

**Lost Chance – Acceptance at last? A commentary on
Armstrong, Carol Ann v Quest Laboratories Pte Ltd [2018] SGHC 66***

I. Introduction

1. In the tort of negligence, damages are awarded if the claimant can establish that he has suffered loss.¹ While most claims for loss in the tort of negligence usually revolve around physical damage,² courts have recognised losses of a non-physical nature, including claims for pure economic loss or loss of genetic affinity.³ Courts, however, have consistently refused to recognise claims for a loss of chance in the context of medical negligence.⁴ Simply put, a lost chance arises where negligence on the part of the doctor deprives the patient of his chances of recovery.⁵
2. However, in *Armstrong, Carol Ann v Quest Laboratories Pte Ltd* (“*Armstrong*”),⁶ the Singapore High Court recognised lost chance as a form of compensable loss.⁷ In this article, it will be argued that the decision in *Armstrong* is theoretically sound for two reasons. First, tort law does protect certain fundamental interests.⁸ The characterisation of loss in tort law should not derogate from this; a lost chance is *still* a compensable loss if it has affected the fundamental interests of a person. Second, recognising lost chance as compensable loss helps ensure more just outcomes. This article will first consider the facts of *Armstrong*, before turning to the analysis of the judgment.

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¹ Margaret Fordham, “The Protection of Personal Interests; Evolving Forms of Damage in Negligence”, (2015) 27 SAclJ 643.

² Gary Chan Kok Yew, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at [20.050] and [20.083]. This includes, *inter alia*, personal injury claims and damage to property.

³ *NTUC Foodfare Co-operative Ltd v SIA Engineering Company Limited* (“*NTUC Foodfare*”) [2018] SGCA 41. See also *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918 where the court awarded the plaintiff in that case, damages for the loss of genetic affinity.

⁴ *Gregg v Scott* [2005] 2 AC 176. Courts have preferred to view lost chance as being part of causation rather than a form of actionable damage in cases involving medical negligence.

⁵ Margaret Fordham, “Loss of Chance—A Lost Opportunity?” (2005) Singapore Journal of Legal Studies. 6 [2018] SGHC 66.

⁷ *Armstrong, Carol Ann v Quest Laboratories Pte Ltd* (“*Armstrong*”) [2018] SGHC 66 at [16] citing *Gregg v Scott* [2005] 2 AC 176 at [25]. Lord Nicholls opined that “the loss of a chance should constitute actionable damage”. I have, in this piece, referred to “actionable damage” as “compensable loss”.

⁸ C.P. Goldberg, “Two Conceptions of Tort Damages: Fair v. Full Compensation”, 55 DePaul L. Rev. 435 (2006) at p 437.

II. Brief facts

3. *Armstrong* concerned a suit brought by the wife of the late Peter Traynor.⁹ Traynor had a biopsy done on the 14th of September 2009.¹⁰ The specimen was sent to Quest Laboratories and a pathology report was subsequently produced.¹¹ The pathologist, one Dr Tan Hong Wui, concluded that there was no malignancy.¹²
4. In 2012, Traynor consulted another oncologist, Dr Ang Peng Tiam, when he found his right armpit to be swollen.¹³ Dr Ang asked that the specimen taken from Peter Traynor's mole in 2009 be reviewed by another pathologist.¹⁴ The report that was subsequently issued ("2012 report") carried a different diagnosis – that the mole was not benign.¹⁵ Unfortunately the cancer had spread throughout Traynor's body, resulting in his death within a year (in December 2013).¹⁶
5. His widow brought a suit against Quest Laboratories and Dr Tan claiming, *inter alia*, (a) benefits Traynor's dependents would have received from him,¹⁷ and (b) sums his dependents would have inherited from him.¹⁸ These two claims were premised on the assumption that negligence on Dr Tan's part resulted in Traynor losing the chance to survive for another 4 years (i.e. the lost chance argument).¹⁹

III. The High Court decision

A. *Lost chance as a form of actionable damage*

6. After discussing evidence tendered by medical experts for both parties, Justice Choo Han Teck opined that "there was a loss of an early opportunity for treatment" of Traynor's cancer.²⁰ Choo J further noted that if Traynor's physician (Dr Ang) had received the 2012 report instead of the 2009 report, the physician would have

⁹ *Armstrong* at [2].

