No More Chances for Lost Chances: A Weinribian Response to Weinrib

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Sometimes, patients who were negligently misdiagnosed by their doctors are unable to receive any compensation through tort litigation. This has led to a perception of unfairness, igniting arguments in favour of what is known as the "loss of chance" doctrine. Under this doctrine, patients would be able to claim damages for the lost chances of recovery that they suffered due to negligent misdiagnoses. British and Canadian courts have rejected this doctrine in the medical negligence context on the basis that it does not cohere with tort law principles of injury compensation. Professor Ernest Weinrib, in "Causal Uncertainty" (2016) 36:1 Oxford Journal of Legal Studies 1, has offered an interpretation of loss of chance that he claims would maintain the overall coherence of the tort liability system. In this article I offer a critique of his proposal on the basis that it does not achieve the coherence that it promises. My comments are rooted in

Parfois, des patients, ayant été négligemment mal diagnostiqués par leur médecin, ne sont pas capables d'obtenir un dédommagement avec une action en responsabilité délictuelle. Ces situations ont mené à la perception d'une injustice, amenant ainsi des arguments en faveur de la théorie de la perte de chance. Sous cette théorie, les patients victimes d'erreurs négligentes de diagnostic pourraient réclamer des dommages-intérêts pour la perte de chance de guérison subie. Les tribunaux britanniques et canadiens ont rejeté cette théorie dans le contexte de la négligence médicale parce qu'elle n'est pas cohérente avec les principes d'indemnisation du droit de la responsabilité délictuelle. Le Professeur Ernest Weinrib, dans « Causal Uncertainty » (2016) 36 : 1 Oxford Journal of Legal Studies 1, a récemment proposé une interprétation de la théorie de la perte de chance pour laquelle il prétend maintenir une cohérence générale

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the commitment to coherence that professor Weinrib has elucidated in his book *The Idea of Private Law* (Oxford: Oxford University Press, 2012) so my response to his proposal is, in my view, Weinribian in nature. Drawing on his insights, I comment on how consistency and coherence are related, and how and why these formal values matter to tort law theory and practice.

avec le droit de la responsabilité délictuelle. Dans cet article, je critique sa proposition au motif qu'elle ne permet pas d'obtenir la cohérence promise. Mes commentaires sont enracinés dans l'engagement du Professeur Weinrib envers la cohérence, qu'il a expliqué dans son livre *The Idea of Private Law* (Oxford : Oxford University Press, 2012). Mes réponses à sa proposition reflètent donc la nature de sa pensée. En se basant sur ses idées, j'argumente comment la consistance et la cohérence sont liées ainsi que pourquoi ces valeurs sont importantes dans la théorie et dans la pratique du droit de la responsabilité délictuelle.

Introduction

Medical misdiagnoses pose an important quandary for tort law. This paper examines the argument that when a patient loses a chance of getting a good or better medical outcome because of a misdiagnosis, that lost chance should be compensable in tort law – this is known as the "loss of chance" doctrine. I argue that Canadian courts have been right to reject the loss of chance doctrine in the medical negligence context, because doing so would compromise the invaluable formal norm of coherent treatment of litigants and, therefore, the integrity of the tort law system. Professor Ernest Weinrib has provided one of the most recent proposals for accepting the loss of chance doctrine, so I focus primarily on why his proposal does not achieve coherence and integrity within tort doctrine as he suggests it does.

The loss of chance issue is situated within a larger context of difficulties around proof of causation. As such, I begin below with an overview of the challenges posed by causal uncertainty by recounting the major Supreme Court of Canada decisions on causation in personal injury litigation. This provides a brief contextual background and is doubly useful because the Court's commentaries in this context have tended to implicitly endorse the idea that consistent and coherent treatment of litigants is paramount. I agree with their conclusions largely on that basis. I then provide an explanation of the loss of chance doctrine and the judicial treatment of the doctrine resulting in its rejection. In Part II, I set out the incoherencies that would result from the loss of chance doctrine and demonstrate that Professor Wienrib's proposal for interpreting loss of chance does not resolve them. In Part III, I draw (as it were) on Professor Wienrib's insights to demonstrate that maintaining the coherence and integrity of the tort law system is paramount for ensuring fair, equal, and non-arbitrary treatment under the law.

I. Causal Uncertainty and Loss of Chance

Typically, to establish tort liability, plaintiffs must show that but for the defendant's negligence, their injury would not have occurred. This "but for" test establishes a causal link between the negligence and the harm suffered, thereby justifying the defendant's liability to the plaintiff.[1] Medical or other

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[1] There is much discussion on whether the "but for" test is always (or ever) the most appropriate analysis for establishing causation in law, and whether the legal definition of causation meets philosophical muster. It is outside the scope

factual uncertainty can, however, render the causal link between negligence and injury impossible to prove. At times, these uncertainties have been interpreted as unduly onerous on plaintiffs so courts have had to wrestle with how to fairly establish liability.

