“Loss of Chance” Doctrine in Medical Malpractice Cases

By John M. Curran

The “loss of chance” doctrine (LOC doctrine) is premised on the theory that the plaintiff should be compensated for the loss of achieving a more favorable outcome when a defendant’s negligence destroys or reduces that prospect. Application of the doctrine assumes that the plaintiff suffered from some preexisting condition or disease that the defendant did not cause. The defendant is held liable if the negligence deprives the plaintiff of the chance of survival or a more favorable outcome. Damages under the LOC doctrine, in its purest form, are awarded “based on the extent to which the defendant’s tortious conduct reduced the plaintiff’s likelihood of receiving a better outcome.”

The LOC doctrine was a reaction to “dissatisfaction with the prevailing ‘all or nothing’ rule of tort recovery.” Under that rule, plaintiffs recover 100% of their damages only if they prove that a defendant’s negligence more likely than not caused the ultimate harm. “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.”

One of the earliest decisions on this subject opines that the “all or nothing” rule provides a “blanket release from liability for doctors and hospitals any time there was less than a 50 percent chance of survival, regardless of how flagrant the negligence.” Another more recent decision notes that the “all or nothing” approach “fails to recognize the common sense proposition that a loss of chance of survival or recovery does injure a person.”

While the LOC doctrine is theoretically applicable to a multitude of cases, its widest application is in the area of medical malpractice. The courts have given various reasons for applying the doctrine to that subject matter.

This article will explore the history of the doctrine in the medical malpractice context, describe its evolution across the country, and analyze the extent to which New York courts have dealt with the doctrine. Because New York law is not fully developed on the topic, answers to some of the questions raised cannot be provided.

History of the Doctrine

The history of the LOC doctrine goes back somewhere between 60 and 160 years. One author traces it back to an
effect of Section 323(a) is providing that one who is negligent and “increases his suffering, or, in short, makes his condition worse than it would have been if due skill and care had been used, would, in a legal sense, constitute injury.”13

Another author has written that “one case credited with a new way of thinking about lost opportunities was the 1911 British contract case of Chaplin v. Hicks.”14 The court held that the plaintiff was entitled to recover because she lost the “opportunity of competition” with a new way of thinking about lost opportunities with respect to a talent competition the defendant theatrical manager conducted.

Most authors regard Hicks v. United States15 as the preeminent case giving rise to the LOC doctrine in the United States. In that case, decided in 1966, the decedent died of a bowel obstruction shortly after being diagnosed with gastroenteritis. The court stated:

When a defendant’s negligent action or inaction has effectively terminated a person’s chance of survival, it does not lie in the defendant’s mouth to raise conjectures as to the measure of the chances that he has put beyond the possibility of realization. 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 circumstances require the plaintiff to show to a certainty that the patient would have lived had she been hospitalized and operated on promptly.16

The First Department’s 1974 decision in Kallenberg v. Beth Israel Hospital17 is frequently cited as the next LOC case because the court affirmed a verdict based on a 20% to 40% loss of chance of survival.18 The Court’s language does not suggest that it perceived it was charting new legal territory. The verdict was affirmed based on a jury charge using the language “substantial possibility” of survival and the usual “substantial factor” language for proximate cause.19

In 1978, the Supreme Court of Pennsylvania became one of the first courts to rely on Section 323 of the Restatement (Second) of Torts “to expand the increased risk of harm to instances of loss of chance.”20 In that case, Hamil v. Bashline, the court vacated the decision below because the jury had been incorrectly charged that the loss of chance could not be considered a proximate cause of the patient’s death.21 The Hamil court relied upon Section 323(a) providing that one who is negligent and “increases the risk of harm” is liable. The decision observed that the effect of Section 323(a) is to relax the degree of certitude normally required of plaintiff’s evidence in order to make a case for the jury as to whether a defendant may be held liable for

the plaintiff’s injuries: Once a plaintiff has introduced evidence that a defendant’s negligent act or omission increased the risk of harm to a person in plaintiff’s position, and that the harm was in fact sustained, it becomes a question for the jury as to whether or not that increased risk was a substantial factor in producing the harm . . .22

The Hamil court also cited to Hicks, including the language “any substantial possibility of survival.”23 The phrase “substantial possibility” and the language in Hamil expressing a relaxation of “the degree of certitude normally required of plaintiff’s evidence” permeate the academic literature and judicial decisions in connection with the LOC doctrine. Hamil appears to be the foundation for the concept that the LOC doctrine is a relaxation of the burden of proof for proximate cause while Hicks’ “substantial possibility” language is repeated in connection with both causation and harm.

