Outside Counsel

Determining Valuation In Loss of Chance Cases

Imagine a scenario in which plaintiff, a lung cancer patient, claims a delay of two weeks in diagnosis caused him harm. He argues that while he may likely have been doomed in any event, he has been deprived of some opportunity for survival for some period of time.

In other words, the plaintiff may assert as his claim that he was deprived of an opportunity or chance to be cured. While the case of Kal lenberg v. Beth Israel Hospital is often credited with the genesis of the loss of chance doctrine in New York, close scrutiny of that case reveals that the court in Kal lenberg did not utilize such language and probably did not intend that the concept be introduced at all.

In Harding v. Noble Taxi Corp and Jump v. Facelle, the doctrine was more formally introduced and in Flaherty v. Fromberg, New York expanded the concept in a medical malpractice context in which a patient’s underlying illness or condition was a contributing factor in the ultimate outcome by indicating that some specified small diminution in likelihood of recovery due to malpractice is sufficient to establish a prima facie case.

Further refinement brought us to a point in which plaintiff’s expert need not quantify or even state that a diminution in chance of cure occurred as long as one is reasonably inferable from the testimony. The concept has also been expanded from the failure to diagnose cases to any case in which the injury is “indivisible.” To date the majority of states have adopted the doctrine in some form, by about a two to one margin with a number of states having inconsistent decisions on the issue.

Broadly stated, the “loss of chance” doctrine in medical malpractice actions permits plaintiffs to recover damages for the reduction in odds of recovery from an ailment attributable to a defendant, even if the failure to recover cannot be shown by a preponderance of the evidence to have been caused in fact by the defendant’s negligence, so long as plaintiff can establish that the defendant’s negligence reduced the chance of recovery from the injury or illness.

The rationale for the application of the doctrine was that utilization of a causation in fact standard led to harsh or “all or nothing” results. By permitting a relaxed causation standard, the courts have implicitly recognized the concept of concurrent causation.

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The Loss of Chance Doctrine

In New York the loss of a chance doctrine has been woven into traditional causation requirements by virtue of some tortured redefinition of the word “substantial.” While the plain English definition of the word substantial is “of considerable importance, size, or worth; real and tangible rather than imaginary,” in New York the legal definition as distorted through the loss of chance prism includes the instruction to the jury that a cause may be considered to be substantial “even if you assign a relatively small percentage to it.”

While in a multi-defendant case this comment might refer to in a one defendant failure to diagnose/loss of chance case, where, under the current case law, the jury is not required to assign a percentage to the loss of chance nor is such a finding of a percentage delineated on the verdict sheet. What is clear is that the traditional preponderance of evidence standard requiring 51 percent certainty would appear to have been diluted by the loss of chance doctrine so that 51 percent likelihood of even a small and undeterminable percentage of a causal relationship is sufficient in terms of causation to create a jury question.

Causation and Valuation

There is a critical distinction between the concepts of “causation” and “valuation” that appears to have been overlooked in medical malpractice litigation. Causation refers to the requisite cause and effect relationship between tortious conduct and a loss before an award of damages may be imposed. Valuation refers to the process of measuring the extent of the loss.

While there has been little debate concerning the right to be compensated for a better than even chance of recovering from an illness or condition, it is when the alleged deprivation relates to the loss of a less than even chance of recovery that the issue becomes contested. An appropriate analogy would be to the loss of a lottery ticket. The lottery ticket represents a less than even chance of recovery. Despite it being unlikely that ownership of it will result in an award of money, such a ticket would have a clear market value. Just because the chances of winning are not better than even does not divest the ticket of all value or so the argument goes. Similarly, the loss of a chance of survival even if survival was unlikely has a value as well.

Although Harding, Flaherty and Jump all addressed the doctrine at the appellate level, those decisions did not specifically address valuation concepts. Rather, the courts either reinstated or reversed verdicts remanding for further proceedings concerning damages. Lost in the shuffle in New York was how the relaxation in the causation standard in loss of chance cases impacts upon the inextricably related notion of appropriate valuation of compensatory damages.

Indeed, PJ II 2:277, relating to pain and suffering, requires the jury to award “a sum of money that will justly and fairly compensate the plaintiff for all losses resulting from the injuries (he,
she) sustained.” The trial and appellate courts have inconsistently addressed how the loss of chance doctrine should be considered by a jury in determining whether there has or has not been any change in the probability of survival or cure and there does not appear to be any appellate case in which loss of chance issues have been included as part of a specific interrogatory on the verdict sheet, so that discounting of the verdict for the pre-existing illness can take place.

