THE RICHARD DAVIES QC MEMORIAL LECTURE

PERSONAL INJURY BAR ASSOCIATION – UK

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LOSS OF A CHANCE

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I do appreciate the honour of the Association's invitation to give this lecture. Kristina Stern, now a silk practising in Sydney, describes the late Richard Davies QC as "a wonderful advocate and a highly impressive man, who took the skills of advocacy very seriously and thought deeply about his own advocacy. He was unfailingly kind and courteous. His unexpected death was a great loss to the London bar, and to 39 Essex Street in particular."

I have also taken note of the distinguished line of speakers from recent years. The only particular benefit I can offer is an Antipodean view of the law which, in these days of remote communication, is as readily available as the views of your colleagues next door, who are probably not next door at this time. And in saying that I can tell you that we in Australia have watched with growing concern the disruption and discomfort which we know from experience you will be suffering in the midst of the pandemic.

It would be tempting to say that the topic of tortious liability for loss of a chance, or increased risk of an adverse outcome, in personal injury cases, might be relevant to potential claims by people who have been infected where reasonable care might have lessened that risk. However, I don't propose to go there.

Our common law system of administering justice is steadily undergoing a process of change. The question of how we identify "harm" for the purposes of personal injury claims, and how we deal with the concept of causation, are matters which call for reflection.

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The criterion of causation postulates a counterfactual: what would the claimant's position have been, had the tortious conduct not occurred? The requirement to compensate the claimant who has suffered loss reflects a theory of corrective justice. It involves an instinctively acceptable moral principle: this is not easily defined, because negligence turns on failure to meet an objective standard, and is not an intention-based tort, but if the law fails to follow it, the law will risk losing the confidence of those it serves.

Yet that element of morality operates between individuals. There is a different moral principle that casts collective responsibility on the state to care for injured members of the community. That principle recognises that many suffer injury without fault on the part of others. "No fault liability" schemes and social welfare safety nets cater for those in need generally. Indeed, "no fault" schemes can substitute for tort-based recovery. (That is the approach preferred by Lord Sumption delivering this lecture in 2017.)

This is not the occasion to evaluate such proposals and existing schemes, but I am conscious that there is on-going concern about social costs and there is pressure to restrict (not expand) the scope of personal injury litigation. However, there is also pressure to control the costs of no-fault schemes. The largest area of no-fault liability in our State, is workers' compensation. But there are also insurance and superannuation schemes which cover State workers, such as police. When the State takes over responsibility for injured workers it tends, like most insurers, to seek to spread the risk. Thus, our State scheme for totally and permanently disabled police is covered by private insurers, who in turn distribute the risk to reinsurers. When passing responsibility to other agencies, private or public, as occurs with no-fault schemes, the financial and social consequences can be substantial and unpredictable. They do not eliminate disputes and systems for review of determinations, nor do they preclude litigation; they have their own problems with transparency, inefficiency and cost.

However, most common law jurisdictions accept that the community at large should *not* pay the cost of injuries inflicted by individuals acting carelessly, and that tort liability can itself serve a valuable function in maintaining compliance with standards, although empirical evidence of such an outcome is hard to find. In any event, my

purpose tonight is to indicate why I think a limited expansion of tort law is desirable in the case of personal injury.

The working out of the scope and limits of a system which imposes liability for personal injuries involves control mechanisms and compromises. We know this has occurred pragmatically and somewhat haphazardly over the last 100 years. I do not want to suggest that a system of this kind must be reformed merely because it lacks logical precision and coherence; I do wish to suggest, however, that we should look closely at our system for corrective justice to see if it achieves a level of incoherence which offends the value of equal treatment underpinning its moral justification. The highest courts in our countries have ostensibly rejected a loss of a chance of a better outcome as a form of harm in personal injury claims, while accepting them in cases of pure economic loss. In particular, that approach has been proposed and rejected in dealing with medical negligence.[1]

Before addressing that issue, may I identify the social vectors which, cumulatively, suggest there are aspects of tort law which warrant reconsideration. These vectors, which are interrelated, include the following.

