LOSS OF A CHANCE

Ben Smith*

Compensation for the loss of a chance has the potential to revolutionise the law of civil obligations as it is known today. It is an innovative theory of damages which was first conceived of at the beginning of this century. It effectively reformulates the damage as the loss of a chance to which the balance of the probabilities test still applies.[1] This is consistent with the orthodox 'all or nothing' causation rule.[2] Its impact however has been delayed and it is only in the last decade that its challenge to orthodoxy has become clear. The primary purpose of this paper therefore is to consider whether or not compensation for loss of a chance represents only a subset of the law of damages or its complete destruction.

I INTRODUCTION

A Purpose

This paper aims to identify the origins and prescribe the limits of the loss of a chance theory. Damages were first awarded for loss of a chance in contract and were initially confined to solicitors' negligence actions. In this context, loss of a chance damages reinforce the fundamental goals of contract law. They protect the reasonable expectations of the respective parties and the interests of those who have reasonably relied on the promises or behaviour of others.[3] Loss of a chance damages also have origins in medical negligence law. However in the late twentieth century, the loss of a chance theory has slipped its theoretical moorings and drifted into previously uncharted areas of liability. Today in all Commonwealth jurisdictions even the loss of a commercial opportunity is compensated; not

* This is an edited version of a paper submitted in fulfilment of the VUW LLB(Hons) requirements.

1 Jane Stapleton "The Gist Of Negligence" (1988) 104 LQR 389, 396.

2 The text book example of the 'but for' causation test can be seen in *Barnett v Chelsea & Kensington HMC* [1969] 1 All ER 1068 (CA).

3 P S Atiyah *An Introduction to the Law of Contract* (5 Ed, Clarendon Press, Oxford, 1995) 34-36.

only in contract, but also in tort. This development has been spearheaded by an expansionary High Court of Australia which has stated that:[4]

> Damages for deprivation of a commercial opportunity by reason of breach of contract or tort should be ascertained by reference to the court's assessment of the prospects of success of that opportunity had it been pursued.

Not all jurists are as eager as the Australian High Court to so rapidly expand the application of loss of a chance. Millet LJ has recently injected an element of realism into this theory by emphasising that the lost chance must be more than just speculation. His Honour quoted Vaughan Williams LJ in *Chaplin v Hicks*[5] who stated that:[6]

> There are cases no doubt, where the loss is so dependent on the mere unrestricted volition of another that it is impossible to say that there is any assessable loss resulting from the breach.

It is therefore necessary to consider the consequences and validity of the rapid and generally unprincipled expansion of loss of a chance damages.

B Overview

The paper develops a loss of a chance paradigm based on the seminal case of *Chaplin v Hicks*. In this case damages were awarded for a contestant's lost chance of competing in a beauty pageant. This case is the foundation of the 'loss of a chance' theory and the analysis assumes that it is good law. The paper therefore outlines the generalised 'contest-like' facts of *Chaplin v Hicks* and then seeks to isolate the key principles of the case. *Chaplin v Hicks* becomes the paradigm from which any extension of the loss of a chance theory must be justified. The paper firstly examines the 'tendering' cases. Secondly the extension of loss of a chance to tort is considered. It is clear from Lord Goff's speech in *Henderson v Merrett Syndicates Ltd* [7] that the law of tort is the general law out of which the parties can, if they wish, contract. In light of the increasing judicial development of concurrent liability and the unpopularity of a rigid compartmentalisation of tort and contract it appears unlikely that loss of a chance damages should be confined to the contractual 'default rules.'

---

4 *Sellars v Adelaide Petroleum NL and Ors* 120 ALR 16 (HCA) ["*Sellars*"].

5 *Chaplin v Hicks* [1911] 2 KB 786, 792-793 (CA) ["*Chaplin v Hicks*"].

6 *Allied Maples Group Lt v Simmons & Simmons (a firm)* [1995] 4 All ER 907, 930 (CA) ["*Allied Maples*"].

7 [1995] 2 AC 145, 193 (HL) ["*Henderson v Merett Syndicates*"].

A lost chance caused by the negligence of a professional advisor fits the flip-side of the paradigm; a loss of the chance to be free from future uncertainty, can be viewed as the loss of the right to compete. The paper however criticises the common judicial approach of justifying the extension on the basis of a distinction between past and hypothetical events. The reversal of the burden of proof is also postulated as an alternative means of mitigating a plaintiff's causation problem. Finally the paper considers the degree to which compensation for lost commercial opportunities is consistent with the *Chaplin v Hicks* paradigm.

II THE FOUNDATIONS OF LOSS OF A CHANCE

A Introduction

At common law there is no good reason why a party may not contract for the benefit of a chance.[8] If the contract contains a promise to provide the chance, breach of that contract results in the loss of that chance. In contract, breach is actionable per se, in contrast to tort where the damage forms the basis of the action. Thus a plaintiff will recover more than nominal damages if he or she is wrongly denied the benefit of the chance contracted for. Any difficulties in estimating the loss in monetary terms will not defeat an award of damages.[9]

B Origins

1 Contract

In *Chaplin v Hicks*[10] the plaintiff was a young woman who entered a beauty contest by submitting her photograph to a newspaper. She was one of fifty contestants short-listed from six thousand applicants. This formed a contractual relationship. Each contestant was to be interviewed by the defendant, who would then select twelve women to gain employment as actresses. The plaintiff was unable to attend the interview on the stipulated date, and the defendant in breach of contract refused to reschedule the interview.

---

8 B Coote "Chance and the Burden of Proof in Contract and Tort" (1988) 62 ALJ 761,771 cites *Pallister v Waikato Hospital Bd* 2 NZLR 725,736 (HC) a case in which a person with suicidal tendencies could contract with others for protection from the chance of suicide.

9 *Fink v Fink* (1946) 74 CLR 127,143.

10 The earliest application of the theory is *Richardson v Mellish* (1824) 2 Bing 229 which was approved in *Chaplin v Hicks,* see further H McGregor *McGregor on Damages* (16 Ed, Sweet & Maxwell, London, 1997) 246; and SM Waddams *The Law of Damages* (2 Ed, Canada Law Book Inc, Toronto, 1991) 13.280.

The defendant could not claim damages for the lost prize itself as she would be unable to prove on the balance of the probabilities that if interviewed, she would have won. However the court acknowledged that but for the conduct of the defendant the plaintiff would have had the chance of competing. This chance was a valuable right, the loss of which could be compensated. The court rejected the proposition that whenever the contingencies on which the result depends are numerous and difficult to deal with, it is impossible to recover any damages for the loss of a chance or opportunity of winning the prize. Instead it held that since the average chance of each competitor was about one in four, the plaintiff should be awarded 25 per cent of what she would have gained had she been selected.

2 Medical negligence

Although *Chaplin v Hicks* is the leading loss of a chance case in the Commonwealth countries, it is not the exclusive origin of the theory. In the United States loss of a chance damages are firmly grounded in medical negligence law.[11] The approach of the state level supreme courts which have considered the theory has been to analyse the extent to which loss of a chance damages reinforce the fundamental policy objectives of tort law. This is a utilitarian calculus which assesses whether or not loss of a chance damages reinforce the objectives of deterrence, the maximisation of social utility, the ascertainment of the truth, and compensation. Implicit in the compensation objective is acceptance of the view that human life has such paramount qualitative value that any lost chance to extend or improve it, inherently demands compensation.

