ON THE MEASURE OF DAMAGES IN SOLICITOR'S NEGLIGENCE CASES

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It is sometimes assumed that, once a plaintiff meets the "but for" causation test in a negligence claim against a defendant, damages are at large, that the plaintiff may claim any damages suffered as a result of the defendant's breach of duty. A trilogy of decisions of the Ontario Court of Appeal show, in the context of solicitor's negligence, that this is not the case. The court will rely on various policy considerations to limit damages. The damages awards in the trilogy are different, but the cases are doctrinally consistent. Different fact situations give rise to different damages awards.

On tient parfois pour acquis que dans le cadre d'une action pour négligence, si le demandeur satisfait au critère de causalité du « facteur déterminant », il peut réclamer le montant de tout dommage-intérêt découlant du manquement au devoir du défendeur. Une trilogie de jugements de la Cour d'appel de l'Ontario indique que tel n'est pas nécessairement le cas dans le domaine de la responsabilité de l'avocat. Les tribunaux s'appuieront sur différentes considérations de politique générale afin de limiter l'étendue des dommages-intérêts. Bien que les montants de dommages-intérêts octroyés dans les décisions de cette trilogie soient différents, cette jurisprudence est uniforme sur le plan de la théorie. L'octroi de dommages-intérêts différents s'explique par le contexte factuel qui varie d'une cause à l'autre.

1. Introduction

In theory, there is no difference between theory and practice. But, in practice, there is.[1] In theory, the innocent party to a broken contract is entitled to claim as damages the amount of his expectation interest, the amount that he would have gained had the contract been performed

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1 Jan LA van de Snepscheut/Yogi Berra.

according to its terms. But, in practice, the court tends to scrutinize this type of counterfactual situation with a gimlet eye. The court tends to give substantial weight to the various factors that might have supervened to prevent the innocent party from gaining the benefit of performance of the contract and to discount the amount of the expected gain accordingly.

This conservative tendency is even more pronounced when the contract is between a lawyer and her client. In theory, at least since the decision of the Supreme Court of Canada in *Central Trust Co v Rafuse,*[2] a client faced with an error on the part of a lawyer may assert a claim against the lawyer in either contract or tort. In *Central Trust*, the Court may have meant to give the client the procedural and substantive best of both worlds. But in practice it is very difficult for a client to obtain an award of damages that includes the amount of his expectation interest.[3] The client's right to sue for breach of contract runs up against the unrepudiated doctrine that an error of judgment alone – a "mere" error of judgment – does not amount to negligence on the part of the lawyer, with the corollary that a lawyer who advises on some matter does not warrant that the advice is correct. An error of judgment on the lawyer's part does not entail liability to the client, so long as the lawyer did not fall below the standard of a reasonable practitioner.

Liability in contract is strict. Since the lawyer does not warrant the advice given to the client, however, the client will not generally succeed in a claim based in contract for the amount of his disappointed expectation interest. The tort measure of damages will prevail. The court will award the client only the amount of his reliance interest, the amount that he lost by relying on the lawyer's advice.

One might reason backwards from the result and infer that, if the court in fact relies on a policy here, the policy is that a lawyer who offers a

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2 [1986] 2 SCR 147 [*Central Trust*].

3 *Black's Law Dictionary*, 9th ed, defines "expectation interest" as the interest of a non-breaching party in being put in the position that would have resulted if the contract had been performed. In *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991), 174 CLR 65, 162f, McHugh J put forward the following expansive characterization of expectation damages, the compensation awarded for the loss of what a party reasonably anticipated from a transaction that was not completed: "A plaintiff's loss from a breach of contract may be manifested in one or more of a number of ways. It may consist in a loss of profits or future benefits, in the difference in value between the price of an asset purchased under the contract and the market value of the asset at the date of breach, in the inability to recoup in whole or in part expenditure incurred in reliance on the defendant performing its part of the contract or in expenditure which will have to be incurred if the plaintiff is to be placed in the same position as it would have been in if the defendant had performed its obligations."

service is not to be regarded as an insurer. A remark made by the Supreme Court of Canada in a different context may apply equally well to the context of solicitor's negligence: "It is an essential basis of the contract between the parties that [the defendant] is not to be in the situation of an insurer."[4] The unstated policy may be that, as the lawyer's gain from giving sound advice is not generally based on the gain expected by the client from the transaction in which the advice is given, so the lawyer's liability for giving unsound advice ought not to be based on the gain expected but not attained because of the lawyer's breach.

Whether the claim against the lawyer lies in contract or in tort, the client, in order to succeed, must still prove that he suffered damages as a result of the lawyer's error. A trilogy of decisions of the Ontario Court of Appeal serve as a useful reminder that, where the client alleges that his lawyer erred, the claim will not succeed, if the client establishes only that the lawyer breached a duty. In addition, the client must establish that the breach caused him to suffer loss. But the court's view of what constitutes loss may differ from the client's. The court will measure loss objectively, as the client's overall financial loss in the transaction in which the lawyer was acting; while the client may measure loss subjectively, by his disappointment that some part of the transaction did not yield the benefit that he had expected – even when his expectation was reasonable. The purpose of this paper will be to clarify these brief and cryptic remarks.

The traditional test for determining causation in negligence cases is the "but for" test, which requires the plaintiff to prove on a balance of probabilities that his loss would not have occurred but for the defendant's negligence.[5] The client does not establish "but for" causation in the required sense when he establishes only that, if the lawyer had advised him properly, he would not have completed the transaction. The trilogy is worth examining in detail in order to trace the interplay between the lawyer's dual liability in contract and in tort, the role of the "but for" test of causation, the fate of the client's expectation interest and the court's conservative view of what constitutes compensable damage arising from a lawyer's error.