In 1981, Professor Joseph H. King, Jr., published a landmark article on the LOC doctrine most often associated with the modern commencement of the doctrine. Professor King’s thesis was that the loss of a chance of achieving a favorable outcome or of avoiding an adverse consequence should be compensable and should be valued appropriately, rather than treated as an all-or-nothing proposition. Preexisting conditions must, of course, be taken into account in valuing the interest destroyed. When those preexisting conditions have not absolutely precluded an adverse outcome, however, the chance of avoiding it should be appropriately compensated even if that chance is not better than even.24

Professor King’s “proportional approach” treats the “loss of chance” as a compensable injury, permits the jury to value the ultimate harm, and then discounts that valuation according to the percentage loss of chance determined by the jury.25

Seventeen years later, Professor King published another article wherein he discussed the development of the “loss-of-a-chance” theory. He recognized that, as of 1998, “most cases to address the loss-of-a-chance issue have arisen in the torts context and have involved medical malpractice claims alleging delayed diagnosis.”26 The article distinguishes between a loss of a chance of achieving a better outcome in the past entailing a retrospective focus, and a loss of chance of averting an adverse outcome in the future entailing a prospective focus.27 Thus, cases may be differentiated based on whether the ultimate harm has already occurred or has yet to fully occur.

Professor King also draws a distinction between cases involving failures to take appropriate measures in a timely fashion (omissions) from cases involving injuries that have been actively inflicted (commissions). He recognized that “the loss-of-a-chance issue has received the most explicit judicial attention in cases arising from passively destroyed or reduced chances.”28 However, he
does not advise limiting the doctrine to only omission theories.

Professor King recommends that valuation be based on a percentage of a reduced loss of chance, irrespective of whether it is greater than 50%, and in situations where the likelihood of a loss of chance is unsubstantial. He does not suggest a certain percentage threshold for recovery.

Professor King severely criticizes the “relaxed proof variations,” which characterize the issue solely in causation terms and refuse to recognize the “loss of chance” as a discrete injury. He argues that this view continues the “all or nothing” rule by allowing the plaintiff to recover undiscounted damages based on the ultimate harm while increasing the likelihood of awards because the standard of proof on causation has been relaxed. He concludes that “the relaxed proof approach represents the worst of both worlds.”

The relaxed standard of causation approach employing the “substantial factor” or “substantial possibility” terminology also has been criticized by the Restatement (Third) of Torts. The Restatement asserts that reliance on Restatement (Second) of Torts, Section 323, is misplaced because that section pertains to duty, not causation or harm.

The National Scene

The LOC doctrine in medical malpractice cases has garnered a great deal of attention in judicial opinions and in law review articles. The highest courts in 22 states have adopted some form of the doctrine. However, the highest courts of nine states have rejected the doctrine. The legislatures in five states have addressed the issue in some respect, including two states that have enacted legislation repudiating the “loss of chance” cause of action.

Judicial opinions have categorized the LOC doctrine under different theories and approaches. Authors of law review articles regarding the doctrine have identified “approaches,” “trends,” and “rules,” which serve to differentiate the various views of the doctrine.

The most current edition of Dobb’s Law of Torts delineates the ways in which the states approach the doctrine. The first category consists of states that deny all liability for loss of chance. When the highest courts of these states have done so, they have typically considered policy matters such as the effect on the tort judicial system, the effect on physicians and their malpractice costs, and the legal considerations necessary to either relax the standard of causation for medical malpractice cases or to recognize a new form of harm or injury. For example, in Smith v. Parrott, the Supreme Court of Vermont balanced the “policy arguments” in ultimately choosing not to adopt the doctrine finding that such “significant and far-reaching policy concerns” should be left to the legislature.

The second category consists of states allowing liability for all harm under a relaxed standard of causation. Under this category, “if the doctor’s negligence was a substantial factor in producing harm, the doctor is liable for the entire harm unless (the doctor) can show a basis for apportionment.” Some courts allow recovery for any loss of chance while others require a substantial possibility of a loss of chance. One author describes this as a theory of “probabilistic causation.”

