DAMAGES FOR LOST CHANCES: LOST FOR GOOD?

STRAIGHT after *Chester* v. *Afshar* [2005] 1 A.C. 134 (noted at p. 32 above) comes another important decision on the liability of doctors: *Gregg* v. *Scott* [2005] UKHL 2, [2005] 2 W.L.R. 268. This is a big case even in the most literal sense: the Law Lords' speeches, all of the highest quality, extend to 54 printed pages.

The issue was the liability of a doctor who negligently misdiagnoses a patient suffering from a serious illness (in this case, a rampant type of cancer) for which the chances of successful treatment are already small: and by the time he is correctly diagnosed later, they have shrunk still smaller. In such a case, is the patient entitled to damages for the reduced chance of a successful cure? The orthodox view, as derived from the House of Lords decision in *Hotson* v. *East Berks Area Health Authority* [1987] A.C. 750, is "No". Where the claimant can show that his chances of recovery if treated early were better than even, we say that he has proved his loss on the balance of probabilities and is entitled to full compensation, calculated on the assumption that, but for the defendant's negligence, he would have been cured. But if his initial chance of recovery was only 50 per cent or less, we say that he has failed to prove his loss and so gets nothing. By application of this rule, Mr. Gregg lost at first instance and, by a majority, in the Court of Appeal (see [2003] C.L.J. 253). In the House of Lords his arguments to the contrary convinced Lord Nicholls and Lord Hope, but not Lord Phillips, Baroness Hale or Lord Hoffmann. So by a majority he lost again, and the orthodox position is affirmed.

For Lord Nicholls, dissenting, the main reason for accepting a "lost chance" claim in such a case is the fact that the existing rule produces results that seem so arbitrary:

> The loss of a 45% prospect of recovery is just as much a real loss for a patient as the loss of a 55% prospect of recovery. In both cases the doctor was in breach of his duty to his patient. In both cases the patient was worse off. He has lost something of importance and value. But, it is said, in one case the patient has a remedy, in the other he does not. This would make no sort of sense .... It cannot be right to adopt a procedure having the effect that, in law, a patient's prospects of recovery are treated as non-existent whenever they exist but fall short of 50%.

Outside the medical context, he reminded us, the law admits claims for loss of less-than-evens chances in many well-known situations. To allow such claims in medical cases calculated on a percentage basis derived from medical statistics might do less than perfect justice, because the underlying problem is a causal link that may or

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may not exist, but which cannot be proved or disproved conclusively. In reality, it might mean that some claimants would get too much because for them the initial failure to treat did not in truth affect the outcome (although we do not know this), whilst others got too little because for them it really did (although we do not know that either). But, said Lord Nicholls, the courts should be prepared to "adapt their process so as to leap an evidentiary gap when overall fairness plainly so requires": as indeed the House of Lords spectacularly did in *Fairchild* v. *Glenhaven Funeral Services Ltd.* [2003] 1 A.C. 32—the case about negligent exposure to asbestos, and resulting mesothelioma. Similar reasoning was adopted in his long and careful speech by the other dissentient, Lord Hope.

The reasons that moved the majority to reject the claim were more diverse.

For Lord Hoffmann, the key obstacle was the difficulty that Lord Nicholls recognised, but felt that he could live with: the problem of allowing a claim on a percentage basis for a "lost chance" when in reality the doctor's negligence may have caused some claimants to lose everything, but others nothing. In principle, a tortious claimant must show that the cause of his harm was the wrongful conduct of the defendant. If he cannot do this, then in principle his claim must fail: and it is no answer for him to say "but proof here is impossible". Certain exceptions to this are acceptable, but they should be limited, and capable of precise definition. That was so in *Fairchild*, but, said Lord Hoffmann, the exception the claimant wanted here was potentially much wider and clear limits could not be placed upon it.

For Lord Phillips, the main problem was not so much the principle of allowing a lost chance claim based on medical statistics as the practical difficulties of dealing with it. In each case, justice would require the court to make a serious attempt to adjust the statistics to take account of the detailed information that is known about this particular claimant. Here, for example, a problem arose because Mr. Gregg, contrary to the initial prognosis, had bucked the statistical trend and was still alive when his case was heard by the House of Lords—so that, as Lord Phillips put it, "The likelihood seems to be that Dr. Scott's negligence has not prevented Mr. Gregg's cure, but has made that cure more painful". In the light of these difficulties, which Lord Phillips explained in detail and at length, it was better for the law to remain as it is. "A robust test which produces rough justice may be preferable to a test that on

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occasion will be difficult, if not impossible, to apply with confidence in practice."

