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Smith v. State of Louisiana, Department of Health and Hospitals: Loss Chance of Survival: The Valuation Debate

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NOTES

Smith v. State of Louisiana, Department of Health and Hospitals: Loss Chance of Survival: The Valuation Debate

I. INTRODUCTION

In a loss of a chance of survival action, a medical malpractice plaintiff recovers for the reduction of the patient's survival possibilities. While the physician's malpractice may not have caused the patient's death or injury, the lost chance theory recognizes that the patient's loss of survival opportunities should be compensable.[1] Loss chance of survival is a relatively new tort action. Although some states do not recognize loss chance as a viable cause of action, several Louisiana cases have recognized the right to recover damages in medical malpractice cases for the loss of a chance of survival. Though recognized in 1987,[2] the Louisiana Supreme Court had never addressed the method of valuing the damages recoverable for lost chance until 1996 in *Smith v. State Department of Health & Hospitals*.[3] The supreme court rejected the most common method to value damages in loss chance, reducing wrongful death damages by the percentage of chance lost, and accepted the lump sum approach.[4] In choosing this method, the *Smith* court defined the loss of a chance as a "distinct compensable injury" and valued the damages in the same way that any item of general damages is calculated.[5]

This casenote analyzes the methods other states use to value damages in a loss of a chance cause of action and will compare and contrast those approaches to the lump sum method chosen by the Louisiana Supreme Court. Part II of this casenote explores the facts and issues presented to the supreme court in *Smith*. In Part III, this casenote reviews the development of the loss of a chance cause of action in both Louisiana and other states that recognize lost chance, and discusses the different methods of valuation used by the courts. Part IV of this casenote describes the Louisiana Supreme Court's method of valuing damages in lost chance and their reasons for choosing that method as described in *Smith*. Finally, Part V discusses the pros and cons of each method of valuation and suggests other viable options for valuing these damages.

II. FACTS

In *Smith v. State Department of Health & Hospitals*, the plaintiff, Benjamin Smith, was hospitalized for five days to undergo minor foot surgery. While in

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1. Jim M. Perdue, *Medical Malpractice 1987: New Faces, New Facts, New Fundamentals*, 18 St. Mary's L.J. 955, 957 (1987).
2. Hastings v. Baton Rouge Gen. Hosp., 498 So. 2d 713 (La. 1987).
3. 676 So. 2d 543 (La. 1996).
4. *Id.* at 547.
5. *Id.*

the hospital, the physicians took a routine chest x-ray that the staff radiologist reported as showing a mass in his right trachea. The hospital staff failed to inform Smith of the x-ray results or recommend further testing. Fifteen months later Smith returned to the hospital where a second chest x-ray was taken. This x-ray revealed that the mass had doubled in size. Smith then learned for the first time of the first x-ray report. Further testing revealed that the mass was a "fast acting lethal cancer."[6] Smith underwent aggressive drug treatment and chemotherapy but died four months later.

Smith's wife and children filed suit against the hospital seeking both survival and wrongful death damages due to the hospital's negligence in failing to inform him of the results of the first chest x-ray. The trial court ruled that the plaintiffs had not met their burden of proving that the fifteen month delay in treatment resulting from the hospital's negligence had *caused* Smith to die or to lose a chance of survival.[7] The trial court found that Smith had lived his normal life expectancy just as if they had diagnosed the cancer in the first stage, when he initially reported to the hospital.[8] Thus, the trial court dismissed the plaintiff's action.[9]

The court of appeal reversed, holding that the plaintiffs were entitled to recover damages for Smith's loss of a chance of survival.[10] Accordingly, the court held that "the percentage probability of loss, if less than 50% is the proper measure of the plaintiff's damages in a case of wrongful death due to medical malpractice."[11] If the defendant caused the plaintiff to lose 12% of his chance of surviving, then the plaintiff would be compensated with 12% of wrongful death damages. The appellate court stated that, "[i]t would not be logical or fair to impose full liability on a physician whose act or omission injures a patient whose chances of recovery were slim at best; and yet imposing liability proportionate to the patient's chances is proper to assure the physician exercises reasonable care."[12]

The supreme court agreed with the appellate court that the plaintiff's family should be compensated for his lost chance of survival, but granted writs to address the method of measuring the damages caused by the deprivation of a chance of survival when that chance is less than 50%.[13] The supreme court rejected the appellate court's method of valuation and held that lost chance on account of medical malpractice is a "distinct compensable injury" which is to be valued as a lump sum award based on all the evidence in the record, as is done

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6. *Id.* at 545.
7. *Id.*
8. *Id.* at 545-46.
9. *Id.* at 546.
10. Smith v. State Dep't of Health & Hosps., 647 So. 2d 653 (La. App. 2d. Cir. 1994).
11. *Id.* at 662.
12. *Id.*
13. *Smith*, 676 So. 2d at 547.

for any other item of general damages.[14] Thus, lost chance damages should be treated just as damages for a broken arm or leg. The jury should determine the extent of the injury, or in this case the chance lost, and should determine what amount should be awarded to compensate the victim or his or her survivors for those damages.

III. PRIOR JURISPRUDENCE

In general, a medical malpractice claim is a negligence case. The plaintiff must prove by a preponderance of the evidence 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 ; (4) the defendant was the proximate cause of the injury; and (5) the plaintiff suffered some damage.[15] In loss of a chance malpractice action, the physician owes a duty to the plaintiff to exercise reasonable medical care, and damages are awarded when that duty is breached. Thus, the plaintiff's main focus is in proving that the doctor's negligence more probably than not caused the injury or death.[16]

The "loss of a chance" action permits a medical malpractice plaintiff to recover for the *reduction* of the patient's survival possibilities when the doctor's negligence is not the sole cause of the plaintiff's death.[17] Take, for instance, a failure to diagnose a preexisting condition, as in the *Smith* case. In this situation, the doctor failed to inform the plaintiff of a fast-acting lethal cancer until it was in the final stages. In order for the plaintiff to recover in tort for medical malpractice, the plaintiff must prove, by a preponderance of the evidence, that the doctor was the *cause-in-fact* of the plaintiff's death or injury. However, since the plaintiff's cancer was more than likely the predominant cause of his death and not the doctor's negligence in diagnosing that cancer, the plaintiff will not be able to prove that but for the doctor's negligence the plaintiff would not have died. This is because the decedent, due to a preexisting condition, had less than a 50% chance of living, even if properly diagnosed and treated in a timely manner. Thus, it is likely that the preexisting condition, rather than the defendant's actions, more probably than not caused the injury.[18] Traditionally, in this situation, if the plaintiff could not prove that the doctor's

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14. *Id.*

15. *See* W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 30, at 164-65 (5th ed. 1984).

16. For the purpose of this paper, assume that the doctor did in fact breach the standard of care. A physician is required to exercise that degree of skill ordinarily employed under similar circumstances by others in the profession and also to use reasonable care, diligence and judgment; a national standard of care, not that of the local area. Ardoin v. Hartford Accident & Indem. Co., 360 So. 2d 1331 (La. 1978).

17. Perdue, *supra* note 1, at 957 (citing Jim M. Perdue, *Recovery for a Lost Chance of Survival: When the Doctor Gambles, Who Puts Up the Stakes?*, 28 S. Tex. L.J. 37, 38 (1987)).

18. Robert S. Bruer, *Loss of a Chance as a Cause of Action in Medical Malpractice Cases:* Wollen v. DePaul Health Center, 59 Mo. L. Rev. 969, 973 (1994).

malpractice was the cause of the plaintiff's death, he would receive nothing in damages. While the physician's malpractice may not have caused the patient's death or injury, the lost chance theory recognizes that the plaintiff's loss in survival opportunities should be compensable.[19]

Using the traditional but-for causation standard for loss of chance cases would not allow the plaintiff to recover anything, as the doctor did not *cause* the plaintiff's injury. Thus, a defendant who caused another to lose a 49% chance of surviving would face no liability, whereas a defendant who caused another to lose a 51% chance would be faced with full wrongful death damages.[20] Because the traditional "all or nothing approach"[21] creates obvious inequities, courts began to recognize the loss of a chance as a cause of action. Courts have taken two different routes in recognizing lost chance. Some courts have made it easier to prove the cause-in-fact standard by saying that the doctor's negligence was a "substantial cause" of the patient's death rather than the cause-in-fact of the death.[22] Other courts, including those in Louisiana, have chosen to view the lost chance as the injury itself, rather than the death.[23] With this view, courts retain the cause-in-fact standard by saying that but for the doctor's negligence, the patient would not have lost a chance of survival.

A. Common Law Recognition of Loss of a Chance as a Cause of Action

The loss of a chance cause of action is relatively new to courts. It was first recognized in 1966 in *Hicks v. United States*.[24] Since that time, most of the jurisdictions that have been confronted with the loss of a chance issue have recognized a patient's right to be compensated for the deprivation of recovery possibilities; however, this cause of action has been the subject of great confusion and controversy as courts struggle to define and determine the applicability and valuation of loss of a chance in medical malpractice cases.

