Texas Bucks the Trend - No Cause of Action for Lost Chance of Survival in the Medical Malpractice Context: Kramer v. Lewisville Memorial Hospital

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I. INTRODUCTION

Jennie Kramer visited her gynecologist in August 1985 complaining of unusual discharges and intermittent bleeding. At that time, her doctor informed her that she tested negative for cancer. Her irregular bleeding continued, but on two subsequent visits to another doctor in November and December, Ms. Kramer was again informed that she did not have cancer. During February of 1986, after continued bleeding, Ms. Kramer detected a hard spot in her vagina. She returned to the second doctor a third time, at which time she was diagnosed with cancer. In spite of subsequent exploratory surgery and chemotherapy, Ms. Kramer died on October 31, 1986.

Ms. Kramer’s husband, Stephen, brought suit against Lewisville Memorial Hospital under the Wrongful Death Act and the Survivorship Statute. The trial court refused the Kramers’ requested jury instructions on the lost chance doctrine, and the jury found that Ms. Kramer’s death was not caused by the defendant’s negligence. The Fort Worth Court of Appeals affirmed the trial court’s refusal of the requested jury instructions on lost chance, reasoning that the lost chance doctrine had not been clearly recognized in Texas, and that such decision was best left to the legislature or to the Texas Supreme Court. The Texas Supreme Court affirmed in

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2. Id. at 398.
3. Id.
4. Id.
5. Id.
6. Id.
7. Mr. Kramer sued on his own behalf, on behalf of Ms. Kramer’s estate, and as next friend of the Kramers’ two children. Id.
8. All of the doctors and the medical groups and centers of which the doctors were members were also named as defendants. Id. However, all defendants settled with the Kramers except Lewisville Memorial Hospital. Id.
9. TEX. CIV. PRAC. & REM. CODE ANN. § 71.004 (Vernon 1986).
10. Id. § 71.021. Actually, the Kramers alleged that their cause of action for lost chance of survival was “based solely on the common law.” 858 S.W.2d at 399. The court later rejected that position, however, and reasoned that, if Texas recognized the lost chance doctrine, it could only be under either the Wrongful Death Act or the Survivorship Statute. Id. at 403.
11. Id. at 399.
an opinion written by Chief Justice Phillips. Over the dissent of three justices, the Kramer majority held that Texas did not recognize a cause of action for lost chance of survival under the Wrongful Death Act, the Survivorship Statute, or the common law.

II. AN OVERVIEW OF THE LOST CHANCE DOCTRINE AND ITS ORIGINS

An exhaustively thorough discussion of the lost chance doctrine is beyond the scope of this note. A brief overview of the origins of the doctrine and its development in other states, however, will provide valuable insight and context to the discussion of Texas' stance on the lost chance doctrine.

A. The Nature of the Cause of Action

The scenario in which a lost chance case arises generally involves a plaintiff who has already suffered some reduction in his or her health due to a pre-existing condition. One commentator has noted that "[i]n the medical malpractice context, lost chance [of survival] endeavors to allow a plaintiff to recover for the diminished chances of surviving or recovering from a disease or malady which results from the health care defendant's malpractice." The emphasis is on the fact that the injury is seen as the percentage loss of chance of survival, and not the actual death. The policy reasons underlying the doctrine stem from the fear that rigid application of traditional proximate causation standards would leave tortious health care providers virtually unchecked for blatant negligence in treating patients whose prospects for recovery were already substantially impaired.

B. The Theoretical Origins of the Doctrine

The lost chance doctrine has its origins in several different sources. The theoretical construct supporting modern recovery for lost chance of survival is largely credited to Professor King's discussion in the Yale Law Journal in 1981. In his article, Professor King stated:

14. Id.
20. See Joseph H. King, Jr., Causation, Valuation, and Chance in Personal Injury Torts Involving
A better method of valuation would measure a compensable chance as the
percentage probability by which the defendant's tortious conduct
diminished the likelihood of achieving some more favorable outcome.

To illustrate, consider a patient who suffers a heart attack and dies
as a result. Assume that the defendant-physician negligently misdiagnosed
the patient's condition, but that the patient would have had only a
40% chance of survival even with a timely diagnosis and proper care.
Regardless of whether it could be said that the defendant caused the
decedent's death, he caused the loss of a chance, and that chance-interest
should be completely redressed in its own right. Under the proposed rule,
the plaintiff's compensation for the loss of the victim's chance of
surviving the heart attack would be 40% of the compensable value of the
victim's life had he survived.21

Authority for the lost chance of survival doctrine in the medical
malpractice context has also been drawn from the Restatement (Second) of
Torts, Section 323(a), which states:

One who undertakes, gratuitously or for consideration, to render services
to another which he should recognize as necessary for the protection of
the other's person or things, is subject to liability to the other for physical
harm resulting from his failure to exercise reasonable care to perform his
undertaking, if (a) his failure to exercise such care increases the risk of
such harm, or (b) the harm is suffered because of the other's reliance
upon the undertaking.22

For those who advocate the lost chance doctrine, this provision made it
"incumbent upon the courts to take the short step analytically from
imposing liability on increasing the risk of harm to imposing liability on a
diminished chance of survival."23

C. The Origins of the Doctrine in Case Law

The case often cited as the genesis for recognizing the lost chance
document in actual medical malpractice cases is Hicks v. United States.24 In
Hicks, a patient died from a negligently misdiagnosed intestinal obstruc-
tion.25 Because the evidence established that the decedent would have
lived had the physicians operated sooner, the court held for the plaintiff.26
The court pointed out, although in dicta,27 that:

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21. Id.
22. Restatement (Second) of Torts § 323 (1965) (emphasis added).
24. 368 F.2d 626, 632 (4th Cir. 1966) (applying Virginia law); see Keith, supra note 15, at 765
n.32.
25. 368 F.2d at 628-29.
26. Id. at 633.
27. See Keith, supra note 15, at 765 n.32.
[w]hen a defendant's negligent action or inaction has effectively terminated a person's chance of survival, it does not lie in the defendant's mouth to raise conjectures as to the measure of the chances that he has put beyond the possibility of realization. If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable.28

Another oft-cited case is Herskovits v. Group Health Cooperative,29 where the Washington Supreme Court expressly adopted the lost chance doctrine in 1983.30 In Herskovits, Leslie Herskovits had developed lung cancer.31 The physician negligently failed to diagnose the cancer on the patient's first visit, and it was determined that, at that time, his chances of survival were already down to thirty-nine percent.32 When the cancer was finally diagnosed, the patient's chances of survival had decreased to twenty-five percent.33 The court allowed recovery for this fourteen percent loss of chance, reasoning that "[t]o decide otherwise would be a blanket release from liability for doctors and hospitals anytime there was less than a fifty percent chance of survival, regardless of how flagrant the negligence."34

D. The Various Permutations of the Doctrine and the Present Stance of Other Jurisdictions

Several variations of the lost chance doctrine have surfaced in jurisdictions that have recognized some form of the action. Some courts have embraced the loss of a "substantial" or "significant" chance of survival, reasoning that these lost chances are the ones that are statistically significant, and thus compensable.35 Other jurisdictions have merely eased the measure of causation required for recovery, requiring only that the negligence was a "substantial factor" in causing the harm, and discarding the traditional probability requirements.36 One state has expressly limited its version of the lost chance doctrine to "limited type[s] of medical malpractice case[s]" in which "the duty breached was one imposed to

28. 368 F.2d at 632 (citing Harvey v. Silber, 2 N.W.2d 483 (Mich. 1942)) (emphasis added); but see Hurley v. United States, 923 F.2d 1091, 1099 (4th Cir. 1991) (applying Maryland law and concluding that "Hicks was not intended to modify the law of medical malpractice").
30. Id. at 479.
31. Id. at 475.
32. Id.
33. Id.
34. Id. at 477.
prevent the type of harm which a patient ultimately sustains and because of the inherent nature of such a case a plaintiff is unable to produce evidence of causation sufficient to meet the traditional rule of causation.'

Although this discussion has primarily focused on the nature of the cause of action for lost chance of survival and the reasoning supporting the concept, the various states that have considered the doctrine are by no means unanimous in their assessment of its validity. Most of the states which have considered the doctrine have accepted it; however, at least eight states have expressly rejected the doctrine and others have expressed views strongly unsympathetic to the lost chance doctrine. There are also at least four states that remain undecided.

III. HISTORY OF THE LOST CHANCE DOCTRINE IN TEXAS

The status of the lost chance doctrine has become an issue of growing uncertainty. Early cases appeared to advocate the lost chance doctrine. Subsequent cases which did not directly address the lost chance issue noted the doctrine’s potential emergence in Texas, but were decided on other grounds. Finally, the courts that have most recently dealt with the lost chance issue have questioned the doctrine’s applicability in Texas, and some courts have deferred resolution of the issue to the legislature or the supreme court.

A. Early Cases Sympathetic to the Doctrine

Two early Texas cases form the primary basis for the argument that Texas has accepted the lost chance doctrine in the medical malpractice context. In Bellaire General Hospital v. Campbell, the patient was

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38. See Kramer v. Lewisville Memorial Hosp., 858 S.W.2d 397, 400-01 (Tex. 1993) and cases cited therein.
39. See id.
40. See id.
41. See id. at 401 n.1.
45. See Valdez, 638 S.W.2d at 116; Bellaire, 510 S.W.2d at 98.
46. 510 S.W.2d at 94.
afflicted with acute pancreatitis. Treatment was prescribed, and the patient improved to the point that she was moved to a semi-private room. While in this room, the patient began experiencing breathing difficulties, and her doctors approved a request that she be moved back into a private room. While being moved, her oxygen was unplugged and after she was placed in another room, it was discovered that it was impossible to reconnect her oxygen supply. A portable oxygen unit rushed to her arrived too late, and she died from oxygen deprivation.

The jury found that the hospital’s negligence in not having a proper oxygen supply and not having a sufficiently accessible portable oxygen unit proximately caused the decedent’s death. The Bellaire court cited the traditional causation rule in Texas as to medical malpractice cases:

> [E]xpert testimony that the event is a possible cause of the condition cannot ordinarily be treated as evidence of reasonable medical probability except when, in the absence of other reasonable causal explanations, it becomes more likely than not that the condition did result from the event.

Proof of reasonable probability will suffice, since it is often difficult to determine with exactitude the medical cause of death. The patient’s doctor testified that it was “very unlikely” the patient would have survived the pancreatitis, even if the oxygen mixup had not occurred. Although not necessary to its holding in light of the jury’s finding of proximate cause, the Bellaire court noted that “[e]ven if it be assumed that her chances for recovery from the pancreatitis were remote, the Hospital would still be liable for depriving her of any chance she might have had.” Thus, this statement by the Bellaire court was the first subtle indication that Texas might recognize the lost chance doctrine in medical malpractice cases.