With the exception of an interrogatory requesting the number of years over which the award is applicable, the verdict sheet in New York makes no reference to any loss of chance elements necessary to perform the appropriate valuation. While there are a smattering of appellate division cases20 that make oblique reference to discounting by virtue of the underlying illness in addressing the extent of damages, there is but one lone trial level decision in which a court appears to have addressed the valuation issue head on.17 In that case the court determined the loss of chance and discounted the verdict accordingly because the issue had not been raised appropriately prior to verdict.18 In New York the loss of chance charge20 explicitly encourages the jury to relax the causation standard, but the lack of any reference in the damages charge implicitly encourages the jury not to consider the concept of loss of chance when evaluating the extent of damages.

A Proposal

The general rationale put forth for the doctrine is that traditional causation concepts are unfairly limiting and that patients who are victims of inappropriate care, for whom the underlying disease rather than the care was the predominant factor in their injury or demise, should nevertheless have a right to have their grievances aired and be compensated. While this argument has some merit, it fails to recognize that any position on this issue should be the result of a balancing of social policies in this case, the best approach to spreading of the risk of such “injuries” and that of policing the medical profession.

Given the recent focus on the increasing cost of health care and vigilance of the Department of Health and Office of Professional Discipline in policing the profession it would seem that such a modification of the causation standard would no longer be necessary, particularly since it was one that originally sprouted from judicial fiat rather than legislative enactment. Indeed, the causation standard for other professionals in New York such as real estate brokers and engineers are much more exacting, while those professions appear to be less under siege than the medical profession.

As an alternative to the abolition of the loss of chance doctrine in New York and the hardship that might result from an all or nothing system of causation, more prominent and consistent application of the valuation concept to the damage elements of a verdict would be an appropriate and viable alternative approach. Many courts that have recognized chance as a compensable interest, including those in New York, have allowed the trier of fact to value that chance without offering meaningful guidance on how to do so.

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be provided with some guidance concerning the extent of damages.

The jury determines the chance of survival given the underlying illness in the absence of negligence, the percentage of diminution in the chance resulting from the defendant’s negligence, and the total measure of damages. The trial court then multiplies the total amount of damages by the net reduced figure to determine the final award.

To illustrate, assume that the jury found that the patient originally had a 40 percent chance of cure and that the physician’s negligence reduced the chance of cure to 25 percent and that the total damages proved were $1 million. The court would then perform the mathematics and subtract 25 percent from 40 percent to arrive at 15 percent, which represents the loss of chance. It would then multiply that percentage by the total loss to arrive at $150,000, the value of damages actually caused by the defendant.23

The above approach would resolve some of the confusion under New York’s current system and remedy some of the omissions of the current PJII damages charges in cases in which plaintiff has requested a loss of chance charge on causation. Moreover, an additional charge including a reference to the loss of chance language indicating that while the law permits and approaches based on the loss of chance of cure or survival (as the case may be) would be appropriate.

Conclusion

New York has been progressive in adopting the loss of chance rather than an all or nothing approach to causation, but in doing so has not consistently and appropriately recognized the concomitant concept of valuation of injury. Its most recent verdict sheet and approach to decisions21 have not appropriately incorporated valuation concepts into the charge and verdict sheet. The courts have converted a traditional all or nothing approach that penalized the plaintiff by requiring too demanding a causal connection to one in which the defendant is penalized and the plaintiff receives a windfall. The above proposal represents an appropriate and viable approach to the valuation of damages in loss of chance cases.

1. This was essentially the fact pattern in Hughes v. New York Hospital, 195 A.D.2d 442, 600 N.Y.S.2d 145 (2nd Dept. 1993).
10. See Crosby v. United States, 48 F.Supp.2d 924, (U.S. Dist. Ct., Alaska, 1999) (for the run down of states having adopted the doctrine). Crosby was decided in 1999, but the trend seems to be in the direction of adoption of the doctrine.
13. See supra note 9.
15. See supra note 9.
17. Birbeck v. Central Brooklyn Medical Group, 2001 WL 1154895 (N.Y. State Supreme Court) . Note that the Court mistakenly compared the 70 percent cure rate with an earlier diagnosis to a 0 percent cure rate because the patient died, rather than compare the cure rate with an earlier diagnosis to the cure rate with a later diagnosis irrespective of actual outcome.
18. Id.
19. See comment to PJII 2:150.
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23. A pattern verdict sheet is included in Jorgensen, supra note 22.

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