# LOST CHANCE AS SUBSTANTIAL FACTOR IN CAUSING INJURY

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## PART 1 OF 2 PART ARTICLE

In medical malpractice cases competent poof of a diminished chance for a cure or better outcome or increased injury and pain and suffering may be a substantial factor or proximate cause of injury. Part 1 of this article will deal with such evidence as presented in failure to diagnose and treat cancer cases while part 2 of this article will address such evidence as presented in failure to diagnose other medical conditions and illness.

The issue of whether a doctor's negligence is more likely than not a proximate cause of plaintiff's injury is usually for the jury to decide. Kallenberg v. Beth Israel Hospital,45 A.D.2nd 177(A.D.2nd 1974), affirmed 37 N.Y.2nd719(Court of Appeals).

In medical malpractice cases involving a delayed diagnosis of disease or medical condition, competent evidence that the negligent delay caused the plaintiff additional pain and suffering, further treatment and/or a diminished chance of survival or cure due to progression of the condition or disease is sufficient. Polanco v. Reed, 105 A.D.3rd 438(A.D.1st.2013).

In the seminal case of Kallenberg,supra., the First Department upheld plaintiff's jury verdict as supported by sufficient evidence and expert testimony proving departure in failing to administer Naturetin over several days to treat high blood pressure causing bleeding aneurysm deprived plaintiff's decedent of life saving surgery in which she had "a 20 say 30 or 40 percent chance of survival." The expert testified that if the medication had been given surgery would have been performed. Thus, the failure to give this medication was a "producing, contributing factor to this woman's death. "

Subsequently, in Mortensen v. Memorial Hospital, 105 A.D.2nd 438 ( A.D.1st 1984), the First Department in a lengthy decision discussed the facts in Kallenberg,supra., and affirmed the Trial Court's charge on proximate cause as to whether the defendant's malpractice deprived plaintiff of a substantial possibility of saving the leg (containing a tumor mass ultimately requiring amputation). The plaintiff alleged that Dr. Rakov was negligent in not reoperating immediately upon discovering the size of the mass or taking other appropriate action to refer the plaintiff.

The Court stated the concepts of "substantial factor in bringing about an injury" and "substantial possibility of avoiding the injury "are virtually indistinguishable. "…That this jury understood that Dr. Rakov' s malpractice had to be a substantial factor in bringing about the loss of plaintiff's leg----by depriving him of a substantial possibility of avoiding amputation----is clear, as evidenced by its last note…" The Jury found Dr. Rakov negligent for not taking any further action after the partial excision of the tumor but, in light of the existing pathology, was unable to find that his inaction was a proximate cause of the amputation.

In its discussion the Court in approving the "substantial possibility "charge cited the Third Department's decision in O'Connell v. Albany Med.Center Hospital, (101 A.D.2nd 637,638) which in affirming a plaintiff's verdict, noted that the charge permitted a jury to find based on the testimony of plaintiff's expert, " That there was a substantial possibility that plaintiff's *** recovery would have been faster, less painful and less disabling but for the malpractice of defendant ".

The Appellate Divisions are in agreement that expert testimony in support of such a claim need not quantify the extent or percentage to which the alleged departure from accepted standards decreased the chance of a better outcome or increased the injury so long as there is sufficient evidence to prove that the departure more likely than not caused this injury. Barbara Goldberg v. Isadore Horowitz, 73 A.D.3rd691(A.D.2nd.2010); King v.St.Barnabas Hose,87A.D.3rd 238(A.D.1st.2011); Clune v.Moore,142A.D.3rd.1330(A.D.4th.2016; D.Y. v. Catskill Reg'l Med.Ctr.,156 A.D.3rd 1003(A.D.3rd 2017).

## PART 1- CANCER CASES

In Polanco, supra., the plaintiff, who was previously treated for breast cancer, alleged the defendant committed malpractice in failing to timely notify her of positive lymph node findings on a PET Scan suspicious for metastatic disease. A second PET Scan 6 months later showed progressive findings. The plaintiff alleged the 6-month delay in learning the results of the PET Scan and diagnosis of metastatic breast cancer recurrence caused increased breast pain, progression of the disease as manifested by the increased size of the lymph nodes, lung surgery, a reduced chance of recovery and 10% diminution in her life expectancy.

