

**FOCUS: HEALTH LAW/PRIVACY**

# Loss of chance: Confusion in New York's standard of proof

Under traditional standards of causation, medical malpractice plaintiffs are usually prevented from recovering where they are unable to show that they had a better-than-even chance of recovery absent the defendant's negligence. Stated otherwise, in medical malpractice actions, plaintiffs must demonstrate that there was a "reasonable medical proba-



**Kenneth Mauro**

bility" (a more than 50 percent chance) that the physician's negligence caused the plaintiff's injury.

Loss of chance, however, is a theory of liability that allows a medical malpractice plaintiff to recover where a delay in proper diagnosis or treatment results

in the plaintiff's suffering an "increased risk" of harm or being deprived of a "chance" of recovery. For instance, if a doctor's inaccurate diagnosis leads to the omission of a specific medical protocol that would have contributed to a 60 percent likelihood of the patient's survival, and the patient dies, the doctor is liable for malpractice. The patient is compensated for the "loss of chance" — the chance of avoiding some adverse result or achieving some favorable result. As this article will discuss, the plaintiff's burden of proof of causation may be easier.

The loss of chance theory was first applied to medical malpractice actions over 40 years ago in the seminal case of *Hicks v. United States* (368 F.2d 626 (4th Cir. 1966)). In *Hicks*, the plaintiff, a Navy enlisted man, took his wife to the naval dispensary because of severe abdominal pain and vomiting. Following examination, the naval doctor diagnosed gastroenteritis. The doctor prescribed medication and sent the patient home with instructions to return eight hours later. While at home, the patient fell to the floor unconscious and died. An autopsy revealed a fatal obstruction of her small intestine. The plaintiff brought suit. At trial, the plaintiff presented experts who testified that had the patient been immediately hospitalized for surgery, there was a chance that she would have survived.

The district court dismissed the case. However, the United States Court of Appeals for the Fourth Circuit reversed, holding that a plaintiff need not prove that the patient would certainly have survived absent the defendant's negligence, but instead, "[i]f there was any substantial possibility of survival and the defendant has destroyed it, he is answerable." Since *Hicks*, courts in many jurisdictions have recognized the loss of chance cause of action in medical malpractice suits when a patient's chance of recovery or survival is less than fifty percent. States, however, have not adopted a uniform stance to the loss of chance doctrine. Instead three different approaches have developed.

A majority of jurisdictions do not permit recovery for the loss of a less-than-50-percent chance of obtaining a more favorable result. In other words, a patient who "probably" would have suffered the same harm had he received proper treatment is entitled to no compensation. Among the jurisdictions that have adopted this approach are California (see, *Dumas v. Cooney*, 235

Cal.App.3d 1594), Florida (see, *Gooding v. University Hosp. Bldg. Inc.*, 445 So.2d 1015 (1984)), Indiana (see, *Watson v. Medical Emergency Serv.*, 532 N.E.2d 1191 (Ind. Ct. App. 1989)), Maryland (see, *Fennel v. Southern Maryland*, 580 A.2d 506 (Md. 1990)), Massachusetts (see, *Wright v. Clement*, 190 N.E. 11 (Mass. 1934)), *Glicklich v. Speviack*, 452 N.E.2d 287 (Mass. App. Ct. 1983)) and Virginia (see, *Blondel v. Hayes*, 403 S.E.2d 340 (Va. 1991)).

Other jurisdictions have taken the approach to duties and causation taken by the Restatement (Second) of Torts 323 which provides that a physician is liable "for physical harm resulting from his

failure to exercise reasonable care to perform his undertaking, if ... his failure to exercise such care increases the risk of such harm ..."

This approach views the underlying injury, the patient's illness or death, as the ultimate injury for which the patient is compensated. Although these jurisdictions adhere to traditional concepts of causation, they expand liability by recognizing the loss of a less-than-even-chance as an actionable injury. Under this approach, a prima facie case for liability is established when a plaintiff produces



**Matthew W. Naparty**

expert medical testimony showing that the defendant negligently deprived the patient of a chance of survival or recovery. The jury would then be required to evaluate the increased risk and to decide whether the increase was a "substantial factor" in (rather than the cause of) the plaintiff's death. Among the jurisdictions that apply the possibility standard are Georgia (see, *Richmond County Hosp. Auth. v. Dickerson*, 356 S.E.2d 548 (Ga. Ct. App. 1987)), Montana (see, *Aasheim v. Humbarger*, 695

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P.2d 824 (Mont. 1985)), Pennsylvania (see *Hamil v Bashline*, 392 A.2d 1250 (Pa. 1978) (holding increased risk of harm may establish proximate cause of physical injury)), Puerto Rico (see *Rosario v. American Export-Isbrandtsen Lines Inc.*, 395 F. Supp. 1192 (E.D. Pa. 1975)), South Dakota (see *Voegeli v. Lewis*, 569 F.2d 89 (8th Cir. 1977)), and West Virginia (see *Thornton v CAMC*, 305 S.E.2d 316 (W.Va. 1983)).

