

CHAPTER FOUR CAUSATION

4.2. ESTABLISHMENT OF CAUSAL LINK

4.2.2 LOSS OF A CHANCE AND PROPORTIONAL LIABILITY

Introductory Note

a) The concept of loss of a chance — or *perte d'une chance* as it is called in French law — is discussed in many places in this book. In Chapter II, it was seen that loss of a chance is used in French law in a way which might extend the scope of protection for physical injury¹ as well as for damage to property or economic interests,² and that the concept is not unknown to English law³ and other legal systems⁴ either.

b) This subsection is concerned with the impact of loss of a chance or *perte d'une chance* on causation; that issue has generally arisen in medical liability cases.⁵ There has been some discussion, particularly among French authors, as to whether medical liability cases were to be distinguished from “traditional” *perte d'une chance* cases,⁶ but it seems that it is now generally agreed that there is no substantive distinction between these cases.⁷ The typical case runs as follows. In the course of medical treatment for a given condition, a physician does or fails to do something in a way that falls below proper standards of medical practice. As it turns out, the treatment either fails or results in injurious side-effects. However, historical and scientific experience had shown that the treatment could fail or produce those side-effects in any event, even with best medical

¹ *Supra*, Chapter II, **2.F.11.** and Note (2) thereafter and 2.1.5.

² *Supra*, Chapter II, **2.F.43.** and 2.3.5.

³ *Supra*, Chapter II, **2.E.49.**

⁴ See von Bar II at 467-70, para. 444-5.

⁵ There is no indication that the following developments could not apply in other situations also, but the debate has focused almost exclusively on medical liability cases, which are especially prone to problems of uncertainty regarding causation. Viney and Jourdain, *Conditions*, for instance, deal with this whole topic under a separate heading concerning causation in medical liability cases, but they underline in their conclusions that in fact parallel developments can be observed in other sectors: Viney and Jourdain, *Conditions* at 197ff., para. 370 ff., conclusion at 203-4, para. 373.

⁶ Such as Cass. crim., 6 June 1990, *supra*, Chapter II, **2.F.43.**, where the injury to the plaintiff prevented him from running his racehorses, thus depriving him of the possibility of earning money, depending on the result of the race.

⁷ See Viney and Jourdain, *Conditions* at 197, para. 370, who do not consider that the medical liability cases form a separate category in substance. Akkermans at 193-200, demonstrates convincingly that the distinction cannot be sustained.

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practice, for a number of reasons (that is the case for most medical treatments, the success of which is never guaranteed and which are almost never absolutely free from complications). It cannot be demonstrated whether the injury to the plaintiff is due to substandard treatment or to one of these other causes which have been identified in the course of historical and scientific experience. As often happens in medical liability cases, no firm evidence can be obtained.

The plaintiff will then recast his or her case in probabilistic terms: for the sake of argument, let us assume that the case is one where the treatment failed and it can be shown that the physician was somehow at fault or negligent in the treatment of the plaintiff.⁸ Statistical evidence shows that proper treatment of the plaintiff's condition is successful in 80% of cases. Experts assess that, given the physician's fault or negligence, the plaintiff had only a 50% chance of recovery. It is still impossible to know whether the plaintiff fell within the 20% of cases where proper treatment would not have been effective or whether he or she rather fell within the additional 30% probability that treatment would fail given the physician's fault or negligence, so it cannot be said that the fault or negligence was a *conditio sine qua non* of the failure of the treatment. Nonetheless, the plaintiff will argue that the conduct of the physician deprived him or her of a 30% chance of recovery; on that point, causation cannot be doubted.

c) In framing a case in probabilistic terms, one of the key assumptions underpinning the assessment of causation in the legal systems studied here is brought to the fore and put into question. Indeed, as was seen above, the assessment of causation under English, French or German law normally results in a *yes* or *no* answer: either there is causation and the defendant is liable to the full extent of damage (provided other conditions of liability are met) or no causal link is found, and no liability arises. When the assessment of causation is made on a probabilistic basis, however, it should be possible to conclude that the defendant has caused the injury to the plaintiff to a certain degree (to be expressed in probabilistic terms).⁹

As Viney points out, even if the assessment of causation is presented as a black-and-white issue in substance, in practice causation is more often than not evidenced on the basis of probabilities.¹⁰ In the legal systems studied here, this translates into the denial

⁸ The same could be done in a case of injurious side-effects, except that the picture is usually more complex, given that many causes can contribute to side-effects: see for instance *Wilsher v. Essex Area Health Authority*, *infra*, 4.E.22.

