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Give Me a Fighting Chance: Why California Should Adopt the Lost Chance Doctrine

Sofia Schersei
University of the Pacific, McGeorge School of Law, s_schersei@u.pacific.edu

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Sofia Schersei*

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* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2022; B.S., Criminology, Law and Society, George Mason University, 2016. I thank my faculty advisor Professor Levine for instilling my love for tort law and guiding me through the writing process. Outside of serving as my Comment advisor, Professor Levine has become a personal mentor and close friend. There are no words to describe my gratitude. I will forever cherish my time in law school learning from such a compassionate and kind Professor. I also thank my dearest husband, Ghaws Shirzai, whose unconditional love, intelligence, and labor allow me to apply mine to write scholarly work. Last, but not least, I thank my remarkable parents, Baryalai Schersei and Farzana Nawabi, who sacrificed their dreams for their children's future. I would not be able to acquire the honor to attend law school as a first-generation student without their labor of love.

I. INTRODUCTION

Sixty-eight-year-old Nita Bird had stage 3C ovarian cancer.[1] When her physician diagnosed her, she had a 35% chance of survival.[2] After Ms. Bird underwent various surgeries, her physician Dr. Eisenkop incorrectly reported that Ms. Bird no longer had cancer and cleared her to stop undergoing chemotherapy.[3] A year later, another surgery revealed that Ms. Bird still had extensive cancer in most of her intestines.[4] She died shortly thereafter.[5] To make matters worse, her family could not recover any monetary compensation for the physician's misdiagnosis.[6]

To recover in a medical malpractice action, a plaintiff must demonstrate—by a preponderance of the evidence—that the defendant's negligence caused his or her injury.[7] Causation plays a critical role in negligence lawsuits.[8] Many factors—such as a physician's misdiagnosis, complicated surgeries, "a patient's genetic predisposition, unhealthy lifestyle choices," or other health issues—can cause a plaintiff's injury.[9] Thus, it is a challenge to demonstrate a physician's negligence caused the plaintiff's injury.[10] The causation problem becomes even more difficult when the plaintiff's chance of recovery is 50% or less before the physician's negligence.[11]

California courts follow the traditional rule that does not allow a plaintiff to proceed in a lawsuit if the plaintiff's chance of survival was 50% or less before a misdiagnosis.[12] A plaintiff in that situation cannot receive monetary compensation in a personal injury case, even if the physician was at fault.[13] California embraces the traditional system; it does not address this causation issue.[14] Furthermore, California requires a patient to have over a 50% survival rate before a physician's

1. Bird v. Saenz, 86 Cal. App. 4th 167, 173 (2001).

2. *Id.* at 172–73 (2001); *see Stages of Ovarian Cancer*, OVARIAN CANCER RES. ALL., https://ocrahope.org/patients/about-ovarian-cancer/staging/#stage-3-ovarian-cancer (last visited Jan. 1, 2021) (defining stage 3C ovarian cancer as "cancer [that] spread to the peritoneum and the cancer in the peritoneum is larger than 2 centimeters and/or cancer has spread to lymph nodes in the abdomen").

3. Bird v. Saenz, 86 Cal. App. 4th at 171.

4. *Id.* at 172.

5. *Id.*

6. *Id.* at 178.

7. Frederickson, Mazeika & Grant, LLP, *Lost Chance Doctrine*, FMG BLOG, https://fmglegal.com/business-litigation/lost-chance-doctrine/ (last visited Aug. 27, 2020) (on file with the *University of the Pacific Law Review*); *see also* LAWRENCE C. LEVINE, QUICK REVIEW OF TORTS 7, 92 (West Academic Publishing, 5th ed. 2014) (defining proximate cause as the element that limits liability if an outcome that is wholly unforeseeable of defendant's negligence occurs).

8. *Id.*

9. *Id.*

10. *Id.*

11. Frederickson, Mazeika & Grant, *supra* note 7.

12. *Id.*

13. *Id.*

14. *Id.*

negligence to seek compensatory damages for a medical malpractice lawsuit.[15] Hence, a patient with a 50.1% survival rate may have a claim in court, but a patient with a 50% survival rate does not.[16] California's adherence to the traditional rule of causation is restrictive and insufficient in comparison to other states' causation problem solutions in medical malpractice cases.[17]

Other states have implemented the Lost Chance Doctrine[18] to address the causation problem.[19] This doctrine allows a plaintiff to have a triable case despite having a chance of survival at or below 50% before the physician's negligence.[20]

This Comment recommends that the California Legislature adopt the Lost Chance Doctrine for patients with 50% or lower to recover damages when a physician's negligence lowered their chance of survival.[21] Part II provides background on medical malpractice cases and the elements a plaintiff must prove to prevail in court.[22] Part III explores the various approaches of the Lost Chance Doctrine.[23] Part IV discusses California cases that have impacted the Lost Chance Doctrine.[24] Part V argues why California should adopt the Lost Chance Doctrine to address the injustice that plaintiffs with a 50% survival rate or less face in medical malpractice cases.[25] Part VI proposes a model rule that the California Legislature may use to implement the doctrine.[26]

II. MEDICAL MALPRACTICE

Some states have adopted the Lost Chance Doctrine for two reasons.[27] First, the doctrine allows plaintiffs to overcome the difficulty of proving causation in medical malpractice.[28] Second, the Lost Chance Doctrine addresses the injustice that a patient with a 50% or less survival rate faces when a physician's negligence lowered their chance of survival.[29] Even plaintiffs who have over a 50% chance of

15. *Id.*

16. Frederickson, Mazeika & Grant, *supra* note 7.

17. Barry F. Rosen, *The Lost Chance Doctrine*, GORDON FEINBLATT LLC BLOG (Mar. 20, 2012), https://www.gfrlaw.com/what-we-do/insights/lost-chance-doctrine (on file with the *University of the Pacific Law Review*).

18. Scholars frequently name the doctrine Lost Chance Doctrine and Loss of Chance interchangeably. Both forms are correct and refer to the same doctrine.

19. Frederickson, Mazeika & Grant, *supra* note 7.

20. *Id.*

21. *Infra* Part VII.

22. *Infra* Part II.

