New York State
ACADEMY
OF TRIAL LAWYERS

MEDICAL MALPRACTICE'S LOST CHANCE DOCTRINE: WHEN TO USE IT AND HOW TO LOSE IT

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PROXIMATE CAUSE PJI 2:70
LOSS OF CHANCE (PJI 2:150 PAGES 85-89)

- An act or omission is regarded as a cause of the injury (in bifurcated trial substitute accident or occurrence) if it was a substantial factor in bringing about the injury (accident or occurrence) that is, if it had such an effect in producing the injury (accident or occurrence) that reasonable people would regard it as a cause of the injury. (Where evidence of comparative fault or concurrent causes). There may be more than one cause of an injury (accident or occurrence), but to be substantial, it cannot be slight or trivial. You may, however, decide that a cause is substantial even if you assign a relatively small percentage to it.

BASIC PRINCIPLES OF PROXIMATE CAUSE AND PRIMA FACIE CASE

- Establishing proximate cause in medical malpractice cases requires a plaintiff to present sufficient medical evidence from which a reasonable person might conclude that it was more probable than not that the defendant's departure was a substantial factor in causing the plaintiff's injury (see Goldberg v Horowitz, 73 AD3d 691, 901 NYS2d 95 [2010]; Johnson v Jamaica Hosp. Med. Ctr., 21 AD3d 881, 883, 800 NYS2d 609 [2005]). "**Gaspard v. Aronoff**, 153 A.D. 3d 795 (2nd Dept. 2017).

- 'A plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased [the] injury' " (Semel v Guzman, 84 AD3d at 1055-1056, quoting Goldberg v Horowitz, 73 AD3 at 694 ". **Gaspard**, supra.)

- *The Appellate Division made no comment on the charges that were given in this case. The Court ruled that the evidence produced at trial supported the jury's finding that Arnoff's failure to advise plaintiff to go to the hospital after reviewing a CT which showed a perforation was a proximate cause of plaintiff's injury. The loss of chance doctrine was not at issue.*

ERROR NOT TO CHARGE DEPRIVATION OF SUBSTANTIAL POSSIBILITY AS PROXIMATE CAUSE

- We agree with the plaintiffs that the Supreme Court erred in denying their request for a jury instruction that a deprivation of a substantial chance for a cure can constitute a proximate cause of a decedent's injuries and/or death. A rational interpretation of the evidence, which is in accord with the plaintiffs' theory of liability, suggests that Dr. Kane's negligence deprived the decedent of a substantial chance for a cure. **Gagliardo v. Jamaica Hospital,** 288 A.D.2nd 179 (2nd Dept. 2001).
- The evidence at trial, however, suggested that the kidney was not viable and would have been removed in any event. Plaintiff's theory of liability was that the negligence of defendants deprived plaintiff of a substantial possibility of having a functioning kidney (see, Stewart v New York City Health & Hosps. Corp., 207 AD2d 703, 704, lv denied 85 NY2d 809; Brown v State of New York, 192 AD2d 936, 937-938, lv denied 82 NY2d 654; see also, Hughes v New York Hosp.-Cornell Med. Ctr., 195 AD2d 442,

444). The court erred in denying Strong's repeated request to so instruct the jury, and we cannot conclude that the error is harmless. **Cannizzo v. Wijeyasekaran,** 259 A.D.2nd 960 (4th Dept. 1999).

COURT OF APPEALS APPROVES JURY CHARGE
Wild v. Catholic Health Sys., 21 N.Y.3d 95 (2013) arising out of 4th Dept.

- The court charged the jury using the language from PJI 2:70, as follows: "An act or omission is regarded as a cause of an injury if it was a substantial factor in bringing about the injury. That is, if it had such an effect in producing the injury that reasonable people would regard it as a cause of the injury."

- "The negligence of any of the defendants may be considered a cause of the injuries to [decedent] if you find the defendant[s'] actions or omissions deprived [decedent] of a substantial possibility of avoiding the consequences of . . . having a permanent feeding tube. The chance of avoiding the need for a [permanent] feeding tube in order to be substantial does not have to be more likely than not, it does not have to be more than 50 percent, but it has to be more than . . . slight."
- *The Court of Appeals actually did not rule or render any opinion at all on the viability of the loss of chance doctrine or the jury charge that that was presented to the jury in regards to that theory in Wild as they opined that the issue was not properly preserved for appeal.*

Clune v. Moore, 142 A.D.3rd 1330 (4th Dept.2016). Survival of bowel perforation, peritonitis and death. Trial dismissal of action reversed.

- In order to establish proximate causation, the plaintiff must demonstrate that the defendant's deviation from the standard of care "was a substantial factor in bringing about the injury" (PJI 2:70; see Wild v Catholic Health Sys., 21 NY3d 951, 954-955, 991 NE2 704, 969 N.Y.S.2nd 846 (2013).

- Where, as here, the plaintiff alleges that the defendant negligently failed or delayed in diagnosing and treating a condition, a finding that the negligence was a proximate cause of an injury to the patient may be predicated on the theory that the defendant thereby "diminished [the patient's] chance of a better outcome," in this case, survival (Wolf, 130 AD3d at 1525; see Goldberg v Horowitz, 73 AD3d 691, 694, 901 NYS2d 95 [2010]). In that instance, the plaintiff must present evidence from which a rational jury could infer that there was a "substantial possibility" that the patient was denied a chance of the better outcome as a result of the defendant's deviation from the standard of care (citations omitted).

- However, "[a] plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the [patient's] chance of a better outcome . . . , 'as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the [patient's] chance of a better outcome. " (Goldberg, 73 AD3d at 694; see Flaherty v Fromberg, 46 AD3d 743, 745, 849 NYS2d 278 [2007]; see generally Brown v State of New York, 192 AD2d 936, 937-938, 596 NYS2d 882 [1993], lv denied 82 NY2d 654, 622 NE2d 304, 602 NYS2d 803 [1993]

Humbolt v. Parmeter, 196 A.D.3rd 1185 (4th Dept. 2021). Action dismissed. See dissent:

- From J. Curran's dissent: Further guiding my analysis is our precedent in medical malpractice cases involving omission theories—i.e., cases with allegations that the defendants were negligent because they failed to perform an action (see Wild v Catholic Health Sys., 85 AD3d 1715, 1717, 927 N.Y.S.2d 250

[4th Dept 2011], affd 21 NY3d 951, 991 N.E.2d 704, 969 N.Y.S.2d 846 [2013]), which is clearly present here. In medical malpractice cases alleging deviations from the standard of care based on omissions that also raise the issue of proximate cause—as is the case here—we have adopted a "loss of chance" theory of causation (id.; see Clune v Moore, 142 AD3d 1330, 1331-1332, 38 N.Y.S.3d 852 [4th Dept 2016]; Wolf v Persaud, 130 AD3d 1523, 1524- 1525, 14 N.Y.S.3d 601 [4th Dept 2015]; see generally 1B NY PJI3d 2:150 at 47, 82-8

- In such cases, where a "plaintiff alleges that the defendant negligently failed or delayed in diagnosing and treating a condition, a finding that the negligence was a proximate cause of an injury to the patient may be predicated on the theory that the defendant thereby 'diminished [the patient's] chance of a better outcome' " (Clune, 142 AD3d at 1331; see Wolf, 130 AD3d at 1525). In those instances, a "plaintiff must present evidence from which a rational jury could infer that there was a 'substantial possibility' that the patient was denied a chance of the better outcome as a result of the defendant's deviation from the standard of care . . . However, [a] plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the [patient's] chance of a better outcome . . ., as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the [patient's] chance of a better outcome" (Clune, 142 AD3d at 1331-1332. [internal quotation marks omitted].

Simko v. Rochester Gen. Hosp., 2021 N.Y. App. Div. LEXIS 6521
Affirms SJ- P's expert opinion deficient

- "We conclude that the opinion of plaintiffs' expert neurologist with respect to the issue of proximate cause was insufficient to defeat defendants' motions for summary judgment (see Diaz v New York Downtown Hosp., 99 NY2d 542, 544, 784 N.E.2d 68, 754 N.Y.S.2d 195 [2002]; Occhino, 151 AD3d at 1871). Plaintiffs' expert acknowledged that, to be effective, intravenous immunoglobulin therapy must be commenced within a certain time of the onset of GBS symptoms, and it is undisputed that, in this case, the therapy was commenced within that time."

- Like the dissent, we acknowledge that plaintiffs' theory of causation is predicated on the allegation that defendants' failure or delay in diagnosing plaintiff's GBS "diminished [her] chance of a better outcome" (Clune v Moore, 142 AD3d 1330, 1331, 38 N.Y.S.3d 852 [4th Dept 2016]). Nothing in our decision herein calls into question the viability of such a theory. The Court of Appeals, however, has instructed that when an expert "states his [or her] conclusion unencumbered by any trace of facts or data, [the] testimony should be given no probative force whatsoever" " (Romano v Stanley, 90 NY2d 444, 451, 684 N.E.2d 19, 661 N.Y.S.2d 589 [1997] [internal quotation marks omitted]; see Amatulli v Delhi Constr. Corp., 77 NY2d 525, 533, 571 N.E.2d 645, 569 N.Y.S.2d 337 n 2 [1991]), and, in this case, as noted above, the opinion of plaintiffs' expert that treatment should have been started sooner was contrary to what the expert agreed was appropriate

Kallenberg v. Beth Israel Hospital., 45 A.D.2nd 177 (1st.Dept. 1974); aff'd 37 N.Y.2nd 719 (1975)

- The record discloses that Mrs. Kallenberg' s condition did not become irreversible until some 72 hours after the August 22 bleed. And Dr. Lieberman explicitly testified that the patient could not be considered a terminal case even on August 24, and that a contributing factor to Mrs. Kallenberg's death was the failure to use Naturetin; and that the failure to give Naturetin on August 23, 24, 25 and 26 was a "producing, contributing factor to this woman's death." Dr. Lieberman further testified that "if properly

treated, energetically and adequately, the patient still has [would have had] a 20, say 30, maybe 40% chance of survival" if surgery had been undertaken; and that surgery could have been performed, if the proper drugs had been administered. He also testified that if the proper drugs had been administered, even without surgery, she had a 2% chance of survival.

- *The problem with relying on Kallenberg, or with thinking Kallenberg is the controlling case, is that the Court of Appeals affirmed it without opinion and the appellate division never analyzed the theory. Also, in Kallenberg, plaintiff unsuccessfully sought a jury instruction that the deprivation of ANY chance of survival would be enough for recovery. It seems, at least to me, that while some believe this to be the trademark LOC case, it really is not. The standard proximate cause charge was utilized as was the language substantial possibility.*

Mortensen v. Memorial Hospital, 105 A.D.2nd 151 (1st Dept. 1984)- approves substantial possibility charge

- That, however, was not the basis of Trial Term's charge. Instead, the jury was asked to consider whether Dr. Rakov's malpractice deprived plaintiff of a substantial possibility of saving the limb. Although this court has had occasion to criticize the "substantial possibility" phrase as "purely speculative" when used by an expert as the basis for projecting an opinion as to whether a party would, at some future time, develop an additional ailment (see Cohen v Lizza, 63 AD2d 557), we believe that in determining proximate cause it accurately conveys to the layman the requirement that to be actionable the defendant's negligence must, more probably than not, bring about the plaintiff's injury. The concepts of "substantial factor in bringing about an injury" and "substantial possibility of avoiding the injury"which reflect, from both perspectives, the issue confronting a jury in such cases, are virtually indistinguishable. That this jury understood that Dr. Rakov's malpractice had to be a substantial factor in bringing about the loss of plaintiff's leg -- by depriving him of a substantial possibility of avoiding amputation -- is clear, as evidenced by its last note. It found Dr. Rakov negligent in not taking any further action after the March 31, 1970 partial incision but, in light of the existing pathology, was unable to find that his inaction was a proximate cause of the amputation.

