

**SEARCHING FOR A NEW RATIONALE FOR COMPENSATING
LOSS OF A CHANCE IN POLISH TORT LAW.
LESSONS TO BE LEARNED FROM ENGLAND AND WALES**

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ABSTRACT

The question of compensation of loss of a chance is relatively rarely debated in the Polish doctrine of the law of tort. One reason for such a state of affairs may be the virtually unanimous opinion of both courts and academic commentators with regard to the permissibility of granting damages for loss of a chance of obtaining a benefit – loss of a chance, traditionally defined as potential harm, does not give rise to damages and falls beyond the scope of Article 361 § 2 of the Polish Civil Code. The paper attempts to show, by reference to the latest experiences of common law jurisdictions, that there exist rational bases for an extension of the notion of harm so that it encompasses loss of a chance where a potential acquisition of a benefit is contingent upon an action of a third party or force majeure, on which the victim has no bearing, subject to the caveat that the victim put an effort into generating the chance in question. In the course of the analysis an attempt will be made to demonstrate, with reference to a selection of factual scenarios considered by Polish courts, that it would be possible to achieve fairer results (whilst avoiding placing unfair compensatory burdens upon the other party) to recognize liability for loss of a chance where the victim put a significant effort into making the chance viable, material, and where, based on ordinary life experience, materialization of such a chance may be considered a natural course of events.

Key words: loss of a chance, compensation, causation, potential harm

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1. INTRODUCTION

It is a classic exposition of the Polish rule on harm that a person obliged to pay damages shall only be liable for ordinary effects of an action or omission which the damage resulted from (Article 361 § 1 of the Polish Civil Code). In addition, in the absence of a different statutory or contractual provision, redress of damage shall cover losses which the injured party¹ has suffered as well as profits which it could have obtained, if no damage were inflicted (Article 361§ 2). Drawing heavily from Roman law and Latin, the former type of harm is termed *damnum emergens*, the latter – *lucrum cessans*. The courts have provided some elucidation as to the exact scope of the provision on *lucrum cessans*, i.e. harm in the form of lost benefits – the broad consensus is that a loss of benefits must be substantiated to a very high degree of probability, showing that certain benefits would have certainly accrued had it not been for an intervening event that inflicted harm².

In contrast and by reference to the Polish approach, the English law view will be laid out. With the law in the area being in a state of flux, the weight of evidence points towards faithful reliance on statistical data, however the prevailing reasoning is still deeply entrenched in the *condition sine qua non*, with the cut-off threshold only slightly lowered. I will venture to argue that it would be in line with the needs of fairness, whilst falling

¹ The terms “victim” and “injured party” are to be understood as synonymous throughout the paper, however in describing the position under Polish law I avail myself of the phrase “injured party” as a more accurate translation from the Polish language.

² One of the latest pronouncements of the principle came in the judgment of the Appellate Court for Szczecin of 13 March 2017, ref. number I ACa 251/15: “Loss of benefits (*lucrum cessans*) consists in a non-increase in the assets belonging to the injured party, which would have been generated had it not been for the event that caused the harm. Harm in the form of lost benefits cannot be totally hypothetical, conversely: it shall be proven by the injured party at such a high level of probability that it is justified to assume, in the light of life experience, that a loss of expected benefits indeed occurred. In addition, harm in the form of *lucrum cessans* must be distinguished from potential harm, understood as “loss of a chance to obtain a certain material benefit”. The difference between the two lies in the fact that where *lucrum cessans* is concerned, the hypothesis regarding the loss of a benefit is almost certain, whilst potential harm implies that the probability of losing a benefit is markedly lower. It is assumed that potential harm is not subject to redress”.

within the bounds of conceptual and doctrinal reasonableness, to allow for the recognition in Polish law of at least one of the following rules: (1) damages for loss of a chance shall be granted where the chance is real and viable, and the claimant put a substantial effort into bringing the chance into existence; (2) damages should be granted in a related scenario, i.e. where the defendant created a significant risk of injury for the claimant which eventually materialized, subsequently taking away a viable chance from the claimant.

2. POSITION UNDER POLISH LAW

It has been noted in the literature that the issues of harm and causation are often conflated in the context of the discussion about indirect harm³, perhaps largely due to the fact that the general principles of recoverability as against harm and causation are regulated in one provision of the Civil Code. Pursuant to Article 361 § 1 of the Civil Code, tort liability covers only ordinary effects of an action or omission. Harm, undefined in the law, has been explained by academic writers as a detraction of one's legally protected goods which occurs against the injured party's will⁴ or that part of *lucrum cessans* which is not liable to compensation on account of the degree of probability of it occurring being too low⁵.

³ Helmut Koziol, "Comparative Report", [in:] *Essential Cases on Natural Causation (Digest of European Tort Law)*, (ed.) B. Winiger, H. Koziol, B.A. Koch, R. Zimmermann, Berlin: Springer 2007, 590-591; Maciej Kaliński, "Glosa do wyroku SN z dnia 28 maja 2008 r., II CSK 35/08", *Glosa 3* (2009): 19. The following judgments accentuate the different sides of the spectrum: judgment of the Supreme Court of 28 April 2004, ref. number III CK 495/02 (causation) and the judgment of the Supreme Court of 21 June 2011, ref. number I CSK 598/10 (manifestations of harm).

