The "loss of opportunity or chance doctrine", which is well recognised in English law, is slowly receiving more attention in South African law.

Essentially, the doctrine applies to an instance where a defendant's alleged breach of contract or duty of care deprives a claimant of the opportunity to obtain a benefit or avoid a loss. A court is asked to place a value on the hypothetical outcome that would have materialised but for the defendant's breach. This value represents a potential damages claim.

Importantly, when applying this doctrine the substantive distinction between causation and quantification must be clearly acknowledged.

In the South African *locus classicus* case of *De Klerk v Absa Bank Ltd and Others* case the Supreme Court of Appeal set out the appropriate approach to be taken in respect of this doctrine. Essentially, the case accepts the doctrine into South African law.

There are several additional South African decisions that reflect an indirect application of the doctrine, without any express recognition thereof. These will be discussed briefly, and English authorities will be used to provide a clearer understanding of the doctrine and its application.

**De Klerk case**

Schutz JA was at pains to emphasise the importance of distinguishing between causation and quantification. Briefly, the plaintiff was claiming damages arising out of an alleged fraudulent or negligent misrepresentation by the defendant which caused him to make a poor investment.

In applying the English case of *Allied Maples Group Ltd v Simmons & Simmons (A Firm)*, Schutz JA states that causation required the establishment, on a balance of probability, of a causal link between the negligence and the loss, while quantification, where it depended on future uncertain events, was decided not on a balance of probability, *but on the court's assessment of the chances of risk eventuating*. The chance is evaluated as part of the assessment of quantum of damage, the range lying somewhere between that qualified as real and substantial on the one hand and near certainty on the other. This appears to indicate a high threshold that must be met in terms of quantification.
The court held that the appellant would have to prove, on a balance of probability, that he would have invested elsewhere at least some of the moneys paid to the third respondent’s scheme (causation). Accordingly, the claiming party would have to prove, on a balance of probabilities, that he would have effected the mitigating actions if he knew what the actual financial position was. The court would then quantify his damages by estimating his chances of earning the figure claimed (quantification).

After considering previous South African decisions, the settled principle that a court will come to the aid of a plaintiff where his claim is uncertain, provided he led the best evidence possible, was applied.

Subsequently, on the basis of the evidence of the plaintiff and especially his expert, an actuary, the court found that sufficient evidence existed that the plaintiff would indeed have invested his money elsewhere and received a better return.

The above decision was expressly recognised in SDR Investment Holdings Co (Pty) Ltd v Nedcor Bank Ltd. The plaintiffs claimed damages in contract for their loss of a chance to sell certain farms at a higher purchase price, where the defendant had refused to do so and proceeded to sell the farms at an auction in breach of a duty.

The court acknowledged that, when applying the "loss-of-chance doctrine", plaintiffs are entitled to speculate in an effort to prove quantum.

The court found that the plaintiff had succeeded in showing that, in respect to the sale of the farms, there was a real and not merely a speculative chance that had the first defendant allowed the sale, the plaintiff’s loss would not have resulted. The court held that the plaintiffs had been wrongfully deprived of their opportunity to do so, and were therefore entitled to damages.

It must be noted that the principle outlined above at 2.1.3 was given an important qualification in Hendricks v President Insurance Co Ltd. The court held that, although a wrongdoer is not relieved of necessity to pay by reason of the quantum not being conducive to precise calculation, this is not applicable where the issue is not quantum but whether the damages actually resulted from action of the wrongdoer. That is to say, the principle is not to be applied in instances where causation is at issue.

In Shoombie v Marais, the court dismissed the plaintiff’s claim for damages as a result of incorrect advice given to her during divorce proceedings, on the basis that the plaintiff would not have acted differently even given the correct advice. There was therefore no causation.

Finally, a plaintiff may still be able to receive compensation where the measure of damages is less than 50% (that is, there is less than 50% likelihood that the damages would not have been suffered).

Conclusion
In conclusion, a plaintiff, where he or she was deprived of obtaining a benefit or avoiding a loss on the basis of the defendant’s alleged negligence, is entitled to a claim for damages under the heading of a "loss of chance".

Once a plaintiff is able to establish, on a balance of probability, a causal nexus between the loss suffered and the negligence of the defendant, he or she must show that there is a real, and not just speculative, chance that the amount of damages claimed would have resulted.

However, to avoid a floodgates argument, it is submitted that courts will require a plaintiff to provide sufficient evidence to establish that it would have acted in the way that it claims it would have (that is, that there was a real chance of the damages being avoided).

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