The "Loss of a Chance" in European Private Law - "All or nothing" or partial compensation in cases of uncertain causation

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Reference

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I. Introduction

Under the current proposal for reform of the French Civil code, article 1346 of the code would provide that «La perte d’une chance constitue un préjudice réparable distinct de l’avantage qu’aurait procuré cette chance si elle s’était réalisée». (The loss of a chance is a compensable injury distinct from the advantage that the realization of the opportunity would have brought about.) The French legislator would thus
confirm a long line of precedents established by the French courts in the matter of "loss of a chance" (or "perte d'une chance").

In other continental systems, for example in Swiss law or in German law which has recently undergone the most important reform of its law of obligations since the entry into force of the German civil code (Bürgerliches Gesetzbuch, BGB) in 1900, neither the legislator nor the courts have awarded compensation for the "loss of a chance".

The following contribution will first take a look at the different factual situations in which the issue of "loss of a chance" arises (II). An analysis of whether and to what extent the "loss of a chance" is an issue of causation (III) and what the traditional solutions are that we have at hand to solve these problems (IV) will follow. There will then be an introduction to the idea and the legal approach of "loss of a chance" (V). Once the different approaches to the problem of uncertainties about natural causation have been presented, this account will try to give a comparative overview and will try to find out if there are any current trends in European private law dealing with the uncertainties surrounding natural causation and the "loss of a chance" (VI). This overview will necessarily have to take into consideration the "Principles of European Contract Law" (or "Lando Principles"), the "UNIDROIT Principles of International Commercial Contracts" as amended in 2004, and the "Principles of European Tort Law" published in 2005 by the "European Group on Tort Law" (VII) which have all been elaborated on a comparative basis over the last decades. In the last part of this contribution the arguments in favour of and against the different approaches to the problem of uncertainty of causation will be weighed up (VIII.), and finally a solution will be proposed (IX).

II. The factual situations

The factual situations that give rise to the question of "loss of a chance" may be put into – at least - four different categories. 6

1. The 1st category: lawyer's liability

The first category concerns the liability of lawyers for mistakes in dealing with their clients' affairs. A case that had to be decided by the Spanish Supreme Court in 2004 may serve as an illustration for this first category:

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4 See, for example, Le Tourneau, Droit de la responsabilité et des contrats, nos. 1415 et seq. with further references.

5 See, for Switzerland: Ch. Müller, La perte d'une chance, nos. 241 et 249; in a decision of June 13, 2007, the Swiss Federal Court for the first time explicitly deals with the issue of "loss of a chance" but, for procedural reasons, leaves the question open, BG/TF 13. 6. 2007, 4A.61/2007, www.bger.ch; for Germany: Reinhard Zimmermann, in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.2.7: "this idea [i.e. the loss of a chance] is practically non-existent in the case law of [German] courts".

6 For further cases in which the approach of "loss of a chance" has been used in French law, see Le Tourneau, Droit de la responsabilité et des contrats, no. 1419 and 1422 et seq.
A lady works as a secretary to the sales manager of a retail chain. She is notified that she is going to be transferred to another section, resulting in changes to her working hours and working conditions. Her attorney fails to lodge her claim with the labour court within the necessary time period. As a consequence, the action brought on her behalf is dismissed.

The lady sues the lawyer seeking compensation for the financial loss consisting in the likely award of damages for breach of the employment contract and the subsequent unemployment benefits she would have been entitled to had the action been successful. It remains uncertain whether she would have won her case had the action been brought in time.7

In recent years, the Courts in England, Scotland, the Netherlands, Denmark, Portugal, Germany, Spain and Switzerland have had to deal with similar cases in which lawyers had negligently omitted to bring a claim or to launch an appeal in time.8

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8 See, for example, the English cases: Allied Maples Group Ltd v Simmonds & Simmonds [1995] 1 Weekly Law Reports (WLR) 1602 (Court of Appeal), 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 Stormmouth Darling, 1993 Session Cases (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 timeously 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, Nederlandse Jurisprudentie (NJ) 1998, 257 (Baijings/H.), excerpts in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.8.7 with comment by WH. van Boom/I. Giesen; the Portuguese case: Lisbon Court of Appeal 8. 7. 1999, according to: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.11.1 with comment by A. Pereira: Held: liability for an amount of € 2,500 out of a damage of € 10,000 for having lost a 25% chance of recovering a debt; the Spanish cases: Tribunal Supremo (TS) 9. 7. 2004 (supra, n. 7), and TS 26. 1. 1999, RJ 1999, 323; the German cases: Federal Court of Justice/Bundesgerichtshof (BGH) 27. 1. 2000, Versicherungsrecht (VersR) 2001, 638; BGH 2. 7. 1987, Neue Juristische Wochenschrift (NJW) 1987, 3255; the Austrian case: Oberster Gerichtshof (OGH) 3. 11. 1966, Amtliche Sammlung der Entscheidungen des OGH (SZ) 39/186; the Swiss case: Federal Court of Justice/Bundesgericht/ Tribunal Fédéral (BG/TF) 12. 12. 1961, BGE/ATF 87 II 364.
2. The 2nd category: liability for medical malpractice

The second category of cases concerns the liability for medical malpractice. An English case from 1989 which has become the leading precedent in England perfectly illustrates this second group:

A 13 year old boy falls from a tree in his school playground and sustains an acute traumatic fracture of his left hip joint. He is taken to hospital but his injuries are not correctly diagnosed and not adequately treated for several days. Later, the boy is found to be suffering from a disability (a vascular necrosis) in his hip joint, resulting from the insufficiency of the blood supply to the epiphysis. Due to the disease, from the age of 20, the young man is permanently disabled.

The defendant health authority admits negligence but claims that, at the time the plaintiff was taken to hospital, the boy’s disability was inevitable. Evidence shows that there was a 25% chance that a vascular necrosis would not have developed had the plaintiff been treated without delay.9

Similar cases of uncertain causation have been brought before the courts in France, Belgium, Germany, Austria, Italy, Spain, the Netherlands, Scotland, Ireland, Lithuania, and Switzerland.10

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9 Hotson v East Berkshire Area Health Authority [1989] Appeal Cases (AC) 750 (House of Lords), excerpts in: Winiger/Kozioł/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.12.1 with comments by K. Oliphant.


