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Causation and Loss of Chance: A Commentary

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Chief Justice, Your Honours, members of the profession, fellow members of the Academy,

It is an Honour to offer a commentary upon Justice Jackson's paper today. The topic of causation in the law has vexed the greatest minds, both academic and judicial, and my comment today ranks as a modest side-salad in the array of more substantial and appetising offerings, of which his Honour's is most certainly one. I shall divide the commentary into two parts. Part 1 makes some brief observations about the basic approach to causation that his Honour proposes in the early part of his paper. These comments are largely affirmatory and laudatory of the analysis that is found there and I merely add one or two additional thoughts and suggestions. I also raise a question concerning where, in the structure of the Civil Liability Acts, Courts are likely to deal with cases involving intervening acts. Part 2 turns to the controversial question regarding loss of chance that is at the heart of His Honour's paper. In this part, I shall suggest that his Honour's approach is strongly principled, but that, even accepting it, the scope of the doctrine may prove wider than his Honour suggests. It is also possible that his suggested approach may ultimately be overcome by pragmatic considerations, although on this the jury is out in Australia. I finish my comments with a brief suggestion as to why it is may be that American and Australian Law currently diverge in the ways that they do in respect of the types of chances they currently protect.

Part 1 - The Basic Causal Analysis

His Honour's basic causal analysis is a robust defence of the 'but for' test as a threshold tool in the determination of issues of factual causation. The test is embedded, as you will know, in the structure of the provisions of the Civil Liability Acts (CLAs) under the first stage of the causal analysis and all courts are obliged to apply it under the Acts, as they did at common law, although there is dispensation for departure in unspecified, exceptional instances provided there a good reasons for doing so. What, then, can be said about these departures and the way they should be handled?

(i) *Multiple Sufficient Causes and the NESS Test*

One departure mentioned by His Honour that was always clearly authorised at common law relates to cases involving multiple sufficient causes operating simultaneously to cause the same harm. A paradigm, but unlikely case is that of the sheriff who had sufficient enemies with good enough aim to shoot him in the heart all at precisely the same time. More likely and better represented in the case law is the case of successive, duplicative conditions, where a later event operates to replicate some of the effects of the earlier one, as in *Baker v Willoughby*¹ and *Jobling v Associated Dairies*.² The paradoxical produced by the 'but for' test in such instances - that *no one* killed the sheriff - can be avoided in such instances by abandoning the traditional but for test in favour of Professor Richard Wright's 'NESS' test.³ This asks not whether any given shot was necessary to kill the sheriff, but whether it was a Necessary Element of *one Set* of conditions that was *Sufficient* to do so. This test appears to have been approved for use in such cases by a majority of the High Court in obiter dicta in 2012 in *Strong v Woolworths Ltd t/as Big W*⁴, as well as by Chief Justice French, citing Professor Wright, in *Amaca Pty Ltd v Booth*.⁵ In the United States, the test is found in § 27 of the *Third Restatement of Torts*, where it

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¹ *Baker v Willoughby* [1970] AC 467 (HL).

² *Jobling v Associated Dairies* [1982] AC 794 (HL).

³ R Wright, 'Causation in Tort Law' (1985) 73 *Cal Law Rev* 1735.

⁴ [2012] HCA 5 at [20], per French CJ, Gummow, Crennan and Bell JJ.

⁵ *Amaca Pty Ltd v Booth* [2011] HCA 53, [48].

forms a substitute rule applicable in cases of causal over-determination. Note that no evaluative discretion is left to judge in such instances in America.⁶ A similarly strict rule should, in my view, be overtly built into the jurisprudence of Australian law in applying the exceptional causation provisions of the Civil Liability Acts.

