



Moving Forward with Loss-of-Chance Claims

By Patrick Stoneking

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On the last day of May, the Minnesota Supreme Court issued its long-awaited decision in *Dickhoff v. Green*. The ruling was unexpected to everyone involved in the case as the Supreme Court recognized claims for “loss-of-chance” for the first time ever. The decision will make a lasting impact on medical malpractice law in Minnesota.

What is Loss of Chance?

“Loss of chance” is a term that comes up most often in cases where a patient’s disease goes undiagnosed and untreated for some period of time. When it comes to most diseases, earlier treatment is usually better than later treatment. So when medical negligence leads to a delay in diagnosis and treatment of a disease, a patient loses the ability to get earlier treatment. This delay is often associated with a decreased probability of surviving – a “loss of chance.”

In *Fabio v. Bellomo*, 504 N.W.2d 758 (Minn. 1993), the Minnesota Supreme Court considered a case involving a patient whose breast cancer went undiagnosed for several years. The patient was still alive, but because of the delay in diagnosis arguably had a higher probability of disease recurrence. In upholding the dismissal of the patient’s claim, our Supreme Court said “We have never recognized loss of chance in the context of a medical malpractice action, and we decline to recognize it in this case.” *Id.* at 762.

Fabio had been cited for 20 years as standing for the proposition that Minnesota was not a “loss of chance” jurisdiction. But with *Dickhoff v. Green*, the Supreme Court now decided to recognize the concept of “loss of chance,” bringing Minnesota’s common law in line with many other jurisdictions.

Dickhoff v. Green

Jocelyn Dickhoff was just a newborn when her parents noticed a lump on her backside. Her parents testified that the lump was brought to their pediatrician's attention immediately, but it was not until after Jocelyn's one-year checkup that the growth was properly assessed as a cancerous tumor. In the meantime, the disease had advanced and metastasized. Experts offered opinions that the delay took Jocelyn from a 60 percent chance of survival to a 40 percent chance of survival. In other words, Jocelyn went from likely survival of cancer to likely death from cancer.

Because of the large shadow cast by *Fabio*, the plaintiffs did not concede that their case was one for a loss of chance. Rather, the claim was styled as one for improbable survival. The Court of Appeals was persuaded by this distinction, but the Supreme Court was not. Despite the Dickhoffs' arguments, the Supreme Court labeled the action as one for loss of chance. But then most surprisingly, the court concluded that the decrease in survival associated with a "loss of chance" claim was a recoverable item of damage.

Jocelyn Dickhoff fought the cancer and continued to survive despite the odds. She was alive when the Supreme Court issued its ruling in her case. Sadly, on July 6, 2013, Jocelyn Dickhoff passed away. She was 7 years old.

What does this mean?

In failure-to-diagnose cases, the defendant physician is not usually responsible for the underlying disease but rather for the damage caused by the delay. Traditionally, unless a plaintiff could prove that the malpractice resulted in a death, there could be no recovery. As our burden of proof is based on the preponderance of the evidence, this meant that a patient with a preexisting prognosis with a 51 percent chance of survival might be able to recover 100 percent of their losses, but a patient with a 49 percent chance of survival had no recourse, no matter how bad the negligence. In *Dickhoff*, the Supreme Court recognized that this was not fair, and devised a legal framework for future cases to fix it.

From now on, if a delay results in a reduction of 20 percent, the plaintiff or his or her next-of-kin can recover 20 percent of the harm. A 40 percent reduction in survival will permit a 40 percent recovery of the total harm, and so on. This rule will allow compensation for losses of chance in any amount, regardless of the starting point or the end point.

There are some unanswered questions remaining in the wake of this decision. For example, what is the "total harm" that will be reduced? As many "loss of chance" plaintiffs will be alive, will damages be measured in terms of personal injury (pain and suffering, etc.) or in terms of wrongful death (pecuniary loss to the next-of-kin)?

Similarly, is the "loss of chance" application limited to cases of life and death? Will it perhaps apply to other injuries, like a loss of chance to conceive a child? Will it apply when a patient's chance to fully recover from a spinal cord injury or stroke is inhibited by negligence?

Medical malpractice lawyers on both sides of the caption are going to be scrambling to answer these questions and many others. *Dickhoff v. Green* will lead to many interesting battles in medical malpractice lawsuits for years to come.

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