Loyola University Chicago Law Journal

Volume 23
Issue 1 *Fall 1991*

Article 7

1991

Lost Chance of Survival in Illinois: The Need for Guidance from the Illinois Supreme Court

Shelly E. Smith

Comment

Lost Chance of Survival in Illinois: The Need for Guidance from the Illinois Supreme Court

I. INTRODUCTION

Lost chance of survival actions involve factual situations in which the conduct of a negligent tortfeasor causes a plaintiff to lose some statistically viable potential for living.[1] A classic example of a lost chance of survival case would be where a pedestrian is run down by a car and then taken to a hospital where a doctor commits malpractice. The pedestrian later dies. Assuming that upon arrival at the hospital, the pedestrian had at least a forty percent medical likelihood of survival if given proper medical care, and assuming that his treating physician negligently failed to render the necessary medical care, the Illinois appellate courts are split as to whether such a plaintiff should recover for this statistical loss. Some Illinois appellate decisions would deny recovery against the doctor for the malpractice, because these cases require that the plaintiff have a fifty-one percent chance of survival that is lost before the plaintiff can recover.[2] However, two cases from the First District Illinois Appellate Court would allow the plaintiff to recover where the evidence shows, to a reasonable certainty, that a delay in treatment or diagnosis lessened the effectiveness of treatment causing actual lost chance of survival.[3]

---

1. Technically, when the lost opportunity for survival exceeds fifty percent, the situation does not actually constitute a lost chance of survival cause of action because traditional proximate cause standards have been met. For a general discussion of proximate cause, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 263-80 (5th ed. 1984). Rather, lost opportunity for survival occurs when a plaintiff loses a statistically significant opportunity to live which cannot be quantified at greater than fifty percent.

2. *See* Hare v. Foster G. McGaw Hosp., 549 N.E.2d 778 (Ill. App. Ct. 1st Dist., 4th Div. 1989); Pumala v. Sipos, 517 N.E.2d 295 (Ill. App. Ct. 2d Dist. 1987); Russell by Russell v. Subbiah, 500 N.E.2d 138 (Ill. App. Ct. 3d Dist. 1986); Curry v. Summer, 483 N.E.2d 711 (Ill. App. Ct. 4th Dist. 1985). The language generally employed by these courts is that the plaintiff must prove more probably than not that the malpractice was a proximate cause of the injury. These courts have interpreted this language to require proof of fifty-one percent causation.

3. *See* Chambers v. Rush-Presbyterian-St. Luke's Medical Ctr., 508 N.E.2d 426 (Ill.

The lost chance of survival situation frequently arises in medical malpractice actions where a plaintiff with a preexisting condition, such as cancer, alleges malpractice on the part of a doctor treating that condition. The issue of whether to allow recovery in lost chance of survival cases has been decided by the supreme courts of many states, with a variety of outcomes.[4]

Currently, a split exists among the Illinois appellate court districts and even within the First District itself as to whether a plaintiff can recover in a lost chance of survival situation.[5] The Illinois Supreme Court has repeatedly denied leave to appeal with respect to these conflicting appellate court holdings.[6] The only Illinois Supreme Court case that offers any guidance is *Borowski v. Von Solbrig*,[7] and this case does not directly address the lost chance of survival issue. *Borowski* was decided in 1975 before the doctrine of lost chance of survival began to be recognized by courts in the United States. Thus, while the *Borowski* case involved a classic lost chance of survival situation, the case was not argued or decided as

---

App. Ct. 1st Dist., 5th Div. 1987); Northern Trust Co. v. Louis A. Weiss Memorial Hosp., 493 N.E.2d 6 (Ill. App. Ct. 1st Dist., 3d Div. 1986).

4. *See infra* note 13. For further information on the lost chance of survival recovery issue, see Jim M. Perdue, *Recovery for a Lost Chance of Survival: When the Doctor Gambles, Who Puts up the Stakes?*, 28 S. TEX. L.J. 37 (1987); Allen E. Shoenberger, *Medical Malpractice Injury: Causation and Valuation of the Loss of a Chance to Survive*, 6 J. LEGAL MED. 51 (1985); Leon L. Wolfstone & Thomas J. Wolfstone, *Recovery of Damages for the Loss of a Chance*, 1982 MED. TRIAL TECH. Q. 121 (1981); Patricia L. Andel, Comment, *Medical Malpractice: The Right to Recover for the Loss of a Chance of Survival*, 12 PEPP. L. REV. 973 (1985); Stephen F. Brennwald, Comment, *Proving Causation in "Loss of A Chance" Cases: A Proportional Approach*, 34 CATH. U. L. REV. 747 (1985); David W. Counce, Recent Decisions, *The Increased Risk Rule: Establishing "Probable" Causation Through Mere Possibility*, 27 ARIZ. L. REV. 257 (1985); Howard Ross Feldman, Comment, *Chances as Protected Interests: Recovery for the Loss of a Chance and Increased Risk*, 17 U. BALT. L. REV. 139 (1987); Linda M. Roubik, Recent Developments, *Recovery for "Loss of Chance" in a Wrongful Death Action*, 59 WASH. L. REV. 981 (1984); Donna H. Smith, Note, *Increased Risk of Harm: A New Standard of Sufficiency of Evidence of Causation in Medical Malpractice Cases*, 65 B.U. L. REV. 275 (1985).

5. *See* cases cited *supra* notes 2-3.

6. *See* Hare v. Foster G. McGaw Hosp., 549 N.E.2d 778 (Ill. App. Ct. 1st Dist. 1989), *appeal denied*, 553 N.E.2d 396 (Ill. 1990); Pumala v. Sipos, 517 N.E.2d 295 (Ill. App. Ct. 2d Dist. 1987), *appeal denied*, 526 N.E.2d 839 (Ill. 1988); Chambers v. Rush-Presbyterian-St. Luke's Medical Ctr., 508 N.E.2d 426 (Ill. App. Ct. 1st Dist.), *appeal denied*, 515 N.E.2d 102 (Ill. 1987); Russell by Russell v. Subbiah, 500 N.E.2d 138 (Ill. App. Ct. 3d Dist. 1986), *appeal denied*, 508 N.E.2d 736 (Ill. 1987); Northern Trust Co. v. Louis A. Weiss Memorial Hosp., 493 N.E.2d 6 (Ill. App. Ct. 1st Dist. 1986) (leave to appeal denied by the Illinois Supreme Court in 1986 in an unreported opinion); Curry v. Summer, 483 N.E.2d 711 (Ill. App. Ct. 4th Dist. 1985) (leave to appeal denied by the Illinois Supreme Court in 1986 in an unreported opinion).

7. Borowski v. Von Solbrig, 328 N.E.2d 301 (Ill. 1975).

a lost chance case.[8] The Illinois appellate courts that have allowed recovery, as well as those that have denied recovery for lost chance, cite *Borowski* as support for their respective positions.[9]

Indeed, if taken out of context, isolated propositions in *Borowski* lend support for both sides of this issue. However, because the Illinois Supreme Court decided *Borowski* at a time when lost chance of survival was not widely recognized, and because the court was not directly addressing a loss of chance argument, the court was probably not concerned with the ramifications of its language with respect to lost chance cases. This Comment will examine specific language used in the *Borowski* decision which has since been cited as authority by the Illinois appellate courts.[10]

The absence of guidance by the Illinois Supreme Court has led to lack of conformity in Illinois appellate court decisions. The issue of whether or not recovery should be allowed in loss of chance cases has been litigated repeatedly in this state, as evidenced by the growing number of appellate court decisions on the matter.[11] In addition, the highest courts of many other states have decided loss of chance cases in the last ten years, giving clear guidance to their lower courts as to whether or not recovery is allowed.[12] Without any such guidance from the Illinois Supreme Court, however, the Illinois appellate courts have divided on both their holdings and their rationales. Currently, whether or not a plaintiff can recover for loss of chance in Illinois is determined only by which court decides the case, rather than by any clear body of law. The Illinois Supreme Court should grant leave to appeal in a loss of chance case at the next available opportunity in order to set clear guidelines for the lower courts to follow.

