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LOSS OF CHANCE: A HISTORICAL OVERVIEW AND ANALYSIS OF THE DOCTRINE'S CURRENT STATE

William A. Ramsey*

I. Introduction

Courts developed the loss-of-chance doctrine, which applies primarily in medical malpractice cases, to assist patients who failed to prove traditional proximate cause.[1] A medical malpractice plaintiff's inability to prove proximate cause arises most often in three situations:

(1) an already ill patient suffers a complete elimination of an insubstantial or substantial probability of recovery from a life-threatening disease or condition;

(2) a patient survives, but has suffered a reduced chance for a better result or for complete recovery; and

(3) a person incurs an increased risk of future harm, but has no current illness or injury.[2]

Some courts use the term *loss of chance* to describe all three situations.[3] Other courts use the term *increased risk of harm* in referring to the first and *lost chance* or *loss of chance* in referring to the second and third situa-

* Mr. Ramsey is an attorney at Barrett & McNagny in Fort Wayne and is a member of the Defense Trial Counsel of Indiana.

1 *See* Indiana Dep't of Ins. v. Everhart, 960 N.E.2d 129, 135 (Ind. 2011); Mayhue v. Sparkman, 653 N.E.2d 1384, 1387 (Ind. 1995).

2 *See Everhart,* 960 N.E.2d at 135 (explaining that "[u]nder the traditional analysis, a plaintiff who could show only a forty-nine-percent chance that the patient would not have suffered some injury but for the physician's negligence would not recover anything."); *see also* Alexander v. Scheid, 726 N.E.2d 272, 276 (Ind. 2000) ("[W]hen a patient's chance of recovering from a disease is already less than fifty percent, it can never be said that the doctor's malpractice was the proximate cause of the ultimate death."); *Mayhue*, 653 N.E.2d at 1387.

3 Cahoon v. Cummings, 734 N.E.2d 535, 544 (Ind. 2000) ("This Court recently had occasion to address the 'loss of chance,' or increased risk of harm doctrine."); *Scheid*, 726 N.E.2d at 276; *see also* Ford-Sholebo v. United States, 980 F. Supp. 2d 917, 992 (N.D. Ill. 2013) ("Furthermore, cause in fact may be established through a 'lost chance' or 'loss of chance' theory whereby the defendant's negligent conduct 'deprived the plaintiff of a chance to survive or recover from a health problem, or where the malpractice has lessened the effectiveness of the treatment or increased the risk of an unfavorable outcome to the plaintiff.'" (quoting Holton v. Memorial Hosp., 679 N.E.2d 1202, 1209 (Ill. 1997))).

tions.[4] Other courts use *increased risk of harm* to describe the second situation.[5] For clarity, this article will use the term *lost chance of recovery* to refer to the first, *increased risk of future harm* to refer to the second and third, and *loss of chance* to refer to the doctrines collectively. In Indiana, the first situation may be referred to as a *Mayhue* cause of action, while the second and third may be referred to as a *Scheid* cause of action, based on the Indiana Supreme Court decisions recognizing the doctrines.[6]

The first situation arises when the harm caused by the increased risk of harm or loss of chance at recovery has already occurred. In other words, it "presupposes that physical harm has resulted from the negligent care"[7] and "permits recovery from a defendant whose negligence significantly increases the probability of the ultimate harm, even if the likelihood of incurring that injury was greater than fifty percent in the absence of the defendant's negligence."[8]

The second and third situations arise when the patient has not yet suffered an injury or the full potential injury.[9] These patients "may maintain a cause of action in negligence for this increased risk of harm, which may be described as a decreased life expectancy or the diminished probability of long-term survival."[10]

Loss of chance is controversial. In fact, some commentators have described it as "the most pernicious example of a new tort action resulting in expanded liability."[11] This article will eschew the debate over the merit of the doctrine because there is no significant chance that the doctrine will disappear in Indiana. Therefore, this article will address only the issues and complexities that arise when parties invoke the doctrine in medical malpractice litigation and will propose modest modifications to the current Model Jury Instructions and Verdict Forms to help juries accurately apply the doctrine.

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4 *See*, *e.g.*, Sawlani v. Mills, 830 N.E.2d 932, 949 (Ind. Ct. App. 2005) (stating that loss of chance, rather than increased risk of harm, applied to a situation in which an injury had not yet occurred), *trans. denied*.

5 *See Scheid*, 726 N.E.2d at 279-80.

6 *Id.* at 272; *Mayhue*, 653 N.E.2d at 1387.

7 *Scheid*, 726 N.E.2d at 278.

8 *Cahoon*, 734 N.E.2d at 539.

9 *Sawlani*, 830 N.E.2d at 947.

10 *Scheid*, 726 N.E.2d at 281.

11 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.R. 595, 598 (2010) (quoting Larry Weiss, *Tort Reform: Our Permanent Issue*, COMMON SENSE (Am. Acad. of Emergency Med., Milwaukee, Wis.), July/Aug. 2008, at 1, 4, *available at* http://www.aaem.org/commonsense/commonsense0708.pdf).

II. Background on Loss of Chance

A. Indiana's adoption of the lost chance of recovery doctrine

While other states adopted the lost chance at recovery doctrine in the late 1970s, the doctrine is a relatively new legal concept in Indiana.[12] The Indiana Supreme Court formally recognized the doctrine in 1995 in *Mayhue v. Sparkman*. The *Mayhue* court explained that the doctrine has its roots in a case addressing the duty to rescue a seaman lost at sea.[13] In the lost-at-sea context, a plaintiff can recover only if "the evidence sustains the reasonable possibility of rescue."[14]

The supreme court in *Mayhue* noted that courts had recognized two forms of the doctrine: the "pure" loss-of-chance doctrine and the approach recognized and supported by the Restatement (Second) of Torts, section 323. Under the pure loss-of-chance doctrine:

> When 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.[15]

The court found that Indiana law was more consistent with the Restatement section 323, which states:

> One who undertakes, gratuitously or for consideration, to render services 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
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> (a) his failure to exercise such care increases the risk of such harm . . . .

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12 Commentators usually identify *Hamil v. Bashline*, 392 A.2d 1280 (Pa. 1978), and *Herskovits v. Group Health Cooperative of Puget Sound*, 664 P.2d 474 (Wash. 1983) (*en banc*), as the first decisions to formally adopt loss of chance. *See* Koch, *supra* note 11, at 605 n.47 (citing Zaven T. Saroyan, *The Current Injustice of the Loss of Chance Doctrine: An Argument for a New Approach to Damages*, 33 Cumb. L. Rev. 15, 24 (2002)).

13 *See Mayhue*, 653 N.E.2d at 1387 (citing Gardner v. National Bulk Carriers, Inc., 310 F.2d 284 (4th Cir. 1962), *cert. denied*, 372 U.S. 913 (1963)).

14 *Id.* (quoting *Gardner*, 310 F.2d at 287).

15 *Id.* at 1387 (quoting Hicks v. United States, 368 F.2d 626, 632 (4th Cir. 1966)). One commentator notes that many jurisdictions cite the *Hicks* decision as the "genesis for loss of chance as a cause of action." Robert S. Bruer, *Loss of Chance as a Cause of Action in Medical Malpractice Cases*, 59 Mo. L. R. 969, 973 (1994).

