“Loss of a Chance”

What is it and what does it mean in medical malpractice cases?

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I. Introduction

Kramer walks in to your office after having been diagnosed with terminal lung cancer. It seems that years earlier he had accepted a job as the next “Marlboro Man” and all of those years of smoking finally caught up with him. Kramer believes that his doctor was late in diagnosing his cancer, that he had exhibited signs and symptoms of cancer for months before it was finally diagnosed, and that this delay in diagnosis warrants a claim for medical malpractice. You quickly learn that the five-year survival rate for non-small cell lung cancer, even if diagnosed at Stage IA is only 49%, so regardless of the delay in diagnosis, Kramer was doomed to succumb to his cancer. Kramer tells you that his cancer was Stage IV when finally diagnosed and his five-year survival rate is only 1%. Does he have a case? Is it not true that the proximate cause of Kramer’s impending death is lung cancer, and not the negligent delay in diagnosis? But the physician’s failure to timely diagnose the cancer reduced Kramer’s five-year survival rate from 49% to only 1%. Has he not been damaged? Undoubtedly, he and his family think so.

In Memorial Hospital at Gulfport v. White, 170 So. 3d 506, 508 (Miss. 2015), the court held that “Mississippi law recognizes the legal theory of the ‘loss of a chance.’” The loss of a chance doctrine is particularly relevant in medical malpractice cases. But what does this mean to Kramer, and what is its relevance to you when analyzing your next potential medical malpractice case?
II. A Plaintiff's Burden Under General Tort Law

Anyone who practices general tort law recognizes the obligation of a plaintiff to prove a \textit{prima facie} case of negligence which includes establishing a duty, breach, causation, and damages. \textit{Todd v. First Baptist Church of West Point}, 993 So. 2d 827 (Miss. 2008)(citing \textit{Grisham v. John Q. Long, V.F.W. Post, No. 4057, Inc.}, 519 So. 2d 413, 416 (Miss. 1988)). With respect to causation, in order for a plaintiff to recover, he must prove both causation-in-fact and proximate cause. \textit{Jackson v. Swinney}, 140 So. 2d 555, 557 (Miss. 1962). “The proximate cause of an injury is that cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury and without which the result would not have occurred.” \textit{Gulledge v. Shaw}, 880 So. 2d 288, 293 (Miss. 2004) (citing \textit{Delahoussaye v. Mary Mahoney's, Inc.}, 783 So. 2d 666, 671 (Miss. 2001)).

In Kramer’s case, the \textit{result} is his death due to cancer. It cannot be said, however, that without the negligence of his physician Kramer’s death “would not have occurred” since he would have still been more likely than not to die regardless of the delay in diagnosis. This “all or nothing rule” is generally applicable to tort cases and provides that a plaintiff may recover damages only by showing that the defendant's negligence, \textit{more likely than not} caused the ultimate outcome—in this case, Kramer’s death. \textit{See generally}, King, Jr., \textit{Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences}, 90 Yale L.J. 1353, 1365–1366 (1981). In discussing the all-or-nothing rule, the court in \textit{Matsuyama v. Birnbaum}, 890 N.E.2d 819, 829 (Mass. 2008) seemingly discussed Kramer’s case:

Thus, if a patient had a 51\% chance of survival, and the negligent misdiagnosis or treatment caused that chance to drop to zero, the [patient] is awarded full … damages. On the other hand, if a patient had a 49\% chance of survival, and the negligent misdiagnosis or treatment caused that chance to drop to zero, the plaintiff receives nothing. So long as the patient's chance of survival before the
physician's negligence was less than even, it is logically impossible for her to show that the physician's negligence was the but-for cause of her death, so she can recover nothing.

This “but-for” analysis is well-ingrained into Mississippi law. In *Glover ex rel. Glover v. Jackson State University*, 968 So. 2d 1267, 1277 (Miss. 2007), the Court held that a “defendant’s negligence is the cause in fact of a plaintiff’s damage where the fact finder concludes that, but for the defendant’s negligence, the injury would not have occurred. (Emphasis added). Mississippi’s Model Jury Instructions concerning the cause-in-fact element of negligence claims speak in terms of whether the defendant’s negligence was “a substantial factor” in producing the plaintiff’s injury. If the plaintiff would have been injured even if the defendant had not been negligent, the defendant’s negligence is not a substantial factor and not a proximate cause. See Miss. Model Jury Instructions, §15:4 (emphasis added).

Courts have recognized that the all-or-nothing rule provides a “blanket release from liability for doctors and hospitals any time there is less than a 50 percent chance of survival, regardless of how flagrant the negligence.” See *Herskovits v. Group Health Coop. of Puget Sound*, 664 P.2d 474 (Wash. 1983). In this regard, the court in *Matsuyama, supra*, recognized that “many courts and commentators have noted, the all or nothing rule is inadequate to advance the fundamental aims of tort law.” *Matsuyama*, 898 N.E. 2d at 830. Specifically, the court noted that the all-or-nothing rule fails to deter medical negligence because it immunizes whole areas of medical practice from liability, *Id.* (citing *McMackin v. Johnson County Healthcare Ctr.*, 73 P. 3d 1094, 1099 (Wyo. 2003)), and because it fails to ensure that victims harmed by the loss of an opportunity for a better outcome are fairly compensated for their losses. *Id.* (citing *Delaney v. Cade*, 873 P. 2d 175 (Kan. 1994)). If he is subject to the requirements of general Mississippi tort law, Kramer is out of luck.