In several personal injury cases, the Supreme Court has considered whether any changes to legal principles and procedures would be justified to account for medical and scientific uncertainty in causation. Through these decisions, the Supreme Court has rejected the proposal that establishing a material increase in risk of harm should result in the onus shifting to the defendant to negate a presumption of causation,[2] provided a number of reminders that scientific precision is not a pre-requisite to proof of causation on the balance of probabilities standard,[3] advocated a "robust and pragmatic" approach to the balance of probabilities standard of proof for causation,[4] and reconfirmed that the test for causation is the "but for" test[5]

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of this paper to comment on the merits of the substantive test for causation, but for a sampling of such commentaries, see e.g. Vaughan Black, "Decision Causation: Pandora's Tool-Box" in Jason Neyers, Erika Chamberlain & Stephen GA Pitel, eds*, Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007) at 309; Richard Wright, "Acts and Omissions as Positive and Negative Causes" in Jason Neyers, Erika Chamberlain & Stephen GA Pitel, eds*, Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007) at 287; Jane Stapleton, "Unnecessary Causes" (2013) 129:1 Law Q Rev 39; Jane Stapleton, "Choosing What We Mean by 'Causation' in the Law" (2008) 73:2 Mo L Rev 433; Jane Stapleton, "An 'Extended But-For' Test for the Causal Relation in the Law of Obligations" (2015) 35:4 Oxford J Leg Stud 697; Richard Goldberg, ed, *Perspectives on Causation* (Oxford: Hart Publishing, 2011); Desmond M Clarke, "Causation and Liability in Tort Law" (2014) 5:2 Jurisprudence 217; Allan C Hutchinson, "Out of the Black Hole: Toward a Fresh Approach to Tort Causation" (2016) 39:2 Dal LJ 561.

2 This approach was adopted by the British House of Lords in *McGhee v National Coal Board*, [1972] 3 All ER 1008 (HL (Eng)). The Supreme Court of Canada was urged to adopt this reasoning in *Snell v Farrell* [1990] 2 SCR 311, [1990] SCJ No 73 (QL) [*Snell* cited to SCR] but did not.

3 See *Snell*, *supra* note 2; *Resurfice Corp v Hanke*, 2007 SCC 7, [2007] 1 SCR 333 [*Resurfice*]; *Clements v Clements*, 2012 SCC 32, [2012] 2 SCR 181 [*Clements* cited to SCC].

4 *Snell*, *supra* note 2 at 330.

5 The most recent confirmation appears in *Ediger v Johnston*, 2013 SCC 18, [2013] 2 SCR 98. In this case, the factual finding of causation was at issue, not

while introducing (arguably quite ambiguously) the limited availability of the "material contribution" test.[6]

The most recent Supreme Court pronouncements on causation in the personal injury context came in 2016, when the Court twice re-visited the causation analysis in two separate claims for compensation for a negligently inflicted injury. First, *British Columbia Workers Compensation Appeal Tribunal v Fraser Health Authority* concerned a workers' compensation tribunal decision on whether the plaintiffs' workplace conditions caused their cancer.[7] The necessary causal connection in that context was governed by section 250(4) of the *Workers Compensation Act*,[8] but the civil tort principles regarding reliance on expert opinions to establish causation were applicable. In response to arguments that the tribunal erred in finding a causal link between the workplace conditions and the subsequent development of cancer, the Court re-affirmed that medical or scientific certainty is not required and held that the tribunal committed no palpable and overriding error in its factual finding that causation was established.[9]

Second, in November 2016, the Supreme Court heard *Benhaim v St-Germain*, an appeal brought by the widow of a man who lost his life to cancer following a negligently delayed diagnosis. The trial judge found that the plaintiff had not established that it was more likely than not that the doctors' negligence caused her husband's death. The trial judge relied on evidence suggesting that even if the patient had been properly diagnosed at an early date, the cancer would likely have claimed his life.[10] The Court of Appeal of Québec reversed the decision, holding that the trial judge failed to apply an inference of causation, even though the doctors' negligence contributed to the factual uncertainty around causation and the plaintiff had adduced

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the legal test for causation. However, the Supreme Court briefly re-confirmed the "but for" test for causation, referring to its earlier decisions in *Resurfice* (*supra* note 3) and *Clements* (*supra* note 3 at para 28).

6 See *Resurfice*, *supra* note 3; *Clements*, *supra* note 3; *Athey v Leonati* [1996] 2 SCR 458, 140 DLR (4th) 235.

7 2016 SCC 25, [2016] 1 SCR 587 [*BC Workers Compensation* cited to SCC].

8 RSBC 1996, c 492.

9 See *BC Workers Compensation*, *supra* note 7 at paras 32, 38.

10 See *Benhaim v St-Germain*, 2016 SCC 48 at paras 17–24, [2016] 2 SCR 352.

some evidence that supported a finding of causation.[11] The majority of the Supreme Court allowed the appeal and upheld the trial judge's original decision.

The Supreme Court reasoned that although drawing an inference of causation was available to the trial judge as a matter of law, its availability does not usurp the duty to evaluate all the evidence presented and weigh it against the requisite standard of proof.[12] The Supreme Court found that there was no overriding error in the conclusion that causation was not established; the trial judge had considered all the evidence presented in order to establish the "but for" connection between negligence and injury, and had weighed that evidence against the balance of probabilities standard of proof, in accordance with the processes of fact-finding.[13]

These two cases demonstrate a clear commitment on the part of the Canadian judiciary to the idea that consistent application of the traditional principles of proof and tort liability yields legitimate outcomes. They also reveal, however, a fairly recent trend towards accepting that some change to the legal analysis for causation is warranted in the injury compensation context, owing to difficulties posed by causal uncertainty and problems associated with factual uncertainty. The loss of chance doctrine, which I turn to now, is a subset of this trend.

