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Medical Malpractice Defense

Expert Analysis

Proof of Causation and Measure Of Recovery in 'Loss of Chance' Cases

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In many medical malpractice cases, the defendant physician's conduct did not "cause" the plaintiff to develop the particular condition that resulted in injury. Instead, it is often claimed that by failing to diagnose a condition such as cancer, or institute treatment at an earlier time, the defendant deprived the plaintiff of the opportunity for a better outcome—the so-called "loss of chance" doctrine. Confusion persists as to the plaintiff's burden of proof and the appropriate measure of damages in such cases. In addition, a possible criticism of the doctrine is that it runs contrary to the plaintiff's burden of proof.

In its recent decision in *Wild v. Catholic Health System*,[1] the Court of Appeals held that the issue of whether New York recognizes the "loss of chance" doctrine was unpreserved. In that case, the plaintiff's decedent, an elderly woman, suffered a perforation of the esophagus during a complicated intubation attempt. As a result, for the last three years of her life she required a feeding tube.

The trial court charged the jury that the negligence of any of the defendants could be considered a cause of the injuries to the decedent if it found that the defendants' actions or omissions deprived her "of a substantial possibility of avoiding the consequences of…having a permanent feeding tube. The chance of avoiding the need for a [permanent] feeding tube in order to be substantial does not have to be more likely than not, it does not have to be more than 50 percent, but it has to be more than…slight."[2]

The court found the defendants' challenge to the viability of the charge unpreserved for appellate review, because defense counsel argued that the "facts of this case" did not support a loss of chance charge, "not that such charge is wholly unavailable under New York law."[3] The court characterized the "sum and substance" of defendants' arguments before the trial court as being that "plaintiffs failed to present evidence in support of the charge which sought to instruct the jury on a negligence theory of loss of chance, and that the jury charge erroneously reduced the burden of proof and relaxed the standard for causation."[4]

> Confusion persists as to the plaintiff's burden of proof and the appropriate measure of damages in loss of chance cases.

The court did consider the defendants' argument that the charge improperly relaxed the burden of proof on causation and concluded that it did not do so. The trial court had charged the jury using language from Pattern Jury Instruction (PJI) 2:70 that "[a]n act or omission is regarded as a cause of an injury if it was a substantial factor in bringing about the injury. That is, if it had such an effect in producing the injury that reasonable people would regard it as a cause of the injury."[5] The Court of Appeals stated that "[t]aking this jury charge as a whole, we do not find support for defendants' contention of an improper alteration of the causation standard or plaintiff's burden of proof."[6]

As pointed out by the notes to PJI 2:150,[7] no New York appellate court has explicitly identified a minimum percentage of loss of chance sufficient to support a finding of proximate causation. Moreover, it appears that the First, Third and Fourth Departments of the Appellate Division require proof that the malpractice deprived the plaintiff of a "substantial possibility" of a better outcome,[8] while the Second Department finds it sufficient if there was proof of "some diminution" in the plaintiff's chances for survival or a better outcome.

Considering the Evidence

In *Abbatantuono v. Boolbol*,[9] for example, the Second Department stated that "[v]iewing the evidence in the light most favorable to the plaintiffs, a valid line of reasoning exists by which a rational jury could have concluded that the [defendant doctor] departed from good and

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accepted standards of medical care by, among other things, not informing the injured plaintiff that she needed chemotherapy, *and that this departure diminished the injured plaintiff's chance of a better outcome or increased her injury*" (emphasis added)[10]

In *Goldberg v. Horowitz*,[11] the plaintiffs alleged that the defendant was negligent in not sending the plaintiff's decedent to the emergency room on the basis of an electrocardiogram (EKG) that he performed in his office after the decedent, who had a history of heart disease, complained of chest congestion and pain in his neck and left shoulder. Approximately 12 hours later, the decedent suffered a massive heart attack.

The plaintiffs' expert contended that had the patient been sent to the emergency room, various forms of medical intervention would have been available either to prevent the heart attack from occurring, or reduce the amount of muscle damage to the heart.

