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Tort Law - Loss of Chance in Wyoming: Alive, but for How Long - McMackin v. Johnson County Healthcare Center

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CASE NOTES

TORT LAW—Loss of Chance in Wyoming: Alive, But for How Long? *McMackin v. Johnson County Healthcare Center*, 73 P.3d 1094 (Wyo. 2003).

INTRODUCTION

In 2003, the Wyoming Supreme Court adopted the "loss of chance" tort doctrine in negligence and medical malpractice claims.[1] From 1990 to 1999, Harriette Brown (Brown) resided in the Amie Holt Care Center, operated by the Johnson County Healthcare Center (JCHC).[2] In July 1998, Brown began to display symptoms of transient ischemic attacks or, in laymen terms, "ministrokes."[3] From July 1998 to March 1999, Brown continued to suffer periodic ministrokes at irregular intervals.[4] At 9:00 p.m. on March 7, 1999, a JCHC care provider and nurse noticed that, among other symptoms, Brown's speech was slurred, the left side of her face was drooping, and her left eye remained closed.[5] Although the attendant nurse, Jennifer Sather, checked on Brown periodically throughout the night, she did not take any action until 4:30 a.m. when she telephoned Dr. Kirven.[6] Dr. Kirven counseled Nurse Sather to wait until morning for Brown's regular physician, Dr. Schueler.[7] At 8:00 a.m. that morning, another nurse, Vicki Blakely, examined Brown and called Dr. Schueler.[8] An hour later Dr. Schueler examined Brown, diagnosed her with a cerebrovascular accident (stroke), and transferred her to the hospital.[9] Brown failed to recover from the stroke and died two weeks later.[10]

Brown's daughter, Leslie McMackin (McMackin), brought wrongful death and medical malpractice claims against JCHC, Nurse Sather, Nurse Blakely, Dr. Schueler, Dr. Kirven, and Medical Associates of Johnson County, collectively referred to as the "Defendants."[11] McMackin alleged the Defendants should have treated Brown's ministrokes more aggressively in order to ameliorate Brown's condition.[12] The district court granted De-

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1. McMackin v. Johnson County Healthcare Ctr., 73 P.3d 1094, 1100 (Wyo. 2003).
2. *Id.* at 1095–96.
3. *Id.* at 1096.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 1095.
12. *Id.* at 1098.

fendants' Motion for Summary Judgment, holding that a genuine issue of material fact did not exist with respect to the causation element required to establish a medical malpractice claim.[13] McMackin appealed her case to the Wyoming Supreme Court.[14]

The Wyoming Supreme Court reversed the district court, holding that "McMackin's malpractice claims fall under the 'loss of chance' doctrine and the facts alleged . . . satisfy the causation element, at least for purposes of summary judgment."[15] The court thereby adopted the loss of chance doctrine for the first time in Wyoming tort law.[16] The court then clarified what a plaintiff must prove to prevail on a loss of chance claim:

> Generally, to prevail on a claim that the physician's failure to evaluate and treat a patient caused the patient to lose the chance for survival, the plaintiff must show the following: (1) The patient has in fact been deprived of the chance for successful treatment; and (2) The *decreased chance for successful treatment more likely than not* resulted from the physician's negligence.
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> Under this analysis, the causal connection between the defendant's omission and the decedent's stroke can be established if the defendant's omissions increased the risk of the harm suffered by the plaintiff.[17]

Although the court stated that McMackin had raised the loss of chance doctrine, she never expressly raised such a claim.[18] Nonetheless, the evidence submitted by McMackin was consistent with the loss of chance doctrine.[19]

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13. *Id.* at 1095.
14. *Id.*
15. *Id.*
16. *Id.* at 1100.
17. *McMackin*, 73 P.3d at 1098–99 (quoting 1 DAVID W. LOUISELL & HAROLD WILLIAMS, MEDICAL MALPRACTICE, ¶ 8.07[2] at 8-94, ¶ 9.04[4] at 9-22-27 (2002)) (emphasis added).
18. The court stated, "it is claimed [by McMackin] that these omissions were the cause of Brown's 'loss of a chance' to avoid the onset of the stroke." *Id.* at 1097.
19. *See* Plaintiff's Supplement to Expert Witness Designation at 4, McMackin v. Johnson County Health Ctr., 73 P.3d 1094 (Wyo. 2003) (No. 01-214) (quoting Dr. Cutchall as stating, "[i]t is possible within a reasonable degree of medical probability that if the above breaches had not happened in succession, Ms. Brown may have survived her hemorrhagic stroke. In my opinion, such failures and the cumulative effect of such failures are the most likely among the possible causes of the death of Harriette Brown").

Defendants then petitioned the Wyoming Supreme Court for a rehearing on two issues: 1) whether the loss of chance doctrine is contrary to the Wyoming wrongful death statute and 2) whether McMackin's claims were within the scope of the Wyoming Governmental Claims Act.[20] In *McMackin II*, the court held "the loss of chance claim [in McMackin's case] fits within Wyoming's wrongful death statute," and McMackin's claims were "within the protection afforded by the Governmental Claims Act."[21] In addition to reaffirming its earlier holding, the court clarified certain aspects of the loss of chance doctrine by suggesting pattern jury instructions, damage calculation methods, and expert witness requirements.[22]

This case note will address what is required to meet the causation element of a medical malpractice claim and will examine how loss of chance has evolved and become more widely accepted over the past few decades. It will discuss how Wyoming's adoption of loss of chance plays into the nation's tort reform movement. This case note takes the position that the Wyoming Supreme Court was correct in holding that loss of chance falls within the scope of a wrongful death action. Finally, this note will explain the appropriate measure for calculating damages in a loss of chance action.

BACKGROUND

The manner in which courts apply loss of chance has evolved over the past four decades. This section examines several of the key cases in the development of the loss of chance doctrine. Those courts embracing the doctrine apply varying approaches to the causation standard required to establish loss of chance. This section also addresses how courts fit the doctrine into wrongful death and survivor actions. Finally, the background section explores the range of policy rationales supporting and rejecting the loss of chance doctrine.

The Evolution of Loss of Chance

The first hallmark loss of chance case was a Fourth Circuit medical malpractice case, *Hicks v. United States*, where the defendant doctor fatally misdiagnosed the patient's illness.[23] The patient arrived at the emergency room complaining of severe intestinal pain.[24] The doctor misdiagnosed her illness as gastroenteritis and sent her home.[25] The patient returned home,

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20. McMackin v. Johnson County Healthcare Ctr., 88 P.3d 491, 492 (Wyo. 2004) [hereinafter "McMackin II"].
21. *Id.* at 492, 496.
22. *Id.* at 494–95.
23. Hicks v. United States, 368 F.2d 626 (4th Cir. 1966).
24. *Id.* at 628.
25. *Id.*

took the prescribed medication, and slept for several hours.[26] Upon awakening, the patient drank a glass of water, promptly vomited, and fell unconscious to the floor.[27] The patient never revived.[28] Expert testimony revealed that a reasonable doctor should have conducted routine tests to rule out the possibility of a high obstruction, which was the ultimate cause of the patient's death.[29] The Fourth Circuit found the doctor negligent.[30] In dicta, the court stated:

> When a defendant's negligent action or inaction has effectively terminated a person's chance of survival, it does not lie in the defendant's mouth to raise conjectures as to the measure of the chances that he has put beyond the possibility of realization. If there was *any substantial possibility of survival* and the defendant has destroyed it, he is answerable. Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass. The law does not in the existing circumstances require the plaintiff to show to a *certainty* that the patient would have lived had she been hospitalized and operated on promptly.[31]