First, over the last century there has been a progressive abandonment of juries for determining civil claims and, in particular, personal injury claims. Procedural rules and rules of evidence tend to be loosened where the judges are no longer lay persons. It may be obvious, but procedural controls can be simplified where prejudicial material will be seen by the judge in any event, although he or she will be the ultimate finder of fact; and where witness statements, whether on oath or otherwise, can be prepared and exchanged before trial, thereby reducing the dependence on oral evidence which is a central feature (for better or worse) of the jury trial.

Secondly, there is the role of expert evidence. There can be little doubt that over the years expert evidence has come to play an increasingly large role in identifying both the standards required by the obligation to exercise reasonable care, and the causal link between a particular event and the harm suffered. Judges regularly complain if they have not had expert evidence on a particular issue, or the evidence is deficient:

1 *Gregg v Scott* [2005] 2 AC 176; [2005] UKHL 2; *Tabet v Gett* (2010) 240 CLR 537; [2010] HCA 12.

Gregg v Scott was a prime example of the latter. It has also created a changed role for the "balance of probabilities" standard. When scientists assert that a particular outcome was probably caused by a particular event, to demand in addition that a judge must feel an actual persuasion as to the connecting factor, may seem like little more than an appeal to unverified, and possibly unconscious, assumptions. In dealing with dust diseases, we have become familiar with the use of epidemiology to provide a systematic method for identifying and quantifying risks to health. As explained by a former Chief Justice of my court, James Spigelman, in *Seltsam Pty Ltd v McGuiness*:[2]

> "Epidemiology provides two types of material: first, the statistical measurement of an association between exposure and disease and, secondly, interpretation of the data to determine general causation."

The measure of the strength of an association is the "relative risk", being the incidence of disease in exposed individuals compared to the incidence in the general population. When the relative risk resulting from tortious exposure is above 2, there is a greater than even probability that causation has been established. We then conclude that the plaintiff has proved his or her case by showing that it was more probable than not that the injury was caused by the defendant's negligence. More recently, anxiety has been expressed about reliance on relative risk calculations. In a judgment to which I will come, the Privy Council counselled caution:[3]

> "But inferring causation from proof of heightened risk is never an exercise to apply mechanistically. A doubled tiny risk will still be very small."

The size of the risk may mean it is subject to a larger margin of error; but where the risk has materialised, the logic of the calculation is sound. The basis for the expression of caution was unclear.

Thirdly, the resistance to treating a lost chance as "harm" is based in large part on the principle that causation must be established on the balance of probabilities.[4] This is seen as an important control mechanism. Yet states of satisfaction are

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2 (2000) 49 NSWLR 262; [2000] NSWCA 29 at [62].

3 *Williams v Bermuda Hospitals Board* [2016] AC 888.

4 It has been suggested that the "balance of probabilities" is a reasonably recent development of the common law: J Leubsdorf, "The Surprising History of the Preponderance Standard of Civil Proof" (2016) 67 Florida L Rev 1569; but cf M Redmayne, "Standards of Proof in Civil Litigation" (1999) 62 MLR 167.

inherently indeterminate and hard to define; conventionally, we refuse to tell juries what "beyond reasonable doubt" means. But the phrase "balance of probabilities" is just as problematic. And its meaning has changed over time.

In a 1938 judgment of the Australian High Court, *Briginshaw v Briginshaw*,[5] Sir Owen Dixon, after referring to a passage in *Wigmore*, said:

> "The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes."

In a 1999 article in the Modern Law Review,[6] Professor Redmayne noted the uncertain history of the phrase, and, indeed, the ambiguity of the term "probabilities", and its changing use over time. We tend to assume it refers to the mid-point on a linear scale, between belief that a proposition is certainly false, and the belief that it is certainly true. Even accepting such a construct, to posit that all cases fall on one side or other of the mid-point is unrealistic. To distinguish between, say, 0.4 and 0.6 (or 40% and 60%) may be an entirely arbitrary exercise. But when epidemiologists (or other scientific experts) identify a causal connection at a level of probability such as 42%, we say, dogmatically, that the plaintiff has not proved his or her case.

