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Recovering for a Loss of a Chance of Survival

Loss of a chance in South African medical malpractice

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Recovering for a Loss of a Chance of Survival

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A. Introduction

Delictual law is an ever-changing area of the law which is constantly developed and adapted by the courts to meet the changing demands of society. One area in which delictual principles have been adapted to address the contemporary needs of society is within the medical malpractice context, in terms of the development of the loss of a chance doctrine. This doctrine allows for a physician to be held delictually liable for causing a loss of a chance of recovery or survival in medical misdiagnosis cases where a physician negligently failed to diagnose a curable disease, and the patient is thus harmed by or succumbs to such a disease.¹ This doctrine has been particularly surrounded by controversy and disagreement within the legal fraternity, whereby some advocates view it as tampering with the standard of proof required to establish causation, being an element needed to prove delictual liability, whereas others argue that the policy considerations in favour of adopting such a doctrine justify a lowering of the causation requirement.

As of yet, the South African judiciary has not expressly developed the country's delictual law in order to incorporate a doctrine of loss of a chance. It is this writer's objective to demonstrate why such a doctrine ought to be introduced into South African delictual law as a secondary claim which is to be available once a claimant is unable to meet the traditional test for causation, and then evaluate in which manner this doctrine should be integrated into the law, keeping in mind South Africa's law of delict and the court's past practices in developing delictual principles.

Section B of this paper will foremost set out the principles inherent to the loss of the chance doctrine, by discussing the origins and historical developments of the doctrine, as well as the rationale and policy considerations behind it. Furthermore, the critiques and complications in

¹ Fischer, D. (2001) *Tort Recovery for a loss of a chance*. 605.

regards to the practical enforcement of the doctrine within the principles of delictual liability will be highlighted. This writer will particularly limit herself in discussing the theoretical difficulties caused by the doctrine in relation to the all or nothing standard of proof for causation.

After having set out the general principles underlying the doctrine of loss of a chance, Section C will go on to evaluate the two different approaches predominately adopted worldwide to overcome the concerns regarding how the doctrine disregards the causation standard. The first approach, the “substantial possibility” approach, calls for the relaxation of the causation standard in specific cases, whilst the second approach, the “pure chance” approach, views the loss of a chance as an autonomous injury in and of itself. This writer will discuss the theoretical arguments which underlie both of these approaches – as advocated both by foreign courts and legal scholars -, as well as the inherent advantages and disadvantages of both such approaches.

Finally, the above discussions will be applied to the South African delictual law context in Section D of this paper. Each of the two approaches as discussed in Section C will be evaluated in relation to South Africa’s delictual law, as well as its judiciary’s past practices in developing delictual principles. By doing so this writer will illustrate which approach is more beneficial and suitable within the South African delictual law context.

B. The loss of a chance doctrine

The basic philosophy underlying the doctrine of a lost chance can be demonstrated best by means of a theoretical example:

On a Monday, a patient goes to the doctor with severe stomach pains, for which he is prescribed pain killers and antacids. The pain persists and he goes to the doctor two more times, on Tuesday and Wednesday. On both occasions, the doctor does a general check-up on the patient, but still goes on to merely prescribe the patient medication to relieve the pain. On Thursday the patient is rushed to the hospital with a burst stomach ulcer and dies due to internal bleeding and liver failure. If his condition had been diagnosed on the first day he visited the doctor, he would have had a forty-five percent chance of recovery. With every day the ailment was not

diagnosed, this chance dropped by 5 percent. Thus, by the time the patient is rushed to the hospital on Thursday, he has only a 30% chance of recovery..

If the deceased's widow were to institute legal actions against the medical practitioner for damages, the all or nothing approach would squash her case, as the pre-existing condition which had reduced deceased's chances of recovery to less than 50 percent, and therefore precludes a finding that on a balance of probabilities the doctor's negligence more likely than not caused the deceased's death. Hence, even though there was a clear negligent malpractice on the part of the doctor, the deceased's estate is left without a recourse against the doctor unless it can be shown on a balance of probabilities that, more likely than not, the patient would have survived if the physician had diagnosed the condition on the first day, and that therefore it was the doctor's negligence, and not the patient's pre-existing condition, that had caused the patient's death

Situations such as the one described above illustrate the burden faced by victims of medical malpractice in proving that it was the physician that caused the unfavourable outcome in cases where the victim's chances of recovery or achieving a certain outcome were below fifty percent. This is so as the test for determining causation in delictual liability is subject to a stringent standard of proof, called the "all or nothing" approach. Due to such a standard of proof only those that can show by a preponderance of evidence – i.e. fifty percent and higher - that it was the defendant, and not the pre-existing condition, which caused the harm are able to hold the defendant delictually liable and receive compensation.² If it is proven that there is a fifty percent likelihood that the defendant caused the injuries or outcome, then the defendant will be liable for all losses.³ This is not the case if there was a forty-nine percent or lower possibility of the chance occurring.⁴ Consequently, most cases of medical negligence are hard to prove as most of such claims involve the tracing of hypothetical cases 'where it is principally impossible to establish a causal connection between the damaging event and a finally suffered injury or loss',⁵ mostly due to the existence of pre-existing conditions, an evidentiary gap or concurrent causes.⁶

² Nicols, S.M. (2001) *Jorgenson v Venter: The South Dakota Supreme Court declares loss of chance doctrine as part of our common law in medical malpractice torts.* 625.

³ Palmer, A.M. (2010) *Kemper v Gordon: The Kentucky Supreme Court forecloses the loss of chance doctrine in medical malpractice cases.* 641.

⁴ Ibid.

⁵ Jansen, N. (1999) *The idea of a lost chance.* 271.

⁶ King J.H. (1981) *Causation, valuation and chance in personal injury torts involving pre-existing conditions and future consequences.* 1376.

It is in this context that the loss of a chance doctrine is utilised to overcome this ‘all or nothing’ standard of proof by providing victims, or their dependants, with an avenue of compensation for the chance lost - especially if the lost chance was in regards to a chance of survival – even if the plaintiff is unable to prove on a balance of probabilities that the chance would have materialised.⁷ How this is done, practically, as well as which courts have opted to introduce such an approach into its delictual law will be explained below, focusing specifically on the English and U.S. case law on the matter (see (i)). The rationales which inform the necessity for the introduction of the loss of a chance doctrine will also be laid out (see (ii)), as well as the criticisms and practical complications the doctrine faces (see (iii)).

i. Origins and development of the doctrine

The loss of a chance doctrine has gradually been introduced into the delictual law of numerous jurisdictions in order to address the inadequacy and perceived unfairness of the all or nothing approach in cases of lost chances.⁸ In order to fashion a relief for a plaintiff who could not meet the all or nothing approach but could still prove that the physician’s negligence played an aggravating factor in the outcome, some courts have allowed for the lowering of the causation standard by means of the loss of a chance doctrine.⁹

The doctrine surfaced for the first time in the early 1900’s English contract case *Chaplin v Hicks*.¹⁰ This landmark case introduced the idea of a lost chance into the English common law by holding that the plaintiff was entitled to receive damages for the loss of an opportunity to win a competition due to the defendant’s failure in informing her that she had been selected to compete as one of the Top 50 candidates.¹¹ Although this judgment was handed down in the auspices of breach of contract, it still highlights the court’s view that a chance has value by holding that the lost ‘opportunity of competition’ was something worth compensating.¹²

Over the past century, the doctrine has been used to recover lost chances in a number of different scenarios, such as failures to warn, rescue or give informed consent to medical procedures, as well as in terms of cases of professional negligence and loss of a commercial

⁷ Van der Heever, P. (2007) *The application of the doctrine of a loss of a chance to recover in medical law*. 1.

⁸ Nicols supra note 2 at 619.

⁹ Ibid.

¹⁰ *Chaplin v Hicks* [1911] 2 KB 786.

¹¹ Palmer supra note 3 at 641.

¹² *Chaplin* supra note 10 at pg 789; Cross L.L. (1987) *Alfonso v Lund: Loss of Chance rejected as a basis for recovery in medical malpractice*. 193.

activity.¹³ This paper, however, will specifically focus on how the doctrine has developed in the context of medical malpractice.

When dealing with the loss of a less than even chance of survival in medical malpractice cases, the courts have particularly applied principles as enunciated in “man overboard” cases in the context of the maritime rescue doctrine.¹⁴ In terms of this doctrine, where a seaman falls overboard and there is no attempt whatsoever made to save his life although there was a reasonable possibility of rescue, the master may be held liable for the failure to take action.¹⁵ This doctrine is specifically applicable in situations where a medical practitioner has failed to diagnose a patient’s disease, and has thus failed to take or recommend any further actions that could be taken to prevent serious harm to or the death of the patients. This doctrine was applied in terms of a medical malpractice case by a landmark U.S. case, *Hicks v United States*.¹⁶ Addressing the defendant’s reliance on the all or nothing approach to causation the court held, ‘When a defendant’s negligent action or inaction has effectively terminated a person’s chance of survival, it does not lie in the defendant’s mouth to raise conjectures as to the measure of the chances that he had put beyond the possibility of realisation.’¹⁷

However, even given the widespread adoption of the loss of a chance doctrine, the English courts have not expressly acknowledged the loss of a chance as a general type of damage giving rise to delictual liability.¹⁸ The English common law’s position remains uncertain, whereby the court in the landmark *Hotson v East Berkshire*¹⁹ case – although rejecting to allow for a claim of loss of a chance – stated that it would not ‘lay it down as a rule that a plaintiff could never succeed by proving loss of a chance in a medical negligence case’.²⁰ The use of the doctrine to try to compensate for the loss of a chance of a cure was furthermore rejected by the House of Lords in *Gregg v Scott*,²¹ where the court emphasised that it would not make an exception to its requirement that causation be proved on a balance of probabilities.²² This attitude mirrors those adopted in other cases such as *Wilsher v Essex* and *Chester v Afshar*²³ where the courts refused to lower the standard of causation or set aside the

¹³ Fischer supra note 1 at 606; Supra note 7 at 12.

