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"LOSS OF A CHANCE"

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Introduction

One hundred and twelve years ago Max Planck proposed a formula to explain the problem of black-body radiation. He became confident that the formula was correct. But he did not understand the underlying physics of it. No matter how he tried he could not reconcile his discovery with conventional physics. For 6 weeks he devoted himself to the most strenuous period of work in his life. In a letter to Robert Wood he said that a 'theoretical interpretation had to be found at any cost no matter how high' and that he was 'prepared to sacrifice every one of my previous convictions about physical laws'. Sacrifice he did. And so began the era of quantum mechanics.

For every successful paradigm-changing challenge to orthodoxy, there are many failed ones. I suspect that my invitation to speak again to this conference, and the topic, 'loss of a chance', upon which I was asked to speak, came from a committee with an eye to a critique of Australian orthodoxy on the subject. In the spirit of this invitation I will consider the recently emerged Australian, English, and Canadian orthodoxy concerning the law relating to loss of a chance. But the queries I will raise about the orthodoxy are not of a revolutionary nature. As Lord Nicholls and Kiefel J have observed it is 'a question which has divided courts and commentators throughout the common law world'.¹ Further, my thoughts are only tentative.

Although the queries I raise about the recent orthodoxy are not Australian law, and not likely to be accepted as Australian law, they invite attention to the underlying basis of parts of our law of torts: in particular (1) the nature of rights protected by the law of torts and the divide between the law of contract and the law of torts; and (2) the meaning of loss.

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¹ *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537, 580 [119] (Kiefel J); *Gregg v Scott* [2005] 2 AC 176, 180 [1].

Consider the following two problems.

Problem 1: A lawyer gives gratuitous but careless legal advice to a client about the prospects of success of an action. The lawyer gives the advice with the intention that it be relied upon. The client relies on the advice. The client cannot prove that it was likely to win the action if careful advice had been given. But the client loses a real chance of succeeding and making a significant profit.

Problem 2: A doctor gives gratuitous but careless advice to a patient not to worry about a lump in her arm. The doctor gives the advice with the intention that it be relied upon. The patient relies on the doctor's advice. The lump develops into a cancer and the patient's arm has to be amputated. The patient cannot prove that it was likely that her arm would not have been amputated if careful advice had been given but she loses a real chance that amputation could have been avoided.

The Australian orthodoxy has recently become that although the legal client can recover for the lost chance of making profit, the patient cannot recover for the lost chance of avoiding amputation.² The lawyer is liable but the doctor is not. The orthodoxy is a powerful one although it is very recent. It has foundations in some basic principles of the law of torts. And it is supported by a recent decision of a unanimous, and powerful, decision of the New South Wales Court of Appeal, and, on appeal, a decision of the High Court of Australia. This paper considers this new orthodoxy and the possible deeper questions which might arise from it for the law of torts.

The liability of the lawyer for a loss of a chance of a better financial outcome

The leading case is the decision of the English Court of Appeal in *Chaplin v Hicks*.³ That case has been cited in hundreds of subsequent cases in the law of torts and contract. It involved the plaintiff, Miss Chaplin, who was short-listed in a nation wide beauty contest when her photo was one of 50 chosen from 6000 photos. The prize was a theatrical engagement for three years at £5 per week (approximately £780). Miss Chaplin was competing with 49 others for 12 of these engagements. The jury found that the defendant, later Sir Seymour Hicks, breached his contract with Miss Chaplin by failing to give her a reasonable opportunity to submit herself to the judgment of the defendant who was selecting the contestants that would receive the engagement.. The jury awarded £100 in damages. The Court of Appeal rejected submissions that the damages were too remote or that they were unassessable and should only have been nominal. The award for loss of a chance was entirely open to the jury as was the quantification of the amount. As Farwell LJ explained, the assessment of the precise loss of chance suffered was an essential discretionary role

² For the previous position see *Board of Management of Royal Perth Hospital v Frost* (Unreported Full Court of the Supreme Court of Western Australia: Malcolm CJ, Rowland & Wallwork JJ, 26 February 1997); *Gavalas v Singh* (2001) 3 VR 404; *Rufo v Hosking* (2004) 61 NSWLR 678.

³ [1911] 2 KB 786.

for the jury: if the jury had awarded only nominal damages the Court of Appeal could not have interfered with the decision.⁴

The decision in *Chaplin v Hicks* has been relied upon many, many times. It was followed in England in relation to solicitor's negligence in *Kitchen v Royal Air Force Association*.⁵ In that case, Mr Kitchen was electrocuted in his home. His widow alleged that this was caused by the negligence of the local electricity company. Part of her subsequent action was against solicitors who failed to bring proceedings before the limitation period expired. Amidst a litany of legal issues, Lord Evershed MR described as 'the most difficult point of all'⁶ the question whether Mrs Kitchen could recover damages for a lost chance of recovering damages. The Court of Appeal held that Mrs Kitchen had a valuable right to sue for damages and that the value of this right fell to be quantified by the chances of the claim succeeding. That quantification was not necessary on the appeal because there was no appeal on quantum.