⁹ This should be distinguished from the situation where, in the presence of many causes which each can account for the whole of the damage, apportionment is made between the various causes: see *infra*, 4.4.2.

¹⁰ Viney and Jourdain, *Conditions* at 163, para. 345. While under French law the probabilistic element may be "hidden" in the way causation is evidenced, English and German law are more open about it, although they do not admit probabilistic causation either. Under English law, remoteness of damage now relies in principle on the reasonable foreseeability test. Nonetheless, the "but for" test intervenes at the prior stage of cause-in-fact. Under German law, adequacy is also based on probabilities,

of any liability (because causation has not been established) when the evidence shows that the probability that the conduct of the defendant caused the injury to the plaintiff was less than half,¹¹ and liability for the full extent of injury will be possible (provided other conditions are fulfilled) as soon as the 50% probability threshold is passed. The introduction of some form of liability assessed as a percentage of the total injury could very well be fairer to both parties, especially in cases where the evidence shows a probability lying only slightly above or below 50%.¹²

d) Nonetheless, as will be seen below, the legal systems studied here have on the whole been reluctant to allow claims based on loss of a chance along the lines outlined above. Among European legal systems, the impact of loss of a chance on causation appears to have been most discussed in French law, and the outcome there remains the most favourable to these claims. Three cases are presented hereafter to illustrate the state of French law. English law is more reserved, as seen in the fourth annotated case. As for German law, it appears that it has followed an alternative route to deal with the uncertainty surrounding causation, namely through reduction or reversal of the burden of proof (to the advantage of the plaintiff);¹³ certain authors argue that the concept of loss of a chance should be introduced into German law,¹⁴ but others consider that the concept runs counter to the basic structure of German tort law, in that a chance does not qualify as a protected *Rechtsgut*.¹⁵

although it is not clear that adequacy applies to *Haftungsbegründung* (Staudinger-Medicus, § 249 at 41, para. 48; Münchener-Grünsky, § 249 at 364, para. 38); in any event, as in English law, any cause must be a *conditio sine qua non* in order to be considered at all in the assessment of causation.

¹¹ The court will then formally conclude that “but for” test has been failed: the injury would have occurred even if the conduct of the defendant is assumed away.

¹² See on proportional liability in general the thorough comparative study of Akkermans.

¹³ Akkermans at 161-8. See *infra*, 4.2.3., on the burden of proof regarding causation.

¹⁴ See E. Deutsch, *Unerlaubte Handlungen und Schadensersatz* (1987) at 203, para. 410, and N. Jansen, “The Idea of a Lost Chance” (1999) 19 OJLS 271. For a nuanced view, allowing loss of a chance in a limited number of situations, see H. Fleischer, “Schadensersatz für verlorene Chancen im Vertrags- und Deliktsrecht” JZ 1999, 766.

¹⁵ See H. Stoll, “Schadensersatz für verlorene Heilungschancen vor englischen Gerichten in rechtsvergleichender Sicht”, in *Festschrift Steffen* (1995) 465. On the role of the concept of *Rechtsgut* in German tort law, see *supra*, Chapter II, 1.3.

*Cass. civ. Ire, 17 November 1982*¹⁶

Goddé v. Debrune

and

*Cass. civ. Ire, 12 November 1985*¹⁷

Konstantinow v. Manrique

and

*Cass. civ. Ire, 7 February 1990*¹⁸

Jugnet v. Hérard

4.F.15.-17.

PERTE D'UNE CHANCE

Under French law, even if it cannot be established that the fault of the defendant caused the damage actually suffered by the plaintiff, the plaintiff can validly argue that the fault of the defendant deprived him or her of a chance to avoid the actual damage. The loss of a chance constitutes a separate head of damage which in practice corresponds to a fraction of the actual damage.

A. Cass. civ. Ire, 17 November 1982

4.F.15.

Mishap in sinus operation

Facts: The defendant physician undertook to perform a drain the plaintiff's sinus. He introduced a surgical instrument (trocar) through the plaintiff's nostril into the sinus. Some blood started to flow. In order to ensure proper placement of the instrument, the physician injected air into the cavity of the sinus. An embolism occurred, and the plaintiff lapsed into coma, leading to permanent incapacity. He sued the defendant for damages.