¹⁴ Cross supra note 12 at 192.

¹⁵ Ibid.

¹⁶ *Hicks v United States* [1893] 150 U.S. 442.

¹⁷ Ibid at 632. Another misdiagnosis cases where the court drew on rescue cases was *Wendland v Sparks* 574 N.W. 2d 327 (Iowa 1998).

¹⁸ Jansen supra note 5 at 273.

¹⁹ *Hotson v East Berkshire* [1987] 2 All ER 90.

²⁰ Ibid at pg 916.

²¹ *Gregg v Scott* [2005] UKHL 2.

²² Van der Heever supra note 7 at 35.

²³ *Wilsher v Essex* [1988] AC 1074; *Chester v Afshar* [2004] UKHL 41.

all or nothing approach. Thus, English courts are seemingly reluctant to uniformly depart from traditional principles of causation, by rather preferring to approach the issue on a case to case basis. Such an approach causes uncertainty and unpredictability, resulting in unfair results whereby some claimants are awarded compensation for damages, whilst others go empty-handed.

In contrast, however, courts have chosen to limit the test for causation in terms of the doctrine in regards to the loss of a chance resulting in economic loss.²⁴ This results in absurd implications, which is best articulated in the following statement: ‘The net result of the *Chester* and *Gregg* cases is that a person who loses the chance of living a few more years does not lose something of value, while a person who loses a chance of economic betterment does because property, unlike life, has value. These cases are not capable of being reconciled.’²⁵

The U.S. jurisprudence on the matter is also quite varied, with different states approving of the doctrine, whilst others refuse to introduce it into its delictual law. Different approaches have been developed by the courts and scholars in order to overcome the all or nothing binary of causation and thus allowing for a loss of a chance doctrine to be integrated into its law. The U.S.’s development of the doctrine of loss of a chance will be discussed in Section C, where two different approaches which have been taken by its courts will be analysed.

In the next two subsections this writer will discuss the rationale behind adopting a loss of a chance doctrine, as well as the main critiques of the doctrine.

ii. The rationale behind compensating for a lost chance

The advantages of introducing a loss of a chance doctrine can only be fully understood if the rationale behind the doctrine, as well as its public policy considerations and objectives, are emphasised. Three underlying rationales will be discussed, namely the recognition that a lost chance has a value, that there should be fairness in regards to the difficulty of proof and that delictual liability acts as deterrence for the medical profession.

²⁴ *Gregg* supra note 21 at para 42: ‘In principle, the answer to this question is clear and compelling. In such cases, as in the economic ‘loss of chance’ cases, the law should recognise the manifestly unsatisfactory consequences which would follow from adopting an all-or-nothing balance of probability approach as the answer to this question.’

²⁵ Van der Heever supra note 7 at 51.

The loss of a chance doctrine is based on one prevalent and vital premise, being that a chance has value and therefore should be compensated for if it is prevented from manifesting itself due to another's negligent actions. Especially in the medical field an increased chance to survive, to be cured or achieving any other favourable medical outcome is of great value.²⁶ This is even the case where the chance is less than fifty percent, as the loss of any possibility of recovery causes real harm to the patient.²⁷ Especially when taking into account modern science and technology which is able to provide real recovery and cures, the loss of even a small chance of recovery is measurable and real.²⁸ Thus, a chance of obtaining a medical benefit or avoiding a harm has such value that people would even be willing to pay for it, and therefore such a chance, it is argued, should be legally protected.²⁹ It is this rationale that underlies the doctrine which seeks to lower the standard of proof in order to allow a cause of action for a reduction or the total destruction of a chance.³⁰ The critiques which have been raised in regards to this rationale will be discussed in (iii).

The second rationale underlying the development of the doctrine is the objective to alleviate the harsh burden and unfair results the application of the traditional standard of proof has on plaintiffs who lost a chance which had a less than even probability of occurring. Thus, the doctrine of the loss of a chance seeks to integrate fairness by doing away with the difficulty of proof resulting from the stringent all or nothing approach, and instead reducing the causation standard or by defining the loss of the chance as an injury in and of itself.³¹ By doing so, a sense of fairness and equity is restored whereby the plaintiff is given the opportunity to bring forth a triable case based on the aggravation of his or her pre-existing ailment due to the physician's negligence.³²

By insisting that causation must be proven on a balance of probabilities, courts have been accused of imposing an arbitrary dividing line between actionable and not actionable medical malpractice cases. As stated by Palmer, 'to both the statistician and the patient seeking care from a doctor, there is no meaningful difference between a 50.0001% and a 49.999% chance of recovery'.³³ By allowing negligent physicians to walk away without any imposition of liability merely because their act of malpractice only deprived a patient of a less than fifty percent chance of recovery is not only unjust but detrimental to the proper functioning and

²⁶ Palmer supra note 3 at 654.

²⁷ Ibid at 657.

²⁸ Ibid at 658.

²⁹ Fischer supra note 1 at 617.

³⁰ Van der Heever supra note 7 at 23.

³¹ Nicols supra note 2 at 625.

³² Ibid.

³³ Palmer supra note 3 at 657.

integrity of the medical system, as well as dangerous to the safety of all citizens which turn to and trust their doctors to protect their interests, especially their interest in remaining alive.³⁴ As stated by Judge Posner, ‘A tortfeasor should not get off scotfree because instead of killing his victim outright he inflicts an injury that is likely though not certain to shorten his victim’s life.’³⁵

Thus the doctrine asserts fairness as one of the primary justification for recovery for the loss of a chance, as it deems it unjust to deny a plaintiff the chance of holding the negligent physician liable due to a lack of evidence caused primarily due to the defendant’s delictual act (as, by depriving the plaintiff of the treatment due to a failure to diagnose, the plaintiff can never know whether such treatment would have been successful) or a pre-existing condition resulting in the standard of proof not being met.³⁶

Lastly, the rationale which especially addresses medical malpractice claims of action is that of deterrence. This rationale of deterrence is based on the economic theory that actors will act with appropriate precautions if they know that there is a likelihood of a suit ensuing and them being held liable for the harm caused.³⁷ Underdeterrence results in too little precautions being taken, whilst overdeterrence will induce actors to take too many precautions.³⁸

Proponents of the loss of a chance doctrine in the medical malpractice context argue that the all or nothing rule is harsh and ineffective, as it does not provide sufficient deterrence for physicians to not act negligently.³⁹ This is so as the all or nothing rule has two disadvantageous consequences. On the one hand, by not holding physicians liable for any negligence which destroys a chance of recovery which is less than fifty percent, the approach results in underdeterrence.⁴⁰ On the other hand, holding a physician who created a 51 percent risk liable for 100 percent of the plaintiff’s damages leads to overdeterrence and thus the defendant paying for more harm than they actually caused.⁴¹ The loss of a chance doctrine, this writer seeks to propose, strikes a balance between the two by offering a more precise approach, whereby the defendant will only have to pay for the percent of the chance lost, instead of not paying at all if the chance is less than fifty percent, or paying the full amount of damages in the case that the chance is more than fifty percent.

³⁴ Fischer supra note 1 at 626.

³⁵ Palmer supra note 3 at 659.

³⁶ Fischer supra note 1 at 626.

³⁷ Ibid at 627.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid at 627-8.

When dealing with deterrence it is also vital to consider the policy considerations which are raised by the medical and insurance industry, which claim that actions such as the loss of a chance encourage too many medical malpractice cases, resulting in significant losses in the bottom-line of medical practices and insurance firms, as well an increase in the fees medical practitioners will be forced to charge, due to their increasing costs of obtaining insurance. However, as discussed above, the loss of a chance doctrine actually has a fair effect in that physicians will be held liable in proportion to the harm caused. The belief that an adoption of the loss of a chance theory would lead to a significant rise of medical malpractice cases, and thus to increasing malpractice insurance premiums, will specifically be addressed within the South African context in Section D of this paper.

Supporters of the loss of a chance doctrine argue that the arguments made by the medical and insurance industry cannot be upheld, as the all or nothing approach essentially ‘immunis[es] whole areas of medical malpractice from liability’⁴² and essentially ‘declares open season for critically ill or injured persons’.⁴³ It are especially those patients with less than an even chance of recovery who are most in need of protection by the courts as they placed their entire trust into their physician’s capability and relied more on his or her judgment than their own independent judgment.⁴⁴ Therefore, it has been argued that it should be the courts prerogative to protect this class of persons who have been injured or killed by preventable negligence instead of the profits of insurance companies and physicians.⁴⁵

iii. Main critiques of the doctrine and complications relating to causation

Having discussed the three main policy considerations which inform the development of the loss of a chance doctrine, this writer will highlight the main critiques which have been levelled against the doctrine and its advocates. Three critiques will be discussed, namely that chances have no value as its magnitude cannot be quantified with certainty, that there is no workable basis for formulating a limiting principle and, most importantly, that the doctrine unnecessarily lowers the standard of proof with which causation is to be proven, which has detrimental consequences.⁴⁶

⁴² *McMackin v Johnson County, Healthcare Cor.* 73 P.3d 1094, 1099 (Wyo. 2003).

⁴³ *Roberson v Counselman*, 686 P.2d 149, 160 (Kan. 1984).

⁴⁴ *Palmer* supra note 3 at 658.

⁴⁵ *Ibid.* However, it should be noted that such statements are made within the American context, and therefore do not take into account important factors that have to be considered in the non-Western and developing world where health is mainly the state’s responsibility, such as limited state resources.

⁴⁶ *Fischer* supra note 1 at 621.