Fourthly, the formulation of the standard of proof has been refined. This may be an example of a change resulting from judges taking on the role of deciding factual issues, and articulating their reasoning processes. Reasons are scrutinised carefully by the losing party and errors and omissions are identified and addressed by the appeal court. Findings as to causation are no longer a matter of common sense; terminology becomes important. In 1956, in *Bonnington Castings v Wardlaw*,[7] Lord Reid famously stated that the plaintiff "must make it appear at least that on the balance of probabilities the breach of duty caused or *materially contributed* to his injury."[8] Because there were two sources of silica dust capable of producing the

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5 (1938) 60 CLR 336 at 361; [1938] HCA 34.
6 See fn 4 above.
7 *Bonnington Castings Ltd v Wardlaw* [1956] AC 613.
8 *Bonnington Castings* at 620.

injury, the finding in favour of the plaintiff was based on material contribution. That was said to involve "a question of degree." It was sufficient to prove on the balance of probabilities that the tortious dust "did in fact contribute a quota of silica dust which was not negligible" and therefore "did help to produce the disease."

There has been debate as to the circumstances in which this approach may be applied, but in principle it is available in medical negligence cases. In 2016, Lord Toulson, writing for the Privy Council in *Williams v Bermuda Hospitals Board*, expressly applied it. Mr Williams suffered serious complications resulting from an accumulation of sepsis following a delayed operation for acute appendicitis. The Board accepted that it was "right to infer on the balance of probabilities that the [Hospital's] negligence materially contributed to the process, and therefore materially contributed to the injury to the heart and lungs."[9]

The Board also commented on circumstances which arose in *Bailey v Ministry of Defence*.[10] Ms Bailey had been admitted to hospital for removal of a gallstone. Following an endoscopy, she was negligently treated, as a result of which she was left in a weakened state. She developed pancreatitis, which was a non-negligent complication of the endoscopy. She ended up vomiting in her sleep, aspirating vomit and suffering a cardiac arrest and hypoxic brain damage. The Board identified the claimant's weakened condition and the non-negligent pancreatitis as involving co-morbidities, each of which materially contributed to the adverse outcome. The claimant was entitled to recover. The Board stated:

> "The fact that her vulnerability was heightened by her pancreatitis no more assisted the hospital's case than if she had an eggshell skull."[11]

Fifthly, the concept of "material contribution" as a form of causation fits comfortably with another major development in the law, namely the abandonment of the absolute defence of contributory negligence and its replacement with an apportionment of liability. The contribution of the tortfeasor may be assessed at less than 50%, but liability is sufficiently established.

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9 *Williams* at [42].
10 [2009] 1 WLR 1052.
11 *Williams* at [47].

The sixth development, which directly challenged the fairness of a system which required demonstration of causation on the balance of probabilities, arose in dealing with mesothelioma claims. Somewhat ironically, it arose because medical science had developed in a particular direction, which identified a problem *without* producing an answer. Like the silicosis in *Bonnington Castings*, a common asbestos-related disease, asbestosis, was understood to be the product of cumulative sequential exposures. All periods of inhalation may contribute to the injury, which is therefore described as a single divisible injury. Mesothelioma, however, was understood to be a form of cancer, the severity of which was not dependent upon cumulative exposure, but could be caused by a single fibre. If there were a known tortious source of fibre, together with an assumed ambient, non-tortious source, it might be possible to undertake a relative risk assessment to determine if the tortious fibre was the probable source of the disease. However, if there were multiple tortious sources, that exercise would not allow causation to be established with respect to any tortfeasor on the balance of probabilities, and there was no way of knowing which source was the effective cause. The problem addressed in *Fairchild v Glenhaven Funeral Services*[12] was whether the existence of multiple tortfeasors allowed all to escape responsibility. As we know, the House of Lords was content to rely on the reasoning in the so-called "hunter cases" to avoid an unattractive outcome.[13] The "hunter cases" involved a person shot by one of two negligent hunters, in circumstances where it was not possible to identify the source of the bullet. In *Fairchild*, on the assumption that each of the sources of dust involved tortious conduct, each defendant was liable. If the hunting cases were anomalous, the anomaly was somewhat expanded in *Fairchild*.