Under the Restatement's approach, "once the plaintiff proves negligence and an increase in the risk of harm, the jury is permitted to decide whether the medical malpractice was a substantial factor in causing the harm suffered by the plaintiff."[16] In adopting the Restatement, the supreme court explained that the "approach establishes a more procedurally-oriented response to such claims."[17]

Five years after deciding *Mayhue*, the supreme court was faced with the issue of whether to recognize a lost chance of recovery claim in the context of a wrongful death action. In *Cahoon v. Cummings*[18] the court held that wrongful death plaintiffs could proceed on a lost chance of recovery theory despite the Wrongful Death Act's requirement that "the death of one *is caused* by the wrongful act or omission of another."[19] The court rejected the plaintiff's claim that a defendant should be liable for full wrongful death damages, however, and held that "damages are proportional to the increased risk attributable to the defendant's negligent act or omission."[20]

B. LOST CHANCE OF RECOVERY IN OTHER STATES

As the court in *Mayhue* recognized when adopting the version of the lost chance of recovery doctrine identified in section 323, states across the country have differed in their approach to the question how to deal with a patient who lost a chance of survival or a better outcome.[21] One commentator has noted that an interesting geographic trend has emerged in that "most Midwestern and plains states (including Ohio, Indiana, Illinois, Wisconsin, Iowa, Missouri, Kansas, and Oklahoma) *have* adopted the doctrine, while most southern and southeastern states (including South Carolina, Florida, Tennessee, Mississippi, Alabama, Arkansas, and Texas) have *not* adopted it."[22] As this trend suggests, efforts to completely eliminate the doctrine in Indiana through the judiciary seem unlikely to succeed.

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16 *Mayhue*, 654 N.E.2d at 1388.

17 *Id.*

18 734 N.E.2d 535 (Ind. 2000).

19 IND. CODE § 34-23-1-1 (emphasis added).

20 *Cahoon*, 734 N.E.2d at 541.

21 *See Mayhue*, 654 N.E.2d at 1389 n.5 (citing Gooding v. University Hosp. Bldg., Inc., 445 So. 2d 1015 (Fla. 1984) (applying traditional proximate cause and rejecting loss of chance); Cooper v. Sisters of Charity of Cincinnati, Inc., 272 N.E.2d 97 (Ohio 1971) (same); Thompson v. Sun City Cmty. Hosp., Inc., 688 P.2d 605 (Ariz. 1984) (adopting § 323 approach); Aasheim v. Humberger, 695 P.2d 824 (Mont. 1985); DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986) (adopting loss of chance); Scafidi v. Seiler, 574 A.2d 398 (N.J. 1990) (applying § 323 but adopting loss of chance as measure of damages)).

22 Koch, *supra* note 11, at 611.

Many states have refused to recognize lost chance of recovery altogether.[23] Courts have explained the rationale for rejecting the doctrine as follows:

> Lesser standards of proof are understandably attractive in malpractice cases where physical well being, and life itself, are the subject of litigation. The strong intuitive sense of humanity tends to emotionally direct us toward a conclusion that in an action for wrongful death an injured person should be compensated for the loss of any chance for survival, regardless of its remoteness. However, we have trepidations that such a rule would be so loose that it would produce more injustice than justice.[24]

Courts rejecting lost chance of recovery have also recognized that the doctrine is inconsistent with "a fundamental tenet of tort law that the plaintiff retains the ultimate burden of persuasion in negligence actions" and has the danger of requiring defendants to disprove causation.[25]

Other states have found that plaintiffs can recover for a lost chance of recovery only if a patient had a greater than fifty-percent prenegligence chance of recovery.[26] These states would deny recovery in the situation the supreme court *in Mayhue* specifically addressed.

As this discussion illustrates, Indiana law, although consistent with that of a significant number of other states, particularly states geographically proximate, benefits medical malpractice plaintiffs more than the law in many states. This circumstance should be kept in mind whenever plaintiffs attempt to expand the doctrine.

C. INDIANA'S RECOGNITION OF RECOVERY FOR INCREASED RISK OF FUTURE HARM

In *Scheid*, a 2000 decision, the Indiana Supreme Court held that a plaintiff could recover damages for an increased risk of future harm or a decreased life expectancy. The court noted the inherent difficulty a plaintiff faces in showing traditional causation and damages when the harm has not yet occurred:

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[23] *See* Crosby v. United States, 48 F. Supp. 2d 924, 927 n.15 (D. Alaska 1999) (recognizing that 12 states had explicitly refused to recognize the doctrine); Koch, *supra* note 11, at 606-607 (recognizing that 16 states had disavowed the doctrine).

[24] *Gooding*, 445 So. 2d at 1020 (quoting *Cooper*, 272 N.E.2d at 104).

[25] *See* Bruer, *supra* note 15 at 987 (discussing Pillsbury-Flood v. Portsmouth Hosp., 512 A.2d 1126 (N.H. 1986)).

[26] *See*, *e.g.*, Peterson v. Ocean Radiology Assocs., P.C., 951 A.2d 606, 610 (Conn. Ct. App. 2008) ("[T]he plaintiffs must first prove that had the standard of care been followed, there was a greater than 50 percent chance of avoiding the harm."); Stone v. Williamson, 753 N.W.2d 106, 107 (Mich. 2008) (recognizing that a Michigan statute "prohibits recovery for the loss of an opportunity to survive or achieve a better result unless the opportunity was greater than 50 percent"); Marvelli v. Alston, 100 S.W.3d 460, 480 (Tex. Ct. App. 2003), *rev. denied*.

> Just as it is difficult to find causation where the harm is already more than likely to occur, it seems odd to speak of a causal relationship between a defendant's act or omission and an as yet unknown ultimate result. Although an act of malpractice may reduce a patient's chances for survival or for obtaining a better result, this is simply a statistical proposition based on the known experience of a group of persons thought to be similarly situated . . . . In any given case, however, the plaintiff's ultimate injury either does or does not occur. Thus, if full recovery is awarded based on an appraisal of causation (or greater than fifty percent probability), the plaintiff who later beats the odds may be overcompensated for an injury that never ultimately emerges. Similarly, the plaintiff who has a less than fifty percent chance, but nonetheless does ultimately bear the full brunt of the disease, may be undercompensated.[27]

The court explained that this type of loss of chance, unlike the situation addressed in *Mayhue*, applies more directly to damages than to causation. The supreme court stated:

> We think that loss of chance is better understood as a description of the injury than as either a term for a separate cause of action or a surrogate for the causation element of a negligence claim. If a plaintiff seeks recovery specifically for what the plaintiff alleges the doctor to have caused, i.e., a decrease in the patient's probability of recovery, rather than for the ultimate outcome, causation is no longer debatable. Rather, the problem becomes one of identification and valuation or quantification of that injury. We view the issue presented by JoAnn's claim as whether a plaintiff may recover for an increased risk of harm, here a decreased life expectancy, caused by a doctor's negligence, before the ultimate consequences are known. Because in this case the ultimate injury is death, the increased risk of that result is a decrease in life expectancy. Although loss of chance could also be applied as a label for this injury, we do not view recognizing this injury as a deviation from traditional tort principles. Rather, in this context it is nothing more than valuation of an item of damages that is routinely valued in other contexts.[28]

In support of its conclusion that Indiana law should allow plaintiffs to recover damages for a decreased life expectancy, the supreme court discussed a 1980 decision, *Dayton Walther Corp. v. Caldwell,* in which it held a

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[27] *Scheid*, 726 N.E.2d at 277.