The First Department held that the Motion Court erroneously decided issues of fact stating where oncology experts present competing opinions on causation, particularly about the progression of the disease, there is an issue of fact for the jury to decide. Whether a diagnostic delay affected a patient's prognosis is typically an issue of fact that should be presented to the jury.

In Hughes v. New York Hospital-Cornell Medical Ctr. 195 A.D.2nd 442(A.D.2nd 1993) medical expert testimony that a 2 week delay in testing or referring the patient who was coughing up blood to a lung specialist was responsible for additional suffering and a diminished chance of survival or death which was earlier than it might have been (Mr. Hughes died from advanced lung cancer a mere 6 weeks after his initial hospital discharge). This evidence was sufficient to reverse dismissal of the complaint as a matter of law and grant a new trial.

The Second Department noted that the jury may have reasonably inferred that the cancer was spreading rapidly, and there was no evidence that starting treatment 2 weeks earlier would have had no effect. It is possible to conclude that a few more weeks or months of life were possible but for the omission. Further, the court states that it cannot be said with absolute certainty that Mr. Hughes would not have had a chance to survive even longer given his age and active life style.

More recently, in Wager v. Rao, 178 A.D.3rd 434 (1st.2019), the First Department found plaintiff's expert's affidavit sufficient to deny summary judgement in setting forth that delayed diagnosis of lung cancer caused decedent's cancer to progress from very treatable stage 1 to terminal stage 4 at the time of diagnosis resulting in death. The court stated even though both parties' experts did not really know the status of decedent's condition at that time of the alleged delay the experts could base their opinions on their knowledge of the rate of progression of this particular type of cancer.

In Calvin v. N.Y.Med Group P.C., 286 A.D.2nd 469(A.D.2nd 2001), the Second Department affirmed a jury verdict for the plaintiff (ultimately sustaining $667,775) based on expert testimony that malpractice resulting in a 2-week delay in the diagnosis of high-grade non-Hodgkin's lymphoma was a cause of death several days after the diagnosis.

The Appellate Court finds that the plaintiff's expert witnesses established that Dr. DeWitt's departures from good and accepted standards of medical care were a substantial factor in causing the decedent's death, **"**The plaintiff simply had to show that "it was probable that some diminution in the chance of survival had occurred."

Here, the jury's choice to give more credence to the plaintiff's expert witness was a fair interpretation of the evidence.

In Scanga v. Family Practice Assocs. of Rockland. 302 A.D.2nd 443(A.D.2nd 2003), the Second Department affirmed the denial of summary judgment to the doctors where there was no showing that a 3-4-month delay in the diagnosis of decedent's colon cancer was not a substantial factor in shortening the length of the decedent's life. Although defendants' medical expert opined that the cancer was "unresectable" regardless of when diagnosed and that "beginning chemotherapy 3 or 4 months earlier would have had an insubstantial effect on how long plaintiff would live or on the quality of his remaining days", it failed to establish that the delay was not a substantial factor in shortening the length of Scanga' s life.

In Neyman v. Doshi Diagnostic Imaging Servs.P.C., 153 A.D.3rd 538( A.D.2nd 2017)., the Second Department, in reversing summary judgement for the defendant, referred to the detailed medical affidavit of plaintiff's medical expert that the 7 month delay in diagnosing

plaintiff's breast cancer more likely than not deprived the plaintiff of a chance for a cure and the immense suffering of the continuing cancer therapy and eventual progression of the cancer would have been avoided.

Had a mammogram been timely obtained (this was the alleged departure), more likely than not, the breast tumors would have been detected at an early stage. The expert opined that the tumor was "fast growing "with a "relatively short doubling time ", and that "delays in diagnosis when dealing with a fast-growing tumor "such as plaintiff's, "are quite significant in negatively impacting the plaintiff's outcome." Further, the expert opined that the cancer in March 2006 was at most a stage one or two, and that the failure to diagnose at that time proximately caused Olena to lose the chance for a better outcome, including the elimination of the cancer through excision and chemotherapy. The expert pointed to plaintiff's positive response to chemotherapy, which extended her life, despite the numerous bony metastasis present at diagnosis, for over 2 years and 7 months after her diagnosis and mastectomy.

The Court stated that where oncological experts present competing opinions on causation, particularly about the progression of the disease, there is a triable issue of fact to decide. Citing Polanco, supra.

