Tabet v Gett - [2010] HCA 12

HIGH COURT OF AUSTRALIA

GUMMOW ACJ,
HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

REEMA TABET (BY HER TUTOR GHASSAN SHEIBAN) APPELLANT

AND

DR MAURICE GETT RESPONDENT

Tabet v Gett [2010] HCA 12
21 April 2010
S259/2009

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with J L A Lonergan and J Chambers for the appellant (instructed by Slater & Gordon Lawyers)

N J Young QC with J K Kirk and K C Morgan for the respondent (instructed by Blake Dawson Lawyers)

CATCHWORDS

Tabet v Gett

Negligence – Medical negligence – Damage – Loss of chance – Appellant suffered irreversible brain damage – Respondent's delay in providing proper treatment breached duty of care owed to appellant – Where not established on balance of probabilities that breach caused any part of brain damage – Where breach at most caused loss of less than 50% chance of better outcome – Whether law of tort recognises or should recognise loss of chance of better outcome as damage giving rise to liability in negligence – Relevance of policy considerations concerning extension of liability in medical negligence cases.

Negligence – Medical negligence – Damage – Loss of chance – Trial judge assessed as 40% the lost chance of better outcome – Court of Appeal found evidence supported no

more than 15% chance of better outcome – Whether evidence sufficient to establish loss of chance of better outcome – Whether inference could properly be drawn from evidence as to loss of chance.

Words and phrases – "balance of probabilities", "damage", "gist of the action", "loss of a chance of a better outcome", "standard of proof".

1. GUMMOW ACJ. The appellant suffers irreversible brain damage. She was born in 1984 and brought her action in the Supreme Court of New South Wales by her tutor, who is her uncle. The respondent, Dr Gett, was the second defendant in the action and at all material times was a registered medical practitioner practising as a paediatrician and a visiting medical officer at the Royal Alexandra Hospital for Children in Sydney. The events giving rise to the litigation took place when the appellant, then aged six years, was a patient at the hospital. Changes to the common law subsequently made by the *Civil Liability Act* 2002 (NSW) did not apply directly to this case.

2. The action was brought in negligence alone and there was no claim in contract. The appellant pleaded her case as one in which breach by the respondent of his duty to manage her with due care and skill caused or contributed to cause her injury, loss and damage, or, in the alternative, led to "the loss of an opportunity to avoid injury, loss and damage". The appellant at trial failed on the first ground but succeeded on the second.

3. There are two central issues. The first is whether in a claim arising from personal injury the law of negligence permits the bifurcation in this way of the nature of the actionable damage attributable to the same breach of duty, so that failure of the case on the first branch may be overcome by success on the second. In substance, the respondent contends that these are not true alternatives and that the law of negligence does not recognise as compensable damage the loss of opportunity in question here. The second issue is whether, in any event, the evidence sufficiently supported the favourable finding at trial on the claim for loss of opportunity.

The course of the litigation

4. On 11 January 1991 the appellant was admitted to the hospital and came under the care of the respondent. The appellant had recently suffered from chickenpox which had resolved but both before and after that illness she suffered from headaches, nausea and vomiting. The respondent made a provisional diagnosis that the appellant was suffering from chickenpox, meningitis or encephalitis.

5. The significant events which followed, and the course of the 36day trial before Studdert J [1] , were described as follows by the Court of Appeal (Allsop P, Beazley and Basten JJA)[2]:

> "On 14 January 1991, after suffering a seizure, and after a CT scan and EEG were performed [the appellant] was diagnosed as suffering from a brain tumour. She received treatment, including an operation to remove the tumour. She suffered

irreversible brain damage, partly as a result of events on 14 January 1991, partly from the tumour (which had been growing for over 2 years), and partly from the operative procedure and other treatment (not said to be in any way negligently performed).

> The [appellant] brought proceedings against the [respondent] in negligence. The central allegation was that the CT scan that was undertaken on 14 January should have been performed earlier, either on 11 or 13 January, and that if it had, she would have had a better medical outcome. The plaintiff also brought proceedings against Dr Mansour, who had treated her in an earlier admission to hospital on 2931 December 1990. The trial judge held that Dr Mansour was not negligent in his treatment of the [appellant] and there is no appeal from that decision.
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> The trial judge held, however, that the [respondent] was negligent in failing to order a CT scan on 13 January 1991. His Honour found no earlier negligent act or omission, thereby concluding that the [respondent] acted reasonably in making his provisional diagnosis on 11 January that the [appellant] was suffering from chickenpox or varicella meningitis or encephalitis."

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[1] *Tabet v Mansour* [2007] NSWSC 36.

[2] *Gett v Tabet* (2009) 254 ALR 504 at 506507 .

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6. **Following paragraph cited by:**

   Hirst v Sydney South West Area Health Service (22 August 2011) (Davies J)

The finding by Studdert J of negligence in failing to order a CT scan on 13 January was based upon an episode at 11 am on that day when nursing staff observed that the appellant's pupils were unequal and the right pupil was not reactive. However, his Honour was not persuaded on the balance of probabilities that the discovery of the tumour upon administration of a CT scan on 13 January would have led to the appellant being treated in such a way as would have avoided the seizure and deterioration in her condition on 14 January.

7. The Court of Appeal continued its account of the trial as follows [3] :

> "Having found that the [respondent] breached his duty of care, the trial judge did not conclude that this negligence caused or contributed to the seizure and deterioration which occurred on 14 January. Rather, his Honour found that the [appellant] lost a chance of a better medical outcome had the brain tumour been

detected on 13 January 1991, as it would have been if the CT scan had been performed that day."

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[3] (2009) 254 ALR 504 at 507.

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8. The trial judge had introduced his holding with respect to the loss of a chance by stating that on the balance of probabilities he was satisfied that, had a CT scan been called for at 11 am on 13 January, it would have been performed urgently, the tumour would have been detected and treatment, probably by administration of steroids rather than by drainage, would have reduced intracranial pressure. The absence of treatment "deprived [the appellant] of the chance of a better outcome" [4] . Further, the detection of the tumour on 13 January would have eliminated the time lost in carrying out the CT scan after the seizure on the next day and before urgent surgery was subsequently performed.

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[4] [2007] NSWSC 36 at [306] .

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9. There was then the question of remedy. The Court of Appeal described the outcome of the trial as follows [5] :

"His Honour assessed the [appellant's] damages referable to her entire brain damages in a total amount of $6,092,586. His Honour found that it was probable that the [appellant's] decline on 14 January contributed to her ultimate disabilities and assessed that contribution to be no greater than 25%, representing an assessment of $1,523,146. An attack by the [respondent] on this divisible apportionment was abandoned at the appeal. The trial judge assessed that the loss of a chance of a better outcome, that is avoiding the damage referable to the deterioration on 14 January (the 25%), was 40%. The damages to which the [appellant] was thus entitled for a 40% loss of a chance was $610,000. His Honour thus ordered verdict and judgment for the [appellant] in that sum."

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[5] (2009) 254 ALR 504 at 507.

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10. **Following paragraph cited by:**

ACT v Gillan; Gillan v ACT (02 August 2019) (Penfold J)

> 55. *Tabet v Gett* is a High Court decision that, relevantly, excludes recovery in medical negligence claims in which the better result of which the plaintiff was deprived cannot be shown to have been more probable than the alternative. It is accordingly unlikely that a plaintiff would seek to **rely** on that case (as distinct from recognising the need to meet the more burdensome test of causation applied in that decision: at [10] above).

The trial judge emphasised that the "loss of a chance" branch of the appellant's case, upon which alone she had succeeded, had not been her primary claim. This had been for recovery for negligence resulting in her brain damage and the appellant's case had been that, even if this result were restricted to the harm suffered on 14 January, her overall disability was indivisible. It may be accepted that the medical evidence had been led and crossexamined with that primary claim uppermost in mind.

11. The Court of Appeal set aside the judgment for the appellant and entered judgment for the respondent. The appellant in this Court seeks the restoration of the outcome at trial. The principal ground of appeal is that the Court of Appeal erred in holding that the causal effects of the clinical negligence of the respondent should be assessed on the balance of probabilities alone rather than, as at trial, "on the basis of loss of a chance of a better outcome". That is to say, the appellant disputes the adverse outcome for her in the Court of Appeal on what earlier in these reasons is identified as the first of the central issues.

12. It should be noted that in the Court of Appeal, (a) the respondent failed in his challenge to the finding that he had been negligent in failing, on 13 January, to consider other possible diagnoses and to order a CT scan on that day, and (b) the appellant failed in her contention that she had suffered more than the loss of the opportunity of a better outcome and that the primary judge should have found, on the balance of probabilities, that the negligence of the respondent had caused the whole of the brain injury referable to her seizure and deterioration on 14 January, being 25 per cent of her overall disability after the operation.

The state of authority

13. In ruling in favour of the appellant on the "loss of a chance" branch of her case, the trial judge drew support from the decisions of the Victorian Court of Appeal in *Gavalas v Singh* [6] and of the New South Wales Court of Appeal in *Rufo v Hosking* [7] . But, as Callaway JA emphasised in the first case [8] , the appeal had turned upon the assessment of damages and, as M W Campbell AJA explained in the other case [9] , the litigation there was conducted on the basis that if the facts supported a claim based on the loss of a chance then the action lay. Nevertheless, in the present case Studdert J regarded himself as bound by *Rufo* .

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[6] (2001) 3 VR 404 .

[7] (2004) 61 NSWLR 678 .

[8] (2001) 3 VR 404 at 409.

[9] (2004) 61 NSWLR 678 at 693694 .

14. Shortly after *Rufo* was decided by the New South Wales Court of Appeal, in *Gregg v Scott* [10] the House of Lords (Lords Hoffmann and Phillips of Worth Matravers MR and Baroness Hale of Richmond; Lords Nicholls of Birkenhead and Hope of Craighead dissenting) affirmed the rejection by the Court of Appeal (Simon Brown and Mance LJJ; Latham LJ dissenting)[11] of the submission by the plaintiff that the trial judge should have awarded him damages on the footing that the reduced chances of successful treatment of the cancer he suffered should be recoverable as damages in negligence.

[10] [2005] 2 AC 176 .

[11] [2003] Lloyd's Rep Med 105.

15. In breach of his duty of care owed to his patient Mr Gregg, Dr Scott had failed forthwith to refer him for a biopsy investigation in November 1994, and the cancer was undetected until November 1995. There was a delay in the commencement of treatment, in which time the cancer had spread. But Mr Gregg had been in remission since 1998. The trial was in 2001 and there was no discernible recurrence of the disease as the litigation proceeded to the House of Lords. Expert evidence treated a "cure" as diseasefree survival for 10 years. It was an agreed fact that had Mr Gregg been promptly diagnosed and treated his chance of diseasefree survival for 10 years would have been 42 per cent, but at the trial in 2001 this had been reduced to only 25 per cent.

16. Mr Gregg was thus a survivor against what might be called the statistical odds. His sole complaint was that the breach of duty by Dr Scott had reduced his prospects of a "cure", being diseasefree survival until at least 2008. However, the chronology meant that the chance had not yet run its course. It thus remained unsettled whether Dr Scott's breach of duty had destroyed the chance of a "cure". It may have been a paradox that Mr Gregg's resilience made it more difficult for him to establish his case. Nevertheless, how, it might be asked, had the damage, the loss of the chance which was the gist of the action, yet been sustained?

17. Moreover, there was a risk of overcompensation if Mr Gregg recovered damages upon his action tried in 2001 for the reduction in his prospects of survival by reason of the negligent failure in diagnosis in 1994 [12] . As a general proposition, and in many fields of law, assessments of compensation or value are made by taking into account all matters known at the later date, when conjecture is no longer essential [13] .

[12] Cf *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 527; [1992] HCA 55.

[13] *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 658659 [39]; [2004] HCA 54.

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18. Against that background, it is, with respect, unsurprising that one of the majority, Lord Phillips, said that it would be unsatisfactory to award damages for the reduction of the chance of a cure when the longterm result of treatment is still uncertain [14] , thereby perhaps threatening the coherence of the common law [15] . A similar concern for coherence in the tort of negligence is apparent in the opinion of Baroness Hale. She asked how a personal injury law concerned with outcomes could live with an alternative of recovery for loss of a chance of an outcome [16] .

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[14] [2005] 2 AC 176 at 225. See also at 234 per Baroness Hale.

[15] [2005] 2 AC 176 at 221. See the analysis of this case by Professor Stapleton, "Loss of the Chance of Cure from Cancer", (2005) 68 *Modern Law Review* 996.

[16] [2005] 2 AC 176 at 233.

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19. Counsel for the present appellant, seeking to diminish the significance for this case of the reasoning of the majority in *Gregg v Scott* , emphasised that, unlike *Gregg v Scott* , it does not present the conundrum of a chance or prospect of the plaintiff dying earlier than would otherwise be the case as the basis for an action brought while the plaintiff still lived. Here, it was said, the end result, the appellant's disabilities, had been reached before the action was commenced.

20. Earlier, in *Laferrière v Lawson* [17] the Supreme Court of Canada, on appeal from the Quebec Court of Appeal[18], had considered "loss of chance" in medical negligence. The reasons of the majority (La Forest J dissenting) were given by Gonthier J, who said of "the loss of chance analysis" that it added unnecessary and impermissible confusion to medical negligence cases because it "in fact hides a break in the causal link" [19] . However, in the British Columbia Court of Appeal it has been said by Southin JA that, in that Province, the relationship of patient and physician is essentially contractual. The patient has the right to performance of the contract on its terms and on that basis there might be recovery of damages representing the loss of a chance of less than 50 per cent of a better outcome [20] . But, as indicated above, there was no contractual claim in this case and no occasion to consider the approach taken by Southin JA [21] .

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[17] [1991] 1 SCR 541 .

[18] [1989] RJQ 27.

[19] [1991] 1 SCR 541 at 591.

[20] *de la Giroday v Brough* [1997] 6 WWR 585 at 598601 ; *Oliver (Guardian ad litem of) v Ellison* [2001] 7 WWR 677 at 691699 .

[21] Cf *Breen v Williams* (1996) 186 CLR 71; [1996] HCA 57; *Wong v The Commonwealth* (2009) 236 CLR 573; [2009] HCA 3.

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21. Perhaps more immediately congenial to the appellant's case is the recent decision of the seven member Supreme Judicial Court of Massachusetts in *Matsuyama v Birnbaum* [22]. By reason of the failure in diagnosis by the defendant in 1995, Mr Matsuyama's cancer, which then might still have been curable, had metastasised to an advanced inoperable phase resulting in his premature death[23]. In upholding the finding of the jury that the misdiagnosis was a "substantial contributing factor" to the death of Mr Matsuyama, Marshall CJ said[24]:

> "the loss of chance doctrine views a person's prospects for surviving a serious medical condition as something of value, even if the possibility of recovery was less than even prior to the physician's tortious conduct. Where a physician's negligence reduces or eliminates the patient's prospects for achieving a more favorable medical outcome, the physician has harmed the patient and is liable for damages. Permitting recovery for loss of chance is particularly appropriate in the area of medical negligence. Our decision today is limited to such claims."

Her Honour went on to stress that if "loss of a chance" is to be recognised as actionable it is better understood as an injury recognised by the law of tort, than as a separate cause of action or as a surrogate for the necessary element of causation in a negligence claim[25]. If recovery be sought for decrease in the patient's prospect of recovery, rather than the ultimate outcome, there has to be identification and valuation of that diminished prospect. With that I, with respect, agree. But that does not mean that issues of causation do not arise on such an analysis. It will be necessary to say more of this important consideration later in these reasons.

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[22] 890 NE 2d 819 (2008). The decision is the subject of a "Note", (2009) 122 *Harvard Law Review* 1247.

[23] 890 NE 2d 819 at 826 (2008).

[24] 890 NE 2d 819 at 823 (2008).

[25] 890 NE 2d 819 at 832 (2008), adopting *Alexander v Scheid* 726 NE 2d 272 at 279 (2000).

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22. **Following paragraph cited by:**

Mal Owen Consulting Pty Ltd v Ashcroft (20 June 2018) (Basten and Macfarlan JJA, Barrett AJA)

However, as Kiefel J explains in her reasons, the form of the actual recovery in *Matsuyama* was in the controversial shape of "proportional damages" representing not the loss of a chance of survival but a percentage of a damages award on a statutory wrongful death claim by the executrix of Mr Matsuyama.

23. **Following paragraph cited by:**

    Jadwan Pty Ltd v Rae & Partners (A Firm) (09 April 2020) (Bromwich, O'Callaghan and Wheelahan JJ)

In *Matsuyama*, Marshall CJ did emphasise two matters, both of which are uncontroversial and applicable to the present appeal. The first is the importance of determinations of fact based upon expert testimony rather than speculation based on insufficient evidence[26]. The second is the distinction between the injury or damage which is the gist of the action in negligence and the proper measure of damages[27]. Much of the difficulty derives from the multiple reference of the term "damage", which is used to identify that which the law accepts as sufficient *injuria*, and the measure of compensation represented by the sum for which judgment is entered [28] .

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[26] 890 NE 2d 819 at 833834 (2008).

[27] 890 NE 2d 819 at 838839 (2008).

[28] *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 442 ; *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at 508509 [69]; [2003] HCA 15; *Cattanach v Melchior* (2003) 215 CLR 1 at 15-16 [22][23]; [2003] HCA 38.

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24. In that regard Lord Walker of Gestingthorpe has emphasised that while questions of assessment of damages may involve quantifying future or hypothetical chances, the common law has not accepted that the attribution of liability should be proportionate to the proof of causation [29] . Nevertheless, in some of the cases there has been a tendency to run together questions of attribution of liability and the measure of damages recoverable.

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[29] *Transport for London (formerly London Underground Ltd) v Spirerose Ltd (in administration)* [2009] 1 WLR 1797 at 1813; [2009] 4 All ER 810 at 826827 .

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25. In the present case, the Court of Appeal considered, and properly so, that it could only be for this Court "to reformulate the law of torts to permit recovery for physical injury not shown to

be caused or contributed to by a negligent party, but which negligence has deprived the victim of the possibility (but not the probability) of a better outcome".

26. Their Honours added [30] :

> "Such an approach would not readily be limited to medical negligence cases, but would potentially revolutionise the law of recovery for personal injury. It would do so by reference to an assessment of increased risk of harm, verbally reformulated into loss of a chance or opportunity in order to equate it with the recognition in *Sellars* [*v Adelaide Petroleum NL* [31]] and like cases of the existence in commerce of a coherent notion of loss of a right or chance of financial benefit. No doubt the limits of the 'commercial' or financial opportunity or advantage dealt with in *Sellars* will be a matter of future debate: see the discussion in *Gregg* [*v Scott* [32] by Baroness Hale of Richmond]. In our view, its limits (unless expanded by the High Court) must fall short of a proposition which revolutionises the proof of causation of injury or [which redefines what is 'harm'] in personal injury cases."

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[30] (2009) 254 ALR 504 at 586.

[31] (1994) 179 CLR 332; [1994] HCA 4 .

[32] [2005] 2 AC 176 at 232.

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27. These reasons will seek to demonstrate that the reformulation of which the Court of Appeal spoke should not be made, and that the appeal to this Court must fail. However, this outcome will not require acceptance in absolute terms of a general proposition that destruction of the chance of obtaining a benefit or avoiding a harm can never be regarded as supplying that damage which is the gist of an action in negligence.

The case for the appellant

28. Studdert J had described the success of the appellant as the entitlement "to be compensated for the loss of a chance of a better outcome had the breach of duty not occurred" [33] . The identification of the chance lost as that of a "better outcome" is repeated elsewhere in the reasons. As noted by the Court of Appeal, the "better outcome" appears to have been avoidance of the brain damage referable to the deterioration on 14 January. This was assessed as a contribution of 25 per cent to the ultimate disabilities which the appellant suffers. The "chance" of avoiding that brain damage referable to the deterioration of 14 January was assessed by the trial judge as 40 per cent.

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[33] [2007] NSWSC 36 at [379] .

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29. In this Court counsel for the appellant submitted that at the heart of her case was the concept of the lessening of the gravity of the final result. As refined in the course of argument, the appellant's case is that the respondent's negligence deprived her of a chance, prospect or opportunity that had remained open only for a short period between 11 am on 13 January and her seizure and deterioration on 14 January. The chance, prospect or opportunity had been of avoiding so much of the eventual outcome, her disabled state, which as to 25 per cent was attributable to her seizure and deterioration on 14 January.

30. The appellant sought to stigmatise the respondent's case as being that, because the likelihood of this better outcome was less than 50 per cent, it followed (a) that on the balance of probabilities the appellant would still have suffered as much as she did, and therefore (b) the chance, prospect or opportunity had no worth.

31. **Following paragraph cited by:**

Austen v Tran (12 May 2021) (McWilliam AJ)
Hookey v Manthey (21 May 2020) (Ryan J)

However, if the likelihood of a better outcome had been found to be greater than 50 per cent then on the balance of probabilities the appellant would have succeeded, not failed, on the main branch of her case in negligence. The question of principle thus becomes whether the law permits recovery in negligence on proof to the balance of probabilities of the presence of something else, namely a chance, opportunity or prospect of an outcome the eventuation of which, however, was less than probable.

The case for the respondent

32. The respondent submitted that even if (which he disputed) the appellant had correctly formulated the applicable legal principles, the evidence had provided an insufficient basis for a favourable outcome based on anything more than speculation. The respondent also challenged the indeterminacy of the terms used by the trial judge, "better outcome" and "chance". The respondent submitted that the "chance" found was that steroids if administered, or a drain if inserted earlier, would have worked to lessen or avert brain damage, but that, in the way the evidence was led at the trial, these mere possibilities were not tied to evidence sufficient to found any assessment of the potential effectiveness of that chance. Indeed, at the trial, counsel for the respondent had submitted that there was no expert evidence as to the value of the lost chance or sufficiently identifying the actual harm suffered on 14 January.

33. For the reasons which follow, the case presented by the respondent should be preferred to that presented by the appellant. This is so both with respect to the applicable principles, and with respect to what the respondent submits in any event to have been the weaknesses in the evidence.

34. **Following paragraph cited by:**

BestCare Foods v Origin Energy (31 May 2012) (McDougall J)

Before turning to matters of deep principle, something more should be said respecting the reasons of the trial judge.

The reasons of the trial judge

35. The trial judge began with the proposition, which the appellant properly accepted in submissions to this Court, that the existence of the chance of a better outcome had to be proved on the balance of probabilities. His Honour continued [34] :

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[34] [2007] NSWSC 36 at [377], [378], [381], [382], [429] .

"I am satisfied on the probabilities as to the following:

(i) that the failure to relieve the [appellant's] intracranial pressure during the twentyfour hour period prior to [her] decline on 14 January 1991 was causative of brain damage occurring at and following the time of the [appellant's] observed decline on 14 January;

(ii) that the [appellant] lost the chance of that relief and of avoiding or minimising that damage by reason of the breach of duty of the [respondent];

(iii) that the chance was not so low as to be speculative, but was a good chance, although less than a fifty percent chance.

... *Whilst I do not have the benefit of any expert opinion as to the value of the lost chance in percentage terms*, I have decided that the loss of the chance had the breach of duty not occurred is to be measured at forty percent. In so concluding, I have regard to the following:

(a) the probability that a CT scan if sought would have been performed urgently, on 13 January, revealing the presence of the medulloblastoma;

(b) the probability that the detection of the medulloblastoma would have been followed immediately on 13 January by the placement of a drain or the prescription of steroids. ... I consider it more likely that steroids would have been prescribed rather than the placement of a drain;

(c) whilst I consider that the placement of a drain would have proved more effective to relieve pressure, the probability is that the steroids would have had some beneficial effect, and would have reduced tumour related swelling;

(d) the carrying out of the CT scan on 13 January would have avoided the time occupied in performing the CT scan and the EEG on 14 January. Should it still have proved necessary to insert the drain on 14 January, notwithstanding the prescription of steroids the day before, this procedure could have been carried out approximately two hours earlier than it was. ...

(e) If, notwithstanding the prescription of steroids on 13 January, the decline had still occurred on 14 January, the elimination of the delay for the CT and the EEG on the later date and the earlier insertion of the drain would have increased the chance of a better outcome. ...

After close attention to the matter and whilst acknowledging the difficulties of the task, I have decided that I should proceed with the assessment [of the value of the lost chance].

> The [appellant] is entitled to damages referable to the loss of a chance of a better outcome in relation to the harm suffered on 14 January 1991 only. There were altogether four contributors to the totality of the brain damage from which the [appellant] presently suffers:
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> (i) the medulloblastoma with its seeding, and the hydrocephalus;
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> (ii) the damage that occurred on 14 January 1991;
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> (iii) the surgery on 16 January 1991;
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> (iv) the subsequent radiotherapy treatment.
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> ...
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> Having considered all the medical evidence, I think it probable that the event of 14 January made some contribution to the [appellant's] ultimate disabilities, particularly her cognitive loss and her ataxia, her loss of balance and her coordination impairment. However, I find on the probabilities that the contribution made by the event of 14 January 1991 to the above specified disabilities and to her disabilities generally was significantly less than the combined contribution of the remaining contributors. *It is impossible to be precise about the matter, as reflection on the medical evidence reveals,* but I find on the probabilities that the contribution of the event of 14 January 1991 to the aggregate brain damage and resulting disabilities with which the [appellant] has presented to this Court is no greater than twentyfive percent." (emphasis added)

36. The Court of Appeal [35] , however, held that if, contrary to its view, a loss of chance analysis were "legitimate" it would consider that the appellant lost, at most, a 15 per cent chance, not a 40 per cent chance, of avoiding the overall 25 per cent of the brain damage.

[35] (2009) 254 ALR 504 at 555.

The evidence

37. The trial judge plainly had appreciated the difficulty in deriving from the evidence the conclusions he reached both as to the 25 per cent contribution to the appellant's disabilities and as to the 40 per cent chance of avoiding the deterioration on 14 January. This situation may be contrasted, for example, with that disclosed in *Matsuyama* [36], where there was before the jury extensive evidence by expert witnesses to support the opinion that the development of gastric cancer was classified into four distinct stages with each carrying a diminished chance of survival, measured by five diseasefree years after treatment. It was the development of medical science to the point that, at least for some conditions, expert evidence could replace speculation that, in the view of the Massachusetts court, made it appropriate to recognise loss of chance as a form of injury[37].

[36] 890 NE 2d 819 at 824828 (2008).

[37] 890 NE 2d 819 at 834 (2008).

38. No doubt the present case arose in very particular circumstances making it difficult to find the appropriate comparator or counterfactual. Usually this will require proof of what would have been the plaintiff's position in the absence of the breach of duty by the defendant. The difficulty in the present case arises from the substitution, for which the appellant contends, of loss of the chance of a better outcome for proof of physical injury, as the gist of the cause of action in negligence.

39. **Following paragraph cited by:**

Kozarov v State of Victoria (19 February 2020) (Jane Dixon J)
Wilson v Bauer Media Pty Ltd (13 September 2017) (John Dixon J)

172. In *Tabet v Gett*, [134] Gummow ACJ said:

> The cases dealing with the assessment of the measure of damages, whether in contract or tort, are replete with exhortations that precision may not be possible and the trial judge or jury must do the best it can. The treatment in *Malec v J C Hutton Pty Ltd* of the assessment of damages for future or potential events that allegedly would have occurred, but cannot now occur, or that allegedly might now occur, is an example. But in that case the claim giving rise to the assessment had been for physical injury, the contraction of a disease as a result of the negligence of the defendant.

Kiefel J said: [135]

> Different standards apply to proof of damage from those that are involved in the assessment of damages. *Sellars v Adelaide Petroleum NL* confirms that the general standard of proof is to be maintained with respect to the issue of causation and whether the plaintiff has suffered loss or damage. In relation to the assessment of damages, as was said in *Malec v J C Hutton Pty Ltd*, "the hypothetical may be conjectured". The court may adjust its award to reflect the degree of probability of a loss eventuating. This follows from the requirement that the courts must do the best they can in estimating damages; mere difficulty in that regard is not permitted to render an award uncertain or impossible.

via
[135] Ibid 585 [136] .

Wearne v State of Victoria (08 February 2017) (John Dixon J)
Winky Pop Pty Ltd v Mobil Refining Australia Pty Ltd (13 July 2015) (Digby J)
Johnson v Box Hill Institute of TAFE (12 December 2014) (J Forrest J)
Lindsay-Field v Three Chimneys Farm Pty Ltd (29 September 2010) (J Forrest J)
Lindsay-Field v Three Chimneys Farm Pty Ltd (29 September 2010) (J Forrest J)

The cases dealing with the assessment of the measure of damages, whether in contract or tort, are replete with exhortations that precision may not be possible and the trial judge or jury must do the best it can. The treatment in *Malec v J C Hutton Pty Ltd* [38] of the assessment of damages for future or potential events that allegedly would have occurred, but cannot now occur, or that allegedly might now occur, is an example. But in that case the claim giving rise to the assessment had been for physical injury, the contraction of a disease as a result of the negligence of the defendant. The imprecision allowed in the assessment of damages in such cases does not necessarily or logically apply where a claim for physical injury fails but is said to be saved by transmutation of the damage alleged into the loss of a chance of a better outcome.

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[38] (1990) 169 CLR 638; [1990] HCA 20 .

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40. With that in mind, something should be said respecting *McGhee v National Coal Board* [39] . That decision of the House of Lords on appeal from Scotland may be read as deciding, on orthodox grounds, that the negligence of the defendants had materially contributed to the personal injury of the pursuer. That characterisation later was disputed by the House of Lords itself in *Fairchild v Glenhaven Funeral Services Ltd* [40] , but it is unnecessary here to enter upon that debate. What is presently significant is that in the interim, when giving that orthodox reading of *McGhee* , Lord Bridge of Harwich in *Wilsher v Essex Area Health Authority* [41] had said of the speeches in *McGhee* that their conclusion manifested a "robust and pragmatic approach" to the drawing of a legitimate inference from "the undisputed primary facts of the case".

[39] [1973] 1 WLR 1; [1972] 3 All ER 1008.

[40] [2003] 1 AC 32 .

[41] [1988] AC 1074 at 1090.

41. This unremarkable use of language in the context of physical injury cases was then translated in *Rufo* into something more. In that case, the New South Wales Court of Appeal [42] , after citing Lord Bridge's statement in *Wilsher* , concluded that if "a robust and pragmatic approach" were adopted to the primary facts of that case, then it was more probable than not that the chance of a better medical outcome was lost, with that chance being more than speculative or remote.