[28] *Id.* at 279-80.

trial court properly admitted evidence that a defendant's negligence caused a plaintiff to have an increased risk of meningitis and epilepsy, explaining that "[t]o hold otherwise would virtually wipe out any appraisal by an expert medical witness as to an estimate of permanent future impairments."[29] The *Scheid* court explained that the *Dayton Walther* decision "foreshadowed recognition of compensation for increased risk of yet unknown but serious consequences."[30] The court also addressed the proper measure of damages for an increased risk of harm claim and found a plaintiff should be entitled to recover for the reduction of the prenegligence life expectancy.[31]

Conspicuously absent from the *Scheid* decision was a discussion of the substantial body of Indiana law holding that a plaintiff cannot recover for a decreased life expectancy. In *Richmond Gas Co. v. Baker*, a 1898 decision, the Indiana Supreme Court rejected the notion that a plaintiff could recover for an injury that decreased his life expectancy. The court explained:

> That in an action for injury by the wrong of another the actual condition of the injured person, as caused by the accident, may be considered for the purpose of determining the amount of damages, present and prospective, which should be awarded. And, if the condition of the injured person is such that a shortening of life may be apprehended, this may be considered, in determining the extent of the injury, the consequent disability to make a living, and the bodily and mental suffering which will result. This, however, falls far short of authorizing damages for the loss or shortening of life itself. The value of human life cannot, as adjudged by the common law, be measured in money. It is, besides, inconceivable that one could thus be compensated for the loss or shortening of his own life.[32]

Subsequent decisions, citing *Richmond Gas*, reiterated that "there can be no recovery for shortening life itself."[33] As late as 1976, courts from other jurisdictions cited the *Richmond Gas* decision for the proposition that Indi-

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29 273 Ind. 191, 198-99, 402 N.E.2d 1252, 1256 (1980).

30 *Scheid*, 726 N.E.2d at 280.

31 *Id.*

32 Richmond Gas Co. v. Baker, 146 Ind. 600, 45 N.E. 1049, 1052 (1897).

33 Pittsburgh, C., C. & St. L. Ry. Co. v. Brown, 178 Ind. 11, 97 N.E. 145, 150 (1912); *see also* Lake Erie & W.R. Co. v. Johnson, 191 Ind. 479, 133 N.E. 732, 733 (1922) ("It is true that a consideration of the nature and extent of the injuries may lead indirectly to some consideration of their probable effect, but the jury should not be told to award damages to an injured party for the years taken off his own life by his injury."); Cleveland, C., C. & St. L.R. Co. v. Miller, 165 Ind. 381, 74 N.E. 509, 511 (1905) (holding a jury instruction on damages did not mislead the jury and noting that "[t]he jurors were told with the greatest distinctness that the plaintiff was not entitled to recover anything for the shortening of her life"); Muncie Pulp Co. v. Hacker, 37 Ind. App. 194, 76 N.E. 770, 775 (1906) ("If this instruction authorized damages for the shortening of life, it was erroneous.").

ana did not allow recovery for a shortened life expectancy.[34] It is not clear whether the *Scheid* court was aware of this prior authority and chose to take Indiana law on a different path or was not apprised of the *Richmond Gas* decision and its progeny and believed it was deciding a new issue. Regardless, although the *Richmond Gas* line of cases presents an interesting historical and academic discussion, *Scheid* is now the law.

D. INCREASED RISK OF FUTURE HARM IN OTHER STATES

As the supreme court in *Scheid* recognized, whether a plaintiff should be entitled to recover for a decreased life expectancy has divided courts.[35] Some states allow such recovery,[36] while others have specifically rejected decreased life expectancy as an element of damages.[37] The courts that reject decreased life expectancy as an element of damages, however, often allow plaintiffs other recourse for likely future harm; the courts merely hold that shortened life expectancy itself is not compensable.[38]

As with lost chance of recovery, Indiana law in the area of damages for increased risk of future harm is not an outlier. It is, however, more beneficial to medical malpractice plaintiffs than the law in other states. This factor should be considered if plaintiffs argue for an expansion of current law allowing recovery for decreased life expectancy.

III. REQUIREMENTS OF LOST CHANCE OF RECOVERY

As the Indiana Court of Appeals has explained, "[b]efore a plaintiff in a medical malpractice action may invoke the 'increased risk of harm' standard, the plaintiff must establish that it is within the class of plaintiffs to which the lesser standard of causation under Section 323 may be applied."[39]

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34 Downie v. U.S. Lines Co., 359 F.2d 344, 346 (3d Cir. 1966); Rhone v. Fisher, 167 A.2d 773, 778 (Md. 1961); Paladino v. Campos, 368 A.2d 429, 430 (N.J. Ch. Div. 1976).

35 *Scheid*, 726 N.E.2d at 280-81; *see also* Otani ex rel. Shigaki v. Broudy, 92 P.3d 192, 198 (Wash. 2004) (Sanders, J., dissenting) (recognizing the split of authority).

36 *Scheid*, 726 N.E.2d at 280-81 (collecting cases from the District of Columbia, Florida, North Carolina, Florida, Louisiana, and Ohio); *see also* Fein v. Permanente Med. Grp., 695 P.2d 665, 676 (Cal. 1985) (citing Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 594 (1974)); Bauer ex rel. Bauer v. Memorial Hosp., 879 N.E.2d 478, 500-501 (Ill. Ct. App. 2007) (collecting cases from Virginia, Indiana, Ohio, Delaware, Florida, Louisiana, North Carolina, and South Carolina).

37 Burke v. United States, 605 F. Supp. 981, 988 (D. Md. 1985) ("It is clear in Maryland that no separate damages may be allowed for the shortening of life expectancy itself."); Beeman v. Manville Corp. Asbestos Disease Comp. Fund, 496 N.W.2d 247, 256 (Iowa 1993); Wickens v. Oakwood Healthcare Sys., 465 Mich. 53, 59-60, 631 N.W.2d 686, 690 (2001) (rejecting a medical malpractice plaintiff's contention that she could recover for a loss of opportunity to survive); Verni ex rel. Burstein v. Harry M. Stevens, Inc., 903 A.2d 475, 501 (N.J. App. Div. 2006) ("[S]hortened life expectancy is not an element of loss of enjoyment of life damages in an action for personal injury."); *Paladino*, 368 A.2d at 430.

38 *See*, *e.g.*, *Burke*, 605 F. Supp. at 988-99.

39 Dughaish ex rel. Dughaish v. Cobb, 729 N.E.2d 159, 166 (Ind. Ct. App. 2000), *trans. denied.*

"If a plaintiff cannot carry his or her burden to invoke Section 323, the traditional standard of proximate cause applies."[40]

For a lost chance of recovery claim to succeed, a plaintiff must show a defendant's negligence increased the risk of harm to a patient and was a substantial factor in a patient's unfavorable outcome.[41] Specifically, a plaintiff must show: (1) a defendant health care provider was negligent; (2) the negligence increased the risk of harm to the patient; and (3) the negligence was a substantial factor in causing the injury or death.[42]

A. LOST CHANCE OF RECOVERY CLAIMS REQUIRE EXPERT TESTIMONY

To create a question of fact sufficient to preclude summary judgment or withstand a directed verdict motion, a plaintiff must have expert evidence showing the elements for lost chance of recovery.[43] Plaintiffs cannot reach a jury with testimony that speculates a patient could have had an increased risk of harm; plaintiffs must present expert testimony showing an actual increased risk of harm.[44] In other words, the lost chance of recovery doctrine is not an exception to the general rule that juries may not award damages based on mere speculation.[45]

B. A PATIENT MUST HAVE HAD A PRENEGLIGENCE CHANCE OF SURVIVAL

As a matter of common sense, a plaintiff pursuing a claim based on lost chance of recovery must show that the patient had a chance of surviving but for a health care provider's negligence. Indeed, "if the patient had no chance of survival, there is nothing lost by the defendant's conduct, even if a breach occurs."[46] Therefore, "the loss of chance concept, when properly analyzed, does not relax or lower plaintiffs' burden of proving causation."[47] However, some plaintiffs' attorneys claim that certain language in *Mayhue* allows cases to proceed upon testimony that is less than reasonably certain that a

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40 Laycock v. Sliwkowski, 12 N.E.3d 986, 991 (Ind. Ct. App. 2014).

