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Loss of a Chance and a Chance of Loss

from Chaplin v Hicks [1911] 2 KB 786 to Gregg v Scott [2005] 2 AC 176

by Lord Walker of Gestingthorpe

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Loss of a Chance and a Chance of Loss

By Lord Walker of Gestingthorpe

Every law student knows the case of *Chaplin v Hicks*.[1] The case is coming up for its centenary, and it is the natural starting point for any discussion of "loss of a chance" in English law. But not every judge recollects the facts precisely. Judges sometimes refer to it as the case about the beauty contest[2] and imply that the outcome was highly, or even wholly, unpredictable. The same mistake has been made by academics, including Tony Weir[3], and Helen Reece in a scholarly article[4] to which I acknowledge my debt in preparing this lecture.

In fact the competition was for aspiring actresses, with twelve prizes of 3-year theatrical engagements (four at £5 a week, four at £4 a week and four at £3 a week). Originally the winners were to be chosen by the votes of readers of the newspaper in which the photographs of 24 chosen finalists were to be published; those votes would presumably have been cast on the basis of the ladies' looks. But the unexpectedly large entry (about 6,000) made the organisers have second thoughts, and the rules were changed. Readers in ten regions of the United Kingdom were to chose five finalists for each region (again, presumably, on the the basis of looks.) But the eventual winners were to be chosen by Mr Hicks, a well-known actor-manager, by auditions (or at least interviews) at the Aldwych Theatre in London. Mr Hicks would presumably take account of a finalist's likely ability to learn her lines, and to act, as well as her looks. We know from the law report that Miss Chaplin was the top finalist for the London region; and we also know that she was already an actress, because she was at the time appearing in Dundee, where a redirected letter reached her on 6 January 1909, telling her to be at the Aldwych at 4 p.m that day. That is how she lost her chance. So although Vaughan Williams LJ was right in saying[5] that the finalists' average chance of a prize was about one in four, the jury who awarded her £100 may have thought that she had an above-average chance.

I apologise for burdening you with so much detail about the facts of *Chaplin v Hicks*, but this topic is one on which close attention to the facts is

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[1] [1911] 2 KB 786

[2] For instance *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602, 1611, 1620

[3] Tort Law (2002) p 75

[4] Losses of Chances in Law (1996) 59 MLR 188, 189-198

[5] at 791

often necessary; and it is appropriate, as it is the Incorporated Council of Law Reporting whose annual lecture I have the honour of delivering today, to pay tribute to their extraordinary accuracy in reporting facts, arguments and judgments. But it seems that in reporting *Chaplin v Hicks* a century ago it was not thought necessary or proper to tell us the name of the daily newspaper, or the plaintiff's first name.

Helen Reece's article jumps from Miss Chaplin's one in four chance of a prize to the 25% chance (as found by the trial judge) that earlier diagnosis of the fractured femur suffered by the teenage plaintiff in *Hotson*[6] would have resulted in his avoiding being disabled by necrosis of the hip joint. That is a dramatic leap from contract to tort, from pure economic loss to personal injury, and (most relevantly as the author argues) from the indeterministic to what is already determined (though unknown). I shall come on to some of these complexities in due course, but for the moment I want to go further into the cases of economic loss. Typically they are concerned with the consequences of professional negligence by a lawyer, whether in allowing a client's claim to become statute-barred, as in *Kitchen,*[7] or failing to advise a client about some risk in a transaction before the client has committed itself, as in *Allied Maples*[8]. In the one case the client loses his chance of an award of damages, or an advantageous settlement; in the other he loses the chance of renegotiating the transaction to avoid or reduce the risk.

The judgments in *Allied Maples* of Stuart-Smith, Hobhouse and Millett LJJ provide the first full judicial discussion of economic loss through loss of a chance. All three judgments refer to the well-known saying of Lord Reid in *Davies v Taylor* [9]

> "You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All you can do is evaluate the chance."