The third category comprises states authorizing liability for the value of the lost chance. Plaintiffs recover under this approach “only an amount representing the value of the chance destroyed by the defendant’s negligence.” According to Dobb’s Law of Torts, this is the view developed by Professor King, and the number of states adopting this view is growing. It appears to be well-established that the plaintiff cannot recover both traditional “all or nothing” damages and compensation for the loss of chance injury. Within this category, some courts apply proportional damages on a percentage basis while others entrust the issue to the jury on a subjective basis.

In addition to the debate over whether the doctrine is conceived as a relaxation of the burden of proof on causation or as a compensatory injury, state courts have analyzed whether there may be recovery for only greater than the 50% probability of survival or a better outcome and whether the probability must at least be substantial.

There are also questions of whether the doctrine is consistent with a state’s wrongful death statute, and whether the plaintiff must have experienced the ultimate harm before a “loss of chance” occurs.

A 2014 law review article on the LOC doctrine describes it as “a well-established tort doctrine, and yet it remains something of a mystery.” The “mystery” of the doctrine is rooted in the differing terminology used to describe it, the categories or approaches used to identify its forms, and the combinations of ways in which the states apply it.

Where New York Fits

Has New York Adopted the Doctrine?

New York is routinely listed among the states that have adopted some form of the LOC doctrine. However, it has been identified as within both the relaxed burden of proof and proportional approaches. New York’s highest court, the Court of Appeals, has yet to accept or reject the doctrine.

In Kallenberg, the Court of Appeals affirmed the First Department’s decision which, as noted above, is widely regarded as one of the first cases in the country to apply the LOC doctrine. However, the decision in Kallenberg was affirmed without opinion, indicating that the Court of Appeals concurs only in the result reached by the First Department and not for the reasons given in the opinion of the lower court. Kallenberg therefore cannot be viewed as a Court of Appeals decision adopting the doctrine.
In *Wild v. Catholic Health System*, the one case where the Court of Appeals recently could have addressed it, and was urged to do so, the Court concluded that “defendants’ broad challenge to the ‘loss of chance’ doctrine” was unpreserved for appeal. The Court referred to the issue as “the loss-of-chance theory of liability.” In a footnote, the Court quoted two California cases to define the theory as granting “recovery to patients for deprivation of the opportunity of more beneficial treatment and the resulting gain in life expectancy or comfort, although the evidence fails to establish a reasonable probability that without defendant’s negligence, a cure was achievable.”

The Court’s language in *Wild* may provide some clues that it viewed the LOC doctrine as one involving the relaxed burden of proof on causation. First, it referred to the doctrine as a “theory of liability,” as opposed one involving harm or damages. Second, it referenced decisions from California where the courts have rejected the doctrine to avoid relaxing the standard of proof. Lastly, the Court focused on the burden of proof issue raised by the defendants, as opposed to the injuries or harm.

The Court also addressed the defendants’ contentions, to the extent preserved, that the jury instructions “improperly reduced plaintiffs’ burden of proof.” The Court found that, as a whole, the jury charge did not improperly alter “the causation standard or plaintiffs’ burden of proof.” In reaching this conclusion, the Court was careful to note that the trial court included within its charge both the usual burden of proof and proximate cause charges.

Because the court in *Wild* affirmed the charge as a whole, including use of the usual burden of proof and proximate cause instructions, it appears that, as of 2013, the Court had no intention of changing the burden of proof or proximate cause standards in medical malpractice “loss of chance” cases. But this is largely speculation as the Court did not express any opinion on the doctrine.

The Appellate Division has never expressly adopted the LOC doctrine. Still, it appears well understood that the Appellate Division has embraced the “loss of chance” concept.

The Committee on Pattern Jury (Civil) Instructions (PJI Committee) has a section on the LOC doctrine following its pattern medical malpractice charge. The PJI Committee places that discussion under its “proximate cause” heading. It observes that “applying the doctrine is troublesome because its parameters are unclear.”

**Kallenberg**

The PJI Committee’s discussion of the issue starts with *Kallenberg*. There, the First Department affirmed a verdict in favor of the plaintiff for wrongful death in the amount of $55,000. The plaintiff claimed that the defendant failed to administer a medication to the decedent who had suffered a hemorrhage from a cerebral aneurism. The court in *Kallenberg* found that the testimony supported the conclusion that the failure to administer the medication was a “producing, contributing factor” of the death.

