Damages for the Loss of a Chance in Contract and Tort

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When a plaintiff's chance of a prize or cure is dashed by a defendant's negligence or breach of contract, the plaintiff no doubt feels that a remedy is in order. The question arises, however, whether a hope, a mere chance of a prize, remedy, or cure, is a loss that the courts will consider worthy of a remedy. Early this century damages were awarded for a lost chance in *Chaplin v Hicks*.[1] The extent of that remedy has recently been more closely defined by the House of Lords in *Hotson v East Berkshire Area Health Authority*.[2]

I. Whether Damages Are Available

1. Chaplin v Hicks

The plaintiff in *Chaplin v Hicks* was a young woman who, in 1908, entered a beauty contest organised by the defendant. A contractual relationship existed. From over 6000 entrants the plaintiff was selected as one of fifty finalists. Each finalist was to attend a personal interview with the defendant, and he was to choose twelve winners who would receive valuable employment as actresses. The plaintiff, however, was unable to attend at her allotted interview time and the defendant, in breach of his contract with the plaintiff, refused to interview her at a later date. The plaintiff, then, was not even considered in the final selection.

Counsel for the defendant argued that damages should be nominal because

1 [1911] 2 KB 786.
2 [1987] 2 All ER 909.

"it is impossible to estimate the quantum of the reasonable probability of the plaintiff's being a prize-winner".[3] The court disagreed. They held that the plaintiff could not claim damages for the lost prize itself since she could not prove on the balance of probabilities that she would have won, even if she had been considered. Nevertheless, the mere opportunity of competing for that prize was a valuable right the loss of which could be compensated:[4]

> the taking away from the plaintiff of the opportunity of competition, as one of a body of fifty, when twelve prizes were to be distributed, deprived the plaintiff of something which had a monetary value.

The plaintiff was awarded substantial damages for the value of the chance of competing which she had contracted for.

2. *Hotson v East Berkshire Area Health Authority*

Difficult questions have arisen since *Chaplin v Hicks*, in both contract and tort cases, over how far the remedy for a lost chance can be extended. The House of Lords has now answered some of these questions in *Hotson v East Berkshire Area Health Authority*.[5]

The plaintiff in *Hotson* was a thirteen year old boy who injured his hip at school. The defendant health authority was admittedly negligent in delaying the treatment of his hip for five days. Recovery from the injury depended on whether the blood vessels leading to the femoral epiphysis, a part of a child's hip joint, were intact. It was probable, a probability which was assessed at 75 percent, that all those blood vessels had been destroyed by the fall so that, even without the defendant's negligence, the plaintiff would have suffered permanent deformity of the hip. However, if some blood vessels had survived the fall, then prompt treatment would have led to full recovery and it would have been the defendant's negligence which had caused the deformity.

The Court of Appeal[6] held that a cure which depends upon a 25 percent chance of blood vessels being intact is not distinguishable from a beauty contest prize which depends upon a chance that the entrant will be selected as a winner. They therefore upheld Brown J's decision[7] that the plaintiff be awarded damages of £11,500 for his lost chance of a cure. That figure represented 25 percent of what damages would have been if the award had been for the deformity itself.

The House of Lords, however, overturned the Court of Appeal's decision and allowed the appeal of the East Berkshire Area Health Authority. Lord Ackner and Lord MacKay pointed to an important factor which distinguishes

3 Supra at note 1, at 795.
4 Ibid, at 793.
5 Supra at note 2.
6 [1987] 1 All ER 210.
7 *Hotson v Fitzgerald* [1985] 3 All ER 167, 181.

Hotson[8] from *Chaplin v Hicks*. This difference is in the nature of the facts upon which the chance depends in each case. In *Chaplin v Hicks* the chance depends on a hypothetical fact – whether the defendant, *if the situation had ever arisen*, would have selected the plaintiff as a winner. *Hotson,* however, is very different. Here the chance depends on a past fact – whether the blood vessels, *in a situation which did arise*, were already destroyed before the defendant's negligence. Lord MacKay said that in *Hotson*,[9]

> the fundamental question of fact to be answered in this case related to a point in time before the negligent failure to treat began. It must, therefore, be a matter of past fact.

