

2016

Evaluating a Lost Opportunity to Sue

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Abstract

Where a defendant's wrong deprived the plaintiff of an opportunity to bring an action and obtain a judgment against a third party, the court deciding on the defendant's liability will determine how the action against the third party would have been decided rather than forming a view on whether the plaintiff ought to have succeeded. The plaintiff's loss will be assessed by reference to the degree of probability that the hypothetical action would have succeeded. Two figures must thus be determined: the likely amount that the plaintiff would have been awarded had an action against the third party been successfully brought, and the probability that such an action would have been successful. This article explores the principles governing the determination of those two figures. In addition, this article investigates how benefits obtained by the plaintiff as a result of the third party's wrong impact upon the defendant's liability.

Keywords

civil wrong, third party, plaintiff, liability

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Abstract

Where a defendant's wrong deprived the plaintiff of an opportunity to bring an action and obtain a judgment against a third party, the court deciding on the defendant's liability will determine how the action against the third party would have been decided rather than forming a view on whether the plaintiff ought to have succeeded. The plaintiff's loss will be assessed by reference to the degree of probability that the hypothetical action would have succeeded. Two figures must thus be determined: the likely amount that the plaintiff would have been awarded had an action against the third party been successfully brought, and the probability that such an action would have been successful. This article explores the principles governing the determination of those two figures. In addition, this article investigates how benefits obtained by the plaintiff as a result of the third party's wrong impact upon the defendant's liability.

I Introduction

A civil wrong may deprive the victim of an opportunity to bring an action,¹ and obtain judgment, against a third party.² This may occur, for example, where a solicitor negligently fails to institute proceedings before the client's action against the third party becomes statute-barred,³ or negligently allows the action to be dismissed for want of prosecution (that is, an inordinate delay in moving the proceedings along),⁴ or wrongfully advises the client to abandon or settle the action.⁵ In such cases, the plaintiff must prove, on the balance of probabilities, that proceedings

* Reader, Sussex Law School. The author is grateful for helpful comments by two anonymous reviewers.

¹ The rules discussed in this article apply at least where the wrong is a breach of contract, fraud, negligence, or misleading or deceptive conduct under statute: see *Johnson v Perez* (1988) 166 CLR 351, 363 (Wilson, Toohey and Gaudron JJ).

² Instead of depriving the plaintiff of an opportunity to go to court, the defendant's wrong may deprive the plaintiff of an opportunity to initiate arbitration proceedings against the third party. The principles governing the assessment of the plaintiff's loss are the same: see *Mills v Bale* [2010] NSWDC 162. For convenience, this article refers only to hypothetical litigation.

³ See, eg, *Nikolaou v Papasavas, Phillips & Co* (1989) 166 CLR 394; *Green v Berry* [2001] 1 Qd R 605; *Leitch v Reynolds* [2005] NSWCA 259 (5 August 2005); *Nigam v Harm [No 2]* [2011] WASCA 221 (18 October 2011).

⁴ See, eg, *Johnson v Perez* (1988) 166 CLR 351. The principles governing the dismissal of an action for want of prosecution were discussed in *Tyler v Custom Credit Corp Ltd* [2000] QCA 178 (19 May 2000) [2], [5] (Atkinson J).

⁵ See, eg, *Chamberlain v Ormsby* [2005] NSWCA 454 (21 December 2005); *Worthington v Da Silva* [2006] WASCA 180 (7 September 2006); *Firth v Sutton* [2010] NSWCA 90 (30 April 2010); *Rosa v Galbally* (2013) 42 VR 382.

against the third party would have been issued and pursued but for the defendant's wrong.⁶

The determination of the defendant's liability and of the quantum of the plaintiff's loss requires a choice between two approaches: (1) determining whether the plaintiff's hypothetical action against the third party ought to have succeeded,⁷ or (2) determining whether that action would in fact have succeeded. Under the first approach — determining whether the plaintiff's hypothetical action against the third party ought to have succeeded — a plaintiff may be denied compensation even though the hypothetical action would have succeeded (because, for example, new evidence shows that the plaintiff had no claim),⁸ and a plaintiff may obtain compensation even though the hypothetical action would have failed (because, for example, new evidence shows that the plaintiff did have a claim). While this approach was endorsed by Brennan J in the High Court of Australia in *Sellers v Adelaide Petroleum NL*,⁹ the second approach has prevailed; that is, Australian courts determine whether the hypothetical action would in fact have succeeded, not whether it ought to have succeeded.¹⁰

Under the approach of determining whether the plaintiff's hypothetical action against the third party would in fact have succeeded, the determination of the defendant's liability and the assessment of the plaintiff's loss are straightforward where it is certain how the plaintiff's action against the third party would have been decided upon. In *Johnson v Perez*,¹¹ the High Court of Australia approvingly quoted the following statement made by Lord Evershed MR in *Kitchen v Royal Air Force Association*:

⁶ See, eg, *Worthington v Da Silva* [2006] WASCA 180 (7 September 2006) [118] (Buss JA); *Firth v Sutton* [2010] NSWCA 90 (30 April 2010) [104] (Allsop P); *Nigam v Harm (No 2)* [2011] WASCA 221 (18 October 2011) [145] (Newnes JA); *Liddy v Bazley* [2013] NSWCA 319 (27 September 2013) [8] (Basten JA). It is not necessary to prove that proceedings would have reached final judgment; it is sufficient to prove that proceedings would have been pursued to final judgment or earlier valuable settlement: *Falkingham v Hoffmans* (2014) 46 WAR 510, 525–6 [52], 526 [54] (Pullin and Murphy JJA), 558 [242] (Buss JA).

⁷ In a two-party context, this approach was taken in *Harrison v Harrison* [2013] VSCA 170, where a promise made by the defendant, which gave rise to proprietary estoppel, caused the plaintiffs to abandon an inheritance-related claim against the defendant.

⁸ Such an outcome might be justifiable on the ground that the duty breached by the defendant does not aim to protect an undeserved success in litigation.

⁹ (1994) 179 CLR 332, 368. See also David Hamer, “‘Chance Would Be a Fine Thing’: Proof of Causation and Quantum in an Unpredictable World” (1999) 23(3) *Melbourne University Law Review* 557, 608.

¹⁰ See, eg, *Tutunkoff v Thiele* (1975) 11 SASR 148, 150–1 (Bray CJ): ‘[W]hat I have to decide is what the plaintiff has lost by the defendant's negligence and what he has lost is what a court would have awarded him in an action by him against his employer, not what I would award if the present action were an action against the employer’; *Rosa v Galbally* [2012] VSC 3 (31 January 2012) [38] (Macaulay J): ‘The task I am performing, however, is not to find for myself whether or not the hospital was negligent or whether or not Mrs Rosa was contributorily negligent but, rather, to assess the prospects of success or failure before the hypothetical court on those issues’.

