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Chances as Legally Protected Assets*

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Abstract: The doctrine of loss of a chance has been deployed by courts jurisdictions in cases presenting causal uncertainty for over a century. In both the civil and common law jurisdictions where it is applied, however, there is debate as to the precise rationale and scope of application of the doctrine. In this working paper we compare theories, cases and practices from four Western European jurisdictions: France, Belgium, the Netherlands and England & Wales. Our methodology departs from a more traditional institutional comparison. We move towards an argument for a version of the theory of loss of chance that could work across jurisdictions. First, we briefly outline the application of the doctrine in the four jurisdictions. Subsequently, we present a typology of current practical application across jurisdictions. Finally, we present a theory of loss of a chance that reduces it to its (logical) core: for a chance to be lost, it must have been possible for the claimant to 'possess' the chance and the defendant must have made him lose this chance. Hence, we argue that mere ex post uncertainty on the existence of causation is not sufficient to justify application of the doctrine of loss of chance.

Résumé Depuis plus d'un siècle, en cas d'incertitude causale, les juridictions européennes ont recours à la perte de chance. Il existe toutefois un débat, aussi bien dans les juridictions de droit civil que dans celles de common law, relatif aux fondements et au champ d'application de ce concept. Dans nos travaux, nous comparons les théories, les jurisprudences et les pratiques de quatre pays de l'Union européenne: la France, la Belgique, les Pays-Bas, et le Royaume-Uni. Nous avons opté pour une méthodologie s'écartant de la comparaison institutionnelle traditionnelle, avec pour objectif de façonner une version théorique de la perte de chance qui serait applicable dans ces quatre systèmes juridiques. Nous avons ensuite construit une typologie de cas où application de la théorie est faite dans l'ensemble des systèmes étudiés. Enfin, nous présentons une théorie de la perte de chance réduite à son noyau (logique): pour qu'une chance soit perdue, il faut que le demandeur l'ait avant tout 'possédée', et que le défendeur ait fait perdre cette chance. Ainsi, nous soutenons que la seule incertitude *ex post* quant à l'existence de causalité est insuffisante pour justifier l'application de la perte de chance.

Zusammenfassung „Verlorene Chancen" werden von den Gerichten in Europa seit mehr als einem Jahrhundert in Fällen, in denen es um einen unsicheren

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Kausalzusammenhang geht, berücksichtigt. Trotz der generellen Anerkennung dieser Lehre herrschen in den Rechtsordnungen Unklarheiten in Bezug auf ihre genaue Begründung sowie ihren Anwendungsbereich. In diesem Aufsatz werden die Theorien, Fälle und Praktiken aus vier westeuropäischen Ländern verglichen: Frankreich, Belgien, die Niederlande und England und Wales. Die vorliegend verwendete Methode weicht von der klassischen Rechtsvergleichung ab. Der Aufsatz verfolgt das Ziel, eine über die Jurisdiktionen hinweg anwendbare Theorie der „loss of chance" zu entwickeln. Er ist wie folgt gegliedert: Zunächst wird die Anwendung der Doktrin in den vier Rechtsordnungen skizziert. Im Anschluss wird eine Typologie der aktuellen praktischen Anwendung in verschiedenen Jurisdiktionen dargestellt. Zuletzt wird eine Theorie des „loss of a chance" vorgestellt, die sie auf ihren (logischen) Kern reduziert: Um eine Chance zu verlieren, muss der Kläger diese Chance zunächst „besessen" haben und muss der Beklagte ihm diese genommen haben. Wir vertreten daher, dass eine bloße ex post Unsicherheit in Bezug auf das Bestehen eines Kausalzusammenhangs nicht ausreicht, um die Anwendung der Lehre der „loss of a chance" zu rechtfertigen.

1. Introduction

1. The doctrine loss of a chance is applied in cases of causal uncertainty, though not all cases of causal uncertainty warrant the application of the doctrine. The doctrine is based on and justified by the idea that although the claimant cannot prove that the defendant caused him or her a harm that ultimately occurred, the claimant can prove that the defendant caused him or her to lose a chance at a better outcome.[1] This doctrine has been applied by both common law and civil law courts in Europe for over a century.[2] However, its adoption has neither been widespread[3]

1 France: A. Bénabent, *Droit des obligations* (Paris: L.G.D.J., 17th edn 2018), para. 553; Ph. Malaurie, L. Aynès & Ph. Stoffel-Munck, *Droit des obligations* (Paris: L.G.D.J., 10th edn 2018), para. 242. Belgium: B. Dubuisson, V. Callewaert, B. De Coninck & G. Gathem, *La responsabilité civile. Chronique de jurisprudence 1996–2007, 1, Le fait générateur et le lien causal* (Brussels: Larcier 2009), para. 438, p 368. Netherlands: C.H. Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel II. De verbintenis in het algemeen* (Deventer: Wolters Kluwer, 2d edn 2017), para. 79. England & Wales: Court of Appeal 15 May 1911, *Chaplin* v. *Hicks* [1911] 2 KB 786.

2 France: Cour de cassation req. 17 July 1889, *s. 1891*, 1, p 399. Belgium: Cass. 19 October 1937, *Pas* 1937, I, p 298; Cass 8 December 1958, *Pas.* 1959, I, p 354. Netherlands: With the exception of the Netherlands where early applications stem from the 1980s and 90s: Hoge Raad der Nederlanden 13 February 1981, *Heesch/Reijs*, ECLI:NL:HR:1981:AC2891, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:1981:AC2891 = *NJ* 1981, 456; Hoge Raad der Nederlanden 24 October 1997, *Baijings/Mr H,* ECLI:NL:HR:1997:AM1905, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:1997:AM1905 = *NJ* 1998/257. England & Wales: Court of Appeal 15 May 1911, *Chaplin* v. *Hicks supra* n. 1.

3 See for instance the German position: Bundesgerichtshof 23 September 1982, VII ZR 82/82, http://connect.juris.de/jportal/prev/KORE102948371 = *NJW* 1983, 442; Palandt/Grüneberg 2015, Vorb v § 249, para. 53; C.C. van Dam, *European Tort Law* (Oxford: Oxford University

nor without contest.[4] Even those jurisdictions that have adopted a broad application of the doctrine, struggle to define its limits. This article is based on a comparative research of the doctrine in four legal systems (France, Belgium, the Netherlands, England and Wales) and aims at clarifying the boundaries of the doctrine of loss of a chance.

2. Comparing the doctrine of loss of a chance presents some methodological difficulties. Since it departs from a judicially developed doctrine rather than from a typical fact pattern[5] or a well-known legal institution,[6] a slightly different approach was required. First, we explore how the doctrines are received in the four jurisdictions. This part serves both to inform the reader of the specific legal background of each jurisdiction as well as to provide a first stepping stone in understanding the doctrine: what do lawyers and judges claim they do when applying the doctrine? In conducting this analysis, we stay as close to national perceptions as possible. The conclusion of this analysis is that all systems follow a similar justification for and rationale of the doctrine, however, the focal points of both doctrinal and judicial debates differ. Hence, it was necessary to go beyond what judges are said to do (doctrine) to what they actually do (practice).

Press, 2d edn 2013), paras. 1110-1113. Chances are, after all, not listed in §823 BGB, see H. Koziol, *Basic Questions of Tort Law from a Germanic Perspective* (Vienna: Jan Sramek Verlag 2012), p 154. Nevertheless, AG Cruz Villalón in his opinion on the case C-611/12 P brands the 'loss of opportunity' as part of the 'general principles common to the laws of the Member States', within the meaning of the second paragraph of Art. 340 TFEU, finding support thereto in the case law of the European Court of Justice (paras 49, 62 and 68). However, the AG also stresses that the concept has been developed in specific fields of law, and has not yet has not yet become widespread in the law of damages of the European Union itself (para. 56). See opinion AG Cruz Villalón 20 March 2014, C-611/12 P, ECLI:EU:C:2014:195, http://curia.europa.eu/juris/liste.jsf?num=C-611/12&language=NL.

4 France: F. G'Sell-Macrez, *Recherches sur la notion de causalité* (Paris: Paris I 2005), para. 457. Belgium: H. Bocken, I. Boone & M.Kruithof, *Het buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels* (Bruges: die Keure 2014), para. 75, p 49. Netherlands: Hoge Raad der Nederlanden 21 December 2012, *Deloitte Belastingadviseurs/H&H Beheer*, ECLI:NL:HR:2012:BX7491, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2012:BX7491 = *JA* 2013/41, with annotation by A.J. Akkermans & Chr.H. van Dijk; I. Giesen, *Bewijslastverdeling bij beroepsaansprakelijkheid* (Deventer: Tjeenk Willink 1999), p 72, 122; B. C.J. Van Velthoven, 'Verlies van een kans en proportionele aansprakelijkheid: verschillende figuren voor verschillende gevallen? (I-II)', 3.4. *NTBR* (*Nederlands Tijdschrift voor Burgerlijk Recht*) 2018, p (72) at 102.

5 K. Zweigert & H. Kötz, *Introduction to Comparative Law* (Oxford: Oxford University Press 1998), p 34; T.P. Van Reenen, 'Major Theoretical Problems of Modem Comparative Legal Methodology (1): The Nature and Role of the Tertium Comparationis', 28. *Comp. & Int'l. L. J. S. Afr. (Comparative and International Law Journal of Southern Africa)* 1995, p. (175); E. Örücü, 'Methodological Aspects of Comparative Law', 8. *Eur. J.L. Reform (European Journal of Law Reform)* 2006, p (29) at 32.

6 E. Örücü, 8. *Eur. J.L. Reform* 2006, p (29) at 33.

That endeavour is the topic of section 3. There, an attempt is made at devising a cross-jurisdiction typology based on the fact patterns of the cases in which the doctrine is typically applied. This typology provides an answer to the question: what do judges actually do in practice when applying the doctrine? Although this typology reveals a certain common core, it does not in itself provide a solid basis for a transnational theory. In section 4, finally, we employ a more conceptual approach in which we attempt to formulate a more rational formulation of the doctrine that works (or could work) in the four jurisdictions. This conceptualization is based on the insights gained in sections 2 and 3. Where possible, the theory thus formulated is related back to the practical applications described in sections 2 and 3. Our conclusion is that the doctrine of loss of a chance has a convincing rationale, but that this rationale is often neglected both in practice and in scholarly debate. Insisting on the original justification of the doctrine requires shifting the focus from the loss sustained (e.g. the physical injury) to the loss of the intangible asset. Taking this rationale seriously results in a more nuanced and restricted scope of application of the doctrine, which is sometimes feared to be too broad. The result is a theory that both respects the current practice of applying loss of a chance and caters to the criticisms lodged against the doctrine across jurisdictions.

2. Loss of a Chance and Causal Uncertainty from National Law Perspectives

3. Within the four legal systems investigated, the meaning and the scope of the doctrine of loss of a chance differ. This section seeks to provide an answer to the question: how is the doctrine of loss of a chance traditionally perceived in the four jurisdictions? The method of comparison here differs slightly from what has been common in previous research.

