HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

TRAVEL COMPENSATION FUND APPELLANT

AND

ROBERT TAMBREE T/AS R TAMBREE
AND ASSOCIATES & ORS RESPONDENTS

Travel Compensation Fund v Robert Tambree t/as R Tambree and Associates [2005] HCA 69
16 November 2005
S54/2005

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 26 February 2004 and in their place order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation:

J E Marshall SC with N F Francey and M J O'Meara for the appellant (instructed by McCabe Terrill)

P B Walsh for the first respondent (instructed by Burston Cole & Co)

R E Dubler SC with H Sonmez for the second respondent (instructed by Phillips Fox)

No appearance for the third to fifth respondents

CATCHWORDS

Travel Compensation Fund v Robert Tambree T/as R Tambree & Associates

Trade Practices – Fair Trading Act – Misleading or deceptive conduct – Person who suffers loss or damage by conduct of another in contravention of Act.

Damages – Causation – Whether illegal conduct severed the chain of causation – Travel Compensation Fund established as part of national scheme for regulation of travel agents – Fund compensated members of the public who suffered loss by reason of an act or omission of a travel agent – Travel Shop International ("TSI") was a participant in the Fund – Financial statements of TSI prepared by first respondent and audited by second respondent in support of TSI's continued participation in the Fund – Appellant acted in reliance on information about the financial position of TSI – Respondents knew of such reliance – Respondents negligent and engaged in misleading or deceptive conduct in preparing and auditing the financial statements of TSI – Unlawful trading by TSI a cause of the damage suffered by the appellant.

Damages – Causation – Statutory context relevant to determining approach to causation – Application of common law approach to causation in the context of the Fair Trading Act – Whether policy considerations and value judgments relevant.

Fair Trading Act 1987 (NSW), ss 42, 68.
Travel Agents Act 1986 (NSW).

1 GLEESON CJ. This appeal concerns an issue of causation that arose in assessing damages against an accountant and an auditor who were held to have been negligent, and to have engaged in misleading or deceptive conduct in contravention of s 42 of the *Fair Trading Act* 1987 (NSW) ("the Fair Trading Act"). The appellant took proceedings in the Supreme Court of New South Wales and succeeded in its claim for damages, both at first instance before Austin J[1], and in the Court of Appeal[2]. However, the Court of Appeal substantially reduced the damages awarded.

2 In order to explain how the issue as to damages arises it is necessary to state, in broad terms, the statutory and factual basis of the first and second respondents' liability to the appellant.

The travel compensation scheme

3 Uniform State legislation has established a national scheme for the regulation of travel agents. The relevant New South Wales legislation is the *Travel Agents Act* 1986 (NSW) ("the Travel Agents Act"). One aspect of the regulatory scheme involves a compensation fund designed to safeguard people who suffer loss by reason of an act or omission of a travel agent. One form of such loss involves paying in advance for travel services and, through default on the part of the agent, not receiving the services. The scheme was examined by Lehane J in *Travel Compensation Fund v Travel Guide Pty Ltd (in liq)*[3].

4 The Travel Compensation Fund ("the Fund") is administered by a group of trustees, originally the responsible Ministers in a number of States, who were appointed pursuant to a Deed of Trust ("the Deed") dated 12 December 1986. By virtue of s 52 of the Travel Agents Act the trustees may sue and be sued in the name of the Fund. The existence of the Fund is recognised by the Travel Agents Act and the regulations made under that Act. Travel agents may apply to become "participants" in the scheme established by the Deed. A participant is, by definition, a travel agent licensed under a State Act who meets certain prescribed eligibility requirements. Participation is on an annual basis. A Management Committee determines whether applicants should be admitted as participants, and conducts annual financial reviews to determine whether participation should be renewed. The eligibility criteria are based on financial security, determined by reference to audited financial statements. Failure to meet the criteria could result in a requirement to obtain a bank guarantee, or to invest more capital in the

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1 *Travel Compensation Fund v Fry* [2002] NSWSC 1044.

2 *Tambree v Travel Compensation Fund* (2004) Aust Contract Reports ¶90-195.

3 (1997) 72 FCR 371.

business, or it could result in denial or loss of participation. The Travel Agents Act requires all travel agents to be licensed (s 6). It is a condition of all licences that the licensee be a participant in the compensation scheme (s 11(2)).

5 Clause 15 of the Deed provides:

> "15.1 Subject to this Deed, the Trustees shall pay compensation out of the Fund to a beneficiary -
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> (a) who is a client; and
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> (b) who has suffered or may suffer pecuniary loss arising directly from a failure to account for money or other valuable consideration by a participant -
>
> where -
>
> (c) the failure to account arises from an act or omission by the participant or an employee or agent of the participant; and
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> (d) the client is not protected against the loss by a policy of insurance.
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> 15.2 The Trustees may in their absolute discretion:
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> (a) pay compensation to a beneficiary under clause 15.1 in relation to any consequential pecuniary loss suffered by reason of a failure to account; and
>
> (b) pay compensation, including compensation in relation to any consequential pecuniary loss suffered by reason of a failure to account, to a person to whom they are not required to pay compensation under clause 15.1."

6 The word "beneficiary" is defined to include a person who entrusts money to a travel agent. The trustees hold the Fund on trust for the Crown in right of the States and for every person who entrusts money to a travel agent in connection with travel arrangements if the travel agent fails to account for the money. In such a context, failure to account includes, and typically involves, failure to apply money for the purpose for which it was entrusted to the agent[4].

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4 *Roxborough v Rothmans of Pall Mall Australia Limited* (2001) 208 CLR 516 at 543-544 [71].

7 The purpose of the discretionary power conferred by cl 15.2, and the manner in which the power is commonly exercised, was the subject of evidence before Austin J, who said:

> "Claims were dealt with by the Management Committee either under clause 15.1, under which [the appellant] must make a claim for pecuniary loss suffered directly from a failure to account by a participant in the Fund if the requirements of that provision are satisfied, or under clause 15.2 where the Trustees are given a discretion, in certain circumstances, to pay compensation to a person whose claim does not fall within clause 15.1. Mr Brattoni [an officer of the Fund] gave evidence explaining how the Trustees exercise their discretion under clause 15.2. He said that cases under clause 15.2 normally involve unlicensed agents. Commonly participation in the Fund is terminated and then the Department of Fair Trading takes steps to terminate the travel agent's licence and close the business. That is what happened in the present case. In considering claims, the Trustees look to the date of termination of participation in the Fund and the date of any payments made after that termination. If the Trustees form the opinion that members of the public with whom the travel agent dealt would be unlikely to know, when they paid their money to the agent, that they were surrendering their money to an unlicensed operator, and there was no unusually long period of time between the termination and the payment of money to the agent, the Trustees would be likely to exercise their discretion in favour of the claimant. Mr Brattoni's evidence is that the Trustees exercised their discretion upon the basis of such considerations in the present case."

8 The practical significance of cl 15.2 is obvious. Business failures are not always neat and tidy. People often attempt to trade out of financial difficulties. As in the present case, there sometimes can be an interval between financial failure, loss of a licence, and complete closure of a business. Clause 15.2 was designed to protect members of the public who deal with agents in such circumstances.

<u>The compensation payments</u>

9 The payments made by the Fund, which gave rise to these proceedings, followed what Austin J described as the collapse of a business carried on at 366 Church Street, Parramatta under the name of "The Travel Shop International". The business was established by Ms Renee Fry. Ms Fry and her father were also sued in the original proceedings, and much of the judgment of Austin J is devoted to the resolution of factual and legal questions that are no longer directly in issue. The issues were blurred by the fact that, when her business was in the process of collapse, Ms Fry, "informally transferred" it to a company named The Travel Shop International Pty Ltd. That company ("TSIPL") had been incorporated in October 1996. Ms Fry was the sole director and shareholder.