And if some past event (such as Mr Hicks giving unreasonably short notice of the audition at the Aldwych) has excluded the possibility of what would otherwise have been a possible outcome (Miss Chaplin being awarded a three year contract) that chance too must be evaluated. The general rule is that in this sort of case the issue of liability depends on findings about past

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[6] *Hotson v East Berkshire Area Health Authority* [1987] AC 750
[7] *Kitchen v Royal Air Force Association* [1958] 1 WLR 563
[8] See footnote 2
[9] [1974] AC 207, 213

facts in the real world, decided on the balance of probabilities; quantum of damage depends on the evaluation of probabilities in a parallel universe in which no breach of duty occurred.

That general rule does however need some qualifications. First, it is sometimes difficult (as Stuart-Smith LJ put it)[10] to tell where the question of causation ends and quantification begins. That is indeed the heart of the problem if you try to introduce "loss of a chance" into personal injury cases. The second qualification is that the court will not treat an insubstantial or speculative chance as capable of evaluation[11]. The third qualification is that if the probability to be evaluated depends solely on what the claimant himself would have done, or on what the defendant himself would have done, as a matter of free choice, that question is to be decided on the balance of probabilities.[12] That is logical, at any rate in a case where the adviser's defence is that the client, even if correctly advised about the risk or disadvantage, would have decided to proceed with the transaction, because that defence goes to liability rather than to quantum. In one case[13] alleging solicitor's negligence in failing to advise purchasers about a right of way the defence was that the clients (who were property developers) would have gone ahead anyway – as they were said to have done on six separate occasions in the past. We do not know how the case ended as it is reported on an issue as to implied waiver of privilege in respect of the files on the other six purchases.

Allied Maples was concerned with a complex business deal under which the purchaser, an Asda subsidiary, wished to acquire a "cherry-picked" portfolio of 48 retail premises for £26m but was told by the vendor that four of them would have to be acquired indirectly, by the purchase of one of the vendor's subsidiaries (after some unwanted premises had been hived off). This alteration in the plan raised the risk of liability on tenant's covenants in respect of premises which were not part of the deal, and the purchaser's solicitors failed to give adequate advice about this. So there were hypothetical questions as to what the purchaser, if correctly advised, would have done. First, it might simply have pulled out (the judge thought

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[10] Footnote 2 at p1609 (because of the overlap, the Court of Appeal was critical of the decision to have a split trial)

[11] Footnote 9 at p212 (Lord Reid)

[12] *Sykes v Midland Bank Executor & Trustee Co Ltd* [1971] 1 QB 113; *Bolitho v City and Hackney HA [1998] AC 232, 240:* "A defendant cannot escape liability that the damage would have occurred in any event because he would have committed some other breach of duty thereafter"

[13] *Lillicrap v Nalder & Son* [1993] 1 WLR 94, 99; cf *McWilliams v Sir William Arrol & Co Ltd* [1992] 1 WLR 295, the case of the steel erector who would not have worn a safety belt if provided

this very unlikely). Second, it might have negotiated a reduced price (also unlikely, because the size of the risk was then unquantifiable; it had since come home to roost in a big way, hence the litigation). Third, the purchaser might have successfully negotiated a limited tailor-made covenant for indemnity (the judge thought this probable but did not quantify the chance). The chance of the purchaser being happy to proceed without any renegotiation was evidently regarded as non-existent. The Court of Appeal recast some of the judge's declarations and subject to that modification directed that the issue of quantum (including the evaluation of the chance of successful renegotiation) should go to trial.

So far I have been looking at claimants who have irretrievably suffered the loss of a chance of obtaining an economic benefit (for instance Mrs Kitchen who through her solicitor's negligence lost a claim for damages for her husband's death) or who have irretrievably lost a chance of avoiding economic detriment (for instance the young RAF pilot who failed, because of his solicitor's negligence, to bar his entailed interest under a family trust and then died, still a bachelor, on active service).[14] Now I want to look at the borderline (which is sometimes quite elusive) between professional fault which gives rise to an immediate cause of action and that which merely produces a risk of future loss – the chance of a loss in the second part of my title.