1. From Kuhn v. Banker *to* Hicks v. United States

For years, the standard by which to evaluate causation in loss of chance cases was represented in *Kuhn v. Banker*.[25] In *Kuhn*, the court stated that, "[t]he loss of [a] chance . . . standing alone, is not an injury from which damages

19. Perdue, *supra* note 1, at 957 (citing Aasheim v. Humberger, 695 P.2d 824, 827-28 (Mont. 1985)).

20. Stephen F. Brennwald, *Proving Causation in "Loss of a Chance" Cases: A Proportional Approach*, 34 Cath. U. L. Rev. 747, 752 (1985).

21. *Id.* at 752.

22. *See, e.g.*, Hicks v. United States, 368 F.2d 626 (4th Cir. 1966).

23. *See, e.g.*, Rachel Smith v. State of Louisiana, Dep't of Health and Hosps., 676 So. 2d 543 (La. 1996).

24. 368 F.2d 626 (4th Cir. 1966).

25. Brennwald, *supra* note 20, at 755.

will flow."[26] Courts adhered to the preponderance standard firmly. Thus, plaintiffs who could not meet the traditional but-for causation standard had little hope of ever receiving compensation for the loss of their opportunities. However, in 1966, "a decision of the United States Court of Appeals for the Fourth Circuit appeared to provide new hope to these victims."[27] In *Hicks v. United States*, a physician failed to diagnose a strangulated bowel which, but for the delay, could have been surgically treated, thereby saving the patient's life.[28] In finding that the doctor's negligence destroyed whatever chance of recovery the decedent might otherwise have had, the court stated that:

> If there was any *substantial possibility of survival* and the defendant has destroyed it, he is answerable. Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass. The law does not in the existing circumstance require the plaintiff to show to a *certainty* that the patient would have lived had she been hospitalized and operated on promptly.[29]

In other words, if the defendant has destroyed a *substantial possibility of survival*, he will be liable for damages. It seems as though *Hicks* just reiterated the holding in *Kuhn*, using the language "substantial possibility" as a mere reemphasis of the traditional standard of proof of causation, the "but-for" standard. However, lower courts stretched this language to develop the loss of a chance cause of action.[30] Many decisions citing *Hicks* use the "substantial possibility" language and interpret it to mean a lesser standard of causation than but-for—the substantial possibility standard.[31] Instead of saying that the doctor *caused* the plaintiff's death or injury, courts were holding physicians liable when it was just a "substantial possibility" that the doctor caused the death or injury.[32] Thus, courts were saying the doctor's negligence was a substantial cause of the patient's death, rather than the cause-in-fact of the death, and were granting recovery to the plaintiff. This quote, though dicta, opened the

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26. Kuhn v. Banker, 13 N.E.2d 242, 247 (Ohio 1938).
27. Brennwald, *supra* note 20, at 755.
28. 368 F.2d 626, 628 (4th Cir. 1966).
29. *Id.* at 632.
30. *See, e.g.*, Voegeli v. Lewis, 568 F.2d 89 (8th Cir. 1977); McBride v. United States, 462 F.2d 72 (9th Cir. 1972); Jeanes v. Milner, 428 F.2d 598 (8th Cir. 1970); Wright v. United States, 507 F. Supp. 147 (E.D. La. 1981); and Whitfield v. Whittaker Mem'l Hosp., 169 S.E.2d 563 (Va. 1969).
31. Brennwald, *supra* note 20, at 757. *See, e.g.*, Jeanes v. Milner, 428 F.2d 598, 604 (8th Cir. 1970), which held that a jury may conclude that the loss of an 11% chance of survival caused the patient's death; Thomas v. Corso, 288 A.2d 379, 389 (Md. 1972) found that a physician who failed to deliver proper medical attention to an injured patient in the emergency room destroyed a substantial possibility of survival; and Kallenberg v. Beth Israel Hosp., 357 N.Y.S.2d 508 (N.Y. App. Div. 1974). *See also* Jack Rosati, *Causation in Medical Malpractice: A Modified Valuation Approach*, 50 Ohio St. L.J. 469 (1989).
32. *See, e.g.*, *Hicks*, 368 F.2d at 632.

floodgates of litigation as it formed the basis for several courts to relax the standard of proof as they surveyed how much of a chance was lost.[33]

2. From Hicks *to* Hamil v. Bashline

In *Hamil v. Bashline*, the court used a new approach by finding a statutory basis for relaxing the traditional causation standard of proof to recognize loss of a chance as a cause of action, rather than using the dicta in *Hicks*.[34] In *Hamil*, the patient was taken to the hospital because he was suffering from chest pains. An electrocardiogram (EKG) was ordered, but due to a faulty outlet the EKG machine did not work. The hospital staff was unable to locate another machine. Since the patient was unable to receive treatment at the hospital, he was taken to a private office where he later died. The Supreme Court of Pennsylvania, in deciding the case, relied upon Section 323(A) of the Restatement (Second) of Torts,[35] finding that the effect of Section 323(A) is to "relax the degree of certitude" normally required of the plaintiff's evidence as to proof of causation in order to take the case to the jury.[36] "The court read section 323 (A) as 'tacitly . . . permit[ing] the issue to go to the jury upon a *less than normal threshold of proof*.'"[37] In other words, if the doctor's negligence increased the patient's chances of dying, the jury would then be required to evaluate the increased risk and to decide whether the increase was a "substantial factor" in (rather than the *cause* of) the plaintiff's death. If the jury finds that it is a substantial factor, then causation will be established. Though the *Hamil* court reached the same end result as the *Hicks* court, the *Hamil* court had a basis for their relaxed causation, Section 323(A), rather than simply relying on dicta.

3. From Hamil *to* Herskovits v. Group Health Cooperative

In *Herskovits v. Group Health Cooperative*, the Supreme Court of Washington followed the relaxed causation approach used in *Hamil*, but relaxed cause-in-fact to an even greater degree.[38] The court held that a reduction of a chance of survival from 39% to 25% due to the physician's failure to diagnose lung cancer on the first visit was in fact compensable, even though the plaintiff

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33. Michael J. Fox, *The Loss of Chance Doctrine in Medical Malpractice*, 33 A.F. L. Rev. 97, 99 (1990).

34. 392 A.2d 1280 (Pa. 1978).

35. *Id.* at 1286. Restatement (Second) of Torts § 323(A) (1966) provides:

> One who undertakes, gratuitously or for consideration, to render services to another 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 (a) his failure to exercise such care increases the risk of such harm. . . .

36. Bruer, *supra* note 18, at 975-76 (quoting *Hamil*, 392 A.2d at 1286).

37. Fox, *supra* note 33, at 100 (quoting *Hamil*, 392 A.2d at 1287 (emphasis added)).

38. 664 P.2d 474 (Wash. 1983).

had less than a 50% chance of surviving before the doctor's negligence.[39] Most importantly, the majority opinion noted that "[c]ausing reduction of the opportunity to recover 'loss of chance by one's negligence . . . does not necessitate a *total* recovery against the negligent party for all damages caused by the victim's death.'"[40] Rather, "[d]amages should be awarded to the injured party or his family based only on damages caused directly by [the plaintiff's] premature death, such as lost earnings, and additional medical expenses, etc."[41] This was a marked difference from the preceding cases which held the defendants fully liable for the injury. In other words, in *Hicks* and *Hamil*, even though the doctor was only a substantial cause of the patient's death, he was still liable for full wrongful death damages, just as if the physician was the cause-in-fact of the injury or death. *Herskovits* found this to be unfair and held that the doctor should only be liable for the extent of the injury that he or she caused, rather than full wrongful death damages.[42]

The *Herskovits* case was also important for its concurring opinion by Justice Pearson.[43] In the cases preceding *Herskovits* and in its own majority opinion, courts viewed the death of the patient as the injury but modified the degree of proof of causation. Instead of saying "but for" the doctor's negligence the plaintiff would not have died, the courts simply lessened the "but for" requirement by stating that the doctor's negligence was the "substantial cause" of the plaintiff's death. In both the traditional "but-for" test and the "substantial cause" test, the injury was always defined as death. However, Justice Pearson's opinion in *Herskovits* recognized that the injury was not the death itself, but rather the loss of a chance of survival.[44] Put simply, "but for" the doctor's negligence the plaintiff would not have lost a chance of survival. By redefining the injury, courts are able to keep the traditional but-for standard of proof of causation in negligence cases, thus defeating the problem of the plaintiff's inability to prove, by a preponderance of the evidence, that the doctor caused the death. Even though many courts failed to adopt this "redefining the injury" approach, Louisiana did adopt it in *Smith*.

