Loss of a Chance of a Better Outcome – Legal Considerations

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"Chance is always powerful. Let your hook be always cast; in the pool where you least expect it, there will be a fish." Ovid (43BC–17AD)

"Facts are stubborn things, but statistics are more pliable." Mark Twain (1835–1910)

What is a 'loss of a chance' claim?

Negligence

It is trite law that to establish a claim in tort for negligence, a plaintiff must establish three elements, namely that:

- the plaintiff was owed a duty of care;
- that duty was breached; and
- the breach caused the plaintiff to suffer damage.

'Negligence' refers to civil liability for unintended harm when that harm is caused by someone's failure to meet the required standard of competence. The list of types of harm that are actionable is not closed. The argument advanced in 1987 by the claimant in the English case of Hotson v East Berkshire Area Health Authority[1] was that the list should be expanded to include the loss of a chance to avoid a particular outcome. In Rufo v Hosking[2] the argument advanced was that the list should include the loss of a chance to obtain a better outcome (if, in fact, they be different causes of action).

'Damage' and Causation

The traditional approach in claims for medical negligence is that 'damage' is defined as the plaintiff's physical loss. The enquiry is focussed on whether, on the balance of probabilities, the defendant's breach caused or materially contributed to the plaintiff's physical loss. If it is more likely than not that the defendant's breach did cause or materially contribute to the plaintiff's physical loss, the plaintiff can recover the damages which flow from that loss. Harriton v Stephens[3] emphasises that if it cannot be concluded that the plaintiff 'would' have suffered the damage that is claimed then the damage claimed cannot be actionable. The 'would' in this formulation implicitly refers to curial satisfaction on the balance of probabilities.

Balance of probabilities: all or nothing

If one considers this exercise of determining probability in statistical terms, if the Court is satisfied that there is anywhere between a 51% and 100% chance that the defendant's breach caused or materially contributed to the physical loss, then the plaintiff receives 100% of damages. If the Court is satisfied that there is only a 0 – 50% chance that the defendant's breach caused or materially contributed to the physical loss, the plaintiff receives nothing. The law accepts a fiction – if something is more likely than not, it is taken to be a certainty for the purpose of recovery.

This orthodox approach provides a clean distinction between establishing causation and the consequential step of quantifying damages.

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[1] [1997] 1 AC 750

[2] (2004) 61 NSWLR 678

[3] (2006) 226 CLR 52 at [264]

Loss of chance

What occurs in a 'loss of a chance' case is that the plaintiff in effect redefines his/her physical loss (as a matter of pleading) as the chance of avoiding a physical loss or the chance of obtaining a better physical outcome. Upon establishing what that chance is, the plaintiff recovers that percentage of the damages which the defendant would be liable for if the chance was a certainty – for example, if the loss of a chance is proven to be 40%, the plaintiff recovers 40% of the damages.

Recasting the burden of proof

To recast the damage upon which a plaintiff sues not as the occurrence of physical injury but as a chance of avoiding the occurrence of physical injury is in truth to recast the burden of proof. It amounts to a partial and asymmetric abandonment of the requirement for proof on the balance of probabilities: a plaintiff would receive (and the defendant would be liable for) full compensation if the plaintiff could prove the loss of a chance that is greater than 50% yet the plaintiff would still receive (and the defendant would still be liable for) partial compensation if and to the extent that the plaintiff could prove the loss of a chance which is less than 50%.

On one view, this removes the fiction of the orthodox rule. On another, it allows plaintiffs in loss of a chance cases to 'jump' an evidentiary gap. It also blurs the distinction between causation and quantification of damages as the same evidence is, in effect, being used for both purposes, whereas there may be other factors relevant to the particular plaintiff which make quantification of the damages a more complex exercise[4].