However, Austin J found it possible to reach reasonably confident conclusions about the financial history of Ms Fry trading as The Travel Shop International, and those conclusions are not in dispute in this appeal.

10 Ms Fry was the principal of the business, but her father was in charge of the accounting side. In 1996 Ms Fry sought, and obtained, admission as a participant in the Fund. She applied successfully for a travel agent's licence. She was issued with Licence No 2TA4438. She did not commence trading until early 1997. She specialised in arranging holidays in Fiji and Bali.

11 The financial statements of the firm for each of the years ended 30 June 1997 and 30 June 1998 were prepared by the first respondent and audited by the second respondent. They were submitted to the Fund in support of the firm's continued participation, which was essential for the maintenance of the travel agent's licence. The auditor's report noted that the financial statements had been prepared for distribution to, inter alia, the trustees of the Fund. Austin J found that both the first and second respondents knew that the financial statements would be sent to, and relied upon, by the Fund for the purpose of maintaining participation.

12 There was a major issue at the trial, resolved adversely to the first and second respondents, arising out of an allegation that the financial statements of The Travel Shop International omitted to disclose substantial liabilities as at 30 June 1997 and 30 June 1998. One of the major creditors of the firm was Metro Travel, a wholesaler of airline tickets. As at 30 June 1997, the firm owed Metro $65,684. By 30 June 1998, the amount was $152,615. It later increased to $163,237. The financial statements for the year ended 30 June 1997, which were completed in December 1997, showed no current liabilities. They reported a net profit of $24,702. The financial statements for the year ended 30 June 1998, which were prepared in November 1998, showed no current liabilities. They reported a net profit of $8,337.

13 It is unnecessary, for present purposes, to examine the detail of Austin J's reasons for concluding that the financial statements were false and misleading. He accepted the evidence of an expert witness, Mr Humphreys, that, if adjusted to reflect the true position of the firm, the 1997 and 1998 statements should have shown a material deficiency of assets to liabilities, and a significant trading loss. An officer of the Fund said that, in February 1999, when a field audit was conducted, Mr Fry said that he had been "naughty" in not disclosing the creditors in the firm's accounts. It is also unnecessary to examine his Honour's reasons for concluding that the first and second respondents had been negligent in preparing and auditing the financial statements respectively, and that they had engaged in misleading conduct in contravention of s 42 of the Fair Trading Act.

14 From mid-1998 Metro Travel began to press for payment of its debt. Pressure upon Ms Fry from a number of creditors increased. Austin J, after

considering some "very unclear" evidence found that Ms Fry "informally transferred the business to TSIPL as from some time in November 1998" and that "from November 1998 onwards, TSIPL conducted the travel agency business that had previously been conducted by Ms Fry trading as 'The Travel Shop International'". From that time, moneys received from clients were paid into a bank account of TSIPL. Bearing in mind that Ms Fry was the sole director and shareholder of TSIPL, the informality of the "transfer" is understandable. The stationery used in connection with the business continued to quote licence No 2TA4438. The licence was still held by Ms Fry.

15 In February 1999, following complaints from creditors, the Fund decided to do the field audit mentioned above. Mr Fry said he was negotiating to sell the business, and asked for ten days to complete the negotiations. He said that if the business closed immediately there would be a loss of client funds, and claims on the Fund. On 18 February 1999, Ms Fry sent a letter to the Fund saying that she wished to cease participation. On 23 February 1999, the Fund terminated her participation.

16 From 23 February to 20 April 1999 Ms Fry and her father continued to conduct, from the same premises, the business of a travel agency, although the firm's licence had ceased to have effect when it lost its right to participate in the Fund. Austin J said:

> "Mr Brattoni sought emergency approval of claims for clients of The Travel Shop who had not received valid travel documents after paying deposits. Mr Brattoni put in place arrangements whereby another travel agent called San Michele Travel took over all bookings that had been made by The Travel Shop International and completed them, on the basis that compensation would be available from [the Fund] to make up differences between the cost of re-booking and refunds upon cancellation.
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> In April 1999 the Department of Fair Trading changed the locks at 366 Church Street Parramatta and placed chains on the door, precluding Ms Fry and Mr Fry from having access to the premises and effectively bringing to an end the business, which they allege to have been conducted at that time by [another entity]. Subsequently proceedings were taken by the Department of Fair Trading in this Court, leading to orders banning The Travel Shop International, Ms Fry and Mr Fry from operating as travel agents for a period of five years from the date of the orders, made in May 1999."

17 Between the end of February 1999 and the forced closure of the business in April 1999, Ms Fry used stationery that referred to a number of entities associated with her and her father. Austin J gave several examples. Two will suffice for present purposes. Itinerary details and a booking acknowledgment were provided under a letterhead "The Travel Shop International Pty Ltd" and in

smaller font "Incorporating Fiji & Bali Resorts International Ltd ... Lic No. 2TA4438". A receipt was issued with a letterhead referring to "The Travel Shop ... Lic No. 2TA004438 [sic]" and at the foot of the page "The Travel Shop International Pty Ltd Affiliated with: Fiji Resorts International Pty Ltd Bali Resorts International Pty Ltd" and the name Renee Fry in bold letters.

18 Austin J found that, faced with evidence of serious misrepresentations by Ms Fry in the financial statements for 1997 and 1998, and complaints of failure to pay debts, the Fund acted reasonably in terminating Ms Fry's participation. He also found that, after it emerged that Ms Fry appeared to be continuing to trade, the Department of Fair Trading acted reasonably in shutting down the business.

19 The Fund received a large number of claims from people who dealt with The Travel Shop International in 1999, paid deposits and other moneys, and did not receive the services for which they paid. The Fund accepted claims, and made payments to claimants, in the total amount of $143,050. Some of the claims related to moneys paid before 23 February 1999 ($13,320). Most claims related to moneys paid between that date and 20 April 1999.

The findings on liability and the assessment of damages

20 The appellant claimed that the conduct of the first respondent in preparing the financial statements of Ms Fry trading as The Travel Shop International for the years ended 30 June 1997 and 30 June 1998, and the conduct of the second respondent in auditing those statements and signing the audit reports attached to them, contravened s 42 of the Fair Trading Act, which prohibits a person from, in trade or commerce, engaging in conduct that is misleading or deceptive. Austin J accepted that contention. Section 68 of the Fair Trading Act provides that a person who suffers loss or damage by conduct of another person that is in contravention of s 42 may recover the amount of loss or damage by action against the other person. Austin J held that the appellant had suffered loss or damage by conduct of the first and second respondents in contravention of s 42. He concluded that their conduct caused the appellant to suffer loss in the amount of $143,050. In reaching that conclusion, he accepted evidence that, if the financial statements had shown a true and fair view of the financial position of the business, the appellant would have required either bank guarantees or substantial increases of capital as a condition of permitting continued participation in the Fund. Austin J found that "[f]ailure to comply with the requirement for a bank guarantee or capital injection would have resulted ... in determination of Ms Fry's participation in the Fund, with the result that she would not have been able to carry on the business of a travel agent lawfully."

21 Austin J also found that the first and second respondents owed the appellant a common law duty of care, and acted in breach of that duty. They knew that the financial statements were prepared for submission to the Fund for the purpose of Ms Fry's renewal applications. Austin J held that the appellant

relied on the statements, and that such reliance was reasonable. The same loss resulted from the negligence as from the contravention of the Fair Trading Act.

