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LOSS OF CHANCE—A LOST OPPORTUNITY?

Gregg v. Scott[1]

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I. INTRODUCTION

In civil actions, a claimant must of course establish his case on the balance of probabilities. Seen in crude percentage terms, this effectively means that if a court considers it to be more than 50% likely that a case has been made out, the claimant will win. Conversely, if the likelihood is anything less, he will lose. There is no middle ground, and no room for a lower award of damages to take account of a reduced level of probability—it is a matter of all or nothing.

This approach applies not only to the determination of what *actually* happened in a given situation, but also to the determination of what *might* have happened had the defendant not committed the wrong complained of. The result is that if there is a less than even chance that the thing which might have happened would actually have happened had it not been for the defendant's act, the claimant's action will fail—even if he seeks to recover not for the whole of his damage but only for the chance which the defendant caused him to lose. So in *Hotson v. East Berkshire Health Authority*, for example, the House of Lords held that a claimant who, due to his doctor's negligence, lost a 25% chance of recovering from an injury, failed in his action, since on the balance of probabilities he would not have recovered from the injury anyway, even if he had been properly treated.[2] There is thus no legal

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1 [2005] U.K.H.L. 2, [2005] 2 W.L.R. 268 [*Gregg*].

2 [1987] A.C. 750 [*Hotson*]. In *Hotson*, the claimant fell from a tree. He was not treated promptly, and suffered from avascular necrosis. Even had he been treated in a timely manner, there was a 75% chance that this condition would have been manifested. In finding that the action must fail, the House of Lords reversed the decision of the Court of Appeal ([1987] 1 All E.R. 210), in which Dillon L.J. had observed at 219 that: "As a matter of common sense, it is unjust that there should be no liability for failure to treat a patient, simply because the chances of a successful cure by that treatment were less than 50%." For criticism of the decision of the House of Lords in *Hotson*, see, *e.g.*, Jane Stapleton, "The Gist of Negligence" (1988) 104 Law Q. Rev. 389. In fact, as Stapleton observes at 393, although *Hotson* is generally read as a rejection of loss of chance as actionable damage, the House of Lords did not state this explicitly in that case. For further discussion of this point, see Kumaralingam Amirthalingam, "Anglo-Australian Law of Medical Negligence—Towards Convergence?" (2003) Torts Law Journal 117 at 134-135.

distinction between an act which causes a claimant's damage and one which causes a claimant to lose a better than even chance of avoiding that damage, and no general recognition that losing a chance which is assessed at less than 50% can offer a basis for compensation in its own right.

There are, however, some situations in which the balance of probabilities requirement is applied less rigidly. The rule that one cannot recover for a lost chance is notably modified in cases where a defendant negligently deprives a claimant of the chance to gain financial benefit. In such cases, damages are assessed not on the outcome which the claimant would have desired, but on the economic opportunity which he has lost, and this lost opportunity is treated as actionable damage.[3] In addition, in two landmark decisions in recent years, the House of Lords has relaxed the rules of causation in other situations. In *Fairchild v. Glenhaven Funeral Services Ltd.*,[4] their Lordships held that, in specific and exceptional circumstances involving multiple tortfeasors, a claimant who cannot establish on the balance of probabilities that the negligence of any of the defendants actually caused or contributed to his damage may nevertheless succeed in his action. And in *Chester v. Afshar*,[5] their Lordships extended the principles of causation in medical non-disclosure cases in effectively holding that a patient who is not warned of the risks of surgery may be awarded damages for losing the right to make an informed choice, even when on the balance of probabilities he can establish only that he would have had the surgery at a different

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3 See *e.g.*, *Allied Maples Group Ltd. v. Simmons & Simmons* [1995] 1 W.L.R. 1602 [*Allied Maples*] in which a solicitor's negligence deprived the claimant of the opportunity to negotiate a better bargain; *Kitchen v. Royal Air Force Association* [1958] 1 W.L.R. 563 [*Kitchen*] in which a solicitor's failure to issue a writ on time deprived the claimant of the opportunity to pursue court proceedings; and *Spring v. Guardian Assurance plc* [1995] 2 A.C. 296 [*Spring*] in which a negligent reference deprived the claimant of the opportunity to secure employment. For further discussion of these cases, see *infra* note 34.

4 [2003] 1 A.C. 32 [*Fairchild*]. In *Fairchild,* the claimants all contracted mesothelioma (a fatal condition) through exposure to asbestos dust while working for a series of employers. It was not possible to tell which employer each claimant had been working for when the condition had been triggered, and once triggered it could not be made worse by subsequent exposure. The House of Lords nevertheless held that the employers were jointly and severally liable.

