Medicolegal Sidebar

Medicolegal Sidebar: The Law and Social Values: Loss of Chance

B. Sonny Bal MD, JD, MBA, Lawrence H. Brenner JD

Introduction

Laws can appear to be arbitrary and rigid, but legal rules can also reflect complex social values that change and evolve through time [3]. As an example, in 1986 the US Supreme Court upheld the constitutionality of a law that criminalized homosexual conduct [1]. Twenty years later, the court reversed, holding that the Constitution bars legislation criminalizing consensual sexual relations

between adults [10]. Nineteen US states now legalize gay marriage, whereas 31 states have prohibitions against it [12]. The Constitution did not change between these decisions; instead, society became more tolerant of homosexual relationships. The Court's conflicting decisions reflected this evolution in social values.

The loss-of-chance doctrine likewise reflects a tension in competing social values. The doctrine was created, in part, to compensate patients

who lost an already diminished chance of living because of medical negligence. Society attaches value to life, and loss-of-chance reflects that social value. Still, legal rules must be fair and just toward all parties, and provide predictable, understandable guidelines. The concern is that the loss-of-chance doctrine may encourage lawsuits based on speculation and probability calculations, when plaintiffs claim that alternative treatment methods might have led to a better outcome.

To illustrate the doctrine, consider a hypothetical situation involving a patient with a diagnosis of a malignant tumor whose diagnosis was missed, although even with proper diagnosis, the outcome would be fatal. If the plaintiff claims that earlier diagnosis could have improved 5-year survival, should courts hold the doctor liable for the lost chance of survival, or should there be no liability since the patient would have died anyway?

The doctrine is relevant to orthopaedic surgery, where many elective operations are targeted at improving function or quality of life. In fact, the historical development of loss-of-chance has case law related directly to orthopaedic surgery [2, 4, 8]. In such

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B. S. Bal MD, JD, MBA (✉)
Department of Orthopaedic Surgery,
University of Missouri, Columbia,
1100 Virginia Ave., Columbia,
MO 65212, USA
e-mail: balb@health.missouri.edu

B. S. Bal MD, JD, MBA,
L. H. Brenner JD
BalBrenner/Orthopaedic Law Center,
Chapel Hill, NC, USA

L. H. Brenner JD
Department of Orthopaedics and
Rehabilitation, Yale University,
New Haven, CT, USA

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cases, negligent treatment may lead to a satisfactory result, but not quite as good as may have resulted otherwise. If so, should the patient be able to recover for the missed chance at a better outcome?

In situations like the above, the answers are not always clear-cut. The traditional model of negligence would not hold the doctor liable, because while missing a cancer diagnosis may reflect substandard care, the harm inflicted is uncertain since the diagnosis is lethal in any event. But, because society values life, proponents of loss-of-chance argue that some monetary damages should be awarded if the patient can prove a probabilistic change in survival odds. The doctrine, which has been unevenly adopted among state jurisdictions, is an attempt to address the dilemma posed in such situations.

Deviation From the Standard of Care

In a medical malpractice lawsuit, a plaintiff must prove that the physician deviated from the standard of care, and that the deviation proximately caused harm. The alleged harm has to be measurable, tangible, and reducible to a monetary award. The usual level of proof required in medical malpractice actions is the preponderance of the

evidence, which means a greater than 50% probability that the claims made by the plaintiff are accepted by the jury.

The above model of negligence precludes recovery by plaintiffs whose condition is such that they have a 50% or less reduction in the chance of survival, or a better outcome because of substandard care. Such plaintiffs cannot overcome the greater than 50% threshold required by the preponderance of the evidence standard. The loss-of-chance helps plaintiffs in these situations. For example, consider the hypothetical example of an active laborer with an acute carpometacarpal fracture subluxation that goes undiagnosed. After cast treatment for several weeks, the injury is finally diagnosed, and the patient is told that a carpectomy and wrist fusion is the only option. Plaintiff's experts agree that earlier diagnosis and timely surgery would have led to a near-normal wrist, but that over time, wrist stiffness and arthritis would be inevitable, with wrist fusion the most likely long-term outcome. Assuming those experts could attach mathematical certainties to these assertions, the loss-of-chance doctrine would permit recovery for the suboptimal outcome.

The loss-of-chance doctrine may keep doctors vigilant, and avoiding what legal scholars have called "recurring misses," where the medical

system can escape liability for the negligent treatment of patients who are compromised [7]. The doctrine may offer fairness to such patients, while improving medical quality and deterring negligent conduct. Under loss-of-chance, a court can, for example, grant monetary relief to a patient who died sooner than he/she would have from a malignant tumor whose diagnosis was negligently missed [9]. Opponents argue [11, 14] that definite probability calculations are often difficult in medical decision-making, and resolving uncertainty against a physician is equally unfair, and could encourage litigation.

