

# **Damages for loss of chance in negligence: the availability of an alternative remedy**

**Andrew Barker**

## ***Introduction***

Damages for loss of chance are damages for the loss of an opportunity to obtain or receive a desired outcome (see M. Lunney, "What Price a Chance" (1995) 15 Legal Stud. 1). Rather than compensating a plaintiff for what actually happened in the past, loss of chance damages compensate a plaintiff on the probabilities of what may have happened.

Damages for loss of chance involve a potentially significant challenge to the usual process of proof in a civil trial. It is fundamental to our adversarial system of civil justice that the plaintiff carries the burden of proving all facts relevant to its claim on the balance of probabilities. If the court is satisfied that the probability that an event happened is 51%, then it happened. If the probability is only 49%, then it did not happen. This is the 'all or nothing' approach. Any uncertainty as to what happened is recognized in the burden of proof – if the Court cannot decide, then the plaintiff's claim will fail.

By contrast, damages for loss of chance are all about uncertainty. If the probability of an event happening in the past is 51%, then 51% of the value of that event is all the plaintiff gets. If the probability of the event happening is only 49%, then the plaintiff only gets 49%. The challenge to the 'all or nothing' approach is readily apparent; why should a plaintiff, who has shown that the probability an event occurred is greater than 50%, not receive the full value of her claim? Equally, why should the plaintiff who is not able to establish a probability of at least 50%, recover anything at all?

Regardless of this conflict, damages for loss of chance are an accepted feature of the law of negligence in New Zealand (and indeed contract and equity). The key question is *when* are they available. Professor Todd in his text "**The Law of Torts in New Zealand**" has commented that "we still need to search for a principled answer" to this question (p. 1000). The Court of Appeal has attempted to provide such an answer in its decision in ***Benton v Miller & Poulgrain*** [2005] 1 NZLR 66 ("***Benton v Miller***"). It is this question, and the answer proposed by the Court of Appeal, that is the focus of this paper.

I should state at the outset that while I offer some criticism of the Court of Appeal's approach in ***Benton v Miller***, I think the decision is in most respects correct. It is certainly more satisfactory than the approach previously taken by the court. In the end, all I suggest is the addition of a gloss to that case, to ensure that the focus of damages for loss of chance is on situations of evidential uncertainty.

### ***Cause-in-fact***

Damages for loss of chance are ultimately a question of what sort of loss will be compensated in tort law, i.e. do we compensate for actual loss suffered, or for the mere chance of avoiding that loss. This question raises difficult issues for tort law theorists. Surprisingly, however, this foundational question of *whether* we should compensate for mere chances has rarely been considered by the courts.<sup>1</sup> Indeed, the cases tend to suggest that mere chances are *not* usually a compensable loss. Loss of chance damages are treated as an exceptional remedy, developed in response to difficulties in proving a relationship of cause-in-fact.

As its name suggests, cause-in-fact represents the factual component of the causation inquiry. It is generally seen as a policy neutral, scientific inquiry. It is concerned with determining whether the negligent act of the defendant was *a* cause of the plaintiff's injury. The question of whether the defendant's act should be treated as *the* cause of

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<sup>1</sup> One notable exception to this is Stapelton, "The gist of negligence part II: The relationship between "damage" and causation" (1988) 104 LQR 389. See also the brief consideration of the issue in *Gregory v Rangitikei District Council* [1995] 2 NZLR 208 at 230.

the injury for the purpose on imposing liability (and the point at which the court may consider other non-factual criteria in determining causation) is the remoteness inquiry (or cause-in-law).

The universal test for cause in fact is the 'but for' test; i.e. but for the act of the defendant, would the plaintiff have suffered her injury. If the answer to that question is yes, then the defendant's act was a cause of the injury; see **McWilliams v Sir William Arrol & Company** [1962] W.L.R. 295 (HL); **Barnett v Chelsea and Kensington Hospital Management Committee** [1969] QB 429; **Deloitte Haskins & Sells v National Mutual** [1993] AC 774 (PC).