Held: The court of first instance dismissed the action. The court of appeal reversed and allowed the action. The Cour de cassation quashed the court of appeal judgment and remitted the case back to the court of appeal for further consideration.

Judgment: "The court of appeal finds... 'that the method used by the physician conformed to usual practice, which involves (...) checking the access to the sinus cavity' and 'that, while it is possible that the physician injected air in the blood vessel cut by the trocar during the back-and-forth movement of the piston of the syringe, which contained 2 to 3 cm³ of air, it cannot be excluded, however, that it was the air (naturally) present in the sinus which passed through the cut made in the blood vessel by aspiration due to the proximity of the internal jugular vein'.

¹⁶ JCP 1983.II.20056, D 1984.Jur.305. Translation by Y.P. Salmon.

¹⁷ Bull.civ. 1985.I.298. Translation by Y.P. Salmon.

¹⁸ Bull. civ. 1990.I.39. Translation by Y.P. Salmon.

It adds that ‘it was not established with certainty that the injection of air, carried out notwithstanding the flow of blood, was the cause of the embolism’ and ‘that furthermore it was not proved that the damage to a blood vessel, during the introduction of the trocar, was due to a negligent act by the physician’. It concludes that there was ‘no proof whatsoever of error’ and that ‘finally (...) the accident of the plaintiff is the result of an unforeseeable and exceptional complication’.

The court of appeal nevertheless found the physician liable to ‘bear half of the consequences of the injury’ on the following grounds. Considering ‘that the loss of a chance pre-supposes an existing risk which is susceptible of being increased by a wrongful act’ and ‘given that the embolism was provoked by an influx of air in the breach made in a blood vessel, an existing risk — albeit an exceptional one — was present when a flow of blood was witnessed at the start of the operation; as such, it meant that it was dangerous, or at least ill-advised, to inject air into the sinus’. Accordingly, ‘in so doing, the physician was negligent and increased the chances that [the plaintiff] would be exposed to the complication sustained’.

In relying on to the notion of loss of a chance to find the physician partially liable for the realization of a risk, although this notion could only have a bearing on the assessment of the injury, the court of appeal breached [Articles 1382 and 1383 C.civ.], since it otherwise found that there was no evidence that the fault found against the physician, namely the injection of air into the sinus despite bleeding, caused the occurrence of harm, namely an embolism.”

B. Cass. civ. 1re, 12 November 1985

4.F.16.

Thrombosis

Facts: The plaintiff was transported to hospital following an accident which left him half-paralyzed and unable to speak. He recovered and was sent home, but the symptoms reappeared shortly thereafter. He requested the defendant, his family doctor, to visit him. The defendant examined the plaintiff and told him to see a specialist. It took a few days for the specialist to visit the defendant at home. Upon his arrival, the specialist diagnosed carotid artery thrombosis, and proceeded to operate on the plaintiff urgently the next day. Unfortunately, the surgery was not as successful as expected, and it appeared from the evidence that it might have been more successful if conducted earlier. The plaintiff sued the defendant for having failed to refer him to a specialist forthwith.

Held: The court of appeal rejected the claim. The Cour de cassation quashed the decision of the court of appeal and remitted the case back for consideration.

Judgment: “The court of appeal... dismisses the claim on the ground that causation was not proved to exist between the alleged fault of the defendant and the damage ‘even if one takes loss of a chance into account’, given that at any rate the expert stated that it was not certain that the hemiplegia would have been better treated than it actually was if the surgery had been undertaken earlier.

However, the court of appeal limited its examination to the causal relationship between the delay in providing medical care and the harm suffered by the plaintiff. In so deciding, it did not give a legal basis to its decision since it failed to enquire whether a causal relationship could nonetheless exist as between that delay and the mere loss of a chance that the plaintiff would

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recover, a form of injury which is distinct from that made up by the aforementioned harm.”

C. Cass. civ. 1re, 7 February 1990

4.F.17.

Damage to the eye

When a physician fails to provide proper information to a patient, the physician may be liable for the resulting loss of a chance of recovery.

Facts: In the course of an operation on the plaintiff's sinus (decompression), the internal wall of the right eye socket was damaged, leaving the plaintiff with impaired vision. Although such an occurrence is not exceptional when such an operation is performed, the plaintiff had not been informed of its risk. He sued the defendant for damages, both material and non-material.