As to causation, the Second Department in Neyman, supra., held that a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant. Further," As to causation , the plaintiff's evidence may be deemed legally sufficient even if its expert cannot quantify the extent to which the defendant's act or omission decreased plaintiff's chance of a better outcome or increased his injury , so long as evidence is presented from which the jury may

infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased his injury,"

In Luna v. Spadafore, 127 A.D.3rd 933(A.D.2nd 2015), the Second Department affirmed a 6.8 million jury verdict in favor of the plaintiff finding that there was a valid line of reasoning and permissible inferences from which the jury could have rationally concluded that the physicians departed from good and accepted medical practice and that the 13 month delay in obtaining a biopsy to diagnose plaintiff's thyroid cancer proximately caused her to have a worsened prognosis or decreased 10 year survival rate.

The Appellate Court concludes that "where both sides present expert testimony in support of their respective portions, it is for the jury to decide which expert's testimony is more credible."

Denial of summary judgment was affirmed by the Third Department in Provost v. Hassam 256 A.D.2nd 875(A.D.3rd 1988) based on expert affidavits that defendant committed malpractice in not timely performing a breast biopsy causing an 8-month delay in the diagnosis of plaintiff's cancerous mass. Further, said expert opined to within a reasonable degree of medical certainty that had the cancer been timely diagnosed, plaintiff's tumor would have been much smaller and she would not have suffered metastasis to the axillary lymph node. The expert further opined that a timely diagnosis would have increased plaintiff's chances for long term survival. Thus, this expert's testimony raised a factual issue for the jury to decide.

In Feldman v. Levine 90 A.D.3rd 477(A.D.1st 2011) the First Department reversed the Court below and reinstated a $1.2 million verdict in favor of the plaintiff based on malpractice causing a delay in the diagnosis and treatment of plaintiff's lung cancer. There was evidence to

conclude that the negligent delay in diagnose caused plaintiff pain and suffering, diminished her chance of survival and hastened her death. The Court stated that the oncological issues presented by the competing causation experts, namely the rate of progression of decedent's cancer, do not involve the type of novel methodology requiring a Frye hearing**.** The experts disagreement as to whether the lung cancer was present and could have been diagnosed during plaintiff's treatment with defendant prior to the diagnosis of Stage IV lung cancer was a jury issue. Moreover, the medical literature cited by plaintiff supported the methodology used by plaintiff's expert to estimate the progression of decedent's cancer.

In Schaub v. Cooper 34 A,D.3rd 268(A.D.1st 2006) the First Department reversed summary judgment for the defendant holding that plaintiff's experts did not concede that decedent's cancer was incurable after June 1999 but only that her chances for survival had decreased. Factual questions remained as to whether defendant's delay in testing or referring the decedent to a specialist diminished her chances for survival.

In essence, plaintiff's expert oncologist created a fact issue by opining that the 10 month delay in diagnosis of plaintiff's gastric cancer caused the cancer to progress from a Stage 1A cancer, as it had not spread to the liver, with a 78% five (5) year survival rate to a Stage IV cancer which at the time had a 7% five (5) year survival rate.

The Appellate Court holds that the defendant did not meet his initial burden of proof and we cannot conclude that the delay in testing or referring decedent was not responsible for a diminished chance of survival or death which was earlier than it might have been.

In Borawski v. Huang, 34 A.D.3rd 409(A.D.2nd 2006) a malpractice case for delayed diagnosis of stomach cancer, the Appellate Court reversed dismissal of plaintiff's Complaint at

the close of the evidence and granted plaintiff a new trial.

The court held:

> "Where, as here, a failure to treat is alleged, the plaintiff simply must show that "'it was probable that some diminution in the chance of survival had occurred'" (*Calvin v. New York Med. Group, 286 AD2d 469, 470, 730 NYS2d 337 [2001]* quoting *Jump v. Facelle, 275 AD2d 345, 346, 712 NYS2d 162 [2000]).*

In Gagliardo v. Jamaica Hosp,288 A.D.2nd 179(A.D.2nd 2001) the Second Department held that the Supreme Court committed error requiring a new trial in denying plaintiff's request to instruct the jury that a deprivation of a substantial chance for a cure can constitute a proximate cause of a decedent's injuries and/or death ( the jury found a departure in failing to perform a sonogram to detect testicular cancer but no proximate cause of death 16 months later ).