126
3. The 3rd category: cases of competition

In the third category, we find cases of competition in the fields of politics, commerce, sports, or others (e.g. beauty contests):

- In an Irish case, under a regulation that was later declared unconstitutional, a politician was precluded from standing in National and European elections. The politician claimed to have lost the chance of being elected.\(^\text{11}\)
- In a German case, an architect was excluded from an architectural contest in an unjustified manner.\(^\text{12}\)
- In one Greek case, horses counting among the favourites were excluded from participating in horse races. The owners claim compensation for being deprived of the prize money they would have won had the horses been able to participate.\(^\text{13}\)
- In Geneva, a candidate in the Miss Suisse 2006 competition was hurt in a car accident. This made it impossible for her to participate in the contest.\(^\text{14}\)

4. The 4th category

The fourth is a hybrid category. Examples are cases of lost or stolen tickets for lotteries, or other cases in which the victim was hindered from participating in games of chance. A Greek case from 1987 can be cited as an example:

A person purchased a National lottery ticket. During the lottery, one number was drawn twice. It was discovered that, out of negligence on the part of the public organs, the plaintiff’s number was not included in the ballot box, while the winning number was included twice. The bearer of the omitted ticket filed an action claiming the amount of the higher prize or at least half of it.\(^\text{15}\)

III. The “loss of a chance” – an issue of causation?

All European tort law systems require, as a starting point, a link of natural causation between the tortfeasor’s activity and the victim’s injury or damage. The

\(^{11}\) Redmond v The Minister for the Environment et al., 13. 2. 2004, according to: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.14.1 with comments by E. Quill.


\(^{13}\) Areios Pagos (AP) 447/1957 (Sect. A) [1958] NoV 6, 102; AP 742/1958 (Sect. C’) [1959] NoV 7, 380; according to: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.5.1 with comments by E. Dacoronia; see also the French case: Cour d'appel de Paris 21. 11. 1970, Juris-classeur périodique. La semaine juridique (JCP). 1970 Jur. 16990: claim brought against a jockey who was considered to have negligently ceased to push the horse on the finish line; see also the Norwegian case: Court of First Instance 18. 10. 1983, according to: V. Ulfbeck/B. Askeland, in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.16.1.

\(^{14}\) The case was of interest for the local newspapers but was not brought before the courts.

tortfeasor's activity needs to be a *conditio sine qua non* of the victim's injury or, 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."\(^{16}\)

In our first case concerning the Spanish secretary, the lawyer had negligently omitted to bring a claim in time. However, it is uncertain whether the claim would have succeeded had it been brought in time.

In the second case, the case of the English boy that had fallen from the tree, the doctor had committed several faults. It is however impossible to know whether, in case of timely and adequate treatment, the disability would have been avoided.

In the third category of cases it is impossible to know if the Irish politician would have won the election had he been able to participate. It is also impossible to know if the German architect would have won the contest, if the horses would have won the race or if the candidate from Geneva would have won the title of Miss Swiss had they been afforded the chance to participate.

The common features in all these cases are that the person held to be liable acted negligently (if negligence was required) and that the victim cannot show that the loss would have been prevented had the other party acted as required by contract or law. From this point of view, the victim cannot meet the requirements of the *conditio sine qua non*-test and the problem is one of causation.

### IV. Traditional solutions

In European Private Law several traditional solutions exist to strengthen the victim's position in situations in which it is difficult for him or her to establish a link of natural causation between the damage and the negligent behaviour of the person held to be liable. For cases concerning the "loss of a chance", there are at least four traditional ways to help the victim:

- The first solution is to clear up the question of causation "ex-post".
- The second solution is to lower the victim's burden of proof.
- The third solution is to reverse the burden of proof.
- The fourth solution is an extensive application of the principle of alternative causality.

#### 1. 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' negligence, the issue of causation 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


128
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 or question préalable for the success of the client's claim in the procedure against his lawyer. In possibly establishing some form of certainty in causation between the lawyer's negligence and the client's damage, the second proceedings will resolve the issue of "loss of a chance". We could consequently speak of "first proceedings within the second proceedings" (or of a "Prozess im Prozess").

This approach is constantly applied by the courts in Germany. It has also been used by the courts in the Netherlands and by Swiss courts.

2. Lowering the burden of proof

In cases of the first category in which it appears impossible to definitively clear up causation on an "ex-post" basis as well as in cases belonging to the three other categories, other remedies are needed. Another remedy could be found in lowering the victim's burden of proof as far as the causal link is concerned.

In some legal systems, for instance in Germany (§ 286 of the German Code of civil procedure (Zivilprozessordnung, ZPO), it is necessary for the causal link to be established with certainty ("Gewissheit").

In Swiss law, the victim must establish a sufficient (i.e. predominant) probability of the purported cause with regard to the effect ("überwiegender Wahrscheinlichkeit"). 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 60%. (In this case, a testicular cancer was negligently diagnosed too late and the patient died). In this case, which remains exceptional in Swiss law,

17 For a critical view on the German case law, see Mäsch, ZeuP 2006, 656 (674); idem, JZ 2006, 198; idem, Chance und Schaden, p. 76 et seq., 126.
18 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 Mäsch; for further references, see Mäsch, Chance und Schaden, p. 76 et seq.
19 Hoge Raad 24. 10. 1997, NJ 1998, 257 (Baijings/mr. H.), excerpts in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.8.7 with comments by W.H. van Boom/I. Giesen; according to the Dutch case law, the court may also use the approach of "loss of a chance", see W.H. van Boom/I. Giesen, 10.8.9 et seq.
20 BG/TF 12. 12. 1961, BGE/ATF 87 II 364 (373 et seq.).
21 See, for example, Mäsch, ZeuP 2006, 656 (674 et seq.); idem, Chance und Schaden, p. 237 et seq.
22 For German law, see 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' ed., Wien 2000, n. 580 with references.
23 BG/TF 8. 5. 1981, BGE/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.
the courts awarded compensation to the height of 60% of the damages.\textsuperscript{24} According to dominant opinion in Switzerland, a mere "probability" of causation is, on the contrary, not sufficient to establish a claim for the entire damages or parts of them.\textsuperscript{25}

In cases of medical malpractice the law courts in Austria have also lowered the burden of proof of causation to a predominant probability in order to award compensation for the entire damage.\textsuperscript{26}

In English law 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.\textsuperscript{27}

Probabilities below this line are, in principle,\textsuperscript{28} not sufficient proof of causation in any legal system. In none of our given examples can the victim satisfy the "more probable than not"-test. According to this standard, all of the actions would have to be dismissed. This is true for the action of the Spanish secretary against her lawyer, for the action of the English teenager who had fallen from the tree against his doctor and, obviously, e.g., for the action of the candidate from Geneva for the Miss Suisse competition against the person who caused the traffic accident in which she was hurt.

3. \textit{Reversing the burden of proof}

Another solution would be to entirely reverse the burden of proof.