2. Messineo v Beale

The first case in the trilogy is *Messineo v Beale*.[6] In *Messineo*, the plaintiffs believed that they were purchasing a vacation property that included

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4 *J Nunes Diamonds Ltd v Dominion Electric Protection Co*, [1972] SCR 769, 778. The defendant was a security protection company.

5 *Resurfice Corp v Hanke*, 2007 SCC 7 at paras 18-23, [2007] 1 SCR 333.

6 (1978), 20 OR (2d) 49 (CA) [*Messineo*].

Murch's Point. However, their lawyer failed to advise them that the vendor never had title to Murch's Point and so could not convey it to them. The actual conveyance thus fell short of their expectation. When they became aware of the shortfall, they claimed as damages against their lawyer the value of Murch's Point. But the claim did not succeed.

At trial,[7] the Court found that:

(a) Murch's Point contained substantial acreage and considerable shoreline;

(b) in his contract with the clients, the lawyer undertook to search and certify title;

(c) in fact, the lawyer did not certify that the clients had a good, marketable title – the lawyer did not do a reporting letter;

(d) the lawyer's account to the client nevertheless included a fee for certifying title;

(e) a lawyer who certifies title does not give a warranty of title or guarantee that the client will receive a property free of defects;

(f) a lawyer may be negligent for failing to discover a defect in title but is not liable for breach of a guaranty of good title.

Both at trial and on appeal, the courts found that the plaintiffs had suffered no loss overall. The property, even without Murch's Point, was worth as much as the clients had agreed to pay for it.[8] If part of the purchase price had been specifically allocated to Murch's Point, the plaintiffs might have had a viable claim, but there was no evidence of that.

The lawyer's error did not cause the plaintiffs to lose Murch's Point. Because Murch's Point was not the vendor's to convey, it was never available to be conveyed to them:

> … [I]t is obvious that the defendant's breach of duty was not the cause of the plaintiffs getting no title to Murch's Point. The vendor had no title to Murch's Point, and could

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7 (1976), 13 OR (2d) 329 (Sup Ct) [*Messineo SC*].

8 The plaintiffs had agreed to pay $43,500 for the property. At trial, even their own expert witness conceded that the property was worth at least that much. In fact, the plaintiffs held back $8,000 from the purchase price because they did not receive title to Murch's Point. The vendor did not succeed in obtaining payment of the $8,000. This may have influenced the Court's view of what loss the plaintiffs had really suffered.

> give none. Nothing the defendant could have done would have changed that situation.[9]

Thus, it was not sufficient for the plaintiffs to establish that:

> The defendant's negligence … caused the plaintiffs to complete a transaction that they otherwise would have avoided.[10]

The Court of Appeal observed that, if the lawyer had advised the plaintiffs properly, they might have refused to complete the transaction without the conveyance of Murch's Point, or else attempted to negotiate an abatement in the purchase price. But, because of the lawyer's error, these options were not available to them.

Messineo appears, then, to stand for the propositions that:

(a) in order to succeed, the plaintiff must establish a financial loss that goes beyond a merely disappointed expectation, where the loss is measured by what the plaintiff paid, not by what the plaintiff hoped to gain;

(b) the lawyer's error must have caused the loss, in the sense that the error caused the plaintiff to lose something that he would otherwise have been able to obtain;

(c) in order to succeed, it is not sufficient for the plaintiff to establish that he would not have completed the transaction had the lawyer advised him properly.

In theory, then, it should be possible to understand the subsequent decisions by reference to the interplay of the two determining factors in *Messineo*, whether the plaintiffs suffered a loss and whether the lawyer caused the loss, given that the plaintiff would not have completed the transaction but for the lawyer's error.

One striking feature of *Messineo* that recurs in the subsequent cases is that the outcome was determined in large measure by the nature of the evidence put forward by the plaintiffs. In *Messineo*, the plaintiffs did not attempt to prove that the property without Murch's Point was worth less than they had paid for it, or that they had suffered consequential damages. It is questionable whether the plaintiffs could not have found an expert to give the opinion that the property was worth less because it did not include

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9 *Messineo*, *supra* note 6 at 51.

10 *Ibid* at 54.

Murch's Point, such being the nature of expert evidence. So, in both *Messineo* and in the subsequent cases, it must be borne in mind that the ultimate holding of the count is strongly relative to the nature of the evidence advanced by the plaintiffs.

It is somewhat ironic that *Messineo* should have turned out to be such an influential authority on the measure of damages. Commentators noted early on that the fact situation in *Messineo* is "comparatively rare" and "atypical."[11] Understandably so, since it would be comparatively rare for a purchaser to be unable to establish that a property with a missing parcel is worth more than the same property without the missing parcel. That is what the purchasers in *Messineo* were unable to establish to the satisfaction of the Court.

In *Messineo*, the Court relied on *Ford v White & Co*,[12] a decision of the English Chancery Division. In *Ford*, the lawyer failed to advise the plaintiffs that a vacant lot on a property they were purchasing was subject to building restrictions. The plaintiffs claimed as damages against the lawyer the amount by which the lot would have been worth more (£1250) without the building restrictions. The claim did not succeed.