A third approach to the loss of chance doctrine examines whether the physician was probably responsible for the patient's lost of any chance for survival. This lost chance then becomes the injury for which damages are sought, rather than the actual physical injury or death the patient suffered. Because this approach recognizes a lost chance of recovery, however small, as the compensable interest, a significant difference is evinced by the manner in which damages are calculated: rather than awarding damages based on the patient's current physical condition, the focus is shifted to the decrease in the patient's chance of survival or successful treatment. Damages for the lost chance would be measured by the "percentage probability by which the defendant's tortious conduct diminished the likelihood of achieving some more favorable result" (King, "Causation, Valuation and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences," 90 Yale L.J. 1353, 1369 (1981)).

For example, if a plaintiff suffered a harm valued at \$1 million due to his present physical condition, and the physician probably deprived the plaintiff of a 40 percent chance at a better outcome, the total damages awarded would equal \$400,000. Among the jurisdictions that endorse this view are Arizona, Iowa, Kansas, Michigan, Missouri, Nevada (see *Perez v. Las Vegas Med. Ctr.*, 805 P.2d 589 (Nev. 1991)), New Jersey, Oklahoma, and Washington.

In such a jurisdiction, a plaintiff can recover for the loss of any chance regardless of how slight, unlike the first two approaches where the chance lost must be "substantial." Significantly, plaintiffs in these last two jurisdictions are permitted to recover for the loss of less than even chance.

For example, with the first approach, a plaintiff would be denied recovery completely even if she can prove that she was deprived of a 40 percent chance of cure by a preponderance of the evidence. To recover in those jurisdictions, a plaintiff must demonstrate that there was a reasonable medical probability (a more than 50 percent chance) that the physician's negligence caused her injury which, under these facts, she would be unable to prove. With the second approach, a plaintiff would get to the jury and she would be able to recover full damages for her injury. Utilizing the third approach, the plaintiff would be allowed to recover damages, but not for the entire value of her injury. Instead, the jury would determine an amount that would

fairly and adequately compensate plaintiff for her injury, and then award damages representing 40 percent of that value.

**New York remains undecided**

While many jurisdictions have consistently applied one of the three approaches detailed above, some jurisdictions, including New York, have been sending mixed messages.

The first New York court to decide a case brought under this theory of recovery was the Appellate Division, First Department (see *Kallenberg v. Beth Israel Hospital* (45 A.D.2d 177 (1st Dept., 1974)). In *Kallenberg* the plaintiff was in need of a specific medication [Natrexin] to reduce her blood pressure and keep it at a reasonably low level. Although the drug was ordered, for some unexplained reason, the drug was never administered to the decedent.

By failing to give the indicated drug of choice, Mrs. Kallenberg was not in an operable condition; ultimately she died. In other words, had the drug been administered as ordered, Mrs. Kallenberg would have had an operation, which could have possibly saved her life. By not administering the drug, the defendants deprived her of whatever chances the operation would have given her for survival.

The jury found that the failure to give the drug did constitute negligence. The defendants argued that the failure to give Mrs. Kallenberg the drug did not cause her death. Instead they argued, as did the dissent, that "her condition was then terminal and could not be reversed." The Appellate Division, however, rejected this argument and affirmed the jury's verdict in plaintiff's favor holding that:

[The plaintiff's expert] testified that "if properly treated, energetically and adequately, the patient still has [sic] would have had a 20, say 30, maybe 40 percent chance of survival" if surgery had been undertaken; and that surgery could have been performed, if the proper drugs had been administered. He also testified that if the proper drugs had been administered, even without surgery, she had a 2 percent chance of survival.

On the record before us, it is clear that the jury could find, as it did, that had Mrs. Kallenberg been properly treated with the indicated medication of choice, her blood pressure could have been kept under control, and she might have improved sufficiently, even after August 22, to undergo surgery and make a recovery.