B. Louisiana's Adoption of the Loss of a Chance Cause of Action

1. Hastings v. Baton Rouge General Hospital

Louisiana courts were slow in adopting loss of a chance of survival as a cause of action. Courts around the United States were granting relief to plaintiffs

39. *Id.* at 475.
40. *Id.* at 479 (emphasis added).
41. *Id.*
42. *Id.*
43. *Id.* at 479.
44. *Id.* at 487.

under this cause of action as early as 1966, citing *Hicks* as authority.[45] However, it was not until 1987, in *Hastings v. Baton Rouge General Hospital*, that Louisiana courts officially adopted loss of a chance as a viable cause of action.[46] In *Hastings*, the plaintiff was admitted to the emergency room of a private hospital due to multiple stab wounds. A thoracic surgeon ordered the patient transferred to a public hospital after discovering that the patient did not have insurance. The transfer required that the patient be disconnected from life-saving equipment. Shortly after the disconnection, the plaintiff died.

The supreme court, citing *Hicks* and *Herskovits*, stated that "[i]t is not necessary to prove that a patient would have survived if proper treatment had been given, but only that there would have been a *chance of survival*."[47] *Hastings* adopted the "substantial factor" language in *Hicks*, explaining that the doctor's negligence need not be the only factor in causing the plaintiff's death, but rather only a substantial factor.[48] The Louisiana Supreme Court extended its reasoning to hold that malpractice may be a substantial factor in destroying even a very modest chance of survival.[49] The court proceeded to formulate a two-part test for loss of a chance causes of action.[50] First, the plaintiff must prove, as in any negligence action, that the defendant owed the plaintiff a duty to protect against the risk(s) involved and that the defendant breached that duty.[51] Second, the plaintiff must prove that the defendant's actions were a substantial cause-in-fact of the death.[52] If both of these two factors are met, then the defendant is liable for the loss of a chance of survival of the patient.

The reasoning in *Hastings* simply relaxed the causation standard from cause-in-fact to a "substantial factor." The court did not redefine the injury as the loss of a chance itself. Nevertheless, the court in *Hastings* recognized loss of a chance as a cause of action for the first time in Louisiana.

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45. Hicks v. United States, 368 F.2d 626 (4th Cir. 1966). *See, e.g.*, Wright v. United States, 507 F. Supp. 147, 158-59 (E.D.N.Y. 1981); Jenkins v. St. Paul Fire and Marine Ins. Co., 422 So. 2d 1109 (La. 1982) (Dennis, J., dissenting); and Nelson v. Pendelton Mem'l Methodist Hosp., 612 So. 2d 908, 910 (La. App. 4th Cir. 1993).

46. 498 So. 2d 713 (La. 1987). Prior to *Hastings*, at least two Louisiana appellate court decisions upheld the right of medical malpractice plaintiffs to recover in instances where it was proven that the defendant's negligence destroyed a significant chance that the patient's death or injury could have been avoided. *See, e.g.*, Hunter v. Office of Health Servs., 385 So. 2d. 928, 932-33 (La. App. 2d Cir.), *writ denied*, 393 So. 2d 737 (1980); Fairchild v. Brian, 354 So. 2d 675, 679-80 (La. App. 1st Cir. 1977), *quoted in* Gordy Smith v. State Dep't of Health & Human Resources Admin., 523 So. 2d 815, 822 (La. 1988).

47. *Hastings*, 498 So. 2d at 720 (emphasis added).

48. *Id.*

49. *Id.* For this proposition, the courts cited Kallenberg v. Beth Israel Hosp., 357 N.Y.S.2d. 508 (N.Y. App. Div. 1974), in which the loss of a 2% chance of survival was found to pose a jury question.

50. *Hastings*, 498 So. 2d at 718.

51. *Id.*

52. *Id.* at 720.

The *Hastings* court did not have the opportunity to address the issue of valuing the damages for loss of chance cases. Since the court was simply deciding the issue of whether the trial court erred in granting a directed verdict, it had to remand to the trial court for a trial on the merits.[53] Thus, the supreme court was not faced with the issue of how to value the damages. However, in dicta, the court seemed to indicate that 100% of the wrongful death damages are recoverable.[54] The court indicates this by stating that, "if a defendant physician, by action or inaction, has destroyed a substantial possibility of the patient's survival, such conduct becomes a proximate cause of the patient's death."[55] Though the court did not give any clear guidance to lower courts in valuing damages for lost chance cases, they infer full recovery.

2. *From* Hastings *to* Gordy Smith v. State Department of Health & Human Resources Administration

In Louisiana, it was not until *Gordy Smith v. State Department of Health & Human Resources Administration* that the court made an effort to recognize loss of a chance, not just as a relaxing of the traditional causation standard, but as redefining the injury suffered by the plaintiff.[56] The court recognized that the injury suffered was a loss of a chance of survival, rather than the death. In *Gordy Smith*, the plaintiff was admitted to a hospital emergency room complaining of shortness of breath. The hospital staff negligently failed to administer an EKG timely and negligently failed to monitor the patient's condition after admission to the emergency room. The patient's condition worsened and the patient eventually suffered a fatal heart attack. The court held that the hospital's negligence did not cause the patient to lose a chance of survival because it was impossible to know whether an earlier discovery of the patient's deteriorating condition could have prevented the heart attack.[57]

The court reiterated the holding in *Hastings*, stating that the medical malpractice plaintiff does not have the unreasonable burden of proving that the patient would have lived if the defendant had not been negligent.[58] However, the *Gordy Smith* court seemed to re-phrase the second question of the two-fold test set out in *Hastings*. The second question in *Gordy Smith* asked "whether the defendant's [negligence] decreased the patient's chance of survival."[59] In

53. *Id.* at 723.

54. *Id.* at 721.

55. *Id.*

56. 523 So. 2d 815 (La. 1988) [hereinafter *Gordy Smith* to distinguish it from *Rachel Smith*, which is the focus of this casenote].

57. The court stated that it was common knowledge that heart attacks occur suddenly and without negligence; however, it explained "that the lack of medical attention provided to Mrs. Smith after her initial examination upon admission to the emergency room and during the period prior to the cardiac arrest did in fact fall below the applicable standard of care." *Id.* at 819 (italics deleted).

58. *Id.* at 821.

59. *Id.* at 820.

essence, the court was saying, but for the defendant's negligence, the patient would not have lost a chance of survival whereas the *Hastings* court asked whether the defendant's actions were a substantial cause-in-fact of the death.

In *Gordy Smith*, the issue of valuing damages for loss chance was once again not addressed as the supreme court found that the patient failed to prove that the defendant's negligence decreased the patient's chances of survival. Thus, the defendants were relieved of liability all together. The court based its finding on the fact that heart attacks can occur suddenly and that "it cannot be said that the only reasonable explanation of the heart attack was the defendant's negligence."[60] Therefore, since it found that the defendant was not liable, the court was not faced with how to value damages in a loss of a chance cause of action.

3. *From* Gordy Smith *to* Ambrose v. New Orleans Police Department

The "redefining the injury" approach was most clearly stated by the Louisiana Court of Appeal for the Fourth Circuit in *Ambrose v. New Orleans Police Department.*[61] In *Ambrose*, the court found that the patient, who died of a heart attack, had a chance of survival, and that the actions of the emergency medical technicians (EMT) in spending too much time at the scene and walking the patient to the stretcher were the causes-in-fact of the patient's lost chance of survival.[62] In so finding, the court asked the traditional negligence question of whether the conduct in question (the EMT's actions) was a cause-in-fact of the resulting harm.[63] The appellate court stated that "[t]he harm allegedly caused by the defendants was the loss of the decedent's chance of survival."[64] From this, it was clear that the fourth circuit had moved away from the *Hastings* "substantial factor" relaxed standard of proof (in proving causation to patient's death) and towards redefining the injury as the loss of a chance itself. Even though the court still used the "substantial factor" language when it stated that "the defendant's conduct was a substantial factor in depriving the decedent of that chance of survival," it stated the harm as the lost chance and not death.[65] Thus, the "substantial factor" language here is simply another way to say "but-for" rather than a relaxed standard. This line of reasoning by the fourth circuit set the stage for the court's decision in *Rachel Smith.*

The supreme court in *Ambrose* granted writs to consider the issue of lost chance; however, the court did not have to look at lost chance as they decided the case on the theory of gross negligence rather than loss of a chance.[66] Thus, the

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60. *Gordy Smith*, 523 So. 2d at 823.
61. 627 So. 2d 233 (La. App. 4th Cir. 1993).
62. *Id.* at 243.
63. *Id.*
64. *Id.* at 238 (citing Martin v. East Jefferson Gen. Hosp., 582 So. 2d 1272 (La. 1991); *Gordy Smith*, 523 So. 2d 815; and Hastings v. Baton Rouge Gen. Hosp., 498 So. 2d 713 (La. 1986)).
65. *Ambrose*, 627 So. 2d at 238.
66. Ambrose v. New Orleans Police Dept., 639 So. 2d 216, 219 (La. 1994).

supreme court avoided the valuation issue once again. In an often cited footnote, the supreme court noted that it had at least twice addressed the loss of a chance of survival, in *Hastings*[67] and in *Martin v. East Jefferson General Hospital*,[68] and it "ha[d] not yet addressed the proper measure of damages to be awarded where a plaintiff has proven only the loss of a chance of survival."[69]

The Louisiana Supreme Court currently recognizes loss of a chance of survival as a viable and distinct cause of action. As it stands today, a plaintiff must satisfy the two-fold test that the defendant was negligent and that his negligence was the cause-in-fact of the patient's loss of a chance of survival in order to find liability. However, a court's inquiry does not stop when liability is found. After determining that the defendant is liable to the plaintiff, the court must then compensate the victim for the resulting harm.