If a professional adviser (whether a conveyancing solicitor or a financial adviser or a property valuer) does a bad job for his client the officious bystander might say to the client, "He has let you down but you are not actually out of pocket at the moment; wait and see what happens before you think of going to law". Or if he were belligerent as well as officious he might say, "He has let you down and sold you a defective package of services; you are worse off; threaten him with a writ at once".

The law's response reflects both of these contrasting attitudes. Most of the reported cases in this area are concerned with issues of limitation of actions, and it is therefore appropriate to make a short detour into the topic of concurrent liability. Where the claimant has contracted for professional services he has concurrent remedies in contract and tort for any breach of professional duty. That was finally settled beyond doubt by the decision of the House of Lords in *Henderson v Merrett Syndicates Ltd*[15], approving the well-known decision of Oliver J in *Midland Bank Trust Co. Ltd v Hett Stubbs*

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[14] *Otter v Church Adams Tatham* & Co [1953] Ch 280 (at p 290 Upjohn J applied *Chaplin v Hicks* but should have looked at the balance of probabilities, as disentailing would have been the client's free choice: see *Allied Maples* at p1612)

[15] [1995] 2 AC 145

& *Kemp*[16] which, in the words of Lord Goff[17] "broke the mould." The contractual liability does not depend on proof of loss but may yield only nominal damages, and will prima facie become statute-barred after six years. The concurrent liability in tort avoids, Lord Goff said[18],

"...the startling possibility that a client who has had the benefit of gratuitous advice from his solicitor may in this respect be better off than a client who has paid a fee."

So often the focus will be on tortious liability in negligence, for which loss is of course essential. In *Wardley Australia*[19] the plurality of the High Court of Australia put it in these terms:

> "The answer to the question when a cause of action for negligence causing economic loss accrues may require consideration of the precise interest infringed by the negligent act or omission . . . With economic loss, as with other forms of damage, there has to be some actual damage. Prospective loss is not enough.
> When a plaintiff is induced by a misrepresentation to enter into an agreement which is, or proves to be, to his or her disadvantage, the plaintiff sustains a detriment in a general sense on entry into the agreement. That is because the agreement subjects the plaintiff to obligations and liabilities which exceed the value or worth of the rights and benefits which it confers upon the plaintiff. But, as will appear shortly, detriment in this general sense has not universally been equated with the legal concept of 'loss or damage'. And that is just as well. In many instances the disadvantageous character or effect of the agreement cannot be ascertained until some future date when its impact upon events as they unfold becomes known or apparent and, by then, the relevant limitation period may have expired. To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust. Moreover, it would increase the possibility that the courts would be forced to estimate damages on the basis of likelihood or probability instead of assessing damages by reference to established events. In such a situation, there would be an ever-present risk of

[16] [1979] Ch 384
[17] At p190; at pp191-192 Lord Goff surveyed Commonwealth authority on concurrent liability
[18] At p185
[19] (1992) 175 CLR 514, 527 per Mason CJ and Dawson, Gaudron and McHugh JJ

> under-compensation or over-compensation, the risk of the former being the greater."

Wardley Australia (decided in 1992) contains a full discussion of the English authorities down to that time, and was itself cited to the House of Lords in *Law Society v Sephton & Co*[20] in which Lord Hoffmann described the plurality judgment as "a masterly exposition of the law which deserves careful study." But Lord Hoffmann thought that the passage which I have quoted "somewhat overstated" the policy considerations favouring late accrual of the cause of action: "It is often the case that a plaintiff, who has plainly suffered some damage, is obliged to commence proceedings before the full effects of his injury can be known." Lord Hoffmann also quoted Lord Nicholls in *Nykredit (No 2)*[21], one of the crop of valuation cases arising out of the last great property slump:

"Within the bounds of sense and reasonableness the policy of the law should be to advance, rather than retard, the accrual of a cause of action."