This distinction between the two cases is vital because of the rule stated in *Mallett v McMonagle* by Lord Diplock:[10]

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

The essential issue behind the chance in *Hotson* (whether the blood vessels were intact) was an issue of past fact and, therefore, susceptible to the *Mallett v McMonagle* test. By that test, as a matter of certain fact, the blood vessels had not remained intact and, therefore, no chance existed at all. Although in fact there was a chance that the blood vessels were still intact, the rule stated in *Mallett v McMonagle* means that the *factual* chance is not recognised by the *law* as being a chance at all. This is why Lord Ackner says that even before the defendant's negligence the plaintiff's femoral epiphysis was "doomed".[11] The plaintiff, therefore, was unable to prove causation.

In *Chaplin v Hicks*, however, the essential issue behind the chance (whether the defendant would select the plaintiff as a winner) was a hypothetical fact. It was not a past fact to which the rule stated in *Mallett v McMonagle* could be applied. That rule clearly cannot apply to hypothetical facts, for otherwise no causation could have been proved in *Chaplin v Hicks*, which the House of Lords expressly recognises and does not overrule.[12] Before applying *Mallett v McMonagle*, Lord MacKay finds it necessary to note that *Hotson* "did not raise any question of what might have been the situation in a hypothetical state of facts".[13]

Thus it appears that the House of Lords have in no way cast doubts upon the validity of treating a mere chance as a "right of considerable value"[14] the loss of which can be compensated by an award of damages. Rather, they have merely decided that such a chance cannot depend on a past fact. Damages for the loss of a chance will only be available where the chance depends on a hy-

8 Supra at note 2, at 915 per Lord Mackay, and at 921 per Lord Ackner.
9 Ibid, at 915.
10 [1970] AC 166, 176.
11 Supra at note 2, at 921.
12 Ibid, at 913 and 921.
13 Ibid, at 915.
14 Supra at note 1, at 797 per Fletcher Moulton LJ.

pothetical fact, as in *Chaplin v Hicks*.

Yvonne Cripps has said in a case note on the House of Lords decision that,[15]

> [t]he House of Lords rejected the proposition that a defendant could be liable for causing the loss of a chance of recovery which was less than 50 percent even if proper medical treatment had been given promptly.

It is respectfully submitted that this note overstates the effect of the decision of the House of Lords. Their decision rested on the chance in *Hotson* being dependent on a past fact. A chance of recovery which is less than 50 percent might, however, depend on a hypothetical fact. For example, the chance of recovery might depend on how a patient *would have* reacted to certain drugs *if* the defendant had not negligently failed to administer those drugs. In such a case there appears to be nothing in the House of Lords decision which would prevent recovery on the same principles as were applied in *Chaplin v Hicks*.

This is especially clear in the judgment of Lord MacKay, who, after noting that, in *Hotson*, the chance depended on a past fact, said:[16]

> I have the impression from reading the judgments of the Court of Appeal that this aspect of the facts in the present case may not have been in the forefront of the discussion there. Much of the judgment of the Court of Appeal will remain for consideration in the future.

Even Lord Bridge, whose judgment is perhaps the most restrictive, recognises that *Hotson* does not quash the notion of an analogy being drawn between *Chaplin v Hicks* and medical negligence cases:[17]

> I think there are formidable difficulties in the way of accepting the analogy. But I do not see this appeal as a suitable occasion for reaching a settled conclusion as to whether the analogy can ever be applied.

Lord Bridge does not expand on what are the "formidable difficulties" but one important possibility is discussed below.[18]

3. *The Application of* Hotson *to Contract Actions*

It seems clear that the decision in *Hotson* will apply equally to contract actions. Even where parties contract on the express terms that one confer a benefit upon the other, the value of which depends upon the chance of a past fact, no damages will be awarded for the lost chance.