[42] (2004) 61 NSWLR 678 at 694 per M W Campbell AJA.

42. In the present case, the trial judge proceeded in his assessment of the evaluation of the lost chance mindful of what he saw as the invitation in *Rufo* to take "a robust and pragmatic approach". But, as the respondent emphasised, this had been advocated by Lord Bridge with respect to the drawing of inferences from undisputed primary facts, whilst here there were deficiencies in the evidence necessary to support a finding for the appellant on a critical matter.

43. This critical matter concerned what would have been the efficacy of steroid treatment in the short period of opportunity between the episode at 11 am on 13 January and the seizure the next day. The evidence in reexamination of one of the expert witnesses, the neurosurgeon Mr Ian Johnston, was as follows:

> "Q. What is your view as to whether or not the use of steroids would have had a role in avoiding the incident of the acute decline on 14 January 1991 in this patient?
>
> A. Well, this would be absolutely a guess; I mean, it's entirely speculative. I don't think they would have been sufficiently effective under those circumstances of this particular patient, Reema, to do that, but I don't know.
>
> Q. What was it about her condition that leads you to express that opinion?
>
> A. Well it was primarily the pressure was primarily due hydrocephalus [sic], but, you know, tumourrelated swelling steroids would have improved [sic]. So it an issue [sic] of which was the more important and by how much. That is very

speculative, I have to say. I mean, you could certainly make an argument that they would have improved the situation and that they may have prevented the episode, but, as I say, nobody could answer that with any certainty."

44. Mr Klug's evidence in crossexamination was that, while in nonacute conditions the administration of steroids was very effective, faced with the situation on 13 January he would have had to have made a very careful assessment of the condition of the appellant and may have used a combination of steroids and a ventricular drain if there had been a risk of serious deterioration. But Mr Klug was not asked for an opinion as to the efficacy of that treatment in the period before the time of the seizure on the next day.

45. This evidence provided a basis for no more than speculation as to the loss of a chance of a better outcome whether assessed at 40 per cent or (as the Court of Appeal indicated) 15 per cent. For that reason the appeal to this Court should fail.

The issue of principle

46. **Following paragraph cited by:**

Hassan (formerly described under the pseudonym AFX21) v Minister for Home Affairs (20 May 2024) (Perry J)
Alrifai v Australian Capital Territory (18 March 2022) (Balla AJ)
Old v Miniter (31 July 2020) (Judge Levy SC)
Coote v Dr Kelly (14 March 2012) (Schmidt J)

> 173. Even if there had been a diagnosis made in September 2009, Mr Coote would have required excision of the lesion. He would then also have faced all of the risks of the excision which he later received. That it is possible that his outcome would have been better, so far as the consequences of metastasis is concerned, had excision occurred in 2009, may be accepted, but that it is probable that he would have had a better outcome, has not been shown. Unquestionably there was a chance of this, but it is settled that Mr Coote may not be compensated for the loss of such a chance (*Tabet v Gett* at [46] .)

Further, and as an additional ground of decision, in personal injury cases the law of negligence as understood in the common law of Australia does not entertain an action for recovery when the damage, for which compensation is awarded consequent upon breach of duty, is characterised as the loss of a chance of a better outcome of the character found by the trial judge in this case.

47. **Following paragraph cited by:**

Hannaford v Stewart (No 2) (13 July 2011) (Hall J)

Reynolds v Aluma-Lite Products Pty Ltd (24 August 2010) (McMurdo P and Muir and Chesterman JJA,)
Guthrie v News Limited (14 May 2010) (Kaye J)

It should be said immediately that the principles dealing with recovery of damages for breach of contract offer no appropriate analogy. The action for breach of contract lies upon the occurrence of breach, but that in negligence lies only if and when damage is sustained. This has significance for the application of limitation statutes. But it has the further and relevant importance identified by Brennan J in *Sellars v Adelaide Petroleum NL* [43] . This is that in a negligence action, unlike an action in contract, the existence and causation of compensable loss cannot be established by reference to breach of an antecedent promise to afford an opportunity.

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[43] (1994) 179 CLR 332 at 359.

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48. In a contract case the plaintiff should be entitled at least to nominal damages for loss of the promised opportunity. The jury in *Chaplin v Hicks* [44] assessed at £100 (at the time a not inconsiderable sum) the damages for the breach found of the contractual obligation to take reasonable means to give the plaintiff an opportunity of presenting herself for selection by the defendant in a competition with 12 prizes of threeyear theatrical engagements. The defendant, later Sir Seymour Hicks, was a wellknown actor and theatrical manager in Edwardian London, who had built the Aldwych and Globe theatres, presented successful musical comedies, and discovered new talent, including that of the young P G Wodehouse as a lyricist[45]. With these matters in mind, it is readily seen that the plaintiff lost a chance of real value. The unsuccessful submission to the Court of Appeal by McCardie for the defendant [46] was that the only remedy was nominal damages, because substantial damages were so contingent as to be incapable of assessment.

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[44] [1911] 2 KB 786 .

[45] Higgins, *The Golden Age of British Theatre (18801920)*, entry "Sir Seymour Hicks (18711949)", (2009) <http://www.thecamerinoplayers.com/britishtheatre/

[46] [1911] 2 KB 786 at 788789 .

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49. **Following paragraph cited by:**

Tapp v Gray (07 February 2011) (Harrison AsJ)

Chaplin v Hicks [47] is authority for the proposition that if a plaintiff, by the breach of contract by the defendant, has been deprived of something which has a monetary value, there is to be an assessment of damages notwithstanding difficulty in calculation or impossibility of making an assessment with certainty. This Court, speaking in *McRae v Commonwealth Disposals Commission* [48] of *Chaplin v Hicks* , said that the broken promise in effect had been to give the plaintiff a chance and that she would have had a real chance of winning a prize, and thus that it was proper enough to say that the chance was worth something.

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[47] [1911] 2 KB 786 .

[48] (1951) 84 CLR 377 at 411412 per Dixon and Fullagar JJ; [1951] HCA 79 .

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50. But these considerations do not appear in the frame of reference for the present case. As Brennan J indicated in *Sellars* [49] , in an action in tort where damage is the gist of the action, the issue which precedes any assessment of damages recoverable is whether a lost opportunity, as a matter of law, answers the description of "loss or damage" which is then compensable.

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[49] (1994) 179 CLR 332 at 359.

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51. In *D'OrtaEkenaike v Victoria Legal Aid* [50] , McHugh J said:

> "Reasonable foreseeability of physical harm is generally enough to impose a duty of care on a person who knows or ought reasonably foresee that physical harm is a likely result of his or her conduct. Liability will arise when the duty is breached and where there is a causal relationship between the breach and the harm."

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[50] (2005) 223 CLR 1 at 37 [101]; [2005] HCA 12 .

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52. Further, harm to the interests of the plaintiff which is not sustained by injury to person or property, in the ordinary sense of those terms, nevertheless may qualify in at least some cases as the compensable damage consequent upon a breach of a duty of care as understood in the tort of negligence. The decisions in *Hill v Van Erp* [51] and *Perre v Apand Pty Ltd* [52] respec ting recovery for "economic loss" are wellknown examples.

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[51] (1997) 188 CLR 159; [1997] HCA 9 .

[52] (1999) 198 CLR 180; [1999] HCA 36 .

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53. **Following paragraph cited by:**

Bill v Northern Land Council (22 November 2018) (White J)

Where the act or omission complained of does not amount to interference with or impairment of an existing right, some care is needed in identifying the interest said to have been harmed by the defendant and said to be sufficient to attract the protection of the law in this field. The point was made by McPherson JA in *Christopher v The Motor Vessel "Fiji Gas"* [53] . That process of identification requires a sense of the existing and inherent principles of the law [54] . One of those principles favours the development of the common law, and in particular the tort of negligence, in a coherent fashion [55] .

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[53] (1993) Aust Torts Reports ¶81202 at 61,967.

[54] *Smith v Jenkins* (1970) 119 CLR 397 at 418; [1970] HCA 2; *Cattanach v Melchior* (2003) 215 CLR 1 at 3031 [64][65] .

[55] *Sullivan v Moody* (2001) 207 CLR 562 at 579581 [50][55]; [2001] HCA 59; *Harri ton v Stephens* (2006) 226 CLR 52 at 123 [242][243]; [2006] HCA 15.

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54. **Following paragraph cited by:**

Chester v WA Country Health Service (02 June 2022) (Quinlan CJ; Mazza and Beech JJA)
Chester v WA Country Health Service (13 November 2019) (Goetze DCJ)
Molinara v Perre Bros Lock 4 Pty Ltd (30 October 2014) (Kourakis CJ; Nicholson and Parker JJ)
Reynolds v Aluma-Lite Products Pty Ltd (24 August 2010) (McMurdo P and Muir and Chesterman JJA,)

In the present case, with reference to what had been said in *Sellars* [56] when dealing with an action to recover "loss or damage" under s 82 of the *Trade Practices Act* 1974 (Cth) for contravention of s 52 of that statute, the Court of Appeal referred to the existence in commerce of a coherent notion of loss of a right of a chance of financial benefit. In that regard, the statement of principle by Brennan J in *Sellars* [57] is significant:

"As a matter of common experience, opportunities to acquire commercial benefits are frequently valuable in themselves, not only when they will *probably* fructify in a financial return but also when they offer a *substantial prospect* of a financial return. The volatility of the market for speculative shares testifies to both the valuable character of commercial opportunities and the difficulty of assessing the value of opportunities which are subject to serious contingencies. Provided an opportunity offers a substantial, and not merely speculative, prospect of acquiring a benefit that the plaintiff sought to acquire or of avoiding a detriment that the plaintiff sought to avoid, the opportunity can be held to be valuable. And, if an opportunity is valuable, the loss of that opportunity is truly 'loss' or 'damage' for the purposes of s 82(1) of the Act and for the purposes of the law of torts."

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[56] (1994) 179 CLR 332 .

[57] (1994) 179 CLR 332 at 364.

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55. More generally, in *Naxakis v Western General Hospital* [58] Gaudron J observed that while, "where no other loss is involved", there was no reason in principle why loss of a chance or commercial opportunity should not constitute damage for the purposes of tort law, different considerations apply where the risk has eventuated and there has been physical injury.

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[58] (1999) 197 CLR 269 at 278 [29]; [1999] HCA 22 .

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56. Her Honour continued [59] :

"The notion that, in cases of failure to diagnose or treat an existing condition, the loss suffered by the plaintiff is the loss of chance, rather than the injury or physical disability that eventuates, is essentially different from the approach that is traditionally adopted. On the traditional approach, the plaintiff must establish on the balance of probabilities that the failure caused the injury or disability suffered, whereas the lost chance approach predicates that he or she must establish only that it resulted in the loss of a chance that was of some value [60] ."

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[59] (1999) 197 CLR 269 at 279 [32] .

[60] See *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 355.

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57. **Following paragraph cited by:**

State of New South Wales v Skinner (08 February 2022) (Basten, Brereton and McCallum JJA)

Several considerations thus are presented. One may be seen from the statement by Professor David Fischer made upon consideration in 2001 of decisions in the United States, Australia and other common law jurisdictions[61]:

> "A major rationale for loss of a chance where plaintiff cannot prove traditional damage is that the chance of obtaining a benefit or avoiding a harm has value in itself that is entitled to legal protection. Thus, destruction of this chance ought to be regarded as damage giving rise to an actionable tort. Characterizing the damage as the loss of a chance of avoiding harm (or gaining a benefit) relieves the plaintiff of the burden of proving that the harm itself (or lost benefit itself) occurred. At the same time, the characterization preserves the requirement that plaintiff prove [damage] by the usual standard of proof. Note, however, that under the 'chance has value' characterization, it is often easier to prove actionable damage. It is usually easier to prove that defendant created a risk of harm (or a risk of loss of benefit) than to prove that defendant caused the harm itself (or benefit itself)." (footnotes omitted)

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[61] "Tort Recovery for Loss of a Chance", (2001) 36 *Wake Forest Law Review* 605 at 617618.

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58. **Following paragraph cited by:**

Li v So (28 August 2019) (Croft J)
ACT v Gillan; Gillan v ACT (02 August 2019) (Penfold J)

But why should the law favour the weakening of the requirement for proving causation such that, in the situation posited by Gaudron J (which is found in the present litigation), the plaintiff should have the benefit and the defendant the detriment of an easier proof of actionable damage for a negligence action?

59. **Following paragraph cited by:**

Paul v Cooke (19 September 2013) (Basten, Ward and Leeming JJA)

It may be said that the "all or nothing" outcome on the balance of probabilities leads to "rough justice". But the traditional approach in personal injury cases represents the striking by the law of a balance between the competing interests of the parties, and the substitution of the loss of a chance as the actionable damage represents a shift in that balance towards claimants. Again, there may be a view that, especially with respect to medical treatment, the substitution assists in the maintenance of standards where there is a less than even chance of a cure. This was a consideration which Baroness Hale adverted to in *Gregg v Scott* [62] . But any such potential benefit to the public weal has to be weighed against, for example, the prospect of "defensive medicine" with emphasis upon costly testing procedures in preference to a sequential deductive approach to diagnosis and treatment.

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[62] [2005] 2 AC 176 at 231.

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60. In *Gregg v Scott* , Baroness Hale went on [63] :

> "But of course doctors and other health care professionals are not solely, or even mainly, motivated by the fear of adverse legal consequences. They are motivated by their natural desire and their professional duty to do their best for their patients. Tort law is not criminal law. The criminal law is there to punish and deter those who do not behave as they should. Tort law is there to compensate those who have been wronged. Some wrongs are actionable whether or not the claimant has been damaged. But damage is the gist of negligence. So it can never be enough to show that the defendant has been negligent. The question is still whether his negligence has caused actionable damage. ... In this case we are back to square one: what is actionable damage?"

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[63] [2005] 2 AC 176 at 231232 .

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61. **Following paragraph cited by:**

Fox v State of Queensland (16 June 2016) (Bowskill QC DCJ)

In that situation, it should be remembered that the duty of care and its breach are assumed. The determination of the existence and content of a duty of care is not assisted by looking first to the harm sustained by the plaintiff and then reasoning, as it were, retrospectively [64] . Nor is it appropriate to reason that, duty and breach being established, the plaintiff who on the balance of probabilities cannot establish actionable damage nevertheless must have a remedy.

[64] *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 443 [60][61], 461462 [126][128]; [2005] HCA 62.

62. Finally, there is the consideration which weighed with Gaudron J in *Naxakis* [65] , Gonthier J in *Laferrière* [66] and Lord Hoffmann in *Gregg v Scott* [67] . Where, as in the present case, and unlike in *Gregg v Scott* itself, the relevant risk of a bad outcome in a preexisting but undiagnosed or untreated condition has eventuated before the institution of the litigation, the factors bound up in the earlier chance have played themselves out. What is in issue is past events, preceding in this case disabilities from which the appellant suffers. The cause of the disabilities, on the evidence, may be uncertain. But the difficulty which this presents is not overcome by removing the analysis of the facts and law to the more abstract level for which the appellant contends.

[65] (1999) 197 CLR 269 at 280281 [36] .

[66] [1991] 1 SCR 541 at 605.

[67] [2005] 2 AC 176 at 196.

Conclusions and orders

63. The Court of Appeal reached the correct result on the matters of which the appellant complains in this Court. Further, the Court should not so modify the common law as to produce a different result.

64. The appeal should be dismissed with costs.

65. **Following paragraph cited by:**

King v Western Sydney Local Health Network (14 June 2013) (Basten, Hoeben and Ward JJA)

HAYNE AND BELL JJ. We agree with Kiefel J that, for the reasons her Honour gives, the appellant did not prove that the respondent's negligence was a cause of damage. We add only the following.

66. **Following paragraph cited by:**

Saadat v Commonwealth (09 May 2025) (Stanley J)
Hassan (formerly described under the pseudonym AFX21) v Minister for Home Affairs (20 May 2024) (Perry J)

178. In relation to the ***first*** form of causation identified, being that the respondents' negligence meant that the applicant "*lost a chance to be returned to PNG*", that framing of the case, with respect, is not correct in law. As the High Court held in *Tabet* , the standard for assessing causation in negligence is not a loss of chance but the balance of probabilities: cf a claim for economic loss. As Hayne and Bell JJ explained in *Tabet* at [66] , " *[w]hat must be demonstrated (in the sense that the tribunal of fact must be persuaded that it* ***is more probable than not****) is that a difference has been brought about and that the defendant's negligence was a cause of that difference*": (emphasis added). In *Tabet* , their Honours continued to state that (at [68]–[69]):

> … to accept that the appellant's loss of a chance of a better medical outcome was a form of actionable damage would shift the balance hitherto struck in the law of negligence between the competing interests of claimants and defendants. That step should not be taken. The respondent should not be held liable where what is said to have been lost was the possibility (as distinct from probability) that the brain damage suffered by the appellant would have been less severe than it was.
>
> It may be that other cases in which it might be said that, as a result of medical negligence, a patient has lost "the chance of a better medical outcome" (for example, a diminution in life expectancy) differ from the present case in significant respects. These are not matters that need be further examined in this case. ***It need only be observed that the language of loss of chance should not be permitted to obscure the need to identify whether a plaintiff has proved that the defendant's negligence was more probably than not a cause of damage (in the sense of detrimental difference*).** The language of possibilities (language that underlies the notion of loss of chance) should not be permitted to obscure the need to consider whether the possible adverse outcome has in fact come home, or will more probably than not do so.
>
> (Emphasis added; citations omitted.)

See also *Tabet* at [46], [58]–[59] (Gummow ACJ), [101] (Crennan J), [143], [152] (Kiefel J).

Ottrey v Bedggood's Transport Pty Ltd (09 March 2022) (J Forrest J)
Ottrey v Bedggood's Transport Pty Ltd (09 March 2022) (J Forrest J)
Rubino v Ziaee (23 December 2021) (McWilliam AJ)
Williams v Fraser (20 May 2021) (Harrison J)
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) (10 September 2020) (Quinlan CJ, Mitchell JA, Beech JA)

Ellis (by his next friend Christopher Graham Ellis) v East Metropolitan Health Service (09 March 2018) (Gething DCJ)
Cook v Modern Mustering Pty Ltd (23 June 2017) (Southwood, Blokland and Hiley JJ)
Cook v Modern Mustering Pty Ltd (23 June 2017) (Southwood, Blokland and Hiley JJ)
Australian Mud Company Pty Ltd v Coretell Pty Ltd (17 March 2017) (Greenwood, Jagot and Burley JJ)
DC v State of New South Wales (10 August 2016) (Basten and Ward JJA, Sackville AJA)
DC v State of New South Wales (10 August 2016) (Basten and Ward JJA, Sackville AJA)
Cook v Modern Mustering Pty Ltd and Ors and Savage and Ors v Modern Mustering Pty Ltd and Ors (10 December 2015) (Kelly J)
King v Western Sydney Local Health Network (14 June 2013) (Basten, Hoeben and Ward JJA)
Pritchard v DJZ Constructions Pty Ltd (28 June 2012) (Bathurst CJ, Whealy and Barrett JJA)
Pritchard v DJZ Constructions Pty Ltd (28 June 2012) (Bathurst CJ, Whealy and Barrett JJA)
DJZ Constructions Pty Ltd v Paul Pritchard trading as Pritchard Law Group (21 October 2010) (Schmidt J)
DJZ Constructions Pty Ltd v Paul Pritchard trading as Pritchard Law Group (10 September 2010) (Schmidt J)

For the purposes of the law of negligence, "damage" refers to some difference to the plaintiff. The difference must be detrimental. What must be demonstrated (in the sense that the tribunal of fact must be persuaded that it is more probable than not) is that a difference has been brought about and that the defendant's negligence was a cause of that difference. The comparison invoked by reference to "difference" is between the relevant state of affairs as they existed *after* the negligent act or omission, and the state of affairs that would have existed had the negligent act or omission not occurred [68] .

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[68] *Gregg v Scott* [2005] 2 AC 176 at 181-182 [9] .

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67. In this case, saying that a *chance* of a better medical outcome was lost presupposes that it was *not* demonstrated that the respondent's negligence had caused any difference in the appellant's state of health. That is, it was not demonstrated that the respondent's negligence was probably a cause of any part of the appellant's brain damage.

68. **Following paragraph cited by:**

Gunnersen v Henwood (07 September 2011) (Dixon J)

Gunnersen v Henwood (07 September 2011) (Dixon J)
Gunnersen v Henwood (07 September 2011) (Dixon J)

As Gummow ACJ explains, to accept that the appellant's loss of a chance of a better medical outcome was a form of actionable damage would shift the balance hitherto struck in the law of negligence between the competing interests of claimants and defendants. That step should not be taken. The respondent should not be held liable where what is said to have been lost was the possibility (as distinct from probability) that the brain damage suffered by the appellant would have been less severe than it was.

69. **Following paragraph cited by:**

East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) (10 September 2020) (Quinlan CJ, Mitchell JA, Beech JA)
Pierce v Metro North Hospital and Health Service (03 November 2016) (Campbell J)

It may be that other cases in which it might be said that, as a result of medical negligence, a patient has lost "the chance of a better medical outcome" (for example, a diminution in life expectancy) differ from the present case in significant respects. These are not matters that need be further examined in this case. It need only be observed that the language of loss of chance should not be permitted to obscure the need to identify whether a plaintiff has proved that the defendant's negligence was more probably than not a cause of damage (in the sense of detrimental difference). The language of possibilities (language that underlies the notion of loss of chance) should not be permitted to obscure the need to consider whether the possible adverse outcome has in fact come home, or will more probably than not do so.

70. HEYDON J. The trial judge, who conducted a lengthy trial with his customary balance and skill, correctly said that the case presented very complex issues. At the trial, one element of the plaintiff's case against the second defendant, who is the respondent in these proceedings ("the defendant"), was that he had negligently ordered a lumbar puncture on 13 January 1991 which had caused brain damage. The trial judge rejected that case and it is not now pressed. Another element of the plaintiff's case was that the negligent failure of the defendant to ensure that a CT scan was carried out on 11 or 13 January more probably than not caused her brain damage. That case too was rejected by the trial judge and is not now pressed. That left the plaintiff with a contention that the failure to ensure a CT scan on 13 January deprived her of a chance, albeit a less than even chance, that the damage might have been avoided. There were other difficult issues facing the trial judge, with which this appeal is not concerned, about a failed case against another defendant, about whether the defendant was negligent at all, about how much of the plaintiff's damage was attributable to the defendant's negligence, and about the quantum of damages.

71. The trial judge and the Court of Appeal accepted the factual aspect of the contention that the plaintiff had been deprived of a chance that the damage might have been avoided. But they were divided on a question of law, which the plaintiff put in this Court in the following way:

> "Does the common law of negligence in Australia recognise a less than even chance of avoiding an adverse health outcome as an interest of value to a patient, the loss of which by reason of a doctor's negligence, can be compensated as damage suffered by that patient?"

The trial judge felt bound by an assumption as to the law in earlier authority to answer the question in the affirmative. The Court of Appeal upheld a challenge to that assumption and termed it "plainly wrong". It answered the question in the negative.

A preliminary question

72. Before that question of law can be answered in this appeal in relation to the plaintiff, it is necessary to conclude that the plaintiff *did* lose a less than even chance of avoiding an adverse health outcome as a result of the defendant's negligence. If she did not, the question does not arise.

What was the defendant's negligence?

73. The trial judge found that the defendant's negligence lay in his failure to order a CT scan shortly after the plaintiff's father drew a nurse's attention to the fact that the plaintiff, who was in hospital under the defendant's care, was staring and unresponsive at 11am on Sunday 13 January. Following observations by the nurse and a registrar, the defendant was summoned. He advised that a lumbar puncture be performed, as it was, but not a CT scan.

What damage did the defendant's negligence cause?

74. The damage which the plaintiff suffered was brain damage. Some of that damage was caused by increased intracranial pressure arising from a tumour which had been growing for over two years and from a build-up of cerebral spinal fluid ("hydrocephalus"). The occurrence of that damage manifested itself in symptoms – staring into space and a "seizure" – which were observed in the plaintiff from 11.45am on Monday 14 January. The trial judge put the same point from another angle in finding that "the failure to relieve the plaintiff's intracranial pressure during the twenty-four hour period prior to the plaintiff's decline on 14 January 1991 was causative of brain damage occurring at and following the time of the plaintiff's observed decline on 14 January". The trial judge found that that failure to relieve pressure had been caused by the defendant's failure to order a CT scan. The trial judge found that this brain damage was no greater than 25 percent of the plaintiff's total brain damage. The balance was caused by the tumour, the hydrocephalus, surgery on 16 January to remove the tumour, and subsequent medical treatment.

The reasoning of the courts below

75. Before 11am on 13 January the plaintiff was not thought to be suffering from a tumour. It is not disputed that if the CT scan had been called for soon after 11am on 13 January, the tumour and the hydrocephalus would have been discovered, an opportunity for treatment would have

arisen, and that opportunity would have been taken pending surgery three days later. The crucial question is whether the chance of an occurrence of brain damage at 11.45am on 14 January could have been reduced if the defendant had arranged for a CT scan on 13 January. Despite the exceptional skill with which counsel for the plaintiff assembled and presented the arguments for an affirmative answer, the answer is in the negative.

76. The reasoning of the courts below was as follows. If a decision to perform a CT scan had been made after 11am on 13 January, it would have required the summoning, from outside the hospital or from within the hospital after other medical activity had finished, of an anaesthetist, a radiologist, and a radiographer. It could have taken five to six hours to arrange and carry out the CT scan. But the CT scan would have detected the tumour and the hydrocephalus. The plaintiff would then have been treated with steroids rather than by the insertion of an intracranial drain to remove cerebral spinal fluid, because although Dr Maixner, a neurosurgery registrar on duty on 13 January (who later assisted Mr Johnston to remove the tumour), would have preferred the latter course, her superior, Mr Johnston, a neurosurgeon, would have adopted the former. That treatment would probably not have avoided the 25 percent share of the brain damage attributed to the negligence. But it would have created a less than even chance of avoiding that 25 percent share of the brain damage.

The courts below diverge

77. At this point the reasoning of the courts below diverged. The trial judge thought that the relevant chance was 40 percent. The Court of Appeal considered that the trial judge's figure was too high, and that the correct figure was not more than 15 percent. The Court of Appeal said [69] :

> "It is clear from his Honour's analysis that in reaching 40% he weighed in the scales the likely efficacy of a drain in reducing pressure. To do so, we think failed to give weight to the finding that is implicit in his reasons that on the balance of probabilities steroids would have been administered. If a loss of a chance is compensable, here, one cannot ignore that on the findings it is loss of a chance of a better outcome in circumstances where the administration of steroids was the proven likely treatment."

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[69] *Gett v Tabet* (2009) 254 ALR 504 at 555 [245] .

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78. It is convenient now to proceed by inquiring whether the trial judge erred in relation to the insertion of a drain before 11.45am on 14 January, whether in any event the possibility that a drain could be inserted before 11.45am was legitimately open for consideration, and whether the insertion of a drain after 11.45am but two hours faster than it actually was would have mattered.

Did the trial judge consider the possible insertion of a drain before 11.45am?

79. Contrary to what the Court of Appeal said and the defendant submitted, on their true construction the reasons for judgment of the trial judge do not reveal the supposed error of

finding that, while the likely treatment would have been steroids, there was a possibility of placing a drain before 11.45am, and that this possibility increased the chance of a favourable outcome. The trial judge did say that inserting an intracranial drain would have "given the plaintiff a chance of a better outcome than the prescription of steroids", but he put that consideration aside in view of the fact that the decision about what would have happened rested with Mr Johnston, and he preferred steroid treatment.

Should the possible insertion of a drain before 11.45am have been considered?

80. Although the trial judge did not commit the supposed error of taking into account the possibility that a drain might have been employed before 11.45am on 14 January, counsel for the plaintiff contended that it would not have been an error. He submitted that since the trial judge was dealing with hypothetical events, the trial judge was entitled to include the possibility of using a drain as one factor in his assessment. That submission must fail.

81. The trial judge found that the treatment which would have been administered on 13 January to reduce pressure would have been "either … drainage or prescription of steroids." These treatments are expressed as being alternative, not concurrent. The same is true of the following finding:

> "I consider the use of a drain would have given the plaintiff a chance of a better outcome than the prescription of steroids, but in assessing the value of the lost chance I must heed the superior role Mr Johnston would have had in the decision-making process if he became the treating surgeon. Whichever of the two forms of treatment would have been undertaken, the plaintiff was deprived of the chance of having it by the … defendant's breach of duty and was consequently deprived of the chance of a better outcome."

Once the trial judge decided that Mr Johnston's preferred method of steroid treatment would have been the one embarked on, the trial judge saw the drain technique as an option only if the steroid treatment failed. In that respect the trial judge was accepting Mr Johnston's evidence. In particular, Mr Johnston said that the steroid treatment by itself would have continued until it was clear that "there was not improvement" or there was some deterioration in the plaintiff's condition. If either of those events happened, a drainage procedure would be employed – but only then. Mr Klug, a neurosurgeon who gave evidence for the plaintiff, considered that the steroid treatment would work within 24 hours. It would seem that if a CT scan had been performed within a five or six hour period after the incident at 11am on 13 January, and the decision to prescribe steroids had been taken some time after that, steroid treatment could not have commenced earlier than 6pm on 13 January, which would have given the steroids only 17 or 18 hours to take effect before 11.45am on 14 January. But Mr Klug did not say that steroid treatment could work within 17 or 18 hours. Hence a decision that it had not brought about an improvement could not have been made until after the episode on 14 January. And there was no deterioration until that episode. Accordingly there was no possibility, if Mr Johnston's approach was being followed, that a drainage procedure would have been employed and that this would have reduced the chance of the 14 January episode taking place. Once the trial judge decided that Mr Johnston's non-negligent decision would have been to treat the steroid path as an alternative to the drainage path and to pursue the former in the first instance, both he and the Court of Appeal were right to exclude the possibility that the drainage path had a chance of bringing about a better outcome – whether

or not, as the trial judge thought, that chance was greater than the chance associated with steroid treatment.