¹¹ (1988) 166 CLR 351, 364 (Wilson, Toohey and Gaudron JJ), 371–2 (Brennan J), 390 (Dawson J).

If, in this kind of action, it is plain that an action could have been brought, and if it had been brought that it must have succeeded, of course the answer is easy. The damaged plaintiff then would recover the full amount of the damages lost by the failure to bring the action originally. On the other hand, if it be made clear that the plaintiff never had a cause of action, that there was no case which the plaintiff could reasonably ever have formulated, then it is equally plain that the answer is that she can get nothing save nominal damages for the solicitors' negligence.¹²

However, the outcome of a hypothetical action is rarely certain. There are two fundamentally different ways in which this uncertainty may be resolved. First, it may be resolved on the balance of probabilities. Under that approach, if it is more likely than not that the action against the third party would have been successful, damages will be awarded in the likely amount that the plaintiff would have recovered from the third party had the action against the third party been successful; otherwise, no substantive damages will be awarded. Alternatively, damages may be assessed by multiplying two figures: the likely amount that the plaintiff would have recovered from the third party had the action been successful, and the probability (expressed as a percentage figure) that the action would have been successful.

In determining liability for pure economic loss, Australian courts do not apply the same method of resolving factual uncertainties to all hypothetical past events. In particular, while uncertainties as to hypothetical past conduct of the plaintiff are determined on the balance of probabilities,¹³ losses dependent upon hypothetical past conduct of third parties are assessed by reference to the degree of probability of the conduct occurring but for the defendant's wrong.¹⁴ These principles cannot easily be applied to hypothetical litigation between the plaintiff and a third party, because it is usually impossible to disentangle the numerous actions by the parties involved in hypothetical litigation. Hypothetical actions of the plaintiff and of third parties (the defendant and the judge in the hypothetical proceedings) are inextricably

¹² [1958] 1 WLR 563, 574–5.

¹³ *Crown Insurance Services Pty Ltd v National Mutual Life Association of Australasia Ltd* [2005] VSCA 218 (1 September 2005) [14] (Buchanan JA); *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666, 674 [22] (Nettle JA); *La Trobe Capital & Mortgage Corp Ltd v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299, 318 [89] (Finkelstein J); *Doolan v Renkon Pty Ltd* (2011) 21 Tas R 156, 175 [60].

¹⁴ *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 355 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Heenan v Di Sisto* [2008] NSWCA 25 (11 March 2008) [28] (Giles JA); *Hendriks v McGeoch* [2008] NSWCA 53 (2 April 2008) [87]–[99] (Basten JA); *La Trobe Capital & Mortgage Corp Ltd v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299, 321 [97]–[102] (Finkelstein J).

interwoven,¹⁵ and a holistic assessment must be made of the mix of possible actions.¹⁶

In *Johnson v Perez*, where it was undisputed that the hypothetical action the plaintiff had been denied from bringing due to the defendants' negligence would have been successful, Brennan J observed that it should be determined on the balance of probabilities whether or not the plaintiff's action against the third party would have been successful.¹⁷ However, the alternative approach has since prevailed.¹⁸ It is now settled that the plaintiff's loss is to be assessed by reference to the degree of probability that the action against the third party would have been successful.¹⁹ For example, in *Nikolaou v Papasavas, Phillips & Co* ('*Nikolaou*'), Mason CJ said:

The Court must ascertain the value of what the appellant lost as a result of the solicitors' negligence. It will need to determine what the appellant would have recovered but for that negligence and will need to discount that amount by the chance that he would not have been successful in that claim ...²⁰

Under Australian law, two figures must thus be determined in order to evaluate a lost opportunity to sue: the likely amount that the plaintiff would have recovered from the third party had the action been pursued and been successful, and the probability (as a percentage figure) that the hypothetical action would have been successful.²¹ Strictly, the first figure is not the amount that the third party would have been ordered to pay to

¹⁵ It may also be relevant what the defendant solicitor would have done during the hypothetical proceedings. It is unclear whether loss dependent upon hypothetical past conduct of the defendant is assessed on the balance of probabilities or by reference to the degree of probability; see Katy Barnett and Sirko Harder, *Remedies in Australian Private Law* (Cambridge University Press, 2014) 38–9.

¹⁶ For a general discussion of how a mix of different types of event is and should be treated, see Sirko Harder, 'Assessing Loss Dependent upon Hypothetical Past Events' (2014) 19 *Deakin Law Review* 199, 213–15.

¹⁷ (1988) 166 CLR 351, 372. In *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 368, Brennan J re-interpreted his statement in *Johnson v Perez* as endorsing a determination of whether the hypothetical action *ought* to have succeeded.

¹⁸ The conflict between Brennan J's statement in *Johnson v Perez* and subsequent decisions by the High Court was pointed out in *Falkingham v Hoffmans* (2014) 46 WAR 510, 556 [234] (Buss JA). However, a determination on the balance of probabilities was endorsed in *Molinara v Perre Bros Lock 4 Pty Ltd* (2014) 121 SASR 61, 73–4 [48] (Kourakis CJ).

¹⁹ *Johnson v Perez* (1988) 166 CLR 351, 391 (Dawson J); *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 119 (Deane J); *Green v Berry* [2001] 1 Qd R 605, 612 [7]–[8] (McMurdo P), 619 [36] (Pincus JA), 620 [42] (Jones J); *Radosavljevic v Radin* [2003] NSWCA 217 (13 August 2003) [51] (Mason P); *Dunn v Firth* [2003] NSWCA 280 (3 October 2003) [68] (Beazley JA); *Leitch v Reynolds* [2005] NSWCA 259 (5 August 2005) [85]–[86] (Santow JA); *Worthington v Da Silva* [2006] WASCA 180 (7 September 2006) [125]–[130] (Buss JA); *Firth v Sutton* [2010] NSWCA 90 (30 April 2010) [160]; *Nigam v Harm (No 2)* [2011] WASCA 221 (18 October 2011) [258]–[266] (Murphy JA); *Liddy v Bazley* [2013] NSWCA 319 (27 September 2013) [16]–[19] (Basten JA); *Karabay v Carr* [2014] NSWCA 143 (8 May 2014) [44]; *Falkingham v Hoffmans* (2014) 46 WAR 510 523 [44] (Pullin and Murphy JJA), 553 [219] (Buss JA).

²⁰ (1989) 166 CLR 394, 400.

²¹ The determination of either figure may require the court to make findings of fact: *Leitch v Reynolds* [2005] NSWCA 259 (5 August 2005) [40] (Santow JA); *Mills v Bale* [2010] NSWDC 162 (4 August 2010) [643]–[669].

the plaintiff, but the amount that the plaintiff would in fact have obtained from the third party (through enforcement procedures if necessary).²² However, the fact that the plaintiff may not have obtained full satisfaction of the hypothetical judgment has not been raised in the cases (because the third party was always insured or otherwise ‘deep-pocketed’) and will be ignored here. On that basis, the two figures that determine the value of a lost opportunity to sue are the amount of the hypothetical award and the probability of the hypothetical action succeeding.