Illustration

A dog is injured while attempting to jump a fence. Recovery is possible, but only if certain

15 [1987] CLJ 389, at 389.
16 Supra at note 2, at 919.
17 Ibid, at 914.
18 Infra, at p 43.

nerves have not been damaged in the accident, and treatment is prompt. It is impossible to evaluate certainly whether those nerves have been damaged, but a veterinary expert estimates there is a 75 percent probability that they have been. The dog's master contracts with Vet to treat the dog, although both know that even the best treatment will depend upon the 25 percent chance that the nerves are not damaged. Vet, in breach of the contract, fails to treat the dog, whose injury becomes permanent.

In the above illustration the dog's master could not claim damages for the lost chance of having his pet cured. Although a factual chance existed, and the parties based their contractual relationship on that chance, it is a chance which the law does not recognise as existing at all because of the rule stated in *Mallett v McMonagle* as applied in *Hotson v East Berkshire Area Health Authority*.[19]

There may be other remedies to the plaintiff who has lost a chance based on a past fact. Specific performance may be available,[20] although that would clearly be of little use in the above illustration. The plaintiff might cancel the contract and recover any money paid.[21] There might even be an action to recover what the defendant has saved by not performing.[22] Damages for the chance, with which this article is concerned, will not be available however.

4. *The Application of* Chaplin v Hicks *to Tort Actions*

In *Hotson v East Berkshire Area Health Authority*[23] the House of Lords did not have to decide whether a chance which *was* legally recognised – that is, a chance which depends on a hypothetical fact – could be compensated in a negligence action just as it had been in a contract action in *Chaplin v Hicks*.[24] Since there was no legally recognised chance, that issue did not arise. The Court of Appeal, however, who thought a chance did exist, did consider the issue. It appears to be this aspect which Lord MacKay was referring to in the House of Lords when he said "much of the judgement of the Court of Appeal will remain for consideration in the future".[25] It is perhaps also one of the "fundamental difficulties" which Lord Bridge saw in applying *Chaplin v Hicks* to medical negligence actions.

Counsel for the Health Authority had argued before the Court of Appeal that a distinction should be drawn between *Chaplin v Hicks* and cases involving tort actions on the ground that "in the case of tort, but not of contract, the plaintiff has to prove some loss or damage and must do so on the balance of probabilities".[26]

19 Supra, at p 41.
20 *Markholm Construction Co Ltd v Wellington City Council* [1985] 2 NZLR 520.
21 Contractual Remedies Act 1979, ss 7 and 9.
22 *Joyner v Weeks* [1891] 2 QB 31; *Samson and Samson Ltd v Practor* [1975] 1 NZLR 655. But compare *Tito v Waddell* (No.32) [1977] 1 Ch 106, 332.
23 Supra at note 2.
24 Supra at note 1.
25 Supra at note 2, at 919.
26 Supra at note 6, at 216.

Donaldson M.R. pointed out, however, that this distinction only applies where the damages in the contract action are merely nominal:[27]

> Even in contract, if more than a bare right of action is to be established, the plaintiff must prove a loss of substance and, once again, this must be proved on the balance of probabilities.

The fundamental point in *Chaplin v Hicks* was that substantial loss, such as that which is the "gist of liability"[28] in negligence actions, *had* been proved. Although the plaintiff could not prove that she had lost the winning prize as a result of the defendant's breach, she could prove on the balance of probabilities that she had lost the *chance* to win that prize. The loss of that chance was a substantial loss and had been proved on the balance of probabilities. The proven loss would, therefore, be sufficient to found an action in negligence, just as it had been sufficient to found substantial damages in contract. Dillon LJ said in the Court of Appeal:[29]

> I see no reason why the loss of a chance which is capable of being valued should not be capable of being damage in a tort case just as much as in a contract case such as *Chaplin v Hicks*.