For Baroness Hale, a key problem with allowing a "lost chance" claim in cases where the claimant's initial chance of recovery was poor, was the impact she thought this would necessarily have on claims where the initial chance of recovery was good. At present, where the negligent misdiagnosis deprived the patient of a chance of recovery that was 51 per cent or better, he gets full compensation, calculated on the basis that he would have recovered. But a law which allowed the patient to claim full damages where he lost a good chance of recovery, and reduced damages where he lost a bad one, would be both unfair to doctors, and logically inconsistent. In her view, introducing "lost chance" claims where the chance of recovery was low would therefore mean we must stop giving full compensation in "good chance" cases, and reduce the damages in any case where the claimant's initial chance of recovery was less than certain. For this reason, among others, she—unlike Lord Nicholls—embraced Tony Weir's theory that "lost chance" damages are acceptable in the context of claims for financial loss, but not personal injuries.

In closing the door on "lost chance" claims in negligent misdiagnosis cases, two of the majority left it ajar—if only slightly—for claims framed in other ways. Lord Phillips said that a claimant who could not show on the balance of probabilities that if treated in good time he would have recovered might still be able to show, on the balance of probabilities, that the need for painful and invasive treatment would have been avoided: in which case a claim for pain and suffering would succeed. And Baroness Hale said that although Mr. Gregg failed in his claim for a lost chance of a full recovery, he might still have had a modest claim in respect of the "lost years" if he could have shown that his median life expectancy had been reduced.

All this contrasts sharply with *Chester* v. *Afshar* where House of Lords, by a majority, applied the rules of causation very strictly against a surgeon who had failed to warn a patient about the risks inherent in an operation. In doing so, they stressed the need to "vindicate" patients whose doctors failed to treat them with due care. How come this argument, which carried the day in *Chester* v. *Afshar,* failed to do so here? The cases are logically distinguishable, of course—but a different spirit clearly animates the two decisions. The main reason for this, I suspect, is that a claimant-favourable decision in *Gregg* v. *Scott* would have had a far greater practical impact on the working of the law. The facts in *Chester* v. *Afshar* were unusual, and unlikely to recur. But the scenario in *Gregg* v.

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Scott, by contrast, is commonplace, and if Mr. Gregg had won this would have opened the door to very many claims. As Lord Hoffmann said, "It would have enormous consequences for insurance companies and the National Health Service".

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LIABILITY FOR LOST FUTURE BUSINESS IN CONTRACT

As Lord Emsworth's second son Freddie knew, there is money to be made in selling dog biscuits (P.G. Wodehouse, *Blandings Castle*). Life, of course, imitates art, and in *Jackson* v. *Royal Bank of Scotland plc* [2005] UKHL 3, [2005] 1 W.L.R. 377 the House of Lords had to consider a bank's liability to customers engaged in just such a line of profitable business. The defendant bank disclosed confidential information about the business activities of the claimants (who were importers of dog chews from Thailand) to the claimants' principal customers. These purchasers were so incensed by the size of the claimant importers' mark-up, disclosed by the bank in breach of its duty of confidence, that they terminated their relationship, with "disastrous consequences" for the claimants' business. The claimants sued the bank for the losses consequent on its disclosure of the commercially sensitive information. The learned judge found a substantial chance that the claimants' business relationship with the dog chew *aficionados* would have lasted for a further four years had it not been for the bank's revelations, and with appropriate (and increasing) discounts for hypothetical vicissitudes, he awarded damages accordingly. The Court of Appeal, however, held that an additional limit was imposed by the well known test of remoteness of damage in *Hadley* v. *Baxendale* (1854) 9 Exch. 341. Accordingly, "the cut-off point for the bank's liability was the end of such period as was within the reasonable contemplation of the bank at the time of breach", and this was held to be one year only, rather than four.

The House of Lords decided that this was wrong. Once it had been found as a fact that the loss of business over a four-year period was reasonably foreseeable at the time of contracting, there was no justification for limiting those losses according to what the defendant bank might have foreseen at the time of breach. The remoteness test in contract is applied at moment of formation, and not breach. "Extraordinary" losses (beyond the "naturally foreseeable") will be recoverable if the defendant had knowledge of

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