In practice the courts have resolved the conflicting policy considerations in favour of either early or late vesting of a cause of action by concentrating, as the High Court of Australia put it in *Wardley Australia,* on the nature of the interest infringed. If through professional negligence the claimant's property is reduced in value, or the claimant obtains property (including a chose in action) less valuable than he was entitled to expect, then he suffers an immediate loss. That is illustrated by *Forster v Oughtred & Co*[22]. Mrs Forster charged her farm in 1973 to secure advances to her son for a hotel venture which failed. In January 1975 she was called on to pay £70,000 to prevent the security being enforced against her farm, and in August 1975 she did so. She sued her solicitor for having failed to explain the transaction properly, but the proceedings were struck out for want of prosecution. In 1980 she issued a second writ, within six years of the demand and payment, but more than six years after she had executed the ill-advised mortgage. The position was, Stephenson LJ said[23], that she

> "suffered actual damage through the negligence of her solicitors by entering into the mortgage deed, the effect of which has been to encumber her interest in her freehold estate with this legal charge

[20] [2006] 2 AC 543, 550, 553
[21] [1997] 1 WLR 1627, 1633
[22] [1982] 1 WLR 86
[23] At p98

and subject her to a liability which may, according to matters outside her control, mature into financial loss as indeed it did."

The claim put forward in the second writ was therefore statute-barred. If however Mrs Forster (acting on negligent professional advice) had simply entered into a personal covenant to guarantee her son's borrowing, her loss would not have occurred until she had been called on to pay.

That was essentially the position in *Law Society v Sephton & Co.*, although the liability was, in that case, the Law Society's obligation, under a statutory compensation scheme, to make good misappropriations by a dishonest solicitor. It had for some years relied on accountant's reports on the solicitor's affairs negligently prepared by Sephton & Co. The House of Lords approved a statement of principle by Saville LJ[24]:

"In [*Forster v Oughtred & Co* and other similar] cases, however, the court was able to conclude that the transaction then and there caused the claimant loss, on the basis that if the injured party had been put in the position he would have occupied but for the breach of duty, the transaction in question would have provided greater rights, or imposed lesser liabilities or obligations than was the case; and that the difference between the two states of affairs could be quantified in money terms at the date of the transaction."

The case in which Saville LJ stated that principle was about a negligent valuation of property offered as a mortgage security. Cases of that sort are of particular interest because they raise not only the question of when loss occurs, but also whether the loss includes any fall in value caused by changes in general market conditions; and all the cases which antedate Lord Hoffmann's famous opinion in *SAAMCO*[25] must therefore be treated with caution. The current state of the property market makes this a topical point.

Consider, if you will, the following scenario. With the property market booming a bank lends £2.4m to a property company for the purchase and development of a site. Surveyors value the site (which is to be the only mortgage security) at £3.5m but their advice is negligently over-optimistic; the valuation should have been no more than £2m. Then credit dries up, the market collapses, the developer defaults on the mortgage and the site is sold by auction for £350,000. What is the recoverable loss and when does it occur?

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[24] *First National Commercial Bank Plc v Humberts* [1995] 2 AER 673, 679

[25] *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191

That is a slightly simplified version of the facts of *Nykredit (No.2)*[26], which was one of the appeals heard with *SAAMCO* in 1996. It then returned to the Lords on another point in 1997. The first appeal decided that the recoverable loss was limited to the difference between the amount of the negligent valuation and the amount of a proper valuation as at that date. The second appeal decided that on the facts the loss occurred at once, because the security was inadequate from the start, and the borrower's covenant was worthless, even though the loss was not finally quantified until the security was realised by the auction sale.

In *Nykredit (No.2)* the House of Lords made clear that where a mortgage security is negligently overvalued the timing of loss is fact-sensitive. In that case the result might have been different if the borrower had been a large company whose credit was reliable. But this has puzzling implications. Viewed as a marketable asset, a loan on a security valued at twice the amount of the loan is more easily marketable than a loan on a security with a narrower margin of cover; and it is much more easily marketable than a loan on inadequate security even if the borrower's covenant seems reliable. The mortgage lender's bundle of rights is less valuable than it was entitled to expect. Since one of the main causes of the current financial crisis was the indiscriminate marketing of large packages of mortgage loans – also known as collateralised debt obligations, or toxic assets - it is surprising that the court has not, so far as I know, had occasion to consider this aspect of the timing of pure economic loss. *Nykredit (No.2)* will not, I suspect, be the last word on the subject.