The 'but for' test is a counter-factual test. It involves the asking of a hypothetical question as to what would have happened absent the negligent act of the defendant. Sometimes the question is easily answered; would I have hit your car if I had not run the red light? Sometimes the answer is not so simple; would you have been successful in the court proceedings if I had filed your claim within the relevant time period?

It is clear that the loss of chance analysis is a response to difficulties in proving a 'but for' relationship.<sup>2</sup> Its primary focus is where the hypothetical question posed by the 'but for' test is regarded by the court as too speculative to be capable of answer.

*"[T]he greater the uncertainty surrounding the desired future outcome, the less attractive it becomes to define the claimant's loss by whether or not, on balance of probability, he would have achieved the desired outcome but for the defendant's negligence. This definition of the claimant's loss becomes increasingly unattractive because, as the uncertainty of outcome increases, this way of defining the claimant's losses accords ever less closely with what in practice the claimant had and what in practice he lost by the defendant's negligence.*

*In order to achieve a just result in such cases the law defines the claimant's actionable damage more narrowly by reference to the opportunity the claimant lost, rather than by reference to the loss of the desired outcome which was*

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<sup>2</sup> The loss of chance analysis is not the only response the courts have taken to problems in proving cause-in-fact. For example, where cause-in-fact is uncertain, and where no party can be blamed for that uncertainty, the court may adopt as an alternative to the 'but for' test a test of a 'material contribution' (*Bonnington Castings v Wardlaw* [1956] AC 613 (HL)). It may also choose to reverse the burden of proof (*McGhee v National Coal Board* [1973] 1 WLR 1 (HL)).

*never within in his control. In adopting this approach the law does not depart from the principle that the claimant must prove actionable damage on the balance of probability. The law adheres to this principle but defines actionable damage in different, more appropriate terms. The law treats the claimant's losses of his opportunity or chance as itself actionable damage."*

**Gregg v Scott** [2005] 2 WLR 268 (HL) at 273 per Lord Nicholls. See also **Kitchen v Royal Air Force Association** [1958] 1 WLR 563; **Benton v Miller**.

### ***The 'all or nothing' approach and the burden of proof***

As noted, the loss of chance analysis is a response to uncertainty in proving a 'but for' causal relationship. It should be emphasized that there is nothing inherently objectionable about 'evidential uncertainty'. It is a fact of the trial process, and particularly the adversarial trial, where the focus is on ensuring rights of participation, rather than determining the objective accuracy of the facts presented by the parties (see Fuller, "**The form and limits of adjudication**", (1978) 92 Harv L Rev, 353; Barker, "**Ideas on the purpose civil procedure**" [2002] NZ Law Review 437).

To deal with the problems of evidential uncertainty within an adversarial system, we have developed two important rules:

- (i) A fact only needs to be proved on the balance of probabilities. If this standard is met, then the fact is treated as certain ("**the standard of proof**").
- (ii) The burden of proving any fact rests with the plaintiff. If following trial, the fact remains uncertain, then the plaintiff's claim will fail ("**the burden of proof**").

To these can be added a third requirement, of particular relevance to proving cause-in-fact. The courts require positive proof of a causal relationship. A mere statistical relationship between cause and effect is usually not sufficient to establish a causal relationship; see generally Eggelstone, "**Evidence, Proof and Probability**" (1983); Cohen, "**The Probable and the Provable**" (1977).

In respect of the first of these requirements, the standard of proof is usually understood as meaning that the plaintiff must show that the likelihood of the fact having occurred is 51%.<sup>3</sup> Once a plaintiff has met this standard, the fact will be treated as certain.

*"In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain."*

**Mallett v McMonagle** [1969] 2 All ER 178 (HL) at 190 – 191 per Lord Diplock. See also **Davies v Taylor** [1974] AC 207 at 212 per Lord Reid; **Hotson v East Berkshire HA**, [1987] 1 AC 750 (HL) at 793 per Lord Ackner; **Gregg v Scott** [2005] 2 WLR 268 (HL).