The "substantial possibility" language from *Hicks* lead many courts to relax the traditional proximate cause standard to allow the plaintiff to recover when the defendant's negligence lessened the patient's chances for survival.[32] Although a number of courts have cited *Hicks* as supporting their choice to adopt loss of chance, the Fourth Circuit explained in *Hurley v. United States* that the *Hicks* dicta had been misconstrued and that *Hicks* did not endorse the loss of chance doctrine.[33] The *Hurley* court explained that the "substantial possibility" spoken of in *Hicks* is synonymous with "probability."[34] As such, the court interpreted *Hicks* as having done nothing to

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26. *Id.* at 629.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 633.
31. *Id.* at 632 (emphasis added).
32. Daniel J. Andersen, *Loss of Chance in Utah?*, 9 UTAH B. J. 8, 9 (Nov. 1996).
33. Hurley v. United States, 923 F.2d 1091, 1093–94 (4th Cir. 1991). *Hurley* involved a medical malpractice case against a doctor for failing to examine a Holter (cardiac) monitor report until eight days after it was received. *Id.* at 1092. The report revealed the patient's pacemaker was malfunctioning and needed replacement. *Id.* The patient suffered a cardiac arrest seven days after the doctor received the report and one day before the doctor reviewed the report. *Id.* The Fourth Circuit held that the loss of a chance for successful recovery was not recognized under Maryland law. *Id.* at 1099.
34. *Id.* at 1094.

alter the traditional causation standard, under which a plaintiff must prove "the defendant's breach of duty was more likely than not (i.e., probably) the cause of injury."[35]

The next landmark case, *Herskovits v. Group Health Cooperative*, was the first to abandon the all or nothing approach to loss of chance.[36] Under the all or nothing approach, a plaintiff may recover for the full value of the death if the decedent had a fifty-one percent or greater chance of survival prior to the defendant's negligence; however, recovery is denied for a patient having only a forty-nine percent or less chance of survival prior to the malpractice.[37] In *Herskovits*, the plaintiff's husband visited the hospital repeatedly over the course of a year, complaining of chest pains and coughing.[38] He then consulted a doctor not associated with the hospital.[39] The independent doctor evaluated the patient and gave the hospital additional directions that finally led to a cancer diagnosis.[40] Herskovits ultimately had his lung removed and died twenty months later.[41] Expert testimony contended that the delay in Herskovits's diagnosis may have reduced his chance of a five-year survival from thirty-nine percent to twenty-five percent—a thirty-six percent reduction in his initial (thirty-nine percent) chance of survival.[42] The Washington Supreme Court reversed the trial court's grant of the hospital's motion for summary judgment.[43] The court rejected the hospital's contention that the plaintiff must show Herskovits would probably (more likely than not) survive if the hospital had not been negligent.[44] Instead, the court held that "medical testimony of a *reduction of chance of survival* from 39 percent to 25 percent *is sufficient evidence to allow the proximate cause issue to go to the jury*."[45]

One of the most often-cited cases rejecting the loss of chance doctrine is *Kramer v. Lewisville Memorial Hospital*.[46] In *Kramer*, the plaintiff's wife first visited her gynecologist in August 1985, after experiencing irregular discharge and bleeding.[47] Mrs. Kramer's gynecologist diagnosed her as

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35. *Id.*
36. Herskovits v. Group Health Coop., 664 P.2d 474, 479 (Wash. 1983) (rejecting the argument that a plaintiff must prove the decedent had a fifty-one percent or greater chance of survival prior to the defendant's negligence).
37. *Id.* at 486 (Pearson, J., concurring).
38. *Id.* at 475.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 475, 479.
43. *Id.* at 479.
44. *Id.*
45. *Id.* (emphasis added).
46. Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397 (Tex. 1993).
47. *Id.* at 398.

having a yeast infection and sent a microscope slide from her pap smear to the hospital for screening.[48] Two doctors at the hospital reviewed the slide and failed to detect any abnormal cells indicative of cancer.[49] Over the next year the condition continued to bother Mrs. Kramer and she continued to visit various doctors in search of an explanation.[50] Finally, fourteen months after the original pap smear, Mrs. Kramer's doctor performed a cervical biopsy that diagnosed cancer.[51] Mrs. Kramer underwent treatment immediately, which ultimately proved unsuccessful.[52] Mrs. Kramer passed away in October 1986.[53]

Mrs. Kramer's husband brought suit under the Texas wrongful death and survivorship statutes.[54] The lab technician who originally examined Mrs. Kramer's pap smear slide admitted that the original slides contained abnormal cells and that her failure to detect the cells was a "mistake in judgment."[55] The plaintiff's expert testified that Mrs. Kramer's chances of survival, which at the time of her first pap smear were 95 to 100%, decreased to slightly less than 50% by the time her cancer was diagnosed.[56]

The Texas Supreme Court refused to accept the plaintiff's contention that Mrs. Kramer's harm was her loss of chance to survive.[57] Instead, the court insisted Mrs. Kramer's "true harm" was her ultimate death.[58] The court, therefore, required that the plaintiff prove the defendant's conduct was *more likely than not* the cause of Mrs. Kramer's death.[59] Consequently, the court held that the Texas Wrongful Death Act did not permit recovery under the loss of chance doctrine.[60]

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48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 398–99.
53. *Id.* at 399.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 405.
58. *Id.* ("Unless courts are going to compensate patients who 'beat the odds' and make full recovery, the lost chance cannot be proven unless and until the ultimate harm occurs.").
59. *Id.*
60. *Id.* at 398.

Causation and Damages

Although a majority of courts across the nation espouse some form of loss of chance, their approaches to the doctrine vary.[61] Authorities often cite three approaches to loss of chance; however, such distinctions are often confused because these authorities often use the same terminology to describe different approaches.[62] The most significant difference between courts is the manner in which they apply the causation standard. In some jurisdictions, the standard of proof for causation is identical to traditional standards.[63] Under the traditional approach, the plaintiff must prove that the patient had a better than even chance of surviving her illness or injury and that the defendant's negligent conduct was the proximate cause of the ultimate injury or death.[64] If the plaintiff meets the above standard, she is entitled to recover for the entire value of the death or injury, not just the lost chance.[65]

Alternatively, jurisdictions may use what is often referred to as the "relaxed causation" approach.[66] This approach reduces the traditional evidentiary standard and allows the fact finder to determine causation without any evidence of a "reasonable probability that the defendant's negligence caused the patient's death or other ultimate harm."[67] Under this approach, courts may require only that the plaintiff prove the defendant negligently

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61. *See id.* at 408 (Hightower, J., dissenting) (explaining that courts embracing the loss of chance doctrine "have not all applied the doctrine in the same way, [but] they permit some type of recovery for individuals whose lives are damaged by medical negligence but who cannot meet the arbitrary standard advocated by the Court"); Scafidi v. Seiler, 574 A.2d 398, 403–05 (N.J. 1990) (discussing the different approaches loss of chance jurisdictions apply as well as the causation standard applied in states disallowing the loss of chance doctrine).

62. For example, *compare* Andersen, *supra* note 32, at 9 (explaining that "pure loss of chance" allows a plaintiff to recover that percentage of damages equal to the percentage of lost chance), *with* McMackin v. Johnson County Healthcare Ctr., 73 P.3d 1094, 1099 (Wyo. 2003) (referring to "pure" lost chance when the plaintiff may recover full damages if she can prove the defendant's negligent conduct diminished the plaintiff's chance to any degree).

63. *Kramer*, 858 S.W.2d at 402. *See also* Herskovits v. Group Health Coop., 664 P.2d 474, 476 (Wash. 1983) ("Other jurisdictions have rejected this [relaxed] approach, generally holding that unless the plaintiff is able to show that it was *more likely than not* that the harm was caused by the defendant's negligence, proof of a decreased chance of survival is not enough to take the proximate cause question to the jury.").

64. Delaney v. Cade, 873 P.2d 175, 183 (Kan. 1994).

65. *Id.*

66. *Kramer,* 858 S.W.2d at 401.