The Court found that the property as a whole was worth what the plaintiffs had paid for it, so they suffered no loss. The Court was unwilling to compensate the plaintiffs for what it characterized as their disappointment that the property was not worth more than they had paid for it, the amount that the lot would have been worth without the building restrictions:

> The application of this measure of damage would place the plaintiffs not in the same position, but in a better position than if the defendants had properly fulfilled their duty; that is to say, they not only would have a property equivalent to the price which they paid for it, but would also receive an additional £1250 as a recompense for their disappointment that the property was not by that amount worth more than the price that they paid for it. Such a measure of damage … would be tantamount to making the defendants liable on the footing that they warranted that their view was right"[13]

What are we to make of the various reasons offered by the courts for the claimants' lack of success in *Messineo* and *Ford*?

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11 See "Solicitors' Responsibilities in Real Estate Transactions" (1979), 8 RPR 155, 181f

12 [1964] 2 All ER 755 (ChD) [*Ford*].

13 *Ibid* at 758

The Court of Appeal in *Messineo* did not expressly adopt the justification offered by Pennycuick J in *Ford*, that to award the plaintiffs the higher measure of damages would be tantamount to making the lawyers liable for breach of warranty. The trial judge in *Messineo* did. The trial judge found that the lawyer's certification of title is not a warranty that the plaintiffs would receive good title:

> The effect of certification of title by a solicitor in Ontario is not a warranty of title. A solicitor's duty is to discover and report title defects to the purchaser before closing. If the property is found after closing to have title defects the solicitor may be found to have been negligent in carrying out his duty to discover and report such defects, and liable to the purchaser for damages resulting from such negligence.[14]

The Court of Appeal neither affirmed nor rejected this reasoning. The Court noted that it agreed with the trial judge's result, but said that it preferred to state the principle in these words:

> The measure of damages is the difference in money between the amount paid by the client to the vendor, and the market value of the land to which the client received a good title.[15]

This has the look of a general statement applicable to a wide range of cases. One problem in tracing the subsequent history of *Messineo* will be to determine whether the Court's statement is meant to be as general in its application as this formulation suggests or whether, rightly understood, it is more restricted in scope to the sort of fact situation to which it is a response.

If the Court in fact implicitly affirmed the view of certification on which both the Court in *Ford* and the trial judge in *Messineo* relied, the result would accord with the traditional view that lawyers, among other skilled professionals, do not warrant or guarantee a result. The traditional view is that lawyers do not warrant or guarantee results for their clients, but rather that they undertake to practice at a certain level of competence:

> The standard of care required of a solicitor is not one of perfection, and an error of judgment alone is not enough to amount to negligence. A solicitor does not undertake with his client not to make mistakes, but only not to make negligent mistakes. Where a solicitor gives his opinion on a question of law, he cannot be held to warrant its correctness where it was honestly founded and honestly given.[16]

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14 *Messineo SC*, *supra* note 7 at 336.

15 *Messineo*, *supra* note 6 at 52.

16 Lewis Klar, *Remedies in Tort*, looseleaf (Toronto: Carswell, 1988) vol 2 at 16.III-78.12

The Court found that the lawyer's error did not cause the plaintiffs to lose Murch's Point. Perhaps the Court's reasoning would have been easier to grasp if it had asked what the lawyer's error did cause the plaintiffs to lose. In *Phillips v Ward,*[17] a decision of the English Court of Appeal, Denning LJ dealt with the measure of damages arising from a surveyor's negligence. Denning LJ's answer to the comparable question regarding the surveyor was that, if the plaintiff had received a proper (non-negligent) report from the surveyor,

> [o]n receiving that report, the plaintiff either would have refused to have anything to do with the house, in which case he would have suffered no damage, or he would have bought it for a sum which represented its fair value in its bad condition, in which case he would pay so much less on that account.[18]

Similarly, the Court in *Messineo* found that the lawyer's error caused the plaintiffs to complete a transaction that they would otherwise have avoided.

In *Messineo*, the lawyer's error caused the plaintiffs to be deprived of the opportunity not to complete the transaction, in which case they would have suffered no damage. The lawyer's error did not cause the plaintiffs to lose Murch's Point, which was not available to be lost. By focusing on what the clients would have obtained in the normal course had the lawyer not been negligent, the Court in *Ford* was able to characterize the plaintiffs' claim in that case as a claim for "an additional recompense for their disappointment that the property was not by that amount worth more than the price they paid for it." In the normal course, the plaintiffs would have suffered that disappointment even if the lawyer had not been negligent, so the lawyer ought not to be required to make recompense for it.

The Court's minimalist understanding of the lawyer's certification of title, even though it accords with the traditional view of the lawyer's undertaking, may nevertheless appear to be in some tension with the view that lawyers are liable to their clients both in contract and in tort, a view no longer doubtful at least since the decision of the Supreme Court of Canada in *Central Trust*.[19]

A client's ordinary understanding of certification would likely lead her to believe that her lawyer had warranted or guaranteed that she would receive good title, based simply on the ordinary meanings of "certification"

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17 [1956] All ER 874 (C.A.)

18 *Ibid* at 875f.

19 *Supra* note 2.

and "warranty."[20] So the client's understanding of the retainer might be in some tension with the court's understanding of the lawyer's undertaking.

One way to align the lawyer's contractual liability with a more limited tort liability that does not include the client's expectation interest would be to gerrymander the retainer by limiting the lawyer's undertaking to performing the normal investigation of title in a competent way, but not to certify title.[21] The result would be to limit damages correspondingly, on the basis that the limited undertaking, not including a warranty of title, would correspond to a tort, rather than contract, measure of damages. The client would be entitled to recover only her reliance interest, the cost of her reliance on the lawyer's undertaking to search title competently. The client would be put in the position she would have occupied had the lawyer's breach of undertaking not occurred, the position of having the opportunity not to complete the transaction and thus not suffer any damages.

