involves a degree of speculation about the value and probability of success of a path not taken. Such losses are inherently uncertain in that it may be difficult for the plaintiff to prove at trial the nature and extent of these losses. Thus, the risk of uncertainty of loss is systemically prevalent in a claim for reparative equitable compensation. The question therefore arises: How does a court of equity make certain this loss?

10 In order to be met by an award of equitable reparative compensation, two cases suggest a mixed approach to the problem of (un)certainty of loss: one possibility, as shown by the approach of the New South Wales Court of Appeal in *Ramsay v BigTinCan*[34] ("*BigTinCan*"), is to follow a model of probabilistic reasoning. The other is to process the uncertainty more explicitly through the algorithm of equitable discretion. This article argues that both are relevant. However, the limits of any probability-based approach should be recognised. Specifically, the model of probabilistic reasoning adopted by a court must align with equity's normative choices underpinning the fiduciary's obligation of undivided loyalty.

II. Certainty of loss and loss of a chance

11 In order to understand certainty of loss, it is useful to step outside equity for one moment. Analysis distinguishes between claims in which loss must be proved as part of the plaintiff's cause of action and those claims which are actionable *per se*.[35]

31 (2013) 16 HKCFAR 681.

32 *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [123], *per* Ribeiro PJ.

33 *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [170], *per* Lord Millett NPJ.

34 [2014] NSWCA 324; special leave to appeal to the High Court refused ([2015] HCATrans 59).

35 See generally Michael Tilbury, *Civil Remedies: Principles of Civil Remedies* vol 1 (Sydney: Butterworths, 1990) at pp 150–151; Katy Barnett & Sirko Harder, *Remedies in Australian Private Law* (Melbourne: Cambridge University Press, 2014) at pp 32–39; Normann Witzleb *et al*, *Remedies: Commentary and Materials* (Sydney: Thomson Reuters, 2015) at paras 3.170–3.240. See also Harvey McGregor, *McGregor On Damages* (Sweet & Maxwell, 19th Ed, 2014) ch 10.

12 In relation to claims at law for which the plaintiff must prove loss as one of the elements of the cause of action, such as in negligence,[36] an extreme solution would be for the liability model to exclude compensation for losses which are not established to the requisite standard of certainty. The polar opposite approach would be to presume damage and let the court in its discretion decide the compensation recoverable. In reality, neither of these models is adopted where the plaintiff must prove loss. Rather, accepted models for judicial action include determining the event's probability and awarding the whole amount if that probability exceeds 50% likelihood and nothing otherwise. Alternatively, the court may adopt a scaled approach and, having determined the probability of an event occurring, multiply that probability by the value of the lost chance to reach a certain value of loss. Where the plaintiff has lost a valuable commercial opportunity, the approach of the court varies depending on the hypothetical contingency being accounted for. The picture varies depending on whether it is the hypothetical conduct of a third party,[37] the hypothetical conduct of the plaintiff in deciding whether or not to take up or realise a potential commercial opportunity (in other words, "Would the plaintiff have taken the opportunity had it not been lost?")[38] or the hypothetical conduct of the defendant[39] which must be accommodated.

13 In claims at law which do not require the plaintiff to demonstrate loss as part of the cause of action, such as trespass, damages are said to be "at large". Damages are at the discretion of the court and the ability of the court to award substantial damages is not bounded by

36 There is an obvious tension in whether, at least in the case of personal injury, that loss must be expressed as physical injury, increasing the risk of causing the injury or the loss of a chance to avoid it. The expansion of loss of chance analysis more generally into these areas lies beyond the scope of this article. See, *eg*, *Barker v Corus (UK) Ltd* [2006] 2 AC 572 and *Tabet v Gett* (2010) 240 CLR 537, albeit that the latter case is discussed below at paras 28–31.

37 Assess (multiply) via degree of probability: *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332; *Heenan v Di Sisto* [2008] NSWCA 25 at [28], *per* Giles JA, with whom Mason P and Matthews AJA agreed, referred to with approval in *Prosperity Advisers Pty Ltd v Secure Enterprises Pty Ltd* [2012] NSWCA 192 at [78], *per* Tobias AJA, with whom Barrett and Macfarlan JJA agreed; *Hendriks v McGeoch* [2008] NSWCA 53 at [87]–[99], *per* Basten JA, with whom Spigelman CJ and Giles JA agreed; *Falkingham v Hoffmans* [2014] WASCA 140 at [44], *per* Pullin and Murphy JJA, and [219], *per* Buss JA; special leave to the High Court refused ([2015] HCATrans 066).

38 Assess on a balance of probabilities: *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 642–643, *per* Mason CJ and Dawson, Toohey and Gaudron JJ; *Greg v Scott* [2005] 2 AC 176 at [83], *per* Lord Hoffmann; *Heenan v Di Sisto* [2008] NSWCA 25 at 32, *per* Giles JA, with whom Mason P and Matthews AJA agreed.

