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CASE NOTE

Meck v. Paramedic Services of Illinois: Proximate Cause and the Lost Chance Doctrine in Illinois

by Jennifer Deitchman

I. INTRODUCTION

Illinois state courts have long had conflicting opinions concerning the standard for recovery in medical malpractice suits.¹ The most recent claims at issue have requested the expansion of medical malpractice liability to instances where the defendant's negligence caused a "loss of chance," a reduction in the statistical possibility of survival for the patient.² Because of the lack of definitive precedent from the Illinois Supreme Court, the appellate courts were at odds with one another to formulate the appropriate rule of law concerning proximate cause in these lost chance cases.³ Unfortunately, this disparity created confusion and inconsistency among the jurisdictions.⁴

Finally, the Illinois Supreme Court held in *Holton v. Memorial Hospital* that plaintiffs could recover in lost chance cases if they proved by a preponderance of the evidence that their chances of survival were decreased by defendants' negligence.⁵ As a result, the First District Appellate Court of Illinois was able to apply this new rule of law in *Meck v. Paramedic Services of Illinois* on the appellate level

and create the appropriate standard of review for decisions on summary judgment.⁶

Part II of this Note identifies the problems with determining proximate cause in lost chance cases. In addition, Part II outlines the two arguments presented in decisions leading up to *Meck v. Paramedic Services of Illinois*. Part III discusses the reasoning behind the decision in *Meck*. Part IV compares the court's decision with the preceding cases, and concludes that the correct solution was formulated to determine proximate cause in lost chance cases. Finally, Part V examines how the *Meck* decision will influence future case law and the quality of care provided to the critically ill.

II. BACKGROUND

A. The Concept of Lost Chance

The lost chance of survival doctrine is generally invoked in situations involving a plaintiff who loses a statistically viable chance of living due to the negligent conduct of the defendant.⁷ The most common lost chance situation occurs in a medical malpractice suit where a patient with a

pre-existing condition charges the medical community with malpractice in its treatment of that condition.⁸ The main issue arises when different standards are used for determining whether the pre-existing condition or the malpractice is the proximate cause of the injury.⁹ As a result, many Illinois courts have debated the possibility of recovery allowed in lost chance cases and have arrived at different conclusions of law.¹⁰ However, both sides of the debate at the Illinois appellate level cited to the vague language in the same case, *Borowski v. Von Solbrig*, for precedent when deciding whether to allow recovery.¹¹

The Illinois appellate courts allowing recovery in lost chance situations struggled with the traditional tort standard that would require proof that “but for” the negligence of the tortfeasor injury or death probably would not have occurred.¹² Because of the factual context of most lost chance cases, it was very difficult to prove with any degree of medical certainty that patients who were in critical condition would have survived regardless of any alleged malpractice.¹³ As a result, Illinois appellate courts were forced to rely on a different proximate cause standard in order to allow recovery.¹⁴

B. Advocates for the Lost Chance Doctrine

This different standard for proximate cause in lost chance situations was borrowed from the

Pennsylvania Supreme Court who relied on Section 323 of the Second Restatement of Torts for its reasoning.¹⁵ The Restatement indicates that if a defendant’s negligence increases the risk of physical harm to the plaintiff, he or she is subject to liability for that increased risk.¹⁶ Using this standard, the plaintiff does not need to prove that the defendant’s negligence was the sole cause of the harm or the increased risk, but that it was a contributing cause.¹⁷

The First District Appellate Court of Illinois applied this new standard in *Northern Trust Co. v. Louis Weiss Memorial Hospital and Chambers v. Rush-Presbyterian-St. Luke’s Medical Center*.¹⁸ In *Northern Trust*, plaintiff was suing defendant hospital for negligence in regards to the delay of treatment of a newborn gradually deteriorating from respiratory failure.¹⁹ In that case, the plaintiff’s medical expert testified that because of the delay of proper care, the baby did suffer from increased morbidity, although he could not specify how much.²⁰ As a result, the *Northern Trust* court held for the plaintiff reasoning that once there is evidence that the defendant’s negligence caused an increased risk of harm in the plaintiff, then the case should go to the jury to determine whether the increased risk was a substantial factor in producing the harm.²¹