¹⁰ *Id* at [1].

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Id* at [2].

¹⁴ *Ibid.*

¹⁵ *Armstrong* at [2].

¹⁶ *Ibid.*

¹⁷ *Id* at [20].

¹⁸ *Ibid.*

¹⁹ *Id* at [21].

²⁰ *Id* at [8].

explained to Traynor that “his mole might be cancerous”.²¹ This would have resulted in a “completely different course of action” for both Traynor and his physician.²² Choo J concluded that Dr Tan’s negligence deprived Traynor of a “fighting chance”,²³ and that this “probably caused him to die years earlier than he would have done”.²⁴

7. Choo J then had to decide the quantum of damages the plaintiff was entitled to, as a result of the lost chance.²⁵

B. Quantifying lost chance in award of damages

8. On the issue of quantifying the lost chance in this case, Choo J referred to the additional years Traynor would have lived had he been properly diagnosed (i.e. the “lost years” argument).²⁶ He held that Dr Tan’s negligence “caused Peter Traynor to lose four years of his life”.²⁷
9. In arriving at this figure, Choo J refused to rely on the plaintiff’s expert witness’s (Prof McCarthy) assessment that “Traynor had a 68% chance of surviving 10 years”, which was based on certain statistics regarding cancer staging.²⁸ Choo J reasoned that such statistics, being general data, were intended for doctors to advise their patients, and could only assist the court by providing a *rough* indication of the number of years of compensation to award.²⁹ Instead, he relied on the fact that Traynor had lived for four years after his diagnosis in 2009 (even though he was misdiagnosed),³⁰ and the evidence which showed that his cancer was not dormant.³¹

²¹ *Id* at [8].

²² *Ibid.*

²³ *Id* at [19].

²⁴ *Ibid.*

²⁵ *Ibid* at [9].

²⁶ *Armstrong* at [18]. See Liang Shi Wei Jeremy, Low Kee Yang, “Recognising Lost Chances in Tort Law”, (2014) Singapore Journal of Legal Studies at p 118.

²⁷ *Id* at [21].

²⁸ *Id* at [12] and [19]. Cancer staging is “the classification by oncologists as to how far a cancer has progressed, [which] in turn determines the chances of survival”. In this case, the expert witness, Prof McCarthy was of the view that Peter Traynor had a 68% chance of living for another 10 years.

²⁹ *Id* at [19].

³⁰ *Ibid.*

³¹ *Ibid.*

Using this, he estimated that if not for the misdiagnosis,³² Traynor would have survived for “[eight] years from 2009”.³³

IV. Discussion

10. Up till the decision in *Armstrong*, courts have, in medical negligence cases, preferred to discuss lost chance in terms of causation.³⁴ A leading case on this was *Gregg v Scott*.³⁵ In that case, the doctor had negligently misdiagnosed a lump in the claimant’s arm as being benign.³⁶ As it turned out, the lump was cancerous, but the doctor’s negligence resulted in a nine month delay in the claimant receiving treatment.³⁷ The claimant sued, alleging that “if he had been diagnosed earlier, there would have been a very high likelihood of a cure”.³⁸ The House of Lords, in dismissing the claim, discussed the claimant’s lost chance of recovery in terms of causation:

“There is no inherent uncertainty about what caused something to happen in the past or about whether something which happened in the past will cause something to happen in the future. **Everything is determined by causality.** What we lack is knowledge and the law deals with lack of knowledge by the concept of the burden of proof.

Similarly, in the present case, the progress of [claimant] Mr Gregg's disease had a determinate cause. It may have been inherent in his genetic make-up at the time ... [or it may] have been affected by subsequent events and behaviour for which Dr Scott was not responsible. Medical science does not enable us to say. **But the outcome was not random; it**

³² *Ibid.* Justice Choo Han Teck opined that “And I therefore leap where Lord Nicholls had leapt, and estimate that Peter Traynor might have lived twice that number (i.e 8 years) had he been properly diagnosed”.