⁴ Grzegorz Karaszewski, „Art. 361”, [in:] *Kodeks cywilny. Komentarz*, (ed.) J. Ciszewski, Warszawa: LexisNexis 2014, 602; Maciej Kaliński, *Szkoda na mieniu i jej naprawienie*, Warszawa: CH Beck 2014, 3; Adam Olejniczak, „Art. 361”, [in:] *Kodeks cywilny. Komentarz LEX. Tom III. Zobowiązania. Część ogólna*, (ed.) A. Kidyba, Warszawa: LEX 2014, 104; Przemysław Sobolewski, „Art. 361”, in: *Tom III A. Kodeks cywilny. Komentarz. Zobowiązania. Część ogólna*, (ed.) K. Osajda, Warszawa: CH Beck 2017, 162-163, .

⁵ Witold Czachórski, *Zobowiązania – zarys wykładu*, Warszawa: LexisNexis 2003, 100.

A flat-out rejection of liability for loss of a chance of accruing a financial reverberates across the opinions of most of the eminent commentators. Potential harm is said not to be recoverable for two principal reasons: first, it requires paying respect to other than ordinary consequences of the tortious event, contrary to Article 361 § 2 of the Civil Code); second, to qualify as *lucrum cessans*, a high probability that a benefit would have accrued must be shown⁶.

Of all types of tort, medical negligence cases amplify the conceptual tension between harm and causation. For Polish courts have held that it is causation that should govern the recoverability of damages where a distant consequence of a medical professional's act or omission has arguably caused harm⁷. Elsewhere it has been held that the causative link between a medical act or omission and harm may be direct or indirect, more or less distant, but must be within the bounds of "normality"⁸. Causation within Article 361 § 1 of the Civil Code appears to exist where a given event has created circumstances that conduced to or facilitated the occurrence of another event, which then led to the direct infliction of harm⁹. Various terms are used for the required degree of causation – including vague ones that could potentially lower the bar such as "appropriate" or "sufficient"¹⁰, however the standard of "high degree of probability" has been recently reaffirmed in a judgment by the Supreme Court¹¹. It is difficult to establish whether medical negligence cases warrant, under Polish law as it stands,

⁶ Ewa Bagińska, „Kompensacja utraconej szansy – problem związku przyczynowego czy szkody?”, [in:] *Współczesne problemy prawa zobowiązań*, (ed.) J. Haberko, A. Olejniczak, A. Pyrzyńska, D. Sokołowska, Warszawa: Wolters Kluwer 2015, 43-45.

⁷ Judgment of the Appellate Court for Rzeszów of 22 November 2012, ref. number I ACa 306/12; judgment of the Appellate Court for Białystok of 7 March 2013, ref. number I ACa 879/12; judgment of the Appellate Court for Gdańsk of 23 April 2013, ref. number I ACa 721/12; judgment of the Appellate Court for Łódź of 30 April 2015, ref. number I ACa 1752/14.

⁸ Judgment of the Appellate Court for Warsaw of 7 March 2014, ref. number I ACa 1244/13.

⁹ Judgment of the Appellate Court for Warsaw of 13 May 2015, ref. number I ACa 1059/14.

¹⁰ Judgment of the Appellate Court for Warsaw of 4 November 2014, ref. number VI ACa 1981/13.

¹¹ Judgment of the Supreme Court of 24 May 2017, ref. number III CSK 167/16.

a more relaxed treatment of causation. The Supreme Court has ruled that ordinary rules of causation (a result being an “ordinary consequence” of an act or omission) applies to both *damnum emergens* and *lucrum cessans*¹². Importantly, and perhaps crucially for medical negligence, it is not decisive for the purposes of there being an adequate causative link between an act or omission and the resulting harm to establish that the result (effect) does not ensue in a given case (although in others it does or has) or that the result is a “rare case”¹³.

It should not escape us that the courts and the legislator alike, on occasion, allow for the recoverability of some forms of far-fetched benefits which never materialized could be recoverable. One example is the judgment of the Supreme Court of 8 November 1977 (ref. number I CR 380/77), where, whilst discussing the amount of allowance due to a person badly injured in childhood and rendered unable to work, it was stressed that, although a standard salary rate should be applied, account could be taken of one’s extraordinary talents or aptitudes of the injured party. In addition, Article 11a(1) of the Act of 29 August 1997 on Tourist Services¹⁴ constitutes a basis upon which damages for losing a chance of having an enjoyable vacation may be granted¹⁵. Courts grant damages for lost earnings (however not for projected lost earnings accounting for unrealized promotions or bonuses) and chances as regards one’s future may be granted for torts against the person under Articles 444 § 2 and 445 of the Civil Code¹⁶. Particularly, the

¹² Judgment of the Supreme Court of 28 April 2004, ref. number III CK 495/02.

¹³ Judgment of the Supreme Court of 17 November 2016, ref. number IV CSK 27/16.

¹⁴ Consolidated text: Polish Official Journal of Laws of 2004, no. 223, item 2268 as amended).