The court in *Kallenberg* upheld a judgment for a plaintiff whose expert testified that the defendant's negligence deprived the plaintiff of a 20-to-40-percent chance of survival. Although the court made it clear that it was willing to recognize loss of chance as a viable cause of action, the court did not use language that suggested which of the three approaches it was embracing. For years, *Kallenberg* was interpreted by attorneys and

trial courts to stand for the proposition that if medical malpractice plaintiffs can prove that they were deprived of a 2 percent chance of recovery or better result, then the jury can award damages for the underlying injury. The Appellate Division, Third Department, however, disagreed with this interpretation (see *Kimball v. Sears* (59 A.D.2d 984 (3d Dept., 1977)).

In *Kimball*, the plaintiff urged the court that *Kallenberg* was law, and that it stood for the position that "a jury need only determine that defendants' malpractice deprived a decedent of a chance of survival, regardless of how small that chance might be." The Third Department rejected this view explaining that "[t]he ultimate finding cannot be whether the deceased would have a certain percentage chance of recovery; rather, it must be whether there was a substantial possibility the decedent would have recovered but for the malpractice" (*id.*, at 985 (emphasis added)). This did not shed any light on *Kallenberg*, which remained the source of confusion. Nearly a decade after *Kimball*, the First Department was presented for the first time with an opportunity to clarify its holding in *Kallenberg* (see *Mortensen v. Memorial Hospital* (105 A.D.2d 151 (1st Dept., 1985)). In *Mortensen*, the court upheld a jury instruction which required the plaintiff in a medical malpractice action to show that there was a substantial possibility that the patient could have achieved a better result had the malpractice been avoided and that a showing that there was a slight possibility of a better result was not sufficient to support recovery for the plaintiff.

It was alleged that the defendant physician had been negligent in not treating more promptly a 10-year-old boy whose leg was ultimately amputated because of a tumor. The plaintiff's expert had testified that the patient would have had an 80 percent chance of achieving a complete recovery if an attempt to excise the tumor mass had been made promptly. The defendant's witness, however, testified that it would not have been possible to excise the tumor fully even with prompt treatment. In its charge on proximate cause the court stated:

[I]f you conclude that there was a substantial possibility that amputation could have been avoided had that surgery been performed at that time, that is in early April, and that the defendant's negligence in failing to perform that surgery deprived the plaintiff of that substantial possibility, then the defendant is liable to the plaintiff.

If, however, you conclude that that substantial possibility did not exist, then plaintiff has not established that he suffered any injury as a result of the defendant's negligence and he is therefore not entitled to recover.

After the jury made several requests for clarification of the charge, the court further charged the jury that it was not in a position to give a specific percentage, but that sub-

stantial possibility meant a "significant" or "realistic" possibility. The plaintiff's counsel repeatedly urged that the *Kallenberg* rule be charged so that, according to his interpretation, even the slightest possibility of saving the limb would be sufficient to support a verdict in plaintiff's favor, but the court refused.

The jury thereafter returned with a verdict, finding unanimously that Dr. Rakov was negligent in not taking any action with respect to the mass sooner, but, that a substantial possibility of saving the leg did not exist even had such action been taken. On appeal, the plaintiff argued that, under *Kallenberg*, all that need be shown to establish proximate cause is that plaintiff was deprived of an opportunity for cure. The Appellate Division, First Department rejected this argument and held that:

[c]ontrary to plaintiff's arguments, he is not entitled to recover on the basis of a finding that Dr. Rakov's malpractice deprived him of the possibility, no matter how slight, of saving his leg. Such a finding cannot support a damage award since proof of a mere possibility of cure does not satisfy a prerequisite to liability, i.e., that Dr. Rakov's malpractice was a legal cause - a substantial factor - in bringing about plaintiff's injury which is, after all, the loss of his leg. If the loss of the leg was from a cause other than his malpractice, then Dr. Rakov is not liable.

In our view, the appropriate inquiry as to proximate cause in the situation here presented is whether, given the condition which existed in plaintiff's left leg in the latter part of March or early April, 1970, it is more probable than not that the loss of the limb was caused by Dr. Rakov's negligence in not reoperating immediately or taking other appropriate action.