Many cases in which a loss of a chance claim is pleaded involve an alleged delay in the diagnosis of cancer. Because of the amount of funding for cancer research, there are often reliable epidemiological studies which provide a sound basis for asserting the statistical likelihood of a certain outcome, for example, plaintiff's chance of surviving for a certain period of time. Epidemiological studies may also establish which particular physical outcomes a plaintiff may or may not have avoided. However, even though the plaintiff may be able to assert the statistical chance of a particular outcome, the plaintiff cannot prove which statistical group he/she would have fallen into. In other words, there is a gap in what the plaintiff can prove. Where the chance of a particular outcome is not the subject of evidence which is as clear and statistically valid as that presented in epidemiological studies, causation becomes dependent on expert opinion, or more often than not, competing expert opinions. Again, there is no 'proof' of what the outcome would or will be.

Here the law has a choice of three possible outcomes:

(a) an exceptional proof rule that allows the plaintiff to 'jump' the evidentiary gap of proving on the balance of probabilities what would have occurred or will occur;
(b) a rule that limits recovery to reflect an assumed percentage contribution to the plaintiff's loss; or
(c) denial of recovery.

If (a) is adopted, there are further consequences – where should the boundary of the exception be drawn and how can this be justified? These questions are addressed below.

The present status of the law

What could loosely be described as 'loss of a chance cases' have been known to the law for some time. The most commonly quoted starting point is the English case of Chaplin v Hicks[5], a case where a woman was denied the chance of winning a beauty contest because she was not notified of her interview. The application of that principle to medical negligence cases is a far more recent phenomenon.

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[4] see below

[5] [911] 2 KB 786, CA

Jurisdictions outside Australia

In the United Kingdom, 'loss of a chance' as a cause of action is not part of the common law having been rejected by the House of Lords in Hotson[6] and Gregg v Scott[7]. The House of Lords also held in Gregg v Scott[8] that physical changes (for example, pain and enlargement of a tumour) accompanying the deterioration which is a consequence of a negligent failure to treat is not sufficient 'damage' upon which to hang, as consequential loss, the lost chance of a better outcome.

In Canada, 'loss of a chance' as a cause of action is not part of the common law, having been rejected by the Supreme Court of Canada in Lawson v Laferrière[9]. In that case, Gonthier J said:

"Even though our understanding of medical matters is often limited, I am not prepared to conclude that particular medical conditions should be treated for purposes of causation as the equivalent of diffuse elements of pure chance, analogous to the non–specific factors of fate or fortune which influence the outcome of a lottery."[10]

In the United States, some jurisdictions allow an isolated exceptional rule of proof of causation but only in medical negligence cases and some 'mass tort' cases to overcome situations where some but not all individual plaintiffs could prove a causal link (for example, tobacco and asbestos cases).

In Ireland, recovery has been allowed: Philp v Ryan[11].

High Court of Australia

There are a number of High Court of Australia judgments which contain dicta (or commentary not strictly necessary to decide the case) on loss of a chance cases, but to date there has been no decision which has squarely considered whether a pure loss of a physical chance can form what Professor Jane Stapleton calls the 'actionable damage'[12] in medical negligence cases: see for example Chappel v Hart[13], Naxakis v Western General Hospital & Anor[14] and Harriton v Stephens[15].

Unless and until the High Court directly considers whether such a cause of action should form part of the common law of Australia, trial judges and intermediate appellate courts are bound by decisions of other Australian intermediate appellate courts unless they consider the decision is "plainly wrong"[16].

Intermediate appellate courts in Australia

In Rufo v Hosking[17] the New South Wales Court of Appeal held that a plaintiff who can prove on the balance of probabilities that there existed a chance of a better medical outcome had the defendant's negligence not occurred is entitled to recover damages for the loss of that chance even though the chance may be less than 50%. The proposition was applied by the Court of Appeal in State of New South Wales v Burton[18], although that case was not a medical negligence case – it involved the loss of a chance of a better outcome had the plaintiff been provided with proper counselling. The plaintiff was a police marksman who was fired upon, but not hit, during a farm siege and later developed PTSD as a result of the shooting. Further, in that case Rufo was cited but no issue as to the correctness of Rufo appears to have been raised.

