The Loss of Chance Doctrine:

Should the Doctor Be Liable for Results that Were Not Caused by His Negligence?

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2006

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The loss of chance doctrine, also called the lost chance doctrine, the increased risk of harm doctrine, and the value of a chance doctrine, is:

> . . . a claim against a doctor who has engaged in medical malpractice that, although it does not result in particular injury, decreases or eliminates the chance of surviving or recovering from the preexisting condition for which the doctor was consulted.[1]

There are differing approaches taken by the jurisdictions that have adopted the loss of chance doctrine. [2]

(1) Pure Loss

Some jurisdictions focus the compensable loss on the actual lost chance not the ultimate outcome.[3] "The lost opportunity for a better outcome, is itself, the injury for which the negligently injured person may recover."[4] With this approach, the plaintiff may recover if her chances for a better outcome were less than fifty percent, however, she can only recover for the opportunity lost or "the portion of damages actually attributable to the defendant's negligence," not the entire outcome.[5]

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1 BLACK'S LAW DICTIONARY 958 (7th ed. 1999).

2 The differing approaches are explained in *Lord v. Lovett*, 146 N.H. 232 (2001).

3 *Lord v. Lovett*, 146 N.H. 232 (2001)
Hebert v. Parker, 796 So.2d 19 (2001)

4 *Lord*, 146 N.H. at 235.

5 *Id*. at 235-36.

"Under this approach, 'by defining the injury as the loss of chance . . ., the traditional rule of preponderance is fully satisfied." [6]

(2) All or Nothing

Few jurisdictions follow the traditional tort standard and require that the plaintiff must prove by a preponderance of the evidence that but-for the defendant's negligence the plaintiff would not have suffered the harm.[7] Essentially, a plaintiff must establish that she was "deprived of at least a fifty-one percent chance of a more favorable outcome than was actually received.[8] Under this approach, the plaintiff can recover for the entire preexisting illness or condition and the ultimate outcome. [9]

A plaintiff who had only a fifty percent, or less, chance of recovery without defendant's negligence could not recover anything because she could not meet the evidentiary burden that, without the defendant's negligence, her chance of a more favorable outcome was fifty-one percent or greater.[10] But if the plaintiff could establish that without the defendant's negligence she would have had a fifty-one, or greater, percent chance of recovery, then she would be entitled to recover damages for the ultimate outcome.[11]

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6 *Id*. at 236 (2001) (quoting *Perez v. Las Vegas Medical Center*, 107 Nev. 1, 805 P.2d 589, 592 (1991)).

7 *Williams v. Spring Hill Memorial Hosp.*, 646 So.2d 1373 (1994); *Clayton v. Thompson*, 475 So.2d 439 (1985).

8 *Lord*, 146 N.H. at 234.

9 *Id*.

10 *Id*. at 234- 35.

11 *Id*. at 235.

(3) Relaxed Causation

Other jurisdictions relax the traditional evidentiary standard of more likely than not by allowing causation to be resolved by the jury without evidence of a reasonable probability that the defendant's negligence caused the patient's ultimate harm.[12] In other words, the plaintiff need only show that the defendant's negligence "'increased the harm' to the plaintiff or 'destroyed a substantial possibility'" of a better outcome. [13] Some jurisdictions allow any degree of increased harm, while others require the increased harm to be substantial. [14]

However, there are differing opinions of "substantial."[15] The Supreme Court of Washington held that a 14% reduction, from 39% to 25%, was sufficient evidence of causation.[16] While the Supreme Court of Kansas held that substantial was merely more than appreciable, it further stated that it would not "attempt to draw a bright line rule on the percentage of lost chance that would be

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[12] *Thornton v. CAMC*, 172 W. Va. 360, 305 S.E.2d 316 (1983); *Hamil v. Bashline*, 481 Pa. 256, 392 A.2d 1280 (1978).

[13] *Lord*, 146 N.H. at 235.

[14] *Id*.

[15] *Borgren v. United States*, 716 F.Supp. 1378, 1383 (D.Kan. 1989) (loss of 30% to 57% chance was appreciable loss of chance); *Falcon v. Memorial Hosp.* 436 Mich. 443, 470, 462 N.W.2d 44 (1990) (superceded by statute, Mich. Comp. Laws § 600.2912a [2] [2000]) (loss of 37.5 % chance of survival constitutes loss of substantial opportunity; declined to determine what lesser percentage would fail to constitute substantial opportunity); *Kallenberg v. Beth Israel Hosp.*, 45 A.D.2d 177, 180 357 N.Y.S.2d 508 (1974) (affirmed jury verdict for plaintiff in malpractice action where expert opined there was a loss of 20% to 40% chance of survival).