Held: The court of appeal allowed the claim for non-material damages only. The Cour de cassation upheld the decision of the court of appeal.

Judgment: “The court of appeal found that the defendant physician was at fault, and assessed the non-material damage suffered by the plaintiff at FRF 10,000. At the same time, it held that there was no direct causal relationship between that fault and the various heads of ‘bodily’ harm for which the plaintiff claimed compensation.

The plaintiff argues against that judgment that, had he been informed of the risk associated with the surgery, he could have refused the surgery; a direct causal link therefore existed between the alleged bodily harm and this breach of a duty to inform, which led to the very risk which was realized.

However, in failing to fulfil his obligation to inform the plaintiff about the possible consequences of his decision to accept the operation which he proposed to him, the defendant only deprived the patient of a chance to avoid — with a perhaps more judicious decision — the risk which was ultimately realized. Such a loss [of a chance] constitutes a form of injury distinct from the bodily harm for which alone the plaintiff was seeking compensation.”

Notes

(1) The three judgments above provide a good overview of the ups and downs of *perte d'une chance* in French medical liability law over the past thirty years.

In the first annotated case, the first civil chamber of the Cour de cassation put a damper on a 17-year old line of cases and returned to a more orthodox position. The starting point had been a judgment of 14 December 1965, where the first civil chamber had recognized that the plaintiff could rightfully claim for a “*perte d'une chance de guérison*” (loss of a chance to recover) in cases where a physician had through a fault deprived the plaintiff of a chance to recover from his condition.¹⁹ The first civil chamber

¹⁹ Cass. civ. 1re, 14 December 1965, JCP 1966.II.14753, note by R. Savatier.

of the Cour de cassation maintained its position and other civil courts followed that position in a rapidly growing body of case-law.²⁰ The criminal chamber of the Cour de cassation, however, steadfastly refused to allow compensation to the *partie civile* in such cases, on the ground that depriving the plaintiff of such a chance was not criminally punishable.²¹ In the face of considerable criticism from doctrinal writers,²² the Cour de cassation in the annotated judgment revisited its case-law²³ and stated unambiguously that the concept of *perte d'une chance* cannot be used to overcome causation problems and thereby open the door to a form of proportional liability.

(2) In the first annotated case, in any event, the Cour de cassation underlined that there was no evidence that the physician was even at fault, since the actions of the physician consisted in nothing more than the normal execution of the operation in question. In the end, the plaintiff was seeking to hold the physician liable for the realization of a risk which is inherent in the type of operation performed, even though the physician had committed no fault. From that point of view, the intervention of the Cour de cassation may appear justified.²⁴

(3) In view of the second and third annotated judgments, the view set out in the previous paragraph may be the most appropriate interpretation of the first annotated judgment. Indeed, the second and third cases show how the concept of *perte d'une chance* in the field of medical liability has survived the first case, albeit within more closely defined boundaries.

In the second annotated case, contrary to the first one, some form of fault could be imputed to the defendant, namely the failure to refer the plaintiff to a specialist on an urgent basis. The operation carried out by the specialist was not a complete success (not due to any fault on the part of the specialist). Clearly it may, at any rate on the basis of existing medical knowledge, not be *possible* to say whether, but for the delay in referring the plaintiff, the operation *would have been* more successful; all that one can say is that the longer the delay, the lower the chances of an operation being completely successful.

²⁰ See the note by M. Saluden under the annotated case, JCP 1983.II.20056, as well as Viney at 197-8, para. 370.

²¹ Saluden, *ibid.*

²² Including R. Savatier (starting with a case comment at JCP 1966.II.14753 and in numerous comments and articles thereafter) and F. Chabas (case comments at D 1971.Jur.637 and JCP 1980.II.19272, as well as “Vers un changement de nature de la responsabilité médicale” JCP 1973.I.2737). For a thorough account of the doctrinal debates around this issue, reference can be made to the judgment of the Supreme Court of Canada in *Laferrière v. Lawson* [1991] 1 SCR 541, where the court, ruling on the state of the law of Quebec, more or less took the same position as the Cour de cassation in the first annotated case.

²³ The judgment has been interpreted as a *revirement* (reversal of case-law) by M. Saluden in her comment at JCP 1983.II.20056, A. Dorsner-Dolivet in her comment at D 1984.Jur.305 (“un véritable coup d'état”) and G. Durry in his chronicle at (1983) 82 RTDciv 535 at 547-9.

