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TORT LAW — LOSS OF A CHANCE DOCTRINE — MASSACHUSETTS SUPREME JUDICIAL COURT ACCEPTS LOSS OF A CHANCE IN MEDICAL MALPRACTICE SUITS. — *Matsuyama v. Birnbaum*, 890 N.E.2d 819 (Mass. 2008).

Negligence plaintiffs must generally demonstrate by a preponderance of the evidence that the defendant's conduct actually caused their injuries.<sup>1</sup> This principle of but-for causation, combined with judicial reluctance to recognize losing a chance as an injury, plays a potentially troubling role in some medical malpractice cases. Given a patient whose condition gives her a less than even chance of survival notwithstanding careful treatment, any carelessness on the doctor's part will not give rise to a viable suit because her estate cannot establish but-for causation — more likely than not she would have died anyway. Spurred by commentators and considerations of fairness and efficiency, many states have adopted "loss of a chance" theories to allow plaintiffs some recovery under these unfortunate circumstances.<sup>2</sup> These theories give patients a recovery proportional to the diminution of their chances of survival. Recently, in *Matsuyama v. Birnbaum*,<sup>3</sup> the Massachusetts Supreme Judicial Court recognized a version of loss of a chance, suggesting several factors that make loss of a chance appropriate in the medical malpractice context. But the court did not offer a coherent theory of why these factors should all be required before extending loss of a chance, and the factors taken individually suggest different conceptions of the doctrine's proper scope. This leaves lower courts the difficult task of determining which factors to emphasize and which to deemphasize in deciding on the proper scope of loss of a chance. They can best accomplish this task by emphasizing the narrow relationship-focused factors *Matsuyama* discussed.

Kimiyoshi Matsuyama died of stomach cancer that went undetected despite numerous visits to his doctor.<sup>4</sup> During these visits Matsuyama generally exhibited increasingly severe symptoms of stomach cancer: heartburn, difficulty breathing while eating, severe stomach pain, the appearance of cancer-indicative moles, and elevated levels of cancer-indicative bacteria.<sup>5</sup> After five visits and almost four years,

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<sup>1</sup> See, e.g., Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1355–56 (1981).

<sup>2</sup> See *Matsuyama v. Birnbaum*, 890 N.E.2d 819, 828 n.23 (Mass. 2008) (listing states that have accepted a version of the doctrine).

<sup>3</sup> 890 N.E.2d 819.

<sup>4</sup> See *id.* at 824–25.

<sup>5</sup> See *id.*

Matsuyama's physician finally ordered the ultrasound that would show that he had stomach cancer.<sup>6</sup> He died only five months later.<sup>7</sup>

The following June, Matsuyama's widow, as executrix, brought suit against Dr. Neil Birnbaum, Matsuyama's primary physician.<sup>8</sup> Based on expert testimony about chances of survival at various stages of stomach cancer, the jury found that Matsuyama had a 37.5% chance of survival at the time of Birnbaum's initial carelessness<sup>9</sup> and that Birnbaum's carelessness was a "substantial contributing factor" in Matsuyama's death.<sup>10</sup> Multiplying Matsuyama's damages by 37.5%, the jury awarded his widow and child \$328,125.<sup>11</sup>

On appeal, the Massachusetts Supreme Judicial Court unanimously affirmed,<sup>12</sup> holding this version of the loss of a chance doctrine compatible with the "fundamental aims" of its tort law: loss-sharing, deterrence, and compensation.<sup>13</sup> The court began by noting the inefficiency and injustice of the traditional causation rule, stating that "[i]t fails to provide the proper incentives to ensure that the care patients receive does not slip below the 'standard of care and skill of the average member of the profession'"<sup>14</sup> and fails "to ensure that victims, who incur the real harm of losing their opportunity for a better outcome, are fairly compensated."<sup>15</sup> The court then "delineat[ed] the proper shape of the doctrine" by responding to standard critiques of it.<sup>16</sup> To the claim that loss of a chance diluted traditional causation principles, the court responded that a proper understanding of the injury in loss of a chance cases eliminates this difficulty. By recognizing the loss of a chance itself as the injury, the traditional causation principles still apply, but rather than needing to prove that the physician's lack of care caused death, a claimant can prove liability by showing that the physician's carelessness caused "the diminished likelihood of achieving a more favorable medical outcome."<sup>17</sup>

The court then responded to the concern that loss of a chance would destabilize tort law. It "emphasize[d] that [its] decision . . . [was]

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<sup>6</sup> See *id.* at 825.

<sup>7</sup> See *id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 828.