Where the nature of the lawyer's retainer is largely implicit, rather than explicit, it is entirely reasonable to "reverse engineer" the retainer by working backwards from the measure of damages awarded by the court.[22] However, this solution achieves greater logical consistency than the courts have sought, at the expense of the client's untutored understanding of what the lawyer meant by certifying title. The courts have simply refrained from awarding clients their disappointed expectation interest, on the basis that a lawyer's undertaking does not entail strict liability. Where the lawyer wrongly, but non-negligently, certified title, the court would clearly be reluctant to make a lawyer liable for a client's disappointed expectation interest; similarly, where the lawyer negligently certified title, but the negligent certification did not cause the loss of the client's expectation interest, as in *Messineo*. The client would still not have obtained his expectation interest even if the certification had been free of error.

In *Messineo* and *Ford*, the courts did not find that certification of title is equivalent to warranty of title. Whatever argument may have been made in favour of the opposite position, based on the client's understanding of "certification," that position is now diminished in importance with the

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20 Compare [an] ordinary meaning of "certify": to endorse or guarantee (that certain required standards have been met) [*The Free Dictionary*], with [an] ordinary meaning of "warrant": authorization or certification, to guarantee or attest to the quality, accuracy or condition of [*The Free Dictionary*].

21 See "Solicitors' Responsibilities in Real Estate Transactions," *supra* note 11; Annotation to trial decision in *Kienzle v Stringer* (1980), 14 RPR 29 (OHC); and Angela Swan, *Canadian Contract Law* 2d ed (Toronto: Lexis Nexis, 2009) at 367-370.

22 I am grateful to Angela Swan for suggesting the felicitous expression "reverse engineer" in this context.

advent of title insurance. In most transactions involving title insurance, the lawyer does not even purport to certify title.

3. Kienzle v Stringer

In *Kienzle v Stringer*,[23] the second in the *Messineo* trilogy, the plaintiff paid a sum of money to purchase from the estates of his parents the interest of his two sisters in a farm that the parents had originally owned. Unbeknownst to the siblings, each of them had already acquired pursuant to the *Devolution of Estates Act* a one-third interest in the farm, because the estates of the parents had been administered without a transfer to them of title to the farm property after three years. The lawyer mistakenly advised the plaintiff that, on payment to the estates of the parents, the plaintiff had acquired the sisters' interest in the farm when, in fact, because of faulty conveyancing, he had not acquired either sister's interest. When the facts became known, one sister was content to affirm the plaintiff's original purchase of her interest from the parents' estates. The other was not. The plaintiff still had to purchase the interest of the recalcitrant sister and suffered other damages as well, including the lost profit on the operation of the farm, no longer viable because of the defect in his title, during a period of time sufficient to permit him to mitigate by purchasing another farm.

The Court reaffirmed that, in *Messineo*, "The solicitor caused the plaintiff to complete a transaction that he would otherwise have avoided …"[24] But the Court found a fact situation in *Kienzle* different from the one in *Messineo*. The Court found that the lawyer's error caused the plaintiff to lose something that he would have acquired but for the error. Then, distinguishing *Messineo*, the Court held that, where the lawyer's error caused the plaintiff's loss, the plaintiff's damages are not limited to the difference between the contract price, the amount originally paid by the plaintiff to purchase the recalcitrant sister's interest, and the value of what he received, which was no title, therefore nothing. The plaintiff was entitled to damages that included both the amount still required to purchase the recalcitrant sister's interest and the amount of damage consequential upon operating an unprofitable farm.

The majority still limited the amount of the plaintiff's recoverable damages by refusing to allow the plaintiff to recover the profit that he would have made from the purchase of another farm, to be completed on receipt of the proceeds of sale of the original farm that had belonged to his parents. The majority found that the loss of profit from the secondary

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23 (1981), 35 OR (2d) 85 (CA) [*Kienzle*].

24 *Ibid* at 88.

transaction was not reasonably foreseeable. Wilson JA, dissenting, would have allowed the plaintiff to recover the loss of profit from the secondary transaction:

> It seems to me that when a solicitor negligently certifies title to a purchaser, the frustration of a subsequent transaction resulting from the defect in title is something which ought to be regarded as "liable to" or "not unlikely to" flow from the solicitor's breach of contract.[25]

It is questionable whether an analysis based solely on reasonable foreseeability is sufficient in this context. Foreseeability of loss is a first principle laid down by the courts as early as *Hadley v Baxendale.*[26] But reasoning from first principles without reference to the more specific principles followed by the court in the context at hand may yield the wrong result. As we have already seen from *Messineo*, a court will not consider the lawyer to warrant the soundness of advice given to the client, thus limiting the client's recovery in a claim against the lawyer.[27]

It is relatively clear that there is a difference in policy between the majority and the minority, the policy of the majority as regards reasonable foreseeability again working in favour of the lawyer. Here, and with policy differences generally, it is strongly arguable that the measure of damages is not determined by the application of a pre-existing rule but rather that the court's choice of a measure of damages simply gives rise to a new rule for future cases.[28] It is not quite as clear whether the difference between the majority and the minority is a difference simply over a narrower or a wider view of what is encompassed in reliance interest, or is rather a difference as to whether the plaintiff ought also to be awarded his expectation interest. Compensation for loss of profit from a subsequent transaction would appear to be compensation for a disappointed expectation interest.[29] The minority decision in *Kienzle* might then be seen as a bridgehead for this type of claim.