Critics have voiced numerous disadvantages to the insistence by advocates of the loss of a chance doctrine that a chance has a value and therefore should be legally protected. Opponents question whether a chance has any value at all due to the difficulties associated with the valuation of the chance or in quantifying the damages due.⁴⁷ It is argued that the loss of a chance should not be compensable as loss of a chance claimants often seek the award of wildly speculative damages, which the courts then grant because they have very little reliable evidence relating to the magnitude of the lost chance.⁴⁸ According to those opposing the introduction of the doctrine, the evidence relied on to prove a statistical likelihood of survival or recovery is also speculative and should therefore not be actionable.⁴⁹ By emphasising too much on statistical data, opponents argue that plaintiffs open the door for error, and therefore mislead the jury or the bench.⁵⁰

Such a critique loses sight of the fact that survival rates are based on data obtained by medical experts, which are more than mere guesses but based on extensive scientific data and professional expertise and knowledge regarding the matter.⁵¹ Thus, in the medical malpractice context, is it easier to distinguish miss or negligent cases from standard cases due to the good statistical information available concerning chances of success of certain procedures and medication.⁵² Furthermore, the problems regarding quantification are not insurmountable, and merely highlight that as of yet there is no objective measure, one which can be developed in future with the guidance of public policy considerations.⁵³

Secondly, the doctrine is also criticised in that it does not include a workable basis for formulating a limiting principle, the lack of which would result in any claim of a lost chance being actionable, regardless of how speculative. To counter this argument, many scholars have set out to formulate such limiting principles. For example, Perry argues that the liability imposed in loss of a chance cases can be limited by only imposing liability where the defendant has interfered with the plaintiff's personal autonomy, and the plaintiff then relies on the defendant to his own detriment.⁵⁴ This detrimental reliance can manifest itself in an increased risk of physical harm or economic loss.⁵⁵ In the medical malpractice context, such an interference occurs when a physician deprives the patient of an opportunity to follow a

⁴⁷ Van der Heever supra note 7 at 67.

⁴⁸ Fischer supra note 1 at 621.

⁴⁹ Palmer supra note 3 at 645.

⁵⁰ Nicols supra note 2 at 636.

⁵¹ Palmer supra note 3 at 645.

⁵² Ibid at 632.

⁵³ Van der Heever supra note 7 at 67.

⁵⁴ Fischer supra note 1 at 623.

⁵⁵ Ibid at 625.

preferable course of action, for example if the physician misdiagnosed the patient's disease or negligently failed to detect the cause of the patient's ailment.⁵⁶ By interfering with the patient's autonomy to decide on undergoing a certain medical procedure or taking certain medication, the physician deprives the patient of a chance of recovery or a cure, which – according to Perry - should be regarded as a delict.

The final, and most critical, criticism of the doctrine – and the one which this writer will specifically seek to address in the remainder of this paper – is that the loss of a chance doctrine, as it has been adopted in most jurisdictions, tampers with traditional causation standards. Causation is one of the elements a claimant has to prove in order to establish the delictual liability of the defendant. To meet this requirement, the plaintiff must introduce evidence which establishes a reasonable basis for the conclusion that it was the defendant's actions that more likely than not were the cause of the harmful result.⁵⁷ In terms of the medical malpractice context, the plaintiff must therefore establish with a reasonable certainty that there is a sufficient causal connection between the patient's loss or injury and the physician's actions.⁵⁸ This causal connection is a question of fact, and is mostly supported by the evidentiary testimony of an expert witness.⁵⁹ The plaintiff must essentially prove on a balance of probabilities that, were it not for the physician's negligent act or omission, the favourable chance would have materialised.⁶⁰ As discussed above, this all or nothing approach – whereby a plaintiff must prove causation on a balance of probabilities, failing which there will no relief granted whatsoever – is very difficult in situations in which there are pre-existing conditions or where there is no medical certainty whether a certain favourable outcome would have materialised as the physician's negligence robbed the plaintiff of the chance of every knowing.⁶¹

The next section will highlight two approaches that have been used by the courts and advocated for by legal scholars to overcome the perceived harshness of the all or nothing approach. Firstly, the substantial possibility approach will be discussed, being an approach which allows for the lowering of the causation standard. It is this approach which has traditionally been used to give effect to the loss of a chance doctrine, and is subject to many criticisms relating to its tampering of the traditional causation standard. Secondly, the pure chance approach will be discussed, which seeks to meet the criticism mentioned above. It

⁵⁶ Ibid.

⁵⁷ Cross supra note 12 at 190.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid 191.

⁶¹ Ibid.

does so by maintaining the traditional all or nothing approach for causation, and instead shifts the focus from causation to wrongfulness, being another element of delictual liability.

C. Overcoming the problematic all or nothing causation standard: Two approaches

Although over the past years different approaches have been formulated by foreign courts and legal scholars which result in the rewarding of claims for lost chances, this writer will discuss the two most prominent approaches which have been adopted and advocated for. Whilst the first approach allows for the lowering of the traditional causation standard, the second approach, the pure chance approach, does not alter the causation standard but rather shifts the focus to wrongfulness by regarding the loss of a chance as an injury in and of itself. In this section the theory behind each approach will be discussed, as well as the court decisions and academic writers which have formulated, adopted and critiqued these.⁶² Only in Section D will this writer address which approach is best suited in the South African context.

i. The relaxation of the causation standard

‘When a defendant’s negligent action or inaction has effectively terminated a person’s chance of survival, it does not lie in the defendant’s mouth to raise the conjectures as to the measure of the chances that he has put beyond the possibility of realisation, if there was any substantial possibility of survival and the defendant had destroyed it, he is answerable. Rarely it is possible to demonstrate to an absolute certainty what would have happened in the circumstances that the wrongdoer did not allow to come to pass. The law does not in the existing circumstances require the plaintiff to show to a certainty that the patient would have lived had she been hospitalised and operated on promptly.’⁶³

As can be seen in this extract from *Hicks v United States*, a number of jurisdictions, in response to the perceived harshness of the all or nothing burden of proof, have resorted to lowering the standard of proof of causation by relying on the substantial possibility approach. According to this approach, causation in a loss of a chance case, where the plaintiff lacked a greater than even chance of recovery, will be proven once a reasonable possibility of survival has been demonstrated.⁶⁴ Therefore, the traditional all or nothing standard of proof used to prove proximate causation for delictual liability is redefined and replaced by a lower standard of substantial possibility in cases where the plaintiff is unable to prove causation on a balance

⁶² As the U.S.’s medical malpractice field is the most developed, this writer will primarily focus on approaches used in U.S. courts.

⁶³ Hick supra note 16 at 632.

⁶⁴ Cross supra note 12 at 196; see *Herskovits v Group Health, Washington Supreme Court* (1983) 99 Wash, where it was held that the physician’s failure to diagnose the patient’s lung cancer had caused a six month delay in diagnosis, thus depriving the plaintiff of a 14 % chance of surviving five years, was substantial and compensable.

of probabilities. The evidentiary burden which must be met by the plaintiff can be achieved by demonstrating that there was a substantial possibility that the plaintiff would have avoided the harm but for the defendant's conduct.⁶⁵ Hence, under this standard '[i]f there was any substantial possibility of survival and the defendant destroyed it, he is answerable.'⁶⁶

Essentially, the unfairness of the all or nothing approach has caused courts to manipulate the rules affecting causation in order to mitigate the perceived harshness of the rule.⁶⁷ Similarly, other jurisdictions have recognised the substantial factor test, by holding that 'the plaintiff must prove that the defendant's breach of duty and deviation from the standard of care was a substantial factor in causing the reduced chance of recovery or survival'.⁶⁸ Therefore, to prove proximate cause, it is sufficient for the plaintiff to only prove that the defendant's negligent act, and not the pre-existing condition, was a substantial cause or factor in bringing about the harmful result – there is no need to prove that the defendant's act was the sole cause of the injury.⁶⁹

Both these tests – the substantial possibility and the substantial factor test – thus manipulate the traditional all or nothing rule of causation in an effort to mitigate the perceived harshness of the stringent burden of proof in cases where the plaintiff has lost a less than even chance, or where concurrent causes or pre-existing conditions complicate the plaintiff's ability to meet the traditional causation standard.⁷⁰ Therefore, in order to address the inequity caused by the all or nothing approach (where, for example, a plaintiff who has lost a chance of 49 percent will not be able to recover for any of the harm suffered), courts have resorted to lowering causation standards in order for a plaintiff to meet the required elements in establishing delictual liability.

In order to succeed in his or her loss of a chance claim, the plaintiff has to offer expert testimony that illustrates that some compensable, "substantial" deprivation of a chance of recovery occurred due to the physician's negligence.⁷¹ Determining what should be regarded as "substantial" has, however, been a difficult task. Courts have generally avoided fixing exact percentages or pronouncing on a consistent definition of substantial.⁷² In *Jorgenson v*

⁶⁵ Foran E.M. *Medical Malpractice: A lost chance is a compensable interest*.485.

⁶⁶ MacIntosh V.E. (1983) *Medical malpractice and 'loss of chance' actions – What standard should Florida adopt?* 147.

⁶⁷ King supra note 6 at 1377.

⁶⁸ Palmer supra note 3 at 655, See also *Deutsch v Shein* 597 S.W.2d 141 (1980); *Hamil v Bashline* 481 Pa. 256 (1978).

⁶⁹ Ibid; Cross supra note 12 at 196.