82. The plaintiff submitted that both steroid treatment and a drain insertion could have been used, and it was not an either/or choice. It is true that the trial judge stated that it might be necessary to insert the drain on 14 January, even if steroids had been prescribed the day before [70] . But on the non-negligent approach which would have been followed, the necessity to insert the drain would only have arisen if there was some reason for thinking that the steroid treatment had failed or that the plaintiff's condition had deteriorated. There was no evidence that it would have been possible to say that the steroid treatment had failed until more than 24 hours had passed, and there was no deterioration in the plaintiff's condition until the episode at 11.45am on 14 January. However long the period over which the damage was suffered, the trial judge did not fix it as starting before 11.45am.

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[70] Above at [81].

Would the insertion of a drain after 11.45am have helped?

83. The trial judge pointed out that if a CT scan had been carried out on 13 January, it would not have been necessary to perform the CT scan and the EEG on 14 January. Hence a drain could have been inserted after 11.45am on 14 January, approximately two hours earlier than it was. He thought that this would have increased the chance of a better outcome [71] . This reasoning rests on the idea that if the drain were inserted after the plaintiff's decline at 11.45 am but before 3.10pm there was an increased chance of avoiding brain damage. This aspect of the trial judge's reasoning was supported by counsel for the plaintiff in this Court. He relied on Mr Johnston's evidence that if the plaintiff were on steroid treatment, she would have been closely monitored by neurological staff, that they could have been available for speedy intervention, and that once the episode of 14 January commenced there could have been speedy intervention by inserting a drain. This evidence was qualified to some degree by other evidence from Mr Johnston: the neurological staff were available anyway, and intervention would have been delayed by the need to arrange a theatre. But Mr Johnston accepted that time would have been saved if the CT scan had been carried out the day before.

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[71] See pars (d) and (e) of the passage quoted by Gummow ACJ at [35].

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84. **Following paragraph cited by:**

Snorkel Elevating Work Platforms Pty Limited v Borren Metal Forming Limited (14 September 2010) (Gray P; Refshauge and Cowdroy JJ)

It is desirable to analyse the argument of counsel for the plaintiff by reference to alternative factual bases. One factual possibility is that the relevant brain damage suffered by the plaintiff took place in a relatively short period of time around 11.45am. The other factual possibility is that the brain damage took place over a continuous period or series of periods for some time after 11.45am. The trial judge said the brain damage occurred "at and following the time of the plaintiff's observed decline on 14 January". He thus fixed a time when the damage started. But he did not explicitly make a finding choosing between the two possibilities as to when it ended.

85. If the matter is approached on the first possible factual basis, namely that the plaintiff's brain damage took place in a relatively short period of time around 11.45am, then inserting the drain two hours earlier than it actually was on 14 January would not have affected the occurrence of the damage suffered at 11.45am. It would not have increased the chance of that deterioration in the plaintiff's condition being avoided or reduced, and that is the vital inquiry. To that inquiry nothing that could only have happened after 11.45am on 14 January matters. Once the trial judge decided that it was Mr Johnston's course of treatment which would have been followed – steroid treatment but no drain insertion until either the steroid treatment was seen to be failing or the plaintiff's condition deteriorated – there was no occasion before the actual deterioration in the plaintiff's condition at 11.45am on which to decide to employ a drain. The trial judge spoke of the elimination of the delay for the CT scan and the EEG as permitting the earlier insertion of the drain and as therefore increasing the chance of a better outcome "[i]f, notwithstanding the prescription of steroids on 13 January, the decline had still occurred on 14 January". But there was no evidence or finding that any decline on 14 January took place until 11.45am, nor any evidence or finding that an occasion arose before 11.45am on 14 January on which the effectiveness of the steroid treatment might be reviewed and a decision made to insert a drain. Hence any saving in time in employing a drain by reason of what ought to have happened the day before was immaterial.

86. If the matter is approached in the light of the second factual possibility – that the relevant brain damage occurred over a continuous period or series of periods beginning at 11.45am – the events in the afternoon, and the saving of time had the CT scan taken place on 13 January, could have significance. The problem is that there was no evidence, and the trial judge was therefore not able to make any finding, about whether the occurrence of brain damage was a continuing process or about whether an insertion of the drain two hours earlier than it was inserted would or could have avoided or reduced the continuing process of brain damage.

87. The trial judge accepted, and the plaintiff relied on, some general medical evidence that the longer the delay between deterioration and intervention by neurosurgeons the greater the likely damage. But this evidence does not overcome the difficulty that there was no occasion of deterioration to suggest the need for intervention by a neurosurgeon in the form of adopting the drain technique before the damage began to be suffered at 11.45am. Nor does it overcome the difficulty that it has not been shown that in the specific case of this plaintiff the two hours would or could have mattered thereafter.

Did the failure to adopt steroid treatment destroy any chance of avoiding the brain damage that happened on 14 January?

88. The trial judge found that whichever of the two forms of treatment would have been undertaken if a CT scan had revealed the tumour and the hydrocephalus – prescription of steroids or drainage treatment – the plaintiff was deprived of the chance of having it and was consequently deprived of the chance of a better outcome. The chance of a better outcome arising from drainage treatment has been discussed in the preceding paragraphs, and excluded. What of the chance of a better outcome arising from the preferred form of treatment, steroid treatment?

89. Apart from Mr Johnston's last two answers in re-examination [72] , Mr Johnston gave other relevant evidence. In answer to the question whether steroid treatment "would have reduced the risk of, if not avoided, the incident that occurred on the 14th", Mr Johnston said: "I'm not sure." After a debate about an objection, he continued his answer as follows:

> "[S]teroids are not particularly effective in, say, situations where the pressure is due to hydrocephalus. They are more effective where there is actual brain swelling, brain oedema. So I don't know – I can't say that steroids would have had a very significant effect, and I certainly can't say – let us assume that she had been on steroids from Sunday at 11am – that that would have stopped the episode on Monday. I think that's not a reasonable supposition."

In a later answer he said that after initiating the steroid treatment:

> "it is problematic what would then have happened. I mean, it is entirely possible that actually the same course of events would have happened, that we would have been closely monitoring her and then on the Monday she would have had the deterioration".

In re-examination he was asked how steroid treatment would have assisted the plaintiff on 13 January. He answered that he thought that steroids were not particularly effective in relation to hydrocephalus, but were more effective where there was brain swelling or tumour-related swelling, and could have reduced that swelling. Although it follows from the trial judge's findings that steroid treatment would have commenced no earlier than 6pm on 13 January, the trial judge did not make findings, because the evidence did not permit him to make findings, about the time by which steroid treatment might have become effective or the time at which or the circumstances in which the effectiveness of steroid treatment might have been reviewed and steps taken to insert a drain.

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[72] See reasons of Gummow ACJ at [43].

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90. The plaintiff's argument in relation to the effect of the steroid treatment by itself came to this. The plaintiff accepted that Mr Johnston testified that the proposition that the steroid treatment *would* have prevented the 14 January episode was "not a reasonable supposition", "would be absolutely a guess", and was "entirely speculative". But the plaintiff submitted that this evidence was directed to whether it was more probable than not that the steroid treatment would have prevented the episode. That was not, for present purposes, the relevant question. The relevant question was whether there was a chance that they may have done

so. The plaintiff pointed to evidence from Mr Johnston that steroids could have beneficial effects even if they would not have prevented the 14 January episode. The problem is that Mr Johnston's evidence must be taken as a whole. His last answer in re-examination [73] was that while "you could certainly make an argument" that the use of steroids "*may* have prevented the episode"[74], it was not an argument one could have confidence in: "nobody could answer that with any certainty." He thought that it "would be absolutely a guess", "entirely speculative" and "very speculative" whether steroid treatment would have created a chance of avoiding the 14 January incident. That is, it was not possible to say that there was even a chance that steroid treatment may have prevented the episode. If Mr Johnston's evidence had stood alone, it would not have been right to conclude that the lost chance of a better outcome was quantifiable. The Court of Appeal correctly said of his evidence [75] :

> "If that was the only evidence, the [plaintiff] would not have established that she was entitled to an award of damages for the loss of a chance of a better outcome as the evidence would not have [risen] above there being a speculative chance."

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[73] See reasons of Gummow ACJ at [43].

[74] Emphasis added.

[75] *Gett v Tabet* (2009) 254 ALR 504 at 554 [241] .

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91. The Court of Appeal, however, then referred to certain evidence of Mr Klug. It involves three propositions. First, Mr Klug said that if a CT scan had been performed on either 11 January or 13 January it "would have indicated the presence of hydrocephalus" in addition to the existence of the tumour. Secondly, he said that if the plaintiff was not in extremis (which the plaintiff was not on 13 January) he:

> "would have used high dose corticosteroids in the first instance which is very effective in improving the situation of children with this disorder. I would have then planned when to carry out a definitive procedure to remove the tumour which would have involved, as part of the removal of the tumour, also the insertion of an intraventricular drain. If the child is in good condition I would see no reason to, as a preliminary, insert a ventricular drain."

He said that the administration of high dose corticosteroids "invariably, within 24 hours, would lead to substantial improvement in the condition and enable one to more fully assess the patient and plan on a semi-elective basis to undertake the operation." Thirdly, he said that on 13 January he would have had:

> "to very carefully assess the condition of the child at that time and it could well be, if I thought the hydrocephalus was extreme and causing or having the risk of potential serious deterioration, I may have used a combination of treatment at that time, namely, a ventricular drain and corticosteroids. I think it's a delicate decision here, one would have to very carefully analyse the situation of the child from a neurologic point of view."

92. The Court of Appeal said of the third proposition in this evidence [76] :

> "The reasonable inference from this evidence is that even if there were hydrocephalus, steroids would still have some effect, though the evidence did not permit any conclusion as to what that effect would have been."

Nor did the evidence permit any conclusion that the effect would have been to reduce the chance of the occurrence of the brain damage which took place at or after 11.45am on 14 January. In these circumstances the Court of Appeal's conclusion that the plaintiff "lost some chance of a better outcome which ranged between speculative and some effect" does not follow [77] .

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[76] *Gett v Tabet* (2009) 254 ALR 504 at 554 [242] .

[77] *Gett v Tabet* (2009) 254 ALR 504 at 554-555 [243] .

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93. The damage on 14 January was caused by the intracranial pressure generated by the tumour and the hydrocephalus in combination. The steroid treatment which Mr Johnston would have adopted would not have been "particularly effective" where the pressure was due to the hydrocephalus, but was more likely to be effective where there was actual brain swelling whether caused by the tumour or otherwise. There is no evidence as to what role the tumour actually played in causing brain compression or a vascular compromise, independently of the proposition that it operated in combination with the hydrocephalus. As explained above [78] , the period from when the steroid treatment would have commenced, ie 6pm on 13 January, until the episode at 11.45am on 14 January was less than 18 hours. While Mr Klug's experience indicated that the steroid treatment would "invariably" bring about improvement within 24 hours, he did not give evidence about whether it could be expected within 17 or 18 hours. Nor did he give evidence about whether his conclusions drawn from general experience necessarily applied in the circumstances of the plaintiff: the trial judge found that her tumour had existed for 700 to 945 days, was 3.5cm in diameter, was "extensive" and was "very advanced".

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[78] At [81].

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94. All these factors support Mr Johnston's view that it "would be absolutely a guess", "entirely speculative" and "very speculative" whether steroid treatment would have created a chance of avoiding the 14 January incident. It follows that the conclusions in the courts below that there was a chance of avoiding the brain damage on 14 January had the defendant arranged a CT scan soon after 11am on 13 January cannot be sustained.

The Court of Appeal's lack of confidence

95. The Court of Appeal's selection of a 15 percent figure for the lost chance was very tentative. Their Honours said that if they "were forced" to place a percentage figure on the lost chance they would be "loathe to assess it as greater than 15%", and said that that figure was "at most" that which reflected the lost chance [79] .

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[79] *Gett v Tabet* (2009) 254 ALR 504 at 555 [245] .

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96. Further, the difference between 40 percent as found by the trial judge and 15 percent is a large one. One number is nearly three times the size of the other, and the financial consequences are significant. The difference is actually larger because of the Court of Appeal's doubts about whether even 15 percent was correct. But the very fact of this large difference between conclusions reached after such careful consideration in each of the courts below of a very difficult case supports the conclusion that it was in truth not possible to arrive at any conclusion on the question of whether the negligence caused the plaintiff to lose a chance of avoiding or reducing the damage. The difference suggests that the condition of the evidence left them no alternative but to grope towards speculative outcomes which it was impossible for them firmly to grasp.

Conclusion

97. The question of law which the plaintiff wishes to agitate was argued by the parties fully and forcefully because on one factual basis it would have been a live and decisive issue. But now the question has ceased to be live and decisive. The question has become hypothetical in the sense that the assumption it rests on has turned out to be incorrect. The question is controversial among lawyers and in other cases, but as between the plaintiff and the defendant in this case the controversy has turned out to lack concreteness. For them it has become moot. There is no answer to the question posed which will produce any consequences for the parties. The question has become purely abstract and academic. The only significance of an answer would lie in what future courts would make of it. They are likely to treat it not as a decision, but only as a dictum; not as the resolution of a controversy, but only as advice; not as an event, but only as a piece of news.

98. The consciousness of parties and their legal representatives that the outcome of a debate about the correctness of contested propositions of law is decisively important to the interests of those parties often greatly assists the sharpness and quality of that debate. Doubtless it did so here. But the efficacy of a debate does not depend only on whether the participants in the debate have that consciousness. The efficacy of its resolution depends on the court sharing that consciousness and being assisted by that consciousness. Here a stage has been reached in a journey along the path to decision which has caused that consciousness to cease to exist because an issue has ceased to be decisively important. No assistance can be gained from a consciousness that has ceased to exist. In this field, for me, at least, to embark on difficult and doubtful inquiries in an attempt to answer the question without the assistance to be gained from that consciousness is a potentially very dangerous course. This is a case in which, since it is not necessary to do so, it is desirable not to.

99. Accordingly, the appeal must be dismissed.

100. **Following paragraph cited by:**

Jackson v Bishop (15 November 2013) (Kingham DCJ)

CRENNAN J. This appeal arises out of an action in medical negligence, and turns on the application of fundamental principles of causation in accordance with which the appellant failed to prove that the respondent's negligence caused or contributed to cause damage. The facts are set out in the reasons of Gummow ACJ and Kiefel J. The appellant raises the question of whether Australian law does or should permit recovery of damages where the breach of a duty of care results in the loss of a chance of a better medical outcome, where the chance of avoiding certain damage which occurred was assessed by the trial judge at 40 per cent [80] . That question should be answered in the negative for the reasons given by Kiefel J, with which I agree.

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[80] *Tabet v Mansour* [2007] NSWSC 36 at [378], [434] .

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101. As recognised by her Honour and also by Gummow ACJ and Hayne and Bell JJ, the adoption in personal injury cases of "loss of a chance" as a basis for liability would represent a major development in the common law. If the appellant's arguments were accepted, the respondent would be held liable where what had been lost was the possibility (but not the probability) that the brain damage suffered by the appellant would have been less catastrophic than it was.

102. **Following paragraph cited by:**

ACT v Gillan; Gillan v ACT (02 August 2019) (Penfold J)

The present requirement of proof of causation in personal injury cases results in boundaries being drawn which differ from those which are relevant to liability for pure economic loss. Policy considerations which tell against altering the present requirement of proof of causation in cases of medical negligence include the prospect of thereby encouraging defensive medicine, the impact of that on the Medicare system and private medical insurance schemes and the impact of any change to the basis of liability on professional liability insurance of medical practitioners. From the present vantage point, the alteration to the common law urged by the appellant is radical, and not incremental, and is therefore the kind of change to the common law which is, generally speaking, the business of Parliament.

103. I agree with the orders proposed by Gummow ACJ and Kiefel J that the appeal should be dismissed with costs.

104. KIEFEL J. Reema Tabet ("the appellant") was six years old when she was readmitted to hospital on 11 January 1991 with symptoms of vomiting and headaches. She had recently suffered from varicella (chickenpox). A CT scan taken on 14 January revealed that she had a large brain tumour. Differing opinions were given by expert witnesses as to whether a scan should have been ordered by the respondent, a specialist paediatrician, at an earlier point in time, given the symptoms exhibited by the appellant. The trial judge, Studdert J of the Supreme Court of New South Wales, was persuaded that one was necessitated immediately after the appellant had been observed to be staring and unresponsive on the morning of 13 January [81] . The finding of a negligent omission, on the part of the respondent, is not in issue on this appeal.

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[81] *Tabet v Mansour* [2007] NSWSC 36 at [193] .

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105. The appellant suffered brain damage as a result of a neurological event which occurred on 14 January and which led to the CT scan being performed. Studdert J found that the damage was associated with intracranial pressure, produced by the pressure of the tumour and an excess of spinal fluid in the cranial cavity (hydrocephalus). That damage contributed to the severe, irreversible brain damage and consequent disability which the appellant now suffers. The other contributors were the tumour itself, the operation undertaken in an attempt to remove it and the treatment which followed [82] . Studdert J attributed 25 per cent of the appellant's overall disability to that neurological event.

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[82] *Tabet v Mansour* [2007] NSWSC 36 at [382] .

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106. Studdert J was not persuaded, on the balance of probabilities, that if the respondent had ordered a CT scan on 13 January and the appellant was treated upon the discovery of the tumour, such brain damage as occurred on 14 January would have been avoided. Her claim that such damage was caused by the respondent therefore failed. However, his Honour considered that she had been deprived of the chance of a better outcome by reason of the delay in the treatment she could have received and was entitled to be compensated for that loss. Earlier detection of the tumour would have enabled treatment, most probably by corticosteroids, in an attempt to reduce the intracranial pressure. This would have had some beneficial effect, his Honour held. His Honour assessed "the chance of a better outcome, and of avoiding the brain damage that occurred on 14 January 1991" at 40 per cent [83] . His Honour applied that percentage to the figure representing the contribution of the event of 14 January to the appellant's overall disability in arriving at an award of $610,000.

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[83] *Tabet v Mansour* [2007] NSWSC 36 at [434] .

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107. The Court of Appeal of the Supreme Court of New South Wales considered that, were damages to be assessed for the loss of the chance of a better outcome, they should be reduced to 15 per cent [84] . The trial judge's assessment of the chance of a better outcome at 40 per cent took into account that an intraventricular drain would also have been inserted, thereby increasing that chance. The Court of Appeal held that this was contrary to the finding that treatment by corticosteroids rather than the placement of the drain was most likely to have been pursued [85] . However, the Court allowed the respondent's appeal and dismissed the claim. In its opinion to permit recovery for the claim for the loss of the chance involves a proposition which would revolutionise proof of causation of injury [86] . A decision of that Court which had adopted a loss of chance analysis [87] was considered by the Court of Appeal to have departed from conventional principles and it declined to follow it [88] .

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[84] *Gett v Tabet* (2009) 254 ALR 504 per Allsop P, Beazley and Basten JJA.

[85] *Gett v Tabet* (2009) 254 ALR 504 at 555 [245] .

[86] *Gett v Tabet* (2009) 254 ALR 504 at 586 [381] .

[87] *Rufo v Hosking* (2004) 61 NSWLR 678 (and also *Gavalas v Singh* (2001) 3 VR 404).

[88] *Gett v Tabet* (2009) 254 ALR 504 at 587 [389] .

Damage and causation in an action for medical negligence

108. The three elements of a cause of action in medical negligence, necessary to be established in order to recover compensation, are a duty owed by the medical practitioner to the plaintiff to avoid harm which is reasonably foreseeable, a breach of that duty and damage which results from that breach. It is the third element which is the focus of this appeal. It incorporates both the fact of loss or damage having been suffered and the cause of that damage being the medical practitioner's negligent act or omission. Those facts are ordinarily required to be proved to the general standard, on the balance of probabilities [89] .

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[89] *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 355; [1994] HCA 4.

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109. **Following paragraph cited by:**

Damage is an essential ingredient in an action for negligence; it is the gist of the action [90] . The action developed largely from the old form of action on the case, in which it was the rule that proof of damage was essential to a plaintiff's case[91]. In *Brunsden v Humphrey* [92] Bo wen LJ pointed out that in certain classes of case the mere violation of a legal right imports damage, but that principle was "not as a rule applicable to actions for negligence: which are not brought to establish a bare right, but to recover compensation for substantial injury." Generally speaking "there must be a temporal loss or damage accruing from the wrongful act of another, in order to entitle a party to maintain an action on the case." [93] Ne gligence in the abstract will not suffice [94] .

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[90] *Williams v Milotin* (1957) 97 CLR 465 at 474; [1957] HCA 83.

[91] See Prosser, *Handbook of the Law of Torts*, 2nd ed (1955) at 165; Glanville Williams and Hepple, *Foundations of the Law of Tort*, 2nd ed (1984) at 60.

[92] (1884) 14 QBD 141 at 150.

[93] *Williams v Morland* (1824) 2 B & C 910 at 916 [107 ER 620 at 622], referred to in *Brunsden v Humphrey* (1884) 14 QBD 141 at 150 per Bowen LJ.

[94] *Hay or Bourhill v Young* [1943] AC 92 at 116 per Lord Porter; *Haynes v Harwood* [1935] 1 KB 146 at 152.

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110. An action in negligence, said Bowen LJ [95] , "is based upon the union of the negligence and the injuries caused thereby, which in such an instance will as a rule involve and have been accompanied by specific damage." Nevertheless the action on the case has itself been described as sufficiently flexible to enable judges to extend it to cover situations where damage was suffered in circumstances which called for a remedy [96] . The Court of Appeal in this case observed that the common law has adapted to recognise different kinds of harm. But nowhere is it suggested that the requirement for damage itself can be dispensed with. Liability based upon breach of duty of care without proven loss or harm will not suffice.

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[95] *Brunsden v Humphrey* (1884) 14 QBD 141 at 150.

[96] *Sidaway v Governors of Bethlem Royal Hospital* [1985] AC 871 at 883 per Lord Scarman.

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111. **Following paragraph cited by:**

Taylor v Woodgate (28 March 2025) (Weber SC DCJ)
Gibson (a pseudonym) v Askim Pty Ltd ATF the Askim (28 June 2024) (Baker J)

> 184. It is well settled that establishing that a defendant's negligence was a necessary condition of harm "does not require certainty – [a]ll that is necessary is that … the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm": *Karpik v Carnival Plc (The Ruby Princess) (Initial Trial)* [2023] FCA 1280 at [814] quoting *Tabet v Gett* [2010] HCA 12; 240 CLR 537 at [111]. To put it another way, "it is no answer to the question whether something has been demonstrated as being more probable than not to say that there is another possibility open; the determination of the question turns on consideration of the probabilities": *Kone Elevators Pty Ltd v Shipton* [2021] ACTCA 33 at [81] citing *Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182 at [34].

Roberts v Shimmin (29 April 2024) (Andronos SC DCJ)

> 251. In *Tabet v Gett* (2010) 240 CLR 537 at [111], Kiefel J stated:
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> > "All that is necessary is that, according to the course of common experience, the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm. More probable means no more than that, upon a balance of probabilities, such an inference might reasonably be considered to have some greater degree of likelihood; it does not require certainty."

Patterson & Anor v Mamou (t/as De Novo Conveyancing) (01 March 2024) (Abadee DCJ)
Karpik v Carnival plc (The Ruby Princess) (Initial Trial) (25 October 2023) (Stewart J)

> 814. In determining whether, but for the failure to screen passengers' symptoms and encourage and implement physical distancing, Mr Karpik would have contracted COVID-19, it is important to bear in mind that the standard of proof is the balance of probabilities. As explained by Kiefel J in *Tabet v Gett* [2010] HCA 12; 240 CLR 537 at [111]:
>
> > All that is necessary is that … the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm. "More probable" means no more than that, upon a balance of probabilities, such an inference might reasonably be considered to have some greater degree of likelihood; **it does not require certainty**.
> >
> > (Emphasis added.)

Youssef v Bevchain Pty Ltd (18 August 2023) (Newlinds SC DCJ)
Tsiaras v SPI Management Pty Ltd (09 May 2023) (Robertson J)
Fraser v Victorian WorkCover Authority (19 December 2022) (Her Honour Judge Robertson)

293 Where there are competing hypotheses as to what caused the plaintiff's injuries, to satisfy me that the negligent conduct of Dreamtech was a cause of the injury suffered by the plaintiff, the plaintiff must establish that the more probable inference appearing from the evidence is that the plaintiff's injuries were caused by Dreamtech's negligence, as opposed to some other cause. If the evidence gives rise to competing inferences, neither of which is more probable than the other, the plaintiff will not discharge the burden of proof and establish the hypothesis with the required degree of probability. [140] The plaintiff must demonstrate that the competing inference is less likely. [141]

via

[140] *Jones v Dunkel* (*supra*) per Dixon CJ at 305; *TC v State of New South Wales* [2000] NSWSC 292 at paragraph [50] ; *Tabet v Gett* (2010) 240 CLR 537 at paragraph [111] per Kiefel J

Cotton On Group Services Pty Ltd v Golowka (14 December 2022) (McLeish and T Forrest JJA; J Forrest AJA)
Kumar v Sydney Western Realty Pty Ltd (No. 2) (31 August 2021) (Abadee DCJ)
Munday v St Vincent's Hospital (17 June 2021) (Maxwell P; Kennedy and Walker JJA)
J.K. Williams Staff Pty Limited v Sydney Water Corporation (18 March 2021) (Preston CJ)
MacQuarrie v Hunter New England Local Health District (31 August 2020) (Walton J)
Khan v Workers' Compensation Regulator (24 June 2020)
Corbin v State of Queensland (03 May 2019) (Ryan J)
Hayes v State of Queensland (29 July 2016) (Margaret McMurdo P and Mullins and Dalton JJ,)
Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)
Waller v James (06 May 2013) (Hislop J)
Amaba Pty Ltd v Booth (10 December 2010) (Beazley, Giles and Basten JJA)
Shaw v Thomas (23 July 2010) (Beazley, Tobias and Macfarlan JJA)

The common law requires proof, by the person seeking compensation, that the negligent act or omission caused the loss or injury constituting the damage. All that is necessary is that, according to the course of common experience, the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm. "More probable" means no more than that, upon a balance of probabilities, such an inference might reasonably be considered to have some greater degree of likelihood; it does not require certainty [97] .

[97] *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 6.

112. **Following paragraph cited by:**

Dino Dinov v Allianz Australia Insurance Limited (20 October 2017) (Beazley P, Meagher JA and McDougall J)
Asden Developments Pty Ltd (in liq) v Dinoris (No 3) (05 July 2016) (Reeves J)
Paul v Cooke (25 July 2012) (Brereton J)

The "but for" test is regarded as having an important role in the resolution of the issue of causation, although more as a negative criterion than as a comprehensive test [98] . The resolution of the question of causation has been said [99] to involve the common sense idea of one matter being the cause of another. But it is also necessary to understand the purpose for making an inquiry about causation [100] and that may require value judgments and policy choices [101] .

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[98] *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 515-516 per Mason CJ, 522 per Deane J; [1991] HCA 12 .

[99] *Fitzgerald v Penn* (1954) 91 CLR 268 at 277; [1954] HCA 74; *The National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569 at 590; [1961] HCA 15 ; *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 515 per Mason CJ, 523 per Deane J, 531 per McHugh J.

[100] *Chappel v Hart* (1998) 195 CLR 232 at 256 [63]; [1998] HCA 55; *Henville v Walker* (2001) 206 CLR 459 at 491 [98]-[99]; [2001] HCA 52; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 128 [56]; [2002] HCA 41.

[101] *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 515 per Mason CJ, 524 per Toohey J, 531 per McHugh J.

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113. **Following paragraph cited by:**

Hirst v Sydney South West Area Health Service (22 August 2011) (Davies J)

Once causation is proved to the general standard, the common law treats what is shown to have occurred as certain [102] . The purpose of proof at law, unlike science or philosophy, is to apportion legal responsibility [103] . That requires the courts, by a judgment, to "reduce to legal certainty questions to which no other conclusive answer can be given." [104] The result of this approach is that when loss or damage is proved to have been caused by a defendant's act or omission, a plaintiff recovers the entire loss (the "all or nothing" rule).

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[102] *Mallett v McMonagle* [1970] AC 166 at 176 per Lord Diplock; *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 at 642-643 per Deane, Gaudron and McHugh JJ; [1990] HCA 20 .

[103] *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 509 per Mason CJ.

[104] *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 340 per Dixon J; [1948] HCA 7 , cited in *Amaca Pty Ltd v Ellis* (2010) 263 ALR 576 at 592 [70] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; [2010] HCA 5 .

The appellant's problem in proof of causation of physical damage

114. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
Carangelo v State of New South Wales (27 May 2016) (Macfarlan and Gleeson JJA, Emmett AJA)

> 70. When physical or mental injury or harm is proved, the question is whether it was caused by a relevant negligent act or omission. A claimant will fail if the evidence does not establish the link between the act or omission of the defendant and the damage or harm suffered. It must be able to be said that, but for the act or omission, the claimant would not have suffered the injury or harm (*Tabet v Gett* at [114]).

In actions involving medical negligence the loss or damage claimed to have been suffered is ordinarily physical or mental injury or harm. When such injury or harm is proved the question then is whether it was caused by the negligent act or omission, such as a failure to diagnose or treat the disease or other condition from which the plaintiff then suffered. The difficulty which the appellant faced in this case was that the expert medical evidence did not establish the link between the omission of the respondent, with the consequent delay in treatment, and the brain damage which occurred on 14 January, necessary for a finding of causation. There was no evidence as to what harm might have been caused by the delay [105] . It could not be said that "but for" the delay the appellant would not have suffered brain damage. It follows from Studdert J's findings that the probability was that the tumour would have caused it in any event.

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[105] As observed by the Court of Appeal: *Gett v Tabet* (2009) 254 ALR 504 at 557 [258] .

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115. Studdert J found that the best outcome for the appellant required that the intracranial pressure on the brain be relieved as soon as possible. There were two possible treatments available: the administration of corticosteroids or the insertion of an intraventricular drain, but his Honour made a finding that it was "more likely that steroids would have been prescribed rather than the placement of a drain" [106] . His Honour made no finding as to what the outcome of such treatment in the period of delay would have been. His Honour considered that corticosteroids would have had "some beneficial effect". The evidence did not permit a more specific or certain finding.

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[106] *Tabet v Mansour* [2007] NSWSC 36 at [378] .

