May Comparative Law Help to Find an Answer? - The Example of the (Worldwide) Search for a Fair Scope of Liability in Cases of Professional Negligence

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Reference

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I. Introduction

The following contribution analyses the role comparative law may play in the decision making process of judges when dealing with topical legal issues. The example chosen to illustrate the role of comparative law is the current (almost worldwide) discussion of a fair scope of medical negligence in cases of uncertain causation. The purpose of this paper is not to suggest a solution to the problem of uncertain causation in medical malpractice cases or in other cases of professional negligence, such as ca-

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The purpose is, on the contrary, to discuss the use courts may make of the comparative method when addressing topical legal issues and to highlight some of the benefits that may be derived from using this method.

II. The search for a fair scope of liability in cases of medical negligence

In most, if not all, jurisdictions, liability in contract or tort requires a causal link between the damage suffered by the person bringing a claim for compensation (the claimant) and the activity of the person held to be liable (the defendant). In the words of art. 3:101 of the Principles of European Tort Law (PETL): ‘An activity or conduct is a cause of the victim’s damage if, in the absence of the activity, the damage would not have occurred.’ This is also called the conditio sine qua non-


2 European Group on Tort Law (ed.), Principles of European Tort Law—Text and Commentary, Vienna/New York (2005), art. 3:101; see also: www.ectil.org/. The ‘Principles of European Tort Law’ were presented by a group of European researchers specialised in the law of extra-contractual liability (or: tort law). The Principles are based on a wide comparative research including most European and some extra-European jurisdictions. For more information on the European Group on Tort Law, see e.g. Jaap Spier, in: European Group on Tort Law (ed.), Principles of European Tort Law—Text and Commentary, Vienna/New York (2005), p. 12 ss; idem, in Francesco Milazzo (édit.), Diritto romano e terzo millennio—Radice e prospettive dell’esperienza giuridica contemporanea (a cura di Francesco Milazzo), Napoli (2004), p. 239 et seq.; Helmut Koziol, Die “Principles of European Tort Law” der “European Group on Tort
If the claimant meets the condition sine qua non-test, he may recover 100% of the damage. If the claimant cannot prove causation with the probability required by law, he recovers nothing. We therefore speak of an ‘all or nothing’-approach to causation.

In recent years, the argument was made that the traditional test of causation and the ‘all or nothing’-approach may sometimes lead to unfair results. These cases, it is argued, require different rules.

III. Case scenarios

Three case scenarios taken from the recent case law of courts in Europe, the USA, and Australia may illustrate the problem.

1) In Fribourg, Switzerland, a man attends the local hospital. A medical assistant wrongly and negligently diagnoses influenza. The patient is released but returns three hours later in very critical conditions. Another medical doctor now diagnoses meningitis and the patient is treated accordingly. When he is released weeks later, he is deaf on both ears.

In order to establish a causal link between the defendant’s negligent act and the claimant’s damage, Swiss law requires, in principle, that the claimant establish proof of a predominant probability of causation. If the

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Subject to, e.g., contributory negligence of the claimant.
claimant meets this requirement, he receives, in principle, full compensation; if he cannot meet this test, he recovers nothing (principle of ‘all or nothing’).

In the above case, according to an expert report, it cannot be excluded that, even if the medical assistant had not acted with negligence, the patient would have lost his sense of hearing. The patient thus cannot establish with the probability required by Swiss law that, had the medical assistant not made the mistake, he would not have lost his sense of hearing.

The medical assistant’s negligence has, however, deprived him of a considerable chance of avoiding the damage.1

2) In Boston, USA, an internist misdiagnoses the conditions of a 42-year-old patient over a period of several years because he does not carry out the appropriate tests. When the necessary examinations are finally ordered, they reveal a gastric cancer. The year after, the patient dies of this cancer, leaving his wife and his minor son. The relatives of the deceased claim compensation for damage suffered due to the loss of their husband and father. In Common Law jurisdictions, in order to be entitled to compensation, the claimant is traditionally required to establish that it is more probable than not that the defendant caused his damage.

Exert advice shows that there is a 62.5% chance that the patient would have died regardless of the doctor’s negligence; the claimants thus

cannot meet the more probable than not test. Had the diagnosis been performed in time, the patient would, however, have had a 37.5% chance of survival.