This article explores the rules of Australian law that govern the determination of those two figures. With regard to the first figure, this article ascertains the precise effects of the sometimes misunderstood decisions by the High Court of Australia in *Johnson v Perez* and in *Nikolaou*. With regard to the second figure, this article analyses the problematic decision by the Victorian Court of Appeal in *Rosa v Galbally*.²³ This article will also investigate how the defendant’s liability is affected by benefits obtained by the plaintiff as a result of the event that gave rise to the plaintiff’s claim against the third party.²⁴ In that context, this article examines the decision by the New South Wales Court of Appeal in *Firth v Sutton*,²⁵ which has been misunderstood by the same court in several recent cases.

II Amount of the Hypothetical Award

One figure that must be determined in order to evaluate a lost opportunity to sue is the likely amount that the third party would have been ordered to pay to the plaintiff had the latter successfully sued the former. The trial in the action against the defendant often takes place a considerable time after the third party’s wrong. In the meantime, there may have been changes in the law governing the assessment of compensation for that type of wrong (including a change in the courts’ approach to assessing damages), in the general economic conditions or in the plaintiff’s individual circumstances. It is therefore necessary to choose a point in time by reference to which those matters are determined. This is done through the concept of the ‘date of assessment’.

As a general rule, damages for breach of contract or tort are assessed as at the ‘date of breach’,²⁶ or, more precisely, the date the cause of action

²² *Falkingham v Hoffmans* (2014) 46 WAR 510, 523 [44] (Pullin and Murphy JJA).

²³ (2013) 42 VR 382.

²⁴ If the third party has committed a wrong against the plaintiff, the defendant and the third party are not liable for the ‘same damage’ for the purpose of contribution or proportionate liability: *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, 633–4 [38]–[40] (French CJ, Hayne and Kiefel JJ), 650–1 [97] (Bell and Gageler JJ).
²⁵ [2010] NSWCA 90 (30 April 2010).

²⁶ See, eg, *Johnson v Perez* (1988) 166 CLR 351, 355 (Mason CJ), 367 (Wilson, Toohey and Gaudron JJ), 380 (Deane J); *McCrohon v Harith* [2010] NSWCA 67 (8 April 2010) [54]; *Vieira v O’Shea* [2012] NSWCA 21 (5 March 2012) [44]. The rules on the date of assessment for various types of civil wrong are discussed by Barnett and Harder, above n 15, 41–6.

accrued.²⁷ In the circumstances under discussion, this is the date at which the plaintiff lost the (supposed) claim against the third party because it became statute-barred, was dismissed or was settled.²⁸ As an important exception to the general rule, damages for personal injury are usually assessed as at the date of the judgment (or trial).²⁹

However, the fact that the concept of the date of assessment is used for different issues (applicable law, purchasing power of money, etc) has led to uncertainty in the present context. It is difficult to ascertain the ratios of the judgments delivered by the High Court of Australia in the key cases of *Johnson v Perez*,³⁰ which was decided first, and *Nikolaou*.³¹ These cases were heard contemporaneously by the same seven judges. While two separate decisions were handed down, it is clear that the judgments by the same judge or judges in the two cases were meant to be consistent with each other. In *Nikolaou*, no judge intended to deviate from what he or she had said in *Johnson v Perez*.

In *Johnson v Perez*,³² the plaintiff's actions against his former employers in respect of work-related injuries were dismissed for want of prosecution, as a result of negligence on the part of the plaintiff's solicitors. It was undisputed that, had the personal injury actions been duly pursued, the employers would have been ordered to pay damages to the plaintiff and would have been in a financial position to do so.³³ In the years between the work accidents and the trial in the action against the defendant solicitors, the level of damages awarded for personal injury rose considerably. The trial judge assessed damages according to the prevailing awards at the time of his decision. On appeal in the High Court of Australia, Brennan J,³⁴ and in a separate judgment Deane J,³⁵ agreed with that approach. The other five judges ordered a new trial limited to damages, on the ground that the trial judge had used the wrong date. However, the majority judges took differing views as to the correct date.

Mason CJ said that the date of the notional trial should be used as the date of assessment because in the absence of the defendants' negligence the plaintiff would not have been entitled to benefit from the subsequent rise in personal injury awards.³⁶ Dawson J said that damages should be

²⁷ *Slaveski v State of Victoria* [2010] VSC 441 (1 October 2010) [2127]; *Simply Irresistible Pty Ltd v Couper* [2010] VSC 601 (17 December 2010) [398] n 130; *Souter v Condor Developments Pty Ltd* [2012] WASCA 227 (9 November 2012) [41]. See also *Saric v Tehan* (2011) 33 VR 632, 636–7 [10] (Mandie JA).

²⁸ *Johnson v Perez* (1988) 166 CLR 351, 363 (Wilson, Toohey and Gaudron JJ), 389 (Dawson J).

²⁹ *Richardson v Whymark Nominees Pty Ltd* [2004] WASCA 208 (16 September 2004) [289]–[290] (Jenkins J); *Warrick v Bryan* [2005] WASCA 70 (13 April 2005) [91]–[93]; *Berryman v Hames Sharley (WA) Pty Ltd* (2008) 38 WAR 1, 116 [763]; *Goodman v Impact Hire Australia Pty Ltd* [2009] NSWSC 941 (11 September 2009) [6]–[7].

³⁰ (1988) 166 CLR 351.

³¹ (1989) 166 CLR 394.

³² (1988) 166 CLR 351.

³³ *Ibid* 364.

³⁴ *Ibid* 376–8.

³⁵ *Ibid* 380–4.

³⁶ *Ibid* 360–1.

assessed as at the date of the wrong, defined as the date at which the actions against the employers had been dismissed.³⁷ In a joint judgment, Wilson, Toohey and Gaudron JJ said that there was no reason to depart from the general principle that damages are assessed as at the date of the wrong,³⁸ but that changes in the law (including court practice in assessing damages) subsequent to the notional trial date should not be taken into account.³⁹

The High Court's decision has created confusion. In one subsequent case, the plurality's judgment in *Johnson v Perez* was cited as authority for the proposition that damages for a lost opportunity to sue are to be assessed as at the date of the notional trial in the action against the third party.⁴⁰ This proposition is too broad. With regard to all issues other than the applicable law (such as the purchasing power of money), the plurality and Dawson J in *Johnson v Perez* endorsed the date of the defendant's wrong, and not the date of the notional trial, as the date of assessment. In other subsequent cases, it was said that the ratio of the High Court's decision in *Johnson v Perez* was that damages for a lost opportunity to sue are to be assessed as at the date of the defendant's wrong.⁴¹ This is not entirely accurate either, for in respect of the applicable law, which was the issue before the High Court in *Johnson v Perez*, the plurality and Mason CJ endorsed the date of the notional trial as the date of assessment in the event that the date of the notional trial precedes the date of the wrong.