22 The loss found by Austin J was the amount paid to claimants under cl 15 of the Deed. What Austin J said in that respect about cl 15.2 has been set out earlier in these reasons. It was directly relevant to his assessment of damages. He summarised the appellant's case on causation, which he accepted, as being that, by reason of the conduct of the first and second respondents, the appellant renewed Ms Fry's participation in the Fund and thereby permitted her to continue to trade as a licensed travel agent until February 1999. In consequence, the appellant suffered the loss constituted by meeting the claims. The conduct of the first and second respondents allowed a state of affairs to develop in which Ms Fry was able to continue to trade and expose clients (directly) and the appellant (indirectly) to loss. He said, referring to a submission put on behalf of the second respondent, that proper discharge of his auditing duties would have led to a chain of regulatory events that would have prevented the loss in fact suffered by the appellant. He accepted that most of the claims in question were treated by the appellant as discretionary claims under cl 15.2 of the Deed because the failure to account, even where the payments had been made before 23 February 1999, arose while the business was unlicensed. By the time the losses of the clients were incurred, the business had been taken over by TSIPL, which was not a participant. However, the trustees of the Fund were obliged to exercise their discretion under cl 15.2 in a fiduciary capacity, acting for proper purposes and upon relevant considerations. Austin J held that they acted properly in discharge of their fiduciary obligations in paying the claims.

23 The Court of Appeal accepted the reasoning of Austin J in all respects but one, which is the point in issue in the present appeal. Sheller JA, with whom Mason P and Ipp JA agreed, noted that, of the total amount of claims paid by the appellant ($143,050), only $13,320 was for compensation to consumers who had made payments before 23 February 1999. He observed that, in the period that followed, until the premises at 366 Church Street, Parramatta were closed by licensing inspectors on 20 April 1999, when dealing with the public, TSIPL quoted Mr Fry's licence number. All the claims other than those represented by the amount of $13,320 were in respect of business done during that period. Sheller JA concluded that the loss resulting from such claims was not causally related to the negligence of the first and second respondents. Accordingly, the Court of Appeal reduced the amount of damages awarded to the appellant to $13,320.

24 The reasoning of Sheller JA turned upon the illegality of Ms Fry's conduct (and perhaps that of her father) in continuing to operate, or cause TSIPL to operate, the business at 366 Church Street, Parramatta. He asked himself whether that conduct "severed the chain of causation". In answering that question, he referred to normative considerations affecting the determination of issues of causation, citing, among other authorities, a passage in the judgment of

Ipp JA in *Ruddock v Taylor*[5], where it was said that issues of causation may involve two questions, one factual and one normative, and that the ultimate question to be answered on the second aspect is whether the defendant *ought* to be held liable to pay damages for that harm. Sheller JA said:

> "As a value judgment I do not think that what Ms Fry did following her termination of participation could be regarded as a normal occurrence. A person would not normally terminate the licence which enabled that person to conduct a travel agent's business and yet continue to conduct that business illegally."

He concluded:

> "[The second respondent's] conduct in negligently preparing a misleading audit occurred in the context of supporting Ms Fry's application to participate in the scheme. [The appellant] relied upon this conduct in its pleading by claiming that the accounts and audit induced [the appellant] to permit Ms Fry to continue in the scheme and accordingly engage in the business of a travel agent. She subsequently ceased to carry on that business in her own name, and a little later, ceased to participate in the scheme. It is not clear from the findings whether thereafter she did other than work for TSIPL, which seems to have made use of her licence number. [The first and second respondents] knew that the accounts and audit certificate were to aid Ms Fry continuing in the scheme and engaging in business as a licensed travel agent. However in my opinion, by no test could it be said that the negligently prepared accounts and audit and the misrepresentations that flowed from them, were causally related to her continuing illegally in the business of a travel agent. The example given by counsel for [the second respondent] of the negligent testing of a potential driver being causally related to the driver negligently injuring a person while continuing to drive after the licence was cancelled, seems to me apposite. On this ground, in my opinion, both the appeal and the cross-appeal should be upheld to the extent that [the appellant] is not entitled to recover the amount of compensation paid to those claimants who suffered loss as the result of Ms Fry's activities after 23 February 1999."

Causation

25 The reasoning of Sheller JA commenced by identifying the problem to be addressed in the present case as one involving the "intervention of other immediate causes" between breach of duty (common law and statutory) and

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5 (2003) 58 NSWLR 269 at 286 [87].

harm. In such a case, he said, while it has been recognised that a "but for" test of causation may have an important negative function, it is inadequate as a comprehensive positive test[6]. The intervening immediate cause of the loss related to business activities after 23 February 1999 was said to be the illegal conduct of Ms Fry and TSIPL in unlicensed trading. Then, Sheller JA said, the solution to the problem required the exercise of a value judgment.

26 The loss in question was that incurred by the appellant in meeting claims under cl 15.2 of the Deed. As Austin J pointed out, although the power exercised in paying those claims was discretionary, in the fiduciary context in which they were paid the payments represented properly incurred expenses. The Court of Appeal appeared to have no difficulty with that. However, the evidence referred to by Austin J in the passage quoted above as to the regulatory purpose of cl 15.2 was not referred to in the reasons of Sheller JA. It shows that payment of claims resulting from the activities of unlicensed operators in the relatively brief interval that often occurs between loss of participation rights and physical closure of a business is the very kind of thing to which cl 15.2 was directed.

27 Whether claims on the Fund are made under cl 15.1 or cl 15.2, there will always be the conduct of a third party, described as failure to account, in between the breach of statute or negligence on the part of an accountant or auditor involved in providing financial statements to the appellant, and the suffering of harm by the appellant. Such conduct may well involve illegality. The Fund does not exist only to protect the public against lawful behaviour. A travel agent's failure to account, whether the agent be licensed or unlicensed, will always be the occasion of the kind of loss suffered by the appellant in meeting claims under cl 15 of the Deed. Typically, as in the present case, the failure to account will be related to financial difficulties in which the agent is involved. That is why agents are required to provide financial statements in support of applications to become, and remain, participants in the compensation scheme. The whole purpose of the scheme is to protect the public against loss resulting from dealing with defaulting agents. Default commonly results from financial failure, and failure to account by an agent may well involve some form of illegality. When the appellant called for audited financial statements, the kind of loss to the public, and the kind of loss to itself, against which it sought protection was loss that would always involve an agent's failure to account.

28 It is not in doubt that issues of causation commonly involve normative considerations, sometimes referred to by reference to "values" or "policy". However, as Stephen J pointed out in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*[7], the object is to formulate principles from policy, and to

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6 See *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6.

7 (1976) 136 CLR 529 at 567.

apply those principles to the case in hand. In the context of considering an issue of causation under the Fair Trading Act, the statutory purpose is the primary source of the relevant legal norms[8]. The case did not call for a value judgment about the conduct of Ms Fry. Why her failure to account, after she lost her licence, in respect of moneys paid to her company while it was illegally trading under her licence should be treated differently from her failure to account, after she lost her licence, in respect of moneys paid after she lost her licence but before the authorities took steps to close down her business, is not apparent.

29 To acknowledge that, in appropriate circumstances, normative considerations have a role to play in judgments about issues of causation is not to invite judges to engage in value judgments at large. The relevant norms must be derived from legal principle. In this case, the primary task of the Court is to apply the legislative norms to be found in the Fair Trading Act, although the outcome is not materially different to applying the common law of negligence.

30 Section 68 of the Fair Trading Act, in its application to a contravention of s 42, gives rise to the same questions as does s 82 of the *Trade Practices Act* 1974 (Cth) in its application to a contravention of s 52 of that Act. In recent cases, this Court has pointed out that, in deciding whether loss or damage is "by" misleading or deceptive conduct, and assessing the amount of the loss that is to be so characterised, it is in the purpose of the statute, as related to the circumstances of a particular case, that the answer to the question of causation is to be found[9].