The United States courts have taken a purely instrumental view of tort law.[12] Tort law therefore is only understood to the extent that these goals (which have a justification outside of tort law) are advanced or frustrated. As such this approach views tort not as an end but purely as a means to an end.

Although courts in the United States have accommodated the loss of a chance theory in the context of medical negligence, the approach of Commonwealth courts has been less conciliatory. The House of Lords has made it manifestly clear in *Hotson v East Berkshire Area*

---

11 See *Hicks v United States* (1966) 368 F 2d 626 632 (4th Cir 1996); *Hamline v Bashline* (1978) 481 Pa 256 392 A 2d 1280 (1978), and *Herskovits v Group Health Cooperative of Puget Sound* (1983) 664 P 2d 474 488 (Wash 1983).

12 Contrast the non-instrumentalist conception of tort law which focuses on the individual relationship between tortfeasor and victim and not the aggregate of these relationships; Ernest Weinrib "The Special Morality of Tort Law" (1989) 34 McGill L J 403.

Health Authority[13] that loss of a chance damages are inappropriate in medical negligence cases.

C The Stylised Facts of Chaplin v Hicks

Chaplin v Hicks is the bedrock of loss of a chance in contract. This paper aims to rationalise any extension of the loss of a chance theory as an incremental analogous extension of *Chaplin v Hicks.* Thus it is necessary to isolate the stylised facts of the case in order to rationalise any future development. Essentially the breach of contract deprived the plaintiff of the chance to succeed in a contest. The chance that the defendant would select the plaintiff as a winner was a hypothetical fact. The plaintiff was one of a finite group of competitors who had given consideration for the mathematical chance of receiving a definite, positive benefit. Given that there was a finite number of possible outcomes[14] from the given 'experiment' the contestant had a mathematical probability of winning.[15] This deductive result is logically independent of experience and proceeds from cause to effect.

Having generalised the facts of *Chaplin v Hicks* it is now possible to reconcile and rationalise the development of the loss of a chance theory. This paper outlines a paradigm for loss of a chance damages. Any extension of the theory will have to come within this paradigm.

D Tendering Processes

Loss of a chance damages should be available to plaintiffs who lose their chance of competing in a contest-like situation with a finite number of competitors. These damages will

---

13 [1987] AC 750 (HL) [*Hotson*]. In this case a hip injury which the plaintiff incurred falling out of a tree, was through negligence not diagnosed by the hospital until five days had elapsed. Had the correct diagnosis been made immediately with the appropriate treatment, there remained only a 75 per cent risk of the plaintiff's disability developing. The House of Lords adopted an 'all or nothing' approach where either the fall or the misdiagnosis caused the disability. On the balance of probabilities it was the fall. The valuation of a lost chance could only arise once causation had been established. Their Lordships were unwilling to entertain the plaintiff's claim that he had lost a 25 per cent chance of avoiding the disability.

14 Either the plaintiff wins the contest or she does not.

15 For example the consequence of throwing a coin has a mathematical probability as there is a finite number of outcomes; either heads or tails. So too has throwing a dice. See further Marc Stauch "Causation, Risk, and Loss of Chance in Medical Negligence" (1997) 17 Oxford Journal of Legal Studies 205, 220.

take into account first any expenditure incurred as a result of reasonable reliance on the contract; and secondly the expectation interest of the plaintiff. Therefore plaintiffs who have been aggrieved by irregularities in a tendering process come within this paradigm. New Zealand courts have followed the lead of the Supreme Court of Canada in analysing tendering systems in terms of two contracts.[16] The first contract (the secondary contract) arises in respect of the submission of the tender. The second (the primary contract) comes to fruition, if at all, when the tender is accepted. This approach gives effect to the reasonable expectations of the parties to create legal relations and protects the integrity of the tendering process.

Markholm Construction Co Ltd v Wellington City Council[17] clearly comes within the paradigm. In this case the defendant advertised sections of property for sale at stipulated prices. A ballot would be held in the event of more than one bid for one section. The defendant underpriced the market and as a result attracted numerous bids. On account of this mistake, it refused to hold the advertised ballot. This amounted to a breach of the contract which had come into existence by the plaintiff's reply to the defendant's unilateral offer to the public. Just as in *Chaplin v Hicks* the defendant had lost a valuable mathematical chance of winning a contest (the ballot) from a finite group of competitors. The defendant's breach of the secondary contract meant that it lost the chance of securing the primary contract.

The most recent 'tendering' case to come within the paradigm in New Zealand is the High Court decision of *Pratt Contractors Ltd v Palmerston North City Council.*[18] In this case the defendant Council advertised for tenders to be submitted for the construction of a flyover bridge in Palmerston North. Upon receipt of the tender and a $100 non-refundable deposit the Council would first assess the ability of the contractor to complete the project on a pass/fail basis. If the criteria were met, the Council would then award the contract to the lowest tenderer. The plaintiff had submitted the lowest tender, but was not considered because a third party had submitted an alternative tender which stated that it would complete the project for $250,000 less than their nearest rival. This saving was made possible by changes in the Council's design plan. The third party was subsequently awarded the contract.

---

16 *R in Right of Ontario v Ron Engineering & Construction Eastern Lt* [1981] 1 SCR 111. See also *Blackpool and Fylde Aero Club Lt v Blackpool Borough Council* [1990] 3 All ER 25 (CA).

17 [1985] 2 NZLR 520 (CA).

18 [1995] 1 NZLR 469 (HC) [*Pratt Contractors*].

The court however held that this alternative tender was not an offer sufficiently precise to be accepted by the Council. It was not a tender for the purposes of the process initiated by the defendant. The plaintiff had been a victim of a breach of contract because once the Council purported to act within the tendering framework, it was obliged to award the contract to the tenderer submitting the lowest conforming tender. Loss of a chance damages compensated both the plaintiff's reliance interest (the preparatory costs involved in the tendering process) and its expectation interest (the profit that would have resulted by performance of the contract).

The court in this case did not value the lost chance in percentage terms but on "an overall assessment in the round."[19] This is one way of compensating the plaintiff for its lost 100 per cent chance of getting the contract. In terms of the two contract approach, the plaintiff proved that but for the Council's breach of the secondary contract, it would have been awarded the primary contract.

III EXTENSION TO TORT

A Re-examination of the Tendering Process

This paper has so far concluded that loss of a chance damages should be awarded to plaintiffs in cases which approximate the 'contest' paradigm of *Chaplin v Hicks*. The tendering cases are the first extension of the paradigm. They have all been contract cases. It is possible however that a certain fact scenario may be so close to the paradigm, that the fact that the cause of action is in tort is immaterial. Such was the case in *Gregory v Rangitikei District Council*.[20]

In this case the Council was held to owe a duty of care to the plaintiff in respect of the sale by tender of a roadman's cottage. The Council had legitimately not accepted any tenders, but had privately negotiated the cottage's sale shortly afterwards. This conduct was held to be in breach of the Council's duty of care which required the latter to follow statutory procedures in the sale of land. Therefore the plaintiff was compensated for his lost chance of purchasing the cottage. The paradigm should be extended to cover this situation as the 'contest-like' facts approximate *Chaplin v Hicks* in the same manner as the contractual cases. A tortious duty of

---

19 *Pratt Contractors* above n 18, 489.