⁷⁰ Kind supra note 6 at 1368; Foran supra note 65 at 479

⁷¹ Nicols supra note 2 at 631

⁷² Palmer supra note 3 at 645

*Vener*⁷³, substantial loss was defined as being less than 50% but still considered significant.⁷⁴ In other jurisdictions, the determination of what is considered “substantial” is left to the jury to decide.⁷⁵ Some jurisdictions have furthermore added other limiting factors alongside that the loss of the chance must have been substantial, in that in Kansas it must also be shown that the resulting harm was also substantial.⁷⁶ Other jurisdictions have placed a cap on what percentage of recovery is too low for the filing of a suit under the loss of chance doctrine.⁷⁷

According to Wallace, there are three interpretation of the term “substantial possibility”, ‘One interpretation is to recognize the substantial possibility of loss of chance when the lost opportunity was less than fifty percent. A second interpretation is that the loss of a substantial chance includes a loss of a chance between fifty percent or less to “anything greater than five percent. A third interpretation is that “substantial” means anything exceeding fifty percent.’⁷⁸ This uncertainty and vagueness of the term “substantial” is one of the most prevailing critiques of this approach, whereby the seemingly wide discretion offered by the term allows for the “opening of the floodgates” of medical malpractice liability.⁷⁹ The point at which the percentage of the chance lost can be seen as too trivial is unknown. Some courts have even gone so far as to hold that the loss of a chance doctrine applies ‘no matter how small that chance may have been’, as was done in *James v United States*.⁸⁰ Thus, it has been argued that the ambiguity of the ‘substantial’ standard could lead to physicians being held liable for the loss of any chance, no matter how small or trivial.⁸¹ However, Jansen argues that the loss of a chance doctrine, utilising a relaxed causation standard, does not open the floodgates for highly speculative claims. When looking at the court’s approach to this doctrine, Jansen states that ‘courts have seen no difficulties in distinguishing a substantial chance whose loss is recoverable from purely speculative claims.’⁸² Furthermore, courts could use other judicial tools to prevent the success of too speculative claims.⁸³

⁷³ *Jorgenson v Vener* 616 N.W. 2d 366 (2000).

⁷⁴ *Ibid* at para 29-31.

⁷⁵ Weigand, T (2002) *Loss of chance in medical malpractice: The need for caution*. 9.

⁷⁶ *Ibid*

⁷⁷ Fox M.J. (2009) *The loss of chance doctrine in medical malpractice The need for Tennessee’s adoption of the loss of chance doctrine in medical malpractice litigation*. 230.

⁷⁸ Wallace B.D. (2009) *Poor policy stunts Tennessee tort law again: The need for Tennessee’s adoption of the loss of chance doctrine in medical malpractice litigation*. 229.

⁷⁹ Nicols *supra* note 2 at 631-2.

⁸⁰ *James v United States* 483 F. Supp. 581, 587 (N.D. Cal 1980).

⁸¹ Fox *supra* note 77 at 100

⁸² Jansen *supra* note 5 at 294

⁸³ Such as specifying caps or by arguing that the case brought was so frivolous that it was vexatious and should therefore be thrown out of court.

Opponents of the doctrine see this tampering of causation standards as essentially abolishing the plaintiff's need to establish causation, allowing for a lottery-type approach to awarding damages.⁸⁴ Furthermore, it has been argued that by altering the causation standards of delictual liability, the doctrine is hindering the court's truth-finding function, as judges can no longer establish with a degree of certain whether a defendant actually caused the complained-of delict.⁸⁵ This results in a defendant having to bear the costs of a harm where there was no established legal proximate cause.⁸⁶ In a macro context, it is also argued that the doctrine, in allowing for speculation to meet the standard of proof, would have the effect of penalising the medical community.⁸⁷ As stated in *Gooding v University Hospital Building Inc*, 'No other professional malpractice defendant carries this burden of liability without the requirement that plaintiffs prove the alleged negligence probably rather than possibly caused the injury.'⁸⁸ Thus, the tampering of the standard of proof may result in a defendant being held liable 'simply because a patient fails to improve or where serious disease processes are not arrested because another course of action could possibly bring a better result.'⁸⁹ Critics of the relaxed causation standard furthermore argue that the manipulation of the all or nothing approach has inequitable consequences on the defendant whereby the defendant has to be responsible for the entire cost of the injury although he or she only caused a small percentage (but viewed as 'substantial') of the plaintiff's harm.⁹⁰

ii. Pure chance theory: Recognising a lost chance as a separate injury

'Attempts to deal with the problem posed by the destruction of a chance by tinkering with the standard of proof can only further confuse matters of loss assignment. If the law on this question is to be rationalised, a vehicle other than the standard of proof will have to be used. The appropriate vehicle is a re-evaluation of the traditional ways of thinking about the interest for which the relief is sought and the role of chance in valuing that interest.'⁹¹

Following the criticisms levelled at the loss of a chance doctrine due to the court's relaxation of the burden of proof of causation, many scholars and supporters of the doctrine set out to conceptualise an approach which would not tamper with the causation standards, but would

⁸⁴ Nicols supra note 2 at 633.

⁸⁵ Ibid at 635.

⁸⁶ Ibid at 639.

⁸⁷ Ibid.

⁸⁸ *Gooding v University Hospital Building Inc*. 445 So. 2d at 1019-20.

⁸⁹ Ibid.

⁹⁰ MacIntosh supra note 65 at 487-8. This can be seen in juxtaposition to the traditional all or nothing approach which is inequitably affects the plaintiff who cannot recover for any of the harm he or she suffered merely because the greater than even probability barely is missed.

⁹¹ King supra note 6 at 1370.

still give those that lost a chance the opportunity to bring a triable case to court. Writers such as Joseph H. King Jnr and Nils Jansen thus developed an approach which focused on recognising the loss of a chance as a separate injury in and of itself, thereby moving the conversation away from causation to valuation. Instead of redefining the standard of causation, the pure chance theory focuses and redefines the injury suffered by the plaintiff and shifts the focus of the percentage of the chance lost into terms of assessment of damages.⁹² With the pure chance approach the issue of proximate causation is addressed by treating the loss of a chance to a better outcome – and not the patient’s death – as the injury.⁹³ By means of this approach, the death of the patient is not seen as the injury, but the lost chance is the injury caused. Therefore, it is no longer the plaintiff’s onus to prove on a balance of probabilities that the patient’s death would not have occurred but for the doctor’s negligence – which is an onerous task in loss of a chance cases, as pre-existing conditions and multiple/concurrent causes usually distort this truth-seeking mission.⁹⁴ Rather the plaintiff must prove on a balance of probabilities that the practitioner caused the loss of the chance of survival, being the injury suffered by the plaintiff. Essentially, the pure chance theory is thus a theory of injury, and not one of causation.⁹⁵

Before moving on to the technicalities of this approach, this writer will highlight the theoretical underpinnings and justification behind the theory by looking at the writings of King and Jansen. King in “*Causation, valuation and chance in personal injury torts involving pre-existing conditions and future consequences*” emphasises that the distinction between causation and valuation must be preserved.⁹⁶ He criticises the courts in their failure to examine causation without an accompanied analysis of its companion concept of valuation.⁹⁷ By understanding the difference between causation and valuation, instead of conflating the two issues into a single enquiry, King argues that cases involving loss of a chance, where pre-existing conditions come into play, can be resolved without tampering with the causation enquiry.⁹⁸ Whereby causation relates to the fact of a loss or the source of the loss, valuation in contrast is the process of identifying and measuring the loss that was caused by the tortious conduct.⁹⁹ By keeping this distinction in mind, the problems raised by pre-existing conditions can be dealt with during the valuation and calculation-of-damages phase, instead

⁹² Ibid at 1354; Jansen supra note 5 at 271 and 282; Cross supra note 12 at 199

⁹³ Palmer supra note 3 at 653

⁹⁴ Ibid

⁹⁵ Ibid.

⁹⁶ King supra note 6 at 1354.

⁹⁷ Ibid. at 1353

⁹⁸ Ibid at 1354

⁹⁹ Ibid

of complicating the issue of causation where the pre-existing conditions have not completely preordained an adverse outcome.¹⁰⁰ Therefore, by means of this approach the pre-injury condition of the victim is only taken into account at the valuation stage, not when discussing causation.¹⁰¹ King illustrates this logic by means of an example, “That a terminally ill victim would have died on Tuesday, the next day, does not prevent the defendant’s conduct from being a cause of his death on Monday, but would obviously be quite relevant to the question of damages.”¹⁰²

Jansen’s “*The idea of a lost chance*” has also been regarded as authoritative work in relation to the pure chance theory. In his view, a lost chance should be regarded as a harm which should generate recovery in cases of unclear causation.¹⁰³ Jansen emphasises the difference between chances and final events, whereby a chance by itself should be viewed as a legal right.¹⁰⁴ His theory is in part inspired by the French and Dutch’s law approach towards the loss of a chance doctrine, whereby both jurisdictions deal with the issue in terms of harm itself and the quantification of damages, instead of trying to solve the theoretical difficulties of the doctrine within the auspices of causation.¹⁰⁵ Thus, “a new kind of harm is accepted, and causation has to be shown in relation to this harm”.¹⁰⁶

At the very basis of the pure chance approach is therefore the need to assist the plaintiff’s interest in protecting their chances, being a thing of value.¹⁰⁷ It matters not, legally, whether the victim on a balance of probabilities would have suffered the final damage even in absence of the tortious action.¹⁰⁸ Jansen explains this submission by means of the following anecdote:

‘If a tortfeasor destroys or steals money which his victim is about to spend in a casino, he may not claim that he did not in fact cause any damage because the victim would have lost or spent the money anyway. (...) In the same way, the very meaning of the idea of a lost chance is that it must be questioned whether, on the balance of probabilities, the victim would have in fact suffered a final damage even in absence of the tortious action. In legal terms this question no longer arises.’¹⁰⁹

According to Jansen, the risk that the final damage may occur or be avoided, or whether a final benefit is obtained, should remain exclusively in the hands of the victim – this is a personal right, which another then interferes with when he or she robs the victim of such a

¹⁰⁰ Ibid

¹⁰¹ Ibid at 1356.

¹⁰² Ibid at 1361.

¹⁰³ Jansen supra note 5 at 271.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid at 274.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid at 283.