The First District also ruled in *Chambers v. Rush-Presbyterian* that the jury should decide on proximate cause where evidence is presented that the

defendant's negligence increased the risk of harm to the plaintiff.²² The *Chambers* court held that the negligence need not be the only cause or the nearest cause of the injury.²³

In addition, the *Chambers* court also overruled the "better result" test in support of the Illinois Supreme Court in *Borowski v. Von Solbrig*.²⁴ Both the *Chambers* court and the *Borowski* court held that it is not necessary for the plaintiff to prove that a better result would have occurred had the defendant not been negligent.²⁵

C. Dissenters of the Lost Chance Doctrine

The appellate courts Illinois also rejected the new standard of proximate cause for lost chance cases.²⁶ The court in *Hare v. Foster G. McGaw Hospital* ruled that the mother of a patient who died from complications caused by Hepatitis B could not recover damages from the hospital for its negligent treatment of her son.²⁷ In this case, the First District used *Borowski* for its rationale and held that the plaintiff was required to prove that the defendant's failure to hospitalize the patient more likely than not resulted in his death.²⁸ Because of the lack of this definitive proof, the plaintiff was denied recovery.²⁹

In *Netto v. Goldenberg*, the Second District Appellate Court of Illinois followed the *Hare* decision by requiring the plaintiff to prove that the defendant's negligence more likely than not caused the plaintiff's injury.³⁰

In addition, the *Netto* court also overturned the "substantial factor" theory advanced in *Northern Trust* claiming that it reduced the standard for probable cause.³¹

As a result of the *Hare* and *Netto* decisions, statistics became a vital element of proof in lost chance medical malpractice cases.³² In order for the plaintiff to recover in a lost chance scenario, he or she would have to prove that the patient would have had a better than fifty percent chance of recovery in order to establish that the negligence, not the pre-existing condition, was the proximate cause of the harm.³³ If the expert testimony could only establish a fifty percent chance of recovery or lower, then the plaintiff was not entitled to recover for lack of proximate cause.³⁴

D. The New Rule of Law on Lost Chance

In this environment of contradictions within the appellate districts, the Illinois Supreme Court decided to settle the debate in 1997 with its ruling in *Holton v. Memorial Hospital*.³⁵ In *Holton*, the Illinois Supreme Court sided with the *Northern Trust* and the *Chambers* courts by lowering the standard for recovery in lost chance cases.³⁶ Here, the plaintiff suffered from paraplegia due to the defendant's negligence in failing to properly diagnose her condition in a timely fashion.³⁷ The *Holton* court held that in a lost chance medical malpractice suit, proximate cause may

be established if the defendant's negligence is found to have more likely than not increased the plaintiff's risk of harm.³⁸ In addition, the Illinois Supreme Court specifically overruled the bar against allowing recovery in cases where the patient's recovery is estimated to be less than fifty percent.³⁹

III. DISCUSSION

In *Meck v. Paramedic Services of Illinois*, the First District Appellate Court of Illinois considered whether the lost chance doctrine as applied in the *Holton* case should be applied when ruling on defendant's motion for summary judgment.⁴⁰ The circuit court had granted defendant's motion for summary judgment based on the reasoning in the *Hare* decision ruling that the plaintiff needed to prove that the defendant's negligence more likely than not caused the injury to the decedent.⁴¹ In addition, the decedent had to have a greater than a fifty percent chance at recovery, absent the malpractice, to prove that the defendant's negligence, not the pre-existing condition, was the proximate cause.⁴² Because the expert testimony could not establish a fifty percent chance at recovery, the circuit court ruled in favor of defendant's motion for summary judgment.⁴³

