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Falcon v. Memorial Hospital: A Rational Approach to Loss-of-Chance Tort Actions

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CASE NOTE

FALCON V. MEMORIAL HOSPITAL: A RATIONAL APPROACH TO LOSS-OF-CHANCE TORT ACTIONS

I. INTRODUCTION

"Loss-of-Chance" tort actions are suits by or for a party who suffered from a preexisting condition that lowered her survival chances to a point below fifty percent and who has suffered a subsequent injury as the result of negligent medical treatment. If that patient dies, the court must determine who or what caused the injury. Did the preexisting condition run its course, or did the negligence of the attending physician cause the patient's death?

Consider the following hypothetical:[1] Mr. Doe went to a physician with a preexisting cancerous tumor, giving him a forty-five percent chance of survival. The physician negligently failed to diagnose the tumor, and Mr. Doe went untreated for an additional six months. During that period of time, the tumor grew and Mr. Doe's chance of survival diminished to merely ten percent. Six months later, Mr. Doe died. In a wrongful death action by Mr. Doe's widow, should the trial court grant the physician's motion for a directed verdict? Under traditional tort law, a court would grant the motion because the plaintiff could not prove by a preponderance of the evidence that the physician caused the death of Mr. Doe. It is likely that Mr. Doe would have died regardless of the negligent treatment because his original chance of survival was only forty-five percent. Mrs. Doe would therefore be unable to prove that but for the physician's negligence, Mr. Doe would be alive today. The court, however, may find it difficult to ignore the fact that, with proper treatment, the patient may have survived, and that the physician's negligence may have, in fact, caused the patient's death.

In loss-of-chance cases, the court's inquiry focuses not on the question of the physician's negligence but rather on the cause in fact of the patient's death. The inquiry by the court focuses on the actual cause of death. Was it the tumor, or the physician's negligence? If the statistics indicate a probability that the patient would have died even with proper treatment, is

1. This situation is purely hypothetical and is not intended to mirror any actual situations.

there any way to avoid the harsh result of denying recovery to the survivor of the negligently treated patient? Is there any way to justify imposing liability on the medical profession? These questions have plagued courts in recent medical malpractice cases in which the decedent had less than a fifty-percent chance of survival before the physician's duty arose.[2]

This Note provides insight into the oft-misunderstood concept[3] of loss-of-chance and discusses the legal and policy arguments both for and against acceptance of this tort action. In addition, this Note considers the recent decision by the Michigan Supreme Court which addressed this precise problem in *Falcon v. Memorial Hospital*,[4] comparing it to the approaches taken by other courts that have faced this issue. After an examination of the various policy arguments made by courts and commentators, this Note concludes that courts should allow loss-of-chance tort actions in order to reach a fair and consistent approach in a largely unsettled area of legal and medical practice.[5]

II. THE LOSS-OF-CHANCE DOCTRINE: HISTORY AND DEVELOPMENT

Under traditional tort law, a plaintiff must demonstrate that (1) the defendant had a duty to the plaintiff; (2) the defendant breached that duty; (3) the defendant was the cause-in-fact of the injury as well as the proximate cause; and (4) the plaintiff suffered some injury.[6] In loss-of-chance cases, proving causation is the stumbling block in the analysis. The fact that the patient had less than a fifty percent chance of survival from the start indicates that she would have died even if she received proper medical treatment. Therefore, the problem in these cases is reconciling the of loss-of-chance doctrine with traditional tort principles of causation.

The loss-of-chance doctrine has its roots in a 1966 Fourth Circuit case. In *Hicks v. United States*,[7] the court of appeals analogized loss-of-chance ac-

2. Peter Hohenhaus, *The Fourth Circuit Steps Back from the "Loss of Opportunity" Approach in Medical Malpractice in* Hurley v. United States, 1991 WL 330760 (Mar. 1991).

3. Howard R. Feldman, Comment, *Chances as Protected Interests: Recovery for the Loss of Chance and Increased Risk*, 17 U. BALT. L. REV. 139 (1987).

4. 462 N.W.2d 44 (Mich. 1990).

5. Hohenhaus, *supra* note 2, at 4. "The debate over the validity of the loss of opportunity cause of action will continue into the future." *Id.*

6. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984).

7. 368 F.2d 626 (4th Cir. 1966). In *Hicks*, the wife of an enlisted man was brought to a dispensary for treatment of abdominal pain. *Id.* at 628-29. The doctor on duty diagnosed the patient as having gastroenteritis and prescribed pain relievers. *Id.* The woman died shortly thereafter from high intestinal obstruction. *Id.* Expert testimony introduced at trial that prompt diagnosis and surgery could have prevented the death of the patient. *Id.*

tions to the legal theory of attempts to rescue.[8] Comparing a doctor's duty to save his patient with a master's duty to save his seaman, the court held that when a reasonable possibility of survival is destroyed by the doctor's omission, the doctor will be held liable.[9] The situation in *Hicks* was revisited by the Fourth Circuit in *Waffen v. United States*.[10] In *Waffen*, the court of appeals recognized a cause of action and noted the difficulty in drawing a distinct line for imposing liability at a fifty-percent chance of survival: This distinction would require "pseudo-scientific precision and [would] encourage a battle of experts between one who evaluates the lost chance at forty-nine percent and the other who estimates it closer to fifty-one percent."[11] According to the Fourth Circuit, the plaintiff need only show that "the increased risk amounted to a loss of a substantial possibility of survival."[12]

More recently, in *Herskovits v. Group Health Cooperative*,[13] the Washington Supreme Court held that the loss of a less-than-fifty percent chance of survival constitutes a compensable injury under the Washington State wrongful death statute.[14] The plurality opinion, authored by Judge Pearson, concluded that the injury was not the death itself, but rather the loss-of-chance of survival.[15] The "lead"[16] opinion by Justice Dore viewed the death of the patient as the injury, but modified the required degree of proof of causation.[17] Justice Dore's approach requires that the plaintiff merely provide medical evidence that the defendant increased the risk of harm to the plaintiff,[18] a far less stringent standard than the traditional standard of "but

8. *Id.* at 632-33.