3) In Sydney, Australia, the 6-year-old Rema Tabet is admitted to a hospital. She has recently suffered from chickenpox and has subsequently suffered from headaches, nausea and vomiting. With a delay of one day, a CT scan and an EEG are performed and she is diagnosed as suffering from a brain tumor. She receives treatment, including an operation to remove the tumor but suffers irreversible brain damage.

She brings a claim for damages and alleges that, had she been examined in time, she would have had a considerable chance that part of her damage be avoided. She cannot, however, satisfy the Common Law’s more probable than not-test.

In recent years, similar cases have also been brought before the courts in many jurisdictions worldwide; in Europe this has been the case for example in France, Belgium, Germany, Austria, Italy, Spain, the

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Netherlands, Scotland, Ireland, and Lithuania\(^1\); in the USA similar cases were brought before the courts of at least 31 States of the Union\(^2\).

\(^1\) French Cour de cassation (Cour de cass.) 18. 3. 1969, Bulletin des arrêts de la Cour de cassation, chambres civiles (Bull. civ.) II, no 117, excerpts in Winiger/Koziol/Koch/Zimmermann (eds), Digest of European Tort Law, Vol. 1; Essential Cases on Natural Causation, Wien/New York (2007), 10. 6. 1. with comments by O. Moréteau/L. Francoz-Terminal; Belgian Cour de cassation/Hof van Cassatie 19. 1. 1984, Pasicrisie (Pas.) 1984, I, 548, excerpts in Winiger/Koziol/Koch/Zimmermann (eds), Digest of European Tort Law, 10. 7. 1 with comments by J. Durand; the German cases: BGH 11. 6. 1968, Neue Juristische Wochenschrift (NJW) 1968, 2291, excerpts in Winiger/Koziol/Koch/Zimmermann (eds), Digest of European Tort Law, 10. 2. 1 with comments by R. Zimmermann/J. Kleinschmidt; Oberlandesgericht (OLG) Stuttgart 21. 6. 1990, VersR 1991, 821; the Austrian case: Oberster Gerichtshof (OGH) 8. 7. 1993, Juristische Blätter (JBl.) 1994, 540 with comments by Bollenberger, excerpts in Winiger/Koziol/Koch/Zimmermann (eds), Digest of European Tort Law, 10. 3. 1 with comments by B. A. Koch; the Swiss case Obergericht Zürich, 87 ZR (1988) n. 66 pp 209 et seq., 85 RJS (1989) pp 119 et seq. with comments by Ch. Müller, La perte d’une chance, Berne (2002), n. 245 et seq.; the Italian case; Corte di Cassazione 4. 3. 2004, according to: Winiger/Koziol/Koch/Zimmermann (eds), Digest of European Tort Law, 10. 9. 7 with comments by M. Graziaidei/D. Migliasso; the Spanish case: Tribunal Supremo 10. 10. 1998, RJ 1998, 8371, excerpts in Winiger/Koziol/Koch/Zimmermann (eds), Digest of European Tort Law, 10. 10. 1 with comments by J. Ribot/A. Ruda; the Dutch case; Gerechtshof Amsterdam 4. 1. 1996, NJ 1997, 213 (Wever/De Kraker), excerpts in Winiger/Koziol/Koch/Zimmermann (eds), Digest of European Tort Law, 10. 8. 1 with comments by W. H. van Boom/I. Giesen (medical malpractice case, 25% chance of reaching a better result of treatment); the Scottish case; Kenny v. Bell, 1953 SC 125, excerpts in Winiger/Koziol/Koch/Zimmermann (eds), Digest of European Tort Law, 10. 13. 1 with comments by M. Hogg; the Irish case; Carol v. Lynch 16. 5. 2002 (High Court), according to: E. Quill, in Winiger/Koziol/Koch/Zimmermann (eds), Digest of European Tort Law, 10. 14. 6; the Lithuanian case; Supreme Court of Lithuania, according to: Winiger/Koziol/Koch/Zimmermann (eds), Digest of European Tort Law, 10. 21. 1 with comments by J. Kirsiene/S. Selélionyte-Drudeitienë; see the Hungarian case BH no. 360 (Supreme Court, Legf. Bir. Pfv. III. 20. 20. 028/2006, according to A. MENYHARD, in H. Koziol/B. Steininger (eds), European Tort Law 2006, Wien/New York 2008, pp 276 et seq.