- Thus, Trial Term quite correctly refused to charge in accordance with plaintiff's request that the deprivation of any possibility of avoiding amputation was sufficient to impose liability. Moreover, we conclude that Trial Term's charge accurately conveyed to the jury the requirement that Dr. Rakov's malpractice, to be actionable, had to be a substantial factor in bringing about the loss of plaintiff's leg.

Stewart v. New York City Health and Hosps. Corp., 207 A.D.2nd 703 (1st Dept. 1994)
Reinstates jury's liability verdict based on lost chance to conceive

- We disagree and reinstate the verdict for loss of child-bearing capacity. Under the court's charge, to which defendant did not object and which, in our view, did not, as defendant claims, impermissibly "prevent[] the jury from considering whether defendant's alleged negligence was more likely than not a proximate cause of her injury," plaintiff was required to prove "that it was more likely than not … that she lost a substantial opportunity to have natural child birth." In addition, the jury was instructed that it "must be persuaded by a preponderance of the credible evidence that what [plaintiff] lost, if it was substantial, was more likely than not lost because of the loss of the tube. … But the chance that she lost, in order to be substantial, doesn't have to be more likely than not. It doesn't have to be more than 50 percent but it has to be more than slight."

- Thus plaintiff did not, as defendant contends, have to prove that defendant's negligence "deprived [her] of the ability to conceive and bear children naturally." Rather, plaintiff merely had to prove that defendant's negligence was the proximate cause of the loss of plaintiff's right fallopian tube and that such negligence deprived her of a substantial possibility of that ability. And if the jury found that she lost even a 5 to 10 percent chance of having a successful pregnancy as a result of sexual intercourse and that this chance was "substantial," a verdict in her favor would be justified."

- *The problem with this from a defense perspective is that now the LOC doctrine has gone from preventing an all or nothing defense strategy for the defendants to granting the plaintiff an all or nothing play on damages. There is no diminution of damages based upon the percent of loss.*

Feldman v. Levine, 90 A.D.3rd 477 (1st Dept. 2011)
Reversed dismissal and 1.2 million verdict reinstated

- The oncological issues presented by the competing causation experts, namely, the estimation of the rate of progression of decedent's cancer, do not involve the type of novel scientific methodology contemplated for a Frye hearing (see Frye v United States, 293 F 1013 [DC Cir 1923]). Rather, the experts' disagreement as to whether decedent's lung cancer was present and could have been diagnosed during her treatment with defendant prior to her diagnosis of Stage IV lung cancer, was a jury issue (see Marsh v Smyth, 12 AD3d 307, 785 NYS2d 440 [2004]). Moreover, the medical literature cited by plaintiff supported the methodology used by her expert to estimate the progression of decedent's cancer (see Leffler v Feld, 51 AD3d 410, 856 NYS2d 106 [2008])

- *The delay in diagnosis of cancer cases are cases where LOC is most frequently utilized because in the simplest form, earlier is always better in terms of cancer and so it is a fairly easy concept for plaintiff to advance. There is room for pushback and in fact in Candia v. Estepan, 289 AD2d 38 (1st Dept 2001) the Court even found that the specific type of cancer plaintiff had (mesothelioma) did not allow for a cure or a better outcome. Cross-examination of the plaintiff's expert remains the strongest way to highlight the speculative nature of the LOC as well as making an appropriate trial record so that appellate review is possible if there are alterations to the jury charges which diminish plaintiff's burden or unjustly enrich the plaintiff in some fashion.*

Wager v. Rao, 178 A.D.3rd 434 (1st Dept. 2019)
Delayed diagnosis of lung cancer- Affirms denial of SJ

- In opposition, plaintiffs raised a triable issue of fact. Plaintiffs' expert opined that, as a result of the allegedly negligent delay in diagnosis, the decedent's cancer progressed from the very treatable stage I to the terminal stage IV. These competing opinions on the progression of the disease created an issue of fact for a jury to decide (see Polanco v Reed, 105 AD3d 438, 441, 963 N.Y.S.2d 57 [1st Dept 2013]). Although there is no direct evidence regarding the stage of the decedent's cancer when she presented to defendants, and it is thus not possible for either expert to really know what the status of the decedent's condition was at that time, both experts based their opinions on their own knowledge of the rate of progression of this particular type of cancer. Plaintiffs' expert's explanation of the basis of this knowledge was sufficient to create an issue of fact"

- *This case was a procedural disaster where the trial court lost the motion papers and then summarily denied the SJM as incomplete forcing an appeal on whether plaintiff's expert affidavit should be considered due to defect and whether a question of fact was created by the conflicting experts in this metastatic lung cancer case. The matter is scheduled for trial this year. There really was no weighing in by the appellate division on LOC.*

Almonte v. Shaukat, 2022 NY Slip Op 02221 (1st Dept. 2022)

- Reversed summary judgement for defendants. P alleged defendants departed from accepted practice in failing to give her a proper diagnosis and discharge instructions to follow up lump in breast. P alleged this caused a 13 month delay in the diagnosis of her breast cancer and diminished her chances of a better outcome and survival (P was stage 3 at diagnosis and stage 4 at time of treatment 20 months later.). The court finds disputed issues of fact as to departures but that the defendants experts failed to establish prima facie that any departure did not worsen P' outcome and survival.
- " In any event, plaintiff raised an issue of fact through her expert physician's opinions as to the progression of her cancer between February 2016 and March 2017, and beyond, and how the 13-month delay in being diagnosed with breast cancer led to her developing a more advanced stage of breast cancer and reducing her odds of survival by at least 13% (*see Polanco v Reed*, 105 AD3d 438, 441-442 [1st Dept 2013]; *King v St. Barnabas Hosp.*, 87 AD3d 238, 245 [1st Dept 2011]). "

O'Connell v. Albany Med. Center Hospital, 101 A.D. 2nd 637 (3rd Dept. 1984).
Failure to administer proper antibiotics cause failed skin grafts & injury

- Applying these instructions in their review of the expert testimony on both sides, the jury was presented with a question of fact as to proximate cause which they resolved in favor of plaintiffs. They could find from the testimony of plaintiffs' expert that there was a substantial possibility that plaintiff Edmund O'Connell's recovery would have been faster, less painful and less disabling but for the malpractice of defendant (see Kimball v Scors, 59 AD2d 984, mot for lv to app den 43 NY2d 648; Kallenberg v Beth Israel Hosp., 45 AD2d 177, affd 37 NY2d 719). Since the question of proximate cause is a jury question, the jury alone may weigh conflicting evidence in determining the credibility of the weight to be accorded expert testimony (Monahan v Weichert , 82 AD2d 102; Kallenberg v Beth Israel Hosp., supra, p 180).

- *The charge that was offered was – "If you find that the hospital was negligent and that its negligence was the proximate cause of the failure of the September 28, 1977 and October 5, 1977 skin grafts and the subsequent October 31, 1977 skin graft, resulting in an injury to the plaintiff, and was the proximate cause of the plaintiff's present condition, then the hospital is responsible for the injuries that are a result of such negligence." The Supreme Court, Appellate Division, held that: (1) evidence supported finding that hospital's physician employees failed to follow proper and approved standards and practices in care and treatment of patient and that such malpractice was proximate cause of plaintiff's injuries and damages. There was no appellate issue related to a LOC doctrine.*

Brown v. State of New York, 192 A.D.2nd 936 (3rd Dept. 1993).

- In order for claimant to prove that the delays in diagnosis and/or treatment were a proximate cause of his injury, evidence was required that there was a "substantial possibility" that the removal of claimant's larynx was caused by the delay and that the State's negligence deprived claimant of an appreciable chance of avoiding the loss suffered (see, Kimball v Scors, 59 AD2d 984, 985, lv denied 43 NY2d 648; see also, Kennedy v Peninsula Hosp. Ctr., 135 AD2d 788, 792; Mortensen v Memorial Hosp., 105 AD2d

151, 157-158). With respect to the pivotal question of proximate cause, the Court of Appeals has noted: "The issue of causation in medicine is always difficult but, when it involves the effect of a failure to follow a certain course of treatment, the problem is presented in its most extreme form. We 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" (Toth v Community Hosp., 22 NY2d 255, 261)

D.Y. v. Catskill Regional Med. Ctr.,156 A.D.3rd 1003 (3rd Dept. 2017)
Delayed diagnosis of appendicitis- Affirms denial of dismissal

- Where, as here, the plaintiff alleges that the defendant negligently delayed in diagnosing and treating a condition, proximate cause may be predicated on the theory that the defendant "diminished [the patient's] chance of a better outcome or increased the injury" (Wolf v Persaud, 130 AD3d 1523, 1525, 14 NYS3d 601 [2015]). An expert's failure to quantify the extent to which the delayed diagnosis and treatment diminished the chance of a better outcome or increased the injury is not fatal to the establishment of proximate cause, so long "as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased his [or her] injury" (Flaherty v Fromberg, 46 AD3d 743, 745, 849 NYS2d 278 [2007]; accord Neyman v Doshi Diagnostic Imaging Servs., P.C., 153 AD3d 538, 545, 59 NYS3d 456 [2017]; see Goldberg v Horowitz, 73 AD3d 691, 694, 901 NYS2d 95 [2010).”

- Viewing the evidence in the light most favorable to plaintiffs, a juror could rationally conclude that defendant's failure to expand his diagnosis and order a CT scan on or before October 21, 2011 caused the child's underlying condition to remain undetected and unnecessarily worsen over the course of several days, thereby resulting in continued emotional and physical pain and suffering relating to the child's underlying condition and the child's transfer to a tertiary care center for treatment of the abscess, including the insertion of a percutaneous line (see Gaspard v Aronoff, 153 AD3d 795, 797, 61 NYS3d 240 [2017]; Wolf v Persaud, 130 AD3d at 1525 .}

- *The Court went on to hold that ‘Even if a juror accepted defendant's argument that an earlier diagnosis may have resulted in a more invasive surgical procedure than the child ultimately underwent, he or she could still rationally conclude that the failure to expand the diagnosis and order an earlier CT scan caused the child to, at a minimum, endure unnecessary pain and suffering while he awaited a diagnosis and treatment that would fully address his underlying condition and symptoms’. This was really a directed verdict denial that the appellate division weighed in on and not anything directly related to LOC.*

D’Orta v. Margaretville Mem. Hosp., 154 A.D.3rd 1229 (3rd Dept. 2017)
Affirms denial of SJ- delayed administration of TPA for stroke

- Although Rubenstein's affirmation was succinct in this regard, his opinion that the benefit from administration of TPA is improved by earlier treatment was sufficient to raise a triable issue of fact regarding whether plaintiff would have had a better outcome had he arrived at Kingston Hospital sooner, thereby providing the opportunity for earlier administration of TPA, notwithstanding his arrival within

the 4½-hour treatment period.

- In our view, Rubenstein's opinion that TPA has been proven to improve long-term outcomes for stroke victims as well as his conclusion that "the failure to administer [TPA] deprived [plaintiff] of a substantial possibility for a better long-term neurological outcome, meaning a substantial chance for improved speech, movement and cognition," was sufficient to raise a triable issue of fact with regard to causation (citations omitted).

Jump v. Facelle, 275 A.D.2nd 345 (2nd Dept. 2000)
Judgement reversed and verdict for P reinstated

- This testimony tends to establish that the negligent delay of 11 or 12 hours in performing surgery, for which Dr. Pastena can be considered responsible, increased the harm to the decedent by infection, and decreased his chances of survival. There is also evidence in the record which tends to support a finding that the decedent was not septic on the evening of the 18th, but that he had become so by 9:00 A.M. the next morning. In other words, there is evidence that the decedent's condition worsened significantly while Dr. Pastena was responsible for him.

- Under these and all the other circumstances revealed in the record, we conclude that there was legally sufficient evidence of causation. In cases of this nature, the plaintiff's expert need not quantify the exact extent to which a particular act or omission decreased a patient's chances of survival or cure, as long as the jury can infer that it was probable that some diminution in the chance of survival had occurred (Citations omitted).