The principle in *Chaplin* and in *Kitchen* is well established in Australia, England and Canada.⁷ It has been said that 'the client's lost chance has value even if the court, reviewing the facts with 20/20 hindsight, would assess the plaintiff's prospects of success at less than 50%.⁸ It has also been suggested that it does not matter whether the 'loss of chance' claim is brought against the solicitors in contract or tort.⁹

The lack of liability of the doctor for a loss of a chance of a better medical outcome

The decision of the High Court of Australia in Tabet v Gett

In *Tabet v Gett*¹⁰ the issue concerning loss of chance was considered by the New South Wales Court of Appeal and the High Court of Australia in the context of medical negligence. On 11 January 1991, Miss Tabet, age 6, was admitted to the Royal Alexandra Hospital for Children in Sydney. She was suffering from headaches, nausea and vomiting and had recently suffered from chickenpox. Dr Gett made a provisional diagnosis that Miss Tabet was suffering from chickenpox, meningitis or encephalitis. At 11am on 13 January 1991, nursing staff noticed that Miss Tabet's

⁴ [1911] 2 KB 786, 801.

⁵ [1958] 1 WLR 563.

⁶ [1958] 1 WLR 563, 574.

⁷ *Davies v Taylor* [1974] AC 207, 213 (Lord Reid); *Instant Nominees Pty Ltd v Redman* [1987] WAR 218, 226 (Burt CJ); *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54; (1991) 174 CLR 64, 118 - 119 (Deane J); *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] EWCA Civ 17; [1995] 1 WLR 1602, 1614 (Stuart-Smith LJ), 1621 (Hobhouse LJ), 1626 (Millett LJ); *Feletti v Kontoulas* [2000] NSWCA 59 [35] (Mason P); *Gregg v Scott* [2005] UKHL 2; [2005] 2 AC 176, 232 [218] (Baroness Hale); *Leitch v Reynolds* [2005] NSWCA 259; (2005) Aust Torts Reports 81-806 [86] (Santow JA); *Hammond Worthington v Da Silva* [2006] WASCA 180 [117] (Buss JA); *Nigam v Harm (No 2)* [2011] WASCA 221 [201] (Murphy JA).

⁸ *Nigam v Harm (No 2)* [2011] WASCA 221 [201] (Murphy JA citing ten other authorities).

⁹ *Johnson v Perez* [1988] HCA 64; (1988) 166 CLR 351. See especially the joint judgment of Wilson, Toohey and Gaudron JJ at 363; *Central Trust Co v Rafuse* [1986] 2 SCR 147, 198 (Le Dain J).

¹⁰ [2010] HCA 12; (2010) 240 CLR 537.

pupils were unequal and the right pupil was not reactive. The next day, on 14 January 1991, she suffered a seizure. She was then given a CT scan and an EEG which diagnosed a brain tumour. The brain tumour had been growing for more than 2 years.

Miss Tabet suffered irreversible brain damage. The brain damage was the result of a number of causes: the tumour, the seizure, and a subsequent operative procedure and other treatment (which was not said to be negligent). Miss Tabet brought an action against Dr Gett claiming that he was negligent, mainly for failing to perform a CT scan on either 11 or 13 January 1991. The trial judge held that Dr Gett was negligent only in failing to order a CT scan on 13 January 1991. If the CT scan had been performed on 13 January 1991, it would have been performed urgently and the tumour would have been detected. Treatments would have reduced intracranial pressure. The absence of treatment at that time deprived Miss Tabet of the chance of a better outcome. But his Honour held that if the tumour had been discovered on 13 January 1991 it would not have prevented the seizure or the deterioration in Miss Tabet's condition.

Different views were reached by the trial judge and the Court of Appeal concerning the extent of the lost chance. The trial judge thought that the lost chance was a 40% chance lost of avoiding the 14 January 1991 event which contributed 25% to the brain damage. The Court of Appeal considered that the 40% chance should only be 15%. On appeal to the High Court, Gummow ACJ and Heydon J held that no recovery should be possible due to evidentiary gaps.¹¹ As Gummow ACJ explained, 'the evidence provided a basis for no more than speculation as to the loss of a chance of a better outcome whether assessed at 40 per cent or (as the Court of Appeal indicated) 15 per cent.'¹² Heydon J rested his decision on this ground alone.¹³

On the issue of principle, the Court of Appeal considered that it could only be for the High Court of Australia 'to reformulate the law of torts to permit recovery for physical injury not shown to be caused or contributed to by a negligent party, but which negligence has deprived the victim of the possibility (but not the probability) of a better outcome'.¹⁴ Their Honours held that such an approach would be revolutionary:

Such an approach would not readily be limited to medical negligence cases, but would potentially revolutionise the law of recovery for personal injury. It would do so by reference to an assessment of increased risk of harm, verbally reformulated into loss of a chance or opportunity in order to equate it with the recognition in *Sellars* and like cases of the existence in commerce of a coherent notion of loss of a right or chance of financial benefit. No doubt the limits of the "commercial" or financial opportunity or advantage dealt with in *Sellars* will be a matter of future debate: see the discussion in *Gregg v Scott* at 232 (Baroness Hale of Richmond). In our view, its limits (unless expanded by the High Court) must fall short of a proposition which revolutionises the proof of causation of injury or (by redefining what is "harm") in personal injury cases.

The High Court unanimously rejected an appeal. Three of the key reasons for decision are considered below. Those reasons derive from the judgment of Kiefel J (with whom Hayne, Bell and Crennan JJ agreed) and the judgment of Gummow ACJ

¹¹ [2010] HCA 12; (2010) 240 CLR 537, 559 [45] (Gummow ACJ); [97]-[98] (Heydon J).