9. *Id.* at 633.

10. 799 F.2d 911 (4th Cir. 1986). The rationale in *Waffen* was rejected by the same court in *Hurley v. United States*, 923 F.2d 1091 (4th Cir. 1991), based on the court of appeals' reliance on recent Maryland precedent rejecting loss-of-chance tort actions under Maryland law. The court in *Hurley* did not criticize its previous holdings in *Hicks* and *Waffen*, but merely recognized that Maryland decisions, specifically, *Fennell v. Southern Md. Hosp. Ctr. Inc.*, 580 A.2d 206, 214-15 (Md. 1990), had rejected loss-of-chance claims. *Hurley*, 923 F.2d at 1098.

11. *Waffen*, 799 F.2d at 923.

12. *Id.*

13. 664 P.2d. 474 (Wash. 1983). Mrs. Herskovits died of a cancerous tumor that had been detected two years earlier by Group Health. *Id.* at 476. A private physician testified for the plaintiff that Group Health should have discovered the tumor six months before it did, when the patient was seen for a chronic cough. *Id.* According to the physician, this failure to properly diagnose the tumor decreased the patients chances of survival from 39% to 25%. *Id.*

14. *Id.* at 477.

15. *Id.* at 487.

16. Linda Roubik, *Recovery for "Loss of Chance" in a Wrongful Death Action — Herskovits v. Group Health*, 59 WASH. L. REV. 981, 984 n.16 (1984).

17. *Herskovits*, 664 P.2d at 476-77.

18. *Id.* at 476-478.

for" causation.[19]

These opinions and others that have followed, confuse the legal issues involved in loss-of-chance malpractice cases.[20] The issues faced by courts like the *Falcon* court include: (1) Identification of the actual injury suffered, (2) the applicable standard of proving causation, "but for" or a modified standard, and (3) the policy justifications that should be given the most weight.

III. *FALCON V. MEMORIAL HOSPITAL*

A. The Facts of Falcon

On March 22, 1973, Nena Falcon, then nine-months pregnant, was admitted to Memorial Hospital under the care of Dr. Kelso.[21] At Falcon's request, Dr. Kelso "administered a saddle block anaesthetic prior to delivery of the child."[22] No intravenous line was inserted at any time during delivery or after.[23] Immediately after delivery of her child, Ms. Falcon fell into a convulsive state.[24] Attempts to resuscitate her were unsuccessful and she subsequently died.[25] An autopsy revealed that the cause of death was an amnionic fluid embolism, which is both unpredictable and life-threatening.[26]

Nena Falcon's mother brought a wrongful death suit against Dr. Kelso and the hospital, claiming that the physician's negligence, in failing to recognize Nena's condition and to take preventive steps to reduce the chances of death, brought about Nena's premature death.[27] Deposition testimony was offered that included a statement by Dr. Abouleish, the plaintiff's expert, that although patients who are stricken with amniotic fluid embolisms have only a 37.5% chance of survival,[28] Nena Falcon's chance for survival would have been significantly higher had an intravenous line been inserted.[29] The trial court granted the defendants' motion for a directed verdict based on its finding that the experts who testified as to the appropriate standard of care were not qualified to do so.[30] The Michigan Court of Appeals reversed is finding as to the experts and remanded to the trial court directing it to allow

19. Roubik, *supra* note 16, at 984.

20. *See* Hohenhaus, *supra* note 2 at 6-10 (illustrating the constant reinterpretation of the law in this area).

21. Falcon v. Memorial Hosp., 462 N.W.2d 44, 58 (Mich. 1990) (Riley, C.J., dissenting).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 49, 59 (Riley, C.J., dissenting).

28. *Id.* at 59.

29. *Id.*

30. *Id.*

the expert testimony.[31]

On remand, the trial court granted the defendants' motion for summary judgment, holding that the plaintiff failed to prove that the defendants' negligence was the proximate cause of Ms. Falcon's death.[32] The court of appeals again reversed, and the defendants appealed this decision.[33]

B. The Rationale of Falcon *and its Predecessors*

In *Falcon*, the Michigan Supreme Court considered whether to recognize Mrs. Falcon's cause of action on the basis of loss-of-chance. It was undisputed on appeal that Nena Falcon had only a 37.5% chance of survival due to the embolism.[34] It was also undisputed that Dr. Kelso was negligent in not placing an intravenous line in Nena Falcon.[35] The issue before the court was whether the plaintiff had any legal basis for her cause of action and, if so, how damages should be determined. Traditional tort law mandated that the plaintiff had no cause of action.[36] In loss-of-chance cases, the patient has a less-than-fifty percent chance of survival before treatment by the negligent physician.[37] The plaintiff normally does not have a cause of action under traditional tort law because she cannot prove that the doctor's negligence caused the patient's death.[38]

Most states impose a standard of proof that requires the plaintiff to show that the patient would have survived had it not been for the negligence of the defendant; in other words the patient's chances for recovery must exceed fifty percent.[39] Several cases before *Falcon*, however, found a cause of action without this better-than-fifty percent chance of recovery requirement.[40] The *Falcon* court examined those cases and determined that Michigan law would

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31. *Id.* at 59-60.