23. *Infra* Part III.

24. *Infra* Part IV.

25. *Infra* Part V.

26. *Infra* Part VI.

27. Margaret T. Mangan, Comment, *The Loss of Chance Doctrine: A Small Price to Pay for Human Life*, 42 S.D. L. REV. 279, 285 (1997) (discussing the importance of the Lost Chance Doctrine).

28. *Id.*

29. *Id.*

survival face an uphill battle to prove all six elements of a medical malpractice case.[30]

Section A addresses the duty, standard of care, and breach of duty requirements a patient must prove in a medical malpractice case.[31] Section B addresses the causation element and why it is hard for plaintiffs to satisfy the causation element.[32] Section C discusses how a plaintiff must link the injury to the physician's negligence to recover damages.[33]

A. Duty, Standard of Care, and Breach of Duty Elements

In a medical malpractice negligence claim, the duty element requires a legal affiliation between the parties.[34] A plaintiff meets this element if the law requires the defendant to act or not act in a certain way toward the plaintiff.[35] Duty is seldom an issue where the defendant acts in a fashion that injures a plaintiff.[36] In most—if not all—Loss of Chance claims, the healthcare professional owes a duty of care to their patient.[37] Additionally, more than one physician may have a duty to the patient if multiple physicians failed to diagnose the patient properly.[38]

The plaintiff must also demonstrate the physician breached his or her duty of care.[39] In a negligence lawsuit, the court usually measures the defendant's actions against the actions of a theoretical reasonable prudent person acting under the same or similar circumstances.[40] However, the law imposes a higher standard of care for physicians and other medical professionals in a medical malpractice lawsuit.[41] Nevertheless, the law does permit the medical industry to set its own reasonable care standard.[42] A plaintiff must show the physician did not follow the relevant

30. *See id.* ("some courts recognize injury resulting from medical malpractice as not only a physical harm, but also the loss of an opportunity of avoiding that harm.").

31. *Infra* Section II.A.

32. *Infra* Section II.B; *see* Mangan, *supra* note 27 at 284–85.

33. *Infra* Section II.C.

34. Levine, *supra* note 7 at 43–44.

35. *Id.*

36. *Id.* at 43.

37. Benjamin Lajoie, *Reopening the Discussion of the Loss of Opportunity Doctrine in New Hampshire: A Look at Decisions Made in Light of Current Times*, 13 U.N.H. L. REV. 99, 111 (2015).

38. *See id.* at 111–12 ("[T]he Massachusetts Supreme Court found the radiologist and internal medicine physician jointly and severally liable for the plaintiff's loss of chance of survival when both physicians negligently failed to provide the other with patient information that would have led to an earlier diagnosis of breast cancer."); *see also* Summers v. Tice, 33 Cal. 2d 80, 84, 88 (1948) (holding that under the doctrine of alternative liability, two independent tortfeasors may be held liable if it is impossible to know which individual caused the plaintiff's injury, and thus, the burden of proof will shift to the defendants to either absolve themselves of liability or apportion the damages between them).

39. Gerald Michaud & Mark Hutton, *Medical Tort Law: The Emergence of a Specialty Standard of Care*, 16 TULSA L. REV. 720, 722 (1981).

40. *Id. at* 721.

41. *See id.* at 722 ("In a medical negligence case, however, the question of whether the defendant acted in conformity with the common practice within his profession is the essence of the suit.").

42. *See id.* ("As part of his prima facie case, a malpractice plaintiff must affirmatively prove that the

standard of medical care that physicians normally exercise when treating a patient.[43] In medical malpractice suits, common breaches of that standard occur when a physician makes a careless decision, misdiagnoses the patient, or postpones a diagnosis or treatment.[44]

B. The Cause in Fact and Proximate Cause Elements

Once the plaintiff satisfies the elements of duty and a physician's breach of the standard of care, the plaintiff must prove the defendant's negligence was the cause in fact and proximate cause of the plaintiff's harm.[45] However, proximate cause is not a key issue if a plaintiff meets the causation element.[46] To establish causation, a plaintiff must satisfy the traditional "but-for" test.[47] Under this test, the plaintiff must show that their injury would not have occurred but for the physician's negligence.[48] This test is difficult to prove when a patient already has a survival rate of 50% or less.[49] Jurisdictions that follow the traditional standards hold that such patients would face the ultimate harm of death, even without a physician's negligence.[50] In these jurisdictions, the causation element focuses on whether the physician's conduct ultimately caused the injury—not the lost opportunity of a better medical outcome.[51] Thus, under the traditional approach, some physicians can escape liability for their negligent actions.[52]

However, the Lost Chance Doctrine enables some plaintiffs to recover something.[53] Under this doctrine, the causation element does not emphasize the ultimate injury; rather, it focuses on whether the physician's negligence caused reduced the patient's chance for a better medical outcome.[54] The plaintiff must prove the physician's negligence caused the injury by a preponderance of the evidence.[55] This

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relevant recognized standards of medical care exercised by other physicians were not followed in the treatment of the plaintiff.").

43. *Id.*

44. Lajoie, *supra* note 37 at 112.

45. *See* Levine, *supra* note 7 at 88–89 (listing causation and proximate cause as two separate elements under tort law).

46. For the purpose of this Comment, the focus is on causation since at this point the case's requirement a plaintiff with less than a 50% survival rate cannot go further in the lawsuit. Levine, *supra* note 7.

47. *Id*. at 89.

48. *Id*. at 88–89.

49. *Id*. at 92.

50. Lajoie, *supra* note 37 at 114.

51. *Id.*

52. Steven R. Koch, *Whose Loss is It Anyway – Effects of the Lost-Chance Doctrine on Civil Litigation and Medical Malpractice Insurance*, 88 N.C. L. REV. 595, 605 (2010).

53. Lajoie, *supra* note 37 at 114; *see* Koch, *supra* note 52 at 605 (explaining the Lost Chance Doctrine proportional approach where "a plaintiff with a [40%] chance of recovery who, because of the defendant doctor's negligent act, had her chance of recovery reduced to only [10%], could collect [30%] . . . of her total damages from the defendant doctor").