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 negligent act might have been the cause of the patient's damage.\textsuperscript{29} In medical malpractice cases, the Dutch and the Austrian courts

\textsuperscript{24} According to this decision, the probability of 40% is thus to be taken into consideration in quantifying the damages under art. 43 sect. 1 CO. The decision has been commented upon by Olivier Guillod, \textit{La responsabilité civile des médecins: un mouvement de pendule}, in: M. Borghi/O. Guillod/H. Schultz (éd.), \textit{La responsabilité del medico e del personale sanitario fondata sul diritto pubblico, civile e penale}, Lugano 1989, n. 247; Thévenoz, \textit{La perte d’une chance}, p. 237 (253); Ch. Müller, \textit{La perte d’une chance}, p. 178 et seq.

\textsuperscript{25} Max Guldener: \textit{Beweiswürdigung und Beweislast nach schweizerischen Zivilprozessrecht}, Zürich 1955, p. 21: "Die bloße Möglichkeit, dass sich der rechtserhebliche Tatbestand verwirklicht hat, genügt nicht, um auch nur einen Teilbetrug zuzusprechen."; Ch. Müller, \textit{La perte d’une chance}, p. 196.

\textsuperscript{26} See, for example, Helmut Koziol, \textit{Österreichisches Haftpflichtrecht}, Band I, 3. Aufl., Wien 1997, no. 16/11.


\textsuperscript{28} See, however, a decision of the Austrian Supreme Court of Justice according to which, in case of medical malpractice, the mere probability of causation would be sufficient, OGH 17. 6. 1992, JBl. 1993, 316 (319).

as well as the Supreme Court of Lithuania have also used the reversal of the burden of proof in cases of uncertain causation.\textsuperscript{30}

The German courts have extended these principles to other professions that aim at protecting others from dangers to life or health.\textsuperscript{31} According to the case law, a person who violates a \textit{contractual duty} to provide information or to give advice carries the burden of proof to show that his act has not caused the damage or that, in case of appropriate information, the damage would also have occurred.\textsuperscript{32}

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.\textsuperscript{33} Given that, in these cases, the issue of causation 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.

In cases of lawyer's liability, the German courts have, on the contrary, always refused to reverse the burden of proof even in cases of gross negligence on the part of the lawyer.\textsuperscript{34} Unlike a patient, the lawyer's client would not be exposed to any existential risk. Furthermore, unlike in cases of medical malpractice, in cases of lawyer's negligence it would not be possible to conclude systematically from the lawyer's negligence that there is a causal link between negligence and the client's loss of a claim.\textsuperscript{35} The Swiss Federal Court of Justice has not reversed the burden of proving causation in lawyer's negligence cases either. Therefore, the client must establish a predominant probability of the lawyer's negligence with regard to his loss of a claim.\textsuperscript{36}


\textsuperscript{31} Berufe, „die auf Bewahrung anderer vor Gefahren für Körper und Gesundheit gerichtet sind“, BGH 13. 3. 1962 NJW 1962, 959 (life guard); BGH 10. 11. 1970, NJW 1971, 243 (midwife); BGH 5. 7. 1973, BGHZ 61, 118 (121).

\textsuperscript{32} BGH 5. 7. 1973, BGHZ 61, 118.

\textsuperscript{33} For a critical appreciation of the German case law, see Mäsch, ZEuP 2006, 656 (674).

\textsuperscript{34} See, for example, BGH 1. 10. 1987, NJW 1988, 200; BGH 9. 6. 1994, BGHZ 126, 217 (221): Held: „a): Im Anwaltshaftungsprozess hat der Mandant auch dann zu beweisen, dass die Pflichtverletzung für den geltend gemachten Schaden ursächlich geworden ist, wenn dem Anwalt ein grober Fehler unterlaufen ist. Die Beweisführung kann jedoch im Einzelfall nach den Grundsätzen des Anscheinsbeweises erleichtert sein“.\textsuperscript{35}

\textsuperscript{35} BGH 9. 6. 1994, BGHZ 126, 217 (223 et seq.).

4. Applying the principles of alternative causation extensively

A fourth approach to resolve uncertainties in natural causation could be found in an extensive application of the rules on alternative causation.

In 1995, the 4th senate of the Austrian Supreme Court of Justice had to decide about a 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, 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, the court held them liable for half of the damage.37

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.38

The "Principles of European Tort Law" state, in art. 3:103 (1), in accordance with the 4th senate’s reasoning in the case of the disabled baby, that “(i)n 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 to the extent corresponding to the likelihood that it may have caused the victim’s damage.” We will come back to this proposal in a moment.39

V. Legal concept of “loss of a chance”

According to the concept of “loss of a chance”, 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 contract law (such as the financial interests of the Spanish secretary in our 1st case) or in tort law (such as the bodily integrity of the teenager in the 2nd case). The fact that triggers liability is the “loss of a chance” itself.40

In the case of the English teenager treated inadequately in hospital, liability would not be triggered by damage caused to his bodily integrity for which the causal link

39 Infra, IX.B.
40 See, for example, O. Moréteau/L. Francoz-Terminal, in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.6.3; Jansen, OJSt. 1999, 271 (282 et seq.).
is established with a probability of only 25%. Liability would be triggered, on the contrary, by the fact that the boy has lost the chance to recover.

This perspective is fundamentally different from the traditional point of view, as it does away with the problem of causation. In our first case, there is no doubt that the lawyer's negligence has deprived the Spanish secretary of a chance to win her case; neither is there any doubt that the English boy lost a 25% chance of complete recovery due to the doctor's malpractice.

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 not the boy'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 different and is no longer a problem.

Contrary to the traditional approaches, the concept of "loss of a chance" does not lead to a compensation according to the principle of "all or nothing". Due to the change of perspective, it leads to a partial compensation of the damage corresponding to the chance lost. The French Cour de cassation has put it in the following words: «La réparation d'une perte de chance doit être mesurée à la chance perdue et ne peut être égale à l'avantage qu'aurait procuré cette chance si elle s'était réalisée».

In the case of the English boy who has lost a 25% chance to recover entirely, the negligent doctor would be liable for 25% of the boy's damages. In the case of the young woman from Geneva who, due to an accident caused by the driver of a car, was prevented from participating in the Miss Suisse 2006 competition, her damage would probably be evaluated at 1/20 of the lost income she would have made had she won (supposing that there were 20 finalists).

In the other cases, the damages suffered would also be calculated according to the percentage of the chance lost.

VI. Comparative overview and current trends in European private law

Under the traditional approaches as they are currently employed in Europe, in none of our cases would the victim's action succeed. According to the concept of "loss of a chance", on the contrary, many if not all of the actions would succeed in an amount corresponding to the degree of the chance lost. The outcome of a given case therefore depends very much on the concept applied.