In *Barker v Corus*,[14] the House of Lords applied *Fairchild* in circumstances where part of the exposure was through the negligence of the claimant. If that had been a straight contributory negligence case, apportionment of liability between the plaintiff and the defendant would have followed. Although that was the result upheld in the House of Lords, it was not a straight contributory negligence case, because it was

[12] [2003] 1 AC 32; [2002] UKHL 22.
[13] See J Stapleton, "Uncertain Causes: Asbestos in UK Courts" in M Martin-Casals and D M Papayannis, *Uncertain Causation in Tort Law* (Cambridge University Press, 2016), p 89; see also J Stapleton, "Factual Causation, Mesothelioma and Statistical Validity" (2012) 128 LQR 221.
[14] [2006] 2 AC 572; [2006] UKHL 20.

not established on the balance of probabilities that the defendant had indeed materially contributed to the injury. On the medical evidence, the disease had resulted from inhaling a particular fibre, the source of which could not be proven. The result, in effect, was that a defendant could be liable by exposing a claimant to an increased material risk of injury, so long as the injury was mesothelioma. This approach was expressly applied in 2011 in *Sienkiewicz v Greif*.[15] The House of Lords rejected the proposition that a doubling of the risk test must be applied in cases of a single tortious exposure. On one view, the ruling in *Sienkiewicz* was not a departure from *Fairchild*, but merely demonstrated the breadth of *Fairchild* in abandoning a doubling of the risk principle as the basis of liability.[16]

There are two propositions and a footnote in relation to the asbestos claims. First, *if* it is permissible in principle to allow recovery for tortiously exposing a person to a material increase in the risk of suffering injury, where the injury has materialised, it is surely correct in principle that the defendant should be liable only to the extent of the increase, by applying apportionment principles in calculating damages. It was open to the Parliament to say otherwise, as it did following *Barker v Corus*, but that is a different point.

Secondly, these cases gave rise to a level of anxiety over the notion of proof on the balance of probabilities. Thus, in *Sienkiewicz*, Lord Rodger distinguished between the availability of epidemiology to establish that the defendant's breach had probably caused the injury, and the requirement in civil proceedings for the judge to decide on the balance of probabilities, "what actually happened" in the particular case.[17] That language echoes Chief Justice Dixon in the 1938 case of *Briginshaw*, a case not dealing with scientific proof.

The footnote is this: a highly regarded international authority on mesothelioma postulated a principle based on cumulative exposure rather than exposure to a single fibre. This evidence was accepted by our Court. As explained by French CJ in *Amaca Pty Ltd v Booth*,[18] a case decided not long after *Sienkiewicz*:

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[15] *Sienkiewicz v Greif (UK) Ltd* [2011] 2 AC 229; [2011] UKSC 10.
[16] See Stapleton, Uncertain Causes, p 93.
[17] *Sienkievicz* at [158].
[18] (2011) 246 CLR 36; [2011] HCA 53 at [51].

> "It is enough for present purposes to say that an inference of factual causation, as against both [defendants], was open on the evidence before the primary judge. The cumulative effect mechanism involving all asbestos exposure in causal contribution to the ultimate development of a mesothelioma had been propounded and was accepted by his Honour. It depended upon an understanding of physiological mechanism. It did not depend upon the epidemiology. Whether or not medical science in the future vindicates or undermines that theory, is not to the point."

There is a seventh development which I think is important and takes us back to the moral underpinnings of tort law. If those moral underpinnings were concerned with individual personal responsibility, that rationale was destroyed, or at least greatly diminished, by the growth of personal liability insurance and particularly compulsory insurance. On the other hand, there is an understandable response when dealing with a specific case to ask where the burden of an undoubted calamity should lie, as between the suffering claimant and an insured defendant. But that response ignores the cumulative effects of over-ready acceptance of such claims, usually by lowering the hurdle of establishing lack of reasonable care.

Finally, although in some areas the courts have been cautious about allowing claims for pure economic loss,[19] that has not been so in relation to claims for a lost opportunity of a better outcome where the claim is in contract, or even based on a statutory cause of action for misleading or deceptive conduct.[20] It is by no means obvious why a claim for a lost opportunity of a better outcome should be treated more favourably where the claim is in contract rather than tort, or where the claim is for a lost economic opportunity, rather than for a better physical or mental outcome.[21]

Further, contract law has adapted to permit recovery of damages for distress, vexation and injury to feelings where the very object of the contract has been to provide pleasure, relaxation or freedom from molestation.[22] An example is *Heywood*

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[19] *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at [70]-[74] (McHugh J); [165] ff (Gummow J); [328] (Hayne J); [1999] HCA 36; see also *Bryan v Maloney* (1995) 182 CLR 609; at 618 (Mason CJ, Deane and Gaudron JJ); [1995] HCA 17.

