

Risk Management: The Doctrine of Loss of Chance

Raising the Stakes | By LEONA EGELAND SIADEK, Vice President, Government Relations, The Doctors Company

FAILURE TO DIAGNOSE has long been a leading cause of action in medical malpractice cases. This has been particularly true for claims against primary care physicians in cases involving cancer. Raising the stakes to greater levels of liability for doctors is the growing legal threat called “loss of chance.”

The loss of chance doctrine seeks to compensate a plaintiff for injuries resulting from the diminished likelihood that the outcome would have been better had some act or omission of medical care not occurred. Typically, the plaintiff represents that the injuries caused by a disease or condition, usually cancer, become more severe

the longer a diagnosis is delayed and thus the prospect (or “chance”) of a cure or longer life decreases.

The doctrine of loss of chance was introduced into the United States’ common law in 1868 when a New York court was faced with a contract breach by a landowner who went back on his promise to allow a farmer to use the land. In *Taylor v. Bradley*, the court ruled that the farmer was being deprived of his chance for profit. The doctrine subtly moved forward with approval through U.S. treatises and case law and is becoming a growing category of medical malpractice litigation.

Usually a doctor is held liable for diagnostic delay or failure only if that failure is found to be a substantial factor in a patient’s injury or death. However, courts in an increasing number of states have adopted the doctrine of loss of chance. Under this doctrine, the doctor can be held liable for depriving the patient of a significant chance of a better outcome, including survival.

A common expression of the doctrine allows for the full recovery of damages if a patient had a 50 percent or greater chance of a better outcome and allows a proportional recovery of damages if a patient’s chance of a better outcome was less than 50 percent. For example, if at the time of a failure to diagnose, a patient had a greater than 50 percent chance of survival with a prompt diagnosis, that patient would recover full damages in a case. If the patient had a 40 percent chance of survival at the time of failure to diagnose and that chance was diminished to 20 percent, the patient could still recover proportional damages.

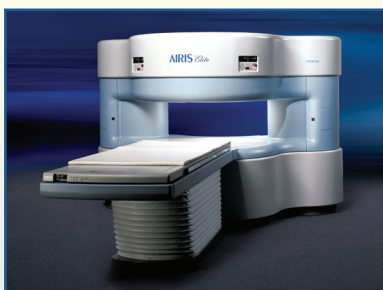
Those judges adopting loss of chance say that they believe it to be a fairer doctrine. Twenty-two states recognize some form of the principle, and a number of states have cases pending that may lead to the doctrine’s adoption. States have adopted a wide range of different percentage criteria and a threshold for a loss of chance constituting a recoverable injury that varies from “substantial” to “appreciable.”

A few state courts have held that the loss of chance to survive in alleged medical malpractice cases is not actionable. In some of these states, new cases are pending to seek a reversal of the previous decision. ■



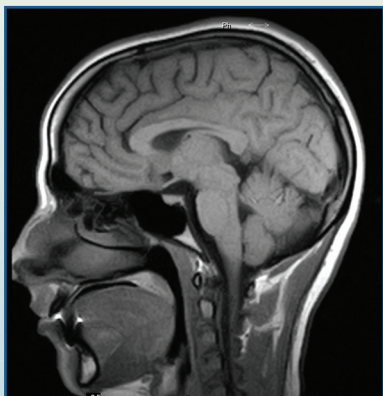
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