

Ghost of a Chance: Gregg v. Scott in the House of Lords

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In January 2005 the House of Lords released its long-awaited decision in *Gregg v. Scott*.¹ By a 3:2 margin the court held that factual causation in medical malpractice cases should not be resolved on a loss-of-chance basis. This note presents an account of the reasons in *Gregg v. Scott*. It goes on to offer some criticism of those reasons and an assessment of the implications of the decision for the law of Canada.

1. Loss-of-chance causation and the facts in Gregg v. Scott

Loss-of-chance functions as an exception to the general rule for factual causation in tort. That general rule for cause-in-fact requires a plaintiff to prove on the balance of probabilities that were it not for the defendant's fault, the plaintiff would not have suffered the harm in respect of which she is claiming. Under that orthodox balance-of-probabilities standard, a plaintiff loses unless she can show that in the absence of the defendant's error, her injury would most likely not have occurred.

Loss-of-chance causation permits a plaintiff who cannot satisfy the traditional balance-of-probability standard to nevertheless succeed, at least in part. It does so by permitting such a plaintiff to claim that the defendant's fault deprived her of some chance of not suffering the harm in question. There is an alternative way of describing loss-of-chance causation. Under this description, loss-of-chance causation preserves the balance-of-probability standard but permits the plaintiff to "re-describe" the harm, so that instead of claiming to have suffered harm X — where X is, say, a broken leg — the

plaintiff claims to have been deprived of some chance of not being subjected to harm X.

It is an interesting point whether these alternatives are just two different ways of describing the same thing, or whether they are in fact different things, but in terms of the award the plaintiff receives they are extensionally equivalent. That is, under either approach the plaintiff is then awarded damages calculated by taking the dollar value which would be awarded in respect of the root harm, and discounting that by the probability that the harm would have happened in any event.

An illustration would likely assist. I offer one from an area where loss-of-chance causation has been successfully invoked, first in England and later in Canada.² A plaintiff might claim that her lawyer carelessly failed to launch a civil action on her behalf before the applicable limitation period expired. Since the original claim is now barred, such a plaintiff would seek damages from her careless lawyer based on the total amount she would get had she won the suit that the lawyer should have launched. However, the defendant lawyer might reply that, even had he commenced the suit in time, the claim was a weak one with, say, only a 30% chance of success. The lawyer would then go on to argue that, according to the balance-of-probabilities standard, the plaintiff has failed to prove that she lost anything, since more likely than not the plaintiff would have failed in the originally-contemplated suit. Loss-of-chance causation permits a plaintiff in that position to succeed and get damages amounting to 30% of the sum that she would have been awarded had she won the original suit.



But there is a catch. Loss-of-chance causation is not generally available. It has been applied in only a small number of areas. It operates in the example just described, and in some other pockets of the law,³ but courts have not adopted it as a generally applicable causal standard. In most types of claims, courts have proven unreceptive to defendants' attempts to characterize their cases as claims for a reduced chance of not suffering a given harm.

In its 1987 decision in *Hotson v. East Berkshire Area Health Authority*⁴ the House of Lords overruled a decision to apply loss-of-chance causation in a medical malpractice case. Relying in part on *Hotson*, in its 1991 decision in *Laferrière v. Lawson*⁵ the Supreme Court of Canada overruled a Québec Court of Appeal decision which had used a loss-of-chance approach in a claim for delictual responsibility in a clinical context. While there may at one time have been a measure of doubt as to whether that case represented the law in Canada's common law jurisdictions, in 2003 the Ontario Court of Appeal put an end to uncertainty on that point. It ruled that *Laferrière* stood for the proposition that loss-of-chance causation was not available in medical malpractice cases in Canada.⁶

The boundaries of loss-of-chance remain uncertain. The reported decisions in which it has been applied are a motley group, with no obvious common feature to set them apart from cases where courts have refused to employ a loss-of-chance approach to factual causation. Moreover, there is no consensus in academic writing as to where loss-of-chance causation might legitimately be invoked. Arguments can be advanced for never resorting to loss of chance, or for making it available in every case (though this would amount to a striking transformation of civil litigation), or for applying it only in some sub-set of disputes – for instance in contract but not tort, or in cases where proof of loss depends on the hypothetical act of some third party, or only in cases where the chain of events that must be hypothesized in order to conduct the causal inquiry can be said to be completely determined by the incidents which have taken place.⁷

Against this background of judicial randomness and scholarly dissension it is unsurprising that some plaintiff might attempt to persuade courts to revisit the question of whether loss of chance might be available in case of medical malpractice, or at least in some sub-set of such cases. That brings us to *Gregg v. Scott*.

