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So You're Telling Me There's a Chance: An Examination of the Loss of Chance Doctrine Under Nebraska Law

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Comment*

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I. INTRODUCTION

Imagine a lawyer sitting in her office in Lincoln, Nebraska, when a client walks in—her name is Mary. Mary tells the lawyer the following story about her husband, Lloyd. Lloyd was experiencing horrific pain in his throat and chest one day while driving a client to the airport in his limousine. Due to the pain, he decided he needed to see a

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doctor. He went to see Dr. Harry Dunne, who told him that he should not be worried and diagnosed him with gastroesophageal reflux disease, more commonly known as acid reflux. Dr. Dunne told Lloyd to stay away from spicy and fatty foods and to take some over-the-counter antacid medicine. At first, these suggestions helped, and Lloyd continued with life as normal. Approximately a year later, Lloyd started coughing up blood and having severe pain in his throat and chest. Extremely concerned, he returned to Dr. Dunne who immediately sent Lloyd to get x-rays and a throat biopsy. The test determined that Lloyd had hypopharyngeal cancer, a type of throat cancer. Shortly after that, Lloyd died as a result of the cancer.

The lawyer decided to take the case. Through expert witnesses, the lawyer determined that if Dr. Dunne had correctly diagnosed the cancer on the first try, Lloyd would have had a 49% chance of survival. However, after the delayed treatment, Lloyd only had a 10% chance of survival. The experts also helped the lawyer determine that Dr. Dunne breached the standard of care and that he was the direct and proximate cause of the lost chance of survival. Knowing all of this, what should the lawyer do? Can Mary recover any damages for Lloyd's wrongful death?

This hypothetical is an example of a traditional "loss of chance" case where the patient's original chance of survival was less than 50%. The loss of chance doctrine is a tort theory that allows plaintiffs to recover damages for their lost chance of survival or chance of a better outcome.[1] The problem for Mary is that she lives in Nebraska, one of the few states that does not recognize recovery under the loss of chance doctrine.

This Comment examines the loss of chance doctrine and its different permutations. It argues that Nebraska should adopt the "distinct compensable injury" approach to the loss of chance doctrine to allow patients to recover damages when their original chance of survival or better outcome is less than 50%. Nebraska should adopt this form of the loss of chance doctrine because it is consistent with traditional tort law principles and it provides vulnerable patients with a form of recovery that can help protect them from the negligence of their healthcare professionals. Most importantly, the reasons the Nebraska Supreme Court previously listed in opposition to the loss of chance doctrine are not persuasive.

Part II of this Comment will survey the history and the three distinct approaches to the loss of chance doctrine: the "all or nothing" approach, the "relaxed standard of proof" approach, and the "distinct compensable injury" approach. Part III will examine the status of the

1. *See* Steven R. Koch, Comment, *Whose Loss Is It Anyway? Effects of the "Lost-Chance" Doctrine on Civil Litigation and Medical Malpractice Insurance*, 88 N.C. L. REV. 595, 598–603 (2010).

loss of chance doctrine in Nebraska. Part IV will analyze why the Nebraska Supreme Court is misguided in refusing to adopt the loss of chance doctrine and will also discuss the policy reasons supporting Nebraska's adoption of the loss of chance doctrine.

II. THE LOSS OF CHANCE DOCTRINE AND ITS DIFFERENT PERMUTATIONS

The loss of chance doctrine is a legal theory that has been accepted and applied in a majority of states.[2] However, not all courts are willing to accept the so-called "radical" doctrine. The doctrine "has been described as 'the most pernicious example of a new tort action result-

2. *See, e.g.*, Thompson v. Sun City Cmty. Hosp., 688 P.2d 605 (Ariz. 1984); Ferrell v. Rosenbaum, 691 A.2d 641 (D.C. 1997); Cahoon v. Cummings, 734 N.E.2d 535 (Ind. 2000); DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986); Delaney v. Cade, 873 P.2d 175 (Kan. 1994); Hastings v. Baton Rouge Gen. Hosp., 498 So. 2d 713 (La. 1986); Dickhoff *ex rel.* Dickhoff v. Green, 836 N.W.2d 321 (Minn. 2013); Wollen v. DePaul Health Ctr., 828 S.W.2d 681 (Mo. 1992); Perez v. Las Vegas Med. Ctr., 805 P.2d 589 (Nev. 1991); Alberts v. Schultz, 975 P.2d 1279 (N.M. 1999); McKellips v. Saint Francis Hosp., Inc., 741 P.2d 467 (Okla. 1987); Smith v. Providence Health & Servs.—Or., 393 P.3d 1106 (Or. 2017); Hamil v. Bashline, 392 A.2d 1280 (Pa. 1978); Herskovits v. Grp. Health Coop., 664 P.2d 474 (Wash. 1983); McMackin v. Johnson Cty. Healthcare Ctr., 73 P.3d 1094 (Wyo. 2003). Overall, twenty-seven states have adopted the loss of chance doctrine: Arizona, Delaware, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Utah, Washington, West Virginia, Wisconsin, and Wyoming; twelve states have refused to adopt the loss of chance doctrine: Alabama, Alaska, Florida, Idaho, Kentucky, Maryland, Mississippi, Nebraska, South Carolina, Tennessee, Texas, and Vermont; and a few states have not examined the loss of chance doctrine or have deferred it to the legislature. *See, e.g.*, Estate of Frey v. Mastroianni, 463 P.3d 1197 (Haw. 2020) (holding that loss of chance could be considered in causation analysis); Lord v. Lovett, 770 A.2d 1103 (N.H. 2001) (adopting the doctrine in New Hampshire); *Smith*, 393 P.3d 1106 (adopting the doctrine in Oregon); Lauren Guest, David Schap & Thi Tran, *The "Loss of Chance" Rule as a Special Category of Damages in Medical Malpractice: A State-by-State Analysis*, 21 J. LEGAL ECON. 53, 59 tbl.1 (2015). The Michigan Supreme Court adopted the loss of chance doctrine. Falcon v. Mem'l Hosp., 462 N.W.2d 44 (Mich. 1990). However, the Michigan legislature later amended its medical malpractice statute to state that a "plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%." MICH. COMP. LAWS ANN. § 600.2912a(2) (Westlaw through P.A. 2020, No. 164, of the 2020 Regular Session, 100th Legislature) (effective Apr. 1, 1994). Connecticut also applied the loss of chance doctrine but retained the requirement that the decedent "had at least a 51 percent chance of survival" before the negligence. Boone v. William W. Backus Hosp., 864 A.2d 1 (Conn. 2005). The South Dakota Supreme Court also adopted the loss of chance doctrine before its ruling was abrogated by statute. *See* Jorgenson v. Vener, 616 N.W.2d 366 (S.D. 2000), *abrogated by* S.D. CODIFIED LAWS § 20-9-1.1 (Westlaw through laws of the 2021 Regular Session effective February 17, 2021).

ing in expanded liability.'"[3] The loss of chance doctrine is a cause of action that is almost unique to medical malpractice litigation; it allows "a patient-turned-plaintiff to recover damages from a doctor-turned-defendant without even needing to establish that the doctor was . . . [the proximate cause of] the patient's alleged injury."[4] The law surrounding the loss of chance doctrine can be difficult to navigate due to the drastically different approaches taken by courts around the country.[5]

The loss of chance doctrine in medical malpractice cases traditionally applies when a doctor decreased an injured or ill patient's chance of (1) surviving or (2) recovering.[6] With regard to the first situation, the patient succumbs to the illness, and "the loss suffered is the lost chance of surviving the preexisting injury or illness or at least a chance of a substantial increase in the length of such survival."[7] The majority of cases that involve the loss of chance doctrine fall into this category.[8] The second category includes cases that involve patients who do survive but do not recover as fully as they should have because of medical malpractice.[9]