20 [1995] 2 NZLR 208, 228 (HC) [*Gregory*].

care compensates the plaintiff, deters the defendant and is non-speculative. This is consistent with the instrumentalist view of tort law.

In *Gregory* the plaintiff had to sue in tort as although the Council probably owed a contractual duty to consider all tenders fairly, the terms were not breached.[21] However the fact that the duty found by McGechan J was only based on statutory provisions may mean that *Gregory* is of limited application.[22] As his Honour noted:[23]

> The existence of a remedy in contract, alongside the alleged duty of care 'to properly consider' tenders received, counts heavily against recognition of a duty in that area. It is a situation where contract can be left to prevail.

Therefore it appears that the existence of a contractual relationship militates strongly against the imposition of a duty of care in tort. The *Chaplin v Hicks* paradigm however offers an alternative rationale for the imposition of liability on the Council.

B The Inadequacy of Contract

An overly strict limitation of loss of a chance damages to the law of contract would have caused a manifest injustice in *Gregory*.[24] The same was true in the House of Lords' decision in *White v Jones*.[25] In this case, a solicitor had negligently failed to make certain changes in a client's will, before his death. As a result the intended beneficiary of the will received nothing. However, because of privity of contract, the solicitor owed no contractual duty of care to the disappointed beneficiary. Lord Goff allowed the plaintiff to recover for her lost chance of receiving a financial benefit by using tort in an essentially gap-filling role to fix liability via the solicitor's assumption of responsibility.[26] The existence of a contract was no bar to tort

---

21 *Gregory* above n 20, 229.

22 Duncan Webb "Liability in the Context of the Tender Process" (1996) 2 New Zealand Business Law Quarterly 102, 114.

23 *Gregory* above n 20, 229.

24 *Gregory* above n 20.

25 [1995] 2 AC 207 (HL) [*White v Jones*].

26 See Lord Steyn's discussion of the limitations of English contract law in *Williams and Another v Natural Life Health Foods Ltd and Mistlin* (1998) 30 April (HL). See also B Hepple "The Search for Coherence" (1997) 50 Current Legal Problems 67.

liability.[27] Tort law had to expand to meet the inadequacies of contract. A remedy in tort therefore circumvented the rigidity of the doctrines of privity and consideration.

This result was anticipated twelve years earlier by the New Zealand Court of Appeal in *Gartside v Sheffield, Young & Ellis*.[28] On identical facts Cooke J (as he then was) outlined the importance of delivering corrective justice:[29]

> To deny an effective remedy in a plain case would seem to imply a refusal to acknowledge the solicitor's professional role in the community. In practice the public relies on solicitors to prepare effective wills.

Thus it is clear that to effect justice for the disappointed legatees in *White v Jones*[30] and *Gartside*[31] loss of a chance damages should clearly be available. The result is not speculative or based on an empirical probability. It is close to a 100 per cent certainty that had the solicitor not been negligent she would have inherited her legacy. Thus loss of a chance in this context delivers corrective justice and compensates the plaintiff's expectation interest. The general social welfare of society is increased if lawyers make fewer mistakes in the drafting of legal documents. The imposition of liability in this case strongly reinforces the instrumental goals of tort.

C The Move to Concurrent Liability

It appears that loss of a chance damages should be available in both tort and contract. This is consistent with the modern development of concurrent liability. In contract, the measure of damages gives the plaintiff the value of the contract had it been performed. The tort measure places the plaintiff in the position they would have been in had the tort not occurred. However the general principle is the same; the plaintiff should receive the monetary sum which, so far as money can, represents fair and adequate compensation for the loss of injury sustained by reason of the defendant's wrongful conduct.[32]

---

27 This is made clear by *Henderson v Merett Syndicates Ltd* above n 7.

28 [1983] NZLR 37 (CA) [*Gartside*].

29 *Gartside* above n 28, 43.

30 *White v Jones* above n 25.

31 *Gartside* above n 28.

32 *Commonwealth of Australia v Amman Aviation Pty Ltd* 104 ALR 1, 36 (HCA) [*Amman Aviation*].

Although this general principle is the same, some jurists argue that because the rules governing its application differ in contract and tort, loss of a chance damages should be confined to contract.[33] It is submitted that this approach is incorrect. These differences are more formulaic and semantic than real. One difference is the requirement of damage in tort, in contrast to contract, where a cause of action accrues upon breach. However Sir John Donaldson MR outlined in *Hotson v East Berkshire Area Health Authority*:[34]

> even in contract, if more than a bare right of action is to be established, the plaintiff must prove a loss of substance…on the balance of probabilities.

The tests for remoteness are another difference. In contract the damage must be 'within the reasonable contemplation of the parties' whereas in tort the damage must be reasonably foreseeable. Lord Scarman in *H Parsons (Livestock) Ltd v Uttley & Co Ltd* [35] thought the distinction was semantic and not substantial. Other commentators have argued forcefully that no other word or phrase other than 'reasonable' can describe the degree of foresight required for damage, whether in contract or tort.[36]

Thus it is submitted that these differences, in themselves should not prevent the recovery of loss of a chance damages in tort law. Confining loss of a chance damages to contract would reinforce the compartmentalisation of the law of obligations. In the Court of Appeal decision of *Hotson,* Sir John Donaldson MR pointed out the potentially anomalous consequences of confining loss of a chance damages to contract.[37] If this were so, then a patient who lost a chance of recovery due to the negligence of a doctor working in a public hospital (subject to the law of tort) would be without redress. However if the doctor were in private practice (subject to the law of contract) the patient would be compensated for the lost chance of recovery.

This paper therefore advances the proposition that loss of a chance damages should be available in the general law of tort and not just the default rules of contract. However any

---

33 See the approach of Deane J in *Amman Aviation* above n 32.

34 *Hotson* above n 13, 760.

35 [1978] 1 QB 791, 807 (CA).

36 Jane Swanton "Concurrent Liability in Tort and Contract: the Problem of Defining the Limits" (1996) 10 Journal of Contract Law 19, 44. See further Jane Swanton "The Convergence Of Tort And Contract" (1989) 12 Sydney Law Review 40.

37 *Hotson* above n 13, 760.

tortious extension of the loss of a chance theory must be within the original paradigm. Therefore the writer disagrees with Lord Bridge's statement in *Hotson* that the perceived analogy between the contract cases where loss of a chance was accepted and tort cases was "superficially attractive."[38] The nature of the 'formidable difficulties in the way of accepting such an analogy' is unclear.

IV NEGLIGENT ADVISERS

A Introduction

It is now necessary to examine whether or not the loss of a chance caused by the negligence of a professional adviser comes within the paradigm. The writer believes it does. Professional advisers are employed to minimise the risk of a future uncertainty. For example an auditor is employed to assess a company's accounts in order to see whether the company should stay in business or be wound up. Without his or her professional service, the viability of the business would be uncertain. In terms of the 'contest' paradigm, a person who employs a professional adviser is contracting to avoid future uncertainty and therefore to ensure the contest takes place.[39] The right to be free of uncertainty rather than part of it, is the flip-side of the right to compete. Therefore compensation for the loss of a chance caused by a professional adviser's negligence is consistent with the *Chaplin v Hicks* paradigm.