32. *Id.* at 60.

33. *Id.*

34. *Id.* at 59. Dr. Abouleish testified that out of 100 patients suffering from this fluid embolism, 50 will die within the first half hour after labor. *Id.* at 59. Of the 50 that survive the first half hour, 25 will develop a blood coagulation problem and only 12 1/2 of those will survive. *Id.*

35. *Id.*

36. Jack Rosati, *Causation in Medical Malpractice: A Modified Valuation Approach*, 50 OHIO ST. L. J. 469, 471 (1989).

37. Feldman, *supra* note 3, at 143.

38. Rosati, *supra* note 36, at 471.

39. *Id.* A majority of states have adopted one of two standards requiring the plaintiff to show a better-than-fifty percent chance of recovery. Those standards are: (1) that the plaintiff have a better than 50% chance of recovery to a "reasonable medical certainty," the most stringent standard for plaintiffs, and (2) that the plaintiff have a greater than 50% chance of recovery to a "reasonable probability," which is a less stringent standard. *Id.*

40. *See, e.g.*, DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986); Roberson v. Counselman, 686 P.2d 149 (Kan. 1984); Aasheim v. Humberger, 695 P.2d 824 (Mont. 1985).

recognize loss-of-chance as an actionable tort.[41]

The cases and commentaries on this subject properly demonstrate that this legal construct comports with tort law and public policy. The remainder of this Note will examine the Michigan Supreme Court's views on the issues of causation and valuation as compared to the views of other courts and commentators.

1. Causation

As previously discussed, under traditional tort law, a plaintiff must establish five factors for a proper cause of action. They are: That the defendant owed the plaintiff a duty; that the defendant breached that duty; that the plaintiff was in some way injured; that the defendant's negligence caused the injury; and that the negligence was the proximate cause of the injury.[42]

When a patient has a preexisting condition that leaves her with a less-than-fifty percent chance of survival, causation is difficult to prove.[43] If a plaintiff is able to prove causation, she is able to recover the full amount of the pecuniary loss.[44] A court, however, must reconcile traditional tort causation principles with the patient's preexisting condition. The issue is whether the preexisting condition or the defendant's negligence caused the patient's death.

According to the *Falcon* court, the compensable injury at issue was not Nena Falcon's death but rather the loss of opportunity to live.[45] This distinction is critical. The plaintiff could not prove that the defendants were the but-for cause of her daughter's death, but had shown that the defendants were the cause-in-fact of the loss of Nena's 37.5% chance of survival.[46] Under this approach, the plaintiff need not show that the defendant was the but-for cause of the death.[47] Plaintiff need show only that the defendant

41. Falcon v. Memorial Hosp., 462 N.W.2d 44, 48, 52 (Mich. 1990).

42. Perez v. Las Vegas Medical Ctr., 805 P.2d 589 (Nev. 1991). *See also* KEETON ET AL., *supra* note 6, at 164-65.

43. Joseph H. King Jr., *Causation, Valuation and Chance in Personal Injury Torts Involving Preexisting Conditions and Circumstances*, 90 YALE L. J. 1353, 1356-57 (1981). Preexisting conditions can be defined as "a disease, condition[,] or force that has become sufficiently associated with the victim to be factored into the value of the interest destroyed, and that has become so before the defendant's conduct has reached a similar stage." *Id.* at 1357. In other words, a preexisting condition is one which the injured party has *before* treatment by a physician and one which is significantly related to the nature of the treatment performed by the physician. *Id.*

44. *Id.* at 1356, 1363.

45. Falcon v. Memorial Hosp., 462 N.W.2d 44, 52 (Mich. 1990).

46. *Id.* at 45-46.

47. *Id.* at 52.

caused the loss of that chance of survival.[48] With traditional causation principals intact, the plaintiff is able to maintain a legitimate case against the negligent physician.[49]

Because the defendants cannot be said to have caused Nena Falcon's death, they were not held responsible for her death, but rather for the loss of her opportunity to survive.[50] The injury resulting from the malpractice was "not only . . . the physical harm, but also . . . the loss of opportunity of avoiding physical harm."[51] The court held that by denying Nena Falcon of a thirty-seven-percent chance of survival, the defendants deprived her of a "loss of opportunity" to live.[52] In so finding, the Michigan court found the defendants liable for thirty-seven percent of the compensation otherwise awarded under the wrongful death statute.[53]

In a seminal comment, professor Joseph King expounds the theory relied upon by the *Falcon* court.[54] Professor King criticizes the all-or-nothing approach of traditional tort law as being contrary to the purposes and goals of tort law.[55] King asserts that courts often fail to distinguish between the cause of the injury and the value to which the injured party is entitled.[56] According to King, courts should recognize a tort action which awards damages for loss of a patient's opportunity to survive and to continue life.[57] As King points out, courts should acknowledge injuries other than death:

> [E]ven if the plaintiff is not entitled to recover for the loss of a chance of completely avoiding some specific harm, such as cancer-induced death, he might still be entitled to recover for the loss of a chance to slow the course of the disease or to mitigate its painful