The court noted that the “question of proximate cause is a jury question” and that the jury could find that, if the medication had been given, the decedent’s blood pressure “could have been kept under control” and “might have improved sufficiently” to undergo the surgery and “make a recovery.”

With respect to the loss of a chance, the testimony from plaintiff’s expert was that the decedent had a 20% to 40% chance of survival with the medication and the surgery, and a 2% chance of survival with the medication only. It is this testimony that is most often cited, together with the “could have” and “might have” language quoted above, which has caused this case to be categorized under the LOC doctrine. However, the *Kallenberg* court never used that term and never analyzed the appropriateness of the doctrine.

The record in *Kallenberg* reveals that the court charged proximate cause by instructing the jury to decide “whether there was a substantial possibility that Mrs. Kallenberg would have survived if she received proper treatment.” The record also indicates that the jury was instructed that “if Mrs. Kallenberg would have died regardless of the negligence, you must find for the defendants” and that “if you find there was a substantial possibility that Mrs. Kallenberg would have survived but for (the) negligence, you should find for the plaintiff.” Additionally, the record shows that the court charged the typical burden of proof standard (i.e., more likely than not) and the standard proximate cause language (i.e., the negligence must be a “substantial factor in bringing about” the death).

The negligence found by the jury in *Kallenberg* was in not administering the medication. This was found to be the proximate cause of the death. The harm was therefore

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the death, not the loss of chance of survival or a better outcome. It appears the plaintiff was awarded the full value of the ultimate harm (i.e., death) even though there was a 60% to 80% chance the decedent would have died irrespective of negligence. This would seem to conflict with Professor King’s concept of the doctrine and might fall within his “worst of both worlds.”

“Substantial” vs. “Any”/“Some”
The record in Kallenberg reflects that the plaintiff unsuccessfully sought a jury instruction that the deprivation of any chance of survival would be enough for a recovery. Three years later in Kimball v. Scors,71 the Third Department rejected the plaintiff’s argument that Kallenberg required a jury charge authorizing recovery when the decedent is deprived of “a chance of survival . . . regardless of how small that chance might be.”72 Instead, the court adopted the standard of whether there was a “substantial possibility” of survival but for the malpractice.

Ten years after Kallenberg, in Mortensen v. Memorial Hospital,73 the First Department endorsed the “substantial possibility” charge recognizing that it had been approved in Pennsylvania and that the Hicks decision had employed it as well.74 The court rejected a jury charge allowing recovery for the “deprivation of any possibility.”75 The Fourth Department also has employed the “substantial possibility” charge,76 although it may only be applicable to “omission theories” of malpractice.77 As pointed out by the PJI Committee, it appears that the First, Third and Fourth Departments have endorsed the “substantial possibility” concept which, by Mortensen’s reference to Pennsylvania law, is linked to the relaxed burden of proof on causation approach.

The Second Department, however, has routinely adhered to language allowing recovery when there is “a diminished chance of survival,”78 a diminution of a substantial chance,79 and when the negligence “diminished the plaintiff’s chance of a better outcome.”80 The “some diminution” or “a diminution” language from the Second Department appears more in line with Professor King’s approach treating the LOC doctrine as an independently compensable claim and without any requirement of a substantial loss. It also is different, however, because damages are not proportional or otherwise targeted to the loss of chance.

The Court of Appeals has not been presented with the Second Department’s language, but Wild involved the use of the “substantial possibility” language. Perhaps because the “broad challenge” to the LOC doctrine was unpreserved, the Court did not reject the “substantial possibility” standard. Nevertheless, because the “substantial possibility” language was in the charge in Wild and the verdict was affirmed, it would seem that the “substantial possibility” language is acceptable, provided the usual burden of proof and proximate cause charges also are given.81

The PJI Committee discusses the difference between the Second Department and the other departments.82 While it appears to be a conflict, recent decisions from the First and Fourth Departments suggest that the Second Department language is gaining acceptance.83

“Hastening”/“Speeding Up” and “Aggravation”/“Precipitation”
The record in Kallenberg shows that the trial court and counsel discussed whether the court should charge that the jury could award damages if the negligence caused the decedent’s death to be hastened. The trial court did not deliver such a charge, at least in part due to the late hour in which the discussion occurred.