This initial indicator in Bellaire was expanded eight years later by the Corpus Christi Court of Appeals in Valdez v. Lyman-Roberts Hospital, Inc. In Valdez, Juanita Valdez was eight months pregnant when she became seriously ill, and was taken by her family to her midwife. The
midwife surmised that labor had not yet ensued, and the family rushed the patient to a nearby hospital, at which point they were instructed to proceed to a second hospital. The second hospital refused to see the patient because she was not a patient of any doctor at the hospital. The family then brought her home, and she died shortly afterwards of a ruptured uterus.

The Valdez court reversed a directed verdict by the trial court in favor of the defendant hospitals and held that there was sufficient evidence to present the proximate cause issue to the jury. Further, the Valdez court cited Bellaire for the proposition that the hospitals were answerable for their negligence even if the decedent’s prospects for survival were already dim. In language clearly advocating the lost chance doctrine, the court added that “[t]he burning candle of life is such a precious light in anyone’s existence that no one has a right to extinguish it before it flickers out into perpetual darkness and oblivion.” Finally, the Valdez court concluded: “Therefore, if the appellee hospitals accelerated [the patient’s] death by even an hour, minutes or seconds, they could be liable.”

b. The Interim Period — Texas Fails to Firmly Establish the Doctrine

In the aftermath of Bellaire and Valdez, no court expressly accepted the lost chance doctrine, although courts occasionally hinted that the doctrine

59. Id.
60. Id. at 114.
61. Id.
62. 638 S.W.2d at 116.
63. Id. (citing Bellaire Gen. Hosp., Inc. v. Campbell, 510 S.W.2d 94, 98 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref’d n.r.e.)).
64. Id. (citing Sciandra v. Shovlin, 211 A.2d 437, 439 (1965)).
65. Id. (emphasis added). Three years later, the Corpus Christi Court of Appeals decided Brownsville Medical Center v. Gracia, 704 S.W.2d 68 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.). In that case, a minor child complaining of stomach pains and a fever was originally taken to a hospital in Matamoros, Mexico. Id. at 70. Four days later, his parents transferred him to a hospital in Brownsville, but the next day the child was transferred to a second hospital for surgery. Id. at 71. After pre-surgery tests were conducted, a social worker for the second hospital informed the child’s mother that, because of the family’s lack of medical insurance, the boy could not stay in the hospital. Id. at 71-72. The social worker informed them that there was a public hospital in Galveston which would be more suitable for a family in their financial condition. Id. at 72. After being transported to the public hospital by air ambulance, and before surgery was ever performed, the child died. Id.

At trial, the jury found that the second hospital was negligent in refusing medical treatment and transferring the child to the public hospital in Galveston, and that this negligence was the proximate cause of the child’s death. Id. at 75. The Gracia court, on affirming this result, adopted Restatement (Second) of Torts § 323 as imposing an “independent duty to the child not to negligently allow the termination of services to the child’s detriment.” See id. at 77 (emphasis added). Thus, while not explicitly discussing the lost chance doctrine, the Gracia court did adopt the Restatement provision which has been recognized as one of the origins of the lost chance doctrine. See id.; Keith, supra note 15, at 764.
had potential validity in Texas. In 1989, the United States District Court for the Northern District of Texas, Fort Worth Division, decided Bohn v. United States. In Bohn, a boy informed his mother of a lump under his arm. The mother responded by taking her son to a local hospital, where a cancerous tumor was removed. Further examinations by the doctor at the time revealed no other tumors present. However, it was later revealed that the boy still had cancer, and though he underwent thorough treatment, he died eight months later.

The court entered judgment for the defendant health care providers, notwithstanding the court's firm belief that the doctors involved were clearly negligent. Rather, the court determined that, since the fatal cancer had already deprived the boy of any realistic chances of recovery, the doctors' negligence was not even a cause in fact of his death. However, the court did make reference to the lost chance doctrine when it noted that "[t]he fact that the physicians breached the standard of care expected of them did not result in [the boy's] death or the loss of a chance to live longer.

The next Texas case that had occasion to at least mention the lost chance doctrine provided no more guidance than did Bohn. In Duncan v. Carney, the defendant physician failed to diagnose Kenneth Duncan's heart ailment. Later that evening, Duncan died of a heart attack. The decedent's wife brought suit against the physician, alleging that he was negligent, and that his negligence reduced her husband's chances of surviving the heart attack. In her opinion, Justice O'Connor acknowledged the theoretical nature of the lost chance doctrine. Due to a procedural defect, however, she concluded that "[i]f there is a cause of

68. Id. at 444.
69. Id.
70. Id.
71. Id. at 445.
72. Id.
73. Id. at 448.
74. Id. at 447.
75. See id. (citing Brownsville Medical Ctr. v. Gracia, 704 S.W.2d 68 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.) (emphasis added). Thus, the passage could arguably be stated to have been the Northern District's recognition of the lost chance doctrine in Texas.
76. See Duncan v. Carney, 784 S.W.2d 488 (Tex. App.—Houston [1st Dist.] 1990, writ denied).
77. Id.
78. Id. at 488.
79. Id. at 489.
80. 784 S.W.2d at 489.
81. Id. (citing Perdue, supra note 15, at 37).
82. Id. at 490. The plaintiffs' special issue number one asked the jury for a determination of which of two doctors' negligence it found was the proximate cause of the husband's death. Id. at 489. The jury answered that one doctor was negligent, and that the second was not. Id. However, in special
action for lost chance of survival in Texas, it was not preserved in this case . . . ; [therefore] we need not reach the issue of whether there is such a cause of action in Texas." Thus, after Duncan, the applicability of the lost chance doctrine in Texas was more uncertain than ever.

