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Contributory Negligence under the TPA – Will the High Court be able to continue its protection of the careless consumer?

Amanda Stickley*

In 2004 apportionment was introduced to the Trade Practices Act 1974 (Cth) - a new subsection was inserted into s 82 of the Act enabling a court to take into account a claimant's own failure to exercise reasonable care and reduce the damages awarded. The introduction of contributory negligence as being relevant in assessing damages under s 82 for misleading or deceptive conduct will test the tension that exists between the principles of consumer protection and the concept of personal responsibility. The High Court has in the past refused to apply contributory negligence to claims under s 82 despite much criticism and arguments for a just and equitable determination of responsibility for damage suffered. This article examines the tensions between the principles of consumer protection, previously guarded by the High Court in its interpretation of the Act, and the imposition of personal responsibility through the new s82(1B) on the careless consumer. It questions whether the new provision will undermine the policy of consumer protection and where the High Court may draw the line in its protection of the careless consumer by examining scenarios that commonly arise involving a lack of reasonable care on the part of the claimant.

1. Introduction

On 30 July 1974, Attorney-General Lionel Murphy stated in the Federal Senate:

> … it will be apparent to honourable senators that the [Trade Practices] Bill is of great importance. It represents a great advance in areas of restrictive trade practices and consumer protection and attends to a wide variety of problems. This is intended to promote efficiency and competition in business, to reduce prices and to protect all Australians against unfair practices. I commend the Bill to the Senate.[1]

* LLB, Grad Dip Leg Prac, LLM (QUT), Lecturer, Faculty of Law, Queensland University of Technology. The author wishes to thank Professor Sharon Christensen, Faculty of Law, QUT for her comments on the draft of this article.

1 Senate Hansard, 30 July 1974.

With the enactment of the *Trade Practices Act 1974* (Cth), consumer protection was introduced into Australian federal law. Since its commencement, the TPA has undergone many changes, the most significant taking place in 1996 (National Competition Policy)[2] and 2004 (economic reform).[3] But despite the changes, the focus of the Act has not altered – competition law and the protection of consumers.[4]

The High Court's firm stance on providing consumers with the highest possible degree of protection through the Act was evident in its rejection of the application of the doctrine of contributory negligence under ss 82 and 87.[5] This rejection was based on the interpretation of the sections in light of the objective of the Act contained in s 2.[6] However, this approach is challenged by the insertion of s 82(1B) which requires a court to reduce a claimant's damages if any of the loss suffered arises from the claimant's own failure to act reasonably. In light of the firm "all or nothing" approach previously championed by the court, the issue arises as to how the principles of consumer protection may continue to influence the courts when apportioning loss.

The tension between the principles of consumer protection and the concept of personal responsibility is clear in cases where the consumer has been careless or is inexperienced and this has led to some of the loss suffered. In recent years there has been an increasing expectation in society that individuals will be responsible for any loss that they have caused, including being responsible for the loss they suffer through their own carelessness.[7] In respect of claims for damages under the TPA, the concept of personal responsibility has found favour with some members of the High Court. For example, in *Alexander (t/as Minter Ellison Ltd) v Perpetual Trustees WA Ltd*[8] Kirby J (in the minority), discussing apportionment between wrongdoers, stated:

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2 *Competition Policy Reform Act 1995* (Cth).

3 *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth).

4 The consumer protection provisions of the TPA were described as 'the jewel in the Commission's crown', see ACCC, "Celebrating 30 Years", ACCC Update, Issue 16, December 2004, p 17.

5 *Henderson v Amadio Pty Ltd* (1995) 81 FCR 149 at 265; *Henville v Walker* (2001) 206 CLR 459; *I&L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109.

6 Section 2 states: "The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection." This section was inserted by the *Competition Policy Reform Act 1995* (Cth).

7 See for example the decisions of the High Court in *Romeo v Northern Territory Conservation Commission* (1998) 192 CLR 431 at 447; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469; *Swain v Waverley Municipal Corporation* (2005) 220 CLR 517.