The trial court dismissed the action at the close of the proof, concluding that there was insufficient proof of causation. The Second Department reversed, stating that "[a] plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, 'as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the chance of a better outcome or increased [the] injury.'"[12]

In *Jump v. Facelle*,[13] where the claim was that a delay in performing surgery "reduce[d] [the decedent's] chances of survival," the Second Department reinstated a verdict in favor of the plaintiff, holding that "[i]n cases of this nature, the plaintiff's expert need not quantify the exact extent to which a particular act or omission decreased a patient's chances of survival or cure, *as long as the jury can infer that it was probable that some diminution in the chance of survival had occurred*" (emphasis added).[14]

Although, as indicated, the First Department generally requires that a plaintiff relying upon the loss of chance doctrine prove that the malpractice deprived the plaintiff of a "substantial possibility" of a cure or better outcome, it appears to have applied a different standard in *Stewart v. New York City Health & Hospitals Corporation*.[15] The plaintiff's expert in *Stewart* testified that if the plaintiff's right fallopian tube had not ruptured as a result of an ectopic pregnancy and been destroyed, she would have had a less than 50 percent chance of having a child by means of sexual intercourse, which he could not "specifically" quantify. The defendant's expert calculated the percentage as only 5 to 10 percent.

It appears that the First, Third and Fourth Departments of the Appellate Division require proof that the malpractice deprived the plaintiff of a "substantial possibility" of a better outcome, while the Second Department finds it sufficient if there was proof of "some diminution" in the plaintiff's chances for survival or a better outcome.

The jury found that the "omission to diagnose" the ectopic pregnancy prior to a specified date was a departure from accepted practice and "deprive[d] plaintiff of a substantial possibility of giving birth naturally."[16] Accordingly, the jury returned a verdict in the plaintiffs' favor for the loss of "natural" child-bearing capacity.

On defendant's post-trial motion, the claim for loss of child-bearing capacity was dismissed, on the ground that the evidence was legally insufficient to show, with reasonable medical certainty, that there was a "substantial" possibility that the plaintiff could have a successful uterine pregnancy following sexual intercourse. The court rejected the plaintiffs' argument that a 10 percent chance was such a "substantial" possibility.

The First Department reinstated the verdict, holding that the charge, to which the defendant did not object, did not "prevent[] the jury from considering whether defendant's alleged negligence was more likely than not a proximate cause of her injury," and that plaintiff was required to prove that it was "more likely than not" "that she lost a substantial opportunity to have natural childbirth."[17] The Appellate Division noted that in addition, the jury was instructed that it "must be persuaded by a preponderance of the credible evidence that what [plaintiff] lost, if it was substantial, was more likely than not lost because of the loss of the tube," and that "the chance that she lost, in order to be substantial, doesn't have to be more than 50 percent but it has to be more than slight."[18]

The Appellate Division concluded that "if the jury found that she lost even a 5 to 10 percent chance of having a successful pregnancy as a result of sexual intercourse and that this chance was 'substantial,' a verdict in her favor would be justified."[19]

A 5 to 10 percent chance of a better outcome, by definition, appears "slight," yet PJI 2:70 defines "substantial factor" as meaning that the defendant's negligence "had such an effect in producing the injury that reasonable people would regard it as a cause of the injury." PJI 2:70 further instructs that "to be substantial, it cannot be slight or trivial," and that the jury may decide that a cause is substantial even if it assigns a relatively small percentage to it."[20]

Moreover, pursuant to the "some diminution" standard, a plaintiff could arguably recover damages based on proof that the defendant's malpractice deprived him or her of even a 1 to 2 percent chance of recovery, which would effectively legitimize what has been rejected as a misreading of *Kallenberg v. Beth Israel Hospital*.[21]

For many years, *Kallenberg* was interpreted as meaning that deprivation of a 2 percent chance of survival, caused by a failure to provide proper medical

treatment, was legally sufficient proof of causation. The plaintiffs' theory of liability in that case was that the defendants had negligently failed to administer a drug, Naturetin, which would have reduced the decedent's blood pressure so that she could safely undergo surgery for treatment of a bleeding cerebral aneurysm. According to the plaintiffs' expert, the failure to give Naturetin on each of the next four days after the decedent suffered a rebleed was a producing, contributing factor to the death. The expert testified that if properly treated, the patient would have had "a 20, say 20, maybe 40% chance of survival if surgery had been undertaken," and that if the proper drugs had been administered, even without surgery, she had a 2 percent chance of survival.[22]