5 [2004] U.K.H.L. 41, [2005] 1 A.C. 134 [*Chester*]. In *Chester*, the defendant doctor advised the claimant to undergo spinal surgery. The surgery carried a small risk that the claimant would develop cauda equine syndrome (a form of paralysis), but the defendant failed to warn her of this risk. The surgery was carried out competently, but the risk eventuated. Even though the claimant could not show that she would have refused the surgery had she been aware of the risk, the House of Lords (by a majority of 3:2) held that the defendant was liable for depriving the claimant of the right to make an informed choice about whether, when and from whom she wished to receive treatment. Their Lordships also held that her paralysis was to be regarded as having been caused by the breach of the defendant's duty of care in failing to warn her of the risk. (For further discussion of this point, see *infra* notes 68 and 69 and accompanying text). Immediately after *Chester* was decided, there were fears that the decision might lead to similar liability in all cases of negligent advice, but the decision of the Court of Appeal in *Paul Davidson Taylor (a firm) v. White* [2004] E.W.C.A. Civ. 1511 [*White*] allayed these fears. In *White*, a client sued his former solicitors for negligent advice. Both the High Court and the Court of Appeal held that, even if negligence could be established, since the claimant could not show that he would have acted any differently had he received the correct advice, the rules of causation had not been satisfied, and his action must fail. Lady Justice Arden observed that the decision in *Chester* applied to very particular circumstances involving negligent failure to warn a patient of the side effects of treatment—it had *not* established a new general rule of causation: "The basic rule remains that a tortfeasor is not liable for harm when his wrongful conduct did not cause that harm." See Mike Willis & Wendy Brown, "A Change in the Rules?" [2004] New L. J. 1882.

time had he been aware of the risks, and not that he would have refused the surgery altogether. Although the judgments in these cases were deliberately restricted to their particular facts, the decisions (particularly that in *Chester*) gave rise to speculation that there might be a knock-on effect in other situations—especially those involving medical negligence—where the odds are stacked against a claimant proving his case under the normal rules.

This speculation has now been halted, at least for the time being, by the decision of the House of Lords in *Gregg v. Scott*. For in *Gregg*, their Lordships held that claims for loss of a chance arising from medical negligence must continue to be assessed according to the conventional requirements for establishing causation.

II. The Decision in *Gregg*

In *Gregg*, the claimant, Mr Gregg, was misdiagnosed by the defendant, Dr Scott, as suffering from a benign lump under his arm, when he was in fact suffering from non-Hodgkin's lymphoma. Because Dr Scott negligently failed to recognise the possibility that the lump might be cancerous, he did not refer Mr Gregg for tests which would have diagnosed the condition and identified the need for immediate treatment. As a result, diagnosis and treatment of Mr Gregg's condition were delayed by about nine months. According to medical statistics, this delay reduced from 42% to 25% his prospects of disease-free survival for ten years. The delay also meant that, by the time the condition came to be treated, it had reached such an advanced stage that he had to undergo more radical and debilitating procedures than would have been the case had the diagnosis been made nine months earlier.

Mr Gregg brought an action in negligence against Dr Scott. The trial judge, Inglis J., who considered himself to be bound by *Hotson*, held that the action must fail. He accepted that the failure to diagnose and treat the condition had probably caused it to spread more quickly, but held that, even if it had been properly diagnosed, the chance of recovery would still have been less than 50%. Mr Gregg had therefore failed to make out his case.

Mr Gregg appealed to the Court of Appeal, where two arguments were made on his behalf. The first was that, since the trial judge had accepted that the cancer would probably not have spread so quickly had it been treated, this amounted to injury. Mr Gregg was entitled to compensation for this injury, and that included compensation for a reduction in his chances of survival. Although rejected by Simon Brown and Mance L.JJ., this argument was accepted by Latham L.J. The second argument was that, irrespective of any other form of injury, the reduction in Mr Gregg's chances of survival was itself compensable. This argument was also rejected by the majority (Latham L.J. holding that he did not need to deal with it).[6]

The same arguments were made before the House of Lords, where, by a bare majority, the appeal was dismissed. Lord Hoffmann, Lord Phillips of Worth Matravers M.R. and Baroness Hale of Richmond were all of the opinion that the rules for establishing causation could not be varied to deal with cases of this kind, although Lord Nicholls of Birkenhead and Lord Hope of Craighead would have allowed the claim.

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6 [2002] E.W.C.A Civ. 1471.

A. *The Majority Judgments*

The first argument, that Mr Gregg had sustained an injury in the form of the rapid spread of the cancer due to its late diagnosis, was rejected by the majority.[7] Lord Hoffmann, in considering Latham L.J.'s acceptance of this argument in the Court of Appeal, was of the view that treating the accelerated progress of the disease as damage either begged the question of whether a defendant could be liable for a lost chance, or wrongly assumed that the spread of Mr Gregg's cancer due to the late diagnosis had caused his life expectancy to be decreased, when the trial judge had found that it was likely that his life would have been shortened to less than ten years anyway.[8] Baroness Hale took a similar position: "[i]t is not enough to show that a claimant's disease has got worse during the period of delay. It has to be shown that treating it earlier would have prevented that happening, at least for the time being."[9]

The primary attention was thus focused on the argument based on loss of chance. Lord Hoffmann observed that the "[o]ne striking exception to the assumption that everything is determined by impersonal laws of causality is the actions of human beings."[10] With respect to such actions, the law allowed for the possibility of establishing a case based on loss of chance. But even in the area of human actions, a distinction was drawn between situations turning on what the claimant or the defendant—or someone controlled by the defendant—might do (in which area the normal rules applied) and those turning on the possible action of an independent third party (in which area alone loss of a chance was recognised).[11] Mr Gregg's case sought to remove this distinction, since it was effectively based on the argument that *Fairchild* should be extended to "all cases in which a defendant may have caused an injury and has increased the likelihood of the injury being suffered."[12] In his Lordship's view, however, "a wholesale adoption of possible rather than probable causation as the criterion of liability would be so radical a change in our laws as to amount to a legislative act," and would have severe consequences for both insurance

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7 In fact, this argument was also in theory rejected by Lord Nicholls, one of the minority judges, but in his case, this was because he considered that it failed to get to the heart of the problem with respect to loss of chance, which he would have resolved in Mr. Gregg's favour: *supra* note 1 at paras. 57-58. The argument was accepted by Lord Hope: see *infra* note 46.