C. The Valuation System: History and Application

"Valuation is animated by a premise similar to that underlying causation: that a tortfeasor should be charged only with the value of the interest he destroyed."[70] In a loss of a chance case, the interest destroyed is the loss of a chance itself. So how do we put a dollar figure on the loss of a chance of survival? It is this premise, that the tortfeasor should only be charged with the value of what he destroyed, that courts have continuously struggled with in these cases. Because loss of a chance is so hard to value, common law courts have used varying methods for calculating the damages.

1. Percentage Probability Approach

The percentage probability approach is the most commonly used method among the various jurisdictions.[71] Professor Joseph King, Jr. first introduced

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67. *Martin*, 498 So. 2d at 720.

68. The issue of loss of a chance of survival reappeared in 1991 with the case of Martin v. East Jefferson Gen. Hosp., 582 So. 2d 1272 (La 1991). In *Martin*, the physician failed to properly diagnose lupus timely, causing the plaintiff to go into cardiac arrest and eventually die. The supreme court merely elaborated on the holding in *Gordy Smith*. The court explained that "to establish causation in a situation where the patient dies, the plaintiff need only prove that the defendant's malpractice resulted in the patient's loss of a chance of survival." *Id.* at 1278. Thus, *Martin* simply reiterated the fact that the plaintiff does not have to prove causation between the malpractice and death, only causation between the malpractice and the loss of a chance.

Once again, the Louisiana Supreme Court was able to escape the valuation question. The supreme court found that the doctor's malpractice caused the plaintiff's death by a preponderance of the evidence. Thus, full wrongful death and survival action damages were awarded. Since the defendant was found to be fully liable, the question of how to value loss of a chance was not answered.

69. *Ambrose*, 639 So. 2d at 219.

70. Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale L.J. 1353, 1356 (1981).

71. *See, e.g.*, Boody v. United States, 706 F. Supp. 1458 (D. Kan. 1989); Falcon v. Memorial Hosp., 462 N.W.2d 44 (Mich. 1990); Perez v. Las Vegas Med. Ctr., 805 P.2d 589 (Nev. 1991); and

this approach in a frequently cited law review article entitled "*Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences.*"[72] This method awards damages in direct proportion to the chance of survival that the plaintiff lost by reducing wrongful death damages to the percentage of chance lost.[73] If a jury determined that the plaintiff lost a 30% chance of surviving, it would then be instructed to assess wrongful death damages and to multiply the figure it reached by 30%. The factfinder assesses and weighs the wrongful death damages in the same fashion that it estimates ordinary wrongful death damages, and then it reduces the wrongful death damages by the percentage of survival that the doctor destroyed.[74] For example, if a plaintiff suffered harm that the jury valued at $1 million (i.e., wrongful death damages), and the physician deprived the plaintiff of a 30% chance at a better outcome, the total damages awarded for the lost chance of survival would equal $300,000.[75] A majority of the courts around the country follow King's approach in assessing loss of chance damages.[76]

2. Lump Sum Award

Some courts use another approach in valuing damages for a lost chance of survival: the "lump sum" award. This approach views the loss of a chance of surviving as a "distinct, compensable injury" rather than a spin-off of wrongful death.[77] This approach allows the jury to determine the proper value of a lost chance without extensive guidance from the court. "A jury would first determine the magnitude of the chance that was lost [the percentage of chance lost]. Then, it would subjectively evaluate the value of the lost chance, and arrive at an award."[78] The jury would simply make a determination valuing the lost chance as a lump sum award based on all of the evidence in the record, such as loss of support and service, as is done for any other item of general damages.[79] For example, the jury would hear expert testimony on the percentage of chance lost by the plaintiff and determine that the doctor deprived the plaintiff of a 30% chance of survival. The jury would then hear testimony on the damages caused by the doctor's negligence, like the increased medical expenses, as well as loss

McKellips v. St. Francis Hosp., Inc., 741 P.2d 467 (Okla. 1987).

72. King, *supra* note 70, at 1381-87.

73. *Id.* at 1382.

74. *Id.*

75. Lisa Perrochet et al., *Lost Chance Recovery and the Folly of Expanding Medical Malpractice Liability*, 27 Torts & Ins. L.J. 615, 620 (1992).

76. *See, e.g.*, Boody v. United States, 706 F. Supp. 1458 (D. Kan. 1989); Falcon v. Memorial Hosp., 462 N.W.2d 44 (Mich. 1990); Perez v. Las Vegas Med. Ctr., 805 P.2d 589 (Nev. 1991); and McKellips v. St. Francis Hosp., Inc., 741 P.2d 467 (Okla. 1987).

77. Rachel Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 547 (La. 1996).

78. Brennwald, *supra* note 20, at 782.

79. The jury would hear basically the same evidence that would be presented in a wrongful death valuation determination.

of support, service, and consortium. Then, the jury would weigh all of the evidence provided, taking into account that the physician is responsible for a 30% reduction in the plaintiff's survival chance. Finally, the jury would use its discretion to determine that the plaintiff should be compensated with an award of, say, $34,000.[80] This approach is not as popular as the percentage probability approach, yet some jurisdictions use it.[81]

3. Full Survival and Wrongful Death Damages

The full survival and wrongful death damages approach provides full compensation for the loss of life, regardless of the lost chance of survival caused by the doctor.[82] For example, in applying this approach, if the jury found the doctor to have deprived the plaintiff of a 30% chance of surviving, it would award the plaintiff full wrongful death and survival action damages based on things such as loss of support, service, and consortium. Unlike the percentage probability example above where the court reduces the wrongful death damages by 30% to award $300,000, using this approach, the court would award the plaintiff the full one million even though the doctor did not cause the plaintiff's death by a preponderance of the evidence. Since one of the goals of tort damage awards is to compensate the victim for the loss *caused* by the defendant, this approach's obvious inequities render it the least popular of the three. Though commentators and courts speak of the full wrongful death and survival damages approach as one of the options in valuing damages in loss of chance cases, its harsh results render it almost unused.

There are other theoretical approaches;[83] however, courts have predominantly chosen from these three methods when valuing loss of chance causes of action.

D. Louisiana's Valuation History and Approach

Louisiana courts recognized loss of a chance as a cause of action in 1986; however, the Louisiana Supreme Court was never before faced with how to value these damages until ten years later in *Rachel Smith v. State Department of Health & Hospitals*.[84] Since the supreme court, for ten years, failed to give the lower courts guidance on valuing damages for a lost chance of survival, the holdings

80. Since the jury is not compensating the plaintiff for something concrete, they are able to use their discretion as to the amount they feel the injury is worth. The figure $34,000 is simply a figure I created as an example and has no concrete basis to be founded upon as the example does not have the facts to support a concrete basis.

81. *See, e.g.*, Borgren v. United States, 723 F. Supp 581 (D.C. Kan. 1989) and James v. United States, 483 F. Supp. 581 (N.D. Cal. 1980).

82. *See* Martin J. McMahon, *Medical Malpractice: Measure and Elements of Damages in Actions Based on Loss of Chance*, 81 A.L.R. 4th 485 (1990).

83. *See, e.g.*, Rosati, *supra* note 31, at 476 (modified valuation approach) and Brennwald, *supra* note 20, at 783-84 (weighted means approach).

84. Rachel Smith v. State of Louisiana, Dep't of Health & Hosps., 676 So. 2d 543 (La. 1996).

of the appellate and trial courts are completely split between the three methods and, in some cases, stretched beyond their intended meanings.

For example, in *Claudet v. Weyrich*,[85] the fourth circuit used the loss of a chance theory, but applied it to a plaintiff who survived. In *Claudet*, the patient's chance of survival decreased from 75% to 42% due to the doctor's failure to timely diagnose breast cancer. The court used the lump sum method to award damages to the plaintiff because the delayed diagnosis resulted in a 33% decreased possibility that the plaintiff would survive. It was immaterial whether the plaintiff had or had not died. Since the damage was the decreased possibility of survival, she should be compensated for that loss. *Claudet* foreshadowed the decision in *Smith*, as using the percentage probability approach would not be appropriate in a situation such as this, where the resulting injury did not end in death.

