

Arizona's Loss of a Chance Doctrine
Not a Cause of Action, but More Than an Evidentiary Rule
by Stephen A. Bullington

Parker was taken to the emergency room with tightness in his chest and severe shortness of breath. A battery of tests which included a chest x-ray led to an ultimate diagnosis of congestive heart failure. Parker was admitted to the hospital under the care of an internal medicine specialist, Dr. Crow, and was appropriately treated for his heart condition. He was discharged several days later with medication and a diet designed to prevent future episodes of congestive heart failure. Parker went back to Dr. Crow, as instructed, one month later and his condition had stabilized. Dr. Crow instructed his patient to continue with his diet and medication and return in six months for follow-up. Parker followed these instructions and when he returned in six months, his heart condition was still under control. He complained, however, that he had developed a cough in the last month and was just recently noticing a bloody tint to his sputum. Dr. Crow was visibly shaken. He explained to Parker that the chest x-ray performed in the hospital had shown a suspicious mass in the right lung. Dr. Crow admitted that he did not raise this during the hospitalization because of Parker's severe heart condition, but he intended to address this issue in the first post-operative visit. Dr. Crow had forgotten. Parker was finally diagnosed with Stage III lung cancer and despite aggressive therapy, died of lung cancer one year later.

Parker's family brought a wrongful death claim against Dr. Crow, alleging medical malpractice. Dr. Crow admitted negligence and testified that he should have made the diagnosis seven months earlier. Plaintiffs alleged that this earlier diagnosis could have saved Parker's life. The plaintiffs retained an expert oncologist to discuss the dynamics of lung cancer and survival rates. The plaintiffs' expert testified that Parker's lung cancer was probably Stage II when he was hospitalized for congestive heart failure and was undoubtedly Stage III when it was ultimately diagnosed seven months later. The oncologist acknowledged that, generally, if treated aggressively, Stage II cancer has a 40 percent cure rate, while Stage III cancer only has a 20 percent rate of cure. Thus, even plaintiffs' oncologist agreed that Parker probably would have died even if the diagnosis had been made seven months earlier. He further agreed that, at best, Parker had a 20 percent greater chance of being cured if his cancer had been diagnosed and treated seven months earlier. Dr. Crow's attorney moved for a directed verdict on the grounds that no reasonable jury could find that Dr. Crow's alleged negligence "probably" caused Parker's death. The motion was denied, the case went to the jury, and the plaintiffs were awarded 100 percent of the damages they requested. The award survived appeal and left Dr. Crow wondering if he was truly 100 percent responsible for Parker's death.

General Negligence Principles and the Loss of a Chance Doctrine

Arizona courts do not recognize a distinct cause of action for the loss of a chance, but rather have crafted an evidentiary rule that allows a case to go to the jury with less-than-probable evidence on causation. This evidentiary rule blurs the causation picture and offers no guidance to the trial judge, attorneys or jury on the calculation of damages where the plaintiff's injury is the loss of a chance. The end result is that the jury is typically only given standard instructions on proximate cause and damages and is left to its own discretion in evaluating those elements.

One of the open questions is whether a plaintiff can recover all damages, or is limited to recovery for the lost chance. For example, should Parker's family recover for the 20 percent chance of survival he lost, or for 100 percent of the damages caused by his death? The absence of a settled rule allows room for trial courts to tell juries that they can award full damages for wrongful death.

Arizona's loss of a chance rule is becoming more pervasive in negligence cases, and particularly in medical malpractice cases. It may also apply in other situations.¹ Despite this, the doctrine is confusing and difficult for judges, attorneys and juries to apply. This is attributable, in part, to the fact that Arizona courts have published only two cases directly discussing the judicial philosophy applicable to this evidentiary rule.² This article attempts to shed some light on Arizona's loss of a chance doctrine and discusses the fundamental fairness of the doctrine. Finally, this article suggests alternatives which would offer judges and attorneys clearer guidance in instructing a jury on the causation and damages issues in loss of a chance cases.

cause of the claimed injury. Proximate cause is defined as “[t]hat which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and *without which the result would not have occurred*.”³ Indeed, proximate cause traditionally allows recovery for damages only where “it is more probable than not that the conduct of the defendant was a cause in fact of the result.”⁴ Thus, the plaintiff must show a greater-than-50-percent chance that her injury was caused by the defendant’s negligence.