8 *Supra* note 1 at para. 71.

9 *Ibid*. at para. 203. Her Ladyship concluded at para. 207 that Mr Gregg might, in fact, have been able to claim some damages—for the extent to which the pain and suffering which he would have suffered anyway would be made worse by knowing that his condition could have been detected earlier, and possibly also a modest 'lost years' claim for the extent to which the median life expectancy of persons with his condition might be slightly lower in cases of delayed diagnosis. However, as she observed at para. 208, these issues had not been explored at trial.

10 *Ibid*. at para. 82.

11 In the first type of situation, represented by cases such as *McWilliams v. Sir William Arrol & Co.* [1962] 1 W.L.R. 295 and *Bolitho v. City and Hackney Health Authority* [1998] A.C. 232, the claimant must prove on the balance of probabilities that he or the defendant would have acted so as to produce a favourable outcome. In the latter type of situation, represented by cases such as *Allied Maples, supra* note 3, the claimant need only show that there was a chance that the third party would have acted so as to produce a favourable outcome. His Lordship concluded that "this apparently arbitrary distinction obviously rests on grounds of policy." And since most cases in the latter category involved financial loss, he added that there was anyway an argument that the chance itself could be regarded as property, like a lottery ticket. See *supra* note 1 at para. 83.

12 *Ibid*. at para. 84.

companies and the National Health Service.[13] And the control mechanisms which had been proposed in order to limit such a wholesale adoption (for example, the suggestion that liability be confined to cases in which the claimant had suffered an injury)[14] were artificial and did not pass the test of coherent and principled development which Lord Nicholls had laid down in *Fairchild*.[15] Allowing the present claim would require the removal of the qualifications and restrictions of *Fairchild* and the abandonment of a good deal of authority.[16] This Lord Hoffmann could not sanction.[17]

Baroness Hale referred to the recent decisions in *Fairchild* and *Chester*, both of which had modified well settled principles. However, those cases had dealt with "particular problems,"[18] which could be addressed without altering the principles governing the majority of personal injury claims, something which would not be possible in this case. Observing that "damage is the gist of the action in negligence,"[19] her Ladyship approved the conventional approach to proving causation. It was generally accepted that complaints for loss of chance would have to depart from the traditional formulation and seek damages not for loss of outcome but for the reduced chance of achieving that outcome.[20] Although Mr Gregg had tried to frame his case in a way which in theory retained a conventional approach to causation (by linking his action to a physiological change), it still required damage to be redefined in terms of loss or diminution of the chance of a better outcome. And, as the recent decision of the New South Wales Court of Appeal in *Rufo v. Hosking*[21] indicated, it would—certainly in medical cases—almost always be very easy to show that the defendant's negligence had resulted in such a loss or diminution. Defining damage in this way might seem to appeal to common sense and fairness, but actions would be available both for loss of an outcome and for loss of a chance of that outcome, and claimants would be in a 'heads you lose everything, tails I win something' situation.[22] This would lead to liability in almost every case. The only way to make it fairer would be if damages were awarded only proportionately even in outcome cases. This, however, would make the entire area of damages less predictable and would "cause far more problems … than the policy benefits are worth."[23]

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13 *Ibid*. at para. 90.

14 As in this case, where Mr. Gregg argued that the spread of the cancer due to its delayed diagnosis constituted injury. *Ibid*. at para. 86.

15 *Ibid*. at paras. 89-90. See too *Fairchild*, *supra* note 4 at 68.

16 His Lordship referred in this respect, *inter alia*, to the decisions of the House of Lords in *Hotson*, *supra* note 2 and *Wilsher v. Essex Area Health Authority* [1988] A.C. 1074 [*Wilsher*].

17 *Supra* note 1 at para. 85.

18 *Ibid*. at para. 192.

19 *Ibid*. at para. 193.

20 *Ibid*. at para. 209. Baroness Hale referred to the influential article by Stapleton, "The Gist of Negligence", *supra* note 2. The article was also cited by several of her fellow judges.

21 [2004] N.S.W.C.A. 391 [*Rufo*]. In *Rufo*, a doctor treated a patient negligently and she sustained spinal damage, but it could not be shown that she would not have suffered this damage in any event. Campbell A.J.A., giving the leading judgment of the Court, held at para. 405 that: "adopting a robust and pragmatic approach to the facts of this case … it seems to me more probable than not that the [negligent treatment] in the context of the … vulnerable state of the appellant's spine caused the loss of a chance that the appellant would have suffered less spinal damage than she in fact did."

22 *Supra* note 1 at para. 224.

23 *Ibid*. at para. 225.