41 *See Mayhue*, 653 N.E.2d at 1388.

42 *Id.*; Wolfe v. Estate of Custer ex rel. Custer, 867 N.E.2d 589, 597 (Ind. Ct. App. 2007), *trans. denied*.

43 *See Mayhue*, 653 N.E.2d at 1388 (recognizing that a plaintiff must prove an increased risk of harm before the jury can determine whether the alleged negligence was a substantial factor in causing the harm); Long v. Methodist Hosp. of Ind., Inc., 699 N.E.2d 1164, 1169 (Ind. Ct. App. 1998) (affirming summary judgment for the defendant where the plaintiff had no expert testimony showing an increased risk of harm), *trans. denied.*

44 *See Dughaish*, 729 N.E.2d at 166; *Long*, 699 N.E.2d at 1169; *cf.* Cutter v. Herbst, 945 N.E.2d 240, 251 (Ind. Ct. App. 2011).

45 *See Mayhue*, 653 N.E.2d at 1388 (recognizing that a plaintiff must prove an increased risk of harm before the jury can determine whether the alleged negligence was a substantial factor in causing the harm); *Long*, 699 N.E.2d at 1169 (affirming summary judgment for the defendant where the plaintiff had no expert testimony showing an increased risk of harm).

46 Hebert v. Plaquemine Caring, L.L.C., 43 So. 3d 239, 242 (La. Ct. App. 2010), *writ denied*.

47 Holton v. Memorial Hosp., 679 N.E.2d 1202, 1213 (Ill. 1997).

patient lost a chance of survival. A careful reading of the decision shows otherwise.

In adopting section 323, the court in *Mayhue* discussed in some detail an Oklahoma decision, *McKellips v. Saint Francis Hospital*, in which the Oklahoma Supreme Court explained that health care providers "should not be given the benefit of the uncertainty created by their own negligent conduct."[48] Some plaintiffs will argue that this language means a plaintiff can proceed to a jury even without expert testimony stating that a patient had a prenegligence chance of survival. But the uncertainty referred to by the *Mayhue* and *McKellips* courts was about whether a patient would have survived—not whether a patient had a prenegligence chance of survival. In fact, the *McKellips* court made clear that patients must prove a prenegligence chance of recovery, holding that a plaintiff must have "proof that the defendant's conduct increased the risk of harm or death by substantially decreasing the chance of recovery or survival."[49] Only after such proof is established may the jury permissibly decide whether the defendant's negligence caused the death or other harm.[50]

C. A PLAINTIFF MUST HAVE EVIDENCE OF A PATIENT'S PRE- AND POSTNEGLIGENCE CHANCES OF SURVIVAL EXPRESSED IN PERCENTAGES

In wrongful death cases, a plaintiff pursuing a lost chance of recovery claim may recover "the total amount of damages ordinarily allowed in a wrongful death suit multiplied by the difference between the pre-negligence and post-negligence chances of survival."[51] The jury should hear expert testimony establishing in percentages the prenegligence chance of survival and the postnegligence chance of survival. Allowing the jury to calculate damages without testimony on these percentages would lead to wholly speculative damages awards.[52]

The *Mayhue* decision itself provides support for the requirement of expert testimony expressed in terms of percentages. Specifically, as the supreme court explained in a subsequent decision:

> [O]nce causation is established under *Mayhue,* the plaintiff is to receive the proportion of damages traceable to the defendant's negligent act or omission. Specifically, we adopted the standard for measuring damages under Section 323 of the Restatement of

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48 *Mayhue*, 653 N.E.2d at 1389 (quoting McKellips v. St. Francis Hosp., 741 P.2d 467, 474 (Okla. 1987)).

49 *McKellips*, 741 P.2d at 475.

50 *Id.*

51 *Everhart*, 960 N.E.2d at 132.

52 *Cf.* Clarian Health Partners Inc. v. Sprunger, 999 N.E.2d 473 (Ind. Ct. App. 2013) (unpublished decision) (holding trial court improperly gave instruction that "caused the jury to speculate on awarding damages for a reduced chance of survival").

> Torts as set forth in [the Oklahoma Supreme Court's decision in *McKellips*]. In *McKellips,* the court held that statistical evidence should be admitted to determine the "lost chance" by subtracting the decedent's postnegligence chance of survival from decedent's prenegligence chance of survival. Then, "[t]he amount of damages recoverable is equal to the percent of chance lost multiplied by the total amount of damages which are ordinarily allowed in a wrongful death action."[53]

This explanation of the doctrine's application requires statistical evidence and a mathematical calculation of a plaintiff's net damages. Without pre- and postnegligence percentages, calculating damages in this fashion would be impossible.

The court in *Mayhue* also discussed and expressed approval of *Herskovits v. Group Health Cooperative of Puget Sound*, a Washington decision applying section 323.[54] In *Herskovits*, the decedent had a thirty-nine-percent prenegligence chance of survival and a twenty-five-percent postnegligence chance of survival.[55] The court implicitly recognized that verdicts based purely on speculation are improper and that a plaintiff must present evidence showing a patient's prenegligence chance of survival in order to proceed, stating: "Where percentage probabilities and decreased probabilities are submitted into evidence, there is simply no danger of speculation on the part of the jury."[56]

The Indiana Court of Appeals decision in *Wolfe v. Estate of Custer* also holds that plaintiffs must provide expert testimony, expressed in terms of percentages, to succeed on a lost chance of recovery claim. Although the court rejected an argument that a plaintiff must have such testimony to prove causation, it held that "evidence of quantification *is required* in relation to the damages issue in a § 323 case."[57] Because damages is a necessary element of a medical malpractice claim,[58] the distinction between damages and causation, although important, should not ultimately affect what evidence a plaintiff needs to reach a jury.

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53 Smith v. Washington, 734 N.E.2d 548, 551 (Ind. 2000) (internal citations omitted).

54 *See Mayhue*, 653 N.E.2d at 1388 (discussing Herskovits v. Group Health Coop. of Puget Sound, 664 P.2d 474 (Wash. 1983) (*en banc*)).

55 *Herskovits*, 664 P.2d at 476.

56 *Id.* at 478; *see also* Koch, *supra* note 11 at 634-35 ("[T]he statistical evidence on which the plaintiff's expert testimony is based must be reliable enough to eliminate speculation and guessing from the calculation of what chance of recovery the plaintiff actually lost.").

57 Wolfe v. Estate of Custer ex rel. Custer, 867 N.E.2d 589, 599 nn.10 and 11 (Ind. Ct. App. 2007), *trans. denied* (emphasis added).