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25 *Ibid* at 91.

26 (1854), 9 Exch 341, 156 ER 145.

27 By analogy, it would be a mistake for the court to attempt to determine whether a communication is privileged by applying the Wigmore criteria – the first principles – without first asking whether the communication falls within a class traditionally held to be privileged; or to attempt to determine whether a defendant owes a duty of care by applying the *Anns* test – the first principles – without first asking whether the defendant falls within a class traditionally held to owe a duty of care. The reference is to *Anns v Merton London Borough Council,* [1978] AC 728 (HL).

28 As Angela Swan submits persuasively at many points in *Canadian Contract Law*, *supra* note 21.

29 See Swan, *ibid* at 353f:

> It is sometimes assumed that the expectation interest refers to the plaintiff's lost

4. TILCO v Posesorski

In *Toronto Industrial Leaseholds Ltd v Posesorski*,[30] the last decision in the *Messineo* trilogy, the lawyer failed to advise a purchaser of an industrial property that a lease held by a tenant contained a renewal option. The option, if exercised, would allow the tenant to pay rent during the renewal period substantially below market. The plaintiff, unaware of the option, paid more for the property than it was worth. After the purchase, the plaintiff, in order to get rid of the troublesome option, had to pay the tenant an amount by which the rent during the renewal period was less than market rent.

The Court found that:

(d) unlike the purchaser in *Messineo*, the plaintiffs had suffered a loss, because the property was not worth as much as they had paid for it;

(e) "As in *Messineo*, the solicitor's negligence caused the clients to complete a transaction they would not have entered into had the solicitor done his job properly."[31] The plaintiffs, if properly advised, could have refused to complete the transaction or attempted to negotiate a new purchase price, taking into account the existence of the option;

(f) following *Kienzle*, the plaintiffs were entitled to the difference between what they paid for the property and what the property was worth, as well as consequential damages, including the amount of the decrease in value of the property between the date of purchase and the date of discovery of the lawyer's error, the loss of use of funds represented by the overpayment of the purchase price, legal fees and the cost of maintaining the vacant property.

TILCO is similar to *Messineo* in that the lawyer's error did not cause the renewal option to be present in the lease, just as the lawyer's error in *Messineo* did not cause the prior conveyance of Murch's Point. However, unlike the lawyer's error in *Messineo,* the lawyer's error in *TILCO* did cause the plaintiffs to suffer loss.

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profits, that the reliance interest refers to the expenses that the plaintiff incurred and that the restitution interest refers to the amount paid by the promise to the promisor. These assumptions are generally correct.

30 (1994), 21 OR (3d) 1 (CA) [*TILCO*].

31 *Ibid* at para 77.

The Court also appeared to give some doctrinal foundation to the prior holding in *Kienzle*, by invoking the concept of perfect restitution:

> The parties agreed at trial that had Mr. Solway told the clients about the option, they would not have purchased the property. Perfect restitution would therefore appear to require a notional undoing of the transaction some ten years after it was completed, coupled with an attempt to determine the net benefit or loss suffered by the clients as a result of entering into the transaction. Sometimes the evidence permits a relatively accurate reconstruction of events on the assumption that certain things would or would not have occurred had there been no breach. In this case, it is impossible to perform that reconstruction. There are too many variables, many of which were not addressed in the evidence, presumably because the parties were satisfied that an attempt to unravel the transaction and establish the clients' position on the assumption that the transition had not occurred was so complicated as to defy performance.
> Absent the ability to make perfect restitution, a court, in assessing damages, must do the best it can.[32]

Where the lawyer's error causes the client to suffer loss, then, perfect restitution remains a theoretical ideal, even if not practically possible in a given case.

It has been submitted in a prior discussion elsewhere that, because the award of damages included compensation for the difference between the value of the property without the option, the latter being what the plaintiff had expected to obtain, and the value of the property with the option, the Court in fact compensated the plaintiff for the amount of its disappointed. expectation interest: "It was a coincidence – though one that is very common – that the clients' expectation interest and their reliance interest were the same."[33] The reasoning appears to be that, because the plaintiff paid for the property more than the property was worth, the plaintiff lost the amount of its overpayment. This loss could be considered either reliance loss or expectation loss. However, this submission should be treated with caution. So long as the plaintiff would continue to be denied compensation for the profit from a secondary transaction, as in *Kienzle*, it is questionable whether the Court recognizes a claim based on disappointed expectation interest. The coincidence in *TILCO* may not have wider significance.

5. Subsequent Decisions Following the Trilogy

The trilogy has been followed in many subsequent cases, both in Ontario and in other jurisdictions in Canada, but not always clearly understood. In

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32 *Ibid* at paras 70-71

33 Swan, *supra* note 21 at 370

Harela v Powell,[34] a lawyer failed to advise purchasers of a cottage lot that the lot was subject to setbacks and other zoning and building restrictions that would impact on their plan to build a cottage on the property. The lot with the restrictions was worth less than they had paid for it. In addition, they lost both the use of the lot for sixteen months while they applied for a variance, and the chance of obtaining discounts and rebates that would have been available to them had they been able to commence construction when they completed the purchase. They also incurred expenses in applying for a minor variance and had to pay increased building costs. The Court allowed the plaintiffs damages under all of these heads of damage.

The Court found the position of the plaintiffs to be analogous to that of the plaintiffs in *TILCO*. If the lawyer had advised them properly, they would not have purchased the lot at the price they paid for it. They would have had the options of refusing to complete the transaction and forfeiting their deposit, attempting to get out of the deal and retaining their deposit, attempting to sell the lot to a third party, and minimizing their loss by negotiating a lower purchase price or a postponement of the closing date and seeking the minor variances required. The lawyer's error deprived them of these options.