\(^2\) References in Supreme Judicial Court of Massachusetts, Matsuyama v. Birnbaum (above, fn. 3), 828 f. fn. 23.
In many countries, issues of uncertainty of causation are often also raised in cases of lawyer's liability: a lawyer negligently omits, for example, to bring a claim in time. The client then sues the lawyer seeking compensation for her financial loss consisting of the likely award of damages she would have been entitled to, had her action been successful. In the proceedings against the lawyer, the lawyer argues that the client would have lost the case anyway. It remains uncertain whether she would have won her case had the lawyer not acted with negligence and had the action been brought in time.

In recent years, the courts in England, Scotland, the Netherlands, Denmark, Spain, Portugal, Germany, and Switzerland have had to deal with cases in which lawyers had negligently omitted to bring a claim or to launch an appeal in time or in which they had committed other professional mistakes that reduced, or destroyed, a client's prospects in winning a case.

See, for example, the English cases: Allied Maples Group Ltd v. Simmonds & Simmonds [1995] 1 WLR 1602 (CA), excerpts in Winiger/Koziol/Koch/Zimmermann (eds), Digest of European Tort Law, 10.12.5 with comment by K. Oliphant; Kitchen v. Royal Air Force Association [1958] WLR 563 (a solicitor's negligence resulted in his client's action for damages being time-barred; award of damages for loss of a chance); the Scottish case: Kyle v. P & J Stormonth Darling, 1993 SC 57, excerpts in Winiger/Koziol/Koch/Zimmermann (eds), Digest of European Tort Law, 10.13.7 with comment by M. Hogg (solicitors failed to lodge an appeal in time and as a result the pursuer was unable to continue his action. He therefore brought an action against the solicitors claiming to have suffered loss as a result of their negligence. Held: The pursuer's action was successful, and a hearing ordered to determine the value of the chance which the pursuer had lost. The Inner House commented: "the pursuer [...] is right to claim damages for what he offers to prove he has lost, namely the value of the lost right to proceed with his appeal in the original litigation. The pursuer will fail unless it is established that the lost right had an ascertainable, measurable, non-negligible value; but he is under no obligation, as a precondition of obtaining an award against the present defenders, to show that he would probably have succeeded in the original litigation"; the Dutch case: Hoge Raad 24.10.1997,
IV. Requirements for liability: the *conditio sine qua non*-test and criticism of the test

In some jurisdictions, in order to establish causation between the damage suffered by the claimant and the defendant’s act, *certainty* of causation is required. In others it is sufficient to establish that it was *more probable than not* that the defendant caused the damage suffered by the victim.

The above case scenarios have in common that the person held to be liable acted negligently and that the victim cannot show that the loss would have been prevented had the other party acted as required by law. The victim thus cannot meet the requirements of the *conditio sine qua non*-test and, consequently, is unable to prove with the probability that is traditionally required that the defendant’s activity has caused his or her damage. He is, however, able to prove that the doctor’s (or the lawyer’s) negligence deprived him of a *(substantial)* chance of a better outcome.

In recent years, many victims as well as a certain number of courts have been dissatisfied with the traditional *conditio sine qua non*-test and with the traditional ‘all or nothing’ approach\(^1\).

The ‘all or nothing’ approach is particularly criticised in situations in which the negligence of one person destroys the chance of an outcome favourable to another. It is argued that uncertainties that are due to the first person’s negligence should be part of this person’s ordinary risks of life instead of being borne by the party that has lost the chance of a more favourable outcome. The High Court of Zurich stated, in a 1989 ruling: “To refuse damage payments to the relatives of a patient who had clearly been treated wrongfully and who subsequently had died of cancer with the argument that the causal link between the fault committed by a doctor and the patient’s death remains uncertain would be highly unjust”\(^2\).

The criticism of the ‘all or nothing’ principle is particularly intense in cases where the probability reaches the limits of the level required\(^3\).

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\(^1\) For more arguments for or against liability in such situations, see Th. Kadner Graziano, *ERPL* 2008, 1009, at 1030 et seq.; idem *ZEuP* 2011, 171, at 185 et seq.