58 Martin v. Richey, 711 N.E.2d 1273, 1284 (Ind. 1999) (recognizing that "injury and damages" are "an essential element of any negligence claim").

This concept is illustrated by a 2012 unpublished Indiana Court of Appeals decision, *Pine v. Stirling Clinic*.[59] In *Pine*, the court of appeals affirmed a grant of summary judgment to a health care provider in a lost chance of recovery case on the grounds that the plaintiff had no expert testimony "as to [the patient's] percentage chance of survival [before the alleged negligence]. Therefore, because [plaintiff] failed to produce quantitative evidence of the risk of harm, his claim fails."[60] Although *Pine* cannot be cited as precedent under Indiana's Appellate Rules, the decision accurately applies citable precedent and uses sound logic to reach its result.

D. THE OPEN QUESTION OF WHAT TO DO WITH A PATIENT WHOSE PRENEGLIGENCE CHANCE OF SURVIVAL WAS AT LEAST FIFTY PERCENT

An arguably open question is whether the lost chance of recovery doctrine applies when a patient stood a better than fifty-percent chance of recovery before medical negligence. In *Cutter v. Herbst*,[61] the Indiana Court of Appeals held that the doctrine applies when a plaintiff's prenegligence chance of survival exceeded fifty percent. Judge Robb dissented and explained:

> I believe the Supreme Court in *Mayhue* adopted the Restatement approach in which damages are assessed for the increased risk of harm for only those cases in which proximate cause for the ultimate injury could not otherwise be proven because the patient already had a greater than 50% chance of that injury occurring even in the absence of negligence. Where the patient's chance of survival is greater than 50% absent the negligence, however, traditional tort principles adequately address the injury and applying the Restatement approach is unnecessary.[62]

Judge Robb made the same point in her dissenting opinion in *Indiana Department of Insurance v. Everhart*,[63] in which the Indiana Supreme Court granted transfer. The supreme court in *Everhart* had the opportunity to address the issue but decided that the case was an "inappropriate vehicle for deciding whether to do so."[64] Specifically, the court found that principles of joint and several liability applied and made it unnecessary to decide whether the defendant at issue was entitled to a reduced verdict.

Recently, in *Laycock v. Sliwkowski*, the Indiana Court of Appeals again addressed the question and found that the doctrine does not apply to pa-

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[59] 964 N.E.2d 316 (Ind. Ct. App. 2012).

[60] *Id.*

[61] 945 N.E.2d 240 (Ind. Ct. App. 2011).

[62] *Id.* at 251.

[63] 939 N.E.2d 1106 (Ind. Ct. App. 2010), *trans. granted*.

[64] *Everhart*, 960 N.E.2d at 135.

tients whose prenegligence chance of survival exceeded fifty percent.[65] The court did not discuss the *Cutter* opinion but looked at language used by the courts in *Mayhue* and *Everhart* as well as the supreme court's decision in *Robertson v. B.O.*, which involved the situation in which a decedent's prenegligence chance of survival was less than fifty percent. The court in *Robertson* stated that "[f]or these types of cases—and *only* these types of cases—in *Mayhue* we adopted the Restatement (Second) of Torts § 323 (1965) increased risk of harm approach."[66] Based on this language, the court in *Laycock* concluded that "it is clear that our supreme court intended for *Mayhue* to alter the standard of causation only in cases where a patient has a fifty percent or worse chance of recovering, not in all cases in which a plaintiff alleges an increased risk of harm."[67]

Therefore, the court of appeals is currently split on the issue of whether the doctrine applies to patients who stood a greater than fifty-percent chance of recovery before a health care provider's negligence. Judge Robb, in her dissenting opinion in *Cutter*, and the *Laycock* panel persuasively point out that language used by the supreme court suggests that the doctrine applies only when the chances of recovery were fifty percent or less.[68] But until the supreme court directly addresses the issue, the question remains open and parties may attempt to raise the doctrine even if a patient had a greater than fifty-percent chance at recovery before any alleged negligence.

IV. Requirements of Increased Risk of Future Harm

A. plaintiffs must prove traditional negligence elements

In recognizing the compensability of a risk of future harm, the *Scheid* court noted that the theory is more accurately identified as "a description of the injury than as either a term for a separate cause of action or a surrogate for the causation element of a negligence claim."[69] Therefore, a plaintiff seeking to recover under a theory that a health care provider's negligence caused a risk of future harm must still show the traditional elements of duty, breach, and proximate cause.[70] Proximate cause, in such cases, does not mean proximate cause of death or the ultimate injury but instead refers to proximate cause of the increased risk of death or ultimate injury.[71] As

65 12 N.E.3d 986 (Ind. Ct. App. 2014).

66 977 N.E.2d 341, 346 (Ind. 2012).

67 *Laycock*, 12 N.E.3d at 992.

68 In interests of full disclosure, the author served as a judicial law clerk for Judge Robb.

69 *Scheid*, 726 N.E.2d at 279-80.

70 *Id.* at 279.

71 *See Sawlani*, 830 N.E.2d at 940 ("Mills was also required to prove that the increased risk of harm was caused by Sawlani's act or omission. Thus, Mills was also required to prove that Sawlani failed to meet the appropriate standard of care by failing to diagnose her cancer in 1997 and that this failure caused the increased risk of harm.").

the increased risk is the measure of damages, evidence that a patient's life expectancy was already shorter than average before the alleged negligence, although likely irrelevant to causation, is highly relevant to damages.[72]

B. CURRENTLY, ANY RISK OF FUTURE HARM IS COMPENSABLE

The court in *Scheid* noted that some jurisdictions require plaintiffs to show that the risk of future harm is "significant" but declined to adopt a similar requirement.[73] The court explained:

> Because we measure damages by probabilizing the injury, the likelihood that plaintiffs will bring claims for trivial reductions in chance of recovery seems small. If, in the future, we face a volume of insignificant claims, perhaps such a rule will become necessary. For now, we are content to rely on basic economics to deter resort to the courts to redress remote probabilities or insubstantial diminutions in the likelihood of recovery.[74]

Therefore, although under current law a plaintiff with a one-percent chance of future harm could permissibly bring a claim, a defendant faced with such a claim would be well served to point out that the *Scheid* court did not envision such claims being brought and could use the case as a catalyst to convince the court of appeals or supreme court that more concrete guidance is necessary.

V. FACTORS TO CONSIDER WHEN DECIDING WHETHER TO ARGUE THAT A CASE INVOLVES LOST CHANCE OF RECOVERY

In many cases, the plaintiff's counsel will dictate whether a case proceeds under a lost chance of recovery or traditional proximate cause theory. Indeed, the doctrine generally benefits plaintiffs, and it is ultimately a plaintiff's burden to show that the doctrine applies.[75] But in some cases in which a plaintiff has not raised the doctrine, defense counsel may be faced with the choice of raising the doctrine or allowing the plaintiff to proceed solely on a traditional proximate cause theory. There are two important considerations involved in making that decision: (1) the chance of a defense verdict based on causation and (2) the importance of reducing damages.

The primary purpose of allowing a plaintiff to recover for a lost chance of recovery is to assist a plaintiff who was harmed but could not prove tradi-

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72 Short v. United States, 908 F. Supp. 227, 239 (D. Vt. 1995) (reducing life expectancy from 20 years to 15 years); Simon v. Smith, 470 So. 2d 941, 945 (La. Ct. App. 1985), *writ denied,* 476 So. 2d 353 (La. 1985), and *writ denied,* 476 So. 2d 355 (La. 1985).