This is often referred to as the 'all or nothing' approach.

If the court is not able to determine the fact either way, on the balance of probabilities, then it will rely on the *burden of proof*. It is rare for a case to be determined according to this rule. Usually, and regardless of how poor the evidence, the court will attempt to determine what did or did not happen in the past; see **Robins v National Trust Co** [1927] AC 515 (PC) at 520 per Lord Dunedin. However, where any fact cannot be determined on the evidence, the burden of proof must operate.

*"No judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which owing to the unsatisfactory state of the evidence, or otherwise, deciding on the burden of proof is the only just course open to him to take."*

**Rhesa Shipping Co. S.A. v. Edmunds** [1985] 2 All ER 712 (HL) at 718 per Lord Brandon.

*"There is nothing inherently uncertain about what caused something to happen in the past or about whether something which happened in the past will cause something to happen in the future. Everything is determined by causality. What*

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<sup>3</sup> Interestingly, there is research to suggest that the judge (and the jury) generally require more than proof simply of a 51% probability, something more like a 75% probability. See R. J. Simon & L. Mahan, "Quantifying Burdens of Proof" (1970-71) 5 Law & Soc. Rev. 319, referred to by J. G. Fleming in "Probabilistic Causation in Tort Law", (1989) Can. Bar Rev. 661. Note also the comments of Lord Mackay in **Hotson v East Berkshire HA** [1987] 1 AC 750 at 786: "[A] judge deciding disputed questions of fact will not ordinarily do it by use of a calculator."

*we lack is knowledge and the law deals with lack of knowledge by the concept of the burden of proof.”*

**Gregg v Scott** [2005] 2 WLR at 286 per Lord Hoffmann.

The burden of proof is a true incident of our adversarial system of civil justice. It operates regardless of whether or not there was anything further the plaintiff could have done to establish the fact; see for example **Wakelin v London & South Western Railway Co** (1886) 12 App Cas 41 (HL).

### ***Loss of chance in New Zealand***

Prior to the decision in **Benton v Miller**, the leading Court of Appeal decisions concerning damages for loss of chance in negligence were **Takaro Properties Ltd v Rowling** [1986] 1 NZLR 22 (CA)<sup>4</sup> (“**Takaro**”) and **Martelli McKegg Wells & Cormack v Commbank International NV** (CA, 7 November 1996, CA75/96) (“**Martelli McKegg v Commbank**”).

**Takaro** concerned the negligent refusal by the Minister of Finance to approve the issue of shares in the plaintiff company to an overseas party. The issue of those shares was a necessary part of a refinancing package for the plaintiff’s property development. Following the refusal of that consent, the refinancing package did not proceed, and the property venture failed. Takaro brought a claim for damages against the Minister, seeking the profit that had been lost as a result of the failed venture. The claim failed at first instance, because the court did not think that on the balance of probabilities, the development would have been successful.

The Court of Appeal overturned that decision, and held that the High Court should have attempted to value the chance of success of the development, rather than simply deciding whether it was more probable than not that the development would succeed. It was accordingly an appropriate case for the application of the loss of chance analysis.

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<sup>4</sup> The loss of chance analysis was also referred to in *Gartside v Sheffield Young & Ellis* [1983] NZLR 37 (CA) and *Brown v Heathcote County Council* [1986] 1 NZLR 76 (CA).

The Court did not discuss in any detail when the loss of chance analysis was appropriate. However, it did refer to the classic statement of principle in **Mallett v McMonagle** [1970] AC 166 at 176 per Lord Diplock:

*"In determining what [happened] in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. **But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damage which it awards.**"*

The decision in **Takaro** therefore supported a distinction between what are referred to as questions of 'historic fact' (what did happen in the past) and 'hypothetical' questions (what would have happened in the past). The all or nothing approach was to be applied to questions of historic fact, and the loss of chance analysis to hypothetical questions.