48. *Id.*

49. Justice Levin, author of the plurality opinion, focused on the breach of understanding between patient and doctor. *Id.* at 52-53. The implied understanding between Nena Falcon and Dr. Kelso was that he would undertake such procedures as would most effectively limit the chance of injury to the patient. *Id.* By failing to insert the intravenous line, Dr. Kelso breached that implied promise and was held liable by the Michigan Supreme Court. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *See generally* King, *supra* note 43, at 1363 (expounding the theory that loss-of-chance comports with traditional tort principles). Professor King is considered an exceptional authority in the area of medical malpractice and specifically loss-of-chance actions. He has been cited extensively by many courts, including the Michigan Supreme Court in *Falcon*. Other courts have also relied on King's theories. *See, e.g.*, Hare v. Foster G. McGaw Hosp., 549 N.E.2d 778, 783 (Ill. 1989); Cooper v. Hartman, 533 A.2d 1294, 1296 (Md. 1987); Aasheim v. Humberger, 695 P.2d 824, 828 (Mont. 1989); McKellips v. Saint Francis Hosp., 741 P.2d 467, 476 (Okla. 1987).

55. King, *supra* note 43, at 1377.

56. *Id.* at 1363.

57. *Id.* at 1372-73.

effects.[58]

In addition, King argues that the patient may lose a chance to benefit from potential scientific breakthroughs.[59] If, for example, medical technology has the capacity to prolong a patient's life, but the health care provider fails to utilize that technology, that health care provider should be liable for depriving the patient of her ability to enjoy any relevant medical advancements that may have affected her situation.[60] King concludes that "[l]oss of chance should be compensable even if the chance is not better than even, and it should be recognized and valued as such rather than an all-or-nothing proposition."[61] Thus, King rejects the relaxation of generally accepted causation principles and finds that the loss-of-chance is a separate and distinct injury.

Similarly, other jurisdictions have recognized loss-of-chance as an injury unto itself. The Supreme Court of Nevada recognized loss-of-chance as an actionable tort in *Perez v. Las Vegas Medical Center*.[62] The court defined the loss not as the death, but rather as the loss of the chance of survival caused by medical malpractice.[63] By defining the injury as such, the "traditional rule of preponderance is fully satisfied . . . . The medical malpractice *more probably than not* decreased a substantial chance of survival and the injured person ultimately died or was severely debilitated."[64] It is important to recognize that the compensable injury recognized in *Perez* was not the death of the patient, but the loss of the opportunity to live.

Those who argue that the injury at issue is the patient's death express concern that courts focusing on loss-of-chance have to compensate a plaintiff who "beat the odds" and survived despite the defendant's negligence.[65] In that case, did the plaintiff actually suffer any injury because of the loss-of-chance? Commentators who argue this point have misapplied the notion of "loss-of-chance." Although the doctor is responsible for decreasing the patient's chance of survival, there is no compensable damage if the patient fully recovers.[66] Therefore, if Nena Falcon survived despite her doctor's negligence, she would have a cause of action that would bear no fruit in terms of damages. While neither death nor actual injury is a compensable injury in

58. *Id.* at 1373.

59. *Id.*

60. *Id.* at 1376.

61. *Id.*

62. 805 P.2d 589 (Nev. 1991) (involving a physician who failed to diagnose an inmate's brain hemorrhage). In *Perez*, one expert testified that plaintiff "probably did not have a greater than fifty percent chance" of surviving the aneurism. *Id.* at 591.

63. *Id.* at 592.

64. *Id.* (emphasis in original).

65. Roubik, *supra* note 16, at 985.

66. *Id.*

such a case, both are manifestations that such an injury occurred and prove that damages ought to be awarded. The lack of death or injury does not absolve the physician from liability; rather, their absence is factored into the determination of damages. If the party does not die, the monetary award will be a nullity. Therefore, the plaintiff has a cause of action in theory, but one which yields no return.[67]

A great deal of the confusion surrounding loss-of-chance tort actions has resulted from courts' attempts to counteract the harsh results of the all-or-nothing approach by changing the standard of proof imposed upon the plaintiff.[68] Reformulation of the standard of proof is a fundamentally flawed approach and should not be used by courts to rebel against the all-or-nothing approach. This approach was examined by the Ohio Supreme Court in *Coopers v. Sisters of Charity*,[69] which rejected a claim that the standard of proof should be lowered in loss-of-chance cases. The court held that the plaintiff failed to show that the injury was caused by the defendant more probably than not, and because this standard had not been met, plaintiff was disallowed recovery on any basis.[70]

Some courts, however, have failed to properly identify the injury sustained and have resorted to the practice of lowering the standard of proof required to prevail in a loss-of-chance suit. In *Scafidi v. Seiler*, the New Jersey Supreme Court found liability for a physician's failure to prescribe tocolytic therapy.[71] Instead of recognizing the loss of the premature child's chance of survival, that court lowered the standard of proof from the "probability" to the "substantial factor" test.[72] As Professor King warned, however, the standard of proof should be established by the court, regardless of the type of tort action.[73] The only legal basis for allowing recovery is the recognition of a distinct tort.[74] As the Florida Supreme Court pointed out in *Gooding v. University Hospital Building, Inc.*,[75] relaxation of the causation requirement may "correct a perceived unfairness" to the party who could not prove traditional causation, but at the same time it may cause injustice to the defendant-physician. Finding a separate action (e.g., loss-of-chance) is the only way to allow recovery without subverting traditional tort principles. This separate action recognizes the loss of opportunity to survive as distinct from

67. *See* discussion *infra* part III.B.2.
68. *See, e.g.*, Scafidi v. Seiler, 574 A.2d 398 (N.J. 1990).
69. 272 N.E.2d 97, 104 (Ohio 1971).
70. *Id.*
71. 574 A.2d at 398. Tocolytic therapy is used to delay labor in pregnant women. *Id.*
72. *Id.* at 406.
73. *See* King, *supra* note 43, at 1366.
74. *Id.*
75. 445 So. 2d 1015, 1019-20 (Fla. 1984).

the injury of death. The Michigan Supreme Court correctly identified the injury involved.