Mr. Gregg presented to Dr Scott with a lump under his left arm. Scott diagnosed the lump as innocuous and recommended neither treatment nor further investigation. Nine months later Gregg was seen by another physician who correctly diagnosed the lump as cancerous. During the period of delay the lump had grown in size and the cancer had spread. Gregg sued Scott for negligence and the trial judge found that Scott's performance fell below the applicable standard of care. Next, based on expert evidence, the judge found that the delay due to Scott's carelessness had reduced Gregg's prospects of survival from 42% to 25%.

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On those findings the judge dismissed the plaintiff's claim since, on the balance of probabilities, the delay had not harmed him. That is, had Scott correctly diagnosed and properly treated Gregg, Gregg never had a better than even chance of beating the cancer so, more likely than not, Scott's fault had caused Gregg no loss. Scott's argument that he should be awarded damages to compensate him for the reduction of his chance of being a survivor was rejected on the basis that *Hotson* stood as a bar to loss-of-chance claims in medical malpractice cases. Gregg appealed but the Court of Appeal agreed with the trial judge.⁸ Gregg then appealed to the House of Lords.

2. Gregg v. Scott in the House of Lords

In the House of Lords all five judges acknowledged that loss-of-chance causation operated in some areas of English law but had not yet been applied in a medical malpractice case. The issue was thus whether that approach to causation should be introduced to the health care area. As Lord Phillips put it,



This appeal has raised an important issue of policy. Should this House introduce into the law of clinical negligence the right of a patient who has suffered an adverse event to recover damages for the loss of a chance of a more favourable outcome?⁹

I begin with the reasons of the two dissenting law lords, since the reasons of the three in the majority are most easily understood as responses to the dissents. Borrowing a page from Lord Denning's book by starting his speech with a string of plain, short sentences, Lord Nicholls began with a forceful account of the deficiency of the existing law.

A patient is suffering from cancer. His prospects are uncertain. He has a 45% chance of recovery. Unfortunately his doctor negligently misdiagnoses his condition as benign. So the necessary treatment is delayed for months. As a result the patient's prospects of recovery become nil or almost nil. Has the patient a claim for damages against the doctor? No, the House was told. The patient could recover damages if his initial prospects of recovery had been more than 50%. But because they were less than 50% he can recover nothing.

This surely cannot be the state of the law today. It would be irrational and indefensible. The loss of a 45% prospect of recovery is just as much a real loss for a patient as the loss of a 55% prospect of recovery. . . .

[Application of the traditional standard] would make no sort of sense. It would mean that in the 45% case the doctor's duty would be hollow. It would be empty of content.¹⁰

Lord Nicholls noted that there were some cases where loss-of-chance causation had received judicial imprimatur, and he thought that it was time for claims of the sort in *Gregg v. Scott* to join that group. To his mind the distinguishing feature of medical negligence claims was their inherent uncertainty. That is, the element which justified this shift in the law was the lack of justified confidence in the accuracy any prediction of the plaintiff's prospects of recovery had he been properly treated. Since estimates of the sort in issue in this case were clouded by a considerable measure of doubt, requiring the plaintiff to pass the 50% cut-off before he could get anything was unfair.

Lord Nicholls acknowledged that not all cases of medical negligence were fraught with this element of uncertainty and that his new standard would pose line-drawing problems. However, he would leave for another day the question of the appropriate response to causation in those medical negligence claims which were not attended by such doubt. And as for line drawing problems, he noted that courts were accustomed to dealing with those.¹¹

Lord Nicholls identified a second but related factor that, in his view, made loss-of-chance causation appropriate in a case like *Gregg v. Scott* – namely that statistical thinking characterized the mindset and discourse of the area of activity in question. Since the field of medicine was one in which “statistics are widely used and have been so for many years”¹² there was a sense in which statistics — or statistical discourse — represented the best and most common description of what the plaintiff had lost. In other words, the plaintiff's

prospects of recovery, expressed in percentage likelihood, represent the *reality* of his position so far as medical knowledge is concerned. The law should be exceedingly slow to disregard medical reality . . .¹³