A circumstance that gives rise to the loss of chance doctrine is as follows: suppose a doctor negligently fails to inform a patient of a medical condition that they have, resulting in delayed treatment. Once the patient's condition is appropriately diagnosed, it becomes evident that their prognosis is poor and that the delayed diagnosis diminished their chances of a full recovery. The patient sues the doctor in negligence. They later die of the medical condition.

To prove causation and, therefore, to establish that the negligent doctor is liable to them, the patient (or their estate) must demonstrate that it is more likely than not that but for the doctor's negligence, the adverse outcome (i.e., the patient's death) would not have occurred. Establishing this causal connection can pose difficulties because the natural course of the plaintiff's

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11 See *ibid* at paras 26–35.

12 See *ibid* at para 44.

13 See *ibid* at paras 77–86.

illness itself, even if diagnosed and treated in a timely manner, could also be said to have caused the patient's eventual death.

Where the patient's chance of survival prior to the misdiagnosis was less than 50%, it would not be possible for them to establish on a balance of probabilities that, but for the doctor's negligence, they would have survived. This is because even absent an act of negligence, the adverse outcome was already more likely to occur than not. Consequently, it would be impossible to establish causation and the action would have to fail. This uneasy outcome, where a patient has been treated negligently yet cannot receive compensation in law, has given rise to what is known as the loss of chance doctrine.[14] Proponents argue that courts should treat the reduction in chances of a better outcome as a compensable injury. Then, if a causal connection between the negligent misdiagnosis and a lost chance can be established on the requisite balance of probabilities standard of proof, the patient will at least be compensated for their provable loss: the reduction in chances of a better outcome. This way, both the goal of corrective justice, as well as the traditional approach to tort liability, can remain undisrupted. As Professor Lara Khoury succinctly summarizes, "this approach is *prima facie* compelling because it confirms the apparent conceptual validity of the notion [of loss of chance] and its conformity with the rules of civil liability."[15]

Despite urging from litigants and scholars,[16] Canadian and British courts have refused to adopt the loss of chance doctrine on the basis that it would

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[14] A number of sub-specialists in the medical field have commented on the loss of chance doctrine, offering examples of when the issue could arise in relation to particular specializations. See e.g. Timothy Craig Allen, "Loss of Chance Doctrine: An Emerging Theory of Medical Malpractice Liability" (2012) 17:4 Pathology Case Rev 172; Mark J Garwin, "Risk Creation, Loss of Chance, and Legal Liability" (2002) 16:6 Hematol Oncol Clin North Am 1351; James Tibballs, "Loss of Chance: A New Development in Medical Negligence Law" (2007) 187:4 Med J Aust 233; K Leslie et al, "Loss of Chance in Medical Negligence" (2014) 42:3 Anaesth Intensive Care 298.

[15] *Uncertain Causation in Medical Liability* (Portland: Hart Publishing, 2006) at 119.

[16] See e.g. Jamie Cassells & Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, 2d ed (Toronto: Irwin Law, 2008) at 341–42: "In cases like *Laferrière v Lawson*, the defendant's negligence has indeed deprived the plaintiff of a valuable chance (to seek medical treatment). It is hard to discern why she should not receive compensation for this loss….It is to be hoped that the Supreme Court will revisit this issue." For early advocates of the loss of chance doc-

cause irreconcilable incoherence and inconsistency within well-established tort law principles.[17] For instance, in *Laferrière v Lawson*, Gonthier J held

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trine, see e.g. Jane Stapleton, "The Gist of Negligence Part II: The Relationship Between 'Damage' and Causation" (1988) 104 Law Q Rev 389; Joseph H King Jr, "Causation, Valuation, and Chance in Personal Injury Torts Involving Pre-existing Conditions and Future Consequences" (1981) 90:6 Yale LJ 1353. See also Nils Jansen, "The Idea of a Lost Chance" (1999) 19:2 Oxford J Leg Stud 271; SM Waddams, "The Valuation of Chances" (1998) 30:1 Can Bus LJ 86. *Cf* Vaughan Black, "Not a Chance: Comments on Waddams, the Valuation of Chances" (1998) 30:1 Can Bus LJ 96; Kevin Joseph Willging, "*Falcon v. Memorial Hospital*: A Rational Approach to Loss of Chance Tort Actions", Case Comment, (1993) 9:1 J Contemp Health & Pol'y 545; Khoury, *supra* note 14 at 91–113; Ernest J Weinrib, "Causal Uncertainty" (2016) 36:1 Oxford J Leg Stud 135 [Weinrib, "Causal Uncertainty"]; Rui Cardona Ferreira, "The Loss of Chance in Civil Law Countries: A Comparative and Critical Analysis" (2013) 20:1 MJECL 56.