¹² [2010] HCA 12; (2010) 240 CLR 537, 559 [45].

¹³ [2010] HCA 12; (2010) 240 CLR 537, 574 [97]-[98].

¹⁴ *Gett v Tabet* [2009] NSWCA 76 [345].

(parts of which were adopted by Hayne and Bell JJ). They are, in summary, (i) the absence of an identifiable right or interest of the plaintiff; (ii) the absence of any loss; and (iii) policy reasons. The first two are reasons which differentiate the scenarios of the doctor who causes a patient to lose a chance of a better medical outcome and the lawyer who causes a client to lose a chance of financial gain.

In Kiefel J's reasons, her Honour also conducted a thorough survey of the decisions in this area in other jurisdictions. As her Honour observed, the question is one 'which has divided courts and commentators throughout the common law world'.¹⁵ However, as her Honour also observed, most jurisdictions have answered in the negative the question of whether a plaintiff can recover for a lost chance of a better medical outcome. Those include civil law jurisdictions in Germany, Austria, Greece, Norway, Estonia and Lithuania.¹⁶ The same is true of common law jurisdictions in England¹⁷ and Canada.¹⁸ In contrast, there is acceptance of recovery for loss of a chance of a better medical outcome in some jurisdictions in the United States¹⁹ and in France.²⁰

Two arguments concerning differences between the lawyer and the doctor

The first possible difference concerns whether any right of the plaintiff's is infringed by negligence which merely deprives the plaintiff of a better medical outcome. As Kiefel J observed, 'negligence in the abstract' is not actionable.²¹ Similarly, Gummow ACJ, in a passage with which Hayne and Bell JJ agreed,²² said that although in 'pure economic loss' cases harm to the interests of the plaintiff can qualify as compensable harm,²³ 'where the act or omission complained of does not amount to interference with or impairment of an existing right, some care is needed in identifying the interest said to have been harmed by the defendant'.²⁴ As Hayne and Bell JJ said 'to accept that the appellant's loss of a chance of a better medical outcome was a form of actionable damage would shift the balance hitherto struck in the law of negligence between the competing interests of claimants and defendants'.²⁵ No such interest was identified in the case of a claim for damages for loss of a chance of a better medical outcome.

¹⁵ *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537, 580 [119] (Kiefel J); *Gregg v Scott* [2005] 2 AC 176, 180 [1].

¹⁶ [2010] HCA 12; (2010) 240 CLR 537, 582 [126].

¹⁷ *Hotson v East Berkshire Area Health Authority* [1987] AC 750; *Wilsher v Essex Area Health Authority* [1988] 1 AC 1074; *Gregg v Scott* [2005] 2 AC 176. But compare *Barker v Corus (UK) Ltd* [2006] UKHL 20; [2006] 2 AC 572 as interpreted in *Sienkiewicz (Administratrix of the Estate of Enid Costello Deceased) (Respondent) v Greif (UK) Limited* [2011] UKSC 10; [2011] 2 AC 229.

¹⁸ *Laferrière v Lawson* [1991] 1 SCR 541 on appeal from Quebec but followed in common law provinces: *Cottrelle v Gerrard* (2003) 67 OR (3d) 737 (CA Ontario). See discussion in H Luntz 'Loss of chance in medical negligence' [2010] UMelbLRS 14.

¹⁹ *Matsuyama v Birnbaum* (2008) 890 NE (2d) 819.

²⁰ [2010] HCA 12; (2010) 240 CLR 537, 583 [127].

²¹ [2010] HCA 12; (2010) 240 CLR 537, 577 [109]; *Bourhill v Young* [1943] AC 92, 116 (Lord Porter).

²² [2010] HCA 12; (2010) 240 CLR 537, 564 [68].

²³ [2010] HCA 12; (2010) 240 CLR 537, 560-561 [52].

²⁴ [2010] HCA 12; (2010) 240 CLR 537, 561 [53].

²⁵ [2010] HCA 12; (2010) 240 CLR 537, 564 [68].

The second objection went to the heart of the submissions on the appeal in *Tabet*. Gummow ACJ said that the issue of principle was whether 'a lost opportunity, as a matter of law, answers the description of "loss or damage" which is then compensable'.²⁶ This second objection was a key argument relied upon by the respondent, Mr Young QC, in *Tabet*. He submitted that the reason why the doctor is not liable is because no loss was suffered:²⁷

The issue is what qualifies as damage for the purposes of an action in medical negligence. Does it extend to an unlikely chance of a better medical outcome? On the balance of probabilities, the appellant lost nothing.

This submission was accepted by all of the Court in *Tabet* except Heydon J who decided the appeal on the ground of the absence of sufficient evidence. Kiefel J differentiated between a lost chance of making money and a lost chance of a better medical outcome, explaining that 'the commercial interest lost may readily be seen to be of value itself. The same cannot be said of a chance of a better medical outcome or a person's interest in it.'²⁸ Similar reasoning is contained in the decision of Baroness Hale in *Gregg v Scott*.²⁹ Confronting head-on the apparent anomaly between allowing clients of lawyers to recover for a lost financial chance but not allowing a patient of a doctor to recover, Baroness Hale said:

One counter-argument is that, in this as in many other respects, there is a real difference between personal injury and financial loss. As Tony Weir puts it: "where the claimant is suing in respect of personal injury or property damage, he must persuade the judge that that injury or damage was probably due to the defendant's tort, whereas in cases of financial harm it is enough to show that the claimant had a chance of gain which the defendant has probably caused him to lose. There is nothing irrational in this, unless one supposes it is sensible to speak of 'loss of a chance' without saying what the chance is of. Losing a chance of gain is a loss like the loss of the gain itself, alike in quality, just less in quantity: losing a chance of not losing a leg is not at all the same kind of thing as losing the leg." (at p 76)

A possible answer to the first objection: An assumption of responsibility

On one view, the essence of the first objection might involve a concern that the relevant interests of the patient are insufficient to establish a right against the doctor which would be manifested in a duty of care to protect the patient from losing a chance of a better medical outcome. This is a common law question. In Western Australia it has been held that the principles concerning whether a duty of care is owed at common law remain unaffected by the provisions of the *Civil Liability Act 2002* (WA).³⁰

²⁶ [2010] HCA 12; (2010) 240 CLR 537, 560 [50].

²⁷ [2010] HCA 12; (2010) 240 CLR 537, 543.

²⁸ [2010] HCA 12; (2010) 240 CLR 537, 581 [124].

²⁹ *Gregg v Scott* [2005] UKHL 2; [2005] 2 AC 176, 232 [219].

³⁰ *Department of Housing and Works v Smith [No 2]* [2010] WASCA 25 [77] (Buss JA).

If the claim is one for breach of contract the question of whether there is a duty to protect a plaintiff from losing a chance of a better medical outcome is a matter of construction of the contractual terms, express or implied.

Is the law of torts any different? The concept of an assumption of responsibility has a long history. It borrows, both etymologically and doctrinally, from *assumpsit*. *Assumpsit* involved a pleading that the defendant 'assumed and faithfully promised'. The proper general issue for the defendant to plead was 'non assumpsit' (I did not assume and promise).³¹ For many years, consideration from the plaintiff was unnecessary for a successful action which pleaded *assumpsit* in relation to mis-performance of an undertaken responsibility.³²

The modern expression of this idea is usually regarded to be the expression of it in the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*³³ by Lord Devlin. His Lordship spoke of an assumption of responsibility as an express or implied undertaking; a relationship 'equivalent to contract' where but for the lack of consideration there would be a contract. Lord Devlin was not formulating a new idea. Lord Devlin was repeating the views of Lord Shaw in *Nocton v Lord Ashburton*³⁴ who, in turn, had quoted from the argument of Sir Roundell Palmer (as the later Lord Chancellor was then) in *Peek v Gurney*³⁵ who spoke of a 'representation in equity ... equivalent to contract'. Speaking of *Hedley Byrne*, Professor Stevens has argued that the concept of assumption of responsibility is 'the only doctrinally satisfying way of explaining the result in the case'³⁶ and 'indispensable if the law is to be understood'.³⁷

The effect of a number of judicial decisions in the last two decades in Australia has been that, at the very least, there is a dark cloud hanging over any role for assumption of responsibility. In *Hill v Van Erp*,³⁸ Gummow J described the term 'assumption of responsibility' as 'imprecise', 'beguiling' and 'deceptively simple'. In *Perre v Apand Pty Ltd*,³⁹ McHugh J observed that reliance and assumption of responsibility are not necessary or sufficient for the existence of a duty of care.⁴⁰ McHugh J went on to explain that those concepts are no more than evidentiary indicators of the plaintiff's vulnerability to harm from the defendant's conduct, which, in turn, provides the relevant criterion for determining whether a duty of care arises.⁴¹

In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*,⁴² Gleeson CJ, Gummow, Hayne and Heydon JJ said that the vulnerability of the plaintiff has emerged as an important requirement in cases where a duty of care to avoid economic loss has been held to have been owed. Their Honours said that it may be that, as Professor Stapleton

³¹ D Ibbetson *A Historical Introduction to the Law of Obligations* (1999) 131.

³² D Ibbetson *A Historical Introduction to the Law of Obligations* (1999) 133 and *Powtuary v Walton* (1598) Ro Abr 1.10, *Action sur Case*, P5.

³³ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] UKHL 4; [1964] AC 465, 529.

³⁴ *Nocton v Lord Ashburton* [1914] AC 932, 971.

³⁵ (1873) LR 6 HL 377.

³⁶ R Stevens *Torts and Rights* (2007) 34.

³⁷ R Stevens *Torts and Rights* (2007) 36.

³⁸ *Hill v Van Erp* [1997] HCA 9; (1997) 188 CLR 159, 229-231.

³⁹ *Perre v Apand Pty Ltd* [1999] HCA 36; (1999) 198 CLR 180.

⁴⁰ *Perre v Apand Pty Ltd* [1999] HCA 36; (1999) 198 CLR 180, 228 [124].

⁴¹ *Perre v Apand Pty Ltd* [1999] HCA 36; (1999) 198 CLR 180, 228 [125].

⁴² *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16; (2004) 216 CLR 515, 530 [23].

suggested, the concept of vulnerability might explain earlier cases where a duty of care was based on notions of reliance and assumption of responsibility.⁴³ 'Vulnerability' in this context was explained to involve the plaintiff's inability to protect himself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant.