C. The Recent Trend — Courts Question the Doctrine’s Applicability and Look to the Legislature or Texas Supreme Court for Guidance

The Texas appellate courts that have considered the lost chance doctrine within the past two years have begun to question whether the cause of action has ever been recognized in Texas. The Houston Court of Appeals, Fourteenth District, expressed such doubt in the recent case of Karl v. Oaks Minor Emergency Clinic. In Karl, the plaintiffs sued several physicians, as well as the emergency clinic, for negligently failing to diagnose the decedent’s pancreatic cancer. The plaintiffs alleged that this negligence resulted in the decedent’s lost chance of survival. The trial court, however, granted the defendants’ motion for summary judgment on the ground that Texas does not recognize the lost chance doctrine.

On appeal, the Karl court reviewed the mechanics of the basic lost chance doctrine, stating that such an action is based on a doctor negligently causing a reduction in the patient’s chances of recovery. The court stressed that “[t]he existence of a cause of action seeking recovery of issue number ten, the plaintiffs requested a jury instruction, unique to the second doctor, which asked the jury whether it found that the second doctor had proximately caused the ‘reduction of any chance for survival’ of the husband. Id. The court held that this request erroneously submitted the negligence issue as to the second doctor a second time, thus requiring an affirmandance of the verdict in favor of the defendants. See id.

83. Id. at 490. Another recent case which mentioned the lost chance doctrine was Crites v. Pietila, 826 S.W.2d 175 (Tex. App.—El Paso 1992), rev’d, 851 S.W.2d 185 (Tex. 1993). In Crites, plaintiffs alleged the loss of chance doctrine in their pleadings. Id. at 175. However, the trial court granted summary judgment in favor of the defendants, holding that plaintiffs’ claims were barred by the Workers’ Compensation Act. Id. The El Paso Court of Appeals reversed and remanded, holding that the claims were not so barred, id. at 176; however, there was no further discussion of the lost chance doctrine by the court. The Texas Supreme Court reversed on the availability of the claims under the Workers’ Compensation Act, but similarly failed to mention the lost chance doctrine. See 851 S.W.2d at 186-87.


85. 826 S.W.2d 791 (Tex. App.—Houston [14th Dist.] 1992, writ denied).
86. Id. at 792.
87. Id.
88. See id.
89. See id. at 792-93 (citing RESTATEMENT (SECOND) OF TORTS § 323(a) (1965)); Darrell L. Keith, Medical Expert Testimony in Texas Medical Malpractice Cases, 43 BAYLOR L. REV. 1, 96-97 (1991); Perdue, supra note 15, at 37.
damages for the diminution in the chance of survival has not yet been established in the jurisprudence of the state of Texas.90 The court cited Duncan,91 Valdez,92 Bellaire,93 and Bohn94 as having only mentioned the lost chance doctrine in dicta.95 Thus, in affirming the trial court's grant of a summary judgment for the defendants, the Karl court concluded that "[i]n light of the fact that no Texas caselaw has expressly adopted a cause of action for lost chance, we likewise decline to do so."96

The Fort Worth Court of Appeals came to similar conclusions in a case decided less than one month after Karl.97 In Crawford v. Deets,98 the decedent died from a ventricular tumor, which was not detected by the defendant physicians during neurological exams.99 The jury found that the doctors were not negligent, and thus the trial court held for the defendants.100 In one of their points of error, the appellants alleged that the trial court erred in prohibiting them from pleading a cause of action for lost chance of survival.101

The Crawford court, paralleling Karl's reasoning, opined that "[n]o Texas court has clearly held that the loss of chance doctrine is applicable in Texas."102 The court mentioned the two Corpus Christi decisions of Valdez103 and Brownsville Medical Center v. Gracia104 as sympathetic to the lost chance doctrine, but de-emphasized the relevant portions of those decisions as dicta.105 Finally, the court concluded that "instituting a new cause of action such as loss of chance of survival is better left to the legislature or the supreme court."106

90. 826 S.W.2d at 793.
92. See Valdez v. Lyman-Roberts Hosp., Inc., 638 S.W.2d 111, 116 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.).
95. See 826 S.W.2d at 793 (citing Duncan, 784 S.W.2d at 489-90; Valdez, 638 S.W.2d at 116; Bellaire, 510 S.W.2d at 98; Bohn, 724 F. Supp. at 447).
96. 826 S.W.2d at 794.
98. Id. at 795.
99. Id. at 797.
100. Id.
101. Id.
102. Id.
103. Valdez v. Lyman-Roberts Hosp., Inc., 638 S.W.2d 111, 116 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.).
104. 704 S.W.2d 68, 76 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).
105. See 828 S.W.2d at 797 (citing Brownsville Medical Ctr. v. Gracia, 704 S.W.2d 68, 76 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); Valdez, 638 S.W.2d at 116.
106. 828 S.W.2d at 797.
TEXAS BUCKS THE TREND

About one month after it decided Crawford, the Fort Worth court was again confronted with the lost chance issue. In Kramer v. Lewisville Memorial Hospital, the decedent’s husband sued the hospital for failing to timely diagnose his wife’s cancer. The plaintiff appealed the trial court’s refusal to submit the jury instructions on the lost chance doctrine. The Fort Worth Court of Appeals noted its decision in Crawford that the issue of whether a cause of action for lost chance of survival exists in Texas was more appropriately left to the discretion of the legislature or the supreme court. As in Karl, the Kramer appellate court reasoned that the language sympathetic to the doctrine in Duncan, Valdez, and Bellaire was dicta.