Proximate cause is troublesome where the damages claimed by the plaintiff are for the loss of a less-than-50-percent chance of survival or improved outcome.⁵ In such cases, the Arizona Supreme Court has relaxed the standard for allowing such cases to go to the jury. However, to ultimately prevail on such a claim, the plaintiff must still prove that the injury claimed was *more probably than not* caused by the defendant’s negligence.⁶

Thompson v. Sun City

In *Thompson v. Sun City Community Hospital, Inc.*, the plaintiff claimed that her child was injured because the defendant hospital transferred the child from its emergency room to a second hospital, thereby causing a delay in treatment. The defense expert testified that, even if the failure to admit caused the delay, the plaintiff had only a five to ten percent chance for a complete recovery with prompt surgery. The plaintiff’s expert was unwilling or unable to quantify the chance of a complete recovery with prompt surgery, and only testified that the child had a “substantially better chance” of full recovery had surgery been performed at once.⁷

At trial, the plaintiff requested a jury instruction that proximate cause was established if she had proved that the defendant’s acts or omissions had “increased the risk of harm” to the plaintiff. The trial court refused the instruction and the plaintiff appealed. While the case was reversed and remanded by the Arizona Supreme Court, both the Court of Appeals and the Arizona Supreme Court affirmed the lower court’s decision in refusing to give the above-cited jury instruction.⁸

The Supreme Court held that a jury instruction was inappropriate, but that the plaintiff could get to the jury on the issue of causation even if her expert could not testify that the chance of a cure or better outcome was more probable than not. The Court cautioned, however, that to succeed at trial, the plaintiff must still prove that her injuries were “probably” caused by the physician’s negligence:

We acknowledge that it permits the case to go to the jury on the issue of causation with less definite evidence of probability than the ordinary tort case. To this extent, no doubt, it permits the jury to engage in some speculation with regard to cause and effect. However, the jury is still instructed that they must find for the defendant unless they find a *probability* that the defendant’s negligence was a cause of the plaintiff’s injury.⁹

Lohse v. Faultner — Applying the Doctrine to Non-Medical Cases

In the most recent Arizona case discussing loss of a chance, *Lohse v. Faultner*,¹⁰ the court recognized that *Thompson* merely “lowered the threshold of proof to reach a jury on causation in a limited group of cases...”¹¹ Perhaps the most significant aspect of the *Lohse* decision is that it extended the loss of a chance doctrine to a non-medical scenario. In *Lohse*, the plaintiffs, property owners, sued after a forest fire that originated in the Kaibab National Forest spread to their adjoining land. The plaintiffs claimed that defendants negligently failed to patrol for fire after logging in the forest and thereby permitted the fire to spread out of control. The plaintiffs’ expert declined to state that a proper fire patrol would have probably resulted in detection and suppression of the fire, but he argued that a proper fire patrol would have “increased the probability of detection and suppression.”¹² The defendants moved for summary judgment claiming that the plaintiffs failed to present evidence that defendants’ alleged nonfeasance deprived them of a “substantial chance” to escape harm. The trial court granted the motion, and the plaintiffs appealed.

On appeal, the plaintiff argued that summary judgment was improper in light of the lost chance doctrine enunciated by the *Thompson* court. The Court of Appeals disagreed and affirmed the lower court’s ruling.¹³ The plaintiffs argued that their expert’s testimony was sufficient to allow the jury to decide the case since, even in *Thompson*, the plaintiff’s experts were unwilling or unable to quantify the patient’s loss of a chance. The Court of Appeals distinguished the cases, however, noting that the expert in *Thompson* was at least able to testify that the plaintiff would have had a “substantially better chance to escape injury, but for the hospital’s neglect.”¹⁴ The *Lohse* court commented:

Our review of these authorities leads us to conclude that although *Thompson* “softened the edge of the probabilities formula considerably,”... the proof in qualifying cases still must rise to the level of

substantiality. Plaintiff's evidence does not reach that level in this case.¹⁵ The court, in a unanimous decision, concluded:

Plaintiffs rely wholly on [their expert's] general assertion that a fire patrol would have 'increased the probability' of timely detecting the fire. But the range of probability runs from infinitesimal to nearly certain, and probabilities can increase from one to another insignificant degree. [Plaintiff's expert] ultimately acknowledged that he had no opinion whether a fire patrol would in fact have prevented Plaintiff's injuries in this case. Like the trial court, we find such evidence too thin, even under *Thompson*, to create a jury case of proximate cause.¹⁶

Thus, the *Lohse* court held that a mere "possibility" of a causative link is insufficient to even send a case to the jury. The plaintiff must show the loss of a "substantial chance."