Lord Hope also dissented, and like Lord Nicholls he was centrally concerned to identify a factor that would make loss-of-chance available in cases like *Gregg v. Scott* but would not simultaneously lead to the sweeping change of making it available in every civil claim. In his judgment, the uncertainty element that was so important to Lord Nicholls was not the key. Rather, in Lord Hope's view the factor that made loss-of-chance applicable in this instance (but would not at the same time make it applicable in every case) was the fact that the plaintiff suffered a *physical injury* during the period of delay caused by the misdiagnosis; namely, he suffered an enlargement of his tumour. That enlargement constituted “a physical injury which the appellant would not have suffered but for the doctor's negligence.”¹⁴ The fact that the plaintiff could point to this physical manifestation of the defendant's carelessness — a manifestation which arose after the carelessness — was what, in Lord Hope's view, authorized a departure from the otherwise-applicable balance-of-probabilities approach.

Note that Lord Hope's analysis embodies the second of the alternative ways of conceiving of loss-of-chance causation. That is, it purported to retain the significance of the 50% barrier in the balance-of-probabilities test, and to



re-describe the plaintiff's loss. This approach to loss of chance had been the one that persuaded the Court of Appeal in *Hotson*¹⁵ and it was at the core of Lord Hope's dissent in *Gregg v. Scott*. Lord Hope would not go so far as to permit this re-characterization to take place in every case, but he would permit it when the defendant's fault produced some physical injury, such as Gregg's enlarged tumour. In his mind that demonstrable injury justified a probabilistic approach to the case. It appears to follow from his approach that a patient who suffered a delay in treatment and consequential reduced prospects of survival, but who could not point to some physical manifestation of the delay, such as a bigger tumour, would not be able to turn to loss-of-chance causation.

As for the three majority judgments, Baroness Hale confessed a measure of sympathy for the result that accepting a loss-of-chance argument would produce in this case. However, she declined to endorse that result because it would represent too radical a change in the law. She noted that "almost any claim for loss of an outcome could be reformulated as loss of a chance of that outcome"¹⁶ and that there could be no principled basis for confining loss-of-chance causation to medical negligence cases.¹⁷ A wholesale rejection of balance-of-probabilities causation and concomitant adoption of probabilistic causation would reduce predictability and make settlement and trials more difficult.

In response to Lord Nicholls' point that failing to provide a remedy in a case of this sort emptied a doctor's duty of content, Baroness Hale took the view that this was not an area of human activity where potential tort liability was a necessary motivator:

doctors and other health care professionals are not solely, or even mainly, motivated by the fear of adverse legal consequences. They are motivated by their natural desire and their professional duty to do their best for their patients.¹⁸

Lord Hoffmann likewise took the view that "a wholesale adoption of possible rather than probable causation would be so radical a change in our law as to amount to a legislative

act."¹⁹ He rejected the arguments of the two dissenters that loss-of-chance causation could be justified in this case on the basis of some principled, yet incremental change in the law. With respect to the uncertainty argument that formed one strand of Lord Nicholls's argument, Lord Hoffmann's view was that uncertainty made no difference:

The fact that proof is rendered difficult or impossible . . . because medical science cannot provide the answer . . . makes no difference . . .

What we lack is knowledge and the law deals with lack of knowledge by the concept of the burden of proof [*i.e.*, the requirement that the plaintiff demonstrate harm on the balance of probabilities.]²⁰

And in response to Lord Nicholls's reliance on the fact that the medical world looked at things in statistical terms, Lord Hoffmann rejected the notion that the world-view and

discourse of the defendant's profession or subculture was at all pertinent to whether loss-of-chance causation was available. The pertinent discourse, in his view, was not that of the medical community but rather that of the law, and "the law regards the world as in principle bound by laws of causality. Everything has a determinate cause, even if we do not know what it is."²¹

With respect to Lord Hope's focus on the injury, Lord Hoffmann likewise saw that as irrelevant. He emphasized that the real basis of Gregg's claim was his diminished prospect of survival. That was what the defendant was really concerned about. (Or rather, that is what Lord Hoffmann said that the plaintiff would be *required* to be concerned about.) The fact that the plaintiff suffered a physical injury — the enlargement of the tumour — was, in Lord Hoffmann's view, an incidental and immaterial feature of the case.