(ii) *Seeing Past Fictional Causal Tests*

Outside cases involving multiple sufficient causes, however, His Honour suggests at paragraphs [31]-[33] that the basic ‘but for’ test should normally be respected and applied. I entirely agree. If a court abandons the test outside of this type of case in favour of weaker approaches based on the proposition that the defendant made a ‘material contribution’ to harm; ‘increased its risk’ or was a ‘substantial factor’ in producing it, it is no longer, in truth, making any *finding* of causal connection at all; it is drawing an *inference* of causation when the facts or evidence do not support it. This may be justified on exceptional occasions for reasons of policy or distributive justice, but no favours are done to the jurisprudence of causation by the pretence that normal causal rules are actually satisfied when X was not at least a necessary element of one sufficient set of conditions to produce Y. I endorse His Honour’s scepticism of the rhetoric of ‘material cause’ in this regard. His admission is replete with the intellectual honesty of the American Legal Realists, although I rather suspect that his Honour would be the last person to align himself with members of that historical movement. The serious point that his Honour’s is making is that these alternative “causal” concepts –material contribution and the like- are language tools that are deployed for worthy purposes, but they hide background normative judgments about a court’s assessment of where the risk of causal uncertainty should be made to lie and we should not be fooled.⁷ For the same reason, it is encouraging to see that the idea that ‘common sense’ can solve difficult causation issues has fallen out of favour with the High Court, although, perhaps to preserve the dignity of its reasoning in former times, the Court sometimes persists in offering explanations for the concept that purport to make it less objectionable. In the *Tambree* case, for example, Justice Callinan appears to have suggested that common sense is, in effect, a reference to wealth of judicial wisdom that is embedded in its experience of previous precedents⁸, not a popular conception of the way the world works, or a fictional common, experiential mind. The idea that we should be frank about our causal judgements and the justifications for them is reinforced in the terms of the Civil Liability Acts. I confess that I am not normally refreshed or much impressed by the Civil Liability Acts, but in this detail I make an exception. Abandoning fictions and bringing the issues out into the open makes for clearer, better, more coherent law.

(iii) *The Structure of the Civil Liability Acts –where do Intervening Causes fit?*

Before moving on to loss of chance, there is final matter regarding the causation provisions of the CLAs that I would like to raise, because it is a personal puzzle that confuses both myself and my students. This concerns the question of where, under the new structure for thinking about causation that is prescribed by Acts, cases of ‘intervening cause’, such as *McKew v Holland, Hannen & Cubitts*⁹ are now to fit. In the old case of *McKew*, you may remember, the plaintiff had suffered an injury to his left leg as a result of his employer’s negligence. He then subsequently attempted to descend a flight of stairs without a handrail and ended up injuring his right leg in consequence. The question was whether the employer was responsible in part for the second injury as well as the first, or whether the plaintiff’s own carelessness was such as to ‘sever the causal chain’ and render the plaintiff himself solely responsible for that injury. But for the first injury, the second would not have been suffered, but the defendant was nonetheless held not to be liable for the second because the plaintiff himself was its only cause. How and where would a court now consider such a case? At one time, one might think that it logically belongs with the questions of factual causation under s 11(1)(a) of the Civil Liability Act 2003 (Qld) . The language of ‘intervening cause’ suggests as much. However, there does not appear to be any

⁶ *McKew v Holland, Hannen & Cubitts* 1969 3 All ER 1621.

⁷ The same view is taken by Kirby J in *Travel Compensation Fund v Tambree* (2006) 224 CLR 627 at [62]-[63].

⁸ See, eg, *Travel Compensation Fund v Tambree* (2006) 224 CLR 627 at [81] per Callinan J: ‘common sense... is.. the sum of the tribunal’s experience as a tribunal, its constituents’ knowledge and understanding of human affairs, its knowledge of other cases and its assessment of the ways in which notional fair minded people might view the relevant events...’ .

⁹ [1969] 3 All ER 1621.

provision in 11(1)(b) for exceptional departures from the 'but for' test in cases in which the test *is* satisfied, as opposed to cases in which it isn't. The result, I think, is that cases in which intervening causes operate will now be dealt with as normative issues regarding the 'scope' of the defendant's liability under 11(1)(b) of the Queensland Act and its equivalents. Perhaps this was always intended and perhaps it is right to place them here. There is no doubt that decisions in such cases require normative judgments regarding responsibility- choices between different potential causes. The question is simply whether they are still to be regarded as 'causal' judgments. Given that they have previously been so regarded, the Act seems to rearrange the furniture. The results will no doubt still be the same. The point does, however, raise a question over the wisdom of legislative provisions that seek to restructure existing common law principles. On this occasion, the realignment involves a distinct, conceptual shift away from the traditional common law understanding and language of 'intervening cause', which could cause complication, if not confusion. A potentially better solution, in my view, would be to replace s 11(1)(b) with a provision that that permits for deviation from the but for test in any case in which the results if produces regarding issues of factual causation are unjustified.

Part 2- Loss of Chance- A Question of Principle, or Pragmatics?

