

SUPREME COURT OF LOUISIANA

NO. 95-C-0038

**RACHEL SMITH, INDIVIDUALLY AND ON BEHALF OF
THE MINORS, MICHAEL AND BRIAN SMITH**

versus

**STATE OF LOUISIANA,
DEPARTMENT OF HEALTH AND HOSPITALS, ET AL**

VICTORY, JUSTICE, Dissenting.

I cannot agree with: (1) this Court's adoption in *Hastings v. Baton Rouge General Hospital*, 498 So.2d 713 (La. 1986), of the lost chance of survival doctrine as a part of Louisiana's medical malpractice law; or (2) with the majority's approach in the instant case in evaluating damages in lost chance of survival cases.

My disagreement with the Court's adoption of the lost chance of survival doctrine is both pragmatic and theoretical. From a pragmatic standpoint, the doctrine yields unfair results. How the doctrine of lost chance results in erroneous and inequitable outcomes is illustrated by the Court of Appeals of Maryland:

Because loss of chance of recovery is based on statistical probabilities, it might be appropriate to examine the statistical probabilities of achieving a "just" result with loss of chance damages . . . To compare the two rules, assume a hypothetical group of 99 cancer patients, each of whom would have had a 33-1/3% chance of survival. Each received negligent medical care, and all 99 dies. Traditional tort law would deny recovery in all 99 cases because each patient had less than a 50% chance of recovery and the probable cause of death was the preexisting cancer not the negligence. Statistically, had all 99 received proper treatment, 33 would have lived and 66 would have died; so the traditional rule would have statistically produced 33 errors by denying recovery to all 99.

The lost chance rule would allow all 99 patients to recover, but each would recover 33-1/3% of the normal value of the case. Again, with proper care 33 patients would have survived. Thus, the 33 patients who statistically would have survived with proper care would receive only one-third of the appropriate recovery, while the 66 patients who dies as a result of the preexisting condition, not the negligence, would be overcompensated by one-third. The loss of chance rule would have produced errors in all 99 cases.

[Emphasis added.]

Fennell v. Southern Maryland Hospital (1990), 320 Md. 776, 580 A.2d 206, 212-13 (declining to adopt the doctrine of loss of chance of survival [in Maryland]).

From a theoretical standpoint, the doctrine has no basis in Louisiana law. The sources of law in Louisiana are well defined--they are legislation and custom. La. Civ. Code art. 1. Legislation is “a solemn expression of legislative will.” La. Civ. Code art. 2. Custom results from practice repeated for a long time and generally accepted as having acquired the force of law. La. Civ. Code art. 3. In Louisiana, as in all codified systems, legislation is the superior source of law, and under no circumstances may custom abrogate legislation. La. Civ. Code art. 1, comment (a); La. Civ. Code art. 3. Courts may fashion equitable remedies only when no rule for a particular situation can be derived from legislation or custom. La. Civ. Code art. 4.

Louisiana R.S. 9:2794A(3) 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. The negligence need not be the only causative factor. It is enough that it increased the harm to the patient. *Pfiffner v. Correa*, 94-0924, 94-0963, 94-0992, p. 2 (La. 10/17/94); 643 So.2d 1228, 1230; *Hastings*, 498 So.2d at 720. Therefore, the plaintiff does not have to shoulder the burden of proving that the patient would have survived if properly treated. He need only demonstrate that the decedent had a chance of survival or recovery which was denied him as a result of the defendant’s negligence. *Pfiffner*, 94-0924, 94-0963, 94-0992, p. 2; 643 So.2d at 1230; *Martin v. East Jefferson General Hospital*, 582 So.2d 1272, 1278 (La. 1991).

In my view, the adoption of the lost chance of survival doctrine by this Court in *Hastings*, and the accompanying relaxed burden of proof in medical malpractice cases, flies in the face of a clear expression of legislative will and is an improper extension of judicial authority in violation of La. Civ. Code art. 4.