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[6] Supra, footnote 1

[7] [2005] 1 AC 187 (HL)

[8] ibid

[9] [1991] 1 SCR 541; (1991) 78 DLR (4th) 609

[10] Id at 656

[11] [2004] IESC 105

[12] Professor Jane Stapleton, Cause in Fact and the Scope of Liability for Consequences, Law Quarterly Review 2003, 119 (July) 388–425

[13] (1998) 195 CLR 232

[14] (1999) 197 CLR 269

[15] (2006) 226 CLR 52

[16] See *Farah Constructions Pty Ltd v Say–Dee Pty Ltd* (2007) 230 CLR 89 at 151–152 [135]

[17] (2004) 61 NSWLR 678

[18] (2006) Aust Torts Reports ¶81–826

At the New South Wales Court of Appeal hearing in Gett v Tabet[19] in July this year, it was argued that 'loss of a chance' should not be considered an entrenched part of the common law of Australia. The Court of Appeal constituted by Allsop P, Beazley and Basten JJA allowed leave to the appellant doctor to argue that Rufo was wrongly decided.

It is argued that the Victorian Court of Appeal decision of Gavalas v Singh[20] is a loss of chance case. In the author's view, that case is about the application of loss of a chance to an assessment of damages and does not raise the causation issue raised by both Rufo and Gett v Tabet. The Queensland Court of Appeal decision in Jang v Australia Meat Holdings Pty Limited[21] is also cited as a loss of a chance case, but that was not a medical negligence case – it was held that damages were recoverable for the loss of a chance to avoid Q fever by appropriate vaccination in circumstances where the plaintiff's employer had failed to ensure that the plaintiff consulted his general practitioner for advice about vaccination.

First instance decisions in Australia

There are a small number of first instance decisions of the Supreme Court in New South Wales where trial judges awarded damages on the basis of the loss of a chance of a better outcome, (for example Tran v Lam[22]).

There are a few first instance decisions in New South Wales (other than Burton) which have referred to or have followed Rufo, namely Halverson v Dobler[23] and Tabet v Mansour[24].

There is a first instance decision of Justice Heenan in Western Australia decided after Rufo; being Ellis as Executor of the Estate of Paul Steven Cotton (Decd) v The State of South Australia & Ors[25], which might be considered a loss of a chance case, but this is not a medical negligence case. It is a (very long and complex) judgment concerning a plaintiff who contracted lung cancer as a result of exposure to asbestos during two different periods of employment or as a result of smoking, or both.

Difficulties presented by loss of a chance cases

- In the author's view, the difficulties presented by loss of a chance cases which have not been addressed adequately in any of the Australian judgments to date is that:
- they create an incoherence in the law of causation; and
- there is a confusion between the use of a loss of a chance analysis in determining causation and hence liability as opposed to quantification of damages.

Incoherence of the law

The importance of the coherence of the law was emphasised by the High Court of Australia in Sullivan v Moody[26]. In a joint judgment, the Court noted:

"Developments in the law of negligence over the last thirty or more years reveal the difficulty of identifying unifying principles that would allow ready solutions of novel problems. Nonetheless, that does not mean that novel cases are to be decided by reference only to some intuitive sense of what is 'fair' or 'unfair'. There are cases, and this is one, where to find a duty of care would so cut across other legal principles as to impair their proper application…"

Although speaking of a duty of care, the same observations apply to other legal principles such as causation. The High Court has re–iterated the importance of the coherence of the law more recently in Tame v New South Wales[27], Graham Barclay Oysters Pty Ltd v Ryan[28] and in June 2008 in Lumbers v Cook[29].