As in *TILCO*, the plaintiffs were entitled to both the amount of the diminished value of the lot and to consequential damages. However, the Court also saw *TILCO* and *Messineo* as conflicting authorities, *Messineo* limiting the plaintiff's damages to the difference between the purchase price and the actual value of the land with the undisclosed defect, and *TILCO* allowing both the basic *Messineo* measure of damages and other consequential damages as well. The Court saw the judgment of the Court of Appeal in *Kienzle* as authority for the proposition that the *Messineo* measure of damages is not appropriate in all cases.

On the analysis presented here, however, *Messineo* and *TILCO* are not in conflict, if the starting point in *Messineo* is kept in mind. The plaintiff must have suffered an overall loss. Once the plaintiff establishes a loss, the entire loss is theoretically compensable. *Messineo* does not limit the damages, if there has been a loss. Rather, *Messineo* sets a threshold for when there has been a loss: that the plaintiff must have suffered a financial loss that goes beyond a disappointed expectation interest. The view that *Messineo* limits damages to the difference between the purchase price and the value of what is received is not uncommon,[35] but mistaken. The mistake arises from taking out of context the statement in the majority

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34 (1998), 163 DLR (4th) 365 (Ont Ct J (Gen Div)).

35 See e.g. the trial decision in *Krawchuk v Scherbak* (2009), 85 RPR (4th) 262 (Ont Sup Ct) at paras 87-88, rev'd on appeal (2011), 106 OR (3d) 598 (CA)

judgment in the Court of Appeal that "The measure of damages is the difference in money between the amount paid by the client to the vendor, and the market value of the land to which the client received a good title."[36] The context is that, in order to be entitled to any damages at all, the plaintiff must establish an overall loss in the transaction.

Messineo is at least sufficiently wide in scope to apply to vendors as well as to purchasers. In *Davidson v Lee, Roche & Kelly,*[37] another decision of the Ontario Court of Appeal, the Court followed *Messineo*, but this time in a case where the client was a vendor rather than a purchaser. Where the plaintiff suffered no overall loss, the Court disallowed his claim against his lawyer, despite the lawyer's error resulting in the client's completing a transaction that he would not otherwise have completed.

The plaintiff and his wife sold a business, on the understanding that the purchaser would pay them interest at a certain rate on the unpaid balance of the purchase price. The lawyer failed to advise the vendors that an agreed cap on the amount of interest payable meant that they would not be receiving as much interest as they expected. The plaintiff claimed as damages the difference between the amount of interest that he and his wife expected to receive and the lesser amount to which they were actually entitled by virtue of the interest cap. The claim was unsuccessful.

The Court found that:

(g) the vendors suffered no loss overall. There was no evidence that the business was worth more than the amount for which they had actually sold it even with the interest cap. It appears that the plaintiff did not lead any evidence to that effect;

(h) the lawyer's error did not cause the amount of interest payable to the vendors to be less than the amount that they expected to receive. The purchaser would not have agreed to pay a higher amount of interest in any event.

(i) the vendors would not have completed the transaction, had the lawyer advised them properly about the amount of interest due to them pursuant to the agreement with the purchaser: "The lawyer's negligence resulted in the clients completing a transaction that they would have avoided, if the lawyer had advised them of the true amount of interest."[38]

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36 *Messineo*, *supra* note 6 at para 17.

37 2008 ONCA 373, [2008] OJ No 1833 (QL) (CA).

38 *Ibid* at para 5

The Court went on further to justify the *Messineo* line of reasoning, by reversing the intuitive application of the "but for" test: "Without the lawyer's negligence, there would not have been a sale."[39] This is a reversal of the application of the "but for" test with a vengeance. If not for the lawyer's error, the clients would not have had the benefit of the good bargain that they in fact obtained. *Davidson* may be viewed as a straightforward application of *Messineo* to the context where the client is a vendor rather than a purchaser, and as extending the reasoning in *Messineo* by reversing the intuitive application of the "but for" test.

Spencer v King,[40] a decision of the New Brunswick Court of Queen's Bench, is also a straightforward application of *Messineo*. In *Spencer*, the lawyer failed to advise the purchaser that the property conveyed to him was ten acres less than called for in the agreement of purchase and sale. The conveyance did not include a parcel referred to as "the flatiron," which the vendor had conveyed away previously. The plaintiff claimed as damages against the lawyer the value of the missing parcel. The plaintiff's claim did not succeed.

The Court found that:

(a) the plaintiff suffered no loss overall. There was no evidence that the property was worth less than the plaintiff had paid for it. However, it also appears that the plaintiff did not attempt to lead evidence that the property was worth less than he had paid for it;

(b) the lawyer's error did not cause the missing parcel not to be available for conveyance to the plaintiff;

(c) had the lawyer advised him properly, the plaintiff would not have completed the transaction:

> While I have some doubt that the "flatiron" was that central to Mr. Spencer's decision to purchase, I accept his testimony that had he been advised that the "flatiron" had been previously conveyed out of the property he was buying, then Mr. Spencer would not have purchased the property.[41]

Here, and in other cases following *Messineo*, the court may "have some doubt" whether a client's self-serving assertion after the fact, that she would not have completed a transaction had the lawyer advised her

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39 *Ibid*.