8 (2004) 216 CLR 109

> … a rational system of law would provide a means by which those responsible for such damage were obliged to share the burden as between each other in a just and equitable way, having regard to the extent of their respective responsibilities for the damage.[9]

This approach based on natural justice can also be seen in Kirby J's judgment in *I&L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (*I&L Securities*),[10] where his Honour held that:

> Providing windfall gains to litigants is not part of the scheme of the legislation. That scheme contemplates that all should be responsible, but only responsible, for the damage that they cause.[11]

Despite these strong statements, the "all or nothing" approach has been consistently upheld as meeting the consumer protection objects of the Act. The fact that consumers were consistently compensated for loss caused through their own lack of care has not swayed the majority view of the High Court. The introduction of contributory negligence concepts while maintaining the consumer protection objective of the Act gives rise to the uncertainty about where the court will draw the new line in protecting the careless consumer. This article will examine where this new line will be drawn by analysing several common situations where careless consumers under the "all or nothing approach would have received compensation for the full amount for their loss.

2. A Brief History of the "All or Nothing" Approach

To put the scenarios in context, it is necessary to understand the development of the all-or-nothing approach. When a claimant proves that they have suffered loss or damage from misleading or deceptive conduct that is in breach of s 52, they are entitled to damages under s 82 of the Act in addition to other possible orders under s 87.

Section 82(1) of the TPA states:

> A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV, IVA, IVB or V or section 51AC may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

Compensation is only recoverable if there is a causal link between the claimant's loss or damage and the misleading or deceptive conduct. Under the common law, causation is

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9 Ibid at [69], citing *Mahoney v McManus* (1981) 180 CLR 370 at 378 per Gibbs CJ.
10 (2002) 210 CLR 109.
11 Ibid at [178].

a question of fact and requires the application of commonsense.[12] The members of the High Court in *Wardley Australia Ltd v Western Australia*[13] held that the same approach should be applied to s 82. Therefore, it need not be that the misleading or deceptive conduct is the dominant cause of the loss in order for the claimant to prove that it was caused by that conduct, and similarly any conduct of the part of the claimant that adds to the loss does not disentitle them to damages.

This position was affirmed by the High Court in the decisions of *Henville v Walker* (*Henville*)[14] and *I&L Securities Pty Ltd*,[15] in which the High Court interpreted s 82 of the TPA to mean that any negligence on the part of the claimant was only relevant if that negligence broke the chain of causation between the misleading or deceptive conduct and the loss suffered.[16] As long as the contravening conduct was a cause of the loss or damage, the claimant was entitled to recover all losses.[17]

The rejection of a claimant's own conduct being relevant under the TPA was based on an interpretation of s 82 stemming from the policy of the Act. Section 2 of the Act states:

> The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

The interpretation of the TPA is very much consumer protection orientated. This is obvious from the references to consumer protection policy throughout the judgments in this area. Justice McHugh in *Henville* stated:

> Nothing in the common law, in s 52 or s 82 or in the policy of the Act supports the conclusion that a claimant's damages under s 82 should be reduced because the loss or damage could have been avoided by the exercise of reasonable care on the claimant's part. There is no ground for reading into s 82 doctrines of contributory negligence and apportionment of damages.[18]

However, not all members of the High Court have agreed with the "all or nothing" approach despite also relying upon the consumer protection objective of the TPA. In *Henville*, Gleeson CJ, in the minority, held that not all of the loss should be awarded, stating:

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12 (1991) 171 CLR 506 at 515-17 per Mason CJ; at 524 per Deane J; at 5301 per McHugh J.
13 (1992) 175 CLR 514 at 525.
14 (2001) 206 CLR 459.
15 (2002) 210 CLR 109.
16 See *Henville v Walker* (2001) 206 CLR 459 at 493 [106] per McHugh J.
17 See for example, *Henville v Walker* (2001) 206 CLR 459 at 505 [140].
18 Ibid at 163-4 [178].

> Neither the purpose of the statute nor the justice of the case requires that, … the respondents should be required to underwrite all the losses, regardless of how they came to be incurred. [19]

In *I&L Securities*, Kirby J, in dissent, agreed with the analysis of the lower courts in Queensland that a cause of the loss suffered by the appellant was separate and distinct from the misleading or deceptive conduct. His Honour held that the damages to be awarded under s 82 were only to be the loss or damage that was caused by that conduct and not the loss of damages caused by the claimant's own conduct.[20] But despite going against the "all or nothing" approach, Kirby J also referred to the objective of the TPA, noting that providing windfalls to the claimants was not part of the scheme of the legislation. The scheme required that a defendant should be responsible for the damage that they cause.[21]

Justice Callinan was in the majority that allowed the appeal in *I&L Securities*, but his Honour indicated that the denial of the application of contributory negligence produced "a result which is unfair and seems rather unlikely to have been intended by the legislature."[22] His Honour stated:

> This regrettably inescapable reading of s 82 has the capacity to cause a grave injustice in a case, for example, in which a defendant's conduct has played a relatively minor part only in the production of the plaintiff's loss, and the plaintiff's own conduct has been a major contributing factor in causing the loss.[23]

His Honour's comments indicated that in his opinion the remedies under the Act were not as they should be. This opinion was shared by many academic writers. For example, Seddon has stated:

> The case for allowing a court to make adjustments to the damages awarded to a victim of misleading conduct is based on simple notions of responsibility. It seems wrong to impose entire responsibility on the person providing the information and none on the person receiving it.[24]

Professor Pengilley, in relation to the decision of *Henville*, opined:

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19 Ibid at [35].
20 Ibid at [183].
21 (2002) 210 CLR 109 at [178].
22 Ibid at 175 [211].
23 Ibid at 175-6; see also *Astley v Austrust Ltd* (1999) 197 CLR 1 at [132].
24 N Seddon, "Misleading Conduct: The Case for Proportionality" (1997) 71 *ALJ* 146 at 149.

> The disaster of the decision lies in the impact it must have. The case holds parties responsible for damages caused by matters they did not warrant and over which they have no control. The case also encourages non-responsibility for decisions taken. Parties in the position of Mr Henville can act irresponsibly in what they do in the knowledge that any losses caused by their actions can be recovered from another party.[25]

The majority of academic opinion was that the legislation needed amendment to allow contributory negligence of the claimant to be taken into account when assessing damages under s 82.[26]

In light of the history of contributory negligence under the common law and the policy of consumer protection in the TPA, the "all or nothing" interpretation of s 82 was understandable. Under the common law, contributory negligence refers to a failure of a plaintiff to act reasonably. Originally under the common law, any fault on the part of the plaintiff resulted in no liability for the defendant.[27] Contributory negligence was a complete defence to a claim in negligence as the failure to take reasonable care by the plaintiff was seen to break the chain of causation. Apportionment legislation[28] exists in all Australian jurisdictions to allow contributory negligence to be taken into account but it will not necessarily defeat the claim.[29] However, it did take the intervention of legislation before courts would take into account a plaintiff's conduct to reduce damages.

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25 "The Ten Most Disastrous Decisions Made Relating to the Trade Practices Act" (2002) 30 *ABLR* 331 at 356. See also Professor Pengilley, "High Court Decides on Damages for Misleading Conduct with Dramatic Repercussions in all Fields of Commerce" (2002) 17 *Aust & NZ TPLB* 89 at 93. However, later Professor Pengilley writes that the principles of *Henville* and *I&L Securities* are correct, but applied wrongly in *Henville*: "Contributory negligence: Is it Pleadable to reduce Damages ;under Section 52 of the Trade Practices Act? The High Court Speaks Again" (2002) 18 *Aust & NZ TPLB* 102 at 108.

26 See Professor Pengilley, "High Court Decides on Damages for Misleading Conduct with Dramatic Repercussions in all Fields of Commerce" (2002) 17 *Aust & NZ TPLB* 89 at 93, 102; G Pearson, "The Pregnant Preposition and the Definitive and Indefinitive Article: Sections 82 and 87 of the TPA and Damages for the Whole or the Part of the Loss" (2003) 11 *CCLJ* 163 at 187; L Griggs, "Proportionality, Consumerism and Achieving a Just Result – The Need for Change to s 82 of the Trade Practices Act 1974" (2003) 11 *CCLJ* 1 at 20.

27 *Williams v Commissioner for Road Transport* (1933) 50 CLR 258.

28 See *Law Reform (Miscellaneous Provisions) Act 1965* (NSW), s 9(1); *Law Reform Act 1995* (Qld), s 10(1); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), s 7*; Wrongs Act 1954* (Tas), s 4(1); *Wrongs Act 1958* (Vic,) s 26(1); *Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947* (WA), s 4(1); *Civil Law (Wrongs) Act 2002* (ACT), s 102; *Law Reform (Miscellaneous Provisions) Act 1956* (NT), s 16(1).