The approach of the New Zealand Court of Appeal in respect of professional adviser's negligence however is dichotomous. Within a year, on identical material facts the court has used both the loss of a chance theory to impose liability and the orthodox classification of damage. It is therefore unclear which classification of damages should prevail.

B The Loss of a Chance Approach

The New Zealand Court of Appeal awarded loss of a chance damages in *Martelli McKegg Wells & Cormack v Commbank International NV*.[40] In this case the defendant solicitor's negligence caused the plaintiff debenture holder delay in appointing its own receivers, who would have managed the secured assets more profitably than the statutory receivers. In effect

---

38 *Hotson* above n 13, 782.

39 The contest clearly does not take place when the negligent delay of a solicitor causes the plaintiff's right to argue their case in court to be time barred; See *Kitchen v Royal Air Forces Association* [1958] 2 All ER 241 (CA).

40 (7 November 1996) unreported, CA 75/96 [*Martelli McKegg*].

what was lost was a retrospective negative chance; a chance of not losing so much money. The plaintiffs proved this lost chance of appointing their own receivers at an earlier time to the balance of the probabilities standard. However the use of loss of a chance damages was not justified in terms of the *Chaplin v Hicks* paradigm. Instead the court employed a commonly used distinction between past and hypothetical facts.

1 The past/hypothetical facts distinction

The distinction between events which happened in the past and those which happened in the future is a prevalent solution to problems of causal indeterminacy by the Commonwealth courts.[41] It rests on the commonly quoted words of Lord Diplock in *Mallet v McMonagle* whereby:[42]

> In determining what did happen in the past a court decides on a balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future had something not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would not have happened and reflect those chances, whether they are more or less than even, in the amount of damages it awards.

---

41 *Hotson* above n 13, *Malec v JC Hutton Pty Lt* (1990)169 CLR 638 [*Malec*] see text at n 77; See also *Janiak v Ippolito* [1985] 1 SCR 146. In this last case the plaintiff was negligently injured by the defendant in a car accident. It was estimated that the surgery which was required to rehabilitate injuries to the plaintiff's back sustained in the accident had a 70 per cent chance of success. However the plaintiff refused to have the operation, and thus failed to mitigate his loss. Justice Wilson was not prepared to regard the future 70 per cent chance as a certainty and thus compensated the plaintiff for the remaining risk of continuing loss. This loss was assessed at 30 per cent of his future lost earnings.

42 [1970] AC 166, 176 (HL) [*Mallet v McMonagle*]. See also *Davies v Taylor* [1974] AC 207 212, 213 where Lord Reid stated that:

> You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think the law is so foolish as to suppose you can. All you can do is evaluate the chance. Sometimes it is virtually 100 percent: sometimes virtually nil. But often it is somewhere in between. And if it is somewhere in between I do not see much difference between a probability of 51 percent and a probability of 49 percent…If the balance of the probability were the proper test what is to happen in the two cases that I have supposed of a 60 per cent and 40 per cent probability…I can see no ground that the 40 per cent case fails altogether, but the 60 per cent case gets 100 per cent…So I reject the balance of probability test in this case.

An event in the past either did or did not occur so damages are assessed on an 'all or nothing' basis. Loss of a chance damages however are more appropriate in relation to an event which might or might not yet occur (future), or would or would not have occurred (hypothetical). The House of Lords cited *Mallet v McMonagle*[43] to distinguish *Hotson* from *Chaplin v Hicks*. In *Chaplin v Hicks* the chance depended on a hypothetical fact, whether or not the plaintiff would have won the contest if she had been selected.[44] By contrast in *Hotson* the chance depended on a matter of past fact, whether the defendant had developed the necrosis prior to the hospital's negligent diagnosis. Although there was a chance that the necrosis had not occurred prior to the negligent treatment, the rule in *Mallet v McMonagle*[45] means that the factual chance is not recognised by the law as being a chance at all.[46]

Therefore in *Martelli McKegg* loss of a chance damages were justified as the court had to adjudicate a matter of hypothetical fact rather than one of past fact to which the ordinary civil standard would apply. The court tried to answer the hypothetical question of when the plaintiff would have appointed their receivers by calculating a weighted average of the chance of avoiding the loss.[47]

2 *Criticism of the distinction*

The writer does not see any merit in the distinction. In cases of professional negligence the court has to decide what would have occurred in the absence of the negligent conduct. This is a hypothetical question. It is a question which may be answered in the past or in the future. It therefore becomes necessary to differentiate between events which are past historic and past

---

43 *Mallet v McMonagle* above n 42.

44 See Helen Reece "Losses of Chances in the Law" (1996) 59 MLR 188 who seeks to rationalise the loss of a chance case law as either deterministic whereby the orthodox rule of causation applies; or indeterministic in which case damages are assessed pursuant to the loss of a chance theory. See also Timothy Hill "A Lost Chance for Compensation: Negligence by the House of Lords" (1991) 54 MLR 511 who outlines that a lost hypothetical chance is compensable as a personal chance but a lost chance in the past is only a statistical chance which does not merit compensation.

45 *Mallet v McMonagle* above n 42.

46 G Cooper "Damages for the Loss of a Chance in Contract and Tort" (1988) 52 Auck U L Rev 39, 41.

47 The company was under statutory management from 15 March to 24 July. At the start of this period, there was only a 30 per cent chance of avoiding loss. This increased to a 75 per cent chance by 7 April and to 11 percent on 1 May. Aggregation of these percentages gave a discount of 17.5 per cent which was used to compute a figure for the 'likely lost sales.'

hypothetical. This becomes very confusing. To label the plaintiff's disability in *Hotson* a 'past historic' event and not 'past hypothetical' appears to be no more than a semantic distinction.

It is an ineffective method of limiting loss of a chance liability. Such a distinction has the potential to revolutionise the law of damages as all damages questions are in a sense hypothetical questions.[48] This approach may open the door to treating all claims, not on the traditional 'all or nothing' basis but as hypothetical chances with damages proportional to the fault of the defendant. Therefore it is recommended that this distinction be abandoned. Any extension of the loss of a chance theory must instead be within the framework of the *Chaplin v Hicks* paradigm. In *Martelli McKegg* the plaintiffs contracted with the solicitors in order to minimise any uncertainty which might arise in respect of receivership. This ensured their paradigmatic right to compete. Their loss of this chance is therefore compensable on the grounds of the *Chaplin v Hicks* paradigm rather than the false distinction between past historic, past hypothetical, and future events.

3 An English perspective

The English Court of Appeal adopted a similar approach to *Martelli McKegg* in *Allied Maples*.[49] In this case the plaintiff, a carpet retailer purchased certain businesses and shop properties from another furnishings group. As a result of the transaction the plaintiff was landed with a contingent liability which in due course materialised. The plaintiff argued that had its solicitors brought the risk of this contingent liability to their attention, they would have taken steps to indemnify themselves in respect of such open ended liability. Due to the defendant's negligence they lost this chance.