¹⁰⁹ Ibid.

chance to make an own determination.¹¹⁰ Thus, in terms of a medical malpractice context, a physician would not be able to argue that the victim would have died even if he or she would have been treated correctly, as the physician's misdiagnosis or failure in properly informing the victim robbed the victim of the chance to decide by him or herself whether to proceed in such a way manner notwithstanding the possible risks.¹¹¹

To illustrate the difference between discussing the victim's pre-existing condition at the different stages, as well as considering the loss of the chance as an injury, this writer will refer to the scenario given at the beginning of this paper.

In this case, the victim had a pre-existing condition, being a stomach ulcer, for which he had a forty-five percent chance of recovery had the doctor discovered it at the first consultation. With every day the ailment was not diagnosed, this chance of recovery dropped by 5 percent, leaving him with a thirty percent chance of survival by the time he is rushed to the hospital. If the traditional approach is used – being the one where the concept of valuation is not analysed separately and the lost chance is not seen as an injury – the all or nothing approach would squash the plaintiff's case, as the pre-existing condition which had reduced the patient's chances of recovery to less than 50 percent and therefore precludes a finding that on a balance of probabilities the doctor's negligence more likely than not caused the patient's death. In contrast, if the concepts of causation and valuation are kept distinct there is a different result. Even though the victim's chance of survival was lower than 50 percent, the doctor caused a loss of a 5 percent chance every day that he did not diagnose the victim's ailment. As the physician did not diagnose the deceased's ailment for three days, his negligence caused the loss of a 15 percent chance of survival. Therefore, whereas the causal link between the physician's negligence and the deceased's death could only be established with 15 percent, the loss of a chance of 15 percent can be proved with a certainty of 100%.¹¹² Consequently, by means of the pure chance theory the defendant's negligence can still be established as a *conditio sine qua non* of the deceased's lost chance – and not of the deceased's death itself – without tampering with the causation standard or altering the traditional elements of delictual liability.

Thus, the lost chance is seen as an injury, worth compensating, and for which causation can be proven on a balance of probabilities by leading expert evidence proving that the doctor's misdiagnosis lowered the chances of the victim. Therefore, while in terms of the traditional

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid at 282.

approach to causation the plaintiff could not prove on a preponderance of evidence that the victim was denied a chance of recovery by the defendant's negligence, in terms of this approach the plaintiff can show that more likely than not that it was the doctor who deprived the victim of a 5 percent chance of recovery every day the former failed to diagnose him.¹¹³

Once causation has been proven, the issue of valuation of damages must be approached. It is then at this stage that the victim's pre-injury condition will be taken into account, whereby the defendant should not be held liable for harm he has not caused.¹¹⁴ Thus, the defendant should only be subject to liability to the extent that he tortuously contributed to the harm by allowing the pre-existing disease to progress by failing to diagnose it.¹¹⁵ Thus, the plaintiff's recovery has to be limited to a percentage proportional to the chance lost.¹¹⁶ Damages are calculated by considering what chance was lost and what the value of the total recovery would be worth.¹¹⁷ As has been discussed above, advocates for the loss of a chance theory have highlighted the fact that calculations of the percentage of chance actually lost has become more reliable due to the medical innovation in that regard. As was stated by Palmer, '[a]lthough there are few certainties in medicine or in life, progress in medical science now makes it possible ... to estimate a patient's probability of survival to a reasonable degree of medical certainty'.¹¹⁸ Practically, the court thus calculates the damages due by taking the total of all 'damages usually recovered for the underlying injury or death multiplied by the percentage of the lost chance'.¹¹⁹

When considering the example given at the beginning of this paper, if the victim's death caused a total injury of R 1 000 000 to his widowed wife, the damages that could be awarded to the plaintiff can be calculated by multiplying the total damages of R 1 000 000 times the percentage of the lost chance, being 15 percent over 100, as the physician had failed to diagnose him for three days and his chances of recovery fell by 5 percent for every day the condition was not diagnosed and treated. According to these calculations, the court could award the plaintiff R 150 000 for the 15 percent lost chance the physician caused by his negligence.

As can be seen by means of this example, the pure chance approach separates the question of what/who caused the loss (causation) from the question regarding what the nature and extent

¹¹³ King supra note 6 at 1364.

¹¹⁴ Ibid at 1356.

¹¹⁵ Ibid at 1360.

¹¹⁶ Weigand T (2003) *Loss of chance in medical malpractice: A look at recent developments*. 624.

¹¹⁷ Ibid.

¹¹⁸ Palmer supra note 3 at 654.

¹¹⁹ Ibid at 660; *Delaney v Cade* 873 P.2d 175, 187 (Kan. 1994).

of the loss is (valuation).¹²⁰ By doing so, the pure chance approach seeks to find a fair balance between, on the one hand, giving those that have lost a chance of survival an avenue to pursue compensation for their loss, but also, on the other hand, ensuring that the medical community does not have to pay damages for harm that they did not cause by their tortious conduct and which could be attributed as a pre-existing condition of the victim. Thus, damages are apportioned in direct relation to the harm actually caused, by neither over or undercompensating the plaintiff.¹²¹ Most importantly, it does so without altering or modifying the traditional test for causation in delictual law, whereby the lost chance is viewed as a compensable harm.¹²²

D. Integrating the loss of a chance doctrine into South African delictual law

Having set out the different approaches that have been taken in other jurisdictions in order to introduce a loss of a chance claim in delictual law, as well as the considerations which lean in favour of such an adoption, this writer will now bring the conversation into the South African context.

The suitability of either of the two different approaches discussed in this paper, namely the substantial possibility and pure chance approach, has to be judged by evaluating how these fit in and align with current principles of South African delictual law. The substantial possibility approach's suitability has to be evaluated within the confines of the delictual element of factual causation, whilst the pure chance doctrine has to be considered in relation to the element of wrongfulness. It is at this point that the current state of South African delictual law will be set out and examined, in order to determine in which manner the loss of a chance doctrine could best be integrated into South African law so as to provide a secondary claim for plaintiffs that are unable to meet the traditional causation standards.

After evaluating the legal logistics and aspects of such an adoption of the loss of a chance doctrine, this writer will lastly address some of the practical implications – and, as some critics might call it, complications – of such an adoption, specifically relating to the medical

¹²⁰ King *supra* note 6 at 1363.

¹²¹ Palmer *supra* note 3 at 660.

¹²² Weigand *supra* note 116 at 618 and 624.

community, medical malpractice insurance and burden placed upon the State in regards to funding.

i. The relaxation of the causation standard and the ‘but for’ test for causation

The substantial possibility approach, as discussed in Section C, allows for a claim in the loss of a chance of a cure by lowering the factual causation standard. Thus, in order to evaluate if and how such an approach could be adopted into South African delictual law it is foremost necessary to set out the basic principles regarding factual causation. Due to varying, and at times vague, judgments handed down by the South African courts in the past, the endeavour to pinpoint what exactly is understood to be the test for factual causation is complicated, and not conclusive.

As discussed before, factual causation is the first distinct inquiry of the element of causation and concerns itself with establishing a factual nexus between the defendant’s conduct and the plaintiff’s harm.¹²³ Only once factual causation has been established will the question of legal causation arise, which seeks to inquire whether the harm was too remote from the defendant’s conduct.¹²⁴ In regards to the issue at hand, we are only concerned with factual causation, as it is this inquiry which focuses on whether it was the defendant’s conduct which factually caused the plaintiff’s harm, which in this case would be the loss of a chance of a cure.

Traditionally the courts apply the *conditio sine qua non* test (also known as the ‘but for’ test) as a point of departure for establishing a factual nexus.¹²⁵ This test employs a process of hypothetical deduction in order to establish whether the defendant’s conduct was a necessary condition for the harm to occur, and not merely a pre-existing antecedent.¹²⁶ Thus, it has to be considered whether, but for the defendant’s conduct, the complained-of act and the harm that ensued from it would have still occurred.¹²⁷ As discussed in Section B, it is this test together with the all or nothing approach which stands in the way of the success of a loss of a chance claim, as there is either an evidentiary gap or a pre-existing condition which stands in the way of meeting the test. This is so because when the court mentally eliminates the defendant’s conduct (such as a misdiagnosis), it is not possible to prove on a balance of probabilities that the harm (injury or death) would not have occurred.

¹²³ Visser CJ & Good C.K (2015) *The emergence of a ‘flexible’ conditio sine qua non test for factual causation*. 151.

¹²⁴ *International Shipping Co (Pty) Ltd v Bentley* 1990 1 All SA 498 (A) at 700E-I.

¹²⁵ Visser & Good supra note 123 at 151.

¹²⁶ Ibid; *International Shipping* supra note 124 at 700F-H.

¹²⁷ *Minister of Police v Skosana* 1977 (1) SA 31 (A) and *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A).

This is best illustrated by referring to the scenario explained at the beginning of this paper. With the but for test, it would have to be shown that the patient would still be alive but for the doctor's negligent misdiagnosis. However, as the patient's chance of recovery had it been diagnosed on his first visit to the practitioner was only estimated to be at 45% due to his precondition, it would not be possible to meet the but for test as there would be no conclusive proof, as measured on a balance of probabilities, that he would have survived had the practitioner correctly diagnosed him from the get-go.

Thus, as it seems, a plaintiff claiming compensation for a loss of a chance would not be able to meet the but for test if the chance of survival or a cure was under 50 percent before intervention by the defendant. However, the state of the factual causation test is not that clear-cut. Different dicta and judgments seemingly approve of other tests or approaches to the question of factual causation. In *Minister of Safety & Security v Van Duivenboden*,¹²⁸ as well as *Minister of Finance v Gore NO*¹²⁹ it is stated that the court should exercise common sense when applying the but for test, so as to avoid overly unfair results from ensuing due to its application.¹³⁰ Other judicial dicta seem to point away from the use of the but for test to determine factual causation. In *Minister of Police v Skosana*¹³¹ at 35C-D and in *Siman & Co (Pty) Ltd v Barclays National Bank Ltd*¹³² at 915A-B Corbett JA mentions the possibilities of exceptions to the but for test, such as in cases of concurrent or supervening causes emanating from the wrongful conduct of other parties.¹³³ Furthermore, in *Skosana* Corbett JA mentions at 34F-G and 35E-F the notion of negligent conduct 'materially contributing' to harm. It is this last dicta which is especially interesting in light of the question whether the substantial possibility approach could be adopted in South African delictual law in order to allow for the loss of a chance doctrine.