39 At least in contract, there is support for both a balance of probabilities and a degree of probabilities approach. See *Commonwealth v Amman Aviation Pty Ltd* (1991) 174 CLR 64 and *Chaplin v Hicks* [1911] 2 KB 786.

the plaintiff's ability to prove the nature and extent of particular losses. Many torts actionable *per se* protect interests such as rights to liberty and property. These torts protect interests which are vindicated on infringement by money awards without proof of loss.[40] However, where loss beyond an infringement to the underlying interest is alleged, loss must be proven and it is in such circumstances that certainty of loss may bite even in torts which are actionable *per se*.[41]

14 The other matter to clarify is the distinction between causation and certainty of loss. Particularly in the context of loss of a chance, the requirement of certainty is capable of narrower and broader understandings. At its broadest, certainty may describe a phenomenon which is said to exist "at the causation stage".[42] McGregor refers to "loss of chance proper"[43] as the analysis undertaken when loss of chance is the loss itself claimed for,[44] which must satisfy a test of causation. Loss of chance proper itself "constitute[s] compensable damage, … [as] when the provision of the chance is the object of the duty which has been breached".[45] This the learned author distinguishes from loss of chance in a "quantification" sense.[46] The plaintiff having established loss of chance as a recognised head of loss which is shown to exist on a balance of probabilities, "the lost chance must be quantified by resort to percentages and proportions".[47] This approach which separates out causation from calculation is well accepted.[48] It also accords with the functionally and normatively discrete questions performed by those twin inquiries, according to which causation is about the connection between the loss and the defendant's wrong and certainty is about whether the loss has

40 See Jason Varuhas, "The Concept of 'Vindication' in the Law of Torts: Rights, Interests and Damages" (2014) 34 OxJLS 253.

41 See, *eg*, *R (Sturnham) v Parole Board (Nos 1 and 2)* [2013] 2 AC 254. This was a consolidated appeal in the cases of *R (Faulkner) v Secretary of State for Justice* and *R (Sturnham) v Parole Board (Nos 1 and 2)*.

42 Harvey McGregor, *McGregor On Damages* (Sweet & Maxwell, 19th Ed, 2014) at para 10-046.

43 Harvey McGregor, *McGregor On Damages* (Sweet & Maxwell, 19th Ed, 2014) at para 10-046.

44 This is particularly controversial in personal injury claims, where it has met with varying success. See, *eg*, *Barker v Corus (UK) Ltd* [2006] 2 AC 572 and *Tabet v Gett* (2010) 240 CLR 537.

45 Harvey McGregor, *McGregor On Damages* (Sweet & Maxwell, 19th Ed, 2014) at para 10-047.

46 Harvey McGregor, *McGregor On Damages* (Sweet & Maxwell, 19th Ed, 2014) at para 10-046.

47 Harvey McGregor, *McGregor On Damages* (Sweet & Maxwell, 19th Ed, 2014) at para 10-046.

48 Katy Barnett & Sirko Harder, *Remedies in Australian Private Law* (Cambridge University Press, 2014) at pp 32–39; Normann Witzleb *et al*, *Remedies: Commentary and Materials* (Sydney: Thomson Reuters, 2015) at paras 3.170–3.240.

actually occurred at all or its chances of occurring are so small that it should be disregarded.[49] However, as Burrows notes, when dealing with loss of a chance, the causation and the quantification inquiries are linked.[50] It is not helpful to put loss of chance analysis into one or the other. At least where there is no dispute that the actionable loss includes a lost chance, it belongs in both, thus engaging issues of both causation and calculation. This article asks about certainty of loss in the calculation sense, which occurs against the necessary backdrop of causation.

III. Equitable compensation and certainty

15 Turning now to those cases in which equitable compensation has been awarded for loss of a chance flowing from a breach of fiduciary obligation, two cases demonstrate alternate methods of making certain the plaintiff's losses. Both have a place in equity's arsenal. The first employs a method of probabilistic reasoning. The second explicitly embeds certainty within equity's discretion and according to equity's presumed standards of conduct about the defendant. Each will be considered in turn.

A. Probabilistic reasoning

16 The use of probabilistic reasoning is shown by *BigTinCan*, which concerned BigTinCan ("BTC"), a start-up company engaged in developing apps for smart phones. The principal players were Keane, a director and majority shareholder in BTC, and Ramsay, who was also a director of BTC and held shares representing approximately 20% of BTC's capital. Ramsay's function was to assist BTC in capital raising and marketing the app known as "BigTinCan Connect". In March 2009 BTC engaged Pollers to develop a new version of that app, and during 2009 Ramsay worked on capital raising for BTC and regularly reported that he could raise up to $1.2m. Keane obtained copies of e-mails indicating that Ramsay and Pollers during their engagement with BTC had (with others):[51]

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49 Normann Witzleb *et al*, *Remedies: Commentary and Materials* (Sydney: Thomson Reuters, 2015) at para 3.175.

50 Andrew Burrows, "Uncertainty about Uncertainty: Damages for Loss of a Chance" (2008) 1 *Journal of Personal Injury Law* 31 at 42–43, noting that cases such as *Barker v Corus* [2006] 2 AC 572, which might otherwise be thought of as personal injury actions, permit actionable damage in the form of a loss of a chance and that claims for the negligent infliction of economic loss similarly deal with loss of chance at the liability stage. See also Andrew Burrows, "Comparing Compensatory Damages in Contract and Tort: Some Problematic Issues" in *Torts in Commercial Law* (Simone Degeling, James Edelman & James Goudkamp eds) (Sydney: Lawbook Co, 2011) at pp 378–384.

51 *Ramsay v BigTinCan* [2014] NSWCA 324 at [12], *per* Macfarlan JA; *BigTinCan v Ramsay* [2013] NSWSC 1248 at [68], *per* Ball J.

> … formulated and implemented a plan to acquire BTC assets at a discounted value, to develop and undertake BTC's business through a new entity ('Newco') and to divert funding and business opportunities from BTC to Newco.