54. Lajoie, *supra* note 37 at 114.

55. *Id.*

injury is not a traditional, physical injury; rather, it is the diminished chance of a more promising outcome.[56] If the plaintiff can meet the loss of chance standard, then they may recover for the injury.[57]

C. Damages

In every negligence action, the plaintiff must prove actual damages.[58] Courts that have adopted the Lost Chance Doctrine will hold or imply that loss of chance itself constitutes a damage.[59] Specific losses—such as loss of consortium, income, life expectancy, and enjoyment of life—may also suffice as damages.[60] Once the plaintiff satisfies this element, the defendant is liable for the percentage reduction of the patient's chance of survival.[61] However, this is easier said than done.[62] There is no uniform standard of how juries compute damages in loss of chance claims in the United States.[63] Certain courts may reduce monetary compensation for damages to mirror the percentage reduction in a patient's chance for recovery.[64] Another court has held that a patient could recover the full damages amount.[65]

III. LOST CHANCE DOCTRINE

The Lost Chance Doctrine is a departure from traditional legal principles that usually demand an injured plaintiff to prove a probability of harm.[66] Normally, a plaintiff must establish that the wrongdoer's negligence caused, more likely than not, their injury.[67] However, some jurisdictions and state legislatures decided the traditional rule was too restrictive and adopted the Lost Chance Doctrine.[68] Under

56. *Id.*

57. *Id.*

58. Levine, *supra* note 7 at 100.

59. Starkey v. St. Rita's Med. Ctr., 117 Ohio App. 3d 164, 173 (1997).

60. *Id.*; *see Loss of Consortium: More than Sexual Pleasures*, HG.ORG, https://www.hg.org/legal-articles/loss-of-consortium-more-than-sexual-pleasures-23278 (defining loss of consortium as "the inability of one's spouse to have a normal marital relationship, or in many cases, loss of sexual pleasure").

61. Lajoie, *supra* note 37 at 103.

62. *See generally* Martin J. McMahon, Annotation, *Medical Malpractice: Measure and Elements of Damages in Actions Based on Loss of Chance*, 81 A.L.R. 485 (Mar. 15, 2021).

63. *Id.*

64. *See* Delaney v. Cade, 873 P.2d 175, 178, 183 (Kan. 1994) (holding that the plaintiff cannot recover the full amount of their damages, but rather the court must limit or reduce the monetary compensation based on the amount of chance that the plaintiff lost); Fennell v. Southern Maryland Hosp. Ctr., Inc., 580 A.2d 206, 208 (Md. 1990).

65. *See* Hope v. Seahorse, Inc., 651 F. Supp. 976, 991–92 (S.D. Tex. 1986) (ruling it was proper for damages to reflect a full 10 years' life expectancy, though the patient only a 60% to 80% chance of living those 10 years, if the physician was not negligent in diagnosing or treating the patient correctly. would have diagnosed they had been diagnosed and treated correctly).

66. Rosen, *supra* note 17.

67. *Id.*

68. *See* MO. REV. STAT. § 537.021 (West 2022) (allowing for court appointment of a plaintiff ad litem, on behalf of an original plaintiff who already died, for lost chance causes of action); *see also* Wollen v. DePaul

this doctrine, if the injured party shows that their physician disadvantaged them of a significant chance of avoiding harm, then they establish adequate evidence of causation.[69]

The traditional all-or-nothing approach to causation "fails to recognize the common-sense proposition that a person's loss of chance to survive or recover *does* injure a person."[70] Jurisdictions adopting the doctrine deem "the lost chance of a better outcome—not the final harm itself—to be the compensable damage."[71] Jurisdictions that lower the standard to meet the causation element to make things fairer for plaintiffs are nothing new in the torts system.[72] Jurisdictions have adopted the Lost Chance Doctrine in various forms.[73] Nevertheless, states did not accept the doctrine collectively.[74] Section A discusses the Pure Form approach.[75] Subsection B deliberates the Substantial Chance approach.[76] Subsection C discusses the State of Washington's Lost Chance Doctrine.[77]

A. Pure Form Approach: The Relaxed Causation Standard

The Pure Form approach permits a patient plaintiff to recover monetary compensation for any chance of recovery equal to or less than 50%, thereby relaxing

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Health Center, 828 S.W.2d 681, 687 (Mo. 1992) (holding the plaintiff had an action for lost chance of recovery in Missouri); *see* Dickhoff v. Green, 836 N.W.2d 321, 324 (Minn. 2013) (holding Minnesota law permits recovery for loss of chance in a medical malpractice action); Rosen, *supra* note 17; *see* Charles A. Jones, et al., *The "Loss of Chance" Doctrine in Medical Malpractice Cases*, TROUTMAN PEPPER (Mar. 13, 2013), https://www.troutman.com/insights/the-loss-of-chance-doctrine-in-medical-malpractice-cases.html (on file with the *University of the Pacific Law Review*) (listing the twenty-two states and the District of Columbia—Arizona, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, South Dakota, Virginia, Washington, West Virginia, Wisconsin, and Wyoming—that adopted the doctrine and highlighting the states and highlighting eight states, such as Florida, Idaho, Maryland, Mississippi, New Hampshire, Tennessee, Texas, South Carolina and Vermont—who have clearly rejected the Lost Chance Doctrine).

69. Rosen, *supra* note 17.

70. *See* John Curran, *Loss of Chance Doctrine in Medical Malpractice Cases*, 87 N.Y. ST. B.A. J. 31, 31 (2015) ("Wrongful death actions are typical applications of the LOC doctrine upon allegations that negligence "hastened" or "speeded up" the death or deprived the decedent of a chance of survival. There has been substantial debate outside New York about whether the doctrine is compatible with state wrongful death statutes.").

71. Rosen, *supra* note 17.

72. *See* Zuchowics v. United States, 140 F.3d 381, 388 n.6 (2nd Cir. 1998) ("In the last [50] years the strictness of the requirement that the plaintiff show that without defendant's act or omission the accident would not have occurred has been mitigated in several types of cases. . . . [T]he modern trend is to place the burden on the defendants to disprove causation."); *see also* Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 774 (1970) (shifting the burden of proof to the defendants to prove that their violation was not a cause of the plaintiff's deaths; in the absence of such proof, defendants' causation of such death is established as a matter of law); *see* Summers v. Tice, 33 Cal. 2d at 84 (holding that under the doctrine of alternative liability, two independent tortfeasors may be held liable if it is impossible to know which individual caused the plaintiff's injury, and thus, the burden of proof will shift to the defendants to either absolve themselves of liability or apportion the damages between them).