Baroness Hale acknowledged that there were some situations in which claims for loss of chance were allowed, but these involved economic loss, and so could be distinguished from cases involving physical injury:

> There is not much difference between the money one expected to have and the money one expected to have a chance of having: it is all money. There is a difference between the leg one ought to have and the chance of keeping a leg which one ought to have. There is perhaps an even greater difference between the disease free state one ought to have and the chance of having a disease free state which one ought to have.[24]

In cases of personal injury, assessment of the chance which had been lost was a complicated matter, as this case illustrated. What, if anything, had Dr Scott's negligence actually caused? In spite of the statistically reduced chance of survival which had resulted from the negligence, Mr Gregg was, in fact, still alive almost ten years on. So could it even be said that Dr Scott's negligence had reduced the chances of a successful outcome, given that Mr Gregg had "turned out to be one of the successful minority at each milestone"?[25] There were simply too many complex issues involved for it to be feasible to allow claims for loss of chance in personal injury cases, and the claim must fail.[26]

In a long and very detailed analysis of the facts of the case and the evidence which had been available at trial, Lord Phillips highlighted the complexities and uncertainties involved in reaching decisions in medical cases on the basis of clinical statistics—complexities and uncertainties which in this case he considered had caused both the High Court and the Court of Appeal to reach a "fallacious"[27] (although not ultimately determinative) conclusion about the extent of Mr Gregg's prospects for long-term survival. Like Baroness Hale, he expressed concern about what chance Mr Gregg could be said to have lost, given that he was still alive nearly ten years after his treatment started: "On the facts known today … the likelihood is that Dr Scott's negligence has not prevented Mr Gregg's cure, but has made that cure more painful".[28] In a case of this kind, Lord Phillips preferred a robust test which produced rough justice to one which would "be difficult, if not impossible, to apply with confidence in practice,"[29] and he felt that only the Law Commission

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[24] *Ibid*. at para. 220. Her Ladyship referred to Helen Reece, "Losses of Chances in the Law" (1996) 59 Mod. L. Rev. 188, and to the subtle distinction discussed in that article between deterministic events in the natural world and indeterministic events involving human actions, a point also made by Lord Hoffmann. On the economic loss point, too, her Ladyships' reasoning was not dissimilar to Lord Hoffmann's view that the chance of gaining financial benefit could almost be equated with a form of property: see *supra* note 11.

[25] *Ibid*. at 226. Her Ladyship observed that this made Mr Gregg's case different from (and even implicitly less deserving than) *Hotson*, *supra* note 2, and *Rufo*, *supra* note 21, where the injury had already happened.

[26] *Ibid*.

[27] *Ibid*. at para. 147.

[28] *Ibid*. at para. 189. Mr Gregg would have been entitled to a claim for additional pain and suffering and other adverse outcomes caused by the delayed diagnosis, but these had not been canvassed at trial, *ibid*. at para. 227.

[29] *Ibid*. at para. 169.

would be in a position to consider the implications which changing the test for causation might have for other areas of law.[30] However, while holding that "[a]warding damages for the reduction of the prospect of a cure, when the long term result of the treatment is still uncertain, is not a satisfactory exercise,"[31] his Lordship nevertheless acknowledged that:

> Where medical treatment has resulted in an adverse outcome and negligence has increased the chance of that outcome, there may be a case for permitting a recovery of damages that is proportionate to the increase in the chance of the adverse outcome.[32]

It is thus significant that Lord Phillips' judgment ended with recognition that actions for loss of a chance might be tenable in cases where damage had actually been sustained.

B. *The Minority Judgments*

In his dissenting judgment, Lord Nicholls appealed to common sense and the desire to achieve justice. He opened his judgment with an example of a patient suffering from cancer with a 45% chance of recovery whose doctor misdiagnosed his condition as benign and delayed treatment, as a result of which the patient's prospects of recovery became nil or almost nil. With respect to the proposition no action would be available to such a patient, he responded:

> 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 … But, it is said, in one case the patient has a remedy, in the other he does not.
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> This would make no sort of sense. It would mean that in the 45% case the doctor's duty would be hollow … I would hold that a patient has a right to a remedy as much where his prospects of recovery were less than 50-50 as where they exceeded 50-50.[33]

Lord Nicholls examined the cases allowing recovery for loss of chance of an economic benefit[34] and considered the possible application of such cases to the area of medical negligence. Cases involving loss of chance in medical situations were, his Lordship conceded, often different from those in which the chance of an economic benefit was lost, since in the economic benefit cases the claimant's actual position at the time of the negligence was *not* determinative of the crucial hypothetical fact of what the position would have been but for that negligence, whereas in medical cases like *Hotson* the patient's actual condition at the time of the negligence *was* determinative of what the position would have been had the defendant not acted negligently. This

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30 *Supra* note 1 at para. 174.
31 *Ibid.* at para. 190.
32 *Ibid*.
33 *Ibid*. at paras. 3-4.
34 *Ibid*. at paras. 9-16. The cases to which his Lordship referred included *Kitchen*, *Spring* and *Allied Maples*, *supra* note 3 and *Chaplin v. Hicks* [1911] 2 K.B. 786.

made it difficult to apply a 'diminution of prospects' analysis to cases like *Hotson*. However *Hotson* had not closed the door to recovery in medical cases such as *Gregg*, where identifying the nature and extent of the patient's condition did *not* provide a simple answer to what the outcome would have been but for the doctor's negligence:[35]