In *Nikolaou*,⁴² the plaintiff suffered injuries in a car accident in 1976. He instructed the defendant solicitors to make a claim for those injuries against the nominal defendant. No such claim was made and, before the plaintiff discovered that fact, the claim became statute-barred in September 1979. In mid-1981, the plaintiff stopped working, due to a psychiatric illness caused by the accident. He then brought an action against the defendants for the loss of his opportunity to bring the personal injury claim against the nominal defendant.

The parties agreed that, had an action against the unidentified driver been brought in time, the unidentified driver would have been found negligent and the plaintiff would have been found contributorily negligent to the extent of 25 per cent. It was found that the defendant solicitors had been negligent and that, but for that negligence, the personal injury claim would have been heard in late 1979 or early 1980. The trial judge assessed damages as at the time of his judgment (in 1986), having regard to the plaintiff's psychiatric illness. The Full Court of the Supreme Court of Victoria ordered a new trial limited to damages, on the ground that the

³⁷ Ibid 391–2.

³⁸ Ibid 367–8.

³⁹ Ibid 369.

⁴⁰ *Da Silva v Fiocco Hopkins Nash* (2005) 38 SR (WA) 88 (3 March 2005) 110 [142].

⁴¹ *Turner v George Weston Foods Ltd (Newcastle)* [2007] NSWCA 67 (30 March 2007) [29], [31]; *Steve Masselos & Co v Young* [2011] NSWCA 352 (21 November 2011) [13].

⁴² (1989) 166 CLR 394.

plaintiff's loss should be assessed by reference to his circumstances at the date of the notional trial in the personal injury action. The plaintiff's appeal to the High Court of Australia was rejected by a majority (Deane J dissenting).⁴³

Mason CJ, referring to his judgment in *Johnson v Perez*, said that the date of the notional trial should be the date of assessment.⁴⁴ Brennan J said that the plaintiff's loss should be assessed by reference to his or her circumstances at the time of the notional trial, including the possibility, but not probability, of developing a psychiatric illness. It should be noted that Brennan J had made a similar statement in *Johnson v Perez*.⁴⁵ In a joint judgment, Wilson, Dawson, Toohey and Gaudron JJ said that damages should be assessed as at the date when the plaintiff's claim for personal injuries had become statute-barred.⁴⁶ They expressed disagreement with the Full Court, which had endorsed the date of the notional trial, saying that 'it is necessary to speak of the date when the cause of action against the solicitors arose rather than the notional date of trial of the action against the Incorporated Nominal Defendant'.⁴⁷

It should be clear from those statements in *Nikolaou* that the plurality endorsed the date of the defendant's wrong as the date of assessing the value of a lost opportunity to sue.⁴⁸ However, two other statements of the plurality create some uncertainty. First, the plurality also said that the date of the notional trial needed to be determined in assessing the plaintiff's loss.⁴⁹ This is puzzling, for that date should be irrelevant if the reference date is the date of the defendant's wrong. Secondly, the difference between the view of the Full Court and that of the plurality in the High Court was downplayed in the High Court's separate decision on the costs of the appeal to that court. The plaintiff argued that he should not bear those costs because the High Court had dismissed the appeal on grounds that differed from the reasons given by the Full Court. In a joint judgment, the six majority judges in the High Court said that

it did not appear that the approach taken by the Full Court as to the use that may be made of events after the time at which the plaintiff's claim for damages for personal injury ... was likely to be heard ... was at variance with the approach taken by the majority in this Court.⁵⁰

In *Nikolaou*, the difference between the date of the defendant's wrong and the date of the notional trial was indeed small — only a few months.

⁴³ Ibid 407. In *Johnson v Perez* (1988) 166 CLR 351, 392, Dawson J opined that consequential loss suffered after the date of the notional trial should be taken into account if, at the time of the defendant's wrong, such loss was foreseen as probable.

⁴⁴ (1989) 166 CLR 394, 398–9.

⁴⁵ Ibid 376–7.

⁴⁶ Ibid 404.

⁴⁷ Ibid 403.

⁴⁸ See *Falkingham v Hoffmans* (2014) 46 WAR 510, 555 [229] (Buss JA).

⁴⁹ *Nikolaou* (1989) 166 CLR 394, 404 (Wilson, Dawson, Toohey and Gaudron JJ).

⁵⁰ Ibid 408. Deane J abstained from participating in the cost decision because he was in dissent in the main decision.

But it may be several years in another case. It is therefore unfortunate that the reasons of the plurality in *Nikolaou* are not as clear as they could be.

At least some of the High Court judges in the two cases also considered the date relevant to two other matters. The first matter is evidence relating to the plaintiff's circumstances, for example medical reports.⁵¹ The plurality in *Johnson v Perez*,⁵² and Mason CJ in *Nikolaou*,⁵³ opined that evidence relating to circumstances after the date of assessment is admissible to 'piece together' the case that the plaintiff could have made out in the hypothetical action. This proposition has since been applied by the New South Wales Court of Appeal.⁵⁴ The plurality in *Johnson v Perez*,⁵⁵ and also the plurality (and thus majority) in *Nikolaou*,⁵⁶ pronounced that evidence relating to the plaintiff's circumstances after the date of the defendant's wrong may also be considered for the purpose of determining what loss would then have been regarded as likely to arise in the future. These statements were not confined to events occurring prior to the date of the notional trial.⁵⁷

The second matter in respect of which the relevant date was considered is the price of goods and services and the purchasing power of money. Four of the seven judges in *Johnson v Perez* made observations specifically on that issue. Mason CJ,⁵⁸ Brennan J,⁵⁹ and Deane J⁶⁰ favoured the date of the judgment in the action against the defendant whereas Dawson J favoured the date of the defendant's wrong.⁶¹ The plurality in *Johnson v Perez* said nothing specific on the purchasing power of money but, as mentioned before, they made the general observation that compensation for a lost opportunity to sue is to be assessed as at the date of the defendant's wrong.⁶² It may thus be said that a majority in *Johnson v Perez* (the plurality and Dawson J) favoured the date of the defendant's wrong as the date to be used to determine the price of goods and services and the purchasing power of money.⁶³

What, then, is the current state of the law on all of these issues? Compensation for a lost opportunity to sue is generally assessed as at the date of the defendant's wrong, which is the date at which the plaintiff lost the ability to proceed with a claim against the third party. That rule was

⁵¹ Where the defendant's wrong has exacerbated the loss caused by the third party's wrong, evidence relating to such exacerbation is, of course, admissible: *Johnson v Perez* (1988) 166 CLR 351, 369 (Wilson, Toohey and Gaudron JJ).

⁵² *Johnson v Perez* (1988) 166 CLR 351, 368–9 (Wilson, Toohey and Gaudron JJ).

⁵³ (1989) 166 CLR 394, 399.