[16] *Herskovits v. Group Health Coop.*, 99 Wash. 2d 609, 664 P.2d 474 (1983).

sufficient for the case to be submitted to the jury." [17] In a later case, the Kansas court made a slight clarification by holding that a 5-10 % chance was sufficient to maintain a cause of action.[18]

West Virginia Approach

West Virginia follows the latter of the three approaches. West Virginia's leading case on loss of chance is *Thornton v. CAMC.*[19] In *Thornton*, the plaintiff suffered a compound comminuted fracture of his right leg as the result of a motorcycle accident. For the next four years, he underwent additional treatment for his leg and his right leg was eventually amputated.[20] Plaintiff contended that his original injury had been improperly treated, resulting in the need for the amputation. The defendant doctor contended that the original injury was so severe that the amputation would have resulted regardless of his treatment.[21] The plaintiff argued that the doctor's negligence caused a loss of the "value of a chance" that his leg would heal properly.[22] The *Thornton* Court held that:

> . . . where a plaintiff in a malpractice demonstrated that a defendant's acts or omissions have increased the risk of harm to the plaintiff and that such increased risk of harm was a substantial factor in bringing about the ultimate injury to the plaintiff, then the defendant is liable for such ultimate injury. [23]

However, the Court, like many other jurisdictions, sets forth no bright line rule as to what constitutes a substantial factor. By failing to establish a bright line rule, or even some type of guidelines, the

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17 *Delaney v. Cade*, 255 Kan. 199, 215-16, 873 P.2d 175, 186 (1994).

18 *Pipe v. Hamilton*, 274 Kan. 905, 913, 56 P.3d 823, 829 (2002).

19 *Thornton v. CAMC*, 172 W. Va. 360, 305 S.E.2d 316 (1983).

20 *Id*. at 362, 305 S.E.2d at 318.

21 *Id*. at 366, 305 S.E.2d at 323.

22 *Id*.

23 *Id*. 368, 305 S.E.2d at 324-25.

Court in essence allows the plaintiff to recover damages for the ultimate harm even if the "substantial factor" did not increase the harm by more than fifty-one percent.

Conclusion

As Professor Joseph King, Jr. has opined, the relaxed causation approach "represents the worst of both worlds [because it] continues the arbitrariness of the all-or-nothing rule, but by relaxing the proof requirements, it increases the likelihood that a plaintiff will be able to convince a jury to award full damages.[24]

By allowing a plaintiff to recover for the entire outcome, when there was a more than 50% chance of such outcome regardless of the defendant's negligence, the Court alters the traditional "more likely than not" standard. The Court is also allowing defendants to be held liable for the harm in a greater percentage than that for which they are actually responsible.

In *Thornton*, the Court stated that the issue is "one of causation – did the doctor's actions or inactions increase the risk of [harm] and was this risk a substantial factor in [the ultimate outcome]."[25] This is the underlying issue regardless of what approach is followed by the jurisdiction. The "all or nothing" approach is followed by a minority of jurisdictions,[26] while the majority, including West Virginia, has adopted the "relaxed causation" approach.[27] However, the "pure loss" approach is clearly the better and more just of the three because the lost chance, increased risk of

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[24] King, "REDUCTION OF LIKELIHOOD" REFORMULATION AND OTHER RETROFITTING OF THE LOSS-OF-A-CHANCE DOCTRINE, 28 U. Mem. L. Rev. 492, 508 (1998).

[25] *Thornton*, 172 W.Va. at 366, 305 S.E.2d at 323.

[26] *Lord*, 146 N.H. at 235.

[27] *Thornton*, 172 W.Va. at 366, 305 S.E.2d at 323.

harm, itself is the compensable injury. Under that approach, the defendant is only liable for the **harm actually caused by him**, whether that harm was "substantial" or minimal. Also, the plaintiff can still recover damages for the increased harm even if her ultimate chances of a better outcome were less than fifty percent.

> The loss of chance of achieving a favorable outcome or of avoiding an adverse consequence should be compensable and should be valued appropriately, rather than treated as an all-or-nothing proposition. Preexisting conditions must, of course, be taken into account in valuing the interest destroyed. When those preexisting conditions have not absolutely preordained an adverse outcome, however, the chance of avoiding it should be appropriately compensated even if that chance is not better than even.[28]

[28] *Lord*, 146 N.H. at 236 (citing King, CAUSATION, VALUATION, AND CHANCE IN PERSONAL INJURY TORTS INVOLVING PREEXISTING CONDITIONS AND FUTURE CONSEQUENCES, 90 Yale L.J. 1353, 1354 (1981)).