In *Gordon v. Willis Knighton Medical Center*, the court used the same analysis that lost chance cases apply when the chance of survival is greater than 50%.[86] In *Gordon*, the patient lost a 90% chance of survival due to the doctor's malpractice. The court stated that "[a]lthough the analysis and holding [by the court of appeal] in [*Rachel*] *Smith* were used in measuring the damages of an individual with less than a 50% chance of survival, we believe the majority rule is rational and equitable in all cases of loss of chance."[87] By its very nature, a loss of chance case precludes one from finding that the defendant's negligence was the sole cause of the plaintiff's demise. Accordingly, the plaintiff's recovery was reduced by the percentage of probability that she would have died even if the hospital had not committed malpractice, or 10%.[88] Using this rationale, the plaintiff was awarded 90% of the wrongful death damages, rather than full wrongful death and survival action damages.

Other holdings by the lower courts simply picked one of the three traditional methods of valuing damages and applied it. There was no consistency among the circuits in dealing with this type of damages.[89] Before *Rachel Smith*, the loss of a chance cause of action was anything but clear. Not only did the courts have no clear indication of how to value these damages, but they were also left without an articulate test for finding liability. However, with the Louisiana Supreme Court's decision in *Rachel Smith*, the uncertainty was finally resolved.

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85. 662 So. 2d 131 (La. App. 4th Cir. 1995).

86. 661 So. 2d 991 (La. App. 2d Cir. 1995).

87. *Gordon*, 661 So. 2d at 1000 (referring to Rachel Smith v. State Dept. of Health & Hosp., 647 So. 2d 653 (La. App. 2d Cir. 1994)). The court of appeal in *Rachel Smith* used the percentage probability method to assess damages.

88. Robert J. David, *Department Recent Development: Professional Liability*, 43 La. B.J. 307, 308 (1995).

89. *See, e.g.*, Rowsey v. Jones, 655 So. 2d 560 (La. App. 2d Cir. 1995); In Re Helene Morales, 652 So. 2d 1095 (La. App. 4th Cir. 1995); McCann v. ABC Ins. Corp., 640 So. 2d 865 (La. App. 4th Cir. 1994); and Todd v. Sauls, 647 So. 2d 1366 (La. App. 3d Cir. 1994).

IV. THE CASE

In *Rachel Smith v. State Department of Health & Hospitals*, the Louisiana Supreme Court granted writs to address the method of valuation of the damages recoverable for the loss of a chance of survival.[90] In *Rachel Smith*, a hospital staff negligently failed to inform the patient, Benjamin Smith, of an x-ray that revealed a mass in his right trachea and to recommend further testing. Fifteen months later, when Smith learned of the x-ray, his cancer had progressed to the "extensive" stage and was non-operable.[91] At the time of the x-ray, when Smith should have been notified to seek treatment, his cancer was in a "limited" stage that was treatable by one radiation point.[92] Smith died four months later, and his wife and their two minor children sued the hospital for survival and wrongful death damages.[93]

The defendants admitted that the hospital staff was at fault and that the staff breached the standard of care for medical treatment under the circumstances, but they contested whether the delay in treatment had caused any damages.[94] After a trial on the merits, the trial court ruled that "plaintiffs had not met their burden of proving that the fifteen-month delay in treatment resulting from the State's admitted negligence had caused Smith to die *or to lose a chance of survival*."[95] Since the trial court found that the plaintiff actually "lived his expected life span" as if he had received treatment immediately after the x-ray, it concluded the plaintiff suffered no damages and the defendants were, therefore, not liable.[96] Thus, it was not necessary for the trial court to choose a method for valuing loss of chance damages.

The court of appeal reversed, "concluding that the trial court was plainly wrong in failing to find the loss of a chance of survival."[97] Since the appellate court found the defendants liable under the loss of a chance cause of action, the court had to decide how to value the loss. "As to the method of measuring those damages, the intermediate court rejected plaintiff's contention that they were entitled to full damages for the death, noting that plaintiffs failed to prove, more probably than not, that Smith would have survived but for the [defendant's] malpractice."[98] The court stated that the proper measure of the plaintiff's damages in a case of wrongful death due to medical malpractice, if less than 50%, is through the application of the percentage probability approach.[99]

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90. 676 So. 2d 543 (La. 1996).
91. *Id.* at 545.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Rachel Smith*, 676 So. 2d at 545 (emphasis added).
96. *Id.* at 545-46.
97. *Id.* at 546 (citing the court of appeal in Rachel Smith v. State Dept. of Health & Hosp., 647 So. 2d 653 (La. App. 2d Cir. 1994)).
98. *Rachel Smith*, 676 So. 2d at 546.
99. *Id.*

However, the court maintained that "the plaintiff in a loss of a chance of survival case still retains the burden of proving by a preponderance of the evidence that the defendant's negligence caused the loss of a chance."[100] Using the percentage probability approach, the court of appeal found the total damages for wrongful death, funeral expenses, future lost earnings, and survival action damages to be $764,347.[101] The court then reduced this amount in proportion to the lost 10% chance of survival (which the court concluded was the lost chance from expert testimony) and awarded a total of $76,434 to the plaintiffs.[102]

The supreme court agreed with the court of appeal's holding that the plaintiff proved by a preponderance of the evidence that the negligence of the defendants deprived Smith of a chance of survival and that the plaintiffs should receive compensation.[103] However, the supreme court disagreed with the intermediate court's method for valuing the damages, preferring the lump sum approach to the use of percentage probability.[104]

The supreme court, before it addressed the method of measuring damages caused by the deprivation of a chance of survival, clearly articulated for the first time what was necessary to prove liability in loss of chance cases. First, the court agreed with the court of appeal that the "plaintiffs were not required to prove a reasonable or substantial chance of survival."[105] The court stated that "[t]he issues in loss of a chance of survival cases are whether the tort victim lost any chance of survival because of the defendant's negligence and the value of that loss."[106]

Second, the supreme court addressed the confusion regarding causation, as to whether it should relax the cause-in-fact standard or redefine the injury to be the lost chance and keep the traditional but-for standard. The court stated unequivocally that:

> [a]llowing recovery for the loss of a chance of survival is not, as the court of appeal suggested, a change or a relaxation of the usual burden of proof by a preponderance of the evidence. Rather, allowing such recovery is a recognition of the loss of a chance of survival as a *distinct compensable injury* caused by the defendant's negligence, to be distinguished from the loss of life in wrongful death cases, and there is no variance from the usual burden in proving that distinct loss.[107]

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100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 547.
105. *Id.* at 546.
106. *Id.* at 546-47.
107. *Id.* at 547 (emphasis added).

Thus, the court rejected the idea of relaxing the cause-in-fact standard as many courts had done before, and chose to define the injury as the lost chance, which allows the causation standard to remain "but-for." In other words, but for the doctor's negligence, the patient would not have lost a chance of survival.

The supreme court created a three-part test for plaintiffs to prove liability in a medical malpractice case seeking damages for the loss of a less-than-even chance of survival. The plaintiff must prove by a *preponderance of the evidence* that: (1) "the tort victim had a chance of survival at the time of the professional negligence"; (2) "the tortfeasor's action or inaction deprived the victim of all or part of that chance"; and (3) "the value of the lost chance (which is the only item of damages at issue in such a case)."[108] Once the court had cleared the confusion surrounding the loss of a chance cause of action itself, it moved on to discuss the proper method of valuing these damages.