²⁴ See the note by M. Saluden under the annotated case, JCP 1983.II.20056.

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Against that background, the court of appeal had found against the plaintiff on the basis that he had failed to establish that the delay was the cause of the lack of success of his operation. While that may be true, the Cour de cassation added that the defendant's fault did reduce the chances of complete success, or in other words had caused the plaintiff the loss of a chance (*perte d'une chance*) that the operation would be completely successful. *Perte d'une chance* is acknowledged as a valid head of damage under French law, a point which the first annotated judgment did not dispute. Accordingly, it becomes possible to establish causation between the fault of the defendant and the *perte d'une chance*, so that the liability of the defendant would be made out.

The second annotated case is one of a series of Cour de cassation decisions which have reinstated *perte d'une chance* in the context of medical liability cases, starting with a judgment of the first chamber of 8 January 1985.²⁵

(4) The third annotated case shows the interplay between *perte d'une chance* and the duty to inform. Its facts are not dissimilar to those of the first annotated case: the medical intervention related to the sinuses of the patient, and was fraught with risk. It was properly conducted, but nonetheless one of the risks inherent in the operation materialized and the plaintiff was injured. In the third annotated case, however, the plaintiff did not argue that the physician, in conducting the operation (even without fault), deprived him of a risk of recovery without complications. Rather, the plaintiff claimed that he had not been properly informed of the risk of complications which ultimately eventuated, and that he would have refused treatment had he known about that risk; according to the plaintiff, the physician should then be held liable for the whole of the injury. The Cour de cassation agreed that the defendant was liable, but not for the actual injury caused to the plaintiff. As the court noted, it is by no means certain that the plaintiff would have decided otherwise even if he had been fully informed, so that it cannot be said that the injury would have been avoided but for the fault in not informing the plaintiff fully. At most, the plaintiff was deprived of a chance to escape the risk of complications by deciding not to undergo the operation. For the courts, *perte d'une chance* is the only head of damage where causation can be established with the requisite certainty. The third annotated case is one of a series of cases where *perte d'une chance* has been recognized as a valid head of damage for failure to inform the patient fully.²⁶

(5) In the second and third annotated cases, the Cour de cassation insisted on the distinction between the actual damage suffered by the plaintiff (failure to recover completely from thrombosis, damage to the eye socket) and the damage which the loss of a chance represents. As the court underlined, these are two distinct heads of damage.

²⁵ Cass. civ. Ire, 8 January 1985, Bull.civ. 1985.I.10, D 1986.Jur.390. Viney and Jourdain, *Conditions* at 201, para. 372, further cite Cass. civ. Ire, 18 January 1989, Bull.civ. 1989.I.19; Cass. civ. Ire, 7 June 1989, Bull.civ. 1989.I.230, D 1991.Jur.158; Cass. civ. Ire, 30 October 1995, Bull.civ. 1995.I.384, Resp. civ. et assur. 1996.Com.25.

²⁶ See *supra*, 4.F.14. and Note (2) thereafter.

In practice, however, the value of the loss of a chance will usually be assessed as a proportion of the actual damage suffered. For instance, in a case decided by the Cour de cassation on 18 January 1989,²⁷ the court of appeal had “concluded that the injury suffered by [the victim]... had to be assessed at FRF 943 000, but fixed the *quantum* of damages at FRF 700 000, considering that the injury consisted in a *perte d’une chance*”; the Cour de cassation approved, stating that “the court of appeal, which [having found that the injury consisted in a *perte d’une chance*] could not hold the [defendant] liable for the whole of the injury, thus... legally justified its decision.”

In the end, it might appear difficult to reconcile the first annotated judgment with the last two. In the first annotated judgment, the Cour de cassation refused to allow partial recovery of the damage suffered by plaintiff by using *perte d’une chance* to alleviate causation difficulties, whereas in the last two cases, the Cour de cassation allows recovery of *perte d’une chance* as a head of damage independent from the damage actually suffered by the plaintiff, finding that causation had been established between the fault of the physician and the *perte d’une chance*. Beyond differences in wording, the idea is the same: the lack of causation between the conduct of the defendant and the actual damage is solved by defining an “intermediate” head of damage with which causation is established — which in practice corresponds to a proportion of the actual damage.²⁸ Yet there are some differences between those cases, which could explain their respective outcomes. For one, no fault was established in the first case, whereas the defendant physician was at fault in the last two cases; if the defendant had been held liable in the first case, it would truly have been a case of risk-based liability. Furthermore, the first case related to a positive *action* by the physician (the actual conduct of the operation), whereas the last two concerned an *omission* (second one) and a *failure to inform properly* (third one).²⁹