> In such cases, as in the economic 'loss of chance' cases, the law should recognise the manifestly unsatisfactory consequences which would follow from adopting an all-or-nothing balance of probability approach … The law should recognise that Mr Gregg's prospects of recovery had he been treated promptly, expressed in percentage terms of likelihood, represent the reality of his position so far as medical knowledge[36] is concerned.[37]

The difference between good and poor prospects of recovery in medical cases of this kind should, in his Lordship's opinion, be relevant to compensation, not to liability.[38] Allowing actions for loss of chance would offer a fair and rational solution to the present law, which was "crude to an extent bordering on arbitrariness."[39] And the objections which had been raised to this solution could all be dismissed. 'Floodgates' was not a convincing reason for letting injustice stand unremedied.[40] Nor was the uncertainty of the boundaries ("[c]ourts are well able to determine whether a particular case falls into one category or another").[41] Any increased burden on the National Health Service was for Parliament, not the courts, to deal with,[42] and there was no reason either why liability for loss of chance would result in defensive practices.[43]

Lord Hope for reasons which he expressed to be very close to those of Lord Nicholls, would also have allowed the appeal.[44] Like Lord Nicholls, he considered the case to be distinguishable from *Hotson*, since in *Hotson*, the probable effect of the delay in treatment was determined by the state of facts existing when the plaintiff

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35 *Ibid.* at paras. 34-39. Baroness Hale had also indicated that *Hotson* could be distinguished from this case, although it was implicit in her judgment that this distinction lessened rather than increased the chances of a successful outcome. See *supra* note 25.

36 Like Lord Phillips (*supra* note 27 and accompanying text), Lord Nicholls recognised the difficulties inherent in the use of medical statistics, although he took a different view of these difficulties. In his opinion, although one could never be sure on which side of the statistical probability a claimant would actually fall ("Who can know whether Mr Gregg was in the 58% non-survivor category or the 42% survivor category?") this was not enough to justify a conclusion that a 'statistical chance' had no value to an individual case and could not, therefore, attract an award of compensation. In suitable cases, such as *Fairchild*, the courts were "prepared to adapt their process so as to leap an evidentiary gap when overall fairness plainly so requires." Despite its imperfections, statistical evidence of a diminution in perceived prospects would often be the nearest one could get to a diminution of actual prospects. Moreover, use of statistics to determine chance was not revolutionary. "Courts habitually use statistics when compensating … for a risk of an outcome which may materialize." *Ibid.* at paras. 28-33.

37 *Ibid.* at para. 42.

38 *Ibid.* at para. 43. Quoting Dore J. in *Herskovits v. Group Health Cooperative of Puget Sound* (1983) 664 P. 2d 474 at 477, his Lordship observed: "To decide otherwise would be a blanket release from liability for doctors and hospitals any time there was less than a 50% chance of survival, regardless of how flagrant the negligence."

39 *Ibid.* at para. 46.

40 *Ibid.* at para. 48.

41 *Ibid.* at para. 50.

42 *Ibid.* at para. 52.

43 *Ibid.* at paras. 55-56.

44 *Ibid.* at para. 92.

was admitted to hospital, whereas in this case, the course of the disease still lay in the future when the appellant was seen by the doctor.[45] Of the five Law Lords, Lord Hope was the only one to base his decision on the argument that Mr Gregg had sustained actual physical damage in the form of the enlarged tumour, and that this damage had reduced his prospects of survival.[46] However, his Lordship was also of the view that the claim could be based on loss of chance as a cause of action in its own right. He agreed with Lord Nicholls that "what has to be valued is what the appellant lost, and that the principle on which that loss must be calculated is the same irrespective of whether the prospects were better than 50%."[47]

III. Discussion

There will be some who breathe a sigh of relief that the seemingly unstoppable trend away from a conventional approach to causation heralded by the decisions in *Fairchild* and *Chester* has apparently been arrested in *Gregg*.[48] Others will consider it unfortunate that while *Chester* was regarded by the House of Lords as an appropriate case for compensation, *Gregg* was not.

Whatever one's views of the consequences of *Fairchild*, few would deny that it was a decision based on exceptional facts involving deserving claims.[49] Those who objected to it did so primarily because they feared (perhaps with some justification[50]) that it would be impossible to prevent its principles from being extended to allow a relaxation of the rules of causation in an increasingly wide range of situations. The decision in *Chester*, based on the loss of a patient's right to make an informed choice, although dealing with a different issue and not involving a direct application of *Fairchild*, arguably represented a further relaxation of the traditional approach to causation.[51] *Chester* is open to criticism for what some may regard as its somewhat

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45 *Ibid*. at para. 109.

46 *Ibid*. at para. 117. Lord Phillips, *ibid*. at para. 187, considered that Lord Hope's approach (based on the physical damage represented by the tumour) would "produce a different result to that of Lord Nicholls." In fact, although the majority in *Gregg* rejected Lord Hope's view that the enlargement of the tumour constituted damage, the argument that the tumour's growth was itself a form of injury was not an unsustainable one. Had this view been accepted by the majority, it would have offered a plausible basis for allowing recovery, and would have obviated the need for the case to be decided on the basis of loss of chance.