17 Ball J at first instance found that Ramsay had breached his fiduciary duties as director of BTC and, *inter alia*:[52]

> … that … Ramsay's conduct caused BTC to lose an opportunity to raise finance and that equitable compensation of $300,000 plus interest should be awarded against … Ramsay and … Pollers to compensate for the loss of that opportunity.

There were investors interested in BTC's business but, according to Ball J, motivated by his personal interests, Ramsay's disloyal motivation thwarted BTC's funding hopes.[53] The lost chance of obtaining funding was established at trial by evidence which demonstrated that:[54]

> Ramsay told … Keane that he was confident he could raise up to $1,200,000 and at the board meeting on 28 January 2010 he reported that it was hoped that between $800,000 and $1,200,000 would be in … by February 2010. However that did not happen. … Taking these matters into account … an appropriate way to value BTC's lost opportunity is to assume that it had a 25 per cent chance of raising $1,200,000. On that basis, the value of the lost opportunity is $300,000.

Ball J calculated applying a degree of probability approach: 0.25 (probability of event occurring) x $1,200,000 (value of lost chance) = $300,000 (certain value of loss).

18 On appeal, a majority of the New South Wales Court of Appeal did not alter the amount awarded, but added an important qualification of principle which was that Ball J had erred in treating the lost opportunity to obtain funding, of itself, as a substantial financial loss. Rather, it was necessary also to demonstrate that the funding would have been put to a profitable use.[55] Macfarlan JA stated:[56]

> … the raising of funds would only have been of benefit to BTC if it could have done something useful with them. Otherwise, whilst the company would have received money, it would have incurred a

52 *Ramsay v BigTinCan* [2014] NSWCA 324 at [13], *per* Macfarlan JA.
53 *BigTinCan v Ramsay* [2013] NSWSC 1248 at [80], *per* Ball J.
54 *BigTinCan v Ramsay* [2013] NSWSC1248 at [101], *per* Ball J.
55 *Ramsay v BigTinCan* [2014] NSWCA 324 at [69] and [72], *per* Macfarlan JA, with whom McColl JA agreed (at [2]). Gleeson JA (at [123]–[141]) valued the lost opportunity significantly lower at 0.1 x $650,000 = $65,000, taking into account various contingencies affecting the possible outcome of Ramsay in successfully executing capital raising proposals.
56 *Ramsay v BigTinCan* [2014] NSWCA 324 at [69], *per* Macfarlan JA.

> liability to the investor to repay an equivalent amount, either as a debt due to a creditor or as share capital ultimately to be returned to a shareholder. If the evidence established that funding would, or might, have enabled BTC to earn profits, the absence of that funding might fairly be regarded as causally related to a financial loss. Otherwise, it could not be so regarded.

19 The principal authority cited for this proposition was *Adelaide Petroleum NL v Poseidon*[57] ("*Poseidon*"), which concerned a claim for damages under s 82 of the Trade Practices Act 1974 (Cth) (the predecessor to the Australian Consumer Law).[58] That case established that when suing for the value of a lost commercial opportunity, where that opportunity is impacted by the potential conduct of a third party, the compensation awarded must reflect the likelihood and value of the lost opportunity. Crucially, the plaintiff must demonstrate that a real loss has been suffered. At trial, French J refused a claim for the plaintiff's capital benefit foregone because a rights issue and share placement did not go ahead. He distinguished between the (notional) capital loss and the "loss of the use of the money",[59] only the latter being included in the damages calculation. After being upheld in the Federal Court, the *Poseidon* litigation went on further appeal to the High Court of Australia in *Sellars v Adelaide Petroleum NL*[60] ("*Adelaide Petroleum*"). All members of the court confirmed that the applicant must show:[61]

> … on the balance of probabilities that he or she has sustained *some* loss or damage. However, in a case such as the present, the applicant shows *some* loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had *some* value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities. [emphasis added]

57 *Adelaide Petroleum NL v Poseidon Ltd* (1990) 98 ALR 431 at 530–532, *per* French J, upheld in *Poseidon Ltd v Adelaide Petroleum NL* [1991] FCA 663; 105 ALR 25 at 42, *per* Burchett J, and 51, *per* Lee J. Shephard J expressed himself generally to be in agreement with the judgments of Burchett and Lee JJ. Cited in *Ramsay v BigTinCan* [2014] NSWCA 324 at [70], *per* Macfarlan JA.

58 Competition and Consumer Act 2010 (Cth) Sch 2.

59 *Adelaide Petroleum NL v Poseidon Ltd* (1990) 98 ALR 431 at 531, *per* French J, upheld in *Poseidon Ltd v Adelaide Petroleum NL* [1991] FCA 663; 105 ALR 25 at 42, *per* Burchett J, and 51, *per* Lee J. Shephard J expressed himself generally to be in agreement with the judgments of Burchett and Lee JJ.

60 (1994) 179 CLR 332.

61 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 355, *per* Mason CJ, Dawson, Toohey and Gaudron JJ. See also 362–364, *per* Brennan J.