67. *Id.*

denied her a "'*substantial*' or '*appreciable*' *possibility* of survival or recovery."[68]

Additionally, courts may determine causation by whether the negligence *increased the risk* of the ultimate harm.[69] This approach is based on Section 323 of the Restatement (Second) of Torts, which provides:

> 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
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> (a) his failure to exercise such care *increases the risk of such harm*, or
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> (b) the harm is suffered because of the other's reliance upon the undertaking.[70]

Both the relaxed causation and the increased risk approaches may be applied if the "increased risk of harm or loss of substantial chance to avoid harm is a '*substantial factor*' in bringing about the ultimate harm."[71] The New Jersey Supreme Court in *Scafidi v. Seiler* described the substantial factor test as requiring the "jury to determine whether the deviation, in the context of the preexistent condition, was sufficiently significant in relation to the

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68. *Id.* (emphasis added).

69. *See* Herskovits v. Group Health Coop., 664 P.2d 474, 476 (Wash. 1983) (explaining that some courts allow the proximate cause issue to proceed under section 323 of the Restatement (Second) of Torts). At least one court has found a significant difference between "loss of chance" and "increased risk." United States v. Cumberbatch, 647 A.2d 1098, 1100 n.3 (Del. 1994) (finding the increased risk doctrine broader than loss of chance "since the former appears to apply even if the plaintiff has a greater than 50 percent chance of survival prior to the malpractice" and because it "might apply to situations not involving death as the potential outcome").

70. RESTATEMENT (SECOND) OF TORTS § 323 (1965) (emphasis added). *See also* Scafidi v. Seiler, 574 A.2d 398, 403 (N.J. 1990) (applying section 323 to medical malpractice cases). *Contra* Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397, 405 (Tex. 1993) (rejecting plaintiff's contention that Section 323 compelled the adoption of loss of chance and finding instead that Section 323 "does not determine or suggest the appropriate standard of causation").

71. *Kramer,* 858 S.W.2d at 401 (emphasis added). *See also Scafidi,* 574 A.2d at 403 (quoting Evers v. Dollinger, 471 A.2d 405, 415 (N.J. 1984) (finding that section 323 applies to medical malpractice cases and establishing causation where the "increased risk was a substantial factor in producing the condition from which plaintiff currently suffers")).

eventual harm to satisfy the requirement of proximate cause."[72] The New Jersey Supreme Court then explained that proximate cause was a "vague notion."[73] The court described it "as a standard for limiting liability for the consequences of an act based 'upon mixed considerations of logic, common sense, justice, policy and precedent.'"[74] The *Scafidi* court found that when a plaintiff has a "preexistent injury or disability and is then adversely affected by a defendant's negligence, the standard by which the jury evaluates causation must be expressed in terms consistent with the operative facts."[75]

Just as the courts do not agree on how to apply the causation standard, there is similar disparity in how the courts treat the award of damages.[76] Adding to the confusion, causation and damages are often intertwined in loss of chance cases.[77] Jurisdictions applying the traditional approach permit plaintiffs to recover full damages, provided the patient had a better than even chance of survival prior to the malpractice.[78] Among those jurisdictions that place value on the lost chance itself, rather than just the ultimate injury or death, there are two approaches. Many jurisdictions require that damages be calculated by multiplying the percentage of loss of chance by what would be the total damages for the ultimate death.[79] The

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72. *Scafidi,* 574 A.2d at 406.

73. *Id.* at 402 (quoting Glen O. Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713, 713 (1982)).

74. *Id.* (quoting Caputzal v. Lindsay Co., 222 A.2d 513, 517 (1966)). *Scafidi* involved a medical malpractice case where the plaintiff sued the defendant doctor for failing to arrest her premature labor which led to the premature birth, and ultimate death, of the plaintiff's child. *Id.* at 399. The court affirmed the appellate court's finding of reversible error in the trial court's refusal to instruct the jury in accordance with the increased risk of harm doctrine. *Id.*

75. *Id.* at 402.

76. *Kramer,* 858 S.W.2d at 402.

77. Andersen, *supra* note 32, at n.4 ("[C]ausation becomes a rebuttable presumption which enables plaintiffs to pass through causation with little or no analysis, and go directly to damages."). *See also* Delaney v. Cade, 873 P.2d 175, 183 (Kan. 1994) ("The discussion of the standards of proof of the causation element in a loss of chance case is not only inextricably intertwined with any discussion of the theory itself but also with the damages resulting from the lost or diminished chance.").

78. 1 BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY STOLTZFUS JOST, & ROBERT L. SCHWARTZ, HEALTH LAW, § 6-7b at 309–11 (2d ed. 2000).

79. *Kramer,* 858 S.W.2d at 402 (explaining that many loss of chance jurisdictions calculate damages by multiplying the percentage of lost chance by the total value of the ultimate injury or death); *Scafidi,* 574 A.2d at 400 (holding that damages "should be apportioned to reflect the likelihood that the premature birth and death would have been avoided by proper treatment. Thus, plaintiffs' damages will be limited to the value of the lost chance for recovery attributable to defendant's negligence."); Roberts v. Ohio Permanente Med. Group, Inc., 668 N.E.2d 480, 484 (Ohio 1996) ("[T]he trier of fact may then assess the degree to which the plaintiff's

New Jersey Supreme Court even goes so far as to place the burden on the defendant to prove that "the damages for which he is responsible are capable of some reasonable apportionment," rather than the entire value of the death or injury.[80] If the defendant fails to do so, the plaintiff may recover the full value of her ultimate injury or death.[81] The second approach permits the fact-finder to place a value directly on the lost chance.[82] Advocates of this approach argue that a jury does not require precise statistical evidence in order to determine the lost chance.[83] This approach allows juries to "consider such factors as the physical and mental pain and anguish that accompany the lost chance of improved health, as well as other physical losses and consequential damages, including medical costs."[84]

Wrongful Death and Survivor Actions

The country's courts are also divided on whether a loss of chance case may be brought as a wrongful death or survivor action.[85] Several courts have found that a wrongful death action is the "proper legal vehicle" for loss

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chances of recovery or survival have been decreased and calculate the appropriate measure of damages. The plaintiff is not required to establish the lost chance of recovery or survival in an exact percentage in order for the matter to be submitted to the jury. Instead, the jury is to consider evidence of percentages of the lost chance in the assessment and apportionment of damages.").

80. *Scafidi,* 574 A.2d at 406.

81. *Id.* For an illustration of the calculation of the apportioned form of damages *see id.* at 407.

82. *See* James v. United States, 483 F. Supp. 581, 587–88 (N.D. Cal. 1980) (finding that "damages may be recovered even if they are not susceptible to accurate measurement"). *James* involved a plaintiff who was required to undergo a physical examination as a condition of new employment. *Id.* at 583. A chest x-ray revealed an abnormality that the radiologist feared might be cancer. *Id.* However, a clerical error caused the radiologist's report to be filed before being reviewed by James's physician. *Id.* As a result, James did not discover his lung cancer for another two years. *Id.*

83. *Cf.* Parker v. Wilk, 2003 WL 21221895, at *3 (Del. Super. Ct. May 27, 2003) (quoting Delaney v. Cade, 873 P.2d 175, 187 (Kan. 1994)) (describing the valuation approach as "the simplest because the introduction of statistical evidence is unnecessary," yet rejecting it because "the goal of reaching some degree of precision in determining the loss allocation is lacking"). *Parker* involved a survival claim where the plaintiff's expert testified that the decedent's chances of survival would have been improved if the defendants had not acted negligently. *Id.* at *1. However, the plaintiff's expert was not able to pinpoint the percentage by which the decedent's chances for survival were diminished. *Id.* at *2. Because the court only took a proportional approach to loss of chance damages, it held that the plaintiff could not recover inasmuch as there was not a percentage on which to base the award of damages. *Id.* at *4.

84. *Kramer,* 858 S.W.2d at 410 (Hightower, J., dissenting).