First of all the plaintiff had to prove on the balance of the probabilities, that were it aware of the contingent liability it would have taken steps to protect itself.[50] Secondly it was then necessary to prove a substantial chance (which could be less than 50 percent) that

---

48 S M Waddams "The Principles Of Compensation" in *Essays on Damages* (Ed) P D Finn (The Law Book Company, Sydney, 1992) 11. See also J G Fleming "Probabilistic Causation in Tort Law -A Postscript" (1991) 77 Canadian Bar Revue 136,140.

49 *Allied Maples* above n 6; see also HW Wilkenson "The loss of a 'chance' in conveyancing transactions" (1996) 41 NLJ 88.

50 A similar point arose in *McWilliams v Sir William Arrol & Co Lt* [1962] 1 All ER 623 (CA). In this case an employer breached its statutory duty by failing to supply the deceased employee with safety equipment. The evidence however suggested that even if the equipment had been provided, he would not have worn it. Thus recovery was denied.

negotiations with the vendor would have lead to an indemnity.[51] Stuart Smith LJ in the majority judgement held that the plaintiffs had proved these two steps. However the writer believes that the dissenting judgment of Millet LJ is the better view.

His Honour argued that the second step could not be established by the plaintiffs. On the facts the chance that the plaintiffs were deprived of was the chance of persuading the vendor to act against its own interests by accepting a warranty which its own solicitors had struck out.[52] Millet LJ, concerned at the speculative nature of this lost chance thought that there had to be some objective criteria by which the chance could be evaluated. Although the court could examine the relative bargaining strengths of the parties, the extent of the risk, and the effect on the deal if the vendor refused these were all unknown subjective matters which were unable to be inferred.[53]

C The Balance of the Probabilities Approach

The loss of a chance approach exemplified in *Martelli McKegg* and *Allied Maples* is in stark contrast to both *Sew Hoy & Sons (In Receivership and in Liquidation) v Coopers & Lybrand*[54] and *McElroy Milne v Commercial Electronics Ltd*.[55] In *Sew Hoy* the Court of Appeal considered whether or not a company which continued trading after its auditors negligently certified its accounts as true and fair without qualification, could recover from the auditors the trading losses which it then incurred. Although the facts are materially indistinguishable from *Martelli McKegg* the Court of Appeal did not approach the issue on a loss of a chance basis.

In *Sew Hoy* the creation of the opportunity to incur loss or alternatively the lost opportunity of modifying its business activities as appropriate to its true financial status, was not the relevant damage.[56] The plaintiff would have to prove on the balance of the probabilities that it suffered economic loss. However the court disagreed with the decision of

---

51 *Davies v Taylor* above n 42.

52 *Allied Maples* above n 6, 928.

53 Millet LJ's concern of the speculative nature of loss of a chance damages was heeded in *Stovold v Barlows* (1995) *The Times*, 30 October.

54 [1996] 1 NZLR 392 (CA) [*Sew Hoy*].

55 [1993] 1 NZLR 39, 41 (CA) [*McElroy Milne*].

56 *Sew Hoy* above n 54, 409.

the English Court of Appeal in *Galoo Ltd (In Liquidation) v Bright Grahame Murray (A Firm)*.[57] In *Galoo* it was held on identical facts that the auditors' negligence only created the opportunity for the company to incur trading losses rather than any financial loss; therefore the auditors were not liable. By contrast the New Zealand Court of Appeal held that the negligent advice which persuaded a company to continue trading could be causative of loss.

However Thomas J agreed with the statement in *Galoo* that the 'but for' test was not a definitive test for causation:[58]

> As a complete test [the 'but for'] test has long been regarded [as] suspect. But it need not be discarded. It provides a convenient starting point rather than a test…What is to be accepted is that an affirmative answer [to the 'but for' test] is not decisive to the question of causation. Within that framework the causal link will still need to be established.

His Honour also stated that "commonsense" could not be the sole test of liability although it was a valuable adjunct to judicial reasoning.[59] This is consistent with McHugh J's dissenting judgment in *March v Stramare*.[60] A losing party has the right to know why it has lost and should not have its objections brushed aside with a reference to common sense. In sum, the best approach was to use the 'but for' test as a preliminary causative step and then inquire as to:[61]

> whether the particular damage claimed is sufficiently linked to the breach of the particular duty to merit recovery in all the circumstances.

The damages dichotomy is further evidenced by the Court of Appeal decision of *McElroy Milne*.[62] The facts of this case are materially indistinguishable from *Allied Maples*. In *McElroy*

---

57 [1994] 1 WLR 1360 (CA) [*Galoo*].

58 *Sew Hoy* above n 54, 408.

59 *Sew Hoy* above n 54, 408.

60 (1991) 171 CLR 506, 533 [*March v Stramare*]. McHugh J however is more scathing in his attack on the utility of commonsense than Thomas J. His Honour termed the commonsense criterion as "at best an uncertain guide involving subjective, unexpressed, and undefined, extra legal values varying from one decision maker to another."

61 *McElroy Milne* above n 55, per Cooke P, cited in *Sew Hoy* above n 54, 402.

62 *McElroy Milne* above n 55; See also Brendon WF Brown *Damages* (NZLS Seminar, Wellington, 1997) 39 ["*Damages*"].

Milne the plaintiffs had leased a new property development to an anchor tenant for 12 years. Their solicitors had negligently failed to secure a guarantee in respect of the lease from the lessor's parent company. As a result of the breach of contract the value of the plaintiff's asset, which was to marketed, fell considerably. The court however required the plaintiffs to prove causation using the traditional approach.

D Resolution of the Dichotomy

At present it is unclear whether or not the New Zealand Court of Appeal would endorse the categorisation of damages as loss of a chance. *Martelli McKegg* evidences a liberal approach to the question of damages. *Sew Hoy* and *McElroy Milne* reaffirm the orthodoxy. A choice must be made in favour of either approach. Ex ante certainty regarding the appropriate categorisation of damages is imperative for business people in New Zealand. It would not be fair if plaintiffs could elect to choose the most beneficial measure of damages. The damages award under the orthodox approach, is tightly constrained. For example in *Sew Hoy* the court clearly outlined that any loss that would have been incurred, notwithstanding the auditors' negligence, could not be compensated.[63] In contrast the damages awarded under the loss of a chance theory generally are a smaller percentage of a larger sum, as exemplified in *Martelli McKegg*. In that case the court calculated a weighted average of the entire value of the likely lost sales. It would be contrary to justice if plaintiffs could choose a theory of damages purely to maximise their financial return.

It is clear that whatever approach is adopted, the 'but for' test is not the exclusive test for causation. As Mason CJ said in *March v Stramare*:[64]

> In philosophy and science, the concept of causation has been developed in the context of explaining phenomena by reference to the relationship between conditions and occurrences. In law, on the other hand, problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence.

If the function of causation is to apportion legal responsibility then it is clear that any result from the 'but for' test will be tempered by value judgements and policy considerations.[65] The writer firmly believes that loss of a chance caused by negligent

---

63 *Sew Hoy* above n 54, 401.

64 *March v Stramare* above n 60, 509.

65 *March v Stramare* above n 60; see further SM Waddams "Causation In Canada And Australia" (1993) 1 The Tort Law Review 75, 76.

professional advisers comes within the *Chaplin v Hicks* paradigm, and therefore should be regarded as compensable loss. It is then necessary to consider whether or not there are any countervailing policy considerations which militate against the imposition of loss of a chance damages in this class of case. In this 'second stage' it is expedient to consider the degree to which loss of a chance damages reinforce the instrumental goals of tort law.

