1. The Loss-of-Chance Doctrine

The “loss of chance” doctrine applies in a medical negligence action when a plaintiff might have suffered the injury without the defendant’s negligent act or omission, but the defendant’s negligence increased the probability of the injury. The doctrine is most frequently applied in failure-to-diagnose cases, in which the plaintiff’s illness goes untreated for a time, thereby increasing the risk that the illness will adversely affect the patient’s health. In such cases, the physician did not cause the underlying medical condition, and the patient might not have recovered even if the condition had been properly diagnosed. Therefore, satisfying the traditional burden of proving proximate cause can be extremely difficult, if not impossible.

Under the traditional definition of proximate cause, the plaintiff must prove that if the defendant had not been negligent, he or she would not have suffered the injury. Applying this traditional definition in a failure-to-diagnose case requires the plaintiff to prove that, at the time of the failure to diagnose, he or she had a 50 percent or greater chance of recovery or survival; a plaintiff whose chance of survival was less than 50 percent will have no cause of action. A significant minority of states subscribe to this approach.1

Fortunately, most jurisdictions that have considered this issue have determined that the traditional definition of causation should not apply when a doctor’s negligence reduces a patient’s opportunity to recover. These jurisdictions instead subscribe to some form of the loss-of-chance doctrine, which allows the injured patient or his or her survivors compensation for the “lost chance” of recovery or survival resulting from the doctor’s negligence.

The loss-of-chance doctrine commonly comes into play in those cases where the patient had less than an even chance of recovery or survival when he or she originally consulted a physician, and thus cannot satisfy the traditional standard of causation. The doctrine did not have much support until 1981, when the Yale Law Review published an article by Professor Joseph H. King, Jr., which stated:

The loss of a 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. Pre-existing conditions must, of course, be taken into account in valuing the interest destroyed. When those pre-existing 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.2

The primary rationale for the loss-of-chance doctrine is that it imposes the costs of uncertainty – that is, whether a patient would have recovered but for the physician’s negligence – on the negligent doctor, rather than on the innocent patient.

In 1987, the Oklahoma Supreme Court, citing Professor King’s article, concluded that:

... [I]n those situations where a health care provider deprives a patient of a significant chance for recovery by negligently failing to provide medical treatment, the health care professional should not be allowed to come in after the fact and allege that the result was inevitable inasmuch as that person put the patient’s chance beyond the possibility of realization. Health care providers should not be given the benefit of the uncertainty created by their own negligent conduct. To hold otherwise would in effect allow care providers to evade liability for their negligent actions or inactions in situations in which patients would not necessarily have survived or recovered, but still would have a significant chance of survival or recovery.3

The Loss-of-Chance Doctrine in Colorado

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MEDICAL NEGLIGENCE

Courts that adopt the loss-of-chance doctrine in effect recognize a lost chance as a distinct cause of action, treating it as a compensable injury. As a distinct claim, the plaintiff must still prove by a preponderance of the evidence that the defendant’s conduct reduced his or her chance of a more favorable outcome.

Some jurisdictions require that the plaintiff prove that the lost chance of recovery was “substantial.” None of these courts has set a minimum for a “substantial” lost chance, but at least one has held that a lost chance of 11 percent meets this criterion. Some courts have held that although statistical evidence may be required in the damages phase of the case, it is not required to prove causation. Rather, the plaintiff need only present expert testimony that his or her chance of recovery would have been “substantially” or “significantly” greater if not for the physician’s negligence.

Other jurisdictions hold that the lost chance need not be substantial or significant, as long as the negligence reduced, to any degree, the patient’s opportunity to recover. Jurisdictions that subscribe to this rule have, either explicitly or implicitly, adopted sec. 323(a) of the Restatement (Second) of Torts (1965), which states:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other 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.

Of those jurisdictions that have adopted the loss-of-chance doctrine, the majority use an approach consistent with this section of the Restatement.

2. Valuation of Lost Chance

The preferred approach to determining the value of a lost chance is the “percentage probability” method. Under this formula, once negligence and causation have been proven, damages are computed by multiplying the chance of recovery lost by the total value of a complete recovery. This formula requires the jury to place a monetary value on the life or limb that the plaintiff lost, or is in danger of losing.

The percent of chance lost must then be multiplied by the value of that life or limb.