[20] *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332; [1994] HCA 4.

[21] See J Edelman, "Loss of a Chance" (2013) 21 Torts LJ 1; H Luntz, "Loss of Chance in Medical Negligence", U of Melb Leg Stud Res Paper No. 522, (2010) https://ssrn.com/abstract=1743862: cf Lord Neuberger, speech to Professional Negligence Bar Association, 2008.

[22] *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 363 (Mason CJ); [1993] HCA 4.

v Wellers[23] where a woman recovered damages for mental distress, short of a recognised psychiatric injury, from a solicitor who failed negligently to obtain the equivalent of an apprehended violence order. Similar awards have been allowed in the so-called "holiday cases", where the object of the contract was to provide pleasure or relaxation. It appears anomalous that the plaintiffs could recover in *Jarvis v Swans Tours Ltd*[24] and in *Jackson v Horizon Holidays Ltd*,[25] and in equivalent Australian cases.[26] As explained by Edelman J in the Australian High Court in *Moore v Scenic Tours*, these are described as compensation for "expectation loss":[27] where the law cannot provide for performance of the contract, it provides "a secondary right for the value of the performance that was not received or the difference in value due to the defect."[28] But expectation loss can aptly cover the disappointed expectation of competently provided medical services.

It is true that a contract claim is founded on a pre-existing relationship and a failure to fulfil a negotiated promise.[29] However, many medical services are provided pursuant to contract; those which are not may be seen as invoking a relationship which is at least analogous to contract. The patient seeks the provision of professional services for a particular purpose to do with bodily integrity. The medical practitioner holds himself or herself out as providing general or specialist medical services. Agreement to treat the patient involves an implied agreement, not to cure the patient, but to exercise reasonable care in diagnosis and treatment. There is an assumption of responsibility and reliance.[30]

These various factors suggest a cogent case can be made for adopting a formulation of harm in medical negligence cases which encompasses the loss of a chance of a better outcome. I should now explain how the case law has reached a different position.

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[23] [1976] QB 446.
[24] [1973] QB 233.
[25] [1975] 1 WLR 1468.
[26] *Baltic Shipping Co v Dillon*; applied recently in *Moore v Scenic Tours Pty Ltd* (2020) 98 ALJR 481; [2020] HCA 17 at [43]-[56].
[27] *Moore v Scenic Tours* at [62]-[63].
[28] Ibid at [64].
[29] *Sellars v Adelaide Petroleum NL* at 359 (Brennan J); *Tabet v Gett* at [47] (Gummow ACJ).
[30] J Edelman, fn 21 above, p 7.

First, it is necessary to identify a degree of imprecision which afflicts the formulation of principles in this area of tort law. As we know, in *Gregg v Scott*, five eminent judges (indeed, eight including the judges in both appeal courts) divided narrowly as to the outcome. Some commentators, including *McGregor on Damages*, have disagreed with the views of the minority in the House of Lords, Lord Nicholls and Lord Hope, who had stated that the outcome of the case created a wrong without a remedy. According to *McGregor*, that analysis: "gets us nowhere for it begs the question. They assume that a wrong has been done, which is the very question that it is for the court to decide."[31] True it is that no liability arises until all the elements of the tort have been established. Negligence without harm is not tortious. However speaking for the majority in *Gregg*, Lord Hoffmann stated:[32]

> "The question which has given rise to this appeal is whether Dr Scott's negligence caused injury to Mr Gregg."

(The minority did not dispute that proposition.) Lord Hoffmann continued:[33]

> "In the Court of Appeal Mr Gregg's counsel advanced two arguments. The first was that Mr Gregg had proved that the delay had caused him injury because the judge found that if he had been treated earlier the cancer would probably not have spread as quickly as it did. … The second argument was that quite apart from any other injury, the reduction in his chances of survival was itself a compensatable head of damage."