40 (1992), 131 NBR (2d) 235 (QB)

41 *Ibid* at para 10.

properly, is true. Courts are used to looking at such assertions with scepticism:

> It is always easy for a witness to say what he would have done and for a judge to say he accepts that assertion. But such evidence is, in truth, not evidence of a fact but evidence of opinion. It should be tested in the crucible of reason.[42]

However, in the *Messineo* context, the court can afford to give the client the benefit of the doubt. If the client did not suffer loss in the overall transaction, it is not as important for the court to determine whether the "but for" test is satisfied as it would be where the client really does suffer loss.

It is also possible for a court to apply the reasoning in *Messineo* beyond its proper scope. In *Clarke v Milford,*[43] a decision of the Nova Scotia Supreme Court, Appeal Division, Mrs Leslie entered into an agreement to sell to the plaintiff a property left by her late husband to their son, a minor, upon the son's attaining his majority. Mrs Leslie did not have the right to enter into the agreement without court approval. The plaintiff paid Mrs Leslie the purchase price. The plaintiff's lawyer, who also acted for Mrs Leslie in the transaction, applied to the court for approval of the sale. Twelve years later, however, no evidence could be found that the lawyer had actually obtained an order approving the sale or that the lawyer had prepared and registered a deed in favour of the plaintiff. After paying municipal taxes on the property for twelve years, the plaintiff discovered that he had not obtained title to the property, part of which the son had by then conveyed away. The plaintiff claimed as damages against the lawyer the current value of the property. The plaintiff's claim succeeded to the extent that the Court awarded damages in the amount of the purchase price paid to Mrs Leslie and the realty taxes paid in the mistaken belief that the plaintiff was the owner, but not in the amount of the current value of the property.

The Court followed *Messineo*, on the basis that the lawyer's error was not the cause of the plaintiff's loss. Because Mrs Leslie could never convey the son's interest in the property without court approval, the lawyer could have done no more than warn the plaintiff of Mrs Leslie's inability to convey the property.

But why should *Messineo* apply at all? The starting point in *Clarke* is not the same as in *Messineo,* because the plaintiff in *Clarke* suffered a loss. Further, it is not clear that the lawyer did not cause the plaintiff's loss. The

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42 *Hong Kong Bank of Canada v Touche Ross & Co* (1989), 36 BCLR (2d) 381 at 392 (CA).

43 (1987), 78 NSR (2d) 337 (SC(AD)) [*Clarke*].

trial judge had found that "… there is some question whether an order authorizing the sale of infant's real estate would have been granted under the circumstances" and "… there is a very real question whether a court order would have been granted in view of the terms of the will of the late Mr Leslie as James Leslie was not yet twenty-one years of age and therefore the property was not yet fully vested in James Leslie. There is the possibility James Leslie may have died before reaching twenty-one, in which case there would have been an intestacy with respect to the property."[44]

On this basis, then, why should *Messineo* apply at all, rather than the loss of a chance doctrine as set out in such cases as *Folland v Reardin*?[45] As long as there was a chance that the plaintiff might have obtained a court order approving the sale, the appropriate measure of damages should be the amount claimed by the plaintiff, the current value of the property, discounted by the improbability of the court having approved the sale. The *Messineo* measure of damages is appropriate where the plaintiff has suffered no loss. Where the plaintiff has suffered a loss, the *Messineo* measure of damages is overly restrictive, as *Kienzle* and *TILCO* make clear. The reasoning in *Messineo* should not be divorced from the fact situation which gave rise to the Court's general statement as to the measure of damages.

6. Causation

The *Messineo* trilogy, even when "harmonized" along the lines recommended here, still does not purport to settle difficult questions of causation. Assuming that the lawyer breached a duty to the client, did the breach of duty cause the loss suffered by the client? Conflicting answers are possible, each with support from the high authority of the Supreme Court of Canada.

In *Canson v Boughton,*[46] a lawyer acted for intermediate purchasers of a property who sold ("flipped") the property prior to the time for completing their agreement of purchase and sale with the vendors. The intermediate purchasers made a profit on the flip. The lawyer who acted for the intermediate purchasers also acted for the final purchasers, but without disclosing to the latter that they were not purchasing from the vendors, but rather from the intermediate purchasers, and without disclosing the intermediate profit. The lawyer's failure to disclose amounted to a breach of his fiduciary duty to the purchasers. Had the

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44 (1984), 64 NSR (2d) 361 at paras 5 and 7 (SC(TD)).

45 (2005), 74 OR (3d) 688 (CA).

46 [1991] 3 SCR 534 [*Canson*].

lawyer made the purchasers aware of the secret profit, they would not have completed the transaction. Here is the "but for" link with *Messineo*, although in the context of a claim for breach of fiduciary duty. And, as a result of the secret profit, the property was overpriced.[47]

The purchasers intended to develop the property by building a warehouse on it, but due to the negligence of engineers and a pile driving company, the piles supporting the warehouse sunk into the soil, resulting in damage to the building. The purchasers were unable to recover more than a part of their loss from the engineers and the pile driving company, and then sought recovery from the lawyer.

The Supreme Court of Canada held that the purchasers were entitled to recover from the lawyer the amount of the undisclosed secret profit, but not the consequential damages due to intervening acts unrelated to the lawyer's breach of duty. For the majority, LaForest J stated:

> I do not think that the claim for the harm resulting from the actions of third parties can fairly be looked upon as falling within what is encompassed in restoration for the harm suffered by the breach.[48]

The "but for" test is thus subject to "a common sense view of causation". Before the lawyer will be held liable for consequential damages, the client must show that the damages resulted from the lawyer's breach of fiduciary duty. This would apply *a fortiori* to a lawyer's negligent breach of duty.