Seven years after Kallenberg, the Fourth Department decided Monahan v. St. Joseph’s Hospital and Health Care Center,84 wherein the court relied on Kallenberg and Kimball to conclude that the “defendant would not be free from liability because his conduct merely speeded up the happening of a result that was inevitable in any event.”85 The decision in Monahan illustrates a common theme between the LOC doctrine and the well-established concepts underlying the PJI Committee’s “aggravation” (2:282) and “precipitation” (2:283) charges. The plaintiff’s argument in Kallenberg was premised on some of the same Court of Appeals cases supporting those pattern charges.86 Monahan is cited in the comment following both charges, and within the PJI Committee’s “loss of chance” discussion.

According to the comment following PJI 2:282, the charge applies to situations “where the defendant’s wrongful act does not cause the condition, injury or illness.”87 This is certainly the context of “loss of chance” cases involving medical malpractice, if not every medical malpractice case. The “aggravation” charge instructs the jury that the plaintiffs “should be compensated only to the extent that (plaintiff’s) condition was made worse by the defendant’s negligence.”88 Interestingly, the “aggravation” and “precipitation” charges are categorized by the PJI Committee as a damages concept, not as a causation concept.

The “aggravation” charge may be conceptually consistent with the LOC doctrine as it seeks to limit a plaintiff’s compensation to the “damage caused by aggravation of the preexisting condition” and “to the extent that you find [the plaintiff’s] condition was made worse by the defendant’s negligence.”89 This similarity is supported by the discussion in Monahan wherein the Appellate Division granted the plaintiff a new trial and focused on distinguishing between the preexisting condition and the aggravation of that condition by the defendant’s alleged negligence. The court phrased it as an issue of proximate cause:

Proximate cause, a troublesome concept of the law of negligence generally, poses special problems in the field of medical malpractice. The problem is described
in one treatise as follows: “Almost every person who receives the services of a physician is sick or disabled when he first goes to the physician. Thus there lurks the ever present possibility that it was the patient’s original affliction rather than the physician’s negligence which caused the ultimate damage.”

Assuming the conceptual similarity between “loss of chance” and “aggravation/precipitation,” a number of questions arise in the event a LOC theory is supported by the evidence, a LOC charge is sought, and the court agrees to deliver one to the jury: (1) must the “aggravation” and/or “precipitation” charge be given to limit the award to exclude the plaintiff’s pre-existing condition and/or an inevitable result; (2) must the verdict sheet incorporate language to that effect; and (3) must the LOC theory be alleged in the pleadings such as is required by some courts for the “aggravation” charge?

The LOC doctrine in medical malpractice cases has garnered a great deal of attention in judicial opinions and in law review articles. New York courts have yet to grapple with these issues in the LOC context. But, if New York has adopted the doctrine, one would expect these questions to arise.

**Compensation: Proportional vs. Full vs. Subjective**

Professor King’s proportional approach directs the jury to compute the full amount of damages and have that amount discounted by the value of the plaintiff’s percentage loss of chance. As mentioned before, Professor King severely criticizes the second approach, which allows so-called full damages under a relaxed burden of proof for causation. A third approach allows the jury to award a subjective amount targeted to the loss of chance but without use of a percentage discount.

No appellate court in New York, and only one trial court, has adopted Professor King’s proportional approach. Without discussion of the issue, appellate courts have allowed full damages apparently under the relaxed standard of causation approach (i.e., “substantial possibility”). Some appellate courts have reduced apparent “loss of chance” awards on the more subjective basis of whether the award represents reasonable compensation.

The use of a proportional or a subjective approach would largely be dictated by the evidence presented at trial. If the expert evidence employs percentages, a proportional approach becomes possible. Otherwise, the only option would seem to be to allow the jury to follow the subjective approach. Still, there is no support in the academic literature or judicial decisions permitting full damages for the ultimate harm suffered when at least some of that harm was inevitable or attributable to a pre-existing condition.

The subjective approach would appear to be most consistent with New York’s existing law incorporated in the “aggravation” charge. The jury is instructed to award damages only for the harm caused by the defendant’s negligence and not for plaintiff’s preexisting condition. If this conclusion is accurate, it may not be necessary for the Court of Appeals to adopt the doctrine because existing New York law already embodies it.