It certainly seems that there can be no logical distinction between contract actions and tort actions where the application of *Chaplin v Hicks* is concerned. Although the Court of Appeal were wrong in thinking that a legally recognised chance existed at all, it is submitted that they were correct in thinking that *if* such a chance did exist, then it could be compensated in a negligence action. If that is so, then despite the decision of the House of Lords in *Hotson*, it is possible that *Chaplin v Hicks* will yet be applied to medical negligence tort actions:

Illustration

> Patient is bitten by a snake. A cure is possible, but it is a cure which succeeds in only 25 percent of cases. Success depends upon how Patient's body reacts to an antidote. What that reaction would have been cannot be determined with reference to past facts – it is an unknown contingency. Public Hospital negligently fails to provide the antidote. Patient suffers severe and permanent injury as a result of the effects of the snake's venom. Patient brings a negligence action.

If the above situation were to arise in a jurisdiction without legislation abolishing actions for damages arising from personal injury by accident,[30] then it is submitted that *Chaplin v Hicks* should be applied and damages awarded for the lost chance of a cure. Patient's chance should be legally recognised as a chance, since it depends not on a past fact, but on a hypothetical fact – how Patient would have reacted to the antidote. There is substantial loss because

27 Ibid.
28 Fleming, *The Law of Torts* (6th ed 1983) 99.
29 Supra at note 6, at 219.
30 Accident Compensation Act 1982 s 27(1).

the mere chance was a thing of value.

5. *Chances Which are Better than Even*

Assuming a chance which is based on a hypothetical fact and, therefore, recognised by the law, the next question which arises concerns the situation where that chance is heavily in the plaintiff's favour. Suppose that in *Chaplin v Hicks* forty-five of the fifty finalists were to be selected as winners and given valuable employment as actresses.

The plaintiff might then claim that the loss of the prize itself could be proved on the balance of probabilities to be a result of the defendant's breach and her damages should equal the full value of the prize. An alternative view is that in such a situation damages should still be awarded for the chance itself and therefore discounted, albeit by less than 50 percent, to reflect the value of the lost chance, not the prize. The authorities seem to support the latter view.

In *Otter v Church, Adams, Tatham & Co*[31] the defendant solicitor negligently failed to advise the plaintiff that the deceased, an RAF pilot serving in India in 1944, should make a will. As a result a property worth £7,000 passed to the uncle of the deceased, and not to the deceased's mother, when he was killed on active service on 14 May 1945. It was highly likely that had the plaintiff, the deceased's mother, been properly advised by the defendant, she would have told the deceased of the rule of law by which the property would pass to his uncle, and he would have made a will in her favour. There was a small chance, however, that the deceased would not have done so. This was clearly a case of a greater than even chance which depended on a contingency.

Upjohn J, citing *Chaplin v Hicks*, held that he must consider the chance that the deceased would not have made a will, when considering damages. Accordingly, he discounted damages from £7,000 to £6,500. Ogus notes of this case that "the benefit is not the profit, but the chance of making a profit".[32] A similar solution was reached in another case involving a negligent solicitor, *Kitchen v Royal Air Forces Association*.[33] The plaintiff had a cause of action against an electricity company which was "more likely to succeed than not."[34] When the action lapsed because of the solicitor's negligence, however, damages were awarded for the lost cause of action (value £2,000) not the likely successful outcome (value £3,000).

In tort cases also, it has been held that where loss depends on a greater than even contingency, damages should be discounted to reflect that contin-

31 [1953] Ch 280; cf *Sykes v Midland Bank Executor and Trustee Co* [1971] 1 QB 113; 69 LQR 160.

32 Ogus *The Law of Damages* (1973) 296.

33 [1958] 2 All ER 241.

34 Ibid, 251.

gency. In *Clark v MacLennan*[35] the defendant doctor negligently performed an operation prematurely. Even if he had waited, however, the success of the operation would have depended upon hypothetical contingencies in relation to how an operation performed at the correct time on this particular patient would have proceeded.

The plaintiff was not, therefore, entitled to damages for the full failure to cure, but only to damages representing the two thirds *chance* of a cure which she had lost.