The court made it clear that *Kallenberg* was never intended to advocate the view that a jury can award damages for the loss of any chance, no matter how slight. Indeed, the court said that any such interpretation was the result of confusion. There was, however, a major flaw in the opinion: it was left unclear which standard the court was embracing. Indeed, the holding seems to be sending two conflicting views. First, the court said that the "prerequisite to liability" is that the defendant's negligence must be a "substantial factor in bringing about plaintiff's injury." Just a few lines later, however, the court just as clearly seems to be adopting another standard: "the appropriate inquiry as to proximate cause in the situation here presented is whether ... it is more probable than not that the loss of the limb was caused by Dr. Rakov's negligence." The courts in New York continue to have difficulty determining what degree of chance is "substantial" enough to justify a verdict for the plaintiff.

In *Stewart v. New York City Health & Hospitals Corp.* (207 A.D.2d 703 (1st Dept., 1994)) the First Department was again confronted with a medical malpractice action brought under the loss of chance theory. The court's holding in *Stewart* may clarify some

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of the confusion left after *Mortensen*. In *Stewart*, the plaintiff's expert testified at trial that although he was unable to "specifically" state plaintiff's chance of having a successful pregnancy as a result of sexual intercourse, he testified that the range of success would have been between 13 and 100 percent if plaintiff's right fallopian tube had not ruptured and been destroyed as a result of an ectopic pregnancy. The defendant's expert calculated the percentage at 5 to 10 percent.

The jury found that "the omission to diagnose ... plaintiff's ectopic pregnancy (prior to a specified date) was a departure from acceptable medical practice" and "depriv[ed] plaintiff of a substantial possibility of giving birth naturally." In light of this determination, the jury returned a verdict in plaintiff's favor for the loss of "natural" childbearing capacity. Upon defendant's post-trial motion, however, the trial court set the jury's verdict aside holding that the evidence was legally insufficient to show, with reasonable medical certainty, that there was a "substantial" possibility that plaintiff could have a successful uterine pregnancy following sexual intercourse and rejected plaintiff's argument that a 10 percent chance is such a "substantial" possibility.

The Appellate Division, however, reinstated the jury's verdict for loss of childbearing capacity holding that:

plaintiff was required to prove "that it was more likely than not ... that she lost a substantial opportunity to have natural child birth." In addition, the jury was instructed that it "must be persuaded by a preponderance of the credible evidence that what [plaintiff] lost, if it was substantial, was more likely than not lost because of the loss of the tube ... But the chance that she lost, in order to be substantial, doesn't have to be more likely than not. It doesn't have to be more than 50 percent but it has to be more than slight."

Thus plaintiff did not, as defendant contends, have to prove that defendant's negligence "depriv[ed] her of the ability to conceive and bear children naturally." Rather, plaintiff merely had to prove that defendant's negligence was the proximate cause of the loss of plaintiff's right fallopian tube and that such negligence deprived her of a substantial possibility of that ability. And if the jury found that she lost even a 5 to 10 percent chance of having a successful pregnancy as a result of sexual intercourse and that this chance was "substantial," a verdict in her favor would be justified. To establish a prima facie case of negligence, the plaintiff must show that the defendant's negligence was a substantial factor in bringing about the injury.

*Stewart v. New York City Health & Hospitals Corp.*, 207 A.D.2d, at 785 (citations omitted)(emphasis added).

At first blush, the holding in *Stewart* seems abundantly clear; simply stated, if a plaintiff can show that the patient was deprived of a possibility, then that plaintiff will get to the jury. It would then be for the jury to determine whether the plaintiff was deprived of a "substantial" possibility. Should the jury answer this question in the affirmative, a damage award is justified. Upon further analysis, however, it becomes apparent that *Stewart* leaves one very important question unanswered: will demonstrating the loss of any chance, no matter how slight, get a plaintiff to the jury? The *Stewart* court held that evidence that the patient was deprived a chance ranging between 13 and 100 percent was enough to make out a prima facie case. But common sense dictates that a "slight" chance can never be deemed a "substantial" chance. Therefore, if a plaintiff can offer proof that the defendant's negligence deprived the patient of only a 1 percent chance, has that plaintiff met his burden of establishing a prima facie case? The Appellate Division, Second Department apparently thinks the answer to this question is yes (see, *Jump v. Facelle*, 275 A.D.2d 345 (2nd Dept., 2000); see also, *Borawski v. Huang*, 34 A.D.3d 409 (2nd Dept., 2006)).

In *Jump*, the plaintiff's expert testified that the defendant was negligent in delaying a surgical procedure for 11 hours to wait for the defendant physician, for whom she was covering. With respect to the issue of causation, the plaintiff's expert gave testimony establishing that the delay increased the harm to decedent by infection, decreasing his chances of survival. There was evidence that the decedent's condition worsened significantly during this time. Upon motion of the defendant, the trial court set aside a jury verdict in favor of the plaintiff on causation grounds.