I turn now to His Honour's argument regarding loss of chance. There are many points that can be made on this difficult topic, but I am limited by time.

- (i) A first point is that His Honour, in common with members of the High Court, tends to regard the loss of chance doctrine as being in direct tension with the basic rules of causation and the traditional onus of proof, so that it is to be understood, as representing a 'tectonic shift' in approach (para [63]). This was assumed by the High Court in *Tabet v Gett*,¹⁰ but denied by the Supreme Judicial Court of Massachusetts in *Matsuyama v Birnbaum*.¹¹ The resolution of this question is key to resolving debates about both the propriety and scope of the doctrine.

Only two answers are possible. The first is that there is no tension at all, because the doctrine simply recognises a new form of actionable damage or protected interest in the law. New forms of right, including new economic rights, are developed incrementally by courts from time to time. In *Perre v Apand*,¹² the High Court developed a new, carefully circumscribed right for persons not to have their trading interests harmed by the negligence of others. This right did not previously exist, but was created as a gradual development of the preceding law. Similarly, it might be argued, all that cases such as *Sellars*¹³ do is to recognise an expansion in the range of harms that count as damage in the law and thereby to recognise some chances as legal 'rights'. If a plaintiff can prove on a balance of probabilities that he or she has been caused to lose such a right, then it is proper that the law should compensate the loss. To do so is consistent, not inconsistent, with rules of causation and the normal aims of private law in doing corrective justice and compensating the victims of wrongdoing.

If this is the proper analysis, then the objection that loss of chance doctrine undermines the traditional approach to causation is entirely misconceived. It also logically follows that plaintiffs should be able to recover for the loss of chances of more than 50%,¹⁴ although it would often not be in their interests to advance this line of argument, rather than arguing that they have been caused more traditional end-damage. The challenge that remains, however, is for courts to clearly identify those chances that constitute rights. Sometimes this debate is conducted in terms of asking

¹⁰ [2010] HCA 12 at [130], per Kiefel J (Hayne, Crennan and Bell JJ agreeing), [59], [68] per Gummow ACJ.

¹¹ (2008) 452 Mass 1, 16.

¹² [1999] HCA 36.

¹³ *Sellars Ltd & Poseidon Ltd v Adelaide Petroleum NL* (1994) 179 CLR 332 (HCA).

¹⁴ If the chance is indeed a separate asset, then this must follow. It matters not whether the chance loss was a very valuable one (60, 70, 80 or 90%) or a less valuable one (10, 20, 30%). It was an asset lost and damages must be equivalent to its face value in either case.

whether or not the chance is truly a ‘valuable’ one,¹⁵ but that is, with respect, a distraction. The key question is not whether an economic interest is *valuable*, it is whether there is a sufficiently good reason to protect it, so as to justify its recognition as a primary right in law.¹⁶ If there is, then the difficulties of precisely valuing it must be simply born and dealt with as best judges can. More complex evidence may be needed, but I have no doubt that they will be equal to the task.

This, principled rights-based understanding of the loss of chance doctrine is, I think, explicit in his Honour’s paper, which proceeds on the basis that there must always be some underlying primary right on which the claim can be based. This was also the view of Gummow ACJ in *Tabet v Gett*¹⁷ and there is significant support for it. After all, many of the cases in which losses of chance have been compensated are those in which traditional damage has been proven and the loss of chance is consequential on that, more traditional injury. Cases involving the quantification of damages for loss of life expectancy following a physical injury,¹⁸ or loss of dependency following a tortious death¹⁹ are classic examples. Adopting what I shall call the ‘rights-based’ analysis, it does seem strongly arguable, as his Honour suggests, that a litigant who engages a lawyer to represent his or her case at trial has an independent, primary right to a chance of success.²⁰ Similarly, His Honour is correct, I think, in suggesting that one who pays money to enter a competition has an implied contractual right to be given a chance of winning the prize.²¹ I nonetheless respectfully doubt whether it will be possible to limit the scope of the doctrine of loss of chance to these two instances. Their internal logic surely also extends to cases in which professionals have been contracted to assist in securing a financial opportunity or avoiding a risk,²² or someone has agreed to secure the chance of a job for a plaintiff by providing them with an accurate reference.²³ They might also, in theory, extend to cases in which the defendant has agreed to protect a plaintiff against a particular physical risk. Consider perhaps the example of a person who hires a bodyguard to protect him against criminal attack. The bodyguard knocks off and goes to the pub. The plaintiff is injured. There is a 70% chance that the plaintiff would have been injured anyway, even if the bodyguard had been present, because the force used was extreme. If chances can become rights by contract, as the argument runs, then this too is a case in which the loss of chance argument would surely apply. The plaintiff should get 30% of the damages he or she normally would for the injury sustained.