In jurisdictions that require 'certainty' of causation, it has e.g. been criticised that losing a 90% prospect of recovery is a real loss for a patient; however, since certainty is required, in case of a probability of causation of 90%, the claim must fail. It has further been criticised that, where certainty is required, courts will, on the other hand, in order to award damages tend to 'take for granted what in fact is uncertain' or, in other words, 'assume certainty where none in truth exists'.

In Common Law countries, it has often been criticised as unjustifiable that in cases where there is a probability of causation of 50% an action is entirely rejected whereas in cases where there is a probability of 51% the victim receives full compensation. Donaldson, then Master of the Rolls and judge in the Court of Appeal, expressed the opinion that "[i]f this is the law, it is high time that it was changed". In his dissenting opinion in the medical malpractice case Gregg v. Scott, Lord Nicholls stated that "[t]his surely cannot be the state of the law today. It would be irrational and indefensible. The loss of a 45% prospect of recovery is just as much a real loss for a patient as the loss of a 55% prospect of recovery. [...] It cannot be right to adopt a procedure having the effect that, in law, a patient's prospects of recovery are treated as

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1. See e.g. the German case OLG Hamm 26.8.1998, VersR 2000, 325 (a 90% chance is not sufficient to establish certainty of causation between a medical doctor's negligence and the patient's damage).

2. Koziol, in Winiger/Koziol/Koch/Zimmermann (eds), Digest of European Tort Law, 10.29.4.

3. Lord Nicholls in Gregg v. Scott [2005] UKHL 2 at 43; “The law should not, by adopting the all-or-nothing balance of probabilities approach, assume certainty where none in truth exists”.

non-existent whenever they exist but fall short of 50%". ¹

On the other hand, many courts are reluctant to depart from the traditional rules and to make exceptions from, or even abandon, the conditio sine qua non-test. They fear to open floodgates and to pave the way to unlimited liability.

In the three above scenarios, the highest courts in Switzerland, Massachusetts/USA, and Australia were required to (re-) consider the issue of a fair scope of liability in cases of medical negligence.

V. The role of comparative law in the search for a solution

When discussing the liability of the hospital in Fribourg in the first case mentioned above, the Swiss Federal Court discussed at large an approach that had been developed by the French courts in similar cases (i.e. liability for ‘loss of a chance’ or ‘perdre d’une chance’).—When discussing the liability of the internist in Boston, the Supreme Court of Massachusetts considered the solutions applied in the other 49 jurisdictions in the USA.—In the Australian case of the 6-year old girl who had suffered brain damage, the High Court of Australia requested the lawyers to present the state of the law in other jurisdictions, in particular in Canada, the USA, and Europe.

The courts in all three jurisdictions thus relied, among others, on the comparative method when addressing the highly topical issue of professional liability in cases of uncertain causation. However, neither was the Swiss court bound to follow the approach used by French courts; nor

¹ Gregg v. Scott [2005] UKHL 2 at 3 and 43. See also at 46: “The present state of the law is crude to an extent bordering on arbitrariness”. See also Lord Hope, ibidem at 114 et seq. (dissenting opinion).
was the court in Massachusetts bound to follow the case law of any of the other jurisdictions in the USA; nor was the High Court of Australia bound to consider or follow the court practice in Canada, the USA, or Europe.

Why did these courts then consider foreign law and foreign court practice? Why do the courts use the comparative method, and in which way may the comparative method contribute to finding a solution for the currently highly topical issue of uncertain causation in cases of professional negligence?

1. Discovering the full range of solutions to a given problem

It seems that the first benefit of the comparative method is that it allows to uncover a wide range of different possible solutions to the problem under examination.

In our scenarios, in situations in which it is difficult for the victim to establish a link of natural causation between the negligent behavior of the person held to be liable and the damage, a comparative analysis reveals that there are at least five ways to ease the burden that lies on the victim.

a) Clearing up the issue of causation 'ex-post'

A first solution could be to clear up the issue of causation 'afterwards' (or 'ex post'). In cases of lawyers' professional negligence, where the courts often face issues of uncertainty of causation, the issue of liability will usually be raised in a second, subsequent procedure, i.e. an action for damages against the lawyer. In the second procedure, the judge establishes-in a hypothetical manner-whether the lawyer's negligence has hindered the client from winning the first proceedings or whether the client would have failed regardless. The hypothetical outcome of the first procedure thus is a condition for the success of the
client's claim in the procedure against his lawyer. We could consequently speak of 'first proceedings within the second proceedings' (or of a 'Prozess im Prozess').

