Losing a Chance to Survive: An Examination of the Loss of Chance Doctrine within the Context of A Wrongful Death Action

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I. Introduction

Imagine a scenario in which an individual travels to his primary care physician for a regular physical. The individual believes himself to be free of any life-threatening issues, but during his visit, tells the physician that he has been experiencing some gastric distress, heartburn, and shortness of breath when eating and lifting. Assume further that the individual has particular risk factors of which the treating physician is aware, and which significantly increase the patient's likelihood of being diagnosed with gastric cancer. In response to the patient's complaints, the doctor diagnoses the patient with gastrointestinal reflux disease and recommends over-the-counter medications to relieve the patient's symptoms, but opts not to order any additional tests. Over the course of the next few months, the patient suffers from moles on his skin that contain bacteria.

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2 Id. Matsuyama, who had a history of smoking, was of Asian descent and lived in Japan and Korea for the first twenty-four years of his life. Id. According to the physician in the case, because of the food that Matsuyama consumed while living in Japan and Korea, he was ten to twenty times more likely to develop gastric cancer as compared to a member of the general population of the United States. Id.
3 Id. The physician followed a similar course of treatment when the patient returned complaining of increased heartburn pain, as well as additional pain when he was eating. Id.
known to be associated with gastric cancer.4

Almost four years after the initial appointment, the patient is diagnosed with gastric cancer, and tragically dies as a result. In response to his death, the patient’s estate brings a medical malpractice lawsuit alleging wrongful death against the doctor for his failure to diagnose and treat the patient’s condition.5 Under this wrongful death cause of action, the estate seeks damages for pain and suffering, but also damages for the loss of chance of survival.6

Part I of this note briefly introduces the reader to the loss of chance doctrine and wrongful death statutes, and identifies the split in the jurisdictions regarding the compatibility of the loss of chance doctrine with wrongful death statutes. Part II addresses the history of both the loss of chance doctrine and wrongful death statutes. Part III discusses case law from a number of jurisdictions that have addressed whether the loss of chance doctrine is compatible with their state’s wrongful death statute. Part IV argues that the compatibility of the loss of chance doctrine and wrongful death statutes depend upon the type of loss of chance approach adopted by the jurisdiction, and Part V offers additional concluding thoughts.

A. The Loss of Chance Doctrine & Wrongful Death Statutes

The loss of chance doctrine, referred to as the loss chance of survival, or the loss of a chance of recovery, is a relatively new tort theory of recovery, which allows plaintiffs in medical malpractice cases to seek damages when a patient has been deprived of some probability of recovery resulting from the physician’s negligence.7 Loss of chance occurs when a physician does something wrong, such as failing to diagnose an illness, that causes a statistical decrease in the patient’s chance for survival or for a better outcome.8 As it is now understood, the doctrine is designed to compensate the patient

4 Matsuyama, 890 N.E.2d at 825. At the time of the examination, the physician was unaware that such moles could have been a sign of gastric cancer. Id. Believing the moles to be “common,” the physician failed to make Matsuyama aware of the link between the bacteria and cancer. Id.
5 Id. The lawsuit also alleged breach of contract, and negligence on the part of the physician. Id. Of particular importance to this note is the wrongful death lawsuit. Id. A wrongful death cause of action is designed to compensate the decedent’s survivors for losses that they incur as a result of the decedent’s death. See infra Part II.C.
6 Matsuyama, 890 N.E.2d at 826-27.
7 Joan F. Renahan, A New Frontier The Loss of Chance in Medical Malpractice Cases, BOSTON BAR JOURNAL 14 (May/June 2009), available at http://www.bostonbar.org/pub/bbj/bbj0506_09/bbj0506.pdf; see also infra Part II.A.
8 Margaret T. Mangan, Comment, The Loss of Chance Doctrine: A Small Price to Pay For Human Life,
for the lost opportunity of survival caused by the physician's negligence, by awarding damages based on the value of the opportunity lost.9

In some instances, such as the scenario illustrated in the introduction, a patient will die as a result of the physician's negligence, and the decedent's estate will bring a wrongful death action in medical malpractice against that physician, where they will also seek loss of chance damages.10 Such actions are governed by the state statute of the appropriate jurisdiction, and are designed to financially provide for those individuals who may have been dependent on the decedent.11 These actions assert that one party caused another's wrongful death because of the first party's failure to abide by a reasonable standard of care.12 Where loss of chance damages are designed to compensate the injured party for the value of the loss of opportunity they have suffered, wrongful death actions are designed to compensate for the death of an individual.13

This distinction presents the potential incompatibility between the loss of chance doctrine and wrongful death statutes.14 A number of jurisdictions have weighed

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42 S.D. L. REV. 279, 283 (1997); David A. Fischer, Tort Recovery for Loss of Chance in Medical Malpractice, 36 WAKE FOREST L. REV. 605, 605 (2001). The loss of chance doctrine can also be described as the loss of the patient's chance to avoid a serious physical injury or death. Howard Ross Feldman, Comment, Chances as Protected Interests: Recovery for the Loss of a Chance and Increased Risk, 17 U. BALz. L. REV. 139, 144 (1987). One of the first individuals to write on the topic, Professor Joseph H. King Jr., stated the loss of chance as the loss of "achieving a favorable outcome or of avoiding an adverse consequence." Joseph H. King, Jr., Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences, 90 YALE L.J. 1353, 1354 (1981).


12 Id.

13 Id. (explaining how wrongful death cases pay compensation to the victim's family for their own damages).

in on the compatibility of the loss of chance doctrine and states’ wrongful death statutes and have come to four different outcomes. Some jurisdictions that have adopted the loss of chance doctrine have found the doctrine to be compatible with their wrongful death statutes, and allow for loss of chance damages under the wrongful death statute. Other jurisdictions that have adopted the loss of chance doctrine have found the doctrine incompatible with their state’s wrongful death statute and have barred any recovery of loss of chance damages under a wrongful death suit. Two jurisdictions have refused to adopt the loss of chance doctrine in any form, because their courts determined the doctrine to be incompatible with their state’s wrongful death statute. Finally, a number of jurisdictions have simply refused to adopt the loss of chance doctrine. Though a brief review of the loss of chance doctrine and wrongful death statutes appears to suggest the two are mutually exclusive and hence incompatible, a deeper analysis of the issue seems to reveal that certain variations of the loss of chance doctrine are likely actionable under, and hence compatible with, wrongful death statutes.

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17 See Joshi v. Providence Health Sys. of Or. Corp., 149 P.3d 1164, 1169-70 (Or. 2006). "[P]laintiff must demonstrate that defendant’s negligent acts or omission was sufficient to bring about decedent’s death. Plaintiff cannot avoid this requirement by showing that defendants’ negligent act or omission merely increased the risk of death.” Id.; see also United States v. Cumberbatch, 647 A.2d 1098, 1103 (Del. 1994).

Since a wrongful death claim is purely statutory and the statute is expressly limited to . . . 2) authorizing the maintenance of an action against a person who ‘causes the death’ of another . . . it is not the proper type of action in which to pursue a loss of chance claim.

Id.
18 See, e.g. Kramer v. Lewisville Memorial Hosp., 858 S.W.2d. 397, 403-04 (Tex. 1993). Though Texas chose not to adopt the loss of chance doctrine, the Supreme Court did hold that if the loss of chance doctrine was accepted, it would be incompatible with the Texas Wrongful Death Statute. Id. at 404.
19 See infra Part IV (analyzing the compatibility of certain variations of loss of chance with wrongful death statutes).
II. History

A. History of the Loss of Chance Doctrine

The origin of the loss of chance doctrine can be traced back to an 1867 Ohio Supreme Court ruling on a medical malpractice case. In that case, a physician mistreated a patient with a dislocated shoulder, but argued he should be free from liability because the patient was already injured when he came to him, and thus his mistreatment did not cause the injury. The court disagreed stating that any lack of the proper standard of skill or care which "diminishes the chances of the patient's recovery, prolongs his illness, increases his suffering, or, in short, makes his condition worse than it would have been if due skill and care had been used, would, in a legal sense, constitute injury.