1 Policy

Damages for loss of a chance compensate the plaintiff who has suffered loss caused by the negligent professional adviser. However any argument based on deterrence really needs to be substantiated by empirical research. It is possible that loss of a chance liability would successfully deter negligent professional services. It is equally possible that if professional advisers are exposed to an increased risk of liability then the cost of their services will increase (as will professional liability insurance) and the range of services that they offer may decrease. This would be especially true if the advice was in respect of a high risk transaction, and would lead to a decrease in the general social welfare of society. However it is submitted that the better view is that in today's competitive market it is unlikely that loss of a chance liability would lead to a scaling down of services or escalation in prices. Professional services firms face fierce competition to attract and maintain a strong client base. If they were subject to loss of a chance liability it is submitted that extra care would be taken in respect of their proffered services. This reinforces the deterrence objective of tort law and maximises social utility.

However it is crucial to bear in mind the cautionary words advanced by Millet LJ in *Allied Maples* concerning the speculative nature of the loss of a chance theory. Even though the loss of a chance approach is preferred to the orthodox categorisation of loss, it will be difficult for plaintiffs to prove that the hypothetical actions of third parties would occur. For example in *McElroy v Milne* it would be very difficult for the plaintiff to prove that the parent company would altruistically sign the guarantee document.

2 Conclusion

In sum the instrumental goals of tort are reinforced. It is submitted that there are no insurmountable policy considerations which bar loss of a chance damages in this context. Therefore it is possible to extend the *Chaplin v Hicks* paradigm. This view is clearly contrary to *Sew Hoy* and *McElroy Milne*, but consistent with *Martelli McKegg* and *Allied Maples*. Given the divided judicial acceptance of the loss of a chance theory, it may be preferable to develop a

solution to professional negligence liability outside of the *Chaplin v Hicks* paradigm. One such solution is the reversal of the burden of proof.

V ALTERNATIVES TO LOSS OF A CHANCE

A Reversal of the Burden of Proof

In England this approach attracted House of Lords support 25 years ago in the area of medical negligence.[66] Although their Lordships later distanced themselves from this controversial common law development,[67] the Canadian Supreme Court has recently adopted this technique in a more commercial context.

In *Rainbow Industrial Caterer Ltd v Canadian National Railway Co*[68] the plaintiff entered into a contract to supply meals for work crews of the defendant railway. The price per meal was based on the defendant's estimate of the total number of meals that would be required. It turned out that far fewer meals were required; close to a 30 per cent reduction. The plaintiff suffered a $1,000,000 loss and terminated the contract.

The plaintiff sought damages in an action for negligent misrepresentation.[69] The defendant however maintained that had Rainbow known the facts, they still would have entered the contract, at some higher price, and still suffered some loss.[70] Therefore Rainbow could not prove that 'but for' the negligent misrepresentation the loss would not have occurred.

The Supreme Court acknowledged that though the legal burden generally rests with the plaintiff, it was not immutable.[71] Valid policy reasons could reverse the ordinary onus. Sopinka J stated that the onus should be reversed in this case so that the defendant bore the risk of non-persuasion.[72] Therefore the plaintiff did not have to negative all the speculative

---

66 *McGhee v National Coal Board* [1973] 1 WLR 1 (HL).

67 *Wilsher v Essex Area Health Authority* [1988] AC 323.

68 84 DLR (4th) 291 (SCC) [*Rainbow*]. See also *Snell v Farrell* [1990] 2 SCR 311.

69 In New Zealand a misrepresentation would be remedied under section 6 of the Contractual Remedies Act.

70 Rainbow still would have suffered loss because of endemic systematic errors such as railway employees taking too much food.

71 *Rainbow* above n 68, 297.

72 *Rainbow* above n 68, 297.

hypotheses about his position that may have occurred had the defendant not committed the tort. The burden of proof instead rested on the defendant who had set up the hypothetical situation.

The Privy Council has displayed similar concern in relation to speculative claims albeit in a different context. In *Brickenden v London Loan & Saving Co*[73] a fiduciary breached their duty by the non-disclosure of material facts. Lord Thankerton stated that once the court had determined that the non-disclosure was material, speculation as to what course the plaintiff, on disclosure, would have taken is irrelevant.[74]

B Negligent Advisers

Having established the history of the reversal of the onus it is now possible to assess the validity of such an action in relation to negligence caused by professional advisers. The leading case is *Downs v Chappell*.[75] In this case the plaintiffs purchased the first defendant's bookshop business. They did so on the basis of a letter from the second defendants, who were accountants, which detailed the annual turnover of the business and the gross profit percentage. The first defendant knew the figures in it were false, and was liable for the tort of deceit. The accountants had misrepresented the figures and were liable in negligence.

Although the trial judge had found in favour of the plaintiffs on liability against each of the defendants, he concluded that the plaintiffs had not proved on the balance of the probabilities that they would not have completed the purchase had the true figures been disclosed. In this manner the defendant's loss could be attributed to their inexperience as stationers, the opening of a rival bookshop, and a reduction in demand caused by an economic downturn, rather than the defendants' torts.

Hobhouse LJ took the same approach as Sopinka J in *Rainbow*.[76] His Honour stated that the trial judge was wrong in asking the plaintiffs how they would have acted if they were told the truth. They were never told the truth by the first defendant nor given the correct figure by the accountants. All that needed to be proven was the fact that the plaintiffs entered the contract as a result of both the fraudulent and negligent misrepresentation.

---

73 [1934] 3 DLR (PC) 465 [*Brickenden*].

74 *Brickenden* above n 73, 472.

75 [1996] 3 All ER 344, (CA) [*Downs v Chappell*].

76 *Downs v Chappell* above n 75, 350-351.

C Validity

The reversal of the burden of proof is an extremely pro-plaintiff development in the law. It unhesitatingly prefers the interests of the plaintiff to those of the defendant. It is a response to defendants' manipulation of the orthodox causation rule to escape liability. It thereby allows plaintiffs to recover when they would be thwarted under the traditional approach. However the reversal of the onus is not a common occurrence. It is difficult to discern why the burden of proof has been used in some cases, but not in others. Why for example did the English Court of Appeal not reverse the onus in *Galoo* as they did in *Downs v Chappell*?

However there must be strong policy reasons justifying the departure from the status quo. The strongest policy justification in favour of reversing the onus is the elimination of hypothetical speculative claims put forward by defendants desirous of escaping liability. In this regard, this approach is to be preferred to the loss of a chance theory.

Arguably the reversal of the onus over-compensates the plaintiff and over-deters the defendant. This is true where it is equally probable that the damage was caused by two different events. Here an onus reversal does not solve the problem of a defendant paying for the full amount of damages that he or she has not been shown to the balance of the probabilities to have caused. It is an ad hoc solution created by pro-plaintiff courts in response to evidential uncertainty. However in *Rainbow* and *Downs v Chappell* the judiciary are not responding to evidential uncertainty. The overriding policy is to minimise the spectre of hypothetical speculative claims.