This distinction was further reinforced by the Court of Appeal in **Martelli McKegg v Commbank**. In that case, the defendant failed to advise the plaintiff of a potential illegality in a funding transaction they undertook with a third party. While the question of illegality was eventually resolved with the third party, the uncertainty surrounding that issue led to a delay in the appointment of the plaintiff's receivers to the third party, which in turn led to a loss of trading profit during the period of delay.

The uncertainty in that case was in determining when the plaintiff would have appointed receivers. Consistent with the decision in **Takaro**, the Court treated this as a hypothetical question, which should be determined using the loss of chance analysis.

*"Where what is lost is a chance, however, that loss can be assessed even if less than 50 percent. A familiar example is the chance of success in litigation which has become impossible through failure to comply with a limitation period. In the present case, however, it was accepted that Commbank had been wrongfully deprived of the "chance" or opportunity of putting its receivers in place at an earlier date, and that that loss was of some value. The only remaining issue was quantification. The Judge has correctly observed this distinction.*

*Whether Commbank would have made its appointment before or after 7 April 1988 is not an issue of past fact, to be proved on balance of probabilities. It is a hypothetical question, the answer to which is not essential to the issues of causation or liability. It goes only to quantum."*

Accordingly, prior to the decision in ***Benton v Miller***, the position in New Zealand could be summarised as follows:

- (i) Where the question was one of 'historic fact' – i.e. what did happen, not what may have happened – the question was to be determined by reference to the balance of probabilities.
- (ii) Where the question was hypothetical – i.e. what would have happened, and not what actually happened – the question was to be determined by reference to the loss of chance analysis.

### ***Benton v Miller & Poulgrain***

Mr and Mrs Benton were married but held property in their separate names. In particular and prior to the arrangements at issue in these proceedings, Mrs Benton owned 71% of a property in Pauanui worth \$70,000. This was where the couple lived. Mr Benton owned 29% of that property, as well as a property in Auckland, also worth \$70,000.

In 1986, the Bentons undertook a number of property transactions, which gave rise to the litigation ("the property transactions"). The relevant part of those transactions was that Mr Benton sold his property in Auckland for \$70,000, and bought Mrs Benton's interest in the property in Pauanui for \$49,700 (71% of \$70,000). Mr Poulgrain acted for the Bentons on the property transactions, and did not advise them of the possibility that the Pauanui property was already the matrimonial home under the Matrimonial Property Act 1976.

The couple subsequently separated, and Mrs Benton brought proceedings in the Family Court seeking a half-share in the Pauanui property, on the basis that it was the

matrimonial home. Mr Benton at first defended those proceedings, arguing that as a result of the property transactions, the Pauanui property was separate property. However, he eventually accepted what the Court of Appeal described as the "indefensibility of his position", and compromised that action with a payment of \$90,000 being 50 % of the current value of the property. He then claimed that amount from Mr Poulgrain. During the course of the trial, it was accepted that Mr Poulgrain had been negligent in failing to advise Mr Benton of the effect of the Matrimonial Property Act. The issue was what loss was suffered by Mr Benton as a result of this negligence.

At first instance, Mr Benton argued that if had he been properly advised, he would have had Mrs Benton execute an agreement under s21 of the Matrimonial Property Act. Accordingly, he should recover the \$90,000 he had to pay to her in settlement of her matrimonial property claim. The court found that on the evidence, Mrs Benton would not have signed such an agreement, and so this claim failed. In the alternative, he argued that if she had refused to sign such an agreement, he would not have entered into the property transactions, and so he should recover the \$49,700 he paid to her at that time. This claim was also rejected, as being unsupported by the evidence and otherwise speculative.