A. Origins of the Loss of Chance Doctrine

Surprisingly, the earliest known example of the loss of chance doctrine is not a medical malpractice case; instead, it is an English contracts case, *Chaplin v. Hicks*.[10] In *Chaplin*, the defendant, Hicks, was a "well-known actor and theatrical manager."[11] Hicks invited women to submit their photographs to a local newspaper as part of a beauty

3. Koch, *supra* note 1, at 598.
4. *Id. But see* Washington v. Am. Cmty. Stores Corp., 196 Neb. 624, 244 N.W.2d 286 (1976) (applying loss of chance doctrine to loss of future earnings damages); Chaplin v. Hicks [1911] 2 KB 786 (Eng.) (applying loss of chance doctrine to breach of contract case); David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 WAKE FOREST L. REV. 605 (2001) (examining the multiple areas of law to which the loss of chance doctrine has been applied).
5. *Delaney*, 873 P.2d 175 (applying the "relaxed standard of proof approach" to the loss of chance doctrine); Matsuyama v. Birnbaum, 890 N.E.2d 819 (Mass. 2008) (applying the "distinct compensable injury" standard to the loss of chance doctrine); Cohan v. Med. Imaging Consultants, P.C., 297 Neb. 111, 900 N.W.2d 732 (2017) (rejecting the loss of chance doctrine and applying the traditional "all or nothing" approach); *see also* Alexander v. Scheid, 726 N.E.2d 272, 279 (Ind. 2000) ("[L]oss 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.").
6. *Delaney*, 873 P.2d at 178.
7. *Id.*
8. *Id.*
9. *Id.*
10. Chaplin v. Hicks [1911] 2 KB 786 (Eng.); *see also* Fischer, *supra* note 4, at 607–09 (examining the origins of the loss of chance doctrine and *Chaplin*).
11. *Chaplin*, 2 KB at 786.

competition.[12] The readers of the newspaper would then vote on fifty finalists, and the finalists would be entitled to present themselves to be personally judged by Hicks in hopes of being selected for one of twelve prizes.[13] The plaintiff submitted her photo and was selected as one of the finalists.[14] A letter was sent to her, but she never received it.[15] Therefore, the plaintiff alleged that the contract had been breached because she did not have the chance to present herself to be personally judged as the contest promised.[16] The jury awarded her £100 for the lost chance of winning one of the twelve prizes.[17] Hicks appealed, stating the damages were too speculative.[18] However, the appellate court affirmed the lower court's findings and held that her loss of chance to win a prize was a right that had value and for which the trier of fact should determine the amount of damages.[19]

The more contentious application of the loss of chance doctrine is in the negligence context where, unlike breach of contract claims, "causation . . . is an element of the cause of action."[20] The most controversial use is in medical malpractice situations where a "plaintiff cannot prove by a preponderance of evidence that defendant caused traditional damage."[21] One of the earliest cases, and perhaps the most cited by courts adopting the loss of chance doctrine in the medical malpractice context, is *Hicks v. United States*.[22] In *Hicks*, a doctor negligently failed to diagnose a patient's illness, and, as a result, the patient died.[23] The defendant argued that Hicks's estate could not prove the misdiagnosis caused her death.[24] However, the court rejected this argument, stating:

> 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. Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass. The law does not in the existing circumstances require the plaintiff to show to a *certainty* that the

12. *Id.* at 786–87.
13. *Id.* at 787.
14. *Id.* at 787–88.
15. *Id.*
16. *Id.* at 788.
17. *Id.*
18. *Id.*
19. *Id.* at 790–93, 797.
20. Fischer, *supra* note 4, at 609.
21. *Id.*
22. Hicks v. United States, 368 F.2d 626 (4th Cir. 1966).
23. *Id.* at 628.
24. *Id.*

> patient would have lived had she been hospitalized and operated on promptly.[25]

Hicks "has come to be cited for the proposition that traditional notions of 'more likely than not' causation pose a problematic barrier to recovery by patients who have experienced poor medical outcomes due to a doctor's failure to diagnose and that other theories of recovery may be viable."[26]

One of the first cases to unequivocally use the modern formulation of the loss of chance doctrine as a theory of recovery in a medical malpractice case was *Hamil v. Bashline*.[27] In *Hamil*, "the plaintiff put on expert testimony that the decedent had a 75 percent chance of surviving his heart attack with proper treatment."[28] The defendant rebutted this idea by offering "evidence that the decedent's death was imminent, regardless of treatment."[29] The trial court ruled in favor of the defendant, holding that the "plaintiff had failed to establish this negligence as a proximate cause of the decedent's death."[30] The plaintiff appealed, and the Pennsylvania Supreme Court re-examined the issue.[31] In deciding the case, the court examined section 323 of the *Restatement (Second) of Torts*, as well as *Hicks*.[32] In the court's reasoning, it explained that the loss of chance doctrine is a doctrine that relaxes the standard of proof required by traditional tort principles.[33] This facilitates claims so long as there is evidence that the "increased risk was . . . a substantial factor in bringing about the resultant harm."[34] The approach adopted by the court in *Hamil* is known as the relaxed standard of proof approach and is only followed

25. *Id.* at 632 (citing Harvey v. Silber, 2 N.W.2d 483 (Mich. 1942)).
26. Smith v. Providence Health & Servs.—Or., 393 P.3d 1106, 1112 (Or. 2017). It is surprising to see so many courts cite to *Hicks* because, unlike the modern uses of loss of chance, the case "did not actually involve proof of less than a 51 percent chance that the correct diagnosis would have" resulted in Hicks living. *Id.*
27. Hamil v. Bashline, 392 A.2d 1280 (Pa. 1978); *see also* George J. Zilich, Note, *Cutting Through the Confusion of the Loss-of-Chance Doctrine Under Ohio Law: A New Cause of Action or a New Standard of Causation?*, 50 CLEV. ST. L. REV. 673, 697–98 (2002) (examining *Hamil* and its use of the loss of chance doctrine).
28. *Smith*, 393 P.3d at 1112.
29. *Id.*
30. *Hamil*, 392 A.2d at 1283–84.
31. *Id.* at 1280, 1282–83.
32. *Id.* at 1286–88. Section 323 of the *Restatement (Second) of Torts* provides: "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." RESTATEMENT (SECOND) OF TORTS § 323 (AM. LAW INST. 1965).
33. *Hamil*, 392 A.2d at 1286.
34. *Id.* at 1288.

in a few states.[35] Though some states cling to this approach, two other approaches have been consistently adopted: (1) the all or nothing approach, and (2) the distinct compensable injury approach.

B. The All or Nothing Approach

In a medical malpractice action under traditional tort principles, a plaintiff must prove four elements: (1) the doctor owed the patient a duty; (2) the doctor breached that duty; (3) the doctor's breach caused the injury; and (4) the plaintiff actually suffered some form of injury.[36] In loss of chance cases, the plaintiff generally has the most considerable difficulty proving that the doctor caused the injury.[37] Traditional tort law principles "require[ ] the plaintiff to prove causation by a preponderance of the evidence."[38] Causation is proven by showing that the doctor's actions were both the cause in fact and the proximate cause of the patient's injury.[39] "Under this standard, a plaintiff must prove that it is more likely than not that the defendant's negligence caused the patient's injury."[40] If the plaintiff is unable to show that it is more likely than not that the defendant caused the injury, then he or she cannot recover.[41] This standard is known as the all or nothing approach.[42]

"The all-or-nothing approach is the traditional rule" and essentially denies the adoption of the loss of chance doctrine.[43] This is because, under the all or nothing approach, plaintiffs can never recover for a loss of chance and can only recover when the defendant more likely than not caused the ultimate injury to the plaintiff.[44] One case often cited by courts applying the traditional all or nothing approach