2. Valuation of damages

Once a court recognizes that the patient's loss of the opportunity to survive is a cognizable cause of action, the court must then determine the appropriate standard for the calculation of damages. In the all-or-nothing approach of traditional tort law, the plaintiff, if able to prove that her chances of recovery were greater than fifty percent, will receive one-hundred percent of the determined value of damages caused by the death of the patient, even though the plaintiff did not prove to a one-hundred percent degree of certainty that the defendant caused the loss.[76] If the plaintiff is unable to prove that the negligence more probably than not caused the death, then the plaintiff is denied relief.[77] Under the loss-of-chance approach, the plaintiff is awarded a measure of damages in proportion to the amount of loss in the chance of survival caused by the defendant.[78]

In *Falcon*, the Michigan Supreme Court found a solution to the problem of valuing Mrs. Falcon's loss: because the defendants in *Falcon* were responsible for depriving Nena Falcon of only a percentage of her chance of survival, the court determined that their liability should reflect that percentage.[79] Therefore, because Nena Falcon had only a 37.5% chance of survival due solely to her preexisting condition, the physicians were held liable only for an identical percentage of the amount awarded under a wrongful death action.[80] This approach is rational and consistent because the full amount of damages under a wrongful death action should not be awarded when death is not the injury in question.[81] Because the injury is the loss of chance, the physician should be liable only for the loss of that chance for which he is responsible. This approach of setting a value for the plaintiff's loss is known as the "expected value" or "weighted mean" computation.[82]

Under the expected value approach, the trier of fact considers all possible outcomes and the value of each, discounted by the likelihood of occur-

76. Falcon v. Memorial Hosp., 462 N.W.2d 44, 47 (Mich. 1990).

77. King, *supra* note 43, at 1353.

78. That is to say that the physician should be held liable for a share proportionate to the chance of survival which he diminished through his negligence, regardless of whether the patient had a one percent chance of survival or a ninety-nine percent chance.

79. *Falcon*, 462 N.W.2d at 57.

80. *Id.*

81. *Id.* at 52. The Michigan Supreme Court determined that the injury to Nena Falcon was the loss of her chance to live, not her actual death. *Id.*

82. King, *supra* note 43, at 1384.

rence.[83] This method "more precisely measures the value of chance . . . [and] is more consonant with a central purpose of valuing chance: achieving a more rational and accurate loss allocation."[84] Although the extensive use of statistics has drawn serious criticism,[85] King argues that their use is "essential" and points out that statistics are already used in the causation process.[86] This formulation of damages is the most accurate, most effective means of valuation.[87] In this way, the physician is held responsible for the injury that he caused and is not held liable as if he were the only possible cause.[88]

In fact, King takes this approach even further than a loss-of-chance discussion warrants. In maintaining that the physician should be responsible only for the chance which he caused the patient to lose, King extends his system of valuation to cases in which the plaintiff shows a better-than-fifty percent chance of survival.[89] Continuing to employ the all-or-nothing approach in these cases would be an anomaly. In one case, the physician would be liable only for the portion of the loss for which he was the cause. In another case, he would be held liable for the entire loss, the patient's death, under the potentially mistaken assumption that he was solely responsible. Such an approach would result in overcompensation for plaintiffs on the whole.[90] Therefore, in the interest of fairness and consistency, the plaintiff should receive the proportion of the damages for which the physician is responsible, regardless of whether the probability of his negligence being the cause was above or below fifty percent.

IV. Policy Considerations in the Use of Loss-of-Chance Actions

A. Arguments in Favor of the Use of Loss-of-Chance

The *Falcon* court recognizes that the physician-patient relationship is one which is entered into "not only to prevent disease or death, but also to defer or ameliorate the suffering associated with disease or death,"[91] a viewpoint

83. *Id.*

84. *Id.*

85. Lawrence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1330 & n.2 (1971).

86. King, *supra* note 43, at 1385. Statistics are necessary for the fact-finder, even in traditional tort actions in determining whether the plaintiff's chances for survival exceeded 50%. *Id.*

87. *Id.* at 1387.

88. *Id.*

89. *Id.*

90. *Id.*

91. Falcon v. Memorial Hosp., 462 N.W.2d 44, 51 (Mich. 1990).

closely resembling contract law.[92] The patient expects the physician to provide adequate services whether or not the patient has a greater-than-fifty-percent chance of survival. If a physician breaches that duty, she should not be able to avoid the consequences of her actions merely because the patient's chance of survival was less than fifty percent.