29 Prior to the civil liability legislation it had been held that a plaintiff could not be found to be 100% responsible under the apportionment legislation: *Wynbergen v The Hoyts Corporation* (1998) 72 ALJR 65; 149 ALR 25. Now it is possible for damages to be reduced by 100% if it is just and equitable: see *Civil Liability Act 2002* (NSW), s 5S; *Civil Liability Act 2003* (Qld), s 24; *Wrongs Act 1954* (Tas), s 4(1); *Wrongs Act 1958* (Vic), s 63; *Civil Law (Wrongs) Act 2002* (ACT), s 47. For a decision where such a reduction has been made, see *MacKenzie v Nominal Defendant* [2004] DCNSW (8 July 2004).

Therefore, the power of a court to reduce a plaintiff's claim for damages to take into account the plaintiff's own conduct that does not amount to a break in the chain of causation is a legislative device.

3. Contributory Negligence under the TPA - Section 82(1B)

Amendment of s 82 occurred in 2004 with the enactment of the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth).[30] Section 82(1B) provides:

> Despite subsection (1), if:
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> (a) a person (the claimant) makes a claim under subsection (1) in relation to:
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> (i) economic loss; or
>
> (ii) damage to property;
>
> caused by conduct of another person (the defendant) that was done in contravention of section 52; and
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> (b) the claimant suffered the loss or damage:
>
> (i) as a result partly of the claimant's failure to take reasonable care; and
>
> (ii) as a result partly of the conduct referred to in paragraph (a); and
>
> (c) the defendant:
>
> (i) did not intend to cause the loss or damage; and
>
> (ii) did not fraudulently cause the loss or damage;
>
> the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage.

The new subsection is similar to the apportionment legislation, however closer examination reveals that s 82(1B) is extremely limited in its application and may be even more so if consumer protection principles continue to influence the High Court's interpretation. The subsection is limited in its application as follows:

- Section 82(1B)(a) states that apportionment for a claimant's own conduct is limited to claims for economic loss or property damage. Therefore a claimant seeking

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30 *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth), Sch 3, s 5. The section commenced 26 July 2004 (Sch 12). The Act also introduces apportionment between defendants. For a detailed examination of apportionment under the TPA, including apportionment between defendants, see S Christensen and A Stickley, "Will Apportionment of Responsibility for Misleading Conduct Erode the Consumer Protection Potency of the Trade Practices Act 1974?" (2006) 34 *Australian Business Law Review* 118.

damages for damages for personal injury who has acted negligently themselves will not have their damages reduced.[31]

- Section 82(1) applies to contraventions of Pt IV, IVA, IVB or V or s 51AC of the Act, but subsection (1B) only applies to breaches of s 52. Many actions are argued before a court in the alternative. Therefore, if the conduct of the defendant is misleading or deceptive as in contravention of s 52 but is also a misleading representation in breach of s 53A, a claimant who has failed to act reasonably may claim only under s53A in order to avoid a reduction in damages.

- Paragraph (c) will not allow a defendant to seek apportionment if the defendant intended to cause the loss or damage or if they fraudulently caused the loss or damage.

4. Application of s 82(1B) – Possible interpretation

Until the High Court is given the opportunity to interpret s 82(1B), there will be much speculation as to how the new section will impact upon claims under s 52 in respect of the careless consumer. The possible interpretation and application of the subsection is best understood by considering the provisions of s 82(1B) in the context of common scenarios.

4.1 Inexperienced business person buys franchise

A situation in which the tensions between the concept of responsibility and consumer protection are apparent is where a person, inexperienced in business, buys a franchise and reliance upon misleading or deceptive statements in the documents provided by the franchisor in respect of the profit that should be made and the statements prove to have no factual basis. Clearly the franchisee will be able to claim s 52 of the TPA has been breached. However, what if the franchisee did not attend any of the training offered by the franchisor; deviated from the core products of the business and made other business decisions that have led to the business running at a loss and failing?

Prior to the insertion of subsection (1B), it is arguable that a court would allow the franchisee to recover all of their losses, including the losses that were due to their

[31] However with the amendment of the TPA by the *Trade Practices Amendment (Personal Injuries and Death) Act 2006* (Cth) with the insertion of s 82(1AAA), a claimant will be prevented from claiming damages for personal injury or death for a contravention of Pt V, Div 1, which includes s 52This is in response to the Ipp Report, Recommendations 19 and 20.

inexperience and bad business decisions.[32] However, it is clear on such facts that the franchisee's own conduct contributed to their loss which now will allow a defendant to claim apportionment under s 82(1B). But with consumer protection policy influencing the interpretation of the subsection it still could be possible for a careless claimant to avoid any reduction in damages.