73 *Scheid*, 726 N.E.2d at 282 n.13 (citing Dickey ex rel. Dickey v. Daughety, 917 P.2d 889, 890-91 (Kan. 1996), and *Perez v. Las Vegas Med. Ctr.*, 805 P.2d 589, 592 (Nev. 1991)).

74 *Id.*, 726 N.E.2d at 281-82.

75 *Laycock*, 12 N.E.3d at 991.

tional proximate cause. If a plaintiff is willing to forego this benefit in an attempt to recover full damages, a defendant should think very carefully about raising the doctrine, as doing so could give the plaintiff a better chance of a plaintiff's verdict.

The benefit to a defendant of a verdict based on lost chance of recovery is that a plaintiff does not recover full damages. Obviously, every defendant has some interest in keeping a damages award to a minimum. But in medical malpractice cases involving qualified providers and substantial medical bills or a death, a defendant's interest may be somewhat reduced, as that defendant's maximum exposure is capped at $250,000,[76] and even a reduced award could exceed this amount. A qualified provider facing a wrongful death claim would be less interested in the benefit of a reduced damages award than would a nonqualified provider. To the qualified provider, any reduced chance of a defense verdict may not be worth any possible benefit of reduced damages. A nonqualified provider faces a much different analysis. Would it be better to proceed to trial with a seventy-five-percent chance of a defense verdict on a case in which total damages are expected to approach three million dollars, or to proceed with a fifty-percent chance of a defense verdict where it is reasonable to expect damages will be reduced by sixty percent? There is no right answer to this question; the answer likely turns on available defenses, a defendant's ability to absorb a large verdict, stomach for risk, motivation to exonerate the defendant's conduct, and insurance policy limits.

This article will not attempt to address all potential situations or to recommend whether to raise the doctrine. However, it is reasonably foreseeable that some defendants will prefer to proceed to trial on a claim alleging lost chance of recovery and, therefore, defense counsel should at least consider the issue in conjunction with a particular defendant's needs, interests, and circumstances.

VI. Jury Instructions and Verdict Forms

The current Model Jury Instructions include instructions on both lost chance of recovery and increased risk of harm. As discussed below, although the current instructions are a significant improvement over those that existed before 2013, some modest revisions or additions to the current instructions and verdict forms would help fully and accurately instruct juries on the doctrines.

A. instructions on lost chance of recovery

1. The Former Model Instruction

Before 2013 revisions, the Model Jury Instruction on lost chance of recovery stated:

[76] Ind. Code §§ 34-18-3-1; 34-18-14-3.

> A [*type of health care provider*] may be liable to a patient for an increased risk of future physical harm resulting from the [*type of health care provider*]'s failure to exercise reasonable care. The patient may recover for an increased risk of future physical harm even if the full consequences of the [*type of health care provider*]'s actions are not yet known.
>
> To recover damages from [*defendant*], [*plaintiff*] must prove by the greater weight of the evidence that:
>
> (1) [*defendant*]'s care and treatment of [*plaintiff*] fell below the appropriate standard of care;
> (2) [*defendant*]'s failure to meet the appropriate standard of care was a responsible cause in increasing the risk of future harm to [*plaintiff*]; and
> (3) had [*defendant*] met the appropriate standard of care, [*plaintiff*] had a chance of avoiding the future harm.
>
> In determining the amount of damages to award [*plaintiff*] for increased risk of harm, if any, you must first decide the percentage value of the increased risk of harm to [*plaintiff*].
>
> To make this determination, consider the evidence presented about:
>
> (4) [*plaintiff*]'s risk of incurring the future harm before [*defendant*]'s alleged negligent acts or omissions, and
> (5) [*plaintiff*]'s risk of incurring the future harm after [*defendant*]'s alleged negligent acts or omissions.
>
> These chances should be expressed as percentages. The difference between the first percentage and the second percentage is the percentage value of [*plaintiff*]'s increased risk of future harm.
>
> After determining the percentage value of [*plaintiff*]'s increased risk of future harm, you must determine the total value of the increased risk of future harm to [*plaintiff*] based on the evidence presented.
>
> [In making this determination, you may consider: (*insert damage elements*.)][77]

This instruction presented many problems. What is more, the instruction omitted a fundamental requirement of increased risk of harm: a health care provider's breach must be a substantial factor in causing the patient's

[77] INDIANA MODEL JURY INSTRUCTION (CIVIL) 1555 (2011).

injury.[78] When adopting the increased risk of harm theory, the supreme court in *Mayhue* specifically recognized that a "plaintiff must still prove by a preponderance of evidence that the defendant's negligence was a substantial factor in causing the plaintiff's harm."[79] Further, in *Cahoon*, the supreme court held an instruction informing that jury that, among other things, it must determine whether the increased risk of harm was a substantial factor in causing a patient's death accurately stated the law.[80] The "substantial factor" requirement is an important element on which the jury should be instructed.

Second, the instruction mixed the elements of an increased risk of future harm claim with the elements of a lost chance of recovery claim by instructing the jury to determine "the total value of the increased risk of future harm." In adopting the increased risk of harm theory, *Mayhue* rejected the traditional theory that awards damages for the value of the increased risk of harm. The court first recognized that under the traditional version of the doctrine "[t]he compensable injury is not the result, which is usually death, but the reduction in the probability that the patient would recover or obtain better results if the defendant had not been negligent."[81] The court in *Mayhue*, however, did not adopt this approach and instead adopted the Restatement section 323.

2. The Current Model Instruction

The 2013 revisions to the Model Instruction addressed many of the problems that existed with the prior instruction. The current Model Instruction states:

> A [type of health care provider] may be liable to a patient for a loss of chance of survival resulting from the [type of health care provider]'s failure to exercise reasonable care.
>
> To recover damages from [defendant], [plaintiff] must prove by the greater weight of the evidence that:
>
> (1) [defendant]'s care and treatment of [plaintiff] fell below the appropriate standard of care;
> (2) if [defendant] had met the appropriate standard of care, [plaintiff] would have had a chance of survival;
> (3) [defendant]'s failure to meet the appropriate standard of care decreased [plaintiff]'s chance of survival; and

78 *See Mayhue*, 653 N.E.2d at 1388; *Wolfe*, 867 N.E.2d at 597.

79 *Mayhue*, 653 N.E.2d at 1388 (citing *McKellips,* 741 P.2d at 475).

80 *Cahoon*, 734 N.E.2d at 539-40.

81 *Mayhue*, 653 N.E.2d at 1387.

(4) [defendant]'s failure to meet the appropriate standard of care was a substantial factor in causing the harm to [plaintiff].

In determining the amount of damages to award [plaintiff] for a lost chance of survival, if any, first decide the percentage value of the lost chance of survival to [plaintiff].

To make this determination, consider the evidence presented about:

(5) [plaintiff]'s percentage chance of survival before [defendant]'s alleged negligent acts or omissions, and
(6) [plaintiff]'s percentage chance of survival after [defendant]'s alleged negligent acts or omissions.

The difference between these percentages is the percentage value of [plaintiff]'s lost chance of survival.

After determining the percentage value of [plaintiff]'s lost chance of survival, determine the value of the total damages based on the evidence presented.