³³ *Ibid.*

³⁴ Liang Shi Wei Jeremy, Low Kee Yang, “Recognising Lost Chances in Tort Law”, (2014) Singapore Journal of Legal Studies at p 121. See also *Gregg v Scott* [2005] 2 AC 176 at [79] and *Yeo Peng Hock Henry v Pai Lily* [2001] 4 SLR 571.

³⁵ [2005] 2 AC 176.

³⁶ *Id* at [5].

³⁷ *Ibid.*

³⁸ *Id* at [62].

was governed by laws of causality and ... inability to establish that [the] delay in diagnosis caused the reduction in expectation in life cannot be remedied by treating the outcome as having been somehow indeterminate.”³⁹
[Emphasis added]

11. Prior to *Armstrong*, Singapore courts also adopted the same approach towards the doctrine of lost chance, consistently refusing to recognise it as a form of compensable loss.⁴⁰ The claimant would have to then prove that he suffered another type of loss (i.e physical injury or financial loss)⁴¹ to establish a claim in damages. *Armstrong* therefore broke new ground in recognising lost chance as a form of compensable loss.⁴²
12. However, the court did not express its reasons for recognising lost chance as compensable loss, merely pointing out that “whether it is a loss of chance or loss of hope, [...] is still a loss”.⁴³ We now turn to examine the underlying theoretical foundation of damages in tort to demonstrate that the decision in *Armstrong* is sound, as it is (a) theoretically consistent with the fundamental interests protected by tort law, and (b) better accords with notions of justice as it does not deny a deserving claimant of a remedy.

A. Consistent with fundamental interests protected by tort law

13. It has been argued that “there are certain aspects of human wellbeing which can be regarded as fundamental or core moral interests, and that setbacks to these interests, or at least sufficiently serious setbacks, constitute harm”.⁴⁴ These interests relate to fundamental interests in life or bodily integrity.⁴⁵ Tort law recognises these

³⁹ *Gregg v Scott* [2005] 2 AC 176 at [79] – [80].

⁴⁰ See *Tan Hun Hoe v Harte Denis Mathew* [2001] 3 SLR(R) 414 where the court discussed lost chance as a doctrine of causation.

⁴¹ Gary Chan Kok Yew, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at [20.050] – [20.067] This can be traced to Roman Law. See Peter Birks, *The Roman Law of Obligations* (Oxford University Press, 2014) at p 195 – 197.

⁴² *Armstrong* at [18].

⁴³ *Id* at [18].

⁴⁴ John Oberdiek *et al*, *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) at p 55.

⁴⁵ *Ibid*. A distinction is made between first and second order interests. First order interests relate to fundamental interests in life, bodily integrity etc. To that end, a loss of a chance in the context of medical negligence may be framed as a fundamental interest within this framework as opposed to an increased exposure to risk which would be a second order interest. See also C.P. Goldberg, “Two Conceptions of Tort Damages: Fair v. Full Compensation,” 55 DePaul L. Rev. 435 (2006) at p 437.

fundamental interests by *compensating* the claimant who has suffered a setback to his interests as a consequence of the tortfeasor's actions.

14. Similarly, in the context of medical negligence, a patient who has been deprived of a better chance of recovery as a result of a doctor's negligence has suffered a setback to his fundamental interest in life or bodily integrity.⁴⁶ After all, a patient would generally want to undertake a course of treatment that gives him the best possible chance of recovery,⁴⁷ or in cases of terminal illness, extend his life for as long as possible.⁴⁸ Where the tortfeasor's negligent act has set the patient on an entirely different course of treatment or delayed timely treatment, i.e. the lost chance, this constitutes a harm to the patient for which he should be compensated.⁴⁹ This is in line with the compensatory norm in tort law. Damages in tort are usually awarded on the basis of compensating the claimant.⁵⁰ The aim is to restore the claimant to the position he would have been in had it not been for the tortfeasor's actions.⁵¹
15. This, however, does not mean that the scope of damages for a lost chance will be unlimited. After all, the loss of chance must be linked to an adverse physical

