

## Speculation or reality? – Loss of chance and the law of damages

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### *General observations*

The law of damages has been one of the most dynamically developing area of private law for centuries. Not only the ever-changing public moral and the rapidly evolving technology that brings new ways of infringement to light almost on a daily basis drive the nature of the law of damages but the various interests and needs of diverse groups in the society enact continuous challenges to the law of damages both in tort law and in contract law.<sup>2</sup> While most studies focus on the questions of civil liability for damages and the preconditions under which a wrongdoer may be obliged to cover the loss of the aggrieved party, our intention is to take the reader on a short tour in the world of a very specific problem in relation to damages, namely the elements of loss than can be recovered under this core of private law.

Civil law legal systems tend to distinguish between monetary damages and non-pecuniary losses. In the former category, the actual loss, the loss of earnings and the justified expenses to mitigate the effect of damages can be organized, while the latter category embraces the consequences of moral loss and the effects of infringements in someone's personality.<sup>3</sup> Millions of court cases deal with these elements of loss in diverse legal systems, however, from time to time, a new category evolves through the colorful claims plaintiffs bring to the courts. One of the most recent attack against the strong concept on the composition of loss to be recovered is the problem of loss of chance. Loss of chance seems to be a problem in two fields of the law of damages: on one hand, it is a question of the elements of damages whether this relatively new phenomenon can be sublimed under one of the columns of losses. On the other hand, loss of chance brings questions in relation to causation to the surface sharpening the question: what establishes a connection between the obligation to recover damages and the amount of damages to be recovered. In the present study we aim to highlight some of the actual questions related to the problem of loss of chance from a purely private law aspect comparing several leading legal systems in Europe on how they evaluate these claims and under what conditions courts find claims based on loss of chance acceptable. The study takes a mainly theoretical perspective and uses court decisions only to demonstrate the prevailing theories in each system scrutinized and not to draw a map on some organic developments on the legal evaluation of loss of chance as a special category of tort and contract claims.

### *Loss of chance from two angles*

The law of damages has two columns in private law: tort law and contract law. While tort law is considered to be liability arisen from breaching non-contractual obligations in civil law legal systems, contract law presumes a valid contract exists in between the wrongdoer and the aggrieved party. In the area of torts, loss chance has more relevance and the roots of such claims go back to torts rather than contracts. In fact, healthcare service providers had to face the new type of claims based on the recovery of damages suffered on the ground of losing a chance by not properly or timely diagnosing patients who then had to face with shortened life expectancy or expectancy of full recovery of health. Under tort law, the definition of loss is a key concept since classic European civil codes focus on the outcome of the unlawful action rather than the actual form and type of unlawfulness. The old Roman law principle, *neminem laedere* prohibits

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<sup>2</sup> Cornford, Tom: *Toward a Public Law of Tort*, Ashgate Publishing, 2008. 5.

<sup>3</sup> Sugarman, Stephen D.: *Torts in Law*, International Encyclopedia of Behavioral and Social Sciences, 1/2013. 4.

all types of actions and omissions that may lead to damaging consequences to other persons.<sup>4</sup> This concept clearly shows how important it is to identify and categorize these damaging consequences that practically establish tortious liability of the wrongdoer. Also, tort law – in most civil law legal systems – stands on the ground of full compensation aiming to recover all the losses the aggrieved party suffers in connection with the tort, the breach of a non-contractual obligation. For the defendant in a litigation process, it is vital to erode the connection between the plaintiff's alleged losses and his unlawful acts or omissions. In case of loss of chance, the causal link might be too loose and too remote for establishing liability on the wrongdoer's side.<sup>5</sup> Also, in many cases, the concept of loss of chance is considered a form of hypothetical causation that is not welcome by most civil law legal system given the uncertain nature of such claims and the burdensome and sometimes endless procedure for evidence.<sup>6</sup>

In the field of contract law, the situation seems much clearer. Contracts establish calculable and foreseeable, exact obligations for both or all parties to the agreement, therefore, identifying breach is typically much easier than evaluation breaches in tort law that tend to rely on public morality much more. In case of contracts, loss of chance might be a factor to consider in the composition of damages when the consequences of the breach seize the innocent contractual party from some opportunity the law otherwise supports and promotes and that the breaching party might have knowledge of.