The preeminent case on the loss of chance doctrine is *Hicks v. United States.* In *Hicks*, the decedent died of a bowel obstruction shortly after being examined and diagnosed with gastroenteritis. The court held the physician violated the reasonable

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20 Craig v. Chambers, 17 Ohio St. 253, 257-59 (1867).
21 Id. at 258.
22 Id. at 261. Modern courts have similarly phrased the patient's loss of chance for recovery as constituting a real injury. See infra Part III.B.2. In 1902, a Kentucky Court addressed a case where a physician failed to diagnose a bone dislocation and such failure allegedly resulted in arm muscle weakness and impairment. Burk v. Foster, 69 S.W. 1096, 1098 (Ky. 1902). The court disagreed with the physician's argument that the patient would have suffered injuries regardless, and held "the patient is entitled to the chance for better results . . . [t]hat the patient might have died in spite of the treatment, or that 'ordinarily' they did die in such cases . . . is no excuse to the physician who neglects to give his patient the benefit of the chance." Id. at 1098. In addition to early tort cases recognizing the doctrine, there is also a famous breach of contract case acknowledging the doctrine in its primitive form. See Chaplin v. Hicks, [1911] 2 K.B. 786. In the English case, the plaintiff was one of many contestants vying for a contract in a beauty contest but failed to make it among the group of finalists because the defendant did not notify the plaintiff that she had made it to the next round. Id. at 786-88. Although the plaintiff had a less than a fifty/fifty chance of winning, the court held the plaintiff was deprived of the opportunity to compete, and this lost opportunity held some monetary value. Id. at 790-801. See also Mange v. Unicorn Press, 129 F. Supp. 727, 730 (S.D. N.Y. 1955) (recognizing trend allowing juries to determine value of the chance which plaintiff has been deprived).
23 368 F.2d 626 (4th Cir. 1966).
24 Id. at 628-29. Shortly after the examination, the woman went home, experienced another episode of vomiting, took the medicine that was prescribed and laid down. Id. at 629. Eight hours after the examination, the woman got up, drank a glass of water, vomited and fell to floor unconscious. Id. Efforts to revive her were unsuccessful. Id. She died from massive hemorrhaging of the intestine because of strangulation caused by obstruction. Id.
standard of care required of physicians when he failed to diagnose the appropriate illness.\textsuperscript{25} 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.\textsuperscript{26}

\textsuperscript{25} Hicks, 368 F.2d at 632-33. Virginia defines the reasonable standard of care for physicians as follows:

A physician holds himself out as possessing the knowledge and ability necessary to the effective practice of medicine... However, he is not an insurer, nor is he held to the highest degree of care known to his profession... He must exhibit only that degree of skill and diligence employed by the ordinary, prudent practitioner in his field and community, or in similar communities, at the time.

Id. at 629 (quoting Reed v. Church, 8 S.E.2d 285, 288 (Va. 1940)).

\textsuperscript{26} Id. at 632. Since Hicks, a number of courts have adopted the loss of chance doctrine in some form. See e.g. Thompson v. Sun City Cmty. Hosp., Inc., 688 P.2d 605 (Ariz. 1984); Ferrell v. Rosenbaum, 691 A.2d 641 (D.C. 1997); Holton v. Memorial Hosp., 679 N.E.2d 1202 (Ill. 1997); Cahoon v. Cummings, 734 N.E.2d 555 (Ind. 2000); DeBurkarte v. Louvar, 395 N.W.2d 131 (Iowa 1986); Delaney v. Cade, 873 P.2d 175 (Kan. 1994); Hastings v. Baton Rouge Gen. Hosp., 498 So. 2d 713 (La. 1986); Wollen v. DePaul Health Ctr., 828 S.W.2d 681 (Mo. 1992); Aasheim v. Humberger, 695 P.2d 824 (Mont. 1985); Perez v. Las Vegas Med. Ctr., 805 P.2d 589 (Nev. 1991); Evers v. Dollinger, 471 A.2d 405 (N.J. 1984); Alberts v. Schultz, 1999-NMSC-015, 126 N.M. 807, 975 P.2d 1279; Roberts v. Ohio Permanente Med. Grp., Inc., 668 N.E.2d 480 (Ohio 1996); McKellips v. Saint Francis Hosp., Inc., 741 P.2d 467 (Okla. 1987); Hamil v. Bashline, 392 A.2d 1280 (Pa. 1978); Brown v. Koulikakis, 331 S.E.2d 440 (Va. 1985); Herskovits v. Grp. Health Coop. of Puget Sound, 664 P.2d 474 (Wash. 1983); Thornton v. CAMC, 305 S.E.2d 316 (W. Va. 1983); Ehlinger v. Sipes, 454 N.W.2d 754 (Wis. 1990); \textit{McMackin I}, 73 P.3d 1094 (Wyo. 2003); \textit{McMackin II}, 88 P.3d 491 (Wyo. 2004); Matsuyama v. Birnbaum, 890 N.E.2d 819 (Mass. 2008). However, there are different variations of how the doctrine is applied. See infra Part II.B. In addition to Hicks, the Second Restatement of Torts is also given credit for being one of the first sources to recognize recovery for the loss of chance. See RESTATEMENT (SECOND) OF TORTS § 323 (1965). The relevant portion of the text provides that one who "render[s] services to another . . . 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." Id. A number of courts have recognized that the language of Section 323 of the Restatement gives courts the option of adopting the loss of chance doctrine. See infra note 71.
Hicks was instrumental in recognizing the credibility of the loss of chance doctrine as it paved the way for other courts to acknowledge the significance of a patient losing a chance to survive.\textsuperscript{27}

Fifteen years after the decision in Hicks, Professor Joseph King published a widely cited Yale Law Journal article in which he argued that a plaintiff's loss of chance is a compensable harm that should be recognized as a separate tort.\textsuperscript{28} Professor King continued, "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."\textsuperscript{29}

B. Variations among the Jurisdictions

Throughout the past thirty years, many courts have grown increasingly fond of the loss of chance doctrine in tort recovery, yet these courts have been unable to apply a uniform approach to the doctrine.\textsuperscript{30} A number of different interpretations have been applied to the loss of chance doctrine including the traditional causation method, the "pure" loss of chance approach, the substantial loss of chance approach, and the increased risk of harm approach.\textsuperscript{31}

\textsuperscript{27} See Kallenberg v. Beth Israel Hospital, 45 A.D.2d 177 (1974). In Kallenberg, the decedent was brought to the hospital, but did not receive the necessary medication for her condition. \textit{Id.} at 178-79. At trial, expert testimony demonstrated that if the decedent had received the necessary medication, she would have had between a twenty and forty percent chance of survival. \textit{Id.} at 179-180. The jury held for the decedent's family, and the appellate court held that such a finding was correct because "had Mrs. Kallenberg been properly treated with the indicated medication of choice, her blood pressure could have been kept under control, and she might have improved sufficiently . . . to undergo surgery and make a recovery." \textit{Id.} at 180.

\textsuperscript{28} King, supra note 8, at 1354 (1981).

\textsuperscript{29} Id. at 1355. King asserted that the "traditional rule barring recovery when the chance of recovery is under 50 percent is arbitrary, and contrary to the deterrent objectives of tort law because it denies recovery for statistically demonstrable losses resulting from negligent acts." Weigand, supra note 14, at 6 (crediting Professor King's article as having greatly advanced the loss of chance doctrine). "Professor King's concept for valuation of lost chance [has] had a profound effect upon the further development of the loss of chance doctrine as a theory of recovery and measure of damages for medical malpractice victims unable to show a better than 50 percent chance of survival or recovery." Darrell L. Keith, \textit{Loss of Chance: A Modern Proportional Approach to Damages in Texas}, 44 Baylor L. Rev. 759, 771 (1992).


\textsuperscript{31} Id. In a traditional medical malpractice case, liability for negligence is based upon a causal connection between the negligence and the injury of which the patient complained, and in such actions, the plaintiff must plead and prove that the defendant is at fault, and also that they caused
1. Traditional Causation

Jurisdictions rejecting the loss of chance doctrine do so in favor of the traditional rules of causation. Plaintiffs in these jurisdictions are required to show the negligent act by the physician "more likely than not caused the injury thereby allowing for recovery." In such jurisdictions, if a plaintiff is able to show the patient had a greater than fifty percent chance of survival, he is more likely to succeed on his claim because of the reduced uncertainty as to whether an existing illness or the physician's

the injury. John D. Hodson, Annotation, Medical Malpractice: "Loss of Chance" Causality, 54 A.L.R. 4TH 10, § 2a (1987). In proving causation, plaintiffs must establish that injury would not have occurred "but for," the defendant's conduct. PAGE KEETON & WILLIAM PROSSER, PROSSER AND KEETON ON THE LAW OF TORTS 30, 266 (5th ed. 1984). When there are two or more forces at work which produce the result, the "but for" test is dropped, and the plaintiff must then prove the defendant's actions were a substantial factor in causing the plaintiff's injury, and that it was more probable than not that the defendant caused the plaintiff's injuries. Robert S. Bruer, Note, Loss of Chance as a Cause of Action in Medical Malpractice Cases, 59 Mo. L. Rev. 969, 971-72 (1994). The plaintiff must show that the patient's chances of recovery were greater than fifty percent and, but for the physician's negligence, the plaintiff lost a chance of survival. Id. at 973. To illustrate, imagine a scenario where the physician failed to diagnose a patient because he didn't run the proper tests, and as a result, the chances of her survival went from seventy percent to thirty percent. Truckor, supra note 30, at 353. The patient eventually dies, and in a subsequent malpractice action, the plaintiff uses a traditional negligence theory. Id. Under such a theory, the plaintiff is required to prove the "physician breached a duty of care by failing to order the tests, as well as establish a causal connection between the physician's conduct and the patient's injury," or show that the defendant's conduct was more likely than not the cause of the lost chance of recovery. Id. For an overview of the "pure" loss of chance approach, see infra Part II.B.2.a (demonstrating recovery is allowed if plaintiff proves that physician's conduct deprived the patient of a better outcome). For a discussion of the substantial loss of chance approach, see infra Part II.B.2.b (granting recovery when plaintiff proves physician's negligence resulted in substantial lost chance of recovery). For an overview of the increased risk of harm approach, see infra Part II.B.2.c (relaxing traditional causation but requiring patient to be exposed to increased risk from physician's act).