There are two more detours to be made before we arrive at *Gregg v Scott*. The first detour takes us, surprisingly, into the field of compensation for compulsory acquisition of land. It is well known that the announcement of a compulsory purchase scheme can put a blight on land for years, while planning policies in the neighbourhood may change. If for instance a one-storey industrial building in Shoreditch is designated for purchase for an extension of the underground, that destroys any prospect of planning permission for profitable redevelopment as a four-storey mixed-use block of offices and flats. So fairness requires quantification of the property's "hope value" in a parallel "no-scheme" world.

The Land Compensation Act 1961 contains some elaborate and difficult statutory assumptions[27] - Harman LJ[28] once referred to them as a

[26] Footnote 21
[27] s 6 and First Schedule
[28] *Davy v Leeds Corporation* [1964] 3AER 390, 394

slough of despond –which in effect turn probability into certainty. The House of Lords has recently decided[29], reversing both the Lands Tribunal and the Court of Appeal, that where these special assumptions do not apply, the hypothetical hope value of a property (in that case, the building in Shoreditch I have already mentioned) is to be quantified as a chance, the loss of which is to be compensated as such. Authorities on loss of a chance in tort have begun to be referred to in land compensation cases, perhaps because Stuart-Smith LJ, who gave the leading judgment in *Allied Maples*, was the presiding Lord Justice in a compensation case called *Porter*[30]. But it seems to me simpler, in that field, to go on using the term hope value, which is well understood.

That leads on naturally to the other detour, which might be described as damages measured by the loss of a bargaining opportunity. They are sometimes called "*Wrotham Park* damages",[31] which the court can award for breach of contract, especially in lieu of an injunction, even though the claimant cannot prove actual financial loss. In *Attorney General v Blake*[32] Lord Nicholls explained,

> "The measure of damages awarded in this type of case is often analysed as damages for loss of a bargaining opportunity or, which comes to the same, the price payable for the compulsory acquisition of a right. This analysis is correct. The court's refusal to grant an injunction means that in practice the defendant is thereby permitted to perpetuate the wrongful state of affairs he has brought about."

Lord Nicholls also referred to the *Wrotham Park* decision as a "solitary beacon," but in the last few years it has made regular appearances in the Law Reports. There has recently been an admirable review of the authorities by Warren J in *Field Common Ltd v Elmbridge Borough Council*, [33] making some penetrating observations on the concept of loss of a bargaining opportunity:

> "Although an analysis based on the loss of a bargaining opportunity works, at least as a close analogy, in that sort of context, it is important to realise its limitations. An actual claim, pleaded and argued on the basis of a loss of opportunity, would place the onus on the claimant of showing, on a balance of probabilities that, had a

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[29] *Spirerose v Transport for London* [2009] 1 WLR 1797
[30] *Porter v Secretary of State for Transport* [1996] 3AER 693
[31] *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798
[32] [2001] 1 AC 268, 281, 283
[33] [2008] EWHC 2079 para 90

> negotiation taken place, it would have produced a result and that such a result would, in money terms, be the same as that which would be reached in a hypothetical negotiation. It would not be correct to assess the percentage chance that an agreement would have been reached, thus entitling the claimant to a percentage of the full damages. This is because the chance depends not on the acts of a third party when the percentage approach would apply but depends on the acts of the defendant himself where it is "all or nothing" depending on whether or not the claimant establishes on a balance of probabilities that a negotiation would have been successful: compare *Allied Maples Group Plc v Simmonds & Simmonds* [1995] 1 WLR 1602. The claimant in such a case may therefore fail to establish causation. In contrast, the assessment of damages by reference to negotiation *assumes* the success of such a negotiation and assumes, often contrary to the facts, that there are willing parties on each side."