The concept of vulnerability was again central to the decision of the High Court in *Barclay v Penberthy*.⁴⁴ In that case, a company, Nautronix, suffered economic loss for injuries to its employees in a plane crash. One issue was whether the pilot, and his employer company, Fugro, owed a duty of care to prevent economic loss to Nautronix. One cause of the crash was the carelessness of the pilot. The majority joint judgment upheld the conclusions of the trial judge that economic loss to Nautronix was a foreseeable consequence of carelessness by the pilot and that Nautronix was unable to protect itself from the foreseeable harm of an economic nature caused, in part, by the pilot's negligence.⁴⁵ There was no evidence that Nautronix could have negotiated successfully for the inclusion of such an appropriate term in the charter agreement with the pilot's employer; and it was not incumbent upon Nautronix to establish that it could not have bargained for a particular contractual provision.⁴⁶

There are some similarities between the concept of 'vulnerability' as it has been developed and applied by the High Court of Australia, and the concept of an assumption of responsibility. In a separate judgment in the majority in *Barclay*, Kiefel J observed that Nautronix had not relied in the High Court upon a direct contractual claim which it had against the pilot's employer based upon the charter agreement.⁴⁷ However, her Honour held that a tortious duty of care arose based upon the implied term of reasonable care in that agreement, coupled with Fugro's knowledge of Nautronix's project, its commercial purposes and the importance of the employees to the achievement of those purposes.⁴⁸ Knowledge of reliance by an individual is a significant, although not determinative, factor.⁴⁹ This approach to vulnerability has some affinity with the concept of an assumption of responsibility, in the meaningful sense in which that phrase was used by Lord Devlin in *Hedley Byrne & Co Ltd*, as the equivalent of a contract without consideration.

The underlying similarity between some of the concerns motivating a finding of 'vulnerability' and the concept of assumption of responsibility may explain why the concept of assumption of responsibility has shown some resilience despite the serious doubts which now surround it. In Western Australia, for example, it has recently been said that a duty of care will arise where a customer seeks advice from a bank and the bank assumes responsibility, or undertakes, to provide it.⁵⁰

⁴³ *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16; (2004) 216 CLR 515, 531 [24].

⁴⁴ *Barclay v Penberthy* [2012] HCA 40.

⁴⁵ *Barclay v Penberthy* [2012] HCA 40 [44] (French CJ, Gummow, Hayne, Crennan & Bell JJ).

⁴⁶ *Barclay v Penberthy* [2012] HCA 40 [47].

⁴⁷ *Barclay v Penberthy* [2012] HCA 40 [172].

⁴⁸ *Barclay v Penberthy* [2012] HCA 40 [176] - [177].

⁴⁹ *Barclay v Penberthy* [2012] HCA 40 [174]; *Perre v Apand Pty Ltd* [1999] HCA 36; (1999) 198 CLR 180, 194 [10] (Gleeson CJ).

⁵⁰ *Smith v McCusker QC (No 7)* [2011] WASC 88 [432] - [434] (Martin CJ).

It is not suggested here that, in the absence of a decision by the High Court of Australia, the concept of an assumption of responsibility could be accepted in Australia as the sole determining factor of a duty of care in a case. But an examination of the first objection to imposing liability upon a negligent doctor who deprives a patient of a chance of a better medical outcome may focus attention upon the role of assumption of responsibility in relation to duty of care and its relationship with the concept of vulnerability.

Even if the label 'assumption of responsibility' has no utility, one possible counter-argument to the approach that there is no tortious duty because the patient has no right or interest might be to invite attention upon the difference between contractual undertakings and tortious ones.

The argument might be that recognition that an undertaking without consideration could be a relevant factor in the recognition of a duty of care in cases involving medical negligence could avoid fine distinctions between whether or not a contract exists. In many cases the undertaking by the doctor will be embodied in terms of a contractual relationship, express or implied. But, when medical services are provided as part of a 'bulk billing' practice, it is unclear whether consideration exists to support the existence of a contract exists between the patient and the doctor.⁵¹ It may also be that a difference might exist depending upon the nature of the arrangements between a patient and a doctor in a regular bulk-billing surgery and a patient and a doctor in a public hospital. As a matter of principle and absent statutory differences such as limitation periods, if no contract exists in some of these situations it might be questioned whether the result at common law should be different in the case of the patient who pays for all or part of the service, or the patient who has the service provided in a public hospital or a doctor's rooms? Is it not the same duty assumed by the doctor in each case?

A possible answer to the second objection: The meaning of loss

The second objection was considered by the High Court in the context of the common law meaning of loss. The events in *Tabet v Gett* occurred in 1991. Today, any case would need to confront the meaning of loss in the context of the *Civil Liability Acts*.⁵² For instance, the Western Australian legislation provides that the meanings generally to be given to the terms 'harm', 'personal injury' and 'personal injury damages' are as follows:

harm means harm of any kind, including the following —

- (a) personal injury;
- (b) damage to property;
- (c) economic loss;

⁵¹ A query raised by Gummow J in *Breen v Williams* [1996] HCA 57; (1996) 186 CLR 71 at 123.

⁵² *Civil Law (Wrongs) Act 2002* (ACT), ss 40, 43, 44, 45 (1) and (3) and 46; *Civil Liability Act 2002* (Tas), ss 9, 11, 12, 13 and 14; *Wrongs Act 1958* (Vic), ss 43, 44, 48, 49, 51 and 52; *Civil Liability Act 2002* (WA), ss 3, 5B, 5C and 5D; *Civil Liability Act 2003* (Qld), ss 9, 10, 11 and 12 and dictionary; and *Civil Liability Act 1936* (SA), ss 3, 32, 34 (1) and (3) and 35.

personal injury includes —

- (a) death;
- (b) pre-natal injury;
- (c) impairment of a person's physical or mental condition; and
- (d) disease;

personal injury damages means

damages that relate to personal injury to a person caused by the fault of another person, but does not include a sum payable under a superannuation scheme or any life or other insurance policy.