Brennan J put the matter thus:[62]

> As a matter of common experience, opportunities to acquire commercial benefits are frequently valuable in themselves, not only when they will *probably* fructify in a financial return but also when they offer a *substantial prospect* of a financial return. … Provided an opportunity offers a substantial, and not merely speculative, prospect of acquiring a benefit that the plaintiff sought to acquire or of avoiding a detriment that the plaintiff sought to avoid, the opportunity can be held to be valuable. And, if an opportunity is valuable, the loss of that opportunity is truly 'loss' or 'damage' for the purposes of s.82(1) of the Act and for the purposes of the law of torts. [emphasis added]

20 Although Macfarlan JA held that Ball J had erred in the approach he took in arriving at $300,000 equitable compensation, the same result was reached by different computation as a "fair assessment of BTC's loss"[63] taking into account the various contingencies[64] involved in the business enterprise and the fact that in his Honour's view the parties would not have committed their time and energy had they not assessed the prospects of business success at greater than 10% or estimated returns in excess of $650,000.[65] Therefore, the original figure arrived at by Ball J was confirmed.

21 As a model for making certain BTC's loss, the approach of all members of the New South Wales Court of Appeal accords with the probabilistic method. Despite Macfarlan and Gleeson JJA reaching differing figures, both approaches were premised on the view that BTC had to show the "prospects of success of that opportunity had it been pursued"[66] expressed in the view that "the funding would have been put to profitable use".[67] This apparently required on the evidence a translation connecting BTC's failure to obtain funding to the profits which might have been earned with that funding. It is of course possible to identify other hypothetical uses to which funding on similar facts might have been put, all of which would have required their own evidential foundation. Potential examples include debt reduction or a marketing campaign for BTC's apps on various digital platforms. Debt reduction may have resulted in a lower monthly interest payment, thus saving expenditure and the marketing campaign an uptake in retail sales of the app. The point of these examples is merely to suggest that the

62 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 364, *per* Brennan J.

63 *Ramsay v BigTinCan* [2014] NSWCA 324 at [83], *per* Macfarlan JA.

64 *Ramsay v BigTinCan* [2014] NSWCA 324 at [84], *per* Macfarlan JA: "the very significant business contingencies to which the prospect of deriving the anticipated profits was subject".

65 Note that this was the figure placed on success by Gleeson JA.

66 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 355, *per* Mason CJ and Dawson, Toohey and Gaudron JJ.

67 *Ramsay v BigTinCan* [2014] NSWCA 324 at [72], *per* Macfarlan JA.

"profitable use" to which the opportunity is put might but need not involve a revenue stream. Rather, the phrase is intended to capture the idea of a return or value in the chance beyond the existence of the chance itself.

22 It is important to notice the limits on the use of this type of probabilistic reasoning in making certain the value of lost opportunities which may be claimed for breach of fiduciary duty. As is axiomatic, the obligation of the fiduciary is, within the scope of the relationship, not to put herself in a position of conflict or possibility of conflict between duty and self-interest or conflicting duties owed to more than one principal and not to make a profit.[68] This obligation of the fiduciary is strict. Absent the informed consent of the principal,[69] or the fiduciary withdrawing from the relationship (thus avoiding the possibility of conflict and profit, albeit that in some circumstances withdrawal may itself constitute breach of fiduciary and non-fiduciary obligations), the principal is entitled to expect a zero risk or very low threshold of conflict. The absolute loyalty required of the fiduciary means, at least when we consider the parallel liability of the breaching fiduciary to account for profits, that it is irrelevant that the gain in the hands of the fiduciary is one which the principal "was unwilling, unlikely or unable to make".[70]

23 The same principle arguably operates when equity makes certain the loss flowing from breach. The normative choice underlying the fiduciary principle is a strict obligation of fiduciary loyalty, and arguably must inform equity's method of making loss certain. It should

68 *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390 at 392; *Breen v Williams* (1996) 186 CLR 71 at 135, *per* Gummow J; *Pilmer v Duke Group Ltd* (2001) 207 CLR 165 at [78]–[79], *per* McHugh, Gummow, Hayne and Callinan JJ; *Birtchnell v Equity Trustees and Agency Co Ltd* (1929) 42 CLR 384 at 408, *per* Dixon J; *Boardman v Phipps* [1967] 2 AC 46 at 124, *per* Lord Upjohn; *Hospital Products v USSC* (1984) 156 CLR 41 at 103, *per* Mason J. See also *Maguire v Makaronis* (1997) 188 CLR 449 at 461, *per* Brennan CJ and Gaudron, McHugh and Gummow JJ; *Beach Petroleum NL v Abbott Tout Russell Kennedy* (1999) 48 NSWLR 1 at 47; *Howard v Commissioner of Taxation* [2014] HCA 21 at [59], *per* Hayne and Crennan JJ. There is a debate as to whether the prohibitions against conflict and profit are separate principles or form part of the same principle: see, for example, *Chan v Zacharia* (1984) 154 CLR 178 at 199, *per* Deane J; *Howard v Commissioner of Taxation* [2014] HCA 21 at [57], *per* Hayne and Crennan JJ; and *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45 at [5]. For the purposes of the discussion in this article, nothing turns on this distinction.

69 *Boardman v Phipps* [1967] 2 AC 46 at 104, *per* Lord Cohen, 105 and 112, *per* Lord Hodson, and 117, *per* Lord Guest; *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 WLR 1126 at 1131–1132; *Maguire v Makaronis* (1996) 188 CLR 449 at 466–467, *per* Brennan CJ and Gaudron, McHugh and Gummow JJ; *Farah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [107].