Therefore in the negligent adviser cases discussed above, the reversal of the burden of proof would be a viable alternative to loss of a chance damages. For example in *Sew Hoy* if the onus were reversed, the auditors could allege that even if the accounts were correct the company would still have incurred certain losses. The auditors would no longer be able to speculate as to what the company would have done had it not been given negligent advice.

VI LOSS OF A COMMERCIAL OPPORTUNITY

A Introduction

The loss of a chance paradigm has been formulated and extended from the generalised contest-like facts of *Chaplin v Hicks*. This paradigm acts to limit the compensation of the entire spectrum of lost chances. If a new class of lost chance is to be compensated, it must come within the paradigm. So far, lost tendering chances and lost opportunities caused by the negligence of professional advisers have come within the paradigm. The issue which this

paper now considers is whether the loss of a purely commercial opportunity should be compensated.

B The Expansionary Approach of the Australian High Court

The Australian High Court has firmly encouraged this extension. The embers of the compensation for loss of a commercial opportunity are evident in the High Court's decision in *Malec*.[77] In *Malec* the plaintiff was employed by the defendant in a meatworks. Due to the negligence of the employer he contracted brucellosis which caused a neurotic illness.[78] This in effect meant that the plaintiff was unemployable. The trial judge found however, that a variant of the neurotic condition which the plaintiff suffered from as a result of the brucellosis more likely than not would have manifested itself as a result of an unrelated back condition in 1982. Thus the Supreme Court of Queensland awarded no damages for lost earnings after 1982 because 'all or nothing' causation could not be established.

The majority in the High Court[79] however justified loss of a chance (of future earnings) damages on the basis of the past/hypothetical facts distinction; a distinction which this paper has discredited.[80] The High Court stated that:[81]

> The probability [of the lost chance] may be very high - 99.9 per cent - or very low - 0.1 per cent. But unless the chance is so low as to be regarded as speculative - say less than 1 per cent - or so high as to be practically certain - say over 99 per cent - the court will take that chance into account in assessing the damages.

However the same court stated in *Sellars v Adelaide Petroleum NL and Ors* that:[82]

> neither in logic nor in the nature of things is there any reason for confining the approach taken in Malec concerning the proof of future possibilities and past hypothetical situations to the assessment of damages for personal injuries.

---

77 *Malec* above n 41; See also the approach of Dawson J in *Wynn v NSW Insurance* 133 ALR 154, 162-163 (HCA) in relation to tortious compensation for future economic loss.

78 An infectious disease of cattle goats and pigs, caused by bacteria and transmittable to man.

79 Deane, Gaudron and McHugh. JJ

80 *Malec* above n 41, 643.

81 *Malec* above n 41, 643.

82 *Sellars* above n 4, 25.

Therefore the reasons which the court used to justify the application of loss of a chance in *Malec* could be applied, in the court's opinion, with equal force to damages for loss of a commercial opportunity. The *Sellars* case concerned a company, Adelaide Petroleum, which had entered into parallel negotiations with two other companies, Pagini and Poseidon. Adelaide's aim was to persuade either of these two companies to acquire the management's share-holding as part of its corporate restructuring. Although a draft contract was prepared with Pagini, Adelaide's directors decided to enter into an arrangement with Poseidon. However three weeks after the heads of agreement were signed, Poseidon repudiated the contract. Subsequently Adelaide negotiated with Pagini for a second time and was able to come to an agreement but on less favourable terms. Adelaide then sued Poseidon for the loss of their opportunity to secure commercial benefits which a contractual agreement with Pagini would have guaranteed.

In *Sellars* the plaintiffs sought relief under a statutory provision which granted damages for false representations which either induced a person to act or refrain from acting.[83] The High Court endorsed the *Malec* principle's commercial application and stated that there was no rational basis for distinguishing between damages for deprivation of commercial opportunity in contract, the statutory provision, or the law of torts.[84] Damages would be assessed by reference to the court's estimate of the prospect of success of the opportunity had it been pursued.[85]

C Loss of a Commercial Opportunity: Outside the Paradigm

It is submitted that the decision of the High Court in *Sellars* lies on the spectrum of lost chances which falls outside the *Chaplin v Hicks* paradigm. First the court justifies loss of a chance damages on the past/hypothetical facts distinction. As this paper has argued, such a distinction is more apparent than real. It is only a methodological tool which permits a judicially active judge to arrive at his or her desired outcome without any policy justification. Broad distinctions like this one are not uncontroversial in other areas of tort law. For example the policy/operational distinction has attracted considerable criticism.[86]

---

83 The Trade Practices Act ss2 52 82(1).

84 *Sellars* above n 4, 30, 36.

85 *Sellars* above n 4, 30.

86 See *Stovin v Wise & Norfolk County Council* [1996] 3 All ER 801 (HL) 812 per Lord Hoffmann.

1 The degree of speculation

The alleged lost opportunity is also too speculative. Just like in *Malec* the plaintiff only had to show some non-negligible loss of opportunity. Although the lost opportunity of continuing negotiations with Pagini was definitely non-negligible; on the balance of probabilities the contract would not have been completed.[87] This is evident given the numerous contingencies which would have frustrated the successful completion of the contract.[88] First the negotiations had to be satisfactorily concluded. French J, the trial judge assessed this probability as 'high'. Secondly an underwriter for the share issue had to be found. Thirdly there were seven conditions precedent in the contract which had to be satisfied. The court at first instance considered that there was a 'reasonable' prospect and at least an even chance of surmounting these two obstacles. The finalisation of a deal with Pagini thus would have been difficult. The lost chance therefore amounted to the multiplication of these three mathematical probabilities. By means of example suppose that there was a 75 per cent chance of concluding the contract, and a 50 per cent chance for both obtaining an underwriter and satisfying the conditions precedent. Multiplying these three probabilities together gives a lost chance of 18.75 per cent. It is difficult to see why this lost chance was held to be compensable loss given that it was subject to such serious and clearly speculative contingencies.

Even though the lost chance in *Sellars* is numerically approximately the same as the lost 25 per cent chance in *Chaplin v Hicks* the two cases concern diametrically different facts. It is not possible to extend the paradigm to cover a *Sellars* type situation. There is no 'contest-like' set of facts, nor a contract to minimise future uncertainty. The loss of a commercial opportunity is not at all consistent with the other categories of loss that have come within the paradigm. Therefore it is not a valid option for the High Court to rely on the authority of *Chaplin v Hicks.*

2 Over and under- compensation

The majority in *Sellars* also stated that the ratio decicendi was supported by other considerations:[89]

---

87 The lost opportunity of continuing negotiations included obtaining the financial benefits which completion of the contract would have entailed.

88 *Sellars* above n 4, 32-33.

89 *Sellars* above n 4, 30.

> The [loss of a chance] approach results in fair compensation whereas the all or nothing outcome produced by the civil standard of proof would result in the vast majority of cases in over-compensation or under compensation to an applicant who has been deprived of a commercial opportunity.

This argument is illusory. Under the loss of a chance theory the defendant pays for the percentage likelihood that he or she caused the damage; the loss of the commercial opportunity. In reality the damage is not at all *partially* caused by the defendant. It either is or it is not. Though the solution may be just in the aggregate, it fails to work effective justice between the individual plaintiff and the defendant.[90] If the defendant actually caused a commercial opportunity to be lost, the plaintiff is under-compensated; if he or she did not cause the chance to be lost, the plaintiff is over-compensated. The writer argues that plaintiffs will be over or under-compensated under both loss of a chance or 'all or nothing' causation. The advantage of the former approach however, is that it eliminates the arbitrary unfairness engendered by the latter.