4. Some research in the past took cases involving 'causal uncertainty' as the starting point.[7] The problem with such an approach is that although all systems require at least a 'but for' or '*condicio sine qua non*' causal link,[8] the standards of

7 See e.g. I. Gilead, M.D. Green & B.A. Koch (eds), *Proportional Liability: Analytical and Comparative Perspectives* (Berlin: De Gruyter 2013).

8 France: Examples of cases where the French *Cour de cassation* required *a condicio sine qua non* causal link: Cour de cassation 2ème civ. 24 May 1971, n° 70-11365, www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000006985282; Cour de cassation 2ème civ. 9 April 2009, n °08-15977, www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000020508980; Cour de cassation 2ème civ. 22 January 2009, n°07-20878, www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000020181542; Cour de cassation 2ème civ. 10 November 2009, n° 08-16920, www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000021269943; Cour de cassation 1re civ. 17 February 2016, n°14-16560, www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000032085297. Belgium: Cass. 28 June 2018, C.17.0696.N; Cass. 12 June 2018,

proof differ. The standard of proof in Belgian, Dutch and French law is high. Although absolute certainty is not required, courts[9] require near-absolute certainty[10] or at least a reasonable degree of certainty.[11] All these standards are markedly higher than the more modest English balance of probabilities.[12] This means that some civil cases of 'uncertainty' would not qualify as 'uncertain' in England & Wales. Moreover, loss of a chance is not the only way to deal with causal uncertainty. Indeed, some legal systems employ several substantive legal mechanisms to deal with causal uncertainty of which the doctrine of loss of a chance is just one example, and some do not apply the doctrine at all.[13] Especially in the Netherlands, much confusion exists as to whether loss

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C.16.0428.N. This but for-link is even specifically required in cases of loss of a chance today, see Cass. 15 May 2015, C.14.0269.N. Cases to which are referred in this article, yet which are not mentioned to be published in a journal can be accessed through the governmental website www.juridat.be. Netherlands: Hoge Raad der Nederlanden 23 December 2016, *Netvliesloslating*, ECLI:NL:HR:2016:2987, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2016:2987 = *NJ* 2017/133; C.H. Sieburgh, *Mr C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht,* para. 50.

9 In the reform of Belgian civil procedural law this standard of proof is explicitly adopted as a general rule in Art. 8.5 giving it legislative status, see Burgerlijk Wetboek van 13 april 2019 - boek 8 'Bewijs', *BS (Belgisch Staatsblad)* 14 May 2019, p 46353. Full certainty (100%) is not required, but judges have to be convinced beyond any reasonable doubt, see explanatory memorandum to wetsontwerp van 31 oktober 2018 houdende invoeging van Boek 8 'Bewijs' in het nieuw Burgerlijk Wetboek, *Parl.St. (Parlementaire stukken)* Kamer 2018-2019, no. 3349/1, p 16.

10 France: In France, theoretically the causal link must be certain and direct (see for instance: Cour de cassation 2ème civ. 27 October 1975, n°73-14891 and 74-10318, www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000006995515&fastReqId=2003530836&fastPos=1). However, in practice and particularly in the medical context, the *Cour de cassation* has often shown leniency regarding the requirement of certainty. To take a well-known example, there have been many cases where the causal link between the vaccine against hepatitis B and multiple sclerosis has been presumed, notwithstanding that there is no scientific proof as to the existence of causation (see for instance: Cour de cassation 1re civ. 22 May 2008, n°05-20317, n°06-14.952, n°06-10967, n°06-18848, *Bull. civ.* I, n°148-149, https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000018868809&fastReqId=345149728&fastPos=1). Belgium: In Belgium the standard is judicial certainty, which equates to such a high degree of probability that a judge must not earnestly ponder the contrary. It is also applied to the proof of causation, see Cass. 17 September 1981, *Pas.* 1982, I, 90; M. Van Quickenborne, *Oorzakelijk verband tussen onrechtmatige daad en schade* (Kluwer: Mechelen 2007), para. 69, p 62; Bocken et al., *Het buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels* , para. 104, p 68.

11 Netherlands: W.D.H. Asser, *Mr C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Procesrecht. 3. Bewijs* (Deventer: Wolters Kluwer 2017), para. 264.

12 For example Court of appeal, 8 November 1967, *Barnett* v. *Chelsea Hospital,* [1969] 1 QB 428.

13 The doctrine of loss of a chance is not applied under German law, see Bundesgerichtshof 23 September 1982 *supra* n. 3; Palandt/Grüneberg 2015, Vorb v § 249, par. 53, and C.C. Van Dam, *European Tort Law* , paras 1110-1113; H. Koziol, *Basic Questions of Tort Law from a Germanic Perspective*, p 154.

of a chance and the other substantive doctrine (proportional liability) have the same normative function.[14] Hence, 'uncertainty' cannot serve as a starting point.

5. As a result of these differences between jurisdictions, the comparison conducted is, therefore, based entirely on each jurisdiction's own understanding of the doctrine. This reveals both the commonalities and discrepancies needed to formulate a more rational understanding of the doctrine (section 4) as well as to provide the background needed to properly grasp the differences in conceptions of the doctrine across jurisdictions.

2.1. France

6. In various cases, French law turns to the doctrine of loss of a chance. The French *Cour de cassation* first accepted to compensate the loss of a chance in 1889 in a case where a lawyer wrongfully prevented his client of timely filing for an appeal, depriving the client from the opportunity to win the lawsuit.[15] Over the years, the scope of application was extended to cases of medical law and financial law, and nowadays the theory is applied to numerous situations.[16]

7. The broad scope that French courts have given loss of a chance has, however, been criticized in French doctrine. French scholars draw a distinction between 'classic' and 'perverted' loss of chance cases, and criticize the use of the doctrine in the latter cases for providing a tool to bypass the requirement of causation.[17] Patrice Jourdain for instance argues that a lost chance should only be actionable in classic loss of chance cases, in which the wronged party is barred from running this chance, and it is therefore impossible to assess what would have been the final outcome had the wrongdoer not been at fault.[18] As an example of such a case, one can think of the

14 To allow for a negative definition, these adjacent doctrines are briefly addressed, too.

15 Cour de cassation req. 17 July 1889, *s. 1891*, 1, 399.

16 G. Viney, P. Jourdain & S. Carval, *Traité de droit civil, Les conditions de la responsabilité* (Paris: L. G.D.J. 4th edn 2013), para. 280.

17 R. Savatier, 'Une faute peut-elle engendrer la responsabilité d'un dommage sans l'avoir causé?', *D. (Receuil Dalloz)* 1970, p 123; Ph. Brun, 'Perte de chance: les risques de dévoiement', in: O. Sabard (ed.), *La perte de chance, actes de colloque du 12 février 2013*, 218 *L.P.A. (Les petites affiches* 2013*)*, p (49). And for criticisms of the opponents to loss of a chance, see P. Sargos, 'La causalité en matière de responsabilité ou le droit Shtroumpf', *D.* 2008, p 1935; F. Descorps Declère, 'La cohérence de la jurisprudence de la Cour de cassation sur la perte d'une chance consécutive à une faute du médecin', *D.* 2005, p 742.

18 See P. Jourdain, 'La perte d'une chance, une curiosité française', in: P. Wessner, O. Guillot et C. Muller (eds), *Pour un droit équitable, engagé et chaleureux: mélanges en l'honneur de Pierre Wessner* (Basel: Helbing Lichtenhahn 2011), p 167. Other authors have tried to conceptualize the difference between actual and perverted loss of a chance differently. Regarding medical liability cases, François Chabas argues that loss of a chance is only actionable when the patient had only *some* chances left of recovery at the time of the doctor's negligent behaviour, see F. Chabas, 'La perte d'une chance en droit français', in: *Colloque sur les Développements récents*

situation in which a negligent wrongdoer injures a horse right before it was supposed to enter a race, the horse's owner is prevented from running his or her chance of winning, and it is impossible to know if the horse would have won or not. On the contrary, when a patient's treatment is delayed because of his or her doctor's misdiagnosis and the patient dies or is permanently injured, the risk (chance) of illness has been run (the claimant was ill and ended up seeking treatment) and the final outcome is well-known (death or injury). Compensation for the lost chance to recover or to survive allegedly constitutes 'perverted' loss of a chance. However, the French courts apply the doctrine of loss of a chance in this type of situation, notwithstanding its criticized application.

2.2. Belgium

8. Under Belgian law, the doctrine of loss of a chance is applied to a myriad of cases as well, such as cases of medical malpractice,[19] bad professional advice[20] and missed promotions.[21] The doctrinal debate has long been concentrated on the question whether the doctrine of loss of a chance can be applied to both the loss of a chance of obtaining a benefit (one the claimant *did not* get) and the loss of a chance of avoiding a harm (one the claimant *did* suffer).[22] It is certain that the first type of lost chances can be compensated, as long as there was a real chance possessed by the claimant, the chance is definitely lost and there exists a causal link between the lost chance - viewed as a separate head of damage - and the wrongful behaviour.[23] It is less certain whether under the same conditions the loss of a chance of avoiding harm is eligible for damages, as the loss is known and the chance has been run. A minority view critically argues that in those cases asking compensation of a lost chance circumvents the rules of evidence concerning causality.[24] The Belgian *Hof van Cassatie/Cour de*

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du droit de la responsabilité civile, publications du Centre d'études européennes (Geneva, 1991), p 131. J.-S. Borghetti explains that loss of a chance in medical liability should only be actionable whenever both the chance itself and its loss are *certain.* Conversely, whenever it is certain that something of an uncertain nature has been lost, there should be no recovery (when it is certain that a doctor has deprived a patient of an uncertain chance of recovery), see J.-S. Borghetti, 'La perte d'une chance au carré, ou la perte d'une chance de chance', 1. *R.D.C. (Revue des contrats)* 2011, p 77.

19 For example Cass. 21 April 2016, C.15.0286.N; Cass. 5 June 2008, C.07.0199.N.

20 For example Cass. 6 December 2013, C.12.0245.F.

21 For example Cass. 23 October 2015, C.14.0589.F.

22 Recently about this distinction: S. Goldman & R. Jafferali, 'La perte d'une chance à la croisée des chemins – Evolutions et applications jurisprudentielles', 4. *TBBR (Tijdschrift voor Belgisch Burgerlijk Recht)* 2019, p (191) at 192–194.

23 The chance has to be real, see e.g. Cass. 21 April 2016, C.15.0286.N. The causal link has to be certain, see e.g. Cass. 15 March 2010, C.09.0433.N.

24 The criticism thus voiced resembles the French criticism of 'perverted' loss of a chance.

Cassation (hereinafter 'Court of Cassation') still muddies the doctrinal waters with its case law, but based on its latest decision and a recent decision of the Belgian *Grondwettelijk Hof* (the Constitutional Court),[25] the distinction seems to be abandoned.[26] Still, controversy remains. For example, in its decision of 14 December 2017 the Court of Cassation revived an old question on whether the lost chance is a harm that is completely separated from the actual, ultimately suffered harm, in which both harms can be theoretically combined, or whether it is some sort of 'intermediary' harm, inseparably linked to the actual suffered loss. In the latter case it can be more easily perceived as a mere hypothetical loss artificially created in order to guarantee at least a partial compensation.[27] In any case, what is not doubted in Belgium is the fact that the doctrine of loss of a chance cannot be applied when the uncertainty stems from a lack of knowledge regarding which of two or more wrongful events exactly caused the claimant's harm. In such a case, the causal uncertainty will prevent compensation. Belgian law is unfamiliar with other general types of proportional liability in case of causal uncertainty.[28]

2.3. The Netherlands

9. Dutch law offers two doctrines that allow for proportional liability in case of causal uncertainty: loss of a chance and (actual) proportional liability. In Dutch doctrine, the debate in respect of loss of chance mostly revolves around its connection with the doctrine of proportional liability. Are they both unique or are they merely 'two sides of the same coin'?[29] The Dutch Supreme Court's position is that

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25 Constitutional Court.