This Comment will first discuss the historical development of loss of chance doctrines. Next, it will review decisions of several state supreme courts that have dealt with the loss of chance issue. This Comment then will address the current conflict among the Illinois appellate courts regarding recovery for lost chance of survival. Finally, this Comment will propose that decisions of other state supreme courts provide methods by which the Illinois Supreme Court could resolve this controversy.

---

8. Lost chance of survival cases are also referred to as lost chance cases and loss of chance cases. This Comment uses these terms interchangeably.

9. *See* cases cited *supra* note 6. All of the cases listed in note 6 cite to *Borowski*.

10. *See* cases cited *supra* note 6.

11. *See* cases cited *supra* note 6.

12. *See* cases cited *supra* note 13.

II. BACKGROUND

Over the last ten years, many state supreme courts have decided cases involving lost chance of survival claims.[13] These courts have come up with three basically different approaches in terms of their holdings. Two of these approaches allow recovery for lost chance of survival, the difference between the two being the measure of damages allowed.[14] The third group denies recovery in all lost chance of survival situations.[15]

One of the earliest and best known of the lost chance cases is *Herskovits v. Group Health Cooperative of Puget Sound*.[16] Four differing opinions were set forth in *Herskovits*,[17] and these opinions cover the majority of rationales the courts have since relied on in deciding recovery for lost chance cases. The *Herskovits* case involved a medical malpractice lawsuit over a physician's failure to timely diagnose lung cancer.[18] In order to allow recovery in a lost chance of survival situation, the *Herskovits* court believed it needed to look beyond traditional causation standards.[19] The court noted that in the typical tort case the "but for" test would be appropriate.[20] This test would involve proof that, "but for" the negligent conduct of the defendant, the damages or death probably would not have occurred.

The *Herskovits* court decided that a different proximate cause standard should be used in loss of chance cases. The court relied on Section 323 of the Second Restatement of Torts[21] to establish

13. *See* Thompson v. Sun City Community Hosp., Inc., 688 P.2d 605 (Ariz. 1984); Gooding v. University Hosp. Bldg., Inc., 445 So. 2d 1015 (Fla. 1984); DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986); Fennell v. Southern Maryland Hosp. Ctr., Inc., 580 A.2d 206 (Md. 1990); Falcon v. Memorial Hosp., 462 N.W.2d 44 (Mich. 1990); Perez v. Las Vegas Medical Ctr., 805 P.2d 589 (Nev. 1991); Scafidi v. Seiler, 574 A.2d 398 (N.J. 1990); McKellips v. Saint Francis Hosp., Inc., 741 P.2d 467 (Okla. 1987); Herskovits v. Group Health Coop. of Puget Sound, 664 P.2d 474 (Wash. 1983); Ehlinger by Ehlinger v. Sipes, 454 N.W.2d 754 (Wis. 1990).

14. *See* cases cited *supra* note 13. All cases cited allow recovery except for *Fennell* and *Gooding*.

15. *See Fennell*, 580 A.2d at 206; *Gooding*, 445 So. 2d at 1015.

16. Herskovits v. Group Health Coop. of Puget Sound, 664 P.2d 474 (Wash. 1983). The *Herskovits* case is also included in WILLIAM L. PROSSER ET AL., CASES AND MATERIALS ON TORTS 272 (8th ed. 1988).

17. *Herskovits*, 664 P.2d at 474. In addition to the majority opinion, there was a concurring opinion and were two dissenting opinions.

18. *Id.*

19. *Id.* at 476.

20. *Id.* at 477.

21. RESTATEMENT (SECOND) OF TORTS § 323 (1965). Section 323 reads in pertinent part:

> One who undertakes . . . to render services to another which he should recog-

that negligently increasing another's risk of physical harm is sufficient to subject a defendant to liability.[22] The *Herskovits* court then decided that since the claim involved the increased risk of harm to another, the issue of negligence could go to the jury on less than the normal causation showing that would otherwise be required.[23]

In reaching this conclusion, the *Herskovits* court was persuaded by the reasoning of the Pennsylvania Supreme Court in *Hamil v. Bashline*, a case that also relied on Section 323 of the Restatement.[24] The *Herskovits* court observed that under the *Hamil* decision, once a plaintiff has demonstrated that a defendant's acts or omissions in a situation to which Section 323(a) applies have increased the risk of harm to another, such evidence allows the trier of fact to find that such increased risk was in turn a substantial factor in bringing about the resultant harm.[25] The necessary proximate cause will be established if the jury finds such cause.[26] Accordingly, the *Herskovits* court determined that the *Hamil* reasoning was sound and that on a showing of an increased risk of harm, the question of negligence should go to the jury.[27]

Further, the majority opinion in *Herskovits* rejected the defendant's argument that the plaintiff must prove that the decedent would have had a fifty-one percent chance of survival if the negligence had not occurred.[28] The court, however, did not allow recovery of full damages for the plaintiff's decedent's death and instead determined that the measure of damages awarded should be based only on damages caused directly by premature death, such as lost earnings and additional medical expenses.[29]

The concurring opinion in *Herskovits* set forth an alternative approach to damages which would assess damages based on the percentage of reduction in chance of survival.[30] This concurring opinion cited an influential article, written by Joseph H. King, Jr.,

---

nize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm . . . .

Id.

22. *Id.*; *Herskovits*, 664 P.2d at 476.
23. *Herskovits*, 664 P.2d at 479.
24. *Id.* at 477; *see also* Hamil v. Bashline, 392 A.2d 1280 (Pa. 1978).
25. *Herskovits*, 664 P.2d at 477.
26. *Id.* at 478.
27. *Id.* at 477.
28. *Id.* at 479.
29. *Id.*
30. *Id.* at 486 (Pearson, J., concurring).

that appeared in the Yale Law Journal in 1981.[31] The basic thesis of that article is that the loss of chance should be treated as a separate injury.[32] Professor King asserted that in basing recovery on a fifty-one percent chance of survival standard and then allowing recovery of full damages, justice is not served. Nor is justice served, Professor King argued, by allowing no recovery when the loss of chance falls below fifty-one percent.[33] Professor King's article stated that the best approach is to limit the amount of damages recoverable to the percentage of the loss of chance.[34]

One of the dissenting opinions in *Herskovits* argued that the plaintiff did not present evidence of proximate cause that rose

---

31. Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981). King was a Professor of Law at the University of Tennessee College of Law when the article was published. This article has been cited repeatedly in other lost chance of survival cases. *See* Thompson v. Sun City Community Hosp., Inc., 688 P.2d 605, 615 (Ariz. 1984); DeBurkarte v. Louvar, 393 N.W.2d 131, 135 (Iowa 1986); Fennell v. Southern Maryland Hosp. Ctr., Inc., 580 A.2d 206, 212 (Md. 1990); Falcon v. Memorial Hosp., 462 N.W.2d 44, 50 (Mich. 1990); Perez v. Las Vegas Medical Ctr., 805 P.2d 589, 591 (Nev. 1991); Scafidi v. Seiler, 574 A.2d 398, 407 (N.J. 1990); McKellips v. Saint Francis Hosp., Inc., 741 P.2d 467, 476 (Okla. 1987); Ehlinger by Ehlinger v. Sipes, 454 N.W.2d 754, 757-58 (Wis. 1990). The article is also cited in Hare v. Foster G. McGaw Hosp., 549 N.E.2d 778, 783 (Ill. App. Ct. 1st Dist., 4th Div. 1989).