In *Meck*, the decedent, Mr. Roy Meck, suffered a massive heart attack in his home.⁴⁴ Minutes later the emergency medical technicians (EMTs) and paramedics arrived and found Mr. Meck unconscious and without a

pulse.⁴⁵ The paramedics stated that they were able to defibrillate and intubate Mr. Meck in order to establish a pulse.⁴⁶ By the time they reached the hospital, Mr. Meck's heart was resuscitated, but he had suffered severe neurological damage.⁴⁷ He died four days later.⁴⁸

Plaintiff filed a complaint arguing that the paramedics and EMTs violated the professional standard of care by their willful and wanton misconduct on six counts.⁴⁹ The defendant paramedics and the City of Berwyn filed motion for summary judgment claiming that the plaintiff could not prove proximate cause since the decedent did not have a greater than fifty percent chance of survival absent the alleged misconduct.⁵⁰ The trial court subsequently granted the motion for summary judgment and denied plaintiff's motion for reconsideration.⁵¹ The plaintiff appealed both of these decisions.⁵²

The standard for granting a motion for summary judgment is where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."⁵³ In addition, the court must analyze the evidence in a light most favorable to the plaintiff.⁵⁴ If the reviewing court determines that a genuine issue of determining fact exists, then the summary judgment must be overturned.⁵⁵

The First District also

considered the ramifications of the Illinois Emergency Medical Services Systems Act which serves to protect paramedics and EMTs from negligence claims.⁵⁶ In order to file suit, the plaintiff would have to prove willful or wanton misconduct.⁵⁷ The *Meck* court ruled that the case at hand would qualify under this definition, exhibiting a reckless disregard for the safety of others, as defined by previous case law.⁵⁸

In considering the issue of lost chance, the *Meck* court ruled, like the *Holton* court before it, that the *Borowski* test did not lower the plaintiff's burden of proving causation.⁵⁹ Instead, the *Borowski* standard served to prevent the introduction of collateral issues that would result from plaintiff having to prove that a better result would have occurred absent the defendant's negligence.⁶⁰

Next, the *Meck* court again followed the ruling in *Hilton* and held that restricting recovery for negligence against the seriously ill would act as a disincentive to the medical profession to provide quality health care.⁶¹ The defendants argued that they should not be held responsible for any injury to Mr. Meck since he was dead when they arrived at the scene.⁶² However, the court overturned this argument since the decedent was actually revived and lived for four days.⁶³

The First District then held the trial court in error for granting the motion for summary judgment and not applying the standard of proximate cause expressed in *Holton v. Memorial*

Hospital.⁶⁴ Although admitting that the standard established by *Holton* is to be used at the trial level and not at the appellate stage, the *Meck* court applied the *Holton* standard to the case at hand.⁶⁵

Finally, the *Meck* court held that proximate cause was an issue of material fact that should be decided by the jury.⁶⁶ The *Meck* court ruled that the trial court erred when it held that the plaintiff could not prove proximate cause as a matter of law because Mr. Meck had a less than fifty percent chance of survival.⁶⁷ The appellate court's rationale was that the statistical probability of Mr. Meck's survival was not relevant to the injury caused by the defendant or to the ruling on the motion for summary judgment.⁶⁸

IV. ANALYSIS

The First District ruled appropriately in the *Meck* decision with regards to the current state of Illinois law in loss of chance cases. The *Borowski*, *Northern Trust*, *Chambers*, and *Holton* decisions have all determined that recovery should be allowed in medical malpractice suits where the defendant's negligence is not the sole cause.⁶⁹ The *Meck* court correctly applied the law established by the Illinois Supreme Court in *Holton* to the standard of review for decisions on summary judgment and rejected the reasoning establishing a statistical prerequisite for recovery.⁷⁰