26 The Dutch-speaking division of the civil chamber of the Court of Cassation accepts the compensation of both the loss of a chance of obtaining a benefit and the loss of a chance of avoiding a harm: Cass. 5 June 2008, C.07.0199.N; Cass. 15 March 2010, C.09.0433.N; Cass. 21 April 2016, C.15.0286.N. So does the Constitutional Court, which refers to the Dutch-speaking division's case-law, see GwH 30 March 2017, n°42/2017. The French-speaking division of the civil chamber of the Court of Cassation, however, continues to support the distinction inspired by attorney-general Werquin, see Cass. 1 April 2004, C.01.0211F, C.01.0217.F; Cass. 6 December 2013,C.10.0204.F. In a 2017 judgment by the full court, the Court of Cassation did not make the distinction and used the terminology of the Dutch-speaking chambers in its *obiter dicta,* see Cass. 14 December 2017, C.16.0296.N. In a recent judgment of 2019 the Dutch division repeated the terminology once more, see Cass. 5 September 2019, C.18.0302.N. See also Bocken et al., *Het buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, para. 76, p 50.

27 Cass. 14 December 2017, C.16.0296.N., with annotation by F. Auvray & K. ronsijn, 'Het verlies van een kans en het beschikkingsbeginsel', *RW (Rechtskundig Weekblad)* 2018, pp 587–591. See also *infra* s. 3.a.

28 Bocken et al., *Het buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, paras 106–107, pp 69–71.

29 As derived from Van Velthoven, 3. *NTBR* 2018, p (72) at 78, who noted that they are '*twee kanten van dezelfde medaille*' (two sides of the same coin).

these two doctrines are distinct,[30] although many authors challenge this position fiercely.[31] The doctrine of proportional liability can be applied (i) in certain special cases (such as employer's liability for physical injury)[32] (ii) in which there are two or more events that might have caused the detriment, for one of which the claimant is responsible, (iii) there is a more than small, but a less than large probability that the tort was the but for cause of the detriment, and (iv) it would be unfair and unreasonable both to deny liability entirely as well as to allow it.[33] Since this doctrine allows courts to sidestep the causal requirements entirely, it must be applied with restraint.[34] The doctrine of loss of a chance, on the other hand, is applied where no causal link can be established between the wrong and the concrete harm, but it can be said that the defendant deprived the claimant of a chance of success.[35]

2.4 England and Wales

10. English law traditionally adopts a more restrictive approach to the doctrine of loss of a chance, but it would be mistaken to assume English law does not allow application of the doctrine at all or that this doctrine is the only method to deal with causal uncertainty under English law. The doctrine of loss of a chance can be applied in contract law[36] and in situations in which causal uncertainty originates

30 Hoge Raad der Nederlanden 21 December 2012, *Deloitte Belastingadviseurs/H&H Beheer*, *supra* n. 4, paras 3.5.2–3.5.3.

31 C.H. Van Dijk & A.J. Akkermans, 'Proportionele aansprakelijkheid, omkeringsregel, bewijslastverlichting en eigen schuld: een inventarisatie van de stand van zaken', 5. *AV&S (Aansprakelijkheid, Verzekering & Schade)* 2012, p (157); Hoge Raad der Nederlanden 21 December 2012, *Deloitte Belastingadviseurs/H&H Beheer supra* n. 4*, JA* 2013/41, with annotation by A.J. Akkermans & Chr. H. Van Dijk; Van Velthoven, 3. *NTBR* 2018, p (72).

32 As the Supreme Court puts it: the nature of the norm, the nature of the breach and the nature of the damage must allow for this approach. It seems that a fault-based employer's liability for physical injury is more likely to warrant application than a professional negligence case involving economic loss. See e.g. Hoge Raad der Nederlanden 24 December 2010, *Fortis/Bourgonje*, ECLI:NL:HR:2010:BO1799, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2010:BO1799 = *NJ* 2011/251.

33 Hoge Raad der Nederlanden 31 March 2006, *Nefalit/Karamus*, ECLI:NL:HR:2006:AU6092, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2006:AU6092 = *NJ* 2011/250, para. 13.

34 Hoge Raad der Nederlanden 24 December 2010, *Fortis/Bourgonje supra* n. 32, para. 3.8.

35 Hoge Raad der Nederlanden 21 December 2012, *Deloitte Belastingadviseurs/H&H Beheer supra* n. 4, para. 3.5.3, *NJ* 2013/237, with annotation by S.D. Lindenbergh. *As decided in*, e.g. Hoge Raad der Nederlanden 24 October 1997, *Baijings/Mr H supra* n. 2 para. 5.2. Compare *also in respect of this decision*, e.g. I. Giesen & K.L. Maes, 6. *NTBR* 2014, p (219) at 229, M.F.E. Hillen, 'De Hoge Raad en het leerstuk van de proportionele aansprakelijkheid en kansschade', 4. *MvV (Maandblad voor Vermogensrecht)* 2013, p (122) at 124 and C.H. van Dijk & A.J. Akkermans, 5. *AV&S* 2012, p (157) at 159.

36 For example Court of Appeal 15 May 1911, *Chaplin* v. *Hicks supra* n. 1.

from uncertain hypothetical conduct of third parties.[37] Yet, in the context of medical negligence, the House of Lords refused to apply the doctrine of loss of a chance and reiterated that it is for the claimant to prove on the balance of probabilities that but for the defendant doctor's negligence the injury would not have occurred.[38] Furthermore, English courts can exceptionally award damages when the defendant materially contributed to the risk of injury, but these cases are not considered loss of chance cases under English law. Material contribution to the risk of injury cases involve situations in which the current state of (medical) science renders it impossible to prove that the defendant's conduct contributed to the injury.[39] English courts can accept the existence of a (partial) causal relationship, but they will only do so in very exceptional situations.[40]

3. Where Loss of a Chance Is Applied: A Typology

11. In order to provide a road map of the general scope of the doctrine of loss of a chance in the four systems, we have devised a typology of cases where the doctrine is applied in the national systems. The types of cases involve (a) failures to file claims or appeals; (b) denied access to potentially gainful events; (c) medical negligence; (d) negligent financial advice and provision of information; and (e) deprived or diminished career chances. It was impossible to develop a typology which suited the application of the doctrine in all four systems seamlessly. As a consequence, some national applications of the doctrine could be placed under several types of cases.

3.1. Failures to File Claims or Appeals

12. Early applications of the doctrine loss of a chance can be found in cases of solicitor's or advocate's negligence.[41] Indeed, the earliest application of the

37 For example UKSC 20 November 2019, *Edwards on behalf of the estate of the late Thomas Arthur Watkins* v. *Hugh James Ford Simey Solicitors*, https://www.supremecourt.uk/cases/docs/uksc-2018-0132-judgment.pdf; UKSC 13 February 2019, *Perry* v. *Raleys Sollicitors*, www.bailii.org/uk/cases/UKSC/2019/5.html; Court of Appeal 12 May 1995, *Allied Maples* v. *Simmons & Simmons*, www.bailii.org/ew/cases/EWCA/Civ/1995/17.html.

38 UKHL 2 July 1998, *Hotson* v. *East Berkshire Area Health Authority*, www.bailii.org/uk/cases/UKHL/1988/1.html; UKHL 27 January 2005, *Gregg* v. *Scott*, www.bailii.org/uk/cases/UKHL/2005/2.html. See for a different approach in which the claimant received full compensation in the context of medical negligence, UKHL 14 October 2004, *Chester* v. *Afshar*, www.bailii.org/uk/cases/UKHL/2004/41.html.

39 For example UKHL 1 March 1956, *Bonnington Castings Ltd* v. *Wardlaw*, www.bailii.org/uk/cases/UKHL/1956/1.html.

40 UKHL 3 May 2006, *Barker* v. *Corus UK Ltd*, www.bailii.org/uk/cases/UKHL/2006/20.html.

41 France: Cour de cassation req. 17 July 1889 *supra* n. 15. Belgium: Antwerp 7 October 2002, *NjW (Nieuw Juridisch Weekblad)* 2003, p 493. Netherlands: Hoge Raad der Nederlanden 24 October 1997, *Baijings/Mr H supra* n. 2. England & Wales: UKSC 13 February 2019, *Perry* v. *Raleys Sollicitors supra* n. 37.

doctrine in any jurisdiction was in a French case of advocate's negligence in 1889.[42] A negligent judicial officer had deprived the claimant from the possibility of filing a claim in due time. It was uncertain, however, whether the claimant would have won the case had the claim been filed in a timely fashion. The *Cour de cassation* held that this problem could be overcome by claiming compensation for the lost chance of winning. To the present day, French and Belgian[43] courts apply this doctrine without much problem, with judges assessing whether the claim that could not come to fruition, constitutes 'a chance' (meaning that they assess whether it is real) and, if so, how important that chance was (meaning that they assess the value of the chance).

13. The Dutch and English courts have debated the issue in more detail, avoiding application of the doctrine to a large extent. The Dutch and English Supreme Courts have held that where an attorney's client would have had the opportunity to litigate 'but for' the legal professional's negligence, damages must be calculated by conducting a trial within a trial.[44] The Dutch Supreme Court has explicitly held that only where it cannot be determined with sufficient certainty what the court in the original proceedings would have done, it is appropriate to estimate the 'good and bad chances' of the client's claim in the original trial. The UK Supreme Court's position appears to be that these types of cases are loss of a chance cases[45] and that the value of that chance may need to be determined by giving both parties the benefit of a full adversarial trial.[46]

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42 Cour de cassation req. 17 July 1889 *supra* n. 15.

43 Take as an example the facts leading up to the decision of the Court of Cassation of 14 December 2017 *supra* n. 27. Because of a lawyer's negligent behaviour, the limitation period to file in one of his clients' case lapsed. This left the client without the possibility to claim the recovery of a sum of money before a court. The client thereupon files a liability claim against the lawyer, aiming to recover the full amount of money it hoped to file for. The court of appeal that ruled over that liability claim stressed that it is uncertain whether the full amount of money would have been granted by a judge in the hypothetical situation in which the lawyer had timely filed. Hence, it considered that the client could only seek compensation for a lost chance. However, the court did not grant compensation for a loss of a chance, as the client's claim was not directed at such a harm, but rather the full amount. The Court of Cassation quashed that decision, considering that even if the lost chance is not the explicit object of a claim, a judge may grant compensation for it, without infringing the principle of party disposition (*beschikkingsbeginsel/ le principe dispositif*), which is closely related to the principle *non ultra petita.*

44 Hoge Raad der Nederlanden 24 October 1997, *Baijings/Mr H supra* n. 2; UKSC 13 February 2019, *Perry* v. *Raleys Sollicitors supra* n. 37 para. 5.