Thus, it is clear that to establish a prima facie case in delayed diagnosis of cancer cases will succeed or fail based on the sufficiency and details of the experts' opinions and evidence in support of or in opposition to how the delay impacted Plaintiff's medical condition, diagnosis, staging, prognosis and chances for cure or improved outcome. This necessarily requires comparison of cancer status and treatment at time of diagnosis versus at the alleged time when the cancer should have been diagnosed. The expert must address how, why and to what extent did the delayed diagnosis impact or not impact the Plaintiff's chances for cure or longer life expectancy or increase plaintiff's injuries, pain and suffering and/or require further treatment.

Part 2 of this article will address lost chance in medical malpractice cases alleging delayed diagnosis and treatment of other medical conditions and illness.

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## PART 2; LOST CHANCE AS SUBSTANTIAL FACTOR IN CAUSING INJURY

Part 1 of this article addressed proof of diminished chance for a cure or better outcome or increased injury and pain and suffering as a substantial factor or proximate cause of injury in failure to diagnose cancer cases. Part 2 of this article will address the application of law and evidence to medical malpractice cases dealing with failure to diagnose other medical conditions and illness

The Second Department in Jump v. Facelle, 275 A.D.2nd345(A.D.2nd 2000) reversed the lower Court's setting aside of the verdict in favor of the plaintiff and reinstated the verdict finding the plaintiff's expert's testimony tends to establish that the negligent 11 or 12 hour delay in performing surgery increased the harm to the decedent by infection and decreased his chances of survival. There is also evidence that the decedent became septic over the 11-hour period of delay. The Appellate Court held there was legally sufficient evidence of causation stating that in cases like these, the plaintiff's expert need not quantify the exact extent to which a particular act or omission decreased a patient's chances of survival or cure, as long as the jury

can infer that it was probable that some diminution in the chance of survival had occurred.

Also see cases finding delay of 24 hours in recommending surgery for brain abscess diminished chance for better outcome or increased injury. Dockery v. Sprecher, 68 A.D.3rd 1043(A.D.2nd 2009); delay of 24 hours in performing C-section was a substantial factor. Alicea v. Liguori, 54 A.D.3rd 784(A.D.2nd2008); and finding four (4) minute delay in performing C-section a substantial factor in contributing to the infant plaintiff's brain damage. Flaherty v. Fromberg, 46 A.D.3rd 743(A.D.2nd 2007).

In Stewart v. New York City Health and Hosps.Corp, 207 A.D.2nd 703(A.D.1st 1994), the First Department reinstated a plaintiff's verdict holding that loss of even a 5-10% chance of conceiving naturally as testified to by defendant's expert was sufficient to prove causation and allow the jury to find a verdict of $500,000 in favor of the plaintiff (the amount was reduced to $300,000).

The Appellate Court, disagreeing with court below holds as follows:

> "Thus, plaintiff did not, as defendant contends, have to prove that defendant's negligence "deprived [her] of the ability to conceive and bear children naturally." Rather, plaintiff merely had to prove that defendant's negligence was the proximate cause of the loss of plaintiff's right fallopian tube and **[***4]** that such negligence deprived her of a substantial possibility of that ability. And if the jury found that she lost even a 5 to 10 percent chance of having a successful pregnancy as a result of sexual intercourse and that this chance was "substantial," a verdict in her favor would be justified."

In Barbara Goldberg, supra., a case involving alleged departure in failing to recognize EKG changes of cardiac ischemia at rest resulting in decedent suffering a

massive heart attack causing death, the Second Department in reversing dismissal of the action by the Court below pursuant to CPLR 4401, explained proximate cause as follows:

"In a medical malpractice action, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not' that the defendant's deviation was a substantial factor in causing the injury' (citations omitted). Further,

> "A plaintiff's evidence of proximate cause may be
>
> found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, "as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased [the] injury" (*Alicea v. Liguori, 54 AD3d at 786* [internal quotation marks omitted]; *see Flaherty v. Fromberg,*46 AD3d at 745; *Jump v. Facelle, 275 AD2d 345, 346, 712 NYS2d 162 [2000]*."