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116. The evidence as to the effectiveness of corticosteroids, to prevent the brain damage from occurring the next day, was limited. Of the many medical witnesses who gave evidence, only the evidence of two neurosurgeons touched upon the question. Mr Johnston agreed to the general propositions that the earlier the intervention the better the likely result and that corticosteroids would have improved the appellant's neurological condition. But more specifically, and in relation to the appellant's condition, he said that corticosteroids are not particularly effective in situations where the pressure is due to hydrocephalus and he could not say that if she had been given corticosteroids when her condition was first noted as deteriorating on 13 January, they would have stopped the neurological event occurring the next day. He said that it was "problematic" as to what would have happened if corticosteroids had been initiated and that "it is entirely possible that actually the same course of events would have happened". The use of steroids in avoiding the incident of 14 January he considered to be "entirely speculative". He did not think they would have been sufficiently effective, but he did not know.

117. Mr Klug said that in non-acute situations high dose corticosteroids were "very effective in improving the situation of children with this disorder", but did not elaborate further.

118. This evidence does not support a finding that any chance of a better outcome was as high as 40 per cent. The Court of Appeal observed that, whilst it might be inferred from this evidence that corticosteroids might have some effect, it "did not permit any conclusion as to what that effect would have been." [107] It considered that, at the most, it could be said that the appellant "lost some chance of a better outcome which ranged between speculative and some effect" [108] , but went on to hold that even so, to permit recovery for the deprivation of the possibility, but not the probability, of a better outcome would be to significantly alter the existing law as to proof of causation of injury, in particular by redefining what is "harm" [109] .

The appellant's arguments

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[107] *Gett v Tabet* (2009) 254 ALR 504 at 554 [242] .

[108] *Gett v Tabet* (2009) 254 ALR 504 at 554-555 [243] .

[109] *Gett v Tabet* (2009) 254 ALR 504 at 586 [381] .

Redefining damage?

119. The question raised by this appeal is whether the common law of Australia should recognise the loss of a chance of a better outcome, in cases where medical negligence has been found, as actionable damage. In *Gregg v Scott* Lord Nicholls of Birkenhead observed that it is "a question which has divided courts and commentators throughout the common law world." [110] The same observation may be made with respect to civil law systems. In Australia the question has been considered in decisions of intermediate courts of appeal in addition to that the subject of this appeal [111] . It has only been touched upon in decisions of this Court [112] .

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[110] [2005] 2 AC 176 at 180 [1] .

[111] *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47; *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246; *Gavalas v Singh* (2001) 3 VR 404; *Rufo v Hosking* (2 004) 61 NSWLR 678; *State of New South Wales v Burton* (2006) Aust Torts Reports ¶81826.

[112] *Chappel v Hart* (1998) 195 CLR 232; *Naxakis v Western General Hospital* (1999) 197 CLR 269; [1999] HCA 22.

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120. The argument for the appellant, for the acceptance by this Court of the loss of a chance of a better outcome as damage, seeks to draw support from the approach taken by courts of some common law countries, notably the United States of America, and some civil law countries, in particular France, as relevant to what is submitted to be the choice now presented. It is not suggested that a review of other legal systems reveals that there is a correct solution. So much may be accepted. Decisions by courts of other countries, including common law countries, concerning cases of this kind are made in the framework of their substantive law, the principles and policies which inhere in it and the requirements for proof of causation and damage which may or may not be adaptable to accommodate such a claim.

121. In argument for the appellant it was stressed that the only change necessary to accommodate a loss of chance claim is to the type of harm or damage which may result in medical negligence cases. The shift from physical harm to the chance of a better outcome as representing loss is said not to alter or contradict the requirement of proof of loss or damage on the balance of probabilities. But it is accepted by the appellant that the reformulation of the damage may affect the causation question by "shaping" it[113].

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[113] Referring to Stapleton, "The Gist of Negligence – Part I: Minimum Actionable Damage", (1988) 104 *Law Quarterly Review* 213; Stapleton, "The Gist of Negligence – Part II: The Relationship Between 'Damage' and Causation", (1988) 104 *Law Quarterly Review* 389 at 392-394.

Analogy with loss of commercial opportunity cases

122. It was argued that the loss of an opportunity of a better outcome in a patient's illness or condition should not be seen as novel. The law in Australia already recognises the loss of a commercial opportunity as actionable damage. Accepting that there is a commercial interest in realising an opportunity, it was submitted for the appellant that a person likewise has an interest in their medical outcome.

123. It was recognised in *Sellars v Adelaide Petroleum NL* [114] that a loss of the opportunity to obtain a commercial advantage or benefit is loss or damage for the purposes of s 82(1) of the *Trade Practices Act* 1974 (Cth) , where the cause of action arose under s 52(1) of that Act. Previous decisions allowing for recovery had been based in contract, where the breach of the promise to provide the chance itself gave rise to the loss of that chance [115] . But as Brennan J said, in cases under s 82(1) , "as in cases of tort where damage is the gist of the action, a lost opportunity may or may not constitute compensable loss or damage" and it must be proved in some other way [116] .

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[114] (1994) 179 CLR 332 .

[115] *Chaplin v Hicks* [1911] 2 KB 786; *Fink v Fink* (1946) 74 CLR 127; [1946] HCA 54.

[116] *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 359.

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124. **Following paragraph cited by:**

World Touring Melbourne v Australian Grand Prix Corporation (30 August 2024) (Croft J)
World Touring Melbourne v Australian Grand Prix Corporation (30 August 2024) (Croft J)
Boyded Industries Pty Ltd v Bluth (04 August 2023) (Chen J)
Martinez as trustee for Martinez HWL Practice Trust as representative of the partners trading as HWL Ebsworth Lawyers v Griffiths as trustee for the Griffiths HWL Practice Trust (17 December 2019) (Bell ACJ, Meagher JA and Barrett AJA)
Prosperity Advisers Pty Ltd v Secure Enterprises Pty Ltd (25 June 2012) (Macfarlan and Barrett JJA, Tobias AJA)
Valcorp Australia Pty Ltd v Angas Securities Ltd (09 March 2012) (Jacobson, Siopis and Nicholas JJ)

> 135. The primary judge also adopted the following observations of Kiefel J (with whom Hayne and Bell JJ agreed) in *Tabet v Gett* (2010) 240 CLR 537 at [124] :
>
> > So long as an opportunity provides a substantial and not merely a speculative prospect of acquiring a benefit, it can be regarded as of value and therefore loss or damage.

What cases in contract, such as *The Commonwealth v Amann Aviation Pty Ltd* [117] and *Sellar s v Adelaide Petroleum NL* , have in common is that the commercial interest lost may readily be seen to be of value itself. The same cannot be said of a chance of a better medical outcome or a person's interest in it. Lord Hoffmann observed in *Gregg v Scott* that most cases where there has been recovery for loss of a chance have involved financial loss, where the chance itself can be regarded as an item of property [118] . And in *Sellars v Adelaide Petroleum NL* B rennan J observed that, "[a]s a matter of common experience, opportunities to acquire commercial benefits are frequently valuable in themselves". So long as an opportunity provides a substantial and not merely a speculative prospect of acquiring a benefit, it can be regarded as of value and therefore loss or damage [119] . A loss of a chance of a better medical outcome cannot be regarded in this way. As the assessment of damages in this case shows, the only value given to it is derived from the final, physical, damage.

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[117] (1991) 174 CLR 64; [1991] HCA 54 .

[118] [2005] 2 AC 176 at 197 [83] .

[119] *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 364.

Loss of chance as damage – civil law countries

125. In submissions for the appellant support was sought from the recognition given by other countries, in particular France, to lost chances as a kind of harm[120]. But the general clauses of the Code Civil[121] in no way explain what is meant by "dommage"[122] and the approach taken by French courts to the question of damage is different. Professor Markesinis suggests that the tendency towards generalisation and abstraction is most evident in the way French judges deal with the issue of damage. He says that they look for general elements such as certainty of damage and the legitimacy of the interest affected, rather than by finding the form taken by the harm in the case in question[123]. The courts typically regard the loss of a chance as certain if it is real and not just hypothetical[124].

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[120] And also the Netherlands, Italy, Portugal and Spain – see Winiger et al (eds), *Digest of European Tort Law, Volume 1: Essential Cases on Natural Causation*, (2007) at 589, and Belgium: see Graziano, "Loss of a Chance in European Private Law: 'All or

Nothing' or Partial Liability in Cases of Uncertain Causation", (2008) 16 *European Review of Private Law* 1009 at 1027.

[121] Arts 1382 and 1383.

[122] Zweigert and Kötz, *Introduction to Comparative Law*, 3rd ed (1998) at 617-618.

[123] Markesinis, "The Not so Dissimilar Tort and Delict", (1977) 93 *Law Quarterly Review* 78 at 88, referring to Catala and Weir, "Delict and Torts: A Study in Parallel (Part III)", (1964) 38 *Tulane Law Review* 663 at 664.

[124] van Gerven et al (eds), *Torts: Scope of Protection*, (1998) at 32.

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126. An approach closer to that taken in cases in Australia involving loss of commercial opportunity appears to be adopted in civil law countries which do not favour the loss of chance theory[125]. Some do not regard chances, even the chance to be cured, as chances which can be valued on their own[126]. In these countries the possibility of defining a loss of a chance as damage is given only if the chance has an economic value and is accepted as an interest the law will protect, for example a legally recognised opportunity to yield a profit[127]. If it has no economic value it cannot qualify as damage which can be compensated.

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[125] Germany, Austria, Greece, Norway, Estonia and Lithuania – see Winiger et al (eds), *Digest of European Tort Law, Volume 1: Essential Cases on Natural Causation*, (2007) at 589.

[126] Germany: see Winiger et al (eds), *Digest of European Tort Law, Volume 1: Essential Cases on Natural Causation*, (2007) at 590, fn 125.

[127] Winiger et al (eds), *Digest of European Tort Law, Volume 1: Essential Cases on Natural Causation*, (2007) at 590-591.

Loss of chance as independent harm

127. The approach of the French courts was also relied upon to support the submission that loss of a chance in medical negligence cases may be seen as a kind of harm independent of the physical harm occasioned. It would strengthen the argument for acceptance of such harm as damage if it were shown to have a separate, independent existence[128]. Professor Khoury says that some judgments of the French courts acknowledge the uncertainty inherent in the loss of chance in medical negligence cases but justify compensation on the basis that it is a loss independent of the final damage[129]. Despite some strong criticisms, the acceptance of loss of chance cases continues to be supported by the courts. Loss of chance is said to be the "preferred tool" for dealing with causal difficulties created by scientific uncertainty[130]. This suggests that a policy choice is involved.

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[128] Matters considered significant in *Matsuyama v Birnbaum* 890 NE 2d 819 at 838 (Mass 2008) per Marshall CJ.

[129] Khoury, *Uncertain Causation in Medical Liability*, (2006) at 111.

[130] Khoury, *Uncertain Causation in Medical Liability*, (2006) at 113.

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128. There is a real question in this case whether the loss of a chance of a better outcome could be said to be independent of the physical harm suffered by the appellant. Professor Khoury refers to criticism levelled by French commentators at loss of chance in cases of this kind as an alternative head of injury. They suggest that it is not truly distinct, for its calculation is always contingent upon applying the percentage of the lost chance to the quantum of damage relating to the final injury[131]. It will be recalled that that is the process which was undertaken by the trial judge in this case. The commentators argue that when the final injury occurs it "absorbs" the intermediate damage, which loss of chance represents, so that when damages for a lost chance are granted, they constitute, in effect, partial compensation for the actual injury[132]. This point was not lost on the Court of Appeal in this case [133] .

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[131] Khoury, "Causation and Risk in the Highest Courts of Canada, England, and France", (2008) 124 *Law Quarterly Review* 103 at 125-126.

[132] Khoury, "Causation and Risk in the Highest Courts of Canada, England, and France", (2008) 124 *Law Quarterly Review* 103 at 126.

[133] *Gett v Tabet* (2009) 254 ALR 504 at 584 [371] and 585 [375] .

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129. In her article "Causation and Risk in the Highest Courts of Canada, England, and France"[134] Professor Khoury discusses whether an increase in the risk of injury, there being some cases of lost chance which come within this description, might be considered an independent head of damage. It is not necessary to further consider this question on this appeal. Although the Court of Appeal expressed the view that the "so-called loss of an opportunity" was in reality a claim based upon an increased risk of harm [135] , and recovery therefore not permitted[136], it was not discussed in the present context.

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[134] (2008) 124 *Law Quarterly Review* 103.

[135] *Gett v Tabet* (2009) 254 ALR 504 at 585 [377] .

[136] The respondent did not pursue this issue on the appeal.

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130. Professor Khoury suggests that if loss of chance were a truly independent type of injury, defendants would be forced to compensate the plaintiff even if the lost chance resulted in no actual injury[137]. The same point is made by some German commentators. The example given in the *Digest of European Tort Law* [138] is where there is a delay in treatment which is said to reduce the chances of being healed by 40 per cent, but by the time of trial the claimant has been healed. Because the loss of the chance is the relevant damage, in theory a claim may be made as soon as the chance is lost or reduced.

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[137] Khoury, "Causation and Risk in the Highest Courts of Canada, England, and France", (2008) 124 *Law Quarterly Review* 103 at 126.

[138] Winiger et al (eds), *Digest of European Tort Law, Volume 1: Essential Cases on Natural Causation*, (2007) at 591.

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131. Another aspect of the problem identified may be seen in *Gregg v Scott* [139] , where, however, the chance had not played out. The statistical model relied upon by the plaintiff gave his chances of survival for 10 years at the time he consulted with the defendant, who failed to treat his tumour, as 42 per cent. The plaintiff was still alive at trial, when his chances were then assessed at 25 per cent, and he was still alive when the appeal was heard. Considerable uncertainty attended the question as to what his chances were. As Lord Phillips of Worth Matravers MR observed, statistically his prospects of surviving had been improving up to trial and were increasing daily thereafter. The model was inadequate to provide a conclusion as to his chances [140] . By the time of the appeal it was not possible to reach the trial judge's conclusion. The likelihood that the delay in treatment had any effect diminished the longer the plaintiff survived [141] .

Matsuyama v Birnbaum [142]

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[139] [2005] 2 AC 176 .

[140] *Gregg v Scott* [2005] 2 AC 176 at 216-217 [156]-[157] .

[141] *Gregg v Scott* [2005] 2 AC 176 at 220 [169] .

[142] 890 NE 2d 819 (Mass 2008).

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132. The statistical evidence in that case was regarded by Marshall CJ[143] as wholly reliable[144]. Mr Matsuyama died after his gastric cancer metastasised to an inoperable state. The evidence of an expert gastroenterologist was that the cancer would have been diagnosed had there been appropriate testing when Mr Matsuyama consulted the defendant and he might have been capable of cure if treated then[145]. He gave evidence of the method employed by oncologists of classifying cancer of this type into stages, with each stage signalling a more

advanced cancer and carrying a statistically diminished chance of survival[146]. The jury found that Mr Matsuyama had a 37.5 per cent chance of survival at the time he saw the defendant[147]. There was no evidence of this kind in the present case.

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[143] Of the Supreme Judicial Court of Massachusetts.

[144] *Matsuyama v Birnbaum* 890 NE 2d 819 at 833-834 (Mass 2008).

[145] *Matsuyama v Birnbaum* 890 NE 2d 819 at 826 (Mass 2008).

[146] *Matsuyama v Birnbaum* 890 NE 2d 819 at 826 (Mass 2008).

[147] *Matsuyama v Birnbaum* 890 NE 2d 819 at 828 (Mass 2008).

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133. The starting point for the method given by Marshall CJ, to be employed in such cases, is to calculate the total damages which might be allowed for the death or personal injury. The person's present chance, expressed as a percentage, of survival or cure, is deducted from the chance they had immediately prior to the act of negligence and then applied to the figure for total damages[148].

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[148] *Matsuyama v Birnbaum* 890 NE 2d 819 at 840 (Mass 2008).

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134. It was argued for the appellant that the award of "proportional damages", made in *Matsuyama v Birnbaum*, offers a workable solution to cases of this kind and is consistent with Australian authority as to the assessment of past hypothetical situations in the assessment of damages.

135. **Following paragraph cited by:**

Alapic v Venture Campbelllfield Pty Ltd (Deregistered) (No 1) (22 November 2024) (Pillay J)
Pritchard v DJZ Constructions Pty Ltd (28 June 2012) (Bathurst CJ, Whealy and Barrett JJA)

It is important to bear in mind, in connection with this aspect of the appellant's argument, the distinction between the loss or *damage* necessary to found an action in negligence, which is the injury itself and its foreseeable consequences, and *damages*, which are awarded as compensation for each item or aspect of the injury [149] .

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[149] *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 at 527; [1985] HCA 37.

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136. **Following paragraph cited by:**

Australian Salaried Medical Officers' Federation v Peninsula Health (11 August 2023) (Bromberg J)
Kozarov v State of Victoria (19 February 2020) (Jane Dixon J)
Rush v Nationwide News Pty Ltd (No 7) (11 April 2019) (Wigney J)
Rush v Nationwide News Pty Ltd (No 7) (11 April 2019) (Wigney J)
Polan v Goulburn Valley Health (No 2) (31 January 2017) (Mortimer J)

> 101. In the circumstances, it would be inappropriate to find the applicant has not proved she worked any hours of overtime during the claim period. That is so especially since the respondent does not dispute she did perform work outside her ordinary hours, and has itself adduced evidence to quantify what it accepts to be part of that work. The applicant has given probative evidence about the nature of her other duties, and I am satisfied this is not a situation where she has failed to prove any loss. In these circumstances, the Court is required to do its best on the evidence before it to quantify her loss: see, in the context of damages, *Enzed Holdings Ltd v Wynthea Pty Ltd* (1984) 4 FCR 450; 57 ALR 167 at 183 ; *The Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54; 174 CLR 64 at 83 ; *Aristocrat Technologies Australia Pty Ltd v DAP Services (Kempsey) Pty Ltd* [2007] FCAFC 40; 157 FCR 564 at [35], [99] ; *Tabet v Gett* [2010] HCA 12; 240 CLR 537 at [136] ; *TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83; 232 FCR 361 at [39], [164] .

Johnson v Box Hill Institute of TAFE (12 December 2014) (J Forrest J)
Johnson v Box Hill Institute of TAFE (12 December 2014) (J Forrest J)
Kronenberg v Bridge (20 October 2014) (Blow CJ, Porter and Pearce JJ)
BestCare Foods v Origin Energy (31 May 2012) (McDougall J)
New South Wales v Doherty (05 August 2011) (Hodgson and Whealy JJA, Handley AJA)

Different standards apply to proof of damage from those that are involved in the assessment of damages. *Sellars v Adelaide Petroleum NL* confirms that the general standard of proof is to be maintained with respect to the issue of causation and whether the plaintiff has suffered loss or damage [150] . In relation to the assessment of damages, as was said in *Malec v J C Hutton Pty Ltd* , "the hypothetical may be conjectured." [151] The court may adjust its award to reflect the degree of probability of a loss eventuating. This follows from the requirement that the courts must do the best they can in estimating damages; mere difficulty in that regard is not permitted to render an award uncertain or impossible [152] .

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[150] (1994) 179 CLR 332 at 355 per Mason CJ, Dawson, Toohey and Gaudron JJ and 367 per Brennan J.

[151] (1990) 169 CLR 638 at 643 per Deane, Gaudron and McHugh JJ.

[152] *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 83 per Mason CJ and Dawson J, citing *Fink v Fink* (1946) 74 CLR 127 at 143.

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137. **Following paragraph cited by:**

Masters v Dobson Mitchell and Allport (03 June 2014) (Pearce J)
Bosi Security Services Limited v Australia and New Zealand Banking Group Limited (15 June 2011) (Davies J)
Guthrie v News Limited (14 May 2010) (Kaye J)

Thus in the case of the loss of a commercial opportunity, the plaintiff must first establish the fact of the loss, for example by reference to the fact that it had a commercial interest of value which is no longer available to be pursued because of the defendant's negligence. The damages assessed of that loss, the estimation of its value, reflect the chance, often expressed in a percentage, that the opportunity would have been pursued to a successful outcome. The award is proportionate in that sense.

138. The "proportional damages" awarded in *Matsuyama v Birnbaum* do not involve such an assessment. The damages are expressed as a proportion of the total damages which might have been awarded for Mr Matsuyama's wrongful death, but for which the defendant could not be held liable. They have the effect of providing for proportionate liability.

139. The jury in *Matsuyama v Birnbaum* had not identified the loss of the chance as damage. Their finding of causation was that the defendant's negligence was a "substantial contributing factor" to Mr Matsuyama's death and they awarded 37.5 per cent of damages for wrongful death[153]. That outcome was maintained on appeal, but the test of causation was corrected, the "but for" test being held to apply[154]. But in applying that test the Court appears to have focussed upon only Mr Matsuyama's former chance of survival as the fact relevant to the assessment of his position. It does not appear to have considered the fact that he had cancer, which gave the probability that he would not survive, as relevant. As Gonthier J said, giving the judgment for the majority of the Supreme Court of Canada[155] in *Laferrière v Lawson* , consideration of the entire factual situation is necessary on the issue of causation [156] .

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[153] *Matsuyama v Birnbaum* 890 NE 2d 819 at 828 (Mass 2008).

[154] *Matsuyama v Birnbaum* 890 NE 2d 819 at 842 (Mass 2008).

[155] On appeal from the Court of Appeal for Quebec.

[156] [1991] 1 SCR 541 at 591.

Causation in this case

140. **Following paragraph cited by:**

Toon v Central Adelaide Local Health Network (30 July 2025) (Deuter J)
Toon v Central Adelaide Local Health Network (30 July 2025) (Deuter J)
Saadat v Commonwealth (09 May 2025) (Stanley J)
Williams v Fraser (07 October 2022) (Macfarlan and Gleeson JJA, Simpson AJA)
Wei Fan v South Eastern Sydney Local Health District (No 2) (31 August 2015) (Harrison AsJ)
King v Western Sydney Local Health Network (14 June 2013) (Basten, Hoeben and Ward JJA)

> 131. For the reasons indicated, the evidence of Professor Curtis did not establish the causal link between the hospital's omission to offer VZIG to the appellant and the development of her varicella. This was because the evidence did not establish that had VZIG been administered; it was likely that the appellant would not have developed varicella (*Tabet v Gett* [2010] HCA 12; 240 CLR 537 at [140] .

Paul v Cooke (25 July 2012) (Brereton J)

The issue whether damage has been caused by a negligent act invites a comparison between a plaintiff's present position and what would have been the position in the absence of the defendant's negligence [157] . Such an inquiry directs attention to all the circumstances pertaining to the plaintiff's condition at the time he or she sought the medical treatment which was not properly provided. The question of whether harm or damage has been suffered is bound up in the question of causation.

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[157] *Gregg v Scott* [2005] 2 AC 176 at 182-182 [9] per Lord Nicholls of Birkenhead; *H arriton v Stephens* (2006) 226 CLR 52 at 104 [167] per Hayne J; [2006] HCA 15 .

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141. In the present case the appellant suffers from severe brain damage, some of which occurred on 14 January 1991. It is that damage which is the focus of the inquiry about causation. At the time a CT scan should have been performed she had a large brain tumour which was causing intracranial pressure. Unrelieved it was almost certainly going to cause the brain damage

which eventuated. A conclusion that earlier treatment would have altered that outcome is not possible. It could not therefore be demonstrated that the respondent's negligence was probably a cause of the appellant's brain damage.

142. **Following paragraph cited by:**

Martin v Norton Rose Fulbright Australia (26 November 2021) (Jagot, Katzmann and Banks-Smith JJ)
Lee (a pseudonym) v Dhupar (19 November 2020) (Judge Levy SC)
Old v Miniter (31 July 2020) (Judge Levy SC)
Sigma Pharmaceuticals (Australia) Pty Ltd v Wyeth (19 October 2018) (Jagot J)

Expressing what is said to have been lost as the loss of a chance was said by Gonthier J in *Laferrière v Lawson* to divert attention from the proper connection between fault and damage. It is artificial and breaks the causal

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[158] *Laferrière v Lawson* [1991] 1 SCR 541 at 591.

[159] Savatier, *Une faute peut-elle engendrer la responsabilité d'un dommage sans l'avoir causé?*, D 1970 Chron 123 at 124, cited in *Laferrière v Lawson* [1991] 1 SCR 541 at 574.

[160] (1999) 197 CLR 269 at 280 [36] .

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link [158] . I respectfully agree. One commentator to whom his Honour referred [159] sugges ts that in cases of the kind in question what is involved is in truth not a loss of a chance. The factors present in that chance have played themselves out when physical injury or death occurs. What is in issue is a past event. It was to this opinion that Gaudron J referred, with approval, in *Naxakis v Western General Hospital* [160] .

The standard of proof

143. **Following paragraph cited by:**

Newton v Australian Postal Corporation (No 2) (23 December 2019) (Bromberg J)

Resort to the language of "chance" cannot displace the analysis necessary for the determination of the issue of causation of damage. Properly analysed, what is involved in the chance referred to in this case is the possibility, to put it at its highest, that no brain damage would occur or that it would not be so severe. They are the "better medical outcomes" involved in the chance. Expressing what is said to be the loss or damage as a "chance" of a better outcome recognises that what is involved are mere possibilities and that the general

standard of proof cannot be met. Thus the appellant could only succeed if the standard of proof is lower than the law presently requires.

144. *Gregg v Scott* confirmed for the United Kingdom that the general standard of proof should be maintained with respect to claims for damages for medical negligence. Lord Nicholls was the only member of the House of Lords to consider that the law should not require proof on the balance of probabilities and should recognise a person's prospects of recovery as real [161] . T he Supreme Court of Canada in *Laferrière v Lawson* confirmed that if a case did not meet the test of causation applying the general standard of proof, then recovery should be denied [162] .

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[161] *Gregg v Scott* [2005] 2 AC 176 at 189 [42] .

[162] *Laferrière v Lawson* [1991] 1 SCR 541 at 608 per Gonthier J.

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145. **Following paragraph cited by:**

Coote v Dr Kelly (14 March 2012) (Schmidt J)
Ferenczfy v JohnsonDiversey Australia Pty Ltd (01 March 2012) (Nicholson J)

The general standard of proof required by the common law and applied to causation is relatively low. It does not require certainty or precision. It requires that a judge be persuaded that something was probably a cause of the harm the plaintiff suffered. Historically the standard may have been chosen in order to minimise errors in civil jury trials[163], but it nevertheless serves also to accommodate a level of uncertainty in proof.

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[163] As suggested by Clermont and Sherwin, "A Comparative View of Standards of Proof", (2002) 50 *American Journal of Comparative Law* 243 at 258.

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146. In countries like France evidence must approach certainty in proof of causation[164]. Gonthie r J considered the different standards between the law of France and of Quebec – which, generally speaking, applies the common law standard – to be significant in relation to the approaches taken by the courts of those countries [165] . Professor Khoury considers that the strictness with which French courts approach the high standard of proof may have led them to resort to the loss of chance solution[166].

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[164] It is suggested that because civil law countries had no experience of juries, they did not develop notions of probability – see Clermont and Sherwin, "A Comparative

View of Standards of Proof", (2002) 50 *American Journal of Comparative Law* 243 at 257.

[165] *Laferrière v Lawson* [1991] 1 SCR 541 at 601-603 .

[166] Khoury, *Uncertain Causation in Medical Liability*, (2006) at 137.

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147. In Germany, where there is also a high standard of proof, the problem of proof in negligence cases is dealt with by a reversal of the burden of proof. This arises in cases of medical negligence[167]. Where it is proved that a doctor was grossly negligent, the doctor must prove that his or her actions were not the cause of the injury. The term "gross negligence" is not applied restrictively. An action which is contrary to generally acknowledged rules of medical treatment, such as not performing a necessary investigation, will suffice[168].

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[167] Jansen, "The Idea of a Lost Chance", (1999) 19 *Oxford Journal of Legal Studies* 271 at 276-277; see also Fleming, "Probabilistic Causation in Tort Law", (1989) 68 *Canad ian Bar Review* 661 at 670-671.

[168] Jansen, "The Idea of a Lost Chance", (1999) 19 *Oxford Journal of Legal Studies* 271 at 277.

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148. The standard of proof required by the common law already admits of some uncertainty in proof of causation. As Lord Hoffmann observed in *Gregg v Scott* , the wholesale adoption of possible rather than probable causation as a condition of liability is radical [169] .

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[169] [2005] 2 AC 176 at 198 [90] .

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149. The common law has also shown itself to be adaptable in relation to its treatment of evidence of causation in cases where there is difficulty of proof. In *Snell v Farrell* [170] the Supreme Court of Canada has countenanced an approach, in medical negligence cases, where inferences might more readily be drawn adverse to a defendant, because the facts lie particularly within the defendant's knowledge. The inference drawn by members of this Court in *Adelaide Stevedoring Co Ltd v Forst* is noteworthy [171] . The decisions in *McGhee v National Coal Board* [172] and *Fairchild v Glenhaven Funeral Services Ltd* [173] are perhaps more controversial. In this case, however, it is not suggested that any of these approaches are possible and it is not necessary to further consider these decisions.

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[170] [1990] 2 SCR 311 at 328-329 .

[171] (1940) 64 CLR 538, see in particular at 563-564 per Rich ACJ and 567 per Starke J; [1940] HCA 45 .

[172] [1973] 1 WLR 1; [1972] 3 All ER 1008.

[173] [2003] 1 AC 32 .

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150. When an issue is proved to the general standard the court treats the damage caused as certain, thus giving rise to the all-or-nothing rule of recovery. The rule is strongly criticised by those who favour acceptance of loss of chance as damage [174] . However, the rule reflects the certainty that the law considers to be necessary when attributing legal responsibility for harm caused. To replace it with a rule which limits damages awarded according to the degree of probability of causation has its own limitations. It would suggest, if not require, a degree of precision in the assessment of probabilities which is not part of the more liberal, common sense, approach presently undertaken. And, as Baroness Hale of Richmond observed in *Gregg v Scott* , proportionate recovery cuts both ways [175] .

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[174] See *Matsuyama v Birnbaum* 890 NE 2d 819 at 830 (Mass 2008) per Marshall CJ; *Gregg v Scott* [2005] 2 AC 176 at 183 [15] per Lord Nicholls of Birkenhead.