45 See in particular UKSC 20 November 2019, *Edwards on behalf of the estate of the late Thomas Arthur Watkins* v. *Hugh James Ford Simey Solicitors supra* n. 37, para. 23; Court of Appeal 12 May 1995, *Allied Maples* v. *Simmons & Simmons supra* n. 37 para. 22.

46 UKSC 13 February 2019, *Perry* v. *Raleys Sollicitors supra* n. 37 para. 24. In the special case where the value of the opportunity is not dependent on a civil trial, but on a special compensation scheme, the assessment has to be made by reference to that scheme, see UKSC 20 November 2019,

3.2. Denied Access to Potentially Gainful Events

14. A second type of cases concerns situations in which the defendant denied the claimant access to an identifiable potentially gainful event. The most obvious examples are the defendant's wrongful interference with the claimant entering a beauty contest[47] or with the claimant's horse entering a horse race.[48] Further examples include the wrongful prevention of taking part in exam,[49] the wrongful interference with the application for a permit[50] and the wrongful failure to allow for an adequate competition for public procurement.[51]

15. These cases are similar to the cases discussed above regarding the wrongful failure to (advise to) file a claim or appeal, with the marked difference that whereas a judge might realistically be able to decide what another judge would have done, here the judge does not have the natural competence to determine how the potentially gainful event would have turned out. Judges will often rely

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Edwards on behalf of the estate of the late Thomas Arthur Watkins v. *Hugh James Ford Simey Solicitors supra* n. 37, para. 25.

47 Court of Appeal 15 May 1911, *Chaplin* v. *Hicks supra* n. 1.

48 Regarding French law, see Cour de cassation 2ème civ. 4 May 1972, n°71-10121, www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000006987834; Cour de cassation 2ème civ. 20 November 2003, n°02-19455, www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007460741&fastReqId=65641165&fastPos=1.

49 France: Cour de cassation 2ème civ. 25 June 2015, n°14-21972, www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000030791043&fastReqId=618502621&fastPos=1. Belgium: Brussels 28 April 1997, *TAVW (Tijdschrift voor aansprakelijkheid en verzekering in het wegverkeer)* 1998, p 32.

50 Belgium: Cass. 26 June 2008, C.07.0272.N. Netherlands: Rechtbank Rotterdam 23 May 2014, ECLI:NL:RBROT:2014:6291, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2014:6291, para. 5.11 (although the Rechtbank incorrectly held that the doctrine of loss of a chance falls within the scope of proportional liability under Dutch law). See also Rechtbank Amsterdam 12 March 2008, ECLI:NL:RBAMS:2008:BD1193, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2008:BD1193, para. 9, in which the Rechtbank rejected the claim for damages, but suggested that the claimant had lost a chance because of an incorrectly formulated question in a television game.

51 Belgium: Cass. 15 May 2015, C.14.0269.N; Liège 16 October 2001, *JT (Journal des Tribunaux)* 2002, p 111; Antwerp 6 December 2017, *NJW* 2018, 259 with annotation by C. De Koninck; Rb. Brussels 2 December 1997, *RGAR* (*Revue Générale des Assurances et des Responsabilités*), no. 13032. Netherlands: Hoge Raad der Nederlanden 13 February 1981, *Heesch/Reijs supra* n. 2; Hoge Raad der Nederlanden 19 June 2015, *Overzee/Zoeterwoude*, ECLI:NL:HR:2015:1683, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2015:1683 = *NJ* 2016/1, with annotation by T.F.E. Tjong Tjin Tai. Other Belgian examples are Rb. Ghent 8 April 1991, *T.Verz. (Tijdschrift Verzekeringsrecht)* 1992, p 153 (lost chance to marry because of scars in the face); Liège 22 April 1981, *JT* 1982, p 398 (lost chance to promotion in football league because of a wounded player).

on experts and other kind of findings (for example: statistics[52]).[53] Secondly, and more importantly, whereas a party could hypothetically be worse off after having filed a claim or an appeal, in these cases the potential gain is 100% identifiable. It is certain that the claimants in these cases missed an identifiable improvement of their situation. It is – for example – certain that the claimant did not have a permit before the wrongful conduct (the actual situation) and that the wrongful conduct prevented him or her to potentially get one. It is also certain that a permit could only be gained, not lost.

16. All four jurisdictions are generally willing to apply the doctrine of loss of a chance in these cases,[54] though they diverge where the uncertainty lies not in an external event, but in what the claimant would have done in absence of the wrongful behaviour (as elements of free will and unpredictable human behaviour come into play).[55]

3.3. Medical Negligence

17. A third type of cases in which the doctrine is often applied is that of medical negligence. Simply put, the continental jurisdictions have less problem in applying loss of a chance in medical negligence cases,[56] compared to England and

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52 It should be noted, however, that Belgian law awards no compensation for mere hypothetical or 'statistical' chances. As the chance has to be 'real', claimants remain challenged to prove that they are 'part of' the statistic. The foregoing does not require the chance to attain a minimal threshold. Even the slimmest chance is eligible for compensation, if it can be established with sufficient certainty, see Bocken et al., *Het buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, para. 74, p 48; B. Verkempinck, *Schadevergoeding wegens wanprestatie in Europees perspectief* (Bruges: die Keure 2017), para. 2175, p 679. See also Dubuisson et al., *Le fait générateur et le lien causal*, para. 438, pp 368-369; Goldman & Jafferali, 4. *TBBR 2019* , p (191) at 201-202.

53 See Van Quickenborne, *Oorzakelijk verband tussen onrechtmatige daad en schade*, para. 86, pp 81-82.

54 France: Cour de cassation 2ème civ. 15 December 2011, n°10-23889, www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024987740&fastReqId=1520917491&fastPos=1 (on the loss of a chance of including a warranty in a contract). Netherlands: Hoge Raad der Nederlanden 21 December 2012, *Deloitte Belastingadviseurs/H&H Beheer supra* n. 4. England & Wales: Court of Appeal 12 May 1995, *Allied Maples* v. *Simmons & Simmons*; UKSC 13 February 2019, *Perry* v. *Raleys Sollicitors supra* n. 37; UKSC 20 November 2019, *Edwards on behalf of the estate of the late Thomas Arthur Watkins* v. *Hugh James Ford Simey Solicitors supra* n. 37.

55 Cfr. *infra* where this issue is discussed in financial advice cases. For instance, if D had advised C properly about the prospects of the hopelessly unprofitable company X, would C have refrained from investing? French, Belgian and Dutch courts would allow the claimant to rely on the doctrine of the loss of a chance in respect of this element of uncertainty, too, but in England the Court of Appeal in *Allied Maples* and the Supreme Court in *Perry* v. *Raleys Solicitors* have explicitly held that it is for the claimants to prove on the balance of probabilities whether they would have (honestly) taken part in the potentially gainful event.

56 France: Cour de cassation 1re civ. 14 December 1965, *Bull. civ.* I, n°707, *JCP* 1966, II, 14753, with annotation by R. Savatier, www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&

Wales.[57] It is worth for conceptual purposes to make the distinction between cases of delay in diagnosis, other mistreatments as, for example, the lack of informed consent and cases of multiple potential factors.

3.3.1. Delay in Diagnosis

18. French,[58] Belgian[59] and Dutch[60] courts apply the doctrine of loss of a chance to medical negligence cases where a doctor negligently fails to timely diagnose a disease, therefore delaying the patient's treatment, and hereby potentially worsening the patient's condition. This practice is not without criticism. One argument scholars lodge against the application of loss of a chance is that since the recovery should have taken place in the past, these cases are not cases of lost chances but simply of uncertainty.[61] As in all medical cases, a minority in Belgium and France criticizes the use of the loss of a chance doctrine in this type of cases as providing a means to bypass the requirement of causation with the actual harm. Indeed, to the dissenting authors, there is no way to assess what would have been de facto the outcome in the event of a timely diagnosis. Moreover, the death or injury did occur. Hence, only that harm should be compensated.

19. This argument voiced in Belgium and France is reminiscent of the reason that the House of Lords gave for its rejection of the doctrine in *Hotson* v. *East Berkshire AHA.*[62] In that case, a 13-year-old boy fell from a tree. The doctors misdiagnosed him when he first came to the hospital. When he returned several days later he was diagnosed with avascular necrosis. Ultimately, he suffered restricted mobility and permanent disability. Out of every 100 patients in Hotson's situation, only 25 would have recovered when a timely diagnosis was made. The boy claimed damages for his losses, inter alia on the basis of

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idTexte=JURITEXT000006970162&fastReqId=1100847668&fastPos=30. Belgium: Cass. 19 January 1984, *Arr.Cass.* 1983–84, p 585. Netherlands: Hoge Raad der Nederlanden 23 December 2016, *Netvliesloslating supra* n. 8, *NJ* 2017/133, with annotation by S.D. Lindenbergh; HR 27 October 2017, ECLI:NL:HR:2017:2786, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2017:2786 = *NJ* 2017/422.

57 UKHL 2 July 1998, *Hotson* v. *East Berkshire Area Health Authority*; UKHL 27 January 2005, *Gregg v. Scott supra* n. 38.

58 Cour de cassation 1re civ. 14 December 1965 *supra* n. 56; Cour de cassation 1re civ. 14 October 2010, n°09-69195, https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000022921702.

59 Cass. 19 January 1984, *Arr.Cass.* 1983–84, p 585; Antwerp 24 June 2013, 2011/AR/467, www.juridat.be.

60 Hoge Raad der Nederlanden 23 December 2016, *Netvliesloslating supra* n. 8, *NJ* 2017/133, with annotation by S.D. Lindenbergh.

61 Netherlands: J.H. Nieuwenhuis, *Onrechtmatige daden* (The Hague: Kluwer 2008), p 56.

62 UKHL 2 July 1998, *Hotson* v. *East Berkshire Area Health Authority supra* n. 38.

the loss of a chance of recovery. The House of Lords rejected his claim, holding that he had failed to prove on the balance of probabilities that had the diagnosis been timely made, he would have recovered. The causation between the wrong and the actual harm was uncertain. This position was affirmed in *Gregg* v. *Scott.*[63] In that case the defendant doctor negligently misdiagnosed the plaintiff's malignant cancer, stating it to be benign. This had the effect of delaying the treatment of the cancer, greatly reducing the patient's chances of prolonged survival.

3.3.2. Failure to Adequately Inform of Medical Risks

20. There are also cases where doctors negligently fail to warn their patients about the risks inherent to a medical surgery and these risks occur. In this situation, French law allows compensation for the loss of a chance of avoiding the occurrence of the risks by not undertaking the surgery.[64] However, there has to be uncertainty as to the choice the patient would have made had he or she been made aware of the risks. In the case where the patient would have undergone the surgery anyways, or was in a state of emergency, the lack of informed consent cannot serve as a ground to grant compensation for loss of a chance. Belgian courts, certainly nowadays, grant compensation for lost chances to avoid harm. Therefore, cases on informed consent fall under the scope of the Belgian loss of a chance doctrine.[65] However, as under French law, it has to be certain that, had the patient been duly informed, this person would have had a chance to choose not to undergo surgery. If it is blatantly clear that a patient would have taken the risk of the operation in any case, one could argue that the lack of information did not cause a loss of chance not to undergo the surgery.[66] Indeed, there was no chance to lose.