<sup>10</sup> *Id.* at 827. "The judge instructed the jury that 'substantial' 'doesn't mean that Mr. Matsuyama's chance of survival was [50%] or greater, only that there was a fair chance of survival or cure had Dr. Birnbaum not been negligent . . .'" *Id.* at 827 n.20 (alteration in original).

<sup>11</sup> *Id.* at 828.

<sup>12</sup> *Id.* at 823.

<sup>13</sup> *Id.* at 830.

<sup>14</sup> *Id.* (quoting *Brune v. Belinkoff*, 235 N.E.2d 793, 798 (Mass. 1968)).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 831.

<sup>17</sup> *Id.* at 831-32.

limited to loss of chance in medical malpractice actions”<sup>18</sup> and stated what it felt made medical malpractice a “particularly appropriate” place for the doctrine.<sup>19</sup> The court first discussed the scientific evidence available in medical malpractice suits, saying that this evidentiary reliability was “key” to its recognition of loss of a chance<sup>20</sup> and that successful loss of a chance claims required such evidence.<sup>21</sup> The court also emphasized the closeness of the doctor-patient relationship and the doctor’s assumption of that relationship, stating that “health care providers undertake to maximize a patient’s chances of survival, [and so] their failure to do so should be actionable.”<sup>22</sup> The court concluded its remarks about the appropriateness of the doctrine in medical malpractice with the observations that patients often have a less than even chance of survival when they come to the doctor and that doctors are better situated to prevent harm than patients.<sup>23</sup>

The court then reconciled loss of a chance with Massachusetts’s wrongful death statute, which imposes liability on one who “by his negligence causes the death of a person.”<sup>24</sup> To the argument that this fairly clear language barred liability under a loss of a chance theory, the court responded by reciting the unusual history of the wrongful death statute and its subsequent interpretation. The court stated that the statute was adopted in response to a Supreme Judicial Court decision holding that no common law cause of action for wrongful death existed.<sup>25</sup> It then reaffirmed earlier rulings holding that because of this unusual history the statute “impose[s] certain procedural requirements” on wrongful death claims but does not cabin the evolving substantive common law cause of action, including the recognition of loss of a chance claims.<sup>26</sup> Finally, the court upheld the method by which the trial court set damages. Although it recognized that the “proportional damages approach” may over- or undercompensate plaintiffs,<sup>27</sup> the

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<sup>18</sup> *Id.* at 834; *see also id.* at 823. The court reserved the question of whether the loss of a chance doctrine could be used by plaintiffs seeking compensation for ultimate harms that have not yet occurred. *See id.* at 834 n.33.

<sup>19</sup> *Id.* at 823.

<sup>20</sup> *Id.* at 833.

<sup>21</sup> *See id.* at 834 n.32 (“To the extent that evidence of the loss of chance is based on reliable expert testimony about accepted medical data, as it must be, permitting recovery for loss of chance damages does nothing to make our laws of medical malpractice less uniform or predictable than they are in the ordinary course.”).

<sup>22</sup> *Id.* at 835 (quoting KENNETH S. ABRAHAM, *FORMS AND FUNCTIONS OF TORT LAW* 117–18 (3d ed. 2007)) (internal quotation mark omitted).

<sup>23</sup> *See id.*

<sup>24</sup> MASS. GEN. LAWS ch. 229, § 2 (2004).

<sup>25</sup> *See Matsuyama*, 890 N.E.2d at 835–36.

<sup>26</sup> *Id.* at 836–37.

<sup>27</sup> *See id.* at 840 & n.43 (citing David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 WAKE FOREST L. REV. 605, 631–33 (2001)).

court upheld its use on the grounds that it is “an easily applied calculation that fairly ensures that a defendant is not assessed damages for harm that he did not cause.”<sup>28</sup> Having established the viability of the plaintiff’s loss of a chance theory and the method of damage assessment, the court quickly disposed of challenges to the sufficiency of the evidence<sup>29</sup> and jury instructions.<sup>30</sup>