Modern Application

Loss-of-chance theory varies between federal and state laws. Today, the United States uses some variation of the loss-of-chance theory to permit recovery by plaintiffs who cannot prove proximate causation to the minimum 50% threshold. Other states, such as California and Texas, believe that loss-of-chance has no place in their jurisprudence. These states have denied recovery for loss-of-chance cases; unless the plaintiff can show that the probability of lost chance is greater than 50%. A third subset of states, such as South Dakota and Michigan, have legislatively prohibited

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the loss-of-chance doctrine, after their courts used the theory to allow recovery in medical malpractice cases [15]. The relevant South Dakota statute that rescinded a judicial ruling favoring loss-of-chance states, in part that "... the responsible party must be shown to have been the proximate cause of the injury complained of." [13]. The South Dakota legislature was concerned that application of loss-of-chance could run afoul of the required element of proximate causation that the plaintiff must establish in order to prevail in medical negligence claims.

More recently, the Minnesota Supreme Court adopted the loss-of-chance doctrine in a medical malpractice case. Previously, Minnesota had refused to recognize the doctrine. In the 1993 legal case of *Fabio v Bellomo* [6], a patient was assured that a palpable mass in her breast was nothing to worry about. The patient was seen several times during the next 2 to 3 years by the doctor. She then switched providers, and metastatic breast cancer was diagnosed. On review of this case, the Minnesota Supreme Court denied recovery, holding that the statute of limitations for a negligence action had expired, and that because the patient still had a greater than 50% chance of living, she could not recover for the doctor's failure to diagnose and treat her earlier. The Court was clear that, "We have

never recognized loss-of-chance in the context of a medical malpractice action, and we decline to recognize it in this case" [6].

In the 20 years that followed, the *Fabio* decision stood as established law in Minnesota. Then, in the 2013 legal case of *Dickhoff v Green* [5], the Minnesota Court revisited loss-of-chance. Parents of a prematurely born infant noticed a palpable buttock lump, but were reassured by the doctors that the lump was benign. At the 1-year well-baby check, the diagnosis of metastatic rhabdomyosarcoma was made. Experts said that the delay had reduced survival odds from 60% to 40%. In a ruling that attracted interest from legal scholars, the Court specifically overruled *Fabio*, holding that the reduction in the patient's chances to survive the illness would be recognized as compensable damages, consistent with the loss-of-chance doctrine.

The Court explained that the lost chance doctrine was necessary for compensating tort victims and deterring medical negligence. According to the Court, advancements in medical science had made the doctrine workable, that is, more reliable statistical data were available to measure survival odds related to various treatments. Proponents of the ruling agreed that the Court properly acknowledged that increasing a person's chances of

dying or becoming more ill should be construed as a tangible harm. Many such patients are faced with expenses to pay for treatments arising from the negligent diagnosis. Also, by the time death or further injury from the alleged negligence materializes, the statute of limitations may render the physician judgment-proof, as it did in *Fabio*.

The *Dickhoff* decision, and the rationale offered by the Court, leaves many questions unanswered, at least in Minnesota and other states that have adopted loss-of-chance. In choosing modern treatments, doctors have a variety of options, all of which may be reasonable, and all of which may be open to second-guessing and criticism by an expert who claims he/she would have done otherwise, with a better outcome. Why should the medical profession face the risk of payment for a loss in the probability of success, a risk that is unique among professional organizations? Will loss-of-chance lead to juror speculation, egregious expert witness testimony, more medical malpractice lawsuits, increased liability risk for health care providers, and increased costs of healthcare, both from insurance premiums, and from defensive medicine tactics related to patient overtreatment? Until future medical malpractice litigation addresses these questions, the answers will remain unknown.

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Conclusion

The history of the loss-of-chance doctrine; the hesitation of some states to adopt it, and the reversal by the Minnesota Court suggest that there are no easy answers in trying to fairly compensate for certain kinds of harm arising from medical negligence. Legal rules and their application often require a balancing of interests, and court decisions can reflect tensions in societal values. The loss-of-chance doctrine shows that instead of a strict interpretation, or mandated compliance with authoritative norms, the law sometimes reflects an imperfect equilibrium between equally compelling but opposing arguments and interests. It is valuable for the clinician to understand this interplay between social values and the law, to gain an awareness of the legal environment, and facilitate safer clinical practice and increased professional satisfaction.

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