These were treated by the majority in each appeal court as separate items of damage. Lord Phillips stated:[34]

> "Under our law as it is at present, and subject to the exception in *Fairchild's* case, a claimant will only succeed if, on balance of probability the negligence is the cause of *the injury*."

By contrast, Baroness Hale expressed herself in language closer to that of Lord Hoffmann, stating:[35]

> "It is now hornbook law that damage is the gist of the action in negligence. The defendant owes a duty to take reasonable care of the claimant, the breach of which has caused the claimant actionable damage. The primary facts of what took place must be proved on the

[31] McGregor at [10-055].
[32] *Gregg v Scott* at [64].
[33] *Gregg v Scott* at [66].
[34] *Gregg v Scott* at [174].
[35] *Gregg v Scott* at [193].

> balance of probabilities. It must also be shown on the balance of probabilities that what the defendant negligently did or failed to do caused the claimant's damage."

There seems to me to be a slide in the reasoning between "injury" (Lord Hoffmann) or "damage" (Lady Hale) and *heads of damage*. On one view, liability is complete when the claimant establishes that he or she has suffered a compensable loss. Once that occurs, one is in the field of quantification of damages, subject to questions of remoteness. In other words, if it is established that the defendant's negligence has caused harm, say the spread of cancer, it may nevertheless be true that the plaintiff is more likely than not to die *with* the disease, rather than *of* it. That is a calculation to be undertaken by way of apportionment of possibilities.

There are undoubtedly cases where the plaintiff fails to establish harm, but the characterisation exercise can be fraught. The facts in *Hotson v East Berkshire Health Authority*[36] illustrate the problem. You will recall that 13 year-old Stephen Hotson fell while swinging from a rope at his school. He suffered an acute traumatic fracture of his femoral epiphysis, being the top of the femur responsible for growth. The hospital to which he was taken failed to assess any injury to his hip. There had undoubtedly been a rupturing of blood vessels caused by the femoral twisting. The question was whether avascular necrosis was inevitable as a result of the injury. At trial, Justice Simon Brown found that there would have been a 25% chance of avoiding the adverse outcome had the injury been identified when it should have been.

Lord MacKay identified the issue as relating to "a point in time before the negligent failure to treat began."[37] Lord Bridge stated:

> "On the evidence there was a clear conflict as to what had caused 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."

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[36] [1987] AC 750.
[37] *Hotson* at 785.

Ultimately the case turned on an understanding of the evidence. Lord Ackner interpreted the trial judge's finding of fact as meaning that, on the balance of probabilities, the epiphysis at the top of the femur was "doomed", before the plaintiff reached the hospital.[38]

I do not wish to dwell on a factual issue, but I note the Master of the Rolls, Sir John Donaldson's observation, that "there was a conflict of medical evidence which reflects the fact that, whilst all or most surgeons would regard immediate treatment as essential, if only to relieve pain, there is no certainty that immediate treatment will avoid avascular necrosis with consequential disability."[39] I infer that all or most surgeons would operate in part because there *was* a chance of improving the outcome for the epiphysis. Further, one might speculate as to what the outcome would have been if the primary claim had been brought against the school. If it were negligent, for example, in failing to supervise the school playground, it could not have escaped liability for the whole of the damage, but it is quite plausible that it would have recovered a contribution from the hospital. (Questions of contributory negligence might also have arisen, but I note the age of the boy.)

An alternative characterisation of such cases may be to see them as involving a claimant with a pre-existing condition. On one view, at the time Mr Gregg was misdiagnosed he was in fact suffering from a condition which, according to the medically relevant standard of survival for 10 years, he had a 42% chance of surviving. It may be that his existing condition would have led to the defined adverse outcome; however, the failure to provide treatment was shown by the medical evidence, unequivocally, to have led to the spread of the lymphoma. The medical evidence did not suggest that proper treatment would *not* have limited the spread of the lymphoma; rather, it was probable that it would have had that effect; that is why the chance of a better outcome was lost through delay in providing treatment. Accordingly, the omission resulted in a physical deterioration, by failing to slow the natural progression of the disease. This, on one view, is simply an application of the eggshell-skull rule, as observed by Lord Toulson in *Williams*.[40]

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[38] *Hotson* at 792.
[39] *Hotson* at 756.
[40] *Williams* at [47].