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[19] NSWCA Proceedings CA 40110 of 2007, heard 30 July, 31 July and 1 August 2008

[20] [2001] 3 VR 404

[21] [2001] QCA 51

[22] Badgery–Parker J, 20 June 1997, unreported

[23] [2006] NSWSC 1307 at [191] – [249]

[24] [2007] NSWSC 36 (9 February 2007)

[25] (2006) WASC 270 (8 December 2006)

[26] (2001) 207 CLR 562 at 581 [55]

[27] (2002) 211 CLR 317 at 335, 342, 361, 396, 402, 418, 425, 430–431

Lord Nicholls of Birkenhead in Fairchild v Glenhaven Funeral Services Ltd[30] said of new departures in the law:

"To be acceptable the law must be coherent. It must be principled. The basis on which one case, or one type of case, is distinguished from another should be transparent and capable of identification. When a decision departs from principles normally applied, the basis for doing so must be rational and justifiable if the decision is to avoid the reproach that hard cases make bad law."

Asymmetry

This proposition is simple to state but is of significance. As stated at the outset of this paper, the traditional approach in claims for medical negligence is that 'damage' is defined as the plaintiff's physical loss. The enquiry is focussed on whether, on the balance of probabilities, the defendant's breach caused the plaintiff's physical loss. If considering probabilities in statistical terms, if the Court is satisfied that there is anywhere between a 51% and 100% chance that the defendant's breach caused or materially contributed to the physical loss, then the plaintiff receives 100% of damages. If one redefines the damage, not as a physical loss but as the chance of avoiding physical loss or the chance of getting a better physical outcome, then you recover the percentage of damages which reflects that percentage chance. This introduces a fundamental asymmetry or lack of coherence into the analysis. If you say that proof to the level of 40% results in 40% of damages, then consistency requires you to say that proof to the level of 60% results in only 60% of the damages. Otherwise there is an asymmetrical, pro–plaintiff approach.

This view is consistent with Gaudron J's comments in Naxakis[31], Lord Hoffman and Baroness Hale in Gregg v Scott and the Supreme Court of Canada in Lawson v Laferrière. It was also recognised as being the logical corollary of allowing recovery for less than a 50% chance by Justice Santow in Rufo. His Honour said[32]:

"However, it would be productive of injustice if the plaintiff were to receive 100 per cent of the loss where a chance or prospect exceeds 50 per cent (say 51 per cent) yet receive nothing at all if such loss were, say, 49 per cent. The fairest solution is to base compensation on whatever be the percentage, whether above or below 50 per cent, wherever one is dealing with future events or hypothetical ones."

Reshaping causation to loss–of–chance

Baroness Hale of Richmond pointed out in Gregg v Scott that there is no reason in principle why every personal injury case could not be reformulated as the loss of a chance of a better outcome with the consequence that loss of a chance would displace the traditional concept of establishing proof of causation. It would make a defendant liable not only when causation can be proved on the balance of probabilities but also when damage can be characterised as a loss of an opportunity and valued at less than 50%.

There is an alternative system available, namely that recovery should mirror the loss of a chance in all cases, but this would involve a fundamental re–shaping of the law of causation. Such an approach has been suggested in the literature[33].

Causation in loss of chance cases

In loss of a chance cases, the plaintiff must prove that something the defendant did in breach of his/her duty caused the loss of a chance that the plaintiff had of avoiding some physical loss or the loss of a chance of obtaining a better outcome and that the chance lost would be more than

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[28] (2002) 211 CLR 540 at 574, 597–598, 617

[29] [2008] HCA 27 at [78]

[30] [2003] 1 AC 32 at 68

[31] *Naxakis*, supra, at [32]–[33]

[32] *Rufo*, supra, at 688 [45]

[33] See Professor Jane Stapleton, supra, footnote 12; Joseph H King (Jr), "Causation, Valuation, and Chance in Personal Injury Torts Involving pre–existing Conditions and Future Consequences", 90 Yale Law Journal 1353

speculative or remote and, as Justice Campbell put it in Rufo[34], would be "of substance albeit falling short of a fifty one percent chance"[35].