The Supreme Court of Kansas, in *Roberson v. Counselman*,[93] articulated the problems associated with freeing physicians from liability. The court asserted that:

> The reasoning of the district court herein [which rejected loss-of-chance as a cognizable tort] in essence, declares open season on critically ill or injured persons as care providers would be free of liability for even the grossest malpractice if the patient had only a fifty-fifty chance of surviving the disease or injury even with proper treatment.[94]

This rationale was explicitly adopted by the court in *Falcon*.[95]

Professor King has also provided policy reasons for recognizing the loss-of-chance as a separate tort. "The all-or-nothing approach distorts the loss-assigning role of [tort] law[,] . . . undermines the whole range of functions served by the causation-valuation process[,] and strikes at the integrity of the torts system of loss allocation."[96] The tort system of law imposes liability for negligent actions that cause harm. To deny compensation to patients merely because they may have incurred the injury anyway, subverts the tort system of law by allowing physicians to hide behind the fifty percent threshold.[97]

Consider another hypothetical. One hundred women suffer from the same condition from which Nena Falcon suffered and are treated with similar negligence. Under the all-or-nothing approach, none of the subsequent suits will result in compensation for the survivors of the decedent women, despite

92. *Id.* The court advances the notion that doctors and hospitals are not utilized merely to deal with the physical problems of the patients. *Id.* Doctors are engaged by the patient to perform services for the patient. *Id.* The relationship resembles contract law in the sense that these physicians are compensated for the services that they perform, and as such their services must include the treatment of illness or sickness regardless of the chances of the patient for survival. *Id. But see* James J. Murphy, *Beyond Autonomy: Judicial Restraint and the Legal Limits Necessary to Uphold the Hippocratic Tradition and Preserve the Ethical Integrity of the Medical Profession*, 9 J. Contemp. Health L. & Pol'y 1301, 1332-34 (1993) (arguing that a physician is not bound to provide treatment that is futile, non-beneficial or otherwise medically inappropriate).

93. 686 P.2d 149 (Kan. 1984).

94. Roberson v. Counselman, 686 P.2d 149 (Kan. 1984).

95. *Falcon*, 462 N.W.2d at 51.

96. King, *supra* note 43, at 1377.

97. *Id.*

the fact that approximately thirty-seven would still be alive had their treatment been proper.[98] Under the approach taken by the Michigan Supreme Court in *Falcon*, and advocated by Professor King, however, the subsequent actions would yield a return of thirty-seven percent of the aggregate damages. This is an equitable approach when one considers that proper treatment would have kept approximately thirty-seven women alive. Instead of rewarding only those patients who demonstrate a better-than-fifty percent chance of survival with the entire pecuniary amount under the wrongful death statute, the expected value system allows recovery by all parties, but only to the extent that the physician was responsible for the loss.[99] Therefore, if one half of a hospital's patients have a fifty-one percent chance of survival, and the other half have a survival chance of forty-nine percent, and all die as a result of medical negligence, the system set forth in *Falcon* would reapportion the awards among all the patients.[100]

California has taken a different approach.[101] In *Dumas v. Cooney*, the California Court of Appeals found the above hypothetical to be inequitable because sixty-three plaintiffs would be compensated even though the odds show that they would have died with proper treatment.[102] That court ignored two important considerations. First, if the doctors, in these situations had not been negligent, there would still be questions as to which of the one hundred women would be alive.[103] Second, the cost to these physicians is no greater than if they were required to pay the entire pecuniary amount in damages to the thirty-seven women whose death they actually caused. As Professor King points out, this is the "most administratable and consistent

98. Falcon v. Memorial Hosp. 462 N.W.2d 44, 59 (Mich. 1990) (Riley, C.J., dissenting). If one hundred parties bring suit, with each patient individually having a 25% chance of survival, then each suit will fail because none of the plaintiffs could show that the defendant was the but for cause of the injury. *Id.*

According to the testimony of Dr. Abouleish in the *Falcon* case, of 100 women suffering from the embolism, 50 will die immediately, 25 will survive, and the remaining 25 will develop a blood coagulation and one-half of those 25, or 12 1/2 will die from the coagulation. Therefore, of the original 100, 37 1/2 will survive. *Id.*

99. Dumas v. Cooney, Cal. App. 3d (Cal. Ct. App. (1991). The California Court of Appeals in *Dumas* argued that this method resulted in overcompensation to the parties that would have died anyway. *Id.* While recognizing that this may be the case, it is important to keep in mind that the uncertainty concerning who the survivors would be was, in essence created by the negligence of the physician. The expected value approach considers that some compensation to all patients is more just since the lack of certainty was caused by the physician.

100. By recognizing a loss-of-chance action for each of the survivors and assessing damages under the expected value approach, each plaintiff receives 37% of the amount otherwise recoverable under the wrongful death statute.

101. *See*, Dumas v. Cooney, 235 Cal. App. 3d at 1608.

102. *Id.* at 1609.

103. King, *supra* note 43, at 1378.

method for dealing with many complicated cases."[104]

Instead of struggling with the question of causation in the traditional sense, and then determining whether some other means of counteracting an otherwise harsh result are available, a court may simply apply the loss-of-chance doctrine to determine the percentage of the loss for which the physician is negligent and award damages equal to that percentage. As a result, a court need not lower the standard of proof,[105] nor subvert tort principles.[106] The Oklahoma Supreme Court expounded this principal in *McKellips v. Saint Francis Hospital, Inc.*[107] In allowing the claim by the deceased's widow for the hospital's failure to diagnose a heart attack properly, the Oklahoma Supreme Court held that the defendants "should not benefit from the uncertainty created by their own negligence."[108] Professor King resounds this notion: "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."[109] The physician should not be able to walk away from a situation that he potentially created, merely because the patient may have died in any case.

