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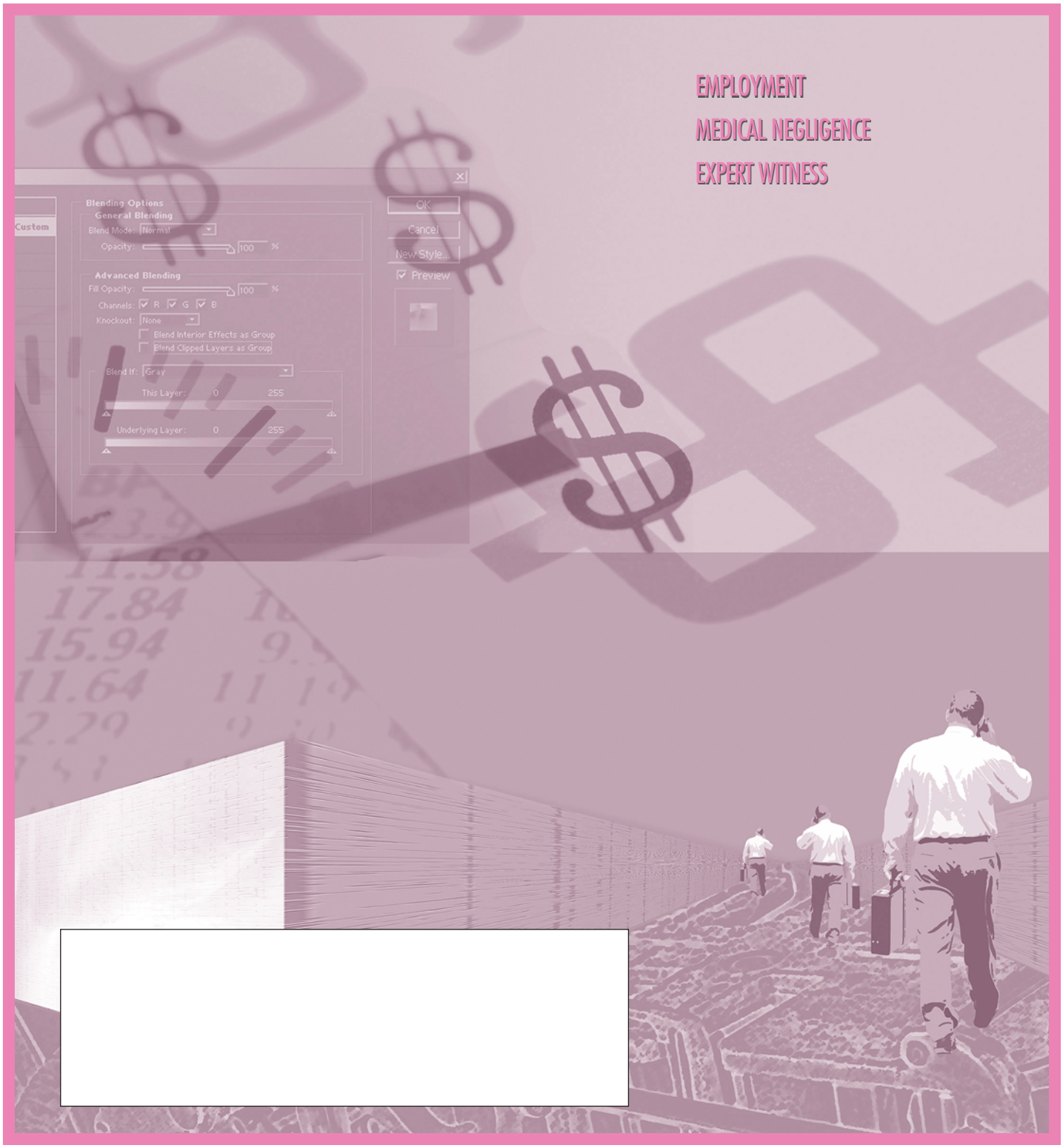

The Loss-of-Chance Doctrine in Colorado

By Anthony Viorst, Esq.