On appeal to the High Court, Heath J took another approach to the claim, based on a consideration of the scope of the duty of care owed by Mr Poulgrain. He held that on the evidence, if he had been properly advised, Mr Benton would not have entered into the property transactions. The effect of the property transactions were that he paid \$49,700 to acquire 21% of the Pauanui property which he already owned (ie he increased his entitlement from 29% to 50%). He calculated the value of that interest at \$37,800.

The Court of Appeal ultimately resolved the case using an approach similar to that of Heath J. On that basis, the case was not determined by the application of a loss of chance analysis. However, the majority of Glazebrook and William Young J discussed in detail the potential impact of a loss of chance analysis, and the principles governing its application. It is this feature of the decision on which I want to focus.

The majority considered that the problem in this case was one of evidential uncertainty. There were two areas of uncertainty:

- The parties' entitlements to the Pauanui property under the Matrimonial Property Act at the time of the property transactions; and
- What would have happened if Mr and Mrs Benton had received proper advice from Mr Poulgrain.

The question of the entitlements of the parties to the Pauanui property was considered to be a matter of "historic fact". Consistent with the authorities noted above, the court held that this question was to be determined on the balance of probabilities. Having reviewed that evidence, the court was satisfied on the balance of probabilities that the Pauanui property was the matrimonial home at the time of the property transactions.

The difficulty in the case concerned what Mr and Mrs Benton would have done if they had been properly advised. This involved the asking of a "hypothetical question". The issue was whether that question should be answered by reference to the balance of probabilities, or by reference to the loss of chance analysis. In respect of this question, the court held as follows:

- *"In cases which turn on how a plaintiff would have acted in the absence of a breach of duty, the all or nothing approach is usually (although not always: see Davies v Taylor) applicable. So if the plaintiff shows that it is more likely than not that he or she would have acted in a particular way, the Court acts on the assumption that this is the way the plaintiff would have acted. If this is not established, then the Court acts on the basis that the plaintiff would not have acted in the particular way."*
- However, where the question was how Mrs Benton (a third party) would have acted, it is appropriate to apply the loss of chance principles.

In other words, loss of chance damages were not to be applied to hypothetical questions in general, but only to hypothetical questions concerning the actions *of a third party*.

Having described that principle, the court found (on the balance of probabilities) that Mr Benton would not have proceeded with the transactions without a matrimonial property agreement, and calculated damages on the basis of the detriment he suffered at the time of the property transactions (ie the difference between what he paid and what he actually received). It also found that there was a high likelihood (75%) that, if she was asked, Mrs Benton would have signed the matrimonial property agreement. In the end, the court took a composite approach, somewhere between these two alternatives, and awarded Mr Benton \$90,000, being the amount he eventually had to pay Mrs Benton.

There was a dissent as to the appropriate approach, although not as to final result. Hammond J believed that this was not a case involving loss of chance. The question instead was determining the scope of Mr Poulgrain's duty of care. His duty was to advise Mr Benton that his title to the Pauanui property was subject to a matrimonial property claim. He did not do that, and as a result Mr Benton had to pay \$90,000 to obtain a clear title. That was the measure of his loss.

### ***Analysis***

The decision in ***Benton v Miller*** represents an important development in the law in New Zealand relating to damages for loss of chance. In particular, it held that the loss of chance analysis does not apply to all 'hypothetical questions', but only those concerning how a third party would have acted. In this respect, the case is probably contrary to the decision of the Court of Appeal in ***Martelli McKegg*** (and also ***Gilbert v Shanahan*** [1998] 3 NZLR 528 (CA)). However, it already appears to be accepted as representing the 'new' approach of the court (see ***Waitakere City Council v Ioane*** (CA, 9 September 2004, CA21/03); ***Scott v Wilson*** (CA, 12 November 2004, CA15/04); ***Edmonds v Scott*** (HC, Wellington, 3 May 2005, Miller J, CIV 2000 – 485 - 000695).