III. The Loss of a Chance Doctrine
In *White, supra*, the court noted that “Mississippi law recognizes the legal theory of the ‘loss of a chance’” and that to recover under this theory, “the plaintiff must prove that, but for the physician’s negligence, he or she had a reasonable probability of a substantial improvement.” *White*, 170 So. 3d at 508. The court added, “stated another way, the plaintiff must offer proof of ‘a greater than fifty (50) percent chance of a better result than was in fact obtained.’” *Id.* at 509. A plaintiff cannot recover if he only establishes a mere possibility of a “chance of recovery.” *Id.*

*White* first presented to the emergency department at Hancock Medical Center with slurred speech and complaints of tingling in his extremities. A CT scan was obtained, but *White* was discharged when the scan was negative for any acute intracranial abnormality. The following day, *White* presented to the emergency department at Memorial Hospital with slurred speech and continued complaints of left-sided numbness. He told the nurses that he thought he was having a stroke. *White* was diagnosed with “left-sided tingling/hypertension,” given blood pressure medications, and yet again, sent home. The very next day, *White* again returned to Hancock, after having fallen, now unable to move his left arm or leg and he could not speak. He was transported to Memorial where an MRI performed revealed a completed stroke. *White* required extensive rehabilitation including occupational therapy, speech therapy, and physical therapy.

As a result of the foregoing, *White* filed suit against Hancock and Memorial alleging that they failed to provide the correct diagnosis and treatment, and that had he received appropriate treatment the completed stroke could have been avoided. Hancock settled with the plaintiff prior to trial, but the case proceeded to trial against Memorial. At trial, *White* offered expert testimony demonstrating that had he been admitted to Memorial in a timely fashion, he would have had a reasonable probability (*i.e.*, more than 50% chance) of substantial improvement. In response, Memorial’s expert testified that *White* would have had only a “small chance” or possibility of a
substantially better outcome. Ultimately, the trial court agreed with White and as such, found in his favor on the issue.

In affirming the judgment for White, the court cited *Clayton v. Thompson*, 475 So. 2d 439 (Miss. 1985), the first case in which the Mississippi Supreme Court addressed the loss of a chance doctrine. *Clayton, supra*, involved the failure to timely diagnose and treat a fractured thumb which left the plaintiff with permanent loss of function. The plaintiff’s theory of the case was that immediate medical attention by an orthopedic surgeon would “probably” have given the plaintiff a “good chance” to recover greater flexibility of his left thumb. *Id.* at 445. The jury was instructed that if it found that timely diagnosis and treatment would “probably have given [the plaintiff] a good chance to recover greater flexibility of his left thumb,” then it had to find for the plaintiff. *Id.* at 444. A verdict in favor of the plaintiff was rendered at trial.

The verdict, however, was later reversed by the Supreme Court. But, in doing so, the Court laid the foundation for the loss of chance doctrine in Mississippi. In its opinion, the Court noted that in medical malpractice cases:

> [T]he plaintiff is rarely able to prove to an absolute certainty what would have happened if early treatment, referral or surgery had happened. “The law does not ... require the plaintiff to show to a certainty that the patient would have lived had she been hospitalized and operated on promptly.” Having in mind this reality, our approach to the requirement of causation in medical malpractice cases necessarily differs from that employed in most other tort contexts.

*Id.* at 445 (internal citations omitted). The verdict was reversed, however, because the Court concluded that the language of the jury instruction invited impermissible speculation and conjecture by the jury which “should have been channeled to consider a substantial probability, rather than a “good chance,” for plaintiff to recover substantially greater flexibility of his thumb. *Id.*
The Court’s opinion in *Ladner v. Campbell*, 515 So. 2d 882 (Miss. 1987) offers the most clarity on the loss of chance doctrine in cases involving the failure to timely diagnose cancer, such as Kramer’s. In *Ladner, supra*, the issue before the Court was the failure to timely diagnose and treat the plaintiff’s breast cancer. Expert testimony established that the delay in diagnosis and treatment had reduced the plaintiff’s five-year survival from 62-percent to 32-percent. *Id.* at 885. The Court reasoned that “proof of causation is particularly difficult in cases where the results complained of are such as might normally be expected to follow from the original disease . . . as is the case when a plaintiff complains of the defendant doctor’s failure to cure, rather than of any positive effects of mistreatment.” *Id.* at 888. The Court ultimately held:

> . . . proof of causation does not require that it be shown that the patient was certain to have recovered or improved with sound medical care, and it has often been said that the plaintiff may sustain the burden of establishing proximate causation with evidence that it was probable, or more likely than not, that the patient would have been helped by proper treatment. Sometimes observing that medicine is not an exact science which would permit certain proof of causation, the courts have accordingly permitted the finding that medical malpractice was a proximate cause of results which proper treatment probably would have prevented, even though the effects on the patient were attributable to the patient's disease or injury.

*Id.* At least as far as a potential malpractice claim, things are looking up for Kramer.

**IV. Conclusion**

Conventional notions of proximate cause do not always apply in medical malpractice cases, particularly when the allegation involves the failure to diagnose a particular condition or disease, such as cancer or stroke. But Mississippi law still requires, even in loss of chance cases, proof of more than simply that the plaintiff’s chance of recovery was merely diminished. Recovery is allowed only when the failure of a physician to render appropriate care results in the loss of a reasonable probability of substantial improvement of the plaintiff’s condition or of a better result that was obtained. Thus, you need not tell Kramer “no suit for you.”