Now the Court adopts a method of valuation that will allow many judgments rendered under the doctrine virtually unreviewable. The modern procedural trend is to require the fact-finder to provide more information in reaching its verdict. See, e.g., La. Code Civ. P. arts. 1812-13 (regarding submission of special verdicts and interrogatories to the jury); and La. Code Civ. P. art. 1917 (regarding request for written reasons for judgment from the court in nonjury trials). The majority's approach ignores this trend and allows the jury to simply arrive at a damage figure without properly explaining the basis of the figure. This "rabbit-out-of-the-hat" approach will be virtually impossible to review on appeal under the manifest error standard. The 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.

The "percentage probability test" proposed by Professor Joseph H. King, Jr., in his article entitled, Causation, Valuation, and Chance in Personal Injury Tort Cases Involving Preexisting Conditions and Future Consequences, 90 Yale L.J. 1353 (1981), is a much fairer and much more precise test than that adopted by the majority. It was used by Judge Norris in his opinion in the Court of Appeal in this case. *Smith v. State of Louisiana, Through The Department of Health and Human Resources*, 26,280 (La. App. 2d Cir. 12/9/94); 647 So.2d 653. Under this test, damages in lost chance of survival cases are measured according to the "percentage probability by which defendant's tortious conduct diminished the likelihood of achieving some more favorable result." King, *supra* at 1382. To illustrate, Professor King states:

[C]onsider a patient who suffers a heart attack and dies as a result. Assume that the defendant-physician negligently misdiagnosed the patient's condition, but that the patient would have had only a 40% chance of survival even with a timely diagnosis and proper care. Regardless of whether it could be said that the defendant caused the decedent's death, he caused the loss of

a chance, and that chance-interest should be completely redressed in its own right. Under the proposed rule, the plaintiff's compensation for the loss of the victim's chance of surviving the heart attack would be 40% of the compensable value of the victim's life had he survived (including what his earning capacity would otherwise have been in the years following death). The value placed on the patient's life would reflect such factors as his age, health, and earning potential, including the fact that he had suffered the heart attack and the assumption that he survived it. The 40% computation would be applied to that base figure.

King, *supra* at 1382.

This approach is much more sensible and fair than that proposed by the majority because it insures that the damages awarded redress the actual injury, which is the *decreased chance of survival or recovery*, not the actual *death*. *Martin*, 582 So.2d at 1278; *Hastings*, 498 So.2d at 720; *Perez v. Las Vegas Medical Center*, 805 P.2d 589, 592 (Nev. 1991). A majority of our sister states have adopted the "percentage probability test." See, e.g., *Wollen v. De Paul Health Center*, 828 S.W.2d 681,685 (Mo. 1992) (In recognizing the possibility of a lost chance cause of action, the Missouri Supreme Court stated, "damages can only be expressed by multiplying the lost life or limb by the chance of recovery lost."); *Perez*, 805 P.2d at 592 ("[D]amages are to be discounted to the extent that a preexisting condition likely contributed to the death."); *DeBurkarte v. Louvar*, 393 N.W.2d 131, 136 (Iowa 1986) ("We believe the better approach is to allow recovery, but only for the lost chance of survival."); *Herskovits v. Group Health Cooperative*, 99 Wash.2d 609, 664 P.2d 474, 479 (Wash. 1983) ("Causing reduction of the opportunity to recover [loss of chance] by one's negligence, however, does not necessitate a total recovery against the negligent party for all damages caused by the victim's death."). I would follow the lead of these states and utilize this formula for calculating damages in lost chance of survival cases: Lost Chance of Survival Damages = (the percent of chance of survival lost due to negligence) multiplied by (the total amount of damages which are ordinarily allowed in wrongful death actions).

The majority claims this approach is too mechanistic. Yet, statistics and mathematics play important roles in many aspects of Louisiana personal injury litigation. For example, our law of comparative fault allows juries to award a sum of damages after evaluating and considering the evidence presented. Thereafter, the jury must allocate percentages of fault

to both the plaintiff and defendant, if they are both at fault. These percentages are then applied to the total damages stated by the jury to reach the amount of damages actually awarded to the plaintiff. La. Civ. Code art. 2324; La. Code Civ. P. art. 1812. Neither this task nor the “percentage probability test” should be considered too mechanistic.

In sum, the majority rejects a fair and logical test accepted by almost all states that allow recovery for loss chance of survival in favor of a test used by almost no state and which will make many judgments unreviewable. I respectfully dissent.