¹⁵ Although the courts have cast this type of liability in terms of non-financial harm inflicted by means of an improperly organized trip by a tour operator. See the resolution of the Supreme Court of 19 November 2010, ref. number III CZP 79/10.

¹⁶ Judgment of the Supreme Court of 9 November 2007, ref. number V CSK 245/07. A full exposition of the principle was attempted in the judgment of the Appellate Court for Białystok of 12 July 2017, I ACa 71/17: “When establishing the amount of damages due the court must take into account, first and foremost, the type and gravity of the harm sustained, the time period in which it persists, the onerousness of the recovery process and rehabilitation, the persistence of intense pain, the necessity of receiving care and support from other people and the scope of that care, permanent consequences of the harm in

former provision is said to be an avenue for the granting of damages where the injured party's life prospects have been damaged, which triggers the defendant's duty to rectify his wrongdoing and recoup the injured party's financial loss¹⁷. Relevantly to our discussion, Article 446 § 3 of the Civil Code envisages the recoverability to the closest family members of a person killed due to a tort where due to his death a considerable deterioration in their living situation has occurred. Although the courts typically couch the loss sustained by injured parties in such cases in terms of *lucrum cessans* or *compensatio lucri cum damno*¹⁸, on occasion damages are granted where emotional harm has led to a deterioration in one's motivation to pursue vital life goals, in other words: losing a chance of having a productive and successful life¹⁹. The law appears to make a clear distinction between losing a chance of obtaining a financial benefit and where a chance (of a financial nature of otherwise) is lost in connection with a tort against the person²⁰. It has been proposed by M. Nesterowicz that plaintiffs could claim for a deterioration of their health, proportionately to the harm inflicted (e.g. 25% if their chance of recovering from a medical condition is reduced by that percentage)²¹. The larger point here is that loss of chance can be conceptualized, should different wording be used, as *damnum emergens* – this will come back numerous times below.

the physical and mental sphere as well as the limitations triggered thereby in everyday life, including the need for permanent rehabilitation, administration of pharmaceuticals, a change in the mode of employment, habits, manners of spending free time, chances as regards the future and other factors”.

¹⁷ Adam Szpunar, *Ustalenie odszkodowania w prawie cywilnym*, Warszawa: Wydawnictwo Prawnicze 1975, 32.

¹⁸ See e.g. the judgment of the Appellate Court for Katowice, First Civil Division, of 28 April 2017, ref. number I ACa 1224/16; judgment of the Appellate Court for Łódź of 24 November 2016, ref. number I ACa 499/16; judgment of the Appellate Court for Kraków of 9 November 2012, ref. number I ACa 1018/12; judgment of the Supreme Court of 6 April 2011, ref. number I CSK 475/10; judgment of the Supreme Court of 24 September 2010, ref. number IV CSK 79/10.

¹⁹ Judgment of the Appellate Court for Gdańsk of 25 June 2015, ref. number V ACa 128/15.

²⁰ Ewa Bagińska, see note 5, 50-51.

²¹ Mirosław Nesterowicz, *Prawo medyczne*, Toruń: Dom Organizatora TNOiK 2004, 142-143.

A slightly more generous test has been applied to cases where merely an omission may be attributed to the tortfeasor. For in analyzing causation here one should not consider whether the harm would have happened if the omission had not taken place, but whether the chance of harm actually occurring would have been drastically reduced if proper actions had been undertaken²². In the context of loss of a chance, however, it appears that such a differentiation is of no consequence. It is perfectly conceivable for an omission to deprive the injured party of a chance of some uncertain future event materializing – an overlooking in medical diagnosis, neglecting to put a blinker on when swerving etc. In addition, it is often difficult to ascertain what “proper actions” in some factual scenarios are, and even if these are determinable, it does not follow that their undertaking was at all plausible or possible.

3. POSITION UNDER ENGLISH LAW

In England and Wales, the position is far from clear, with, broadly speaking, two competing lines of reasoning: the classic balance of probabilities analysis²³, and what has since been termed “quantification”. Quantification entails allowing the court to avail itself of statistical information with a view to handing down a proportionate award according to the chance, expressed as a percentage, of a certain future, yet stifled due to the tortious act, event occurring²⁴. Generally, a claimant should prove he had a substantial chance, as opposed to a speculative chance, of a benefit eventuating²⁵. The first major case where the but for test was relaxed in the context of a loss of a chance claim was *McGhee v National Coal Board* [1972] 3 All ER 1008. There, a material contribution to risk was held sufficient

²² Andrzej Koch, Związek przyczynowy jako podstawa odpowiedzialności odszkodowawczej w prawie cywilnym, Warszawa: Państwowe Wydaw. Naukowe 1975, 74.

²³ See e.g. *Hotson v East Berkshire Area Health Authority* [1987] AC 750.

²⁴ Chris Miller, “Gregg v. Scott: loss of chance revisited”, *Law, Probability and Risk* 4 (2005), 228-229; Lara Khoury, *Uncertain Causation in Medical Liability*, London: Hart Publishing 2006, 218 et seq.; Mindy Chen-Wishart, *Contract Law*, Oxford: OUP 2015, 539 et seq.; Sandy Steel, *Proof Causation in Tort Law*, Cambridge: CUP 2015, 323-326.