Causation: A commonsense approach?

Proving causation can often be difficult and loss of a chance cases are no different than any other in this regard. The High Court in March v Stramare[36] favoured a common sense approach to causation. Consistently, Justice Campbell adopted a "bold and pragmatic approach" to causation in Rufo[37].

There are difficulties with such exhortations to use common sense. Quite obviously, what is common sense to you may seem to be irrationality or contortion to achieve a particular outcome to me. There is also judicial criticism of the use of phrases such as "a common sense approach". Lord Hoffman, in an unpublished lecture delivered to the Chancery Bar Association in England in June 1999, noted the numerous judicial citations of common sense in relation to causation and said that they "often conceal, or perhaps reveal, a complete absence of any form of reasoning… in the best tradition of English anti–intellectualism".[38] Professor Stapleton argues that any causal term should have a precise and agreed meaning[39].

The New South Wales Court of Appeal in E M Baldwin & Son Pty Ltd v Plane[40], Acting Justice Fitzgerald reviewed the case law on causation and said:

"[77] As the cases referred to illustrate, issues with respect to causation can arise in a variety of circumstances and lead to different approaches. A plaintiff's damage might probably result from a single cause, or some combination of possible causes, which might have occurred concurrently or sequentially, and some of which might be unidentifiable. All relevant circumstances, including an increase in the risk to the plaintiff from the defendant's breach of duty and the character and sequence of events, must be considered in deciding whether a defendant's breach of duty which is a possible cause of the plaintiff's damage probably materially contributed to that damage. Circumstances are relevant for this purpose if they assist in establishing or strengthening a casual connection between the defendant's breach of duty and the plaintiff's damage according to expert opinion or by the application of logic, common sense or experience. Unusually, a conclusion that a defendant's breach of duty materially contributed to a plaintiff's damage might be rejected by reference to policy considerations or value judgements.

"[78] The differences of opinion evident in some of the cases are for the most part, less related to questions of principle and more attributable to conflicting views of the primary facts, and, in some instances at least, the conclusions to be drawn from expert evidence."[41]

Causation – a policy choice

Finally, at least one judge in March v Stramare acknowledged that causation is fundamentally a policy choice. After quoting Taylor J in the earlier High Court of Australia decision of Fitzgerald v Penn[42] who said: "..expressions such as 'effective cause', 'direct cause', 'real cause', 'decisive cause' and 'proximate cause', amongst others, have been seized upon, not for the purpose of excluding factors which might be thought to constitute causes in the widest philosophical sense, but for the purpose of placing the defendant's ultimate responsibility upon a practical commonsense basis", Justice McHugh went on to say[43]:

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[34] Id

[35] *Rufo*, Id, at 694 [406]

[36] (1991) 171 CLR 506

[37] Id

[38] Cited by Stapleton, Id, footnote 12.

[39] Ibid at 389

[40] (1998) 17 NSWCCR 434

[41] Ibid, at 473 [77] – [78]

[42] (1954) 91 CLR 268 at 284–285

[43] Id, at 515

"Nevertheless, the use of commonsense notions of causation and the use of expressions such as those to which Taylor J referred require the application of a policy choice, for they allow the tribunal of fact to determine legal liability on broad grounds of moral responsibility for the damage which has occurred."

Returning to Rufo[44], paragraphs [9] and [10] of Justice Hodgson's judgment represent the ratio of that decision. He said:

"9 It seems clear that, if avoidance of the loss in question would have depended upon the plaintiff taking a particular course of action, the plaintiff must prove on the balance of probabilities that, but for the negligence, the plaintiff would have taken that course of action. The plaintiff cannot be compensated for the loss of a chance that the plaintiff might have done so: Sellars [Sellars v. Adelaide Petroleum NL (1994) 179 CLR 332] at 353. However, otherwise I think it is consistent with the principles established in Malec [Malec v. J.C. Hutton Pty. Ltd. (1990) 169 CLR 638] and Sellars to say that it is enough if the plaintiff proves, on the balance of probabilities, that he or she has been deprived of a valuable chance.