As the Illinois Supreme Court determined in *Holton*, barring recovery

for negligence committed against seriously ill patients with less than a fifty percent chance of survival creates a bias in the medical community against those patients who need the most help.⁷¹ By allowing the jury to decide on lost chance cases, the *Meck* and *Holton* courts have helped to eliminate any potential prejudice within the medical community against critically ill patients.⁷²

Next, the rejection of statistics when analyzing proximate cause will help to prevent possible fraud in expert testimony.⁷³ By setting fifty percent as an arbitrary bar to recovery, the courts would be encouraging potential plaintiffs to find any way possible to get over the statistical hurdle in order to have their cases heard.⁷⁴ As a result, the courts would find themselves wading through conflicting expert testimony in every case as to which party's numbers add up to proximate cause as a matter of law.⁷⁵ Setting a statistical boundary will trivialize the proximate cause issue and actually allow cases that would not have qualified under traditional standards to muddle the court system.⁷⁶ The *Meck* court ruled correctly to eliminate the statistical squabbles.

Finally, the *Meck* court held correctly that the *Northern Trust* decision did not lower the standard of proximate cause as held by the *Hare* court.⁷⁷ Instead, by allowing the jury to decide proximate cause as a matter of fact, the *Meck* court has guaranteed that proximate cause will remain a viable issue for the plaintiff.⁷⁸ In order

to recover, the plaintiff must be able to convince an entire jury instead of one judge that the defendant was negligent.⁷⁹

V. IMPACT

Although prior decisions have ruled in favor of recovery in lost chance cases, the *Meck* court's decision specifically will help to solidify the rule of law established in *Holton* and extend it to rulings on motions for summary judgment.⁸⁰ Consequently, there will be fewer lost chance cases rejected at the onset of trial since proximate cause will be considered a jury question.⁸¹

Furthermore, now that the Illinois Supreme Court has established the law in lost chance cases, future parties have a consistent standard with which to plan their strategies.⁸² Before the *Holton* and *Meck* decisions, the standard of law depended more on the jurisdiction or the judge rather than a reliable, established rule of law.⁸³ Now that the rule is established, there will be more consistency in the outcomes of lost chance cases.⁸⁴

Finally, the medical community will be held more accountable to the quality of care given to the critically ill.⁸⁵ By rejecting the notion that medical malpractice can continue to rob the critically ill of their hope of survival without any accountability, the *Meck* and *Holton* courts have established that chances of survival should be a protected commodity.⁸⁶

VI. CONCLUSION

In summary, the Illinois courts have established that proximate cause in lost chance medical practice cases is a question of fact for the jury. Proximate cause can be shown by a preponderance of the evidence proving that defendant's negligence was a cause of the injury or loss of chance. As a result, the Illinois courts now have a consistent, fair standard with which to work.

ENDNOTES

¹ See Shelly Smith, *Lost Chance of Survival in Illinois: The Need for Guidance from the Illinois Supreme Court*, 23 LOY. U. CHI. L.J. 155, 155 (Fall, 1991) [hereinafter Smith, *Lost Chance of Survival*]. For more general discussion of lost chance cases, see also Jim Perdue, *Recovery for a Lost Chance of Survival: When the Doctor Gambles, Who Puts up the Stakes?*, 28 S. TEX. L. REV. 37 (1987); Patricia Andel, *Comment, Medical Malpractice: The Right to Recover for the loss of Chance of Survival*, 12 PEPP. L. REV. 973 (1985).

² See Smith, *Lost Chance of Survival*, *supra* note 1 at 155.

³ See Smith, *Lost Chance of Survival*, *supra* note 1 at 156.

⁴ See Smith, *Lost Chance of Survival*, *supra* note 1 at 157.

⁵ 679 N.E.2d 1202, 1213 (Ill. 1997). See also *Haijan v. Holy Family Hosp.*, 652 N.E.2d 1132, 1138 (Ill. App. Ct. 1st Dist. 1995) for discussion of whether standards for proximate cause in medical malpractice cases can harmonize with lost chance cases.