It is said that these cases turn on the proposition that past events must be proved on the balance of probabilities; whereas future consequences turn upon an evaluation of possibilities. However, care must be taken in relation to "the past". It is true that a past event is one which either happened or did not happen, or, which is the same thing, cannot be proved to have happened. We know that the negligent conduct occurred; the result was that the plaintiff did not receive treatment. However, causation of loss depends upon the hypothetical counterfactual. The consequential effect with respect to causation depends on the mantra that with physical injury the only uncertainty is lack of knowledge, and lack of knowledge is dealt with by the balance of probabilities.[41]

Yet it is difficult to accord these dogmatic assertions the conviction they appear to demand. They often turn on fine distinctions. There is a slide from identifying "past events" as requiring proof on the balance of probabilities, to requiring that the cause of a *physical injury* is to be established on the balance of probabilities. *Hotson* was said to turn on what happened when Master Hotson reached the hospital. The question then asked was twofold, and neither was apt to produce a clear answer: first, to what extent had the blood vessels serving the epiphysis been ruptured or occluded by the initial traumatic injury? Secondly, would that extent, once identified, have already caused avascular necrosis, rendered it more likely, or rendered inevitable at some future time? There was no finding that avascular necrosis had already occurred; the trial judge found there "would have been" a 25% chance of avoiding the adverse outcome, but for the negligence. The judge's finding was an assessment of a counterfactual, namely what would (or might) have happened absent the negligence. In fact, the situation revealed by the expert evidence suggested that the respective doctors were speculating. It was the purpose of attending the hospital to obtain expert professional advice on that very question, based on whatever scans or other diagnostic tests were appropriate. It is possible a timely operation was the best way of answering that question. The negligent conduct prevented any of that occurring.

Even if not all counterfactual inquiries should be assessed by reference to possibilities, there is a strong justification for permitting them to be so assessed

[41] *McGregor* at [10-054].

where the existence of the unverifiable information is an immediate result of the negligent conduct.

The Australian equivalent of *Mallett v McMonagle*[42] is *Malec v JC Hutton Pty Ltd*.[43] The High Court considered whether the plaintiff was entitled to recover damages in circumstances where the loss caused by the tortious conduct of the defendant would, more likely than not, have occurred in any event as a result of circumstances for which the defendant was not legally responsible. The need to engage with the counterfactual required that loss be assessed on degrees of possibility or probability. As Justices Brennan and Dawson noted, "hypothetical situations of the past are analogous to future possibilities: in one case the court must form an estimate of the likelihood that the hypothetical situation *would have occurred*, in the other the court must form an estimate of the likelihood that the possibility *will occur*. Both are to be distinguished from events which are alleged to have actually occurred in the past."[44]

There are factual distinctions, which may or may not have legal significance. For example, there is active intervention as opposed to omission to act. Where a misdiagnosis leads to treatment, which aggravates or accelerates the claimant's condition, one may more readily say that the negligence has caused (contributed to) harm, the extent of which may need to be apportioned as between the original condition and the degree of aggravation. While this factual example provides a clearer case of causation of harm, it is difficult to see why the result should be different in law where the adverse circumstance results from an omission to treat.

It is also true that some loss of a chance cases turn upon whether the lost chance depended on conduct of the plaintiff or of a third party. Such distinctions may have relevance in relation to lost economic opportunities, but they usually have little relevance in relation to medical conditions. That is not to say that, where the complaint is that treatment was not offered, the plaintiff does not have to establish that, had it been offered, it would have been accepted. We now have a statutory provision declaring that, "any statement made by the person after suffering the harm about what he or she would have done [absent the negligent conduct] is inadmissible

[42] [1970] AC 166, 176 (Lord Diplock).
[43] (1990) 169 CLR 638; [1990] HCA 20.
[44] *Malec* at 639-640.

except to the extent (if any) that the statement is against his or her interest."[45] That makes proof in some cases harder.