It was unfortunate that the Court of Appeal in *Benton v Miller* did not refer to its earlier decision in *Martelli McKegg*. That decision had long been applied as the leading authority in New Zealand on damages for loss of chance. However, what I want to argue in the final part of this paper is that the decision in *Benton v Miller* is a worthwhile and important limit on the decision in *Martelli McKegg*. If a conflict between those two decisions was ever to arise before a court, then the approach in *Benton v Miller* ought to be preferred.

However, I also want to add a gloss to that decision. I think that even *Benton v Miller* goes too far in describing cases for which the loss of chance analysis is appropriate. In particular, I will argue that the hypothetical question of what a third party would have done, while necessary for the application of the loss of chance analysis, is not sufficient. Instead, what is also necessary is that the hypothetical question must be one that cannot reasonably be answered, and is accordingly properly described as a matter of 'evidential uncertainty'.

### ***Loss of chance is an exceptional remedy***

The first point to emphasise is that damages for loss of chance are treated by the courts as an exceptional remedy.<sup>5</sup> The usual rule, as I discussed earlier, is that all elements of the plaintiff's cause of action must be proved on the balance of probabilities. The courts have traditionally been reluctant to allow either a plaintiff or a defendant to avoid the impact of the 'all or nothing' approach by reference to an alternative formulation of their claim based on mere chance.

It is probably fair to say that this point has not often received explicit consideration in the cases, although it is implicit in any consideration of the authorities.<sup>6</sup> However, in a system where the 'all or nothing' approach represents the usual response to questions of

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<sup>5</sup> As to scepticism of the appropriateness of the loss of chance analysis in general, and the unusual consequences of a broad application, see Fleming, "The law of torts", (1998), p227-229.

<sup>6</sup> Perhaps the best illustration of the courts' general reluctance to adopt the loss of chance analysis is the recent decision of the House of Lords in *Gregg v Scott* [2005] 2 WLR 268.

proof, it is clear that the loss of chance analysis *should* only be referred to in exceptional cases. The reasons for this can be summarised as follows:

- All claims for loss can be reformulated as a chance of avoiding that outcome. Why should the plaintiff, who can only show a 40% probability of the loss occurring, lose on the 'all or nothing' approach, but recover 40% of that loss when they reformulate their claim as one for loss of chance. The application of the loss of chance analysis is arguably unfair to either the plaintiff or defendant, when compared to their position under the 'all or nothing' approach.
- Loss of chance damages are inherently expansionary of liability in negligence. They involve a movement from compensation for those who *suffer* a loss, to compensation for those who only *may have suffered* such a loss. If the courts are concerned with the expansion of the tort of negligence (and they tell us that they are), imagine how much worse the problem would be if you could also claim for the mere prospect of injury.<sup>7</sup>
- Too broad an application of the loss of chance analysis is also inherently corrosive of the 'all or nothing' analysis. Problems of proof are present in any case. The court gives each side the opportunity to tell their story. Often the evidence before the court is less than satisfactory. Often the court needs to be robust in its findings. However, a key feature of our adversarial system is that the court must form a view as to what happened. That discipline could easily be lost if we allow the court, in those difficult cases, to decide simply on the basis of their uncertainties.

Accordingly, I think that we need to start from the position that the loss of chance analysis is an exceptional approach for the court to take. When the cases are considered, I think it is clear that this is also the approach the courts take to this

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<sup>7</sup> Peel in his article "Loss of chance revisited: *Gregg v Scott*" (2003) 66 MLR 623 at 629 argues that the 'balance of probabilities' test is really a pragmatic limit on potential liability (in that case, the liability of medical practitioners).

question. England has barely accepted the principle in tort law, and there are very few New Zealand cases outside the area of solicitor's negligence.

### ***Hypothetical questions***

***Takaro*** and ***Martelli McKegg v Commbank*** both suggested that the loss of chance analysis is appropriate when what is involved is the asking of a 'hypothetical question' as to what would have happened in the past. I think the Court of Appeal in ***Benton v Miller*** was right to recognise (implicitly) that this is too simple an analysis.