33 Weigand, supra note 14, at 7; see also Keeton, supra note 31 and accompanying text (discussing traditional tort causation).
negligence caused the injury. A plaintiff in a case where the patient had less than a fifty percent chance of recovery is less likely to recover damages because the patient would likely not have recovered even if reasonable medical care was given.

Texas is one jurisdiction that has rejected the loss of chance doctrine in favor of retaining traditional notions of causation. In *Kramer v. Lewisville Memorial Hospital*, a patient experienced gynecological problems, and despite seeing several physicians and undergoing several tests, her symptoms persisted. The patient was diagnosed with cervical cancer, and ultimately died. In refusing to adopt the loss of chance approach, the court held that:

We acknowledge that in searching for the truth, the law does not, and should not, require proof of an absolute certainty of causation or any other factual issue. It always settles for some lower threshold of certainty . . . [but] below reasonable probability, however, we do not believe that a sufficient number of alternative explanations and hypotheses for the cause of the harm are eliminated to permit a judicial determination of responsibility.

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34 See Truckor, supra note 30, at 354 (inferring that in such scenarios, the physician is the party responsible for the patient’s harm). The plaintiff must demonstrate evidence based on reasonable medical probability that the “inadequate treatment was the proximate cause of the patient’s injury or death.” Shively v. Klein, 551 A.2d 41, 43 (Del. 1988). If a plaintiff has a forty percent chance of survival, he will not be allowed to recover under this approach because determining whether the loss of chance was the proximate cause of the physician’s malpractice, or whether it was the result of an existing condition from which the patient suffered is not possible. See Truckor, supra note 30, at 354. “Where the evidence shows only a possibility of causation . . . the court must direct a verdict for the defendant.” Stephen F. Brennwald, Comment, Proving Causation in “Loss of a Chance” Cases: A Proportional Approach, 34 CATH. U. L. REV. 747, 749 (1985).

35 See King, supra note 8, at 1363-64.

36 Kramer, 858 S.W.2d at 407.

37 Id. at 398. This case will be addressed in more detail in the analysis section as the court’s discussion also involves Texas’s wrongful death statute. See infra Parts III.B.4, IV.A (discussing the loss of chance doctrine within the context of Texas’s wrongful death statute).

38 Kramer, 858 S.W.2d at 398. By the time her cancer was discovered, it had spread to her lungs and subsequently she died. Id. at 398-399.

39 Id. at 405. The argument that the loss of chance doctrine alters the causation requirement is echoed by the Chief Justice’s dissenting opinion in *Falcon v. Memorial Hosp.*, stating: The lost chance of survival theory does more than merely lower the threshold of proof of causation; it fundamentally alters the meaning of causation. The most fundamental premise upon which liability for a negligent act may be based is cause in fact. “An act or omission is not regarded as a cause of an event if the particular event would have occurred without it.”
2. Loss of Chance

a. Pure Loss of Chance Approach

Of the jurisdictions adopting the loss of chance approach, three different variations of the doctrine are applied. One approach is the pure loss of chance. This approach views traditional causation standards as overly harsh and allows the plaintiff to recover when he is able to prove that the physician’s conduct deprived the patient of a better end result. Here, courts view the pure loss of chance as the actual injury suffered by the patient. Under the pure loss of chance approach, plaintiffs are still required to apply the more probable than not method of causation, but the compensable interest becomes the loss of chance, rather than the actual injury or death.

In calculating damages under this approach, courts adopt a percentage probability test where the probability of survival is shown in the amount of damages awarded to the plaintiff. Thus, if a plaintiff had a forty-percent chance of survival defendant’s acts did not actually cause the plaintiff’s injury, then there is no rational justification for requiring the defendant to bear the cost of the plaintiff’s damages. Falcon v. Memorial Hosp., 462 N.W.2d 44, 65 (Mich. 1990) (C.J. Riley, dissenting). Courts are also weary of the fact that the jury is required to speculate as to the patient’s chances of survival or cure, that liability for medical malpractice defendants would be based upon a lesser standard than the standard which exists for other professionals, and the ultimate result from a relaxation of the causation requirements would produce a greater amount of injustice. Keith, supra note 29, at 763. According to other courts, the loss of chance doctrine will likely increase the number of successful claims made against a provider which would result in increased malpractice insurance and in increased health care costs in general resulting from doctor’s ordering possibly unnecessary tests so as to prevent lawsuits. See, e.g., Smith v. Parrott, 833 A.2d 843, 847 (Vt. 2003); Crosby v. United States, 48 F. Supp. 2d 924, 928-29 (D. Alaska 1999); Gooding v. Univ. Hosp. Bldg., Inc., 445 So. 2d 1015, 1019-20 ( Fla. 1984); Fennell v. S. Md. Hosp. Ctr., Inc., 580 A.2d 206, 215 ( Md. 1990); Kilpatrick v. Bryant, 868 S.W.2d 594, 603 (Tenn. 1993); Kramer, 858 S.W.2d at 406.


41 See Lord v. Lovett, 770 A.2d 1103, 1106-08 (N.H. 2001); Weigand, supra note 14, at 9 (noting the court recognized the compensable wrong as the value of the lost opportunity).

42 See Weigand, supra note 14, at 9. See also Truckor, supra note 30, at 358; Mangan, supra note 8, at 304-07; supra note 41 and accompanying text.

43 See King, supra note 8, at 1382-84 (explaining plaintiff’s diminished percentage probability
based on proper care and treatment, under pure loss of chance, the patient would
recover damages equal to the percentage of chance lost resulting from the negligence. Additionally, under this method, a patient who faced a ninety-five percent chance of
dying even with appropriate medical care would still have a cause of action against the
physician who negligently deprived him of the five percent chance of survival.

This approach is illustrated in the New Hampshire Supreme Court decision of
Lord v. Lovett. In that case, the plaintiff suffered a broken neck in a car accident, and
was treated in the Lakes Region General Hospital. The plaintiff alleged defendants
negligently misdiagnosed her spinal cord injury, and thus failed to properly immobilize
and administer steroid therapy, causing her to lose the chance of a “substantially better
recovery.” The court held a “plaintiff may recover for a loss of opportunity injury in
medical malpractice when the defendant’s alleged negligence aggravates the plaintiff’s
preexisting injury such that it deprives the plaintiff of a substantially better outcome.”
The court recognized that this loss of opportunity of achieving a better outcome, as
opposed to the entire injury, is the cognizable injury suffered by the patient.

b. The Substantial Loss of Chance Approach

A second method of applying the loss of chance doctrine is through the loss of
a substantial chance approach. This approach allows recovery when the plaintiff
resulting from the defendant’s actions is a compensable chance).

44 See id. If the plaintiff had a forty percent chance of living, and lost a thirty percent chance
because of the physician’s negligence, the plaintiff could recover the percentage lost multiplied by
the amount of damages allowed in a wrongful death suit. See id. If the plaintiff’s life was valued
at $500,000, the calculation would be .30 x 500,000, and plaintiff would be awarded $150,000. See id.
45 Kilpatrick, 868 S.W.2d at 600.
46 770 A.2d 1103.
47 Id. at 1104.
48 Id. Plaintiff stated that she continued to suffer from “significant residual paralysis, weakness
and sensitivity.” Id.
49 Id. at 1106.
50 Id. at 1107; see also Weigand, supra note 14, at 10. The court noted that “the pure loss of chance
doctrine still requires the plaintiff to prove that the injury she suffered -- the lost opportunity for
a better outcome -- was caused, more probably than not, by the defendant’s negligence.” Lord,
770 A.2d at 1107.
51 The following jurisdictions have adopted the substantial chance approach: Arkansas, Kansas,
Oklahoma, Nevada, and New York. See Jaenes v. Mulner, 428 F.2d 598 (8th Cir.1970) (applying
Arkansas law); Roberson v. Counselman, 686 P.2d 149 (Kan. 1984); McKellips v. Saint Francis Hosp.,
741 P.2d 467 (Okla. 1987); Perez v. Las Vegas Medical Center, 805 P.2d 589 (Nev. 1991); Kallenberg v.
Beth Israel Hosp., 45 A.D.2d 177 (N.Y. 1974). As an alternative to the loss of substantial chance,
proves that the defendant's negligent action(s) resulted in a substantial lost chance of recovery or survival to the patient. At trial, plaintiff is required to submit evidence demonstrating the physician's tortious action substantially decreased the opportunity for survival or recovery, at which point the jury will decide if the defendant's actions proximately caused the plaintiff's injury or death. Unlike the pure loss of chance approach, the loss of a substantial chance approach views the ultimate harm as the patient's death.