The Third and Fourth Departments are in accord with this rationale. Clune, supra; D.Y. v. Catskill Reg'l Med.Ctr. supra.

In reversing a directed verdict pursuant to CPLR 4401 in favor of the defendant at the close of plaintiff's case, the Fourth Department in Clune, supra., explains:

"Where, as here, the plaintiff alleges the defendant negligently failed or delayed in diagnosing and treating a condition, a finding that the negligence was a proximate cause of an injury in the patient may be predicated on the theory that the defendant thereby 'diminished {the patient's} chance of a better outcome, 'in this case survival (citations omitted). In that instance, the plaintiff must present evidence from which a rational jury could infer that there was a 'substantial possibility 'that the patient was denied a chance of a better outcome as a result of the defendant's deviation from the standard of care (citations omitted)…However, ' a plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which

the defendant's act or omission decreased the [ patient's ] chance of a better outcome…. 'as long as evidence is presented from which the jury may infer that defendant's conduct diminished the [patient's] chance of a better outcome' (citations omitted)."

The court in Clune, supra., held that plaintiff's expert presented legally sufficient evidence that the negligence of the defendants' deprived the decedent of the substantial possibility of surviving the bowel perforation and resulting peritonitis that led to death. Also stated is that the defendants' departures substantially diminished decedent's chance of surviving the bowel perforation and infection.

The Third Department in D.Y.v.Catskill Reg'l Med.Ctr.,supra., utilized the same language and reasoning in affirming denial of defendant's motion for a directed verdict in a case involving delayed diagnosis and treatment of appendicitis causing a perforation and a large abscess to develop requiring hospitalization to tertiary care medical center and insertion of a percutaneous line. The court pointed out that even if the jury accepted defendant's argument that an earlier diagnosis would have led to a more invasive surgical procedure, he or she could still conclude that the defendant's failure to expand the diagnosis and order an earlier CT scan caused the child, at a minimum, to endure unnecessary pain and suffering while he awaited a diagnosis and treatment that would fully address his underlying condition and symptoms.

The Third Department holds that in cases of delayed diagnosis and treatment of a condition, proximate cause may be predicated on the theory that the defendant "diminished the [ patient's] chance of a better outcome or increased the injury (citations omitted)." The expert's failure to quantify the extent to which the delayed diagnosis and treatment diminished the chance for a better outcome or increased the injury is not fatal to the establishment of proximate cause, so long "as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased his [ of her ] injury ( citations omitted )."

In Gaspardi v. Aronoff, 153 A.D.3rd 795(A.D.2nd 2017) the Second Department affirmed a $1,000,000 jury verdict for the plaintiff based on claims that he was not properly advised of the signs and symptoms of a colon

perforation following a colonoscopy, and that defendant failed to properly treat the perforation causing plaintiff to undergo a Hartmann procedure removing a foot of his colon and subsequent surgeries for reversal of colostomy and hernia repair.

The Second Department, again using substantially the same language in discussing proximate cause as the other departments held that plaintiff presented sufficient expert testimony and evidence to prove that defendant's conduct diminished the plaintiff's chance for a better outcome or increased his injury.

The Court explains:

"…Establishing proximate cause in medical malpractice cases requires plaintiff to present sufficient medical evidence from which a reasonable person might conclude that it was more probable than not that the defendant's departure was a substantial factor in causing plaintiff's injury (citations omitted). …. A plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, so long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance for a better outcome or increased the injury ( citations omitted )."

In the more recent Second Department case of Danielle v. Pain Mgmt.Ctr.of Long Island,168 A.D.3rd 672(A.D.2nd 2019), the court found plaintiff's expert testimony and evidence legally sufficient to support a plaintiff's verdict based on claims that the defendants failed to timely diagnose and treat an

infection and resulting spinal abscess which led to permanent neurological damage. However, the court reversed the verdict and granted defendants a new trial based on the trial court's erroneous rulings limiting cross-examination of plaintiff's experts regarding the alleged negligent conduct of nonparty subsequent treating surgeons.

The court in Danielle, supra., used almost the identical language set forth above in discussing causation and finding plaintiff's evidence sufficient to prove that defendant's departures from accepted medical practice decreased the plaintiff's chance for a better outcome or increased her neurological deficits.