Certainly the decision of the House of Lords in *Hotson* has now shown that this type of discounting of better than even chances cannot occur in cases where the chance depends on a past fact. In such cases the past fact must be determined on the balance of probabilities, so that there is no chance at all – the plaintiff has lost a certainty, not a chance, and he will receive full damages for the actual physical or financial loss he has suffered. This principle stated in *Mallett v McMonagle*, however, applies only "in determining what did happen in the past."[36] Where a chance exists which depends on a contingency, a different rule applies:[37]

> When one is dealing with a hypothetical event one values the chance the plaintiff has of a successful outcome. One does not have to decide on the balance of probabilities what the outcome will be.

This different rule should be just as applicable to likely hypothetical events as it is to unlikely hypothetical events. It is therefore submitted that if in *Chaplin v Hicks* forty-five of the fifty finalists were to be selected as winners, the plaintiff would still receive damages according to her chance of winning, which would be slightly less than if it could have been shown that the defendant had caused her to lose the actual prize. That could not be shown because causation would depend on evaluating a hypothetical event and that cannot be evaluated on the all or nothing balance of probabilities test as the distinction between *Chaplin v Hicks* and *Hotson v East Berkshire Area Health Authority* shows.[38] When, therefore, Lord Ackner says in *Hotson* that, "once liability is established, on the balance of probabilities, the loss which the plaintiff has sustained is payable in full", it is submitted that he must be referring only to those cases where the lost chance depends on a past fact.

Policy considerations also dictate that damages be discounted where the chance lost is greater than even. If a plaintiff can benefit from a less than even chance that he would have been cured, then a defendant should be allowed to benefit from a less than even chance that the plaintiff would *not* have been cured. The defendant's benefit is the discount of damages. As Brown J said in the trial judgment in *Hotson*, the opposite approach "smacks somewhat of

35 [1983] 1 All ER 416.
36 Supra at note 10, at 176.
37 *Clark v MacLennan*, supra at note 36, at 432.
38 Supra at note 2, at 915 and 921.

heads I win, tails you lose".[39]

6. *The Reduction of a Chance*

Perhaps the most difficult problems regarding the application of *Chaplin v Hicks* arise where a chance which depends on a hypothetical fact is not destroyed, but merely reduced by the defendant's breach:

Illustration

Horse Owner contracts with Racing Club to enter his horse in a race. Racing Club breaches the contract by increasing by threefold the number of horses entered in the race. In such a large field Horse Owner's horse is trapped on the rail and does not achieve a placing.

In this illustration the value of the reduction in the horse's chance depends not on a past fact, but upon a hypothetical fact – whether the horse would have achieved a placing in the smaller field for which Horse Owner had contracted. The chance is, therefore, one which is recognised by the law as "something which had a monetary value".[40] The reduction of that chance is a loss which can be compensated. That result would seem to be a straightforward application of *Chaplin v Hicks*.

A problem arises, however, if after having its chances of winning reduced in this way, the horse, nevertheless, wins the race. The problem is that in seeking to allow plaintiffs a remedy, where they cannot prove that the defendant caused them actual financial loss, the courts may have opened the way for recovery by plaintiffs who have suffered no financial loss at all.[41] The argument here is that if it is the lost chance itself which is being compensated, actual physical or financial loss is irrelevant. The chance itself has still been reduced. If the courts require proof of financial or physical harm, they defeat the whole basis of *Chaplin v Hicks*, since in that case the plaintiff could not prove that the defendants had caused her any harm other than the loss of the chance itself. The Horse Owner, so the argument goes, should therefore recover for his reduced chance, even though his horse won the race.

Justice certainly seems to require that the plaintiff fail in such circumstances. Why should he be compensated when he is no worse off? Furthermore, the argument for recovery by a winning plaintiff is flawed. The fallacy is exposed by Croom-Johnson LJ in the Court of Appeal in *Hotson*:[42]

> the chance that something may go wrong is normally subsumed in the eventual result. If no harm is caused in the end the plaintiff will have suffered no damage, even if at one stage in his treatment there was a risk that things might go wrong.

A chance is only a chance at all when it may lead to either of two results.