It may be that although a loss of a chance does not fall within the three examples of 'harm', it is nevertheless encompassed within 'harm of any kind'. But that question need not be explored. The point for consideration in this paper is the common law meaning of loss and what that might reveal for the nature of the law of torts.

One immediate difficulty with Baroness Hale's and Tony Weir's distinction between a lost chance of gain and a lost chance of avoiding personal injury is that the two are not discrete categories. A concert pianist who loses a chance of avoiding amputation of her hand also loses a chance of making the financial gains from continuing in that profession. As Professor Stevens has observed, recovery has been allowed for lost chances from negligently caused physical injuries including the lost chance of financial gain in a competition,⁵³ or lost prospects of marriage.⁵⁴ These examples demonstrate the blurred boundaries between these categories.

More fundamentally, lost chances are at the core of many, perhaps most, of a Court's assessment of losses. The essence of a loss is a consequence undesired by the plaintiff; being in a worse position than we were before the relevant event. As Hayne and Bell JJ expressed it in *Gett*⁵⁵ 'damage' is concerned with a detrimental difference to the plaintiff: 'The comparison invoked by reference to "difference" is between the relevant state of affairs as they existed *after* the negligent act or omission, and the state of affairs that would have existed had the negligent act or omission not occurred.' As Hayne and Bell JJ further observed, 'saying that a *chance* of a better medical outcome was lost presupposes that it was *not* demonstrated that the respondent's negligence had caused any difference in the appellant's state of health.'⁵⁶

It is possible that the nature of loss might be conceptualised in three different, although overlapping, ways:

- (i) the injury which eventuates;
- (ii) a lost chance of avoiding the injury; and
- (iii) an increased risk of an injury.

⁵³ R Stevens *Torts and Rights* (2007) 45, citing *Girvan v Inverness Farmers Dairy (No 2)* [1996] SC 134, 137; *Mulvaine v Joseph* (1968) 112 So Journ 127; *Bhojwani v Kingsley* [1992] 2 EGLR 70, 73; *Doyle v Wallace* [1998] PIQR Q 146.

⁵⁴ Citing *Hughes v McKeown* [1965] 1 WLR 963; *Harris v Harris* [1973] 1 Lloyd's Rep 445, 447.

⁵⁵ [2010] HCA 12; (2010) 240 CLR 537, 564 [66].

⁵⁶ [2010] HCA 12; (2010) 240 CLR 537, 564 [67].

Consider a person who is negligently exposed to radiation. It may be easy to say that no loss has occurred if the person in instance (iii) is merely exposed to the risk of adverse health consequences from the radiation. That person is no worse off. Statistical chances exist in the ether. The statistical chance itself does not materially affect our lives although we might worry about it. But it is more difficult to deny that a loss has occurred when the person who is negligently exposed to radiation contracts cancer. Both (i) the contracting of cancer and (ii) the lost chance of avoiding the cancer are arguably a genuine loss: the person might be said to be in a worse position as a result of the event. Just as a person values a commercial chance, so too does a person value a chance of a better medical outcome. A person might be prepared to pay extra money for a surgeon who or doctor who is thought to give them a better chance of a better outcome even if that person knows that the chance is less than 50%.

It may even be that there is no real difference in effect between (ii) and (iii). When the loss which is compensated is the ultimate eventuality itself, the quantification of that loss is reduced for the possibility that the harm would have occurred in any event. As Deane, Gaudron and McHugh JJ (with whom Brennan CJ and Dawson J agreed) said of an award of damages for loss caused by the defendant's negligently causing the plaintiff's neurotic condition in *Malec v J C Hutton Pty Ltd*⁵⁷ 'damages must be reduced, however, to take account of the chance that factors, unconnected with the defendant's negligence, might have brought about the onset of a similar neurotic condition'. In *Malec*, their Honours treated the assessment of (i) whether the event had occurred (which, if more likely than not to occur, is treated as a certainty) differently from (ii) the assessment of damages for loss. But if the objection relates only to the question of whether loss has been suffered (rather than (i), whether a right of the plaintiff's has been infringed which is discussed above) then the measure of loss is assessed as the lost chance even where the event is more likely to occur than not. Therefore, in the radiation example, if it is proved that on the balance of probabilities the exposure to radiation caused the cancer, the loss falls to be reduced by the probability that the cancer would have occurred in any event. The measure of loss is the lost chance of not contracting cancer.

Against this argument that there might be no difference in effect between category (ii) and category (iii) of loss is a matter discussed in the judgment of Kiefel J in *Tabet*. Kiefel J said that when an issue is proved to the general standard the court treats the damage caused as certain, thus giving rise to the all-or-nothing rule of recovery.⁵⁸ It may be that Kiefel J's comment might involve a concern that the onus lies upon the plaintiff to prove an infringement before, as in *Malec*, the defendant is considered to be required to prove, for the exercise of quantification, that damages should be reduced because there is a chance that the injury would have occurred in any event. In other words, her Honour's concern might not be with quantification of loss but might instead be with identification of the infringement of the plaintiff's rights. If so, then at the stage of quantification of loss the ultimate measure of loss will be the same in cases of both financial injury and personal injury: the lost chance of avoiding the injury.