The supreme court identified the three traditional methods of valuing the damages—the lump sum award, full wrongful death and survival damages, and the percentage probability—and selected the lump sum award.[109] First, the court quickly dismissed the full survival and wrongful death damages.[110] Allowing full recovery "would ignore the [plaintiff's] inability to prove by a preponderance of the evidence that the [patient] would have survived but for the malpractice, which is a requirement for full recovery."[111]

Second, the court rejected the percentage probability approach adopted by the court of appeal. It disagreed with the court of appeal's method of computing damages because of its:

> rigid use of a precise mathematical formula, based on imprecise percentage chance estimates [determined by a jury or judge] applied to estimates of general damages that never occurred [i.e., wrongful death and survival action damages], to arrive at a figure for an item of general damages that this court has long recognized cannot be calculated with mathematical precision . . . the uncertainty progresses geometrically.[112]

Thus, the court concluded that loss chance damages could not be calculated with mathematical certainty and that the mathematical calculating and reducing of the inapplicable wrongful death and survival claims would not magically make the percentage probability approach more accurate than simply allowing the factfinder to value directly the loss of a chance as the sole item of damages.[113] Another reason for the supreme court's rejection of the percentage probability approach was that the lost chance of survival "has a value in and of itself that

108. *Id.*
109. *Id.* at 547-48.
110. *Id.*
111. *Id.* at 547.
112. *Id.* at 548.
113. *Id.*

is different from the value of the wrongful death or survival claim."[114] In emphasizing this point, the court stated that "[t]he jury can calculate the lost chance of survival without going through the *illusory exercise* of setting a value for the wrongful death or survival claims and then mechanically reducing that amount by some consensus of the expert estimates of the percentage chance of survival."[115] The court determined that any theoretical figure representing the amount the plaintiffs would have gotten if they had proven the doctor's negligence by a preponderance of the evidence would not be a concrete figure that would be properly subject to reduction.[116]

The supreme court favored the lump sum approach because the damages are attributable only to the lost chance of survival.[117] The supreme court, for the first time, held that the factfinder should make a subjective determination of the value of the loss, fixing the amount of money that would "adequately compensate the claimants for that particular cognizable loss."[118] In adopting this approach, the court stated that the judge or jury should value the lost chance as a lump sum award based on all the evidence in the record, as is done for any other item of general damages.[119] Particularly, the jury should consider the same evidence a jury considers in a survival and wrongful death action, and then reach its general damage award for loss of a chance on that evidence, as well as other relevant evidence, such as expert medical testimony regarding the percentage chance of survival and whether the victim would have lived longer but for the malpractice.[120] In sum, the majority managed to resolve the uncertainties surrounding the loss of a chance cause of action. The supreme court articulated a distinct three-part test for determining liability under the loss of a chance theory and determined a standard by which to value the damages.

Two Justices dissented. Justice Marcus, in a short dissent, simply agreed with the method the court of appeal employed in measuring damages recoverable for the loss of a chance of survival without giving reasons.[121] Justice Victory rejected the loss of a chance as a cause of action altogether.[122] According to him, lost chance as a cause of action yields unfair results and has no basis in Louisiana law.[123] However, Justice Victory stated that if Louisiana is going

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114. *Id.*

115. *Id.* at 549 (emphasis added). Even though the jury is not determining wrongful death and survival action damages, the jury will hear all of the evidence relevant to a wrongful death and survival action anyway. Thus, the same confusion with reducing wrongful death damages may still result even though the jury is not directly deciding a specific wrongful death/ survival action amount.

116. *Id.* at 549.

117. *Id.* at 548.

118. *Id.*

119. *Id.* at 547.

120. *Id.* at 549.

121. *Id.* at 550 (Marcus, J., dissenting).

122. *Id.*

123. *Id.* at 550-51. Justice Victory explains that lost chance should not be recognized in Louisiana because "[t]he sources of law in Louisiana are well defined—they are legislation and

to recognize lost chance, then the lump sum method is not the best way to value the damages.[124] Justice Victory rejected the lump sum approach because it renders many judgments unreviewable and favored the percentage probability approach.[125] He found this approach more just, as he said it insures that the damages awarded redress the actual injury.[126] Plus, Justice Victory emphasized that the percentage probability approach is the majority rule.

V. ANALYSIS

In order to determine what method the court should use to value damages in a loss of a chance case, it is necessary to understand the policies behind redressing tort victims. Is the purpose behind awarding tort damages compensation? Is it deterrence; i.e., to alter the tortfeasor's future behavior? Is it a combination of both? Or neither? Commentators are split on this question; some feel the purpose of tort damages varies from tort to tort. Several believe that "the rhetoric of tort damages is one of compensation rather than deterrence."[127] "These anti-deterrence arguments seem most persuasive in reference to the sporadic tortfeasor, the speeding driver, or the homeowner who negligently fails to shovel his walk."[128] This logic can be illustrated by a typical car accident. When a plaintiff suffers injury due to a car accident, it is rational that one would want to award the plaintiff damages to help compensate the plaintiff for his doctor bills and for his pain and suffering. The primary purpose of compensation in this situation is not primarily to make the negligent driver realize his driving was below standard and that he should pay more attention next time. Rather, compensation here focuses primarily on "making [the] plaintiff whole."[129]

However, in situations such as malpractice, different considerations may come into play; it is more plausible that tort judgments may serve some deterrent function as well as compensation. Take for instance a doctor who fails to timely

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custom. La. Civ. Code art. 1. . . . Courts may fashion equitable remedies only when no rule for a particular situation can be derived from legislation and custom. La. Civ. Code art. 4." Since La. R.S. 9:2794(A)(3) (1991) "provides that the plaintiff in medical malpractice actions has the burden of proving by a preponderance of the evidence that as a proximate result of the lack of knowledge or skill or failure to exercise the degree of care required, the plaintiff suffered injuries *that would not otherwise have been incurred.* Despite this direct expression of legislative will, this Court has decided that the plaintiff may win merely by showing that the negligence was a *substantial factor in depriving the patient of some chance of life or recovery.*" *Id.* at 550-51.

124. *Id.*

125. *Id.*

126. *Id.*

127. David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 287 (1989).

128. Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 La. L. Rev. 2, 56-57 (1990).

129. Blumstein et. al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 Yale J. on Reg. 171, 173 (1991).

diagnose cancer, as in the *Rachel Smith* case. When the doctor is forced to pay for his mistake, that physician may in fact pay more attention in diagnosing patients in the future. Even if the doctor has never himself been negligent, the doctor's knowledge about potential judgments may make him more likely to engage in safety planning and precautionary measures.[130] Thus, malpractice tort damages may be aimed at not only compensating the victim or the victim's heirs for the injury, but also in deterring the doctor's future conduct.

Each of the different methods of valuing damages in lost chance cases promote these deterrence and compensation policies to a certain degree, but without sophisticated analysis and data, neither compensation nor deterrence seem to favor one approach over the other. As one commentator noted, "[t]here may be good reason for compensating injured persons and for deterring injurious acts, but there is no reason to connect a particular application of deterrence with a particular award of compensation."[131] Thus, this analysis will be practical, rather than policy-oriented.

A. Pros and Cons of the Different Methods of Valuing Damages in Loss of a Chance Actions

1. Full Survival and Wrongful Death Damages

The full survival and wrongful death damages approach provides full compensation for the loss of life, regardless of the chance of survival.[132] This method should be easily dismissed as a viable option due to the clear inequities it causes as shown by the following example. Take for instance a plaintiff who is exposed to large amounts of radiation because of a plant explosion. When taken to the hospital, the doctor negligently fails to attend to him properly, causing a 1% reduction in his survival possibilities. If this approach were adopted, a physician would have to pay the same amount of damages for destroying 1% of a plaintiff's life as he would if he were the corporation who blatantly exposed the plaintiff to the radiation that caused his disease. Intuitively, to both a lay person and a philosopher, the physician should not be responsible for the same amount of damages as the corporation because the doctor did not cause the death. It would not be logical or fair to impose full liability on a physician whose act or omission injures a patient whose chances of recovery were slim at best.[133]

There is also a problem with causation using this approach. As the supreme court in *Smith* stated, "[t]o allow full recovery would ignore the claimant's inability to prove by a preponderance of the evidence that the malpractice victim

130. Galligan, *supra* note 128, at 57.
131. Ernest Weinrib, The Idea of Private Law 43 (1995).
132. McMahon, *supra* note 82, at 505.
133. Rachel Smith v. State Dep't of Health & Hosps., 647 So. 2d 653, 662 (La. App. 2d Cir 1994).

would have survived but for the malpractice, which is a requirement for full recovery."[134] Full recovery would essentially make but-for causation an unnecessary element in proving the plaintiff's case-in-chief. This is a frightening and dangerous proposition. Therefore, it is easy to see why several jurisdictions have rejected this approach, and why it should not be followed in the future.[135]

2. Percentage Probability

The percentage probability approach is the most popular among jurisdictions. The courts that have chosen to use this method feel it "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."[136] *Rachel Smith* points out that this method has gained acceptance by the courts and commentators because of its pragmatic appeal, providing concrete guidelines for calculating damages and alleviating the perceived "pulling out of the hat" problem allegedly associated with the [lump sum] method.[137] The percentage probability approach gives the jury or the court guidelines to follow when deciding on an award so as to achieve a more accurate result. These guidelines are the specific amounts that the jury or court must assess for each injury in wrongful death, such as loss of support, loss of service, and loss of consortium. The jury has to decide the percentage of the doctor's fault based on expert testimony and then assess wrongful death and survival damages and multiply them. By using this method, the doctor is assured that he will not be paying full wrongful death damages because that sum will have been calculated and reduced by his percentage of fault, yielding what some feel is the most closely tailored result for the injury. Justice Victory, in his dissent in *Smith*, supports this by saying that "[t]his approach is much more sensible and fair than [the lump sum approach] because it insures that the damages awarded redress the actual injury, which is the *decreased chance of survival or recovery*, not the actual *death*."[138] Thus, this approach seems to more precisely value the percentage of chance lost by giving definite guidelines to the factfinder, as well as ensuring that the doctor will not be paying full wrongful death damages.