31 This is a case of known reliance, and negligent misrepresentation. The aspect of trade and commerce which attracted the operation of s 42 of the Fair Trading Act was the conduct of the business of a travel agent, in a regulatory context that provided for a scheme of compensation for members of the public who suffer loss through failure to account on the part of defaulting agents. That scheme exposed the appellant to claims for compensation, and to the risk of loss by reason of payments made under cl 15 of the Deed. Because of cl 15.2, and the way it worked in practice, as explained in the evidence, the risk to which the appellant was exposed included the risk of claims for compensation by people who dealt with a travel agent who was no longer a participant in the Fund and

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8 *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 119 [25]-[26].

9 *Henville v Walker* (2001) 206 CLR 459 at 470 [18], 489-490 [96], 509-510 [164]-[165]; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 119 [26], 125-126 [50], 135-136 [84]. See also, more generally, *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 79 ALJR 1079; 215 ALR 385.

was operating following loss of a licence – perhaps attempting to trade out of financial difficulties. To protect itself against that risk, as well as to protect the public, the appellant required information about the financial position of participating agents. It acted in reliance on that information in making decisions about continuing participation, including decisions as to whether to require further security or additional funding. The first and second respondents participated in the provision of such information, knowing that it was for the purpose of such reliance. The statute prohibited misleading conduct by them. They engaged in misleading conduct by the part they played in the provision of false financial information.

32 Misrepresentation will rarely be the sole cause of loss. If, in reliance on information, a person acts, or fails to act, in a certain manner, the loss or damage may flow directly from the act or omission, and only indirectly from the making of the representation[10]. Where the reliance involves undertaking a risk, and information is provided for the purpose of inducing such reliance, then if misleading or deceptive conduct takes the form of participating in providing false information, and the very risk against which protection is sought materialises, it is consistent with the purpose of the statute to treat the loss as resulting from the misleading conduct.

33 The compensation scheme was not limited to providing compensation for failure to account by agents who had current licences at the time of the failure to account. Clause 15.2 of the Deed makes that clear. People whose businesses collapse may well attempt to trade out of their difficulties; and there may well be an interim period between termination of participation in the Fund, with consequent loss of licence, and physical closure of a business by action of the regulatory authorities. The risk that an insolvent agent (as Ms Fry appears to have been) would keep trading until forced by the authorities to close down, and that claims would be made under cl 15.2, was part of the risk against which the appellant was seeking to protect itself when it considered the financial statements of Ms Fry.

34 The illegality of Ms Fry's conduct did not take it outside the scope of the risk against which the appellant attempted to obtain protection. That is made obvious by a consideration of the operation of cl 15.1 of the Deed. A failure to account, by a licensed agent who is still a participant in the Fund, could well involve illegality of some kind. There might be an issue, in a given case, about whether a loss to the appellant in such a case was causally related to misrepresentation by providing erroneous financial statements. If it were so related, however, it would be unlikely that illegality would be an answer to any

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10 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 356-357; *Henville v Walker* (2001) 206 CLR 459 at 469 [14].

issue of causation. Loss following reliance on negligently prepared financial statements often arises in circumstances of illegal conduct on the part of someone against whose default protection is sought. It could hardly be the case that the appellant could only recover damages from a negligent accountant or auditor in the case of a failure to account by an agent whose conduct involved no illegality.

35 The answer to the problem of causation in the present case is to be found, not in a value judgment, but in an accurate identification of the nature of the risk against which the appellant sought protection and of the loss it suffered, considered in the light of the kind of wrongful conduct in which the first and second respondents engaged.

36 The considerations discussed above in relation to the claim under the Fair Trading Act are of equal force in relation to the common law claims for negligence.

37 The conclusion of Austin J was correct.

Orders

38 The appeal should be allowed with costs. The orders of the Court of Appeal should be set aside and in their place it should be ordered that the appeal to that Court be dismissed with costs.

39 GUMMOW AND HAYNE JJ. We agree with Gleeson CJ that the appeal should be allowed and consequential orders made in the form proposed.

40 We agree that what happened in this case can be described as the occurrence of the very risk against which the appellant sought to protect itself by seeking and obtaining the accounting information it did. The first and second respondents[11] each knew that the appellant intended to rely on the accuracy of the accounting information he supplied. The information that was provided by each was false. Providing that information to the appellant was conduct that was misleading or deceptive, or likely to mislead or deceive. Had the respondents acted with reasonable care, neither would have supplied the false information that was supplied.

41 Describing what happened as the occurrence of the very risk against which the appellant sought to protect itself looks at events from the appellant's point of view. That is far from irrelevant, but the respondents contended that it is a conclusion which obscures whether the circumstances in which the risk eventuated are relevant to deciding whether the respondents should be held liable for the losses that ensued. The respondents submitted that in this case the circumstances in which the appellant suffered the loss it did, require the conclusion that the respondents were not to be held responsible for that loss, or at least the greater part of it.

42 Much of the loss the appellant suffered related to dealings Ms Fry, or Ms Fry and her father, had with customers after 23 February 1999. Ms Fry's participation in the Travel Compensation Fund was terminated on 23 February 1999. The dealings that took place after that date were dealings by an unlicensed travel agent and, for that reason, were unlawful[12]. It does not matter whether the dealings were with Ms Fry, Ms Fry and her father, or a company which Ms Fry controlled (The Travel Shop International Pty Ltd).

43 At first instance, Austin J accepted[13] that the appellant acted reasonably in resolving to terminate Ms Fry's participation in the Fund and, no less importantly, that "the Department of Fair Trading acted reasonably in shutting down the business and denying Ms Fry and Mr Fry access to the premises".

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11 The third to fifth respondents did not appear and took no part in the argument of the appeal. It is convenient to refer to the first and second respondents as if they alone were named as respondents to the appeal.

12 *Travel Agents Act* 1986 (NSW), s 6.

13 *Travel Compensation Fund v Fry* [2002] NSWSC 1044 at [119].

These findings were not disturbed on appeal to the Court of Appeal. In particular, there is no basis in the findings made at trial or in the reasons of the Court of Appeal to conclude that any "unusually long period of time [elapsed] between the termination [of participation in the fund] and the payment of money to the agent"[14] by customers before the business was shut down by the Department of Fair Trading.

44 Events taking this course, the characterisation of the trading after 23 February 1999 as illegal, even though correct, is irrelevant to the question whether the appellant suffered loss "by" the respondents' contraventions of the prohibition in s 42 of the *Fair Trading Act* 1987 (NSW). It is irrelevant because the legal characterisation of the conduct of Ms Fry does not bear upon whether the respondents' conduct was a cause of the appellant's loss. In particular, the continued, albeit illegal, trading of Ms Fry (whether alone or with others) was found to be trading which, had the respondents acted properly, would have been prevented.

45 It is now clear that there are cases in which the answer to a question of causation will differ according to the purpose for which the question is asked[15]. As was recently emphasised in *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd*[16], it is doubtful whether there is any "common sense" notion of causation which can provide a useful, still less universal, legal norm. There are, therefore, cases in which the answer to a question of causation will require examination of the purpose of a particular cause of action, or the nature and scope of the defendant's obligation in the particular circumstances[17].

46 In *Allianz*[18], McHugh J noted that considerations of legal policy may enter into the selection of those causative factors which are determinative of liability. However, to accept that proposition, as it should be, is not to adopt a quite different proposition that in any given case the ultimate issue is whether "the

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14 [2002] NSWSC 1044 at [122].

15 *Chappel v Hart* (1998) 195 CLR 232 at 256 [63]-[64] per Gummow J, 285 [122] per Hayne J; *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 at 29, 31 per Lord Hoffmann.

16 (2005) 79 ALJR 1079 at 1095 [96]-[97] per Gummow, Hayne and Heydon JJ; 215 ALR 385 at 406-407.

17 *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at 1091 [70]-[71] per Lord Nicholls of Birkenhead.

18 (2005) 79 ALJR 1079 at 1089 [55]; 215 ALR 385 at 398.

defendant *ought* to be held liable to pay damages for [the] harm [suffered]". This approach to questions of causation taken by Ipp JA in *Ruddock v Taylor*[19] was adopted by the Court of Appeal in the present case[20].