The problem is that *Canson* does not appear to be consistent with a subsequent decision of the Supreme Court of Canada on the question of causation. In *Hodgkinson v Simms,*[49] an accountant recommended four MURB (multiple unit residential building) projects to a client, on the basis that they were suitable for the client's tax planning and tax sheltering investment criteria, without disclosing that he was also doing the accounting work for the developers of the projects and providing other financial services to them, and without disclosing that the developers were paying him a fee for MURB's purchased by his clients on his recommendation. When the real estate market collapsed, the investments lost nearly all of their value. The client became aware of the secret commission and claimed from the accountant the entire amount of his loss.

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47 As noted in *Hodgkinson v Simms* [1994] 3 SCR 377 at 444 [*Hodgkinson*].

48 *Canson*, *supra* note 46 at 580.

49 *Supra* note 47.

The client did not pay more for the investments than their value at the time of purchase. If the client had known of the true relationship between the accountant and the developers, however, he would not have made the investments. Again there is a "but for" link with *Messineo*, but in the context of a claim for breach of fiduciary duty.

The majority of the Court held that the client was entitled to recover the amount of his investment together with consequential damages, including legal and accounting fees:

> … these investors would not have been exposed to *any* of the risks associated with these investments had it not been for their respective fiduciary's desire to secure an improper personal gain. In short, in each case it was the particular fiduciary breach that initiated the chain of events leading to the investor's loss. As such it is right and just that the breaching party account for this lost in full …
> In the present case, the duty the respondent breached was directly related to the risk that materialized and in fact caused the appellant's loss. The respondent had been retained specifically to seek out and make independent recommendations of suitable investments for the appellant.[50]

In *Canson*, by contrast, the client's loss was unrelated to the lawyer's breach of fiduciary duty. The loss was caused by the wrongful act of a third party that was unrelated to the fiduciary breach.

The minority in *Hodgkinson*, however, found that the client's loss was caused not by the accountant's breach of duty but rather by an economic downturn that did not reflect any inadequacy in the advice provided by the accountant. In the minority's view, the "but for" test does not apply where the client's loss resulted from forces beyond the accountant's control. The accountant had otherwise provided sound investment advice:

> … the material question to be considered is whether the parties would reasonably have contemplated the losses associated with economic downturn as liable to result from the respondent's breach of his duty to make full disclosure … This question can only be answered in the negative. It would simply not be reasonable for the parties to have contemplated that the respondent's failure to make full disclosure was likely to result in devaluation of the investment due to an economic downturn … the two events were in no way causally related.[51]

If the downturn in the market is seen as analogous to the intervening act of a third party, then the reasoning of the minority appears to be more faithful to the holding in *Canson*.

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50 *Ibid* at 443, 445.

51 *Ibid* at 478-79.

Questions of causation can be difficult. They can be more difficult when conflicting answers find support in the highest authorities. *Canson* itself may be seen as Janus-faced, holding out different answers on the question of causation. In *McKitterick v Duco, Geist and Chodos*,[52] the Ontario Court of Appeal assessed *Canson* in this way:

> Applying the test in *Canson*, one must ask first whether the losses claimed flow from the breach … However, the second portion of the *Canson* test contains the fair limiting proviso that a person in breach of a fiduciary duty will not be liable for all intervening acts of third parties or for unreasonable intervening acts of the persons to whom he owes that duty. Such acts do not flow from the breach.[53]

In *Messineo*, the Court found that the client would not have entered into a transaction but for a breach of duty by the lawyer. *Messineo* did not purport to settle the question which consequences flow from the breach of duty and are thus compensable, and which consequences may be regarded as flowing from other causes too remote from the breach of duty. The general principle is simply that "Damages cannot be awarded absent evidence of a causal connection,"[54] to be applied as the facts in a given case require.

7. Conclusion

Messineo stands for the proposition that, even where the court is willing to make a finding in favour of the client that the client would not have completed a transaction had the lawyer advised him properly, thus establishing causation as far as the lawyer is concerned, the plaintiff must still establish loss. *Messineo* does not stand for the proposition that, where the plaintiff establishes loss, damages are limited to one head of damage only, the difference in value between what was paid and what was obtained or, as in *Davidson*, what was sold.

It may appear on first impression that the client's position has improved since *Messineo,* with the advent of title insurance. If the lawyer is not to be regarded as an insurer, the same can not be said of a title insurer. A title insurer is certainly an insurer. Still, it is doubtful whether the client may now recover from the insurer for a disappointed expectation interest. If, for example, a property is worth what a purchaser paid for it, then the insurer will say, with some justification, that the client did not suffer a compensable loss. The policy will usually be drafted so as to limit loss to "actual loss," the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject

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52 (1994), 76 OAC 310 (CA)

53 *Ibid* at 317f.

54 *Martin v Goldfarb* (2003), 68 OR (3d) 70, 72 (CA).

to the defect insured against by the policy.[55] In the insurance context, compensation for a disappointed expectation interest would likely be regarded as betterment, against which the insurer resolutely sets its face, with the court's approval.

Is the court right to distinguish the position of the lawyer from that of an insurer? Probably so, if the practice of law is to remain economically feasible for most practitioners. The casualty must be the client's disappointed expectation interest. But even a disappointed expectation interest need not remain disappointed forever, so long as there is some authority in favour of recognizing it – not necessarily under that name – as in the minority judgment in *Kienzle*. One day, the bridgehead may become a point of debarkation for future expansion.

55 Taken from Stewart Title Insurance policy.