(6) While the use of *perte d’une chance* as a head of damage under French law thus enables plaintiffs to avoid certain difficulties related to causation under certain circumstances, its main drawback, as mentioned above and pointed out by Viney, is that compensation will ultimately be granted for only part of the actual damage suffered by the plaintiff.³⁰ As an alternative to *perte d’une chance*, Viney would advocate using the concept of “fault creating a risk for the plaintiff” (*création fautive d’un risque*) — which has materialized — in order to enable the plaintiff to recover the full extent of his or her

²⁷ Cass. civ. 1re, 18 January 1989, Bull.civ. 1989.I.19.

²⁸ This comes very close, without it being openly acknowledged, to the proportional liability model advocated by Akkermans and discussed *supra*, Introductory Note under c).

²⁹ M. Saluden, in her comment on the first annotated case at JCP 1983.II.20056, noted, shortly after the decision of the Cour de cassation in the first annotated case, that it was likely that cases involving faults by omission and *perte d’une chance* would not be affected.

³⁰ See Viney and Jourdain, *Conditions* at 202-4, para. 373.

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injury instead of only part thereof.³¹ Indeed, in a broader perspective, the use of *perte d'une chance* in practice amounts to relieving the plaintiff of part of the burden of proof in medical liability cases, where causation is notoriously difficult to prove; one might ask whether it is not fairer to relieve the plaintiff fully from that burden.³²

*House of Lords*³³

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Hotson v. East Berkshire Area Health Authority

STANDARD OF PROOF. LOSS OF A CHANCE.

Schoolboy falls from a tree

A claim for loss of a chance due to negligent medical treatment following an accident will be dismissed if it is shown that the actual damage suffered by the plaintiff was more likely than not to have been caused by the accident.

Facts: The plaintiff, a schoolboy, fell from a tree and suffered an acute traumatic fracture of his left thighbone. The condition was not immediately diagnosed at the defendant hospital where he was taken and it took five days for a correct diagnosis to be made. The initial injury caused a necrosis of the bone, with immediate disability and almost certain arthritis later in life. The plaintiff sued the defendant for damages, claiming that he would have had a chance to avoid the necrosis if a correct diagnostic had been made at the outset.

The court of first instance found as a fact that, with a timely diagnostic, the plaintiff would have had a 25% chance of avoiding necrosis.

Held: The court of first instance allowed the claim of the plaintiff. The court of appeal confirmed the judgment of the court of first instance. The House of Lords allowed the appeal from the court of appeal and dismissed the plaintiff's claim.

Judgment: LORD BRIDGE³⁴: "...The plaintiff's claim was for damages for physical injury and consequential loss alleged to have been caused by the authority's breach of their duty of care. In some cases, perhaps particularly medical negligence cases, causation may be so shrouded

³¹ For two cases where that approach appears to have been applied, leading to full compensation, see Cass. civ., 26 March 1996, Bull.civ. 1996.I.155 (first decision) and *supra*, Chapter II, 2.F.37. (second decision). In a later case that did not concern medical liability, however, the Cour de cassation clearly reaffirmed that the "creation of a risk, even though it might be certain, does not amount to the certain loss of a chance": Cass. civ. Ire, 16 June 1998, JCP(E) 1998.2077.

³² On the means of relief from the burden of proof as regards causation under French law, see *infra*, 4.F.20.-22. and notes thereafter. Instead of using the device of *perte d'une chance*, German law has put the emphasis on the rules concerning the burden of proof, see *infra*, 4.G.19. and notes thereafter.

³³ [1987] 1 AC 750.

³⁴ Lord Mackay and Lord Ackner also delivered concurring speeches. Lord Brandon and Lord Goff agreed with all three speeches.

in mystery that the court can only measure statistical chances. But that was not so here. On the evidence, there was a clear conflict as to what had caused the avascular necrosis. The authority's evidence was that the sole cause was the original traumatic injury to the hip. The plaintiff's evidence, at its highest, was that the delay in treatment was a material contributory cause. This was a conflict, like any other about some relevant past event, which the judge could not avoid resolving on a balance of probabilities. Unless the plaintiff proved on a balance of probabilities that the delayed treatment was at least a material contributory cause of the avascular necrosis he failed on the issue of causation and no question of quantification could arise. But the judge's findings of fact... are unmistakably to the effect that on a balance of probabilities the injury caused by the plaintiff's fall left insufficient blood vessels intact to keep the epiphysis alive. This amounts to a finding of fact that the fall was the sole cause of the avascular necrosis.