The speech of Lord Phillips was the longest of the five. He spent considerable time analysing the statistical evidence presented to the trial judge and casting doubt on whether that evidence justified the judge's reaching the findings he had in fact reached. Lending support to this doubt was the fact that,

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contrary to the odds found by the trial judge, the plaintiff Gregg was still alive at the date the House of Lords was writing its judgment, more than ten years after he first presented to the defendant Dr Scott.

While Lord Phillips did not use this re-interpretation of the evidence as the sole basis of his decision, he did rely on it to justify his conclusion that

the exercise of assessing the loss of chance in clinical negligence cases is not an easy one. Deductions cannot safely be drawn without expert assistance.²²

In his view, it followed from this that the difficulty that courts will necessarily encounter in understanding and appropriately applying statistical evidence militated in favour of maintaining the simpler, balance-of-probabilities standard as the sole test for factual causation.

It is always likely to be much easier to resolve issues of causation on balance of probabilities than to identify in terms of percentage the effect that clinical issues of causation had on the chances of a favourable outcome. This reality is a policy factor that weighs against the introduction into this area of a right to compensation for the loss of a chance. A robust test which produces rough justice may be preferable to a test that on occasion will be difficult if not impossible, to apply with confidence in practice.²³

Thus, in contrast to Lord Nicholls, who saw the uncertainty factor as an argument in favour of opting of loss-of-chance causation, Lord Phillips saw the difficulties attendant on the presentation, understanding and use of statistical evidence as reasons for rejecting loss-of-chance in favour of the more easily administered traditional test.

2. Critique

Loss-of-chance causation presents thorny issues. Those have been much discussed in various court decisions and in academic literature, and this brief comment does not pretend to undertake any comprehensive engagement with the question. It confines itself to the reasoning of the House of Lords in *Gregg v. Scott* and offers brief comments.

All the judges appreciated that, while loss-of-chance causation had been approved in certain types of cases, extending it to all civil claims would be an unacceptably radical move for a court to make.²⁴ It is true that the traditional approach to causation was formulated by the judiciary, and some persons think that any rule that was initially formulated by a court can legitimately be discarded by that same institution. However, in the case of the balance-of-probabilities rule, which extends back at least 500 years and around which so many other rules, assumptions and social practices have been erected, it is difficult to dissent from the view that a wholesale adoption of loss-of-chance causation would represent such a drastic change that it should only be undertaken after the broad and extended consultation and multi-party input that only the legislative process can offer.

Against that background the question that divided the House in *Gregg v. Scott* was whether a justification might be found for extending loss-of-chance causation to the case before it (and presumably to all or, alternatively, some definable sub-set of medical malpractice cases) without at the same time extending that rule to all civil claims.

In *Gregg v. Scott* there were four arguments in favour of loss-of-chance causation. Each of those seeks to function as a justification for extending loss-of-chance causation to the facts of that case. In addition, three of those arguments purport simultaneously to offer an explanation for why extending that doctrine to the facts of *Gregg v. Scott* would not require it to be applied to all cases. Those three are (1) the uncertainty argument, (2) the underlying-reality argument and (3) the injury argument. The fourth pro-loss-of-chance argument – the hollow duty argument – purports to offer a justification for loss-of-chance causation but seems to offer no stopping point short of general applicability. I offer brief comments on those four arguments.

Consider first Lord Nicholls's uncertainty argument, which claims that loss-of-chance causation is appropriate in *Gregg v. Scott* due to the inherent uncertainty attendant on medical prognoses for cancer. It would seem to require us to treat the following two cases differently:

Case 1: the defendant has been careless and the plaintiff has subsequently suffered harm X. All the experts for both sides agree that there is highly reliable evidence for concluding that it is 45% likely that harm X would not have occurred in the absence of the defendant's fault.



Case 2: again the defendant has been careless and the plaintiff has suffered harm but there are a number of experts who disagree about the relationship between the defendant's fault and harm X. Moreover all the experts admit there is legitimate room for doubt about the accuracy of their estimates. However, the trial judge assesses that complex and conflicting expert evidence and comes to the conclusion that it is 45% likely that harm X would not have occurred in the absence of the defendant's fault.