I also respectfully question his Honour’s apparent assumption that there can only be a valuable right to a chance, where that chance is capable of being bought and sold in an open market. A counter-example in the litigation context is provided by the First Instance decision in *Acton v Graham Pearce*²⁴ (an English case) in which the court was, exceptionally, prepared to award damages for the plaintiff’s lost chance of avoiding a wrongful criminal conviction. The right to avoid false conviction is not an asset that can be bought or sold in a settlement market, but it is nonetheless, surely, a right? If so, the case makes the point that chances can be protected legal rights, without ‘marketable’ in the sense of being transferrable or tradeable.

Even applying his Honour’s strongly principled approach, I therefore wonder whether the lines will be drawn as conservatively as he suggests at paragraph [119]. There are likely to be other cases involving financial opportunities and there may even be cases where opportunities other than

¹⁵ See eg *Tabet v Gett* [2010] HCA 12 at [124], per Kiefel J.

¹⁶ *Ibid.*, at [53], per Gummow ACJ.

¹⁷ *Ibid.*

¹⁸ *Davies v Taylor* [1974] AC 207 (obiter- no substantial chance proved to have been lost).

¹⁹ *Mallett v McMonagle* [1970] AC 166.

²⁰ *Kitchen v Royal Airforces Association* (1958) 2 All ER 241 (66.6% damages).

²¹ *Chaplin v Hicks* [1911] 2 KB 786 (CA).

²² *Hall v Myrick* [1957] 2 QB 455 (solicitor failure to advise client properly of effect of marriage upon inheritance).

²³ *Spring v Guardian Assurance Plc* [1995] 2 AC 296, 327, per Lord Lowry.

²⁴ [1997] 3 All ER 909.

financial ones are also regarded as valuable rights. Nonetheless, on his Honour's rationale, it must, I think be correct to say that the plaintiff in the key *Sellars* case had no independent right to conclude a more profitable contract. It had only the power or factual opportunity to do so. If, therefore, there was a justification for deploying the loss of chance strategy in that particular case, it must be found elsewhere, in more pragmatic justifications.

- (ii) The second answer to the question I posed above is very different. It is that there is indeed a direct tension between loss of chance doctrine and traditional rules regarding causation and the onus of proof, precisely because the doctrine is not being used simply to recognise a new type of protected interest, but rather to sidestep traditional causation rules in respect of claims for damage to more traditional ones. As I suggested above, this appears to be the suspicious view of the High Court in *Tabet v Gett*²⁵ and one of the sources of the Court's hostility to the doctrine. Without attempting to resolve the debate, I simply point out that if this is the correct analysis, then the issues are different and the solutions will therefore be different too. The scope of the doctrine of loss of chance will be decided according to very different criteria to those we have just discussed, not by asking whether the chance lost should be regarded as a valuable *primary legal right* of the plaintiff, but by reference to pragmatic arguments regarding the justice of insisting on traditional causation rules in cases in which there are, for one reason or another, insuperable evidential gaps. Considerations of distributive justice and policy will kick in to determine whether the traditional distribution of the risks of uncertainty onto plaintiffs should, on particular occasions, be redistributed to defendants. Note that the discussion of the High Court in the *Sellars* case proceeds very much along these lines, taking the view that the loss of chance solution is simply a fairer, pragmatic way of dealing with evidential uncertainties than the all-or nothing approach.²⁶

Contrary to what Gummow ACJ assumes in *Tabet v Gett*,²⁷ I do not think that there is anything necessarily *incoherent* in using the doctrine of loss of chance as a pragmatic response to these difficulties in some cases, provided that the reasons for doing so make sense and justify the departure. It is fair to say, however, that if the problem is understood in this way, the solutions will be less predictable. The doctrine will certainly not be mainstream - it will be highly exceptional and reserved for those cases in which there are acutely compelling reasons to shift the risks of evidential uncertainty away from their traditional position. It will also simply not apply where the plaintiff lost a chance of greater than 50%, because in such instances there is simply no pragmatic problem for the doctrine to solve. If its purpose is understood as being to mitigate the difficulty in cases in which the plaintiff cannot, for one reason or another, bridge insuperable evidential gaps, then it has no application in cases in which the plaintiff is able to satisfy the normal onus of proof.