***Mortensen v. Memorial Hospital**, 105A.D.2d 151 (1st Dept. 1984) Affirming the trial courts dismissal of plaintiff's complaint*

- *At issue here is the degree of certainty required to show causation in a medical malpractice action. Apparently, this issue has been the subject of some confusion. For instance, Kallenberg v. Beth Israel Hospital, upon which plaintiff relies, is improperly interpreted to mean that a deprivation of a 2% chance of survival caused by a defendant's failure to afford proper medical treatment is evidence of causation sufficient to make out a prima facie case of medical malpractice. A careful reading of Kallenberg elicits the conclusion, however, that the causal connection between the defendant's malpractice and Mrs. Kallenberg's demise was established by a much more substantial degree of certainty.*

- *The court further charged the jury that it was not in a position to give a specific percentage, but that* ***substantial possibility meant a "significant" or "realistic" possibility.***

- *In Kimball v. Scors, 59 A.D.2d 984, 399 N.Y.S.2d 350, upon which Trial Term relied, the plaintiffs, apparently interpreting Kallenberg as does plaintiff here, had specifically requested a charge that " '[t]he jury need only decide whether or not Mr. Kimball could have had a chance to survive had the malpractice not taken place.' " The Third Department disagreed with such an interpretation, stating:*

- *In our view, Kallenberg v. Beth Israel Hosp. does not stand for the position urged by plaintiffs, i.e., that a jury need only determine that defendants' malpractice deprived a decedent of a chance of survival, regardless of how small that chance might be. Such a charge is implicit with danger in that it could*

reasonably be construed by jurors as judicial restraint on their obligation to find that the malpractice proximately caused the death. The ultimate finding cannot be whether the deceased would have a certain percentage chance of recovery; rather, it must be whether there was a substantial possibility the decedent would have recovered but for the malpractice. If the proof is ambivalent as to the question of whether the deceased would have died regardless of the malpractice, a pure factual issue is raised, as here, and such an issue can only be resolved by a jury determination of whether the malpractice proximately deprived the deceased of that substantial possibility.

Flaherty v. Fromberg, 46 A.D.3d 743 (2nd Dept. 2007)
Four minute delay in performing C-section

- Here, there was legally sufficient evidence to support the jury verdict finding that the appellant deviated from accepted medical practice by refusing to start the caesarean section at 4:06 P.M., even after the anesthesiologist informed him that no fetal heart beat could be detected, thereby further delaying the infant plaintiff's birth by at least four minutes (the first 17 minutes of delay were attributable to other defendants), during which time the infant plaintiff remained anoxic and acidotic, and that such deviation was a substantial factor in contributing to the infant plaintiff's injuries (see Barbuto v Winthrop Univ. Hosp., 305 AD2d at 624; Wong v Tang, 2 AD3d at 840-841; Jump v Facelle, 275 AD2d at 3464

- *To establish proximate cause, the plaintiff must demonstrate "sufficient evidence from which a reasonable person might conclude that it was more probable than not that" the defendant's deviation was a substantial factor in causing the injury (Johnson v. Jamaica Hosp. Med. Ctr., 21 A.D.3d 881, 883, 800 N.Y.S.2d 609; see Holton v. Sprain Brook Manor Nursing Home, 253 A.D.2d 852, 852, 678 N.Y.S.2d 503). As to causation, the plaintiff's evidence may be deemed legally sufficient even if its expert cannot quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased his injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased his injury.*

Neyman v. Doshi Diagnostic Imaging Servs., P.C., 153 A.D.3rd 538 (2nd Dept. 2017)
Reversed SJ- 6 month delayed diagnosis of breast cancer

- However, in opposition, the plaintiff raised a triable issue of fact through his expert oncologist's detailed opinion that Olena's left breast discharge was a sign of malignancy, that the cancer was present in March 2006, and that it would have been detectable by a mammogram. The expert also opined that, in March 2006, the cancer was at most stage one or stage two, and could have been eliminated through excision and chemotherapy. Where, as here, oncological experts present competing opinions on causation, particularly about the progression of the disease, there is a triable issue of fact for a jury to decide (see Polanco v Reed, 105 AD3d 438, 441, 963 NYS2d 57 [2013].

- Noting Olena's documented positive response to chemotherapy, as evidenced by the results of the April 10, 2007, PET/CT scan, which showed that the chemotherapy successfully, although briefly, put the cancer into remission, the plaintiff's expert opined that, even if metastatic disease was present in March 2006, the intervention of chemotherapy at that time would have successfully treated the much smaller amount of metastatic disease. Thus, in the expert's opinion, had chemotherapy been instituted earlier, Olena's chances for recovery, or at least for prolonging her life and reducing her suffering, were substantially improved. This is the type of detailed expert opinion from which a jury could conclude that Sorkin's conduct, if found to have constituted a departure from the standard of care, diminished Olena's

chance of a better outcome or increased her injury (see Flaherty v Fromberg, 46 AD3d at 745; see also Goldberg v Horowitz, 73 AD3d at 694; Alicea v Ligouri, 54 AD3d at 786)

Previtera v. Nath, 164 A.D.3rd 848 (2nd Dept. 2018)
1.25 million verdict overturned – case dismissed cataract surgery, retinal detachment- no causation

- A plaintiff can make a prima facie showing of proximate cause by presenting evidence from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased the injury, even if the expert cannot quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury (see Goldberg v Horowitz, 73 AD3d 691, 694, 901 NYS2d 95 [2010]; Alicea v Ligouri, 54 AD3d 784, 864 NYS2d 462 [2008]). Here, however, the opinion of the plaintiff's expert that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased the injury because, generally, a lack of experience increases the complication rate of the medical procedure, was too speculative to establish that "it was more probable than not" that the defendant's purported deviation was a substantial factor in causing the injury (Goldberg v Horowitz, 73 AD3d at 694 [internal quotation marks omitted]; see Kenigsberg v Cohn, 117 AD2d 652, 653-654, 498 NYS2d 390 [1986]).

- *This case is important to the defense not because no causation was found but because it applies "the more probable than not" proximate cause language. The problem with the LOC doctrine is that there is no consistency amongst the Courts and no guidance as of yet from the Court of Appeals. Further, the appellate divisions are arguably just as useless given that there has not been a clear decision aside from possibly Mortensen which cites Kimball where "substantial" is at least attempted to be defined as significant or a realistic possibility.*

Danielle v. Pain Mgt.Ctr.of Long Island, 168 A.D.3rd 672 (2nd Dept. 2019)
2.6m JV-Delayed diagnosis and treatment of spinal infection and abscess

- "To establish proximate cause, the plaintiff must demonstrate 'sufficient evidence from which a reasonable person might conclude that it was more probable than not that' the defendant's deviation was a substantial factor in causing the injury" (Flaherty v Fromberg, 46 AD3d 743, 745, 849 NYS2d 278 [2007], quoting Johnson v Jamaica Hosp. Med. Ctr., 21 AD3d 881, 883, 800 NYS2d 609 [2005]; see Holton v Sprain Brook Manor Nursing Home, 253 AD2d 852, 678 NYS2d 503 [1998]). "[T]he plaintiff's evidence may be deemed legally sufficient even if its expert cannot quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased his injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased his [or her] injury" (" (Flaherty v Fromberg, 46 AD3d at 745; see D.Y. v Catskill Regional Med. Ctr., 156 AD3d 1003, 1005, 66 NYS3d 368 [2017]; Neyman v Doshi Diagnostic Imaging Servs., P.C., 153 AD3d 538, 545, 59 NYS3d 456 [2017]; Clune v Moore, 142 AD3d 1330, 1332, 38 NYS3d 852 [2016].

- Here, there was legally sufficient evidence to support the verdict finding that Roberts's departures from accepted medical practice decreased the plaintiff's chance of a better outcome or increased her neurological deficits (see D.Y. v Catskill Regional Med. Ctr., 156 AD3d at 1005; Lang v Newman, 54 AD3d 483, 862 NYS2d 859 [2008], affd 12 NY3d 868, 910 NE2d 982, 883 NYS2d 153 [2009]).

Bacchus – Sirju v. Hollis Women's Ctr., 196 A.D. 2d 670 (2nd Dept. 2021)
Over 2 million verdict for pain and suffering affirmed

- In order to establish proximate causation, a plaintiff must present sufficient medical evidence from which a reasonable person might conclude that it was more probable than not that the defendant's departure was a substantial factor in causing the plaintiff's injury (see Berger v Shen, 185 AD3d at 541; Gaspard v Aronoff, 153 AD3d at 796). A plaintiff's evidence of proximate causation "may be found legally sufficient . . . as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased the injury"

- Here, viewing the evidence in the light most favorable to the plaintiff, a valid line of reasoning exists by which a rational jury could have found that Mosberg departed from good and accepted standards of medical care by not informing the decedent that her ultrasound revealed the presence of fluid in the cul-de-sac, by failing to order a CA 125 blood test, and by failing to refer the decedent to a gynecologic oncologist, and that such departures were a substantial factor in causing a delay in the diagnosis of the decedent's ovarian cancer and in diminishing her chance for a better outcome.

POSSIBLE PROXIMATE CAUSE QUESTIONS TO EXPERT / VERDICT SHEET

1) Was this departure more likely than not a proximate cause of injury to Plaintiff?
2) Was this departure more likely than not a substantial factor in causing injury to the Plaintiff?
3) Was this departure more likely than a substantial factor in causing a delay in Plaintiff's diagnosis and worse outcome?
4) Did this departure more likely than not cause Plaintiff to suffer a worse outcome?
5) Did this departure more likely than not deprive the Plaintiff of a substantial possibility or chance of a better outcome?
6) Did this departure more likely than not diminish the Plaintiff's chance for a better outcome?

PROPOSED SUPPLEMENTAL CHARGE TO PJI 2:70 FOR LOST CHANCE CASES

- A negligent act or omission may be a proximate cause of injury if you determine that it more likely than not deprived the P (decedent) of a substantial chance or possibility of a better outcome (or increased the injury, pain and suffering or required additional treatment options to be tailored to the case). In order to be substantial, the loss does not have to be more likely than not, it does noy have to be greater than 50% nor does it have to be quantified to reflect the percentage of loss (or increase in the injury, pain and suffering or medical treatment options) so long as it is not slight and the evidence reasonably shows that there was a diminished chance or possibility of a better outcome (or increased injury, pain and suffering or medical treatment options).

PROPOSED SUBSTITUTE CHARGE TO PJI 2:70 FOR LOST CHANCE CASES

- The plaintiff must prove by a preponderance of the credible evidence that the defendant(s)'departure(s) from accepted medical practice was more likely than not a substantial factor in causing plaintiff's injury. In this case the plaintiff alleges that the defendant(s)' departure(s) from accepted medical practice more likely than not diminished plaintiff's chance for a better outcome or increased plaintiff's injury and/or prolonged pain and suffering and/or further care and treatment (to be tailored to the specific case). Therefore, you must decide whether the defendant (s)' departure (s)', more likely than not, deprived the plaintiff of a substantial chance or possibility for a better outcome or increased his or her injuries and/or prolonged pain and suffering and/or further care and treatment (to be tailored to the specific case). In this regard in order to be substantial the loss does not have to be more likely than not, it does not have to be more than 50% nor quantify or state a percentage to which the defendant(s)' departure(s)' deprived the plaintiff of a chance for a better outcome or increased his or her injury so long as it is not slight and the evidence reasonably shows that the plaintiff was deprived of a chance or possibility for a better outcome or suffered increased injury.

POSSIBLE DAMAGE QUESTIONS ON ITEMIZED VERDICT SHEET PJI 2: 151 A (2)

- **State the amount awarded for past pain and suffering and injuries from the date of injury to the date of your verdict.**
- **State the amount awarded for future pain and suffering and injuries from the date of your verdict and continuing during Plaintiff's life expectancy.**
- **State the number of years over which you are awarding future pain and suffering.**
- **State the amount awarded for Plaintiff's lost chance of a better outcome.**

- **State the amount awarded for past medical care and treatment from the date of injury to the date of your verdict.**
- **State the annual amount awarded for anticipated future medical care and treatment from the date of your verdict for the number of years incurred and the growth rate during those years (See PJI 2: 151 A (2) pages 134-135).**

LOST CHANCE AS SUBSTANTIAL FACTOR IN CAUSING INJURY

By: Alan W. Clark, Esq.*

PART 1 OF 2 PART ARTICLE

In medical malpractice cases competent poof of a diminished chance for a cure or better outcome or increased injury and pain and suffering may be a substantial factor or proximate cause of injury. Part 1 of this article will deal with such evidence as presented in failure to diagnose and treat cancer cases while part 2 of this article will address such evidence as presented in failure to diagnose other medical conditions and illness.