This approach has been successfully applied in lawyer's liability cases by the German Federal (Supreme) Court\(^1\), the High Court of the Netherlands (Hoge Raad)\(^2\) and the Swiss Federal (Supreme) Court.\(^3\)

In cases of medical negligence such as the three above scenarios, however, it is often impossible to clear up afterwards whether the damage would have been avoided had the medical doctor not acted with negligence.

**b) Lowering the burden of proof**

Another, second remedy could be found in lowering the victim's burden of proof as far as the causal link is concerned\(^4\).

In some jurisdictions, for instance in Germany (§ 286 of the German Code of civil procedure), it is necessary for the causal link to be established with certainty ("Gewissheit")\(^5\).

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\(^1\) See, for example, BGH 9.6.1994, Entscheidungen des Bundesgerichtshofes in Zivilsachen, amtliche Sammlung (BGHZ) 126, 217; BGH 16.6.2005, JZ 2006, 198 with comments by G. Mäsch; for further references, see G. Mäsch, Chance und Schaden, p. 76 et seq.


\(^3\) BGITF 12.12.1961, BGE/ATF 87 II 364 (373 et seq.).

\(^4\) See, for example, Mäsch, ZEuP 2006, 656 (674 et seq.); idem, Chance und Schaden, p. 237 et seq.

\(^5\) See, for example, BGHZ 53, 245; BGH, NJW 1993, 935 (937); Mäsch, Chance und Schaden, p. 30 et seq. with further references; Jansen, OJSt. 1999, 271 (276). For Austrian law, see Walter Rechberger/Daphne-Ariane Simotta, Grundriss des österreichischen Zivilprozessrechts, 5. Aufl., Wien 2000, n. 580 with references.
In Swiss law, the victim must, in general, establish a sufficient (i.e. predominant) probability of the purported cause with regard to the effect ('überwiegende Wahrscheinlichkeit') \(^\text{1}\). In a case decided by the law courts of Zurich, it has been held sufficient that the causal link between a doctor’s negligence and the patient’s damage be established with a probability of only 60%.

In cases of medical malpractice, the courts in Austria have also lowered the burden of proof regarding causation and require a predominant probability in order to award compensation for the entire damage \(^\text{2}\).

In English law and other Common law jurisdictions it is necessary and sufficient to establish that it is ‘more probable than not’ (i.e. that there is a probability of 51%) that a damage was caused by an act (or omission) of the defendant \(^\text{3}\).

c) Reversing the burden of proof

A third solution would be to reverse the burden of proof under certain conditions.

In the case of actions of patients against doctors who have acted with gross negligence, German courts have reversed the burden of proof in favour of the patient under the condition that the grossly negligent act

\(^{1}\) BC/TF 8.5.1981, BG/ATF 107 II 269, cons. C. 1b. The burden of proof may vary according to the protected interest at issue, see Roland Brehm, Schweizerisches Zivilgesetzbuch, Das Obligationenrecht, Vol. VI, Art. 41-61 OR, 3rd ed, Bern (2006), Art. 41 N 117 et seq.; see also Ch. Müller, La perte de chance, n. 269.

\(^{2}\) Xs See, for example, H. Koziol, Österreichisches Haftpflichtrecht, Band I, 3. Aufl., Wien 1997, no. 16/11.

of the doctor might have been the cause of the patient’s damage\(^1\). In medical malpractice cases, the Dutch and the Austrian courts as well as the Supreme Court of Lithuania have also used the reversal of the burden of proof in cases of uncertain causation\(^2\).

If the requirements for a reversal of the burden of proof are met, the courts in Germany, the Netherlands and Lithuania award damages, in principle, for the entire loss suffered by the victim although causality remains uncertain (principle of ‘all or nothing’)\(^3\). Given that, in these cases, the issue of causation usually cannot be cleared up afterwards, reversing the burden of proof leads to the result that a medical doctor who has acted with gross negligence is liable for any and all consequences that have probably resulted from his act or omission.