⁶ 695 N.E.2d 1321, 1327 (Ill. App. Ct. 1st Dist.1998).

⁷ See Smith, *Lost Chance of Survival*, *supra* note 1 at 155.

⁸ See Smith, *Lost Chance of Survival*, *supra* note 1 at 156.

⁹ See *id.*

¹⁰ See *id.*

¹¹ 328 N.E.2d 301, 305 (Ill. 1975). The disputed language provides that the burden of proof "must be sustained by proving that the proposition on which he has the burden (proximate cause) is more probably true than not true." See *id.* Illinois appellate courts later interpreted this language as a bar to recovery for a plaintiff whose survival rate was less than fifty percent. See Smith, *Lost Chance of Survival*, *supra* note 1 at 157. However, other Illinois appellate courts in opposition to the bar chose to incorporate other language from *Borowski* into their decisions. "It is unnecessary to extend the burden-of-proof requirements of a medical malpractice case beyond those of an ordinary negligence case by adding the further requirement that the plaintiff prove a better result would have been achieved absent the alleged negligence of the doctor." *Borowski*, 328 N.E.2d at 305.

¹² See Smith, *Lost Chance of Survival*, *supra* note 1 at 157.

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See *Northern Trust Co. v. Louis A. Weiss Hosp.*, 493 N.E.2d 6, 11 (Ill. App. Ct. 1st Dist. 1986) (citing to *Hamil v. Bashline*, 392 A2d 1280, 1288 (1978)). The *Hamil* court provided that once evidence is introduced that a defendant's negligent act increased the risk of

harm, and that harm did occur, that it becomes a question for the jury to decide whether or not it is a substantial factor. See *Northern Trust*, 493 N.E. at 11.

¹⁶ RESTATEMENT (SECOND) OF TORTS § 323 (1965):

One who undertakes...to render services to another which he should recognize as necessary for the protection of the other's person...is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if:

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

¹⁷ See *Holton*, 679 N.E.2d at 1209.

¹⁸ *Northern Trust*, 493 N.E.2d at 16 (holding that it was a jury question to decide on negligence in part); and *Chambers v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 508 N.E.2d 426, 430 (Ill. App. Ct. 1st Dist. 1987) (holding that there may be more than one proximate cause of injury and that one is liable for his or her negligence whether the negligent act contributed solely or in part to the injury).

¹⁹ *Northern Trust*, 493 N.E.2d at 9.

²⁰ See *id.* at 11. "Morbidity" refers to complications due to an ongoing disease process. See *id.* at 11.

²¹ See *id.* at 12.

²² *Chambers*, 508 N.E.2d at 431.

²³ *Id.* at 430.

²⁴ *Id.* at 429-30.

²⁵ *Id.* at 430.

²⁶ *Hare v. Foster G. McGaw Hosp.*, 549 N.E.2d 778, 781 (Ill. App. Ct. 1st Dist. 1989) (holding that if death occurs even in the

absence of negligence, the negligence was not a cause in fact of the death); *Netto v. Goldenberg*, 640 N.E.2d 948, 954 (Ill. App. Ct. 2nd Dist. 1994) (ruling that the *Northern Trust* and *Chambers* courts improperly removed the proximate cause element from medical negligence actions).

²⁷ *Hare*, 549 N.E.2d at 784.

²⁸ See *id.* at 783. The *Hare* court held that the plaintiff needed to prove that her son had a better than fifty percent chance of surviving in order to satisfy the "more probably than not" standard in *Borowski*. See *id.* at 783.

²⁹ See *id.* at 784.

³⁰ *Netto*, 640 N.E.2d at 954.

³¹ *Id.*

³² See *Smith, Lost Chance of Survival*, *supra* note 1 at 171.

³³ See *id.*

³⁴ See *id.*

³⁵ *Holton*, 679 N.E.2d at 1207.

³⁶ *Id.* at 1211.