Thus, as the First Department pointed out in its subsequent decision in *Mortensen v. Memorial Hospital*,[23] the court "was dealing with a record that spoke with some degree of certainty that, if administered, the drug would have permitted surgery, which, in turn, would have afforded the patient a 20 to 40 percent chance of recovery.[24]

In *Kimball v. Scors*,[25] similarly, the Third Department rejected the notion that *Kallenberg* stood "for the position urged by the plaintiffs, i.e., that a jury need only determine that defendants' malpractice deprived a decedent of a chance of survival, regardless of how small that chance might be." "Such a charge is implicit with danger in that it could reasonably be construed by jurors as judicial restraint on their obligation to find that the malpractice proximately caused the death. The ultimate finding cannot be whether the deceased would have had a certain percentage of recovery; rather, it must be whether there was a substantial possibility the decedent would have recovered but for the malpractice.[24]

Damages

Proof of damages by a preponderance of the evidence is generally regarded as requiring greater than 50 percent likelihood, whereas compensating for a loss of chance involves percentages of certainty far less than 50 percent. In addition, it is well-established that if there were several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was the result of a cause for which the defendant was not responsible, the plaintiff has failed to establish causation.[25]

How is this to be reconciled? The court will instruct the jury that the proof in favor of the loss of a 20 percent chance of recovery must outweigh the proof that opposes it, or the burden of proof on damages has not been sustained by the plaintiff. There is no dichotomy here because the concepts are separable. It does require a preponderance of the evidence to prove damages, and the proper measure of damages may be 20 percent of full damages.

Stated differently, suppose there are five identical cases in which a hospital is found liable for the loss of a 20 percent chance of recovery of five substantially equal patients. If the finding is accurate, only one of the patients would have made a recovery, but it is not known which one that would have been. By law, the hospital is supposed to compensate the patients for the damages it caused through negligence. Does that mean that the hospital should pay full compensation to all five patients, which would represent five times the loss it caused? Should the patients who lost a 20 percent chance of cure be compensated the same as a patient who was deprived of a 100 percent chance of recovery? In each case the answer should be no.

The loss of a chance of cure can often be stated in percentage terms, just as apportionment is made among defendants. Indeed, that medical science is now capable of projecting a patient's chances of cure to a reasonable degree of medical certainty has served as the justification for adopting loss of chance as a theory of recovery in some jurisdictions.[26] Percentage deductions can be made from damages awards for set-offs and culpable conduct. It would be a simple matter to extend percentage apportionment to the loss of chance case, such that the plaintiff is compensated for what was lost. In the hypothetical above, that would be 20 percent of what would have been awarded if the decedent was deprived of a 100 percent chance of recovery.

In the event that recovery for loss of chance as a distinct injury is eventually upheld by the Court of Appeals, the compensation should equal what was lost.

Our next column will discuss how other jurisdictions have approached the "loss of chance" doctrine, including adoption of a proportionate theory of recovery.

1. 21 N.Y.3d 951 (2013).
2. Id. at 954-955.
3. Id. at 954.
4. Id.
5. Id. at 955.
6. Id. (citation omitted).
7. Vol. 1B, p. 77.
8. PJI 2:150, Vol. 1B, p. 76; see *Candia v. Estepan*, 289 A.D.2d 38 (1st Dept. 2001); *Cannizzo v. Wijeyasekaran*, 259 A.D.2d 38 (4th Dept. 1999); *Kimball v. Scors*, 59 A.D.2d 984 (3d Dept. 1977).
9. 115 A.D.3d 892 (2d Dept. 2014).
10. Id. at 893 (citations omitted).
11. 73 A.D.3d 691 (2d Dept. 2010).
12. Id. at 694 (citations omitted).
13. 275 A.D.2d 345 (2d Dept. 2000).
14. Id. at 346 (citations omitted).
15. 207 A.D.2d 703 (1st Dept. 1994).
16. Id. at 703.
17. Id. at 704.
18. Id.
19. Id.
20. PJI 2:70.
21. 45 A.D.2d 177 (1st Dept. 1974), affd. 37 N.Y.2d 719 (1975).
22. 45 A.D.2d at 179-180.
23. 105 A.D.2d 151 (1st Dept. 1984).
24. Id. at 156.
25. 59 A.D.2d 984.
26. See, e.g., *Matsuyama v. Birnbaum*, 452 Mass. 1, 16 (Supreme Judicial Court of Massachusetts, 2008).