There are several interpretations of what constitutes a "substantial" loss of chance. One interpretation of a substantial possibility of loss occurs when the lost opportunity was less than fifty percent. Another interpretation is that loss of substantial chance occurs when the loss of chance ranges from less than fifty percent to greater than five percent. A third interpretation is that substantial loss of chance occurs only when the loss is greater than fifty percent.

In McKellips v. Saint Francis Hospital, Inc., the Oklahoma Supreme Court applied the loss of a substantial chance approach. In McKellips, the decedent went to the emergency room complaining of pains coming from both sides of his chest. After examination and testing, the physician diagnosed the patient's condition as gastritis and released him. Later that evening, the patient suffered cardiac arrest and died.

some courts adopt the increased risk of harm where once the "plaintiff presents competent expert evidence that the physician's failure to diagnose a preexisting condition 'increased the risk of harm,' the jury then can proceed to consider and value the claim." Weigand, supra note 14, at 8.

52 Keith, supra note 29, at 792.
53 Keith, supra note 29, at 792 nn. 243-44. This evidence will be in the form of expert medical testimony purporting to show that the plaintiff or decedent was deprived of a substantial chance of survival or improved condition. Id. at 793, n.250.
54 McMackin II, 88 P.3d 491, 492 (Wyo. 2004). “[T]he 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.” McMackin I, 73 P.3d 1094, 1100 (Wyo. 2003).
55 Keith, supra note 29, at 792.
56 Id.
59 Id. at 470. The patient's family had a history of heart disease, but the patient did not suffer from it himself. Id.
60 Id.
61 Id.
plaintiffs brought a wrongful death action alleging the decedent's premature release from the hospital resulted in a loss of chance of survival.\textsuperscript{62} In adopting the loss of chance doctrine, the court applied the substantial chance approach.\textsuperscript{63} The court held:

In medical malpractice cases involving the loss of a less than even chance of recovery or survival where the plaintiff shows that the defendant's conduct caused a substantial reduction of the patient's chance of recovery or survival, irrespective of statistical evidence, the question of proximate cause is for the jury.\textsuperscript{64}

One of the more favorable aspects of this approach is that it prevents a health care provider from avoiding responsibility for negligent conduct simply by stating, "the patient would have died anyway, when that patient had a reasonable chance to live."\textsuperscript{65} This point is illustrated in \textit{Herskovits v. Group Health}, where a physician was sued for failing to detect the decedent's lung cancer.\textsuperscript{66} The decedent's estate alleged that because of the physician's negligence, the decedent lost a fourteen percent chance of surviving five years.\textsuperscript{67} The court held the loss of chance of survival from thirty-nine to twenty-five percent is a substantial and compensable loss.\textsuperscript{68}

c. The Increased Risk of Harm Approach

A third approach to the loss of chance doctrine is the increased risk of harm approach, which relaxes the traditional causation requirements.\textsuperscript{69} This approach has been recognized and adopted by a number of different jurisdictions and requires the

\begin{itemize}
  \item \textsuperscript{62} Id. at 476.
  \item \textsuperscript{63} See McKellips, 741 P.2d at 477.
  \item \textsuperscript{64} Id. The court further held:
    \begin{itemize}
      \item If a jury determines the defendant's negligence is the proximate cause of the patient's injury, the defendant is liable for only those damages proximately caused by his negligence which aggravated a pre-existing condition. Consequently, a total recovery for all damages attributable to death are not allowed and damages should be limited in accordance with the prescribed method of valuation.
    \end{itemize}
  \item Id.
  \item Id. at 476.
  \item \textsuperscript{65} Perez v. Las Vegas Med. Ctr., 805 P.2d 589, 593 (Nev. 1991).
  \item \textsuperscript{66} Herskovits v. Group Health Coop. of Puget Sound, 664 P.2d 474, 475 (Wash. 1983).
  \item \textsuperscript{67} Id. at 475.
  \item \textsuperscript{68} Id. at 479.
  \item \textsuperscript{69} Weigand, \textit{supra} note 14, at 8; \textit{see infra} Part II.B.1 (identifying the traditional causation requirement).
\end{itemize}
patient to have been exposed to an increased risk of harm as a result of the defendant’s act.\textsuperscript{70} This approach derives its authority from the Second Restatement of Torts Section 323.\textsuperscript{71}

The court applied the increased risk of harm approach in \textit{Hamil v. Bashline}.\textsuperscript{72} In \textit{Hamil}, the patient was brought into the emergency room complaining of chest pains.\textsuperscript{73} In the emergency room, the EKG machine failed to function, forcing the patient’s wife to take the patient to a private physician’s office where he later died.\textsuperscript{74} The decedent’s wife eventually filed suit against the hospital under the Pennsylvania Wrongful Death Statute.\textsuperscript{75} The plaintiff’s expert testified to the fact that if the proper methods and treatments had been performed, the decedent would have had a seventy-five percent chance of surviving the heart attack.\textsuperscript{76} The Pennsylvania Supreme Court ultimately held a “prima facie case of liability is established where expert medical testimony is presented to the effect that defendant’s conduct did, with a reasonable degree of medical certainty, increase the risk that the harm sustained by plaintiff would occur.”\textsuperscript{77} Thus, after evidence has been introduced showing the negligent act increased the patient’s risk of harm, the issue goes to the jury to determine whether or not the negligence was a substantial factor in bringing about the patient’s death.\textsuperscript{78}

\textsuperscript{70} Hamil v. Bashline, 392 A.2d 1280, 1288-89 (Pa. 1978); see also Aasheim v. Humberger, 695 P.2d 824, 828 (Mont. 1985);
\textsuperscript{71} Aasheim, 695 P.2d at 828 (holding the loss of chance doctrine reflects the substantive law of Restatement Section 323); cf. Karl v. Oaks Minor Emergency Clinic, 826 S.W.2d 791, 792-94 (Tex. Ct. App. 1992) (refusing to adopt the loss of chance doctrine, but identifying its foundation in the Restatement); cf. Fennell v. Southern Md. Hosp. Ctr., Inc., 580 A.2d 206, 211 (Md. 1990) (declining to adopt the loss of chance doctrine, but acknowledging its source as the Restatement).

The Restatement provides that one who “render[s] services to another . . . 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 . . .” \textit{Restatement (Second) of Torts} § 323 (1965).
\textsuperscript{72} 392 A.2d at 1288-89.
\textsuperscript{73} Id. at 1283.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 1289. After a prima facie case is established that the defendant’s actions increased the risk of harm to the patient, the issue goes to the jury to determine whether the increased risk was a substantial factor in producing the patient’s death. \textit{Hamil}, 392 A.2d at 1289.
\textsuperscript{78} Id. at 1286.
C. Wrongful Death Actions

Wrongful death actions are said to have originated from the "ancient custom of compensating for wrongfully inflicted death[s]." When colonists arrived in the area that is now Massachusetts, they brought and embraced as their own common law the wrongful death action. In the early 1800's, the common law development of wrongful death actions was dealt a blow by the English decision of *Baker v. Bolton*. In the decision, Lord Elleborough stated that, "in a civil court, the death of a human being cannot be complained of as an injury." Subsequently due to this decision, American and English courts refused to recognize a cause of action for wrongful death in the absence of a wrongful death statute. This decision came under intense scrutiny from a number of different courts, and in *Moragne v. States Marine Lines, Inc.*, the U.S. Supreme Court rejected Lord Edinborough's dictum and held that a common law action for wrongful death could be brought under U.S. maritime law.

The right to recover for wrongful death has been codified in every state. The majority of these statutes base their language on Fatal Accidents Act 1846, more commonly known as Lord Campbell's Act. The Act provided that:

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79 STUART M. SPEISER & JAMES E. ROOKS, JR., RECOVERY FOR WRONGFUL DEATH § 1.1, THE MOSAIC OF WRONGFUL DEATH (4th ed. 2012). According to Speiser and Rooks:

In the very early days of the Anglo-Saxons, homicide in all forms was regards as a civil offense, a private wrong. In order to prevent feuds among clanish groups and to encourage peace, what we now call 'damages' for the killing of a person were payable to a deceased’s relatives. *Id.* at § 1:3.

80 See *id.* at § 1:4.

81 170 Eng. Rep. 1033 (1808). In this case, a husband sued the owners of a stagecoach that had overturned and killed his wife. *Id.*


84 *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 408 (1970). The court reasoned where a duty exists at common law, "nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death." *Id.* at 381.

85 LOUIS R. FRUMER & MELVIN L. FRIEDMAN, 10-45 PERSONAL INJURY-- ACTIONS, DEFENSES, DAMAGES § 45.02 (Matthew Bender & Co., Inc. 2013).