Now I want to come back to the questions of whether, how and to what extent loss of a chance (of a better outcome) or a chance of loss (by a bad outcome) have a function in personal injury cases. The leading cases are *Hotson*[34](the case, which I have already mentioned, of the boy disabled by avascular necrosis after a delay in diagnosis of a broken femur), *Wilsher*[35] (the case of the infant whose blindness may have been caused by the administration of excessive oxygen), *Fairchild*[36] (the claimants who might have inhaled asbestos fibres at two or more different workplaces) and *Gregg v Scott*[37]. I shall concentrate on *Gregg v Scott*, which reviews the earlier cases and contains the fullest discussion.

The facts were that in November 1994 Mr Gregg (then aged 43) went to see his GP, Dr Scott, about a lump under his arm. The doctor reassured him and did not refer him to hospital for a biopsy. Nine months later, after he had moved house, Mr Gregg went to his new GP. He was referred to hospital and in November 1995 cancer was diagnosed. It did not respond to normal therapy and was eventually treated with high dose chemotherapy which involved harvesting stem cells. Mr Gregg was discharged in September 1996 but suffered a relapse in 1998. Nevertheless he survived. He sued Dr Scott and gave evidence at the trial of the action in 2001. It was conceded that the doctor was in breach of duty and that this had delayed diagnosis and treatment of the cancer by

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[34] Footnote 6

[35] *Wilshire v Essex Area Health Authority* [1988] AC 1074

[36] *Fairchild v Glenhaven Funeral Services* [2003] 1 AC 32

[37] [2005] 2 AC 176

nine months. But the judge held that Mr Gregg had not proved, on the balance of probabilities, that his expectation of life had been diminished as a result of the negligence. The Court of Appeal dismissed his appeal by a majority of two to one. The House of Lords heard his further appeal with four days of oral hearings in May 2004. Judgment was then reserved for eight months, when the appeal was dismissed by a majority of three to two.

Mr Gregg was still alive at the date of the Lords' judgment. It was then over nine years since his condition had been diagnosed, nine months late. The agreed statement of facts before the Lords recorded that his chance of disease-free survival for ten years would have been 42% had he been promptly diagnosed and treated in November 1994, but was only 25% at the trial in 2001.

So Mr Gregg was a survivor, against all the statistical odds. The case is bedevilled by statistics, and I shall have to come back to them. I simply note, at this stage, that by what some would regard as a cruel paradox Mr Gregg's capacity for survival made it more difficult to establish that his expectation of life had been curtailed as a result of the GP's failure to refer him for a biopsy. His survival was the more remarkable because continuing research established, at some stage before the expert evidence was given at trial, that his form of non-Hodgkin's lymphoma, (ALK negative) had a less favourable prognosis than the less selective average on which the experts' predictive model was based.

The leading opinion for the minority was given by the presiding law lord, Lord Nicholls, and the leading opinion for the majority by Lord Hoffmann. They clearly mark out the important issues of principle at stake. Lord Nicholls thought it arbitrary and unfair that the claimant's reduced chance of recovery (from 42% to 25%) should give him no remedy, since he would probably not have recovered even if diagnosed and treated promptly. He gave his reasons forcibly near the beginning of his opinion:[38]

> "This surely cannot be the state of the law today. It would be irrational and indefensible. The loss of a 45% prospect of recovery is just as much a real loss for a patient as the loss of a 55% prospect of recovery. In both cases the doctor was in breach of his duty to his patient. In both cases the patient was worse off. He lost something of importance and value. But, it is said, in one case the patient has a remedy, and in the other he does not. This would make no sort of sense. It would mean that in the 45% case the doctor's duty would be hollow. The duty would be empty of content."

[38] paras 3-4

Lord Nicholls distinguished[39] two categories of case in the field of clinical negligence:

> "... depending on whether a patient's condition at the time of the negligence does or does not give rise to significant medical uncertainty as to what the outcome would have been in the absence of negligence. The *Hotson* case was in one category. There was no significant uncertainty about what would have happened to Stephen Hotson's leg if determined on the usual probability basis."

Lord Nicholls put Mr Gregg's case in the other category and so did not regard it as necessary to depart from *Hotson* in order to allow the appeal on the basis that Mr Gregg had lost a chance of a longer life. This distinction is questionable and Lord Nicholls himself did, later in his opinion,[40] accept that the difference between the two categories was one of degree.