35. *See* Smith v. Providence Health & Servs.—Or., 393 P.3d 1106, 1113 (Or. 2017) (listing the jurisdictions that follow the relaxed standard of proof approach).
36. *See* Hamilton v. Bares, 267 Neb. 816, 678 N.W.2d 74 (2004) (explaining medical malpractice principles in Nebraska); Patrick L. Evatt, Note, *A Closer Look at Loss of Chance Under Nebraska Medical Malpractice Law:* Steineke v. Share Health Plan, Inc., *246 Neb. 374, 518 N.W.2d 904 (1994)*, 76 NEB. L. REV. 979, 981 (1997); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 164–65 (W. Page Keeton ed., 5th ed. 1984) (examining the common law negligence principles).
37. Evatt, *supra* note 36, at 981.
38. *Id.* at 981–82.
39. *Hamilton*, 267 Neb. at 821, 678 N.W.2d at 79 (citing Neill v. Hemphill, 258 Neb. 949, 607 N.W.2d 500 (2000); Snyder v. Contemporary Obstetrics & Gynecology, P.C., 258 Neb. 643, 605 N.W.2d 782 (2000)); 1 DAN B. DOBBS, THE LAW OF TORTS 269 (2001).
40. Evatt, *supra* note 36, at 982.
41. *Id.* at 983.
42. *See id.* at 981–83.
43. *Id.* at 983; *see* Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981).
44. *See* King, *supra* note 43, at 1356.

is *Jones v. Owings*.[45] In *Owings*, the plaintiff was being treated by the defendant for a fractured femur.[46] Before they could perform surgery, the plaintiff had to have "a pre-operative chest x-ray."[47] The radiologist noted in his report an abnormal spot in the plaintiff's left lung and recommended that the patient have a follow-up x-ray or a computed tomography scan.[48] A year later, the patient returned and another chest x-ray was ordered; as before, the radiologist noted an issue with the left lung.[49] Again the doctor did nothing.[50] Finally, after another year passed, the plaintiff was diagnosed with lung cancer and died shortly thereafter.[51] Experts testified that if the plaintiff had been appropriately diagnosed when the radiologist first noted the spot in her left lung, she would have had almost a 50% chance of survival.[52] However, by the time she was properly diagnosed, she only had a 15%-20% chance of survival.[53]

After reviewing the loss of chance doctrine, the Supreme Court of South Carolina refused to adopt the doctrine and instead held fast to the traditional all or nothing approach.[54] The court relied on language from the Ohio Supreme Court, which stated:

> 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 of 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. Even though there exists authority for a rule allowing recovery based upon proof of causation by evidence not meeting the standard of probability, we are not persuaded by their logic. We consider the better rule to be that in order to comport with the standard of proof of proximate cause, plaintiff in a malpractice case must prove that defendant's negligence, *in probability*, proximately caused the death.[55]

The court refused to adopt the loss of chance doctrine because it "is fundamentally at odds with the requisite degree of medical certitude necessary to establish a causal link between the injury of a patient and the tortious conduct of a physician."[56] Furthermore, it stated that "[l]egal responsibility [under the loss of chance doctrine] is in reality

45. Evatt, *supra* note 36, at 982.
46. Jones v. Owings, 456 S.E.2d 371, 372 (S.C. 1995).
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 372–74.
55. *Id.* at 373–74 (quoting Cooper v. Sisters of Charity, Inc., 272 N.E.2d 97, 103 (Ohio 1971)).
56. *Id.* at 374 (quoting Kilpatrick v. Bryant, 868 S.W.2d 594, 602 (Tenn. 1993)).

assigned based on the mere *possibility* that a tortfeasor's negligence was a cause of the ultimate harm."[57] In sum, the court noted that the loss of chance doctrine "is contrary to the most basic standards of proof which undergird the tort system."[58]

Owings is the prototypical loss of chance case where the plaintiff had an original chance of survival or better outcome of less than 50%, and some act by the doctor decreased that chance.[59] According to the all or nothing approach, plaintiffs who can demonstrate that the defendant was more than 50% liable for the outcome will recover all their damages.[60] However, plaintiffs who cannot demonstrate that the defendant more likely than not caused the damage will recover no damages.[61] In this latter scenario, if the plaintiff is only able to prove a 49% chance of survival to begin with (even if the illness had been properly diagnosed on the first try) but still a 51% chance of death, then the court will conclude the doctor was not the cause of the injury because even with a proper diagnosis it was still more likely than not that the plaintiff would die.[62] This approach led to the dissatisfaction of plaintiffs and plaintiff-sympathetic courts and caused the emergence of the loss of chance doctrine.[63] Overall, plaintiffs are more likely to be fairly compensated for damages caused by negligent doctors in courts that have adopted the loss of chance doctrine.[64]

C. The Relaxed Standard of Proof Approach

The relaxed standard of proof is the minority approach for states that have adopted the loss of chance doctrine, with only a few states

57. *Id.* (citing Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397, 405 (Tex. 1993)).

58. *Id.*

59. *Id.* at 372–74.

60. Alice Férot, *The Theory of Loss of Chance: Between Reticence and Acceptance*, 8 FLA. INT'L U. L. REV. 591, 607–08 (2013); *see also Kilpatrick*, 868 S.W.2d at 607 (Daughtrey, J., concurring in part and dissenting in part) ("The traditional view of proximate cause in a medical malpractice action requires proof that the injury suffered by the patient would not have occurred but for the negligence of the defendant. Where the negligence of the defendant is not the only cause of the injury, this standard means that the plaintiff must prove that the defendant was at least 51 percent responsible for the outcome. Under what has been called the 'all-or-nothing approach' of allocating damages under this rule, a plaintiff who successfully meets the 51 percent standard recovers 100 percent of the damages from the defendant, even though the defendant may have been only partly responsible for the result. Conversely, a plaintiff who can establish only that the defendant was 50 percent responsible (or less) collects nothing from the tortfeasor." (footnote omitted)).

61. *See supra* note 60 and accompanying text.

62. *See supra* note 60 and accompanying text.

63. *See supra* note 60 and accompanying text.

64. *See supra* note 60 and accompanying text.

following this approach.[65] The relaxed standard of proof is best defined by the Kansas Supreme Court, which stated:

> The relaxed standard of proof approach . . . requires plaintiff to present evidence that a substantial or significant chance of survival or better recovery was lost. If plaintiff meets this initial threshold, the causation issue is submitted to the jury, using the traditional proximate cause standard to ascertain whether, in fact, the alleged malpractice resulted in the loss of a substantial or significant chance. Thus, the jury must find by a preponderance of the evidence that the alleged negligence was the proximate cause of the lost chance, but the lost chance itself need only be a substantial or significant chance for a better result, absent any malpractice, rather than a greater than 50 percent chance of a better result.[66]

As the court in *Delaney* explains, the relaxed standard of proof approach eliminates the traditional notions of proximate cause for analyzing the plaintiff's reduced chances of survival or recovery, instead choosing to adopt a substantial or significant causation approach.[67] However, courts have failed to clearly define what a substantial or significant decrease in a chance of survival or better recovery is, and instead, leave it up to the trier of fact to decide.[68]

McKellips v. Saint Francis Hospital, Inc. is an example of a court adopting and applying the relaxed standard of proof approach.[69] In *McKellips*, a widow brought a wrongful death suit against Saint Francis Hospital for negligently causing the death of her husband.[70] The decedent was brought to the emergency room after "complain[ing] of pain over his breastbone radiating to both sides of his chest."[71] The doctor wrongfully diagnosed the decedent with gastritis and released him shortly after.[72] A few hours later, the decedent suffered cardiac arrest and passed away.[73] "At trial, [the plaintiffs'] expert witness, a board certified emergency physician, testified by deposition that [the defendants] were negligent in diagnosing decedent as suffering from gastritis instead of a heart attack, and in releasing him rather than keeping him under observation for a reasonable period of time at the

65. *See* McBride v. United States, 462 F.2d 72 (9th Cir. 1972); Jeanes v. Milner, 428 F.2d 598 (8th Cir. 1970); Blackmon v. Langley, 737 S.W.2d 455 (Ark. 1987); Delaney v. Cade, 873 P.2d 175 (Kan. 1994); Perez v. Las Vegas Med. Ctr., 805 P.2d 589 (Nev. 1991); Kallenberg v. Beth Israel Hosp., 357 N.Y.S.2d 508 (N.Y. App. Div. 1974); McKellips v. Saint Francis Hosp., Inc., 741 P.2d 467 (Okla. 1987); Herskovits v. Grp. Health Coop., 664 P.2d 474 (Wash. 1983).