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41 Cour de cass. 1ère ch. civ. 9. 4. 2002, Bull. civ. I, no. 116; see also Le Tourneau, Droit de la responsabilité et des contrats, no. 1419 with many further references.
42 For the situation in US law, see, for example, the brief overview by Thevenoz, La perte d'une chance, p. 237 (246 et seq.); Weir, Loss of a Chance – Compensable in Tort?, in: Guillod (ed.), Neuere Entwicklungen, p. 111 (123).
43 See, for the 4th approach (i.e. the concept of alternative causation), however, infra IX.
The following comparative overview will show if there are any current trends towards one or the other solution to deal with the problem of "loss of a chance". The overview will reveal that damage payments for the "loss of a chance" are far from being marginal in Europe today.

1) In at least 12 European legal orders the concept of "loss of a chance" is still either unknown or has been rejected. To this group belong the laws of Germany, Austria, Switzerland, as well as Greek law. Other countries that have not (or not yet) adopted the "loss of a chance" approach are Hungary, the Czech Republic, Slovenia, Estonia, Denmark, Sweden, Norway and Finland.

2) In other European jurisdictions, the "loss of a chance" approach is well established and applied to many different factual situations. First and foremost in this group is France, probably the first country to apply this concept at the end of the 19th century. France will probably also be the first country to introduce the concept of "loss of a chance" as a separate category of damages in its civil code.

Another example is the Netherlands where partial compensation in case of uncertain causation has been awarded in lawyers' liability cases as well as in cases of medical malpractice.

3) In a third group of legal orders, the concept of "loss of a chance" has been adopted with slight modifications, or adopted only for certain categories of cases and not (yet) for others.

In Spain, the courts have applied the concept of "loss of a chance". However, the Spanish courts have evaluated the damage very liberally and with great flexibility, and do not necessarily link damages awarded to a precise calculation of the percentage of a chance lost. They have thus avoided establishing precise figures of probability and have awarded damage payments for the victims' non-material harm instead.

The courts in Italy have also adopted the concept of "loss of a chance". In one case, a candidate was excluded from an admissions test without justification. 67 of

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44 See, however, for the law of Austria, the decision of the 4th senate of the OGH cited supra IV. 4.
45 See, for the laws of these countries, the references and comments in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.2. to 10.26; see also Helmut Koziol, Comparative report, in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.29.1 et seq.
46 See supra, I.
47 W.H. van Boom/I. Giesen, in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.8.4 et seq. and 10.8.9 et seq. with references.
48 J. Ribot/A. Ruda, in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.10.7 et seq.
50 M. Graziadei/D. Migliasso, in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.9.5: "In Italy "loss of a chance" (perdita di chance) has been an established category of recovery in tort since the 1980s".
the 97 candidates succeeded in the test. The courts awarded damages for “loss of a chance” on the basis that the chance of success was in excess of 50%.\footnote{Corte di Cassazione 19. 12. 1985, Foro it. 1986, I, 383, excerpts in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.9.1.} In the field of medical malpractice, the Italian courts have applied the concept of “loss of a chance” to cases with degrees of probability lower than 50%.\footnote{Corte di Cassazione 4. 3. 2004 with comments by M. Graziadei/D. Migliasso, in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.9.7 and 10.9.9.}

The English courts apply the concept of “loss of a chance” to several categories of cases but refuse to apply it to medical malpractice. In the case of the English teenager whose injuries were falsely diagnosed, the boy had lost a 25% chance of complete recovery. The House of Lords strictly applied the more probable than not test to causation.\footnote{Hotson v East Berkshire Area Health Authority [1989] AC 750 (HL), excerpts in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.12.1 with comments by K. Oliphant.} The boy could not satisfy the test since his chance of recovery was below 51%. This precedent, the 1989 Hotson v East Berkshire Area Health Authority case, was confirmed in 2005 by a 3:2 majority in Gregg v. Scott.\footnote{Gregg v Scott [2005] United Kingdom House of Lords (UKHL) 2; case note by Mäsch, ZEuP 2006, 656. See, for example, Mäsch, ZEuP 2006, 662 et seq.; idem, Chance und Schaden, 186 et seq.; Ch. Müller, La perte d’une chance, p. 134 et seq.; Jansen, OJLSt. 1999, 271 (275 et seq., 288 et seq.).} In this case, a doctor had not diagnosed a cancer, thereby reducing the patient's chance of survival from 42% to 25%.

In other categories of cases, the concept of “loss of a chance” is well established in English law.\footnote{Kitchen v Royal Air Force Association [1958] WLR 563.} If a lawyer negligently omits to bring a claim or to launch an appeal, according to the 1958 precedent Kitchen v. Royal Air Force Association,\footnote{Chaplin v Hicks [1911] 2 KB 786 (Court of Appeal). 12 out of 50 candidates were to be employed by a theatre for a period of three years. The chance of being among them was therefore about 25%.} he will be held responsible for an amount corresponding to the probability of the lost chance (in Kitchen the client received 2/3 of the maximum amount he could have gained had the first proceedings been won).

In the famous case Chaplin v. Hicks of 1911, the Court of Appeal awarded damage payments to a candidate who had been excluded from a beauty contest although she was qualified for the final competition.\footnote{Chaplin v Hicks [1911] 2 KB 786 (Court of Appeal). 12 out of 50 candidates were to be employed by a theatre for a period of three years. The chance of being among them was therefore about 25%.} It was impossible for her to prove that she would have won the contest. All she could show was the “loss of a chance” of winning so that the case represents one of the early examples of the application of the “loss of a chance” approach. In many other situations the Court of Appeal and the House of Lords have awarded damages for “lost chances”\footnote{Scottish law – like English law – distinguishes between different categories of cases.\footnote{In legal doctrine, this distinction has been criticized, see Martin Hogg, in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.13.11 with references.}}.

Scottish law – like English law – distinguishes between different categories of cases.\footnote{Scottish law – like English law – distinguishes between different categories of cases.\footnote{In legal doctrine, this distinction has been criticized, see Martin Hogg, in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.13.11 with references.}
the “loss of a chance”.60 In cases of lawyers’ negligence, the principle of compensation for lost chances is, on the contrary, well established and the action succeeds without the client having to prove that he would have won the case had the lawyer not been negligent.61

In Portugal, a lawyer was condemned to compensate 1/4 of his client’s damage for having deprived him of a 25% of winning a case.62

In 2004 the Irish High Court announced in an obiter dictum that the court was also in favour of the concept of “loss of a chance”.63

4) Similarly to French law, in Belgian law, the concept of “loss of a chance” has been frequently applied by the courts in cases of lawyers’ negligence, in medical malpractice cases and in numerous other situations.64

However, a decision of the Belgian Cour de Cassation of 2004 calls into question the future of the concept of “loss of a chance” in Belgian law: A young woman had received serious threats from her ex-boyfriend. The local police were informed about the threats and about the dangerousness of the man but did not take any safety measures to protect the woman. The man finally attacked her with acid and seriously injured her. The victim and her parents sued the City of Liège and the Belgian State for damages for negligent omissions.