Consider this hypothetical situation, taken from the South Dakota Supreme Court’s decision in Jorgenson v. Vener:

The patient’s task under the loss of chance doctrine . . . would be to first prove that the physician’s conduct caused the loss of the chance by a preponderance of the evidence. Once causation has been established, the value of the injury, whether a possibility (less than 50%) or a probability (greater than 50%), is compensable. Assuming, for example, that a patient had a 40% chance of recovery under optimal conditions, and the physician’s negligence destroyed that chance, the value of the lost chance would be 40% of the total value of a complete recovery. Similarly, if the patient’s chance at recovery was 60% and the physician’s negligence eliminated that chance, the value of the lost chance would be 60% of the value of a complete recovery. Or, if instead of completely eliminating the chance of recovery, the physician’s negligence merely reduced the chance of recovery from 40% to 20%, then the value
of the lost chance would be 20% of
the value of a complete recovery.13

3. Loss of Chance in Colorado

The status of the loss-of-chance
doctrine in Colorado is unclear. The
first reference to the doctrine is found in
Poertner v. Swearingen14, a Tenth
Circuit case applying Colorado law.

Had the clot been properly diagnosed,
the plaintiff “could have undergone an
operation that might have succeeded in
removing the clot.”15 However, the clot
subsequently traveled to the plaintiff’s
skull, where it became inoperable. It
caused the plaintiff to suffer paralysis
and partial blindness.16 The plaintiff
alleged that the defendant-doctor’s
negligence cost her “a chance” to rem-
eady the injury.17 On appeal from the
entry of a directed verdict, the Tenth
Circuit remanded the matter to the trial
court to determine whether the loss-of-
chance doctrine would be recognized in
Colorado.18

The loss-of-chance doctrine was
squarely addressed by the Colorado
Court of Appeals in Sharp v. Kaiser
Foundation Health Plan of Colorado.19
There, plaintiff had suffered a debilitat-
ing heart attack, and claimed that she
“was negligently misdiagnosed as hav-
ing stable rather than unstable angina
and that had she received different or
more prompt medical treatment her
chances of suffering a heart attack
would have been reduced.”20 The evi-
dence showed that the misdiagnosis
increased plaintiff’s chances of suffering
a heart attack by 20 to 25 percent.21

The issue on appeal, following the
imposition of summary judgment in favor
of the defendant, was whether “the jury
should be allowed to decide the issue of
causation because there is expert testi-
momy that defendants substantially
increased plaintiff’s risk of the resulting
harm or substantially diminished the
chance of recovery.”22 Citing Professor
King’s article, section 323(a) of the
Restatement (Second) of Torts, and the
principle that the costs of uncertainty
should be borne by the negligent doctor
rather than the patient, the Court of
Appeals adopted the loss-of-chance
doctrine, and held that a plaintiff can
recover by showing that the loss of
chance was substantial.23 Reversing the
trial court’s ruling, the Court of Appeals
found that the evidence showing a 20 to
25 percent loss of chance was sufficient
to submit this issue to the jury.24

Unfortunately, the Court of Appeals
holding was modified by the Supreme
Court on certiorari review.25 Upholding
the Court of Appeals, the Supreme
Court “affirm[ed] on narrower grounds,”
finding that Plaintiffs had presented
sufficient evidence of causation, under
the traditional definition, to warrant
submission of the case to a jury.26

Specifically, the Court credited the
affidavit of plaintiff’s expert, in which
the expert opined that it was “more
probable than not that, with adequate
treatment, Mrs. Sharp should not have
sustained” a heart attack.27 In reaching
its holding, the Supreme Court explic-
itly declined to address “the court of
appeals ‘substantial factor’ analysis, or
its application of section 323(a) of the
Restatement (Second) of Torts, as the
resolution of those issues is not neces-
sary to this appeal.”28 Regarding the
loss-of-chance doctrine, the Supreme
Court stated, in footnote 5, as follows:

Although it was not necessary to its
decision, the court of appeals applied
the “lost-chance” doctrine embodied in
Restatement (Second) of Torts
§323(a) (1965). Restatement section
323(a) has been followed in several
jurisdictions, see, e.g., Hamil v. Bash-
line, 481 Pa. 256, 392 A.2d 1280
(1978); Herskovits v. Group Health
Cooperative, 99 Wash.2d 609, 664
P.2d 474 (1983), but we express no
opinion on whether we would apply
section 323(a) in a proper case.29