21. Under Dutch law, there is no certainty as to the actual state of the law on the matter, but there are some cases compensating loss of a chance in the deprived consent situation. [67] This allows us to believe that this case also falls into the loss of

63 UKHL 27 January 2005, *Gregg* v. *Scott supra* n. 38.

64 Cour de cassation 1re civ. 7 February 1990, n°88-14797, www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007022948&fastReqId=1666994014&fastPos=1.

65 Examples: Rb. Leuven 10 February 1998, *TBBR* 1998, p 163; Liège 9 September 2010, *JLMB (Revue de jurisprudence de Liège, Mons et Bruxelles)* 2012, p 1076, with annotation by G. Genicot; Rb. Leuven 10 February 1998, *tbbr* 1998, p 163.

66 See in this sense Liège 25 September 2006, *RGAR* 2007, no. 14324. Regarding French law, see Cour de cassation 1re civ. 20 June 2000, n°98-23046, www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007042550&fastReqId=2038721695&fastPos=1 quoted by M. Bacache, 'Le défaut d'information sur les risques de l'intervention: quelles sanctions ? Pour une indemnisation au-delà de la perte de chance' *D.* 2008, p 1908.

67 Rechtbank Rotterdam 24 November 2015, ECLI:NL:RBROT:2015:8640, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2015:8640 = *JA* 2016/77, para. 4.11, as derived from Van Velthoven, *NTBR* 2018(4), p (102) at 103. See also Gerechtshof Den Haag 9

chance category in the Netherlands. English law has also accepted to allow recovery to the injured patient. However, surprisingly and contrary to the other three legal systems, the House of Lords granted full compensation instead of repairing the loss of a chance of avoiding the injury.[68]

3.3.3. Multiple Potential Factors

22. Finally, a different type of medical negligence is that where a doctor makes a mistake in treating the patient, but it is not clear whether the doctor's negligence caused the harm or not. A good example of this type of case is the English case of *Wilsher* v. *Essex AHA.*[69] In that case, a prematurely born child was erroneously exposed to excessive oxygen. The child subsequently became blind. It was found, however, that the excessive oxygen was only one of five possible factors that could have led to the child's blindness. It had merely increased the risk. The claim was ultimately rejected, though the discussion turned mainly on the application of the English doctrine of 'material increase of risk'. The Belgian courts are likely to refuse an application of the doctrine in these types of cases, in the light of the causality theory adhered to, [70] as there are multiple potential causes with uncertainty as to which cause effectively played a necessary role in the development of the injury.[71] Dutch courts would presumably apply the doctrine of proportional liability.[72] French courts have no problems in applying the doctrine of loss of a chance in these types of cases. [73]

October 2018, ECLI:NL:GHDHA:2018:2558, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2558, para. 16.

68 UKHL 14 October 2004, *Chester* v. *Afshar supra* n. 38.

69 UKHL 10 March 1987, *Wilsher* v. *Essex AHA*, www.bailii.org/uk/cases/UKHL/1987/11.html.

70 The classic majority view on Belgian law is that it strictly adheres to the 'theory of equivalence of conditions' in regard to non-contractual liability arising out of damage caused to another. It regards as a cause every circumstance without which the concrete harm would not have ensued in the manner that it has occurred. No relative weight is given to the causal events determined in this way; not on the basis of adequacy, directness, probability, foreseeability or any other normative criterion. Instead, all causes are considered to be equivalent. Hence, the sole test for causation is the but for-test. See for doctrine merely exemplary: Dubuisson et al., Le fait générateur et le lien causal, paras 388 ff, pp 322 ff; T. Vansweevelt & B. Weyts, *Handboek Buitencontractueel Aansprakelijkheidsrecht* (Antwerp: Intersentia 2009) para 1236, p 775; S. Stijns, *Leerboek Verbintenissenrecht – Boek 1bis* (Bruges: die Keure, 2013) para 138, p 109; P. Van Ommeslaghe & H. De Page, *Traité de droit civil belge, II/2, Droit des obligations – sources des obligations* (Brussels: Larcier, 2013) para 1092, pp 1608-1610; Bocken et al., *Het buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels* para 100, p 65.

71 See S. Lierman, 'Verlies van een kans bij medische ongevallen', *NjW* 2005, p (614) at 617, para. 10.

72 HR 14 December 2012, ECLI:NL:HR:2012:BX8349, *NJ* 2013/236.

73 Cour de cassation 1re civ. 10 January 1990, n°87-17091, 87-17092, 88-18690, www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007023786&fastReqId=1249192846&fastPos=1; Cour de cassation 1re civ. 28 January 2010, n°08-20.755, 08-21.692,

3.4. Negligent Financial Advice and Provision of Information

23. The doctrine of loss of a chance may also find application in the context of negligent financial advice and the negligent provision of incorrect or incomplete information. To begin with, one can think of the situation in which D negligently advices C to invest in company X. When company X goes bankrupt, C loses its investment. It is however uncertain how C would have acted had D given proper advice. Would C have refrained from investing in company X or would C have invested in company X anyway? This type of situation resembles the medical lack of informed consent cases described above in the sense that the uncertainty lies in the conduct of the claimant, though in an entirely different context.

24. French and Belgian courts would apply the doctrine of loss of a chance. French courts consider this type as a 'classic' loss of chance case. French courts even go a step further and apply the doctrine to cases where companies fail to meet their disclosure obligations.[74] In Belgium, under the condition that there was a real chance for C not to have invested in X had C be duly informed, C will obtain compensation for the lost chance to avoid the harm. The recent literature does not claim a distinction should be made according to who is responsible for the uncertainty of the outcome in case of a lack of information.[75] It does not seem to matter whether the uncertainty stems from the behaviour of the defendant, the claimant or a third party.[76] Courts seem to compensate the lost chance indiscriminately. The

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www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000021768298&fastReqId=1131391006&fastPos=1. See also V. Wester-Ouisse, 'Les méandres de la perte de chance en droit médical', *R.L.D.A. (Revue Lamy Droit des Affaires)* January 2013, p 4934.

74 See Cour de cassation com. 11 February 1986, n°84-14788, www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007016501&fastReqId=1949079573&fastPos=1; Cour de cassation com. 10 July 2012, n°11-21954, www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000026182900&fastReqId=623805089&fastPos=1.

75 S. Baeyens, 'De theorie van het verlies van een kans: een rechtsvergelijkende analyse toegepast op de zuivere vermogensschade', *RW* 2016-17, pp 363-378. The author writes that it is categorically irrelevant whose behaviour is the cause of uncertainty (p 370, para. 21). He clearly dismisses the position of English law as similar to Belgian law. See also however, J.-L. Fagnart, 'La perte d'une chance ou la valeur de l'incertain', in: R. Capart, D. de Callataÿ & J.-L. Fagnart (eds), *La réparation du dommage. Questions particulières* (Louvain-La-Neuve: Anthémis 2006), para. 58; B. Dubuisson, 'La théorie de la perte d'une chance en question: le droit contre l'aléa?', *JT* 2007, p (489) at 493, para. 10, who questions whether there can be talk of chances when the realization of the situation to which the chance pertains is dependent solely on the will of the claimant. In this view it can be relevant whether the uncertainty stems from the claimant's behaviour.

76 See also H. Bocken, 'Geen kans verloren. Causale onzekerheid en de rechtspraak van het Hof van Cassatie over het verlies van een kans', in: Gandaius (ed.), *Aansprakelijkheid, aansprakelijkheidsverzekering en andere schadevergoedingssystemen XXXIIIste postuniversitaire cyclus Willy Delva (2006–2007)*, (Mechelen: Kluwer, 2007), para. 15 p (271) at 282-283. The author mentions that

current position of Dutch law on this type of case is not entirely clear (yet). In a medical informed consent case, a Dutch lower court did apply the doctrine of loss of a chance where uncertainty existed regarding the hypothetical conduct of the claimant.[77] In the context of financial litigation, the Dutch Supreme Court explicitly decided that such cases shall not be solved by application of proportional liability,[78] but has not confirmed the application of loss of chance in this context.[79] Finally, English law has adopted the opposite approach as compared to French and Belgian law. If the uncertainty on the hypothetical sequel of events originates from the claimant's behaviour, the doctrine of loss of a chance will not be applied. The Court of Appeal in *Allied Maples* and the Supreme Court in *Perry* v. *Raleys Solicitors* have explicitly held that it is for claimants to prove on the balance of probabilities that they would have filed an honest claim.[80] It is submitted that this might be transposed to this category.

25. A distinct type of case is where the causal uncertainty does not lie in in the hypothetical conduct of the claimant, but of a third party instead. One can think of the situation in which D negligently incorrectly advised its client C on pending negotiations between C and a third party. Had D given proper advice, C would have acted differently. However, it is uncertain how the third party would have reacted and what would have been the result of the negotiations. French and Belgian law can be assumed to continue to apply the doctrine of loss of a chance.[81] The Dutch Supreme Court explicitly confirmed the application of the doctrine of loss of a chance in Dutch law in a case in which the lost chance of the claimant depended on the conduct of the Dutch tax authorities as a third party.[82] The English approach

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causal uncertainty can be caused by different factors, such as the behaviour of the claimant or third parties or events. However, the author does not use the distinction as a criterion for the application of the doctrine of loss of a chance. Also GOLDMAN & JAFFERALI, 4. *TBBR* 2019, p (191) at 202.

77 Rechtbank Rotterdam 24 November 2015 *supra* n. 64, para. 4.11, as derived from VAN VELTHOVEN, 4. *NTBR* 2018, p (102) at 103. See also Gerechtshof Den Haag 9 October 2018 *supra* n. 64, para. 16.

78 Hoge Raad der Nederlanden 24 December 2010, *Fortis/Bourgonje supra* n. 32.

79 For the approach that the doctrine of loss of a chance applies to the duty to provide information more in general, see I. GIESEN & K.L. MAES, 'Omgaan met bewijsnood bij de vaststelling van het causaal verband in geval van verzuimde informatieplichten', *NTBR (Nederlands Tijdschrift voor Burgerlijk Recht)* 2014(6), p (219) at 231.

80 Court of Appeal 12 May 1995, *Allied Maples* v. *Simmons & Simmons* paras 1602, 1610, and UKSC 13 February 2019, *Perry* v. *Raleys Sollicitors supra* n. 37. See also A. BURROWS, *Remedies fort Tort and Breach of Contract*, 2004 (Oxford: Oxford University Press, 3rd edn 2004) pp 56–57; H. MCGREGOR, *McGregor on Damages* (London: Sweet & Maxwell, 17th edn 2003), para. 8-035.

81 France: e.g. Cour de cassation 2ème civ. 15 December 2011, n°10-23.889, www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024987740&fastReqId=1131401427&fastPos=1, on the loss of a chance of including a warranty in a contract. Belgium: Regarding Belgian law, this conclusion can be derived by analogy from the first negligent (financial) advice case.