⁵⁴ *Firth v Sutton* [2010] NSWCA 90 (30 April 2010) [116]–[117]; *Karabay v Carr* [2014] NSWCA 143 (8 May 2014) [82].

⁵⁵ (1988) 166 CLR 351, 368–9 (Wilson, Toohey and Gaudron JJ).

⁵⁶ (1989) 166 CLR 394, 403–4 (Wilson, Dawson, Toohey and Gaudron JJ).

⁵⁷ See *Steve Masselos & Co v Young* [2011] NSWCA 352 (21 November 2011) [16]. Cf *Firth v Sutton* [2010] NSWCA 90 (30 April 2010) [115].

⁵⁸ *Johnson v Perez* (1988) 166 CLR 351, 360.

⁵⁹ *Ibid* 378.

⁶⁰ *Ibid* 382–3.

⁶¹ *Ibid* 389–90.

⁶² *Ibid* 367–8 (Wilson, Toohey and Gaudron JJ).

⁶³ J W Carter, *Contract Law in Australia* (LexisNexis Butterworths, 6th ed, 2013) [36–24].

pronounced by a majority in the High Court of Australia in *Johnson v Perez* and in *Nikolaou*. However, the two decisions by the High Court are binding precedent only insofar as the date of the judgment in the action against the defendant was rejected as the relevant date for the applicable law and for the determination of the plaintiff's circumstances (in particular, the plaintiff's state of health). Crucially, in neither case was the choice between the date of the defendant's wrong and the date of the notional trial a necessary part of the order of a new trial. It is necessary to look at the individual issues considered.

Johnson v Perez concerned the applicable law including a developed practice in the courts' assessment of damages. While the plurality and Mason CJ favoured the date of the notional trial where that date is earlier than the date of the defendant's wrong,⁶⁴ the plurality and Dawson J favoured the date of the defendant's wrong where that date is earlier than the date of the notional trial. Thus, the earlier of the two dates was specified as the date relevant to the applicable law. On principle, the date of the notional trial should always be used because it gives effect to the overarching aim of replicating the decision in the hypothetical action.

Brennan J and Deane J in *Johnson v Perez*,⁶⁵ who favoured the date of the judgment in the action against the negligent solicitors as the date relevant to the courts' assessment practice, argued that their approach gives the plaintiff no more than what he would have been awarded in the hypothetical action against his employers together with an allowance for the delay in obtaining compensation.⁶⁶ However, the plaintiff's loss includes the loss of pre-judgment interest that would have been awarded in the hypothetical action,⁶⁷ and the further delay in obtaining compensation should be addressed through the specific instruments that the law provides in that respect, namely (depending on the circumstances) an award of pre-judgment interest or of compensation for the loss of the use of money pursuant to *Hungerfords v Walker*.⁶⁸ Those instruments could be made more effective if necessary.⁶⁹

With regard to the date used to determine the price of goods and services and the purchasing power of money, the general rule (assessment as at the date of the defendant's wrong) applies in the absence of authority to the contrary. As a matter of principle, since the court attempts to replicate the decision in the hypothetical action, the date relevant to the purchasing power of money ought to be the date that would have been

⁶⁴ This rule was applied in *Golec v Scott* (1995) 38 NSWLR 168, 172.

⁶⁵ (1988) 166 CLR 351.

⁶⁶ Both said that account must be taken of statutory rules on the assessment of damages that existed at the date of the notional trial: *Johnson v Perez* (1988) 166 CLR 351, 376–8 (Brennan J), 380–4 (Deane J).

⁶⁷ *Johnson v Perez* (1988) 166 CLR 351, 390 (Dawson J); *Nikolaou* (1989) 166 CLR 394, 404 (Wilson, Dawson, Toohey and Gaudron JJ).

⁶⁸ (1989) 171 CLR 125. The two instruments are discussed by Barnett and Harder, above n 15, 48–52.

⁶⁹ For example, the general prohibition of compound interest in respect of pre-judgment interest could be removed.

used in that hypothetical decision. Where the plaintiff's claim against the third party was one for personal injury, the court deciding upon that claim would have assessed compensation as at the date of its own judgment. Where the plaintiff's claim against the third party was one for pure economic loss, the court deciding upon that claim would generally have assessed compensation as at the date of the third party's wrong. The same dates should be used by the court deciding upon the defendant's liability. It might be objected that the use of a date earlier than the court's judgment exposes the plaintiff to the impact of inflation. But, again, the law has specific instruments (specifically, awards of pre-judgment interest and *Hungerfords v Walker* damages) to address delays in obtaining compensation.

With regard to the plaintiff's circumstances such as the state of his or her health, the somewhat ambiguous judgment by the majority in *Nikolaou* probably specifies the date of the defendant's wrong as the relevant date. However, in *Karabay v Carr*,⁷⁰ the New South Wales Court of Appeal recently regarded the date of the notional trial as relevant. This approach is preferable on principle since it gives effect to the overarching aim of replicating the decision in the hypothetical action.

Finally, with regard to evidence relating to the plaintiff's circumstances, it seems to be established that evidence emerging after the date of assessment may be used for the purpose of piecing together the case that the plaintiff could have made in the action against the third party. This is appropriate. According to the majority in *Nikolaou*, evidence emerging after the date of the defendant's wrong may also be considered for the purpose of determining what loss would then have been regarded as likely to arise in the future. Brennan J in both cases,⁷¹ and Mason CJ in *Nikolaou*,⁷² objected that evidence emerging after the date of the notional trial cannot possibly assist in determining what a court not in possession of that evidence would have decided. This objection has force. The consideration of evidence that would not have been available in the hypothetical proceedings heightens the already existing danger that the court assesses the plaintiff's loss with the benefit of hindsight. However, the defendant's wrong may be the very reason for the lack of evidence present at the time of the hypothetical trial, and the consideration of evidence emerging later may be regarded as the best corrective measure available.

III Probability of the Hypothetical Action Succeeding

Another figure that must be determined in evaluating a lost opportunity to sue is the probability (expressed as a percentage) that the hypothetical action would have been successful. That exercise requires sufficient material to permit at least a rough estimate. A plaintiff who fails to

⁷⁰ [2014] NSWCA 143 (8 May 2014) [78]–[82], [89].

⁷¹ *Johnson v Perez* (1988) 166 CLR 351, 377; *Nikolaou* (1989) 166 CLR 394, 405.

⁷² (1989) 166 CLR 394, 399.

provide sufficient material to allow such a calculation in respect of one or more heads of loss will not recover anything in that respect.⁷³ Nor will the plaintiff recover anything if the prospect of the hypothetical action succeeding is ‘so low as to be regarded as speculative — say less than 1 per cent’.⁷⁴ In other cases, the plaintiff obtains a percentage of the amount that would have been awarded in the hypothetical action had the plaintiff won that action. Unless the success of the hypothetical action is certain,⁷⁵ a deduction will be made from the amount of the hypothetical award in order to reflect the possibility that the plaintiff might have lost the hypothetical action.