39 Supra at note 7, at 180.
40 *Chaplin v Hicks*, supra at note 1, at 793.
41 *Hotson v East Berkshire Area Health Authority* (CA), supra at note 6, at 218.
42 Ibid, 224.

Thus in *Chaplin v Hicks* if the chance were reinstated, all things being equal, the plaintiff might have either won or lost. Where, however, the race has been run and the plaintiff has won despite his reduced chance, there is no such contingency. He cannot claim that he has lost a chance at all when, if that chance could now be somehow reinstated, if the race could be rerun, there would be no possibility of his situation being improved. It can be seen how this problem illuminates exactly what was being compensated in *Chaplin v Hicks*, not a mere increased risk which may have existed at some time in the past, but a right which if it could now be reinstated would have value to the plaintiff. If the plaintiff has won his race or contest or achieved his cure in any event, no such valuable right exists to be compensated.

Similarly, if Horse Owner brought an action for damages for his reduced chance *before* the race had been run, it is unlikely that he would succeed. The possibility would still exist that the lost chance would be "subsumed in the eventual result",[43] and the courts will not allow a remedy to "a mere potential victim".[44] If, however, Horse Owner *cancels* the contract before the race is run, then there will be no possibility of an eventual win and damages would be awarded for the lost chance just as if the horse had run and lost the race. If Horse Owner does cancel the contract, he may mitigate his damages by entering an alternative race if there is still time.[45]

II The Quantum of Damages

In *Chaplin v Hicks*[46] the problem of quantifying the plaintiff's loss did not arise. Once it had been decided by the court that the mere chance of a prize was a valuable right which could be compensated by substantial damages, the quantum of those damages was that which had been assessed by the jury. Since 1911, however, certain principles have been considered which a judge should apply when assessing the quantum of damages for the loss of a chance which depended on a contingency. Consideration will also be given to relief under s 9 Contractual Remedies Act 1979.

The judgments in the Court of Appeal in *Hotson v East Berkshire Area Health Authority*[47] will be relied upon in considering some of the quantification principles. Although the House of Lords overturned the Court of Appeal's decision, it did so on the ground that there was no chance at all. Accordingly, the statements of the Court of Appeal upon what the consequences would have been if there had been a chance, are still worthy of consideration.

43 Ibid.
44 *McGhee v National Coal Board*, supra at note 19, at 1015.
45 *Sapwell v Bass* [1910] 2 KB 486; cf *Chaplin v Hicks*, supra at note 1, at 797.
46 Supra at note 1.
47 Supra at note 6.

1. Whether Damages Will Be Proportional To The Chance

The general approach of the courts in assessing damages for lost chances has been to give a percentage value to the chance and award that percentage of the total value of the prize or cure in relation to which the chance existed. In *Kitchen v Royal Air Forces Association* Lord Evershed, M.R., says this of the trial judge's estimation of damages:[48]

> since the admitted maximum was £3,000 the final award of £2,000 must, in my view, mean that, in the opinion of the learned judge, this cause of action was one which, on merits, was more likely to succeed than not.

An even more exact proportional approach was taken by Pain J in *Clark v MacLennan*.[49] He found that the plaintiff had lost a two-thirds chance of avoiding permanent stress incontinence. Damages of £11,418.33 were awarded, exactly two-thirds of the £17,127.50 which would have been awarded had the damages been for the injury itself, and not for the chance of the injury.[50]

In the Court of Appeal in *Hotson*, however, Donaldson MR questioned whether this approach would always be applicable. In some circumstances the chance will be worth more (or less) to the plaintiff than its proportion to the eventual loss.[51] It has even been suggested that, where the percentage value of a chance is below a certain level, no substantial damages should be awarded at all. In his trial judgment in *Hotson*, Brown J suggested that no substantial damages could be awarded for a chance of much less than 25 percent.[52] That would be awarding damages for mere speculation, not for a substantial chance.