85. *McMackin II,* 88 P.3d 491, 493 (Wyo. 2004).

of chance.[86] On the other end of the spectrum, several courts have refused to recognize loss of chance in wrongful death actions.[87] In *United States v. Cumberbatch*, the Delaware Supreme Court reasoned that the wrongful death statute is intended to allow those who were injured by the death of another to bring an action against the person who *caused the death* of the other, not for causing a decreased chance of survival.[88] Although the Delaware Supreme Court did not address the issue of whether loss of chance would be viable under a survivor action, it did state that because survivor actions are based on harm to the person injured, "[i]t might be logical . . . for that person (or the legal representatives of the person) to be able to sue and recover compensation irrespective of whether death has occurred."[89] The court distinguished the "loss of chance" doctrine from "increased risk" and declined to express an opinion regarding whether the increased risk doctrine was viable in a wrongful death action.[90] The Delaware Superior Court later held that loss of chance was viable as a common law claim.[91]

Policy Considerations

Some courts fear that permitting loss of chance claims will create a flood of litigation, while other courts feel such fears are misplaced.[92] The

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86. Volz v. Ledes, 895 S.W.2d 677, 679 (Tenn. 1995) (rejecting loss of chance as an independent cause of action and finding "that the plaintiffs' wrongful death action was the proper legal vehicle under which their cause should have been initiated, tried, and decided"). *See also* Roberts v. Ohio Permanente Med. Group, Inc., 668 N.E.2d 480, 482 (Ohio 1996) (affirming that "Ohio should recognize a claim for loss of chance in a wrongful death action").

87. United States v. Cumberbatch, 647 A.2d 1098, 1099 (Del. 1994) (holding that compensation for loss of chance "cannot be obtained in a wrongful death action"). However, the Delaware Supreme Court distinguished the loss of chance doctrine from that of increased risk and declined to express an opinion regarding whether the increased risk doctrine was viable in a wrongful death action. *Id.* at 1100 n.3. *See also Kramer*, 858 S.W.2d at 398 (holding the Texas Wrongful Death Act did not recognize lost chance of survival cases).

88. *Cumberbatch*, 647 A.2d at 1103.

89. *Id.*

90. *Id.* at 1100 n.3. Delaware later did, in fact, adopt the increased risk doctrine in medical malpractice. United States v. Anderson, 669 A.2d 73 (Del. 1995).

91. Edwards v. Family Practice Assocs., 798 A.2d 1059, 1061 (Del. Super. Ct. 2002) ("This Court holds plaintiffs can not maintain their wrongful death action where the medical negligence was not a cause of death. This Court now recognizes as a proper action under Delaware common law a loss of chance of survival.").

92. *Compare* Crosby v. United States, 48 F. Supp. 2d 924, 928–32 (D. Alaska 1999) (finding the arguments against loss of chance, including increased litigation, more persuasive than those arguments for the doctrine), *and Kramer*, 858 S.W.2d at 406 (finding the loss of chance doctrine will open the floodgates of litigation in other areas of professional practice), *with* Jorgenson v. Vener, 616 N.W.2d 366, 371–72 (S.D. 2000) (finding the "medical profession's fears of increased malprac-

Nevada Supreme Court has explained that loss of chance actions will be viable only in a limited number of instances.[93] The court explained that the lost chance must be significant before a plaintiff will have sufficient incentive to bring the case to court.[94] In those instances where it is worthwhile for plaintiffs to pursue a loss of chance action, health care providers *should* be liable for their malpractice.[95]

A common criticism of loss of chance is the fear that it will create a domino effect, leading to similar litigation in non-medical fields.[96] The Texas Supreme Court, for example, expressed concern that adopting loss of chance in medical malpractice would lead to increased litigation over legal malpractice and loss of profits in business failures.[97] Several courts espousing the loss of chance doctrine have shared a similar fear and have, therefore, decided to strictly limit the doctrine to medical malpractice cases.[98] In

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tice litigation as a result of this doctrine are unfounded"), *and* Perez v. Las Vegas Med. Ctr., 805 P.2d 589, 593 (Nev. 1991) (discarding fears of increased litigation because the doctrine would "give deserved redress in infrequent situations").

93. *Perez,* 805 P.2d at 592–93.

94. *Id.*

95. *Id.*

96. *Kramer,* 858 S.W.2d at 406.

97. *Id.* The Texas Supreme Court explained how loss of chance could lead to increased litigation in non-medical malpractice areas:

> If, for example, a disgruntled or unsuccessful litigant loses a case that he or she had a less than 50 percent chance of winning, but is able to adduce expert testimony that his or her lawyer negligently reduced this chance by some degree, the litigant would be able to pursue a cause of action for malpractice under the loss of chance doctrine (citations omitted). Likewise, the logic of the loss of chance doctrine would upend our long settled rules requiring some degree of certainty in establishing lost profits for a new business (citations omitted). Only a business with no chance of success would be foreclosed from some recovery. . . . We see nothing unique about the healing arts which should make its practitioners more responsible for possible but not probable consequences than any other negligent actor.

Id.

98. *See* Hardy v. Southwestern Bell Tel. Co., 910 P.2d 1024, 1025–26 (Okla. 1996) (finding that "an action for loss of chance of survival may not be expanded to apply in an ordinary negligence action brought against one other than a medical practitioner or a hospital"); Daugert v. Pappas, 704 P.2d 600, 604–06 (Wash. 1985) (finding that the substantial factor test used for loss of chance claims could not replace the "but for" causation test used to decide legal malpractice cases); Roberts v. Ohio Permanente Med. Group, Inc., 668 N.E.2d 480, 485 (Ohio 1996) ("We stress that our decision today is limited in its scope and does not alter traditional principles of causation in other areas of tort law.").

Hardy v. Southwestern Bell Telephone Company, the plaintiff unsuccessfully attempted to summon an ambulance through the emergency 911 system for his wife who suffered a heart attack.[99] Plaintiff claimed that Southwestern Bell had caused the telephone system to lock-up by permitting the sale of Garth Brooks concert tickets over the phone, resulting in a system overload.[100] The plaintiff claimed that Southwestern Bell's actions caused his wife to lose a chance for survival.[101] The Oklahoma Supreme Court held that the loss of chance doctrine did not apply outside the sphere of medical malpractice because the public policy rationales did not apply to other tortfeasors.[102] Similarly, in *Daugert v. Pappas*, the Washington Supreme Court found the loss of chance doctrine inapplicable to legal malpractice claims.[103]

Nonetheless, other courts are less troubled by the expansion of loss of chance and have permitted the doctrine in non-medical malpractice litigation.[104] In *Pelas v. Golden Rule Insurance Company*, a Louisiana district court denied a Motion in Limine in which the defendant insurance agent sought to exclude evidence of loss of chance for survival.[105] The court explained, however, that it had few qualms about expanding the doctrine because Louisiana, unlike Oklahoma, did not have a relaxed burden of proof

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99. *Hardy*, 910 P.2d at 1026.
100. *Id.*
101. *Id.* at 1027.
102. *Id.* at 1029.
103. *Daugert*, 704 P.2d at 605. The decision in *Daugert* regarding the inapplicability of loss of chance resulted from the court's consideration of whether a substantial factor causation test would be more apposite in a legal malpractice case. *Id.* at 602. The court found that it was inappropriate to abandon the "but for" test for the substantial factor test. *Id.* at 605. The court based its decision on the distinction between medical malpractice and legal malpractice loss of chance cases. *Id.* at 604–05. In the former, a patient loses all chance of survival; however, if in a legal malpractice trial, the trial judge determines that malpractice cost the plaintiff an appeal, the client may regain the opportunity to have his claim reviewed by the appellate court. *Id.*
104. Pelas v. Golden Rule Ins. Co., 1999 U.S. Dist. LEXIS 9800, at *10 (E.D. La. June 28, 1999) (admitting evidence of a loss of chance for survival resulting from an insurance company's refusal to cover a medical procedure, the United States District Court for the Eastern District of Louisiana stated, "in light of Louisiana's treatment of loss of chance of survival as a distinct, compensable injury, there is no reason to arbitrarily limit the recovery of damages based on the identity of the tort-feasor, particularly in a case like the present one which is very similar to a medical malpractice case"); Blinzler v. Marriott Int'l, Inc., 81 F.3d 1148 (1st Cir. 1996) (reinstating a jury verdict against the defendant motel for causing a loss of chance of survival by delaying a 911 call in response to a guest's heart attack); *cf.* Jorgenson v. Vener, 616 N.W.2d 366, 371 (S.D. 2000) (declining to rule out loss of chance because "it ostensibly places medical malpractice on a different plane of liability compared to other types of malpractice").
105. *Pelas*, 1999 U.S. Dist. LEXIS 9800, at *1.