Lord Nicholls's uncertainty argument would appear to suggest that the plaintiff in Case 2 should have the benefit of loss-of-chance causation but the plaintiff in Case 1 should not. It is far from clear why this should be the case, and indeed this argument does not jibe well with Lord Nicholls's own words quoted above in the text at note 10. More importantly, in practice cases are unlikely to fall near the extreme ends of the spectrum represented by Cases 1 and 2. Many will fall in the middle. And if mere uncertainty becomes the gate-keeping criterion for availability of loss-of-chance causation, then one of the parties to a civil suit will generally have an incentive to prove that such uncertainty exists – and proving (or creating) uncertainty may prove a simple thing to do. In short, the existence or non-existence of uncertainty in the evidence about causation seems to be both an unprincipled and an administratively difficult criterion for sorting loss-of-chance cases from non-loss-of-chance ones.

Lord Nicholls's other argument, allied to the uncertainty argument, is one which relies on the fact that statistical assessments of harm constitute the "medical reality."²⁵ The focus of this argument is uncertain. On one understanding, its claim is that the underlying problem is not simply an epistemic one but is rather attributable to the fact that — an assertion that seems to owe some unacknowledged debt to quantum mechanics — reality with which the law must cope in cases like *Gregg v. Scott* is one characterized by an irreducibly probabilistic nature. And since that reality (but not, it seems, all cases of uncertainty) simply *is* probabilistic, the law should treat it as such and assess causation accordingly.

A second understanding of this claim focuses on the speech that characterizes the communication between persons engaged in the activity in question: if such discourse, in so far as it relates to questions of causation, is characterized by probabilistic assessments as opposed to yes/no assertions, then tort law should follow suit and employ loss-of-chance causation.

As a principled factor for identifying those cases which should properly be resolved by loss-of-chance causation this statistical reality argument has a certain appeal. However, as a candidate for an administrable legal standard it is a nightmare. It would require judges to sort non-loss-of-chance cases from loss-of-chance cases by inquiring into whether the underlying uncertainty (or probabilistic feature of the case) was merely epistemic or, on the contrary, representative of the real nature of things. Putting aside those law suits where a fact in issue is the locus or direction of travel of an electron, it is hard to imagine cases where there could not be dispute about such a factor. And it is even harder to imagine cases where judges are equipped to provide a convincing answer to such a question. The test would require judges to make judgments about which portions of reality are deterministic and which are aleatoric. Even with the assistance of expert evidence that is not the sort of question on which much useful light is likely to be shed by legal argument.

Likewise, Lord Hope's physical injury argument gives rise to a test that would be exceedingly difficult to apply. Let us concede, for the sake of argument, the debatable point that there is a principled reason for treating differently the cases where two plaintiffs each suffer the same harm (as measured by reduced prospects of survival) due to delay in treatment, but one can point to a tumour which has enlarged during the period of delay while the other cannot. What other changes in the body might count as a legal injury for the purposes of this rule? An augmented white blood cell count? An increased feeling of tiredness? Would the required injury be confined to bodies, or could it include injury to the psyche, the plaintiff's property, the plaintiff's economic prospects, etc.?

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The fourth argument is the hollow duty argument, seen in the extract from Lord Nicholls's speech in the text at note 10. If a doctor's duty is to increase one's chances of a positive health outcome, and a careless doctor diminishes those chances, then a legal test which ignores any such diminishment unless it is greater than a certain threshold, seems *pro tanto*, to strip that duty of content. One way to approach this argument is through the claim that it is loss-of-chance causation, rather than the balance of probabilities standard, that provides optimal deterrence. Under the traditional balance-of-probabilities approach, persons whose activities seem statistically correlated with certain outcomes but who do not at least double the likelihood of occurrence of those events will not be found to have caused the occurrence in question. For example, persons who discharge into the environment chemicals which augment the risk of certain cancers by, say, 50% will never be found liable for causing any such cancers, since with any individual cancer they can always say that most likely that cancers would have happened anyway, even in the absence of their activity. The balance-of-probabilities test would provide no incentive for such persons to alter their behaviour. Loss of chance causation would render such persons liable for 33% of the cost of such cancers, and accordingly might prompt them to search for ways to reduce their emissions in an attempt to lessen their future liability. Although he did not elaborate this position in detail, this argument is echoed in Lord Nicholls's words that, in cases similar to *Gregg v. Scott*, the traditional approach leaves the doctor's duty hollow and empty of content.