66. *Delaney*, 873 P.2d at 184.

67. *Id.*

68. *See id.* (citing *McBride*, 462 F.2d 72; *Jeanes*, 428 F.2d 598; *Blackmon*, 737 S.W.2d 455; *Perez*, 805 P.2d 589; *Kallenberg*, 357 N.Y.S.2d 508; *McKellips*, 741 P.2d 467; *Herskovits*, 664 P.2d 474).

69. *McKellips*, 741 P.2d 467.

70. *Id.* at 469–70.

71. *Id.* at 470.

72. *Id.*

73. *Id.*

hospital."[74] Additionally, the expert testified that, based on the decedent's hospital records, the "'heart attack was probably well underway at the time of his visit to the emergency department the first time' and admitting decedent to the hospital for observation at that time would not have prevented the heart attack."[75] As for the decedent's chances of survival the expert stated:

> As far as improving his chances, I think unquestionably his chances would have been significantly improved. As to whether or not it would have, in fact, changed the outcome, I think is a statistical probability statement that is difficult to answer. But as far as improving his chances, there's no question that that's true.[76]

"At the conclusion of [the plaintiffs'] evidence," the defendants asserted that the plaintiffs failed to prove causation and "moved for a directed verdict."[77] "The district court granted the motion," and the plaintiffs appealed.[78] The Court of Appeals for the Tenth Circuit certified two questions of law to the Oklahoma Supreme Court.[79] In essence, the questions asked the court whether it had adopted the loss of chance doctrine and "[i]f the loss of chance doctrine is recognized in Oklahoma, [whether] expert testimony that 'unquestionably [stated the deceased's] chances would have been significantly improved' [was] sufficient under that doctrine to create a question for the jury."[80] The Oklahoma Supreme Court adopted the loss of chance doctrine, stating:

> [I]n those situations where a health care provider deprives a patient of a significant chance for recovery by negligently failing to provide medical treatment, the health care professional should not be allowed to come in after the fact and allege that the result was inevitable inasmuch as that person put the patient's chance beyond the possibility of realization. Health care providers should not be given the benefit of the uncertainty created by their own negligent conduct. To hold otherwise would in effect allow care providers to evade liability for their negligent actions or inactions in situations in which patients would not necessarily have survived or recovered, but still would have a significant chance of survival or recovery.[81]

Regarding the second question, the court further stated that an expert's testimony does not need to be expressed in precise percentages but that such testimony, combined with the evidence, has to establish a significant loss in the chance of survival to create a question for the jury.[82]

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74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 469.
80. *Id.* (alteration in original).
81. *Id.* at 474.
82. *Id.* at 475.

Delaney v. Cade is another example of a court applying the relaxed standard of proof approach.[83] Much like *McKellips*, *Delaney* involves a federal court of appeals certifying a question to a state court related to the loss of chance doctrine.[84] In *Delaney*, the plaintiff was involved in a car accident.[85] As a result of the accident, the plaintiff suffered multiple injuries, including a transected aorta.[86] The plaintiff was taken to the hospital, where she complained of chest pains.[87] "The plaintiff allege[d] Dr. Cade commenced suturing the lacerations on her knees without performing a physical examination, ordering x-rays, or starting [intravenous therapy]."[88] Two hours later, the plaintiff was transferred to another hospital.[89] After she arrived at the second hospital, the doctors learned that her transected aorta had clotted, and as a result of the clotted aorta, the plaintiff was permanently paralyzed.[90] The plaintiff's expert testified:

> [T]en percent of patients with thoracic aortic injuries like [the plaintiff] will suffer permanent paralysis regardless of how the injury is managed. If the plaintiff was in that ten percent, she would have been a paraplegic no matter how much time passed between the accident and surgery. In addition, [the expert] testified he had no way of determining whether the plaintiff was in that ten percent or in the other ninety percent. However, [the expert] did state that the plaintiff's risk of [spinal] cord injury was increased five to ten percent by the prolonged period of shock that she suffered prior to surgery.[91]

The Kansas Supreme Court adopted the loss of chance doctrine and stated that the evidence produced was enough to submit the questions of causation to the jury because "the question of causation is generally a matter to be determined by the finder of fact."[92] In adopting the relaxed standard of proof approach, the court listed the elements that the plaintiff must prove to succeed on the claim:

> In an action to recover for the loss of a chance to survive or for the loss of a chance for a better recovery, the plaintiff must first prove the traditional elements of a medical malpractice action by a preponderance of the evidence. The plaintiff must prove that the defendant was negligent in treating the patient, that the negligence caused harm to the plaintiff, and that as a result the

83. Delaney v. Cade, 873 P.2d 175 (Kan. 1994).
84. *Id.* at 177.
85. *Id.*
86. *Id.* A transected aorta "is the near-complete tear through all the layers of the aorta due to trauma such as that sustained in a motor vehicle collision or a fall. This condition is most often lethal and requires immediate medical attention." *Traumatic Aortic Transection (Aortic Rupture)*, CEDARS-SINAI, https://www.cedars-sinai.edu/Patients/Health-Conditions/Traumatic-Aortic-Transection-Aortic-Rupture.aspx [https://perma.unl.edu/RD5N-HZ5Y] (last visited Feb. 22, 2021).
87. *Delaney,* 873 P.2d at 177.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 177–78.
92. *Id.* at 186.

> plaintiff suffered damages. In proving that the plaintiff suffered harm, the plaintiff must prove that the lost chance of survival or the lost chance for a better recovery when the plaintiff does survive was a substantial loss of the chance.[93]

The method used for calculating damages under this approach is what sets it apart from the other approaches. Under the relaxed standard of proof approach, damages are not calculated based on the percentage lost by the plaintiff; instead, plaintiffs can recover all the damages they could recover under a traditional negligence claim, even though they are not able to show that the defendant is liable for these damages by a preponderance of the evidence.[94] This is because the courts do not define a new injury for a loss of chance claim but relax the traditional standard of causation instead.[95] The relaxed standard of proof approach is only used in a minority of jurisdictions, and it appears courts are reluctant to adopt this approach because it ignores traditional tort principles.[96]

D. The Distinct Compensable Injury Approach

The distinct compensable injury approach is the majority approach in states that have adopted the loss of chance doctrine.[97] This approach follows traditional tort law principles and is by far the most well-reasoned approach to the loss of chance doctrine. Jurisdictions that have adopted the distinct compensable injury approach "treat the reduction of a patient's chance of recovery or survival as a distinct injury," providing damages solely for the percentage of chance lost by the defendant's negligence.[98] This is because courts following this approach "view[ ] a person's prospects for surviving a serious medical condition as something of value, even if the possibility of recovery was less than even prior to the physician's tortious conduct."[99] This is a cornerstone idea for courts that have adopted this approach and is further explained in *Matsuyama*, where the Massachusetts Supreme Court adopted the distinct compensable injury approach and stated:

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93. *Id.* at 185–86.
94. *See* Evatt, *supra* note 36, at 983–84; Férot, *supra* note 60, at 615–16; Zilich, *supra* note 27, at 682–83.
95. Zilich, *supra* note 27, at 682 ("[C]ourts [that have adopted the relaxed standing of proof approach] have relaxed either the standard of proof required or the sufficiency of the evidence called for rather than defining the injury as the loss of chance for a better result." (footnote omitted)).
96. *See* Férot, *supra* note 60, at 615–16.
97. *See* Alexander v. Scheid, 726 N.E.2d 272 (Ind. 2000); DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986); Matsuyama v. Birnbaum, 890 N.E.2d 819 (Mass. 2008); Dickhoff *ex rel.* Dickhoff v. Green, 836 N.W.2d 321 (Minn. 2013); Smith v. Providence Health & Servs.—Or., 393 P.3d 1106 (Or. 2017); Herskovits v. Grp. Health Coop., 664 P.2d 474 (Wash. 1983).
98. *Dickhoff*, 836 N.W.2d at 334–35.
99. *Matsuyama*, 890 N.E.2d at 823.