73. Rosen, *supra* note 17.

74. *Id.*

75. *Infra* Section III.A.

76. *Infra* Section III.B.

77. *Infra* Section III.C.

the traditional standard.[78] For the case to go to trial, a plaintiff must simply show that the physician's negligence deprived the plaintiff of some chance of a greater recovery.[79] To illustrate, a patient who had a 40% chance of recovery before a physician's negligence, which then sank to 30%, has a claim for the 10% reduction.[80] This approach makes the Lost Chance Doctrine more plaintiff-friendly because it allows a plaintiff to recover at least a portion of their injury rather than nothing under California's traditional approach.[81] In total, twenty-two states have embraced this doctrine, while sixteen states did not.[82] Although Ms. Bird's family presented sufficient evidence to produce a triable lawsuit according to the presiding court, the court denied their claim because California has not adopted the Lost Chance Doctrine.[83] Therefore, plaintiffs like Ms. Bird—or their surviving families—cannot recover in a wrongful death claim when the patient's chance of survival is equal to or less than 50%.[84]

Critics of the Pure Form approach argue it would adversely change the United States health care system.[85] They believe physicians would modify the nature and degree of their care due to the fear of potential lawsuits.[86]

B. Substantial Chance Approach

Some jurisdictions have adopted the Substantial Chance approach.[87] The main principle of this approach is that the loss of a chance is a single legal claim.[88] This approach views a compensable injury as the weakened or destroyed chance for a better medical outcome rather than the final harm to the patient.[89] Here, a plaintiff may recover even if the probability of an enhanced medical outcome was less than 50%.[90] However, a plaintiff must establish the causal link between the lost opportunity and a physician's negligence, not between the negligence and the patient's physical harm.[91]

This approach is an adaptation of the Pure Form approach, but it has an additional requirement.[92] A plaintiff must also demonstrate the physician's negligence

78. Brie D. Wallace, *Poor Policy Stunts Tennessee Tort Law Again: The Need for Tennessee's Adoption of the Loss of Chance Doctrine in Medical Malpractice Litigation*, 40 U. MEM. L. REV. 215, 227–28 (2009).
79. *Id.*
80. Frederickson, Mazeika & Grant, LLP, *supra* note 7.
81. *Id.*
82. *Id.*
83. Bird, 86 Cal. App. 4th at 177–78.
84. *Id.* at 176–79.
85. Wallace, *supra* note at 228.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 228–29 (2009).
90. Wallace, *supra* note at 229.
91. *Id.*
92. *Id.*

decreased a "substantial possibility" of a more promising outcome if the physician gave an appropriate treatment.[93] Some jurisdictions, however, will limit recovery based on a percentage threshold.[94] To illustrate, a state may only allow plaintiffs with more than a 10% chance of survival to file suit under the doctrine.[95]

Opponents of substantial chance argue that its application is too difficult.[96] In their view, juries cannot understand or compute the percentages involved in medical malpractice lawsuits.[97] Further, critics argue that juries might resolve cases in a varying fashion due to the arbitrary system of statistical calculation.[98]

C. Washington's Lost Chance Doctrine

The Washington State Supreme Court first acknowledged the Lost Chance Doctrine in *Herskovits v. Group Health Cooperative of Puget Sound*, which considered the state's wrongful death statute.[99] The Court eventually extended the doctrine to situations where plaintiffs were still alive but suffered from a decrease in their chance to survive, as seen in *Mohr v. Grantham*.[100] The Washington Legislature codified the *Mohr* decision in its medical malpractice statute.[101] Washington's medical malpractice specifies the following:

> The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:
>
> (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances;

93. *Id.*

94. *See id.* ("A second interpretation is that the loss of a substantial chance includes a loss of a chance between [50%] or less to "anything greater than [5%].").

95. Wallace, *supra* note at 229.

96. *Id.* at 232.

97. *Id.*

98. *Id.*

99. *See* Herskovits v. Grp. Health Coop., 664 P.2d 474, 479 (Wash. 1983) (overturned a summary judgment for the defendant and restored the plaintiff's cause of action, ruling that plaintiff did not have to show that the decedent's survival rate was 51%, and the evidence of a decreased chance of survival was satisfactory for jury determination of proximate cause); Matthew Wurdeman, Comment, *Loss-Of-Chance Doctrine in Washington: From* Herskovitz *to* Mohr *and the Need for Clarification*, 89 WASH. L. REV. 603, 614 (2014).

100. *See* Wurdeman, *supra* note 99 at 603 (arguing for concrete solutions to establish "a coherent and equitable doctrine that will allow plaintiffs to recover for loss of chance without creating incentives for unfair manipulation of common law tort standards in Washington").

101. *Id.* at 628.

(2) Such failure was a proximate cause of the injury complained of.[102]

IV. CALIFORNIA CASES THAT IMPACT THE LOST CHANCE DOCTRINE

While a significant number of states have adopted the Lost Chance Doctrine, California has neither adopted nor fully rejected it.[103] Instead, courts permit recovery only where a medical professional's negligence was a substantial factor in causing a patient's injury.[104] There are two leading cases regarding the doctrine.[105] Section A discusses the case *Bromme v. Pavitt*, where a patient's husband was unable to prevail in a wrongful death action.[106] Section B examines *Bird v. Saenz*, where the plaintiffs could not proceed because they failed to prove the causation element despite providing evidence of the physician's negligence.[107]

A. Bromme v. Pavitt *(1992)*

Charles Bromme, the husband of a deceased colon cancer patient, sued the wife's physician for wrongful death.[108] He claimed the physician negligently failed to identify the cancer despite the decedent telling him about the abdominal pain twice and requesting a diagnosis.[109] Unfortunately, the physician discovered the colon cancer one year too late.[110] The California Appellate Court partially ruled in favor of the defendant physician by finding that the parties were only allowed to challenge any negligence claims that occurred after 1981.[111] The court's decision hurt the patient's case by barring recovery because the wife's chance of survival was less than 50% in 1981.[112] By comparison, in 1980, when the decedent first complained of the abdominal pain, her chance of survival was as high as 75%.[113]

Nonetheless, the court held that "California does not recognize a cause of action for wrongful death based on medical negligence where the decedent did not have a greater than [50%] chance of survival had the defendant properly diagnosed and treated the condition."[114]

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102. WASH. REV. CODE § 7.70.040 (West 2022).