That claim gave rise to Baroness Hale's counter-argument that doctors are motivated by their desire to do their best for their patients so that we do not need tort law to motivate them.²⁶ This argument echoes one made by the Supreme Court of Canada in *Hollis v. Dow Corning Corp.*²⁷ Interestingly, this is not an argument courts make in favour of other professions or groups. For instance, we do not see judges claiming that, since manufacturers will be motivated by their natural desire to make safe products, we do not need tort law to deter manufacturers. To choose another example, we have noted that loss-of-chance causation has been

extended to lawyers' negligence. The courts which did that were clearly not convinced by the argument that lawyers are motivated to do the best for their clients so that we do not need to deploy tort law to discipline lawyers. In short, Baroness Hale's view of doctors seems rather like that of a person who would take at face value the words that medical school applicants write on their application forms when they are asked to explain why they want to become a doctor.

Furthermore, even if it were true that, say, 99% of doctors are motivated entirely by their wish to do good (and, say, only 10% of manufacturers and 5% lawyers are similarly motivated) Baroness Hale's argument misses the point. The proper question to ask is what causation test might we need to ensure optimal deterrence for that 1% of doctors who are *not* motivated solely by a desire to help their patient and for whom we might therefore need cost-internalization mechanisms in order to ensure they take appropriate care. That is, the fact that health profession-

als as a group might be more saintly than others is of dubious pertinence to the deterrence question, which should focus on the group to be deterred – *i.e.*, non-saintly health professionals.

So Lord Nicholls's hollow-duty argument is a powerful one, and that power is not diminished by claims that doctors are motivated by the wish to cure. The problem with the hollow duty argument is that, while it offers a good reason for resolving *Gregg v. Scott* on a loss-of-chance basis, it provides no reason for not resolving all cases on that basis. It does seem true that if loss-of-chance causation were to be applied in a case like *Gregg v. Scott* there is no obvious stopping point, no principled reason for refusing to apply it in all negligence cases, or for that matter in other instances of civil liability. And everyone agrees that that is too radical a step for a court to take.

Perhaps the thing to do at this point is to recall the observation of Lord Hoffmann in *White v. Chief Constable of South Yorkshire Police*,²⁸ a case which dealt with when tort recovery would or would not be available for purely psychiatric harm. There he admitted that courts had called off the search

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for a principled criterion for when recovery was available for psychiatric harm: “No one can pretend that the existing law, which your Lordships have to accept, is founded upon principle.”²⁹ Lord Hoffmann confessed that the line courts had drawn to separate those cases where recovery could be had for psychiatric loss from those where it could not was not a line that could be justified by principle. He noted, however that the line had been drawn and would not be shifted in favour of any other line that would permit greater recovery, and confessed he was

engaged, not in the bold development of a principle, but in a practical attempt, under adverse conditions, to preserve the general *perception* of law as a system of rules which is fair between one citizen and another.³⁰

The time may have come to call off the search for principle in loss-of-chance causation. The cases where it has been applied share no obvious unifying feature. Cases such as *Gregg v. Scott*, where loss-of-chance causation was denied, present claims for redress which are every bit as compelling as those cases where that causal test has been applied. Yet cases like *Gregg v. Scott* seem to offer no principled, administrable basis which would both permit courts to apply loss-of-chance of chance causation in those cases while concurrently laying down a rule that would not make that causal test available in all cases – which everyone agrees is too radical a step for the judiciary to make.

Perhaps the key problem with the holding in *Gregg v. Scott* is the refusal of the three majority judges to be as candid as Lord Hoffmann was in *White* when he acknowledged that the law was engaged in damage control and had abandoned the search for principle. Their speeches effectively undercut the claims of the two dissenting judges, but they leave the impression that the existing scope of loss-of-chance causation can be justified on some principled basis, which it cannot.