The issue of whether a doctor's negligence is more likely than not a proximate cause of plaintiff's injury is usually for the jury to decide. Kallenberg v. Beth Israel Hospital,45 A.D.2nd 177(A.D.2nd 1974), affirmed 37 N.Y.2nd719(Court of Appeals).

In medical malpractice cases involving a delayed diagnosis of disease or medical condition, competent evidence that the negligent delay caused the plaintiff additional pain and suffering, further treatment and/or a diminished chance of survival or cure due to progression of the condition or disease is sufficient. Polanco v. Reed, 105 A.D.3rd 438(A.D.1st.2013).

In the seminal case of Kallenberg,supra., the First Department upheld plaintiff's jury verdict as supported by sufficient evidence and expert testimony proving departure in failing to administer Naturetin over several days to treat high blood pressure causing bleeding aneurysm deprived plaintiff's decedent of life saving surgery in which she had "a 20 say 30 or 40 percent chance of survival." The expert testified that if the medication had been given surgery would have been performed. Thus, the failure to give this medication was a "producing, contributing factor to this woman's death. "

Subsequently, in Mortensen v. Memorial Hospital, 105 A.D.2nd 438 (A.D.1st 1984), the First Department in a lengthy decision discussed the facts in Kallenberg,supra., and affirmed the Trial Court's charge on proximate cause as to whether the defendant's malpractice deprived plaintiff of a substantial possibility of saving the leg (containing a tumor mass ultimately requiring amputation). The plaintiff alleged that Dr. Rakov was negligent in not reoperating immediately upon discovering the size of the mass or taking other appropriate action to refer the plaintiff.

The Court stated the concepts of "substantial factor in bringing about an injury" and "substantial possibility of avoiding the injury "are virtually indistinguishable. "…That this jury understood that Dr. Rakov' s malpractice had to be a substantial factor in bringing about the loss of plaintiff's leg----by depriving him of a substantial possibility of avoiding amputation----is clear, as evidenced by its last note…" The Jury found Dr. Rakov negligent for not taking any further action after the partial excision of the tumor but, in light of the existing pathology, was unable to find that his inaction was a proximate cause of the amputation.

In its discussion the Court in approving the "substantial possibility "charge cited the Third Department's decision in O'Connell v. Albany Med.Center Hospital, (101 A.D.2nd 637,638) which in affirming a plaintiff's verdict, noted that the charge permitted a jury to find based on the testimony of plaintiff's expert, " That there was a substantial possibility that plaintiff's *** recovery would have been faster, less painful and less disabling but for the malpractice of defendant ".

The Appellate Divisions are in agreement that expert testimony in support of such a claim need not quantify the extent or percentage to which the alleged departure from accepted standards decreased the chance of a better outcome or increased the injury so long as there is sufficient evidence to prove that the departure more likely than not caused this injury. Barbara Goldberg v. Isadore Horowitz, 73 A.D.3rd691(A.D.2nd.2010); King v.St.Barnabas Hose,87A.D.3rd 238(A.D.1st.2011); Clune v.Moore,142A.D.3rd.1330(A.D.4th.2016; D.Y. v. Catskill Reg'l Med.Ctr.,156 A.D.3rd 1003(A.D.3rd 2017).

PART 1- CANCER CASES

In Polanco, supra., the plaintiff, who was previously treated for breast cancer, alleged the defendant committed malpractice in failing to timely notify her of positive lymph node findings on a PET Scan suspicious for metastatic disease. A second PET Scan 6 months later showed progressive findings. The plaintiff alleged the 6-month delay in learning the results of the PET Scan and diagnosis of metastatic breast cancer recurrence caused increased breast pain, progression of the disease as manifested by the increased size of the lymph nodes, lung surgery, a reduced chance of recovery and 10% diminution in her life expectancy.

The First Department held that the Motion Court erroneously decided issues of fact stating where oncology experts present competing opinions on causation, particularly about the progression of the disease, there is an issue of fact for the jury to decide. Whether a diagnostic delay affected a patient's prognosis is typically an issue of fact that should be presented to the jury.

In Hughes v. New York Hospital-Cornell Medical Ctr. 195 A.D.2nd 442(A.D.2nd 1993) medical expert testimony that a 2 week delay in testing or referring the patient who was coughing up blood to a lung specialist was responsible for additional suffering and a diminished chance of survival or death which was earlier than it might have been (Mr. Hughes died from advanced lung cancer a mere 6 weeks after his initial hospital discharge). This evidence was sufficient to reverse dismissal of the complaint as a matter of law and grant a new trial.

The Second Department noted that the jury may have reasonably inferred that the cancer was spreading rapidly, and there was no evidence that starting treatment 2 weeks earlier would have had no effect. It is possible to conclude that a few more weeks or months of life were possible but for the omission. Further, the court states that it cannot be said with absolute certainty that Mr. Hughes would not have had a chance to survive even longer given his age and active life style.

More recently, in Wager v. Rao, 178 A.D.3rd 434 (1st.2019), the First Department found plaintiff's expert's affidavit sufficient to deny summary judgement in setting forth that delayed diagnosis of lung cancer caused decedent's cancer to progress from very treatable stage 1 to terminal stage 4 at the time of diagnosis resulting in death. The court stated even though both parties' experts did not really know the status of decedent's condition at that time of the alleged delay the experts could base their opinions on their knowledge of the rate of progression of this particular type of cancer.

In Calvin v. N.Y.Med Group P.C., 286 A.D.2nd 469(A.D.2nd 2001), the Second Department affirmed a jury verdict for the plaintiff (ultimately sustaining $667,775) based on expert testimony that malpractice resulting in a 2-week delay in the diagnosis of high-grade non-Hodgkin's lymphoma was a cause of death several days after the diagnosis.

The Appellate Court finds that the plaintiff's expert witnesses established that Dr. DeWitt's departures from good and accepted standards of medical care were a substantial factor in causing the decedent's death, **"**The plaintiff simply had to show that "it was probable that some diminution in the chance of survival had occurred."

Here, the jury's choice to give more credence to the plaintiff's expert witness was a fair interpretation of the evidence.

In Scanga v. Family Practice Assocs. of Rockland. 302 A.D.2nd 443(A.D.2nd 2003), the Second Department affirmed the denial of summary judgment to the doctors where there was no showing that a 3-4-month delay in the diagnosis of decedent's colon cancer was not a substantial factor in shortening the length of the decedent's life. Although defendants' medical expert opined that the cancer was "unresectable" regardless of when diagnosed and that "beginning chemotherapy 3 or 4 months earlier would have had an insubstantial effect on how long plaintiff would live or on the quality of his remaining days", it failed to establish that the delay was not a substantial factor in shortening the length of Scanga' s life.

In Neyman v. Doshi Diagnostic Imaging Servs.P.C., 153 A.D.3rd 538(A.D.2nd 2017)., the Second Department, in reversing summary judgement for the defendant, referred to the detailed medical affidavit of plaintiff's medical expert that the 7 month delay in diagnosing

plaintiff's breast cancer more likely than not deprived the plaintiff of a chance for a cure and the immense suffering of the continuing cancer therapy and eventual progression of the cancer would have been avoided.

Had a mammogram been timely obtained (this was the alleged departure), more likely than not, the breast tumors would have been detected at an early stage. The expert opined that the tumor was "fast growing "with a "relatively short doubling time ", and that "delays in diagnosis when dealing with a fast-growing tumor "such as plaintiff's, "are quite significant in negatively impacting the plaintiff's outcome." Further, the expert opined that the cancer in March 2006 was at most a stage one or two, and that the failure to diagnose at that time proximately caused Olena to lose the chance for a better outcome, including the elimination of the cancer through excision and chemotherapy. The expert pointed to plaintiff's positive response to chemotherapy, which extended her life, despite the numerous bony metastasis present at diagnosis, for over 2 years and 7 months after her diagnosis and mastectomy.

The Court stated that where oncological experts present competing opinions on causation, particularly about the progression of the disease, there is a triable issue of fact to decide. Citing Polanco, supra.

As to causation, the Second Department in Neyman, supra., held that a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant. Further," As to causation , the plaintiff's evidence may be deemed legally sufficient even if its expert cannot quantify the extent to which the defendant's act or omission decreased plaintiff's chance of a better outcome or increased his injury , so long as evidence is presented from which the jury may

infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased his injury,"

In Luna v. Spadafore, 127 A.D.3rd 933(A.D.2nd 2015), the Second Department affirmed a 6.8 million jury verdict in favor of the plaintiff finding that there was a valid line of reasoning and permissible inferences from which the jury could have rationally concluded that the physicians departed from good and accepted medical practice and that the 13 month delay in obtaining a biopsy to diagnose plaintiff's thyroid cancer proximately caused her to have a worsened prognosis or decreased 10 year survival rate.

The Appellate Court concludes that "where both sides present expert testimony in support of their respective portions, it is for the jury to decide which expert's testimony is more credible."

Denial of summary judgment was affirmed by the Third Department in Provost v. Hassam 256 A.D.2nd 875(A.D.3rd 1988) based on expert affidavits that defendant committed malpractice in not timely performing a breast biopsy causing an 8-month delay in the diagnosis of plaintiff's cancerous mass. Further, said expert opined to within a reasonable degree of medical certainty that had the cancer been timely diagnosed, plaintiff's tumor would have been much smaller and she would not have suffered metastasis to the axillary lymph node. The expert further opined that a timely diagnosis would have increased plaintiff's chances for long term survival. Thus, this expert's testimony raised a factual issue for the jury to decide.

In Feldman v. Levine 90 A.D.3rd 477(A.D.1st 2011) the First Department reversed the Court below and reinstated a $1.2 million verdict in favor of the plaintiff based on malpractice causing a delay in the diagnosis and treatment of plaintiff's lung cancer. There was evidence to

conclude that the negligent delay in diagnose caused plaintiff pain and suffering, diminished her chance of survival and hastened her death. The Court stated that the oncological issues presented by the competing causation experts, namely the rate of progression of decedent's cancer, do not involve the type of novel methodology requiring a Frye hearing**.** The experts disagreement as to whether the lung cancer was present and could have been diagnosed during plaintiff's treatment with defendant prior to the diagnosis of Stage IV lung cancer was a jury issue. Moreover, the medical literature cited by plaintiff supported the methodology used by plaintiff's expert to estimate the progression of decedent's cancer.

In Schaub v. Cooper 34 A,D.3rd 268(A.D.1st 2006) the First Department reversed summary judgment for the defendant holding that plaintiff's experts did not concede that decedent's cancer was incurable after June 1999 but only that her chances for survival had decreased. Factual questions remained as to whether defendant's delay in testing or referring the decedent to a specialist diminished her chances for survival.

In essence, plaintiff's expert oncologist created a fact issue by opining that the 10 month delay in diagnosis of plaintiff's gastric cancer caused the cancer to progress from a Stage 1A cancer, as it had not spread to the liver, with a 78% five (5) year survival rate to a Stage IV cancer which at the time had a 7% five (5) year survival rate.

The Appellate Court holds that the defendant did not meet his initial burden of proof and we cannot conclude that the delay in testing or referring decedent was not responsible for a diminished chance of survival or death which was earlier than it might have been.

In Borawski v. Huang, 34 A.D.3rd 409(A.D.2nd 2006) a malpractice case for delayed diagnosis of stomach cancer, the Appellate Court reversed dismissal of plaintiff's Complaint at

the close of the evidence and granted plaintiff a new trial.

