8-034(b) The range of the loss of a chance doctrine: general principles. Before turning to the authorities which in modern times have cascaded over the law reports, it is important to address the question, which has much troubled the courts, of how wide ranging is the loss of a chance doctrine. In short, when does a claimant have to prove on a balance of probabilities that a particular result would have come about and when need he prove only that a chance, which may be less than a probability, of achieving that particular result has been lost. The distinction is of immense importance, separating as it does the cases where the claimant will be awarded all or nothing and the cases where a percentage of loss will come his way.

8-035(i) The distinction between past events and future events. The first distinction to which one must have regard appears most clearly in an important passage of Lord Reid's speech in *Davies v Taylor* where he said:

"When the question is whether a certain thing is or is not true – whether a certain event did or did not happen – then the court must decide one way or the other. There is no question of chance or probability. Either it did or it did not happen. But the standard of civil proof is a balance of probabilities. If the evidence shows a balance in favour of it having happened, then it is proved that it did in fact happen." He continued:

"You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All that you can do is to evaluate the chance. Sometimes it is virtually 100 per cent: sometimes virtually nil. But often it is somewhere in between. And if it is somewhere in between I do not see much difference between a probability of 51 per cent and a probability of 49 per cent."

Also important is the similar passage from the speech of Lord Diplock a few years earlier in *Mallett v McMonagle*. He there said:

"The role of the court in making an assessment of damages which depends on its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. 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. But in assessing damages which depend on its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages it awards."

8-036With matters past, therefore, the court has to determine on the balance of probabilities whether the defendant's act caused the claimant's loss, and if the answer is in the affirmative there is full recovery, while if in the negative there is none. It is this that explains the decision of the House of Lords against the claimant schoolboy in *Hotson v East Berkshire Area Health Authority*. A hip injury which he incurred in a school accident was through negligence not diagnosed by the
defendant hospital authority until five days had elapsed. Had the correct diagnosis been made immediately, with consequent appropriate treatment, there remained a 75 per cent risk of the claimant schoolboy's disability developing, but the defendants' breach of duty had turned that risk into an inevitability. The defendants contended that damages for loss of the 25 per cent chance of avoiding the disability were not claimable since the Claimant had not shown that on the balance of probabilities the negligence had caused the disability. The House of Lords upheld this contention, exonerating the defendants entirely from liability for the claimant's disability on the basis that its sole cause had been the original accident so that no loss of a chance was caused to the claimant by the defendants' subsequent negligence. Lord Mackay said:

"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. It did not raise any question of what might have been the situation in a hypothetical state of facts."  

Later in his speech he said:

"The judge's findings in fact mean that the sole cause of the plaintiff's avascular necrosis was the injury he sustained in the original fall, and that implies ... that when he arrived at the hospital for the first time he had no chance of avoiding it. Accordingly, the subsequent negligence of the authority did not cause him the loss of such a chance." 

8-037(ii) The distinction between causation of loss and quantification of loss. This second, equally important, distinction is related to the first, that between past and future events. When we are looking at past events we are necessarily in the realm of causation; the test is balance of probabilities and chances just do not matter. But when we are looking to the future we are concerned with the quantification of loss and here chances are all-important; an assessment of damages is entitled, indeed is required, to take into account all manner of risks and possibilities. The passages from Lord Reid and Lord Diplock already quoted bring this out clearly. It is therefore the case that a loss of a chance, and its assessment, is frequently involved in the quantification process, and this has always been so and long before Chaplin v Hicks was decided.

8-038It is submitted that losses of a chance appearing in the process of quantification do not fall within the loss of a chance doctrine. Loss of a chance proper, as it may be termed, has a more limited field. It comes in before we get to quantification; indeed it comes in at the causation stage. How is this? It is because there are situations where the law has recognised, and has treated, the loss of a chance as a form of loss, an identifiable head of loss in itself. To take Lord Hoffmann's way of putting it in Barker v Corus (UK) Ltd, "the law treats the loss of a chance of a favourable outcome as compensatable damage in itself". Causation is then established by showing that the claimant has lost the chance and showing this on the balance of probabilities. This then makes for three stages in the enquiry: first, it must be ascertained whether loss of a chance is recognised as a head of damage or loss in itself; secondly, it must be shown that on the balance of probabilities the claimant has lost the particular chance; thirdly, the lost chance must be quantified by resort to percentages and proportions.

147[1987] A.C. 750 at 785D.
148[1987] A.C. 750 at 789M.
149At para.8-035, above.
150[2006] 2 A.C. 572. This difficult case is considered at paras 8-017 and 8-018, above and para.8-046, below.
151[2006] 2 A.C. 572, para.36.
Referring Principles:

VII.3.5 - Future damages/Lost profits