The Court of Appeal (la Cour d’appel) awarded damages to the woman. The court stated that it would have been impossible to afford her 100% protection from such an attack. The local police’s failure to act had however deprived the woman of an 80% chance of avoiding the attack. The loss of this chance would justify an award amounting to 80% of the damage suffered.

The Cour de Cassation quashed the decision of the court of appeal stating that a causal link between the negligent conduct and the damage needs to be proved to support an action for damages. Any uncertainty remaining in relation to causation must lead to a failure of the action.65 It will be most interesting to follow the next steps

60 Kenyon v Bell, 1953 SC 125, excerpts in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.13.1 and M. Hogg, 10.13.3 et seq.
62 Lisbon Court of Appeal 8. 7. 1999, according to: Winiger/Koziol!Koch/Zimmermann (eds.), Digest of European Tort Law, 10.11.1 with comments by A. Perreira.
64 See, for example, Cour de cassation/Hof van Cassatie 19. 1. 1984, Pas 1984 I, 548 (medical malpractice, 80% of the damage awarded), excerpts in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.7.1 with comments by I. Durant.
65 Cour de cassation/Hof van Cassatie 1. 4. 2004, excerpts in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.7.6 with comments by I. Durant, 10.7.11, asking if the decision marks “the end of a concept?”
of the Belgian courts in cases of “loss of a chance”, and it will be particularly interesting to see if the application of this concept in other categories of cases will subsist.

This short overview shows, on the one hand, that in many countries the idea of compensating for lost chances has not yet been accepted or has been rejected by the courts. On the other hand, in numerous other countries, the concept of “loss of a chance” has been widely accepted or has been accepted for many categories of cases. This is true, obviously, for France, but also for England, Spain, Italy, and the Netherlands. In Belgium, the theory of “loss of a chance” has been widely accepted and applied by the courts. It seems, however, that the question of its acceptance is again on the agenda of the Belgian Cour de Cassation.

It is also worth noting that the courts in Europe use the concept of “loss of a chance” in similar situations and that English and Scottish courts are, in applying the concept of “loss of a chance”, more severe with lawyers than with doctors, whereas German and Swiss courts, on the contrary, in applying a traditional approach, are more severe with doctors than with lawyers.

VII. The position of the law of the European Union and of the “Principles of Law”

1. The law of the European Union

In the case law of the European Union, some decisions adopt the concept of “loss of a chance”, whereas in other situations the concept is rejected.

In 1993, in the case *Moritz v Commission*, the European Court of First Instance had to decide a case in which a candidate’s application for an appointment to a superior position had been treated with negligence and his chances to be chosen were thereby reduced. The candidate brought a claim for damages. The plaintiff could not prove with certainty that, but for the negligence, he would have been appointed. The only “damage” he could invoke was the “lost chance” to be promoted to the position. The European Court of First Instance partially compensated the candidate for the “loss of a chance” to be promoted to a higher position.

In other situations, however, EU courts rejected partial compensation in situations of lost chances. This is particularly true in the field of “distribution decisions”, i.e. cases relating to EC funding operations. Here the EU courts require full proof that the applicant would have obtained the requested funds if the correct procedure had been followed.

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67 See the comments on this case by U. Magnus/K. Bitterich, in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.27.1.

The "Principles of European Contract law" (or "Lando-Principles")\(^69\) do not mention the "loss of a chance" in their rules on damages (art. 9:501 to 9:510), thereby leaving the question open for discussion.

In contrast, the "Principles of International Commercial Contracts" (or "UNIDROIT-Principles") of 2004\(^70\) clearly take a different position: 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 official commentary to the Principles gives the example of the "the owner of a horse which arrives too late to run in a race as a result of delay in transport". He "cannot recover the whole of the prize money, even though the horse was the favourite" but has a right to partial compensation "in proportion to the probability" of winning the race.\(^71\)

The official commentary gives the further example that "A entrusts a file to B, an express delivery company, in response to an invitation to submit tenders for the construction of an airport. B undertakes to deliver the file before the closing date for tenders but delivers it after that date and A's application is refused. The amount of compensation will depend upon the degree of probability of A's tender having been accepted and calls for a comparison of it with the applications which were admitted for consideration. The compensation will therefore be calculated as a proportion of the profit which A might have made."\(^72\)

The UNIDROIT-Principles thus clearly adopt the position that a claim for damages may be based on the "loss of a chance". Inspired by art. 7.4.3 sect. 2 of the UNIDROIT-Principles, arbitration courts have awarded damages for "loss of a chance" in contract cases on several occasions.\(^73\)


\(^{70}\) Text with comments in http://www.unilex.info/

\(^{71}\) UNIDROIT Principles, art. 7.4.3, Commentary 1, in http://www.unilex.info/

\(^{72}\) UNIDROIT Principles, art. 7.4.3, Commentary 2., Illustration, in http://www.unilex.info/

\(^{73}\) Most claims were brought for lost profit which, according to the traditional rules, could not be proved with sufficient probability: Ad hoc arbitration (San José, Costa Rica), Arbitral Award 30. 04. 2001, Source: V. Pérez Vargas – D. Pérez Umana, The UNIDROIT Principles of International Commercial Contracts in Costa Rican Arbitral Practice, Uniform Law Review, 2006, 181 (Claim for damages for lost profit; the Arbitral Tribunal held that the expected gains were too uncertain to be compensable in their entirety and therefore awarded damages only for the loss of a chance, referring expressly to Art. 7.4.3 of the UNIDROIT Principles); see also: ICC International Court of Arbitration, Paris, Arbitral Award 8264, 04.1997, ICC International Court of Arbitration Bulletin, Vol. 10, No. 2, case 1999, 62-65 (sale of industrial facilities and of know-how, non-delivery of know-how, loss of the possibility to adapt industrial appliances to changing needs of the market; damages for loss of a chance awarded, inspired by art. 7.4.3 of the UNIDROIT Principles); see also (but without express reference to the UNIDROIT Principles: ICC International Court of Arbitration, Arbitral Award No. 9078, 10.2001,
The "Principles of European Tort Law", published in 2005 by the "European Group on Tort Law", do not mention the term "loss of a chance". However, their application would lead to partial compensation in many "loss of a chance" cases. We will come back to the Tort Law Principles' approach in a moment.\textsuperscript{74}

VIII. The arguments in favour of and against the compensation of lost chances

1. The arguments against liability for "lost chances"

There are many arguments against payment of damages for "lost chances".