The court held:

> "Where, as here, a failure to treat is alleged, the plaintiff simply must show that "'it was probable that some diminution in the chance of survival had occurred'" (*Calvin v. New York Med. Group, 286 AD2d 469, 470, 730 NYS2d 337 [2001]* quoting *Jump v. Facelle, 275 AD2d 345, 346, 712 NYS2d 162 [2000]).*

In Gagliardo v. Jamaica Hosp,288 A.D.2nd 179(A.D.2nd 2001) the Second Department held that the Supreme Court committed error requiring a new trial in denying plaintiff's request to instruct the jury that a deprivation of a substantial chance for a cure can constitute a proximate cause of a decedent's injuries and/or death (the jury found a departure in failing to perform a sonogram to detect testicular cancer but no proximate cause of death 16 months later).

Thus, it is clear that to establish a prima facie case in delayed diagnosis of cancer cases will succeed or fail based on the sufficiency and details of the experts' opinions and evidence in support of or in opposition to how the delay impacted Plaintiff's medical condition, diagnosis, staging, prognosis and chances for cure or improved outcome. This necessarily requires comparison of cancer status and treatment at time of diagnosis versus at the alleged time when the cancer should have been diagnosed. The expert must address how, why and to what extent did the delayed diagnosis impact or not impact the Plaintiff's chances for cure or longer life expectancy or increase plaintiff's injuries, pain and suffering and/or require further treatment.

Part 2 of this article will address lost chance in medical malpractice cases alleging delayed diagnosis and treatment of other medical conditions and illness.

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PART 2; LOST CHANCE AS SUBSTANTIAL FACTOR IN CAUSING INJURY

Part 1 of this article addressed proof of diminished chance for a cure or better outcome or increased injury and pain and suffering as a substantial factor or proximate cause of injury in failure to diagnose cancer cases. Part 2 of this article will address the application of law and evidence to medical malpractice cases dealing with failure to diagnose other medical conditions and illness

The Second Department in Jump v. Facelle, 275 A.D.2nd345(A.D.2nd 2000) reversed the lower Court's setting aside of the verdict in favor of the plaintiff and reinstated the verdict finding the plaintiff's expert's testimony tends to establish that the negligent 11 or 12 hour delay in performing surgery increased the harm to the decedent by infection and decreased his chances of survival. There is also evidence that the decedent became septic over the 11-hour period of delay. The Appellate Court held there was legally sufficient evidence of causation stating that in cases like these, the plaintiff's expert need not quantify the exact extent to which a particular act or omission decreased a patient's chances of survival or cure, as long as the jury

can infer that it was probable that some diminution in the chance of survival had occurred.

Also see cases finding delay of 24 hours in recommending surgery for brain abscess diminished chance for better outcome or increased injury. Dockery v. Sprecher, 68 A.D.3rd 1043(A.D.2nd 2009); delay of 24 hours in performing C-section was a substantial factor. Alicea v. Liguori, 54 A.D.3rd 784(A.D.2nd2008); and finding four (4) minute delay in performing C-section a substantial factor in contributing to the infant plaintiff's brain damage. Flaherty v. Fromberg, 46 A.D.3rd 743(A.D.2nd 2007).

In Stewart v. New York City Health and Hosps.Corp, 207 A.D.2nd 703(A.D.1st 1994), the First Department reinstated a plaintiff's verdict holding that loss of even a 5-10% chance of conceiving naturally as testified to by defendant's expert was sufficient to prove causation and allow the jury to find a verdict of $500,000 in favor of the plaintiff (the amount was reduced to $300,000).

The Appellate Court, disagreeing with court below holds as follows:

> "Thus, plaintiff did not, as defendant contends, have to prove that defendant's negligence "deprived [her] of the ability to conceive and bear children naturally." Rather, plaintiff merely had to prove that defendant's negligence was the proximate cause of the loss of plaintiff's right fallopian tube and **[***4]** that such negligence deprived her of a substantial possibility of that ability. And if the jury found that she lost even a 5 to 10 percent chance of having a successful pregnancy as a result of sexual intercourse and that this chance was "substantial," a verdict in her favor would be justified."

In Barbara Goldberg, supra., a case involving alleged departure in failing to recognize EKG changes of cardiac ischemia at rest resulting in decedent suffering a

massive heart attack causing death, the Second Department in reversing dismissal of the action by the Court below pursuant to CPLR 4401, explained proximate cause as follows:

"In a medical malpractice action, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not' that the defendant's deviation was a substantial factor in causing the injury' (citations omitted). Further,

> "A plaintiff's evidence of proximate cause may be
>
> found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, "as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased [the] injury" (*Alicea v. Liguori, 54 AD3d at 786* [internal quotation marks omitted]; *see Flaherty v. Fromberg,*46 AD3d at 745; *Jump v. Facelle, 275 AD2d 345, 346, 712 NYS2d 162 [2000]*."

The Third and Fourth Departments are in accord with this rationale. Clune, supra; D.Y. v. Catskill Reg'l Med.Ctr. supra.

In reversing a directed verdict pursuant to CPLR 4401 in favor of the defendant at the close of plaintiff's case, the Fourth Department in Clune, supra., explains:

"Where, as here, the plaintiff alleges the defendant negligently failed or delayed in diagnosing and treating a condition, a finding that the negligence was a proximate cause of an injury in the patient may be predicated on the theory that the defendant thereby 'diminished {the patient's} chance of a better outcome, 'in this case survival (citations omitted). In that instance, the plaintiff must present evidence from which a rational jury could infer that there was a 'substantial possibility 'that the patient was denied a chance of a better outcome as a result of the defendant's deviation from the standard of care (citations omitted)…However, ' a plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which

the defendant's act or omission decreased the [patient's] chance of a better outcome…. 'as long as evidence is presented from which the jury may infer that defendant's conduct diminished the [patient's] chance of a better outcome' (citations omitted)."

The court in Clune, supra., held that plaintiff's expert presented legally sufficient evidence that the negligence of the defendants' deprived the decedent of the substantial possibility of surviving the bowel perforation and resulting peritonitis that led to death. Also stated is that the defendants' departures substantially diminished decedent's chance of surviving the bowel perforation and infection.

The Third Department in D.Y.v.Catskill Reg'l Med.Ctr.,supra., utilized the same language and reasoning in affirming denial of defendant's motion for a directed verdict in a case involving delayed diagnosis and treatment of appendicitis causing a perforation and a large abscess to develop requiring hospitalization to tertiary care medical center and insertion of a percutaneous line. The court pointed out that even if the jury accepted defendant's argument that an earlier diagnosis would have led to a more invasive surgical procedure, he or she could still conclude that the defendant's failure to expand the diagnosis and order an earlier CT scan caused the child, at a minimum, to endure unnecessary pain and suffering while he awaited a diagnosis and treatment that would fully address his underlying condition and symptoms.

The Third Department holds that in cases of delayed diagnosis and treatment of a condition, proximate cause may be predicated on the theory that the defendant "diminished the [patient's] chance of a better outcome or increased the injury (citations omitted)." The expert's failure to quantify the extent to which the delayed diagnosis and treatment diminished the chance for a better outcome or increased the injury is not fatal to the establishment of proximate cause, so long "as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased his [of her] injury (citations omitted)."

In Gaspardi v. Aronoff, 153 A.D.3rd 795(A.D.2nd 2017) the Second Department affirmed a $1,000,000 jury verdict for the plaintiff based on claims that he was not properly advised of the signs and symptoms of a colon

perforation following a colonoscopy, and that defendant failed to properly treat the perforation causing plaintiff to undergo a Hartmann procedure removing a foot of his colon and subsequent surgeries for reversal of colostomy and hernia repair.

The Second Department, again using substantially the same language in discussing proximate cause as the other departments held that plaintiff presented sufficient expert testimony and evidence to prove that defendant's conduct diminished the plaintiff's chance for a better outcome or increased his injury.

The Court explains:

"…Establishing proximate cause in medical malpractice cases requires plaintiff to present sufficient medical evidence from which a reasonable person might conclude that it was more probable than not that the defendant's departure was a substantial factor in causing plaintiff's injury (citations omitted). …. A plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, so long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance for a better outcome or increased the injury (citations omitted)."

In the more recent Second Department case of Danielle v. Pain Mgmt.Ctr.of Long Island,168 A.D.3rd 672(A.D.2nd 2019), the court found plaintiff's expert testimony and evidence legally sufficient to support a plaintiff's verdict based on claims that the defendants failed to timely diagnose and treat an

infection and resulting spinal abscess which led to permanent neurological damage. However, the court reversed the verdict and granted defendants a new trial based on the trial court's erroneous rulings limiting cross-examination of plaintiff's experts regarding the alleged negligent conduct of nonparty subsequent treating surgeons.

The court in Danielle, supra., used almost the identical language set forth above in discussing causation and finding plaintiff's evidence sufficient to prove that defendant's departures from accepted medical practice decreased the plaintiff's chance for a better outcome or increased her neurological deficits.

The same principles were applicable in D'Orta v.Margaretville Mem'l Hosp.,154 A.D.3rd 1229(A.D.3rd 2017) a Third Department case affirming denial of defendants' motions for summary judgement regarding plaintiff's malpractice claims that defendants failed to timely transfer plaintiff and administer TPA (clot buster drug) to treat a stroke which plaintiff contends would have reduced his neurological deficits suffered from the stroke.

The court found sufficient plaintiff's expert's opinion " that TPA has been proven to improve long-term outcomes for stroke victims as well as his conclusion that ' the failure to administer [TPA] deprived [plaintiff] of a substantial possibility for a better long term neurological outcome , meaning a

substantial chance for improved speech, movement and cognition….."

In King v. St. Barnabas Hose**,** supra., a case involving negligent resuscitation efforts resulting in the death of decedent, the First Department Reversed summary judgement in favor of defendants, finding plaintiff's expert adequately raised triable issues of fact as to whether defendants departed from accepted practice in their resuscitation attempts and that such departures diminished the chance of survival. Plaintiff established that a defibrillator should not have been used as decedent was in asystole and that there was a 6-10-minute delay in administering epinephrine and 18 minutes in giving atropine all diminishing decedent's chance for survival.

Given the body of case law that exists, it is hard to believe that the New York Pattern Jury instructions (PJI) does not provide for a specific charge to the jury in lost chance cases. Although the 2020 commentary to the medical malpractice charge PJI 2:150 does discuss at length loss of chance (see pages 81-85) the proximate cause charge PJI 2:70 does not. As experienced counsel know the proximate cause charge is brief and amazingly the commentary does not address this subject matter.

The one sentence Charge defines substantial factor in bringing about the injury as "if it had such an effect in producing the injury that

reasonable people would regard it as a cause of the injury." However, the Charge does add that in cases of comparative negligence or concurrent causes that to be substantial it can not be slight or trivial. "You may, however, decide that a cause is substantial even if you assign a relatively small percentage to it." (PJI 2:70).

Perhaps a supplemental jury charge to PJI 2:70 could read: The plaintiff must prove by a preponderance of the credible evidence that the defendant's departure from accepted medical practice was more likely than not a substantial factor in causing plaintiff's injury. In this case the plaintiff alleges that the injury suffered is a diminished chance for a cure or better outcome or increased injury and/or prolonged pain and suffering and/or further care and treatment (to be tailored to the specific case). Therefore, you must decide whether plaintiff has proven by a preponderance of the credible evidence that the defendant's departure, more likely than not, deprived the plaintiff of a substantial chance or possibility for a better outcome or increased his or her injury and/or prolonged pain and suffering and/or further care and treatment. In this regard in order to be substantial the plaintiff's evidence does not have to be more than 50% nor quantify or state a percentage to which the defendant's departure deprived the plaintiff of a chance for a better outcome or increased his or her injury so long as it is not slight and there is sufficient evidence to prove that the plaintiff was deprived of a chance or

possibility for a better outcome or suffered increased injury.