[175] [2005] 2 AC 176 at 233 [225] .

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151. It would require strong policy considerations to alter the present requirement of proof of causation. None are evident. The argument that there should be compensation where breach of duty is proved simply denies proof of damage as necessary to an action in negligence. I am unpersuaded that denial of recovery in cases of this kind would fail to deter medical negligence or ensure that patients receive an appropriate standard of care. These matters appear to have been influential in *Matsuyama v Birnbaum*. However, a feature of that case was that the defendant was called as a witness and gave evidence that an effect of the particular contract between Mr Matsuyama's medical insurer and the doctors' practice to which the defendant belonged was that doctors had difficulty in providing patients qualifying for treatment under it with the best medical care[176].

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[176] *Matsuyama v Birnbaum* 890 NE 2d 819 at 825, fn 13 (Mass 2008).

Conclusion

152. **Following paragraph cited by:**

Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)

The appellant is unable to prove that it was probable that, had treatment by corticosteroids been undertaken earlier, the brain damage which occurred on 14 January 1991 would have been avoided. The evidence was insufficient to be persuasive. The requirement of causation is not overcome by redefining the mere possibility, that such damage as did occur might not eventuate, as a chance and then saying that it is lost when the damage actually occurs. Such a claim could only succeed if the standard of proof were lowered, which would require a fundamental change to the law of negligence. The appellant suffered dreadful injury, but the circumstances of this case do not provide a strong ground for considering such change. It would involve holding the respondent liable for damage which he almost certainly did not cause.

153. The appeal should be dismissed with costs.

SirSeymourHicks.html>; Hartnoll (ed), *The Oxford Companion to the Theatre*, 3rd ed (1967) at 443.

Cited by:

Collins v Metro North Hospital and Health Service [2025] QSC 225 -
DB (a pseudonym) v The State of Western Australia [2025] WADC 60 (09 September 2025) (Black DCJ)

528. The determination of causation turns on a consideration of probabilities. All that is necessary is that, according to the course of common experience, the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm. [263]

via

[263] ***Strong v Woolworths Ltd*** [2012] HCA 5; (2012) 246 CLR 182 [34] (***Strong***); ***Tabet v Gett*** [2010] HCA 12; (2010) 240 CLR 537 [111] (***Tabet***).

DB (a pseudonym) v The State of Western Australia [2025] WADC 60 -
Toon v Central Adelaide Local Health Network [2025] SADC 98 (30 July 2025) (Deuter J)

Rogers v Whitaker (1992) 175 CLR 479; *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 WLR 89; *Roads and Traffic Authority of New South Wales v Dederer* (2007) 238 ALR 761; *Tabet v Gett* [2010] HCA 12 ; *East Metropolitan Health Service v Ellis* [2020] WASCA 147; *Circular Head Fencing P/L v Motor Accidents Insurance Board* [2017] TASFC 6; *Varipatis v Almario* [2013] NSWCA 76, considered.

Toon v Central Adelaide Local Health Network [2025] SADC 98 -

Toon v Central Adelaide Local Health Network [2025] SADC 98 -
Toon v Central Adelaide Local Health Network [2025] SADC 98 -
State of New South Wales v T2 (by his tutor T1) [2025] NSWCA 165 -
State of New South Wales v T2 (by his tutor T1) [2025] NSWCA 165 -
Guthrie v Mondiale VGL Pty Ltd (No 2) [2025] FedCFamC2G 938 -
Saadat v Commonwealth [2025] SASC 59 (09 May 2025) (Stanley J)

2535. Causation is largely a question of fact to be approached by applying common sense to the facts of the particular case. Value judgments and policy have a part to play. [2218] The "but for" analysis is not a definitive or exclusive test of legal causation. [2219] However, as the High Court explained in the joint reasons of Gummow, Hayne and Crennan JJ in *Amaca Pty Ltd v Booth* (*Booth*), many issues of causation lie outside the realm of common knowledge and experience. They fall to be determined by reference to expert evidence, for example, medical evidence. In such cases, investigation of difficult and complicated facts cannot be separated from appreciation of any special branch of knowledge which affects them. [2220] At common law, establishing merely that it is possible that the defendant's conduct was a cause of or materially contributed to the disease or injury is insufficient. The High Court in *T abet v Gett* [2221] confirmed the need for a plaintiff to prove causation on the balance of probabilities. It must be proved on the balance of probabilities that the defendant's conduct was a cause of or materially contributed to the plaintiff's injury or illness. [2222] There is also a distinction between a mere prospective risk that the defendant's conduct might cause injury to the plaintiff and the possibility or probability that the defendant's conduct assessed in retrospect did in fact cause or materially contribute to the injury suffered by the plaintiff. [2223]

via

[2221] [2010] HCA 12 , (2010) 240 CLR 537 .

Saadat v Commonwealth [2025] SASC 59 -
Saadat v Commonwealth [2025] SASC 59 -
Deputy Commissioner of Taxation v Peever [2025] FCA 460 -
Saadat v Commonwealth [2025] SASC 59 -
Saadat v Commonwealth [2025] SASC 59 -
Saadat v Commonwealth [2025] SASC 59 -
Han v St Basil's Homes (No 2) [2025] FCA 448 -
Busa v South Eastern Sydney Local Health District Trading as Sydney Eye Hospital [2025] NSWSC 130 (16 April 2025) (Davies J)

240. In *Tabet v Gett* (2010) 240 CLR 537; [2010] HCA 12 Kiefel J said:

> [109] Damage is an essential ingredient in an action for negligence; it is the gist of the action. The action developed largely from the old form of action on the case, in which it was the rule that proof of damage was essential to a plaintiff's case. In *Bruns den v Humphrey* Bowen LJ pointed out that in certain classes of case the mere violation of a legal right imports damage, but that principle was "not as a rule applicable to actions for negligence: which are not brought to establish a bare right, but to recover compensation for substantial injury." Generally speaking "there must be a temporal loss or damage accruing from the wrongful act of another, in order to entitle a party to maintain an action on the case." Negligence in the abstract will not suffice.
>
> [110] An action in negligence, said Bowen LJ, "is based upon the union of the negligence and the injuries caused thereby, which in such an instance will as a rule involve and have been accompanied by specific damage." Nevertheless the action on the case has itself been described as sufficiently flexible to enable judges to extend it to cover situations where damage was suffered in circumstances which called for a

remedy. The Court of Appeal in this case observed that the common law has adapted to recognise different kinds of harm. But nowhere is it suggested that the requirement for damage itself can be dispensed with. Liability based upon breach of duty of care without proven loss or harm will not suffice.

[111] The common law requires proof, by the person seeking compensation, that the negligent act or omission caused the loss or injury constituting the damage. All that is necessary is that, according to the course of common experience, the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm. "More probable" means no more than that, upon a balance of probabilities, such an inference might reasonably be considered to have some greater degree of likelihood; it does not require certainty.

[112] The "but for" test is regarded as having an important role in the resolution of the issue of causation, although more as a negative criterion than as a comprehensive test. The resolution of the question of causation has been said to involve the common sense idea of one matter being the cause of another. But it is also necessary to understand the purpose for making an inquiry about causation and that may require value judgments and policy choices.

(citations omitted)

R v Cowan [2025] NSWDC 100 -
Taylor v Woodgate [2025] NSWDC 89 -
R v Elder [2025] NSWDC 101 -
Jane Jones (a pseudonym) v Waller Legal Pty Ltd [2025] VSC 42 -
Baird and Erbacher v George [2025] TASSC 4 -
MT v Se [2025] SASCA 8 -
MT v Se [2025] SASCA 8 -
Collopy v Parks Victoria (No 2) [2024] VCC 1931 (10 December 2024) (Myers J)

383 Leading Counsel for Mr Collopy referred to *Tabet v Gett* , [208] and *Chol v Pickwick Group Pty Ltd* ,[209] and submitted that the Court ought to infer by the application of common sense, that the reasonably practicable alternative system of work would have avoided Mr Collopy's injuries.

via

[208] (2010) 240 CLR 537

Collopy v Parks Victoria (No 2) [2024] VCC 1931 (10 December 2024) (Myers J)

234 The Court of Appeal in *Golowka* further noted that a finding that there was a reasonably practicable alternative which would have reduced *t he risk* of the plaintiff suffering injury:

> "**... does not resolve the more difficult question as to causation in fact. As will be seen in a moment, the question of risk of injury is irrelevant except as part of the factual matrix in establishing the proof of a causal nexus between the negligent omission and the injury.**
>
> ...
>
> [In *East Metropolitan Health Service v Ellis* ,[116] the West Australian Court of Appeal] restated the basic principle:
>
> 'In this regard, it is clear, and there can be no doubt, that mere proof by a plaintiff of the *possibility* that a defendant's breach caused the plaintiff to suffer harm is insufficient. **The court must**

> **be satisfied that it is more probable than not that the defendant's breach caused the relevant harm**; it is not sufficient to conclude that the breach *may* have been a cause of the harm.'
>
> As *Tabet* demonstrates, at a general level common sense can be used in drawing an inference as to a causal link between the hypothetical alternative system of work and the avoidance of the injury. However, this still requires deductive reasoning based on the evidence and the drawing of an appropriate inference or inferences."
>
> (emphasis added)

Collopy v Parks Victoria (No 2) [2024] VCC 1931 -
Turner v Bayer Australia Ltd [2024] VSC 760 -
Collopy v Parks Victoria (No 2) [2024] VCC 1931 -
Collopy v Parks Victoria (No 2) [2024] VCC 1931 -
Alapic v Venture Campbelllfield Pty Ltd (Deregistered) (No 1) [2024] VCC 1847 -
Alapic v Venture Campbelllfield Pty Ltd (Deregistered) (No 1) [2024] VCC 1847 -
World Touring Melbourne v Australian Grand Prix Corporation [2024] VSC 521 -
World Touring Melbourne v Australian Grand Prix Corporation [2024] VSC 521 -
World Touring Melbourne v Australian Grand Prix Corporation [2024] VSC 521 -
Haley v Laing O'Rourke Australia Management Services Pty Ltd (No 8) [2024] FedCFamC2G 779 (23 August 2024) (Manousaridis J)

148. Thus, in *Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd,* Barker J said here must be "an appropriate causal connection between the contravention and the loss claimed". [179] And the Full Federal Court, in ***Maritime Union of Australia** v Fair Work Ombudsman* , said that a primary judge, having found the relevant contravention, was required "to assess the compensation, if any, that was causally related to those contraventions". [180] The Full Federal Court said: [181]

> That involved not an examination of what did happen, but an assessment of what would or might have occurred, but which could no longer occur (because of the contraventions). Subject to any statutory requirement to the contrary, questions of the future or hypothetical effects of a wrong in determining compensation or damages are not to be decided on the balance of probability that they would or would not have happened. Rather, the assessment is by way of the degree of probability of the effects – the probabilities and the possibilities: *Malec v JC Hutton Pty Ltd* [1990] HCA 20 169 CLR 625 at 642-643 ; *Sellars v Adelaide Petroleum NL* [1994] HCA 4; 179 CLR 332 at 352-356 . The above proposition must be qualified by the recognition that, where the fact of injury or loss is part of the cause of action or wrong, it must be proved on the balance of probability. Compensation is generally awarded for loss or damage actually caused or incurred, not potential or likely damage: *Tabet v Gett* [2010] HCA 12;240 CLR 537 ; *Sellars* at 348 ; *Wardley Australia Ltd v Western Australia* [1992] HCA 55; 175 CLR 514 at 526 ; that is equally so here under ss 807(1)(b) and 545(2)(b).

Gibson (a pseudonym) v Askim Pty Ltd ATF the Askim [2024] ACTSC 203 (28 June 2024) (Baker J)

184. It is well settled that establishing that a defendant's negligence was a necessary condition of harm "does not require certainty – [a]ll that is necessary is that ... the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm": *Karpik v Carnival Plc (The Ruby Princess) (Initial Trial)* [2023] FCA 1280 at [814] quoting *Tabet v Gett* [2010] HCA 12; 240 CLR 537 at [111] . To put it another way, "it is no answer to the question whether something has been demonstrated as being more probable than not to say that there is another possibility open; the determination of the question turns on consideration of the probabilities": *Kone Elevators Pty Ltd v Shipton* [2021] ACTCA 33 at [81] citing *Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182 at [34] .

QUESTIONS OF LAW RESERVED (NOS. 1 AND 2 OF 2023) [2024] SASCA 82 (27 June 2024) (Acting Livesey CJ; Doyle and David JJ)

373. However, the principles governing the approach to be taken by an intermediate appellate court in relation to non-dispositive issues are not the same as those governing trial courts. In *Boensch v Pascoe* ,[224] Kiefel CJ, Gageler and Keane JJ said that, generally speaking, "an appellate court should confine itself to determining only those issues which it considers to be dispositive of the justiciable controversy raised by the appeal". Their Honours went on to say that "[i]t is important to the efficiency of the system as a whole that intermediate courts of appeal should not feel compelled to treat determination of non-dispositive issues in appeals before them as the norm". [225]

via

[224] *Boensch v Pascoe* (2019) 268 CLR 593 at [7] (Kiefel CJ, Gageler and Keane JJ; Bell, Nettle, Gordon and Edelman JJ agreeing at [101]); see also *Tabet v Gett* (2010) 240 CLR 537 at [97]-[98] (Heydon J) .

QUESTIONS OF LAW RESERVED (NOS. 1 AND 2 OF 2023) [2024] SASCA 82 -
Hassan (formerly described under the pseudonym AFX21) v Minister for Home Affairs [2024] FCA 527 (20 May 2024) (Perry J)

178. In relation to the ***first*** form of causation identified, being that the respondents' negligence meant that the applicant "*lost a chance to be returned to PNG*", that framing of the case, with respect, is not correct in law. As the High Court held in *Tabet* , the standard for assessing causation in negligence is not a loss of chance but the balance of probabilities: cf a claim for economic loss. As Hayne and Bell JJ explained in *Tabet* at [66] , "*[w]hat must be demonstrated (in the sense that the tribunal of fact must be persuaded that it* ***is more probable than not****) is that a difference has been brought about and that the defendant's negligence was a cause of that difference*": (emphasis added). In *Tabet* , their Honours continued to state that (at [68]–[69]):

> ... to accept that the appellant's loss of a chance of a better medical outcome was a form of actionable damage would shift the balance hitherto struck in the law of negligence between the competing interests of claimants and defendants. That step should not be taken. The respondent should not be held liable where what is said to have been lost was the possibility (as distinct from probability) that the brain damage suffered by the appellant would have been less severe than it was.
>
> It may be that other cases in which it might be said that, as a result of medical negligence, a patient has lost "the chance of a better medical outcome" (for example, a diminution in life expectancy) differ from the present case in significant respects. These are not matters that need be further examined in this case. ***It need only be observed that the language of loss of chance should not be permitted to obscure the need to identify whether a plaintiff has proved that the defendant's negligence was more probably than not a cause of damage (in the sense of detrimental difference*** **).** The language of possibilities (language that underlies the notion of loss of chance) should not be permitted to obscure the need to consider whether the possible adverse outcome has in fact come home, or will more probably than not do so.
>
> (Emphasis added; citations omitted.)

See also *Tabet* at [46], [58]–[59] (Gummow ACJ), [101] (Crennan J), [143], [152] (Kiefel J).

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It may be that other cases in which it might be said that, as a result of medical negligence, a patient has lost "the chance of a better medical outcome" (for example, a diminution in life expectancy) differ from the present case in significant respects. These are not matters that need be further examined in this case. ***It need only be observed that the language of loss of chance should not be permitted to obscure the need to identify whether a plaintiff has proved that the defendant's negligence was more probably than not a cause of damage (in the sense of detrimental difference*** **).** The language of possibilities (language that underlies the notion of loss of chance) should not be permitted to obscure the need to consider whether the possible adverse outcome has in fact come home, or will more probably than not do so.

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See also *Tabet* at [46], [58]–[59] (Gummow ACJ), [101] (Crennan J), [143], [152] (Kiefel J).

Hassan (formerly described under the pseudonym AFX21) v Minister for Home Affairs [2024] FCA 527 -
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Hassan (formerly described under the pseudonym AFX21) v Minister for Home Affairs [2024] FCA 527 -
Wright v De Kauwe [No 2] [2024] WASCA 51 (17 May 2024) (Buss P; Mitchell JA; Lundberg J)

65. The assessment of the value of the plaintiff's lost opportunity, by reference to the degree of probabilities or possibilities, is carried out in the manner articulated by Deane, Gaudron and McHugh JJ in ***Malec v JC Hutton Pty Ltd*** : [5]

> When liability has been established and a common law court has to assess damages, its approach to events that allegedly would have occurred, but cannot now occur, or that allegedly might occur, is different from its approach to events which allegedly have occurred. A common law court determines on the balance of probabilities whether an event has occurred. *If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred*. Hence, in respect of events which have or have not occurred, damages are assessed on an all or nothing approach. But in the case of an event which it is alleged would or would not have occurred, or might or might not yet occur, the approach of the court is different. The future may be predicted and the hypothetical may be conjectured. But questions as to the future or hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof. If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. The probability may be very high 99.9 per cent or very low 0.1 per cent. But unless the chance is so low as to be regarded as speculative say less than 1 per cent or so high as to be practically certain say over 99 per cent the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. *Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability. The adjustment may increase or decrease the amount of damages otherwise to be awarded.* See ***Mallett v. McMonagle*** ([1970] AC 166, at p 174); ***Da vies v. Taylor*** ([1974] AC 207, at pp 212, 219); ***McIntosh v. Williams*** ([1979] 2 NSWLR 543, at pp 550 551). *The approach is the same whether it is alleged that the event would have occurred before or might occur after the assessment of damages takes place.* (emphasis added)

See *Sellars* (350, 355) (Mason CJ, Dawson, Toohey and Gaudron JJ); *Tabet v Gett* . [6]

Wright v De Kauwe [No 2] [2024] WASCA 51 (17 May 2024) (Buss P; Mitchell JA; Lundberg J)

65. The assessment of the value of the plaintiff's lost opportunity, by reference to the degree of probabilities or possibilities, is carried out in the manner articulated by Deane, Gaudron and McHugh JJ in *Malec v JC Hutton Pty Ltd* : [5]

> When liability has been established and a common law court has to assess damages, its approach to events that allegedly would have occurred, but cannot now occur, or that allegedly might occur, is different from its approach to events which allegedly have occurred. A common law court determines on the balance of probabilities whether an event has occurred. *If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred*. Hence, in respect of events which have or have not occurred, damages are assessed on an all or nothing approach. But in the case of an event which it is alleged would or would not have occurred, or might or might not yet occur, the approach of the court is different. The future may be predicted and the hypothetical may be conjectured. But questions as to the future or hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof. If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. The probability may be very high 99.9 per cent or very low 0.1 per cent. But unless the chance is so low as to be regarded as speculative say less than 1 per cent or so high as to be practically certain say over 99 per cent the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. *Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability. The adjustment may increase or decrease the amount of damages otherwise to be awarded.* See ***Mallett v. McMonagle*** ([1970] AC 166, at p 174); ***Da vies v. Taylor*** ([1974] AC 207, at pp 212, 219); ***McIntosh v. Williams*** ([1979] 2 NSWLR 543, at pp 550 551). *The approach is the same whether it is alleged that the event would have occurred before or might occur after the assessment of damages takes place.* (emphasis added)

See *Sellars* (350, 355) (Mason CJ, Dawson, Toohey and Gaudron JJ); *Tabet v Gett* . [6]

via

[6] *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 [136] (Kiefel J).

Wright v De Kauwe [No 2] [2024] WASCA 51 -
Lin v Max Bean Pty Ltd (No 2) [2024] FedCFamC2G 431 -
Lewis v Martinez and the persons named in the Schedule (No 6) [2024] NSWSC 543 (10 May 2024) (Elkaim AJ)

Tabet v Gett [2010] (2010) 240 CLR 537 ; HCA 12

Lewis v Martinez and the persons named in the Schedule (No 6) [2024] NSWSC 543 -
Lewis v Martinez and the persons named in the Schedule (No 6) [2024] NSWSC 543 -
Cessnock City Council v 123 259 932 Pty Ltd [2024] HCA 17 -
Roberts v Shimmin [2024] NSWDC 171 (29 April 2024) (Andronos SC DCJ)

251. In *Tabet v Gett* (2010) 240 CLR 537 at [111] , Kiefel J stated:

> "All that is necessary is that, according to the course of common experience, the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm. More probable means no more than that, upon a balance of probabilities, such an inference might reasonably be considered to have some greater degree of likelihood; it does not require certainty."

Alrifai v ACT [2024] ACTCA 13 (12 April 2024) (McCallum CJ; O'Sullivan J; McWilliam AsJ)

> 141 A number of the appellant's arguments in support of this part of ground (1) referred to the decision of the High Court in *Tabet v Gett* [2010] HCA 12; 240 CLR 537 . However, as noted by the Territory, although the primary judge referred to that decision, it was not the basis on which her Honour determined this aspect of the causation issue. Her Honour's conclusion was instead founded on her assessment of the expert evidence.

Leakes Road Property Development Pty Ltd v Brasse [2023] VSCA 34 -
Youssef v Eckersley & Anor [2024] QSC 35 -
Youssef v Eckersley & Anor [2024] QSC 35 -
Patterson & Anor v Mamou (t/as De Novo Conveyancing) [2024] NSWDC 47 -
Patterson & Anor v Mamou (t/as De Novo Conveyancing) [2024] NSWDC 47 -
Curran v Yaramati [2023] NSWDC 546 -
Salman v Hornsby Shire Council (No.2) [2023] NSWDC 527 -
Karpik v Carnival plc (The Ruby Princess) (Initial Trial) [2023] FCA 1280 (25 October 2023) (Stewart J)

> 814. In determining whether, but for the failure to screen passengers' symptoms and encourage and implement physical distancing, Mr Karpik would have contracted COVID-19, it is important to bear in mind that the standard of proof is the balance of probabilities. As explained by Kiefel J in *Tabet v Gett* [2010] HCA 12; 240 CLR 537 at [111] :
>
> > All that is necessary is that ... the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm. "More probable" means no more than that, upon a balance of probabilities, such an inference might reasonably be considered to have some greater degree of likelihood; **it does not require certainty**.
> >
> > (Emphasis added.)

Dib v Rex [2023] NSWCCA 243 -
Youssef v Bevchain Pty Ltd [2023] NSWDC 313 -
Australian Salaried Medical Officers' Federation v Peninsula Health [2023] FCA 939 -
Boyded Industries Pty Ltd v Bluth [2023] NSWSC 915 -
Tsiaras v SPI Management Pty Ltd [2023] VCC 699 -
Tsiaras v SPI Management Pty Ltd [2023] VCC 699 -
Lenane Holdings Pty Ltd v Summit Rural (WA) Pty Ltd [2023] WADC 42 -
Lenane Holdings Pty Ltd v Summit Rural (WA) Pty Ltd [2023] WADC 42 -
Lenane Holdings Pty Ltd v Summit Rural (WA) Pty Ltd [2023] WADC 42 -
Vaughan Constructions Pty Ltd v Melbourne Water Corporation (Building and Property) [2023] VCAT 366 -
Veitch v Connor [2023] WADC 38 (31 March 2023) (Gething DCJ)

> The plaintiff's case on liability is in essence that when operating on the plaintiff's left eye, Dr Ward was negligent in not using 'phaco when combined with SST' (phase which I will explain in Part 8). This was the surgical technique later used by Dr Chan when operating on the right eye. This is the 'fault' for the purposes of CLA s 5C(1) . It follows that, in order to prove that this fault by Dr Ward caused the 'harm' particularised in the preceding paragraph, at a notional trial of the Original Action the plaintiff would have been required to prove that, had Dr Ward used the same surgical technique as Dr Chan, the left eye would have had the same outcome as the right eye. In particular, the plaintiff's left cornea would not have been so dysfunctional that it had to be replaced in a corneal transplant. This is the relevant different state of affairs contemplated in the quote at [212] from ***Tabet*** .

Veitch v Connor [2023] WADC 38 (31 March 2023) (Gething DCJ)

> Tabet v Gett (2010) 240 CLR 537

Veitch v Connor [2023] WADC 38 -
Veitch v Connor [2023] WADC 38 -
Ziaee v Rubino [2023] ACTCA 7 -
Chol v Pickwick Group Pty Ltd [2023] VCC 66 -
Reddock v St&T Pty Ltd [2022] QSC 293 (13 January 2023) (Jackson J)

> 122. As well, despite the preference in cases of binding authority for common sense causation or for a material cause to be enough to prove causation, the run of cases of highest authority, in general, consistently shows consideration of whether the alleged cause was a necessary condition of the injury that occurred. [22]

via

> [22] *Wallace v Kam* (2013) 250 CLR 375, 381 [11] ; *Tabet v Gett* (2010) 240 CLR 537, 578 [112] ; *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111, 123 [12] ; *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 440 [44] ; *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413, 426 [21], 457 [119] ; compare *Roads and Traffic Authority v Royal* (2008) 245 ALR 653, 663.

Reddock v St&T Pty Ltd [2022] QSC 293 (13 January 2023) (Jackson J)

> 120. When the question is one of factual causation, the logical comparison is between what actually happened and what would have happened if the negligent act or omission had not occurred. [21]

via

> [21] *Tabet v Gett* (2010) 240 CLR 537, 564 [66] .

Reddock v St&T Pty Ltd [2022] QSC 293 -
Fraser v Victorian WorkCover Authority [2022] VCC 2241 (19 December 2022) (Her Honour Judge Robertson)

> 293 Where there are competing hypotheses as to what caused the plaintiff's injuries, to satisfy me that the negligent conduct of Dreamtech was a cause of the injury suffered by the plaintiff, the plaintiff must establish that the more probable inference appearing from the evidence is that the plaintiff's injuries were caused by Dreamtech's negligence, as opposed to some other cause. If the evidence gives rise to competing inferences, neither of which is more probable than the other, the plaintiff will not discharge the burden of proof and establish the hypothesis with the required degree of probability. [140] The plaintiff must demonstrate that the competing inference is less likely. [141]

via

> [140] *Jones v Dunkel* (*supra*) per Dixon CJ at 305; *TC v State of New South Wales* [2000] NSWSC 292 at paragraph [50] ; *Tabet v Gett* (2010) 240 CLR 537 at paragraph [111] per Kiefel J

Fraser v Victorian WorkCover Authority [2022] VCC 2241 -
Cotton On Group Services Pty Ltd v Golowka [2022] VSCA 279 -
Cotton On Group Services Pty Ltd v Golowka [2022] VSCA 279 -
Cotton On Group Services Pty Ltd v Golowka [2022] VSCA 279 -
Cotton On Group Services Pty Ltd v Golowka [2022] VSCA 279 -
Cotton On Group Services Pty Ltd v Golowka [2022] VSCA 279 -

127. It is conclusively established that, in a claim for damages for personal injury caused by medical negligence, proof of a lost opportunity for a better outcome of treatment is insufficient. Damage (injury) must be established on the balance of probabilities. The concept of loss of a chance is inapplicable in such a claim: *Tabet* at [46]-[47] per Gummow ACJ ; at [111] per Kiefel J; at [66]-[67] per Hayne and Bell JJ.

Williams v Fraser [2022] NSWCA 200 -
Williams v Fraser [2022] NSWCA 200 -
Williams v Fraser [2022] NSWCA 200 -
Williams v Fraser [2022] NSWCA 200 -
Williams v Fraser [2022] NSWCA 200 -
Williams v Fraser [2022] NSWCA 200 -
711 Hogben Pty Ltd v Anthony Tadros [2022] NSWSC 1259 -
Amaca Pty Limited (Under NSW Administered Winding Up) v Roseanne Cleary as the Legal Personal Representative of the Estate of the Late Fortunato (aka Frank) Gatt [2022] NSWCA 151 -
Amaca Pty Limited (Under NSW Administered Winding Up) v Roseanne Cleary as the Legal Personal Representative of the Estate of the Late Fortunato (aka Frank) Gatt [2022] NSWCA 151 -
Ittyerah v Infosys Technologies Pty Ltd [2022] NSWSC 1048 -
Linkara Proprietary Ltd ATF the Karathanassis Family Trust v Telstra Corporation Ltd [2022] NSWDC 211 -
Chester v WA Country Health Service [2022] WASCA 57 -
Chester v WA Country Health Service [2022] WASCA 57 -
Russell v W Osborne and Son Pty Ltd [2022] VCC 425 (05 April 2022) (His Honour Judge Ginnane)

244 The reasoning in *Malec* has been cited with approval including in subsequent decisions of the Trial Division of the Supreme Court of Victoria and the Court of Appeal. [287] In addition, the statement by Gummow ACJ in *Tabet v Gett* , [288] is often cited in which his Honour stated that *:*

"The cases dealing with the assessment of the measure of damages, whether in contract or tort, are replete with exhortations that precision may not be possible and the trial judge or jury must do the best it can. The treatment in Malec v JC Hutton Pty Ltd of the assessment of damages for future or potential events that allegedly would have occurred, but cannot now occur, or that allegedly might now occur, is an example." [289]

Russell v W Osborne and Son Pty Ltd [2022] VCC 425 -
Russell v W Osborne and Son Pty Ltd [2022] VCC 425 -
Russell v W Osborne and Son Pty Ltd [2022] VCC 425 -
Russell v W Osborne and Son Pty Ltd [2022] VCC 425 -
Russell v W Osborne and Son Pty Ltd [2022] VCC 425 -
Alrifai v Australian Capital Territory [2022] ACTSC 48 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Ottrey v Bedggood's Transport Pty Ltd [2022] VSC 59 (09 March 2022) (J Forrest J)

125. The two leading cases concerning the common law test are the High Court decisions in *Marc h v E & MH Stramare Pty Ltd,* [112] and *Tabet v Gett* . [113] In this case both counsel relied upon passages from *Tabet* . Counsel for Bedggood argued that, in truth, this was no more than a loss of chance case. The best Mr Ottrey could do was establish that the failure to install the ISRI seat within the prime mover meant he had lost the opportunity to avoid aggravating his back condition. Counsel for Mr Ottrey countered that the evidence when viewed as a whole meant that his client had established a detrimental difference between what happened and what would have happened if the seat had been fitted.