10 That chance must be inherent in the circumstances, not merely an artefact of the way evidence is presented in the case. Thus, if it appears to be a plain fact as to whether treatment would or would not have been successful, and the element of uncertainty arises merely from different expert views, then the plaintiff will not be compensated for the chance that one expert might be correct. On the other hand, if it appears that the very best medical science can do is to say that the treatment had a quantifiable chance of success, then in my opinion that can be treated as a valuable chance for the loss of which a plaintiff can be compensated. As with other questions concerning causation, a common sense approach should be taken to the question of whether a valuable chance has been lost, or whether the situation is rather one where one or other alternative would definitely have occurred, and the only uncertainty is due to imperfections in the evidence."[45]

Justice Hodgson seems to be drawing a distinction between a case where it is proven that a certain treatment would have been adopted and there may or may not be some debate as to the efficacy of that treatment, but you can form a view as to the likelihood or otherwise of the treatment being successful based upon expert evidence, and a case where you simply have conflicting expert evidence as to what would have happened on the balance of probabilities. He then proceeds to rely on the High Court decision of Malec v J C Hutton Pty Ltd[46] to justify why this approach does not result in any injustice.

Indeed, each of the judges in Rufo[47] seems to rely significantly on the decisions of Malec[48] and Sellars[49]: see Hodgson JA at [4], [6], [9] – [11]; Santow JA at [18], [21], [35], [37] – [39], [51]; Campbell JA at [207]. However, Rufo[50] was not simply an application of the High Court decisions of Malec[51] and Sellars[52]. There is little or no analysis of the differences between those cases and the situation in Rufo[53], even though there is acknowledgment that Sellars[54] is a case about contractual (economic) loss and Malec is a case about quantification of damages only. The wholesale adoption of those principles into a causation analysis in a medical negligence case is inappropriate without much closer reasoning than is offered in Rufo.

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[44] Id

[45] *Rufo*, supra, at 680–681 [9]–[10]

[46] (1990) 169 CLR 638

[47] Id

[48] Id

[49] (1994) 179 CLR 332

[50] Id

[51] Id

[52] Id

[53] Id

[54] Id

Future uncertainty – relevance to the calculation of damages

As was pointed out in Sellars[55] with reference to the speech of Lord Ackner in Hotson[56], while the law takes uncertainty as to the future into account determining the measure of damages, at the anterior stage of determining the existence of a past causal link between a wrongful act and the suffering of damage the law has traditionally proceeded on the balance of probabilities.

Distinguishing economic loss cases

In the case of economic loss such as in Sellars, the damage is not the loss of a chance. The damage is the economic opportunity which has, as a matter of fact, been lost. That economic opportunity has an economic value (although a chance analysis might be required in assessing the value of that lost opportunity). Gregg v Scott distinguished such cases. Baroness Hale of Richmond said[57]:

"It is unfashionable these days to distinguish between financial loss and personal injury. Losing the money one has may not be so different from losing the leg one has. But many claims for financial loss do not relate to the money one has but to the money one expected to have – a prospective financial gain. There is not much difference between the money one expected to have and the money one expected to have a chance of having: it is all money. There is a difference between the leg one ought to have and the chance of keeping a leg which one ought to have. There is perhaps an even greater difference between the disease free state one ought to have and the chance of having a disease free state which one ought to have."

Professor Stapleton argues that they should be described as cases of "present damage to economic value", so as to avoid any suggestion of the unorthodox loss of a chance analysis[58]. Justice McClellan also recognised that a lost chance of a better medical outcome is readily distinguished from a lost financial opportunity[59].