Most recently, the Corpus Christi Court of Appeals was called upon to discuss the applicability of its oft-cited holding some eleven years earlier in Valdez. In Niemann v. Refugio County Memorial Hospital, the plaintiffs asserted that the defendant health care providers negligently deprived the decedent of a chance of survival by failing to diagnose his cancer. The Niemann court denied that it had ever adopted the lost chance doctrine, stating that “[a]lthough we discussed the possibility of a loss of a chance cause of action in dicta, we did not adopt it as such in that case.” Therefore, Niemann’s express repudiation of Valdez as authority

107. See Kramer v. Lewisville Memorial Hosp., 831 S.W.2d 46 (Tex. App.—Fort Worth 1992), aff’d, 858 S.W.2d 397 (Tex. 1993).
108. Id.
109. Id. at 47.
110. Id. at 50.
111. See id. (citing Crawford v. Deets, 828 S.W.2d 795, 797 (Tex. App.—Fort Worth 1992, writ denied)).
113. Valdez v. Lyman-Roberts Hosp., Inc., 638 S.W.2d 111, 116 (Tex. App.—Corpus Christi 1982, writ ref’d n.r.e.).
115. 831 S.W.2d at 50 (citing Karl v. Oaks Minor Emergency Clinic, 826 S.W.2d 791, 792 (Tex. App.—Houston [14th Dist.] 1992, writ denied); Duncan, 784 S.W.2d at 489-90; Valdez, 638 S.W.2d at 116; Bellaire, 510 S.W.2d at 98).
117. Id.
118. Id. at 96.
119. Id. at 97 (emphasis added). In fact, the court gleaned a quote from its own language in Valdez to demonstrate that it had adhered to traditional standards of proximate causation in that case: “The mere possibility that an act of negligence might have caused the damages from a medical
for the lost chance doctrine in Texas strengthened the argument that Texas case law was unclear. Clearly, the time had become ripe for affirmative guidance from the Texas Supreme Court.

IV. Kramer v. Lewisville Memorial Hospital

Jennie Kramer visited her gynecologist in August 1985 because she was experiencing unusual discharges and intermittent bleeding. Her doctor erroneously informed her that she did not have cancer, and the mistake was exacerbated when, in two subsequent examinations, a second doctor twice repeated the error of failing to diagnose Ms. Kramer's cancer. A fourth exam finally revealed her cancer, and Ms. Kramer died as a result on October 31, 1986. Ms. Kramer's husband, Stephen, brought suit against Lewisville Memorial Hospital for damages arising from his wife's death. The Fort Worth Court of Appeals affirmed the trial court's refusal of the plaintiffs' requested jury instructions on lost chance, reasoning that the lost chance doctrine had not been clearly recognized in Texas and that such decision was best left to the legislature or the Texas Supreme Court. The Texas Supreme Court affirmed. The court, in an opinion written by Chief Justice Phillips, and over the dissent of three justices, held that Texas did not recognize a cause of action for lost chance of survival under the Wrongful Death Act, the Survivorship Statute, or the common law.

A. The Majority Opinion

Chief Justice Phillips began his analysis of the lost chance issue by reaffirming the traditional standard of proximate causation for medical viewpoint is not sufficient to support recovery. It must be shown that the act probably caused the injury. *Id.* (emphasis added) (citing Valdez v. Lyman-Roberts Hosp., Inc., 638 S.W.2d 111, 114-15 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.)).

121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 399.
125. *Id.* Mr. Kramer sued on behalf of himself, his wife's estate, and as next friend of the Kramers' two children. *Id.*
126. The other defendants included physicians, a nurse, and other professional medical groups and centers. *Id.* However, all defendants settled with the Kramers except Lewisville Memorial Hospital. *Id.*
127. *Id.*
129. *Id.* at 398.
130. *Id.*
malpractice cases, which states that plaintiffs must "adduce evidence of a 'reasonable medical probability' . . . that their injuries were caused by the negligence of one or more of the defendants." 131  Phillips went on to discuss the various states that have considered the lost chance doctrine, along with the numerous permutations effectuated by the states that have accepted the cause of action. 132  The court then opined that the lost chance doctrine, if applicable in Texas at all, was permissible only under the Wrongful Death Act or the Survivorship Statute, because Ms. Kramer had, in fact, died. 133  

The majority noted that "[e]ach Texas court that has explicitly considered adopting loss of chance has, like the court below, refused to adopt or apply it." 134  Chief Justice Phillips, like the appellate courts recently before him, de-emphasized the value of Bellaire 135  and Valdez, 136  reasoning that they were not loss of chance cases, and that language in those cases sympathetic to the doctrine was dicta. 137  The court looked to the recent decision in Niemann 138  as corroboration for its conclusion. 139  

The court first analyzed the lost chance doctrine under the Wrongful Death Act. 140  Phillips initially noted that, under the Wrongful Death Act, liability could only be imposed for "an injury that causes an individual's death." 141  Thus, he pointed out that while the lost chance doctrine purports to compensate victims for negligence that causes the "loss of a less-than-even chance" of survival, the Wrongful Death Act, by its terms, only authorizes recovery for negligence which causes death. 142  On a slightly different nuance, Phillips noted that while the Wrongful Death Act only authorizes recovery for "actions that actually cause death," the lost

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131. See id. at 400 (citing Duff v. Yelin, 751 S.W.2d 175, 176 (Tex. 1988); Lenger v. Physician's Gen. Hosp., Inc., 455 S.W.2d 703, 706-07 (Tex. 1970); Keith, supra note 15, at 761-62. This standard is referred to as the "more likely than not" standard. Id.