32. King, *supra* note 31, at 1354.

33. *Id.* at 1378. Professor King stated that, "Destruction of a chance should also be compensated for reasons of fairness. But for the defendant's tortious conduct, it would not have been necessary to grapple with the imponderables of chance. Fate would have run its course." *Id.*

34. *Id.* at 1382. Professor King gave the following rationale and example to illustrate his proposed method for compensating plaintiffs for lost chance of survival:

> A better method of valuation would measure a compensable chance as the percentage probability by which the defendant's tortious conduct diminished the likelihood of achieving some more favorable outcome. Under this approach, the trier of fact would continue to make the valuation, but would do so within specific guidelines and parameters set by the court.
>
> To illustrate, consider a patient who suffers a heart attack and dies as a result. Assume that the defendant-physician negligently misdiagnosed the patient's condition, but that the patient would have had only a 40% chance of survival even with a timely diagnosis and proper care. Regardless of whether it could be said that the defendant caused the decedent's death, he caused the loss of a chance, and that chance-interest should be completely redressed in its own right. Under the proposed rule, the plaintiff's compensation for the loss of the victim's chance of surviving the heart attack would be 40% of the compensable value of the victim's life had he survived (including what his earning capacity would otherwise have been in the years following death). The value placed on the patient's life would reflect such factors as his age, health, and earning potential, including the fact that he had suffered the heart attack and the assumption that he had survived it. The 40% computation would be applied to that base figure.

Id. (footnote omitted).

above speculation and conjecture.[35] The same dissenting opinion also stated that relying on statistics to prove proximate cause could lead to unjust results.[36] The other dissenting opinion articulated that there was authority for allowing recovery in a less than fifty-one percent loss of chance case, but that justice was not persuaded by this logic.[37]

The *Herskovits* opinion represents an important step in allowing recovery for lost chance of survival.[38] One of the most persuasive arguments that the *Herskovits* majority opinion makes for allowing recovery for lost chance of survival is that "[t]o decide otherwise would be a blanket release from liability for doctors and hospitals any time there was less than a 50 percent chance of survival, regardless of how flagrant the negligence."[39] The *Herskovits* majority opinion seems to have decided that relaxing the traditional causation standard was justified by both Section 323(a) of the Restatement and as a way of protecting the rights of those who may have a less than fifty percent chance of survival.

In the years following the *Herskovits* decision, numerous other state supreme courts heard cases involving lost chance of survival claims.[40] For example, in 1987, the Supreme Court of Oklahoma issued an advisory opinion to the United States Court of Appeals for the Tenth Circuit in *McKellips v. Saint Francis Hospital, Inc.*[41] The Oklahoma Supreme Court in *McKellips* took a comprehensive look at how other state courts had handled the lost chance of survival question. Ultimately, the *McKellips* court determined that

35. Herskovits v. Group Health Coop. of Puget Sound, 664 P.2d 474, 489 (Wash. 1983) (Brachtenbach, J., dissenting).

36. *Id.* at 490 (Brachtenbach, J., dissenting).

37. *Id.* at 491 (Dolliver, J., dissenting).

38. Because the various opinions in the *Herskovits* case scrutinized the topic in great detail, many subsequent state supreme court opinions cited *Herskovits* as authority. *See* Thompson v. Sun City Community Hosp., Inc., 688 P.2d 605, 614-15 (Ariz. 1984); Gooding v. University Hosp. Bldg., Inc., 445 So. 2d 1015, 1019 (Fla. 1984); DeBurkarte v. Louvar, 393 N.W.2d 131, 136 (Iowa 1986); Fennell v. Southern Maryland Hosp. Ctr., Inc., 580 A.2d 206, 209 (Md. 1990); Falcon v. Memorial Hosp., 462 N.W.2d 44, 54 (Mich. 1990); Perez v. Las Vegas Medical Ctr., 805 P.2d 589, 591 (Nev. 1991); Scafidi v. Seiler, 574 A.2d 398, 405 (N.J. 1990); McKellips v. Saint Francis Hosp., Inc., 741 P.2d 467, 472-73 (Okla. 1987); Ehlinger by Ehlinger v. Sipes, 454 N.W.2d 754, 758 (Wis. 1990). In addition, the following Illinois appellate court cases also cite to *Herskovits*: Hare v. Foster G. McGaw Hosp., 549 N.E.2d 778, 783 (Ill. App. Ct. 1st Dist. 4th Div. 1989); Northern Trust Co. v. Louis A. Weiss Memorial Hosp., 493 N.E.2d 6, 11 (Ill. App. Ct. 1st Dist. 3d Div. 1986); and Curry v. Summer, 483 N.E.2d 711, 719 (Ill. App. Ct. 4th Dist. 1985).

39. *Herskovits*, 664 P.2d at 477.

40. *See supra* note 13 for a listing of those cases.

41. McKellips v. Saint Francis Hosp., Inc., 741 P.2d 467 (Okla. 1987).

recovery for lost chance of survival should be allowed and that the damages should be limited to the percentage of the reduction in the chance of survival.[42]

In discussing the various rationales for allowing recovery for loss of chance, the *McKellips* court discussed the Fourth Circuit case of *Hicks v. United States*.[43] The *Hicks* decision did not specifically address loss of chance, but its language concerning medical negligence standards has nonetheless been cited repeatedly in loss of chance cases.[44] The following language of the *Hicks* decision has been attributed with creating a "substantial possibility" standard for the sufficiency of causation proof:

> 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.[45]

In the *Hicks* case, the plaintiff's proof went beyond the substantial possibility standard.[46] Therefore, the "substantial possibility" lan-

---

42. *Id.* at 477. Specifically, the *McKellips* court stated:

> In summary, we hold 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. We further hold 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.

Id.

43. Hicks v. United States, 368 F.2d 626 (4th Cir. 1966).

44. *See* Thompson v. Sun City Community Hosp., Inc., 688 P.2d 605, 614 (Ariz. 1984); Gooding v. University Hosp. Bldg., Inc., 445 So. 2d 1015, 1019 (Fla. 1984); DeBurkarte v. Louvar, 393 N.W.2d 131, 136 (Iowa 1986); Fennell v. Southern Maryland Hosp. Ctr., Inc., 580 A.2d 206, 210-11 (Md. 1990); Falcon v. Memorial Hosp., 462 N.W.2d 44, 50-51 (Mich. 1990); Scafidi v. Seiler, 574 A.2d 398, 404 (N.J. 1990); McKellips v. Saint Francis Hosp., Inc., 741 P.2d 467, 472 (Okla. 1987); Hamil v. Bashline, 392 A.2d 1280, 1288 (Pa. 1978); Herskovits v. Group Health Coop. of Puget Sound, 664 P.2d 474, 477-78 (Wash. 1983); Ehlinger by Ehlinger v. Sipes, 454 N.W.2d 754, 757 (Wis. 1990); *see also* Curry v. Summer, 483 N.E.2d 711, 719 (Ill. App. Ct. 4th Dist. 1985).

45. *Hicks*, 368 F.2d at 632.

46. *Id.* at 632 ("Both of plaintiff's experts testified categorically that if operated on promptly, [the plaintiff's decedent] would have survived, and this is nowhere contradicted by the government expert.").

guage in *Hicks* appears to be dictum. Nevertheless, some courts have cited the above language as support that a substantial possibility of recovery is enough to meet causation standards.[47]

The *McKellips* court's decision to allow recovery for lost chance of survival appears to have been influenced by the same considerations that the *Herskovits* court mentioned. In particular, the *McKellips* court stated, "Health care providers should not be given the benefit of the uncertainty created by their own negligent conduct."[48]

The *McKellips* court adopted the substantial possibility standard and gave an explanation of what the new standard on sufficiency of proof actually meant.[49] In effect, the decision lowered the plaintiff's burden of production to enable the plaintiff to more easily establish a jury question on the issue of causation. The court noted that lowering the standard gave the jury a greater role in the decision-making process and merely reallocated the power to decide the issue of causation.[50] The court, however, held that before a plaintiff can recover, the jury still is required to determine that the increase in risk under the circumstances was more likely than not a substantial factor in causing the harm.[51] Thus, a plaintiff is not guaranteed recovery just because he is filing a claim in a state that has adopted a lost chance of survival doctrine. The plaintiff still is required to persuade the jury that the conduct of the defendant caused the loss of chance. However, states that do allow recovery for lost chance of survival do not require the plaintiff to show that, absent the defendant's negligence, the plaintiff would have had a fifty-one percent chance or better of recovery.