There is nothing inherently objectionable in the asking, and answering, of a hypothetical question. We do it all the time. The standard of care in negligence is one obvious example (what a reasonable person *would have done*). Indeed, when considering the situation of cause-in-fact, *every* case involves the asking of a hypothetical question. The 'but for' test is a counter-factual test. What that means is that to answer the question of whether the plaintiff would have suffered her loss 'but for' the defendant's negligence, you need to consider what would have happened in a world absent the defendant's negligence. That is a hypothetical question.

This point was recently made by the House of Lords in its decision in ***Gregg v Scott*** [2005] 2 WLR 268 at 287 per Lord Hoffmann:

*"The fact that one cannot prove as a matter of necessary causation that someone would have done something is no reason why one should not prove that he was more likely than not to have done it."*

So it makes no sense to say that the mere posing of a hypothetical question requires resort to the loss of chance analysis. What we can say, however, is that some hypothetical questions are not easily or properly answered because of the degree of speculation they involve. As I noted earlier, it is one thing to ask whether I would have hit your car had I applied the brakes earlier. It is another thing entirely to ask whether you would have won your case if I had filed your claim in time.

### ***Third party action***

The approach suggested by the Court of Appeal was a refinement of the analysis in cases like ***Takaro***, arguing that the hypothetical question must relate to what a *third party* would have done. It was derived from the decision of the English Court of Appeal ***Allied Maples Group Ltd v Simmons & Simmons (a firm)*** [1995] 4 All ER 907. It was also consistent with William Young J's earlier decision as a High Court judge in ***Aorangi Sheepskin Products Ltd v Purnell Creighton McGovern*** (HC, Christchurch, 21 May 2002, CP 3/01).

Outside the particular situation of loss of chance analysis, it has long been recognised that hypothetical questions of what *a plaintiff* would have done must be determined on the balance of the probabilities. Two well known cases illustrate the point.

In ***McWilliams v Sir William Arrol & Company*** [1962] WLR 295, the deceased was employed by the defendant as a steel erector in connection with the construction of a tower crane. During the final stages of construction, he fell from the tower in which he was working and was killed. At the time of the accident, he was not wearing a safety belt, which probably would have saved him from the fall. It also appears that safety belts were not available on the site at the time of the incident. However, while there was clear uncertainty as to whether or not the plaintiff would have worn the safety belt had it been available, the court resolved the matter on the balance of probabilities, and concluded that he would not have worn such a belt had it been available. See also ***Hotson v East Berkshire Area Health Board*** [1987] AC 750

A New Zealand example, outside the particular context of personal injury claims, is the decision of the Court of Appeal in ***Sew Hoy & Sons Ltd (In Rec & In Liq) v Coopers & Lybrand*** [1986] 1 NZLR 392 (see also ***McElroy Milne v Commercial Electronics Ltd*** [1993] 1 NZLR 39 (CA)). The case involved an allegation of negligence against the auditor of the plaintiff in over valuing the plaintiff's stock, and consequently the net operating profits. The company subsequently went into liquidation, and brought a claim against the auditors on the basis that if the defendant had not been negligent, the

plaintiff would have taken steps to avoid or minimize any further trading losses. The case clearly involved a substantial, hypothetical question as to what the plaintiff would have done in the past. However, and accepting that the case only involved a strike out application, the analysis of the Court of Appeal was solely in terms of whether the plaintiff would have been able to prove on the balance of probabilities that its trading losses flowed from the negligence. There was no reference to a loss of opportunity analysis. Indeed, the references by the court to causation meaning something more than providing the opportunity to incur a loss, make it clear that the court thought the loss of chance analysis was inappropriate in that case.

What is clear, and what seems to have been recognised in cases like *Allied Maples* and *Benton v Miller*, is that the courts have not always drawn the connection between this long established rule, and the situation of loss of chance. The important thing about *Benton v Miller* is that it recognised that the loss of chance analysis is not intended to undermine the fundamental principle. I note that the approach in *Benton v Miller* on this point has been affirmed by the House of Lords in *Gregg v Scott* [2005] 2 WLR 268 at 287 per Lord Hoffmann.