Firstly, one might ask whether the concept of "loss of a chance" has already proved its merits in those countries where it has been adopted. In Belgium, it seems that the highest court of the country has recently questioned the concept.\textsuperscript{75}

Another argument can be found in the fact that the principal aim of the liability regime in private law is compensation, not the punishment of generating risks.\textsuperscript{76}

In a 2005 decision concerning liability for medical malpractice, the English \textit{House of Lords} stated that if a patient proved with a probability of 75\% that the doctor's carelessness caused him damage, he would not want his damage payments reduced to less than 100\%. On the other hand, if it is more likely than not that the doctor's carelessness did not contribute to the damage, "then the defendant does not want to have to pay damage for the 20\% or 30\% chance that it did". The House of Lords came to the conclusion that "[a] more likely than not approach to causation suits both sides."\textsuperscript{77}

In continental terminology, it could be said that the "all or nothing" approach is entirely adequate and corresponds to the expectations of both the victim and the person held responsible.

One may further ask if it is not part of the victim's ordinary risks of life that in some situations he or she cannot prove a causal link with a high degree of probability.

If compensation for "lost chances" were admitted wouldn't most cases need to be analysed a second time under the aspect of "lost chances"? In the words of the English \textit{House of Lords} "[a]lmost any claim for loss of an outcome could be

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\textsuperscript{74} Excerpts in ICC International Court of Arbitration Bulletin, 2005 Special Supplement, pp. 73-76 (violation of a ban on distribution and of restrictions on trade, lost profit, decision inspired, among others, by the UNIDROIT Principles).

\textsuperscript{75} \textit{Infra}, IX. 2.

\textsuperscript{76} \textit{Supra}, VI. 4.

\textsuperscript{77} Stoll, \textit{AcP} 176 (1976), 146 (185).

reformulated as a claim for loss of a chance of that outcome". Wouldn't partial compensation then be the rule and full compensation the exception?

According to yet another argument, the concept of "loss of a chance" would generate additional costs given that cases rejected today as failing to meet the standards set by the "more probable than not test" would result in partial compensation under the "loss of a chance" approach. 79

The "loss of a chance" approach would often lead to partial liability. This could generate additional transaction costs. It would often be difficult, time consuming and expensive to determine probabilities with a degree of certainty sufficient to adequately distribute the damages between the parties. It seems that this is why the Spanish courts have, in some cases, opted to compensate not for economic losses but for the mental harm suffered by the victim due to the lost chance. 80

One could further argue that the German and Swiss experiences show that it is possible to solve the most pressing problems of uncertain causation in cases of lawyer's liability and medical malpractice by using traditional remedies. 81

The "all or nothing" approach has the advantage of being simple and probably more efficient. Under the "all or nothing" principle, there is no need to establish precise degrees of probability. If the causation is probable to the degree of preponderance, the damage will be fully compensated for. Below this limit, nothing is due.

All these arguments plead in favour of more traditional solutions or show that the "loss of a chance" approach should be treated with caution.

2. Arguments in favour of partial compensation in case of uncertainty of causation

Other arguments speak, however, in favour of partial compensation in cases of uncertain causation.

Liability for only a certain percentage of the damage is familiar to all European legal orders in case of contributory negligence on the part of the victim. Partial liability as such would therefore not be an innovation.

The traditional approaches have important limits. We have seen that in German law, in cases of gross negligence of a doctor, the burden of proof is reversed. 82

79 See on this argument Fleischer, JZ 1999, 766 (769).
80 Supra, VI. 3.
81 See supra, IV. In all other cases, for example in the absence of gross negligence of a doctor, or in the situations belonging to the third and fourth categories of cases (supra II. 3. and 4.), the claim would fail given the fact that causation cannot be proved with the required degree of certainty. See, for the case of the architect who was excluded from an architectural contest in an unjustified manner: BGH NJW 1983, 442 (444): „Dem Kläger steht jedoch der Nachweis offen, dass er bei Zulassung zum Architekturwettbewerb einen der ausgesetzten Preise gewonnen hätte".
82 Supra, IV. 3.
However, the 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. 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 led to the patient's problems. Given that there was gross negligence, the damage was fully compensated for. This solution is unsatisfactory.

The experiences in France, the Netherlands, England and other countries show that the concept of "loss of a chance" can be useful if handled with care.

One of the characteristics of English tort law is the search for limits of liability. The argument that the floodgates must be kept shut has an important value before English courts. Bearing this in mind, it is most remarkable that English courts have largely adopted, for many categories of cases, the concept of "loss of a chance". That it has not been accepted for medical malpractice cases is an exception in English law that is hardly coherent with the precedents established in other fields by the English courts.

The concept of "loss of a chance" avoids the use of fictions by judges to determine causation in order to reach just results in specific cases. It avoids the courts "taking for granted what in fact is uncertain".

In some cases in which no compensation is awarded today, the application of the concept of "loss of a chance" would lead to partial compensation. In other cases, in which the damage is totally compensated for today, the "loss of a chance" approach would lead only to partial compensation. The costs resulting from the different approaches are not necessarily very different. What changes is the adjustment of the compensation in each specific case.

The issue of "loss of a chance" is raised in situations in which the negligence of one person destroys the chance of an outcome favourable to another. Uncertainties that are due to the first person's negligence should be part of his or her 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

83 Comp. Fleischer, JZ 1999, 766 (773); Jansen, OJLSt. 1999, 271 (277 et seq.).
85 See also Mäsch, Chance und Schaden, p. 35 et seq.
86 Fleischer, JZ 1999, 769 et seq.
87 Mäsch, ZEuP 2006, 656 (665 et seq.).
88 Koziol, in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.29.4.
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". 89

In cases in which it is difficult to establish causation, the parties often reach settlements on the amount of damages. Even in the national legal systems that have not (or not yet) adopted the "loss of a chance" approach, in many cases the victim thus receives partial compensation for the damage suffered. In such cases, the parties often consider partial compensation more equitable than an "all or nothing" approach.

Generally, it is seen that partial compensation in case of uncertain causation better achieves the aim of compensating victims than the "all or nothing" approach. The following example may illustrate this: due to medical malpractice, a doctor does not correctly diagnose an injury or disease in a significant number of cases. As in the case of the English boy, each patient loses a 25% chance of a positive outcome. Several patients suffer from complications. Under the "more probable than not" and the "all or nothing" principles, no patient would receive damage payments since none of them will meet the requirements of the test. Under the concept that provides for damage payments according to the probability of causation, each patient would receive payments corresponding to the probability that the risk may be realized. It is only under this approach that liability and damage payments correspond to the damage that has, in fact, been negligently caused.