Of the courts that are consistent with the *McKellips* court in allowing recovery for lost chance of survival, most have limited the measure of damages recoverable to the percentage in reduction of the chance of survival.[52] Not all courts, however, have followed this decision.[53] For example, a 1990 Wisconsin Supreme Court decision, *Ehlinger by Ehlinger v. Sipes*,[54] determined that recovery for lost chance of survival could include recovery of the full measure

47. *See McKellips*, 741 P.2d at 467 n.17 (citing Brown v. Koulizakis, 331 S.E.2d 440 (Va. 1985)).
48. *Id.* at 474.
49. *Id.* at 475.
50. *Id.*
51. *Id.*
52. Falcon v. Memorial Hosp., 462 N.W.2d 44 (Mich. 1990); Scafidi v. Seiler, 574 A.2d 398 (N.J. 1990).
53. *See infra* notes 54-60.
54. Ehlinger by Ehlinger v. Sipes, 454 N.W.2d 754 (Wis. 1990).

of damages for the injuries sustained if the plaintiff could prove that the negligence of the defendant was a "substantial factor" in producing the harm.[55]

The *Ehlinger* case involved a defendant doctor's failure to diagnose a multiple pregnancy and the resulting injury at premature birth. The Wisconsin Supreme Court in *Ehlinger* determined that in order to establish causation, it was not necessary that the plaintiff show that proper diagnosis and treatment would have been successful.[56] The court held that to satisfy the burden of production on causation, the plaintiff need only show that the omitted treatment was intended to prevent the very type of harm which resulted, that the plaintiff would have submitted to the treatment, and that it is more probable than not that the treatment could have lessened or avoided the plaintiff's injury had it been rendered.[57] Once the plaintiff has come forth with this burden of production, it becomes a question for the jury to determine whether the defendant's negligence was a substantial factor in causing the plaintiff's harm.[58]

In discussing the proper measure of damages the plaintiff should be allowed to recover, the *Ehlinger* court stated that once the defendant's negligence is found to have been a substantial factor in causing the harm, the trier of fact may also consider evidence of the likelihood of success of proper treatment in determining the amount of damages to be awarded.[59] Thus, while the results may be similar to those states that limit the recovery to the percentage of reduction in chance of survival, the Wisconsin Supreme Court does not mandate that only these limited damages may be awarded.[60]

Recently, the Maryland Supreme Court also decided a lost chance of survival case. Applying a strict proximate cause standard, the court in *Fennell v. Southern Maryland Hospital Center, Inc.*[61] decided that recovery for lost chance of survival should not be allowed.[62] The *Fennell* case involved a medical malpractice claim concerning failure to properly treat bacterial meningitis. The plaintiff's expert in the case testified that even if treated in

55. *Id.* at 763.
56. *Id.* at 759.
57. *Id.*
58. *Id.*
59. *Id.* at 763.
60. *Id.*
61. Fennell v. Southern Maryland Hosp. Ctr., 580 A.2d 206 (Md. 1990).
62. *Id.* at 215.

accordance with the appropriate standard of care, the plaintiff's decedent still would have had only a forty percent chance of survival.[63] The *Fennell* court held that in order to demonstrate proximate cause, the plaintiff must prove by the preponderance of the evidence that it is more probable than not that the defendant's act caused the injury.[64]

One reason the *Fennell* court gave for its decision not to allow recovery for loss of chance is that, if it did allow such recovery, damages would be awarded for the "possibility" that the negligence was a cause of the death.[65] The *Fennell* court found that Maryland law did not allow damages based on mere possibilities.[66] A final reason the court gave for its decision was soaring medical malpractice insurance costs. The *Fennell* court was not persuaded that "the benefits of allowing loss of chance damages in a survival action offset the detriments of a probable increase in medical malpractice litigation and malpractice insurance costs."[67]

A dissenting opinion was also filed in the *Fennell* case.[68] The dissent rejected the contention by the majority that loss of chance damages should not be recovered due to the lack of mathematical precision.[69] The dissent argued that it is unfair to allow a person with a fifty-one percent possibility of surviving to recover damages while a plaintiff with only a fifty percent possibility of surviving is precluded from recovering any damages.[70] The conflicting opinions filed in the *Fennell* case illustrate the tension in the various positions taken by groups supporting and arguing against recovery for loss of chance.

The Nevada Supreme Court addressed lost chance of survival in its recent decision of *Perez v. Las Vegas Medical Center*.[71] The *Perez* court held that loss of chance damages could be recovered, but that damages should be discounted to the extent that a pre-existing condition likely contributed to death or serious injury.[72] Influ-

63. *Id.* at 208.
64. *Id.* at 211.
65. *Id.* at 213.
66. *Id.* The *Fennell* court also stated: "Recognizing loss of chance damages in survival actions would involve serious public policy concerns. We are not convinced that such a change should be initiated by this Court." *Id.* at 214.
67. *Id.* at 215.
68. *Id.* at 216 (Adkins, J., dissenting).
69. *Id.* (Adkins, J., dissenting). Judge Adkins stated: "Tort law is not about mathematical niceties; it has to do with fairness to fault-free victims who have suffered harm by reason of the tortious acts or omissions of others." *Id.* (Adkins, J., dissenting).
70. *Id.* (Adkins, J., dissenting).
71. Perez v. Las Vegas Medical Ctr., 805 P.2d 589 (Nev. 1991).
72. *Id.* at 592.

enced by some of the earlier decisions discussed in this section, including *Herskovits*, *McKellips*, and Professor King's article, the *Perez* court held that in order to recover, the chance of survival must have been substantial.[73] As in *Fennell*, a forceful dissenting opinion was filed in *Perez*.[74] The dissent in *Perez* argued that by allowing recovery for loss of chance, the court was opening the floodgates of litigation.[75] As with *Fennell*, the opinions filed in *Perez* illustrate the continuing tension between protecting plaintiffs' rights and curtailing litigation costs.[76]

III. DISCUSSION

Against this backdrop of almost ten years of decisions by other state supreme courts, the Illinois appellate courts are split on the issue of whether to allow recovery in lost chance of survival cases.[77] With no clear guidance from the Illinois Supreme Court,

---

73. *Id.* How to define what constitutes the loss of a "substantial" chance has been discussed by some courts. The *Perez* court decided to leave that decision to be made on a case by case basis in the future as evidenced in the following passage:

> In accord with other courts adopting this view, we need not now state exactly how high the chances of survival must be in order to be "substantial." We will address this in the future on a case by case basis. There are limits, however, and we doubt that a ten percent chance of survival referred to in the example in the dissenting opinion would be actionable. Survivors of a person who had a truly negligible chance of survival should not be allowed to bring a case fully through trial. Perhaps more importantly, in cases where the chances of survival were modest, plaintiffs will have little monetary incentive to bring a case to trial because damages would be drastically reduced to account for the preexisting condition.

Id.

The Michigan Supreme Court took a similar approach in Falcon v. Memorial Hosp., 462 N.W.2d 44 (Mich. 1990). The *Falcon* court held: "We are persuaded that loss of a 37.5 percent of opportunity of living constitutes a loss of a substantial opportunity of avoiding physical harm. We need not now decide what lesser percentage would constitute a substantial loss of opportunity." *Id.* at 56-57 (footnotes omitted).

74. *Perez*, 805 P.2d at 593 (Steffen, J., dissenting).

75. *Id.* at 598 (Steffen, J., dissenting).

76. It should be noted that in addition to the reasons discussed above, the cases discussed in this section also relied on common law cases in their own jurisdictions. As such case law is not especially relevant to the issue of deciding loss of chance doctrine in Illinois, the arguments based on the prior case law of the state were not discussed. In addition, other arguments in the cases focused on the requirements under that particular state's wrongful death statute. Again, due to the differences in such statutes among the states, these issues were not relevant to the Illinois situation.

77. For Illinois appellate cases that have allowed recovery, see Chambers v. Rush-Presbyterian-St. Luke's Medical Ctr., 508 N.E.2d 426 (Ill. App. Ct. 1st Dist., 5th Div. 1987); Northern Trust Co. v. Louis A. Weiss Memorial Hosp., 493 N.E.2d 6 (Ill. App. Ct. 1st Dist., 3d Div. 1986). For those Illinois appellate cases that have denied recovery, see Hare v. Foster G. McGaw Hosp., 549 N.E.2d 778 (Ill. App. Ct. 1st Dist., 4th Div. 1989); Pumala v. Sipos, 517 N.E.2d 295 (Ill. App. Ct. 2d Dist. 1987); Russell by Russell

the appellate courts have taken differing approaches to the lost chance of survival problem. The following passages explore key Illinois decisions.