> [The] probability of survival is part of the patient's condition. When a physician's negligence diminishes or destroys a patient's chance of survival, the patient has suffered real injury. The patient has lost something of great value: a chance to survive, to be cured, or otherwise to achieve a more favorable medical outcome. Thus we recognize loss of chance not as a theory of causation, but as a theory of injury.[100]

Matsuyama is by far the most cited case by courts that have adopted the distinct compensable injury approach to loss of chance. In *Matsuyama*, the defendant had been Matsuyama's physician for more than four years.[101] Due to this extended time of treatment, the defendant was aware that Matsuyama had been suffering from gastric pain for multiple years.[102] The defendant was also aware that Matsuyama carried several risk factors for gastric cancer.[103] Even though the defendant was aware of these critical facts, he did not order any tests to detect gastric cancer.[104] Eventually, after Matsuyama developed moles on his body and reported severe stomach pain, the defendant ordered a test for a bacteria associated with gastric cancer.[105] The test came back positive, but again the defendant did not request further tests to ascertain whether Matsuyama had gastric cancer.[106] Only when Matsuyama later complained of more severe symptoms did the defendant order additional testing.[107] The tests ascertained that there was a cancerous mass in Matsuyama's stomach.[108] The delayed treatment of the gastric cancer resulted in Matsuyama's death.[109] Matsuyama's estate brought suit against the defendant.[110]

Experts provided conflicting evidence and ultimately were unable to determine what chance of survival the victim had before the delayed diagnosis, but agreed that the chances of survival diminished with time.[111] The jury found the defendant negligent and awarded the estate loss of chance damages.[112] In explaining why the court awarded damages and adopted the distinct compensable injury approach, the court stated:

> Recognizing loss of chance as a theory of injury is consistent with our law of causation, which requires that plaintiffs establish causation by a preponderance of the evidence. In order to prove loss of chance, *a plaintiff must prove by a preponderance of the evidence that the physician's negligence caused the*

100. *Id.* at 832 (citations omitted).
101. *Id.* at 824–25.
102. *Id.* at 824.
103. *Id.*
104. *Id.* at 824–25.
105. *Id.*
106. *Id.* at 825.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 819.
111. *Id.* at 825–27.
112. *Id.* at 827–28.

> *plaintiff's likelihood of achieving a more favorable outcome to be diminished*. That is, the plaintiff must prove by a preponderance of the evidence that the physician's negligence caused the plaintiff's injury, where the injury consists of the diminished likelihood of achieving a more favorable medical outcome. The loss of chance doctrine, so delineated, makes no amendment or exception to the burdens of proof applicable in all negligence claims.[113]

Furthermore, the court in Matsuyama, unlike some other courts, stated that to bring a claim for loss of chance, the injury need not result in a patient's death.[114]

Matsuyama points out another critical component of the distinct compensable injury approach: to succeed under this approach, a plaintiff must still prove by a preponderance of the evidence that the defendant caused the injury.[115] However, it is essential to note that the injury is not the death of the patient but the chance of survival or a better outcome that the patient lost.[116] Some courts have relied on section 323 of the *Restatement (Second) of Torts* to justify this approach.[117] This section provides:

> 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.[118]

In *DeBurkarte v. Louvar*, a wife and husband brought a malpractice action.[119] The court found that the doctor was negligent when he evaluated a lump in the wife's breast and only ordered a mammogram.[120] Only after another lump formed did he finally send her to a surgeon for a biopsy.[121] The doctor appealed the finding of negligence, disputing the strength of the evidence and the sufficiency of the proof supporting the damages that were awarded.[122] "The plaintiff's experts . . . testified that the earlier a cancer is discovered, the higher the probability a patient may be cured."[123] Relying on section 323, the court reasoned that this evidence could be introduced because "the Restatement indicates[ ] her injury may also be viewed as a lost chance

113. *Id.* at 832–33 (emphasis added) (citations omitted).
114. *Id.* at 832.
115. *Id.*
116. *Id.*
117. *See, e.g.*, DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986).
118. RESTATEMENT (SECOND) OF TORTS § 323 (AM. LAW INST. 1965).
119. *DeBurkarte*, 393 N.W.2d 131.
120. *Id.* at 132.
121. *Id.*
122. *Id.*
123. *Id.* at 135.

to survive cancer."[124] "The jury could then find from the evidence that the defendant's failure to diagnose and treat the cancer probably caused a substantial reduction in the plaintiff's chance to survive it."[125]

Another example of a court adopting the distinct compensable injury approach to the loss of chance doctrine is *Smith v. Providence Health*.[126] In *Smith*, the plaintiff filed a medical malpractice suit against a doctor and the hospital.[127] The plaintiff went to the emergency room after he began experiencing visual difficulties, slurred speech, mental confusion, and a headache.[128] The defendant examined the plaintiff but failed to "perform a complete physical examination or a thorough neurological examination."[129] The defendant concluded that the plaintiff's symptoms were caused by taking a sleeping aid.[130] The following night the plaintiff returned to the hospital, and the defendant doctor was again working.[131] The plaintiff again complained of head pain and visual problems.[132] The doctor again discharged the plaintiff.[133] A few days later, a magnetic resonance imaging scan (MRI) was finally ordered, but the scan was not performed until the end of the week.[134] The MRI discovered significant brain damage caused by a stroke.[135] The plaintiff was left with slurred speech, inability to perform daily tasks, and inability to work.[136] The plaintiff "alleged that '[a]s a result of the negligence of [the defendants], on a more probable than not basis, [the plaintiff] lost a chance for treatment which, 33 percent of the time, provides a much better outcome, with reduced or no stroke symptoms.'"[137] The Oregon Supreme Court ruled that the plaintiff could recover damages because "a loss of a substantial chance of a better medical outcome can be a cognizable injury in a common-law claim of medical malpractice in Oregon."[138]

The distinct compensable injury approach is also applied to cases that result in an increased chance of recurrence of an illness. In *Dickhoff*, the patient's parents brought a medical malpractice action

124. *Id.*
125. *Id.*
126. Smith v. Providence Health & Servs.—Or., 393 P.3d 1106 (Or. 2017).
127. *Id.*
128. *Id.* at 1107–08.
129. *Id.* at 1108.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 1121.

claiming that the defendants negligently failed to diagnose their child's cancer.[139] The trial court awarded summary judgment to the defendants.[140] The court of appeals reversed and held that the trial court erred in awarding summary judgment to the defendants.[141] The court of appeals reasoned that Minnesota law permits recovery for "loss of chance" in a medical malpractice action even if the patient did not pass away.[142] The Minnesota Supreme Court further explained that the parents created a genuine issue of material fact on the issue of causation because the parents' expert "assert[ed] that [the defendants'] failure to timely diagnose [the] cancer caused a substantial increase in the likelihood that [the] cancer would recur and decreased [the child's] chances of survival by at least 20 percent."[143]