3. The Effect of *Gregg v. Scott* in Canada

Had *Gregg v. Scott* gone the other way it would have given some ammunition to those who advocate a similar change in Canada. Decisions of the House of Lords on factual causation have been influential here. In particular this has been true with respect to exceptions to the traditional causation test; in *Athey v. Leonati*³¹ the Supreme Court of Canada

relied on House of Lords decisions in holding that in some cases the traditional test should be abandoned in favour of the material contribution test. The refusal of Canadian courts to apply loss-of-chance causation in medical cases has been criticized by such prominent legal scholars as Stephen Waddams and Lewis Klar,³² and the New South Wales Court of Appeal has recently decided to opt for loss-of-chance in malpractice cases.³³ A House of Lords decision which followed that line would give some support to those who think that *Laferrière v. Lawson* should be reconsidered.

However, with the House of Lords having elected, even by a narrow 3:2 margin, to cleave to the traditional test, the prospects of abandoning that approach in Canada seem slim. The scope of loss-of-chance causation in this country remains uncertain, but in the short term it seems doubtful that it will be extended to medical malpractice cases.

Indeed, the first and to date only Canadian case to consider *Gregg v. Scott*, the medical negligence case of *McPherson v. Bernstein*,³⁴ cited it in support of rejecting the plaintiff’s contention that loss-of-chance causation should be applied.

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1. [2005] UKHL 2 [*Gregg v. Scott*].
2. The English cases are *Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563 (C.A.) and *Cook v. Swinfen*, [1967] 1 All. E.R. 299 (C.A.). Canadian cases that followed the English lead are *Prior v. McNab* (1976), 16 O.R. (2d) 380 (H.C.); *Gouzenko v. Harris* (1977), 13 O.R. (2d) 730 (H.C.) *Graybriar Industries Ltd. v. Davis* (1992) B.C.L.R. (2d) 190 (C.A.); *Wallace v. Litwiniuk* (2001), 281 A.R. 115 (C.A.) and *Henderson v. Hagblom* (2003), 232 Sask. R. 81 (C.A.), leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 278.
3. For instance, a defendant who breaches a contractual obligation to seek zoning or planning approval for a piece of real property might claim that the plaintiff has suffered no loss because, even had the obligation been performed, the approval would, on the balance of probabilities, not have been granted. Canadian courts



have acknowledged that in such cases damages may be awarded by valuing the loss of the chance that the relevant zoning or planning authority would have given the approval had the defendant sought it: *Multi-Malls, Inc. v. Tex-Mall Properties Ltd.* (1981), 128 D.L.R. (3d) 192 (Ont. C.A.), leave to appeal to S.C.C. refused [1982] 1 S.C.R. xiii; *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.* (1993), 12 O.R. (3d) 675, leave to appeal to S.C.C. refused [1993] 3 S.C.R. vi.