Two cases from the First District Illinois Appellate Court have allowed recovery in lost chance of survival cases.[78] The Illinois Supreme Court denied leave to appeal in both of these cases.[79]

In the first of these cases, *Northern Trust Co. v. Louis A. Weiss Memorial Hospital*,[80] it was alleged that there was negligent delay in medical treatment for a newborn infant, despite obvious and progressive signs of deterioration in the otherwise healthy baby. The plaintiff's expert could not say whether or not the delay made a difference.[81] The plaintiff's expert did testify, however, that the sooner the treatment was instituted, the better it would have been for the child and the less likely it would have been that she would have become as seriously asphyxiated.[82] The expert further testified that because of the delay, the baby suffered an increase in morbidity.[83]

The *Northern Trust* court held that " '[e]vidence which shows to a reasonable certainty that negligent delay in diagnosis or treatment . . . lessened the effectiveness of treatment is sufficient to establish proximate cause.' "[84] In so holding, the *Northern Trust* court cited Section 323 of the Restatement as support, and noted that several courts, including the Pennsylvania Supreme Court in *Hamil v. Bashline*, had applied Section 323 to medical malpractice cases.[85] The *Northern Trust* holding borrowed the following language from *Hamil v. Bashline*:

> Once a plaintiff has introduced evidence that a defendant's negligent act or omission increased the risk of harm to a person in plaintiff's position, and that the harm was in fact sustained, it becomes a question of fact for the jury as to whether or not that

---

v. Subbiah, 500 N.E.2d 138 (Ill. App. Ct. 3d Dist. 1986); Curry v. Summer, 483 N.E.2d 711 (Ill. App. Ct. 4th Dist. 1985).

78. Chambers v. Rush-Presbyterian-St. Luke's Medical Ctr., 508 N.E.2d 426 (Ill. App. Ct. 1st Dist., 5th Div. 1987); Northern Trust Co. v. Louis A. Weiss Memorial Hosp., 493 N.E.2d 6 (Ill. App. Ct. 1st Dist., 3d Div. 1986).

79. *See supra* note 6.

80. Northern Trust Co. v. Louis A. Weiss Memorial Hosp., 493 N.E.2d 6 (Ill. App. Ct. 1st Dist., 3d Div. 1986).

81. *Id.* at 11.

82. *Id.*

83. *Id.*

84. *Id.* at 12 (quoting James v. United States, 483 F. Supp. 581, 585 (N.D. Cal. 1980)).

85. *Id.* at 11.

increased risk was a substantial factor in producing the harm.[86] The *Northern Trust* court was thus applying the "substantial factor" test that other courts have applied. The *Northern Trust* case was decided by the Third Division of the First District Illinois Appellate Court.

The other First District case allowing recovery for lost chance of survival, *Chambers v. Rush-Presbyterian-St. Luke's Medical Center*,[87] was decided by the Fifth Division of the First District. The *Chambers* case involved uncontested medical negligence; the defendant's failure to give insulin to the plaintiff resulted in the plaintiff suffering brain damage and lapsing into a coma.[88] The defendant admitted his negligence, but denied that the plaintiff met his burden of proof on proximate cause.[89] The plaintiff also had pancreatic cancer which went untreated because of the coma and there was evidence that the plaintiff had only a thirty-three percent chance of surviving if he had received proper medical treatment four months earlier. The defendant argued that the plaintiff had to show that there was more than a fifty percent chance of survival at the time of the negligent treatment in order to meet his burden of proof on proximate cause.[90] The *Chambers* court discussed at length why the defendant's argument was incorrect. The court cited the *Northern Trust* holding and based its decision, in part, on the reasoning discussed above in relation to that case.[91]

The *Chambers* court also discussed the proximate cause jury instruction given by the lower court: "It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury."[92] The defendant objected to this instruction on appeal.[93] The *Chambers* court, however, pointed out that the defendant's negligence and the cancer concurred to cause decedent's death.[94] Thus, the court concluded that the long-form proximate cause instruction was properly given.[95]

In addition, the *Chambers* court did not believe that the Illinois

86. *Id.* at 11-12 (quoting Hamil v. Bashline, 392 A.2d 1280 (Pa. 1978)).
87. Chambers v. Rush-Presbyterian-St. Luke's Medical Ctr., 508 N.E.2d 426 (Ill. App. Ct. 1st Dist., 5th Div. 1987).
88. *Id.* at 428.
89. *Id.* at 429.
90. *Id.*
91. *Id.* at 430.
92. *Id.* at 431.
93. *Id.* at 427.
94. *Id.* at 432.
95. *Id.*

Wrongful Death Act imposed a limitation against loss of chance actions. The court held that the Illinois Wrongful Death Act does not limit actions to healthy persons or persons with a better than fifty percent chance of survival.[96]

The *Chambers* court specifically chose not to classify its holding as a lost chance of survival holding, but rather as an accepted application of proximate cause law. Further, the court in *Chambers* distinguished two contrary Illinois Appellate Court cases that it felt did not properly reflect the case law on proximate cause as expressed by the Illinois Supreme Court in *Borowski v. Von Solbrig*.[97] In *Borowski*, the supreme court stated that it need not be shown that a better result would have occurred if proper treatment had been given.[98] This holding by the Illinois Supreme Court is of some significance in the lost chance of survival issue. Thus, in the *Chambers* case, recovery was allowed when the defendant's negligence, acting in concert with the plaintiff's pre-existing condition, was a proximate cause of plaintiff's death.[99]

The decision of the *Chambers* court is somewhat unique in that while its holding was based in part on the more traditional rationale for allowing recovery in loss of chance cases, the court also discussed the idea of concurrent causes. Applying the rationale of concurrent causes to the loss of chance situation appears to be a rather unusual approach when looking at the other cases referred to in this Comment. However, the concurrent causes argument set forth in *Chambers* does have firm grounding in accepted tort law.[100]

A separate line of Illinois appellate court cases, including another case from the First District, rejected a right to recover for lost chance of survival.[101] Two years after the *Northern Trust* decision, the Fourth Division of the First District Illinois Appellate Court in *Hare v. Foster G. McGaw Hospital*[102] held that the Illinois Supreme Court in *Borowski*[103] had set the correct standard for es-

96. *Id.*

97. Borowski v. Von Solbrig, 328 N.E.2d 301 (Ill. 1975).

98. *Id.* at 305.

99. *Chambers*, 508 N.E.2d at 432-33.

100. *See, e.g.*, Ray v. Cock Robin, Inc., 310 N.E.2d 9, 12 (Ill. 1974).

101. *See* Hare v. Foster G. McGaw Hosp., 549 N.E.2d 778 (Ill. App. Ct. 1st Dist., 4th Div. 1989); Pumala v. Sipos, 517 N.E.2d 295 (Ill. App. Ct. 2d Dist. 1987); Russell by Russell v. Subbiah, 500 N.E.2d 138 (Ill. App. Ct. 3d Dist. 1986); Curry v. Summer, 483 N.E.2d 711 (Ill. App. Ct. 4th Dist. 1985).

102. Hare v. Foster G. McGaw Hosp., 549 N.E.2d 778 (Ill. App. Ct. 1st Dist., 4th Div. 1989).

103. Borowski v. Von Solbrig, 328 N.E.2d 301 (Ill. 1975).

tablishing proximate cause in a medical malpractice action.[104] Thus, following *Borowski*, the *Hare* court employed the "more probable than not standard" to require the plaintiff to prove that the defendant's negligence more likely than not was a proximate cause of the resulting injury.[105]

The *Hare* case arose from an appeal from a directed verdict for the defendant. Much of the discussion in Illinois case law on loss of chance revolves around the question of what proof is necessary for the question of causation to go to the jury. However, in *Hare*, the plaintiff's expert never testified that the defendant's negligence was a cause of the decedent's death nor that the alleged malpractice contributed to the death.[106] In addition, there was evidence introduced by the defendant's expert that the decedent's condition could not have been detected even if proper care had been rendered.[107] Thus, under any court's interpretation of the *Borowski* case, the plaintiff in *Hare* failed to meet his burden of proof on causation.