In both cases, the real problem with evaluating claims for damages based on the loss of chance concept is that they seem to be close to a special form of consequential damages, namely, loss of profit, while evidence cannot be carried out with an absolutely certainty. While in case of counting and evaluating lost profit, legal systems also tend to hesitate on the acceptance of claims for such profits<sup>7</sup>, the evidence procedure can be tied to firm grounds in the vast majority of claims. Loss of chance, however, tends to seem like mere speculation demanding the court to compare idealistic speculations (the ratio of chance in lack of the unlawful act) to speculations after the incident happened. As a general approach, the law of damages should not compensate for speculative losses, instead, an absolute certainty is needed to award damages for loss of profit. This absolute certainty is typically missing in the cases of loss of chance, and the evidence procedure seems very soft and intangible given that mathematical values can rarely be ordered to measure the ratio of these chances. Loss of chance may depend on additional factors that call for the establishment of a hypothetical causal chain of events to base the claim. Court usually have to select and establish typical scenarios under which they are willing to compensate parties for losing some or all of their chances.

### ***Contract law relations and loss of chance***

In the area of contracts, two typical types of damages can be identified through which courts tend to award compensation for loss of chance. As common law legal systems seem more sophisticated when differentiating among the many types of losses, this study, for the purpose of clarity, uses the terms of common law to try to find a place for loss of chance. One of these typical types of damages might be reliance damages. Reliance damages in the common law concept provide compensation for the investment made in the hope of the other party keeping

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<sup>4</sup> Costache, Mirela-Paula: The role and the current valences of civil liability principles and functions, Acta Universitatis George Bacovia Juridica, 2/2013. 2.

<sup>5</sup> Walsh, Greg – Walsh, Ana: Tabet v Gett: The end of loss of chance actions in Australia?, Journal of Law and Medicine, 18/2010. 56.

<sup>6</sup> Costache, Mirela-Paula: The role and the current valences of civil liability principles and functions, Acta Universitatis George Bacovia Juridica, 2/2013. 5.

<sup>7</sup> Especially in cases of contract breach situations, courts in the United Kingdom and Germany tend to be very peculiar in assessing damages as described below.

his promise.<sup>8</sup> Reliance damages, however, require some certainty and some logical action on the side of the aggrieved party. Illogical acts and overreactions of events as well as actions without firm grounds do not constitute approved claims in front of European courts.<sup>9</sup> The other type of damages that are close to loss of chance are expectation damages, the so-called benefit of the bargain. According to the common law concept of expectation damages is to provide compensations as if the other party – the breaching party – had kept his promises and had performed his obligations as required by the contract. In common law legal systems, in case of breach of a contract, the preponderant legal consequences would be damages, and common law courts rarely go to the direction of specific performance. In civil law legal system while the governing principle is in kind restitution and providing the innocent party the right to still claim performance from the breaching party, the reality shows very few plaintiffs wanting this option, instead they aim for damages.<sup>10</sup> In case of expectation damages, we may find cases in which some form of speculation can be identified. As an example, contracts without consideration (the so-called free contracts in civil law legal systems) requires speculation to order a price tag to the value of the breach and the effect of the breach on the other party. Also, in case the contract meant to provide some amusement, enjoyment to the innocent party (e.g. travel service contracts, holiday service contracts, contracts for cultural programs), the effects of the breach may go far beyond the actual amount of consideration in the contract (e.g. a ruined holiday may seize the consumer from relaxation that could have been her only option given her busy life and work schedule) that also seems to be a bit of a speculation.

Beyond these two types of damages, court over the European Union are generally reluctant to award damages for loss of chance based on breach of a contract unless these losses qualify as consequential damages and the parties did not exclude the option for recovery for such damages in their agreements. Consequential damages, however, may be seriously limited by legal authorities too. In an international level, the United Nations Convention on the International Sale of Goods (hereinafter referred to as ‘CISG’), for example, strictly exempts the breaching party from the obligation to pay damages to losses that were not foreseeable at the time of concluding the contract. Other than the CISG, many national civil codes Europe-wide (e.g. German Civil Code<sup>11</sup>, Hungarian Civil Code<sup>12</sup>, Italian Civil Code<sup>13</sup>) incorporates the requirement of foreseeability on the breaching party’s side in order to provide compensation for such consequential losses to the innocent party.