- (iii) If one understands the loss of chance doctrine in this way, as a pragmatic compromise to the normal all or nothing solutions that responds to evidential uncertainties, then the cases suggest a host of different circumstances in which a court might be justified in making the departure. These include:
Firstly, where the uncertainty relates to a future event or hypothetical, as opposed to a past, 'historical fact' (this is a particularly popular approach);²⁸

²⁵ The point is convincing for reasons identified by Kiefel J at [130] – namely that if the cases which recognise loss of chance in respect of physical injury were really recognising a new type of protected interest, there would be an action for increased risk even in the absence of end-damage. This is not the case.

²⁶ *Sellars*, 355-6. per Mason CJ, Dawson, Toohey and Gaudron JJ.

²⁷ [2010] HCA 12 at [53].

²⁸ See eg *Mallett v McMonagle* [1970] AC 166, 176, per Lord Diplock; *Tabet v Gett* [2010] HCA at [62] per Gummow ACJ; *Hotson v East Berkshire Health Authority* [1987] AC 750, 785, per Lord McKay; *Malec v Hutton* (1990) 169 CLR 638, 639-40, per Brennan and Dawson JJ, 642-3 per Deane, Gaudron and McHugh JJ.

Secondly (this is a distinction within the ‘hypotheticals’ category), where the uncertainty stems from the impossibility of proving how a third party (as opposed to the plaintiff) would hypothetically have acted, had the breach not taken place;²⁹

Thirdly, where the uncertainty stems from the special difficulty of proving the consequences of a defendant’s omission, rather than his or her positive action;³⁰

Fourthly, where the case involves what is referred to as true causal indeterminacy. This means that, no matter how much information were to be made available to a plaintiff, the causal question would always be impossible to answer.³¹ Such cases are contrasted with those in which the problem is purely epistemological, in the sense that the facts might in theory be known, but just cannot be discovered. The most common case in which causal questions are indeterminate is where they involve working out what a human being or beings would have decided, had a breach not occurred. This is simply impossible. In response to these problems, courts have sometimes deviated from applying the normal onus of proof in cases involving duress and fraudulent misrepresentation,³² although in that context they do not employ the loss of chance strategy, they simply reverse the onus of proof, or make robust inferences of causal connection.

Fifthly, where there is a particular desire to deter a defendant’s conduct, or incentivise the observance of proper standards of behaviour;³³

Sixthly, where it is the defendant’s own wrongdoing that is responsible for making the proof of causation to the normal standard impossible;

Seventhly, where the chance lost is a loss of an economic opportunity, as opposed to the loss of an opportunity of a better physical outcome,³⁴

Eighthly and finally, where the loss of chance is accompanied by some traditional end-damage, but not where that end damage has never been suffered.³⁵

This is not an exhaustive list of possibilities, but each would trigger the doctrine in slightly different circumstances and each has a slightly different justification. I cannot explore them all here. Different judges and courts have endorsed different limiting criteria and sometimes a mix of them. All of the criteria, it is fair to say, have been subject to one criticism or another and the cases overall cannot be reconciled by reference to any single one.

²⁹ Contrast *Sykes v Midland Bank Executor & Trustee Co* [1971] QB 113 (hypothetical first party action – nominal damages only) with *Allied Maples v Simmons & Simmons* [1995] 4 All ER 907 (hypothetical third party action- damages available where loss of substantial chance). For endorsement of the distinction see eg *Sellars*, 353 per Mason CJ, Dawson, Toohey and Gaudron JJ.

³⁰ *Allied Maples v Simmons and Simmons* [1995] 4 All ER 907, per Stuart Smith LJ. Note that His Lordship here (in my view wrongly) aligns the act/omission distinction with the distinction between past historical facts and hypotheticals. The fact that the defendant’s conduct involved an action does not mean that a plaintiff will not have to prove a hypothetical in many instances. Cases of ‘acts’ do not align with case involving ‘historical facts’.

³¹ *Gregg v Scott* [2005] UKHL 2 at [79], per Lord Hoffmann (drawing on H Reece, ‘Lost Chances in the Law’ (1996) 59 *MLR* 188).