70 *Warman v Dwyer* (1995) 182 CLR 544 at 558.

therefore be impermissible to discount the value of a lost opportunity for the risk that the *principal* would not have pursued the opportunity. This is because the obligation of the fiduciary is to avoid conflict or the possibility of conflict between self-interest and duty. It therefore does not lie in the mouth of the fiduciary to ask, *contra* the interest of the principal, about the value of an opportunity discounted for the risk that the principal "was unwilling, unlikely or unable"[71] to pursue it. However, the valuation of a lost commercial opportunity at law *would* entail the question of whether the plaintiff would have taken up the opportunity in any case, to be determined according to the balance of probabilities.[72] Equity's method of making certain the principal's loss cannot run contrary to the underlying obligation of the fiduciary.

24 Care is therefore required in interpreting the statement in *BigTinCan* that the capital raised is "put to profitable use".[73] To the extent that the phrase is intended to capture the idea of a return or value in the chance, it is consistent with the principle that a lost commercial chance is not in itself a recognised head of loss. However, if the phrase is understood to convey an inquiry into the further hypothetical choice or action of the principal, then according to the analysis presented in this article the phrase presents difficulties. It is submitted that the former meaning is that which the court intended. A similar difficulty arises with the potential ambiguity inherent in Macfarlan JA's statement that in arriving at the figure of $300,000 he took into "account the very significant business contingencies to which the prospect of deriving the anticipated profits was subject".[74] Putting to one side for the moment the impact of the hypothetical conduct by third parties, this figure should not, if the analysis in this article is correct, have been arrived at by taking into consideration the question of whether the plaintiff principal would have taken up the opportunity to raise capital. Plainly on the facts, there was a dire need for BTC to raise funds. A major creditor ("ETT") had sent a demand for repayment of its loan[75] and, ultimately, a receiver was appointed to BTC's assets pursuant to ETT's charge.[76] So it seems unlikely that the plaintiff's own conduct was included in the calculus.

25 So what were these contingencies? It is hard to unpack opaque reasoning but it seems reasonable to assume that the hypothetical conduct of third parties is included in this calculation. As explained by Macfarlan JA, "[t]he anticipated profits were to be earned in the future

71 *Warman v Dwyer* (1995) 182 CLR 544 at 558.
72 *Heenan v DeSisto* [2008] NSWCA 25 at [29], *per* Giles JA.
73 *Ramsay v BigTinCan* [2014] NSWCA 324 at [72], *per* Macfarlan JA.
74 *Ramsay v BigTinCan* [2014] NSWCA 324 at [84], *per* Macfarlan JA.
75 *BigTinCan v Ramsay* [2013] NSWSC 1248 at [56], *per* Ball J.
76 *BigTinCan v Ramsay* [2013] NSWSC 1248 at [61], *per* Ball J.

by exploitation of new technology".[77] Thus, the court followed the approach in *Adelaide Petroleum* and, having established the existence of a lost opportunity, valued that lost opportunity by the degree of probability of the prospects of success of the opportunity had it been pursued.[78] On the facts of *BigTinCan*, the majority of the New South Wales Court of Appeal took the view that there was a greater than 10% chance of the business reaching a value of $650,000 and thus the figure of $300,000 awarded by Ball J at trial should stand.[79] It is important to notice that, in contrast to adjustments for the hypothetical conduct of the principal, this process of making the loss certain is consistent with the fiduciary's obligation of loyalty. The "prospects of success" of the fiduciary obtaining capital, and "putting it to profitable use" are risks attendant on that activity which was intended to be carried out by the principal and thus arguably should be included in the calculus for making certain the loss to be borne by the fiduciary in breach of duty. That hypothetical conduct of third parties should be taken into account is also shown by *Hydrocool Pty Ltd v Hepburn*.[80] The case concerned an action for equitable compensation for breach of fiduciary duty against a company director. Siopis J had to determine whether compensation was available in respect of a lost opportunity to enter into and make profits from commercial licensing agreements and loss of royalties under third party agreements. Siopis J discounted the award to reflect the contingencies associated with Hydrocool Pty Ltd receiving licence fees and royalty payments, which were third party risks.[81]

26 In relying on *Poseidon* and adopting this method of calculating equitable compensation, Macfarlan JA in *BigTinCan* expressly confirms that the same issues arise when assessing equitable compensation as at common law: "In this respect it does not matter whether the breaches were of common law, statutory or equitable duties."[82] Despite this

77 *Ramsay v BigTinCan* [2014] NSWCA 324 at [84], *per* Macfarlan JA.

78 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 355, *per* Mason CJ and Dawson, Toohey and Gaudron JJ.

79 *Ramsay v BigTinCan* [2014] NSWCA 324 at [84], *per* Macfarlan JA.

80 [2011] FCA 495.

81 *Hydrocool Pty Ltd v Hepburn* [2011] FCA 495 at [535]–[542], [555] and [558], *per* Siopis J.

82 *Ramsay v BigTinCan* [2014] NSWCA 324 at [71], *per* Macfarlan JA. See also *Amponsem v Laundy (Exhibition) Pty Ltd* [2014] FCCA 2206 ("*Amponsem*") at [123], *per* Manousaridis J. In *Amponsem*, the court discounted an award of equitable compensation payable by an employee chef ("Amponsem") to his restaurant employer ("Laundy"). Amponsem had breached his fiduciary duty in supplying schnitzels to the restaurant without disclosing his interest in the vendor company (having obtained schnitzels from a third party and on-sold them to Laundy at a higher price) and for taking a secret profit from another schnitzel supplier. The discount reflected the fact that the price *per* schnitzel which would have been paid by Amponsem (if properly purchased on behalf of Laundy) to

(*cont'd on the next page*)

assurance, the above discussion shows that care is required.[83] Unlike the position at law, it is submitted that for breach of fiduciary duty, losses cannot be made certain by considering the hypothetical conduct of the principal/plaintiff.