86 Lord Campbell's Act, 9 & 10 Vict. ch. 93 (1846); *see also* Brennwald, *supra* note 34, at 786 n. 292. Lord Campbell's Act was enacted in response to the growing public anxiety about the great number of railway deaths in late 1830's England. R.W. KOSTAL, LAW AND ENGLISH RAILWAY CAPITALISM 1825-1875, 288 (1997). Under English common law, relatives of the deceased could
Whenever the death of any person was caused by the wrongful act, neglect, or default of another, in such a manner as would have entitled the party injured to have sued had death not ensued, an action could be maintained...87

Typically, wrongful death statutes provide for recovery on behalf of certain designated beneficiaries including the husband, wife, children, parents, or next of kin dependent of the deceased, or any combination of beneficiaries.88 In order to recover, however, these beneficiaries must prove the wrongful or negligent act was the proximate cause of the decedent's death.89 If they are able to do so, they are entitled to damages.90

not recover for emotional and economic damages. See id. at 288-89. As such, coroners' juries, groups of people who attempted to determine the cause of someone's death, began awarding deodands, a price set by the coroner's jury "on the object that caused the death of a person," to victim's families. Id. at 288. The use of deodands began to have a significant adverse impact on the business of the railways as coroners' juries were specifically using them to punish and deter railway negligence. Id. at 289. Wanting to abolish deodands, and recognizing that the current safety regulations and standards for financial compensation was not a strong enough legal deterrent to negligence, Lord Campbell introduced a bill "designed to modify the common law principles concerning the right to sue in the case of a fatal accident." Id. The bill gave immediate relatives of the deceased the ability to bring an action for "such damages...proportioned to the injury resulting from such death." Id.

87 Frumer, supra note 85. Lord Campbell's Act “created a new cause of action based on a wrongful act, limited recovery to certain named beneficiaries, and measured damages with respect to the loss suffered by those beneficiaries.” Id; see also Gentry v. Wallace, 606 So. 2d 1117 (Miss. 1992). While there are variations between each state's respective wrongful death action, many of them are modeled after the Lord Campbell original statute, and require that a death result from a negligent act. See supra note 85; Brennwald, supra note 34, at 786 n. 292. See also McMackin II, 88 P.3d 491, 492 (2003) (noting several states have adopted loss of chance have statutes similar to Wyoming’s wrongful death statute). Aiming to produce a law depicting the main provisions found in each state’s wrongful death statute, the National Conference of Commissioners' on Uniform State Laws created a Model Act which stated: “With respect to any death caused by actionable conduct, the decedent's personal representative,... may bring and maintain a death action against any person...legally responsible for the damages...”. UNIF LAW COMM’RS MODEL SURVIVAL AND DEATH ACT § 3(a) (1979). See also supra note 85.

88 Frumer, supra note 85 (failing to qualify as a designated statutory beneficiary will prevent recovery of damages).

89 Theodore I. Koskoff, Requirement that the negligent act was proximate cause of decedent's death, Wrongful Death Action 12 AM.JUR. TRIALS 317, § 14 (2013).

90 Id. § 17. Most jurisdictions that have modeled their wrongful death statutes after Lord Campbell’s Act require that damages for the wrongful death of the decedent be limited to the pecuniary loss suffered by the beneficiaries. Id. A number of other jurisdictions base the award of damages payable to “the decedent's estate on the destruction of the decedent's capacity to carry on life's activities, rather than on the financial loss sustained by the statutory beneficiaries.” Id. Under the Massachusetts statute, damages are based on the degree of culpability of the
III. An Overview of Certain Jurisdictions

Jurisdictions are split as to whether plaintiffs can bring actions and recover for loss of chance under their respective state’s wrongful death statutes. Below is an illustration of a number of jurisdictions that have addressed whether a loss of chance action can be brought under their wrongful death statutes. It is divided between those states that have adopted the doctrine and those that have not, and includes a discussion of each jurisdiction’s treatment of their respective wrongful death statutes. In Part V, this piece argues that the compatibility of a state’s wrongful death statute with the loss of chance doctrine depends upon which approach, of the three discussed above, the jurisdiction takes regarding the loss of chance doctrine.

A. Jurisdictions Adopting the Loss of Chance Doctrine in Some Form

1. Massachusetts

In Matsuyama v. Birnbaum, the patient, Matsuyama was experiencing gastric distress, went to the doctor, Birnbaum on multiple occasions, and was diagnosed and treated for gastrointestinal reflux disease. After Matsuyama went to Birnbaum a third time complaining of epigastria pain, vomiting, sudden weight loss, and premature feelings of fullness after eating, Birnbaum ordered tests which ultimately detected two masses inside Matsuyama’s stomach that were diagnosed as gastric cancer. The plaintiffs argued that Matsuyama lost his chance to be treated successfully at an earlier stage of the cancer when the doctor failed to diagnose the decedent’s cancer.

In adopting the loss of chance doctrine in Massachusetts, the Supreme Judicial Court held that the patient’s death was not the injury suffered. Instead, the court reasoned that given the increases in medical technology, doctors could estimate a patient’s probability of survival to a reasonable degree of certainty. When the physician’s negligence destroys that possibility of survival, the patient has suffered a real injury, namely the chance to survive.

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91 See supra notes 15-18 (identifying jurisdictions addressing whether loss of chance is actionable under their state’s wrongful death statute).
93 Id. at 825-26.
94 Id. at 827.
95 Id. at 832.
96 Id.
97 Id. “The patient has lost something of great value: the chance to survive . . . .” Matsuyama, 890
The court also directly addressed the loss of chance doctrine's compatibility with the state’s wrongful death statute.\(^9\) Previously, Massachusetts had held that wrongful death claims existed at common law, and that wrongful death claims were common law claims that continually evolve.\(^9\) Massachusetts eventually enacted a wrongful death statute that placed liability on anyone who “by his negligence causes the death of a person.”\(^10\)

The *Matsuyama* court recognized that wrongful death actions did not traditionally encompass loss of chance of survival claims, yet it held that such claims are “sufficiently akin to wrongful death claims as to be cognizable under the wrongful death statute. . .”\(^10\) The court reasoned since medical science has evolved and developed to a point where it is possible to quantify how much the malpractice damaged a patient’s prospects for survival, and given the strong public policy favoring compensation for victims of medical malpractice, recovery for the loss of chance of survival should be accepted into the common law of wrongful death.\(^10\)

2. Missouri

In *Wollen v. DePaul Health Center*, the patient was referred to the DePaul Health Center for tests.\(^10\) If the appropriate tests had been ordered, or if the respondents had correctly interpreted the tests that were given, the patient would have been diagnosed

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\(^9\) Id. at 835-36.

\(^9\) Gaudette v. Webb, 284 N.E.2d 222, 227-28 (1972). In *Gaudette*, the court allowed a wrongful death claim to be brought under the wrongful death statute even though the statute did not provide the plaintiffs with any right to recover because the statute of limitations had run. Id.

\(^10\) MASS. GEN. LAWS Ch. 229 § 2 (2013). The purpose of the wrongful death statute is to compensate the decedent’s family for the loss of the decedent’s life. Thibert v. Milka, 646 N.E.2d 1025, 1026 (Mass. 1995).

\(^10\) *Matsuyama*, 890 N.E.2d at 836; Renzi v. Paredes, 890 N.E.2d 806, 813 (Mass. 2008). But see Weigand, *supra* note 14, at 16-17. Weigand argues that loss of chance is fundamentally inconsistent with the Massachusetts wrongful death statute, as the claim is not seeking a redress for the death but for a diminishment in the chances of survival. Id.

\(^10\) *Matsuyama*, 890 N.E.2d at 837-38. Even though the terms of the Massachusetts’ statute did not provide the plaintiffs with any right to recover loss of chance of survival damages under the wrongful death statute, the court allowed recovery because they viewed allowing recovery as within the natural development of the common law of wrongful death. See id. at 838. The court further remarked, “[i]n a loss of chance wrongful death case . . . a plaintiff must show that her prospects for survival were diminished from what they would otherwise have been, and the magnitude of that diminution will determine damages.” Id. at 838. The defendant will only be responsible for those damages he caused. Id.

with gastric cancer, with a thirty percent chance of survival. Instead, the physician failed to diagnose the patient, and the patient died of gastric cancer a year and half later. The patient’s widow brought a wrongful death action against the Health Center shortly thereafter.

While the court concluded that the respondent’s negligence was not a substantial factor in the death of the patient because the evidence only suggested the negligence might have contributed to the death, the court was receptive to adopting the loss of chance doctrine. When the Medical Center failed to diagnose the cancer, they deprived the patient of the loss of a chance of recovery, and the court deemed that loss to be the harm suffered.

The court further noted that this case was not brought under the proper statute. The wrongful death statute requires that before an appropriate individual can sue for wrongful death, the death of a person must result from the defendant’s negligence. In this case, the question arose as to whether a court or jury could infer from the thirty percent loss of chance of survival that the patient’s death resulted from the defendant’s negligence. In loss of chance cases where the likelihood of death was high, it is difficult to prove the death was the result of the defendant’s failure to properly diagnose the patient because a substantial number of factors, apart from the physician’s negligence, could have contributed to the death.

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104 Id. at 681-82.
105 Id. at 682.
106 Id.
107 Id. at 683.
108 Id. at 684. This is the pure loss of chance approach. See supra Part II.2.a.
109 Wollen, 828 S.W.2d at 685. The two statutes discussed in the case were the wrongful death statute, and the survivorship statute. Id.
110 See Mo. Rev. Stat. § 537.080 (2012). The full statute reads,

"[w]henever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person or party who, or the corporation which, would have been liable if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured."