³² For consideration of the law’s proper response to such uncertainties in the context of restitutionary claims, see J Edelman and E Bant, *Unjust Enrichment* (2nd ed, Hart, 2016), pp. 189-94, 219-20, 222-3.

³³ *Matsutama* 452 Mass 1, 14 (2008).

³⁴ This is a distinction represented in the case law of Australia and the United Kingdom. As his Honour’s paper makes clear, the distinction works the other way round in the United States.

³⁵ *Gregg v Scott* [2005] UKHL 2 is sometimes rationalised as such a case, in which the plaintiff had, at the time the action was heard, still not sustained the end-damage physical injury that it was suggested he had lost the chance of avoiding. Note that in *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 278 [29], Gaudron J suggested that the distinction works the other way around- that if end damage has been suffered in the sense that the risk has ‘eventuated’, then there can be no claims for the loss of the chance of avoiding it. The same view is taken by Gummow ACJ in *Tabet* at [62] (in such cases, the chance has ‘played itself out’ and the only concern can be with the end-damage).

It is also important to realise that if the doctrine of loss of chance is understood as a pragmatic response to evidential problems, then its merits need to be examined alongside other strategies that courts have used to plug evidential gaps. These include reversing the normal onus of proof; or drawing robust ‘inferences’ of causation in cases in which the defendant has increased the risk of the type of damage the plaintiff has suffered. These approaches provide other ways dealing with same pragmatic problems, but they are all or nothing solutions. Is it better, then, to respond to insuperable evidential problems by transferring the risk of uncertainty entirely to the defendant, as the High Court effectively did in *Chappell v Hart*³⁶ and the House of Lords did in the *Fairchild*³⁷ case, or is it better to share the risk between plaintiff and defendant, as the loss of chance doctrine prescribes?

There is no obvious ‘right answer’ to these questions when the loss of chance doctrine is understood pragmatically. In cases of personal injury, English and Australian courts currently prefer the all or nothing strategy instead of loss of chance doctrine, by drawing robust causal inferences in the plaintiff’s favour in deserving cases. American Courts, by contrast, prefer all or nothing solutions in financial matters and the pragmatic sharing of the risks of uncertainty in some cases involving personal injury. All-or-nothing, or risk-sharing? Which is better and when?

- (iv) This brings me to the final matter. Is it possible to provide an explanation as to why American and Australian Courts appear to deploy loss of chance doctrine in completely different types of case? I think there is, though I am only speculating. Tort law in the United States is as much a tool of regulation as it is of corrective justice. Arguments regarding social utility tend to be given a longer leash. In such a jurisdictional environment, I suggest, the argument that doctors should be incentivised to observe their duty to protect patients is likely to find more favour in the Courts than it is here; and loss of chance doctrine provides a convenient mechanism for achieving this end. Normal causal criteria are dropped in such cases in the name of the general good and in the interests of achieving efficient levels of care that are proportionate to the risks created. It is notable that in the *Tabet* case, Gummow ACJ expressly rejected such deterrence and incentive arguments³⁸ whilst in the *Matsuyama* case, the Court expressly accepted their importance as part of its reasoning.³⁹ Conversely, I suspect that, given the economic and political environment of that jurisdiction, American courts are far less likely to conceptualise pure economic opportunities as rights and less likely to use tort law as a tool for the regulation of economic markets than the protection of human interests. Perhaps also the political power of the personal injury Bar in the United States has something to do with the matter. In Australia, it is liability insurers that have dominated debate in the last decade and a half.

These are just off-the cuff suggestions, but even speculating about them demonstrates how complex matters can become when one start using the loss of chance doctrine as a pragmatic device for dealing with evidential uncertainties, rather than understanding it as a way of recognising and protecting existing legal rights, as His Honour contends we should. The key question, as ever, is whether the added complexity of pragmatism and difficulties of fair risk-distribution is warranted in the interests of justice.

³⁶ *Chappell v Hart* (1998) 195 CLR 232 (HCA).

³⁷ *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 (HL).

³⁸ *Tabet v Gett* [2010] HCA 12 at [59] (citing the dangers of ‘defensive medicine’ as a counterargument).

³⁹ *Matsutama* 452 Mass 1 (2008), 13-14. See also *McMackin v. Johnson County Healthcare Ctr.*, 73 P.3d 1094, 1099 (Wyo. 2003), S.C., 88 P. 3d 491 (Wyo 2004); *Brune v. Belinkoff*, 354 Mass. 102, 109 (1968).