In some cases, a substantial discount was made in order to reflect particular weaknesses in the plaintiff’s case or particular facts that may have given the third party a whole or partial defence. For example, in *Leitch v Reynolds*,⁷⁶ where a solicitor’s negligence led to the client’s action for medical malpractice becoming statute-barred, a discount of 55 per cent was made to reflect the absence of X-rays that would have been vital for the plaintiff to establish his case against the doctors. In *Worthington v Da Silva*,⁷⁷ which again involved a lost opportunity to sue in respect of a personal injury, a discount of 35 per cent was made to reflect the possibility that the plaintiff might not have been able to establish that her disability met a certain threshold and that her injuries were attributable to the third party’s negligence. Where there are several discrete features of the hypothetical action that would have been adverse to the plaintiff, the court need not make separate discounts in relation to each feature but may make an overall discount in relation to all features as a whole.⁷⁸

In other cases, a global discount for unspecified contingencies was made. For example, in *Mills v Bale*,⁷⁹ where the prospect of the hypothetical action being unsuccessful was considered ‘most unlikely’,⁸⁰ a discount of 15 per cent was still made ‘to take into account the vagaries,

⁷³ *Mills v Bale* [2010] NSWDC 162 (4 August 2010) [691]; *Moss v Eagleston* [2014] NSWSC 6 (4 March 2014) [151]–[152]. See also *Witcombe (as executrix of the estate of Witcombe) v Talbot & Olivier* (2011) 280 ALR 177, 198 [117]–[118]; *Hawkins v Oates* [2015] NSWSC 571 (15 May 2015) [55].

⁷⁴ *Falkingham v Hoffmans* (2014) 46 WAR 510, 553 [220] (Buss JA), quoting (from a different context) *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638, 643 (Deane, Gaudron and McHugh JJ). Where the plaintiff would have had multiple bases for the claim against the third party, requiring success on one basis only, the plaintiff’s chances of success may be more than slight even though each basis alone would have had only a slight chance of success: *Sweeney v Attwood Marshall* [2003] QCA 348 (15 August 2003) [19]–[20].

⁷⁵ As it was in *Johnson v Perez* (1988) 166 CLR 351; *Williams v Bodewes* (1997) Aust Torts Reports 81–449; *Orford v Qi Ying He* (2002) 36 MVR 464

⁷⁶ [2005] NSWCA 259 (5 August 2005) [85]–[87].

⁷⁷ [2006] WASCA 180 (7 September 2006) [127]–[130].

⁷⁸ *Golec v Scott* (1995) 38 NSWLR 168, 171; *Murphy v Miller* [1998] NSWCA 150 (16 October 1998); *Nigam v Harm [No 2]* [2011] WASCA 221 (18 October 2011) [154]–[155] (Newnes JA), [260]–[266] (Murphy JA); *Falkingham v Hoffmans* (2014) 46 WAR 510, 532 [84] (Pullin and Murphy JJA), 570 [288] (Buss JA).

⁷⁹ [2010] NSWDC 162 (4 August 2010); revd on other grounds *Bale v Mills* (2011) 81 NSWLR 498.

⁸⁰ [2010] NSWDC 162 (4 August 2010) [501].

uncertainties and accidents of litigation'.⁸¹ A discount for unspecified contingencies has sometimes been added to a discount for specified contingencies. For example, in *Feletti v Kontoulas*,⁸² a discount of 10 per cent was made in respect of the general uncertainties of litigation, and a further discount of 10 per cent was made to reflect the possibility that the plaintiff may not have given evidence in the hypothetical action, which evidence would have been important to the plaintiff's success. Finally, a single discount reflecting both specified and unspecified contingencies has sometimes been made.⁸³

A problematic decision on the possibility of a discount was made by the Victorian Court of Appeal in *Rosa v Galbally*.⁸⁴ While working as a casual nurse in a geriatric hospital, the plaintiff suffered injury as a result of being forcefully kicked in the neck by an elderly patient affected by dementia. The defendant solicitors negligently advised the plaintiff to settle a common law claim for pain and suffering against her employer for \$100,000. Had she pursued that claim, she would probably have received damages in the region of \$190,000.⁸⁵

In the plaintiff's action against the solicitors, the plaintiff submitted that the allegations that she would have made in an action against her employer were that her employer, in breach of duty, had failed to provide adequate warning to her of the patient's punchy, restive and aggressive nature. She argued that the prospect of the hypothetical action succeeding should be regarded as certain. The defendants submitted that it would have been shown, in the proceedings against the employer, that the hospital had provided adequate warning to the plaintiff through making available incident reports and nursing plans. They argued that a deduction of 35 per cent should be made to reflect the possibility that the hypothetical action might have been unsuccessful.

The trial judge, Macaulay J, took the view that an oral warning had been required,⁸⁶ and found a 'substantial likelihood'⁸⁷ and 'strong prospects'⁸⁸ that the plaintiff would have succeeded in establishing negligence against her employer. He also found it 'most unlikely that a court would have found that she failed to exercise reasonable care for her own safety'.⁸⁹ Nevertheless, before deducting the settlement sum, he deducted 17.5 per cent from the sum that the plaintiff was likely to have been awarded in an action against her employer. This was the median figure between the two figures (nil and 35 per cent) suggested by the parties. Macaulay J made that deduction in order

⁸¹ Ibid [801]. See also *Firth v Sutton* [2010] NSWCA 90 (30 April 2010) [160].

⁸² [2000] NSWCA 59 (23 March 2000) [65].

⁸³ See, eg, *Green v Berry* [2001] 1 Qd R 605, 612 [6]–[7] (McMurdo P), 619 [36] (Pincus JA).
⁸⁴ (2013) 42 VR 382.

⁸⁵ *Rosa v Galbally* [2012] VSC 3 (31 January 2012) [86].

⁸⁶ Ibid [31].

⁸⁷ Ibid [22].

⁸⁸ Ibid [34].

⁸⁹ Ibid [37].

to reflect the combined risk that, despite my view of the probabilities, Mrs Rosa may not have established negligence against her employer or, if she had, there may have been a finding of some contributory negligence against her.⁹⁰

The Victorian Court of Appeal overturned the discount and awarded compensation in the full difference between the amount of the hypothetical award and the settlement sum. However, the precise ratio of that decision is unclear. There are two possibilities, both of which are problematic. The ambiguity is demonstrated by two passages from the judgment of Tate JA, who spoke for the court. Tate JA observed:

Without the identification of particular difficulties Rosa would have faced in establishing her cause of action, in my opinion the judge's reasons omitted to supply a proper basis for the discount chosen and raised the possibility that the assessment of risk made in fixing Rosa's prospects of success was based upon an arbitrary figure chosen as a middle ground compromise.⁹¹

In this passage, Tate JA seems to be saying that the trial judge had been wrong to make a discount for unspecified contingencies. It is debatable whether the discount made was for specified or unspecified contingencies. Either way, it is difficult to see why a discount for unspecified contingencies should be wrong on principle. As Mason P, speaking for the New South Wales Court of Appeal, said in *Feletti v Kontoulas*: 'Forensic experience shows that the strongest cases can fail, or may expect to be settled at some discount'.⁹² As mentioned before, a discount for unspecified contingencies was made in that case and other cases. Even if those decisions were not binding on the Victorian Court of Appeal in *Rosa v Galbally*, the court ought to have engaged with them.