However, the percentage probability method has several problems. One of the approach's main drawbacks is that wrongful death and survival action damages must be calculated. Since the compensable injury is the *loss of a chance* itself and not the *death*, it is unnecessary and even burdensome to require the factfinder to first make a hypothetical determination of the value of survival

134. Rachel Smith v. State of Louisiana, Dep't of Health & Hosps., 676 So. 2d 543, 547 (La. 1996).

135. The supreme court in *Rachel Smith* rejected this approach for these reasons. *Id. See supra* discussion accompanying note 111.

136. King, *supra* note 70, at 1384.

137. *Rachel Smith*, 676 So. 2d at 548.

138. *Id.* at 551.

and wrongful death claims that are not really at issue and then to discount that value mathematically.[139] The *Smith* court stated that "[t]his mathematical discounting of the subjective valuation of inapplicable claims does not magically make that approach more precise or more accurate than simply allowing the factfinder to value directly the loss of a chance of survival that is the sole item of damages at issue in the case."[140] If the factfinder must first determine wrongful death and survival action damages, then the loss of a chance cause of action will be limited only to situations in which the plaintiff has died. It is plausible, but would be quite morbid, to calculate these damages for a plaintiff who is still alive.[141] Another problem with the percentage probability approach is the focus on its ridged use of a precise mathematical formula. The damages awarded to the plaintiff are based on imprecise percentage chance estimates applied to general damages that never occurred, and both of which cannot be calculated with mathematical precision. When these two imprecise figures are multiplied, the uncertainty progresses geometrically, making this sum more inaccurate than if the jury had simply determined the amount as a lump sum.[142]

3. Lump Sum Award

The lump sum approach has several advantages and disadvantages as well. Commentators that support this method state that it is the "most simple to apply and would give the jury great leeway in granting what it felt was an appropriate award."[143] Using this approach, the factfinder values *only* the damages at issue—the lost chance—which is more logical than requiring the jury to calculate damages for wrongful death when the physician's negligence was not the more probable cause of the death. Some commentators also believe that the lump sum method is more in line with the method of valuing other general items of damage. For example, when a defendant's negligence *causes* a plaintiff to break his arm, the jury awards the plaintiff a lump sum for the damages he suffered based on all of the evidence in the record. Similarly, the jury is doing the same task when it awards a lump sum for damages that are caused by the doctor's

139. *Id.* at 549.

140. *Id.* at 548.

141. Note, in using the lump sum method, the same evidence is presented to the jury as in the percentage probability approach with regards to wrongful death and survival action damages. The difference is that the jury is not bound to the wrongful death formula in the lump sum approach.

142. For example, "multiplying the estimated damages by the calculated quantum of chance lost will increase the proportion of the hidden error term in the product. Suppose that the jury estimated the total damages to equal $100,000. Suppose that the hidden error term in the jury's estimate is $10,000. Multiplying the estimated damages by the quantum of chance lost computed yields ($100,000 =/- 10,000) * (10% =/- 4%) = ($10,000 =/- 5,400). Note that the error term has increased to 54% of the measurement term." Leon Rozenblit, Smith v. Louisiana: *Calculating Damages in a Lost Chance Case* (1996) (Unpublished manuscript on file with Thomas Galligan, Jr., Professor of Law, Louisiana State University).

143. Brennwald, *supra* note 20, at 782-83.

negligence and that negligence *caused* a plaintiff to lose a chance of survival. This is so because loss of chance is a distinct compensable injury, just like breaking an arm. Juries are asked to value these types of tort damages everyday and loss of a chance should be no different.

Though the lump sum approach logically follows the method of valuing damages for distinct compensable injuries, it has the greatest potential for inaccurate results. Imagine a situation where a wife sits to the left of a prominent doctor in the court room. The jury hears a tale of how this doctor caused the patient, her husband, to lose 5% of a chance of survival. After a dynamic closing argument about the horrors the doctor caused, the attorney for the plaintiffs then asks the jury to return to the jury room and give this grieving wife the compensation that she deserves. When the jury goes to award an amount, it will be difficult for them to remember and understand that the patient had a slim chance of surviving before the doctor's negligence. This will create a tendency for juries to award something close to, if not full, wrongful death damages each time a loss of a chance case goes before a jury. Thus, the result may not often match the injury. If doctors are constantly hit with full wrongful death damages when they cause even the slightest reduction in a patient's chance of survival, this type of litigation will be greatly increased. In turn, this will cause doctors to carry higher insurance policies, thus creating higher medical bills for the public. In addition, this may lead to defensive medicine where doctors will order more tests than necessary or require patients to stay an extra night in the hospital to avoid any possibility of a loss of chance claim. This too will result in higher medical bills for the public.

The second major problem, which compounds the first one, is that the lump sum method of valuation will render lost chance judgments virtually unreviewable. Even though the *Claudet* court used the lump sum method, it noted,

> [t]here is only limited appellate review of such determinations. The standard for appellate review of general damages awards is difficult to express and is necessarily non-specific, and the requirement of an articulated basis for disturbing such awards gives little guidance as to what articulation suffices to justify modification of a generous or stingy award.[144]

Justice Victory pointed out in his *Rachel Smith* dissent that "[t]he reviewing court will have little idea of what chance of survival the jury determined was lost, thus little basis to determine if the jury was manifestly erroneous."[145] Without having any control over whether the jury overcompensates plaintiffs in a situation where the likelihood of overcompensation is great, this will simply exacerbate the problems stated above regarding increased insurance coverage and

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144. Claudet v. Weyrich, 662 So. 2d 131, 134 (La. App. 4th Cir. 1995).

145. Rachel Smith v. State of Louisiana, Dep't of Health & Hosp., 676 So. 2d 546, 551 (La. 1996).

defensive medicine. The appellate court can more easily review the percentage probability approach as it requires the factfinder to provide more information in reaching its verdict, such as the percentage of chance lost, as well as the amount of damages for loss of consortium, support, and service. Thus, the appellate court can more easily overturn the verdict under the manifest error rule, as the figure is explained and not just a figure arrived at by pulling it out of a hat.[146]

There are major problems with all three of the approaches to valuing damages in loss of chance cases. In sum, the full wrongful death and survival damages approach ignores the causation element in negligence cases; the percentage probability approach requires the jury to determine wrongful death and survival damages which are not an issue in the case and limit lost chance to only deceased victims; and the lump sum approach has the propensity to overcompensate with almost no appellate review. Louisiana has chosen to use the lump sum approach. It, therefore, becomes the duty of the courts or the legislature to alleviate the problems that this approach causes in order to continue to recognize loss of a chance as a cause of action. There is no perfect way to value these damages, as valuing damages in itself is intangible and inexact. However, the suggestions that follow may help to curtail some of the problems that Louisiana will face in using the lump sum approach.

B. Suggestions for Alleviating the Problems Caused by Using Lump Sum

There is no way to arrive at an exact figure when trying to put a value on something so intangible as the loss of a chance. An exact figure simply does not exist. However, in compensating tort victims, we strive to come up with a figure that most closely resembles the injury suffered. Though there is no perfect solution, the following suggestions may help alleviate some of the major problems that each approach possesses, especially the lump sum approach.

1. Keep Lump Sum, but Have Heightened Scrutiny on the Appellate Level

Since the lump sum approach has the greatest propensity to overcompensate, it justifies some type of heightened scrutiny. As it stands now, general damages awards, such as lost chance, are questions of fact the jury determines. The appellate court reviews questions of fact under the manifest error standard. Under this standard, the reviewing court may not merely decide if it would have found the facts differently. Rather, the court of appeal must affirm the trial court where the latter's judgment is not clearly wrong or manifestly erroneous.[147] This stringent standard does not allow the appellate courts much leeway in overturning awards that they feel are too high and are not in proportion with the doctor's percentage of fault. Thus, if the damage awards granted in loss of

146. *Id.* at 548.
147. Ambrose v. New Orleans Police Dept., 639 So. 2d 216, 221 (La. 1994).

chance cases were questions of law or treated as questions of law, the appellate court could scrutinize these awards more carefully. The reviewing court could merely decide that it would have found the facts differently and determine an award it felt appropriate.

This type of heightened scrutiny has never been tried before, so there is no precedential basis to rely on. However, it can be analogized to the first circuit court of appeal's approach in *Green v. City of Thibodeaux*.[148] In *Green*, the court held that a cracked curb that caused the plaintiff's injury during a Mardi Gras parade did not pose an unreasonable risk of harm for strict liability purposes. In *Green*, the factfinder decided things such as if the crack was two inches or three inches wide, or if the pavement was uneven or smooth, issues the court considered questions of fact. The judge then decided, from the factfinder's findings, whether the sidewalk's condition did or did not constitute an unreasonable risk of harm, which was a question of law according to the first circuit. Traditionally, determining whether a thing posed an unreasonable risk of harm was a question of fact for the jury. However, by determining that whether the sidewalk posed an unreasonable risk of harm was a question of law and not fact, the appellate court could avoid the manifest error standard and simply decide this question for itself. Similarly, in the loss of a chance situation, the jury would determine the percentage of chance lost. The judge would then determine the amount of damages to award, which would be considered a question of law.