47 In *Sullivan v Moody*[21], this Court, in the joint judgment of five Justices, affirmed the rejection in Australia of what has been identified as the three-stage approach in negligence cases adopted by Lord Bridge of Harwich in *Caparo Industries Plc v Dickman*[22]. This appended to questions of duty and foreseeability of damage a criterion of what in the given situation was "fair, just and reasonable". Of this, it was said in *Sullivan v Moody*[23]:

> "The question as to what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle. The concept of policy, in this context, is often ill-defined. There are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application, not discretionary decision-making in individual cases."

48 There are indications in the United Kingdom that, in determining for the law of tort questions of sufficient or determinative causal linkage, a similar approach to that in *Caparo* should be adopted by asking whether as "a value judgment" the defendant ought to be held liable[24]. However that may be, the considerations referred to in *Sullivan v Moody* when affirming the rejection in Australia of *Caparo* apply likewise to the approach taken by the Court of Appeal in this case by reference to *Ruddock v Taylor*.

49 In the present case, where one of the claims made (and the claim to which most attention was given both in the courts below and in this Court) was a

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19 (2003) 58 NSWLR 269 at 286 [86]-[89].

20 *Tambree v Travel Compensation Fund* [2004] Aust Contract Rep ¶90-195 at 92,697-92,698 [150].

21 (2001) 207 CLR 562 at 579 [49] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.

22 [1990] 2 AC 605 at 617-618.

23 (2001) 207 CLR 562 at 579 [49].

24 *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at 1090-1091 [69]-[71] per Lord Nicholls of Birkenhead.

statutory claim, "notions of 'cause' as involved in [that] statutory regime are to be understood by reference to the statutory subject, scope and purpose"[25]. In particular, the question presented by s 68 of the *Fair Trading Act* was whether the conduct of each respondent, that constituted a contravention of that Act, was *a* cause of the loss or damage sustained[26]. The characterisation of Ms Fry's conduct as unlawful was not relevant to that inquiry.

50 Although these conclusions about the *Fair Trading Act* suffice to require the allowing of the appeal, it is as well to add that the appellant's claim in negligence neither required nor permitted some different answer to the question of causation that had to be answered in demonstrating liability for that tort. Ms Fry's continued trading, after her participation in the Fund was terminated, was not an intervening event that broke the chain of causation between the negligent misstatements the respondents made and the loss the appellant suffered. The appellant relied on the accuracy of the statements made by the respondents. The appellant's reliance on the statements, its conduct in terminating Ms Fry's participation, and its conduct after the termination, were all held to be reasonable. Had the respondents not acted as they did, the appellant would not have suffered loss because the regulatory steps that were taken to stop Ms Fry trading would have been taken much sooner than they were. No question of value judgment, about the extent of loss for which the respondents should be held liable, arose in this case.

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25 *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 79 ALJR 1079 at 1095 [99] per Gummow, Hayne and Heydon JJ; 215 ALR 385 at 407.

26 *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 119 [26] per Gleeson CJ, 128 [57] per Gaudron, Gummow and Hayne JJ.

51 KIRBY J. I agree in the orders proposed by the other members of this Court. However, I do not agree with the ways in which error on the part of the Court of Appeal of New South Wales is there expressed so as to justify the restoration of the judgment of the primary judge in the Supreme Court of New South Wales (Austin J)[27]. There was error; but in my view it was different from that identified in the other reasons.

The facts, legislation and common ground

52 The facts are stated by Gleeson CJ[28]. His Honour explains the manner in which the Travel Compensation Fund ("the Fund") was constituted, the recovery of payments out of which is in issue in this appeal[29]. Also explained there is the relevant legislation, being the *Travel Agents Act* 1986 (NSW)[30] ("Travel Agents Act") and the *Fair Trading Act* 1987 (NSW)[31] ("Fair Trading Act"). It is by reference to the former Act that the object and design of the travel compensation scheme, providing for payments from the Fund (the appellant in this appeal), is to be understood. It is by reference to the latter Act[32] that the claim by the Fund for recovery against the accountant and an auditor of the defaulting travel agent (the first and second respondents in this appeal), is chiefly to be judged. The Fund also brought its claim relying on negligence by the respondents at common law.

53 As other reasons explain, the Fair Trading Act limits the recovery by a person found to have engaged in misleading or deceptive conduct by reference to a concept of a causal connection between the impugned conduct and the loss or damage suffered. This result is achieved in consequence of the use in the Fair Trading Act of the preposition "by" in s 68(1). In the same way as s 82 of the *Trade Practices Act* 1974 (Cth) ("Trade Practices Act") has been interpreted, s 68 of the Fair Trading Act, in its reference in sub-s (1) to contraventions of s 42 of

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27 *Travel Compensation Fund v Fry* [2002] NSWSC 1044.

28 Reasons of Gleeson CJ at [9]-[19].

29 Reasons of Gleeson CJ at [3]-[6], with reference to *Travel Compensation Fund v Travel Guide Pty Ltd (In liq)* (1997) 72 FCR 371.

30 Reasons of Gleeson CJ at [3].

31 Reasons of Gleeson CJ at [1]; [30]-[31].

32 Notably, s 42.

that Act, presents the question whether a causal connection has been established between a breach of that Act and the amount of the loss or damage claimed[33]:

> "The measure of damages hangs on the words 'by conduct'; the preposition 'by' has been interpreted to mean 'by reason of' or 'as a result of'."

54 In the context of a claim, such as this, arising out of statutory provisions, it is self-evident that the starting point for charting the boundaries of contested issues of causation is a thorough examination of the facts and of the statute. In such matters, the duty of a court is not, as such, to give effect to common law notions but faithfully to carry into force the objects of the legislation, as understood from the language and structure of the statutory text[34].

55 To this extent, I agree with what has been written in this appeal by Callinan J[35]. Specifically, I agree that the test for resolving contested questions of causation, applicable to claims based on legislation such as the Fair Trading Act, remains that stated by this Court in *March v Stramare (E & M H) Pty Ltd*[36]. Relevantly, it is as explained in the passage from the reasons of Mason CJ in *March*, extracted by Callinan J[37]. There is no occasion in this appeal to alter or re-express what was stated there.

56 It follows that the reasons of Gummow and Hayne JJ are correct in pointing out that the extent of the liability of the respondents to the Fund was to be ascertained by the application of the Fair Trading Act[38]. Yet, as will often be the case, in charting the limits of such legal liability, both at common law and

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33 *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274 at 286 applied in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 153 [142].

34 *Trust Co of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1033 [92]; 197 ALR 297 at 316; *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 89 [46]; *Victorian Workcover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 544-545 [62]-[64]; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 111-112 [249]; *Allan v Transurban City Link Ltd* (2001) 208 CLR 167 at 184-185 [54]; *The Queen v Lavender* (2005) 79 ALJR 1337 at 1357 [107]; 218 ALR 483 at 548.

35 Reasons of Callinan J at [79].

36 (1991) 171 CLR 506.

37 Reasons of Callinan J at [80] citing (1991) 171 CLR 506 at 515.

38 Reasons of Gummow and Hayne JJ at [49].

under such legislation[39], the outer bounds will be defined by similar notions of commonsense, practicality and reasonableness[40], as these concepts appeal to judges expressing the common law, and to Parliament enacting legislation such as the Fair Trading Act.

Values and policy judgments in issues of causation

57 *Approach to issues of causation*: The point of departure of my reasoning from that of my colleagues concerns any attempt to restate or qualify the approach to issues of causation explained by Mason CJ in *March*, by excluding from that approach the "second question" that his Honour identified as integral to such decisions. His Honour described this "second question" ("whether a defendant is in law responsible for damage which his or her negligence has played some part in producing"[41]) as one to be answered in determining whether recovery was available in the particular case. It cannot be doubted that this is a policy question where value judgments have to be resolved. The contrary proposition is inconsistent with both earlier and later authority of this Court. Nothing in the Fair Trading Act suggests the need for a different approach in that statutory context.