**“Substantial Factor” and “Substantial Possibility”**

In Mortensen, the First Department upheld the jury charge instructing only “substantial possibility” on the issue of proximate cause concluding that the “concepts of ‘substantial factor in bringing about an injury’ and ‘substantial possibility of avoiding the injury . . .’ are virtually indistinguishable.” However, in view of the Court of Appeals discussion in Wild, which seems to require the standard burden of proof and proximate cause instructions when “substantial possibility” is charged, is the statement in Mortensen accurate? In other words, if “substantial factor” must be charged when “substantial possibility” is charged, there must be a difference between the two concepts. Does the difference lie in “substantial,” the word common between the two, or in the words “factor” and “possibility?” Logic would seem to dictate that the difference between “substantial factor” and “substantial possibility” must be in the difference between “factor” and “possibility.”

The law appears clear that proximate cause cannot be measured by percentages or probabilities. Of course, the burden of proof is measured by probabilities (i.e., more likely than not). But in Wild, the Court of Appeals seems to indicate that the burden of proof should not be changed when “substantial possibility” is charged. Thus, probabilities are necessitated by the burden of proof but prohibited from causation.

The First Department’s decision in Stewart v. New York City Hospital Corp. helps to illustrate the point. The jury awarded the plaintiff $500,000 for the plaintiff’s loss of “natural” childbearing capacity following an ectopic pregnancy causing destruction of the right fallopian tube. The trial court granted the defendant’s post-trial motion in part, finding that a 10% chance was not a “substantial” possibility of having children naturally, and reduced the damages for loss of the fallopian tube to $100,000. The First Department reversed, stating that the jury would be justified in concluding that the loss of a “5 to 10 percent” chance of having a child naturally was “substantial.” The court increased the award to $300,000.

The First Department applied the usual requirement that a plaintiff show that the negligence “was a substan-
tial factor in bringing about the injury.” The court did not address whether the “5 to 10 percent” chance applied to “substantial factor” or to “the injury.” But, if proximate cause cannot be discounted by percentages, the “5 to 10 percent” would seem to apply to “the injury.”

Assuming this to be true, on what basis did the First Department increase the award to $300,000 (halfway between the trial court and the jury awards)? Does this mean that the injury must be “substantial” before any award of damages may be made by a jury? Under what principles of tort law do we limit compensation only for “substantial” harm, whatever that may mean under the law? At a minimum, it would seem that using “substantial” for both causation and harm is confusing.

Speculative Harm vs. Compensable Harm

One of the common criticisms of the LOC doctrine is that it permits recovery for harm that is speculative.107 Contrary to settled law prohibiting such a result,108 A related criticism is that the doctrine allows compensation based on ultimate harm that has not fully occurred and may never occur.109

Using Stewart as an example again, is an award based on a “5 to 10 percent” loss of chance necessarily speculative because that form of harm does not meet the burden of proof by more likely than not? Additionally, the decision does not indicate whether the plaintiff had suffered the ultimate harm of being unable to conceive naturally. What if the plaintiff was still of childbearing age and bore a child naturally later? Was the plaintiff compensated for an ultimate harm that did not occur?

Cases involving the delayed diagnosis of cancer are typical subjects for the LOC doctrine.110 Assertions by plaintiffs that medical malpractice deprived them of a probability of a cure or for a better outcome are frequently met with defense complaints that the claims are speculative. The courts have nevertheless ordinarily allowed them to be weighed by a jury because, as one court has observed, “[w]e can then only deal in probabilities since it can never be known with certainty whether a different course of treatment would have avoided the adverse consequences.”111

A recent Second Department case highlights some of the troublesome issues that arise in these types of cases with respect to damages. In Luna v. Spadofora,112 the jury returned a verdict of $6.8 million that the trial court set aside, concluding that there was no rational basis upon which the jury could find that the 13-month delayed diagnosis of the plaintiff’s thyroid cancer was a proximate cause of the plaintiff’s injuries. Plaintiff alleged that the delayed diagnosis worsened her prognosis, increased her harm due to metastasis of her cancer, and significantly decreased her 10-year survival rate. Plaintiff’s expert testified that, when the plaintiff first saw the defendant, there was an 85% to 90% 10-year survival rate but that the delayed diagnosis reduced that to 40% to 50%. The Appellate Division reversed the trial court and reinstated the verdict, finding that there was a rational basis for the jury to conclude that the defendant’s negligence proximately caused the plaintiff to have a worsened or decreased 10-year survival rate.113