17 One often discussed British case is *Hotson v East Berkshire Area Health Authority* [1988] UKHL 1, [1987] AC 750, where a boy fell out of a tree and broke his hip. A negligent misdiagnosis resulted in permanent damages. However, that damage was more likely caused by the fall itself, rather than by the negligent misdiagnosis, though a proper diagnosis may have increased the boy's chances that the permanent damage would not have occurred by 25%. The House of Lords rejected a loss of chance approach and decided that causation was not established on a balance of probabilities, precluding a finding of liability. The most recent House of Lords pronouncement on loss of chance came in *Gregg v Scott* [2005] UKHL 2, [2005] 2 AC 176 [*Gregg* cited to UKHL], where a patient's cancer was misdiagnosed, resulting in a 42% chance of survival being reduced to a 25% chance. Since the pre-negligence chance of survival was less than 50%, causation was not established and recovery was denied. In Canada, the loss of chance was rejected by the Supreme Court in *Laferrière v Lawson* [1991] 1 SCR 541, 78 DLR (4th) 609 [*Laferrière* cited to SCR]. The plaintiff's estate argued that although it could not be established that the defendant doctor's negligence caused the plaintiff's death, the causal link between the negligence and the reduction in *chance* of a better outcome could be established, and should be compensated. The Supreme Court denied the claim on the basis that causation was not established. The Supreme Court affirmed that reasoning in *St-Jean v Mercier*, 2002 SCC 15, [2002] 1 SCR 491. Notably, Canadian courts have accepted the loss of chance argument in other situations, including cases where a defendant negligently failed to seek the relevant zoning approval from a planning authority. Courts have established liability and awarded damages on the basis of the chance that the zoning approval would have been obtained if the defendant had applied for it (see *Eastwalsh Homes Ltd v Anatal Developments Ltd* [1993] 12 OR (3d) 675, 100 DLR

that allowing loss of chance claims where causation could not be established would amount to subjecting "doctors to an exceptional regime of civil liability," an inconsistency that he was not willing to tolerate.[18] In *Gregg v Scott*, Baroness Hale held that allowing loss of chance broadly within tort law would mean that "a defendant who has negligently increased the risk that the claimant will suffer harm in the future…would be liable even though no harm had yet been suffered."[19] She explained that, "[t]his would be difficult to reconcile with our once and for all approach to establishing liability and assessing damage."[20] In the same case, Lord Phillips succinctly noted, "it seems to be that there is a danger, if special tests of causation are developed piecemeal to deal with perceived injustices in particular factual situations, that the coherence of our common law will be destroyed."[21] Echoing Lord Phillips's emphasis on coherence and consistency in the law, Lord Hoffmann's speech dismissing the appeal approvingly referred to the following comments of an earlier House of Lords decision:

> To be acceptable the law must be coherent. It must be principled. The basis on which one case, or one type of case, is distinguished from another should be transparent and capable of identification. When a decision departs from principles normally applied, the basis for doing so must be rational and justifiable if the decision is to avoid the reproach that hard cases made bad law.[22]

(4th) 469 (Ont CA), leave to appeal to SCC refused, 225 (30 September 1993)). Courts have also accepted it where a plaintiff claimed negligence on the part of a lawyer: liability was established and damages were awarded on the basis of the chance that the legal claim would have been successful absent the lawyer's negligence (see *Henderson v Hagblom*, 2003 SKCA 40, 16 CCLT (3d) 1, leave to appeal to SCC refused, 278 (8 January 2004)). For largely the same reasons that I express here, I may question the propriety of those decisions, but I confine my discussion here to whether introducing the loss of chance doctrine in the medical negligence context can maintain coherence within the general tort law framework.

18 *Laferrière, supra* note 17 at 608.

19 *Gregg*, *supra* note 17 at 212.

20 *Ibid*.

21 *Ibid* at 172.

22 *Ibid* at 89, citing *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32.

Ultimately, Canadian and British courts have held that loss of chance simply does not cohere with tort law principles and introducing it would cause irreconcilable inconsistencies. I argue that courts have been right to reject the loss of chance argument on the basis of incongruity with tort law doctrine, but a fulsome articulation of the underpinning values of consistency and coherence in tort law is lacking. As a result, judicial rejection of loss of chance has remained unconvincing to some. Among those is Professor Ernest Weinrib, who has offered the most recent interpretation of loss of chance. He claims to coherently justify the use of loss of chance in some tort circumstances, including the medical negligence context.[23] Below, I assess whether Weinrib's proposal would ensure that litigants who should be treated similarly are subjected to consistent legal principles, thus maintaining a coherent tort law framework governing negligently inflicted injuries.

Drawing on Professor Weinrib's own insights in *The Idea of Private Law*,[24] I explain why incoherence compromises the legitimacy of tort adjudication and highlight the problems that would arise if loss of chance were introduced into medical negligence litigation. I demonstrate that Weinrib's proposal would not achieve its promise of consistency and coherence, and therefore integrity, within tort law doctrine. As a result, his proposal for loss of chance must be rejected. Through this analysis, I aim to provide the missing articulation for why courts have been right to reject the loss of chance argument on the basis of the inconsistency and incoherence, and the resultant compromise to the integrity of tort law, that would occur if it were adopted. My primary purpose is to use the loss of chance argument, and especially Weinrib's recent proposal, to demonstrate that consistency and coherence are invaluable because they ensure that common law tort doctrine and theory have unity and congruence, without which a tort law system cannot maintain its integrity.

II. Inconsistencies and Incoherences: Issues in Loss of Chance and Professor Weinrib's Proposal

Most simply, consistency matters because it ensures that litigants are not treated arbitrarily.[25] A fuller explanation of this idea requires a discus-

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23 Weinrib, "Causal Uncertainty", *supra* note 16.

24 (Oxford: Oxford University Press, 2012) [Weinrib, *Private Law*].

25 See e.g. Lawrence Friedman, "Common Law Decision-Making, Constitution-

sion of how consistent application of legal principles, including fact-finding principles, work in conjunction with the substantive justifications that give rise to legal principles to maintain a coherent and acceptable adjudicative outcome. I offer that discussion below, after outlining three examples of the incoherence that would result from introducing loss of chance in the medical negligence context.