Prevention of damage is another aim of liability which has been increasingly accepted in European private law and which has been adopted as one of the guiding principles of liability law in the "Principles of European Tort Law". 90 The objective of preventing damage from happening rather than punishing the tortfeasor supports without any doubt the apportioning of partial compensation in case of uncertain causation. 91 Under the "all or nothing" approach, numerous violations of contractual and extra-contractual obligations remain without consequence although they might have caused enormous damage. Partial liability would, on the contrary, create an incentive to behave as required by contract or by law.

The criticism of the "all or nothing" principle is particularly heavy in cases where the probability reaches the limits of the level required. 92 It has often been

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90 Art. 10:101 2nd sent. of the Principles states: "Damages also serve the aim of preventing harm."

91 See, for example, Fleischer, JZ 1999, 766 (770).

92 See, for example, Bydlinski, FS Beitzke, p. 3 (32 et seq.); Stoll, FS Steffen, p. 465 (466); Jansen, 19 OJLS 271 (277 et seq.); Kozioł, FS Stoll, p. 233 (238); Ch. Müller, La perte d'une chance, n. 272 et seq., 290; Mäsch, Chance und Schaden, p. 125 et seq.; Hirsch, Perte de chance et causalité, VII.: "la théorie
criticised as hardly justifiable that in case of a probability of causation of 49% an action is entirely rejected whereas in case a probability of 51% the victim receives full compensation. Donaldson, the English Master of the Rolls and judge at the Court of Appeal, expressed the opinion that “[i]f this is the law, it is high time that it was changed”.93 Many practitioners on the continent confirm that in many cases clients consider the “all or nothing approach” as highly unjust and difficult to accept for victims.

IX. Proposal

Several arguments speak against compensation for “lost chances”; others speak in favour of the concept of “loss of a chance”. How could the problem be solved?

In many cases of the first category (i.e. cases of lawyer’s liability),94 it will be possible to proceed to “proceedings within proceedings” allowing for an ex-post remedy of the problem of uncertainty.95 This seems to be the best solution for this category of cases.

In the other categories of cases, a distinction could be drawn between contractual liability and liability in tort.

1. Contractual liability

In the field of contractual liability, to preserve the chance of a successful outcome may be at the heart of the contractual obligations:96 If a doctor fails to carry out an act that is prescribed by professional standards, he violates a principal obligation of his contract with the patient, which is to do everything that is necessary in the patient’s interest. The principal obligation of the doctor is, in most cases, obviously not to guarantee a favourable outcome but to do everything necessary to preserve the patient’s chances of recovery. If a lawyer fails to take a step that is required by the interests of his client, he violates a principal duty of the contract with the client, i.e. to do anything that is necessary for the client to succeed with his case.

Once the violation of this obligation is established, the problem is how to measure the resulting damage. In this context, the patient’s or the client’s chance of success could very well be taken into consideration even if the probability of a favourable outcome is below 50%.97

93 Hotson v East Berkshire Area Health Authority 2. 7. 1987 (1987) 1 AC 750 (759).
94 Supra, IV. 1.
95 Supra, II. 1. For a critical view of this solution, see Mäsch, ZEuP 2006, 656 (674); idem, Chance und Schaden, p. 142 et seq., 388 et seq., 400 et seq.
96 This is true both for the contract between patient and medical doctor and for the contract between client and lawyer. See also Mäsch, Chance und Schaden, p. 237 et seq., conclusions p. 423 et seq., particularly points 3, 6, 7 and 10; contra Fleischer, JZ 1999, 766 (772).
97 See Mäsch, Chance und Schaden, p. 237 et seq. and 424-426 (nos. 6-14).
The fact that the violation of a principal obligation under the contract would otherwise not be sanctioned and the aspect of *prevention* as one of the main purposes of liability law are important arguments in favour of partial compensation according to the degree of probability of the chance that was lost.  

2. Liability in torts

A. Starting point

In the field of tortuous liability, the issue is more delicate. Comparative studies have confirmed that certain interests that lawyers trained in Germanic legal systems usually call *absolute rights* enjoy a more extensive protection than others. In German law, the victim must, in principle, establish the violation of an absolute right in order to succeed with a claim in tort. In Swiss law an act is considered illegal and triggers liability if it violates an absolute right (in this case Swiss lawyers speak of "Erfolgsunrecht"). We observe that these rights also enjoy a more extensive protection in other systems. This is for instance the case in English law and even in French law, where the proposed reform confirms a hierarchy of interests protected in torts. This hierarchy of interest provides an efficient guarantee, in the German legal family, but also in England, that the floodgates of liability are kept shut.

To state, without any major distinction between the interests concerned, that the "loss of a chance" (for example to recover from an injury or to win a legal procedure) is a compensable injury in tort risks undermining the limits of tortuous liability. Given that many tort law systems respect a hierarchy of legally protected interests in tortuous liability, it seems highly problematic that the different categories of "loss of a chance" should all be treated in the same manner: In medical malpractice, the interests at stake are bodily integrity and life. These interests enjoy the highest protection in the law of torts. On the other hand, in the other categories of cases, the "lost chances" concern purely economical interests that enjoy a more limited protection in the law of torts.

98 See also Mäsch, Chance und Schaden, p. 427 no. 18; idem, ZEuP 2006, 656 (675).
100 Jansen, OJLSt. 1999, 271 (288). In order to limit liability, French courts use the element of "direct causation", see for example, Geneviève Viney, Modération et limitation des responsabilités et des indemnisations, in: Jaap Spier (ed.), The Limits of Liability, Keeping the Floodgates Shut, La Haye/ Londres/Boston 1996, p. 127, 131 et seq.
103 See, for example, W. van Boom/H. Koziol/Ch. Witting: Pure Economic Loss, Wien/New York 2004; Koziol, in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.29.5.
The rule in art. 1346 of the French *avant-projet* that states that “the loss of a chance is a compensable injury” therefore may fit in French law, but it seems unlikely that it would be adequate for certain other countries or for European private law in general, even *de lege ferenda*.

B. *Proposal for solution*

a) **Condition of liability: Violation of an interest enjoying protection by the law of torts**

For liability in tort, the solution could be in the continued respect of the traditional hierarchy of protected interests, as suggested by the “Principles of European Tort Law”. According to art. 2:102 of the Principles which is the result of intensive comparative studies: “(1) The scope of protection of an interest depends on its nature; the higher its value, the precision of its definition and its obviousness, the more extensive is its protection. (2) Life, bodily or mental integrity, human dignity and liberty enjoy the most extensive protection”, whereas, according to sect. (4) “[p]rotection of pure economic interests or contractual relationships may be more limited in scope. In such cases, due regard must be had especially to the proximity between the actor and the endangered person, or to the fact that the actor is aware of the fact that he will cause damage even though his interests are necessarily valued lower than those of the victim.”