An important judicial development pointing towards the fact that the but for test is no longer the sole test for factual causation – and therefore pointing towards the possible flexibility of the factual causation standard – is the recent Constitutional Court decision of *Lee v Minister*

¹²⁸ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 25: 'A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably the cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise of metaphysics.' This judgment has been described as 'the most recent, post-constitutional affirmation of [the but for test's] flexibility' in *Lee* at para 47.

¹²⁹ *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA) para 33.

¹³⁰ Price, A. (2014) *Factual causation after Lee*. 492.

¹³¹ *Minister of Police v Skosana* 1977 (1) SA 31 (A).

¹³² *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A).

¹³³ Price supra note 130 at 492.

of *Correctional Services*¹³⁴. In *Lee*, the applicant brought a claim against the Minister of Correctional Services for delictual damages suffered as a result of contracting tuberculosis while in detention. It was argued that the prison authority had wrongfully and negligently caused his contraction of TB due to their failure to take adequate precautions to protect him from the disease. The Constitutional Court upheld the plaintiff's claim although the claim could not meet the traditional but for test for factual causation.

Nkabinde J emphasised the injustice created by the application of a mechanical and inflexible test especially in cases where it needs to be determined whether a specific omission was a cause of a certain consequence, and stated that '[it is clear] that in some classes of claim the traditional common law but-for test is not enough to deliver adequately just outcomes (...) [indicating] that the common law but-for test for causation is an over-blunt and inadequate tool for securing constitutionally tailored justice'.¹³⁵

Before *Lee*, no South African Court had explicitly departed from the orthodox understanding of the but for test.¹³⁶ Merely a few judicial dicta had only suggested the possibility of departing from the test in certain instances (as discussed above, *Skosana*, *Siman* and *Van Duivenboden*). It is this recent development in the understanding of the flexibility of the test for factual causation which could possibly be taken advantage of in order to introduce the loss of a chance doctrine into South African delictual law. If the test for factual causation is seen as flexible, a plaintiff claiming for a loss of a chance of a cure would be able to prove that the practitioner had caused him or her harm, for example by using the substantial possibility approach to prove that the defendant's conduct was a substantial factor in, and thus substantially and materially contributed to, the final ensuing harm.

However, whilst the judicial dicta mentioned above seem to provide an open door for the introduction of the loss of a chance doctrine by means of a flexible causation standard, there are disadvantages in using this approach. Although the court in *Lee* expressly departed from the but for test and endorsed a flexible but for test for factual causation, it did so whilst saying that it was not actually developing the common law¹³⁷. This failure to expressly develop the common law by stating that the but for test is to be considered a flexible test has led to much uncertainty and criticism. The Constitutional Court had a perfect opportunity to clearly set out the law in this regard and to set out guidelines as to how factual causation is to

¹³⁴ *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC).

¹³⁵ *Ibid* at para 39-41 and 100-101.

¹³⁶ Price *supra* note 130 at 492.

¹³⁷ *Lee supra* note 134 at para 45 and 72-3. *Supra* note 130 at 492.

be considered in future, keeping in mind all the different approaches adopted and advocated for before *Lee*.¹³⁸ Yet, the court rather focused on the flexibility of the but for test for factual causation instead of addressing whether there ought to be a flexible factual causation inquiry itself.¹³⁹ Also, it failed to clarify whether this flexible but for test only applies to systematic state omissions, or to all types of omissions. No clarity was provided – rather the Constitutional Court handed down a judgment which has raised more questions and which has created more ambiguity in regards to the factual causation element.

It is for this reason that this writer submits that although *Lee* might have opened a door for the doctrine of the loss of chance to be adopted in South African delictual law by means of a flexible causation standard, this approach would not be suitable keeping in mind the lack of clarity on the matter, as well as the general dissatisfaction the legal fraternity has shown of this judgment.¹⁴⁰ This approach would only be suitable if the position were to be clarified by a court and it would be clear that the factual causation enquiry was a flexible one applicable to all types of delicts, not being confined to the all or nothing approach as seen in the traditional but for test for factual causation relating only to systematic state failures.

ii. A lost chance and wrongfulness

The loss of a chance doctrine can also be introduced into the law by means of the pure chance theory, whereby instead of evaluating whether the defendant factually caused the loss of the chance, it is evaluated whether the defendant's conduct was wrongful, in that he or she committed an injury by negligently costing the patient a chance of survival. This approach therefore relates to the delictual element of wrongfulness, whereby it would be in the plaintiff's hands to prove that the defendant's conduct was wrongful and hence constituted a wrong worthy of compensation. Once the wrong has been established, the plaintiff will have to illustrate that the defendant caused such a wrong, being the lost chance and not the ensuing death. The actual percentage of the chance lost is then only considered at the valuation stage of the delictual enquiry, whereby the lower the chance lost, the lower the compensation would be that the defendant will be ordered to pay.

In order to illustrate how the loss of a chance doctrine could be introduced by means of the element of wrongfulness, this writer has to first set out what the test for wrongfulness is in

¹³⁸ Visser & Good supra note 123 at 163.

¹³⁹ Ibid.

¹⁴⁰ Visser & Good supra note 123 at 163.

South African delictual law, as well as discuss how, hypothetically, a claim based on the loss of a chance would be able to meet such a test.

Wrongfulness is a necessary delictual element that is used to determine the boundaries of delictual liability.¹⁴¹ Hence, to prove an actionable claim, a plaintiff not only has to show that the harm was caused intentionally or negligently; furthermore it has to be shown that the harm was caused wrongfully.¹⁴² Wrongfulness is determined by means of application of rules established by the courts over time (some being in the form of rebuttable presumptions as to wrongfulness, e.g. the rule that it is prima facie wrongful to cause physical injury to another by a positive act, or to defame another), as well as the application of judicial discretion.¹⁴³

The South African courts have time and again explicitly recognised a general test for wrongfulness in the law of delict, whereby wrongfulness of a harm-causing act turns on a general criterion of reasonableness, on the legal convictions of the community and on considerations of policy.¹⁴⁴ According to Fagan, the standard academic view of the meaning of wrongfulness can be summarised as follows: ‘a harm-causing act was wrongful if, and only if, it was unreasonable – that being judged from an ex post facto perspective.’¹⁴⁵ It is important to note that Fagan does not agree fully with this statement, whereby he claims that this view is mistaken. According to him, wrongfulness does not concern the reasonableness of the defendant’s conduct but rather the reasonableness of the imposition of liability for conduct that has been shown to be unreasonable.¹⁴⁶ He states this in combination with citing numerous cases which contain an explicit endorsement of this approach to reasonableness, *Minister van Polisie v Ewels*¹⁴⁷ being the first authoritative case to do so.¹⁴⁸ Other Supreme Court judgments specifically ask whether the harm-causing conduct ought to be ‘actionable’ or ought to attract delictual liability for damages.¹⁴⁹ Other cases dealing with negligently caused pure economic loss have referred to the reasonableness of imposing liability in order

¹⁴¹ Visser & Good supra note 123 at 159.

¹⁴² Fagan A. (2005) *Rethinking wrongfulness in the law of delict*. 90.

¹⁴³ Ibid.

¹⁴⁴ Fagan supra note 142 at 93-4. See *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) at 1204D-E; *Carmichele v Minister of Safety and Security* 2001 (1) SA 489 (SCA) at 494D-F.

¹⁴⁵ Fagan supra note 142 at 91.

¹⁴⁶ Ibid at 93.

¹⁴⁷ *Minister van Polisie v Ewels* 1975 (3) SA 590 (A).

¹⁴⁸ Fagan supra note 142 at 107. Cases which followed suit include *Minister of Law and Order v Kadir* 1995 (1) SA 303 (AD), *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* (2000) 1 All SA 128 (A) and *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA).

¹⁴⁹ *Van Duivenboden* at 441E-F and 442B; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) at 399; *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA) at 236; *Carmichele* at 321.

to determine the wrongfulness of the harm-causing act.¹⁵⁰ As was stated in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*,¹⁵¹ '[C]onduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant. It is then that that it can be said that the legal convictions of society regard the conduct as wrongful.'¹⁵²

Taking all these cases into account, it is clear that the question of wrongfulness turns around the question of whether it would be reasonable to impose liability on the defendant for the harm-causing conduct, and it is on this understanding that this writer will continue. Thus, the element of wrongfulness is used by the court to determine the outer limits of liability, by asking whether it would be reasonable to impose liability for a harm-causing act, as a matter of policy and in terms of the convictions of society.

As the element of wrongfulness inherently involves an enquiry into what conduct ought to be held actionable in delict, it is this element that has been used in the past to justify the extension of the law of delict, specifically Aquilian liability, to cases previously not covered by such liability. Looking at how courts have justified the extension of liability to other harm-causing acts is helpful in this regard, as it illustrates the underlying issues and concerns this writer's proposed extension of liability to conduct resulting in a lost chance would have to meet if it were to be brought before court.

Delictual liability has been extended from the traditionally accepted harm-causing conduct to cases where a person negligently causes physical harm to another by an omission (rather than a positive act), as well as to cases of pure economic loss, where a person negligently causes another to suffer patrimonial loss, but not due to causing physical harm to his person or property.¹⁵³ The first judgment to allow for an extension in terms of pure economic loss was *Administrateur, Natal v Trust Bank van Afrika*.¹⁵⁴ This extension of liability for pure economic loss was justified by the court in holding that there had been a duty which the defendant had owed to the plaintiff which had been breached by the defendant.¹⁵⁵ Although

¹⁵⁰ Fagan supra note 142 at 108; See *Siman* at 914B; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* (1985) 1 All SA 347 (A) at 497-505.