Courts in other countries refused to reverse the burden of proof in such cases.

d) Applying rules on alternative causation

A fourth approach to resolve uncertainties in natural causation could be found in an application of the rules on alternative causation. According to these rules, “in case of multiple activities, where each of them alone would have been sufficient to cause the damage, but it remains uncertain which one in fact caused it, each activity is regarded as a cause

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3. For a critical appreciation of the German case law, see Mäsch, ZEuP 2006, 656 (674).
of the damage". In some jurisdictions, each actor then is liable to the extent corresponding to the likelihood that it may have caused the victim's damage (concept of proportional liability); in other jurisdictions each actor is fully liable and the claimant has a choice whom to sue (principle of joint and several liability).

The rules on alternative causation may also be applied when one of the potential sources lies within the sphere of the victim, such as in the three above scenarios where the damage was caused either by the medical doctor's negligence or it was a consequence of the claimant's injury anyway. In 1995, the 4th senate of the Austrian Supreme Court of Justice applied the rules on alternative causation in a medical malpractice case: The court had to decide the case of a baby that was born heavily disabled. The disability was due either to the fact that the baby had had the umbilical cord tied around his neck three times when born, a fact that was unavoidable for the doctors and was exclusively within the victim's sphere of risk, or it was due to a placental insufficiency, a fact that the doctors should have discovered and the consequences of which they could have avoided. The 4th senate of the Supreme Court applied, by way of analogy, the rules on alternative causation; given the fact that the doctors were responsible for one out of two potential sources of the baby's damage.

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1 Compare Art. 3:103(1) of the Principles of European Tort Law.
2 See Art. 3:103(1) of the Principles of European Tort Law.
3 See, e.g., Art. 3:106 of the Principles of European Tort Law: "The victim has to bear his loss to the extent corresponding to the likelihood that it may have been caused by an activity, occurrence or other circumstance within his own sphere".
damage, the court held them liable for half of the damage. 

Other senates of the Austrian Supreme Court of Justice have not followed this line of reasoning and prefer to lower or to reverse the burden of proof in similar situations.

e) Legal concept of ‘loss of a chance’

The courts in some jurisdictions apply a fifth solution to the problem of uncertain causation, the concept of ‘loss of a chance’. Under this concept, the act that triggers liability in cases of uncertain causation is not the violation of a right that is traditionally the object of protection in contracts or torts (such as the patients’ life or the bodily integrity in the above case scenarios). The fact that triggers liability is the ‘loss of a chance’ of a better outcome itself.

This perspective is different from the traditional points of view, as the claimant needs to establish causation between his damage and the loss of a chance of a better outcome. In all of the above cases, there is no doubt that the medical doctor’s negligence has deprived the patients of a chance to recover.

The concept of ‘loss of a chance’ thus changes the object of legal protection: the direct object of protection in ‘loss of a chance’ cases is

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3. See, for example, O. Moréteau/L. Francoz-Terminal, in Winiger/Kozioł/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.6.3; Jansen, OJLSt. 1999, 271 (282 et seq.).
not the patient's health but his *chance* to recover. The concept of 'loss of a chance' also brings change in the elements to be taken into consideration in order to establish causation. Due to the change of perspective, the issue of causation is no longer a problem since causation between the doctor's negligence and the loss of the chance to recover is *certain*.

The concept of 'loss of a chance' does not lead to compensation according to the principle of 'all or nothing'. Due to the change of perspective, it leads to *partial* compensation of the damage corresponding to the chance lost. The action succeeds in an amount corresponding to the degree of the chance lost.

The loss of a chance approach is well established in *France*, *Belgium* and the *Netherlands*\(^ 1 \). In other jurisdictions such as Spain, the concept of 'loss of a chance' has been adopted with slight modifications, or it has been adopted only for certain categories of cases and not for others. The courts in *England* and in *Scotland*, e.g., apply the concept of 'loss of a chance' to several categories of cases, in particular to lawyer's liability, but do not apply it to medical malpractice.

In the above scenario of the patient who died of cancer in Boston, for example, under the 'loss of a chance'-approach, liability would not be triggered by damage caused to the life or bodily integrity of the patient for which the causal link is established with a probability of only 37.5%. Liability would be triggered, on the contrary, by the fact that the patient has lost the chance to recover and survive. The patient would then be entitled to recover 37.5% of the damage suffered.