Another important policy consideration is that the recognition of loss-of-chance actions would deter physicians from minimizing the importance of properly treating terminally ill or critically injured patients.[110] Physicians will no longer be able to dodge liability for their negligent acts merely because their patient had a less-than-fifty percent chance of survival. In addition, doctors and health care specialists will utilize the most effective methods available in an effort to save their patients.[111]

B. Arguments against the use of Loss-of-Chance

Many courts faced with the adoption of loss-of-chance rejected it.[112] Likewise, Chief Justice Riley vigorously opposed the position of the plurality in *Falcon*.[113] While this view is not without merit, the legal and policy justifications fall clearly on the side of the acceptance of loss-of-chance actions.

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104. *Id.*

105. Gooding v. University Hosp. Bldg., Inc., 445 So. 2d 1015, 1019 (Fla. 1984).

106. Hare v. Foster G. McGaw Hosp., 549 N.E.2d 778, 783-84 (Ill. App. Ct. 1989) (refusing to impose liability on hospital for failure to properly diagnose patient's fatal hepatitis).

107. 741 P.2d 467, 474 (Okla. 1987).

108. *Id.*

109. King, *supra* note 43, at 1378.

110. Herskovits v. Group Health Coop., 664 P.2d 474, 477 (Wash. 1983

111. *See, e.g.*, Cooper v. Sisters of Charity, 272 N.E.2d 97 (Ohio 1971).

112. *See, e.g.*, Gooding v. University Hosp. Bldg., Inc., 445 So. 2d 1015, 1019 (Fla. 1984); Hare v. Foster G. McGaw Hosp., 549 N.E.2d 778 (Ill. App. Ct. 1989).

113. Falcon v. Memorial Hosp., 462 N.W.2d 44, 58 (Mich. 1990) (Riley, C.J., dissenting).

Arguing against loss-of-chance, Chief Justice Riley ultimately fails to accurately discern exactly what this tort involves.[114] The Chief Justice contends that "[t]he recognition of a lost chance as a cognizable injury is necessarily based on the reasoning that but for the defendant's negligence, the plaintiff *might possibly* have avoided an adverse result. Thus, recognition of lost chance as a recoverable interest contradicts the very notion of cause in fact."[115] In misconstruing the standard of proof to be one of possibility, the Chief Justice misunderstands the concept of loss-of-chance. Loss-of-Chance does not mandate a relaxation of traditional tort standards of causation.[116] The action is based on the injury being the lost opportunity, not the death itself.[117] To state that this cause of action allows for recovery when the physician "might possibly" have caused the injury,[118] is to misunderstand the concept. The plaintiff must prove that the physician's negligence caused the loss-of-chance of survival, using whatever standard that state applies in torts cases, typically a preponderance of the evidence.[119]

Despite Chief Justice Riley's suggestion, loss-of-chance does not "abandon the truth seeking function of law."[120] Instead, this distinct tort action recognizes that the truth in a wrongful death action cannot always be ascertained. In the interest of fairness to the plaintiff, loss-of-chance seeks to determine whether or not the defendant caused the loss of the plaintiff's chance of survival. Accordingly, Mrs. Falcon was awarded damages from the defendants because they deprived her daughter of a thirty-seven percent chance of survival, not because they caused her daughter's death.[121]

The Chief Justice also contends that deterrence will not result from the recognition of loss-of-chance damages. This viewpoint suggests that either doctors frequently act negligently, or that they need not act with due care for people who have a lower-than-fifty percent chance of survival. The effect of assuming the Chief Justice's view would be to "declare[] open season on critically ill or injured persons."[122]

Chief Justice Riley's suggestion that loss-of-chance will increase health care costs is tenuous at best. In fact, incidents of medical malpractice would arguably decrease because physicians would act more carefully; would ensure that tests are conducted properly; and would consider all methods of

114. *Id.*
115. *Id.* at 65 (emphasis in original).
116. King, *supra* note 43 at 1376.
117. Falcon v. Memorial Hosp., 462 N.W.2d 44, 52 (Mich. 1990).
118. *Id.* at 65 (Riley, C.J., dissenting).
119. King, *supra* note 43, at 1367.
120. Falcon, 462 N.W.2d at 66 (Mich. 1990) (Riley, C.J., dissenting).
121. *Id.* at 57.
122. Roberson v. Counselman, 686 P.2d 149, 160 (Kan. 1984).

treatment available.[123] In addition, it is worth noting once again that the aggregate amount of damages under the loss-of-chance approach would not increase. Furthermore, if the number of loss-of-chance cases is fewer than the number of traditional medical malpractice cases, the cost to the physicians would be lower.[124] Therefore from an economic point of view, it may be more cost effective to adopt loss-of-chance tort actions.