Ottrey v Bedggood's Transport Pty Ltd [2022] VSC 59 -
Ottrey v Bedggood's Transport Pty Ltd [2022] VSC 59 -

Ottrey v Bedggood's Transport Pty Ltd [2022] VSC 59 -
Ottrey v Bedggood's Transport Pty Ltd [2022] VSC 59 -
Ottrey v Bedggood's Transport Pty Ltd [2022] VSC 59 -
Ottrey v Bedggood's Transport Pty Ltd [2022] VSC 59 -
Ottrey v Bedggood's Transport Pty Ltd [2022] VSC 59 -
Ottrey v Bedggood's Transport Pty Ltd [2022] VSC 59 -
Southon v Ray [2022] NSWDC 32 -
Southon v Ray [2022] NSWDC 32 -
De Kauwe v Cohen [No 4] [2022] WASC 35 (09 February 2022) (LE Miere J)

IIII. The first to fifth defendants are not prejudiced by the way in which Dr de Kauwe frames his case as a loss of opportunity. The causal link between the defendants' wrongful act and the plaintiff's lost opportunity is assessed on the balance of probabilities. If the plaintiff proves that he has suffered a loss of some value, then the causal link is made out. The evaluation of the lost opportunity is a matter for damages, not causation. [165] The plaintiff must show that the opportunity provided a substantial and not merely speculative prospect of acquiring a benefit. Such an opportunity can be regarded as of value and therefore as loss or damage. [166]

via

[165] ***Sellars v Adelaide Petroleum NL*** [1994] HCA 4; (1994) 179 CLR 332; ***Tabet v Gett*** [2010] HCA 12; (2010) 240 CLR 537 [124] (Kiefel J).

De Kauwe v Cohen [No 4] [2022] WASC 35 (09 February 2022) (LE Miere J)

IIII. The first to fifth defendants are not prejudiced by the way in which Dr de Kauwe frames his case as a loss of opportunity. The causal link between the defendants' wrongful act and the plaintiff's lost opportunity is assessed on the balance of probabilities. If the plaintiff proves that he has suffered a loss of some value, then the causal link is made out. The evaluation of the lost opportunity is a matter for damages, not causation. [165] The plaintiff must show that the opportunity provided a substantial and not merely speculative prospect of acquiring a benefit. Such an opportunity can be regarded as of value and therefore as loss or damage. [166]

via

[166] See Aghion, Daniel '*Proving the money trail: The importance of causation in lost opportunity claims*' (2019) 151 *Precedent* 4, citing ***Tabet v Gett*** [2010] HCA 12; (2010) 240 CLR 537 .

De Kauwe v Cohen [No 4] [2022] WASC 35 -
De Kauwe v Cohen [No 4] [2022] WASC 35 -
De Kauwe v Cohen [No 4] [2022] WASC 35 -
De Kauwe v Cohen [No 4] [2022] WASC 35 -
State of New South Wales v Skinner [2022] NSWCA 9 (08 February 2022) (Basten, Brereton and McCallum JJA)

57. (2010) 240 CLR 537; [2010] HCA 12 .

State of New South Wales v Skinner [2022] NSWCA 9 -
State of New South Wales v Skinner [2022] NSWCA 9 -
State of New South Wales v Skinner [2022] NSWCA 9 -
Rubino v Ziaee [2021] ACTSC 331 -
Rubino v Ziaee [2021] ACTSC 331 -
Baxter v Preston [2021] QPEC 69 -

Martin v Norton Rose Fulbright Australia [2021] FCAFC 216 -
Woodcock & Woodcock [2021] FedCFamC1F 88 -
Woodcock & Woodcock [2021] FedCFamC1F 88 -
Bottos v CityLink Melbourne Ltd [2021] VSC 585 -
Rosanne Cleary as the Legal Personal Representative of the Estate of the late Fortunato (aka Frank) Gatt v Amaca Pty Ltd [2021] NSWDDT 5 -
Kumar v Sydney Western Realty Pty Ltd (No. 2) [2021] NSWDC 446 -
Collins v Insurance Australia Ltd [2021] NSWDC 371 -
Munday v St Vincent's Hospital [2021] VSCA 170 -
Munday v St Vincent's Hospital [2021] VSCA 170 -
Munday v St Vincent's Hospital [2021] VSCA 170 -
Munday v St Vincent's Hospital [2021] VSCA 170 -
Munday v St Vincent's Hospital [2021] VSCA 170 -
Lao v Kantfield Pty Ltd [2021] VCC 685 (28 May 2021) (His Honour Judge Ginnane)

239 In *Tabet v Gett* ,[273] Gummow ACJ stated that:

The cases dealing with the assessment of the measure of damages, whether in contract or tort, are replete with exhortations that precision may not be possible and the trial judge or jury must do the best it can. The treatment in Malec v JC Hutton Pty Ltd of the assessment of damages for future or potential events that allegedly would have occurred, but cannot now occur, or that allegedly might now occur, is an example. [274]

Lao v Kantfield Pty Ltd [2021] VCC 685 (28 May 2021) (His Honour Judge Ginnane)

239 In *Tabet v Gett* ,[273] Gummow ACJ stated that:

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via

[274] Ibid 557 [39] . See also ibid 535 [136] (Kiefel J).

Lao v Kantfield Pty Ltd [2021] VCC 685 -
Makaroff v Nepean Blue Mountains Local Health District [2021] NSWCA 107 -
Lao v Kantfield Pty Ltd [2021] VCC 685 -
Makaroff v Nepean Blue Mountains Local Health District [2021] NSWCA 107 -
Lao v Kantfield Pty Ltd [2021] VCC 685 -
Lao v Kantfield Pty Ltd [2021] VCC 685 -
Williams v Fraser [2021] NSWSC 416 (20 May 2021) (Harrison J)

224. Moreover, in considering the competing evidence about this I have necessarily had regard to the onus of proof that Hailee Williams bears. I accept unconditionally that the evidence establishes that if her condition had been detected earlier, specifically when Dr Fraser reported on her condition to Dr Mutasim, she would in the first instance have been conservatively managed in the ways detailed by the experts. However, I am unable to accept that Hailee Williams had any more than a *chance* that this approach would have obviated the deterioration of her condition in the way that has occurred. In accordance with authority, such as *Tabet v Gett* cited earlier, Hailee Williams is required to establish that it is probable that conservative management would have avoided her current problems. The uncontroversial proposition that she had a *chance* of doing so, and that she has established the existence of that *chance*, does not suffice to prove that Dr Fraser is liable to her for his breach of duty.

Williams v Fraser [2021] NSWSC 416 -
Williams v Fraser [2021] NSWSC 416 -
Talacko v Talacko [2021] HCA 15 (12 May 2021) (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ)

42. In the first category, where the wrongful act "does not amount to interference with or impairment of an existing right", it is necessary to identify "the interest said to have been harmed by the defendant" [35] . That interest, whether described as a chance or as an opportunity, must be lost: the chance of a loss is not the same as the loss of a chance [36] . As Kiefel J said in *Tabet v Gett* [37] , an example of such a loss is "a commercial interest of value which is no longer available to be pursued because of the defendant's negligence". An illustration is *Sellars v Adelaide Petroleum NL* [38] , where this Court held that "loss or damage" in s 82 of the *Trade Practices Act 1974* (Cth) included the loss of an opportunity to have entered into an agreement with a third party on the more favourable terms that would have been achieved but for the defendant's wrongdoing.

via

[37] (2010) 240 CLR 537 at 585 [137] . See also *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 355.

Talacko v Talacko [2021] HCA 15 -
Austen v Tran [2022] ACTSC 114 -
Austen v Tran [2022] ACTSC 114 -
Talacko v Talacko [2021] HCA 15 -
Yelda v Sydney Water Corporation; Yelda v Vitality Works Australia Pty Ltd [2021] NSWCATAD 107 -
Jimenez v Watson [2021] NSWCA 55 -
Jimenez v Watson [2021] NSWCA 55 -
KSG Investments Pty Ltd v Open Markets Group Ltd [2021] VSC 145 -
KSG Investments Pty Ltd v Open Markets Group Ltd [2021] VSC 145 -
KSG Investments Pty Ltd v Open Markets Group Ltd [2021] VSC 145 -
J.K. Williams Staff Pty Limited v Sydney Water Corporation [2021] NSWLEC 23 -
Dickson v State of NSW [2021] NSWSC 234 -
Talacko v Talacko & Ors [2021] HCATrans 39 -
Joldzic (bht Joldzic) v Patrick [2021] NSWDC 55 (09 March 2021) (Abadee DCJ)

204. Although s 5E clarified that the ultimate onus of proof on causation, in respect to both elements of causation, it did not alter the common law principles relating to the standard of proof for causation in actions for damages for personal injury. In that connection, in a claim for damages for personal injury caused by negligence, as was said by Kiefel J (as her Honour then was) in *Tabet v Gett* (2010) 240 CLR 537 :

> "[111] All that is necessary is that, according to the course of common experience, the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm. "More probable" means no more than that, upon a balance of probabilities, such an inference might reasonably be considered to have some greater degree of likelihood; it does not require certainty".

Skinner v The State of New South Wales (No 2) [2021] NSWDC 49 -
Skinner v The State of New South Wales (No 2) [2021] NSWDC 49 -
Skinner v The State of New South Wales (No 2) [2021] NSWDC 49 -
Skinner v The State of New South Wales (No 2) [2021] NSWDC 49 -
Lee (a pseudonym) v Dhupar [2020] NSWDC 717 -
Talent v Patterson's Earthmoving Pty Ltd (ABN 47 103 530 909) [2020] VCC 1681 -
Talent v Patterson's Earthmoving Pty Ltd (ABN 47 103 530 909) [2020] VCC 1681 -

Hamlyn v Stanton (No. 3) [2020] NSWDC 632 -
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 (10 September 2020) (Quinlan CJ, Mitchell JA, Beech JA)

> Consistent with the common law position that 'damage' for the purposes of the causation action in negligence does not include the loss of a chance of a better outcome, [289] it may readily be accepted that the mere 'possibility of impairment or injury' is not 'harm' within the meaning of the *Civil Liability Act* .
>
> *via*
>
> [289] ***Tabet v Gett*** [2010] HCA 12; (2010) 240 CLR 537 (***Tabet v Gett***).

East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 -
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 -
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 -
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 -
MacQuarrie v Hunter New England Local Health District [2020] NSWSC 1174 -
BNL20 v Minister for Home Affairs [2020] FCA 1180 -
Old v Miniter [2020] NSWDC 401 -
Old v Miniter [2020] NSWDC 401 -
Khan v Workers' Compensation Regulator [2020] QIRC 95 -
Khan v Workers' Compensation Regulator [2020] QIRC 95 -
D'Souza v Barclays Building Services (WA) Pty Ltd [2020] WADC 87 (19 June 2020) (Gething DCJ)
Tabet v Gett [2010] HCA 12 ; (2010) 240 CLR 537
The State of Western Australia v Watson

D'Souza v Barclays Building Services (WA) Pty Ltd [2020] WADC 87 (19 June 2020) (Gething DCJ)

> 492. The following observation by Hayne and Bell JJ in ***Tabet v Gett*** is an instructive starting point. [521]
>
> > For the purposes of the law of negligence, 'damage' refers to some difference to the plaintiff. The difference must be detrimental. What must be demonstrated (in the sense that the tribunal of fact must be persuaded that it is more probable than not) is that a difference has been brought about and that the defendant's negligence was a cause of that difference. The comparison invoked by reference to 'difference' is between the relevant state of affairs as they existed after the negligent act or omission, and the state of affairs that would have existed had the negligent act or omission not occurred.

D'Souza v Barclays Building Services (WA) Pty Ltd [2020] WADC 87 -
Hawkins v South Western Sydney Local Health District [2020] NSWDC 308 -
Hawkins v South Western Sydney Local Health District [2020] NSWDC 308 -
Hookey v Manthey [2020] QSC 125 (21 May 2020) (Ryan J)

> 104. In addition to their primary submissions, the Manthey Parties submitted – and I did not understand this submission to have been contradicted by the plaintiffs – that neither *Chaplin v Hicks* nor *Tabet v Gett* stood for the proposition that a plaintiff could receive substantial, rather than nominal damages, upon proof of a breach of contract.

Hookey v Manthey [2020] QSC 125 (21 May 2020) (Ryan J)

> 18. In writing, developing that argument, the Manthey Parties submitted that –

[16] A claim for damages for the loss of a commercial opportunity involves two stages.

[17] *First* ... the plaintiff must prove not only that there was a breach of contract by the defendant, but that the breach caused the loss of an identifiable commercial opportunity: *Hart Security Australia v Boucousis* (2016) 339 ALR 659 at 687 [13] .

> (a) Where the claim is in contract, the cause of action is complete upon the breach of an obligation. Nominal damages can always be recovered: see *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 335 ; *Tabet v Gett* (2010) 240 CLR 537 at 559 [47]-[48] .
>
> (b) But to recover substantial damages it is also necessary to show that the breach caused the loss of a commercial opportunity and, on the balance of probabilities that the opportunity had some value: *Principle Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd* [2018] 2 Qd R 584 at 587-8 [12] – [13] .

[18] *Second*, if the plaintiff can prove that, then its damages are assessed as being equal to the value of the opportunity lost, having regard to probabilities or possibilities of relevant factual hypotheses: *Sellars* ...at 335; *Principle Properties* ... at 588 [13].

Hookey v Manthey [2020] QSC 125 (21 May 2020) (Ryan J)

Tabet v Gett (2010) 240 CLR 537 , applied

Hookey v Manthey [2020] QSC 125 -
Hookey v Manthey [2020] QSC 125 -
Hookey v Manthey [2020] QSC 125 -
Loretta Craig v Anthony Johnson [2020] NSWSC 430 (22 April 2020) (Lonergan J)

40. Reliance was also placed upon the statements of Basten JA in *Mal Owen Consulting Pty Ltd v Ashcroft* (2018) 97 NSWLR 1163; [2018] NSWCA 135 [17]-[19] . That was a case dealing with damages for lost commercial opportunity caused by a solicitor's negligence, not, as is the case here - a claim for lost opportunity to settle the case on certain asserted bases. As stated by Basten JA, there is a necessary distinction between a claim in negligence - as distinct from breach of contract - and that is that proof of loss is an essential element of the cause of action:

> "[17] That reasoning was affirmed in *Tabet v Gett* a case approving the refusal of this Court to allow damages for the loss of a chance of a better outcome in relation to a claim for personal injury resulting from medical negligence. In addressing the issue of principle, Gummow ACJ stated:
>
> > '[47] It should be said immediately that the principles dealing with recovery of damages for breach of contract offer no appropriate analogy. The action for breach of contract lies upon the occurrence of breach, but that in negligence lies only if and when damage is sustained. This has significance for the application of limitation statutes. But it has the further and relevant importance identified by Brennan J in *Sellars* ... This is that in a negligence action, unlike an action in contract, the existence and causation of compensable loss cannot be established by reference to breach of an antecedent promise to afford an opportunity.'

Kiefel J (with whom Hayne and Bell JJ and Crennan J agreed) adopted a similar view:

'[23] It was recognised in *Sellars v Adelaide Petroleum NL* that a loss of the opportunity to obtain a commercial advantage or benefit is loss or damage for the purposes of s 82(1) of the *Trade Practices Act 1974* (Cth) , where the cause of action arose under s 52(1) of that Act. Previous decisions allowing for recovery had been based in contract, where the breach of the promise to provide the chance itself gave rise to the loss of that chance. But as Brennan J said, in cases under s 82(1) , 'as in cases of tort where damage is the gist of the action, a lost opportunity may or may not constitute compensable loss or damage' and it must be proved in some other way.

[24] What cases in contract, such as *The Commonwealth v Amann Aviation Pty Ltd* and *Sellars v Adelaide Petroleum NL*, have in common is that the commercial interest lost may readily be seen to be of value itself. The same cannot be said of a chance of a better medical outcome or a person's interest in it. Lord Hoffmann observed in *Gregg v Scott* that most cases where there has been recovery for loss of a chance have involved financial loss, where the chance itself can be regarded as an item of property. And in *Sellars v Adelaide Petroleum NL* Brennan J observed that, '[a]s a matter of common experience, opportunities to acquire commercial benefits are frequently valuable in themselves'. So long as an opportunity provides a substantial and not merely a speculative prospect of acquiring a benefit, it can be regarded as of value and therefore loss or damage.'

[18] There is nothing in *Badenach v Calvert* , on which the trial judge placed significance, inconsistent with this line of authority. *Badenach* involved a claim in negligence brought by the beneficiary under a will whose expectation had been significantly reduced by a family provision claim by the daughter of the testator by an earlier marriage, for whom no allowance had been made in the will. The beneficiary sued the testator's solicitor. The claim was in negligence, not contract. Accordingly, as in *Tabet* , loss was an essential element of the cause of action. There was no reference in *Badenach* to claims for breach of a contract to provide a commercial opportunity.

[19] Once it is accepted that a claim lies for breach of a contract promising a commercial opportunity, the calculation of loss must be undertaken by an assessment of possibilities, in the manner recognised in *Malec v J C Hutton Pty Ltd* . That step was not taken in the present case." (Footnotes omitted).

Loretta Craig v Anthony Johnson [2020] NSWSC 430 -
Jadwan Pty Ltd v Rae & Partners (A Firm) [2020] FCAFC 62 -
Mistrina Pty Ltd v Australian Consulting Engineers Pty Ltd [2020] NSWSC 130 -
Mistrina Pty Ltd v Australian Consulting Engineers Pty Ltd [2020] NSWSC 130 -
PIA Mortgage Services Pty Ltd v King [2020] FCAFC 15 -
Kozarov v State of Victoria [2020] VSC 78 -
Kozarov v State of Victoria [2020] VSC 78 -
Kozarov v State of Victoria [2020] VSC 78 -
Newton v Australian Postal Corporation (No 2) [2019] FCA 2192 -
Martinez as trustee for Martinez HWL Practice Trust as representative of the partners trading as HWL Ebsworth Lawyers v Griffiths as trustee for the Griffiths HWL Practice Trust [2019] NSWCA 310 -
Chester v WA Country Health Service [2019] WADC 152 (13 November 2019) (Goetze DCJ)

Tabet v Gett [2010] HCA 12

Chester v WA Country Health Service [2019] WADC 152 -
Chester v WA Country Health Service [2019] WADC 152 -
Aiberti and Military Rehabilitation and Compensation Commission (Compensation) [2019] AATA 4238 -
Aiberti and Military Rehabilitation and Compensation Commission (Compensation) [2019] AATA 4238 -
Phelan v Melbourne Health [2019] VSCA 205 -

Gooley v NSW Rural Assistance Authority (No 3) [2019] NSWSC 1314 -
Riva NSW Pty Limited v Mark a Fraser; Fraser v Riva (NSW) [2019] NSWSC 1310 -
Li v So [2019] VSC 515 -
ACT v Gillan; Gillan v ACT [2019] ACTSC 200 (02 August 2019) (Penfold J)

55. *Tabet v Gett* is a High Court decision that, relevantly, excludes recovery in medical negligence claims in which the better result of which the plaintiff was deprived cannot be shown to have been more probable than the alternative. It is accordingly unlikely that a plaintiff would seek to **rely** on that case (as distinct from recognising the need to meet the more burdensome test of causation applied in that decision: at [10] above).

ACT v Gillan; Gillan v ACT [2019] ACTSC 200 -
ACT v Gillan; Gillan v ACT [2019] ACTSC 200 -
ACT v Gillan; Gillan v ACT [2019] ACTSC 200 -
ACT v Gillan; Gillan v ACT [2019] ACTSC 200 -
ACT v Gillan; Gillan v ACT [2019] ACTSC 200 -
ACT v Gillan; Gillan v ACT [2019] ACTSC 200 -
ACT v Gillan; Gillan v ACT [2019] ACTSC 200 -
ACT v Gillan; Gillan v ACT [2019] ACTSC 200 -
ACT v Gillan; Gillan v ACT [2019] ACTSC 200 -
ACT v Gillan; Gillan v ACT [2019] ACTSC 200 -
ACT v Gillan; Gillan v ACT [2019] ACTSC 200 -
ACT v Gillan; Gillan v ACT [2019] ACTSC 200 -
ACT v Gillan; Gillan v ACT [2019] ACTSC 200 -
ACT v Gillan; Gillan v ACT [2019] ACTSC 200 -
Roo Roofing Pty Ltd v Commonwealth [2019] VSC 331 -
Bucic v Arnej Pty Ltd [2019] VSC 330 (20 May 2019) (Zammit J)

71. The reasoning in *Malec* has been cited with approval in many subsequent decisions. [32] For example, in *Tabet v Gett* , [33] Gummow ACJ stated that:

> The cases dealing with the assessment of the measure of damages, whether in contract or tort, are replete with exhortations that precision may not be possible and the trial judge or jury must do the best it can. The treatment in *Malec v JC Hutton Pty Ltd* of the assessment of damages for future or potential events that allegedly would have occurred, but cannot now occur, or that allegedly might now occur, is an example. [34]

via

[33] (2010) 240 CLR 537 (' *Tabet*').

Bucic v Arnej Pty Ltd [2019] VSC 330 -
Bucic v Arnej Pty Ltd [2019] VSC 330 -
Corbin v State of Queensland [2019] QSC 110 (03 May 2019) (Ryan J)

256. He relied upon *Tabet v Gett* [99] for its explanation that proof of causation at common law required a plaintiff to prove that, according to the course of common experience, the *more pro bable* inference is that a defendant's negligence caused the harm. He referred additionally to *Bujdoso* to make the point that a plaintiff was not required to prove that, were it not for the defendant's negligence, his safety would have been guaranteed.

Corbin v State of Queensland [2019] QSC 110 -
Walker v Newlands Northern Underground Pty Ltd [2019] QSC 96 -

Walker v Newlands Northern Underground Pty Ltd [2019] QSC 96 -
Rush v Nationwide News Pty Ltd (No 7) [2019] FCA 496 -
Walker v Newlands Northern Underground Pty Ltd [2019] QSC 96 -
Rush v Nationwide News Pty Ltd (No 7) [2019] FCA 496 -
Ritson v Commissioner of Police, New South Wales Police Force [2019] FCA 475 (01 April 2019) (Lee J)

32. In *Wilson v Alexander* [2003] FCAFC 272; (2003) 135 FCR 273, the Full Court (Ryan, Heerey and Allsop JJ) held that s 57 applied as a federal law or a surrogate federal law picked up under s 79 . The Full Court noted that s 79 applies not just to federal courts but, also, to state and territory courts when exercising federal jurisdiction, and it is in that context, "as part of the regulation of the exercise of the judicial power of the Commonwealth, that s 79 picks up applicable State law so as to apply it *as federal law* to the resolution of a controversy within the authority of the Commonwealth to quell" (at 279 [20]). Hence, properly considered, s 79 is not an attempt of state parliaments to control federal courts in the exercise of federal jurisdiction. The Full Court explained (at 279 [19]):

> It is unnecessary and inappropriate to undertake a general discourse on s 79 and its operation; but, in the light of the comments of the Full Court in *Woodlands v Permanent Trustee Company Ltd* (1996) 68 FCR 213, 245 it is necessary to say a number of things. Section 57 applies in the Federal Court by force of s 79 of the *Judiciary Act* as long as it is "applicable" and as long as the Constitution or the laws of the Commonwealth do not otherwise provide. There is no reason to conclude that s 57 is not applicable. It deals with an aspect of procedure and the rights of a party to an adjournment. There is no law of the Commonwealth or provision of the Constitution which otherwise provides. So picked up, it applies as a federal law or a "surrogate" federal law: *Pederson v Young* (1964) 110 CLR 162, 165, *ASIC v Edensor Nominees Pty Ltd* (2001) 240 CLR 559 , and *Solomons v District Court* (2002) 211 CLR 119, 134, [21] . The Court in *Woodlands* appeared to favour the view that s 79 picks up only "procedural laws". That is not correct: *Commissioner of Stamp Duties v Owens (No 2)* (1953) 88 CLR 168, 170, *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 135, *Edensor, Bass v Permanent Trustee Group* (1999) 198 CLR 34 and *British American Tobacco v Western Australia* (2003) 200 ALR 403, 420 [65] . This makes it unnecessary to decide whether s 57 is procedural or substantive for this purpose, a distinction which the High Court has said in this context is "not one that sheds any great light on this, or any other area of the law": *Bass* at 350.

Phelan v Melbourne Health [2019] VCC 241 -
Phelan v Melbourne Health [2019] VCC 241 -
MA & J Tripodi Pty Ltd v Swan Hill Chemicals Pty Ltd [2019] VSCA 46 -
MA & J Tripodi Pty Ltd v Swan Hill Chemicals Pty Ltd [2019] VSCA 46 -
Frangie v South Western Sydney Local Health District trading as Liverpool Hospital [2019] NSWDC 42 -
Neville's Bus Service Pty Ltd v Pitcher Partners Consulting Pty Ltd [2018] FCA 2098 -
Neville's Bus Service Pty Ltd v Pitcher Partners Consulting Pty Ltd [2018] FCA 2098 -
Neville's Bus Service Pty Ltd v Pitcher Partners Consulting Pty Ltd [2018] FCA 2098 -
Florescu v Australian Meat Company [2018] VCC 2004 -
Florescu v Australian Meat Company [2018] VCC 2004 -
Bill v Northern Land Council [2018] FCA 1823 -
Sigma Pharmaceuticals (Australia) Pty Ltd v Wyeth [2018] FCA 1556 -
Sigma Pharmaceuticals (Australia) Pty Ltd v Wyeth [2018] FCA 1556 -
Deans v Maryborough Christian Education Foundation Ltd [2018] QDC 123 (25 July 2018) (Farr SC DCJ)

48. Similar observations were made by Dorney QC DCJ in *Solomona v No 1 Riverside Quay Pty Ltd* : [33]

> ""*[42] But if it is necessary to have recourse to s 305B(1)(b) and the determination of whether the risk was "not insignificant", relevant appellate authority does suggest that this requirement does modify the common law. Any resultant modification is "designed to increase the degree of probability of harm which is required for a finding that a risk was foreseeable" and, as such, is a more demanding test for a plaintiff, although "not by very much": see Rudd v Starbucks Coffee Company (Australia) Pty Ltd [2015] QDC 232 at [181]-[184] . As remarked in Erikson, the statute has sought to ensure that liability is "not imposed on a defendant too readily": at [36], citing noted authority.*
>
> *[43] Again, there is not to be retrospective reasoning as to the nature of the harm sustained: see the remarks of Gummow ACJ in Tabet v Gett (2010) 240 CLR 537 at 563 [61] . As Fox has noted, although the fact that there was no evidence of previous complaints about, or injuries sustained as a result of, such ice, that does not necessitate a conclusion that the risk of injury is slight: at [85]. But when that fact is considered together with the fact that this implementation of the planogram was a routine task, I conclude that the degree of probability of risk of harm by way of any appreciable personal injury was sufficiently low as to be "insignificant" within the terms of the provision. Because I have not accepted his expert evidence, it is unnecessary to explore Dr Buckley's opinion that a person (such as the plaintiff) "who already has degenerative disc disease would be at a higher risk of having a rupture as a result of an incident like lifting the icecream basket". No cogent examination of the nature of any "higher risk" was undertaken in any event."*

Mal Owen Consulting Pty Ltd v Ashcroft [2018] NSWCA 135 -
Mal Owen Consulting Pty Ltd v Ashcroft [2018] NSWCA 135 -
Mal Owen Consulting Pty Ltd v Ashcroft [2018] NSWCA 135 -
Bauer Media Pty Ltd v Wilson (No 2) [2018] VSCA 154 -
Bauer Media Pty Ltd v Wilson (No 2) [2018] VSCA 154 -
Bauer Media Pty Ltd v Wilson (No 2) [2018] VSCA 154 -
Adams v Wadesley [2018] VSC 304 -
The State of South Australia v Roberts [2018] SASCFC 25 -
Corkhill v Commonwealth of Australia (No 3) [2018] ACTSC 87 -
Ellis (by his next friend Christopher Graham Ellis) v East Metropolitan Health Service [2018] WADC 36 (09 March 2018) (Gething DCJ)

722. The following observation by Hayne and Bell JJ in ***Tabet v Gett*** is an instructive starting point [752] .

> For the purposes of the law of negligence, "damage" refers to some difference to the plaintiff. The difference must be detrimental. What must be demonstrated (in the sense that the tribunal of fact must be persuaded that it is more probable than not) is that a difference has been brought about and that the defendant's negligence was a cause of that difference. The comparison invoked by reference to "difference" is between the relevant state of affairs as they existed after the negligent act or omission, and the state of affairs that would have existed had the negligent act or omission not occurred.

Ellis (by his next friend Christopher Graham Ellis) v East Metropolitan Health Service [2018] WADC 36 -

Ellis (by his next friend Christopher Graham Ellis) v East Metropolitan Health Service [2018] WADC 36 -
Ellis (by his next friend Christopher Graham Ellis) v East Metropolitan Health Service [2018] WADC 36 -
Souz v CC Pty Ltd [2018] QSC 36 -
Souz v CC Pty Ltd [2018] QSC 36 -
Souz v CC Pty Ltd [2018] QSC 36 -
Souz v CC Pty Ltd [2018] QSC 36 -
Spata v Tumino [2018] NSWCA 17 -
Birbilis Bros Pty Ltd v Chubb Fire and Security Pty Ltd [2018] QSC 3 -
Birbilis Bros Pty Ltd v Chubb Fire and Security Pty Ltd [2018] QSC 3 -
Birbilis Bros Pty Ltd v Chubb Fire and Security Pty Ltd [2018] QSC 3 -
Macks v Viscariello [2017] SASCFC 172 (22 December 2017) (Lovell J, Corboy AJ and Slattery AJ)

261. The principles that apply to an assessment of damages for loss of a chance are not contentious. They were recently affirmed by the High Court in *Tabet v Gett* [117] and can be traced through well known decision such as *Chaplin v Hicks* ,[118] *McRae v Commonwealth Disposals Commission* ,[119] *Fink v Fink* ,[120] *Malec v JC Hutton Pty Ltd* ,[121] *The Commonwealth of Australia v Amann Aviation Pty Ltd* [122] and *Sellars v Adelaide Petroleum NL*. [123]

Macks v Viscariello [2017] SASCFC 172 -
Macks v Viscariello [2017] SASCFC 172 -
Whelan v Cigarette & Gift Warehouse Pty Ltd [2017] FCA 1534 -
Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Limited [2017] QCA 254 -
Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Limited [2017] QCA 254 -
Dino Dinov v Allianz Australia Insurance Limited [2017] NSWCA 270 -
White and Military Rehabilitation and Compensation Commission (Compensation) [2017] AATA 1555 -
White and Military Rehabilitation and Compensation Commission (Compensation) [2017] AATA 1555 -
Wilson v Bauer Media Pty Ltd [2017] VSC 521 (13 September 2017) (John Dixon J)

172. In *Tabet v Gett,* [134] Gummow ACJ said:

> The cases dealing with the assessment of the measure of damages, whether in contract or tort, are replete with exhortations that precision may not be possible and the trial judge or jury must do the best it can. The treatment in *Ma lec v J C Hutton Pty Ltd* of the assessment of damages for future or potential events that allegedly would have occurred, but cannot now occur, or that allegedly might now occur, is an example. But in that case the claim giving rise to the assessment had been for physical injury, the contraction of a disease as a result of the negligence of the defendant.