Id.
111 Wollen, 828 S.W.2d at 685.
112 Id. at 685-86. The court’s analysis plays to the inherent individuality of every person, where different people experience different outcomes in spite of a failure to diagnose. Id. at 686.
In spite of this, the court offered the plaintiff a lifeline in the form of the Missouri Survivorship Statute.\(^{113}\) The pertinent part of the statute reads:

> Causes of action for personal injuries, other than those resulting in death, whether such injuries be to the health or to the person of the injured party, shall not abate by reason of his death . . . but in case of the death of either or both such parties, such cause of action shall survive to the personal representative of such injured party . . .\(^{114}\)

The statute allows for a personal representative to seek damages for the injuries suffered by the patient, including the loss of a chance of survival, even in the event the patient dies.\(^{115}\) If the plaintiff had brought her claim under the Survivorship Statute, she would have had the opportunity to recover the value of the thirty percent chance of survival that the decedent lost because of the doctor’s failure to diagnose.\(^{116}\)

3. Wyoming

In *McMackin v. Johnson County Healthcare Ctr. I. (hereinafter “McMackin I”),* Wyoming adopted the loss of chance doctrine.\(^{117}\) In *McMackin I,* the patient, Brown, began experiencing mini-strokes in 1998, which rendered her confused and unable to communicate.\(^{118}\) The physician neither referred Brown for a neurological workup, tested for causes, nor did he further diagnose or prescribe medications for her condition.\(^{119}\) In March of 1999, Brown was admitted to the Johnson County Healthcare Center because she was crying and suffering from anxiety, having trouble talking, and the left side of her face was drooping.\(^{120}\) Brown’s nurse periodically checked on her throughout the night from 11 p.m. to 4:30 a.m., but did not call for a physician until 4:30 a.m., at which point she was advised to wait for Brown’s treating physician.\(^{121}\) Brown’s symptoms persisted throughout the night, yet she was not examined until 9 a.m. when she was diagnosed as having had a stroke.\(^{122}\) She died fourteen days later of stroke-


\(^{114}\) *Id.*

\(^{115}\) *Id.*

\(^{116}\) See *Wollen,* 828 S.W.2d at 686.

\(^{117}\) *McMackin I,* 73 P.3d 1094, 1100 (Wyo. 2003).

\(^{118}\) *Id.* at 1096.

\(^{119}\) *Id.*

\(^{120}\) *Id.* Brown’s daughter, McMackin, argued that based upon these symptoms, her mother should have received prompt treatment. *Id.*

\(^{121}\) *McMackin I,* 73 P.3d at 1096.

\(^{122}\) *Id.*
related complications.123

McMackin, Brown’s daughter, argued that Johnson County Healthcare Center’s failure to refer Brown to a specialist in mini-stroke seizures, and its failure to employ available treatment methods caused Brown to experience a “loss of a chance” to avoid the stroke.124 The court adopted the substantial loss of chance doctrine in which the patient’s ultimate death, and not the lost chance itself, is the relevant harm in determining proximate cause.125

A year later, in McMackin v. Johnson County Healthcare Ctr. II (hereinafter “McMackin II”), the Wyoming Supreme Court was tasked with explaining how the loss of chance doctrine fit within the scope of the Wyoming Wrongful Death Statute.126 Because McMackin I identified the patient’s ultimate death as the relevant harm under the substantial loss of chance doctrine, the court in McMackin II held it logical for such loss of chance actions to be permitted under the Wyoming Wrongful Death Statute.127 The court reasoned although the legislature intended for only the death of a person to be vindicated under the wrongful death statute, Brown’s loss of chance of survival is so similar to death that it would not be outside the “bound of reason, logic, or the law” to allow for recovery under the wrongful death statute.128

In attempting to fit the loss of chance doctrine into the causation standard for the Wyoming Wrongful Death Statute, the court quoted an earlier Supreme Court of Wisconsin case.129 In that case, the court noted that the substantial factor test was a

123 Id.
124 Id. at 1097. McMackin also argues that when Brown came to the healthcare center with symptoms the second time, the failure of the healthcare center to take any action to treat the condition caused Brown to lose a chance to survive the stroke. Id. at 1098.
125 Id. at 1100-01. See also McKellips v. Saint Francis Hosp., Inc., 741 P.2d 467 (Okla. 1987).
127 Id. According to the court, Wyoming’s wrongful death statute is identical or very similar to the majority of other states that have adopted the loss of chance doctrine. Id. The statute 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. . . WYO. STAT. ANN. § 1-38-101 (2005). Unless the defendant is a cause of the death itself, and not just a cause of the loss of chance, the plaintiff may not recover under the wrongful death statute. WYO. STAT. ANN. §1-38-101, § 1-4-101 (2005).
128 McMackin II, 88 P.3d at 493. The court noted that in some jurisdictions, loss of chance claims may be brought as survivorship claims. Id.
129 Id. at 493-494; see Ehlinger v. Sipes, 454 N.W.2d 754, 758-59 (Wis. 1990).
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. In other words, the negligent act must be a substantial cause of the lost chance of survival.

Wyoming medical malpractice law requires that the plaintiff prove the physician’s deviation from the standard of care was the legal cause of the patient’s injuries. Wyoming defines legal cause according to the Second Restatement, which states that the actor’s negligent conduct is a legal cause of harm to another if:

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.

As such, if the defendant’s conduct is a substantial factor in bringing about the patient’s death, the defendant will be said to have caused the patient’s death, and would be liable in a wrongful death action. The court’s decision to allow loss of chance in a wrongful death action is consistent with traditional causation for wrongful death actions in Wyoming.

B. Jurisdictions Declining to Adopt the Loss of Chance Doctrine

1. Oregon

In Joshi v. Providence Health Systems, the plaintiff’s husband was treated at a health center for a severe headache, blurred vision, and dizziness. Three days later, the patient, still disoriented and experiencing vision problems, contacted the treating physician by telephone. The treating physician attributed the symptoms to the

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130 Ebinger, 454 N.W.2d at 758-59.
131 McMackin II, 88 P.3d at 493 (citing Ebinger, 454 N.W.2d at 758-59).
132 Id. at 496.
134 RESTATEMENT (SECOND) OF TORTS § 431 (1965).
135 Allen, supra note 133, at 554-556.
136 Id.
137 Joshi v. Providence Health Systems, 149 P.3d 1164, 1165 (Or. 2006). After ordering a CT scan and a lumbar puncture, the ER physician discharged the patient with a prescription for pain medication. Id.
138 Id. at 1166.
prescribed pain medication and recommended replacing the medications with over the counter medications.\textsuperscript{139} The patient suffered a stroke shortly thereafter and died, and in response his wife filed a wrongful death action against the hospital and physician.\textsuperscript{140}

Oregon’s Wrongful Death Statute provides that that:

When the death of a person is caused by the wrongful act or omission of another, the personal representative of the decedent, may maintain an action against the wrongdoer, if the decedent might have maintained an action, had the decedent lived, against the wrongdoer for an injury done by the same act or omission.\textsuperscript{141}

The court’s analysis of the wrongful death statute focused on the phrase, “when the death of a person is caused by the wrongful act or omission of another.”\textsuperscript{142} The court ultimately determined that the reasonable probability standard should apply to causation, and thus in a wrongful death suit, a plaintiff must prove the defendant’s negligent act or omission more likely than not brought about the death of the decedent.\textsuperscript{143} However, the court also determined that the substantial factor test is applicable to the analysis if the defendant’s conduct was a substantial factor in producing the death.\textsuperscript{144} If so, the defendant will be held liable for his actions.\textsuperscript{145}

The plaintiff further urged the court to adopt the loss chance of chance doctrine, which would have allowed her to demonstrate causation by introducing evidence that the “defendants’ negligence deprived the decedent of a chance of surviving the stroke he suffered.”\textsuperscript{146} The court held the plaintiff must demonstrate that the defendant’s negligent act or omission was sufficient to cause the decedent’s death.\textsuperscript{147}

\textsuperscript{139} Id. at 1166.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} OR. REV. STAT. § 30.020 (2012).
\textsuperscript{143} Joshi, 149 P.3d at 1167.
\textsuperscript{144} Id. at 1168 - 69.
\textsuperscript{145} Id. at 1168.
\textsuperscript{146} Id. at 1168. \textit{See supra} Part II.B.1 (discussing traditional causation).
\textsuperscript{147} Joshi, 149 P.3d at 1169.
In this case, the plaintiff could not prove that the defendant’s failure to diagnose the decedent’s stroke caused his death.\textsuperscript{148} Instead, the plaintiff showed that the defendant’s failure to diagnose likely deprived the decedent of a thirty percent chance of survival.\textsuperscript{149} While this thirty percent chance of survival may constitute some type of injury, it is death, not the loss of chance, that is the compensable injury under the Oregon wrongful death statute.\textsuperscript{150}