The Court of Appeals of Maryland rejected the loss-of-chance theory because, among other things, the use of statistics and probabilities would confuse the jury.[125] According to that court, such evidence is "unreliable, misleading and easily manipulated . . . ."[126] The Maryland court expresses fear that the excessive use of statistics offered by both sides will lead to an unworkable system for medical malpractice cases.[127] The loss-of-chance case, however, utilizes statistics no more than a traditional wrongful death action. In both cases, the patient's preexisting condition must be considered. As the Maryland Court acknowledges, traditional cases involve a determination that a patient had a 50.1% chance of survival. To impose liability, the trier of fact must consider statistical evidence of the patient's chance of survival; the negligence of the physician, assuming liability; and the amount of damages to be awarded.[128] Even in traditional all-or-nothing cases, statisti-

123. Feldman, *supra* note 3, at 151.

124. As an example, assume that 100 cases come to Hospital X, and that the value of the pecuniary interest of each of these patients is $100,000. Under the modified valuation approach, if 50 cases are brought under the loss-of-chance doctrine with each patient having a 25% chance of survival, the loss of these lives through negligence will impose a liability of $1,250,000.00 ($25,000 x 50). If the other 50 patients have a 75% chance of survival, the loss of their lives would impose liability of $3,750,000. Thus, in a jurisdiction that recognizes loss-of-chance damages, Hospital X would face a total liability of $5 million when the number of cases are the same on either side of 50% threshold. If the number of loss-of-chance patients is 5 and the other class remains at 50, the death of the loss-of-chance patients would result in $125,000.00. The class of patients with a 75% chance of survival would still result in $3,750,000. ($75,000 x 50). Thus the total liability would be $3,875,000.

If the jurisdiction does not recognize loss of chance, then the liability in the first case above (when the cases are both 50 persons in each class) would break down as follows: No liability for the loss of chance patients, and full liability for the others; thus $5,000,000 would be the total liability. The second example, however, brings about a different result. If there are 5 loss-of-chance patients and 50 patients with a 75% chance of survival, the outcome is still $5,000,000. As a result, the outcome in a jurisdiction which has adopted loss of chance is $1.125 million lower than the jurisdiction that does not recognize loss-of-chance.

125. *See* Fennell v. Southern Md. Hosp. Ctr. Inc., 580 A.2d 206, 213 (Md. 1990) (refusing to recognize a tort action where the emergency room doctors failed to provide needed treatment, and the patient subsequently died from swelling of the brain, a symptom of bacterial meningitis).

126. *Id.* at 213.

127. *Id.* at 214.

128. In traditional tort liability cases, the trier of fact must determine that the decedent had a greater-than-50% chance of survival. To do so requires that the trier engage in statistical

cal evidence is necessary. Therefore, the unequivocal argument that loss-of-chance cases will involve "bewildering sets of numbers,"[129] is an attack on all wrongful death actions.

Another commentator argued that physicians should not be "frustrated by the law's conversion of survival statistics gathered over decades and involving thousands of patients into a yardstick used to measure one specific life."[130] The response to this line of argument is simple: Why allow the physician to benefit from the very same statistics when they show the patient's chances of survival to be less than fifty percent? If statistics should not be used to determine liability in a loss-of-chance action, then neither should statistics be used to free a physician from liability under traditional tort actions.

In *Fennell v. Southern Maryland Hospital Center, Inc.*, the Maryland Court of Appeals concluded by stating that the "benefits of allowing loss-of-chance damages" are not offset by the "probable increase in medical malpractice litigation and medical insurance costs."[131] This Note, however, demonstrates that recognition of loss-of-chance damages and the proportional valuation process in all medical malpractice cases would lead to lower costs to the medical profession.[132] Negligence by any individual or group that results in harm should result in liability, regardless of the potential costs to that party in the future. Taken to its logical extreme, the *Fennell* court's policy would exempt an automobile driver from liability for an accident he negligently caused because it might raise insurance rates for all of the persons insured by that company. The court's role is not to weigh the injury caused by a party's negligence against the additional costs that the party may have to bear in the future. Negligence that results in harm imposes liability on the negligent party. The *Fennell* court has espoused a policy of destructive judicial activism.

V. CONCLUSION

The loss-of-chance action in medical malpractice cases does not lower the standard of proof that a plaintiff must meet. It merely recognizes that the patient with a preexisting chance of survival of lower than fifty percent suf-

speculation. Likewise, in the loss-of-chance case, the trier must determine what the patient's chances of survival were prior to treatment in order to determine damages. Thus, both types of cases require the trier of fact to determine the statistical probabilities.

129. *Fennell*, 580 A.2d at 214.

130. Michael J. Fox, *The Loss of Chance Doctrine in Medical Malpractice*, 33 A.F. L. REV. 97, 102 (1990).

131. Fennell v. Southern Md. Hosp. Ctr., Inc., 580 A.2d 206, 215 (Md. 1990).

132. *See supra* notes 123-24 and accompanying text.

fers a compensable injury when she dies subsequent to negligent treatment by her physician despite the preexisting condition. This distinct tort comports with traditional requirements of proof and causation. Any uncertainty associated with the extent of the negligently caused injury should be reflected in the assessment of damages. Therefore, a doctor should not be held liable for the loss of the patient's life when it can be proven only that the physician merely lowered the chance for survival. Likewise, in cases in which a patient has a greater-than-fifty percent chance of survival, the medical professional should only be held liable for the proportion of chance for which he or she was responsible for decreasing.

The recognition of loss-of-chance tort actions and the use of proportional damages in all medical malpractice cases involving preexisting conditions advance the position that medical professionals should be held responsible, albeit solely for the results of their actions. When these physicians act negligently, freedom from liability would only send a signal that the lives of terminal patients are less valuable. Finally, as demonstrated, this process of valuation will cause no additional liability in the aggregate. In fact, this process may save the medical profession.[133] And so, in the interests of consistency and fairness in the law, and favorable public policy, loss-of-chance damages should be accepted under the reasoning set for by the *Falcon* court and Professor King.

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133. *See supra* note 124 and accompanying text.