47 *Ibid*. at para. 121. His Lordship added at para. 123 that he had hoped that it was not too late for the pain and suffering which the appellant suffered due to the tumour's enlargement and the distress caused by his awareness that his condition had been misdiagnosed to be brought into account, but that the majority view that the appeal must be dismissed had removed that possibility.

48 The slightly earlier decision of the Court of Appeal in *White*, *supra* note 5, although dealing with a completely different issue outside the arena of medical negligence, also indicated a desire to halt a general move away from the conventional approach to causation.

49 See *supra* note 4. For discussion of *Fairchild* and its implications, see, *e.g*., Jane Stapleton, "Lords a'leaping Evidentiary Gaps" (2002) Torts Law Journal 276; Tony Weir, "Making It More Likely v. Making It Happen" [2002] Cambridge L.J. 519; and Margaret Fordham, "Causation in the Tort of Negligence—A Dispensable Element?" [2003] Sing. J.L.S. 285.

50 See, *e.g*., the decisions in *Sylvia Barker v. Saint Gobain Pipelines plc* [2004] E.W.C.A. Civ. 545 and *Brown v. Corus (U.K.) Ltd.* [2004] E.W.C.A. Civ. 374.

51 See *supra* note 5. In *Chester*, the House of Lords applied the decision of the Australian High Court in *Chappel v. Hart* (1998) 195 C.L.R. 232 [*Chappel*], although *Chester* went further than *Chappel* in the sense that, unlike the claimant in *Chappel*, the claimant in *Chester* could not even argue that she would have chosen a more skilled doctor had she been made aware of the risks of surgery.

cavalier attitude to the causal link between negligence and damage, but whether one approves or disapproves of the decision, its liberality was certainly seen by some as auguring success for the appeal in *Gregg*.[52]

Yet in *Gregg*, their Lordships made no connection between the two cases. Indeed, only Baroness Hale in *Gregg* referred to *Chester* at all.[53] The reasoning of the majority appeared to be based not so much on a *Chester*-type analysis of patients' rights (an analysis closely associated with notions of corrective justice) as on one which favoured distributive justice, as seen in cases such as *Rees v. Darlington Memorial Hospital N.H.S. Trust*.[54] Although no overt preference for one approach over the other is to be found in the judgments in *Gregg*—and it would be simplistic to see the decision as espousing only the values of distributive justice—it is nevertheless clear that the majority judges feared the possible consequences for society of allowing actions for loss of chance. Among these consequences were the danger of an unacceptably patient-friendly climate, and a concomitant increase in litigation. Some of their Lordships even expressed concerns (again mirroring, though not referring to, views expressed in *Rees*) about the potentially serious implications for the National Health Service.[55]

The policy arguments underlying the majority's decision in *Gregg* have some force. But it is hard to see these arguments as stronger than the argument that a patient should be able to expect his doctor to act carefully, regardless of whether the condition from which he suffers is one from which he is statistically likely or statistically unlikely to recover. As Lord Nicholls observed (echoing Dillon L.J. in the Court of Appeal in *Hotson*),[56] it makes no sense to deprive a patient who has been treated negligently of any action against his doctor simply because his chances of recovering were not more than 50% to start with. To do so gives a doctor treating anyone with less than a 50% chance of recovery *carte blanche* to act as negligently as he chooses.

A patient goes to his doctor because something is wrong with his health. If the condition from which he is suffering turns out to be very serious, as in the case of cancer, the patient knows that the chance of a complete cure is unlikely to be as high as 100% or even, in many cases, 50%. But a guaranteed cure is not the issue in the case of a serious illness. The patient consults his doctor seeking prompt diagnosis and immediate treatment, so that he has a *chance* to stop the condition from getting any worse and thus a *chance* of being cured. If his doctor acts negligently, and misdiagnoses the condition, he removes the opportunity to treat the condition in a timely manner, which also removes or reduces the chance of a cure, whether that

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52 See, *e.g.*, Kumaralingam Amirthalingam, "Causation and the Gist of Negligence" [2005] Cambridge L.J. 32. On the other hand, it can be argued that the significance of *Chester* should be restricted to the area of informed consent, which has always been something of a law unto itself, raising as it does issues of both negligence and trespass.

53 It is perhaps particularly surprising that neither Lord Hoffmann nor Lord Hope, who heard the appeals in both *Chester* and *Gregg*, referred to the former in deciding the latter, although this might have been because they (along with Lord Phillips and Lord Nicholls) considered informed consent cases like *Chester* to be *sui generis*. See also *supra* note 52.

54 [2004] 1 A.C. 309 [*Rees*].