27 There is one further risk attendant on the approach adopted by the New South Wales Court of Appeal in *BigTinCan*, which is that the model of reasoning may elide breach and loss. In adopting a method of making certain the plaintiff's loss for breach of fiduciary duty, and placing this in parallel with the calculation of loss in other departments of the law, analysis may fail to notice an important distinction, which is that for breach of fiduciary duty it is not necessary for the plaintiff to establish loss in proving the defendant's breach. Breach is established where the defendant has placed herself in a position of actual or serious possibility of conflict of duty and self-interest or conflicting duties.[84] The existence and quantum of loss may be relevant in determining the appropriate remedy to meet the plaintiff's equity, but is not part of the inquiry at breach. The corollary of this statement is that it is not necessary for the plaintiff to prove loss to make her claim for breach of fiduciary duty. Unless the remedy sought *is* reparative equitable compensation, there is no requirement for certainty or indeed causation to be satisfied in relation to items of loss. Loss can have no relevance, for example, to a claim for an account of profits.

28 By contrast, in the common law action for negligence, the plaintiff must establish harm to her interests as part of her claim.[85] For example, authority tells us that it is not permitted to convert what is a claim for physical injury into a claim for the loss of a chance to obtain a better medical outcome in a claim against an allegedly negligent doctor by his patient for irreversible brain damage. Common law causation cannot be bypassed by recasting the damage as the lost opportunity to obtain a better medical outcome rather than the physical damage suffered. This is shown by *Tabet v Gett*[86] in which six-year-old Reema Tabet was admitted to hospital in Sydney on 11 January 1991 suffering from headache, nausea and vomiting. Tabet had recently suffered from chickenpox and the paediatrician who attended her, Gett, made a provisional diagnosis that she was suffering from "chickenpox,

third party suppliers was likely higher than that actually paid by Amponsem. See *Amponsem* at [115]–[116].

83 See paras 16–25 above.

84 See n 68 above.

85 For example, as outlined in *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 at [52], *per* Gummow ACJ, harm to the interests of the plaintiff which is sustained by injury to person, property or as (pure) economic loss.

86 *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537. See generally James Edelman, "Loss of a Chance" (2013) 21 TLJ 1.

meningitis or encephalitis".[87] In fact she had a brain tumour. On 13 January nursing staff observed that Tabet's "pupils were unequal and the right pupil was not reactive".[88] On 14 January Tabet suffered a seizure and after a computerised tomography ("CT") scan and electroencephalogram ("EEG") were performed, the tumour which had been growing for over two years was discovered.[89] Reema Tabet suffered irreversible brain damage and consequent disability.[90] This damage was said to be a product of the tumour, the seizure, surgery performed on 16 January and subsequent radiotherapy treatment.[91] Tabet brought an action against Gett alleging negligence for his failure to perform a CT scan on 11 or 13 January. This failure to manage her with due care and skill, she argued, caused or contributed to "injury loss and damage" or, in the alternative "led to 'the loss of an opportunity to avoid injury, loss and damage'".[92] Tabet failed at trial in relation to her claim for physical injury but succeeded in her claim for the lost chance.[93] The matter for decision in the High Court of Australia was whether the law of negligence recognises as compensable damage a loss of opportunity, here the lost opportunity of a better medical outcome. Tabet argued that if the CT scan had been performed on 13 January, the tumour would have been detected and urgent treatment ordered. By Gett's failure to do so, Tabet argued that she had lost the chance of a better medical outcome.

29 The motivation behind the decision to frame Tabet's claim as one for a lost chance was that expert medical evidence could not establish a causal link between the failure of Gett to perform a timely CT scan, with the consequent delay in treatment, and the brain damage which occurred on 14 January.[94] On a "but for" test of causation, it could not be established that but for Gett's delay, Tabet would not have suffered brain damage.[95] The trial judge had found the presence of the tumour would have caused brain damage in any event. Thus, her claim

87 *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 at [4], *per* Gummow ACJ.
88 *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 at [6], *per* Gummow ACJ.
89 *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 at [5], *per* Gummow ACJ.
90 *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 at [105], *per* Kiefel J.
91 *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 at [35], *per* Gummow ACJ, and [105], *per* Kiefel J.
92 *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 at [2], *per* Gummow ACJ.
93 *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 at [8], *per* Gummow ACJ.
94 *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 at [114], *per* Kiefel J.
95 This case was heard under the pre-*Civil Liability Act* 2002 (NSW) common law. The court applied the "but for" test as a negative criterion of causation. As stated in *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 ("*Tabet*") at [112], *per* Kiefel J:

> … [t]he resolution of the question of causation has been said to involve the common sense idea of one matter being the cause of another. But it is also necessary to understand the purpose for making an inquiry about causation and that may require value judgments and policy choices.