Kiefel J said: [135]

> Different standards apply to proof of damage from those that are involved in the assessment of damages. *Sellars v Adelaide Petroleum NL* confirms that the general standard of proof is to be maintained with respect to the issue of causation and whether the plaintiff has suffered loss or damage. In relation to the assessment of damages, as was said in *Malec v J C Hutton Pty Ltd*, "the hypothetical may be conjectured". The court may adjust its award to reflect the degree of probability of a loss eventuating. This follows from the requirement that the courts must do the best they can in estimating damages; mere difficulty in that regard is not permitted to render an award uncertain or impossible.

via

[135] Ibid 585 [136] .

Wilson v Bauer Media Pty Ltd [2017] VSC 521 -
Wilson v Bauer Media Pty Ltd [2017] VSC 521 -
Tinnock v Murrumbidgee Local Health District (No 6) [2017] NSWSC 1003 -
Tinnock v Murrumbidgee Local Health District (No 6) [2017] NSWSC 1003 -
Cook v Modern Mustering Pty Ltd [2017] NTCA 1 -
Cook v Modern Mustering Pty Ltd [2017] NTCA 1 -
Cook v Modern Mustering Pty Ltd [2017] NTCA 1 -
Cook v Modern Mustering Pty Ltd [2017] NTCA 1 -
Cook v Modern Mustering Pty Ltd [2017] NTCA 1 -
Cook v Modern Mustering Pty Ltd [2017] NTCA 1 -
Cook v Modern Mustering Pty Ltd [2017] NTCA 1 -
Quigg v Northend Carpentry [2017] VMC 13 -
Quigg v Northend Carpentry [2017] VMC 13 -
Daniel Smith by his tutor Debra Smith v South Western Sydney Local Health Network [2017] NSWCA 123 -
State of New South Wales (Department of Justice - Corrective Services) v Huntley [2017] FCA 581 (26 May 2017) (Perry J)

249. Fifthly, with respect to non-economic loss, there was no challenge at trial to Ms McIntyre's opinion that the events from 10 May 2011 acted as an acute and chronic stressor exacerbating Ms Huntley's depressive symptomology and that "*the Major Depressive Disorder symptomology currently* [i.e. January 2014] *impacts Mrs Huntley's ability to function to the full potential in her life, professionally, socially and relationally.*" Nor is any issue now taken with the primary judge's finding that CSNSW's conduct exacerbated Ms Huntley's depression from which she had suffered prior to the events of May 2011: reasons below at [471]. However, at the hearing of the appeal CSNSW submitted that the primary judge "*found as part of the damage that in accordance with Ms McIntyre's evidence the appellant suffered a* ***chronic*** *disorder*" caused by the breach of the Act (emphasis added). Contrary to this, in CSNSW's submission, Ms McIntyre's report went no higher than to consider that it was ***possible*** that Ms Huntley would suffer a chronic disorder and argued that that did not suffice to attract compensation based upon its interpretation of the High Court's decision in *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 .

Kenny v Workers' Compensation Regulator [2017] QIRC 40 (11 May 2017)

[145] 'More probable', means no more than that, upon a balance of probabilities, such an inference might reasonably be considered to have some greater degree of likelihood; it does not require certainty (see *Tabet v Gett* [3]).

via

[3] *Tabet v Gett* [2010] 240 CLR 537

Kenny v Workers' Compensation Regulator [2017] QIRC 40 (11 May 2017)
Tabet v Gett [2010] 240 CLR 537
Groos v WorkCover Queensland

Kenny v Workers' Compensation Regulator [2017] QIRC 40 (11 May 2017)

[149] Counsel for the Appellant states that it is important to bear in mind that the balance of probabilities permits a degree of uncertainty. It cites Keifel J, with whom Hayne, Crennan and Bell JJ agreed, observed in *Tabet v Gett* [8] :

via

[8] *Tabet v Gett* [2010] 240 CLR 537 at [111] to [113]

Kenny v Workers' Compensation Regulator [2017] QIRC 40 -
Kenny v Workers' Compensation Regulator [2017] QIRC 40 -
Australian Mud Company Pty Ltd v Coretell Pty Ltd [2017] FCAFC 44 -
Bristow Helicopters Australia Pty Ltd v Australian Federation of Air Pilots [2017] FWCFB 487 (06 March 2017) (Vice President Catanzariti, Deputy President Gooley, Commissioner Wilson)

4 *Tabet v Gett* (2010) 240 CLR 537, [111]-[113] .

Wearne v State of Victoria [2017] VSC 25 -
Wearne v State of Victoria [2017] VSC 25 -
Wearne v State of Victoria [2017] VSC 25 -
Wearne v State of Victoria [2017] VSC 25 -
Polan v Goulburn Valley Health (No 2) [2017] FCA 30 (31 January 2017) (Mortimer J)

101. In the circumstances, it would be inappropriate to find the applicant has not proved she worked any hours of overtime during the claim period. That is so especially since the respondent does not dispute she did perform work outside her ordinary hours, and has itself adduced evidence to quantify what it accepts to be part of that work. The applicant has given probative evidence about the nature of her other duties, and I am satisfied this is not a situation where she has failed to prove any loss. In these circumstances, the Court is required to do its best on the evidence before it to quantify her loss: see, in the context of damages, *Enz ed Holdings Ltd v Wynthea Pty Ltd* (1984) 4 FCR 450; 57 ALR 167 at 183 ; *The Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54; 174 CLR 64 at 83 ; *Aristocrat Technologies Australia Pty Ltd v DAP Services (Kempsey) Pty Ltd* [2007] FCAFC 40; 157 FCR 564 at [35], [99] ; *Tabet v Gett* [2010] HCA 12; 240 CLR 537 at [136] ; *TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83; 232 FCR 361 at [39], [164] .

Perkins v Woolworths Pty Ltd [2017] QDC 1 -
Perkins v Woolworths Pty Ltd [2017] QDC 1 -
Perkins v Woolworths Pty Ltd [2017] QDC 1 -
Cooper v Nominal Defendant [2017] NSWDC 3 -
East Metropolitan Health Service v Martin [2017] WASCA 7 -
East Metropolitan Health Service v Martin [2017] WASCA 7 -
Fleming v State of Queensland [2016] QDC 334 -
Kerle v BM Alliance Coal Operations Pty Limited [2016] QSC 304 -
Fleming v State of Queensland [2016] QDC 334 -
Kerle v BM Alliance Coal Operations Pty Limited [2016] QSC 304 -
Kerle v BM Alliance Coal Operations Pty Limited [2016] QSC 304 -
Kerle v BM Alliance Coal Operations Pty Limited [2016] QSC 304 -
Fleming v State of Queensland [2016] QDC 334 -
Solomona v No 1 Riverside Quay Pty Ltd [2016] QDC 289 -
Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd (No 2) [2016] QSC 252 (07 November 2016) (Jackson J)
Tabet v Gett (2010) 240 CLR 537; [2010] HCA 12 , cited

Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd (No 2) [2016] QSC 252 (07 November 2016) (Jackson J)

128. A relevant starting point is *Chaplin v Hicks* ,[47] both because it is a leading case on damages for breach of contract for a loss of a chance to obtain a pecuniary benefit and to point out the differences and similarities between it and the present case. Sometimes it is described as a case about the loss of a chance to win a beauty contest. [48] It was more accurately identified by Gummow J in *Tabet v Gett* [49] as an opportunity to present for selection by the defendant theatrical manager in a competition with twelve prizes of a three year theatrical engagement. Two features emerge immediately. First, the chance or opportunity was only a

chance of a benefit not a detriment. To put it into commercial language, it was a chance of profit, not a chance of profit or loss. Second, the contractual promise was to provide the opportunity, so it was precisely that breach that was to be compensated.

Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Ltd (No 2) [2016] QSC 252 (07 November 2016) (Jackson J)

128. A relevant starting point is *Chaplin v Hicks* ,[47] both because it is a leading case on damages for breach of contract for a loss of a chance to obtain a pecuniary benefit and to point out the differences and similarities between it and the present case. Sometimes it is described as a case about the loss of a chance to win a beauty contest. [48] It was more accurately identified by Gummow J in *Tabet v Gett* [49] as an opportunity to present for selection by the defendant theatrical manager in a competition with twelve prizes of a three year theatrical engagement. Two features emerge immediately. First, the chance or opportunity was only a chance of a benefit not a detriment. To put it into commercial language, it was a chance of profit, not a chance of profit or loss. Second, the contractual promise was to provide the opportunity, so it was precisely that breach that was to be compensated.

via

[49] (2010) 240 CLR 537 , 559-560 [48] .

Pierce v Metro North Hospital and Health Service [2016] NSWSC 1559 -
Pierce v Metro North Hospital and Health Service [2016] NSWSC 1559 -
Pierce v Metro North Hospital and Health Service [2016] NSWSC 1559 -
Pierce v Metro North Hospital and Health Service [2016] NSWSC 1559 -
Coote v Kelly [2016] NSWSC 1447 -
Rothonis v Lattimore [2016] NSWSC 1409 (05 October 2016) (Fagan J)

132. Further, whilst all of the medically qualified witnesses agree that the stroke in June 2007 was probably attributable to the PFO, I am not persuaded on the balance of probabilities that it would have been averted by closure or medication, if either had been prescribed. In relation to closure, the evidence does not establish that this has in all cases been effective to prevent subsequent stroke where the procedure has been carried out in response to one or more prior ischaemic events. There is insufficient evidence from which I could find on the balance of probabilities that if the procedure had been performed on the plaintiff, in advance of her having had any proven ischaemic attack, this would have been preventive. The evidence may be sufficient to establish that closure would have improved her chances of not having a stroke in June 2007 but damages in an action such as the present cannot be awarded for the loss of a chance of a better outcome: *Tabet v Gett* (2010) 240 CLR 537; [2010] HCA 12 .

Serrao (by his Tutor Serrao) v Cornelius (No.2) [2016] NSWCA 231 (29 August 2016) (Leeming JA at [1]; Sackville AJA at [2]; Emmett AJA at [77])

45. In *Gett v Tabet* [30] this Court said that the authority to depart from earlier decisions should be exercised only if two preconditions are satisfied. These are: [31]

> "the strong conviction of the later court that the earlier judgment was erroneous and not merely the choice of an approach which was open, but no longer preferred...and
>
> the nature of the error...can be demonstrated with a degree of clarity by the application of correct legal analysis." [Citation omitted.]

If the preconditions are satisfied, the Court may need to take a variety of other considerations into account in determining whether earlier decisions should be followed. These considerations include the importance placed on certainty and predictability of the law. However, the Court needs to be satisfied that there are "compelling reasons" to depart from the earlier decision. [32]

via

30. [2009] NSWCA 76; 254 ALR 504, affirmed Tabet v Gett [2010] HCA 12 ; 240 CLR 537 .

Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd [2016] FCA 1032 -
DC v State of New South Wales [2016] NSWCA 198 -
DC v State of New South Wales [2016] NSWCA 198 -
DC v State of New South Wales [2016] NSWCA 198 -
Hayes v State of Queensland [2016] QCA 191 -
APV v Department of Finance and Services [2016] NSWCATAD 168 -
Heraud v Roy Morgan Research Ltd (No 2) [2016] FCCA 1797 -
Asden Developments Pty Ltd (in liq) v Dinoris (No 3) [2016] FCA 788 -
Fox v State of Queensland [2016] QDC 146 -
Fox v State of Queensland [2016] QDC 146 -
Robinson Helicopter Co Inc v McDermott [2016] HCA 22 -
Robinson Helicopter Co Inc v McDermott [2016] HCA 22 -
Robinson Helicopter Co Inc v McDermott [2016] HCA 22 -
Robinson Helicopter Co Inc v McDermott [2016] HCA 22 -
Robinson Helicopter Co Inc v McDermott [2016] HCA 22 -
Robinson Helicopter Co Inc v McDermott [2016] HCA 22 -
Carangelo v State of New South Wales [2016] NSWCA 126 (27 May 2016) (Macfarlan and Gleeson JJA, Emmett AJA)

70. When physical or mental injury or harm is proved, the question is whether it was caused by a relevant negligent act or omission. A claimant will fail if the evidence does not establish the link between the act or omission of the defendant and the damage or harm suffered. It must be able to be said that, but for the act or omission, the claimant would not have suffered the injury or harm (*Tabet v Gett* at [114]).

Carangelo v State of New South Wales [2016] NSWCA 126 -
Carangelo v State of New South Wales [2016] NSWCA 126 -
Carangelo v State of New South Wales [2016] NSWCA 126 -
WorkCover Queensland v Padua [2016] QDC 115 -
WorkCover Queensland v Padua [2016] QDC 115 -
Badenach v Calvert [2016] HCA 18 -
Badenach v Calvert [2016] HCA 18 -
Badenach v Calvert [2016] HCA 18 -
Badenach v Calvert [2016] HCA 18 -
Badenach v Calvert [2016] HCA 18 -
Butcher v Inflight Logistics Services Pty Ltd [2016] QDC 101 (05 May 2016) (Moynihan QC DCJ)

14. In *Tabet* , Hayne and Bell JJ explained at p. 564 [66] , that "damage" means:

> *For the purposes of the law of negligence, "damage" refers to some difference to the plaintiff. The difference must be detrimental. What must be demonstrated (in the sense that the tribunal of fact must be persuaded that it is more probable than not) is that a difference has been brought about and that the defendant's negligence was a cause of that difference. The comparison invoked by reference*

to "difference" is between the relevant state of affairs as they existed after the negligent act or omission, and the state of affairs that would have existed had the negligent act or omission not occurred. (footnotes omitted)

Butcher v Inflight Logistics Services Pty Ltd [2016] QDC 101 -
Fowler v Workers' Compensation Regulator [2016] QIRC 48 -
Martin v Minister for Health [2016] WADC 15 -
Martin v Minister for Health [2016] WADC 15 -
Nightingale v Blacktown City Council [2015] NSWCA 423 -
Nightingale v Blacktown City Council [2015] NSWCA 423 -
Ennis Paint Australia Holding Pty Ltd v Jimmy Poh Wing Lei [2015] NSWSC 1933 -
Cook v Modern Mustering Pty Ltd and Ors and Savage and Ors v Modern Mustering Pty Ltd and Ors [2015] NTSC 82 -
Cook v Modern Mustering Pty Ltd and Ors and Savage and Ors v Modern Mustering Pty Ltd and Ors [2015] NTSC 82 -
Cook v Modern Mustering Pty Ltd and Ors and Savage and Ors v Modern Mustering Pty Ltd and Ors [2015] NTSC 82 -
Cook v Modern Mustering Pty Ltd and Ors and Savage and Ors v Modern Mustering Pty Ltd and Ors [2015] NTSC 82 -
Westcott v Minister for Health [2015] WADC 122 -
Westcott v Minister for Health [2015] WADC 122 -
State of Queensland (Department of Communities, Child Safety and Disability Services) v Simon Blackwood (Workers' Compensation Regulator) [2015] QIRC 177 -
State of Queensland (Department of Communities, Child Safety and Disability Services) v Simon Blackwood (Workers' Compensation Regulator) [2015] QIRC 177 -
State of Queensland (Department of Communities, Child Safety and Disability Services) v Simon Blackwood (Workers' Compensation Regulator) [2015] QIRC 177 -
Alcan Gove Pty Ltd v Zabic [2015] HCA 33 -
Alcan Gove Pty Ltd v Zabic [2015] HCA 33 -
Alcan Gove Pty Ltd v Zabic [2015] HCA 33 -
Wei Fan v South Eastern Sydney Local Health District (No 2) [2015] NSWSC 1235 -
Maritime Union of Australia v Fair Work Ombudsman [2015] FCAFC 120 -
Maritime Union of Australia v Fair Work Ombudsman [2015] FCAFC 120 -
Waller v James [2015] NSWCA 232 -
Talacko v Talacko [2015] VSC 287 -
Calvert v Badenach [2015] TASFC 8 -
Winky Pop Pty Ltd v Mobil Refining Australia Pty Ltd [2015] VSC 348 -
May v Military Rehabilitation and Compensation Commission [2015] FCAFC 93 (30 June 2015) (Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ)
Tabet v Gett [2010] HCA 12; 240 CLR 537
Teoh v Minister for Immigration and Ethnic Affairs

May v Military Rehabilitation and Compensation Commission [2015] FCAFC 93 (30 June 2015) (Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ)

219. These statements have been often applied: in such cases as *Tubemakers of Australia v Fernandez* (1976) 50 ALJR 720; 10 ALR 303 at 307, 310-311, *EMI (Australia) Ltd v Bes* [1970] 2 NSWR 238 at 241 ; *Amaca Pty Ltd v Booth* [2011] HCA 53; 246 CLR 36 at 61-62 [69] ; *Tabet v Gett* [2010] HCA 12; 240 CLR 537 at 588 [149] ; *Australian Iron and Steel Ltd v Connell* [1959] HCA 54; 102 CLR 522 at 535-536 [6] ; *Allianz Australia Ltd v Sim* [2012] NSWCA 68 at [48] ; *Evans v Queanbeyan City Council* [2011] NSWCA 230; *Webb v Repatriation Commission* [1988] FCA 127 at [18] ; *Australian Telecommunications Commission v Barker* [1990] FCA 489; 12 AAR 490 at 493-494 ; *Major Engineering Pty Ltd v Timelink Pacific Pty Ltd (No 2)* [2009] VSCA 83 at [19] . It is also the point made by Latham CJ in *Hume Steel* : 75 CLR 242 at 252.

Eric Fleming v State of New South Wales [2015] NSWDC 104 -

Carangelo v State of New South Wales [2015] NSWSC 655 -
Kollaris v Queensland Property Investments Pty Ltd [2015] VCC 559 (12 May 2015) (His Honour Judge Saccardo)

Cases Cited: *Davies v Nilsen & Transport Accident Commission* [2014] VSCA 278; *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125; *Tabet v Gett* (2010) 240 CLR 537 ; *Roads and Traffic Authority v Royal & Anor* (2008) 245 ALR 653

Kollaris v Queensland Property Investments Pty Ltd [2015] VCC 559 -
Kollaris v Queensland Property Investments Pty Ltd [2015] VCC 559 -
Cowen v Bunnings Group Limited [2014] QSC 301 (16 December 2014) (Alan Wilson J)
Tabet v Gett (2010) 240 CLR 537 , cited

Cowen v Bunnings Group Limited [2014] QSC 301 -
Cowen v Bunnings Group Limited [2014] QSC 301 -
Cowen v Bunnings Group Limited [2014] QSC 301 -
Cowen v Bunnings Group Limited [2014] QSC 301 -
Johnson v Box Hill Institute of TAFE [2014] VSC 626 -
Johnson v Box Hill Institute of TAFE [2014] VSC 626 -
Johnson v Box Hill Institute of TAFE [2014] VSC 626 -
Johnson v Box Hill Institute of TAFE [2014] VSC 626 -
Johnson v Box Hill Institute of TAFE [2014] VSC 626 -
Belinda Lawlor (nee Latta) v State of New South Wales [2014] NSWSC 1659 -
Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Molinara v Perre Bros Lock 4 Pty Ltd [2014] SASCFC 115 -
Molinara v Perre Bros Lock 4 Pty Ltd [2014] SASCFC 115 -
Molinara v Perre Bros Lock 4 Pty Ltd [2014] SASCFC 115 -
Molinara v Perre Bros Lock 4 Pty Ltd [2014] SASCFC 115 -
Kronenberg v Bridge [2014] TASFC 10 -
McFarlane v The State of South Australia [2014] SADC 160 -
McFarlane v The State of South Australia [2014] SADC 160 -
Masters v Dobson Mitchell and Allport [2014] TASSC 31 -
Pisani v Transport Accident Commission [2014] VCC 462 -
Pisani v Transport Accident Commission [2014] VCC 462 -
Pisani v Transport Accident Commission [2014] VCC 462 -
Agricultural Land Management Ltd v Jackson (No 2) [2014] WASC 102 (28 March 2014) (Edelman J)

394. Within a 'common sense' approach it has been held that at common law the 'but for' test has an important role to play as a negative criterion. [351] In other words, it is generally necessary, but not always sufficient, [352] for the plaintiff to prove that the plaintiff's loss would not have been suffered but for the defendant's breach of duty.

via

[351] ***March v E & M H Stramare Pty Ltd*** [1991] HCA 12; (1991) 171 CLR 506, 515 - 516 (Mason CJ); ***Bennet t v Minister of Community Welfare*** [1992] HCA 27; (1992) 176 CLR 408, 413 (Mason CJ, Deanne & Toohey JJ); ***Chappel v Hart*** [1998] HCA 55; (1998) 195 CLR 232, 281 [111] (Hayne J); ***Tabet v Gett*** [2010] HCA 12; (2010) 240 CLR 537, 578 [112] (Kiefel J) .

Agricultural Land Management Ltd v Jackson (No 2) [2014] WASC 102 -
Jamieson v Westpac Banking Corporation [2014] QSC 32 -
Gratrax Pty Ltd v T D & C Pty Ltd [2013] QCA 385 -
Gratrax Pty Ltd v T D & C Pty Ltd [2013] QCA 385 -
Gratrax Pty Ltd v T D & C Pty Ltd [2013] QCA 385 -
Lance v Hogerdyk [2013] WADC 190 (06 December 2013) (Magistrate Scadden)

Tabet v Gett (2010) 240 CLR 537
Tobin v Dodd

Lance v Hogerdyk [2013] WADC 190 -
Lance v Hogerdyk [2013] WADC 190 -
Jackson v Bishop [2013] QDC 279 -
Woolworths Ltd v The Commissioner of Police [2013] WASC 413 -
Woolworths Ltd v The Commissioner of Police [2013] WASC 413 -
Woolworths Ltd v The Commissioner of Police [2013] WASC 413 -
Jackson v Bishop [2013] QDC 279 -
Coote v Kelly [2013] NSWCA 357 -
Sanders v Dr Hillier [2013] NSWDC 192 (20 September 2013) (Gibson DCJ)

155. Counsel for the defendant submits, and I agree, that any chance of a better outcome is even vaguer than *Tabet v Gett* (2010) 240 CLR 537. Further, the loss of her chance of a better medical outcome is not, even if it were able to be proved, compensable damage. The difficulty in this case arises from the substitution of the loss of a chance of a better outcome for proof of actual physical injury as the gist of the cause of action. Gummow ACJ noted at [38]-[39] of *Tabet v Gett* , *supra*:

"[38] No doubt the present case arose in very particular circumstances making it difficult to find the appropriate comparator or counter-factual. Usually this will require proof of what would have been the plaintiff's position in the absence of the breach of duty by the defendant. The difficulty in the present case arises from the substitution, for which the appellant contends, of loss of the chance of a better outcome for proof of physical injury, as the gist of the cause of action in negligence.

[39] The cases dealing with the assessment of the measure of damages, whether in contract or tort, are replete with exhortations that precision may not be possible and the trial judge or jury must do the best it can. The treatment in *Malec v J C Hutton Pty Ltd* of the assessment of damages for future or potential events that allegedly would have occurred, but cannot now occur, or that allegedly might now occur, is an example. But in that case the claim giving rise to the assessment had been for physical injury, the contraction of a disease as a result of the negligence of the defendant. The imprecision allowed in the assessment of damages in such cases does not necessarily or logically apply where a claim for physical injury fails but is said to be saved by transmutation of the damage alleged into the loss of a chance of a better outcome."

Sanders v Dr Hillier [2013] NSWDC 192 -
Sanders v Dr Hillier [2013] NSWDC 192 -
Paul v Cooke [2013] NSWCA 311 -
Paul v Cooke [2013] NSWCA 311 -
BestCare Foods Ltd v Origin Energy LPG Ltd (formerly Boral Gas (NSW) Pty Ltd) [2013] NSWSC 1287 (10 September 2013) (Stevenson J)

40. In the April CofA Judgment, Ward JA (who wrote the principal judgment) summarised the relevant principles as follows (at [84] - [86]): -

"Where a claim is made for loss of a chance or opportunity caused by negligence (or breach of contract), the loss of that chance or opportunity must be proved on the balance of probabilities. Once the loss of a chance or opportunity has been so proved, then it is for the Court to value the possibility or prospect of that chance or opportunity (and this is not an exercise to be carried out on the balance of probabilities) (see *Malec v JC Hutton Ltd* (1990) 169 CLR 638; *Commonwealth v Amann Aviation Pty Ltd* (1992) 174 CLR 64 ; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 and, more recently, *Tabet v Gett* (2010) 240 CLR 537).

The majority in *Sellars* said (at *355*) that 'acceptance of the principle enunciated in *Malec* requires that damages for deprivation of a commercial opportunity, whether the deprivation occurred by reason of breach of contract, tort or contravention of s 52(1), should be ascertained by reference to the court's

assessment of the prospects of success of that opportunity had it been pursued'. At 358, Brennan J, as his Honour then was, said:

'Where a loss is alleged to be a lost opportunity to acquire a benefit, a plaintiff who bears the onus of proving that a loss was caused by the conduct of the defendant discharges that onus by establishing a chain of causation that continues up to the point when there is a substantial prospect of acquiring the benefit sought by the plaintiff. Up to that point, the plaintiff must establish both the historical facts and any necessary hypothesis on the balance of probabilities. A constant standard of proof applies to the finding that a loss has been suffered and to the finding that that loss was caused by the defendant's conduct, whether those findings depend on evidence of historical facts or on evidence giving rise to competing hypotheses. In any event, the standard is proof on the balance of probabilities.'

While it is accepted that, as Toohey J in *Amann* noted (at 138) the assessment of damages does sometimes, of necessity, involve what is 'guess work rather than estimation' (his Honour there quoting Menzies J in *Jones v Schiffmann* (1971) 124 CLR 303 at 308), the onus remains on the plaintiff to prove its loss. In a loss of opportunity case that requires evidence from which the value of that lost opportunity can be assessed. In *Sellars* , Brennan J (at 365) noted that 'in order for a plaintiff to establish that a negligent defendant's conduct has caused a valuable loss of opportunity, he or she must establish by evidence that, *but for the contravening conduct of the defendant, he or she could have and would have taken the opportunity and the benefit that it would have yielded*' (my emphasis)."

BestCare Foods Ltd v Origin Energy LPG Ltd (formerly Boral Gas (NSW) Pty Ltd) [2013] NSWSC 1287 -
Van Soest v BHP Billiton Limited [2013] SADC 81 -
King v Western Sydney Local Health Network [2013] NSWCA 162 (14 June 2013) (Basten, Hoeben and Ward JJA)

131. For the reasons indicated, the evidence of Professor Curtis did not establish the causal link between the hospital's omission to offer VZIG to the appellant and the development of her varicella. This was because the evidence did not establish that had VZIG been administered; it was likely that the appellant would not have developed varicella (*Tabet v Gett* [2010] HCA 12; 240 CLR 537 at [140] .

King v Western Sydney Local Health Network [2013] NSWCA 162 -
King v Western Sydney Local Health Network [2013] NSWCA 162 -
Waller v James [2013] NSWSC 497 -
Origin Energy LPG Ltd v BestCare Foods Ltd [2013] NSWCA 90 -
Gratrax Pty Ltd v TD and C Pty Ltd [2013] QDC 63 (09 April 2013) (McGill SC DCJ)
Tabet v Gett (2010) 240 CLR 537 – considered.

Gratrax Pty Ltd v TD and C Pty Ltd [2013] QDC 63 -
Gratrax Pty Ltd v TD and C Pty Ltd [2013] QDC 63 -
Liquorland (Australia) Pty Ltd v Executive Director of Public Health [2013] WASC 51 (27 February 2013) (Edelman J)
22 *Executive Director of Health v Lily Creek International Pty Ltd* [2000] WASCA 258; (2000) 22 WAR 510, 516 - 517 [28] (Ipp J). Compare, at common law, *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 .

Liquorland (Australia) Pty Ltd v Executive Director of Public Health [2013] WASC 51 -
Liquorland (Australia) Pty Ltd v Executive Director of Public Health [2013] WASC 51 -
Karim v The Queen [2013] NSWCCA 23 -
Almario v Varipatis (No. 2) [2012] NSWSC 1578 (21 December 2012) (Campbell J)

174. In my judgment, the personal injury in this case is the "difference" between Mr. Almario's medical condition as it existed after the negligent act or omission, and his medical condition that would have existed had the negligent act or omission not occurred. *Tabet* at 564 [66] per Hayne and Bell JJ .

Almario v Varipatis (No. 2) [2012] NSWSC 1578 -
Almario v Varipatis (No. 2) [2012] NSWSC 1578 -
Wodonga Regional Health Service v Hopgood [2012] VSCA 326 (20 December 2012) (Maxwell P, Buchanan and Harper JJA)

30. The statute being inapplicable, this case is governed by the common law of causation. As Kiefel J (with whom Hayne and Bell JJ agreed) said in *Tabet v Gett*: [10]

> The common law requires proof, by the person seeking compensation, that the negligent act or omission caused the loss or injury constituting the damage. *All that is necessary is that, according to the course of common experience, the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm*. 'More probable' means no more than that, upon a balance of probabilities, such an inference might reasonably be considered to have some greater degree of likelihood; it does not require certainty. [11]

via

[10] (2010) 240 CLR 537 ('*Tabet*').