Thus, following the issuance of the
Supreme Court’s opinion in Kaiser
Foundation Health Plan of Colorado v.
Sharp, the status of the loss-of-chance
doctrine remained uncertain. Since the
issuance of that opinion, no Colorado
case has addressed the loss-of-chance
doctrine.30

Despite the Supreme Court’s refusal
to address the applicability of the loss-
of-chance doctrine in Colorado, it
appears likely that, when the issue
arises, the Court will adopt the doctrine.
This perception is based upon several
factors. First, the notion that the costs
of uncertainty should be borne by the
negligent doctor rather than the innocent
patient is eminently reasonable. Second,
the loss-of-chance doctrine is consistent
with other pro-plaintiff principles that
have been adopted in Colorado, such as
the principle that an injured plaintiff is
entitled to be “made whole” by the tort-
feasor.31 Third, the Supreme Court’s
Sharp opinion, in footnote 5, acknowled-
es that the loss-of-chance doctrine
has been followed in other jurisdictions,
and thus appears to view the doctrine in
a favorable manner. Fourth, as noted
above, the loss-of-chance doctrine has
been adopted by the majority of states
that have considered it, including virtu-
ally all of the states in the Rocky
Mountain region.32

4. Conclusion

The loss-of-chance approach to pro-
voking causation, in those cases in which
the defendant’s negligence increased
the probability of the injury, is a fair way
to compensate patients or their survivors
for the denial of a chance to recover or
survive caused by a doctor’s negligence.
Fortunately, this approach appears to be
gaining widespread acceptance in the
courts. Hopefully, at some point soon,
the doctrine will be officially adopted in
the state of Colorado.

End Notes

1 See, e.g., Mich. Comp. Laws Ann. §
600.2912a(b)(2) (West 2006) (“In an
action alleging medical malpractice, the
plaintiff cannot recover for loss of an
opportunity to survive or an opportunity
to achieve a better result unless the opportu-
nity was greater than 50%.”); Brommee v.
Pavitt, 7 Cal. Rptr.2d 608 (Cl. App. 1992);
Clayton v. Thompson, 475 So.2d 439, 445
(Miss. 1985); Fennell v. S. Md. Hosp. Ctr.,

2 Joseph H. King Jr., Causation, Valuation
and Chance in Personal Injury Torts
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4 See W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS 41, 45 (5th ed. Supp. 1988); see also Jorgenson v. Vener, 616 N.W.2d 366, 370 (S.D. 2000); DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986).

5 Jorgenson, 616 N.W.2d at 372 (citing McKellips, 741 P.2d at 476-77); Wollen, 828 S.W.2d at 684.


9 Jorgenson, 616 N.W.2d at 372, 1287 (N.M. 1999); Wollen, 828 S.W.2d at 684-65.

10 See Alberts v. Schultz, 975 P.2d 1279, 1287 (N.M. 1999); Wollen, 828 S.W.2d at 684-65.

11 Jorgenson, 616 N.W.2d at 372 n.8.

12 Poertner v. Swearingen, 695 F.2d 435 (10th Cir. 1982).

13 Id. at 435.

14 Id.

15 Id. at 435-36.

16 Id. at 436 n.1.


18 Id. at 1154.

19 Id. at 1156.

20 Id. at 1154.

21 Id. at 1156.

22 Id. at 1156.

23 Id. at 1156.

24 Id.


26 Id. at 720.

27 Id.

28 Id.

29 Id. at 720 n.4.

30 The issue was addressed by the Federal District Court in Colorado, in In re Breast Implant Litigation, 11 F. Supp.2d 1217 (D. Colo. 1998). In that case, the federal district court cited the court of appeals’ Sharp opinion for the proposition that Colorado has recognized the loss-of-chance doctrine. Id. at 1226. The Wis. Court of Appeals has also cited the Colo. Court of Appeals’ Sharp opinion for this proposition. See Ehlinger v. Sipes, 148 Wis.2d 260, 434 N.W.2d 825, 828 (Wis. App. 1988). These cases fail to account for the Colo. Supreme Court’s disavowal of the Colo. Court of Appeals opinion.

31 See Presto v. Dupont, 35 P.3d 433, 440 (Colo. 2001) (“[C]ompensatory damages are those that compensate a victim and make her whole”).