103. Frederickson, Mazeika & Grant, *supra* note 7.

104. *See id.* (explaining that a plaintiff may only recover when their chance of survival before the physician's negligence was over 50% and therefore, meeting the substantial factor criteria).

105. *Id.*

106. *Infra* Section V.A.

107. *Infra* Section V.B.

108. Bromme v. Pavitt, 5 Cal. App. 4th 1487, 1492 (1992).

109. *Id.*

110. *Id.*

111. *See id.* at 1504 ("[U]ncontradicted evidence established that Bromme's chance of surviving the cancer after June 1981 was less than 50 percent even if defendant had not been negligent, i.e., that it was not medically probable defendant's alleged negligence after June 1981 was a substantial factor in causing Bromme's death.").

112. *Id.*

113. *Bromme*, 5 Cal. App. 4th at 1495.

114. *See id.* at 1504–05 (leaving the option for the California Legislature to adopt the Lost Chance of

B. Bird v. Saenz *(2001)*

Decedent Nita Bird underwent several surgeries when in the defendant physician's care.[115] The defendant then misdiagnosed her, stating that no residual cancer remained after a surgery.[116] Ms. Bird had a 35% chance of survival at the time the physician found the cancer.[117] The physician failed to insert a port-a-cath during a subsequent procedure.[118] The oversight caused Ms. Bird to have additional health issues—such as kidney failure, adult respiratory distress syndrome, midbrain infarcts, and skin sloughing.[119] Complications from the procedure greatly delayed the physicians from providing the second course of chemotherapeutic agents.[120] Consequently, Ms. Bird's body became resistant to those medications, and she eventually died from the cancer.[121]

The plaintiffs, Ms. Bird's daughters, sued under a wrongful death claim for medical malpractice.[122] The trial court granted summary adjudication and ruled in favor for the defendant physician in the pre-trial stage.[123] The plaintiffs appealed the decision.[124] The appeals court reversed and remanded the case to the trial court because the California Supreme Court had not addressed the issue of the Lost Chance Doctrine.[125] The trial court reasoned there was sufficient evidence for a triable case, and it ruled in favor of the defendant because California had not adopted the doctrine.[126]

Doctrine).

115. *Bird*, 28 Cal. 4th at 912–13.

116. *Id.* at 912; Frederickson, Mazeika & Grant, *supra* note 7.

117. Bird, 28 Cal. 4th at 912.

118. *See* Bird, 86 Cal. App. 4th at 174 ("Plaintiffs argued in their opposition that the complications arising out of the port-a-cath procedure—including the extreme trauma of opening Bird's chest for emergency surgery, adult respiratory distress syndrome, and kidney failure—were substantial factors contributing to Bird's death."); *see also Port-A-Cath*, FREE DICTIONARY, https://medical-dictionary.thefreedictionary.com/Port-A-Cath (last visited Mar. 4, 2022) (on file with the *University of the Pacific Law Review*) (defining a port-a-catch as a "device that provides long-term IV access for administering TPN . . . drugs [and] high-dose chemotherapy.").

119. *Bird*, Cal. App. 4th at 172.

120. *Id.*

121. *Id.*

122. Bird v. Saenz, 28 Cal. 4th 910, 912 (2002); Frederickson, Mazeika & Grant, LLP, *supra* note 7.

123. *See Bird*, 86 Cal. App. 4th at 170, 174 (2001) ("[T]he median five-year survival rate for the type of cancer that Bird had, stage IIIC ovarian cancer, is 35 percent; thus, the care and treatment rendered by defendants in connection with the port-a-cath procedure and/or the medical complications following it, and/or the three-month delay in administering chemotherapy, did not cause Bird's cancer to progress from probably curable (i.e., 51 percent chance of five-year survival, to probably incurable (i.e., less than 51 percent chance of five-year survival)"); Frederickson, Mazeika & Grant, LLP, *supra* note 7.

124. *Bird*, 28 Cal. 4th at 912; Frederickson, Mazeika & Grant, LLP, *supra* note 7.

125. *Bird*, 86 Cal. App. 4th at 184; Frederickson, Mazeika & Grant, *supra* note 7.

126. Frederickson, Mazeika & Grant, *supra* note 7.

V. CALL TO ADOPT THE LOST CHANCE DOCTRINE IN CALIFORNIA

The traditional standard that California currently applies "draws arbitrary lines to determine who is and who is not owed compensation, regardless of one's ability to prove negligence on the part of his physician."[127] Currently, California courts permit a plaintiff with a 55% chance of survival to reach a jury—even if the physician's negligence only cost them 5% of their chance.[128] In contrast, when a physician's negligence reduces a plaintiff's chance of survival from 48% to 2%, the court cannot allow the case to go forward.[129] Section A highlights the reasons why California should adopt the Lost Chance Doctrine.[130] Section B disproves the myth of claimants flooding the courts once the state adopts the doctrine.[131] Section C discusses the Lost Chance Doctrine as an evolving area of the law.[132]

A. Valuing Chances and Increasing Accountability

Lawmakers and courts in various states developed the Lost Chance Doctrine for two leading reasons.[133] One reason comes from the difficulty of demonstrating the causation element in medical malpractice lawsuits.[134] The second reason is the overall injustice that occurs when a medical professional's negligence considerably decreases a patient's chance of recovery, but the professional refuses to compensate the patient.[135] Relaxing the causation element will correct an apparent wrongness to plaintiffs who could prove the possibility that the physician's negligence "caused the injury but could not prove the probability of causation."[136] The doctrine allows some form of recovery when medical malpractice negatively impacted a patient's life.[137]

The Lost Chance Doctrine's relaxation of the causation element does not relieve a plaintiff from proving that damages occurred under a traditional standard of proof.[138] The lost chance of survival or reduction of a better medical outcome qualifies merely as a damage—an element—for an actionable tort.[139] Classifying

127. Chris M. Warzecha, *The Loss of Chance in Arkansas and the Door Left Open: Revisiting* Holt ex rel. Holt v. Wagner, 63 ARK. L. REV. 785, 800 (2010).