132. See 858 S.W.2d at 400-02; see also supra notes 35-41 and accompanying text.

133. See id. at 403.

134. Id. at 402 n.4 (citing Kramer v. Lewisville Memorial Hosp., 831 S.W.2d 46, 50, aff'd, 858 S.W.2d 397 (Tex. 1993); Karl v. Oaks Minor Emergency Clinic, 826 S.W.2d 791 (Tex. App.—Houston [14th Dist.] 1992, writ denied); Crawford v. Deets, 828 S.W.2d 795 (Tex. App.—Fort Worth 1992, writ denied)).


136. See Valdez v. Lyman-Roberts Hosp., Inc., 638 S.W.2d 111, 116 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.).

137. 858 S.W.2d at 402 n.4 (citing Valdez, 638 S.W.2d at 116; Bellaire, 510 S.W.2d at 98).


139. 858 S.W.2d at 402 n.4 (citing Niemann, 855 S.W.2d at 94).

140. See id. at 404.

141. Id. (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 71.002(b) (Vernon 1986)).

142. See id.
chance approach does not technically require this, because it would allow recovery even when the doctor’s negligence did not probably (i.e., more than 50%) cause the death.\textsuperscript{143} The majority, therefore, pronounced that the lost chance doctrine was not applicable under the Wrongful Death Act.\textsuperscript{144}

Regarding the applicability of the lost chance doctrine under the Survivorship Statute, the court reasoned that it necessitated the decision of "whether Texas should adopt the loss of chance doctrine as part of its common law."\textsuperscript{145} The court initially rejected the public policy arguments offered in Justice Hightower’s dissent.\textsuperscript{146} The court then stated that, regardless of the arguments that the "injury" is actually the percentage lost chance of survival, "[t]he true harm remains Ms. Kramer's ultimate death."\textsuperscript{147} The majority also rejected the argument that Restatement (Second) of Torts, Section 323, constituted compelling authority for the lost chance doctrine, noting that "[w]hile this section is the law in Texas, ... it does not determine or suggest the appropriate standard of causation."\textsuperscript{148}

In concluding its analysis of the applicability of the lost chance doctrine under Texas common law, the majority expressed concern about the potentially adverse future consequences that adoption of the lost chance doctrine would bring to professionals in other areas.\textsuperscript{149} Thus, the court concluded that "[f]or all of these reasons, we do not adopt the loss of chance doctrine as part of the common law of Texas."\textsuperscript{150}

\textbf{B. The Dissenting Opinion}

Justice Hightower registered a vigorous dissenting opinion, which was joined by Justices Doggett and Gammage.\textsuperscript{151} Justice Hightower criticized Chief Justice Phillips’ approach to the lost chance of survival doctrine as an

\begin{itemize}
\item \textsuperscript{143} See \textit{id.} (emphasis added).
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Id. This stance was necessary because the Survivorship Statute does not create a new cause of action, but rather only allows any common law action the decedent may have had to survive "to and in favor of the heirs, legal representatives, and estate of the injured person." \textit{id.} (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 71.021 (Vernon 1986)).
\item \textsuperscript{146} See \textit{id.} at 405.
\item \textsuperscript{147} Id.
\item \textsuperscript{148} Id. (citing Colonial Savings Ass'n v. Taylor, 544 S.W.2d 116, 119-20 (Tex. 1976); Sherer v. James, 351 S.E.2d 148, 150-51 (S.C. 1986); Curry v. Sumner, 483 N.E.2d 711, 717 (Ill. App. 1985)).
\item \textsuperscript{149} See \textit{id.} In illustrating its point, the majority acknowledged a case the plaintiffs had cited for approval. See Kansas City M. & O. Ry. Co. v. Bell, 197 S.W. 322 (Tex. Civ. App.—Amarillo 1917, no writ). That case allowed a farmer to recover from a transportation company for his "lost chance" of winning a livestock show. \textit{See id.} at 323-24. The majority emphasized that the case was an aberration, and stated that "[t]o the extent that a no writ case from 1917 might be argued as placing Texas among the handful of jurisdictions that appear to recognize chances to win contests as legally compensable interests, we expressly disavow it." 858 S.W.2d at 406 n.7.
\item \textsuperscript{150} 858 S.W.2d at 407.
\item \textsuperscript{151} See \textit{id.} at 407-10.
\end{itemize}
"all or nothing" approach.\textsuperscript{152} Calling the standard put forth by the majority an "arbitrary" one, Justice Hightower reasoned that the decision of the majority allows full recovery "if a plaintiff can establish that she was negligently deprived of a greater-than-even chance of avoiding the ultimate death or condition."\textsuperscript{153} He objected, however, to the fact that "if she can show the loss only of some smaller chance, she can recover nothing."\textsuperscript{154}

The dissent also reasoned that the majority's decision lessened the deterrent effect of tort law.\textsuperscript{155} Moreover, Justice Hightower urged that the holding inequitably benefitted health care providers because their negligence effectively precludes one from ever knowing whether the victim would have recuperated absent the physician's negligence.\textsuperscript{156} The dissent underscored its entire rationale by emphasizing that the injury to be redressed is "the loss of chance of survival, however small."\textsuperscript{157} Justice Hightower concluded his reasoning by noting that he did not believe recognition of the doctrine would profoundly affect the law,\textsuperscript{158} and that he "would join the majority of other states that have addressed this issue and allow an injured party to recover for loss of chance."\textsuperscript{159}