The decision in Luna indicates that the initial diagnosis was in November of 2003 and that the trial occurred in 2011 or 2012. The plaintiff appears to have been alive when the appeal was decided in April of 2015. This suggests that the Appellate Division reinstated a $6.8 million verdict based at least in part on a reduction of 50% in the 10-year survival rate when in fact the plaintiff was still alive more than 10 years after the diagnosis.

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Critics of the LOC theory would point to Luna as an example of the courts authorizing compensation based on speculative harm and on ultimate harm that did not occur. To address this critique, Professor King and one other author have recommended that “loss of chance” awards be made only after the ultimate harm has occurred.114 However, both authors acknowledge that the statute of limitations would have to be changed to allow time for the ultimate harm to occur.115

“Loss of Chance” and “Wrongful Death”

Wrongful death actions are typical applications of the LOC doctrine upon allegations that negligence hastened or “speeded up” the death or deprived the decedent of a chance of survival. There has been substantial debate outside New York about whether the doctrine is compatible with state wrongful death statutes.116 No New York court has addressed the question.

New York appears to be one of the jurisdictions strictly construing its wrongful death statute117 and otherwise adheres to the common law that an action for personal injury abates upon death.118 It has yet to be seen whether a New York court will authorize “loss of chance” in a wrongful death action under either: (1) the relaxed burden of proof on causation despite the language of the wrongful death statute limiting recovery to negligence “which caused the decedent’s death” or (2) the independent compensable harm method, which is a form of injury separate from the death.

Omission and Commission

At least in the Fourth Department, the Wild decision seems to limit the LOC doctrine to theories of omission.
While this is consistent with Professor King’s observation that most “loss of chance” claims have involved delays in diagnosis,119 the doctrine has not been expressly limited to such cases. The Fourth Department did not cite to any cases supporting its conclusion.

Conclusion

It appears that New York is not applying the LOC doctrine in any coherent or consistent fashion. In three of the four departments, New York has apparently adopted the doctrine, but only if the loss of chance is a “substantial possibility.” In the Second Department, it appears that awards are made for any loss of chance and even when the ultimate harm has not occurred. In the Fourth Department, it appears that the doctrine is only applicable to “omission” theories and not “commission” theories. Further, it appears that New York courts must charge both “substantial factor” and “substantial possibility” even though the First Department has previously stated that those concepts are “virtually indistinguishable.” Some New York courts also award full damages for the ultimate harm based solely on a loss of chance.

All of this has occurred under New York law with virtually no discussion of the issues or the policy considerations underlying the imposition of the relaxed standard of causation or the recognition of a new form of harm. Until there is clarification from the Court of Appeals, it will be up to the trial courts and counsel to craft the application of the LOC doctrine, if at all. In the meantime, it appears that plaintiffs and defendants will take their chances with the LOC doctrine.