4.1.1 Arguments by franchisee to avoid application of s 82(1B)

In such a scenario the franchisee could argue that s 82(1B) is not applicable due to the fact that the defendant intended to cause the loss or that they have not failed to take reasonable care.

The franchisee could argue that an intention "to cause the loss or damage" is demonstrated by an intention to mislead or deceive, preventing any apportionment by virtue of s 82(1B)(c). A defendant which makes statements as to the profit of a business with no factual basis is arguably intending to mislead or deceive the prospective franchisee. If it is accepted by the courts that an intention to cause loss is equivalent to an intention to mislead, paragraph (c) provides a loophole for a court wishing to provide consumer protection to the highest degree possible. Such an interpretation would restrict the subsection to defendants who could claim that they "acted honestly and reasonably"[33], for example, by breaching s 52 simply by passing on misleading information.

An inexperienced franchisee may be able to prove that they did not fail to take reasonable care in order to avoid any reduction of their damages.[34] The phrase "reasonable care" denotes an objective test in assessing the conduct of the claimant, but as noted by the Ipp Report and leading torts text books, when considering the conduct of a plaintiff in a negligence action in light of an allegation of contributory negligence, courts often apply a more lenient standard, for some reason expecting less of a plaintiff.[35]

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32 These facts are similar to those in *Gardner Corporation Pty Ltd v Zed Bears Pty Ltd* [2003] WASC 13 (23 January 2003).

33 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 197 per Gibbs CJ.

34 TPA, s 82(1B)(b)(i).

35 See *Review of the Law of Negligence– Final Report*, September 2002, [8.11]-[8.13] where it was recommended that it needed to be legislated that a plaintiff's contributory negligence is to be assessed according by the same objective standard as a defendant's and this recommendation has been implemented in the majority of the Australian civil liability legislation: *Civil Liability Act 2002* (NSW), s 5R; *Civil Liability Act 2003* (Qld), s 23; *Civil Liability Act 1936* (SA) s 44; *Civil Liability Act 2002* (Tas), s 23; *Wrongs Act 1958* (Vic,) s 5K; *Civil Liability Act 2002* (WA), s 5K. There are no equivalent provisions in the legislation of the Australian Capital Territory and the Northern Territory. See also J G

There is no provision in the TPA that states that the conduct of the claimant must be assessed on the same objective basis as the defendant's. A court may consider characteristics of the claimant, such as business inexperience, as relevant when determining whether reasonable care was exercised. Therefore bad business decisions and deviation from selling the core products of the franchise could be seen as reasonable in light of the inexperience of the franchisee.[36] In *Gardner Corporation Pty Ltd v Zed Bears Pty Ltd*[37] in similar circumstances to those described, Stetyler J applied the principles from *Henville*[38] and *I&L Securities*[39], and awarded the full loss, reasoning that the conduct of the claimant was not "abnormal" and the decisions "were ordinary business decisions made in the course of the operation of the business by a person who was, and who was known to be, inexperienced in the running of a business of that kind".[40]

4.1.2 Arguments by defendant for application of s 82(1B)

If intention is widely interpreted, the interpretation of s 82(1B)(c) may be further debated by a defendant seeking apportionment. The paragraph refers to the intention to cause "the loss or damage" not "some loss or damage".[41] Therefore in this situation the defendant could argue that the statements as to the expected profit of the franchise may have been inflated, but that it was not intended to cause the extent of the loss actually suffered by the franchisee.

However, a policy influenced court is more likely to interpret "the loss or damage" as merely some form of loss or damage rather than the damage or loss that may have been intended. Therefore, an argument that the franchisee suffered loss or damage to a greater extent than intended would not result in apportionment of that additional loss or

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Fleming, *The Law of Torts* (1998), 9th ed, Law Book Co, p 320; H Luntz and D Hambly, *Torts: Cases and Commentary* (2002), 5th ed, LexisNexis Butterworths, [6.2.4]; F Trindade and P Cane, *The Law of Torts in Australia* (1999), 3rd ed, Oxford University Press, p 565; F McGlone and A Stickley, *Australian Torts Law* (2005), LexisNexis Butterworths, [13.10]; *Caterson v Commissioner of Railways* (1973) 128 CLR 99.

36 See *Gardner Corporation Pty Ltd v Zed Bears Pty Ltd* [2003] WASC 13 (23 January 2003), where Stetyler J, applying the principles from *Henville* and *I&L Securities*, awarded the full the loss, reasoning that the conduct of the claimant was not "abnormal" and the decisions "were ordinary business decisions made in the course of the operation of the business by a person who was, and who was known to be, inexperienced in the running of a business of that kind" (at [78]).