Future probabilities in calculating damages is not a loss of chance

As was acknowledged in Rufo, Malec is a case about assessing damages where questions arise as to the future or hypothetical effect of physical injury and the degree of likelihood of the occurrence of those future or hypothetical effects. It is quite clear from the joint judgment of Justices Deane, Gaudron and McHugh that they were dealing with the issue of quantification of damages after liability (including causation) has been established. An assumption is made in Rufo[60] that the comments of the High Court in Malec[61] as to the approach to events which it is alleged would or would not have occurred, or might or might not yet occur, when assessing damages can be applied equally to the determination of causation. Although these concepts serve similar goals, the tasks being undertaken by the court are quite different – causation questions relate to the fact of a loss or of its source whereas valuation or quantification is the process of identifying and measuring the loss that was caused by the tortious conduct. A classic example of the confusion between these two concepts is that the figure mentioned in Malec in relation to establishing whether a chance is so low as to be regarded as speculative (less than 1 per cent)[62] for the purpose of assessing damage is quoted for the purpose of establishing whether the loss of a particular chance is speculative for the purpose of causation[63].

Quantification of damages

The confusion mentioned above as to the different tasks being undertaken when determining causation as opposed to quantification of the damage resulting from the loss of a chance is exemplified also in the way in which damages are usually assessed in loss of chance cases. There is

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[55] Id, at 335

[56] Id, at 792–793

[57] Id at [220]

[58] Stapleton, Id, at 409–410

[59] *Halverson v Dobler*, Id, at [219]–[221]

[60] Id

[61] Id

[62] *Malec*, Id, at 643

[63] For example, Studdert J at first instance in *Rufo*, (2002) NSWSC 1041 at [246]–[247]

usually a direct application of the percentage lost chance to the (often agreed) quantification of the claim had the chance been a certainty. However, it may not always be the case that such a direct correlation reflects the actual loss to the plaintiff.

A good example of this is Tabet v Mansour[64]. In that case, the plaintiff had a medulloblastoma. The plaintiff's brain damage was caused by a number of different factors, the majority of which were unrelated to Dr Gett's negligence – the medulloblastoma itself and the raised intracranial pressure it caused, the surgery to remove the tumour, chemotherapy and in particular radiotherapy, which was very high dose in the hope of saving the plaintiff's life (which it did). Ultimately, Justice Studdert found that Dr Gett's failure to order a CT scan a day earlier than it was ultimately performed resulted in the plaintiff suffering a neurological deterioration and losing a chance of a better outcome of 40%. Justice Studdert then found that the neurological deterioration represented 25% of the plaintiff's overall damage, and therefore held that Dr Gett should pay the plaintiff 10% of the full value of the assessment of damages. Whilst Justice Studdert satisfied himself as to the plaintiff's condition as a result of all the causes of that condition, he did not consider whether the chance of a better outcome which was lost by the plaintiff created or increased any of the plaintiff's needs and therefore whether the plaintiff had, in fact, suffered any loss as a result of the lost chance. He simply adopted a formulaic approach.

Should loss of chance be allowed?

The fundamental conundrum in loss of a chance cases is whether recovery should be allowed at all or, alternatively, in some limited cases. For a jurisprudential analysis of the circumstances in which fault for something one cannot control or for bearing the consequence of 'bad luck', the author recommends Honoré's article "Responsibility and Luck: The Moral Basis of Strict Liability"[65].

Policy reasons against loss of chance

In Gregg v Scott[66], Baroness Hale identified three policy reasons why loss of a chance of a better outcome should not be recognised as an available cause of action:

- if it is accepted that the two approaches cannot co–exist because defendants would always be liable either for the total damage or for a proportion, then those plaintiffs who currently obtain full recovery would only be entitled to a proportion of their damage. As Baroness Hale described such a development: "This would surely be a case of two steps forward three steps back for the great majority of straightforward personal injury cases";
- the expert evidence would be much more complex; and
- recovery would be less predictable for respondents and insurers.

A fourth reason is that the need to identify a precise percentage lost chance is an artificial exercise whereas a finding on the balance of probabilities is a 'blunter' instrument with some latitude.

