Loss of chance

Suzanne Farg and Verity Danziger discuss the hurdles to overcome to establish a claim

The method by which the courts assess whether a future event would have occurred, but for the defendant’s negligence, is at the heart of any determination of causation and is often highly relevant to quantum. However, the authorities show a marked difference in the approach taken by the courts, with certain types of cases requiring that causation be proved on balance of probability, while in others an assessment of lost opportunity has been considered more appropriate. Additionally, this lost opportunity approach (lost chance) is proving increasingly important in the quantification of damages for personal injury and, in particular, in respect of lost earnings. This is well illustrated in the recent clinical negligence case of XYZ v Portsmouth Hospitals NHS Trust [2011], in which the claimant was awarded approximately £5.8m for loss of earnings and business opportunity.

Causation and loss of chance

It has long been accepted that in certain cases it is sufficient for the claimant to show that the defendant’s negligence caused them to lose the opportunity of some favourable outcome. Quantum will then reflect the likelihood that this outcome would have eventuated. Famously, in Chaplin v Hicks [1911-13], Miss Chaplin brought a successful claim for loss of the chance to win a beauty contest after the defendant negligently omitted to include her in one of the earlier rounds of the competition. More recently, in the solicitors’ negligence case of Allied Maples Group Ltd v Simmons & Simmons [1995], the claimant was successful in claiming that they had received negligent advice from the defendant during a transaction. They argued that, had they been properly advised, they would have had the opportunity to try to negotiate their way out of certain liabilities for which they became responsible once the transaction had completed. In this case, the Court of Appeal found that it was not necessary for the claimant to show, on balance, that the negotiations would have been successful but simply that there was a real possibility of this outcome.

Attempts to extend the loss of chance principle to causation in clinical negligence cases, however, have been met with little success. In the leading case of Hotson v East Berkshire Area Health Authority [1987], the House of Lords considered whether the claimant should be able to recover damages for delayed treatment of his leg fracture, following which he developed avascular necrosis of the bone causing permanent disability. It was found at first instance that, even without the negligent delay in treatment, the claimant had a 75% probability of developing avascular necrosis. Therefore, the claimant was entitled to recover damages for the loss of the 25% chance that he could have avoided this outcome. The House of Lords allowed the defendant’s appeal on the basis that the medical evidence showed, on balance of probabilities, that the blood vessels in the claimant’s leg were so badly damaged by the initial fracture that he would have suffered avascular necrosis in any event. Thus, the claimant had not proved that the defendant’s negligence caused or materially

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It remains a matter for debate as to whether there is a reasoned distinction between the cases in which causation must be proved on balance of probabilities and those in which it is sufficient to show loss of chance of a more favourable outcome, or whether this distinction is based solely on policy grounds. Certainly, in personal injury claims, a loss of chance approach would make defendants liable even in circumstances where the evidence strongly indicates that negligence was not the cause of the claimant’s injury. Additionally, the cost of medical expert evidence might increase as it would be necessary to make a detailed consideration in every case as to the percentage likelihood that negligence, rather than some other factor, caused the claimant’s injury, in order to reflect this percentage in the quantum. Finally, many successful claimants who would previously have recovered 100% of damages for an injury, proved, on balance of probability, to have been caused by the defendant’s negligence, would instead have their damages reduced for the percentage chance of some other cause. Weighed against this, however, is the effect on those claimants who have had their chances of survival dramatically reduced by the defendant’s negligence (say from 49% to 10%), but who must still be told that this is not considered to be a loss for which they should be compensated.

The loss of chance approach in quantum

In contrast, if the claimant is successful in establishing causation on balance of probability in his claim, the courts will readily quantify his damages by reference to loss of opportunity.

One example of this is where a claimant has a small risk of some further injury in the future, in which case an increase in the award of general damages, or an award of provisional damages, is often allowed. More significantly for claimants, the courts have often approached loss of earnings claims in terms of loss of chance to pursue occupations with higher earnings. In Doyle v Wallace [1998], the claimant was employed as a clerk at the time of her injury but was considered to have had a 50% chance of becoming a drama teacher in the future. The Court of Appeal approved an approach of taking the multiplicand for loss of earnings as the midpoint between the respective salaries of a clerk and a drama teacher, in order to reflect the likelihood of increased earnings in the future.

It is important to obtain evidence from medical experts as to the effect of the delay on the claimant’s life expectancy overall, as well as their prognosis in comparison with the ten-year survival data.

Further, the courts have often approached loss of earnings claims in terms of loss of chance to pursue occupations with higher earnings. In Doyle v Wallace [1998], the claimant was employed as a clerk at the time of her injury but was considered to have had a 50% chance of becoming a drama teacher in the future. The Court of Appeal approved an approach of taking the multiplicand for loss of earnings as the midpoint between the respective salaries of a clerk and a drama teacher, in order to reflect the likelihood of increased earnings in the future.