2. Delaware

In \textit{United States v. Cumberbatch}, the Supreme Court of Delaware addressed whether Delaware recognizes the loss of chance doctrine in a medical malpractice action brought under the wrongful death statute.\textsuperscript{151} In \textit{Cumberbatch}, the hypothetical defendants failed to diagnose the decedent’s meningitis, when a proper diagnosis would have given the patient a forty-five percent chance of survival.\textsuperscript{152} Even though the decedent had a significant chance of death regardless of the negligent care, the negligent care reduced his chance of survival from forty-five to twenty-five percent.\textsuperscript{153}

The purpose of the Delaware wrongful death statute is “to permit the recovery of damages not limited to pecuniary losses by persons injured as a result of the death of another person.”\textsuperscript{154} The pertinent part of the statute reads, “an action may be maintained against a person whose wrongful act causes the death of another.”\textsuperscript{155}

The court ultimately held the loss of chance doctrine incompatible with Delaware’s wrongful death statute, and offered two reasons for their analysis.\textsuperscript{156} First, the court held that the causation requirement in the statute, requiring the plaintiff to prove the defendant’s negligence more likely than not caused the death, was not met.

\begin{flushleft}
\textsuperscript{148} Id. at 1170.
\textsuperscript{149} Id.
\textsuperscript{150} Joshi, 149 P.3d at 1170. OR. REV. STAT. § 30.020 (2012).
\textsuperscript{151} United States v. Cumberbatch, 647 A.2d 1098, 1099 (Del. 1994). The question posed to the Delaware Supreme Court was based on a hypothetical situation created by the United States District Court for the District of Delaware in order to determine whether the loss of chance doctrine is actionable under Delaware’s Wrongful Death Statute. \textit{Id.} at 1098.
\textsuperscript{152} Id. at 1099.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 1103; DEL. CODE ANN. Tit. 10, § 3725 (1996).
\textsuperscript{155} DEL. CODE ANN. tit. 10, § 3722(a) (1996). A person does not cause another’s death where it was probable that the person would have died from his or her medical condition regardless of the malpractice. \textit{Cumberbatch}, 647 A.2d at 1103.
\textsuperscript{156} \textit{Cumberbatch}, 647 A.2d at 1103.
\end{flushleft}
because evidence showed that the patient would have died regardless of the
malpractice.\textsuperscript{157} Second, and more importantly, the court recognized the inherent
difference between loss of chance and wrongful death statutes.\textsuperscript{158} If an injury is suffered
in the loss of chance situation, the injury is the reduced possibility of survival, not the
death itself.\textsuperscript{159} This standard differs from wrongful death actions where the death is the
compensated injury.\textsuperscript{160} Ultimately, the court concluded it would be inappropriate to
award loss of chance damages in a wrongful death action.\textsuperscript{161}

3. Georgia

In \textit{Dowling v. Lopez}, the defendant, a physician specializing in diseases of the
stomach and intestines, was treating a patient for abdominal pain and concluded the
patient was suffering from Crohn's disease.\textsuperscript{162} During the time that the patient was
under the defendant's care, the defendant noted a mass in the patient's lower abdomen
during physical examinations.\textsuperscript{163} After the patient was hospitalized three times, the mass
was ultimately discovered to be cancer, from which the patient died shortly thereafter.\textsuperscript{164}
The decedent's estate brought suit against the physician for wrongful death, alleging that
the defendant's failure to diagnose the cancer caused the patient's premature death.\textsuperscript{165}
The defendant countered that the wrongful death claim should have been thrown out, as
the failure to diagnose the cancer was not the proximate cause of the patient's death.\textsuperscript{166}

\begin{thebibliography}{1}
\bibitem{157} Id.
\bibitem{158} Id.
\bibitem{159} Id.
\bibitem{160} Id.\ Patricia Andel notes, "Commentators believe that these inconsistencies arise from the
courts' failure to focus on the key issue—namely, where one is deprived of his chance to survive, the
actual loss suffered is this lost chance, not the life itself." Patricia L. Andel, Comment, Medical
available at http://digitalcommons.pepperdine.edu/plr/vol12/iss4/4/. \textit{See also Brennwald, supra
note 34, at 787.} "In loss of chance cases . . . a plaintiff is not trying to recover for a wrongful
death, but for the loss of a chance to avoid the death." \textit{Id.} Thus, the damages requested are not
for the death itself, but for the lost opportunity to survive. \textit{Id.}
\bibitem{161} Cumberbatch, 647 A.2d at 1103.
\bibitem{162} Dowling v. Lopez, 440 S.E.2d 205, 207 (Ga. App. Ct. 1993). Crohn's disease is a condition of
chronic inflammation of the gastrointestinal tract. CENTER FOR DISEASE CONTROL AND PREVENTION
Inflammatory Bowel Disease (IBD), http://www.cdc.gov/ibd/ (last updated July 15, 2011). A common complication from the disease is the blockage of the intestine from swelling and scari
tissue which can result in cramping, vomiting, and bloating. \textit{Id.} Patients with Crohn's
disease have an increased risk of developing infections and colon cancer. \textit{Id.}
\bibitem{163} Dowling, 440 S.E.2d at 207.
\bibitem{164} Id.
\bibitem{165} Id.
\bibitem{166} Id.
\end{thebibliography}
The Georgia wrongful death statute provides that, "the surviving spouse or, if there is no surviving spouse, a child or children . . . may recover for the homicide of the spouse or parent the full value of the life of the decedent, as shown by the evidence." An individual can only recover under the Georgia wrongful death statute where the defendant's wrongful or negligent act resulted in the decedent's death. Questions over whether the patient's life may have been extended if not for the physician's negligence, as argued by the plaintiff, are not applicable under the Georgia wrongful death statute because the statute does not provide for recovery of loss of chance of extended survival.

4. Texas

In Kramer v. Lewisville Memorial Hospital, the court first held that loss of chance damages are not recoverable under the Texas wrongful death statute, and subsequently, rejected the doctrine outright. The Texas wrongful death statute provides a cause of action for "actual damages arising from an injury that causes an individual's death . . ." The Kramer court noted the wrongful death statute authorizes recovery solely for injuries causing death, and not for injuries causing a loss of a "less-than-even chance of avoiding death." As a result, the statute's language appears to reject the pure loss of chance

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167 GA. CODE ANN. § 51-4-2(a) (2000). Homicide does not refer solely to deaths resulting from the commission of a crime, but also includes deaths that are the result of a wrongful act, default or negligence of another. Id.
168 Lopez, 440 S.E. 2d at 208; see also GA. CODE ANN. § 51-4-2(a) (2000).
169 Lopez, 440 S.E. 2d at 208. Damages associated with loss of chance of survival, e.g. pain and suffering, loss of enjoyment of life, etc., cannot be brought under wrongful death actions because they assume that the plaintiff is alive, and has only been deprived of an opportunity to live longer. Id. Wrongful death statutes require a death. Id. The court further held that the negligence of the physician alone is not enough to allow recovery in wrongful death actions. Id. The plaintiff must show that the defendant proximately caused the death of the patient. Id. Since there was no proof that the decedent did not have terminal cancer when she first went to the doctor, the possibility exists that the cancer was already in a terminal stage, and she would have died regardless of the negligence. Id.
170 Kramer v. Lewisville Memorial Hosp., 858 S.W.2d. 397, 398 (Tex. 1993). See also supra Part II.B.1.
171 TEX. CIV. PRAC. & REM. CODE ANN. § 71.002(a) (West 2008). Furthermore, "a person is liable for damages arising from an injury that causes an individual's death if the injury was caused by the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfulness, or default." Id. at § 71.002(b).
172 Kramer, 858 S.W.2d at 404. A less-than-even chance of recovery refers to the fact that the patient has a less than fifty percent chance of survival. See supra notes 32-35 and accompanying text.
approach, which views the injury as the loss of chance, rather than the death.\footnote{Kramer, 858 S.W.2d at 404.}

Furthermore, the \textit{Kramer} court held that the act only authorizes claims for actions that actually cause death.\footnote{\textit{Id.}} The court viewed negligent conduct as a cause of harm to another only if it produced an event that would not have occurred without the negligent conduct.\footnote{\textit{Id.}} As such, the court noted that both the pure loss of chance approach and the relaxed causation approach appear to allow a plaintiff to recover without proving this statutorily-required link between injury and death.\footnote{\textit{Id.}} The legislature did not intend this type of recovery, and thus any attempt to obtain damages for an act of negligence that by itself did not cause the death of the patient will fail.\footnote{\textit{Id.}}

\textbf{IV. Analysis}

At the macro level, the loss of chance doctrine appears incompatible under the states' wrongful death statutes, given that wrongful death statutes seek to compensate for a death and loss of chance seeks to compensate for a diminished opportunity of survival.\footnote{\textit{See supra} Part II.B \& II.C (identifying the rationale behind the loss of chance doctrine and wrongful death statutes).} Upon closer examination, the substantial loss of chance variation of the doctrine is compatible with a typical wrongful death statute and the pure loss of chance variation is incompatible with a wrongful death statute.\footnote{\textit{See supra} Part II.B.2 (identifying three different variations of the loss of chance doctrine).}

\textbf{A. The Pure Loss of Chance Approach's Incompatibility with Wrongful Death Statutes}

As previously described, courts apply a number of different interpretations to the loss of chance doctrine.\footnote{\textit{Supra} Part II.B.2 (identifying three different variations of the loss of chance doctrine).} These differing interpretations of the doctrine arose because of the courts' "failure to focus on the key issue — namely, where one is deprived of his chance to survive, the actual loss suffered is this lost \textit{chance}, not the loss..."
Courts adopting the pure loss of chance approach recognize this distinction and have held the injury suffered by the patient to be the lost chance to survive or recover. The Delaware Supreme Court illustrates this principle by writing that the basis for a claim of an injury suffered in the loss of chance situation is the reduced possibility of survival, and not the death itself. Under this approach, courts are still required to find causation, but the cause and effect relationship is between the defendant's negligent act, and the loss of chance suffered by the decedent.