²⁵ *Allied Maples Group Ltd. v Simmons and Simmons* [1995] 1 WLR 1602.

to recover damages. The outcome has been criticized for being heavily influenced by policy considerations and ignoring principle²⁶. Explained as “exceptional”, its ratio was tested in *Gregg v Scott* [2005] UKHL 2, where the claimant had found a lump under one of his arms and was assured by his GP, the defendant, that the lump was in fact a benign collection of fatty tissue. The misdiagnosis led the claimant to ignore the lump, however, after a year where alarming symptoms such as dizziness and intense throat pain ensued, he consulted another GP who rushed him to the hospital with, as it turned out, the proper diagnosis – non-Hodgkin’s lymphoma. During the course of the trial it was borne by statistics that at the time the claimant consulted the defendant, he had a 42% chance of surviving the cancer, a chance that was reduced to 25% when he was finally admitted to the hospital. The House of Lords denied recoverability of damages because at the moment when the defendant’s omission increased the risk of the patient dying (or, in other words, deprived him of a chance of at least extending his life) did not exceed 50%. An important consideration which pointed towards not granting damages was that, at the time of the appeal, the claimant was still alive²⁷, therefore the risk the defendant contributed to seems not to have materialized.

Where a breached duty of care consists in protecting the claimant from being deprived of economic opportunity, it has been argued, or providing the claimant with an opportunity to recover losses, damages should be allowed²⁸. It is this explicit or reasonably implied understanding that should govern recoverability. English law, similarly to Polish law (with the possible exception of Articles 444 § 2 and 445 of the Civil Code), tends towards distinguishing between potential harm representing economic loss and personal injury. The latter is thought to be better compensated on an all-or-nothing basis, as opposed to the proportionate approach of loss of a chance, because where the claimant had, say, a 60% chance of recovery, the doctors could be safe in the knowledge that their potential negligence

²⁶ Vivienne Harpwood, *Modern Tort Law*, Hove: Psychology Press 2005, 167-169.

²⁷ Chris Miller, see note 24, p. 231; “Margaret Fordham, Loss of Chance – a Lost Opportunity?”, *Singapore Journal of Legal Studies* 2005, 214.

²⁸ Jason W. Neyers, Erika Chamberlain, S.G.A. Pitel, *Emerging Issues in Tort Law*, London: Bloomsbury 2007, 481.

would not be as costly as where the chance is higher. Notwithstanding, Baroness Hale in *Gregg* argued forcefully that “Where a patient’s condition is attended with such uncertainty that medical opinion assesses the patient’s recovery prospects in percentage terms, the law should do likewise (...) To decide otherwise would be a blanket release from liability for doctors and hospitals any time there was less than a 50% chance of survival, regardless of how flagrant the negligence”²⁹.

There are numerous outlier cases which could lay the grounds for granting damages in any of the two scenarios outlined in the introduction to the paper. First, in *Dixon v Clement Jones Solicitors* [2004] EWCA Civ 1005 it was held that it was sufficient for a client, whose solicitor allowed a claim the client had against an accountant firm to be statute-barred, to show she had a viable chance of winning the case had she pursued it, and not that she would not have proceeded if she had the right advice. The facts of *Molinari v Ministry of Defence* [1994] PIQR Q33 bear resemblance to *Gregg* and it is regrettable that it was not cited in the latter case. The plaintiff developed leukaemia at work which, his employer conceded and for which admitted liability, was caused by exposure to radiation. After the disease worsened, the plaintiff found himself having a 12% to 20% chance of another relapse which, according to the body of medical expertise available at the time, would have been fatal. He successfully claimed damages on this basis, and it appears that the critical difference between *Molinari* and *Gregg* was that in the latter case the judges were slow to admit there was a “completed tort” – judicial parlance for a risk that has materialized by the time of the trial³⁰.

Helpful as regards my line of reasoning is a line of cases where a material contribution to injury was found sufficient to ground a compensatory claim³¹. In *Fairchild v Glenhaven Funeral Services Ltd* [2004] UKHL 22, Lord Nicholls contended that, since causation is inherently, at least in part, a value judgment, it allows for, exceptionally, extending the defendant’s liability even where the but-for test of causation is not satisfied³². The

²⁹ Per Baroness Hale in *Gregg v Scott*, at [43].

³⁰ Chris Miller, see note 24, 231.

³¹ Sarah Green, *Causation in Negligence*, London: Bloomsbury 2015, 160-165.