1. The Loss-of-Chance Doctrine

The "loss of chance" doctrine applies in a medical negligence action when a plaintiff might have suffered the injury without the defendant's negligent act or omission, but the defendant's negligence increased the probability of the injury. The doctrine is most frequently applied in failure-to-diagnose cases, in which the plaintiff's illness goes untreated for a time, thereby increasing the risk that the illness will adversely affect the patient's health. In such cases, the physician did not cause the underlying medical condition, and the patient might not have recovered even if the condition had been properly diagnosed. Therefore, satisfying the traditional burden of proving proximate cause can be extremely difficult, if not impossible.

Under the traditional definition of proximate cause, the plaintiff must prove that if the defendant had not been negligent, he or she would not have suffered the injury. Applying this traditional definition in a failure-to-diagnose case requires the plaintiff to prove that, at the time of the failure to diagnose, he or she had a 50 percent or greater chance of recovery or survival; a plaintiff whose chance of survival was less than 50 percent will have no cause of action. A significant minority of states subscribe to this approach.[1]

Fortunately, most jurisdictions that have considered this issue have determined that the traditional definition of causation should not apply when a doctor's negligence reduces a patient's opportunity to recover. These jurisdictions instead subscribe to some form of the loss-of-chance doctrine, which allows the injured patient or his or her survivors compensation for the "lost chance" of recovery or survival resulting from the doctor's negligence.

The loss-of-chance doctrine commonly comes into play in those cases where the patient had less than an even chance of recovery or survival when he or she originally consulted a physician, and thus cannot satisfy the traditional standard of causation. The doctrine did not have much support until 1981, when the *Yale Law Review* published an article by Professor Joseph H. King, Jr., which stated:

> The loss of a chance of achieving a favorable outcome or of avoiding an adverse consequence should be compensable and should be valued appropriately, rather than treated as an all-or-nothing proposition. Preexisting conditions must, of course, be taken into account in valuing the interest destroyed. When those preexisting conditions have not absolutely preordained an adverse outcome, however, the chance of avoiding it should be appropriately compensated even if that chance is not better than even.[2]

The primary rationale for the loss-of-chance doctrine is that it imposes the costs of uncertainty – that is, whether a patient would have recovered but for the physician's negligence – on the negligent doctor, rather than on the innocent patient.

In 1987, the Oklahoma Supreme Court, citing Professor King's article, concluded that:

> . . . [I]n those situations where a health care provider deprives a patient of a significant chance for recovery by negligently failing to provide medical treatment, the health care professional should not be allowed to come in after the fact and allege that the result was inevitable inasmuch as that person put the patient's chance beyond the possibility of realization. Health care providers should not be given the benefit of the uncertainty created by their own negligent conduct. To hold otherwise would in effect 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.[3]

Courts that adopt the loss-of-chance doctrine in effect recognize a lost chance as a distinct cause of action, treating it as a compensable injury.[4] As a distinct claim, the plaintiff must still prove by a preponderance of the evidence that the defendant's conduct reduced his or her chance of a more favorable outcome.[5]

Some jurisdictions require that the plaintiff prove that the lost chance of recovery was "substantial."[6] None of these courts has set a minimum for a "substantial" lost chance, but at least one has held that a lost chance of 11 percent meets this criterion.[7] Some courts have held that although statistical evidence may be required in the damages phase of the case, it is not required to prove causation. Rather, the plaintiff need only present expert testimony that his or her chance of recovery would have been "substantially" or "significantly" greater if not for the physician's negligence.[8]

Other jurisdictions hold that the lost chance need not be substantial or significant, as long as the negligence reduced, to any degree, the patient's opportunity to recover. Jurisdictions that subscribe to this rule have, either explicitly or implicitly, adopted sec. 323(a) of the *Restatement (Second) of Torts* (1965), which states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize 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 . . . his failure to exercise such care increases the risk of such harm.