⁵⁷ (1990) 169 CLR 638, 645.

⁵⁸ [2010] HCA 12; (2010) 240 CLR 537, 588 [150].

Some of these threads can then be drawn together in considering the views about the nature of loss expressed by Baroness Hale and Mr Tony Weir, it must be true that, as Baroness Hale and Mr Weir say, losing a chance of gain is a loss like the loss of the gain itself and losing a chance of not losing a leg is not at all the same kind of thing as losing the leg. But there may be three possible counter-arguments deriving from the discussion above.

First, although losing a chance of not losing a leg is not at all the same kind of thing as losing the leg, the quantification exercise might be similar, drawing the two types of loss closer together. This would be so if it is right that when the plaintiff proves on the balance of probabilities that the leg would not have been lost but for the negligence, the measure of loss is discounted to reflect the chance that the leg would have been lost.

Secondly, as discussed above, there may be instances in which the line between these two types of loss is very difficult to draw, such as in the example of the concert pianist.

Thirdly, even though a lost chance of not losing a leg is not the same as losing the leg, the latter type of lost chance might nevertheless be a loss. It may not be as easily quantifiable in monetary terms as the lost chance of making money, but many losses are not easily quantifiable in money. This does not detract from their nature as a loss. In *Barker v Corus (UK) Ltd*,⁵⁹ relying upon *Chaplin v Hicks*, Lord Hoffmann made this point:

The quantification of chances is by no means unusual in the courts. For example, in quantifying the damage caused by an indivisible injury, such as a fractured limb, it may be necessary to quantify the chances of future complications. Sometimes the law treats the loss of a chance of a favourable outcome as compensatable damage in itself. The likelihood that the favourable outcome would have happened must then be quantified: see, for example, *Chaplin v Hicks* [1911] 2 KB 786 and *Kitchen v Royal Air Force Association* [1958] 1 WLR 563.

A third issue: policy considerations

A final reason was mentioned by Gummow ACJ in the context of rejecting an argument that loss of chance recovery assists in the maintenance of standards is the argument that it encourages 'defensive medicine'.⁶⁰ This fear of 'defensive medicine', as well as the impact of expanded liability upon insurance schemes and Medicare, were relied upon by Crennan J as stand-alone policy reasons which tell against recognition of liability based upon loss of a chance.⁶¹ Another policy concern enunciated by Lord Hoffmann in *Gregg v Scott*⁶² is the major consequences that recognition of liability for loss of chance would have for the National Health Service or insurance companies.

⁵⁹ [2006] UKHL 20; [2006] 2 AC 572.

⁶⁰ [2010] HCA 12; (2010) 240 CLR 537, 563 [59] (Gummow ACJ).

⁶¹ [2010] HCA 12; (2010) 240 CLR 537, 575 [102] (Crennan J).

⁶² *Gregg v Scott* [2005] 2 AC 176, 198-199 [90].

There are counter-arguments to these policy concerns. First, it is unclear whether there is any uniform acceptance that the effect of recognising loss of chance liability would encourage defensive medicine or that it would have a vast effect it would have on the NHS or insurance companies. No submissions were made in the cases about any empirical studies on these issues and no evidence was given of these matters at trial. In *Gregg v Scott*,⁶³ Lord Nicholls said that '[e]very doctor is fully aware he may be sued if he is negligent. There is no reason to believe that adopting the approach set out above will affect the practices followed by doctors.'

Secondly, a policy concern such as 'defensive medicine' invites attention to the content of the concern. What is meant by the practice of medicine in a defensive way? Does 'defensive medicine' equate with a conservative practice of medicine? For instance, does it mean that if there is doubt on a matter then all tests will be ordered? If so, how much doubt is necessary before the conduct is characterised as defensive? And, as a matter of policy, is 'defensive medicine' a bad thing? What would be the result of an empirical study which asked a large sample of patients whether they wanted their doctors to take a conservative or defensive approach to their treatment?

Thirdly, as Gummow ACJ recognised, if policy is to be assessed then policy arguments such as a concern about defensive medicine must be weighed against other policy arguments such as the need for maintenance of standards. The latter policy concern was an influential reason for the *recognition* of loss of chance liability by four justices of the South African Constitutional Court in *Lee v Minister for Corrective Services*,⁶⁴ which is discussed below. In that case, the Court explained that a failure to recognise loss of chance liability would mean that there would be no incentive for prison authorities to reduce substantial, and negligent, systemic risk of prisoners contracting tuberculosis. As explained below, for these judges the difficulty was that the nature of the disease was such that it was almost always impossible for an individual prisoner to prove that the tuberculosis was caused, on the balance of probabilities, by the systemic and negligent risks created by the prison authorities.⁶⁵

Loss of a chance beyond medical and professional negligence

The focus of this paper has been on the divide between the lawyer whose negligence causes a client to lose a chance of financial gain and the doctor whose negligence causes a patient to lose a chance of a better medical outcome. I have already observed that there might be difficulty in differentiating between cases involving a lost chance of financial gain and a lost chance of a better medical outcome which might result in financial gain. But the excision of lost chances, other than commercial chances, from the meaning of loss may have repercussions beyond the medical industry.