Lord Hoffmann reviewed the authorities both in England and overseas. He saw no sufficient reason to depart from the English authorities:[41]

> "The rule which the House is asked to adopt is the very rule which it rejected in *Wilsher's* case. Yet *Wilsher's* case was expressly approved by the House in *Fairchild's* case. *Hotson's* case too would have to be overruled. Furthermore the House would be dismantling all the qualifications and restrictions with which it so recently hedged the *Fairchild* exception. There seem to me to be no new arguments or change of circumstances which could justify such a radical departure from precedent."

Lord Hoffmann rejected various suggested control mechanisms similar to those which in his view "disfigure the law of liability for psychiatric injury". Perhaps the most interesting part of his opinion is the passage in which (after acknowledging, as Lady Hale did, Helen Reece's scholarly article) he differed from Lord Nicholls as to two distinguishable categories:[42]

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[39] paras 35 ff; the quotation is from para 38
[40] paras 49-50
[41] para 85
[42] para 79

> "The law regards the world as in principle bound by laws of causality. Everything has a determinate cause even if we do not know what it is. The blood-starved hip joint in *Hotson's* case, the blindness in *Wilsher's* case, the mesothelioma in *Fairchild's* case; each had its cause and it was for the plaintiff to prove that it was an act or omission for which the defendant was responsible. The narrow terms of the exception made to this principle in *Fairchild's* case only serves to emphasise the strength of the rule. The fact that proof is rendered difficult or impossible because no examination was made at the time, as in *Hotson's* case, or because medical science cannot provide the answer, as in *Wilsher's* case, makes no difference. There is no inherent uncertainty about what caused something to happen in the past or about whether something which happened in the past will cause something to happen in the future. Everything is determined by causality. What we lack is knowledge and the law deals with the lack of knowledge by the concept of the burden of proof."

Lord Hoffmann went on to acknowledge that human free will provides a "striking exception" to this assumption. He observed[43]:

> "The law distinguishes between cases in which the outcome depends on what the claimant himself (*McWilliams v Sir William Arrol & Co*[44]) or someone for whom the defendant is responsible (*Bolitho v City & Hackney HA*[45]) would have done, and cases in which it depends on what some third party would have done. In the first class of cases the claimant must prove on a balance of probability that he or the defendant would have acted so as to produce a favourable outcome. In the latter class, he may recover for loss of a chance that the third party would have so acted. This apparently arbitrary distinction obviously rests on grounds of policy."

I am not sure whether Lord Hoffmann himself considered the distinction arbitrary. I think it can be justified on grounds that I have already mentioned, that is whether the point goes to liability or to quantum. But that distinction can seem arbitrary because, as Stuart-Smith LJ said[46], it is sometimes hard to tell where causation ends and quantification begins.

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[43] para 83
[44] Footnote 13
[45] Footnote 12
[46] Footnote 10

Lord Hope, the other dissenter, agreed with Lord Nicholls but would have based his decision primarily on the narrower ground that the GP's negligence had allowed the tumour to grow before it was treated, and that that amounted to actual physical damage and so was a "hook"[47] on which to hang the claim for his lost years.

The opinion of Lord Phillips (who was perhaps drawing on experience gained while chairing the BSE inquiry) went most fully into the facts, and in particular the statistical evidence. He was critical both of the quality of the evidence itself, and of the use that had been made of it,[48] including the figures of 42% and 25% adopted by both sides in the agreed statement of facts. I find these criticisms powerful.

Lady Hale agreed with Lord Nicholls to the limited extent of regarding the case as less predetermined than *Hotson*.[49] She saw it as a new case but, like Lord Hoffmann, she rejected the appellant's arguments based on policy. They were outweighed by other considerations: first, common sense would almost always suggest that delay in diagnosis and treatment must have contributed to an unfavourable outcome, but (second) it would often be impossible to establish quantifiable damage. Third, personal injury *is* different from economic loss. Fourth, the appellant's argument, taken to its logical conclusion, was no less than

> "... that personal injury law should transform itself. It should never be about outcomes but only about chances. It seems to me that this is the real problem in this case. How can the two live together?[50]"

That is, I am the first to acknowledge, an inadequate summary of five learned and closely-reasoned opinions which together run to 227 paragraphs in the law report. They all call for close study. But I would suggest three general conclusions to be drawn from this very interesting and difficult case.