3 Contrary view

This paper has concluded that *Sellars* was wrongly decided and that the case falls outside the *Chaplin v Hicks* paradigm. This view is not uncontroversial.

Waddams has supported the High Court of Australia's decision in *Sellars.*[91] By paraphrasing the words of Fletcher Moulton LJ in *Chaplin v Hicks* Waddams argues that if a plaintiff is deprived of a chance of considerable value *that many people would give money for* then that the lost chance should be compensable.[92] The writer submits that a theory of loss of a chance damages premised on a paradigm of value alone is not the law in New Zealand.

Everyday in New Zealand there are chances of considerable value that many people give money for, whether it be a person paying premiums on an insurance policy, a stockbroker

---

90 LR Ellis "Loss of Chance as Technique: Toeing the Line at Fifty Percent" (1993) 72 Texas L Rev 369 398, 402.

91 S M Waddams "Damages: Assessment of Uncertainties" (1998) 13 Journal of Contract Law 55,66 ["Assessment of Uncertainties"].

92 "Assessment of Uncertainties" above n 91, 61.

speculating on the stock exchange, or a sporting enthusiast gambling at the TAB. It is not disputed that all these chances although speculative, are of value. However if any of the above people were negligently denied the above chances and compensated in accordance with a value paradigm, then the proverbial spectre of indeterminate liability of an indeterminate amount to an indeterminate class would well be nigh.

The conceptual foundation of the *Chaplin v Hicks* paradigm mirrors the methodology of the House of Lords retreat from their decision in *Anns v Merton London Borough Council*.[93] Whereas the value paradigm advocated by Waddams leads to open ended liability for the loss of a chance, the 'contest' paradigm advanced in this paper only leads to incremental extensions of loss of a chance liability.

D The New Zealand Position

The New Zealand Court of Appeal adopted a similar approach to loss of a chance damages in *Takaro Properties Ltd v Rowling*.[94] In this case the negligent refusal of the Minister of Finance to consent to the issue of shares to a foreign corporation led to the failure of a property development which the plaintiff was to undertake with funds to be provided from the share capital and other finance. The Court of Appeal's judgment was overruled on other grounds by the Privy Council without comment on the approach to damages. The trial judge did not believe that causation had been established. Although it was possible that the development would be profitable, on the balance of the probabilities it would be unprofitable.

The Court of Appeal disagreed. The correct approach was to consider whether or not there was some chance of success and then to value the lost commercial opportunity.[95] This approach identifies the wrongly withheld consent as a valuable asset because of the opportunities for a profitable enterprise that could have subsequently have flowed from it.[96]

---

93 [1991] 1 AC 398 (HL).

94 *Takaro Properties Lt v Rowling* [1986] 1 NZLR 22, 54 (CA) per Somers J [*Takaro*]; *Damages* above n 62, 36.

95 *Takaro* above n 91, 63. The same approach was adopted by the Court of Appeal in *Craig v East Coast Bays City Council* [1986] 1 NZLR 99 (CA).

96 *Takaro* above n 91, 35.

However the assessment of 'some' chance will inevitably be speculative. If plaintiffs can frame a cause of action based on the lost of 'some' chance, then there is the potential for unlimited liability. It is submitted that this is an unwise development in the law. As stated above it creates uncertainty in the business community due to the ex ante impossibility of identifying a real and substantial non-speculative chance.

E Summary

In summary it is submitted that damages can never be awarded for lost commercial opportunities as this class of lost chance lies outside the *Chaplin v Hicks* paradigm. The writer disagrees with the modern expansionary approach taken by the Commonwealth courts. It is recommended that a more appropriate and internally consistent approach would be to incrementally expand the loss of a chance theory in accordance with the *Chaplin v Hicks* paradigm. The paradigm is the tool by which to argue by analogy. In addition to non-compliance with the *Chaplin v Hicks* paradigm, the loss of a commercial opportunity is very speculative. It is difficult to see exactly how judges can award damages in this class of lost chance and at the same ensure that the veracity of the claim is upheld.

Reversal of the burden of proof however is not an appropriate alternative in this class of loss. In the case of a lost chance caused by the negligence of a professional adviser, it is the defendant who advances speculative claims in order to escape liability. The reversal of the onus minimises this speculation. However in respect of a lost commercial opportunity it is the plaintiff who is relying on mere speculation in order to impose liability. Therefore a reversal of the onus would not result in effective justice in the circumstances.

VIII CONCLUSION

This paper has exposed the limits of loss of a chance damages by critically assessing the modern expansionary approach taken by the Commonwealth courts. This has been done by developing a paradigm based on the generalised facts of *Chaplin v Hicks*. Loss of a chance damages could be awarded in circumstances which approximated a contest and where there were a finite number of competitors who had a mathematical chance of winning. This was true of the 'tendering' cases. The loss of a chance theory was then expanded to fill in the gaps of contract law exposed by the doctrine of consideration and privity of contract. In this manner loss of a chance damages were not limited to the 'default' rules of contract law but also applied to the 'general' law of tort. This development is consistent with the current trend of concurrent liability which discourages the rigid compartmentalisation of the law of obligations.

The loss of a chance paradigm is also flexible enough to cover lost chances occasioned by the negligence of professional advisers. People contract with professional advisers to minimise future uncertainty. The right to be free of this uncertainty is the flip-side of the right to be part of the contest. Therefore the lost chance caused by the negligence of a professional adviser is compensable. There are no countervailing policy considerations in this class of case as loss of a chance damages reinforce the policy objectives of tort law.

The approach of the New Zealand Court of Appeal however has been dichotomous. As the paradigm covers this lost chance, the writer advocates that the approach of the Court of Appeal in *Martelli McKegg* is to be preferred to their approach in *McElroy Milne* and *Sew Hoy*. However the writer dismisses the past/hypothetical facts distinction which is commonly used to justify loss of a chance damages. This is only a methodological tool which permits the judicially active judge to arrive at a conclusion without adequate policy justification. The sole justification of compensating a lost chance caused by a negligent professional adviser is that it lies within the paradigm which in turn is uncontroverted by policy.

However given that the New Zealand Court of Appeal has adopted differing approaches with respect to loss of a chance damages on materially indistinguishable facts, this paper has considered the reversal of the burden of proof as an alternative solution. It has concluded that only the strongest policy reasons can justify a departure from the normal rule. Such a departure is justified if it effectively minimises purely hypothetical and speculative claims advanced by the defendant.

Finally the paper considered where, on the spectrum of lost chances, a lost commercial opportunity lay. In contrast the possibility exists for the courts to extend the *Chaplin v Hicks* paradigm to cover novel classes of loss. In this way, just as the categories of negligence are never closed, neither are the categories of loss.[97] If the lost chance is in tort then it is necessary to consider issues of policy. The policy stage is a check back to the paradigm and it ensures that loss of chance damages will be justified only if they reinforce the fundamental objectives of tort law. In this way compensation for the loss of a chance is a subset of the general law of damages.

---

97 *Hotson* above n 13, 761 (CA) per Sir John Donaldson MR.