55 See, *e.g.*, Lord Hoffmann's observations, *supra* note 13 and accompanying text.

56 See *supra* notes 2 and 33.

chance was good or not so good in the first place. In such a case, the gist of the claim is not the damage caused by the condition, for which the doctor cannot and should not be held responsible. The gist of the claim is the chance of recovery which the patient has lost due to the doctor's negligence, for which there is a sustainable argument that the doctor can and should be held responsible.[57]

It may be suggested that *Gregg*—which involved a claim for a lost chance of avoiding injury or disease in the future, as opposed to a lost chance of avoiding the consequences of an injury or disease which had already occurred—was perhaps not the best case in which to test the loss of chance argument. Claims for loss of expectation of life are difficult enough at the best of times, and as Baroness Hale and Lord Phillips both pointed out, the claim in this case related to a reduced chance of surviving for ten years by someone who was not only alive when the action was initiated but who was still alive, having survived almost to the ten year mark, when his appeal reached the House of Lords.[58] This fact made it very difficult to calculate what chance Mr Gregg had actually lost and what he should be compensated for—a point which was clearly of significance to Lord Phillips, who suggested that he might have been willing to consider the possibility of an action for loss of chance if the case had been one where an 'adverse outcome' had actually occurred.[59] The dissenting judges premised their judgments largely on the fact that, at the time of the negligent diagnosis, the course of the disease still lay in the future, thus increasing the relevance of the medical statistics in calculating the probable extent to which the misdiagnosis had reduced Mr Gregg's chances of recovery.[60] In the abstract, this view held considerable merit. But by the time the case reached the House of Lords, it looked as though the reduced life expectancy at the heart of the claim had probably been avoided, which could be seen as diminishing the practical impact of this premise.

Concerns about the damage which actually resulted from the lost chance in *Gregg* are certainly valid. On the other hand, there is an equally valid view that Mr Gregg's survival was not actually pertinent to the legal issue raised by his claim. Dr Scott's negligence deprived him of a chance of recovering from his cancer. That lost chance formed the basis of Mr Gregg's action, and was arguably the only consideration which should have been taken into account in determining liability. While it is true that, by the time the case reached the House of Lords, Mr Gregg had managed—in spite of his lost chance—to survive almost to the ten year mark, this fact was really only relevant to the assessment of damages. So there is a case for suggesting that

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[57] For a fuller examination of this argument, see Kumaralingam Amirthalingam, "Loss of Chance: Lost Cause or Remote Possibility?" [2003] Cambridge L. J. 253 at 255.

[58] See *supra* notes 25 and 28 and accompanying text. Had Dr Scott sent Mr Gregg for tests at the time of the consultation in November 1994, Mr Gregg would have started treatment in April 1995. Due to the failure to conduct these tests his treatment actually commenced in January 1996. The case came before the House of Lords in May 2004 and the judgment was delivered in January 2005. It seems that the ten year disease-free survival period was measured from the beginning of Mr Gregg's treatment in January 1996. See, *e.g.*, the judgment of Lord Scott, *supra* note 1 at para. 132: "It is not quite clear to me what is the starting point for this 10 year period. I think that it is probably the date of commencement of treatment". On this basis, Mr Gregg had survived for "some nine years" (per Lord Phillips, *ibid.* at para. 127) when their Lordships reached their decision.

[59] See *supra* note 32.

[60] See *supra* notes 35 and 45.

their Lordships should have found in Mr Gregg's favour on the legal issue and only then have tackled the difficulties associated with assessing what damage, if any, he had sustained.[61] Lord Nicholls' reasoning that the size of the chance which has been lost should be relevant to compensation, not liability,[62] can equally extend to the damage which results from that lost chance.

Regardless of what one thinks of the decision in *Gregg*, the case leaves unresolved several issues with respect to claims for loss of chance, arguably the most significant of which relates to the distinction drawn in English law between claims for loss of an economic opportunity dependent on the acts of independent third parties, which the courts do allow, and claims for loss of either an economic opportunity or a chance to avoid personal injuries dependent on the acts of the claimant or the defendant, which they do not allow. In his judgment, Lord Hoffmann admitted that the distinction was "apparently arbitrary"[63] but based on policy considerations. However, these considerations were not fully explored by his Lordship.

Baroness Hale made the nice point that, while losing a chance to make money is a form of economic loss, losing the chance to avoid physical harm is not a form of physical harm.[64] This apparently led her to the view that, because an award of damages offers accurate compensation for economic harm but not for personal injuries, loss of the chance to make money may appropriately be compensated with an award of damages, but loss of the chance to avoid personal injuries may not. The reason for this is not entirely clear. Given the law's requirement that personal injuries should in fact be compensated with damages—however unsatisfactory and inexact such compensation may be—why should the loss of a chance of avoiding such injuries not be compensated in the same way?

Moreover, even if the conventional approach to compensation might not favour awarding damages for a lost chance to avoid personal injuries, it can be argued that *Chester* (although admittedly a decision on informed consent rather than negligent treatment) has so altered the whole question of what amounts to compensable damage—at least where actions for medical negligence are concerned—as to require a re-appraisal of this approach. Baroness Hale, as the only member of the House of Lords in *Gregg* to cite the decision in *Chester*, referred to the rights-based analysis employed in that case. Quoting Lord Hope's judgment in *Chester*, she appeared to agree that the function of the law was to "enable rights to be vindicated and to provide remedies when duties have been breached."[65] She even acknowledged the relevance of Lord Hope's statement to cases such as this one, where "if there is only ever a less than even chance of a cure … what incentive is there for a doctor to take proper care of his patient?"[66] Yet, without embarking on a detailed discussion of the significance of *Chester* in this respect, her Ladyship nevertheless concluded that, because damage was the gist of negligence, it would be wrong to allow claims for loss of chance in

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61 In terms of damages, Mr Gregg might have had a better claim had he also sought compensation for the pain and suffering which he had endured due to the late diagnosis. See the judgments of Baroness Hale, Lord Phillips and Lord Hope, *supra* notes 9, 28 and 47.