Wodonga Regional Health Service v Hopgood [2012] VSCA 326 -
Wodonga Regional Health Service v Hopgood [2012] VSCA 326 -
Wodonga Regional Health Service v Hopgood [2012] VSCA 326 -
Electro Optic Systems Pty Ltd v The State of New South Wales; West and West v The State of New South Wales [2012] ACTSC 184 -
Electro Optic Systems Pty Ltd v The State of New South Wales; West and West v The State of New South Wales [2012] ACTSC 184 -
Electro Optic Systems Pty Ltd v The State of New South Wales; West and West v The State of New South Wales [2012] ACTSC 184 -
Carswell v Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane [2012] QSC 253 (07 September 2012) (Margaret Wilson J)
Tabet v Gett (2010) 240 CLR 537 , cited.

Carswell v Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane [2012] QSC 253 -
Carswell v Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane [2012] QSC 253 -
Carswell v Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane [2012] QSC 253 -
Indigo Mist Pty Ltd v Palmer [2012] NSWCA 196 -
Paul v Cooke [2012] NSWSC 840 -
Paul v Cooke [2012] NSWSC 840 -
Pritchard v DJZ Constructions Pty Ltd [2012] NSWCA 196 -
Pritchard v DJZ Constructions Pty Ltd [2012] NSWCA 196 -
Pritchard v DJZ Constructions Pty Ltd [2012] NSWCA 196 -
Pritchard v DJZ Constructions Pty Ltd [2012] NSWCA 196 -
Pritchard v DJZ Constructions Pty Ltd [2012] NSWCA 196 -
Pritchard v DJZ Constructions Pty Ltd [2012] NSWCA 196 -
Pritchard v DJZ Constructions Pty Ltd [2012] NSWCA 196 -
Pritchard v DJZ Constructions Pty Ltd [2012] NSWCA 196 -
Prosperity Advisers Pty Ltd v Secure Enterprises Pty Ltd [2012] NSWCA 192 -
BestCare Foods v Origin Energy [2012] NSWSC 574 -
BestCare Foods v Origin Energy [2012] NSWSC 574 -
BestCare Foods v Origin Energy [2012] NSWSC 574 -
Nominal Defendant v McLennan [2012] NSWCA 148 -
Monaghan Surveyors Pty Ltd v Stratford Glen-Avon Pty Ltd [2012] NSWCA 94 -
Provident Capital Limited v John Virtue Pty Ltd (No 2) [2012] NSWSC 319 -
Naiman Clarke Pty Ltd v Tuccia [2012] NSWSC 314 (05 April 2012) (Ball J)

22. In support of objection in (c), Mr Fini relies on the decision of the High Court in *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 . That case, however, was concerned with the question whether the a plaintiff who had suffered brain damage following a seizure could claim damages from her treating doctor on the basis that she had lost the opportunity of a better outcome as a consequence of the doctor's negligence in failing to order a scan earlier than he did. The High Court held that she could not. In doing so, it drew a distinction between the loss of a commercial opportunity which itself had a recognised value and the loss of a chance which did not. The plaintiff's loss in *Tabet* fell into the latter category. Critical to that conclusion was the nature of the loss that was claimed. The case says nothing about the types of contract under which claims for the loss of a chance can be made. What is important is the nature of the loss claimed, not the nature of the contract breach which is said to give rise to that loss.

Naiman Clarke Pty Ltd v Tuccia [2012] NSWSC 314 -
Allianz Australia Ltd v Sim [2012] NSWCA 68 -
Allianz Australia Ltd v Sim [2012] NSWCA 68 -
Coote v Dr Kelly [2012] NSWSC 219 (14 March 2012) (Schmidt J)

173. Even if there had been a diagnosis made in September 2009, Mr Coote would have required excision of the lesion. He would then also have faced all of the risks of the excision which he later received. That it is possible that his outcome would have been better, so far as the consequences of metastasis is concerned, had excision occurred in 2009, may be accepted, but that it is probable that he would have had a better outcome, has not been shown. Unquestionably there was a chance of this, but it is settled that Mr Coote may not be compensated for the loss of such a chance (*Tabet v Gett* at [46] .)

Coote v Dr Kelly [2012] NSWSC 219 (14 March 2012) (Schmidt J)

136. There was no issue in this case that if it was found that Mr Coote had an ALM in 2009, that if a biopsy had then been undertaken, the ALM would have been identified and treated. Mr Coote's case was that it was Dr Kelly's failure to send him for a biopsy, which had resulted in damage of the kind discussed in *Tabet v Gett* . For Dr Kelly it was argued that the evidence did not establish that treatment in 2009 would have resulted in any difference for Mr Coote, given the size of the lesion in September 2009.

Coote v Dr Kelly [2012] NSWSC 219 -
Coote v Dr Kelly [2012] NSWSC 219 -
Goddard Elliott v Fritsch [2012] VSC 87 -
Goddard Elliott v Fritsch [2012] VSC 87 -
Goddard Elliott v Fritsch [2012] VSC 87 -
Valcorp Australia Pty Ltd v Angas Securities Ltd [2012] FCAFC 22 (09 March 2012) (Jacobson, Siopis and Nicholas JJ)

135. The primary judge also adopted the following observations of Kiefel J (with whom Hayne and Bell JJ agreed) in *Tabet v Gett* (2010) 240 CLR 537 at [124] :

> So long as an opportunity provides a substantial and not merely a speculative prospect of acquiring a benefit, it can be regarded as of value and therefore loss or damage.

Valcorp Australia Pty Ltd v Angas Securities Ltd [2012] FCAFC 22 -
Ferenczfy v JohnsonDiversey Australia Pty Ltd [2012] SADC 22 -
Ferenczfy v JohnsonDiversey Australia Pty Ltd [2012] SADC 22 -
Amaca Pty Ltd v King [2011] VSCA 447 (22 December 2011) (Nettle, Ashley and Redlich JJA)

124. The evidence permitted the jury to analyse the causation issue in that way, which coincided with the way in which the judge charged the jury – that is, that the respondent must satisfy

them that negligent factory exposure was a cause of, or materially contributed to, the mesothelioma. In such a task, assuming for the moment that the medical evidence did not (contrary to the appellant's submission) deny causation, the commonsense approach commended in *March* was in point. [53]

via

[53] *Tabet v Gett* (2010) 240 CLR 537, 578 [111]–[112] (Kiefel J with whom Hayne and Bell JJ and Crennan J agreed); *Roads and Traffic Authority v Royal* (2008) 82 ALJR 870, 898 [144] (Kiefel J).

MM Constructions (Aust) Pty Limited v Port Stephens Council (No. 6) [2011] NSWSC 1613 (22 December 2011) (Johnson J)

350. In order for a loss of a chance to realise a commercial opportunity, the Court must be satisfied, on the balance of probabilities, that some loss would have been suffered: *Sellars v Adelaide Petroleum NL* [1994] HCA 4; 179 CLR 332 at 364 ; *Tabet v Gett* [2010] HCA 12; 240 CLR 537 at 560 [50] , 578 [111] . The chances of profit being realised are to be assessed as a matter of probability: *Sellars v Adelaide Petroleum NL* at 348-355, 364.

Henderson v Buman [2011] VCC 1523 -
Daffey v Alfred Health [2011] VCC 1466 (16 December 2011) (His Honour Judge Saccardo)

17 In *Tabet v Gett* , [10] Kiefel J observed:

> "The common law requires proof, by the person seeking compensation, that the negligent act or omission caused the loss or injury constituting the damage. All that is necessary is that, according to the course of common experience, the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm. 'More probable' means no more than that, upon a balance of probabilities, such an inference might reasonably be considered to have some greater degree of likelihood; it does not require certainty."[11]

via

[10] (2010) 240 CLR 537

Daffey v Alfred Health [2011] VCC 1466 -
Amaca Pty Ltd v Booth [2011] HCA 53 -
Amaca Pty Ltd v Booth [2011] HCA 53 -
Victorian WorkCover Authority v J Sarunic and Sons Pty Ltd [2011] VSC 562 -
Lowes v Amaca Pty Ltd [2011] WASC 287 -
Lowes v Amaca Pty Ltd [2011] WASC 287 -
Nigam v Harm (No 2) [2011] WASCA 221 -
Nigam v Harm (No 2) [2011] WASCA 221 -
Merck Sharp & Dohme (Australia) Pty Ltd v Peterson [2011] FCAFC 128 -
Merck Sharp & Dohme (Australia) Pty Ltd v Peterson [2011] FCAFC 128 -
Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257 (27 September 2011) (Margaret McMurdo P and Margaret Wilson AJA and Martin J)

116. The "loss of a chance" was the alternative claim made by the plaintiff. When the trial was conducted the High Court had not delivered judgment in *Tabet v Gett.* [67] The parties recognised the possible effect of the decision and, as his Honour records in footnote 1 of his reasons:

> "The alternative basis on which the plaintiff's case was presented, i.e. for having suffered a loss of chance or opportunity of receiving reasonable and appropriate treatment which would have eliminated or reduced the prospects of suffering a stroke is clearly no longer maintainable in light of the judgment of the High Court in *Tabet v Gett* [2010] HCA 12 . That case was argued in the High Court while judgment in this matter was reserved and the parties requested that I refrain from delivering judgment in this matter until the decision in the High Court was known and the parties had the opportunity to make further submissions."

Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257 -
Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257 -
Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257 -
Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257 -
Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257 -
Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257 -
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Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257 -
Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257 -
Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257 -
Chua v Lowthian [2011] VSC 468 -
Chua v Lowthian [2011] VSC 468 -
Gunnersen v Henwood [2011] VSC 440 (07 September 2011) (Dixon J)

223. Professor Fleming argues that the primary obstacle to preventive damages is the objection of the common law to speculative damages.[27] The mirror image of the proposition that mitigation of an exposure to risk is compensable in tort may be a loss of a chance claim. However, there are distinctions to be drawn between such claims, starting with the observation that the chance lost is commonly a commercial opportunity, something of value. [28] Here, there was no opportunity of value lost to the Gunnersens to undertake expenditure to improve the stability of the escarpment.

via

[28] For example, the lottery ticket in *Chaplin v Hicks* [1911] 2 KB 786, or the opportunity to contract with a third party in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332. See also *Tabet v Gett* (2010) 240 CLR 537 , which is discussed below.

Gunnersen v Henwood [2011] VSC 440 -
Gunnersen v Henwood [2011] VSC 440 -
Gunnersen v Henwood [2011] VSC 440 -
Gunnersen v Henwood [2011] VSC 440 -
Gunnersen v Henwood [2011] VSC 440 -

Gunnersen v Henwood [2011] VSC 440 -
Doolan v Renkon Pty Ltd [2011] TASFC 4 -
Doolan v Renkon Pty Ltd [2011] TASFC 4 -
Doolan v Renkon Pty Ltd [2011] TASFC 4 -
Hirst v Sydney South West Area Health Service [2011] NSWSC 664 (22 August 2011) (Davies J)

108. The Defendant submitted that the Plaintiff does not satisfy s 5D(1)(a) *CLA* because the causation experts agreed that the injuries and disabilities from which the Plaintiff currently suffers could not have been avoided had treatment of the type likely to have been indicated if the Plaintiff's hydrocephalus was detected between 27 September and 18 October 2000 had been administered, namely, early delivery and a shunting procedure. The Defendant further submitted that all the Plaintiff can establish at best is the loss of a chance of a better medical outcome. In that regard the Defendant submitted that the present case is no different from *Tabet v Gett* (2010) 240 CLR 537 . The Defendant pointed in this regard to the evidence of the causation experts that expressed uncertainty about a percentage improvement had there been earlier intervention, and the uncertainty about being able to identify what disabilities would have been eliminated or improved.

Hirst v Sydney South West Area Health Service [2011] NSWSC 664 -
Hirst v Sydney South West Area Health Service [2011] NSWSC 664 -
Hirst v Sydney South West Area Health Service [2011] NSWSC 664 -
Hirst v Sydney South West Area Health Service [2011] NSWSC 664 -
Hirst v Sydney South West Area Health Service [2011] NSWSC 664 -
Eades v Formbys Lawyers [2011] WADC 125 (15 August 2011) (Derrick DCJ)

227. In order to prove that the loss of opportunity to appeal caused by the defendant's breach of duty of care constituted actionable harm, the plaintiff must prove two things on the balance of probabilities. First, that the application for leave to appeal was of some value: ***Kitchen v Royal Air Forces Association*** [1958] 1 WLR 563, 574 - 575; ***Hammond Worthington v Da Silva*** [2006] WASCA 180 [118] ; ***Tabet v Gett*** [2010] HCA 12; (2010) 240 CLR 537 [52], [66], [108]. Secondly, that but for the defendant's negligence he would have pursued the application for leave to appeal: ***Worthington v Da Silva*** [118]. As to the second of these matters, it is not in dispute in this case that if the ALS had made its grant of aid within a sufficient amount of time prior to the expiry of the appeal period the plaintiff would have pursued the application for leave to appeal.

Eades v Formbys Lawyers [2011] WADC 125 -
Evans v Queanbeyan City Council [2011] NSWCA 230 (05 August 2011) (Allsop P, Hodgson and Basten JJA)

49. There are a number of references in the High Court to *McGhee* : *Bennett* at 420-421 per Gaudron J; *March v Stramare* at 514 and 516 per Mason CJ; *Chappel v Hart* at 273-274 [93] per Kirby J; *RTA v Royal* at (2008) 82 ALJR 870, 888-889 [94] per Kirby J and 897-898 [143] per Kiefel J; *Amaca Pty Ltd v Ellis* [2010] HCA 5; 240 CLR 111 at 123 [12] ; and *Tabet v Gett* at 558 [40] per Gummow ACJ and 588 [149] per Kiefel J .

Evans v Queanbeyan City Council [2011] NSWCA 230 -
Evans v Queanbeyan City Council [2011] NSWCA 230 -
Evans v Queanbeyan City Council [2011] NSWCA 230 -
Evans v Queanbeyan City Council [2011] NSWCA 230 -
New South Wales v Doherty [2011] NSWCA 225 -
Evans v Queanbeyan City Council [2011] NSWCA 230 -
Hannaford v Stewart (No 2) [2011] NSWSC 722 -
Mediterranean Olives Financial Pty Ltd v Gita Lederberger [2011] VSC 301 -
Bosi Security Services Limited v Australia and New Zealand Banking Group Limited [2011] VSC 255 (15 June 2011) (Davies J)

95. The growers' case on valuation depended on them showing on the balance of probabilities that the extinguishment of their rights lost them the opportunity to have the projects restructured and continued to full term. In order to value that lost opportunity the Court then makes an assessment of the probability or possibility of a viable restructure occurring, based on a consideration of the evidence. [103] The value is ascertained by reference to the degree of probability or possibility of the event happening so that to have value, the possibility must be more than a mere hope or speculation. [104] Thus the growers' case required some evidentiary basis from which the Court could evaluate the likelihood of the restructure counterfactual eventuating had the growers' rights not been extinguished. [105]

via

[105] *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666; *Tabet v Gett* (2010) 240 CLR 537 .

Bosi Security Services Limited v Australia and New Zealand Banking Group Limited [2011] VSC 255 -
Walton v Majid [2011] WADC 69 -
Walton v Majid [2011] WADC 69 -
Glenys June Witcombe as Executrix of the Estate of Keith Malcolm Witcombe v Talbot and Olivier [2011] WASCA 107 -
Glenys June Witcombe as Executrix of the Estate of Keith Malcolm Witcombe v Talbot and Olivier [2011] WASCA 107 -
Ball v Eldarin Services Metro Pty Ltd [2011] VCC 500 -
Ball v Eldarin Services Metro Pty Ltd [2011] VCC 500 -
Angas Securities Ltd v Valcorp Australia Pty Ltd [2011] FCA 190 (08 March 2011) (Besanko J)
Tabet v Gett (2010) 240 CLR 537 , cited

Angas Securities Ltd v Valcorp Australia Pty Ltd [2011] FCA 190 -
Construction, Forestry, Mining and Energy Union v Stuart-Mahoney [2011] FCA 56 (08 February 2011) (Ryan J)

26. More recently, the High Court in *Tabet v Gett* (2010) *240 CLR 537, at 111* again referring to *Brads haw* , stated that;

> "More probable" means no more than that, upon a balance of probabilities, such an inference might reasonably be considered to have some greater degree of likelihood; it does not require certainty.

Construction, Forestry, Mining and Energy Union v Stuart-Mahoney [2011] FCA 56 -
Tapp v Gray [2011] NSWSC 44 -
Asim v Penrose [2010] NSWCA 366 (21 December 2010) (Tobias, Macfarlan and Young JJA)

158 In my opinion the primary judge erred in concluding that the evidence was sufficient to establish on the balance of probabilities that T7154 was the culpable taxi. I have come to this view upon a careful consideration of the whole of the relevant evidence. It is to be appreciated that the present appeal is by way of rehearing pursuant to s 75A of the *Supreme Court Act 1970* . The relevant principles were recently referred to by this Court (Allsop P, Beazley and Basten JJA) in *Gett v Tabet* [2009] NSWCA 76; (2009) 254 ALR 504 at [10] - [20] . An unsuccessful appeal to the High Court did not deal with the issue discussed in the joint judgment under the heading "Nature of the Appeal": *Tabet v Gett* [2010] HCA 12; (2010) 240 CLR 537 . Allsop P also referred to the nature of such an appeal in *Yarrabee Coal Co Pty Ltd v Lujans* [2009] NSWCA 85 at [3] - [4], as did Beazley JA in the same case at [9] - [13] . It is unnecessary to restate those principles except to observe that the primary judge's rejection of Mr Rana's evidence was not based on his demeanour. His Honour acknowledged (at [99]) that he gave his answers in an unemotional and apparently truthful manner. Nevertheless, as a general proposition some allowance must be made for the advantages of the primary judge who had the opportunity to absorb the totality of the evidence over the course of the trial.

Asim v Penrose [2010] NSWCA 366 -
Silverbrook Research Pty Ltd v Lindley [2010] NSWCA 357 -
Silverbrook Research Pty Ltd v Lindley [2010] NSWCA 357 -
Silverbrook Research Pty Ltd v Lindley [2010] NSWCA 357 -
Amaba Pty Ltd v Booth [2010] NSWCA 344 (10 December 2010) (Beazley, Giles and Basten JJA)

109. *Tabet* was not a case governed by the *Civil Liability Act* , but by general law principles. Those general law principles undoubtedly include the concept of "material contribution". That concept does not apply in all cases, but it does in cases where a causal connection involves a number of elements. It applies in cases involving "multiple sufficient causes", a phrase used in Trindade, Cane and Lunney, *The Law of Torts in Australia* (4th ed, 2007) at p 554.

Amaba Pty Ltd v Booth [2010] NSWCA 344 -
Amaba Pty Ltd v Booth [2010] NSWCA 344 -
Amaba Pty Ltd v Booth [2010] NSWCA 344 -
Amaba Pty Ltd v Booth [2010] NSWCA 344 -
Edmund James Bateman v Face Accountants Pty Limited [2010] NSWSC 1355 -
Edmund James Bateman v Face Accountants Pty Limited [2010] NSWSC 1355 -
Edmund James Bateman v Face Accountants Pty Limited [2010] NSWSC 1355 -
DJZ Constructions Pty Ltd v Paul Pritchard trading as Pritchard Law Group [2010] NSWSC 1197 -
DJZ Constructions Pty Ltd v Paul Pritchard trading as Pritchard Law Group [2010] NSWSC 1197 -
DJZ Constructions Pty Ltd v Paul Pritchard trading as Pritchard Law Group [2010] NSWSC 1197 -
Francis v Petros [2010] WADC 149 -
Francis v Petros [2010] WADC 149 -
Francis v Petros [2010] WADC 149 -
Francis v Petros [2010] WADC 149 -
Lindsay-Field v Three Chimneys Farm Pty Ltd [2010] VSC 436 -
Lindsay-Field v Three Chimneys Farm Pty Ltd [2010] VSC 436 -
Lindsay-Field v Three Chimneys Farm Pty Ltd [2010] VSC 436 -
Sullivan Nicolaides Pty Ltd v Papa [2010] QSC 364 (24 September 2010) (Margaret McMurdo P and Margaret Wilson AJA and Martin J)

9. The plaintiff has been left significantly disabled by this stroke. She says that the stroke, and its consequences, were caused by the defendant's negligence or by breach of the terms implied in the defendant's retainer that it would exercise reasonable care and skill and claims damages from the defendant. [1]

via

[1] The alternative basis on which the plaintiff's case was presented, i.e. for having suffered a loss of chance or opportunity of receiving reasonable and appropriate treatment which would have eliminated or reduced the prospects of suffering a stroke is clearly no longer maintainable in light of the judgment of the High Court in *Tabet v Gett* [2010] HCA 12 . That case was argued in the High Court while judgment in this matter was reserved and the parties requested that I refrain from delivering judgment in this matter until the decision in the High Court was known and the parties had the opportunity to make further submissions.

Sullivan Nicolaides Pty Ltd v Papa [2010] QSC 364 -
Snorkel Elevating Work Platforms Pty Limited v Borren Metal Forming Limited [2010] ACTCA 23 (14 September 2010) (Gray P; Refshauge and Cowdroy JJ)

49. In the current proceedings, we are left with only conjecture as to the cause of the accident, in circumstances analogous to those considered by the High Court in *Amaca Pty Ltd* and *Tabet v Gett* . The cause might have been because the pin was under-strength, but in the absence of knowing what force the keeper pin was subject to, it may not have been. The cause might have been the under-strength keeper pin, but it might also have been the binding of the bush

causing the rotation of the pivot pin which would have broken any keeper pin, no matter how strong. Even though there is evidence that the bush was found to be serviceable, no technical evidence exists to establish the cause of the rotation of the pivot pin which resulted in the distortion and failure of the keeper pin. Such uncertain factual matrix is a highly problematic circumstance upon which to apply the prima facie inference. This is because the test of Gaudron J in *Bennett* and *Naxakis* is predicated on an assumption that it may be possible to prove "that the [alleged negligent] conduct had no effect at all or that the risk would have eventuated and resulted in the damage in question in any event" (see Gaudron J in *Naxakis* (at [31])). This assumption does not detract from the requirement for there to be established the connection between the increase of risk and the damage suffered.

Snorkel Elevating Work Platforms Pty Limited v Borren Metal Forming Limited [2010] ACTCA 23 (14 September 2010) (Gray P; Refshauge and Cowdroy JJ)

40. His Honour made such statement after a n extensive discussion (at [4]-[33]) of authorities dealing with such issue, including those mentioned above and the decision of Dixon J in *Betts v Whittingslowe* (1945) 71 CLR 637 (*Betts*) which is the foundation of the principle in question. The reasoning of Ipp JA in *Flounders* has been recently approved in *Yarrabee Coal Co Pty Ltd and Another v Lujans* (2009) 53 MVR 187 (at [247]), *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd* (2008) 15 ANZ Insurance Cases 61-780 (at [240]) (*Baulderstone*) and *Gett v Tabet* (2009) 254 ALR 504 (*Gett*) (at [254]), a decision of the New South Wales Court of Appeal. An appeal to the High Court from the decision of the Court of appeal was dismissed: see *Tabe t v Gett* (2010) 84 ALRJ 292 (*Tabet v Gett*). See also this Court's decision in *Huen v Hyland* [200 4] ACTCA 5 (at [47]-[49]). The New South Wales Court of Appeal in *Baulderstone* said (at [240]):

> ... Whilst in some cases a breach of duty coupled with an accident of the kind that might thereby be caused is enough to justify a factual inference about a causal link, that is not a rule of law. It is an aspect of an available process of drawing of conclusions about causation...

The New South Wales Court of Appeal in *Gett* also pointed out that the recent High Court authority of *Roads and Traffic Authority v Royal and Another* (2008) 245 ALR 653 (*R oyal*), confirms the reasoning of the abovementioned decisions. For example, in *Royal* Kiefel J said (at [143]-[144]):

> It remains a requirement of the law that a plaintiff prove that a defendant's conduct materially caused the injury. Nothing said in *Betts* detracts from that requirement, which forms the basis for the restatement of the test of causation in *March* ... No decision of this Court holds that there is that equivalence or some lessening of the requirement of proof. As the majority in *Bennett* observe d, they are questions which have not been considered by this court.
>
> The present state of authority does not accept the possibility of risk of injury as sufficient to prove causation. It requires that the risk eventuate. Kitto J in *Dunkel* said that one "does not pass from the realm of conjecture into the realm of inference" unless the facts enable a positive finding as to the existence of a specific state of affairs. Spigelman CJ pointed out in *Seltsam*, with respect to an increased risk of injury, that the question is whether it *did* cause or materially contribute to the injury actually suffered. This enquiry is consistent with the commonsense approach required by *March* .

Snorkel Elevating Work Platforms Pty Limited v Borren Metal Forming Limited [2010] ACTCA 23 -
Snorkel Elevating Work Platforms Pty Limited v Borren Metal Forming Limited [2010] ACTCA 23 -
Snorkel Elevating Work Platforms Pty Limited v Borren Metal Forming Limited [2010] ACTCA 23 -
DJZ Constructions Pty Ltd v Paul Pritchard trading as Pritchard Law Group [2010] NSWSC 1024 -
DJZ Constructions Pty Ltd v Paul Pritchard trading as Pritchard Law Group [2010] NSWSC 1024 -

Lennon v State of South Australia [2010] SASC 272 -
Withyman v State of NSW [2010] NSWDC 186 (01 September 2010) (Elkaim SC DCJ)

389. More recently Kiefel J, again in the High Court said this:

> *"111. The common law requires proof, by the person seeking compensation, that the negligent act or omission caused the loss or injury constituting the damage. All that is necessary is that, according to the course of common experience, the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm. "More probable" means no more than that, upon a balance of probabilities, such an inference might reasonably be considered to have some greater degree of likelihood; it does not require certainty .*
>
> *112. The "but for" test is regarded as having an important role in the resolution of the issue of causation, although more as a negative criterion than as a comprehensive test . The resolution of the question of causation has been said to involve the common sense idea of one matter being the cause of another. But it is also necessary to understand the purpose for making an inquiry about causation and that may require value judgments and policy choices. (Tabet v Gett* [2010] HCA 12 at para. 111 *).*

Reynolds v Aluma-Lite Products Pty Ltd [2010] QCA 224 -
Reynolds v Aluma-Lite Products Pty Ltd [2010] QCA 224 -
Reynolds v Aluma-Lite Products Pty Ltd [2010] QCA 224 -
Jack Brabham Engines Ltd v Beare [2010] FCA 872 (19 August 2010) (Jagot J)

343. These claims need to be assessed having regard to the relevant principles. The concepts of "loss or damage" are not narrow and are not limited to economic loss. However, mere risk of loss is insufficient; until the contingency is satisfied, there is no loss. A comparison between the position in which the person found themselves by reason of the misrepresentation and the position they otherwise would have been in is a relevant but not necessarily exclusive consideration. If satisfied that loss or damage has been caused, a court must do its best to quantify the loss even if some speculation and guesswork is required. The standard of proof that damage has occurred is the ordinary civil standard of the balance of probabilities. Damages for a lost commercial opportunity (where the chance itself can be regarded as of value and not merely speculative) are to be assessed having regard to the likely outcomes, prospects or probabilities or possibilities of success if that opportunity had not been lost (see, for example, *Commonwealth v Amann Aviation Pty Limited* (1991) 174 CLR 64, *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332; [1994] HCA 4, *Tabet v Gett* (2010) 84 ALJR 292; [2010] HCA 12 at [123]-[124] and, generally, *Miller's Annotated Trade Practices Act* (31st ed, Thomson Reuters, 2010 at [1.82.21]-[1.82.94]).

Jack Brabham Engines Ltd v Beare [2010] FCA 872 -
Shaw v Thomas [2010] NSWCA 169 -
Shaw v Thomas [2010] NSWCA 169 -
Peterson v South Eastern Sydney Illawarra Area Health Service & Elliott [2010] NSWDC 114 -
Peterson v South Eastern Sydney Illawarra Area Health Service & Elliott [2010] NSWDC 114 -
Keldote Pty Ltd v Riteway Transport Pty Ltd [2010] FMCA 394 -
Keldote Pty Ltd v Riteway Transport Pty Ltd [2010] FMCA 394 -
McKay v McPherson [2010] VCC 585 -
McKay v McPherson [2010] VCC 585 -
McKay v McPherson [2010] VCC 585 -

Clothier v Dr Fenn and Greater Southern Area Health Service [2010] NSWDC 96 (01 June 2010) (Williams DCJ)

> 83 In Tabet v Gett [2010] HCA 12 , Hayne & Bell JJ said "For the purposes of the law of negligence, "damage" refers to some difference to the plaintiff. The difference must be detrimental. What must be demonstrated (in the sense that the tribunal of fact must be persuaded that it is more probable than not) is that a difference has been brought about and that the defendant's negligence was a cause of that difference. The comparison invoked by reference to "difference" is between the relevant state of affairs as they existed *after* the negligent act or omission, and the state of affairs that would have existed had the negligent act or omission not occurred ... the language of loss of chance should not be permitted to obscure the need to identify whether a plaintiff has proved that the defendant's negligence was, more probably than not, a cause of damage (in the sense of detrimental difference). The language of possibilities (language that underlies the notion of loss of chance) should not be permitted to obscure the need to consider whether the possible adverse outcome has in fact come home, or will more probably than not do so."

Clothier v Dr Fenn and Greater Southern Area Health Service [2010] NSWDC 96 -
Guthrie v News Limited [2010] VSC 196 -
Guthrie v News Limited [2010] VSC 196 -
Allstate Explorations NL v Blake Dawson Waldron (A Firm) [2010] WASC 97 (07 May 2010) (Em Heenan J)

> Tabet v Gett [2010] HCA 12

Allstate Explorations NL v Blake Dawson Waldron (A Firm) [2010] WASC 97 -
Firth v Sutton [2010] NSWCA 90 -
Firth v Sutton [2010] NSWCA 90 -
Hanna v Uniting Church in Australia Property Trust (NSW) [2010] NSWSC 293 -
Hanna v Uniting Church in Australia Property Trust (NSW) [2010] NSWSC 293 -
Gett v Tabet [2009] NSWCA 76 -
Wilson v Alexander [2003] FCAFC 272 (26 November 2003) (Ryan, Heerey & Allsop JJ)

> *ASIC v Edensor Nominees Pty Ltd* (2001) 240 CLR 559 applied

Wilson v Alexander [2003] FCAFC 272 -
Wilson v Alexander [2003] FCAFC 272 -