The Appellate Division, however, reversed reasoning that the testimony of the plaintiff's expert "tends to establish that the negligent delay of 11 or 12 hours in performing surgery, for which Dr. Pastena can be considered responsible, increased the harm to the decedent by infection, and decreased his chances of survival." The court, citing *Mortensen*, held that "[i]n cases of this nature, the plaintiff's expert need not quantify the exact extent to which a particular act or omission decreased a patient's chances of survival or cure, as long as the jury can infer that it was probable that some diminution in the chance of survival had occurred" (emphasis added).

The Second Department clearly held that a plaintiff could get to the jury merely by demonstrating that there was "some diminution in the chance of survival" and that the jury was free to decide if "some" was substantial. But see, *Kenigsberg v. Cohn* (117 A.D.2d 652 (2nd Dept., 1986), leave denied 68 N.Y.2d 602).

It is important to note that the three standards detailed above do not alter the plaintiff's burden of persuasion. To the contrary, as in every negligence action, the plaintiff always has the burden of proving their case by a preponderance of the evidence. What is different among the approaches is the plaintiff's burden of production, viz., what the plaintiff is required to prove by a preponderance of the evidence in order to recover. For example, a plaintiff may be able to prove by a preponderance of the evidence that the defendant was negligent, and that such negligence deprived the plaintiff of a 15 percent chance of survival. This does not necessarily mean, however, that the plaintiff is entitled to recover. Indeed, applying the first approach, the plaintiff would undoubtedly be denied recovery. By contrast, if the second approach is applied, it is possible that the jury will determine that 15 percent was substantial.

The true interest lost in personal injury cases involving a pre-existing condition is the plaintiff's chance that, but for the defendant's negligence, he would have enjoyed a better result or avoided an adverse consequence (see, *King*, "Causation, Valuation and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences," *supra*). Professor King argues that when courts have denied recovery for a lost chance, they erroneously applied the all-or-nothing causation standard, which allows recovery only if the defendant's conduct probably was a substantial factor in bringing about the harm.

The First Department's approach in *Stewart* is consistent with the substantial factor test. It differs from the lost chance theory endorsed by Professor King and several states. The lost chance theory appears to undermine basic tort concepts which provide that "there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff suffered" (Prosser & Keeton, *Torts*, Sec. 41, at 253 (5th ed. 1994)). Where a patient had only a minimal chance of survival, the physician would be liable despite the fact the he probably did not cause the patient's death or physical injury. In nearly every case, a plaintiff will be able to obtain an expert opinion that something more could have been done to increase the patient's chance of a better outcome. Thus, as the California Court of Appeals said in *Dumas v. Cooney* (*supra*, at 1610), "[r]edefining lost chance as a new form of injury... radically alters the meaning of causation."

More recently, the Second Department

held in *Borawski v. Huang*, 34 A.D.3d 409 (2006): "In order to establish a prima facie case in a medical malpractice action, where causation is always a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant" (citations omitted, emphasis added). The very next sentence, however, states: "Where, as here, a failure to treat is alleged, the plaintiff simply must show that 'it was probable that some diminution in the chance of survival had occurred'" *supra* at 410 (citations omitted, emphasis added). This can appear to be a confusing combination of the first two standards, unless it is understood that the "injury" has changed: the injury to the plaintiff is the lost chance itself, which is characteristic of the third approach.

The Court of Appeals has not spoken on this issue. The high court might adopt either of the first two standards. In New York, the traditional rule is that medical malpractice plaintiffs must prove causation by reason-

able medical probability. Should the Court of Appeals adopt this approach with respect to the loss of chance cause of action, it would not be compromising its current standard.

On the other hand, the more "relaxed" causation standard endorsed by some of the decisions of the First, Second and Third Department would allow plaintiffs to circumvent the "more probable than not" causation standard simply by cloaking their medical malpractice claim in another theory of liability.

It appears that New York is not likely to adopt the approach where any loss of chance, if proved by a preponderance of the evidence, would be actionable and where the damages awarded would reflect just how substantial a chance was deprived to plaintiff because of the defendant's negligence.

Kenneth Mauro and Matthew W. Napaty are partners at Mauro Goldberg & Lilling LLP, which dedicates its practice to statewide and national Appellate Litigation and to assisting trial counsel in litigation strategy. Mr. Mauro represented the defendant on Appeal in the *Mortensen* case.

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