128. *See* Frederickson, Mazeika & Grant, LLP, *supra* note 7 (highlighting that California requires that a plaintiff must have a 50% or more chance of survival before a physician's negligence occurred).

129. *Id.*

130. *Infra* Section VII.A.

131. *Infra* Section VII.B.

132. *Infra* Section VII.C.

133. Mangan, *supra* note 27 at 285.

134. *Id.*

135. *Id.*

136. *See id.* at 285 (quoting Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397, 408 n.1 (Tex. 1993) (Hightower, J., dissenting)).

137. *Id.*

138. David A. Fischer, *Tort Recovery for Loss of Chance*, 36 WAKE FOREST L. REV. 605, 618 (1997).

139. *Id.* at 617–18.

a lost chance of preventing harm as a damage—or acquiring a better outcome—relieves a plaintiff's burden of showing the harm or lost benefit that occurred.[140] Nonetheless, the classification maintains the condition that a plaintiff must verify damages by the traditional standard of proof.[141]

If a jurisdiction rejects the doctrine, then it allows medical professionals' immunity from claims for the grossest malpractice if a patient's chance of survival was less than 50%.[142] Rejecting the doctrine "undermines the deterrence and loss allocation functions of tort law . . . thereby negating the whole purpose of tort law."[143] Although a medical professional's negligence may not be the fundamental source of the patient's illness or death, in several situations, the physician's negligence "causes statistically demonstrable losses."[144] Further, because of a physician's negligence, a person will never know if they would have recovered without the medical malpractice.[145] A patient's unawareness gives medical professionals the "benefit of an uncertainty created by their own negligence."[146] Nevertheless, "fundamental fairness dictates that the cost of that uncertainty should be imposed on the tortfeasor rather than on its victim."[147]

California must hold negligent medical professionals liable for a patient's loss of survival or reduction of a better medical outcome.[148] By adopting the Lost Chance Doctrine, California can prevent—or reduce the likelihood of—physicians evading accountability for their part in a patient's death.[149] Many critics argue that such an accountability places a burden on the healthcare system.[150] However, courts must not reduce the worth of human life as a consequence of these potential burdens placed upon the healthcare system.[151]

The doctrine offers an equitable recovery method because courts would allocate monetary compensations in proportion to the patient's lost chance.[152] A person should recover for any loss of a better medical outcome, irrespective of how small the decreased percentage is.[153] California should accept the Lost Chance Doctrine because the chance of survival of its citizens has tremendous value.[154] This

140. *Id.* at 618.

141. *Id.*

142. Mangan, *supra* note 27 at 285.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. Mangan, *supra* note 27 at 285.

148. *Id. at* 298.

149. *Id. at* 285.

150. *Id. at* 298.

151. *Id. at* 285.

152. Mangan, *supra* note 27 at 304.

153. *Id.*

154. *Id. at* 285; *see* Fischer, *supra* note at 618 ("A major rationale for loss of a chance where plaintiff cannot prove traditional damage is that the chance of obtaining a benefit or avoiding a harm has value in itself that is entitled to legal protection.").

argument is founded on the idea that individuals willfully pay to pursue a contract case or property case with a 50% or less chance of winning.[155] In several cases, this "value is reflected in an actual market; a lawsuit with a 50% [or less] chance of success has real settlement value, and land with a chance of rezoning will have a higher market value than land without a chance."[156] Nonetheless, the identical principle applies here, although there is no tangible market.[157] Courts accepting the concept that chances have value ought to logically allow a claim for lessening of chance, in addition to destruction of chance.[158]

B. Myth of Flooding the Courts and Increased Costs for the State if California Adopts the Doctrine of Lost Chances

The Lost Chance Doctrine has caused tension among those with opposing social values.[159] The doctrine's purpose is to compensate individuals who already had a reduced chance of living before the medical negligence.[160] Society attributes value to life, and the doctrine reflects that communal importance.[161] Opponents of the Lost Chance Doctrine are concerned it may incite litigation based on speculation and probability calculations regarding alternate care methods that might have allowed better health outcomes.[162] Further, these critics often argue that plaintiff-friendly doctrines would open up the floodgates for future tort litigation.[163] In their view, the Lost Chance Doctrine will allow more plaintiffs to win their medical malpractice cases with the lenient standard of the causation element.[164]

This argument fails to consider that causation is just one of six elements that a plaintiff must meet for a court to rule in their favor.[165] Neither factual nor statistical data support the critics' view, and therefore it is not a compelling argument.[166] To highlight the notion that such opponents overemphasize consequences of states adopting the Lost Chance Doctrine, the Massachusetts Supreme Court stated:

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155. Fischer, *supra* note at 618.

156. *Id.*

157. *See id.* ("The same principle applies even though there is no actual market . . . courts recognizing the theory that chances have value should logically grant a cause of action for reduction of chance as well as destruction of chance.").

158. *Id.*

159. B. Sonny Bal & Lawrence H. Brenner, *Medicolegal Sidebar: The Law and Social Values: Loss of Chance*, CLINICAL ORTHOPEDICS AND RELATED RES. (Aug. 7, 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4160481/ (on file with the *University of the Pacific Law Review*).

160. *Id.*

161. *Id.*

162. *Id.*

163. George J. Zilich, *Cutting Through the Confusion of the Loss-Of-Chance Doctrine Under Ohio Law: A New Cause of Action or a New Standard of Causation*, 51 CLEV. ST. L. REV. 673, 699 (2003).

164. *Id.*

165. *Id.*

166. *See* Koch, *supra* note at 621 (highlighting states that did adopt the Lost Chance Doctrine and showing that there were no significant increases after their adoption of the doctrine).