⁴⁶ How we perceive time might explain this. See Mark Rowlands, *The Philosopher and the Wolf* (Granta, 2008) at p 195 – 215. Rowlands argues that death harms us because it “deprives us of a future”. This is because humans conceive of time as a “river flowing from the past, through the present and into the future”. It suggests a view of “life’s meaning as something towards which we must aim; or as a direction in which we must travel”. This explains the sense of loss we feel at a wasted opportunity; the future that we once envisioned will never be realised. Zeno’s arrow paradox also contains the germ of this idea. See Nick Huggett, “Zeno’s Paradoxes”, *Stanford Encyclopaedia of Philosophy* (11 June 2018) <<https://plato.stanford.edu/entries/paradox-zeno/#Arr>> (Accessed 30 April 2019) and Ned Markosian, “Time”, *Stanford Encyclopaedia of Philosophy* (24 January 2014) <<https://plato.stanford.edu/entries/time/>> (Accessed 9 May 2019). See also, Joel Feinberg, *Harm to Others* (Oxford University Press, 1984) at p 79 – 83. The manner in which we perceive time could, in the author’s opinion, provide a normative basis for the recognition of loss chance as actionable damage in medical negligence cases, though this would merit fuller discussion in a separate piece.

⁴⁷ *Yeo Peng Hock Henry v Pai Lily* [2001] 4 SLR 571 at [7]. The trial judge found that the claimant, Ms Pai, would have gone to the A&E unit immediately if she had been so instructed by the defendant.

⁴⁸ The facts present in *Armstrong* aptly illustrate this point.

⁴⁹ See *Yeo Peng Hock Henry v Pai Lily* [2001] 4 SLR 571. In this case, the Plaintiff patient saw her family doctor, complaining of blurring of vision in her eye. The doctor suspected that she had a detached retina but failed to refer her to a specialist to seek immediate medical attention. The Plaintiff eventually lost vision in her eye owing to the doctor’s negligence. Although the Plaintiff’s claim was eventually dismissed by the Court of Appeal on grounds that causation had not been proved, it is arguable that the doctor’s negligence in failing to inform the Plaintiff to seek immediate treatment from a specialist caused her to lose the chance for prompt treatment.

⁵⁰ Gary Chan Kok Yew, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at [20.005]. See Geistfeld, Mark A., "Compensation as a Tort Norm" (2013) New York University Public Law and Legal Theory Working Papers. Paper 419.

⁵¹ *Ibid.*

outcome for the patient.⁵² Moreover, the claimant must still prove that he would not have suffered a setback to his interest “but for” the tortfeasor’s actions.⁵³

B. Justice

16. As Lord Nicholls pointed out, to deny a deserving claim in such medical situations would result in a situation where the patient does not have a remedy despite losing “something of importance and value”⁵⁴ as a result of the doctor’s negligence.⁵⁵ The inherent difficulties in characterising lost chance as compensable loss (as discussed in para 9 above) should not be a bar to dispensing justice for deserving claimants.
17. Recognising lost chance as compensable loss has two further advantages that ensure a just outcome. First, it allows the court flexibility in quantifying damages. Second, it simplifies matters, focussing the court’s attention on determining the loss suffered by the claimant. We discuss each in turn below.
18. Characterising lost chance claims as a setback to the claimant’s fundamental interests accords the court flexibility in determining the extent to which this lost chance has set back the claimant’s interest, having regard to the relevant circumstances. This seemed to be the approach taken by Choo J in his quantification of damages. Refusing to solely rely on the statistical evidence tendered by medical experts at trial,⁵⁶ Choo J also took into account the fact that Traynor lived for an additional four years into his assessment of damages.⁵⁷ In doing so, Choo J was able to adjust damages to reflect the true loss suffered by the claimant, thereby ensuring a fairer outcome.⁵⁸
19. *Armstrong* therefore demonstrates the limits of statistical evidence in determining the quantum of damages to be awarded. Statistical data are, as Choo J pointed out,

⁵² This would mean that a patient whose chances of recovery have been adversely impacted but did not eventually suffer any physical loss might be unable to recover for the chance lost. Whether this should be the case merits a fuller discussion in a separate paper.