Reasonably certain evidence v conflicting expert opinion

As mentioned above, Justice Hodgson in Rufo[67] seems to draw a distinction between a case where it is proven that a certain treatment would have been adopted and there may or may not be some debate as to the efficacy of that treatment, but you can form a view as to the likelihood or otherwise of the treatment being successful based upon expert evidence, and a case where you simply have conflicting expert evidence as to what would have happened on the balance of probabilities.

This distinction is useful, even though Justice Hodgson was of the view that recovery for the loss of a chance should be allowed in both situations. Some have argued that if loss of a chance cases are to be allowed, they should be restricted to recovery where there is reasonably certain evidence of what

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[64] [2007] NSW SC 36

[65] Law Quarterly Review 1988, 14 (October), 530–553

[66] Id, at [225]

[67] Id

would have occurred, particularly where there are epidemiological studies or other good statistical evidence[68]. However, in the author's view, that distinction is not valid.

Chief Justice Spigelman made some interesting observations about this in Seltsam Pty Limited v McGuiness[69]:

"Epidemiological evidence identifies associations between specific forms of exposure and the risk of disease in groups of individuals. Epidemiologists do make judgments about whether a statistical association represents a cause–effect relationship. However, those judgments focus on what is sometimes called in the epidemiological literature 'general causation': Whether or not the particular factor is capable of causing the disease. Epidemiologists are not concerned with 'specific causation': Did the particular factor cause the disease in an individual case? …

"Evidence of possibility, including expert evidence of possibility expressed in opinion form and evidence of possibility from epidemiological research or other statistical indicators, is admissible and must be weighed in the balance with other factors, when determining whether or not, on the balance of probabilities, an inference of causation in a specific case could or should be drawn. Where, however, the whole of the evidence does not rise above the level of possibility, either alone or cumulatively, such an inference is not open to be drawn.

"The common law test of balance of probabilities is not satisfied by evidence which fails to do more than establish a possibility…

"With respect to many diseases, medical science is able to give clear and direct evidence of a causal relationship between a particular act or omission and a specific injury or disease. There are, however, fields of inquiry where medical science is not able to give evidence of that character. There are cases in which medical science cannot identify the biological or pathological mechanisms by which disease develops. In some cases medical science cannot determine the existence of a causal relationship. Such a state of affairs is not necessarily determinative of the existence or non–existence of a causal relationship for purposes of attributing legal responsibility."

Statistical evidence may be helpful as indicative but it cannot alone be determinative. As can be seen from the quote above, from a legal perspective there is little difference between the way courts use statistical evidence as opposed to expert opinion evidence. From a logical and philosophical perspective, one might feel more comfortable in recovery being allowed where there is at least some methodical and statistically valid basis for forming a view as to what might have occurred or might occur in the future. It is quite another matter for courts to determine recovery based on broad medical generalisations such as "the earlier a disease is diagnosed, the better the outcome" or, worse still, specific evidence in a particular matter that the possible outcome from the treatment which probably would have been administered was something which the treating doctors simply could not comment on because it was a medical imponderable, the best evidence being that whether the plaintiff's outcome would have been better was purely speculative.

Conclusion

If we are to countenance a fundamental change from the orthodox law in relation to causation, at best it should be to a consistent, equitable and symmetrical system which allows recovery to less than 100% where the lost chance is less than 100%. Such a change is so fundamental, however, that it amounts to a legislative act. Like Lord Hoffman, Lord Phillips of Worth Matravers and Baroness Hale of Richmond in Gregg v Scott[70], any such change should be left to Parliament.

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[68] See, for example, Jacques Boré, "L'Indemnisation pour les chances perdue: une forme d'appréciation quantitative de la causalité d'un fait dommageable" quoted in Laferrière v Lawson, supra, per Gonthier J at 625–628

[69] (2000) 49 NSWLR 262 at [60]–[101]

[70] Id