The ratio of the decision by the Victorian Court of Appeal may be even more problematic. Tate JA also observed:

The careful assessment made by the judge of the elements of the cause of action, and his meticulous and assiduous approach to the uncertainties and difficulties in the evidence, all led him to conclude that his view of the probabilities was that there was a 'substantial likelihood' that Rosa's claim would succeed, it also being 'most unlikely' that there would be any finding of contributory negligence. It was this global and evaluative assessment that should have governed his conclusions on liability unless there were distinct and individual features of the claim that reduced the overall prospects of success. No such distinct and individual features were identified.⁹³

In this passage, Tate JA might be saying that the judge had been wrong to make a discount to reflect particular risks involved in the hypothetical action that would have had a less than even chance of materialising. This interpretation gains support from a statement made in

⁹⁰ Ibid [39].

⁹¹ *Rosa v Galbally* (2013) 42 VR 382, 406 [102].

⁹² [2000] NSWCA 59 (23 March 2000) [65].

⁹³ *Rosa v Galbally* (2013) 42 VR 382, 407 [105] (citation omitted).

the court's second decision in the case. Tate JA, again speaking for the court, said: 'There were no risk factors identified by the judge which were not disposed of by the judge in Rosa's favour'.⁹⁴ However, while the trial judge may have 'disposed of' identified risks, he did not as a result regard the success of the hypothetical action as certain. 'Substantial likelihood' and 'strong prospects' are not the same as certainty. The judge merely found that it was more likely than not that the identified risks would not have materialised.

Tate JA might have been saying, therefore, that a discount of less than 50 per cent cannot be made. In other words, where a risk involved in the hypothetical action would have had a less than even chance of materialising, the plaintiff's loss is determined on the balance of probabilities and not by reference to the degree of probability. This proposition conflicts with the many decisions that require an evaluation of a lost opportunity to sue by reference to the degree of probability of the action succeeding and not on the balance of probabilities.⁹⁵ Thus, whichever of the two possible interpretations of the ratio for overturning the discount is adopted, *Rosa v Galbally* should be regarded as wrongly decided in that respect.

IV Deduction of Benefits Received

A person who has lost an opportunity to sue a third party for a wrong may have received benefits as a result of the third party's wrong, either from the third party under a statutory compensation scheme or from another source such as a social security fund. For example, where the third party is the plaintiff's employer and the lost action is one for a workplace injury, the plaintiff may have received statutory workers' compensation from the employer. The question arises whether and how such benefits are to be taken into account in evaluating the lost opportunity to sue the third party.

Some benefits flowing from a civil wrong reduce the wrongdoer's liability while others do not.⁹⁶ For example, payments made under a workers' compensation scheme reduce the employer's liability at common law,⁹⁷ whereas payments received under a private insurance contract do not reduce the wrongdoer's liability.⁹⁸ Where a plaintiff who has lost the opportunity to sue a third party has obtained a benefit as a result of the third party's wrong and that benefit reduces the third party's liability, it correspondingly reduces the defendant's liability, as the court deciding on the defendant's liability aims to replicate the hypothetical decision on the third party's liability.

⁹⁴ *Rosa v Galbally (No 2)* (2013) 42 VR 382, 423 [28].

⁹⁵ See cases cited above n 19.

⁹⁶ See Barnett and Harder, above n 15, 28–29, 179–81.

⁹⁷ See, eg, *Workers Compensation Act 1987*(NSW) s 151A(1)(b).

⁹⁸ *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569, 599–600 (Windeyer J).

A benefit received as a result of a wrong may have to be paid back once the victim obtains common law damages from the wrongdoer. In the present context, the plaintiff may have received a benefit which she would have had to pay back had she obtained judgment against the third party, but which she can now keep because she has not in fact obtained judgment against the third party. There can be no doubt that such a benefit reduces the defendant's liability. If the success of the hypothetical action is uncertain, the question arises whether the discount reflecting that uncertainty is to be made before or after the value of the benefit is deducted.

This question was considered in *Green v Berry*.⁹⁹ The defendant solicitor negligently failed to institute in time an action by the plaintiff against his former employer in respect of a workplace injury. The chance of that action succeeding was found to be 50 per cent.¹⁰⁰ There was an argument as to whether the 50 per cent deduction was to be made before or after deducting workers' compensation payments and social security benefits, which the plaintiff had received in respect of the workplace injury but would have had to pay back had he received common law damages from his employer. The Queensland Court of Appeal held that the 50 per cent deduction was to be made after the deduction of the benefits. Pincus JA, with whom McMurdo P agreed, considered it wrong to 'assess damages for a 50 per cent chance of success on the basis that the plaintiff had a 100 per cent chance of losing worker's compensation payments received'.¹⁰¹ He explained:

[T]he only relevant factors are taken to be the gross damages (G), worker's compensation payments (W), and social security payments (S) ... If the plaintiff wins he receives G only, because the W he receives and that part of S which he receives comes in and goes out again. If the plaintiff does not sue he gets no G but receives, and keeps the whole of, W and S. So the difference between winning 100 per cent and not suing is arrived at by subtracting W and S from G, which is of course the amount the trial judge assessed, \$172,601.57. A 50 per cent chance of getting that benefit is worth \$86,300.78.¹⁰²

Taking the same view, Jones J said:

In summary the manner in which I consider the assessment of damages in a case such as this should be undertaken, involves the following steps —

1. Establish what was the likely award of damages in the notional trial ...
2. Deduct from that amount the sum of all refunds which would have been made from that award ...

⁹⁹ [2001] 1 Qd R 605.

¹⁰⁰ Ibid 612 [6]–[7] (McMurdo P), 619 [36] (Pincus JA), 628–9 [85]–[86] (Jones J).

¹⁰¹ Ibid 619 [38].

¹⁰² Ibid 619 [37].

3. Apply to this amount the assessed percentage chance of success, thus yielding the value of the lost cause of action as at the notional trial date.¹⁰³

This approach is correct on principle. On the facts, the benefits would have been lost only if the action against the employer had been successful. In other words, the probability of losing the benefits was of the same percentage as the probability of obtaining common law damages. It would have been wrong, therefore, to calculate the plaintiff's loss by taking 50 per cent of the common law damages that he would have obtained from his employer had an action against the employer been brought and been successful, and then to deduct 100 per cent of the benefits that would have been lost in that event.

