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Reducing recovery in 'lost chance of recovery' cases

In medical-malpractice cases involving solely iatrogenic loss (e.g., harm of or relating to medical treatment), the plaintiff bears the burden of proof in establishing that medical negligence was more probably the cause than not the cause of his or her ultimate injury. When an iatrogenic cause combines with an innocent cause, such as an underlying medical condition of the patient, the plaintiffs often pursue a cause of action under the "loss of chance" doctrine and its arguably relaxed burden of proof.

That doctrine permits recovery when a medical expert opines to a "reasonable [degree of medical] certainty" that the physician's negligence caused a lost chance of recovery. *Holton v. Memorial Hospital*, 679 N.E.2d 1202, 1211-13 (Ill.Sup.Ct. 1997).

It is nearly axiomatic that one could more easily prove that a chance of harm, rather than an actual harm, resulted from medical negligence. Should loss of chance plaintiffs be entitled to recover 100 percent of their damages absent proof of actual harm?

As some commentators have argued, fair application of the loss-of-chance doctrine requires treating the lost chance of recovery itself as the compensable harm, rather than the ultimate injury sustained by the patient (the so-called "separate injury approach," which has been adopted in Iowa, Kansas, Michigan, Missouri, Nevada and Washington). J. King, "Causation, Valuation and Chance in Personal Injury Torts Involving Pre-existing Conditions and Future Consequences," 90 Yale L.J. 1353, 1365 (1981).

In this way, the medical tortfeasor is held accountable only for damages flowing from iatrogenic causes, rather than compensating patients for innocent causes which the medical tortfeasor played no role in causing, such as the patient's underlying medical condition. Id.

The Illinois Supreme Court has never imposed any limitation on a patient's right to recovery in cases alleging medical negligence resulted in a "lost chance of recovery." Instead, probabilistic proof that medical negligence caused a chance of an injury is sufficient to allow the patient to recover 100 percent of his or her damages.

Notably, state Supreme Court dicta suggests that a reduction of damages in proportion to the lost chance of recovery, as would occur under the "separate injury" approach, is the proper result in these cases. *Holton*, 679 N.E.2d at 1210, n1., and 1213, n2. *Borowski v. Von Solbrig*, 328 N.E.2d 301, 305 (Ill.Sup.Ct. 1975). Under the present application of the loss of chance doctrine in Illinois, however, jurors are not instructed by the court on any methodology for reducing damages in proportion to the lost chance of survival.

In that regard, jurors are ill-equipped to properly assign value to the injury at issue, the probabilistic harm itself, rather than the ultimate injury. This results in juries overcompensating loss of chance plaintiffs not only for harm attributable to iatrogenic causes, but also for "innocent causes" such as the plaintiff's underlying medical condition, without any differentiation between the two.

By Jason Winslow

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The Supreme Court, or the Supreme Court Committee on Jury Instructions in Civil Cases, could resolve this inequity with jury instructions providing a formula for the jury to reduce damages in proportion to the lost chance of harm.

This is not a foreign concept to the Illinois Supreme Court. For example, in *Dillon v. Evanston Hospital*, 771 N.E.2d 357 (Ill.Sup.Ct. 2002), the Supreme Court determined that a jury had not been properly instructed on damages in an increased risk of future harm case, commenting that "a plaintiff can obtain compensation for a future injury that is not reasonably certain to occur, but the compensation would reflect the low probability of occurrence." 771 N.E.2d at 370.

The *Dillon* court remanded and provided the trial court with a proposed instruction adopted from another jurisdiction, which specified a formula for the jury to apply in assigning damages to the "chance" of a future injury. I.P.I. Civil 30.04.03, a pattern jury instruction which memorializes the Dillon ruling, refers to the use of a corresponding instruction providing a methodology for how such damages are calculated, I.P.I. Civil 30.04.04.

As the *Dillon* court concluded, instructions aid the jury in the difficult task of assigning reduced damages to account for proof of only probabilistic harm. Similar instructions could be used in loss of chance cases to aid the jury not only in differentiating between iatrogenic and innocent causes, but also in properly assigning value to probabilistic harm (i.e., the lost chance of recovery).

For example, if the patient's chance of recovery from the underlying medical negligence was 49 percent in the absence of negligence, then jury instructions guiding the jury to multiple the recoverable damages by that percentage should be given. Not instructing the jury in this fashion risks overcompensating patients by allowing juries to conclude that full recovery of damages is allowed even without proof that an iatrogenic cause of harm was more likely than not the proximate cause of the actual harm suffered by the plaintiff.

Allowing this reduction will result in more efficient and fairer outcomes for medical providers in those cases where the actual harm results in greater part from underlying medical conditions which the medical tortfeasor played no role in causing in the first instance.