82 Hoge Raad der Nederlanden 21 December 2012, *Deloitte Belastingadviseurs/H&H Beheer supra* n. 4.

differs in comparison to the situation in which the uncertainty lies in the hypothetical conduct of the claimant. When the uncertainty lies in the hypothetical conduct of a third party, English law would apply the doctrine of loss of a chance exactly because the causal uncertainty stems from the hypothetical conduct of a third party and not from the hypothetical conduct of the claimant.[83] English law thus takes a deviating position and does attach importance to the origin of the uncertainty in this regard.

3.5. Deprived or Diminished Career Chances

26. Finally, it is worth briefly considering one area of law where the language of chances is often invoked, but where the doctrine of loss of a chance is not necessary to establish the claim in the first place: that of lost career chances. Lost career chances often play a role in personal injury cases, in which one of the heads of damage usually is loss of income. Establishing that income has been lost is often easy. How much income has been lost, however, is particularly difficult to calculate as it is usually uncertain how the victim's career would have developed but for the tort. The claimant might have gone on to develop a very lucrative career, but it is unlikely to be sure. The claimant will argue, of course, that he or she would have become the next Oprah Winfrey, whereas the defendant will argue that the claimant would never have gotten on TV in the first place.

27. Because of the uncertainties inherent to the question about someone's future career, this debate is often held in terms of chances.[84] That does not mean, however, that it is (or should be) considered a loss of a chance case. English and Dutch courts tend to deal with this issue as a matter of simple calculation.[85] Having established that a tort was committed and that loss has been suffered, all that is left to do is calculate that loss. English and Dutch courts calculate this head of damage pragmatically without the need to rely on loss of a chance.

28. French courts, on the other hand, do view these cases as loss of chance cases. The reasoning is plain. All losses must be compensated, but the extent of the loss of

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83 Court of Appeal 12 May 1995, *Allied Maples* v. *Simmons & Simmons*, para. 1602 *supra* n. 37. See also P.H. Winfield & J.A. Jolowicz, *Winfield and Jolowicz on Tort* (London: Sweet & Maxwell, 19th edn 2014), p 183 and A. Burrows, *Remedies fort Tort and Breach of Contract*, pp 56–57. See differently S. Green, *Causation in Negligence* (Oxford: Hart Publishing 2015) pp 170–172.

84 Hoge Raad der Nederlanden 20 December 2013, ECLI:NL:HR:2013:2138, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2013:2138 = *VR* 2014/142; French law: Cour de cassation 2ème civ. 10 December 2009, n°06-17727, www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000021474098&fastReqId=329672966&fastPos=1.

85 Although Art. 6:97 DCC allows a court to estimate the damage and English courts are permitted to make a 'Blamire' lump sum award as in Court of Appeal 8 October 1992, *Blamire* v. *South Cumbria Health Authority* [1993] PIQR 1.

income is uncertain. As a result, the theory has been applied to the loss of a chance of getting a promotion or a raise, the loss of a chance of passing an exam, the loss of a chance of winning a competition or a bet, the loss of a chance of marrying someone or having children, the loss of a chance of concluding a contract, etc.[86] At the same time, however, it is worth emphasizing that this does not mean that *anyone* could claim that one would have become the CEO (chief executive officer) of a large corporation and claim a loss of a chance of having multimillion euro annual salary. To be recoverable, the chance must be 'real' and 'serious'[87] so that compensation is not given for something that is too derisory or hypothetical.[88] In outcome, therefore, the results might not be all that different.[89]

29. Belgian courts know both approaches. Belgian law compensates future losses that are already certain when the obligation to compensate of the wrongdoer is assessed by a court. Take as an example a case in which an employee falls victim to a wrongfully caused traffic accident on his way to work on the day of a special selection procedure for in-house promotion. He suffers a serious head injury, which will plague him with bouts of severe migraine for the rest of his life. Since the migraine immediately diminishes his ability to work at full capacity, he will be compensated for that. In the calculation of this compensation, the normal increase of income according to a normal career will be taken into account.[90] This future – though certain – loss can be immediately calculated and allowed compensation for. What is uncertain, however, is whether the employee would have succeeded at the special in-house selection procedure. Like French law, the loss of income that could have resulted from that specific selection, will rather be translated into a lost chance. The lost chance to join the selection procedure and possibly obtain, at least more quickly, a promotion will be compensated via the doctrine of loss of a chance, under the conditions outlined earlier.

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86 See for many other examples of French cases: G. Viney, P. Jourdain, & S. Carval, *Traité de droit civil,* para. 280.

87 See Cour de cassation 1re civ. 5 November 2009, n°07-21442, www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000021250673&fastReqId=1130312449&fastPos=1.

88 A. Guégan-Lécuyer, 'Les conditions de réparation de la perte de chance', in O. Sabard (ed.), *La perte de chance, actes de colloque du 12 février 2013*, 218 *L.P.A. (Les petites affiches 2013)*, p 15.

89 Although it is worth noting that French courts are comparatively generous, even awarding compensation where the claimant only had a 5% chance of success, see Cour de cassation 2ème civ. 1 July 2010, n°09-15594, www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000022458327&fastReqId=1264388956&fastPos=1.

90 Bocken et al., *Het buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, para. 72, p 47. Compare Cass. 15 December 2004, s. 12.0097.F.

4. Explaining Loss of a Chance

4.1. The Problem with Loss of a Chance as It Exists

30. Although both the descriptive account in section 2 and the typology of section 3 shed light on the question neither provides a coherent picture that allows for a more transnational understanding of the doctrine of loss of a chance. However, the research does show two things: (i) the doctrine of loss of a chance is accepted in principle in all jurisdictions, but (ii) its precise scope of application is neither clear nor uncontested.

31. Criticisms lodged against the doctrine are tailored to the version of loss of a chance deployed. The Dutch are confused as to whether there is something peculiar to the doctrine of loss of a chance as opposed to their doctrine of 'actual' proportional liability. The Belgians debate whether chances of avoiding a harm and of obtaining a benefit are inherently different so as to justify different legal treatment. And both the Belgians and the French criticize the doctrine for providing a bypass of the causation requirement,[91] whilst the English reject its application apparently in fear of it becoming such a bypass.[92]

32. It seems that in all jurisdictions, the debate surrounding the doctrine of loss of a chance boils down to the following. The doctrine of 'loss of a chance' has gone beyond its proper scope and has become a tool to bypass causation entirely without ever looking for an actual lost chance.[93] An example would be a case like that of *Wilsher* v. *Essex AHA*[94] where the injury (RLF (retrolental fibroplasia) leading to blindness) could have been caused by any out of five factors of which the doctor's negligence was only one (*supra* paragraph 22). Applying the doctrine in such a case would simply result in avoiding the causal requirement altogether.

33. Yet despite these criticisms, all four jurisdictions maintain that the doctrine of loss of chance can be applied in some cases. The challenge thus becomes finding a theory that both retains the doctrine of loss of a chance as a valid doctrine as well as caters to these criticisms.

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91 See e.g. P. Brun, in: *La perte de chance, actes de colloque du 12 février 2013*, p 49.

92 See e.g. Baroness Hale in UKHL 27 January 2005, *Gregg* v. *Scott supra* n. 38, paras 214-215.

93 France: P. Brun, in: *La perte de chance, actes de colloque du 12 février 2013*, p 49; F. Descorps Declère, 'La cohérence de la jurisprudence de la Cour de cassation sur la perte d'une chance consécutive à une faute du médecin', *D.* 2005, p 742; V. Wester-Ouisse, *R.L.D.A* January 2013, p 4934. Belgium: J.L. Fagnart, 'La responsabilité des pouvoirs publics dans la prévention des actes de violence (annotation of Liège 27 November 1996)', *Journal des procès* 1997, p (26) at 27-28.

94 UKHL 10 March 1987, *Wilsher* v. *Essex AHA supra* n. 69.

4.2. Back to Basic Principles

34. Finding a theory that works transnationally requires either a very detailed theory with many exceptions, or a more minimalist theory that only retains the necessary core of the doctrine. Given the disparities between the contemporary national debates as well as the fact the doctrine of loss of a chance has a very clear rationale to it, we have opted for attempting the latter.

35. The basic justificatory force of the doctrine of loss of a chance is that the actual loss or harm is disregarded completely and that the focus is shifted to another, separate head of damage: the lost chance. Taking this doctrine seriously identifies three questions that need to be answered in order to find a workable theory of loss of a chance: (i) What is a (valuable) chance? (ii) Did the wrongful conduct make the claimant lose that chance? And (iii) from whom can the claimant claim compensation for the lost chance?

4.2.1. What Is a (Valuable) Chance: The Distinction Between Chances, Risks and Uncertainties

4.2.1.1. Chances, Risks and Uncertainties

36. First of all, it is submitted that the misconception of the doctrine of loss of a chance as an instrument to bypass the causal uncertainty is influenced by a linguistic issue. The root of the problem with talking about chances is that the word 'chance' can be used in two ways. It is possible, for instance, to say that 'there is a chance that event X caused this loss' as well as 'I have a good chance of winning the foot race against you'. Both uses are apparent in the application of the doctrine of loss of a chance, but only the latter fits its logic. The former describes a state of uncertainty. It is unknown whether event A led to head of damage B and that nescience is phrased in terms of probabilities. The latter, however, is phrased in terms of an intangible asset that can be possessed. That wording fits the doctrine of loss of a chance better. If chances can be lost, they once were possessed.

> **Example 1.** A participates in a race. Experts agree that A has a 10% chance of winning the race. D1 prevents A from running by locking A up right before the race.
>
> **Example 2.** B has worked for D2 for many years and was exposed to asbestos. B contracts lung cancer. There is 10% a chance that the exposure to asbestos was the cause of B's disease.

37. In example 1, A clearly has an *ex ante* chance of winning the race. In example 2, however, B does not 'have' an *ex ante* chance, but probabilities are merely used to make sense of reality. There is reason to believe that this is why Dutch courts

would apply their doctrine of 'actual' proportional liability in example 2 scenarios.[95]

38. The implications of this distinction are important as it shifts the focus of our discussion. We are not concerned with the probabilities of the wrong being the cause of any tangible harm, rather we are concerned with finding out whether the claimant had a chance of something better than his or her *status quo* that was wrongfully taken away by the defendant. This shows that not every causal uncertainty will be 'saved' by the doctrine of loss of a chance. If there was no chance to be lost, no compensation is given. Also, if it is uncertain whether the wrongful conduct took the chance away, the claimant is still left empty-handed. This triggers two questions: (1) what does it mean to have a chance?; (2) when is a lost chance worth something?

39. 'Having a chance' requires that there is some uncertainty as to whether the position of the relevant individual will improve or not. There must be some *ex ante* uncertainty in the outcome even in the absence of the wrongful act.[96] The most obvious example is that of someone entering a race or a competition. We might be almost sure someone will win, but predicting the outcome with certainty is virtually impossible. Such a state of 'having a chance', is highly similar to being at risk of something, for example being at risk of losing the race. Conceptually, risks and chances are highly similar. Yet there is one way in which they differ: the one can be qualified as an asset taken away (a chance), while the other is a peculiar type of harm being inflicted (a risk). Two examples may clarify this.