V. A DELIBERATION ON THE SOUNDNESS OF THE MAJORITY'S HOLDING

The immediate impact of the decision in \textit{Kramer} is obvious. When plaintiffs seek to recover compensation from a physician or health care organization as a result of the death of a loved one, they will henceforth be limited to recovering only for that negligence which, by a reasonable medical probability, caused the injuries for which compensation is sought.\textsuperscript{160} The majority's decision in \textit{Kramer}, refusing to adopt the lost chance doctrine in Texas, is a well-reasoned and responsible analysis. The rationales and policy factors supporting adherence to traditional proximate

\begin{enumerate}
\item \textsuperscript{152} \textit{Id.} at 407.
\item \textsuperscript{153} \textit{Id.} at 408-09.
\item \textsuperscript{154} \textit{Id.} at 409.
\item \textsuperscript{155} \textit{See id.}
\item \textsuperscript{156} \textit{See id.} Further, the dissent vigorously contended that the early decision in \textit{Kansas City M. & O. Railway v. Bell}, 197 S.W. 322, 323 (Tex. Civ. App.-Amarillo 1917, no writ), warranted acceptance of the lost chance doctrine in the medical malpractice context. 858 S.W.2d at 409. Justice Hightower scorned the majority for its decision to "lower the protection for hogs rather than to raise the protection for humans." \textit{Id.}
\item \textsuperscript{157} 858 S.W.2d at 409. (emphasis added). The dissent reasoned that "[p]roperly viewing the harm caused as the loss of chance rather than the patient's death, it is unnecessary to analyze the applicability of the Texas Wrongful Death Act." \textit{Id.} at 409 n.2. The dissent posited that the majority "mischaracterizes the injury to be redressed in this case." \textit{Id.}
\item \textsuperscript{158} \textit{Id.} at 410. In fact, Justice Hightower criticized the majority for "extrapolating what results might be under different circumstances." \textit{Id.} at 410 n.5.
\item \textsuperscript{159} \textit{Id.} at 410.
\item \textsuperscript{160} \textit{See Duff v. Yelin}, 751 S.W.2d 175, 176 (Tex. 1988); \textit{Lenger v. Physician's Gen. Hosp., Inc.}, 455 S.W.2d 703, 706-07 (Tex. 1970).
\end{enumerate}
causation standards are numerous and diverse. Among these supporting factors are the decision’s legal validity, statistical accuracy, and favorable implications for various policy concerns.

A. The Legal Soundness of the Holding

Advocates of the lost chance doctrine view the less-than-fifty-percent reduction in a patient’s chance of survival as a valid and compensable injury. These proponents respond to the proximate causation barrier by contending that the reduction, after all, is proximately caused by the physician’s negligence. Kramer exposes the logical inconsistency of this line of reasoning by setting forth an appropriate demarcation between what is and is not a compensable injury under the law. Although proponents of the lost chance doctrine insist that the percentage loss of chance of survival is a compensable injury, a simple hypothetical exposes the fallacy of this argument:

For example, if a doctor negligently treats a person with a 40% chance of recovery and the doctor’s negligence reduces the patient’s chance of recovery to only 10%, whether the patient lives or dies, the doctor’s negligence cost the patient a 30% loss of chance of survival. If the patient dies, the probable cause of death was the pre-existing disease or injury; it is unlikely that the negligence caused the death. If the patient lives, the negligence clearly did not cause the death. In both scenarios, there was negligence resulting in a 30% loss of chance of survival. Surely no one would seriously argue that a person in the latter situation should be allowed to recover for his or her "statistical" lost chance of survival. The Texas Supreme Court referred to the claimed injury in the latter situation as merely "metaphysical" in form. The majority correctly recognized this inconsistency when it reasoned: "[t]he true harm remains Ms. Kramer’s death. Unless courts are going to compensate patients who 'beat the odds' and make full recovery, the lost chance cannot be proven unless and until the ultimate harm occurs."

B. The Statistical Soundness of the Holding

Another reason that the majority’s holding is the better one is that, given the typical lost chance scenario, traditional proximate causation standards will arguably produce the correct result more often than the
modified lost chance standards.\textsuperscript{167} An examination of the statistical errors resulting from usage of both of the methods of recovery provides valuable insight:

To compare the two rules, assume a hypothetical group of 99 cancer patients each of whom would have had a \( 1/3 \)\% chance of survival. Each received negligent medical care, and all 99 died. Traditional tort law would deny recovery in all 99 cases because each patient had less than a 50\% chance of recovery and the probable cause of death was the pre-existing cancer [and] not the negligence. Statistically, had all 99 received proper treatment, 33 would have lived and 66 would have died; so the traditional rule would have statistically produced 33 errors by denying recovery to all 99.