37 [2003] WASC 13 (23 January 2003).

38 (2001) 206 CLR 459.

39 (2002) 210 CLR 109.

40 Ibid at [78].

41 An obvious example is that if the defendant intended to cause the claimant economic loss, but instead they suffered property damage, s 82(1B) may not apply.

damage. The policy of consumer protection would require a defendant who intentionally inflicted loss or damage to be responsible for the whole of that loss, even if it exceeded what was intended.

4.2 Truth of the misleading or deceptive silence would have been discovered if information verified

Many situations involve silence on the part of the defendant of a fact that could have been discovered by the claimant had a check of the information been carried out to verify the situation. For example, a person buys a restraunt business that is licensed to seat 100 people, but the restaurant has 120 seats when inspected and the profit statements are the result of the restaurant utilising the 120 seats. The defendant (the vendor) does not inform the purchaser of the difference and the solicitor acting for the purchaser does not carry out any check with the licensing authority – a simple check that would have discovered the truth of the situation.[42] Such silence is misleading or deceptive conduct and prior to the amendment of s 82 the failure to check the licence would not have prevented the purchaser from recovering all of their loss. But could the defendant now seek apportionment on the grounds that by failing to carry out the usual investigations involved in the purchase of a business, the purchaser failed to take reasonable care and this failure has contributed to the loss of the purchaser?

4.2.1 Arguments by purchaser to avoid application of s 82(1B)

In order to avoid any reduction in damages the purchaser could argue that by remaining silent the defendant either intentionally or fraudulently caused the loss; or that the failure to investigate the licence did not amount to a failure to exercise reasonable care on their part.

Silence is accepted as coming within the definition of "conduct" in s 4(2) of the TPA and as to whether the silence is misleading or deceptive, it will depend upon whether in light of all of the circumstances there is a reasonable expectation that if a relevant fact existed it would be disclosed.[43] A defendant who has engaged in misleading or deceptive conduct by silence arguably has deliberately kept silent with the knowledge that the silence would induce the purchaser to purchase the business. A broad interpretation of intention to cause loss as being equivalent to an intention to mislead

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42 Facts of *Collins Marrickville Pty Ltd v Henjo Investments Pty Ltd* (1987) 72 ALR 601.

43 *Demagogue Pty Ltd v Ramensky* (1992) 110 ALR 608. See also *Hai Quan Global Smash Repair v Ledabow Pty Ltd* (2004) ATPR 42-025*; Metalcorp Recyclers Pty Ltd v Metal Manufactures Ltd* [2003] NSWCA 213 at [14].

would assist the careless purchaser, as it could be argued that by remaining silent the defendant intended to cause the loss and therefore no apportionment would be allowed under s 82(1B).

Alternatively it may be argued that by remaining silent the defendant knew the purchaser's understanding of the licensed seating capacity of the restaurant to be false. Under the common law "fraud" is defined as knowing a statement to be false, not believing it to be true or being recklessly indifferent as to whether it was true or false.[44] "Fraud" in s 82(1B) would be given the same interpretation due to the acceptance by the courts previously of the application of the principles of the action for deceit at common law.[45]

With the introduction of apportionment between the claimant and the defendant under s 82(1B) there may be an increase in allegations of intent to cause loss and fraud against defendants by claimants seeking to avoid a reduction of damages for their own lack of care.[46] The exclusion from the apportionment process of intentional and fraudulent conduct will no doubt make them "central feature[s] of misrepresentation litigation".[47]

In respect of an argument that a failure to check information does not amount to a failure to exercise reasonable care, even members of the minority in *Henville* and *I&L Securities*, were against a defendant avoiding liability simply because the truth of a statement could have been ascertained by the claimant. Chief Justice Gleeson stated in *Henville*:

> It will commonly be the case that a person who is induced by misleading or deceptive representation to undertake a course of action will have acted carelessly, or will have been otherwise at fault, in responding to the inducement. The purpose of the legislation is not restricted to the protection of the careful or astute.[48]

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44 *Derry v Peek* (1889) 14 App Cas 337 at 360.