The Court of Appeals in Wild v. Catholic Health Sys, 21 N.Y.3rd 951(Court of Appeals 2013), a malpractice case involving a claim of delayed diagnosis of a perforated esophagus in an 83 yr. old woman requiring a feeding tube (she died 3 years later of unrelated causes), although not squarely addressing lost chance (the issue not properly raised by defendants during the trial) did not find improper the following jury charge by the trial court on causation:

"The negligence of any of the defendants may be considered a cause of the injuries to (decedent) if you find the defendant(s') actions or omissions deprived [decedent] of a substantial possibility of avoiding the consequences of having a permanent feeding tube. The chance of avoiding a need for a permanent feeding tube to be substantial, does not have to be more likely than not and it does not have to be more than 50%, but it has to be more than slight

"

PART **3. CONCLUSION**

In view of the above case law and ambiguous jury charge, it is highly recommended that counsel address proximate cause issues in lost chance cases during jury voir dire. These cases can easily be lost if jurors will not accept the given proof and applicable law that lost chance does not have to be greater than 50% so long as it is not slight or trivial. Jurors must be willing to award substantial

damages where the proof meets this threshold. Many jurors have strong beliefs, values or biases on these issues. These need to be elicited and jurors excused for cause. Otherwise, the case is over before the proof begins.

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PROPOSED JURY CHARGES AND VOIR DIRE IN LOST CHANCE CASES*

Given the established body of case law that exists, it is hard to believe that the New York Pattern Jury instructions (PJI) does not provide for a specific charge to the jury in lost chance cases. See my article entitled **"Lost Chance as Substantial Factor In Causing Injury "published** NYLJ October 14 and 21, 2020. Although the 2020 commentary to the medical malpractice charge PJI 2:150 does discuss at length loss of chance (see pages 81-85) the proximate cause charge PJI 2:70 does not. As experienced counsel know the proximate cause charge is brief and amazingly the commentary does not address this subject matter.

The proximate cause charge set forth in PJI 2:70 simply recites that "An act or omission is regarded as a cause of the injury if it was a substantial factor in bringing about the injury. That is, if it had such an effect in producing the injury that reasonable people would regard it as a cause of the injury." However, the Charge does add that in cases of comparative negligence or concurrent causes that to be substantial it can not be slight or trivial. "You may, however, decide that a cause is substantial even if you assign a relatively small percentage to it." (PJI 2:70)

The Court of Appeals in Wild v. Catholic Health Sys, 21 N.Y.3rd 951 (Court of Appeals 2013), addressed a malpractice claim of delayed diagnosis of a perforated esophagus in an 83 yr. old woman requiring a feeding tube (she died 3 years later of unrelated causes). Although not squarely addressing lost chance, the issue not properly preserved by defendants during the trial , the court did not find improper the following jury charge included by the trial court on causation:

"The negligence of any of the defendants may be considered a cause of the injuries to

(decedent) if you find the defendant(s') actions or omissions deprived [decedent] of a substantial possibility of avoiding the consequences of having a permanent feeding tube. The chance of avoiding a need for a permanent feeding tube in order to be substantial, does not have to be more likely than not and it does not have to be more than 50% but it has to be more than slight." The Court notes that the trial court at the outset correctly instructed the jury as to plaintiff's burden of proof and used the exact language set forth in PJI 2:70 that "An act or omission is regarded as a cause of an injury if it was a substantial factor in bringing about the injury. That is, if it had such an effect in producing the injury that that reasonable people would regard it as a cause of the injury ".

The Court concludes that "taking this jury charge as a whole, we do not find support for defendants' contention of an improper alteration of the causation standard or plaintiffs' burden of proof" (Nestorowich v. Ricotta, 97 N.Y.2nd 393,401,740 N.Y.S.2nd 668, 767N.E.2nd 125 (2002).

Similarly, the issue in Mortensen v. Memorial Hospital, 105 A.D.2nd 438 (A.D.1st 1984) was whether the defendant's alleged malpractice in not immediately reoperating to remove the entire mass on the leg deprived the plaintiff of a substantial possibility of saving the leg (Containing a tumor mass which eventually required amputation). The Court states the concepts of "substantial factor in bringing about an injury "and "substantial possibility of avoiding the injury are virtually indistinguishable "The jury found Dr. Rakov negligent for not taking any further action after the partial excision of the tumor but, in light of the pathology was not able to find that his inaction was a proximate cause of the amputation.

In Mortensen, supra, the Court approved the "substantial possibility "charge citing O'Connell v. Albany Med Center, 101 A.D.2nd 637,638 (A.D.3rd) in which the Third Dept. in affirming a plaintiff's verdict noted that the charge permitted the jury to find based on the testimony of

plaintiff's expert "That there was a substantial possibility that plaintiff's *** recovery would have been faster, less painful and less disabling but for the malpractice of defendant".

The Appellate Divisions are in agreement that expert testimony in support of such a claim need not quantify the extent or percentage to which the alleged departure from accepted standards decreased the chance of a better outcome or increased the injury so long as there is sufficient evidence to prove that the departure more likely than not caused this injury. Goldberg v. Horowitz, 73 A.D.3rd 691 (A.D.2nd 2010); King v. St. Barnabas Hose, 87 A.D.3rd 238 (A.D.1st. 2011); Clune v. Moore, 142 A.D.3rd 1330 (A.D.4th 2016); D.Y. v. Catskill Reg'l Med. Ctr., 156 A.D.3rd 1003 (A.D.3rd 2017).

In a more recent case of delayed diagnosis of lung cancer allowing progression of the cancer to a more advanced stage, the experts, although not knowing the status of the cancer at the time of the alleged delay, could base their opinions on knowledge of the rate of progression of the particular type of cancer. Wager v. Rao, 178 A.D.3rd 434 (A.D.1st 2019). The court explaining that competing expert opinions on the rate of progression of the disease typically presents an issue of fact for the jury to resolve. Citing Polanco v. Reed, 105 A.D.3rd 438 (A.D.1st 2013).

Competent evidence that the negligent delay caused the plaintiff additional pain and suffering, further treatment and/or a diminished chance of survival or cure due to progression of the disease is sufficient. Polanco, supra.

Similarly, in Calvin v. N.Y. Med Group P.C., 286 A.D.2nd 469 (A.D.2nd 2001) the Second Department held that "The plaintiff simply had to show that "it was probable that some diminution in the chance of survival had occurred."

A delay of 11-12 hours in performing surgery was sufficient where evidence showed the delay

increased the harm to decedent by infection and decreased his chances of survival. Jump v. Facelle, 275 A.D.2nd 345 (A.D. 2nd 2000).

The First Department has held that a 5-10% loss in the chance of conceiving naturally as testified to by defendant's expert was sufficient to prove causation and allow jury verdict of $500,000 reduced on appeal to $300,000. Stewart v. New York City Health and Hosps. Corp, 207 A.D.2nd 703 (A.D.1st 1994).

Based on case precedents perhaps a supplemental jury charge to PJI 2:70 could read:
"The plaintiff must prove by a preponderance of the credible evidence that the defendant's departure(s) from accepted medical practice was more likely than not a substantial factor in causing plaintiff's injury. In this case the plaintiff alleges that the injury suffered is a diminished chance for a cure or better outcome and/or increased injury and/or prolonged pain and suffering and/or further care and treatment (to be tailored to the specific case). Therefore, you must decide whether plaintiff has proven by a preponderance of the credible evidence whether the defendant's departure(s), more likely than not, deprived the plaintiff of a substantial chance for a better outcome and/or increased his or her injury and/or prolonged his/her pain and suffering and/or further care and treatment. In this regard in order to be "substantial" the plaintiff's evidence does not have to be more than 50% nor quantify or state a percentage to which the defendant's departure deprived the plaintiff of a chance for a better outcome or increased his or her injury so long as it is not slight or trivial and there is sufficient evidence to prove that the plaintiff was deprived of a chance or possibility for a better outcome and / or suffered increased injury."

PROPOSED JURY VOIR DIRE OUTLINE IN LOST CHANCE CASES

THE PAINTIFF (JOHN IN THIS CASE EXAMPLE) CLAIMS THE DEFENDANTS' NEGLOGENT DELAY IN DIAGNOSIS OF CANCER MORE LIKELY THAN NOT DEPRIVED HIM OF A SUBSTANTIAL CHANCE FOR A CURE AND INCREASED HIS PAIN AND SUFFERING BY ALLOWING THE CANCER TO SPREAD AND WORSEN. JOHN IS ASKING THE JURY TO FAIRLY AND JUSTLY COMPENSATE HIM FOR HIS INJURIES, HARMS AND LOSSES.

UNDER OUR CIVIL JUSTICE SYSTEM, IF JOHN PROVES HIS CASE THE JURY MUST FAIRLY AND JUSTLY COMPENSATE HIM FOR ALL HIS INJURIES, HARMS AMD LOSSES. A JURY AWARD IS NOT A PRIZE OR GIFT BUT MEANT TO PROVIDE FAIR AND JUST COMPENSATION FOR INJURIES AND PAIN AND SUFFERING. ITS ALSO ABOUT WHAT WAS TAKEN AWAY FROM JOHN BY THE DEFENDANTS' WRONGFUL CONDUCT.

1) DO YOU GENERALLY AGREE OR DISAGREE WITH OUR SUSTEM? HOW DO YOU FEEL ABOUT DETERMINIG FAIR AND JUST COMPENSATION FOR JOHN'S INJURIES, PAIN AND SUFFERING?

TELL ME MORE ABOUT THAT. WHY? WHO AGREES WITH JUROR (NAME JURORS)?

WHO DISAGREES? WHY? TELL ME MORE ABOUT THAT?

2) HOW DO YOU FEEL ABOUT THE POSSIBILITY THAT A DELAYED DIAGNOSIS OF CANCER CAN DEPRIVE A PATIENT OF A SUBSTANTIAL CHANCE FOR A LONGER AND BETTER LIFE? CAN ALLOW THE CANCER TO WORSEN CAUSING INCREASED PAIN AND SUFFERING AND ADDITIONAL DEBILITATING CARE AND TREATMENT?

TELL ME MORE ABOUT THAT. WHY?

2a) HAVE YOU OR ANYONE CLOSE TO YOU EVER BEEN IN A SIMILAR SITUATION? DID YOU PREFER WE DISCUSS PRIVATELY?

3) IN THIS CASE THE INJURIES RELATE TO LOST CHANCE FOR A CURE OF BETTER OUTCOME. HOW DO YOU FEEL ABOUT THIS TYPE OF CLAIM? IF PROVEN, HOW DO YOU FEEL ABOUT FAIRLY AND JUSTLY COMPENSATING JOHN FOR THE LOST CHANCE FOR A LONGER AND BETTER LIFE? INCREASED PAIN AND SUFFERING DUE TO WORSENING OF THE CANCER? FURTHER CARE AND TREATMENT? TELL ME MORE ABOUT THAT? WHY?

4) SOME FOLKS MIGHT SAY IF JOHN ONLY LOST A CHANCE FOR A CURE, THAT IS NOT 100% GUARANTEED, THEN I COULD NOT COMPENSATE HIM FOR THAT LOSS, OTHERS FEEL A PATIENT SHOULD BE ENTITLED TO FAIR AND JUST COMPENSATION FOR THIS INJURY. WHICH ARE YOU A LTTLE CLOSER TO? TELL ME MORE ABOUT THAT. WHY?

5) SOME FOLKS MIGHT SAY WELL IT DEPENDS ON THE PRECENTAGE OF THE LOST CHANCE, WAS IT 10% 25%, 50% OR MORE. HOW DO YOU FEEL ABOUT THAT?
WOULD YOU BE WILLING AND ABLE TO FAIRLY AND JUSTLY COMPENSATE JOHN EVEN IF THE LOST CHANCE WAS LESS THAN 50%? (TAYLOR TO PROOF IN CASE).

6) DID YOU BELIEVE PUBLISHED STATISTICS ON CANCER SURVIVAL ARE GENERALLY RELIABLE? ARE YOU WILLING TO ACCEPT THIS EVIDENCE IN SUPPORT OF OR IN OPPOSITION TO THIS CLAIM? WHY OR WHY NOT?