58 *The authority of this Court*: There are many other remarks by judges of this Court that acknowledge explicitly that identifying the outer limits of legal recovery for loss or damage, in cases of this kind, cannot be explained solely by reference to the "but for" test of temporal relationships; nor to considerations of "commonsense" or other such verbal formulae. Thus in *Wardley Australia Ltd v Western Australia*[42], the joint reasons of four members of this Court analysed the limits of recovery under s 82 of the Trade Practices Act. They did so by reference to various considerations culminating in what is declared, in the circumstances, to be a matter of "justice" and "reasonableness", "practical" and "fair" and "sensible"[43]. Clearly, these are words connoting a value judgment of

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39 Referring to Fleming, *The Law of Torts*, 7th ed (1987) at 172-173; Hart and Honoré, *Causation in the Law*, 2nd ed (1985) at 110.

40 *Fitzgerald v Penn* (1954) 91 CLR 268 at 277-278.

41 (1991) 171 CLR 506 at 515.

42 (1992) 175 CLR 514 at 533.

43 *Wardley* (1992) 175 CLR 514 at 533. See also *Chappel v Hart* (1998) 195 CLR 232 at 270 [93.3]; *Rosenberg v Percival* (2001) 205 CLR 434 at 449 [45], 463-464 [91], 487 [160]-[161], 504-505 [221]-[223]; *I & L Securities* (2002) 210 CLR 109 at 154 [144]; Stapleton, "Perspectives on Causation" in Horder (ed), *Oxford Essays in Jurisprudence*, 4th series (2000) 61 at 77.

the kind identified in *March*. To say the least, they do not conjure up the image of a refined rule or precise principle of law.

59 Several times, before and since *Wardley*, this Court has acknowledged that decisions about the outer boundary of recovery in contested questions of causation cannot be reduced to a neat verbal formula. This is what Gummow J[44] and I[45] each meant in our reasons which sustained the majority conclusion in *Chappel v Hart*. We each referred to the need to temper results produced by the mechanical application of legal formulae by reference to values and normative considerations. In fact, the reasons of Gummow J, in *Chappel*, could not have been clearer[46]:

> "the 'but for' test is not a comprehensive and exclusive criterion, and the results which are yielded by its application properly may be tempered by the making of value judgments and the infusion of policy considerations."

In support of this by now orthodox position, his Honour referred to the foregoing passage in the reasons of Mason CJ in *March*[47].

60 More recently, the impossibility of deciding contested questions of causation, in cases of this kind, by reference to a legal formula or "legal principle" alone, and the necessity of taking values into account, was explained by McHugh J. He did so in *Henville v Walker*[48]. He repeated his approach in *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* where he said[49]:

> "Where several factors operate to bring about the injury to a plaintiff, selection of the relevant antecedent (contributing) factor as legally causative requires *the making of a value judgment and, often enough, consideration of policy considerations*. This is because the determination of a causal question always involves a normative decision."

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44 *Chappel* (1998) 195 CLR 232 at 255 [62] referring to *March* (1991) 171 CLR 506 at 516 and *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 413.

45 *Chappel* (1998) 195 CLR 232 at 269-270 [93.3].

46 *Chappel* (1998) 195 CLR 232 at 255 [62] (citations omitted).

47 See above and the extract in the reasons of Callinan J at [80].

48 (2001) 206 CLR 459 at 491-492 [100]-[101], [103].

49 (2005) 79 ALJR 1079 at 1089 [55]; 215 ALR 385 at 398 (emphasis added) (citation omitted).

In support of this last proposition, McHugh J referred, for authority, to the reasons of Gummow J in *Chappel*, thereby once again incorporating by reference the test stated by Mason CJ in *March*.

The correct expression of the applicable principle

61 This steady, frequently applied and unchallenged line of authority is now cast in doubt by unnecessary observations in this appeal criticising the references in the Court of Appeal to "value judgments". Given that, in referring to "value judgments", Sheller JA in that Court[50] (and Ipp JA earlier in *Ruddock v Taylor*[51] to which reference was there made) did no more than to use language repeatedly deployed by Justices of this Court, I consider that the criticism of them for doing so is unwarranted.

62 Moreover, the criticism represents an attempt to return this area of legal discourse to the sophistry that suggested that contested questions of causation (including in cases such as the present) can be resolved by the application of a legal formula or by an appeal to a "legal principle". In Australian law, we have progressed beyond such a masquerade to a more candid acknowledgment that some questions, presented for judicial decision, are not susceptible to such verbal formulae. They require more detailed explanations. They oblige reference by the judicial decision-maker to the factors (whether the terms of any applicable statute or the purposes of the relevant rules of the common law) that lead him or her to the conclusion that is reached. It seems that unrealistic presumptions[52], fictitious postulates[53] and argument-closing "legal principles"[54] may now be returning to vogue in Australia whereas, elsewhere in the common law, realism, a functional analysis and greater transparency in judicial reasoning represent the

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50 *Tambree v Travel Compensation Fund* [2004] Aust Contract Rep ¶90-195 at 92,695 [139]. An extract appears in the reasons of Gleeson CJ at [24].

51 (2003) 58 NSWLR 269 at 286 [87]. See now *Ruddock v Taylor* (2005) 79 ALJR 1534.

52 *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 79 ALJR 1736 at 1773 [203]-[204] per Kirby J; cf at 1740 [10] per Gleeson CJ. The reference is to the adoption and application of a presumption of law that the law of China under consideration in that case was the same as the law of Australia.

53 *Favell v Queensland Newspapers Pty Ltd* (2005) 79 ALJR 1716 at 1722-1723 [23]-[24] per Kirby J. The reference is to the fiction of the "ordinary reader" of defamatory matter and the elaboration of the characteristics attributed to that fiction.

54 Reasons of Gleeson CJ at [28]-[29].

modern norms[55]. If this is what is meant by a return to "strict legalism", I respectfully decline to embrace it.

63 Although I do not agree with all of his reasoning, I certainly concur in Callinan J's remark that, in deciding cases such as the present, tribunals of fact cannot resort to "an invariable scientific formula". They must draw on commonsense, experience, understanding, a multiplicity of community values and their own judgment. They should explain their reasoning "with candour" which "demands the acknowledgment … of the use of … common sense in determining causation [questions]"[56].

The difficulty presented by authority on *Caparo*

64 *Rejection of the three-stage approach*: This is not an occasion to resume the argument over the suggested three-stage approach to the resolution of the duty question in negligence cases, adopted by the House of Lords in *Caparo Industries Plc v Dickman*[57]. That approach is now followed, in substance, in most common law countries[58]. I have acknowledged that, for the time being, it has been rejected in Australia by a majority of this Court in *Sullivan v Moody*[59] and that it is my duty to conform[60]. (It would be a duty easier to fulfil if, in the place of the candid evaluation of applicable considerations of "whether it was fair, just and reasonable that the law should impose a duty of a given scope upon that tortfeasor for the benefit of that person"[61] some alternative methodology had

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55 See eg *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at 1090-1091 [69]-[71] per Lord Nicholls of Birkenhead. This passage is referred to with apparent disapproval by Gummow and Hayne JJ at [48].

56 Reasons of Callinan J at [81].

57 [1990] 2 AC 605 at 617-618.