McGregor states that the first step in considering loss of a chance is to ask whether the loss of a chance is recognised as a head of damage or loss in itself. That is accepted, *McGregor* continues, "when the provision of the chance is the object of the duty that has been breached."[46] *Chaplin v Hicks*[47] is identified as an example. The solicitor's negligence in not carrying out his or her retainer is said to be "the archetypal illustration of loss of a chance in its proper sphere."[48] Possibly that is so, because the solicitor does not guarantee a favourable outcome, but then neither does the medical practitioner. Like the solicitor, the doctor must identify the problem, advise the patient as to the benefits, risks and cost of a particular response, and so on. That analysis is persuasive. There is something artificial in seeing loss of a chance as weakening the principle of causation. Rather, it is a redefinition of harm.

My impression that the English courts, like Australian courts, are wary about making further inroads into the requirement that causation be established on the balance of probabilities, but that concern is misplaced. The concept of material contribution was an inroad; the abandonment of the necessary and sufficient test of causation in *Fairchild* was another. The exceptional nature of the circumstances of *Fairchild* was addressed in 2016 in *International Energy Group v Zurich Insurance*.[49] However, although *Fairchild* can be described as a case of "material increase in risk" of an adverse outcome, which sounds like the loss of a chance to avoid an adverse outcome, this is a somewhat artificial way of describing the factual circumstances of mesothelioma. On the other hand, the doctrine of material contribution recognises a common feature of questions of causation, namely that there can be many factors which in combination may be seen to demonstrate a causal connection, but which cannot be factually or legally disentangled.

These points suggest that the distinction between causing harm and quantifying loss is not as watertight as current doctrine suggests. Ms Chaplin clearly lost an

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45 *Civil Liability Act 2002* (NSW), s 5D(3)(b).
46 *McGregor* at [10-048].
47 [1911] 2 KB 786.
48 *McGregor* at [10-048].
49 [2016] AC 509.

opportunity to be part of a competition, but on a statistical assessment she was to be one of 50 from whom 12 would be selected. What harm had she proved on the balance of probabilities? None; but she won because the harm had been defined as a loss of a chance. It follows that the definition of the harm is indeed the key element in at least some of these cases.

It may be accepted that not all medical negligence will give rise to successful damages claims. Some years ago, we had a claim in Sydney brought by a woman who suffered serious and permanent disabilities when an aneurism in her right cerebral artery burst during an operation for its removal. There was no negligence in the conduct of the operation, nor in the diagnosis and advice leading to the operation. The allegation of negligence, which was made good, was that she had undergone an angiogram in 2003, three years before the operation, at a time when the aneurism was present, but was not identified. For three years, she understood she did not have an aneurism; over the three years, there was no physical change in the aneurism and, unsurprisingly, no deterioration in the standards or success of available medical procedures. The conduct of the negligent medical practitioner, did nothing at all to increase the risk of the particular harm materialising.[50] Reliance on loss of a chance of a better medical outcome would not have affected the outcome.

In raising these issues, I do not intend to suggest that alternative forms of reasoning adopted in the cases were unavailable, nor indeed that particular results were necessarily wrong. In 2004 our Court adopted loss of a chance reasoning in a medical negligence case;[51] in 2009 we declined to follow it on the basis that it did not correctly reflect the current state of the law.[52] The second decision was upheld in the High Court of Australia.[53]

There is an open question as to whether the courts should rely upon the legislature to change the rules, if thought appropriate, or whether by way of an incremental approach the courts might change the current proscription. The factors I noted earlier in this talk could justify judicial reconsideration. There is some irony in the fact that the courts, which used to be accused of protecting their own in providing

[50] *Paul v Cooke* (2013) 85 NSWLR 167; [2013] NSWCA 311.
[51] *Rufo v Hosking* (2004) 61 NSWLR 678; [2004] NSWCA 391.
[52] *Gett v Tabet* (2009) 254 ALR 504; [2009] NSWCA 76.
[53] *Tabet v Gett*, fn 1 above.

immunity from negligence for barristers, are happy to allow claims for loss of a chance against solicitors, but decline to uphold claims against medical practitioners on that basis.

What is clear is that we have not yet finally resolved these issues; it remains for the highest courts to identify the limits of the preclusion. I look forward to reading the judgments in your future cases.

Thank you so much for your patience.

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