\(^1\) Xx W. H. van Boom/I. Giesen, in Winiger/Koziol/Koeh/Zimmermann (eds.), *Digest of European Tort Law*, 10.8.4 et seq. and 10.8.9 et seq. with references.
f) Résumé

The first benefit to be derived from using the comparative method is that it reveals the full range of approaches (in our case: five) that are available for the solution of the problem under examination. The comparative analysis may thus reveal solutions that have so far been unknown in the comparatist's own jurisdiction and it may consequently widen the range of solutions to a given problem.

In the three above scenarios, for example, the courts in Switzerland (2007), Massachusetts (2008), and Australia (2010) considered, for the first time ever, to award partial compensation corresponding to the probability of causation instead of applying the 'all or nothing'-approach (which used to be the traditional approach to causation in medical negligence cases in these jurisdictions). They had discovered the 'loss of a chance approach' in other jurisdictions through a comparative analysis.

2. Discovering current trends

Secondly, the comparative overview may reveal whether there are any current trends towards one or the other solution to the problem dealt with\(^\text{1}\). The overview may for example reveal that some solutions, that are still unknown in the comparatist's own legal system, are well being used in other jurisdictions.

Partial compensation according to the probability of causation (instead of damages according to the 'all or nothing'-approach) has been awarded by the 4th senate of the Austrian Supreme Court of Justice in

\(^1\) For the benefits of discovering such trends, see Lord Bingham in Fairchild v. Glenhaven (House of Lords) [2002] 3 All ER 305 at 334i "In a shrinking world [...] there must be some virtue of uniformity of outcome whatever the diversity of approach in reaching that outcome."
the above mentioned decision\(^1\), applying the rules on alternative causation. In cases of medical malpractice and lawyers' liability, the courts in France, Belgium, the Netherlands, as well as the courts in many States of the US constantly award partial compensation (using the 'loss of a chance'-approach); the courts in England and Scotland award partial compensation in cases of lawyer's liability and the courts in Italy and Spain have reached similar results also applying a 'loss of a chance' approach to causation\(^2\).

The ‘UNIDROIT Principles of International Commercial Contracts’\(^3\) suggest to award partial compensation corresponding to the likelihood of causation; Art. 7.4.3 sect. 2 of the UNIDROIT Principles states that “[c]ompensation may be due for the loss of a chance in proportion to the probability of its occurrence.”

The ‘Principles of European Tort Law’ also provide for partial liability corresponding to the likelihood of causation (suggesting to apply rules on alternative causation).\(^4\)

For the problem under examination in the above case scenarios, a comparative overview thus shows that awarding compensation in an amount corresponding to the probability that the doctor's negligence might have caused the patient's damage, i.e. partial liability for the damage suffered by the patient, is an approach that is being far from marginal from a comparative perspective.

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\(^1\) Above, fn. 28.

\(^2\) References above, fn. 5 et seq.

\(^3\) www.unilex.info.

\(^4\) Art. 3:101, 3:103(1), 3:106 PETL; see Th. Kadner Graziano in Winiger/Koziol/Koch/Zimmermann (eds), Digest of European Tort Law, 10.28 (p. 585 et seq.).
3. Benefitting from the experiences made in other jurisdictions and inviting a critical assessment of the pros and cons of the solutions under examination

Thirdly, the comparative method allows benefitting from the experiences that have been made in other jurisdictions; it helps avoiding to repeat unsatisfactory experiences that have already been in other jurisdictions; and it invites to weigh up the arguments for and against all possible solutions.

This may, again, be illustrated with the above examples. It has been said that in some jurisdictions in cases of gross negligence the courts reverse the burden of proof of causation in favour of the patient (see the third of the above solutions)\(^1\). This might, at first sight, seem an interesting approach to solve the above scenarios. The experiences made in German case law show, however, the weaknesses of this approach: A patient does not necessarily want to see the doctor punished for his imprudent acts. He wants to be compensated for damages regardless of the doctor’s degree of fault\(^2\). In fact, there is no link between the degree of the doctor’s fault and the probability that the fault caused damage to the patient. The decisions of German courts perfectly illustrate that this link is missing: in one case, there was a 90% chance that a minor fault on the doctor’s behalf led to a patient’s damage. The court however refused compensation because of the doubts that remained about causation. In another case, there was a 10% chance that gross negligence caused the patient’s problems\(^3\). Given that there was gross negligence,

\(^1\) Supra, IV.3.