Consider Plaintiff A who can establish a 70% likelihood that a doctor's negligence caused her injury. The doctor would be found liable to the plaintiff, and the plaintiff would receive 100% compensation for the injury. Plaintiff B, however, can only establish a 30% likelihood that the doctor's negligence caused her injury. In her case, the doctor could not be found liable. If the loss of chance doctrine were applicable, however, Plaintiff B might still receive partial compensation if she can establish that the doctor's negligence caused a diminished chance of a medically better outcome. This is an appealing result because although Plaintiff B might not receive full compensation for the injury she suffers, she at least receives some compensation to account for her lost chance of a medically better outcome. This is the appeal of the loss of chance proposal.

But compare Plaintiff A to Plaintiff B. If chances of medically better outcomes are to be compensable, how can awarding Plaintiff A full compensation for the injury be justified? After all, Plaintiff A could only establish that the doctor's negligence increased the chance of a medically worse outcome – just like Plaintiff B.[26]

One response could be to simply appreciate this possibility, and agree that if loss of chance is accepted for Plaintiff B, then it must also be accepted for Plaintiff A. In other words, both the plaintiffs and defendants should have the benefit of the loss of chance doctrine. If this proposal were accepted, there would be no incongruity between Plaintiff A and B. It would also mean, however, that tortious injury claims that arise out of medical neg-

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al Shadows, and the Value of Consistency: The Jurisprudence of William F. Batchelder" (2014) 12:1 UNH L Rev 1 ("[c]onsistency provides some assurance that particular outcomes of judicial lawmaking will be predicable and not arbitrary" at 26). For further discourse on the value of consistency, see also John E Coons, "Consistency" (1987) 75:1 Cal L Rev 59; Christopher J Peters, "Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis" (1996) 105:8 Yale LJ 2031.

26 Weinrib refers to this incongruence as the problem of "reciprocity" throughout "Causal Uncertainty", *supra* note 16.

ligence would be risk-compensation based, rather than injury-compensation based, without any clear justification for why medical negligence should be treated differently from other types of negligence leading to injury.[27] This leads to the next comparison.

Compare Plaintiff B to Plaintiff C who is injured by a product that was negligently manufactured. Just like Plaintiff B, Plaintiff C can establish a 30% likelihood that the negligent manufacturing caused her injury. If loss of chance were accepted in the medical negligence context, then Plaintiff B could characterize her claim as a lost chance of avoiding an adverse medical outcome and could receive some compensation for that lost chance. Plaintiff C, however, could not. Even though she may be able to establish some chance that her injury would have been avoided absent the manufacturer's defect, the fact that she suffered negligence at the hands of a manufacturer rather than a doctor precludes her from receiving compensation. This inconsistency is difficult to justify because, again, if the legal principle is that increasing a chance of an injury is compensable, then Plaintiff C should be able to seek compensation despite being unable to establish that the manufacturer caused her injury on a balance of probabilities.

Agreeing that a right to avoid a chance of an adverse outcome "sits uncomfortably within the framework of negligence law taken as a whole," Ernest Weinrib has recently proposed a new conceptualization that he suggests would give coherence to the loss of chance doctrine within the tort law scheme. [28] First, Weinrib explains that the law recognizes a plaintiff's right to be treated in a particular manner when she has relied on a defendant's undertaking to act in that way. If the defendant fails to act in that way, the plaintiff's right has been breached.[29] Any damage arising out of that breach,

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27 Notably, in *Clements*, *supra* note 3 at paras 35–45, the Supreme Court of Canada seems to suggest that a risk-compensation approach may be available in very limited circumstances via the "material contribution to risk" test for causation, while noting the rarity of this possibility and its inapplicability in instances of medical or scientific uncertainty.

28 "Causal Uncertainty", *supra* note 16 at 160.

29 Weinrib explains that this falls into a category of rights "that arise in and through persons' interactions. Such rights are *in personam*: they generally hold only as between the parties whose interaction created them. Paradigmatic of this kind of right is the right to contractual performance, which exists only through the interaction between promisor and promisee" (*ibid* at 161). Another example of a reliance-based right is encompassed in the tort of negligent misrepresenta-

Weinrib suggests, should be compensable.[30] A lost chance of a better outcome, while not an independent right, may be a compensable damage if it arises out of the defendant's breach.[31]

The medical misdiagnosis situation that invokes the loss of chance argument can then be considered a subset of this right by characterizing the doctor and patient relationship as follows: a patient relies on a doctor's undertaking to provide an increased chance of survival or recovery (whatever that chance may be, even if it is less than 50%). They have a right to be treated in accordance with that undertaking. If the doctor acts negligently, the plaintiff's right is breached.[32] Weinrib summarizes his proposal as follows:

> To sum up: the loss of the chance is compensable not because the plaintiff has an independent right to the chance, as they have to their physical integrity. Instead, the right is to the defendant's non-negligent conduct in the execution of an undertaking on which the plaintiff, at the defendant's invitation, is relying. *The purpose of the undertaking is to allow the*

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tion, where a special relationship exists when a person relies on representations made by a specialist. If the specialist's statement turns out to be negligent, then any losses resulting from reliance on that statement are recoverable.