³² *Fairchild v Glenhaven Funeral Services Ltd*, per Lord Nicholls at [40].

consensus seems to be that a relaxation of the causation test applies only exceptionally – *Fairchild* concerned an worker who fell down with mesothelioma due to long-term exposure to dust³³. In *Barker v Corus (UK) plc* [2006] UKHL 20, Lord Hoffmann cast the risk of a disease materializing as *damnum emergens*³⁴. I, in turn, would propose to take the opposite route, by perceiving the risk as an omission on the part of the defendant which deprived the claimant of a chance to live free from the disease. As we can see, the language of “material contribution to risk” (as further elaborated in cases like *Sienkiewicz v Greif (UK) Ltd* [2011] 2 AC 229 and *Durham v BAI (Run Off) Ltd* [2012] 1 WLR 867) may be seen as an omission to prevent a very negative consequence from occurring and taking away from the claimant, despite their best efforts, the chance of the consequence not ever realizing itself. Although branded by one commentator as an episode in the “transformation of broadly sensible ideas about causation into a rhetorical legal concept bearing an increasingly tenuous relationship with reality”³⁵, and a reverberating reiteration throughout the judgment that *Fairchild* should be confined exclusively to mesothelioma cases³⁶, I wish to take on board the larger theoretical point, i.e. that material contribution to risk could ground a claim for damages³⁷. Employees who work in conditions blighted by constant exposure to an adverse agent are in their rights to claim damages from their employer – for certain where the risk materializes, i.e. where the claim is brought following the claimant’s falling down with an illness. However, *Gregg* opened an avenue where the chance of the risk eventuating hovers around 50% (a grey zone). Suppose not 8,

³³ Jonathan Morgan, “Lost Causes in the House of Lords: *Fairchild v Glenhaven Funeral Services*”, *Modern Law Review* 66 (2003).

³⁴ Joe Thomson, “*Barker v Corus*: *Fairchild Chickens* come home to roost”, *Edinburgh Law Review* 10 (2006), 425.

³⁵ Per Laleng, “*Sienkiewicz v Greif (UK) Ltd.* and *Willmore v Knowsley Metropolitan Borough Council*: A Material Contribution to Uncertainty?”, *Modern Law Review* 74(5) (2011), 778.

³⁶ See *Sienkiewicz v Greif (UK) Ltd.*, per Lord Brown at [187].

³⁷ I will therefore sidestep what is arguably the key ratio of *Sienkiewicz*, i.e. valuable discussion concerning causal agents. The bulk of the judgment is devoted to causation rules applied to situations where it is unclear which causative agent was dominant in bringing about a particular state of affairs.

but 3 years passed after Mr Gregg consulted his negligent doctor. He was still alive, and had a 55% of survival, however his condition slowly but surely deteriorated. On the all-or-nothing analysis (but-for causation) he would have received full compensation, although disquiet could have been expressed regarding his uncertain future.

On a side note, an argument from freedom of choice could also be made in some circumstances, e.g. in cases like *Chester v Afshar* [2004] UKHL 41, where a back patient underwent an operation not having been told about an attendant 1-2% risk that she might be left paralyzed afterwards. The risk materialized. Having established that the doctor could have been negligent in omitting to provide full information, the court went on to say that negligence in this case was not based on the way in which the medical professional carried out the surgery, but instead on the failure to give full information. This finding was confirmed in *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.

4. QUANTUM OF DAMAGES

It appears implausible to discuss the subject without providing a recipe for the evaluation of damages if recoverability for loss of a chance is to be recognized. Potential harm is difficult to pin down as a plethora of factors, some within the reach of the victim's influence and some not, have a bearing upon the ultimate magnitude of harm actually sustained. Also, the courts in the United Kingdom, even though the victim's chance of avoiding further harm or obtaining a benefit is estimated and expressed in terms of percentage, the approach to the quantum of damages is not comparably proportionate. In other words, if the victim is found to have had an over 50% chance, he receives a predetermined flat amount of damages. However, the number remains the same regardless of whether the chance stood at 51 or 99%³⁸. Conversely, the 50% cut-off means that a victim with a negligible chance is considered equal in terms of his entitlement to damages in the eyes of the law as a person whose chance inches close to 50%. It is evident, and perhaps overly simplistic, to note that the judges

³⁸ *Gregg v Scott*, paras 14-21.

are given a considerable amount of discretion, and that latitude, it appears, is gaining some traction in medical negligence cases in Poland³⁹. Second-guessing or “guesstimating” has been applied in particular in cases under Article 446 § 3 of the Civil Code, with the courts openly admitting that harm recoverable under this provision may sometimes be impossible to quantify⁴⁰.

A sliding scale is to be preferred to fulfil the need for fairness and justice, however inoperable the outcome may be, provided that the loss of a chance has already occurred. Inductively, I would propose that judges account for the effort the victim took to put themselves in a position where, had the loss not been inflicted, there is a distinct possibility that certain benefits would have accrued. For instance, a student lawyer who has sustained brain injury preventing him from pursuing the career path of a lawyer should be additionally compensated for the loss of a chance to pursue the chosen profession. It is not necessary that the damages represent the loss of average earnings of lawyers (although this appears fair), but, hypothetically, the value representing the financial loss incurred in the period between the moment when the harm was inflicted up to the moment when the victim would start to earn the average earnings as a lawyer – in other words, a 10-or-so years’ period between graduating and becoming an associate at a law firm, for example.