First, it demonstrates yet again the need for lawyers and judges to be competent, if they cannot be expert, in the uses and abuses of statistics. In the field of criminal law there has rightly been concern over the lack of training in handling DNA evidence, and about paediatricians giving expert evidence (particularly in cot death cases) going beyond their proper field of

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[47] See Prof. Jane Stapleton, Cause-in-Fact and the Scope of Liability for Consequences (2003) 119 LQR 388

[48] paras 147 ff

[49] paras 211 ff

[50] para 222

expertise.[51] Figures can give a completely false illusion of precision and reliability. For instance the finding in *Hotson* of a 25% chance of avoiding necrosis, if the injury had been treated promptly, was based on the trial judge splitting the difference between the evidence of two experts, neither of whom he found particularly satisfactory. The need for competence in handling statistics is important whether or not the notion of loss of a chance is to play a larger part in personal injury cases.

The second point to note is that of the five law lords, only Lord Hoffmann, as I read the case, uncompromisingly rejected that tendency. Lord Phillips stated[52] that the complications of the case had persuaded him that it was not a suitable vehicle for developing the law. Lady Hale said[53] that the argument "will not do, at least on the facts of this case". Mr Gregg has survived for longer than any plausible statistical average, and though he had had a terrible time, the only issue on appeal was his claim in respect of what he would have earned during what he expected, when the writ was issued, to be his "lost years".

But (third and finally) the adoption in personal injury cases of "loss of a chance" as the basis for liability, rather than for computing quantum, would indeed be a fundamental development in the common law. The borderline of personal injury is sometimes debateable, both as to psychiatric troubles and as to non-injurious bodily changes such as pleural plaques[54]. But the concept of actual physical injury, caused by the defendant's negligence, has always been essential. Liability for personal injury does differ in many ways from liability for pure economic loss, which has its own control mechanisms.[55] Such a major change in personal injury law would have grave implications for insurers and for the National Health Service.[56] I am inclined to agree with Lord Hoffmann that such a change should be left to Parliament. But there is probably even less chance of that than of an even more radical change to a statutory scheme of non-fault compensation for all cases of accidental personal injury.

In closing may I leave you with a conundrum about a lottery. It is sometimes said (wrongly as I have tried to demonstrate) that Miss Chaplin was in the position of someone with a lottery ticket. But imagine a monthly

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[51] There is a very extensive literature on this topic. A good starting point is the Law Commission's recent Consultation Paper no.190 The Admissability of Expert Evidence in Criminal Proceedings in England and Wales

[52] para 190

[53] para 200

[54] *Rothwell v Chemical & Insulating Co Ltd* [2008] AC 281

[55] See Lady Hale at para 220

[56] See Lord Hoffmann at para 90

lottery in which a million numbered tickets are regularly sold through a network of a thousand street-corner outlets within a large city. Mrs Lucky, a pensioner, has a regular order with a particular ticket-seller, Mr Nostrodamus, for the same numbered ticket each month – say, 555,555. If Mr Nostrodamus carelessly sells that ticket to another punter, and it is not the winning number, Mrs Lucky loses nothing. But what if 555,555 turns out (on a completely random draw) to be the winner? Can Mrs Lucky sue for damages equivalent to the first prize? Can she say that the winning number, though unknown, did not depend on human choice and was always "in the stars"? Or can Mr Nostrodamus, invoking Leibniz and chaos theory, say that if Mrs Lucky had duly got her favourite number, that would have been a different possible world in which a different outcome must be supposed? I believe that something of this sort (of which my fiction is a simplified version) did actually happen in Australia, but as it never came to court the answer also lies, unknown, in another possible world.