LAW & MEDICINE

Loss of a Chance

A doctor runs a walk-in clinic to treat acute conditions such as minor trauma and provide services such as flu shots and prescription refills. The clinic staff does not routinely measure blood pressure (BP). A patient who has used the facility for many years comes in and asks for a BP measurement because it was elevated when she had it checked at a recent health fair. It now reads 180/105, but she is entirely asymptomatic. The doctor promptly starts antihypertensive therapy and recommends that she follow up with a primary care physician within 2 weeks. Unfortunately, before she can do so, she sustains a massive stroke. Regarding possible negligence in this case, the doctor is negligent in failing to routinely screen for hypertension. Routine BP measurements are usually performed with every doctor-patient encounter, with some exceptions, such as in a radiologist's office. Whether screening for hypertension should be part of a walk-in clinic routine will be determined by experts who will define the community standard. However, even if the doctor has breached the standard of care, his or her professional liability requires the plaintiff to show that the negligent act or omission proximately caused the injury. Proof of causation may be problematic when the harm suffered is a natural expectation of the underlying condition, and the doctor's negligence simply deprived the patient of some chance of reducing that risk. In this hypothetical case, hypertension was the underlying condition, and the doctor's omission can be said to have caused the patient to lose the opportunity to avoid or reduce the odds of sustaining a stroke. This is known as the "loss of a chance" doctrine.

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The key issue surrounding the "loss of a chance" doctrine is what level of risk reduction or lost opportunity is necessary to pass the proximate causation threshold. How large a risk of an adverse outcome and how much of a reduction in that risk are required as a matter of law? Some courts assert that the plaintiff must show that the original risk is substantial to begin with, e.g., greater than 50%. Other courts have held that all that is needed is for the plaintiff to show that the defendant's negligence led to a lost opportunity for a better result, irrespective of the degree of loss.

The Kansas Supreme Court initially used the term "appreciable chance" as the yardstick of measure (*Roberson v. Counselman*, 686 P.2d 149, Kan. 1984). A decade later, this was modified to "substantial loss of the chance" (*Delaney v. Cade*, 873 P.2d 175, Kan. 1994). Finally, in its latest deliberation on the subject, the Kansas court held that a 5%-10% chance was enough for liability (*Pipe v. Hamilton*, 56 P.3d 823, Kan. 2002). In that case, gangrene and death set in after surgery for small bowel obstruction, and the doctor did not pursue other tests because the patient had only a 5%-10% chance of survival. In ruling against the defendant, the court stated: "Pipe (plaintiff) contends a 10% chance of survival is more than a trifling matter and is something that Kansas public policy supports as being recognized as substantial. We agree. As a matter of law, a 10% loss of chance cannot be said to be token or de minimis."

Cases alleging delayed diagnosis of cancer frequently pose "loss of a chance" issues. In one ruling concerning the untimely diagnosis of lung cancer, a Washington court held that survival reduction of 14%, from 39% to 25%, was enough to entrust the jury to decide on the issue of proximate causation (*Herskovits v. Group Health Co-op. of Puget Sound*, 664 P.2d 474, Wash. 1983).

A few jurisdictions, however, take the position that the loss of a chance has to be more than 50% (*Grant v. American Nat. Red Cross*, 745 A.2d 316, D.C.App. 2000). In this case, the plaintiff contracted hepatitis C after receiving a blood transfusion. The blood bank did not routinely screen for alanine aminotransferase levels, but the plaintiff lost the case after conceding that the chance of avoiding hepatitis C even with screening was less than 40%. ■

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