45 *Henville v Walker* (2001) 206 CLR 459 at [135]; 182 ALR 37. The consumer protection policy of the TPA aligns with the common law in that intentional, fraudulent conduct does not allow a claim of contributory negligence: *Venning v Chin* (1974) 10 SASR 299 at 317 per Bray CJ (intentional tort of trespass); *Standard Chartered Bank v Pakistan National Shipping Corporation (Nos 2 and 4)* [2002] 3 WLR 1547 (fraud).

46 See B McDonald "Proportionate Liability in Australia: The devil in the detail' (2005) 26 *ABR* 29 at 49, where it is considered that as insurance policies may not cover fraud, a claimant may not wish to allege it.

47 J Watson, 'From Contribution to Apportioned Contribution to Proportionate Liability' (2004) 78 *ALJ* 126 at 142.

48 (2001) 206 CLR 459 at [13].

Justice Kirby in *I&L Securities* did not think that a failure to check accuracy could be used to reduce a claimant's damages, noting:

> The result would have been different if the supposed separate cause of the appellant's loss or damage had been its failure to detect and correct the negligent valuation of the respondent. For such causes of loss, s 82 of the Act contemplates no diminution in the consumer's recovery from the party in contravention of the Act that has caused its loss or damage. The contravener is forbidden from asserting 'You should not have believed me when I misled you'.[49]

Relying upon the consumer protection policy of the Act and the comments from members of the High Court who were in favour of apportionment before the amendment, the purchaser is likely to be successful in arguing that the failure to check was not a failure to exercise reasonable care.

However, should such an argument fail and the court applies s 82(1B), satisfied that the purchaser's failure to check was a failure to exercise reasonable care and that it has contributed to their loss, consumer protection policy may still be able to rescue the careless purchaser. The new subsection requires that the court must reduce the damages as it thinks "just and equitable" - in such a scenario would a court think it "just and equitable" to reduce the purchaser's damages?[50]

A court intent on providing the consumer the highest protection may decide that the circumstances of the case lead to a conclusion that, despite the claimant's conduct, the just and equitable apportionment in the circumstances should be 0% to the purchaser and 100% to the defendant, however, this will depend upon whether an assessment of 100% is permitted.

Before the High Court decision of *Wynbergen v Hoyts Corporation*,[51] it was thought that if the circumstances justified it, a court could reduce a plaintiff's damages by 100% based upon their contributory negligence. But in *Wynbergen* it was held that a 100% reduction could not be regarded as just and equitable.[52] Due to the similarity of the wording of s 82(1B) with the state apportionment legislation, this decision presents a

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49 (2002) 210 CLR 109 at 165 [182].

50 As to what is "just and equitable" it is purely at the discretion of the court. Under the common law the culpability of the plaintiff and defendant are compared in light of all of the circumstances: *Pennington v Norris* (1956) 96 CLR 10 at 16; *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529; *Joslyn v Berryman* (2002) 214 CLR 552; 77 ALJR 1233; 198 ALR 137.

51 (1998) 149 ALR 25.

52 Ibid at 29.

significant hurdle for a court intent on the protection of consumers. However, the court may be able to rely upon the consumer protection argument as a justification for attributing 0% to the purchaser and the fact that the civil liability legislation in many of the Australian jurisdictions now permits a finding of 100% to a plaintiff under the civil liability legislation. [53]

4.3 Experienced consumer careless in investigations prior to transaction

Another common scenario is where an experienced consumer relies upon the misleading or deceptive statements of another and their own investigations carried out prior to entering into the transaction are negligent and do not expose the truth of the situation. For example, if a corporate real estate agent makes statements to a property developer that indicate that a suburb has good growth potential and states what a new property development would be able to be to sold at, such a statement could be in breach of s 52 if the agent had no grounds for making such a statement as no property in the are had achieved such prices. However, what if the developer carries out its own investigations and due to its own carelessness its investigations do not reveal the falsity of the agent's information and the new development sells at a loss?[54]

Prior to s 82(1B) it would have been likely that a court would have allowed the developer to be fully compensated, despite the fact that its own negligence had contributed to its loss.

4.3.1 Arguments by developer to avoid application of s 82(1B)

Depending upon the interpretation of intention to cause the loss or damage, it could be argued that the evidence that no properties had been sold in the area at such prices was proof of an intention to mislead or deceive and therefore no apportionment could be made due to the exclusion in s 82(1B)(a).