*Matsuyama* thus suggests to lower courts the factors that make medical malpractice an appropriate place for loss of a chance. However, *Matsuyama*’s suggestions about this appropriateness will make it difficult for lower courts to know when, if ever, to expand the doctrine. The question of proper expansion is important because courts will face requests to expand sooner rather than later. Factual scenarios involving sympathetic plaintiffs with systemic evidentiary problems pressure courts to consider expanding the doctrine,<sup>31</sup> and some courts have already recognized loss of a chance outside of medical malpractice.<sup>32</sup> Courts will have a difficult time deciding whether to extend the doctrine because *Matsuyama* gives conflicting, confusing advice. It lists two types of factors that make medical malpractice a particularly good candidate for loss of a chance: relationship-based factors such as the closeness of the doctor-patient relationship and the doctor’s greater ability to prevent harm, and an evidence-based factor, the scientific evidence available in the medical context. The decision not to extend beyond medical malpractice implicitly relies on the significance of both kinds of factors, but there is no reason why all of these factors should be required for loss of a chance to be appropriate. A decision to expand outside the medical malpractice context thus would require emphasizing one set of factors and deemphasizing the other, but taken individually the sets paint quite different pictures of the appropriate scope of the doctrine, leaving lower courts initially to guess at what the Supreme Judicial Court will consider the doctrine’s proper scope.

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<sup>28</sup> *Id.* at 840.

<sup>29</sup> *See id.* at 841–42. The court emphasized that it still required but-for causation rather than using a “substantial contributing factor” test of causation. *See id.* at 842. But the causal relationship to be proven was between carelessness and the loss of a chance, not wrongful death. *See id.* at 842–43.

<sup>30</sup> *See id.* at 843–47. Though the court held that the trial court improperly took from the jury’s consideration whether *Matsuyama* had any chance for survival after Birnbaum’s negligence, it refused to remand on this ground because the defendant had not preserved an objection to this aspect of the instruction. *See id.* at 844–45.

<sup>31</sup> This is especially true where pluralistic theories of tort law — like the one expounded in *Matsuyama* — drive the analysis. *See* John C.P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1222, 1249–50 (2008) (arguing that pluralistic tort theories will lead to calls for expansion of loss of a chance).

<sup>32</sup> *See, e.g.,* *Bishop v. Gainer*, 272 F.3d 1200, 1206–07 (7th Cir. 2001) (allowing use of loss of a chance in employment discrimination claims).

A court might require that all the factors be present before extending loss of a chance, but this approach does not fit with *Matsuyama*'s declarations about the "fundamental aims of tort law": loss-sharing, deterrence, and compensation.<sup>33</sup> But if these fundamental aims determine the doctrine's proper scope, courts cannot always require both the evidence-based and the relationship-based distinguishing features of medical malpractice. Consider deterrence. Whether tort law without loss of a chance efficiently deters depends on factors like the likelihood that the traditional rules will "systematically 'miss' ongoing instances of antisocial behavior that [tort law] should deter"<sup>34</sup> and whether defendants profit from their antisocial conduct.<sup>35</sup> Given these context-dependent factors, a blanket ban on loss of a chance without scientific evidence may actually undermine rather than promote effective deterrence. Similarly, if tort law is truly about loss-sharing, factors such as the relative numbers of injurers and victims, the availability of insurance, and whether the injurer and injured are commercial entities<sup>36</sup> are more relevant than the level of trust in the parties' relationship. These incongruities between the fundamental aims of tort law and *Matsuyama*'s explanations about what makes loss of a chance appropriate in medical malpractice suggest that a trial court's decision to require both relationship and evidentiary factors before extending loss of a chance would be based more on *Matsuyama*'s broad language than on a coherent theory linking the two. Thus, a future trial court cannot, consistent with all of *Matsuyama*'s stated fundamental aims of tort law, simply require all of the factors before extending the doctrine. Such a court will have to pick some to emphasize and others to deemphasize — a difficult choice considering that the scope of the doctrine will be quite different depending on which factors are chosen.

If the relationship-specific factors such as the plaintiff's trust in the defendant are central, loss of a chance is likely applicable to many professionals but not to most other possible tortfeasors. Consider first the closeness of the doctor-patient relationship. Patients trust and go to doctors precisely because of patients' relative inability to improve on their own their chances for the best outcome.<sup>37</sup> Something close to this, though, could also be said of other professionals, such as lawyers.

<sup>33</sup> See *Matsuyama*, 890 N.E.2d at 830.

<sup>34</sup> Saul Levmore, *Probabilistic Recoveries, Restitution, and Recurring Wrongs*, 19 J. LEGAL STUD. 691, 706 (1990).

<sup>35</sup> See *id.* at 720.

<sup>36</sup> Cf. Ronen Perry, *Relational Economic Loss: An Integrated Economic Justification for the Exclusionary Rule*, 56 RUTGERS L. REV. 711, 761-65 (2004) (listing these factors in determining the best loss spreader where pure economic harm to third parties results from negligence).