The expert reasoned in his affidavit that due to the delayed diagnosis, the child would likely need additional treatment to combat the recurrence of her cancer that would not have been necessary following a correct diagnosis the first time.[144] The parents also produced testimony that showed it was "more probable than not" that the child's lost chance of survival was a result of the defendants' negligence.[145] The Minnesota court followed reasoning similar to other courts that had adopted the distinct compensable injury approach, stating:

> [The Supreme Court of Minnesota] agree[s] with those courts that treat the reduction of a patient's chance of recovery or survival as a distinct injury. It should be beyond dispute that a patient regards a chance to survive or achieve a more favorable medical outcome as something of value. . . . "When a physician's negligence diminishes or destroys a patient's chance of survival, the patient has suffered real injury. The patient has lost something of great value: a chance to survive, to be cured, or otherwise to achieve a more favorable medical outcome." . . . [A] physician harms a patient by negligently depriving her of a chance of recovery or survival and should be liable for the value of that lost chance.[146]

The distinct compensable injury approach provides a basis for courts to adopt the loss of chance doctrine without ignoring traditional tort principles. Put another way, it provides courts that are reluctant to adopt the relaxed standard of proof approach with a way to allow injured plaintiffs to recover damages against negligent defendants while still requiring them to prove their damages by a preponderance of the evidence.

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139. Dickhoff *ex rel.* Dickhoff v. Green, 836 N.W.2d 321 (Minn. 2013).
140. *Id.* at 324.
141. *Id.*
142. *Id.* at 328.
143. *Id.* at 337.
144. *Id.* at 337–38.
145. *Id.* at 338.
146. *Id.* at 334 (citations omitted).

III. LOSS OF CHANCE UNDER NEBRASKA LAW

Nebraska is one of the few states that still refuses to adopt the loss of chance doctrine and instead adheres to the traditional all or nothing approach.[147] Under Nebraska law, a loss of chance argument cannot be used to establish causation of injury in a medical malpractice case.[148] Instead, under the traditional all or nothing approach, plaintiffs in Nebraska must prove it is "more likely than not" that the defendant's negligence caused the plaintiffs' injuries.[149] This idea has been codified in the Nebraska Hospital Medical Liability Act, which provides that "[d]amages recoverable in any action shall be those losses which have been or shall be sustained by the claimant as a direct and proximate result of the defendant's wrongful acts as established by a preponderance of the evidence."[150] While plaintiffs continuously argue that Nebraska should adopt the loss of chance doctrine, the Nebraska Supreme Court has repeatedly denied its adoption, stating that "this court has not adopted the loss-of-chance doctrine, and we shall not adopt it at this time."[151]

Since Nebraska has not adopted the loss of chance doctrine, arguments in medical malpractice cases often revolve around whether expert medical testimony is loss of chance testimony.[152] Nebraska courts will not allow testimony that is based on the loss of chance doctrine because "an opinion framed in terms of loss of chance would not sustain [the plaintiff's] burden of establishing that the defendants proximately caused her injury."[153] Instead, Nebraska law requires "that 'expert medical testimony must be based on a reasonable degree of medical certainty or a reasonable probability.'"[154] Furthermore, "'[p]robably' has been defined . . . as 'reasonably,' 'credibly,' 'presumably,' 'in all probability,' and 'very likely.'"[155] Though an expert does not have to use the words "reasonable medical certainty," "[m]edical expert testimony regarding causation based upon possibility or specu-

147. Rankin v. Stetson, 275 Neb. 775, 787, 749 N.W.2d 460, 469 (2008).

148. *Id.*

149. *Id.*

150. NEB. REV. STAT. § 44-2819 (Reissue 2010).

151. Cohan v. Med. Imaging Consultants, P.C., 297 Neb. 111, 127, 900 N.W.2d 732, 743 (2017).

152. *See id.*; Richardson v. Children's Hosp., 280 Neb. 396, 787 N.W.2d 235 (2010); *Rankin*, 275 Neb. at 786–87, 749 N.W.2d at 468–69; Gonzales v. Neb. Pediatric Practice, Inc., 26 Neb. App. 764, 923 N.W.2d 445 (Neb. Ct. App. 2019); Coran v. Bd. of Regents, No. A-91-971, 1993 Neb. App. LEXIS 283 (Neb. Ct. App. June 15, 1993).

153. *Rankin*, 275 Neb. at 787, 749 N.W.2d at 469.

154. Edmonds v. IBP, Inc., 239 Neb. 899, 904–05, 479 N.W.2d 754, 757 (1992) (quoting Hohnstein v. W.C. Frank, 237 Neb. 974, 982, 468 N.W.2d 597, 603 (1991)).

155. *Id.* at 905, 479 N.W.2d at 757 (quoting Hare v. Watts Trucking Serv., 220 Neb. 403, 370 N.W.2d 143 (1985)).

lation is insufficient; it must be stated as being at least 'probable,' in other words, more likely than not."[156]

However, even though an expert uses the word "chance" or the phrase "chance at a better outcome," it does not necessarily mean it is loss of chance testimony. For example, there is a distinct difference between (1) a doctor's negligence "decreas[ing plaintiff's] chance of a better outcome," and (2) "but for" the doctor's negligence a chance at "a better outcome would have been probable."[157] This is because a probable chance of a better outcome means the chance of a better outcome is above 50%. Moreover, under Nebraska law, "[o]pinions dealing with proximate causation in a medical malpractice action are required to be given in terms that express a probability greater than 50 percent. While a 49–percent chance of a better recovery may be medically significant, it does not meet the legal requirements for proof of causation."[158]

Even though the weight of Nebraska law appears to be against them, plaintiffs continuously cite to *Washington v. American Community Stores Corp.* as demonstrating that Nebraska courts have adopted the loss of chance doctrine.[159] In *Washington*, the plaintiff brought a suit against a corporation for permanent injuries caused by a motor vehicle accident.[160] The plaintiff was a twenty-four-year-old man who had been employed as a parole officer since graduating from college four months earlier.[161] As a result of the injuries sustained in the accident, the plaintiff was unable to pursue his wrestling career.[162] As part of the plaintiff's complaint, he alleged a loss in earning capacity because of his inability to pursue a wrestling career.[163] While the plaintiff had successfully competed in wrestling competitions at the high school and college levels and was characterized as a prime candidate for the U.S. Olympic team, the defendant argued there was no evidence that he would have been an Olympic wrestler or that he had been promised a job as a wrestling coach.[164]

The trial court awarded the plaintiff damages for lost earning capacity relating to wrestling; the defendant appealed.[165] The defendant

156. Fackler v. Genetzky, 263 Neb. 68, 74, 638 N.W.2d 521, 528 (2002) (citing Doe v. Zedek, 255 Neb. 963, 587 N.W.2d 885 (1999)).
157. Walton v. Patil, 279 Neb. 974, 985, 783 N.W.2d 438, 447 (2010).
158. *Id.* (citing *Rankin*, 275 Neb. 775, 749 N.W.2d 460).
159. Washington v. Am. Cmty. Stores Corp., 196 Neb. 624, 244 N.W.2d 286 (1976); *see also* Steineke v. Share Health Plan of Neb., Inc., 246 Neb. 374, 381, 518 N.W.2d 904, 909 (1994) (Caporale, J., dissenting) (reasoning the Nebraska Supreme Court had already adopted the loss of chance doctrine).
160. *Washington*, 196 Neb. at 625, 244 N.W.2d at 287.
161. *Id.*
162. *Id.*
163. *Id.* at 626, 244 N.W.2d at 288.
164. *Id.* at 627–28, 630, 244 N.W.2d at 288–90.
165. *Id.* at 625, 244 N.W.2d at 287.