58 See discussion in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 626 [238]; cf Witting, "The Three-stage Test Abandoned in Australia – or Not?", (2002) 118 *Law Quarterly Review* 214 at 220-221. The *Caparo* approach was recently adopted by the Singapore Court of Appeal: see *The Owners of the Sunrise Crane v Cipta Sarana Marine Pty Ltd* [2004] SGCA 42 per Yong Pung How CJ and Chao Hick Tin JA; Prakash J dissenting; cf Amirthalingam, "*The Sunrise Crane* – Shedding New Light or Casting Old Shadows on Duty of Care?" [2004] *Singapore Journal of Legal Studies* 551 at 553.

59 (2001) 207 CLR 562 at 579 [49].

60 *Ryan* (2002) 211 CLR 540 at 626 [238].

61 *Ryan* (2002) 211 CLR 540 at 623 [232].

been adopted by this Court that was equally clear and agreed). We are now buffeted, rudderless, on a rough sea and we have no sure compass[62].

65 It may be that, in determining contested questions of causation, the previous references in this Court to "the making of value judgments and the infusion of policy considerations"[63] have now been seen as incompatible with the rejection, in *Sullivan*, of such "judgments" and "considerations" in the ascertainment of a duty of care. I can understand the difficulty that the reasoning in *Sullivan* presents for earlier judicial elaborations of causation in fact and law. However, on this topic, with respect, the supposed distinction between the "formulation of *policy*" and a "search for *principle*", referred to in *Sullivan*[64] is illusory[65]. Commonly (although some deny it) legal *principle* is no more than the distilled product of earlier considerations of legal *authority* and legal *policy*[66].

66 *Transparency in reasons*: Ultimately, debates of this kind only demonstrate the unsatisfactory features of legal discourse on questions of causation[67]. Some judges, of a candid disposition, who bear allegiance to the principle of transparency in judicial reasons, will want, in explaining their conclusions on causation, to identify the "value judgments" and "policy considerations" to which they have had regard. Other judges, who feel uneasy about the acknowledgment of such factors and the consequent uncertainty of legal outcomes, may prefer to express the process of their decision-making as the inevitable application of "legal principle" to the facts. But, when analysed, any such "legal principle" (if it goes beyond the undisputed necessity in statutory claims to fulfil the purposes and assumptions of the statute[68]) is normally reduced to value judgments and policy considerations expressed in very broad language. This is so whether it is expressed by reference to what "commonsense" or "practicality" requires in the particular case or to what is "just", "reasonable",

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62 *Ryan* (2002) 211 CLR 540 at 626 [238]-[239].

63 *Chappel* (1998) 195 CLR 232 at 255 [62].

64 *Chappel* (1998) 195 CLR 232 at 264-265 [87]-[88].

65 Stapleton, "The golden thread at the heart of tort law: Protection of the vulnerable", (2003) 24 *Australian Bar Review* 135 at 135-140.

66 cf Dworkin, *Taking Rights Seriously* (1977) discussed in Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method*, Hamlyn Lectures, 55th series (2004) at 84.

67 *Chappel* (1998) 195 CLR 232 at 264-265 [87]-[88].

68 Reasons of Gleeson CJ at [28]; reasons of Callinan J at [79].

"practical", "fair" and "sensible"[69]. If this is the kind of "legal principle" that my colleagues envisage, it is a legal principle of the most opaque variety which Professor Julius Stone described as a category of illusory reference[70].

67 In the end, there may be no practical difference between the ways the other members of this Court approach the resolution of this question in the present case and the way that I would do so. In a society, such as Australia, governed by the rule of law[71], no one suggests that the outer limits of a person's legal liability for the causation of loss and damage (any more than for the existence of a duty of care in negligence) should depend upon judicial whim, or idiosyncratic "values" and wholly personal "policy considerations", conceived by the judge. Nevertheless, the point of difference concerns the extent to which judges, explaining their reasons on such questions, are duty bound to identify the considerations (in the statute, in past legal authority, in legal principle or policy, or in the facts of the particular case) that explain why those judges draw the boundary of *legal* liability at one point, and not at another.

68 *The decision of the Court of Appeal*: In short, in a case such as the present, the question is why a judge would hold that it was legally proper to assign responsibility for the conduct of the unlicensed travel agent, Ms Fry, and the company under her control (Travel Shop International Pty Ltd), in carrying on trading, to the respondents. This is all that I take Sheller JA (and Mason P with Ipp JA who agreed with him) to have meant in referring to "value judgments". Their Honours did no more than use words and concepts that this Court has itself repeatedly deployed. There is no suggestion in their Honours' reasoning that they were embracing a notion that it was for them to give effect to a "value judgment at large"[72] or to impose liability because they personally thought that to be a good thing. No more did they suggest such a course than Mason CJ earlier did in *March* or Gummow and I did in *Chappel*.

69 Instead, the Court of Appeal was addressing a perfectly legitimate consideration – one undoubtedly invoking "value judgments" and "the infusion of policy". This was whether, in a claim under the Fair Trading Act, for loss or damage for misleading or deceptive conduct, the respondents were rendered liable in law for things done *by* other persons, the doing of which was illegal.

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69 cf *Wardley* (1992) 175 CLR 514 at 533 per Mason CJ, Dawson, Gaudron and McHugh JJ.

70 Stone, *Province and Function of Law* (1946) at 171.

71 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513 [103].

72 Reasons of Gleeson CJ at [29].

There are many cases where courts have had regard to the deliberate (especially criminal) wrong-doing of a third person and treated such conduct as severing the causal link between anterior conduct by a defendant and damage sustained by a plaintiff. There is nothing unusual or heterodox in such an approach[73].

70 It follows that the question that the Court of Appeal identified for itself in these proceedings was in no way unreasonable, unusual or erroneous. It was germane to the issue presented for decision. Once again, I agree with Callinan J that if this case were "one in which the appellant's loss stemmed only, or even substantially from conduct which was illegal, and as a result in particular of its illegal nature", the Court of Appeal's conclusion would have legal support[74]. Certainly, that would be an arguable conclusion. The Court of Appeal was therefore correct in considering it. Moreover, it was correct, in doing so, to resolve a contested issue of causation by reference to the criteria earlier identified by this Court in terms of "value judgments" and "policy considerations".

71 *The error of the Court of Appeal*: It is at this point, nevertheless, that I disagree with the conclusion that the Court of Appeal reached. When the scheme of the Travel Agents Act, of the Trust Deed and of the practices of the Management Committee under that Deed are considered, the conclusion of the Court of Appeal on the causation question can be seen as erroneous. The conclusion of the primary judge was correct.

72 My reasons for reaching this opinion are identical to those explained by Gleeson CJ, once the foregoing point of difference is excised[75]. Those reasons are anchored in the language and purpose of the Travel Agents Act, the provisions of the Trust Deed (and especially cl 15.2), the ordinary practice of the Fund operating in accordance with that Deed, and the reasonable conduct of members of the public dealing with an unlicensed travel agent whose unlicensed status was unknown to them, relying on the fact that the agent was licensed. Such reliance will be reasonable at least during the relatively brief interval, as occurred in this case, between discovery of the defaults of Ms Fry, her father and Travel Shop International Pty Ltd and the initiative taken by the Fund to notify the New South Wales Department of Fair Trading which took immediate steps to

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73 At least since *Hegarty v Shine* (1878) 14 Cox CC 125. See *Thomas Brown and Sons Ltd v Fazal Deen* (1962) 108 CLR 391; *Smith v Jenkins* (1970) 119 CLR 397 at 403. The issue has often led to differences of judicial viewpoints: *Jackson v Harrison* (1978) 138 CLR 438; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254.

74 Reasons of Callinan J at [84].

75 Reasons of Gleeson CJ at [31]-[34].

obtain court orders and to close down Ms Fry's unlicensed travel agent's business.