¹⁵¹ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 All SA 6 (SCA).

¹⁵² *Ibid* at para 13.

¹⁵³ Fagan, A. (2014) *Aquilian liability for negligently caused pure economic loss*. 289.

¹⁵⁴ *Administrateur, Natal v Trust Bank van Afrika* 1979 (3) SA 824 (A).

¹⁵⁵ Fagan supra note 153 at 197.

the court in *Administrateur* did not state explicitly what the nature of that duty was, it did imply that it was a duty to not be negligent.¹⁵⁶

In cases following *Administrateur*, there have been references to ‘a duty of care’, or ‘a duty to take reasonable steps’.¹⁵⁷ The court in *Hirschowitz Flionis v Bartlett*¹⁵⁸ asserted that the decision as to whether a duty exists ‘depends on various factors, including prevailing ideas of justice and where the loss should fall.’¹⁵⁹ The court in *MV MSC Spain* further suggested how a court should go about extending liability for harm-causing acts which are not usually covered:

‘In such cases it becomes necessary to determine whether there is a legal duty owed by the defendant to the plaintiff to act without negligence or, as the inquiry has more recently been formulated, whether, if the defendant was negligent, it would be reasonable to impose liability on him for such negligence. This, in turn, is a matter for judicial judgment involving criteria on reasonableness, the legal convictions of the community, policy and where appropriate, constitutional norms.’¹⁶⁰

It is within these confines that a plaintiff bringing forward a loss of a chance claim would have to establish that the physician’s conduct in negligently failing to diagnose an ailment, or failing to recommend a possible cure, would have to be proven to be wrongful, as it breached the physician’s duty towards his or her patient not to act negligently or not to cause him or her harm. At this point it would have to be established by the plaintiff that the imposition of liability for this harm-causing act would be reasonable, as judged by public policy, the legal convictions of the society and constitutional norms.

Many of the arguments in favour of accepting the loss of a chance doctrine into South African delictual law were outlined and discussed in Section II of this paper which set out the rationale behind the doctrine. All these arguments could be brought before the courts in discussing whether it would be reasonable to hold the defendant liable for his harm-causing act. To summarise, the three underlying rationales discussed were that it should be recognised that a lost chance has a value worth compensating, that there should be fairness in regards to the difficult of proof faced by claimants of a loss of a chance claim and that the increased delictual liability would act as a deterrent for the medical profession to handle patients with a lower standard of care merely because their chance of survival is slim. When accepting that

¹⁵⁶ Ibid at 298.

¹⁵⁷ *Indac Electronics v Volkskas Bank* 1992(1) SA 783 (A) at 789C-D and 799C-D; *Knop v Johannesburg City Council* 1995 (3) SA 556 (A) at 28A and 31C-D; *First National Bank of SA v Quality Tyres* 1995 (3) SA 556 (A) at 568E-D and 570B-C; *Columbus Joint Venture v ABSA Bank* 2002 (1) SA 90 (SCA); *BOE Bank v Ries* 2002 (2) SA 39 (SCA) at 46B-C; *Axiam Holdings v Deloitte & Touche* 2006 (1) SA 237 (SCA) at 247E-F.

¹⁵⁸ *Hirschowitz Flionis v Bartlett* 2006 (3) SA 575 (SCA).

¹⁵⁹ Ibid at 588D-F.

¹⁶⁰ *Telematrix* supra note 151 at 602B-D.

an increased chance of survival is a thing of immense value, and that it is in the community's interest for their medical practitioners to be held accountable for their negligence and that a claimant be given a fair chance in their claim being successful in front of court, there is a good chance that a court would hold it to be reasonable to impose liability for such a harm-causing act based on public policy considerations of fairness and the legal community's convictions.

One step further than that, the court will also have to consider the legal duty that was breached in this regard, as well as evaluating this within the general constitutional ethos. The medico-ethical codes of conduct and prevailing medical practices will be considered by the court as an important indication as to what constitutes medical malpractice.¹⁶¹ The relationship between a patient and his practitioner is usually found within private law, based on contract, as well as on delictual law.¹⁶² The law of delict requires doctors and hospitals to exercise reasonable care to prevent harm from occurring to their patients – when he fails to do so, the doctor or hospital may incur liability for negligence.¹⁶³ The origin of the doctor's duty of care originates from the Hippocratic Oath itself, as well as normative ethics and ethical codes.¹⁶⁴

Beyond the duty of care that the practitioner owes to his patients, and public policy considerations of fairness and deterrence, constitutional norms also inform the decision as to whether or not delictual liability in this regard ought to be extended. The Constitution expressly enshrines the right to bodily integrity, dignity and access to health care.¹⁶⁵ These rights are especially important in the medical malpractice context, as these inform the extent to which a patient's rights have been infringed by the practitioner's actions.¹⁶⁶ It could be argued that the right to bodily integrity especially bears with it the patient's right to have every chance of survival pursued, and to have a lost chance be seen as something of value, the loss of which was a violation of his or her bodily integrity.

Another important consideration in favour of imposing liability for a lost chance can be found within the *National Health Act*, which serves to emphasise the autonomy of the patient.¹⁶⁷ The question of autonomy also falls within the protection of the right to bodily integrity,

¹⁶¹ Coetzee L.C. and Carstens P (2011) *Medical malpractice and compensation in South Africa*. 1267.

¹⁶² *Ibid* at 1269.

¹⁶³ *Ibid* at 1271.

¹⁶⁴ *Jansen van Vuuren and Another NNO v Kruger* 1993 2 All SA 619 (A).

¹⁶⁵ Constitution of the Republic of South Africa, 1996. Section 10 enshrines the right to dignity, while section 12 enshrines the right to bodily integrity. The right to access to health care services can be found in section 24

¹⁶⁶ Pienaar L (2016) *Investigating the reasons behind the increase in medical malpractice*. 8.

¹⁶⁷ *National Health Act*, 61 of 2003. *Ibid* at 9.

whereby it is the patient's right to be informed of all the possible treatments at his/her disposal, and make an informed decision based on that.¹⁶⁸ This right of the patient to participate in his/her health is essential to the query of the loss of a chance. By denying the patient this opportunity to make an autonomous decision regarding the course of action that should be taken – either by failing to diagnose the patient's condition or to suggest a course of action that could have possibly lead to positive results – the doctor infringed the patient's autonomy.

Thus, taking all of this account, it would be likely that a court would hold that a practitioner had breached his or her duty of care. However, before the harm could be regarded as wrongful, the court would have to consider whether it would be reasonable to extend delictual liability to such loss of a chance cases by holding that a lost chance is an injury in and of itself. It is at this point that the practical implications of an imposition of liability in this regard would have to also be looked at and balanced against the reasons in favour of the imposition of liability. Although the reasons for allocating liability as mentioned above are multiple, other important considerations have to be borne in mind, such as the strain this extension of liability could have on the medical community, as well as on the insurance industry.

Writers such as Pepper, Slabbert and Pienaar have pointed out the risk of an increase in medical malpractice litigation that comes with the introduction of the doctrine of the loss of a chance. Although South Africa's health system is overburdened, there has been a sharp increase in medical malpractice litigation.¹⁶⁹ For example, in 2009/2010, the Gauteng Department of Health and Social Development faced medical malpractice claims totalling R 573 million.¹⁷⁰ This increase in litigation can be interpreted to mean that there is a decline in the level of professionalism amongst practitioners.¹⁷¹ Furthermore, it could point towards the fact the patients are becoming more aware of their rights.¹⁷² This is especially so as South Africa's constitution and patient-centred legislation such as the *National Health Act* and the *Consumer Protection Act* bolster patient autonomy and consequently result in patients having strong cases against their negligent practitioners.¹⁷³

¹⁶⁸ Ibid at 10.

¹⁶⁹ Pepper, M.S. and Slabbert, M.N. (2011) *Is South Africa on the verge of a medical malpractice litigation storm?* 29.

¹⁷⁰ Malherbe, J (2013) *Counting the cost: The consequences of increased medical malpractice litigation in South Africa.*

¹⁷¹ Pienaar supra note 166 at 1.

¹⁷² Ibid.

¹⁷³ *Consumer Protection Act* 68 of 2008. Ibid.

The main consequence of this, as pointed out by Pepper and Slabbert, is that increased litigation results in a further reduction in the state's ability to finance the public health care system (which is already a resource-strapped setting) due to the large payouts it is required to make as it is vicariously liable for the acts or omissions of its employees.¹⁷⁴ A further consequence of increased litigation is that there will be an increase in malpractice insurance premiums in the private sector, forcing practitioners to charge their patients progressively more money in order to keep up with the costs of obtaining malpractice insurance.¹⁷⁵ Although it is generally believed that medical malpractice litigation may indirectly improve the quality of patient care, whereby practitioners are made aware that they may be sued if they act negligently, it is argued that this is not the case in South Africa, as its health care industry is under-resourced.¹⁷⁶ Not only does this mean that increased litigation will decrease the amount the state can provide to the health care system, but it also highlights that some of the factors which influence the likelihood of a malpractice suit are out of the control of the practitioners, as an under-resourced health care system often leads to practitioners being forced to work within a poorly resourced and low quality setting.¹⁷⁷

A further negative consequence of increased litigation is the practitioner's changed attitude towards his or her patient, whereby practitioners begin to associate their patients as a medical liability, and thus start to practice defensively.¹⁷⁸ This results in practitioners ordering additional and mostly unnecessary tests in anticipation of potential malpractice action. These defensive practices allow practitioners to be able to point towards the tests undertaken in order to prove that the standard of care had been met.¹⁷⁹ These unnecessary tests not only subject the patient to unnecessary risk, but also drives up the costs of health care.¹⁸⁰

Although these criticisms against the imposition of liability for a lost chance are of great concern, it is this writer's opinion that these are still outweighed by the arguments in favour of holding that a practitioner's conduct in costing a patient a lost chance should be regarded as wrongful, and thus actionable. As stated by Palmer, courts should choose to safeguard the

¹⁷⁴ Pepper & Slabbert supra note 169 at 1. *Mtewa v Minister of Health* 1989 (3) SA 600 (D) held that the state should provide indemnity for doctors working within its hospitals.