argued that the evidence regarding the plaintiff's wrestling career was "based upon speculation and conjecture, that evidence of contingent, uncertain future possibilities, and uncertain future happenings, is speculative and conjectural and therefore incompetent."[166] The Nebraska Supreme Court upheld the trial court's decision.[167] The reasoning the court provided seems lackluster at best. The court stated, "[a]s we have pointed out such specific evidence is unnecessary for the plaintiff to recover under a general allegation of damage. But, more importantly, in this case the plaintiff offered evidence of the earning capacity of coaches and wrestlers."[168] While the court did not specifically state it had adopted the loss of chance doctrine, plaintiffs still argue that it did based on the dissenting opinion found in *Steineke v. Share Health Plan of Nebraska*.[169] In this dissenting opinion the judge states, "it seems to me that wittingly or unwittingly, wisely or unwisely, this court has recognized loss of chance as an element of tort damages [in *Washington*]."[170] However, in *Cohan*, the court ruled that it "do[es] not find this language controlling, especially in view of the more recent case of *Rankin v. Stetson*."[171]

The Nebraska Supreme Court has suggested three distinct reasons for its reluctance to adopt the loss of chance doctrine.[172] First, "adoption of the loss-of-chance doctrine . . . would create unwarranted liability in other cases and other medical contexts."[173] The court reasoned that it would reduce causation standards to require only a "mere possibility" instead of the traditional preponderance of the evidence.[174] Second, the court worried that adopting the loss of chance doctrine would cause it to spread to other areas of the law.[175] Finally, it reasoned that adopting the loss of chance doctrine would "prove contradictory to the Nebraska Hospital-Medical Liability Act, under which the claimant may recover damages only for those losses that are the direct and proximate result of the defendant's wrongful actions, as established by a preponderance of the evidence."[176]

166. *Id.* at 626, 244 N.W.2d at 288.
167. *Id.* at 625, 244 N.W.2d at 287.
168. *Id.* at 630, 244 N.W.2d at 290.
169. Steineke v. Share Health Plan of Neb., Inc., 246 Neb. 374, 381, 518 N.W.2d 904, 909 (1994) (Caporale, J., dissenting).
170. *Id.*
171. Cohan v. Med. Imaging Consultants, P.C., 297 Neb. 111, 125–26, 900 N.W.2d 732, 742 (2017) (citing Rankin v. Stetson, 275 Neb. 775, 787, 749 N.W.2d 460, 469 (2008)).
172. *See id.* at 124–25, 127, 900 N.W.2d at 741–43.
173. *Id.* at 124–25, 900 N.W.2d at 741.
174. *Id.* at 125, 900 N.W.2d at 741.
175. *Id.* at 125, 900 N.W.2d at 741–42.
176. *Id.* at 127, 900 N.W.2d at 742–43 (citing NEB. REV. STAT. § 44-2819 (Reissue 2010)).

IV. NEBRASKA SHOULD ADOPT THE DISTINCT COMPENSABLE INJURY APPROACH TO THE LOSS OF CHANCE DOCTRINE

After examining the different approaches taken around the country regarding the loss of chance doctrine, it is clear that Nebraska should adopt the distinct compensable injury approach. This Part will first examine the three reasons the Nebraska Supreme Court opposes the adoption of the loss of chance doctrine and why these three reasons are not persuasive in the face of the benefits, advantages, and more equitable outcomes produced by the distinct compensable injury approach. Next, this Part will discuss the multiple policy arguments that support the adoption of the distinct compensable injury approach.

A. Why the Nebraska Supreme Court Is Misguided in Refusing to Adopt the Loss of Chance Doctrine

The first reason the court provides is that it fears adopting the loss of chance doctrine will reduce the traditional standards of proof for causation to a "mere possibility" instead of a preponderance of the evidence.[177] By making this assertion, the Nebraska Supreme Court is following the same logic that the South Carolina Supreme Court used in *Owings*.[178] This argument alleges that the loss of chance doctrine, in any permutation, allows plaintiffs to recover damages when they are incapable of proving negligence by a preponderance of the evidence because it allows recovery when the patient would have had an unfavorable outcome more than 50% of the time.[179] The argument continues that allowing recovery in this situation virtually eliminates traditional tort law causation standards and replaces them with damages awards for mere possibilities of negligence.[180]

However, as seen above, adopting the distinct compensable injury approach does not allow for recovery based on mere possibilities of negligence. Instead, it requires the plaintiff to prove the existence of the harm—the loss of chance of survival or a better outcome—by a preponderance of the evidence, which is consistent with traditional tort principles.[181] Requiring plaintiffs to demonstrate their harm by a preponderance of the evidence undermines the concern that adoption will result in a deviation from the traditional causation standard already followed in Nebraska.[182] Courts that follow the distinct compen-

177. *Id.* at 125, 900 N.W.2d at 741.
178. Jones v. Owings, 456 S.E.2d 371 (S.C. 1995).
179. *Id.* at 373–74.
180. *Id.*
181. *See* Zilich, *supra* note 27, at 692–99.
182. *See id.* (explaining that the distinct compensable injury approach does not reduce traditional causation principles and still requires the plaintiff to prove the elements of the cause of action by a preponderance of the evidence).

sable injury approach explicitly state that they are not eliminating the traditional causation standards but are instead adopting a new form of recovery that allows plaintiffs to recover damages to which they are entitled.[183]

Second, the Nebraska Supreme Court worries the loss of chance doctrine will expand beyond medical malpractice to other areas of the law. The court explained this concern by providing the following hypothetical: "For example, does an unsuccessful litigant have a cause of action where an attorney's failure to object to evidence negligently reduced the chance of success by some degree?"[184] Again, this argument does not hold up. First, the court appears to have already expanded the use of the doctrine beyond medical malpractice in *Washington*.[185] The court is correct in thinking that the loss of chance doctrine can be applied to a large variety of cases, including legal malpractice, failure to warn, failure to rescue, and informed consent cases.[186] However, this expanded liability is actually a positive factor for the doctrine. The purpose of negligence law is to award damages when someone has been harmed by the negligence of another. Negligent individuals should be held liable for their negligence, and adopting this approach ensures this can be done efficiently. It is essential to remember that a lost chance has value.[187] That means if an individual lost a chance at winning a case due to a lawyer's negligence, or she lost the chance of being rescued, she deserves to be compensated for that lost chance. The primary requirement should be that a plaintiff can prove by a preponderance of the evidence that the loss occurred and that the defendant caused the loss. Furthermore, if the court is concerned with the loss of chance doctrine being applied in other areas of the law, it can expressly state that it is only adopting the loss of chance doctrine in cases involving medical malpractice.

Finally, the court is concerned that the loss of chance doctrine runs contrary to the Nebraska Hospital Medical Liability Act, which only allows plaintiffs to recover damages that they can prove were caused by the defendant by a preponderance of the evidence.[188] This would be true if the court adopted the relaxed standard of proof approach be-

183. *See supra* note 98 and accompanying text.

184. Cohan v. Med. Imaging Consultants, P.C., 297 Neb. 111, 125, 900 N.W.2d 732, 742 (2017).

185. Washington v. Am. Cmty. Stores Corp., 196 Neb. 624, 244 N.W.2d 286 (1976) (holding plaintiff could recover for lost chance of an Olympic wrestling career due to injuries caused by a car accident).

186. Fischer, *supra* note 4, at 606 (discussing the various legal areas where the loss of chance doctrine can be applied).

187. *Id.* at 617–19; *see* Stephen F. Brennwald, Comment, *Proving Causation in "Loss of a Chance" Cases: A Proportional Approach*, 34 CATH. U. L. REV. 747, 766–68 (1985); Zilich, *supra* note 27, at 684–85.