> **Example 3.** X goes to hospital with an infected wound in her leg. When left untreated, this infection will definitely cause her to lose the leg. If the doctor treats her straight away, she has a 10% of keeping the leg.
>
> **Example 4.** Y goes to hospital for a minor surgery. There is a 10% chance of infection if the doctor fails to clean all surgical tools before surgery.

40. Here, there is a clear difference between the respective positions of X and Y. X clearly 'has' (or 'will obtain') a chance of improving if the doctor treats the wounded leg straight away. Y, on the other hand, does not 'have' a chance of anything, but rather is 'at risk' of being injured if the doctor does not clean the surgical tools. It seems that the English doctrine of 'material contribution to the risk' appeals to this conceptual distinction.[97]

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95 Hoge Raad der Nederlanden 31 March 2006, *Nefalit/Karamus supra* n. 33, *NJ* 2011/250, with annotation by T.F.E. Tjong Tjin Tai.

96 French and Belgian authors would use the term '*aléa*' to identify this ex ante 'uncertainty'. France: F. Chabas, 'La perte d'une chance en droit français', p 131. Belgium: Dubuisson, *JT* 2007 , p 489 and ff.

97 England & Wales material increase of risk, UKHL 15 November 1972, *McGhee* v. *National Coal Board*, www.bailii.org/uk/cases/UKHL/1972/7.html; UKHL 20 June 2002, *Fairchild* v. *Glenhaven*

41. Recognizing this distinction seamlessly introduces the next question. If risks are possibilities of harm that one cannot possess and chances are possibilities of improvements that one can – at least linguistically – possess, when, then, is a chance worth something?

4.2.1.2. Chances of Value

42. If lost chances can result in compensation, apparently a chance is worth something. This does not mean that they need to be tradeable on an open market like lottery tickets, but that people attach some value (monetary or otherwise) to the state of uncertainty. Generally, that will be so where the uncertainties offered the claimants the possibility of improving their position. After all, if A participates in a race with € 5.000 prize money and has a 10% chance of winning, A might rationally be willing to spend up to € 500 on training equipment. Whether the potential outcome of the uncertainty qualifies as 'something better' requires a careful examination of the claimant's position. What was A's *status quo*? One of the problems encountered in our research is that authors and judges often identify a 'normal life' as the *status quo.* When talking about A participating in a race, that happens to be correct: A's *status quo* is the continuation of A's 'normal' life. In other cases, however, it does not work. Take for instance a patient who is at risk of losing his or her leg if not treated immediately. The doctor negligently delays treatment. The patient loses the leg. This may seem like someone who is worse off due to the doctor's treatment, but in fact losing the leg was part of the patient's *status quo.* Even without the negligence of the doctor there was a risk of losing the leg. The doctor could offer the patient a chance of recovery, and that is a chance of something better.

43. The focus on an *ex ante* uncertainty combined with the selection of the proper *status quo* requires a slight shift in thinking. One particularly interesting example that illustrates this comes from Belgium.[98] A woman complained to the police that her ex-boyfriend was stalking and threatening her. The police negligently failed to take action and one day the ex-boyfriend threw chemicals in the woman's face (a so-called acid attack), leaving her disfigured and injured. It is clear that the risk of her disfigurement is not attributable to the police, but rather to the ex-boyfriend's psychotic mind set. The woman, however, also claimed compensation from the police arguing that the police force wrongfully failed to protect her despite her earlier complaints. It has subsequently been debated whether she could claim compensation for a lost chance of not being disfigured. To answer this question we need to focus on the woman's position in detail. She was not a regular person, but someone who had the misfortune of being stalked and harassed. That – unfortunately – was her *status quo.* In civilized society, however, the

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Funeral Services Ltd, www.bailii.org/uk/cases/UKHL/2002/22.html. Netherlands: Hoge Raad der Nederlanden 31 March 2006, *Nefalit/Karamus supra* n. 33, *NJ* 2011/250, with annotation by T.F. E. Tjong Tjin Tai.

98 Cass. 1 April 2004, *RW* 2004-05, 106.

police have a duty to respond to those kinds of threats, thus reducing the possibility of further stalking. Therefore, although there was an inherent hazard as to whether she could be hurt by her ex-boyfriend, the police, by acting (appropriately) could have offered a better outcome, which it did not do. Hence, they made her lose a chance of a better outcome. This therefore is a proper case for the application of the loss of a chance.

4.2.2. When Is a Chance Lost?

4.2.2.1. In Theory

44. In all jurisdictions, it has famously been argued that the use of the loss of a chance doctrine could lead to proportional recovery in all cases.[99] The difference between the requirement of having a chance *of* something better and considering what the chance is *that* A led to B goes a long way to explain this (cfr. *supra*). The next requirement is that the chance is actually lost. For this, the timing of interference by the defendant is important.

45. In order to illustrate this point it is useful to briefly rely on the game-based examples relied upon by, for instance, Baroness Hale (a coin toss),[100] Lord Hope (the casting of a die)[101] and Jeroen Kortmann (drawing of a card from a deck of cards).[102] In all these cases there is a moment when the outcome is undecided and a moment where it is merely uncertain. If a game master draws a card out of a fair deck and asks you what the chance is that it is the ace of hearts, you might intuitively respond that it is 1 out of 52. Although that is correct, it is important to note that this is simply a lack of knowledge: at that point it either is or it is not. You do not know what the outcome is, but the outcome will not change. One of the present authors has made this point elsewhere using the following examples.[103]

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99 Netherlands: Van Velthoven, 4. *NTBR* 2018, p (102). France: J. Boré, 'L'indemnisation pour les chances perdues: une forme d'appréciation quantitative de la causalité d'un fait dommageable', 1. *J.C.P. G. (La semaine juridique, édition générale)* p 2620. See also R. Savatier, 'Une faute peut-elle engendrer la responsabilité d'un dommage sans l'avoir causé ?', *D.* 1970, p 123; Belgium: S. Lierman, *NjW 2005*, p (614) at 616-618, paras 8-11; Vansweevelt & Weyts, *Handboek Buitencontractueel Aansprakelijkheidsrecht*, para. 1030, p 649. England & Wales: Baroness Hale in UKHL 27 January 2005, *Gregg* v. *Scott supra* n. 38, para. 224.

100 UKHL 27 January 2005, *Gregg* v. *Scott supra* n. 38, para. 211.

101 UKHL 27 January 2005, *Gregg* v. *Scott supra* n. 38, para. 113.

102 J.S. Kortmann, 'Meervoudige causaliteit: over alternativiteit bij daders én benadeelden', in C.J.M. Klaassen &J.S. Kortmann(eds), *Causaliteitsperikelen* (Deventer: Kluwer 2012), pp 45-56.

103 W.Th. Nuninga, 'Het recht op een kans', 3. *NTBR (Nederlands Tijdschrift voor Burgerlijk Recht)* 2019, p (41).

> **Example 5.** X organizes a card game. Each participant who pays € 0.25 is allowed to draw one card. The person that draws the ace of hearts wins € 20. C pays X the € 0.25, but before C can draw, D steals the deck of cards.[104]

Here, C purchased a 1/52 chance of € 20. This position in itself is valuable.[105] D interferes with that position. Since it cannot be established that C would have actually drawn the ace of hearts, there is no point in pursuing that claim. C can, however, pursue a claim for the lost chance of 1/52 of winning € 20.

46. Consider now a somewhat different example:

> **Example 2.** X organizes a card game. Each participant who pays € 0.25 is allowed to draw one card. The person that draws the ace of hearts wins € 20. C pays X the € 0.25 and draws a card, but before C can look at what it is, D quickly takes the card and puts it back.

Here, C purchased a 1/52 chance of winning € 20. C exercised that chance. D did not deprive C of that chance. Instead D only deprived C of the knowledge of the outcome. Losing that knowledge is inconvenient and hurts C's litigation prospects, but is generally not considered a head of damage.[106]

47. What these examples show is that for a chance to be lost because of the claimant, the defendant must have interfered with the claimant's position *before* the claimant exercised that chance. Mere *ex post* uncertainty is not enough for the doctrine of loss of a chance to logically apply. It is required that (i) the claimant has a chance of improving his or her position and (ii) the claimant must have been prevented from exercising that chance. Only then could we speak of a chance lost because of the defendant's negligence.

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104 It is assumed for now that X will not allow C to draw from another deck and that this does not constitute a breach of contract.

105 Either worth the € 0.25 C paid or the € 0.38 (=20/52) it would be worth to a rational participant.

106 In Belgium, however, the damage to litigation prospects can be viewed as a harm, when the claimant is wrongfully deprived of pieces of evidence. Interestingly, it is the doctrine of loss of a chance i.e. invoked to do so. In several cases, jurisprudence awards damages for the lost chance to be able to sufficiently prove one of the prerequisites for a successful claim in tort (e.g. wrongfulness of behaviour), which could have allowed for full compensation, see Brussels 27 June 1991, *RGAR* 1992, no. 12032; Rb. Brussels 3 June 2005, *VAV (Verkeer, Aansprakelijkheid, Verzekering)* 2005, p 340; Pol. Liège 4 November 1998, *Verkeersrecht* 1999, p 328; Pol. Marche-en-Famenne 25 July 2001, *Verkeersrecht* 2001, p 367; Pol. Veurne 11 April 2011, *TGR (Tijdschrift voor Gentse Rechtspraak)* 2011, p 288; Pol. Oost-Vlaanderen (afd. Ghent) 8 May 2017, *T.Pol (Tijdschrift van de Politierechters)*, p 112. See also Dubuisson et al., *Le fait générateur et le lien causal* , pp 374 ff., para. 444; Q. De Raedt, 'Het verlies van een kans op het verlies van een kans', *T.Gez. (Tijdschrift voor Gezondheidsrecht)* 2012, p (229) at 231, paras 9-12.; Goldman & Jafferali, 4. *TBBR* 2019 , p (191) at 209-210; T. Coppee, 'Perte d'une chance de prouver : développements récents et perspectives dévolution (Annotation of Rb. Brussels 9 October 2017)', 7. *TBBR* 2019, pp 404-410.

4.2.2.2. The Theory Applied

48. In order to grasp what this means in practice it is worth briefly considering part of the French and Belgian scholarly criticism in this context, which contends that application of the doctrine is inappropriate in (some cases in) the field of medical negligence,[107] as well as English case law. The reasoning is as follows. Imagine a case where a patient should have been treated at date t^1 but, because of the doctor's negligence, treatment is delayed until t^2. At t^1 the patient had 45% chance of recovery, but at t^2 that chance dropped to 25%. The critics of the 'perverted loss of a chance' doctrine argue that here the claimant was in fact able to test his or her luck or 'run the chance' (albeit at t^2) and the outcome is clear (the injury ensued). As a result, they argue, the patient should only be compensated if he or she can establish a causal link with the injury that actually occurred.

49. The problem with this approach is that it mischaracterizes what has been lost. The patient had (or rather: was meant to obtain) a chance of 45% at t^1 and was deprived of that chance. *That* chance has definitely been lost. When the patient in our example received treatment at t^2, he or she only obtained a chance of 25%. Of course some allowance must be made for that benefit, but it seems incorrect to argue that no chance has been lost at all. The extension of the perverted loss of a chance criticism to this type of situation is logically unnecessary.