The same principles were applicable in D'Orta v.Margaretville Mem'l Hosp.,154 A.D.3rd 1229(A.D.3rd 2017) a Third Department case affirming denial of defendants' motions for summary judgement regarding plaintiff's malpractice claims that defendants failed to timely transfer plaintiff and administer TPA (clot buster drug) to treat a stroke which plaintiff contends would have reduced his neurological deficits suffered from the stroke.

The court found sufficient plaintiff's expert's opinion " that TPA has been proven to improve long-term outcomes for stroke victims as well as his conclusion that ' the failure to administer [TPA] deprived [ plaintiff ] of a substantial possibility for a better long term neurological outcome , meaning a

substantial chance for improved speech, movement and cognition….."

In King v. St. Barnabas Hose**,** supra., a case involving negligent resuscitation efforts resulting in the death of decedent, the First Department Reversed summary judgement in favor of defendants, finding plaintiff's expert adequately raised triable issues of fact as to whether defendants departed from accepted practice in their resuscitation attempts and that such departures diminished the chance of survival. Plaintiff established that a defibrillator should not have been used as decedent was in asystole and that there was a 6-10-minute delay in administering epinephrine and 18 minutes in giving atropine all diminishing decedent's chance for survival.

Given the body of case law that exists, it is hard to believe that the New York Pattern Jury instructions (PJI) does not provide for a specific charge to the jury in lost chance cases. Although the 2020 commentary to the medical malpractice charge PJI 2:150 does discuss at length loss of chance (see pages 81-85) the proximate cause charge PJI 2:70 does not. As experienced counsel know the proximate cause charge is brief and amazingly the commentary does not address this subject matter.

The one sentence Charge defines substantial factor in bringing about the injury as "if it had such an effect in producing the injury that

reasonable people would regard it as a cause of the injury." However, the Charge does add that in cases of comparative negligence or concurrent causes that to be substantial it can not be slight or trivial. "You may, however, decide that a cause is substantial even if you assign a relatively small percentage to it." (PJI 2:70).

Perhaps a supplemental jury charge to PJI 2:70 could read: The plaintiff must prove by a preponderance of the credible evidence that the defendant's departure from accepted medical practice was more likely than not a substantial factor in causing plaintiff's injury. In this case the plaintiff alleges that the injury suffered is a diminished chance for a cure or better outcome or increased injury and/or prolonged pain and suffering and/or further care and treatment (to be tailored to the specific case). Therefore, you must decide whether plaintiff has proven by a preponderance of the credible evidence that the defendant's departure, more likely than not, deprived the plaintiff of a substantial chance or possibility for a better outcome or increased his or her injury and/or prolonged pain and suffering and/or further care and treatment. In this regard in order to be substantial the plaintiff's evidence does not have to be more than 50% nor quantify or state a percentage to which the defendant's departure deprived the plaintiff of a chance for a better outcome or increased his or her injury so long as it is not slight and there is sufficient evidence to prove that the plaintiff was deprived of a chance or

possibility for a better outcome or suffered increased injury.

The Court of Appeals in Wild v. Catholic Health Sys, 21 N.Y.3rd 951(Court of Appeals 2013), a malpractice case involving a claim of delayed diagnosis of a perforated esophagus in an 83 yr. old woman requiring a feeding tube (she died 3 years later of unrelated causes), although not squarely addressing lost chance ( the issue not properly raised by defendants during the trial ) did not find improper the following jury charge by the trial court on causation:

"The negligence of any of the defendants may be considered a cause of the injuries to (decedent) if you find the defendant(s') actions or omissions deprived [decedent] of a substantial possibility of avoiding the consequences of having a permanent feeding tube. The chance of avoiding a need for a permanent feeding tube to be substantial, does not have to be more likely than not and it does not have to be more than 50%, but it has to be more than slight

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## PART **3. CONCLUSION**

In view of the above case law and ambiguous jury charge, it is highly recommended that counsel address proximate cause issues in lost chance cases during jury voir dire. These cases can easily be lost if jurors will not accept the given proof and applicable law that lost chance does not have to be greater than 50% so long as it is not slight or trivial. Jurors must be willing to award substantial

damages where the proof meets this threshold. Many jurors have strong beliefs, values or biases on these issues. These need to be elicited and jurors excused for cause. Otherwise, the case is over before the proof begins.

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