However, the *Hare* decision went further than necessary to decide the case before it. For example, the *Hare* court discussed the problems of applying the traditional proximate cause standard to a loss of chance case and discussed Section 323 of the Restatement of Torts and the *Herskovits* case.[108] The *Hare* decision mischaracterized the *Herskovits* holding by asserting that, in *Herskovits*, if the jury made a finding that the increased risk was a substantial factor in bringing about the resultant harm, the plaintiff would be entitled to the full amount of damages for the death.[109] The *Herskovits* decision, however, is actually well known as a case in which recovery for loss of chance was allowed, but damages were limited.[110] The *Hare* court did acknowledge the conflict in the Illinois appellate courts.[111] The *Hare* court determined that it must apply the burden of proof standard of *Borowski* and that only the Illinois Supreme Court had authority to alter its own standard.[112] The

104. *Hare*, 549 N.E.2d at 781. Citing the *Borowski* standard, the *Hare* court noted that: "The Illinois Supreme Court has stated that to prove causation in a medical malpractice action, the plaintiff must establish that it is more probably true than not true that the negligence was a proximate cause of the injury." *Id.*

105. *Id.*

106. *Id.* at 781-82.

107. *Id.*

108. *Id.* at 782-83.

109. *See id.* at 783.

110. *See supra* notes 16-39 and accompanying text.

111. *Hare*, 549 N.E.2d at 783.

112. *Id.*

Hare court also asserted that to allow recovery for loss of chance, Illinois would need to amend its Wrongful Death Statute.[113]

The *Hare* decision interpreted the language of "a proximate cause" in *Borowski* as requiring a fifty-one percent or more cause.[114] There is no indication, however, of such a meaning in the *Borowski* decision. As noted earlier, the language in the *Borowski* case is argued out of context by both sides on the loss of chance issue. In the *Hare* case, there was no expert testimony to support the plaintiff's position that the defendant's negligence caused a loss of chance.[115] Therefore, much of the *Hare* court's language is dicta.[116] Thus, while under any Illinois lost chance decision, the *Hare* plaintiff would not have been entitled to recover for lost chance of survival, the *Hare* court nonetheless used this case as an opportunity to set forth its own opinion on the loss of chance issue.

One of the earliest Illinois appellate court decisions on loss of chance also denied recovery to the plaintiff. In *Curry v. Summer*,[117] the trial court refused to give a jury instruction based on Section 323 of the Second Restatement of Torts. The jury instruction which the plaintiff submitted read as follows: "A person who undertakes to render services to another is liable for physical harm resulting from his failure to exercise reasonable care, if that failure increased the risk of harm."[118] In affirming the trial court's decision, the *Curry* court held that such an instruction would mislead the jury because "resulting from" is not defined within the instruction, and the jury might find liability once they found that the defendants increased the risk of harm.[119] The *Curry* court interpreted this instruction as merely creating a duty. The court asserted that Section 323(a) still required application of the usual standards of proximate cause and burden of proof.[120]

---

113. *Id.* at 784.

114. *Id.* at 783.

115. *See supra* note 106 and accompanying text.

116. For example, the *Hare* court stated:

> [A] patient whose doctor's malpractice deprived him of a 49% chance of surviving his illness would be denied recovery on the basis that it was more probable than not that he died from the illness. On the other hand, a patient deprived by malpractice of a 51% chance of survival would recover the full extent of damages for the death because it was more probable than not that the malpractice caused the death.

Hare, 549 N.E.2d at 782.

117. Curry v. Summer, 483 N.E.2d 711 (Ill. App. Ct. 4th Dist. 1985).

118. *Id.* at 717.

119. *Id.* at 718.

120. *Id.* at 717-18. The *Curry* court stated: "Section 323(a) does go on to provide liability for physical harm resulting from a breach of the duty, but it does not define what

The *Curry* court also discussed cases from other jurisdictions such as *Hamil* and *Herskovits*. The *Curry* court mischaracterized *Herskovits* by implying that *Herskovits* held that the plaintiff can only recover when the jury finds that the plaintiff would more likely than not have survived or recovered absent the defendant's negligence.[121] Actually, in *Herskovits*,[122] the plaintiff had a thirty-nine percent chance of surviving at the time of the alleged negligence, and the alleged negligence caused a fourteen percent reduction in the decedent's chances for survival.[123] The *Curry* court concluded that without showing that the decedent had a better than even chance of survival, i.e., greater than fifty percent, the plaintiff could not recover.[124] The *Curry* court held that this was consistent with both the traditional burden of proof on proximate cause and with the *Borowski*[125] holding.

One year later, in *Russell by Russell v. Subbiah*,[126] the Third District of the Illinois Appellate Court affirmed the decision of the trial court to grant summary judgment in a loss of chance case. In *Russell*, the plaintiff's expert testified that if the defendant had diagnosed a tumor earlier, the plaintiff would have had a fifty-fifty chance of regaining full use of his leg in a brief recovery period rather than a two year recovery period.[127] The *Russell* court concluded that because the doctor's affidavit estimated the plaintiff's chance of a better recovery at fifty-fifty but for the negligence of the defendant, "the probabilities are equal that the conduct of the defendant had no effect on the plaintiff's condition, or that it proximately caused his injury."[128] The court held that this failed to satisfy the plaintiff's burden of proof on causation and warranted the entry of summary judgment in favor of the defendant.[129]

The dissenting opinion in *Russell* argued that proximate cause is a jury question and that it was improper to dismiss the case on summary judgment.[130] In fact, four years later, the Illinois

---

is meant by 'resulting from.' We believe section 323(a) contemplates the usual standards of proximate cause and burden of proof be applied under it." *Id.*

121. *Id.* at 719.

122. Herskovits v. Group Health Coop. of Puget Sound, 664 P.2d 474 (Wash. 1983).

123. *Id.* at 475.

124. *Curry*, 483 N.E.2d at 717.

125. Borowski v. Von Solbrig, 328 N.E.2d 301 (Ill. 1975).

126. Russell by Russell v. Subbiah, 500 N.E.2d 138 (Ill. App. Ct. 3d Dist. 1986).

127. *Id.* at 141.

128. *Id.*

129. *Id.*

130. *Id.* at 142-43 (Barry, J., dissenting). Judge Barry stated, "I certainly do not agree with the majority view that the determinative factor was the doctor's statement that there was a '50/50' probability the delay in diagnosis prolonged the recovery period." *Id.*

Supreme Court in *Gatlin v. Ruder*[131] took the same position as the dissenting opinion in *Russell* regarding the propriety of dismissing an action on a summary judgment motion where the plaintiff had brought forth some evidence as to causation.[132] Although the *Gatlin* case did not involve a loss of chance action, the trial court applied the proximate cause standard set forth in *Russell*. The *Gatlin* court held that, "the *Russell* standard accurately reflects a plaintiff's burden of proof at trial, but incorrectly sets forth a party's burden on a summary judgment motion."[133] The *Gatlin* court held that because proximate cause is an issue of material fact in a negligence suit, once evidence is presented by the plaintiff that the defendant may have proximately caused the injuries, summary judgment is no longer appropriate.[134] Thus, if the Illinois appellate courts apply the *Gatlin* standard to loss of chance actions, it is very likely that fewer of these actions will be dismissed at the summary judgment stage.

Another Illinois appellate case holding against recovery in a lost chance of survival situation is *Pumala v. Sipos*.[135] However, the *Pumala* case did not specifically turn on lost chance of survival doctrine. In *Pumala*, a verdict was directed for the defendant when the trial court found that the plaintiff had failed to present evidence on causation.[136] The court based its ruling on the fact that the plaintiff's expert could neither testify to a reasonable degree of medical certainty nor say that it was more probable than not that the plaintiff's injury occurred as a result of the defendant's negligence.[137] The court concluded that the testimony regarding proximate cause was insufficient to present a question for the jury to determine.[138]

In sum, whether a loss of chance action is allowed may very well depend on which appellate panel of justices reviews the case. Two divisions of the First District Illinois Appellate Court have allowed

---

at 142 (Barry, J., dissenting). Judge Barry went on to conclude that "proximate cause is a material question of fact which should be submitted to trial." *Id.* at 143 (Barry, J., dissenting).

