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Damages Pt. 9 – Damages for the Loss of Chance of Survival from Medical Malpractice

This week the attorneys at Pavlack Law discuss Indiana's "loss of chance" doctrine in Medical Malpractices cases. The loss of chance doctrine attempts to provide compensation for a patient – or the patient's estate if he or she has passed on – where because of medical malpractice the patient's chance of surviving his or her illness has been decreased.

In the typical loss of chance case, "a plaintiff claims the doctor's negligence increased the risk of harm by hastening or aggravating the effect of his pre-existing medical condition or risk." The damage to the patient is not his or her ultimate death, but rather the "chance to survive, to be cured, or otherwise to achieve a more favorable medical outcome." As the Indiana Court of Appeals so accurately stated, "Although there are few certainties in medicine or in life, progress in medical science now makes it possible, at least with regard to certain medical conditions, to estimate a patient's probability of survival to a reasonable degree of medical certainty. That probability of survival is part of the patient's condition. When a doctor's negligence diminishes or destroys a patient's chance of survival, the patient has suffered a real injury. The patient has lost something of great value[.]"

Indiana, like many states has adopted the loss of chance doctrine. The doctrine first entered into Indiana law in the 1995 Supreme Court case *Mayhue v. Sparkman*. In *Mayhue*, the Court went through a thorough analysis of the origins of the loss of chance doctrine – dating back to a federal case in 1966 – and discussed the various approaches that other states have taken. Ultimately, the Court settled upon what is called the § 323 approach. This approach is named for the Restatement of the Law section from which it is derived and was adopted by the supreme courts of Oklahoma and Washington. Section 323 provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize 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, or;
> >
> > (b) the harm is suffered because of the other's reliance upon the undertaking.

Without the lawyer jargon, what this section means is that where a person, such as a doctor, offers aid he assumes a duty to not act negligently. This is based on the premise that the law does not require you to come to someone's aid but when you do you must not cause a greater amount of harm than had you not done so. It also specifically recognizes that the injury caused by the negligence may only be a greater risk of harm. The Supreme Court of Indiana summarized their holding as follows:

> We think in those situations where a health care provider deprives a patient of a significant chance for recovery by negligently failing to provide medical treatment, the health care professional should not be allowed to come in after the fact and allege that the result was inevitable inasmuch as that person put the patient's chance beyond the possibility of realization. Health care providers should not be given the benefit of the uncertainty created by their own negligent conduct. To hold otherwise would in effect allow care providers to evade liability for their negligent actions or inactions in situations in which patients would not necessarily have survived or recovered, but still had a significant chance of survival or recovery.

Basically, the Court said that doctors cannot get away with just arguing that there

was a real chance that the patient would die anyway.

Since its adoption this doctrine has been addressed numerous times by Indiana courts. In *Cahoon v. Cummings*, the Indiana Supreme Court outlined a method for calculating damages under the loss of chance doctrine. The Court found that it would be unjust to hold the doctor liable for all of the damages caused by the death of the plaintiff. Instead, the Court decided that the just means to calculate damages is to determine the amount that would be "ordinarily allowed" in a wrongful death action – the ordinary amount being all of the damages that stem from the passing of the patient. Then take the probability that the patient would have survived had the doctor not been negligent and subtract the survival chance after the doctor was negligent and multiply that amount by the ordinarily allowed amount.

To illustrate this let us look at an example. If a patient was diagnosed with cancer and had a 75% chance of surviving then through the doctor's negligence her chance of survival fell to 25% the loss in chance would be 50% of her ordinary damages. Let us say that her ordinary damages would have been $5 million. This means that under the loss of chance doctrine the patient could recover $2.5 million as a result of the doctor's negligence.

One additional aspect of this doctrine that is well worth discussion is that it allows recovery for a patient who even prior to the negligence had a less than 50% chance of survival. A cynic might contend that no injury has occurred because the patient was probably going to die anyway. However, the law is not so shortsighted and cynical. It recognizes that the difference between a 45% chance of survival and a 25% chance is monumental. This is also an important carve out in the law as to the traditional concepts the recovery of negligence. Recall that in Pt. 5 of the series on damages we discussed the issue of comparative fault in which for a plaintiff to recover someone else or multiple other people had to be responsible for at least 50% of the injuries to the plaintiff. However, under the loss of chance doctrine this is not the case. A patient can be well under the 50% chance of survival – meaning that the patient was probably not going to survive – and yet still recover against a doctor whose negligence decreased that chance of survival. Needless to say, this is an extremely important doctrine.

This particular doctrine of law is a very meaningful one to the author of this post as it is under this doctrine that his brother and sister-in-law – Eric & Renee Flora – were able to recover for malpractice that dramatically decreased Renee's chances of surviving her battle with cancer. The facts of that case were that Renee had gone to a podiatrist in 2004 to seek the removal of a growth from her big toe. The doctor, in the process of moving to a new office, failed to biopsy the growth. The

doctor led Eric & Renee to believe that he had conducted the biopsy and that it was found to have been benign. However, this was not the case and in the summer of 2005 Renee received a second opinion, which revealed that she was suffering from stage three malignant melanoma and that she had only a 17% chance of surviving 12 years. It was determined that had the biopsy been conducted and the cancer diagnosed in 2004 Renee's chance of surviving at least 12 years would have been greater than 80%. While there was still a very real possibility that Renee would not have survived even 6 years with the cancer, the negligence of the podiatrist was sufficient so as to take her chances of survival from highly likely to extremely remote. His negligence did not cause the cancer but it forced Renee to lose the strong chance of survival and in its place leave her with a slim chance. This is fundamentally the crux of the loss of chance doctrine. Providing grounds for recovery where the negligence of a treating physician deprived a patient from some degree of chance of survival. In Renee's case the jury awarded her a judgment of $8.1 million for that loss of chance – even though various caps under Indiana law limited the family's recovery to $1.25 million. While many blogs can be found discussing the verdict, all fail to note that Renee was unable to overcome the odds and at just 37 years of age passed away in September 2009, leaving behind her husband and two lovely young daughters.

Join us again next week for the next installment in our series on damages.

- Pt. 1 – Introduction to Damages and Loss of Consortium
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Sources

- *Cutter v. Herbst*, 945 N.E.2d 240, 247-48 (Ind. Ct. App. 2011).
- *Mayhue v. Sparkman*, 653 N.E.2d 1384 (Ind. 1995).
- *Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966).

- *Cahoon v. Cummings*, 734 N.E.2d 535 (Ind. 2000).

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