¹⁷⁵ Pepper & Slabbert supra note 169 at 29; An increase of claims results in an increase in the cost of indemnity insurance for medical practitioners to the extent that some practitioners may at some point just not be able to afford the premium and will have to stop practising.

¹⁷⁶ Pepper & Slabbert supra note 169 at 30.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid at 32. According to an international MPS casebook survey, 73% of more than 3000 MPS members indicated that they practice medicine defensively.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

rights of the patient injured or killed by preventable negligence.¹⁸¹ The courts should seek to find a way to prevent the unfair results of the all or nothing approach, which – instead of deterring medical negligence – results in immunising a whole area of medical practice from liability merely because the patient’s chances of survival were less than probable.¹⁸²

Palmer encapsulates the moral argument in relation to patient’s right of survival and the insurance and practitioners’ financial interests best in the following statement: “Under this standard, physicians are free from liability for the ‘grossest malpractice’ if the patient had less than an even chance of recovery with proper care. These patients are often the most in need of protection and are the ‘least able to exercise independent judgment’”.¹⁸³ The patients are at the mercy of the physicians upon whom they depend for live-saving. As a policy matter, this class of persons deserves protection, not insurance companies or physician.’¹⁸⁴ This was also reiterated in *Matsuyama v Birnbaum*¹⁸⁵, where the Supreme Judicial Court of Massachusetts stated that ‘We are unmoved by the defendants’ argument that the ramifications of adoption of the loss of chance doctrine are immense across all areas of tort ... [N]egligence that harms the patient’s chances of a more favourable outcome contravenes the expectation at the heart of the doctor-patient relationship...’¹⁸⁶

Besides this moral stance that could be adopted by a court, there are also practical and tangible reasons for rejecting the argument that the extension of delictual liability to allow for a loss of a chance doctrine would have vast negative effects for the medical community and insurance companies. Nicols addresses this subject specifically in regards to the loss of a chance doctrine, rejecting critics’ argument that an extension of liability by means of the introduction of the doctrine would result in increasing pressure on a country’s medical care system by creating an expanded risk of liability for those in the medical profession.¹⁸⁷

Whilst Koch concedes that it is important that the law only offers redress for those wronged based on reasonable probabilities, and not on chance or mere possibility, in order to prevent the skyrocketing of medical costs, he argues that the introduction of the loss of a chance doctrine has no significant impact on either court docket congestion or medical malpractice

¹⁸¹ Palmer supra note 3 at 658.

¹⁸² Ibid.

¹⁸³ Palmer supra note 3 at 658.

¹⁸⁴ Ibid at 658-9.

¹⁸⁵ *Matsuyama v Birnbaum*, 890 N.E. 2d 819 (Mass. 2008).

¹⁸⁶ Ibid at 834-35.

¹⁸⁷ Koch, S.R. (2009) *Whose loss is it anyway? Effects of the Lost-Chance doctrine on civil litigation and medical malpractice insurance*. 598.

insurance costs.¹⁸⁸ He illustrates this by comparing the court dockets and insurance premiums of U.S states which have decided to adopt the doctrine to those that have decided not to do so. Not only could he find no discernible difference between the overall civil caseload of these different states, but he also emphasises that medical malpractice cases in general only compromise about one-half of one percent of the total docket, making any supposed increase in litigation due to the loss of a chance doctrine barely noticeable.¹⁸⁹

Furthermore, Koch rejects the arguments made by critics that the amount of litigation may increase due to the introduction of the doctrine in that malpractice lawyers will use the doctrine to get more business.¹⁹⁰ Due to the nature of the doctrine, it is unlikely that the patient or his/her attorney would know from the get-go that there had been a loss of chance worth compensating – this would only be able to be calculated once the case had proceeded to the discovery phase and expert witnesses had been introduced to the facts of the case.¹⁹¹ Thus, primarily a plaintiff will approach a malpractice lawyer with the claim that his or her practitioner had acted negligently. The fact that the practitioner's actions had caused a loss of chance amounting to an injury would only be able to be discovered and proven at a later stage, not at the very moment of approaching the lawyer for a consultation.¹⁹² Thus, if the adoption of the doctrine does not necessarily lead to an increased court docket, it also means that there would not necessarily be a tangible increase in the claims against practitioners (resulting in the state being liable to more payouts). All the doctrine would achieve is increase the chances of success for litigants who would have filed a medical malpractice claim regardless if they knew that the doctrine existed at the time of consultation with their attorney. Only after a plaintiff is unable to meet the traditional all or nothing approach of causation, will he or she be able to use the loss of a chance doctrine as a secondary claim.

Besides that, Koch argues that the doctrine by itself is self-policing.¹⁹³ Whether the pure chance approach or the substantial possibility/relaxation of the causation standard approach has been adopted, a plaintiff still has a stringent case to meet before a practitioner can be held to have caused a loss of a chance worth compensating. Sufficient evidence has to be presented to proof that the practitioner acted negligently, and the other elements of delictual liability have to be met.¹⁹⁴ Therefore, just because the loss of a chance doctrine has been

¹⁸⁸ Ibid at 601-2.

¹⁸⁹ Ibid at 613.

¹⁹⁰ Ibid at 618.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid at 619.

adopted, it does not mean that automatically any frivolous, lottery-type cases will be successful, as the doctrine by its very nature contains certain thresholds that needs to be met and safeguards to prevent the doctrine's potential for abuse.¹⁹⁵ Courts can also decide to adopt limiting principles, such as was done in Kansas, where the court held that only plaintiffs who have suffered substantial harm should be successful in their loss of a chance claim.¹⁹⁶

In regards to the supposed rise in medical insurance premiums which could be caused by the adoption of the doctrine, Koch analysed the premium payments of several states to conclude that 'the economic effect of such an adoption can be nothing more than a proverbial drop in the bucket'.¹⁹⁷ The evidence, according to Koch, illustrates that litigation-related costs play a relatively small role in the escalation of insurance premium rates and that rather other various factors relating to the market are the actual driving force behind the rates that need to be paid.¹⁹⁸ Koch concludes:

'Indeed, the comparison of two adopting states and two nonadopting states indicates no discernible difference in the premium amounts being paid (...). While not definitive proof of the doctrine's complete lack of effect on malpractice rates, any connection is seemingly negligible and is likely dwarfed by other more significant factors. Accordingly, without this intermediate connection between the lost-chance doctrine's adoption and an increase in malpractice insurance rates, the arguments that suggest an ultimate connection between the doctrine's adoption and an increase in overall health care costs seems more unfounded.'¹⁹⁹

Based on these arguments, this writer concludes that it would be possible to establish that it would be reasonable to impose liability for the loss of a chance, thus establishing that the conduct of depriving the victim of a chance of survival or cure was an injury in and of itself, and consequently wrongful. Having established this, the plaintiff will be free to try and meet all the delictual elements, such as fault, conduct and causation.

As discussed in Section B, with this approach the plaintiff will be able to use the lost chance doctrine as a fall-back or secondary claim, whereby the plaintiff will not have to meet the all or nothing obstacle posed at the causation enquiry. This is so as the lost chance itself has now been recognised as the wrongful conduct. At the causation enquiry the plaintiff will only have to prove that the defendant caused the lost chance, not the actual death or long-lasting disability. Referring back to the example, the plaintiff will be able to show that the physician's failure to diagnose his condition for three days was wrongful (as it was a breach

¹⁹⁵ Ibid.

¹⁹⁶ Weigand supra note 75 at 9.

¹⁹⁷ Koch supra note 187 at 624.

¹⁹⁸ Ibid 627 and 630.

¹⁹⁹ Ibid at 630.

of his duty not to be negligent), and that such wrongful conduct was the cause of him losing the chance of recovery. At this point it does not matter that the chance of recovery initially was only 44 percent - all that matters is that the defendant's wrongful, negligent conduct caused the plaintiff to lose a chance of survival. The question of how much of a chance was lost will then be considered at the valuation of damages stage.

E. CONCLUSION

Having illustrated that a claim of a loss of a chance of survival could meet the test of wrongfulness, it is thus evident that if a claim were to be brought to a South African court it would be possible to be successful. Thus, it is this writer's contention that the effectiveness and potential offered by the loss of a chance doctrine would be greater if it was introduced into South African delictual law by means of the enquiry of wrongfulness – similar to the pure chance theory – than if it were integrated into the law by ways of the element of factual causation. Given the uncertainty regarding the current state of the factual causation test – with many courts and scholars advocating for different tests – an introduction of the loss of a chance doctrine by means of lowering the causation standard would not only lead to more uncertainty, but will lead to academic criticisms relating to the tampering of the factual causation standard as well as the typical 'opening of the floodgates' concerns. In order to ensure the effectiveness of the doctrine it is consequently wiser to introduce it by ways of wrongfulness, whereby the court could create a new harm which is wrongful in the eyes of the law if it holds that it is reasonable, in terms of public policy and the views of the community, to hold a physician responsible for negligently causing the patient to lose a chance of survival or a cure. By means of wrongfulness, the loss of a chance doctrine can therefore be integrated into South African delictual law on a strong fundamental foothold as to not impeach and threaten the effectiveness of the doctrine in future.

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