### ***Tort law and loss of chance***

The loss of chance concept originally evolved in connection with torts and in the area of tort law. Most notably, medical malpractice cases brought the problem to the surface. It seemed to be a weird phenomenon for a while as it changed traditions and theories in tort law that were, in some cases, at least centuries old. An example to how the loss of chance claims caused a turmoil in the area of medical services, oncologists might be the best to demonstrate. Oncologists seemed to enjoy protection from claims based on medical malpractice given that the society somehow accepted the chance of survival was significantly lower for cancer patients than to patients suffering from other syndromes.<sup>14</sup> Also, the treatment was and, in some cases, still has been depended on many factors, therefore, late diagnosis of cancer rarely resulted in

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<sup>8</sup> Leitzel, Jim: Reliance and contract breach, *Law and Contemporary Problems*, 52/1989. 88.

<sup>9</sup> Saidov, Djakhongir – Cunningham, Ralph: *Contract Damages – Domestic and International Perspectives*, Hart Publishing, 2008. 86.

<sup>10</sup> Leitzel, Jim: Reliance and contract breach, *Law and Contemporary Problems*, 52/1989. 95.

<sup>11</sup> *Bürgerliches Gesetzbuch (BGB)*.

<sup>12</sup> Act V of 2013 on the Civil Code.

<sup>13</sup> *Codice Civile*.

<sup>14</sup> Sloan, Frank A. – Chepke, Lindsey M.: *Medical Malpractice*, The MIT Press, 2008. 38.

any claims in front of European municipal courts. Loss of chance, however, changed this protection of the oncologist profession as, in most European legal systems, the courts do not require convincing evidence that the plaintiff could have surely survived the cancer in case of early and timely diagnosis, instead, they only need a possibility backed up with scientific evidence that chances for survival would have been better.<sup>15</sup>

In Germany, the only requirement presently to establish a case based on loss of chance is to provide evidence on causation. Practically, it means awarding compensation for loss of chance depends on the possibility to establish the causal link between the alleged unlawful act or omission and the chance that got reduced as a consequence of such unlawfulness.<sup>16</sup> Several theories of causation may be identified across Europe. One theory follows the so-called but-for test that, despite of its rare presence in most legal systems in the continent, seems to be quite popular in several countries when the case is based on the concept of loss of chance.<sup>17</sup> According to the but for causation test, a question should be answered by the court: but for the existence of an event, would the damaging outcome have occurred.<sup>18</sup> Most critics to the but for test refer to the over-causation this approach may bring to the surface as several irrelevant events might also be found to cause the damaging consequences. Also, tenuous relation between the actions and events can be established by using the but for test.<sup>19</sup> Still, in case of loss of chance claims, very few courts insist on an undeniably convincing surety of the causal link, instead, a logical and not highly unreasonable connection would suffice.<sup>20</sup> The but for test, for this reason, might be a good option to provide firm grounds to loss of chance claims as the missing link can be scientifically established (e.g. in the case of late diagnosis or mistreatment, medical science may find the chance to complete recovery decreasing or diminishing with proceeding in time).<sup>21</sup>

Another test for establishing a causal link might be the proximity-remoteness test. In case the event was a remote cause for the damaging outcome, the test believes there is not logical connection in between the two, therefore, the claim should be rejected. In the case of claims based on the loss of chance concept, the proximity test may help to filter whether the event in question played just a tiny part and other events had to contribute in inflicting the damaging consequences, or it played a major role, and therefore, it has to be considered as the sole of at least the most convincing cause of the negative outcome. In applying this model of causation, the defendant is interested in proving his actions were part of a bigger picture, and the damaging consequences occurred as unfortunate mix of many events from which none could have inflicted the same outcome alone.<sup>22</sup>

Loss of chance may be considered as a special type of harm and not as part of the causation problem. In France, for example, courts tend to continuously stretch the definition of harm and loss given that the Code Civil does not call for an exact definition on this very important lemma of civil liability. French courts tend to look at loss of chance as a special type of harm, therefore,

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<sup>15</sup> Flight, Myrtle: *Law, Liability and Ethics for Medical Office Professionals*, Delmar Publishing, 2011. 123.

<sup>16</sup> Markesinis, Basil S. – Unberath, Hannes: *The German Law of Torts: A Comparative Treatise*, Hart Publishing, 2002. 933.

<sup>17</sup> Infantino, Marta – Zervogianni, Eleni: *Causation in European Tort Law*, Cambridge University Press, 2017. 143.

<sup>18</sup> Infantino, Marta – Zervogianni, Eleni: *Causation in European Tort Law*, Cambridge University Press, 2017. 178.

<sup>19</sup> Coady, David A.: *Testing for Causation in Tort Law*, *Australian Journal of Legal Philosophy*, 27/2002. 89.