50. At the same time, however, it is perfectly conceivable that a medical negligence case does involve a fact pattern where a chance has already been run. A good example would be the case of *Hotson* v. *East Berkshire AHA* (*supra* paragraph 19). If that involved a chance at all, it was run as soon as the boy who fell from the tree sustained the injury. When he came to the hospital it was practically impossible to see whether a treatment would make any difference. Had there been time to closely inspect the amount of blood vessels remaining intact, the outcome of that analysis would have shown that treatment either would or would not have led to recovery.[108] In other words: this case is more akin to example 2 above than it is to example 1. Knowledge of the exact chain of events was lost, but there were no chances deprived before they were run. Applying the national standards of proof (or a fairness-based doctrine like proportional liability) is more appropriate in such a case.

51. Hence, not all medical negligence cases involve chances being lost. But some do. *Hotson* does not seem to be a loss of a chance case. *Gregg* v. *Scott* on the other hand might. As medical knowledge stands, after all, cancer and its treatment are – for all human purposes – unpredictable.[109] Applying the doctrine of loss of a chance to

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107 *Ibid.*

108 See Lord Bridge's analysis of this case in *Gregg* v. *Scott supra* n. 38.

109 For this distinction between deterministic and 'quasi-indeterministic' cases we are indebted to H. Reece, 'Losses of Chances in the Law', 2. *M.L.R. (Medical Law Review)* 1996.

medical cases requires a careful analysis of the facts. Was this a case where the patient had (or should have received) a chance of something better? If so, did the defendant doctor cause the claimant to lose (or fail to provide) that chance before it was run?

4.2.3. Further Limitation

52. It could be argued that the theory developed so far still leaves open the possibility for a large number of cases to be converted into a loss of a chance case. It will often be possible to imagine an uncertainty existing at the time the wrong was committed which, because of the wrong, will remain uncertain forever. For instance, a victim of a traffic accident who missed a potentially lucrative meeting with a business partner because of the traffic accident caused by the defendant could easily argue that the defendant caused him or her to lose a chance of winning the lucrative deal. Relying on this doctrine, the victim does not even need to show that the meeting would have actually been lucrative, but merely has to make the existence of a chance to a positive outcome plausible.

53. If this is perceived as a problem there are, roughly speaking, two routes: (i) rejecting the doctrine altogether after all, or (ii) relying on existing legal instruments to further limit the application of the doctrine of loss of a chance. One of us has argued elsewhere that the Dutch 'scope of duty' theory might solve this problem.[110] If the claimant wants compensation for a lost chance from the claimant, he or she must have had a right vis-à-vis the defendant to that chance. Conversely, providing or protecting the chance must have been in the scope of the defendant's duty. An easy instance of such a case is where the claimant created the chance for him or herself and the defendant, according to the general rules of remoteness of each jurisdiction, came under an obligation to allow the claimant to exercise this chance. *Chaplin* v. *Hicks* is an example for this (*supra* paragraph 1). That case concerned a beauty contest for women. One contender was eligible to join the finals. The letter inviting her to attend the next stage of the contest arrived too late. As a result she was denied the opportunity to be considered as the winner. She sought damages from the organizer of the contest for breach of contract. The Court of Appeal dismissed the defending organizer's argument that the damage was too remote, granting the claimant compensation for the lost chance to consideration.

54. Another important situation where the claimant has a right to a chance is where it was the defendant's duty to provide it to him or her. The advocate's and solicitor's negligence cases are examples of this. They are usually not under an

110 W.Th. Nuninga, *NTBR* 3. 2019, p 41.

obligation to win the case, but rather under an obligation to allow the claimant the opportunity to try it. The same goes for some cases of medical negligence. A doctor who neglects to administer the correct treatment was never under a duty to ensure recovery, but was under a duty to provide adequate care. Because of the uncertainties inherent in medical science, that often means the doctor was under an obligation to provide a mere chance.

55. Contrary to the current civil practice, however, this does not mean that all cases of medical negligence allow for the application of the doctrine of loss of a chance. Rather, it needs to be inquired at every turn whether the duty that has been breached was one to provide a chance. In cases like *Wilsher* v. *Essex* (*supra* paragraph 22*)*, for instance, that was not the case. The duty breached was one not to administer an excess of oxygen. *That* duty seeks to prevent brain damage, so the brain damage would be the only recoverable loss. *Gregg* v. *Scott* on the other hand was a case where the duty to provide timely treatment had as its very purpose to provide the patient with better chances of recovery. Contrary to how it was decided, that case logically qualifies for the application of the doctrine of loss of a chance.

56. The problem with this approach, however, is that 'scope of duty' arguments are met with some reservation in England and Wales,[111] are not very well-known in France[112] and are rejected in Belgium,[113] In the example of the missed meeting, French and Belgian courts would presumably allow for compensation as neither remoteness nor scope of duty arguments are generally applied. This is part of their legal cultures, which are – unsurprisingly – branded as 'claimant-

111 A. Burrows, *Remedies Fort Tort and Breach of Contract*, p 113.

112 One can, however, point out that the concepts of 'scope of duty' and of 'relativity' are not completely foreign to French judicial reasoning. Viney, Jourdain and Carval have pointed out that there are a few cases where the defendant's behaviour was clearly a *conditio sine qua non* of the claimant's harm but because it's illegality had no correlation with the harm, causation is rejected. They give the following example. It was held by the *Cour de cassation* in 1943 that the illegal hiring of an undeclared immigrant employee was not the cause of the employee's harm resulting from a workplace accident. In this case, it was held that there was no causal link between the illegal hiring and the damage. Indeed, 'the negligent behaviour is only causative if it consists in the transgression of a norm designed to avoid the harm which happened, otherwise, the two remain unconnected'. (French original version: '(...) la faute n'est causale que si elle consiste en la transgression d'une norme ayant pour but d'éviter le dommage produit, non si elle est sans rapport avec celui-ci'.) extracted from: G. Viney, P. Jourdain, and S. Carval, *Traité de droit civil,* , para. 358. See also C. Quézel-Ambrunaz, *Essai sur la causalité en droit de la responsabilité civile* (Paris: Dalloz 2010) paras 178–181 (on the concept of relativity, and the scope of the protective rule); M. Dugué, *L'intérêt protégé en droit de la responsabilité civile* (Paris: L.G.D.J. 2019) 174 (where the author explains that French law sometimes implicitly recognizes that the negligent behaviour (*la faute*) must be relative to the protected interest of the victim).

113 Vansweevelt & Weyts *Handboek Buitencontractueel Aansprakelijkheidsrecht*, paras 172–174, pp 123-125; Van Ommeslaghe & De Page, *Traité de droit civil belge*, pp 1221-1223; Bocken et al., *Het buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels,* para. 77, p 51.

friendly'.[114] Even if our view of the doctrine of loss of a chance were to be accepted in these jurisdictions, its application would, therefore, still be more widespread than in England and the Netherlands.

5. Conclusion

57. The doctrine of loss of a chance is a long-standing but heavily contested doctrine. It is often applied in cases of causal uncertainty, fuelling the criticism (or fear) that it is (or could be) a mere magic spell that allows judges to bypass the requirement of causation altogether. Our research shows that this way of viewing the doctrine has things backwards. Although it is true that the doctrine can be applied in cases where there is an uncertain causal link between the injury sustained and the wrong committed, this does not mean that it can be applied in all cases of causal uncertainty.

58. First, it was inquired what the doctrinal foundations of the doctrine are in the four jurisdictions. From this analysis, it became apparent that all jurisdictions employ the same basic justification for the doctrine: although a causal link between the injury sustained and the wrong committed is lacking, there is a causal link between the wrong committed and the losing of a chance. In formulating the precise contours of the doctrine, however, they differ greatly. The Dutch focus on distinguishing loss of a chance from what is called 'proportional liability', the Belgians debate the conceptual difference between the lost chance of obtaining a benefit and that of avoiding a harm, the French criticize their version of the doctrine for being too widely available and the English judiciary shows exceptional reluctance in expanding the doctrine.

59. Second, in order to enhance the understanding of the doctrine, the focal point of research was shifted to the application of the doctrine in practice. Here too, a common core was easily discernible, yet disparities were found at the boundaries of the doctrine. All jurisdictions agree that denied access to a trial or a potentially gainful event (like a race) warrants the application of the doctrine. Yet applications begin to diverge when it comes to medical negligence, negligent advice and deprived career chances. This analysis shows that dividing the doctrine

114 This legal culture has deep roots. In 2018 a commission of experts proposed a reform of the rules on non-contractual liability arising out of damage caused to another, instigated thereto by ministerial decree. Even when presented with the opportunity to start anew with a clean slate, the commission explicitly wished to retain the flexible nature of Belgian law, which is the reason for its claimant-friendly character, see explanatory memorandum to voorontwerp van wet houdende invoeging van de bepalingen betreffende buitencontractuele aansprakelijkheid in het nieuw Burgerlijk Wetboek, opgesteld door de Commissie tot hervorming van het aansprakelijkheidsrecht opgericht bij ministerieel besluit van 30 september 2017, version 22 August 2018, p 4.

up along the lines of fact patterns and broad categories like 'medical negligence' is unlikely to provide a solid basis for comparison.

60. These findings do not paint a very hopeful picture. Although common cores exist, the precise contours of both doctrinal debate and judicial application diverge so widely that they make it difficult to formulate a workable theory. Nevertheless, two basic insights are gained. In all four jurisdictions the doctrine of loss of a chance is (i) deemed acceptable in principle in some core cases, but (ii) criticized for providing a tool for judges to bypass the causality requirement altogether. These two insights serve as the starting point for the more conceptual analysis.

61. The basic justificatory force of the doctrine of loss of a chance is that although there is no causal link between the injury sustained and the wrong committed, there is a causal link between the wrong committed and the loss of a chance. This provides some key insights. If chances can be lost, they can be possessed. If lost chances warrant compensation, apparently they are worth something. This reveals that in fact the doctrine is not about causal uncertainty, but about the legal recognition of an intangible head of the damage: the valuable chance.

62. Figuring out (a) whether the claimant had (or should have received) a valuable chance and (b) whether it was lost, requires a detailed analysis of the case. A chance exists when there is uncertainty as to whether the claimant's position will improve or remain the same. This is to be analysed from this particular claimant's perspective, which means that in some medical cases the treatment definitely provides a chance of something better, whereas in other medical cases there is merely a risk of something worse. A chance is only capable of being lost so long as it has not been executed. Once a card has been drawn from a deck, a die has been cast or a coin has been tossed, the chance no longer exists. If the defendant interferes with the claimant's position after that moment, they will merely have interfered with knowledge of the outcome, but not with the chance. On the other hand, every time the defendant interferes with the claimant's position before the chance has been run, it should be possible in principle to invoke the doctrine of loss of a chance. Limiting its application further is possible, but is best done by reference to national doctrines of remoteness and scope of duty, so as to stay true to legal cultures.

63. Thus, the result of this comparative analysis is an account of the doctrine of loss of a chance that is more restrictive than most continental applications, but slightly more generous than the common law application. As a result, its adoption would require a shift in approach in all jurisdictions. Nevertheless, it is submitted that by taking the doctrinal foundations of the theory seriously, the scope of application can be delineated more clearly and most criticisms lodged against it can be countered.