7) IN THESE KINDS OF CASES, JOHN HAS THE BURDEN OF PROOF. THIS IS MUCH LESS THAN THE CRIMINAL CASE BURDEN OF PROOF BEYOND A REASONABLE DOUBT. IN THIS CASE JOHN MUST ONLY PROVE THAT WHAT HE CLAIMS IS MORE LIKELY THAN NOT TRUE, SO THAT WEIGHING THE EVIDENCE ON A SCALE IN FAVOR OF EACH PARTY IF THE SCALE TIPS TO ANY SLIGHT DEGREE TOWARD JOHN HE IS ENTITLED TO A VERDICT. SOME FOLKS FEEL THIS MAKES IT TOO EASY FOR JOHN TO PROVE HIS CASE, OTHERS ARE OKAY WITH THIS REQUIREMENT. HOW DO YOU FEEL ABOUT THIS? USE ANALOGY OF SCALES OF JUSTICE; SPORTS SCORE ANALOGY

8) EACH JUROR IS REQUIRED TO TAKE AN OATH TO FOLLOW THE LAW EVEN IF YOU DISAGREE WITH THE LAW. HOW DO YOU FEEL ABOUT THAT? WHAT IF YOU WERE INSTRUCTED BY THE JUDGE THAT ITS UP TO THE JURY TO DECIDE IF JOHN LOST A SUBSTANTIAL CHANCE FOR A CURE

AND BETTER QUALITY OF LIFE AND THE LOST CHANCE DOES NOT HAVE TO BE 50% OR GREATER SO LONG AS IT IS NOT SLIGHT OR TRIVIAL. HOW DO YOU FEEL ABOUT THIS? WOULD YOU BE ABLE TO FOLLOW THIS INSTRUCTION AND FAIRLY AND JUSTLY COMPENSATE JOHN FOR ALL HIS INJURIES, HARMS AND LOSSES?

9) WHAT IF YOU WERE INSTRUCTED BY THE JUDGE THAT THE MEDICAL EXPERTS ARE NOT REQUIRED TO QUANTIFY THE PERCENTAGE OF THE LOST CHANCE SO LONG AS YOU DECIDE THERE IS CREDIBLE EVIDENCE TO PROVE THAT, MORE LIKELY THAN NOT, JOHN WAS DEPRIVED OF A SUBSTANTIAL CHANCE OF A BETTER OUTCOME? HOW DO YOU FEEL ABOUT THIS? WOULD YOU BE ABLE TO FOLLOW THIS INSTRUCTION AND FAIRLY AND JUSTLY COMPENSATE JOHN FOR ALL HIS INJURIES, HARMS AND LOSSES?

10) SOME FOLKS BELIEVE JURY AWARDS ARE MUCH TOO HIGH AND CONTRIBUTE TO THE HIGH COST OF MEDICINE AND INSURANCE AND MAKE IT MORE DIFFICULT FOR DOCTORS TO PRACTICE MEDICINE, AND THAT THERE SHOULD BE CAPS OR LIMITS ON AWARDS WHILE OTHERS FEEL JURY AWARDS ARE GENRALLY FAIR AND JUST AND REFLECT THE SEVERITY OF THE INJURIES, HARMS AND LOSSES SUFFERED. WHICH SIDE ARE YOU ALITTLE CLOSER TO? HOW DO YOU FEEL ABOUT THIS SUBJECT? HOW DO YOU FEEL ABOUT CAPS?

11) SOME FOLKS ARE AGAINST COMPENSATING AN INJURED PERSON FOR PAIN AND SUFFERING BECAUSE ITS NOT GOING TO MAKE THE PAIN OR SUFFERING GO AWAY, OTHERS FEEL THAT IT IS FAIR AND JUST TO DO SO. HOW DO YOU FEEL ABOUT THIS? TELL ME MORE? IF PROVEN, WOULD YOU BE WILLING AND ABLE TO FAIRLY AND JUSTLY COMPENSATE JOHN FOR HIS INCREASED PAIN AND SUFFERING?

12) IF JOHN PROVES HIS CASE. ON A SCALE OF 0-5, WITH O BEING NOT AT ALL COMFORTABLE AND 5 BEING VERY COMFORTABLE, HOW COMFORTABLE WOULD YOU IN RETURNING A

VERDICT PROVIDING SUBSTANTIAL COMPENSATION FOR LOST CHANCE FOR A LONGER AND BETTER LIFE AND INCREASED PAIN AND SUFFERING?

13) HOW DO YOU FEEL YOU ABOUT JURY VERDICTS AWARDING MILLIONS OF DOLLARS? IF PROVEN IN THIS CASE, WOULD YOU BE ABLE TO DO SO?

PREPARE ONE PAGE JURY QUESTIONAIRE

SHORT, FAIR TO BOTH SIDES AND LIMIT QUESTIONS TO MAIN ISSUES

SEE JUROR QUESTIONAIRES AVAILABLE IN NASSAU AND SUFFOLK COUNTIES AS STARTING POINT

OBTAIN APPROVAL FROM TRIAL JUDGE

LITMUS QUESTIONS:

1) NAME 3 PEOPLE YOU MOST ADMIRE OR RESPECT.

2) NAME 3 PEOPLE YOU LEAST ADMIRE OR RESPECT.

3) WHAT 3 WORDS WOULD FAMILY OR FRIENDS USE TO DESCRIBE THE TYPE OF PERSON YOU ARE?

4) WHAT ARE YOUR PASSIONS IN LIFE?

5) WHAT VALUES IN A PERSON ARE MOST IMPORTANT TO YOU?

6) WHAT JOBS HAVE YOU MOST ENJOYED? WHY?

7) SHOULD DOCTORS AND HOSPITALS BE HELD ACCOUNTABLE BY JURIES FOR INJURIES CAUSED BY THEIR NEGLIGENCE OR MALPRACTICE?

8) IF YOU WERE SERIOUSLY INJURED BY A DOCTOR OR HOSPITAL'S NEGLIGENCE OR MALPRACTICE, WOULD YOU FILE A LAWSUIT?

9) CIRCLE WHICH OF THE FOLLOWING TRAITS BEST DESCRIBES YOU? (YOU CAN CIRCLE MORE THAN ONE):

a) VERY CONSERVATIVE

b) CONSERVATIVE

c) LIBERAL

d) PROGRESSIVE

e) REPUBLICAN;

f) DEMOCRAT;

g) INDEPENDENT;

h) PATRIOT;

i) NONE OF THE ABOVE

10) WHAT NEWSPAPERS AND MAGAZINES DO YOU ENJOY READING?

11) WHAT TELEVISIONS SHOWS TO YOU ENJOY WATCHING?

12) WHAT SOCIAL MEDIA CITES DO YOU ENJOY USING?

13) WHAT ARE YOUR HOBBIES AND INTERESTS?

14) DO YOU HAVE ANY BUMPER STICKERS DISPLAYED ON YOUR CAR OR TRUCK?

WHAT DOES IT SAY?

15) DO YOU BELIEVE THERE SHOULD BE CAPS ON JURY AWARDS FOR PAIN AND SUFFERING DAMAGES? WHY? WHAT SHOULD BE THE AMOUNT OF THE CAP?

16) PATIENTS WHO LOST A CHANCE FOR A CURE OR BETTER OUTCOME SHOULD BE FAIRLY AND JUSTLY COMPENSATED FOR THEIR LOSS? AGREE? MAYBE? DISAGREE? WHY?

17) IF SERIOUS AND PERMANENT INJURIES ARE PROVEN, ON A SCALE OF 0 TO 5, HOW LIKELY ARE YOU TO AWARD A SUM OF MONEY IN THE MILLIONS OF DOLLARS?

0 -NOT AT ALL; 1-2- NOT LIKELY; 3-MAYBE; 4-LIKELY; 5- DEFINITELY

HOPEFULLY, THESE QUESTIONS WILL HELP IDENTIFY JURORS' CORE BELIEFS, VALUES AND POTENTIAL BIAS TO FURTHER EXPLORE AS BASIS TO EXERCISE CHALLENGES FOR CAUSE OR PREEMPTORY CHALLENGES.

CONCLUSION

In view of the case law and ambiguous pattern jury charges, it is highly recommended that counsel address proximate cause issues in lost chance cases with the trial judge as early as possible and during jury voir dire. Proposed supplemental jury charges should be considered as these cases can easily be lost if jurors will not accept the given proof and applicable law that lost chance does not have to be greater than 50% so long as it is not slight or trivial. The expert(s) need not quantity the extent of or assign a percentage to the loss so long as there is credible evidence to support a jury finding that the delayed diagnosis more likely than not caused a diminished chance for survival or increased plaintiff's injuries or treatment. Jurors must be willing to award substantial damages where the proof meets this threshold. Many jurors have strong core beliefs, values or biases on these issues. These need to be elicited and biased jurors excused for cause or by peremptory challenge. Otherwise, the case is over before the proof begins.

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LOST CHANCE FOR BETTER OUTCOME AND PROXIMATE CASE: CASE UPDATES*

Recent appellate division decisions have made it abundantly clear that the medical malpractice doctrine of lost chance of a better outcome is an accepted basis for recovery of substantial damages. In cases involving delayed diagnosis or omission failures qualified expert testimony based on the evidence addressing each of the various departures as a proximate cause of or substantial factor in causing the lost chance or increased injury is part and parcel of plaintiff's prima facie case. Examining the case law on this doctrine will help counsel craft the requisite medical expert opinion questions and present appropriate jury charges as well as prepare for jury voir dire.

Recently, the Second Department upheld a multimillion-dollar verdict based upon delayed diagnosis of ovarian cancer. **Bacchus-Sirju v. Hollis Women's Ctr.,** 196 A.D.3d 670 (2nd Dept. 2021).The court upheld the jury's verdict finding plaintiff's expert's testimony sufficient and supported by the evidence that the alleged departures in failing to inform the decedent that her sonogram showed fluid in the cul de sac, failure to obtain a blood CEA and refer to a gynecologic oncologist more likely than not were a substantial factor in causing a delayed diagnosis of ovarian cancer and diminishing her chances for a better outcome. Specifically, in discussing proximate cause, the court held:

"In order to establish proximate causation, a plaintiff must present sufficient medical evidence from which a reasonable person might conclude that it was more probable than not that the defendant's departure was a substantial factor in causing the plaintiff's injury (see Berger v Shen, 185 AD3d at 541; Gaspard v Aronoff, 153 AD3d at 796). A plaintiff's evidence of proximate causation "may be found legally sufficient . . . as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased the injury"

Compare to **Berger v. Shen,** 185 A.D.3d 539 (2nd Dept. 2020) in which the Second Department found the expert's trial testimony to be completely deficient and speculative on proximate

cause and granted defendant judgement notwithstanding the jury's verdict of over $1 million dollars. Although the jury correctly found the defendant departed from accepted practice in failing to advise plaintiff of the nasal patch placed during endoscopic sinus surgery and failure to provide proper postoperative care the evidence showed the that the nasal injuries were caused during the surgery. Therefore, the departures were not proven to be a substantial factor in causing the injuries. However, the court in addressing causation held:

"Establishing proximate cause in medical malpractice cases requires a plaintiff to present sufficient medical evidence from which a reasonable person might conclude that it was more probable than not that the defendant's departure was a substantial factor in causing the plaintiff's injury" (Gaspard v Aronoff, 153 AD3d 795, 796, 61 N.Y.S.3d 240). " A plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased [the] injury'" (Lopes v Lenox Hill Hosp., 172 AD3d 699, 702, 99 N.Y.S.3d 384, quoting Gaspard v Aronoff, 153 AD3d at 796)"

In reversing summary judgement for the defendant internist, the Second Department in **Wiater v. Lewis,** 197 A.D. 3d 782 (2nd Dept. 2021) found plaintiff's expert's submissions sufficient stating:

"Moreover, there are triable issues of fact as to whether Riegelhaupt assumed a duty to assist in the treatment of the injured plaintiff's gastrointestinal issue, and whether Riegelhaupt's alleged departures delayed the diagnosis of the injured plaintiff's ulcerative colitis and decreased his chances of having a better outcome. Whether a diagnostic delay affected a patient's prognosis is typically an issue that should be presented to a jury (see Neyman v Doshi Diagnostic 197 A.D.3d 782, *783")