4. [1987] A.C. 750 (H.L.), allowing an appeal from [1987] 1 All E.R. 210 (C.A.).
5. [1991] 1 S.C.R. 541, allowing in part an appeal from [1989] R.J.Q. 27 (C.A.). See also *St.-Jean v Mercier*, [2002] 1 S.C.R. 491, 209 D.L.R. (4th) 513 at para. 106.
6. *Cottrelle v. Gerrard* (2003), 67 O.R. (3d) 737 (C.A.) at 750, application for leave to appeal to S.C.C. refused [2004] 1 S.C.R. vii.
7. Helen Reece in “Losses of Chances in the Law” (1996), 59 Mod. L. Rev. 188 argues in favour of this criterion for sorting loss-of-chance cases from non-loss-of-chance cases.
8. *Gregg v. Scott*, [2002] EWCA 1471 (C.A.).
9. *Gregg v. Scott*, *supra* note 1 at para. 125.
10. *Ibid.* at paras. 2-4. The hollow-duty argument had proven successful in another House of Lords causation case just a couple of months earlier: *Chester v. Afshar*, [2004] UKHL 41.
11. *Ibid.* at para. 50.
12. *Ibid.* at para. 33.
13. *Ibid.* at para. 42 (emphasis added). This is reminiscent of an argument which found favour just two months earlier in the New South Wales Court of Court of Appeal in *Rufo v. Hosking*, [2004] NSWCA 391. There the court accepted loss-of-chance recovery in a medical malpractice case. One justification offered by Hodgson J.A. for accepting that doctrine in that case was that “if it appears that the very best medical science can do is to say that the treatment had a quantifiable chance of success, then . . . that can be treated as a valuable chance for the loss of which a plaintiff can be compensated.” (Para. 10.)
14. *Ibid.* at para. 117.
15. *Supra*, note 4. It is worth noting that this approach to assessment of damages is taken with respect to future matters “future” in this context meaning matters which may or may not arise after the time of the trial.
16. *Gregg v. Scott*, *supra* note 1 at para. 224.
17. *Ibid.* at para 225.
18. *Ibid.* at para. 217.
19. *Ibid.* at para. 90.
20. *Ibid.* at para. 79. He acknowledged that there were some cases where courts had applied loss-of-chance causation, but claimed those were confined to cases where the hypothetical causal chain involved speculation as to the actions of human beings. (*ibid.* at para. 81).
21. *Ibid.* at para. 79. This argument is reminiscent of that of Lord Goff in *White v. Chief Constable of South Yorkshire Police*, [1999] 2 A.C. 455 (H.L.). There a plaintiff attacked the traditional legal rule that treats psychiatric injury less favourably than physical injury and advanced the argument that current scientific and medical understanding had thrown the legitimacy of the mind/body distinction into doubt. Lord Goff’s reply (at 475) was that scientific understanding of the matter was not determinative of the *legal* relevance of such categorizations and that the law draws distinctions such as that between body and mind for its own purposes.
22. *Ibid.* para. 170. Lord Phillips’s claim that lawyers and judges are poorly equipped to assess scientific evidence phrased in terms of probabilities may be borne out by his own attitude to the fact that Gregg was still alive. He seemed to view Gregg’s ongoing existence as evidence that the trial judge’s conclusions on the probability of causation were wrong. However, probability predictions of future discrete events can neither be proven nor disproven by the occurrence or nonoccurrence of such events. That is, if a prediction is made that event X is 90% likely to happen, the fact that X subsequently happens in no way confirms the accuracy of the prediction. When probabilistic predictions involve single events, such as the death of Gregg, then (apart from predictions of 0% or 100%) the accuracy of such predictions is unverifiable. So Lord Phillips’s claim that the judicial treatment of probability in the reasons of *Gregg v. Scott* demonstrates that judges are ill-equipped to deal with statistics may be demonstrable, but perhaps not in the way that Lord Phillips intended.
23. *Ibid.*, at para. 170.
24. Note that consistency requires that if loss-of-chance is to be made available to the benefit of plaintiffs who cannot prove that the defendant’s fault was more than 50% likely to be the cause of their harm, then it should also be made available to the benefit of defendants. That is, if we allow plaintiffs like Gregg the benefit of loss-of-chance causation, then defendants whose fault is 75% likely to have caused the plaintiff’s injury harm, and who under the balance-of-probabilities test would accordingly be liable for the entire harm,



should in fairness be able to argue that they should pay damages only for 75% of the value of the loss. In fact this is how the Saskatchewan Court of Appeal proceeded in *Henderson v. Hagblom*, *supra* note 2, and the Supreme Court of Canada dismissed the application for leave to appeal that decision.

25. *Gregg v. Scott*, *supra* note 1 at para. 24.

26. *Ibid.*, para. 217.

27. [1995] 4 S.C.R. 634 at 675, *per* La Forest J.

28. *Supra*, note 21 at 511.

29. *Ibid.*

30. *Ibid.* (emphasis added).

31. [1996] 3 S.C.R. 458, relying on *Bonnington Castings v. Wardlaw*, [1956] A.C. 613 (H.L.) and *McGhee v. National Coal Board*, [1973] 1 W.L.R. 1 (H.L.).

32. Stephen Waddams, "The Valuation of Chances" (1998) 30 Can. Bus. L.J. 86; Lewis Klar, *Tort Law*, 3rd ed. (Toronto: Carswell, 2003) at 404-05. And in a similar vein see Salvatore Mirandola, "Lost Chances, Cause-in-fact, and Rationality in Medical Negligence" (1992) 50 U.T. Fac. L.Rev. 258.

33. *Rufo v. Hosking*, *supra* note 13.

34. [2005] O.J. No. 2162 (Sup. Ct. Jus.) at paras. 208-09.

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North American Research Conference on Complementary and Integrative Medicine –
Consortium of Academic Health Centres for Integrative Medicine

May 24-27, 2006, Edmonton, Alberta.

<http://www.imconsortium-conference2006.com>

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June 4-7, 2006 Montreal, Quebec.

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