\(^2\) Comp. Fleischer, JZ 1999, 766 (773); Jansen, OJLSi. 1999, 271 (277 et seq.).

the damage was fully compensated for. The reversal of the burden of proof in cases of gross negligence might, at first hand, seem an attractive solution, is indeed unsatisfactory when considering these experiences.

As far as partial compensation corresponding to the likelihood of causation is concerned, the situation in European private law is very diverse: In many countries the idea of partial compensation corresponding to the likelihood of causation, or of compensating for ‘lost chances’, has not yet been accepted or has been rejected by the courts. In numerous other countries it has been widely accepted or has been accepted for certain categories of cases. Experience in France, Belgium, the Netherlands, Italy, Spain, and in 21 jurisdictions in the USA show that the concept of partial compensation can be useful and work well, if handled with care.

4. Harmonising effect

A fifth benefit of the comparative approach is that it may bring about a significant harmonising effect on European private law since the courts in different jurisdictions would consider, and sometimes adopt, the same solutions. It may thus pave the way for a ‘soft harmonisation’ of the laws (‘bottom up’ approach to harmonization) as opposed to harmonization by way of legislation (or harmonization ‘top down’).

5. Establishing an international community of lawyers being in communication with each other

The comparative analysis does not necessarily lead to identical re-

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1 See also Mäsch, Chance und Schaden, p. 35 et seq.
2 For arguments against this approach see Th. Kadner Graziano, *ERPL* 2008, 1009 (xx).
3 For arguments for this solution, see idem, *ERPL* 2008, 1009 (xx).
4 References above, fn. 5 et seq.
sults in every jurisdiction. On the contrary, the comparative approach also allows the development and coexistence of different solutions in different countries. Some countries could hence serve as laboratories in which certain solutions are ‘tested’, in the same manner as can for instance be observed in the area of private law in the United States where 50 jurisdictions coexist within the Union.

However, even if the courts eventually adopt different solutions, an insight into the solutions used in other jurisdictions, gained through the comparative analysis, increases understanding and favours discussion between lawyers of different jurisdictions. A comparative approach will thus enable the development of a common legal science and it will contribute to the establishment of an authentic (European or even worldwide) community of lawyers which can easily consult with each other.

Here again the above case scenarios may serve as illustration: In the above cases, the Swiss Federal Court, the Supreme Court of Massachusetts and the High Court of Australia all considered to partially compensate the patients according to the ‘loss of a chance’-approach, and they all considered this approach for the first time ever, having learned about this option by means of a comparative analysis.

The High Court of Australia finally rejected the loss of a chance approach. The Swiss Federal Court considered it but, for procedural reasons, left the question of its adoption open. The Supreme Court of Massachusetts adopted it and awarded damages in the amount of 37.5% of the damage suffered since the probability that the doctor’s negligence had caused the patient’s death amounted to 37.5%.

The courts thus reached different conclusions, but they reached them being fully aware of all options, and of their respective advantages and disadvantages, and by taking into consideration the experiences that
had previously been made in other jurisdictions. The comparative method thus broadened the horizon of the courts and led to an informed decision taking into account all possible solutions to the problems, while preserving the freedom of choice for the courts in different jurisdictions.

VI. Conclusions

Courts may derive several benefits from using the comparative method in addition to the traditional methods of interpretation of the law:

(1) In situations in which the national law has gaps or where it lends itself to interpretation, the comparative analysis helps the judge to discover the full range of solutions to a given legal problem.

(2) Comparative law helps to discover current trends on the international level when dealing with topical legal issues.

(3) It invites a critical assessment of the pros and cons of the different solutions under examination, helps judges to benefit from the experiences made in other jurisdictions and helps to avoid repeating unsatisfactory experiences that have been in other jurisdictions.

(4) In some situations, a comparative analysis may bring about a harmonizing effect on the international level and thus offer an alternative to the unification through legislation.

(5) Last but not least, by using the comparative method and by taking into consideration the court practice of other jurisdictions, the courts contribute to the establishment of a discussion beyond the national borders. As far as liability for professional negligence is concerned, the three above cases show that comparative law is, in fact, currently leading to an almost worldwide discussion of the scope of liability for medical negligence and of fair limits of such liability.