for causation in loss of chance cases.[106] *Pelas* points out that section 323(a) of the Restatement (Second) Torts is not on its face limited to medical malpractice and therefore loss of chance likewise should not be limited.[107] In *Blinzler v. Marriott International*, the First Circuit permitted the plaintiff to bring a loss of chance action against the defendant hotel for failing to call an ambulance for her husband who was having a heart attack until fourteen minutes after the plaintiff requested the operator to place the call.[108] The *Blinzler* Court, applying New Jersey law, based its conclusion on the jury's finding that the hotel's "negligence constituted a *substantial factor* in the ensuing death."[109]

Also controversial is whether plaintiffs should be permitted to bring loss of chance claims when the ultimate injury has not yet occurred.[110] The Texas Supreme Court rejected loss of chance in part because it opposes recovery by plaintiffs who, despite the lessened probability, survive:

> [U]nless courts are prepared to compensate even those loss of chance victims who somehow "beat the odds" and recover, the existence of a loss of chance "injury" will be, in reality, wholly dependent upon whether the potential consequences of the victim's illness or injury, such as death, actually come to pass. In short, the true harm to [the plaintiff] remains her death.[111]

Several justices have taken the opposite position and believe plaintiffs should be awarded damages regardless of whether the ultimate injury has occurred.[112] These justices therefore recognize the plaintiff's injury as the

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106. *Id.* at *8.
107. *Id.* at *6.
108. *Blinzler*, 81 F.3d at 1150, 1153–54.
109. *Id.* at 1154 (emphasis added).
110. Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397, 403 n.5 (Tex. 1993).
111. *Id.*
112. *See* Perez v. Las Vegas Med. Ctr., 805 P.2d 589, 592 (Nev. 1991) ("Under this doctrine, the injury to be redressed by the law is not defined as the death itself, but, rather, as the decreased chance of survival caused by the medical malpractice."); Scafidi v. Seiler, 574 A.2d 398, 410 (N.J. 1990) (Handler, J., concurring) ("Given the Court's basic conclusion—that damages can be calculated for the increased risk of harm—I find no principled basis for insisting that a plaintiff incurring an increased risk of future harm as a result of medical malpractice, or, indeed, of other kinds of tortious misconduct, can recover only if and when that harm eventually occurs.") (citation omitted); *Kramer*, 858 S.W.2d at 409 (Hightower, J., dissenting) ("I would adopt the 'separate injury' version of the loss of chance doctrine, under which the harm to be compensated would be the loss of the chance of recovery, rather than the injury or death which ultimately ensues.").

loss of opportunity itself, rather than the ultimate death or other injury.[113] In *Delaney v. Cade*, the Kansas Supreme Court explained that the loss of chance doctrine includes not only those patients who "survive[] the preexisting injury or illness but fail[] to make the *extent or quality of recovery* that might have resulted absent the alleged medical malpractice."[114]

Policy reasons against loss of chance include the argument that the public will ultimately be responsible, through increased insurance premiums, for damages awarded to plaintiffs suffering even the most minimal lost chance of survival.[115] Additionally, courts find that failing to require that the health care provider's actions be the *probable* cause of the plaintiff's injuries could force the healthcare provider to defend cases merely because a plaintiff's condition worsened.[116] Furthermore, adopting loss of chance may require an analysis of societal costs and policy considerations that state legislatures are better suited to resolve than the courts.[117] Perhaps one of the strongest arguments against loss of chance is that it may augment, rather than minimize, the injustice done to patients:

> Assume a hypothetical group of 99 cancer patients, each of whom would have had a 33 1/3% chance of survival. Each received negligent medical care, and all 99 died. Traditional tort law would deny recovery in all 99 cases because each patient had less than a 50% chance of recovery and the probable cause of death was the pre-existing cancer not the negligence. Statistically, had all 99 received proper treatment, 33 would have lived and 66 would have died; so the traditional rule would have statistically produced 33 errors by denying recovery to all 99.
>
> The loss of chance rule would allow all 99 patients to recover, but each would recover 33 1/3% of the normal value

113. *See Scafidi,* 574 A.2d at 410 (Handler, J., concurring); *Kramer,* 858 S.W.2d at 409 (Hightower, J., dissenting); *Perez,* 805 P.2d at 592.

114. Delaney v. Cade, 873 P.2d 175, 178 (Kan. 1994) (emphasis added). *Delaney* involved a question certified to the Kansas Supreme Court by the Tenth Circuit asking whether Kansas recognized the loss of chance doctrine. *Id.* at 177. The Kansas Supreme Court held that Kansas does recognize loss of chance in medical malpractice cases. *Id.* at 187.

115. Crosby v. United States, 48 F. Supp. 2d 924, 928 (D. Alaska 1999) (finding "the doctrine's adoption will increase claims and likely induce another medical malpractice insurance crisis"). For an extensive list of policy rationales against loss of chance, *see* Andersen, *supra* note at 32, 11 n.6 (1996).

116. *Scafidi,* 574 A.2d at 405.

117. Jorgenson v. Vener, 616 N.W.2d 366, 375–76 (S.D. 2000) (Konenkamp, J., dissenting).

> of the case. Again, with proper care 33 patients would have survived. Thus, the 33 patients who statistically would have survived with proper care would receive only one-third of the appropriate recovery, while the 66 patients who died as a result of the pre-existing condition, not the negligence, would be overcompensated by one-third. The loss of chance rule would have produced errors in all 99 cases.[118]

To the opposite end, courts cite numerous policy rationales supporting the loss of chance doctrine. Some courts favor loss of chance because it is consistent with the fact that patients retain healthcare providers specifically to *maximize* their chance of recovery, not merely to cure the disease.[119] Permitting loss of chance deters negligence by encouraging healthcare providers to bestow the best care possible to those with a less than fifty percent chance of survival.[120] Furthermore, courts find that the tortfeasor should bear the cost of uncertainty regarding whether the plaintiff would have survived with proper treatment.[121] Additionally, some courts find that the doctrine provides more equitable treatment for plaintiffs who can only prove their loss of chance was less than fifty percent and not just for those with a fifty percent or greater lost chance.[122] Another policy rationale in favor of loss of chance is that "traditional principles of causation ignore the reality that chances, particularly those of survival, have value."[123] Finally, courts

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118. *Id.* at 377 (quoting Fennell v. Southern Maryland Hosp. Ctr., Inc., 580 A.2d 206, 213 (Md. 1990)).

119. Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397, 404 (Tex. 1993) (explaining why some courts embrace loss of chance).

120. *Id.* at 409 (Hightower, J., dissenting) (disallowing loss of chance "[d]eclares open season on critically ill or injured persons as care providers would be free of even the grossest malpractice if the patient had only a fifty-fifty chance of surviving the disease or injury even with proper treatment"); Herskovits v. Group Health Coop., 664 P.2d 474, 476–77 (Wash. 1983) (rejecting loss of chance would "be a blanket release from liability for doctors and hospitals any time there was less than a 50 percent chance of survival, regardless of how flagrant the negligence"); *Scafidi*, 574 A.2d at 405 (quoting Roberson v. Counselman, 686 P.2d 149, 160 (Kan. 1984)) (jurisdictions rejecting loss of chance may be criticized for "rendering health care providers 'free of liability for even the grossest malpractice if the patient had only a fifty-fifty chance of surviving the disease or injury even with proper treatment'").