Having the appellate court review the damage awards granted in loss of chance cases without the constraints of the manifest error standard would allow greater appellate review. Since the lack of appellate review is one of the main concerns in using the lump sum approach, this would alleviate a major problem. In addition, appellate court judges are more likely to be removed from the emotions tied into a jury trial, as the appellate court only reads the record instead of visualizing a wife next to a prominent doctor. Because it is so removed from this, it may be able to more aggressively review the actual value of the damages and avoid awarding full wrongful death and survival action damages.

2. No Jury Trial, Just Judges or Arbitration

One of the main concerns with the lump sum approach is that juries may award something close to, if not full, wrongful death damages each time a loss of chance case comes before it. A possible way to avoid this is not to allow lost chance cases to go before a jury. This approach is radical, but would alleviate some of the major problems with lost chance. Judges are more experienced in hearing these cases and may be able to more accurately compensate the victim. Since judges or arbitrators understand the cause of action, they may be better equipped to avoid the tendency to award full wrongful death and survival damages. In Britain, personal injuries have come to be tried almost exclusively

148. 671 So. 2d 399 (La. App. 1st Cir. 1995).

by judges rather than by juries, as they feel that judges are explicitly guided by amounts approved in prior cases as well as their specialized knowledge on the subject matter.[149] Thus, by avoiding jury awards, the problems of the lump sum approach may be alleviated.

In Louisiana, there is no constitutional right to a jury trial. Thus, the legislature could pose legislation to take lost chance cases away from juries. By doing this, however, an equal protection violation may arise, as one class of litigants will have access to jury trials (i.e., anyone with a claim for general damages) but not another (i.e., those claiming lost chance). These two classes may not represent one of the enumerated classes articulated in *Sibley v. Louisiana State University, Board of Supervisors*.[150] Thus, those challenging the law would have to show that the law was unreasonable or that it did not further any appropriate state interest.[151] Since overcompensation would likely be deemed an appropriate state interest, the law should be upheld and should survive an equal protection claim. It is possible, however, that distinguishing on the basis of those claiming general damages and those claiming lost chance may be considered discrimination on the basis of physical condition, one of the enumerated classes in *Sibley*. If this is the case, *Sibley* states that "[w]hen a law classifying individuals on the basis of physical condition is attacked, the proponent of the legislation must show that the law does not arbitrarily, capriciously, or unreasonably discriminate against the disadvantaged class by demonstrating that the legislative classification substantially furthers a legitimate state objective."[152] This standard is more stringent than the test articulated for those that do not fit into one of the enumerated classes. If the court finds that the discrimination is based on physical condition, then the new statute proposed here may or may not pass constitutional scrutiny.

3. *Scheduling Damage Awards*

Another major problem associated with the lump sum approach is having juries misunderstand the lost chance cause of action and award full wrongful death and survival action damages that are not in line with the injury caused by the doctor. This may be a result of trials where enormous amounts of relevant information and expertise are introduced into evidence, but without a context within which to evaluate them.[153] Juries have no frame of reference from

149. Blumstein et. al., *supra* note 129, at 179.

150. 477 So. 2d 1094 (La. 1985).

151. *Id.* at 1104. Louisiana may not use the federal three-tier approach (i.e., rational basis, intermediate scrutiny, and strict scrutiny) in equal protection cases. Instead, the Louisiana Supreme Court has articulated its own three-tier approach for equal protection claims in Sibley v. Louisiana State University, Board of Supervisors, 477 So. 2d 1094 (La. 1985).

152. *Sibley*, 477 So. 2d at 1104.

153. Blumstein et. al., *supra* note 129, at 177.

which to draw.[154] However, if prior results were analyzed and information on the spectrum of prior damage awards were provided to juries as an aide to decision making, the problem of overcompensation may be reduced.[155] This would not only give the jury guidelines to follow, it would also provide uniformity in results. One commentator, who proposes a similar plan for all tort damages, suggests that the reporting system should contain things such as the nature and extent of injuries; some finding on each element of pecuniary damages that the law recognizes for the case such as past wages, medical, and other losses; and the value of future wages, medical, and other losses.[156] In addition, for lost chance cases, the reporting system should include the percentage chance of survival the doctor destroyed and the stage and extent of the preexisting condition of the plaintiff.

Scheduling damage awards would reduce overcompensation as well as give the appellate court a firmer basis for review. In cases where valuations differ significantly from prior results, juries would have to identify specific factors that justify the variations. If they failed to explain their result, then an appellate court would have reasons for holding the inadequacy or excessiveness of judgment manifestly erroneous.

Though this approach may resolve some of the major concerns with lump sum, it brings with it several problems. First, scheduling damage awards goes against one of the major policies in tort compensation—the case-by-case approach. In torts, courts strive to compensate *this* person for *this* injury. If we allow juries to depend too heavily on prior case awards, cases which are somewhat factually similar but merit different damage awards may misguide juries. Second, loss chance of survival is a newly recognized tort. Thus, it may be hard statistically to maintain credible amounts of information. If there is too little information, then precedents that are not factually similar enough to pose a viable guideline are once again likely to misguide juries. Finally, if juries are determining the awards that subsequent juries are to use as guidelines, they may not be reliable precedents to follow. If we mistrust juries now and feel that they will overcompensate these victims by using the lump sum approach, then we would not want future juries to follow their lead. In order for the scheduling of damages awards to be a viable option, these problems would have to be addressed.

4. Medical Malpractice Cap on Loss Chance Cases

Currently, medical malpractice is a highly regulated area of the law. Recently, the legislature has put a cap on malpractice claims allowing a plaintiff to recover no more than $500,000 even if the amount of damages exceeds

154. *Id.*

155. Books such as Eason's Quantum Study may be helpful as a guide.

156. Blumstein et al., *supra* note 129, at 180.

this.[157] Similarly, the legislature could put a cap on lost chance damages. The legislature could limit it to half of $500,000, allowing a plaintiff to recover a maximum of $250,000 for lost chance cases.

While this approach would reduce the maximum amount of damages possible, it would not solve the main problems associated with the lump sum approach. Just because the amount of damages is lowered, there is still the problem of the doctor who only caused a 1% chance of survival to be lost. In this situation, a $250,000 cap on lost chance damages would not shield the doctor from overcompensation. In addition, the amount of damages awarded would still be virtually unreviewable.

5. *Medical Review Panel Screening*

Presently, plaintiffs must bring all medical malpractice claims before a medical review panel before plaintiffs can bring their case to court in order for the panel to make a determination on whether each plaintiff has a viable claim or not. During this screening process, the panel could make a determination on what percentage of chance of survival they felt the doctor destroyed. This would present the jury with a neutral third opinion, rather than just the opinion of the plaintiff's and the defendant's expert. By having this neutral third opinion, the jury may be able to make a more informed determination on the percentage of chance lost. In turn, this may yield results more closely tailored to the injury. A neutral third opinion could also be acquired through a court-appointed expert as provided by Louisiana Code of Evidence article 706.[158]

This approach may alleviate a small part of the problem, but ultimately does not solve the major problems associated with the lump sum approach. Even though juries have another neutral opinion, it will not prevent them from awarding full wrongful death and survival action damages. Plus, there will still be a lack of appellate review to reduce judgments that do overcompensate.

VI. CONCLUSION

The Louisiana Supreme Court's method of valuing damages for lost chance causes of action, the lump sum approach, will not only yield excessive damage

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157. La. R.S. 40:1299.39(F) (1992) provides in pertinent part:

> [N]o judgment shall be rendered and no settlement or compromise shall be entered into for the injury or death of any patient in any action or claim for an alleged act of malpractice in excess of five hundred thousand dollars plus interest and cost, exclusive of future medical care and related benefits valued in excess of such five hundred thousand dollars.

158. La. Code Evid. art. 706 provides in pertinent part:

> In a civil case, the court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act.

awards, it will also render these excessive awards practically unreviewable by the appellate court. Since this is a new claim, the courts need to be more cautious in appellate review. Consequently, the lump sum approach is contrary to sound public policy as it adversely impacts the cost and quality of health care and exacerbates the problems of defensive medicine and cost containment. Though there is no perfect solution to alleviate all of the issues that the lump sum approach presents, these problems can be reduced by heightened appellate scrutiny, by not allowing juries to hear lost chance cases, by scheduling damage awards, by putting a cap on the amount of damages awarded for lost chance, or by help from the medical review panel. Thus, in the interest of consistency and fairness in the law, courts should continue to strive for a more accurate way to value damages in loss of chance of survival cases.

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