> We are unmoved by the defendants' argument that the ramifications of adoption of loss of chance are immense across all areas of tort. We emphasize that our decision today is limited to loss of chance in medical malpractice actions. Such cases are particularly well suited to application of the loss of chance doctrine . . . First, as we noted above, reliable expert evidence establishing loss of chance is more likely to be available in a medical malpractice case than in some other domains of tort law. Second, medical negligence that harms the patient's chances of a more favorable outcome contravenes the expectation at the heart of the doctor-patient relationship that the physician will take every reasonable measure to obtain an optimal outcome for the patient . . . Third, it is not uncommon for patients to have a less than even chance of survival or of achieving a better outcome when they present themselves for diagnosis, so the shortcomings of the all or nothing rule are particularly widespread. Finally, failure to recognize loss of chance in medical malpractice actions forces the party who is the least capable of preventing the harm to bear the consequences of the more capable party's negligence.[167]

Additionally, the vast majority of medical malpractice patients never pursue their claims in reality.[168] This trend may seem counterintuitive considering there are more medical malpractice deaths per year than car accidents.[169] Medical professionals and society do not bear medical malpractice costs, but rather the malpractice victims do.[170] "Tort policies of deterrence, fairness, victim compensation and loss spreading would seem to favor recovery," even when the harm is a lost or lessened chance of survival.[171]

Opponents claim that the operational, legal, and court costs to litigants and society will exceed the total damages in countless lawsuits.[172] This argument does not consider the economic reality that potential plaintiffs face.[173] Attorneys may be unwilling undertake loss of chance cases on a contingency grounds because courts are likely to reduce monetary compensations to reflect the reduction in a plaintiff's chance of survival.[174] Additionally, plaintiffs will have to pay for expert testimony to prove the elements of causation and the standard of care.[175] The economic truth is that plaintiffs and attorneys will decline to take financial risks with Lost Chance Doctrine cases when possible monetary compensations are not

167. Matsuyama v. Birnbaum, 890 N.E. 2d 819, 834–35 (Mass. 2008).
168. Zilich, *supra* note 164 at 700.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. Zilich, *supra* note 164 at 700.
174. *Id.*
175. *Id.*

significant.[176] Therefore, California's adoption of the doctrine would not intensify its courts' docket congestion.[177]

C. An Evolving Doctrine

The Lost Chance Doctrine is a difficult and evolving area of the law.[178] Enhanced medical statistics and public sentiment may alter the perception of the doctrine.[179] Expanding statistical data—particularly in oncology and sociopolitical approaches—forming an advancement in the doctrine's approaches.[180] Because of new developments and approaches, a trend toward jurisdictions acknowledging any form of the loss of chance of survival as a tort claim is likely to resume .[181] "Medical research information has improved partially because of the focus on evidence-based medicine."[182] Experts can corroborate the chance of survival with a "reasonable degree of medical certainty."[183] Probabilities are objectively and confidently voiced in oncology and may continue extend to other specialties.[184]

A physician who reduces a patient's percentage and chance of survival deprives that "individual "'of something of value,' for which the patient [deserves monetary compensation] as a matter of 'fairness.'"[185] While the medical industry opposes the Loss of Chance Doctrine, the industry is not immune from it.[186] A plaintiff may only apply the doctrine when a physician's negligence actually occurred.[187] The doctrine provides adequate safeguards for physicians because a patient may not win a case simply because the physician made an incorrect diagnosis.[188] Providing the physician did not act in a grossly negligent manner or did not deviate from the industry's standard of care, no liability will occur.[189] Any worries or difficulties which the doctrine may cause in the medical industry are immaterial when paralleled to the significance of human life.[190]

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176. *Id.*

177. *Id.*

178. Lee J. Johnson, *State Laws on Loss of Chance of Survival Continue to Evolve*, MED. ECON. (Jan. 9, 2013), https://www.medicaleconomics.com/view/state-laws-loss-chance-survival-continue-evolve (on file with the *University of the Pacific Law Review*).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. Johnson, *supra* note 170.

184. *Id.*

185. *Id.*

186. Mangan, *supra* note 27 at 325.

187. *Id.*

188. *Id.*

189. *See id.* at 325–26 (discussing the importance of the Lost Chance Doctrine).

190. *Id.*

VI. MODEL RULE

Various state courts fail to pay attention to the Loss of Chance Doctrine because it has a limited role within the legal system overall.[191] Civil litigation encompasses approximately 17% of the cases that state courts review on a national scale, with a greater percentage comprising criminal cases.[192] In contrast, medical malpractice litigations comprise only 3% of all civil cases.[193] Although critics give disproportionate attention to medical malpractice cases compared to other cases—the share of medical malpractice cases is small.[194] Correspondingly, there is no significant difference in the amount of medical malpractice litigation when comparing states that have adopted the doctrine to those that have not.[195]

Enhanced medical statistical data and growing public sentiments may lead California to revisit the Lost Chance Doctrine either through legal proceedings or the Legislature.[196] But since medical malpractice cases account only for 3% of civil cases, it may be better to address the doctrine within the lawmaking body of a state.[197] Therefore, the California Legislature should adopt this Model Rule based on Michigan Code:

> (1) In an action alleging malpractice, the plaintiff has the burden of proving that at the time of the alleged malpractice:
>
> > (a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.[198]
> >
> > (b) The defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate plaintiff of the defendant failing to provide that standard, the plaintiff suffered an injury.[199]
>
> (2) In an action alleging medical malpractice, the plaintiff has the burden

191. Koch, *supra* note 52 at 632, 636.

192. *Id.* at 636.

193. *Id.*

194. *Id.*

195. *Id.* at 621.