A seemingly conflicting decision was made by the New South Wales Court of Appeal in *Firth v Sutton*.¹⁰⁴ The plaintiff suffered a workplace injury and consulted the defendant solicitor in respect of her claims. At that time, the relevant legislation required an employee to make a generally irrevocable election between common law damages and 'permanent loss compensation' under the workers' compensation scheme.¹⁰⁵ The entitlement to permanent loss compensation ceased on the commencement of proceedings to recover common law damages, and the right to claim common law damages ceased on accepting permanent loss compensation. On the defendant's negligent advice, the plaintiff accepted permanent loss compensation, thus foregoing a claim for common law damages. The New South Wales Court of Appeal held that a deduction of one third should be made to reflect the possibility that the action for common law damages might have been unsuccessful.¹⁰⁶ The court further held that this deduction should be made before the permanent loss compensation was deducted. Allsop P, speaking for the court, said:

The aim of the assessment of the notional common law claim is not to provide Ms Sutton with the common law damages she would have received but to give her the value of the lost chance of such a claim. That assessment necessarily must take into account the contingencies and risks of obtaining that valuable judgment. Only when that has been assessed should the real value of what she has received be brought to account. In other words, what should be brought to account is the full value of what is possessed — the WC entitlements. To deduct these from the notional sum and only afterwards discount for the loss of the chance of obtaining the judgment at common law is to devalue, for no relevant reason, the value of what is possessed in the form of the WC Act entitlements ...¹⁰⁷

¹⁰³ Ibid 632 [108].

¹⁰⁴ [2010] NSWCA 90 (30 April 2010).

¹⁰⁵ *Workers Compensation Act 1987* (NSW) s 151A(2)–(3), later amended by *Workers Compensation Legislation Amendment Act 1998* (NSW) sch 1 items 64–65. The relevant part of s 151A in its initial version is set out in *Chamberlain v Ormsby* [2005] NSWCA 454 (21 December 2005) [134].

¹⁰⁶ [2010] NSWCA 90 (30 April 2010) [160].

¹⁰⁷ Ibid [161].

It might be thought that this approach conflicts with the approach taken in *Green v Berry*. However, such a view would overlook a crucial difference in the facts. In *Firth v Sutton*, the entitlement to permanent loss compensation under the workers' compensation scheme would have been lost on the mere commencement of an action for common law damages, regardless of that action's success. After the commencement of the action, the chance of losing the entitlement to permanent loss compensation would have been 100 per cent even though the chance of obtaining common law damages would have been only two thirds. It was therefore correct to deduct the permanent loss compensation after making a deduction reflecting the uncertainty of the hypothetical action's success.¹⁰⁸

The decision by the New South Wales Court of Appeal in *Firth v Sutton* was thus correct on principle. Unfortunately, in several subsequent cases, the same court said in obiter dicta that the *Firth v Sutton* principle applies also to benefits that would not have been lost unless the hypothetical action would have been successful.¹⁰⁹ However, those benefits should still be governed by the principle laid down by the Queensland Court of Appeal in *Green v Berry*, which case was not referred to in any of the dicta cited. Those dicta should not be followed as they conflict both with principle and with a decision by an intermediate appellate court that cannot be described as plainly wrong.¹¹⁰

V Conclusion

Where a defendant's wrong deprived the plaintiff of an opportunity to bring an action, and obtain judgment, against a third party, the court deciding on the defendant's liability will determine how the action against the third party would have been decided, rather than forming its own view on whether the plaintiff ought to have succeeded. Uncertainty as to the outcome of the hypothetical action will not be decided on the balance of probabilities. Instead, the plaintiff's loss will be assessed by reference to the degree of probability that the hypothetical action would have succeeded. Two figures must thus be determined: the likely amount that the plaintiff would have been awarded in the action against the third party had that action been pursued and been successful, and the probability (as a percentage figure) that the hypothetical action would have been successful.

¹⁰⁸ Consequently, it was wrong in *Vukancic v Velcic* [2007] NSWSC 1001 (6 September 2007) [69]–[72] to deduct the permanent loss compensation before making a deduction reflecting the uncertainty of the hypothetical action's success.

¹⁰⁹ *Steve Masselos & Co v Young* [2011] NSWCA 352 (21 November 2011) [55]; *Liddy v Bazley* [2013] NSWCA 319 (27 September 2013) [71] (Basten JA); *Karabay v Carr* [2014] NSWCA 143 (8 May 2014) [44].

¹¹⁰ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). While different Australian jurisdictions have different workers' compensation schemes, the relevant issue here is how a lost opportunity to sue is evaluated at common law.

The amount of the hypothetical award depends upon the date as at which the plaintiff's loss is assessed. A majority in the High Court of Australia in *Johnson v Perez* and in *Nikolaou* generally favoured the date at which the plaintiff lost the claim against the third party. But this rule is wrong on principle. Since the overarching aim of compensation in the present context is to replicate the decision that would have been made in the plaintiff's action against the third party, compensation should generally be assessed as at the likely date of that hypothetical decision. An exception is the price of goods and services and the purchasing power of money, in relation to which the court deciding upon the defendant's liability should use the same date that the court deciding upon the third party's liability would have used.

The whole amount that would have been awarded in the action against the third party will constitute the plaintiff's loss only if it is certain that this action would have been successful. Otherwise, a discount will be made to reflect the possibility that the action might have been unsuccessful. There may be a discount to reflect particular weaknesses in the plaintiff's case against the third party, or there may be a discount for the general vagaries of litigation, or both. A problematic decision, which should not be followed, was made by the Victorian Court of Appeal in *Rosa v Galbally*. The ratio of that decision is either that a discount for unspecified contingencies cannot be made or that a discount of less than 50% cannot be made. Either possible ratio is wrong on principle, and at least the second possible ratio conflicts with authority.

Benefits obtained by the plaintiff as a result of the third party's wrong (such as workers' compensation or social security benefits) reduce the defendant's liability unless the plaintiff would have been entitled to keep the benefits even if an action against the third party would have been successful. Benefits that would have been lost if, and only if, the action against the third party had been successful must be deducted before making the discount reflecting the uncertainty of the hypothetical action's success. Benefits that would have been lost on the mere commencement of the hypothetical action regardless of its success must be deducted after making the discount reflecting the uncertainty of the hypothetical action's success.

In the light of the issues examined in this article, it is concluded that a court evaluating a lost opportunity to sue should go through the following steps: (1) determine the likely amount that would have been awarded had the hypothetical action been brought and been successful (which involves a consideration of any benefits that would have reduced the third party's liability); (2) deduct benefits that the plaintiff would have had to pay back if, and only if, the hypothetical action had been successful; (3) multiply the resulting amount by the probability (as a percentage figure) that the hypothetical action would have been successful; and (4) deduct any benefits that would have been lost on the mere commencement of the hypothetical action.