30 See *ibid* at 162: "the right arises through the defendant's express or implied invitation to rely for a particular purpose, and the plaintiff's accepting this invitation as reliable and acting on it for the purpose for which it was made….a defendant can be held liable for loss caused when this performance is inadequate. The loss caused by the detrimental reliance constitutes the injury to the plaintiff's right to have the defendant act in a particular way."

31 Weinrib explains that his proposal for loss of chance in the tort context is a familiar principle within contract law doctrine, pointing to the case of *Chaplin v Hicks* [1911] 2 KB 786 (CA), (1911) 27 TLR 244. In this case, a beauty contest organizer breached a contract with a plaintiff by denying her entry into one of the stages of the contest. The plaintiff was awarded damages for the lost chance of winning the contest. Weinrib says that the contractual right that gives rise to damages for lost chance is rooted in the right to be treated in a particular way by another party (i.e. in accordance with the terms of a contract). That, he says, is comparable to a tort law right that would protect a similar right to be treated in a certain way by another person, like the right that Weinrib proposes: to be treated non-negligently by one's doctor (see *ibid* at 160–64). As I explain, however, this proposed right is problematic within the tort law regime, despite the analogy in the contract context.

32 See "Causal Uncertainty", *supra* note 16 at 160–64.

> *plaintiff to have a chance, whatever it is, to survive or recover from the illness*. The plaintiff has a right to conduct consistent with that purpose. The loss of the chance is the specification of the injury to this right of the plaintiff. The probability of the chance's materialising is the measure of the defendant's compensation for its loss.[33]

Weinrib suggests that his proposal allows for a principled reason to compensate a lost chance in the misdiagnosis situation, without causing tension with the general tort law framework because, as I explain further below, it relieves the loss of chance from the type of incongruences that are noted in the above examples. But in my understanding, adopting Weinrib's presentation of the loss of chance doctrine is problematic and brings incongruencies of its own.

First, under Weinrib's proposal, the right to compensation crystalizes the moment a plaintiff is treated contrary to the defendant's undertaking to treat them in a particular way. That constitutes a shift from the tort law right to compensation for a negligently inflicted injury to a right to be treated in accordance with a duty of care, because the right crystalizes the very moment that the duty of care is breached – the losses that result are only *incidents* of that breach. This may be a defensible approach to injury compensation, but it is very different from the existing tort law scheme in which liability does not crystalize until it can be shown that the negligence caused some loss. Moreover, it is not obvious how to manage the scope of the right that Weinrib points to without causing a widespread change in tort liability, because it is not clear which relationships could be characterized as involving the requisite undertaking to act in a particular way, and which would not. For instance, could the requisite implied undertaking exist between a manufacturer and a purchaser? A client and a plumber? A driver and fellow drivers? If so, then should liability crystalize upon breach of the duty of care, giving rise to potential loss of chance damages?

Weinrib's proposal could be read as having an in-built limitation on the scope of its availability, if it is understood that loss of chance damages are only available when the defendant specifically undertakes to improve a plaintiff's chances of some desirable outcome. Even if that were an appropriate limit, it does not properly characterize the nature of the service that doctors may provide to patients. A relationship that centers on an undertaking to improve chances of a better medical outcome may exist when

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[33] *Ibid* at 163 [emphasis added].

a doctor is treating a patient for some condition, but it may not exist when a doctor is providing diagnostic or investigative procedures. At the diagnostic stage, there is no undertaking to provide treatment. Suppose, for instance, that a patient is sent to a specialist for a chest x-ray. That specialist negligently misreads the x-ray and assures the patient's physician that she has a benign condition that requires no treatment. As a result of the misdiagnosis, the specialist has in fact *not* undertaken to improve the chances of survival at all. A right that is contingent on an undertaking to improve chances of survival would not crystalize in this situation.

Accordingly, if one patient was treated negligently while receiving treatment (so the requisite undertaking of improving chances of recovery are cognizable) and suffers a lost chance, they may be compensated for that lost chance, but a patient who suffers a lost chance of survival due to a negligent misdiagnosis may not. The result is significantly different legal outcomes for patients who were both treated negligently by medical professionals and who suffered comparable losses.

The next issue with Weinrib's proposal is his suggestion that plaintiffs who can show, on a balance of probabilities, that a detrimental outcome resulted from the doctor's negligence would be able to receive full compensation for that outcome.[34] This gives rise to the discrepancy described between Plaintiff A and Plaintiff B, above. Weinrib suggests that his proposal can reconcile Plaintiff B receiving compensation only for the lost chance, while Plaintiff A receives compensation for the adverse outcome itself, because under his proposal liability is not contingent on the lost chance itself, but on the breach of the duty of care owed to the plaintiff. Since Plaintiff A can prove, on the balance of probabilities, that the loss resulting from her detrimental reliance on the doctor's undertaking indeed was her ultimate demise, she is entitled to compensation for that outcome. Plaintiff B, on the other hand, can only show that the lost chance resulted from her detrimental reliance on the doctor's undertaking, so she is only entitled to compensation for that lost chance.

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[34] See *ibid*: "the loss of chance is not general to all causal uncertainties, but is solely the consequence of the detrimental reliance induced by the defendant. Accordingly, there is no basis for giving the defendant the reciprocal benefit of reducing full liability to proportional liability when the plaintiff can prove factual causation on the balance of probabilities. Moreover, even in the circumstances of detrimental reliance, the plaintiff is not restricted to a recovery for the lost chance; if an injury to their physical integrity is the provable consequence of the reliance, the plaintiff can recover fully for that injury."