In the case of the English teenager, the interest affected would be the boy’s health and bodily integrity, i.e. an interest enjoying most intensive legal protection. The Spanish secretary would be affected in her economic interests that enjoy minor protection in the law of torts.

b) **Partial liability corresponding to the probability of causation**

Once an injury to an interest protected by tort law is established, the question is – yet again – one of causation between the defendant’s act and the victim’s damage (in the case of the English boy: between the doctor’s negligence and the boy’s lasting handicap). There is a 25% probability that the handicap is due to medical malpractice whereas, there is a 75% probability that the problem is solely due to the boy’s fall from the tree, i.e. an event that lies within the boy’s own sphere.

In such a situation, the liability could be determined by applying a rule on alternative causation. Just like the decision of the 4th senate of the Austrian Supreme Court of Justice,\(^{104}\) art. 3:103 of the Principles of European Tort Law (on “alternative causes”) provides in its sect. (1) that

“[i]n 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 to the extent corresponding to the likelihood that it may have caused the victim’s damage.”

In addition, art. 3:103 of the Principles states that

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\(^{104}\) *Supra*, IV. 4.
"[t]he 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."

Under the condition that the victim is injured in an interest enjoying protection by the law of torts, the damage could then be divided between the victim and the person held to be liable and the damage could be apportioned according to the probabilities of causation.105

Probabilities that remain below a certain borderline should, for practical reasons,106 be entirely ignored in determining the shares of liability. In addition purely hypothetical damages would have to be ignored. In this sense, the French Cour de Cassation takes “lost chances” into consideration only if they are “réelle et sérieuse”;107 and, according to the English courts, the lost chance must have been “a real or substantial chance as opposed to a speculative one”.108

Under this proposal, the “loss of a chance” would not be regarded as a (new) category of damage contrary to the current French proposal for reform. Cases of “lost chances” would, on the contrary, be analysed under the rules on alternative causes.

In certain situations, the concept of “loss of a chance” and the application of the rules on alternative causes pursue the same aims and are, in these cases, to a certain degree and as for the results achieved by both approaches equivalent.109

Compared with the concept of “loss of a chance”, the suggested solution would lead to an apportionment of damages corresponding to the heights of probabilities of causation, just like the “lost chances” approach, but would have the advantage of perfectly respecting the hierarchy of interests protected by the law of torts.110

105 For the application of the Principles to leading European cases in the field of “lost chances” and, in particular, the case of the English boy, see Th. Kadner Graziano, in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.28.1-25.
106 See on this issue Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, chapter 9.
3. Solution of the cases under the proposal

How would the cases we used as examples be solved under this proposal?

The chances of the Spanish secretary to win the case before the labour court would be analysed in the subsequent action for liability for breach of contract against the lawyer who has omitted to bring the claim in time. The solution would thus be "proceedings within the proceedings" and – in the ideal case – certainty about causation between the lawyers' negligence and the secretary's damage would be determined in the proceedings for the lawyers' liability. If it were to prove impossible to establish, in a hypothetical manner, whether the lawyer's negligence has caused the secretary's loss, she could, at least on a contractual basis, claim damages for "loss of a chance" of an amount corresponding to the probability of her winning the case.\[111\]

The claim of the English teenager against his doctor would be successful to the height of 25% of the damage suffered, either on a contractual basis or in tort, given that the boy suffered damage to his health, i.e. to an interest that enjoys the most extensive protection under tort law.\[112\]

The candidate for the title of Miss Suisse 2006 could not succeed on a contractual basis since there was no contract between her and the person responsible for the traffic accident in which she was hurt. Given that she was physically injured, a claim for tortious liability would, in principle, be open to her. It seems however doubtful that her claim would succeed. Given the fact that she remains free to participate in the next year's contest her chance is not definitely lost. She could, however, claim costs caused by the delay of her participation.

XI. Summary

1. The courts in Europe use the concept of "loss of a chance" in similar situations. The common denominator in cases in which the approach has been used is that the person held to be liable has acted negligently but the victim cannot show with the probability that is usually required that the loss would have been prevented had the other party acted as required by contract or law.

2. The concept of "loss of a chance" changes the object of legal protection. According to this approach, 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 contract or in tort. The fact that triggers liability is the "loss of a chance" itself. Due to the change of perspective, the issue of causation is no longer a problem. The concept of "loss of a chance" does not lead to compensation according to the principle

\[111\] For the solution of the case under the Principles of European Tort Law, see Th. Kadner Graziano, in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.28.20-25.

\[112\] For the solution of this case under the Principles of European Tort Law, see Th. Kadner Graziano, in: Winiger/Koziol/Koch/Zimmermann (eds.), Digest of European Tort Law, 10.28.1-19.

147
of "all or nothing" but to partial compensation of the damage corresponding to the chance lost.

3. As far as compensation for "lost chances" is concerned, the situation in European private law is most diverse: In many countries the idea of compensating for "lost chances" has not yet been accepted or has been rejected by the courts. In numerous other countries, the concept of "loss of a chance" has been widely accepted or has been accepted for certain categories of cases.

4. Taking into account the recent developments in European private law as far as compensation for "lost chances" is concerned, the solution for the future could be to partially abandon the principle of "all or nothing" and to compensate, under certain conditions, for "lost chances" according to the probability of causation.

5. In the law of contracts, preserving the chance of a successful outcome may be at the heart of the contractual obligations. Once the violation of this obligation is established, the problem is how to measure the resulting damage. In this context, the patient's or the client's chance to succeed could very well be taken into consideration even if the probability of a favourable outcome is below 50%.

6. In the field of liability in tort, in order to respect the limits of tortuous liability the solution should respect the traditional hierarchy of protected interests just as is suggested by the "Principles of European Tort Law". Once an injury to an interest protected by the law of torts is established, the "loss of a chance" should, in tort, not be regarded as a (new) category of damage but as an issue of causation.

7. Rules on alternative causes such as those suggested in the "Principles of European Tort Law" would allow to partially compensate for "lost chances" and to apportion the damage according to the probabilities of causation. This approach has the advantage of perfectly respecting the hierarchy of interests protected by the law of torts and therefore respecting the limits of tortuous liability whilst at the same time avoiding the harshness of the "all or nothing approach".

8. Given the fact that, in recent years partial compensation in cases of uncertainty of causation has been awarded by state courts or in arbitration proceedings in several European countries, and given the fact that the UNIDROIT Principles and, with a different approach, also the "Principles of European Tort Law" suggest compensating for "lost chances", it seems that the issue also merits further discussion in those countries that, like Germany, Switzerland, or, e.g. the Czech Republic, still exclusively apply "all or nothing" approaches.