To put the foregoing in doctrinal terms, a shift would be advisable from the *conditio sine qua non* (or balance of probabilities) analysis (where non-occurrence of one causative factor may wholly deprive the victim of any recourse to damages⁴¹) to a more flexible, quantification test which would permit proportional recoverability by reference to statistical data⁴², and where no such data is available – a discretionary award reflecting, based upon ordinary life experience, the loss resulting from an inability to

³⁹ See, for example, the judgment of the Appellate Court for Warsaw of 4 November 2014, ref. number VI ACa 1981/13.

⁴⁰ Judgment of the Appellate Court for Łódź of 4 April 2017, ref. number I ACa 1278/16.

⁴¹ For a discussion of how the test is applied in Polish law, see: Przemysław Sobolewski, see note 4, 150-151.

⁴² The test was accepted by the Court of Appeal of England and Wales in the minor-ity judgment of Lanham LJ in *Gregg* in the Court of Appeal ([2002] EWCA Civ 1471).

further pursue one's life goals or otherwise sustain the readiness to achieve a benefit, the receipt of which is one way or another predicated upon having a particular characteristic that had been detracted from or eliminated by virtue of a tortious act⁴³.

5. COROLLARIES OF CONSEQUENCE FOR THE POLISH SYSTEM – CASE STUDIES

It has been hinted at various points throughout the paper that it is difficult to locate the problem of loss of a chance within the tort liability regime. Admissibility of loss of a chance liability, or potential harm, is classified as either lying at the core of causation or the proper definition of harm. From a theoretical point of view, the former view is closer to the truth, I submit. Take the hypothetical example of a person who buys a lottery ticket just before they are pushed by a stranger, as a result of which the ticket falls into a sewage gutter. Indisputably, harm, albeit not necessarily legally actionable harm, occurred as the person has been deprived of a chance of participating in the lottery⁴⁴. The logic, ostensibly short-sighted and simplistic, is nevertheless applied where some initial harm was inflicted first, and further harm could be stopped (in other words, there was a chance of further harm not ensuing) if it was not for some act or omission the victim had no bearing upon. The view is far from

⁴³ See paras 124-128 of *Barker v Corus UK Ltd.* [2006] UKHL 20, where Baroness Hale argues in detail in favour of proportionate recoverability in the context of liability for material contribution to risk.

⁴⁴ One could say “of winning the lottery”, but due to the very remote possibility of this ever happening, I prefer availing myself of the value of participating in the lottery. I think it is mistaken for most academic commentators to focus extensively on potential direct benefits one may derive from a chance, instead of treating loss of a chance as an autonomous loss, consisting in being denied engaging in an activity which, further down the road, may lead to reaping direct benefits. Patrycja Grzebyk has rightly noted that where, for instance, the victim loses the chance of winning a court case because of the lapse of the time limit for appeal, we cannot say merely that their chance did not come to fruition – the chance did not materialize as it had no chance of doing so. See: Patrycja Grzebyk, „Rekompensata utraty szansy”, [in:] *Odpowiedzialność odszkodowawcza*, (ed.) J. Jastrzębski, Warszawa: CH Beck 2007, ed. 1.

controversial, and has been generally adopted in both England and Wales⁴⁵ and Poland⁴⁶.

The “injury within the scope of risk” principle may come to aid as regards a number of claimants whose grievance may be qualified as a “loss of a chance” case. Once an initial injury is inflicted, liability for any and all further foreseeable injury attaches to the defendant⁴⁷. I submit this is similar to my analysis in the preceding paragraph. But the legislator and judges must at one point address the question: if liability for loss of chance is to be allowed after some initial damage is caused, why not allowing it straight away, subject to a balance of probabilities exercise? Despite problems related to the quantification of damages, the courts in multiple jurisdictions have attempted to rely on statistical data to administer justice. Rewarding a lottery participant with a strikingly slim chance of winning may sound grotesque, but, as I argue below, awarding an additional amount of damages for loss of a chance of having a productive life, socially and professionally, is entirely reasonable under many circumstances.

To illustrate the critical junctures of my reasoning in practice, I shall now concisely analyze two cases capable of being reconstructed as ones where loss of a chance damages should have been explicitly acknowledged and granted. First, I will take a breach of privacy case where the defendant publishing house published a number of tabloid stories about a celebrity actress and her relationship with her son, an aspiring model participating at time in the Polish version of “Dancing with the Stars”⁴⁸. The stories were in large part confabulated, manoeuvring between glimpses of truth and outright lies. In particular, some of that information had an adverse effect on the son’s career, e.g. that he was involved in a romantic relationship with his dancing coach, or that he overly relied on his mom’s advice in choosing women. The claimant contended that, due to the untrue material contained in the articles published, he lost a viable chance of obtaining lucrative financial offers and, in general, pushing his career

⁴⁵ Most emphatically: *Fairchild v Glenhaven* [2002] 3 WLR 89.

⁴⁶ See referenced commentaries to Article 361 of the Civil Code in note 3.