121. *Kramer*, 858 S.W.2d at 404–05. *See also Herskovits*, 664 P.2d at 476 ("The underlying reason is that it is not for the wrongdoer, who put the possibility of recovery beyond realization, to say afterward that the result was inevitable.").

122. *Kramer*, 858 S.W.2d at 405.

123. *Id. See also* James v. United States, 483 F. Supp. 581, 587 (N.D. Cal. 1980) ("No matter how small that chance may have been and its magnitude cannot be ascertained no one can say that the chance of prolonging one's life or decreasing suffering is valueless.").

have found that disallowing the loss of chance doctrine rewards those parties who are able to find the most obliging witnesses.[124]

PRINCIPAL CASE

In *McMackin*, the Wyoming Supreme Court reversed the district court's grant of summary judgment to the defendants and adopted the increased risk approach to loss of chance.[125] The district court stated in its order granting summary judgment that "a plaintiff is required to prove through competent evidence that it is *more likely than not* that the defendant's negligence caused the plaintiff's injury."[126] However, the Wyoming Supreme Court found that causation turned not on whether the doctor's negligence more likely than not caused the death, but whether it more likely than not "decreased [the patient's] chance for successful treatment."[127] The court further explained that "the causal connection between the defendant's omission and the decedent's stroke can be established if the defendant's omissions *increased the risk of the harm* suffered by the plaintiff."[128] The plaintiff can then satisfy the burden of proving proximate cause by establishing that proper medical treatment could have helped the patient.[129]

The court then discussed damages. The court decided to calculate damages as a proportion of the value of the patient's death.[130] Here the court stated that in a straightforward case such as *McMackin* where the harm is death, damages are calculated by multiplying the percentage loss of chance by the full measure of damages.[131] The court also clarified that the plaintiff does not have to establish an exact percentage of loss of chance for the jury to hear the case.[132] The jury needs only to hear evidence of the lost percentage.[133]

To help clarify how loss of chance will be applied in Wyoming, the supreme court listed several pattern jury instructions that could be used as a

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124. *Scafidi,* 574 A.2d at 405 (quoting Thompson v. Sun City Community Hosp., 688 P.2d 605, 615 (N.J. 1990)) (disallowing loss of chance places "a premium on each party's search for the willing witness").

125. McMackin v. Johnson County Healthcare Ctr., 73 P.3d 1094, 1098–99 (Wyo. 2003).

126. *Id.* at 1096 (emphasis added).

127. *Id.* at 1099 (emphasis added).

128. *Id.* (emphasis added).

129. *Id.*

130. *Id.* at 1100 (finding "the calamity suffered is death, and the full measure of damages would be those ordinarily allowed in a wrongful death action, reduced by the statistical or percentage loss of chance for survival").

131. *McMackin*, 73 P.3d at 1100; *McMackin II,* 88 P.3d 491, 494 (Wyo. 2004).

132. *McMackin II*, 88 P.3d at 494.

133. *Id.*

starting point.[134] The suggested jury instructions for causation provide that "[a]n injury or damage is caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about the injury or damage."[135] Jury instructions for loss of chance would explain, "[i]f you believe from the evidence that [state nature of defendant's act or omission] increased the risk of [death] [the harm sustained] by significantly decreasing the patient's chances of [survival] [recovery], you should find the defendant to be liable."[136] Finally, instructions for loss of chance damages explain:

> If you find from the evidence that [Defendant] was negligent in the treatment of [Plaintiff] and that this negligence was a substantial factor in reducing [Plaintiff's] chances of obtaining a better result, then you will award such damages as will fairly compensate [Plaintiff] for this loss of chance of a better result.[137]

The court then espoused several policy reasons for adopting the loss of chance doctrine. First, the court explained that it would be unjust not to remedy a loss of chance when such a great portion of medical care is directed towards "extending life for brief periods and improving its quality rather than curing the underlying disease."[138] Second, the court found that it would fail to deter negligence if it required plaintiffs to prove by greater than a fifty percent chance that the practitioner's negligence caused the injury.[139]

In his dissent, Justice Lehman did not specifically attack loss of chance, but emphasized that McMackin failed "to show that any treatment would have altered the death of Mrs. Brown."[140] Furthermore, the dissent explained that the court's adoption of the doctrine was inappropriate where the testimony of the plaintiff's expert witness, Dr. Cutchall, was based on purely conclusory statements.[141] Dr. Cutchall's testimony was not unequivocal in expressing that the Defendants *caused* Brown's death.[142] Additionally, Dr. Felder's affidavit, which supplemented Dr. Cutchall's, did not opine that the untreated Transient Ischemic Attacks *caused* Ms. Brown's death, but rather that "Ms. Brown died from complications of a hemorrhagic

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134. *Id.*
135. WCPJI, No. 3.04, at 18 (Revised April 1994).
136. RONALD W. EADES, JURY INSTRUCTIONS ON MEDICAL ISSUES § 10-10[1] (6th ed. 2005).
137. *Id.* § 10-11[1].
138. *McMackin,* 73 P.3d at 1099.
139. *Id.*
140. *Id.* at 1101 (Lehman, J., dissenting).
141. *Id.* at 1102–04 (Lehman, J., dissenting).
142. *Id.* at 1104 (Lehman, J., dissenting).

stroke *which was preceded by* untreated Transient Ischemic Attacks (TIA's)."[143]

In *McMackin II*, the court re-affirmed that the loss of chance doctrine is viable in actions for wrongful death.[144] The court explained that loss of chance applications varied throughout the nation's jurisdictions with some courts allowing loss of chance as a wrongful death claim, others allowing it as a survivor claim, and still others as an independent theory of recovery.[145] Additionally, the court recognized that loss of chance was only a slight expansion on the scope of wrongful death actions the court had previously embraced.[146] The court rationalized that including the loss of chance doctrine in a wrongful death action did not "strain the bounds of reason, logic, or the law," nor did it violate legislative intent.[147]

ANALYSIS

The Wyoming Supreme Court was correct to acknowledge the growing trend among courts to adopt loss of chance as a viable tort doctrine.[148] The court's decision was controversial in an era of expansive tort reform across the nation.[149] The court's most tenuous holding was that loss of chance is viable as a wrongful death action.[150] Nonetheless, the court was able to justify its position by reconciling wrongful death and loss of chance.[151] The court chose a fair and possibly the most efficient method of damage valuation although it has yet to determine how the proportional damages approach will apply in cases where plaintiffs have not yet suffered the ultimate injury.[152]

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143. Brief for Appellees: Johnson County Healthcare Center, Sather, and Blakely at App. H, 2, McMackin v. Johnson County Healthcare Ctr., 73 P.3d 1094 (Wyo. 2003) (No. 01-214). *See also McMackin*, 73 P.3d at 1104.

144. *McMackin II*, 88 P.3d at 493.

145. *Id. See* supra notes 85–91 and accompanying discussion.

146. *Id.*

147. *Id.*

148. *See* Roberts v. Ohio Permanente Med. Group, Inc., 668 N.E.2d 480, 485 (Ohio 1996) (stating that a "majority of states . . . have adopted the loss-of-chance theory").

149. James Dao, *A Push in States to Curb Malpractice Costs*, N.Y. TIMES, Jan. 14, 2005, at A21.

150. *McMackin II*, 88 P.3d at 493.

151. *Id.*

152. *See* David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 WAKE FOREST L. REV. 605, 619 (2001).