⁵³ See *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 at [52]; *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428.

⁵⁴ *Gregg v Scott* [2005] 2 AC 176 at [3] - [4].

⁵⁵ *Ibid.* Lord Nicholls remarked that this would result in the doctor’s duty being “devoid of content”. In his view, “the loss of a 45% prospect of recovery is just as much a real loss for a patient as the loss of a 55% prospect of recovery”. In both cases, “the doctor was in breach of his duty to the patient” who ended up worse off.

⁵⁶ *Armstrong* at [19].

⁵⁷ *Armstrong* at [19] and [32].

⁵⁸ The court considers the circumstances of the case in doing so to ensure that damages awarded are “just, equitable and proportionate”. See *ACB v Thomson Medical Pte Ltd and others* [2017] 1 SLR 918 at [150].

“intended for doctors to advise their patients”.⁵⁹ Such statistics could not and did not reflect the fact that Traynor defied the odds for a further four years, despite being misdiagnosed.⁶⁰ If damages had been awarded on the basis of the statistical evidence placed before the court, it would in fact have resulted in overcompensation. The quantum of damages to be awarded then must depend on the factual matrix before the court, if it is to reflect the true extent of the loss suffered.

20. Second, adopting this approach eschews the analysis of survival rate percentages.⁶¹ Doing so simplifies matters greatly, preventing confusion with causation and the evidential burden (i.e. balance of probabilities). Lord Hoffmann illustrated this confusion when he commented in *Gregg v Scott* that “everything is determined by causality” and that what is lacking “is knowledge” which the law deals with “by the concept of the burden of proof”.⁶² In doing so, he failed to distinguish between “an act which causes a claimant’s damage and one which causes a claimant to lose a better than even chance of avoiding that damage”.⁶³ This confusion results in injustice, as the loss of a less than 50% chance at avoiding that damage does not “offer a basis for compensation”.⁶⁴
21. Assuming the court in *Armstrong* had adopted the approach in *Gregg*, and statistics showed that Traynor had a less than 50% chance of living for an additional 10 years, he would not have had any claim against Quest Laboratories or Dr Tan. This is, as Lord Nicholls pointed out, “irrational and indefensible”.⁶⁵
22. Viewing this loss of chance as a setback to the claimant’s interest will help avoid this confusion entirely by focusing the inquiry solely on assessing the loss suffered by the claimant. This ensures that deserving claimants are not deprived of a remedy. Historically, the law of torts developed from the system of writs in medieval

⁵⁹ *Armstrong* at [19].

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Gregg v Scott* [2005] 2 AC 176 at [79].

⁶³ Margaret Fordham, “Loss of Chance—A Lost Opportunity?”, (2005) Singapore Journal of Legal Studies at p 205.

⁶⁴ *Ibid.*

⁶⁵ *Gregg v Scott* [2005] 2 AC 176 at [4]. See also Liang Shi Wei Jeremy, Low Kee Yang, “Recognising Lost Chances in Tort Law”, (2014) Singapore Journal of Legal Studies at p 122. The authors note that “The arbitrary line drawn by traditional causation rules results in injustice to the defendant by overcompensating the claimant at a full 100% if the chance was only 50.1%, and injustice to the claimant by undercompensating him at 0% (in fact not compensating him/her at all) if the chance was only 49.9%”.

England.⁶⁶ To sue the tortfeasor, the claimant must specifically state the “relief or remedy” claimed.⁶⁷ This cannot be done if lost chance is not a recognised form of compensable loss. Therefore, adopting this approach will ensure that deserving claimants are not denied a remedy by eliminating the confusion between lost chance and causation.

V. Conclusion

23. *Armstrong* seems to mark a shift in local jurisprudence towards a gradual acceptance of the doctrine of lost chance as compensable loss. However, questions remain as to whether Choo J’s decision will find favour with the Court of Appeal, and how it should be defined and applied if accepted. Nevertheless, the decision in *Armstrong* is a welcome one.

⁶⁶ Christian Witting, *Street on Torts* (Oxford University Press, 2015) at p 5 – 7.

⁶⁷ O 18 R. 15 of the Rules of Court.