<sup>37</sup> See *Falcon v. Mem'l Hosp.*, 462 N.W.2d 44, 52 (Mich. 1990), *superseded by statute*, MICH. COMP. LAWS § 600.2912(a)(2) (1993), *as recognized in* *Weymers v. Khera*, 563 N.W.2d 647, 652-53 (Mich. 1997).

As several commentators have recognized, clients are similarly dependent on lawyers for the ultimate success of their claims.<sup>38</sup> Indeed, common sense suggests that most people have much more experience with medical treatment than they do with the legal system, making clients seem *more* dependent on lawyers than patients on doctors. Although some transactional clients may be able to monitor their lawyers' performance,<sup>39</sup> nontransactional work — such as an injured plaintiff's medical malpractice claim — will likely not be supervised because of the added costs of supervision,<sup>40</sup> and the increasing preference for medical second opinions suggests that more patients will double-check their doctors' decisions.<sup>41</sup> Additionally, the lawyer's superior ability to prevent bad outcomes is similar to the doctor's. While the American judicial system has a strong historical commitment to allowing pro se litigants,<sup>42</sup> and while pro se litigants may occasionally even win,<sup>43</sup> it is difficult to doubt that having counsel significantly improves a plaintiff's odds.<sup>44</sup> In light of these relationship-focused similarities between doctors and other professionals, a decision to focus on these factors would likely result in a loss of a chance doctrine that includes only parties who have the kind of close relationships developed in professional contexts, relationships not present between employer and employee or careless polluter and pollution victims.

However, if the evidentiary factor were taken as central, the doctrine's proper scope would likely *exclude* many professionals who would be covered if the relationship factors were central and *include* some non-professionals who would not be covered if the relationship factors were central. In many professional contexts, evidence about chances is not as good as it is in the medical malpractice context, a difference noted by many of the academic commentators who have cau-

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<sup>38</sup> See, e.g., Lawrence W. Kessler, *Alternative Liability in Litigation Malpractice Actions: Eradicating the Last Resort of Scoundrels*, 37 SAN DIEGO L. REV. 401, 483 (2000) ("The nature of the dependent status in litigation cases is similar to . . . doctor-patient relationships.").

<sup>39</sup> See John C.P. Goldberg, *What Clients Are Owed: Cautionary Observations on Lawyers and Loss of a Chance*, 52 EMORY L.J. 1201, 1210 (2003) (arguing that clients' greater ability to supervise their lawyers' performance counsels against loss of a chance in legal malpractice cases).

<sup>40</sup> Cf. Kessler, *supra* note 38, at 485–86 (arguing that litigation clients are more dependent on lawyers than transactional ones because of litigators' superior knowledge of the process).

<sup>41</sup> See LaDonna Carlton, *Generation X and Civil Juries*, 87 ILL. B.J. 436, 436 (1999) (finding younger jurors in medical malpractice cases felt plaintiffs should have received a second opinion).

<sup>42</sup> See Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 374–76 (2005).

<sup>43</sup> See, e.g., Spencer G. Park, Note, *Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 HASTINGS L.J. 821, 835–36 & n.32 (1997) (noting that 15.4% of the sampled pro se litigants achieved settlements but that a sizeable portion of these acquired counsel after filing but before settling).

<sup>44</sup> Cf. Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 4 (2008) ("[T]here is a wide disparity in the success rate of [immigrants] who have lawyers and those who proceed *pro se*.").

tioned about extending the doctrine to areas like legal malpractice.<sup>45</sup> Plaintiffs in these professional contexts would not recover if lower courts followed *Matsuyama's* evidentiary rather than relationship-focused suggestions. In some nonprofessional areas like toxic torts, though, plaintiffs may be able to rise to the evidentiary challenge.<sup>46</sup> Even some nonscientific areas may provide data clear enough to support loss of a chance under this rationale. In the employment discrimination context, where the Seventh Circuit has utilized loss of a chance in failure to promote claims,<sup>47</sup> government employers often use promotional systems based at least as much on tests and seniority as on discretion.<sup>48</sup> While this evidence is not as scientific as *Matsuyama's*, it is likely closer than evidence that, as Judge Posner noted, is routinely accepted in comparative fault analysis.<sup>49</sup>

Importantly, treating evidence as key does not *a priori* bar certain kinds of claims, but rather invites clever plaintiff's lawyers to find experts capable of generating the requisite statistics. In this sense, a focus on the evidentiary factors would result in a more open-ended loss of a chance doctrine than a focus on the relationship factors would; the nature of the trust involved in doctor-patient or attorney-client relationships does not change, whereas the kind of evidence available in different contexts frequently does. Thus, focusing on the evidentiary factor would create a loss of a chance doctrine that is both broader and narrower — broader in that it would apply wherever plaintiffs could assemble good evidence, and narrower in that many plaintiffs with close relationships to their tortfeasors would be unable, at least in the short term, to meet this high evidentiary hurdle.