Defining a "Substantial Chance"

Unfortunately, Arizona courts have never defined a "substantial chance." The "substantial chance" language which the Arizona Supreme Court adopted in *Thompson*, is generally recognized to have originated with *Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966).¹⁷ Interestingly, however, the very court that decided *Hicks*, has seemingly rejected the Arizona Supreme Court's interpretation of that case.¹⁸

Hicks v. United States

In *Hicks*, a doctor breached his professional duty owed to a patient by misdiagnosing an ailment. Had the doctor accurately diagnosed the ailment, the proper course of action would have been to operate. The defendant argued that proximate cause was not established because it was speculative to conclude that a prompt operation would have successfully saved the patient's life. The court concluded, however, that the evidence showed that a timely operation would have saved the patient's life. Therefore, the court resolved the issue of proximate cause in favor of the plaintiff.¹⁹

Even though *Hicks* is not a true loss of a chance case, it is often cited for the proposition that medical negligence cases do not require the traditional "more probably than not" proximate cause evidence. In so relying upon *Hicks*, courts refer to the following language:

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.²⁰

The Fourth Circuit Court of Appeals has since tried to clarify its position.

Hurley v. United States

Significantly, the Fourth Circuit reinterpreted its decision in *Hicks* in another medical malpractice case, *Hurley v. United States*.²¹ Specifically, the court confirmed that its decision in the *Hicks* case did not change the law of negligence or proximate cause. Further, the court refused to recognize a lost chance cause of action.

In *Hurley*, a patient was implanted with a permanent pacemaker to remedy the effect of congenital heart disease. When the patient was readmitted to the hospital several years later, he was placed in a room which lacked monitoring equipment. As a result, when the patient suffered a cardiac arrest, no one discovered him until severe and irreversible brain damage occurred.

The patient's mother sued, alleging medical malpractice by the physician and the hospital's staff. The plaintiff contended that the physician's failure to examine the patient's heart monitor report for eight days breached the applicable standard of care. The plaintiff claimed that if the physician had read the report earlier, he would have discovered a malfunction in the pacemaker, and the cardiac arrest and resulting injury could have been prevented. The plaintiff also claimed that an immediate response to her son's cardiac arrest would have enabled quicker resuscitation and thus, prevented the brain damage.²²

The physician conceded that he breached his duty to the patient, but denied that the breach proximately caused the patient's injury. In response, the plaintiff requested that the court invoke the lost chance doctrine. The Fourth Circuit held that the doctrine was not a valid cause of action and entered judgment for the defendants. Upon review of its earlier decision in *Hicks*, the court referred to the often-quoted language as "dicta which precipitated misunderstanding throughout the courts."²³ The court construed the "substantial possibility of survival" test espoused in *Hicks* as making no change in the law of causation because a "substantial possibility" is tantamount to a "probability." The court explained:

Some courts have since interpreted the words 'substantial possibility' to have modified the law of

medical malpractice....[I]t is *rarely possible* for a plaintiff to show an absolute certainty what would have happened had the defendant not been negligent. Thus, the plaintiff need *not* prove to a *certainty* that the plaintiff would have lived had she been treated in compliance with the standard of care... Evidently, the message in the passage is that plaintiff need not show to a certainty that surgery would have saved a patient's life. A probability of success is sufficient.²⁴

The court concluded:

...the plaintiff must prove the defendant's breach of duty was more likely than not [i.e., probably] the cause of injury. Therefore, the point made in the passage that causation must be proved to a probability, but not to a certainty, does not make any change in the law of causation.²⁵

As pointed out below, this approach makes better sense than Arizona's ambiguous evidentiary rule.

Fundamental Fairness

Arizona's loss of a chance doctrine is a powerful evidentiary rule which conflicts with established negligence and procedural principles and allows an unfair result. Enabling a jury to award a verdict where the plaintiff has failed to produce evidence that her injury was proximately caused by the defendant's negligence is obviously at odds with traditional negligence standards. Further, forcing the trial judge to submit a case to the jury where the plaintiff cannot satisfy the proximate cause element contradicts the precedent that a case should not be allowed to go to the jury if no reasonable jury could agree with the conclusion advanced.²⁶ Finally, if the jury is armed only with standard instructions on causation and damages, it may "speculate" on those issues and may either return a defense verdict or award the plaintiff full damages. The ultimate outcome is unpredictable and unfair to all litigants.