2. Id. at 493; Dickhoff v. Green, 836 N.W.2d 321, 333 (Minn. 2013).
3. Id.
8. Dickhoff, 836 N.W.2d at 333 (emphasis in original).
13. Id.; Craig v. Chambers, 17 Ohio St. 253, 261 (1867).
14. King II, supra note 1, p. 500; see also Fischer, supra note 9, p. 609.
15. 368 F.2d 626 (4th Cir. 1966).
16. Id. at 632 (emphasis added); see also Casaceli, supra note 12, pp. 525–26.
17. 45 A.D.2d 177 (1st Dep’t 1974), aff’d, 37 N.Y.2d 719 (1975).
18. Féro, supra note 9, at 592–93; Casaceli, supra note 12, p. 527, n. 27.
19. See Hicks, 368 F.2d at 632; Kallenberg, 45 A.D.2d at 178.
22. Id. at 269.
23. Id. at 271–72.
24. King I, supra note 5, at 1354.
27. Id., p. 502.
28. Id., p. 503.
30. Id., p. 508.
33. Dickhoff, 836 N.W.2d at 334, n.12.
34. Id.
36. See, e.g., Dickhoff, 836 N.W.2d at 333–35; Matsuyama, 452 Mass. at 10–18.
37. Wurdeman, supra note 32; Casaceli, supra note 12; Féro, supra note 9; Ralph Frasca, Short Paper and Note: Loss of Chance Rules and the Valuation of Loss of Chance Damages, 15 J. Legal Econ. 91 (2009) (identifying the traditional rule and the incremental loss of chance rule); King II, supra note 1.
39. Id., p. 662.
40. 175 Vt. 375 (2003).
41. Id. at 381.
42. Dobbs, supra note 38, p. 663.
43. Fischer, supra note 9, p. 605.
44. Id., p. 665.
46. Id., p. 666; King I, supra note 5, p. 1365; see, e.g., Mead v. Adrian, 670 N.W.2d 174, 179–80 (Iowa 2003).
47. Fischer, supra note 9, p. 619, n. 65.
49. Casaceli, supra note 12, pp. 331–33.
50. Id., pp. 547–52.
51. Matsuyama, 452 Mass. at 20, n.33; Mead, 670 N.W.2d at 182–83 (Cady, J., concurring); Alexander v. Scheid, 726 N.E.2d 272, 277 (Ind. 2000); King II, supra note 1, p. 544; Wurdeman, supra note 32, pp. 642–43.
52. Wurdeman, supra note 32, p. 604.
53. Compare Casaceli, supra note 12, p. 531, n.5 and Féro, supra note 9, p. 610, n. 178.
54. 45 A.D.2d 177 (1st Dep’t 1974), aff’d, 37 N.Y.2d 719 (1975).
55. King I, supra note 5, p. 1368, n. 5; Féro, supra note 9, pp. 592–93; Fischer, supra note 9, p. 608, n. 17; Stephen R. Koch, Comment; Whose Loss Is It Anyway? Effects of the “Lost-Chance” Doctrine on Civil Litigation and Medical Malpractice Insurance, 88 N.C. L. Rev. 595, 607, n. 56 (2010).
58. Wild, 21 N.Y.3d at 953.
59. Id. at n.1.
60. Id. at 954.
61. Id. at 952–53.
62. See also 1B New York Pattern Jury Instructions (2d ed. 2015) (PJI), 1:23–2:70.
64. Id.
65. Id.
66. PJI 2:150, pp. 77–79.
67. Kallenberg, 45 A.D.2d at 179.
68. Id.
69. Id.
70. PJI 2:150, p. 77.
72. Id. at 984–85.
73. 105 A.D.2d 151 (1st Dep’t 1984).
74. Id. at 159.
75. Id.
80. Flaherty v. Fromberg, 46 A.D.3d 743, 745 (2d Dep’t 2007); Alica v. Ligouri, 54 A.D.3d 784 (2d Dep’t 2008).
82. PJI 2:150, pp. 77–79.
84. 82 A.D.2d 102 (4th Dep’t 1981).
85. Id. at 108.
87. PJI 2:282.
88. Id.
89. PJI 2:282, p. 892.
90. Monahan, 82 A.D.2d at 107 (quoting 1 Louisell & Williams, Medical Malpractice, par. 8:07, p. 213).
91. PJI 2:282, p. 893.
92. King I, supra note 5, pp. 1381–87, 1397.
93. King II, supra note 1, p. 508.
94. Dobbs, supra note 38, § 196, pp. 667–68; Fischer, supra note 9, p. 619, n. 65.
98. Dobbs, supra note 38, § 196.
99. Id.
100. PJI 2:282.
102. 105 A.D.2d at 159.
104. PJI 2:23.
105. 207 A.D.2d 703 (1st Dep’t 1994).
106. Id. at 703–04.
110. King II, supra note 1, p. 501.
111. Brown v. State of N.Y., 192 A.D.2d 936, 938 (3d Dep’t), lv. denied, 82 N.Y.2d 654 (1993); see, e.g., Dickhoff v. Green, 836 N.W.2d 321, 336 (Minn. 2013) (juries are routinely delegated the duty of determining life expectancy based on probabilities and statistics).
112. 127 A.D.3d 933 (2d Dep’t 2015).
113. Id. at 934.
114. King II, supra note 1, p. 560; Wurdemann, supra note 32, pp. 642–44.
115. Id.
117. EPTL 5-4.1.

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