Multiply this dollar amount by the percentage value of [plaintiff]'s lost chance of survival. I will give you a verdict form that will help guide you through this process.

It is important to note the distinct nature of the third and fourth elements. A plaintiff must prove that a health care provider's negligence caused an increased risk of harm, not merely that the negligence was a substantial factor in increasing the harm.[82] These concepts can become blurred and, if not clearly delineated, alter and reduce a plaintiff's burden of proof.

The instruction's requirement that the jury identify percentages provides a safeguard against verdicts supported by speculation. Although general verdicts assigning damages are nearly impossible to attack, a verdict stating that a health care provider's negligence caused a patient to lose a specific percentage of chance when the evidence provides no support for that finding would be assailable. The permissibility of this aspect of the instruction is discussed in more detail below.

[82] Perkins v. Shah, 904 N.E.2d 729 (Ind. Ct. App. 2009) (unpublished opinion) (holding a jury instruction stating that a plaintiff must prove "defendants' negligence *was a substantial factor in* reducing the decedent's chance of survival" did not correctly state the law but also holding the error was harmless based on other instructions).

3. Proposed Change to the Model Instruction

The only aspect of this instruction that should be questioned is the directive that the jury should perform the calculation that reduces a plaintiff's damages. As discussed below, a court is perfectly capable of performing the mathematical calculation and entering a judgment in an appropriate amount based on the jury's damage award and percentage findings.

Finally, although a separate instruction will likely inform the jury that it should consider only expert testimony on medical causation issues, including a statement in the lost chance of recovery instruction that reminds the jury that a plaintiff is required to demonstrate the lost chance of recovery elements through expert testimony would be appropriate and helpful.

B. PLAINTIFF'S VERDICT FORM IN A LOST CHANCE OF RECOVERY CASE

1. The Model Verdict Form

The Current Model Verdict Form for a lost chance of recovery case involving a death states:

> We, the Jury, decide in favor of the Plaintiff [name], and against the Defendant, [name], and we find the following:
>
> [decedent]'s chance of survival before [defendant] fell below the appropriate standard of care ___%
>
> – [decedent]'s chance of survival after [defendant] fell below the appropriate standard of care ___%
>
> = Percentage value of lost chance of survival ___%
>
> We further specify that the amount of damages to be awarded to [name of personal representative], in [his][her][its] capacity as personal representative of [decedent]'s estate, and [names of surviving dependent children, surviving spouse, and surviving dependent next of kin] are as follows:
>
> [name of personal representative] $___
>
> only for reasonable medical, hospital, funeral, and burial expenses, and the cost of administering decedent's estate)
>
> \+ [names of surviving dependent children, surviving spouse, and surviving dependent next of kin] $___
>
> Total damages $___
>
> x Percentage value of lost chance of survival ___%
>
> = Plaintiff's verdict amount $___

2. Proposed Modifications

The only proposed modification to this form is that, instead of allowing the jury to make this calculation, such task should fall to a court.[83] Courts have proven perfectly capable of modifying damage awards in a variety of instances, such as those where a statutory cap on damages exists, claims against insurance companies where a jury's verdict exceeds policy limits, and claims in which a defendant is entitled to a set-off. Having the court perform the calculation guards against a jury working backwards and first determining what the jury wants to ultimately award a plaintiff and then choosing a total damages award that allows the jury to do so. Further, no unfair prejudice would exist to a plaintiff if a court performs the modification to the damages award. The procedure simply provides a safeguard to ensure that a judgment in a lost chance of recovery case accurately reflects a plaintiff's damages.

3. Requiring the Jury to Identify Percentages Does Not Result in an Impermissible Special Verdict

It is important to note that the Model Verdict Form, with or without the suggested modification, resembles what the court of appeals in *Sawlani v. Mills* described, in dicta, as an impermissible special verdict. The court noted that verdict forms identifying the percentage of fault are used in actions governed by the Comparative Fault Act, but that "[u]nlike in comparative fault actions, we do not have statutory authority for such verdict forms [in medical malpractice cases]."[84] Although the court's statement was dicta, it warrants attention, respect, and consideration.

A special verdict is "[a] verdict in which the jury makes findings only on factual issues submitted to them by the judge, who then decides the legal effect of the verdict."[85] Trial Rule 49 abolished special verdicts and interrogatories to a jury "to eliminate the confusion and lack of finality generated by a maze of potentially confusing subsidiary questions."[86] Both the supreme court and court of appeals have explained that a verdict form sent to the jury is permissible under Rule 49 if it requires the jury to determine the "ultimate facts required to be resolved by the jury."[87] The supreme court has similarly explained that a verdict is general, not special, if it is "[a] finding by the jury in terms of the issue, or all the issues, referred to

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[83] *See McKellips*, 741 P.2d at 476-77.

[84] *Sawlani*, 830 N.E.2d at 949.

[85] BLACK'S LAW DICTIONARY 1593 (8th ed. 2004).

[86] Wilkes v. State, 917 N.E.2d 675, 687 (Ind. 2009).

[87] Wood v. State, 988 N.E.2d 374, 377 (Ind. Ct. App. 2013) (quoting *Wilkes*, 917 N.E.2d at 687).

them."[88] Verdict forms are impermissible, on the other hand, if they ask for "preliminary or subsidiary findings leading to the ultimate verdict."[89]

Thus, the court of appeals has approved jury forms asking the jury to determine whether a defendant "knowingly or intentionally possessed a firearm,"[90] whether the state "'has/has not' proved beyond a reasonable doubt that appellant was convicted of each of the four alleged prior felonies; whether appellant 'has/has not accumulated two or more prior unrelated felony convictions'; and whether 'he is/is not an habitual offender.'"[91]

It is also worth noting that *Sawlani*'s distinction between a case governed by the Comparative Fault Act, in which a statute provides authority for what the court deemed a special verdict, and a common-law negligence case, to which the Comparative Fault Act does not apply, is not necessarily appropriate. To the extent a statute conflicts with a trial rule, the trial rule prevails.[92] In other words, the Comparative Fault Act should not be interpreted to allow a special verdict prohibited by Trial Rule 49.

The current Model Verdict Form should not run afoul of Trial Rule 49 and is consistent with the supreme court's explicit holding that the appropriate measure of damages in a lost chance of recovery case is "equal to the total amount of damages ordinarily allowed in a wrongful death suit multiplied by the difference between the pre-negligence and post-negligence chances of survival."[93] That being said, until the court of appeals approves the Model Verdict Form, using a general verdict form along with an instruction explaining how to calculate damages would be a defensible strategy aimed at eliminating a potential appealable issue.

C. INSTRUCTIONS FOR INCREASED RISK OF FUTURE HARM

1. The Current Model Instructions

The Model Instructions include two instructions that are relevant to a claim involving an increased risk of future harm. The instructions state:

> 1556. Loss of Chance—Increased Risk of Future Harm
>
> If you decide that [defendant] was negligent, and that [defendant]'s negligence was a substantial factor in increasing [plaintiff]'s risk of future harm, then you must decide the amount of money that will fairly compensate [plaintiff] for that increased risk.

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88 Denton v. State, 496 N.E.2d 576, 582 (Ind. 1986) (quoting BLACK'S LAW DICTIONARY 1399 (5th ed. 1979)).

89 *Wood*, 988 N.E.2d at 377 (quoting *Wilkes*, 917 N.E.2d at 687).

90 *Id.* at 378.