See generally *Tabet* at [111]–[113], *per* Kiefel J.

was brought for the lost chance of a better medical outcome. This claim rests on the view that with earlier intervention, for example, through release of intracranial pressure as soon as possible, a better outcome may have been achieved for Reema Tabet.[96]

30 There were difficulties in valuing the chance lost by Tabet. The New South Wales Court of Appeal indicated that she had lost a 15% chance of avoiding the seizure of 14 January, which itself contributed to 25% of her overall disability.[97] At trial this had been valued at a 40% chance of avoiding the seizure. Gummow J held that the evidence provided "a basis for no more than speculation"[98] and on this basis found that the claim was not established, Heydon J similarly pointing to evidential difficulties.[99] Kiefel J also doubted the figure of 40% as being established on the evidence.[100] However, leaving to one side the issue of valuation, of relevance to this discussion is the point of principle that it was not permitted to convert Tabet's claim for damages for physical injury into a claim for loss of a chance of a better medical outcome. Kiefel J confirmed that, in contradistinction to the loss of a commercial opportunity, the loss of a chance of a better medical outcome is not of itself actionable damage in a personal injury claim in negligence:[101]

> What cases in contract, such as *The Commonwealth v Amann Aviation Pty Ltd* and *Sellars v Adelaide Petroleum NL*, have in common is that the commercial interest lost may readily be seen to be of value itself. The same cannot be said of a chance of a better medical outcome or a person's interest in it. … So long as an opportunity provides a substantial and not merely a speculative prospect of acquiring a benefit, it can be regarded as of value and therefore loss or damage. A loss of a chance of a better medical outcome cannot be regarded in this way. As the assessment of damages in this case shows, the only value given to it is derived from the final, physical, damage.

It was therefore not possible to circumvent the difficulty in meeting causation in relation to physical injury by establishing the connection in

96 *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 at [115]–[118], *per* Kiefel J.
97 *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 at [105], *per* Kiefel J.
98 *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 at [45], *per* Gummow ACJ.
99 *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 at [97]–[99], *per* Heydon J.
100 *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 at [118], *per* Kiefel J.
101 *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 at [124], *per* Kiefel J, with whom Crennan J agreed at [100]. See also [68], *per* Hayne and Bell JJ:

> As Gummow ACJ explains, to accept that the appellant's loss of a chance of a better medical outcome was a form of actionable damage would shift the balance hitherto struck in the law of negligence between the competing interests of claimants and defendants. That step should not be taken. The respondent should not be held liable where what is said to have been lost was the possibility (as distinct from probability) that the brain damage suffered by the appellant would have been less severe than it was.

relation to a different loss, the lost chance of a better medical outcome. Kiefel J thus confirmed:[102]

> It would require strong policy considerations to alter the present requirement of proof of causation. None are evident. The argument that there should be compensation where breach of duty is proved simply denies proof of damage as necessary to an action in negligence. I am unpersuaded that denial of recovery in cases of this kind would fail to deter medical negligence or ensure that patients receive an appropriate standard of care.

31 In equitable compensation for breach of fiduciary duty, the risk is not, as was the case for example in *Tabet v Gett*, of *by-passing* the need to prove physical injury, but of eliding breach and loss. Rather, reasoning may therefore relocate an element (loss) which properly belongs at the stage of remedy to the earlier question of breach. Seeking reparative equitable compensation for a lost opportunity necessarily requires a method of making that loss sufficiently certain. A model of calculation of equitable compensation which simply "bolts on" the probabilistic reasoning approach risks running together these important distinctions. In equity, all questions are thus *not* the same as at law, as asserted by Macfarlan JA in the New South Wales Court of Appeal – "namely, whether the loss has flowed from identified breaches of duty".[103] In addition, the availability of equitable compensation as an equitable remedy will nonetheless be subject to equity's overriding supervisory discretion to award relief.[104] However, as discussed below, equitable discretion is also the conduit for a more overt exercise of judgment in making certain the plaintiff's loss.

B. Discretion

32 An alternative model of making certain loss in equity is to do so within the machinery of equitable discretion and according to equity's model of expected fiduciary conduct. All equitable remedies, including equitable compensation, are discretionary in their availability. A plaintiff has an equity for relief which will be met by the minimum remedy necessary to meet the justice of the case.[105] Within this framework, the

102 *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 at [151], *per* Kiefel J. See also *Robinson Helicopter Co Inc v McDermott* [2016] HCA 22 at [86] and *Badenach v Calvert* [2016] HCA 18 at [38], *per* Gordon J.

103 *Ramsay v BigTinCan* [2014] NSWCA 324 at [71], *per* Macfarlan JA.

104 See generally Simone Degeling, "Discretion and Equitable Compensation" in *Equitable Compensation and Disgorgement of Profit* (Simone Degeling & Jason Varuhas eds) (Oxford: Hart Publishing, 2017) (forthcoming) ch 14.

105 *John Alexander's Clubs v White City Tennis Club Ltd* (2010) 241 CLR 1 at 45–46; *Giumelli v Giumelli* (1999) 196 CLR 101 at [50], *per* Gleeson CJ and McHugh, Gummow and Callinan JJ.

conceptual task of making certain the plaintiff's loss can be delegated explicitly to equitable discretion. As explained by Ribeiro NPJ (adopting the approach of Handley JA in *Houghton v Immer (No 155) Pty Ltd)*[106] in *Libertarian*:[107]

> …in such circumstances, the Court adopts a robust approach. This was explained by Handley JA … as follows:
>
> > In my judgment the Court should assess the compensation in a robust manner, relying on the presumption against wrongdoers, the onus of proof, and resolving doubtful questions against the party 'whose actions have made an accurate determination so problematic'. See *LPJ Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1990) 24 NSWLR 499 at 508.