⁴⁷ Pat Van den Heever, *The Application of the Doctrine of a Loss of a Chance to Recover in Medical Law*, Pretoria: Pretoria University Law Press 2007, p. 53 *et seq.*

⁴⁸ These are the facts of the case as reported in the judgment of the Appellate Court for Warsaw of 19 February 2014, ref. number I ACa 1073/13.

forward. “Dancing with the Stars” was noted for being a springboard for many a celebrity’s fame and opportunities that come along with it. The Appellate Court for Warsaw remarked that because the claimant and his mother openly talked about their relationship in interviews on a regular basis, they must have been ready for further publications, some of which could show them in an unflattering light. This position is similar to the law of England and Wales in this regard⁴⁹. Notwithstanding, the claimant’s implied consent did not cover untrue and/or fabricated information about his personal life. Crucially, and this is the principal point of contention, the court went on to say that the claimant, as he participated in the 12th edition of the programme, must have (or if in fact did not, should have) known “how the game is played” – his predominant motivation was to up his brand and develop showbusiness opportunities, therefore he must have been prepared for a bombardment of tabloid stories, some of which could have been, by reference to a reasonable assessment of the state of the tabloid industry, of dubious factual value. In sum, instead of accentuating the loss of a chance aspect, the court focused much more on foreseeability. I think this is mistaken. Even if it is granted that potentially defamatory stories were foreseeable, it does not follow that their emergence did not deprive the claimant of a chance to obtain tangible benefits due to his media exposure. Of course, one could counter that a relationship with the media is a two-edged sword, and a celebrity cannot expect only positive stories. This contention, however agreeable, has no relevance to the case at hand, where the stories published were false. I cannot see how a publisher, who intentionally makes available stories to whose authenticity (or lack thereof) one cannot have a reasonable doubt, should not be held liable for distant, albeit causally related, consequences of their actions where the claimant’s expectations and viable chances, which the defendant’s actions dashed, were entirely understandable, reasonable and, *nota bene*, foreseeable, considering the prior record of the show the claimant partook in. The claimant did put an effort in order to receive an invitation on the show, i.e. he received a chance he was in its right to capitalize upon. A proportionate measure of damages would have reflected the clash between his legitimate expectation and prior effort put into making that expectation viable, and

⁴⁹ *Campbell v MGN Ltd* [2004] UKHL 22.

the defendant's intervening, tortious conduct. References could have been made to prior contestants of the show and the level of their achievement following their appearances.

Importantly, a significant number of direct harm instances may be conceptualized as exercises in hypothesizing drawing from the doctrine of loss of a chance. Take a case where a claimant survives a car accident in which her husband and daughter die. As a result, in addition to grave bodily injuries, the claimant sustained severe psychiatric harm and consulted a psychiatrist. Their level of incapacitation is such that for the first three months following her departure from the hospital where she was treated she found herself unable to make a phone call to her doctor, nor is she able to withstand staying alone in her house, and therefore she requires permanent company so that she does not feel anxiety. Before the accident she run, together with her husband, a dentist clinic which subsequently fell in demise as she lost interest in business. She was diagnosed with depression and a serious spinal fracture⁵⁰. Handing down a judgment on the plaintiff's claim for damages for lost chances of a better and more prosperous life, coupled with benefits gained from bringing up a daughter, the court noted that the loss of close family members deprived the victim of her purpose in life, and rendered it meaningless. The court did not explicitly address the issue of loss of a chance of leading a happy family and professional life had it not been for the accident, focusing instead on the physical and psychiatric harm sustained⁵¹. Even so, damages were increased by an amount representing the slump in revenue of the victim's business endeavour (interestingly, accounting for anticipated increases in turnover based upon ordinary trends of growth), as well as for the detriment she suffered from by virtue of her inability to effectively communicate with others being impeded.

I would venture to surmise that, at least in conceptual terms, it would have been proper for the judges to acknowledge that the victim did indeed sustain significant financial and non-financial losses as she was not able to

⁵⁰ These are the facts of the case as reported in the judgment of the Appellate Court for Łódź of 7 September 2016, ref. number I ACa 366/16.

⁵¹ Interestingly, one of the arguments pursued by the claimant in *Gregg* concerned the gratuitous pain and suffering (i.e. direct harm) resulting from a negligent diagnosis. Here, however, the judicial consideration focused, one would say to a disproportionate extent, on the lost chance line of argument.

capitalize upon many an opportunity she had as a mother and experienced dentist technician as well as a businessperson. It is increasingly more often that the courts in Poland openly admit that a sliding scale indeed exists and that the sheer difference between *lucrum cessans* and potential harm is one of degree⁵², and this only goes to show that the crux of the problem with differentiating between these two types of harm may lie merely, disappointingly for a meticulous drafter, in carefully formulating the particulars of a legal definition. It would be possible to achieve fairer results (whilst avoiding placing unfair compensatory burdens upon the other party) to recognize liability for loss of a chance where the victim put a significant effort into making the chance viable, material, and where, based on ordinary life experience, materialization of such a chance may be considered a natural course of events. For it is just and fair to grant damages where the victim, prior to the tort and the ensuing harm, was on course to obtain a certain benefit, even if that benefit was not certain in the legalistic sense of the word. Pursuing a chosen, potentially lucrative, career path, is definitely a lost chance where, by virtue of harm sustained, the victim is no longer able to commit to the extent they used to, or perhaps not able to engage in it at all.