An example is a recent decision from the Constitutional Court of South Africa. In *Lee v Minister for Corrective Services*,⁶⁶ Mr Dudley Lee was incarcerated in prison

⁶³ [2005] 2 AC 176 at 192 [56].

⁶⁴ [2012] ZACC 30.

⁶⁵ [2012] ZACC 30 [92]-[93].

⁶⁶ [2012] ZACC 30.

between 1999 and 2004. During his incarceration he contracted tuberculosis, probably from another prisoner. The evidence was that South Africa has one of the highest rates of transmission of TB anywhere in the world. The authorities were 'pertinently aware of the risk' of inmates contracting TB. The Constitutional Court held that the relevant authorities were liable for their wrongful failure to take reasonable adequate measures to prevent infection. But the Court divided on the question of whether the evidence showed that tuberculosis had been caused by the negligence of the prison authorities or whether the evidence only supported a finding that the prison authorities had caused Mr Lee to lose a chance of avoiding contracting TB.

One argument before the Constitutional Court, which had succeeded before the Supreme Court of Appeal, was that Mr Lee should fail because it was just as likely as not that even if adequate precautions had been put in place, Mr Lee would still have been infected. This was because TB was so widespread in the prison that the responsible authorities could not examine 4000 prisoners with such regularity and thoroughness that TB could be detected before a prisoner became contagious. Writing for a majority of the Constitutional Court, Nkabinde J rejected this argument and held the Minister to be liable. Her Honour considered that it was enough that Mr Lee 'found himself in the kind of situation where the risk of contagion would have been reduced by proper systemic measures'.⁶⁷

In contrast, the powerful decision of Cameron J (Mogoeng CJ, Khampepe J and Skweyiya J concurring) did not take such an expansive view of either causation, or of 'risk as loss'. His Honour held that the only conclusion possible on the facts was that the prison authorities' conduct increased the overall risk that Mr Lee would contract TB. It could not be said that it was more probable than not that but for the conduct of the prison authorities Mr Lee would not have contracted TB.⁶⁸ Part of the problem was that Mr Lee did not know how he contracted TB, so it was very difficult for him to establish what the prison authorities should have done. Further, TB can be contracted by breathing in just one airborne TB microbacterium and an individual may test negative for TB even if the bacterium is present. And a person in whom TB has progressed from 'dormant' to 'active' will not always show symptoms.

Cameron J concluded that Mr Lee could not prove that the systemic negligent increase in the risk of contracting TB had caused his infection. But his Honour recognised that recovery was possible for Mr Lee's loss of a chance of not contracting TB. In a powerful, and succinct, statement of the overarching principle at the opening of his Honour's judgment, Cameron J held that 'our law should be developed to compensate a claimant negligently exposed to risk of harm, who suffers harm'.⁶⁹ The qualification that harm must be suffered focuses the enquiry upon the loss of a chance, rather than the mere risk of it. This careful and detailed decision shows that the law on this issue has some way to go before it becomes *common* law. The dominant orthodoxy in many countries, and the rejection of assumption of responsibility or a wider conception of loss, may not yet be the conclusive answer.

⁶⁷ [2012] ZACC 30 [60].

⁶⁸ [2012] ZACC 30 [79].

⁶⁹ [2012] ZACC 30 [79].

Conclusion

The purpose of this paper was not to attempt to suggest error in the recent orthodoxy across many countries which rejects recovery for negligence which is premised upon a loss of a chance of a better medical outcome. Instead, the purpose was to illuminate possible counter-arguments to three of the essential arguments in favour of the orthodoxy as illustrated by the decision of the High Court of Australia in *Tabet v Gett*. Some of those counter-arguments raise important issues of principle which themselves invite attention to fundamental issues concerning the law of torts and contract.

The first counter-argument raises the issue of whether there is any role or place for a concept of assumption of responsibility, as that concept was traditionally understood, in the law of torts? Such a concept shades the law of tort into the law of contract (contractually assumed responsibility). It raises fundamental questions about the proper boundaries between these areas of law. This counter-argument also illustrates further questions for the Courts which might arise in the wake of *Tabet* such as whether a plaintiff can outflank the exclusion of loss of a chance of a better medical outcome for the tort of negligence by bringing a claim for breach of contract.⁷⁰ Although it was recognised that commercial chances are recoverable for both breach of contract and torts, one of the doubts expressed in *Tabet* was whether any analogy could be drawn between a claim based upon a tort and one based upon breach of contract.

The second counter-argument directs attention to the fundamental question of what is meant by loss in the law of torts. This question is now overlaid by the Civil Liability Acts.

The final counter-argument might focus attention on the role of policy arguments in the law of torts. To what extent is recourse to policy legitimate or possible? Where is the boundary located between policy and principle? How should evidence on these issues be presented to lower Courts and should rules concerning interveners and *amici curiae* be re-formulated?

These are large questions. The consequences of the three counter-arguments are beyond the scope of this paper. The aim today, consistent with my brief, is merely to raise the questions and to stimulate thought.

⁷⁰ For a powerful assertion of the negative answer see C McKay 'Concurrently liability in claims for loss of chance of a better medical outcome' (2012) 20 TLJ 29. See also the doubts expressed by Gummow ACJ about whether any analogy could be drawn between a claim based upon a tort and one based upon breach of contract: [2010] HCA 12; (2010) 240 CLR 537, 559 [45] (Gummow ACJ).