These two outcomes remain irreconcilable, even in Weinrib's characterization. If liability is crystalized on the basis of the right to be treated in a manner that accords with an undertaking to improve chances of survival, then both Plaintiff A and B have suffered in exactly the same way: both detrimentally relied on the doctor's treatment, both were treated negligently, and both suffered the same reduction in chance as a result of that reliance. Tolerating significantly different outcomes for both parties could not be justified.

Next, Weinrib suggests that his re-characterization does not imply that compensation for lost chances would be available even absent a manifest injury. In his proposal, he explains:

> …liability is the result not merely of the loss of the chance, but also of the plaintiff's detrimental reliance on the defendant's undertaking. In the absence of the adverse outcome, the plaintiff has not suffered the detriment that a proper diagnosis might have obviated.[35]

The first problem with this is visible through the following example: a doctor treats Plaintiff D negligently and reduces her chance of survival from 30% to 10%. Suppose that Plaintiff D beats the odds and survives, despite the reduction in the chance of survival. Under Weinrib's proposal, Plaintiff D should not be compensated, because she cannot point to any detriment resulting from her reliance on the doctor's undertaking to treat her non-negligently.

This may seem promising on the surface, but it gives rise to an internal tension in Weinrib's proposal: he suggests that the plaintiff's rights rest on the doctor's undertaking to provide a better chance of outcome.[36] If so, then Plaintiff D *does* suffer a detriment – she suffers the loss of a chance of a better outcome. Holding that she cannot recover against a negligent doctor would mean, under Weinrib's proposal, that she has had a legal right breached, she has suffered the detriment that corresponds with the breached right, but has no legal recourse until she dies. The result is a necessary incongruence between the right that is protected and its administration: the right that Weinrib articulates is independent of any final outcome – it is a right to treatment consistent with improving chances. At the same time,

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35 *Ibid*.

36 *Ibid*.

administering that right depends on the manifestation of the final outcome of that chance.

Moreover, Weinrib's proposal does not address the fact that any claim where the causal link between the ultimate adverse outcome and the negligence cannot be established could simply be reframed as a claim for the loss of chance. Accordingly, compensability of lost chances can be characterized as an alternative mechanism for handling causal uncertainty. This leads back to the question of why this mechanism of accommodating causal uncertainty should not be available in all situations of negligently inflicted injuries. Suppose, for instance, that a plaintiff suffers a heart attack. She has a 30% chance of survival. Upon negligent treatment by her doctor, her chances of survival are reduced to 10% and she ultimately dies. Her right to non-negligent treatment is breached. She cannot establish that the ultimate death resulted from the doctor's negligence, but she can recover for the reduction in her chances of survival. But suppose her doctor treated her appropriately, and a negligent driver delayed her arrival at a hospital, resulting in the same reduction in her chance of survival. Under Weinrib's proposal, no compensation would be available to her in the second situation because she cannot establish a causal link between the driver's negligence and her death. Both situations involve negligence, reduction in chance, injury, and casual uncertainty, so the difference in outcomes is difficult to justify.

Each of the scenarios of Plaintiffs A, B, C, and D contain issues of factual uncertainty around causation of a physical injury. The loss of chance doctrine effectively allows for factual uncertainty to be accommodated in different ways for each plaintiff, resulting in outcomes that are incoherent with one another. They are incoherent in the sense that one outcome cannot be justified in comparison with the others.

III. Why Consistency and Coherence Matter

The formal requirement of principled consistency ensures that the outcomes that are achieved through the adjudicative system can be *coherently justified*. Incoherent justification ultimately amounts to arbitrary treatment. Below, I explain this further by demonstrating the interplay between consistency and coherent justification of adjudicative outcomes. Here, I draw on Weinrib's *Idea of Private Law* which contains, for me, the most helpful

exposition and defense of formal values in contemporary tort law scholarship.[37]

The first thing to keep in mind is that legal principles have in-built justifications. The standards of proof in adjudication, for instance, are justified based on what our society considers a fair allocation of the risk of error. In criminal law the "beyond a reasonable doubt" standard applies because the risk of error should favour the accused. In the civil context, the balance of probabilities applies because the risk of error should be balanced fairly, with a slight favour towards the defendant.[38] Importantly, this is not a normative claim. Other societies may come to different (and still justifiable) conclusions on what constitutes a fair error distribution. The point is that there may be a variety of justifiable legal principles, and the justification is embedded in the legal principles that exist.[39]

When legal principles are applied consistently, the justifications that exist within those principles are applied dependably as well. Through that consistency, the adjudicative system produces outcomes that are coherently justified.[40] That coherence would be lost if judges applied laws differently to procure outcomes that appear desirable based on extraneous justifications.[41]

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37 *Supra* note 24.

38 See Alex Stein, *Foundations of Evidence Law* (Oxford: Oxford University Press, 2005) at 2. See also Larry Laudan, *Truth, Error, and Criminal Law*: *An Essay in Legal Epistemology* (Cambridge: Cambridge University Press, 2006) at 129.

39 As Stein notes, "[m]oral considerations that inform risk-allocating decisions belong to the domain of politics" (*supra* note 38 at 12).

40 Weinrib makes this point in *Private Law*, *supra* note 24 at 32: "In the law's self-understanding, private law is a justificatory enterprise…. Coherence must be understood in the light of this justificatory dimension. For a private law relationship to be coherent, the consideration that justifies any feature of that relationship must adhere with the considerations that justify every other feature of it."