188. NEB. REV. STAT. § 44-2819 (Reissue 2010).

cause that approach reduces the level of causation needed and, therefore, does not require the plaintiff to prove causation by a preponderance of the evidence.[189] However, that would not be the case under the distinct compensable injury approach because, under this approach, the plaintiff must prove that the defendant caused their loss of chance by a preponderance of the evidence.[190]

Through examination, it is clear that the reasons listed by the Nebraska Supreme Court are lackluster and can be refuted. Though these reasons may point out flaws with the relaxed standard of proof approach, none of the reasons are strong enough to show that the adoption of the distinct compensable injury approach would be inappropriate.[191] Even if the Nebraska Supreme Court is still hesitant, there are a multitude of policy reasons in support of the loss of chance doctrine that should persuade the court to adopt it.

B. Policy Reasons Supporting Nebraska's Adoption of the Loss of Chance Doctrine

The loss of chance doctrine has gained extreme popularity among the majority of courts in this country, and Nebraska should follow suit.[192] The doctrine is essential both to protect injured patients and to prevent future medical malpractice incidents. Under the traditional all or nothing approach, "if a patient had a 49% chance of survival, and the [doctor's negligence] caused that chance to drop to zero," then the doctor would not be held liable.[193] "Thus, the all or nothing rule provides a 'blanket release from liability for doctors and hospitals any time there [is] less than a 50 percent chance of survival, regardless of how flagrant the negligence.'"[194] This is precisely why the loss of chance doctrine needs to be adopted. A doctor should not be allowed to negligently care for a patient and avoid liability solely because the patient's chance of survival is below 50%.[195] The Kansas Supreme Court explained this perfectly by stating:

> The reasoning of the district court herein [to reject the loss of chance as a distinct compensable injury] . . . in essence, declares open season on critically ill or injured persons as care providers would be free of liability for even the

189. Férot, *supra* note 60, at 615–16.
190. *See* Zilich, *supra* note 27, at 692–99.
191. As alluded to above, Nebraska should not adopt the relaxed standard of proof approach because it does not follow traditional tort law principles and it is likely to overcompensate plaintiffs. This is because under this approach, courts award full damages based on a relaxed standard of causation instead of damages based on the specific loss of chance caused by the negligent defendant. *See supra* section II.C.
192. *See supra* note 2 and accompanying text.
193. Matsuyama v. Birnbaum, 890 N.E.2d 819, 829 (Mass. 2008).
194. *Id.* at 829–30 (citing Herskovits v. Grp. Health Coop., 664 P.2d 474, 477 (Wash. 1983)).
195. *See* Evatt, *supra* note 36, at 994.

> grossest malpractice if the patient had only a fifty-fifty chance of surviving the disease or injury even with proper treatment.[196]

In his *Yale Law Review* article, Professor King provided a multitude of reasons why courts should adopt the loss of chance doctrine.[197] First and foremost, the traditional all or nothing approach "subverts the deterrent objectives of tort law by denying recovery for the effects of conduct that causes statistically demonstrable losses."[198] Furthermore, the all or nothing approach does not serve the primary aim "of fairly allocating the costs and risks of human injuries."[199] Most importantly, the traditional all or nothing approach "fails to ensure that victims, who incur the real harm of losing their opportunity for a better outcome, are fairly compensated for their loss."[200]

Additionally, it is essential for courts to adopt the loss of chance doctrine because in these cases it was the defendant's negligence that effectively made it impossible to determine whether or not the patient would have survived had he or she received appropriate care, and "it is particularly unjust to deny the person recovery for being unable 'to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass.'"[201] Nebraska should adopt the loss of chance doctrine to not only fairly compensate injured patients but also to protect future victims of medical malpractice. If Nebraska refuses to adopt the loss of chance doctrine, it is telling sick and vulnerable individuals that their precious chance of survival has no value and should be ignored.

One final reason noted by other jurisdictions reluctant to adopt the loss of chance doctrine is the fear that it will sharply increase the number of medical malpractice cases.[202] However, statistical data repudiates this concern. The best list available for determining the number of cases filed is the list of claims that medical malpractice insurers paid in states that have adopted the doctrine.[203] The federal government requires medical malpractice insurers to report each time they pay a claim for one of their insureds.[204] The database that collects this data is the National Practitioner Data Bank (NPDB) maintained by

196. Delaney v. Cade, 873 P.2d 175, 180 (Kan. 1994) (quoting Roberson v. Counselman, 686 P.2d 149, 160 (Kan. 1984)); *see* Evatt, *supra* note 36, at 994.
197. *See* King, *supra* note 43.
198. *Id.* at 1377.
199. Vertentes v. Barletta Co., 466 N.E.2d 500, 504 (Mass. 1984) (Abrams, J., concurring).
200. Matsuyama v. Birnbaum, 890 N.E.2d 819, 830 (Mass. 2008) (citing *Delaney*, 873 P.2d 175).
201. *Id.* at 831 (quoting Hicks v. United States, 368 F.2d 626, 631 (4th Cir. 1966)).
202. *See* Férot, *supra* note 60, at 607–09.
203. *See* Koch, *supra* note 1, at 619–20; *NPDB Data*, NAT'L PRAC. DATA BANK, https://www.npdb.hrsa.gov/analysistool [https://perma.unl.edu/KM75-S5ZX] (last visited Feb. 22, 2021).
204. 42 U.S.C. § 11131 (2018).

the United States Department of Health and Human Services (USDHHS).[205] The data compiled by the USDHHS in the NPDB shows that there is no obvious effect on the number of claims being paid after a state adopts the loss of chance doctrine.[206] While the number of claims being paid does not directly correlate to the number of medical malpractice cases being filed, it is a strong signal that adopting the loss of chance doctrine does not significantly impact the number of cases.

V. CONCLUSION

For the time being, it looks like Mary is not going to be able to recover anything from the doctor who negligently decreased Lloyd's chance of survival. Though this Comment argues against the approach taken by the Nebraska Supreme Court, that stance remains the law in Nebraska. However, Nebraska should adopt the distinct compensable injury approach to the loss of chance doctrine because it is consistent with traditional tort law principles, provides vulnerable patients with a form of recovery that can help protect them from the negligence of their healthcare professionals, and, most importantly, because the reasons the Nebraska Supreme Court previously listed in opposition to the loss of chance doctrine are not persuasive. The distinct compensable injury approach allows patients to hold their doctors accountable even when they have less than a 50% chance of survival or a better outcome while still requiring plaintiffs to demonstrate by a preponderance of the evidence that the defendant was at fault for their lost chance. If Nebraska were to adopt the distinct compensable injury approach to the loss of chance doctrine, the state could better provide injured plaintiffs with the valuable protection they need. No longer will doctors be immune to liability in cases involving patients who happened to have a chance of survival below 50%.

Over the coming years, Nebraska attorneys will need to continue to fight for the adoption of the loss of chance doctrine, and only then will the Nebraska Supreme Court see why it should adopt the doctrine. Without the dedicated work of attorneys, the only other possible chance would be the Nebraska Legislature choosing to adopt a statute allowing for loss of chance suits. Either way, only time will tell if Mary or people like Mary will ever be able to recover damages against negli-

205. *NPDB Data*, *supra* note 203.

206. *See* Koch, *supra* note 1, at 619–24 (examining the effect of the loss of chance doctrine on the number of cases heard by the courts). Koch examines multiple states that have adopted the doctrine including Wyoming, Illinois, and Ohio. *Id.* Each state shows that there was not any lasting increase in the number of malpractice cases being heard by the courts but rather the number of cases had often actually gone down. *Id.* However, Koch mentions this may be due to a lag in reporting by the insurance companies. *Id.* at 620 n.120.

gent doctors who are now shielded by the all or nothing approach taken by the Nebraska Supreme Court.