73 As Gleeson CJ points out, by reference to the legislative scheme, the Deed and the practice of the Fund, it is unconvincing to suggest that the Fund's entitlement to recover its payments was limited to cases where the travel agent's conduct involved no illegality[76]. In the words of Gummow and Hayne JJ, what happened as a result of misleading and deceptive conduct on the part of the accountant and auditor was "the very risk against which the [Fund] sought to protect itself by seeking and obtaining the accounting information it did."[77]

74 This was not, therefore, a case where the unlicensed and illegal activity of a third party severed the causal link between the respondents' respective conduct and the loss and damage suffered by the Fund. On the contrary, that loss and damage was precisely the kind of activity for which the Fund could be held liable by consumers and against which it was entitled to expect that the accountant and auditor would effectively protect its interests. In terms of the Fair Trading Act, it was a loss or damage suffered "by" the contravening conduct of other persons, namely the respondents. Neither the travel agent alone nor the consumers themselves could be classified as the sole, or even the main, cause of the relevant loss. It follows that the Court of Appeal erred in deleting from the judgment in favour of the Fund, awarded by the primary judge, the sums recovered by consumers from the Fund in respect of payments made between 23 February 1999 and the eventual closure of the business on 20 April 1999.

75 This result follows, in my view, not from any misunderstanding by the Court of Appeal of the principles of causation expressed by this Court. Nor does it follow from the application of those principles to the claims made by the Fund based, respectively, on the Fair Trading Act and negligence at common law. To the contrary, Sheller JA expressed those principles accurately, in terms of this Court's repeated statements about them. At no stage did he or the other judges of the Court of Appeal pretend to a power to assign liability to the respondents by reference to open-ended "policy" or "values" alone. Sheller JA simply recognised that the verbal formulae and pretended "legal principles" were not sufficient, without more, to resolve the cut-off point of liability in a contested case of causation. That point is only discovered by a thorough examination of the facts, viewed by reference to the purpose of the legislation and to compatible value judgments and considerations of legal policy that are candidly disclosed.

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76 Reasons of Gleeson CJ at [34].

77 Reasons of Gummow and Hayne JJ at [40].

76 In a sense, it is the very transparency of the reasons of the Court of Appeal in this case, encouraged by this Court's past authority, that has assisted this Court to identify the Court of Appeal's error and now to correct it.

Orders

77 For these reasons I agree in the orders proposed by Gleeson CJ.

78 CALLINAN J. I agree with the reasons for judgment and conclusion of the Chief Justice. I make these additional observations.

79 The Court of Appeal approached the question of causation as if it were deciding a case at common law rather than a cause of action conferred by statute. As the Chief Justice has pointed out, in a case of the latter kind, the scope and objects of the relevant enactment are critically important, and bear closely upon any question of the meaning to be given to any language relating conduct to a consequence, that is, language directed to the question of causation, in this case, one word only, "by". But because I think that there was a departure by the Court of Appeal in its discussion and application of the common law principles relating to causation from those stated by this Court in *March v Stramare (E & M H) Pty Ltd*[78], it should be made clear that that case continues to state the relevant common law on that topic for Australia.

80 In *March v Stramare*, Mason CJ (with whom Gaudron J agreed) said this[79]:

> "Commentators subdivide the issue of causation in a given case into two questions: the question of causation in fact – to be determined by the application of the 'but for' test – and the further question whether a defendant is in law responsible for damage which his or her negligence has played some part in producing[80]. It is said that, in determining this second question, considerations of policy have a prominent part to play, as do accepted value judgments[81]. However, this approach to the issue of causation (a) places rather too much weight on the 'but for' test to the exclusion of the 'common sense' approach which the common law has always favoured; and (b) implies, or seems to imply, that value judgment has, or should have, no part to play in resolving causation as an issue of fact. As Dixon CJ, Fullagar and Kitto JJ remarked in *Fitzgerald v Penn*[82]: 'it is all ultimately a matter of common sense' and '[i]n truth the conception in question [ie, causation] is not susceptible of reduction to a satisfactory formula.'"

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78 (1991) 171 CLR 506.

79 (1991) 171 CLR 506 at 515.

80 See, for example, Fleming, *The Law of Torts*, 7th ed (1987) at 172-173; Hart and Honoré, *Causation in the Law*, 2nd ed (1985) at 110.

81 See Fleming, *The Law of Torts*, 7th ed (1987) at 173.

82 (1954) 91 CLR 268 at 277-278.

81 With respect I agree with his Honour's observations. It would be a delusion to think that a disputed question of causation can be resolved according to an invariable scientific formula, and without acknowledgment that common sense, that is, the sum of the tribunal's experience as a tribunal, its constituents' knowledge and understanding of human affairs, its knowledge of other cases and its assessment of the ways in which notional fair minded people might view the relevant events, is likely to influence the result. Of course it is possible to say, sometimes with force, that tribunals may on occasions tend to become remote from the community and its values, indeed that there is not a community value as such, but a multiplicity of community values, themselves shifting from time to time, and that one person's common sense may sometimes be another's nonsense. But all of that is to say no more than that perfect justice, the availability of a perfect test for liability, is beyond human reach. But tribunals of fact have to do the best they can. And that which has to be done is better done with candour, and candour demands the acknowledgment by any tribunal or any judge called upon to resolve a matter, of the use of his or her common sense in determining causation. Value judgments may sometimes be inescapably involved, but that they may, does not justify the division of the question into a "but for" test and a further inquiry whether a defendant should in law be held responsible for a plaintiff's damage.

82 It certainly appears that the Court of Appeal here did so divide the inquiry, adopting a two stage approach of the kind rejected by the majority of this Court in *March v Stramare*. The first stage of the inquiry resulted in a concurrent finding of fact in favour of the appellant[83]:

> "The next question is whether, bearing in mind the particular circumstances in which they negligently made misleading representations [the first and second respondents] should be held responsible for all of [the appellant's] loss. It is a matter of public importance that accountants should not, when asked to prepare financial reports of business entities, to be used by an agency such as [the appellant], act so negligently as to produce a misleading report. Even more so can this be said of an auditor who provides an auditor's certificate. These documents were about Ms Fry's financial affairs and were provided for [the appellant]. Again there are challenges on the facts to the conclusion that they fell within the scope of the risk."

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83 *Tambree v Travel Compensation Fund* [2004] Aust Contract Rep ¶90-195 at 92,698 [154] per Sheller JA, Mason P and Ipp JA agreeing.

83 The reason why the appellant failed at the second stage is, in effect, that a new event for which the first and second respondents could not be responsible was said to have intervened, the continuation of trading, illegally, by Ms Fry. The emphasis was upon the illegality of the trading.

84 If this were a case not governed by legislation, and if it were one in which the appellant's loss stemmed only, or even substantially from conduct which was illegal, and as a result in particular of its illegal nature, I might well have decided it as the Court of Appeal did[84]. But it is not such a case. That the trading after the termination of the licence was illegal was incidental only. What is to the point are the facts that Ms Fry had been given a licence to trade, that it had been renewed, that she had traded under it, that it had been given a number, that the quotation of the number was probably necessary for continued trading in the travel business, that the licence had to be displayed at the place of business[85], and in particular after the licence was terminated, that Ms Fry used it, and the number allocated to it, to continue to trade. Underlying these, and directly and naturally contributing to them, including the subsequent, incidentally illegal trading, were the negligent accounting and auditing, and the misrepresentations consequent upon them.

85 It is likely that the erroneous adoption of the two stage test by the Court of Appeal led it into the further error of treating the illegality of the trading as a decisive disqualifying factor for an award of post-licence losses. The test propounded in *March v Stramare* would have, as I have said, produced a different result if this were a common law action.

86 I would join in the orders proposed by the Chief Justice.

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84 See *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 302-303 [147]-[152] per Callinan J; *State of New South Wales v Lepore* (2003) 212 CLR 511 at 625 [342] per Callinan J.

85 *Travel Agents Act* 1986 (NSW), ss 33-35.