196. Johnson, *supra* note 179.

197. Koch, *supra* note 52 at 605.

198. MICH. COMP. LAWS ANN. § 600.2912a (West 2022) (this language was adopted from Michigan's Loss of Chance statute).

199. *Id.*

> of proving that he or she suffered an injury caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff can recover for loss of an opportunity to survive or an opportunity to achieve a better medical outcome even when the opportunity was equal or less than 50%.[200]

If California enacted this Model Rule—thus adopting the Lost Chance Doctrine—it would leave the judiciary with discretion to adopt either the pure form or substantial approach.[201] These divergent approaches would result in different outcomes in legal proceedings.[202] If the Legislature does not adopt a specific approach, then lower courts in California may apply the doctrine inconsistently.[203] Under the pure form approach, a patient who had a 40% chance of recovery before a physician's negligence, which then sank to 30%, would have a claim for the 10% reduction.[204] This approach makes the Lost Chance Doctrine more plaintiff-friendly because it allows a plaintiff to recover at least a portion of their injury rather than nothing under California's traditional approach.[205]

While the substantial chance approach is similar to the pure form approach in calculating compensation percentages, it does add an additional requirement.[206] States that have adopted the substantial chance approach only allow plaintiffs with more than a 10% chance of survival to file suit under the doctrine.[207] This approach may exclude plaintiffs and may not be suitable for what the Model Rule is trying to accomplish.[208] Legislators should consider adding language to implement the pure form approach so that all plaintiffs who faced harm by their physicians can at least meet the causation requirement.[209] This way each plaintiff has a fighting chance to get their day in court.[210]

VII. CONCLUSION

The Lost Chance Doctrine changes the out-of-date preponderance of the evidence standard, modifies a plaintiff's burden of proof, and allows a liability

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200. *See id.* (the language was altered to allow plaintiffs to recover even with a 50% or less chance of survival).

201. *Supra* Part III.

202. *Supra* Section III.A.–B.

203. *Id.*

204. Frederickson, Mazeika & Grant, *supra* note 7.

205. *Id.*

206. Wallace, *supra* note 78 at 229.

207. *Id.*

208. MICH. COMP. LAWS ANN. § 600.2912a (West 2022).

209. *Supra* Section III.A.

210. Michael A. Zeytoonian, *Getting Your Day in Court – What Does It Really Mean? And How Can We Get it for You?*, MEDIATE.COM (Mar. 2016), https://www.mediate.com/articles/ZeytoonianMbl20160329.cfm (on file with the *University of the Pacific Law Review*).

expansion of medical malpractice claims.[211] Various state courts and state legislations have decided the traditional rule is too limiting and therefore embraced the Lost Chance Doctrine.[212] Under this traditional rule, a plaintiff patient with a 50% or less chance of survival before a physician's negligence cannot recover for any wrongs committed against them.[213] However, at the same time, a patient with a 50.1% chance of survival before a physician's negligence may prevail in court to recover some monetary compensation.[214] Jurisdictions implementing doctrines to allow plaintiffs to satisfy the causation element more fairly is nothing new within the torts system.[215] California's traditional rule of "all-or-nothing" is arbitrary and leads to horrible results.[216] This long-standing standard is inescapably unfair because it only allows certain plaintiffs to successfully file suit."[217] The remaining plaintiffs will not only suffer from their ailments but also the physician's negligent acts.[218]

The relaxing of the causation element will provide relief for plaintiffs who can prove that the medical malpractice instigated the injury but cannot meet the causation standard under the traditional approach.[219] The doctrine allows some form of recovery when medical malpractice negatively impacted a patient's life.[220]

The doctrine's relaxation of the causation element does not relieve a plaintiff from proving that damages occurred under a traditional standard of proof.[221] They still must meet all six elements in a medical malpractice case to win their case—still shielding physicians from fraudulent claims.[222] However, if California adopts

211. Johnson, *supra* note 179.

212. *See* MO. REV. STAT. § 537.021 (West 2022) (allowing for court appointment of a plaintiff ad litem, on behalf of an original plaintiff who already died, for lost chance causes of action); *see also Wollen*, 828 S.W.2d at 685–86 (holding the plaintiff had an action for lost chance of recovery in Missouri); *see Dickhoff*, 836 N.W.2d at 324 (holding Minnesota law permits recovery for loss of chance in a medical malpractice action); Rosen, *supra* note 17; *see* Jones, *supra* note 68.

213. *Bird*, 28 Cal. 4th at 912; *see* Frederickson, Mazeika & Grant, *supra* note 7 (explaining California's traditional standard rule in medical malpractice cases).

214. *Id.*

215. *Zuchowics*, 140 F.3d at 388; *see Haft*, 3 Cal. 3d at 774 (shifting the burden of proof to the defendants to prove that their violation was not a cause of the plaintiff's deaths; in the absence of such proof, defendants' causation of such death is established as a matter of law); see Summers v. Tice, 33 Cal. 2d 80, 84 (1948) (holding that under the doctrine of alternative liability, two independent tortfeasors may be held liable if it is impossible to know which individual caused the plaintiff's injury, and thus, the burden of proof will shift to the defendants to either absolve themselves of liability or apportion the damages between them).

216. *Bird*, 28 Cal. 4th at 912; *see* Frederickson, Mazeika & Grant, *supra* note 7 (explaining California's traditional standard rule in medical malpractice cases).

217. Zilich, *supra* note 164.

218. *Bird*, 28 Cal. At 912; Frederickson, Mazeika & Grant, *supra* note 7.

219. *See* Mangan, *supra* note 27 at 285 (quoting the dissent of Texas' supreme court case Kramer v. Lewisville Memorial Hospital).

220. *Id.* at 304.

221. Fischer, *supra* note 138 at 618.

222. *Id.*

the proposed Model Rule, then plaintiffs like Ms. Bird may recover for the negligent acts of their physicians.[223]

The Lost Chance Doctrine offers adequate protections for physicians because a patient may not prevail in a medical malpractice case merely because the physician made an improper diagnosis.[224] As long as the physician is not grossly negligent or did not diverge from the profession's standard of care, no liability will occur.[225] Any uncertainties or complications that the doctrine may cause in the medical industry are immaterial when paralleled to the significance of human life.[226]

223. *See Bird*, 86 Cal. App. 4th at 178 n.3 (holding that Ms. Bird's family may not recover because her pre-existing condition with less than a 50% chance of survival disqualified her to prevail in a medical malpractice claim).

224. *See* Mangan, *supra* note 27 at 325 (discussing the importance of the Lost Chance Doctrine).

225. *Id.* 325–26.

226. *Id.*