Of those jurisdictions that have adopted the loss-of-chance doctrine, the majority use an approach consistent with this section of the Restatement.[9]

2. Valuation of Lost Chance

The preferred approach to determining the value of a lost chance is the "percentage probability" method.[10] Under this formula, once negligence and causation have been proven, damages are computed by multiplying the chance of recovery lost by the total value of a complete recovery.[11] This formula requires the jury to place a monetary value on the life or limb that the plaintiff lost, or is in danger of losing. The percent of chance lost must then be multiplied by the value of that life or limb.[12]

Consider this hypothetical situation, taken from the South Dakota Supreme Court's decision in *Jorgenson v. Vener*:

> The patient's task under the loss of chance doctrine . . . would be to first prove that the physician's conduct caused the loss of the chance by a preponderance of the evidence. Once causation has been established, the value of the injury, whether a possibility (less than 50%) or a probability (greater than 50%), is compensable. Assuming, for example, that a patient had a 40% chance of recovery under optimal conditions, and the physician's negligence destroyed that chance, the value of the lost chance would be 40% of the total value of a complete recovery. Similarly, if the patient's chance at recovery was 60% and the physician's negligence eliminated that chance, the value of the lost chance would be 60% of the value of a complete recovery. Or, if instead of completely eliminating the chance of recovery, the physician's negligence merely reduced the chance of recovery from 40% to 20%, then the value

of the lost chance would be 20% of the value of a complete recovery.[13]

3. Loss of Chance in Colorado

The status of the loss-of-chance doctrine in Colorado is unclear. The first reference to the doctrine is found in *Poertner v. Swearingen*[14], a Tenth Circuit case applying Colorado law. Had the clot been properly diagnosed, the plaintiff "could have undergone an operation that might have succeeded in removing the clot."[15] However, the clot subsequently traveled to the plaintiff's skull, where it became inoperable. It caused the plaintiff to suffer paralysis and partial blindness.[16] The plaintiff alleged that the defendant-doctor's negligence cost her "a chance" to remedy the injury.[17] On appeal from the entry of a directed verdict, the Tenth Circuit remanded the matter to the trial court to determine whether the loss-of-chance doctrine would be recognized in Colorado.[18]

The loss-of-chance doctrine was squarely addressed by the Colorado Court of Appeals in *Sharp v. Kaiser Foundation Health Plan of Colorado.*[19] There, plaintiff had suffered a debilitating heart attack, and claimed that she "was negligently misdiagnosed as having stable rather than unstable angina and that had she received different or more prompt medical treatment her chances of suffering a heart attack would have been reduced."[20] The evidence showed that the misdiagnosis increased plaintiff's chances of suffering a heart attack by 20 to 25 percent.[21] The issue on appeal, following the imposition of summary judgment in favor of the defendant, was whether "the jury should be allowed to decide the issue of causation because there is expert testimony that defendants substantially increased plaintiff's risk of the resulting harm or substantially diminished the chance of recovery."[22] Citing Professor King's article, section 323(a) of the *Restatement (Second) of Torts,* and the principle that the costs of uncertainty should be borne by the negligent doctor rather than the patient, the Court of Appeals adopted the loss-of-chance doctrine, and held that a plaintiff can recover by showing that the loss of chance was substantial.[23] Reversing the trial court's ruling, the Court of Appeals found that the evidence showing a 20 to 25 percent loss of chance was sufficient to submit this issue to the jury.[24]

Unfortunately, the Court of Appeals holding was modified by the Supreme Court on certiorari review.[25] Upholding the Court of Appeals, the Supreme Court "affirm[ed] on narrower grounds," finding that Plaintiffs had presented sufficient evidence of causation, under the traditional definition, to warrant submission of the case to a jury.[26] Specifically, the Court credited the affidavit of plaintiff's expert, in which the expert opined that it was "more probable than not that, with adequate treatment, Mrs. Sharp should not have sustained" a heart attack.[27] In reaching its holding, the Supreme Court explicitly declined to address "the court of appeals 'substantial factor' analysis, or its application of section 323(a) of the Restatement (Second) of Torts, as the resolution of those issues is not necessary to this appeal."[28] Regarding the loss-of-chance doctrine, the Supreme Court stated, in footnote 5, as follows:

> Although it was not necessary to its decision, the court of appeals applied the "lost-chance" doctrine embodied in Restatement (Second) of Torts §323(a) (1965). Restatement section 323(a) has been followed in several jurisdictions, *see, e.g., Hamil v. Bashline*, 481 Pa. 256, 392 A.2d 1280 (1978); *Herskovits v. Group Health Cooperative*, 99 Wash.2d 609, 664 P.2d 474 (1983), but we express no opinion on whether we would apply section 323(a) in a proper case.[29]

Thus, following the issuance of the Supreme Court's opinion in *Kaiser Foundation Health Plan of Colorado v. Sharp*, the status of the loss-of-chance doctrine remained uncertain. Since the issuance of that opinion, no Colorado case has addressed the loss-of-chance doctrine.[30]

Despite the Supreme Court's refusal to address the applicability of the loss-of-chance doctrine in Colorado, it appears likely that, when the issue arises, the Court will adopt the doctrine. This perception is based upon several factors. First, the notion that the costs of uncertainty should be borne by the negligent doctor rather than the innocent patient is eminently reasonable. Second, the loss-of-chance doctrine is consistent with other pro-plaintiff principles that have been adopted in Colorado, such as the principle that an injured plaintiff is entitled to be "made whole" by the tortfeasor.[31] Third, the Supreme Court's *Sharp* opinion, in footnote 5, acknowledges that the loss-of-chance doctrine has been followed in other jurisdictions, and thus appears to view the doctrine in a favorable manner. Fourth, as noted above, the loss-of-chance doctrine has been adopted by the majority of states that have considered it, including virtually all of the states in the Rocky Mountain region.[32]

4. Conclusion

The loss-of-chance approach to proving causation, in those cases in which the defendant's negligence increased the probability of the injury, is a fair way to compensate patients or their survivors for the denial of a chance to recover or survive caused by a doctor's negligence. Fortunately, this approach appears to be gaining widespread acceptance in the courts. Hopefully, at some point soon, the doctrine will be officially adopted in the state of Colorado.

End Notes

[1] *See e.g.,* Mich. Comp. Laws Ann. § 600.2912a(b)(2) (West 2006) ("In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%."); *Brommee v. Pavitt*, 7 Cal. Rptr.2d 608 (Ct. App. 1992); *Clayton v. Thompson*, 475 So.2d 439, 445 (Miss. 1985); *Fennell v. S. Md. Hosp. Ctr., Inc.*, 580 A.2d 206 (Md. Ct. App. 1990).

[2] Joseph H. King Jr., *Causation, Valuation and Chance in Personal Injury Torts*

Involving Preexisting Conditions and Future Consequences, 90 YALE L.J. 1353, 1354 (1981).

[3] *McKellips v. St. Francis Hospital, Inc.*, 741 P.2d 467, 474 (Okla. 1987).

[4] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 41, 45 (5th ed. Supp. 1988); *see also Jorgenson v. Vener,* 616 N.W.2d 366, 370 (S.D. 2000); *DeBurkarte v. Louvar*, 393 N.W.2d 131 (Iowa 1986).

[5] *Jorgenson*, 616 N.W.2d 366, 370-71.

[6] *See e.g. Delaney v. Cade*, 873 P.2d 175, 183 (Kan. 1994); *Mayhue v. Sparkman*, 653 N.E.2d 1384, 1389 (Ind. 1995); *McKellips, supra*, 741 P.2d at 476; *Perez v. Las Vegas Med. Ctr.*, 805 P.2d 589, 591 (1991); *Wollen v. DePaul Health Ctr.*, 828 S.W.2d 681, 685 (Mo. 1992).