Implications for Tort Reform

Although Wyoming may have been justified in adopting loss of chance as an expansion of existing case law, the fact it did so has not been without controversy. During the 2005 legislative session, both the Wyoming House of Representatives and the Senate introduced legislation in response to *McMackin*.[153] The House bill died in committee.[154] However, the Senate file fared better.[155] Senate File 165 sought to abrogate the loss of chance doctrine and require "that in those actions founded upon an alleged want of ordinary care or skill, the conduct of the responsible party must be shown to have been the proximate cause of the injury upon which the complaint is based."[156] Furthermore, the 2005 Senate File stated that "[t]he legislature also finds that the application of the 'loss of chance doctrine' as applied by the Wyoming Supreme Court in [*McMackin*], improperly alters or eliminates the requirement of proximate causation."[157] Senate File 165 had significant support in the Senate, although it ultimately failed on its third reading by a vote of thirteen to sixteen.[158]

Some courts feel that the legislature is the more appropriate body to authorize any drastic changes in tort law—including the adoption of loss of chance.[159] However, others have decided there is room within their respective state's common law for the courts to adopt the doctrine.[160] This tension

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153. S.F. 165, 58th Leg. (Wyo. 2005); H.B. 115 58th Leg. (Wyo. 2005), *available at* http://legisweb.state.wy.us.

154. H.B. 115, 58th Leg., Digest of House Journal (Wyo. 2005), *available at* http://legisweb.state.wy.us/2005/digest/HB0115.htm.

155. S.F. 165, 58th Leg., Digest of Senate Journal (Wyo. 2005), *available at* http://legisweb.state.wy.us/2005/digest/SF0165.htm.

156. S.F. 165, 58th Leg., at 1–2 (Wyo. 2005), *available at* http://legisweb.state.wy.us.

157. S.F. 165, 58th Leg., at 2 (Wyo. 2005), *available at* http://legisweb.state.wy.us.

158. S.F. 165, 58th Leg., Digest of Senate Journal (Wyo. 2005), *available at* http://legisweb.state.wy.us/2005/digest/SF0165.htm.

159. Hurley v. United States, 923 F.2d 1091, 1099 (4th Cir. 1991) ("Judge McAuliffe expressed that such a change [espousing loss of chance] must be inaugurated by the legislature, not the judiciary.").

160. United States v. Cumberbatch, 647 A.2d 1098, 1104 (Del. 1994):

> While some courts have indicated that only the legislature should determine the propriety of awarding damages for a loss of chance of survival, (citation omitted) we do not find it necessary to so decide here. Although we believe that a legislative solution is appropriate, the courts may have the power to fashion such a remedy through the common law.

Id.

between the power of the courts and the legislature has been amplified in recent years by calls for tort reform across the nation.[161] Although Wyoming recently rejected a constitutional amendment granting the legislature power to place limits on noneconomic damages, the state's voters did approve an amendment permitting the legislature to require a review board to examine all medical malpractice cases before forwarding them to the courts.[162] With the fervent call for tort reform, particularly in Wyoming, the adoption of loss of chance may be criticized because it takes a step towards increasing tort litigation and potentially increasing insurance premiums.[163] Loss of chance, however, does not guarantee an increase in litigation.[164] In *Perez v. Las Vegas Medical Center*, the Nevada Supreme Court disagreed that adoption of loss of chance would create a flood of litigation.[165] Instead, the Nevada Supreme Court found the doctrine would be applied infrequently.[166] The court explained that dramatic increases in litigation would not occur because "in cases where the chances of survival [are] modest, plaintiffs will have little monetary incentive to bring a case to trial because damages would be drastically reduced to account for the preexisting condition."[167]

Wrongful Death and Survivor Actions

The Wyoming Supreme Court's conclusion that loss of chance falls within the state's Wrongful Death Act is tenuous. In order to permit a dece-

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161. Symposium, Justice and Democracy Forum, *The Law and Politics of Tort Reform*, 4 NEV. L.J. 377, 377 (2003) ("Medical malpractice concerns have also received substantial attention across the nation, as have other tort reform issues such as punitive damages, limits on non-economic damages, regulation of attorney fees, and control of class actions.").

162. Dao, *supra* note 149, at A21.

163. Crosby v. United States, 48 F. Supp. 2d 924, 928 (D. Alaska 1999); *cf.* Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397, 406 (Tex. 1993) (expressing concern that adopting loss of chance in medical malpractice would lead to increased litigation in other practice areas).

164. Perez v. Las Vegas Med. Ctr., 805 P.2d 589, 593 (Nev. 1991) (finding that the court's decision to adopt loss of chance would not open the floodgates of litigation). *Perez* involved a prison inmate, Lopez, who was taken to the hospital two days after incarceration. *Id.* at 590. Lopez remained hospitalized for four days; however, physicians made no attempts to diagnose the cause of his persistent headaches. *Id.* Six days after Lopez's return to prison, a nurse discovered Lopez suffering seizures in his cell. *Id.* The on-duty physician was notified; however, minimal treatment was administered to Lopez who died within hours. *Id.* The Nevada Supreme Court reversed the district court's grant of summary judgment to the defendant and adopted the loss of chance doctrine. *Id.* at 590, 592, 593.

165. *Id.* at 593.

166. *Id.* at 592 (explaining that because the lost chance for survival must be *substantial*, "[s]urvivors of a person who had a truly negligible chance of survival should not be allowed to bring a case fully through trial").

167. *Id.*

dent's family to recover for the defendant's negligence, loss of chance must fall into either a wrongful death or a survivor action.[168] In Wyoming, a plaintiff may not bring a survivor action for personal injury damages in situations where the patient died from the same injury.[169] Therefore, survivor actions are not available to any plaintiff whose decedent died from the pre-existing injury.[170] Consequently, the decedent's personal representative must turn to the Wyoming Wrongful Death Act for compensation.[171]

The Wyoming statutes permit a wrongful death action when the defendant's negligent conduct caused the decedent's *death*.[172] Therefore, unless a defendant healthcare provider is a cause of the death itself, and not merely the lost chance, the plaintiff may not recover under either a wrongful death or a survivor action.[173] The Delaware Supreme Court, in *Cumberbatch*, found that similar causation language in the state's wrongful death statute barred loss of chance wrongful death actions.[174]

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168. WYO. STAT. ANN. §§ 1-4-101, 1-38-101 (LexisNexis 2005).

169. *Id.* at § 1-4-101. This section provides:

> In addition to the causes of action which survive at common law, causes of action for mesne profits, injuries to the person, an injury to real or personal estate, or any deceit or fraud also survive. An action may be brought notwithstanding the death of the person entitled or liable to the same, *but in actions for personal injury damages, if the person entitled thereto dies recovery is limited to damages for wrongful death.*

Id. (emphasis added).

170. *Id.*

171. Edwards v.Fogarty, 962 P.2d 879, 884 (Wyo.1998) (Golden, J., dissenting).

172. WYO. STAT. ANN. § 1-38-101 (LexisNexis 2005) provides:

> Whenever *the death* of a person *is caused by* wrongful act, neglect or default such as would have entitled the party injured to maintain an action to recover damages if death had not ensued, the person who would have been liable if death had not ensued is liable in an action for damages, even though the death was caused under circumstances as amount in law to murder in the first or second degree or manslaughter.

Id. (emphasis added).

173. WYO. STAT. ANN. §§ 1-38-101, 1-4-101 (LexisNexis 2005).

174. *See* United States v. Cumberbatch, 647 A.2d 1098, 1103 (Del. 1994) (quoting DEL. CODE ANN. tit. 10, § 3722(a) (1994) (concluding that loss of chance is not viable as a wrongful death action because wrongful death actions are to be maintained against persons who "*cause[d] the death* of another").