In a wrongful death action, the injury being compensated is the actual death of the patient. As a result, a cause and effect relationship exists between the physician's negligent act and the death of the patient. If the individual bringing the lawsuit can show that the proximate causation requirement is satisfied, the plaintiff will recover damages traditionally allowed under the wrongful death statute, including pecuniary losses, losses of companionship and society, and mental anguish attributable to the death. Because the pure loss of chance approach views the ultimate injury as the lost chance, and not the person's death, it is deemed incompatible with a state's wrongful death statute that views death as the ultimate injury.

The pure loss of chance approach has been employed by plaintiffs in a number of medical malpractice cases brought under wrongful death statutes. However, in a number of jurisdictions, plaintiffs have argued, unsuccessfully, for the adoption of the pure loss of chance approach. United States v. Cumberbatch, 647 A.2d 1098, 1103 (Del. 1994); Kramer v. Lewisville Memorial Hosp., 858 S.W.2d. 397, 404 (Tex. 1993); Koskoff, supra note 89 (establishing that the wrongful act must be the proximate cause of the patient's death).
number of these cases, the court found this variation of the doctrine to be incompatible with their state's respective wrongful death statutes, and their reasons for doing so were almost identical.  

The Texas wrongful death statute only affords liability on an injury that causes an individual's death. Thus, if the loss of chance doctrine were accepted in Texas, the injury would need to have resulted in the death in order for the plaintiff to recover. Like Texas, Missouri's wrongful death statute requires that a death result from the negligence of a defendant before an appropriate party can file suit. 

Unlike Texas however, Missouri accepted the loss of chance doctrine, but only allowed for recovery under its wrongful survivorship statute. The pure loss of chance approach is incompatible with Missouri's Wrongful Death statute because the courts viewed the harm caused by the physician's negligence as the loss of the chance of recovery, and not the loss of life as required by the statute. When plaintiffs are unable to prove that death was the result of defendant's actions, recovery is not be permissible under the wrongful death statute. 

Under the Georgia wrongful death statute, recovery is only permissible when death results from the wrongful act, default or negligence of another. In an implicit rejection of the pure loss of chance approach, the court in Lopez stated that the wrongful

Weimer v. Hetrick, 525 A.2d 643 (Md. 1987); Wollen v. Depaul Health Center, 828 S.W.2d 681 (Mo. 1992); Dowling v. Lopez, 440 S.E.2d 205 (Ga. Ct. App. 1993); Kramer, 858 S.W.2d at 398.  

See supra Part III.B (discussing jurisdictions where recovery for loss of chance is prohibited under wrongful death statutes).  


See Kramer, 858 S.W.2d at 404. In Kramer, the plaintiffs advocated for the court to accept the pure loss of chance doctrine, but were unsuccessful as the court held that such an approach was impermissible under the existing statute. Id. Specifically, the Texas Wrongful Death Act does not authorize recovery for "injuries that cause the loss of a less-than-even chance of avoiding death." Id.  


Wollen, 828 S.W.2d at 686. The court adopted the pure loss of chance approach. Id. at 684-685.  

Id. at 684. At best, the plaintiffs could only prove that the physicians caused Wollen to lose his chance of survival. Id.  

See id. at 686.  

See GA. CODE ANN. § 51-4-1 (1978); supra Part III.B.3 (discussing Georgia's wrongful death statute).
death statute does not provide for the recovery for loss of chance of extended survival. In its analysis, the court dismissed the argument that the plaintiff could recover for the loss of chance of survival under a wrongful death action based on evidence that the decedent's life could have been prolonged had it not been for the defendant's negligence. This is an incorrect argument because of the inherent and fundamental distinction between wrongful death claims, and loss of survivorship claims: that wrongful death claims compensate for the death of the person and loss of survivorship claims compensate for the loss of a chance to live. Under this logic, recovery of loss of chance damages under the pure loss of chance approach would be possible under a survivorship statute but not under a wrongful death statute.

B. The Loss of a Substantial Chance Approach & Wrongful Death Statutes

Courts adopting the loss of a substantial chance approach of the loss of chance doctrine hold the patient's death, as opposed to the lost chance itself, as the ultimate harm. It stands to reason that recovery for the substantial loss of chance approach may be possible under wrongful death statutes that are based on the custom of compensating individuals for wrongfully inflicted deaths. Because this variation recognizes death as the ultimate harm, it encompasses the true purpose of a wrongful death statute. Of course, in order to recover under this interpretation, the physician's negligent act or omission must be shown to have proximately caused the death of the patient.

The critical distinction between the pure loss of chance approach and the substantial loss of chance approach is evident in . While the pure loss of chance approach recognizes a lost chance of survival as an injury apart from death, the substantial loss of chance holds death as the ultimate injury. This distinction

199 Id.
200 Id.
201 See id; supra Part III.B.3.
203 See McMackin II, 88 P.3d at 492-493; see Allen, supra note 133, at 551.
204 See supra Part II.C.
205 See supra note 89 (identifying requirement of proximate cause in establishing wrongful death actions).
206 McMackin II, 88 P.3d at 492.
207 Id. at 493.
represents the core difference between the two approaches to the loss of chance doctrine, and accounts for the reason why some courts find the doctrine to be incompatible with their state's wrongful death statutes.208

In its decision in *McMackin I*, the Wyoming Supreme Court adopted the loss of chance doctrine.209 Of particular importance to the analysis is *McMackin II*, where the Wyoming Supreme Court adopted the substantial loss of chance approach to the loss of chance doctrine.210 Under this approach, the patient's ultimate death, and not the lost chance, is the relevant harm when determining proximate cause.211 Considering the Wyoming Wrongful Death Statute only compensates for the death of an individual, that the substantial loss of chance approach would be compatible with the wrongful death statute logically follows.212

Another jurisdiction finding the loss of substantial chance approach compatible with its wrongful death statute is Oklahoma.213 While not explicitly stating this point, the Supreme Court of Oklahoma in *McKellips* clearly acknowledged that it views the ultimate injury as death under substantial loss of chance approach when it stated that "where the plaintiff shows that the defendant's conduct caused a substantial reduction

208 Id. at 492. See supra part III.B (discussing jurisdictions which have found loss of chance doctrine incompatible with wrongful death statutes).
209 *McMackin I*, 73 P.3d 1094, 1100 (Wyo. 2003). A motion for rehearing by the healthcare center was granted. Id. at 1101. The same court later reaffirmed the original holding in adopting the loss of chance doctrine, specifically the loss of a substantial chance approach. *McMackin II*, 88 P.3d at 492.
210 *McMackin II*, 88 P.3d at 492.
211 Id. It is important to understand that in jurisdictions adopting the substantial loss of chance variation of the loss of chance doctrine, loss of chance and wrongful death are considered two separate injuries, but if the defendant's actions resulting in the patient's loss of chance were a proximate cause of the patient's death, the plaintiff can bring a loss of chance claim under the wrongful death statute. See supra Part II.B.2.b (explaining substantial loss of chance considers death to be injury for which recovery is allowed). Proximate cause will be established if the plaintiff can prove that the defendant's actions were a substantial factor in the death of the plaintiff. Allen, supra note 133, at 554. The actor's negligent conduct is a legal cause of harm if . . . his conduct is a substantial factor in bringing about the harm. Id.
of the patient’s chance of recovery or survival, irrespective of statistical evidence, the question of proximate cause is for the jury.” In this case, because the substantial loss of chance doctrine views death as the ultimate injury, it is compatible with the Oklahoma wrongful death statute.

V. Conclusion

The loss of chance doctrine is an area of tort law that remains unsettled, and will continue to remain that way over the coming years. While its continued adoption among the jurisdictions is certainly a bright spot, plaintiffs will continue to face challenges in seeking recovery for the loss of chance under their state’s wrongful statute depending on which variation of the doctrine their jurisdiction has adopted. Some type of unanimity among the jurisdictions regarding the various approaches to the loss of chance doctrine would be helpful, but is unlikely. As it currently stands, plaintiffs must continue to rely on the judiciary for guidance and analysis regarding how to effectively bring and recover for loss of chance claims.


215 See McKellips, 741 P.2d at 477 (noting that underlying injury suffered by patient is death).