

LOSS-OF-CHANCE REVISITED -- DOES MINNESOTA COMPENSATE DOOMED PATIENTS?

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On its face, negligent misdiagnosis is a garden-variety medical malpractice action, if there is such a thing. The prima facie elements are: 1) establishing the standard of care; 2) showing that defendant departed from the standard of care; 3) showing that defendant's departure was a direct cause of the compensable harm; and 4) showing the nature and extent of the harm. The third element, proof of compensable harm, requires special attention when the negligence resulted in the plaintiff's likelihood of surviving his or her illness falling from above 50% to below 50%.

In some jurisdictions, this circumstance would merit no particular legal attention. There, the law entitles a plaintiff to be compensated for the reduction in the chance of survival without regard to whether or not he or she is likely to die due to the alleged negligence. This is called a loss-of-chance claim. The Minnesota Supreme Court has refused to recognize this cause of action where, despite the negligence, the plaintiff's likelihood of survival remains above 50%. Our Court, however, has not clearly faced the circumstance where the negligence resulted in the plaintiff's likelihood of surviving his or her illness falling from above 50% to below 50%.

A. Loss-of-Chance

Under the loss-of-chance theory, a patient whose chances of recovery have been reduced is permitted to recover damages for that reduction. This is true for the patient who continues to have a chance of survival greater than 50% after a physician's negligence as well as the patient whose chance of survival was never greater than 50%. The patient in either of these scenarios can prove causation by establishing through competent medical testimony simply that the negligence lowered the chance of survival. See generally, Martin J. McMahon,

Annotation, Medical Malpractice: Measure and Elements of Damages in Actions Based on Loss of Chance, 81 A.L.R. 4th at 485 (2008).

The caveat to the loss-of-chance theory of recovery is that the patient's damage calculation is subject to the "proportional approach." Under the proportional approach, a defendant physician is only liable for a proportional amount of the plaintiff's injuries. See, Steven R. Koch, *Whose Loss is it Anyway? Effects of the "Lost-Chance" Doctrine on Civil Litigation and Medical Malpractice Insurance*, 88 N.C. L. Rev. 595 (2010). Thus, if a physician's negligence causes a patient's chance of recovery to decrease from 30 percent to 20 percent, the patient may only recover 10 percent of his or her total damages from the negligent physician.

Twenty-two states have adopted the loss-of-chance doctrine. See, Steven R. Koch, *Whose Loss is it Anyway? Effects of the "Lost-Chance" Doctrine on Civil Litigation and Medical Malpractice Insurance*, 88 N.C. L. Rev. 595 (2010). Sixteen states, including Minnesota, have expressly refused to recognize loss-of-chance, while six other states have deferred on deciding the issue. *Id.* The highest court has yet to address the issue in the remaining six states. *Id.*

Minnesota chose not to recognize a loss-of-chance cause of action because both damage and liability calculations are too speculative and necessarily based upon hard-to-prove statistics. *Fabio v. Bello-mo*, 504 N.W.2d 758, 762-3 (Minn. 1993). However, in *Fabio*, the plaintiff's proof was that she was still expected to survive despite the alleged negligence, that is, her likelihood of survival remained above 50%. *Id.* See also *Leubner v. Sterner*, 593 N.W.2d 119 (Minn. 1992); *Hilt v. Roy*, 1995 WL 497280 (Minn. App. Ct. 1995).

B. The Deceased Patient

The most common fact situation in this category of claims involves a wrongful death claim where the proof is that the negligent failure to diagnose resulted in the patient's chance of surviving the underlying illness or medical condition falling from above 50% to below 50% and the patient dying before the commencement of suit or at least before the trial. In other words, the proof is that the negligence made it probable that the patient would not survive and, indeed, the patient did not survive. A recent example of this circumstance is *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711 (Minn. 2008).

In *MacRae*, the plaintiff's decedent, her husband, had a mole that became suspicious. Doctors performed a shaved biopsy without removing the entire mole. The laboratory made a negligent mistake - it reported that the mole was benign when in fact it was malignant. According to medical expert testimony, Mr. MacRae's melanoma would have been completely cured if the correct diagnosis had been timely made and the mole been removed. Instead, the melanoma became metastatic and unsurvivable. Mr. MacRae ultimately succumbed to this cancer.

The issue before the Court in *MacRae* was when the claim accrued for statute of limitations purposes. *Id.* at 715. Suit was commenced more than four years after the date of the alleged negligence. However, the medical proof was that "within four years of [the commencement of suit], Roderick MacRae's illness progressed to the point where it was no longer more likely than not that he would have survived his illness [with treatment.]" *Id.*

The Court held that the claim in *MacRae* did not accrue until Mr. MacRae reached the point in time where he could not survive his cancer. This holding was



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based on the Court's view that, on the record before it, no legally compensable harm occurred until Mr. MacRae became unlikely to survive his illness:

We agree that a patient suffers compensable damage from a negligent misdiagnosis of cancer when it becomes more likely

than not that he will not survive the disease.

Id. at 719-20, 22.

The proof regarding this issue of survivability in *MacRae* consisted of the opinion of a hematologist and was not complicated or elaborate. The expert opined

simply that melanoma that originates in the left leg will first become metastatic in the inguinal lymph node. Because no abnormality was noted in these lymph nodes during a preoperative examination within four years of the commencement of suit, Mr. MacRae's cancer likely had

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not yet metastasized and he likely would have survived if his cancer had been discovered and treated at that time. *Id.* at 715.¹

C. The Doomed Patient

Assume Mr. MacRae commenced suit while still living. Would he have had a legally compensable claim based upon the very same proof that the negligent misdiagnosis of his cancer made it more likely than not that he would not survive that disease? Or would his case have been subject to summary dismissal as nothing more than a loss-of-chance claim? This fact pattern has not been presented to our appellate courts.

It is submitted that Mr. MacRae, in this example, should not be deprived of a

remedy by the fortuity of still being alive at the time suit is commenced. To hold otherwise would require a complete departure from the holding, and logic, in *MacRae*. Moreover, it would not reflect Minnesota's public policy to place "great value on compensating tort victims." *Jepson v. General Cas. Co. of Wisconsin*, 513 N.W.2d 467, 469 (Minn. 1994).

There is nothing in our jurisprudence that supports the notion that only wrongful death negligent diagnosis claims are legally viable. Indeed, the irony is that if the patient takes too long to die, even the wrongful death claim recognized in *MacRae* would fail because the statute of limitations would have expired before the death.²

It has been our common law for decades that a tort cause of action accrues when

there has been legally compensable harm. In the medical negligence wrongful death setting, a cause of action accrues when the defendant's negligence has caused the patient to become likely not to survive the underlying disease. There is no reasonable basis to treat the living, but doomed plaintiff differently than the family of the deceased patient.

¹ The *MacRae* Court discussed *Fabio*, but not as it related to the issue of a loss of a chance..

² A medical negligence wrongful death claim must be commenced within three years of the date of death, but not more than four years from the date the cause of action accrued. Minn. Stat. §§ 541.076, 573.02.