Langford v Hebran [2001] concerned a claimant who had been a successful kickboxer, and also a trainee bricklayer, but was unable to continue in either profession due to injuries suffered in a road traffic accident. The Court of Appeal heard an appeal on behalf of the defendant that the first instance judge had over-valued the claimant’s loss of earnings. At the time of the accident, the claimant was aged 27 and was at the beginning of his professional career as a kickboxer. He had already had considerable success as an amateur and had become world light middleweight champion. The claimant adduced factual evidence as to how his likely career would have progressed, had he not been injured. He also called expert evidence from a forensic accountant who applied a statistical approach to the likelihood of a number of possible paths down which the claimant’s career as a kickboxer could potentially have progressed. A ‘basic claim’ was used as a
starting point, which assumed that the claimant would have continued in professional kickboxing until the age of 36. He would have had five professional fights a year, run numerous training classes and would also have worked for 26 weeks of the year as a bricklayer. After the age of 36, the claimant would have worked full time as a bricklayer and would have continued to hold 30 kickboxing training classes each year until age 60. On the basis of the available evidence, the court accepted this basic claim as a virtual certainty.

In addition to the basic claim, the claimant’s forensic accountant calculated lost earnings based on four possible scenarios, including that the claimant would win a European title and also that he would become world champion. The claimant was awarded damages on a lost-chance basis in respect of these scenarios. The defendant argued on appeal that a loss of chance approach (as in Doyle) should only be utilised where there was a single lost opportunity and that, where there were multiple possibilities for a future career, a more broad-brush approach should be utilised. However, the Court of Appeal considered that this would not produce a fair result for the claimant.

The Court of Appeal did make some modification as to the way in which the percentage chance of success for each scenario was calculated and also applied an overall discount for contingencies of 20%. However, the award the court arrived at was sufficiently close to the first instance decision that the defendant’s appeal was dismissed.

The correct approach for loss of earnings was subsequently defined by the Court of Appeal in Herring v Ministry of Defence [2003] in the following terms:

... it is a truism that the assessment of future loss in this field is in a broad sense the assessment of a chance or, more accurately, a series of chances as to the likely future progress of the claimant in obtaining, retaining or changing his employment, obtaining promotion, or otherwise increasing his remuneration. None the less, such assessment has not traditionally been regarded as necessitating application of the technique of percentage assessment for ‘loss of a chance’ based on the likely actions of third parties... In cases such as Doyle v Wallace... and Langford v Hebran... the court has in special circumstances felt obliged to adopt such a method in order to calculate particular aspects of the claimant’s future loss claim. However, those decisions have not purported generally to replace the traditional method of adjusting the multiplier or multiplicand within the career model appropriate to the particular claimant so as to reflect (a) the likelihood of an increase in earnings at some point in the claimant’s career and (b) those contingencies/vicissitudes in
respect of which a discount appears to be appropriate.

The claimant is therefore required to identify the ‘base line’ career model which he would have pursued but for the negligence and a ‘percentage chance approach’ will not usually apply to this loss. In addition, however, if there is a possibility of a career path that allows for much higher earnings, this will be considered on a loss of chance basis, providing that this is a real (substantial) possibility, rather than being merely speculative. There is nothing to preclude the courts from also applying a discount to these claims to account for other contingencies and the level of such a discount is likely to be dependent upon the particular facts of the case.

This approach was applied in the cases of Smith v Collett [2009] and Clarke v Maltby [2010] to the benefit of the respective claimants. In Smith, the Court of Appeal was considering another claim regarding a promising sports career cut short. At age 18, the claimant, Ben Collett, was playing in the reserves team for Manchester United FC against Middlesbrough FC when he sustained leg fractures following a negligent high tackle. Although the fractures healed, he was unable to regain his former ability and, a few years later, he gave up professional football entirely and took a degree course with a view to entering a career in journalism.

At first instance, Swift J awarded nearly £4m for future loss of earnings. In doing so she took into account the claimant’s previous success as a junior player and his steady personality as evidence of his likely future success. She was also assisted by factual evidence as to the claimant’s footballing ability and regarding average earnings in the football industry from a variety of witness called on behalf of the claimant (including club manager Sir Alex Ferguson and team captain Gary Neville). In all loss of chance claims, the importance of factual and expert industry evidence cannot be underestimated and, in this case, the quality of the factual evidence was vital in allowing the claimant to bring his loss of earnings claim fully.

The judge accepted that, for the three years immediately following the date of the index event, the claimant’s career at Manchester United was secure. Even if he had been unable to play due to injury, he would still have received his salary. Thereafter, the judge accepted that, barring injury, the worst case would be that the claimant would have played for his whole career in the Championship League. Additionally, she considered that he had a 60% chance of playing in the Premier League for at least one third of his career.

The judge therefore used, as the ‘baseline’, the fact that the claimant would have been employed by Manchester United and thereafter would have played at a Championship League club for the remainder of his career (until age 35). In addition, in respect of the loss of chance claim, the claimant was awarded 60% of the difference between Premier League and Championship League earnings, for one third of the loss of earnings multiplier. The claimant’s residual earning capacity (as a journalist) was deducted from the total and a discount of 15% was applied for contingencies. The judge considered, however, that a claim for employment as a football manager after age 35 was too speculative.