The upshot is that the appeal must be allowed on the narrow ground that the plaintiff failed to establish a cause of action in respect of the avascular necrosis and its consequences. Your Lordships were invited to approach the appeal more broadly and to decide whether, in a claim for damages for personal injury, it can ever be appropriate, where the cause of the injury is unascertainable and all the plaintiff can show is a statistical chance which is less than even that, but for the defendant's breach of duty, he would not have suffered the injury, to award him a proportionate fraction of the full damages appropriate to compensate for the injury as the measure damages for the lost chance.

...I do not see this appeal as a suitable occasion for reaching a settled conclusion as to whether the analogy [with case-law regarding loss of potential earnings or a potentially successful right of action] can ever be applied.

As I have said, there was in this case an inescapable issue of causation first to be resolved. But if the plaintiff had proved on a balance of probabilities that the authority's negligent failure to diagnose and treat his injury promptly had materially contributed to the development of avascular necrosis, I know of no principle of English law which would have entitled the authority to a discount from the full measure of damage to reflect the chance that, even given prompt treatment, avascular necrosis might well still have developed..."

Notes

(1) In the annotated case, the House of Lords skirted the issue of loss of a chance under English law, by finding, in the words of Lord Bridge, that "[t]his was a conflict... about some relevant past event", which the judge had to resolve on a balance of probabilities. Given that, even if treatment had been undertaken in time, the plaintiff would still have had a 75% chance of developing the injury which occurred, the House of Lords found that, on the balance of probabilities, the cause of the injury was the fall from the tree, and that the failure to treat the plaintiff in time could not be considered as a cause of that injury. Only if the case involved the assessment of damages for injury which had not yet materialized (a future fact) would the House of Lords have been ready to entertain the idea that the award of damages should be discounted to account for

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uncertainty.³⁵

Even if the House of Lords left the door open for loss of a chance under English law, the approach taken in *Hotson* does not actually bode well for it, at least in medical liability cases. Lord Bridge would make a distinction between “traditional” cases such as *Chaplin v. Hicks* (a claim in contract)³⁶ and medical liability cases, such as was made by French writers but appears to have been abandoned there.³⁷ Yet the annotated case would have been suitable for a reasoning based on loss of a chance: indeed the trial judge found that the delay in treatment, for which the defendant was responsible, deprived the plaintiff of a 25% of recovery, and proceeded to award the plaintiff a sum corresponding to 25% of the total damage. It appears, however, that neither the plaintiff’s claim nor the judgment of the trial judge was clearly articulated in terms of lost chances. The House of Lords decided to ignore loss of a chance, and held that the claim was one for personal injury, i.e. for the actual damages suffered by the plaintiff. On that account, the House was correct in finding that causation had not been established.

(2) It may be that, in *Hotson*, the evidence was so clear and comprehensible that the House of Lords could not avoid making a finding on the basis of the actual damage, as opposed to a lost chance.³⁸ Yet the House of Lords has run into criticism for its characterization of the case as one of past fact;³⁹ indeed the distinction appears somewhat arbitrary to the extent that the date of the trial, as opposed to the date of the accident, is used to determine whether the case is one of past fact (where the uncertainty goes to causation) or future fact (where the uncertainty is merely reflected in the quantum of damages).⁴⁰

³⁵ See the speech of Lord Ackner (not reproduced), [1987] 1 AC 750 at 793-4.

³⁶ *Chaplin v. Hicks* [1911] 2 KB 786, CA. See also *Allied Maples Group Ltd v. Simmonds & Simmonds*, *supra*, Chapter II, 2.E.49., and Rogers at 204-7.

³⁷ *Supra*, 4.2.2., Introductory Note under b).

³⁸ This is the opinion of D.P.T. Price, “Causation — The Lords’ Lost Chance?” (1989) 38 ICLQ 735 at 754.

³⁹ Price, *ibid.* at 753. See also Akkermans at 200-4.

⁴⁰ Akkermans, *ibid.*