131. Gatlin v. Ruder, 560 N.E.2d 586 (Ill. 1990).

132. *Id.* at 589.

133. *Id.*

134. *Id.*

135. Pumala v. Sipos, 517 N.E.2d 295 (Ill. App. Ct. 2d Dist. 1987).

136. *Id.* at 296.

137. *Id.* at 298-99.

138. *Id.* at 299. The *Pumala* court stated that, "A mere possibility is not sufficient to sustain the burden of proof of proximate cause. The causal connection must not be contingent, speculative or merely possible." *Id.*

recovery in a loss of chance situation,[139] while another division of the same district has indicated that it would deny recovery,[140] and the Second, Third, and Fourth Districts all appear to deny recovery.[141]

IV. ANALYSIS

The Illinois appellate cases allowing recovery as well as those denying recovery have all cited *Borowski* as support.[142] It appears that the only way to resolve this conflict is for the Illinois Supreme Court to clarify how the *Borowski* holding should apply in a loss of chance situation. There is a lack of consistency in how the Illinois appellate courts are applying the standards set forth by the Illinois Supreme Court. By denying leave to appeal in these loss of chance cases over the last six years,[143] the Illinois Supreme Court has allowed the controversy to continue. In order to prevent unnecessary litigation and to insure that the laws of the State of Illinois are applied uniformly, the Illinois Supreme Court should grant leave to appeal in a lost chance of survival case and specifically decide the issue.

As discussed in connection with other state supreme court decisions, there are several theories that the Illinois Supreme Court could look to in determining whether or not to allow recovery for lost chance of survival. The barrier that some Illinois appellate courts have found to allowing recovery for loss of chance is that, to do so, traditional proximate causation standards must be relaxed. There are, however, two possible methods for allowing recovery that do not require any relaxation of traditional proximate cause standards.

The first method, which provides a novel approach to loss of chance recovery, is to treat the negligence and the pre-existing condition as concurrent causes.[144] Under this method, it is unnecessary that the alleged negligence be found to be the only cause in order to establish proximate causation.

---

139. Chambers v. Rush-Presbyterian-St. Luke's Medical Ctr., 508 N.E.2d 426 (Ill. App. Ct. 1st Dist., 5th Div. 1987); Northern Trust Co. v. Louis A. Weiss Memorial Hosp., 493 N.E.2d 6 (Ill. App. Ct. 1st Dist., 3d Div. 1986).

140. Hare v. Foster G. McGaw Hosp., 549 N.E.2d 778 (Ill. App. Ct. 1st Dist., 4th Div. 1989).

141. Pumala v. Sipos, 517 N.E.2d 295 (Ill. App. Ct. 2d Dist. 1987); Russell by Russell v. Subbiah, 500 N.E.2d 138 (Ill. App. Ct. 3d Dist. 1986); Curry v. Summer, 483 N.E.2d 711 (Ill. App. Ct. 4th Dist. 1985).

142. *See supra* notes 2-3.

143. *See supra* note 6.

144. *See supra* notes 87-100 and accompanying text.

The Illinois Supreme Court decision in *Ray v. Cock Robin, Inc.*[145] supports the idea that there may be more than one proximate cause of an injury. Relying on fundamental negligence doctrines, the *Ray* court held, " 'there may be more than one proximate cause of injury, and . . . one is liable for its negligent conduct whether it contributed in whole or in part to the plaintiff's injury, so long as it was one of the proximate causes of the injury.' "[146] This holding lends support to the idea that, although the negligence of a defendant is not the sole cause of the injury, the defendant may nevertheless be held liable for the plaintiff's injury. Concurrent causation appears to be one of the rationales the *Chambers* court was advancing.[147] Thus, under accepted tort law, it is not required that the defendant's conduct be the sole cause of the plaintiff's injury.[148] If the defendant's negligence is viewed as a concurrent cause with the plaintiff's pre-existing condition, proximate causation can be found without relaxing traditional standards.

One potential difficulty with the concurrent causes theory is that when the concurrent cause is a pre-existing condition of the plaintiff, the defendant could argue that under the Illinois law of contributory negligence, the plaintiff should not be allowed to recover if the plaintiff's own negligence (the pre-existing condition in this situation) is greater than fifty percent. In a loss of chance situation, the plaintiff will always have had a fifty percent or less chance of survival or recovery at the time of the defendant's negligence.[149]

---

145. Ray v. Cock Robin Inc., 310 N.E.2d 9 (Ill. 1974).

146. *Id.* at 12 (quoting Nelson v. Union Wire Rope Corp., 199 N.E.2d 769, 780 (Ill. 1964)) (citations omitted).

147. Chambers v. Rush-Presbyterian-St. Luke's Medical Ctr., 508 N.E.2d 426, 430-32 (Ill. App. Ct. 1st Dist., 5th Div. 1987). The *Chambers* court discussed why the long-form jury instruction was appropriate in the lost chance of survival situation.

> Defendants' alternative argument, that the long form proximate cause instruction given to the jury deprived them of a fair trial, is without merit. They object to the inclusion of the following sentences in the instruction: "It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury."

Id. at 431 (citations omitted). The court went on to note that, "The comment to this instruction notes that it is appropriate to use the two sentences quoted above where there is evidence that something or the acts of a person other than the defendant proximately caused the injury." *Id.* (citation omitted). The court concluded that the "defendants' defense theory that something other than their negligence (i.e., cancer) caused the death makes the use of the long form instruction appropriate according to the accompanying comment." *Id.* at 432.

148. *See* KEETON ET AL., *supra* note 1, at 265-68.

149. *See supra* note 1.

Therefore, while the idea of treating the defendant's negligence as one of several causes is theoretically possible, if the plaintiff's own condition were to be treated as contributory negligence, then recovery could not be allowed under this theory. In practice, however, the plaintiff's pre-existing condition is not the result of his own negligence in a lost chance case, so it is not analogous to a contributory negligence situation. One advantage to this concurrent cause theory for the plaintiff is that the plaintiff should be able to recover full damages if the defendant's conduct was a proximate cause of the injury, even if the defendant's conduct was not the sole proximate cause.

The second and more widely followed method for allowing recovery for loss of chance without relaxing traditional proximate cause requirements is to treat the reduction in chance of survival or recovery as the injury itself.[150] This approach would be consistent with the holdings of the majority of state supreme courts that have decided the issue. If the loss of opportunity to survive or recover is a distinct injury, then proximate cause can be shown even if the plaintiff has less than a fifty-one percent chance of recovery. The difficulty with this approach is in determining how damages should be measured for this injury of the loss of opportunity to survive or recover.[151]

When the loss of chance injury is treated as a distinct injury for which the plaintiff is recovering, damages are sometimes measured by a percentage of the total value of the plaintiff's life. The percentage is determined in relation to the reduction in chance of survival or recovery.[152] This method has been widely accepted, in

150. *See supra* notes 32-34 and accompanying text.

151. Beyond the issue of allowing loss of chance damages, a corollary issue involves which damage elements should even be included in a loss of chance recovery. At the outset, it should be noted that issues dealing with specific elements of damages recoverable in a lost chance of survival action, such as loss of consortium, are beyond the scope of this article.

However, states have taken varying approaches to the problem of which specific damages should be allowed, and exactly which elements should be included in a loss of chance recovery is the subject of much controversy. For a review of the measure and elements of damages recoverable in medical malpractice actions based on loss of chance, see Martin J. McMahon, Annotation, *Medical Malpractice: Measure and Elements of Damages in Actions Based on Loss of Chance*, 81 A.L.R. 4th 485 (1990). *See also supra* notes 13-15 and accompanying text (listing the various approaches states have taken in awarding loss of chance damages).