The defendant appealed on the ground that the judge should not have accepted as a virtual certainty that the claimant would play for a Championship League club and should instead have applied a percentage chance to this possibility. Additionally, on the ground that the discount taken for contingencies overall was too low. The Court of Appeal dismissed the appeal in its entirety (albeit commenting, obiter, that it would have been more logical for the residual earnings capacity to have been deducted after the contingency discount had been made).

The Court of Appeal found that it was appropriate to accept, on the evidence, that there was only a very small risk of the claimant not playing at least at Championship League level, and that this risk could appropriately be included in the general discount for contingencies. The amount of the discount itself, while appearing low, also took into account that the claimant could have had an even more successful career. The difference between earnings in the Premier and Championship Leagues were such that even if the claimant had played in the Premier League for slightly longer than a third of his career, his earnings would have disproportionately increased and, taking this into account, a discount of just 15% for contingencies was appropriate.

In Clarke, the claimant was a solicitor injured in a road traffic accident. She recovered damages on the basis that, while she would still be able to practise as a solicitor in the future, her injury was such that she would be unable to continue in her role as a fixed share equity partner. The court took, as the baseline for her claim, the average earnings of a salaried partner in a regional law firm. The claimant also recovered a percentage of the difference between the base line earnings and the average earnings of partners in medium and large-sized City firms, based on

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**Burden of Proof**

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the chances that claimant would have gained employment with such firms in the future. 

*Dixon v Were [2004]*, is a good example, however, of a claim in which the loss of chance of higher earnings was considered to be too speculative. In this case, the claimant, a university student who was not considered to be an academic ‘high flier’ (having had to re-sit one year of his degree course), brought a loss of earnings claim for a career in the financial services sector, as well as a loss of chance claim for the very high earnings obtained by some individuals in that sector. In determining this issue the court weighed evidence of the claimant’s aptitude for a career in financial services, as well as industry information regarding average earnings. It was found that the claimant would have worked in the financial services industry in London and the baseline claim was calculated on this basis. Nothing was allowed for bonus payments (albeit that those were a real possibility), and conversely no reduction was taken for the possibility that the claimant may have had lower earnings as a result of working outside London (again a real possibility). Gross J stated that:

In seeking to do practical justice, it seems to me that such swings and roundabouts produce simplicity and go a long way to achieving fairness for both parties.

A reduction of 3% in the overall loss of earnings multiplier was made to account for contingencies and, in particular, because:

... in today’s employment climate, it cannot be assumed that employment in the claimant’s hypothetical career path would have been continuous and unbroken.

On considering the possibility of very high earnings, however, the judge took the view that the claimant’s chance of securing these additional earnings could only be considered speculative, which was insufficient to allow a further award of damages. This decision was based on the lack of evidence (as to the claimant’s pre-injury abilities or application to his studies) to support his claim that he had a substantial chance of very high earnings.

Finally, in the recent case of *XYZ*, the claimant had previously had a successful career in the pharmaceutical market research industry, including being appointed head of his professional body. At the time of his injury, the claimant was taking a sabbatical with a plan to then start his own agency in the same sector, for which he had prepared a first draft business plan. The court accepted as the baseline that the claimant would have started this business and that it would have generated a turnover of at least £2m pa. Additionally, that there was a 50% chance of the business achieving a turnover of £5m in five years and a 20% chance of achieving a turnover of £10m in ten years. The loss of chance claim was, therefore, calculated on the percentage chance of the turnover increasing incrementally in most years during these periods. A substantial discount was applied for contingencies not already taken into account in the calculation of the percentage chances above. These contingencies included the possibility that the net profit margin and the claimant’s equity share in the business would have been different to that assumed by the judge. In calculating the contingency discount, the judge first took into account a 14.46% reduction (agreed by the parties) in the future loss of earnings multiplier and, additionally, applied a 15% discount to the claimant’s projected total net income.

The claimant also recovered damages for the loss of the capital which would have been achieved had he run the business successfully and sold it at age 65. This claim was not considered too speculative; but a significant discount of 25% was applied to take into account the various contingencies in connection with the profits of this sale.

Overall, the claimant recovered approximately £4.6 million for loss of earnings and £1.2 million in respect of sale of the business.

The decision in *XYZ* again emphasised the importance of strong factual evidence as to the claimant’s ability to attract very high earnings and also of expert evidence regarding earnings in the industry in question. For those claimants for whom there is a substantial possibility of earnings significantly higher than their baseline career model indicates, a loss of chance claim can usually be advanced with confidence if sufficiently good quality supportive evidence is adduced. ■

**Application**

In *Clarke v Maltby* [2010] EWHC 1201 (QB), the court applied a 15% discount to the earnings multiplier and, additionally, a 14.46% reduction (agreed by the parties) in the future loss of earnings multiplier to determine the claimant’s projected total net income. Overall, the claimant recovered approximately £4.6 million for loss of earnings and £1.2 million in respect of sale of the business.