In *McMackin II*, however, the Wyoming Supreme Court explained how it fit loss of chance into the causation standard required for wrongful death actions.[175] In quoting a Wisconsin case, *Ehlinger v. Sipes*, the court indicated that the substantial factor test was an appropriate indicator of causation.[176] A healthcare provider's negligence in increasing the risk of harm is a cause of death if it is a *substantial factor* in causing the death.[177] In using the substantial factor test, "substantial factor" is not synonymous with being the sole cause of the injury:

> One who negligently creates a dangerous condition may be held liable even though another cause is also a substantial factor in contributing to the result . . . . "There may be more than one substantial causative factor in any given case . . . ." The defendant's negligent conduct need not be the sole or primary factor in causing the plaintiff's harm.[178]

The court once more clarified the causation standard stating, "[t]he negligent act(s) must be a substantial cause (more likely than not) of the lost chance to survive."[179] The Nevada Supreme Court has similarly found that the preponderance of the evidence standard is met in loss of chance cases when the plaintiff proves that the "medical malpractice *more probably than not* decreased a substantial chance of survival and that the injured person ultimately died or was severely debilitated."[180]

Furthermore, Wyoming medical malpractice case law requires only that the plaintiff prove (a) the standard of care required, (b) that the doctor deviated from this standard, and (c) that such deviation was the *"legal cause"* of the patient's injuries.[181] The Wyoming Supreme Court has adopted the Restatement's definition of "legal cause," which provides:

> The actor's negligent conduct is a legal cause of harm to another if[:]

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175. *McMackin II*, 88 P.3d 491, 493 (Wyo. 2004).
176. *Id.* at 493–94 (citing Ehlinger v. Sipes, 454 N.W.2d 754, 758–59 (Wis. 1990)).
177. *Id.* at 493 (citing *Sipes*, 454 N.W.2d at 758–59 (Wis. 1990)).
178. *Id.* (quoting *Ehlinger*, 454 N.W.2d at 758–59).
179. *Id.* at 496 (emphasis added).
180. Perez v. Las Vegas Med. Ctr., 805 P.2d 589, 592 (Nev. 1991).
181. Mize v. North Big Horn Hosp. Dist., 931 P.2d 229, 233 (Wyo. 1997) (emphasis added). In *Mize* the Wyoming Supreme Court addressed the proper causation standard required to survive a motion for summary judgment in a medical malpractice case. *Id.* at 231.

> (a) his conduct is a *substantial factor* in bringing about the harm, and
>
> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.[182]

Consequently, if a defendant's conduct is a substantial factor contributing to the patient's death, the defendant caused the patient's death and is liable under a wrongful death action.[183] The court's decision to permit loss of chance as a wrongful death action is therefore consistent with the traditional causation standard for wrongful death actions in Wyoming.

Damage Valuation

The Wyoming Supreme Court appropriately chose the proportional loss of chance approach, which focuses on awarding damages in proportion to the degree which the defendant's negligence diminished the plaintiff's chances for survival.[184] This approach concentrates on the harm caused by the defendant rather than on the plaintiff's ultimate harm caused in part by the pre-existing condition.[185] However, the court's decision to base damages on a percentage of the value of the ultimate injury downplays the fact that the patient's loss of chance has a distinct value independent of the ultimate harm suffered.[186]

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182. Allmaras v. Mudge, 820 P.2d 533, 541 (Wyo. 1991) (quoting RESTATEMENT (SECOND) OF TORTS § 431 (1965)) (emphasis added). *Allmaras* involved an appeal of the trial court's grant of summary judgment to a general contractor in a suit alleging the contractor failed to adequately warn the public of construction hazards associated with utility repairs alongside a street intersection. *Id.* at 534–35.

183. *See* RESTATEMENT (SECOND) OF TORTS § 431 (1965).

184. *See* Scafidi v. Seiler, 574 A.2d 398, 408 (N.J. 1990).

185. Delaney v. Cade, 873 P.2d 175, 176 (Kan. 1994).

186. *See Scafidi,* 574 A.2d at 410 (Handler, J., concurring). Justice Handler questioned:

> the requirement of harm as a precondition to recovery in increased-risk-of-harm cases. Given the Court's basic conclusion—that damages can be calculated for the increased risk of harm—I find no principled basis for insisting that a plaintiff incurring an increased risk of future harm as a result of medical malpractice, or, indeed, of other kinds of tortious misconduct, (citation omitted), can recover only if and when that harm eventually occurs. The occurrence of ultimate harm simply does not bear on whether

The question remains whether the Wyoming Supreme Court will permit recovery when the ultimate injury has not yet occurred.[187] The plaintiff's lost chance should have value of its own independent of whether the ultimate harm has occurred.[188] Otherwise, negligent acts are implicitly condoned or, at minimum, ignored.[189] Furthermore, allowing plaintiffs to recover for future risk of harm ensures that patients are neither overcompensated nor undercompensated:

> the chance of avoiding or the risk of incurring that harm can otherwise be demonstrated and valued for purposes of awarding damages.

Id.; Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397, 409 (Tex. 1993) (Hightower, J., dissenting) ("I would adopt the 'separate injury' version of the loss of chance doctrine, under which the harm to be compensated would be the loss of the chance of recovery, rather than the injury or death which ultimately ensues."); Perez v. Las Vegas Med. Ctr., 805 P.2d 589, 593 (Nev. 1991) ("By defining the injury as the loss of chance of survival, the traditional rule of preponderance is fully satisfied.").

187. *Scafidi,* 574 A.2d at 411 (Handler, J., concurring) ("The fact that the plaintiffs in the present case have not—yet—suffered extreme symptoms is no justification for denying recovery."); Petriello v. Kalman, 576 A.2d 474, 483 (Conn. 1990) (finding it "fairer to instruct the jury to compensate the plaintiff for the increased risk of [the ultimate harm] based upon the likelihood of its occurrence rather than to ignore that risk entirely").

188. *See Scafidi,* 574 A.2d at 410 (Handler, J., concurring). Justice Handler stated:

> I find no principled basis for insisting that a plaintiff incurring an increased risk of future harm as a result of medical malpractice, or, indeed, of other kinds of tortious misconduct, can recover only if and when that harm eventually occurs. The occurrence of ultimate harm simply does not bear on whether the chance of avoiding or the risk of incurring that harm can otherwise be demonstrated and valued for purposes of awarding damages. I remain persuaded that the occurrence of ultimate harm should not be a condition precedent to the recovery of compensatory damages. If that chance or risk is demonstrated by evidence grounded in reasonable medical possibility, it should, based on ordinary experience and notions of fairness and sound policy, constitute a sufficient basis for redress (citation omitted).

Id.

189. *See* Delaney v. Cade, 873 P.2d 175, 182–83 (Kan. 1994) ("There is certainly nothing . . . to justify leaving the season open on persons who suffer paralysis, organ loss, or other serious injury short of death while protecting only those who do not survive the negligence").

> Not all of these persons will actually suffer harm, but each has suffered a loss in an actuarial sense because his chances of avoiding the harm have been reduced. These kinds of losses can often be insured against, and plaintiffs that use their recoveries to purchase such insurance are not overcompensated. Those plaintiffs that actually suffer the future loss will receive appropriate compensation from their insurance companies. Those plaintiffs that do not suffer the future loss receive nothing from their insurance companies, and thus, are not overcompensated.[190]

Consequently, permitting recovery for future risk of harm ensures an opportunity for adequate compensation for injured plaintiffs.[191]

CONCLUSION

The Wyoming Supreme Court was correct to adopt loss of chance as a viable medical malpractice claim in Wyoming. Importantly, the adoption of loss of chance allows patients to recover for their diminished chance of survival or recovery resulting from negligent medical care. The loss of chance doctrine is applicable in wrongful death actions because the applied substantial factor test of causation satisfies the Wyoming wrongful death statute's causation requirement. It can no longer be said that "the chance of prolonging one's life . . . is valueless."[192] Wyoming attorneys can expect to see the doctrine evolve as the Wyoming Supreme Court confronts issues of specific application. However, given current trends in tort reform, it is possible that the Wyoming Legislature may yet ring the death knell for loss of chance.

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190. Fischer, *supra* note 152, at 633 (citations omitted).
191. *See id.*
192. James v. United States, 483 F. Supp. 581, 587 (N.D. Cal. 1980).