<sup>20</sup> Markesinis, Basil S. – Unberath, Hannes: *The German Law of Torts: A Comparative Treatise*, Hart Publishing, 2002. 725.

<sup>21</sup> Flight, Myrtle: *Law, Liability and Ethics for Medical Office Professionals*, Delmar Publishing, 2011. 158.

<sup>22</sup> Kramer, Adam: *Proximity as Principles: Directness, community norms and the tort of negligence*, *Tort Law Review*, 11/2003. 71.

they require the plaintiff to prove a viable chance existed prior to the damaging event.<sup>23</sup> Actually in France, loss of chance is used in French law in a way that might extend the scope of protection for physical injury as well as for damage to property or economic interests. This broad interpretation of the concept of loss provides an almost unlimited opportunity to plaintiffs to seek remedy in case they feel they lost something even if that chance is a bit speculative.<sup>24</sup> In the United Kingdom, loss of chance cases have firm theoretical backgrounds by now, and the courts worked out doctrines to filter claims. In the infamous *Allied Maples Group Limited v Simmons & Simmons*<sup>25</sup>, the court stated the causal link between the plaintiff's alleged loss and the defendant's negligence (breach of the duty of care doctrine) depends on what the plaintiff would have done in events which did not, in fact, happen, and what the defendant would have done in events which did not, in fact happen. Also, in the *Mount v Barker Austin* case<sup>26</sup>, the court emphasized the legal burden is on the plaintiff to prove she lost anything. The defendant's burden of proof, on the other hand is to demonstrate the plaintiff did not lose anything in consequence of his negligence. It is worth to point out that the court in the *Mount v Barker Austin* case added the defendant could successfully exonerate himself from civil liability and, therefore, paying any damages to the plaintiff if his negligence did not, of itself, cause the plaintiff's loss. The latter condition is very important. In case of concurring causes, that is otherwise a very common occurrence and a known doctrine in tort law generally, given that the defendant's negligence was only one of multiple causes, the claim built on the loss of chance principle would not be successful to the plaintiff.<sup>27</sup> The English courts, however, also do not require absolute surety. When assessing whether the plaintiff's prospects of success are more than merely negligible, the court actually makes realistic assessment of what would otherwise have been the plaintiff's prospects, and that assessment can tend towards a general assessment for the plaintiff, in light of the defendant's negligence.<sup>28</sup>

### *Closing remarks*

In general, we may conclude courts over Europe are very selective based on the types of cases. They typically award damages on the ground of loss of chance in medical malpractice cases and rarely in other areas of professional negligence (e.g. construction cases). Courts even establish a logical connection to the breach of the duty of care in case the chance would have been very low even if the tortious action or omission had not been committed. While most courts in Europe tend to have a restrictive interpretation on the loss of chance concept, and they aim to limit the possibility for such claims finding most speculative claims inadmissible, French law seems to be the only exception. The doctrinal consideration behind the lenient approach of French law is the lack of definition for loss in the French Code Civil. Courts enjoy an almost unlimited freedom when interpreting what falls under the concept of loss given that social, technological and moral developments may also contribute in broadening the loss concept in

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<sup>23</sup> Tomlinson, Edward A.: Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking, Louisiana Law Review, 48/1988. 1304.

<sup>24</sup> Tomlinson, Edward A.: Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking, Louisiana Law Review, 48/1988. 1311.

<sup>25</sup> *Allied Maples Group Limited v Simmons & Simmons* (1995) 4 All ER 907.

<sup>26</sup> *Mount v Barker Austin* (1998) EWCA Civ 277.

<sup>27</sup> Michaud, Hillary J.: Tort Law: Concepts and Applications, Pearson, 2013. 197.

<sup>28</sup> Walker, Morris: Causation and loss of chance: claiming damages in professional negligence cases, 2016, available at: <https://www.walkermorris.co.uk/publications/banking-matters-january-2016/causation-and-loss-of-chance-claiming-damages-in-professional-negligence-cases/#>.

France. In general, French courts are notorious of being pro-plaintiff in tort cases, however, just like other courts in Europe, in contractual breach situations, the application and admissibility of loss of chance cases are very low. Contract law scenarios rarely receive broad interpretation when assessing damages, given that contracts contain voluntary obligations and terms the parties agreed prior to the breach and the assessment of damages. As in most European legal systems, liability for breach of a contract is getting to reach a stricter, almost no-fault level, the assessment of damages worthy of reimbursement is rarely step into slippery areas like the problem of loss of chance cases.