91 *Denton*, 496 N.E.2d at 582.

92 State ex rel. Gosnell v. Cass Cir. Ct., 577 N.E.2d 957, 958 (Ind. 1991).

93 *Everhart*, 960 N.E.2d at 133; *see also Cahoon* at 540-41 (citing *McKellips,* 741 P.2d at 476-77).

> [Plaintiff]'s increased risk of future harm is the difference between [plaintiff]'s risk of harm before and after [defendant]'s negligence.
>
> In determining how much [plaintiff]'s risk of harm was increased, you may consider the medical and statistical evidence the parties have submitted.
>
> The money awarded for these damages is separate from, and must not duplicate, money awarded for any other damages.
>
> 1557. Lost Chance—Reduced Life Expectancy
>
> If you decide that [defendant] was negligent, and that [defendant]'s negligence was a substantial factor in reducing [plaintiff]'s chance for a better result, then you must decide the amount of money that will fairly compensate [plaintiff] for that reduced chance.
>
> [Plaintiff]'s decreased chance for a better result is the difference between [plaintiff]'s chance for a better result before and after [defendant]'s negligence.
>
> In determining how much [plaintiff]'s chance for a better result was decreased, you may consider the medical and statistical evidence the parties have submitted.
>
> The money awarded for these damages is separate from, and must not duplicate, money awarded for any other damages.

2. Problems with the Current Model Instructions

A significant problem exists with the current instructions. The instructions tell the jury to award damages if a defendant's conduct was a substantial factor in increasing the plaintiff's risk of future harm. The comments to the Model Instructions state, "[The] Committee has returned to its use of the term 'substantial factor' instead of 'responsible cause' in the loss of chance instructions, Nos. 1555-1557, based on the use of the term in loss of chance cases." As support, the committee cites the supreme court's decision in *Atterholt v. Herbst*,[94] and the court of appeals' decisions in *Sawlani v. Mills*[95] and *Cutter v. Herbst*.[96] The courts in *Atterholt* and *Sawlani* did use the term *substantial factor* in these decisions. However, the courts used the term in the context of the elements of a lost chance at recovery claim, not in

[94] 902 N.E.2d 220 (Ind. 2009).

[95] 830 N.E.2d 932 (Ind. Ct. App. 2005).

[96] 945 N.E.2d 240 (Ind. Ct. App. 2011).

the context of a lost chance of future harm claim.[97] As discussed above, a plaintiff pursuing a lost chance at recovery claim must show that a defendant caused an increased risk of harm and that the malpractice was a substantial factor in causing the patient's harm.[98] The *Atterholt* and *Sawlani* decisions, therefore, do not support the proposition that a plaintiff seeking damages for increased risk of future harm need meet only the substantial factor burden.

To recover damages for increased risk of future harm, a plaintiff must prove traditional proximate cause of a risk of future harm and not merely that conduct was a substantial factor.[99] The current Model Instructions, therefore, misstate the law and lower a plaintiff's burden of proof.

3. Proposed Instructions on Increased Risk of Future Harm

Before the adoption of the current Model Instructions 1556 and 1557, Judge Baker expressed displeasure with the former Model Instruction 1557 and recommended the following instruction in decreased life expectancy cases.[100] He wrote:

> In determining the amount of damages to award the plaintiff, you must decide whether the defendant's negligence caused a decrease in the plaintiff's life expectancy.
>
> To make this determination, you should carefully consider the evidence presented as to what plaintiff's normal life expectancy would have been had the alleged negligent acts or omissions not occurred, compared to her life expectancy now as shown by the evidence.
>
> If you find that the plaintiff has a decreased life expectancy proximately caused by the defendant's negligence, then you may award such damages as you believe will fairly compensate the plaintiff for this loss. You must value plaintiff's damages based upon the difference between the plaintiff's life expectancy before and after defendant's negligence. In addition to considering the change in plaintiff's overall life expectancy, you may also consider the loss of

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97 *See Atterholt*, 902 N.E.2d at 223 ("We adopted Section 323 of the Restatement (Second) of Torts and explained the proper approach to such claims: 'when a plaintiff proves negligence and an increase in the risk of harm, the jury is permitted to decide whether the medical malpractice was a substantial factor in causing the harm suffered by the plaintiff.'" (quoting *Mayhue,* 653 N.E.2d at 1388)); *Sawlani*, 830 N.E.2d at 938-39 (quoting *Mayhue*, 653 N.E.2d at 1389); *id.* at 944-45 (discussing *Cahoon*, 734 N.E.2d at 540). The *Cutter* decision does not include the term *substantial factor*.

98 *See Mayhue*, 653 N.E.2d at 1389.

99 *See Scheid*, 726 N.E.2d at 279-80; *Sawlani*, 830 N.E.2d at 940.

100 The comments to Model Instruction 1556 note that the instruction is based in part on Judge Baker's dissenting opinion.

> opportunity for a cure and unnecessary physical pain and mental suffering.
>
> In considering the extent of loss of life expectancy, you may consider the medical and statistical evidence submitted by the parties to guide your determination.
>
> If you decide that the plaintiff has a decreased life expectancy proximately caused by the defendant's negligence, you are not to assess damages that would occur beyond the life expectancy determined by you.[101]

The Illinois Court of Appeals has also identified a recommended instruction for this context:

> [Plaintiff] claims that he has suffered an increased risk of a decreased life expectancy as a result of the defendants' negligence. The plaintiff is entitled to recover damages for harm resulting from a failure to exercise reasonable care. If the failure to exercise reasonable care increases the risk that such harm will occur in the future, the plaintiff is entitled to compensation for the increased risk. In order to award this element of damages, you must find a breach of duty that was a substantial factor in causing a present injury which has resulted in an increased risk of future harm. The increased risk must have a basis in the evidence. Your verdict must not be based on speculation. The plaintiff is entitled to compensation to the extent that the future harm is likely to occur as measured by multiplying the total compensation to which the plaintiff would be entitled if the harm in question were certain to occur by the proven probability that the harm in question will in fact occur.[102]

Both Judge Baker's proposed instruction and the instruction approved by the Illinois court address the deficiency in the current Model Instructions and identify the pertinent issues for the jury more completely than the current Model Instructions.

VII. CONCLUSION

For better or worse, loss of chance appears here to stay in Indiana. Although courts adopted the doctrine to assist plaintiffs, the doctrine does not have to be pernicious for defendants. When properly applied and limited in scope, the doctrine can result in a more appropriate and reasonable mea-

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101 *Sawlani*, 830 N.E.2d at 949-50 (Baker, J., concurring in result).

102 Bauer ex rel. Bauer v. Memorial Hosp., 879 N.E.2d 478, 499 (Ill. Ct. App. 2007).

sure of damages than traditional proximate cause. The doctrine should not relieve plaintiffs of the burden of proving causation; although the plaintiff need not show that the negligence caused the ultimate outcome, the plaintiff still must show that the negligence caused the decreased chance of cure. The requirement that plaintiffs' experts must express the decreased chance in terms of percentages can present excellent opportunities on cross-examination to weaken experts' opinions and set up summary judgment or directed verdict motions.

Finally, Indiana jurisprudence on the doctrine is less advanced than that of other states. As Indiana law is already somewhat more favorable to plaintiffs than that of other jurisdictions, when open issues arise, out-of-state law will likely provide some support for modest limitations on the doctrine and thus protect health care providers from further expansions of tort liability.