[7] *Jeanes v. Milner*, 428 F.2d 598, 605 (8th Cir. 1970); *see also Jorgenson v. Vener*, 640 N.W.2d 485, 491 n.4 (S.D. 2002) (Gilbertson, C.J. dissenting) (15 percent is substantial); *Mays v. United States*, 608 F. Supp. 1476, 1481 (D. Colo. 1985), *rev'd on other grounds*, 806 F.2d 976 (10th Cir. 1986) (25 % is substantial); *O'Brien v. Stover*, 443 F.2d 1013, 1018 (8th Cir. 1971) (30 percent is substantial).

[8] *See McKellips*, 741 P.2d at 474; *Perez*, 805 P.2d at 592; *Wollen*, 828 S.W.2d at 683.

[9] *See e.g., Borkowski v. Sacheti*, 682 A.2d 1095 (Conn. Ct. App. 1996); *DeBurkarte v. Louvar*, 393 N.W.2d 131 (Iowa 1986); *Hastings v. Baton Rouge Gen'l Hosp.*, 498 So.2d 713 (La. 1986); *Holton v. Mem'l Hosp.*, 679 N.E.2d 1202 (Ill. 1997).

[10] *See* Margaret T. Mangan, *The Loss of Chance Doctrine: A Small Price to Pay for Human Life,* 42 S.D. L. REV. 279, 311 (1997).

[11] *Jorgenson*, 616 N.W.2d at 372 (*citing McKellips*, 741 P.2d at 476-77); *Wollen,* 828 S.W.2d at 684.

[12] *See Alberts v. Schultz*, 975 P.2d 1279, 1287 (N.M. 1999); *Wollen*, 828 S.W.2d at 684-65.

[13] *Jorgenson*, 616 N.W.2d at 372 n.8.

[14] *Poertner v. Swearingen*, 695 F.2d 435 (10th Cir. 1982).

[15] *Id.* at 435.

[16] *Id.*

[17] *Id.* at 435-36.

[18] *Id.* at 436 n.1.

[19] *Sharp v. Kaiser Foundation Health Plan of Colorado,* 710 P.2d 1153 (Colo. App. 1985).

[20] *Id.* at 1154.

[21] *Id.* at 1156.

[22] *Id.* at 1154.

[23] *Id.* at 1156.

[24] *Id.*

[25] *Kaiser Foundation Health Plan of Colorado v. Sharp,* 741 P.2d 714 (Colo. 1985).

[26] *Id.* at 720.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 720 n.4.

[30] The issue was addressed by the Federal District Court in Colorado, in *In re Breast Implant Litigation*, 11 F. Supp.2d 1217 (D. Colo. 1998). In that case, the federal district court cited the court of appeals' *Sharp* opinion for the proposition that Colorado has recognized the loss-of-chance doctrine. *Id.* at 1226. The Wis. Court of Appeals has also cited the Colo. Court of Appeals' *Sharp* opinion for this proposition. *See Ehlinger v. Sipes*, 148 Wis.2d. 260, 434 N.W.2d 825, 828 (Wis. App. 1988). These cases fail to account for the Colo. Supreme Court's disavowal of the Colo. Court of Appeals opinion.

[31] *See Preston v. Dupont*, 35 P.3d 433, 440 (Colo. 2001) ("[C]ompensatory damages are those that compensate a victim and make her whole").

[32] *See, e.g., Medved v. Glenn*, 125 P.3d 913, 917 (Utah 2005); *Alberts v. Schultz*, 126 N.M. 807, 975 P.2d 1279, 1283-84 (N.M. 1999); *Delaney v. Cade,* 255 Kan. 199, 873 P.2d 175, 211 (Kan. 1994); *McKellips v. Saint Francis Hosp., Inc.*, 741 P.2d 467, 474 (Ok. 1987); *Aasheim v. Humberger,* 215 Mont. 127, 695 P.2d 824, 828 (Mont. 1985); *Thompson v. Sun City Cmty. Hosp., Inc.*, 141 Ariz. 597, 688 P.2d 605, 615-16 (Az. 1984).