The loss of chance rule would allow all 99 patients to recover, but each would recover \( 1/3 \)\% of the normal value of the case. Again, with proper care 33 patients would have survived. Thus, the 33 patients who statistically would have survived with proper care would receive only one-third of the appropriate recovery, while the 66 patients who died as a result of the pre-existing condition, not the negligence, would be overcompensated by one-third. The loss of chance rule would have produced errors in all 99 cases.\textsuperscript{168}

Therefore, as the Texas Supreme Court stated, the traditional standard of proximate causation "is thus not some arbitrary, irrational benchmark for cutting off malpractice recoveries, but rather a \textit{fundamental prerequisite of an ordered system of justice}."\textsuperscript{169}

\textbf{C. Favorable Implications for Policy Concerns}

The rising health care costs in this country are a matter of major public concern; one need only read a current magazine or newspaper in order to be aware of the pervasiveness of the issue.\textsuperscript{170} In fact, Americans' concerns about health care costs may have even had a crucial impact on the outcome of our most recent presidential election.\textsuperscript{171}

The amount of litigation conducted in the medical malpractice context has been continually increasing in the United States at an alarming rate.\textsuperscript{172} Expenditures for medical liability insurance in this country have swelled from approximately sixty million dollars in 1960 to well over seven billion

\begin{footnotes}
\item[167] See 580 A.2d at 213.
\item[168] Id.
\item[169] 858 S.W.2d at 405 (emphasis added).
\item[171] See generally Robert J. Blendon et. al., \textit{The Implications of the 1992 Presidential Election for Health Care Reform}, 268 JAMA 3371 (1992) (discussing the results of several studies which assessed the impact of health care issues on the 1992 election).
\end{footnotes}
dollars in 1988. Corollarily, the number of malpractice suits has increased dramatically from only about one action per one hundred physicians in 1960, to around thirteen per one hundred at the close of the past decade.

States that have adopted the lost chance doctrine have arguably created an environment in which even more litigation will result, as more scenarios would allow potential recovery. This exposes physicians to greater liability, and, therefore, costs must inevitably be passed on to consumers in the form of increased health care insurance premiums. Additionally, doctors may potentially be compelled, in light of the ever-present threat of litigation, to practice overly defensive medicine. This would, in turn, increase the costs to consumers and insurers.

Obviously, the Texas Supreme Court’s decision in Kramer will not, of its own accord, halt the spiraling increase in health care costs. However, the decision is a step in the right direction. If other jurisdictions will follow Texas’ lead, the otherwise potentially disastrous effects on the health care system may yet be avoided.

Another policy concern is the increase in medical malpractice litigation generally in Texas and across the country. The eagerness of some lawyers to assist clients with unmeritorious claims serves only to worsen the situation. While it is not desirable for people with equitable claims to forego their just assertions within the legal system, it is desirable to stem the flow of frivolous and unwarranted lawsuits that fill the courts’ dockets today. Drawing the line at allowing recovery only for conduct which proximately causes the injury is a sound method for reversing the litigation trend.

Finally, medical professionals should not be expected to endure such an unbearable burden of precision. Health care providers concededly do have a rather unique opportunity to aggravate a patient’s pre-existing condition. However, as the Kramer court realized, once the lost chance doctrine is recognized, there is no “principled way . . . [to] prevent its application to similar actions involving other professions.” Among one

173. See id. at 2.
174. See id.
176. See 580 A.2d at 215; 1 Cal. Rptr. 2d at 592.
177. See 580 A.2d at 215.
178. See id.
179. For some of the more ludicrous examples of lawsuits that have been won, see John Berendt, The Lawsuit, ESQUIRE, May 1993, at 37, 37-38.
181. 858 S.W.2d at 406.
of the "other professions" that could be affected is the legal profession.\textsuperscript{182} Recognizing the lost chance doctrine in the legal malpractice context would likely lead to embittered plaintiffs suing their attorneys for negligence that results in a reduced chance of winning a lawsuit.\textsuperscript{183} No court has yet applied the lost chance doctrine to attorneys. Thus, adopting the lost chance doctrine in the medical malpractice context places defendant health care providers in an unprecedented position.\textsuperscript{184} As one court reasoned: "No other professional malpractice defendant carries this burden of liability without the requirement that plaintiffs prove the alleged negligence probably rather than possibly caused the injury."\textsuperscript{185} Thus, the \textit{Kramer} decision serves to treat medical professionals on equal footing with other professionals.

VI. CONCLUSION

In \textit{Kramer},\textsuperscript{186} the Texas Supreme Court settled that Texas does not recognize a cause of action for lost chance of survival in the medical malpractice context.\textsuperscript{187} The majority based its opinion on the express language of the Wrongful Death Act, as well as the traditional standards of causation, which the court saw fit to uphold.\textsuperscript{188} The decision clarifies a hotly contested legal issue that had become increasingly unclear in Texas' system of jurisprudence, and also makes a policy statement to the state and the country. Whether the \textit{Kramer} decision will be challenged by the Texas legislature is a question that remains open. However, for now, the Texas Supreme Court has stood on traditional legal principles, common sense, and responsible policy concerns, and the decision may ultimately be a move toward increasing the respect shown to both the medical and legal professions.

\textit{by Wayne Barnes}

\textsuperscript{182} See id.
\textsuperscript{183} See id.; Dumas v. Cooney, 1 Cal. Rptr. 2d 584, 593 (Cal. Ct. App. 1991).
\textsuperscript{184} See Gooding v. University Hosp. Bldg., Inc., 445 So. 2d 1015, 1019-20 (Fla. 1984); see Dumas, 1 Cal. Rptr. 2d at 593.
\textsuperscript{185} 445 So. 2d at 1020 (emphasis added). That is, since the lost chance doctrine allows recovery for a less than 50% reduction in a patient's chance of survival, it expressly condones recovery for actions which did not, more likely than not, cause the death of the patient.
\textsuperscript{186} Kramer v. Lewisville Memorial Hosp., 858 S.W.2d 397 (Tex. 1993).
\textsuperscript{187} See id. at 403-07.
\textsuperscript{188} See id.