In reversing judgement for the defendant and granting a new trial the Second Department in **Walsh v. Akhund,** 198 A.D. 3d 1010 (2nd Dept. 2021) held it was error to exclude evidence that decedent's sister tested positive for the BRCA gene after decedent's death as such evidence according to plaintiff's expert was probative that had decedent been properly advised by defendant to undergo the test it would more likely that not been positive enabling decedent to

undergo removal of her ovaries diminishing her chances of developing ovarian cancer. In discussing proximate cause in this context, the court holds:

"Establishing proximate cause in medical malpractice cases requires a plaintiff to present sufficient medical evidence from which a reasonable person might conclude that it was more probable than not that the defendant's departure was a substantial factor in causing the plaintiff's injury" (Gaspard v Aronoff, 153 AD3d 795, 796, 61 N.Y.S.3d 240). "'A plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased [the] injury'" (Lopes v Lenox Hill Hosp., 172 AD3d 699, 702, 99 N.Y.S.3d 384, quoting Gaspard v Aronoff, 153 AD3d at 796-797 "

The Fourth Department has recently reaffirmed the viability of the lost chance doctrine in failure to diagnose cases. See **Simko v. Rochester Gen. Hosp.,** 2021 NY Slip Op 06470 (4th Dept. 2021). However, the majority opinion affirmed summary judgement for defendant on the basis that Plaintiff's expert neurologist's opinion was insufficient to prove proximate cause finding the expert's general opinion that the earlier the diagnosis of Guillain – Barre' Syndrome and treatment with intravenous immunoglobulin treatment the better the outcome to be conclusory and speculative. The majority explains as follows:

"Like the dissent, we acknowledge that plaintiffs' theory of causation is predicated on the allegation that defendants' failure or delay in diagnosing plaintiff's GBS "diminished [her] chance of a better outcome" (Clune v Moore, 142 AD3d 1330, 1331, 38 N.Y.S.3d 852 [4th Dept 2016]). Nothing in our decision herein calls into question the viability of such a theory. The Court of Appeals, however, has instructed that when an expert "states his [or her] conclusion unencumbered by any trace of facts or data, [the] testimony should be given no probative force whatsoever" (Romano v Stanley, 90 NY2d 444, 451, 684 N.E.2d 19, 661 N.Y.S.2d 589 [1997] [internal quotation marks omitted]; see Amatulli v Delhi Constr. Corp., 77 NY2d 525, 533, 571 N.E.2d 645, 569 N.Y.S.2d 337 n 2 [1991])"

The dissent by J. Curran found this expert's opinion on causation to be sufficient and consistent with the expert's opinion set forth in its holding in **Clune v. Moore,** 142 A.D. 3d 1330 (4th Dept. 2016) and would have denied summary judgement commenting:

“As acknowledged by the majority, this appeal implicates the "loss of chance" theory of proximate causation that applies in delayed-diagnosis medical malpractice actions where the allegations are predicated on an "omission" theory of negligence (Wild v Catholic Health Sys., 85 AD3d 1715, 1717, 927 N.Y.S.2d 250 [4th Dept 2011], affd 21 NY3d 951, 991 N.E.2d 704, 969 N.Y.S.2d 846 (2013). See Stradtman v. Cavaretta (appeal no. 2) 179 A. D.3rd 1468, 1471 [4th Dept 2020]; Clune v Moore, 142 AD3d 1330, 1331-1332, 38 N.Y.S.3d 852 [4th Dept 2016]; Wolf v Persaud, 130 AD3d 1523, 1525, 14 N.Y.S.3d 601 [4th Dept 2015]; Gregory v Cortland Mem. Hosp., 21 AD3d 1305, 1306, 802 N.Y.S.2d 579 [4th Dept 2005]; Cannizzo v Wijeyasekaran, 259 AD2d 960, 961, 689 N.Y.S.2d 315 [4th Dept 1999]; see generally 1B NY PJI3d 2:150 at 47, 82-86 [2021]).

In such cases, proximate cause is not analyzed under the ordinary "substantial factor" approach (PJI 2:70), but rather according to whether the alleged delay in diagnosis diminished the plaintiff's "chance of a better outcome or increased the injury" (Wolf, 130 AD3d at 1525). Although I have expressed concern "that a loss of chance concept reduces a plaintiff's burden of proof on the element of proximate cause" (Humboldt v Parmeter, 196 AD3d 1185, 1194, 151 N.Y.S.3d 788 [4th Dept 2021, Curran, J., dissenting]), the majority and I agree that this Court has nonetheless adopted that causation standard in this type of medical malpractice action “

Over a vigorous dissent by J. Curran the Fourth Department in **Humbolt v. Parmeter,** 196 A.D.3rd 1185 (4th Dept. 2021) reversed the lower court’s denial of summary judgment to defendant finding plaintiff’s expert affidavit deficient in proof of departures and proximate cause. In his dissent J. Curran found plaintiff’s expert’s opinion sufficient on proximate cause based on the well-established lost chance doctrine stating:

“In such cases, where a "plaintiff alleges that the defendant negligently failed or delayed in diagnosing and treating a condition, a finding that the negligence was a proximate cause of an injury to the patient may be predicated on the theory that the defendant thereby 'diminished [the patient's] chance of a better outcome' " (Clune, 142 AD3d at 1331; see Wolf, 130 AD3d at 1525). In those instances, a "plaintiff must present evidence from which a rational jury could infer that there was a 'substantial possibility' that the patient was denied a chance of the better outcome as a result of the defendant's deviation from the standard of care”

The Third Department has again recently applied the lost chance doctrine in **Holland v. Cayuga Med. Ctr.,** 195 A.D.3rd 1292 (3rd Dept. 2021) affirming denial of summary judgement to defendant based on plaintiff’s expert neurologist’s affidavit setting forth departures in the

administration of TPA to treat plaintiff's stroke and as to causation stating:

"He further stated that because Holland was given an improper dose, she was deprived of a substantial possibility of a better outcome, up to and including a 100% recovery. Additionally, Lechtenberg specifically states that Holland "experienced a worsening of her stroke likely caused by progression of cerebral ischemia and clots evolving/propagating from her stroke condition," and that the "specified tPA treatment [could have] prevent[ed] the stroke worsening." After reviewing his affidavit, we find it neither speculative nor conclusory, and any scrutiny with respect to the source or basis for the expert's opinion, or the credibility of the affiant himself, is properly left to cross-examination at trial (citations omitted).

As pointed out in my prior articles discussing lost chance, despite its prevalence in omission cases involving delayed diagnosis and treatment, the proximate cause Pattern Jury Instruction PJI 2:70 does not include a lost chance charge for these types of medical malpractice cases. (See **Lost Chance as a Substantial Factor of Injury., Part 1 and Part 2,** NYLJ October 14th and 21st, 2020 and **Proposed Jury Charges and Voir Dire in Lost Chance Cases,** August 23, 2021). Thus, it is advisable that counsel submit proposed jury charges based on anticipated trial testimony, evidence and applicable law to the trial judge prior to the start of trial. The issues regarding delayed diagnosis and treatment causing the lost chance should be explored during voir dire to identify and excuse any prospective jurors who indicate a potential bias against proof of lost chance for a better outcome or increased injury.

The Court of Appeals in **Wild v. Catholic Health Sys.**, 21 N.Y.3rd 951 (2013), addressed a malpractice claim of delayed diagnosis of a perforated esophagus in an 83 yr. old woman requiring a feeding tube (she died 3 years later of unrelated causes). Although not squarely addressing lost chance, the issue not properly preserved by defendants during the trial , the court did not find improper the following jury charge included by the trial court on causation:

"The negligence of any of the defendants may be considered a cause of the injuries to

(decedent) if you find the defendant(s') actions or omissions deprived [decedent] of a substantial possibility of avoiding the consequences of having a permanent feeding tube. The chance of avoiding a need for a permanent feeding tube in order to be substantial, does not have to be more likely than not and it does not have to be more than 50% but it has to be more than slight."

The Court notes that the trial court at the outset correctly instructed the jury as to plaintiff's burden of proof and used the exact language set forth in PJI 2:70 that "An act or omission is regarded as a cause of an injury if it was a substantial factor in bringing about the injury. That is, if it had such an effect in producing the injury that that reasonable people would regard it as a cause of the injury ". The Court concludes that "taking this jury charge as a whole, we do not find support for defendants' contention of an improper alteration of the causation standard or plaintiffs' burden of proof" (Nestorowich v. Ricotta, 97 N.Y.2nd 393,401,740 N.Y.S.2nd 668, 767N.E.2nd 125).

In a more recent First Department case of delayed diagnosis of lung cancer allowing progression of the cancer to a more advanced stage, the experts, although not knowing the status of the cancer at the time of the alleged delay, could base their opinions on knowledge of the rate of progression of the particular type of cancer. **Wager v. Rao**, 178 A.D.3rd 434 (1st Dept. 2019). The court explaining that competing expert opinions on the rate of progression of the disease typically presents an issue of fact for the jury to resolve. Citing **Polanco v. Reed**, 105 A.D.3rd 438 (1st Dept. 2013).

Competent evidence that the negligent delay caused the plaintiff additional pain and suffering, further treatment and/or a diminished chance of survival or cure due to progression of the disease is sufficient. **Polanco**, supra.

In lost chance medical malpractice cases the proximate cause question is part and parcel of plaintiff's prima facie case and must be carefully crafted based on the expert's testimony. In general the expert testimony must establish that each departure is more likely than not a proximate cause of the injury or a substantial factor in causing the injury. The injury may be the diminished chance for a better outcome or increased pain and suffering and additional treatment for the injury. The inclusion of the word substantial in the causation question must not confuse the jury to believe that the lost chance itself must be greater than 50%. There may be more than one proximate cause of an injury. The case law is clear that the expert testimony need not quantify the percentage of the lost chance so long as there is credible evidence for the jury to determine that the plaintiff lost a chance for a better outcome. However, the lost chance to be compensable cannot be sight or trivial. Whether a delayed diagnosis caused a diminished chance or affected the plaintiff's prognosis or recovery is generally a jury question.

The expert testimony must detail the basis for the lost chance based on facts and data in evidence and not solely rest on the premise that the earlier the diagnosis the better the outcome. Case law makes clear such opinion testimony alone unsupported by an evidentiary basis may be considered by the court to be speculative and conclusory in nature and insufficient to make out plaintiff's prima facie case.

The verdict sheet will include the proximate cause question following each alleged departure question. So, the question will typically read was the alleged departure a substantial factor or a proximate cause of plaintiff's injury. The exact wording depends on support from the expert's testimony. Thus, the wording of the proximate cause question posited to the expert may be "Was this departure more likely than not a substantial factor in causing plaintiff a delayed diagnosis and diminished chance for a better outcome? ". Additionally, "Was this

departure more likely than not a substantial factor in causing plaintiff additional pain and suffering and further treatment?" Cases have also sanctioned use of the phrase "substantial possibility "in the context of "Did the departure more likely than not deprive the plaintiff of a substantial chance or possibility of a better outcome or avoiding the injury." The concepts of "substantial factor in bringing about an injury "and "substantial possibility of avoiding the injury are virtually indistinguishable". see **Mortenson v. Memorial Hospital,** 106 A.D.2nd 438 (1st Dept. 1984). In any case the charge should be clear that the lost chance of better outcome or of avoiding the injury does not have to be greater than 50% so long as it is not slight or trivial.

CONCLUSION

Medical malpractice cases based on omission such as delayed diagnosis or chance of avoiding the injury are appropriate for application of the lost chance doctrine. The appellate division decisions are all in agreement that the lost chance doctrine is a basis for recovery of substantial damages. As the PJI does not provide a lost chance charge counsel must carefully prepare expert testimony to address this subject in detail based on credible evidence and craft proposed jury charges supported by the applicable case law in the department. Equally important, counsel must voir dire the jury on this subject so as to identify and excuse jurors who express bias against this type of evidence.

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