It might be considered rather harsh, however, that a 10 percent chance of winning a horse race be dismissed as merely speculative. Surely that is a valuable right. This point is especially clear in contract. Should a contracting party be denied a remedy in damages simply because the contingent chance he has contracted for is a small one? Some authority for the proposition that the loss of even quite small chances may be compensated can be drawn from *Otter v Church, Adams, Tatham & Co.*[53] That case involved a chance which was very large rather than very small. The important thing was, however, that damages were still discounted to reflect the chance. If the defendant can benefit from a "rather unlikely" chance that damage would not have occurred, then the plaintiff should benefit from an equally small chance. It is submitted, therefore, that a directly proportional approach will almost always be applied, even to very small or large chances.

48 Supra at note 34, at 251.
49 [1983] 1 All ER 416.
50 Ibid, 433.
51 *Hotson v East Berkshire Area Health Authority*, supra at note 6, at 217.
52 *Hotson v Fitzgerald*, supra at note 7, at 177.
53 Supra at note 32.

There will often be difficulty in putting a percentage value on a particular chance. In *Otter v Church, Adams, Tatham & Co.*, however, Upjohn J said "that difficulty is no bar to the assessment of damages . . . I have to make up my mind as best I can".[54]

That assessment will obviously depend on wide factors. It has been suggested that if a case involving a horse race were to arise, evidence from bookmakers might be relevant.[55]

The proportional approach would also seem to apply to indirect damage. Take the example of the horse race. An indirect gain from winning a major horse race will be that the value of the horse will increase. If a plaintiff loses a 25 percent chance of losing a race, his damages will be 25 percent of the prize money *plus* 25 percent of the amount by which the value of his horse would have increased if it had won.[56]

2. *Damages and Cancellation: Contractual Remedies Act 1979*

When a chance based on a hypothetical fact has been lost because of a defendant's breach of contract, it will be necessary to consider the relationship of damages and cancellation under the Contractual Remedies Act 1979.

Often the price paid for a chance will be greater than the value of that chance. If Plaintiff pays $2 for a lottery ticket from which he has a one percent chance of winning $100, then he has paid $2 for a chance which is worth, by the proportional approach, only $1. As long as such a plaintiff does not affirm the contract after the chance has been destroyed or reduced by the defendant's breach,[57] he may cancel the contract[58] and that the court will order the $2 to be repaid under s 9(2)(a) of the Contractual Remedies Act. No damages would be awarded, since any repayment of the price paid is set off against damages.[59] This appears to have been the basis of the decision not to award damages for a lost contingent chance in *Sapwell v Bass.*[60] There, the value of the chance was less than the price which the plaintiff had saved by rescinding the contract. There was, therefore, no loss for which damages could be awarded.[61]

In other cases the price paid will be less than the value of the chance. If Plaintiff pays $2 for a lottery ticket from which he has a one per cent chance of winning $400, then he has paid $2 for a chance which is worth, by the proportional approach, $4. In such a case damages, the value of the lost chance, would be $4 if no other order is made. If the contract had been cancelled and

54 Ibid, 290.
55 *Hotson v East Berkshire Area Health Authority*, supra at note 6, at 224.
56 *Chaplin v Hicks*, supra at note 1, at 797.
57 Contractual Remedies Act 1979, s 7(5).
58 Section 7(4)(b)(i).
59 Section 10(2).
60 Supra at note 47.
61 *Chaplin v Hicks*, supra at note 1, at 797.

an order made under s 9(2)(a) Contractual Remedies Act for the return of the purchase price, then additional damages would be $2.[62]

Conclusion

Proportional damages should be available for the loss of a chance which depends on a hypothetical fact. This will be so whether the plaintiff's claim is in contract or tort, and whether his chance is less or better than even. It is important to note that the House of Lords in *Hotson* have not decided that a lost chance can never be compensated in a medical negligence case. Rather, it is only when a less than even chance depends on a past fact that the chance is accorded no legal value – it is no chance at all. Where a greater than even chance depends on a past fact damages will be awarded without discount for the actual physical or financial loss resulting.

62 Section 10(2) Contractual Remedies Act 1979.