152. The Oklahoma Supreme Court in *McKellips* cited the following example to illustrate how the damages recovery would be measured:

> To illustrate the method in a case where the jury determines from the statistical findings combined with the specific facts relevant to the patient[,] the patient originally had a 40% chance of cure and the physician's negligence reduced the

large part due to the influence of Professor King's article,[153] as this was his suggestion as to how to compensate plaintiffs for loss of chance.

A somewhat different approach was taken by the Wisconsin Supreme Court in *Ehlinger by Ehlinger v. Sipes*.[154] It appears that the Wisconsin Supreme Court advocates a method whereby all of the relevant information is given to the jury, including evidence of the likelihood of success of proper treatment, and then the jury determines what a just amount of damages is if the negligence is a substantial factor in causing the harm.[155] This approach gives juries more leeway than applying a straight percentage result. One advantage to this method is that while statistics on rates of survival obtained through expert testimony are likely to vary considerably, the figure that a jury of twelve arrives at will be the result of a more complex valuation process. Thus, while the statistical approach has the advantage of ease of application, the *Ehlinger* court's approach may lead to more just results because the jury has the opportunity to assess and evaluate all factors.

Even without relaxing traditional causation standards, Illinois could allow recovery for loss of chance under either of the two methods outlined above. However, a question arises as to whether or not such recovery should be allowed at all without showing fifty-one percent causation of the total injury. The loss of chance situation is not the only area where recovery is sought without the requirement of proving fifty-one percent causation of the total injury.[156]

A recent set of Seventh Circuit Court of Appeals opinions[157] held that a coal miner must only show that his black lung disease is a contributing cause of his disability to recover under the Black Lung Act. In each case, however, Judge Coffey strongly disagreed with the above analysis, arguing that in order to recover, a coal

---

chance of cure to 25%, (40% - 25%) 15% represents the patient's loss of survival. If the total amount of damages proved by the evidence is $500,000, the damages caused by the defendant is 15% x $500,000 or $75,000.

McKellips v. St. Francis Hosp., Inc., 741 P.2d 467, 477 (Okla. 1987).

153. *See supra* notes 31-34 and accompanying text.

154. Ehlinger by Ehlinger v. Sipes, 454 N.W.2d 754 (Wis. 1990). The *Ehlinger* court did not treat the loss of chance as a distinct injury, but rather allowed the jury to find causation of the whole injury when the defendant's negligence was a substantial factor in producing the harm.

155. *See id.* at 763.

156. *See infra* notes 157-59 and accompanying text.

157. Collins v. Director, Office of Workers' Comp. Programs, United States Dep't of Labor, 932 F.2d 1191 (7th Cir. 1991); Compton v. Inland Steel Coal Co., 933 F.2d 477 (7th Cir. 1991); Shelton v. Old Ben Coal Co., 933 F.2d 504 (7th Cir. 1991).

miner should have to prove that black lung disease caused at least fifty-one percent of his disability.[158] Judge Coffey further argued that using a lower standard allows miners whose disabilities were caused primarily by smoking or congenital heart disease to qualify for government benefits.[159] The majority, however, held against this view. Thus, in areas other than loss of chance, courts have realized that it is not always possible to show fifty-one percent causation in a case where recovery should still be allowed.

Further support for allowing recovery in the loss of chance situation appears in the majority of other state supreme court cases. As discussed above, many of these courts have noted that to deny recovery would mean that a person with less than a fifty percent chance of survival who enters a hospital would have no redress, no matter how gross the negligence of the defendant.[160] Although such a person may have a fifty percent or less chance of surviving his injury or illness, whatever chances that person possesses are one hundred percent of his future. To deny any recovery to a person who loses a substantial chance of surviving would be to essentially say that once your chances reach fifty percent or less, your life is worthless.

In answer to the contention that allowing recovery for loss of chance will open the "floodgates of litigation," it should be noted that the economic realities of attempting to recover in such a lawsuit, especially in the medical malpractice context, will very likely insure that cases are only brought where the damages are substantial and the negligence is fairly clear. Because tort cases are almost always handled on a contingency fee basis, it is highly unlikely that cases will be filed where the loss of chance is a very small percentage. In addition, by including language limiting recovery to cases where the loss of chance is "substantial," the Illinois Supreme Court would limit successful plaintiffs' actions to truly meritorious cases.

Depending on the approach taken by the Illinois Supreme Court, allowing recovery for loss of chance is consistent with prior case law in Illinois on causation. The Illinois Supreme Court should decide a loss of chance case and set forth guidelines to be

158. *Collins*, 932 F.2d at 1195 (Coffey, J., concurring); *Compton*, 933 F.2d at 492 (Coffey, J., concurring); *Shelton*, 933 F.2d at 509 (Coffey, J., dissenting).

159. *Collins*, 932 F.2d at 1195 (Coffey, J., concurring); *Compton*, 933 F.2d at 492 (Coffey, J., concurring); *Shelton*, 933 F.2d at 509 (Coffey, J., dissenting).

160. *See* Herskovits v. Group Health Coop. of Puget Sound, 664 P.2d 474, 477 (Wash. 1983).

followed by both the Illinois trial courts and the Illinois appellate courts.

V. PROPOSAL

The Illinois Supreme Court should allow recovery for loss of chance damages when the loss of chance is substantial. By allowing the jury to decide when proximate causation has been proved and what the proper measure of damages is based on all of the evidence, the Illinois Supreme Court can insure that the people of Illinois are themselves determining what is just compensation and which claims are meritorious. To deny recovery anytime a plaintiff has a fifty percent or less chance of recovery would be dangerous to the public at large and unfair to the individual plaintiff.[161] Violations of the standard of care do not always mean that the negligence has caused the plaintiff to lose a significant chance of survival. However, when the plaintiff can prove that due to the negligence of a defendant, the plaintiff was deprived of a substantial opportunity to survive or recover, the plaintiff should be entitled to recover damages.

VI. CONCLUSION

The conflict in Illinois appellate court decisions on loss of chance has been noted in an American Law Reports annotation.[162] This confusion has led the highest courts of other states to cite Illinois as both a state that allows recovery and as one that does not allow recovery, depending upon which side of the issue the court is seeking to support.[163] The trial courts in Illinois are left

161. The *McKellips* court gave the following rationale for allowing recovery:

> Health care providers should not be given the benefit of the uncertainty created by their own negligent conduct. To hold otherwise would be in effect to allow care providers to evade liability for their negligent actions or inactions in situations in which patients would not necessarily have survived or recovered, but still would have a significant chance of survival or recovery.

McKellips v. St. Francis Hosp., Inc., 741 P.2d 467, 474 (Okla. 1987).

162. John D. Hodson, Annotation, *Medical Malpractice: "Loss of Chance" Causality*, 54 A.L.R. 4th 10 (1990). Illinois is listed in a section on jurisdictions in which requirements are not settled. The annotation cites Northern Trust Co. v. Louis A. Weiss Memorial Hosp., 493 N.E.2d 6 (Ill. App. Ct. 1st Dist., 3d Div. 1986), Russell by Russell v. Subbiah, 500 N.E.2d 138 (Ill. App. Ct. 3d Dist. 1986) and Curry v. Summer, 483 N.E.2d 711 (Ill. App. Ct. 4th Dist. 1985), to show the conflict in Illinois.

163. For example, the dissenting opinion in Falcon v. Memorial Hosp., 462 N.W.2d 44, 62 (Mich. 1990) (Riley, C.J., dissenting), cites *Curry*, as support for the idea that § 323 of the Restatement simply establishes a duty, while the majority opinion in Scafidi v. Seiler, 574 A.2d 398, 404 (N.J. 1990), cites to *Chambers* and *Northern Trust* as authority for allowing recovery in lost chance of survival situations.

without guidance as to what to do in a loss of chance case. In the First District, a trial court would be further confused by looking at the split in its own appellate district.

The Illinois Supreme Court should resolve this conflict by deciding a loss of chance case and setting forth clear guidelines as to when and how recovery should be allowed. This author believes that the fairest and safest result is to allow recovery in loss of chance cases where the loss of opportunity is substantial. However, regardless of how the Illinois Supreme Court decides the issue, it is time to give guidance to both the lower courts and future litigants.

SHELLY E. SMITH