4.3.2 Arguments by defendant for application of s 82(1B)

Putting aside the issue of the possible wide interpretation of an intention to cause the loss or damage, could s 82(1B) be relied upon by the estate agent or would the developer be able to rely upon the exclusions? It is possible that in light of the actual

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53 A reduction of a plaintiff's damages of 100% to be made is permissible: *Civil Liability Act 2002* (NSW) s 5S; *Civil Liability Act 2003* (Qld), s 24*; Wrongs Act 1954* (Tas), s4(1); *Wrongs Act 1958* (Vic), s 63; *Civil Law (Wrongs) Act 2002* (ACT), s 47.

54 These facts are similar to *Henville v Walker* (2001) 206 CLR 506.

negligence of the developer, in contrast to inexperience or a mere failure to verify information, a court is more likely to apply s 82(1B). The experience of the developer raises the standard that may be expected of them in carrying out investigations prior to entering into the transaction. In such circumstances it is obvious that the developer has failed to exercise reasonable care in its own investigations and this failure has combined with the misleading conduct of the estate agent to cause the loss, satisfying s 82(1B)(b). Therefore a court would have to reduce the developer's damages to the extent as it thinks just and equitable having regard to the loss that was caused by their own carelessness.

As noted, not all members of the High Court have favoured the "all or nothing" approach. Although Gleeson CJ adopted the "all or nothing approach" in *I&L Securities*,[55] in *Henville*[56] his Honour, then in the minority, stated that neither the purpose of the TPA nor the justice of the case should lead to the defendant being liable for all losses.[57] And Kirby J in *I&L Securities* held (a sentiment shared by Callinan J):

> The principle of consumer protection reflected in the Act is one of fairness to consumers. Except to the extent expressly provided in terms of penalties and punishments, it is not one of over-compensation and unjust excess. Providing windfall gains to litigants is not part of the scheme of the legislation. That scheme contemplates that all should be responsible, but only responsible, for the damage that they cause.[58]

The consumer protection principles may however still benefit the careless developer as the phrase "just and equitable" allows a court to take into any factors it thinks relevant - not only the issue of causation between the developer's lack of care and the loss suffered. Therefore in assessing culpability and comparing how far each party deviated from the standard of reasonable care expected, a court may justify reducing the damages of the developer to a lesser degree than would be done if causation was the only relevant factor. A court may take into account the knowledge that a real estate agent would be expected to possess about the sale of properties in their area, in contrast to a developer without such local knowledge to justify a smaller reduction in damages.

5. Conclusion

55 (2002) 210 CLR 109.
56 (2001) 206 CLR 459.
57 (2001) 206 CLR 459 at [35]; 182 ALR 37.
58 (2002) 210 CLR 109; 192 ALR 1 at [178].

It is clear that the policy of the TPA plays a significant role in its interpretation and will no doubt continue to do so. The TPA was intended to "to protect all Australians against unfair practices",[59] but the policy of consumer protection was relied upon to place a misleading or deceptive defendant as the bearer of all losses unless the chain of causation between the conduct and the loss was broken. The case law establishes that proving such a break to a court intent on consumer protection was no easy task.

A court intent on protecting the consumer to the highest degree will face challenges with s 82(1B). The introduction of apportionment indicates that the intention of the Parliament is that a defendant in breach of s 52 is not to be placed in the role of insurer of all loss. But 'the mind of a judge naturally searches for an alternative construction that avoids such an affront to justice'[60] as Kirby J noted in *I&L Securities.* Therefore consumer protection policy influencing the interpretation of s 82(1B) may ensure that the TPA continues to protect and compensate the careless consumer to the fullest extent possible.

The membership of the High Court has undergone change since the decisions of *Henville*[61] and *I&L Securities*.[62] Therefore the door is open for the newly constituted court to adopt a fairer and more just approach to providing compensation under s 82 that, as evidenced by Kirby J's dissenting judgment in *I&L Securities*, still upholds the consumer protection policy of the TPA. Acknowledging a claimant's own responsibility for the loss they have suffered due to their own carelessness does not erode the principles of consumer protection, but encourages fairness to all consumers.

Until the High Court is required to determine the interpretation of s 82(1B), it can only be assumed that consumer protection will continue to be the major influence but with interpretation influenced by the principles of consumer protection, the careless consumer may still be protected.

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59 Senate Hansard, 30 July 1974.

60 (2002) 210 CLR 109 at [178].

61 (2001) 206 CLR 459.

62 (2002) 210 CLR 109. Justice Gaurdron retired from the High Court in 2003 and McHugh J in 2005.