Alternatives

The Arizona courts should either recognize a separate and distinct cause of action for a lost chance or simply abandon the ambiguous evidentiary rule in favor of traditional negligence principles. Some states recognize a lost chance cause of action.²⁷ Such claims are sent to the jury with less-than-probable evidence on causation, but the damages are discounted to reflect the value of the lost chance.²⁸ Thus, in Parker's situation, the case would still go to the jury, but the plaintiff would only recover 20 percent of the total damages. Alternatively, some states simply refuse to allow a case to go to the jury for the loss of a less-than-even chance on proximate cause.²⁹ These courts refuse to recognize a lost chance cause of action and require that the established elements of negligence be proven. Neither approach may be ideal, but both offer clearer guidance and are more fair than Arizona's loss of a chance doctrine.³⁰

Reverting to a traditional negligence standard is the best alternative. These established principles obviously work and have stood the test of time. Further, to recognize a distinct cause of action for the loss of a chance, no matter how small, would encourage more lawsuits. Virtually all decisions and actions involve risk-taking to one degree or another. It would be unjust and unworkable to allow a cause of action for every act or decision which results in some remote lost chance.

Conclusion

Arizona's loss of a chance doctrine is an ambiguous evidentiary rule that empowers a jury to speculate on causation and damages and all but guarantees an unfair result for one of the litigants. The courts should abandon this doctrine which forces the judge and jury to ponder "level[s] of substantiality" and return to traditional negligence principles. Alternatively, the courts could recognize a lost chance cause of action and limit damages to the lost chance. Recognizing a distinct lost chance cause of action offers clearer guidelines, but also promises more litigation involving claims for remote chances. Traditional negligence principles offer the best alternative with clear and established guidance.

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ENDNOTES

1. See, e.g. J. Lankford, D. Blaze, *The Law of Negligence in Arizona*, § 4.7, pp. 57-59 (1992) (Pointing out the relevance of the loss of a chance doctrine to legal malpractice cases); *Lohse v. Faulmer*, 176 Ariz. 253, 860 P.2d 1306 (App. 1992), review denied 11/4/93.
2. *Thompson v. Sun City Community Hospital, Inc.*, 141 Ariz. 597, 688 P.2d 605 (1984); *Lohse v. Faulmer*, 176 Ariz. 253, 860 P.2d 1306 (App. 1992), review denied 11/4/93.
3. Black's Law Dictionary (5th Ed. 1979)
4. W. Prosser and R. Keeton, *The Law of Torts*, § 41 (5th Ed. 1984).
5. *Thompson v. Sun City Community Hospital, Inc.*, 141 Ariz. 597, 688 P.2d 605 (1984); *Lohse v. Faulmer*, 176 Ariz. 253, 860 P.2d 1306 (App. 1992) review denied 11/4/93.
6. *Thompson v. Sun City Community Hospital, Inc.*, 141 Ariz. 597, 688 P.2d 605 (1984).
7. *Id.* at 607, 688 P.2d at 615.

8. *Id.* at 608, 688 P.2d at 616; *Thompson v. Sun City Community Hospital, Inc.*, 142 Ariz. 1, 11, 688 P.2d 647, 657 (App. 1983).
9. *Thompson v. Sun City Community Hospital, Inc.*, 141 Ariz. at 607-608, 688 P.2d at 615-616. (emphasis in original).
10. 176 Ariz. 253, 860 P.2d 1306 (App. 1992), review denied 11/4/93.
11. *Id.* at 261, 860 P.2d at 1314.
12. *Id.* at 261, 860 P.2d at 1314.
13. *Id.* at 255, 860 P.2d at 1308.
14. *Id.* at 263, 860 P.2d at 1316.
15. *Id.* at 263, 860 P.2d at 1316.
16. *Id.* at 264, 860 P.2d at 1317.
17. *Id.* at 263, 860 P.2d at 1316.
18. *Hurley v. United States*, 923 F.2d 1091 (4th Cir. 1991).
19. *Hicks v. United States*, 368 F.2d 626, 633 (4th Cir. 1966).
20. *Id.* at 632 (emphasis added).
21. *Hurley v. United States*, 923 F.2d 1091 (4th Cir. 1991).
22. *Id.* at 1092.
23. *Id.* at 1093.
24. *Id.* at 1094.
25. *Id.* at 1094.
26. *Orme School v. Reeves*, 166 Ariz. 301, 802 P.2d 1000 (1990) (summary judgment appropriate where claim lacks probative value such that reasonable jury could not agree with conclusion advanced by proponent of claim).
27. See, e.g., *Dickey v. Daughety*, 905 P.2d 697 (Kan.App. 1995); *McKellip v. St. Francis Hospital*, 741 P.2d 467 (Okla. 1987); for an excellent discussion of this issue, see, King, "Causation Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences," 90 Yale L.J. 1353 (1981).
28. *Id.*
29. See, e.g., *Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397 (Tex. 1993); *Dumas v. Cooney*, 1 Cal.Rptr.2d 584 (Cal.App. 1991).
30. *Id.*