6. CONCLUSIONS

Generally, the benefit of Articles 444 and 445 of the Civil Code creates an avenue for claimants to pursue damages for loss of a chance in cases of torts against the person. The courts, however, as shown by the analysis of the case law above, are reluctant to rely on those provisions, and it often is Article 361 that claims are based and adjudicated upon. No equivalent exists in English law, however there judges have shown remarkable flexibility and readiness to work around statistical data to produce equitable results.

⁵² One of the most recent examples is the judgment of the Appellate Court for Katowice of 9 March 2017, ref. number I ACa 1002/16. This has been reiterated by a number of academic commentators, e.g. Zbigniew Banaszczyk, see note 3, side no. 49; Krzysztof Zagrobelny, “Art. 361”, [in:] *Kodeks cywilny. Komentarz*, (ed.) E. Gniewek, Warszawa: CH Beck 2017.

Above, I argued that it is necessary to recognize recoverability of damages where, by virtue of a tortious act, the claimant was deprived of a viable chance to which emergence he had contributed significantly. There must be an avenue for such claimants as otherwise only two paths, I think, are available. One, and we should be ready to dismiss this, there is a possibility that the courts may move towards a less sympathetic position where they apply their discretion in quantifying the victim's chance of obtaining a benefit in a way that the threshold becomes exceedingly high. Areas where statistical data is available may remain relatively untouched (e.g. medical negligence), however elsewhere, particularly as regards the chance to lead a productive life or pursue a career path, it would be well within the bounds of reason to deny recoverability either on the count of lack of causation or remoteness. After all, the courts would have to delve into the intricacies of human motivation, dedication, external circumstances such as the difficulty of state exams, workplace environment, attitude of the higher management when it comes to promotions etc. Notwithstanding, and this is the second avenue open, recoverability for loss of a chance should be allowed in plain and explicit terms, subject to, understandably, restrictions reminiscent of those applicable to remoteness.

Life experience of most judges should suffice to assess that, in a particular case, the victim could have achieved a lot more had it not been for an intervening tort they encountered. Of course, questions of fault arise – how far should a defendant's fault stretch? I am relatively comfortable in saying that liability for a whole host of, often distant, consequences of one's action, including such where questions of moral luck come into play⁵³, is trite law in both Poland and England – in the former case, the “ordinary consequence” condition is capable of being stretched, whilst English requirements of causation have made it possible to, for example, hold liable a defendant whose employee, having been injured at work due to no fault of the defendant, developed a skin lump that transformed into

⁵³ For more on this, see, for example: Antony M. Honoré, “Responsibility and Luck”, *Law Quarterly Review* 104 (1988), 530 et seq.; Jeremy Waldron, “Moments of Carelessness and Massive Loss”, [in:] *Philosophical Foundations of Tort Law*, (ed.) D. Owen, Oxford: OUP 1995, 387 et seq.; John Gardner, “The Wrongdoing that Gets Results”, *Philosophical Perspectives* 18 (2004), 53 et seq.

terminal cancer⁵⁴. The reasoning above may prove particularly worthwhile considering that the traditional models of assessing hypothetical chances of a certain consequence occurring are growing more and more outdated in a number of fields, particularly medical negligence⁵⁵. Judges have also been proven to overly rely on statistical data whilst turning a blind eye to the contingencies of the case at hand, therefore dismissing claims which fell in a “grey zone” or within a gap in statistical coverage⁵⁶.

Where no statistics are available, the courts could strive towards achieving an equitable result by awarding damages where the defendant materially contributed to the creation of a risk that the claimant sustains a loss. Let me slightly tweak the facts of the second case we discussed in the preceding section. The accident victim was transported to the hospital where her condition was misdiagnosed, and a futile operation was performed. Miraculously, she recuperated and seemed to enjoy life relatively well, however by no means to the extent from before the accident. Even if no bodily harm was inflicted⁵⁷, the hospital had a bearing upon the gravity of her harm and the related loss of a chance of living a productive and happy life. Understandably, the hospital’s fault is considerably lower than that of the driver who caused the accident, however an apportionment would be, by all accounts, equitable. One travail, however, with this approach is that it would have to be rationalized as an instance of an omission to prevent a very negative consequence from occurring and taking away from the claimant, despite their best efforts, the chance of the consequence not ever realizing itself. For otherwise one may run into a conundrum of allowing recoverability for material contribution to risk only where such risk materializes⁵⁸.

⁵⁴ *Smith v Leech Brain & Co* [1962] 2 QB 405.

⁵⁵ In the context of diagnosing cancer, see: Gordon C. Wishart, Andrew Axon, “Proof of causation: a new approach in cancer cases”, *Clinical Risk* 19(6) (2013), 130-138.

⁵⁶ Claire McIvor, “Debunking some judicial myths about epidemiology and its relevance to UK tort law”, *Medical Law Review* 21(4) (2013), 553 et seq.

⁵⁷ Philosophically, this is highly debatable as it may well be the case that every medical intervention involving an interaction with one’s entrails, even where their condition is left intact, constitutes an intervention capable of constituting actionable harm, i.e. the sheer fact that one’s bodily integrity was interfered with for no rational reason.

⁵⁸ As noted by Joe Thomson, see note 34, p. 426.

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