Lower courts following *Matsuyama* thus find themselves in an unenviable position. The decision itself offered suggestions for why loss of a chance is appropriate in medical malpractice, but it listed “fundamental aims” of tort law that are incompatible with requiring all of the factors. It also remained silent about which factors should be emphasized and which downplayed in determining the doctrine's proper scope. *Matsuyama* discussed the factors almost simultaneously, offering few hints about which factors are more important.<sup>50</sup>

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<sup>45</sup> See, e.g., Fischer, *supra* note 27, at 632–33; Goldberg, *supra* note 39, at 1212.

<sup>46</sup> Cf. *In re “Agent Orange” Prods. Liab. Litig.*, 597 F. Supp. 740, 835–39 (E.D.N.Y. 1984) (discussing the difficulty of traditional negligence rules in toxic tort cases and using reasoning similar to loss of a chance in upholding the proposed class action settlement).

<sup>47</sup> See, e.g., *Bishop v. Gainer*, 272 F.3d 1200, 1206–07 (7th Cir. 2001).

<sup>48</sup> See, e.g., *Koski v. Gainer*, No. 92 C 3293, 1997 WL 619858, at \*3–4 (N.D. Ill. Sept. 30, 1997) (describing the promotional system used by the Illinois State Police).

<sup>49</sup> See *Doll v. Brown*, 75 F.3d 1200, 1206–07 (7th Cir. 1996).

<sup>50</sup> Perhaps the court's repeated references to the evidentiary factor suggest it should be elevated. However, doing so would lead to a broad loss of a chance doctrine, a result hard to square with the court's assurances that the doctrine will not radically alter Massachusetts tort law.

Given this difficult situation, what should lower courts do? Emphasizing the relationship-focused factors will more carefully and reasonably define loss of a chance until the Massachusetts Supreme Judicial Court speaks more clearly. First, the relationship factors deal with matters of traditional judicial concern, such as the duties parties owe to each other. Given the difficulty courts already have applying the mathematical aspects of loss of a chance,<sup>51</sup> a decision to emphasize the relationship factors would avoid compounding this problem.<sup>52</sup> Second, emphasizing these factors provides a more stable initial boundary for the doctrine. Using the evidentiary factors would invite loss of a chance claims in a wide variety of contexts, whereas using the relationship factors would keep it largely within professional liability. While it may ultimately be wise to expand loss of a chance beyond this area,<sup>53</sup> such a dramatic reworking of tort law seems best left to the Supreme Judicial Court rather than trial courts. Third, courts applying loss of a chance in nonmedical, but still professional, contexts would have the experience of other courts to guide them; in many Commonwealth countries, loss of a chance is already accepted in legal malpractice claims.<sup>54</sup> Finally, following the relationship factors avoids imposing heavy, unusual duties on otherwise unrelated parties.<sup>55</sup> Keeping loss of a chance within professional boundaries would impose these higher duties only in close relationships, where they are more appropriate.<sup>56</sup> Thus, courts following *Matsuyama* should emphasize the relationship-focused factors rather than the evidentiary one.

The loss of a chance doctrine could reshape American tort law. By providing conflicting suggestions on what makes medical malpractice an especially appropriate place for the doctrine, *Matsuyama* unfortunately bequeathed to lower courts difficult questions about the doctrine's proper scope, questions courts can best answer by hewing to the narrower, relationship-focused factors *Matsuyama* identified.

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<sup>51</sup> See generally Lars Noah, *An Inventory of Mathematical Blunders in Applying the Loss-of-a-Chance Doctrine*, 24 REV. LITIG. 369 (2005).

<sup>52</sup> Cf. D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 HARV. L. REV. 533, 534 (2008) ("The dialogue between law and quantitative methods in the civil rights area has lasted for decades, but few would characterize the relationship as happy.")

<sup>53</sup> For a bibliography of both sides of the debate, see Joseph H. King, Jr., "Reduction of Likelihood" *Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine*, 28 U. MEM. L. REV. 491, 493 n.8 (1998).

<sup>54</sup> See Fischer, *supra* note 27, at 642–43 (citing examples). Interestingly, many of these nations do not allow loss of a chance in medical malpractice cases. See *id.* at 642.

<sup>55</sup> See Goldberg, *supra* note 39, at 1207.

<sup>56</sup> See *id.* at 1209–10.