### ***The problem with Benton v Miller & Poulgrain***

The difficulty with the decision in *Benton v Miller* is that it assumed that because the loss of chance analysis cannot apply to hypothetical questions concerning the conduct of a plaintiff, it necessarily applies to all other hypothetical questions, and in particular questions relating to the conduct of a third party. I do not think that this conclusion necessarily follows.

As I have discussed above, there is no objection in principle to the asking and answering of hypothetical questions. The problem is that in some circumstances, the answer to that question is too speculative. But this is not always the case, and *Benton v Miller* is a good illustration of this.<sup>8</sup> The uncertainty in the case concerned whether or not Mrs Benton would have signed the matrimonial property agreement. This was a hypothetical

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<sup>8</sup> Another case where this criticism could be made is *Retirement Enterprises Ltd v Beattie Rickman Legal* (HC, Hamilton, 27 April 2004, CIV 2003-419-293).

question, but it was not one that was in any sense incapable of proof. Regardless of all the circumstantial evidence that suggested she would have signed the agreement (and which led the Court to conclude that there was a 75% chance of her doing so), she appears to have sat in the Court for the duration of the trial. Any uncertainty as to what she would have done could have been answered by simply asking her the question.

The point can be made by looking at the case another way. If Mr Benton had called Mrs Benton, and that the evidence from both parties was that they would have signed the matrimonial agreement, on what basis could Mr Benton's award have been discounted? It would be as certain as any fact could be that the agreement would have been signed.

It is correct that the fact that a hypothetical question is involved is necessary before the court will use the loss of chance analysis, but the fact that it is a hypothetical question is not in itself sufficient for the use of that analysis. Hypothetical questions are simply an illustration of situations where the usual 'all or nothing' approach is not appropriate. They illustrate the situation where answering the 'but for' inquiry would be unreasonably speculative. However, it does not follow that all hypothetical questions involve unreasonable speculation.

This point, and the proper approach to the application of the loss of chance analysis, was well made in one of the original authorities on the point, ***Kitchen v Royal Air Force Association*** [1958] 1 WLR 563. The case concerned a failure by solicitors to bring proceedings within the relevant time limit.

*"If, in this kind of action, it is plain that an action could have been brought, and if it had been brought that it must have succeeded, of course the answer is easy. The damaged plaintiff then would recover the full amount of the damages lost by the failure to bring the action originally. On the other hand, if it be made clear that the plaintiff never had a cause of action, that there was no case which the plaintiff could reasonably ever have formulated, then it is equally plain that the answer is that she can get nothing save nominal damages for the solicitors' negligence.*

...

*But the present case falls into neither one nor the other of the categories which I have mentioned. There may be cases where it would be quite impossible to try "the action within the 'action'" as Mr O'Connor asks. It may be that for one reason or another the action for negligence is not brought till, say twenty years after the event and in the process of time the material witnesses or many of them may have died or become quite out of reach for the purpose of being called to give evidence.*

*In my judgment, what the court has to do (assuming that the plaintiff has established negligence) in such a case as the present, is to determine what the plaintiff has by that negligence lost. The question is, has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case, it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can."*

Against that background, I suggest the appropriate approach is as follows:

- (i) The starting point is that the plaintiff bears the burden of proving all facts relevant to their case, on the balance of probabilities.
- (ii) All facts concerning what has happened in the past must be proved by the plaintiff on the balance of probabilities.
- (iii) All hypothetical questions that relate to the action of either the plaintiff or defendant must be proved on the balance of probabilities.
- (iv) All hypothetical questions that relates to the conduct of third parties must be determined on the balance of probabilities, unless that question is not reasonably capable of proof. In that situation, the Court will use a loss of chance analysis.