62 See *supra* note 38 and accompanying text.

63 See *supra* note 11.

64 *Supra* note 24.

65 *Supra* note 1 at para. 216, citing *Chester*, *supra* note 5 at para. 87.

66 *Ibid*.

cases such as this. She held *Chester* to be factually distinguishable on the ground that, unlike Mr Gregg, Miss Chester had suffered actual damage, which meant that the only question in that case was whether or not the doctor should pay for having failed to warn her of the risk of it occurring.[67]

While it is true that the claim in *Chester* related to damage which had already been sustained, whereas Mr Gregg's claim did not, in *Chester*, the gist of the claim was not in reality Miss Chester's damage—it was her right to full disclosure of risks of medical treatment. Only through an unconventional approach to causation on the part of the majority judges in that case was the failure to observe this right connected with the relevant damage.[68] So if in *Chester*, the loss of a right to be fully informed of medical risks (even risks which could not be shown to affect a claimant's decision to undergo the treatment) was the underlying basis for liability, then why should not the underlying basis for liability in cases like *Gregg* be the loss of chance to avoid the consequences of physical illness or injury? One might question the legitimacy of a legal distinction between what was in practice—if not in theory—the loss of a right to be made aware of risks in *Chester* and the loss of a chance to avoid the consequences of a disease in *Gregg*. Indeed it could perhaps even be argued that *Gregg*, where Dr Scott's negligence actually increased the likelihood that Mr Gregg would not recover from his cancer, in principle offered a stronger cause of action than *Chester*, where Dr Afshar's negligence in failing to inform Miss Chester of the risks of surgery did not in itself increase the likelihood that she would be paralysed.[69] It is unfortunate that in *Gregg*, Baroness Hale did not fully address these issues, or the implications with respect to actions for loss of chance which flowed from the newly espoused rights approach in *Chester*.

Until the whole question of why loss of chance in personal injury actions cannot be compensable is dealt with head-on, the law—particularly with respect to claims for loss of chance with respect to medical negligence—will remain both unsettled and unsatisfactory.[70]

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67 *Ibid*. at para. 217.

68 See, *e.g*., the judgment of Lord Steyn, *supra* note 5 at para. 19: "… but for the surgeon's negligent failure to warn the claimant of the small risk of serious injury the actual injury would not have occurred when it did and the chance of it occurring on a subsequent occasion was very small. It could therefore be said that the breach of the surgeon resulted in the very injury about which the claimant was entitled to be warned."

69 The majority in *Chester* treated the negligence as being the cause of the injury on the basis that the risk of injury was very small, which meant that, since the risk eventuated on the occasion when the surgery was in fact performed, it was not statistically likely that it would have eventuated on a different occasion had Miss Chester been warned of it and had she thus deferred the surgery to a later date: *supra* note 68. In terms of legal causation, however, the risk was a random one and it was not the failure to warn of it which caused it to eventuate when it did.

70 In Singapore, the courts have traditionally followed the conventional English approach to causation in medical negligence cases. For example, in *Yeo Peng Hock Henry v. Pai Lily* [2001] 4 S.L.R. 571, the claimant suffered from blurred vision, which it transpired was attributable to a detached retina. Her doctor negligently failed to refer her to a specialist, and she subsequently lost the sight in her left eye. However, the Court of Appeal held that the claimant's action must fail, since she could not establish that, on the balance of probabilities, her sight in the relevant eye would have been saved even if she had been referred to a specialist immediately. The decision was based on an application of *Hotson*, *supra* note 2, and *Wilsher*, *supra* note 16.

IV. Conclusion

At first blush, the decision of the House of Lords in *Gregg* is somewhat bemusing. While no one would have been surprised a few years ago to see their Lordships refuse a claim for loss of chance, the climate has changed so much in the wake of *Fairchild* and *Chester* that *Gregg* now seems something of an anomaly. *Chester*, in particular, decided only months before *Gregg*, seemed to presage a rights-based approach to medical negligence modelled on the Australian position in cases like *Chappel*[71]—an approach under which a patient's right to careful medical treatment can be seen as having an intrinsic value independent of its consequences. Yet in *Gregg*, there was no rights-based analysis and no acceptance that Mr Gregg's claim could in any way be separated from his inability to prove, on the balance of probabilities, that Dr Scott's act caused him harm. Although technically distinguishable, the two decisions are philosophically incompatible.

In seeking to make sense of the *Chester*/*Gregg* divide, commentators may well be tempted to conclude that their Lordships have perceived the dangers inherent in a large-scale relaxation of the rules for establishing causation, and that they now wish to rein in the liberal tendencies of the last few years. However, the almost universal lack of reference in *Gregg* to the decision in *Chester*[72] means that such a conclusion is certainly speculative, and may well be premature. Until the next causation issue (and specifically the next causation issue in a medical negligence case) comes before the House, we can only wait and wonder.

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[71] *Supra* note 51.

[72] As has been suggested above, *supra* notes 52 and 53, this might have been due to the fact that *Chester* concerned informed consent rather than negligent treatment.