41 Weinrib expresses this point precisely as follows: "The necessity for coherence arises from the nature of justification. A justification justifies: it has normative authority with respect o the material to which it applies. The point of adducing a justification is to allow that authority to govern whatever falls within its scope…. Consequently, a justification sets its own limit. *For an extrinsic factor to cut the justification short is normatively arbitrary*" (*ibid* at 39 [emphasis added]).

Applying the loss of chance doctrine could seem justified on the basis that it gives some compensation to a person who has been treated negligently by their doctor. But that outcome and its justification does not cohere with other outcomes, which are governed by tort law principles requiring a causal link between negligence and the injury. Applying legal principles inconsistently to achieve outcomes that seem more desirable opens a gate for the arbitrary, illegitimate exercise of legal authority; the demand for consistency furnishes the adjudicative system with the fairness that inheres in coherence.

The value of coherence through consistency may be further elucidated in an analogous context. Suppose a university is endowed with funds and must decide how to distribute them through scholarships. The awards can be justified in several ways, such as academic merit, financial need, or in furtherance of some societal welfare goal. The university must choose how to justify the awards. The chosen justification will then be embedded into the policy that the university settles on. Suppose the university decides that the scholarship will be awarded solely on the basis of academic achievement. That justification (i.e. academic merit) is then embedded into the policy. That policy must be applied consistently, even though other justifications exist (like social welfare concerns or financial need). It would be improper to give an individual the scholarship based on financial need, because financial need is not the justification that underpins that scholarship. Although it may seem to be a laudable outcome, the decision to make that award would be incoherent, arbitrary, and unfair.

In the same way, accommodating factual uncertainty by resorting to the loss of chance doctrine may appear desirable because it would afford an injured individual some compensation, but such piecemeal justification is inappropriate. It results in incoherent treatment of litigants in tortious injury actions and causes outcomes that cannot be coherently justified in comparison with one another.

My discussion so far invokes a necessary point of clarification: holding that legal principles emerge embedded with some substantive justification does not imply that alternative legal principles are necessarily unjustifiable, or that the substantive justification that is chosen is invariably the right one. As Weinrib notes:

> Legal formalism is not a political position.…What is paramount to the formalist is not the substantive desirability of

> any legal arrangement, but the coherence of the justificatory considerations that support its component features.[42]

In parallel to Weinrib's comments above, my claims here do not imply that tort law doctrines are the only justifiable means of regulating medical negligence. Other problems of access to justice due to financial and practical barriers when it comes to medical negligence have prompted some to advocate for removing medical negligence from the tort law scheme.[43] My comments here should not be taken to bear any relevance on such viewpoints. The primary aim of this paper is to comment on the intrinsic value, within tort theory, of the formal ideals of consistency and coherence. As such, the argument that I present here is that the loss of chance doctrine is incoherent *within* tort law, where injuries occurring because of medical negligence are currently regulated.

Conclusion and Next Steps

I have offered a response to Weinrib's proposed interpretation of loss of chance through what I have understood as Weinrib's own commitment to coherence within tort law. His clear elucidations on the value and interrelationship between consistency and coherence have enabled my response here and have informed much of my thinking about tort law doctrine and theory. I maintain that Weinrib's loss of chance proposal in "Causal Uncertainty" does not achieve the coherence that he so astutely articulates elsewhere, and therefore must not be accepted. Consistent and coherent treatment of litigants matters – the fairness and legitimacy of tort adjudication is contingent on this. Given its affront to these formal values, the loss of chance doctrine must be rejected.

But what, then, of those individuals who are treated negligently by medical providers, whose chances of better medical outcomes are reduced as a result, but who are unable to prove causation on a balance of probabilities as existing tort law principles demand? Is the only answer a complete re-

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42 Weinrib, *Private Law*, *supra* note 24 at 46.

43 See e.g. Robert S Prichard, *Liability and Compensation in Health Care* (Toronto: University of Toronto Press, 1990). See also Gerald B Robertson, "A View of The Future: Emerging Developments in Health Care Liability" (2008) Health LJ 1; Elaine Gibson, "Is It Time to Adopt a No-Fault Scheme to Compensate Injured Patients?" (2016) 47:2 Ottawa L Rev 307.

moval of medical negligence from the tort law scheme? And if so, is there no answer for negligently treated patients who must currently argue their claims within the tort law framework? Assuming that a full re-vamp of the administration system for medical negligence claims in Canada is a long-term solution (at best), I suggest that the most viable solution in the short term is to ensure that legal players do better to recognize and particularize the psychological harm and trauma that occur in situations of negligent misdiagnoses.[44] Lawyers and legal academics must work with psychologists and psychiatric professionals to more fully understand the human experience when a misdiagnosis results in a lost chance to survive or to have better health. Lawyers should gather the evidence necessary to advocate for the legitimacy and severity of such suffering. In the interest of honouring the principle of full compensation, such damages must be awarded where it can be appropriately proven. This paper is not intended to undertake such interdisciplinary work, but it may be seen as an urgent call for such work in the near future.

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[44] I note that in *Lafferière*, *supra* note 17 at para 169, the plaintiff was awarded $10,000.00 in damages for her psychological pain and suffering but these damages were not central to her claim. The judicial reasoning does not make the nature of the argumentation and evidence advanced with respect to these damages clear.