³⁷ See *id.* at 1208.

³⁸ *Id.* at 1213.

³⁹ See *id.*

⁴⁰ *Meck*, 695 N.E.2d at 1323.

⁴¹ See *id.* at 1324.

⁴² See *id.*

⁴³ See *id.*

⁴⁴ *Id.* at 1323.

⁴⁵ *See id.* at 1324.

⁴⁶ *See id.*

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹ *See id.*

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *See id.*

⁵³ *See* 735 ILL. COMP. STAT. 5/2-1005(c) (West 1996).

⁵⁴ *Meck*, 695 N.E.2d at 1324. *See also*, *Wells v. Enloe*, 669 N.E.2d 368, 371 (Ill. Ct. App. 5th Dist. 1996); *Gatlin v. Ruder*, 560 N.E.2d 586, 589 (Ill. 1990).

⁵⁵ *Meck*, 695 N.E.2d at 1324.

⁵⁶ *See* 210 ILL. COMP. STAT. 50/3-150 (West 1996). Section 3-150 provides, in pertinent part:

(a) Any person, agency or governmental body licensed or authorized pursuant to this Act or its rules, who in good faith provides life support services...in an emergency shall not be civilly or criminally liable as a result of their acts or omissions in providing such services unless such acts or omissions...are inconsistent with the person's training or constitute willful or wanton misconduct. *See id.*

⁵⁷ *See Meck*, 695 N.E.2d at 1324. An act is defined as "willful or wanton" if it demonstrates a failure to exercise ordinary care and is committed under circumstances exhibiting a reckless disregard for the safety

of others. *See Affatato v. Jewel Cos.*, 632 N.E.2d 137, 145 (Ill. App. Ct. 1994).

⁵⁸ *See Meck*, 695 N.E.2d at 1325.

⁵⁹ *Meck*, 695 N.E.2d at 1327. The *Borowski* test refers to language in the opinion stating that plaintiff should present evidence that defendant's negligence was more likely than not a cause of injury in order to recover. *Borowski*, 328 N.E.2d at 305.

⁶⁰ *Borowski*, 328 N.E.2d at 305.

⁶¹ *Meck*, 695 N.E.2d at 1328.

⁶² *See id.*

⁶³ *See id.*

⁶⁴ *See id.* at 1325. (referring to *Holton*, 679 N.E.2d at 1213).

⁶⁵ *Meck*, 695 N.E.2d at 1325. The *Holton* court held as a standard that plaintiff should not have to prove that the victim had a greater than fifty percent chance of survival in order to recover. *Holton*, 679 N.E.2d at 1213.

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ *See Smith, Lost Chance of Survival*, *supra* note 1 at 157.

⁷⁰ *Meck*, 695 N.E.2d at 1328.

⁷¹ *See Smith, Lost Chance of Survival*, *supra* note 1 at 179.

⁷² *Meck*, 695 N.E.2d at 1328.

⁷³ *See Smith, Lost Chance of Survival*, *supra* note 1 at 178.

⁷⁴ See *id.*

⁷⁵ See Smith, *Lost Chance of Survival*, *supra* note 1 at 179.

⁷⁶ See Smith, *Lost Chance of Survival*, *supra* note 1 at 178.

⁷⁷ See *Holton*, 679 N.E.2d at 1213.

⁷⁸ *Meck*, 695 N.E.2d at 1327.

⁷⁹ See *id.*

⁸⁰ *Id.* at 1327.

⁸¹ See Smith, *Lost Chance of Survival*, *supra* note 1 at 178.

⁸² See Smith, *Lost Chance of Survival*, *supra* note 1 at 157.

⁸³ See Smith, *Lost Chance of Survival*, *supra* note 1 at 157.

⁸⁴ See *Meck*, 695 N.E.2d at 1328.

⁸⁵ See *id.*

⁸⁶ *Id.*; *Holton*, 679 N.E.2d at 1213.