33 *Libertarian* concerned Woods, who wanted to acquire a 10% stake in an English company called The Sporting Exchange ("TSE"), and Hall, a Hong Kong-based businessman. Hall undertook to use his connections and knowledge of TSE to assist Woods to acquire the necessary shareholding. Towards the end of 2002 the parties embarked on their project to obtain 10% of TSE's shares using €50m (£5,949,994) provided to Woods via his company Libertarian. The money was paid by Woods into a trust account set up by Hall with a firm of solicitors, Berwin Leighton Paisner ("BLP"). Unknown to Woods or Libertarian, Hall designated the BLP trust account as the client account of his company Axdale. Hall transferred without authority substantial funds in and out of the account. On 14 October 2003 Hall withdrew £5,463,508 claiming that this money was to purchase 1,777,700 shares in TSE at £3.11 *per* share. This was a lie: no shares were purchased and no explanation was given as to how the money was used.[108] The breach of duty relied upon by Woods was a breach of fiduciary duty.[109]

34 The loss suffered by Libertarian was the opportunity to on-sell TSE shares in the market. Of relevance to this discussion is the method of by which the Hong Kong Court of Final Appeal made certain Libertarian's loss. Evidence indicated that subsequent to the notional purchase date, Libertarian would have been able to offer the entire parcel to Softbank and that 42% would have been purchased at £13.2005 *per* share. The remaining 58% were assumed to have been able to be sold at £8.84 *per* share. The court acknowledged the inherent difficulties in

106 (1997) 44 NSWLR 46 at 59, *per* Handley JA, with whom Mason P and Beazley JA agreed.

107 *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [138], *per* Ribeiro PJ. See also [123], *per* Ribeiro PJ, and [174], *per* Millett NPJ.

108 *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [30], *per* Ribeiro PJ.

109 *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [35], [106] and [111]–[112], *per* Ribeiro PJ.

finding a basis for valuing the shares,[110] principal amongst these the "guesswork" and "evidential gaps" in ascribing a price a potential buyer would have been willing to pay for a hypothetical shareholding in a company whose share register was in a state of flux, the time of the hypothetical transaction being more than ten years prior. However, adopting an approach in which "the court is entitled to be robust and do rough and ready justice without having to justify the amount of its award with any degree of precision"[111] the orders made by the courts below were confirmed on ultimate appeal.

35 According to the approach adopted in *Libertarian* the inherent uncertainty of valuation was resolved via recourse to equity's presumptions and assumed standards of conduct which apply to the fiduciary. As explained by Millett NPJ the court:[112]

> … may [first] be able to take the fiduciary at his own word and use his falsehoods to establish the facts as if they were true, even though they are known to be untrue. Secondly the court is entitled to make every assumption against the party whose conduct has deprived it of the necessary evidence.

Everything is presumed against the wrongdoer or, to put it another way, in valuing hypothetical loss equity presumes a state of affairs consistent with performance of the underlying obligations of the wrongdoer.[113] The obligation of the fiduciary in *Libertarian* was an obligation of loyalty, expressed as an obligation not to put himself in a situation of conflict or serious possibility of conflict. The obligation is in this sense absolute. Consistently with this approach, a probabilistic method of making certain the value of the lost opportunity is not relevant because the

110 *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [137], *per* Ribeiro PJ.

111 *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [174], *per* Millett NPJ.

112 *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [174], *per* Millett NPJ.

113 A parallel example of equity's evidential and valuation rules operating in this fashion comes from the law of equitable tracing. For example, in the case of a mixed fund in value shortage comprising trust money and that of a breaching trustee or fiduciary, beneficiaries may choose to presume that the trustee or fiduciary has spent her own money first in diminution of the value of the fund: *Re Hallett* (1880) 13 Ch D 696; *Re Oatway* [1903] 2 Ch 356. As pointed out in *Re Caledonia Travel Service Pty Ltd* (2003) 59 NSWLR 361 at [63]–[65], *per* Campbell J, there are difficulties in understanding *Re Hallett* as being about the presumed intention of the trustee to draw out her own money first when there are already breaches of trust in mixing the money and a potential future breach in dissipating it. However, such qualifications aside, it is possible to argue that equity's identification rule is premised on a view of the trustee's conduct which is in with conformity with her duty. See also *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 at [1514], *per* Lewison J, who draws a more general analogy between the taking of accounts and tracing.

obligation of the fiduciary is not inherently probabilistic or at least capable of reduction to a level of performance.

IV. Conclusion

36 Recovering the value of the loss of a chance, whether at law or equity, is a vexed topic. The limited purpose of this article has been to suggest that when awarding equitable compensation for breach of fiduciary duty in the reparative measure, equity necessarily makes certain this loss. Further, despite some superficial similarities with the method at law of making such loss certain, important differences exist.

37 Primary amongst these is that the hypothetical conduct of the principal cannot be a factor in the calculation. The fiduciary's obligation of loyalty, and the law's commitment to protecting that obligation, prevents an inquiry as to whether the principal would have pursued the opportunity had it not been lost. More obviously, whilst other methods of calculation according to probabilities and possibilities are relevant, equity also has its own method of making certain hypothetical losses which are explicitly informed by its own normative positions and ethical commitments. Further, the limits on equity's decision-making identified in this article should not be seen as an artefact of a false dichotomy between law and equity. The phenomenon of "fusion by analogy" with the common law has now been accepted.[114] Rather, these limits arise as a necessary consequence of the fiduciary obligation itself.

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114 For example, all members of the court in *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 accepted the position of principal such that equity may develop by analogy with the common law, albeit not in relation in that case to the availability of punitive damages for breach of fiduciary duty. See generally Andrew Burrows, "Remedial Coherence and Punitive Damages in Equity" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Sydney: Lawbook Co, 2005) ch 15.